

November 1, 2016

Embraer SA Pays \$205 Million to the SEC and DOJ to Settle FCPA Violations

Executive Summary

On October 24, 2016, U.S. authorities announced that Brazilian aircraft manufacturer Embraer SA agreed to pay more than \$205 million to resolve violations of the Foreign Corrupt Practices Act's anti-bribery, books and records and internal control provisions. According to the U.S. Department of Justice and Securities and Exchange Commission, Embraer made more than \$83 million in profits by using sham consulting agreements to funnel bribes totaling almost \$6 million to foreign officials in the Dominican Republic, Mozambique and Saudi Arabia. In addition, Embraer violated the FCPA's books and records provisions by mischaracterizing the purpose of the payments, and violated the internal controls provisions by failing to implement adequate controls for the retention of third-party sales representatives and agents.

Pursuant to a deferred prosecution agreement ("DPA") with DOJ, Embraer agreed to pay a monetary penalty of \$107,285,090, enhance its corporate compliance program and retain an independent compliance monitor for at least three years.¹ Separately, Embraer agreed to an order with the SEC requiring it to disgorge \$98,248,291 in profits and prejudgment interest.² Embraer may receive up to \$20 million of credit against the SEC settlement for amounts disgorged to Brazilian authorities; in a separate press release, Embraer reported that it has agreed to disgorge approximately \$18.2 million to Brazilian authorities to settle potential claims regarding violations of Brazilian law.³

Factual Allegations

According to the SEC's and DOJ's filing documents, which Embraer admitted are accurate,⁴ between 2008 and 2011, Embraer made improper payments to foreign officials in the Dominican Republic, Saudi Arabia

¹ Deferred Prosecution Agreement ¶¶ 7, 9, 11-13, *United States v. Embraer, S.A.*, No. 16-cr-60294-JIC (S.D. Fla. Oct. 24, 2016).

² Final Judgment as to Defendant Embraer, S.A. at 4-5, *Sec. and Exch. Comm'n v. Embraer, S.A.*, No. 16-cv-62501-JAL (S.D. Fla. Oct. 24, 2016).

³ Press Release, Embraer, S.A., Embraer Announces the Resolution of Case with the US and Brazilian Authorities (Oct. 24, 2016), <http://www.embraer.com/en-US/ImprensaEventos/Press-releases/noticias/Pages/Embraer-announces-the-resolution-of-case-with-the-US-and-Brazilian-authorities.aspx>.

⁴ Deferred Prosecution Agreement, *supra* note 1, at ¶ 2; Consent of Embraer, S.A. ¶ 42, *Sec. and Exch. Comm'n v. Embraer, S.A.*, No. 16-cv-62501-JAL (S.D. Fla. Oct. 24, 2016).

and Mozambique to obtain contracts with foreign governments or state-owned entities.⁵ The SEC and DOJ have jurisdiction because Embraer's ADRs trade on the New York Stock Exchange and because the improper payments were made through a U.S. bank account belonging to Embraer's wholly-owned U.S. subsidiary, Embraer Representations LLC. In addition, the SEC noted that at least one email in furtherance of the scheme was sent through a U.S. server.

Dominican Republic

In the Dominican Republic, Embraer paid a commission of \$3.52 million to a then-colonel in the Dominican Republic's air force in connection with his assistance in obtaining the Dominican Senate's approval of the air force's request to purchase military aircraft from Embraer for \$96.4 million. Embraer was aware that the colonel had been speaking to a Dominican senator about "profit sharing." Embraer agreed to pay a commission requested by the colonel, and after the sale had been approved, made an initial payment of \$100,000 to the colonel through a corporate shell entity. Following the first payment, and in response to growing pressure from the colonel, Embraer arranged for the remaining payments to be made through a sham consulting agreement, purportedly entered in connection with promoting the sale of Embraer aircraft in Jordan. The agreement required Embraer to make an upfront payment of \$3.42 million (the same amount owed to the colonel), which Embraer recorded on its books as a sales commission, notwithstanding that Embraer never sold any aircraft in Jordan, and the consultant never provided any legitimate services in connection with the sale of aircraft to the Dominican air force.

Saudi Arabia

Embraer paid \$1.65 million to a foreign official in connection with the sale of three jets worth approximately \$93 million to a Saudi Arabian state-owned enterprise.⁶ A Saudi Aramco executive told Embraer that in exchange for a commission of \$550,000 per new jet, he could persuade his company to purchase new, rather than used, jets. Embraer agreed to the commission, and funneled it through a third party pursuant to a phony consulting agreement.

Mozambique

The corrupt payments in Mozambique were made in connection with the sale of two commercial aircraft for approximately \$65 million to Linhas Aéreas de Moçambique, S.A., the state-owned commercial airline in Mozambique. During negotiations for the sale in 2008, a Mozambican national suggested that

⁵ Information ¶¶ 15-59, *United States v. Embraer, S.A.*, No. 16-cr-60294-JIC (S.D. Fla. Oct. 24, 2016); Complaint ¶ 2, *Sec. and Exch. Comm'n v. Embraer, S.A.*, No. 16-cv-62501-JAL (S.D. Fla. Oct. 24, 2016).

⁶ Kevin Baxter, *Saudi Aramco Says Employee Took Bribe from Embraer in Aircraft Purchase*, Wall St. J., Oct. 28, 2016, <http://www.wsj.com/articles/saudi-aramco-says-employee-took-bribe-from-embraer-in-aircraft-purchase-1477656228> (reporting that the SOE was Saudi Aramco).

Embraer should make a monetary “gesture” towards Mozambican officials when the first plane was delivered. Embraer offered to make a payment of between \$50,000 and \$80,000, which was rejected by the CEO of Linhas Aéreas de Moçambique as an insult. Embraer ultimately agreed to the CEO’s suggestion of an \$800,000 payment (\$400,000 per airplane), and executed a consulting agreement with a company related to the Mozambican national for \$800,000, notwithstanding that the company had not rendered any legitimate services to Embraer.

India

Finally, the resolution agreements state that Embraer improperly accounted for payments made in connection with the sale of aircraft to the Indian Air Force in 2008. Several years prior to the sale, Embraer contracted with a UK-based company with close ties to an Indian national, in order to obtain the Indian national’s assistance in selling aircraft to the Indian Air Force and avoid laws in India prohibiting the use of commercial agents for military sales. Following the sale, when the Indian national’s counsel demanded payment under the then-expired contract with the UK-based company, Embraer negotiated a settlement by which it caused its Swiss subsidiary to pay \$5.76 million under a false agency agreement with another company affiliated with the Indian national.

Violations and Resolution

Criminal Information and Deferred Prosecution Agreement

DOJ’s Information charged Embraer with conspiring to violate the FCPA’s anti-bribery and books and records provisions, and knowingly and willfully violating the internal control provisions of the FCPA. The Information also charged Embraer with failing to implement adequate internal controls that required due diligence, written contracts and documentation that services had been provided before payments could be made to third-party consultants.

In the press release accompanying the settlement, DOJ stated that it discounted Embraer’s criminal penalty by 20% below the bottom of the U.S. Sentencing Guidelines range to reflect “Embraer’s full cooperation but incomplete remediation.”⁷ The DOJ credited Embraer’s cooperation, including providing information about individuals involved in the misconduct, Embraer’s lack of prior criminal history, and Embraer’s implementation of a more robust compliance and controls program. DOJ credited Embraer only for partial remediation because Embraer did not discipline a senior executive who was aware of bribery discussions and had oversight for the employees engaged in those discussions. The DPA also

⁷ Press Release, Dep’t of Justice, Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016), <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>.

emphasized the fact that Embraer did not self-report the violations; rather, the investigation began when the SEC served a subpoena on Embraer.

SEC Complaint and Settlement

The SEC complaint charged Embraer with civil violations of the FCPA's anti-bribery, books and records and internal controls provisions. Like DOJ, the SEC faulted Embraer's internal controls related to vendor due diligence and the execution of written contracts with third-party consultants. The SEC noted, in particular, that Embraer did not have written contracts with any of the foreign officials or the Indian consultant, notwithstanding that it knew that those individuals were the intended beneficiaries of the payments.⁸

Key Takeaways

The Embraer resolutions highlight a number of ongoing trends in FCPA enforcement actions.

The government is continuing to extract significant penalties and disgorgement for FCPA violations. This is the third FCPA enforcement action announced so far this year with combined penalties and disgorgement in excess of \$200 million, and the disgorgement is one of the largest ever in an SEC FCPA enforcement action.

FCPA investigations are often long and expensive. An Embraer press release mentioned that its internal investigation lasted more than six years, entailed review of hundreds of thousands of documents and involved more than 100 interviews with employees and third parties.⁹

U.S. authorities continue to cooperate with their foreign counterparts. The Embraer resolutions are another example of the SEC's and DOJ's cooperation with authorities in other countries. The SEC press release accompanying the settlement stated that the investigation involved the assistance of authorities in Brazil, South Africa, Switzerland, Uruguay, Spain and France.¹⁰

The SEC takes a broad view of U.S. jurisdiction. The SEC appeared to have jurisdiction over Embraer because it is a foreign issuer that made corrupt payments through a New York bank account. Nevertheless, the SEC also asserted jurisdiction because "at least one email in furtherance of the scheme passed through U.S. servers." While in past enforcement actions regulators have stated and implied that such emails may be sufficient to establish U.S. jurisdiction, in each of those cases the emails in question

⁸ Consent of Embraer, S.A., *supra* note 4, at ¶¶ 3-5.

⁹ Press Release, Embraer, S.A., *supra* note 3.

¹⁰ Press Release, Sec. and Exch. Comm'n, Embraer Paying \$205 Million to Settle FCPA Charges (Oct. 24, 2016), <https://www.sec.gov/news/pressrelease/2016-224.html>.

were sent by an employee of the company alleged to have violated the FCPA.¹¹ Here, the only email the SEC cited was sent from the Dominican colonel who received improper payments to a third party that Embraer used for the Dominican bribery scheme.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹¹ See, e.g., Criminal Information ¶ 17, *United States v. Bridgestone Corp.*, No. 4:11-cr-00651 (S.D. Tex. Sept. 15, 2011) (noting email sent from employees in Japan to employees in Houston, Texas in furtherance of a corrupt scheme); Information ¶ 57.a., *United States v. Panalpina World Transp. (Holding) Ltd.*, No. 4:10-cr-00769 (S.D. Tex. Nov. 4, 2010) (noting email sent from an employee in Houston, Texas to employee based in Switzerland in furtherance of a corrupt scheme); Information ¶¶ 24, 26.c., *United States v. Magyar Telekom, Plc.*, No. 1:11-cr-00597 (E.D. Va. Dec. 29, 2011) (noting emails sent from employees to U.S.-based email addresses in furtherance of a corrupt scheme).