Miller & Chevalier

International Alert

FCPA Autumn Review 2016

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Introduction

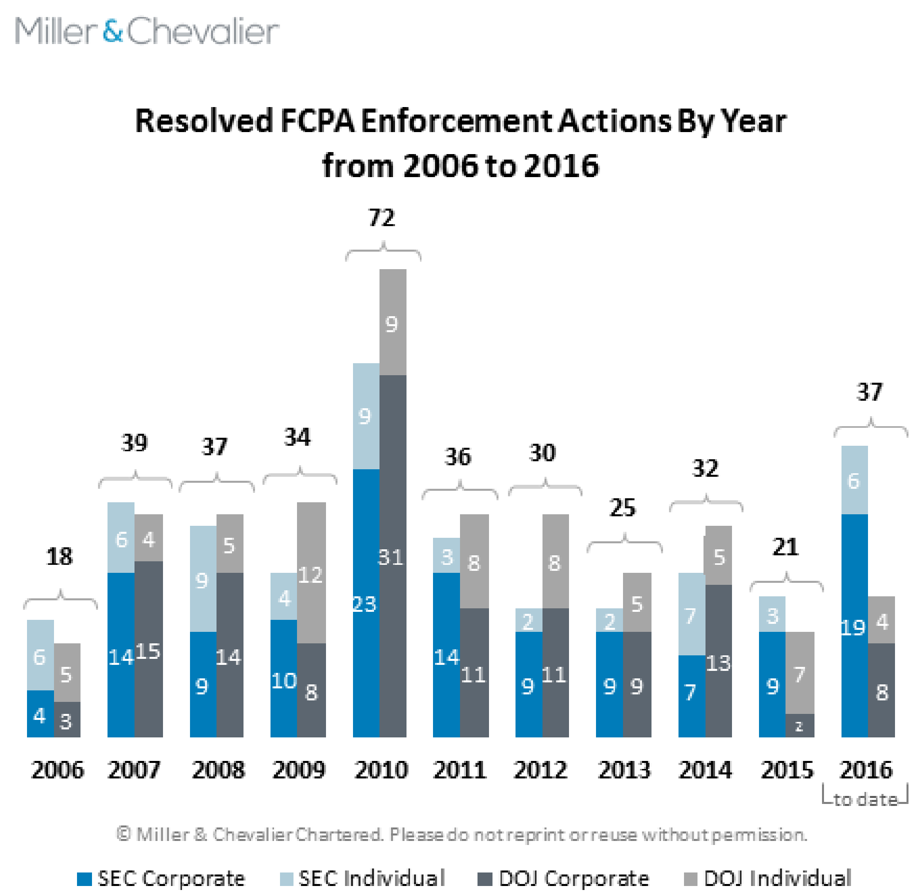
Enforcement activity under the U.S. Foreign Corrupt Practices Act (FCPA) remained high during the third quarter of 2016, with U.S. authorities entering into 14 new FCPA-related dispositions, including 11 by the U.S. Securities and Exchange Commission (SEC or Commission) and three by the U.S. Department of Justice (DOJ or Department). Together, the SEC and DOJ have resolved 37 enforcement actions through September of this year, already exceeding their combined annual totals for every year since 2010. If this brisk pace is maintained through the end of the year, the agencies will end 2016 with at least 48 enforcement actions, the second-highest annual total in the FCPA's history.

The SEC's and DOJ's FCPA-related activity over the past quarter highlights the interplay between the agencies' respective approaches to enforcing the statute. Some recurring patterns, which we have touched on in past FCPA Reviews and explore further below, include:

- the SEC pursuing and resolving more corporate enforcement actions as the DOJ shifts its focus toward larger cases involving more serious misconduct;
- an increase in publicly reported DOJ declinations (*i.e.,* formal decisions to close an investigation without bringing an enforcement action); and
- the DOJ's implementation of its new FCPA pilot program, which, beyond serving as another avenue to promote the reported benefits of self-disclosure and cooperation, is also the vehicle that introduced the latest tool in the DOJ's enforcement toolbox: a declination that requires the disgorgement of alleged ill-gotten gains, as compared to typical declinations, which involve no payment of any type.

Resolved Enforcement Actions

The SEC resolved eight corporate and three individual FCPA enforcement actions this quarter, for a total of 25 dispositions for the year. The DOJ resolved three corporate FCPA enforcement actions over the same period of time, bringing the Department's disposition total to 12 through the end of September. As the chart below demonstrates, the SEC has continued to ramp up its FCPA-related enforcement efforts, with its 11 dispositions this quarter constituting almost half of its FCPA activity in 2016 to date and nearly matching its year-end totals in each of the last four years. The Commission's 25 resolved enforcement actions so far this year exceed its total number of FCPA dispositions from any prior year except for 32 in 2010 and, at this rate, will likely match or exceed that total by year's end. By contrast, the DOJ's FCPA-related enforcement activity this year has been flat, generally consistent with the Department's pace over the past several years, with the exception of an anomalous 2015, the reasons for which we analyzed in our FCPA Winter Review 2016.



Note: Updated through October 17, 2016. These statistics count each distinct resolution with a company and its affiliates as separate enforcement actions. They also include certain FCPA-related settlements and SEC default judgments.

Reflecting the geographic trends in FCPA enforcement that we discussed in our FCPA Summer Review 2016, a disproportionate number of this quarter's resolved enforcement actions continue to relate to activities in China, with the rest set in Latin America, Africa, Russia, and India. The corporate and individual settlements this quarter run the gamut in terms of industries involved, types of misconduct alleged, and scope of the reported violations.

Four of the SEC's eight corporate FCPA dispositions this quarter involved alleged misconduct in China and required defendants to pay monetary assessments ranging from $765,688 to $20 million stemming from the conduct of their Chinese subsidiaries. Two of these enforcement actions -- settlements with U.K.-based AstraZeneca plc (AstraZeneca) and GlaxoSmithKline plc (Glaxo) in August and September, respectively -- highlight the SEC's continued focus on the healthcare industry, as discussed in our FCPA Spring Review 2016, and the particular emphasis on healthcare companies operating in China, explored in the Novartis case section of that Review. In its enforcement actions against both AstraZeneca and Glaxo, the SEC alleged that employees of their foreign subsidiaries falsified expenses, directly and by colluding with certain third-party vendors, to generate the funds necessary to make improper payments to government-employed health care providers (HCPs) in China (AstraZeneca and Glaxo) and Russia (AstraZeneca). The other two enforcement actions -- the July settlement with Utah-based multi-level marketer Nu Skin Enterprises, Inc. (Nu Skin) and the September settlement with Wisconsin-based provider of building efficiency systems and specialty automotive products Johnson Controls, Inc. (Johnson Controls) -- further underscore the broad nature of the risks associated with operating China. The Johnson Controls case involved a Chinese subsidiary that was implicated in another FCPA disposition in 2007, shortly after being acquired by Johnson Controls. In response to the company's efforts to remediate certain internal-controls weaknesses identified in the wake of that disposition, employees at the Chinese subsidiary reportedly devised another scheme to circumvent the new controls. The Nu Skin case centered on an allegedly improper charitable contribution -- a rare sole basis for an FCPA enforcement action. According to the SEC, the company's Chinese subsidiary made a large payment to a charity established by a high-ranking Chinese party official in exchange for his assistance in an ongoing provincial investigation into the subsidiary's potential noncompliance with local law.

The other corporate FCPA enforcement actions brought by the SEC are more varied in their geographical scope. In July, the SEC reached a $9.4 million FCPA settlement with Chile-based LAN Airlines S.A. (LAN) as part of a $22.2 million joint resolution by LAN and its parent company LATAM Airlines Group S.A. (LATAM) with the SEC and the DOJ. These parallel actions related to alleged payments made in connection with a union dispute in Argentina and turned on the same facts that led to a settlement by LAN's CEO with the SEC in February of this year (see our FCPA Spring Review 2016). In another investigation related to Latin America, Key Energy Services, Inc. (Key Energy) settled with the SEC over allegations that its Mexican subsidiary engaged a consulting firm without approval to channel improper payments to an employee of Mexico's state-owned oil company, Petróleos Mexicanos (PEMEX). Because Key Energy was reportedly on the verge of bankruptcy at the time of its settlement, the SEC only required $5 million in disgorgement and did not impose a civil penalty. In September, the SEC entered into a $6 million FCPA settlement with Belgium-based brewing company Anheuser-Busch InBev (AB InBev) over alleged improper payments, routed through third-party sales promoters, to government officials in India to increase sales and production.

The SEC brought its largest corporate enforcement action of the quarter in September, settling with New York-based hedge fund Och-Ziff Capital Management Group LLC (Och-Ziff) for nearly $200 million, as part of a $412.1 million joint resolution with the DOJ. The agencies alleged that Och-Ziff funded transactions by intermediaries, agents, and business partners in which bribes were paid to high-level government officials in several African countries, including officials with Libya's sovereign wealth fund, as a means to secure investments and mining rights and otherwise influence relevant officials.

The three individuals resolving FCPA-related charges with the SEC this quarter include two C-suite executives of an issuer company and a senior-level executive of an issuer's Chinese subsidiary. In mid-September, the SEC entered into an administrative settlement with Jun Ping Zhang (Ping), a former executive with Florida-based technology-services firm Harris Corp. (Harris) and former CEO and Chairman of its Chinese subsidiary, who agreed to pay a $46,000 penalty in connection with alleged payments the subsidiary had made to certain customers, potential customers, consultants, and government regulators. The SEC announced the enforcement action against Ping, together with its decision to decline enforcement against Harris, following a declination the company received from the DOJ in May 2016 (see *Declinations* section below and our FCPA Summer Review 2016). Later the same month, the SEC entered into administrative settlements with Och-Ziff CEO Daniel Och and CFO Joel Frank to resolve charges that the two men had allegedly ignored red flags in authorizing the illicit transactions at issue in the SEC and DOJ actions against Och-Ziff. Och agreed to pay a nearly $2.2 million penalty as part of his settlement, while the penalty to be imposed against Frank is still under consideration by the Commission.

A development likely to facilitate the SEC's enforcement of the FCPA against individual defendants is a September 30th decision from the U.S. District Court for the Southern District of New York in the SEC's ongoing civil action against three former executives of Magyar Telekom, Plc (Magyar). The court's decision affirmed two jurisdictional theories that largely favor the SEC in FCPA cases against foreign executives. First, the court held that it has personal jurisdiction over the three Hungary-based executives based on their roles in the preparation of Magyar's SEC filings. The court found that representations the defendants made to the company's independent auditor in connection with Magyar's financial disclosures and other securities filings that were ultimately submitted via the SEC's EDGAR website satisfied the requisite "minimum contacts" for personal jurisdiction over the defendants in the United States. The court concluded that its exercise of personal jurisdiction was reasonable, notwithstanding burdens alleged by the defendants, because the SEC's suit furthered a significant interest in enforcing U.S. securities laws and because the litigation would not interfere with other countries' enforcement of their own laws. Second, the court held that the SEC satisfied the "use of instrumentality of interstate commerce" element of the anti-bribery statute, ruling that the defendants' participation "in the preparation of falsified SEC filings that were posted to and accessible from the SEC's EDGAR internet web site" constituted use of an instrumentality of interstate commerce, and finding that Magyar's filings with the SEC were a foreseeable consequence of defendants' actions. By establishing jurisdiction over foreign individuals based solely on their roles in helping prepare a company's securities filings, the court contributed to the SEC's broad view of its jurisdiction under the FCPA. This decision increases the SEC's leverage in future negotiations with individual targets of FCPA investigations and could embolden the SEC in the pursuit of non-U.S. nationals under the statute going forward.

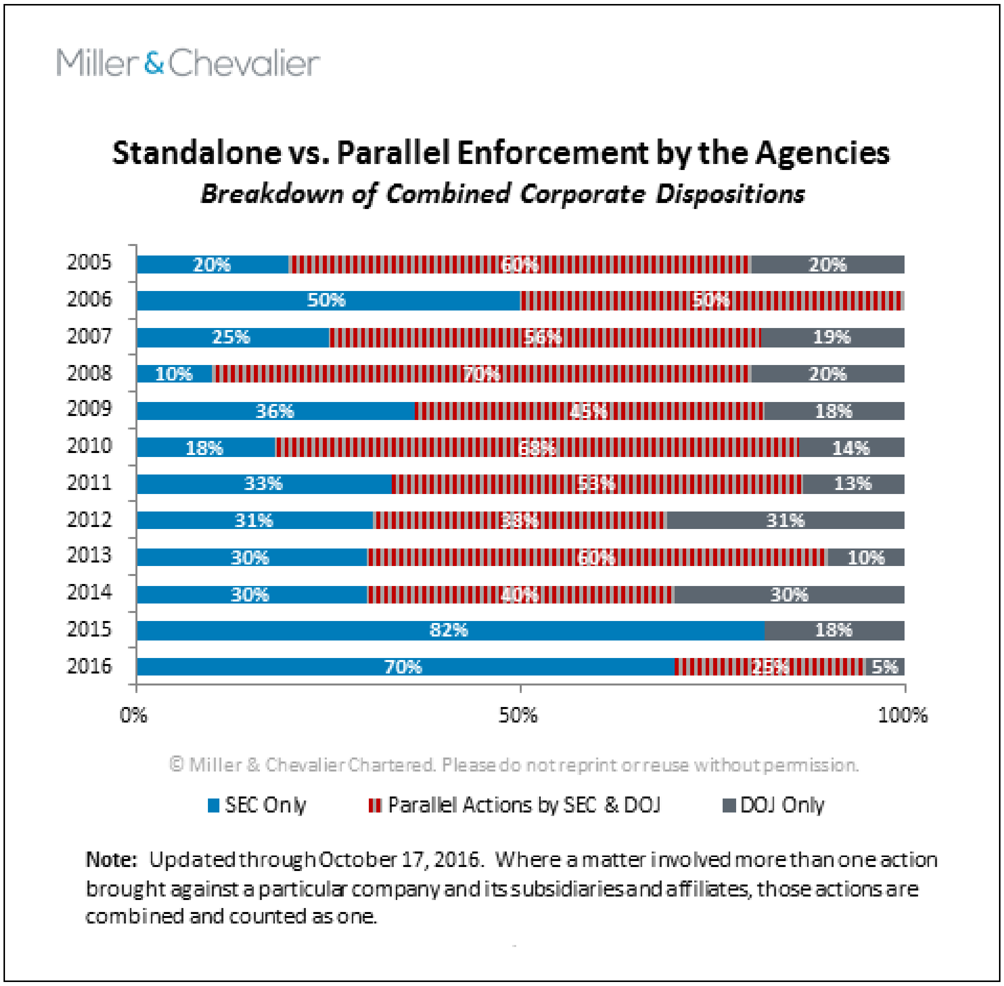
Significantly, all of the SEC's enforcement actions this quarter were brought via administrative proceeding, which continues a trend we have discussed in several recent FCPA Reviews. We expect this pattern to continue, as the SEC has vigorously defended its use of administrative tribunals in the face of constitutional challenges by defendants (see our FCPA Summer 2016 Review). Of note, the U.S. Court of Appeals for the District of Columbia Circuit recently sided with the SEC on this issue, finding the appointment process for SEC Administrative Law Judges (ALJs) to be constitutional. We discuss this opinion below, as well as the SEC's amended Rules of Practice, which went into effect on September 27, 2016.

The DOJ's three corporate FCPA dispositions this quarter all featured parallel SEC actions, described above. The first of these settlements, a three-year Deferred Prosecution Agreement (DPA) with LATAM, was based on alleged misconduct by the company's subsidiary LAN in Argentina. The other two enforcement actions -- a three-year DPA with Och-Ziff and a guilty plea by Och-Ziff's wholly-owned subsidiary OZ Africa Management GP LLC -- were triggered by alleged misconduct in Africa by the two companies.

SEC and DOJ Enforcement Trends

Historically, the SEC and DOJ have, on balance, resolved comparable numbers of FCPA corporate enforcement actions each year, particularly when counting distinct actions against affiliated corporate entities as a single resolution. Since 2015, however, this balance has shifted, with the SEC entering into more than three times as many combined corporate dispositions as the DOJ during the same time frame. This shift likely reflects the strategic decision by the DOJ to reallocate internal resources within the Department toward focusing on larger, high-impact cases and on pursuing culpable corporate executives.

The following chart, which tracks the percentage of combined corporate enforcement actions brought by each agency since 2005, captures this evolving trend, detailing how the SEC's enforcement role vis-à-vis the DOJ has morphed in recent years. The historically large percentage of parallel enforcement actions brought by both agencies highlights the fact that most government-driven FCPA investigations initially involve both the SEC and DOJ, except where the investigation target is not an issuer. As these investigations unfold, however, one of the agencies sometimes decides against pursuing a parallel action. There could be many reasons for this, including but not limited to: a determination by the DOJ that the elements of a criminal violation have not been met; particular facts that deprive either the DOJ or SEC of jurisdiction; recognition that a particular case is better suited for one agency or the other; or a decision by an agency to decline enforcement in recognition of a company's voluntary self-disclosure, extraordinary cooperation, or remedial compliance measures.



As this chart illustrates, the SEC has consistently been involved in approximately 70 to 90 percent of all the corporate FCPA dispositions over the last 11 years, with the figure rising to 95 percent for the first nine months of 2016. Through 2014, the DOJ was involved in a comparable number of enforcement actions -- approximately 60 to 80 percent of the total number of combined corporate resolutions -- but that figure dropped significantly to 18 percent in 2015 and 30 percent in 2016 to date. Notably, the share of resolved enforcement actions involving the DOJ has declined in tandem with a decline in the DOJ's participation in parallel resolutions with the SEC.

It is important, however, not to make too much of the overall number of corporate enforcement actions brought by the SEC and DOJ each year, as this is not the only meaningful metric of the agencies' enforcement activity. For instance, this measurement does not:

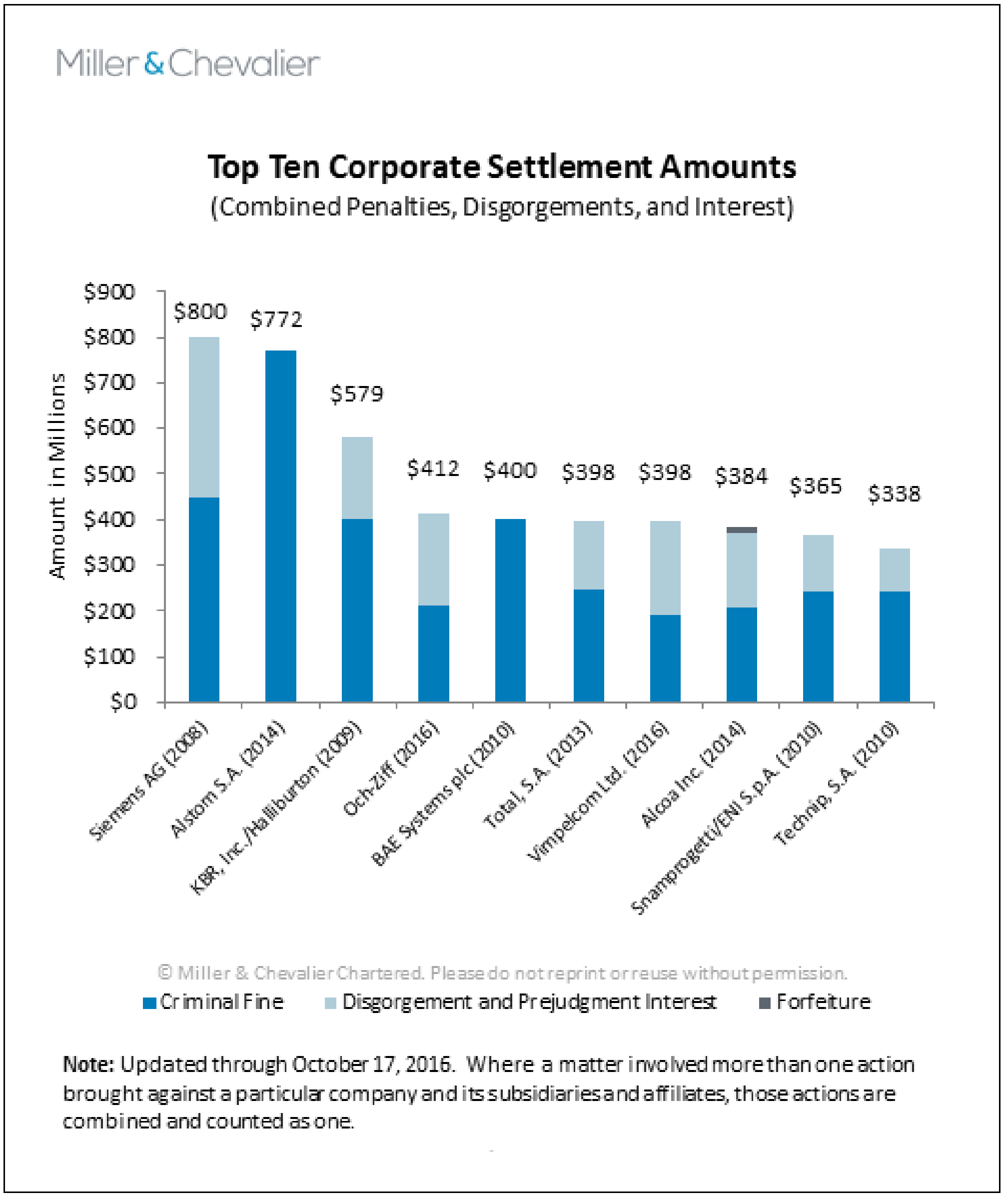
- include the prosecution of individuals on FCPA-related counts, where the DOJ has outpaced the SEC in recent years and which is an area of particular DOJ emphasis, especially in light of the Yates Memorandum;

- account for the DOJ's and SEC's wide-reaching investigative efforts, which often do not result in enforcement actions but nevertheless represent a significant investment of resources by the agencies;

- consider DOJ initiatives such as the FCPA pilot program, which promises participants who self-disclose and cooperate benefits up to and including a declination; or

- take into consideration the size and scope of the agencies' respective corporate resolutions, instead treating them all as equals.

In 2016, for example, two of the agencies' corporate resolutions resulted in combined settlement amounts that rank among the top ten largest enforcement actions of all time by dollar value, specifically the agencies': (1) February 2016 settlement with VimpelCom Ltd. (VimpelCom) and one of its subsidiaries, which imposed penalties, disgorgement, and interest totaling almost $398 million; and (2) September 2016 settlement with Och-Ziff and a subsidiary, which resulted in penalties, disgorgement, and interest totaling approximately $412 million. The chart below details the top ten largest corporate FCPA settlements, which has been updated to include both the VimpelCom and Och-Ziff settlements.



The magnitude of these recent settlements, as well as the DOJ's involvement in fewer corporate resolutions overall, bear out the Department's stated intent to move way from "smaller cases" toward "bigger, higher impact cases," which we discussed in our FCPA Winter Review 2016. The growing number of resolutions by the SEC, most of which have involved smaller-value settlements, further illustrate the growing divergence of the agencies' FCPA enforcement paradigms over the last two years.

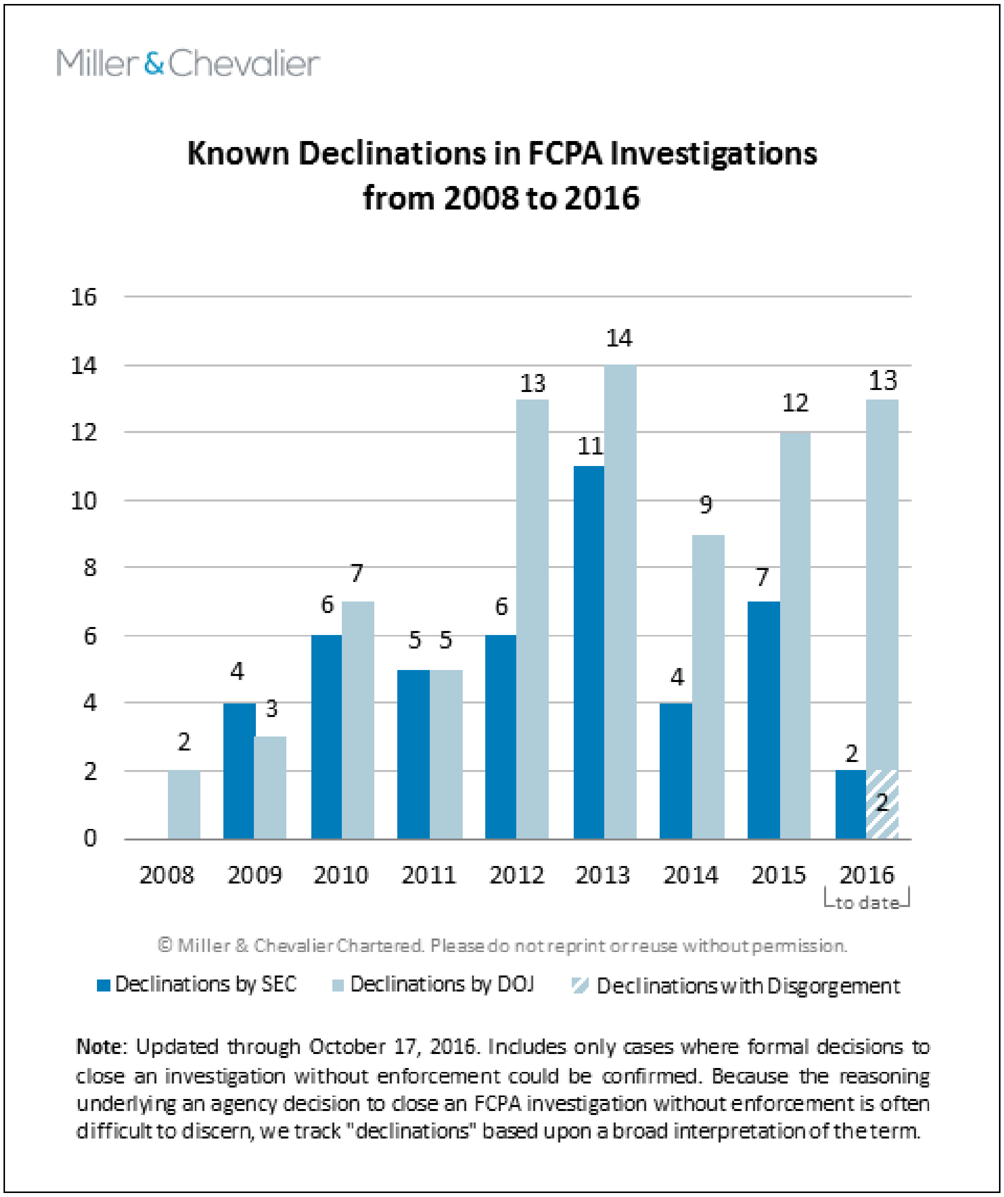
Declinations

While declinations traditionally refer to the DOJ or SEC closing an active FCPA investigation without enforcement and without any reciprocal agreement by the target company, the DOJ issued a new type of declination to two companies in September, representing a hybrid approach to the resolution of FCPA investigations. These declinations, provided to NCH Corporation (NCH) and HMT LLC (HMT), were released in the form of "letter agreements" from the DOJ that contained the respective company's signature and set forth facts and conditions to which each company agreed.

Heretofore, declinations, at least in the FCPA context, generally have been simple notices issued by the DOJ to inform target companies of the closure of an investigation -- they imposed no conditions or requirements and contained little in the way of analysis. The declinations with disgorgement are, by contrast, essentially a new form of settlement that represents a cross between a traditional declination and a typical settlement, since they require the target company's formal consent to a series of conditions, including the public disclosure of wrongdoing, disgorgement of all profits made from the illegal conduct, and continued cooperation in ongoing investigations of individuals, in exchange for the Department agreeing to decline prosecution. However, these declinations with disgorgement would seem preferable for companies' to their closest analog, the non-prosecution agreement (NPA), for several reasons, including the absence of common NPA requirements such as monetary penalties, directed compliance program enhancements, periodic self-reporting obligations, and broader cooperation expectations.

Due to their unique nature, we review the declinations against NCH and HMT in a separate article below. Notwithstanding the substantive distinctions from historical declinations and other forms of settlement such as NPAs, we have counted these declinations with disgorgement as declinations in our statistics since the DOJ characterizes them as such, but we have and will distinguish them in the future, as appropriate.

Including the declinations against NCH and HMT, the agencies issued 10 known declinations this quarter, including eight by the DOJ and two by the SEC. The DOJ's 13 declinations to date this year, which already exceeds last year's total, likely have contributed to the recent drop in DOJ enforcement actions, discussed in the preceding section.



The DOJ has issued a significant number of its recent declinations -- two last quarter and three this quarter, including those issued to NCH and HMT -- under its FCPA pilot program. Introduced in April 2016, the pilot program seeks to encourage self-disclosure of potential FCPA violations and greater cooperation by companies in exchange for greater leniency by the DOJ. In our FCPA Summer Review 2016, we noted that the DOJ's public release of declination letters under the pilot program broke with the historical practice of informing only the target company of a declination. Until this time, the ability to track declinations was largely dependent on whether the recipient companies chose to make their declinations public; for example, if they concluded they were required to do so under securities laws. In contrast, under the pilot program the DOJ has begun, at least in certain instances, to publicly release its declination letters and has even created a webpage dedicated to this purpose. The Department's public release of these letters appears to serve two purposes -- increasing the transparency of its declination process and promoting the purported benefit for companies of taking advantage of the pilot program.

Following is a list of the declinations we identified this quarter. Of note, while the SEC opted to pursue enforcement in several of the investigations the DOJ declined to prosecute, the DOJ, for its part, joined the SEC in declining enforcement in both investigations where the Commission issued declinations this quarter:

- **Johnson Controls**: On July 11, 2016, the Wisconsin-based industrial company entered into a disposition with the SEC over alleged violations of the FCPA's books-and-records and internal-accounting-controls provisions (see below). On the same day, the DOJ publicly released a declination letter announcing the Department's decision to close its inquiry into possible FCPA violations by the company "consistent with the FCPA Pilot Program" and "despite the bribery by employees of [the company's] subsidiary in China." The letter identifies several factors as the basis for the declination, including the company's: (1) voluntary self-disclosure; (2) thorough investigation; (3) full cooperation, including "provision of all known relevant facts about the individuals involved in or responsible for the misconduct," and "agreement to continue to cooperate in any ongoing investigation of individuals"; (4) steps taken to enhance its compliance program and internal accounting controls; (5) full remediation, including separation of all employees found to be involved in the misconduct; and (6) payment of full disgorgement and a civil penalty to the SEC.

- **AB InBev**: In an SEC filing on August 29, 2016, the Belgian brewing company disclosed that the DOJ had notified the company on June 8, 2016 that the Department was closing its investigation "into AB InBev's current and former affiliates in India ... and whether certain relationships of agents and employees were compliant with the" FCPA, and that the DOJ "would not be pursuing enforcement action in this matter." The filing indicated, however, that the SEC's investigation was ongoing. On September 28, 2016, AB InBev and the SEC entered into a settlement over the company's alleged violations of the books-and-records and internal-accounting-controls provisions of the FCPA and the whistleblower protection provisions of the Dodd-Frank Act (see below).

- **AstraZeneca**: On August 30, 2016, the biopharmaceutical company entered into a settlement with the SEC, based on alleged deficiencies in the company's internal accounting controls (see below). In connection with the SEC settlement, the company announced that the Commission acknowledged the company's "cooperation during the entire course of the inquiry" and that the DOJ had closed its parallel investigation into the underlying activities in China and Russia by the company's subsidiaries.

- **Cisco Systems, Inc.** (**Cisco**): In its Form 10-K filed on September 8, 2016, the California-based networking technology company announced that the SEC and DOJ had "recently informed [the company] that they have decided not to bring enforcement actions" based on the results of the "investigation into allegations which [Cisco and the SEC and DOJ] received regarding possible violations of the [FCPA] involving business activities of [the company's] operations in Russia and certain of the Commonwealth of Independent States, and by certain resellers of [Cisco] products in those countries." The company further stated that it had "fully cooperated with and shared the results of [its] investigation with the" agencies. Cisco previously disclosed this investigation in a Form 10-Q filed with the SEC on February 20, 2014.

- **Harris**: In the September 12, 2016 release announcing the SEC's settlement with Ping, the Commission disclosed that it had "determined not to bring charges against Harris, taking into consideration the company's efforts at self-policing that led to the discovery of Ping's misconduct shortly after the acquisition, prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC's investigation." The DOJ had previously advised the Florida-based technology services company of its decision to decline enforcement of the same underlying conduct in May 2016, as described in our FCPA Summer Review 2016.

- **HMT**: On September 29, 2016, the DOJ publicly released its letter to the Texas-based manufacturer of above-ground storage tanks, announcing that the Department was closing its FCPA investigation of the company "[c]onsistent with the FCPA Pilot Program announced April 5, 2016." As noted in our discussion of the declinations issued to NCH and HMT below, the DOJ's investigation reportedly found a number of FCPA violations relating to the company's sales in Venezuela and China; however, the Department chose to close the investigation under the FCPA pilot program due, in part, to NCH's self-disclosure, thorough internal investigation, cooperation, steps taken to enhance its compliance program and internal accounting controls, full remediation, and the company's agreement to disgorge $2,719,412, "which represents the profit to HMT from the illegally obtained sales in Venezuela and China."

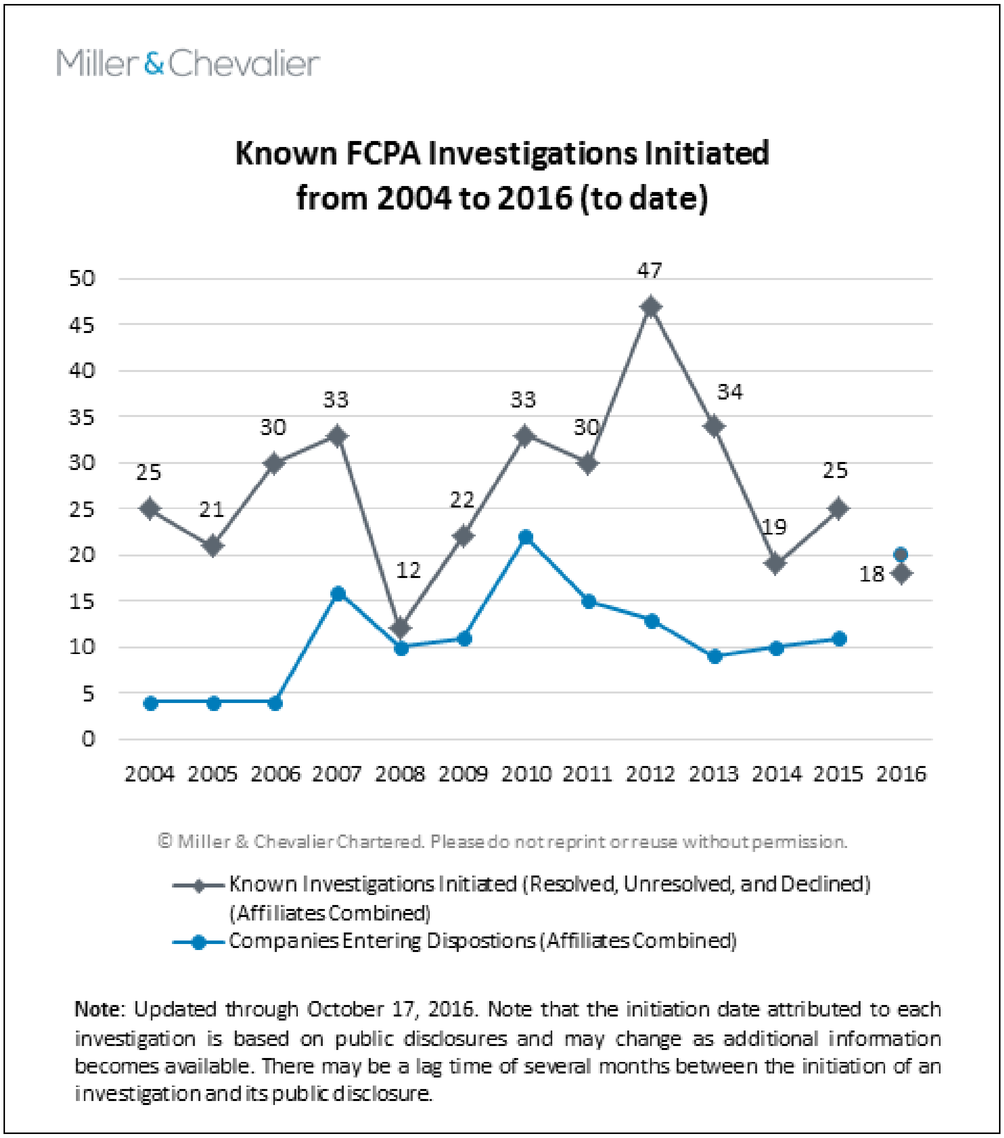
- **NCH**: On September 29, 2016, the DOJ publicly released its letter to the Texas-based industrial supply and maintenance company, which largely mirrored the DOJ's declination letter to HMT and announced that the Department was closing its FCPA investigation of NCH and its subsidiaries "[c]onsistent with the FCPA Pilot Program." As noted in our discussion of the declinations issued to NCH and HMT below, the DOJ's investigation reportedly found a number of FCPA violations stemming from conduct of NCH's subsidiary in China. According to the DOJ's declination letter, the Department chose to close the investigation under the FCPA pilot program due, in part, to NCH's self-disclosure, thorough internal investigation, cooperation, steps taken to enhance its compliance program and internal accounting controls, full remediation, and the company's agreement to disgorge $335,342, "which represents the profit to NCH from the illegally obtained sales in China."

- **Glaxo**: On September 30, 2016, the same day the SEC announced that it had reached a settlement with Glaxo over alleged accounting violations in China, the U.K. pharmaceutical company informed press outlets that: "The [DOJ] has also concluded its investigation into these matters and will be taking no further action." The DOJ, for its part, has declined to comment on this matter.

- **Grifols SA** (**Grifols**): In its Form 6-K, filed with the SEC on October 7, 2016, the Spanish pharmaceutical company stated that the DOJ "notified Grifols that the Department has closed its inquiry into Grifols, concerning possible violations of the U.S. Foreign Corrupt Practices Act." The company's disclosure further notes that "[i]n its notice of declination to prosecute, the Department acknowledged the full cooperation of Grifols in the investigation."

Known Investigations

In addition to the 37 enforcement actions resolved by the SEC and DOJ during the first three quarters of the year, we have identified 18 new FCPA investigations initiated by the agencies in 2016 to date, suggesting an active level of overall FCPA enforcement activity. By comparison, at this point in 2015, we had identified 17 investigations initiated by the SEC or DOJ alongside the 19 enforcement actions the agencies had brought during the first three quarters of the year.



Since the publication of our FCPA Spring Review 2016 in May, we have identified 12 additional FCPA investigations initiated by the agencies in 2016, as well as two previously unknown investigations initiated prior to this year. As we have noted in prior Reviews, the DOJ and SEC almost certainly have a significant number of FCPA investigations underway that are not yet public knowledge because the agencies and the companies involved have chosen not to publicly disclose them at this time. The numbers in the chart are therefore likely to rise, even for past years, since public companies sometimes wait months, or even years, to disclose the existence of an investigation in their securities filings -- with some choosing never to do so -- and non-issuer companies often never disclose the existence of an investigation. However, with the DOJ beginning to publicize more of its declination decisions, as discussed in the *Declinations* section above, the public is bound to learn of FCPA investigations that, in the past, may never have been publicly disclosed. For example, the DOJ's decision to publicly divulge the declinations it provided to HMT and NCH in September represented the first public acknowledgement of these investigations, which we have now updated the chart above to reflect.

International Developments

The past quarter also saw a number of relevant international developments. In Great Britain, the U.K. Serious Fraud Office (SFO) entered into its second-ever DPA on July 8, 2016, reaching a settlement with an unnamed U.K. enterprise over allegations of foreign bribery. The DPA includes a charge of failure to prevent bribery under the U.K. Bribery Act 2010 (UKBA), and a charge of conspiracy under the Criminal Law Act of 1977, which applies to conduct that occurred before the UKBA entered into force in 2011.

In Brazil, a review board within the Federal Public Prosecutor's Office rejected a settlement between Brazilian authorities and Dutch oil-services firm SBM Offshore (SBM) related to SBM's alleged bribery of executives at Petróleo Brasileiro S.A. (Petrobras), Brazil's national oil company. SBM had agreed to pay over $340 million to Petrobras and the Brazilian government as part of the settlement, but the settlement is now on hold, pending review by a higher level review panel within the Federal Public Prosecutor's Office. The corruption investigation of Petrobras continues to ensnare additional Brazilian political figures, with corruption charges filed against former President Luiz Inácio Lula da Silva and the arrest of former Finance Minister Guido Mantega. In addition, the Brazilian Senate voted to convict President Dilma Rousseff, concluding her impeachment proceeding, and, less than two weeks later, the Brazilian Chamber of Deputies voted to expel its member and former Speaker Eduardo Cunha on account of money laundering and corruption allegations.

Meanwhile in Mexico, the country's president signed new anti-corruption legislation into law on July 18, 2016, implementing the 2015 Constitutional reform on anti-corruption. The legislation creates a coordinating committee responsible for managing the development of anti-corruption guidelines at all levels of Mexico's government, and includes provisions aimed at public officials and private sector corruption, including new disclosure requirements and broadened sanctions and penalties.

Actions Against Corporations

Johnson Controls Settles with the SEC over Alleged FCPA Accounting Violations in China

On July 11, 2016, Johnson Controls, a Wisconsin-based global provider of building efficiency systems, automotive batteries, and seating and interior systems for automobiles, agreed to pay more than $14 million to the SEC to settle charges that it violated the books-and-records and internal-accounting-controls provisions of the FCPA. According to the Cease-and-Desist Order (Order), between 2007 and 2013, China Marine, the Chinese subsidiary of Johnson Controls' Global Marine building efficiency business, made more than $4.9 million in improper payments. China Marine employees allegedly used the improper payments to obtain and retain business and for personal enrichment. The Order stated that, as a result, Johnson Controls' books and records did not accurately and fairly reflect Johnson Controls' transactions and disposition of its assets. Many Johnson Controls vendor payments "were incorrectly recorded as legitimate vendor transactions … when in fact they were payments for goods never received or payments intended for foreign or commercial bribery or embezzlement."

The scheme came to light in 2013 after Johnson Controls received anonymous reports following the departure of China Marine's managing director. After becoming aware of the allegations, Johnson Controls quickly and voluntarily disclosed the allegations to the U.S. authorities -- about one month after receiving the second anonymous tip. Johnson Controls then extensively cooperated with the SEC and the DOJ's investigation. At around the same time as the SEC settlement, the DOJ publicly disclosed that it has declined to prosecute Johnson Controls for China Marine's alleged conduct, "consistent with the FCPA Pilot Program."

The same Chinese operation was implicated in York International's (York) 2007 FCPA settlement, which Johnson Controls acquired in 2005 (see discussion in our FCPA Autumn Review 2007). The 2007 SEC Consent Judgment alleged that York's Chinese subsidiary, China Marine's predecessor, provided high-value gifts to Chinese shipyard employees and paid its agents "hundreds of thousands of dollars for nebulous and undocumented services." According to the SEC, after Johnson Controls acquired York in 2005, Johnson Controls investigated York's business practices in China, terminated individuals involved in the alleged misconduct at China Marine, hired a new managing director of China Marine, and limited China Marine's use of agents and required that all sales go through China Marine's internal sales team based in China.

But, according to the recent SEC Order, China Marine employees, including the new managing director, "devised another avenue to continue the [improper] payments." The SEC alleged that instead of diverting funds using *agents*, who now faced more stringent scrutiny under Johnson Controls' compliance program, China Marine used *vendors*, who Johnson Controls considered lower risk and were subjected to less due diligence and monitoring. According to the SEC, Johnson Controls considered China Marine vendors lower risk because (1) the vendors did not interface with government officials and (2) the vendors generally had low-dollar-value transactions with China Marine. By using inflated or fake vendor transactions that averaged only $3,400 each, China Marine employees were able to divert the $4.9 million used for the alleged improper payments in the course of the six-plus-year period.

Among other purposes, China Marine employees allegedly used funds generated by their illicit scheme to pay "employees of government-owned shipyards … to obtain and retain business ..." The new vendor scheme, according the SEC, was a "multi-stepped arrangement" that involved collusion among the managing director, 18 other China Marine employees from three offices and several China Marine vendors. The managing director allegedly approved adding vendors to the vendor master file without disclosing that certain sales managers had beneficial interests in these vendors. As a result, the sales managers allegedly added fake costs for parts and services to sales reports, thereby inflating project costs. Procurement managers allegedly "knowingly" approved bogus purchase orders and the vendors, allegedly, "at the direction of China Marine sales managers, created fake order confirmations … and invoices." Finally, the finance manager allegedly authorized payments "even when supporting documentation was missing or erroneous." According to the SEC, funds generated through these fake transactions were transferred to China Marine employees' personal bank accounts and then used for bribery and personal enrichment.

The SEC's Order highlighted Johnson Controls' lack of oversight as the main internal controls failure that allowed the extensive scheme to go undetected for over six years. According to the Order, this lack of oversight manifested in three ways:

- Johnson Controls had "very little oversight" of China Marine's operations and instead relied on the newly-hired managing director's "ability to self-police" his business operations. The company did not review most China Marine vendor transactions, because the average vendor payment was $3,400, significantly below the threshold that would trigger review by Johnson Controls' Denmark office, which oversaw its Global Marine business. Similarly, Johnson Controls did not ensure that audits would adequately review vendor payments that were below the "audit testing threshold."

- Even when Johnson Controls reviewed vendor transactions, such as when a transaction met the review threshold or during audits, its managers based in Denmark admitted that "they did not have sufficient knowledge and understanding of China Marine's projects to recognize when certain vendor payments were unnecessary, whether goods ordered had actually been delivered, or whether design fees were necessary given [Johnson Controls] had an in-house design service."

- The lack of oversight by headquarters allowed a "culture of impunity" to exist at China Marine.

The alleged illicit scheme began while York/Johnson Controls was still under its three-year monitorship from the 2007 settlement. The original remediation arising from the first settlement clearly failed, and particularly relevantly, the SEC's Order noted that Johnson Controls failed to implement adequate controls in spite of the prior settlement and in spite of a recommendation by the compliance monitor that the company "integrate the [China] Marine business more closely into [Johnson Controls'] compliance culture." Yet, the SEC settled with Johnson Controls in an administrative proceeding in which the company was not required to admit to any of the Commission's findings and was not required to retain a monitor. Furthermore, the DOJ declined to prosecute the company. The DOJ's declination letter explicitly referenced its pilot program. The DOJ also publicly released the declination letter, adding to an apparent recent trend toward publicizing declinations (see discussion in our FCPA Summer Review 2016). Both the DOJ declination letter and the SEC Order made it clear that Johnson Controls has met all the conditions set forth by the pilot program for lenient treatment such as no requirement for a monitor or declination. These factors suggest that the agencies' programmatic goals may have played a role in the seemingly unusually favorable outcome Johnson Controls was able to secure in this case despite China Marine being a repeat offender. Johnson Controls' specific cooperation and remediation actions highlighted by the DOJ in its declination letter include the following:

- voluntary self-disclosure;
- thorough investigation by the company;
- full cooperation, with an emphasis on the "provision of all known relevant facts about the individuals involved in or responsible for the misconduct" and the company's "agreement to continue to cooperate in any ongoing investigation of individuals";
- steps taken to enhance the company's compliance program and internal accounting controls;
- full remediation, including separation from all employees found to be involved in the misconduct; and
- payment of full disgorgement and a civil penalty to the SEC.

Noteworthy Aspects

- **No "Low-Risk" Third Parties in High-Risk Markets**: The facts of this case highlight what many practitioners know from experience: there are no truly low-risk third parties in high-risk markets. Johnson Controls tightened its controls on agents, so China Marine local management created slush funds using vendors, which Johnson Controls erroneously believed posed lower risk. As a result, Johnson Controls did not sufficiently vet and monitor China Marine vendors. While the SEC's Order did not discuss the exact nature of China Marine's allegedly bogus or colluding vendors, they appear to have been design companies and other vendors involved in China Marine's core business. In our experience in China, we have seen many mundane vendors traditionally considered low risk used for diverting funds for illicit purposes, including: printing and stationary vendors, car rental companies, office equipment vendors, catering companies, advertising companies, and building materials vendors. Some of these types of vendors in China have been involved in other FCPA dispositions. Johnson Controls' experience cautions that, in risk-balancing a compliance program, while it is common practice to establish lower due diligence and monitoring requirements for lower-risk third parties, in high-risk jurisdictions like China, even traditionally low-risk third parties often warrant higher scrutiny.

- **Effective Monitoring Needs to Be Informed and Probing**: Johnson Controls employees and auditors reviewed some of China Marine's vendor transactions, but failed to detect the improper payments. Indeed, they admitted to investigators that they did not have "sufficient knowledge and understanding of China Marine's projects to recognize when certain vendor payments were unnecessary, whether goods ordered had actually been delivered, or whether design fees were necessary given Johnson Controls had an in-house design services." Without a doubt, asking such detailed and probing questions in vetting or auditing a third party is time consuming for compliance personnel and auditors and potentially uncomfortable because it could involve interrogating trusted local managers. This task is even more difficult if the company's business is complex or highly technical. But the monitoring failures discussed in the SEC's Order show that vetting and monitoring third-party relationships in high-risk markets (as well as managing other key compliance risks) must involve understanding the local business in depth and, for at least a selection of transactions reviewed, asking detailed and probing questions similar to those highlighted by the SEC and quoted above. This testing is particularly important for transactions for which reviewers and auditors, based on normal supporting documents alone, could not ascertain the legitimacy of the transaction.

LATAM Airlines and LAN Airlines Settle with SEC and DOJ Related to Argentinian Operations

On July 25, 2016, the DOJ and the SEC announced that they reached agreement with LATAM and LAN, respectively, to settle FCPA books-and-records and internal-accounting-controls violations. LAN was a publicly-traded airline company headquartered in Santiago, Chile, that provided passenger and cargo airline services throughout Latin America and its common stock was registered on the New York Stock Exchange. LATAM is the successor-in-interest to LAN. LAN became LATAM after a 2012 merger with TAM Airlines S.A. and LATAM's holdings now include LAN and its subsidiaries.

The airline agreed to pay more than $22 million to settle parallel civil and criminal cases related to improper payments it authorized during a dispute between the airline and its union employees in Argentina. This case is related to SEC's February 2016 settlement with Ignacio Cueto Plaza, which we discussed in our FCPA Spring 2016 Review. Ignacio Cueto Plaza was LAN's then-President and COO and is currently LAN's CEO.

The DOJ entered into a three-year DPA with LATAM to settle a two-count charge of violating the internal-accounting-controls and the books-and-records provisions of the FCPA. As part of the DPA, LATAM agreed to pay a $12.75 million criminal penalty, to continue to cooperate with the DOJ's investigation, to enhance its compliance program and to retain an independent compliance monitor for a term of at least 27 months.

For its part, the SEC filed a Cease-and-Desist Order charging that LAN failed to keep accurate books and records and maintain internal accounting controls. LAN will pay $6.74 million in disgorgement and $2.7 million in prejudgment interest.

According to the SEC and DOJ documents, following several years of exploring potential expansion into Argentina, LAN entered the Argentine market in 2005 by purchasing 49 percent of the shares of AERO 2000. AERO 2000 was a non-operating Argentine airline that possessed an airline operation certificate and owned flight routes. As part of the deal, LAN agreed to hire workers from two defunct Argentine airlines.

Around 2006, the labor unions representing those workers began making demands on LAN Airlines. For example, the unions each had a "single-function" rule in their collective agreements with the airlines that limited workers from performing more than one work function for LAN. The unions did not enforce this rule and if they were to do so, LAN would have to double its work force, which would have seriously imperiled its ability to continue operations in Argentina. In 2006, the unions began campaigning for wage increases and they threatened to enforce the single-function rule unless LAN Argentina agreed to a substantial wage increase.

The DOJ and SEC documents allege that, in 2006 and 2007, LAN executives authorized payments to an Argentine consultant knowing that the consultant might pass some portion of the money to union officials in Argentina to help settle the dispute with the unions. At that time, the papers allege, the consultant was a "Cabinet Advisor ‘ad-honorem'" to Argentina's Secretary of Transportation.

The consultant allegedly provided LAN executives with information on how to deal with specific unions, provided information on unions in general, and offered to negotiate with the unions directly. However, the draft contract with the consultant, which was never signed, allegedly said the consultant would perform a study of existing air routes in Argentina and the regional market. According to the disposition documents, executives at LAN approved the consultant's compensation and directed the company's CFO to pay three invoices submitted by the consultant totaling $1.15 million and referencing a contract signed by the parties. The DOJ and SEC allege that an unrelated LAN subsidiary, AAI, based in Delaware, made the improper payments on behalf of LAN, which AAI described as payments to "other debtors" on its books and records. The consultant and his wife received the $1.15 million in payments into their brokerage accounts in Virginia. In addition, LAN also paid an additional $58,000 invoice issued by a company owned by the consultant's son and wife that said it was for a study of existing air routes in Argentina and the regional market, which the LAN executives allegedly knew was inaccurate.

In sum, as a result of the sum of these payments, the SEC Cease-and-Desist Order states that LAN obtained a benefit of almost $7 million.

The government's charges do not relate to anti-bribery violations and thus do not explicitly state whether the improper payments in question relate to the payments made by the company to the consultant, or to the payments passed on by the consultant to the unions (the latter option would suggest that the government viewed the unions as foreign officials under the FCPA). However, the DPA states that LAN entered into the $1.5 million consulting agreement with the Consultant "in *order to funnel bribes to labor union officials*." As a result of these corrupt payments, LAN's unions had agreed not to enforce the one function rule for a period of years and had accepted substantially lower wage increased than they had been demanding. The SEC has similar language, noting that when approving payments to the consultant, LAN "understood that it was possible the consultant would pass some portion of the $1.15 million to union officials in Argentina." At the same time, the consultant himself was a government official by virtue of his position as a cabinet adviser to the Secretary of Transportation, and the SEC faulted LAN for failing to conduct proper due diligence through which "LAN might have become aware of his January 2005 appointment as a Cabinet Advisor to Argentina's Transportation Secretary."

Noteworthy Aspects

- **No Bribery Violations Brought**: Neither the DOJ nor SEC brought anti-bribery charges in this case, although the government's factual narrative refers to "corrupt" payments. The agencies never identified the union leadership as foreign officials, nor do they identify the consultant as a "foreign official," despite his "Cabinet Advisor ‘ad-honorem'" role to Argentina's Secretary of Transportation. Presumably his role in government offered some benefit to LATAM in the negotiation process with the unions, but it was not sufficient to allege bribery. Alternatively, the government might have faced evidentiary hurdles which precluded it from building an effective bribery case; for example, there is a reference in the DPA that "because of the [company's] delayed disclosure, potentially relevant evidence was lost or destroyed, including the routine application of data retention policies."

- **Lack of Sufficient Remediation**: In listing out the factors the Department considered in entering into the DPA, it noted that LATAM has designed and is in the process of implementing a compliance program and system of internal accounting controls and has committed to ensuring that these will continue to be implemented in a sufficient manner. However, at the same time, the DOJ noted that the "[c]ompany has failed to remediate adequately, including significantly by failing to discipline in any way the employees responsible for the criminal conduct recounted in the statement of facts … including misconduct by at least one high-level Company executive and thus the ability of the compliance program to be effective in practice is compromised." This language is unique and suggests that the DOJ questions whether effective remediation is possible so long as senior executives of concern remain in their positions.

- **Potential Action Against Other Individuals**: While the DOJ and SEC have not released any statements related to any pending charges against additional employees, the disposition documents indicate that there might be at least one additional case. For example, the documents extensively refer to LAN's Vice President of Business Development who is a U.S. citizen residing in Miami, Florida. While the documents do not indicate any specific wrongdoing on behalf of this employee, he or she was in charge of LAN's expansion efforts into Argentina and was involved in some of the underlying facts of the case. However, given how historic the underlying allegations are, it is also likely that any cases would have been brought already.

- **First Enforcement Action Against South American Company**: The DOJ and SEC's parallel enforcement against LAN and LATAM represent the first FCPA- related enforcement action against a company that is headquartered in South America. While there have been enforcement actions against companies' Latin American subsidiaries such as in Ralph Lauren Corporation and Stryker Corporation, or where the improper payments were made to officials in South America, such as in BizJet, this is the first instance where the US government brought charges against a South American company. Surprisingly, the first Latin American-based company to settle FCPA charges is from Chile, a country traditionally perceived to be less corrupt than other countries in the region; for example, in Miller & Chevalier's 2016 Latin America Survey, Chile was in the top three countries for survey participants' perceptions of the effectiveness of its anti-corruption laws. However, the activity in question occurred in Argentina, a country that scored significantly worse than Chile in the same survey results; for example, survey results indicated that only three percent of survey participants in Argentina believe that their country's anti-corruption laws are effective. It is likely that LATAM won't have the distinction of being the only Latin American company with an enforcement action against it for long, as earlier this month Brazilian aircraft manufacturer Embraer S.A. reported a $200 million pre-settlement reserve and several other investigations of South American companies, including Petrobras and Eletrobras (both Brazilian) and Sociedad Quimica y Minera S.A. (Chilean) have been made public.

- **Pilot Program**: Although the DOJ's new pilot program is not referenced in the settlement documents, it is likely that the DOJ did not view this case eligible for that program. This is likely because as the DPA states, LAN "did not timely voluntarily disclose the FCPA violations to the Office," and only did so after press reports surfaced that local enforcement officials had commenced investigations of the conduct. The pilot program does give limited credit for companies who do not voluntary self-disclose, but only if they appropriately remediate; in this case, as discussed above, the DOJ documents indicate that they do not consider the company's remediation efforts satisfactory, in part due to not disciplining "employees responsible for the criminal conduct." Nevertheless, the company's cooperation was significant enough to receive two points off of its culpability score, which helped reduce its penalty in the final fine calculation. However, it would have presumably been entitled to greater discount or possibly a declination for the accounting provision violations had there been earlier disclosure or better remediation.

- **Unique Monitor Term Length**: We are not aware of another settlement resulting in a monitor term lasting 27 months. The most common lengths are one, two, or three years in duration. Several settlements also have a hybrid arrangement with an 18-month independent monitorship and an 18-month self-monitorship. LATAM's DPA length is three years.

- **Local Enforcement Unclear**: The DPA states that Argentine and Chilean law enforcement officials had commenced investigations of the conduct in question. South American media has reported that Argentine authorities are investigating former transportation secretary Ricardo Jaime for receiving $1.15 million in bribes from LAN and specifically, whether Jaime accepted bribes through his private secretary, Manuel Vázquez. There are also media reports that Chilean prosecutors have opened a similar investigation relating to bribery of Jaime.

Key Energy Settles with the SEC Over Alleged Payments to Employee of Mexican National Oil Company

On August 11, 2016, Texas-based oilfield-services company Key Energy Services, Inc. settled the SEC's allegations that the company violated the FCPA's internal-accounting-controls and books-and-records provisions. As part of the settlement, Key Energy agreed to pay $5 million in disgorgement -- the only monetary penalty imposed on the company.

The SEC's central allegation against the company, detailed in the Commission's Cease-and-Desist Order (Order), is that Key Energy's Mexican subsidiary, Key Mexico, made corrupt payments to an employee at Mexico's state-owned oil company, PEMEX, through a consulting firm.

According to the Order, between 2010 and 2013, Key Mexico hired a consulting firm with ties to an employee at PEMEX to advise the company regarding its contracts with PEMEX. The Order did not elaborate on the nature of these ties. Key Mexico's former country manager approved and carried out this hiring decision. While Key Energy became aware that Key Mexico was doing business with this consulting firm (but not that firm's ties to the PEMEX official) as early as 2011, it allowed Key Mexico to continue working with the firm without a contract and without conducting due diligence, despite having such requirements in the company's compliance program. Moreover, the SEC faulted the company for Key Mexico having no compliance staff or internal audit processes of its own.

According to the SEC, Key Energy received numerous benefits as a result of the payments made to the consulting company. In 2011, before PEMEX had issued certain contracts for tender, the PEMEX employee linked to the consulting company forwarded internal emails from PEMEX officials with information on these contracts to Key Mexico's country manager, who passed them on to Key Energy employees in Houston. One of Key Energy's vice presidents who saw these emails suggested that PEMEX should add $90 million to an ongoing Key Mexico contract. In March 2011, PEMEX amended this contract to increase it by about $60 million.

The SEC alleged that Key Mexico paid the consulting firm approximately $561,000 between 2010 and 2013. Key Mexico's employees entered at least $229,000 of this amount in Key Mexico's accounting systems as "Expert advice on contracts with the new regulation of PEMEX…." However, according to the Order, there was no evidence that the PEMEX employee or the consulting firm to which he had ties provided any legitimate consulting services for Key Mexico. The Order alleges that Key Mexico, in fact, funneled money to the PEMEX employee through the consulting firm, including payments of $8,000 per month starting in 2011, after Key Mexico secured an additional contract with PEMEX.

In addition to its payments to the consulting firm, Key Energy authorized Key Mexico to donate about $118,000 in gifts to PEMEX's annual Christmas celebration in 2012. While Key Energy employees believed that the gifts would be used in a raffle, as they had been in the past, Key Mexico employees gave $55,000 of these gifts directly to the approximately 130 PEMEX officials working in the regions where Key Mexico operated. Key Energy approved this amount in gifts for the raffle even though it was approximately nine times and 26 times more than what the company spent on raffle gifts for PEMEX in 2010 and 2011, respectively.

In January 2014, the SEC contacted Key Energy about possible FCPA violations. In April of the same year, Key Mexico's employees told Key Energy management that the former Key Mexico country manager had pledged to bribe at least one PEMEX employee. Key Energy reported these accusations to the SEC and launched an extensive internal investigation. The company hired a new Chief Compliance Officer (CCO), who instituted a "renovation and enhancement" of the compliance program, including manually reviewing vendors in Mexico, implementing a new business opportunities protocol to help the company better understand the business risks of agents, consultants and other business partners and establishing more advanced controls around payment procedures in countries where Key Energy operates. Remedial measures also included instituting in-person visits to international locations by the CCO, reviewing Key Energy's anti-corruption policy and committing to exiting the Mexican market by the end of 2016. According to the Order, Key Energy cooperated with the SEC during the investigation. In April of 2016, Key Energy announced that the DOJ declined to bring an FCPA action against the company.

Noteworthy Aspects

- **The SEC Considered Key Energy's Financial Situation in Determining Penalty**: The SEC ordered Key Energy to pay $5 million in disgorgement and did not impose a civil penalty. Disgorgement is usually calculated by the amount of illegal profits that the entity received. The Key Energy resolution, however, is an example of a disgorgement amount that was influenced by a company's overall financial situation. According to the SEC, "in determining the disgorgement amount and not to impose a penalty, the Commission has considered Key Energy's current financial position and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities." In recent years, Key Energy has experienced financial difficulties that reflect the general downturn in the oil and gas sector. The company announced in August 2016 that it expected to file for bankruptcy. The SEC's consideration of Key Energy's financial situation is similar to DOJ's conduct toward logistics firm IAP Worldwide Services, Inc. (IAP), which we covered in the FCPA Summer Review 2015. In IAP's case, the DOJ's NPA allowed IAP to pay its fine in four separate installments because of the company's financial difficulties. Here, despite avoiding a penalty and lowering the disgorgement amount, this matter has proven very costly for Key Energy: in its Form 8K filed on June 15, 2016, Key Energy reported that its costs related to this investigation amounted to around $75 million.

- **Corruption Trends in Mexico**: The facts alleged by the SEC on the part of both Key Energy and the PEMEX employee reflect the trends identified in in Miller & Chevalier's 2016 Latin American Anti-Corruption Survey. Of the major economies (over $100 billion GDP) surveyed, Mexico, along with Venezuela, Argentina, and Brazil, was seen as most corrupt in the region. In addition, Mexican state-owned entities, such as PEMEX, scored poorly, with 74 percent of respondents viewing such entities as significantly corrupt. Numerous past FCPA actions have featured payments to PEMEX officials, including Crawford Enterprises, Inc., Paradigm B.V., Siemens AG, and Hewlett-Packard

Mexico. Additionally, according to the Survey, only eight percent of the respondents found Mexico's current anti-corruption laws to be effective compared with a regional average of 23 percent. Mexico amended its anti-corruption laws in the summer of 2016 to expand the coverage of violations and strengthen fines, as summarized in an article below.

AstraZeneca Settles Long-Running Investigation with the SEC

On August 30, 2016, the SEC announced an administrative settlement with AstraZeneca, the London-based, UK-incorporated biopharmaceutical company, for $5.5 million in fines and disgorgement. The SEC's Cease-and-Desist Order alleged that, between 2005 and 2010, AstraZeneca failed to devise and maintain a sufficient system of internal accounting controls and thereby allowed its wholly-owned subsidiaries operating in China and Russia to operate several schemes that provided improper benefits to HCPs at state-owned or -controlled hospitals or medical departments and to falsely record those improper benefits as bona fide business expenses. As is common in SEC administrative settlements without a criminal component, AstraZeneca did not admit or deny the SEC's allegations.

With respect to China, the Order alleged that, between 2007 and 2010, AstraZeneca's wholly-owned subsidiary there (AZ China) provided improper benefits to HCPs "as incentives to purchase or prescribe [AstraZeneca] pharmaceuticals." The improper benefits allegedly included gifts, cash, "maintenance fees," entertainment and speaker fees that in some instances were for "totally fabricated" speaking engagements. In addition, AZ China employees made payments in cash to local officials in 2008 "to get reductions or dismissals of proposed financial sanctions against the subsidiary." Funds for the improper payments were allegedly generated in several ways: through employee expense reimbursements that were inadequately supported or supported by fake tax receipts (*fa piao*), through fake or inflated invoices from a collusive travel vendor, and through "bank accounts in doctors' names" established by AZ China.

According to the Order, local managers planned and closely tracked the improper payments. Allegedly, AZ China employees and managers "maintained written charts and schedules that recorded the amount of forecasted or actual payments [of improper benefits] that AZ China would make per month or year in numerous regions throughout China." The charts detailed specific benefits provided to specific physicians or particular hospitals or medical departments as designated by specific physicians.

With respect to Russia, the SEC made less detailed but similar allegations that, between 2005 and 2010, AstraZeneca's subsidiaries operating in Russia (AZ Russia) provided "improper incentives," in the form of "gifts, conference support and other means," to government-employed HCPs in connection with sales of AstraZeneca pharmaceutical products. Also similar to China, AZ Russia allegedly kept charts that tracked HCPs, their positions and "their level of influence in making purchasing decisions for the respective entities where they worked and the manner in which they could be motivated to purchase [AstraZeneca] products..."

The $5.5 million AstraZeneca agreed to pay the SEC in settlement is composed of $4.3 million in disgorgement, $375,000 in civil monetary penalty and $822,000 in prejudgment interest. The Order stated that the SEC considered AstraZeneca's cooperation in setting the amount of the civil monetary penalty, and while noting that AstraZeneca did not self-report, the Order praised AstraZeneca's "significant cooperation" and remedial efforts.

Noteworthy Aspects

- **Long-Running Investigation Involving Multiple Authorities**: AstraZeneca's public filings indicate that the SEC began its investigation against the company in October 2006 and initially focused on the firm's businesses in Italy, Croatia, Russia and Slovakia. In 2010, the DOJ either joined the existing investigation, or initiated a new investigation possibly as a part of the then-ongoing pharma sweep. The long span of the investigation makes this settlement an outlier in terms of investigation duration (see our related discussion here), especially given the relatively small settlement amount, the lack of a concurrent foreign prosecution and the apparent lack of any planned individual prosecutions (no individuals were highlighted in the SEC's Order).

In addition to the countries on which the U.S. agencies focused, the Serbian government indicted the company in 2011 for alleged "improper payments to physicians" at a government cancer institute. We have not found information as to the outcome of the DOJ or the Serbian government investigation. Given the SEC settlement, it is likely that the DOJ has or will decline to prosecute the company. Notably, the SEC's Order did not allege facts sufficient to suggest that the DOJ had jurisdiction over the conduct at issue.

- **Common Payment Patterns, Two Exceptions**: The various types of improper payments and schemes alleged against AstraZeneca are mostly typical of other life sciences cases involving conduct in China: gifts, entertainment, conference support, questionable speakers' fees, colluding travel vendors, *etc.* One unique alleged payment scheme is that AZ China "establish[ed] bank accounts in doctors' names" to enable the improper payments. Another more important unique feature here is that both AZ China and AZ Russia had allegedly maintained charts detailing the incentive schemes and that those charts were maintained at the organizational level and approved by country-level managers. This allegation may have contributed to the SEC's decision to bring charges against AstraZeneca, the UK parent, in spite of its small role and the fact that there is no allegation that any AstraZeneca employees knew of or approved the alleged schemes.

Nu Skin Enters Administrative Settlement with SEC for Improper Charitable Contribution

On September 20, 2016, Nu Skin Enterprises, Inc. (Nu Skin US), a cosmetic and nutritional supplement company headquartered in Provo, Utah, agreed to pay $766,000 in penalties, disgorgement and prejudgment interest to settle an administrative action with the SEC. The SEC alleged that a charitable contribution made by Nu Skin US's wholly-owned Chinese subsidiary, Nu Skin (China) Daily Use & Health Products Co. Ltd. (Nu Skin China), violated the books-and-records and internal-accounting-controls provisions of the FCPA because it allegedly made the contribution in order to influence a government official.

According to the SEC's Order, Nu Skin China made a donation of one million RMB (approximately $154,000) to a charity chosen by a Chinese Communist party official (Party Official) in order to influence an ongoing investigation into the company's sales practices by a local government agency. A provincial-level Administration of Industry and Commerce (AIC) began an investigation of Nu Skin China's sales practices following an unauthorized 2013 promotional meeting hosted by the company when it did not have a direct selling license or a physical retail store in the city, both of which were required under Chinese law. The AIC informed Nu Skin China that it intended to impose a fine of 2.8 million RMB (approximately $431,088) against the company for violations of Chinese direct selling laws.

The SEC further alleged that a Nu Skin China employee reached out to the Party Official, who was an acquaintance, and requested that he propose a charity to receive a donation from Nu Skin China at the same time the AIC's investigation was ongoing. The Party Official allegedly proposed a charity, with which the Party Official was affiliated, that had not yet been established in the province. Senior personnel at Nu Skin China allegedly requested that the Party Official personally intervene in the AIC's investigation in exchange for the charitable donation to the Party Official's proposed charity.

According to the settlement documents, Nu Skin US, upon learning that Nu Skin China intended to make a donation, identified the potential FCPA risks and advised Nu Skin China to consult with a U.S. law firm based in China. The law firm allegedly included anti-corruption language in the proposed donation agreement prohibiting the use of the donation to influence government officials, but the language was subsequently removed from the final draft unbeknownst to Nu Skin US. However, the SEC's Order alleges that "Nu Skin US did not ensure that adequate due diligence was conducted by Nu Skin China with respect to charitable donations to identify links to government or political party officials and to prevent payments intended to improperly influence such persons in violation of the company's anticorruption policy and the FCPA."

In addition to the charitable donation, the Party Official allegedly requested that the company obtain college recommendation letters to U.S. universities from influential U.S. persons, which Nu Skin China labeled as a "top priority." According to the settlement documents, Nu Skin US subsequently reported that it had secured a prominent U.S. person to write a letter of recommendation for the Party Official's child.

According to the SEC's Order, two days after the donation ceremony, which was attended by the Party Official, the AIC notified Nu Skin China that it would not charge or fine the company in relation to violations of the direct selling laws.

Noteworthy Aspects

- **Necessity of Performing Due Diligence on Charitable Contributions**: Previous enforcement actions, such as the 2004 Schering-Plough case, have highlighted the use of charitable contributions to confer improper benefits to government officials in violation of the FCPA. While Nu Skin US attempted to address the FCPA risks posed by the charitable donation, the company failed to perform adequate due diligence on or monitor the contribution to ensure compliance safeguards were in place. Although the SEC's Order noted that Nu Skin US identified that the contribution posed some FCPA risk, Nu Skin US did not uncover the connection between the donation, the Party Official and the ongoing investigation, despite red flags. The SEC's Order also highlights the fact that, around the same time period, Nu Skin China requested that Nu Skin US engage an influential person to write college recommendation letters on behalf of the same Party Official, which suggests that the company should have investigated whether the charitable foundation had any connections to government officials, such as the Party Official. The SEC's Order emphasizes the need for companies to understand the purpose of charitable contributions and thoroughly vet whether any related government actions or officials may be influenced by such donations.

- **Necessity of Ensuring that Compliance Safeguards Are In Place**: The SEC's Order also notes that Nu Skin China engaged a U.S. law firm based in China to provide advice on risk mitigation and the law firm included anti-corruption provisions in the donation agreement. However, Nu Skin US did not monitor to ensure that the anti-corruption clauses were included in the final executed version of the contract, and the language was removed.

- **Local Law Violation Cause of Alleged Bribery Scheme**: The Nu Skin case demonstrates the importance of companies understanding the local law requirements in the countries where they operate. Nu Skin China allegedly failed to follow the local laws related to direct selling and as a result, faced an investigation by Chinese authorities. The case highlights the risks related to local law violations, which could lead to solicitations by local officials for improper benefits to cover up the violations or to have penalties dismissed.

Anheuser-Busch InBev Settles with SEC Over Improper Payments and Benefits Allegedly Provided to Officials in India and Violations of Whistleblower Protection Rules

On September 28, 2016, the SEC announced a settlement with AB InBev, a Belgium-based brewing company and issuer of securities on the New York Stock Exchange. Under the settlement, AB InBev agreed to pay approximately $6 million to the SEC for violations of the books-and-records and internal-accounting-controls provisions of the FCPA and the whistleblower protection provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The alleged violations involved AB InBev's now defunct joint venture with RJ Corp, InBev India International Private Limited (IIIPL).

From 2009 to 2012, AB InBev owned a 49 percent stake in IIIPL, which managed the marketing and distribution of beer for AB InBev's wholly-owned Indian subsidiary, Crown Beers India Private Limited (Crown). During this period, the SEC alleged that two third-party sales promoter companies hired by IIIPL made improper payments to Indian government officials to obtain beer orders and to extend the permissible daily brewing hours for Crown during several months in 2011. When IIIPL sought reimbursement from Crown for the promoters' activities, it inflated commissions and reimbursements to hide the improper payments. Crown, in turn, paid or accrued the expenses and recorded them in its books as legitimate promotional costs. Crown's books, including the illegitimate payments, were then consolidated into AB InBev's books.

In addition, the SEC identified multiple internal-accounting-controls failings of Crown. According to the SEC, Crown employees did not verify that contracts were executed with the promoter companies. Although AB InBev expedited an already planned internal audit of IIIPL upon receiving a compliance-related internal complaint in 2010, the audit failed to scrutinize the promoter company's activities or expenses. Moreover, the SEC Order noted that AB InBev did not address many of the issues identified in the 2010 audit until 2011 or early 2012.

Furthermore, the SEC alleged that in December 2012, AB InBev violated Dodd-Frank's whistleblower protection provisions when it entered into a separation agreement with a former Crown employee who had raised concerns about IIIPL's relationship with the third-party promoter companies on multiple occasions. After the employee was terminated in 2012, AB InBev and the employee entered into a separation agreement, which required the employee to "keep in strict secrecy and confidence" any "unique information ... that is not a matter of common knowledge or otherwise generally available to the public."

Following the execution of the agreement, the employee, who had previously communicated with the SEC, ceased to do so to avoid triggering the separation agreement's liquidated damages provision. It is unclear from the SEC's Order whether AB InBev knew that the employee had been cooperating with the Commission. Regardless, the SEC found that the language of AB InBev's separation agreement, which did not explicitly include an exception for reporting to authorities, "impeded the Crown Employee from communicating directly with the Commission staff." The SEC noted that AB InBev had executed similar agreements in the past.

According to the settlement, at the beginning of the investigation, AB InBev failed to cooperate fully. For example, it failed to report two separate compliance related complaints to the SEC, it took no immediate corrective steps when the SEC alerted it of allegations that IIIPL employees planned to destroy documents, it did not respond to subpoenas in a timely manner and it made broad assertions of privilege that stalled that investigation. However, the Order suggested that AB InBev's cooperation improved over time.

Noteworthy Aspects

- **Continued Commitment to Protect Whistleblowers**: This settlement marks the latest example of the SEC's continued commitment to aggressively enforce Dodd-Frank's whistleblower protection provisions, specifically with respect to companies' separation agreements. During the last quarter, Health Net, Inc. (which has since merged with Centene Corp) and BlueLinx Holdings Inc. also settled with the SEC in connection with such agreements. The newly appointed Chief of the SEC Whistleblower Office, Jane Norberg, stated, "[t]hreat of financial punishment for whistleblowing is unacceptable. We will continue to take a hard look at these types of provisions and fact patterns." In this case, the SEC noted that as part of its remediation efforts, AB InBev amended its separation agreements to include the following language: "I understand and acknowledge that notwithstanding any other provision in this Agreement, I am not prohibited or in any way restricted from reporting possible violations of law to a governmental agency or entity and I am not required to inform the Company if I make such reports."

- **Application of Internal-Accounting-Controls Provisions to Affiliates**: Under the FCPA's accounting provisions, an issuer that holds the majority voting power in an entity, including a joint venture, is strictly liable for the internal accounting controls of that entity. However, an issuer that holds "50 per centum or less of the voting power" must only proceed in good faith "to the extent reasonable under the issuer's circumstances" to cause the entity to establish and maintain a system of internal accounting controls. As noted, this matter involved two AB InBev affiliates. The first affiliate, Crown, is AB InBev's wholly-owned subsidiary. Therefore, AB InBev is strictly liable for failures in Crown's internal controls. Regarding the second affiliate, IIIPL, AB InBev owned a minority stake and, significantly, had less than 50 percent of the voting power due to the fact that AB InBev's joint venture partner had the right to appoint the chairman who held the tiebreaking vote. Thus, it appears that a good faith standard applied. Ultimately, the SEC findings only alleged internal-accounting-control failings with respect to the activities of Crown, which reimbursed IIIPL for the alleged illicit transactions with the promoter companies. It did not allege any violations with respect to IIIPL's failures.

- **Failure of JV to Incorporate Due Diligence Procedures Leads to Violations**: Although the SEC only alleged internal controls *violations* relating to Crown's activities, the SEC Order describes AB InBev's failures to implement controls, particularly due diligence procedures, at IIIPL, which underscores the importance of ensuring that controls are properly implemented at all levels of a company's structure, including minority joint ventures. The settlement suggests that after the 2010 internal audit, AB InBev took some steps to improve the controls at Crown and IIIPL including: requiring the two entities to adopt AB InBev's own policies, distributing due diligence questionnaires, creating tighter controls over expenses and cash, conducting FCPA trainings, and replacing a flawed accounting system. Yet, despite AB InBev's efforts, the SEC noted that IIIPL employees were able to actively circumvent the controls. For example, upon hiring the second promoter company, Crown requested IIIPL to complete AB InBev's FCPA due diligence forms. However, IIIPL ignored the request and did not conduct due diligence on the company before it began performing work. Instead, IIIPL employees later completed and backdated the due diligence forms. Furthermore, IIIPL employees altered the promoter company's answers to make them seem more appropriate.

GlaxoSmithKline Enters SEC-only Resolution Over Misconduct in China

On September 30, 2016, the SEC announced that British pharmaceutical company Glaxo had settled FCPA charges with the Commission over alleged violations of the books-and-records and internal-accounting-controls provisions in connection with questionable payments by two subsidiaries in China. Under the terms of a Cease-and-Desist Order (Order) imposed via administrative proceeding, Glaxo agreed to pay a $20 million civil penalty to resolve the allegations. The enforcement action also appears to bring to a close roughly 10 years of FCPA-related investigations by U.S. authorities into Glaxo -- beginning with a probe into Glaxo's involvement in the Iraq oil-for-food scandal, continuing with the agencies' industry-wide investigation into the pharmaceutical sector, and culminating in a series of internal whistleblower reports that Glaxo self-disclosed in recent years.

According to the SEC, employees at Glaxo's wholly-owned Chinese subsidiary GlaxoSmithKline (China) Investment Co Ltd. and its majority-owned public-private joint venture Sino-American Tianjin Smith Kline & French Laboratories Ltd. (collectively Glaxo China) engaged in various pay-to-prescribe schemes from at least 2010 to mid-2013 in an effort to boost sales. These schemes allegedly involved the payment of various things of value -- including cash, gifts, improper travel and entertainment with no or little educational purpose, shopping excursions, and family and home visits -- to publicly-employed healthcare professionals in China, reportedly increasing the sale of Glaxo products to state-owned hospitals and institutions by millions of dollars.

Among the means of funding such payments, employees at Glaxo China reportedly colluded with third-party vendors, to which they paid nearly $225 million for planning and event services from 2010 to mid-2013. In testing conducted during the course of the investigation, Glaxo found that approximately 44 percent of sampled invoices were inflated and approximately 12 percent were for events that did not occur.

The SEC stated that employees of Glaxo China would record the improper payments they made as legitimate expenses on the company's books and records, including "medical association sponsorships, employee expenses, conferences, speaker fees and marketing costs."

Without admitting or denying these findings, Glaxo consented to the SEC's Order, which included FCPA-related accounting charges, but alleged no corresponding anti-bribery violations. In addition to paying a $20 million civil penalty, Glaxo also agreed to submit periodic reports to the SEC over the next two years on the status of its remediation and compliance program. In detailing its decision to settle with Glaxo, the SEC specifically mentioned the company's remedial efforts, which included promptly cooperating with the Commission's investigation and significantly enhancing the company's compliance program.

Noteworthy Aspects

- **China's Parallel Prosecution of Glaxo China**: The Glaxo investigation garnered significant attention in July 2013, after China's Ministry of Public Security raided Glaxo China's offices and accused local executives of using third-party vendors such as travel agencies to make approximately $500 million in improper payments to local healthcare professionals, among others, to induce the purchase of Glaxo products. In September 2014, a Chinese court found Glaxo China guilty of the allegations and ordered the company to pay a $492 million penalty following a non-public, one-day trial. The court also found five Glaxo China executives, including the former head of Glaxo China, Mark Reilly, guilty on bribery-related counts. All five executives received suspended sentences. Notwithstanding the enforcement action by China, U.S. authorities continued their investigations into the alleged misconduct.

- **Specific Allegations Limited to China**: Although the SEC and DOJ have reportedly investigated Glaxo for over 10 years in connection with a range of potential misconduct in over a dozen countries in Europe, Latin America, the Middle East, and Asia, the SEC Order here focuses solely on China, except to mention: "The deficiencies in Glaxo's internal accounting controls and compliance program also led to instances of similar improper conduct in connection with sales in other countries in which Glaxo operates."

- **DOJ Reportedly Declines Enforcement**: Glaxo has stated that the DOJ opted to close its parallel investigation into the alleged misconduct without pursuing enforcement, a decision some press outlets suggested might be in recognition of the $492 million fine that China levied on Glaxo China in 2014. Notably, however, the SEC Order does not include any facts suggesting knowledge or misconduct by a U.S. person or the use of the mail or any other means or instrumentality of U.S. interstate commerce. A separate investigation into the allegations by the U.K.'s Serious Fraud Office is reportedly still underway.

- **SEC-Only Enforcement Actions Involving China**: Glaxo's settlement is the latest in a line of SEC-only enforcement actions over the past year involving the healthcare industry in China (see also AstraZeneca, SciClone, Novartis, and Bristol-Myers Squibb). This pattern suggests that the DOJ and SEC have gotten comfortable with the idea that this crop of cases involves conduct isolated to the in-country management of local affiliates, without the knowledge or direction of their parent companies.

- "**Pervasive" Misconduct Alleged**: The SEC characterized the misconduct within Glaxo China as "pervasive" and carried out with the knowledge and assistance of regional and district management within China. For example, one sales representative reportedly submitted a work plan to a regional manager describing the intent to pay a certain healthcare professional, among other things, 20 RMB (approximately $3) per box of prescribed product every month in addition to providing "appropriate gifts" on holidays for a guarantee of more than 40 boxes of prescribed product every month.

- **Controls Weaknesses Involving Speaker Fees**: While Glaxo had limits on the amount in fees that speakers could be paid, both per hour and cumulatively per year, the company had no effective system in place to confirm the actual identity of the speakers it engaged. Of approximately $17 million that Glaxo China spent on speaker fees from 2010 to mid-2013, approximately $2.2 million was paid to persons whose qualification as healthcare professionals could not be verified. Of note, Glaxo, as part of its remediation, agreed to make global changes to its business model, including, among other things, "the elimination of most payments to doctors, including fees to healthcare professionals to speak about the Company's prescription medicines and altering the compensation structure for its sales force to eliminate incentive pay based on the number of prescriptions generated."

- **Improper Use of Marketing Programs**: Glaxo China allegedly used marketing programs to improperly influence healthcare professionals. For example, in 2010, Glaxo China reportedly engaged a local vendor to facilitate a national marketing program that the company's senior marketing and sales managers had created and helped to administer. While the project was intended to provide healthcare clinics with tools to facilitate the storage and administration of vaccines that required refrigeration, employees instead selected participating clinics based on marketing considerations and used project funds to provide healthcare professionals with approximately $2.3 million in gifts such as laptops, tablets, and other electronic devices.

- **Failure to Address Red Flags Identified by Audits/Reviews**: Although local internal audit and compliance reviews identified significant controls deficiencies and evidence of some of the mechanisms used to fund the improper payments as early as 2010 (for example, falsified Point-of-Sale slips and fake bank statements; fabricated invoices from hotel and restaurants; inadequately trained staff; and approval of non-compliant activities), according to the SEC Order, these findings were treated as isolated instances rather than as signs of a larger problem. Of note, the SEC also highlighted the fact that Glaxo China structured the commissions paid to sales representatives in a way that provided an incentive to inflate sales (for example, an audit sample indicated that for over 40 percent of the sales personnel, commission bonuses exceeded 50 percent of their income).

Och-Ziff Enters DOJ and SEC Dispositions Over Alleged Improper Payments and Other FCPA Violations in Africa

On September 29, 2016, New York-based hedge fund Och-Ziff entered into agreements with the DOJ and SEC related to charges of violating the anti-bribery and accounting provisions of the FCPA, as well as violating the Investment Advisers Act. As part of the combined settlement, Och-Ziff agreed to pay approximately $412 million in fines, disgorgement, and interest to the agencies, making this FCPA disposition the fourth highest to date by dollar value. Och-Ziff also agreed to retain an independent compliance monitor for three years. The charges against Och-Ziff stem from allegations of "funding corrupt transactions," self-dealing, and misleading investors in relation to transactions managed by two Och-Ziff employees in the Democratic Republic of the Congo (DRC), Libya, Guinea, Niger, and Chad. As discussed in a separate article below, the SEC also settled with Och-Ziff's CEO, Daniel Och, and the company's CFO, Joel Frank, over related charges, although both men agreed to the settlements without admitting or denying the findings.

Och-Ziff's disposition with the DOJ includes a DPA related to two counts of conspiracy to violate the anti-bribery provisions of the FCPA relating to conduct in the DRC and Libya, and one count each of falsifying the company's books and records and failing to implement adequate internal controls relating to conduct in the DRC, Libya, Niger, and Chad. As part of the DOJ's resolution, OZ Africa Management GP LLC, a wholly-owned subsidiary of Och-Ziff that was used to hold Och-Ziff's interests in the joint venture in Africa, pled guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions in connection with conduct in the DRC.

The SEC'sCease-and-Desist Order (Order) was issued against Och-Ziff (an issuer), as well as Och-Ziff's subsidiary, Och-Ziff Management LP (OZ Management) (a registered investment adviser), and Och and Frank in their individual capacities. The SEC's settlement involves the same conduct as the DOJ resolution, with the Commission also alleging that the defendants violated the FCPA's anti-bribery, books-and-records, and internal-accounting-controls provisions, as well as alleging fraudulent, misleading and deceptive practices in violation of the Investment Advisers Act.

According to its press release, the SEC learned of the alleged violations "while proactively scrutinizing the way that financial service firms were obtaining investments from sovereign wealth funds overseas." The SEC also stated that its investigation into these allegations is "continuing."

Democratic Republic of the Congo

According to the disposition documents, Och-Ziff's Israeli business partner (Partner) paid over $100 million in bribes to DRC government officials to secure special access and lower pricing in the mining sector between 2005 and 2015. In late 2007 and early 2008, Och-Ziff and the Partner discussed forming a joint venture in which the Partner would use his close connections with the DRC government to secure lucrative deals, with funding from Och-Ziff. According to the DPA, the Partner told certain senior Och-Ziff employees that he would need to make payments to DRC officials and other "local partners" to obtain access to favorable deals, but the Och-Ziff employees did not inform the company's legal or compliance functions about these statements. The documents note, as well, that due diligence of the Partner in early 2008 raised a number of concerns and red flags regarding the Partner's relationships with officials and business practices, and several senior managers recommended against doing business with the Partner.

Nevertheless, on instructions from top management, Och-Ziff and related entities entered into several transactions with the Partner between March 2008 and February 2011 related to DRC assets and companies.

The DOJ and SEC allege that certain Och-Ziff managers were aware that a portion of the investment monies that went to the Partner would be used to "pay substantial sums of money to DRC officials to secure access to these opportunities in the DRC mining sector." Och-Ziff funded the Partner through several mechanisms: a purchase of shares in one Partner-controlled company, a convertible loan to another Partner-controlled company and a margin loan to a third Partner-controlled company. The DOJ and SEC also allege that the Partner paid bribes to acquire assets of a Canadian firm that had been seized by DRC officials, including bribes paid to the DRC's attorney general and three justices of the DRC's Supreme Court to deliver favorable rulings in proceedings involving those assets. The SEC Order notes that certain senior Och-Ziff personnel knew that a key purpose of the transaction involved (a convertible loan to a Partner-controlled company) was to "provide DRC Partner with funds to pay bribes to facilitate the takeover of the Canadian mining company for the benefit of Och-Ziff and DRC Partner." In addition, the Partner allegedly paid bribes to government officials to acquire additional assets that were consolidated into existing holdings to make them more attractive to prospective buyers.

Libya

The DOJ and SEC allege that Och-Ziff employed a Libyan agent (Agent) who paid several million dollars in bribes between 2007 and 2010 to Libyan government officials to secure $300 million in investments into Och-Ziff hedge funds by Libya's sovereign wealth fund, the Libyan Investment Authority (LIA). Och-Ziff agreed to pay a "finder's fee" of $3.75 million to the Agent for securing LIA investments. The disposition documents state that a senior Och-Ziff manager knew that all or part of this fee would be paid to LIA officials to obtain their agreements for these investments.

According to the DPA, despite his role in obtaining meetings between Och-Ziff managers and LIA officials in 2007, the Libyan Agent stated that his status as Och-Ziff's agent could not be publicly disclosed to the LIA. However, once the finder's fee amount was negotiated, it became clear that internal Och-Ziff protocols would not allow payment of the fee if the Agent's participation was not disclosed. The disposition documents state that an Och-Ziff manager and the Agent allegedly discussed various means of masking the agent's involvement in the deal, including the Agent providing a false representation that he had conducted the required disclosure to the LIA. Both parties eventually agreed that the Agent would establish a special purpose vehicle (SPV) in the British Virgin Islands, and the parties entered into a forward-looking consultancy agreement for $3.75 million -- the full amount of the fee -- that would pass through the SPV. That agreement still required disclosures to the LIA that, according to the DPA, were never made. The DOJ and SEC allege that, through the SPV, the Agent funneled millions of dollars in bribes to three Libyan government officials in return for LIA's investment in Och-Ziff. The documents state that Och-Ziff earned over $100 million in fees and incentive income from LIA's investment.

The DOJ and SEC also allege that Och-Ziff invested $40 million in a Libyan real estate development project -- founded and overseen by the Agent. In addition, Och-Ziff's managers allegedly used investor funds to pay a "deal fee" of $400,000 that a senior Och-Ziff manager "understood" was intended to compensate the Agent for bribes the Agent paid to Libyan officials in connection with the development project. According to the agencies, Och-Ziff did not conduct any due diligence on the Agent prior to engaging him to work on Och-Ziff's behalf, nor was there any formal approval of the work arrangement.

African Global Capital in Guinea, Chad, and Niger

Och-Ziff formed a joint venture -- African Global Capital (AGC) -- in 2007. Och-Ziff held a 40 percent "advisory and management interest" in the venture through OZ Management and other subsidiaries to invest in natural resource assets in Africa. The SEC noted that "Och-Ziff had joint control over all investments and operations of" the relevant affiliated companies. The SEC further stated that "Och-Ziff did not impose adequate controls on the use of investor funds by its business partners or conduct due diligence into the specific uses of investor funds by those partners" and thus that "Och-Ziff's business partners misused investor funds, enriched themselves, and paid bribes to various government officials."

The joint venture established two investment funds, AGC I and AGC II. The DOJ and SEC allege that investments by Och-Ziff, AGC and their business partners in Chad, Niger, and Guinea "were facilitated by the use of illegal bribery." Additionally, the SEC alleges that several AGC transactions violated the Investment Advisers Act. Och-Ziff managers also provided money to its local partner in the DRC and the Libyan Agent through the AGC funds, though the SEC noted that the "corrupt" transactions mostly used managed investor funds rather than Och-Ziff's own capital.

The agency documents note that "an AGC portfolio company" used funds from Och-Ziff to hire various consultants, including a Gabonese national. The DOJ and SEC documents do not identify this consultant by name, but the DOJ press release notes that a Gabonese national, Samuel Mebiame, "was charged on Aug[ust] 16, 2016, with conspiring to bribe foreign government officials to obtain mining rights in Chad, Niger and Guinea." In 2007, Och-Ziff managers allegedly became aware that the Gabonese consultant's compensation was disproportionately large and that part of the compensation was a "deal introduction related consulting fee" in connection with mining interests in Africa. The DOJ and SEC allege that, despite this knowledge, Och-Ziff managers continued to fund capital calls to the joint venture, and that a portion of the funds provided were used to reimburse the Gabonese consultant for at least $2 million in bribes that the consultant paid to officials in Chad and Niger to secure uranium concessions on Och-Ziff's behalf. In particular, the SEC alleges that a senior Och-Ziff employee "knew or was willfully blind to the high probability that [the consultant] would use [Och-Ziff provided funds] to pay bribes to government officials in order to win mining deals."

The documents state that the consultant and Och-Ziff employees structured a series of transactions involving the purchase of African natural resource assets to avoid detection of their self-dealing and bribery. In one instance, Och-Ziff employees facilitated the purchase of an interest in an oil field that the SEC alleges represented a high corruption risk. Additionally, the SEC alleges that OZ Management failed to notify investors of the fact that the purchase would involve payment to the consultant, who had interests in AGC II, as required by the Investment Advisers Act. The SEC alleges that OZ Management provided incomplete and misleading information to the investors and did not disclose the risks of corruption. In addition, the SEC alleges that OZ Management told the investors that steps would be taken to ensure the invested funds were appropriately used, and that ultimately this was not true.

The SEC further alleges that in 2011, the Gabonese consultant sought the help of Och-Ziff employees to profit from "future Guinean government actions." Och-Ziff employees structured a transaction that provided the consultant with $52 million to put towards those efforts. The SEC alleges that in preparation for the transaction, certain Och-Ziff managers provided "false information" to Och-Ziff and an investor so that the transaction would be approved. Based on the misleading information provided by the Och-Ziff managers, the SEC asserted that the investor did not understand the "true terms of the transactions." With the funds from the transaction, the consultant allegedly "paid $2.1 million to Och-Ziff to satisfy an outstanding debt[...], $25 million to the government of Guinea to try to secure access to valuable mining investments there, $1 million to the agent affiliated with a high level Guinean government official and his family," and the remainder was used for the consultant's personal benefit and that of his business partners.

In addition to the FCPA-related issues, the SEC also identified various other transactions in which OZ Management "failed to disclose all material facts and conflicts of interest in its communications with investors in certain […] transactions or to adequately control the use of investor funds" and the SEC alleged that "OZ Management made material misrepresentations or omissions and engaged in self-dealing." These resulted in various cited violations of the Investment Advisers Act.

Noteworthy Aspects

- **Complex Case Results in Fourth Largest Disposition in FCPA History**: The combined settlement of $412 million represents the fourth largest FCPA settlement in history. (See the Introduction section, above, for a chart of the ten highest-value FCPA settlements.) Och-Ziff agreed to a disposition with the DOJ for roughly $213 million. The DOJ noted that relevant considerations for the penalty calculation included:

    - the fact that Och-Ziff did not self-report the conduct to the DOJ;
    - a two-point downward adjustment to the culpability score for the company's cooperation and acceptance of criminal responsibility;
    - a 20 percent credit off of the bottom of the Sentencing Guidelines fine range further acknowledging Och-Ziff's cooperation and "comprehensive internal investigation" (though the DOJ noted that the company "did not receive additional credit because of issues that resulted in a delay to the early stages of the investigation");
    - the company's provision of information related to the conduct of individuals (presumably per the instructions in the Yates Memorandum);
    - "the seriousness of the offense conduct including the high-dollar amount of bribes paid to foreign officials, conduct in multiple, high-risk jurisdictions, and the facts that the bribery occurred at a high level within the Company";
    - Och-Ziff's "significant remediation to improve" its "compliance program and internal controls"; and
    - the company's acceptance of an independent compliance monitor.

    Och-Ziff's settlement with the SEC required disgorgement of over $173 million, with nearly $26 million in additional prejudgment interest. The SEC Order states that the SEC waived over $173 million in civil penalties based on the imposition of the DOJ criminal penalty.

- **Firsts for DOJ and SEC**: This case involves the first FCPA-related DPA and criminal plea agreement with a hedge fund. The DOJ previously entered an NPA in 2007 with Omega Advisors related to Omega's actions in Azberbaijan, which involved the same set of facts that were litigated in the case of *U.S. v. Kozeny*. The Omega NPA required Omega to "civilly forfeit" $500,000 and cooperate with the DOJ's then-ongoing investigation. Also very rare, two corporate settlements this quarter have involved charges against the sitting CEOs of the company -- LATAM and Och-Ziff. As discussed above, LATAM entered into a settlement with the SEC this quarter, after its CEO previously settled individual charges with the SEC in February 2016.

- **Och-Ziff Employees Removed Compliance Concerns from Audit Findings on DRC Partner**: According to the disposition documents, in 2008, Och-Ziff employees conducted an audit of one of the companies owned by Och-Ziff's Partner in the DRC to determine if the proceeds of the convertible loan that Och-Ziff had made to the company were being spent in accordance with the loan's terms. The resulting draft audit report stated the auditors' belief that certain Partner company expenses were the "costs of maintaining political alignment and for protocol with the authorities in the DRC." The draft report also recommended further investigation and "flagging" of the issue in the context of relevant "compliance requirements." According to the DOJ, when shown the draft audit report, a senior Och-Ziff manager involved in setting up the transaction and other transactions that formed the basis for the DOJ's action against the company instructed that the "paragraph referencing payments for political alignment with senior government officials be removed" from the report, and the language was not included in the final report. This is a vivid example of management override of existing internal accounting controls.

- **Certain Senior Managers Repeatedly Hid Risks and Key Facts from Compliance Functions**: The summary above details several instances in which the primary managers responsible for the transactions at issue did not inform the compliance and legal functions of key facts or areas of risk. The agencies' disposition documents list other instances of such activity: for example, the DOJ stated that a deal proposed by Och-Ziff's partner in AGC (which the company ultimately did not enter) included "'$5 million for the ongoing Presidential campaign' in a West African country," but while that proposal was shared by an Och-Ziff manager with analysts, "it was not shared with legal or compliance." The SEC also notes that certain executives at Och-Ziff "ignored red flags and corruption risks and allowed [corrupt] transactions to proceed." Thus, while the documents indicate that elements of a compliance program and related controls were in place during the period in which the improper activities occurred, the disposition papers also suggest that at least the senior managers involved in the transactions at issue were able to ignore or otherwise keep the compliance and legal functions ignorant of their activities. This fact likely contributed to the agencies' requirement for an independent compliance monitor as part of the settlement, as well as other specific requirements, such as the SEC's specific requirement that the company's CCO be separated from other officer positions and have substantial approval and veto powers over a wide range of potential future transactions.

- **Extensive International Cooperation in Investigation**: In announcing the settlements, the DOJ and SEC acknowledged the assistance of authorities in a number of jurisdictions with prominent offshore banking industries, including Switzerland, the British Virgin Islands, Malta, Cyprus, Gibraltar, Jersey, and Guernsey, as well as the United Kingdom. The involvement and cooperation with the U.S. authorities of so many countries continues a growing willingness by those countries' authorities to help US and other anti-corruption authorities to track down evidence related to corrupt transactions.

DOJ Provides Declinations with Disgorgement to HMT and NCH

On September 29, 2016, the DOJ published two declinations that arguably introduced a new FCPA settlement mechanism. Although called "declinations," these two new dispositions contrast with past DOJ declinations in that they involve the following additional features: (1) disgorgement; (2) a declination "letter agreement" that is signed by both the DOJ and the settling company; (3) factual descriptions of the alleged wrong doing in the declination letter agreement; and (4) a specific agreement by the settling company to continue to cooperate with related individual prosecutions. These declinations with disgorgement, as they may be called, were issued to two privately held companies: HMT and NCH.

These two declinations with disgorgement are part of the FCPA pilot program announced in April 2016, and they were foreshadowed by the pilot program's requirements and track record up to this point. As noted in our earlier analysis, to qualify for the benefits of the pilot program, companies must meet four main requirements: voluntary self-disclosure, full cooperation with the DOJ, appropriate remediation measures, and *disgorgement* of all profits resulting from the FCPA violation. As to the disgorgement requirement, the first three of the five total declinations under the pilot program so far -- Nortek, Inc.; Akamai Technologies, Inc.; and Johnson Controls -- were all issued to *public* companies and paired with a SEC settlement (either an NPA or an administrative order) that required disgorgement. But for *private* companies, over whom the SEC lacks jurisdiction to order disgorgement, it has been unclear how the disgorgement requirement could be satisfied. These two declinations with disgorgement reveal one mechanism: a letter agreement that requires disgorgement and that justifies the payment with a factual statement incorporated into the letter agreement.

HMT LLC

HMT is a Texas-based producer of liquid storage tanks for the oil and gas industry. According to the declination letter, HMT, "through its employees and agents, paid approximately $500,000 in bribes to government officials in Venezuela and China," in order to secure business that generated $2,719,412 in net profits.

In Venezuela, between approximately 2002 and 2011, HMT allegedly allowed a local agent/reseller to "substantially" mark up the price of HMT products sold to Petroleos de Venezuela, S.A. (PDVSA), the Venezuelan state-owned and -controlled energy company. The agent/reseller then allegedly used a portion of the markup to bribe PDVSA employees and other Venezuelan officials. According to the DOJ, in as early as 2008, two HMT managers based in Houston knew or should have known that the agent was paying bribes -- the Venezuelan agent allegedly told one of the HMT managers "explicitly" that it was paying bribes -- but the HMT managers still approved commission and subcontracting payments to the agent.

In China, between approximately 1999 and 2011, a HMT Chinese distributor allegedly "paid bribes on almost all transactions in China," including to government officials connected to various Chinese state-owned enterprises. A HMT regional manager responsible for overseeing sales in China allegedly received emails in as early as 2008 that were "sufficient to provide notice that bribes were being paid by the China distributor."

Interestingly, one of HMT's remediation steps highlighted in the declination letter is that the company "severed business relationships with *seven* other agents/distributors based on the findings of its investigation." This step suggests a wider range of questionable conduct than that covered by the declination letter.

As a part of the settlement, HMT agreed to disgorge $2,719,412 in net profits and to "continue to cooperate in any ongoing investigations of individuals."

NCH Corporation

NCH is a Texas-based producer and distributor of industrial supply and maintenance products. According to the declination letter, between February 2011 and mid-2013, NCH's subsidiary in China provided cash, gifts, meals and entertainment to employees of Chinese state-owned and -controlled companies, "in order to influence [their] purchasing decisions." NCH described these benefits in its accounting records as "customer maintenance fees," "customer cooperation fees," and "cash to customer." An NCH executive in the United States allegedly reviewed these expenditures.

Also, in June 2012, NCH allegedly "paid expenses for several employees of a … Chinese government customer for a 10-day trip to various cities in the United States and Canada." Of the 10 days, "only one half-day involved business-related activities," the rest involved sightseeing and other non-business activities. Notably, NCH's Chinese subsidiary "had a sales bid pending" before the government customer when the company arranged the trip (though NCH lost the bid before the trip took place). Moreover, the declination document noted that before the company had paid for the trip, NCH was "advised that the proposed 10-day trip might violate the FCPA."

In total, NCH allegedly "provided things of value worth approximately $44,545 to Chinese government officials in connection with sales that generated profits to NCH of approximately $335,342." NCH agreed to disgorge that amount as a part of the settlement, and to "continue to fully cooperate in any ongoing investigations of individuals arising from this matter."

Noteworthy Aspects

- **Declinations with Bite**: While the DOJ characterizes these matters as "declinations," they represent a new hybrid approach to the resolution of FCPA investigations, complete with signed "letter agreements" detailing the underlying allegations and imposing burdens, including obligations to continue cooperating in any ongoing investigations of individuals and to disgorge all profits made from the illegal conduct. Until now, declinations, at least in the FCPA context, have typically been simple notices sent by the DOJ that informed target companies of the closure of an investigation, but that imposed no conditions or requirements and contained little in the way of support. These declinations with disgorgement are, by contrast, essentially a new form of settlement agreement, in which a target company formally consents to a series of conditions, including the public disclosure of alleged wrongdoing, disgorgement of ill-gotten gains, and certain cooperation obligations, in exchange for the Department declining to prosecute alleged violations of law. Nevertheless, declinations with disgorgement may be preferable to their closest analog, the NPA, for several reasons, including the absence of common NPA requirements such as monetary penalties, directed compliance program enhancements, periodic self-reporting obligations, and broader cooperation expectations.

- **Suitable Cases for Using Declinations with Disgorgement**: Interestingly, NCH and HMT's declinations with disgorgement point to two types of cases that may be well-suited for this settlement mechanism. The NCH matter exemplifies the type of case where a target might have received a simple declination in the past, but which now must also disgorge and continue to cooperate. Although the DOJ does not always specify the amount paid in alleged bribes, the last case we could identify involving the DOJ prosecuting a company for paying foreign officials less than $50,000 in total bribes dates back to 1991, against Eagle Bus Manufacturing, Inc. Also, the DOJ's allegations against NCH -- consisting of gifts and entertainment that may or may not have violated the FCPA and a single overseas trip that probably violated the FCPA but did not lead to any profits -- are not typical of the more serious allegations found in DOJ FCPA settlements from the past few years.

  The HMT matter exemplifies the type of case where the investigation target might have received an NPA or a DPA in the past, but which now has the opportunity to benefit from a declination with disgorgement, if certain conditions are met. Allegations against HMT -- including bribes paid in two countries totaling approximately $500,000, illicit profits of approximately $2.7 million, clear evidence of knowledge by the U.S. parent, and a possible wider pattern of illicit conduct -- are comparable to, and in some cases appear more serious than, allegations found in several recent DOJ DPAs and NPAs, such as Ralph Lauren Corporation, Orthofix International, and Tyson Foods.

Obviously, no reliable principle can be derived from a sample of two, but declinations with disgorgement could conceivably become a common method for DOJ resolutions of FCPA allegations against private companies who satisfy the Department's standard criteria for securing a declination (see bullet below), but where (1) credible evidence indicates that the companies realized a significant profit from the alleged misconduct; or (2) the scope or severity of the alleged misconduct suggests a traditional declination would not be appropriate.

- **Criteria for Securing a Declination with Disgorgement**: The list of factors the DOJ cited to support its declination with disgorgement decisions in HMT and NCH are nearly identical to the factors the Department cited to justify the declinations it provided to Nortek, Akamai Technologies, and Johnson Controls earlier this year, including: (1) voluntary self-disclosure; (2) thorough and comprehensive investigation; (3) full cooperation, including compliance with the Yates Memo requirements; (4) full disgorgement; (5) compliance program enhancements; and (6) full remediation in the form of employee discipline and severing business ties with suspect third parties. The close similarities here raise a host of questions, such as whether these criteria are fixed and how the justification for offering a company a declination with disgorgement differs from the justifications for providing a traditional declination, or offering an NPA. Given that the Nortek, Akamai Technologies, and Johnson Controls declinations each explicitly note that the company "will be disgorging to the SEC the full amount of disgorgement as determined by the SEC," it is possible that the DOJ may plan to require the disgorgement of illicit profits whenever it provides a declination, except in cases where the SEC will already be doing so. In the case of HMT and NCH, each is a privately-held company that does not qualify as an issuer under the FCPA, so the SEC had no jurisdiction to investigate their alleged violations of the statute and seek disgorgement. It is hard to imagine a scenario where the DOJ would pursue a declination with disgorgement against an issuer, as this would seem to be the purview of the SEC. To our knowledge, the DOJ has never pursued an FCPA case against an issuer that the SEC declined to penalize.

Actions Against Individuals

SEC Settles with Former CEO of Harris Corporation's Chinese Subsidiary for Allegedly Authorizing and Allowing Improper Gifts and Hospitality to Chinese Officials

On September 12, 2016, the SEC announced a settlement with Jun Ping Zhang, a former executive of Harris Corporation's Chinese subsidiary, Hunan CareFx Information Technology, LLC (CareFx China). The settlement arose from Ping's alleged violations of the anti-bribery, books-and-records and internal-accounting-controls provisions of the FCPA. Ping consented to the entry of a Cease-and-Desist Order (Order), without admitting or denying the findings set out therein, which not only ordered Ping to cease and desist from committing or causing any current or future violations but also required Ping to pay a $46,000 civil penalty.

Ping was CareFx's Executive Vice President and Chief Technology Officer and CareFx China's Chairman and CEO at the time Harris acquired CareFx in April 2011. The Order alleges that, from April 2011 and April 2012, "Ping directly authorized or indirectly allowed between $200,000 and $1 million in improper gifts to government officials at Chinese state-owned hospitals and regional Departments of Health." The Order provides some detail regarding payments made during the relevant time frame, many of which did not individually exceed $6,500. These officials then awarded over $9.6 million in contracts to CareFx China.

With Ping's knowledge and under his management, CareFx China employees requested reimbursement for improper gifts by submitting invoices labeled as "office expenses," "entertainment" or "transportation." Ping then reviewed and submitted monthly expense summary reports to Harris, knowing that these reports contained false information. He also authorized or was aware of gift payments, which were incorrectly reported in CareFx China's books as sales expenses and consulting fees. These entries were then consolidated into Harris' financial statements.

The Order notes that Ping "did not disclose this bribery scheme to Harris's attorneys during the pre-acquisition due diligence process," including failing "to disclose to Harris any information about the improper gifts or the use of bogus expense invoices used to pay for them." According to the Order, Ping also told employees "not to get caught." However, Harris discovered the conduct within a few months of the acquisition and acknowledged the payments in a Form 10-Q filed on May 4, 2016.

In April 2012, Harris relieved Ping of his duties as Chairman and CEO of CareFx China and terminated his employment three months later. In September 2012, Harris sold CareFx China's outward facing operations and, in June 2015, Harris terminated all CareFx China employees.

As reported in our FCPA Summer Review 2016, Harris received declinations from the DOJ and SEC, which were announced together with Ping's settlement.

SEC Settles with Och-Ziff CEO and CFO

On September 29, 2016, at the same time that it announced the resolution of its FCPA investigation of Och-Ziff, the SEC announced a related settlement with Och-Ziff's CEO, Daniel Och, and the company's CFO, Joel Frank, over charges related to Och-Ziff's improper activities in the DRC and Libya.

The SEC Order found that "Och personally approved the expenditure of funds in two transactions with Och-Ziff's partner in the DRC in which bribes were paid," and that "Frank approved the expenditure of Och-Ziff funds in transactions in which bribes or improper payments were made." The Order notes that "[b]oth Och and Frank were aware of the high risk of corruption in transactions with Och-Ziff's DRC partner in light of his reputation and connections to high level DRC government officials" but "[d]espite these risks, Och approved and Frank authorized Och-Ziff to enter into each of these transactions." Thus, "although neither Och nor Frank knew that bribes would be paid, Och caused Och-Ziff's books and records violations in two DRC transactions, and Frank caused the company's books and records and internal controls violations in connection with the two DRC Partner transactions" and a Libya transaction.

Och will pay nearly $2.2 million to settle the charges, while Frank has agreed to additional proceedings "to determine what, if any, civil penalties" he will face. Both men consented to the Cease-and-Desist Order "without admitting or denying" the findings; however, the SEC Order states that, for the purposes of Frank's additional proceedings, all findings in the Order are accepted by Frank as true.

It is notable that Frank agreed to the settlement prior to a determination of the size of the civil penalty. As both Och and Frank have agreed to cooperate in the continuing SEC investigation, it is possible that Frank's penalty will be in part determined by the extent and value of his participation.

Ongoing Developments and Related Litigation

Miller & Chevalier

Two Courts Challenge Graham Court's Holding that Disgorgement is Subject to the Statute of Limitations

As reported in our FCPA Summer Review 2016, on May 26, 2016, the U.S Court of Appeals for the Eleventh Circuit held in *S.E.C. v. Graham* that the five-year statute of limitations in 28 U.S.C. § 2462 applies to SEC claims for disgorgement or declaratory relief. Although *Graham* is not binding outside of the Eleventh Circuit, it represented a significant challenge to the SEC's stated position that disgorgement is not subject to the general statute of limitations established by Section 2462 because it is an equitable remedy.

Since *Graham* was decided, in addition to the Magyar case discussed below, two other courts have distinguished the *Graham* court's holding. On August 2, 2016, the U.S. District Court for the Eastern District of New York issued a decision in *SEC v. Saltsman* in which the court noted the circuit split on the issue of whether disgorgement is subject to the statute of limitations, discussed that the Second Circuit had not considered the issue and held that disgorgement is not subject to the statute of limitations for two reasons: (1) because disgorgement and forfeiture have different legal meanings; and (2) because disgorgement is not punitive, unlike forfeiture, fines and penalties.

Then, on August 23, 2016, the Tenth Circuit issued a decision in *SEC v. Kokesh* holding that disgorgement is not subject to the statute of limitations so long as it is an equitable remedy. The court explicitly rejected the *Graham* court's approach of defining the word "forfeiture" broadly, preferring to limit the meaning of that word to the Black's Law Dictionary definition: "[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity."

The Eighth Circuit Upholds the Dismissal of Wal-Mart Investor Suit

On July 22, 2016, the Eighth Circuit affirmed a lower court's dismissal of the Wal-Mart Stores, Inc. (Wal-Mart) shareholder suit against directors and officers of the corporation because the complaint did not present specific or detailed facts sufficient to show that the Board failed to make an impartial decision regarding the internal investigation into potential bribery in Mexico. As discussed in our FCPA Summer Review 2014, the derivative suit was largely based on allegations published in a 2012 *New York Times* (Times) article, which reported that Wal-Mart management ignored allegations of corruption in Mexico and allowed the investigation to be run and controlled by an interested in-house lawyer. While Wal-Mart reportedly is cooperating with the DOJ and SEC, it has yet to finalize a settlement and press reports suggest that the company recently rejected a settlement offer of $600 million. However, a number of shareholder class action lawsuits have been filed against the company, its Board of Directors and its Audit Committee. Following the publication of the *Times* article, shareholder suits alleging that numerous past and present Wal-Mart executives and directors breached their fiduciary duties to the company by permitting and hiding the Mexican bribery scheme and compromising the integrity of the internal investigation were filed in the Western District of Arkansas and Delaware state court. The suits also alleged that the defendants caused the company to issue false proxy statements in connection with its 2010 and 2011 Board elections.

The 2012 *Times* article alleged that, in 2005, a former Wal-Mart executive reported alleged bribery by Wal-Mart's Mexican subsidiary, Wal-Mart de Mexico (Wal-Mex) to the company's General Counsel. A resulting internal investigation by Wal-Mart uncovered data corroborating the claims, and investigators drafted an investigation report that reported a reasonable suspicion that Mexican and U.S. laws had been violated. Crucially, there was no record of who received this draft investigation report. Although the investigators recommended a full in-house investigation, control of the investigation passed from the independent Corporate Investigations Unit to Wal-Mex itself under the direction of its General Counsel, who closed the investigation shortly thereafter and found no violations by the General Counsel and his Wal-Mex colleagues.

Wal-Mart disclosed the potential FCPA violations to the DOJ and disclosed both SEC and DOJ actions in its quarterly report, as discussed in our FCPA Autumn Review 2014.

The Eighth Circuit upheld the lower court's finding that the shareholders failed to submit a demand for the Wal-Mart Board to investigate the allegations in their complaint, which is a prerequisite to bringing a derivative suit under Delaware law. The lower court rejected the plaintiffs' claim that the Board could not make the decision impartially; thus, any demand to the Board would be futile. Following the lower court's dismissal, the shareholders appealed the decision, focusing on seven Wal-Mart directors who, according to the complaint, faced a substantial likelihood of personal liability from a lawsuit brought by the corporation and were therefore unable to make an impartial determination regarding whether to take action. However, in order for these directors to face potential personal liability, they must have been aware of the alleged bribery at Wal-Mex prior to the publication of the *New York Times* article. The plaintiffs advanced three theories to support the fact that the directors knew of the misconduct, but the Eighth Circuit rejected each theory.

The Eight Circuit first found that while it was reasonable to infer that the chair of the Audit Committee should have received the investigation report, which discussed findings from the internal investigation, based on his position on the Audit Committee, his knowledge of the report, without more, did not satisfy the heightened pleading requirement. Ultimately, the court ruled that the Audit Committee's obligation to report to the Board does not support a reasonable inference that the Board knew what the Audit Committee Chair had learned from the draft investigative report and reinforced its rejection of the principal that "directors must have known about a problem because someone was supposed to tell them about it."

The court also dismissed the claim that the Board learned of the potential bribery from other executives because while certain officers learned of the draft investigation report findings, the plaintiffs did not demonstrate that officers shared the information with each other.

Finally, the court rejected the legal premise of the shareholders' argument that the Board's knowledge of misconduct can be inferred from the conduct's egregiousness alone. The court concluded that the shareholders pleadings failed to provide concrete factual allegations required to infer actual or constructive Board knowledge in this case.

Rulings in the SEC's Civil Suit against Magyar Telekom Executives

On September 30, 2016, Judge Sullivan of the Southern District of New York ruled on cross motions for summary judgment in the long-running case against three Magyar executives. The court exercised personal jurisdiction over the individuals on the ground that they purposefully availed themselves of U.S. securities exchanges to conceal their alleged wrongdoing. The court also held that the SEC satisfied the "use of instrumentality of interstate commerce" element of the anti-bribery statute because defendants' Sarbanes-Oxley certifications were included in SEC filings made available to the public through the internet. Finally, the court barred some of the civil penalties against two of the executives on statute of limitations grounds.

The case centers on the SEC's civil prosecution of three former Magyar executives for alleged bribery of Macedonian officials. Magyar sold American depository receipts on U.S. securities exchanges and made regular SEC filings through the SEC's online EDGAR system. All three defendants (Elek Straub, Tamás Morvai, and András Balogh) are Hungarian nationals. During the relevant period, Straub, Balogh, and Morvai served, respectively, as CEO, Director of Central Strategic Organization, and Director of Business Development and Acquisitions at Magyar.

For a more detailed factual background, please see our FCPA Winter Review 2013 and FCPA Spring Review 2013. In sum, the SEC's allegations were that the defendants: (1) offered or paid bribes to foreign officials in violation of the anti-bribery provisions of the FCPA; (2) aided and abetted violations of the same provisions; (3) aided and abetted Magyar's failure to maintain accurate books and records and sufficient internal accounting controls; (4) falsified Magyar's books and records; (5) made false or misleading statements to an accountant or auditor.

Specifically, the SEC brought the case in 2011, alleging that from December 2004 through June 2006, the defendants engaged in a scheme to bribe public officials in Macedonia to mitigate the effects of that country's new telecommunications legislation. The defendants allegedly authorized € 4.875 million in bribes, concealed through sham consulting contracts, to Macedonian officials. They allegedly maintained inaccurate books and records that did not reflect the true nature of the consultancy contracts by submitting false Sarbanes-Oxley Act certifications in connection with Magyar's SEC filings and false management representation letters to Magyar's external auditor, PricewaterhouseCoopers (PwC), and made false representations to the company's accounting department.

In 2013, Judge Richard J. Sullivan denied the defendants' motion to dismiss. For discussion of Judge Sullivan's previous 2013 ruling, please see our FCPA Spring Review 2013. Following the denial of the motion to dismiss, the defendants moved for summary judgment and the SEC cross-moved for partial summary judgment.

Personal Jurisdiction

In order to exercise specific personal jurisdiction, the court had to find (1) that defendants had the requisite minimum lawsuit-related contacts with the United States and (2) that the exercise of personal jurisdiction is reasonable under the circumstances of this particular case. For purposes of their summary judgment motion, the defendants conceded that they had minimum contacts with the United States. Nevertheless, the court undertook a minimum contacts analysis because it informed the reasonableness inquiry.

In finding that the defendants had the requisite minimum contacts with the United States, the court pointed to the defendants' role in preparing Magyar's filings with the SEC, noting that Straub signed management representation letters submitted in connection with PwC's audit of Magyar's financial disclosures and Sarbanes-Oxley certifications that were ultimately filed with those disclosures on the SEC's EDGAR website. The court also noted Balogh and Morvai's involvement in the management representation letters. The court ruled that the exercise of specific personal jurisdiction was appropriate under a "purposeful availment" theory, finding that the defendants had purposefully availed themselves of the U.S. securities exchanges to conceal their alleged wrongdoing.

With regard to the reasonableness test, the court found that the United States' significant interest in enforcing its securities laws outweighed the burdens to the defendants of defending a lawsuit in the United States, even though one of the defendants was undergoing treatment for leukemia. According to the court, because the defendants had purposefully directed their activities at U.S. residents, they needed to make a compelling case that the exercise of jurisdiction was unreasonable. The defendants also had argued that the United States had little interest in a case involving the bribery of Macedonian officials by Hungarian corporate executives whereas Hungary and Macedonia have a much greater interest in adjudicating the alleged bribery changes. The court held that the instant litigation did not interfere with efforts of other countries to enforce their laws and added that the United States has an interest in enforcing its laws to protect U.S. investors and to ensure the integrity of its markets.

Use of Instrumentality of Interstate Commerce

The court next held that the SEC had met its burden of proving that the defendants made use of the mails or any means or instrumentality of interstate commerce. Under the FCPA statute Section 78dd-1, the SEC has jurisdiction over issuers like Magyar, as well as their employees and officers. However, under the statute, the SEC must still show that the defendants used the "mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment …"

Recent discovery in the case showed that only a handful of relevant emails were routed through and/or stored on network servers located within the United States and even then, they only involved Balough. The SEC's cross motion for summary judgment argued that even Balough's one email routed through the U.S. server satisfied the subject matter jurisdictional element.

Additionally, the SEC argued an alternative theory -- that the defendants used an instrumentality of interstate commerce by "participating in the preparation of falsified SEC filings that were posted to and accessible from the SEC's EDGAR internet web site." In assessing the SEC's reliance on EDGAR filings to satisfy the jurisdictional element, the court looked at two legal issues: (1) whether the EDGAR filings constitute use of an instrumentality of interstate commerce; (2) to what extent the defendants (as opposed to the company) used an instrumentality of interstate commerce.

The court said the first question was "easily answered," because "[t]he internet unquestionably constitutes an instrumentality of interstate commerce," and thus, since the website in question is registered to the SEC and accessible to investors, a company uses an instrumentality of interstate commerce when it files documents publicly on EDGAR website. Here, the court cited to a number of cases in the Southern District of New York where a defendant's use of the internet, including email, electronic SEC filings, and use of EDGAR, qualified as an instrumentality of interstate commerce.

With regard to the second question, the court said the subject matter jurisdictional element has been liberally interpreted in other contexts and that it is sufficient if the defendant acted with knowledge that the use of an instrumentality of commerce "'will follow in the ordinary course of business' or that ‘such use can reasonably be foreseen, even though not actually intended.'" Here, the defendants allegedly concealed the true nature of contracts and agreements and submitted false management representation letters and certifications, which were the basis for the company's SEC filings. The court noted that the question of whether the "foreseeability inquiry" applies to FCPA's anti-bribery provisions appears to be a case of first impression, but that there was no genuine dispute that Magyar's filings with the SEC were a foreseeable consequence of the defendants' actions. The court added "[a]t the very least [the] [d]efendants should have reasonably foreseen such filings."

Statute of Limitations

The court next reviewed the defendant's arguments that the statute of limitations had run and ruled that part of the SEC's claims for civil penalties were time-barred.

The applicable statute of limitations for FCPA claims brought by the SEC is under 28 U.S.C. § 2462, which states that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." In sum, this provision gives the SEC five years to commence an enforcement proceeding after claims have first accrued, except if the offender is not found within the United States. In 2013, the court had dismissed the defendants' motion to dismiss arguments on statute of limitations because the defendants had not been in the United States during the relevant period. However, the court noted that a recent discovery now indicated that Straub and Morvai had traveled to multiple U.S. cities in 2005, albeit for short spurts.

The SEC's sought relief can be categorized in three parts: (1) injunction prohibiting defendants from violating securities laws; (2) disgorgement of ill-gotten gains plus prejudgment interest; (3) civil penalties. The court first decided whether Section 2462 applies to each of these three categories of relief and then how the defendants' 2005 U.S. travel affected the analysis. The court held that Section 2462 covered the civil penalties and did not cover injunction relief and that the only disputed application of the code was whether it applied to category two above -- disgorgement relief.

Ultimately, the court held that Section 2462 did not apply to disgorgement relief. The defendants had argued that disgorgement is similar to civil forfeiture which is covered under the statute, citing to the Eleventh Circuit's SEC v. Graham decision. We covered that court decision in the FCPA Review Summer 2016, as well as a Client Alert on June 6, 2016. Judge Sullivan noted that the *Graham* court's reasoning was "logical," but that "the Second Circuit has construed disgorgement as an equitable remedy." Because "the weight of authority in [in the Second Circuit] holds that disgorgement ... is not covered by Section 2462," the judge declined to depart from this authority.

After deciding that Section 2462 only applies to the civil penalties sought by the SEC, the court went on to decide whether the recently-discovered fact of the two defendants' brief travel to the United States in 2005 meant that the SEC's claims are time-barred under that statute.

The court concluded that actions covered by Section 2462 are subject to a five-year statute of limitations if the defendant is present in the United States *at any time* during that five-year period. The court rejected the SEC's argument that the five-year limit tolls while the defendant is absent from the United States. In assessing when the SEC's claims "first accrued," the court pointed to the Supreme Court's decision in *Gabelli v. SEC* that "a right accrues when it comes into existence." See the FCPA Spring Review 2013 for our discussion of the Gabelli decision. Thus, the court held that claims for civil penalties against Straub and Morvai that accrued before those defendants' trips to the United States are time-barred by Section 2462. The SEC would have had to bring those actions by October 2010 but did not file the action until December 29, 2011. However, the court said that the actions that took place *after* the defendant's 2005 trips were not time barred. Many of the certifications at the center of the allegations were created after Straub and Morvai's trips to the United States.

The court then turned to the SEC's motion for summary judgment on a few other claims related to falsification of the company's books and records and false statements to the auditor, but noted that disputed issues of fact existed which precluded a summary judgment.

Some commentators have been quick to argue that the decision will mean more aggressive individual enforcement actions brought by the SEC under this jurisdictional argument. However, the unique characteristics in this case suggest its narrow applicability. As an initial matter, the defendants here conceded the minimum contacts point. Despite the court's own analysis on that issue, another defendant might be able to make strong arguments as to the lack of defendant's minimum contacts with the United States. For example, as discussed in our FCPA Spring Review 2013, in February 2013, a federal court dismissed the FCPA action the SEC had filed against a former Siemens executive, calling his connection to the United States far too attenuated to satisfy minimum contacts.

U.S. Agency Developments

SEC Amends Its Internal Rules of Practice Governing Administrative Proceedings

On September 27, 2016, the final amended Rules of Practice governing the SEC's administrative proceedings went into effect. Because many FCPA enforcement actions are resolved in SEC administrative proceedings, the amendments are of significant interest to companies and individuals facing scrutiny by the SEC. As detailed in our FCPA Autumn Review 2015, the SEC initially proposed the amendments in September 2015, soliciting public comment on its planned changes. We noted that since the enactment of the Dodd-Frank Act in 2010, the SEC has continued to rely on expanded authority under the Act to prosecute a significant portion of FCPA-related misconduct via administrative proceedings, presided over by the SEC's own ALJs, rather than through court-filed civil complaints. The SEC's reliance on administrative proceedings has drawn sharp criticism from groups pointing to statistics that show that the SEC has won a higher percentage of cases in administrative proceedings than those it brings in district court. Perhaps in response to these concerns, the SEC proposed amendments to its Rules of Practice. Four of the nineteen amendments proposed generated the bulk of the comments:

Rule 360 (*increasing the length of time provided for discovery and establishing a deadline for the filing of the ALJ's initial decision on the case*)

Rule 360 governs the timing for the prehearing period, a hearing, a period for reviewing hearing transcripts and submitting post-hearing briefs and establishes the deadline for filing a decision by the ALJ. As proposed, the amendment: (1) requires that the SEC issue the Order Instituting Proceedings -- which contains the allegations against the respondent and a timetable for the proceedings -- that establishes a period of 30, 75, or 120 days for the preparation of the ALJ's initial decision, the clock on which would begin to run from the completion of post-hearing or dispositive motion briefing, or a finding of a default; and (2) extends the maximum length of the prehearing period to four, six, and eight months for 30, 75, and 120-day decision deadlines, respectively. Commenters were supportive of both proposals, but many called for longer and more flexible prehearing periods. In adopting the amended rule, the SEC extended the proposed maximum eight-month prehearing period under the 120-day deadline to 10 months in response to the public comments.

Rule 233 (*permitting depositions as a matter of course*)

The proposed amendment allows both respondents and the SEC up to five depositions by right in 120-day proceedings and permits no depositions in either of the two shorter proceedings. Commenters generally favored amending the rule to mirror Rule 30 of the Federal Rules of Civil Procedure, which governs the timing, notice, and methods of taking depositions by oral examination. After considering the comments, the SEC adopted a final rule that included an additional provision permitting either side to move the hearing officer for leave to notice two additional depositions.

Rule 220 (*requiring respondents to state in the answer whether they will assert avoidance or affirmative defenses, including reliance on professional advice*)

The proposed amendment requires the respondent to affirmatively state any reliance defense, "even if such theories are not technically considered affirmative defenses." Commenters roundly rejected this proposal, arguing that it would unfairly require respondents to disclose their trial strategy and would infringe on the attorney work-product privilege. The SEC adopted the amendment over these objections, however, asserting that the change would not "unfairly advantage" the Commission.

Rule 320 (*altering the standard for admissibility of evidence and clarifying the admissibility of certain hearsay evidence is admissible*)

The proposed amendment adds "unreliable" to the list describing types of evidence to be excluded from proceedings and clarified the conditions under which hearsay could be admitted. Most commenters were concerned about the admissibility of hearsay under the proposed rule and favored incorporating the rules governing hearsay from the Federal Rules of Evidence. The Commission rejected such recommendations and adopted the amendment as proposed.

Rule 250 (*expanding the right to summary disposition*)

Though the SEC did not initially propose changes to Rule 250, a commenter persuaded the Commission to amend it by suggesting that respondents be allowed to challenge the SEC's legal theories, as a matter of right, prior to the hearing. Embracing the recommendation, the SEC amended the rule to expand the ability of parties to move for a summary disposition, mirroring Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure.

These updates to the Rules of Practice come at a critical time in light of the scrutiny that the SEC's administrative proceedings have received from observers as well as the courts, including several challenges in recent years to their constitutionality. Most recently, on August 9, 2016, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *Lucia v. SEC*, which addressed the issue of whether SEC's ALJs are "Officers" who must be appointed pursuant to the Appointments Clause of the Constitution. The court held that because SEC ALJs lack the authority to issue "final decisions," they are not Officers within the meaning of the Appointments Clause and their appointment is thus constitutional. The D.C. Circuit's decision follows several district and circuit court rulings that cast doubt on the constitutionality of the SEC ALJ appointment process. (See our FCPA Summer 2016 Review for a discussion of those decisions). Although the D.C. Circuit's decision in *Lucia* is not binding on other circuits, it is the first to address the constitutionality question head on and may influence the outcome of similar challenges in other courts in the SEC's favor.

International Developments

SFO Secures Second DPA

On July 8, 2016, the SFO announced a settlement with an unnamed U.K. small-to-medium-sized enterprise related to bribery in unnamed foreign jurisdictions. The U.K. enterprise -- referred to as "XYZ" in pleadings -- agreed to pay a total of approximately £6.5 million in disgorgement and financial penalties to settle the SFO's charges and agreed to ongoing cooperation with the SFO, including self-reporting to the agency regarding its anti-corruption compliance program. This settlement is the SFO's second DPA, following its first DPA in November 2015 with Standard Bank Plc, as reported in our FCPA Winter Review 2016.

The SFO charged XYZ with conspiracy under the U.K.'s prior anti-bribery laws (Section 1 of the Criminal Law Act of 1977, which applies to conduct prior to the UKBA's entry into force in 2011) and with failure to prevent bribery under the UKBA (Section 7). In its announcement, the SFO stated that it could not currently reveal XYZ's identity because of ongoing, related legal proceedings, and the SFO described the activities giving rise to the enforcement action only in general terms, noting that the misconduct took place from 2004 to 2012 (straddling the enactment of the UKBA) and involved employees and agents engaging in systemic bribery to secure at least 28 contracts in foreign jurisdictions. Similarly, in approving the settlement, Lord Justice Leveson (the same judge who presided over the Standard Chartered DPA) at Southwark Crown

Court described the underlying conduct only in general terms, but noted that the majority of bribes were offered at the instigation of agents and that the "bribing mechanism was not particularly sophisticated or redolent of a corporate cover-up."

The SFO's announcement and court pleadings focused primarily on justifying XYZ's monetary penalties. Specifically, the SFO stated that it was faced with a choice as to whether to impose a penalty that would force XYZ into insolvency and the announcement noted circumstances suggesting that the penalty it ultimately imposed was in recognition of XYZ's limited financial means, "exemplary cooperation," compliance program enhancements and response upon discovering the misconduct. In particular, the SFO and Lord Justice Leveson noted that XYZ's parent -- a U.S.-registered company referred to as "ABC" in pleadings -- surfaced the misconduct in the course of implementing a global compliance program in 2011-2012 and that upon learning of the issue, ABC immediately retained a law firm to conduct an internal investigation. The court pleadings also noted that the law firm assisted ABC with voluntarily disclosing the issue to the SFO in a written report in early 2013, after which the SFO conducted its own investigation.

Regarding XYZ's financial position, the pleadings noted that XYZ had limited means and ability such that the maximum amount it would have been able to provide towards paying any financial obligation imposed without becoming insolvent was estimated to be £352,000. The pleadings further stated that ABC had agreed to cover a portion of the roughly £6.2 million disgorgement amount, which XYZ agreed to pay over the course of the three-to-five year DPA. The pleadings noted that ABC entered into an agreement with XYZ to cover roughly £1.9 million of the total disgorgement amount in light of dividends that ABC had received from XYZ. The pleadings also provided details on the penalty and disgorgement calculations, noting that the starting point for the applicable financial penalty was just under £16.4 million, given the type and extent of the offences, but that the DPA's penalty of £6.5 million "sufficiently marks the offending and is itself fair, reasonable and proportionate." Lord Justice Leveson stated that his decision was based on a policy to reward self-reporting and implementation of compliance programs such that those efforts are "seen to be worthwhile."

Notably, Lord Justice Leveson emphasized that XYZ's parent company, ABC, was not involved in XYZ's misconduct and suggested that the parent company's actions were a key factor in the settlement. Specifically, Lord Justice Leveson noted that "ABC was entirely ignorant of what had been happening at XYZ and its conduct when it had intimation of the facts has been beyond reproach." The court also noted that ABC's "behavior and its support for XYZ have been important features in allowing the case to be resolved in the way it which it has." Thus, this enforcement action demonstrates that a parent company may play a prominent role in resolving U.K. enforcement actions against a subsidiary -- even if it is not implicated in the subsidiary's misconduct -- and that the parent company may earn substantial credit for its subsidiary by actively implementing its compliance program abroad and by taking prompt remedial action when misconduct is discovered.

Brazil Update

The last quarter saw several important developments related to the Brazilian government's anti-corruption efforts, including "Operation Car Wash," the ongoing corruption probe related to Petrobras, Brazil's national oil company. Particularly notable is the rejection of Dutch oil-services company SBM 's leniency accord by a Federal Public Prosecutor's Office (Ministério Público Federal, or MPF) review board; the permanent removal of President Dilma Rousseff, concluding the impeachment proceedings against her; the judicial approval of corruption charges against Former President Luiz Inácio Lula da Silva; the arrest of former Finance Minister Guido Mantega; and the expulsion from the Chamber of Deputies of former chamber President Eduardo Cunha.

MPF Review Board Rejects SBM's Settlement of Bribery Allegations

SBM, a Netherlands-based oil services firm specializing in floating off-shore production and storage facilities, faced another obstacle in its ongoing attempt to settle allegations that the company paid bribes to officials at Petrobras. On September 1, 2016, the Fifth Chamber for Coordination and Review and Anti-Corruption (Fifth Chamber), a review board within the MPF, rejected a settlement that SBM had reached with Brazilian authorities earlier this year.

In July 2016, SBM entered into an out-of-court settlement, known as a leniency accord, with the MPF, Brazil's Ministry of Transparency, Oversight and Control (Transparency Ministry); created by President Michel Temer in May 2016, the General Counsel for the Republic and Petrobras. In exchange for a discharge of legal responsibility relating to allegations that SBM paid bribes to Petrobras executives from 1996 to 2012, the leniency accord required SBM to provide information to aid in the Brazilian government's continued investigation and to adopt additional compliance protocols. Additionally, SBM agreed to pay $328.2 million to Petrobras and $13.6 million to the Brazilian government.

On September 1, 2016, the Fifth Chamber rejected the leniency accord, highlighting various issues that need to be addressed before the agreement can be approved. In particular, the review board found that the deal failed to provide authorities with enough information to assist in further investigations of corruption at Petrobras. It also expressed concern that the deal might not be adequate to cover damages identified in the future.

In a clarification statement released following the review board's decision, the Transparency Ministry recognized the Fifth Chamber's authority to review the leniency accord, but defended the deal. It noted that the leniency accord complied with all of the requirements of Brazil's Clean Company Act. In addition, it emphasized that SBM had already provided investigators with a terabyte of information, which led to the identification of other parties involved with Operation Car Wash. According to the Ministry, investigators may only use this information in the future if the leniency accord stays in effect.

The General Counsel for the Republic and the MPF have appealed the Fifth Chamber's decision. The Fifth Chamber confirmed its decision and referred the matter to a higher level review board within the MPF -- the Higher Council -- for further consideration.

Impeachment of President Rousseff

On August 31, 2016, Brazil's Senate voted 61-20 to convict Former President Rousseff following charges of budget mismanagement, resulting in her permanent removal from office. Our FCPA Spring Review 2016 and FCPA Summer Review 2016 discussed links between Rousseff and Operation Car Wash, as well as the Senate's vote to commence impeachment proceedings against her. The impeachment process began on May 12, 2016, when the Senate voted 55-22 to put Rousseff on trial for employing illegal bookkeeping maneuvers to cover up a growing budget deficit. Since May, Michel Temer, formerly the Vice President, has served as interim President. Temer, a member of the Democratic Movement Party, will complete Rousseff's second term, which concludes at the end of 2018. The Senate's August 31st vote marks the end of a 13-year rule by Rousseff's Workers' Party.

Operation Car Wash Ensnares former President and Finance Minister

Since Rousseff's removal, the Workers' Party has faced additional scrutiny -- including corruption charges against former President Lula and the arrest of former Finance Minister, Guido Mantega.

On September 20, 2016, Judge Sérgio Moro, who oversees Operation Car Wash, accepted corruption charges against former President Lula. Federal prosecutors brought the charges on September 14, 2016, alleging that Lula and his wife received more than $1 million in improvements to a beachfront apartment from a construction company, OAS S.A. (OAS), in exchange for promising OAS lucrative contracts with Petrobras. Lula denies any wrongdoing.

On September 22, 2016, Brazilian police arrested Guido Mantega, Brazil's Finance Minister from 2006 to 2014, on charges that he requested an unauthorized payment of approximately $2 million from Brazilian billionaire Eike Batista to pay Workers' Party campaign debts. Mantega served as Finance Minister under both Lula and Rousseff and was the chairman of Petrobras in 2012.

Expulsion of the President of the Chamber of Deputies

On September 12, 2016, the Chamber of Deputies, the lower house of the Brazilian legislature, voted 450-10 to expel former Chamber of Deputies President Eduardo Cunha for failing to disclose offshore assets to a congressional panel. In May, the Supreme Court indicted Cunha, who had been spearheading efforts to remove Rousseff from office, on charges of collecting millions of dollars in bribes in connection with Operation Car Wash. As a result, Cunha formally resigned as President of the Chamber of Deputies in July, but maintained his seat as a member, which afforded him continued immunity from prosecution under Brazilian law. The September 12th vote bars Cunha from holding public office for 10 years and strips him of special legal protections granted to sitting lawmakers, which is bound to affect his pending prosecution, increasing the likelihood of a plea agreement that may lead to indictments of additional individuals.

Mexico Adopts a New Anti-Corruption Framework

On July 18, 2016, Mexico published a comprehensive body of new anti-corruption legislation, implementing Mexico's 2015 Constitutional reform on anti-corruption. Mexico's new anti-corruption framework aims to address the country's past failings regarding corruption by addressing the need for additional corruption regulations and by targeting both the supply and demand sides of corruption. In particular, the legislation creates a National Anti-Corruption System administered by a Coordinating Committee responsible for, among other things, managing the development of anti-corruption guidelines at all levels of Mexico's government, from the Federal level to the local/municipal level. Notably, the Coordinating Committee will include participation by citizens through a Citizens Participation Committee whose representative will preside over the Coordinating Committee. The Coordinating Committee will also include representatives from the Mexican judiciary and several government bodies (such as a prosecutor and a representative from the transparency ministry).

In order to address corruption among public officials, the laws require public officials to disclose their assets, potential conflicts of interest, and tax returns. It also increases sanctions for violations of the laws by public officials, extends the statute of limitations for "serious administrative offenses" from three to seven years, and subjects "serious" cases to the jurisdiction of the Federal Tribunal for Administrative Justice.

The framework also targets corruption in the private sector by, among other things, encouraging companies to adopt elements of anti-bribery compliance programs, creating a Special Anti-Corruption Prosecutor with investigative powers, increasing sanctions for companies violating the laws (*e.g.*, debarment and liquidation), offering a reduction in penalties for companies that voluntarily disclose wrongdoing and cooperate with enforcement officials, and creating a public registry of parties debarred from participating in government procurement.

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Upcoming Speaking Engagements

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10.26.16	FCPA Blog Conference: Talk Or Teeth: What Does Global Enforcement Really Mean? (Marc Alain Bohn)
11.01.16	2016 International Trade Council - Houston (Timothy P. O'Toole and Richard A. Mojica)
11.17.16	CI's 2nd Andean Summit on Anti-Corruption Compliance & Enforcement (Matteson Ellis)
12.02.16	ACI's 33rd International Conference on the FCPA (Kathryn Cameron Atkinson)
12.05.16	ACI's Seventh Annual New York Forum on Economic Sanctions (Barbara D. Linney)
01.31.17	ACI's 11th Houston Forum on the FCPA (Kathryn Cameron Atkinson) *Registration discount code: S10-855-855L17.S

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