

Recent Regulatory Activity is Evidence of Continuing Trend to Prosecute Individuals for Violating the U.S Foreign Corrupt Practices Act

As part of Daylight’s continuing efforts to apprise companies of developments relating to the U.S. Foreign Corrupt Practices Act (FCPA), the following is a summary of recent activity by the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC).

I. INTRODUCTION

There has been a significant uptick in the number of FCPA cases brought by the DOJ and SEC in the past several years; and recent statements by DOJ and SEC officials noting that more than 100 companies are currently under investigation indicate that the spotlight on the FCPA will not diminish any time soon. Another trend that will in all likelihood continue to increase is the pursuit and prosecution of individual corporate executives for violations of the FCPA. The aggressiveness with which individual defendants may be pursued is exemplified in the SEC’s recent case against Nature’s Sunshine Products (NSP).¹

II. BACKGROUND

On July 31, 2009, the SEC brought a settled enforcement action against Nature’s Sunshine Products for violating the anti-bribery, books and records and internal controls provisions of the FCPA, alleging that NSP’s Brazilian subsidiary bribed customs brokers to allow for the importation of unlicensed products into Brazil and that NSP’s books and records were falsified to conceal the illegal payments. The SEC also charged NSP’s CEO and its former CFO for violations of the books and records and internal controls provisions of the FCPA.

While an FCPA case against corporate executives is by no means unusual or unique, the theory that the SEC used in this case may have set a new precedent. Unlike previous FCPA cases against corporate executives, the SEC did not allege that either of the executives had personal knowledge of the bribes or the failure to record the payments to the customs officials accurately in NSP’s books and records. Instead, the SEC charged the executives as “control persons” under Section 20(a) of the Securities Exchange Act of 1934, which imposes liability on individuals who control those individuals who violate the law.²

¹ SEC v. Nature’s Sunshine Products, Inc., Douglas Faggioli and Craig D. Huff, Case No. 09CV672 (D. Utah, Filed July 31, 2009). <http://www.sec.gov/litigation/litreleases/2009/lr21162.htm>.

² Control person liability will not attach if the controlling person can show they acted in good faith and did not directly or indirectly induce the act of acts constituting the violation.

Foreign Corrupt Practices Act Update
September 1, 2009

In imposing liability on NSP's CEO and CFO, the SEC complaint alleged that the CEO had overall responsibility for NSP's international operations, and the CEO and CFO were directly or indirectly responsible for making and keeping books and records, including oversight of the NSP employees in Brazil who were responsible for "making and keeping NSP's books and records that accurately reflected in reasonable detail the state of registration of products sold in Brazil and devising and maintaining a system of internal controls sufficient to provide reasonable assurance that the registration of NSP products sold in Brazil was adequately monitored."

In a speech before the New York City Bar Association in early August, SEC Enforcement Director Rob Khuzami recently acknowledged that "more needs to be done in enforcing the FCPA, including being more proactive in investigations," and announced the creation of a new FCPA unit that "...will focus on new and proactive approaches to identifying violations of the FCPA." The NSP case may portend the new stepped-up enforcement goals.

In addition to the NSP case, recent months have seen the criminal convictions of a former U.S. congressman and well-known businessman for conspiracy to violate the FCPA, indictments of several corporate executives of a large, multi-national manufacturing company and the trial of husband-wife movie producers who allegedly bribed the former governor of the Tourism Authority of Thailand in return for contracts to stage the Bangkok Film Festival.

All of the above appear to be consistent with a statement made in late 2008 by Mark Mendelsohn, the Deputy Chief of DOJ's Fraud Section that:

The number of individual prosecutions has risen – and that's not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.³

III. WHAT THIS MEANS FOR CORPORATE EXECUTIVES

Enforcement of the FCPA is at an all time high. The DOJ and SEC have brought many more cases against corporate executives during the last three years, and it appears that this trend will continue. The NSP case may also signal that the DOJ and SEC will use new and unique legal theories to impose individual liability on corporate executives.

In light of these trends, it is important that companies proactively review their FCPA compliance program to ensure that their supervisory systems and internal controls provide corporate executives with an effective means to obtain enough information and exercise sufficient oversight to protect both themselves and the company against potential FCPA liability.

³ "Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007", CORPORATE CRIME REPORTER, September 16, 2008.



IV. HOW DAYLIGHT CAN HELP

Daylight Forensic & Advisory has unparalleled FCPA and anti-corruption expertise, having developed and implemented training programs, conducted investigations and assessed and enhanced compliance programs, including internal controls systems for some of the world's largest companies. If you would like further information on Daylight's services in these areas, please contact Ellen Zimiles at (212) 554-2602, Joseph Spinelli at (212) 554-2603 or Scott Moritz at (212) 554-2626.