

## NCH and HMT Avoid FCPA Prosecution NCH 与 HMT 避免 FCPA 起诉

Obtain Declination Letters from DOJ, But Pay Disgorgement  
从美国司法部获得拒绝起诉函；但交出了非法所得

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Anti-Corruption 反腐败

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On September 29, 2016, the U.S. Department of Justice (“DOJ”) issued letters of declination to NCH Corporation (“NCH”) and HMT LLC (“HMT”). Both companies are Texas-based “domestic concerns.” The letter to NCH, an industrial supply and maintenance company, relates to an investigation into possible violations of the anti-bribery provisions of the U.S. Foreign Corrupt Practices Act (“FCPA”) based on alleged bribes paid by its Chinese subsidiary to Chinese state-owned customers. The letter to HMT, a company that manufactures, supplies, and services aboveground liquid storage tanks for oil and gas companies, relates to an investigation into possible violations of the anti-bribery provisions of the FCPA based on alleged bribes paid by an HMT sales agent in Venezuela to Petroleos de Venezuela S.A. (“PDVSA”) and bribes paid by an HMT distributor in China to state-owned customers.

The declination letters, which were issued under the DOJ’s recently announced enforcement [pilot program](#), include agreements by NCH and HMT to voluntarily pay disgorgement to DOJ. NCH agreed to pay over \$335,000 in disgorgement while HMT paid over \$2.7 million—both amounts represent what DOJ determined were the profits from illegally-obtained sales.

2016 年 9 月 29 日，美国司法部（“司法部”）向 NCH Corporation（“NCH”）与 HMT LLC（“HMT”）出具拒绝起诉函。这两家公司均为总部在德克萨斯州的“国内企业”。对 NCH（一家工业供应和维护公司）出具的拒绝起诉函有关一项基于 NCH 的中国子公司向中国国有客户的所指贿赂而针对可能违反美国反海外腐败法（“FCPA”）反贿赂规定的情形进行的调查。对 HMT（一家为石油天然气公司生产、供应和维护地上液体存储罐的公司）出具的拒绝起诉函有关一项基于 HMT 在委内瑞拉的销售代理向 Petroleos de Venezuela S.A.（“PDVSA”）的所指贿赂以及 HMT 的一个中国经销商对国有客户的贿赂而针对可能违反 FCPA 反贿赂规定的情形进行的调查。

这两份根据司法部近期宣布的执法试点计划出具的拒绝起诉函内容包括：NCH 和 HMT 同意自愿向司法部交出非法所得。NCH 同意支付 335,000 美元的非法所得，而 HMT 支付了超过 270 万美元——该等金额均为司法部认定为从非法获得的销售额中获得的利润。

### A. Background and Alleged Misconduct 背景和所指不当行为

NCH is an industrial supply and maintenance company based in Irving, Texas, with a subsidiary in China (“NCH China”). In its declination letter, DOJ found that from early-2011 until mid-2013, NCH China illegally provided things of value to Chinese government officials in order to influence their purchasing decisions. As a preliminary matter, DOJ also found that state-owned and state-controlled customers of NCH were “instrumentalities” under the FCPA.

NCH 是一家位于德克萨斯州欧文的工业供应和维护公司，在中国设有一家子公司（“NCH 中国”）。在其拒绝起诉函中，司法部认定，从 2011 年初至 2013 年中，NCH 中国非法地向中国政府官员提供了有价值之物，旨在影响其采购决定。司法部还初步认定，NCH 的国有和国家控制客户是符合 FCPA 规定的机构。

DOJ found that the bribes to the Chinese government officials were provided in the form of cash, gifts, meals, and entertainment. All told, these illegal “things of value” were valued at over \$44,000. These expenses were described in NCH China’s internal accounting records as, among other things, “customer maintenance fees,” “customer cooperation fees,” and “cash to customer.” DOJ explicitly noted that an American-based NCH executive who oversaw NCH’s business in China reviewed these expenditures.

司法部认定，对中国政府官员的贿赂系以现金、礼品、餐饮和招待的形式提供的。这些非法的“有价值之物”合计价值超过 44,000 美元。这些费用在 NCH 中国的内部会计记录上被描述为“客户维护费”、“客户合作费”和“付客户现金”等。司法部明确指出，一位负责监督 NCH 在华业务的美国 NCH 高管审核了这些支出。

DOJ’s declination letter describes how NCH paid expenses for several employees of an NCH China government customer to attend a 10-day trip to various U.S. and Canadian cities in June 2012. According to the letter, only half of one day pertained to business activities, while the balance of the time involved non-business leisure. DOJ determined that in total NCH paid approximately \$12,000 for the non-business related expenditures associated with the trip despite knowing that the guests were government officials with whom NCH China had a pending sales bid. The declination letter also describes how NCH knew at the time that the expenses were not used for legitimate business activities and that the company had knowledge that the trip might violate the FCPA, although DOJ did not specify in the letter why NCH believed the trip was a potential violation.

司法部的拒绝起诉函指称，NCH 于 2012 年 6 月为 NCH 中国某政府客户的几名雇员付费参加为期 10 天的访问美国和加拿大城市的旅行。根据该函，该次旅行仅有半天与业务活动相关，而其余时间涉及与业务无关的休闲。司法部认定，NCH 共计为该次旅行的非业务相关支出支付了约 12,000 美元，尽管明知这些宾客为政府官员，且 NCH 中国正在向其投标销售项目。该拒绝起诉函还指称，NCH 当时知道这些费用并非用于正当业务活动，且该公司了解该旅行可能违反 FCPA，但司法部未在该函中指明为何 NCH 认为该旅行可能违法。

DOJ concluded that the above activities were connected to sales that generated \$335,342 in profits for NCH, which is the amount that NCH agreed to disgorge.

司法部推断，上述活动与为 NCH 带来 335,342 美元利润的销售相关，NCH 同意交还该笔非法所得。

DOJ’s findings of HMT’s illegal acts regard activity in both Venezuela and China. DOJ found that from 2002 until 2011, an HMT sales agent in Venezuela illegally paid bribes to PDVSA officials in order to get PDVSA to purchase HMT products. HMT’s Venezuelan agent funded these bribes by quoting prices to PDVSA that were substantially higher than the price HMT quoted to the agent. PDVSA then paid these prices to HMT, which kept the amount it quoted to the agent and gave the windfall back to the agent as purported commissions and subcontracting fees. Portions of these payments were then used by the agent to pay bribes to PDVSA and others. DOJ noted that two HMT regional managers based in Texas who were responsible for HMT’s sales in Latin America approved the commissions and subcontracting payments to the agents. One regional manager was explicitly told by the agent that he was paying bribes, while the regional manager had the information sufficient to put him on notice that bribes were being paid by the agent.

司法部关于 HMT 非法行为的发现涉及在委内瑞拉和中国的活动。司法部认定，从 2002 年至 2011 年，HMT 在委内瑞拉的一个销售代理商非法向 PDVSA 官员支付了贿赂，以便让 PDVSA 购买 HMT 的产品。HMT 的委内瑞拉代理商通过向 PDVSA 报出远远高于 HMT 向该代理商所报价格的方式支付这些贿赂。PDVSA 随后向 HMT 支付了这些价款，HMT 保留了向代理商报价的金额，并将多余款项返还代理商，作为所谓的佣金和分包费。这些款项的一部分后来被该代理商用于向 PDVSA 及其他人支付贿赂。司法部指出，两名驻德克萨斯州、负责 HMT 在拉丁美洲销售的 HMT 区域经理批准了对代理商支付的上述佣金和分包费。该代理商明确告知一名区域经理，其打算支付贿赂，而另一名区域经理掌握的信息足以令其注意到该代理商正在支付贿赂一事。

DOJ also found that in China from approximately 1999 through 2011, a distributor engaged by an HMT subsidiary paid bribes to Chinese government officials in exchange for their purchase of HMT products. DOJ determined that an HMT regional manager responsible for overseeing HMT's regional sales received emails providing information sufficient to give notice that bribes were being paid by the Chinese distributor.

司法部还认定，从 1999 年至 2011 年，HMT 子公司在中国聘请的一个经销商向中国政府官员支付贿赂，以换取其购买 HMT 的产品。司法部认定，一名负责监督 HMT 区域销售的 HMT 区域经理收到了一些电邮，这些电邮包含令其注意到该中国经销商正在支付贿赂的充分信息。

DOJ concluded that the above activities were connected to sales that generated \$2,719,412 in net profits to HMT.

司法部推断，与上述活动关联的销售为 HMT 带来了 2,719,412 美元的净利润。

## **B. Self-Reporting, Cooperation, and Remediation 自我报告、合作和补救**

DOJ's declination letters acknowledge that NCH and HMT fully cooperated with the DOJ, including voluntarily self-disclosing the conduct and completing thorough and comprehensive internal investigations. Importantly, and consistent with the admonition in the Yates Memo, DOJ explained that the companies provided "all known relevant facts about individuals involved in or responsible for the misconduct." As described in the declination letters, the companies also promised to continue cooperating in DOJ's ongoing investigation of the individuals involved in the potential FCPA violations.

司法部的拒绝起诉函确认，NCH 与 HMT 充分配合了司法部，包括自愿披露有关行为，并进行了详尽和全面的内部调查。重要的是，根据耶茨备忘录（Yates Memo）中的告诫，司法部解释，这些公司提供了“关于涉及不当行为或为不当行为负有责任的个人的所有已知的相关事实”。如拒绝起诉函所述，这些公司还承诺继续配合司法部对涉及潜在 FCPA 违法行为的个人的后续调查。

DOJ also praised the steps NCH and HMT took to enhance their compliance programs and internal accounting controls, two components of a "full remediation" effort that also included terminating or otherwise taking disciplinary action against the individuals involved in the wrongdoing. In NCH's case, this included taking action against "senior managers and lower-level employees involved in the misconduct, as well as high-level executives at NCH's headquarters in the United States who oversaw the subsidiary in which the China misconduct occurred." In HMT's case, this included terminating eight employees; sanctioning ten employees; severing business relationships with the Venezuelan agent; and severing business relationships with the China distributor. HMT also voluntarily severed business relationships with seven other agents/distributors as a result of the investigation.

司法部还称赞了 NCH 与 HMT 为加强其合规制度和内部会计控制而采取的措施，这是“完全补救”努力的两个重要方面。其他措施还包括解雇或以其他方式处分参与不当行为的个人。就 NCH 而言，这包括向“参与不当行为的高级经理和较低员工以及 NCH 美国总部负责监督发生中国不当行为的子公司的高管”

采取行动。就 HMT 而言，这包括解雇八名员工；处分十名员工；与委内瑞拉代理商断绝业务关系；以及与中国经销商断绝业务关系。为配合调查，HMT 还自愿与另外七家代理商/经销商断绝业务关系。

In a new development, DOJ observed that NCH and HMT's agreement to disgorge all profits associated with the misconduct was a crucial part of the companies' cooperation. Other declination letters under the pilot program have pointed to a company's payment of disgorgement to the Securities and Exchange Commission ("SEC") in parallel proceedings when describing the company's cooperation. However, the NCH and HMT declination letters appear to be the first time disgorgement payments to DOJ, without SEC involvement or in cases where the SEC likely lacks jurisdiction, have been treated as a part of cooperation.

根据最新消息，司法部指出，NCH 与 HMT 同意交还与不当行为相关的所有利润是这些公司合作的关键一步。试点计划下的其他拒绝起诉函在描述一些企业的合作时均提及这些企业向美国证券交易委员会（“证交会”）交还非法所得。但是，向 NCH 与 HMT 出具的拒绝起诉函似乎是首例向司法部交还非法所得，在没有证交会的参与的情况下或在证交会可能缺乏管辖权的情况下，此举被视为合作的一部分。

### C. Consequences 后果

As described above, NCH agreed to pay \$335,342 in disgorgement to the DOJ in connection with the declination letter and HMT agreed to pay \$2.7 million in connection with its declination letter. Of note, the declination letters specifically conclude that DOJ's decision to close the investigations into NCH and HMT offers no protection against prosecution "of any individuals, regardless of their affiliation with [the companies]" Previous declination letters under the pilot program have not concluded with such language, stating instead that DOJ "may reopen [its] inquiry" if "additional information or evidence" is made available in the future.

如上所述，NCH 同意就拒绝起诉函向司法部支付 335,342 美元的非法所得，HMT 同意就拒绝起诉函支付 270 万美元。值得注意的是，拒绝起诉函明确推断，司法部结束对 NCH 与 HMT 的调查的决定并非保证“任何个人（无论其与[这些公司]有何关联）”可免于起诉。试点计划下之前拒绝起诉函的结论并未采用该等措辞，而只是称，如果将来可获得“进一步的信息或证据”司法部“可能重新展开调查”。

### D. Observations and Lessons Learned 观察和汲取的教训

*Disgorgement.* The inclusion of disgorgement in the declination letters to NCH and HMT LLC is a noteworthy development, one that calls into question the very understanding of what a declination letter means. Up until now, when a company received a declination letter, it meant that no charges would be brought, and, by extension, that negotiations with DOJ over penalties and disgorgement were unnecessary. In recent cases under the pilot program, disgorgement was paid to SEC under parallel investigations. By tying disgorgement to a declination letter, DOJ may be injecting new uncertainty into the range of potential outcomes available to a company facing an FCPA investigation conducted solely by DOJ. Moreover, DOJ specifically described disgorgement as a fundamental part of the companies' cooperation, as opposed to a penalty or equitable remedy. By doing so, DOJ may be signaling that for domestic concerns, disgorgement will become a pre-requisite to eligibility for a declination letter in the future, along with self-disclosure and other core aspects of cooperation (e.g., making witnesses available for interviews).

*交还非法所得。*在向 NCH 和 HMT LLC 出具的拒绝起诉函中加入交还非法所得的内容是一个值得关注的变化，这使对拒绝起诉函的理解本身产生了问题。直至今日，当一家公司收到拒绝起诉函时，则意味着其不会被提出任何指控，同时意味着，与司法部就处罚和交还非法所得的谈判也不再必要。在试点计划下的近期案件中，在几项同时进行的调查中，非法所得均向证交会支付。司法部将交还非法所得与拒绝起诉函挂钩，这使得在一些由司法部独立开展的 FCPA 调查中的受调查公司面临更多变数。而且，司法部将交还非

法所得明确描述为这些公司合作的根本一步，而非处罚或衡平法救济。通过这么做，司法部可能在暗示，对于美国国内企业而言，除了自我披露和其他合作的核心方面（如安排证人参加面谈）外，交还非法所得将成为获得拒绝起诉函资格的一项前提。

*Individual Prosecution.* These declinations continue to evidence DOJ's emphasis on pursuing cases against individuals involved in misconduct. Given that the declination letters mention multiple U.S.-based executives and obligates NCH and HMT to continue cooperating, it will be interesting to see whether individual charges are brought in connection with the alleged wrongdoing.

*对个人的起诉。* 上述拒绝起诉函再次表明，司法部侧重于追究参与不当行为的个人。鉴于拒绝起诉函提及多位在美国的高管，并使 NCH 与 HMT 负起继续合作的义务，是否会就所指不当行为提起个人指控值得关注。

*Lessons Learned.* This settlement also reinforces lessons learned from other anti-corruption cases, including the need to:

*汲取的教训。* 本次和解还进一步印证了我们从其他反腐败案例中获得的教训，包括采取以下措施的必要性：

- develop and implement effective internal controls and ensure that gifts, meals, entertainment, and travel funds are used appropriately;  
拟订和实施有效的内部控制，确保礼品、餐饮、招待和旅行的适当利用；
- adopt robust, risk-based control and audit procedures sufficient to prompt timely investigation of red flags, particularly in geographic areas with a high risk of corruption; and  
采用健全、基于风险的控制和审计流程，以便及时调查危险迹象，尤其是在具有高腐败风险的地区；和
- timely investigate and remediate reports or findings of improper activity.  
及时调查和弥补不当活动的报告或发现。

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