

Foreign Corrupt Practices Act Updates

Chiquita Brands International, Inc. Consents to Civil Penalty and SEC Cease-and-Desist Order Based on Apparent Bribes Made by Colombian Subsidiary

Chiquita Brands International, Inc. (Chiquita) recently agreed with the Securities and Exchange Commission (SEC) to pay a civil penalty of \$100,000. Chiquita also agreed to accept entry of an administrative cease-and-desist order based on violations of the Foreign Corrupt Practices Act's (FCPA) accounting provisions arising out of apparent bribes paid by Chiquita's wholly-owned Colombian subsidiary to Colombian customs officials.¹

Like the SEC's recent settlement with IBM in December 2000, Chiquita's settlement evidences the SEC's intent to pursue enforcement actions even when the allegedly false books and records are those of an issuer's foreign subsidiary and even when the issuer did not participate in creating the false entries. It also demonstrates that the SEC will hold issuers accountable for the failure of their controls systems to prevent FCPA violations. It shows that the SEC will aggressively punish parent companies for their subsidiaries' actions even when the SEC is unable to prove actual bribery by the parent company and even when the parent company has taken subsequent corrective action.

¹ *Securities and Exchange Commission v. Chiquita Brands International, Inc.*, 1:01CV02079 (D.D.C. October 3, 2001); *In the Matter of Chiquita Brands International, Inc.*, Administrative Proceeding File No. 3-10613, Rel. No. 17169, October 3, 2001.

THE FCPA'S ANTIBRIBERY AND ACCOUNTING PROVISIONS

The FCPA antibribery provisions make it unlawful for any issuer, domestic concern, or person acting within the United States to make or offer to make a payment of anything of value directly or indirectly to a foreign official, international organization official, political party or party official, or any candidate for public office, for the purpose of influencing that official to assist in obtaining or retaining business. 15 U.S.C. § 78m(b). The FCPA's accounting provisions require companies with securities listed in U.S. trading markets to keep books, records, and accounts, which accurately and fairly reflect any transaction and disposition of assets in reasonable detail, and to maintain an adequate system of internal accounting controls. 15 U.S.C. § 78dd-1 to -3.

The FCPA's antibribery provisions do not apply directly to a foreign subsidiary of a U.S. company so long as the subsidiary itself is not an issuer or a U.S. company and so long as no acts in furtherance of the corrupt payment take place in the United States. A U.S. parent company is not liable for corrupt payments made by a foreign subsidiary unless the parent knowingly participates in or authorizes the corrupt payment.

On the other hand, a U.S. company is responsible for ensuring that its foreign subsidiary complies with the FCPA's accounting provisions. The parent must assure that its subsidiary both maintains accurate books and records and establishes and implements internal accounting controls. The parent can be held liable for its failure to ensure the accuracy of a subsidiary's books and records even if the parent company has no knowledge or reason to know of the inadequate recordkeeping.

THE SEC'S FINDINGS

According to the SEC, employees of Chiquita's wholly-owned subsidiary C.I. Bananos de Exportacion S.A. (Banadex) authorized two separate payments to Colombian customs officials in order to secure the license renewal of a port facility. In September 1995, Banadex learned that renewal of its license for its port storage facility, which served as a location where goods could be stored pending inspection by Colombian customs officials, was in jeopardy because of previous citations for failure to comply with customs regulations. In the absence of any knowledge or consent of any Chiquita employee, a Banadex security officer paid two installments totaling approximately \$30,000 from a Banadex discretionary expense account to Colombian officials. Banadex's books and records falsely identified the first payment as a maritime donation and the second installment as relating to a maritime agreement.

An April 1997 Chiquita audit review of Banadex discovered the improper payments. Following an internal investigation, Chiquita took corrective action, including terminating the responsible Banadex employees and reinforcing its internal controls with respect to its Colombian operations.

Chiquita's policies contained strict guidelines on the use of discretionary expense accounts and prohibited making payments of the kind made to the

Colombian customs officials. Moreover, Chiquita required quarterly identification and disclosure of all payments made to government officials or employees as well as political candidates or parties. Despite those procedures, internal audits in 1996 and 1997 exposed numerous instances in which Banadex had failed to submit the required documentation and had inaccurately labeled transactions within the Banadex books and records.

SIGNIFICANCE OF SEC SETTLEMENT

Chiquita's settlement with the SEC is significant because it reaffirms the aggressiveness with which the SEC is now pursuing actions against parent companies for the alleged bribery of foreign officials by subsidiaries, even when the SEC has no indication that the parent companies themselves were involved in any bribe or alleged FCPA violations. Moreover, the settlement demonstrates that the SEC will continue to hold parent companies responsible for the actions of their subsidiaries notwithstanding compliance systems and internal corrective measures taken against the wrongdoers.

Both the Chiquita case and the recent IBM case highlight the continued vigilance by the SEC of the FCPA accounting provisions. This trend underscores the need for parent companies to adopt vigorous compliance systems that will prevent violations by their subsidiaries before they occur. Moreover, parent companies should be certain to take corrective action upon detecting FCPA violations by their subsidiaries. In a recent release, the SEC re-emphasized that in evaluating enforcement actions, it will credit cooperation in the form of (1) self-policing, (2) self-reporting, (3) remediation, and (4) cooperation with law enforcement authorities.²

² SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation in Exercising Prosecutorial Discretion, SEC Release No. 2001-117 (October 23, 2001).

PRACTICAL ADVICE

U.S. companies should take care to implement a comprehensive FCPA compliance program that will prevent FCPA violations in their foreign subsidiaries. The minimum components of an effective FCPA compliance program are:

- A clear corporate ethics policy prohibiting violations of the FCPA and establishment of compliance standards and procedures that are reasonably capable of reducing the prospect of violations
 - Assignment of responsibility for the FCPA compliance program to senior managers
 - Regular training of officers, employees, agents, and consultants concerning the requirements of the FCPA
 - Implementation of appropriate disciplinary mechanisms for violations or failure to detect violations
 - Establishment of a system by which officers, employees, agents, and consultants can report suspected violations without fear of retribution
 - Corporate procedures, including a recorded due diligence inquiry, to ensure that the company forms business relationships with reputable agents, consultants, representatives, and joint venture partners
 - Corporate procedures to ensure that companies do not delegate substantial discretionary authority to individuals with a propensity to engage in illegal activities
- Inclusion in all contracts with agents, consultants, joint venture partners, and other representatives, warranties that no payments of money or anything of value will be offered, promised or paid, directly or indirectly, to any foreign official, foreign political party, party official, or candidate for foreign public or political office to induce such officials to use their influence with a foreign government or instrumentality to obtain an improper business advantage for the company
 - Inclusion in all contracts with agents, consultants, and other representatives a warranty that the agent, consultant, or representative shall not retain any sub-agent or representative without the prior written consent of the company.

For a fuller discussion of these and other FCPA issues, see Stephen F. Black and Roger M. Witten, *Complying with the Foreign Corrupt Practices Act*, 11 Business Law Monographs (Matthew Bender 2001).

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