

### Independent Investment Research Focused on Public Company Interactions with the SEC.

## Confirmed, Undisclosed SEC Investigation

**Watch List Status:** Added to Watch List of Companies with Undisclosed SEC Investigations

*Confirmed, Undisclosed SEC Investigation.* The first Freedom of Information Act (FOIA) response indicating an SEC investigation was dated 09-May-2019, and later confirmed in an appeal response dated 19-Aug-2019. This is a change from a response dated 16-Oct-2018, at which time no signs of recent SEC investigative activity were found. With new data reflected in this report, **Nike, Inc. is added to our Watch List** of companies with confirmed, undisclosed SEC investigations.

### Disclosure Insight®

Since Michael Avenatti made his loud and repeated accusations of bribery against Nike in the spring of 2019, the story has dropped from the news. Investors, apparently satisfied with the company's statement made at the time, have moved on. This is misguided.

To be clear, this report offers no view on Mr. Avenatti or the particular accusations he's made against Nike, though we do parse Nike's reaction at the time. Mr. Avenatti might seem tiresome to some, perhaps even lacking credibility to others, but investors should focus on the fact that Nike is not new at having to fend-off questions about bribery. That is what we suspect the new SEC investigation we found is about. The only way to be sure, however, is to ask the company.

We allow that Mr. Avenatti's legal problems are many, and include charges of extortion involving Nike. But this should not take the spotlight off the troubling implications of yet another investigation of bribery involving Nike. That is our focus here.

**Yet another investigation of bribery you say?** Perhaps. SEC investigative records, which we acquired under the FOIA, show Nike was named or involved in two relatively recent and undisclosed investigations involving bribery, illegal payments, and/or money laundering. Both investigations ended in late 2016. Neither was disclosed.

Given Nike's history of bribery-related investigations, a new round of similar questions fairly opens the question of whether this is a company with a culture that allows bribery, and perhaps, even relies on it as a tool of commerce.

### Bribery Investigations Really Do Matter

Potential violations of the Foreign Corrupt Practices Act (FCPA), one of the most common bribery investigations we see, tend to get little investor reaction when they are disclosed. The fines that can result are typically one-time charges, and usually relatively small as compared to a company's size. This lulls many investors into stopping their analysis at potential fines. We argue doing so makes them vulnerable to negative surprises later.

From SEC investigative documents we've acquired under the FOIA through the years, we know the SEC investigates bribery as an accounting investigation, often with a focus on potential weaknesses in internal controls. So-called "tone at the top" is also considered.

SEC accounting investigations are known to rattle investors. Yet we rarely hear investors talk about a FCPA investigation in terms of potentially dirty accounting. The documents we've seen suggest they should.

Further, a bribery investigation can cause revenue and earnings shortfalls later in end markets where bribery was previously viewed as a necessary tool of commerce. Yet when it comes to a bribery-related investigation, it is even more rare that we encounter investors who go that next step, to where they make the connection that a bribery investigation – and its aftermath – can create lasting challenges for a company that go far beyond one-time fines paid in the current quarter.

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**What is the Proper Accounting Treatment for a Bribe?**

Anytime you hear bribery accusations are in the air, remind yourself of the following –

- 1) In the United States bribery is an illegal act. To engage in the practice involves making active decisions by those involved to break the law and try to hide it.
- 2) It's hard to hide it. Money does not move inside a corporation without leaving a trail.
- 3) Somehow, in some way, a bribe gets recorded in a company's books. Some entry was made somewhere to record the transfer of value.

With that in mind, ask yourself the following –

- What is the proper accounting treatment for a bribe? There obviously is none, as bribery is illegal.
- Who signed off on it?
- What's that say about a company's internal controls?
- What is the auditor going to say when they find out?
- What is the culture and tone at the top in a company where bribery occurs?

The rationale behind those that engage in bribery is that it is so necessary, the reward so valuable, and that it is worth breaking the law to do it. Now ask yourself --

- What happens to a company's capacity to execute on fundamentals in end markets where bribery is no longer available as a tool of commerce?

Depending on the nature of the bribery, and who was impacted by it, investors will also want to consider any adverse public relations impact.

**The SEC Risk for Nike**

Like him or not, Mr. Avenatti's accusations were loud, repeated, and came with records he posted online. In our experience, this was sufficiently serious-sounding that the SEC was sure to open an investigation, if it was not already doing so.

The SEC may not be investigating Mr. Avenatti's claims or anything related to bribery. To be sure, you have to ask the company. The question for investors is this: Will Nike otherwise disclose it? The history suggests they will not.

In prior public statements on similar questions, which we include below, we found Nike especially adept – a master, if you will – at making references to investigative activity of some kind without really saying much. There are usually no specifics, press releases, or accompanying SEC filings.

Since we know there was at least one investigation in the recent past, we recommend those with an interest ask Nike, Inc. what contact it has had with the SEC's Division of Enforcement in the past two years. The timing of SEC responses to us suggests that **Nike, Inc. management may have known about an SEC probe since at least May-2019.**

Keep in mind that a public company can be involved in more than one SEC investigation at a time. As such, we routinely recommend asking a company if there are any investigations beyond what is disclosed or reported in media stories – or even in our research.

Clients are invited to contact us anytime, in total confidence, to discuss how to better assess the risks we identify here.

– *John P. Gavin, CFA*

**Our full research history with select disclosure excerpts appear below.**

From the Probes Reporter Database

If we alert you to the existence of an undisclosed SEC investigation – or any response from the SEC – that means we filed a Freedom of Information Act (FOIA) request on the company in question and have a response, in black-and-white on government letterhead, that supports our statement.

We filed our first FOIA request on this company in **Oct-2012**. Below is the notable SEC response history for this company:

15-Jan-2013	FOIA Response	SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities."
30-Jul-2013	FOIA Response	SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities."
16-Jan-2014	FOIA Response	SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities."
23-Apr-2014	Appeal Response	Existence of on-going SEC enforcement proceedings officially confirmed on appeal; Access to records remains blocked.
19-Nov-2014	FOIA Response	SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities."
16-Dec-2014	Appeal Response	Existence of on-going SEC enforcement proceedings officially confirmed on appeal; Access to records remains blocked.
11-Aug-2015	FOIA Response	No SEC investigative records found.
29-Jul-2016	FOIA Response	No SEC investigative records found.
16-Aug-2017	FOIA Response with Document(s)	Documents released on closed SEC probe(s) of this company. Access to certain other investigative records denied on same probe(s).
27-Nov-2017	Appeal Response	Appeal to access certain investigative records on closed SEC probe(s) of this company denied.
16-Oct-2018	FOIA Response	No SEC investigative records found.
9-May-2019	FOIA Response	SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities."
19-Aug-2019	Appeal Response	Existence of on-going SEC enforcement proceedings officially confirmed on appeal; Access to records remains blocked.

When research history is available in our database, we present it above so you can compare it to company disclosures. Other interpretative guidance and disclosures appear below.

As can be seen in the table above, at least once in the past the SEC cited the "law enforcement exemption" of the Freedom of Information Act (FOIA) as basis to deny the public's access to the detailed records we sought on this company. As a matter of law, the SEC is acknowledging some sort of investigative activity with this response. We filed an appeal with the SEC's Office of the General Counsel to challenge that response. In response to our latest appeal(s), the date(s) of which is/are also shown in the table above, the SEC stated, "We have confirmed with staff that releasing the withheld information could reasonably be expected to interfere with on-going enforcement proceedings."

While the SEC as a matter of course tells the public that an on-going investigation should not be construed as a finding of any wrongdoing, the public interest is understandably high in tracking these investigations and their outcome. In this case, our research shows these SEC proceedings are undisclosed by **Nike, Inc.**

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## Documents Acquired Under the Freedom of Information Act

### Nike's Previous, Undisclosed Bribery-Related Investigations

SEC investigative records from our document library show Nike was named or involved in two relatively recent, undisclosed, investigations involving bribery, illegal payments, and/or money laundering. Both investigations ended in late 2016.

- One was an investigation titled, “**Certain Illegal Payments and Money Laundering in Connection with FIFA**”. We only have a single-page Case Closing Report from this investigation, which shows it ended on 01-Sep-2016.
- **The other was a Foreign Corrupt Practices Act (FCPA) investigation titled, “Matter Name: Nike, Inc.”** A termination letter sent to the company on 29-Jun-2016, said this investigation concluded without an enforcement action recommended against Nike, Inc. As is standard in these letters, the SEC letter also says the notice, “must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff’s investigation.”

We only have three pages of SEC investigative records from the above investigations. **They appear at the end of this report.** We have no other documents or information that would help the investor gauge the timing, duration, or scale of these now closed matters.

*Editor’s Note: When the SEC denies access to records on closed SEC investigations, they are frequently blocking internal SEC documents known as “Opening and Closing Reports, including ‘Case Closing Recommendation,’ ‘Matter Under Inquiry Summary,’ ‘Investigation Summary,’ and/or similar documents and/or reports.” A Case Closing Report is merely the cover page for a report called a Case Closing Recommendation. A Case Closing Recommendation is the SEC’s report that tells you why an investigation was opened, what work was done, and the conclusions reached. To date, the SEC almost always refuses to release its Case Closing Recommendations and similar documents, a practice for which we remain sharply critical of the agency.*

## Notable Events and Disclosures

Our search of Nike filings, going back as far as May-2012, found no clear disclosure of SEC investigative activity. However, in 2015, US Federal prosecutors announced corruption cases against officials and associates connected with FIFA, the organization that puts on The World Cup football (soccer) event.

On 27-May-2015, the Huffington Post ran a story titled, “[Nike Just Became Part Of The FIFA Corruption Scandal!](#)”. In a statement to the Huffington Post, Nike was reported to have said,

*“Like fans everywhere we care passionately about the game and are concerned by the very serious allegations. Nike believes in ethical and fair play in both business and sport and strongly opposes any form of manipulation or bribery. **We have been cooperating, and will continue to cooperate, with the authorities.**” [Emphasis added]*

We call this a “stealth disclosure” of an investigation. Like with the statement issued in response to the Avenatti accusations, below, there was no accompanying press release or SEC filing. Nor were there specifics that identified with which authorities Nike claimed it had been cooperating.

Later, on 17-Jul-2015, the Huffington Post then reported that the SEC was investigating matters related to the FIFA corruption scandal. See, “[FIFA Corruption Draws SEC Scrutiny](#)”, Huffington Post, 17-Jul-2015. The following is an excerpt –

*“U.S. securities regulators are examining the behavior of several companies with links to FIFA or other soccer bodies caught up in a major corruption scandal to see if there were possible violations of U.S. federal bribery laws, a person with knowledge of the matter said ... In late May, Nike said that the government had not alleged that it violated the law or knowingly took part in a kickback scheme.”*

Quoting from the same article, Nike’s response at the time was as follows –

*“In a statement on Friday [also 17-Jul-2015], a Nike spokesman said that the company ‘is committed to cooperating with any government investigation into the FIFA matter.’”*

Again, there was still no accompanying press release or SEC filing to go with this stealth disclosure of Nike’s involvement in a bribery-related investigation at the time. Again, there no specifics that identified with which government investigation Nike claimed it was committed to cooperating.

### **Nike’s Response to Avenatti Reveals a Present-Day Investigation**

In a widely reported statement at the time of Mr. Avenatti’s bribery accusations, in Apr-2019, but not appearing in a press release or an SEC filing, Nike attempted to discredit Avenatti, as seen below –

*“Nike will not respond to the allegations of an individual facing federal charges of fraud and extortion and aid in his disgraceful attempts to distract from the athletes on the court at the height of the tournament. **Nike will continue its cooperation with the government’s investigation into grassroots basketball and the related extortion case.**”*

- 07-Apr-2019 [Emphasis added]

As highlighted above, and consistent with its prior pattern, Nike again made what we call a “stealth disclosure” of an investigation. It did so by acknowledging that, oh-by-the-way, Nike is involved in, “the government’s investigation into grassroots basketball”.

Public companies use the stealth disclosure ploy when they want to get some kind of bad news out there, but they do not want to give it the clarity, prominence, or detail needed for investors to objectively assess the risk it may pose. Stealth disclosures of bad news are not new to Nike. So long as analysts and reporters do not ask follow-up questions on specifics, this will remain an effective communications tool for Nike.

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**SEC investigative records from previous,  
undisclosed investigations of Nike appear next page.**



SEC DIVISION OF ENFORCEMENT

Case Closing Report

As of: 06/29/2016

Probes Reporter.

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Matter No.: HO-11895-A

Matter Name: Nike Inc.

The undersigned has been designated by the Director of the Division of Enforcement to exercise delegated authority to terminate and close all investigations authorized by the Commission pursuant to Section 20 of the Securities Act of 1933 [15 U.S.C. 77f], Section 21 of the Securities Exchange Act of 1934 [15 U.S.C. 78u], Section 18 of the Public Utility Holding Company Act of 1935 [15 U.S.C. 79r], Section 42 of the Investment Company Act of 1940 [15 U.S.C. 80a-41], and section 209 of the Investment Advisers Act of 1940 [15 U.S.C. 80b-9].

I hereby close this case, pursuant to delegated authority.

*Karol Bruchmeyer*

Signature

*FCPA Unit Chief*

Title

*6/30/2016*

Date

Probes Reporter.

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**SEC DIVISION OF ENFORCEMENT**

**Case Closing Report**

As of: 09/01/2016

**Probes Reporter.**

*Better Disclosure for Better Decisions.®*

**Matter No.:** HO-12726-A

**Matter Name:**

Certain Illegal Payments and Money Laundering in Connection with FIFA

The undersigned has been designated by the Director of the Division of Enforcement to exercise delegated authority to terminate and close all investigations authorized by the Commission pursuant to Section 20 of the Securities Act of 1933 [15 U.S.C. 77t], Section 21 of the Securities Exchange Act of 1934 [15 U.S.C. 78u], Section 18 of the Public Utility Holding Company Act of 1935 [15 U.S.C. 79r], Section 42 of the Investment Company Act of 1940 [15 U.S.C. 80a-41], and section 209 of the Investment Advisers Act of 1940 [15 U.S.C. 80b-9].

I hereby close this case, pursuant to delegated authority.

*Stephen*  
\_\_\_\_\_  
Signature  
*Deputy Director*  
\_\_\_\_\_  
Title  
*9/9/16*  
\_\_\_\_\_  
Date

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DIVISION OF  
ENFORCEMENT

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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June 29, 2016

**VIA FIRST-CLASS MAIL**

Michael J. Shepard, Esq.  
Hogan Lovells US LLP  
4 Embarcadero Center  
15<sup>th</sup> Floor  
San Francisco, California 94111

Re: **In the Matter of Nike Inc., HO-11895**

Dear Mr. Shepard:

We have concluded the investigation as to Nike Inc. Based on the information we have as of this date, we do not intend to recommend an enforcement action by the Commission against Nike Inc. We are providing this notice under the guidelines set out in the final paragraph of Securities Act Release No. 5310, which states in part that the notice “must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff’s investigation.” (The full text of Release No. 5310 can be found at: <http://www.sec.gov/divisions/enforce/wells-release.pdf>.)

Sincerely,

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**Notes:** *The SEC reminds us that its assertion of the law enforcement exemption should not be construed as an indication by the Commission or its staff that any violations of law have occurred with respect to any person, entity, or security. New SEC investigative activity could theoretically begin or end after the date covered by the latest information in this report, which would not be reflected here. The SEC did not disclose the details on investigations referenced herein. All we know is that they somehow pertain to the conduct, transactions, and/or disclosures of the companies referenced above. Companies with undisclosed SEC investigations are maintained on our Watch List of companies with undisclosed SEC investigations.*

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