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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Marubeni — Extending FCPA's Jurisdictional Reach

Law360, New York (February 17, 2012, 1:34 PM ET) -- On Tuesday, Jan. 17, 2012, the U.S. Department of Justice filed a deferred prosecution agreement requiring Marubeni Corporation to pay \$54.6 million in criminal penalties for its participation in a conspiracy to bribe Nigerian officials in violation of the U.S. Foreign Corrupt Practices Act.[1]

The deferred prosecution agreement requires Marubeni to retain a corporate compliance consultant for two years and to cooperate with the DOJ's ongoing investigations. The criminal charges against Marubeni will be dropped after two years so long as Marubeni abides by the terms of the deferred prosecution agreement. Marubeni is the fourth non-U.S. company, and the second Japanese company, to face criminal charges in this matter. The charges against Marubeni are yet another stark reminder of the DOJ's interpretation of the FCPA's expansive jurisdictional reach.

The Bonny Island Conspiracy

The Marubeni case stems from a scheme by a four-company, multinational joint venture to bribe Nigerian officials in exchange for contracts to build liquefied natural gas facilities on Bonny Island, Nigeria.[2] The criminal information filed by the DOJ accuses Marubeni of being an agent through which bribes were paid. The members of the joint venture were Technip SA, Snamprogetti Netherlands BV, Kellogg Brown & Root Inc. ("KBR") (a Halliburton subsidiary) and JGC Corporation.

The joint venture, TSKJ, was formed in 1991 in order to bid on and complete the Bonny Island project. Between 1995 and 2004, TSKJ was awarded four contracts by Nigeria LNG Limited, a corporation formed by the Nigerian government to develop the Bonny Island project. Interestingly, only 49 percent of Nigeria LNG was owned (indirectly) by the Nigerian government. The remaining 51 percent was held by multinational oil companies. Nevertheless, officers and employees of Nigeria LNG were considered "foreign officials" for purposes of the FCPA.

In order to secure these contracts, a "steering committee" comprised of executives from each of the joint venture owners agreed to hire Jeffrey Tesler, a U.K. citizen, to arrange and pay bribes to high-level Nigerian officials. The steering committee agreed to hire Marubeni, a Japanese company headquartered in Tokyo, to arrange and pay bribes to lower-level Nigerian officials. TSKJ ultimately paid Marubeni \$51 million to use to bribe the officials. The contracts awarded to TSKJ were valued at over \$6 billion.

The Charges

TSKJ

Marubeni is only the latest company involved with the conspiracy to settle with the DOJ or the U.S. Securities and Exchange Commission, or to plead guilty to charges. In February 2009, KBR pled guilty of conspiring to violate the FCPA, as well as to substantive bribery

offenses, agreeing to pay \$402 million in criminal penalties.[3]

That same day, KBR and Halliburton also agreed to disgorge \$177 million in ill-gotten gains to the SEC.[4] In 2008, KBR's member of the steering committee, Albert Jackson Stanley, pled guilty of conspiring to violate the FCPA.[5] He is currently awaiting final sentencing.

In June 2010, the DOJ filed a deferred prosecution agreement against Technip SA, a French company headquartered in Paris and an issuer of U.S. securities.[6] Technip was charged with conspiring to violate the provisions of the FCPA applying to "issuers" (i.e., companies with regular SEC reporting requirements) and "domestic concerns" (i.e., companies with their principal place of business in the United States or that are organized under the laws of a U.S. state).

KBR, one of the conspirators, was a domestic concern, as it was a company organized and headquartered in the United States. Technip was also charged with a substantive violation of the FCPA's issuer provisions. Technip paid a \$240 million criminal fine. It also disgorged \$98 million to the SEC for violations of the FCPA's anti-bribery, books and records, and internal controls provisions.[7]

In July 2010, the DOJ filed a deferred prosecution agreement against Snamprogetti Netherlands BV, a Dutch corporation headquartered in Amsterdam.[8] Snamprogetti was charged with conspiracy to violate and aiding and abetting violations of the FCPA provisions applying to domestic concerns. Snamprogetti also paid \$240 million in criminal penalties. Together with its parent, Eni SpA (which was an issuer of U.S. securities), Snamprogetti also settled with the SEC, disgorging an additional \$125 million.[9]

The last of the joint venture owners, JGC Corporation, a Japanese company headquartered in Yokohama, Japan, entered into a deferred prosecution agreement in April 2011. JGC was also charged with conspiracy and aiding and abetting and paid a \$218.8 million criminal fine.[10]

Individual Agents

Individuals involved with the conspiracy have been charged as well. As noted above, Albert Stanley, KBR's representative on the steering committee, pled guilty to conspiracy in 2008. Jeffrey Tesler, the agent retained by TSKJ to pay bribes to high-level government officials, pled guilty to conspiracy and to a substantive violation of the FCPA in March 2011.

A U.K. citizen resident in London, Tesler was extradited to the United States to face the charges. He was indicted as an agent of an "issuer," "domestic concern" and "person" under the FCPA. Wojciech Chodan, a sales vice president and consultant affiliated with KBR, was also extradited from the United Kingdom, after which he pled guilty of conspiracy to violate the FCPA. He and Tesler are both awaiting sentencing.

Marubeni

Marubeni was charged with conspiracy to violate the FCPA's issuer and domestic concern provisions, as well as with aiding and abetting KBR to violate the domestic concern provisions. Although the DOJ charged Marubeni with conspiracy and aiding and abetting, there were also grounds on which to charge Marubeni with a direct violation of the provisions applying to "any person other than an issuer" or domestic concern.

Marubeni is alleged to have met with Stanley in Houston to discuss Marubeni's contracts with TSKJ and associated fees. This alleged conduct, if true, would satisfy the FCPA's application to "any [] act in furtherance of [a] payment" "while in the territory of the United States." [11] Other alleged conduct with a connection to the U.S. included Marubeni's having sent a letter by fax to Stanley in Houston, in addition to Marubeni's co-conspirators'

activities in the United States.

A Warning?

It is not possible to say with certainty why Marubeni was charged with conspiracy and aiding and abetting with respect to the domestic concern provisions, rather than with directly violating the "any person" provisions, which apply to conduct by anyone, regardless of nationality. One possible rationale, however, is that the DOJ is attempting to expand the FCPA's jurisdictional reach through the use of aiding and abetting.

The FCPA prohibits U.S. persons from engaging in corrupt activities outside of the United States, even if the conduct has no other connection to the U.S. [12] Non-U.S. companies must use a "means or instrumentality of interstate commerce" — such as an email to or from the U.S. — in order to be liable under the FCPA's anti-bribery provisions, even if they are also issuers. [13] Non-U.S. companies that are not issuers must take some act while in the territory of the United States in order to be liable.

Nevertheless, the DOJ charged Marubeni specifically with aiding and abetting "KBR's willful and corrupt acts outside the United States." [14] The DOJ may be sending a message to non-U.S. companies that even if they take no action in the United States, and even if their U.S. co-conspirators take no action in the United States, the DOJ may still charge them with aiding and abetting the wholly extraterritorial conduct of those co-conspirators.

--By Daniel P. Levison and Jarod Taylor, Morrison & Foerster LLP

Daniel Levison is a partner in Morrison & Foerster's Tokyo office. Jarod Taylor is an associate in the firm's New York office.

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[1] DOJ Release No. 12-060, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), available at <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html>.

[2] Criminal Information, United States v. Marubeni Corp., Case No. 4:12-cr-00022 (S.D. Tex. Jan. 17, 2012).

[3] DOJ Release No. 09-112, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>.

[4] SEC Release 2009-23, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), available at <http://sec.gov/news/press/2009/2009-23.htm>.

[5] SEC Litigation Release No. 20700, SEC Charges Former CEO of Kellogg, Brown & Root, Inc. with Foreign Bribery (Sept. 3, 2008), available at <http://www.sec.gov/litigation/litreleases/2008/lr20700.htm>.

[6] DOJ Release 10-751, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>.

[7] SEC Release 2010-110, Technip to Pay \$338 Million to Settle SEC and DOJ Charges; Brings Total Sanctions Against Joint Venture Partners to \$917 Million (June 28, 2010), available at <http://www.sec.gov/news/press/2010/2010-110.htm>.

[8] DOJ Release 10-780, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010), available at <http://www.justice.gov/opa/pr/2010/July/10-crm-780.html>.

[9] SEC Litigation Release No. 21588, Securities and Exchange Commission v. ENI, S.p.A. and Snamprogetti Netherlands, B.V., Case No. 4:10-cv-02414, S.D. Tex. (Houston) (July 7, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21588.htm>.

[10] DOJ Release 11-431, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011), available at <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html>.

[11] 15 U.S.C. § 78dd-3(a).

[12] 15 U.S.C. § 78dd-2(i).

[13] Compare 15 U.S.C. § 78dd-1(a) with 15 U.S.C. § 78dd-1(g).

[14] Criminal Information ¶ 23, United States v. Marubeni Corp., Case No. 4:12-cr-00022 (S.D. Tex. Jan. 17, 2012).