

June 29, 2017

***Kokesh* Raises Questions About Declinations with Disgorgement Under the FCPA Pilot Program**

On June 16, 2017, the United States Department of Justice issued a declination letter to Linde North America Inc. and Linde Gas North America LLC (collectively, “Linde”), American subsidiaries of a German multinational chemical company, closing an investigation against Linde for potential violations of the Foreign Corrupt Practices Act (“FCPA”). As part of the declination, DOJ required Linde to disgorge and forfeit over \$11 million dollars obtained from, or relating to, the alleged corrupt scheme. The *Linde* declination is the sixth declination issued by DOJ since it announced the Fraud Section’s FCPA Enforcement Plan and Guidance (the “Pilot Program”) on April 5, 2016,¹ and the third declination where DOJ required a company to disgorge profits received from the alleged improper conduct.²

This memorandum addresses whether the question recently left open by the Supreme Court in *Kokesh v. Securities and Exchange Commission* (No. 16-529)—whether the SEC has the authority to seek, or the courts have the authority to order, disgorgement absent express statutory authority—raises doubts about the legality of declinations with disgorgement that were introduced under DOJ’s Pilot Program.

The *Linde* Declination

In *Linde*, the alleged misconduct concerned corrupt payments made by a Linde affiliate company to high-level officials of a state-owned entity in the Republic of Georgia from approximately November 2006 to December 2009 in order to facilitate the purchase of assets and equipment used in the production of boron gas.³ Upon discovery of the corrupt arrangements, Linde voluntarily self-disclosed the matter to DOJ, cooperated with DOJ’s investigation, and enhanced its compliance program. DOJ subsequently issued Linde a declination letter consistent with its Pilot Program. As part of the declination, Linde

¹ U.S. Dep’t of Justice, The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), available at <https://www.justice.gov/criminal-fraud/file/838416/download>.

² Just today, DOJ made public a fourth declination where it required a company to disgorge profits received from alleged improper conduct. In *In re: CDM Smith*, DOJ issued a declination letter to CDM Smith Inc., a privately held American engineering and construction company, closing an investigation related to corrupt payments made to government officials in India and requiring CDM Smith Inc. to disgorge over \$4 million dollars. *In re: CDM Smith*, U.S. Dep’t of Justice Declination Ltr. (June 21, 2017), available at <https://www.justice.gov/criminal-fraud/page/file/976976/download>.

³ *In re: Linde North America Inc.*, U.S. Dep’t of Justice Declination Ltr. (June 16, 2017), available at <https://www.justice.gov/criminal-fraud/file/974516/download>.

agreed to disgorge \$7,820,000 in profits and benefits received from the improperly obtained sales of boron gas and forfeit \$3,415,000 of corrupt proceeds owed to the companies owned or controlled by the Georgian officials.

DOJ's pursuit of disgorgement as part of a declination is a relatively novel enforcement mechanism that began in 2016 with the implementation of the Pilot Program. In 2016, DOJ announced five declinations as a part of the Pilot Program—three declinations issued to companies where DOJ did not seek disgorgement but credited the companies' disgorgement in their parallel settlements with the SEC, and two declinations issued to companies where DOJ itself sought disgorgement.⁴ *Linde* is the first declination announced in 2017, and involves a declination issued to private companies with disgorgement.

***Kokesh* Raises Questions About DOJ's Authority to Seek Disgorgement While Declining Prosecution**

In *Kokesh*, the Supreme Court held that disgorgement sought in SEC enforcement actions constitutes a "penalty", and therefore is subject to the five-year statute of limitations governing such actions.⁵ Particularly relevant here is footnote 3, which stated that "[n]othing 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."⁶ This footnote was notable because at oral argument, various Justices asked questions that seemed to focus on the absence of any statutory basis for the SEC to seek disgorgement as an "equitable remedy" in civil actions.⁷

There is no question that DOJ has the statutory authority to seek disgorgement against convicted defendants.⁸ Specifically, the alternative fines provision of 18 U.S.C. § 3571 allows DOJ to seek fines,

⁴ See Paul, Weiss Client Mem., *FCPA Enforcement and Anti-Corruption Devs.: 2016 Year in Review*, 7 (Jan. 20, 2017), https://www.paulweiss.com/media/3897243/19jan17_fcpa_year_end.pdf.

⁵ *Kokesh v. Sec. and Exchange Comm'n*, No. 16-529, slip op. 1 (June 5, 2017); see also Paul, Weiss Client Mem., *U.S. Supreme Court Holds that Five-Year Statute of Limitations Applies to Claims for Disgorgement Brought by the SEC* (June 6, 2017), <https://www.paulweiss.com/media/3977137/6june17-kokesh.pdf>.

⁶ *Kokesh*, slip op. at 5 n.3.

⁷ For example, at oral argument, Justice Alito noted that "it would certainly be helpful and maybe essential to know what the authority for [disgorgement] is." Transcript of Oral Argument at 13, *Kokesh v. Sec. and Exchange Comm'n*, (Apr. 18, 2017) (No. 16-529). Justice Kennedy also asked, "Is [] there specific statutory authority that makes it clear that the district court can entertain this [disgorgement] remedy?" *Id.* at 7-8.

⁸ This statutory authority is critical, as only Congress has the authority to set and impose criminal penalties. See *Ex Parte U.S.*, 242 U.S. 27, 42 (1916) ("[I]ndisputable also is it that the authority to define and fix the punishment for crime is legislative . . ."); *McCloud v. Deppisch*, 409 F.3d 869, 873 (7th Cir. 2005) ("[I]t is the legislature and the legislature alone that has the power to define criminal offenses and to prescribe penalties for them.").

including twice the gross gain to the defendant from the offense, or twice the pecuniary loss to a victim, from defendants who have been “found guilty of an offense.”⁹ But there is no indication in this statute—or in any other federal statutes—that this alternative fines provision can be triggered against a company whom DOJ is declining to prosecute.

As noted above, Linde was not found guilty of any offenses. Nonetheless, Linde was required under the Pilot Program to disgorge its profits in order to receive a declination from DOJ. While undoubtedly a company in Linde’s situation may be only too happy to disgorge ill-gotten profits in exchange for a declination of criminal prosecution, *Kokesh* raises thorny questions for DOJ as to the legality of seeking disgorgement without a clear statutory basis.¹⁰ DOJ announced earlier this year that it will continue the Pilot Program as it reviews the program and considers any adjustments;¹¹ the lessons from *Kokesh* may be particularly important for DOJ to incorporate as it conducts this review.

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⁹ 18 U.S.C. § 3571(a), (d).

¹⁰ Interestingly, on June 5, 2017, the Attorney General issued a memorandum prohibiting DOJ from imposing settlement conditions that required a defendant to make payments to non-governmental third-party organizations. This prohibition was made with few exceptions, among them being where a payment was “expressly authorized by statute.” Att’y Gen. Mem. re: *Prohibition on Settlement Payments to Third Parties* (June 5, 2017), available at <https://www.justice.gov/opa/press-release/file/971826/download>. The memorandum suggests that DOJ under the new Administration may be willing to reexamine its authority to seek certain sanctions in negotiated settlements.

¹¹ See Paul, Weiss, *FCPA Pilot Program: One-Year Retrospective* (Apr. 20, 2017), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/videos/fcpa-pilot-program-one-year-retrospective?id=24217>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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