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FCPA Update

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Do FCPA Remedies Follow FCPA Wrongs? "Disgorgement" in Internal Controls and Books and Records Cases

On July 27, 2011, the U.S. Securities and Exchange Commission ("SEC") settled an FCPA-related administrative proceeding against London-based Diageo plc after the company's subsidiaries allegedly made improper payments of over $2.7 million to government officials in India, Thailand, and South Korea. The Cease-and-Desist Order claimed that Diageo was "unjustly enriched by $11,306,081 from increased sales" as a result of "a pervasive practice of making illicit direct and indirect payments to government officials throughout India to obtain and retain liquor sales."[1] Despite containing detailed allegations of foreign bribery, the Order requires Diageo to cease and desist only from committing violations of the FCPA's books and records and internal controls provisions. No FCPA anti-bribery charges appeared in the Order.

The Diageo settlement is the most recent example of a growing trend that began four years ago with the SEC's settlement with Textron Inc.,[2] in which the SEC has obtained hefty FCPA-related settlements including company obligations to "disgorge" various amounts when the defendant directed to pay the "disgorgement" sum has not been charged with violations of the FCPA's primary anti-bribery prohibitions set forth at 15 U.S.C. §§ 78dd-1, 78dd-2, or 78dd-3.

Disgorgement is an equitable remedy, intended not to punish but to prevent unjust enrichment and to deter illegal conduct.[3] To obtain disgorgement, the government must prove a causal connection between the wrongdoing and the profits representing the unjust enrichment.[4] Lacking this causal connection, settlements invoking disgorgement but charging no primary anti-bribery violations push the law's boundaries, as disgorgement is predicated on the common-sense notion that

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1 *See In re Diageo plc*, Admin. Pro. No. 3-14490, Order Instituting Cease-And-Desist Proceedings, at 3 (July 27, 2011); *see also* SEC Press Rel. 2011-158, SEC Charges Liquor Giant Diageo with FCPA Violations (July 27, 2011), http://www.sec.gov/news/press/2011/2011-158.htm.

2 *SEC v. Textron*, 07-cv-1505 (D.D.C. Aug. 24, 2007).

3 *See* Sasha Kalb and Marc Alain Bohn, "Disgorgement: The Devil You Don't Know," *Corporate Compliance Insights* (Apr. 12, 2010), http://www.corporatecomplianceinsights.com/2010/disgorgement-fcpa-how-applied-calculated/. In equity, "the nature of the violation determines the scope of the remedy." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (internal citations omitted).

4 *SEC v. First City Fin. Corp.*, 890 F.2d 1215 (D.D.C. 1989).

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an actual, jurisdictionally-cognizable bribe was paid to procure the revenue identified by the SEC in its complaint. In FCPA cases, if no such bribe is alleged as such – *i.e.*, if the SEC alleges only a deficiency in record keeping and internal controls – how can it be said that the remedy fits the violation? Without a more direct link between the profits and the charged violations, these "no-charged bribery disgorgement" settlements appear designed to inflict punishment rather than achieve the goals of equity.

In 2004, the SEC first sought disgorgement in an FCPA case, settling with ABB Ltd. for $5.9 million in disgorgement and prejudgment interest, and a $10.5 million civil penalty.[5] In that case, violations of the FCPA's anti-bribery, books and records, and internal controls provisions were charged. Since its settlement with ABB, the SEC has collected, in total, over $1 billion in disgorgement and related pre-judgment interest in over 60 FCPA proceedings, and in many cases disgorgement has been a significant, if not primary, focus of the settlement.[6] Seventeen of these cases – all from 2007 onward, including four in 2011 – have included disgorgement without anti-bribery charges.[7] From those settlements, the SEC has collected over $123 million in disgorgement and pre-judgment interest, in addition to nearly $30 million in civil penalties. The largest of these cases was *SEC v. Chevron Corp.* in 2007, in which the SEC obtained disgorgement of $25 million after at least $20 million in illegal surcharges was paid to Iraq's State Oil Marketing Organization.[8]

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5 *See* Mike Kohler, "The Façade of FCPA Enforcement," 41 *Geo. J. Int'l L.* 907, 981 (Summer 2010); SEC Litig. Rel. 18775, SEC Sues ABB Ltd. In Foreign Bribery Case (July 6, 2004), http://www.sec.gov/litigation/litreleases/lr18775.htm. The $10.5 million civil penalty would be deemed satisfied by two of ABB's affiliates' payment of criminal fines in a parallel criminal proceeding brought by the DOJ. *Id.*

6 *See* Kohler, note 5 at 982, *supra* (noting that since 2004, the SEC has sought disgorgement in virtually every FCPA action it has brought); OECD Working Group on Bribery, "United States: Phase 3" at ¶ 19 (Oct. 15, 2010), http://www.oecd.org/dataoecd/10/49/46213841.pdf (noting $1 billion in disgorgement); Kalb & Bohn, note 3, *supra* (characterizing the SEC's pursuit of disgorgement as "aggressive," and noting that Statoil, Willbros Group, Halliburton/KBR, Siemens, and Daimler, collectively paid $639.5 million.).

7 *See In re Diageo plc*, Admin. Pro. No. 3-14490 (July 27, 2011) ($3 million civil penalty, $11.3 million disgorgement, $2 million pre-judgment interest); *In re Rockwell Automation Inc.*, Admin. Pro. No. 3-14364 (May 3, 2011) ($400,000 civil penalty, $1.7 million disgorgement, and $590,000 prejudgment interest); *SEC v. Comverse Tech. Inc.*, 11-cv-1704 (E.D.N.Y. Apr. 6, 2011) ($1.2 million disgorgement and $359,000 prejudgment interest); *SEC v. IBM Corp.*, 11-cv-563 (D.D.C. Mar. 18, 2011) ($2 million civil penalty, $5.3 million disgorgement, and $2.7 million prejudgment interest); *SEC v. GE Co.*, 10-cv-1258 (D.D.C. July 27, 2010) ($1 million civil penalty, $18.4 million disgorgement, and $4 million prejudgment interest); *SEC v. Agco Corp.*, 09-cv-1865 (D.D.C. Sept. 30, 2009) ($2.4 million civil penalty, $13.9 million disgorgement, and $2 million prejudgment interest); *In re Helmerich & Payne*, Admin. Pro. No. 3-13565 (July 30, 2009) ($320,600 disgorgement, and $55,000 prejudgment interest); *SEC v. Avery Dennison Corp.*, 09-cv-5493 (C.D. Cal. July 28, 2009) ($200,000 civil penalty, $273,000 disgorgement, and $45,000 prejudgment interest); *SEC v. Novo Nordisk*, 09-cv-862 (D.D.C. May 13, 2009) ($3 million civil penalty, $4.3 million disgorgement, and $1.7 million prejudgment interest); *SEC v. ITT Corp.*, 09-cv-272 (D.D.C. Mar. 13, 2009) ($250,000 civil penalty, $1 million disgorgement, and $387,000 prejudgment interest); *SEC v. Fiat S.p.A.*, 08-cv-2211 (D.D.C. Dec. 22, 2008) ($3.6 million civil penalty, $5.3 million disgorgement, and $1.9 million prejudgment interest); *SEC v. A.B. Volvo*, 08-cv-473 (D.D.C. Mar. 26, 2008) ($4 million civil penalty, $7.3 million disgorgement, and $1.3 million prejudgment interest); *SEC v. Flowserve Corp.*, 08-cv-294 (D.D.C. Feb. 21, 2008) ($3 million civil penalty, $2.7 million disgorgement, and $853,000 prejudgment interest); *SEC v. Akzo Nobel N.V.*, 07-cv-2293 (D.D.C. Jan. 4, 2008) ($750,000 civil penalty, $1.6 million disgorgement, and $548,000 prejudgment interest); *SEC v. Chevron Corp.*, 07-cv-10299 (S.D.N.Y. Nov. 20, 2007) ($3 million civil penalty, and $25 million in disgorgement and prejudgment interest); *SEC v. Ingersoll-Rand,* 07-cv-1955 (D.D.C. Oct. 31, 2007) ($1.9 million civil penalty, $1.7 million disgorgement, and $561,000 prejudgment interest); *SEC v. Textron*, 07-cv-1505 (D.D.C. Aug. 31, 2007) ($800,000 civil penalty, $2.3 million disgorgement, and $450,000 prejudgment interest).

8 *See* SEC Litig. Rel. No. 20363, SEC Files Settled Books and Records and Internal Controls Charges Against Chevron Corporation For Improper Payments to Iraq Under the U.N. Oil for Food Program — Company Agrees to Pay a Total of $30 Million (Nov. 14, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20363.htm. Notably, the disgorgement was deemed satisfied by a $20 million settlement with the DOJ and a $5 million settlement with the Manhattan District Attorney's office.

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In another significant settlement with General Electric in July 2010, the SEC alleged that GE's subsidiaries were involved in a $3.6 million "kickback" scheme with the Iraqi government, charged only books and records and internal controls violations, and ultimately collected disgorgement of over $22 million including prejudgment interest.[9] The SEC's pleadings in these "Oil for Food" cases no doubt did not charge primary anti-bribery violations because the funds wrongfully paid were paid to the Iraqi government, not to "foreign officials," making FCPA bribery charges inappropriate.

A disconnect between the remedy and the charged "wrong" is shown not only by the recent Diageo and Oil for Food settlements, but by the SEC's recent settlement with ITT Corp., in which the SEC alleged ITT Corp.'s subsidiaries derived "over $1 million" in profits from contracts resulting from alleged inappropriate payments to state owned entities over the course of several years, and obtained just over $1 million in disgorgement after charging the company with only books and records and internal controls violations.[10]

The FCPA, of course, has two components – (1) the Act's anti-bribery provisions, and (2) the Act's internal controls/books and records provisions. Violations of either can result in civil liability and criminal sanctions, depending on the facts. And, in the case of a violation of the primary anti-bribery provisions, there is likely to be a clear causal connection between improper conduct and illicit gain, *if* a bribe is paid, *if* business is won, and *if* there are profits earned as a result of the bribery. Although the calculation of the ill-gotten gain may be complicated,[11] a *quid pro quo* is generally identifiable in such cases.

In the context of a violation of the FCPA's books and records or internal controls provisions, however, the required causal connection between the wrong and any alleged ill-gotten gain[12] is inherently much more tenuous, if it can be said to exist at all. These provisions, which apply solely to issuers under the Securities Exchange Act of 1934, require that (1) a reporting company keep its books and records in reasonable detail in order to accurately reflect transactions and payments, and (2) a reporting company maintain a system of internal accounting controls to ensure the integrity of the company's financial statements, and ensure that assets are maintained and disposed of in accordance with management directive, which, it is assumed, contains a prohibition against obtaining business through corrupt payments.

As many companies have learned, these books and records and internal controls provisions may be violated even in the absence of jurisdictionally-cognizable bribery. Even where there is bribery associated with such violations, the connection between a books and records violation, or an internal controls violation, on the one hand, and the generation of illegal profits, on the other, can be quite attenuated. Indeed, the import of the language, structure, and history of the books and records provisions is to bar the United States from acting against a foreign subsidiary and its parent if the foreign subsidiary ultimately acted alone, assuming the subsidiary and the corporate parent are not otherwise subject to the FCPA by reason of U.S. nexus, and if the subsidiary properly records the bribes.

"In the context of a violation of the FCPA's books and records or internal controls provisions, however, the required causal connection between the wrong and any alleged ill-gotten gain is inherently much more tenuous, if it can be said to exist at all."

Given the bedrock principle that a court's equitable power to order such a disgorgement goes only as far as the scope of the violation,[13] it is difficult to determine how a court could lawfully allow disgorgement of profits for uncharged violations without the remedy crossing the

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9 *See* SEC Litig. Rel. No. 21602, SEC Files Settled Books and Records and Internal Controls Charges Against General Electric Company and Two Subsidiaries for Improper Payments to Iraqi Ministries Under the U.N. Oil for Food Program (July 27, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21602.htm.

10 *SEC v. ITT Corp.*, Complaint at ¶ 1, 1:09-CV-00272 (D.D.C. Feb. 11, 2009); SEC Litig. Rel. No. 20896, SEC Files Settled Charges Against ITT Corporation for Violations of the Books and Records and Internal Controls Provisions of the Foreign Corrupt Practices Act (Feb. 11, 2009), http://www.sec.gov/litigation/litreleases/2009/lr20896.htm.

11 *See* Kalb and Bohn, *supra* note 3.

12 *First City,* 890 F.2d 1215.

13 *Milliken*, 418 U.S. at 738.

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line into "punishment" for the violations actually charged.[14]

Although settling companies that willingly accept disgorgement as a remedy in such cases may have important strategic interests at stake – *e.g.*, avoiding primary anti-bribery charges – even these companies (as well as the SEC) must consider that the federal courts may at some point step in and forbid such settlements as beyond "the bounds of fairness, reasonableness, and adequacy."[15] Similarly, although stipulated SEC civil cease and desist orders do not require judicial approval for their entry, the same result could occur if, and when, the agency seeks judicially to enforce the requirements of a jurisdictionally-flawed order in one of the "no charged bribery-disgorgement" cases.[16] At some point, in any event, Congress may well determine that the practice of seeking "disgorgements" in cases in which there is no jurisdictionally-cognizable bribery charged by the SEC is an inappropriate use of the agency's authority. In light of these serious legal issues, the Commission itself may wish to re-examine its settlement practices in this arena. ■

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"[T]he federal courts may at some point step in and forbid [no charged bribery-disgorgement] settlements as beyond 'the bounds of fairness, reasonableness, and adequacy.'"

14 The FCPA itself sets forth a statutory scheme of fines, but does not explicitly mention equitable remedies or disgorgement as an available avenue for the SEC to pursue. *See* David C. Weiss, "The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence," 30 *Mich. J. Int'l. Law* 471, 497 (2008-2009) (noting that fining authority under the FCPA is in a separate part of the statute than the SEC's general fining authority, and stating that "[n]either the reports of the House or Senate floor discussion of the FCPA or its subsequent amendments, nor the 1981 follow-up report from the U.S. General Accounting Office on corporate bribery and the FCPA, mention disgorgement as a remedy.").

15 *SEC v. Bank of America*, 653 F. Supp. 2d 507, 508-09 (S.D.N.Y. 2009); *see also United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411, 1448 (E.D.N.Y. 1988) ("[t]he authority to order disgorgement derives from the broad equitable powers given courts under the securities laws to provide such remedies as are necessary to make effective the congressional purpose.... The fashioning of equitable remedies under the securities laws lies within the sound discretion of the court.") (internal citations omitted).

16 In *Avery Dennison*, in light of books and records and internal controls violations, the court approved a settlement that included a civil penalty, but the SEC ordered disgorgement in a separate Cease-and-Desist order. *See SEC v. Avery Dennison Corp.*, Final Judgment, 2:09-CV-05493(DSF) (C.D. Cal. Aug. 19, 2009); *In re Avery Dennison Corp.*, Admin Pro. No. 3-13564, Cease-and-Desist Order (July 28, 2009).

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The U.K. Proceeds of Crime Act and the SFO's Latest Bribery-Related Settlement

The Serious Fraud Office ("SFO"), the United Kingdom's chief investigative agency and prosecutor of foreign corruption, last month reached a civil settlement with Macmillan Publishers ("Macmillan") under which Macmillan agreed to pay just over £11 million in respect of profits earned unlawfully at Macmillan's textbook business in Rwanda, Uganda and Zambia.[1] The settlement was agreed under Part 5 of the Proceeds of Crime Act 2002 ("POCA").

Macmillan is owned by Germany's Verlagsgruppe Georg von Holtzbrinck GmbH, the world's 12th-largest publisher as of 2009.[2]

This is the largest civil settlement made in the United Kingdom in a matter of overseas corruption, and shows once again the SFO's willingness to use the civil asset recovery provisions of POCA to fight overseas corruption. It also provides a good example of how the SFO expects companies to self-report and cooperate with it in order to reach a civil rather than a criminal outcome. Unfortunately, it also demonstrates that civil settlements in the United Kingdom still tend to lack transparency.

Macmillan's Education Division had won public tenders for textbook sales in the three African countries. Investigations conducted by Macmillan determined that the tenders were susceptible to corruption and the creation of improper relationships. Macmillan could not be certain that it had won the contracts in a non-corrupt manner, and it accepted, in the words of the SFO press release, that it "may have received revenue that had been derived from unlawful conduct."[3]

An accounting examination followed. The SFO took an aggressive approach to the calculation of the criminal proceeds, and agreed with Macmillan to the payment of a sum of £11,263,852, in a Consent Order approved by the High Court, in accordance with Section 276 of POCA.[4]

Information concerning Macmillan's conduct came to the SFO via a somewhat unusual route. The World Bank had apparently become aware of bribes paid by a Macmillan agent in an unsuccessful bid to win a contract to supply primary school textbooks to a project in Southern Sudan funded by the World Bank's Sudan Multi-Donor Trust Fund.[5]

The World Bank wrote a report about the information it received and passed the information on to the U.K. authorities. In December 2009, the City of London Police ("the City Police") executed search warrants. In March 2010, Macmillan self-reported the issue to the SFO, which then demanded that Macmillan follow the procedure set out in the *Approach of the Serious Fraud to Dealing with Overseas Corruption* (the "*Approach*"). This required Macmillan to retain external counsel in order to review the company's books and records to determine other improper payments or areas of corruption risk.[6]

Macmillan's initial review was scrutinised by the SFO, the World Bank and the City Police. They then asked Macmillan to conduct more detailed investigations into its Rwanda, Uganda and Zambia business, focusing on all public tender contracts between 2002 and 2009.[7]

The final product of this investigation was presented to the World Bank and the SFO, the latter of which declared the investigation thorough and completed to its satisfaction. The SFO considered that Macmillan had reacted appropriately to learning about the allegations of corruption, by "reviewing its internal anti-bribery and corruption policies and procedures [and] appointing external consultants to recommend and help implement an internal appropriate anti-bribery and corruption compliance regime."[8]

The SFO stated that the "resolution of this inquiry" (*i.e.*, the decision to proceed solely civilly, rather than by way of criminal prosecution or confiscation of assets) was based on a number of factors, including Macmillan's self-reporting and continued cooperation. Richard Alderman, the SFO's Director, stated: "Civil recovery allows us to deal with certain cases of corporate wrongdoing effectively. It delivers value for money to the public by saving the cost of lengthy investigations and protracted legal proceedings."[9]

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1 Serious Fraud Office Press Rel., Action on Macmillan Publishers Limited (July 22, 2011), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/action-on-macmillan-publishers-limited.aspx (hereinafter "Macmillan Release").

2 Ted Treanor, Top 20 List: World's Largest Publishing Co's (Oct. 9, 2009), http://gilbane.com/blog/2009/10/top_20_list_worlds_largest_publishing_cos.html.

3 Macmillan Release, note 1, *supra*.

4 *Id.*

5 Macmillan Release, note 1, *supra*; World Bank Press Rel., The World Bank Group Debars Macmillan Limited for Corruption in World Bank-supported Education Project in Southern Sudan (Apr. 30, 2010), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22563910~menuPK:34465~pagePK:34370~piPK:34424~theSitePK:4607,00.html (hereinafter "World Bank 2010 Release").

6 Macmillan Release, note 1, *supra*.

7 *Id.*

8 *Id.*

9 *Id.*

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Macmillan's resolution of its matter with the SFO has three basic aspects.

First, as stated, it has agreed to pay more than £11 million in the form of civil recovery, as well as the SFO's costs of £27,000.[10] The low figure of the SFO's costs reinforces Alderman's points that civil settlements do not overtax the SFO's resources.

Second, Macmillan has been debarred from bidding for World Bank contracts for six years (reducible to three years for continued cooperation). That punishment was imposed in April 2010, based on the World Bank's initial report into the South Sudan allegations.[11] The World Bank welcomed the agreement reached by the SFO and has not adjusted its punishment.[12]

Finally, Macmillan will be subject to review by an independent monitor, who will report to the SFO within 12 months and to the World Bank.[13]

This matter is important for a number of reasons, particularly to those companies subject to the jurisdiction of the U.K. authorities for overseas corruption, that is, any company, following the entry into force on July 1, 2011 of the U.K. Bribery Act 2010 (the "Bribery Act"), which "carries on a business, or part of a business" in the United Kingdom.[14]

For one thing, it shows that the SFO does not need to rely solely on the Bribery Act in order to pursue companies for overseas bribery—though it is sure to use the Act where appropriate. That is largely because of the SFO's use of its civil asset recovery powers under POCA. This is the fifth time the SFO has resolved an overseas corruption matter in this way, following: Balfour Beatty plc (£2.25 million, 2008);[15] AMEC plc (£4.94 million, 2009);[16] M.W. Kellogg Ltd. (£7 million, 2011);[17] and DePuy International Ltd. (£4.83 million, 2011).[18] As can be seen, the amount recovered from Macmillan is by some distance the largest.

This use of civil recovery has certain advantages, for both the SFO and companies. The SFO is well aware of this, and, in its *Approach*, puts forward the attempt to settle matters civilly as a reward for companies that self-report and take appropriate remedial steps.[19]

Civil recovery gives companies (and the SFO) certainty. In instances in which the SFO has attempted to agree to a criminal sentence with a defendant, it has come under severe criticism from the court.[20] Two judges, including England's Chief Justice, have emphasised that the SFO has little power to promise defendants a particular criminal law resolution, with ultimate sentencing powers residing with the court.[21] But POCA's civil recovery scheme, especially where the SFO proceeds by way of a Consent Order, gives much less latitude to the courts to disturb agreements. It is true that a Consent Order has to be approved by the court, and the court may under POCA section 276(2)(6) "make any further provision which [it] thinks appropriate." But it appears that no court has yet used this provision to amend a Consent Order—and if it did, the order might no longer be binding on the company.[22]

Civil recovery also allows a greater degree of confidentiality, as there is no requirement that Consent Orders be publicized, even though they need to be approved by the court. This instance is a

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10 *Id.*

11 World Bank 2010 Release, note 5, *supra*.

12 World Bank Press Rel., World Bank Applauds Action by the UK Serious Fraud Office in Relation to Bribery Charges Against Macmillan Publishers Limited in an Education Project in Sudan (July 22, 2011), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22967949~pagePK:34370~piPK:34424~theSitePK:4607,00.html (hereinafter "World Bank 2011 Release").

13 Macmillan Release, note 1, *supra*.

14 *See* Bribery Act 2010, c.23, s.7(5)(b) (Eng.), http://www.legislation.gov.uk/ukpga/2010/23/contents.

15 Serious Fraud Office Press Rel., Balfour Beatty plc (Oct. 6, 2008), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx.

16 Serious Fraud Office Press Rel., SFO Obtains Civil Recovery Order Against AMEC plc (Oct. 26, 2009), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx.

17 Serious Fraud Office Press Rel., MW Kellogg Ltd To Pay £7 Million in SFO High Court Action (Feb. 16 2011) (hereinafter "MWKL Release"), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/mw-kellogg-ltd-to-pay-7-million-pounds-in-sfo-high-court-action.aspx.

18 Serious Fraud Office Press Rel., DePuy International Limited Ordered To Pay £4.829 Million in Civil Recovery Order (Apr. 8, 2011) (hereinafter "DePuy Release"), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/depuy-international-limited-ordered-to-pay-4829-million-pounds-in-civil-recovery-order.aspx.

19 Serious Fraud Office, Approach of the Serious Fraud to Dealing with Overseas Corruption 1, 3, 4 (July 21, 2009), http://www.sfo.gov.uk/bribery--corruption/the-sfo's-response/self-reporting-corruption.aspx.

20 *See R v. Dougall*, [2010] EWCA Crim. 1048, ¶¶ 19-25 (May 13, 2010), http://www.judiciary.gov.uk/media/judgments/2010/r-v-dougall; *R v. BAE*, (2010) S2010565, ¶ 13 (Dec. 21, 2010), http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf;. *R v. Innospec Ltd.* [2010] Crim. L.R. 665, Sentencing Remarks of Lord Justice Thomas, ¶¶ 26-28 (Mar. 26, 2010), http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf.

21 *See Dougall* at ¶¶ 25, 31; *Innospec* at ¶¶ 26-27.

22 POCA section 276(2)(a) gives the court the specific power to reduce the amount to be recovered, and the court has done so in at least one instance, in *Director of Assets Recovery Agency v Oswald Theodore John* [2007] EWHC 360 (QB). Of course, such an outcome, while reducing certainty, would be welcomed by a company.

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perfect case in point: the SFO has informed us that the Consent Order is not publicly available owing to a confidentiality clause in the settlement agreement.

Finally, the use of civil recovery can overcome particular problems. In the DePuy matter, for example, the U.S. authorities had already punished DePuy criminally, so criminal sanctions were unavailable in the United Kingdom because of concerns over double jeopardy.[23] With M.W. Kellogg Ltd., the company had received money from contracts procured improperly, but there was no evidence that anyone at the company knew or should have known of the wrongdoing, so criminal charges could not be proffered.[24] In the Macmillan matter, from the scant information publicly available, it appears that no reliable evidence of criminality was found,[25] so the SFO may have been wary of pressing charges.

This case also provides some important indicators as to how best to work with the SFO. Once clear allegations are discovered, there are very significant reasons, all else being equal, to self-investigate and report to the SFO. Here, the SFO gave Macmillan credit for approaching it "with a view to co-operation" and rewarded it with a civil settlement, no criminal charges, and no prosecution of its employees; a worthwhile reward indeed, particularly when considering that Macmillan reported to the SFO only after it had already been investigated by the World Bank and raided by the City Police.[26]

The case also indicates how the SFO will seek to be involved. In this case, Macmillan reported its initial findings to the SFO which then, along with the World Bank and the City Police, decided on the areas on which Macmillan should further concentrate.[27] This approach is to be welcomed, as it saves companies the time and expense of conducting an overbroad investigation.

Further, this case, like most SFO foreign corruption cases, was multi-jurisdictional, also involving the World Bank. Because Macmillan self-reported to the SFO, and cooperated with the World Bank from an early stage, the company enabled the authorities to work with one another,[28] so that Macmillan was not punished twice for the same conduct. It is significant that the World Bank has not added any further punishment, or extended the debarment period, as a result of the most recent findings.[29]

The final point to be made about this case is one that is less welcome: the lack of transparency. As noted above, the Consent Order providing the terms of the settlement is confidential, and thus even many of its most basic terms are unavailable to the public. The value of the contracts won by Macmillan and its manner of winning them have not been released, so it cannot be known on what basis the £11 million forfeiture was calculated, or what was wrong with the public tender processes and Macmillan's own processes. There are mentions in the SFO's press release of a possible "corrupt relationship" and potential "unlawful conduct," but no further details are set forth. Indeed, the SFO also stated in the press release that the products Macmillan supplied were of a good quality and were not overpriced, which raises doubts as to whether there really was unlawful conduct.[30] It is hoped that in the future the SFO and cooperating companies will release more detailed information about matters settled by way of civil recovery. Either way, this case demonstrates that the benefits of self-investigating and self-reporting instances of possible overseas corruption, and seeking to pursue a civil settlement with the SFO, remain tangible. ■

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23 DePuy Release, note 18, *supra*.

24 MWKL Release, note 17, *supra*.

25 Macmillan Release, note 1, *supra*.

26 *Id.*

27 *Id.*

28 *Id.*

29 World Bank 2011 Release, note 12, *supra*.

30 Macmillan Release, note 1, *supra*.

Novo Nordisk Settles with Russia's Anti-monopoly Service

The July 2011 issue of *FCPA Update* reported on the recent decision of Russia's Federal Anti-monopoly Service ("FAS") holding that OOO Novo Nordisk, the Russian subsidiary of a Danish pharmaceutical company, and a dominant entity, improperly refused to contract with a number of potential distributors.[1] The FAS found, among other things, that Novo Nordisk failed to set clear compliance-related criteria that potential distributors had to meet under Novo Nordisk's distributor policy. Novo Nordisk appealed the decision and, on July 28, 2011, settled with FAS. Although the settlement resolved the matter for Novo Nordisk, the outcome leaves the interplay between Russian anti-monopoly laws and the U.S. and U.K anti-corruption laws and policies as uncertain as ever.

As part of the settlement, Novo Nordisk revised its Policy Regarding Commercial Partners ("Policy") to comply with the FAS directive.[2] The Policy now lists nine apparently exclusive reasons, each of which Novo Nordisk may assert and rely upon to refuse to contract with a distributor, including the provision of false information or a distributor's refusal to participate in FCPA training or to accede to an anti-bribery contract clause. But Novo Nordisk may refuse to contract with a distributor only if that distributor or its principals have been found guilty of a corruption law violation by the competent authorities in Russia or elsewhere. If Novo Nordisk obtains information suggesting that a distributor had been involved in corruption law violations in the past, its only recourse is to forward that information to authorities in Russia or other countries and suspend the contracting process until the authorities render a decision.[3]

Although the FAS's goal of ensuring a level playing field is laudable, the Policy sets a bar for compliance-related refusals to contract when the obligation to contract is provided by Russian law that may be too high to satisfy U.S. and U.K. anti-corruption authorities. The uneven record of enforcement of anti-corruption laws by Russian authorities and the limited resources dedicated to the effort give rise to the very real possibility that multinational companies in Russia will be forced to contract with third parties who have a spotty compliance history but use the Novo Nordisk precedent to their advantage. Although FAS agreed, as part of the settlement, that Novo Nordisk had the right to check its distributors for compliance with Russian and foreign anti-corruption laws, it is not clear that such checks could ever go beyond the criteria set up in the Policy.

The potential FCPA and U.K. Bribery Act liability that this situation creates may lead to a revival of the local law defenses under these regimes or, alternatively, potentially deter foreign investment into Russia. At a minimum, the outcome in the Novo Nordisk case will raise compliance costs in Russia and complicate the lives of in-house legal and compliance officers of companies that do business in Russia and that are subject to the FCPA and the U.K. Bribery Act, among other OECD anti-bribery regimes. ■

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1 FAS Press Rel., FAS Russia and Novo Nordisk Concluded a Settlement Agreement (July 29, 2011), http://www.fas.gov.ru/fas-news/fas-news_32039.html (Rus.).

2 "OOO Novo Nordisk's Policy Regarding Commercial Partners" (July 25, 2011) (on file with authors).

3 The Policy does not clarify whether Novo Nordisk could use this information to refuse to contract based on the "provision of false information" clause if the distributor had certified, for example, that it had not been involved in compliance law violations.