

A low-angle, upward-looking perspective of several modern skyscrapers with glass facades. The buildings are rendered in a stylized, wireframe-like manner with black outlines. A prominent diagonal stripe of solid green color runs from the bottom left towards the top right, bisecting the image. The sky is a light gray.

NAVIGANT

FCPA Q3 2016
— QUARTERLY
REPORT



GLOBAL INVESTIGATION AND COMPLIANCE

ELLEN ZIMILES

Managing Director
Financial Services Advisory & Compliance
Segment Leader and Head of Global
Investigations & Compliance
212.554.2602
ellen.zimiles@navigant.com

JOHN LOESCH

Director
Global Investigations & Compliance
202.973.3235
john.loesch@navigant.com

JAY PERLMAN

Director
Global Investigations & Compliance
202.973.3220
jay.perlman@navigant.com

ALEX SHEA

Associate Director
Global Investigations & Compliance
212.554.2682
alex.shea@navigant.com

navigant.com

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FCPA Q3 2016 — QUARTERLY EVENTS

I. FCPA Q3 REPORT - QUARTERLY EVENTS

During the recently completed third quarter of 2016, the Department of Justice ("DOJ") resolved two matters and the Securities and Exchange Commission ("SEC") resolved ten matters. Financial penalties and disgorgement ordered in these actions exceeded \$487 million. The disparity in the number of cases being brought by the two regulators is not surprising as the SEC has a lesser burden of proof, and in most of the cases being brought by the SEC, the charges are focused on violation of the internal controls and books and records provisions of the FCPA and not on the substantive bribery charge, which is much harder to prove.

In addition to the continuing trend of companies using third party intermediaries to make illegal payments, the cases also involved the provision of improper gifts, travel and entertainment, as well as charitable contributions. Additionally, this quarter contained the first FCPA case against a hedge fund and a case in which a whistleblower was improperly impeded in his efforts to communicate with the SEC about alleged FCPA violations. In imposing sanctions in several of the cases, both the SEC and DOJ referenced company's cooperation efforts and DOJ specifically referenced the standards outlined in the FCPA Pilot Program.

Finally, statements by U.S. and international regulators made clear that enforcement of anti-bribery and corruption regulations will continue and that the authorities will make every effort to protect whistleblowers, promote international cooperation, and use deferred prosecution agreements to resolve matters.

II. ENFORCEMENT ACTIVITY IN Q3 2016

A. Johnson Controls

On July 11th, Johnson Controls Inc. (NYSE: JCI) agreed to pay approximately \$14 million in disgorgement and penalties to the SEC to settle charges that it violated the books and records and internal controls provisions of the FCPA related to improper payments made by its Chinese subsidiary, China Marine.¹ The subsidiary allegedly used sham vendors to make illicit payments to employees of Chinese government-owned entities. Johnson Controls Inc. voluntarily reported the activity to both the SEC and DOJ, conducted a thorough investigation, cooperated with DOJ, and took remedial actions to address the conduct. As a result, Johnson Controls received a declination later in accordance with the provisions of the FCPA Pilot Program.²

1. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Johnson Controls, Inc. (July 11, 2016) (File No. 3-17337).
2. Declination Letter, U.S. Dep't. of Justice Re: Johnson Controls (June 21, 2016) (<https://www.justice.gov/criminal-fraud/file/874566/download>).

B. LATAM Airlines Group S.A.

On July 25th, LATAM Airlines Group S.A. (NYSE: LFL) entered into a three year deferred prosecution agreement with DOJ pursuant to which they agreed to pay a criminal fine of \$12.75 million and engage an independent compliance monitor to resolve FCPA violations. LATAM also agreed to pay the SEC \$6.74 million in disgorgement and \$2.7 million in prejudgment interest. The violations stemmed from the airline company paying bribes to union officials in Argentina in an attempt to resolve employment issues at its subsidiary in Argentina, LAN Argentina S.A.³ The SEC previously settled FCPA-related charges against Ignacio Cueto Plaza on February 4, 2016. Cueto, CEO of LAN Airlines, authorized improper payments to a third-party consultant with the understanding that it was possible that the consultant would pass a portion of the payments along to union officials in Argentina.

C. Key Energy Services, Inc. (“DPA”)

On August 11th, Key Energy Services, Inc. (“Key Energy”) (NYSE: KEG) agreed to pay the SEC \$5 million in disgorgement to settle charges that the company’s Mexican subsidiary, Key Mexico, violated the internal controls and books and records provisions of the FCPA related to the improper recording of illicit payments made to an employee at Mexico’s state-owned oil and gas provider, Pemex. Key Mexico reportedly funneled hundreds of thousands of dollars in illicit payments to the Pemex employee through an intermediary consulting firm, which resulted in Key Mexico receiving approximately \$60 million in contract funding from Pemex.⁴

D. AstraZeneca PLC

On August 30th, AstraZeneca PLC (NYSE: AZN) agreed to settle SEC charges that it violated the books and records and internal controls provisions of the FCPA as a result of its wholly-owned subsidiaries in China and

Russia making illicit payments to doctors at state-owned agencies in China and Russia in an attempt to boost drug sales. The improper payments were in the form of cash, gifts, travel, conference support and other benefits. In addition, employees in the China subsidiary made cash payments to local government officials to reduce or avoid certain fines. AstraZeneca PLC agreed to pay approximately \$4.3 million in disgorgement, \$822,000 in prejudgment interest, and a \$375,000 civil penalty. The SEC noted that AstraZeneca PLC provided significant cooperation and enhanced its internal controls and compliance program during the investigation, including increasing compliance budgets and staff.⁵

E. Jun Ping Zhang

On September 12th, Jun Ping Zhang, the former chairman/CEO of Harris Corporation’s (NYSE: HRS) subsidiary in China, CareFx China, agreed to pay a \$46,000 civil penalty to settle FCPA charges that stemmed from paying bribes to Chinese government officials in an attempt to increase sales. Jun Ping Zhang is a US resident and citizen. The SEC did not charge Harris Corporation citing its prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC’s investigation.⁶

F. Nu Skin Enterprises

On September 20th, the SEC announced that Nu Skin Enterprises, Inc. (NYSE: NUS) had agreed to pay approximately \$766K to settle charges that it violated the internal controls and books-and-records provisions of the FCPA. The Chinese subsidiary of Nu Skin Enterprises, Inc., Nu Skin (China) Daily Use & Health Products Co. Ltd., made an illicit payment to a charity in an attempt to “obtain the influence of a high-ranking Chinese Communist party official to impact an on-going provincial agency investigation.”⁷

3. SSEC Order Instituting Cease and Desist Proceedings, In the Matter of LAN Airlines S.A. (July 25, 2016) (File No. 3-17357).

4. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Key Energy Services, Inc. (Aug 11, 2016) (File No. 3-17379).

5. SEC Order Instituting Cease and Desist Proceedings, In the Matter of AstraZeneca PLC (Aug 30, 2016) (File No. 3-17517).

6. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Jun Ping Zhang (Sept. 13, 2016) (File No. 3-17535).

7. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Nu Skin Enterprises, Inc., (Sept. 20, 2016) (File No. 3-17556).

G. Anheuser-Busch InBev SA/NV

On September 28th, Anheuser-Busch InBev SA/ NV (NYSE: BUD) agreed to pay the SEC \$6 million to settle allegations that it violated the books and records and internal controls provisions of the FCPA and attempted to impede a whistleblower's ability to report the FCPA violations to the SEC. The SEC alleged that Anheuser-Busch InBev's former minority-owned joint venture used third-party sales promoters to make illicit payments to government officials in India in an effort to increase the sales and production of its products there. Additionally, according to the SEC, an Anheuser-Busch InBev subsidiary entered into a separation agreement with a whistleblower in 2012, which contained nondisclosure guidelines and a financial damages provision that the SEC contended wrongfully impeded the whistleblower from continuing to voluntarily communicate with the SEC. Anheuser-Busch InBev agreed to report to the SEC on the operation of the company's FCPA and anti-corruption compliance program for a period of two years following the agreement.⁸

H. Och-Ziff Capital Management Group

On September 29th, the SEC announced that Och-Ziff Capital Management Group ("Och-Ziff") agreed to pay approximately \$173 million in disgorgement and \$26 million in interest to the SEC and engage an independent compliance monitor to settle FCPA charges.⁹ The hedge fund also entered into a three-year deferred prosecution agreement with the DOJ in a parallel criminal proceeding carrying a criminal penalty of \$213 million.¹⁰ In addition, both Och-Ziff's CEO and CFO individually agreed to pay significant fines.¹¹ These agreements resolve bribery charges in connection with Och-Ziff's business dealings with foreign government officials in Africa and is the first time that a hedge fund has agreed to a settlement involving FCPA violations. SEC enforcement director Andrew Ceresney stated that "Och-Ziff engaged in complicated, far-reaching schemes to get special access and secure significant deals and profits through corruption."

I. HMT LLC and NCH Corporation

On September 29th, the DOJ released declination letters for two private Texas companies, HMT LLC and NCH Corporation, under its FCPA Pilot Program.¹² HMT LLC is a manufacturer and supplier of oil and gas storage tanks that paid bribes to foreign government officials in Venezuela and China. HMT LLC agreed to disgorge approximately \$2.7 million. NCH Corporation is a manufacturer of cleaning products that paid bribes including cash and other things of value to foreign government officials in China. NCH Corporation agreed to disgorge \$335,342. These declination letters are the first declinations under the DOJ FCPA Pilot Program to include a disgorgement payment and are also the first declinations to be issued to private companies.

J. GlaxoSmithKline plc

On September 30th, GlaxoSmithKline (NYSE: GSK) plc agreed to pay the SEC \$20 million to settle alleged violations of the internal controls and recordkeeping provisions of the FCPA by its subsidiary, GlaxoSmithKline (China) Investment Co Ltd, and a joint venture, Sino-American Tianjin Smith Kline & French Laboratories Ltd, in China. The two entities were involved in paying millions of dollars in illicit payments to foreign officials in China in an attempt to increase sales. The improper payments, facilitated by third-party vendors, were in the form of gifts, improper travel and entertainment, shopping excursions, and cash.¹³

III. WHAT THE REGULATORS ARE SAYING

Whistleblowers, international cooperation, and deferred prosecution agreements were topics of conversation as leaders from the DOJ, SEC, and U.K. SFO hit the speaker's circuit this quarter.

At the Sixteenth Annual Taxpayers Against Fraud Conference, SEC Enforcement Director Andrew Ceresney called the SEC's whistleblower program "a game changer"

8. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Anheuser-Busch InBev SA/NV (Sept. 28, 2016) (File No. 3-17586).

9. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Och-Ziff Capital Management Group LLC (Sept. 29, 2016) (File No. 3-17595).

10. Id. at 107-09. The SEC agreed to forego the \$173 civil penalty due to the \$213 million criminal penalty imposed as part of the company's settlement with DOJ.

11. The CEO agreed to pay \$2.2 million to settle the charges; the CFO's fine has yet to be determined. Press Release, U.S. SEC, Och-Ziff Hedge Fund Settles FCPA Charges (Sept. 29, 2016) (www.sec.gov/news/pressrelease/2016-203.html).

12. Declination Letter, U.S. Dep't. of Justice Re: HMT LLC (Sept. 29, 2016) (<https://www.justice.gov/criminal-fraud/file/899116/download>). Declination Letter, U.S. Dep't. of Justice Re: NCH Corporation (Sept. 29, 2016) (<https://www.justice.gov/criminal-fraud/file/899121/download>).

13. SEC Order Instituting Cease and Desist Proceedings, In the Matter of GlaxoSmithKline plc (Sept. 30, 2016) (File No. 3-17606).

14. Andrew Ceresney, Director, SEC Division of Enforcement, Speech at the Sixteenth Annual Taxpayers Against Fraud Conference, The SEC's Whistleblower Program: The Successful Early Years (Sept. 14, 2016) www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html.

that has had a “transformative impact . . . both in terms of the detection of illegal conduct and in moving our investigations forward quicker and through the use of fewer resources.” Ceresney said that the whistleblower program has received more than 14,000 tips from whistleblowers in every state and from over 95 foreign countries. FCPA related tips have increased from 115 in fiscal year 2012 to 186 in fiscal year 2015. Ceresney believes that the whistleblower program has increased self-reporting of FCPA violations by companies because there is a very real risk of the SEC learning of a potential FCPA issue via a whistleblower and there are negative “consequences” if the SEC learns of misconduct from “other sources.”¹⁴

At the International Bar Association Annual Conference, SEC Chair Mary Jo White emphasized that vigorous enforcement of the FCPA is a high priority for the SEC and DOJ. She called the fight against bribery and corruption “a global effort” that requires “significant and multi-faceted cooperation” from international partners. She cited the VimpelCom enforcement action as a case where the SEC “received significant cooperation from numerous countries” which was “an exceptional global effort in a very important case.” Ms. White said that charging individuals involved in bribery schemes continues to be a priority and “remains one of the most powerful deterrents in any enforcement area.”¹⁵

At the same IBA conference, Attorney General Loretta Lynch also talked about the need for international cooperation. “Serving justice increasingly requires a global outlook” in today’s interconnected world. She cited cooperative efforts with Switzerland in the FIFA case and also the Kleptocracy Asset Recovery Initiative as examples where the DOJ has had recent success working with law enforcement counterparts around the world.¹⁶

Principal Deputy Attorney General David Bitkower also sounded the international cooperation theme at the ABA Southeastern White Collar Crime Institute. Bitkower said that the DOJ Criminal Division is “strengthening the coalitions we have formed with our international law enforcement and regulatory counterparts” and that they are “leveraging our relationships with both U.S. and foreign regulators more and more.” He also talked about how the DOJ Fraud Section has publicly released information about several declination decisions as part of a “greater effort to promote both transparency and accountability.” This “enables companies to make more rational decisions when they learn of foreign corrupt activity” because they know that “a decision not to disclose wrongdoing will result in a significantly different outcome than if the company had voluntarily disclosed the conduct” and cooperated. This “increased transparency in our FCPA charging decisions will encourage voluntary corporate self-disclosure of overseas bribery and thus more prosecutions of the individuals responsible for those crimes, and ultimately less crime.”¹⁷

Over in the U.K., Serious Fraud Office Director David Green spoke at the Cambridge Symposium on Economic Crime. Green called Deferred Prosecution Agreements a “new tool” that the SFO is learning how to use. He cited the two completed agreements, Standard Bank and XYZ, and said to “be patient” as there are others coming. He also said that cooperation is a prerequisite for a DPA and that the “traditional tactics of the litigator have no place in DPA negotiations.” A DPA should be a “transparent agreement that a court will accept, reflecting the interest of justice.”¹⁸

SFO General Counsel Alun Milford appeared at the Handelsbatt Conference 2016 and also talked about deferred prosecution agreements. Milford said that “judicial approval of a deferred prosecution agreement is hard-won” and the “rewards do not come for free,” but rather are “won through a combination of co-operation and reform.”¹⁹

15. Mary Jo White, SEC Chair, Keynote Remarks at the Legal Practice Division Luncheon International Bar Association Annual Conference, Securities Regulation in the Interconnected, Global Marketplace (Sept. 21, 2016) www.sec.gov/news/speech/securities-regulation-in-the-interconnected-global-marketplace.html.

16. Loretta Lynch, Attorney General, Keynote Address at the Morning Session of the International Bar Association Annual Conference (Sept. 21, 2016) www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-international-bar-association-s-2016.

17. David Bitkower, Principal Deputy Assistant Attorney General, Remarks at the American Bar Association Southeastern White Collar Crime Institute (Sept. 8, 2016) www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-david-bitkower-delivers-remarks-american-bar.

18. David Green, Director, UK Serious Fraud Office, Report to the Cambridge Symposium on Economic Crime 2016 (Sept. 5, 2016) www.sfo.gov.uk/2016/09/05/Cambridge-symposium-2016.

19. Alun Milford, UK Serious Fraud Office General Counsel, Remarks at the Handelsbatt Conference 2016, Deferred Prosecution Agreements – the perspective from England and Wales (Sept. 14, 2016) www.sfo.gov.uk/2016/09/14/deferred-prosecution-agreements-perspective-england-wales.

At the Global Investigations Review Live, Ben Morgan, Joint Head of Bribery and Corruption at the SFO, talked to defense bar attendees about the importance of building trust and understanding with the SFO. “If you have played the half-hearted cooperation game with us on one case, you inevitably carry that with you,” he said. Morgan said the SFO welcomes cooperation not because it is easier than a prosecution, but “to reach resolutions that are sufficiently severe, but that protect innocent people, and incentivize others to come forward and confront the wrongdoing that has taken place in their organisations.” He said that it is “a high-stakes gamble” for a company that does not cooperate.²⁰

20. Ben Morgan, Joint Head of Bribery and Corruption, UK Serious Fraud Office, Speech at the Global Investigations Review, It's time to talk: trust, relationships and the SFO (Sept. 15, 2016) www.sfo.gov.uk/2016/09/15/ben-morgan-global-investigations-review-live.