

## **RAE Non-Prosecution Agreement (Part III): The Tangible Benefits of Full Cooperation**

In our prior two postings we reviewed the Non-Prosecution Agreement (NPA or Agreement) entered into by RAE Systems, Inc., and the US Department of Justice (DOJ). In Part I, we reviewed the facts which led to the violations of the Foreign Corrupt Practices Act (FCPA); in Part II, we discussed the Corporate Compliance Program which RAE agreed to implement; and in this final article, we will discuss the Corporate Compliance Reporting that RAE agreed to in its NPA. We will then conclude with some of the lessons which we believe can be learned from this NPA and the implication of these lessons for the FCPA practitioner.

The Corporate Compliance Reporting requirements are found at Appendix C of the NPA. In this, RAE agreed to report, at no less than annual intervals, on the remediation efforts to which it agreed to and the implementation of a Corporate Compliance Program. RAE is required to provide a “complete description of its remediation efforts” and any proposals “reasonably designed to improve the policies and procedures of RAE for ensuring compliance with the FCPA and other applicable anticorruption laws...” If the DOJ has any comments to the initial two reports, RAE is to incorporate them into any subsequent reports. Additionally, if RAE discovers credible evidence of a FCPA violation, it is required to report this “promptly” to the DOJ.

The RAE Agreement, in conjunction with the Deferred Prosecution Agreements and the NPA for Noble Corp., released in November 2010 regarding Panalpina and related settlements, provide excellent guidance for the FCPA Practitioner. Each Agreement sets forth a complete description of the DOJ’s most current thoughts on what constitutes the most recent *best practices* of a FCPA compliance program and in addition to this general guidance, the RAE Agreement provides specific guidance on joint ventures. More than going through the motions of performing due diligence on a prospective joint venture partner, a company must remedy any deficiencies found in the process should the transaction go forward.

Yet, as significant as the information noted above may be, I believe that the most significant lessons are learned from the RAE Agreement Non-Prosecution Agreement is what did *not* occur. Even though RAE failed to follow the 2004 FCPA compliance *best practices* when it failed to engage in due diligence on the Fushun joint venture acquisition and even though RAE failed to take effective remedial measures with the KHL joint venture after it became a corporate subsidiary and after RAE had *actual knowledge* of FCPA violations; RAE did not sustain a criminal charge against it. In its Letter Agreement to the NPA, the DOJ noted “...*non-prosecution agreement based, in part, on the following factors: (a) RAE Systems's timely, voluntary, and complete disclosure of the facts described in Appendix A; (b) RAE Systems's thorough, real-time cooperation with the Department and the U.S. Securities and Exchange Commission ("SEC"); (c) the extensive remedial efforts already undertaken and to be undertaken by*

*RAE Systems; and (d) RAE Systems's commitment to submit periodic monitoring reports to the Department.”*

Representatives from both the DOJ and SEC have been preaching the virtues and tangible benefits of self-disclosure and thorough cooperation with their respective agencies in any FCPA investigation or enforcement action. This RAE matter would appear to provide specific evidence of the benefits of such corporate conduct. The NPA reports that RAE had **actual knowledge** of FCPA violations yet no criminal charges were filed. Further, no ongoing external Corporate Monitor was required. Clearly RAE engaged in actions during the pendency of the investigation which persuaded the DOJ not to bring criminal charges.

Any company facing a FCPA enforcement action should study this matter quite closely and, to the extent possible, determine the steps that RAE engaged in or performed. The RAE enforcement action together with the Noble enforcement action which resulted also in a Non-Prosecution Agreement, were also reached with no external Corporate Monitor. No criminal penalties and no External Monitor are important examples of the tangible benefits for working closely with the DOJ in any FCPA enforcement matter.

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