

INTERNAL INVESTIGATIONS AND COMPLIANCE UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

FCPA Crackdown Continues: DOJ Undercover Sting Is Largest in History; SEC Charges Parent Company with Violations Stemming from Subsidiary's Actions

January 26, 2010

Key Facts:

- Last week, the U.S. Department of Justice ("DOJ") indicted 22 executives and employees from companies in the military and law enforcement products industry in the largest FCPA action targeting individuals in history. This sting is the first large-scale use of undercover law enforcement assets in an FCPA investigation.
- U.S. Securities and Exchange Commission ("SEC") enforcers also remain busy; the recent NATCO action illustrates both the risks posed by subsidiaries and the benefits of thorough internal investigations and remedial action.

A New Level of DOJ Enforcement: Employees Solicited by Industry Insider Working with FBI

Last week, the federal government arrested 22 executives and employees of more than a dozen companies in the military and law enforcement products industry for alleged violations of the U.S. Foreign Corrupt Practices Act ("FCPA"). Approximately 150 agents with the Federal Bureau of Investigation ("FBI"), including agents from the FBI's specialized FCPA enforcement unit, as well as foreign enforcers were involved. Assistant Attorney General Lanny Breuer warned: "From now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent."

The unsealed indictments indicate that executives and employees were approached by a former executive in the industry who introduced targeted executives to an individual claiming to be a procurement agent for the defense minister of an African country. Charging documents state that the purported procurement agent was an undercover FBI agent.

According to the unsealed indictments, the defendants agreed to make "commission payments," part of which would be kickbacks to government officials, to the undercover agent in exchange for a lucrative government contract. These allegations form the basis of the substantive FCPA charges, as well as related conspiracy and money laundering charges. The scheme, which allegedly was replayed multiple times, demonstrates that enforcers are devoting major resources to FCPA enforcement and employing increasingly aggressive tactics.

SEC FCPA Enforcement Continues

Books-and-Records Provisions Can Lead to Liability Even Where Payments Are Extorted

On January 11, the SEC filed a settled civil action charging NATCO Group Inc. ("NATCO") with violations of the FCPA stemming from acts of a NATCO subsidiary. According to the complaint, employees of the subsidiary made cash payments to Kazakh officials who had demanded bribes after threatening employees with jail and deportation. Subsequently, the subsidiary created false documents that failed to accurately reflect the extorted payments, as well as other payments to a third-party vendor. Though extortion negates the *mens rea* element of criminal charges, civil charges under the FCPA do not require corrupt intent.

Acts of Subsidiaries Can Lead to Liability for Parent

Because NATCO failed to ensure that its subsidiary accurately recorded the payments, and because NATCO's consolidated books and records did not properly reflect the payments, the SEC determined that the company had violated the books-and-records and internal controls provisions of the FCPA. NATCO offered to pay a \$65,000 civil penalty to resolve the SEC's enforcement action. The SEC agreed to NATCO's settlement offer, citing NATCO's swift remedial measures (including a thorough internal investigation), as well as cooperation after the inaccurate records were discovered in a NATCO internal audit.

Key Takeaways:

- **Ensure your company has an effective foreign anti-corruption program**
 - **Helps avoid violations;**
 - **Enables early detection and remediation;**
 - **Helps establish that any wrongdoing is individual, not corporate.**
- **Ensure your employees know how to recognize and report red flags, including:**
 - **Requests for unusual methods of payment (e.g., payment through a third party);**
 - **Requests that the company use certain vendors or agents; and**
 - **Reluctance to act openly or efforts to hide interactions with the company.**
- **Swiftly and thoroughly investigate and address reports of potential problems.**

For more information regarding the FCPA, as well as online resources, see [our FCPA page](#). If you have any questions regarding this Alert, please feel free to contact your regular contacts with Bass, Berry & Sims PLC, or the authors of this Alert listed below.

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