United States: FCPA overview and trends

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Marking the lowest mid-year total in a decade, US enforcement authorities have brought eight resolved FCPA enforcement actions to date this year. Of the eight enforcement actions, five were brought by the US Securities and Exchange Commission (SEC) and three by the US Department of Justice (DOJ).

It appears that the enforcement numbers overall may be down in part because of a rise in the number of declinations – or decisions not to pursue enforcement – particularly by the DOJ. The DOJ's decision not to bring parallel FCPA dispositions alongside several SEC enforcement actions this year appears to reflect a conscious DOJ strategy to more frequently decline enforcement, where appropriate. Speaking on 6 March 2015, Assistant Attorney General for the DOJ's Criminal Division, Leslie Caldwell, predicted that we would be seeing 'an uptick in declinations for companies that actually come in and do everything that they are supposed to do.' Whatever the explanation, unless the pace of FCPA enforcement picks up considerably (as it did last year), 2015 is on track to be the lowest year in terms of resolved dispositions since 2005.

With respect to resolved enforcement actions, two areas continue to feature:

- mergers and acquisitions (M&A); and
- the provision of gifts, travel and entertainment (GTE). Additionally, as the US enforcement agencies have publicly stated, they continue to pursue the prosecution of individuals.

M&A actions

This year's enforcement action against Goodyear, and last November's SEC and DOJ settlement with Bio-Rad, highlight the importance of proper M&A due diligence. The DOJ and SEC, through enforcement actions and guidance such as the *Resource Guide to the US Foreign Corrupt Practices Act*,[1] have firmly established an expectation for companies to engage in substantive anticorruption due diligence in connection with M&A deals they are contemplating. Although conducting some of this due diligence postacquisition is seen as acceptable, the agencies have said that 'a company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks'.[2]

While substantive FCPA due diligence can complicate and even potentially derail a merger or acquisition (such as Lockheed Martin Corp's failed acquisition of Titan Corp in 2004), the failure to undertake such due diligence can also render a transaction

worthless or practically worthless after the fact. For instance, eLandia International estimated that the value of its 2009 acquisition of Latin Node, Inc declined by US$20.6m from the purchase price of US$26.819m due largely to 'the cost of the FCPA investigation, the resulting fines and penalties to which we may be subject, the termination of Latin Node's senior management, and the resultant loss of business', which came out of potential FCPA violations by Latin Node that eLandia discovered and promptly disclosed during its post-acquisition due diligence process.

Bio-Rad

On 3 November 2014, Bio-Rad Laboratories, Inc ('Bio-Rad'), a medical diagnostics and life sciences manufacturing and sales company, agreed to pay over US$55m to settle parallel DOJ and SEC FCPA investigations with respect to its business operations in Russia, Vietnam and Thailand. The DOJ alleged criminal violations of the FCPA's books and records and internal accounting controls provisions, and the SEC found that the company engaged in civil violations of the FCPA's anti-bribery, books and records, and internal accounting controls provisions.

According to the SEC's Order (the 'Order'), in Thailand, Bio-Med acquired a 49 per cent interest in Diamed Thailand through the acquisition of Diamed Thailand's Swiss parent, Diamed AG in October 2007. Prior to the acquisition, the Order asserts, Diamed Thailand began paying an inflated commission to a Thai agent of which the agent was to pay a percentage to Thai government officials in exchange for business. This arrangement continued after the 2007 acquisition. The Order states that in March 2008, Bio-Rad's Asia-Pacific general manager learned of the arrangement and tasked the Bio-Rad Singapore controller with investigating the matter. The controller confirmed that bribes were being paid, but the general manager did not instruct Diamed Thailand to stop making the payments. This arrangement continued until early 2010 and resulted in the payment of US$708,608 to the agent and US$5.5m in gross sales revenues. The Order notes that Bio-Rad performed very little due diligence of Diamed Thailand prior to the acquisition of Diamed AG.

According to the pleadings, the above-described payments, as well as those in Russia and Vietnam, were mischaracterised (including as commission payments) on Bio-Rad's subsidiaries' books, records and financial accounts, which were consolidated into Bio-Rad's books and records and reported in its financial statements. These actions resulted in the DOJ finding the company engaged in criminal violations of the FCPA's books and records and internal accounting controls provisions, and the SEC finding the company engaged in civil violations of the FCPA's anti-bribery, books and records, and internal accounting controls provisions.

The SEC's indication that the company performed insufficient due diligence of Diamed Thailand serves as a reminder that the agencies expect companies to perform thorough pre-acquisition due diligence with an FCPA component whenever possible.

Goodyear

On 24 February 2015, the SEC announced a settlement with Goodyear, the global tire-manufacturing company. As described in the Order, Goodyear violated the books and records and internal controls provisions of the FCPA in connection with US$3.2m in improper payments

made by two subsidiaries to employees of government-owned entities and private companies in Kenya and Angola. The two subsidiaries recorded the improper payments as legitimate business expenses in their books and records, which were then consolidated into Goodyear's books and records. According to the Order, Goodyear did not prevent or detect these payments because 'it failed to implement adequate FCPA compliance controls at its subsidiaries in sub-Saharan Africa.' Under the terms of the settlement, Goodyear agreed to pay just over US$16m in disgorgement and pre-judgment interest. Goodyear also agreed to report on its remediation efforts and compliance programme implementation for a three-year period.

Specifically, according to the Order, from 2007 to 2011, Goodyear's indirect subsidiary in Kenya, Treadsetters, paid over US$1.5m in bribes to employees of private companies and government agencies to obtain business. According to the Order, the subsidiary also made and falsely recorded improper payments to local government officials, including city council employees, police and building inspectors.

Goodyear acquired a minority ownership interest in Treadsetters in 2002, and by 2006 Goodyear acquired a majority ownership interest. After Goodyear became majority owner, Treadsetters' founders and the local general manager continued to run day-today operations. Although the Order only covers improper payments from 2007 to 2011 (the time period when Goodyear was a majority owner), the SEC specifically faulted Goodyear for failing to conduct and detect the improper payments through 'adequate due diligence' when it acquired Treadsetters, and for failing to implement adequate FCPA compliance training and controls after acquisition. This finding is especially noteworthy because Goodyear initially held only a minority interest in Treadsetters, which suggests that companies should conduct adequate due diligence when acquiring a minority stake, or when increasing ownership, in an entity.

Gifts, travel and entertainment

Two FCPA dispositions resolved by the SEC this year – *FLIR Systems, Inc* ('FLIR') and *BHP Billiton* – were almost exclusively focused on the provision of GTE to non-US officials. While the provision of improper GTE has long been a focus of the DOJ and SEC, it has been quite uncommon for the agencies to bring FCPA actions based *primarily* on such misconduct. Historically, companies have been prosecuted for the provision of improper GTE *alongside* other forms of bribery. *BHP Billiton* and *FLIR*, however, demonstrate that the agencies will pursue FCPA violations that are centred on the provision of improper GTE. Such actions, however, often only involve books-and-records and/or internal controls charges rather than anti-bribery charges, possibly because of the increased difficulty of establishing a quid pro quo when only GTE is involved.

FLIR Systems, Inc

On 8 April 2015, FLIR settled with the SEC in connection with GTE provided to Saudi Arabian government officials in violation of the FCPA's anti-bribery and accounting provisions. The Order required FLIR to pay US$9.5m in penalties, disgorgement and interest. In its press release touting the SEC settlement, FLIR also announced that the DOJ had declined to pursue a case against the company. FLIR's settlement with the SEC is the result of a second enforcement action arising from the same set of events within the last year: the SEC charged

FLIR employees Stephen Timms and Yasser Ramahi with violating the anti-bribery and internal controls provisions of the FCPA and Timms and Ramahi agreed to settle those charges in 2014.

According to the Order, FLIR entered into a contract to sell binoculars using infrared technology to the Saudi Ministry of Interior ('MOI') in 2008. A key condition of the contract was a Factory Acceptance Test (FAT), which involved FLIR flying MOI officials to Massachusetts to test the binoculars before approving delivery. The trip turned into what Timms later referred to as a 'world tour': in addition to spending a single five-hour day at FLIR's Boston facility for the equipment inspection and making three other brief visits there, the Saudi officials also visited Casablanca, Paris, Dubai, Beirut and New York on the way to and from Boston, for a total of 20 nights over the course of the trip. Timms and Ramahi arranged for FLIR to pay for the Saudi officials' airfare and luxury hotels for the entire trip and also used a third-party agent to purchase watches for some of the same MOI officials. The SEC Order additionally alleged that Ramahi arranged for FLIR to pay for additional travel and entertainment for MOI officials to celebrate New Year's in Dubai in 2008 and 2009.

After FLIR paid for the MOI officials' travel, watches and New Year's celebrations, the MOI approved the binoculars for delivery and placed another order for US$1.2m. The Order implies that the world tour contributed to the MOI's decision to award the contract to FLIR, since the head of the MOI's technical committee and a senior engineer on the committee, who played a key role in the committee's decision, were among the officials treated to the tour.

The Order acknowledges that FLIR had some FCPA-related policies and internal controls in place during the relevant period, which may have benefited the company in its negotiations with the SEC. However, the Order highlights many weaknesses in FLIR's FCPA-related policies and internal controls and notes that FLIR had inadequate controls for gift-giving.

The FLIR settlement highlights the risk of improper GTE expenses in connection with otherwise legitimate transactions involving foreign officials. The Order explicitly notes how much of the overall travel and other hospitality provided to representatives of FLIR's foreign government clients directly related to FLIR's FATs. In both cases, activities related to the FAT took up but a small portion of the travel time and expenses for which FLIR paid. The language of the Order and the imposed penalties suggest that if a contract includes legitimate GTE spending on foreign officials related to a legitimate transaction, corporate compliance programmes should nonetheless treat them as an FCPA risk area.

BHP Billiton

On 20 May 2015, the SEC announced charges against global mining company BHP Billiton for violating the internal controls and books and records provisions of the FCPA in connection with its hospitality programme for the 2008 Summer Olympic Games in Beijing. Under the Order, BHP Billiton agreed to pay US$25m in civil penalties for its failure to devise and maintain sufficient internal controls and accurate books and records relating to the hospitality packages that the company offered and provided for the Olympic Games.

BHP Billiton, an official sponsor of the 2008 Beijing Olympics, launched an Olympics hospitality programme to develop relationships with its customers and clients. According to the Order, as

part of this programme BHP Billiton extended hospitality packages to more than 170 government officials and employees of state-owned enterprises, which allowed the officials to attend the Olympics at BHP Billiton's expense. The hospitality packages included event tickets, sightseeing excursions, luxury hotel accommodations, meals and business-class airfare for the officials and their guests. BHP Billiton explained to its employees that the purpose of the Olympic sponsorship was to 'strengthen relationships with key local and global stakeholders, for example, Government Ministers, Suppliers and Customers', and that the hospitality packages were 'a primary vehicle to ensure this goal is achieved'.

At the time BHP Billiton extended the Olympics hospitality packages, its compliance programme was decentralised and although it had formed an Olympic Sponsorship Steering Committee and Global Ethics Panel, neither committee reviewed nor approved invitations to a government official. According to the SEC, in spite of the fact that BHP Billiton's Guide to Business Conduct prohibited the provision of things of value in violation of anti-corruption laws, several officials who received the hospitality packages were directly involved in or in a position to influence negotiations to obtain access rights, regulatory actions or business dealings.

In the press release accompanying the Order, Antonia Chion, Associate Director of the SEC's Division of Enforcement, stated that 'the company failed to provide adequate training to its employees and did not implement procedures to ensure meaningful preparation, review, and approval of the invitations.' The SEC found that BHP Billiton's books and records, 'namely certain internal forms that employees prepared in order to invite a government official to the Olympics, did not, in reasonable detail, accurately and fairly reflect [BHP Billiton's] pending negotiations or business dealings with the government official at the time of the invitation.'

Prosecution of individuals

The DOJ has continued to emphasise the importance of the prosecution of individuals and thus the DOJ's prosecution and trial of Joseph Sigelman deserves special notice, as it was the DOJ's first trial of an individual on FCPA charges since the January 2012 acquittal of John Joseph O'Shea. Sigelman's trial lasted nine days and ended with prosecutors entering into a negotiated guilty plea with Sigelman on only one of the six counts with which he was charged after a key government witness admitted to lying on the stand. Sigelman's sentence of probation with no imprisonment was essentially a victory for Sigelman, and the judge was particularly critical of the government's key witness as well as its sentencing recommendation. The trial adds to a string of recent FCPA prosecutions involving individuals in which the government has failed to secure a conviction or its recommended sentence, highlighting the difficulties the DOJ has sometimes encountered when forced to bear its burden of proof in court.

Against this backdrop, it is worth noting that a federal district court has already twice continued the trial date of Dmitrij Harder, the former owner and president of Chestnut Consulting Group Inc, indicted on 6 January 2015, and Harder recently requested a third continuance to delay the trial currently set for 24 September 2015. In granting the defendant's prior requests to reschedule the trial, the court reasoned that the extensions were necessary due to the complexity of the case and breadth of discovery. Likewise, in the FCPA prosecution of Alstom executive Lawrence Hoskins, the court recently continued the trial to 30 November 2015, over the government's opposition, finding that the defendant needed additional time to prepare his

defence at least in part because of a recently filed Third Superseding Indictment and ongoing discovery efforts. Although all indications are that both cases will proceed to trial, it will be interesting to see if the government will be put to its burden or if one or both of the defendants might secure favourable plea agreements, especially if the government's cases face any setbacks.

Notes

1. Available at: www.justice.gov/sites/default/files/criminalfraud/legacy/2015/01/16/guide.pdf.

2. See Resource Guide to the U.S. Foreign Corrupt Practices Act, 62.

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