Business Transactions Solutions § 271:53

Business Transactions Solutions
November 2016 Update
Alan S. Gutterman*
Part XI. Going Global: Building an International Business
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Chapter 271. Anti-Bribery Compliance
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§ 271:53. Client alert regarding Foreign Corrupt Practices Act recent and anticipated developments

Companies subject to Foreign Corrupt Practices Act ("FCPA") must continuously reevaluate and modify their compliance programs to take into account regulatory activities and expanding case law. In general, the Department of Justice ("DOJ") and Securities Exchange Commission ("SEC") have increased their enforcement activities in this area over the last few years and have been successful in obtaining several large civil and criminal penalties against companies and individuals for FCPA violations. Some interesting trends developing out of recent DOJ and SEC actions include the following:

- Companies have been required to retain independent consultants to review their FCPA compliance policies and procedures and to prepare reports to their boards of directors and the SEC documenting their findings and recommendations. Consultants are required to be given access to files, books, records, personnel, and agents, and companies have been given a short period (i.e., 90 days) to adopt and implement the consultant's recommendations.[1]
- Companies have been cited for failing to perform adequate due diligence to determine if their agents in foreign countries were complying with the FCPA, such as when substantial amounts of money are paid by the agent for "consulting" services that were never properly documented or shown to have been performed. In some cases, companies actually instructed their foreign agents to submit false invoices to cover up improper payments.[2]
- Companies have been prosecuted for potential violations of the FCPA when it appears that they failed to do anything when their employees were aware of a high probability that the company's foreign agents or distributors had made improper payments to local officials in connection with sales of the company's products.[3]
- Cases have reinforced the long-standing rule that illegal bribes need not be in the form of cash. For example, substantial fines have been paid by companies shown to have offered automobiles, shopping trips and country club memberships, as well as cash payments, to foreign government officials to obtain an improper advantage while bidding on government contracts.[4]
- The scope of the payments prohibited under the FCPA has been expanded to include payments to foreign officials intended to either directly or indirectly assist the payor in obtaining or retaining business. Prior cases had limited FCPA application to payments that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements; however, the Fifth Circuit has held that the FCPA prohibits bribes paid to foreign officials to secure illegally reduced customs and sales taxes on products imported into the country.[5]
- Attempts to secure government licenses, permits or certifications in a foreign country that may be necessary to launch or continue business operations in that country will likely be deemed an effort to "obtain or retain business" in a foreign country for purposes of the FCPA. As such, improper payments to government officials during the course of the licensing or permitting process may lead to an FCPA enforcement action. In one case, payments made to government officials in Turkey to secure government reports and certifications that were necessary for the conduct of business in Turkey were found to be improper when the officials failed to do what was needed to complete certain inspection reports and failed to comply with specific regulatory requirements pertaining to the issuance of the needed certifications. Similarly, companies may run afoul of the FCPA by making improper payments and gifts to foreign government officials that are responsible for exercising discretionary authority over registration and inspection of products as a condition for lawful sale of the products in the foreign country.[6]
- Payments made to a bona fide charity nonetheless violated the FCPA when they were made for the purpose of influencing the president of the charity to use his authority as the director of another entity to purchase the products of the

parent company making payments to the charity. The SEC noted several things that should have been picked up by internal auditors regarding the payments, including the fact that they were made from a promotional fund earmarked for donations to other types of non-profit entities and the size of the donations in relation to other payments was abnormally high.[7]

Calls for reform of the FCPA have been made for several years; however, Congress has been slow to act and both the DOJ and the SEC have been involved in other areas that have captured the limited resources available for legal and regulatory restructuring. During that time the DOJ and the SEC tried to dampen the drumbeat for FCPA reform by promising new and improved guidance. Finally, on November 14, 2012, the SEC and DOJ released their long-awaited Resource Guide to the U.S. Foreign Corrupt Practices Act, which provides not only a detailed analysis of the FCPA but also closely examines how the SEC and DOJ approach FCPA enforcement. The Guide is available for review and downloading at https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf. The regulatory agencies noted that the Guide addresses a wide variety of topics including who and what is covered by the FCPA's anti-bribery and accounting provisions; the definition of a "foreign official"; what constitute proper and improper gifts, travel, and entertainment expenses; facilitating payments; how successor liability applies in the mergers and acquisitions context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context. In addition, the Guide includes hypotheticals, examples of enforcement actions and matters that the SEC and DOJ have declined to pursue, and summaries of applicable case law and DOJ opinion releases.

The release of the Resource Guide will likely go a long way toward silencing calls for wholesale reform of the FPCA; however, a great deal of attention is always paid to predicting future developments in the FCPA enforcement arena and regulators continuously make pronouncements on issues that are of particular concern. For example, the DOJ has from time-to-time indicated that it will devote more resources to investigating activities of foreign companies operating in U.S. territory and launching sector-wide investigations, a strategy that has already been used in several industries (e.g., oil and gas, medical devices, and freight forwarding). It has also been expected that enforcement of other crimes, such as money laundering, export controls violations and false accounting, alongside FCPA violations will increase, and that there will be an increased flow of information regarding potential FCPA violations from a variety of sources including whistleblower actions by employees, competitors who are frustrated by the fact that an alleged violator has been able to obtain a foreign government contract under suspicious circumstances, media investigations and voluntary disclosures. In that regard, another development to watch is the impact of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 which provides, among other things, for rewards and protections for whistleblowers who voluntarily provide information regarding violations of the securities laws which, of course, would include violations of the FCPA.

Finally, settlements of enforcement actions recently agreed to by the DOJ and SEC highlight the benefits that companies facing an investigation can expect from:

- Reporting the situation to the regulator on their own initiative in the early stages of internal investigations.

- Sharing detailed findings of the internal investigations and providing timely updates to enforcement staff when new information was uncovered.

- Providing summaries of witness interviews and voluntarily making witnesses available for interviews, including those in foreign countries.

- Voluntarily translating documents from a foreign language into English.

- Terminating officers and employees responsible for the misconduct.

- Strengthening their anti-corruption policies and conducting extensive mandatory training with employees around the world with a focus on bolstering internal audit procedures and testing protocols.

Problems arose for companies that did not voluntarily disclose the FCPA violations and did not initially disclose certain

relevant facts that it learned in the course of their internal investigation. Regulators also frowned on companies that failed to discipline in any way the employees responsible for the criminal conduct, including high-level company executives, observing that these failures compromised the effectiveness of the company's compliance program. In addition, regulators criticized the rigor and value of internal controls over vendor payments in situations where managers reviewing such payments lacked an understanding of customized transactions in foreign countries and/or the projects for which the payments were purportedly made.

Footnotes

[*] Alan S. Gutterman is the founder and director of the Business Counselor Institute (www.businesscounselorinstitute.org) and the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org). He received his A.B., M.B.A., and J.D. from the University of California at Berkeley, a D.B.A. from Golden Gate University and a Ph.D. in Law from the University of Cambridge in the United Kingdom. For more information about Alan, see https://www.linkedin.com/in/alangutterman and/or contact him at agutterman@alangutterman.com.

[1] SEC v. The Titan Corp., Litigation Release No. 19107, 84 S.E.C. Docket 3413, 2005 WL 474238 (S.E.C. Release No. 2005); see also IN THE MATTER OF MONSANTO COMPANY, RESPONDENT, Release No. 34, 50978, Release No. 2160, Release No. 50978, Release No. AE - 2160, 2005 WL 38787 (S.E.C. Release No. 2005).

[2] See, e.g., SEC v. The Titan Corp., Litigation Release No. 19107, 84 S.E.C. Docket 3413, 2005 WL 474238 (S.E.C. Release No. 2005); see also IN THE MATTER OF MONSANTO COMPANY, RESPONDENT, Release No. 34, 50978, Release No. 2160, Release No. 50978, Release No. AE - 2160, 2005 WL 38787 (S.E.C. Release No. 2005).

[3] See SEC v. GE Invision, Inc., Litigation Release No. 19078, Release No. 2187, Release No. AE - 2187, 88 S.E.C. Docket 2206, 2005 WL 354589 (S.E.C. Release No. 2005).

[4] See, e.g., S.E.C. v. ABB Ltd, Litigation Release No. 18775, Release No. 2049, Release No. AE - 2049, 83 S.E.C. Docket 849, 2004 WL 1514888 (S.E.C. Release No. 2004).

[5] U.S. v. Kay, 359 F.3d 738, 6 A.L.R. Fed. 2d 711 (5th Cir. 2004).

[6] See SEC Litigation Release No. 20000 (Feb. 13, 2007), SEC Release No. 55281 (Feb. 13, 2007), SEC v. The Dow Chemical Company, 1:07-cv-00336 (Feb. 13, 2007, D.D.C.). This means that company compliance programs designed to prevent and detect any improper payments by employees and agents that would violate the FCPA must be carefully reviewed to ensure that the appropriate level of scrutiny is applied whenever the company, or one of its affiliates, discovers that a license, permit or certificate must be obtained from a foreign government to launch or continue business activities in that government's country. The first thing that should be done is to independently verify, through communications with competent local counsel, that a specified license, permit or certification is in fact required. It is possible that foreign officials may simply create a requirement that does not really exist in order to obtain improper payments from the company. Second, the usual caution should be exercised regarding the use of third parties to deal with foreign officials during the licensing or permitting process. Third parties should be vetted for their understanding of, and adherence to, ethical and legal requirements including the FCPA. Third, any payments that are earmarked for a license, permit or certification should be made only to the licensing agency directly and the company should obtain appropriate documentation from the licensing agency before making the payment. Any request by an official of the licensing agency to have payments made directly to him or her or to another party other than the licensing agency should immediately raise a "red flag." Finally, all expenditures made during the course of applying for, and obtaining, a license, permit or certification from a foreign governmental body should be fully and correctly documented on the company's books and records and made available for audit and inspection.

[7] IN THE MATTER OF SCHERING-PLOUGH CORPORATION, RESPONDENT., Release No. 34, 49838, Release No. 2032, Release No. 49838, Release No. AE - 2032, 82 S.E.C. Docket 3644, 2004 WL 1267922 (S.E.C. Release No. 2004).

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The Founding Director of the Institute is Alan Gutterman, who is the developer and author of Business Transactions Solution, a Thomson Reuters Legal Solution available through Westlaw Next. Alan is a well-known and widely respected legal and business counselor to entrepreneurs, emerging companies and investors. He received his law degree from Boalt Hall at the University of California in Berkeley and has also earned a PhD from the Faculty of Law at the University of Cambridge, where he was affiliated with the ESRC Centre for Business Research. He has been a partner and senior counsel at internationally recognized law firms where he has specialized in general corporate and securities matters, venture capital, mergers and acquisitions, international law and transactions, strategic business alliances, technology transfers and intellectual property. He has also served as the chief legal officer of a leading international wholesaler in the information technology industry headquartered in Silicon Valley. In addition to his work with the Institute, he is the Founding Director of the Growth-Oriented Sustainable Entrepreneurship Project (gseproject.org), which engages in and promotes research, education and training activities relating to entrepreneurial ventures launched with the aspiration to create sustainable enterprises that achieve significant growth in scale and value creation through the development and commercialization of innovative products or services which form the basis for a successful international business. More information about Alan is available here.

Information on the Institute's publications is available through the Institute's website (businesscounselorinstitute.org) and currently include the popular and innovative online Business Transactions Solution, available exclusively on Westlaw Next; Business Counselor Practice Guides covering legal and regulatory compliance, law firm management, technology management and transactions and strategic alliances; California Transactions Forms for Business Entities and Business Transactions; and Going Global: A Guide to Building an International Business.

FCPA Report

October 2016

In this update, we are pleased to bring you new material to help keep you updated on recent FCPA developments. Updates in this supplement include the new DOJ bribery cases and SEC cases identified below which have been announced since the last update. We've revised Chapter 1 to discuss these cases and update the discussions of the key elements of the FCPA. As always, new summaries of SEC books and records cases have been added to chapter 27 and the full text of the DOJ and SEC enforcement actions have been added to Chapter 39.

As usual, we review the cases described below for trends that can be reported to clients to assist them in their efforts to avoid FCPA problems and effectively address concerns of the DOJ and SEC when an investigation is launched or it otherwise becomes clear that the client is at risk for prosecution for potential FCPA violations. The cases in this Report highlight the benefits that companies facing an investigation can expect from:

- Reporting the situation to the regulator on their own initiative in the early stages of internal investigations.
- Sharing detailed findings of the internal investigations and providing timely updates to enforcement staff when new information was uncovered.
- Providing summaries of witness interviews and voluntarily making witnesses available for interviews, including those in foreign countries.
- Voluntarily translating documents from a foreign language into English.
- Terminating officers and employees responsible for the misconduct.
- Strengthening their anti-corruption policies and conducting extensive mandatory training with employees around the world with a focus on bolstering internal audit procedures and testing protocols.

Problems arose for companies that did not voluntarily disclose the FCPA violations and did not initially disclose certain relevant facts that it learned in the course of their internal investigation. Regulators also frowned on companies that failed to discipline in any way the employees responsible for the criminal conduct, including high-level company executives, observing that these failures compromised the effectiveness of the company's compliance program. Finally, regulators criticized the rigor and value of internal controls over vendor payments in situations where managers reviewing such payments lacked an understanding of customized transactions in foreign countries and/or the projects for which the payments were purportedly made.

Cases in this supplement include:

DOJ Bribery cases: § 39:13. *United States v. Moises Abraham Millan Escobar*, January 7, 2016; § 39:17. *In Re BK Medical ApS,* June 21, 2016; § 39:19. *United States v. LATAM Airlines Group S.A.*, July 25, 2016

SEC Bribery cases: § 39:14. *In the Matter of Nortek, Inc.,* June 7, 2016; § 39:15. *In the Matter of Akamai Technologies, Inc.,* June 7, 2016; § 39:16. *In the Matter of Analogic Corp. and Lars Frost* Admin Proc. File No. 3-17305, June 21, 2016; § 39:18. *In the Matter of Johnson Controls* Admin Proc. File No. 3-17337, July 11, 2016

DOJ Bribery Cases

§ 39:13. *United States v. Moises Abraham Millan Escobar*, January 7, 2016, 5 FCPA Rep. § 39:13 (2016)

On January 7, 2016, Moises Abraham Millan Escobar (Millan) pleaded guilty under seal to one count of conspiracy to violate the Foreign Corrupt Practice Act ("FCPA") for his role in in a scheme to corruptly secure energy contracts from Venezuela's state-owned and state-controlled energy company, Petroleos de Venezuela S.A. (PDVSA). Millan was a former employee of Abraham Jose Shiera Bastidas (Shiera), who subsequently pleaded guilty on March 22, 2016 to one count of conspiracy to violate the FCPA and commit wire fraud and one count of violating the FCPA. The scheme involved several parties, all of whom were indicted by the DOJ, who worked together to submit bids to provide equipment and services to PDVSA through their various companies. The defendants admitted that beginning in 2009 bribes and other things of value were paid to PDVSA purchasing analysts to ensure that the defendant's companies were placed on PDVSA bidding panels, which enabled the companies to win lucrative energy contracts with PDVSA. Bribe payments were also made to other PDVSA officials in order to ensure that the companies were placed on PDVSA-approved vendor lists and given payment priority so that they would get paid ahead of other PDVSA vendors with outstanding invoices. Certain of the defendants also admitted to conspiring to launder the proceeds of the bribery scheme and making false statements on their0 federal income tax return. As part of their plea agreements, Millan, Shiera and the other defendants all agreed to forfeit proceeds of their criminal activity.

§ 39:17. *In Re BK Medical ApS,* June 21, 2016, 5 FCPA Rep. § 39:17 (2016)

On June 21, 2016, the DOJ announced that a subsidiary of Massachusetts technology company Analogic Corporation had entered into a non-prosecution agreement ("NPA") and agreed to pay a $3.4 million penalty to resolve the government's investigation into improper payments made in Russia and elsewhere in violation of the FCPA. According to admissions made in the resolution documents, BK Medical ApS, a manufacturer of ultrasound equipment headquartered in Denmark, engaged in a scheme with its distributor in Russia to make improper payments to third parties using fictitious invoices, falsely book those third-party payments and cause Analogic to falsify its books and records. BK Medical admitted that, as part of the scheme, after the terms of a sale had been agreed upon, the distributor requested that BK Medical issue invoices that falsely inflated the sales price on the equipment. The distributor then overpaid BK Medical the inflated amount and BK Medical transferred the excess funds to third parties as directed by the distributor, the company admitted. BK Medical had no legitimate business relationship with those third parties and had not conducted due diligence on them, it admitted. According to admissions in the resolution documents, at least some of these payments ultimately went to

doctors employed by Russian state-owned entities. Although the scheme involving its Russian distributor was the most extensive, BK Medical also admitted that it engaged in similar schemes with distributors in five other countries. BK Medical admitted that its conduct – creating and maintaining these fictitious invoices, representing to Analogic that BK Medical was complying with all Analogic accounting policies and signing Sarbanes-Oxley subcertifications – caused Analogic to falsify its books, records and accounts in violation of the FCPA. As part of the NPA, BK Medical agreed to pay the criminal penalty, to continue to cooperate with the department and with foreign authorities in any ongoing investigations and prosecutions relating to the conduct, including of individuals, to enhance its compliance program and to periodically report to the DOJ on the implementation of its enhanced compliance program. The DOJ explained that it had reached this resolution based on a number of factors. Among other factors, BK Medical received credit for its self-disclosure and its remediation, including terminating the officers and employees responsible for the corrupt payments. It received partial credit for cooperation because, as described in the NPA, it did not initially disclose certain relevant facts that it learned in the course of its internal investigation. In a related matter, Analogic reached a settlement on June 21, 2016 with the SEC under which it agreed to pay $7,672,651 in disgorgement and $3,810,311 in prejudgment interest (see § 39:16).

§ 39:19. *United States v. LATAM Airlines Group S.A.*, July 25, 2016, 5 FCPA Rep. § 39:19 (2016)

On July 25, 2016, the DOJ announced that LATAM Airlines Group S.A. (LATAM), a commercial airline company based in Chile, had agreed to pay a $12.75 million criminal penalty in connection with a scheme to pay bribes to Argentine union officials via a false consulting contract with a third-party intermediary in violation of the accounting provisions of the FCPA. According to admissions made in the resolution documents, executives at LATAM's predecessor-in-interest, LAN Airlines S.A. (LAN), executed a fictitious $1.15 million consulting agreement with an advisor to the Secretary of Argentina's Ministry of Transportation in October 2006. Although the agreement purportedly required the consultant to undertake a study of Argentine airline routes, the consultant never provided any such services. Instead, the purported consultant funneled the monies he received pursuant to the contract to Argentine labor union officials in exchange for the union agreeing to accept lower wages and to not enforce what would have been a costly labor rule. In total, LAN profited by more than $6.7 million as a result of the bribes paid to the union officials. LATAM entered into a three-year deferred prosecution agreement ("DPA") to resolve the case. As part of the DPA, LATAM agreed to pay a $12.75 million criminal penalty, continue to cooperate with the DOJ's investigation, enhance its compliance program and retain an independent corporate compliance monitor for a term of at least 27 months. The DOJ explained that it had reached this resolution based on a number of factors, including the fact that LATAM did not voluntarily disclose the FCPA violations, but did cooperate with the department's investigation after the press in Argentina uncovered and reported the conduct approximately four years after it had occurred. After LATAM began cooperating, it did so fully and provided all relevant facts known to it, including about individuals involved in the misconduct. LATAM did not, however, remediate adequately. LATAM failed to discipline in any way the employees responsible for the criminal conduct, including at least one high-level company executive, and thus the ability of the compliance

program to be effective in practice is compromised. As a result, the company paid a penalty within the U.S. Sentencing Guidelines range instead of receiving a discount off the bottom of the range. In a related matter, LATAM reached a settlement on July 25, 2016 with the SEC under which it agreed to pay $6.74 million in disgorgement and $2.7 million in prejudgment interest. Thus, the approximately $22.2 million in combined penalty, disgorgement and prejudgment interest far exceeded the $6.7 million in savings the company had received from its improper payments.

SEC Bribery Cases

§ 39:14. *In the Matter of Nortek, Inc.*, June 7, 2016, 5 FCPA Rep. § 39:14 (2016)

On June 7, 2016, the SEC announced a non-prosecution agreement ("NPA) with Rhode Island-based residential and commercial building products manufacturer Nortek Inc. ("Nortek") to forfeit ill-gotten gains connected to bribes paid to Chinese officials by foreign subsidiaries. Nortek agreed to pay $291,403 in disgorgement plus $30,655 in interest. According to the NPA, approximately $290,000 in improper payments and gifts were made to Chinese officials by Nortek's subsidiary in order to receive preferential treatment, relaxed regulatory oversight, or reduced customs duties, taxes, and fees. These included cash payments, gift cards, meals, travel, accommodations, and entertainment. Nortek self-reported the misconduct promptly, and cooperated extensively with the ensuing SEC investigations. The NPAs stipulate that Nortek is not charged with violations of the FCPA and does not pay additional monetary penalties. Among the company's actions outlined in the NPA:

- Reported the situation to the SEC on their own initiative in the early stages of internal investigations.
- Shared detailed findings of the internal investigations and provided timely updates to enforcement staff when new information was uncovered.
- Provided summaries of witness interviews and voluntarily made witnesses available for interviews, including those in China.
- Voluntarily translated documents from Chinese into English.
- Terminated employees responsible for the misconduct.
- Strengthened their anti-corruption policies and conducted extensive mandatory training with employees around the world with a focus on bolstering internal audit procedures and testing protocols.

§ 39:15. *In the Matter of Akamai Technologies, Inc.*, June 7, 2016, 5 FCPA Rep. § 39:15 (2016)

On June 7, 2016, the SEC announced a non-prosecution agreement ("NPA) with Massachusetts-based internet services provider Akamai Technologies ("Akamai") to forfeit ill-gotten gains connected to bribes paid to Chinese officials by foreign subsidiaries. Akamai agreed to pay $652,452 in disgorgement plus $19,433 in interest. According to the NPA, Akamai's foreign subsidiary arranged $40,000 in payments to induce government-owned entities to purchase more services than they actually needed. Employees at the foreign subsidiary violated the company's

written policies by providing improper gift cards, meals, and entertainment to officials at these state-owned entities to build business relationships. Akamai self-reported the misconduct promptly, and cooperated extensively with the ensuing SEC investigations. The NPAs stipulate that Akamai is not charged with violations of the FCPA and does not pay additional monetary penalties. Among the company's actions outlined in the NPA:

- Reported the situation to the SEC on their own initiative in the early stages of internal investigations.
- Shared detailed findings of the internal investigations and provided timely updates to enforcement staff when new information was uncovered.
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§ 39:16. *In the Matter of Analogic Corp. and Lars Frost* Admin Proc. File No. 3-17305, June 21, 2016, 5 FCPA Rep. § 39:16 (2016)

On June 21, 2016, the SEC announced that Massachusetts-based medical device manufacturer Analogic Corp. and its wholly-owned Danish subsidiary had agreed to pay nearly $15 million to settle parallel civil and criminal actions involving FCPA violations. An SEC investigation found that Analogic's Danish subsidiary, BK Medical ApS, engaged in hundreds of sham transactions with distributors that funneled about $20 million to third parties, including individuals in Russia and apparent shell companies in Belize, the British Virgin Islands, Cyprus, and Seychelles. Analogic agreed to pay $7.67 million in disgorgement and $3.8 million in prejudgment interest to settle the SEC's charges that it failed to keep accurate books and records and maintain adequate internal accounting controls. In determining the settlement, the SEC considered Analogic's self-reporting, remedial acts, and general cooperation with the SEC's investigation. BK Medical agreed to pay a $3.4 million criminal fine in a non-prosecution agreement announced on June 21, 2016 by the DOJ (see § 39:17). Lars Frost, BK Medical's former Chief Financial Officer, also agreed to pay a $20,000 penalty to the SEC to settle charges that he knowingly circumvented the internal controls in place at BK Medical and falsified its books and records.

§ 39:18. *In the Matter of Johnson Controls* Admin Proc. File No. 3-17337, July 11, 2016, 5 FCPA Rep. § 39:18 (2016)

On July 11, 2016, the SEC announced that Johnson Controls, a Wisconsin-based global provider of HVAC systems, agreed to pay more than $14 million to settle charges that it violated the books and records and internal accounting controls provisions of the FCPA. An SEC investigation found that a wholly-owned Chinese subsidiary of Johnson Controls used sham vendors to make improper payments of approximately $4.9 million to employees of Chinese

government owned shipyards, and ship-owners and others, to obtain and retain business and personally enrich themselves. According to the SEC's order instituting a settled cease-and-desist proceeding against Johnson Controls: Johnson Controls acquired the Chinese subsidiary as part of a 2005 acquisition of York International, which was subject to a prior FCPA enforcement action in October 2007, for conduct in China and other parts of York's business; despite JCI's efforts to remediate China Marine, the bribery continued; from 2007 to 2013, the managing director of China Marine, with the aid of approximately eighteen China Marine employees in three offices, continued the bribery and theft that began under his predecessor by using vendors instead of agents to facilitate the improper payments; Johnson Controls limited the use of agents, and thus the employees used the vendor scheme to create slush funds. The employees fashioned the improper scheme using vendors because vendor transactions were considered low risk by JCI due to the low dollar value of the transactions, with the average vendor payment approximately $3400; Johnson Controls' internal controls over vendor payments were less rigorous, and China Marine operated with very little oversight by JCI's Denmark office, which oversaw the Global Marine business. Even in the instances where managers in Denmark did a review, they did not understand some of the highly customized transactions at China Marine or the projects involving the sham vendors; and Johnson Controls self-reported this misconduct to the SEC and cooperated with the investigation. The SEC's order finds that Johnson Controls violated the internal accounting controls and books and records provisions of the Securities Exchange Act of 1934. Without admitting or denying the findings, Johnson Controls agreed to cease-and-desist from committing or causing any violations of Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B), pay disgorgement of $11,800,000 plus prejudgment interest of $1,382,561, pay a civil penalty of $1,180,000, and to report to the SEC for one year on the status of its FCPA and anti-corruption related remediation and implementation of compliance measures.

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As always, we hope that these materials help keep you informed of recent FCPA developments and we appreciate your continued support of this product. We welcome comments from our subscribers regarding our publications. If you have any questions or comments about this publication, please do not hesitate to contact Customer Service at 1-800-328-4880 or by fax at 1-800-340-9378 (WEST). If you would like to inquire about related Thomson Reuters/West publications, or wish to place an order, please contact us at 1-800-344-5009

FCPA Report

January 2017

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As usual, we review the cases described below for trends that can be reported to clients to assist them in their efforts to avoid FCPA problems and effectively address concerns of the DOJ and SEC when an investigation is launched or it otherwise becomes clear that the client is at risk for prosecution for potential FCPA violations. In one of the cases described in this Report, regulators imposed substantial penalties against defendants who made payments they knew would eventually be passed as bribes to high-ranking governmental officials in various foreign countries to secure access to, and preference for, the investment opportunities. Employees of these defendants altered books and records to disguise the bribes and the defendants also repeatedly failed to implement and maintain adequate internal accounting controls, which allowed its employees, agents and business partners to misappropriate assets. When deciding on penalties for violations of the FCPA, regulators lacked patience with defendants that failed to completely remediate problematic behavior, such as a defendant that did not discipline a senior executive who was aware of bribery discussions in emails and had oversight responsibility for employees engaged in those discussions.

Another case involved successor liability of a defendant that acquired a Chinese company later found to have illegally made payments to buy gifts for government officials to influence their decisions to purchase that company's products and services. The chairman and chief executive officer of the Chinese company knew that these false expenses were improperly recorded in his company's books and records as legitimate expenses or fees and that, as a result, their true nature would not be disclosed to acquirer. Because the company's financials were consolidated into the acquirer's books and records after the acquisition was completed, the CEO had caused the acquirer's failure to make and keep accurate books, records, and accounts, as required under the FCPA. Although only able to perform limited pre-acquisition due diligence on the Chinese company, the acquirer took immediate and significant steps after the acquisition to train staff in China and integrate its new subsidiary into the acquirer's system of internal accounting controls. As a result of these post-acquisition measures, including the implementation of an anonymous complaint hotline, the acquirer discovered the misconduct at the subsidiary within five months of the acquisition. While the SEC found that the CEO of the Chinese company violated the FCPA, and he consented to the entry of the cease-and-desist order and agreed to pay a $46,000 civil penalty, the SEC

determined not to bring charges against the acquirer, taking into consideration the company's efforts at self-policing that led to the discovery of the misconduct shortly after the acquisition, prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC's investigation.

Finally, the SEC took a strong stand against a defendant that entered into separation agreements that stopped employees from continuing to voluntarily communicate with the SEC about potential FCPA violations due to a substantial financial penalty that would be imposed for violating strict non-disclosure terms, an agreement that the SEC characterized as an unacceptable threat of financial punishment for whistleblowing. In addition to financial penalties, the defendant is obligated to make reasonable efforts to notify certain former employees that it does not prohibit employees from contacting the SEC about possible law violations.

There have been several other important developments since the last issue of this Report. In October 2016, the International Organization for Standardization published its long-awaited ISO 37001, which it described as the first international anti-bribery management system standard designed to help organizations combat bribery risk in their own operations and throughout their global value chains. The system outlined in ISO 37001 includes requirements for an anti-bribery policy and procedures; top management leadership, commitment and responsibility; oversight by a compliance manager or function; anti-bribery training; risk assessments and due diligence on projects and business associates; financial, procurement, commercial and contractual controls; reporting, monitoring, investigation, and review; and corrective action and continual improvement. In addition, the election of Donald J. Trump as president in November 2016 cast a cloud around the future direction of FCPA enforcement activities given that he has been a strenuous critic of the FCPA, once referring to it as a "horrible law and it should be changed" and further comment that it puts U.S. business at a "huge disadvantage." We will monitor both of these developments over the coming months.

Cases in this Report and supplement include:

DOJ Bribery cases: § 39:27. United States v. Och-Ziff Capital Management and OZ Africa Management Op LLC; and § 39:30. United States v. Embraer SA

SEC Bribery cases: § 39:20. In the Matter of LAN Airlines S.A., Admin Proc. File No. 3-17357, July 25, 2016; § 39:21. In the Matter of Key Energy Services, Inc., Admin Proc. File No. 3-17379, August 11, 2016; § 39:22. In the Matter of Astrazeneca PLC, Admin Proc. File No. 3-17517, August 30, 2016; § 39:23. In the Matter of Jun Ping Zhang, Admin Proc. File No. 3-17535, September 13, 2016; § 39:24. In the Matter of Nu Skin Enterprises, Inc., Admin Proc. File No. 3-17556, September 20, 2016; § 39:25. In the Matter of Anheuser-Busch Invev SA/NV, Admin Proc. File No. 3-17586, September 28, 2016; § 39:26. In the Matter of Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och and Joel M. Frank Admin Proc. 3-17595, September 29,

2016; § 39:28. In the Matter of GlaxoSmithKline plc, Admin Proc. File No. 3-17305, September 30, 2016; § 39:29. SEC v. Embraer SA

DOJ Bribery Cases

§ 39:27. United States v. Och-Ziff Capital Management and OZ Africa Management Op LLC, 5 FCPA Rep. § 39.27 (2016)

On September 29, 2016, the DOJ announced that a New York-based alternative investment and hedge fund manager, Och-Ziff Capital Management Group LLC (Och-Ziff), and its wholly-owned subsidiary, OZ Africa Management GP LLC (OZ Africa), had entered into resolutions with the DOJ to resolve criminal charges and agreed to pay a criminal penalty of more than $213 million in connection with a widespread scheme involving the bribery of officials in the Democratic Republic of Congo (DRC) and Libya, a resolution that the DOJ noted was the first time a hedge fund has been held to account for violating the FCPA. Och-Ziff entered into a deferred prosecution agreement in connection with a criminal information charging the company with two counts of conspiracy to violate the anti-bribery provisions of the FCPA, one count of falsifying its books and records and one count of failing to implement adequate internal controls. According to the companies' admissions, in late 2007, Och-Ziff employees began discussions with a businessman operating in the DRC about entering into a partnership based on special access to lucrative investment opportunities in the DRC involving the country's diamond and mining sectors. Och-Ziff employees learned that the businessman gained access to these attractive investment opportunities by making corrupt payments to senior government officials in the DRC, the companies admitted. According to the plea agreement, between 2008 and 2012, Och-Ziff entered into several DRC-related transactions in conjunction with the businessman, understanding that Och-Ziff's funds would be used, in part, to pay substantial sums of money to high-ranking DRC officials to secure access to, and preference for, the investment opportunities. In late 2008, after an Och-Ziff employee was alerted that an audit of the businessman's records revealed payments to DRC officials, that employee instructed that any references to those payments be removed from a final report of the audit, the companies admitted. Och-Ziff also admitted that, beginning in 2007, it engaged a third-party agent to assist the company in securing an investment from the Libyan Investment Authority (LIA), that country's sovereign wealth fund, knowing the agent would need to pay bribes to Libyan officials. The agent was engaged without formal approval or any due diligence, according to court documents. The company admitted that, beginning in February 2007, the agent worked on behalf of Och-Ziff to obtain an asset placement from the LIA, including setting up a meeting between a senior Och-Ziff employee and the Libyan official empowered to make investment decisions for the LIA. According to court documents, in late November 2007, Och-Ziff received a $300 million investment from the LIA into the company's hedge funds. Och-Ziff admitted that it subsequently entered into an agreement to pay the agent a "finder's fee" of $3.75 million, knowing that all or a portion of the fees would be paid to Libyan officials in return for their assistance in obtaining the LIA's investment. In addition, Och-Ziff admitted that it falsified its books and records and attempted to

conceal and disguise the bribes paid through the agent by paying the "finder's fee" through a sham consulting agreement. Och-Ziff also failed to implement and maintain adequate internal accounting controls, which allowed its employees, agents and business partners to misappropriate assets, the company admitted. As a result of its failure to conduct due diligence on its partners and the lack of financial controls, Och-Ziff failed to prevent bribe payments from being made in the DRC, Libya, as well as in Chad and Niger, where an Och-Ziff joint venture made mining-related investments, according to admissions in court documents. In addition to the payment of the criminal penalties, Och-Ziff agreed to implement rigorous internal controls, retain a compliance monitor for a term of three years and cooperate fully with the DOJ's ongoing investigation, including its investigation of individuals. In related proceedings, the SEC filed a cease and desist order against Och-Ziff Capital Management Group LLC and OZ Management LP on September 29, 2016, whereby Och-Ziff agreed to pay approximately $199 million in disgorgement to the SEC, including prejudgment interest (see 5 FCPA Rep. § 39:26 (2016)).

§ 39:30. United States v. Embraer SA, 5 FCPA Rep. § 39.30 (2016)

On October 24, 2016, Brazilian aircraft manufacturer Embraer S.A. (Embraer) entered into a resolution with the DOJ to resolve criminal charges and agreed to pay a penalty of $107,285,090 in connection with schemes involving the bribery of government officials in the Dominican Republic, Saudi Arabia and Mozambique, and to pay millions more in falsely recorded payments in India via a sham agency agreement. According to the company's admissions, Embraer executives and employees paid bribes to government officials and falsified books and records in connection with aircraft sales to foreign governments and state-owned entities in multiple countries. In 2008, Embraer paid $3.52 million to an influential government official in the Dominican Republic via a false agency agreement to secure a contract to sell the Dominican Air Force eight military aircraft for approximately $92 million. In 2010, Embraer paid $1.65 million to an official at a Saudi Arabian state-owned and -controlled company via a false agency agreement to secure that instrumentality's agreement to purchase three aircraft from Embraer for approximately $93 million. In 2008, Embraer paid $800,000 via a false agency agreement with an intermediary designated by a high-level official at Mozambique's state-owned commercial airline, Linhas Aéreas de Moçambique S.A. (LAM), to secure LAM's agreement to purchase two aircraft from Embraer for approximately $65 million. In 2009, Embraer paid an agent $5.76 million pursuant to a false agency agreement with a shell company in connection with a contract it secured to sell the Indian Air Force three aircraft for approximately $208 million. In total, Embraer earned profits of nearly $84 million on the foregoing aircraft sales. Under the terms of its three-year deferred prosecution agreement with the DOJ, Embraer agreed to continue to cooperate with the DOJ's investigation; enhance its compliance program; implement a more adequate system of internal accounting controls; and retain an independent corporate compliance monitor for a term of three years. The Criminal Division's Fraud Section reached this resolution based on a number of factors, including the fact that Embraer did not voluntarily disclose the FCPA violations, but did cooperate with the department's

investigation after the SEC served it with a subpoena. After Embraer began cooperating, it did so fully and disclosed all relevant, non-privileged facts known to it, including about individuals involved in the misconduct. Embraer did not, however, engage in full remediation. It disciplined a number of company employees and executives engaged in the misconduct, but did not discipline a senior executive who was aware of bribery discussions in emails in 2004 and had oversight responsibility for the employees engaged in those discussions. As a result, the criminal penalty in this case is 20 percent below the bottom of the applicable range under the U.S. Sentencing Guidelines, a discount that reflects Embraer's full cooperation but incomplete remediation. In related matters, Embraer reached settlements with both the SEC (see 5 FCPA Rep. § 39.29 (2016)) and Brazilian authorities.

SEC Bribery Cases

§ 39:20. In the Matter of LAN Airlines S.A., Admin Proc. File No. 3-17357, July 25, 2016, 5 FCPA Rep. § 39:20 (2016)

On July 25, 2016, the SEC announced that South American-based LAN Airlines had agreed to pay more than $22 million to settle parallel civil and criminal cases related to improper payments it authorized during a dispute between the airline and its union employees in Argentina. An SEC investigation found that when LAN encountered problems negotiating labor agreements with the unions, it was contacted by a consultant from Argentina who offered to negotiate on the company's behalf. The consultant made clear that he would expect compensation for such negotiations, and that payments would be made to third parties who had influence over the unions. LAN's CEO approved $1.15 million in payments to the consultant through a sham contract for a purported study of existing air routes in Argentina. The CEO knew that no actual study would be performed and that it was possible the consultant would pass some portion of the money to union officials in Argentina to settle the wage disputes. To settle the SEC's charges that it failed to keep accurate books and records and maintain adequate internal accounting controls, LAN agreed to pay $9.4 million in disgorgement and prejudgment interest. In a deferred prosecution agreement announced on July 25, 2016, by the DOJ, LAN agreed to pay a $12.75 million penalty (see 5 FCPA Rep. § 39:19 (2016)). As for the CEO, Ignacio Cueto Plaza, he was charged with FCPA violations by the SEC earlier in 2016 and settled the charges.

§ 39:21. In the Matter of Key Energy Services, Inc., Admin Proc. File No. 3-17379, August 11, 2016, 5 FCPA Rep. § 39:21 (2016)

On August 11, 2016, the SEC announced that Houston-based Key Energy Services, Inc. had agreed to pay $5 million in disgorgement to settle charges that it violated the internal controls and books-and-records provisions of the FCPA. The violations arose from payments its Mexican subsidiary, Key Mexico, made to a contract employee at Petróleos Mexicanos (Pemex), Mexico's state-owned oil company. An SEC investigation found that Key Mexico made payments to the Pemex employee to induce him to provide

advice, assistance and inside information that was used by Key Energy and Key Mexico in negotiating contracts with Pemex. Key Mexico paid the Pemex employee through an entity that provided purported consulting services to Key Mexico, even though Key Energy had not authorized the relationship with the consulting firm and lacked supporting documentation regarding the purported consulting work performed. The hiring of the consulting firm was arranged and approved by Key Mexico's then-country manager, who did not disclose to Key Energy the connection between the consulting firm and the Pemex employee. Key Mexico improperly recorded the transfers to the consulting firm, determined to be at least $229,000 paid from 2010 through at least 2013, as legitimate business expenses in Key Mexico's books and records, which were consolidated into Key Energy's books and records. The SEC investigation also found that Key Energy personnel eventually became aware, at least as early as 2011, that Key Mexico was doing business with the consulting firm. Nevertheless, Key Mexico's relationship with the consulting firm continued, even though, contrary to Key Energy policy, neither Key Energy nor Key Mexico had conducted due diligence on the consulting firm and Key Mexico did not enter into a written agreement or contract with the consulting firm until 2013. Key Energy ultimately uncovered the consulting firm's relationship to the Pemex employee in 2014, when Key Energy began an investigation into other allegations concerning the country manager. Without admitting or denying the findings, Key Energy agreed to a cease-and-desist order and to pay $5 million in disgorgement. In determining to accept the offer, the SEC considered cooperation Key Energy afforded to the SEC staff and the remedial acts undertaken by Key Energy. In addition, in determining the disgorgement amount and not to impose a penalty, the SEC considered Key Energy's current financial condition and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities.

§ 39:22. In the Matter of Astrazeneca PLC, Admin Proc. File No. 3-17517, August 30, 2016, 5 FCPA Rep. § 39.22 (2016)

On August 30, 2016, the SEC announced that U.K.-based biopharmaceutical company AstraZeneca PLC had agreed to pay more than $5 million ($4.325 million in disgorgement, $822,000 in prejudgment interest and a $375,000 civil penalty) to settle charges that it violated the books and records and internal controls provisions of the FCPA as a result of its wholly-owned subsidiaries in China and Russia making improper payments to foreign officials. An SEC investigation found that employees of AstraZeneca's subsidiary in China made improper payments in the form of cash, gifts and other items to foreign official healthcare providers as incentives to purchase or prescribe AstraZeneca pharmaceuticals, and also made payments in cash to the local officials to get reductions or dismissals of proposed financial sanctions against the subsidiary. The investigation found that employees of AstraZeneca's subsidiary in Russia also made improper payments in connection with pharmaceutical sales. The SEC's investigation also found that the improper payment schemes occurred over the course of several years, and were orchestrated or condoned by multiple levels of management at AstraZeneca's China and Russia subsidiaries. The illicit payments by the China and Russia subsidiaries were not accurately reflected in AstraZenca's books and records. Furthermore, the

Company failed to devise and maintain a sufficient system of internal accounting controls, and lacked an effective anti-corruption compliance program during this period.

§ 39:23. In the Matter of Jun Ping Zhang, Admin Proc. File No. 3-17535, September 13, 2016, 5 FCPA Rep. § 39.23 (2016)

On Sept. 12, 2016, the SEC announced that a former executive at an international communications and information technology company had agreed to settle charges that he violated the FCPA by facilitating a bribe scheme whereby illegal payments were made to Chinese government officials to obtain or retain business. An SEC investigation found that Jun Ping Zhang (Ping), in his capacity as the chairman and CEO of a Chinese subsidiary of Harris Corporation (Harris), authorized and facilitated a practice of giving gifts to officials at state-owned hospitals in China. With Ping's knowledge and under his management, the subsidiary's sales staff used bogus expense receipts to generate cash for the gifts. Ping and the supervisors that he managed authorized the false expense claims, knowing that they were fabricated and that the "reimbursed" funds were actually used to buy gifts for government officials to influence their decisions to purchase the subsidiary's products and services. Ping knew that these false expenses were improperly recorded in the subsidiary's books and records as legitimate expenses or fees and that, as a result, their true nature would not be disclosed to Harris. Because the subsidiary's financials were consolidated into Harris's books and records, Ping caused Harris's failure to make and keep accurate books, records, and accounts, as required under the FCPA. Although only able to perform limited pre-acquisition due diligence on the subsidiary, Harris took immediate and significant steps after the acquisition to train staff in China and integrate the subsidiary into Harris's system of internal accounting controls. As a result of Harris's post-acquisition measures, including the implementation of an anonymous complaint hotline, Harris discovered the misconduct at the subsidiary within five months of the acquisition. The SEC's found that Ping violated the anti-bribery, books and records, and internal accounting controls provisions of the Securities Exchange Act of 1934. Ping consented to the entry of the cease-and-desist order and agreed to pay a $46,000 civil penalty. The SEC determined not to bring charges against Harris, taking into consideration the company's efforts at self-policing that led to the discovery of Ping's misconduct shortly after the acquisition, prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC's investigation.

§ 39:24. In the Matter of Nu Skin Enterprises, Inc., Admin Proc. File No. 3-17556, September 20, 2016, 5 FCPA Rep. § 39.24 (2016)

On September 20, 2016, the SEC announced that Provo, Utah-based Nu Skin Enterprises, Inc. (Nu Skin US) had agreed to pay $765,688 (disgorgement of $431,088, prejudgment interest of $34,600, and a civil money penalty in the amount of $300,000) to settle charges that it violated the internal controls and books-and-records provisions of the FCPA. The FCPA violations arose from a payment its Chinese subsidiary, Nu Skin (China) Daily Use & Health Products Co. Ltd. (Nu Skin China), made to a charity to obtain the influence of a high-ranking Chinese Communist party official to impact an on-

going provincial agency investigation. An SEC investigation found that in 2013, Nu Skin China was under investigation by a provincial branch of the Administration of Industry and Commerce (AIC) concerning Nu Skin China's compliance with the laws and regulations applicable to direct selling in China. Following the AIC's initial investigation, the AIC informed Nu Skin China that it had gathered enough information to support violations against the company and it was threatening to impose an RMB 2.8 million fine which, at the time, equated approximately $431,088. The SEC investigation also found that certain personnel of Nu Skin China made a decision to request that the party official personally intervene in the AIC matter in return for Nu Skin China making an RMB 1 million donation to a charity identified by the party official. The party official was associated with the entity that was responsible for establishing the charity in the province. Further, the provincial head of the AIC had previously reported to the party official. Following the donation ceremony, a Nu Skin China employee suggested contacting the party official to request that Nu Skin China not be named or fined by the AIC and internal emails reflected that Nu Skin China believed that such action was "crucial for us to settle this . . . peacefully." Two days later, Nu Skin China received notice of the AIC's final decision in which the company was neither charged nor fined. In determining to accept the payment offer from Nu Skin US, the SEC considered cooperation that Nu Skin US afforded to the SEC staff and the remedial acts undertaken by Nu Skin US.

§ 39:25. In the Matter of Anheuser-Busch Invev SA/NV, Admin Proc. File No. 3-17586, September 28, 2016, 5 FCPA Rep. § 39.25 (2016)

On September 28, 2016, the SEC announced that Anheuser-Busch InBev has agreed to pay $6 million ($2,712,955 in disgorgement plus interest of $292,381 and a penalty of $3,002,955) to settle charges that it violated the FCPA and chilled a whistleblower who reported the misconduct. An SEC investigation found that the company used third-party sales promoters to make improper payments to government officials in India to increase the sales and production of Anheuser-Busch InBev products in that country. Despite repeated complaints from employees, Anheuser-Busch InBev had inadequate internal accounting controls to detect and prevent the improper payments, and the company failed to ensure that transactions involving the promoters were recorded properly in its books and records. The SEC's order further found that Anheuser-Busch InBev entered into a separation agreement that stopped an employee from continuing to voluntarily communicate with the SEC about potential FCPA violations due to a substantial financial penalty that would be imposed for violating strict non-disclosure terms, an agreement that the SEC characterized as an unacceptable threat of financial punishment for whistleblowing. In addition to the payments, the company must cooperate with the SEC for a two-year period and report its FCPA compliance efforts while making reasonable efforts to notify certain former employees that Anheuser-Busch InBev does not prohibit employees from contacting the SEC about possible law violations.

§ 39:26. In the Matter of Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och and Joel M. Frank Admin Proc. 3-17595, September 29, 2016, 5 FCPA Rep. § 39.26 (2016)

On September 29, 2016, the SEC announced that Och-Ziff Capital Management Group has agreed to pay nearly $200 million ($173,186,178 in disgorgement plus $25,858,989) to the SEC to settle civil charges of violating the FCPA and the anti-fraud provisions of the Investment Advisers Act of 1940. In addition, Och-Ziff CEO Daniel S. Och agreed to pay nearly $2.2 million to settle SEC charges that he caused certain violations along with CFO Joel M. Frank, who also agreed to settle the charges. The SEC detected the misconduct while proactively scrutinizing the way that financial services firms were obtaining investments from sovereign wealth funds overseas. The SEC's subsequent investigation of Och-Ziff found that the fund used intermediaries, agents, and business partners to pay bribes to high-level government officials in Africa. According to the SEC's order, the illicit payments induced the Libyan Investment Authority sovereign wealth fund to invest in Och-Ziff managed funds. Other bribes were paid to secure mining rights and corruptly influence government officials in Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo. The SEC's order found that Och-Ziff executives ignored red flags and corruption risks and permitted illicit transactions to proceed, Och-Ziff's books and records did not accurately describe the true purposes for which managed investor funds were used, and the company did not have adequate internal controls to detect or prevent the bribes. As part of its settlement agreement with the SEC, Och-Ziff acknowledged that it expected to enter into a deferred prosecution agreement with the DOJ in a parallel criminal proceeding (see 5 FCPA Rep. § 39:27 (2016)).

§ 39:28. In the Matter of GlaxoSmithKline plc, Admin Proc. File No. 3-17305, September 30, 2016, 5 FCPA Rep. § 39.28 (2016)

On September 30, 2016, the SEC announced that GlaxoSmithKline plc ("GSK") had agreed to pay $20 million to settle charges that it violated the FCPA when its China-based subsidiaries engaged in pay-to-prescribe schemes to increase sales. An SEC investigation found that the schemes spanned a period of years and involved the transfer of money, gifts, and other things of value to health care professionals, which led to millions of dollars in increased sales of GSK pharmaceutical products to China's state health institutions. The participants included certain complicit sales and marketing managers within GSK's China-based subsidiaries. GSK failed to devise and maintain a sufficient system of internal accounting controls and lacked an effective anti-corruption compliance program to detect and prevent these schemes. As a result, the improper payments were not accurately reflected in GSK's books and records. The SEC's order found that GSK violated the FCPA's internal controls and books-and-records provisions. GSK consented to the order without admitting or denying the findings, and agreed, in addition to payment of the civil penalty, to provide status reports to the SEC for the next two years on its remediation and implementation of anti-corruption compliance measures.

§ 39:29. SEC v. Embraer SA, 5 FCPA Rep. § 39.29 (2016)

On October 24, 2016, the SEC announced a global settlement along with the DOJ and Brazilian authorities that requires aircraft manufacturer Embraer S.A. to pay more than $205 million to resolve alleged violations of the FCPA. The SEC's complaint allegeD that Embraer made more than $83 million in profits as a result of bribe payments from its U.S.-based subsidiary through third-party agents to foreign government officials in the Dominican Republic, Saudi Arabia, and Mozambique. Embraer allegedly created false books and records to conceal the illicit payments, and also engaged in an alleged accounting scheme in India. According to the SEC's complaint, $3.52 million in bribes were paid to an official in the Dominican Republic's air force to secure a military aircraft contract in that country, and $1.65 million in bribes were routed to an official in Saudi Arabia to win business there. An alleged $800,000 payment was made at the behest of a Mozambican government official as a condition of obtaining a contract with a state-owned airline in that country. Approximately $5.76 million was allegedly paid to an agent in India in connection with the sale of three highly specialized military aircraft for India's air force, and the payments were falsely recorded in Embraer's books and records as part of a consulting agreement that wasn't legitimate. Under the settlement, Embraer agreed to pay a $107 million penalty to the DOJ as part of a deferred prosecution agreement (see 5 FCPA Rep. § 39.30 (2016)), and more than $98 million in disgorgement and interest to the SEC. Embraer may receive up to a $20 million credit depending on the amount of disgorgement it will pay to Brazilian authorities in a parallel civil proceeding in Brazil. Embraer must retain an independent corporate monitor for at least three years.

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