

HOW TRUMP SEC MAY IMPACT JAPANESE COMPANIES IN 2017

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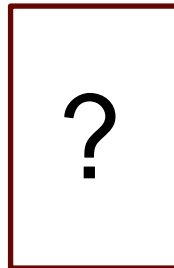
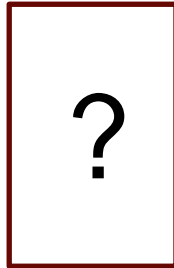
Hiro is a well-recognized cross-border litigator in the Japan market, ranked Band 1 or as leading individual in virtually all major third party attorneys guides such as Chambers Global, Chambers Asia, Legal 500, Best Lawyers and Benchmark Litigation. In addition to a long list of intellectual property litigation matters, Hiro has substantial experience in compliance and investigations matters.

- Changes at the SEC
- Factors Driving Financial Reporting Penalties
- Spectrum of Cases in 2016
- Reducing exposure to penalties in 2017 and beyond

CHANGES IN SEC CHAIR AND COMMISSIONERS



Jay Clayton,
Sullivan &
Cromwell



Kara M. Stein
Commissioner
since 2013
Term exp. 2017



Michael S. Piwowar
Commissioner
since 2013
Term exp. 2018



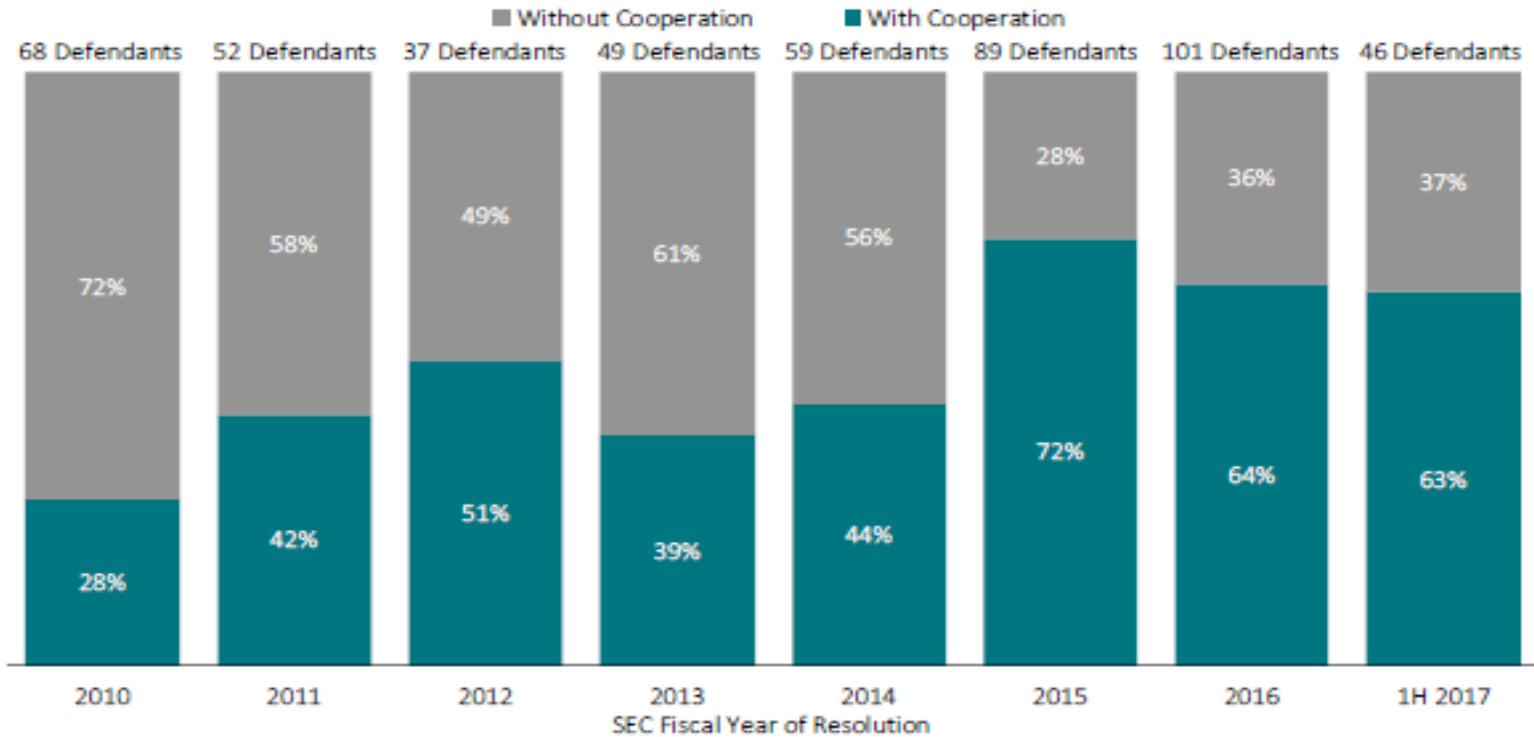
- “Jay Clayton . . . expressed skepticism that large corporate penalties deter fraud.”
 - WSJ, March 23, 2017
- “It is all too easy to say that . . . corporations that engage in wrongdoing should be penalized where it hurts the most—financially. However, that objective often overlooks a key constituency. Again, the Forgotten Investor, who has already been victimized by corporate fraudsters, is further made to pay for the sins of others.”
 - Acting Chair Piwowar, February 24, 2017

SEC Penalty Factors (select)

- The need to deter the particular type of offense
- Presence or lack of remedial steps by the corporation
- Extent of cooperation with Commission and other law enforcement

Statement of the Securities and Exchange Commission Concerning
Financial Penalties (Jan. 4, 2006)

FACTORS DRIVING CASES: INCREASED COOPERATION

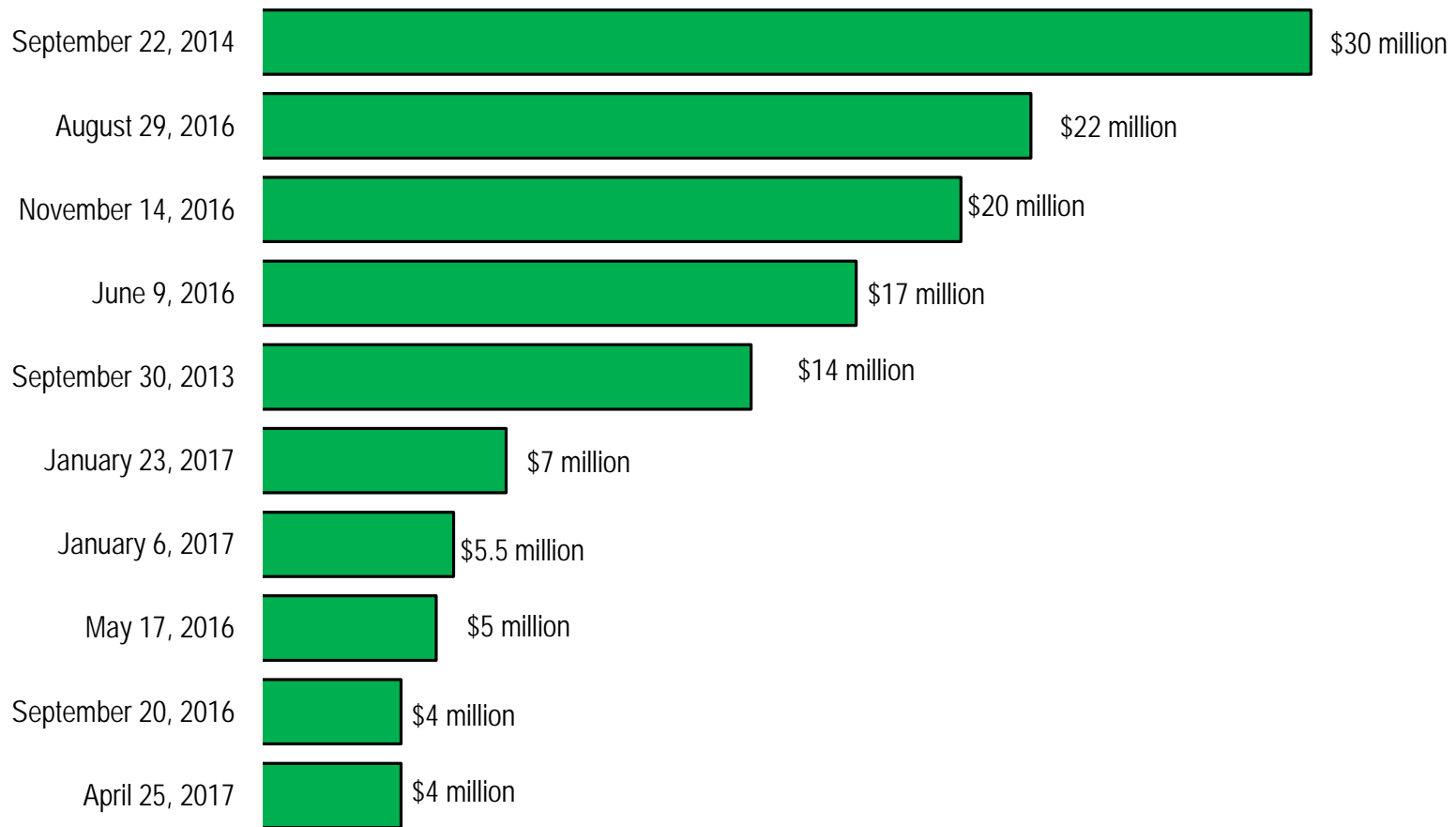


Source: Cornerstone Research, Securities Enforcement Empirical Database

FACTORS DRIVING CASES: WHISTLEBLOWER BOUNTIES ⁹

SEC HAS AWARDED \$154 MILLION TO 44 WHISTLEBLOWERS

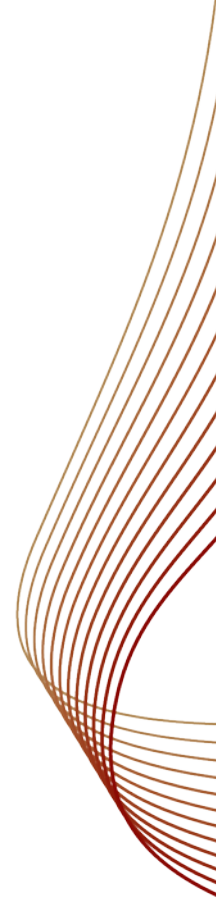
TOP 10 AWARDS (UP TO 30% OF AMOUNT COLLECTED BY SEC)



Source: SEC

2011: 0
2012: 2
2013: 3
2014: 0
2015: 3
2016: 5

Source: SEC



SEC Allegations

- 2009: Customers purchasing generic versions of Roundup; sales coming in below forecasts
- Sales force tells customers to “maximize” purchases in Q4 to participate in a rebate program in 2010
- 33% of Roundup 2009 sales in US occur in Q4
- Company delayed recording rebates costs until 2010

Outcome

- Monsanto settled the case for \$80 million penalty
- No personal misconduct by CEO/CFO, who returned nearly \$4 million in
- Whistleblower collected \$22 million bounty

President Trump FCPA Views in 2012:

- FCPA is a “horrible law and it should be changed”
- FCPA puts U.S. businesses at a “huge disadvantage”
- FCPA makes U.S. “like the policemen for the world, it’s ridiculous”

SEC Chair Clayton Views in Dec. 2011:

- FCPA creates “asymmetry in regulation”
- FCPA “places significant costs on companies . . . compared to their competitors”
- U.S. “should reevaluate its approach to the problem of foreign corruption”
- In 2006-07, Japan brought only one corruption prosecution (with relatively minor consequences), but the U.S. brought 67 cases
- The FCPA’s legislative history mentions a significant scandal involving U.S. firms paying money to foreign officials in Japan, which gave to opponents of strong U.S. relations with those countries an “effective weapon” with which to argue against closer U.S. ties

Jan. 6, 2017: Kraft Foods, Inc.

- Subsidiary used agent in India to obtain licenses
- Insufficient due diligence & monitoring of agent
- \$13 million penalty for internal controls and records violations

Jan. 12, 2017: Zimmer Biomet Holdings, Inc. (and DOJ)

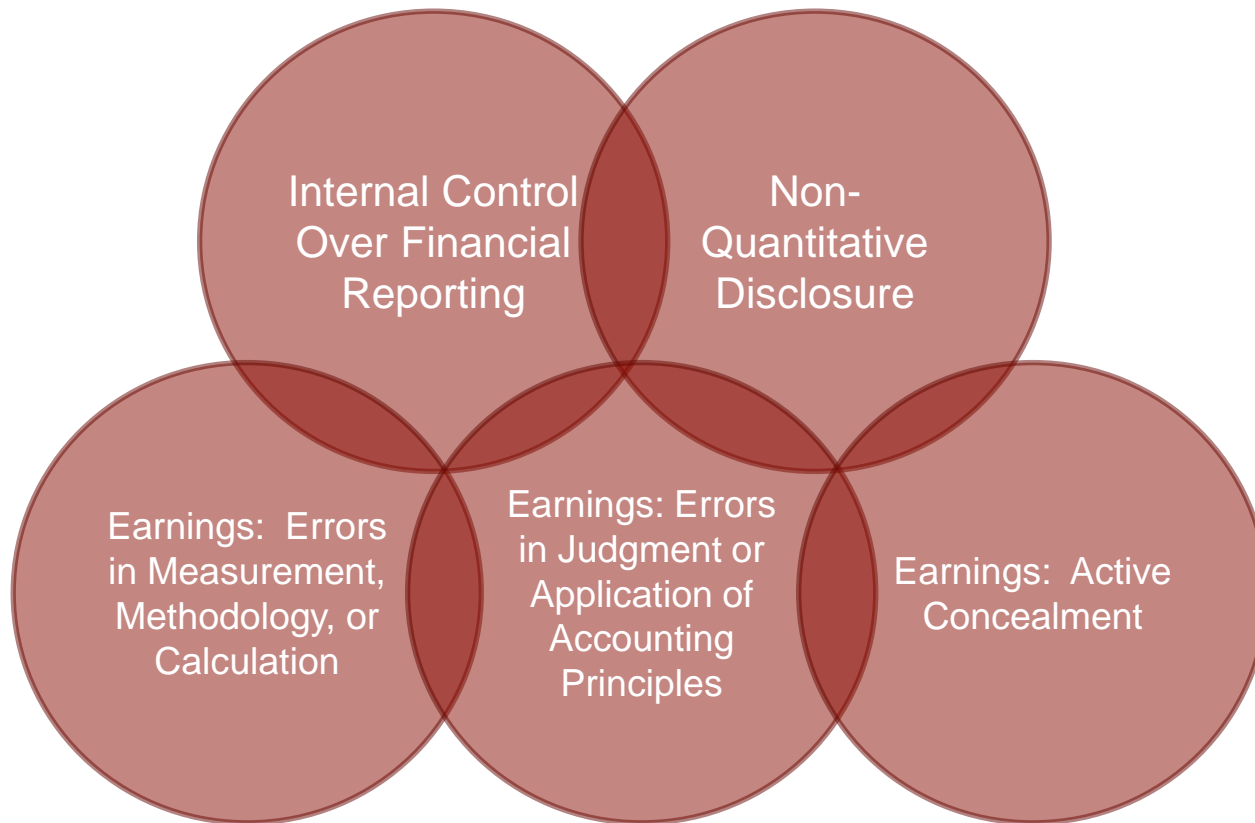
- Subsidiaries used questionable customs brokers that used illicit methods and improper payments to officials to import goods into Mexico using illicit methods and improper payments
- Insufficient due diligence procedures & accounting controls
- \$30 million in penalties, disgorgement, and prejudgment interest, plus independent compliance monitor for 3 years

Jan. 13, 2017: Sociedad Qyimica y Minera de Chile (and DOJ)

- unauthorized payments to Chilean politicians, political candidates, and others from an account controlled by a senior manager
- \$30.5 million in criminal and civil penalties, to retain an independent compliance monitor for two years, and to self-report to the agencies for an additional year

Jan. 18, 2017: Orthofix International

- Brazilian subsidiary sought to increase sales by engaging third-party agents to make improper payments to doctors at government-owned hospitals
- \$6.1 million in civil penalties and disgorgement and to retain an independent compliance monitor for one year



- *AVEO Pharmaceuticals*
 - paid a \$4 million penalty for allegedly failing to adequately disclose the FDA's concerns about flagship kidney cancer drug
- *Navistar*
 - paid a \$7.5 million penalty for the way it characterized the status of EPA approval of the company's engine designed to meet Clean Air Act standards
- *Uni-Pixel*
 - Paid \$750,000 for touting "multi-million dollar" sales agreements, highlighting potential revenues but omitting to mention material conditions the company had to meet to receive those revenues

- **Trump SEC Change Factor: marginal**

- *Logitech Int'l*
 - paid a \$7.5 million penalty in connection with its CFO and Controller allegedly deliberately minimizing the write-down of millions of dollars of excess component parts for a product with excess inventory
- *IEC Electronics*
 - had its EVP of Operations barred from acting as an officer or director and its Controller permanently suspended from practicing as an accountant before the SEC for their roles in orchestrating a false inventory accounting scheme, allegedly making false entries in work-in-process spreadsheets to meet budgeted gross profit margins
- *Marrone Bio Innovations*
 - paid \$1.75 million when its COO concealed from company finance personnel and auditors various sales concessions offered to customers, leading the company to improperly recognize revenue
- **Trump SEC Change Factor: marginal**

- *Ocwen Financial*
 - paid a \$2 million penalty to settle claims that it misstated financial results through “as a result of a flawed methodology used to value complex mortgage assets”
- *Intl FCSTONE*
 - paid a \$150,000 penalty over allegations that it overstated its operating revenues by \$10 million and its net income by \$6 million as a result of accounting errors in recording and reporting over-the-counter derivative trading gains at a subsidiary
- *The Phoenix Companies*
 - paid \$600,000 for purportedly dozens of errors in its financial reports, "including basic errors in its calculations, assumptions, and application of accounting guidance" due to “improper accounting determinations" and carelessness in the implementation of the company’s accounting systems
- **Trump SEC Change Factor: moderate**

- *PowerSecure International*
 - paid \$470,000 for failing to disclose segment level financial results at a sufficiently disaggregated level of the organization, contributing to incorrect identification of reporting units
 - no misstatements, but segment disclosures would help users of financial statements “make more informed judgments”
- *RPM Int’l*
 - SEC sued company and GC for failing to properly disclose a material loss contingency or accrue for the potential costs of an investigation and settlement with the DOJ
 - GC and company knew or should have known that the ultimate costs of the investigation and DOJ settlement would be material
 - Defendants are litigating against the SEC
- **Trump SEC Change Factor: moderate**

INSUFFICIENT INTERNAL CONTROLS

- *Magnum Hunter Resources*
 - paid a \$250,000 penalty to settle SEC charges that it had insufficient internal controls over financial reporting
 - rapid growth “strained its accounting resources” and led to inability to close its books on a monthly basis
 - no misstatements by the company; rather, misstatements *might result in the future*
- *United Airlines*
 - paid a \$2.4 million penalty for circumventing its internal control procedures to ensure non-stop flight route for gov’t official
 - CEO by-passed internal processes, including analysis of market data, approvals by chief revenue officer & audit committee
 - no misstatements by the company
- **Trump SEC Change Factor: high**

- Trump/Clayton SEC likely to pursue cases and penalties:
 - When there unjust enrichment from wrongful conduct
 - When complicity in the violation is widespread throughout the corporation
 - When there is a lack of remedial steps by the corporation
 - When there is a lack of cooperation with Commission and other law enforcement

Best Prevention:

Assess, Detect, Investigate, Remediate (repeat)



Source: Committee of Sponsoring Organizations of the Treadway Commission, Fraud Risk Management Guide

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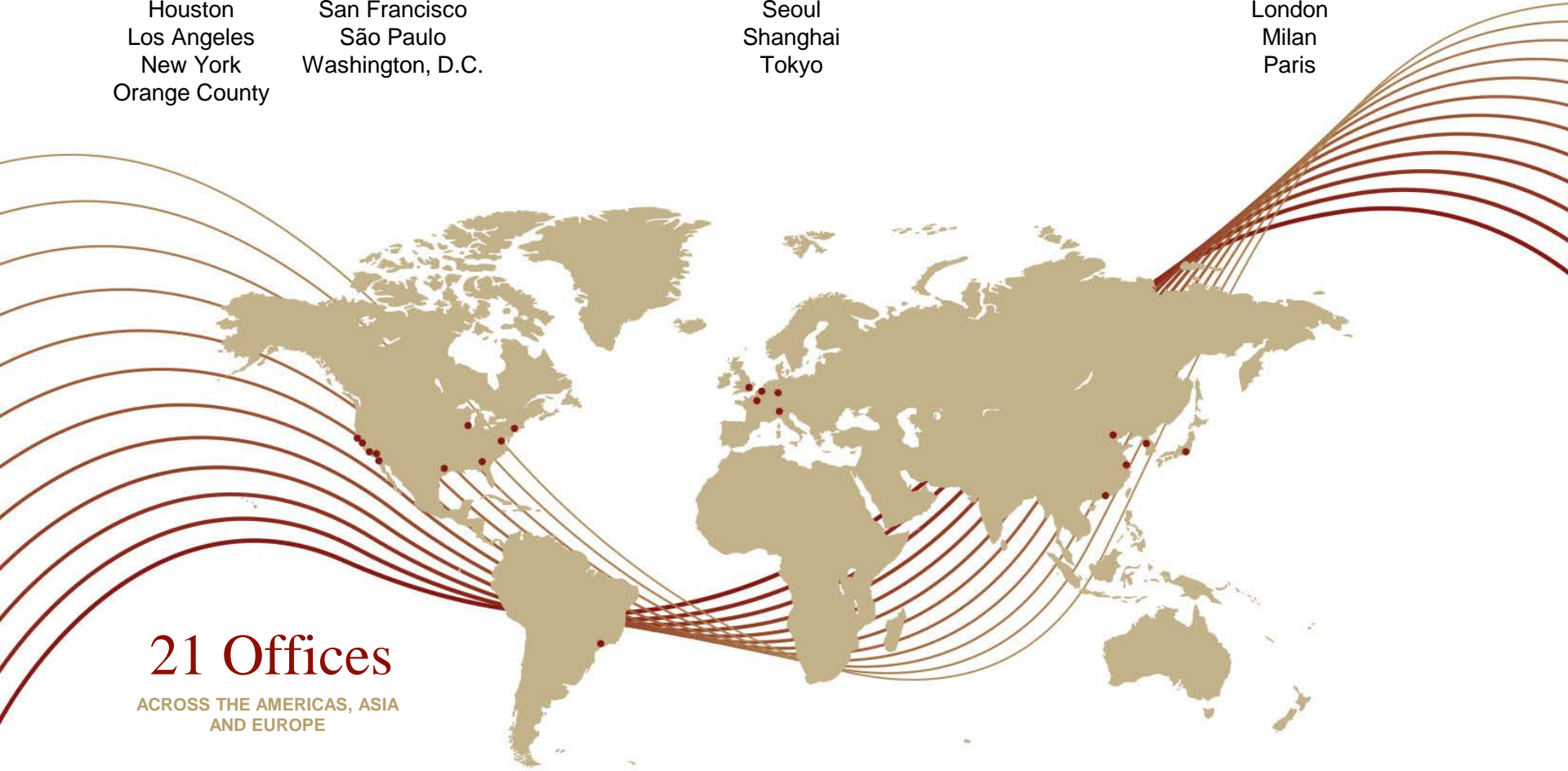
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