

A low-angle, upward-looking perspective of several modern skyscrapers with glass and steel facades. The buildings are rendered in a stylized, wireframe-like manner with black outlines. The sky is a solid, vibrant green, creating a strong contrast with the dark building structures. The composition is dynamic, with lines converging towards the top of the frame.

NAVIGANT

FCPA Q2 2016  
— QUARTERLY  
REPORT



## GLOBAL INVESTIGATION AND COMPLIANCE

### ELLEN ZIMILES

Managing Director  
Financial Services Advisory & Compliance  
Segment Leader and Head of Global  
Investigations & Compliance  
646.227.4612  
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

### About Navigant

Navigant Consulting, Inc. (NYSE: NCI) is a specialized, global professional services firm that helps clients take control of their future. Navigant's professionals apply deep industry knowledge, substantive technical expertise, and an enterprising approach to help clients build, manage and/or protect their business interests. With a focus on markets and clients facing transformational change and significant regulatory or legal pressures, the Firm primarily serves clients in the healthcare, energy and financial services industries. Across a range of advisory, consulting, outsourcing, and technology/analytics services, Navigant's practitioners bring sharp insight that pinpoints opportunities and delivers powerful results. More information about Navigant can be found at [navigant.com](http://navigant.com).

# FCPA Q2 2016 — QUARTERLY REPORT

## I. SECOND QUARTER 2016 FCPA ACTIVITY SUMMARY

During the recently completed second quarter of 2016, the Department of Justice ("DOJ") resolved three matters, the same number as during the first quarter, and the Securities and Exchange Commission ("SEC") resolved four matters, down from eight in the first quarter. Financial penalties and disgorgement ordered in these actions exceeded \$24 million. In resolving its four actions, the DOJ appeared to be following the principles outlined in the Department of Justice Fraud Section Foreign Corrupt Practices Act ("FCPA") Enforcement Plan and Guidance ("DOJ Pilot Program").<sup>1</sup> In addition, during the second quarter, the IRS issued a ruling noting that disgorgement paid to the SEC in an FCPA enforcement action is not tax deductible and the 11th Circuit Court of Appeals held that SEC disgorgement actions are subject to a five year statute of limitations.

## II. ENFORCEMENT ACTIVITY IN Q2 2016

### A. Las Vegas Sands

On April 7th, the SEC announced that the Las Vegas Sands Corp. (NYSE: LVS) agreed to pay a \$9 million penalty to settle FCPA charges. The resort and casino company also agreed to retain an independent consultant for two years to review its internal controls, record keeping and financial reporting policies and procedures, and its ethics and compliance functions. The charges stemmed from allegations that Las Vegas Sands failed to report roughly \$62 million in expenses paid to an outside consultant hired to conduct business in China and Macau. The unnamed consultant acted as a middle man to hide the company's role in the purchase of property and a Chinese basketball team.<sup>2</sup>

1. See, DOJ Launches FCPA Self-Reporting Program, Ellen Zimiles and Jay Perlman, Navigant April 2016 [http://www.navigant.com/-/media/WWW/Site/Insights/GIC/GIC\\_FCPASelfRepPilotProg\\_TL\\_0416\\_nocrops.pdf](http://www.navigant.com/-/media/WWW/Site/Insights/GIC/GIC_FCPASelfRepPilotProg_TL_0416_nocrops.pdf). The FCPA Pilot Program builds on the "Yates Memo", which was released in September 2015 and emphasizes the importance of seeking accountability from individuals in corporate fraud matters as opposed to just seeking redress from corporations. DOJ Principles Regarding Corporate Cooperation and Individual Accountability for Corporate Wrongdoing, Ellen Zimiles and Jay Perlman, Navigant November 2015

[http://www.navigant.com/-/media/WWW/Site/Insights/GIC/GIC\\_YatesMemoClientAlert\\_TL\\_1115\\_FINAL.PDF](http://www.navigant.com/-/media/WWW/Site/Insights/GIC/GIC_YatesMemoClientAlert_TL_1115_FINAL.PDF)

2. In the Matter of Las Vegas Sands Corp., SEC Administrative Proceeding No. 3-17204, April 7, 2016, available at <https://www.sec.gov/litigation/admin/2016/34-77555.pdf>.



B. Akamai and Nortek Receive SEC Non-Prosecution Agreements and DOJ Declination Letters

In early June, both the diversified industrial company, Nortek, Inc. (NASDAQ: NTK), and the internet services company, Akamai Technologies, Inc. (NASDAQ: AKAM), became the first companies under the FCPA Pilot Program to receive Declination Letters. The Declination Letters were issued after the companies self-reported their involvement in making illicit payments to Chinese officials, fully cooperated with the U.S. government, and took remedial actions to address the conduct. Both companies also agreed to non-prosecution agreements with the SEC in which Akamai Technologies agreed to pay \$652,000 in disgorgement and \$19,400 in pre-judgment interest, while Nortek agreed to pay \$291,000 in disgorgement and \$30,000 in pre-judgment interest.<sup>3</sup>

C. Biomet Breaches Deferred Prosecution Agreement (“DPA”)

On June 6th, the DOJ issued a Status Report regarding the 2012 DPA for the medical device manufacturer, Biomet, Inc., now known as Zimmer Biomet Holdings, Inc. (NYSE: ZBH). The Status Report stated that the company had breached its 2012 DPA because of conduct in Brazil and Mexico, which was disclosed to the DOJ after the date of the DPA, but predated the DPA. The announcement may signal a move by the DOJ to revoke the DPA and/or prosecute the company.

In 2012, Biomet agreed to pay a \$17.3 million fine to the DOJ and accepted the terms of the three year DPA, which was subsequently extended for a fourth year. It was also required to pay \$5.5 million in fines to the SEC. Biomet allegedly made illicit payments to foreign government doctors in multiple countries from 2000 through 2008.<sup>4</sup>

D. Analogic Corporation DOJ Non-Prosecution Agreement

On June 21st, the DOJ entered into a non-prosecution agreement with BK Medical ApS, a subsidiary of Analogic Corporation (NASDAQ: ALOG), in which BK Medical ApS, agreed to a non-prosecution agreement and payment of a \$3.4 million criminal penalty. In a related action, Analogic agreed to pay \$7.7 million in disgorgement and \$3.8 million in pre-judgment interest to the SEC. According to the DOJ, Analogic, through its distributor, sold medical equipment to hospitals or other medical facilities controlled by the government of Russia, provided inflated invoices to its Russian clients, and in turn made payments to third parties who provided no services to BK or Analogic, as a means to further BK’s business interests. Some of these payments ultimately went to doctors employed by Russian state-owned enterprises and facilitated BK’s continued business in Russia. The DOJ further noted that BK also engaged in similar schemes in five other countries.

The DOJ reported that while BK did not initially disclose certain relevant facts that it learned in the course of its internal investigation, by the conclusion of the investigation, they had provided the DOJ all relevant facts known to it, including information about individuals involved in the FCPA misconduct. As a result, BK received partial credit of 30%, as opposed to the full 50% allowed under the DOJ Pilot Program.<sup>5</sup>

### III. REGULATORY GUIDANCE

A. IRS Ruling that Disgorgement Paid in FCPA Enforcement Action is not Deductible

On May 6th, the Office of the Chief Council of the IRS announced that a disgorgement payment by the SEC in a corporate FCPA enforcement action was not tax deductible, concluding that the purpose of disgorgement is primarily punitive, rather than equitable relief.<sup>6</sup> It will be interesting to see how this announcement may affect how disgorgement is characterized in regulatory actions, especially in light of SEC v. Graham discussed below.

3. SEC Announces Two Non-Prosecution Agreements in FCPA Cases, SEC Press Release, June 7, 2016, available at [www.sec.gov/news/pressrelease/2016-109.html](http://www.sec.gov/news/pressrelease/2016-109.html). Also see DOJ Declination Letter to Nortek, June 3, 2016, available at <https://www.justice.gov/criminal-fraud/file/865406/download> and DOJ Declination Letter to Akamai, June 6, 2016, See: <https://www.justice.gov/criminal-fraud/file/865411/download>.

4. Status Report, U.S. v. Biomet, Inc., Case No. 1:12-cr-080, United States District Court, Columbia District, June 6, 2016.

5. Analogic Subsidiary Agrees to Pay More than \$3.4 Million to Resolve Foreign Bribery Charges, DOJ Press Release, June 21, 2016, See: <https://www.justice.gov/opa/pr/analogic-subsidiary-agrees-pay-more-14-million-resolve-foreign-bribery-charges>. Also see Analogic NPA, available at <https://www.justice.gov/opa/file/868771/download>. Also see, In the Matter of Analogic Corporation and Lars Frost., SEC Administrative Proceeding No. 3-17305, June 21, 2016, available at <https://www.sec.gov/litigation/admin/2016/34-78113.pdf>.

6. I.R.S. G.C.M. 201619,008 (May 6, 2016), available at <https://www.irs.gov/pub/irs-wd/201619008.pdf>

## B. Sally Yates Speech Defending the Yates Memo

On May 10th, Deputy Attorney General (“DAG”) Sally Q. Yates delivered a speech at the New York City Bar Association White Collar Crime Conference<sup>7</sup> in which she provided a progress report on the implementation of the principles contained in the Yates Memo. In addressing concerns that were raised by the private bar subsequent to the memo’s publication, the DAG noted (i) companies are making “real and tangible efforts...to identify facts about individual conduct”; (ii) there had been no claims that companies have been forced to waive privilege; and (iii) the focus on individuals have helped compliance officers steer companies and their employees toward best practices and higher standards. The DAG also stated that the focus on individual culpability is leading to a more uniform, systematic and sustained investigative tactics. In addition, the tenets of the Yates Memo have also found their way to the Antitrust Division as well as other agencies.

## C. SEC v Graham – Disgorgement and Declaratory Relief are Subject to Five-Year Limitations Period

On May 26th, The United States Court of Appeals for the Eleventh Circuit ruled that 28 U.S.C. § 2462, the five-year statute of limitations applicable to SEC actions, applies to SEC claims for disgorgement or declaratory relief.<sup>8</sup> Historically, the SEC has asserted that disgorgement is an equitable remedy and thus not subject to the statute of limitations. The Eleventh Circuit’s ruling conflicts with the D.C. and Ninth Circuits’ interpretations which held that disgorgement is an equitable remedy, and is thus not subject to the statute of limitations. It remains to be seen to what extent the Graham case will impact the SEC’s litigation strategy both in terms of seeking review by the Supreme Court and in each individual investigation.

7. Deputy Attorney General Sally Q. Yates, Keynote Address at the New York City Bar Association 5th Annual White Collar Crime Institute, Women in White Collar Kickoff Reception (May 9, 2016), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association>.

8. SEC v. Graham, 21 F. Supp. 3d 1300, (11th Cir. 2016).