

## **Top 10 FCPA Investigations of 2010, Part II**

Yesterday we presented our list of Top 10 investigations of 2010, Part I. It contained numbers 1 through 5. Today we conclude our list with numbers 6 through 10. We view these matters as educational opportunities for the FCPC, Bribery Act or other compliance and ethics practitioner. As we noted in Part I, we are indebted to the FCPA Blog and FCPA Professor for their timeless work in bringing these matters to the compliance world's attention as soon as they become public knowledge. On to Part II...

### **6. PBSJ- The Effect of an Ongoing FCPA Investigation in a Merger and Acquisition.**

As reported by the FCPA Blog, in what may be the first case of its kind, a U.S. company that has no securities traded on an exchange but files periodic reports with the SEC disclosed an internal investigation into possible Foreign Corrupt Practices Act violations. The matter involved PBSJ Corporation, which in January, 2010, stated that it would not satisfy the filing deadline for its Annual Report on Form 10-K for the year ended September 30, 2009 "due to an internal investigation being conducted by the Audit Committee of the Board of Directors." The company said the purpose of the internal investigation "is to determine whether any laws have been violated, including the Foreign Corrupt Practices Act, in connection with certain projects undertaken by PBS&J International, Inc., one of the Company's subsidiaries, in certain foreign countries."

However this was not the reason that PBSJ made our Top 10 list. In the spring and summer of 2010, PBSJ sought bidders for itself. One of the concerns was the ongoing and unresolved FCPA investigation. PBSJ whittled the bidders down to two finalists, Company A and Company B. Company B had a higher bid price but demanded that the merger agreement include additional closing conditions regarding the FCPA investigation and a definition of "Company Material Adverse Effect" that would have allowed Company B to terminate the merger agreement in the event of adverse developments in the FCPA investigation. PSBJ declined to provide this in the closing documents and so PBSJ took a lower stock price for its shareholders because of its unresolved FCPA investigation.

### **7. Schlumberger-Red Flags, Red Flags and More Red Flags.**

In October, the Wall Street Journal reported that the DOJ was investigating allegations of possible bribery in Yemen by Schlumberger Ltd., in connect with Schlumberger's 2002 agreement with the Yemen government to create a national exploration data-bank for the country's oil industry. The allegations involve a foreign business representative, Zonic Invest Ltd., which became involved in the 2002 Data Bank Development Project between Schlumberger and Yemen's national oil company, the Petroleum Exploration and Production Authority. Zonic's General Director is the nephew of the then and current President of Yemen, Ali Abdullah Saleh. From the WSJ article, it was not clear the precise business relationship between Schlumberger and Zonic, for instance: whether Zonic was an agent of Schlumberger, a joint venture partner or simply a contractor.

In the WSJ article there were several reported allegations which stand out as classic *Red Flags* in Foreign Corrupt Practices Act (FCPA) compliance policies. Initially, Petroleum Exploration and Production Authority had urged Schlumberger to hire Zonic as a go-between at or near the time the contractual negotiations were nearing conclusion. Second the data-bank project went forward after Schlumberger “agreed to hire and pay Zonic a \$500,000 signing bonus” then the contract between Schlumberger and the Petroleum Exploration and Production Authority was concluded. Indeed the General Director of Zonic was quoted as saying, “If it wasn’t for Zonic, there would have been no data-bank project.” Lastly, the WSJ article does not reference that any written contract was executed between Schlumberger and Zonic for this \$500,000 payment.

As many *Red Flags* that may have been raised in the WSJ report of the actions and statements that transpired before the contract for the data-bank project was concluded between Schlumberger and the Petroleum Exploration and Production Authority, there were several raised thereafter. After the contract for was concluded, WSJ reported that internal Schlumberger documents revealed that “Zonic wanted a roughly 20% cut of Schlumberger’s profits from the project.” While Schlumberger did not agree to pay such percentage of profits outright, it was noted that Schlumberger documents stated that the Yemen country manager had “suggested that those amounts could be compensated [to Zonic] through services.” These services were said to include providing personnel to the project, networking, furniture and computer hardware. Payments for such services were made, even though there was no contract between Schlumberger and Zonic, from 2002 to 2004. A contractual relationship between the parties was established in 2004 and lasted until at least 2007. The total amount paid by Schlumberger to Zonic was reported to be \$1.38 from 2003 to 2007. However, with regards to the services and products supplied by Zonic to Schlumberger, the WSJ noted that some were “above market rate” and others were unnecessary; specifically noting that over \$200,000 was paid for certain computer hardware, “although Schlumberger itself was among the leading providers of such hardware.” The Daily Finance Blog reported, in an October 8, 2010 posting, that Zonic did not provide some of the services for which it was paid.

## **8. CB Richard Ellis-No business or industry immune from the FCPA.**

In October, CB Richard Ellis, global real estate firm disclosed possible FCPA violations related to its operations in China. As reported by the FCPA Blog, the Company detailed in a SEC filing that its employees made payments for entertainment and gifts to Chinese government officials, which were discovered during an internal investigation. The Company said in the filing that it has “As a result of an internal investigation that began in the first quarter of 2010, ...determined that some of its employees in certain of its offices in China made payments in violation of Company policy to local governmental officials, including payments for non-business entertainment and in the form of gifts. The payments the Company discovered are minor in amount and the Company believes relate to only a few discrete transactions involving immaterial revenues. The Company also said that it had self disclosed the payments to the DOJ and SEC in February, 2010. It

has been cooperating with the agencies and has taken other unspecified "remedial measures."

As reported by the FCPA Professor, the Company also reported another investigation. This second investigation began in the third quarter of 2010. It was labeled as an "internal investigation, with the assistance of outside counsel, involving the use of a third party agent in connection with a purchase in 2008 of an investment property in China for one of the funds the Company manages through its Global Investment Management business. This investigation is ongoing and at this point the Company is unable to predict the duration, scope or results thereof. In light of the Company's cooperation with the DOJ and the SEC as described above, the Company voluntarily notified both agencies of this separate internal investigation and will report back to them when the Company has more information."

Most business believe that the DOJ and SEC target industries or sectors which work traditionally in countries where corruption is perceived to be endemic, such as the energy sector. However this CB Richard Ellis investigation clearly demonstrates that any company which does business overseas needs to have a full FCPA compliance program in place.

#### **9. Rino-Welcome to the (FCPA) Club.**

In what the FCPA Professor termed the first focus of a FCPA inquiry on a China-based issuer, the Chinese company Dalian disclosed in an SEC filing that it was notified that the SEC was "conducting a formal investigation relating to the Company's financial reporting and compliance with the Foreign Corrupt Practices Act for the period January 1, 2008 through the present. The Company is cooperating with the SEC's investigation. It is not possible to predict the outcome of the investigation, including whether or when any proceedings might be initiated, when these matters may be resolved or what if any penalties or other remedies may be imposed."

As reported in the Wall Street Journal, the DOJ and the SEC have never charged a listed Chinese company. At least two Chinese subsidiaries of U.S. issuers — DaimlerChrysler China Ltd., now known as Daimler North East Asia Ltd. and DPC (Tianjin) Co. Ltd., a medical products company — have settled foreign bribery charges with the agencies. But now we have the first Chinese issuer. All we can say is to quote the FCPA Professor, "*Welcome to the Club*".

#### **10. SciClone-hell hath no fury like a SEC Subpoena.**

The pharmaceutical company SciClone had a fairly tumultuous August and September. It included the following:

**August 10<sup>th</sup>**-Shares of the Company as low as 40% down from the previous day's close, closing down 31.9%. Levi & Korsinsky, The Law Offices of Howard G. Smith LLP, the law firm of Kahn Swick & Foti, LLC and the law firm of Roy Jacobs & Associates all announced that they were is investigating SciClone on behalf of shareholders for possible violations of state and federal securities laws.

**August 11**-The law firms of Pomerantz Haudek Grossman & Gross, Statman, Harris & Eyrich, Goldfarb Branham and Finkelstein Thompson all announced that they were investigating claims on behalf of investors of SciClone to determine whether it has violated federal securities laws.

**August 12**-the law firm of Robbins Umeda announced that it commenced an investigation into possible breaches of fiduciary duty and other violations of the law by certain officers and directors at the Company.

**August 13**-The law firm of Kahn Swick & Foti announced that the firm has filed the first securities fraud class action lawsuit against SciClone in the United States District Court for the Northern District of California.

**August 19**-the law firms of Barroway Topaz Kessler Meltzer & Check and Brower Piven both announced that they had filed class action lawsuits was filed in the United States District Court for the Northern District of California on behalf of purchasers of the securities of SciClone and purchasers of the common stock of SciClone.

**August 20**-the law firm of Kendall Law Group announced an investigating of SciClone for shareholders. Unfortunately another class action law suit was filed, this time by the law firm of Ryan & Maniskas.

**August 28**-the law firm of Roy Jacobs & Associates (again) announced that it was investigating SciClone for potentially violating the federal securities laws.

**September 7**-The Shuman Law Firm announced that it had filed a class action lawsuit against the Company.

**September 8**-the law firm of Kaplan Fox & Kilsheimer announced that it had filed a class action suit against SciClone.

**September 16**-the law firm of Strauss & Troy announced that it had filed a class action lawsuit against SciClone for potential violations of state and federal law.

**September 23**- The law firm of Lief Cabraser Heimann & Bernstein announce that class action lawsuits have been brought on behalf of purchasers of the common stock of SciClone.

So what did SciClone actually do? The FCPA Professor reported that on August 9th, SciClone announced that it had been contacted by the SEC and was advised that the SEC has initiated a formal, non-public investigation of SciClone. In connection with this investigation, the SEC had issued a subpoena to SciClone requesting a variety of documents and other information. The subpoena requested documents relating to a range of matters including: interactions with regulators and government-owned entities in China, activities relating to sales in China and documents relating to certain company financial and other disclosures. On August 6, 2010, the Company received a letter from the DOJ indicating that the DOJ was investigating FCPA issues in the pharmaceutical industry generally, and had received information about the Company's practices suggesting possible violations.

During SciClone's August 9th earnings conference call, the Company President and CEO Friedhelm Blobel stated that SciClone "intends to cooperate fully with the SEC and DOJ in the conduct of their investigations, and has appointed a special committee of independent directors to oversee the Company's efforts." Blobel noted that "as far as timing is concerned, the lawyers tell us that these investigations typically are long lasting." We would opine that his lawyers got that point "spot on".

So there it is, our Top 10 investigations from 2010. Last week, we listed our Top 10 enforcement actions from this year. We will end this year with a list of our Top 10 FCPA compliance issues for 2010. We hope you have found these lists and this blog helpful and instructive. We also want to thank everyone who has supported us throughout the year with kudos, criticisms, questions and comments.

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