

SEC's Charges Against Noble Execs — A Noble Pursuit?

Law360, New York (March 20, 2012, 1:18 PM ET) -- On Feb. 24, 2012, the U.S. Securities and Exchange Commission charged three executives of Noble Corporation, a Swiss oil services company, with violating the Foreign Corrupt Practices Act. The SEC accused Noble's former CEO and the company's current division manager in Nigeria of arranging hundreds of thousands of dollars in bribes from 2003 to 2007. According to the SEC, the bribes were to induce Nigerian customs officials to grant new temporary permits and extensions to allow Noble's oil rigs to remain in the country improperly. Both individuals are disputing the charges.

Of perhaps even more interest, the SEC also charged Noble's former controller and director of internal audit with aiding and abetting these alleged bribes and with directly violating the FCPA's internal controls and books and records provisions. In particular, the SEC contended that the former audit director's actions allowed the bribes to be falsely recorded as legitimate operating expenses on Noble's books, records and accounts. Unlike the other two charged executives, the former audit director has agreed to settle with the SEC and pay a \$35,000 civil penalty.

In November 2010, Noble itself settled charges arising from the same set of facts and entered into a nonprosecution agreement with the U.S. Department of Justice under which the company paid a \$2.59 million criminal fine. As part of the agreement, the company admitted paying a Nigerian freight forwarding agent approximately \$74,000 and that at least some employees knew a portion of that money would be used to bribe Nigerian customs officials. The company also admitted to falsely recording the payments in its books and records.

In addition, Noble consented to the entry of a court ordered injunction on related SEC claims and agreed to pay \$5.57 million in disgorgement and prejudgment interest.

The SEC's decision to separately pursue individuals in this case is not surprising: Government officials regularly emphasize the effective deterrent effect of imposing individual penalties for FCPA violations. We think it is notable, however, that the SEC took action against Noble's former internal audit director. This charge suggests the SEC is setting a very high (and challenging) standard: If there is corporate wrongdoing, the SEC (1) expects internal audit personnel to uncover that wrongdoing and (2) may charge internal auditors for failure to do so.

We also think it notable that the other two executives charged in the case are disputing the charges. This strategy may be the result, at least in part, of recent failures by the government in several FCPA cases that have actually gone to trial. (Historically, virtually all FCPA enforcement actions have been settled before trial.)

Most recently, as widely reported, the DOJ suffered defeat in the so-called “Shot Show” case. In that case, 10 executives prevailed against charges that they made payments to a third party (in fact, undercover U.S. government agents) expecting those payments to be used to bribe an African defense minister. The government moved to dismiss the charges after concerns were raised about its legal approach, the use of a questionable informant and the conduct of the undercover agents.

Judge Richard J. Leon of Federal District Court for the District of Columbia admonished the DOJ for its “very very aggressive conspiracy theory” and discovery process which, he said, had “no place in a federal courtroom.” The government’s defeat in the Shot Show case follows upon a similar defeat in the Lindsay Manufacturing Co. case.

A spokeswoman for the DOJ insisted valiantly that DOJ would “continue to vigorously investigate and prosecute” violations.

The decision by these two Noble executives not to settle the charges against them suggests that individuals may be increasingly willing to contest FCPA charges in court. The decision in this case may have been buttressed by recent U.S. government losses in FCPA trials. That said, the executives’ success in challenging the charges is far from assured, particularly given that Noble already settled with the DOJ and the SEC on these or very similar facts. Whatever happens, one thing is certain: The legal community will be watching the matter with keen interest.

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