

**SEC FINDS DONATIONS TO BONA FIDE CHARITY  
TO BE IN VIOLATION OF THE FCPA**

In a recent high-profile enforcement action under the Foreign Corrupt Practices Act (“FCPA”), the U.S. Securities and Exchange Commission (“SEC”) found that charitable contributions to a bona fide charity affiliated with a government official may violate the FCPA. See Order Instituting Proceedings, In the Matter of Schering-Plough Corp., File No. 3-11517 (June 9, 2004). In the Schering-Plough matter, the SEC alleged that Schering-Plough’s Polish subsidiary, S-P Poland, (1) inaccurately recorded payments made to a charitable foundation to influence the purchase of Schering-Plough pharmaceutical products, and (2) failed to devise and maintain an adequate system of internal accounting controls to prevent or detect improper payments. Specifically, the SEC determined that S-P Poland had violated the FCPA’s books and records provision by classifying the contributions as “donations,” when in fact the contributions were made to induce a government official to influence purchases of Schering-Plough’s products. Additionally, the SEC asserted that Schering-Plough had failed to devise and maintain an effective system of internal accounting controls, as evidenced by the extent and duration of the improper payments by its foreign subsidiary and the improper recording of these payments in the subsidiary’s books and records. Rather than challenge the SEC’s theory, Schering-Plough settled the enforcement action for a \$500,000 civil penalty without admitting to or denying the allegations in the complaint.

The underlying facts were as follows. According to the SEC, S-P Poland made payments totaling \$75,860 to the Chudow Castle Foundation (“Foundation”), a charitable organization established in 1995 to restore castles and other historic sites in the Silesian region of Poland. The founder and President of the Foundation became the Director of the Silesian Health Fund in 1999, a position that enabled him to make purchasing decisions regarding pharmaceutical products for the Fund as well as to influence purchases by Silesian hospitals and clinics. Shortly after the Director assumed his leadership position at the Fund, S-P Poland made the first of a series of charitable contributions to the Foundation. Between March 2000 and March 2002, S-P Poland’s oncology unit manager (“Manager”) arranged for twelve additional payments from S-P Poland to the Foundation. The SEC alleged that the Manager structured some of these payments at or below his approval limit to conceal their nature, and provided false medical justifications for most of the payments on the documents that he submitted to S-P Poland’s finance department. S-P Poland classified these payments as donations in its books and records.

The SEC acknowledged that the Foundation was in fact a bona fide charitable organization. Nevertheless, the SEC took the position that because the contributions were requested by the government official, they were not donations, but rather were made to influence the official with respect to the purchase of Schering-Plough’s products. In the SEC’s view, the payments were more properly characterized as “dues” required by the Director for his assistance.

The SEC also found that Schering-Plough had failed to devise and maintain an adequate system of internal controls for detecting improper payments by foreign subsidiaries. The SEC based this finding on S-P Poland's failure to conduct any due diligence prior to making promotional or charitable donations to determine whether any government officials were affiliated with proposed recipients. The absence of such due diligence procedures resulted in S-P Poland never considering whether the relationship of the Director of Silesian Health Fund to the Foundation was a problem.

In this enforcement action, the U.S. government has explicitly taken the position that a donation to a bona fide charitable foundation may violate the FCPA. Specifically, the SEC's position is that payments directed by a government official, even when made to a bona fide charity, violate the FCPA when they are made to obtain or retain business. Although the SEC's charges were based on the FCPA's accounting provisions, the SEC Order and Civil Complaint suggest that payments to bona fide charities may violate the FCPA's antibribery provisions as well, even when those payments are not passed on directly or indirectly to a government official. This enforcement action indicates that U.S. law enforcement authorities are adopting an increasingly expansive definition of corrupt payments that could render promotional charitable donations a criminal violation of the FCPA, even though such payments traditionally have withstood scrutiny.

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If you have any questions concerning the foregoing or would like additional information, please call Martin J. Weinstein (Chair, Compliance & Enforcement Practice Group) at (202) 303-1122, or Robert J. Meyer (Vice-Chair) at (202) 303-1123.

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