FCPA Update

A Global Anti-Corruption Newsletter

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SAP Settlement Signals Potential Leniency for Repeat Offenders That Cooperate

In January 2024, U.S. authorities announced parallel DOJ and SEC resolutions of FCPA investigations into SAP SE, a Germany-based multinational software company that markets its software globally through numerous wholly owned subsidiaries.

SAP agreed to pay approximately $220 million to DOJ and the SEC to resolve enforcement actions stemming from their respective investigations into possible violations of the FCPA's anti-bribery and books and records provisions.[1] In its Deferred Prosecution Agreement ("DPA") with DOJ, SAP admitted to bribing officials in South Africa and Indonesia through its subsidiaries and third parties in order to secure government contracts for software and services, and to falsifying

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1. Deferred Prosecution Agreement, *United States v. SAP SE* (Jan. 10, 2024), https://www.justice.gov/opa/media/1332661/dl?inline ["SAP DPA"]; Order, *In re SAP SE*, Securities Exchange Act Release No. 99308 (Jan. 10, 2024), https://www.sec.gov/files/litigation/admin/2024/34-99308.pdf ["SAP Order"].

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SAP's books, records, and accounts in connection with the bribery scheme.[2] In its settlement with the SEC, SAP admitted to conferring—through third parties—improper payments and/or gifts to officials in South Africa and Indonesia, as well as Malawi, Tanzania, Ghana, Kenya, and Azerbaijan, in connection with securing government contracts for software and services.[3]

The resolutions offer insights into the effect of recent DOJ and SEC policies and pronouncements, especially with respect to recidivist companies that react meaningfully to misconduct. The SEC's Order, in particular, telegraphs a heightened focus on third-party risk. The resolutions also involve the application of DOJ's Clawback Pilot Program and reflect further international cooperation in FCPA enforcement.

The Alleged Facts

SAP's shares are traded on the New York Stock Exchange and the company is an issuer under the FCPA. Between 2013 and 2022, various wholly owned and controlled subsidiaries of SAP sold and maintained the company's software and provided other professional services on the company's behalf, thereby allegedly acting as agents of an issuer. SAP's subsidiaries in this case were authorized by SAP to distribute, sell, license, and sublicense software to customers. The subsidiaries' financial statements were consolidated and reported in SAP's financial statements.[4]

In South Africa, SAP's agents allegedly procured improper advantages for the company in connection with contracts between SAP and South African government entities, relying in part on third-party intermediaries to facilitate payments to South African officials and using email, messaging apps, and other communication methods.[5] According to the DPA, employees of SAP's subsidiaries in South Africa made payments to an official of the City of Johannesburg to obtain a contract for software and services that more than quintupled SAP's revenue when compared to its prior contracts with the city. In dealings with the South African Department of Water and Sanitation, SAP agents allegedly routed payments to a department official through two intermediaries—each was paid 14.9% of SAP's revenue from the contract, just below the 15% rate requiring higher-level approval by SAP—to conceal the nature of bribe payments.[6] In several similar instances, employees of SAP's subsidiaries in South Africa enlisted third parties to obtain business from

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2. SAP DPA, Attachment A ¶¶ 15, 41.
3. SAP Order ¶¶ 12, 19, 25, 32.
4. SAP DPA, Attachment A ¶ 12; SAP Order ¶¶ 1, 4–7.
5. SAP DPA, Attachment A ¶¶ 15, 25; SAP Order ¶ 12.
6. SAP DPA, Attachment A ¶¶ 33–37.

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other government entities; related payments were falsely recorded as commissions on SAP's books.[7]

In Indonesia, similar events allegedly unfolded involving SAP's agents, third parties, and Indonesian government officials between 2015 and 2018.[8] The SEC's Order alleges that SAP's subsidiary in Indonesia engaged a local reseller "known for a pattern of corrupt business dealings" to pay bribes to government officials, sometimes using fake invoices to funnel payments to slush funds.[9] SAP allegedly obtained and retained certain contracts to provide software and services to an Indonesian state telecommunications agency by bribing government officials and their family members.[10] The SEC's Order notes that employees of the intermediary reseller paid for shopping excursions and dining in New York City for an agency official and his wife in June 2018.[11] The DPA states that the schemes in South Africa and Indonesia resulted in profits of approximately $103.4 million to SAP.[12]

"The SAP case suggests that even when a company has engaged in prior misconduct, criminal fines may be reduced if the company undertakes significant cooperation and remediation."

In addition to the schemes in South Africa and Indonesia, the SEC's Order alleges that an SAP subsidiary used a Zimbabwe-based reseller to engage in bid-rigging and arrange improper payments to government officials in Malawi, Tanzania, Ghana, and Kenya in connection with multiple SAP deals between 2014 and 2018.[13] One such instance occurred in 2016 when SAP worked with this reseller (and another intermediary retained solely for its political connections) to secure a $1.2 million contract with the Ghana National Petroleum Corporation by offering to make payments to a government official worth 40% of the total deal in

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7. *Id.* at ¶¶ 38–40.
8. *Id.* at ¶ 41; SAP Order ¶ 25.
9. SAP Order ¶¶ 25–26.
10. SAP DPA, Attachment A ¶ 48.
11. SAP Order ¶ 27.
12. SAP DPA ¶ 4(a).
13. SAP Order ¶ 19.

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exchange for illegitimate "support services."[14] Notably, SAP suspended the reseller in September 2018, after the company learned that the reseller was paying bribes to the Tanzania Ports Authority and the Kenya Revenue Authority.[15] However, SAP subsequently allowed the reseller to recommence resales until ultimately terminating the reseller in July 2019.[16]

Text messages allegedly indicated that in December 2021 and January 2022, a mid-level employee of SAP's subsidiary in Azerbaijan provided gifts to multiple officials of the state oil company to obtain a May 2022 contract valued at $1.6 million.[17] The SEC Order notes that the gifts were valued at approximately $3,000 in total, 100 times SAP's gift limit of $30.[18]

The SEC found that all of the alleged bribe payments made by SAP's intermediaries were improperly recorded as legitimate commissions or expenses in SAP's books and records and that SAP lacked the internal controls necessary for detecting or preventing such payments, particularly with respect to its due diligence and payments to third parties.[19] The SEC's Order describes SAP's corporate anti-corruption policy that was in place during the relevant periods, but the SEC found that SAP did not ensure that its wholly owned subsidiaries were adhering to its corporate policies, especially in high risk areas such as Africa, Indonesia, and Azerbaijan.[20]

The Resolutions

To reach a resolution with DOJ, SAP entered into a three-year DPA, agreed to pay a criminal penalty of approximately $118.8 million, and forfeited approximately $100 million (crediting up to $55 million for payments owed to authorities in South Africa in addition to any disgorgement or forfeiture paid to the SEC or authorities in South Africa). To reach a resolution with the SEC, SAP entered into a cease-and-desist order and agreed to pay disgorgement and prejudgment interest of approximately $98.5 million (receiving an offset of approximately $60 million against payments made or to be made to authorities in South Africa). In total, SAP agreed to pay approximately $220 million to settle the DOJ and SEC investigations.[21]

Continued on page 5

14. *Id.* at ¶ 22.
15. *Id.* at ¶ 24.
16. *Id.*
17. *Id.* at ¶ 32.
18. *Id.*
19. *Id.* at ¶ 33.
20. *Id.*
21. *Id.* at ¶¶ 41–44; SAP DPA ¶ 4(l).

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The DPA states that SAP did not voluntarily and timely disclose the cited conduct and, as a result, the company did not receive voluntary disclosure credit pursuant to the Corporate Enforcement and Voluntary Self-Disclosure Policy ("CEP").[22] The DPA also cites SAP's prior criminal and civil resolutions in the United States and globally, particularly a 2021 NPA with the National Security Division regarding potential export law violations and a 2016 resolution with the SEC regarding alleged FCPA violations in Panama.[23]

Nonetheless, DOJ credited SAP for its cooperation, acceptance of responsibility, and timely remediation pursuant to the CEP, noting SAP's cooperation after public allegations about the matter surfaced in South Africa in 2017, SAP's provision of regular, prompt, and detailed updates to DOJ, and SAP's facilitation of employee interviews and phone imaging of relevant custodians.[24] The DPA also credited SAP for its timely remediation, which included analyzing the underlying conduct and performing a gap analysis, undertaking a comprehensive risk assessment of high-risk areas and internal controls, eliminating its third-party sales commission model worldwide (including prohibiting all sales commissions for public sector contracts in high-risk markets), increasing its resources devoted to compliance, strengthening internal monitoring and audit programs, and promptly disciplining all employees involved in the misconduct.[25] Additionally, SAP withheld a total of $109,141 from the bonuses of employees who were suspected of wrongdoing, in accordance with DOJ's Clawback Pilot Program.[26] In weighing the relevant considerations, DOJ assessed a criminal penalty of $118.8 million, reflecting a 40 percent discount off the 10th percentile of the U.S. Sentencing Guidelines fine range.[27] SAP agreed to implement corporate compliance and reporting programs, but the company was not required to engage an independent compliance monitor.[28]

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22. SAP DPA ¶ 4(b).
23. *Id.* at ¶ 4(i); *see also* Non-Prosecution Agreement, *United States v. SAP SE* (Apr. 20, 2021), https://www.justice.gov/opa/press-release/file/1390531/download; Order, *In the Matter of SAP SE*, Securities Exchange Act Release No. 77005 (Feb. 1, 2016), http://www.sec.gov/litigation/admin/2016/34-77005.pdf.
24. SAP DPA ¶ 4(c).
25. *Id.* at ¶ 4(e).
26. *Id.* at ¶ 4(f); *see also* Kara Brockmeyer, et al., "DOJ Issues Trio of Updates that Further Heighten Compliance Expectations, Particularly Involving Off-System Communications and Compensation Systems," Debevoise in Depth (Mar. 6, 2023), https://www.debevoise.com/-/media/files/insights/publications/2023/03/06_doj-issues-trio-of-updates-that-further-heighte.pdf.
27. SAP DPA ¶ 8.
28. *Id.* at ¶¶ 14–17.

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Key Takeaways

The SAP case illustrates the effect of some of the recent DOJ and SEC policies and priorities relating to FCPA enforcement:

- **Cooperation can offset the impact of recidivism on criminal penalties.** The SAP case suggests that even when a company has engaged in prior misconduct, criminal fines may be reduced if the company undertakes significant cooperation and remediation.[29]
- **The SEC remains focused on third-party FCPA risk.** The SEC Order highlights SAP's failure to vet payments to third parties. Companies should continue to conduct thorough due diligence and deploy accounting and payment controls to minimize the risks of using intermediaries.
- **The Clawback Pilot Program continues to credit withheld bonuses in criminal penalty determinations.** DOJ credited SAP the $109,141 that it withheld from employees allegedly involved in the cited misconduct. Although the clawback penalty reduction constitutes less than 0.10% of the total fine, it serves as an example of the program in action.[30]
- **DOJ is deepening partnerships with international enforcement partners.** The SAP case marks the second time DOJ has credited South African authorities for their assistance in anti-corruption investigation and enforcement (the first being the ABB case in 2022), in a further reflection of active cross-border cooperation and in line with DOJ's statements.[31]

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29. *See* Kara Brockmeyer, et al., "DOJ Offers New Incentives in Revised Corporate Enforcement Policy," Debevoise Update (Jan. 24, 2023), https://www.debevoise.com/-/media/files/insights/publications/2023/01/24_doj-offers-new-incentives-in-revised-corporate.pdf.
30. *See* Winston M. Paes, Andreas A. Glimenakis, and Caroline H. Wallace, "Penalty Reductions for Clawbacks and Late Self-Disclosure: Albemarle FCPA Settlement Highlights Recent DOJ Policies," FCPA Update, Vol. 15, No. 3 (Oct. 2023), https://www.debevoise.com/-/media/files/insights/publications/2023/11/fcpa-update-october-2023.pdf.
31. *See* Nicole M. Argentieri, Acting Assistant Attorney General, "Keynote Address at the 40th International Conference on the Foreign Corrupt Practices Act" (Nov. 29, 2023), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-address-40th.

What Is "Reasonably Prompt" Voluntary Self-Disclosure?

In 2016, DOJ issued the first precursor to what has become the Corporate Enforcement Policy. That original "pilot program" offered the possibility of a declination with disgorgement or, absent a declination, a reduction of 50% off the bottom of the Sentencing Guidelines' fine range for companies that voluntarily self-disclosed, fully cooperated with DOJ's investigation, and timely remediated any wrongdoing.[1] However, even assuming full cooperation and remediation, the pilot program's maximum discount of 50% decreased to 25% absent voluntary self-disclosure made "within a reasonably prompt time after becoming aware of the offense."

What started as a pilot program applicable only to the FCPA Unit became the Corporate Enforcement Policy ("CEP") that now applies throughout the Criminal Division,[2] variations of which have since been adopted by each component of DOJ to incentivize voluntary self-disclosure.[3] During the course of 2023, DOJ revised the CEP[4] and announced a department-wide safe harbor for voluntary self-disclosures in the context of mergers and acquisitions.[5]

As additional cases have been brought under the CEP, it has become clearer what constitutes "reasonably prompt" self-disclosure in the eyes of the government, although the time period often depends upon the circumstances. Two recent cases demonstrate the differences: Lifecore Biomedical/Landec Corporation[6] and Albemarle Corporation.[7]

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1. "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download ["Pilot Program"].
2. Formalized at Justice Manual § 9-47.120, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.
3. Deputy Attorney General Lisa Monaco, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group" (Sept. 15, 2022) (hereinafter "Monaco 2022 Memo"), https://www.justice.gov/opa/speech/file/1535301/download; *see also* Kara Brockmeyer *et al.*, "DOJ Offers Additional Guidance on Corporate Criminal Enforcement," Debevoise In Depth (Sept. 19, 2023), https://www.debevoise.com/insights/publications/2022/09/doj-offers-additional-guidance-on-corporate.
4. "Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy" (Jan. 17, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law; U.S. Dep't. of Justice, Criminal Division, "Corporate Enforcement Policy" (updated Jan. 2023), https://www.justice.gov/criminal/criminal-fraud/corporate-enforcement-policy (hereinafter "2023 revisions"); *see also* Andrew Levine *et al.*, "DOJ Offers New Incentives in Revised Corporate Enforcement Policy," Debevoise In Depth (Jan. 24, 2023), https://www.debevoise.com/insights/publications/2023/01/doj-offers-new-incentives-in-revised.
5. "Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions" (Oct. 4, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self; *see also* Kara Brockmeyer *et al.*, "DOJ Announces Six-Month 'Safe Harbor' Policy for Acquisition-Related Disclosures" (Oct. 6, 2023), https://www.debevoise.com/insights/publications/2023/10/doj-announces-six-month-safe-harbor-policy.
6. Declination Letter, *In re Lifecore Biomedical, Inc. (f/k/a Landec Corporation)* (Nov. 16, 2023), https://www.justice.gov/media/1325521/dl?inline ["Declination Letter"].
7. Non-Prosecution Agreement, *In re Albemarle Corp.* (Sept. 28, 2023), https://www.justice.gov/media/1316796/dl?inline ["Albemarle NPA"].

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Evolution of DOJ's Voluntary Self-Disclosure Requirements

As of January 2023, DOJ guidance provided two timelines for voluntary self-disclosure. In most circumstances, companies were expected to voluntarily self-disclose within a "reasonably prompt time after becoming aware of the misconduct" with the company bearing the burden to demonstrate timeliness. However, where aggravating circumstances are present, companies are expected to disclose "immediately upon becoming aware of the allegation of misconduct." In October 2023, DOJ added a third timeline for self-disclosure in connection with mergers and acquisitions. Under a pilot program announced by Deputy Attorney General Monaco, an acquirer can benefit from a presumption of a declination for the acts of an acquired company (including post-closing) if it voluntarily self-reports within six months of the closing date (subject to extension depending on the circumstances), regardless of whether the conduct was discovered pre- or post-closing and regardless of aggravating factors at the acquired company.[8]

"Reasonably Prompt" in Practice

There has yet to be an example of a company receiving full credit (i.e., a declination with disgorgement) for voluntary self-disclosure "immediately upon the company becoming aware of the allegation of misconduct" where aggravating factors are present. However, the Lifecore Biomedical/Landec Corporation declination offers an example of what is clearly "reasonably prompt," both in general and in the mergers and acquisitions context.[9] The Albemarle settlement offers an example of a voluntary self-disclosure that DOJ explicitly considers *not* to have been made reasonably promptly.

Lifecore

In November 2023, Lifecore Biomedical, Inc., a publicly traded pharmaceuticals company, agreed to disgorge $406,505 in profits in connection with allegations that DOJ referred to as violations of the FCPA's anti-bribery provisions.[10]

Lifecore acquired Yucatan Foods L.P. in December 2018.[11] Between May 2018 and August 2019, some of Yucatan's officers, employees, and agents allegedly paid bribes to one or more Mexican officials in relation to wastewater discharge permits

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8. *See supra* note 5.
9. As the declination does not mention the M&A safe harbor, we assume the voluntary self-disclosure was made prior to the commencement of the pilot program.
10. Declination Letter, *supra* note 6.
11. It appears that, at the time of the acquisition, Yucatan Foods was a domestic concern, subject to the FCPA, meaning that Lifecore, as the acquirer, could have been subject to successor liability. *See* Landec Corp., Form 8-K, exhibit 2.1 (filed Dec. 18, 2018) (Capital Contribution and Partnership Interest and Stock Purchase Agreement indicating that Yucatan was a Delaware limited partnership), https://www.sec.gov/Archives/edgar/data/1005286/000143774918021662/ex_127301.htm.

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and manifests.[12] These alleged bribes amounted to approximately $14,000, and DOJ stated that the company benefitted from $406,505 in costs avoided as a result of these illicit payments.[13] In addition to alleged payments to Mexican officials, Yucatan also allegedly spent $310,000 on fraudulent manifests to present to those officials.[14] The payments occurred both before and after Lifecore's acquisition of Yucatan and Tanok (a manufacturing facility owned and operated by Yucatan).[15]

Lifecore only learned of the misconduct during post-acquisition integration. The reason Lifecore did not discover the misconduct sooner was that at least one Yucatan officer took affirmative steps to conceal the misconduct during pre-acquisition due diligence.[16] Lifecore initiated an internal investigation upon learning of the misconduct and voluntarily self-disclosed the misconduct to DOJ.[17]

"DOJ is reminding companies that they certainly should not wait until the end of an internal investigation to determine whether something is reportable … and also should not wait too many months after having evidence to make that determination."

In its declination letter, DOJ noted that Lifecore had disclosed the conduct within three months of first discovering the possibility of misconduct and within "hours after an internal investigation confirmed that misconduct had occurred."[18] Exactly when this first discovery took place in relation to the closing of the transaction is unclear from the information in the declination letter. It is, therefore, unknown whether Lifecore would have qualified under the M&A safe harbor announced in October 2023. However, the very short timeline involved (within a few months) is indicative of what would be required for a post-closing audit under the six-month window of the M&A safe harbor. While the timeline in the declination letter may be short, the facts discussed therein are not unique among FCPA declinations. In 2016, the SEC granted Harris Corporation a true declination (i.e., without disgorgement)

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12. Declination Letter, *supra* note 6, at 1-2.
13. *Id.* at 1.
14. *Id.*
15. *Id.* at n. 2.
16. *Id.* at 2.
17. *Id.*
18. *Id.*

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in a case involving discovery of misconduct in post-acquisition due diligence where pre-acquisition due diligence was limited and an executive (Jun Ping Zhang) of the acquired company had attempted to conceal the wrongdoing.[19] As a result, Lifecore would have been eligible for a declination with disgorgement under the CEP as its disclosure was clearly "reasonably prompt."

Albemarle

Two months before the Lifecore settlement, Albemarle, a global, publicly-traded chemicals company, settled with DOJ and the SEC for $218 million on charges that it had violated both the anti-bribery and the books and records provisions of the FCPA.[20] While DOJ trumpeted the speed at which Lifecore had self-disclosed, it chose explicitly to find that Albemarle's disclosure of illicit payments was not reasonably prompt.

According to the settlement documentation, between 2009 and 2017, agents of Albemarle allegedly paid bribes to secure sales of chemicals to oil refineries in Vietnam, India, and Indonesia, and engaged high-risk agents in China and the UAE.[21] The proceeds derived from these payments were over $98 million.[22] According to a parallel SEC cease and desist order, the company relied for many years on third-party sales agents and distributors, and failed to implement the necessary compliance systems to oversee these agents.[23] Notably, a series of internal audits identified gaps and inconsistencies regarding agents' payments and contracts, all of which violated the company's own policies.[24]

Albemarle apparently learned of potential misconduct in 2016 and conducted an internal investigation focused on Vietnam. In or around April 2017, it apparently completed the Vietnam investigation and terminated the relevant agents.[25] Albemarle also expanded its investigation to other countries and voluntarily self-disclosed misconduct related to four separate geographies, including Vietnam, in January 2018.[26] DOJ noted that this disclosure was nine months after the internal investigation in Vietnam had produced evidence of such misconduct, and 16 months

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19. U.S. Securities and Exchange Commission, "SEC Charges Former Information Technology Executive with FCPA Violations, Former Employer not Charged Due to Cooperation with SEC," Admin. Proc. File No. 3-17535 (Sept. 12, 2016), https://www.sec.gov/litigation/admin/2016/34-78825-s.pdf. *See also* Order Instituting Cease-and-Desist Proceedings, *In re Jun Ping Zhang* (Sept. 13, 2023), https://www.sec.gov/files/litigation/admin/2016/34-78825.pdf.
20. Albemarle NPA, *supra* note 7.
21. Order, *In re Albemarle Corp.*, Securities Exchange Act Release No. 98622 (Sept. 29, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98622.pdf ["Albemarle Order"].
22. Albemarle NPA ¶ 10.
23. Albemarle Order ¶ 6.
24. *Id.* ¶ 7.
25. Albemarle NPA ¶ 2, Attachment A ¶ 44.
26. Albemarle NPA ¶ 2.

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after the company became aware of possible misconduct in Vietnam. DOJ has explicitly stated that they did not find this disclosure to be reasonably prompt and declined to give Albemarle full credit for timely self-reporting.[27]

Despite finding that the voluntary self-disclosure was not "reasonably prompt," DOJ noted that it gave even untimely voluntary self-disclosure significant weight in determining the form of disposition (an NPA rather than a DPA or guilty plea) and the penalty, which was 45% lower than the applicable Sentencing Guidelines range.[28]

Key Takeaways

Changes in DOJ guidance regarding the timing of voluntary self-disclosure and the benefits thereof make it important for companies considering voluntary self-disclosure to evaluate both the context of the self-disclosure and the potential benefits to be gained. In particular:

- The 2023 revisions providing for the possibility of a declination with disgorgement in the presence of aggravating factors will rarely apply. Indeed, most of the aggravating factors mentioned in the original Pilot Program, such as the size of the bribe or involvement of senior management, are unlikely to be known immediately upon becoming aware of the allegation of misconduct. As a result, voluntary self-disclosure under these circumstances may hold appeal only for recidivists confronted with allegations of significant bribery.
- The safe harbor policy for M&A transactions provides a definite period within which to self-report (six months after closing) that is not tied to the timing of awareness of wrongdoing and is stricter and more definitive than prior guidance.[29] For that reason, it strongly incentivizes robust pre-acquisition due diligence, as organizing and completing a post-closing audit in six months can be very challenging, especially in higher-risk jurisdictions (which may be one reason why prosecutors have discretion to extend the period). Self-reporting in such circumstances enables a company to avoid successor liability. However, self-reporting is not without cost, as even disgorgement can be a significant penalty. Proceeding down this path may involve the reporting of much smaller improper payments than those involved in typical FCPA enforcement actions (such as the $14,000 in the Lifecore Biomedical/Landec declination) and result in disgorgement of "profits" many times larger (over $400,000 in the case of Landec), not to mention additional investigation costs incurred due to DOJ involvement.

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27. *Id.*
28. *Id.* at ¶ 3.
29. *See* Brockmeyer *et al.*, *supra* note 5.

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- The timing of voluntary self-disclosure outside of the two circumstances above is fact-specific and remains uncertain. While DOJ surely had its reasons to change the starting point from awareness of an offense to awareness of misconduct, one should not overstate the impact, as the onus was always on the company to demonstrate timeliness. By including both the period from the original allegation and the period from actionable evidence of misconduct in the Albemarle NPA, DOJ is reminding companies that they certainly should not wait until the end of an internal investigation to determine whether something is reportable (i.e., could be an offense) and also should not wait too many months after having evidence to make that determination.

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FCPA Update

FCPA Update is a publication of
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