

FCPA Update:

Avianca Self-Reports FCPA Investigation

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Breeding Henry Baysan PC contact.

Avianca Holdings S.A., a multi-Latam airline holding company traded on the New York Stock Exchange, has voluntarily disclosed an internal investigation surrounding alleged violations of U.S. and non-U.S. anti-corruption laws to the U.S. Department of Justice and the Securities Exchange Commission (“SEC”). The company discovered the practice in 2017 and hired an outside law firm to investigate.

In a statement released by Avianca, it disclosed that “through internal processes, [it] discovered a business practice where company employees, which may include members of senior management, as well as certain members of the board of directors, provided things of value, which as of today [it] believes to have been limited to free and discounted airline tickets and upgrades, to government employees in certain countries.” Avianca, in addition to outside counsel, has retained a forensic investigatory firm to conduct an internal investigation to determine whether this practice may have violated the U.S. Foreign Corrupt Practices Act (“FCPA”) or other laws. Avianca has also implemented controls to prevent this conduct in the future.

In the past, the Justice Department and SEC have settled cases with companies for providing free travel to foreign officials. They have also settled with a foreign airline for bribery related to union labor contracts. But, this case presents a unique question of whether offering free and discounted tickets and upgrades by an airline itself qualifies as a bribe under the FCPA.

The FCPA prohibits U.S. companies, including their affiliates and subsidiaries, and other categories of companies with ties to the U.S. – including companies listed on a U.S. stock exchange (including American Depository Receipts), regardless of its country of origin – from bribing foreign officials to gain a business advantage. The FCPA also applies to companies using interstate commerce in the U.S. (including, e.g., bank wires). In short, the question here revolves around whether Avianca’s actions rise to a violation of foreign bribery laws and could be consequential for international airlines around the globe.

Avianca is cooperating with the DOJ and SEC in the investigation.

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