DEBEVOISE & PLIMPTON LLP

# FCPA Update

**November 2010 ■ Vol. 2, No. 4**

## The SEC's Draft Rules Implementing Dodd-Frank's Whistleblower Program

On November 3, 2010, the Securities and Exchange Commission ("SEC") issued its proposed rules[1] implementing the whistleblower provisions added by the Dodd–Frank Wall Street Reform and Consumer Protection Act[2] ("Dodd-Frank Act"). These provisions amended the Securities Exchange Act of 1934 by creating Section 21F. Because the FCPA is part of the relevant sections of federal securities laws, the whistleblower rules, if made final, will apply to SEC enforcement activity in connection with FCPA matters.[3] As press reports have indicated,[4] the proposed rules are already generating considerable concern that the whistleblower program poses the risk of undermining existing internal compliance programs. As the comment period continues and the agency considers comments received, that risk will continue to dominate the debate over the various provisions of the rules.

* * *

Under Congress's mandate in the Dodd-Frank Act, the SEC was required to prl j rid^qb rules to implement the whistleblower program that would require the SEC to pay awards to eligible whistleblowers who voluntarily provide the SEC with original information that leads to a successful enforcement action yielding monetary sanctions of over $1 million.[5] Section 21F also includes protections for whistleblowers from retaliation by their employees for providing information to the SEC.

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1 SEC Rel. 34-63237, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Nov. 3, 2010), http://www.sec.gov/rules/proposed/2010/34-63237.pdf.

2 Pub. L. No. 111-203, 124 Stat. 1376.

3 The FCPA, 15 U.S.C. §§ 78dd-1, *et seq.*, is a chapter within the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*

4 *See, e.g.*, Edward Wyatt, "For Whistle Blowers, Expanded Incentives," *The New York Times* (Nov. 14, 2010), http://www.nytimes.com/2010/11/15/business/15whistle.html.

5 Pub. L. No. 111-203, § 922(a), 124 Stat. at 1841-48.

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## The SEC's Draft Rules ■ Continued from page 1

### Key Requirements of the Proposed Rules

The Proposed Rules reflect a range of judgments by the SEC in interpreting and applying its statutory mandate under Section 21F.

- First, whistleblowers must be natural persons; companies are ineligible for treatment as whistleblowers and may not receive bounties.[6]
- Second, the information must be provided voluntarily—a key concept both in the statute and in the Proposed Rules that the SEC has issued.[7] When an individual is within the scope of a request for information or documents the SEC has already made in the course of an investigation or inquiry, that person is not deemed to be providing information voluntarily.[8]
- Third, original information means information derived from independent knowledge *or* analysis undertaken by the whistleblower.[9] "Analysis" includes, in complex matters, an independent assessment of information for the SEC.
- Fourth, the information must be essential to or must significantly contribute to the success of the enforcement action in order for the whistleblower to be entitled to an award.[10]
- Fifth, the whistleblower is to receive an award of ten to thirty percent of the total monetary sanctions collected in any case in which the recovery is over $1 million. The determination of the precise amount is at the discretion of the SEC.[11]

### Whistleblower Submissions

The Proposed Rules require that whistleblower submissions be made under penalty of perjury.[12] Although the Dodd-Frank Act permits whistleblower anonymity and confidentiality,[13] the Proposed Rules provide that any anonymous whistleblower must retain a lawyer. The lawyer must sign a separate certification that she or he has verified the whistleblower's identity and has reviewed, and will maintain, the whistleblower's original signed statement.[14]

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6 SEC Rel. 34-63237, *supra* note 1, at 124 (proposed rule to be codified at 17 C.F.R. § 240.21F-2).

7 *See id.* at 127-28 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(a)); Pub. L. No. 111-203, § 922(a), 124 Stat. at 1482.

8 SEC Rel. 34-63237, *supra* note 1, at 127-28 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(a).

9 *See id.* at 128-31 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(b)).

10 *See id.* at 131-32 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(c)).

11 *See id.* at 133 (proposed rule to be codified at 17 C.F.R. § 240.21F-5).

12 *See id.* at 137-38 (proposed rule to be codified at 17 C.F.R. § 240.21F-9(b)).

13 Pub. L. No. 111-203, § 922(a), 124 Stat. at 1846-47.

14 *See* SEC Rel. 34-63237, *supra* note 1, at 135 (proposed rule to be codified at 17 C.F.R. § 240.21F-7(b)).



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### Exclusions from Whistleblower Eligibility

Consistent with the statute,[15] the Proposed Rules exclude certain individuals from whistleblower eligibility. Some key exclusions include regulatory and law enforcement personnel, foreign government employees, auditors, individuals convicted of a violation (at least with respect to a violation that relates to the relevant subject matter), and any potential whistleblowers who intentionally submit false or fraudulent information.[16] The Proposed Rules also exclude a variety of potential whistleblowers from eligibility based on the definition of "original information" in Proposed Rule 21F-4.[17] As defined in the Proposed Rules, "original information" must be derived from the whistleblower's "independent knowledge" or "independent analysis" and cannot be information that is:

- Already known to the SEC from any other source (unless it can be shown that such source obtained the information from the whistleblower);
- Derived from an allegation made in a judicial or administrative hearing, government report, hearing, audit or investigation, or from news media (unless the whistleblower is the original source); or
- Submitted on or before the July 21, 2010 effective date of the Dodd-Frank Act.[18]

The rule defines "independent knowledge" as factual information not derived from publicly available sources.[19] "Independent analysis" is defined broadly in the rule as a person's analysis "done alone or in combination with others," and which may be based on publicly available information.[20] The SEC states that this broad definition is a recognition that persons can, through "evaluation and analysis, provide vital assistance to the Commission staff in understanding complex schemes and identifying securities violations."[21] The Proposed Rules then state that information will not be considered to be derived from independent knowledge or independent analysis if the information was obtained:

- Through a communication subject to the attorney-client privilege, except as permitted by the SEC's attorney conduct or state ethics rules;
- Through legal representation of a client when the disclosure to the SEC is for the whistleblower's own benefit, except as permitted by the SEC's attorney conduct or state ethics rules;
- Through an engagement by an independent public accountant required under the federal securities laws;
- By a person with legal, compliance, audit, supervisory or governance responsibilities, in situations in which the information was communicated to such person with the reasonable expectation that the person would take steps to cause the company to respond appropriately to the violation, unless the company did not disclose the information to the SEC "within a reasonable time" or proceeded in "bad faith";
- Otherwise through or from an entity's compliance, audit, legal or other similar function or processes, unless the entity did not disclose the information to the SEC "within a reasonable time" or proceeded in "bad faith";
- In a manner or by a means that violates applicable state or federal criminal law; or
- From any individual who would otherwise be excluded pursuant to any of the above criteria.[22]

### Interactions with Internal Compliance Programs

The SEC's proposal states that the SEC considered but did not include a requirement that individuals exhaust the avenues made available by internal company compliance procedures before taking advantage of the whistleblower

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15 *See* Pub. L. No. 111-203, § 922(a), 124 Stat. at 1843.

16 *See* SEC Rel. 34-63237, supra note 1, at 136-37 (proposed rule to be codified at 17 C.F.R. § 240.21F-8).

17 *See id.* at 128-30 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(b)).

18 *See id.* at 128 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(b)(1)).

19 *See id* at 128 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(b)(2)).

20 *See id* at 128-29 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(b)(3)).

21 *See id.* at 19.

22 *See id.* at 129-130 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(b)(4)).

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provisions.[23] Instead, the Proposed Rules purport to attempt to strike a balance between the goals of the statute and the desire to support and strengthen corporate compliance programs by permitting whistleblowers to be considered an "original source" of information if they first provided the information to a company's internal compliance personnel as long as the whistleblower then provided the information to the SEC within 90 days of any internal disclosure.[24] The SEC also has made clear that the Commission will consider whether whistleblowers reported the potential violation internally as one factor in determining whether an increased award would be appropriate.[25] The Commission has even indicated that, as a first step in some whistleblower cases, it may ask the company itself to provide views on a particular complaint and formulate a response before the SEC begins an investigation.[26]

## Potential Whistleblower Retaliation Claims

The Proposed Rules also have implications for companies' employment decisions. The Act prohibits retaliation by employers against whistleblowers, and provides employees with a private cause of action to enforce the prohibition.[27] The Dodd-Frank Act's anti-retaliation provisions are likely to expand significantly private causes of action as compared to similar actions brought under the Sarbanes–Oxley Act of 2002[28] ("SOX"). Anti-retaliation complaints filed under SOX have been disproportionately unsuccessful. Of 1,273 such claims filed under SOX, the Secretary of Labor issued only seventeen decisions in favor of the whistleblower.[29] The Dodd-Frank Act's more expansive provisions will likely have more impact through two key provisions.

First, whereas under SOX, whistleblowers must file retaliation complaints with the Secretary of Labor in the first instance,[30] the Dodd-Frank Act allows whistleblowers to bring retaliation suits directly to federal district court.[31] In addition, the Dodd-Frank Act modifies the requirement in the SOX anti-retaliation regime that permits claims to be brought only against public companies—a restriction that barred many claims brought against subsidiaries and affiliates.[32] The Dodd-Frank Act makes clear that whistleblower retaliation claims may be brought against subsidiaries or affiliates whose financial information is included in the consolidated financial statements of companies filing with the SEC, thereby removing the exception that had triggered so many dismissals under the SOX statutory regime.[33] ■

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23 *See id.* at 34.

24 *See id.* at 131 (proposed rule to be codified at 17 C.F.R. § 240.21F-4(b)(7)).

25 *See id.* at 51-53.

26 *See id.* at 34-35.

27 Pub. L. No. 111-203, § 922(a), 124 Stat. at 1845-46.

28 Pub. L. No. 107-204, 116 Stat. 745 (anti-retaliation provisions codified at 18 U.S.C. § 1514A).

29 Jennifer Levitz, "Senators Protest Whistleblower Policy," *Wall Street Journal* (Sept. 10, 2008), http://online.wsj.com/article/SB122101918024118495.html.

30 *See* 18 U.S.C. § 1514A(b).

31 Pub. L. No. 111-203, § 922(a), 124 Stat. at 1846.

32 *See* Levitz, *supra* note 29.

33 *See* Pub. L. No. 111-203, § 929A, 124 Stat. at 1852.

# The Panalpina Settlements: Additional Evidence Concerning the Costs and Benefits of Cooperation with U.S. Authorities

On November 4, 2010, the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") settled FCPA charges against Panalpina World Transport ("PWT"), a Swiss company that specializes in global freight-forwarding and logistics services, and six companies in the oil-and-gas industries. These settlements are notable not only for the size of the combined civil and criminal fines and disgorgements – totaling approximately $236 million – and the U.S. government's commitment to focus on entire industries, but also for the DOJ's clear message that companies will benefit from self-reporting and cooperating with U.S. authorities.

## The Panalpina Settlements

The DOJ and SEC alleged that PWT and its U.S.-based subsidiary, Panalpina, Inc., violated the FCPA's anti-bribery and books and records provisions by paying at least $27 million in bribes to foreign officials in seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia and Turkmenistan, between 2002 and 2007. The bribes were allegedly paid on behalf of PWT's customers to circumvent local rules and regulations relating to the import of goods and materials.

PWT entered into a three-year deferred prosecution agreement ("DPA") with the DOJ, while Panalpina, Inc. pleaded guilty to conspiring to violate the books and records provisions of the FCPA and with aiding and abetting certain customers in violating the books and records provisions of the FCPA. Together, the Panalpina companies paid a criminal fine totaling $70.56 million. As part of its DPA, PWT is required to fully cooperate with U.S. and foreign authorities in any ongoing investigations of the company's corrupt payments and to implement a comprehensive compliance program.

The SEC also filed a complaint against Panalpina, Inc. – a company whose securities do not trade on U.S. exchanges and whose securities and debt offerings are not otherwise regulated by the SEC – asserting jurisdiction by alleging that Panalpina served as an agent of issuers, *i.e.*, Panapina's U.S.-based customers. According to SEC FCPA Unit Chief Cheryl Scarboro, this expanded scope of the SEC's jurisdiction has never been asserted in the past.[1] Ultimately, Panalpina agreed to disgorge approximately $11.3 million in profits.

Other companies that settled with the DOJ and/or SEC include Transocean, Inc., a global provider of offshore oil drilling services, which agreed to a three-year DPA, payment of a $13.4 million penalty to the DOJ, and $7.2 million disgorgement to the SEC; Tidewater Marine International, Inc., a global operator of offshore service and supply vessels for energy exploration, which agreed to a three-year DPA, payment of a $7.35 million penalty to the DOJ, and $8.1 million disgorgement to the SEC; Pride International Inc., an oil and gas drilling company, which agreed to a three-year DPA, payment of a $32.6 million penalty to the DOJ, and a $23.5 million disgorgement to the SEC; Shell Nigeria Exploration and Production Company (SNEPCO), a Nigerian subsidiary of Royal Dutch Shell plc, which agreed to a three-year DPA, payment of a $30 million penalty to the DOJ, and $18.1 million in disgorgement to the SEC; Noble Corporation, a Swiss oil and gas company, which agreed to a non-prosecution agreement ("NPA"), payment of a $2.59 million penalty to the DOJ, and a $5.6 million disgorgement to the SEC; and GlobalSantaFe Corporation, which consented to injunctive relief, disgorgement of $3.8 million and a civil penalty of $2.1 million to the SEC.[2]

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1 *See* Ashley Jones, "With Panalpina Case, SEC Spreading its Wings on Foreign Corruption" *WSJ Law Blog* (Nov. 5, 2010), http://blogs.wsj.com/law/2010/11/05/with-panalpina-case-sec-spreading-its-wings-on-foreign-corruption/; *see also* Thomas Huddleston, Jr., "236.5M Panalpina Settlement Shows SEC Spreading its Wings Overseas, *Corporate Counsel* (Nov. 17, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202474965088.

2 *See* SEC Press Rel. 2010-214, SEC Charges Seven Oil Services and Freight Forwarding Companies with Widespread Bribery of Customs Officials (Nov. 4, 2010), http://www.sec.gov/news/press/2010/2010-214.htm.

## The Panalpina Settlements ■ Continued from page 5

Perhaps most critically, the DOJ press release announcing these corporate resolutions specifically noted that all of the settlements "reflect the department giving appropriate and meaningful credit to these companies to the extent that they have voluntarily self-disclosed their conduct and commensurate with the quality and extent of their cooperation."[3] No defendant was required to retain a compliance monitor.

### The Value of Voluntary Disclosure and Cooperation

In a speech at the 24th National Conference on the Foreign Corrupt Practices Act, Assistant Attorney General Lanny Breuer discussed the Panalpina settlements and emphasized the importance of self-reporting and cooperation with government officials.[4] He held up Panalpina as an example of "what it means to really cooperate with the government," and noted that the Panalpina cases are "instructive for what they say about the value of cooperation." Mr. Breuer explained: "Panalpina engaged counsel to lead investigations encompassing 46 jurisdictions, hired an outside audit firm to perform forensic analysis, and promptly reported the results of its internal investigation in over 60 meetings and calls with the Department and the SEC." He concluded, "I can assure you that if you do not voluntarily disclose your organization's conduct, and we discover it on our own, or through a competitor or a customer of yours, the result will not be the same."[5]

The penalties meted out in connection with the Panalpina settlements support Mr. Breuer's comments. The companies described by the DOJ as having voluntarily disclosed FCPA issues – Tidbwater Marine International and Noble Corporation – paid the lowest fines relative to the size of their illicit profits. In addition, all companies were described by the DOJ as having cooperated and engaged in remedial measures to at least some degree. The chart summarizes each of the Panalpina settlements, noting whether the company was described as having voluntarily disclosed their conduct, the amount of their illicit gain (as measured by the required disgorgement in connection with SEC settlements), and the respective fine/penalty paid. *See chart below.*

Noble, which paid the lowest fine to the DOJ, was also the only company which the DOJ viewed as having completely and voluntarily disclosed its conduct in a timely manner, and fully cooperated with the government investigation. The DOJ press release recognized that "Noble's early voluntary

| Company | Voluntary Disclosure | Allegedly Illicit Gain | Fine /penalty Amount | Fine-to- Gain Ratio |
|---|---|---|---|---|
| Panalpina | No (cooperated after "several months") | $11.3 million | $70.56 million | 6.2 |
| Transocean | No (but cooperated) | $7.2 million | $13.44 million | 1.9 |
| SNEPCO | No (but cooperated) | $18.1 million | $30 million | 1.7 |
| Pride | No (but cooperated) | $23.5 million | $32.625 million | 1.4 |
| Tidewater | Yes | $8.1 million | $7.35 million fine/ $217,000 penalty | .88 |
| Noble | Yes | $5.6 million | $2.59 million | .5 |
| GlobalSanteFe | No | $3.8 million | $2.1 million civil penalty | N/A |

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3 *See* DOJ Press Rel. 10-1251, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4. 2010), http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

4 *See* Lanny A. Breuer, Remarks at 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html (hereinafter "Brewer Remarks").

5 *Id.*

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disclosure, thorough self-investigation of the underlying conduct, full cooperation with the department and extensive remedial measures undertaken by the company" weighed considerably in the DOJ's decision not to prosecute the company.[6]

PWT and Panalpina, in contrast, paid a fine six-times greater than the amount of their illicit gain. This appears to be explained by allegations that the company was at the center of the corrupt activity, did not voluntarily disclose and did not cooperate with the government for "several months," according to the DOJ. Nevertheless, DOJ recognized PWT's extensive remediation efforts and credited its eventual "full" cooperation.[7]

With the DOJ's press release specifically noting "meaningful credit"[8] for self-disclosure and Mr. Breuer's recent speech touting the benefits of self-disclosure and cooperation, the DOJ appears to be making a concerted effort to counter some recent articles that have questioned whether self-reporting and cooperation actually produce tangible benefits for corporate defendants when they resolve their issues with the U.S. government.[9]

### The Value of Model Compliance Programs

The Panalpina settlements also allowed the DOJ to emphasize the importance of robust FCPA compliance programs as the best way to mitigate penalties in the face of misconduct by company employees. The DOJ required each company to adopt model compliance programs, and it included those model programs in the settlement agreements to serve as a roadmap for other companies to follow. Key features of the compliance programs include (1) annual compliance policy reviews and updates; (2) policies governing facilitation payments; (3) application of compliance policies to "outside parties" acting on behalf of the company in foreign jurisdictions; and (4) assigning a senior corporate executive to oversight and implementation of the compliance policy, with a direct reporting line to the legal counsel and internal audit or the board of directors (or a committee of the board).[10]

These model compliance programs are in line with recent remarks by Mr. Breuer, who encouraged companies to take a "hard look" at their compliance practices and find ways to strengthen internal controls and encourage a "culture of compliance."[11] Both DOJ and the SEC list an effective compliance program as a factor relevant to the determination of appropriate sanctions.[12]

Additionally, the U.S. Federal Sentencing Guidelines (the "Guidelines") provide companies with clear incentives, including lower fines, to develop effective compliance and ethics programs.[13] New revisions to the 2010 Guidelines also recommend that, after detecting illegal conduct, companies should take reasonable steps to (1) remedy the harm resulting from the conduct, including self-reporting, cooperation with government agencies, and remediation, and (2) prevent further similar criminal conduct, including assessing the compliance and ethics program and making adjustments as necessary. The Guidelines note that

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6 *See* DOJ Press Release, note 3, *supra*.

7 *See United States v. Panalpina World Transport (Holding), Ltd.*, Deferred Prosecution Agreement (Nov. 4, 2010), http://www.justice.gov/opa/documents/panalpina-world-transport-dpa.pdf. (hereinafter "Panalpina DPA").

8 *See* DOJ Press Release, note 3, *supra*.

9 See Bruce Hinchey, "Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements" (Jul. 15, 2010), http://ssrn.com/abstract=1650925; Lucinda A. Low, Owen Bonheimer, & David. S. Lorello, "The Uncertain Calculus of FCPA Voluntary Disclosures" (2007) http://www.abanet.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf.

10 *See* Panalpina DPA, Attachment C, note 7, *supra*.

11 *See* Brewer Remarks, note 4, *supra*.

12 *See* Exchange Act Rel. No. 44969, Accounting and Auditing Enforcement Rel. No. 14780, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001), http://www.sec.gov/litigation/investreport/34-44969.htm; Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

The U.K. Bribery Act, by contrast, provides for an affirmative defense that would allow a company to demonstrate that it had "adequate procedures" in place to prevent bribery.

13 *See* U.S. Federal Sentencing Guidelines § 8C2.5(f)(1).

## The Panalpina Settlements ■ Continued from page 7

companies may use an outside professional advisor to ensure adequate assessment and implementation of modifications.[14]

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Despite the Panalpina settlements and Mr. Breuer's comments, companies still must engage in a complicated calculus before deciding whether voluntary disclosure and cooperation will be appropriate in any individual case.[15] Panalpina conducted an extensive, multi-year internal investigation, costly steps which may not always be the best approach for every potential FCPA violation, particularly with respect to small, localized, and easily-corrected problems. The full cost of voluntary disclosure includes investigative costs, revenue and earnings loss, post-settlement monitor costs, post-settlement compliance costs, negative publicity, shareholder lawsuits, and loss of licenses and customers. Although the real-world benefits of voluntary disclosure, even in the wake of the Panalpina settlements, cannot be accurately predicted from the settlements alone, these cases will require companies and their counsel to give additional weight to the benefits (or reduced costs) associated with voluntary disclosure. To the extent potential FCPA issues do arise, however, one thing is certain: the best defense remains having a comprehensive, robust compliance program in place. ■

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14 *See* U.S. Federal Sentencing Guidelines § 8B2.1(b)(7) and Commentary.

15 Potential actions by foreign law enforcement agencies may further complicate this calculation. Resolution of a case with U.S. authorities may be only the beginning of the process for certain parties involved in allegations of foreign bribery. Last week, Nigeria's Economic and Financial Crimes Commission raided Panalpina offices and arrested eleven of Panalpina's top officials over the alleged distribution of over $240 million in bribes. *See* Idowu Sowunmi, "EFCC Raids Panalpina, Arrests 11 Officials Over $240m Bribery Scam," *This Day* (Nov. 26, 2010) http://www.thisdayonline.com/.

# DOJ Challenged on Meaning of "Foreign Official"

Responding to an indictment alleging corrupt payments to employees of Telecommunications D'Haiti S.A.M. ("Telecom Haiti"), a Miami businessman has argued that employees of the state-owned Haitian telephone company are not "government officials" within the meaning of the FCPA and that if they are deemed "government officials," then the FCPA is unconstitutionally vague as it is being applied in the case.[1] The challenge presents a broad assault on the U.S. government's expansive interpretation of the FCPA that could have far-reaching implications in many parts of the world where clear distinctions between government and private industry are blurred or non-existent.

The defendant, Joel Esquenazi, along with two other individuals, was indicted on December 8, 2009 for allegedly making corrupt payments to two officials of Telecom Haiti between 2001 and 2005.[2] The alleged purpose of the payments was to allow a U.S. corporation of which Esquenazi was the President and a part owner to obtain and offer to customers discounted rates on telephone calls between the U.S. and Haiti. According to the indictment, Esquenazi and others transferred more than $800,000 to a shell company to be used for bribe payments, including payments to the two employees

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1 *See United States v. Esquenazi*, No. 09-cr-21010, Defendant Joel Esquenazi' Motion To Dismiss Indictment For Failure to State a Criminal Offense and for Vagueness (S.D. Fla. 2009).

2 *See id.*, Indictment, http://www.justice.gov/criminal/fraud/fcpa/cases/esquenazij.html.

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of Telecom Haiti, who also were indicted by the U.S. government.

The FCPA prohibits payments to "any foreign official for the purposes of . . . inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality."[3] The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency or instrumentality thereof."[4] The Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") consistently have interpreted this language to cover not only payments to traditional government officials, but also those to employees of state-owned entities, even if those employees or entities do not directly perform a traditional government function. Thus, in the past, the DOJ and SEC have applied this section to employees of a government-owned bank in Argentina,[5] an employee of a regional health fund in Poland,[6] physicians and laboratory employees at government-owned hospitals in China, Mexico, Belgium, Luxembourg and France,[7] airport officials in China, the Philippines and Thailand,[8] and officials at state-owned oil and oil services companies in Nigeria[9] and Angola.[10] If these DOJ and SEC interpretations are correct, there can be little doubt that the two employees of Telecom Haiti also are government officials within the meaning of the FCPA.

Esquenazi nevertheless argues that employees of a foreign entity are not "foreign officials" under the act merely because their employer is owned or controlled by a Haitian government entity. Rather, he contends, in order for their employer to be a "department, agency or instrumentality" of Haiti, it would need to perform a traditional government function. As support for this argument, he cites the legislative history of the FCPA to bolster a claim that the purpose of the law was to combat bribery of foreign *government* officials. He suggests that, under the DOJ and SEC view, employees of the Royal Bank of Scotland all would be considered "foreign officials" under the FCPA and analogously that all of the employees of General Motors and AIG when majority-owned by the government would be considered government officials. In other federal statutes, such as the Foreign Sovereign Immunities Act, he argues, an "instrumentality" of a foreign government connotes not merely ownership, but control of the entity by the foreign government. Esquenazi notes that the Organization for Economic Cooperation and Development's ("OECD's") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention") focuses on persons "exercising a public function," rather than on employment by a government-owned entity.[11] He argues that in 1998 Congress amended the FCPA to implement the OECD Convention, citing a Senate Report stating that the amendments were to "conform [the FCPA] to the requirements of and to implement the OECD Convention."[12] The FCPA, he concludes, should apply only to "foreign officials" who perform a government function, not to employees of a commercial enterprise that happens to be owned by the government.

Esquenazi argues in the alternative that the definition of "foreign official" should be interpreted in a way that gives "fair warning" to potential violators and avoids commands that are so uncertain that

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3 15 U.S.C. § 78dd-1(a)(1).

4 15 U.S.C. § 78dd-1(f)(1)(A).

5 *See* Securities Exchange Act Rel. No. 43761, Accounting and Auditing Enforcement Rel. No. 1355, In the Matter of Int'l Bus. Machines Corp. (Dec. 21, 2000), http://www.sec.gov/litigation/admin/34-43761.htm.

6 *See SEC v. Schering-Plough Corp.*, No. 1:04-cv-00945 (D.D.C. 2004).

7 *See SEC v. Syncor Int'l Corp.*, No. 1:02-cv-02421 (D.D.C. 2002).

8 *See In re InVision Technologies, Inc.*, Non-Prosecution Agreement (Dec. 3, 2004), http://www.justice.gov/criminal/fraud/fcpa/cases/invision-tech.html.

9 *See U.S. v. Willbros Group, Inc.*, No. 08-cr-287 (S.D. Tex. 2008) (criminal information and deferred prosecution agreement filed simultaneously); *see also SEC v. Willbros Group, Inc.*, No. 4:08-cv-01494 (S.D. Tex. 2008); SEC Litig. Rel. No. 20571, SEC Files Settled FCPA Action Against Willbros Group, Inc. and Several Former Employees (Jul. 6, 2004), http://www.sec.gov/litigation/litreleases/2008/lr20571.htm

10 *See U.S. v. ABB-Vetco Gray, Inc.*, No. 04-cr-279, Criminal Indictment (S.D. Tex. 2004); *see also SEC v. ABB Ltd.*, No. 04-cv-1141 (D.D.C., Jul. 6, 2004); SEC Litig. Rel. No. 18775, SEC Sues ABB, Ltd in Foreign Bribery Case (Jul. 6, 2004), http://www.sec.gov/litigation/litreleases/lr18775.htm.

11 Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ¶ 1.4(a), http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

12 S. Rep. 105-277, at 2 (Jul. 30, 1998).

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commands that are so uncertain that conduct subject to criminal prosecution is not clearly prescribed. Unless such a narrow interpretation is applied, he argues, the law should be found constitutionally infirm as applied to him for having failed to define a "criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited…."[13]

In its response to Esquenazi's motion,[14] the Government argues that Esquenazi's motion is a premature request for a ruling on the sufficiency of the government's evidence. According to the government, the motion is premature until after that evidence has been presented to the jury. The Government therefore does not address Esquenazi's motion on the merits, although it offers to provide supplemental briefing if the Court requests it. Nevertheless, the Government claims, without elaboration, that the plain text of the FCPA, its interpretation by the courts, its legislative history and U.S. treaty obligations provide no support for interpreting that statute as applying only to officials who perform a public function – a definition that the Government also calls narrow and ambiguous.

In responding to Esquenazi's argument that the FCPA, as applied in his case, is unconstitutionally vague, the government says that the void-for-vagueness doctrine applies only to statutes containing terms that require untethered, subjective judgments. The definition of "foreign official" in the FCPA, the Government argues, requires no subjective assessment and turns instead on standard legal terms. The Government also cites an email, on which Esquenazi was copied, in which Telecom Haiti is referred to as an "instrumentality of the Haitian government."

The DOJ and SEC consistently have given a broad interpretation to the provisions of the FCPA, including the definition of "foreign official." The fact that most cases brought under the statute have resulted in plea bargains or settlements means that the government's interpretation has not been thoroughly tested in the courts. In fact, neither Esquenazi's nor the Government's briefs cited a single contested case in which the definition of "foreign official" was adjudicated. Whether Esquenazi's arguments will persuade the court remains to be seen, but as the DOJ and SEC continue to pursue a vigorous enforcement agenda, challenges like this one may become more frequent. If Esquenazi prevails, moreover, the decision could have profound implications for application of the FCPA in countries like China, in which state ownership of commercial enterprises remains prevalent. FCPA Update will continue to monitor the case and will report on further developments. ■

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13 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

14 *See United States v. Esquenazi*, No. 09-cr-21010, Government's Response in Opposition to Defendant Esquenazi's Corrected and Amended Motion To Dismiss Indictment For Failure to State a Criminal Offense and for Vagueness (S.D. Fla. 2009).

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