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RISK & COMPLIANCE JOURNAL

A Focus on Victims' Rights Leads to Investor Payouts in Credit Suisse Case

A new emphasis by the Justice Department on compensating the victims of white-collar crimes led to some clever lawyering and payouts to harmed investors in a recent case involving Credit Suisse



Credit Suisse last month was ordered to pay \$22.6 million in restitution to victims of a \$2 billion fraud and money-laundering scheme.

PHOTO: ARND WIEGMANN/REUTERS

By *Dylan Tokar*

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When the U.S. Justice Department said earlier this year it would place an increased emphasis on compensating the victims of white-collar crime, lawyers for Credit Suisse Group AG had already taken steps to ensure their client was complying with the new policy.

The Swiss bank in October signed a deal with U.S. and U.K. authorities to resolve investigations into a \$2 billion fraud and money-laundering scheme centered on a tuna-fishing project in Mozambique. As part of that agreement, the bank agreed to pay restitution to a group of investment firms, pension funds and money managers that helped finance the project.

Credit Suisse and a U.K.-based subsidiary were charged with conspiracy to commit wire fraud, but at the heart of the case were \$200 million in bribes and kickbacks paid to Mozambican government officials and a trio of Credit Suisse bankers, who the bank argued acted as rogue employees.

For two decades, federal prosecutors have aggressively prosecuted companies and executives that pay bribes to win business overseas, most often through use of the Foreign Corrupt Practices Act, an antibribery law passed in 1977. But rarely have they sought to identify specific victims of corruption.

That's starting to change. After a surprise appearance by aggrieved investors in a bribery case involving the hedge fund Och-Ziff Capital Management Group LLC prosecutors and companies like Credit Suisse are paying closer attention to the possibility of restitution claims made by victims when negotiating settlements over criminal wrongdoing.

Assistant Attorney General Kenneth Polite in March said the Justice Department's criminal division, which oversees some of the department's biggest investigations into corporate crime, would take steps to ensure that victims were being appropriately considered. The department will process cases in a way that allows white-collar crime victims more time to come forward, and companies should be prepared to address victim's rights during meetings with prosecutors, Mr. Polite said.

When it comes to bribery, that's a sea-change from how the Justice Department approached its cases previously. At the time of the Och-Ziff settlement in 2016, prosecutors didn't envision payouts to victims as part of the agreement. Instead, a group of former investors in a Congolese copper mine that played a central role in the bribery scheme involving Och-Ziff forced the issue by filing for restitution in U.S. court.

The claim, made under the Mandatory Restitution Act of 1996, sparked a lengthy battle between the investors, Och-Ziff and the Justice Department, which initially opposed the restitution claim. But the investors eventually prevailed, and Och-Ziff, which has changed its name to Sculptor Capital Management Ltd., in 2020 agreed to pay \$138 million in restitution—on top of the \$412 million in penalties it already agreed to pay to U.S. authorities.



Matt Herrington, a partner at Paul Hastings.

PHOTO: MATT HERRINGTON

The Och-Ziff matter was front-of-mind for Credit Suisse's lawyers as they began to negotiate a settlement with the Justice Department over the bank's involvement in the Mozambique fraud, said Matt Herrington, a partner at law firm Paul Hastings LLP and one of the bank's lead lawyers on the matter.

"The Och-Ziff case turned into this big and fairly chaotic and uncontrolled process," Mr. Herrington said. "With Credit Suisse, what we really did that was novel was work with the Justice Department and with consulting economists on the front end, to come up with the right result."

Victims' claims can make it harder for companies to get the finality they are looking for when negotiating a settlement. Credit Suisse's lawyers did what they could to minimize the uncertainty.

The bank early on tapped an expert at NERA Economic Consulting Inc. to develop a framework for identifying who was a victim of the tuna-bond scheme, and how to quantify the restitution they would be owed. The Justice Department retained its own experts, and a methodology accepted by both parties was outlined in Credit Suisse's settlement agreement.

The nature of the MRA, however, meant that it was ultimately up to the judge overseeing the case to accept or reject their methodology.

In Credit Suisse's case, the strategy paid off. Neither the judge overseeing the case nor any prospective victims formally challenged the bank's methodology. At a sentencing hearing

last month, District Judge William Kuntz ordered Credit Suisse to pay a total of \$22.6 million in restitution. Money managers [AllianceBernstein LP](#), Aberdeen Asset Management PLC and [Franklin Templeton](#) were among those that received a payout.

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Lawyers expect questions around victims' rights will continue to proliferate in white-collar crime cases. Still, determining exactly who qualifies as a victim, and how to compensate them, could remain a challenge, given how different each case can be.

With bribery, victims might be a competing bidder on a government contract, or they might be more abstract and diffuse—a category of individuals composed of taxpayers or society at large. While the Justice Department has returned illicit proceeds to foreign governments in some cases, it has fought restitution claims in others, arguing that the particular agency involved was complicit in the corruption.

In areas such as cybercrime and healthcare fraud, identifying victims is easier and the Justice Department's track-record around compensation is more established.

Credit Suisse's approach may offer a road map for other companies, but the bank's methodology for calculating restitution, like the one used in the Och-Ziff case, is limited to cases involving investors. It is less clear how parties would approach restitution claims by other types of bribery victims.

No matter the facts of the case, lawyers say companies should follow Credit Suisse's example by being proactive. "You want to be thinking of the victims and restitution from day one," said Kathleen Cassidy, a criminal defense lawyer at law firm Morvillo Abramowitz Grand Iason & Anello PC.

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