



[Thomas B. Snyder](#), Director
405.234.3254
thomas.snyder@crowedunlevy.com



[Andre' Caldwell](#), Associate
405.235.7708
andre.caldwell@crowedunlevy.com

Compliance Invites Mercy: An Assessment of Third Quarter FCPA Enforcement

With increasing frequency, both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have aggressively employed the Foreign Corrupt Practices Act (FCPA) as a significant anti-corruption tool aimed at bribery and related practices all around the world. The third quarter of 2012 shows no sign that these efforts are slowing and recent enforcement action continues to highlight the importance of compliance and internal investigations. Moreover, the enforcement actions continue to emphasize the importance of companies exercising particular diligence over their activities in countries with high corruption risks (i.e. China, Brazil, Russia and India). The following is a brief discussion of significant enforcement actions from the third quarter of 2012.

Subramanian Krishnan, the former chief financial officer for **Digi International, Inc. (Digi)**, a global corporation involved in the communications business, has been an individual target of an SEC investigation for several years. Krishnan, who resigned from his position in 2010, was charged with books and records and internal controls violations arising from his alleged approval of unauthorized travel and entertainment expenses through Digi's Hong Kong office. The investigation was resolved by Krishnan's consent to a final judgment (similar to a nolo contendere plea), an officer and director bar and a financial penalty to be determined at a later date. Digi has not been charged with any violations and reports indicate that no charges are forthcoming. While it would be speculation as to exactly why no enforcement actions were commenced by DOJ or the SEC, the company self-reported the violations and conducted a thorough internal investigation, which likely led, in part, to the absence of any charges against the company.

Tyco International, Ltd. (Tyco), a Switzerland-based maker of fire security products recently resolved investigations by DOJ and the SEC involving alleged payments of "fake" commissions and the use of third party agents to improperly funnel money to obtain lucrative contracts. These actions were alleged to have occurred via Tyco subsidiaries operating in China, France, Germany, Thailand and Turkey. In September 2012, Tyco entered into a non-prosecution agreement with DOJ wherein Tyco agreed to pay approximately \$13 million in fines

and approximately \$13 million (\$10.5 million in disgorgement and \$2.5 million in prejudgment interest) to the SEC. A reading of the tea leaves suggests the penalties could have been much stiffer as both DOJ and the SEC cited Tyco's voluntary disclosure of the matter, cooperation, and extensive internal investigation as reasons supporting the respective settlements.

In August 2012, **Oracle Corporation (Oracle)**, the global software giant, resolved charges brought by the SEC for books and records violations. The SEC alleged that Oracle failed to prevent a subsidiary from secretly setting aside money off the company's books which was eventually used to pay bribes to phony vendors in India. Oracle agreed to pay \$2 million to settle the SEC charges. Again, in its press release, the SEC cited Oracle's self reporting, thorough investigation and the affirmative steps in took in terminating the wrongdoers are reasons supporting the relatively small settlement amount.

Pfizer, Inc. (Pfizer), the pharmaceuticals giant, along with its subsidiary Wyeth, LLC (Wyeth) entered into a two-year deferred prosecution agreement with the DOJ. As part of the DPA, Pfizer, agreed to pay a \$15 million penalty to DOJ and disgorgement to the SEC of \$26.3 million. Wyeth paid \$18.8 million to the SEC. The DOJ and SEC investigation revealed that the companies made improper payments to foreign officials to obtain regulatory and formulary approvals, sales, and increased prescriptions for the company's pharmaceutical products. In addition, Pfizer and Wyeth were charged with trying to conceal the bribery by improperly recording the transactions as legitimate expenses. Reports again indicate that Pfizer self-reported the violations, actively investigated any possible FCPA violations, cooperated in the investigation and took active measures to enhance its FCPA monitoring and compliance programs.

Nordam Group Inc. (Nordam), the Tulsa, Oklahoma based provider of aircraft maintenance, repair and overhaul, was the target of a DOJ investigation into alleged bribes paid to employees of airlines created, controlled, and exclusively owned by the People's Republic of China. DOJ entered into a non-prosecution agreement wherein Nordam agreed to pay a \$2 million fine to DOJ and consistently report to DOJ concerning its compliance efforts on a pre-determined schedule for a three-year period. In explaining its rationale for entering into the agreement, the DOJ again emphasized Nordam's voluntary disclosure, remedial efforts and full cooperation with the investigation.

Orthofix International N.V. (Orthofix), the Lewisville, Texas based orthopedic products maker, reached an agreement in July 2012 to resolve charges with DOJ and the SEC regarding violations of the FCPA in Mexico. Orthofix voluntarily reported problems with a former Mexican

orthopedic distributor in June 2010. Through an internal management review, Orthofix learned that an employee of a Mexican subsidiary made improper payments to a Mexican government healthcare entity. In the end, Orthofix paid \$4.98 million in disgorgement and \$242,000 in prejudgment interest to the SEC and \$2.2 million in fines to the DOJ. Enforcement activity in the third quarter also served as a sobering reminder that corporate fines are sometimes the least of ones' worries. In addition to the individual consequences to Krishanan discussed above, several individuals received prison sentences ranging from 13 months of home confinement to 18 months in federal prison for violations ranging from paying bribes to conspiring to launder money. Coming on the heels of the longest prison terms in FCPA history handed out in the Haiti Telco FCPA case (15 and 9 years), there is little question that the DOJ will continue to pursue individual wrongdoers and seek prison sentences in appropriate cases.

Finally, lessons can be learned from the list of corporations against whom the SEC and DOJ have declined to file charges. These corporations include **Hercules Offshore, Inc**, an oil and gas contractor, **Huntsman Corporation**, a global chemical company, **Sensata Technologies Holding N.V.**, a producer of sensors and controls for manufacturers in the automotive, appliance, aircraft, industrial and HVAC markets, and **Academi LLC**, a private military company. From press reports and public filings, it appears that investigations were opened against these corporations, but have now been concluded. The most significant reason for declination of enforcement appears to be the corporations' internal investigation and discovery of potential FCPA violations, voluntary disclosure, and remedial actions, including firing of employees involved in the illegal activity and enhanced FCPA compliance measures.

While we all await the long anticipated FCPA guidelines from the DOJ, due this month, recent enforcement activity leaves little doubt about DOJ's approach toward potential FCPA violators. In almost all of the cases discussed above, the corporations with active compliance programs who discovered and self-reported wrongdoing, conducted thorough investigations and cooperated with government either avoided charges all together or paid monetary penalties that were likely substantially less than expected in the absence of such proactive compliance efforts. The lesson to be learned or emphasized is that investment in the development of an FCPA compliance program which is actively implemented and conducting thorough investigations when the need arises pales in comparison to the costs of reacting and responding to a DOJ and SEC investigation. For now, the DOJ and SEC's FCPA enforcement activity shows little sign of slowing. In fact, one could speculate that enforcement is likely to increase after the guidelines are announced on the premise that DOJ will have provided guidance, and failure to abide by such guidance will be exhibit number

one in a prosecutorial action. Whatever guidelines the DOJ announces, companies without FCPA compliance programs should take the opportunity to implement one that is consistent with the guidelines and those with existing programs should take the opportunity to revisit them to ensure their consistency. Ignoring the DOJ's guidelines and the FCPA is an option only for the foolhardy.

Please contact Thomas B. Snyder or Andre` Caldwell to answer any questions.

Thomas B. Snyder

(405) 234-3254

thomas.snyder@crowedunlevy.com

Andre` Caldwell

(405) 235-7708

andre.caldwell@crowedunlevy.com

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Oklahoma City
20 North Broadway
Suite 1800
Oklahoma City, OK 73102
(405) 235-7700

Tulsa
500 Kennedy Building
321 South Boston Avenue
Tulsa, OK 74103
(918) 592-9800

Norman
The HiPoint Office Building
2500 McGee Drive, Suite 140
Norman, OK 73072
(405) 321-7317