

Everything Old is New Again: Alcoa and Olympus

Two articles this week spoke about the continuing struggle companies have with the issue of agents and other third party representatives and the potential liability under the Foreign Corrupt Practices Act (FCPA). In an article in the Wall Street Journal (WSJ), entitled “*Kickback Probe at Alcoa Heats Up*”, reporter Dionne Searcey takes a look at the arrest of two figures in the bribery investigation of Alcoa’s activities in Bahrain in connection with the government owned manufacturing company known as Alba. In an article in the New York Times, entitled “*Acquisitions at Olympus Scrutinized*,” reporter Hiroko Tabuchi reviews “a tale of deals and advisors, with puzzling results.” Both cases present novel twists and turns that, if you told someone the facts, you would be accused of making up both stories.

Alcoa

This case involves allegations that Alcoa overcharged Alba by “hundreds of millions of dollars” for purchases of alumina. Alcoa and its representative, Victor Dahdaleh then paid kickbacks to the former Alba Chief Executive, Bruce Hall. Both Hall and Dahdaleh were arrested over the past two weeks. One of the more interesting facts about this matter is that it was brought to light in 2008, when Alba filed a lawsuit in federal district court in Pennsylvania, the corporate home of Alcoa.

According to the FCPA Professor Alba alleged in the lawsuit, “that Alcoa and its employees or agents (1) illegally bribed officials of the government of Bahrain and (or) officers of Alba in order to force Alba to purchase alumina at excessively high prices, (2) illegally bribed officials of the government of Bahrain and (or) officers of Alba and issued threats in order to pressure Alba to enter into an agreement by which Alcoa would purchase an equity interest in Alba, and (3) assigned portions of existing supply contracts between Alcoa and Alba for the sole purpose of facilitating alleged bribes and unlawful commissions. As reported by the FCPA Blog, “Just weeks after Alba sued Alcoa, the U.S. Justice Department intervened in the case” and asked for a stay to investigate “possible criminal violations of the FCPA and other laws by Alcoa and its executives and agent.” The trial court granted the stay.

The WSJ article provided further information on the alleged actions of Dahdaleh. Searcey reported that he “set up a company that acted as an intermediary for Alcoa, a move that officials at the metals company supported”. Further Dahdaleh’s company “used Alcoa’s logo on its letterhead in communications with Alba”. Although Alcoa had a commercial relationship directly with Alba, at some point Dahdaleh’s company acceded to this business relationship.

Olympus

This case may join News Corp as yet another case that keeps on giving. It is not often (as in never) that a former Chief Executive Officer (CEO) claims he was fired for being a whistleblower. However, on October 14, 2011 Olympus Chairman, Tsuyoshi Kikukawa,

dismissed the former head of the company, the Briton Michael C. Woodford, citing cultural differences in management styles. However, Mr. Woodford later said he had been fired after raising questions about a series of acquisitions made by Olympus at what he said were inexplicably high prices or involving disproportionately pricey advisory fees. Woodford later provided documents to the Serious Fraud Office (SFO) and is reported to be to meeting with the US Federal Bureau of Investigation (FBI).

As reported earlier in Dealb%k, in an article entitled “2 Japanese Bankers at Heart of Olympus Fee Inquiry”, reporter Ben Protess said that two persons, Hajime Sagawa and Akio Nakagawa, were alleged to have received \$687 million payout by Olympus for advising Olympus on the 2008 takeover of a British company, the Gyrus Group. The money went to a “tiny unknown firm run by Mr. Sagawa and Mr. Nakagawa...the bulk of the fee later went to a Cayman Islands company that also had ties to at least one of the men.”

Dealb%k said the fee in question was over 30 times the norm on Wall Street for such transactional advice. After the “deal closed and the fees were paid, both firms closed up shop.” Dealb%k, citing securities lawyers and corporate governance experts, said that “federal authorities will probably examine whether the steep fees point to deeper ties between Olympus and the bankers, or even kickbacks to Olympus officials involved in the deal.”

Lessons Learned

Both matters provide clear lessons for the compliance practitioner.

- **Detection.** If there were ever two cases that screamed out for Paul McNulty’s maxim No. 2 “What did you do to detect it”, these were the poster children. From Alcoa, it is clear that your company must absolutely, positively have the right to audit your agent AND then exercise that right. If Alba’s federal court suit allegations are anywhere close to hitting the mark, an audit would have picked this up.

From the Olympus matter, if any of your company’s agent sends its money to the Cayman Islands or Jersey, for example, do not walk but charter a plane and get there as fast as you can to audit the agent’s books and records.

- **Due Diligence, Due Diligence and then more Due Diligence.** What was the size of these agents companies? Dahdaleh formed a company to act as Alcoa’s agent for sales to Alba. Sagawa and Nakagawa were characterized as a “tiny, unknown firm”. Do you think this would have turned up in any credible due diligence investigation on either of these agents or their companies? I would say absolutely.
- **Amount of Commission.** Any agent who receives a commission which ranges in the neighborhood of more than 30 times the norm for such transactions is receiving way too

much money for whatever services he or she is rendering. The Department of Justice is beginning to look at any commission amount because any commission so far out of line can provide money which can be used to pay a bribe or kickback.

- **Agent Oversight.** Lastly, where were Alcoa and Olympus in managing these agent relationships? Any *best practice* should include an Oversight Committee to review agent commission rates and payments.
- **CEOs and Whistleblowers.** And finally, it is never a good thing to fire your CEO because he wants to blow the whistle on potentially criminal conduct and then say it is due to ‘cultural differences’. Strike that—it is never a good thing to fire your CEO because he wants to blow the whistle on potentially criminal conduct—period.