



SECURITIES LITIGATION, GOVERNMENT ENFORCEMENT AND WHITE COLLAR DEFENSE UPDATE | AUGUST 21, 2009

TAKING A NEW TACK, SEC CHARGES CORPORATE OFFICERS INDIVIDUALLY FOR FCPA VIOLATIONS OF OTHER EMPLOYEES

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A recent settled enforcement action filed by the Securities and Exchange Commission (SEC) on July 31, 2009, alleging violations of both the Foreign Corrupt Practices Act (FCPA) and federal securities laws, may have far-reaching implications for officers of United States companies with executive responsibility for overseas business activities. In its complaint, the SEC alleged that the Brazilian subsidiary of Utah-based Nature's Sunshine Products, Inc., a manufacturer of nutritional and personal care products, paid \$1 million in cash to secure permission to import products to Brazil. The complaint also named Doug Faggioli and Craig Huff, the company's CEO and CFO. All parties settled with the SEC; Faggioli and Huff each agreed to pay a civil penalty of \$25,000, and Nature's Sunshine agreed to pay a penalty of \$600,000.

The significance of this enforcement action is that the SEC did not allege that the individuals had either personal knowledge of or involvement in any violation of the FCPA. Instead, under Section 20(a) of the Securities Exchange Act of 1934, the SEC alleged that by virtue of their positions in the company, the two individuals were responsible for preventing employees under their control from violating the law. Under Section 20(a), an individual can be held liable for violations committed by persons under his control. Thereby, the SEC alleged that Faggioli and Huff were responsible for the unlawful actions of subordinate employees even though they had no role in or knowledge of the violations.

This Section 20(a) claim of control person liability is the first time the SEC has used this legal theory to encompass violations of the FCPA. Although not tested through judicial ruling, this new theory of recovery significantly expands the scope of potential enforcement actions against individuals and makes the SEC a more prominent player in governmental enforcement of FCPA violations. In contrast, the Department of Justice (DOJ) is often hindered in prosecuting FCPA violations against an individual by the necessity of showing that the individual had knowledge of or participated in improper activity. Assuming that the theory is upheld when tested by judicial review, the use of Section 20(a) gives the SEC more flexibility to pursue individuals based on their corporate position.

The takeaway lesson from the SEC's complaint is that corporate officers must be increasingly vigilant in ensuring that all employees and subordinates comply with the FCPA. The onus on every corporate officer with oversight responsibility is to ensure that his or her company implements a robust FCPA compliance program, including regular training, effective internal controls, and careful monitoring of agent and other third-party relationships.

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Howrey LLP's SGW Group will circulate the next issue of *The Defender*, its quarterly newsletter, in September. The upcoming issue will include an overview and discussion of a number of recent FCPA developments.

FOR FURTHER INFORMATION:

For further information on this topic or other issues involving Securities Litigation, Government Enforcement and White Collar Defense, please contact one of the attorneys below, or any Howrey attorney with whom you have an existing relationship.

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