

Westport and CEO Settle with SEC for China-Related Allegations of Improper Payments

Westport 与执行总裁对关于中国相关不当支付的指控与证交会达成和解

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Anti-corruption 反腐败

Summary

概要

On September 27, 2019, the Securities and Exchange Commission (“SEC”) announced a \$4.1 million settlement with Westport Fuel Systems, Inc. (“Westport”) and its former chief executive officer, Nancy Gougarty. Based in Vancouver, Canada, Westport is a clean fuel technology company that has shares listed on the NASDAQ. The SEC’s cease-and-desist order finds that Westport and Gougarty violated the anti-bribery, books and records, and internal controls provisions of the FCPA, and that Gougarty caused certain of Westport’s violations.

2019年9月27日，美国证券交易委员会（下称“证交会”）宣布与西科燃料系统公司（Westport Fuel Systems, Inc.）（下称“西科”）及其前执行总裁 Nancy Gougarty 以 410 万美元达成和解。总部在加拿大温哥华的西科是一家股票在纳斯达克上市的清洁能源技术公司。证交会的停止和禁止令认定，西科和 Gougarty 违反了美国反海外腐败法（下称“FCPA”）的反贿赂、账簿和记录以及内部控制规定，且 Gougarty 导致了西科的某些违规行为。

According to the SEC’s order, beginning no later than 2016, Westport, acting through Gougarty and others, engaged in a scheme to bribe a Chinese government official to obtain business and a cash dividend payment by transferring shares of stock in Westport’s Chinese joint venture (“JV”) to a Chinese private equity fund in which the government official held a financial interest. The SEC alleged that Westport concealed the identity of the Chinese private equity fund in its public filings, as well as in its books and records, by falsely identifying a different entity as the counterparty to the transaction. Gougarty caused Westport’s violations by circumventing Westport’s internal accounting controls and signing a false certification concerning the sufficiency of those controls.

根据证交会的该项命令，最迟自 2016 年起，西科通过 Gougarty 及其他人密谋，通过向一名中国政府官员拥有经济利益的一家中国私募股权基金转让西科中国合资企业股票的方式，贿赂该政府官员，以获得业务和现金股息付款。证交会指称，西科在其公开申报资料及其账簿和记录中隐瞒了该中国私募股权基金的身份，将另一个实体伪称为该交易的对手方。Gougarty 通

过规避西科的内部会计控制规定及签署关于上述控制得到充分实施的虚假证明导致了西科的违法行为。

Without admitting or denying the SEC's finding, Westport agreed to pay \$2,546,000 in disgorgement and prejudgment interest and a civil penalty of \$1,500,000, and Gougarty agreed to pay a civil penalty of \$120,000. Westport also agreed to self-report to the SEC on the status of its enhanced anti-corruption compliance policies and procedures for two years. In determining to accept Westport's settlement offer, the SEC considered remedial acts undertaken by Westport concerning its anti-corruption and financial reporting compliance programs, and its cooperation with the SEC.

西科既未承认亦未否认证交会的调查结果，但同意支付 2,546,000 美元的非法所得和判决前利息以及 1,500,000 美元的民事罚金。同时，Gougarty 同意支付 120,000 美元的民事罚金。西科还同意在两年内自行向证交会报告其改进的反腐败合规政策和程序的情况。在决定接受西科的和解要约时，证交会考虑了西科就其反腐败和财务报告合规制度采取的补救行动及其与证交会的合作。

Allegations 指控

- In 2008, Westport entered into a Chinese JV in which the largest shareholder was a Chinese state-owned entity (the "SOE"). A Chinese foreign government official (the "Government Official") held a senior position at the SOE.

2008 年，西科参与设立了一家中国合资企业（其最大股东为一家中国国有企业，下称“国企”）。一位中国政府官员（下称“政府官员”）在该国企担任高级职位。

- In 2013, at the direction of the Government Official, the SOE proposed taking the JV public in China through an initial public offering ("IPO"). The JV's manager, appointed by the SOE, falsely represented to Westport that Chinese law required the SOE to have a majority interest in the JV to qualify for an IPO. Accordingly, the manager of the JV advised Westport that a preliminary step in the IPO process would involve restructuring the JV so that a portion of the shares held by Westport and another entity would have to be transferred to the SOE and a Chinese private equity fund. As discussed below, although the shares were transferred to the private equity fund, the contemplated IPO never took place.

2013 年，在该政府官员的指示下，该国企建议通过首次公开发行（下称“IPO”）将该合资企业在中国上市。该合资企业的经理（由该国企委派）向西科谎称，中国法律要求该国企在该合资企业中持有多数股权才具备 IPO 资格。因此，该合资企业的经理告知西科，IPO 程序的第一步包括重组该合资企业，需要将西科及另一实体持有的股份转让给该国企和一家中国私募股权基金。如下文所述，尽管这些股份被转让给私募股权基金，但预期的 IPO 根本没发生。

- Between 2014 and 2016, Gougarty and a Westport general manager in Asia led the negotiation of the share transfer with the SOE. Early in the negotiations, Gougarty learned from the general manager that the Government Official had a significant but undisclosed financial interest in the Chinese private equity fund that was to receive the JV shares from Westport. The general manager also reported that it was the Government Official's personal financial interest, not Chinese law, which was motivating the transfer of shares to the private equity fund.

2014 年至 2016 年，Gougarty 和西科在亚洲的一名总经理牵头与该国企进行了关于股份转让的谈判。在谈判之初，Gougarty 从该总经理处得知，该政府官员在拟从西科受

让合资企业股份的中国私募股权基金拥有重大但未披露的经济利益。该总经理还报告称，促成向该私募股权基金转让股份的是该政府官员的个人经济利益，而非中国法律。

- In emails, the general manager reported to Gougarty that the Government Official “has [a] personal interest in the fund that [SOE] tries to bring in,” and that the IPO was for the Government Official’s “benefit, all he wants is a discount to the fund where he has interest.”

在电邮中，该总经理向 Gougarty 报告称，该政府官员“在[该国企]拟引入的基金中拥有个人利益，”且 IPO 是出于该政府官员的“利益，他想要的只是兑现他拥有利益的基金。”

- The general manager also reported that the Government Official was seeking a low valuation of the JV shares in order to “make quick and big money” outside the scrutiny of Chinese regulators.

该总经理还报告称，该政府官员要求降低该合资企业股份的估值，以便在未被中国监管机构监查的情况下“快速赚大钱”。

- The Government Official’s personal interest in the private equity fund became a central part of Westport’s negotiation strategy. Gougarty recommended alternatives that included seeking a supply agreement in exchange for a transfer of shares to the private equity fund. In addition, Westport explicitly conditioned the share transfer on obtaining a long-term sales agreement.

该政府官员在该私募股权基金中的个人利益成为西科谈判策略的核心。Gougarty 提出备选方案，包括要求以供货协议作为向该私募股权基金转让股份的条件。此外，西科明确将取得长期销售协议作为股份转让的附加条件。

- In June 2015, Westport’s Board of Directors authorized the share transfer. Gougarty did not disclose to the Board that the Government Official had a personal financial interest in the private equity fund or that the Government Official had requested a discount in the share transfer price. In fact, several months before obtaining the Board’s approval, Gougarty withheld this information from the Board, deleting a sentence in a draft letter to the Board that described the proposed transfer. The SEC alleged that if Gougarty had not removed the sentence, it would have reported to the Board that the Government Official had a financial interest in the private equity fund.

2015 年 6 月，西科的董事会授权了股份转让。Gougarty 未向董事会披露该政府官员在该私募股权基金中拥有个人的经济利益或该政府官员要求股票转让价格折扣之事。事实上，在取得董事会批准之前几个月，Gougarty 就向董事会隐瞒了此信息，在致董事会的一封描述拟议转让的的草稿函中删除了一句话。证交会指称，如果 Gougarty 没有删除那句话，则该函将向董事会报告，该政府官员在该私募股权基金中拥有经济利益。

- By December 2015, Westport and the Government Official agreed on the valuation for the JV. Westport agreed to transfer shares to the SOE and the private equity fund in exchange for a long-term framework supply agreement and a cash dividend of 30 percent of undistributed profits—20 percent more than what was provided for under the JV agreement and more than Westport had received in the past.

2015 年 12 月之前，西科与该政府官员就该合资企业的估值达成一致。西科同意向该国企和该私募股权基金转让股份，交换条件是一份长期框架供货协议和占未分配利润百分之三十的现金股息——比合资协议下规定的多 20%，也比西科过去获得的多。

- In September 2016, pursuant to the share transfer agreement, the private equity fund wired a payment of approximately \$3 million to Westport's bank through a correspondent bank in the United States. Westport's books and records accounting for the transaction falsely reflected the identity of the counterparty in the transaction as a different SOE rather than the true counterparty, the private equity fund.

2016年9月，根据股份转让协议，该私募股权基金通过美国的一个代理银行向西科的银行账户汇入约300万美元。西科为该笔交易所做的账簿和记录会计虚假地将交易对手方的身份反映为与真实对手方（即该私募股权基金）不同的一家国企。

- In October 2016, Westport received approximately \$3.5 million in dividends, which was credited to Westport's bank account in Vancouver, Canada through a correspondent bank in the United States.

2016年10月，西科获得约350万美元的股息，该笔款项通过美国的一个代理银行记入西科在加拿大温哥华的银行账户。

- In SEC filings in 2016 and 2017, Westport falsely described the identity of the counterparty in the share transfer as a different SOE instead of the Chinese private equity fund.

在2016年和2017年度对证交会的申报中，西科虚假地将该股份转让中对手方的身份描述为与该中国私募股权基金不同的一家国企。

- According to the SEC, even though Westport's internal accounting policies purported to establish a process to reconcile public filings with source documents to provide reasonable assurance with respect to the accuracy and consistency of its filings, the company failed to follow this process.

根据证交会，即使西科的内部会计政策声称应建立一个程序，核对公开申报资料和来源文件，就其申报资料的准确性和一致性提供合理保证，但该公司未遵循该程序。

- The SEC alleged that "[a]s evidenced by her own misconduct," Gougarty failed to discharge her duty on behalf of Westport to devise and maintain a sufficient system of internal accounting controls.

证交会指称，“正如其自身不当行为证明的那样，”Gougarty未能代表西科履行其职责，设计并保持一个充分的内部会计控制体系。

- In addition, Gougarty executed a certification falsely attesting that Westport had disclosed all significant deficiencies and material weaknesses in the design and operation of its internal controls to the outside auditors.

此外，Gougarty签署了一份证明，虚假地证明，西科已向外部审计师披露其内部控制设计和运行中的所有重要的不足和实质性缺陷。

Cooperation and Remediation

合作和补救

- During the investigation, Westport enhanced its anti-corruption and compliance policies, training programs, and disclosure policies and controls. Westport enhanced its anti-bribery and anti-corruption controls by adopting revised policies that, among other things, establish specific controls for transactions involving foreign government officials and entities, mandate due diligence for such transactions, and specifically require Westport's business partners to agree to abide by anti-bribery laws, including the FCPA.

在调查期间，西科加强了其反腐败和合规政策、培训计划以及披露政策和控制措施。西科通过采纳修订的政策加强其反贿赂和反腐败控制，其中，为涉及外国政府官员和实体的交易设置具体的控制措施，要求对该类交易进行尽职调查，以及明确要求西科的业务伙伴同意遵守包括 FCPA 在内的反贿赂法律等等。

- Westport's cooperation included making foreign witnesses available for testimony in the United States and voluntarily producing additional requested documents.

西科的合作包括安排外国证人在美国作证，以及自愿提供额外要求的文件。

Key Observations

主要意见

- **Individual accountability.** This settlement reflects the SEC's focus on holding individual executives accountable for FCPA violations. Notably, there is no indication in any public sources that the Department of Justice was involved in this investigation, even though the Department would likely have been able to assert jurisdiction over Gougarty as a U.S. citizen.

个人问责。此次和解表明，证交会侧重于向违反 FCPA 的个人问责。值得注意的是，在任何公开资源中没有迹象表明司法部曾参与此项调查，即使司法部很可能能够对身为美国公民的 Gougarty 主张管辖权。

- **Code of conduct.** This enforcement action shed light on the SEC's high expectations about due diligence requirements in codes of conduct. The SEC order pointed out that Westport's code of conduct prohibited the use of third parties to funnel bribes to government officials and required due diligence when retaining third parties to provide goods or services to Westport. However, the code of conduct was "silent on the need to conduct due diligence when engaging in a business transaction with a third party in which a foreign government official may have a financial interest." In light of the SEC's view on this deficiency, companies may want to consider incorporating a similar provision into their codes of conduct and expanding the situations in which they conduct due diligence on potential third parties in an effort to identify such financial interests.

行为规范。本次执法行动表明了证交会对于行为规范中尽职调查要求有较高的期望。证交会的命令指出，西科的行为规范禁止使用第三方作为向政府官员支付贿赂的渠道，并要求在聘用第三方向西科提供商品或服务时进行尽职调查。但是，该行为规范“未提及对于在与外国政府官员可能拥有经济利益的第三方进行商业交易时进行尽职调查的必要性。”鉴于证交会关于这一缺陷的观点，企业或许考虑在行为规范中加入类似的条款，扩大对第三方进行尽职调查的适用情形，以发现此类经济利益。

- **Vendor contracts.** Similar to the code of conduct, Westport's vendor contracts also appeared to be deficient in the SEC's view because there was no requirement that the company use anti-bribery clauses when engaging in a business transaction with entities of which foreign government officials may have a financial interest.

供应商合同。与行为规范类似，西科的供应商合同在证交会看来也似乎有缺陷，因为其中没有该公司在与外国政府官员可能拥有经济利益的实体从事商业交易时应使用反贿赂条款的要求。

- **Limited jurisdictional hook.** The anti-bribery provisions apply to a foreign issuer like Westport if the company used "the mails or any means or instrumentality of interstate commerce" in furtherance of the bribery scheme. The only U.S. nexus the SEC referenced to support its 30A anti-bribery claim against the company is that

money flowed “through a correspondent bank in the United States.” The limited jurisdictional hook could help explain why the Department of Justice did not bring a parallel case against the company.

有限的管辖权挂钩。如果一家公司使用“邮件或任何州际商务方式或手段”促进贿赂计划，则反贿赂规定适用于像西科这样的外国发行人。证交会援引支持其对该公司的 30A 反贿赂主张的与美国的唯一关联证据是资金“通过美国的一家代理银行”流转。有限的管辖权挂钩可以解释为何司法部未对该公司提起平行诉讼。

- **Canadian enforcement actions.** The Westport settlement appears to be only the third enforcement action against a Canadian company in the FCPA’s history. The previous enforcement actions against Canadian companies were Nordion and Kinross Gold, in 2016 and 2018, respectively. In its press release, the SEC credited the British Columbia Securities Commission for its assistance with the investigation.

加拿大执法行动。西科的和解似乎只是 FCPA 历史上第三起针对加拿大公司的执法行动。之前针对加拿大公司的执法行动分别是 2016 年的 Nordion 和 2018 年的 Kinross Gold 案。在新闻稿中，证交会肯定了英属哥伦比亚证券委员会对此次调查的协助。

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