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### FCPA 2016 Year in Review

In 2016, a year after the sharp decrease in both the number and size of corporate FCPA resolutions, the DOJ's and SEC's enforcement activity rebounded, as reflected by a record number of corporate FCPA resolutions and the collection of a record \$2.43 billion in total fines and penalties. This banner year was driven by the resolution of several multijurisdictional corruption investigations, including the largest global corruption case in history.

There were six other key highlights from 2016 FCPA enforcement:

1. The DOJ announced only one enforcement action against an individual in connection with its 11 corporate resolutions, notwithstanding the issuance of the Yates Memo in September 2015. The SEC, meanwhile, settled eight individual enforcement actions, all of which were against current or former employees of a company that entered into a related corporate FCPA resolution with the SEC.
2. A new DOJ initiative, and similar SEC policy pronouncements, that offer incentives to companies that self-disclose FCPA violations, cooperate with the resulting investigations, and remediate compliance issues.
3. A record year of SEC whistleblower awards, including the first-ever FCPA-related award, and an enforcement action against a company that allegedly sought to chill an FCPA whistleblower.
4. Developments in FCPA-related civil litigation, including subjecting disgorgement to a five-year statute of limitations in SEC proceedings and two rulings regarding the scope of FCPA jurisdiction against foreign nationals.
5. Intensified DOJ and SEC cooperation with international anticorruption regulators and an increase in anticorruption activity outside the United States.
6. Possible changes in FCPA enforcement following the election of Donald J. Trump as President of the United States.

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## INTRODUCTION

In 2016, the most significant Foreign Corrupt Practices Act (“FCPA”) story was the record 25 corporate resolutions and \$2.43 billion in corporate fines and penalties collected by the Department of Justice (“DOJ”) and the Securities Exchange Commission (“SEC”). This banner year of corporate FCPA enforcement included the resolution of four large multijurisdictional investigations by the DOJ and SEC for more than \$395 million each. The highlight was the Brazilian construction company Odebrecht’s agreement to pay the United States, Brazil, and Switzerland a combined total penalty of at least \$3.5 billion to resolve bribery charges, making it the largest global corruption resolution in history. This illustrates a clear and important trend in international corruption enforcement—increasing cooperation among enforcement authorities across jurisdictions.

Against the backdrop of resolving several large corporate cases, the DOJ’s efforts to hold individuals accountable for FCPA violations have lagged. In late 2015, the DOJ received much publicity when it affirmed its pledge to prosecute individuals in connection with corporate resolutions in what is commonly referred to as the Yates Memo. However, in 2016, the DOJ announced the filing of FCPA charges against only two individuals and the receipt of guilty pleas from only six individuals, only one of which related to a concurrent corporate resolution—underscoring the challenges the DOJ faces in establishing individual liability in connection with alleged corporate wrongdoing. Meanwhile, the SEC entered into eight resolutions with individuals, all of which were against current or former employees of a company that entered into a related corporate FCPA resolution with the SEC.

Another highlight of 2016 was the more aggressive attention to anticorruption issues abroad. China, France, India, Mexico, and South Korea adopted enhanced anticorruption laws, and several other countries—such as Brazil and the United Kingdom—increased the intensity of their anticorruption enforcement. Meanwhile, the DOJ and SEC coordinated investigations with their anticorruption counterparts around the world, as demonstrated by their cooperation with Brazilian authorities in the Odebrecht, Braskem, and Embraer matters and with Dutch

authorities in the VimpelCom matter. Such cooperation also led to an increase in the number of companies facing multiso-vereign investigations related to the same underlying conduct.

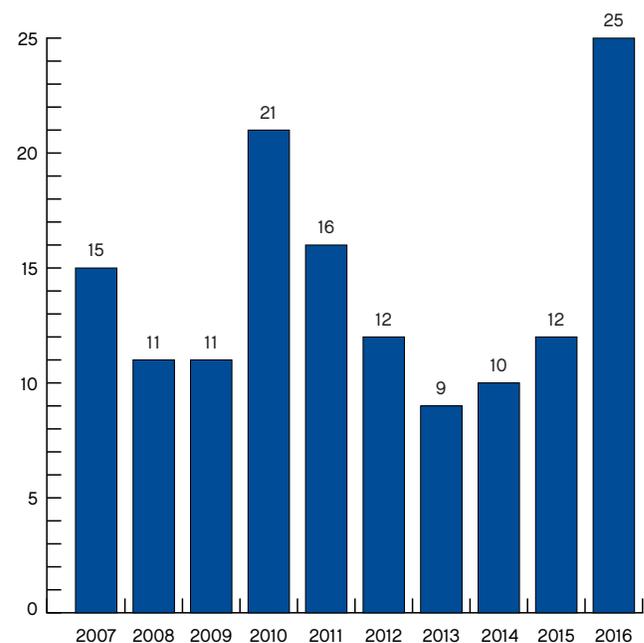
Finally, 2016 saw the election of Donald J. Trump as President of the United States. Since that election, commentators have cited remarks made by Trump in 2012 criticizing FCPA enforcement as unfair to U.S. businesses and have speculated that the new Administration will trigger a downturn in enforcement. As discussed below, however, it is too early to forecast a decline in FCPA enforcement. Indeed, there is good reason to regard predictions of the FCPA’s demise as exaggerated, and those who might choose to see the new Administration as an opportunity to relax anticorruption compliance efforts may do so at their own peril.

## RECORD YEAR FOR CORPORATE FCPA ENFORCEMENT

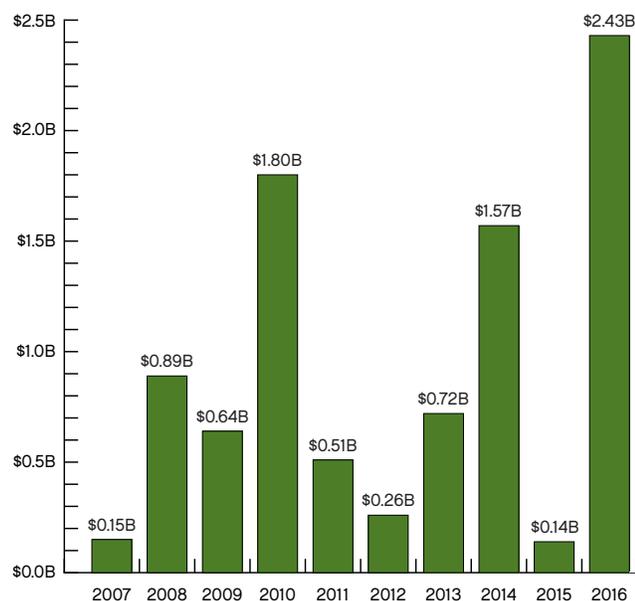
### DOJ and SEC Collected a Record \$2.43 Billion in Fines and Penalties

In 2016, the DOJ and SEC resolved a record 25 corporate FCPA cases against companies, more than double the 12 corporate FCPA resolutions they announced on average each year from 2011 to 2015.<sup>1</sup>

**Chart 1: Number of DOJ and SEC FCPA Corporate Resolutions, 2007–2016**



**Chart 2: Total DOJ and SEC FCPA Corporate Fines and Penalties, 2007–2016**



The combined value of fines and disgorgements for all corporate FCPA resolutions in 2016 was a record \$2.43 billion, close to four times the average amount of fines and disgorgements the DOJ and SEC collected annually between 2011 and 2015.<sup>2</sup>

**Chart 3: Top Five DOJ and SEC FCPA Corporate Resolutions, 2016**

NO.	COMPANY	DATE	DOJ	SEC	TOTAL
1	Teva Pharmaceutical Industries Ltd. (Pharmaceuticals: Israel)	December 22	\$283.2M	\$236.0M	\$519.2M
2	Odebrecht S.A. (Construction: Brazil)	December 21	\$260.0M–\$450.9M <sup>3</sup>	\$94.8M	\$419.8M–\$609.8M
3	Och-Ziff Capital Management Group LLC (Finance: U.S.)	September 29	\$213.1M	\$199.0M	\$412.1M
4	VimpelCom Ltd. (Telecom: Netherlands)	February 18	\$230.1M	\$167.5M	\$397.6M
5	Embraer S.A. (Aerospace: Brazil)	October 24	\$107.3M	\$98.2M	\$205.5M

### DOJ Resolved 11 Corporate Cases for a Record \$1.33 Billion in Fines and Penalties

The DOJ's 11 corporate resolutions resulted in \$1.33 billion in fines and penalties—with settlements ranging from \$3.4 million to \$283.2 million and an average resolution amount of \$121.3 million.<sup>4</sup> Of the 11 DOJ corporate resolutions, there was one guilty plea by a parent and its subsidiary, six deferred

prosecution agreements (“DPA”), and four nonprosecution agreements (“NPA”).

The DOJ's rebound in enforcement statistics is likely attributable to several factors, including the resolution of several large multijurisdictional investigations that had been in progress for several years and the rush to resolve investigations before the end of President Barack Obama's Administration. Additionally,

the DOJ is beginning to reap the benefits of its expanded FCPA enforcement organization. In 2016, the DOJ doubled the number of prosecutors devoted to FCPA prosecutions, and in 2015, the United States tripled the number of Federal Bureau of Investigation (“FBI”) agents devoted to investigating foreign bribery cases, so it now has a much larger enforcement infrastructure that can devote more attention to pending and new cases.<sup>5</sup>

### DOJ Demand for Corporate Monitors

The DOJ’s focus on corporate compliance, highlighted by the hiring of a dedicated compliance consultant in November 2015, contributed to the imposition in 2016 of several intricate post-resolution reporting requirements for companies that resolved FCPA investigations. In February 2016, the Chief of the Criminal Division’s Fraud Section explained that the DOJ increased its emphasis on corporate compliance to be “more adept at evaluating corporate claims about compliance” and to “reduce corporate crime.”<sup>6</sup> Highlighting the DOJ’s emphasis on compliance, all of the DOJ’s seven corporate FCPA resolutions involving a DPA or guilty plea required the company to hire an independent monitor for a three-year term. This trend is significant because post-resolution reporting obligations—particularly those relating to an independent monitor—are costly and can impact the finality of a resolution.

### SEC Resolved a Record Number of Cases and Collected \$1.10 Billion in Penalties

The SEC resolved 24 corporate FCPA cases, including 14 without a corresponding DOJ resolution, and collected \$1.10 billion in disgorgement, interest, and penalties—with settlements ranging from \$320,000 to \$236 million and an average settlement value of \$45.7 million. The SEC’s 2016 FCPA resolutions demonstrate its continued emphasis on conduct in China. Twelve corporate resolutions involved activities in China—a significant increase from 2014 and 2015.<sup>7</sup>

The SEC also continued its trend of resolving corporate FCPA investigations through administrative proceedings instead of civil court actions. Of the SEC’s 24 corporate FCPA resolutions, 17 (71%) were administrative actions, four (17%) were settled through civil complaints filed in federal courts, and three (12%) were resolved through NPAs or DPAs. By comparison, in 2010, the SEC resolved only one FCPA action in an administrative

proceeding.<sup>8</sup> In 2014, the SEC announced a shift in agency policy to make administrative proceedings “the new normal” due to enhanced powers granted to the SEC in the 2010 Dodd-Frank Act.<sup>9</sup> Reliance on administrative proceedings provides the SEC with greater autonomy by allowing it to avoid judicial scrutiny of its settlements.

### Historic Corporate Settlements

In 2016, the DOJ and SEC announced four of the top 10 FCPA resolutions in history (measured by settlement amount), each with a settlement over \$395 million.

Chart 4: Top Ten DOJ and SEC FCPA Corporate Resolutions

NO.	COMPANY	YEAR	TOTAL DOJ AND SEC SETTLEMENT AMOUNT
1	Siemens AG	2008	\$800.0M <sup>10</sup>
2	Alstom S.A.	2014	\$772.3M
3	KBR Inc./ Halliburton Co.	2009	\$579.0M
4	Teva Pharmaceutical Industries Ltd.	2016	\$519.0M
5	Odebrecht S.A.	2016	\$419.8M–\$609.8M <sup>11</sup>
6	Och-Ziff Capital Management Group LLC	2016	\$412.1M
7	BAE Systems plc	2010	\$400.0M <sup>12</sup>
8	Total SA	2013	\$398.2M
9	VimpelCom Ltd.	2016	\$397.6M <sup>13</sup>
10	Alcoa World Alumina LLC	2014	\$384.0M

### Odebrecht’s Record \$3.5 Billion Bribery Resolution with the United States, Brazil, and Switzerland

In December 2016, the Brazilian construction and engineering conglomerate Odebrecht S.A. and its subsidiary Braskem S.A. signed the largest global anticorruption settlement in history, agreeing to pay at least \$3.5 billion to authorities in the United States, Brazil, and Switzerland.<sup>14</sup> The DOJ and SEC’s portion of that, at least \$420 million, amounted to the fifth-largest FCPA settlement in history.<sup>15</sup> The case involved the payment of approximately \$788 million in improper payments to government officials from at least 12 countries.<sup>16</sup> This landmark resolution, part of Brazil’s so-called “Operation Carwash”

investigation, followed an expedited investigation that resulted in prison sentences in Brazil for Odebrecht's CEO and dozens of other executives and the impeachment of the former Brazilian president Dilma Rousseff.<sup>17</sup>

Odebrecht represented that it has the ability to pay a maximum of \$2.6 billion to settle \$4.5 billion in criminal penalties, due in part to its inability to obtain and retain contracts from foreign governments in the wake of the allegations.<sup>18</sup> The DOJ and Brazilian authorities are analyzing Odebrecht's petition and will verify Odebrecht's ability to pay by March 31, 2017, with sentencing scheduled for April 2017.<sup>19</sup> Depending on the resolution of Odebrecht's inability to pay petition, Odebrecht's and Braskem's total global resolutions will be between \$3.5 billion and \$5.4 billion,<sup>20</sup> with the Brazilian authorities collecting almost 80 percent of the total fine, as detailed in Chart Five.

**Chart 5: Odebrecht and Braskem Settlement Range with Brazil, U.S., and Swiss Authorities**

REGULATOR	FINE RANGE	PERCENTAGE OF TOTAL FINES
Brazilian Authorities	\$2.8B–\$4.3B	78%–79%
DOJ & SEC	\$419.8M–\$609.8M	11%–12%
Swiss Authorities	\$354.8M–\$544.8M	10%
<b>Total</b>	<b>\$3.57B–\$5.45B</b>	

Odebrecht and Braskem each pleaded guilty to conspiring to violate the antibribery provision of the FCPA.<sup>21</sup> Odebrecht will pay at least \$260 million to the DOJ, and Braskem will pay \$94.8 million to the DOJ.<sup>22</sup> Separately, New York Stock Exchange-listed Braskem entered into a consent decree with the SEC and agreed to pay \$65 million in disgorgement.<sup>23</sup> Odebrecht was not subject to SEC enforcement because it does not issue securities in the United States. As part of the resolution, Odebrecht and Braskem each agreed to retain its own independent compliance monitor for three years.<sup>24</sup> Typically one monitor is required for the corporate parent, making this the first FCPA action requiring the parent and subsidiary to retain individual corporate monitors.<sup>25</sup>

This was far from a typical corruption case. According to court filings, Odebrecht established a business unit called the Division of Structured Operations to pay bribes to employees of state oil company Petrobras Brasileiro S.A. and to Brazilian politicians in return for contracts.<sup>26</sup> The filings

also state that Odebrecht paid bribes to government officials in Angola, Argentina, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela, in connection with more than 100 projects.<sup>27</sup> Former senior executives used Odebrecht's Division of Structured Operations to authorize bribe payments, and Odebrecht created an elaborate and secret financial structure to account for and disburse corrupt payments to foreign officials.<sup>28</sup> To facilitate its bribery scheme, Odebrecht generated funds that were never recorded on its balance sheet from various sources such as standing overhead charges, overcharges and fees recorded as legitimate but not included in budgets, and success fees for the purchase of company assets.<sup>29</sup> The Division of Structured Operations would then funnel the unrecorded funds through a series of off-the-books and offshore entities and small banks in countries with strong bank secrecy, before reaching the final recipient.<sup>30</sup> The DOJ stated that this group "effectively functioned as a bribe department."<sup>31</sup>

Illustrating the increase in international anticorruption coordination, the DOJ characterized its cooperation with Brazilian and Swiss authorities "as a model for future efforts" and stated that it owes the Brazilian government "an extraordinary debt" for initiating the investigation.<sup>32</sup> As another example of the DOJ and SEC's cooperation with their Brazilian counterparts, in October 2016, the DOJ and SEC worked with Brazilian prosecutors to resolve an FCPA action against the Brazilian aircraft manufacturer Embraer S.A. for \$205 million.<sup>33</sup> As part of the resolution, Embraer may receive up to a \$20 million credit depending on the amount of disgorgement it will pay to authorities in Brazil in a parallel proceeding.<sup>34</sup>

#### **Teva Pharmaceutical Resolved FCPA Action for \$519 Million**

In December 2016, the world's largest generic pharmaceutical manufacturer, Israel-based Teva Pharmaceutical Industries Ltd. and Teva Russia, its Russian subsidiary, agreed to pay \$519 million to the DOJ and SEC to resolve FCPA charges related to improper payments to foreign officials in Ukraine, Russia, and Mexico.<sup>35</sup> According to the charging documents, Teva Pharmaceutical paid bribes to a Ukrainian official to induce him to use his position and political connections to improperly influence the registration of Teva's products in Ukraine.<sup>36</sup> In addition to bribe payments and sales concessions to a Russian official, the charging documents state that

during due diligence, employees and agents of Teva Russia concealed negative information about the Russian official's involvement in corruption related to government drug procurement auction payments.<sup>37</sup> The charging documents also state that Teva Mexico made improper payments to government health care providers in exchange for prescribing Copaxone, Teva's most profitable drug during the relevant period.<sup>38</sup>

This resolution, the fourth-largest in FCPA history and the largest ever involving a pharmaceutical company, consisted of \$283 million in criminal penalties to the DOJ and \$236 million in disgorgement and prejudgment interest to the SEC, which is the second-largest disgorgement in FCPA history.<sup>39</sup> Teva Pharmaceutical entered into a DPA with the DOJ and a cease-and-desist order with the SEC, and Teva Russia pleaded guilty to a one-count information charging the subsidiary with conspiring to violate the antibribery provisions of the FCPA.<sup>40</sup> As part of the settlement, Teva Pharmaceutical agreed to hire an independent compliance monitor for three years.<sup>41</sup>

### **Och-Ziff Resolution Resulted in \$412 Million Criminal and Civil Settlement and Three Individual Actions**

In September 2016, Och-Ziff Capital Management Group LLC ("Och-Ziff") agreed to pay a \$213 million criminal fine to the DOJ and a \$199 million civil payment to the SEC to resolve allegations of bribes paid to high-level government officials in Africa to induce investments in Och-Ziff managed funds.<sup>42</sup> Och-Ziff entered into a DPA with the DOJ and agreed to retain an independent compliance monitor for at least three years, in addition to enhancing internal accounting controls and policies.<sup>43</sup> Och-Ziff subsidiary OZ Africa Management GP LLC pleaded guilty to one count of conspiracy to violate the FCPA.<sup>44</sup> The total settlement of \$412 million represents the sixth-largest monetary settlement and third-largest disgorgement in FCPA history. Additionally, the DOJ and SEC resolved three related individual actions. A Gabonese consultant to a mining company owned by an Och-Ziff joint venture pleaded guilty to DOJ charges of conspiring to bribe foreign government officials, while the SEC resolved individual actions against Och-Ziff's CEO and CFO, marking the first time the SEC alleged the CEO and the CFO of an issuer company were liable for FCPA violations.<sup>45</sup>

The Statement of Facts included in the DPA states that Och-Ziff retained a Libyan intermediary that was connected to

government officials and paid him "finder's fees" to secure investments without conducting due diligence and without providing formal approval for him to work on behalf of Och-Ziff.<sup>46</sup> It also states that Och-Ziff secured mining rights by paying bribes to government officials in Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo and that several Och-Ziff employees understood that Och-Ziff funds would be used, at least in part, to pay substantial sums of money to government officials, but did not share this knowledge with anyone in the compliance or legal departments.<sup>47</sup> These arrangements supposedly secured a long-term deal flow for Och-Ziff.<sup>48</sup>

### **VimpelCom Settled with the DOJ and SEC for \$397 Million**

Dutch company VimpelCom Ltd., one of the world's largest mobile network operators, and its wholly owned Uzbekistan subsidiary, Unitel LLC, entered into resolutions with the DOJ and SEC for \$397.6 million and Dutch authorities for \$397.5 million for a total of \$795 million in global penalties to resolve bribery allegations.<sup>49</sup> The settlement with the DOJ and SEC for alleged violations of the antibribery, books and records, and internal controls provisions of the FCPA represents the ninth-largest monetary settlement in FCPA history.

According to the charging documents, VimpelCom and Unitel conspired to pay \$114 million in bribe payments to government officials in Uzbekistan between 2006 and 2012 to enter and virtually control the Uzbek telecommunications market.<sup>50</sup> The charging documents state that VimpelCom knew it needed a "local partner" to conduct business in Uzbekistan, that VimpelCom executives were aware that a foreign official held an indirect interest in the company VimpelCom acquired to become its local partner, and that VimpelCom later entered into a partnership agreement with the official's front company to facilitate a bribe payment to an Uzbek government official.<sup>51</sup> In addition to a second payment via a front company, the charging documents state that VimpelCom paid an additional \$20 million in bribes through purposefully nontransparent transactions with "reseller" companies.<sup>52</sup>

VimpelCom entered into a DPA with the DOJ, and Unitel pleaded guilty to conspiracy to violate the FCPA.<sup>53</sup> The disgorgement of \$167.5 million is the fifth-largest on record. The settlement also requires VimpelCom to retain an independent

compliance monitor for three years.<sup>54</sup> Separately, under the DOJ's Kleptocracy Asset Recovery Initiative, the DOJ filed two civil complaints seeking the forfeiture of \$850 million in proceeds of alleged illegal bribes and related funds, which are located in Swiss and other European bank accounts, paid to the Uzbek government official.<sup>55</sup>

## LACKLUSTER INDIVIDUAL ENFORCEMENT

### One Year After the Yates Memorandum, Individual FCPA Enforcement Still Lagged

In 2016, more than one year after the DOJ's September 2015 Yates Memo, which promised a renewed DOJ emphasis on prosecuting culpable individuals in connection with corporate criminal investigations, the DOJ filed FCPA charges against only two individuals.<sup>56</sup> Only one of the DOJ's 11 corporate FCPA resolutions, however, involved a corresponding FCPA resolution against an individual.<sup>57</sup> This level of individual prosecution is lower than the DOJ's pre-Yates Memo enforcement figures, when approximately 25 percent of corporate FCPA resolutions by the DOJ led to announced criminal charges against individuals.<sup>58</sup>

Acknowledging the lack of FCPA charges against individuals in 2016, in a November 2016 speech about the DOJ's FCPA enforcement, Deputy Attorney General Yates stated that "[t]he purpose of the Memo was never to increase individual prosecutions by a certain number or percentage. . . . From the beginning, our goal was to develop and institutionalize mechanisms to ensure that, across the department, we consistently investigate and prosecute corporate cases as effectively as possible."<sup>59</sup>

In addition to filing charges against two individuals, in 2016 the DOJ received FCPA-related guilty pleas from six individuals.

### SEC Settled with Eight Individuals

The SEC entered into eight FCPA resolutions with individuals, including the first-ever DPA with an individual in an FCPA case and five resolutions with high-level executives.<sup>60</sup> Notably, all eight of the SEC's individual FCPA actions in 2016 related to a corporate FCPA resolution.

**Chart 6: DOJ and SEC FCPA Individual Resolutions and Enforcement Actions, Announced in 2016**

NO.	INDIVIDUAL	TITLE, COMPANY	DATE	AGENCY	ACTION	RELATED CORPORATE ACTION
1	Moises Abraham Millan Escobar	Former employee, Shiera (Contractor)	January 7	DOJ	Pleaded guilty to conspiracy to violate the FCPA	N/A
2	Ignacio Cueto Plaza	CEO, LAN Airlines S.A.	February 4	SEC	Cease-and-desist order; \$75K civil penalty	LATAM Airlines Group S.A. (July 25, \$12.8M, SEC)
3	Yu Kai Yuan	Former Employee, Parametric Technology (Shanghai) Software Co. Ltd.	February 16	SEC	DPA	PTC, Inc. (February 16, \$28M, DOJ and SEC)
4	Mikhail Gourevitch	Former Engineer, Nordion, Inc.	March 3	SEC	Cease-and-desist order; \$179K disgorgement and civil penalty	Nordion, Inc. (March 3, \$375K, SEC)
5	Lars Frost	Former CFO, BK Medical ApS	June 21	SEC	Cease-and-desist order; \$20K civil penalty	Analogic Corp. (June 21, \$11.5M, SEC)

NO.	INDIVIDUAL	TITLE, COMPANY	DATE	AGENCY	ACTION	RELATED CORPORATE ACTION
6	Jun Ping Zhang	Former Chairman/CEO of Hunan CareFx Information Technology LLC	September 13	SEC	Cease-and-desist order; \$46K civil penalty	N/A
7	Daniel Och	CEO and Chairman, Och-Ziff Capital Management Group LLC ("Och-Ziff")	September 29	SEC	Cease-and-desist order; \$2.2M disgorgement	Och-Ziff (September 29, SEC, \$199M)
8	Joel Frank	Former CFO, Och-Ziff <sup>61</sup>	September 29	SEC	Cease-and-desist order; penalty to be assessed at a later date	Och-Ziff (September 29, SEC, \$199M)
9	Ng Lap Seng	Real Estate Developer in Macau, China	November 22	DOJ	Indictment (eight counts, including conspiracy to violate the FCPA and substantive FCPA counts)	N/A
10	Jeff C. Yin	Principal Assistant to Seng (Real Estate Developer in Macau, China)	November 22	DOJ	Indictment (eight counts, including conspiracy to violate the FCPA and substantive FCPA counts)	N/A
11	Samuel Mebiame	Consultant to Mining Company Owned by Och-Ziff Join Venture	December 12	DOJ	Pleaded guilty to conspiracy to violate the FCPA	Och-Ziff (September 29, DOJ, \$213.1M)
12	Daniel Perez	Director of Maintenance, "Aviation Corp. A"	December 27	DOJ	Pleaded guilty to conspiracy to violate the FCPA	N/A
13	Kamta Ramnarine	General Manager, "Aviation Corp. A"	December 27	DOJ	Pleaded guilty to conspiracy to violate the FCPA	N/A
14	Douglas Ray	President, "Aviation Corp. A"	December 27	DOJ	Pleaded guilty to conspiracy to violate the FCPA and wire fraud	N/A
15	Victor Valdez	Agent, "Aviation Corp. A"	December 27	DOJ	Pleaded guilty to conspiracy to violate the FCPA	N/A
16	Karl J. Zimmer	Former SVP, General Cable Corp.	December 29	SEC	Cease-and-desist order; \$20K penalty	General Cable Corp. (December 29, SEC, \$55M)

## NEW DOJ FCPA PILOT PROGRAM

### DOJ FCPA Pilot Program Created to Encourage Voluntary Self-Disclosure, Cooperation, and Remediation

On April 5, 2016, the DOJ announced the creation of an “FCPA Enforcement Pilot Program” (“Pilot Program”) to encourage voluntary self-disclosure, cooperation, and remediation.<sup>62</sup> The Pilot Program is a one-year program that applies to all FCPA actions “handled” (not merely initiated or resolved) during the program’s duration.<sup>63</sup> To be eligible for the full benefits of the program—including a possible declination, up to a 50 percent reduction in criminal fines, and the avoidance of a corporate monitor—companies must voluntarily self-disclose corruption-related misconduct, fully cooperate with the DOJ, remediate flaws in their corporate compliance programs, and disgorge all ill-gotten profits.<sup>64</sup>

The Pilot Program is a response to ongoing criticisms about the lack of transparency and predictability in FCPA fines and penalties.<sup>65</sup> While the concept of a reduced fine or even a declination in return for self-disclosure, cooperation, and remediation is not new, the Pilot Program attempts to provide a more detailed framework for companies deciding to disclose a potential FCPA violation. In doing so, the DOJ hopes to provide greater predictability to companies as they decide whether to self-disclose, cooperate, and remediate potential wrongdoing.

Since the Pilot Program was adopted, the DOJ attempted to follow through on its pledge to “increase transparency” in charging decisions.<sup>66</sup> As shown in Chart Seven, in the nine

months since the Pilot Program was announced, five companies received declinations from the DOJ pursuant to the program. Each of these companies voluntarily self-disclosed potential misconduct, provided full cooperation, remediated, and disgorged all profits from the improper conduct. In addition to these five declinations, the DOJ also cited the Pilot Program in awarding a 50 percent reduction in criminal fines to one company that “voluntarily self-disclosed [the] misconduct to the government, fully cooperated, and remediated.”<sup>67</sup>

Under the Pilot Program, companies that do not voluntarily self-disclose to the DOJ are eligible to receive only up to a 25 percent reduction in criminal fines.<sup>68</sup> In 2016, the DOJ generally provided the full 25 percent reduction to non-self-disclosing companies as long as they, according to the DOJ, fully cooperated, remediated wrongdoing, and disgorged all ill-gotten profits.<sup>69</sup> In a few instances, however, the DOJ provided less than a 25 percent fine reduction based on the DOJ’s perception of deficiencies in the cooperation and/or remediation of the companies involved.<sup>70</sup> Ultimately, under the Pilot Program, the DOJ retains complete discretion whether to decline prosecution, impose a monitor, or provide full, partial, or no credit.<sup>71</sup>

Time will tell whether the DOJ will continue the Pilot Program and whether the DOJ will apply the guidelines consistently in order to provide more certainty to self-disclosing and cooperating companies. In April 2017, the DOJ will reevaluate whether the DOJ Fraud Section’s guidance related to the Pilot Program “will be extended in duration and whether it should be modified in light of the Pilot Program experience.”<sup>72</sup>

Chart 7: DOJ Declinations Pursuant to the Pilot Program, 2016

NO.	COMPANY	DATE	RESULT	SEC RESOLUTION
1	Nortek, Inc. (Manufacturing: U.S.)	June 3	Declination	NPA and \$322,000 in disgorgement and interest <sup>73</sup>
2	Akamai Tech., Inc. (Technology: U.S.)	June 7	Declination	NPA and \$672,000 in disgorgement and interest <sup>74</sup>
3	Johnson Controls, Inc. (Manufacturing: U.S.)	June 21	Declination	Cease-and-desist order and \$14 million in disgorgement and interest <sup>75</sup>
4	HMT LLC (Oil and Gas: U.S.)	September 29	Declination and \$2.72 million in disgorgement <sup>76</sup>	N/A
5	NCH Corp. (Manufacturing: U.S.)	September 29	Declination and \$335,000 in disgorgement <sup>77</sup>	N/A

## SEC Policy Pronouncements Matched DOJ's Push for Self-Disclosure and Cooperation

The SEC, meanwhile, continued to make public statements about the benefits of self-disclosure, cooperation, and remediation. In a November 2016 speech, the SEC's Director of Enforcement noted that companies that self-report and cooperate may be eligible for reduced charges and penalties, or avoid them altogether.<sup>78</sup> As an example, he noted that the SEC declined to bring an action against a company in light of its "self-policing, self-reporting, and substantial cooperation."<sup>79</sup> Additionally, consistent with the SEC's policy of reserving NPAs and DPAs for parties that self-report violations, the Director of Enforcement stated that the two companies with NPA resolutions in 2016 had made voluntary disclosures.<sup>80</sup> In entering into the NPAs, the SEC emphasized that both companies also cooperated extensively with the SEC's investigation and properly remediated.<sup>81</sup> On the other hand, the Director of Enforcement noted that companies paid "significantly higher penalties" if the SEC learned of the conduct from other sources, including whistleblowers.<sup>82</sup> These comments reinforce the SEC's stated position on the benefits to be derived from self-disclosure and cooperation. As is the case with the DOJ, however, the task of projecting the nature and extent of benefits to be gained in return for self-disclosure to, and cooperation with, the SEC is anything but predictable.

## SEC WHISTLEBLOWER PROGRAM'S RECORD YEAR

2016 marked a record year in awards to whistleblowers under the SEC's whistleblower program. It was also a year of several notable firsts for the program, including the first FCPA-related whistleblower award and a first-of-its-kind action against a company that allegedly sought to contractually limit an employee's ability to report FCPA wrongdoing to the SEC.

### SEC Whistleblower Awards Continued to Increase, Including First-Ever FCPA Whistleblower Award

By the end of 2016, the SEC's whistleblower program led to more than \$500 million in disgorgement, interest, and penalties paid by companies and more than \$136 million in bounties paid to 37 whistleblowers.<sup>83</sup> In the SEC's Fiscal Year 2016, which ended September 30, 2016, the SEC issued a record \$57 million in awards to 13 whistleblowers, more than the total of all previous award amounts since the inception of

the program in 2011.<sup>84</sup> Under the SEC's program, whistleblowers can be eligible for awards when they voluntarily provide "original information" that leads to a successful SEC resolution resulting in a monetary sanction above \$1 million.<sup>85</sup> Awards can range from 10 percent to 30 percent of total recoveries.<sup>86</sup>

In May 2016, the SEC reportedly paid a whistleblower \$3.75 million for information about alleged FCPA offenses committed in connection with the 2008 Summer Olympic Games in Beijing, China.<sup>87</sup> Although the SEC does not identify whistleblowers, if the report is accurate, it may be the SEC's first award to an FCPA-related whistleblower. The SEC, commenting on what appears to be this particular case, stated that the whistleblower's tip "bolstered an ongoing investigation with additional evidence of wrongdoing that strengthened the SEC's case" and "increased [the SEC's] leverage during settlement negotiations with the company."<sup>88</sup> FCPA-related whistleblower awards will no doubt continue. In SEC Fiscal Year 2016 alone, the SEC received 238 FCPA-related tips, up from 186 the year before.<sup>89</sup>

### SEC Settled Action Against Company that Allegedly "Chilled" an FCPA Whistleblower

The SEC took a new step toward protecting whistleblowers through a first-of-its-kind enforcement action in connection with an FCPA resolution, penalizing a company for attempting to impede an employee's ability to report alleged anticorruption wrongdoing to the SEC through the use of severance agreements. In September 2016, Anheuser-Busch InBev ("AB InBev") paid \$6 million to settle SEC charges that AB InBev violated the FCPA and "chilled a whistleblower who reported the misconduct."<sup>90</sup> On the whistleblower claim, the SEC alleged that AB InBev "entered into a separation agreement that stopped an employee from continuing to communicate voluntarily with the SEC about potential FCPA violations due to a substantial financial penalty that would be imposed for violating strict non-disclosure terms."<sup>91</sup> The Acting Chief of the SEC's Office of the Whistleblower noted the "[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."<sup>92</sup>

The SEC also charged three other companies for violating Exchange Act Rule 21F-17, which prohibits the use of confidentiality agreements or other actions to impede a whistleblower

from communicating with the SEC.<sup>93</sup> These actions underscore the SEC's focus on whistleblower protection and serve as a reminder that the SEC continues to actively solicit whistleblower tips while seeking to impose penalties on those who try to "chill" whistleblowers. As such, public companies should ensure they have an effective internal whistleblower program, monitor their internal review and response processes, carefully draft severance agreements and related policies, and respond to employees and former employees who come forward with information.

## UPDATE ON FCPA-RELATED LITIGATION

### SEC Disgorgement May Be Subject to Five-Year Statute of Limitations

For more than a decade, federal courts generally held that disgorgement is an equitable remedy that falls outside the purview of the five-year statute of limitations for any "civil fine, penalty, or forfeiture" set forth in 18 U.S.C. § 2462.<sup>94</sup> Two events in 2016, however, indicate growing acceptance of the proposition that disgorgement is—at least in certain circumstances—a penalty or forfeiture, thus limiting disgorgement to this five-year statute of limitations.

First, the Eleventh Circuit's May 2016 decision in *SEC v. Graham* equated disgorgement with "forfeiture"—a category of payment expressly subject to Section 2462's five-year statute of limitations.<sup>95</sup> The immediate effect of this ruling, at least in the Eleventh Circuit, is to limit the SEC's ability to seek disgorgement for FCPA violations to five years from the time the claim accrues. The SEC joined a petition for certiorari to the U.S. Supreme Court in another case to challenge the Eleventh Circuit's reasoning in *Graham*, which was granted in January 2017.<sup>96</sup>

Second, the Internal Revenue Service ("IRS") Chief Counsel published an Advice Memorandum, which concluded that disgorgement paid to the SEC for FCPA violations was not deductible for U.S. federal income tax purposes because it amounted to a "penalty."<sup>97</sup> The IRS Chief Counsel reasoned that if the disgorgement serves primarily to prevent the wrongdoer from profiting from illegal conduct or to substitute for a civil penalty, then the disgorgement is primarily punitive and therefore a penalty subject to the five-year statute of limitations.<sup>98</sup> This characterization of disgorgement as "punitive"

notably contrasts with longstanding case law in non-tax contexts, which held that disgorgement is nonpunitive.<sup>99</sup> Taken together, these actions signal a potential shift in the traditional analysis of disgorgement as a penalty, which could in turn subject disgorgement in FCPA cases to Section 2462's five-year statute of limitations.

### Foreign Issuer's SEC EDGAR Filings Can Establish FCPA Jurisdiction (S.D.N.Y.)

In September 2016, a federal district court in the Southern District of New York ruled that a foreign issuer's SEC filings on EDGAR can form the basis for establishing FCPA jurisdiction over three of its former executives.<sup>100</sup> The SEC charged three former employees of Magyar Telekom PLC with violating the FCPA for participating in a scheme to offer or pay bribes to Macedonian officials in exchange for favorable treatment for a Macedonian subsidiary.<sup>101</sup>

On summary judgment, the court concluded that, "based on the undisputed evidence, there can be no doubt that Magyar itself clearly used an instrumentality of interstate commerce (the Internet) when it made filings through EDGAR."<sup>102</sup> The court reasoned that "there can be no genuine dispute that Magyar's filings with the SEC were a foreseeable consequence of Defendants' actions" because all three made representations regarding their lack of awareness of illegal conduct to Magyar's auditors and accounting department in connection with various EDGAR filings.<sup>103</sup> The matter is set for trial in 2017.<sup>104</sup>

### No FCPA Jurisdiction Over a Foreign National Based Solely on Alleged Conspiracy and Accomplice Liability (D. Conn.)

The DOJ and SEC's practice of using accessory liability to expand FCPA jurisdiction over nonresidents, non-U.S. citizens, and companies acting abroad was rejected in a set of district court rulings in *U.S. v. Hoskins*.<sup>105</sup> In March 2016, a federal district court in the District of Connecticut reaffirmed its earlier ruling that a nonresident foreign national cannot be subject to criminal liability for conspiracy to violate the FCPA or aiding and abetting an FCPA violation if he or she does not act as an agent of a "domestic concern" or while physically present in the United States.<sup>106</sup>

The DOJ alleged that Lawrence Hoskins, a British citizen and former Senior Vice President for the Asia Region in the Paris office of France-based Alstom SA, was a co-conspirator in a bribery scheme to make improper payments to Indonesian government officials.<sup>107</sup> The court defined the issue as whether a nonresident foreign national can be liable for conspiracy or aiding and abetting a violation of the FCPA where he is not an agent of a domestic concern and does not commit the act while physically in the United States.<sup>108</sup> Ruling in favor of Hoskins, the court relied on the U.S. Supreme Court's holding in *Gebardi v. U.S.*<sup>109</sup> for the proposition that where a statute excludes a certain class of individuals from criminal liability, the DOJ cannot get around congressional intent and charge the same individuals with conspiring to violate the same statute.<sup>110</sup> The DOJ has appealed the decision, and the appeal is now pending.<sup>111</sup>

## INCREASED ANTICORRUPTION ACTIVITY OUTSIDE THE UNITED STATES

While the United States continues to have the most active anticorruption enforcement regime in the world, companies should be aware of increased anticorruption enforcement by foreign enforcement agencies, including investigative activities undertaken by foreign agencies in cooperation with counterparts at the DOJ and SEC. Indeed, in recent years, numerous countries have implemented or enhanced their own enforcement mechanisms targeting government corruption and are applying them against multinational corporations and their executives. Meanwhile, coordination between foreign regulators and the DOJ and SEC is on the rise.

### New Anticorruption Laws

Numerous countries have recently implemented or improved their anticorruption laws and regulations and enhanced their enforcement regimes targeting corruption. Currently, the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Antibribery Convention") comprises 35 OECD countries and six non-OECD countries (Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa).<sup>112</sup> In 2016, OECD Antibribery Convention signatory countries France, Mexico, and South Korea introduced enhanced anticorruption laws, while China and India took steps to strengthen their anticorruption laws.<sup>113</sup>

## Increased Anticorruption Enforcement

An increasing number of countries outside the United States are pursuing their own anticorruption enforcement actions. As non-U.S. anticorruption enforcement actions continue to grow, companies should increasingly appreciate the risk of prosecution from non-U.S. regulators in addition to the DOJ and SEC. Here are some highlights from 2016:

**"Operation Carwash" in Brazil.** Brazil's Operação Lava Jato, "Operation Carwash," which began as a money laundering investigation in 2014, expanded into an investigation into corruption at the state-controlled oil company Petrobras, where executives and Brazilian politicians allegedly accepted bribes in return for awarding lucrative construction contracts. Since 2014, Brazil regulators have indicted almost 200 individuals, including senior executives and politicians, investigated more than 15 companies, and sought forfeiture of more than \$10 billion. In 2016, in addition to the global bribery resolution with Odebrecht and Braskem discussed in the "Record Year for Corporate FCPA Enforcement" section above, the CEO of Odebrecht was sentenced to 19 years in prison after being convicted by a Brazilian jury of paying more than \$30 million in bribes to Petrobras executives, and the Brazilian Supreme Court authorized investigations into almost 50 Brazilian politicians.<sup>114</sup>

**The United Kingdom Continued Active Anticorruption Enforcement.** The United Kingdom's Serious Fraud Office ("SFO") continued to pursue anticorruption investigations under the 2010 U.K. Bribery Act. The SFO entered into the second DPA in U.K. history, this time with an undisclosed small or medium-sized firm that has a U.S. parent company.<sup>115</sup> In another matter, the SFO charged logistics firm F.H. Berling and seven individuals with bribing an agent of the Angolan state oil company, Sonangol.<sup>116</sup> The SFO accepted the case for investigation in September 2014 but did not announce its investigation until July 2016.<sup>117</sup> Finally, a former construction company executive was sentenced to a one-year term of imprisonment in December 2016 after a U.K. jury found him guilty of destroying evidence during an SFO investigation into bribery.<sup>118</sup>

**China's "Operation Foxhunt."** A Chinese anticorruption initiative that began in 2014, called "Operation Foxhunt," continued through 2016.<sup>119</sup> This initiative was designed to track down wealthy Chinese officials or criminals suspected of corruption

who may have fled abroad.<sup>120</sup> In 2015, the Chinese Ministry of Public Security announced that it would work with U.S. law enforcement agencies to apprehend corrupt Chinese officials who may be fugitives in the United States.<sup>121</sup> In November 2016, the United States returned Xiuzhu Yang, a former deputy mayor accused of embezzling more than \$39 million as a public official, to China after she was detained in the United States in 2014.<sup>122</sup> Although China sought extradition treaties with western countries, the United States returned Yang through constitutional means without agreeing to an extradition treaty.<sup>123</sup> Yang was ranked number one on a list of the 100 most wanted corruption suspects, and she was the 37th fugitive from that list returned to China.<sup>124</sup>

### **Close Cooperation Between U.S. Authorities and Foreign Regulators**

In 2016, the DOJ and SEC intensified their cooperation with regulators around the world when conducting and concluding investigations. This cooperation was highlighted by the resolutions in the Odebrecht, Embraer, and VimpelCom matters. In February 2016, the Chief of the DOJ's Fraud Section publicly emphasized increased collaboration with foreign regulators, specifically in such countries such as Brazil, Indonesia, the United Kingdom, and Germany.<sup>125</sup> Separately, the SEC's Director of Enforcement publicly acknowledged assistance from more than two dozen different foreign authorities in the FCPA cases it resolved in the past SEC fiscal year.<sup>126</sup> The United States also continued to participate in the International Foreign Bribery Taskforce, which consists of the FBI, the Royal Canadian Mounted Police, the Australian Federal Police, and the City of London Police Overseas Anticorruption Unit.<sup>127</sup>

The rise in sovereign cooperation and multijurisdictional investigations complicates the process of investigating and resolving corruption cases. Companies facing corruption investigations now, more than ever, deal with multiple enforcement agencies in multiple countries. This can create several problems. For example, not all countries cooperate in multi-jurisdictional investigations, so a company can face investigations by sovereigns that refuse to talk or coordinate their respective investigations. Additionally, not all countries consider penalties imposed by other jurisdictions when resolving their own cases.<sup>128</sup> Therefore, when a company considers

disclosing potential corruption issues in one country, it must consider whether that disclosure will lead to other countries claiming jurisdiction over the relevant conduct.<sup>129</sup>

### **WHAT'S NEXT FOR FCPA ENFORCEMENT UNDER THE TRUMP ADMINISTRATION?**

The 2016 election of Donald J. Trump as President and Republican majorities in both chambers of the U.S. Congress has led to much speculation about the future of FCPA enforcement. In 2012, Trump, as a businessman and private citizen, criticized the FCPA as disadvantageous to U.S. companies.<sup>130</sup> Several commentators have speculated that his comments may portend a decreased emphasis on FCPA enforcement under the Trump Administration.<sup>131</sup>

Thus far, there are no indications the new Administration plans to cut the government's corruption enforcement resources or that it plans to slow down FCPA enforcement after the record year of 2016. Even if the new leadership of the DOJ and SEC decide to de-emphasize FCPA enforcement in favor of other priorities, the impact would likely not be significant, particularly in the short term. While the new leadership will review and set key enforcement priorities and policies with at least some measure of independence from the White House, career DOJ prosecutors and SEC enforcement attorneys handle the day-to-day management of FCPA cases. With years of substantial enforcement activity and experience, these personnel can be expected to continue their work apace in the new Administration, particularly given the significant backlog of cases that now exists.<sup>132</sup> Indeed, one commentator estimated that, based on public filings as of December 31, 2016, there are more than 80 open DOJ or SEC corporate FCPA investigations and as many as 100 other companies believed to be the target of an ongoing FCPA investigation.<sup>133</sup>

Even if FCPA enforcement slows down, multinational companies continue to be subject to anticorruption enforcement outside the United States. As described above, many of these non-U.S. enforcement programs are becoming more robust in every respect. With broadened authority to tackle corruption, enhanced training (sometimes provided by American counterparts), more investigative and case-resolution tools and experience, and the ever-increasing enforcement activity now

underway, non-U.S. countries are poised to see the kind of aggressive expansion of anticorruption enforcement efforts and outcomes that the United States has seen over the past two decades.

## CONCLUSION

2016 was a notable year for FCPA enforcement. The DOJ and the SEC rebounded from a statistically slow 2015 with a record year of corporate FCPA resolutions and fines. Few criminal cases were filed against individuals, and only one of those cases was tied to a corporate resolution. 2016 also saw the creation of a DOJ Pilot Program designed to incentivize self-reporting, cooperation, and remediation; a ramped-up SEC whistleblower program; and increased cooperation between U.S. enforcement authorities and their foreign counterparts. While questions are being raised about the future of FCPA enforcement under the Trump Administration, this is no time to let one's compliance guard down. To the contrary, companies should expect continued anticorruption enforcement in the United States and abroad, and they should therefore ensure that their policies and procedures are appropriately designed and implemented to prevent, identify, and remediate any bribery or other corruption issues as they arise.

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## ENDNOTES

- 1 *U.S. Department of Justice (“DOJ”) FCPA and Related Enforcement Actions 2016*, DOJ; *U.S. Securities and Exchange Commission (“SEC”) Enforcement Actions: FCPA Cases 2016*, SEC.
- 2 *FCPA and Related Enforcement Actions*, DOJ, *supra* note 1; *SEC Enforcement Actions: FCPA Cases*, SEC, *supra* note 1; “[FCPA Year in Review 2015](#),” Jones Day (Jan. 2016).
- 3 Odebrecht’s total criminal penalty is subject to DOJ’s analysis of Odebrecht’s ability to pay application. See [Plea Agreement, U.S. v. Odebrecht S.A.](#), 16-643 (RJD) (E.D.N.Y. Dec. 21, 2016).
- 4 The total number of DOJ corporate enforcement actions in 2016 excludes the DOJ’s so-called “declinations with disgorgement” in HMT LLC and NCH Corp. See [Declination Letter Re: HMT LLC](#), DOJ (Sept. 29, 2016) (declination and disgorgement of \$2.72 million); [Declination Letter Re: NCH Corporation](#), DOJ (Sept. 29, 2016) (declination and disgorgement of \$335,342).
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- 6 Laura Jacobus, “[DOJ’s Andrew Weissmann and Hui Chen Talk Corporate Compliance in Exclusive Interview](#),” Ethics & Compliance Initiative (Feb. 1, 2016).
- 7 *SEC Enforcement Actions: FCPA Cases*, SEC, *supra* note 1.
- 8 *In re Natco Group Inc.*, [Administrative Proceeding No. 3-13742](#), Exchange Act Release No. 61325 (Jan. 11, 2010).
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