

United States v. Herbalife Nutrition, Ltd. (S.D.N.Y. 2020)

Nature of the Business.

Herbalife Nutrition, Ltd. ("Herbalife") is a direct sales company headquartered in the United States and incorporated in the Cayman Islands. Herbalife maintains common stock publicly traded on the NYSE and registered with the SEC pursuant to Section 12(b) of the Exchange Act.

Herbalife operates a wholly-owned subsidiary in China ("Herbalife China").

Influence to be Obtained.

According to the DOJ, between 2007 and 2016, Herbalife and Herbalife China violated the FCPA's internal accounting controls and recordkeeping provisions. Herbalife China allegedly "engaged in a scheme to falsify books and records and provide corrupt payments and benefits to Chinese government officials [and state-owned media outlets,] for the purpose of obtaining, retaining, and increasing Herbalife's business in China."

According to the DOJ, Herbalife China "provided improper payments and benefits" to government officials to help secure a direct selling license, which included cash payments, meals, entertainment and gift cards and subsequently falsified records to obscure the improper payments. The DOJ alleged that Herbalife China improperly influenced state-owned media outlets to "withdraw [negative] articles" about the company. According to the DOJ, the ex-Managing Director of Herbalife China "who participated in the scheme to falsify books and records and provide[d] improper payments and benefits to Chinese government officials, signed and transmitted false Sarbanes-Oxley sub-certification letters in connection with the Company's quarterly and annual filings with the SEC."

Enforcement.

On August 24, 2020, the DOJ entered into a deferred prosecution agreement with Herbalife, pursuant to which it agreed to pay a criminal monetary penalty of \$55,743,093. Herbalife received a twenty-five percent discount off the recommended minimum sentence under the U.S. Sentencing Guidelines for the company's full cooperation and remediation efforts.

The DOJ noted that this decision was informed by various factors: Herbalife's continued cooperation, lack of criminal history, remedial measures including terminating employees involved in the schemes, the strengthening of its compliance procedures and policies, and the company's agreement to disgorge profits to the SEC and to enter into a three-year compliance monitoring and reporting agreement.

On August 28, 2020, the SEC settled its enforcement action against Herbalife for violations of the FCPA's anti-bribery, books-and-records, and internal accounting controls provisions. Herbalife was ordered to pay disgorgement of \$58,669,993.00 and prejudgment interest of \$8,643,504.50.

Key Facts

Citation. *United States v. Herbalife Nutrition Ltd.*, 20 Cr. 00443 (S.D.N.Y. 2020).

Date Filed. August 24, 2020.

Country. China.

Date of Conduct. 2007 - 2016.

Amount of the Value. Not stated.

Amount of Business Related to the Payment. Not stated.

Intermediary. Third-party agents.

Foreign Official. Unnamed government officials and employees of state-owned news outlets.

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

Other Statutory Provision. None.

Disposition. Deferred-Prosecution Agreement.

Defendant Jurisdictional Basis. Issuer.

Defendant's Citizenship. United States.

Total Sanction. About \$55 million.

Compliance Monitor/Reporting Requirements. Three-year reporting requirement.

Related Enforcement Actions. *In the Matter of Herbalife Nutrition, Ltd.*, Admin. Proc. File No. 3-19948 (August 28, 2020).

Total Combined Sanction. About \$122 million.