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April 18, 2017

To: Olympus Corporation of Asia Pacific, Corporate Governance Division

From: John F. Wood
Michael A. DeBernardis

Re: **FCPA Implications of Pending Transaction between Olympus (Shenzhen) Industrial Ltd. and An Ping Tai**

You have asked for advice regarding the legal risks associated with the potential transfer of two dormitories ("Dormitory Transaction") by Olympus (Shenzhen) Industrial Ltd. ("OSZ") to Chinese company An Ping Tai Investment Development Co., Ltd. ("APT"). Per your instructions, we have based our analysis entirely on the factual summaries and referenced documents and materials you have provided us, and we assume the facts therein to be correct. We have not taken any steps to independently verify those facts or to investigate this matter.

Based on the information we have been provided, there appears to be a significant likelihood that APT engaged in corrupt activity on behalf of OSZ. We understand that Olympus Corporation's internal investigation, which was assisted by Shearman & Sterling and Nishimura & Asahi, concluded that certain Olympus employees violated internal procedures and that the use of APT created a significant corruption risk, but that the internal investigation did not uncover any concrete, verifiable evidence demonstrating that APT in fact made corrupt payments on OSZ's behalf or otherwise resolved the Customs Issue (defined below) through corrupt means. We further understand, however, that the internal investigation was limited by APT's refusal to provide information regarding the services it provided on behalf of OSZ, other than to state that APT did not violate any anti-corruption laws.

Because OSZ cannot prove that APT engaged in corrupt activity, but the circumstances suggest a significant likelihood that APT did, OSZ finds itself in the very difficult position of potentially facing contradicting legal obligations. Specifically, it is possible that completing the Dormitory Transaction (or a cash payment in lieu thereof) would be an act in furtherance of a violation of the U.S. Foreign Corrupt Practices Act ("FCPA") or other anti-corruption laws. At the same time, because OSZ does not have actual evidence of corrupt activity by APT, OSZ might have a contractual obligation to complete the Dormitory Transaction.

On the whole, given the significant risk that APT engaged in corrupt activity on OSZ's behalf, we think the most appropriate course of action would be to insist that APT provide additional information that could potentially alleviate OSZ's corruption concerns. Specifically, OSZ should insist that APT provide information regarding APT's ownership and the services APT provided on behalf of OSZ. If APT refuses to provide additional information, or if the information fails to address the corruption concern, the wisest course would be for OSZ to refuse to complete the Dormitory Transaction. We recognize that APT does not have a legal obligation to provide such information to OSZ – either under its contracts or under any other legal authority – and that failure to complete the Dormitory Transaction might leave OSZ in breach of its contract with APT. Nonetheless, we believe that it is better for OSZ to risk a breach of contract, and potentially be ordered by a Chinese court to complete the Dormitory Transaction, than to take any further action to compensate OSZ in light of the very strong indicia of corruption.

I. BACKGROUND

You have instructed that we base our analysis on the facts contained in a memorandum prepared by Mr. Oda Shuichi (Manager of Corporate Governance Division, Olympus Corporation of Asia Pacific ("OCAP"); Manager of Legal Affairs, Olympus (China) Co., Ltd.) titled "Factual Developments of the Case" and the documents referenced therein. As instructed, we also referred to legal memoranda and reports prepared by external counsel Baker & McKenzie LLP and Squire Patton Boggs LLP. For the purposes of this memorandum, we have been instructed to assume that those facts are true and accurate. Therefore, we neither undertook an independent investigation nor took any other steps to verify the accuracy of the facts provided to us and presented below. Accordingly, we did not interview any employees or other individuals to obtain additional information to use in this analysis.

You have instructed us to focus our analysis on the Dormitory Transaction, wherein OSZ will transfer two dormitories to APT or, as an alternative, pay APT cash compensation. The Dormitory Transaction arises out of OSZ's use of APT as an intermediary to assist OSZ in negotiations with Shenzen Customs. We understand that foreign companies in Shenzen's special manufacturing zone can import raw materials duty free if the end products are exported to other countries rather than sold in China. In 2006, during an inspection, Beijing Head Customs noted a $694 million discrepancy between the volume of materials that OSZ had imported and the finished products it was shipping out ("Customs Issue"). Beijing Customs sent the Customs Issue to be handled by Shenzen Customs.

OSZ tried to explain to Shenzen Customs that the discrepancy was the result of data-entry error and retained at least one consultant to assist in negotiations with Shenzen Customs. However, Shenzen Customs persisted and threatened a fine of at least $9 million dollars against OSZ. At least one internal assessment concluded that the penalty could be as high as $400 million.[1]

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[1] Factual Developments of the Case Memorandum; Jonathan Soble, *Olympus Investigation Shows Ethical Lapses and a Caterer With Clout*, The New York Times, April 9, 2016 [hereinafter "NYT Article"]; Report of Baker & McKenzie LLP (June 27, 2014).

In May 2013, apparently fearful that the Customs Issue, still unresolved, might be referred back to Beijing Customs, OSZ proposed retaining an "advisor," An-Yuan Holding Group Co, Ltd. ("An Yuan"), to resolve the Customs Issue. An Yuan apparently promised that it could reduce the fine to a maximum of RMB 30 million (approximately $5 million).

An Yuan did not have particular experience dealing with customs authorities in China or abroad. Instead, An Yuan was selected by OSZ because An Yuan had connections to local authorities in Shenzen.[2] Indeed, OSZ had retained An Yuan previously in 2011 after fire inspectors identified safety violations at OSZ's factory in Shenzen. An Yuan was able to resolve the matter with the fire inspectors without the need for OSZ to pay a fine or make any changes to its facility. OSZ credited this result to An Yuan's connections to Chinese officials in the central and provincial government and specifically referenced this result and these connections when proposing to engage An Yuan in connection with the Customs Issue.[3]

An Yuan proposed using a company it claimed to be its affiliate, APT, as the entity to contract with OSZ in connection with the Customs Issue. The exact relationship between APT and An Yuan remains unclear, as we understand that no legal connection could be confirmed through a review of public records in China and APT has not provided information to OSZ or Olympus Corporation regarding its ownership.

Like An Yuan, APT does not appear to have any relevant experience dealing with customs authorities. OSZ previously retained APT as a contractor at its factory to provide catering, cleaning, and security services related to the employee cafeteria.[4] The timing of OSZ's engagement of APT to provide services related to its cafeteria suggests that the engagement may have been in part intended as compensation for An Yuan's assistance on the fire safety issue. None of these activities suggests that APT would be an appropriate representative for dealings with customs authorities.

With regard to the Customs Issue, OSZ initially agreed to compensate APT in an amount equal to 5% of the total customs discrepancy ($694 million).[5] Kazuhiro Watanabe (Chairman of OCAP) granted preliminary approval of the engagement of APT. The engagement was then presented to executives of Olympus Corporation, including Olympus Corporation Chairman Yasuyuki Kimoto, Olympus Corporation President Hiroyuki Sasa, and Olympus Corporation Senior Executive Managing Director Hideaki Fujizuka.[6] Although the Olympus Corporation executives approved of the transaction, Senior Executive Managing Director Fujizuka directed that the arrangement be structured in a manner that limited the amount of cash compensation owed to APT to an amount below the threshold requiring the approval of Headquarters under Olympus Corporation internal control procedures.

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2 Factual Developments of the Case Memorandum
3 *Id.*; NYT Article; Baker & McKenzie Report.
4 Baker & McKenzie Report.
5 Factual Developments of the Case Memorandum, Exhibit D.
6 Factual Developments of the Case Memorandum.

OSZ's solution to Mr. Kimoto and/or Mr. Fujizuka's directive[7] was to structure the compensation in two parts. In the Consultancy Services Agreement, OSZ agreed that should the fine from Shenzen Customs be less than RMB 30 million (approximately $5 million), APT will receive 80% the difference between the ultimate fine and RMB 30 million.[8] In a Supplementary Agreement that was signed the same day and that referenced the Consultancy Services Agreement, OSZ agreed to transfer ownership to APT of two dormitories that OSZ maintained for its employees in Shenzen.[9] This solution was unofficially approved by Olympus Corporation Directors and Executives including Chairman Kimoto, President Sasa, Executive Director Fujizuka and Director/Executive Director Takeuchi (Director of Olympus; Chairman of Olympus Corporation of the Americas), and Masahito Kitamura (Olympus Corporation Chief Compliance Officer).[10]

In early December 2013, OSZ began the process for obtaining formal approval from OCAP for the arrangement with APT.[11] Certain Managers with responsibility for examining the request, including Mr. Oda, expressed concern regarding the arrangement. As a result, Mr. Watanabe initially withheld approval. In late December 2013, while Mr. Oda consulted Mr. Motoyoshi Nishikawa (Outside Director, Olympus), Mr. Nishikawa suggested that Mr. Oda consult Mr. Kitamura. On January 6, 2014, Mr. Oda met with Mr. Kitamura to express concerns about the arrangement with APT. Mr. Kitamura suggested that Mr. Oda consult Mr. Katsuya Natori (Outside Corporate Auditor, Olympus). During a meeting with Mr. Oda on January 10, 2014, Mr. Natori refrained from offering any advice and asked to not be involved in the issue.

In April 2014, another request was made to OCAP to approve the arrangement with APT. Although those Managers again expressed the opinion that the arrangement should not be approved, Mr. Watanabe granted approval.[12] On April 25, 2014, OSZ signed the Consultancy Services Agreement with APT.[13] OSZ signed the Supplementary Agreement the same day.[14] Both agreements had been countersigned by APT on December 31, 2013.

In May 2014, after the agreement with APT had been signed, Olympus China Ltd. retained Squire Patton Boggs LLP to review the facts surrounding the Customs Issue and the retention of APT and to provide advice regarding the potential anti-corruption risks surrounding these activities. Squire Patton Boggs, apparently not knowing that the agreement with APT had already been signed, strongly recommended that OSZ refrain from engaging APT to resolve the Customs Issue due to the high risk that the arrangement could result in a violation of the FCPA and PRC anti-corruption law. Separately, in June 2014, OCAP obtained a report from Baker & McKenzie LLP containing Baker & McKenzie's opinions regarding the anti-corruption risks associated with the Customs Issue and the retention of APT. Also noting the significant anti-corruption risk, Baker & McKenzie recommended that OCAP and OSZ take immediate steps to inform APT and An Yuan that they should take no further steps in dealing with Shenzen

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7 Final Investigation Report of Shearman & Sterling LLP and Nishimura & Asahi, 41. *Id.* 57.
8 Consultancy Services Agreement between OSZ and APT.
9 Supplementary Agreement between OSZ and APT.
10 Factual Developments of the Case Memorandum.
11 *Id.*
12 *Id.*
13 Consultancy Services Agreement between OSZ and APT.
14 Supplementary Agreement between OSZ and APT.

Customs on behalf of OSZ until an internal investigation could be conducted. In July 2014, the reports of Baker & McKenzie and Squire Patton Boggs were provided to Mr. Masashi Shimizu (Olympus Corporation Standing Auditor and Supervisory Board Member) and Olympus Corporation CCO Kitamura.

In August 2014, OSZ was informed that it would not be fined or otherwise punished in connection with the Customs Issue.[15] Because no fine was assessed, APT was entitled to 80% of RMB 30 million, or RMB 24 million, as well as transfer of the dormitories. On September 18, 2014, OSZ submitted a request to pay APT RMB 24 million (approximately $4 million) under the Consultancy Services Agreement. In support of the request, OSZ submitted a document that included approval from President Sasa, Executive Director Fujizuka, Executive Director Takeuchi and Executive Director Hirata for the payment. The request was approved by OCAP, and RMB 24 million was paid to APT in December 2014.[16]

In April 2015, APT began pressuring OSZ to transfer the dormitories.[17] However, subsequent to signing the Supplemental Agreement, OSZ had learned that the transfer of the dormitories was restricted under the rules and regulations of the Shenzen Industrial District.[18] Moreover, in February 2015, Olympus Corporation launched an internal investigation into the arrangement with APT. With the assistance of Shearman & Sterling and Nishimura & Asahi, an Investigation Committee engaged in an eight month investigation.[19] Ultimately, the Investigation Committee found no concrete evidence that any bribes were paid by APT to any Chinese government officials.[20] The Investigation Committee did, however, find that certain employees violated Olympus Corporation's internal procedures, and those employees were disciplined. We understand that APT refused to submit to an interview by representatives of the Investigation Committee and refused to provide information regarding its ownership or the services it provided on behalf of OSZ, except that APT did provide a general statement that it did not violate any anti-corruption laws. The issues identified in the Investigation Report raised concern and caused hesitation in attempting to resolve the Dormitory Transaction issue with APT.[21]

Beginning in the Fall of 2015 and continuing throughout 2016, with the assistance of Shearman & Sterling and local Chinese counsel, OSZ attempted to negotiate a resolution regarding the transfer of the dormitories with APT. In one meeting, APT indicated that if OSZ could not legally transfer the dormitories under Shenzen regulations, it should compensate APT for the remaining balance of the fee that the parties had initially agreed (5% of $694 million, or $34 million). Therefore, APT indicated that it would seek RMB 186 million (approximately $30 million) plus interest and other fees.[22] OSZ, through its attorneys, has attempted to resolve the issue through other methods of compensation or payment of a lesser fee. We understand that the issue remains unresolved but that APT has sued OSZ in China seeking approximately RMB 240

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15 Factual Developments of the Case Memorandum; NYT Article.
16 Factual Developments of the Case Memorandum.
17 *Id.*
18 *Id.*
19 *Id.*
20 Final Investigation Report of Shearman & Sterling LLP and Nishimura & Asahi.
21 Factual Developments of the Case Memorandum.
22 Factual Developments of the Case Memorandum, Exhibit D.

million in damages related to OSZ's alleged breach of the Consultancy Services Agreement and the Supplemental Agreement due to OSZ's failure to transfer the dormitories.

II. ANALYSIS

Hughes Hubbard is not providing advice regarding Chinese law, including Chinese contract law. Nonetheless, we point out that we are not aware of any provision in the agreement with APT that would excuse OSZ from transferring the dormitories or making a payment of comparable value. As we understand it, the contract does not contain any audit provisions or other provisions that would give OSZ a right to demand further information before making the payment.

There is a significant risk that OSZ has already violated relevant anti-corruption laws – perhaps including the U.S. FCPA – and that completing the Dormitory Transaction would be an act in furtherance of that violation. This leaves OSZ in the difficult position of either potentially violating its contractual obligations or potentially taking another act in furtherance of a violation of anti-corruption laws. In light of that predicament, we believe that the wisest course would be for OSZ to insist that APT cooperate with its efforts to obtain further information regarding APT's ownership and the services that APT provided on behalf of OSZ. In the event that APT fully cooperates, OSZ will need to assess whether the information sufficiently alleviates the concern that APT may have made corrupt payments on OSZ's behalf. Under the circumstances, we recommend that such an assessment be conducted by a fully independent anti-corruption expert or committee. If APT declines to cooperate, we believe that the circumstantial evidence of corruption in this case is so strong that OSZ should refuse to complete the Dormitory Transaction unless ordered to do so by a court.

The following section provides a general overview of the anti-corruption concerns associated with the use of APT.

A. Non-U.S. Anti-Corruption Laws

Both China and Japan have their own anti-corruption laws. We are not providing advice regarding any non-U.S. laws. Nonetheless, we wish to emphasize that the indicia of bribery associated with the use of APT for the Customs Issue are strong, and thus there may have been a violation of Chinese or Japanese anti-corruption laws. In addition to the possibility that Chinese and Japanese anti-corruption laws were violated, OSZ or Olympus Corporation could be in violation of the U.K. Bribery Act, as it appears that Olympus Corporation carries on a business in the U.K., which is sufficient to invoke jurisdiction under the U.K. Bribery Act even if the conduct at issue has no connection to the United Kingdom.

B. U.S. FCPA's Anti-Bribery Provisions

1. Summary of Anti-Bribery Provisions

The FCPA's Anti-Bribery Provisions prohibit (i) an act in furtherance of (ii) a payment, offer or promise of, (iii) anything of value, (iv) to a foreign official,[23] or any other person while knowing that such person will provide all or part of the thing of value to a foreign official, (v) with corrupt intent, (vi) for the purpose of either (a) influencing an official act or decision, (b) inducing a person to do or omit an act in violation of his official duty, (c) inducing a foreign official to use his influence with a foreign government to affect or influence any government decision or action, or (d) securing an improper advantage, (vii) to assist in obtaining or retaining business.[24]

Under the FCPA, "a person's state of mind is 'knowing' with respect to conduct, a circumstance, or a result" if he or she has actual knowledge of or "a firm belief that a person is engaging in such conduct or that a circumstance exists, or that a result is substantially certain to occur."[25] In addition, knowledge of a circumstance can be found when there is a "high probability" of the existence of such circumstance.[26] Companies and individuals, therefore, are not permitted simply to bury their "head[s] in the sand" and ignore improper payments by agents or partners. According to the legislative history,

> the Conferees agreed that "simple negligence" or "mere foolishness" should not be the basis for liability. However, the Conferees also agreed that the so called "head-in-the-sand" problem – variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance" – should be covered so that management officials could not take refuge from the act's prohibition by their unwarranted obliviousness to any action (or inaction), language or other "signaling device" that should reasonably alert them of the "high probability" of an FCPA violation.[27]

2. *Potential Liability for Relevant Entities and Individuals Related to the Customs Issue and the Dormitory Transaction*

The arrangement between OSZ and APT is highly suspicious and raises significant red flags that suggest that APT used corrupt means to solve the Customs Issue. In particular, APT may have made corrupt payments to Chinese government officials (including Shenzen Customs officials) in order to resolve the Customs Issue. Likewise, it is possible that APT itself is legally or beneficially owned by Chinese government officials, including Shenzen Customs officials.

We understand that Olympus Corporation's internal investigation did not uncover any concrete evidence that APT made corrupt payments to resolve the Customs Issue. We also understand, however, that APT did not fully cooperate with Olympus Corporation's internal investigation, and instead merely offered a statement that it made no corrupt payments in connection with the Customs Issue. It thus remains quite possible – perhaps even likely – that APT did, in fact, engage in corrupt activity on behalf of OSZ in connection with the Customs

[23] The FCPA further prohibits payments to foreign political parties and officials thereof.
[24] *See* 15 U.S.C. §§ 78dd-1(a).
[25] 15 U.S.C. § 78dd-1(f)(2)(A).
[26] *See* 15 U.S.C. § 78dd-1(f)(2)(B).
[27] H.C.R. No. 100-576, at 920 (1988).

Issue. If evidence were to surface indicating that APT made a corrupt payment to resolve the Customs Issue or that APT was itself legally or beneficially owned by Chinese government officials, it is possible that any individual or entity involved in approving the transaction with APT would be considered to have acted with "conscious disregard" or "willful blindness" toward that possibility. Based on the facts as we understand them, this could potentially include Olympus Corporation, OCAP, and OSZ, as well as numerous employees and officials thereof, including potentially Chairman Kimoto, President Sasa, Executive Managing Fujizuka, Executive Director Takeuchi, and CCO Kitamura, among others. At the time that OSZ's engagement of APT was approved, these individuals were aware of significant unmitigated red flags regarding APT and may have consciously disregarded those facts in approving or acquiescing to the retention of APT to resolve the Customs Issue.

Although OSZ now appears to have a contractual obligation to complete the Dormitory Transaction, the fact remains that the ownership of APT and the steps APT took to resolve the Customs Issue remain unknown. Therefore, to the extent the Customs Issue was resolved through corrupt means, there is a risk that completion of the Dormitory Transaction could constitute an act in furtherance of any such corrupt conduct.

3. FCPA Jurisdiction in Connection with the Resolution of the Customs Issue and the Dormitory Transaction

The FCPA's anti-bribery provisions apply to three classes of persons or entities: covered issuers of securities in the U.S., domestic concerns, and other persons who commit acts in the U.S. in furtherance of a corrupt payment. Based on the facts that have been provided we are not able to determine whether the FCPA would apply to this factual circumstance.

It does not appear that the "domestic concern" language would cover the conduct at issue here, as we are not aware of evidence that any U.S. company or U.S. citizen or national was involved in the potentially corrupt activity.

Likewise, it does not appear that the "covered issuer" language would create FCPA jurisdiction here. Foreign companies may be Covered Issuers under the FCPA if they list American Depositary Receipts ("ADRs") on a U.S. national securities exchange.[28] Although we understand that Olympus Corporation has ADRs that are traded on over-the-counter markets in the U.S., our research indicates that these are "Level I ADRs." Because Level I ADRs do not create reporting requirements and do not require registration under Section 12 of the Securities Exchange Act of 1934, Level I ADRs (as opposed to Level II or Level III ADRs) are not sufficient to render Olympus Corporation a Covered Issuer for purposes of the the FCPA.[29]

Finally, as noted above, foreign companies that are not domestic concerns or Covered Issuers may still be subject to the FCPA if the foreign company or its employees or agents take

[28] Abikoff et al., Guide to the FCPA & Beyond 46.

[29] The Accounting Provisions (included in 15 U.S.C. § 78m) apply to "every issuer which has a class of securities registered pursuant to section [Section 12 of the Securities Exchange Act of 1934] and every issuer which is required to file reports pursuant to [Section 15(d) of the Exchange Act]."

any act in furtherance of the corrupt scheme while in the U.S.[30] We do not have enough information to determine whether any acts were taken in the U.S. in relation to the use of APT and the resolution of the Customs Issue. We do note, however, that Mr. Takeuchi is not only a Director of Olympus, but also Chairman of Olympus Corporation of the Americas. As Mr. Takeuchi was aware of the arrangement with APT and appears to have had some role in approving it, the U.S. Department of Justice, which takes a very broad view of the FCPA's jurisdiction, may view Mr. Takeuchi's role at Olympus Corporation of the Americas as sufficient to create FCPA jurisdiction.

Even if the retention of APT and resolution of the Customs Issue involved no actions that would trigger FCPA jurisdiction, any acts taken in the United States in furtherance of the Dormitory Transaction itself could trigger jurisdiction for the entire arrangement. For example, the DOJ has taken the position that the use of U.S. bank accounts in furtherance of a corrupt scheme can create FCPA jurisdiction. As a result, the use of U.S. bank accounts in connection with the Dormitory Transaction may invoke FCPA jurisdiction. Likewise, any meetings, emails or phone calls in or from the United States discussing the Dormitory Transaction may be sufficient for the exercise of jurisdiction by the DOJ. We understand that the negotiations with APT and resolution of the Customs Issue are being handled by Olympus Corporation (at the headquarters level) with the assistance of Shearman & Sterling. Olympus Corporation's Global General Counsel, Ms. Donna Miller, is based in the United States. We are not aware of the role Ms. Miller or her staff have played in resolving the Dormitory Transaction. To the extent Ms. Miller or her staff in the United States have taken any steps in furtherance of the Dormitory Transaction (such as engaging in or overseeing the negotiations with APT), such action may be sufficient to establish FCPA jurisdiction over the entire arrangement.

C. <u>U.S. FCPA's Accounting Provisions</u>

The Books and Records and Internal Accounting Controls Provisions of the FCPA apply only to Covered Issuers.[31] The Books and Records Provision requires covered issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[32] The Internal Accounting Controls Provisions require Covered Issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things: (1) transactions are executed in accordance with management's general or specific authorization; (2) transactions are recorded as necessary to permit preparation of financial statements that conform with generally accepted accounting principles or other applicable criteria and to maintain accountability for assets; and (3) access to assets is permitted only in accordance with management's general or specific authorization. Parties are prohibited from knowingly circumventing or knowingly failing to implement a system of internal accounting controls. As used in the Accounting Provisions, "reasonable detail" and "reasonable assurances" mean a level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.[33]

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[30] 15 U.S.C. §§ 78dd-3.
[31] 15 U.S.C. § 78m(b)(2).
[32] 15 U.S.C. § 78m(b)(2)(A).
[33] 15 U.S.C. § 78m(b)(7).

As described above, neither Olympus Corporation nor its relevant subsidiaries appear to be Covered Issuers for purposes of the FCPA. As a result, based on the information we have seen, neither Olympus Corporation nor any of its relevant subsidiaries are subject to the FCPA's Accounting Provisions.

While we believe that the Accounting Provisions do not apply based on the plain language of the FCPA, we are not aware of any case stating definitively that the sale of a foreign company's Level I ADRs in the U.S. over-the-counter markets is insufficient to render that foreign company a Covered Issuer and subject to the Accounting Provisions of the FCPA. Moreover, U.S. courts appear willing to apply certain U.S. securities laws (though not the Accounting Provisions of the FCPA specifically) to companies issuing Level I ADRs.[34]

In the very unlikely event that the U.S. Securities and Exchange Commission (SEC) considers Olympus Corporation to be a Covered Issuer, there is a significant likelihood that the SEC would conclude that Olympus Corporation violated the Accounting Provisions of the FCPA. Unlike the Anti-Bribery Provisions, no corrupt payment or promise to a foreign government official is required to violate the Accounting Provisions. Indeed, the DOJ and SEC regularly rely on the Accounting Provisions when they have difficulty obtaining sufficient evidence that a corrupt payment was actually made or promised or might otherwise have difficulty demonstrating jurisdiction in connection with the Anti-Bribery Provisions.[35]

As noted above, the books and records provisions require issuers to keep and maintain books and records that "accurately and fairly reflect the transactions and dispositions" of their assets. Importantly, the financial books and records of an issuer include the books and records of the subsidiaries as well, at least where the subsidiaries' books and records are ultimately consolidated into those of the issuer.[36] The Dormitory Transaction (or any alternative transfer agreed by the parties) must be fairly and accurately recorded as compensation to APT in connection with the customs issue. To the extent the obligations reflected by the Dormitory Transaction have been recorded in a way that does not accurately and fairly represent the fact that the obligation is compensation for APT's work on the Customs Issue, such inaccurate recording could constitute a violation of the books and records provisions.

Even if properly recorded, however, executing the Dormitory Transaction without obtaining the necessary approvals at OSZ, OCAP, and Olympus Corporation could violate the internal controls provisions of the FCPA. While Olympus Corporation has a system of internal

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34 *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 2017 WL 66281 (N.D. Cal. Jan. 4, 2017).

35 For example, in 2012 the SEC entered into a consent agreement with Oracle Corporation ("Oracle") related to books and controls and internal control provisions of the FCPA. The SEC did not allege that Oracle or any third party on Oracle's behalf paid or promised any bribes. Rather, the SEC alleged that Oracle's internal controls were deficient so as to create a "potential for bribery and embezzlement." Compl., *SEC v. Oracle Corp.*, No. 12-cv-4310 (N.D. Cal. Aug. 16, 2012). As a result, Oracle paid a $2 million fine in connection with the SEC's Complaint that Oracle violated the Accounting Provisions of the FCPA.

36 *In the Matter of Johnson Controls*, Inc., Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Admin Proc. File No. 3-17337. Johnson Controls paid a civil penalty, disgorgement and interest to the SEC in the amount of $14.3 million to resolve the matter.

controls in place, the evidence indicates that the Supplementary Agreement was designed specifically to allow OSZ to engage and compensate APT in a manner that would circumvent those internal controls. If Olympus Corporation is a Covered Issuer, we believe that it is highly likely that the DOJ or SEC would take the view that the manner in which APT was engaged represents a circumvention of the internal controls of Olympus Corporation and would be strong evidence that Olympus Corporation does not "maintain a system of internal accounting controls sufficient to provide reasonable assurances that...transactions are executed in accordance with management's general or specific authorization."

III. CONCLUSION

The circumstances surrounding the Dormitory Transaction raise significant red flags from an anti-corruption standpoint. Despite these red flags, we understand that OSZ may be contractually and legally obligated to either transfer the dormitories or offer cash consideration as an alternative.

With the press surrounding OSZ's handling of the customs issue, including Olympus Corporation's own press release on the subject, and knowledge that the DOJ is actively investigating OSZ's handling of the Customs Issue, we encourage OSZ, OCAP, Olympus Corporation and any other related entity involved in approving or supervising the Dormitory Transaction to take every precaution before finalizing the Dormitory Transaction (or an alternate transaction as the case may be). Accordingly, as described above, we recommend that OSZ <u>not</u> complete the Dormitory Transaction unless APT fully cooperates with efforts to obtain information regarding APT's ownership and the nature of the services APT has provided. In the event APT cooperates, we recommend that OSZ, OCAP or Olympus Corporation establish a completely independent committee to review the information provided by APT and make a judgment as to whether such information sufficiently addresses the various red flags raised by the arrangement.

In the event that APT either does not provide that information or that information does not reasonably resolve the concern that APT may have engaged in corrupt activity on OSZ's part, we recommend that OSZ not complete the Dormitory Transaction unless ordered to do so by a court. While we recognize that this approach may put OSZ in breach of contract, under these circumstances it is wiser to breach the contract than to engage in a transaction that may be in furtherance of an act of corruption.

Finally, we offer no assessment of the adequacy of the internal investigation performed by the Investigation Committee. To the extent that the Investigation Committee was led by individuals who were also involved in the decision to retain APT, the independence or objectivity of the investigation could be called into question. The U.S. Department of Justice would expect that any investigation be conducted and supervised only by individuals who were not involved in the underlying conduct. Any suggestion that the investigation was tainted by bias or lack of independence would greatly diminish the value of the investigation in the eyes of the Department of Justice or other international regulators, limiting both the willingness of the regulator to accept the findings of the investigation and the mitigating credit provided to the company for conducting the investigation. If the Investigation Committee's investigation lacked

independence, we think it is imperative that the Investigation Committee's work be reviewed by a separate committee or outside counsel who were not in any way involved in the underlying activity.