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Briefing note
January 2013

The Asia Pacific Top Ten FCPA Enforcement Actions of 2012

The Asia Pacific region remained a hotspot for US anti-corruption enforcement authorities in 2012. Six of the twelve corporate Foreign Corrupt Practices Act (FCPA) settlement agreements in the past year involved business operations in that region. In addition to these six resolutions, we include some prosecutions against individuals which confirm the enforcement focus on the decision makers who authorize bribery. Finally, we include a Japanese company that paid bribes outside the region, and some significant declinations, as the agency press releases and company disclosures discussing the factors underlying the decision not to charge can provide as much guidance as the settlement agreements.

In chronologic order, our list includes:

1. Biomet Inc: On March 26, 2012, the US-based provider of medical devices, and two of its wholly owned subsidiaries, entered into a DPA with the DOJ for improper payments to doctors employed by publicly-owned hospitals in China, as well as bribes paid in Latin America by two other subsidiaries. Biomet agreed to a three-year DPA, with $17.28 million in criminal penalties, retention of a compliance monitor for 18 months, and implementation of rigorous internal controls. The SEC required Biomet to disgorge $4,432,998 in profits and pay $1,142,733 in prejudgment interest. The conduct in China included use of a distributor to pay "surgeon rebates" of up to 25% in cash, to pay for 20 Chinese surgeons to travel to Spain, largely for sightseeing, and to pay for travel for a hospital department head to travel to Switzerland to visit his daughter, all of which were falsely claimed as "commissions," "royalties," "consulting fees," and "scientific incentives" on the company's business records.

Key: This case was part of DOJ's 2010 "industry sweep," kicked off by letters of inquiry to medical device companies seeking information as to their distribution practices. Despite the fact that this was not technically a voluntary disclosure since it was triggered by the DOJ letter, the company received a 20% credit below the lowest possible fine due to its extensive internal investigation, cooperation, remediation, and compliance program enhancements.

2. Nordam Group: On July 17, 2012, a US-based aircraft maintenance company entered into a non-prosecution agreement (NPA) with DOJ, requiring payment of $2 million in criminal fines. Employees of Nordam had executed fictitious sales representation agreements with third parties, using the payments to bribe employees of a state-owned airline in China to obtain a multi-million dollar contract to repair aircraft engines.

Key: The very low penalty was justified, according to DOJ, because of the Company's voluntary disclosure, cooperation, and remediation and because a larger fine would threaten the company's viability. The NPA included compliance guidelines for mergers and acquisitions.

3. Oracle: On August 16, 2012, the US-based enterprise systems firm settled FCPA books and records charges with the Security and Exchange Commission (SEC) by paying a $2 million civil penalty. The company voluntarily disclosed that it had failed to prevent a subsidiary from secretly setting aside money off the company's books that was eventually used to make unauthorized payments to phony vendors in India. It had allegedly structured its transactions to enable its distributors to create side funds used to pay bribes to Indian officials, which were invoiced as payments to local vendors which provided no actual services to Oracle.

Key: In addition to a relatively low fine, there were no criminal charges brought against Oracle. The penalty was based on the Company's voluntary disclosure, cooperation, remediation (including firing the employees), and enhancements to its existing compliance program. In its complaint, the SEC provided insights into what measures it expected of a company that uses third-party distributors, including due diligence to increase transparency into government contract pricing, contractual provisions disallowing side funds, and post-settlement controls.

4. Tyco: On September 24, 2012, Swiss-based Tyco International and seven subsidiaries located in Asia Pacific (and other subsidiaries elsewhere) settled criminal charges brought by the DOJ and civil charges brought by the SEC, based on 12 bribery schemes in 17 countries, including China, Thailand, India, Laos, Indonesia, and

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Malaysia. Tyco and a subsidiary entered into an agreement whereby the subsidiary pleaded guilty to conspiracy, Tyco agreed to pay over $26 million pursuant to an NPA and SEC final judgment, including criminal penalties ($13.68 million), disgorgement of profits ($10,564,992), and prejudgment interest ($2,566,517). The alleged conduct in China included payment of fees to a "site project team" of a state-owned corporation for the award of a contract, gifts and cash given to government officials through agents, forgery of receipts for entertainment of healthcare professionals, and creation of false itineraries for trips by Chinese government doctors. In Thailand, money was paid to a consultant for renovation work in connection with the installation of a closed circuit TV system for the Thai parliament but no service was performed. In India and China, payments were made to third parties, recorded as commissions but paid to employees of government customers to secure contracts. In Malaysia, intermediaries were used to pay an employee of a government-controlled entity.

Key: All of this conduct occurred after the entry of an injunction in 2006 against FCPA violations, a DPA requiring payment of $50 million in fines, and implementation of a compliance program by Tyco's overseas subsidiaries.

5. Allianz: On December 17, 2012, this German insurance and asset management company agreed with the SEC to pay a total of $12.4 million, including a $5,315,649 civil penalty, the same amount in disgorgement of profits, and $1,765,125 in prejudgment interest. The SEC alleged that 295 insurance contracts issued on government projects had been obtained through payments by the company's Indonesian joint venture to employees of state-owned entities. The Company was found to be an issuer based on the shares and bonds it registered with the SEC and traded on the NY stock exchange, although it is not listed on a US stock exchange. It allowed the payments to continue for three years after it discovered the bribery during an internal audit, but ultimately, undertook an internal investigation following a whistleblower complaint. Some of the payments were disguised as "overriding commissions" for an agent unassociated with the contracts. In other instances, the payments were structured as overpayments by the government insurance holder who was then reimbursed.

Key: Companies registered with the SEC must understand how broadly the US defines its jurisdiction and also recognize the risk of whistleblowers.

6. Eli Lilly: On December 20, 2012, the US-based pharmaceutical company reached a settlement with the SEC, agreeing to pay $29,398,734, which included a civil penalty of $8.7 million, disgorgement of $13,955,196 in profits, and prejudgment interest of $6,743,538. This ten-year investigation uncovered bribery schemes in four countries including China by Eli Lilly subsidiaries. According to the SEC, employees of the subsidiaries falsified expense reports to provide spa treatments, jewelry, and other gifts and cash payments to PRC government-employed physicians. Included among notable improper payments in other countries were payments to a small charitable foundation founded and administered by the head of one of the regional government health authorities in exchange for being placed on the pharmaceutical reimbursement list.

Key: For some of the third parties used by the subsidiaries, little was known other than the offshore address and bank account information as no real services were provided other than funneling money to government customers. Despite learning of possible FCPA violations, steps were not taken to curtail risky practices for more than five years.

Individuals:

7. Control Components Inc. (CCI) officials: The former president Stuart Carson, former director of China and Taiwan sales Hong "Rose" Carson, former director of worldwide sales Paul Cosgrove, and former vice president of customer service worldwide David Edmonds pleaded guilty in 2012 and were sentenced to four months imprisonment, six months home confinement, 13 months home confinement, and four months imprisonment, respectively, and $20,000 in fines for each except $200,000 for Stuart Carson. This followed denial of their motions to dismiss (based on their challenge to the DOJ definition of "instrumentality" and procedural deficiencies) and to suppress (based on CCI's agreement with the government forcing the officials to cooperate with DOJ interviews or face termination). CCI's bribery occurred in over 36 countries and involved employees of both state-owned and private companies.

Key: The defendants raised a rare challenge to DOJ's broad reach and while ultimately unsuccessful, their motions forced DOJ to defend its position and provided judicial parameters for the definition of "foreign officials."

8. Garth Peterson: The former Managing Director of Morgan Stanley's real estate practice in China, pleaded guilty on April 25, 2012, to conspiracy to violate the FCPA's internal controls provisions. Peterson circumvented Morgan Stanley's internal controls to transfer ownership interest in real estate to the former Chairman of a Chinese state-owned entity, which served as the real estate development arm for a district government in Shanghai. In return, the former Chairman helped obtain business for Peterson, a US citizen. Peterson was sentenced on August 13, 2012, to nine months in prison, disgorgement of profits of $254,589, forfeiture of his interest in property worth $3.4 million, and a permanent ban on working in the securities industry.

9. Declinations:
(a) Morgan Stanley was trumpeted this year as an example of a declination by DOJ, which did not hold the corporation responsible for Garth Peterson's misconduct. Because Morgan Stanley had discovered and disclosed the misconduct (which had occurred despite Peterson's participation in the corporate FCPA training program at least seven times), had warned Peterson of the FCPA risk of the transactions some 35 times, had terminated the transaction before it was completed, and fired Peterson as soon as the misconduct was discovered, neither the SEC nor DOJ charged Morgan Stanley. The company's internal controls provided reasonable assurance that its employees were not engaged in bribery of government officials. This case is described extensively in the new Guidance on the FCPA, p.61.

(b) W.W. Grainger, a US-issuer, announced the declination by DOJ of criminal charges, following voluntary disclosure of an internal investigation of accounting lapses that suggested possible use of prepaid gift cards for Chinese customers as bribes. The results of the internal investigation ultimately did not "substantiate initial information suggesting significant use of gift cards for improper

purposes" and on August 14, 2012, DOJ reportedly closed its inquiry according to the 10-Q Quarterly Report.

(c) Sensata Technologies Holding, a US-based automotive, appliance and aircraft sensor manufacturer, announced in its 10-Q Report that DOJ closed its inquiry on July 27, 2012, following its voluntary disclosure of an internal investigation into a third-party relationship in China with one of its subsidiaries.

(d) Huntsman Corp, a US-issuer, announced in its 10-Q Report on August 1, 2012, that the DOJ and SEC will not take enforcement action against the company for bribes paid in India by employees of its joint venture. The declination may have been based on the relatively low volume, less than $11,000 in payments during a nine-month period, the company's self-disclosure, and termination of involved employees.

10. Marubeni Corp: On January 17, 2012, the Department of Justice resolved its investigation of the Japanese trading company that was allegedly used as a third-party intermediary by TSKJ, a four-partner joint venture, to pay bribes to Nigerian officials relating to liquefied natural gas facilities development contracts on Bonny Island. The Company entered into a two-year deferred prosecution agreement (DPA) with the US Department of Justice (DOJ), agreeing to pay $54.6 million in criminal fines and to retain a compliance consultant for that period.

Key: The almost unlimited extraterritorial reach of the FCPA was confirmed when DOJ extended jurisdiction over this non-US issuer, non-US company based on its role as an "agent of an issuer" (American JV partner KBR) and as an "agent of a domestic concern" (French JV partner Technip), a co-conspirator, and an aider and abettor of the joint venture's FCPA violations.

Conclusion. US enforcement activity in the Asia Pacific region is unlikely to wane in the coming years. Transparency International's Corruption Perception Index for 2012 gave failing scores to 2/3 of Asia Pacific countries, ranking these countries as highly corrupt, although there are countries in this region that score in the top ranks for non-corruption. Because of the US enforcement focus on Asia Pacific, treating these practices as business as usual is even riskier in this region than elsewhere in the world.

First published in Corporate Compliance Insight January 2013.