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A Newsletter Covering Developments in Criminal and Civil Enforcement of the FCPA

In This Issue

Technip Enters into DPA with DOJ, Pays $338 Million Settlement[1]

On June 28, 2010, the U.S. Department of Justice (DOJ) announced that it had entered into a deferred prosecution agreement (DPA) with French construction and engineering company Technip SA ("Technip"). Technip settled FCPA-related charges by agreeing to pay a $240 million criminal penalty and engaging a monitor.[2] Additionally, the Securities and Exchange Commission (SEC) charged that Technip violated the books and records and internal controls provisions of the Act in the bribery scheme.[3] In settling the civil SEC complaint, Technip agreed to pay an additional $98 million in disgorgement of profits.[4]

A criminal information, filed in the U.S. District Court for the Southern District of Texas, charged Technip with one count of conspiracy to violate the FCPA and one substantive count of violating the FCPA's anti-bribery provision.[5] These charges arose from the company's role in a four-company joint venture that paid over $100 million in bribes to Nigerian government officials over the course of a decade in order to secure construction contracts, valued at over $6 billion, to build liquefied natural gas facilities on Nigeria's Bonny Island.[6] The joint venture consisted of Technip, Kellogg, Brown and Root, Inc. (KBR), Italy's Snamprogetti, and JGC Corporation, once known as Japan Gasoline Co., Ltd. According to the information, the joint venture hired agents who paid bribes to high-level Nigerian government officials in return for the construction contracts for the Bonny Island project.[7]

KBR, a former subsidiary of Halliburton, and Halliburton previously agreed to pay almost $600 million in fines related to the same scheme in 2009.[8] In addition, in September 2008, KBR's former CEO, Albert "Jack" Stanley pleaded guilty to conspiring to violate the FCPA for his role in the bribery scheme.[9]

Under the DPA, Technip agreed to retain an independent corporate compliance monitor, implement a stringent anti-corruption program that requires the inclusion of audit rights and full compliance terms in all contracts with agents and business partners, and cooperate with the government's ongoing investigation. If Technip abides by the terms of the agreement, the DOJ will seek the criminal information's dismissal upon the agreement's expiration in approximately two years.[10]

Technip's sanctions, when added to those of its joint venture partners in the Bonny Island project that have resolved their portions of the government investigations, total $917 million - the largest FCPA-related aggregate settlement in history.[11]

Department of Justice Guidance on Company Disputes with Corporate Monitors

As part of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), prosecutors may continue to require a company to engage an independent monitor to oversee and ensure a company's compliance with the agreement.[12] There has been mounting concern about monitor accountability, oversight, costs, and potential favoritism in the monitor selection process.[13] In response, the Department of Justice recently issued additional guidance for federal prosecutors regarding the selection and oversight of monitors.

The DOJ and companies that are parties to DPAs and NPAs have cooperated in the selection of monitors.[14] DOJ officials often select monitors based on their personal knowledge of those attorneys who have suitable qualifications and rely on recommendations.[15] Nonetheless, there has been criticism that the use of monitors results in substantial costs to companies and that there is a potential for favoritism in the appointment process.

The DOJ initially addressed these concerns in the Morford Memorandum, issued by then-Acting Deputy Attorney General Craig Morford in March 2008, which sought to ensure that the monitor selection process was collaborative and that the most qualified candidates were selected. Specifically, the Morford Memorandum articulated nine basic principles for federal prosecutors to apply in drafting DPA and NPA provisions providing for monitors.[16] The GAO found that prosecutors adhered to the Morford Memorandum in selecting 4 of the 6 monitors required under DPA and NPA agreements between March 2008 and September 2009.[17]

However, the GAO also found that the DOJ did not clearly communicate to companies its role in addressing their concerns about the cost and scope of the duties of the monitors, and amount of work to be completed by the monitor.[18] Some companies were unaware that there existed a mechanism for resolving disputes with monitors even though that process is typically spelled out in the agreement, while others were hesitant to request the involvement of DOJ because of a fear of reprisal or a lack of understanding of the role of DOJ.[19]

Given the DOJ's reliance on monitors to ensure compliance with DPAs and NPAs, the GAO concluded that the DOJ should more clearly communicate to companies its role in resolving disagreements with monitors.[20] Such a process would also allow the DOJ to be better informed of potential performance issues related to monitors. Therefore, the GAO recommended that the Attorney General issue guidelines regarding this issue.[21]

On May 25, 2010, Acting Deputy Attorney General Gary G. Grindler issued the Grindler Memorandum,[22] which applies only to criminal matters and to the DOJ. The Grindler Memorandum adds a tenth principle to those outlined in the Morford Memo: that monitorship agreements explain the role of the Department in resolving disagreements that may arise between the corporation and the monitor.[23]

In applying the additional principle, prosecutors should be mindful of several considerations.[24] First, the DOJ's role in resolving disputes should make it clear that it is not a party to the engagement agreement between the company and the monitor, and thus, the DOJ is precluded from arbitrating contractual disputes between the parties. Second, the DOJ's role generally should be limited to determining whether the company has complied with the terms of the agreement. Finally, the DOJ's role will depend on the public and law enforcement interests implicated by the dispute. The Grindler Memo offers examples of disputes that DOJ may resolve, such as a disagreement over the monitor's recommendations regarding the compliance program, its implementations, and improvements needed, as well as the monitor's role and responsibilities under the agreement.

When a monitor makes a recommendation that a company considers unduly burdensome, impractical, unduly expensive, or otherwise inadvisable, the Grindler Memo suggests that a company may propose, in writing, an alternative policy, procedure, or system designed to achieve the same objective or purpose as the disputed recommendation of the monitor.[25] However, if the company and the monitor cannot agree on a particular recommendation, the DOJ should be promptly informed, and can resolve the disagreement.[26]

Federal prosecutors, when drafting language about the DOJ's role in such dispute resolution, should make it clear that any relevant concerns be raised in the first instance with the U.S. Attorney's Office or the Department Component handling the case.[27] The Grindler Memo also recommends including language in the agreement establishing annual, or more frequent, meetings between company representatives and DOJ officials to discuss the monitorship and any company concerns, including such topics as the scope or costs of the monitorship.[28] Nonetheless, the Grindler Memo recognizes that any specific DPA or NPA provisions are dependent on both the facts and circumstances of the case, as well as the monitor's specific responsibilities.

Interestingly, most of the DPAs and NPAs reached during the past decades have generally included a clear process for a company to express its objections to the recommendation of a monitor, and propose less burdensome and costly alternatives. If such disagreements could not be resolved, there has always been a mechanism for access to DOJ.

First DOJ FCPA Opinion Procedure Release in 2010

On April 19, 2010, the Department of Justice issued its first opinion procedure release of 2010, declaring that a U.S. company would not violate the FCPA if the company engaged a foreign government official for services rendered to the company.[29] Opinion procedure releases are issued in response to a request from a company seeking to ascertain whether specified prospective conduct would violate the FCPA.[30] Opinion procedure releases from the DOJ are only binding on the requesting party and the DOJ, but can provide useful guidance to other companies and their counsel on what conduct the DOJ considers a breach of the FCPA.[31]

The opinion request was submitted by a U.S. company ("Requestor") that was selected by a U.S. government agency to design, develop, and construct a facility ("the Facility") in a foreign country.[32] Under the contract, the company was required to engage and compensate individuals to work at the Facility. The U.S. government agency had an agreement with the foreign government, pursuant to which the U.S. provided assistance to the foreign country, which included the development of the Facility. The foreign country informed the U.S. government agency that it had appointed an individual to be the director of the Facility, and was in the process of selecting other individuals to fill other positions at the Facility. The U.S. govern-

ment agency then directed the Requestor to engage the individual selected by the foreign country to be the Facility Director.

As a result, the Requestor directed its subcontractor to engage and pay personnel at the Facility. Through its local subsidiary, the subcontractor entered into a proposed, one-year service contract with the Facility Director designated by the foreign government. The contract provided the Facility Director compensation of $5,000 per month to provide services as directed by the foreign country. The U.S. government agency and the foreign government anticipated that the Facility Director would be paid directly by the foreign government at the conclusion of the one-year contract.

The Requestor was concerned that it could be subjected to potential liability under the FCPA because the proposed Facility Director's was a government official of the foreign government. The Requestor indicated, however, that the Facility Director's responsibilities as an official of the government did not relate to the Facility, and the services to be performed under the contract would be "separate and apart" from his or her responsibilities as a government official. Moreover, the Facility Director would not perform any services on behalf of, or make any decisions affecting, the Requestor company, either as the Facility Director or in his or her role as a foreign official, and the Requestor would not provide any direction to the Facility Director.

Based on these facts, the DOJ stated that it did not intend to take any enforcement action with respect to the proposed service contract, notwithstanding the fact that the Facility Director was a "foreign official" within the meaning of the FCPA and would be receiving compensation from the Requestor (albeit indirectly, through a subcontractor). The DOJ based its conclusion on the existing contractual obligation of the Requestor to perform as directed by the U.S. government. Moreover, the Facility Director would be engaged by Requestor's subcontractor pursuant to an agreement between the U.S. government agency and the foreign country's government.

In addition, the DOJ noted that the Requestor did not play any role in selecting the Facility Director, and that the Facility Director's position would be separate and apart from his or her position as a foreign official. The DOJ considered such other factors as the fact that the Facility Director would not perform any services on behalf of, or receive any direction from, the Requestor, nor would the Facility Director have any decision-making authority over matters affecting the Requestor, "including procurement and contracting decisions."[33]

Financial Reform Bill Compensates Whistleblowers Assisting the SEC

On June 30, 2010, the House passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), a final version of a bill that emerged from a House-Senate conference on June 29, 2010.[34] The Act calls for comprehensive financial reform and includes a program that would reward whistleblowers who aid the Securities and Exchange Commission (SEC) in investigating securities violations, including violations of the FCPA. The Act is the final version of a House bill proposed in December 2009 and a similar Senate bill introduced in March 2010 by Senate Banking Committee Chairman Christopher Dodd (D-CT).[35]

The Act provides for the SEC to pay an award to one or more whistleblowers who "voluntarily provided original information to the Commission that led to the successful enforcement" of any administrative or judicial action brought by the SEC that results in monetary sanctions exceeding $1,000,000.[36] The award amount shall be "not less than 10 percent" and

"not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions."[37] The SEC will also consider other factors in determining the final amount of the award, such as the significance of the information provided, the degree of assistance provided by the whistleblower, the "programmatic interest" of the SEC in awarding whistleblowers, and any other relevant factors.[38]

The proposed legislation defines "whistleblower" as any individual who provides information relating to a violation of the securities laws[39] but does not provide an award to a whistleblower if, at the time the information is acquired, he or she is an employee of "an appropriate regulatory agency," the DOJ, or a self-regulatory organization, or if he or she is a member of the Public Company Accounting Oversight Board or a law enforcement organization.[40] In addition, the whistleblower will not be awarded if he or she is convicted of a criminal violation related to the underlying action, or if he or she acquired the information in the performance of an audit of financial statements required under the securities laws.[41]

The whistleblower provision in the Act is significant because of the potentially enormous financial incentive it provides for whistleblowers. Notably, the award is a percentage of the penalties from the underlying action, as well as *any related action*. For that reason, any subsequent DOJ penalty or foreign penalty could be aggregated into the whistleblower award. This could lead to a potential windfall for a whistleblower. For example, if the legislation had been in place in December 2008 during the Siemens investigation and subsequent sanctions,[42] a whistleblower for that action could have received nearly $500 million because Siemens was subject to a total monetary sanction of $1.6 billion, the largest aggregate FCPA monetary penalty to date.[43]

As the SEC continues to increase the number of enforcement actions it undertakes, the award could affect how and when a company decides to voluntarily disclose information. In addition, the whistleblower legislation underscores the importance of establishing clear procedures related to privileged corporate information and encouraging employees to first report any potential securities law violations to the company.

Breuer Cautiously Approaches Costly FCPA Cases

At a May 4, 2010 Council on Foreign Affairs meeting, Assistant Attorney General Lanny Breuer suggested a potential shift in the prosecution of FCPA cases away from older, document-driven investigations to more "robust, newer" cases.[44]

Among the primary catalysts for such a change is the inherently limited resources of the DOJ's Fraud Section.[45] Breuer noted that these resources could be utilized to investigate and prosecute new cases, or to send important messages through the prosecution of older, more difficult cases.[46]

Historically, it has not always been easy for the DOJ to prosecute FCPA cases against individuals, as illustrated by the cases against James Giffen and Viktor Kozeny.[47] However, in his speech, Breuer noted that, since 2005, the Fraud Section had initiated 36 corporate FCPA enforcement actions, and imposed fines totaling more than $1.5 billion.[48] In addition, 77 individuals have been charged with FCPA violations.[49]

While careful not to commit to any particular vision of future FCPA prosecutions, Breuer acknowledged the costs of prosecuting time-consuming FCPA cases, as opposed to, for example, self-reporting or using sting operations.[50] This recognition may influence the choice of cases the DOJ selects to prosecute in the FCPA area in the future.

Endnotes

1 The editors would like to thank Karen Woody and Margaret Ryznar, associates at Cadwalader, for their contribution to this FCPA Alert, as well as Keith Gerver for editing assistance.

2 Deferred Prosecution Agreement, United States v. Technip SA, Criminal No. 4:10-431 (S.D. Tex. June 28, 2010).

3 *SEC Charges Technip with FCPA Violations,* U.S. SECURITIES AND EXCHANGE COMMISSION, June 28, 2010, available at http://www.sec.gov/news/press/2010/2010-110.htm.

4 *Id.*

5 Information, United States v. Technip SA, Criminal No. 4:10-431 (S.D. Tex. June 28, 2010).

6 *Id.*

7 *Id.*

8 Press Release, *Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine,* DEPARTMENT OF JUSTICE (Feb. 11, 2009), available at http://www.justice.gov/opa/pr/2009/February/09-crm-112.html.

9 Press Release, *Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges,* DEPARTMENT OF JUSTICE (Sept. 3, 2008), available at http://www.justice.gov/opa/pr/2008/September/08-crm-772.html.

10 Deferred Prosecution Agreement, *supra* note 2.

11 *SEC Charges Technip with FCPA Violations, supra* note 3.

12 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-110, REPORT TO CONGRESSIONAL REQUESTERS: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 1 (2009) [hereinafter GAO Report], *available* at http://www.gao.gov/new.items/d10110.pdf.

13 GAO Report, *supra* note 12, at 3–4.

14 *Id.* at 3.

15 *Id.*

16 Memorandum from Craig S. Morford, Acting Deputy Att'y Gen. to Heads of Department Components and United States Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

17 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-260T, REPORT TO CONGRESSIONAL REQUESTERS: PROSECUTORS ADHERED TO GUIDANCE IN SELECTING MONITORS FOR DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, BUT DOJ COULD BETTER COMMUNICATE ITS ROLE IN RESOLVING CONFLICTS 5 (2009), *available at* http://www.gao.gov/new.items/d10260t.pdf. *See also* GAO Report, *supra* note 12, at 4.

18 *Id.*

19 Lorraine McCarthy, *DOJ Issues Guidance for Prosecutors Drafting Corporate Monitor Agreements,* 5 WHITE COLLAR CRIME REP. 395 (June 4, 2010).

20 GAO Report, *supra* note 12, at 4.

21 *Id.*

22 Memorandum from Gary G. Grindler, Acting Deputy Att'y Gen., to Heads of Department Components and United States Attorneys, Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010), *available at* http://www.justice.gov/dag/dag-memo-guidance-monitors.html.

23 *Id.*

24 For further information on these considerations, see *id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 Fraud Section, U.S. Dep't of Justice, FCPA Opinion Procedure Release, No. 10-01 (Apr. 19, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1001.pdf.

30 Christopher M. Matthews, *DOJ Pens First FCPA Opinion Procedure Release of 2010,* MAIN JUSTICE, Apr. 22, 2010, *available at* http://www.mainjustice.com/2010/04/22/doj-pens-first-fcpa-opinion-procedure-release-of-2010/.

31 *Id.*

32 FCPA Opinion Procedure Release, No. 10-01.

33 *Id.*

34 The Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

35 Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. (2010).

36 H.R. 4173, 111th Cong. § 748 (2010).

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *See* United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008) and SEC v. Siemens Aktiengesellschaft, No. 08-CV-02167 (D.D.C. Dec. 12, 2008).

43 The Siemens penalty consisted of a fine of over $450 million from the DOJ, $350 million in disgorgement, and nearly $850 million by the German authorities. See Press Release, United States Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), available at http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

44 Lisa Brennan, *Breuer: DOJ May Rethink Costly FCPA Cases,* MAIN JUSTICE, May 7, 2010, *available at* http://www.mainjustice.com/2010/05/07/breuer-doj-may-rethink-costly-fcpa-cases-like-bourke-giffen/.

45 *Id.*

46 *Id.*

47 *See, e.g.,* Lisa Brennan, *SDNY Shakes Up Team on Long-Stalled Kazakh Bribe Case,* MAIN JUSTICE, Apr. 15, 2010, *available at* http://www.mainjustice.com/2010/04/15/sdny-shakes-up-team-on-long-stalled-kazakh-bribe-case/print/ and Jesse Sunenblick, *No Kozeny Extradition, Bahamian Court Rules,* MAIN JUSTICE, Jan. 27, 2010, available at http://www.mainjustice.com/2010/01/27/no-extradition-for-viktor-kozeny-bahamian-court-rules/.

48 Lisa Brennan, *Breuer: DOJ May Rethink Costly FCPA Cases,* MAIN JUSTICE, May 7, 2010, *available at* http://www.mainjustice.com/2010/05/07/breuer-doj-may-rethink-costly-fcpa-cases-like-bourke-giffen/.

49 *Id.*

50 *Id.*

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