Legal Backgrounder

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Anheuser-Busch InBev's Implications for FCPA and Dodd-Frank Act Compliance

by Lucinda A. Low

On September 28, 2016, the US Securities and Exchange Commission (SEC or the Commission) released a settlement with Anheuser-Busch InBev SA/NV involving its business dealings in India.[1] The fines and penalties accompanying the settlement (approximately $6 million in total)[2] do not reach the levels of other cases in 2016. However, the case is significant in the broader context of Foreign Corrupt Practices Act (FCPA) enforcement against parent companies for conduct by their foreign subsidiaries and affiliates and of whistleblower-protection compliance required by the Dodd-Frank Act. This Legal Backgrounder will describe the conduct at issue and SEC's charges. Then it will discuss the settlement's implications for corporate compliance, particularly as it concerns SEC's ever-expanding interpretation of an issuer's internal-controls obligations.

The FCPA Conduct at Issue

Anheuser-Busch InBev SA/NV (AB InBev or the Company) resulted from a 2008 combination of US-based Anheuser-Busch and Belgian-based InBev. Prior to the merger, Anheuser-Busch did business in India through a subsidiary, Crown Beers IPL (Crown), while InBev did business through a joint venture, InBev India LPL (IILPL). Post-merger, IILPL took over the marketing and distribution of beers produced by Crown, which Crown had previously marketed directly.

During the relevant period, 2009-2012, Crown was consolidated in the books and records of AB InBev. IILPL was a minority joint venture, owned 49% by AB InBev and 51% by an unrelated Indian company, RJ Corp. The board was equally split between the two shareholders, but RJ Corp. appointed the chairman, who had a tie-breaking vote. RJ Corp. also appointed virtually all of the joint venture's management, with the exception of the chief financial officer.[3]

IILPL hired third-party sales promoters in the Indian states of Andhra Pradesh and Tamil Nadu to assist it in the marketing and sale of beer, which in those states is controlled by state-owned enterprises. One of those third parties was also involved in securing approval from the Andhra Pradesh authorities for

[1] *In the Matter of Anheuser-Busch InBev SA/NV, Sec. Exch. Act Rel. No. 78957, Accounting and Audit Enforcement Rel. No. 3808, Adm. Proc. File No. 3-17586* (Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order) (hereinafter, the Order).
[2] This total is comprised of disgorgement of $2,712,955, prejudgment interest of $292,381 and a civil penalty of $3,002,955.
[3] From 2011-early 2014, the Order notes that Crown's in-house counsel also acted as IILPL's in-house counsel. Order, ¶ 5.

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extra brewing hours for Crown. No advance due diligence was done on these third parties, nor were any formal contracts entered into at the time they were first engaged.[4] According to the SEC Order, the third parties made improper payments to state authorities in order to secure these benefits.

Some of the expenses these third parties incurred (including expenses later determined to include improper payments) were invoiced to Crown for reimbursement and were paid by Crown. Crown recorded the expenses as legitimate marketing and promotional expenditures.

The Whistleblower Issues

The joint venture began to experience compliance difficulties as early as 2009. AB InBev received an internal complaint regarding IILPL at that time, which included concerns as to one of the promoters. In response, the Company accelerated an already-planned internal audit of IILPL for 2010. That audit scrutinized IILPL and found certain deficiencies, but it did not review the promoter. The Order notes that AB InBev did not immediately remedy the deficiencies it discovered.

The whistleblower—a Crown employee—related specific allegations to his employer about the promoters during 2010-2011. Crown terminated him in early 2012, at which time he and an AB InBev subsidiary that was his direct employer entered into a separation agreement resolving certain employment-law claims relating to his termination. The separation agreement included a broad but not atypical confidentiality clause that subjected him to significant penalties for breach of that provision, with no exception for disclosures to the government. In the wake of that agreement, the whistleblower—who unbeknownst to the company had been in communication with SEC—ceased those communications.

The Settlement

SEC charged AB InBev with violations of the FCPA's books-and-records and internal-controls provisions. No anti-bribery violation was charged, possibly because the conduct involved foreign entities and did not implicate the FCPA's anti-bribery jurisdiction. The Commission also charged the Company with violating Rule 21F-17(a), which SEC adopted as part of its implementation of Dodd-Frank. That rule provides:

> No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications.

SEC viewed the separation agreement as impeding the Crown employee from communicating directly with the Commission staff.

In addition to the Cease-and-Desist Order, and the monetary sanctions noted earlier, the settlement obliged the Company to cooperate with and report to the Commission for a two-year period. It also required the Company to reach out to certain former employees and provide them with a copy of the Order and apprise them of the fact that the Company does not prohibit their contacting government agencies regarding possible violations of law.[5]

[4] The Order describes some post-hiring due diligence performed on one of the third parties and backdated, and the formalization of a contract, also after the fact. Order, ¶¶ 11, 18-19.
[5] Order, ¶¶ F. and G.

Compliance Implications of the Case

Whistleblower-Protection Implications. SEC's Order does not address whether the Company, in entering into the separation agreement with its disclosure restrictions, had a specific intent to chill the whistleblower's communications with the Commission.[6] Although the rule's "action to impede" language implies the need to prove purposeful impedimentary action, SEC seems to have read out any intent element and to have focused simply on the chilling effect of the agreement. While perhaps not surprising, this broad reading suggests SEC intends to vigorously police company practices for any possible inhibiting effects.

In the wake of this case, companies that issue securities should review their standard employment-settlement agreements (including those used by their consolidated subsidiaries and affiliates) to ensure that they cannot be construed as violating Section 21F and its implementing regulations. While confidentiality restrictions may still be enforced, adding a clause specifically recognizing an individual's right to report violations to the government despite such restrictions is critical. The Order notes that AB InBev amended its separation agreements in 2015 to add the following language:

> I understand and acknowledge that notwithstanding any other provision of this Agreement, I am not prohibited or in any way restricted from reporting possible violations of law to a governmental agency or entity, and I am not required to inform the Company if I make such reports.[7]

This language, covering all violations of law, not just the securities laws, and the regulations of any government agency, is broader than the scope of Section 21F and its implementing regulations, but it provides room to cover other potentially relevant whistleblower-protection regimes.

Although not an issue in the AB InBev settlement, companies conducting internal investigations should also ensure that their *Upjohn* warnings cannot be faulted for inhibiting disclosure. Further, companies must be mindful of the prohibitions on whistleblower retaliation in Dodd-Frank and the Sarbanes-Oxley Act.

FCPA-Compliance Implications. This case shows how SEC is continuing to expand its interpretation of the responsibilities imposed by the FCPA's accounting provisions. It is one of only a few involving a minority-owned joint venture. Notably, however, SEC did not train its sights on the joint-venture entity, which would have required it to grapple with the FCPA's lesser accounting compliance responsibilities for issuers vis-à-vis their minority-owned affiliates.[8] Rather, it focused on the conduct of Crown, a consolidated, wholly-owned subsidiary, which is fully subject to the issuer's accounting obligations. SEC held Crown responsible for policing the conduct of the joint venture in its dealings with third parties.

While SEC's theory of those violations is not set out in detail, it effectively imposed strict liability on the issuer for Crown's failure to adequately vet the activities (including the expense-reimbursement requests) of the joint venture and its improper booking.

The internal-controls implications are particularly noteworthy. The Order criticizes Crown for not ensuring that the joint venture had a contract in place with the promoters and for not ensuring that due

[6] It does note that similar language appeared in other such agreements used by the Company, suggesting it was a standard provision.
[7] Order, ¶ 33.
[8] The FCPA requires issuers owning 50% or less of an entity only to use good-faith efforts to cause the affiliate to comply with the internal-controls provisions. 15 U.S.C. § 78m(b)(6).

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diligence was done on the promoters.[9] The internal-controls violations were characterized as Crown's, not the joint venture's.[10] The Order said nothing about whether the issuer had met its good-faith obligation under the FCPA to ensure that the joint venture had adequate internal controls.

Importantly, Crown's payments to the joint venture were specific expense reimbursements, rather than more general capital contributions. Moreover, the conduct involved the use of third parties, a well-known FCPA risk area. Still, they were one step removed from the usual third-party liability scenario.

Where funding is provided by a shareholder for more general operating purposes, it would presumably be more difficult for SEC to establish a books-and-records violation on the part of the funder absent some red flags regarding the use of the funding. SEC will, however, still have an expectation of good-faith efforts regarding the joint venture's controls, which the Commission interprets as going beyond internal accounting controls and extending to the entirety of the entity's compliance program.[11] Companies involved in joint ventures, even those with only a minority stake, should therefore ensure that they properly oversee the venture's funding and expense reimbursement, in addition to ensuring that the joint venture develops an appropriate compliance program. But even that may not be enough. The AB InBev Order suggests that SEC viewed Crown as having not just a general obligation to institute a program, but specific due-diligence and other compliance obligations with respect to particular third-party transactions of the joint venture, a separate entity. The close connection between the joint venture's business and Crown's business may have influenced SEC's decision, but that is not clear from the Order. Notably, AB InBev ultimately terminated its involvement in the joint venture (which was dissolved), bringing fully in house all of the functions it previously performed.

Finally, the case highlights the importance to the terms of resolution of timely and fulsome remediation, an element Department of Justice enforcement authorities have recently highlighted in public statements.[12] The Order stresses the negative implications of the Company's failure to take timely corrective action. For instance, the Company was slow in responding to the 2010 audit and did not act quickly once it learned of the joint venture's plans to destroy documents. SEC also found the Company was not sufficiently cooperative and noted that once it discovered potential violations, AB InBev failed to self-report them. These deficiencies likely motivated SEC to include ongoing cooperation and reporting requirements in the Order.

Conclusion

The AB InBev case is an important indicator of the SEC's attitude to whistleblower protection in the wake of Dodd-Frank. Companies that qualify as "issuers" should carefully review their agreements and other practices to ensure they do not even inadvertently create impediments to reporting.

The case also continues a recent trend of aggressively interpreting the scope of an issuer's internal-controls and books-and-records responsibilities. Companies that have viewed their compliance responsibilities to a minority-owned, non-controlled affiliate as having been discharged by undertaking a good-faith effort to impose a compliance program should think again about the extent of their responsibilities toward such an affiliate in the wake of this case.

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[9] Order, ¶¶ 14, 20.

[10] *Id.* ¶ 39.

[11] FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act, *available at* https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

[12] Remarks of Andrew Weissman, Chief, Fraud Section, Criminal Division, Department of Justice, Dec. 1, 2016, ACI FCPA Conference, Washington, DC, *available at* http://globalinvestigationsreview.com/article/1078309/weissmann-companies-failing-to-get-the-message-on-remediation.

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