Editor-At-Large
Jason W. Parsont

THE CLS BLUE SKY BLOG
COLUMBIA LAW SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS

Editorial Board
John C. Coffee, Jr.
Edward F. Greene
Robert J. Jackson, Jr.

Wachtell Lipton Discusses the SEC and "Exceptional" Cooperation

By David A. Katz, Wayne M. Carlin and David B. Anders April 26, 2013

Earlier this week, the SEC announced that it had entered into a non-prosecution agreement (NPA) with Ralph Lauren Corporation to resolve an investigation under the Foreign Corrupt Practices Act (FCPA). While the Department of Justice also announced that it had entered into an NPA with Ralph Lauren, it is the SEC agreement that is most notable. This agreement, only the fourth publicly reported NPA that the SEC has entered since it announced that it would begin using such agreements – and the first such agreement in an FCPA case – illustrates the potential benefits of cooperation.

The SEC's press release explains that employees of a Ralph Lauren subsidiary bribed government and customs officials in Argentina in order to import the company's products without necessary paperwork and to avoid mandated inspections. In connection with the SEC's NPA, the company agreed to pay disgorgement in the amount of $593,000 and $141,845.79 in interest. More significantly, the SEC's press release goes to great lengths in describing the agency's rationale in granting Ralph Lauren an NPA instead of charging the company in an enforcement action. The press release details the steps taken by Ralph Lauren that, in the SEC's view, amounted to "exceptional" cooperation.

According to the SEC, the company discovered the misconduct during an internal review designed to improve internal controls and compliance efforts, which included FCPA training in Argentina. Within two weeks of the discovery, Ralph Lauren reported the misconduct to the SEC. Thereafter, the company voluntarily and expeditiously produced documents to the SEC. Ralph Lauren provided English translations for documents; provided summaries of witness interviews conducted overseas; and made overseas witnesses available for SEC interviews in the U.S. The company also implemented significant remedial measures, including adopting new training; terminating both the employees involved in the wrongdoing and the related business arrangements; strengthening internal controls and due diligence procedures; and conducting a risk assessment of its operations worldwide. While each case will be unique, the SEC's transparency provides companies with an indication of the steps that may be sufficient to persuade the SEC to accept a resolution short of an enforcement action.

Ralph Lauren's separate NPA with DOJ included a monetary penalty of $882,000 as well as a 16-paragraph statement of facts admitted by Ralph Lauren. The SEC's willingness to enter into an NPA to resolve an FCPA investigation is a welcome development. But it bears noting that – in view of the NPA with DOJ – the overall resolution here also encompassed a financial penalty in an amount greater than the company's ill-gotten gains plus interest, as well as admissions to facts sufficient to establish liability. While the case is thus a positive step in the SEC's efforts to show that cooperation will be rewarded, the reward will be more meaningful if it is in the future extended in a case in which the "exceptional" cooperator is not also making a punitive financial payment and effectively admitting to liability in a parallel proceeding. The SEC's new leadership, Chairman Mary Jo White and Co-Directors of Enforcement George Canellos and Andrew Ceresney, can be expected to maintain an intense level of SEC enforcement activity. As former federal prosecutors, all three also have a ready familiarity with the use of NPAs and deferred prosecution agreements. It is to be hoped that they will be alert to opportunities to use these forms of resolution to provide meaningful rewards for significant cooperation.