

In the Matter of Fresenius Medical Care AG & Co. KGaA (2019)

Nature of the Business.

Fresenius Medical Care AG & Co. KGaA ("Fresenius") is a global provider of medical services and products for patients with chronic kidney failure and is headquartered in Bad Homburg, Germany.

Fresenius maintains American Depositary Shares which are publicly traded on the NYSE and are registered with the SEC pursuant to Section 12(b) of the Exchange Act.

Fresenius Medical Care Deutschland GmbH is a limited liability company subsidiary of Fresenius that managed Fresenius' West Africa business. Saudi Advanced Renal Services Ltd. is a subsidiary of Fresenius that distributes Fresenius' products in Saudi Arabia.

Influence to be Obtained.

According to the SEC, Fresenius violated anti-bribery, books and records, and internal accounting controls provisions of the FCPA when it was aware of FCPA violations conducted by its subsidiaries globally, but did not take steps to address it and in some instances aided the wrongdoing or encouraged destruction of evidence related to the bribes. The SEC alleged violations by Fresenius subsidiaries in the following countries:

- Saudi Arabia: Saudi Advanced Renal Services ("SRS"), the Fresenius subsidiary, made improper payments to government officials and doctors to ensure business opportunities. SRS made bribes to win tenders related to its dialysis products which included direct bribes to doctors and government officials, and indirectly through payments for false services. SRS inaccurately accounted for the payments or destroyed documents to hide the scheme and Fresenius consolidated SRS's financials with its own. Fresenius was aware of this as early as 2009 when a senior finance officer reported a general manager for false invoices submitted, but the manager was not terminated until 2013.
- Morocco: Fresenius employees (a senior officer and a sales manager) devised a scheme to bribe a government official in Morocco who was a doctor at two "state owned military hospitals" to win contract with affiliated hospitals. They paid the doctor a commission through a false marketing agreement contract with one of the hospitals, and additional bribes from 2008 through 2012 by way of fake bonuses to another Fresenius manager who then directed the funds to the doctor. Despite receiving a "whistleblower email raising various allegations about payments to government officials" related to those opportunities in 2012 and a complaint in 2013, Fresenius did not investigate until January 2014.
- West African Countries: Fresenius had bribery schemes in eight West African countries: Gabon, Cameroon, Benin, Burkina Faso, Chad, Ivory Coast, Niger, and Senegal. Bribes were paid to doctors and hospital administrators through a third party agent, sales were manipulated by employees, and Fresenius paid falsified commissions to the doctors and administrators of state-owned hospitals.
- Angola: Fresenius' EMEA Executive Vice President and other Fresenius employees were aware of corruption in Angola's healthcare and dialysis industry, but employees did not receive proper training and no steps were taken to guard against corruption risks when operating in Angola. Fresenius, through a separate entity it created, began to sell dialysis devices into Angola in 2008 which led to monetary and equity bribes being sent to a military official and doctors affiliated with public hospitals. Fresenius also participated in sham warehousing contracts, paying a large sum for storage services that were never received to

Key Facts

Citation. *In the Matter of Fresenius Medical Care AG & Co. KGaA*, Admin. Proc. File No. 3-19126 (Mar. 29, 2019).

Date Filed. March 29, 2019.

Country. Multiple countries including Saudi Arabia, Angola, West African region, Turkey, Spain, China, Serbia, Bosnia, and Mexico.

Date of Conduct. 2009-2016.

Amount of the Value. Not Stated.

Amount of Business Related to the Payment. Over \$135 million.

Intermediary. Third-party agents.

Foreign Official. Unnamed doctors/government officials.

FCPA Statutory Provision. Anti-Bribery; Books-and-Records; Internal Controls.

Other Statutory Provision. Not Stated.

Disposition. Cease-and-Desist Order.

Defendant Jurisdictional Basis. Issuer.

Defendant's Citizenship. German.

Total Sanction. \$147 million.

Compliance Monitor/Reporting Requirements. Independent Compliance Monitor for two years and a year of self-reporting after.

Related Enforcement Actions. *In re Fresenius Medical Care AG & Co. KGaA* (Feb 25, 2019).

Total Combined Sanction. \$231.7 million.

family members of the military officer that owned the service. Wrongful payments in Angola continued in the form of "consulting contracts" and business arrangements that allowed the Angolan government officials to profit.

- Turkey: In Turkey, Fresenius entered into joint venture arrangements with various doctors and provided them with shares of the joint venture in exchange for their assistance in funneling patients from the public hospitals they worked in to Fresenius clinics. The doctors were given payments for their efforts.
- Spain: Fresenius received an advantage in "certain public tenders between 2007 and 2014" as a result of bribes to doctors and administrators through falsified "consulting agreements," trips, gifts, and consulting "expenses." Fresenius's audit team raised issues with these practices in 2010 and again in 2014 to Fresenius' Management Board concerning the lack of documentation around these payments, but this practice persisted for another year.
- China: Fresenius paid bonuses from 2007 to 2014 to doctors and correspondence suggested that the payments were made "to influence clinic procurement decisions" of Fresenius equipment.
- Serbia and Bosnia: In the Balkan region, Fresenius paid four doctors sitting on a public tender commission in order to gain business and paid for their trips and extra benefits related to medical conferences. The SEC alleges that Fresenius bribed a government doctor who could influence Fresenius' ability to start and run clinics in Bosnia.
- Mexico: In order to win a customer tender, Fresenius' subsidiary in Mexico paid a third-party distributor to pay kickbacks to officials at the customer agency ("Mexico's state-run social insurance agency"). After winning the tender, a director and officer at the Fresenius Mexican subsidiary contracted with the distributor to for its "advice" services, which an internal audit revealed was improper as the contract was ostensibly created for past services and payments were made after the fact.

Enforcement.

On March 29, 2019, the SEC settled its enforcement action against Fresenius. In consideration of Fresenius' remedial efforts, which included self-disclosure of some of the violations, anti-bribery training, more thorough procedures on due diligence and selection of third party agents, and "varied" cooperation with the investigation, Fresenius was required to implement an Independent Compliance Monitor and make periodic reports and to continue to self-monitor following the conclusion of the agreement with the monitor. Fresenius was also required to pay disgorgement of \$135 million and prejudgment interest of \$12 million. As a result of the criminal fine imposed by the Department of Justice in a related action, the SEC acknowledged it would not impose a civil penalty in addition.

In a related matter, the DOJ entered into a non-prosecution agreement with Fresenius, citing the company's voluntary disclosure of the issues, the company's own investigation into the matter, the company's engagement and cooperation in the DOJ's investigation, and Fresenius took remedial action including firing employees who were involved. Fresenius agreed to pay a criminal fine of \$84.7 million.