



## DOJ and SEC Prosecution of Bribery in Ukraine Emphasizes the Importance of Robust Internal Control System

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Department of Justice and the Securities and Exchange Commission ended the year with another successful high profile Foreign Corrupt Practices Act prosecution. Agricultural commodity giant Archer Daniels Midland Company (ADM) has agreed to pay a total of \$54.3 million in fines to the Securities and Exchange Commission and the Department of Justice to settle civil and criminal charges over payment of bribes in Ukraine from 2002 through 2008.

On Dec. 20, Alfred C. Toepfer International Ukraine (ACTI Ukraine), a subsidiary of ADM, pleaded guilty and agreed to pay \$17.8 million in criminal fines to the DOJ<sup>1</sup> to settle charges that it paid bribes in Ukraine to obtain value-added tax (VAT) refunds in violation of the Foreign Corrupt Practices Act (FCPA). ADM also agreed to pay \$36.5 million in disgorgement and prejudgment interest to the SEC<sup>2</sup>.

According to the SEC the bribery occurred from 2002 to 2008. Ukraine imposed a 20 percent VAT on goods purchased in its country. If the goods were exported, the exporter could apply for a refund of the VAT already paid to the government on those goods. However, at times the Ukrainian government delayed paying VAT refunds it owed or did not make any refund payments at all. On these occasions, the outstanding amount of VAT refunds owed to ADM's Ukraine affiliate reached as high as \$46 million.

The SEC alleges that in order to obtain the VAT refunds that the Ukraine government was withholding, ADM's subsidiaries in Germany and Ukraine devised several schemes to bribe Ukraine government officials to release the money. The bribes paid were generally 18 to 20 percent of the corresponding VAT refunds. For example, the subsidiaries artificially inflated commodities contracts with a Ukrainian shipping company to provide bribe payments to government officials. In another scheme, the subsidiaries created phony insurance contracts with an insurance company that included false premiums passed on to Ukraine government officials. The misconduct went unchecked by ADM for several years because of its deficient and decentralized system of FCPA oversight over subsidiaries in Germany and Ukraine, asserted SEC.

The SEC's complaint charges ADM with violating Sections 13(b)(2)(A) and 13(b)(2)(B) of the Securities Exchange Act of 1934. ADM consented to the entry of a final judgment ordering the company to pay disgorgement of \$33,342,012 plus prejudgment interest of \$3,125,354. The final judgment also permanently enjoins ADM from violating those sections of the Exchange Act, and requires the company to report on its FCPA compliance efforts for a three-year period.

In a parallel criminal case, ACTI Ukraine pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA and agreed to pay \$17.8 million in criminal fines. The Department of Justice also entered into a non-prosecution agreement (NPA) with ADM in connection with the company's failure to implement an adequate system of internal financial controls to address the making of improper payments both in Ukraine and by an ADM joint venture in Venezuela.

1 <http://www.justice.gov/opa/pr/2013/December/13-crm-1356.html>

2 <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139#.Usq-CbEo7oo>

According to the NDA, a number of concerns were expressed to ADM executives, including an e-mail calling into question potentially illegal “donations” by ACTI Ukraine and ACTI Hamburg to recover the VAT refunds, yet nonetheless failed to implement sufficient anti-bribery compliance policies and procedures to prevent corrupt payments. “ADM’s lackluster anti-bribery controls enabled its subsidiaries to get preferential refund treatment by paying off foreign government officials,” said Gerald Hodgkins, an associate director in the SEC’s Division of Enforcement. “Companies with worldwide operations must ensure their compliance is vigilant across the globe and their transactions are recorded truthfully.”

In addition to the monetary penalty, ADM and ACTI Ukraine also agreed to cooperate with the DOJ, to periodically report the companies’ compliance efforts, and to continue implementing enhanced compliance programs and internal controls designed to prevent and detect FCPA violations.

The ADM case emphasizes that FCPA penalizes not only corruption in obtaining government contracts but also payment of bribes in connection with obtaining services and obligations that the foreign governments is required to provide to US companies and their affiliates. Another important aspect of this case is that ADM was not charged with making the corrupt payments. Rather, its violation was in failing to implement an adequate system of internal financial controls to prevent the making of improper payments.

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