

Quarterly FCPA Report: First Quarter 2012

BY THE GLOBAL COMPLIANCE AND DISPUTES PRACTICE

I. INTRODUCTION

The first quarter of 2012 presented a mixed bag for the U.S. Department of Justice ("DOJ") in Foreign Corrupt Practices Act ("FCPA") enforcements. The DOJ dealt with setbacks such as a second mistrial in the Shot Show case and the eventual dismissal of the entire case, including the dismissal of the indictments of three individual defendants who pleaded guilty in 2011. On the other hand, the DOJ obtained a guilty plea from Patrick Joseph and a conviction against Jean Rene Duperval in the Haiti Teleco case. With the filing of a second superseding indictment, the Haiti Teleco case replaces the now-defunct Shot Show case as having the most individual (non-corporate) defendants in history. Despite criticisms leveled against the DOJ relating to recent mistrials and acquittals, the DOJ and the U.S. Securities and Exchange Commission ("SEC") announced settlements with penalties and disgorgements totaling more than \$111 million this quarter, an increase of over \$20 million from last quarter.

The start of 2012 also saw further development to the statute's definition of "foreign official." Judge Hughes issued preliminary jury instructions in the trial of John O'Shea, which established a fact-specific test for determining whether an individual will be treated as an agent or instrumentality of a foreign government. The jury instructions were generally consistent with the analysis used last year by Judge Matz in the *Lindsey* case, and with instructions used in the *CCI* and *Esquenazi* cases.

II. ENFORCEMENT ACTIONS AGAINST INDIVIDUALS

A. Shot Show Prosecution – Dismissed

The Shot Show Prosecution continued to unravel over the course of the first quarter, with the second trial resulting in acquittal for two defendants and a mistrial for the three remaining defendants. The DOJ eventually asked Judge Leon to dismiss with prejudice all remaining indictments on February 21, 2012. The DOJ would also later file a motion to dismiss with prejudice the indictments against the three individual defendants who had pleaded guilty to conspiracy in 2011.

The Shot Show Prosecution began on January 19, 2010, when the DOJ announced that it had arrested twenty-two individuals in connection with a two-and-a-half year undercover "sting" operation. At the time, the Shot Show case involved more individual defendants than any other FCPA enforcement case in DOJ history. The indictments alleged that the defendants engaged in a scheme to pay a twenty percent "commission" to a sales agent who the defendants believed represented the Minister of Defense of Gabon in order to win a portion of a \$15 million deal to outfit the country's presidential guard. The trial of the first group of defendants ended in a mistrial in September 2011.

The second trial in the Shot Show case began at the end of September 2011 and lasted more than three months. After two weeks of deliberation, on January 30, 2012, the jury acquitted defendants R. Patrick Caldwell and John Gregory Godsey of violating the FCPA and money laundering charges. Caldwell was the Senior Vice President of Sales and Marketing, and later CEO, of Protective Products of America, Inc., a company that designs and manufactures body armor. Godsey is an owner of a Georgia company that sold law enforcement and military equipment.

The next day, Judge Leon declared a mistrial when the jury failed to reach a verdict for the three remaining defendants, siblings John and Jeana Mushriqui, and Marc Morales. The Mushriquis are both executives of Mushriqui Consulting, which manufactures and exports military equipment and bulletproof vests, and Morales is an agent of Godsey's company in Georgia. Initially, the DOJ stated that it intended to retry the Mushriquis and Morales.

Less than one month later, the DOJ asked Judge Leon to dismiss with prejudice all remaining indictments. In its motion, the government cited the outcomes of the previous cases, the impact of certain legal and evidentiary rulings in the first two cases and their impact on future cases, and the governmental resources required to proceed, as influencing its decision. On March 27, 2012, the DOJ filed a motion to dismiss the indictments against the three defendants who had previously pleaded guilty: Jonathan M. Spiller, Haim Geri, and Daniel Alvarez. As a result of the motion their guilty pleas have been withdrawn and the DOJ cannot retry them for the same crimes in the future.

B. O'Shea – Acquitted

John O'Shea, former ABB Network Management ("ABB NM") manager, was acquitted on January 16, 2012 of one count of conspiracy to violate the FCPA, twelve substantive FCPA counts, four counts of international money laundering, and one count of falsifying records in a federal investigation. Judge Hughes, presiding over the case, ordered the dismissal following the DOJ's presentation of its case. Judge Hughes stated that the government's primary witness against O'Shea, "[K]new almost nothing," and that his testimony was, "abstract and vague, generally relating gossip."

O'Shea was arrested in November 2009, and his trial in Houston began on January 11, 2012. If O'Shea had been convicted on all counts, he could have faced up to twenty years in prison. On February 9, 2012, the DOJ filed a motion to dismiss the remaining counts of conspiracy, money laundering, and obstruction against O'Shea.

ABB Ltd of Switzerland entered into a deferred prosecution agreement ("DPA") with the DOJ and entered into a settlement with the SEC in September 2010 with total fines, penalties, and other monetary damages of \$58 million. At the same time, ABB Ltd's U.S. subsidiary, ABB Inc., pleaded guilty to a criminal information charging it with one count of violating the anti-bribery provisions of the FCPA and one count of conspiracy to violate the FCPA. ABB NM, which is part of that U.S. subsidiary, allegedly made improper payments to employees of Mexican state-owned utilities to gain contracts. Fernando Maya Basurto, a principal of one of the Mexican intermediaries through which the payments were made, pleaded guilty in November 2009 to a one-count criminal information for his role in the conspiracy.

Judge Hughes, presiding over the case before its dismissal, issued a set of preliminary jury instructions to Jurors that included instructions regarding the definition of a "foreign official" for FCPA purposes. The instructions told jurors that whether an agency is an instrumentality of a foreign government, such that its employees may be foreign officials, depends on the characteristics of the agency. Judge Hughes' instructions paid particular attention to whether the agency performs a

government function, and cautioned that officials of a government-owned or government-controlled business that are involved only with parts of the business that do not perform a government function should not be considered foreign officials.

Judge Hughes' instructions are generally in accord with Judge Matz's decision on the definition of "foreign official" issued last year in the *Lindsey* case. Both Judge Matz and Judge Hughes determined that whether an individual is a foreign official is a fact-based inquiry. Judge Hughes' instructions enumerated similar factors for the jury to consider as those used by Judges Selna and Martinez in the *CCI* and *Esquenazi* cases, respectively, suggesting a growing consensus amongst judges in this previously-sparse area of FCPA precedent.

C. Haiti Teleco: Zurita – Indicted; Joseph – Pleaded Guilty; Duperval – Convicted

The first quarter of 2012 brought several developments in the Haiti Teleco case. The first superseding indictment, filed in 2011, charged Miami-based Cinergy Telecommunications Inc. ("Cinergy") and five individuals with paying \$1.4 million in improper payments to officials at Haiti's state-owned telecommunications firm, Haiti Teleco. On January 20, 2012, the DOJ filed a second superseding indictment, which added additional charges and an additional individual defendant, Cecilia Zurita. Zurita, a former vice president of Cinergy Telecommunications Inc., is also the wife of Washington Vasconez Cruz, the President of Cinergy, who was already under indictment in the case.

The second superseding indictment alleges that Cinergy and other companies involved in the scheme made an additional \$1.22 million in improper payments to secure improper benefits from Haiti Teleco. According to the second superseding indictment, Zurita issued checks to shell companies and intermediaries, who in turn used the money to pay officials at Haiti Teleco. To conceal the improper nature of the payments, Zurita allegedly included false descriptions on the checks. The DOJ has recently moved to drop the charges against Cinergy because, according to the DOJ, Cinergy is actually a non-operational entity that exists only on paper for the benefit of Zurita and Cruz. Cruz and Zurita are currently both wanted fugitives.

In addition to the second superseding indictment, the DOJ obtained a guilty plea from another defendant in the Haiti Teleco case, Patrick Joseph. Joseph, who was charged with one count of conspiracy to commit money laundering in the DOJ's first superseding indictment, pleaded guilty on February 8, 2012. Joseph is a former general director for telecommunications at Haiti Teleco. Joseph agreed to cooperate with the DOJ in exchange for consideration of a lighter sentence and agreed to pay \$955,000 as part of his plea.

Finally, the DOJ obtained a conviction against Jean Rene Duperval for his part in the Haiti Teleco conspiracy on March 12, 2012. Duperval, a former director of international relations at Haiti Teleco, was charged with having participated in a money laundering scheme in order to conceal approximately \$500,000 worth of bribe payments. Duperval was convicted on two counts of conspiracy to commit money laundering and nineteen substantive money laundering counts by a U.S. jury in Miami following a week long trial and only three hours of deliberation. Duperval's sentencing is scheduled for May 21, 2012. Each of the money laundering counts and the conspiracy to commit money laundering counts carries a maximum penalty of twenty years in prison. Duperval also faces fines and the possibility of forfeiture, which the court will determine at a later date.

D. Chodan, Tesler, and Stanley – Sentenced

Three individuals connected with the TSKJ joint venture (Technip, Snamprogetti, Kellogg Brown & Root (“KBR”), and JGC) scheme to pay \$180 million in improper payments to Nigerian officials were sentenced in February 2012. The TSKJ companies won four contracts worth more than \$6 billion to build liquefied natural gas facilities on Bonny Island, Nigeria by paying an estimated \$170 million in bribes to Nigeria officials. The TSKJ joint venture companies have paid fines and penalties totaling over \$1.65 billion to settle FCPA charges.

Wojciech Chodan, a 74 year-old former KBR manager, was sentenced on February 22, 2012, to one year of unsupervised probation and must pay a \$20,000 fine. Chodan, who pleaded guilty in December 2010 to one count of conspiracy to violate the FCPA, faced up to five years in prison. The terms of Chodan’s probation allow him to return to the U.K. to serve his probation. Chodan, who holds dual U.K. and Polish citizenship, was based in the U.K. during the relevant time of his participation in the TSKJ conspiracy, and was extradited from the U.K. in 2010. Chodan previously agreed to forfeit \$726,885 as part of his plea.

Jeffrey Tesler, a London-based solicitor, was sentenced on February 23, 2012, to twenty-one months in prison and ordered to pay a \$25,000 fine. Tesler pleaded guilty in March 2011 to charges of violating the FCPA and conspiring to violate the FCPA for his part in the TSKJ bribery scheme. Tesler, through his Gibraltar-based company, was alleged to have been the conduit for passing roughly \$130 million in bribes from the TSKJ partners to Nigerian officials. Tesler faced a maximum sentence of up to ten years in prison. As part of his plea, Tesler forfeited \$149 million, the largest FCPA forfeiture to-date by an individual. It is believed that Tesler will serve his sentence in the U.S., although there have been rumors recently that Tesler is attempting to get permission from U.S. authorities to serve his sentence in the U.K.

Finally, on February 24, 2012, Albert “Jack” Stanley, the former Chairman and CEO of KBR, was sentenced to thirty months in prison for his part in the TSKJ bribery scheme. Stanley’s guilty plea in 2008 to charges of violating the FCPA and conspiracy to commit mail and wire fraud is widely credited with having broken open the DOJ’s investigation of the TSKJ conspiracy. At the time of his guilty plea, Stanley’s preliminary sentence was to be eighty-four months in prison, but that sentence was variable subject to his cooperation with the DOJ. Stanley has also been ordered to make a \$10.8 million restitution payment to KBR.

E. Noble Corporation Executives – Charged

On February 24, 2012, the SEC charged three Noble Corporation executives with violations of the FCPA for allegedly making improper payments to Nigerian officials in exchange for illegal import permits for drilling rigs. The three executives are Mark Jackson, former CEO, James Ruehlen, the head of Noble’s Nigerian subsidiary, and Thomas O’Rourke, a former controller and head of internal audit for Noble Corporation.

The SEC alleges that Jackson and Ruehlen paid “hundreds of thousands of dollars in bribes” to Nigerian customs officials. The SEC also alleges that Jackson approved the improper payments and concealed the payments from Noble’s audit committee and auditors. Ruehlen allegedly prepared false documents, sought approval for the bribes, and processed and paid the bribes. O’Rourke was charged with aiding and abetting Noble Corporation’s violations of the FCPA and directly violating the internal records and false records provisions. O’Rourke has agreed to a settlement with the SEC and has agreed to pay a \$35,000 civil fine.

III. RECENT CORPORATE ENFORCEMENT ACTIONS

A. *Marubeni Corp. – DOJ Settlement*

On January 17, 2012, the DOJ announced that Marubeni Corporation of Japan agreed to pay \$54.6 million in criminal penalties as part of a DPA to resolve FCPA charges related to its role in the TSKJ bribery scheme. In a criminal information filed the same day, the DOJ charged Marubeni with one count of conspiracy to violate the FCPA and one count of aiding and abetting violations of the FCPA.

Marubeni, much like U.K. solicitor Jeffrey Tesler, acted as an agent for the TSKJ joint venture. According to the DOJ, Marubeni assisted the joint venture in its efforts to win EPC contracts to build liquefied natural gas facilities on Bonny Island, Nigeria by making improper payments to low-level Nigerian government officials. The DOJ also alleged that on two occasions, Marubeni employees met with high level officials in the executive branch of the Nigerian government to discuss the designation of representatives with whom Marubeni could negotiate the details of subsequent improper payments. Due in part to Marubeni's activities, TSKJ won four contracts valued at more than \$6 billion from 1995 to 2004.

B. *Qualcomm Inc. – Investigation Disclosed*

In a February 1, 2012 quarterly report, Qualcomm disclosed that the company is under investigation by the SEC and DOJ for potential violations of the FCPA. According to the company's disclosure, the company initially received notice from the SEC of a formal order of private investigation on September 8, 2010. Qualcomm's disclosure states that the company understands that the investigation is the result of disclosures made to the SEC and the audit committee of Qualcomm's board of director by a whistleblower. Although an internal review did not identify any errors in the company's financial records, on January 27, 2012, the DOJ notified the company that a preliminary investigation had been launched into Qualcomm's FCPA compliance. The SEC is also actively investigating the matter. Qualcomm has stated that it intends to fully cooperate with the government's investigation.

C. *Medical Device Industry Probe – DOJ and SEC Settlements*

Smith & Nephew plc and Biomet, Inc., two medical device companies, reached settlements with the DOJ and SEC during the first quarter as part of the government's continued investigation into the medical device industry.

On February 6, 2012, the DOJ announced that Smith & Nephew had agreed to pay over \$22 million and enter into a DPA to settle FCPA allegations related to payments made to government-employed doctors in Greece in exchange for the use of Smith & Nephew products. Smith & Nephew's DPA includes a \$16.8 million penalty, as well as assurances that the company will implement remedial measures and continue to cooperate with the government. The company is also obligated to appoint an outside corporate monitor for the first 18 months of the DPA, with reporting obligations continuing for the next three years. In agreeing to the DPA, the DOJ noted that the company cooperated fully in the government's investigation, voluntarily disclosed the violation, and took remedial measures including implementation of an enhanced compliance program. In a related SEC settlement, Smith & Nephew agreed to disgorge \$5.4 million in wrongful profits.

On March 26, 2012, the DOJ announced that Biomet had also entered into a DPA requiring the company to pay \$17.28 million in criminal penalties as well as implement internal controls, cooperate fully with the DOJ, and retain a compliance monitor for the first 18 months of the DPA. The DOJ had

been investigating Biomet for allegedly making over \$1.5 million in improper payments from 2000 to 2008 to influence the award of hospital contracts in Argentina, Brazil, and China.

The DOJ alleged that Biomet executives, employees, and agents used fraudulent accounting practices in order to inaccurately record the improper payments as “commissions,” “royalties,” “consulting fees,” and “scientific incentives” to avoid detection. In addition to cooperating with the DOJ in its own investigation, Biomet also cooperated with the DOJ’s ongoing investigation into the medical device industry. The DOJ also lauded Biomet’s extensive self-investigation, remedial efforts, and compliance improvements in announcing the DPA.

In a related SEC settlement, Biomet agreed to disgorge \$5.4 million in profits, including pre-judgment interest. The SEC alleged that Biomet’s compliance and internal audit functions failed to stop these improper payments even after learning about the misconduct, and Biomet’s executives and internal auditors in the United States knew about and openly discussed these payments.

D. Halliburton Co. – Subpoena

In a February 16, 2012 SEC filing, Halliburton disclosed that the company and an employee had received subpoenas from the SEC related to the ongoing investigation into alleged improper payments made in Angola. The SEC initiated the current investigation in December 2010 after an anonymous email alleged that certain current and former personnel violated the FCPA through an Angolan vendor. The email also alleged conflicts of interest, self-dealing, and the failure to act or investigate potential violations of the FCPA.

In December 2011, Halliburton disclosed to the DOJ that the company was commencing an internal investigation into potential FCPA investigations. In the third quarter of 2011, Halliburton provided updates to the DOJ and SEC on the status of the investigation. According to the company’s Form 10K Annual Report, the current SEC subpoenas stem from information disclosed during these discussions.

E. Bruker Corp. – Employee Dismissals

On March 2, 2012, Bruker Corporation disclosed that it had fired workers and third party agents at a subsidiary in China and Hong Kong, Bruker Optics, for failure to comply with corporate policies and standards of conduct. The dismissals stem from an internal investigation, first reported to the DOJ and SEC in August of 2011, into potential violations of the FCPA due to payments made to employees or agents of government-owned enterprises in China. The company announced that it has completed its internal investigation into the optics unit but that management has decided to hire an independent audit firm to investigate other subsidiaries. In addition to the investigation, the company has implemented enhanced FCPA compliance procedures and instituted stronger financial controls and oversight over subsidiaries in Hong Kong and China.

F. BizJet Int’l – DOJ Settlement

On March 14, 2012, the DOJ announced that BizJet International Sales and Support Inc., an aircraft maintenance, repair, and overhaul services provider based in Oklahoma, had agreed to pay \$11.8 million in criminal penalties as part of a three year DPA to resolve FCPA charges. These charges stemmed from the company’s alleged improper payments to secure contracts in Latin America. In its criminal information, the DOJ charged BizJet with one count of conspiring to violate the FCPA’s anti-bribery provisions.

According to the DOJ, BizJet made improper payments to government officials with the Mexican Policia Federal Preventiva, the Mexican Coordinacion General de Transportes Aereos Presidenciales, the air fleet for the Gobierno del Estado de Sinaloa, and the Republica de Panama Autoridad Aeronautica Civil. The company allegedly made payments both directly to foreign officials and indirectly through shell corporations set up and run by a BizJet sales manager. The DOJ alleged that BizJet executives orchestrated, authorized, and approved the unlawful payments.

The DPA includes requirements that BizJet will cooperate with the government in the ongoing investigation, make periodic reports to the DOJ regarding the company's compliance efforts, and implement an enhanced compliance program with strengthened internal controls. In agreeing to the DPA, the DOJ noted that the BizJet cooperated fully in the government's investigation, voluntarily disclosed the violation, and took immediate remedial measures. BizJet's indirect parent company, Lufthansa Technik AG, also entered into a DPA related to BizJet's alleged improper payments.

G. Layne Christensen – Investigation Disclosed

On March 22, 2012, Kansas-based drilling, water treatment, and construction services company Layne Christensen disclosed that it had notified the DOJ and SEC of potential violations of the FCPA. The violations stem from payments made by foreign subsidiaries to intermediaries for African government officials. According to the company's statement, the internal investigation uncovered improper payments in "certain countries in Africa relating to the payment of taxes, the importing of equipment, and the employment of expatriates." The DOJ and SEC have not announced whether they will take action regarding Layne Christensen's disclosure.

IV. CONCLUSION

If activity in the first quarter is any indication, 2012 will be a significant year in shaping the scope and application of the FCPA. Despite collecting over \$98 million in criminal fines and penalties, the government's tactics and strategies are under increased scrutiny after a string of failed prosecutions. In the courts, a developing body of law is defining "foreign official" in a broad manner generally consistent with the government's historical position. How the DOJ and SEC reevaluate and adapt in light of this complex and ever-changing climate will be a major development to follow throughout the course of the next year.

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