

# SULLIVAN & CROMWELL LLP

---

## *S&C Alerts*

### **Foreign Corrupt Practices Act Alert: SEC uses FCPA's Expansive Reach to Pursue Domestic Conduct in United Continental Enforcement Action**

---

#### PRACTICES & CAPABILITIES

---

**AML & Sanctions Enforcement and  
Compliance**

**FCPA & Anti-Corruption**

DECEMBER 13, 2016

On December 2, 2016, the Securities & Exchange Commission ("SEC") issued a cease-and-desist order compelling United Continental Holdings, Inc. ("United" or the "Company") to pay a civil penalty of \$2.4 million and undertake other remedies for alleged violations of the Foreign Corrupt Practices Act's ("FCPA") books and records and internal controls provisions. Those provisions, which are codified in the Securities Exchange Act of 1934, apply to records and controls of all commercial activities of an issuer of registered securities, not only to situations involving alleged bribery. The SEC action followed a July 2016 Non-Prosecution Agreement ("NPA") between United and the Department of Justice ("DOJ") based on the same conduct, pursuant to which United paid a \$2.25 million penalty and agreed to enhance its compliance and anti-bribery/anti-corruption standards and procedures. In the NPA, the DOJ noted United's willingness to accept responsibility for its conduct, cooperate with the DOJ investigation, and undertake extensive remedial actions, including submitting periodic reports to the DOJ regarding United's anti-bribery compliance controls.

The SEC settlement is notable in several respects:

- The SEC's expansive interpretation of the terms "books and records" to include not only the formal accounting and financial records of the Company, but also forms and records required by the Company's internal policies for the authorization of transactions.

- The SEC's pursuit of investigation and settlement techniques that are typically employed in the foreign-bribery context in connection with a case of entirely domestic conduct, which may reflect a move by the SEC to make broader use of those tools.

## **Background**

According to the SEC, in 2012, United's CEO unilaterally approved the initiation of an unprofitable flight route between Newark Liberty International Airport ("Newark") in New Jersey and Columbia Metropolitan Airport ("Columbia") in South Carolina, in order to curry favor with the Port Authority's Chairman, David Samson, who owned a home in South Carolina. The SEC alleged that United sought to influence Mr. Samson in connection with the Port Authority's consideration of a hangar project at Newark, the approval of which would have benefitted United. On the same day that United's CEO approved the flight between Newark and Columbia, the Port Authority's Board approved the lease agreement for the hangar project. The SEC alleged that the Newark-to-Columbia route ultimately was not profitable and caused the Company to lose an estimated \$945,000. The SEC further alleged that United's CEO circumvented the Company's usual process for flight route initiation and violated United's Code of Business Conduct and Continental's Ethics and Compliance Guidelines. The SEC concluded that the approval of the new route had not been accurately recorded in United's books and records because the required written authorization was not requested or obtained before service began on the new route.

## **Settlement**

The settlement is notable for its expansive interpretation of the terms "books and records" to include not only the formal accounting and financial records of the Company, but also forms and records submitted in connection with the authorization of transactions, pursuant to the Company's internal policies. Considered alongside last year's enforcement action against BHP Billiton—in which the SEC took a similarly broad view in charging books and records violations arising out of inaccuracies in internal gift and entertainment expenditure approval forms—the two settlements might mark

the beginning of a trend toward more aggressive use of the FCPA's books and records violations to address a wider variety of alleged misconduct. The United settlement also serves as a reminder that the FCPA's books and records and internal controls provisions, unlike the FCPA's substantive anti-bribery provisions, are phrased broadly and can and have been used not only to pursue violations involving the bribery of foreign officials, but also in a variety of domestic scenarios not involving corruption, including, for example, in sanctioning accounting and securities fraud. Also noteworthy is the use of the sorts of settlements typically employed by the DOJ and SEC in the foreign-bribery context in connection with a case of entirely domestic conduct, which may reflect the authorities' intention to expand their use of these procedures.