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Recent Decision Provides Helpful Guidance on FCPA's "Wide Net"

District Court Determines that the SEC Bears the Burden of Negating the 'Facilitating' Payments Exception

On December 11, 2012, in a rare opinion interpreting the U.S. Foreign Corrupt Practices Act ("FCPA"), U.S. District Judge Keith Ellison granted, in part, two Noble Corporation¹ executives' motions to dismiss claims by the Securities and Exchange Commission ("SEC") involving alleged bribes paid to Nigerian government officials in exchange for Temporary Import Permits ("TIPs") to operate oil rigs in Nigerian waters.² Throughout his 61-page decision, Judge Ellison addressed several points of contention regarding the FCPA while reaffirming that the statute "cast[s] an otherwise wide net over foreign bribery."³ The decision offers helpful guidance to FCPA practitioners and companies with business operations abroad.

In *SEC v. Jackson*, the defendants contended that the FCPA requires a plaintiff to allege "by name, or at minimum by role and job responsibility, the foreign official who was sought to be influenced." After a detailed discussion of the FCPA's legislative history and precedent, Judge Ellison disagreed and determined that the SEC's allegations of payments to unspecified Nigerian government officials were sufficient:

[I]t would be perverse to read into the statute a requirement that a defendant know precisely which government official, or which level of government official, would be targeted by his agent; a defendant could simply avoid liability by ensuring that his agent never told him which official was being targeted and what precise action the official took in exchange for the bribe.⁴

¹ Noble Corporation is an international provider of offshore drilling services and equipment, and operates a wholly-owned subsidiary in Nigeria. In November 2010, Noble entered into a non-prosecution agreement with the Department of Justice whereby it agreed to pay a \$2.59 million penalty as a result of bribes paid to Nigerian customs officials between January 2003 and May 2007. It also settled an enforcement action with the SEC and agreed to pay approximately \$5.5 million in disgorgement of profits and prejudgment interest. Press Release, DOJ, *Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties*, Nov. 4, 2010, available at <http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html>.

² Notably, Judge Ellison granted the motions to dismiss without prejudice; the SEC was granted leave to amend its complaint to cure the deficiencies identified throughout the opinion. *SEC v. Jackson*, No. H-12-0563, 2012 WL 6137551 (S.D. Tex. Dec. 11, 2012).

³ *Id.* at *12 (internal citations omitted).

⁴ *Id.* at *11-12.

In a potential matter of first impression, the court agreed with the defendants' position that the SEC bears the burden of pleading the inapplicability of the 'facilitating' payments exception and held "that the evolution of the statute...strongly supports the conclusion that the SEC must bear the burden of negating the 'facilitating' payments exception. The facilitating payments exception is best understood as a threshold requirement to pleading that a defendant acted 'corruptly.'"⁵

Judge Ellison then drew a distinction between the alleged improper payments at issue. On one hand, the SEC alleged that the defendants authorized payments to Nigerian officials to obtain TIPs based on falsified paperwork and through an improper process. In regards to those payments, "[t]he grant of permits by government officials that have no authority to grant permits on the basis sought is in no way a ministerial act nor can it be characterized as 'speeding the proper performance of a foreign official's duties.'"⁶ Judge Ellison then determined that the SEC's pleadings "easily negate" the facilitating payments exception with regard to payments made to acquire TIPs based on false paperwork.⁷ On the other hand, with regard to alleged payments to Nigerian officials to obtain TIP extensions, the court determined that the SEC failed to plead sufficient facts to support the allegation that the defendants "knew that these payments would be used to influence a discretionary decision of a foreign official."⁸ The court noted that "any bribes offered to speed along or assure that action would fall squarely into the 'facilitating' payments exception."⁹

Additionally, one of the defendants asserted that the FCPA claims should be dismissed because the facilitating payments exception is "unconstitutionally vague." Judge Ellison rejected the argument holding that "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal'....Here, a person of common intelligence should have no difficulty understanding that routine government actions do not include the granting of permits based on fraudulent documents."¹⁰

Finally, the decision includes an interesting discussion of the doctrine of fraudulent concealment, how the standard varies across circuits, whether the FCPA's statute of limitations should be tolled based upon the

⁵ *Id.* at *17.

⁶ *Id.* at *18 ("[I]f payments were made to induce officials to validate the paperwork while knowing it to be false, that too would not qualify as simply expediting a ministerial act.").

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *21 (internal citations omitted).

defendants' concealment of bribery, and whether (and when) the SEC had adequate notice of such conduct.

This document is intended to provide you with general information regarding a recent FCPA decision. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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