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U.S. Supreme Court's Ruling on Disgorgement Has Broad Implications for FCPA Matters

On June 5, 2017, the United States Supreme Court unanimously held that the U.S. Securities and Exchange Commission ("SEC") is barred from obtaining disgorgement for actions predating the five-year limitations period set forth in 28 U.S.C. § 2462. Expanding on its landmark ruling in *Gabelli v. SEC*,[1] the Court rejected the government's argument that disgorgement is remedial because it "restores the status quo," and held that because disgorgement orders represent a penalty, they fall within the five-year statute of limitations of § 2462.[2]

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1. 133 S.Ct. 1216 (2013). In *Gabelli*, the Court held that the discovery rule is inconsistent with the plain meaning of 28 U.S.C. § 2462 and is unwarranted in the enforcement context. As such, the SEC must bring an enforcement action for civil penalties within five years of the completion of the alleged wrongful conduct.
2. *Kokesh v. SEC*, No. 16-529, slip op. at 11 (June 5, 2017).

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Though *Kokesh* did not involve allegations of violations of the Foreign Corrupt Practices Act ("FCPA"), its holding may well have a lasting impact on FCPA actions. Since 2004, the SEC has relied heavily on disgorgement amounts in FCPA settlements and virtually every corporate FCPA settlement in 2016 included disgorgement. Indeed, disgorgement totaled $1.14 billion in 2016, more than 97% of the total monetary recovery obtained as part of SEC FCPA settlements.[3]

The ruling has implications for companies considering self-reporting and could also impact the deductibility of and availability of indemnification for disgorged amounts. It also leaves open the potential that *Kokesh* could alter the SEC's approach in assessing both the timeliness of self-reporting and the scope of cooperation.

Factual and Procedural Background

In 2009, the SEC brought an action against Charles Kokesh alleging that he misappropriated $34.9 million from two investment-advisory firms he owned and caused the filing of false and misleading SEC reports and proxy statements in order to conceal that wrongful conduct. The SEC sought civil penalties, disgorgement, and an injunction barring Kokesh from future violations of the federal securities laws. Kokesh's alleged wrongdoing included conduct both within and preceding the five-year statute of limitations period.

A jury found Kokesh liable for various securities law violations. The district court held that § 2462 precluded any penalties for misappropriation that had occurred prior to October 27, 2004—five years prior to the date the SEC filed the complaint. However, the court held that the Commission's request for a $34.9 million disgorgement judgment was not a "penalty" within the meaning of § 2462 and therefore no limitations period applied. The court ordered Kokesh to pay the $34.9 million in disgorgement—$29.9 million of which related to conduct outside the limitations period—and $18.1 million in prejudgment interest. Kokesh appealed.

On appeal, Kokesh asserted that the SEC's suit was time-barred. Kokesh argued that disgorgement operates as either a penalty or forfeiture and therefore was subject to the five-year statute of limitations set forth in 28 U.S.C. § 2462.[4]

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3. 84% of this amount is attributable to five large cases brought last year—Teva, Och-Ziff, Braskem SA, VimpelCom, and JPMorgan APAC—in which the SEC did not assess a civil monetary penalty due to the large criminal fine imposed by the Department of Justice ("DOJ") in its parallel criminal case. Since these cases are global settlements, and the DOJ has indicated that it will seek disgorgement in FCPA cases as well (*see, e.g.,* U.S. Dep't of Justice, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance,* at *9 n.3 (Apr. 5, 2016) ("Pilot Program"); U.S. Dep't of Justice, Declination Letter issued to Linde North America Inc. (June 16, 2017), https://www.justice.gov/criminalfraud/file/974516/download), we think it is more appropriate to compare disgorgement to the total amount collected by the US government. For cases brought by the SEC in 2016, disgorgement was almost 56% of the total amount collected by the US government.

4. Section 2462 applies to any "civil fine, penalty, or forfeiture."

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The Tenth Circuit reached the opposite conclusion and held that disgorgement is neither penal, nor a forfeiture, but rather is a non-punitive remedy.[5] In reaching this conclusion, the Tenth Circuit expressly disagreed with a June 2016 opinion from the Eleventh Circuit in *SEC v. Graham,* which held that the terms "disgorgement" and "forfeiture" were essentially synonymous and therefore were subject to the limitations period under § 2462.[6]

The Supreme Court's Ruling

The Supreme Court granted certiorari in *Kokesh v. SEC* to resolve the circuit split over whether § 2462 applies to claims for disgorgement in SEC enforcement actions. The Court held that SEC disgorgement constitutes a penalty and is therefore subject to the five-year limitations period of § 2462.

"The ruling has implications for companies considering self-reporting and also could impact the deductibility of and availability of indemnification for disgorged amounts."

The Court held that SEC disgorgement constitutes a penalty under §2462 because: (i) it is imposed as a consequence for violating public laws and not to compensate injured parties; (ii) it is imposed for deterrent, and thus punitive, purposes; and (iii) in many cases, it is not compensatory.[7] The Court reasoned that a sanction is penal if it is intended to deter future violations and not to compensate a victim for his or her loss.[8] Because SEC may seek disgorgement of an amount that exceeds the defendant's gains (for example, where a tipper is held liable for profits earned by a tippee), the Court held that disgorgement is intended to punish and to deter future misconduct.[9]

While the Court's eleven-page opinion answered the primary question of the applicability of § 2462 to SEC disgorgement, it leaves other questions, especially pertinent to FCPA actions, unresolved. It is to those that we now turn.

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5. *SEC v. Kokesh,* 834 F.3d 1158, 1164-66 (10th Cir. 2016).
6. *SEC v. Graham,* 823 F.3d 1357 (11th Cir. 2016).
7. *Kokesh,* No. 16-529, slip op. at 9.
8. *Kokesh,* No. 16-529, slip op. at 7.
9. *Id.* at 8, 10. The Court based its conclusion that disgorgement is not compensatory on the fact that disgorged amounts are paid either to the U.S. Treasury or to the District Court, rather than to victims directly, and the District Court has the discretion to determine whether and to whom the money will be distributed. *Id.* at 9.

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Potential Impact on FCPA Cases

As discussed above, almost all recent SEC FCPA settlements have included disgorgement amounts. The importance of the now-applicable five-year statute of limitations to disgorgement in SEC enforcement actions is especially important in the FCPA context given that most FCPA investigations last for several years. According to publicly reported data, the median length of an FCPA investigation settled in 2016 was just over four years.[10] Since much of the underlying conduct at issue in an FCPA investigation often occurs well before the SEC learns of the conduct and begins an investigation, tolling agreements will become an even more important tool for the government.

A. Tolling Agreements

In light of the Court's holding in *Kokesh,* the Government is likely to place even greater importance on seeking tolling agreements at the start of each FCPA investigation in order to keep as much conduct as possible actionable. However, given that the five-year statute of limitations period now applies to both disgorgement and penalties, we expect that even companies fully cooperating with the government may seek to narrow or tailor any tolling agreement.[11] *Kokesh* provides significant leverage for companies that want to narrow tolling agreements, and companies may now feel emboldened to push back more firmly than before (including by analogizing to privilege and jurisdictional arguments, which are also often not waived).[12] It will also be interesting to see whether the SEC considers the failure to agree to a tolling agreement to be a failure to cooperate.

Another factor for companies to consider is the possibility that the DOJ could seek disgorgement that the SEC would be precluded under the statute of limitations from seeking. Although *Kokesh* limits SEC disgorgement, it does not impact the DOJ, which has the ability to suspend its five-year statute of limitations, with

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10. This estimate is derived from comparing the announcement of the start of an investigation based on media reports and company disclosures in SEC filings to the date that the case was brought. The SEC also acknowledged, prior to *Kokesh,* the need to be mindful of § 2462. Andrew Ceresney, Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), https://www.sec.gov/news/speech/2013-spch111913ac, ("[t]he length of time it takes to investigate these cases, particularly given the frequent need to collect foreign evidence, sometimes presents a statute of limitations issue.")

11. The analysis is not necessarily the same for individuals, who often have less of an incentive to cooperate with the government and are more reluctant to enter into tolling agreements.

12. For example, eligibility for full cooperation credit with the DOJ is not predicated upon waiver of the attorney-client privilege or work product protections. USAM 9-28.720. The DOJ explicitly stated in the new Pilot Program launched in 2016 that the program requirements do not require a waiver to obtain cooperation credit. Pilot Program, *supra* note 3. The SEC Enforcement Manual also states "The staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director." SEC Enforcement Division, *Enforcement Manual,* § 4.3 (Oct. 28, 2016), *available at* https://www.sec.gov/divisions/enforce/ enforcementmanual.pdf.

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court approval, for up to an additional three years to obtain evidence from foreign jurisdictions.[13] Under the Pilot Program, the DOJ has shown a willingness to seek disgorgement where that money is not being recovered by the SEC.[14] If this trend at the DOJ continues, one can envision a situation where a company is required to disgorge profits from Years 1-5 to the SEC and Years 6-8 to the DOJ.

Though there are open questions regarding the role of tolling agreements going forward, it seems very likely that the SEC will be more reluctant to begin investigations in which the conduct predates or is close to the five-year mark.

B. Self-Reporting and Cooperation Credit

Now that the Supreme Court has held that the five-year statute of limitations applies not just to penalties but also to disgorgement, companies have to carefully weigh the benefits and disadvantages when deciding whether to self-report misconduct to the government, particularly if the conduct is several years old.[15] It remains to be seen whether the government will provide greater incentives to encourage companies to self-report in the wake of this decision.

Kokesh may also have a significant impact on a company's willingness to expand the scope of an investigation. Investigations often start with a discrete issue, discovered in an audit or from a whistleblower, and expand to encompass other issues. Similarly, a company self-reporting a discrete issue with one agent could be asked by enforcement agencies to undertake a broader review of its third party relationships. The merits of undertaking such broader reviews differ from case to case, but unquestionably increase the costs associated with the investigation, and may lead to the discovery of additional violations that would not otherwise have been identified within the statute of limitations. Given *Kokesh,* broadening the scope of an internal investigation as part of cooperation with the government is likely to increase the volume and amount of questionable payments within the limitations period, as well as increasing investigative costs.

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13. 18 U.S.C. § 3292 (2012) ("Upon application... indicating that evidence of an offense is in a foreign country... a period of suspension under this section...shall not exceed three years....").

14. Pilot Program, *supra* note 3, at *9 n.3; U.S. Dep't of Justice, Declination Letter issued to HMT LLC (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download; U.S. Dep't of Justice, Declination Letter issued to NCH Corporation (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899121/download; U.S. Dep't of Justice, Declination Letter issued to Linde North America Inc. (June 16, 2017), https://www.justice.gov/criminal-fraud/file/974516/download.

15. The DOJ Pilot Program gives credit under the US Sentencing Guidelines for voluntary disclosure made "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to prove timeliness. Pilot Program, *supra* n. 3, at 4. Under the *Seaboard* Report, the SEC also gives credit for self-reporting, although the amount of the credit is not specified. *See* U.S. Sec. & Exch. Comm'n, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Release No. 34-44969 (Oct. 23, 2001) ("Seaboard Report"), available at http://www.sec.gov/litigation/investreport/34-44969.htm.

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C. The Fate of Disgorgement

As noted by many commentators, footnote 3 of the *Kokesh* opinion seems to invite a challenge to the appropriateness of the SEC seeking disgorgement at all.[16]

The Court's discomfort appears to stem from its view that Congress has not explicitly authorized the SEC to seek disgorgement in district court actions.[17] However, the Court did not address the fact that Congress explicitly authorized the SEC to obtain disgorgement, in addition to civil monetary penalties, in cease-and-desist proceedings - thereby recognizing two distinct remedies – disgorgement and civil monetary penalties.[18] Of course, the fact that disgorgement was expressly authorized in cease-and-desist proceedings could also suggest that the SEC must obtain explicit authorization to seek such a remedy in its district court actions. Yet the legislative history of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Remedies Act") made it clear that Congress intended to give the SEC the ability to obtain *both* disgorgement and civil monetary penalties in both injunctive actions and administrative proceedings.[19]

D. Civil Monetary Penalties

The SEC is authorized to seek civil monetary penalties for violations of both the anti-bribery provisions of the FCPA[20] and the accounting provisions of the FCPA.[21] It is possible that companies could argue that, since the Court concluded that

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16. *Kokesh v. SEC,* No. 16-529, slip op. at 5, n.3 ("Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.").
17. *Id.* at 2-3 ("In 1990, as part of the Securities Enforcement Remedies and Penny Stock Reform Act, Congress authorized the Commission to seek monetary civil penalties ... The Act left the Commission with a full panoply of enforcement tools ... however, the Commission has continued its practice of seeking disgorgement in enforcement proceedings.").
18. *See* Section 21B of the Exchange Act, 15 U.S.C. § 78u-2 (imposing civil penalties in administrative proceedings) and Section 21C(e) of the Exchange Act, 15 U.S.C. § 78u-3(c) (authorizing the SEC to enter an order in an administrative proceeding requiring "accounting and disgorgement, including reasonable interest").
19. *See* S. Rep. No. 101–337, at 7, 1190 WL 263550 (1990) ("In a number of enforcement cases, the SEC successfully has urged courts to invoke their equitable powers to require that law violators "disgorge" the amounts by which they are unjustly enriched."). *See also id.* at *9-10 ("Thus, for example, if a violation involves fraud and resulted in substantial losses to other persons, a court (in addition to ordering disgorgement of profits) may assess a civil penalty equal to a violator's gain[.]"); H.R. Rep. No. 101–616, at 1402, 1990 WL 256464 (1990) ("Subsection (e) of Section 21B [of the Remedies Act] provides that the Commission or the appropriate regulatory agency may enter an order requiring an accounting and disgorgement, including reasonable interest, in any proceeding in which a penalty may be imposed under Section 21B.... The Commission, of course, will continue to be able to seek disgorgement in its civil injunctive actions.") (citation omitted); *see also id.* at *1398 (expressly noting that the decision to codify officer and director bars in Section 20 of the Remedies Act "does not restrict the court's inherent equitable authority," including "orders directing disgorgement of unlawful profits").
20. Section 32(c) of the Exchange Act, 15 U.S.C. 78ff (imposing civil penalties of up to $16,000 per violation).
21. Section 21(B)(b) of the Exchange Act, 15 U.S.C. § 78u(d)(3) (penalties may not exceed the greater of the gross amount of the pecuniary gain to the defendant as a result of the violation or $75,000 to $725,000 per violation based on the seriousness of each violation); *see also* 17 C.F.R. § 201.1004 (providing adjustments for inflation). The SEC may obtain civil monetary penalties in both administrative proceedings and district court actions. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 §§ 202, 301, 401, and 402 (codified in scattered sections of Title 15 of the United States Code).

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disgorgement is a penalty, the SEC's total monetary recovery in a given case must be limited to the statutory amounts authorized under the penalty provisions. However, the penalty provisions under §21(d)(3) of the Exchange Act are relatively expansive, allowing recovery of a penalty up to the amount of the ill-gotten gain or statutory penalty amounts per violation, whichever is greater.[22] If the SEC believes it is limited in the amount of disgorgement it can recover, the agency may be less willing to give full credit to the criminal fine and seek a civil monetary penalty in addition to disgorgement.[23]

"Though there are open questions regarding the role of tolling agreements going forward, it seems very likely that the SEC will be more reluctant to begin investigations in which the conduct predates or is close to the five-year mark."

E. Indemnification, Reimbursement, and Deductibility

On its face, *Kokesh* appears to be a decision that will result in lower disgorgement amounts. However, the finding that disgorgement is a penalty could have an impact on the availability of indemnification, reimbursement, and deductibility of disgorgement paid, which may result in those subject to disgorgement penalties paying more out of pocket than before *Kokesh* was decided.[24]

For years, SEC settlements have precluded indemnification for penalties, though SEC settlements generally have not precluded defendants from seeking indemnification for disgorgement. Now that *Kokesh* has made clear that disgorgement is a penalty, it remains to be seen whether SEC settlements will preclude indemnification for disgorgement going forward.[25]

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22. Those statutory limits may be raised if bipartisan legislation introduced in the Senate this past April is enacted. The Stronger Enforcement of Civil Penalties Act of 2017 ("SEC Penalties Act") would increase the statutory limits on civil monetary penalties in order to "create meaningful penalties to serve as an effective deterrent to crack down on fraud." Stronger Enforcement of Civil Penalties Act of 2017, § 2, S. 779, 115th Cong. (2017). The SEC Penalties Act seeks to increase the per-violation cap applicable to entities to $10 million and would allow the SEC to assess such penalties in both administrative actions and in district court actions. *Id.*

23. Although the SEC has historically given full credit for the amount of the criminal fine in FCPA cases, it has also assessed its own additional penalty where it believes that the criminal fine was not sufficient. *See, e.g.,* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Weatherford International With FCPA Violations (Nov. 26, 2013), available at https://www.sec.gov/news/press-release/2013-252.

24. *See* Andrew Ceresney, "The Impact of the *Kokesh* Decision on Disgorgement for Conduct Within the Statute of Limitations," Securities Regulation & Law Report (July 3, 2017) (forthcoming publication).

25. *See generally,* Mary Jo White, et al., *What Kokesh v. SEC Means for Enforcement Actions,* LAW360 (June 8, 2017), https://www.law360.com/articles/932661/what-kokesh-v-sec-means-for-enforcement-actions.

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Historically the IRS classified disgorgement payments as "remedial" and permitted their deduction on that basis.[26] However, last year, the IRS Chief Counsel issued an Advice Memorandum ("CCA") in response to a request for assistance stating that disgorgement paid to the SEC for violating the FCPA could not be deducted.[27] While the memorandum is, by its own terms, "advice [that] may not be used or cited as precedent," the reasoning employed may serve as helpful guidance for other similarly situated companies.

The corporate taxpayer to which the CCA pertained had settled alleged violations of the internal controls and books and records provisions of the FCPA with the SEC, and was required to pay disgorgement and a civil penalty to the SEC. The IRS advised that "disgorgement in federal securities law cases can be primarily compensatory or primarily punitive for federal tax law purposes depending on the facts and circumstances of a particular case." Because the company could not establish that the disgorgement was intended to compensate the SEC or a third party for actual losses, the IRS determined that the payment was primarily punitive. Given the court's reasoning in *Kokesh* that disgorgement is penal in part because in many cases it does not compensate a victim,[28] it appears likely that the IRS also will consider future disgorgement to the SEC to be punitive and therefore not deductible.

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26. The tax code prohibits a deduction for a "fine or similar penalty paid to the government" for the violation of any law. 26 C.F.R. § 1.162-21.
27. Memorandum, Off. Chief Counsel, Internal Revenue Serv. (Jan. 29, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf
28. *Kokesh v. SEC*, No. 16-529, slip op. at 9 (June 5, 2017).

In First Enforcement Action of the Trump Administration, DOJ Issues "Declination" Regarding Linde North America

On June 16, 2017, the United States Department of Justice ("DOJ") released a "declination" letter (the "Declination") involving Linde North America, Inc. and Linde Gas North America LLC, New Jersey-headquartered subsidiaries of a German engineering conglomerate.[1] In connection with the Declination, Linde North America paid $11,235,000 in disgorgement, relating to payments made between 2006 and 2009 by a company that Linde North America had acquired in 2006 and dissolved in 2010.

This is the third time that the DOJ has obtained disgorgement as part of a declination under the Pilot Program, established in April 2016.[2] The Declination is particularly noteworthy because it is the first time since the change in administration that the DOJ has used this form of resolution. The Declination also highlights a risk inherent in certain types of acquisitions, specifically those including an "earn-out" provision, and underscores the importance of pre-transaction due diligence, and the implementation and monitoring of a risk-based compliance program following closing.

The Declination

As with the two prior declinations under the Pilot Program,[3] this Declination is in the form of a letter containing specific factual allegations, albeit more abbreviated than a traditional enforcement action. The Declination contains very little information regarding the timing of relevant events.

In October 2006, Linde North America acquired Spectra Gases, Inc., a company with three executives who were the principal shareholders and managers (the "Spectra executives"). The acquisition agreement included a traditional "earn-out" provision,[4] whereby an acquiring company holds back part of the purchase price, with final payment contingent on certain measurable targets post-acquisition. Such a

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1. U.S. Dep't of Justice, Declination Letter issued to Linde North America Inc. (June 16, 2017), https://www.justice.gov/criminal-fraud/file/974516/download.
2. United States Department of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," April 5, 2016, https://www.justice.gov/criminal-fraud/pilot-program ("Pilot Program"). *See* Paul R. Berger, Andrew M. Levine, Bruce E. Yannett, and Philip Rohlik, "U.S. Department of Justice Issues New FCPA Guidance and Launches Pilot Enforcement Program," FCPA Update, Vol. 7, No. 9 (Apr. 2016), http://www.debevoise.com/insights/publications/2016/04/fcpa-update-april-2016. As this issue was going to press, the DOJ announced its second declination under the Trump administration, In re CDM Smith, Inc. U.S. Dep't of Justice, Declination Letter issued to CDM Smith, Inc. (June 21, 2017), https://www.justice.gov/criminal-fraud/page/file/976976/download.
3. *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), http://www.debevoise.com/insights/publications/2016/10/fcpa-update-october-2016.
4. Declination, *supra* n. 1 at 1.

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provision helps to retain owners or managers of the sellers, who are then incentivized to help achieve relevant targets. Under the Spectra earn-out provision, the Spectra executives agreed to continue managing the company for three years following Linde's acquisition[5] and, therefore, were scheduled to remain at the company until late 2009.

In November 2006, shortly after the acquisition, Spectra purchased a boron column and other assets used to produce boron gas from the National High Technology Center of Georgia ("NHTC"), an entity fully owned and controlled by the Republic of Georgia.[6] In order to ensure that Spectra would be selected as the purchaser of the boron column, the Spectra executives apparently agreed to share the profits from selling the boron gas with certain high-level officials at NHTC and a third-party intermediary. Spectra received only about a quarter of the profits from the boron column, with the remaining approximately three-quarters going to entities associated with the NHTC officials.[7]

In total, Spectra received approximately $6,390,000 in profits generated from the boron column, which, according to the Declination, "was a driving force in the determination of the 'earn-out.'"[8] In January 2010, before discovering the corrupt conduct, Linde dissolved Spectra, becoming its "successor in interest."[9] Linde received approximately another $1,430,000 in profits generated from the boron column.

After Linde discovered the corrupt conduct,[10] the company withheld $10 million in earn-out payments from the Spectra executives and another $3,415,000 in funds from the entities associated with the NHTC officials.

According to the Declination, the DOJ's decision to close its investigation was based on a number of factors, including that Linde: timely self-disclosed the matter; conducted a "thorough, comprehensive and proactive" investigation; fully cooperated with the DOJ, including providing "all known relevant facts about the individuals involved"; agreed to continue to cooperate with any ongoing investigation of individuals; fully remediated, including terminating or taking disciplinary action against the Spectra executives and lower-level employees; enhanced the company's compliance program and internal accounting controls; and agreed to disgorge $7.82 million in profits that it and Spectra received from the improper conduct, and to forfeit another $3.4 million that it withheld from companies owned or controlled by the NHTC officials.

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5. *Id.*
6. *Id.*
7. *Id.* at 1-2.
8. *Id.* at 2.
9. *Id.*
10. The Declination does not specify when or how Linde discovered the corrupt conduct.

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Lessons from the Linde North America Declination

A. What is a Declination?

A declination traditionally involved the DOJ's exercising discretion not to bring a case that it could, because of equitable considerations or reasons such as the small size or limited nature of violations. With a "traditional declination," the DOJ did not announce its decision or seek a penalty from the company.[11] For comparative purposes, such a "traditional declination" differs from the DOJ's decision to close an investigation upon concluding it could not carry its burden of proof, given insufficient evidence, lack of jurisdiction, expiration of the limitations period, or other factors.

"[A] 'declination' under the Pilot Program nevertheless imposes the burdens of a public recitation of factual allegations and disgorgement of illicit profits, and therefore can be viewed as another 'non-prosecution' vehicle through which the DOJ resolves an enforcement action."

Under the Pilot Program, the concept of a "declination" clearly has evolved, designed to reward the trifecta of self-reporting, full cooperation, and timely remediation. As we previously have noted, a "declination" with disgorgement under the Pilot Program is not significantly different than a non-prosecution agreement.[12] While a company escapes the ongoing obligations of a non-prosecution agreement, a "declination" under the Pilot Program nevertheless imposes the burdens of a public recitation of factual allegations and disgorgement of illicit profits, and therefore can be viewed as another "non-prosecution" vehicle through which the DOJ resolves an enforcement action.

B. The First Enforcement Action of the Trump Administration?

As noted in the title, the Linde North America Declination is the first FCPA enforcement action of President Donald Trump's administration. Of course, FCPA investigations often last for years, and the Linde investigation certainly predated the new administration.

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11. *See, e.g.*, Yannett, et al., *supra* n.3.

12. *See id.* ("The benefits of a Pilot Program declination are therefore muted by the requirement to pay disgorgement, the reputational damage from published allegations, and the related potential for collateral consequences, as well as the reality of the Pilot Program's baseline encouragement of self-reporting and cooperation.").

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With that proviso, the use in this case of a Pilot Program declination with disgorgement suggests that vigorous enforcement of the FCPA continues, *so far.* Given the ongoing transitions in the leadership ranks at DOJ, we of course will have to wait and see.

C. "Earn-Out" Provisions

The Declination also highlights certain risks associated with "earn-out" provisions, notwithstanding the possibly valuable benefits of keeping owners and managers in place following an acquisition. An acquirer can find itself having ownership but not operational control. Additionally, because an earn-out provision has an expiry date, this arrangement also risks incentivizing individuals to meet certain short-term goals without regard for what follows. Both risks associated with earn-out clauses can be addressed, at least in part, through careful drafting of such provisions.

As the Declination demonstrates, these are potential anti-corruption risks, especially when involving business operations in high-risk countries from a corruption perspective.[13] Consistent with past guidance issued by the DOJ and SEC, these risks can be addressed best by conducting appropriate pre-transaction due diligence, completing due diligence as soon as practicable after closing, and promptly implementing a risk-based anti-corruption compliance program (including appropriate policies and procedures that ensure oversight of management). This guidance, most recently stated affirmatively in Opinion Release 14-02 and implied in the traditional declination for Harris Corporation in September 2016, originated in the Halliburton-related Opinion Release of June 2008.[14] Linde North America did not have the benefit of that guidance when its acquired Spectra nineteen months earlier, but it is now well-established.

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13. Although outside the FCPA context, the SEC recently settled charges that a former executive at the Commonwealth Bank of Australia participated in a bribery scheme that involved helping the majority shareholder of a company acquired by Computer Sciences Corporation receive an earn-out payment of over $30 million. Litigation Release, U.S. Sec. & Exch. Comm'n v. Keith Hunter, Civil Action No. 2:16-cv-07246 (Sept. 27, 2016), available at https://www.sec.gov/litigation/litreleases/2016/lr23657.htm.

14. U.S. Dep't of Justice, Opinion Procedure Release 08-02 (June 13, 2008), available at https://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

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