Client Alert

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What's Old is New Again: Total Settles FCPA Charges Involving Decade-Old Conduct

By Randall J. Fons and Brian Neil Hoffman

This week the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) announced that France-based oil and gas company Total S.A. resolved Foreign Corrupt Practices Act (FCPA) charges by agreeing to pay a near record-setting $398.2 million. In addition to the magnitude of Total's payout, the case is notable for other reasons, too – the vintage of the misconduct and investigations; the appointment of an independent compliance monitor; the continued expansion of international enforcement cooperation in FCPA matters; and the number of classic FCPA risk factors involving third parties present in the charged conduct. The case thus provides a useful reminder to companies and executives of the omnipresence of the FCPA and other countries' foreign anti-bribery laws, as well as an opportunity to review and enhance anti-bribery compliance efforts.

BACKGROUND OF THE MATTER

According to the SEC and DOJ, Total, a French company with American Depository Shares that trade on the NYSE, paid over $60 million to an Iranian official through the use of intermediaries between 1995 and 2004, in order to secure two lucrative oil development contracts in Iran in 1995 and 1997. Specifically, after Total and the Iranian official met to discuss a contract in 1995, an offshore subsidiary of Total entered into a consulting contract with an intermediary chosen by the official. The intermediary was to perform vaguely defined "economic and marketing research and support services." Although it is not clear from the charging documents whether the intermediary actually provided any services (other than channeling money to the Iranian official), over two-and-a-half years Total paid approximately $16 million to a Swiss bank account for the benefit of the intermediary and, ultimately, for the Iranian official. In 1997, the process largely repeated itself with a second intermediary and consulting contract, under which Total paid approximately $44 million to a Swiss bank account. In its books and records, Total ambiguously, and misleadingly, described the payments as legitimate "business development expenses."

On May 29, 2013, the DOJ announced that Total entered into a deferred prosecution agreement (DPA) with the DOJ, under which it agreed to pay a $245.2 million penalty. In addition, the SEC initiated settled cease-and-desist proceedings, under which Total agreed to disgorge $153 million in profits that the company had earned from the oil development contracts. The company additionally agreed to employ an independent compliance monitor for three years. The SEC and DOJ both accused Total of violating or conspiring to violate the FCPA's anti-bribery, books and records, and internal controls provisions.

IT'S NOT OVER UNTIL IT'S OVER

The vintage of the charged misconduct and the government's investigation will be concerning to companies and executives seeking closure for dated activities. The SEC and DOJ claim that Total began paying bribes to the Iranian official in the mid-1990s and stopped in 2004. This 2013 settlement, therefore, charges Total with conduct that occurred *between nine and eighteen years ago*. Additionally, the SEC and DOJ began investigating Total's conduct in 2003, and Total apparently began negotiating a possible settlement with the agencies in 2010. The government's investigations thus took ten years to complete. This despite the fact that, according to the DOJ's DPA, Total cooperated with the government by producing relevant documents from abroad and disclosing the results of its internal investigation.

Though it took a decade to investigate the case, the SEC's and DOJ's claims against Total apparently aged like a fine French wine: Total agreed to pay a total of nearly $400 million in disgorgement and criminal penalties to resolve the matter – one of the top five most expensive FCPA settlements ever.

Total, however, does not stand alone in undergoing a lengthy FCPA investigation process. In 2012, for example, the DOJ and SEC announced that Pfizer, Inc. resolved FCPA charges that the company self-reported in 2004, and which involved conduct starting in 1997. In complex FCPA cases, the SEC and DOJ routinely ask parties to enter into agreements to toll the running of the statute of limitations, particularly in the midst of active investigatory work or settlement negotiations. In Total's case, the public releases do not specify whether Total entered into a tolling agreement, but given the age of the facts, it is likely that a tolling agreement was in place.

THE RETURN OF INDEPENDENT MONITORS

Total's costs will be compounded by the SEC's and DOJ's mandates that Total engage an independent compliance monitor. Total stipulated in its settlements that, for the next three years, a French national or French law or accounting firm – acceptable to both the SEC and DOJ – will evaluate and monitor Total's anti-bribery policies and procedures, as well as the board of directors' and senior executives' "commitment to an effective implementation of a corporate compliance program against violations of the anti-corruption laws." The monitor must also communicate regularly with French authorities, thus compounding the complexities of the monitor's oversight, as well as Total's overall costs.

Although previously commonplace, the SEC and DOJ recently have taken a more selective view of when to insist on the engagement of an independent compliance monitor. In no small part, this was due to backlash over the costs and disruption that independent compliance monitors involve. The FCPA Resource Guide, released in November 2012, provides that compliance monitors may be particularly appropriate "where a company does not already have an effective internal compliance program or needs to establish necessary internal controls." The SEC and DOJ will also consider the seriousness, duration, and pervasiveness of the misconduct; the nature and size of the company; and subsequent remedial efforts. The Guide further states that companies may be allowed to self-monitor when the company has voluntarily disclosed transgressions, fully cooperated with the investigation, and "has demonstrated a genuine commitment to reform."

The Total settlement shows that cooperation with an investigation alone may not be enough to avoid the appointment of an independent monitor in an FCPA matter. Although it is possible that Total's situation involved unique, unpublicized facts that particularly justified the appointment of an independent monitor, companies cannot overlook the possibility that even dated FCPA transgressions could involve the retention of an independent compliance monitor and, thus, a very long tail. As a result, early in the course of a potential FCPA matter, companies should carefully consider any necessary remedial efforts, and the appropriate investigatory, disclosure, and cooperation strategy to pursue.

TEAMWORK IS KEY

Continuing the trend of the increased globalization of securities enforcement, the Total case provides yet another example of international FCPA enforcement cooperation. In its press release, the DOJ touted the case as "… the first coordinated action by French and U.S. law enforcement in a major foreign bribery case." Moreover, the DOJ noted a French investigation into Total and its CEO as a reason for entering into the DPA. In addition, the SEC likewise noted its appreciation of the assistance of French regulatory authorities.

Investigating and prosecuting foreign bribery cases is relatively unfamiliar ground to the French authorities. Until 2008, France had not convicted anyone on foreign bribery charges. Its relative lack of prosecutions for foreign bribery resulted in France being publicly stung in 2012, when the Organisation for Economic Co-operation and Development (OECD) announced that it was "seriously concerned at [the] lack of foreign bribery convictions in France," and the "lacklustre response of the authorities in actual or alleged cases of foreign bribery involving French companies." Heeding the criticism, French prosecutors recently announced that charges were being recommended under French anti-bribery laws against Total and its chairman and chief executive officer, Christophe de Margerie. These charges appear to reflect part of France's increased vigor in enforcing its own anti-bribery laws.

DON'T FORGET THE THIRD-PARTY BASICS

Finally, the Total case provides an educational review of many FCPA risk factors that can arise in connection with the engagement of third-party intermediaries or agents. In particular, in the Total matter:

- The Iranian official, and not Total, selected the third parties with which Total entered into consulting contracts;
- It is not clear what, if any, diligence Total conducted with respect to the intermediaries;
- The intermediaries' services were vaguely described as "economic and marketing research and support services" in their consulting contracts, and it is not clear what, if any, services that they provided (other than transmitting money to the Iranian official); and
- Total ambiguously described the payments to the intermediaries in its books and records as "business development expenses," without any further specificity.

Once again, the government has given companies and executives good reason to take proactive steps in assuring that their FCPA compliance bases are well covered, particularly when it comes to engaging third-party agents and consultants. Third parties have proven to be fertile ground for the government to plow when conducting anti-bribery investigations. As a result, great care must be taken in formulating FCPA policies and procedures, policing conduct around the world, and establishing internal controls that will withstand government scrutiny, even years later.

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