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INTERNATIONAL TRADE & NATIONAL SECURITY

Noteworthy FCPA Enforcement Actions in 2021

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Torres Law, PLLC is an international trade and national security law firm that assists clients with the import and export of goods, technology, and services. The firm has extensive experience with the various regimes and agencies governing trade such as the Directorate of Defense Trade Controls, the Bureau of Industry and Security, the Office of Foreign Assets Control, the U.S. Customs and Border Protection, and others. Our group provides clients with full support for all trade law issues, including U.S. export control and sanctions laws, industrial security, the Foreign Corrupt Practices Act, anti-boycott laws, and customs laws.

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Torres Law is an international trade and national security law firm that assists clients with the import and export of goods, technology, and services. We have extensive experience with the various regimes and agencies governing national security and trade such as U.S. Customs and Border Protection, the Department of Commerce Bureau of Industry and Security, the Department of State Directorate of Defense Trade Controls, the Department of Treasury Office of Foreign Assets Control, the Committee on Foreign Investment in the United States, the Defense Counterintelligence and Security Agency and others. Our group provides clients with full support for all trade and national security law issues, including U.S. export control and economic sanctions laws, industrial security, and trade strategy and policy.

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www.torrestradelaw.com

CONTACT US BY EMAIL AT
info@torrestradelaw.com

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The Foreign Corrupt Practices Act ("FCPA") is jointly enforced by the DOJ's Criminal Division and the SEC's Enforcement Division. The DOJ has criminal FCPA enforcement authority over issuers, and their officers, directors, employees, agents, or stockholders acting on the issuer's behalf. The DOJ also has both criminal and civil enforcement responsibility for the FCPA's anti-bribery provisions over domestic concerns, and over certain foreign persons and businesses that act in furtherance of a violation of FCPA while in the territory of the United States. The SEC is responsible for civil enforcement of the FCPA over issuers, and their officers, directors, employees, agents, or stockholders acting on the issuer's behalf.

In 2021 there were three FCPA enforcement actions taken against companies.

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WPP plc

On September 24, 2021, the SEC announced that WPP plc ("WPP"), a London-based advertising group, has agreed to cease and desist from committing violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA and to pay $10.1 million in disgorgement, $1.1 million in prejudgment interest, and an $8 million civil penalty to resolve charges that WPP violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA.

The alleged FCPA violations were related to bribery schemes and internal accounting control and compliance deficiencies at WPP's Indian, Chinese, Brazilian, and Peruvian subsidiaries. Moreover, due to structural deficiencies, WPP failed to promptly or adequately respond to multiple warning signs of corruption at certain subsidiaries.

Violation of the Anti-bribery Provisions of the FCPA, 15 U.S.C. § 78dd-1
This violation resulted from conduct regarding WPP's Indian subsidiary's payments to government officials. WPP was unjustly enriched by $5,669,596 as a result of two bribery schemes at its Indian subsidiary.

Violation of the Books and Records Provision of the FCPA, 15 U.S.C. § 78m(b)(2)(A)
This violation resulted from WPP's book and records failing to accurately reflect the true purpose of outgoing and incoming transactions.

Violation of the Internal Accounting Controls Provision of the FCPA, 15 U.S.C. § 78m(b)(2)(B)
This violation resulted from WPP's failure to implement a system of internal accounting controls sufficient to provide reasonable assurances that transactions were executed in accordance with management's general or specific authorization and that access to assets was permitted in accordance with management's general or specific authorization.

WPP's Remedial Actions and Cooperation
According to the SEC order, WPP's remedial acts and cooperation were considered by the SEC in determining to accept WPP's offer. Specifically, the SEC considered WPP's sharing of facts

developed in the course of its own internal investigation and accounting reviews, translating of key documents, and making employees abroad available for interviews. WPP's remediation included, among other measures, the termination of senior executives and other employees involved in the misconduct, and the enhancement of its global compliance, internal investigations, and risk and controls functions.

As of the time of writing, the DOJ has not brought charges against WPP for FCPA violations; however, its investigation appears to be ongoing.

Amec Foster Wheeler Limited

On June 25, 2021, the SEC announced civil charges against Amec Foster Wheeler Limited ("Foster Wheeler"), an engineering company, for FCPA violations related to $1.1 million in improper payments by its subsidiary, Foster Wheeler Energy Limited ("FWLE"), to employees of a Brazilian state-owned oil company, Petroleo Brasileiro S.A. ("Petrobras") in exchange for a $190 million contract to design a gas-to-chemicals complex in Brazil. Foster Wheeler obtained a benefit of over $17.6 million as a result of its misconduct.

Specifically, the SEC released a cease-and-desist order finding that Foster Wheeler violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. Foster Wheeler consented to the SEC order, agreeing to pay the SEC $22.7 million in disgorgement and prejudgment interest for its FCPA violations. The SEC order provides for offsets for the $22.7 million penalty of up to $12.6 million in disgorgement paid to Brazilian and United Kingdom authorities.

On the same day, Foster Wheeler also agreed to pay $18,375,000 to resolve DOJ criminal charges related to the FCPA violations and entered a three-year deferred prosecution agreement with the DOJ related to the FCPA violation.

Deutsche Bank AG

On January 8, 2021, the SEC announced that Deutsche Bank AG ("Deutsche Bank"), a multinational financial services corporation, consented to the SEC's cease-and-desist order finding that Deutsche Bank violated the books and records and internal accounting controls provisions of the FCPA,[1] and agreed to pay more than $43 million to settle the SEC's charges. On the same day, Deutsche Bank also agreed to pay more than $130 million to resolve DOJ criminal charges related to the FCPA violations and associated commodities fraud scheme. Deutsche Bank also entered a three-year deferred prosecution agreement with the DOJ.

The SEC and DOJ charges arise from Deutsche Bank's improper use, between 2009 and 2016, of hundreds of third-party intermediaries, business development consultants, and finders (collectively "BDCs") to obtain and retain global business. During this time period, Deutsche Bank failed to maintain adequate internal accounting controls concerning the use and payment of BDCs, allowing for bribe payments and payments for unknown, undocumented, or unauthorized services. The improper payments were inaccurately recorded as legitimate business expenses in Deutsche Bank's books and records, and involved invoices and documentation falsified by its employees.

[1] Sections 13(b)(2)(A), 13(b)(2)(B) of the Exchange Act, 15 U.S.C. §§ 78m(b)(2)(A), (B).

The SEC described four improper BDC engagements that Deutsche Bank entered between 2007 and 2017.

1. Between 2007 and 2015, Deutsche Bank retained a consultant in Italy to refer high-net-worth clients to the Deutsche Bank. Deutsche Bank did not conduct reasonable due diligence prior to engaging the consultant, who was a regional tax judge in Italy, and thus a current government official during his BDC engagement. Deutsche Bank's multiple payments to the Italian consultant exceeded the commission rate in his contract and were made more frequently than permitted by the contract. As a result of this relationship, Deutsche Bank was unjustly enriched by approximately $1 million.
2. Between 2010 and 2011, Deutsche Bank retained and paid a consultant in Abu Dhabi to obtain a deal with an Abu Dhabi sovereign wealth fund, knowing that the consultant was a relative of a high-ranking official and key decision-maker of the wealth fund. Deutsche Bank also knew that the consultant was a proxy for the wealth fund official and that it needed to pay the consultant to obtain the wealth fund's business. Deutsche Bank employees referred to the official as a "gatekeeper" for the wealth fund. As a result of this relationship, Deutsche Bank was unjustly enriched by approximately $30 million.
3. Between 2011 and 2012, Deutsche Bank made approximately $1.1 million in improper payments to a general manager of the family office of a senior member of a prominent Middle Eastern family in order to obtain and retain the family office's lucrative banking business. The general manager made investment decisions for the family office and managed hundreds of millions of dollars in investments on behalf of the family office. In order to transfer funds to the general manager, Deutsche Bank entered a BDC contract with a shell company registered in the British Virgin Islands that was owned by the general manager's wife. The payments to the general manager were inaccurately recorded in Deutsche Bank's books and records. As a result of the relationship, Deutsche Bank was unjustly enriched by approximately $3 million.
4. Between 2011 and 2013, Deutsche Bank retained and paid a consultant in China at least $1.6 million to establish a clean energy investment fund with a Chinese government entity. Before Deutsche Bank engaged the Chinese consultant as a BDC, the consultant provided Deutsche Bank employees with a *curriculum vitae* that indicated he was "currently the senior advisor to [the regional Chinese] Government" with which Deutsche Bank sought to establish the investment fund. Deutsche Bank employees also knew that the consultant was a "close friend of" a foreign government official whose approval was required in order to establish the investment fund. Deutsche Bank dissolved the investment fund in 2012 because it failed to raise sufficient capital. Deutsche Bank earned no profits from this engagement.

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Questions? Contact Us:

Call 202.851.8200 or 214.295.8473
Email Info@torrestradelaw.com

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