

Policy Issues Alert

DOJ Prosecution Of BAE Heralds Continued Aggressive FCPA Enforcement Environment

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On Friday, February 5, 2010, BAE Systems plc, one of the largest defense contractors in the world, announced that it had negotiated a global resolution of the U.S. and U.K. governments' investigations of corruption allegations that had been levied against BAE.

In order to resolve the U.S. Department of Justice's (DOJ) ongoing investigation of violations of the Foreign Corrupt Practices Act (FCPA), BAE agreed to plead guilty to a one-count criminal information charging that BAE had conspired to make false statements to various U.S. government agencies regarding its anti-corruption undertakings and had failed to disclose its payment of hundreds of millions of dollars in commission payments in connection with arms sales as it was required to do in order to obtain export licenses for U.S. defense articles that were included in its products. BAE also agreed to pay

a \$400 million criminal penalty to the U.S. In order to resolve the U.K. Serious Fraud Office's (SFO) ongoing investigation of BAE's activities in a number of countries in Eastern Europe and Africa, BAE agreed to plead guilty to one charge of breach of duty to keep accounting records in relation to payments made to a former marketing advisor in Tanzania. BAE also agreed to pay a criminal penalty of £30 million to the U.K. Thus, BAE agreed to pay a total penalty of approximately \$450 million to resolve the two ongoing investigations against it.

The BAE settlement is noteworthy for a number of reasons. First, it demonstrates DOJ's ongoing commitment to pursue FCPA matters and represents the third largest criminal penalty ever imposed in an FCPA matter (Siemens AG paid a criminal penalty of \$450 million in late 2008 and Kellogg, Brown & Root LLC paid a \$402 million penalty in early 2009). Second, the DOJ's FCPA investigation of BAE was not resolved with a plea to an FCPA anti-bribery

charge. Instead, BAE agreed to plead guilty to a conspiracy charge involving false statements, in violation of 18 U.S.C. § 1001, and concealment of substantial commission payments in arms export applications, in violation of the Arms Export Control Act, 22 U.S.C. § 2778. Although the filed criminal information describes payments that appear to be actual or intended bribes, it is noteworthy that DOJ was willing to forego a bribery charge to resolve this significant matter. Undoubtedly, this was an important part of the deal for BAE to allow it to position itself to respond to possible government suspension and debarment actions that may follow these pleas. Third, the case again demonstrates the DOJ's willingness to push its jurisdictional reach in cases involving foreign-based, non-issuers that make suspect payments outside the United States. Unquestionably, the false

statements and omissions involving U.S. government agencies described in the information provide a jurisdictional basis. With respect to the questionable payments, however, it appears that most were made outside the United States with the exception of "substantial benefits" provided to "one [Saudi] official . . . through various payment mechanisms both in the territorial jurisdiction of the U.S. and elsewhere." Thus, in spite of this seemingly slight jurisdictional nexus, DOJ aggressively pursued this FCPA matter and obtained an agreement from BAE to plead guilty to a felony and pay a \$400 million penalty. Fourth, like the Siemens matter, this case involves a coordinated, global resolution of parallel investigations by two different countries, highlighting the ever-increasing levels of cooperation between U.S. authorities and their foreign counterparts.

Please email the author at steven.tyrrell@weil.com with questions about this article.

Partners Notes

Four King & Spalding Lawyers Co-Author Global Climate Change Pamphlet

Four King & Spalding lawyers are co-authors of a new publication titled *The SEC and Climate: Disclosure Requirements*, part of the continuing series of LexisNexis global climate change special pamphlets that collectively address the law of global climate change. The pamphlet is published by Matthew Bender. The King & Spalding lawyers who contributed to the publication are Patricia T. Barmeyer, Keith M. Townsend, Lewis B. Jones and John C. Bottini.

The pamphlet also includes an examination of current practices regarding climate disclosures as well as the private and public efforts to reform those practices.

The SEC and Climate: Disclosure Requirements is available for purchase from the publisher at <http://www.lexisnexis.com>.

Ms. Barmeyer, a partner and head of King & Spalding's environmental practice, also leads the firm's climate change task force. She concentrates her practice on environmental litigation in the areas of water, waste, air and coastal resources. She is a former senior assistant attorney general of the state of Georgia and a fellow of the American College of Environmental Lawyers.

Mr. Townsend is a partner in King & Spalding's corporate practice. He has significant experience advising public companies on SEC reporting and disclosure requirements, corporate governance issues and other corporate and securities matters.

Mr. Jones is a counsel in King & Spalding's tort and environmental litigation practice. Within his general environmental litigation practice, he focuses

on water resources. He has extensive experience with the Endangered Species Act, wetlands permitting issues and the Comprehensive Environmental Response and Compensation and Liability Act (CERCLA).

Mr. Bottini is an associate in King & Spalding's tort and environmental litigation practice. He is involved in all aspects of environmental law including regulatory compliance, permitting, due diligence and litigation in the areas of air, water and waste, and also handles the defense of toxic tort cases.

King & Spalding recently advised Singapore LNG Corporation Pte. Ltd. in the development and award of a contract for the engineering, procurement and construction (EPC) of a liquefied natural gas (LNG) terminal at Jurong Island, Singapore, to Samsung C&T Corporation. The dollar amount of the transaction was not disclosed.

The budget for the Singapore LNG terminal is SGD 1.5 billion. Two-thirds of that amount, about SGD 1 billion, has been earmarked for the EPC contract. The facility will have an initial capacity of 3.5 million tons per annum (Mtpa), with provisions for doubling its capacity. The project is expected to be ready for start-up in 2013.

The King & Spalding legal team involved in the transaction, under the oversight of partner Philip R. Weems in Dubai, UAE, and partner Scott A. Greer, in Houston, Texas, was led by Atlanta, Ga.-based counsel Angus N. McFadden, with the assistance of counsel Amy M. Hollis and associates Angelica G. Alfaro and Robert B. Garner, all of whom are in the firm's Houston office.

Partners Notes

DataCert Hosted Solutions Provide Global Clients End-to-End Data Privacy Protection And Security

DataCert, Inc., the leading global provider of legal operations management solutions, announced today that its hosted solutions provide clients end-to-end security and data privacy protection, critical requirements particularly when deploying legal operations management solutions in Europe. DataCert, which entered the European market in 2005, has seen its business there grow almost 900% since then, including a number of new deals signed in 2009.

Supporting DataCert's efforts to provide its growing European client base with solutions that meet their unique regulatory requirements, Savvis, Inc., DataCert's software hosting provider, has become certified by the Safe Harbor program as adhering to the stringent European Union (EU) data privacy laws. This enables DataCert, which has been certified since 2005, to deliver comprehensive Safe Harbor-certified hosted solutions that provide global corporate legal departments with end-to-end data privacy protection with regard to data transfers between the EU and the United States. In addition to being Safe Harbor

certified, both DataCert and Savvis are SAS 70 Type II audited, providing clients end-to-end security assurance.

For more information, please contact DataCert at 800-780-3681 or e-mail nasales@datacert.com (North American inquiries) or emeasales@datacert.com (international inquiries).

DataCert, Inc. reports strong 2009 financial performance, with revenue growth for the eleventh consecutive year. A substantial increase in bookings resulting from almost \$12 million in new sales orders, including significant growth in its EMEA business, drove an over 20 percent revenue increase for the company. DataCert achieved these results while investing 30 percent of revenue back into its products and services, expanding its presence in Europe by opening its fourth office there in Zurich, and completing the acquisition of a software development, customer support, and professional services center for the legal market from Symcon Global Technologies (SGT), its former partner in Chennai, India.

Norris Attorney Jeremy Silberman Speaks On Developments In Franchise Law

Jeremy Silberman, a Member with the Bridgewater-based law firm of Norris McLaughlin & Marcus, P.A., will be the speaker at the Business Dinner Meeting of the Franchise Law Committee of the New Jersey State Bar Association (NJSBA) on Wednesday, March 17, 2010, at 6:00 PM at the New Jersey Law Center in Newark, New Jersey.

Mr. Silberman will be speaking about developments in constructive termination law and recent amendments to the New Jersey Franchise Practices Act. The Committee will discuss these issues in light of the shift in strategy by franchisors and manufacturers to reduce and eliminate exclusive territories to expand

market share. In particular, Silberman will discuss his involvement in *Main-tainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc.*, 408 N.J. Super. 461 (App. Div.), cert. denied, 200 N.J. 502 (2009), in which the court upheld a cause of action for constructive termination under the NJFPA.

He will also report on the constructive termination case pending before the U.S. Supreme Court, *Mac's Shell Service, Inc. v. Shell Oil Products Company LLC*, argued January 19, 2010. Lastly, the group will discuss the recent amendments to the New Jersey Franchise Practices Act, which was signed into law last month.