February 17, 2017

# A Flurry of FCPA Enforcement Actions Marks the End of the Obama Administration

Following on the heels of a record-breaking enforcement year,[1] the Department of Justice and the Securities and Exchange Commission continued their FCPA enforcement activities at a breakneck pace in December 2016 and January 2017. In the final weeks of the Obama Administration, DOJ resolved matters with six companies, which collectively paid $513.3 million in criminal fines. The SEC also brought enforcement actions against six companies, which paid a total of $328 million in civil penalties, disgorgement, and prejudgment interest. In addition, in January 2017 alone, the DOJ charged five individuals criminally, and the SEC charged two civilly, for alleged violations of the FCPA.

The flurry of enforcement activity likely had more to do with Obama Administration officials' efforts to clear the decks before the arrival of the Trump Administration, rather than to signal any new enforcement trends. Nonetheless, some enforcement themes emerge from a close reading of these cases. For example, two of the actions—Zimmer Biomet and Orthofix—shed light on how DOJ and the SEC treat repeat offenders who were subject to prior FCPA enforcement actions. Others, such as General Cable, continue to demonstrate that the Pilot Program factors can be applied retroactively to companies who self-reported before DOJ announced its Pilot Program.[2] Still others reinforce DOJ's new focus on disgorgement. For example, in the Teva case, DOJ announced that the appropriate resolution would include $235 million in disgorgement and prejudgment interest, but then credited Teva's payment of these amounts to the SEC as part of the parallel SEC resolution, rather than seeking additional disgorgement to the DOJ.

We summarize below some of the most important enforcement actions and developments of the past two months.

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1 Paul, Weiss, Rifkind, Wharton & Garrison, FCPA Enforcement and Anti-Corruption Developments: 2016 Year in Review (Jan. 20, 2017), https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/fcpa-enforcement-and-anti-corruption-developments-2016-year-in-review.aspx?id=23567 ("Year in Review").

2 Paul, Weiss, Rifkind, Wharton & Garrison, DOJ Announces a Pilot Program to Encourage Companies to Self-Report FCPA Violations (Apr. 6, 2017), https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/doj%E2%80%99s-fraud-section-announces-a-pilot-program.aspx?id=21706 ("Pilot Program Alert").

## Teva Pharmaceuticals Enters into Fourth Largest SEC and DOJ FCPA Settlement Ever for $519 Million

On December 22, 2016, Teva Pharmaceutical Industries Ltd. ("Teva"), agreed to pay more than $519 million to settle civil and criminal FCPA charges involving alleged improper payments to foreign government officials in Russia, Ukraine, and Mexico, and for failing to maintain proper internal accounting controls.[3] Teva, an Israeli company that is the world's largest manufacturer of generic pharmaceuticals, entered into a deferred prosecution agreement ("DPA") with DOJ and a parallel settlement with the SEC. In addition, Teva's Russian subsidiary, Teva LLC ("Teva Russia"), entered into a plea agreement under which it admitted to conspiring to violate the anti-bribery provisions of the FCPA.[4]

Among other things, the government alleged that Teva and Teva Russia employees paid bribes to a high-ranking Russian government official to induce him to use his authority to increase sales of Teva's products; that Teva paid bribes to a senior Ukrainian government official within the Ministry of Health to influence the registration of Teva's products within the country; and that Teva failed to implement and enforce effective controls at its Mexican subsidiary, which allowed the subsidiary to pay bribes to physicians employed by the Mexican government. The $519 million Teva paid to resolve this matter includes a criminal penalty of $283 million, disgorgement of the company's profits in the amount of $214 million, and prejudgment interest of $21 million. As noted above, DOJ included disgorgement and prejudgment interest in its calculation of the amount to be paid, but credited the disgorgement and prejudgment interest paid by Teva, in the same amounts, to the SEC, and did not require further disgorgement. Teva also agreed to a compliance monitor for three years.

In calculating the appropriate penalty, the government gave Teva some credit for cooperation, but noted that Teva did not self-report and delayed cooperation in the early stages of the investigation. Accordingly, Teva received only a 20 percent reduction off the bottom of the U.S. Sentencing Guidelines fine range for (i) its cooperation with DOJ (including making U.S. and foreign employees available for interviews, deferring personnel actions in order to allow U.S. and foreign employees to be available for interviews, providing information related to individual involvement and disclosing conduct of which DOJ was previously unaware) and (ii) its remediation efforts (including causing 15 employees involved in the misconduct to be separated from the company, enhancing its compliance policies, procedures, and

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[3] Deferred Prosecution Agreement, *United States* v. *Teva Pharm. Indus. Ltd.*, No. 16-20968-CR (S.D. Fl., Dec. 22, 2016), https://www.justice.gov/criminal-fraud/file/920436/download; Complaint, *Securities and Exchange Commission* v. *Teva Pharmaceutical Industries Ltd.*, No. 16-25298-CV (S.D. Fl., Dec. 22, 2016), https://www.sec.gov/litigation/complaints/2016/comp-pr2016-277.pdf.

[4] Plea Agreement, *United States* v. *Teva LLC*, No. 16-20967-CR (S.D. Fl., Dec. 22, 2016), https://www.justice.gov/opa/press-release/file/920241/download.

training programs, adopting a standalone third-party due diligence program and terminating relationships with certain third parties).

The total penalty in this case is the fourth-largest FCPA resolution and the largest settlement involving a pharmaceutical company to date.[5] The significant settlement amount reflects the "pervasiveness" of the conduct, which occurred in multiple high-risk jurisdictions, and the involvement of high-level executives in the criminal conduct. The resolution, along with others discussed below, provides another example of the seemingly strong resurgence of compliance monitors, which were imposed in 2016 in connection with the VimpelCom, Odebrecht and Braskem settlements, among others, as well as in several of the actions in 2017 discussed below, namely, Zimmer Biomet, SQM, and Orthofix.

### General Cable Resolves SEC and DOJ FCPA Enforcement Actions for $75 Million

On December 29, 2016, General Cable Corporation ("General Cable"), a Kentucky-based global manufacturer, distributer and installer of copper, aluminum, and fiber optic cable, entered into a DOJ non-prosecution agreement ("NPA") and SEC consent order to resolve allegations that General Cable's subsidiaries made improper payments to foreign officials from 2003 to 2015. The payments were made to secure business resulting in profits of $51 million in Angola, Thailand, Indonesia, Bangladesh, China and Egypt.[6] According to the NPA, General Cable executives were aware that the payments were being made and that they were being used for improper purposes. In announcing the resolutions, both DOJ and the SEC emphasized the failure of General Cable to implement appropriate controls to detect and prevent corruption.[7]

General Cable agreed to pay almost $20.5 million in criminal penalties to resolve the DOJ investigation and to pay the SEC over $51 million in disgorgement and $4 million in prejudgment interest. The SEC

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5 This resolution dwarfs the $70 million Johnson & Johnson, Inc. settlement from 2011. Press Release, U.S. Sec. & Exchange Comm'n, SEC Charges Johnson & Johnson With Foreign Bribery (Apr. 7, 2011), https://www.sec.gov/news/press/2011/2011-87.htm; Press Release, U.S. Dep't of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011), https://www.justice.gov/opa/pr/johnson-johnson-agrees-pay-214-million-criminal-penalty-resolve-foreign-corrupt-practices-act.

6 General Cable Corporation, Exchange Act Release No. 79073 2016 WL 7474485 (Dec. 29, 2016), https://www.sec.gov/litigation/admin/2016/34-79703.pdf; Non-Prosecution Agreement, *United States* v. *General Cable Corp.* (Dec. 29, 2016), https://www.justice.gov/criminal-fraud/file/921801/download.

7 Press Release, U.S. Sec. & Exchange Comm'n, Wire and Cable Manufacturer Settles FCPA and Accounting Charges (Dec. 29, 2016), https://www.sec.gov/news/pressrelease/2016-283.html; Press Release, U.S. Dep't of Justice, General Cable Corporation Agrees to Pay $20 Million Penalty for Foreign Bribery Schemes in Asia and Africa (Dec. 29, 2016), https://www.justice.gov/opa/pr/general-cable-corporation-agrees-pay-20-million-penalty-foreign-bribery-schemes-asia-and.

simultaneously settled with a former senior vice president of General Cable for causing violations of the books and records and internal accounting controls provisions of the FCPA.[8]

Although General Cable voluntarily disclosed the conduct prior to the announcement of the FCPA Pilot Program, DOJ considered the same factors announced in the Pilot Program in evaluating the appropriate penalty. Specifically, DOJ applied a 50 percent reduction to the bottom of the U.S. Sentencing Guidelines fine range, crediting General Cable's (i) voluntary and timely disclosure, (ii) cooperation (including proactively providing updates to DOJ, disclosing conduct beyond the scope of the original disclosure, and making foreign-based employees available for interviews in the United States) and (iii) remediation and extensive enhancement of its compliance program (including causing 16 employees who were implicated in the misconduct to separate from the company, and terminating relationships with 47 third party agents involved in the misconduct).

### Mondelēz Resolves SEC FCPA Investigation Relating to Pre-Acquisition Violations by Cadbury for $13 Million

On January 6, 2017, Mondelēz International, Inc. ("Mondelēz"), an American food, beverage, and snack food manufacturer, and Cadbury Limited ("Cadbury"), an English confectionaries and beverages company acquired by Mondelēz in 2010, agreed to pay $13 million in civil penalties to settle SEC charges relating to pre-acquisition conduct by Cadbury.[9] Prior to the acquisition, Cadbury traded ADRs on the NYSE. Mondēlez, then known as Kraft Foods, Inc., first reported receipt of an SEC subpoena almost six years ago, in February 2011.[10]

According to the consent order, in January 2010, Cadbury India Limited, a wholly owned subsidiary of Cadbury, sought licenses to expand production capacity at its existing plant in Baddi, Himachal Pradesh, India. Cadbury India retained an agent to assist it in obtaining the licenses without a written contract and without conducting appropriate due diligence on the agent before hiring. Cadbury India paid the agent a total of $90,666 in cash based only on superficial invoices, which did not include proper supporting documentation. The SEC found that Cadbury India's books and records "did not accurately and fairly reflect the nature of the services" and that Cadbury India's internal controls were inadequate. Because the acquisition was made through a hostile takeover, Mondelēz was unable to conduct complete pre-acquisition due diligence on Cadbury, but it did conduct substantial, risk-based post-acquisition due

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8 Karl Zimmer, Exchange Act Release No. 79704, 2016 WL 7474486 (Dec. 29, 2016), https://www.sec.gov/litigation/admin/2016/34-79704.pdf.

9 Cadbury Ltd. and Mondelez Int'l, Inc., Exchange Act Release No. 79753, 2017 WL 66590 (Jan. 6, 2017), https://www.sec.gov/litigation/admin/2017/34-79753.pdf.

10 Kraft Foods Inc., Annual Report (Form 10-K) (Feb. 28, 2011), https://www.sec.gov/Archives/edgar/data/1103982/000119312511048979/d10k.htm.

diligence. While the post-acquisition due diligence failed to identify the relationship with the Indian agent, a whistleblower came forward shortly after the acquisition in October 2010, which triggered an internal investigation into Cadbury India.

The SEC credited Mondelēz for its cooperation in the investigation, including conducting an internal investigation with outside counsel and forensic accountants, and recognized Mondelēz's remedial actions, such as implementing a global compliance program at Cadbury and a comprehensive review of the use of third parties by Cadbury India. It is notable that the SEC chose to bring an action against the successor company, rather than the predecessor, because its own guidance states that the SEC ordinarily will take action against a successor company only in "limited circumstances," which generally include cases in which there were "egregious and sustained violations," where the successor company directly participated in the violations, or where it failed to stop the misconduct post-acquisition.[11] It is possible that Mondelēz was held responsible because it did not uncover issues with the Indian agent as part of its post-transaction due diligence, the agent was hired less than two months before the acquisition was closed, and the agent's involvement continued for five months after the acquisition. The structure of the settlement may not necessarily reflect the view that Mondelēz, as the acquiring entity, committed wrongdoing; rather, it may reflect a practical resolution of the misconduct here, given how long ago the acquisition was. Indeed, the SEC attributed the relevant misconduct to Cadbury India, with Mondelēz's responsibility "a result of [its] acquisition of Cadbury stock."

### Zimmer Biomet Settles with DOJ and the SEC for More Than $30 Million

On January 12, 2017, Zimmer Biomet Holdings Inc. ("Zimmer Biomet"), a medical device manufacturer, agreed to pay more than $30 million to resolve DOJ and SEC investigations into repeated violations of the FCPA. Zimmer Biomet agreed to enter into a DPA, pay a $17.4 million criminal penalty to DOJ and retain an independent compliance monitor for three years. Zimmer Biomet also agreed to pay the SEC $6.5 million in penalties and $5.82 million in disgorgement, plus interest, to resolve books and records violations.[12] In addition, Zimmer Biomet's indirect subsidiary, JERDS Luxembourg Holding S.AR.L.

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11 Crim. Div., U.S. Dep't of Justice & Enforcement Div., U.S. Sec. & Exchange Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 28 (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf. *Cf.* GE InVision, Inc., Exchange Act Release No. 51199, 2005 WL 354585 (Feb. 14, 2005), https://www.sec.gov/litigation/admin/34-51199.htm (GE was subject to successor liability where a subcontractor hired by InVision paid bribes to Filipino and Thai government officials, but in that case the misconduct was identified and disclosed prior to GE's acquisition of InVision).

12 Deferred Prosecution Agreement, *United States* v. *Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, ECF No. 18 (D.D.C. Jan. 17, 2017), https://www.justice.gov/opa/press-release/file/925171/download; Biomet, Inc., Exchange Act Release No. 79780, 2017 WL 117101 (Jan. 12, 2017), https://www.sec.gov/litigation/admin/2017/34-79780.pdf.

("JERDS"), pled guilty to one count of causing Zimmer Biomet to violate the FCPA's books and records provisions through the actions of JERDS' wholly-owned Mexican subsidiary.[13]

Biomet, which became Zimmer Biomet after its 2015 acquisition by Zimmer Inc., had been subject to a previous DPA with DOJ and an SEC settlement, both entered into in 2012, for FCPA violations relating to misconduct involving the use of a third-party distributor in Brazil between 2000 and 2008.[14] The 2012 DPA included an independent monitor requirement, and that independent monitor was unable to certify that Biomet's compliance program satisfied the requirements of the DPA. According to the DOJ, the fact that the new conduct was both itself a violation of the FCPA and a violation of the prior resolution agreements was a "relevant consideration" in determining the appropriate resolution here.[15] For example, the 2012 DPA required Biomet to terminate the third-party Brazilian distributor, but Biomet continued to use a distributor connected with the prohibited distributor until the end of 2013. Separately, this new resolution also stemmed from unrelated payments made, from 2008 through 2013, by Biomet's Mexican subsidiary to customs officials to allow it to import contraband dental implants into Mexico, resulting in more than $2.6 million in profits.

Although DOJ and the SEC credited Zimmer Biomet's cooperation and remedial actions, both DOJ and the SEC focused on Biomet's recidivism in announcing the charges. Then-Assistant Attorney General Leslie Caldwell stated, "Zimmer Biomet is now paying the price for disregarding its obligations under the earlier deferred prosecution agreement."[16] Similarly, Kara Brockmeyer, Chief of the SEC Enforcement Division's FCPA Unit, stated that "Biomet didn't entirely learn its lesson the first time around."[17] In calculating the appropriate penalty, DOJ increased Zimmer Biomet's culpability score by two points for committing the offense less than five years after the previous resolution, and the fine imposed is in the middle of the U.S. Sentencing Guidelines range, rather than at or below the bottom of the Guidelines range, as in many other FCPA criminal resolutions.

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13 Crim. Info., *United States* v. *JERDS Luxembourg Holding S.AR.L.*, No. 17-CR-00007, ECF No. 1 (D.D.C. Jan. 12, 2017), https://www.justice.gov/opa/press-release/file/925166/download.

14 *United States* v. *Biomet, Inc.*, No. 12-CR-0080, ECF No. 2 (D.D.C. Mar. 26, 2012); *U.S. Sec. & Exchange Comm'n* v. *Biomet, Inc.*, No. 12-CV-00454, ECF No. 1 (D.D.C. Mar. 26, 2012).

15 Press Release, U.S. Dep't of Justice, *Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation* (Mar. 26, 2012), https://www.justice.gov/opa/pr/third-medical-device-company-resolves-foreign-corrupt-practices-act-investigation.

16 Press Release, U.S. Dep't of Justice, *Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges* (Jan. 12, 2017), https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act.

17 Press Release, U.S. Sec. & Exchange Comm'n, *Biomet Charged With Repeating FCPA Violations* (Jan. 12, 2017), https://www.sec.gov/news/pressrelease/2017-8.html.

### SQM Settles Enforcement Actions with DOJ and the SEC for $30 Million

On January 13, 2017, the Chilean chemicals and mining company Sociedad Química y Minera de Chile ("SQM"), entered into a DPA with DOJ and a settlement with the SEC, pursuant to which it will pay a $15.5 million criminal penalty and a $15 million civil penalty for allegedly paying approximately $14.75 million in bribes in Chile between 2008 and 2015.[18] SQM also agreed to an independent monitor for a two-year term.

According to the settlement agreements, during the relevant time period, SQM had series B shares listed on the New York Stock Exchange and also made periodic filings with the SEC as a foreign private issuer. The settlement agreements stated that SQM a) had established an internal discretionary account that it used to make payments to fictitious vendors that were associated with certain politically exposed persons ("PEPs") for services that were not provided, and b) had donated to foundations for the benefit of the same PEPs. The settlement agreements noted SQM management had learned of the payments through an internal audit in 2014, but did not take adequate measures to stop them until 2015.

SQM self-reported the matter to U.S. authorities after it learned of the discretionary account through inquiries from Chilean tax authorities. While the SEC credited SQM for self-reporting, DOJ did not.[19] SQM therefore received only a 25 percent reduction from the bottom of the U.S. Sentencing Guidelines range for its cooperation and remediation, which included personnel changes, strengthening its internal audit and compliance departments, hiring additional staff trained in compliance issues and consulting experts in order to improve relevant internal policies and procedures. In addition, the DOJ settlement agreement explained that it was requiring a compliance monitor because "[a]lthough the Company has taken a number of remedial measures, the Company is still in the process of implementing its enhanced compliance program, which has not had an opportunity to be tested."[20]

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18 Deferred Prosecution Agreement, *United States* v. *Sociedad Química y Minera de Chile*, No. 17-CR-00013, ECF No. 2 (D.D.C. Jan. 13, 2017) ("SQM DPA"), https://www.justice.gov/criminal-fraud/file/930786/download; Sociedad Química y Minera de Chile, Exchange Act Release No. 79795, 2017 WL 447218 (Jan. 13, 2017) ("SQM SEC Resolution"), https://www.sec.gov/litigation/admin/2017/34-79795.pdf.

19 Crim. Div., U.S. Dep't of Justice, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* 4 (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download ("for a company to receive credit for voluntary self-disclosure of wrongdoing under this pilot . . . [t]he voluntary disclosure [must] qualif[y] under U.S.S.G. § 8C2.5(g)(1) as occurring 'prior to an imminent threat of disclosure or government investigation'").

20 SQM DPA.

### Orthofix Settles FCPA Enforcement Action with SEC for $6 Million

On January 18, 2017, Orthofix International N.V. ("Orthofix"), a Texas-based medical device company, agreed to pay the SEC approximately $6 million to resolve violations of the books and records and internal accounting controls provisions of the FCPA. As with several of the other resolutions of the last two months, the settlement also requires Orthofix to retain an independent compliance consultant, in this case for just one year.[21] As described in the SEC Order, the scope of the compliance consultant's mandate is limited to "review[ing] and evaluat[ing] Respondent's internal controls, record-keeping and financial reporting policies and procedures . . . and to make recommendations designed to reasonably improve the Policies and Procedures."[22]

According to the settlement, from 2011 to 2013, Orthofix do Brasil LTDA ("Orthofix Brazil"), a wholly-owned subsidiary of Orthofix, used third-party representatives and distributors to pay bribes to doctors at government-owned hospitals in an attempt to induce the doctors to use Orthofix products. The SEC alleged that Orthofix Brazil misrepresented the payments in its records, which were subsequently consolidated into Orthofix's records. According to the SEC, there was a lack of "policies or processes . . . to standardize or centrally approve and monitor the commissions and discounts," and "[t]he decentralized nature of Orthofix's business in Brazil allowed Orthofix Brazil to easily evade the policies and controls that Orthofix did have in place."[23]

In 2012, while these violations were occurring, Orthofix entered into a settlement with DOJ and the SEC for unrelated FCPA violations.[24] Among other things, those settlements included a self-reporting requirement. While still under those agreements, in 2013 Orthofix discovered the conduct at issue in this resolution and self-reported it. In response, DOJ extended the 2012 DPA twice, through July 2016, in order to further investigate Orthofix's conduct and the company's remedial actions but ultimately did not

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21 Orthofix International N.V., Exchange Act Release No. 79828, 2017 WL 192393 (Jan. 18, 2017) ("Orthofix SEC Resolution"), https://www.sec.gov/litigation/admin/2017/34-79828.pdf (the total payment consists of disgorgement of $2,928,000, prejudgment interest of $263,375, and a civil penalty of $2,928,000). Simultaneously with its FCPA settlement—although unrelated—Orthofix also settled with the SEC regarding accounting violations for an $8.25 million penalty. Press Release, U.S. Sec. & Exchange Comm'n, Medical Device Company Charged With Accounting Failures and FCPA Violations (Jan. 18, 2017), https://www.sec.gov/news/pressrelease/2017-18.html. Four of Orthofix's former executives also settled cases with the SEC related to Orthofix's accounting violations. *Id*.

22 Orthofix SEC Resolution at 9.

23 Orthofix SEC Resolution at 6.

24 *Id*. The 2012 settlement required Orthofix to pay $5.2 million in civil fines as part of an agreement with the SEC, and $2.22 million in criminal penalties to DOJ pursuant to a DPA. *Id*.

bring criminal charges. According to a company press release, "After careful review by the DOJ, the Company was informed that the DOJ has decided to take no further action with respect to this matter."[25]

Even though Orthofix was required to self-report, the SEC credited the self-reporting, along with cooperation and remediation, in calculating the appropriate resolution.

This case is remarkable in that the violations occurred right around the same time as Orthofix entered into a previous DPA. Indeed, the SEC order is critical of Orthofix's failure to fully address deficiencies in its controls and corruption-related risks at its subsidiaries' operations in response to the previous resolution. Nonetheless, the SEC recognized that Orthofix ultimately did undertake "significant" remedial measures to address these deficiencies and, thus, Orthofix received credit for such efforts.[26]

## Recent Individual Prosecutions under the FCPA

In January 2017, DOJ and the SEC also announced seven enforcement actions against individuals. These include five criminal prosecutions and two civil enforcement actions.

On January 4, 2017, DOJ charged Charles Beech, a U.S. national and resident, and Juan Hernandez-Comerma, a lawful permanent resident of the U.S., who both pled guilty January 10, 2017 to violations of the anti-bribery provisions of the FCPA in connection with bribes paid to purchasing analysts employed by Venezuela's state-owned and state-controlled energy company, Petroleos de Venezuela S.A. ("PDVSA") so that their respective companies would be included on a bidding list for PDVSA.[27] Including Beech and Hernandez-Comerma, eight individuals have pled guilty since 2015 as part of an ongoing U.S. government investigation into bribery at PDVSA. DOJ credited the Swiss Federal Office of Justice with assistance.[28]

DOJ also charged former U.N. Secretary General Ban Ki-Moon's brother, Ban Ki Sang, and nephew, Bahn Joo Hyun, along with two other individuals, John Woo and Malcolm Harris, for allegedly setting up a scheme to pay $2.5 million in bribes to facilitate the sale of a 72-story skyscraper in Hanoi, Vietnam to the

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25 Press Release, Orthofix Int'l N.V., Orthofix Announces Resolution of SEC Investigations (Jan. 18, 2017), http://ir.orthofix.com/releasedetail.cfm?ReleaseID=1008341.

26 Orthofix SEC Resolution.

27 *United States* v. *Beech*, No. 17-CR-00006 (S.D. Tex, Jan. 4, 2017), https://www.justice.gov/criminal-fraud/file/925196/download; *United States* v. *Hernandez-Comerma*, No. 17-CR-00005, (S.D. Tex, Jan. 4, 2017), https://www.justice.gov/criminal-fraud/file/925206/download.

28 Press Release, U.S. Dep't of Justice, Two Businessmen Plead Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Schemes (Jan. 10, 2017), https://www.justice.gov/usao-sdtx/pr/two-businessmen-plead-guilty-foreign-bribery-charges-connection-venezuela-bribery.

sovereign wealth fund of an unidentified Middle Eastern country for $800 million.[29] The scheme involved use of an intermediary, Harris, who held himself out as an agent of a foreign official of the unidentified Middle Eastern country with influence over its sovereign wealth fund; Harris was not an agent, and instead pocketed the $500,000 intended as a bribe for the foreign official. Ban, a South Korean national and resident, and Bahn, a South Korean national and legal permanent resident of the United States, were each charged with one count of conspiracy to violate the FCPA, three counts of violating the FCPA, one count of conspiracy to commit money laundering, and one count of money laundering (Bahn was also charged with one count of wire fraud, one count of aggravated identity theft, and one count of conducting monetary transactions in illegal funds); Harris was charged with one count of wire fraud, one count of aggravated identity theft, and one count of conducting monetary transactions in illegal funds. Notably, Harris was not charged with violating the FCPA because he did not have intent to bribe a foreign official. In fact, intent was at the heart of the Bahn and Ban prosecution – even though Harris was not actually an agent of a foreign official, the government alleges that their intent was to bribe a foreign official through their payments to Harris. Their indictment, dated December 15, 2016, was unsealed when Bahn was arrested in New Jersey on January 10, 2017. On the same day, the government filed a complaint charging one count of conspiracy to violate the FCPA against Woo, a national of South Korea and legal permanent resident of the United States, and arrested him at John F. Kennedy Airport in New York.[30] Harris was detained in Mexico on January 12, 2017 in a joint operation between Mexican federal authorities and U.S. authorities and pled not guilty on January 17, 2017.[31] Ban is currently at large.

### Former Bio-Rad General Counsel Awarded $10 Million in Whistleblower Case Involving FCPA Violations

Finally, the recent whistleblower complaint brought by the former General Counsel of Bio-Rad Laboratories, Sandford Wadler, highlights yet another challenge faced by companies that discover FCPA problems beyond regulatory enforcement. On February 6, 2017, the jury awarded Mr. Wadler over $10 million, finding that Bio-Rad retaliated against him for raising concerns about potential FCPA violations.[32]

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29 Press Release, U.S. Dep't of Justice, Four Individuals Charged in Foreign Bribery and Fraud Scheme Involved Potential $800 Million International Real Estate Deal for South Korean Company (Jan. 10, 2017), https://www.justice.gov/usao-sdny/pr/four-individuals-charged-foreign-bribery-and-fraud-scheme-involving-potential-800 ("Bahn Release").

30 *United States* v. *Woo*, No. 17-MJ-00139 (S.D.N.Y, Jan. 10, 2017); *United States* v. *Bahn*, *Ban and Harris*, No. 16-CR-00831 (S.D. N.Y., Dec. 15, 2016); Bahn Release.

31 *United States* v. *Bahn et al.*, No. 16 Cr. 831, ECF No. 15 (S.D.N.Y. Jan. 17, 2017).

32 Final Verdict, *Wadler* v. *Bio-Rad Laboratories, Inc.*, No. 15 Civ. 2356, ECF No. 223 (N.D. Cal. Feb. 7, 2017); Richard L. Cassin, FCPA Whistleblower: Former Bio-Rad GC Awarded $10 Million For Retaliatory Firing, FCPA Blog (Feb. 7, 2017) ("Cassin Article"), http://www.fcpablog.com/blog/2017/2/7/fcpa-whistleblower-former-bio-rad-gc-awarded-10-million-for.html.

In 2014, Bio-Rad entered into a resolution with the SEC and an NPA with DOJ. As part of those resolutions, Bio-Rad paid $55 million in civil and criminal fines to settle allegations regarding bribery and internal controls violations with respect to its businesses in Thailand, Vietnam, and Russia.[33] Prior to the settlement, in 2013, Bio-Rad terminated Mr. Wadler based on what it stated were performance issues.[34] Two years later, in 2015, after Bio-Rad settled with the government, Mr. Wadler filed the whistleblower complaint alleging that his 2013 termination was actually in retaliation for raising concerns about potential FCPA violations by Bio-Rad in China.[35]

During the trial, which began on January 17, 2017, Mr. Wadler testified that Bio-Rad had made only a "paper effort" to comply with the FCPA and that when he raised concerns about the company's practices in China to the Board of Directors in 2013, he was "abruptly fired."[36] Bio-Rad CEO Norman Schwartz testified, on the other hand, that Mr. Wadler was actually the one primarily at fault for the anti-corruption failures in Thailand, Vietnam and Russia, which Bio-Rad's in-house and outside lawyers also attempted to support through other evidence. Mr. Schwartz's testimony, as reported in the press, was that outside counsel, who were asked to investigate Mr. Wadler's China-related claims, concluded that the claims were not based on any due diligence, but rather appeared to be an attempt by Mr. Wadler to set himself up as a whistleblower.[37] Despite this testimony, a jury in the U.S. District Court for the Northern District of California determined that Wadler's report of potential abuses in China was protected whistleblower activity, and that his termination was in retaliation for his reporting the issue.[38]

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33 Bio-Rad Labs., Inc., Exchange Act Release No. 73496, 2014 WL 5513834 (Nov. 3, 2014), https://www.sec.gov/litigation/admin/2014/34-73496.pdf; Non-Prosecution Agreement, *United States* v. *Bio-Rad Labs., Inc.* (Nov. 3, 2014), http://www.corporatecrimereporter.com/wp-content/uploads/2014/11/Bio-Rad-NPA.pdf.

34 Mot. to Dismiss, *Wadler* v. *Bio-Rad Laboratories, Inc.*, No. 15 Civ. 2356, ECF No. 24 (N.D. Cal. Jul. 28, 2015).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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