

# The Asia Pacific Top Ten FCPA Cases of 2016

Asia-Pacific played a significant role in 2016's record-breaking enforcement actions of the US Foreign Corrupt Practices Act (FCPA), regionally contributing the largest percentage of cases in terms of both numbers and penalties and accounting for almost one-third of the total fines and penalties assessed. Many of the companies charged were operating in China, but some of the alleged misconduct also took place in Bangladesh, India, Indonesia and Thailand.

**Nine of 19 criminal prosecutions (47%) by the US Department of Justice (DOJ) involved companies operating in the region, as did 15 of 23 civil resolutions by the US Securities and Exchange Commission (SEC) (65%).**

This trend has been building for a few years, and Asia-Pacific will remain an FCPA target-rich environment, as multinational enforcement cooperation continues to increase, along with international intolerance of corruption.

Here are the most important Asia-Pacific FCPA enforcement actions in 2016.

## 1. General Cable Corporation (FCPA Pilot Programme)

In the last case of 2016, General Cable agreed to pay a civil and criminal penalty totaling US\$75.75 million with the SEC and DOJ on 29 December 2016. The agencies alleged that General Cable's subsidiaries had third-party agents and distributors make corrupt payments to employees of state-owned companies in Bangladesh,

China, Indonesia and Thailand, as well as in other countries to obtain business.

**Key points:** In April 2016, the DOJ introduced the one-year FCPA Pilot Programme, designed to encourage voluntary self-disclosures. General Cable's criminal fine reflected a 50% reduction from the applicable US Sentencing Guidelines range because it met the four prongs of the programme: voluntary self-disclosure, full cooperation, timely and appropriate remediation and disgorgement of all related profits.

Other actions taken under the FCPA Pilot Programme this year included two DOJ "*declinations*" against **HMT LLC** and **NCH Corporation**.

Although the DOJ declined to prosecute HMT and NCH, the letter agreements signed by company officials required the disgorgement of profits – US\$2.7 million and US\$335,000 respectively – and an admission of the DOJ's allegations of bribing officials in China (and also Venezuela in HMT's case). HMT admitted its distributor paid bribes on almost all its sales transactions in China. NCH paid bribes, including a 10-day

## Top 10 in APAC

- General Cable Corporation (FCPA Pilot Programme)
- Parametric Technology
- Healthcare and pharmaceutical companies
- Las Vegas Sands
- Qualcomm
- Nu Skin Enterprises
- Anheuser-Busch InBev
- JPMorgan
- Embraer
- Individuals

sightseeing trip involving only a half day of business-related activities, in support of its sales. Because neither company was subject to SEC jurisdiction, there could be no parallel civil prosecutions as is typical when the DOJ declines to prosecute admitted misconduct.

Three more typical FCPA Pilot Programme declinations by DOJ resulted in SEC civil penalties. None of these companies was required to admit to the misconduct, all of which

occurred in China.

- **Johnson Controls' China**  
Marine business allegedly used fake vendors to make improper payments to employees of SOE-owned shipyards, led by the managing director of the business. The SEC noted that this was the second time Johnson Controls had violated the FCPA, and fined the company US\$14 million despite its self-disclosure and cooperation.
- **Nortek and Akamai** agreed to pay the SEC US\$322,058 and US\$671,885 respectively for bribes by their foreign subsidiaries to Chinese officials. Nortek allegedly sought favourable treatment in terms of relaxed regulatory oversight and reduced taxes. Akamai sought to induce the purchase of unnecessary services.

## 2. Parametric Technology

In February 2016, two Chinese subsidiaries of Parametric Technology Corporation (PTC) paid US\$28 million to the DOJ and SEC. The two PTC subsidiaries provided over US\$1.1 million in recreational travel to New York, Los Angeles, Las Vegas and Hawaii, involving guided tours and golfing to Chinese employees of state-owned enterprises, who usually signed the business agreements with PTC. These trips were disguised in PTC's books and records as legitimate commissions.

**Key points:** PTC had failed to identify and remediate the conduct despite three internal investigations of compliance issues at its Chinese subsidiaries. The SEC noted that PTC's vague code of ethics and anti-bribery policies did not account for specific corruption risks associated

with doing business in China, nor did PTC have an independent compliance staff or an internal audit function to review its internal accounting controls.

## 3. Healthcare and pharmaceutical companies

In February 2016, the head of the SEC's FCPA Unit, Kara Brockmeyer, said that the SEC *"is going back to the pharma industry after a break for a period of years."* She was referring to the enforcement focus on pharmaceutical companies starting in the early 2000s, which has resulted in billions of dollars in fines and disgorgements, based on the theory that some healthcare professionals employed by state-owned hospitals are *"foreign officials"* under the FCPA. The following settlements are a clear indication that the break is over for this industry sector.

### ■ SciClone Pharmaceuticals

In February 2016, SciClone Pharmaceuticals paid more than US\$12 million to the SEC to settle charges that its subsidiaries made improper payments and provided gifts, travel and lavish hospitality to Chinese healthcare professionals. In reaching the settlement, the SEC considered SciClone's enhanced internal accounting controls.

**Key points:** The relatively low penalty imposed on SciClone is, according to the SEC, a reminder to all companies that taking timely and voluntary remediation steps is an important factor.

### ■ Novartis

In March 2016, Novartis AG agreed to pay the SEC approximately US\$25 million to settle charges involving its Chinese subsidiaries that allegedly provided gifts and payments

to healthcare professionals and engaged in *"pay-to-prescribe schemes"* to induce sales to Chinese health institutions. The bribes were recorded as proper travel and entertainment, educational training, marketing events, medical training and marketing events.

**Key points:** Novartis commenced its internal investigation as a response to media reports concerning a competitor. Although the SEC does not make clear whether Novartis voluntarily self-disclosed, it does note that Novartis' internal review identified significant weaknesses with the company's internal controls.

### ■ Olympus Corporation

Also in March, Olympus Corporation of the Americas, a subsidiary of the Japan-based medical equipment manufacturer, resolved FCPA charges based on alleged bribes in Latin America and agreed to pay US\$22.8 million as part of a total US\$646 million penalty, also including False Claims Act and Anti-Kickback Statute charges.

**Key points:** Overlapping regulatory regimes can lead to massive fines. Compliance needs to be holistic, looking at even unrelated laws to avoid triggering a prosecutor's interest.

### ■ AstraZeneca PLC

In August 2016, AstraZeneca paid the SEC US\$5.5 million to settle charges relating to alleged misconduct in China and Russia. Its Chinese subsidiary made improper payments to employees of Chinese SOEs in the hope that they would purchase or prescribe its pharmaceutical products. The company also provided cash payments to local officials to obtain dismissals or reductions of possible financial sanctions.

**Key points:** AstraZeneca was aware

of certain FCPA violations following an internal investigation, but did not voluntarily disclose the results to the SEC. However, the SEC did note that the company provided significant cooperation once the misconduct came to light.

#### ■ GlaxoSmithKline

We reported on GlaxoSmithKline (GSK) in 2014 and 2015 in relation to the record US\$490 million fine imposed by Chinese anti-corruption authorities (as well as imprisonment of several executives) and a global investigation involving UK and US enforcement agencies. In September 2016, GSK agreed to pay US\$20 million to the SEC to resolve charges that it provided things of value to Chinese government officials in order to improperly influence them and increase sales. This misconduct was facilitated by collusive third parties and the improper payments were inaccurately recorded as legitimate travel and entertainment expenses, marketing and promotion expenses, speaker payments and medical association payments.

**Key points:** While the US and Chinese enforcement actions were reportedly not coordinated, the SEC's relatively low civil penalty, its decision not to impose disgorgement of profits and the DOJ's decision to close its investigation may have been influenced by China's sizeable parallel fine.

#### 4. Las Vegas Sands

In April 2016, Las Vegas Sands (LVS) agreed to pay the SEC US\$9 million for failing to properly record payments to a consultant that assisted in the purchase of a basketball team and a building in China, against Chinese laws that prohibit gaming companies from owning a team. LVS improperly recorded the payments, including for artwork that was never actually

bought.

**Key points:** Media reports have linked the SEC and DOJ investigations to an alleged wrongful termination of the former CEO of LVS China, who is said to have clashed with a more senior executive and thereafter was terminated, reminding companies to take employees' grievances seriously.

#### 5. Qualcomm

In March 2016, Qualcomm agreed to pay the SEC US\$7.5 million for providing entertainment, gifts and offers of employment to relatives of Chinese officials who the company believed were in a position to decide whether to purchase its mobile technology products.

**Key points:** This case provides descriptions of examples of misbehaviour in the handling of "*sons and daughters*" and "*princelings*," which is helpful guidance for companies seeking to discern the limits on hiring relatives or friends of government officials in the FCPA context.

#### 6. Nu Skin Enterprises

In September 2016, Nu Skin agreed to pay the SEC US\$765,688 to settle charges based on a US\$150,000 charity donation by its Chinese subsidiary at the direction of a Chinese government official who could intervene in a provincial investigation by local authorities of Nu Skin's noncompliance with local restrictions on direct product sales.

**Key points:** This is only the second FCPA case charging a violation based solely on a charitable donation intended to influence a government official.

#### 7. Anheuser-Busch InBev

In September 2016, Anheuser-Busch

InBev agreed to pay US\$6 million to the SEC based on allegations that its India joint venture used third-party sales promoters to make improper payments to government officials to obtain orders and favourable treatment. The SEC was also concerned that a nondisclosure clause in a separation agreement could be perceived to have a chilling effect on a potential whistleblower.

**Key points:** The SEC's perception of a common NDA has been referred to in other regulatory contexts such that companies should carefully consider NDA wording.

#### 8. JPMorgan

In November 2016, JPMorgan agreed to pay over US\$264 million to the SEC, DOJ and Federal Reserve to settle charges in relation to how its Hong Kong subsidiary managed the hiring of approximately 100 friends and relatives of clients, including Chinese state-owned entities over a seven-year period.

**Key points:** While this case illustrates the two agencies' recent focus on corrupt hiring practices, it is also notable for what may be the beginning of a trend involving the addition of a third agency to an FCPA settlement, the Federal Reserve.

#### 9. Embraer

In October 2016, Embraer resolved corruption charges by agreeing to pay US\$205 million to the DOJ, SEC and Brazilian authorities. Among the charges were alleged bribes paid to an agent relating to a contract to sell the Indian Air Force three aircraft.

**Key points:** This case involved cross-border coordination between the United States and Brazil, including an offset of the SEC disgorgement for the Brazilian fine.

#### 10. Individuals

**■ Jun Ping Zhang**

In September 2016, Jun Ping Zhang, the former CEO of Harris Corporation's China subsidiary paid a civil penalty of US\$ 46,000 to the SEC to settle charges relating to facilitating gift-giving to officials at state-owned hospitals in China. Jun Ping Zhang approved the use of false expense receipts to generate cash for gifts to officials.

**Key points:** The misconduct was discovered immediately after Harris acquired the subsidiary, was self-disclosed and was quickly remediated such that neither the DOJ nor the SEC took actions against Harris Corporation, but it has now closed down its China operations completely.

**■ Yu Kai Yan**

In February 2016, in a case related to PTC, a sales executive operating in Hong Kong and China, Yu Kai Yun, resolved charges with the SEC through the first deferred prosecution agreement in an FCPA case against an individual. The charges were deferred for three years based on his cooperation during the investigation.

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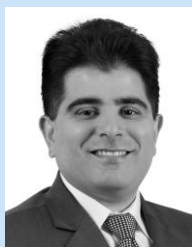
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