

2016 FCPA Enforcement Actions and Highlights

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Overall, this was a more active year for FCPA enforcement actions when compared to 2015. This year, Department of Justice (“DOJ”) took a total of 10 enforcement actions and Securities and Exchange Commission (“SEC”) took a total of 25 enforcement actions. Like last year, SEC is more active than DOJ, in terms of numbers of the enforcement actions. Of the 10 enforcement actions taken by DOJ, only 1 of them was related to a real person. Of the 25 SEC enforcement actions 4 of them were related real persons.

In terms of sectoral concentration of FCPA enforcement actions, one can see that mostly the technology sector were targeted followed by the pharmaceutical sector. In terms of where the foreign bribery took place, China seems dominant. In fact, all of the 4 pharmaceutical companies were charged with foreign bribery in China.

This year, we were expecting to see the effects of Yates Memo, which underlined the significance of individual accountability for deterring corporate wrongdoing and provided a guideline on how to enforce such accountability. That said the total number of FCPA enforcement actions against individuals so far is 5, as opposed to 30 enforcement actions against corporations.

This year, one of the more interesting cases is with regard to provision of paid internships, provision of loans to universities and provision of loans for house buying to relatives of Chinese officials (the Qualcomm case). The case echoes the BNY Mellon case of last year, where provision of valuable internships to relatives of public officials was deemed bribery. Also this year for the first time, a hedge fund was found to have violated the FCPA.

DOJ Enforcement Actions

In February 2016, VimpelCom, a Dutch communications company agreed to pay a combined fine of more than \$795 million to US and Dutch authorities to settle the charges that it made corrupt payments to Uzbek officials. The DOJ classified this case as “one of the largest global foreign bribery resolutions ever”. VimpelCom’s Uzbek subsidiary pleaded guilty, while Vimpelcom entered into a deferred prosecution agreement (“DPA”) with the DOJ. According to admissions, companies paid at least \$114 million in bribes to an Uzbek official, a close relative of a high-ranking Uzbek governmental official who had influence over the telecom industry. The companies attempted to hide illicit payments as payments to shell companies, payments for equity transactions, consulting agreements and reseller transactions. Vimpelcom is to pay \$167 million to SEC with regard to the case.

In February 2016, two Chinese subsidiaries of PTC Inc. entered into a non-prosecution agreement (“NPA”) with DOJ and agreed to pay \$14.54 million in penalties. The companies admitted that

they paid for recreational travel expenses of Chinese public officials and in return obtained \$13 million in contract. Although the seeming purpose of these trips was training, the travel plan also included New York, Los Angeles, Las Vegas and Hawaii. Admittedly, the travel expenses were hidden in sales made to the relevant Chinese state-owned entities. In a SEC action relating to the case, PTC agreed to pay \$11.858 million in disgorgement and \$1,764 in prejudgment interest to settle charges.

In March 2016, Abraham Jose Shiera Bastidas pleaded guilty bribing Venezuelan public officials, in order to obtain lucrative energy contracts from a Venezuelan government owned and controlled energy company. Bastidas also made corrupt payments in order to expedite payments to his companies.

In March 2016, the Latin American subsidiary of a US based health-care company, Olympus Latin America, entered into a DPA with the DOJ and agreed to pay \$22.8 million to resolve FCPA charges. According to court documents in order to increase its sales in Central and South America, the subsidiary implemented a plan to provide cash, money transfers, personal grants, personal travel and free or heavily discounted equipment to public officials. Officials would be provided with these in trainings centers whose seeming aim was to educate doctors. The bribes amounted to the approximate amount of \$3 million and gains were more than \$7.5 million.

In June 2016, Analogic Corporation entered into a \$3.4 million NPA with the DOJ in order to settle charges that its Denmark subsidiary BK Medical ApS made illegal payments to Russian public officials. As per the scheme, BK Medical ApS would pay inflated prices to its distributor and upon getting the payments from its distributor, would then transfer the excessive amounts to third parties with whom the subsidiary did not have a legitimate business relationship. The Denmark subsidiary also admitted that it did not engage in third party due diligence with these third parties. In a SEC action relating to the case, Analogic agreed to pay \$7.67 million in disgorgement and \$3.8 million prejudgment interest.

In July 2016, Latam Airlines, a Chilean airline company entered into a DPA with the DOJ and agreed to pay \$12.75 million to settle charges. According to the admissions, the company entered into a false consulting contract \$1.15 million in value, in order for the “consultant” to funnel the money to Argentine union officials. This way, the union officials agreed to a lower wage deal. Company is to pay the SEC \$6.74 million in disgorgement and \$2.7 million in prejudgment interest. According to the SEC investigation when the consultant contacted the company, the consultant made clear that payments would go to third parties and CEO was aware that the consultant would not perform the actions stipulated in the contract.

In September 2016, Och-Ziff, a New York based hedge fund management entered into a DPA with the DOJ, agreeing to pay more than \$213 million in order to settle the charges. OZ Africa, a wholly owned subsidiary of Och-Ziff pleaded guilty. According to companies’ admissions, Oc-

Ziff employees knowingly continued their business relationship with a third party consultant who they knew gained access to lucrative investment opportunities through bribes to public officials. The company was aware that part of the money paid to the consultant would be used as bribes. In another scheme, the Och-Ziff admitted to knowingly hiring a consultant who would pay bribes to government officials in order to secure investments. Och-Ziff hired the consultant without any due diligence. Och-Ziff agreed to pay \$200 million to SEC, in order to settle charges regarding the relevant case. Och-Ziff is the first hedge fund held accountable for FCPA violations.

In September 2016, OZ Africa Management GP is the first hedge fund that held liable for violating Foreign Corrupt Practices Act (“FCPA”). The company entered into a DPA with DOJ and agreed to pay \$213,055,689.

The charges arose from a widespread scheme involving bribery of officials in Democratic Republic of Congo and Libya.

In October 2016, Embraer, a Brazilian aircraft manufacturer, entered into a DPA with the DOJ, agreeing to pay \$107 million as penalty. The company admitted that it paid government officials in Mozambique, Dominican Republic and in Saudi Arabia, bribes in order to obtain contracts. The bribes were concealed through false agency agreements. The company also agreed to pay \$83.8 million in disgorgement and \$14.4 million in prejudgment interest to SEC.

SEC Enforcement Actions

In February 2016, SAP SE settled charges with SEC that it had paid Panamanian government officials bribes in order to gain sales contracts. According to the SEC investigation, an SAP employee falsified internal approval forms, falsifying documents as discounts. Panamanian partner created a slush fund with the excessive discounts and paid bribes to officials. SAP SE agreed to pay \$3.7 million, in order to settle charges.

In February 2016, SciClone, an American pharmaceutical company, agreed to pay \$12 million to settle charges that it bribed Chinese health officials. According to the SEC investigation, SciClone employees provided money, gifts and other things of value to health officials.

In February 2016, SEC entered into its first DPA with an individual in an FCPA related case. SEC held that YU Kai Yuan, a former employee of PTC’s Chinese subsidiaries qualified for a NPA due to his significant cooperation during the investigation into PTC Chinese subsidiaries.

In February 2016, Ignacio Cueto Plaza, president and COO of LAN airlines agreed to pay \$75,000 to settle charges that he has authorized payments to an Argentinian consultant who he knew would transfer the payments to Argentinian union officials in order for them to agree to lower wages.

In March 2016, Qualcomm, an American telecommunications company, settled charges with SEC that it paid bribes to Chinese officials in order to gain business advantage, and agreed to pay a \$7.5 million penalty. According to the SEC investigation, Qualcomm provided employment and paid internships to Chinese officials' relatives, in order to influence their business decisions. Such employment and internship applications were referred to as "must place" or "special" hires within the company. In one case, the company provided a grant to a university, in order to render the son of Chinese official a position in a Ph.D. program and renew his student visa. Further, a company executive provided the son of a Chinese official with \$75,000 loan for a house payment. Qualcomm also provided other things of value to Chinese officials such as airplane tickets to their children or luxury goods for their spouses.

In March 2016, Nordion, a Canadian healthcare company and its employee Mikhail Gourevitch settled charges that they bribed Russian officials for business advantages. Mr. Gourevitch agreed to pay \$100,000 in disgorgement, \$12,000 in prejudgment interest and a \$66,000 penalty. Nordion agreed to pay a \$375,000 penalty as well. According to the SEC investigation, Mr. Gourevitch paid improper funds obtained from Nordion to a third party agent and falsified documentation regarding the payments.

In April 2016, Las Vegas Sands, an American casino and resort operating company, agreed to pay a \$9 million fine to settle SEC charges that it bribed Chinese officials. According to the SEC investigation, company made improper payments to a consultant in order to gain business advantages in China. The company concealed the payments through falsifying books and records, and in one case declaring payment for an artwork which was never purchased. The company employees referred to the consultant as "the beard".

In June 2016, Nortek Inc., an American building products manufacturer, entered into an NPA with SEC in order to settle charges that it bribed Chinese officials. The company agreed to pay \$291,403 in disgorgement and \$30,655 in interest. According to the NPA, the company made cash payments, provided gift cards and entertainment expenses to the Chinese officials in order to obtain favored treatment and reduced customs taxes.

In August 2016, Key Energy, an American energy company agreed to pay a \$5 million disgorgement in order to settle charges that its Mexican subsidiary bribed Mexican officials. According to the SEC investigation, the Mexican subsidiary made payments to a consulting company who funneled payments to the Mexican public official. The Mexican official in return provided insider information on how to successfully negotiate contracts with Mexico's state-owned oil company Pemex. The Mexican subsidiary did not conduct due diligence or entered into a written contract with the consulting firm.

In August 2016, Astrazeneca, a UK pharmaceutical company, agreed to pay more than \$5 million to settle charges that the company's subsidiaries made illicit payments in China and Russia.

According to the SEC investigations the subsidiaries provided officials with cash, gifts and other types of payments in order for the company products to be prescribed and obtain fine reductions for proposed financial sanctions.

In September 2016, a former employee of the Harris Corporation, an American communications and information technology company, agreed to settle charges that he bribed Chinese government officials. Jun Ping Zhang agreed to pay a \$46,000 civil penalty. The SEC investigation found that Ping falsified expense receipts in order to obtain cash for the gifts provided to Chinese officials. Harris Corporation was not charged by the SEC, as Harris Corporation discovered the misconduct, its prompt self-reporting, remediation efforts and cooperation with the SEC.

In September 2016, GlaxoSmithKline (“GSK”), a UK pharmaceutical company, agreed to pay \$20 million for the transfer of money, gifts, and other things of value to health care professionals in China in order to increase its sales.

In September 2016, NuSkin Enterprises, an American multilevel marketing company agreed to pay \$765,688 to settle charges that it bribed Chinese officials. According to the SEC investigation company’s Chinese subsidiary made a donation to a charity identified by a party official from Chinese Communist party to impact an on-going provincial agency investigation against the company. In July, Johnsons Controls, an American provider of HVAC systems, agreed to pay \$14 million to SEC in order to settle charges that it bribed Chinese officials. According to SEC investigation, the company’s Chinese subsidiary, which was the subject of a previous FCPA enforcement action, made payments of almost \$4.9 million to employees of Chinese government owned shipyards, and others, to obtain and retain business and personally enrich themselves. The subsidiary used vendors for these actions because vendor transactions (instead of agents) were tagged as “low-risk” by the company. Even where the managers of the company oversaw these transactions, they were not able to uncover the illicit deals as the transactions were highly customized.¹

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(First published in Mondaq on December 19, 2016)

¹ Information regarding the cases mentioned in the article has been obtained from the official SEC (<https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>) and DOJ (<https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2016>) websites.