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A Client Alert from Paul Hastings

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October 2011

Quarterly FCPA Report: Third Quarter 2011

BY THE GLOBAL COMPLIANCE AND DISPUTES PRACTICE

I. Introduction

The third quarter demonstrated that the Foreign Corrupt Practices Act ("FCPA") continues to hold the attention of a broad audience, including in the courtroom. For the second consecutive quarter, a guilty jury verdict was handed down, this time for two executives in the Haiti Teleco case. Also for the second quarter in a row, the definition of "foreign official" was the subject of courtroom activity in the Control Components, Inc. ("CCI")-related case, *U.S. v. Carson et al*.[1] There, the U.S. Department of Justice ("DOJ"), in preparing its jury instructions, helped clarify an issue related to the definition of "foreign official."

Additionally, this year has seen a flurry of activity in three different trials, which include the Lindsey,[2] Carson, and arms contract[3] cases, all of which continued through the summer. Following the guilty verdict in May 2011, the Lindsey defendants have continued with their motion to dismiss the case based on government misconduct. The judge has not yet ruled on this motion.

In the Carson case, the defendants had previously lost a motion based on the definition of "foreign official," when they argued that employees of state-owned enterprises were not covered by the FCPA. This quarter the question surrounding "foreign officials" came up during the preparation of jury instructions. The judge asked whether a defendant's knowledge that the individual allegedly receiving an improper payment is a "foreign official" is an element of an FCPA offense. Both the DOJ and the defendants in Carson agreed that it was. Final language for the jury instructions is expected to be agreed upon in the next few weeks.

In addition, defendants in this case lost another motion, this time on the applicability of the Travel Act to improper payments made in the course of international business transactions. The court held that, because defendants were acting in California to make wired payments from Sweden to China and Latvia, some instrumentality in interstate commerce was presumably used, making the law applicable to their conduct. The trial is set for June 2012.

In the twenty-two defendant arms contract "Shot Show" case, the trials were set for all eighteen remaining defendants after the trial of the first four ended in a hung jury. The DOJ plans to retry the case, and the judge is now allotting eight weeks for each of the three groups of defendants, twice as long as the three to four weeks originally allotted. Defendants have also filed a motion to dismiss a conspiracy charge, arguing that they did not know each other and that, therefore, there was no "hub" to the alleged conspiracy.

Beyond this courtroom activity, the DOJ and the U.S. Securities and Exchange Commission ("SEC") announced a number of enforcement actions. For corporate defendants, this included two SEC settlements, one of which also entered into a Non-Prosecution Agreement ("NPA") with the DOJ. Another defendant pleaded guilty to the DOJ's charges. For individuals, there were two guilty verdicts and a separate sentencing that resulted in a forty-six month prison term. Also, in the Haiti Teleco case, six new indictments were issued against five individuals, two of whom are former Haitian government officials, and one company. Lastly, the DOJ issued its first FCPA Opinion Release for 2011 regarding the provision of promotional expenses.

II. Recent Corporate Enforcement Actions

A. Cinergy Telecommunications Inc. – New Indictments in the Haiti Teleco Case

On July 13, 2011, the DOJ filed a superseding indictment against six defendants, including two former Haitian government officials, for their involvement in the alleged illicit payment and money laundering scheme that took place from December 2001 through January 2006. According to the indictment, Cinergy Telecommunications Inc. and a related company, Uniplex Telecommunications Inc., allegedly paid more than $1.4 million in improper payments through shell companies to employees of Telecommunications D'Haiti ("Haiti Teleco"), Haiti's state-owned national telecommunications company.

The six defendants are Cinergy, Washington Vasconez Cruz, president of Cinergy and Uniplex, Amadeus Richers, former director of Cinergy and Uniplex, Patrick Joseph, former general director for telecommunications at Haiti Teleco, Jean Rene Duperval, former director of international relations for telecommunications at Haiti Teleco, and Marguerite Grandison, former president of Telecom Consulting Services Corp. and sister of Duperval.

Duperval was previously charged with one count of conspiracy to commit money laundering and twelve counts of money laundering. Grandison had also previously been charged with conspiracy to violate the FCPA, to commit wire fraud, and to commit money laundering, and seven counts of FCPA violations and twelve counts of money laundering.

According to the superseding indictment, the defendants allegedly made the improper payments to obtain business advantages for Cinergy and Uniplex, including favorable telecommunications rates and credits towards payments owed. The defendants allegedly received and forwarded the payments through various shell companies, including J.D. Locator Services, Fourcand Enterprises, and Telecom Consulting Services.

Two other defendants previously charged in the alleged scheme, Joel Esquenazi and Carlos Rodriguez, were convicted on August 4, 2011 (discussed below).

B. Armor Holdings – DOJ and SEC Settlements

On July 13, 2011, Armor Holdings, a military and law enforcement equipment company, entered into settlements with the DOJ and the SEC to resolve allegations of FCPA violations related to improper payments made to secure United Nations ("U.N.") contracts. Armor Holdings, currently owned by BAE Systems, agreed to pay the DOJ a criminal penalty of $10.3 million and will disgorge $5.7 million to the SEC.

The DOJ and SEC alleged that a subsidiary of Armor, Armor Products International, Ltd. ("API"), paid more than $200,000 in commissions to a third-party sales agent knowing some of that money would be used to make improper payments to a U.N. procurement official. As a result, Armor won contracts worth $6 million. The DOJ and SEC alleged that Armor falsely recorded these commission payments and kept $4.4 million in additional payments to third-party intermediaries off its books and records.

According to the SEC's complaint, between 2001 and 2006, API's agents made at least ninety-two payments to a third-party intermediary to help API win contracts to supply body armor for U.N. peacekeeping missions. The SEC stated that these agents "caused API to enter into a sham consulting agreement" with this third-party intermediary. Another subsidiary of Armor, Armor Holdings Products ("AHP"), allegedly used a separate accounting system to disguise over $4 million in commissions paid to intermediaries from 2001 through 2007.

Armor entered into an NPA with the DOJ. Armor was not required to retain a corporate monitor. Instead, Armor was required to report to the DOJ on the implementation of its enhanced compliance efforts every six months for the duration of the two-year agreement. The DOJ acknowledged Armor's voluntary disclosure, internal investigation, and cooperation with the DOJ and the SEC. The DOJ cited the fact that the conduct took place prior to its acquisition by BAE Systems and that Armor subsequently adopted BAE's due diligence protocols, compliance policies, and internal controls as part of the reason Armor was not required to retain a monitor. In its settlement with the SEC, Armor agreed to a permanent injunction against further violations and agreed to pay $1.5 million in disgorgement, $458,438 in prejudgment interest, and a civil money penalty of $3.68 million. The SEC cited Armor's thorough internal investigation and cooperation in its assessment of Armor's penalty.

C. Diageo plc – Liquor Company Settles Books and Records Charges

On July 27, 2011, Diageo plc settled charges with the SEC stemming from allegations that subsidiaries of Diageo had made illegal payments to government officials in India, Thailand, and South Korea from 2003 to 2009 in order to obtain tax benefits, government orders, and prime product placement at government-owned stores, in violation of the FCPA. Diageo agreed to pay more than $11.3 million in disgorgement, $2.1 million in prejudgment interest, and a $3 million financial penalty under the settlement. The SEC also has entered a cease and desist order against the company for further violations of the FCPA's books and records and internal controls provisions.

Diageo is one of the world's largest producers of premium alcoholic beverages, whose brands include Johnnie Walker and Windsor Scotch. The SEC alleged that Diageo's subsidiaries made more than $2.7 million in illegal payments and that the company's lack of oversight and financial controls allowed its subsidiaries to disguise the true nature of these payments through the use of third parties and inflated invoices.

According to the SEC, these payments included $1.7 million to Indian officials, which led to increased sales producing more than $11 million in profit. Diageo allegedly paid approximately $600,000 to Thai government and political party officials, resulting in a favorable decision from the Thai government regarding a multi-million dollar tax and customs dispute. In an effort to obtain tax rebates in South Korea, Diageo also allegedly paid for travel and entertainment for customs and other government officials and rewarded one customs official with a payment of approximately $86,000 for his role in the government's favorable decision. Additionally, Diageo allegedly made hundreds of payments to military officials in South Korea in order to obtain and retain liquor business.

D. Bridgestone Corporation – Antitrust and FCPA Conspiracy

On September 15, 2011, the DOJ announced that Bridgestone Corporation had agreed to plead guilty to violations of antitrust laws and the FCPA. Bridgestone was charged with conspiracy to violate the Sherman Act and the FCPA. Bridgestone will pay a $28 million criminal fine for its role in the conspiracies.

Bridgestone is a Tokyo headquartered company that manufactures marine hose and other industrial products. The government alleged that Bridgestone authorized and approved improper payments to employees of state-owned industries in Latin America in order to sell marine hose. These payments were allegedly made through a local sales agent who received funds on top of the agent's earned commission. These payments were allegedly then passed on to the government officials. According to the DOJ, this conduct began as early as January 1999 and continued through May 2007.

In addition, Bridgestone allegedly agreed to rig bids, fix prices, and allocate shares of the marine hose market among co-conspirators by not submitting prices or bids for certain customers or by submitting intentionally high prices or bids. Bridgestone is the fifth company to be charged in this bid-rigging conspiracy, and nine individuals to date have been convicted for their involvement. In 2008, the former general manager of Bridgestone's international engineer products department, Misao Kioki, pleaded guilty and was sentenced to two years in prison for his role in the FCPA and antitrust conspiracies.

Under the plea agreement, the DOJ recognized Bridgestone's cooperation during the investigation and extensive remediation, which included restructuring parts of its business, terminating many third-party agents, making employees available for interviews, and taking remedial action with respect to employees who made improper payments. In addition, the DOJ cited Bridgestone's commitment to continuing to enhance its compliance program and internal controls as a factor in the recommendation for a substantially reduced fine. Under the terms of the plea agreement, Bridgestone is required to cooperate in the DOJ's ongoing investigations but is not required to retain a corporate monitor.

III. Enforcement Actions Against Individuals

A. Joel Esquenazi and Carlos Rodriguez – Guilty Verdicts for Terra Telecommunications Executives

On August 4, 2011, Joel Esquenazi and Carlos Rodriguez, former president and executive vice president, respectively, of Florida-based, Terra Telecommunications Corp. ("Terra"), were found guilty of conspiracy to violate the FCPA and conspiracy to launder money, wire fraud, seven counts of FCPA violations, and twelve counts of money laundering. These charges stemmed from their role in a scheme to make illegal payments to government officials at Haiti Teleco. Sentencing is scheduled for October 13, 2011, and each defendant faces up to five years in prison, plus fines, for each of the wire fraud and FCPA-related counts. The conspiracy and substantive money laundering counts carry a maximum penalty of twenty years in prison, plus possible fines.

Esquenazi and Rodriguez conspired and made corrupt payments of over $800,000 between 2001 and 2005 using shell companies to facilitate the payments and falsely recording these payments as remittance for "consulting services." According to court documents, these payments were made to obtain favorable telecommunications rates and to encourage the continuance of Terra's telecommunications connection with Haiti.

Former Terra controller Antonio Perez pleaded guilty in April 2009 to money laundering and conspiracy to violate the FCPA and is currently serving a twenty-four month prison sentence. Others charged in the scheme include Juan Diaz, president of J.D. Locator Services, who pleaded guilty to charges of money laundering and conspiracy to violate the FCPA in 2009 and was sentenced to twenty-four months in prison; Jean Fourcand, the president and director of Fourcand Enterprises Inc., who pleaded guilty to a money laundering charge in 2010 and was sentenced to six months in prison; and Robert Antoine, the former director of international affairs at Haiti Teleco, who pleaded guilty to conspiracy to commit money laundering in 2010 and admitted to receiving more than $1 million in illegal payments and was sentenced to forty-eight months in prison.

Since the verdict, a dispute between these two defendants and the DOJ has arisen over whether Haiti Teleco is a state-owned company and, therefore, whether its employees would constitute “foreign officials” for the purposes of the FCPA. At issue is a document signed by Haitian Prime Minister Jean Max Bellrive referring to Haiti Teleco as a private company. The DOJ and Bellrive stated that the document was intended for internal purposes only and that Haiti Teleco is, in fact, a state-controlled institution. However, on September 14, 2011, lawyers for the defendants filed court papers intended to show that the document was not an “internal” document but rather a document prepared in response to a request by one of the defendant’s attorneys. This issue has not yet been resolved.

B. Jorge Granados – LatiNode CEO Sentenced

On September 7, 2011, former CEO of Latin Node Inc. (“LatiNode”), Jorge Granados, was sentenced to forty-six months in prison and two years supervised release for making unlawful payments to Honduran government officials. Granados pleaded guilty in May 2011 to charges of conspiracy to violate the FCPA, which included the unlawful payment of over $500,000.

LatiNode is a Florida-based telecommunications company. In 2006 and 2007, Granados and other LatiNode executives agreed to make payments to officials at the Honduran state-owned telecommunications company, Empresa Hondureña de Telecomunicaciones (“Hondutel”). eLandia International Inc. discovered the payments when it acquired LatiNode in 2007 and disclosed the information to the DOJ. LatiNode pleaded guilty in 2009 to charges of violating the FCPA and paid a $2 million fine.

In addition to Granados, LatiNode’s CFO, Manuel Salvoce, Vice President for Business Development, Manuel Caceres, and Chief Commercial Officer, Juan Pablo Vasquez, have all pleaded guilty to similar charges and are scheduled to be sentenced in November and December 2011. They all face up to five years in prison.

IV. Opinion Release 11-01

On June 30, 2011, the DOJ released its first FCPA Opinion Release of 2011. The Requestor wrote to the DOJ regarding a proposal to pay certain expenses for one official from each of two foreign government agencies to visit the United States and learn more about services provided by the Requestor. The officials would be selected by their own agencies and not by the Requestor, and the Requestor intended to pay for economy class airfare, lodging in the United States, local transport, and meals for a two-day program.

Other relevant facts surrounding the proposed visit included the Requestor had no non-routine business before either of the government agencies, and its routine business consisted primarily of seeking approval of pending adoptions, which is governed by administrative rules with identified standards. In addition, the Requestor would host only the selected officials and not spouses or family members, no cash would be provided directly to the officials, no entertainment, side trips, or leisure activities would be provided, and any souvenirs would reflect the Requestor’s business logo and be of nominal value.

Based on these facts, the DOJ found that the expenses contemplated by the Requestor are “reasonable under the circumstances and directly relate to ‘the promotion, demonstration, or explanation of [the Requestor’s] products or services’” as set out in 15 U.S.C. § 78dd-2(c)(2)(A).

V. Conclusion

This quarter saw a continuation of the enforcement trends from the first half of 2011, as focus continues to remain on the numerous trials and judicial rulings. New indictments, settlements, and guilty pleas also show that the focus by enforcement agencies on the FCPA remains strong. This aggressive enforcement environment, along with increased enforcement of anti-corruption laws outside the United States, makes it imperative for companies of all sizes and in all industries to ensure that they have adequate practices and policies in place to protect against FCPA and other anti-corruption law liability.

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[1] *U.S. v. Carson, et al.*, No. 09-77 (C.D. Ca. 2009).
[2] *U.S. v. Noriega, et al.*, No. 10-1031 (C.D. Ca. 2010).
[3] *U.S. v. Amaro Goncalves, et al.*, No. 09-335 (D.D.C. 2010).