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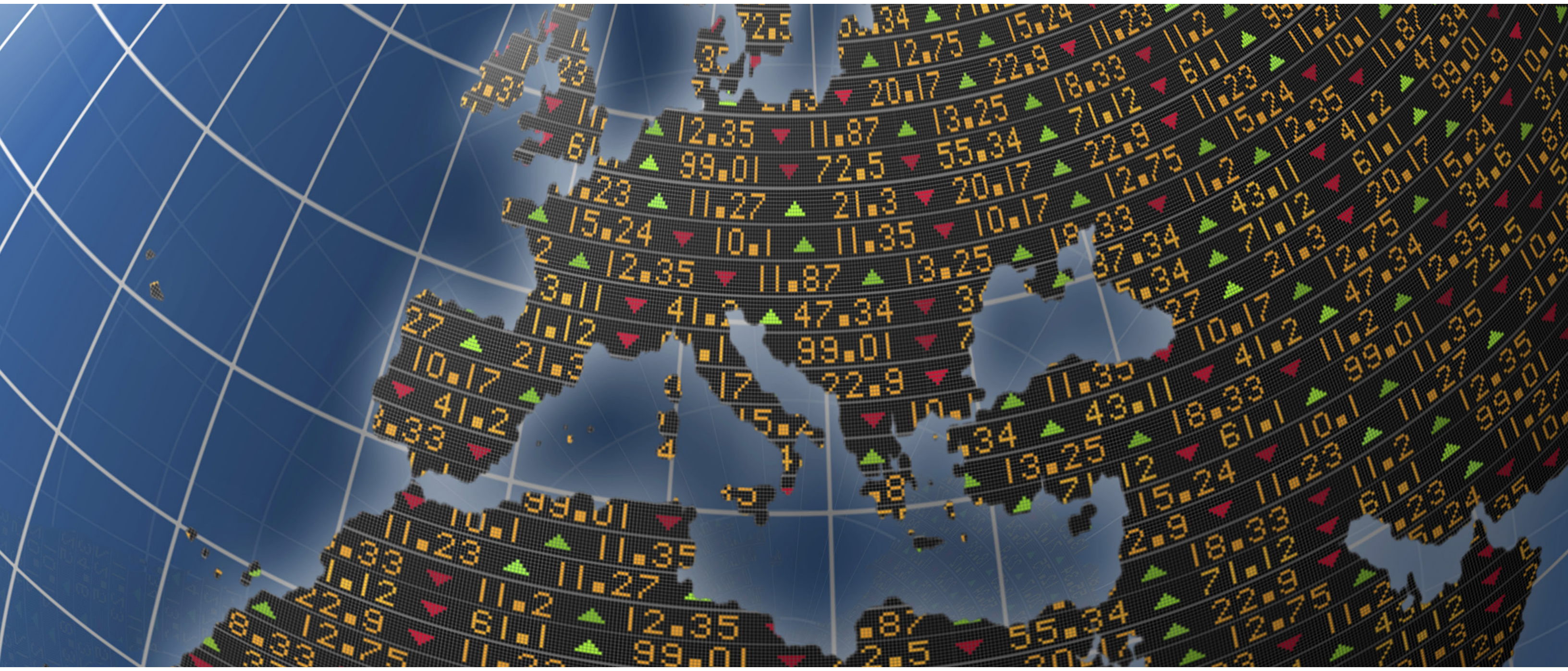

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Taking the Statute of Limitations Seriously: Applying *Kokesh*, District Court Dismisses SEC Claims Seeking "Obey-the-Law" Injunction

Ruling against an effort by the U.S. Securities and Exchange Commission ("SEC") to enjoin two individuals charged in connection with the Och-Ziff Capital Management Group's ("Och-Ziff") recent Foreign Corrupt Practices Act ("FCPA") settlement, a federal district court in New York has applied the general federal statute of limitations to bar a so-called "obey-the-law" injunction, even though injunctions normally are considered equitable remedies that are not subject to such statutes. The ruling is significant because it applies a five-year limitations period to yet another SEC remedy, thereby expanding the scope of last year's Supreme Court ruling in *Kokesh v. SEC*.[1]

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1. 137 S. Ct. 1635 (2017); Kara Novaco Brockmeyer, Andrew J. Ceresney, Jil Simon, "U.S. Supreme Court's Ruling on Disgorgement Has Broad Implications for FCPA Matters," FCPA Update, Vol. 8, No. 11 (June 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/06/fcpa_update_june_2017a.pdf.

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On July 12, 2018, in *SEC v. Cohen*,[2] Judge Garaufis of the Eastern District of New York dismissed claims against Michael L. Cohen and Vanja Baros, both former employees of Och-Ziff or its subsidiaries, for violations of the FCPA and other securities laws and for aiding and abetting such violations because the SEC's claims were barred by the five-year statute of limitations found in the U.S. Code.[3] The allegations against the defendants related to their employment at Och-Ziff or its subsidiaries and their involvement in investments in Africa, which were the subject of SEC and DOJ enforcement actions in September 2016 against Och-Ziff and its wholly-owned subsidiary OZ Africa Management CP, LLC.[4] In its complaint, the SEC sought monetary penalties, disgorgement, and a permanent injunction barring the defendants from violating the provisions of the securities laws that formed the basis of the complaint, a so-called "obey-the-law" injunction.

The district court in *SEC v. Cohen* agreed with the defendants' arguments, becoming the first court to apply last year's *Kokesh* ruling in the FCPA context. The district court's order, which the SEC may appeal, represents an extension of *Kokesh*, rejecting several SEC theories that would have limited the scope of the Supreme Court's ruling. Although further litigation is likely in this area, *SEC v. Cohen* is a powerful and timely statement – given the recent enforcement actions arising out of very old conduct[5] – that the SEC will continue to face significant hurdles if it fails to bring enforcement actions within five years of the underlying alleged violation. Assuming it is not reversed, individuals and entities subject to SEC investigations will find themselves in a stronger position to negotiate with the SEC with regard to when the statute of limitations begins to run, the scope of tolling agreements, and applicability of the five-year limitations period to at least some forms of injunctive relief.

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2. *U.S. Sec. & Exch. Comm'n v. Cohen*, Mem. and Order, Case No. 1:17-cv-00430-NGG-LB (E.D.N.Y July 12, 2018). ECF. No. 68 [hereinafter "Cohen Order"].
3. *See* 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.").
4. *See* Paul R. Berger, Colby A. Smith, Rushmi Bhaskaran, Kayla Bensing, "In First Major FCPA Enforcement Action Against a Hedge Fund, U.S. Settles with Och-Ziff Capital Management," FCPA Update Vol. 8, No. 3 (Oct. 2016), https://www.debevoise.com/~/media/files/insights/publications/2016/10/fcpa_update_october_2016.pdf; United States v. Och-Ziff Capital Mgmt. Grp. LLC, Cr. No. 16-516 (NGG), Deferred Prosecution Agreement (E.D.N.Y. Sept. 29, 2016) ("DPA"), Attachment A ("Statement of Facts"), https://www.justice.gov/opa/file/899306/download. The SEC's administrative order largely tracks the facts set forth in the DOJ's papers. *See In re* Och-Ziff Cap. Mgmt. Grp. LLC, et al., SEC Admin. Pro. 3-17595 (Sept. 29, 2016) ("SEC Order"), https://www.sec.gov/litigation/admin/2016/34-78989.pdf.
5. *See, e.g.*, Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, Jil Simon, Andreas A. Glimenakis, "U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic," FCPA Update Vol. 9, No. 10 (May 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/05/fcpa_update_may_2018.pdf.
6. Cohen Order at 2-13, 17.

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Limitations Period for Disgorgement

SEC v. Cohen involved nine transactions in Libya and elsewhere in Africa that occurred between May 30, 2007 and April 15, 2011.[6] As the complaint against them was filed on January 26, 2017[7] (prior to the Supreme Court's ruling in *Kokesh*), the question before the court was which claims, if any, survived the five-year statute of limitations period.

There is no specific statute of limitations for SEC civil actions, therefore the general five-year statute of limitations in 28 U.S.C. § 2462 applies. That limitations period applies by its terms to "any civil fine, penalty, or forfeiture, pecuniary or otherwise" sought by the SEC.[8] In *Kokesh*, a unanimous Supreme Court held that the same limitations period applies to SEC actions for disgorgement, which the Court said act as a penalty under the statute.[9] The Court in *Kokesh* based this holding on the fact that disgorgement in SEC actions is: (i) designed to be a consequence of violating public laws (as opposed to private wrongs),[10] (ii) designed to deter violations of securities laws,[11] and (iii) usually not compensatory.[12]

"Although further litigation is likely in this area, *SEC v. Cohen* is a powerful and timely statement – given the recent enforcement actions arising out of very old conduct – that the SEC will continue to face significant hurdles if it fails to bring enforcement actions within five years of the underlying alleged violation."

Based on *Kokesh*, which was decided after the SEC filed its case against Cohen and Baros, it seemed likely that the SEC's claims for civil penalties and disgorgement against the *Cohen* defendants should be time barred. The SEC presented three arguments to the contrary, all of which were rejected by the court.

First, the court rejected the SEC's argument that the statute of limitations was inappropriately considered at the motion to dismiss stage because it is an

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7. *Id.* at 17.
8. *Gabelli v. SEC*, 568 U.S. 442, 447, 454 (2013).
9. *Kokesh, supra* note 1, 137 S. Ct. at 1642, 1645.
10. *Id.* at 1643.
11. *Id.*
12. *Id.* at 1644.

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affirmative defense relating to remedies. The court found that taking the allegations of the complaint as true, it was clear that they related to conduct outside of the five-year period.[13]

Second, and most interesting from a practical perspective, the SEC argued that one of the defendants had entered into tolling agreements that extended the limitations period.[14] The Och-Ziff investigation began as an industry sweep of dealings with Libyan banks and sovereign wealth funds after the fall of the Gadhafi government. The investigation later expanded to a second formal order relating to conduct in sub-Saharan Africa. The question before the district court was the meaning of an agreement to toll the limitations period for "any action . . . arising out of the investigation," where the "investigation" was defined with reference to the first formal SEC order relating to Libya and did not refer to the second order regarding Sub-Saharan Africa.[15] The SEC argued that "arising out of" referred to any matter (including other investigations) that the SEC discovered as a result of its initial investigation into Libya. The court disagreed, opting for the narrower approach put forth by the defendants – that the tolling agreements only suspended the statute of limitations for the claims relating to the initial investigation, i.e., those related to Libya. Even with the tolling agreements – which extended the limitations period for 21 months – the court found the Libyan claims to be time barred because the relevant transactions had taken place in 2007 and 2008; the remaining claims from later periods were time barred because they had never been tolled.[16]

Parties currently subject to tolling agreements with the SEC should carefully review the wording of those agreements in light of *Cohen*. As we noted in discussing the *Kokesh* ruling,[17] going forward, companies and individuals should consider seeking narrow tolling agreements, and *Cohen* provides an example of how such an agreement can be tailored to the circumstances underlying the initial investigation. In addition to preserving statute of limitations defenses, narrow tolling agreements (whether existing or future) should also give companies leverage to push back against the tendency of FCPA investigations to metastasize far beyond the original

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13. Cohen Order at 18 (relying on *Jones v. Block*, 549 U.S. 199, 215 (2007)). The parties agreed that the relevant nine transactions all occurred between May 30, 2007 and April 15, 2011, therefore "even the most recent transaction occurred more than five years before the SEC filed suit on January 20, 2017." *Id.* at 17. The court further stated that because § 2462 "prohibits the court from 'entertaining' actions that accrued more than five years earlier" it could not allow discovery to proceed "with respect to claims that appear to be time-barred on the face of a plaintiff's complaint." *Id.* at 18.

14. *Id.* at 20.

15. *Id.* at 21.

16. *Id.* at 20-23.

17. Brockmeyer *et al.*, *supra* n.1 at 4-5.

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allegations (e.g., demands to "boil the ocean"[18]). However, in light of *Cohen*, it is equally likely that the SEC will seek to require cooperating companies to enter into particularly broadly worded tolling agreements.

Finally, the SEC argued that in a disgorgement action the limitations period should accrue upon receipt of ill-gotten gains, not merely when the underlying conduct took place.[19] The district court so found,[20] however, that the limitations period for an FCPA claim accrues at that point that a violation occurs and not later. Nowhere does the FCPA prohibit the receipt of money or other benefits that are the result of an improper payment. Instead, the FCPA prohibits the use of the means of interstate commerce to offer, promise, or give anything of value to a foreign official.[21] The idea that the limitations period begins with (or that the offense continues through) the receipt of subsequent benefits from a bribe often surfaces in contexts such as the seemingly abandoned "tainted contracts" theory of successor liability[22] and elsewhere. It is useful for companies and counsel to have another judicial decision debunking this mistaken assertion.

Does *Kokesh* Apply to Injunctions?

Kokesh held that the five-year period of § 2462 applies to disgorgement because disgorgement operates as a penalty. Unlike the relatively novel remedy of disgorgement (unknown at common law),[23] injunctions have existed as an equitable remedy since before time immemorial[24] and have a long history of being considered equitable rather than punitive. That has also been the position of the SEC. As recently as May of 2018, Steven Peikin, Co-Director of Enforcement at the SEC, told defense attorneys that it was a "non-starter" to argue that *Kokesh* applies to

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18. Leslie R. Caldwell, Assistant Attorney General, U.S. Dep't of Justice, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (April 17, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law.

19. Cohen Order at 24.

20. *Id.* (citing *SEC v. Straub*, No. 11-cv-9645 (RJS), 2016 WL 5793398, at *19 (S.D.N.Y. Sept. 30, 2016)).

21. 15 U.S.C. § 78dd-1.

22. *See* Sean Hecker, Andrew M. Levine, Bruce E. Yannett, Philip Rohlik and Steven S. Michaels, "Opinion Release 14.02: Revisiting Successor Liability," FCPA Update, Vol. 6, No. 4 (Nov. 2014), https://www.debevoise.com/~/media/files/insights/publications/2014/11/fcpa_update_nov_2014.pdf.

23. *See, e.g.*, Samuel L. Bray., Remedies, Meet Economics; Economics, Meet Remedies at 29 (September 22, 2017). Oxford Journal of Legal Studies (Forthcoming); UCLA School of Law, Law-Econ Research Paper No. 17-16. Available at SSRN: https://ssrn.com/abstract=3041719; George P. Roach, "A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies for Equity in Federal Agencies," 12 Fordham J. Corp. and Fin. L. 1, 49 (2007) (tracing growth in use of "disgorgement" in US judicial opinions from being exceedingly rare before 1960 to being exceedingly common thereafter).

24. First Statute of Westminster, 3 Edw. 1, c. 5. (1275) (defining time immemorial as beginning with the reign of Richard I (1189)). *See, e.g.*, George Franklin Bailey, "The Growth of the Equitable Remedy of Injunction" at 3 (1895) (tracing first injunction to the reign of Henry I (r. 1100-1135) with possible origins in Roman law), *Historical Theses and Dissertations Collection 77*, https://scholarship.law.cornell.edu/historical_theses/77.

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injunctions and that such an argument should not be raised in a Wells meeting, adding: "You are welcome to try to persuade a court to extend *Kokesh* in a litigated case, but that is not something we are likely able to agree to in a settled context or to forgo based on litigation risks."[25]

The district court in *SEC v. Cohen* eschewed the formal classification of the injunction in this case as necessarily equitable and conducted an examination of the substance. The injunctive relief sought by the SEC was to prohibit the defendants from violating the securities laws in the future.[26] Also known as an "obey-the-law" injunction, the injunction sought by the SEC would not impose any new obligation on the defendants, as they, like everyone else, already are required to obey the law. Applying the three factors *Kokesh* used to determine that disgorgement was a penalty, the district court found that an obey-the-law injunction satisfied two: (i) the remedy was sought to "redress alleged 'wrong[s] to the public,' not just 'wrong[s] to individuals'"; and (ii) the injunction was at least in part a non-compensatory penalty, in that the injunction would impose no duties on the defendants, but instead "mark [d]efendants as lawbreakers" and "stigmatize them in the eyes of the public."[27] As a result, the district court found that the obey-the-law injunction sought by the SEC was a "penalty" under *Kokesh*. As this ruling could be read to conflict with a recent (non-FCPA) Eighth Circuit case,[28] litigation over the issue of whether and when an injunction is a penalty is likely to continue.

The district court's decision in *Cohen* is subject to appeal and does not create binding authority for other courts. However, *Cohen* provides valuable judicial guidance on tolling agreements, when the statute of limitations accrues in the FCPA context, and the applicability of *Kokesh* to injunctive relief that operates, in part, as a penalty. Assuming it is not reversed, *Cohen* will strengthen arguments available to companies and individuals subject to SEC scrutiny and, hopefully will encourage the SEC to investigate and resolve future cases more expeditiously.

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25. Steven Peikin, Co-Director, Division of Enforcement, U.S. Sec. & Exch. Comm'n, "Keynote Address at the New York City Bar Association's 7th Annual White Collar Crime Institute" (May 9, 2018), https://www.sec.gov/news/speech/speech-peikin-050918.

26. Cohen Order at 25.

27. *Id.* at 29-30 (quoting, in part, *SEC v. Gentile*, No. 16-CV-1619 (JLL), 2017 WL 6371301, at *3 (D.N.J. Dec. 13, 2017)).

28. *See SEC v. Collyard*, 861 F.3d 760 (8th Cir. 2017).

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FCPA Settlements Reached with Beam Suntory and Credit Suisse

More than halfway through 2018, there have been nine FCPA corporate resolutions: two joint resolutions with the SEC and DOJ, four SEC-only resolutions, and three DOJ-only resolutions. In July 2018, two corporate settlements were announced: Beam Suntory settled a long-running investigation with the SEC regarding improper payments made to various government officials through third-party intermediaries in India, and Credit Suisse settled with both the SEC and DOJ over its hiring practices in Asia, becoming the second bank (and third company) to settle claims relating to Chinese "Princelings."[1] The Beam Suntory enforcement action serves as yet another reminder to remedy expeditiously improper payment practices at acquired companies. The Credit Suisse enforcement action repeats many themes related to hiring practices, which were set out in the earlier JPMorgan Securities (Asia Pacific) enforcement action, but provides little additional guidance.

Beam Suntory

On July 2, 2018, Beam Suntory Inc. ("Beam"),[2] maker and seller of branded alcoholic beverages worldwide, settled a cease-and-desist order with the SEC (the "Beam Order").[3] Beam neither admitted nor denied the SEC's allegations that Beam's Indian subsidiary ("Beam India") made improper payments and the SEC found that Beam violated the books and records and internal controls provisions of the FCPA. Beam agreed to pay approximately $6.1 million in disgorgement and pre-judgment interest, and a civil penalty of $2 million.[4]

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1. We have covered prior settlements of "Princeling investigations" related to Qualcomm and JPMorgan. *See* Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, "SEC Expands Its Aggressive Approach to Connected Hires in Qualcomm Enforcement Action," FCPA Update Vol. 7, No. 8 (Mar. 2016), https://www.debevoise.com/insights/publications/2016/03/fcpa-update-march-2016; Bruce E. Yannett, Andrew M. Levine, Philip Rohlik, "Beyond 'Sons and Daughters': JPMorgan Resolves Hiring Practices Probe," FCPA Update Vol. 8, No. 4 (Nov. 2016), https://www.debevoise.com/insights/publications/2016/11/fcpa-update-november-2016. In addition, the SEC's settlement with Bank of New York Mellon, although not related to China, was premised on the theory that an internship for an official's relative may be considered a thing of value. Sean Hecker, Bruce E. Yannett, Phillip Rohlik, David Sarratt, "The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials," FCPA Update Vol. 7, No. 1 (Aug. 2015), https://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015.
2. The relevant findings in the Order relate to a period before Beam's acquisition by Suntory.
3. *In the Matter of Beam Inc., n/k/a Beam Suntory Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No 83575, Accounting and Auditing Enforcement Rel. No. 3944, Admin Proc. File No. 3-18568 (July 2, 2018), https://www.sec.gov/litigation/admin/2018/34-83575.pdf.
4. Commissioner Hester M. Peirce's approval was given "with exception" as to the civil penalty. *See* U.S. Sec. & Exch. Comm'n, Final Commission Votes: July 2018, https://www.sec.gov/about/commission-votes/commission-votes-2018-07.xml.

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The findings in the Beam Order are factually similar to those in the SEC's 2011 administrative proceeding against Diageo,[5] which also involved alcohol sales and distribution in India. The broader issue presented by the Beam Order, however, more closely mirrors the issue in the April 2018 Dun & Bradstreet resolution[6] – namely: why Beam did not quickly remedy a pattern of improper payments discovered at an acquired foreign subsidiary. In terms of evaluating the SEC's enforcement practices, the Beam Order raises the same questions we noted with regard to the Dun & Bradstreet resolution: why the investigation took so long after a self report by Beam in 2012[7] and why the SEC ultimately chose to pursue this enforcement action after such a long delay.[8]

The findings in the Beam Order relate to activity by Beam India and/or its regional management in Australia and the use of third-party promoters to direct improper payments to government officials. Beam acquired Beam India in 2006.[9] Beam India's predecessor regularly made payments to Indian officials.[10] When Beam acquired the company, it retained the existing management and these practices continued.[11] Specifically, Beam India made inflated payments to "third-party promoters," knowing that part of those funds would be paid to employees of government-owned depots and liquor stores to encourage orders and obtain shelf space.[12] In addition, Beam India made payments to lower-level officials to obtain or speed up necessary permits and registrations, and made at least one larger payment, through a third-party bottler, to a more senior official who demanded approximately $18,000 for registering a new product label.[13]

Like the Dun & Bradstreet Order, the Beam Order focuses on the failure to timely remediate deficiencies at an acquired subsidiary in a difficult jurisdiction. The Beam Order points to red flags first appearing in 2010, including a report from January 2011

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5. *In the Matter of Diageo plc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order and A Civil Penalty, Securities Exchange Act of 1934 Rel. No. 64978, Accounting and Auditing Enforcement Rel. No. 3307, Admin. Proc. File No. 3-14490 (July 27, 2011), https://www.sec.gov/news/press/2011/2011-158.htm.

6. *In the Matter of Dun & Bradstreet Corp.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 83088, Accounting and Auditing Enforcement Rel. No. 3936, Admin. Proc. File No. 3-18446 (Apr. 23, 2018), https://www.sec.gov/litigation/admin/2018/34-83088.pdf [hereinafter "D&B Order"].

7. *See* Beam Inc., Quarterly Report (Form 10-Q), at 18. (Nov. 8, 2012).

8. Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, Jil Simon, Andreas A. Glimenakis, "U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic," FCPA Update, Vol. 9, No. 10 at 5 (May 2018), https://www.debevoise.com/insights/publications/2018/05/fcpa-may-2018.

9. Beam Order ¶ 6.

10. *Id.* ¶¶ 7-8.

11. *Id.* ¶ 9. Unlike the Dun & Bradstreet Order, there is no suggestion in the Beam Order that Beam management was aware of the payments at the time of acquisition.

12. *Id.* ¶¶ 10-13.

13. *Id.* ¶¶ 14-16.

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stating that "promoters are likely making grease payments" to Indian government officials.[14] Notably, and in the wake of the Diageo settlement in 2011, Beam received advice from a global auditing firm, a U.S. law firm, and an Indian law firm to take additional investigative steps, which it apparently did not immediately heed.[15] Beam undertook at least one small investigation, but it was not expanded to all third-party relationships. A full investigation did not begin until September 2012.[16]

The Beam Order, like the Dun & Bradstreet Order, underscores the importance of companies taking appropriate and prompt steps to follow up when confronted with evidence of possible wrongdoing, especially at newly acquired companies in difficult jurisdictions.[17] With this Order, the SEC also continues to make clear that it expects companies to remediate issues in companies acquired in high-risk jurisdictions as soon as practicable after acquisition or discovery.

"The Beam Suntory enforcement action serves as yet another reminder to remedy expeditiously improper payment practices at acquired companies."

Beam has announced that it is continuing to cooperate with DOJ's ongoing investigation,[18] and the probe into this matter appears not to be fully settled. As we noted with regard to the Dun & Bradstreet enforcement action,[19] it is unclear how DOJ would have jurisdiction over the relevant payments, which appear to have been confined to India. The company's cooperation may relate to cases against individuals, but it is otherwise unclear whether there would be any benefit to an additional DOJ enforcement action against Beam or even a public "declination"

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14. *Id* ¶¶ 17-22.

15. *Id.* ¶¶ 19-21.

16. *Id.* ¶ 22.

17. This was recently addressed by Deputy Assistant Attorney General Matthew S. Miner in a speech at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets, in which he said that the DOJ "know[s] that there are many benefits when law-abiding companies with robust compliance programs are the ones to enter high-risk markets or, in appropriate cases, take over otherwise problematic companies. The July 25, 2018 address is available at: https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th.

18. Henry Cutter, "Beam Suntory Settles Bribery Probe with SEC," Wall Street Journal (July 2, 2018) https://blogs.wsj.com/riskandcompliance/2018/07/02/beam-suntory-settles-briberyprobe-with-sec/.

19. *See* Levine et al., *supra* note 8.

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(which would merely serve to name-and-shame the company based on DOJ stating that its investigation found a violation of the anti-bribery provisions that it declined to prosecute).

Credit Suisse

On July 5, 2018, the SEC and DOJ publicly announced resolutions with Credit Suisse relating to its hiring practices in Asia. On May 30, 2018, Credit Suisse AG and Credit Suisse (Hong Kong) Limited ("Credit Suisse HK") had entered into a previously unannounced non-prosecution agreement with DOJ relating to alleged violations of the anti-bribery provisions of the FCPA (the "Credit Suisse NPA").[20] On July 5, 2018, Credit Suisse Group AG consented to the entry of a cease-and-desist order relating to the anti-bribery and internal controls provisions of the FCPA (the "Credit Suisse Order"). Credit Suisse AG and Credit Suisse HK, agreed to pay $77,000,000 in penalties: $47,029,916 to DOJ paid by Credit Suisse HK,[21] and $29,823,804 in disgorgement and pre-judgment interest to the SEC paid by Credit Suisse Group AG.[22]

The Credit Suisse enforcement action is the second enforcement action against the Hong Kong branch of a major bank in connection with its hiring practices related to candidates referred by State-Owned-Entity ("SOE") executives or government officials in China. Like the JPMorgan enforcement action before it, most of the facts asserted in the Credit Suisse NPA and Credit Suisse Order involve employees of Credit Suisse HK, with minor U.S. contacts also noted.[23] Credit Suisse HK is asserted to be an "agent" of Credit Suisse within the meaning of the FCPA with no meaningful discussion of agency law.[24] Unlike the JPMorgan and Bank New York Mellon enforcement actions, which mainly involved internships, the facts disclosed in the Credit Suisse enforcement action involve both internships and longer-term employment opportunities.

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20. Letter from Sandra L. Moser et al. to Herbert S. Washer Re: Credit Suisse (Hong Kong) Limited Criminal Investigation, Non-Prosecution Agreement (May 24, 2018), https://www.justice.gov/opa/pressrelease/file/1077881/download [hereinafter "Credit Suisse NPA"].

21. Credit Suisse NPA at 5.

22. In the Matter of Credit Suisse Group AG, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities and Exchange Act Rel. No. 83593, Accounting and Auditing Enforcement Rel. No. 3948, Administrative Proceeding File No. 3-18571 (July 5, 2018), https://www.sec.gov/litigation/admin/2018/34-83593.pdf [hereinafter "Credit Suisse Order"].

23. Credit Suisse Order ¶ 19; Credit Suisse NPA, Attachment A ¶ 27.

24. Credit Suisse Order ¶ 6; Credit Suisse NPA, Attachment A ¶ 3. We previously questioned the unsupported assertion that a foreign subsidiary is an "agent" of its parent in connection with the JPMorgan enforcement action, *see* Yannett, *supra* note 1 ("For at least 90 years, it has been black letter law that a wholly owned subsidiary is not an agent merely by virtue of ownership"), and questioned such assertions at greater length in connection with the Legg Mason enforcement action, *see* Andrew M. Levine, Philip Rohlik, Jil Simon, "DOJ Applies Expansive Theory of Agency in Legg Mason Enforcement Action," FCPA Update, Vol. 9, No. 11 (June 2018), https://www.debevoise.com/insights/publications/2018/06/fcpa-june-2018.

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Like the two prior banking cases, the Credit Suisse NPA and Credit Suisse Order allege *quid pro quo* arrangements by which APAC Credit Suisse senior managers "sought to improperly influence foreign officials to assist Credit Suisse in winning lucrative investment banking mandates."[25] As in the prior cases, at least some of these hires were tracked on spreadsheets.[26] The hires described in detail in the resolution documents were retained without the typical vetting of qualifications required of ordinary hires. They also received employment and other advantages based more on their relationships than performance. According to the resolution documents, by hiring employees connected to government and SOE officials, Credit Suisse HK employees knowingly violated Credit Suisse policies and took actions to conceal the hires from the company's legal and compliance department.[27]

The similarity of the Credit Suisse allegations to those in the JPMorgan case suggests that the practice of connected hiring was widespread. In our prior discussion of the JPMorgan settlement, we noted that several questions remained outstanding that concern how companies can and should treat prospective employees with a government connection. These questions included whether connections or the identity of the referrer can ever influence a hiring decision and whether some "handholding" for certain candidates may be permissible.[28] The Credit Suisse resolution leaves these questions open, which may result in over-regulation of hiring practices by the SEC and DOJ.

For example, the SEC alleges that Credit Suisse offered employment to more than 100 individuals that had some connection to foreign government officials in APAC between 2007 and 2013. This number includes "more than 60 employees and interns referred by foreign government officials at more than 20 different Chinese SOEs" and others referred by officers at Chinese government agencies.[29] However, it appears that some of the 40 unspecified "referral hires" were not actually referred by, but were "related to"[30] or merely "otherwise connected with"[31] Chinese officials. With the exception of four seemingly egregious cases, the "referral hires" are described generally and in an imprecise manner suggesting that the statements may not apply to each of the 100 or so hires: they "*often* lacked technical skills, were less

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25. Credit Suisse Order ¶ 12; Credit Suisse NPA, Attachment A ¶ 13.
26. Credit Suisse NPA, Attachment A ¶ 17.
27. Credit Suisse Order ¶¶ 9-20; Credit Suisse NPA, Attachment A ¶¶ 12, 15.
28. Yannett et al., *supra* note 1, at 6.
29. Credit Suisse Order ¶¶ 1, 3.
30. Credit Suisse Order at ¶ 2; Credit Suisse NPA, Attachment A ¶ 13.
31. Credit Suisse NPA, Attachment A ¶ 13.

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qualified, and had significantly less banking and other relevant experience;"[32] and "certain referral hires" were recommended for hiring before interviews took place or the candidate was vetted.[33]

As with prior hiring practices settlements, what constitutes a *quid pro quo* is unclear in all but a small number of instances. For most of the 100 or so hires, the *quid pro quo* is not explained. In some cases, the alleged *quid pro quo* is inferred from internal communications. In others, the *quid pro quo* was demonstrable: "*Certain* referral hires … were prioritized based on the understanding and expectation that officials at these clients would reward Credit Suisse,"[34] but the settlement papers refer to only "at least three cases" (out of more than 100) as ones in which the spreadsheets tracking the hires actually attributed deals to the hire.[35]

Both actions allege violations of the anti-bribery provisions of the FCPA, but neither alleges that any remuneration was provided, in whole or in part, to a foreign official. While the Order and NPA do set forth details regarding the four referral hires, including their substantial remuneration, the referral hire's compensation is not alleged to have been given, in whole or in part, to the foreign officials.[36] Instead, the Credit Suisse Order alleges that offering employment to a friend or relative was a "personal benefit" provided to the requesting officials.[37] The intangible personal benefit is not money, gifts, or other traditional forms of bribery. Indeed, the benefit conferred on the foreign official is the same regardless of whether the official bargained for the employment in exchange for specific business, or the hire was made in the hope that the employee's relationship would be beneficial, or in the absence of any *quid pro quo*. Unlike the situation with tangible bribes, where the compliance advice would be not to provide anything of value to a foreign official, the "personal benefit" associated with hiring anyone connected to a foreign official leaves companies with the sole defense of negating the corrupt intent element of the statute. In order to do so, companies apparently must adopt hiring practices indirectly dictated by the enforcement agencies in the descriptions of remedial measures found in FCPA settlements.

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32. Credit Suisse NPA, Attachment A ¶, 18 (emphasis added); see also Credit Suisse Order ¶ 23.
33. Credit Suisse NPA, Attachment A ¶ 14; *see also* Credit Suisse Order ¶2.
34. Credit Suisse NPA, Attachment A ¶ 16 (emphasis added).
35. Credit Suisse Order ¶ 22; Credit Suisse NPA, Attachment A ¶ 17.
36. Furthermore, given the absence of a books and records charge, it is not even suggested that these payments were improperly recorded.
37. Credit Suisse Order ¶ 1; the Credit Suisse NPA quotes Credit Suisse's internal policy which, since 2007 stated that offers of employment could be a "thing of value" under the FCPA. Credit Suisse NPA ¶ 12.

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The Credit Suisse Order and Credit Suisse NPA (as well as the prior JPMorgan enforcement action), therefore, may not only yield regulation via the FCPA in the relatively extreme cases described at length in the enforcement actions, but also with regard to any hire by a foreign subsidiary that has any connection to a government official. As a result, companies likely to encounter referrals from government officials (such as banks and other prestige employers) should be conservative in hiring anyone "referred by, related to, or otherwise connected with" SOEs or government officials. In addition to making sure that all employees are hired through a standard hiring program, the compliance enhancements undertaken by Credit Suisse suggest that companies should consider:

"The Credit Suisse enforcement action repeats many themes related to hiring practices, which were set out in the earlier JPMorgan Securities (Asia Pacific) enforcement action, but provides little additional guidance."

- Vetting all candidates referred by a foreign official;
- Requiring all candidates for employment to be screened by "an independent service for connections to government officials";
- Ring-fencing referred hires from working on projects with the companies to which they are connected;
- Conducting periodic reviews of hiring controls;
- Conducting "yearly headcount reviews to ensure accurate record-keeping concerning hiring"; and
- Conducting HR-specific FCPA training.[38]

Setting aside the open question of statutory interpretation of the "thing of value" provided "to a foreign official" in such cases, the SEC and DOJ should consider whether guidance found only in lists of remedial measures effectively results in over-regulation of foreign labor markets.

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38. Credit Suisse NPA at 2.

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The Credit Suisse NPA and the Corporate Enforcement Policy

The Credit Suisse NPA is also informative for practitioners and companies subject to the FCPA by further elucidating DOJ's approach to its Corporate Enforcement Policy.[39] Credit Suisse did not self-report and therefore did not receive self-reporting credit. It received only partial cooperation credit from DOJ under the Policy because DOJ found its cooperation to be "reactive, instead of proactive."[40] What this means is not explained, demonstrating that, although the Corporate Enforcement Policy is a step forward in transparency for DOJ, its application can still be opaque. Credit Suisse also received only partial credit for remedial measures it implemented due to what DOJ viewed as insufficient discipline of employees who engaged in misconduct. Credit Suisse "only recorded policy infractions internally and provided notices of infractions to three employees."[41] Hence, what does appear to be clear is that DOJ is unlikely to award full remediation credit to companies unless the employment of at least some individuals actively involved in wrongdoing is terminated. That said, Credit Suisse still received a 15% downward departure from the lower end of the Sentencing Guidelines range.

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39. U.S. Attorneys' Manual, 9-47.120 - FCPA Corporate Enforcement Policy.
40. Credit Suisse NPA at 1.
41. *Id.* at 2.

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