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Quarterly FCPA Report: Second Quarter 2010

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I. Introduction

The second quarter of 2010 has been relatively quiet, in contrast to the record-breaking number of FCPA enforcement actions initiated in the first quarter of the year. While the U.S. Securities and Exchange Commission ("SEC") reported four enforcement actions during the quarter, the U.S. Department of Justice ("DOJ") filed only two FCPA cases toward the end of the second quarter.

The lack of new prosecutions, however, is not an indication that the federal government is relaxing its FCPA enforcement efforts. In April 2010, Charles Edward Jumet received the longest sentence ever imposed for a violation of the FCPA. In the last week of June, the DOJ and SEC announced long-awaited settlements with Technip, and in first week of July, the two agencies announced settlements with Snamprogetti and ENI. These settlements were all in relation to the Nigerian Bonny Island bribery scheme that has now netted the U.S. government $1.28 billion in criminal and civil penalties thus far. Additionally, the DOJ and SEC are continuing investigations into a variety of multinational corporations such as Panalpina and HP.

The second quarter of 2010 also saw the first FCPA-related Opinion Release of 2010 from the DOJ. A U.S. company asked the DOJ whether or not it would be a violation of the FCPA to hire a person who qualified as a foreign official where the company was required to do so because of a contract with the U.S. government.

In light of the continuing trend toward steeper fines for corporations and longer sentences for individuals, it remains crucial for corporations to stay vigilant and ensure their compliance programs are sufficient to ensure that violations of the FCPA do not occur, and it remains vital that corporations without compliance programs work immediately to establish such programs for their employees and foreign subsidiaries.

II. Summary of Recent Corporate Enforcement Investigations

A. Technip

On June 28, 2010, the DOJ announced that Technip S.A. agreed to settle FCPA charges, for its participation in a ten-year scheme to bribe Nigerian government officials in order to obtain engineering, procurement and construction ("EPC") contracts. Technip, based in Paris, France, is a global engineering, construction and services company. The DOJ filed a deferred prosecution agreement and a two-count criminal information against Technip. The DOJ charged Technip with one count of conspiracy and one count of violating the FCPA.

Technip agreed to pay a $240 million criminal penalty. Technip also agreed to pay $98 million in disgorgement of profits relating to violations of the FCPA's anti-bribery, books and records, and internal controls provisions in order to settle the charges with the SEC. Under the terms of the deferred prosecution agreement, the DOJ agreed to postpone prosecution of Technip for two years, during which Technip will retain an independent compliance monitor who will review Technip's compliance program. Technip is also to cooperate with the DOJ in ongoing investigations. If Technip abides by the terms of the agreement, the information will be dismissed when the term of the agreement expires.

According to court documents, Technip and three other companies had formed a four-company joint venture, TSKJ, to which Nigerian LNG Ltd ("NLNG") awarded four EPC contracts worth $6 billion between 1995 and 2004 to build liquefied natural gas ("LNG") facilities on Bonny Island, Nigeria. The Nigerian state-owned Nigerian National Petroleum Corporation ("NNPC") was the largest shareholder of NLNG. Technip had authorized the joint venture to hire two agents, Jeffrey Tesler, and a Japanese trading company, to pay bribes to several Nigerian government officials. The joint venture ultimately paid approximately $132 million to a Gibraltar corporation controlled by Tesler, and more than $50 million to the Japanese company. Court documents state that Technip intended these payments to be used in part to bribe Nigerian government officials.

B. Veraz Networks

On June 29, 2010, the SEC filed a settled enforcement action against Veraz Networks ("Veraz"), alleging that Veraz had committed violations of the books and records and internal controls provisions of the FCPA. Veraz is a telecommunications company based in San Jose, California. The SEC alleged that Veraz had failed to accurately record improper payments in its books and records and had failed to devise and maintain a system of internal controls that would have prevented such payments.

Veraz allegedly retained a consultant in China who gave gifts and made improper payments from 2007 to 2008 to officials at a state-controlled telecommunications company in China in order to obtain business for Veraz. A Veraz supervisor approved the gifts and described them as a "gift scheme." The gifts totaled approximately $40,000. In addition, the SEC alleged that a Veraz employee made improper payments to the CEO of a state-controlled company in Vietnam to obtain business for Veraz.

Veraz consented to an injunction permanently enjoining Veraz from violations of the books and records and internal controls provisions of the FCPA and agreed to pay a penalty of $300,000 to the SEC.

C. Snamprogetti Netherlands, B.V. and ENI S.p.A.

On July 7, 2010, the DOJ announced that Snamprogetti Netherlands, B.V., a Dutch company that was part of the same Nigerian Bonny Island EPC project as KBR and Technip (discussed above), agreed to pay $240 million to settle bribery charges. The company was charged with one count of conspiracy and one count of aiding and abetting violations of the FCPA. Snamprogetti was one of the partners in TSKJ. Snamprogetti is the third partner of the joint venture to be charged by U.S. authorities.

Snamprogetti, its current parent company, Saipem S.p.A., and ENI entered into a two-year deferred prosecution agreement with the DOJ. The companies agreed to ensure that their compliance programs satisfy certain standards and to cooperate with the DOJ in ongoing investigations. The criminal information will be dismissed at the end of the two-year term if the companies all abide by the terms of the agreement.

On the same day, the SEC filed a civil complaint against Snamprogetti as well as its former parent company, ENI S.p.A., alleging violations of the anti-bribery and books and records and internal controls provisions of the FCPA. The two companies are jointly and severally liable to pay $125 million to the SEC in disgorgement.

Snamprogetti and ENI's settlements with the DOJ and SEC bring the total criminal and civil penalties assessed for the Bonny Island bribery scheme to $1.28 billion.

III. Summary of Recent Individual Enforcement Actions

A. The SHOT-Show Sting Operation

The DOJ has moved to consolidate the SHOT-Show indictments from January 2010. As reported in the Paul Hastings Quarterly FCPA Report for the first quarter of 2010, the DOJ and the FBI arrested 22 people in connection with an FBI-sting operation where a number of military and law enforcement equipment suppliers agreed to provide kickback payments to an African Minister of Defense. In the initial indictments, those individuals were charged either individually or in pairs.

On April 16, 2010, however, the DOJ filed a single superseding indictment and brought all of the cases together. In the superseding indictment, the DOJ charges that all of the defendants agreed to sell goods to an African nation at an inflated price and transmit part of the price paid to an intermediary who would then provide the African Minister of Defense with half of the inflated amount. The DOJ alleges that each person knew that the inflated amount was a bribe that would go to the African Minister of Defense. The DOJ further alleges that the defendants participated in a small test sale where they sold a small quantity of goods at the inflated price and then transmitted the required payment to the intermediary.

While each of these facts was present in the prior indictments, the superseding indictment has brought all of these cases together as a single large conspiracy in which all of the defendants participated. The superseding indictment charges each defendant with conspiracy to violate the FCPA, conspiracy to commit money laundering, and at least one count of violating the FCPA. Each defendant faces the possibility of at least thirty years of imprisonment.

B. Charles Paul Edward Jumet

On April 19, 2010, Charles Paul Edward Jumet was given the longest prison sentence ever imposed for FCPA-related violations. Jumet was sentenced to 87 months in prison for paying bribes to former Panamanian government officials in order to secure lucrative maritime contracts, and for making a false statement to federal agents. Jumet was also ordered to pay a $15,000 fine and to serve three years of supervised release following his prison term. Jumet was convicted in the Eastern District of Virginia.

Jumet had pleaded guilty on November 13, 2009, to conspiracy to violate the FCPA and to making a false statement to federal agents. Jumet and others had conspired from 1997 to 2003 to pay money secretly to Panamanian government officials in exchange for the officials' granting of contracts to Ports Engineering Consultants Corporation ("PECC") to maintain buoys and lighthouses along the waterway in Panama. Jumet at the time was an officer of PECC, an affiliate of Virginia Beach-based Overman Associates. PECC was awarded a no-bid 20-year concession in 1997. Jumet admitted in his guilty plea that he and others had authorized bribes of more than $200,000 in total to Panamanian government officials.

Jumet had also made a false statement to the FBI regarding an $18,000 corrupt payment by pretending that the check was a donation for an official's reelection campaign, rather than admitting it was a bribe. Both Assistant Attorney General Lanny Breuer and U.S. Attorney MacBride emphasized that this sentence was a clear demonstration that the U.S. government is intent on enforcing the FCPA and imposing severe penalties for violations of the anti-bribery law.

C. Wojciech Chodan and Jeffrey Tesler

On April 21, 2010, a London judge stated that Wojciech Chodan, KBR's one-time sales manager, should be extradited to Texas to face trial. Chodan was indicted for helping the joint venture TSKJ bribe Nigerian officials to obtain a lucrative gas contract. Chodan is a U.K. citizen and was indicted in February 2009 by a federal grand jury in Houston, Texas.

Chodan, along with fellow U.K. citizen Jeffrey Tesler, a lawyer who was indicted simultaneously with Chodan, also lost his extradition hearing in March 2010. Chodan and Tesler were both charged with one count of conspiracy to violate and ten counts of violating the FCPA. They each face up to 55 years in prison if convicted of all counts. The indictment also seeks to have them forfeit more than $132 million, the amount of bribes they allegedly arranged to pay on behalf of TSKJ to Nigerian government officials.

D. Employees of Dimon Inc./Alliance One International

On April 29, 2010, the SEC brought a civil enforcement action against four former employees of Dimon, Inc., now Alliance One International, Inc. The SEC charged the four employees with violating the anti-bribery provisions of the FCPA and aiding and abetting such violations.

The SEC alleged that from 1996to 2004, Dimon's subsidiary in Kyrgyzstan paid more than $3 million in bribes to various government officials to purchase Kyrgyz tobacco for reselling to Dimon's customers. Defendant Bobby J. Elkin, Jr., a former country manager for Dimon in Kyrgyzstan, authorized, directed and made these bribes through a bank account held under his name. Defendant Baxter J. Myers, a former regional financial director, authorized fund transfers from a Dimon's subsidiary to Elkin's account, and Defendant Thomas G. Reynolds, a former corporate controller, formalized the accounting methodology used to record the payments made from Elkin's account, for the purposes of Dimon's internal accounting.

Dimon also allegedly paid bribes of around $543,000 to Thai government officials in order to obtain contracts worth approximately $9.4 million. Defendant Tommy L. Williams, a former senior vice president of sales, allegedly directed the sale of tobacco from Brazil and Malawi to the Thailand Tobacco Monopoly through Dimon's Thai agent and authorized the bribes. The defendants all consented to the entry of final judgments permanently enjoining them from violations of the FCPA and aiding and abetting such violations. Myers and Reynolds also agreed to pay civil penalties in the amount of $40,000 each.

E. Robert Antoine

On June 3, 2010, Robert Antoine, a former employee of Haiti's state-owned national telecommunications company, was sentenced to 48 months in prison for his involvement in a money-laundering and bribery scheme. Antoine was also ordered to pay almost $1.9 million in restitution and to forfeit almost $1.6 million. He will also serve three years of supervised release following his prison sentence.

Antoine was indicted in December 2009 and pleaded guilty in March 2010 of conspiracy to commit money laundering. From 2001 to 2003, Antoine was the director of international affairs for Telecommunications d'Haiti. Antoine admitted accepting bribes from three U.S. telecommunications companies and disguising the origin of the bribes by funneling them through intermediary entities in the U.S.

While the FCPA does not attach liability to foreign officials who accept bribes, Antoine's actions in disguising the origin of funds in the stream of U.S. commerce is an offense under U.S. anti-money-laundering laws. Several of the executives from the U.S. companies from which Antoine received the funds are still awaiting trial.

F. John Webster Warwick

On June 25, 2010, John Webster Warwick was sentenced to 37 months in prison for his role in a conspiracy to pay bribes to former Panamanian government officials to secure maritime contracts. Warwick was also sentenced to two years of supervised release after serving his prison term and ordered to forfeit $331,000 in proceeds from the crime.

Warwick pleaded guilty on February 10, 2010 to a one-count indictment charging conspiracy to make corrupt payments to foreign government officials to secure business for the PECC. Warwick had been involved in the same scheme for the PECC as Charles Paul Edward Jumet, who earlier in 2010 had received the longest sentence ever imposed for FCPA violations, as discussed above.

Warwick, a resident of Virginia Beach, Virginia, was sentenced in the U.S. District Court in Richmond, Virginia.

G. Ousama M. Naaman

On June 25, 2010, Ousama M. Naaman pleaded guilty to conspiracy and to violating the FCPA. Naaman, a dual citizen of Lebanon and Canada, was charged in a superseding indictment on June 24, 2010 with conspiracy to defraud the United Nations Oil-for-Food Program and conspiracy to violate the anti-bribery and books and records provisions of the FCPA. He was also charged with violating the FCPA and aiding and abetting such violations.

Naaman had been an agent for Innospec, Inc., which in March 2010 reached a $40 million global settlement with authorities in the U.S. and U.K. for FCPA and U.N. Oil-for-Food Program violations. In Naaman's guilty plea, he admitted paying or promising to pay more than $3 million in kickbacks to officials in Iraq's Ministry of Oil and the Trade Bank of Iraq in order to obtain business for Innospec.

Naaman was originally indicted in August of 2008 and was charged with one count of conspiracy to commit wire fraud and to violate the FCPA and two counts of violating the FCPA. The superseding indictment dropped the wire fraud conspiracy charge, however. Naaman was arrested on July 30, 2009 in Frankfurt, Germany and was extradited to the U.S.

No date has yet been set for sentencing, but Naaman faces up to 10 years in prison.

H. Sentencing Updates

The second quarter of 2010 saw sentencing delayed for a number of individuals convicted of FCPA violations. These include Gerald and Patricia Green, whose sentencing was delayed several times throughout the quarter and eventually moved off the calendar altogether on June 3. The next status conference for the Greens was scheduled for July 1.

In addition, Albert Jack Stanley, former Chairman and CEO of KBR, had his sentencing postponed until September 23, 2010. Stanley pleaded guilty in September 2008 to a two-count criminal information charging him with conspiracy to violate the FCPA and to commit mail and wire fraud. Stanley is currently free on $100,000 unsecured bail pending sentencing.

IV. DOJ Opinion Releases on April 19, 2010

The Department of Justice issued its first FCPA Opinion Release of the year on April 19, 2010. A U.S. company requested that the DOJ determine whether it would take action against the company under the FCPA given the following facts. In support of an agreement between the U.S. government and a foreign government to construct a facility in the foreign country, the U.S. government hired a U.S. company to build the facility and to hire and compensate the facility's staff. However, the foreign government retained the power to appoint the facility director. The foreign government selected the facility director, without any input from the U.S. company, and the U.S. government directed the U.S. company to hire the specified individual. The U.S. company hired him as required by its contract with the U.S. government and paid him $5,000 per month. However, the individual was also employed by the foreign government in a separate government agency and, therefore, qualified as a foreign official under the FCPA. The U.S. company represented to the DOJ that in neither position would the foreign official have decision-making authority over procurement or contracting decisions affecting the company and that the individual would not be subject to the company's direction.

The DOJ stated that, in these circumstances, the company would not be in violation of the FCPA, and the DOJ would take no action against it. The DOJ Opinion Release emphasized two factors. First, the individual was hired pursuant to an agreement between the U.S. government and the foreign government. Second, the individual would have no decision-making authority over contract or procurement decisions that would affect the company.

While this Opinion Release is only binding between the requesting company and the DOJ, it does indicate that U.S. companies required by the U.S. government to hire a person who qualifies as a foreign official may not be in an untenable situation for two separate reasons. First, the FCPA includes an affirmative defense for reasonable and bona fide payments made to a foreign official pursuant to a contract with a foreign government or agency. 15 U.S.C. § 78dd1(c)(2). The DOJ's inclusion of the fact that the hiring requirement was in connection with an agreement with a foreign government seems to be a reference to this affirmative defense. Here, the company was required, as a subcontractor for the U.S. government, which had entered into an agreement with a foreign government, to hire and compensate this foreign official. Thus, the hiring and compensation decision may be considered to have been made pursuant to a contract with a foreign government or agency. Assuming the DOJ's Opinion Release relied on this affirmative defense, the DOJ's decision to take no action against the company indicates that the DOJ determined the payment was reasonable.

Second, the fact that the individual would have no decision-making authority over contract or procurement decisions that would affect the company speaks directly to the issue of intent, which is required by the FCPA. Under the FCPA, the payment made to a foreign official must be made in order to obtain or retain business. Here, the payments the individual would receive as the facility director would not be made in order to obtain or retain business because the individual would not have authority over business decisions affecting the U.S. company in his role as the facility's director or his role as a foreign official. Therefore, the payments lacked the corrupt intent required to constitute a violation of the FCPA. Although the DOJ did not specifically state which, if either, reason weighed more heavily in making the decision not to pursue an FCPA action against the U.S. company, there are two potential bases for that

decision. U.S. companies that find themselves contractually obligated to hire a foreign official should consider whether either of these two reasons would protect them from future prosecution.

V. Conclusion

The second quarter of 2010 has seen a dip in the number of enforcement actions relating to the FCPA, in sharp contrast to the high number of FCPA enforcement actions in the first quarter. However, the steep fines and lengthy sentences imposed indicate that companies and executives have every incentive to persist in efforts to comply with the FCPA. As such, corporations and individuals alike should not be swayed into complacency by the second quarter's relative lack of new prosecutions. To the contrary, with a number of multinational corporations under investigation, the current quiet may merely be the calm before another storm.

Thus, it remains crucial for corporations to remain attentive, and to ensure that their compliance programs are sufficient in monitoring and enforcing adherence to anti-corruption and anti-bribery policies and procedures. Corporations without compliance programs should immediately work to establish such programs for their employees and foreign subsidiaries.

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