

# Novartis Pays \$25 Million to Settle Allegations of FCPA Violations in China 诺华支付 2,500 万美元和解关于在中国违反 FCPA 的指控

March 25, 2016 2016年3月25日

Anti-Corruption 反腐败

On March 23, 2016, Novartis AG (“Novartis”) agreed to pay \$25 million to settle civil charges with the Securities and Exchange Commission (“SEC”) alleging that it violated the Foreign Corrupt Practices Act (the “FCPA”) by paying bribes to healthcare professionals (“HCPs”) in China from 2009 to 2013 to increase sales. Employees and managers of its two China-based subsidiaries attempted to hide the improper payments by using complicit third party agents and by improperly recording them as legitimate expenses for travel and entertainment, conferences, educational events, and medical studies. These books and records were later consolidated into the financial reports of Novartis, which is listed on the New York Stock Exchange. This conduct resulted in violations of the books and records and internal accounting controls provisions of the FCPA.

2016年3月23日，诺华集团（“诺华”）同意支付2,500万美元就指控其违反美国《反海外腐败法》（“《反海外腐败法》”）的民事起诉与美国证券交易委员会（“证交会”）达成和解。诺华因于2009年至2013年间在中国向医疗专业人员（“医疗专业人员”）行贿以增加其药品销售而被起诉。其两家中国子公司的员工和经理企图利用有同谋关系的第三方代理掩盖不当付款，并将该等付款记录为用于旅行和招待、会议、教育活动和医疗研究的合法支出。该等账簿和记录后来被合并到诺华（在纽约证券交易所上市）的财务报告中。此行为导致违反《反海外腐败法》下的账簿和记录以及内部会计控制规定。

## Allegations 指控

The SEC alleged that from at least 2009 to 2013, certain employees and agents Novartis' two indirect Chinese subsidiaries provided things of values to foreign officials, principally HCPs, which led to several million dollars in sales to state-owned health institutions. Specifically:

证交会指控称，至少在从2009年至2013年的期间，诺华的两家间接中国子公司的部分员工和代理向外国官员，其中主要是医疗专业人员提供了有价值之物，这带来了向国有医疗机构的数百万美元的销售额。具体为：

- Novartis' subsidiary, Shanghai Novartis Trading Ltd (“Sandoz China”), allegedly engaged in a pay-to-prescribe scheme. The SEC alleged that the sales representatives at Sandoz China provided cash and gifts to high prescribing HCPs they described as “key” customers, and directly reported the volumes of their prescriptions to certain senior management at Sandoz China. Some employees also

maintained spreadsheets that directly link a certain cash value to be provided to HCPs in exchange for a certain volume of prescription, in which the cash value -- varying from several hundreds and thousand dollars annually -- were referred to as "investment," and certain HCPs were recorded as "money worshippers." The improper payments were funded through the submission of false expense reports, including fake receipts/fapiaos.

诺华的子公司，上海诺华贸易有限公司（“上海诺华”），被指控有付费开处方药行为。证交会指控称，上海诺华的销售代表向经常开处方的医疗专业人员提供现金和礼物，并将该等人员称为“关键”客户，并直接向上海诺华的部分高级管理人员汇报其处方药数量。部分员工还保存了电子数据表，将向医疗专业人员提供的现金额与处方药数量直接挂钩，并将现金---每年可从数百美元至数千美元不等---称为“投资”，而部分医疗专业人员被记录为“拜金者”。该等不当付款通过虚假支出报告完成，包括伪造的收据/发票。

- The SEC also alleged that Sandoz China made improper payments by paying HCPs to collect and analyze medical data regarding the use of and reaction to a particular Novartis drug. The studies -- which were not approved by Novartis' Global Clinical Quality Assurance Group as required -- did not yield any legitimate medical data, and a payment of \$522,000 was made to financially reward the HCPs who prescribed the drugs.

证交会还指控称，上海诺华作出了其他不当付款，其向医疗专业人员支付费用以收集和分析有关某种诺华药物的使用和反应的医疗数据。该等研究---未按要求经诺华的全球临床质量保证集团批准---没有产生任何合法的医疗数据，而支付了 522,000 美元用于开处方药的相关医疗专业人员的经济回报。

- Novartis also allegedly offered corrupt payments and other inducements to HCPs through complicit third party vendors. The SEC alleged that Sandoz China hired local Chinese travel companies to arrange travel, accommodations, and meals for HCPs in connection with educational events. However, many of the events did not have a legitimate educational purpose or had only a minimal amount of time spent on educational activities relative to sightseeing or other recreational activities. The related expenses were approved and paid with "little or no supporting documentation."

诺华还被指控通过同谋的第三方供应商向医疗专业人员提供了腐败付款和其他利益诱导。证交会指控称，上海诺华聘用了中国当地旅游公司为医疗专业人员安排与教育活动有关的差旅、住宿和餐饮。但是，许多活动没有产生合法教育目的或者与观光或其他娱乐活动相比仅有相当少的时间花在教育活动上。相关费用被批准并支付，但“仅有很少的文件支持，有的甚至没有文件支持”。

- For example, in 2009 Sandoz China sponsored 20 Chinese HCPs to attend a medical conference in Chicago. Although the conference was for educational purposes, Sandoz China also paid for the group's sightseeing and recreational activities, such as a Niagara Falls excursion, \$150 in "pocket" or "walking around" money for their spouses, and cover charges at a strip club.

例如，在 2009 年，上海诺华资助了 20 名中国医疗专业人员参加在芝加哥的一个医学会议。尽管该会议是为了教育目的，上海诺华支付了该团体的观光和娱乐活动费用，例如尼亚加拉瀑布旅游，他们的配偶的 150 美元“零花”或“闲逛”费用，并支付了一个脱衣舞俱乐部的费用。

- In 2011, Sandoz China approved and paid a travel company's invoices of \$25,000 and recorded them as legitimate expenses without verifying that the lecture was actually held or attended by HCPs.  
2011 年，上海诺华批准并支付了一个旅行公司的 25,000 美元的发票并将其记录为合法费用，而没有核实是否实际举行了该讲座或者医疗专业人员是否实际参加了该讲座。
- From 2011 to 2013, the other Novartis subsidiary, Beijing Novartis Pharma Co., Ltd. ("Novartis China") retained event planning vendors to provide HCPs with improper inducements to prescribe or recommend Novartis products. Despite the true nature of the payments, they were recorded as legitimate marketing costs on Novartis China's books and records.  
在 2011 至 2013 年，另一个诺华子公司，北京诺华医药有限公司（“北京诺华”）聘请了活动规划供应商为医疗专业人员提供不当利益诱导，诱使其在处方中开立诺华产品或者推荐诺华产品。无视付款的真实性质，该等付款在北京诺华的帐簿和记录中被记录为合法营销支出。
- The SEC alleged that despite Novartis' widespread use of third-party travel and event planning vendors in China, Novartis did not have sufficient internal accounting controls or anti-corruption compliance measures in place in connection with the use of those vendors. In particular, Novartis failed sufficiently to train its employees to detect improper payments and failed to conduct reasonable due diligence on the vendors.  
证监会指控称，尽管诺华在中国广泛使用第三方差旅和活动规划供应商，其没有与使用该等供应商有关的现有的、充分的内部会计控制或反腐败合规措施。特别地，诺华未能为其员工提供充分培训如何发现不当付款，且未能对其供应商进行合理的尽职调查。

## Cooperation and Remediation 合作和补救

---

The SEC acknowledged that in response to the SEC investigation and media reports concerning a Novartis competitor in August 2013, Novartis conducted an expansive review of its relationships with travel and event planning vendors in China. From its internal review, Novartis learned that a significant amount of events did not comply with Novartis policies and procedures and that such events led to the generation of funds used to provide improper payments and other inducements to HCPs.

证监会承认，为了应对证监会调查和2013年8月有关某诺华竞争者的媒体报道，诺华对其与中国的差旅和活动规划供应商的关系进行了广泛审查。从其内部审查来看，诺华了解到，许多活动没有遵守诺华政策和程序，且该等活动导致资金被用于提供向医疗专业人员的不当付款和其他利益诱导。

The SEC further praised Novartis for its remedial efforts to improve its internal controls, including:

证监会进而表扬了诺华的改进其内部控制措施的补救努力，包括：

- Overhauling its anti-corruption policies and procedures;  
全面修改其反腐败政策和程序；

COVINGTON

- Re-organizing its compliance functions to include enhanced oversight by regional and headquarter compliance personnel;  
重新组织其合规职能，并加强地区和总部合规人员的监督；
- Terminating and imposing other disciplinary sanctions against certain culpable employees;  
解雇部分有罪员工及对该等员工施加其他纪律处罚；
- Suspending vendor relationships and payments;  
中止供应商关系和付款；
- Eliminating the use of vendors to support external meetings; and  
停止使用供应商支持外部会议；以及
- Doubling training initiatives.  
双倍增加培训活动。

As part of the settlement, Novartis also agreed to provide status reports to the SEC for the next two years on its remediation and implementation of anti-corruption compliance measures. During the two-year term, Novartis would also report any additional credible evidence of corrupt payments by Novartis or its agents, as well as any related false books and records entries. Novartis is also required to certify, in writing, compliance with such undertakings and to supply supporting exhibits demonstrating compliance.

作为和解的一部分，诺华还同意向证交会提供下一个两年有关其补救和执行反腐败合规措施的进展报告。在该两年期间，诺华还会报告诺华或其代理的任何额外的可信的腐败付款证据，以及任何相关虚假帐簿和记录。诺华还被要求书面证明遵守该等承诺以及提供支持性的证据证明合规。

## Consequences

### 后果

Novartis agreed to disgorge \$21.5 million in profits, pay \$1.5 million in prejudgment interest, and pay a \$2 million penalty to the SEC, without admitting or denying the SEC's findings.

诺华同意缴纳2,150万美元的不当得利，支付1,500万美元的判决前利息，以及向证交会支付200万美元罚金，而没有承认或否认证交会的结论。

## Key Observations

### 关键观察结果

- The settlement appears to demonstrate an effort by the SEC to its commitment to crediting cooperation in the FCPA investigations. Although it is difficult to determine with certainty, facts that indicate that credits were given for Novartis' significant cooperation and remediation are:

和解看起来显示了证交会对于善意配合《反海外腐败法》调查的奖励。尽管很难具体确定是因诺华的重大配合和补救努力而给予了奖励：

- The SEC only found books and records and controls violations, rather than bringing any anti-bribery charges; and

COVINGTON

证交会仅提出了账簿和记录及控制违规，而没有提起任何反贿赂指控；以及

- Novartis appears to have received a significant discount on the civil penalty, i.e., a relatively low penalty of \$2 million as compared to the disgorgement of \$21 million, despite the absence of self-reporting.  
诺华的民事罚金看起来有很大的折扣，即，与缴纳 2100 万美元的不当得利相比，仅一个相对较低的 200 万美元的罚金，尽管在缺少自我举报的条件下。
- The compliance certification requirement described above appears to be newly inserted into FCPA-related cease-and-desist orders. It remains unclear to what extent the SEC expects a company to fulfill this obligation.  
上面描述的合规证明要求看起来是新加入《反海外腐败法》相关的停止令的。但不清楚证交会希望公司在多大程度上履行此义务。
- The settlement is the latest in a string of actions in which the U.S. enforcement agencies continue to take the position that HCPs at state-owned hospitals are “foreign officials” under the FCPA, reminding life science companies of the need for robust compliance policies and controls for interacting with such officials. In particular, the settlement alerts a pharmaceutical company to the corruption risks associated with medical studies programs involving HCPs and the need to adopt robust controls to prevent clinical studies and other medical research programs from being misused to hide corrupt payments.  
此和解是美国执法机构继续认为公立医院的医疗专业人员是《反海外腐败法》下的“外国官员”的前提下所采取的一系列行动里面的最新的一个案件，这提醒生命科学公司在与该等官员交流时遵守相关政策和控制措施的必要性。特别地，该和解提醒医药公司要警惕与涉及医疗专业人员的医学研究有关的腐败风险，以及利用有力的控制措施阻止利用临床研究和其他医学研究项目来掩盖腐败付款的必要性。
- This settlement also reinforces the lessons learned from other anti-corruption cases, including the need to:  
此和解还强化了从其他反腐败案件中学到的经验和教训，包括以下必要性：
  - establish and maintain strong controls over the use of travel agencies in China, which continues to be an area of focus for both U.S. and Chinese regulators;  
制定和维持对利用中国的旅行机构的强有力的控制措施，这仍是美国和中国监管机构的一个重点领域；
  - develop and implement effective internal controls designed to verify expense claims and ensure that reimbursed funds are used for appropriate purposes, including gifts, meals, entertainment, and travel; and  
开发和执行有效的内部控制措施，旨在核实费用支出以及确保支出的资金用于适当目的，包括礼物、餐饮、娱乐和旅行；以及
- ensure that a company’s compliance program extends to its foreign subsidiaries, with a focus on robust financial accounting controls, easy access by employees of foreign subsidiaries to company anti-corruption policies, requirements, and trainings.  
确保公司的合规项目延伸至其外国子公司，尤其是有力的财务会计控制以及让外国子公司的员工能够较容易地接触公司反腐败政策、要求和培训。

COVINGTON

- The settlement also illustrates how U.S. regulators view historical conduct through the lens of present-day compliance expectations, rather than expectations at the time of the misconduct. Like several recent settlements, the issues raised by the SEC in the settlement went back as far as 2009, which according to Novartis largely predated many of the compliance measures that the company has introduced since then.

此和解还显示美国监管机构如何根据当今的合规预期而非违规行为发生时的预期查看历史行为。和最近几件的和解一样，证交会在和解中提出的问题可追溯至 2009 年，而这大部分问题发生在许多合规措施尚未制定之前。

---

If you have any questions concerning the material discussed in this client alert, please contact the following China-focused members of our [Global Anti-Corruption practice group](#):  
如果您对本客户电子期刊中讨论的材料有任何疑问，请联络我们全球反腐败业务组驻中国的下列成员：

|                               |                  |  |
|-------------------------------|------------------|--|
| Eric Carlson 柯礼晟 (Shanghai)   | +86 21 6036 2503 | <a href="mailto:ecarlson@cov.com">ecarlson@cov.com</a> |
| Hui Xu 徐辉 (Shanghai)          | +86 21 6036 2508 | <a href="mailto:hxu@cov.com">hxu@cov.com</a>           |
| James Yuan 苑轲 (Shanghai)      | +86 21 6036 2516 | <a href="mailto:jyuan@cov.com">jyuan@cov.com</a>       |
| Ping An 安平 (Shanghai)         | +86 21 6036 2512 | <a href="mailto:pan@cov.com">pan@cov.com</a>           |
| Anna Zhao 赵芳 (Washington)     | +1 202 662 5449  | <a href="mailto:azhao@cov.com">azhao@cov.com</a>       |
| Huanhuan Zhang 张欢欢 (Shanghai) | +86 21 6036 2515 | <a href="mailto:hzhang@cov.com">hzhang@cov.com</a>     |

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

本文信息无意作为法律意见。阅读者在就本文中提及的事项采取行动前应寻求具体的法律意见。

In an increasingly regulated world, Covington & Burling LLP provides corporate, litigation, and regulatory expertise to help clients navigate through their most complex business problems, deals and disputes. Founded in 1919, the firm has more than 800 lawyers in offices in Beijing, Brussels, London, Los Angeles, New York, San Francisco, Seoul, Shanghai, Silicon Valley, and Washington.

在监管日益严格的世界里，科文顿•柏灵律师事务所为客户提供公司、诉讼及监管专业知识，以帮助其处理最为复杂的业务问题、交易和争议。该律师事务所成立于 1919 年，在北京、布鲁塞尔、伦敦、洛杉矶、纽约、旧金山、首尔、上海、硅谷和华盛顿设有办事处，拥有 800 多名律师。

This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts.  
本通讯旨在向我们的客户及其他有兴趣的同事提供相关的动态。如果您将来不希望收到电邮或电子资讯，请发送电邮至 [unsubscribe@cov.com](mailto:unsubscribe@cov.com)。

© 2016 Covington & Burling LLP. All rights reserved. © 2016 科文顿•柏灵律师事务所。保留所有权利。