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## **IN THIS ISSUE:**

Recent DOJ and SEC Settlements Illustrate
the Importance of Anti-Corruption
Compliance in the Context of
Acquisition Transactions
By Robert S. Bennett, Gary DiBianco

By Robert S. Bennett, Gary DiBianco & Colleen P. Mahoney

## From the Managing Editor.....2

The Biggest LBO of All Time! (This Month's Contender)

Buyer Beware: Successor Liability for Export Violations and Due Diligence Measures to Identify and Mitigate Deal Risks.....4

By John Barker, Ronald Lee & Michael Ginsberg

## 

By Profs. Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas

<u>European M&A Perspective</u>: Disclosure of Intentions in French Tender Offers — the Example of *Artemis/Suez*.......9

By Eric Cafritz, Patrick Jaïs, James Gillespie & Cedric Chanas

Corporate Governance Feature:
Delaware Court of Chancery Addresses
Stock Option Dating & Timing Issues......11

By Alexandra A.E. Shapiro & Blair G. Connelly



# Recent DOJ and SEC Settlements Illustrate the Importance of AntiCorruption Compliance in the Context of Acquisition Transactions

By Robert S. Bennett, Gary DiBianco & Colleen P. Mahoney

Robert S. Bennett is a former federal prosecutor and co-leader of the international Government Enforcement Litigation group and the Criminal and Civil Litigation practice in the Washington, D.C. office of Skadden, Arps, Slate, Meagher & Flom LLP. Gary DiBianco is a partner in Skadden Arps' Litigation and Government Enforcement Group, and Colleen P. Mahoney heads the firm's securities enforcement and compliance practice in the Washington, D.C. office. Contact: rbennett@skadden.com, gdibianc@skadden.com, or cmahoney@skadden.com.

The U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) entered into two recent Foreign Corrupt Practices Act (FCPA) settlements illustrating the U.S. government's continued focus on enforcement of the FCPA, including in situations where there has been a corporate change in ownership.

## **Vetco International Ltd.**

On February 6, 2007, three wholly owned subsidiaries of Vetco International Ltd. pleaded guilty to violating the antibribery provisions of the FCPA and to conspiring to violate the FCPA. Vetco International described the settlement as fulfilling a closing condition for the sale of its Vetco Gray division to General Electric Co. (GE).

The three subsidiaries, Vetco Gray Controls Inc., Vetco Gray Controls Ltd. and Vetco Gray UK Ltd., agreed to pay criminal fines totaling \$26 million. The DOJ also entered into a deferred prosecution agreement with a fourth wholly owned subsidiary of Vetco International, Aibel Group Ltd., regarding similar underlying conduct. The \$26 million in fines is the largest criminal penalty to date in an FCPA case and suggests that the DOJ may be seeking to raise the cost of these cases.

Vetco International is a U.K.-based company that was acquired from ABB Ltd. in 2004 by a consortium of private equity investors. At the time of that acquisition, Vetco Gray UK pleaded guilty to FCPA violations based on payments to Nigerian customs officials. In connection with the acquisition, the DOJ issued an opinion release stating that it would not take any enforcement action against the acquirers, provided that they agreed, among other things: 1) to continue to cooperate with the DOJ and SEC in the government investigations; 2) to disclose any additional pre-acquisition payments as they were discovered; and 3) to adopt internal accounting controls and a rigorous anti-corruption compliance code. (See DOJ FCPA Opinion Release No. 2004-02.) Following the acquisition, Vetco Gray UK Ltd. remained subject to the plea agreement with the U.S. government.

(Continued on page 3)

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(Continued from page 1)

In the current plea agreements, the three Vetco subsidiaries admitted to making approximately 378 payments totaling \$2.1 million to Nigerian customs officials over a two-year period to receive preferential treatment during the customs process. According to the agreements, invoices for the illegal payments describing the items as "express courier payments," "interventions" and "evacuations" were sent from Nigeria to Vetco Gray Controls Inc. in Houston. In addition, the agreements include an admission that the improper payments underlying the 2004 guilty plea continued after the plea and until at least mid-2005.

The plea agreements require Vetco International's subsidiaries to complete the investigation of the companies' conduct as originally required under the 2004 Vetco Gray UK plea agreement. The subsidiaries also must retain an independent compliance expert to monitor their implementation of and compliance with new policies and procedures. The agreements provide that any future purchaser is bound to these monitoring and investigating obligations in the event the subsidiaries are sold.

The DOJ indicated that the fines assessed in connection with the 2007 pleas took into account the Vetco subsidiaries' cooperation, voluntary disclosure and acceptance of responsibility. Vetco International announced that it had "fully cooperated with the DOJ by conducting a lengthy and thorough investigation . . . and took significant remedial action in response to its findings."

## **El Paso Corporation**

On February 7, 2007, the SEC and DOJ reached agreements with publicly traded El Paso Corporation, regarding allegations that it paid approximately \$5.5 million in illegal surcharges to the former government of Iraq between June 2001 and June 2002 in connection with purchases of crude oil from third parties under the United Nations' Oil-for-Food Program. The SEC filed FCPA books and records and internal controls charges against El Paso and ordered the company to pay a civil penalty of \$2,250,000. The U.S. Attorney's Office for the Southern District of New York entered into a non-prosecution agreement with El Paso in which El Paso agreed to forfeit an additional \$5,482,363.

The settlements relate to sale of Iraqi oil through the United Nations Oil-for-Food program by Coastal Corporation, which was acquired by El Paso in January 2001. The complaint filed by the SEC in connection with the settlement alleges actions by Coastal prior to the acquisition by El Paso, as well as actions by El Paso after the acquisition.

In particular, the SEC complaint alleges that two Coastal executives met with the Director General of Iraq's State Oil Marketing Organization (SOMO) in Baghdad, who demanded a 10-cent illegal surcharge per barrel on future Iraqi crude oil contracts. The complaint alleges that after Coastal was acquired by El Paso, a company official arranged to make a 10-cent per barrel surcharge payment totaling \$201,877. According to the complaint, El Paso did not make any subsequent direct payments to SOMO, but beginning in June 2001, El Paso allegedly entered into 14 third-party transactions that included almost \$5.5 million in illegal surcharges (25 to 30 cents per barrel on 21.4 million barrels of oil). The SEC concluded that El Paso knew, or was reckless in not knowing, that it had paid improper surcharges on these third-party contracts.

The SEC charges specify that 1) El Paso failed to maintain an adequate system of internal controls to detect and prevent the surcharges and 2) El Paso's accounting for its Oil-for-Food transactions failed to record properly the nature of the company's payments. The DOJ characterized El Paso's conduct as paying illegal surcharges to the former government of Iraq, in violation of United States wire fraud statutes and sanctions that prevented transactions with the former government of Iraq. The focus on wire fraud—as opposed to the anti-bribery provisions of the FCPA—appears to be based on the fact that the surcharges were paid to the Iraqi government, rather than a government official as required under the FCPA.

## **Additional Recent Settlements**

The Vetco and El Paso agreements follow significant FCPA settlements in October 2006, involving Statoil ASA and Schnitzer Steel Industries, Inc. On October 13, 2006, Statoil, a Norwegian oil and gas company, reached agreements with the SEC, DOI and the United States Attorney's Office for the Southern District of New York to settle investigations regarding alleged FCPA violations in connection with a 2002 contract with Horton Investments Ltd. for business development in Iran. The settlement documents state that Statoil made payments to an Iranian official in 2002 and 2003 in order to persuade him to assist the company to obtain the award of a contract to develop an Iranian gas field. Statoil entered into a three-year deferred prosecution agreement with the DOJ, and agreed to pay a criminal penalty of \$10.5 million. In a related agreement with the SEC, Statoil agreed to pay disgorgement of an additional \$10.5 million. Statoil also agreed to retain an independent compliance consultant for three years to review its internal controls and FCPA compliance policies and procedures. Statoil is the DOI's first criminal enforcement action directly against a foreign issuer for FCPA violations.

On October 16, 2006, Schnitzer Steel, an Oregon-based steel company reached agreements with the SEC, DOJ and the United States Attorney's Office for the District of Oregon to settle FCPA allegations related to more than \$1.8 million in corrupt payments to officers and employees of Schnitzer Steel's government-owned customers in China, as well as private customers in China and South Korea, to induce these customers to purchase scrap metal from the company. Schnitzer Steel entered into a three-year deferred prosecution agreement with the government, and its Korean subsidiary SSI International Far East Ltd., pleaded guilty in U.S. District Court in Portland, Oregon to charges that it violated the anti-bribery and books and records provisions of the FCPA as well as conspiracy and wire fraud charges. Under the plea agreement, SSI International Far East agreed to pay a \$7.5 million fine. The wire fraud charges were based on alleged kickbacks to private customers, rather than government officials as required under the FCPA. Schnitzer Steel simultaneously reached a civil settlement with the SEC, under which it agreed to disgorge \$7.7 million of profits and prejudgment interest.

## Conclusion

The recent series of settlements illustrates the continued importance of FCPA due diligence in corporate transactions. In addition, given the DOJ's ongoing commitment to post-plea monitoring, anti-corruption compliance should remain a focus after the acquisition of an entity that has been subject to regulatory investigations and agreements.

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