

Recent Developments in Global Antibribery Enforcement

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As expected, enforcement of the Foreign Corrupt Practices Act (FCPA) continues to be a priority for both the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). Year to date, the DOJ has brought FCPA charges against four companies and 29 individuals. The SEC, which is still forming and expanding its dedicated FCPA unit, has pursued civil enforcement actions against three companies and four individuals. Recent months have brought the passage of a bill that, if enacted, will reward FCPA whistleblowers and the first-ever "global settlement" reached between a cooperating company and several U.S. and U.K. enforcement authorities.

Innospec Inc. Enters "Global Settlement" of Bribery Charges with U.S. and U.K. Authorities

On March 18, 2010, Innospec Inc., which makes fuel additives, pleaded guilty to a 12-count information charging wire fraud in connection with Innospec's payment of kickbacks to the former Iraqi government under the United Nations Oil-for-Food Program (OFFP), as well as FCPA violations in connection with bribe payments the company made to officials in the Iraqi Ministry of Oil.¹ Innospec agreed to pay a \$14.1 million criminal fine and to retain an independent compliance monitor for a minimum of three years. Notably, during the plea hearing, Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia criticized the excessive price tag associated with monitors and required the DOJ to inform her once the monitor had been selected.²

Innospec also settled a civil complaint with the SEC charging Innospec with violating the FCPA's antibribery, internal controls, and books and records provisions.³ Innospec agreed to disgorge \$11.2 million in profits to the SEC. It also agreed to pay \$2.2 million to resolve outstanding matters with the U.S. Office of Foreign Assets Control (OFAC) related to the U.S. embargo against Cuba.

In yet another related matter brought by the United Kingdom's Serious Fraud Office (SFO), Innospec's British subsidiary, Innospec Ltd., pleaded guilty in connection with corrupt payments made to Indonesian officials and agreed to pay a criminal penalty of \$12.7 million.⁴ The SFO described the resolution of this case as "the first 'global settlement' reached with a co-operating Company and ... resolved in cooperation with US government authorities – DOJ, SEC and OFAC."

However, subsequently the Crown Court judge who accepted Innospec's plea raised doubts about the SFO's ability to continue to participate with the DOJ and SEC in crafting global settlements for companies that agree to plead guilty. The judge concluded that "the SFO cannot enter into an agreement under [U.K.] laws ... with an offender as to the penalty in respect of the offense charged" and "no such arrangements should be made again."⁵ As a result, companies seeking joint settlements may now fear being fined on both sides of the Atlantic for the same offenses.

Daimler AG Settles FCPA Matter for \$180 Million; Russian and German Subsidiaries Plead Guilty; Daimler AG and Chinese Subsidiary Enter Deferred Prosecution Agreements

On April 1, 2010, the U.S. District Court in the District of Columbia approved German vehicle-maker Daimler AG's settlement of various FCPA charges relating to alleged systematic payments and gifts to state-owned customers and government officials in at least 22 countries.⁶ The FCPA investigation into Daimler began in 2004, triggered by the firing of an alleged whistleblower from the audit group at DaimlerChrysler Corp., Daimler's former U.S. affiliate.

In the DOJ proceedings, Daimler AG entered into a two-year deferred prosecution agreement to resolve charges of conspiracy to violate the FCPA's books and records provisions and violations of those provisions. The DOJ did not charge Daimler AG under the FCPA's antibribery provisions. Daimler AG also agreed to pay an overall criminal penalty of \$93.6 million and to retain an independent compliance monitor for three years. Two subsidiaries – DaimlerChrysler Automotive Russia SAO and Daimler Export and Trade Finance GmbH – pleaded guilty to conspiracy to violate the FCPA and to violating the FCPA's antibribery provisions. A third subsidiary, DaimlerChrysler China, entered into a two-year deferred prosecution agreement to resolve charges of conspiracy to violate the FCPA and violating the FCPA's antibribery provisions.

In a related SEC civil proceeding, the Commission charged Daimler AG under the FCPA's antibribery, internal controls, and books and records provisions.⁷ Daimler AG, without admitting or denying the allegations of the SEC's complaint, agreed to disgorge \$91.4 million and to retain a monitor for three years.

SEC Charges Former Finance Executives and Senior Employees of Global Tobacco Company

On April 28, 2010, the SEC charged four former employees of Dimon, Inc., now Alliance One International, Inc., with violating the antibribery provisions of the FCPA and with aiding and abetting violations of the FCPA's internal controls and books and records provisions.⁸ According to the complaint, over the course of eight years, a Dimon subsidiary paid more than \$3 million in cash bribes to various Kyrgyzstan government officials, including officials with authority to issue export licenses, to purchase Kyrgyz tobacco for resale. The complaint charged three former Dimon employees for their alleged roles in this scheme: Bobby J. Elkin, a country manager for Kyrgyzstan, for authorizing and making bribe payments from an account held under his name; Baxter J. Myers, a Regional Financial Director, for authorizing fund transfers; and Thomas G. Reynolds, a Corporate

Controller, for formalizing the accounting methodology used to record the payments.

The SEC further alleged that Dimon, through a Brazilian subsidiary, paid approximately half a million dollars to government officials of the Thailand Tobacco Monopoly in exchange for \$9.4 million worth of sales contracts. The complaint charged former Senior Vice President of Sales, Tommy L.

Williams, who directed the sales of tobacco from Brazil and Malawi to the Thai government, for authorizing the bribes, which were then characterized as commissions paid to Dimon's agent in Thailand. The complaint also alleged that business trips arranged by Dimon for Thai officials, one of which included trekking in the Amazon jungle and piranha fishing and another which included a week-long detour from Brazil to Madrid and Rome, were sightseeing trips without a legitimate business purpose.

Without admitting or denying these allegations, the four defendants consented to the entry of final judgments permanently enjoining each of them from violating the antibribery and the accounting and internal controls provisions of the FCPA. Defendants Myers and Reynolds also agreed to pay civil monetary penalties of \$40,000 each.

DOJ Opinion Release Permits U.S. Company to Hire Foreign Official

On April 19, 2010, the DOJ distributed its first opinion procedure release of the year, advising a U.S. company that it could hire a foreign official without violating the FCPA in a narrow set of circumstances.⁹ According to the opinion, a U.S. agency hired the company that requested the opinion to build a facility in a foreign country funded by the U.S. At the foreign country's behest, the U.S. agency instructed the company to hire a foreign official as director of this facility.

The DOJ found this arrangement permissible because the official was "hired pursuant to an agreement between the U.S. ... and the Foreign Country, and will not be in a position to influence any act or decision affecting" the company. The opinion also noted that the foreign official was appointed by the foreign country, without any involvement from the company, based on his or her qualifications and that the official would not perform any services on behalf of, or receive any direction from, the company.

DOJ Officials Remark on Monitors, Definitions of Foreign Officials and Facilitation Payments, and the Pharmaceutical Industry

In the course of an April 8, 2010 panel discussion, Charles Duross, Assistant Chief in the DOJ Criminal Division's Fraud Section, made several noteworthy remarks concerning the FCPA.¹⁰ First, with respect to corporate compliance monitors often used in deferred and non-prosecution agreements as well as in plea agreements, Duross remarked: "Corporate monitors are not going away. But I think we've become more sophisticated and refined with our use of them. We're wary of corporate monitors gone wild. We don't put monitors in to ruin a company." Duross emphasized that the DOJ adheres to a memorandum, known as the Morford Memorandum, during the monitor selection process. Further, under the right circumstances, companies may be allowed to self-

monitor. (This was the case in the July 2009 Helmerich & Payne, Inc. settlement, for example, in which WilmerHale represented the company.)

Duross also addressed the issue of facilitation payments. Facilitation payments are permitted under the FCPA "to expedite or to secure the performance of a routine governmental action" such as obtaining permits or licenses. This exception does not apply to discretionary governmental decisions concerning the award of business. Duross emphasized that the facilitation payments exception to liability is "very narrow." He said, "We're not saying you should make facilitating payments, it's an exception, we're not encouraging it."

Finally, Duross expressed his views on the FCPA's definition of a foreign official. He argued that the statute is broad in this respect and explained that the DOJ examines various factors when considering whether employees of a foreign entity are foreign officials, including the extent of government control and ownership over the entity as well as whether the government has veto power and the authority to appoint officials within the entity.

On a related note, Acting Deputy Attorney General Gary G. Grindler, in his remarks to the National Institute on Health Care Fraud, stated that in the coming months the DOJ plans to increasingly use the FCPA to prosecute kickbacks and bribes paid by pharmaceutical companies.¹¹ Pharmaceutical companies have significant FCPA exposure in foreign countries where health care is often government-run. As Grindler explained, "[i]n some foreign countries, nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product may involve a 'foreign official' within the meaning of the FCPA."

U.S. Financial Reform Bill With Whistleblower Rewards Passes the Senate

On May 20, 2010, the Senate passed the much-anticipated financial reform bill, the Wall Street Reform and Consumer Protection Act, by a 59-39 vote.¹² The House of Representatives passed its version of the bill in December 2009. Part of the measure – which is now headed to a House-Senate conference committee where lawmakers will work to resolve differences between the two chambers – establishes a new program to reward whistleblowers who assist the SEC in investigations of securities violations such as FCPA violations.¹³

According to the Senate version of the bill, whistleblowers who voluntarily provide "original information" leading to a successful judicial or administrative action brought by the SEC resulting in monetary sanctions exceeding \$1 million "shall" be paid between 10 and 30 percent of any money the government collects as a result of the provided information. The House version of the bill contains a similar provision, which states that the SEC "may" pay a reward of up to 30 percent of imposed monetary sanctions. Whistleblowers would also be paid if their information led to successful "related actions" brought by the DOJ, appropriate regulatory authorities, self-regulatory organizations, and certain State authorities.

U.K. Parliament Passes Bribery Bill

On April 8, 2010, the United Kingdom reformed its bribery laws by enacting the Bribery Act,¹⁴ which is expected to come into force by this fall. Among other things, and similar to the FCPA, the new law creates a discrete offense of bribery of a foreign public official, which punishes payments made to foreign government officials to obtain or retain business or a business advantage where any of the relevant acts or omissions take place in the U.K. Those with a "close connection" with the U.K. (*i.e.*, U.K. citizens, residents, and companies) can also be liable for engaging in bribery carried out entirely outside of the U.K. Where the bribery is committed by a company, the law also penalizes senior company officers with whose "consent or connivance" bribery was committed.¹⁵

Moreover, companies, but not individuals, that carry on business, or part of a business, in the U.K., can be held strictly liable for the failure to prevent bribery. This liability will arise when a person "associated" with the company pays a bribe for the purpose of obtaining or retaining business or a business advantage. The only defense to liability under this provision is proof that the company had "adequate procedures" in place to prevent the bribery from occurring.

While the Bribery Act bears some similarity to the FCPA, there are also significant differences. First, in addition to the specific offense of bribery of a foreign public official, the law contains general bribery offenses that combat bribery in both the public and private sectors and punish both the bribe-giver and the bribe-taker. Second, the law has no exception for facilitation payments. Finally, the law carries criminal penalties of up to 10 years in prison per offense compared to the FCPA's five years of imprisonment.

¹ Press Release, Department of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), www.justice.gov/opa/pr/2010/March/10-crm-278.html.

² Christopher M. Matthew, *Judge Blasts Compliance Monitors at Innospec Plea Hearing*, MAIN JUSTICE, Mar. 18, 2010, www.mainjustice.com/2010/03/18/judge-blasts-compliance-monitors-at-innospec-plea-hearing.

³ Press Release, Securities and Exchange Commission, SEC Charges

Innospec for Illegal Bribes to Iraqi and Indonesian Officials (Mar. 18, 2010), www.sec.gov/news/press/2010/2010-40.htm.

⁴ Press Release, Serious Fraud Office, Innospec Limited prosecuted for corruption by the SFO (Mar. 18, 2010), www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx.

⁵ Sentencing remarks of Lord Justice Thomas, *In the Crown Court at Southward Regina v. Innospec Limited*, at 7, 13 (Mar. 26, 2010), www.judiciary.gov.uk/docs/judgments_guidance/sentencing-remarks-thomas-lj-innospec.pdf.

⁶ Press Release, Department of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties (Apr. 1, 2010), www.justice.gov/opa/pr/2010/April/10-crm-360.html.

⁷ Press Release, Securities and Exchange Commission, SEC Charges Daimler AG With Global Bribery (Apr. 1, 2010), www.sec.gov/news/press/2010/2010-51.htm.

⁸ Litigation Release, Securities and Exchange Commission, No. 21509 (Apr. 29, 2010), www.sec.gov/litigation/litreleases/2010/lr21509.htm.

⁹ Opinion Procedure Release, Department of Justice, No. 10-01 (Apr. 19, 2010), www.justice.gov/criminal/fraud/fcpa/opinion/2010/1001.pdf.

¹⁰ Christopher M. Matthews, *Compliance Monitors Are Here to Stay*, MAIN JUSTICE, Apr. 8, 2010, www.mainjustice.com/2010/04/08/compliance-

monitors-are-here-to-stay.

¹¹ Press Release, Department of Justice, Acting Deputy Attorney General Gary G. Grindler Delivers Remarks at the National Institute on Health Care Fraud (May 13, 2010), www.justice.gov/dag/speeches/2010/dag-speech-100513.html.

¹² 156 Cong. Rec. D. 571 (May 20, 2010) (stating that the Senate passed H.R. 4173 after inserting therein the text of S. 3217).

¹³ See H.R. 4173, 111th Cong. § 7203 (as referred to the Senate, Jan. 20, 2010); S. 3217, 111th Cong. § 922 (as reported by S. Comm. on Banking, Housing, and Urban Affairs, Apr. 15, 2010).

¹⁴ U.K. Ministry of Justice, Bribery Act 2010, www.justice.gov.uk/publications/bribery-bill.htm.

¹⁵ Although where none of the relevant acts or omissions take place in the U.K., this provision applies only to those senior officials who have a "close connection" with the U.K.

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