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Ralph Lauren: Inadequate Rewards For Exemplary Cooperation

Law360, New York (May 01, 2013, 11:46 AM ET) -- On April 22, the U.S. Department of Justice and the U.S. Securities and Exchange Commission announced nonprosecution agreements with Ralph Lauren Corporation relating to the bribery of Argentine custom officials to import products into Argentina without necessary inspections and paperwork. The SEC said it decided not to bring charges because the company promptly self-reported the bribes and thoroughly cooperated in the SEC's investigation. Although the government will no doubt cite these NPAs as an exemplar of the benefits of self-reporting and cooperation, we think they reaffirm the importance of careful consideration before a company decides to self-report potential unlawful conduct.

Based on the facts recited in the SEC NPA, Ralph Lauren appears to have held itself to an extremely high standard of compliance. On its own initiative, the company adopted a new Foreign Corrupt Practices Act policy and distributed it to employees, which led some Argentine employees to raise concerns about the company's customs broker. The company immediately conducted an internal investigation, which ultimately uncovered improper payments and gifts to government officials. Within two weeks of this discovery, Ralph Lauren self-reported its findings to both the SEC and the DOJ. The NPA also highlights that Ralph Lauren adopted numerous remedial measures, including firing its customs broker and implementing further enhancements to its compliance program, cooperated extensively with the SEC, and undertook a world-wide review of its operations that uncovered no other violations.

It is difficult to imagine a set of facts more deserving of a nonpublic declination based on the criteria outlined by the SEC and the DOJ late last year in their FCPA Resource Guide: detection of the wrongdoing by the corporation itself; a thorough internal investigation of the misconduct; implementation of remedial measures, including termination of employees engaged in wrongdoing and improvements in internal controls and compliance programs; and voluntary disclosure to the DOJ and/or the SEC.[1] The only difference between this case and the six examples of declinations in the FCPA Resource Guide appears to be the size of the payments. The government may have viewed the amounts paid by the Ralph Lauren subsidiary (totaling about $600,000) as not small enough to qualify for a declination.

The Ralph Lauren NPAs are far less advantageous to the company than a declination, which would have involved no public allegations of wrongdoing and no fines. By contrast, in addition to paying approximately $1.6 million in penalties and disgorgement, under the DOJ NPA, the company had to publicly admit and accept responsibility for the illegal conduct, which potentially exposes it to shareholder lawsuits and reputational damage. The company also was required to agree to toll the statute of limitations, implement further extensive changes to its compliance program, and submit annual reports to the DOJ detailing its remediation efforts. If Ralph Lauren is found to have breached any of the terms of the agreements — determined solely by the SEC or the DOJ — it may still face the original charges by both agencies, plus potentially new charges based on any information collected during the course of the NPAs.

The benefits to the government from entering into these NPAs are clear. NPAs — unlike deferred prosecution agreements and SEC injunctive actions — are not filed with any court, thus escaping the kind of judicial scrutiny that has recently been given to some SEC settlements. Moreover, the SEC and DOJ are able to emphasize, once again, the importance of voluntary disclosure and cooperation, while still requiring significant ongoing obligations on the part of the company.

The benefits to Ralph Lauren, on the other hand, are less clear. It is likely that the government applied a discount when deciding what sanctions to impose based on the company's self-reporting and cooperation. However, it is not at all clear that any such discount was sufficient to cover the incremental investigative and other costs incurred by the company as a result of the self-report, and the additional burdens the company has agreed to shoulder by entering into the NPAs.

For other companies contemplating whether to self-report potential FCPA violations, the case reinforces the importance of closely evaluating the risks and rewards of potential outcomes, especially given the government's apparent reluctance to grant a declination even when presented with a textbook case of extraordinary cooperation.

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[1] A Resource Guide to the U.S. Foreign Corrupt Practices Act, Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (Nov. 14, 2012), available at http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.