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Key Takeaways from Beam Suntory's FCPA Settlement with DOJ

On October 27, 2020, a U.S.-based producer and distiller of beverages, Beam Suntory, Inc. (“Beam” or “the Company”), agreed to pay a penalty of nearly \$20 million dollars to resolve a Department of Justice investigation into FCPA violations involving its Indian subsidiary.¹ The settlement with DOJ came over two years after Beam reached a settlement regarding the same conduct with the Securities Exchange Commission in which the Company agreed to pay \$6 million in disgorgement and prejudgment interest, as well as \$2 million in penalties.² In its press release announcing the deferred prosecution agreement with Beam, however, DOJ announced that it was “not crediting any portion of the penalty paid to the SEC because Beam did not seek to coordinate a parallel resolution with the department.”³ In addition, DOJ appeared to take a more aggressive view of the underlying evidence, highlighting “efforts by a then-member of Beam’s legal department to affirmatively avoid uncovering information related to improper activities and practices by third-parties engaged by Beam in India that presented corruption risks.”⁴

DOJ’s pointed refusal to credit Beam’s previously paid penalties, as well as its harsher view of Beam’s conduct, represent the rare instance in which the two agencies have differed starkly in their view of a case. DOJ’s differing approach raises questions about the application of DOJ’s “piling on” policy and also reinforces the need for companies facing parallel enforcement actions to engage thoughtfully and contemporaneously with both agencies when discussing settlement.

THE DISCORDANT SETTLEMENTS

Both settlements involved essentially the same conduct relating to Beam’s Indian subsidiary, Beam Global Spirits & Wine (India) Private Limited (“Beam India”). Beam India allegedly conspired with third-party distributors, bottlers, and sales promoters to pay bribes to various Indian government officials between 2006 and 2012 to obtain improper advantages in connection with sales, label registrations, and licenses in



India.⁵ In order to conceal the payments, Beam relied on falsely recorded expenses and false invoices.⁶ Both DOJ and the SEC charged Beam with violating the FCPA's books-and-records and internal controls provisions, and DOJ additionally charged Beam with conspiracy to violate the FCPA's anti-bribery provisions.⁷

In settling the SEC action via a cease-and-desist order in July 2018, Beam agreed to pay disgorgement and prejudgment interest of approximately \$6 million, and a civil penalty of \$2 million.⁸ The SEC's order acknowledged Beam's self-disclosure of the misconduct, cooperation with the staff's investigation, and multiple remedial actions. While the order described a series of internal investigations and reviews overseen by Beam's legal department under the heading, "Beam Failed to Timely Remediate Deficiencies," the order did not suggest any wrongdoing by Beam's in-house counsel.⁹

By contrast, DOJ characterized Beam's misconduct as "serious," and premised that characterization largely on the fact that "high-ranking" members of Beam's legal department were involved in efforts to "affirmatively avoid uncovering information related to improper activities."¹⁰ In addition, the deferred prosecution agreement noted that these individuals actively impeded implementation of controls that would have uncovered the misconduct, and manipulated a related compliance review.¹¹ DOJ also took a much harsher view of Beam's cooperation and remediation than the SEC. DOJ gave Beam only "partial credit" for cooperation, finding that Beam "fail[ed] to fully cooperate, including positions taken by Beam that were not consistent with full cooperation, as well as significant delays caused by Beam in reaching a timely resolution and its refusal to accept responsibility for several years."¹² Furthermore, DOJ found that Beam had "fail[ed] to fully remediate" and gave the company only partial credit for its remediation efforts, asserting that Beam had failed to discipline some of the individuals involved in the misconduct.¹³

Perhaps the most notable difference between the two settlements, however, involved the monetary sanctions. DOJ imposed a criminal penalty of \$19,572,885, more than double the amount that Beam paid to the SEC.¹⁴ Furthermore, DOJ declined to give Beam any credit for the \$2 million penalty paid to the SEC "because the Company did not seek to coordinate a parallel resolution with the Fraud Section and the Office."¹⁵

According to the two agencies' most recent version of the *FCPA Resource Guide*, when resolving FCPA cases, "DOJ and SEC strive to avoid imposing duplicative penalties, forfeiture, and disgorgement for the same conduct."¹⁶ This policy against "piling on" was announced by former Deputy Attorney General Rod Rosenstein in a May 9, 2018 speech and instructs DOJ attorneys "when possible, to coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct." The policy provides that DOJ may nevertheless impose complete remedies under certain circumstances, after weighing factors such as: "the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwanted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities."¹⁷ This case appears to illustrate the unusual scenario where DOJ has determined that the piling on policy does not apply due to lack of cooperation.¹⁸ Due in large part to the confidential nature of DOJ investigations and settlement negotiations, the specific reasons for DOJ's stance here are not clear. However, DOJ's statements indicate that they viewed Beam's cooperation much more negatively than did the SEC.

KEY TAKEAWAYS

While it is impossible to know what nonpublic factors may have led to DOJ's harsher stance against Beam, the settlement raises significant questions for companies facing parallel FCPA investigations and their counsel. In particular, this case raises questions about how DOJ will apply its anti-piling on policy, and whether DOJ will view aggressive advocacy positions taken by defense counsel as a sign that a company was not cooperative. In addition, companies and



their counsel should engage with both agencies as they seek to resolve parallel investigations. Failure to do so could expose the company to unnecessary penalties.

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¹ Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 20-CR-705 (N.D. Ill. Oct. 23, 2020), available at <https://www.justice.gov/opa/press-release/file/1331666/download> (hereinafter "Beam DPA").

² See Press Release, SEC, SEC Charges Beam Suntory Inc. with FCPA Violations (Jul. 2, 2018), available at <https://www.sec.gov/enforce/34-83575-s> (hereinafter "SEC Admin. Summary")

³ See Press Release, U.S. Dep't of Just., Beam Suntory Inc. Agrees to Pay Over \$19 Million to Resolve Criminal Foreign Bribery Case, DOJ (Oct. 27, 2020), available at <https://www.justice.gov/opa/pr/beam-suntory-inc-agrees-pay-over-19-million-resolve-criminal-foreign-bribery-case> (hereinafter "DOJ Press Release")

⁴ *Id.*

⁵ See DOJ Press Release, *supra* note 3; see also SEC Admin. Summary, *supra* note 2.

⁶ See DOJ Press Release, *supra* note 3; see also SEC Admin. Summary, *supra* note 2.

⁷ Compare Order Instituting Cease-and-Desist Proceedings, *In the Matter of Beam Inc., n/k/a Beam Suntory Inc.*, No. 3-18568 (Jul. 2, 2018), available at <https://www.sec.gov/litigation/admin/2018/34-83575.pdf> (hereinafter "Beam SEC Order"), with Criminal Information, *United States v. Beam Suntory Inc.*, No. 20-CR-705 (N.D. Ill. Oct. 21, 2020), available at <https://www.justice.gov/opa/press-release/file/1331671/download>.

⁸ SEC Admin. Summary, *supra* note 2.

⁹ See Beam SEC Order, *supra* note 7.

¹⁰ Beam DPA, *supra* note 1, at ¶¶ 4(i), 5-6.

¹¹ *Id.* at ¶ 29 (member of Beam Legal Department instructing that a "U.S. regulatory regime" should not be imposed on Beam India's way of doing business).

¹² See DOJ Press Release, *supra* note 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Beam DPA, *supra* note 1, at ¶ 4(k).

¹⁶ See U.S. Dep't of Just. & SEC, *A Resource Guide to the Foreign Corrupt Practices Act (2020)* at 71, available at <https://www.justice.gov/criminal-fraud/file/1292051/download>.



¹⁷ *Id.* (quoting See Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Just., Letter to Heads of Department Components on Policy on Coordination of Corporate Resolution Penalties (May 9, 2018)); see also Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute, May 9, 2018, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>.

¹⁸ It is not unheard of for DOJ to bring an FCPA enforcement action for conduct already settled with the SEC. See, e.g., Press Release, U.S. Dep't of Just., Las Vegas Sands Corporation Agrees to Pay Nearly \$7 Million Penalty to Resolve FCPA Charges Related to China and Macao (Jan. 19, 2017), available at [https://www.justice.gov/opa/pr/las-vegas-sands-corporation-agrees-pay-nearly-7-million-penalty-resolve-fcpa-charges-related#:~:text=Las%20Vegas%20Sands%20Corp.,China%20\(PRC\)%20and%20Macao](https://www.justice.gov/opa/pr/las-vegas-sands-corporation-agrees-pay-nearly-7-million-penalty-resolve-fcpa-charges-related#:~:text=Las%20Vegas%20Sands%20Corp.,China%20(PRC)%20and%20Macao). However, the subsequent adoption of DOJ's piling on policy makes DOJ's decision to do so here even more noteworthy.