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Och-Ziff Restitution Highlights Risks of Subsidiary Pleas in Criminal Resolutions

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In 2016, hedge fund Och-Ziff Capital Management Group ("Och-Ziff") entered into one of the largest Foreign Corrupt Practices Act ("FCPA") resolutions ever: It agreed to pay a total of $412 million to the Department of Justice and the Securities and Exchange Commission; it agreed to a three-year monitor; and its subsidiary, OZ Africa Management GP, LLC ("OZ Africa"), pleaded guilty to conspiring to violate the anti-bribery provisions of the FCPA. A new decision by the U.S. District Court for the Eastern District of New York, however, suggests that this resolution may only be the beginning.

After OZ Africa pleaded guilty, a number of alleged victims filed a motion seeking to be paid approximately $1.8 billion in restitution — an amount more than four times greater than the penalties Och-Ziff agreed to pay as part of its resolution. Although both the government and OZ Africa opposed this request, the court nonetheless held that the claimants qualified as "victims" under the Mandatory Victims Restitution Act ("MVRA") and so could receive restitution. While the court implied that the claimants were unlikely to recover the full $1.8 billion they had requested, this decision nonetheless introduces yet another significant risk that companies must consider when resolving FCPA and other criminal cases.

Background

The alleged scheme at issue in the Och-Ziff case is complicated, but at its core, similar to many other FCPA cases: Och-Ziff allegedly made investments with business partners in Africa knowing that those investments would be used in part to pay bribes. As relevant here, one of Och-Ziff's partners bribed public officials in the Democratic

Republic of Congo ("DRC") so that the DRC would forfeit Canadian mining company Africo Resources Ltd.'s ("Africo") interests in a copper and cobalt mine called the Kalukundi mine, and then transfer those rights to a sham entity called Akam Mining SPRL ("Akam"). Och-Ziff then invested in an entity that ultimately purchased both Akam and a controlling interest in Africo, thereby acquiring control over the Kalukundi mine. Although Africo had attempted to challenge the DRC's forfeiture of Africo's interest in the Kalukundi mine, Africo shareholders agreed to Och-Ziff's purchase of a majority stake in Africo given the uncertainty of how their lawsuit, and therefore their interest in the mine, would play out. The result was tens of millions of dollars of profit for Och-Ziff.

In September 2016, Och-Ziff entered into a resolution with the DOJ and the SEC in connection with these and other allegations. As part of this resolution, Och-Ziff agreed to a deferred prosecution agreement requiring it to pay a $213 million criminal fine and submit to a three-year monitor. It separately agreed to pay $199 million to the SEC and, importantly, agreed that OZ Africa would plead guilty.

Although significant, this resolution was in many ways a beginning rather than an end. Och-Ziff faced securities class actions alleging that it had improperly downplayed the government's investigations, and it spent years unsuccessfully seeking an exemption from the Department of Labor so that it could continue to manage ERISA assets as a Qualified Professional Asset Manager. Most recently, a group of approximately 50 Africo shareholders sought restitution in connection with OZ Africa's sentencing. Those shareholders claimed that they qualified as "victims" under the MVRA; that Och-Ziff's scheme had prevented Africo from developing the Kalukundi Mine; and that, if Africo had developed the mine, the mine could have produced upwards of $1.8 billion in value.

Although both OZ Africa and the government opposed the Africo shareholders' motion, in a recent decision, Judge Nicholas G. Garaufis held that the shareholders qualified as "victims" under the MVRA and so could receive restitution. Importantly, Judge Garaufis held that the court had the authority to order restitution despite the fact that the parties had entered into a plea agreement that jointly recommended there be no further monetary penalty beyond what Och-Ziff had already agreed to pay to the DOJ as part of its deferred prosecution agreement. The court found that nothing in the plea agreement "bar[s] the court from ordering restitution" and, noting that a "Rule 11(c)(1)(C) plea agreement only 'binds the court once the court accepts the plea agreement,'" seemingly implied that the court could simply reject a plea agreement that prohibited awards of restitution.[1] Rejecting the government and OZ Africa's arguments, the court

also held that the Africo shareholders qualified as victims under the MVRA because they were "directly and proximately harmed as a result of" OZ Africa's conduct.[2]

Although the court held that the Africo shareholders qualified for restitution, it asked for additional briefing as to the amount.[3] In a footnote, the court made clear that it "does not believe that the claimants are entitled to a restitution award based on the full projected value of the Kalukundi Mine as if it had been developed," which the shareholders had claimed to be $1.8 billion.[4] Nonetheless, the court's ruling paves the way for a significant award of restitution that may fundamentally change the economics of Och-Ziff's resolution and, in the absence of a settlement, will inevitably result in protracted litigation.

Takeaways

Although the amount of restitution, if any, that the court will ultimately impose on OZ Africa is unclear, Judge Garaufis's decision promises to complicate corporate resolutions of FCPA and other cases significantly. The possibility of broad restitution awards will make it more difficult for companies to predict the full monetary impact of a resolution, especially in bribery cases, where the effect on third parties such as investors and competitors can be wide-ranging and unclear. Indeed, companies who allegedly lost contracts because of a competitor's bribery will almost certainly point to Judge Garaufis's decision in an effort to receive restitution in future FCPA cases.

The risk posed by litigated restitution awards provides further reason for companies to avoid entering into a guilty plea in criminal resolutions, even to the extent doing so requires greater concessions in other areas. Notably, neither of the traditional mechanisms for resolving criminal matters — non-prosecution agreements and deferred prosecution agreements — risk runaway restitution awards. A non-prosecution agreement is simply an agreement between a company and the government, and so does not create an avenue through which victims can assert claims under the MVRA. And while a deferred prosecution agreement is technically filed with the court, it similarly avoids the possibility of restitution awards because the defendant is never actually sentenced (assuming, of course, that the conditions of the agreement are satisfied). It is only when a company pleads guilty that a court may impose restitution beyond what is contemplated in a negotiated resolution.

While parties can oftentimes minimize unpredictability through the use of conditional pleas under Federal Rule of Criminal Procedure 11(c)(1)(C), this case demonstrates the limitations of that approach. A conditional plea effectively controls the nature of the

penalty imposed — Rule 11(c)(1)(C) provides that a joint sentencing recommendation becomes binding on the court if the court accepts the plea agreement. But that provision generally applies only to monetary penalties and jail terms; if parties tried to condition a Rule 11(c)(1)(C) plea on the court declining to award restitution, courts would almost certainly refuse to accept the underlying plea agreement as inconsistent with the court's obligations under the MVRA.

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1. *U.S. v. OZ Africa Management GP, LLC,* 16-CR-515, slip op. at 9 (NGG) (E.D.N.Y. Aug. 28, 2019).↩

2. *Id.* at 7.↩

3. *Id.* at 20.↩

4. *Id.* at 20 n.12.↩

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