

# FCPA Update

A Global Anti-Corruption Newsletter



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## The Collateral Consequences of Declinations with Disgorgement: Revisiting the CDM Smith Declination

In June 2017, the U.S. Department of Justice (“DOJ”) released a declination letter with respect to the Massachusetts engineering and construction company CDM Smith, related to alleged bribes paid by the company’s Indian subsidiary.<sup>1</sup> That declination by the DOJ was followed by a series of investigations by authorities in India that are ongoing. These continuing investigations into CDM Smith in India, and related allegations against Indian government officials, highlight both the benefits and disadvantages of the “declination with disgorgement,”

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1. Letter from U.S. Department of Justice to Nathaniel B. Edmonds, June 21, 2017, <https://www.justice.gov/criminal-fraud/pilot-program/declinations> (hereinafter “CDM Smith Declination”).

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a form of resolution that the DOJ first began using under the 2016 Pilot Program.<sup>2</sup> In particular, the ongoing Indian investigations suggest that, despite the current trend of multinational coordination in the investigation of bribery, a declination with disgorgement, ostensibly a decision not to take enforcement action, may carry with it collateral consequences that continue after the DOJ closes its investigation.

### Declinations with Disgorgement

Beginning with the 2016 Foreign Corrupt Practices Act Enforcement Plan and Guidance (the “Pilot Program”),<sup>3</sup> the DOJ expressly offered the possibility of a “declination” to a company that voluntarily self-discloses wrongdoing, fully cooperates with the DOJ’s investigation, engages in remediation, and disgorges any profits from the wrongdoing. Under the Pilot Program, the DOJ granted seven such declinations with disgorgement, each of which was publicly disclosed on the DOJ’s website,<sup>4</sup> in the form of a letter announcing the closing of the investigation. On November 29, 2017, the DOJ announced that declinations with disgorgement would become the presumptive method for resolving self-reported cases, assuming a lack of aggravating factors, and that all such declinations with disgorgement would be made public.<sup>5</sup>

Unlike a traditional declination, which reflects a decision by the DOJ not to proceed with an enforcement action against a company, a declination with disgorgement contains both a punitive element (disgorgement) and the public shaming associated with an enforcement action. As such, declinations with disgorgement may be seen as a new type of resolution vehicle by which the DOJ enforces the FCPA against corporations (supplementing guilty pleas, deferred prosecution agreements (“DPAs”), and non-prosecution agreements (“NPAs”)).

### CDM Smith

Like other declinations with disgorgement, the CDM Smith Declination took the form of a short (two-page) letter, in which the DOJ informed the company that it had closed its investigation. The letter announced that the DOJ had found that CDM Smith’s Indian subsidiary (“CDM India”) had paid \$1.8 million in “bribes”

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2. See Bruce E. Yannett, Andrew M. Levine, and Philip Rohlik, “The Difficulty of Defining a Declination: An Update on the DOJ’s Pilot Program,” FCPA Update, Vol. 8, No. 3 (Oct. 2016), <https://www.debevoise.com/insights/publications/2016/10/fcpa-update-october-2016>.
  3. U.S. Department of Justice, “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance” (Apr. 5, 2016), <https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program>.
  4. See <https://www.justice.gov/criminal-fraud/pilot-program/declinations>.
  5. U.S. Department of Justice, “Corporate Enforcement Policy (USAM 9-47.120),” <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy>.

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to officials of the National Highways Authority of India (“NHAI”) and local officials in the State of Goa, but that DOJ had decided to close its investigation due to the company’s self-disclosure, cooperation, remediation, and disgorgement of just over four million dollars in profit associated with the “illegally obtained contracts in India.”<sup>6</sup>

**“Although declinations with disgorgement allow companies to avoid ongoing reporting obligations commonly associated with NPAs and DPAs, the public nature of declinations with disgorgement give rise to a risk of ongoing investigations and legal jeopardy in other jurisdictions, as occurred in the CDM Smith case.”**

The CDM Smith Declination also noted that the alleged bribery was known to “[a]ll senior management at CDM India.”<sup>7</sup> As is made clear in the FCPA Corporate Enforcement Policy, a declination “is a case that would have been prosecuted or criminally resolved” but for voluntary disclosure, full cooperation, remediation, and disgorgement.<sup>8</sup> As the allegations in the CDM Smith Declination involve actions in India by employees of an Indian company (CDM India), the CDM Smith Declination included a jurisdictional predicate, alleging that CDM India employees “also acted as employees and agents of CDM Smith,”<sup>9</sup> signaling either an unusual form of employment contract at CDM India or a continuation of the DOJ’s aggressive use of the agency theory to define FCPA jurisdiction broadly.

**Collateral Consequences and Considerations for Declinations with Disgorgement**

Although the CDM Smith Declination resolved the DOJ’s investigation, it was followed by the opening of investigations in India. The Indian central government announced an investigation into related allegations by the Indian Central Vigilance Commission (“CVC”),<sup>10</sup> and the State of Goa apparently opened its

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6. CDM Smith Declination.

7. *Id.*

8. Corporate Enforcement Policy, *supra* n. 5.

9. CDM Smith Declination.

10. “Probe ordered into U.S. firm’s bribery case,” *The Hindu* (July 11, 2017), <http://www.thehindu.com/news/national/other-states/probe-ordered-into-us-firms-bribery-case/article19259336.ece>; “NHAI is investigating CDM scam, says Gadkari,” *Times of India* (July 16, 2017), <https://timesofindia.indiatimes.com/city/goa/nhai-is-investigating-cdm-scam-says-gadkari/articleshow/59613618.cms>; “Govt starts process to probe USD 1.18 ‘bribery’ in NHAI,” *Outlook Indian* (Aug. 3, 2017), <https://www.outlookindia.com/newscroll/govt-starts-process-to-probe-usd-118-bribery-in-nhai/1115132>.

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own investigation.<sup>11</sup> On January 31, 2018, the Economic Times of India published a two-part investigation detailing the results of a CVC investigation into bribery at the NHAI and the Directorate General of Central Excise Intelligence (“DGCEI”) (since renamed the Directorate General of Goods and Services Tax Intelligence).<sup>12</sup> According to the report, the CVC found that CDM Smith allegedly paid bribes to win NHAI contracts and avoid payment of service tax. The DGCEI denied the allegations and CDM Smith did not comment for the articles. According to the Economic Times, the CVC report was finalized at the end of 2017 and is awaiting action by the Central Bureau of Investigation. The report apparently alleges that NHAI officials conspired with CDM Smith, and that DGCEI officials “deliberately botch[ed] up” a service tax avoidance case against the company.<sup>13</sup> In refusing to comment, a CDM Smith spokesman noted that legal proceedings in India were ongoing.<sup>14</sup>

While it is unknown what legal jeopardy CDM Smith and CDM India may ultimately face in connection with the ongoing Indian investigations, the case highlights one of the perils of self-reporting: the lack of closure often associated with FCPA corporate enforcement actions. Even in this era of multinational cooperation, foreign follow-on investigations of anti-corruption matters resolved with U.S. authorities remain common.<sup>15</sup> Although declinations with disgorgement allow companies to avoid ongoing reporting obligations commonly associated with NPAs and DPAs, the public nature of declinations with disgorgement give rise to a risk of ongoing investigations and legal jeopardy in other jurisdictions, as occurred in the CDM Smith case.

From the point of view of the international fight against corruption, follow-on investigations associated with publicly disclosing declinations with disgorgement may also be seen as a positive, not a negative. Such publicity can encourage enforcement action by other jurisdictions, including, as is suggested in the Economic Times’ investigation, the possibility of eventual punishment of corrupt

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11. “Goa Chief Secretary to Conduct Inquiry into CDM Smith Bribery Case,” The Indian Express (July 15, 2017), <http://indianexpress.com/article/india/goa-chief-secretary-to-conduct-inquiry-in-cdm-smith-bribery-case-4752262/>.
  12. Dalip Singh, “ET Investigation Part I: How an American firm bribed its way to lucrative contracts in India,” Economic Times (updated Feb. 10, 2018), <https://economictimes.indiatimes.com/news/politics-and-nation/et-investigation-how-us-company-bribed-indian-officials-to-win-contracts/articleshow/62701302.cms>; Dalip Singh, “ET Investigation Part II: How US contractor CDM Smith used ‘service tax reimbursements’ to pay bribes,” Economic Times (updated Feb. 10, 2018), <https://economictimes.indiatimes.com/news/politics-and-nation/et-investigation-part-ii-how-us-contractor-cdm-smith-used-service-tax-reimbursements-to-pay-bribes/articleshow/62715084.cms>.
  13. Dalip Singh, “ET Investigation Part I,” *supra* n. 12.
  14. *Id.*
  15. See, e.g., Kelly Swanson, “In global enforcement rush, SBM Offshore became ‘roadkill’” Global Investigations Review (Feb. 22, 2018), <https://globalinvestigationsreview.com/article/jac/1159338/in-global-enforcement-rush-sbm-offshore-became-%E2%80%99Croadkill%E2%80%9D>.

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officials. This policy benefit – the prompting of enforcement activity by other authorities – also raises the question of why the DOJ felt it necessary to use an aggressive jurisdictional theory to reach actions that took place in India and to demand the payment of four million dollars in disgorgement to the U.S. Treasury. It is, of course, open to doubt whether the Indian authorities would have commenced investigations if not spurred into action by the DOJ's enforcement action. While the lack of facts in the CDM Smith declination letter leaves open the question as to whether it is truly an appropriate instance, there are times – even leaving aside the question of subject matter jurisdiction - when the DOJ should defer to local authorities. This is especially the case in the context of a relatively limited amount of improper payments apparently confined to a single country with, despite its imperfections, a strong independent judiciary and rule of law tradition. The declination with disgorgement vehicle should not absolve the DOJ of its responsibility to exercise the type of prosecutorial discretion traditionally associated with a declination.

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## A Primer on the ISO 37001 International Anti-Bribery Standard

Enforcement authorities, non-governmental organizations, academics, and others have devoted significant attention to what constitutes an effective anti-bribery compliance program. In October 2016, the International Organization for Standardization (“ISO”),<sup>1</sup> a global standards-setting organization, published its own international anti-bribery standard. This article provides a primer on that standard — ISO 37001:16, *Anti-bribery management systems – Requirements with guidance for use* (“ISO 37001”) — and responses to it.

ISO developed the 37001 standard to provide anti-bribery guidance and a related international benchmark, as well as a pathway for organizations to obtain independent verification for their efforts to combat bribery. In particular, the standard requires organizations to adopt certain measures to help prevent, detect, and respond to bribery. It applies widely to companies across industries and jurisdictions. Since its issuance, numerous companies have sought ISO 37001 certification; the standard itself has received both praise and criticism.

### What Is ISO 37001?

ISO 37001 provides organizations with requirements and guidance to establish, implement, maintain, and improve their anti-bribery management systems. According to ISO, such a system is “designed to instill[] an anti-bribery culture within an organization and implement appropriate controls, which will in turn increase the chance of detecting bribery and reduce its incidence in the first place.”<sup>2</sup>

The standard addresses bribery in different contexts that may affect an organization, including bribery *by* the organization, the organization’s employees, and the organization’s business associates, as well as bribery *of* the organization, the organization’s employees, and the organization’s business associates.

ISO 37001 is intended to be adaptable for use by all organizations, regardless of type, size, or nature of activity. The standard is likewise intended to work in any jurisdiction and regardless of whether the adopting organization is in the public, private, or non-profit sector. By design, ISO 37001 may function in a standalone capacity or be integrated into an organization’s existing compliance system.

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1. ISO is an independent, non-governmental organization that creates international standards for systems, products, and services covering a wide variety of industries and topics including technology, food safety, agriculture, and healthcare, and has over published 22,000 such standards. See International Organization for Standardization: All About ISO, <https://www.iso.org/about-us.html>.
  2. International Organization for Standardization, ISO 37001 Anti-Bribery Management Systems 2 (2016), [https://www.iso.org/iso/iso\\_37001\\_anti\\_bribery\\_mss.pdf](https://www.iso.org/iso/iso_37001_anti_bribery_mss.pdf).

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### Requirements

ISO 37001 requires an organization to adopt a series of measures to help prevent, detect, and respond to bribery risk. The requirements fall into six categories: Context of the Organization, Leadership, Planning, Support, Operation, Performance Evaluation, and Improvement. The requirements include:

- **Context of the Organization**

- Determining the external and internal issues relevant to its anti-bribery management system;
- “Understanding the needs and expectations of stakeholders”;
- Determining the scope of the anti-bribery management system; and
- Conducting a bribery risk assessment.

- **Leadership**

- A governing body and top management that “demonstrate leadership and commitment with respect to the anti-bribery management system” by taking certain actions including “ensuring the integration of the anti-bribery management system requirements into the organization’s processes,” and deploying adequate resources;
- Adopting an anti-bribery policy that meets specific criteria; and
- Appointing an employee to oversee compliance with the anti-bribery policy.

- **Planning**

- Addressing identified risks and opportunities; and
- Setting measurable objectives and making plans to achieve them.

- **Support**

- Determining and providing adequate resources;
- Vetting and training employees;
- Communicating both internally and externally; and
- Creating and updating documentation.

- **Operation**

- Conducting risk assessments on projects and business partners;
- Implementing financial and commercial controls;
- Implementing procedures concerning gifts, hospitality, donations, and similar benefits; and
- Adopting reporting and investigation procedures.

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- **Performance Evaluation**
  - Adopting measures to monitor and evaluate the performance of the system;
  - Conducting internal audits; and
  - Conducting reviews by top management and the anti-bribery compliance function of the system.
- **Improvement**
  - Implementing corrective actions and continual improvements.

In addition to listing the requirements, the standard also provides detailed, practical guidance on the types of actions an organization can take to implement them. For example, the standard addresses how an organization could conduct the required bribery risk assessment.

**“ISO 37001 may be particularly helpful for international organizations that operate in multiple jurisdictions with varying anti-bribery regulations, requirements, and expectations.”**

### Certification Process

As with other ISO standards, an independent, accredited third-party can conduct an audit in order to certify an organization’s compliance. This certification is valid for three years.

The certification process is not mandatory, and the standard is meant to be flexible so that an organization may utilize it with or without being formally certified.

### How Does ISO 37001 Compare to Other Compliance Guidance?

An important question in evaluating the usefulness of the standard is how it differs from the already extensive anti-bribery guidance provided by regulators, including the U.S. Department of Justice (“DOJ”), the U.S. Securities and Exchange Commission (“SEC”), and the U.K. Ministry of Justice, among others. For example, DOJ and the SEC released a *Resource Guide to the U.S. Foreign Corrupt Practices Act* (“Resource Guide”)<sup>3</sup> in 2012; more recently, the DOJ Fraud Section published

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3. U.S. Dep’t of Justice and SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 14, 2012) (“Resource Guide”), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.



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guidance on compliance programs entitled *Evaluation of Corporate Compliance Programs*<sup>4</sup> in 2017; and the U.S. Attorneys' Manual and Federal Sentencing Guidelines also contain relevant standards for evaluating compliance programs (collectively, "U.S. Guidance").

There is significant overlap between the U.S. Guidance and ISO 37001. They both address commitment by senior management, risk assessments, training and communications, reporting and investigation, continuous improvement, and testing and review procedures, and they emphasize the culture of compliance. However, the particular purpose, format, and detail of ISO 37001 and the U.S. Guidance differ.

ISO 37001 provides concrete steps deemed necessary for certification and "how to" guidance on ways to meet the requirements. Unlike the U.S. Guidance, it is not focused on a particular jurisdiction and is meant to apply broadly (though the U.S. Guidance itself is part of a growing body of such guidance from authorities around the world, including in the United Kingdom and Brazil, and in any event has relevance beyond the United States).

In contrast to ISO 37001, the U.S. Guidance addresses how prosecutors evaluate a compliance program, including in the context of a government investigation, but does not provide a roadmap for building one.<sup>5</sup> Indeed, the DOJ Fraud Section's guidance expressly raises "common questions," rather than offer answers, and acknowledges that it is "neither a checklist nor a formula."<sup>6</sup> The Resource Guide, meanwhile, has a much broader ambit than addressing compliance programs. It details the FCPA's "statutory requirements while also providing insight into DOJ and SEC enforcement practices through hypotheticals, examples of enforcement actions and anonymized declinations, and summaries of applicable case law and DOJ opinion releases."<sup>7</sup> The Resource Guide does include a section on "Hallmarks of Effective Compliance Programs," addressing many of the same compliance topics as ISO 37001.

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4. U.S. Dep't of Justice, Criminal Division, Fraud Section, *Evaluation of Corporate Compliance Programs* (Feb. 8, 2017), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.
  5. See Sean Hecker, Andrew M. Levine, and Philip Rohlik "DOJ Issues Guidance on Evaluating Corporate Compliance Programs," *FCPA Update*, Vol. 8, No. 7 (Feb. 2017), [https://www.debevoise.com/~media/files/insights/publications/2017/02/fcpa\\_update\\_february\\_2017.pdf](https://www.debevoise.com/~media/files/insights/publications/2017/02/fcpa_update_february_2017.pdf).
  6. *Evaluation of Corporate Compliance Programs*, *supra* n.4.
  7. Resource Guide, Foreword.

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### Potential Benefits and Criticisms of ISO 37001

ISO 37001 is intended to help create or enhance an organization's anti-bribery culture and to enable an organization to detect instances of bribery earlier and take corrective action quicker. Adopting ISO 37001 would not shield an organization from prosecution if bribery occurs, but it could help mitigate penalties from regulators. For example, compliance with ISO 37001 could yield an audit trail that demonstrates a bribe was a one-time event — committed by a rogue employee who circumvented well-developed compliance procedures — rather than a systemic problem. In the event of a criminal investigation, prior implementation of the standard, like other efforts to adopt and maintain an effective anti-bribery compliance program, may help demonstrate that an organization has taken reasonable steps to prevent bribery, and therefore reduce financial penalties or other adverse consequences.<sup>8</sup>

ISO 37001 is also intended to provide a means for an organization to demonstrate to customers and other stakeholders the organization's commitment to stamping out bribery.<sup>9</sup> Adoption of the standard may help protect an organization's reputation and reduce related harm in the event of bribery or other corrupt conduct. An organization also may be able to save time and resources by interacting with ISO-certified organizations, for example to streamline the on-boarding of third parties.

There has been criticism of both the substance of ISO 37001 and the certification process. For one, extensive anti-bribery guidance that already has been issued by regulators and others arguably render non-regulatory standards such as ISO 37001 unnecessary or less helpful. It is also not known how DOJ and the SEC, which have not issued any official statements about the standard, would view its adoption relative to other compliance protocols in the event of an investigation or a prosecution.

There is also a concern that ISO 37001 may encourage "check-the-box" compliance, which the Resource Guide specifically warns against.<sup>10</sup> That said, any regulatory guidance also can become a "check-the-box" exercise if the organization implementing it chooses to do no more than the perceived minimum or fulfills isolated standards without deploying a truly effective compliance program.

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8. ISO 37001 Anti-Bribery Management Systems at 3.

9. *Id.*

10. Resource Guide at 57 ("Compliance programs that employ a 'check-the-box' approach may be inefficient and, more importantly, ineffective.").

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Finally, some questions have been raised regarding the certification process, given that an organization can set for itself the scope of the certification, possibly certifying only a portion of its operations. It is therefore important to understand the extent of a certification when evaluating an organization that touts itself as “ISO Certified.”

### Conclusion

The future of ISO 37001 remains uncertain. In the United States, Wal-Mart and Microsoft have stated publicly that they are seeking certification.<sup>11</sup> Internationally, some large companies already have received certification, including the Italian oil and gas company Eni SpA, the French rail transportation company Alstom, and the intellectual property and technology company CPA Global.<sup>12</sup> In addition to businesses, governments also have started to adopt ISO 37001, including in Singapore and Peru.<sup>13</sup> In China, a local regulator in Shenzhen adopted an anti-bribery management system based on the standard.<sup>14</sup>

ISO 37001 may be particularly helpful for international organizations that operate in multiple jurisdictions with varying anti-bribery regulations, requirements, and expectations. As more companies and governments implement ISO 37001, it may become an important signaling tool to customers, investors, and regulators that an organization is committed to anti-bribery compliance and is seeking to adhere to appropriate standards and expectations.

While the usefulness and relevance of ISO 37001 certification will vary depending on the circumstances, it has the potential to be a helpful source of support or guidance for an organization’s anti-bribery compliance program. In the end, in addition to the quality and implementation of the standards themselves, the ultimate value of such a certification rests in large part on the credibility, expertise, and extent of review by the certifying organization.

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11. David Howard, “Why Microsoft is Adopting the New International Anti-Bribery Standard,” The Official Microsoft Blog (May 17, 2017), <https://blogs.microsoft.com/on-the-issues/2017/05/17/microsoft-adopting-new-international-anti-bribery-standard>; Nandita Bose and Kevin Krolicki, “Wal-Mart Seeks Anti-Corruption Certification, in Talks with Regulators,” Reuters (May 3, 2017), <https://www.reuters.com/article/us-usa-compliance-walmart/wal-mart-seeks-anti-corruption-certification-in-talks-with-regulators-idUSKBN17Z2PM>.
  12. Press Release, Eni SpA, “Eni Becomes the First Italian Company to Obtain the ISO 37001:2016 ‘Antibribery Management Systems’ Certificate of Conformity for its Anti-Corruption Compliance Program” (Jan. 25, 2017), [https://www.eni.com/en\\_IT/media/2017/01/eni-becomes-the-first-italian-company-to-obtain-the-iso-370012016-antibribery-management-systems-certificate-of-conformity-for-its-anti-corruption-compliance-program](https://www.eni.com/en_IT/media/2017/01/eni-becomes-the-first-italian-company-to-obtain-the-iso-370012016-antibribery-management-systems-certificate-of-conformity-for-its-anti-corruption-compliance-program); Press Release, Alstom, “Alstom Obtains ISO 37001 Certification for Its Anti-Bribery Management System” (June 27, 2017), <http://www.alstom.com/press-centre/2017/06/alstom-obtains-iso-37001-certification-for-its-anti-bribery-management-system/>; Press Release, CPA Global, “CPA Global Achieves ISO 37001 Anti-Bribery Certification” (July 13, 2017), <https://www.cpaglobal.com/press-releases/cpa-global-achieves-iso-37001-anti-bribery-certification>.
  13. Elizabeth Gasiorowski-Denis, “How Microsoft is Bursting the Bribery Bubble,” International Organization for Standardization (Nov. 8, 2017), <https://www.iso.org/news/ref2238.html>.
  14. Shenzhen Government, “City To Pilot Anti-Bribery Management System” (June 19, 2017), [http://english.sz.gov.cn/In/201706/t20170619\\_7168671.htm](http://english.sz.gov.cn/In/201706/t20170619_7168671.htm).

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