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Recent FCPA Disclosure Highlights Risks at the U.S.-Mexico Border and Potential Agribusiness Probe

As 2018 came to an end, a voluntary disclosure to the U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) by U.S.-based agribusiness, CHS, Inc. (“CHS”), of potential violations of the Foreign Corrupt Practices Act (“FCPA”) should be a warning for other companies in the agribusiness that the government will certainly be taking a closer look at the industry, especially in light of the utilization of local customs agents. Companies in the agricultural industry would be well served to examine their anti-corruption policies and processes, as well as their relationships with custom agents and freight forwarders.

Regardless of one’s political affiliation, recent events in the news regarding borders should serve as a reminder of the anti-corruption risks companies continue to face as they seek to import and/or export their product across international borders without controversy. Indeed, last November, U.S.-based agribusiness, CHS, revealed in its 10-K potential violations of the FCPA related to a small number of reimbursements the company made to Mexican customs agents in the 2014-2015 time period for payments to Mexican customs officials in connection with inspections of grain crossing the border by railcar. CHS indicated in its filing that it is “fully cooperating with the government,...which assistance includes investigating other areas of potential interest to the government.”

While a few months have passed, this disclosure is significant for two reasons: (1) it’s a reminder that companies should always closely monitor their compliance efforts with respect to transporting products across international borders, and (2) it may prompt the DOJ to take

a closer look at how other companies in this industry import or export their products, an “industry sweep.”

As experience has shown, once one company within a certain industry makes a voluntary disclosure, the DOJ tends to take a closer look at how other companies in that industry address similar issues. This is true for three reasons: (1) the DOJ believes that if one company must pay bribes to officials in a market to obtain favorable treatment, others in that industry may likely do so as well, (2) during the prosecution of that specific company, the DOJ develops a knowledge of how the bribes are paid, which they can apply to other investigations relating to that industry more generally, and (3) when a company is cooperating for a favorable result from the DOJ, it is not uncommon for the DOJ to obtain documents, including e-mails, from company employees who report what others within the industry are doing to address a similar issue, here paying bribes to customs officials.

While there have been numerous investigations into the pharmaceutical, oil and gas, financial, and energy industries, investigations in the agricultural sector are not as common, thus making this investigation more significant. Others within the agribusiness should be aware of a potential industry wide probe, and ensure that anti-corruption compliance programs are not only in place, but are being reviewed and audited, taking this recent enforcement activity into account. These reviews should focus on their relationships with custom agents and freight forwarders.

Paradoxically, while CHS's voluntary disclosure may set off an industry wide probe, it is possible that the DOJ will decline to prosecute it. Last year, Deputy Attorney General Rod Rosenstein announced a revised "FCPA Corporate Enforcement Policy" that formalized aspects of the 2016 FCPA pilot program into the United States Attorneys' Manual.¹ The policy dictates that when a corporation voluntarily self-discloses misconduct, fully cooperates with the DOJ investigation, timely and adequately remediates misconduct, and disgorges any ill-gotten profits, there is a presumption that the DOJ will decline to bring an FCPA case

absent "aggravating circumstances." The rationale behind the policy is to "provide incentives for companies to engage in ethical corporate behavior" and that the DOJ expected the new policy "to reassure corporations that want to do the right thing."

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1. Time will tell whether CHS will receive the benefits of its voluntary disclosure, and whether the DOJ and SEC will expand its resources to investigate companies in the agribusiness industry.

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