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## Writing the Facilitating Payments Exception Out of the FCPA

### From the Experts

*David Krakoff, Lauren Randell and Paige Ammons, Business Crimes Bulletin*

Last summer, a lawsuit brought by the Securities and Exchange Commission (SEC) alleging Foreign Corrupt Practices Act (FCPA) violations against two individuals related to Noble Corporation, a global oil and gas drilling services company, nearly went to trial in federal court in Texas. *SEC v. Jackson and Ruehlen*, No. 12-cv-563 (S.D. Tex.). (Note: The authors represented Mr. Jackson in this case. The views expressed herein are theirs alone.) As one of the only civil FCPA cases to proceed to that stage of litigation, the case provided unique insights into the SEC's interpretation of key provisions of the FCPA. The case ultimately settled on very favorable terms for the individuals, but the SEC's position on the facilitating payments exception to the FCPA was a notable departure from its own stated guidance and may herald a renewed attempt by the SEC to further narrow the exception to the point of irrelevance.

### Summary of the Litigation and Settlements

The SEC's case arose out of the long-running Panalpina investigation into Nigerian oil and gas drillers, which began in July 2007, and Noble Corporation's subse-



quent voluntary disclosure and settlement with the SEC and Department of Justice (DOJ) in 2010. A year and a half after the company's settlement, the SEC filed suit against Noble's former CEO and CFO, and its country manager in Nigeria. The suit alleged that they violated the FCPA by approving bribes to Nigerian government officials in connection with temporary import permits for its rigs; falsifying internal accounting records; and circumventing internal controls, among other counts.

For the next two and a half years, the individuals aggressively defended their case against the SEC in pre-trial motions practice and full discovery. First, the defendants narrowed the case on statute of limitations grounds through a successful motion to dismiss the

Complaint. See Joint Stipulation and Motion, Dkt 104; see also *Gabelli v. SEC*, 568 U.S. 133 (2013). Then, at the end of discovery, the SEC voluntarily dismissed its claims regarding the adequacy of Noble's internal controls. See SEC's Unopposed Motion for Partial Voluntary Dismissal with Prejudice, Dkt 134. Finally, District Court Judge Keith Ellison denied all parties' motions for summary judgment, including a motion by the SEC that would have precluded the defendants from invoking the facilitating-payments exception at trial.

Just a week before trial was set to begin, the SEC reached settlements with both defendants. The settlements did not include any bribery violations, nor did they include any payment of money

by either individual or any restrictions on their future employment opportunities.

### **The Facilitating-Payments Exception Generally, and the SEC and DOJ's Existing Interpretation**

The facilitating-payments exception to the FCPA provides an exemption for payments to foreign officials "the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official. . . ." 15 U.S.C § 78dd-1(b).

In 2012, the Criminal Division of the U.S. Department of Justice (DOJ) and the Enforcement Division of the SEC published "A Resource Guide to the U.S. Foreign Corrupt Practices Act," which outlined the agencies' guidance on various facets of the FCPA and reinforced the agencies' limited view of the scope of the exception for facilitating payments. See A Resource Guide to the U.S. Foreign Corrupt Practices Act, Nov. 14, 2012, available at <http://1.usa.gov/1Cgyt0z> ("Resource Guide"). Although the Resource Guide recognized that the facilitating-payments exception existed in the statute, the Resource Guide cited the U.S. Court of Appeals for the Fifth Circuit's *Kay* decision to assert that the exception "does not include acts that are within an official's discretion or that would constitute misuse of an official's office." Resource Guide at 25; see also *U.S. v. Kay*, 359 F.3d 738, 751 (5th Cir. 2004).

Because facilitating payments have rarely been addressed in litigated FCPA cases, the Resource Guide also cited to certain past settlements as examples of payments that did not qualify as facilitating payments. For example, the Resource Guide stated that "an Oklahoma-based corporation violated the FCPA when its subsidiary paid Argentine customs officials approximately \$166,000 to secure customs clearance for equipment and materials that lacked required certifica-

tions or could not be imported under local law and to pay a lower-than-applicable duty rate." Resource Guide at 25. Interestingly, though, the underlying settlement papers in that case — involving Helmerich & Payne — suggest that the payments may indeed have fallen within the facilitating-payment exception, and that the Resource Guide is espousing a very narrow definition of a facilitating payment. For example, the underlying SEC cease-and-desist order in the Helmerich & Payne case stated that the "payments were made with the purpose and effect of avoiding potential delays typically associated with the international transport of drilling parts." Exchange Act Release No. 60400, 2009 WL 2341649 at \*1 (July 30, 2009). Likewise, the company's non-prosecution agreement with the DOJ stated that the payments were made "to facilitate the performance of routine governmental action." DOJ Non-Prosecution Agreement with Helmerich & Payne, available at <http://1.usa.gov/159UI0H>.

Notably, even the Resource Guide emphasizes that whether a payment qualifies as a facilitating payment depends on the *purpose* or the *intent* of the payor: "[T]he facilitating payments exception focuses on the *purpose* of the payment rather than its value." Resource Guide at 25 (emphasis in original). That interpretation makes sense, given that the language of the exception specifically includes the words, " . . . the purpose of which is to expedite or to secure the performance of a routine governmental action." 15 U.S.C § 78dd-1(b) (emphasis added). Unfortunately, the SEC now appears to have abandoned its own Resource Guide.

### **The SEC's Reading of the Exception in the *Noble* Litigation**

The SEC's interpretation of the facilitating-payments exception in the *Noble*

litigation was even narrower than the dim view of the exception taken in the Resource Guide. Taken to its logical end, the SEC's new interpretation would have effectively read the exception out of the FCPA.

The *Noble* defendants argued that the payments they had approved were facilitating payments because their purpose was only to expedite the issuance of routine permits to which *Noble* was entitled under local law. In its motion for partial summary judgment, the SEC asked the court to find as a matter of law that the facilitating-payments exception did not apply to the payments in the case. The SEC's argument, though, did not focus on the purpose of the payments, as stated in the Resource Guide and the statute itself. Instead, the SEC argued that a court assessing whether the facilitating-payment exception applies in a particular case must rely on the foreign law surrounding the sought-after governmental actions. In this case, according to the SEC, the issue was whether the government actions were "discretionary" under Nigerian law, not the defendants' purpose in making the payments. SEC Motion for Partial Summary Judgment at 2.

The SEC argued that "the touchstone of a facilitating payment is a lack of discretion on the part of government officials to deny the outcome sought by the payment." SEC Motion for Partial Summary Judgment at 25. In effect, then, the SEC abandoned its position in the Resource Guide — that the payor's subjective "purpose" is the key question — in favor of a purportedly objective inquiry about foreign law.

The SEC's reading of the exception, focusing on whether the foreign official actually had discretion under foreign law, would effectively eviscerate the facilitating-payment exception by reading out the 'intent or purpose' element. No com-

pany or individual could pay a facilitating payment without extensive foreign law research — including into unpublished agency guidance, as in the *Noble* case — to rule out the possibility that foreign law made some aspect of the official's duty discretionary. Facing that burden, prudent companies would have no choice but to eliminate facilitating payments altogether. It is clear, however, that Congress did not intend for the application of the facilitating-payments exception to turn on determinations of foreign law. Where Congress intended an inquiry into the actual law of the foreign jurisdiction, as in the FCPA's affirmative defense regarding local law, Congress stated that inquiry clearly. 15 U.S.C. § 78dd-1(c)(1) (establishing an affirmative defense to the FCPA for payments that are "lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country"). By contrast, the facilitating-payment exception refers only to the payor's purpose

in making the payment.

It also makes sense that the facilitating-payment exception would not depend on a determination of foreign law. Foreign law is not always clear, as was the case here, where the SEC relied upon a questionable expert and unpublished Nigerian governmental agency manuals to purportedly establish the content of Nigerian law. Requiring a country-by-country determination of law would also result in disparate treatment of similar payments made for similar purposes by the same individuals, based only on jurisdiction.

### Unanswered Questions

Due to the settlements, the court never had the opportunity to rule on the fate of the FCPA's facilitating-payments exception under the SEC's newfound interpretation. But the SEC's position on this issue signals a shift in policy toward the practical elimination of the exception. If the SEC continues down the road established in this case, it will be interesting to examine

whether courts accept the SEC's position eliminating the exception. However, since most FCPA cases are not litigated, the SEC may seek to push its novel interpretation into law, without approval by the courts, by including it in settlement agreements going forward. Counsel should be aware of this effort and, where possible and appropriate, resist the SEC's efforts to rewrite the law.

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