Johnson & Johnson DPA-Part I: Self-Disclosure Reduces Fine

On April 8, 2011, the Wall Street Journal (WSJ) reported that Johnson & Johnson settled certain charges related to violations of the Foreign Corrupt Practices Act (FCPA) with the Department of Justice (DOJ) and Securities and Exchange Commission (SEC). The settlement was in the mechanism of a Deferred Prosecution Agreement (DPA). Over the next two postings we will be reviewing this DPA and its implications for the FCPA compliance practitioner. In this posting we will review the allegations of criminal misconduct and the issue of self-reporting. In the second posting we will review some of specific compliance program *best practices* which Johnson & Johnson agreed to implement.

The FCPA Blog reported that the company agreed to "pay a $21.4 million penalty to resolve criminal FCPA charges with the DOJ and $48.6 million in disgorgement and prejudgment interest to settle the SEC's civil charges." Additionally, as reported in the FCPA Blog, [the Johnson & Johnson subsidiary] "DePuy International Limited settled corruption charges brought by the Serious Fraud Office [in the United Kingdom]. The company was ordered by the High Court to pay £4.8 million in a civil recovery action." So for those of you keeping score at home, Johnson & Johnson agreed to pay fines and penalties in the total amount of $77 million. For those of you scoring through the FCPA Blog, this settlement vaults the company to the FCPA Blog's vaunted Top Ten FCPA settlements of all-time list, displacing ABB Ltd., at Number 10.

The DPA between Johnson & Johnson and the DOJ is very instructive for all FCPA practitioners and provides a wealth of information on not only the specific facts of the case, but information on what the DOJ is currently viewing as the *best practices* of a FCPA compliance program and conduct which Johnson & Johnson engaged in during the investigative process which led to a dramatic reduction in the overall fine and penalty assessed against the company.

I. The Allegations

As reported in the New York Times, Johnson & Johnson had engaged in a wide ranging effort to bribe doctors in Greece through "an elaborate scheme to pay about 20 percent of the price of the company's devices to Greek surgeons." The Times article went on to report that "The company also paid bribes to Polish doctors and administrators who served on hospital committees that made purchasing decisions for medical equipment. Some of the bribes included paying for travel arrangements for doctors to attend medical conferences, a common practice throughout the industry. The company also bribed doctors in Romania who prescribed the company's drugs. The Times article reported that Robert Khuzami, director of the SEC's division of enforcement, said that the company had attempted to hide these illegal transactions "using sham contracts, off-shore companies and slush funds to cover its tracks."

In addition to these admissions of FCPA violations, Johnson & Johnson also admitted in its DPA that it had paid kickbacks to the Iraqi regime of Saddam Hussein under a United Nations oil-for-food program. These kickbacks were in the form of price overcharging and then remitting this overcharge back to the (then) Iraqi government.

II. To Self Disclose or Not Self-Disclose-It Should No Longer Be a Question

The question often arises as to whether a company should self-disclose to the DOJ or not. Over the past couple of years this has been a significant debate in the FCPA world. This debate arose long before the Dodd-Frank Whistle-Blower legislation so we will leave the discussion on the implications of that issue for another day. Over the past couple of years, we have seen companies take different approaches to self-disclosure. For instance Avon self-disclosed shortly after it received an internal whistle-blower report of alleged FPCA violations in its China operations. Hewlett-Packard (HP) apparently did not self-disclose to the DOJ or SEC any alleged possible FCPA violations emanating from its German subsidiary and those agencies did not publicly announce they were investigation HP for FCPA violations until after the WSJ broke the story.

FCPA practitioners have repeatedly asked the DOJ for specific guidance as to what will be the tangible results of self-disclosure. In the Johnson & Johnson DPA this question is clearly answered. Listed under the section "Relevant Considerations" one of the reasons the DOJ entered into the DPA is the following:

a. J&J voluntarily and timely disclosed the majority of the misconduct described in the [Criminal] Information and Statement of Facts;

So the self-disclosure was one of the reasons that the DOJ entered into the DPA, however, and perhaps more importantly, the self-disclosure brought to Johnson & Johnson a monetary benefit with a tangible reduction in its overall fine and penalty. The DPA reported a reduction by 5 points of the company's overall Culpability Score with the following:

> *(g)(1) The organization, prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time after becoming aware of the offense, reported the offense, fully cooperated, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct; -5*

It is not possible to determine from the DPA how much of the reduction was attributable to the self-disclosure and how much was attributed to the conduct thereafter. However, this precise language makes clear that the DOJ places a real value on such self-disclosures and companies should take this as a clear sign that, at the end of the day, it will be better for them to self-disclose.