Client Alert

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SEC Cites Strong FCPA Compliance as Key Factor in Decision Not to Prosecute Multinational Company
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Late last month, the Securities and Exchange Commission ("SEC") announced a non-prosecution agreement ("NPA") with Ralph Lauren Corporation ("RLC"), through which the company must disgorge more than $700,000 in illicit profits (and interest) obtained between 2005 and 2009 in connection with bribes paid by a subsidiary to government officials in Argentina. In a second NPA, RLC contemporaneously resolved the same matter with the Department of Justice ("DOJ"), agreeing to pay an additional penalty of $882,000.

The SEC agreement represents the agency's first NPA with a company in a case concerning alleged violations of the Foreign Corrupt Practices Act ("FCPA"). The favorable result secured by RLC through the company's proactive approach to the allegations underscores the SEC's commitment in FCPA matters to rewarding self-disclosure, cooperation, and vigorous anti-corruption compliance. With respect to the latter, it also provides additional (and welcome) transparency into the SEC's expectations for an effective FCPA compliance program.

The SEC and NPAs

In January 2010, the SEC declared that it would begin considering NPAs for matter resolution as part of its greater Enforcement Cooperation Initiative. Section 6.2.4 of the SEC Enforcement Manual describes an NPA as “a written agreement between the Commission and a potential cooperating individual or company, entered in limited and appropriate circumstances, that provides that the Commission will not pursue an enforcement action against the individual or company if the individual or company agrees to,” among other things:

- Cooperate truthfully and fully in the SEC's investigation and related enforcement actions;
- Comply with "express undertakings" in the investigation and related enforcement proceedings; and
- Satisfy disgorgement and/or penalty payment obligations.

If the agreement is violated, the SEC retains its ability to pursue a subsequent enforcement action against the individual or company. Included among the principal factors considered by the SEC in its analysis of whether to resolve a corporate investigation with an NPA is the company’s establishment of effective compliance procedures and an appropriate “tone at the top” (prior to the discovery of the misconduct).

The Alleged Wrongdoing

In 2010, soon after RLC adopted and disseminated a new, improved, and board-sanctioned FCPA policy, the company received information indicating that bribes were being paid by its Argentinean subsidiary to customs officials in that country. Employees with the subsidiary initially reported the indiscretions, alleging that the bribes were enabled through an Argentinean customs broker to assist the company in (i) securing entry of products without the required paperwork, (ii) obtaining clearance for prohibited goods, and (iii) avoiding customs inspections.

To obtain money for bribes, the customs broker submitted invoices to RLC's General Manager in Argentina. In addition to line items for legitimate charges, the invoices included payment requests for "Loading and Delivery Expenses" and "Stamp Tax/Label Tax." The latter descriptions were used to disguise bribe payments. All told, between 2005 and 2009, RLC's subsidiary remitted approximately $568,000 to its customs broker to pay bribes to customs officials. During this same time period, RLC's General Manager in Argentina provided gifts to three different government officials, including perfume, dresses and handbags valued at between $400 and $14,000 each–again, according to the SEC, to improperly secure the importation of RLC's products into Argentina.

In contemplating these facts, the SEC determined that RLC failed to perform adequate due diligence on the Argentinean customs broker, neglected to adequately review the authorization of reimbursement payments to the customs broker, and failed to devise and maintain an adequate system of internal controls for its subsidiary.

The Non-Prosecution Factors

Notwithstanding the pattern of corruption perpetrated by the Argentinean subsidiary, the SEC decided to resolve the case with an NPA, highlighting several factors in the settlement papers supporting this decision.

For example, the SEC points out that RLC discovered the misconduct during the rollout of its enhanced FCPA policy in 2010. The SEC credits employees of the subsidiary in Argentina for reviewing the new policy soon after its release and reporting to management conduct by the customs broker that seemed to run afoul of the new policy. In addition, RLC, upon being notified of the concerns by employees, responded immediately to end the misconduct by terminating the customs broker, ceasing retail operations in Argentina, and further enhancing its FCPA compliance program (as discussed in more detail below). Finally, the SEC acknowledged RLC's extensive cooperation with investigators from the SEC and DOJ, which included the following efforts:

- Promptly reporting preliminary findings of the internal investigation to the SEC (within two weeks of discovering the illegal payments and gifts);
- Conducting multiple findings presentations for law enforcement;
- Voluntarily and expeditiously producing documents;
- Providing English-language translations of the documents to the SEC;
- Summarizing witness interviews conducted by the company's investigators overseas; and

- Making overseas witnesses available for SEC interviews (and bringing witnesses to the U.S.).

Commenting on these cooperation efforts in the Commission's press release about the RLC matter, George Canellos, the SEC's Acting Director of the Enforcement Division, lauded RLC for "immediately reporting" the misconduct and "providing exceptional assistance" to the SEC investigators.

The Message: Rewarding Robust FCPA Compliance

As with the carefully crafted mitigation language in other recent FCPA dispositions, such as Morgan Stanley in 2012 and Johnson & Johnson in 2011, the government took the opportunity in the NPA with RLC to spotlight the company's anti-corruption efforts, providing valuable compliance program guidance for multinational companies.

For instance, the SEC, in deciding to resolve the matter with an NPA, credited RLC for its "comprehensive" new compliance program, including enhanced third-party due diligence procedures, a global risk assessment process, and significant improvement to its internal controls. Kara Brockmeyer, the SEC's FCPA Unit Chief, emphasized in the Commission's press release that the RLC NPA "shows the benefit of implementing an effective compliance program," adding that the company "discovered this problem after it put in place an enhanced compliance program and began training its employees."

For its part, the DOJ also recognized RLC's "extensive" and "timely" cooperation, and commended RLC for conducting a "worldwide risk assessment," implementing extensive FCPA training for personnel, enhancing the company's FCPA policy and third-party due diligence protocols, and employing an improved gift policy.

Such ardent statements by the government are reminiscent of those made in conjunction with the 2012 FCPA action against former Morgan Stanley executive Garth Peterson. In that matter, both the SEC and DOJ declined to bring enforcement actions against the company, due in significant part to the documented strength of the company's anti-corruption compliance program and its construction and maintenance of "a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials." Government officials extolled Morgan Stanley's cooperation, exhaustive internal investigation, and specific compliance program components, including its extraordinary training regimen, solid standards and controls, regular monitoring process, and extensive due diligence on business partners.

The compliance program guidance in the SEC's NPA with RLC, viewed in the context of similar guidance from other recent FCPA dispositions--most notably Morgan Stanley--demonstrates a continued attention by the government to rewarding companies for effective anti-corruption programs. The enduring message seems to be that programs with effective FCPA policies and procedures, robust controls, a global risk assessment component, consistent training, and regular monitoring--accompanied by a timely and proportional response to any misconduct--will continue to pay dividends when it comes to resolving FCPA enforcement matters.

The proof, as they say, is in the pudding: RLC resolved a five-year bribery scheme involving a corrupt intermediary and hundreds of thousands of dollars in improper payments without corporate charges from either the SEC or the DOJ, and for a total of about $1.7 million in disgorgement and penalties. All things considered, this is a reassuring result for companies that, faced with such circumstances, would seek to take some comfort that their efforts to

design, develop, implement, and oversee a robust anti-corruption compliance program would be given careful consideration when the government contemplates the appropriate resolution of an FCPA investigation.

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