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Attorneys React To SEC's FCPA Action Against Goodyear

Law360, New York (February 24, 2015, 7:13 PM ET) -- Goodyear Tire & Rubber Co. has reached a $16 million settlement with the U.S. Securities and Exchange Commissionover allegations its subsidiaries violated the Foreign Corrupt Practices Act. Here, attorneys discuss the significance of the enforcement action.

Ross A. Albert, Morris Manning & Martin LLP
“Today’s settlement demonstrates that the SEC and the DOJ are continuing to investigate and bring high-profile FCPA cases against large U.S. companies with multinational operations. From the public company perspective, the lesson here is that Goodyear reaped a substantial benefit from self-reporting these violations and for cooperating with the government, as the SEC acknowledged in its press release: 'The settlement reflects the company’s self-reporting, prompt remedial acts, and significant cooperation with the SEC’s investigation.' Companies would also do well to beef up their internal compliance and audit capabilities."

Jeffrey Alberts, Pryor Cashman LLP
“The commission’s charges against Goodyear are based on allegations that Goodyear failed to detect bribes paid by African subsidiaries, including a subsidiary that Goodyear acquired after the alleged bribery began. This substantial settlement underscores the importance of conducting thorough due diligence concerning anti-bribery policies and practices before acquiring a company that operates overseas.”

Marcus Asner, Arnold & Porter LLP
“The Goodyear enforcement action serves to highlight the serious challenges law-abiding companies face when conducting business in Africa. Even the most well-intentioned company can find itself dragged into an FCPA investigation through a local subsidiary or agent. The allegations reinforce the need to maintain a robust compliance program and strong controls, and to conduct thorough due diligence into third-party agents. The settlement itself — which was handled administratively, involved an alleged 'books and records' violation, and no admission — reinforces the value of conducting a full internal investigation and taking remedial measures once possible wrongdoing comes to light.”

Jacob S. Frenkel, Shulman Rogers Gandal Pordy & Ecker PA
“This apparently routine case has three significant SEC-FCPA program points. First, the disgorgement computation related overwhelmingly to payment of commercial bribes — that is, cash payments to employees of private companies and government-owned enterprises. The cash payments directly to government officials represented a small percentage of the bribes. Second, Goodyear divested itself of its interest in the Kenyan entity and is divesting itself of its Angolan subsidiary. That is a true 'cleansing'

of the entities that paid the bribes. Last, there is no fine; none. This highlights that early and overwhelming cooperation and remedial measures can persuade the commission as to the outcome."

Bethany Hengsbach, Sheppard Mullin Richter & Hampton LLP
"According to the SEC's cease and desist order, Goodyear was rewarded, in the form of a relatively low fine, for self-reporting misconduct and cooperating with the SEC's investigation. In addition, the order could presage an uptick in enforcement activity in Africa, which has attracted increased global investment and, in certain countries, posted impressive recent economic growth. Despite these advancements, several African countries remain high on Transparency International's Corruption Perceptions Index. As such, the order provides a clear reminder of the need to conduct appropriate pre- and post-acquisition due diligence on businesses operating in regions and industries that pose a high corruption risk."

Tom Hanusik, Crowell & Moring LLP
"The message from SEC Enforcement is that they are going to pursue commercial bribery cases just like DOJ does with the Travel Act and the SFO does with the U.K. Bribery Act. Today's settlement may also reflect a 'broken windows' approach to FCPA enforcement insofar as the SEC charges only books and records violations and does not impose a civil penalty."

Ryan Hong, Michelman & Robinson LLP
"The significance of Goodyear's $16 million payment to settle SEC charges for violating the FCPA is it highlights the benefits of cooperation. Through its subsidiaries, Goodyear was allegedly involved with paying $3.2 million in bribes in Kenya and Angola. However the SEC noted that 'Goodyear … provided significant cooperation with the commission's investigation.' In contrast, Avon Products paid a $135 million penalty to settle SEC civil and criminal charges related to $8 million in alleged illegal payments in a matter where the SEC complaint noted Avon's lack of cooperation. Marubeni Corporation stonewalled the SEC and was forced to pay $88 million for FCPA violations of bribing Indonesian officials. Three executives related to Marubeni's trading partner were personally convicted of FCPA-related crimes."

Edward T. Kang, Alston & Bird LLP
"This case should serve as a warning to multinational companies both procedurally and substantively. Procedurally, this case demonstrates the SEC's renewed commitment to bringing FCPA enforcement matters by administrative order rather than through the courts, effectively circumventing meaningful judicial review. Given the clear home court advantage of the administrative process, the SEC will likely continue to use this tool in the future. Substantively, Goodyear ultimately paid for its failure to bring these African companies under the umbrella of Goodyear's compliance program. This case is thus a reminder that companies will be held accountable for misconduct within even small, distant subsidiaries."

Lathrop Nelson, Montgomery McCracken Walker & Rhoads LLP
"Goodyear's self-reporting and cooperation appear to have staved off criminal prosecution and fines, particularly compared with other recent notable FCPA actions against Avon Products and Alcoa. It also serves as a reminder of continued vigilance in FCPA compliance. Goodyear learned of the bribery through its ethics hotline and took immediate steps to cooperate. But even then, the SEC still challenged the company's FCPA controls. This action may serve as an additional wake-up call for companies to make sure they have effective and workable FCPA compliance programs to prevent such conduct."

Mike O'Leary, Holland & Hart LLP
"Despite two fairly extensive foreign bribery schemes, it is significant that the SEC did not impose any civil penalty beyond the disgorgement of the illegal profits attributable to the bribes, and there does not appear to be a parallel DOJ criminal action."

Christopher Oprison, Akerman LLP
"The government claims Goodyear had inadequate internal controls to detect or prevent the bribes. I disagree. Goodyear is a great example of how a company helps itself by having a robust compliance program. Goodyear received an anonymous tip through its ethics hotline, conducted an effective internal investigation, self-reported to the government, and divested its interests in the offending entities — all remedial measures that go a long way toward demonstrating the company's commitment to anti-corruption. For their efforts, they received an appropriately modest punishment. This is what we as practitioners in this field preach to our clients. Stay current, know what is going on in your company, take all claims of potential misconduct seriously, and stand ready at all times to act decisively."

Steve Pelak, Holland & Hart LLP
“The cited reason for this relative leniency is Goodyear’s self-disclosure of the violations, extensive cooperation, and remediation, which continues a recent SEC enforcement trend of entering into settlements involving no or minimal civil penalties where a company has proactively self-disclosed and been similarly cooperative.”

Daniel Perry, Milbank Tweed Hadley & McCloy LLP
“The FCPA has historically been used as an enforcement tool against U.S. parent corporations where they authorized, directed or in some way controlled the activity of a foreign subsidiary engaged in bribing foreign officials. In recent years, however, the SEC adopted an increasingly broad view of parent-subsidiary liability, now charging parent corporations with anti-bribery violations based on the acts of their subsidiaries without pleading any direct involvement by the parent in those violations. Goodyear is the latest example of this trend. Using the books and records provisions contained in the FCPA, the SEC determined to charge Goodyear for conduct that appears to have been conducted by two indirect subsidiaries without the knowledge or participation of Goodyear. The conduct actually attributed to Goodyear by the SEC is worth noting. The SEC faulted Goodyear for failing to implement adequate FCPA compliance training and controls sufficient to detect or prevent bribes at two of their indirect African subsidiaries. For one of those subsidiaries, the SEC went so far as to allege that Goodyear was at fault for failing to conduct 'adequate due diligence' in order to identify the illegal activity when acquiring one of the subsidiaries.”

Thomas K. Potter III, Burr & Forman LLP
“This settlement is consistent with the commission’s announced priorities for 2015. As noted in 'SEC Enforcement: 2014 Review and 2015 Outlook,' Enforcement Director Ceresney and FCPA chief Brockmeyer said to look for another productive year of FCPA enforcement targeted at a wider array of FCPA defendants, company sizes and locations. Small to midsized companies expanding into international markets can be at greater risk for enforcement actions, as they often lack the compliance and risk-management infrastructure or experience to avoid these issues. The subject sits at the intersection of commerce, differing international norms and anti-money laundering concerns, and also relates to increased activity to pursue foreign 'kleptocracy' proceeds or assets here in the United States.”

Keith Rosen, Chadbourne & Parke LLP
"Two things are significant about this enforcement action. First, it reinforces the SEC’s emphasis on self-reporting, remedial action and cooperation. The SEC imposed disgorgement and interest costs on Goodyear, but did not require a monetary penalty as a result of the company’s cooperation. Second, the case highlights the importance of the application of rigorous internal controls on foreign subsidiaries. After an acquisition, it is critical that a company engage in vigorous post-acquisition due diligence and

impose a tailored compliance plan. As this case shows, errors can result in years of investigation costs, disgorgement and years of additional SEC reporting obligations."

Michelle Shapiro, Dentons
"Although 'only' $5 million in alleged bribes separates Goodyear from Avon, today's resolution sharply contrasts with the recent FCPA action against Avon, which required a guilty plea, $135 million payment and appointment of an independent monitor. Two valuable lessons emerge. First, Goodyear paid a much lighter penalty because, unlike in Avon, the government did not allege that the parent knew of and took steps to conceal the subsidiaries' conduct — demonstrating once again that the cover up can be worse than the 'crime.' Second, Goodyear could have avoided all of this had it done appropriately robust preacquisition due diligence and paid attention to what was going on at the offending subsidiaries."

Randy Stephens, NAVEX Global
“This is significant because it is a textbook response by a company’s compliance department to a whistleblower’s report of bribery. The whistleblower reported the bribery allegations via the ethics line. The company conducted a thorough investigation and determined a violation of its policy and the FCPA might have occurred. The company self-reported the allegations to the SEC and implemented additional corrective measures to reduce the risk of future failures. Working with the government in this fashion succeeded in eliminating any civil fines. Other companies should use this lesson to conduct a risk assessment on their own programs, especially in high-risk countries and businesses.“

John T. Zach, Boies Schiller & Flexner LLP
“In addition to demonstrating the benefits of prompt cooperation with enforcement agencies, the Goodyear case is another example of how anonymous tips and whistleblowers are generating white collar investigations. Based on Goodyear’s filings, the Kenya bribery scheme was uncovered after an anonymous call to its own ethics hotline; and the Angola scheme came from another employee tip. The SEC and DOJ are actively soliciting these sorts of tips to launch investigations, both overt and covert. Companies should take note of how Goodyear’s quick, decisive response to receiving information through its own channels was key to the successful settlement.”

--Editing by Mark Lebetkin.
