MEXICO’S NEW ANTI-CORRUPTION INITIATIVE

On July 18, Mexico’s president Enrique Pena Nieto signed into law an anti-corruption legislation package that implemented the country’s new National Anti-Corruption System. Its purpose is to coordinate the efforts of all Mexican governmental bodies involved in anti-corruption enforcement at the federal, state and municipal levels. As part of this reform effort, Mexico has enacted four new laws—the General Law for the National Anti-Corruption System, the General Law on Administrative Responsibilities, the Organic Law for the Federal Tribunal on Administrative Justice and the Federal Accounting and Accountability Law—and amended five existing laws. These laws apply to both public officials and private parties, including companies and their directors, officers and employees. This new anti-corruption regime represents a significant step for Mexico, a country where corruption and bribery have long been widespread at all levels.

There are several primary takeaways from Mexico’s new anti-corruption regulations, which will come into effect July 19, 2017. First, the National Anti-Corruption System will be administered by a Coordinating Committee, which is ultimately responsible for managing the development of anti-corruption guidelines at all levels of Mexico’s government. In other words, the committee will operate the anti-corruption system on a national level, establishing the principles, public policies and proceedings for the coordination of authorities at all levels of government regarding the prevention, detection and sanction of corruption, as well as the audit and control of public resources. Interestingly, the committee will also include participation by citizens through a Citizens Participation Committee, which will have a representative who will preside over the Coordinating Committee.

Second, the legislation has created a legal framework that aims to address corruption among public officials. Specifically, the new and amended laws require officials to disclose their assets, potential conflicts of interest and tax returns. The new laws have also increased sanctions for violations by public officials and extended the statute of limitations for “serious” administrative offenses from three years to seven years.

Last, the new laws not only target public officials but also have provisions aimed at private entities, including individuals working on behalf of private entities, who have been found to engage in corrupt activities, such as bribery, collusion in bid procedures and wrongful use of public resources, to name a few. For example, individuals found guilty under the new anti-corruption laws can face...
penalties of up to twice the amount of the acquired benefits, as well as compensatory and/or punitive damages. A private company faces similar sanctions as individuals but, in addition, can have its ability to participate in state-owned projects suspended for up to 10 years. Private companies found guilty of corrupt activity under these new laws can also be suspended from all business activities for up to three years. At the same time, the new regulations provide for some partial defenses for entities and persons charged with violating the law, offering a reduction in penalties for companies that voluntarily disclose wrongdoing and cooperate with enforcement officials. The laws also will consider the existence of a current compliance program that includes effective tools—for example, effective reporting, investigation procedures and whistleblower protection provisions— as a potential mitigating factor.

Mexico’s new anti-corruption laws will apply to both domestic companies and those based outside of Mexico, their affiliates and their officers who do business in Mexico and have any type of direct or indirect contacts with Mexican government officials. The new laws are quite stringent compared to the previous laws in place—for example, the new legislation has created a complete prohibition on gifts to public officials, regardless of value, as well as a zero-tolerance policy for facilitation payments.

With this in mind, the adoption of this new anti-corruption regime should trigger companies with operations in Mexico to ensure that they have implemented a sufficiently robust and effective compliance program to prevent activities in violation of the new laws. In addition, because the new laws will hold companies accountable for individuals acting on their behalf, companies with operations in Mexico or that have third parties working on their behalf there, would be wise to update their anti-corruption training program for both employees and third parties. Finally, such companies should be vigilant in monitoring the progress of any new developments that come out of Mexico’s National Anti-Corruption System and track any guidance materials published by the Coordinating Committee.

TWO RECENT DECLINATIONS SHED LIGHT ON THE DOJ’S FCPA PILOT PROGRAM

On September 29, the DOJ issued two more declinations under its recently announced FCPA Pilot Program, which is intended to encourage companies to disclose FCPA misconduct and cooperate in federal investigations. The two declinations, both involving U.S.-based, private companies, HMT LCC (HMT) and NCH Corporation (NCH), are significant for two reasons. First, these declinations are the first declinations under the Pilot Program where publicly available facts indicate that the DOJ likely had jurisdiction to bring charges under the FCPA, but declined to do so. Though declining to prosecute the two companies, the DOJ required them to disgorge their profits from their improper payments, a first-of-its-kind resolution.

The DOJ’s FCPA Pilot Program

The DOJ’s one-year FCPA Pilot Program, which was announced on April 5, 2016, is intended to encourage companies to disclose FCPA misconduct in exchange for mitigation credit when the DOJ resolves its investigation of that misconduct. The Program’s three primary requirements are that companies must (1) voluntarily self-disclose the misconduct, (2) cooperate with the government’s investigation and (3) take appropriate remediation actions.

The HMT and NCH declination letters further elaborate on these requirements. In those letters, the DOJ explained that its decision not to prosecute HMT and NCH for their FCPA violations was based on several factors, including (1) timely, voluntary self-disclosure of the violations, (2) a thorough and comprehensive investigation of the violations, (3) full cooperation in the DOJ’s investigation, including providing all known relevant facts about the individuals involved in or responsible for the misconduct, (4) agreement to disgorge all...
...it is unclear what other factors, including the strength of the evidence of misconduct and the strength of the DOJ’s jurisdictional arguments, may contribute to the DOJ’s decision to issue a declination under the Program.

The Potential Impact of Evidentiary and Jurisdictional Hurdles on the Pilot Program

While these are the factors that the DOJ explicitly referenced in the two recent declination letters, it is unclear what other factors, including the strength of the evidence of misconduct and the strength of the DOJ’s jurisdictional arguments, may contribute to the DOJ’s decision to issue a declination under the Program. For example, the DOJ’s jurisdiction over the actions of the three companies that previously received declinations under the Pilot Program appears to be tenuous based on the facts set forth in those letters, which indicate that the misconduct in each investigation involved the actions of foreign subsidiaries in China with no clear nexus to the United States.

Significantly, the HMT and NCH declination letters, however, suggest that the DOJ would have had jurisdiction to prosecute the companies, both of which constitute domestic concerns under the FCPA. The HMT letter states that the company paid approximately $500,000 in bribes to government officials in Venezuela and China to influence those officials’ purchasing decisions. The letter further explains that two regional HMT managers based in Houston, Texas, approved payments to a Venezuelan agent who was paying bribes, that one of those managers was told by the agent about the bribes and that the other manager received sufficient information to have known about the bribes. Additionally, the letter states that a regional manager who was a U.S. citizen received emails sufficient to provide notification of bribes paid by the China distributor.

The NCH declination letter states that NCH’s subsidiary in China (NCH China) provided approximately $45,000 in cash, gifts, meals and entertainment to Chinese government officials. The NCH letter explains that an NCH executive in the United States was responsible for overseeing NCH’s business in China and reviewed expenditures for “customer maintenance fees,” “customer cooperation fees” and “cash to customer,” which were how the bribes were recorded in NCH’s internal accounting records. Additionally, the letter states that despite advice that a proposed trip may violate the FCPA, NCH paid expenses for several employees of an NCH China government customer for a 10-day trip to the United States, which involved only a half-day of business-related activities.

Declinations with Disgorgement: A New Resolution Option for the DOJ FCPA Investigations

When the DOJ announced the Pilot Program, it explained it would consider a declination of prosecution under certain circumstances for companies that met the program’s mitigation requirements. The DOJ noted, however, that companies that received declinations would still be required to disgorge all profits tied to the FCPA misconduct at issue.

The three declination letters that the DOJ released prior to the HMT and NCH declinations did not require disgorgement to the DOJ, likely because those three companies had each previously resolved the SEC investigations and agreed to disgorge profits to the SEC. HMT and NCH, which are private companies and not subject to the SEC’s jurisdiction, agreed to disgorge $2.7 million and $335,000 in profits, respectively, which they had each secured in connection with their FCPA misconduct. The HMT and NCH declinations are the first two declinations that fall into what is essentially a new category of resolution for the DOJ FCPA enforcement actions—declinations with disgorgement—as prior declinations by the DOJ did not require companies to disgorge profits.

Considerations When Evaluating Whether to Disclose

The DOJ’s declination decisions under the Pilot Program consistently have emphasized the minimum requirements for mitigation credit: voluntary self-disclosure, cooperation with the government’s investigation and appropriate remediation actions.

profits made from the illegal conduct, (5) compliance program enhancements and (6) full remediation, including employment actions against employees.
declinations now provide companies with some comfort that the DOJ appears to be committed to issuing declinations under the Pilot Program when it has jurisdiction to prosecute. Those declinations, however, also indicate that the DOJ is committed to ensuring disgorgement to either the SEC or the DOJ in any declination decision. Additionally, the five declinations issued under the Program indicate that the DOJ is likely to make public its declination with disgorgement decisions in the future. It is critical for companies that are considering whether to disclose FCPA misconduct to thoroughly analyze the factors that contributed to these declinations, along with the potential outcomes of their disclosure.

SEC WHISTLEBLOWERS IN FCPA CONTEXT

Since it went into effect in 2011, the SEC’s Whistleblower Program has played a critical role in providing the SEC with leads on potential violations of the federal securities laws. However, it has not—at least until now—seemed to play a particularly important role in FCPA enforcement. That trend may be ending as news reports in August 2016 indicated that the SEC awarded $3.75 million to a former employee of the Australian mining company BHP Billiton, apparently in connection with the May 2015 FCPA enforcement action against the company. While the SEC does not identify whistleblowers, and BHP Billiton claimed it was unaware of whistleblower involvement in the matter, the media reported that “legal sources” confirmed that the whistleblower was a BHP Billiton insider who provided detailed information to U.S. investigators about the mining firm’s activities overseas. If these sources are correct, this may be the SEC’s first FCPA-related whistleblower award, a development that companies would do well to note.

In only 5-1/2 years, the SEC Whistleblower Program has led to SEC awards totaling $111 million. These awards were issued to 34 whistleblowers and have been worth as much as $30 million. The SEC has touted the efficacy of the program, noting that “[a]ssistance and information from a whistleblower who knows of possible securities violations can be among the most powerful weapons in the law enforcement arsenal of the Securities and Exchange Commission.” The SEC believes that whistleblowers can provide unique tips to the SEC due to their proximity to wrongdoing that is otherwise too complex or deeply buried to identify. The law protects whistleblowers with anonymity and shields them from any retaliation from their respective employers. Non-U.S. citizens are also qualified to receive monetary awards, which adds to the pool of potential whistleblowers and is particularly relevant in the FCPA context.

The incentives for employees to come forward with inside information relating to violations of the securities law has created an influx of insider tips. In 2012, 3,000 tips were received, and in 2015, that number rose to 4,000. In total, the SEC Office of the Whistleblower has received 14,000 tips from individuals in all 50 states and 95 foreign countries. The SEC and its constituents have been vocal in their positive reactions to the program’s success. SEC Chair Mary Jo White deems the program to have been a “game changer” in the way the SEC enforces laws and regulations. Andrew Ceresney, Director of the SEC Division of Enforcement, has said that the program “has had transformative impact on the agency.”

Historically, the number of FCPA tips the SEC has received in comparison to corporate disclosure and fraud tips has been much lower. However, the BHP Billiton award could change that. While it is too soon to know what kind of effect this award alone might have on whistleblowing in the FCPA context, it may certainly raise employee awareness that such a reporting avenue exists in this area.
ISO RELEASES FINAL VERSION OF ISO 37001—ANTI-BRIBERY MANAGEMENT SYSTEMS

On October 15, 2016, the International Organization for Standardization (ISO) published the final version of the long-anticipated standard on Anti-Bribery Management Systems (ISO 37001:2016). This is the first ISO standard to address specifically anti-bribery compliance programs. The ISO is an independent non-governmental organization that “develop[s] voluntary, consensus-based, market relevant International Standards.” ISO 37001:2016 has been designed to provide a flexible framework that complies with anti-bribery laws in any country. In particular, the standard covers the major requirements of the UK Anti-Bribery Act and the Foreign Corrupt Practices Act.

The release of this standard has been watched closely by members of the anti-bribery compliance community as it will provide a useful benchmark by which organizations can measure and assess their anti-bribery compliance programs. Given that the ISO standards have been highly influential in the manufacturing and quality control contexts, this standard has the potential to provide companies with an independent and external credential they can use to demonstrate the strength of their compliance programs.

Changes From Draft to Final Version

The published final version of ISO 37001:2016 retains the same principals, topics, and fundamental structure as the draft version circulated in early 2016, which we discussed in our prior edition. The changes to the draft are largely stylistic and organizational. The final published version includes a few, minor substantive changes from the draft version. These changes largely serve to make various concepts and requirements in the prior draft more explicit. In particular:

■ The final standard includes an additional duty for the governing body to “ensure[] that the organization’s strategy and its anti-bribery policy are aligned.” See § 5.1.1.
■ Throughout the document, wherever it discusses policies and procedures for raising compliance concerns, it has added language that the organization should encourage raising concerns “in good faith, or on the basis of a reasonable belief.” See §§ 5.2, 8.9.
■ In section 6.2 on anti-bribery objectives and plans to achieve them, the final standard has added a requirement that the objectives must state who will impose sanctions or penalties.
■ Section 7.2.2.1 on employment process deletes its previous reference to personnel not being penalized and instead elaborates that personnel will not “suffer retaliation discrimination or disciplinary action (e.g., by threats, isolation, demotion, preventing advancement, disciplinary action, transfer, dismissal, bullying, victimization, or other forms of harassment).”
■ Section 7.3 on awareness and training requires personnel to be trained on “how to recognize and respond to solicitations or offers of bribes.”
■ Section 8.4, which deals with non-financial controls, has been revised to expand upon the previous definition to enumerate that non-financial controls includes “procurement, operational, sales, commercial, human resources, legal and regulatory activities controls that manage the bribery risk.”
■ Section 9.1 now requires an organization to determine who in particular is responsible for monitoring.

Assessment Process

Now that the final standard has been published, organizations can seek certification of compliance with the standard (also known as registration) from a third-party certification organization. It is important to note that the ISO does not conduct assessments or grant certifications. Rather, the ISO promulgates standards for other, third-party organizations to
use to conduct assessments. These assessment organizations will perform an audit on the organization to determine and verify if it is in compliance with ISO 37001:2016.

In the United States, ANAB will be accrediting assessment organizations. See http://anab.org/. Organizations accredited by ANAB to perform management systems assessments must follow ISO 17021-1:2015, which lays out an international standard of requirements for performing audit and certification assessments of management systems. The aim of the polices and procedures laid out in ISO 17021-1:2015 is to ensure the organization performing the certification assessment is impartial, competent, responsible, open, confidential, responsive to complaints and takes a risk-based approach.

The certification assessment includes several important steps. First, there is an optional pre-audit. Second, the assessment organization and the organization seeking certification must agree on a plan for the audit. Third, the assessment organization must perform the audit and if they identify any non-conformities, the organization seeking assessment must remediate the non-conformities within 3 months after the audit has been completed. If they do, then the organization seeking certification will be issued a certificate. This completes the initial certification process. After initial certification has been obtained, the registrar will conduct annual surveillance audits for the following initial certification. If certification is maintained, the organization will be subject to periodic audits thereafter.

SEC CONTINUES HARD-LINE APPROACH FOR IMPEDIMENTS TO REPORTING

In light of the potential increase in whistleblower activity in the anti-corruption space, as well as other securities violations, companies should take note that whistleblower protection remains a focal point for the SEC in 2016. In addition to publicly encouraging employees to come forward with information, the SEC has continued its offensive against corporate activity that could discourage reporting in any way. Drawing on the broad language of Rule 21F-17, two recent enforcement actions targeted the confidentiality clauses of severance agreements that expressly allow employees to report possible violations to the SEC but prevent employees from collecting whistleblower rewards. A third recent action targeted a confidentiality clause that caused a whistleblower to stop disclosing information to the SEC.

Continuing the Trend

The actions are the latest in a trend dating back to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which added Section 21F, “Whistleblower Incentives and Protection,” to the Securities Exchange Act of 1934. In August 2011, the SEC adopted Rule 21F-17, which provides:

No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement... with respect to such communications.

The SEC has adopted an aggressive, all-inclusive construction of “impede” under the Rule. For example, in an April 2015 settlement with a corporation, the SEC announced that confidentiality statements during internal investigations could impede whistleblowers from reporting possible violations even though the SEC was “unaware of any instances in which (i) a[n] ... employee was in fact prevented from communicating directly with [SEC] Staff about potential securities law violations, or (ii) [the corporation] took action to enforce the form confidentiality agreement or otherwise prevent such communications.”
Targeting Severance Agreements

And, as noted above, the SEC recently turned its attention to confidentiality clauses in severance agreements that allow public reporting but counteract the financial incentives that the SEC uses to encourage whistleblowing. On August 10, 2016, the SEC settled a case against BlueLinx Holdings Inc. over claims that its severance agreement impeded public disclosure. BlueLinx’s standard agreement allowed employees to disclose information to the SEC, but it required employees to notify the company and required them to forego any whistleblower rewards. These requirements, according to the SEC, constituted impediments on employees’ ability to share confidential information about possible securities violations. When the BlueLinx order was issued, it was unclear whether the SEC was concerned about the effect of the provisions in the aggregate, or whether it believed that each provision—company disclosure and reward forbearance—constituted an action to impede public reporting in its own right.

But the uncertainty was short-lived. Six days later, the SEC settled a case against Health Net, Inc. over the confidentiality provision in its settlement agreements, which dealt only with recovering whistleblower rewards. It was reported that Health Net had amended its standard severance agreements after the SEC adopted Rule 21F-17, presumably to comply with the Rule. According to publicly available reports, Health Net’s agreements allowed employees to “file a charge, provide information, or participate in any investigation or proceeding...” In exchange for severance payment, however, employees were required to “waive[] any right to any individual monetary recovery.”

The SEC found that by causing employees to forego monetary recovery, Health Net’s confidentiality agreements jeopardized “the critically important financial incentives that are intended to encourage persons to communicate directly with [SEC] staff about possible securities laws violations.” The SEC pursued the action even though Health Net never attempted to enforce the confidentiality agreement and there was no evidence that the agreement deterred any former employee from reporting.

Most recently, the SEC included charges for a Rule 21F-17 violation as part of its settlement with Anheuser-Busch InBev SA/NV for FCPA violations, this time where the confidentiality clause caused a whistleblower to stop disclosing information. The whistleblower for the FCPA investigation signed a separation agreement with Anheuser-Busch in which the former employee “agree[d] not to disclose, directly or indirectly, any information regarding the substance of this Agreement to any person..., except to the extent such disclosure may be required for accounting or tax purposes or as otherwise required by law.” The whistleblower believed that the agreement prohibited him from communicating with the SEC and stopped sharing information. Without harping on the text of the agreement—in particular, the exception for disclosure “otherwise required by law”—or considering the reasonableness of the whistleblower’s belief, the SEC found that the agreement impeded disclosure in violation of Rule 21F-17.

Best Practices: Eliminate “Chilling” Language

From these cases, companies can expect to see further enforcement action against any language that the SEC views as discouraging public reporting, even to a small degree, whether at the start, duration or end of employment. And, as BlueLinx and Health Net learned, the SEC will move forward even without evidence that the language had any effect on possible whistleblowers. Accordingly, companies should carefully review their confidentiality agreements and employment policies with an eye toward eliminating any possibly chilling language contained therein.
IN THE INTERIM

July 11, 2016: Two former senior vice presidents of Louis Berger International (LBI), a New Jersey-based construction management company, were sentenced in connection with a bribery scheme that occurred from 1998 through 2010. LBI and its employees allegedly paid $3.9 million in bribes to foreign officials in India, Indonesia, Vietnam and Kuwait to obtain government contracts. The conspirators attempted to conceal the payments as “commitment fees,” “counterpart per diems” and other payments to third-party vendors. Richard Hirsch was sentenced to two years of probation and fined $10,000, while James McClung was sentenced to one year plus one day in jail. Both men pleaded guilty in the U.S. District Court of New Jersey to one count of conspiracy to violate the FCPA and one substantive count of violating the FCPA.

July 15, 2016: SBM Offshore, a Dutch-based group of offshore oil and gas companies, signed a “leniency agreement” with Brazilian authorities and Petrobras that closes out inquiries into alleged corruption from 1996 through 2012. Under the final settlement terms, SBM Offshore will pay a cash penalty of about $163 million and also give Petrobras a 95 percent reduction for future bonus payments, which represents a present value of about $112 million. The DOJ closed an investigation into SBM Offshore when the settlement agreement was announced.

July 19, 2016: The UK Serious Fraud Office (SFO) announced it is conducting a criminal investigation into the activities of Monaco-based Unaoil, its officers, its employees and its agents in connection with alleged bribery, corruption and money laundering. The SFO opened its investigation in March 2016 after a report by Fairfax Media and the Huffington Post alleging that Unaoil paid bribes to foreign officials to help major multinational corporations win contracts. Fairfax Media and the Huffington Post based their report on tens of thousands of internal Unaoil documents they obtained from an unnamed source, most of which are dated between 2003 and 2012.

July 20, 2016: The DOJ filed a civil forfeiture complaint seeking the recovery of more than $1 billion in assets allegedly misappropriated from 1Malaysia Development Berhad (1MDB), a Malaysian sovereign wealth fund. The complaint is the largest single action ever brought under the Kleptocracy Asset Recovery Initiative. According to the complaint, from 2009 through 2015 1MDB officials and their associates allegedly diverted and laundered more than $3.5 billion in funds through a series of complex transactions and fraudulent shell companies with bank accounts in Singapore, Switzerland, Luxembourg and the United States.

July 25, 2016: Chilean-based LAN Airlines agreed to pay $22 million to the DOJ and the SEC to settle parallel civil and criminal cases related to payments that allegedly violated the FCPA. An SEC investigation found that LAN paid a consultant to help negotiate with labor unions on the company’s behalf, and the consultant made clear that some of the payments would be given to third parties who were able to influence the negotiations. The DOJ charged LAN with one count of violating the FCPA books-and-records provision and one count of violating the FCPA internal controls provisions.

August 12, 2016: Key Energy Services, a Houston-based company, received a DOJ declination and agreed to pay $5 million to the SEC to settle alleged FCPA internal controls and books and records violations. An SEC investigation found that Key’s Mexican subsidiary, Key Mexico, made payments to a contract employee at Pemex, Mexico’s state-owned oil company “to induce him to provide advice, assistance and inside information,” which Key used to negotiate contracts.
August 30, 2016: British-Swedish multinational pharmaceutical company AstraZeneca PLC agreed to pay $4.325 million in disgorgement, $822,000 in prejudgment interest and a $375,000 civil penalty to settle charges brought by the SEC for violating the books and records and internal controls provisions of the FCPA when wholly-owned subsidiaries in China and Russia allegedly made improper payments to boost drug sales. The violations described by the SEC in its administrative order ended by 2010, but according to the order, AstraZeneca, which provided significant cooperation with the SEC, waived statute of limitations defenses without admitting or denying the SEC’s findings.

September 8, 2016: California-based networking company Cisco Systems, Inc. announced in its annual report that the DOJ and the SEC had declined to bring enforcement actions in connection with their investigation into Cisco’s operations in Russia and part of the Commonwealth of Independent States. Cisco first disclosed in March 2014 that, at the request of the DOJ and the SEC, it was investigating allegations of FCPA violations involving the company and some of its resellers in those countries.

September 14, 2016: Brazilian prosecutors announced criminal charges of corruption and money laundering against former Brazilian president Luiz Inacio Lula da Silva for his alleged role as the “chief commander” of a kickback scheme that siphoned 6.2 billion reais (US$1.9 billion) from the state-run oil giant Petrobras. According to the prosecutors, some of the funds were diverted to da Silva’s Workers’ Party to keep it in power. Da Silva and his wife, who also is charged with money laundering, have denied wrongdoing.

September 15, 2016: Swedish telecommunications company Telia Company, formerly TeliaSonera, announced that it had received a proposal from U.S. and Dutch authorities to pay $1.4 billion to settle allegations of bribery in Uzbekistan. In connection with the proposed settlement, Telia chairwoman Marie Ehrling said that the company’s entry into Uzbekistan was “unethical and wrongful,” but the company’s reaction to the settlement proposal was that “the amount is very high.”

September 20, 2016: Utah-based Nu Skin Enterprises, Inc. paid more than $750,000 to settle the SEC charges that it violated the books and records and internal control provisions of the FCPA. According to the SEC’s order, Nu Skin’s Chinese subsidiary made a $150,000 payment to a charity to influence a Chinese Communist Party official to intervene in an on-going provincial agency investigation. This is only the second time that a company has been charged with FCPA offenses based solely on a charitable contribution meant to buy influence from a foreign government official—the first being the SEC’s enforcement action against Schering-Plough in 2004.

September 28, 2016: Without admitting or denying the SEC’s findings, Anheuser-Busch InBev will pay $6 million to settle charges that it violated the FCPA and obstructed a whistleblower who reported the misconduct. According to the SEC’s Order, Anheuser-Busch InBev’s minority owned joint-venture in India used third-party sales agents to make improper payments to Indian government officials in an effort to increase sales and production. The company then included language in a separation agreement that discouraged an employee from communicating with the SEC by imposing a $250,000 penalty if the employee violated a strict non-disclosure provision.

September 29, 2016: New York-based medical device manufacturer, Misonix, self disclosed to the DOJ and the SEC possible FCPA violations by its Chinese distributor, saying that the company may have had knowledge of the Chinese distributor’s business practices. Misonix has engaged outside counsel and is conducting an internal investigation which is ongoing.
September 29, 2016: Och-Ziff Capital Management Group, one of the world’s largest institutional alternative asset managers, will pay the DOJ and the SEC a combined $412 million to resolve civil and criminal FCPA violations. The firm will pay $199 million to the SEC, enter into a three-year deferred prosecution agreement with the DOJ, retain a compliance monitor for three years, and pay a $213 million criminal penalty. In addition, Och-Ziff’s CEO Daniel Och will pay nearly $2.2 million to settle the SEC charges that he caused the FCPA violations. According to the SEC’s Order, Och-Ziff used intermediaries, agents, and business partners to pay bribes to high-level government officials in Africa to induce investments from the Libyan sovereign wealth fund, secure mining rights, and otherwise influence government officials in Chad, Niger, Guinea and the Democratic Republic of Congo. Och-Ziff neither affirmed or denied the SEC’s findings.

September 29, 2016: The DOJ released two letters under its FCPA Pilot Program declining to prosecute two companies but requiring each company to disgorge all the profits they made from the improper conduct. The first company, HMT LLC, manufactures above ground liquid storage tanks for the oil and gas industry. The second company, NCH Corporation, manufactures cleaning products. Both companies are based in Texas and privately held. According to the DOJ, HMT used an agent in Venezuela to bribe officials at the state-owned oil company, and used a local distributor to pay bribes in China; while employees of NCH’s Chinese division bribed employees of state-owned and state-controlled customers with travel and entertainment.
FCPA GOVERNMENT INVESTIGATIONS AND CORPORATE SETTLEMENTS

FCPA-Related Cases*

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<td>Pending Investigations**</td>
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* New criminal or civil cases (settled or contested) instituted by year

** Based upon public disclosures of investigations

Corporate FCPA-Related Penalties*

(in U.S. millions)

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* Includes disgorgement; does not include non-U.S. fines

** Includes publicly disclosed reserves for future FCPA settlements
THE FCPA/ANTI-CORRUPTION PRACTICE OF SIDLEY AUSTIN LLP

Our FCPA/Anti-Corruption practice, which involves more than 90 of our lawyers, includes creating and implementing compliance programs for clients, counseling clients on compliance issues that arise from international sales and marketing activities, conducting internal investigations in more than 90 countries and defending clients in the course of SEC and DOJ proceedings. Our clients in this area include Fortune 100 and 500 companies in the pharmaceutical, healthcare, defense, aerospace, energy, transportation, advertising, telecommunications, insurance, food products and manufacturing industries, leading investment banks and other financial institutions.

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