

Client Alert.

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Cooperating and Showing Hardship Yields “Discounted” \$2 Million Penalty for FCPA Violations

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On July 17, the U.S. Department of Justice (“DOJ”) announced that Nordam Group, Inc., a privately held Oklahoma-based aircraft repair company, admitted that a subsidiary and an affiliate, with the approval of Nordam employees, violated the Foreign Corrupt Practices Act (“FCPA”) by bribing employees of state-owned or -controlled airlines in China. The bribes totaled almost \$1.5 million over nine years, securing nearly \$2.5 million in profits. Nordam assented to a non-prosecution agreement, and will pay what the DOJ described as a discounted \$2 million penalty—a relatively modest sum as FCPA penalties go.

The misconduct was not a novel fact pattern, and the terms of the non-prosecution agreement generally follow the norm, but one feature of the Nordam case is notable. Perhaps signaling the DOJ’s willingness, in certain circumstances, to set a penalty that will punish but not destroy, the DOJ noted that it set the penalty at \$2 million because Nordam had demonstrated that a larger penalty would “substantially jeopardize” the company’s viability.

“DO WHAT YOU HAVE TO DO” – USING OVERSEAS AFFILIATES TO PAY BRIBES IN CHINA

In the non-prosecution agreement,¹ Nordam admitted that employees of its Singapore-registered subsidiary and affiliate bribed employees of state-owned or -controlled airlines in China in an effort to obtain business. Payments were funneled to employees of the airlines, and were described as “commissions” and “facilitator fees.” On some occasions, the payments were included in inflated invoices, resulting in the customer unknowingly covering the cost of the bribe.

U.S.-based Nordam employees approved the bribes. In one email, a Nordam employee told two employees of a Nordam affiliate that they should be careful when paying bribes, but acknowledged that you “[d]o what you have to do to get the business. . . . I also understand the reality of doing business in Asia.” In another, a Nordam employee agreed to split customer payments “50/50” over a certain amount, “if our friends can help us.”

In all, Nordam and its affiliates paid as much as \$1.5 million in bribes to secure about \$2.5 million in profits.

THE CONSEQUENCES

Nordam’s agreement with the DOJ includes four key components: (1) the \$2 million penalty; (2) an admission that the bribery took place; (3) enhanced compliance and monitoring measures; and (4) cooperation with the DOJ over the next three years. In return, the DOJ agreed not to prosecute the company. The non-prosecution agreement, however, does not extend to Nordam’s officers, directors, employees, or agents. Indeed, Nordam agreed to cooperate with the DOJ in its ongoing investigation of the individuals who were involved in the bribes. This provision is common, and reflects the DOJ’s oft-stated intent to pursue individuals for FCPA violations.

¹ The entire agreement and the DOJ’s press release are at <http://www.justice.gov/criminal/fraud/fcpa/cases/nordam-group.html>.

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The DOJ cited Nordam's cooperation, in the investigation and going forward, as important to Nordam obtaining a non-prosecution agreement. The DOJ described Nordam as having made a voluntary and "complete" disclosure of the misconduct, and as having cooperated in "real time" with the DOJ. This cooperation included Nordam conducting an internal investigation and making employees and documents available to the DOJ. Nordam also undertook remedial efforts, including enhancing its internal audit function, its compliance program, and its due diligence protocol for third-party agents. Nordam also agreed to provide annual reports to the DOJ on the monitoring and enhancement of its compliance policies. As noted above, Nordam also agreed to cooperate with the DOJ in ongoing investigations.

The \$2 million penalty is modest by FCPA standards, and notable for how the DOJ described how that amount was set. According to the agreement, the DOJ believed that the United States Sentencing Guidelines permitted a larger penalty. The DOJ agreed to a fine "substantially below" the standard range set by the Guidelines only after Nordam demonstrated to the DOJ that anything larger would "substantially jeopardize the Company's continued viability." Nordam submitted to a months-long financial review by an independent accounting expert. From the review, the expert and the DOJ "concluded that this discount was appropriate under the Sentencing Guidelines."

LEARNING FROM NORDAM'S EXPERIENCE

Nordam's misconduct is a classic illustration of how a company lands in FCPA hot water. The apparent mindset of "do what you have to do" to win business, the use of bribe-paying overseas affiliates to secure business from state-owned businesses in China, and the use of sham arrangements to funnel bribes—all of them were present, and they almost put Nordam out of business. Nordam's cooperation and the DOJ's decision that Nordam did not deserve to be put out of business saved Nordam. The "Nordam discount" likely will be reserved for exceptional circumstances, and companies should not assume that they would receive such a discount should they find themselves facing FCPA liability.

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