

DOJ Provides FCPA Guidance for Mergers and Acquisitions; Continues Industry-Wide Investigations and Focus on China

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Recently, the Department of Justice reaffirmed its guidance as to what it views as the proper Foreign Corrupt Practices Act (“FCPA”) compliance procedures in the context of mergers and acquisitions. On July 17, 2012, the Department announced a Non-Prosecution Agreement (“NPA”) with The NORDAM Group Inc., an Oklahoma-based company that provides aircraft maintenance, repair, and overhaul services. On August 7, 2012, the Department announced a Deferred Prosecution Agreement (“DPA”) with Pfizer H.C.P. Corp., an indirect wholly owned subsidiary of the global pharmaceutical company, Pfizer Inc. Both agreements incorporate FCPA compliance guidelines that contain elements related to mergers and acquisitions. The same elements have appeared in other agreements reached in 2012, including with Data Systems & Solutions LLC and with BizJet International Sales and Support, Inc., and can be expected to appear in future resolutions. The NORDAM and Pfizer resolutions are also noteworthy for reflecting the Department’s continued focus on industry-wide investigations and bribery in China.

Corporate Compliance Program

The Department’s standard “Corporate Compliance Program” guidelines articulate the policies and procedures that a company subject to a DPA or an NPA must implement in order to address deficiencies that the Department has identified in the company’s internal FCPA compliance regime. As such, these guidelines provide important insight into what the Department views as the core elements of a satisfactory FCPA compliance program.

The guidelines incorporated in the NORDAM resolution, like those incorporated in the resolutions with Data Systems and BizJet, suggest that companies engaging in a merger or acquisition should be prepared to:

- (1) conduct appropriate risk-based FCPA and anti-corruption due diligence on prospective targets through legal, accounting, and compliance personnel;
- (2) ensure that the company’s anti-corruption policies and procedures apply to the newly acquired or merged entities as quickly as practicable;
- (3) promptly train directors, officers, employees, agents, consultants, representatives, distributors, and joint venture partners of the newly acquired or merged entities on anti-corruption laws and the company’s related policies; and
- (4) conduct an FCPA-specific audit of the newly acquired or merged entities as quickly as possible.

The Pfizer resolution incorporates, through Attachment C.2, enhanced compliance obligations which contain materially similar elements. Although the guidelines and enhanced obligations incorporated in the NORDAM, Pfizer, and other resolutions require self-reporting in the event that due diligence of the newly acquired company uncovers an FCPA violation, this term is specific to the DPAs and NPAs at issue and does not reflect a legally required element of companies’ compliance policies and procedures. Indeed, the decision to self-report may depend upon many factors and should not be undertaken without substantial consideration.

In addition to the elements related to mergers and acquisitions, the guidelines and enhanced compliance obligations incorporated in NORDAM and Pfizer reflect other compliance requirements that have been standard features of Department resolutions. Among other things, these requirements include: a dedicated compliance officer; a policy governing gifts, hospitality, entertainment, political contributions, charitable donations, etc.; periodic risk assessments; anti-bribery financial and accounting procedures; periodic training; and appropriate disciplinary procedures.

Other Trends

The NORDAM and Pfizer resolutions are also noteworthy for reflecting two other recent trends. First, the resolutions reflect a continued focus by the Department on misconduct in China. The NORDAM resolution represents at least the fourth FCPA resolution reached by the Department of Justice in 2012 involving bribery in China. While Pfizer's DPA with the Department was not expressly linked to misconduct in China, the company's concurrent settlement with the SEC identified bribes paid by the company's subsidiaries in China. Second, the resolutions indicate that the Department is continuing an industry-wide investigative approach of FCPA violations. The resolution with NORDAM is the second FCPA resolution in the past six months involving the aircraft maintenance, repair, and overhaul industry. The prior resolution involved BizJet, which, also like NORDAM, was based in Oklahoma. Similarly, the Pfizer resolution follows an announcement by Assistant Attorney General Lanny Breuer that the Department would be focused on foreign bribery by the pharmaceutical and medical device industries and recent FCPA resolutions as to Biomet Inc., Johnson & Johnson, and Smith & Nephew Inc.

Summary of the Facts

According to the NPA, NORDAM and its subsidiaries and affiliates paid bribes to employees of airlines created, controlled, and exclusively owned by the Chinese government. The bribes were paid directly and indirectly through third-party entities in order to obtain aircraft maintenance, repair, and overhaul contracts with the airlines. Accepting these facts as true, NORDAM agreed to pay a penalty of \$2 million, to cooperate with the Department of Justice, and to continue to implement and report on its enhanced FCPA compliance program. The Department explained that it entered into this agreement because of NORDAM's disclosure of the underlying conduct and its cooperation and remedial efforts. The fine issued was set below the standard range under the U.S. Sentencing Guidelines because the company demonstrated that a larger fine would jeopardize its continued viability.

According to the DPA with Pfizer H.C.P, the company made more than \$2 million in improper payments to government officials—including hospital administrators and members of regulatory and purchasing committees—in Bulgaria, Croatia, Kazakhstan, and Russia. The payments were made through sham consulting contracts and travel and cash payments, among other means, and were meant to influence government decisions regarding the approval and registration of Pfizer products and the award of pharmaceutical tenders. The DPA requires Pfizer H.C.P. to pay \$15 million in criminal penalties. In a related settlement with the Securities and Exchange Commission ("SEC"), Pfizer H.C.P.'s parent company, Pfizer Inc. agreed to pay more than \$26.3 million in disgorgement of profits. In addition, Wyeth LLC, a subsidiary of Pfizer Inc., agreed to pay \$18.8 million in disgorgement for FCPA violations of its own subsidiaries, both prior to and after its acquisition by Pfizer Inc. in 2009. According to the SEC's complaint, employees of Pfizer Inc.'s subsidiaries engaged in improper activities in China, Czech Republic, and Italy, in addition to those countries named in the Department's DPA. The Department named the timely voluntary disclosure by Pfizer H.C.P.'s parent company, the thorough and wide-reaching self-investigation, the significant cooperation with the Department and the SEC, and Pfizer Inc.'s early and extensive remedial and compliance efforts as reasons supporting the DPA and a reduction in the criminal penalty. It cited Pfizer Inc.'s and Wyeth LLC's internal investigation and resolution with the SEC as considerations influencing its decision to not pursue a criminal resolution for the improper conduct of Wyeth's subsidiaries prior to Wyeth's acquisition by Pfizer.

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