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LITIGATION

Concurrent Resolution of FCPA, Export Controls and Sanctions Violations Demonstrates Close Cooperation of Federal Agencies

On November 26, the Department of Justice (DOJ) and the Securities and Exchange Commission announced an agreement with three subsidiaries of Swiss oil services company Weatherford International Ltd. to settle Foreign Corrupt Practices Act (FCPA) and criminal export violations under the International Emergency Economic Powers Act and the Trading with the Enemy Act. The settlements collectively represent the most significant resolutions to date in which FCPA, export controls and sanctions violations have been concurrently resolved, and they also mark the first time that foreign trade control violations have been resolved through a settlement structure common in FCPA cases.

According to the DOJ press release, Weatherford failed to establish internal controls to prevent FCPA violations, despite the risks posed by the company's industry and the regions in which it operates. This failure allowed the Weatherford subsidiaries to engage in corruption in Africa and the Middle East and fraudulently misuse the United Nations Oil for Food Program. Weatherford subsidiaries also reportedly participated in the unlicensed export or re-export of US-origin goods to sanctioned countries such as Iran and Syria. Acting Assistant Attorney General Raman observed that:

> effective internal accounting controls are not only good policy, they are required by law for publicly traded companies – and for good reason. This case demonstrates how loose controls and an anemic compliance environment can foster foreign bribery and fraud by a company's subsidiaries around the globe. Although Weatherford's extensive remediation and its efforts to improve its compliance functions are positive signs, the corrupt conduct of Weatherford International's subsidiaries allowed it to earn millions of dollars in illicit profits, for which it is now paying a significant price.

Under the agreement, the three Weatherford subsidiaries will pay penalties and fines totaling more than $252 million, and plead guilty to one count of violating the FCPA's internal controls provisions and export controls charges. Weatherford also agreed to settle a civil FCPA enforcement case with the SEC and will enter into two deferred prosecution agreements. The combination of FCPA, sanctions and export controls violations illustrates a continuing trend of cooperation among the SEC's and DOJ's FCPA units with the US Department of the Treasury's Office of Foreign Asset Control and the US Department of Commerce's Bureau of Industry and Security.

BANKING

Five Agencies Issue Final Volcker Implementation Rules; Small Banks Win Exemptions

On December 10, five financial regulatory agencies (the Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Securities and Exchange Commission and Commodity Futures Trading Commission) adopted long-awaited final rules (Final Rules) implementing the so-called Volcker Rule embodied in Section 13 of the Bank Holding Company Act (which was added by Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act). The Final Rules complete the process begun in October of 2011 when the agencies introduced proposed implementing rules for comment.

The Volcker Rule prohibits banking entities from (1) engaging in short-term proprietary trading for their own accounts and (2) having certain ownership interests in and relationships with hedge funds or private equity funds (covered funds). The Final Rules are intended to provide greater clarity with respect to both the extent of those primary prohibitions and of the related exemptions and exclusions. The Final Rules also require each regulated entity to establish an internal compliance program that is consistent with the extent to which it engages in activities covered by the Volcker Rule, which must include (for the largest entities) making regular reports about those activities to regulators. There are few surprises in the Final Rules as compared to the proposed rules, but the additional detail provided by the Final Rules may have great practical significance in helping banks determine what they can and cannot do.

Under the Volcker Rule, proprietary trading means trading or taking positions as a principal in any security, derivative, option or contract for sale of a commodity for future delivery either to sell in the near-term or with the intent to resell to profit from short-term price movements. Notable exceptions explained in the Final Rules include exemptions and exclusions for underwriting, market making-related activities and trading conducted solely as an agent, broker or custodian. The Volcker Rule also prohibits banking entities from owning, sponsoring or having certain relationships with covered funds. Covered funds exclude certain entities with more general corporate purposes and foreign funds publicly offered abroad, among others. The Final Rules provide helpful detail clarifying the limited activities which banks are still permitted to carry on in connection with covered funds, such as organizing and offering covered funds, underwriting, market making-related activities or acting on behalf of customers as an agent, broker, custodian, trustee or similar fiduciary capacity.

A banking entity engaging in activities subject to the Final Rules must establish an internal compliance program that is reasonably designed to ensure and monitor compliance with all applicable regulatory requirements. A larger banking entity must implement a more detailed compliance program and its CEO must make an annual attestation that his or her bank has appropriate processes in place to maintain, enforce, review, test and modify its compliance program to achieve compliance with the Volcker Rule. Banking entities must also maintain documentation to allow regulators to monitor their activities. Banking entities, beginning with the largest firms, are also required to report certain quantitative metrics designed to monitor trading activities.

Community and small banks are afforded some relief under the Final Rules. If such banks are engaged only in exempted proprietary trading, such as trading in US government, agency, state and municipal obligations, they are exempt entirely from compliance program requirements. All small banks are also exempt from the requirement for a CEO attestation. Moreover, even if a community or small bank engages in proprietary trading or covered fund activities under the rule, it needs only incorporate references to the Volcker Rule into its existing policies and procedures.

The Final Rules are effective April 1, 2014, but the conformance period has been extended from its statutory end date of July 21, 2014 until July 21, 2015. Beginning June 30, 2014, banking entities with $50 billion or more in trading assets and liabilities must report quantitative metrics; on April 30, 2016, banking entities with at least $25 billion but less than $50 billion must report; and on December 31, 2016, banking entities with at least $10 billion but less than $25 billion must report. The agencies will revise the quantitative metrics reporting requirement as appropriate upon review of data collected before September 30, 2015.

The Final Rules are available here.

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