



FINANCIAL SERVICES ADVISORY AND COMPLIANCE

FCPA Q3 2018 — QUARTERLY REPORT

During the third quarter, there were seven corporate Foreign Corrupt Practices Act (FCPA) settlements with disgorgement and penalties nearing \$1.97 billion. These corporate actions included another hiring practices case (Credit Suisse), a repeat offender (Stryker), and a global settlement involving a state-owned entity (Petrobras). In addition, two individuals entered into civil settlements with the SEC and two individuals pleaded guilty to FCPA-related conspiracy counts for bribing officials at Venezuela's state-owned energy company, Petroleos de Venezuela S.A. (PDVSA). Also, two companies received declination letters this quarter from the Department of Justice (DOJ) pursuant to the FCPA Corporate Enforcement Policy — Guralp Systems Limited¹ and The Insurance Corporation of Barbados Limited.²

There was also an important court decision this quarter. On July 12, 2018, a case against two former Och-Ziff Capital Management executives was dismissed on statute of limitations grounds. The court found that all claims involved conduct that occurred more than five years prior to the SEC's filing of the case and that the relief sought by the SEC was "at least partially penal" so was time-barred in line with the Supreme Court's recent holding in *Kokesh v. SEC*.³ The court also rejected the SEC's position that its suit could go forward seeking injunctive relief finding that an injunction "would operate at least partly as a penalty," so also time-barred for the same reason.⁴

I. ENFORCEMENT ACTIVITY IN Q3 2018

Corporate Actions

A. Beam Suntory

On July 2, Beam Suntory Inc. (NYSE: BEAM), an Illinois-based spirits maker, agreed to pay the SEC disgorgement and civil monetary penalties totaling more than \$8.1 million for violations of the FCPA's books and records and internal controls provisions. In accepting the settlement offer, the SEC considered Beam Suntory's voluntary disclosure of the misconduct, cooperation with the investigation, and timely remedial actions. The SEC alleged that from 2006 to 2012, Beam Suntory, through its Indian subsidiary, used third-party promoters to market its products and to make improper payments to government officials to secure orders and placement of Beam products in retail stores. Beam India's management complied with the scheme, inflating invoices to reimburse the third parties and then falsely recording the expenses, which were then consolidated

1. U.S. Dept. of Justice, Letter to Guralp Systems Limited, August 20, 2018, <https://www.justice.gov/criminal-fraud/page/file/1088621/download>.

2. U.S. Dept. of Justice, Letter to The Insurance Corporation of Barbados Limited, August 23, 2018, <https://www.justice.gov/criminal-fraud/page/file/1089626/download>.

3. *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

4. *SEC v. Michael L. Cohen and Vanja Baros*, 17-CV-430, (E.D.N.Y.), July 12, 2018, <https://dlbpbizgnk95t.cloudfront.net/1062000/1062887/ochziff.pdf>.



into Beam Suntory's books and records.⁵ Beam Suntory is the second spirits company to violate the FCPA based on improper conduct in India, as Diageo PLC agreed to pay the SEC more than \$16 million back on July 27, 2011.⁶

B. Credit Suisse Group AG

On July 5, the SEC announced that Credit Suisse Group AG (Credit Suisse)(NYSE: CS) agreed to pay \$30 million to the SEC and a \$47 million criminal penalty to the DOJ to resolve FCPA violations.⁷ As part of the agreement, Credit Suisse (Hong Kong) Limited (Credit Suisse HK) entered into a non-prosecution agreement (NPA) with the DOJ and will continue to cooperate with the DOJ to enhance its compliance program. The investigation discovered that from at least 2007 to 2013, Credit Suisse HK hired and promoted employees who were relatives and friends of key foreign government officials in the Asia-Pacific region. In return for the employment, the officials would then hire or retain Credit Suisse HK for investment banking business and other business. Credit Suisse HK, despite policies prohibiting hiring of candidates related to or referred by officials from state-owned entities, circumvented these policies. The investigation determined that because of the corrupt hiring practices, Credit Suisse HK obtained deals totaling tens of millions of dollars in revenue. The SEC noted that Credit Suisse and Credit Suisse HK's internal accounting controls were not sufficiently maintained and implemented to enforce those policies designed to prohibit the improper activity.⁸ It is noted that Credit Suisse, despite having not voluntarily disclosed the misconduct and despite not receiving full cooperation credit, still received an NPA and a 15% reduction in penalty amount from the bottom end of the sentencing guidelines.

C. Legg Mason Inc.

On Aug. 27, as part of the ongoing FCPA matter involving Société Générale S.A. (SocGen) and Legg Mason Inc. (NYSE: LM), the SEC announced that Legg Mason agreed to pay \$34 million to settle violations of the internal controls provisions of the FCPA.⁹ This comes

after the DOJ announcement on June 4 detailing an NPA with Legg Mason for similar violations.¹⁰ This matter stemmed from Permal Group Ltd. (Permal), a Legg Mason subsidiary investment management firm that had partnered with SocGen to solicit business from Libyan state-owned institutions. Permal was involved in the illicit payments that SocGen sent to a Libyan broker, as Permal managed the funds invested by Libyan institutions. Legg Mason, through Permal, earned approximately \$31.6 million in profits from these investments.

D. Sanofi

On Sept. 4, Sanofi (NYSE: SNY), a global pharmaceutical company headquartered in Paris, agreed to pay the SEC \$25.2 million to resolve violations of FCPA books and records and internal controls provisions. Sanofi subsidiaries in Kazakhstan and the Middle East used kickback schemes involving distributors and various other improper schemes to induce healthcare professionals at public hospitals to increase their prescriptions of Sanofi products. The subsidiaries generated the funds for the illicit payments through fake expense reports for travel and entertainment, clinical trials, consulting fees, product samples, and distributor discounts. Sanofi failed to maintain proper internal accounting controls and compliance program to detect the illegal activity.¹¹ Charles Cain, the SEC's FCPA unit chief noted that "[b]ribery in connection with pharmaceutical sales remains as a significant problem despite numerous prior enforcement actions" and "more work needs to be done to address the particular risks posed in the pharmaceutical industry."¹²

E. United Technologies

United Technologies (NYSE: UTX), on Sept. 12, agreed to pay the SEC \$13.9 million, which included \$9.9 million in disgorgement plus prejudgment interest and a \$4 million civil penalty, to resolve alleged violations of the FCPA's books and records and internal controls provisions. The SEC alleged that United Technologies, which provides technology products and services for the aerospace industries, through its subsidiary, Otis

5. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Beam Inc., n/k/a Beam Suntory Inc., July 2, 2018, File No. 3-18568.

6. SEC Press Release, "SEC Charges Liquor Giant Diageo with FCPA Violations," July 27, 2011, <https://www.sec.gov/news/press/2011/2011-158.htm>.

7. Credit Suisse announced on June 6, 2018 that it agreed to pay the DOJ \$47 million because of FCPA violations. However, the DOJ and SEC did not make an announcement until July 5, 2018.

8. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Credit Suisse Group AG, July 5, 2018, File No. 3-18571.

9. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Legg Mason, Inc., August 27, 2018, File No. 3-18684.

10. U.S. Department of Justice Press Release, "Legg Mason Inc. Agrees to Pay \$64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials," June 4, 2018, <https://www.justice.gov/opa/pr/legg-mason-inc-agrees-pay-64-million-criminal-penalties-and-disgorgement-resolve-fcpa-charges>.

11. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Sanofi, September 4, 2018, File No. 3-18708.

12. SEC Press Release, "Sanofi Charged with FCPA Violations," September 4, 2018, <https://www.sec.gov/news/press-release/2018-174>.

Elevator Company, unlawfully paid Azerbaijan officials to increase sales of elevator equipment from 2012 to 2014. The Otis Elevator Company also was found to have hired Russian agents without conducting any due diligence in Azerbaijan. In addition, the SEC's investigation found that from 2009 to 2013, United Technologies, through a joint venture with International Aero Engines (IAE), retained a Chinese sales agent, without conducting proper due diligence, who had no background or expertise in the airline industry. During this time, the Chinese sales agent requested a \$2 million advance in commission that IAE paid without receiving any supporting documentation. Shortly after, the agent provided confidential documentation regarding a competitor's bid that helped IAE win a large contract to provide engines to a Chinese state-owned airline. IAE paid the Chinese sales agent approximately \$55 million in commissions over the four-year period. The SEC also alleged that United Technologies improperly

funded travel and entertainment expenses for foreign officials. Employees were able to circumvent internal procedures for expense review by mis-categorizing the entertainment component or including the cost as a part of the contract.¹³

F. Petróleo Brasileiro S.A.

On Sept. 27, Petróleo Brasileiro S.A. (Petrobras) (NYSE: PBR) as part of a coordinated global settlement, agreed to pay an \$853.2 million criminal penalty, plus \$933.5 million in disgorgement and prejudgment interest for a total settlement amount of \$1.78 billion. Petrobras also entered into an NPA with the DOJ. Under the agreement, the DOJ and SEC will each receive \$85.32 million of the criminal penalty (10% each), and the Ministerio Publico Federal in Brazil will receive \$682.56 million (80%).¹⁴ The SEC stated that the disgorgement and interest payment may be reduced by payments

13. SEC Order Instituting Cease and Desist Proceedings, In the Matter of United Technologies Corporation, September 12, 2018, File No. 3-18745.

14. U.S. Department of Justice Press Release, "Petróleo Brasileiro S.A. — Petrobras Agrees to pay more than \$850 million for FCPA Violations," September 27, 2018, <https://www.justice.gov/opa/pr/petrleo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>.



made by Petrobras to the class-action settlement fund in the matter of *Petrobras Securities Litigation*, No. 14-cv9662 (S.D.N.Y.).¹⁵ The \$1.78 billion in disgorgement and criminal penalties is the largest financial settlement in an FCPA enforcement action, and the \$933 million disgorgement payment to the SEC is the largest for an FCPA case.

The SEC order found that from at least 2003 to April 2012, Petrobras senior executives, whom Brazilian government employees had appointed to positions of power, worked with contractors and suppliers to inflate the cost of infrastructure projects by billions of dollars. This occurred as Petrobras conducted large-scale expansion of its oil- and gas-producing infrastructure. The contractors paid Petrobras senior executives billions in kickbacks, which the senior executives used to pay the Brazilian officials who helped them obtain their positions at Petrobras. The senior executives submitted false and misleading documentation for internal filings to the SEC and, due to the overcharges for kickbacks, inflated property, plant, and equipment in Petrobras financial statements. The senior executives also received bribes from other companies trying to win or negotiate more favorable contracts with Petrobras. Petrobras also made improper payments to Brazilian politicians to stop a parliamentary inquiry into Petrobras contracts and to fund a campaign for a politician overseeing the location of a future Petrobras refinery. As part of its remediation and cooperation with the investigations, Petrobras replaced its board of directors and executive board and implemented increased governance, cutting ties with certain individuals and disciplining other employees.¹⁶

G. Stryker Corporation

On Sept. 28, Stryker Corporation (Stryker) (NYSE: SYK) agreed to pay the SEC \$7.8 million and to cease and desist from committing violations of the books and records and internal controls provisions of the FCPA. The SEC order detailed violations of internal accounting and record keeping by Stryker's wholly owned subsidiaries operating in India, China,

and Kuwait. In India, the SEC found that from 2010 to 2015 Stryker's wholly owned subsidiary did not maintain documentation for more than a quarter of the transactions reviewed. Stryker India also submitted inflated invoices to private hospitals that paid Stryker India at the previously negotiated lower rates and passed the additional expense on to patients and insurers. In China, Stryker's subsidiary sold products through sub-distributors that were not vetted, approved, or trained, a requirement in Stryker's policies. Stryker China employees at times falsified records to hide the usage of an unauthorized sub-distributor. In addition, a Stryker distributor in Kuwait that sold products to Kuwait's Ministry of Health improperly paid at least \$32,000 for Kuwaiti healthcare professionals to attend Stryker events, when Stryker had already directly paid the lodging, meals, and transportation costs for these individuals.¹⁷ The SEC enforcement action is the second against Stryker as the SEC previously charged Stryker on Oct. 24, 2013. In the previous action, Stryker paid \$13.2 million to settle charges related to subsidiaries bribing doctors, healthcare professionals, and other government officials to gain or retain business.¹⁸

Individual Actions

A. Luis Carlos De Leon-Perez

On July 16, Luis Carlos De Leon-Perez pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering. De Leon-Perez bribed officials at Venezuela's state-owned energy company PDVSA and also laundered bribe money others paid to the officials.¹⁹

B. Juan Carlos Castillo Rincon

On Sept. 13, Juan Carlos Castillo Rincon, former manager at a Houston, Texas-based freight-forwarding company, pleaded guilty to one count of conspiracy to violate the FCPA after admitting that he bribed an official at PDVSA.²⁰

15. SEC Order Instituting Cease and Desist Proceedings, In the Matter of *Petróleo Brasileiro S.A. - Petrobras*, September 27, 2018, File No. 3-18843.

16. U.S. Department of Justice Press Release, "Petróleo Brasileiro S.A. — Petrobras Agrees to pay more than \$850 million for FCPA Violations," September 27, 2018.

17. SEC Order Instituting Cease and Desist Proceedings, In the Matter of *Stryker Corporation*, September 28, 2018, File No. 3-18853.

18. SEC Order Instituting Cease and Desist Proceedings, In the Matter of *Stryker Corporation*, October 24, 2013, File No. 3-15587.

19. Department of Justice Press Release, "Former Venezuelan Official Pleads Guilty to Money-Laundering Charge in Connection With Bribery Scheme," July 16, 2018, <https://www.justice.gov/opa/pr/former-venezuelan-official-pleads-guilty-money-laundering-charge-connection-bribery-scheme-0>.

20. Department of Justice Press Release, "Business Executive Pleads Guilty to Foreign Bribery Charge in Connection With Venezuelan Bribery Scheme," September 13, 2018, <https://www.justice.gov/opa/pr/business-executive-pleads-guilty-foreign-bribery-charge-connection-venezuelan-bribery-scheme>.

C. Joo Hyun Bahn

On Sept. 6, the SEC announced that Joo Hyun Bahn, a New Jersey real estate broker, settled FCPA charges related to his attempt to bribe a foreign government official in conjunction with the sale of a commercial building in Vietnam. Bahn agreed to pay \$225,000 in disgorgement, which was deemed satisfied by the forfeiture and restitution ordered at his sentencing in a related criminal proceeding the same day.²¹

D. Patricio Contesse González

On Sept. 25, the SEC announced that Patricio Contesse González, the former CEO of Sociedad Química y Minera de Chile, S.A. (SQM), agreed to pay \$125,000 to resolve FCPA violations. SQM (NYSE: SQM) previously agreed to settle FCPA charges with the SEC and paid \$30.5 million on Jan. 13, 2017. Between 2008 and 2015, SQM donated to dozens of foundations closely tied to or controlled by Chilean politicians and paid nearly \$15 million to vendors despite a lack of evidence of any goods or services received. SQM admitted to falsifying its books and records to hide payments to politicians, logging them as consulting and professional services that SQM never received.²² The SEC's order as to González alleges that he caused SQM to violate the FCPA and circumvented internal accounting controls. González, through a CEO account, paid Chilean politicians and other prominent individuals approximately \$14.75 million in improper payments between 2008 to 2015. González personally initiated the creation of false contracts and invoices to support the illicit payments. As the CEO at the time, González was responsible for SQM's internal accounting controls and wrote SQM's code of ethics. González circumvented these controls to make the payments to Chilean politicians. González agreed to pay \$125,000 to resolve the charges.²³

II. WHAT THE ENFORCERS ARE SAYING?

In an otherwise quiet summer, the DOJ made a significant policy announcement on July 25, 2018. At the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets, Deputy Assistant Attorney General Matthew S. Miner announced that the DOJ will apply the principles contained in the FCPA Corporate Enforcement Policy (the Policy) to acquiring companies that uncover misconduct by the acquired company in connection with pre- or post-acquisition anti-corruption due diligence. Thus, there now is a presumption of a declination to prosecute an acquiring or successor company that uncovers wrongdoing by the acquired company, where the former promptly reports that conduct to the DOJ, fully cooperates with the DOJ, and effectively remediates the problem.

Miner noted that the DOJ/SEC *Resource Guide to the U.S. Foreign Corrupt Practices Act*, published in 2012, states that the DOJ “will give meaningful credit ... and, in appropriate circumstances, ... may consequently decline to bring enforcement actions” against successor companies that disclose and remediate misconduct. Miner acknowledged DOJ's awareness that use of the word “may” in the Guide creates uncertainty for successor companies that discover misconduct before, during, or after an acquisition/merger. To alleviate this uncertainty, Miner announced that the DOJ will apply the principles enshrined in the Policy to M&A situations — presumption of declination if prompt self-reporting, active cooperation with the DOJ, implementation of effective remedial measures, and disgorgement of any ill-gotten gains associated with the wrongdoing.

Miner also urged acquiring companies that uncover corruption during the due diligence process to use the FCPA Opinion Procedures²⁴ before completing an acquisition. These procedures allow a company to obtain an opinion from the attorney general as to whether certain prospective conduct

21. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Joo Hyun Bahn, a/k/a Dennis Bahn, September 6, 2018, File No. 3-18728.

22. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Sociedad Química y Minera de Chile, S.A., January 13, 2017, File No. 3-17774.

23. SEC Order Instituting Cease and Desist Proceedings, In the Matter of Patricio Contesse González, September 25, 2018, File No. 3-18839.

24. <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/frgncrpt.pdf>.

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conforms to DOJ's present enforcement policy regarding the anti-bribery provisions of the FCPA. The FCPA opinion process can take time and slow down a transaction, but Miner feels that "it sometimes makes sense to slow down to assess risks." The FCPA opinion procedures have not been used since 2014, most likely because of the time the process takes and due to the increased transparency by the DOJ in its charging documents and other guidance promulgated by the department over the past few years.

This extended application of the Policy demonstrates the DOJ's continued effort to incentivize companies to disclose potential wrongdoing and to cooperate with the DOJ in its quest to hold those individuals responsible for the wrongdoing accountable. As Miner stated, the DOJ doesn't want "the specter of enforcement to be a risk factor that impedes [M&A] activity by good actors, and instead cedes the field to noncompliant companies." Miner believes that "this approach provides companies and their advisers greater certainty when deciding whether to go forward with a foreign acquisition or merger, as well as in determining how to approach wrongdoing discovered subsequent to a deal."²⁵

Deputy Assistant Attorney General Miner spoke again on Sept. 27, 2018, at the 5th Annual Global Investigations Review New York Live Event. Miner took the occasion to highlight some of the achievements of the Fraud Section during the past year, with the Policy high on his list. He pointed to the Insurance Corporation of Barbados Limited and the Guralp Systems Limited declinations as being noteworthy because they were both cases with aggravating circumstances — senior executives were implicated in the improper conduct — yet both cases were declined under the Policy. Miner went on to mention the previously announced extension of the Policy to the M&A situation and the anti-piling on policy announced in May of this year. He also pointed out the first coordinated resolutions with France (Societe Generale) and Singapore (Keppel Offshore & Marine Ltd.) and highlighted the Petrobras global settlement for the proposition that global enforcement and cooperation with foreign authorities is on the rise. Miner ended his FCPA-focused remarks by pointing out that "due in large part to the Department's focus on individual accountability, more and more FCPA cases are being resolved before the courts," with five trials scheduled over the next seven months.²⁶

25. Deputy Assistant Attorney General Matthew S. Miner Delivers Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption in High Risk Markets, July 25, 2018, <https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th>.

26. Deputy Assistant Attorney General Matthew S. Miner Delivers Remarks at the 5th Annual GIR New York Live Event, New York, N.Y., September 27, 2018, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division>.