

INTERNAL INVESTIGATIONS AND COMPLIANCE UPDATE

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

Latest SEC & DOJ Actions Illustrate Direct Liability of Parent Companies for FCPA Violations of Foreign Affiliates and Agents

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Key Takeaways

- Conduct by intermediaries and employees of a company's international affiliates can trigger direct FCPA enforcement actions against the company, even where the company does not directly own the affiliates.
- Insufficient anti-corruption due diligence on international counter-parties and intermediaries (or failing to *thoroughly* investigate and resolve red flags that arise during due diligence) can increase the risk of corporate liability. For issuers, these actions can also result in criminal internal controls violations.
- Even relatively small companies are being affected by continued escalation in FCPA enforcement; enforcers can be expected to have higher compliance expectations of companies with greater resources.
- A prompt and thorough internal investigation and self-remediation can significantly reduce corporate liability for FCPA violations.

RAE Systems Inc. Settles with DOJ and SEC for Nearly \$3 Million in Sanctions

On December 10, the U.S. Department of Justice ("DOJ") and U.S. Securities & Exchange Commission ("SEC") announced settled enforcement actions against RAE Systems Inc. ("RAE"), a U.S. manufacturer with between 600 and 1400 employees during the relevant times. RAE owned majority shares, through a foreign subsidiary, in two Chinese joint ventures. Improper payments and gifts by employees and agents of the joint ventures led to a civil action by the SEC alleging bribery, books-and-records and internal-control violations, and to a non-prosecution agreement with DOJ wherein the company admitted books-and-records and internal-controls violations and agreed to accept certain sanctions, cooperate with the government and upgrade its compliance program. As part of its non-prosecution agreement, RAE admitted that it implemented internal controls at the joint ventures only "halfway," notwithstanding clear red flags discovered during due diligence conducted prior to its acquisition of its majority interest in one joint venture. Moreover, even after becoming aware of the red flags at the first joint venture, RAE conducted no anti-corruption due diligence prior to acquiring its majority interest in the second joint venture. Pursuant to its

settlements with enforcers, RAE agreed to pay a monetary penalty of \$1.7 million to the DOJ and to pay more than \$1.2 million in disgorgement and prejudgment interest to the SEC. In explaining its decision to enter into an agreement whereby RAE can avoid prosecution, the DOJ cited "the corporation's timely and voluntary disclosure of wrongdoing, its willingness to cooperate in the investigation of its agents and the corporation's remedial actions."

Other Recent Enforcement Actions and Sentencing Guidelines Amendments

While a lack of sufficient compliance measures can result in direct corporate criminal liability, a robust compliance program can enable a company to reduce or even avoid corporate liability:

- In the DOJ's August settlement with Universal Leaf Tabacos LTDA, the agreed sentencing memorandum stated that because of the company's compliance initiative, "the improper conduct came to light. The agreed upon disposition partly reflects credit given for Universal's pre-existing compliance program."
- Similarly, in November, the DOJ cited Noble Corporation's pre-existing compliance program as one of the factors contributing to the DOJ's decision to enter into a non-prosecution agreement with the company.
- Finally, Global Industries, Ltd. [recently reported](#) that, based in part on the company's strong FCPA compliance program, the DOJ and SEC declined to recommend any enforcement action against the company, despite potential violations.

These results reflect underlying principles consistent with the November 1 amendments to the United States Sentencing Guidelines, which emphasize the importance of corporate compliance programs. The amendments added new language which allows for lower sentencing guidelines in certain situations where compliance personnel have a direct reporting relationship with the board of directors or appropriate subgroup (e.g., audit committee) and were not involved in the offense, and where the offense was quickly detected and self-reported.

FCPA financial sanctions in the past six months alone have exceeded \$800 million, the [Dodd-Frank whistleblower rewards program](#) is underway, and the [U.K. Bribery Act](#) will go into effect in 2011. Given these recent developments in the anti-corruption enforcement environment, it is important for companies to determine whether their compliance and training programs are consistent with current best practices. For more information or assistance regarding foreign anti-corruption compliance and international investigations, please contact one of the attorneys listed below. For more information and resources on this topic, please see www.bassberry.com/fcpa and www.bassberry.com/internationaltrade.

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