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Olympus China Legal Analysis

This memorandum addresses U.S. law matters implicated by facts presented about Olympus Corporation ("Olympus") and its subsidiaries, Olympus (Shenzhen) Industrial Co., Ltd. ("OSZ"), Olympus China and Olympus Corporation of Asia Pacific Limited ("OCAP").

I. U.S. Foreign Corrupt Practices Act – Anti-Bribery Provisions

The Foreign Corrupt Practices Act ("FCPA") prohibits offering, paying, promising to pay, or authorizing the payment of anything of value to a foreign official for the purpose of influencing an official act or decision. 15 U.S.C. §§ 78dd-1. The facts presented follow the pattern of a third-party instrumentality bribery scheme. Given the monetary amounts at issue, both the U.S. Department of Justice ("DOJ") and the Securities Exchange Commission ("SEC") would likely investigate for wrongdoing. Were violations of U.S. laws identified, DOJ and SEC would likely pursue penalties against corporate entities and individuals.

The facts set forth in Mr. Weiheng Jia's memorandum, dated March 17, 2017 (the "Deloitte Memorandum"), suggest that OSZ's arrangement with Anyuan/APT Company may have violated the FCPA's anti-bribery provisions. In particular, internal emails indicate that OSZ management contemplated compensating Anyuan/APT Company for bribes that the consultants would pass along to Custom officials on behalf of OSZ. Deloitte Memorandum ¶ 3.4. In addition, the evidence shows that high-level OCAP, OSZ and Olympus executives approved the engagement of Anyuan/APT Company, notwithstanding the fact that relevant OCAP personnel had voiced concerns about the bribery and bookkeeping risks related to the engagement and had circulated

articles concerning "bribery issues related to Anyuan Company". *Id.* ¶¶ 3.8, 3.11, 3.12, 3.15. If Anyuan/APT Company did in fact offer payments to customs officials for the purpose of minimizing OSZ's tax burden, OSZ, OCAP, Olympus and the various employees involved in the decision to retain Anyuan/APT Company could be held liable under the FCPA. The FCPA prohibits using third-party consultants, such as Anyuan/APT Company, to pay bribes to foreign officials for the purpose of influencing an official act or decision or securing an improper advantage. *See* 15 U.S.C. § 78dd-1 *et seq.* Companies and individuals may be held liable not only for intentional violations of the FCPA, but also for consciously disregarding the risk that a third-party consultant would engage in wrongdoing on the company behalf. *See* U.S. Dep't of Justice Crim. Div. & Sec. & Exch. Comm'n Enforce. Div., *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012), available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf [hereinafter FCPA Guide], at 22.

The DOJ and SEC have jurisdiction to enforce the anti-bribery provisions against any of three sets of persons and entities: (1) "issuers", along with their officers, directors, employees, agents and shareholders; (2) "domestic concerns", along with their officers, directors, employees, agents and shareholders; and (3) persons, other than issuers or domestic concerns, acting "while in the territory of the United States". 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; *see also* FCPA Guide, at 10.

"Issuers" are entities that either (1) have a class of securities registered under the Section 12 of the Securities Exchange Act or (2) are required to file reports with the SEC pursuant to Section 15(d) of the Securities Exchange Act. 15 U.S.C. § 78dd-1. Foreign companies that list American Depository Receipts ("ADRs") on U.S. exchanges are considered issuers, but foreign companies that trade ADRs over the counter without registration or § 15(d) filings are not issuers under the FCPA. Assuming Olympus Corporation qualifies as an issuer, it faces exposure under the FCPA as an issuer. The SEC has repeatedly held parent issuers liable for the conduct of their foreign subsidiaries, even absent evidence that the parents knew of the subsidiaries' misconduct. *See* PTC Inc., Exchange Act Release No. 77145, 2016 WL 683594 (February 16, 2016); SciClone Pharmaceuticals, Inc., Exchange Act Release No. 77058, 2016 WL 683571 (February 4, 2016); Alcoa Inc., Exchange Act Release No. 71261, 2014 WL 69457 (January 9, 2014). In this case, the President and Chairman of Olympus' knowledge and approval of the third-party engagement would be ample basis for DOJ or SEC to seek to hold Olympus Corporation liable assuming it qualifies as an issuer. *See* Deloitte Memorandum ¶ 3.8.

In addition, DOJ and SEC have jurisdiction over "domestic concerns"—citizens, nationals or residents of the United States, along with partnerships, associations, joint-stock companies, business trusts, unincorporated organizations and sole proprietorships with their principal place of business in the United States, or which are organized under the laws of a state, territory, possession or commonwealth of the United States. 15 U.S.C. § 78dd-2. Olympus' General Counsel ("GC") and any U.S.-person attorneys at Shearman & Sterling that worked on the transaction with Anyuan/APT Company or the subsequent investigation constitute "domestic concerns" under the FCPA.

The GC learned about Olympus' engagement of Anyuan/APT Company in 2015, when she joined the special investigation committee overseeing Shearman and Nishimura & Asahi's investigation into OSZ's handling of the "Customs Issue". Deloitte Memorandum ¶ 6.14; *see also id.* ¶¶ 1.1-1.3 (describing the "Customs Issue"). Moreover, the Legal Department advises it specifically notified the GC about potential FCPA violations in May 2016 and of flaws in Shearman & Sterling's investigation into the arrangement with Anyuan/APT Company in August 2016. *Id.* ¶¶ 6.7-6.8. The Legal Department further advises that it has continued to reiterate its concerns to the GC on a monthly basis, from August 2016 to the present, and the GC has responded that she has been monitoring potential issues and working with Shearman to resolve them. *Id.* ¶ 6.9. The Legal Department indicates that the GC has not taken any steps to modify or terminate Olympus' relationship with Anyuan/APT Company notwithstanding the Legal Department's persistent airing of its concerns. *Id.* ¶¶ 6.14-6.15.

These facts, if proven, could lead U.S. authorities to believe that the GC or U.S. attorneys at Shearman involved in the transaction or investigation consciously disregarded "any action (or inaction) . . . that should reasonably [have] alert[ed] them of the high probability of an FCPA violation", and took actions to continue such violations. *See* FCPA Guide, at 22 (quoting H.R. Rep. No. 100-576, at 920 (1988)) (internal quotation marks omitted). By extension, there is a risk that Olympus and OSZ could be liable under the FCPA's "domestic concern" provisions based on the actions of these persons, under principles of *respondeat superior*. While this is an underdeveloped area of law, DOJ and SEC have taken very broad views of the jurisdictional reach of the FCPA. In any case, the potential involvement of U.S. persons would make DOJ and SEC more interested in investigating.

Finally, the FCPA's territorial jurisdiction covers non-issuers and non-domestic concerns that do "any corrupt act in furtherance of" a bribery scheme "while in the territory of the United States". 15 U.S.C. § 78dd-3. Here, jurisdiction arguably could exist by virtue of the GC or Shearman's activities while in the United States. The GC attended to emails and held phone and in-person meetings regarding the Anyuan/APT Company matter while within the territory of the United States. Deloitte Memorandum ¶ 6.15. If the GC knew or consciously disregarded the risk that Anyuan/APT Company was making corrupt payments to foreign officials, U.S. authorities could take the position that participation in such discussions while in the United States could constitute an act sufficient to confer jurisdiction under 15 U.S.C. § 78dd-3. *See, e.g.*, Information, *United States v. Samuel Mebiame*, No. 16-cr-627 (E.D.N.Y. Dec. 9, 2016) (asserting § 78dd-3 jurisdiction over individual who "while he was in the United States, received a telephone call from a co-conspirator" allegedly requesting that the defendant undertake conduct in furtherance of a bribery scheme); Plea Agreement, *United States v. Alcatel-Lucent Trade International*, A.G., No. 10-cr-20906 (S.D. Fla. Feb. 22, 2011) (asserting § 78dd-3 jurisdiction over foreign entity whose employees "had regular communications, including telephone calls, facsimiles, and email, with [U.S. parent] personnel located in the offices in Miami, Florida"). Olympus itself would also be subject to § 78dd-3 jurisdiction based on acts in the U.S. by its employees or agents in furtherance of a bribery scheme.

II. Foreign Corrupt Practices Act – Accounting Provisions

In addition to its anti-bribery proscriptions, the FCPA contains accounting provisions applicable to issuers. The "books and records" provisions require issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect transactions and dispositions of the assets of the issuer". 15 U.S.C. § 78m(b)(2)(A). If Olympus is an issuer, it could be held liable for improperly recording payments to Anyuan/APT Company and the sale of OSZ employee dormitories as legitimate consultant fees and real estate sales when such transactions were in fact made in furtherance of corrupt payments. Deloitte Memorandum ¶¶ 2.9, 3.2-3.5; *see, e.g.*, Complaint, *SEC v. Baker Hughes Inc.*, No. 07-cv-1408 (S.D. Tex. Apr. 26, 2007) (alleging Baker Hughes Inc. violated the FCPA's "books and records" provision by, *inter alia*, recording payments to an Angolan agent as "commissions" without "adequately assur[ing] itself that such payments were not being passed on to employees of Sonangol, Angola's state-owned oil company, to obtain or retain business in Angola").

In addition, the FCPA includes an "internal controls" provision, which requires issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that the company's financial statements are accurate and reliably account for the company's assets. 15 U.S.C. § 78m(2)(B). The FCPA Guide explains that an "effective compliance program is a critical component of an issuer's internal controls". FCPA Guide, at 40. Though DOJ and SEC "have no formulaic requirements regarding compliance programs", they have provided guidance regarding the "basic elements" the agencies consider when evaluating the effectiveness of a company's internal controls. *Id.* at 56. Such elements include (1) a corporate "culture of compliance" that is emphasized and adhered to by senior management, (2) a clear, concise and easily accessible code of conduct, (3) adequate staffing and resources dedicated to the compliance program, (4) evidence that the company appropriately evaluates the risk for violations and adjusts its program in response to such risks, (5) targeted and effective training programs, (6) clear and appropriate disciplinary procedures, (7) appropriate evaluation and monitoring of risks associated with third-party relationships, (8) confidential reporting and internal investigation procedures and (9) a willingness and ability to adjust the company's compliance program as appropriate over time. FCPA Guide, at 57-62. Olympus has publicly acknowledged a lack of strong internal controls. Olympus Corporation, *Certain Reports on the Company and its Subsidiary* (June 27, 2016), available at http://www.olympus-global.com/en/common/pdf/td160627e.pdf. The lack of controls is also manifest in approving the APT engagement in face of concerns raised and risks identified by relevant personnel and outside counsel. Deloitte Memorandum ¶¶ 3.8, 3.9, 3.11-3.15.

III. Mail and Wire Fraud

The federal mail and wire fraud statutes criminalize using the mail or wires to knowingly participate in a "scheme or artifice to defraud". *See* 18 U.S.C. §§ 1341, 1343. In this case, the GC's use of phones and emails in the United States would constitute the use of "wire, radio, or television communication in interstate or foreign commerce", and OSZ's alleged retention of Anyuan/APT Company to pay bribes to avoid paying fines to the Shenzhen Customers authorities could constitute "a scheme or

artifice . . . for obtaining money or property by means of false or fraudulent pretenses". 15 U.S.C. § 1343; *see also* Information, *United States v. SSI Int'l Far East, Ltd.*, No. 06-cr-398 (D. Ore. Oct. 10, 2006) (alleging company engaged in wire fraud by overcharging customers for scrap metal and then wiring the overcharged funds to managers of government-owned and private steel production companies in China and South Korea). If the GC's emails and phone calls received or sent within the United States were in furtherance of the bribery scheme, they could arguably create jurisdiction to pursue mail and wire fraud charges in the United States against both the GC and her employers.

IV. Shearman & Sterling Conflict Issues

There are potential trustworthiness and conflict of interest issues in Shearman & Sterling's investigation of the propriety of the dormitory sale to Anyuan/APT, given that the firm represented Olympus in its negotiations with Anyuan/APT Company regarding the sale. Deloitte Memorandum ¶¶ 5.2-5.3, 6.1. Under the American Bar Association ("ABA") Model Rules of Professional Responsibility,[1] lawyers may not represent clients if the representation involves "a concurrent conflict of interest", which exists when "there is a significant risk that the representation of [the] clients will be materially limited by . . . a personal interest of the lawyer". Shearman attorneys arguably had a personal interest in determining that the transaction that their firm helped to negotiate was not illicit or improper. *See* Conflict of Interest: Current Clients, MRPC Rule 1.7 Cmt. 10 ("[I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.").

Even if two different sets of Shearman attorneys worked on the two matters, the investigating attorneys would be barred from "knowingly represent[ing] a client when any one of them practicing alone would be prohibited from doing so by [the rule governing conflict of interests], unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm". Imputation of Conflicts of Interest, MRPC Rule 1.10. The potential reputational and legal risk to Shearman associated with facilitating an agreement that may violate the FCPA or other laws is arguably high enough that permitting other Shearman attorneys to investigate the transaction may "present a significant risk of materially limiting the representation of the client". *See id.* Indicia of Shearman's potential conflict are evident in the investigating team's lack of acknowledgement that the two persons who retained Shearman as independent investigators were responsible for approving the Anyuan/APT engagement, as well as the investigating team's appearing not to have addressed issues related to these two employees during the course of its investigation. Deloitte Memorandum ¶ 6.8.

More broadly, Shearman was not "independent" by U.S. standards. In an SEC Release issued in 2011, the Commission set forth criteria it considers in evaluating

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[1] All lawyers are bound by the professional responsibility rules of the jurisdiction in which they are admitted and in which they practice. Bar Admission and Disciplinary Matters, Ann. Mod. Rules Prof. Cond. § 8.5. Most states have adopted a "conflict of interest" rule similar to the ABA's Model Rule.

"whether, and how much, to credit self-policing, self-reporting, remediation and cooperation". Report of Investigation Pursuant to Section 21(a) of the Sec. Exch. Act of 1934 and Comm'n Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 (Oct. 23, 2001). Relevant questions include: "Did company employees or outside persons perform the review? If outside persons, had they done other work for the company? Where the review was conducted by outside counsel, had management previously engaged such counsel? Were scope limitations placed on the review? If so, what were they?" *Id.* The fact that Shearman had done other work for the company, the persons implicated in the investigation engaged Shearman and Shearman itself participated in aspects of the third-party transactions would likely lead DOJ and SEC to be quite suspicious of the adequacy of Shearman's investigation, its scope and the fulsomeness of Shearman's disclosures to the authorities. All of this would work to the detriment of the company.

V. Self-Disclosure

Disclosure is not required under U.S. law. The decision whether to disclose is driven by a number of factors, including the likelihood of detection by U.S. authorities. If a company plans to disclose, it will generally seek to conduct a thorough, unbiased review of the facts first and take significant remedial steps (*e.g.*, terminate the relationship with third-party agents engaged in bribery, terminate and/or suspend or otherwise penalize wrongdoers, institute stronger controls going forward and expand compliance resources).

In its April 2016 "Enforcement Plan and Guidance", DOJ endeavored to motivate companies to voluntarily self-disclose by developing "an FCPA enforcement pilot program". Under this program, which continues in effect today, companies will receive mitigation credit if they voluntarily self-disclose violations, fully cooperate with the government investigation, remediate and disgorge all illicitly gained profits. For disclosure to be considered voluntary under the pilot program, it must have occurred before "an imminent threat of disclosure or government investigation", "within a reasonably prompt time after becoming aware of the offense", and it must include "all relevant facts known" to the company, including facts about all individuals involved in the violation. U.S. Dep't of Justice Crim. Div., *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), available at https://www.justice.gov/criminal-fraud/file/838416/download (quoting U.S. Sentencing Guidelines Manual § 8C2.5(g)(1) (U.S. Sentencing Comm'n 2004)). One key component is full disclosure.

Olympus' decision regarding whether to disclose is complicated by the fact that Olympus' U.S. subsidiary, Olympus Corporation of the Americas ("OCA"), settled its own FCPA case last year, and is required to report "credible evidence or allegations of a violation of U.S. law" during the term of its Deferred Prosecution Agreement ("DPA") with DOJ. Deferred Prosecution Agreement, *United States v.*

Olympus Latin America, Inc., No. 16-cr-3525 (D.N.J. Feb. 29, 2016), at ¶ 6.[2] Pursuant to the DPA, it is possible that OCA already informed DOJ that an investigation into possible FCPA violations by and within another Olympus entity is ongoing. If OCA made such a disclosure, it may be found to be misleading the authorities if OCA fails to provide full and accurate information. This is a particular issue here given that Shearman's investigation is not independent and seems to have avoided addressing key actions by high-level executives.

VI. Whistleblower Protections

A. Witness Tampering Protections

The Sarbanes-Oxley Act of 2002 ("SOX") amended the federal obstruction of justice statute to bar employers from knowingly retaliating against "any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense". 18 U.S.C. § 1513(e). Violations of this provision can result in fines or imprisonment of up to ten years, or both. *Id.* Thus, as applied to this case, legal personnel who chose to voluntarily disclose potential FCPA violations to DOJ cannot lawfully be fired or suffer an adverse employment consequence in retaliation for their disclosure. This protection expressly applies extraterritorially. 15 U.S.C. § 1513(d).

B. Antiretaliation Provisions

On the civil side, there are two primary sets of laws governing whistleblower protections in the United States. First, SOX provided an administrative (and, in some cases, civil) cause of action against employers that discharged, demoted, suspended, terminated, threatened, harassed or discriminated against an employee in the terms of his or her employment because the employee lawfully acted to provide information or assistance to a government investigation regarding conduct that the employee "reasonably believes" constitutes a violation of SEC rules and regulations, or "any provision of Federal law relating to fraud against shareholders". 15 U.S.C. § 1514A.

The Dodd-Frank Wall Street Reform and Protection Act of 2010 further expanded whistleblower protections by providing a cause of action against any employer—public or private—who retaliated against a whistleblower that lawfully provided information to the SEC, assisted judicial or administrative actions of the SEC or made disclosures required under Sarbanes-Oxley, the SEA or any other rule or law, *see* 15 U.S.C. 78-u-6(h)(1), so long as the whistleblower had a reasonable belief that the information he/she provided related to a possible securities law violation, 17 C.F.R. § 240.21F-2. The whistleblower provisions cover employees who are not otherwise

[2] Indeed, the U.S. authorities' interest in the present matter would likely be further heightened given Olympus' past accounting issues and the guilty plea entered by another Olympus subsidiary, Olympus Latin America, Inc., to U.S. charges in that regard.

eligible to receive awards under Dodd-Frank's whistleblower program. 17 C.F.R. § 240.21F-2.[3]

Importantly, courts have held that SOX and Dodd-Frank's antiretaliation provisions do not apply extraterritorially. In *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014), an employee of Siemens China Ltd., a Chinese subsidiary of Siemens AG, a German company that lists ADRs on the New York Stock Exchange, repeatedly reported potentially improper payments in China, North Korea and Hong Kong to his supervisors at Siemens China. *Id.* at 177. Over time, his authority was diminished, he was demoted and he was ultimately fired. *Id.* Two months after being fired, the employee reported the allegedly corrupt activity to the SEC and sued his former employer for violating Dodd-Frank's antiretaliation provisions. *Id.* Applying the "presumption against extraterritorial application" set forth by the Supreme Court in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), the Second Circuit determined that Dodd-Frank's civil antiretaliation provisions do not apply outside the territorial jurisdiction of the United States, and the listing of Siemens AG ADRs on a U.S. exchange constituted an insufficient domestic nexus to allow the court to assert jurisdiction. *Id.* at 180 ("[W]here a plaintiff can point only to the fact that a defendant has listed securities on a U.S. exchange, and the complaint alleges no further meaningful relationship between the harm and those domestically listed securities, the listing of securities alone is the sort of 'fleeting' connection that 'cannot overcome the presumption against extraterritoriality.'") (quoting *Morrison*, 561 U.S. at 267). The First Circuit reached a similar conclusion with respect to SOX's antiretaliation provisions in *Carnero v. Boston Sci. Corp.*, 433 F.3d 1, 18 (1st Cir. 2006). The holdings in *Liu* and *Carnero* suggest that if OSZ legal personnel were to disclose violations that occurred entirely abroad, such personnel would not receive protection under SOX or Dodd-Frank's antiretaliation provisions, and Olympus' status as an issuer of ADRs would not change this result.

Please let me know if I can provide any further guidance in this matter.

John D. Buretta

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[3] Under 15 U.S.C. §78u-6, the SEC will pay rewards to whistleblowers who provide the SEC "with original information about violations of the federal securities laws". 17 C.F.R. §240.21F-1. However, in-house attorneys who provide information obtained through the attorney-client privilege or in connection with the legal representation of a client cannot collect awards for whistleblowing, unless disclosure of the information would be permitted under 17 C.F.R. § 205.3(d)(2) or the applicable state attorney conduct rules. 17 C.F.R. § 240.21F-4(b)(4). 17 C.F.R. § 205.3(d)(2) authorizes attorneys for issuers to reveal confidential information to the extent the attorney reasonably believes necessary to prevent the issuer from committing a material violation that would likely substantially injure the financial interest of the issuer or its investors; to prevent the issuer from committing perjury; and to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interests of the issuer or its investors, if the attorney's services were used in furtherance of such a violation. The whistleblower awards program may apply extraterritorially. *See Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 182 (2d Cir. 2014) (acknowledging evidence in SEC regulations that the SEC believed the whistleblower bounty program was intended to apply extraterritorially, but expressing skepticism that agency interpretations regarding extraterritorial effect merit deference when assessing congressional intent).

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