

## Profit Counting: The Pfizer FCPA Settlement

*Law360, New York (August 27, 2012, 12:48 PM ET)* -- On Aug. 8, 2012, the U.S. Department of Justice and the U.S. Securities and Exchange Commission announced agreements with the drug manufacturer Pfizer Inc. to settle allegations that a Pfizer subsidiary had paid bribes to non-U.S. doctors and health care system personnel in exchange for prescribing Pfizer products.

Pfizer is a global pharmaceutical and consumer product company headquartered in New York. It is listed on the New York Stock Exchange. The company's activities were alleged to violate the U.S. Foreign Corrupt Practices Act.

The SEC and DOJ settlements provide some insight into how the two enforcement agencies might view the same underlying conduct from different legal perspectives, including the differing ways the two agencies look at profits from a defendant's alleged bribes.

### The DOJ Settlement

The DOJ brought an action against Pfizer's indirectly held subsidiary Pfizer H.C.P. Corporation for payments made to "Foreign officials" in Bulgaria, Croatia, Kazakhstan and Russia, which included physicians, pharmacologists and government officials. Among other things, the DOJ alleged that doctors were paid by the number of prescriptions they wrote for Pfizer products. The Pfizer employees also allegedly falsely booked the transactions using creative billing codes, such as "Professional Services — Non Consultant."

The DOJ estimated that Pfizer made \$7 million in profits for transactions related to \$2 million in bribes. To settle those allegations, Pfizer entered into a deferred prosecution agreement with the DOJ in which it agreed to pay \$15 million in criminal fines. As in many past cases, Pfizer agreed to adopt enhanced compliance obligations for the duration of the deferred prosecution agreement, which is just over two years.

In imposing the terms of the agreement, the DOJ cited Pfizer Inc.'s "extraordinary cooperation" with the DOJ and the SEC. According to the DOJ, Pfizer first brought the facts to the government's attention in a 2004 voluntary self disclosure, undertook "early and extensive" remedial efforts, and agreed to maintain strong compliance procedures in the future. Based on these factors and others, the DOJ describes the \$15 million criminal fine as a "downward departure" from the fine range of \$22.8 million to \$45.6 million it calculated under the U.S. Sentencing Guidelines.

## The SEC Settlement

Because Pfizer is listed on the New York Stock Exchange, it qualifies as an “issuer” under the FCPA, and is thus subject to the jurisdiction of the SEC in addition to that of the DOJ. Interestingly, the SEC settlement is more expansive than the DOJ settlement in almost every way. The SEC alleged that improper payments were made to foreign officials in Bulgaria, China, Croatia, the Czech Republic, Italy, Kazakhstan, Russia and Serbia. The China payments included hospitality, cash, gifts, and international travel for doctors at state-run hospitals, including invitations to “club” events. The Czech payments included a sightseeing visit to Australia to visit a Pfizer manufacturing facility that included layovers and free time in Australia, as well as weekends at ski resorts. Cash payments and travel were also given to Italian doctors.

In addition to charges against Pfizer Inc., the SEC brought charges against Wyeth LLC, acquired by Pfizer in 2009, for its own alleged payments to government doctors in order to increase prescriptions in China, Indonesia and Pakistan.

In its agreement with the SEC, Pfizer consented to pay more than \$16 million in disgorgement and prejudgment interest of more than \$10 million. In addition, Wyeth agreed to pay \$17 million in disgorgement and prejudgment interest of \$1.6 million.

## Analysis

The U.S. government has brought several cases against companies for payments made to non-U.S. doctors, including the recent Biomet settlement. In light of those cases, the substance of the charges against Pfizer and Wyeth follow a strong precedent. Further, with a number of settlements completed and other ongoing investigations reported in public filings, it appears that the government will continue to pursue such cases.

Apart from the substance, the most striking aspect of these cases may be the differences in how the two agencies treated profits: Pfizer disgorged \$16 million to the SEC in profits, whereas the DOJ used \$7 million as the amount of Pfizer’s profit in calculating its penalty range.

One difference is that the two agencies apply a different standard of proof: The SEC must apply a “preponderance of the evidence” standard, whereas the DOJ applies a “beyond a reasonable doubt” standard. One side effect of the lower SEC evidentiary standard is that it allows the SEC to cover a wider swath of conduct, including conduct in countries that the DOJ may decline to charge for lack of evidence of criminal intent or other elements of the crime. More conduct ultimately results in more profits, and a higher disgorgement figure under the SEC’s civil “preponderance of evidence” standard.

Also implicit in the SEC settlement, however, is the fact that Pfizer not only paid to settle allegations related to conduct in China, the Czech Republic, Italy and Serbia, but also to investigate allegations related to conduct in those three countries. While any investigation has to be tempered by prosecutorial discretion, the lower evidentiary bar combined with the international scope of the statute provides the SEC with a potentially more global reach than that of the DOJ. That global reach might help to explain why a case that was voluntarily self-disclosed in 2004 is only being brought to conclusion eight years later.

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