

FCPA Update

A Global Anti-Corruption Newsletter



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SEC Brings First FCPA Enforcement Actions of 2016

The Securities and Exchange Commission (“SEC”) began February by bringing the first two corporate FCPA enforcement actions of 2016. As with most SEC FCPA corporate enforcement actions in 2015, these two actions – against SAP SE (the “SAP Order”),¹ a German software firm with American depository shares listed on the New York Stock Exchange, and against SciClone Pharmaceuticals (the “SciClone Order”),² a California-based pharmaceutical company – were brought

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1. *In the Matter of SAP SE*, Securities Exchange Act of 1934 Rel. No. 77005, 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; Accounting and Auditing Enforcement Rel. No. 3736, Admin. Proc. File No. 3-17080 (Feb. 1, 2016).
2. *In the Matter of SciClone Pharmaceuticals, Inc.*, Securities Exchange Act of 1934 Rel. No. 77058, 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; Accounting and Auditing Enforcement Rel. No. 3739, Admin. Proc. File No. 3-17101 (Feb. 4, 2016).

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as administrative proceedings and did not involve any parallel Department of Justice (“DOJ”) enforcement action.

In mid-February, the SEC brought another enforcement action – against PTC, Inc. (the “PTC Order”),³ a Massachusetts software corporation – this time involving a parallel action by the DOJ. At the same time as the PTC Order, the SEC also entered into its first Deferred Prosecution Agreement (“DPA”) with an individual, Yu Kai Yuan (the “Yuan DPA”),⁴ a former employee of PTC’s Hong Kong and China subsidiaries (collectively, “PTC-China,” which, according to the order operated as a single entity⁵). Unlike with the SAP and SciClone actions, the DOJ entered into a non-prosecution agreement with PTC’s Hong Kong and Chinese subsidiaries (the “PTC NPA”)⁶ for violations of 15 U.S.C. § 78dd-3 (the alternate territorial jurisdiction prong of the FCPA’s anti-bribery provisions).

These orders serve as reminders of best practices for the software and pharmaceutical industries, respectively, as well as those subject to SEC oversight more generally. They repeat many of the themes of the SEC’s aggressive approach to “enforcing the FCPA statute to its fullest extent”⁷: namely, virtual strict liability under the internal controls provisions, the importance of third-party controls, hostility to corporate entertainment, and the need for local compliance resources.

SAP

The SEC’s first enforcement action of the year was brought against SAP for activities in Latin America. SAP agreed to disgorge \$3.7 million in profits,⁸ plus interest, but no civil penalty was imposed because of SAP’s cooperation.⁹ The SAP Order follows almost six months after individual actions by the SEC¹⁰ (the “Garcia Order”) and

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3. *In the Matter of PTC Inc.*, Securities Exchange Act of 1934 Rel. No. 77145, 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; Accounting and Auditing Enforcement Rel. No. 3743, Admin. Proc. File No. 3-17118 (Feb. 16, 2016).
 4. Deferred Prosecution Agreement, available at <https://www.sec.gov/news/pressrelease/2016-29.html>.
 5. PTC Order at ¶ 4.
 6. *In re Parametric Technology*, Non-Prosecution Agreement, available at <http://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges>.
 7. See Andrew Ceresney, “ACI’s 32nd FCPA Conference Keynote Address,” Nov. 17, 2015; <http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html>.
 8. As we have commented on before, there was no charged bribery violation that served as a basis for this disgorgement. See Paul R. Berger, Steven S. Michaels, and Amanda M. Ulrich, “Do FCPA Remedies Follow FCPA Wrongs? ‘Disgorgement’ In Internal Controls and Books and Records Cases,” *FCPA Update*, Vol. 3, No. 1 (Aug. 2011), <http://www.debevoise.com/insights/publications/2011/08/fcpa-update>.
 9. SAP Order at ¶ 7.
 10. *In the Matter of Vicente E. Garcia*, Securities Exchange Act of 1934 Rel. No. 75684, 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, Accounting and Auditing Enforcement Rel. No. 3678, Admin. Proc. File No. 3-16750 (Aug. 12, 2015).

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DOJ¹¹ (the “Garcia Information”) were filed against SAP’s former Vice-President for Global Strategic Accounts, Vicente Garcia, for the same underlying conduct. Garcia later pleaded guilty and was sentenced to 22 months in prison.¹²

Garcia was a former SAP employee who conspired with others to offer bribes to two Panamanian officials and paid bribes of at least \$145,000 to another Panamanian official.¹³ In June 2009, SAP employees in Panama and Mexico were investigating possible software sales to the Panamanian government. At the same time, Garcia, SAP’s Miami-based Vice-President of Global Accounts responsible for sales in Latin America, was approached by a Panamanian lobbyist regarding potential sales to the Panamanian government. The lobbyist informed Garcia of his close ties to a Panamanian government official with influence over purchasing decisions.¹⁴ After speaking to the lobbyist, Garcia took over the Panamanian account from the employees in Mexico and Panama and began planning, with others, to pay bribes to three Panamanian officials (as well as enriching himself with a kickback).¹⁵

“[The SEC’s orders] repeat many of the themes of the SEC’s aggressive approach to ‘enforcing the FCPA statute to its fullest extent’: namely, virtual strict liability under the internal controls provisions, the importance of third-party controls, hostility to corporate entertainment, and the need for local compliance resources.”

Garcia originally planned to pay the bribes by substituting a new local partner in Panama and paying a consulting fee to the new partner.¹⁶ The change of partners, along with other (unspecified) red flags, triggered a compliance review by SAP, which prohibited the payment of the commission.¹⁷ Although SAP’s internal controls were successful in preventing the commission payment, Garcia “used his

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11. *United States v. Vicente Eduardo Garcia*, Information, Case No. 3:15-cr-00366-CRB (N.D. Cal. filed July 13, 2015). The Information charges Garcia with conspiracy to violate the FCPA and criminal forfeiture of the funds received by Garcia as part of the conspiracy.

12. *United States v. Garcia*, Judgment, No. CR-15-00366-CRB (N.D. Cal. Dec. 16, 2015).

13. Garcia Order at ¶ 1.

14. SAP Order at ¶¶ 9, 11.

15. *Id.* at ¶¶ 10-13.

16. *Id.* at ¶ 14.

17. *Id.*

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knowledge of the availability of discounts to push through large discounts in order to create a slush fund from which the local partner was able to pay the bribes.”¹⁸ As a result of his knowledge of the availability of discounts, Garcia falsified justification forms, providing “legitimate reasons” that SAP often used to give discounts.¹⁹

Virtual Strict Liability?

The “DOJ and SEC understand that ‘no compliance program can ever prevent all criminal activity by a corporation’s employees.’”²⁰ Although it would seem that a necessary corollary to that understanding is that it is extraordinarily difficult to prevent a knowledgeable and determined employee from deliberately circumventing internal controls, the SEC nonetheless found that SAP had violated the books and records and internal controls provisions based on Garcia’s behavior.

The SEC found two specific internal controls failures at SAP. First, the SEC found that SAP’s internal controls failed in not verifying employees’ requests for discounts or subjecting them to “heightened anti-corruption scrutiny.”²¹ It is not clear what the “verification” or “heightened anti-corruption scrutiny” would involve, or how such controls would have prevented a committed wrongdoer like Garcia from circumventing them.

Second, the SEC found that SAP’s indirect reporting structure, by which Garcia reported to various supervisors employed by other SAP subsidiaries, “created gaps in supervising Garcia.”²² SAP does business in 188 countries through 272 subsidiaries.²³ As a result of size and global reach, companies like SAP often require complex reporting regimes. The SAP Order is not clear as to why this fact should serve as an “insufficient internal control.” This is especially true given the generic way in which the SAP Order describes SAP’s remediation: “SAP also implemented new policies and procedures to detect and prevent similar issues from recurring in the future.”²⁴ The SEC cites as examples the elevation of the status of the company’s Chief Compliance Officer and the conducting of “regular anti-corruption training, as well as anti-corruption audits.”²⁵ It is unclear, however, how the remedial steps

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18. *Id.* at ¶ 15.

19. *Id.*

20. See A Resource Guide to the U.S. Foreign Corrupt Practices Act 56 (2012) [hereinafter “Resource Guide”], <http://www.justice.gov/criminal/fraud/fcpa/guidance>.

21. SAP Order at ¶ 20.

22. *Id.*

23. *Id.* at ¶ 7.

24. *Id.* at ¶ 22.

25. *Id.*

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relate to the alleged infirmities in the reporting structure. Perhaps more distressing is the Enforcement Division's entry into the world of corporate governance. In the world of multinational corporations, indirect reporting structures are a staple of business. Is the SEC now suggesting that companies should change that structure? Stay tuned.

Key Takeaways from the SAP Order

In addition to requiring (undefined) "heightened anti-corruption scrutiny for large discounts" and addressing gaps created by complex reporting relationships, the SAP Order's section on "Cooperation and Remediation" reminds companies – and software companies in particular – of the need to institute controls over distributor relationships. Although not identified in this circumstance as an internal control failure, the SEC appears to have given SAP credit for auditing "all recent public sector Latin American transactions, regardless of Garcia's involvement, to analyze partner profit margin data especially in comparison to discounts so that any trends could be spotted and high profit margin transactions could be identified."²⁶

Auditing of profit margins also was an issue in the SEC's 2012 action against Oracle Corporation, in which the SEC suggested that the failure to "audit and compare the distributor's margin against the end user price to ensure excess margins were not being built into the pricing structure"²⁷ was a violation of the internal controls provisions of the FCPA. The Oracle case generated controversy,²⁸ and the reappearance of such auditing in the SAP Order (albeit on a more limited basis) serves as a reminder that companies should try to include auditing of distributor profit margins as part of their third-party controls (while recognizing that there are many third-party relationships where such audits are not available, as the distributor's margin is often held – legitimately – as a commercial secret).

SciClone

SciClone is the latest in a long line of pharmaceutical and medical device companies penalized for sales practices in China. SciClone agreed to almost \$12 million in disgorgement and penalties, as well as a three-year reporting obligation to settle

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26. *Id.*

27. *Securities and Exchange Commission v. Oracle Corp.*, Complaint, No. CV-12-4310-CRB at ¶ 17 (N.D.Cal. Aug. 16, 2012).

28. See, e.g., Michael Koehler, "The Dilution Of FCPA Enforcement Has Reached A New Level With The SEC's Enforcement Action Against Oracle," FCPA Professor (Aug. 17, 2012), <http://www.fcprofessor.com/the-dilution-of-fcpa-enforcement-has-reached-a-new-level-with-the-secs-enforcement-action-against-oracle>.

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the SEC proceedings.²⁹ The SciClone Order lists a variety of now-familiar sales practices: corporate hospitality (about which more below); providing domestic travel, accommodation, meals and vacations to health-care professionals designated as “VIP clients”; \$8,600 in undefined “lavish gifts” provided through a third party; and attendance at foreign conferences that included a significant amount of non-business sightseeing.³⁰ For at least some of these practices (the SciClone Order is not clear which ones), the SEC found that SciClone violated the FCPA’s anti-bribery provisions, as well as the accounting and internal controls provisions.³¹

In addition, the SciClone order notes that SciClone failed to conduct due diligence or exercise controls over travel agencies to determine whether events were appropriately business related or whether such events took place at all.³² Controls over travel agencies are important for all companies doing business in China. Until becoming widely publicized as part of China’s investigation of GlaxoSmithKline, use of travel agencies often was a sophisticated method of creating slush funds. In addition, the SEC identified failures in internal controls of a more ubiquitous and banal type, including forged and inconsistent tax invoices (*fa piao*); excessive meal, gift, and entertainment expenses; and “unverified events, doctored honoraria agreements, and duplicative meetings.”³³

PTC, Inc.

Like SAP, PTC is a software company. Like SciClone, PTC encountered FCPA difficulties relating to its sales practices in China, in particular in relation to trips provided to customers that were state-owned entities (“SOEs”). PTC settled an SEC enforcement action, agreeing to pay approximately \$13.6 million in disgorgement and interest.³⁴ PTC’s Chinese and Hong Kong subsidiaries (collectively “PTC-China”) separately entered into a non-prosecution agreement with the DOJ, providing for a \$14.54 million penalty and three-year reporting period.³⁵ In total, PTC and its subsidiaries committed to pay just over \$28 million to the US government.

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29. SciClone Order at ¶ 19.

30. *Id.* at ¶¶ 6-11.

31. *Id.* at ¶¶ 14-17.

32. *Id.* at ¶ 11.

33. *Id.* at ¶ 12.

34. PTC Order at ¶ 36.

35. PTC NPA at p. 2, 4.

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PTC exercised substantial control over PTC-China, with PTC-China's employees reporting directly to PTC.³⁶ According to the PTC Order, it was PTC and not PTC-China that entered into contracts with the SOE customers, and PTC set business and financial goals for its subsidiaries.³⁷ PTC-China's employees hired third parties, called "business partners," in connection with sales to SOE customers.³⁸ These business partners were often selected by the SOE customer and provided "influence services" (arranging introductions to and lobbying SOE customers) to PTC-China and sometimes acted as information technology subcontractors, providing services to the SOE customers on PTC-China's behalf. The business partners were paid success fees of 15% to 30% of each contract with an SOE customer, which in turn were recorded as "Complete Outsourced Deals" or COD payments.³⁹

"Two aspects of both the SciClone and PTC enforcement actions bear special mention in that they repeat guidance provided last year by the SEC in various other enforcement actions: the importance of jurisdiction-dedicated compliance personnel and the importance of getting investigations right."

PTC-China's business partners also served as a way to finance overseas travel requested by PTC's SOE customers. Travel expenses would be paid by the business partners with funds from grossed-up commissions and COD payments received from PTC.⁴⁰ These trips usually included one or two days at PTC's headquarters in Massachusetts, followed by sightseeing visits on the East Coast, and to the Grand Canyon, California, and Hawaii. Between 2006 and 2011, PTC-China paid business partners at least \$1.18 million for arranging such trips.⁴² In addition, between 2009 and 2011, PTC-China staff provided gifts and entertainment to SOE officials ranging from \$50 to \$600, which violated PTC's corporate governance and internal controls policies.⁴³

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36. PTC Order at ¶ 5.

37. *Id.* at ¶¶ 6-7.

38. *Id.* at ¶ 8.

39. *Id.* at ¶¶ 9, 11, 13, 14.

40. *Id.* at ¶ 17.

41. *Id.* at ¶ 19.

42. *Id.* at ¶ 20.

43. *Id.* at ¶¶ 21-22.

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The SEC found that PTC violated the anti-bribery provisions of the FCPA through its agents and employees of PTC-China who paid for travel, gifts, and entertainment for SOE customers. PTC further violated the books and records provisions of the FCPA in that it did not undertake periodic comprehensive risk assessments, had vague policies relating to business entertainment, and failed to properly vet third parties.⁴⁴ PTC China's improper booking of payments to business partners also violated the books and records provisions.

Unlike in the SAP and SciClone cases, the DOJ brought a parallel enforcement action against PTC-China, resulting in a non-prosecution agreement ("NPA"). The PTC NPA's statement of facts is similar to the SEC's PTC Order, though less detailed. Following the trend in 2015 of "SEC-only" enforcement actions, as well as the lack of parallel DOJ actions against SAP or SciClone in 2016, the PTC NPA is somewhat surprising. The improper activities described in the PTC NPA are not significantly different than those in the SciClone Order (though the PTC NPA involved exclusively foreign travel). The method used by PTC to pay for these trips ("business partners") was markedly less sophisticated than that in the SciClone matter (since travel agencies do not exhibit the same kinds of red flags as entities specifically retained to deal with state-owned enterprises). Perhaps PTC-China merited special attention given the use of a scheme highlighted over the past several years of FCPA enforcement actions. Or perhaps, the DOJ was eager for the opportunity to exercise jurisdiction under §78dd-3, which was possible because PTC-China employees accompanied the SOE customers on the US trips (though SAP also involved an obvious US nexus, and SciClone also sent customers on trips to the United States).

Also relevant is the fact that there was a cooperating witness in the PTC case, Yu Kai Yuan, who received a DPA from the SEC. Other than introducing Yuan as a PRC citizen and resident formerly employed by PTC China, the Yuan DPA merely repeats the general information contained in the PTC DPA, offering no specific allegation regarding Yuan's role. The SEC's press release, however, states that Yuan provided significant cooperation during the SEC's investigation.⁴⁵ Given access to a witness who could have greatly eased the evidentiary burdens associated with FCPA cases, it is possible that the DOJ had reason to bring a prosecution but, following the factors set forth in the United States Attorneys' Manual, decided not to do so.

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44. *Id.* at ¶¶ 24-25.

45. Press Release 2016-29, "SEC: Tech Company Bribed Chinese Officials," February 16, 2016, available at <https://www.sec.gov/news/pressrelease/2016-29.html>.

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Additional Lessons from SciClone and PTC

Two aspects of both the SciClone and PTC enforcement actions bear special mention in that they repeat guidance provided last year by the SEC in various other enforcement actions: the importance of jurisdiction-dedicated compliance personnel and the importance of getting investigations right.

First, as with the Bristol-Myers Squibb (“BMS”) enforcement action, the SciClone Order and PTC Order emphasize the importance of having dedicated compliance resources for China. Just as what was an internal controls deficiency in the Oracle enforcement action became a remediation step in the SAP Order, BMS’s failure to have an on-the-ground compliance officer in China was cited as a control failing,⁴⁶ while SciClone’s hiring of such a compliance officer⁴⁷ and PTC’s establishing a new compliance director in China⁴⁸ were noted as “remedial efforts.”

In the SciClone Order, the SEC noted that, sometime after 2007, SciClone identified that a “Specialist” hired to assist in obtaining a license renewal had provided \$8,600 in (undefined) “lavish” gifts to two foreign officials.⁴⁹ At the time, SciClone terminated the services of the “Specialist” and conducted an internal investigation into the “Specialist’s conduct and practices in China.”⁵⁰ The SEC also noted, apparently disapprovingly, that “[t]he review did not look more broadly at sales and marketing practices in China.”⁵¹ Similarly, the SEC’s PTC Order noted that PTC investigated its Chinese business three times (2006, 2008, and 2010) but failed to identify and stop the improper use of business partners.⁵² This approach mirrors the SEC’s comments in its 2015 enforcement action against Mead Johnson, in which it was similarly mentioned that Mead Johnson had conducted an internal investigation into distributors which “failed to find evidence” of an FCPA violation.⁵³

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46. *In the Matter of Bristol-Myers Squibb Company*, Securities Exchange Act of 1934 Rel. No. 76073, 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, Admin. Proc. File No. 3-16881 at ¶ 9 (Oct. 5, 2015).

47. SciClone Order at ¶ 18.

48. PTC Order at ¶ 34.

49. SciClone Order at ¶¶ 9-10.

50. *Id.*

51. *Id.* at ¶ 10.

52. PTC Order at ¶ 23.

53. *In the Matter of Mead Johnson Nutrition Company*, ¶¶ 14-15, Securities Exchange Act of 1934 Re. No. 75532, 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, Admin. Proc. File No. 3-16704 (July 28, 2015).

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Given the paucity of details in the orders, it is difficult to assess the quality of the internal investigations undertaken by Mead Johnson, SciClone, and PTC. It is always important to conduct thorough internal investigations, but lack of further information creates significant uncertainty for on-the-ground compliance personnel in high-risk jurisdictions. First, is an investigation that fails to uncover all misdeeds at a subsidiary an internal controls failure in the SEC's view? Relatedly, in connection with the SciClone Order, should companies always move from investigations of specific allegations (gifts given by the "Specialist") to a broader investigation of sales and marketing practices?

“Compliance in high-risk markets (especially in high-risk industries) can often resemble a game of whack-a-mole, with compliance departments monitoring and investigating dozens of different potential violations of internal procedures There should therefore be occasions when a company can reasonably decide to investigate issues on a case-by-case basis rather than escalating all investigations to the next level. Unfortunately, neither the SciClone Order nor the PTC Order provides any guidance on this issue.”

Compliance in high-risk markets (especially in high-risk industries) can often resemble a game of whack-a-mole, with compliance departments monitoring and investigating dozens of different potential violations of internal procedures: from items like forged *fa piao*, to the use of business partners, to the use of travel agencies to create slush funds, to the use of distributor margins to create slush funds, to creative uses of the proceeds of recycling, to the myriad of other schemes appearing in different provinces and different product lines at different times. A company that truly tries to do the right thing therefore will have several simultaneous demands on its compliance resources. There should therefore be occasions when a company can reasonably decide to investigate issues on a case-by-case basis rather than escalating all investigations to the next level. Unfortunately, neither the SciClone Order nor the PTC Order provide any guidance on this issue.

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Do SAP and SciClone Reinforce the SEC's Hostility to Corporate Hospitality?

Although FCPA settlements are often heavily negotiated, the SEC has significant discretion in determining which facts are ultimately included in public documents. As a result, it is instructive to look at which facts the SEC chose to include or exclude from the SAP Order and the SciClone Order. In both cases, it appears that the SEC is using its selection of facts to signal continued scrutiny of corporate hospitality originally raised in last year's BHP Billiton enforcement action.

Corporate hospitality refers to sponsored sporting or other events at which the goal is to establish goodwill and get to know clients and potential clients. Corporate hospitality was a very public issue after the passage of the UK Bribery Act of 2010 and part of the reason for the publication of the Bribery Act Guidance in 2011, in which the then Secretary of State for Justice, Kenneth Clarke, went out of his way to note "[r]est assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix."⁵⁴ Corporate hospitality events differ from various forms of fraud, such as taking clients on "study trips," which are supposed to showcase products but are actually sightseeing tours. The hypotheticals in the 2012 FCPA "Resource Guide" address the latter, but do not specifically address corporate hospitality of the type addressed in the UK Guidance.⁵⁵

The SEC's 2015 enforcement action against BHP Billiton⁵⁶ suggested that extremely stringent controls were needed if "foreign officials" (as broadly defined by the SEC) were invited to a marquee event – the Beijing Olympics – to which private clients were also invited. Of course, it has always been the case that even if attendance at such events did not violate the FCPA (or UK Bribery Act), it could violate specific ethical rules imposed by home countries (or companies) on their officials.

In the SAP Order, the SEC chose to differ from the underlying facts set forth in the earlier Garcia Order and Garcia Information. The enforcement actions against Garcia involved a clear travel-related violation of the FCPA: Garcia "set up a 'fictional' business trip" to Mexico for one of the Panamanian officials using SAP letterhead to do so.⁵⁷ This trip is not mentioned in the SAP Order. Instead, in the "Background" portion of the SAP Order, the SEC notes that in June 2009 (around the same time the Panamanian bribery scheme was hatched), SAP found that Garcia had

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54. UK Ministry of Justice, "The Bribery Act 2010 Guidance" at 2 (March 2011). Available at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

55. Resource Guide at 17-18.

56. *In the Matter of BHP Billiton Ltd. and BHP Billiton Plc*, SEC Exchange Act Rel. No. 74998, Admin. Proc. File No. 3-16546 (May 20, 2015). See also Andrew M. Levine, Bruce E. Yannett, Matthew Getz, Steven S. Michaels and Philip Rohlik, "Internal Controls of Olympic Proportions: BHP Billiton Settles SEC Investigation of Olympic Hospitality," FCPA Update, Vol. 6, No. 10 (May 2015). <http://www.debevoise.com/insights/publications/2015/05/fcpa-update-may-2015>.

57. Garcia Information ¶ 21(b); Garcia Order at ¶ 10.

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violated its Code of Conduct “when he invited an executive of . . . PEMEX . . . to an SAP marketing event at the Monaco Grand Prix.”⁵⁸ The SEC does not say this invitation violated the FCPA (as it does not form part of the discount-related behavior referred to in the “Legal Standards and Violations” section of the SAP Order).⁵⁹ The SAP Order continues that SAP conducted an internal investigation and “revised its policies prohibiting government officials or employees from attending any ‘hospitality’ event, which it defined as any event where business constitutes less than 80% of the event.”⁶⁰ The SAP Order does not explain why this fact is relevant or why the internal investigation was deficient; nor does it suggest that the prohibition on hospitality events is required by the FCPA. Indeed, neither the SEC nor DOJ mentioned this in their actions against Garcia, which charged violations of the anti-bribery provisions (or conspiracy to violate the same).

Also of note is the specific allegation in the SciClone Order that in 2005 – eleven years before the enforcement action – “VIP clients including several hospital presidents attended the annual Qingdao Beer Festival . . .”⁶¹ Qingdao (formerly transliterated as Tsing Tao) was a German concession during the colonial period and is home to China’s largest brewery, making a beer which is still called Tsing Tao. Although the SciClone Order describes the Qingdao Beer Festival as “golf⁶² in the morning and beer-drinking in the evening,”⁶³ it could also be described as the Chinese version of Oktoberfest.⁶⁴

The SciClone Order includes other, much clearer examples of travel-related violations of the FCPA, including a 2010 sightseeing trip to Mount Fuji and 2008-2010 conference sponsorships in the United States, which “also consisted of significant sightseeing that involved, for example, travel to Las Vegas and

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58. SAP Order at ¶ 9.

59. SAP Order at ¶¶ 26-27.

60. SAP Order at ¶ 9.

61. SciClone Order at ¶ 6.

62. Regardless of whether something is a violation of the FCPA, it is important to consider local law and ethical rules applicable to participants. In 2016, these considerations would discourage golf outings in China. See “Putt it out, player: China’s Communist Party tells members to avoid golf, ‘extravagant eating’, extra-marital sex and other ‘corrupt practices,’” South China Morning Post (22 Oct. 2015), <http://www.scmp.com/news/china/policies-politics/article/1870770/no-golf-or-extra-marital-sex-chinas-communist-party>.

63. SciClone Order at ¶ 6.

64. Qingdao China Guide, <http://www.qingdaochinaguide.com/news/events/qingdao-festivals.html> (“The Asian Oktoberfest lasts for two weeks and begins with a grand opening ceremony, followed by beer tasting, evening entertainment, drinking competitions, and concludes with a themed final ceremony and ‘Ganbei.’”).

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Los Angeles with tours of the Grand Canyon or Disneyland.”⁶⁵ The SciClone Order does not specify how much the Qingdao Beer Festival cost per participant, but it is worth noting that it is an example of taking local doctors to a local public event, very different in scope and cost from the Grand Prix hospitality in the SAP Order and the Beijing Olympics in BHP Billiton, both of which involved significant international travel to expensive sporting events.

The presence of these corporate hospitality allegations in the SAP Order and SciClone Order suggests that the SEC remains interested in the aggressive approach to such events highlighted by last year’s BHP Billiton case, thereby highlighting the importance of well-documented controls in this area. Indeed, as SciClone singled out the Chinese version of Oktoberfest, companies doing business in Germany will want to carefully document any hospitality they provide in Munich in fall 2016.

These actions against SAP, SciClone, and PTC can be seen as largely continuing the SEC’s trend of aggressively using the accounting provisions of the FCPA. In addition, the repetition and variation of themes encountered in 2015 provide clues as to internal controls the SEC is likely to focus on in the year ahead.

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65. SciClone Order at ¶ 11.

In France's First Corporate Plea Agreement, Swiss Bank Resolves Money Laundering Investigation

On January 21, 2016, it became public that on January 5, Swiss bank Reyl & Cie S.A. ("Reyl") had entered into a plea agreement with the French national prosecutor to resolve money laundering charges. A number of the details of this event remain unknown because the relevant documents have not yet been made public. The event is nonetheless of considerable significance for at least two reasons: (i) it is the first time that relatively new criminal procedures have been used to effect a corporate plea in France; and (ii) the event took place in the context of intensifying discussions in the French legislature about possible changes to French laws that might permit some version of a "Deferred Prosecution Agreement" ("DPA"), for which procedures do not now exist in France.

Background

The Reyl case is part of a well-publicized investigation that began in 2013 when it was revealed that a cabinet minister and other prominent members of the French government had been keeping funds in Swiss banks, including Reyl, in violation of French laws. Pursuant to French criminal procedures, the Reyl bank and two of its officers were "*mis en examen*," that is, put under formal investigation, by two well-known investigating magistrates working in the "financial pole" in Paris, Renaud Van Ruymbeke and Roget Le Loire. In December 2015, the investigating magistrates declared a "*non-lieu*" against the bank officers, which dismissed all charges against them, leaving the investigation open only against the bank. These charges against the bank, concerning the laundering of proceeds from tax fraud, were addressed in the January 2016 plea agreement. According to press reports, the bank apparently agreed to pay a fine of €2.8 million.¹

The Procedures Involved

Guilty pleas of any sort are a relatively infrequent occurrence in France. The procedures permitting them are restrictive, and there is little or no tradition of "negotiating" a "deal" through a guilty plea leading to an advantageous outcome

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1. "Fraude fiscale : la banque Reyl accepte une amende de 2,8 millions d'euros," *Le Monde.fr* (Jan. 21, 2016), http://www.lemonde.fr/economie/article/2016/01/21/fraude-fiscale-la-banque-reyl-accepte-une-amende-de-2-8-millions-d-euros_4851416_3234.html#oYWhL2x5C3jDVvcH.99; Rahul Rose, "France's financial prosecutor secures first-ever corporate plea bargain," *Global Investigations Review* (Jan. 26, 2016), <http://globalinvestigationsreview.com/article/1024790/france%E2%80%99-financial-prosecutor-secures-corporate-plea-bargain>.

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for the defendant. Undoubtedly as a result, there is little track record of guilty pleas at all, and none with respect to corporations accused of complicated financial crimes. Furthermore, a guilty plea in France is complicated because of the role of investigating magistrates (“*juge d’instruction*”), who are responsible for most complex financial crimes. Investigating magistrates are judicial officers who are formally independent and neutral: by law they are obligated to determine the “truth” of what happened, to search for both exculpatory and inculpatory evidence, and to develop a file (*dossier*) that establishes the facts of the matter being investigated; they are not prosecutors, they do not file a formal accusatory instrument (such as an indictment under U.S. procedures), and they do not build the case for the prosecution. As a result, they have no tradition of “negotiating,” which would not fit easily into their formal duties.²

French criminal procedures have, since 2004, permitted the entry of a guilty plea under a procedure known as a “CRPC,” which stands for “*Comparution sur Reconnaissance Préalable de Culpabilité*,” roughly translated as a “resolution based on acknowledgement of guilt.”³ Under this procedure, the prosecutor simply makes a proposition to a defendant (or his counsel) to plead guilty to specific charges and will propose the penalty to be applied; the defendant then may accept or reject this proposal. If it is accepted, the proposal is submitted to the trial judge, who may either accept or reject it depending upon the strength of the facts of the case and the reasonableness of the outcome. If rejected, the matter will proceed to trial.

A CRPC differs from American procedures in at least three respects. First, there is little or no tradition of negotiation, or of a steep “discount” for pleading guilty. A defendant entering into a CRPC can avoid the costs of a trial, and to some degree a risk of an unusually high sentence. The defendant cannot, however, expect to get a truly advantageous “deal” compared to a trial outcome. Second, the level of judicial involvement and scrutiny is considerably higher than in the United States. A judge to whom a CRPC agreement is presented is expected to become familiar with the record of the case and will not approve the CRPC (thereby converting it into a criminal judgment) without being assured of the full factual record and the appropriateness of the outcome. Third, compared to a DPA or a Non-Prosecution Agreement (“NPA”), the CRPC is, in fact, a guilty plea, rather than an agreement to avoid a criminal judgment.

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2. For a general summary of French investigative criminal procedures in this context, see Antoine Kirry & Frederick T. Davis, *France*, in *THE INTERNATIONAL INVESTIGATIONS REVIEW* (Nicolas Bourtin ed., 5th ed. 2015).
 3. See Code de procédure pénal, Art. 495-7–16, https://www.legifrance.gouv.fr/affichCode.do;jsessionid=8E8B5E965909859D906B2F5C63F7883C.tpdila11v_1?idSectionTA=LEGISCTA000006167486&cidTexte=LEGITEXT000006071154&dateTexte=20160220.

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In 2011, the French Code of Criminal Procedure was amended to make the CRPC procedures applicable to investigations of complex corporate crimes, and in particular those being led by an investigating magistrate.⁴ Under Article 180-1 of the Code, added by the Law of 13 December 2011,⁵ once (i) an investigating magistrate has sufficiently completed his or her investigation and concludes that “the facts constitute the commission of a crime,” and (ii) if the person or company being investigated “accepts the facts found by the magistrate and the criminal qualification given to it,” then, with (iii) the consent of both the defendant, the prosecutor, and victims who have appeared as parties,⁶ the investigating magistrate “can” order a CRPC – that is, he or she may propose an agreed-upon order setting forth the facts

“[The Reyl plea agreement] is the first time that relatively new criminal procedures have been used to effect a corporate plea in France [and] took place in the context of intensifying discussions in the French legislature about possible changes to French laws that might permit some version of a ‘Deferred Prosecution Agreement’ . . . for which procedures do not now exist in France.”

and the legal basis for a guilty plea, as well as the penalty to be imposed.⁷ The CRPC is then turned over to a trial judge, who within a period of one month may decide whether or not to accept the agreement and impose the agreed-upon sanction. This procedure, known as an “homologation,” is designed to ensure that the sentence

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4. The amended CRPC procedures apply to charges of money laundering, but not tax fraud. The amendments were originally extended to “all crimes” in 2011, but certain offenses, including tax fraud, remain excluded from the scope of the procedure. In 2013, a proposal was made aimed at extending the CRPC/guilty plea procedure to tax fraud, but it was rejected because the French Ministry of Justice considered that it should be dedicated only to minor offenses, notably due to the confidential nature of this procedure.
 5. See Loi no. 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l’allègement de certaines procédures juridictionnelles, Art. 27.
 6. In France, victims (and in some circumstances associations of victims or other people asserting an interest in a criminal outcome) may become *parties civiles*, which means that they are formal parties to the criminal proceeding. *Parties civiles* are given access to the investigating magistrate’s files, are heard on whether a defendant should be bound over for trial, participate in a criminal trial and appeal, and in certain circumstances can appeal an adverse verdict. Normally civil “damages” are awarded to such *parties civiles* as part of the criminal judgment. See generally Kirry & Davis, note 2, *supra*, at 124.
 7. According to the reports summarizing the discussions prior the adoption of Article 180-1, cases conducted by an investigating magistrate may often lead to an admission of responsibility by the defendant, leaving only the sentence to be determined. See Pierre-Yves Collombat, “Rapport fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d’administration générale sur la proposition de loi portant réforme de la comparution sur reconnaissance préalable de culpabilité,” Sénat, No. 120 (Nov. 6, 2013), <http://www.senat.fr/rap/l13-120/l13-1201.pdf>. In those instances, ordering a CRPC accelerates the proceeding and increases efficiency.

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proposed by the prosecutor and agreed by the defendant is adequate. If the trial judge declines to accept the CRPC, then the magistrate judge's order automatically becomes an order of court "binding over" the defendant to trial.

This new procedure is relatively silent on exactly how the agreement is to be reached. The statute notes that the entry of CRPC can be "at the request" of the prosecutor, of the defense, or of the victim or parties. The legislation does not appear to encourage or even permit negotiation, other than with regard to penalty. Notably, the act applies only if, and after, a magistrate judge has already made a neutral determination that the facts justify a finding of guilt on the charges in question. Thus, the French procedures do not seem to be inherently based on, nor even to provide formal recognition of or credit for, a "self-report" by a company, an "internal investigation" by it, or "cooperation" with investigating authorities; rather, the procedure becomes an option only after the investigating magistrate has determined that the facts support a prosecutable case. In fact, in the absence of publication of the factual details of the deal, one cannot know the acts for which the bank admitted "responsibility" under the CRPC; the absence of public access to the deal thus limits any evaluation of the extent of the bank's accountability for its actions.

Questions About the Procedures Used in the Reyl Matter

It appears that a detailed agreement has been submitted to the trial court in the Reyl matter. At present, that agreement is not public and cannot be obtained from court files. From the public facts, however, a number of questions arise:

First, it is noteworthy that the CRPC only arose in January 2016, very shortly after the two individuals who had been investigated were cleared of personal culpability. It would appear unlikely that the corporate negotiation included as one of its terms the dismissal of the potential charges against the individuals, and rather more likely that the CRPC discussions could only begin in earnest once the individuals' issues had been resolved.⁸ In any event, the sequence of events highlights the sensitive and difficult issues that will develop if a corporation seeks a CRPC when both it and related individuals are under scrutiny at the same time.

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8. However, both the prosecutor and the defense counsel have stated in press comments that their "discussions" about the CRPC had begun several months earlier, thus before the December 2015 decisions in favor of the individuals. See Rose, note 1, *supra*.

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Second, it appears that the CRPC was, in fact, nothing more or less than a guilty plea, and did not include either remedial measures or any “cooperation” agreement such that one would normally find in a DPA or an NPA.

And third, in the absence of public access to the documents in question, it is impossible to know yet the extent to which counsel for the bank achieved strategic goals for a client, either by obtaining a plea to a lesser charge than originally contemplated, or by negotiating a penalty less than the maximum.

In short, this first “corporate guilty plea” sheds little light on the usefulness of the 2011 amendments to the French criminal procedural laws designed to encourage such agreed-upon outcomes. Without knowing more about the terms of the agreement, and being able to reconstruct the dynamics that led to it, it is impossible to predict that the CRPC mechanism provides a reproducible template for future cases. In this context, it bears noting that the only corporation yet to take advantage of this procedure was not French but Swiss. How French corporates would approach the negotiation dynamics of the procedure is difficult to assess, but the fact that none have successfully done so in the four years since the Code was amended to permit such a procedure is telling. On the other hand, it is also noteworthy that this CRPC was approved by investigating magistrate Renaud van Ruymbeke, who is a leading and well-regarded member of the “financial pole” in Paris that is responsible for conducting most major financial investigations; his participation provides significant validation to the outcome here.

Questions for the Future

The timing of this event is interesting because it comes at a time when there are apparently intensifying discussions within the government concerning the so-called “Loi Sapin II.” The draft now subject to debate⁹ is long-promised legislation to address the relative failure of France to pursue large corporations compared with the approaches of other countries, notably the United States.¹⁰ One possibility is that the new law will include procedures for some kind of a negotiated outcome that

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9. We noted in our previous issue that the draft law had already been presented to the Council of Ministers. See “The Year 2015 in Anti-Bribery Enforcement: Are Companies in the Eye of an Enforcement Storm?,” *FCPA Update*, Vol. 7, No. 6 (Jan. 2016), <http://www.debevoise.com/insights/publications/2016/01/fcpa-update-january-2016>, at 49. However, as of early February 2016, press articles report that the draft has yet to be sent to the Council of Ministers and will be presented to the National Assembly in March 2016, which results in more than six months delay. See, e.g., Gaëlle Macke, “Corruption: une ‘transaction pénale’ pour mieux punir les entreprises,” *Challenges.fr* (Jan. 29, 2016), <http://www.challenges.fr/economie/20160129.CHA4524/corruption-une-transaction-penale-pour-mieux-punir-les-entreprises.html>.
 10. For a discussion of the perceived imbalance between French and American suits in the area of international corruption, see Frederick T. Davis, “The fight against overseas bribery – Does France lag?,” *Ethic Intelligence* (Jan. 2015), <http://www.ethic-intelligence.com/experts/7546-fight-overseas-bribery-france-lag/?wb48617274=A5A6E209>.

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avoids a criminal judgment – that is, something akin to a DPA as practiced in the United States, or more likely similar to the DPA procedure adopted in 2015 in the United Kingdom, and recently deployed there for the first time.¹¹ From published reports, it appears that the French national financial prosecutor (the prosecutor in the Reyl case) is in favor of a negotiated outcome that would avoid a criminal judgment, along lines comparable to a DPA, but that this proposal is being hotly opposed by others in the government, notably sitting judges.

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11. For discussion of the UK DPA procedure, see John B. Missing, Karolos Seeger, Matthew H. Getz, and Robin Löff, "The United Kingdom Adopts Deferred Prosecution Agreements," *FCPA Update*, Vol. 4, No. 10 (May 2013), <http://www.debevoise.com/insights/publications/2013/05/fcpa-update>. For a description of the first use of the procedure, and the approval of a DPA outcome by the High Court, see Karolos Seeger, Matthew Getz, and Alex Parker, "The United Kingdom's First Deferred Prosecution Agreement," *FCPA Update*, Vol. 7, no 5. (Dec. 2015), <http://www.debevoise.com/insights/publications/2015/12/fcpa-update-december-2015>, and for commentary on the implications of the UK DPA procedure to French court procedures, see Frederick T. Davis, "First British Deferred Prosecution Agreement – The Implications," *Ethic Intelligence* (Dec. 2015), <http://www.ethic-intelligence.com/experts/10555-first-british-deferred-prosecution-agreement/?wb48617274=922264FB>.

Personal Liability for Chief Compliance Officer Upheld in AML Case

This is a testing time to be a compliance officer: evolving risks and heightened regulatory enforcement underscore the importance of how companies ensure adequate resourcing and empowerment of the compliance function. Amidst the ongoing debate about when it may be appropriate to charge a compliance officer personally,¹ a federal court recently has endorsed such a charge by the leading anti-money laundering (“AML”) regulator.² That judgment concerns MoneyGram International Inc. (“MoneyGram”) and its former chief compliance officer, Thomas Haider.

In 2012, MoneyGram entered into a deferred prosecution agreement (“DPA”) with the U.S. Department of Justice (“DOJ”) for, among other offenses, willfully failing to implement an effective AML program under the Bank Secrecy Act (“BSA”).³ The BSA establishes various AML reporting and compliance obligations for financial institutions.

In conjunction with the DOJ’s investigation, MoneyGram was also investigated by the U.S. Treasury’s Financial Crimes Enforcement Network (“FinCEN”), which has among its responsibilities the power to implement, administer, and enforce compliance with the requirements of the BSA. FinCEN ultimately did not take action against MoneyGram itself. However, on December 8, 2014, it issued a \$1 million civil penalty against Haider and sought to bar him from employment at any U.S. financial institution.

FinCEN argued that Haider was personally responsible for MoneyGram’s AML compliance failures. Specifically, FinCEN stated that Haider did not: (i) implement discipline or termination policies for agents and outlets suspected of engaging in, or presenting an unreasonable risk of, fraud or money laundering; (ii) ensure individuals responsible for filing suspicious activity reports (“SARs”) were given proper access to information known by MoneyGram’s Fraud Department; or (iii) conduct due diligence or effective audits of MoneyGram agents and outlets, including those known to be or suspected of engaging in fraud or money laundering.

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1. See, e.g., Andrew Ceresney, Director, Division of Enforcement, SEC, 2015 National Society of Compliance Professionals, National Conference: Keynote Address (Nov. 4, 2015), <https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-ceresney.html>.
 2. See *U.S. Dep’t of the Treasury v. Haider*, Civil No. 15-1518(DSD/HB), 2016 WL 107940 (D. Minn. Jan. 8, 2016).

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FinCEN alleged that, as a result of Haider's failures, agents and outlets known or suspected by MoneyGram personnel to engage in fraud or money laundering were permitted to use MoneyGram as a money transfer system to facilitate their schemes.

Haider filed a motion in the District Court of Minnesota, arguing *inter alia* that FinCEN lacked the power to take such personal action against him. But on January 8, 2016, the court ruled in favor of FinCEN.⁴ The court found that the general civil liability provisions of the BSA⁵ permitted FinCEN to seek civil penalties against a "partner, director, officer, or employee" of a financial institution for willful violations of the BSA, including the obligation on financial institutions to implement an AML program. It further stated: "Section 5321(a)(1)'s explicit reference to 'partner[s], director[s], officer[s], and employee[s]' demonstrates Congress' intent to subject individuals to liability in connection with a violation of any provision of the BSA or its regulations, excluding the specifically excepted provisions."⁶

Although this case relates solely to FinCEN's powers under the BSA, compliance officers in all fields may wonder fairly if this ruling portends the possibility of broader application. This is especially so given the breadth of the BSA, which (for example) requires AML programs of financial institutions to identify and report suspicious activities, including suspected bribery or corruption, to government authorities.⁷ In any event, compliance officers of all sorts – whether with respect to AML, anti-corruption, or other areas of risk – should remain vigilant in ensuring that they continue to act responsibly in overseeing and implementing effective compliance programs.

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3. 31 U.S.C. §§ 5311 *et seq.*

4. See *Haider*, 2016 WL 107940, at *5.

5. 31 U.S.C. § 5321(a).

6. *Haider*, 2016 WL 107940, at *3.

7. 31 U.S.C. § 5318(g).

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