

General Cable Corporation Pays \$75.8 Million to Resolve FCPA Investigations

美国通用电缆公司支付 7,580 万美元和解 FCPA 调查 Conduct Related to China, Thailand, Indonesia, and Other Countries 所指行为涉及中国、泰国、印尼及其他国家

January 3, 2017 2017年1月3日

Anti-Corruption 反腐败

On December 29, 2016, General Cable Corporation (“GCC”), a global manufacturer of wire and cable products, agreed to pay approximately \$75.8 million in connection with a non-prosecution agreement with the Department of Justice (“DOJ”) and a cease and desist order with the U.S. Securities and Exchange Commission (“SEC”) to settle allegations that it violated the anti-bribery, books and records, and internal controls provisions of the U.S. Foreign Corrupt Practices Act (“FCPA”). The settlement, which includes an admission of factual allegations but no criminal charges, requires GCC to pay a criminal penalty of \$20.5 million to the DOJ and \$55.3 million in disgorgement and pre-judgment interest to the SEC.

2016年12月29日，电线电缆产品全球制造商美国通用电缆公司（下称“通用电缆”）同意根据与美国司法部（下称“司法部”）达成的不起诉协议以及美国证券交易委员会（下称“证交会”）发出的停止与禁止令支付约7,580万美元，以就其违反《美国反海外腐败法》（下称“FCPA”）的反贿赂、账簿和记录及内部控制等条文的指控进行和解。该和解包括通用电缆对事实主张的承认但并不含刑事指控。该和解要求通用电缆向司法部支付2,050万美元的刑事罚金，并向证交会支付5,530万美元的非法所得和判决前利息。

Additionally, GCC’s former Senior Vice President responsible for sales in Angola, Karl Zimmer, agreed to pay a \$20,000 civil penalty without admitting or denying the SEC’s findings that he knowingly circumvented internal accounting controls and caused FCPA violations when he approved certain improper payments.

此外，通用电缆负责安哥拉销售的前高级副总裁 Karl Zimmer 同意支付 2 万美元的民事罚金，但其并未承认或否认证交会关于其在批准某些不当付款时故意规避内部会计控制并导致违反 FCPA 规定的认定。

In a separate administrative order with the SEC, GCC also agreed to pay an additional \$6.5 million civil penalty to settle allegations of “improper inventory accounting and disclosure violations.”

根据证交会的另一项行政命令，通用电缆还同意额外支付 650 万美元的民事罚金，以就其“不当存货会计及违反披露规定”等指控进行和解。

Background and Alleged Misconduct 背景和所指不当行为

GCC is a Delaware corporation headquartered in Kentucky that maintains a class of publicly traded stock on the New York Stock Exchange. GCC engages in business through various subsidiaries around the world and maintains separate geographic divisions that oversee the operations of its subsidiaries.

通用电缆是一家特拉华州公司，其总部设在肯塔基州并有一类股票在纽约证券交易所上市。通用电缆通过世界各地的各家子公司经营业务，并设有不同的区域部门监督其子公司的运营。

FCPA Investigations FCPA 调查

According to the SEC's [Cease-and-Desist Order](#), between 2003 and 2015, GCC's overseas subsidiaries made improper payments totaling approximately \$19 million to foreign government officials to obtain or retain business in Angola, Bangladesh, China, Egypt, Indonesia, and Thailand, generating illicit profits of over \$51 million on sales to state-owned enterprises ("SOEs").¹ GCC made these payments directly to foreign government officials or through third-party agents or distributors, in the form of sales commissions, rebates, discounts, and other fees.

根据证交会的[停止与禁止令](#)，从 2013 年至 2015 年，为在安哥拉、孟加拉国、中国、埃及、印度尼西亚和泰国获得或保留业务，通用电缆的海外子公司向外国政府官员支付了总计约 1,900 万美元的不当款项，从而通过对国有企业（下称“国企”）的销售获得超过 5,100 万美元的非法利润。² 通用电缆直接或通过第三方代理人或经销商以销售佣金、回扣、折扣及其他费用的形式对外国政府官员进行不当付款。

According to the admitted [Statement of Facts](#) between GCC and the DOJ, some of these payments were made even though certain executives and employees at GCC knew that certain of its foreign subsidiaries used certain third-party agents and distributors to make corrupt payments to foreign officials in order to obtain and retain business in certain countries. The DOJ faulted GCC in particular for knowingly and willfully failing to implement adequate

¹ GCC admitted in its Statement of Facts with DOJ to a smaller quantity of corrupt payments for a slightly different time period: \$13 million in corrupt payments between 2002 and 2013. Additionally, the Statement of Facts does not reference GCC's conduct in Egypt. Both the Statement of Facts and the Cease-and-Desist Order indicate that the illicit profits totaled \$51 million.

² 通用电缆在其向司法部递交的事实陈述中承认了较小数量的腐败付款，但提供的时间段有所不同，即 2002 年至 2013 年期间支付了 1,300 万美元腐败付款。此外，该事实陈述未提及通用电缆在埃及的行为。该事实陈述及停止与禁止令均指出非法利润总计为 5,100 万美元。

internal accounting controls that required and/or ensured (1) due diligence of third party agents and distributors, (2) proof that services had been rendered by third parties before payment, (3) and oversight of the payment process to ensure that payments were made pursuant to contractual terms or that payments were reasonable and legitimate.

根据通用电缆与司法部之间通用电缆已承认的**事实陈述**，这些付款有些甚至是在通用电缆的某些高管和员工知道其某些外国子公司为了在一些国家获得和保留业务而利用第三方代理人和经销商对外国官员进行腐败付款的情况下进行的。司法部特别批评通用电缆明知且故意地不实施充分的内部会计控制要求和/或确保：(1)对第三方代理人和经销商的尽职调查，(2)在付款之前第三方已提供服务的证明，和(3)监督付款过程以确保付款系根据合同条款进行或付款为合理正当。

The specific conduct varied by each country:

具体行为因国家而异：

- In China, from 2012 to 2015, GCC's subsidiary made improper payments to third-party distributors or agents, typically in the form of "special discounts," technical services fees, design institute fees, or rebates, in connection with sales to SOE customers, which constituted the majority of GCC's sales in China.

在中国，从2012年至2015年，通用电缆的子公司在对国企客户的销售（在通用电缆在华销售额中占大多数）中向第三方经销商或代理人进行了不当付款，这些付款通常是采取“特别折扣”、技术服务费、设计机构费或回扣等形式。

- In Thailand, from 2008 to 2013, GCC's subsidiary gave "success fees" and rebates to a Thai company with the understanding that the company would use the money, in part, to make corrupt payments to Thai SOE officials.

在泰国，从2008年至2013年，通用电缆的子公司向一家泰国公司支付了“成功费”和回扣，而明知该公司会将该笔款项部分用于向泰国国企官员支付腐败款项。

- In Indonesia, from 2011 to 2014, GCC's subsidiary made improper payments to two purported freight forwarders with the understanding that the freight forwarders would use the money, in part, for corrupt purposes.

在印度尼西亚，从2011年至2014年，通用电缆的子公司对两家所谓的货运代理人进行了不当付款，而明知该货运代理人会将该等款项部分用于腐败目的。

- In Angola, from 2003 to 2013, GCC's subsidiaries made improper payments in the form of sales commissions either directly to employees of SOEs in Angola or to a third-party agent knowing that the agent would pass a portion of those payments to officials at SOEs.

在安哥拉，从2003年至2013年，通用电缆的子公司以销售佣金的形式进行不当付款，这些款项要么直接支付给安哥拉的国企员工，要么在明知第三方代理人会将部分款项转给国企官员的情况下支付给第三方代理人。

- In Bangladesh, in 2013, GCC's subsidiary made an improper commission payment to a third-party agent with the understanding that the agent would use the money, in part, for corrupt purposes.

在孟加拉国，通用电缆的子公司于 2013 年在明知第三方代理人会将款项部分用于腐败目的的情况下向第三方代理人支付了不当付款。

- In Egypt, from 2010 to 2015, employees of GCC's subsidiary gave or offered to give improper payments, including cash, gifts, or tips to employees of certain customers of suppliers, some of which included Egyptian SOEs.

在埃及，通用电缆子公司的员工在 2010 年至 2015 年间给予某些供应商的客户的员工（或向这些员工提出给予）不当付款，包括现金、礼品或小费等。这些供应商的客户中有些是埃及的国企。

Accounting Investigation 会计调查

According to the SEC's separate [Cease-and-Desist Order](#) relating to accounting violations, from 2008 to 2012, GCC's Brazilian subsidiary materially understated its cost of sales and overstated copper inventory balances on its books and records, which were consolidated into GCC's financial statements. The inventory overstatement was due to both a deliberate attempt to conceal missing inventory and accounting errors.

根据证交会关于会计违规行为的另一项[停止和禁止令](#)，2008 年至 2012 年间，通用电缆的巴西子公司在其账簿和记录上严重低报了销售成本并夸大了铜存货余额，而巴西的账簿和记录并入了通用电缆的财务报表。夸大存货是为了隐瞒存货缺失和会计失误。

In covering up the missing inventory, certain Brazilian accounting employees manipulated the company's accounting system by entering false entries for inventory values. GCC executives knew generally that GCC's accounting systems were highly manual and not subject to centralized oversight, which presented financial reporting risks. Additionally, when the improper accounting was reported to certain GCC executives in 2012, they actively concealed the inventory overstatement from GCC's executive management.

在隐瞒存货缺失时，某些巴西会计员工通过输入假存货值操纵公司的会计系统。通用电缆的高管一般都知道公司的会计系统很大程度上是手工操作且缺少集中监督，而这种设置会带来财务报告的风险。此外，当 2012 年通用电缆的高管接到不当会计的报告时，他们积极地对高级管理层隐瞒存货夸大一事。

The missing inventory in Brazil caused GCC to materially overstate its inventory by \$46.7 million and overstate its net income available to common shareholders by 21.6%, 11.3%, and 29.8% in 2011, 2010, and 2009 and 8.8% and 13.8% for the first two quarters of 2012.

巴西存货缺失一事导致通用电缆严重夸大了其库存值达 4,670 万美元，并将 2011、2010、2009 年度及 2012 年前两个季度可向普通股股东分配的净收入分别夸大了 21.6%、11.3%、29.8%、8.8%和 13.8%。

Cooperation and Remedial Efforts 配合和补救努力

Both the DOJ and SEC acknowledged GCC's cooperation and remedial efforts. Both agencies noted that GCC voluntarily and timely self-reported the potential FCPA violations and identified further conduct as the investigation proceeded.

司法部和证交会认可了通用电缆的配合和补救的努力。这两个部门都提到通用电缆及时主动地报告了可能存在的违反 FCPA 的行为，而且，随着调查的深入通用电缆发现了其他的违法行为。

Both agencies also credited GCC's cooperation during the investigations by making regular presentations on key finding, producing relevant documents and information, including English translations of numerous documents, and making foreign-based employees available for interviews.

两个部门还认可了通用电缆在调查期间在以下方面的配合：定期报告重要发现、提供相关文件和信息（包括许多文件的英文翻译），以及安排海外员工参加面谈。

The DOJ and SEC also took notice of GCC's remedial measures, including terminating or taking disciplinary actions against employees who were involved in the improper payments, appointing a Chief Compliance Officer with reporting lines to the CEO and Audit Committee, enhancing compliance training, and adopting heightened controls on the selection and use of third parties.

司法部和证交会还注意到通用电缆的补救措施，包括解聘或处分参与不当付款的员工、委派向公司首席执行官和审计委员会汇报的首席合规官、加强合规培训，以及在选择和使用第三方方面实施更严格的控制。

As a result of GCC's cooperation and remediation efforts, the DOJ gave GCC a 50% discount off the bottom of the U.S. Sentencing Guidelines fine range.

鉴于通用电缆的配合和补救努力，司法部给予了通用电缆《美国量刑指南》罚金范围下限 50% 的减免。

Consequences 后果

To settle the SEC's claims that it violated the FCPA's anti-bribery, books and records, and internal controls provisions, GCC agreed to disgorge \$51.2 million dollars and pay \$4.1 million in prejudgment interest. The SEC did not impose a civil penalty for the violations based in part on GCC's non-prosecution agreement with the DOJ, in which GCC agreed to pay a criminal fine of \$20.5 million dollars. GCC also agreed to self-report its FCPA compliance efforts for the next three years.

为就证交会关于其违反 FCPA 反贿赂、账簿和记录和内部控制条文的指控进行和解，通用电缆同意缴纳 5,120 万美元的非法所得，并支付 410 万美元的判决前利息。部分基于通用电缆与司法部达成的不起诉协议（根据该协议通用电缆同意支付 2,050 万美元的刑事罚金），证交会未就通用电缆的违法行为施加民事处罚。通用电缆还同意在未来三年里主动报告其在 FCPA 合规方面的努力。

GCC further agreed to a \$6.5 million civil penalty to settle allegations of “improper inventory accounting and disclosure violations.”

通用电缆还同意支付 650 万美元的民事罚金，以和解对其“不当存货会计和违反披露规定”的指控。

Observations and Lessons Learned 观察和汲取的教训

The GCC enforcement action is noteworthy for the related SEC action against GCC’s former Senior Vice President responsible for sales in Angola, Karl Zimmer. This action is consistent with the DOJ’s and SEC’s public statements that they are focusing on enforcement actions against individuals.

通用电缆执法行动值得注意之处在于证交会对通用电缆负责安哥拉销售的前高级副总裁 Karl Zimmer 采取的行动。该行动与司法部及证交会将重点针对个人进行执法行动的公开声明是相符的。

This enforcement action is also noteworthy because of the separate SEC accounting action. This may suggest that the SEC is using FCPA investigations to identify more traditional accounting fraud cases.

此次执法行动的另一值得注意之处在于证交会单独的会计执法行动。此举可能表明证交会将利用 FCPA 调查来发现较为传统的会计欺诈案件。

This settlement also reinforces lessons learned from other anti-corruption cases, including the need to:

本次和解还加强了从其他反腐败案件中汲取的教训，包括需要：

- Develop and implement effective internal controls designed to verify payments and benefits provided to third parties, including discounts to distributors.

制定和实施旨在核实给予第三方款项和利益（包括给经销商的折扣）的有效内部控制。

- Ensure adequate oversight of the foreign business activities, particularly in businesses and countries with a history of corruption or related issues.

确保对外国业务活动实施充分监督，在有腐败或相关问题历史的业务领域和国家尤其应如此。

- **Timely investigate and remediate reports or findings of improper activity.**
及时就不当活动的报告或发现进行调查和补救。

If you have any questions concerning the material discussed in this client alert, please contact the following members of our [Global Anti-Corruption practice](#)

group:

如果您对本客户电子期刊中讨论的材料有任何疑问，请联络我们[全球反腐败业务组](#)下列成员。

Eric Carlson 柯礼晟 (Shanghai)	+86 21 6036 2503	ecarlson@cov.com
Min He 何敏 (Shanghai)	+86 21 6036 2517	mhe@cov.com
James Yuan 苑轲 (Shanghai)	+86 21 6036 2516	jyuan@cov.com
Ping An 安平 (Shanghai)	+86 21 6036 2512	pan@cov.com
Huanhuan Zhang 张欢欢 (Shanghai)	+86 21 6036 2515	hzhang@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

本文信息无意作为法律意见。阅读者在就本文中提及的事项采取行动前应寻求具体的法律意见。

In an increasingly regulated world, Covington & Burling LLP provides corporate, litigation, and regulatory expertise to help clients navigate through their most complex business problems, deals and disputes. Founded in 1919, the firm has more than 800 lawyers in offices in Beijing, Brussels, London, Los Angeles, New York, San Francisco, Seoul, Shanghai, Silicon Valley, and Washington.

在监管日益严格的世界里，科文顿·柏灵律师事务所为客户提供公司、诉讼及监管专业知识，以帮助其处理最为复杂的业务问题、交易和争议。本律师事务所成立于1919年，在北京、布鲁塞尔、洛杉矶、伦敦、纽约、旧金山、首尔、上海、硅谷和华盛顿设有办事处，拥有800多名律师。

This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

本通讯旨在向我们的客户及其他有兴趣的同事提供相关的动态。如果您将来不希望收到电邮或电子资讯，请发送电邮至 unsubscribe@cov.com。

© 2017 Covington & Burling LLP. All rights reserved.

© 2017 科文顿·柏灵律师事务所。保留所有权利。