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Government Investigations ADVISORY ■

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SEC Enters Into Its First FCPA Non-Prosecution Agreement

On April 22, the Securities and Exchange Commission (SEC) announced that it had entered into a non-prosecution agreement (NPA) with Ralph Lauren Corp. to resolve alleged violations of the Foreign Corrupt Practices Act by a wholly owned Argentinian subsidiary of the company. The NPA was the first ever entered into by the SEC in an FCPA matter. Ralph Lauren also entered into an NPA with the Department of Justice related to the same conduct. As part of the agreements, the company agreed to pay $1.6 million in total penalties, disgorgement and interest.

Summary of the Alleged Misconduct

The SEC alleged that Ralph Lauren's Argentinian subsidiary ("RLC Argentina") paid $593,000 in bribes to Argentinian officials to gain greater market access for the company's products. From 2005 to 2009, RLC Argentina's general manager allegedly paid bribes totaling $568,000 to Argentinian customs officials to assist in improperly obtaining paperwork necessary for Ralph Lauren's products to clear customs, to permit clearance of items without the necessary paperwork, to permit clearance of prohibited goods and to avoid inspection of products by Argentinian customs officials. RLC Argentina paid the bribes through a third-party customs broker. The broker submitted invoices to RLC Argentina that mischaracterized payment requests as "Loading and Delivery Expenses" and "Stamps Tax/Label Tax" when, in fact, those expenses were allegedly used to pay bribes to Argentinian officials.

During the same time period, RLC Argentina's general manager allegedly provided or authorized gifts to Argentinian officials to secure the importation of Ralph Lauren's products. The gifts allegedly included perfume, dresses and handbags valued at between $400 and $14,000 per item.

In addition to the alleged bribes, the SEC also alleged that Ralph Lauren had failed to maintain an adequate system of internal controls at its Argentinian subsidiary, noting that the company's existing FCPA compliance program "warranted further strengthening to ensure effective compliance with the laws."

Mitigating Factors

The SEC identified several key factors that supported its decision to offer Ralph Lauren an NPA.

First, Ralph Lauren discovered the alleged misconduct during the worldwide rollout of enhancements to its FCPA compliance policy in 2010. Less than six months after the release of the new FCPA compliance policy that was disseminated through the company's intranet site, RLC Argentina employees reviewing the new policy reported concerns regarding the conduct of the third-party customs broker to management.

Second, Ralph Lauren, upon being notified of the issue, responded promptly and cooperated with the government's investigation of the matter. The SEC found particularly noteworthy the company's decision to conduct an internal investigation and to voluntarily disclose its preliminary findings to the government within two weeks of uncovering the payments and gifts. Ralph Lauren also promptly produced documents to the government, provided English language translations, summarized witness interviews that the company's investigators conducted overseas and made overseas witnesses available to the government for interview in the United States. The company also expanded the scope of the investigation beyond Argentina by agreeing to conduct risk assessments of its operations in Italy, Hong Kong and Japan, which identified no further violations.

Third, Ralph Lauren undertook significant remedial efforts. The company terminated the third-party customs broker who facilitated the payments; enhanced its compliance program; adopted an updated anti-corruption policy, which it translated into multiple languages; implemented enhanced due diligence procedures for third parties; issued enhanced policies regarding the use of commission payments and the offering of gifts; implemented in-person anticorruption training for appropriate employees; and ceased retail operations in Argentina and engaged in winding down of all Argentinian operations.

Key Considerations for Businesses

The Ralph Lauren NPA may appear, on first glance, to be a surprising result. After all, most of the mitigating factors cited by the SEC are not novel and are, in fact, common with companies whose cases have been resolved either by formal complaint or by deferred prosecution agreement. There appear, however, to be at least two key differences in this case that may have made the difference for Ralph Lauren.

First, Ralph Lauren's self-disclosure of the preliminary findings of its internal investigation to the SEC and DOJ was incredibly quick—just two weeks after discovering the alleged misconduct. That is an even faster disclosure than, for example, Tenaris S.A., which provided the preliminary findings of its internal investigation to the government four months after learning about alleged FCPA misconduct. In May 2011, the SEC resolved its FCPA investigation into Tenaris by way of a deferred prosecution agreement (DPA). While NPAs and DPAs are both forms of pretrial diversions, NPAs are generally much less formal and impose fewer conditions and restrictions on companies than do DPAs.

Second, Ralph Lauren's decision to cease retail operations and wind down all business in Argentina may have led the SEC to agree to an NPA. Whether that decision was driven solely by the anticorruption issues or by other business considerations is unclear. What is clear, however, is that Ralph Lauren's withdrawal from Argentina shortly after discovering potential misconduct there is an unprecedented decision by a company under FCPA investigation by the SEC, and one that appears to have motivated the SEC to reward the company commensurately.

Companies, however, should not jump too quickly to follow the Ralph Lauren approach and must carefully consider how that approach would unfold under the specific facts and circumstances of their individual case and business model. For example, disclosing the preliminary findings of an internal investigation to the SEC and DOJ before the facts have been fully developed may result in damage to the credibility of the investigation and end up hampering the company's ability to negotiate an adequate resolution with the government. Moreover, withdrawing operations from an entire country or business segment may not be feasible for companies in most scenarios. Those caveats notwithstanding, the facts of the Ralph Lauren case are instructive for any company that uncovers potential FCPA violations and can be used as a guidepost in deciding how to manage those concerns.

***This client advisory was written by* Edward T. Kang *and* Brian D. Frey.**

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