

Olympus To Pay \$646M To Settle Kickback, FCPA Probes

By **Dani Kass**

Law360, New York (March 1, 2016, 1:01 PM ET) -- Japanese camera and medical equipment maker Olympus' U.S. arm will pay \$646 million to settle two different investigations from the federal government over claims it entered into a kickback scheme with physicians and hospitals and violated the U.S. Foreign Corrupt Practices Act, the U.S. Justice Department announced Tuesday.

Pennsylvania-based Olympus Corp. of the Americas will pay a \$312.4 million criminal penalty over the alleged kickback scheme and \$310.8 million to settle False Claims Act violation allegations, which the Justice Department said is the most a medical device company has ever paid under the act. Additionally, the company's subsidiary, Olympus Latin America Inc., has agreed to pay \$22.8 million over alleged FCPA violations regarding a kickback scheme targeted at increasing medical equipment sales in Central and South America.

"Our ability to meet the needs of our customers and their patients is of paramount importance and we can confirm that the previous conduct did not adversely affect patient health or patient care and the investigations and settlements have had no impact on product or service availability," the company said in a statement.

OCA was charged Tuesday in New Jersey federal court of violating the Anti-Kickback Statute, for which it agreed to pay \$312.4 million as part of a deferred prosecution agreement where it admitted to the allegations.

Those kickbacks included giving a hospital a \$5,000 grant to set up a \$750,000 sale, refusing to give a \$50,000 research grant until a hospital agreed to buy their medical equipment, paying for three doctors to go to Japan in exchange for switching to Olympus and giving a doctor with buying power in a New York medical center \$400,000 in free equipment.

In all, those kickbacks led to OCA taking in more than \$600 million in sales and more than \$230 million in profits, the DOJ said.

During the time of the violations, OCA did not have a compliance officer, the government said. That position was created in 2009 and filled by someone qualified in August 2010. The company must enhance its compliance program as part of the deferred prosecution agreement.

For the civil suit that claimed the kickbacks led to false claims being filed, the federal government will receive \$267.3 million and the remaining \$43.5 million will go to states who experienced Medicaid fraud

as part of the scheme. The qui tam suit was originally brought by OCA's former chief compliance officer, John Slowik, who will receive \$44.1 million from the federal settlement and \$7 million of the states' share.

"This case is testament to the fact that without external fraud reporting avenues afforded by current whistleblower laws, corporate greed will go unchecked," Slowik's attorney, Tavy Deming of Kenney & McCafferty PC, said in a statement.

OLA also entered into a deferred prosecution agreement regarding the separate FCPA criminal complaint filed Tuesday in the same court. That complaint alleged OLA paid physicians at government-owned health care facilities almost \$3 million to purchase their products, leading to more than \$7.5 million in profits.

Olympus also agreed to enter into a corporate integrity agreement with the U.S. Department of Health and Human Services.

Larry Mackey of Barnes & Thornburg LLP will monitor compliance with the two deferred prosecution agreements.

Olympus has been embroiled in controversy since 2011, when former CEO Michael Woodford first revealed an accounting fraud by questioning exorbitant advisory fees paid during past mergers. This later led to a whistleblower retaliation suit from Woodford.

Olympus was subsequently forced to restate five years of financial earnings in order to remain listed on the Tokyo Stock Exchange.

Three former Olympus executives pled guilty to accounting fraud in Japanese court in 2012, after the company admitted to hiding more than \$1 billion in losses through a series of sham transactions, including a \$687 million payment it made for financial advice on its \$2 billion takeover of British device company Gyrus Group PLC in 2008.

The ex-chairman of Olympus and two others received suspended prison sentences in Tokyo court in July 2013.

In September 2013, Chan Ming Fon, a former banking executive in Singapore, pled guilty to conspiring to help Olympus hide money as part of the accounting fraud.

About four months later, a Pennsylvania federal judge preliminarily approved a \$2.6 million settlement to be paid by Olympus to resolve a shareholder class action claiming the company failed to tell investors that it had paid "an unprecedented \$687 million" fee — which far exceeded the typical Wall Street advisory fee of 1 to 2 percent — for advice on the Gyrus deal. The judge issued a final judgment ending the case several months later.

In April 2014, six Japanese banks sued Olympus demanding nearly 28 billion yen (\$235 million) for losses related to the accounting scandal.

The government is represented by R. David Walk Jr., Deborah J. Gannett, David E. Dauenheimer, David T. Cohen, Mary Riordan, Nicole Caucci and James P. McDonald of the DOJ.

Slowik is represented by Tavy Deming and Kathryn Schilling of Kenney & McCafferty PC.

Olympus is represented by a team from Pepper Hamilton LLP, led by Thomas Gallagher, in the kickbacks cases and Eric Kraeutler and Alison Tanchyk of Morgan Lewis & Bockius LLP in the FCPA case.

--Additional reporting by Vin Gurrieri, Juan Carlos Rodriguez and Kelly Knaub. Editing by Emily Kokoll.

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