



FINANCIAL SERVICES ADVISORY AND COMPLIANCE

FCPA Q1 2018 — QUARTERLY REPORT

Like the fourth quarter of 2017, the first quarter of 2018 was relatively slow in terms of the number of Foreign Corrupt Practices Act (FCPA) cases resolved by the government. Notwithstanding, the regulators continue to note that FCPA enforcement is not going away. Specifically, Deputy Attorney General Rod Rosenstein reinforced the Department of Justice's (DOJ's) commitment to investigating, prosecuting, and eradicating corporate fraud and the importance of compliance programs that are ingrained in corporate culture.

I. ENFORCEMENT ACTIVITY IN Q1 2018

A. Transport Logistics International, Inc.

On March 13, Transport Logistics International, Inc. (TLI) agreed to pay a criminal fine of \$2 million and enter into a three-year deferred prosecution agreement (DPA) with the DOJ to resolve FCPA charges. Under the DPA, TLI must continue to implement enhanced compliance policies and procedures and report on the status of its anti-corruption compliance program. TLI received a reduced fine because of its inability to pay the penalty that would be due under the U.S. sentencing guidelines, approximately \$21.4 million. TLI is a Maryland-based transportation company that provides services for the transportation of nuclear materials.¹ The DOJ also indicted the former co-president of TLI, Mark Lambert, on 11 counts related to foreign bribery, fraud, and a money laundering scheme in January 2018.² The other former co-president, Daren Condrey, pleaded guilty to conspiracy to violate the FCPA and commit wire fraud on June 17, 2015, though the case is ongoing.³ Between 2004 and 2014, Condrey and others agreed to make payments of approximately \$1.7 million through shell companies banking in Cyprus, Latvia, and Switzerland to Vadim Mikerin,⁴ a director at JSC Technabexport (Tenex), which is a Russian government-owned and controlled supplier of uranium and uranium enrichment services company. Condrey's goal was to obtain and retain business with Tenex. Fake invoices from Tenex to TLI for nonexistent services were created to cover up the bribe payments. TLI would then wire payments for the fake invoices to the shell companies.

1. *United States v. Transport International, Inc.*, No. TDC-18-0011 (D.M.D.).

2. U.S. Department of Justice Press Release, "Former President of Maryland-Based Transportation Company Indicted on 11 Counts Related to Foreign Bribery, Fraud, and Money Laundering Scheme," January 12, 2018.

3. U.S. Department of Justice Press Release, "Russian Nuclear Energy Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act," August 31, 2015. Daren Condrey's case was scheduled to be sentenced in June 2017. However, the docket has been updated several times and documents are still sealed so the case is deemed ongoing.

4. U.S. Department of Justice Press Release, "Vadim Mikerin Entered into a Plea Agreement with the DOJ in Which he Pleaded Guilty to the Single Count of Conspiracy to Violate the FCPA," He was sentenced on December 15, 2015, to four years in prison and to pay a mandatory assessment of \$100 and forfeit approximately \$2.13 million.



B. Elbit Imaging Ltd.

On March 9, Elbit Imaging Ltd. (Elbit) (NYSE: EMITF), an Israeli holding company focusing on real estate investment and development, agreed to pay the SEC \$500,000 to settle violations of the FCPA books and records and the internal controls provisions. Elbit and its subsidiary, Plaza Centers NV (Plaza), paid millions of dollars to third-party offshore consultants and a sales agent purportedly for services related to a real estate development project in Romania and sale of real estate assets in the U.S., but there was no evidence that the consultants and sales agents actually provided services. Elbit and Plaza failed to properly record the payments in a manner that reflected the nature of the payments in their books and records. Elbit and Plaza also failed to devise and maintain internal accounting controls sufficient to provide reasonable assurance that company funds would only be used for legitimate corporate purposes and that transactions were recorded as necessary. Without admitting or denying the findings, Elbit agreed to a cease-and-desist order and paid the civil penalty.⁵

C. Kinross Gold

On March 26, Kinross Gold Corporation (Kinross) (NYSE: KGC), a gold-mining company based in Canada, settled charges with the SEC for violating the FCPA. The SEC charged Kinross due to consistent failure to implement adequate accounting controls for two African subsidiaries, one based in Mauritania and the other in Ghana. While not admitting or denying the findings, Kinross paid a civil penalty of \$950,000 to the SEC. The findings included the following:

1. Kinross acquired the two African subsidiaries for \$7.1 million, knowing that the subsidiaries needed improvements to their anti-corruption compliance programs and internal accounting. Even though internal audit flagged the deficiencies, it took Kinross three years to implement adequate controls. Kinross then failed to maintain the controls after implementing them.

2. Kinross awarded a logistics contract to a Mauritanian government-preferred company, in contravention of Kinross' bidding and tendering procedures, and despite concerns that the company was a high-cost provider with poor technical capabilities.
3. To facilitate contracts with officials in the Mauritanian government, Kinross contracted with a politically connected consultant and failed to conduct the heightened due diligence that was required.

As part of the cease-and-desist order, Kinross will report on its remedial steps for a period of one year.⁶

II. WHAT THE ENFORCERS ARE SAYING

In the first quarter of 2018, there was not much activity on the speaker's circuit related to the FCPA. On March 2, 2018, Deputy Attorney General Rod Rosenstein delivered the keynote address at the 32nd Annual ABA National Institute on White Collar Crime.⁷ In a wide-ranging speech, Rosenstein emphasized that "the Department of Justice stands for the principle that every American deserves equal protection under the rule of law." He talked about the pursuit of truth and how truth may not always match preconceptions. He said, "Government officials who exercise discretion have a special obligation to make the right choice." According to Rosenstein, "federal law enforcement principles are timeless. [The current DOJ leadership] will defend the principles, and we will pass them on to future generations."

Rosenstein went on to highlight some of the DOJ's accomplishments over the past year. Among them was the launch of the new FCPA enforcement policy, which has now been incorporated into the U.S. Attorneys' Manual. Rosenstein also discussed the DOJ's commitment to hold individuals accountable for corporate crimes. At the same time, Rosenstein said the DOJ seeks "to avoid imposing penalties that disproportionately punish innocent employees, shareholders, customers, and other stakeholders. Corporate misconduct can be serious or pervasive enough that an entity-level criminal resolution

5. SEC Order Instituting Cease-and-Desist Proceedings, "In the Matter of Elbit Imaging Ltd.," March 9, 2018, (File No. 3-18397).

6. SEC Order Instituting Cease-and-Desist Proceedings, "In the Matter of Kinross Gold Corporation," March 26, 2018, (File No. 3-18407).

7. Department of Justice, "Deputy Attorney General Rosenstein Delivers Remarks at the 32nd Annual ABA National Institute on White Collar Crime," San Diego, Calif., March 2, 2018. <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-32nd-annual-aba-national-institute>.

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is warranted. We will pursue that outcome when appropriate. But we think carefully about accountability and fairness." Rosenstein concluded by saying, "Corporate America is often the first line of defense for detecting and deterring fraud ... [and] we want to reward companies that invest in strong compliance measures ... When something does go wrong, the greatest consideration should be given to companies that do not just adopt compliance programs, but incorporate them into the corporate culture. If you want [the DOJ] to treat a corporate entity as a victim, you should act like a victim who wants to see the perpetrators held accountable."

At the same conference, SEC Co-Director of Enforcement Steve Peikin indicated that the SEC is not likely to have an FCPA enforcement policy similar to the DOJ's policy, in which there is a presumption of a declination for companies that self-report, fully cooperate, and remediate. This is due to the dramatically different consequences in the SEC civil context.⁸

8. Department of Justice, "Securities Enforcement in 2018 and Beyond," panel discussion at the 32nd Annual ABA National Institute on White Collar Crime, San Diego, Calif., March 1, 2018.