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February 2, 2016

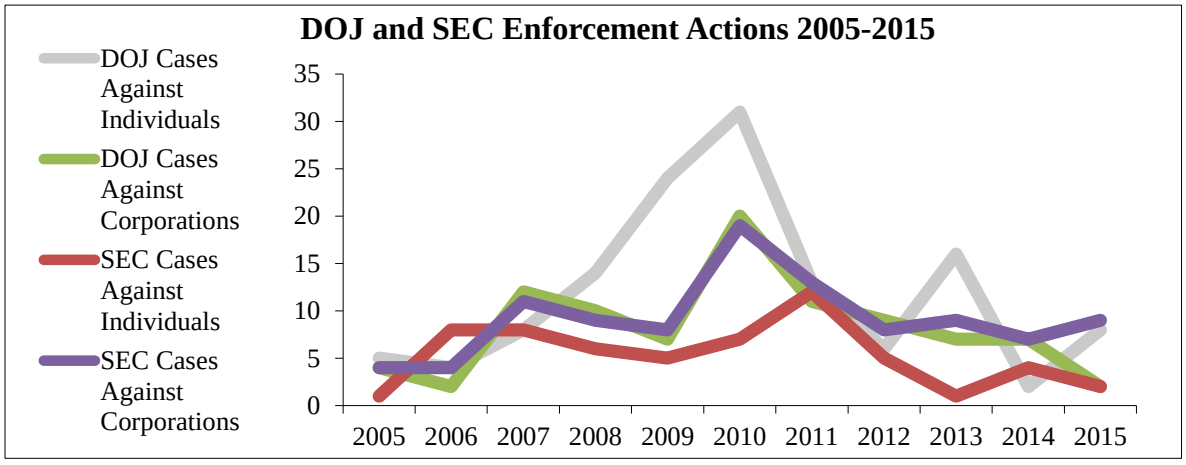
Foreign Corrupt Practices Act Alert

Global Anti-Bribery Year-in-Review: 2015 Developments and Predictions for 2016

I. Introduction: Enforcement Trends and Priorities

Among other significant developments, 2015 saw the U.S. Department of Justice (the "DOJ" or the "Department") document a policy priority of holding individuals accountable for corporate wrongdoing. This policy was laid out in the "Yates Memorandum"—announced by Deputy Assistant Attorney General Sally Quillian Yates—and related changes the DOJ made to the U.S. Attorney's Manual. The most significant aspect of the Yates Memorandum is the requirement that corporations turn over "all relevant facts relating to the individuals responsible for the misconduct" in order to be eligible for *any* cooperation credit. This requirement creates questions about how the DOJ will deal with aspects of attorney-client privilege law and foreign blocking statutes that intersect with the "all relevant facts" requirement.

The commitment to pursuing more cases against individuals appears to be strong, and the DOJ does appear to be passing on some corporate cases where it once might have insisted on a resolution. Going by the statistics, the Yates Memorandum's policy was reflected in the number of cases brought during the year, although the policy was not announced until September. Last year the DOJ resolved with or charged eight individuals in FCPA-related cases,[1] as compared to only two individuals in 2014.[2] Meanwhile, its tempo with respect to corporations decreased. It resolved such cases against only two corporations (or groups of corporations),[3] down from seven in 2014.[4] The penalty amounts were lower, with no corporate penalty cracking the "top ten" of FCPA resolutions in dollar amount, and none coming close to the record $772 million that Alstom paid at the very end of 2014.[5] Another possible consequence of the new policy emphasis is that both of last year's DOJ corporate resolutions were "package" resolutions—the DOJ announced guilty pleas with individuals on the same day the DOJ announced an agreement with the company related to the same conduct.



However, it can be dangerous to extrapolate too much about the government's enforcement agenda based on a single year. While the DOJ last year brought more actions against individuals than in 2014, its 2015 total of eight was *less* than its 2013 total of sixteen.[6]

This year could easily see the DOJ announce significantly more than two FCPA actions with respect to corporations; there are many corporate cases publicly reported to be in the pipeline, and the Department has dedicated significantly increased resources to anti-corruption enforcement. It announced in 2015 that it is hiring ten additional FCPA prosecutors and is also adding at least a dozen FBI agents solely focused on FCPA cases. In early 2016, a senior DOJ official suggested that the number of cases may look very different after just a few months.[7]

Even if the DOJ's emphasis on individuals might mean that the mix of cases will continue to skew away from those that result in a resolution with the company, compliance and investigations will continue to be important priorities for global corporations. Even a case that is only likely to result in a resolution with, or charge against, individuals creates work and headaches for corporate counsel, as well costs of cooperating with the investigation and reputational damage to the company if its employees are charged with wrongdoing. Moreover, whether or not the company is charged is a decision that likely will continue to be made by the DOJ at the end of an investigation, after considerable time and resources have been expended.

The U.S. Securities and Exchange Commission's (the "SEC" or the "Commission") headline numbers, on the other hand, were more consistent with its previous pattern. It resolved with nine corporations[8] and charged or resolved with two individuals.[9] As in prior years, most of the SEC's FCPA resolutions with corporations were based on violations of the FCPA's books-and-records and internal-controls provisions, with only three of the corporate cases including violations of the anti-bribery provisions. For the first time since 2001, none of the corporations that executed a resolution with the SEC simultaneously executed one with the DOJ. Again, this likely reflects the DOJ's shift in emphasis—the DOJ does appear to be passing on cases against corporations that in prior years it might well have treated more aggressively. Notably, China continued to be a country with a concentration of corruption cases—three of the SEC's resolutions involved conduct in China. Two of those China resolutions involved payments to health care providers, a reminder that such payments must be handled carefully in China and other countries where many hospitals are state-owned entities.

We have noted previously the importance of designing compliance programs that are sensitive to the risks posed by third-party payments. In 2015, as in recent years, third parties were involved in the majority of FCPA cases that required entering into a resolution with the government. Both of the DOJ corporate resolutions and six of the nine SEC corporate resolutions involved allegedly improper payments made through third parties.

The continued focus on compliance programs crystallized last year with the Fraud Section's hiring of Hui Chen as a dedicated compliance expert. Chen will assist section attorneys in evaluating company presentations about their compliance programs (which usually take place in the context of Filip factors analyses[10]), will interface with monitors concerning their oversight of companies that have previously resolved with the DOJ, and will train DOJ attorneys on the features of an effective compliance program.

In addition, after several years of news reports about financial institution hiring cases, 2015 saw the first resolution of one. BNY Mellon—without admitting or denying the allegations—resolved the SEC's investigation into whether it hired interns in order to obtain business from a Middle East sovereign wealth fund. The SEC's Order sheds light on a gray area in FCPA enforcement: when, in the government's view, does hiring cross over from relationship building or providing a business courtesy into bestowing a benefit on an official that is corrupt under the statute. WilmerHale represented BNY Mellon in this matter. The case, and the government's other 2015 resolutions, are discussed in more detail in Section III below.

Finally, the DOJ had its wings clipped—ever so slightly—by two rulings that limited its ability to use conspiracy charges to pursue individuals who did not actually carry out any acts within the United States: *United States v. Hoskins*, No. 3:12-CR-00238-JBA, 2015 WL 4774918 (D. Conn. Aug. 13, 2015), and

United States v. Sidorenko, 102 F. Supp. 3d 1124 (N.D. Cal. 2015). These rulings, which are consistent with a 2011 ruling in the "Africa Sting" case that addressed a similar issue without a written opinion, give some comfort to individuals and entities abroad who do not fall into the traditional categories for FCPA liability. The overall jurisdictional reach of the FCPA remains exceedingly broad, however, and there are no legal developments on the horizon that would change that.

II. Key Investigation-Related Developments

This year saw several significant changes in the DOJ's and SEC's approaches to investigations and enforcement generally. In this section we will discuss these significant cross-cutting trends, followed in the next section by a discussion of specific cases.

A. The DOJ Brought Fewer Cases Against Corporations, More Against Individuals

The headline trend in anti-corruption investigations this year was the DOJ's shift in emphasis toward cases against individuals and apparently away from resolutions with companies. As noted above, that shift is reflected in the number of actions the Department took with respect to each type of case, and also apparently reflected in the DOJ's use of "package" resolutions.

Beyond the numbers, Justice Department officials made several public comments characterizing the shift. In January 2015, Assistant Attorney General Leslie R. Caldwell suggested to members of the San Francisco legal community that deferred prosecution agreements "were a bit overused" and that they had become the "default" method for resolving corporate investigations.[11] She told the audience to expect more declinations from the government.[12] Caldwell also said the Criminal Division would aim to bring more and larger cases under the FCPA.[13]

In April, Caldwell dialed up her message by saying the Criminal Division expects corporations to turn over evidence of wrongdoing in a timely and complete way if they want cooperation credit.[14] She emphasized that companies must "identify culpable individuals—including senior executives if they were involved—and provide the facts about their wrongdoing."[15] Caldwell acknowledged that the internal investigations necessary to provide such evidence could cost companies substantial time and money. However, the decision to incur those costs is made by the company, she said, noting that while the Department "expect[s] internal investigations to be thorough, we do not expect companies to aimlessly boil the ocean."[16] Instead, Caldwell suggested that companies should appropriately tailor investigations to root out misconduct, identify wrongdoers, and provide all available facts.[17] Broader surveys of a company's operations were not a requirement of the Department.[18]

These expectations were formalized in a September 9, 2015 policy memorandum authored by Deputy Attorney General Sally Quillian Yates, known as the "Yates Memorandum."[19] The memorandum outlines new policies designed to facilitate criminal cases against individuals. The most significant aspect of this new policy, foreshadowed by Caldwell's April remarks, requires that corporations provide the Department with "all relevant facts relating to the individuals responsible for the misconduct" in order to receive *any* cooperation credit.[20] This "condition of cooperation" appears designed to focus the scope of corporate investigations and disclosures to the government.[21]

At a conference sponsored by the Global Investigations Review and held at WilmerHale's offices later in September, Caldwell characterized the Yates Memorandum as "new policy guidance" that reinforced simple existing Department considerations while also taking "a strong step forward" to reflect the importance of individual accountability.[22] She remarked that attorneys who frequently deal with the Criminal Division in investigations might not see the new guidance as anything radical. However, those who had previously advised their clients that the Department was more interested in corporate resolutions and large fines, rather than obtaining evidence concerning individuals and holding them accountable, "should hear a new message and see a different approach."[23]

The Yates Memorandum has also been incorporated into the revised U.S. Attorneys' Manual ("USAM"). The section on federal prosecution of business organizations now provides that "[i]n order for a company to receive any consideration for cooperation . . ., the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct."[24] Yates acknowledged the change by saying, "[i]n the past, cooperation credit was a sliding scale of sorts and companies could still receive at least some credit for cooperation, even if they failed to fully disclose all facts about individuals. That's changed now."[25]

B. Questions Remain About How the Attorney-Client Privilege and Foreign Blocking Statutes Will Affect the Yates Memorandum's Implementation

The Yates Memorandum announcement almost immediately touched off concern about the ability of a corporation to protect its attorney-client privilege. The memorandum's policy of withholding cooperation credit unless a company discloses "all relevant facts" about individual wrongdoers intersects with the privilege, since privileged communications are often relevant to the government's investigation of an individual. Section 9-28.710 of the USAM has long provided that prosecutors should not ask for waivers of "core" attorney-client communications or work product.[26] While the Yates Memorandum does not directly discuss the privilege, it suggests that this provision is undisturbed by stating that the requirement of full cooperation exists "within the bounds of the law and legal privileges, see USAM 9-28.700 to 9-28.760."[27] Caldwell has also said, "[T]he new guidance does not change existing department policy regarding the attorney-client privilege or work product protection. Prosecutors will not request a corporate waiver of these privileges in connection with a corporation's cooperation."[28]

Yates attempted to clarify the issue further in November by drawing a line between legal advice and facts: "As we all know, legal advice is privileged," she said. "Facts are not."[29] Yates said that, for example, notes and memos created from an interview with a corporate employee need not be produced. But relevant facts, "including the facts learned through those interviews," must be turned over.[30]

While the DOJ's reassurances are easily stated, the distinctions they draw may not be so simple. Sharing the results of an internal investigation with the government can waive the privilege,[31] and it is not clear that companies can always disclose an underlying fact to the government without also disclosing an investigation's results. For example, a company may learn of a relevant fact through interviewing one of its employees, and that fact may not be supported anywhere else in the record. If the government knows that the only interview conducted with that employee occurred as part of the company's internal investigation, it may be difficult or even impossible for the company to share what it learned with the government without also sharing how it learned it—through a privileged communication.

The Yates Memorandum's relationship to privileged information may also depend on how the government will use the information. To introduce a fact at trial, the government needs a statement or other admissible evidence. If the only evidence of a fact exists as part of a privileged communication, the government will, if it takes a case to trial, need that communication. The context of the communication may also be important to the government in evaluating the strength of its case. For example, a statement of fact made the same way in repeated interviews with company counsel has greater evidentiary value to the government than a statement of the same fact obtained at the end an interview with counsel, after repeated denials. Thus, the government's evaluation of its case may require details about the communication, a requirement that is difficult to square with the government's insistence that it does not seek privileged communications.

Foreign blocking statutes will also bear on the Yates Memorandum's implementation. In an international investigation, much of the relevant evidence possessed by the company may be located in countries with blocking statutes that prohibit sharing the evidence with a foreign entity like the DOJ. Corporations have long faced challenges in navigating the contours of such statutes, which are often vague. The DOJ, in turn, has long been frustrated by the difficulty of evaluating companies' claims that evidence cannot be provided because of a blocking statute. The DOJ will presumably be reasonable, and will give cooperation credit where information that is truly blocked by a foreign country's statute is withheld, as long as other relevant information is disclosed. (In such situations the DOJ often must pursue the withheld

evidence by making an MLAT request to the foreign country.) But determining what is "truly blocked" and what is not now takes on greater significance, despite the fact that the foreign statutes themselves have become no easier to interpret.

Companies and corporate counsel will need additional guidance about how the DOJ will take into account these legal principles that bear on the "all relevant facts" requirement. That guidance will begin to emerge as cases are resolved under the new policy in 2016.

C. The SEC and DOJ Continued to Emphasize Voluntary Disclosure

The government continues to pitch the benefits of voluntary disclosure of corporate wrongdoing. SEC Division of Enforcement Director Andrew Ceresney announced in November that his Division will only recommend a Non-Prosecution Agreement ("NPA") or a Deferred Prosecution Agreement ("DPA") if a company self-reports.[32] Ceresney also cited the *PBSJ* case (discussed below in Section III.D) as a recent example of the Commission having entered into a DPA with a company that self-reported.[33] But Ceresney made clear that while self-reporting was a necessary requirement, other discretionary factors including a company's self-policing, remediation, and cooperation would also be considered.[34] He also affirmed that NPAs and DPAs "reflect a significant level of cooperation and have been a relatively limited part of Commission enforcement practice," which "is appropriate and should continue to be the case."[35]

It is not clear from Ceresney's remarks whether the SEC is likely to use NPAs or DPAs any more or less frequently than the once-every-year-or-two rate at which they have been employing them. Indeed, the policy is in some ways not new; the only two other companies to resolve through such agreements had also self-reported.[36] Such agreements' value over a no-admit-no-deny resolution may be limited in any event: The main benefit to the company from this form of resolution, as opposed to entering into a no-admit-no-deny settlement with the Commission, appears to be the lack of a formal enforcement action by the SEC against the company. The most important takeaway from Ceresney's remarks may be that companies for whom the reputational or debarment consequences of a formal SEC enforcement action are particularly severe now have an additional incentive in favor of self-reporting: That an NPA or DPA with the SEC will be unavailable if they choose not to do so and the government later discovers the wrongdoing.

Signs of efforts to encourage voluntary disclosure further have also surfaced from the DOJ. In November, *The Washington Post* reported on an internal, draft DOJ policy that would "strongly recommend[] that prosecutors should decline to bring charges against a company that voluntarily discloses violations of the FCPA and cooperates with the government in its investigation."[37] Leaders from the DOJ and SEC passed up an opportunity to roll out, or at least comment on, the draft policy at a conference later in November. Instead, Kara Brockmeyer, FCPA Unit Chief at the SEC, and Patrick Stokes, FCPA Unit Chief for the DOJ, appeared to emphasize the status quo approach to voluntary disclosure. Brockmeyer highlighted the "exemplary cooperation" of PBSJ.[38] Stokes pointed to the DOJ's resolution with Alstom as an example of how failure to self-report may penalize a company.[39] However, the DOJ even considering such a significant change in declination policy suggests a possible willingness to award more declinations for self-reporting in the future.

D. The DOJ Hired Hui Chen, Compliance Counsel

In early November 2015, the DOJ announced that it had hired Hui Chen as a full-time compliance expert consultant.[40] Chen arrived at the DOJ with experience both as a corporate compliance professional and as a federal prosecutor. From 1991 to 1994, Chen prosecuted criminal cases as part of the Attorney General's Honors Program before serving as an Assistant United States Attorney at the U.S. Attorney's Office in the Eastern District of New York. [41] After stints at Microsoft and Pfizer, Chen most recently served as Global Head for Anti-Bribery and Corruption at Standard Chartered Bank.[42]

Since that announcement, the DOJ has made a number of statements clarifying the scope of Chen's duties.[43] Caldwell stated that Chen would be "interacting with the compliance community to seek input" on how the community and DOJ can advance their mutual interest in strong corporate compliance

programs.[44] Caldwell stressed that the hiring of Chen does not signify that the DOJ is moving toward recognizing or instituting a "compliance defense."[45] In other words, despite pressure from many in the compliance community, the DOJ will not permit a company to rely on its good faith compliance efforts, including its anti-corruption policies and procedures, as an absolute defense where a company employee has circumvented those policies and procedures.[46]

At an FCPA conference in November 2015, Andrew Weissmann, Chief of the Fraud Section of DOJ's Criminal Division, provided additional detail about what he described as Chen's three major responsibilities. First, Chen will play an active role in assisting DOJ prosecutors when companies make compliance presentations to DOJ.[47] Second, Chen will be working with monitors, "making sure they're not having problems, seeing what issues they're confronting, and also making sure that . . . they're fulfilling the job they're assigned to do."[48] Third, Chen will train DOJ prosecutors in better assessing the *Filip* factors related to compliance.[49] In the same session, Chen revealed the four questions she will be asking in evaluating a company's compliance program: (1) whether it is thoughtfully designed, (2) whether it is operational, (3) whether there is good communication among the stakeholders, and (4) whether it is adequately resourced.[50]

Chen appears to be positioning herself as an intermediary of sorts between the DOJ and companies and has stressed that she wants to "spend a lot of time listening to the compliance community."[51] Chen has stated that she plans to organize compliance town hall meetings where she will meet with in-house compliance counsel—outside the presence of DOJ lawyers—to discuss the DOJ's approach to compliance and what is and is not working with that approach.[52] She also has emphasized that she is acting as a consultant to the DOJ, and is not a DOJ employee or prosecutor.[53]

It is unclear what impact Chen's involvement will have on related issues like compliance-program requirements and monitors. In addition, whether Chen will have any impact on the SEC, which frequently brings internal-controls charges in its FCPA enforcement actions, also remains to be seen.

III. Notable Features of Corporate Resolutions and Significant Ongoing Investigations

A. The SEC Resolved for the First Time a Case Relating to the Hiring Practices of Financial Institutions

In August 2015, the SEC announced the first settlement to come out of its investigation into the hiring practices of financial institutions.[54] The Bank of New York Mellon Corporation ("BNY Mellon"), represented by WilmerHale, agreed to pay $14.8 million to resolve the SEC's allegations, which BNY Mellon neither admitted nor denied, that BNY Mellon hired three interns who were relatives of foreign government officials in exchange for business.[55] According to the SEC, the foreign government officials were employed by an unidentified sovereign wealth fund for a Middle Eastern country (the "Sovereign Wealth Fund"), and BNY Mellon provided internships to the relatives—one of whom was unpaid—to win and retain business managing and servicing the assets of the Sovereign Wealth Fund.[56] The SEC alleged that BNY Mellon had violated the anti-bribery and internal-controls provisions of the FCPA.[57]

The resolution is notable because it begins to shed light on what conduct related to hiring practices will be viewed by the SEC as sufficient to warrant bringing FCPA charges. Specifically, the SEC alleged:

- **Request from Government Officials.** In February 2010, two officials employed by the Sovereign Wealth Fund, both with influence in the allocation of new assets, requested that BNY Mellon provide internships to some of their family members.[58] Both officials allegedly made numerous follow-up requests about the status, timing, and other details of the internships for their relatives after the internships had been offered.[59]

- **Alleged Intent to Obtain Business.** The Order alleged that certain BNY Mellon employees viewed delivering the internships as requested as a way to influence the officials' decisions.[60] The Order supported this assertion with quotations from a BNY

Mellon custody relationship manager who stated that granting an official's hiring request was "the only way" to increase BNY Mellon's share of business, and that "Its [sic] silly things like this that help influence who ends up with more assets / retaining dominant position."[61]

- **Alleged Poor Performance and Special Treatment.** The SEC alleged that the relatives of the two officials did not meet the standards of BNY Mellon's highly competitive internship program.[62] The SEC further alleged that two of the three interns were paid more than other interns with the same qualifications, and that all three of these interns worked outside of the normal periods for the internships while performing poorly overall.[63]

Notably, there was no allegation in the SEC's Order that anyone from BNY Mellon communicated to anyone at the Sovereign Wealth Fund that the internships were being provided in return for business, nor was there any allegation that anyone at the Sovereign Wealth Fund offered to provide business in return for the internships. Also, while the sanctions section of the SEC's Order imposed disgorgement, there was no allegation in the body of the document explaining how any profits were caused by the provision of the internships. It is also noteworthy that the internships were provided not to government officials, but to relatives of government officials, with no allegation that any government officials received any pecuniary benefit from the internships, though the SEC alleged that the officials obtained "significant personal value." The SEC's charges for such intangible benefits, as it has suggested in other cases involving charitable contributions, raise questions as to the standard for satisfying the "thing of value" element of the FCPA.

In addition to being the first hiring practices resolution, the *BNY Mellon* case is also the first case to be resolved from the SEC's industry-wide sovereign wealth fund sweep initiated in 2011.[64] The case is notable for still another reason: It is the first-ever FCPA resolution with the SEC that did not include a books-and-records violation. This stems from the fact that there was no allegation that BNY Mellon described the internships inaccurately in its books. This further underscores the unconventional nature of the "thing of value" in the employment cases.

News reports in 2015 indicated that investigations into several other banks' hiring practices remain active.[65]

B. The DOJ's Corporate Resolutions Involved Third Parties and Reflected the DOJ's Emphasis on Holding Individuals Accountable

The DOJ resolved only two cases with corporations in 2015, the lowest number of corporate resolutions in FCPA cases since 2006. On June 16, 2015, the DOJ entered into an NPA with IAP Worldwide Services Inc. ("IAP"), a Florida-based defense and government contracting company. IAP agreed to pay a $7.1 million penalty.[66] In the NPA, IAP admitted to FCPA violations in connection with a homeland security project in Kuwait that was overseen by Kuwait's Ministry of the Interior ("MOI"). IAP admitted to conspiring with Kuwaiti officials to use a shell company to win the bidding for Phase I of the two-phase contract so that it could tailor the requirements for Phase II to IAP's strengths to gain an advantage in bidding for Phase II, the larger and more lucrative contract.[67]

According to the NPA, IAP and the Kuwaiti officials agreed that IAP would receive approximately $4 million for the Phase I contract, and that half of that amount would be diverted to a Kuwaiti consultant who would use the money to pay bribes to the Kuwaiti officials.[68] It was agreed that the consultant would inflate his invoices to IAP in order to hide the transfer of the money to be used to pay the bribes. Between September 2006 and March 2007, IAP and its co-conspirators paid the equivalent of more than $1.78 million to the consultant with the understanding that some or all of the money would then be paid to the Kuwaiti officials as bribes.[69]

About a month later, on July 17, 2015, the DOJ announced it had entered into a deferred prosecution agreement ("DPA") with Louis Berger International ("LBI"), a New Jersey-based construction management

company. LBI agreed to pay a $17.1 million fine.[70] LBI admitted to specific direct payments, as well as indirect payments made through a consulting company, vendors, and other intermediaries, to officials in India, Indonesia, Vietnam, and Kuwait to secure construction contracts.[71] The admitted bribe payments totaled approximately $3.93 million.[72] LBI employees referred to some of the payments as "commitment fees" or "counterpart per diems" rather than bribe payments.[73]

Berger Group Holdings, Inc. ("BGH"), LBI's parent company, had conducted an internal investigation and self-reported the misconduct, but only "after the government made LBI and BGH aware of a False Claims Act investigation."[74] In other words, the company appears to have discovered and reported to the government FCPA misconduct that the government was unaware of, but the company only did so because it was investigating a different allegation that the government had communicated to LBI. That LBI's self-report came after some government intervention may have prevented LBI from obtaining a non-prosecution agreement or declination. This type of voluntary, though not unprompted, report to the government is likely one of the scenarios that senior DOJ officials will have to hash out if they are to move forward on instituting a general policy awarding declinations whenever a company does self-report. That proposed policy change is discussed in section II.C above.

As is often the case, both the *IAP* case and the *LBI* case involved the use of third parties to effectuate at least some of the alleged bribe payments. The same is true for at least six of the nine FCPA resolutions completed between corporations and the SEC last year. The third parties involved in these cases included general contractors, subcontractors, travel agents, distributors, and vendors. These types of conduits for improper payments suggest that a shift is taking place away from the "traditional" FCPA third parties: consultants and sales agents. It may be the case that as compliance programs have adjusted to guard against the most straightforward types of third-party payment abuse, employees have turned to traditionally low-risk third parties to carry out improper payments. In other words, even compliance programs that were reformed years ago to take account of third-party risks may need to be re-examined to ensure that entities thought to be in lower "risk tiers" are adequately monitored.

The IAP and LBI resolutions are also noteworthy because in both cases, the DOJ announced them on the same day that it announced guilty pleas by one or more individuals related to the same conduct. This may be in part a reflection of the DOJ's new emphasis on holding individuals accountable for corporate wrongdoing, although both were announced before the Yates Memorandum was issued.

Both IAP and LBI are privately held companies, which explains why the SEC did not charge either company.

C. Resolutions of SEC Travel and Entertainment Cases Were a Reminder of the Importance of Well-Crafted Compliance Policies for Such Expenditures

Two of this year's SEC resolutions concerned companies providing government officials with free travel and entertainment.

1. *BHP Billiton*

In May 2015, the SEC charged BHP Billiton Ltd. and BHP Billiton Plc (collectively, "BHP"), an Australia-based mining company, with violating the internal-controls and books-and-records provisions of the FCPA in connection with entertaining government officials at the 2008 Summer Olympics held in Beijing, China.[75] To settle the charges, BHP agreed to pay a $25 million civil penalty and to report to the SEC on the operation of its FCPA compliance program for a one-year period.[76] The company neither admitted nor denied the SEC's allegations.[77]

As an official sponsor of the Beijing Olympics, BHP received priority access to tickets, hospitality suites, and accommodations during the 2008 Olympic Games.[78] "[T]o strengthen relationships with key local and global stakeholders, e.g.: Government Ministries, Suppliers and Customers,"[79] the company invited 176 government officials, plus the spouses of 102 of those officials, to attend the Games at the company's

expense.[80] According to the SEC Order, "[s]ixty of the officials ultimately attended, 24 of them with their spouses or guests."[81] The officials hailed primarily from countries in Africa and Asia "with well-known histories of corruption" and allegedly received hospitality packages (valued at $12,000 to $16,000 per package), which included event tickets, sightseeing excursions, and luxury hotel accommodations.[82] BHP executives also allegedly approved the provision of airfares to some officials and their spouses or guests.[83]

In a recent public speech, Ceresney mentioned the *BHP* case as one of the Commission's "significant actions against prominent companies" in 2015.[84] The $25 million penalty paid by BHP does indeed appear to be the largest-ever civil penalty in an FCPA case. That superlative comes with a caveat, however: The SEC took the rare step of allowing BHP to pay only a civil penalty and no disgorgement, a decision discussed below in Section III.H.

2. *FLIR Systems*

In April 2015, an Oregon-based defense technology company, FLIR Systems, Inc. ("FLIR"), resolved an SEC administrative proceeding relating to FLIR's provision of travel and entertainment to government officials from Saudi Arabia and Egypt.[85] This resolution followed the SEC's resolution with two former FLIR employees in 2014 based on the same alleged wrongdoing.[86] The conduct at issue—discovered after FLIR received a complaint letter from a third-party agent—concerned a "world tour" for Saudi Ministry of Interior ("MOI") officials unrelated to the ostensible business purpose of the trip, additional travel for MOI officials that could not be verified as business-related, a trip to Sweden for Egyptian Ministry of Defense ("MOD") officials that included leisure elements, and five expensive watches for MOI officials.[87] In settling the SEC charges, FLIR neither admitted nor denied the conduct.[88] The company agreed to a two-year reporting period and paid approximately $9.5 million in disgorgement, prejudgment interest, and penalty.[89] The SEC's Order alleged violations of the anti-bribery, books-and-records, and internal-controls provisions.[90]

The "world tour" was provided to MOI officials under the guise of a "Factory Acceptance Test" (the "Test"), which FLIR agreed to as part of its $12.9 million contract with the MOI to sell binoculars with infrared technology.[91] The Test was allegedly seen by FLIR as key to future contracts and bookings with MOI.[92] According to the SEC, in early 2009, the head of the Middle East office and his subordinate planned what would become known as the "world tour" for MOI officials to take place before and after the Test.[93] The 20-night trip included stops in Casablanca, Beirut, Paris, and Dubai, and allegedly involved only minimal business-related activity, such as five hours spent at FLIR's facility in Boston inspecting equipment, three other short (one to two hour) trips to the facility, and short hotel room meetings during the course of the seven-day stay in the Boston area.[94] In addition, the SEC alleged that FLIR spent approximately $40,000 on additional travel for the same MOI officials in 2008-2010, spent $7,000 on expensive watches for MOI officials and attempted to conceal the cost and nature of these gifts, and paid the majority of the costs for officials from the Egyptian MOD to attend a Factory Acceptance Test in Stockholm, Sweden in 2011, a trip that cost nearly $43,000.[95]

Both the *BHP* case and the *FLIR* case are reminders about the importance of structuring a compliance program that identifies and ultimately prevents excessive and lavish travel and entertainment for government officials.[96] In the *FLIR* case, the SEC faulted the company for having "no controls or policies in place governing the use of foreign travel agencies," and for making sales managers solely responsible for sales staff expense approvals.[97]

BHP had in fact recognized that "inviting government officials to the Olympics created a heightened risk of violating anti-corruption laws."[98] Consequently, the company required business managers to complete a hospitality application form for any individuals they sought to invite to the Olympics.[99] However, according to the SEC, BHP failed to provide employees and executives with any specific training on how to complete the forms or how to evaluate the bribery risks associated with each of the invitations.[100] Moreover, BHP allegedly did not implement procedures to ensure meaningful review and approval of the forms by personnel outside the manager's business line.[101] As a result, according to the SEC, almost all of the hospitality applications for government officials were approved, though a number of the hospitality

applications were inaccurate or incomplete or included invitations to government officials connected to pending contract negotiations or regulatory dealings such as the company's efforts to obtain access rights.[102]

These shortcomings led SEC Associate Enforcement Director Antonia Chion to comment that a "'check the box' compliance approach of forms over substance is not enough to comply with the FCPA."[103] For gifts and travel, approval forms and a process for review for red flags by personnel outside the business unit can be a useful tool. However, the government will still fault companies that do not back up such controls with the resources to carry out meaningful review and actually deny employees' requests for approval when proposed gifts are inappropriate.

D. The SEC Took the Relatively Rare Step of Resolving a Case Through a DPA

On January 22, 2015, the SEC announced it would enter into a two-year DPA with The Atkins North America Holdings Corporation ("Atkins")—formerly known as PBSJ Corporation ("PBSJ"), a Florida-based issuer—alleging anti-bribery, books-and-records, and internal-controls violations.[104] Atkins agreed to pay a total amount of $3,407,875 in the settlement, and the SEC also charged one employee with bribery in an administrative proceeding.[105]

The DPA stated that in 2009, PBSJ's wholly owned subsidiary PBS&J International Inc. ("PBS&J-I") won multi-million dollar construction contracts for work in Qatar and elsewhere.[106] A high-ranking PBS&J-I employee allegedly offered future bribes, and a letter of credit that was authorized as a precondition, to a Qatari official in exchange for official action to help advance contract bids on several ventures. The payments were to be facilitated through a local partnering company controlled by the Qatari official that would receive "agency fees" from PBS&J-I. Through this scheme, with help from the Qatari official, PBS&J-I succeeded in securing a $35.6 million contract for a light rail transit project in Qatar and a $25 million contract on a project to develop a resort in Morocco.[107] PBSJ discovered the corrupt arrangement and launched an investigation before the agency fees were actually paid.[108]

While apparently only a single high-ranking PBS&J-I employee had knowledge of the corrupt scheme, the DPA stated that PBSJ could have discovered it had it kept adequate records and controls and conducted "meaningful" due diligence at the time. PBSJ ignored several "red flags," according to the SEC, including inflated contract bids by its subsidiary that concealed payments to the local partner company, and receipt of confidential information in a sealed bidding process.[109]

The SEC's use of a DPA in this case was only the third time that the Commission has resolved an FCPA case using either a DPA or NPA. Its use here appears to have been justified, in the SEC's view, by the company having self-reported (to both the SEC and DOJ); taken immediate steps to end the misconduct, including suspending Walid Hatoum (who was charged separately—see below in Section IV.C) and reprimanding four other employees; enhanced its compliance program; and provided "substantial" cooperation to the SEC staff in its investigation.[110] As discussed above in Section II.C, senior SEC staff have drawn attention to the PBSJ resolution to try to encourage more self-reporting going forward.

E. SEC Resolutions Provided Reminders of the Compliance Challenges in Taking Part in a Joint Venture, and of the Value of Cooperation

On February 24, 2015, the SEC resolved a case with Goodyear Tire & Rubber Company ("Goodyear") over alleged violations of the books-and-records and internal-controls provisions. The SEC's Order alleged that Goodyear's joint ventures ("JVs") in Kenya and Angola made over $3.2 million in bribes to employees of private companies, government-owned entities, and local authorities.[111] Without admitting or denying the SEC's allegations, Goodyear entered into a settlement with the SEC and agreed to pay $14,122,525 in disgorgement and $2,105,540 in prejudgment interest.[112] No civil penalty was imposed.

Over the course of five years, according to the SEC, Goodyear's subsidiaries, Treadsetters Tyres in Kenya, and Trentyre Angola in Angola, paid over $3.2 million in bribes, mostly in cash, to obtain tire

sales.[113] In Kenya, Goodyear acquired a minority interest and then a majority interest in Treadsetters, but Treadsetters' founders and local general manager ran the subsidiary's day-to-day operations.[114] Treadsetters' management, in particular the general manager and finance director, paid over $1.5 million in bribes, mostly in cash, to employees of government-owned or affiliated entities, including the Kenya Ports Authority and the Armed Forces Canteen Organization, as well as private companies, to obtain business, and recorded those bribes as expenses for promotional products.[115] In addition, Treadsetters made over $14,000 in improper payments to local government officials, including police and city council employees.[116] The SEC alleged that Treadsetters' practice "was routine and appears to have been in place prior to Goodyear's acquisition."[117]

In addition, Trentyre Angola, which was wholly owned by Goodyear, allegedly engaged in a bribery scheme put in place by its former general manager to make over $1.6 million in bribes to employees of government-owned or affiliated entities and private companies, including to employees of its largest customer, the Catoca Diamond Mine, a consortium of mining interests that included other countries' mining entities.[118]

The *Goodyear* case is an instance in which particularly strong cooperation with the government appears to have helped the company reach a favorable resolution, even though there is no suggestion that Goodyear self-reported. The cease-and-desist order explicitly noted that "the Commission is not imposing a civil penalty based upon [Goodyear's] cooperation in a Commission investigation and related enforcement action."[119]

The *Goodyear* case also underlines the broad reach of the SEC's authority under the books-and-records provision. That provision, of course, requires that company records accurately reflect, in reasonable detail, *all* company transactions, not just payments to foreign government officials.[120] Using this authority, the SEC alleged in its Order that Goodyear had failed to record accurately improper payments to private entities as well as government entities, in violation of the books-and-records violation.[121] This use of the books-and-records provision is notable, although not unique, and highlights the importance of not overlooking commercial bribery when designing and managing compliance programs.

Another joint venture case resolved in 2015 was the *Bristol-Myers Squibb* ("BMS") case. On October 5, 2015, BMS and the SEC resolved an FCPA investigation into BMS's 60%-owned Chinese joint venture with a cease-and-desist order and a payment of just over $14 million, $11.44 million of which represented disgorgement of profits, $2.75 million of which was a civil penalty, and $500,000 of which was prejudgment interest.[122] The SEC's Order stated that certain employees of BMS's joint venture generated funds that were used to pay improper benefits to health care providers working for state-owned and state-controlled hospitals in China.[123] Such conduct included employees using funds derived from travel and expense claims to provide food and personal care items, shopping cards, jewelry, sightseeing, and cash payments to providers in order to induce them to prescribe BMS medications.[124] The Order also pointed to references in documents to "investments" made in order to obtain sales, such as offering speaking engagements, and conference and meeting sponsorships to health care providers in exchange for prescriptions.[125] The Order faulted BMS for failing to respond to allegations made by employees of improper payments and audit findings of weak controls, for not adequately training the BMS sales force in China, and for devoting insufficient resources to FCPA compliance.[126] The *BMS* case is a reminder for companies that operate in countries (like China) where many businesspeople are also government officials to be aware of the potential FCPA implications of providing benefits to individuals in such dual roles.

Both the *Goodyear* case and the *BMS* case are a reminder that joint ventures present particular compliance challenges. This is even more true for those ventures in which a U.S. or U.S.-listed company takes a majority position but permits previous management to continue to run the business. Part of the strategy behind such ventures is often to use the expertise of local managers. However, companies still must implement controls that will give the parent company insight into how the joint venture is actually spending its money, and the ability to stop improper payments.

F. SEC Resolutions Continued to Reflect the Commission's "Strict Liability" Approach to Books-and-Records Violations and Internal-Controls Violations

The *Goodyear* case also reflects the SEC's continued "strict liability" approach to books-and-records violations. There was no allegation in the SEC's cease-and-desist order that Goodyear, the parent company, had any knowledge of its African subsidiaries' payments of bribes to employees of government-affiliated companies and private companies and to local government officials.[127] Rather, the SEC charged the parent company with violating the FCPA's books-and-records provision because the subsidiaries' inaccurate books and records were consolidated into Goodyear's books and records.[128] Further, it charged the internal-controls violation based on the parent company having "fail[ed] to devise and maintain sufficient accounting controls to prevent and detect [the subsidiaries'] improper payments."[129]

Similarly, in the *Mead Johnson* case (discussed in more detail below), there was no allegation that Mead Johnson, the U.S.-based parent company, knew of any misconduct by its Chinese subsidiary.[130] Rather, Mead Johnson was charged with violating the FCPA's books-and-records provision because its records "were incomplete and did not reflect that a portion of the Distributor Allowance was being used contrary to Mead Johnson's policies."[131]

While this type of strict liability for books-and-records violations has been the SEC's effective standard for many years, there was a time when the agency articulated a different view. In 1981, the SEC Chairman stated that "inadvertent recordkeeping mistakes will not give rise to Commission enforcement proceedings" under the books-and-records provision, "nor could a company be enjoined for a falsification of which its management, broadly defined, was not aware and reasonably should not have known."[132] *Goodyear* and *Mead Johnson* are reminders that this is simply not the agency's approach today. Instead, the SEC seems committed to imposing a strict-liability standard on parent companies for their subsidiaries' books-and-records violations, even where the parent companies may have had no knowledge of any such issues.

One potential development to watch in the coming year is the SEC's recently launched civil probe over possible violations of federal bribery laws involving Fédération International de Football Association ("FIFA") soccer officials.[133] The FCPA's anti-bribery laws apply only to payments made to foreign government officials, an element that may or may not exist in this investigation. The books-and-records provision, however, has no such limitation, and thus the government, as it has done in the past, might charge issuers with books-and-records violations despite the lack of all the elements necessary to bring an FCPA bribery charge.

Relatedly, each time the SEC continues its practice of including an internal-controls violation in virtually *every* corporate FCPA resolution, it suggests the Commission takes an exceedingly broad view of what constitutes "a system of internal accounting controls sufficient to provide reasonable assurances" that a company's books are reliable.[134] Given the dozens and dozens of cases the SEC has resolved in the last decade, it would seem at least some involved the type of payments that even "reasonable" controls would not identify and prevent. With the exception of the *Garth Peterson* case involving Morgan Stanley,[135] the SEC has concluded differently.

Breakdown of 2015 SEC Corporate FCPA Resolutions

Involved Alleged Anti-Bribery Statute Violations	Involved Alleged Books-and-Records Violations	Involved Alleged Internal-Controls Violations
3	8	9

Relatedly, the SEC's strict liability approach to internal controls is reflected in the kinds of controls that the SEC has found to be deficient. For example, in the *BNY Mellon* case, summarized above, the SEC alleged that the bank's hiring practices violated the internal-controls provision. The internal-controls provision requires issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that":

- Transactions are executed and recorded appropriately;
- Transactions are recorded as necessary to permit preparation of financial statements and to maintain accountability;
- Unauthorized access to assets is prevented; and
- Recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[136]

The SEC Order, however, did not explain how compliance procedures relating to hiring constitute "accounting" controls. The *BNY Mellon* case, like other cases, suggests that the SEC takes a very broad view of the word "accounting" in the statute, essentially treating the statute as if it regulated all compliance controls, which it does not. The SEC's use of the internal-controls provision in virtually every case seems at odds with the statutory language and intent.

G. An SEC Resolution Addressed an Allegation That Was Not Immediately Reported by the Company to the Government

On July 28, 2015, Mead Johnson Nutrition Company ("Mead Johnson") settled with the SEC charges that Mead Johnson's Chinese subsidiary made more than $2 million in improper payments to health care professionals at government-owned hospitals to recommend the company's infant formula nutrition products to patients.[137] Mead Johnson's majority-owned Chinese subsidiary, Mead Johnson Nutrition (China) Co., Ltd. ("Mead Johnson China"), allegedly misused marketing and sales funds and failed to record accurately the improper payments in its books and records; the subsidiary's books and records were then consolidated into Mead Johnson's books and records, "thereby causing Mead Johnson's books and records to be inaccurate."[138] Without admitting or denying the SEC's findings, Mead Johnson entered into a $12 million settlement of the SEC's charges that it violated the FCPA's books-and-records and internal-controls provisions.[139] The settlement included over $7.7 million in disgorgement, $1.26 million in prejudgment interest, and a $3 million penalty.[140]

Mead Johnson China used third-party distributors to market, sell, and distribute its infant formula products in China, and gave the third-party distributors "distributor allowance" funds to market and sell Mead Johnson products.[141] By contract, the distributor allowance funds belonged to the distributors, but Mead Johnson China employees were able to exercise some control over how the allowance was spent.[142] Mead Johnson had internal policies "to comport with the FCPA and local laws, and to prevent related illegal and unethical conduct," including policies prohibiting improper payments and gifts to healthcare professionals to influence their recommendation of the company's products.[143] Despite these internal policies, Mead Johnson China employees, from 2008 to 2013, caused the distributor allowance funds to be paid to health-care providers at state-owned hospitals to recommend Mead Johnson's products to patients and collect patients' contact information for marketing purposes.[144]

Mead Johnson had received in 2011 an allegation about its Chinese subsidiary's possible FCPA violations through the use of distributor allowance funds.[145] At that time, Mead Johnson conducted an internal investigation that found no evidence of improper use of distributor allowance funds, but still elected to discontinue their use.[146] The SEC appeared to fault Mead Johnson for not self-reporting the initial allegation *and* for not "promptly" disclosing the existence of the allegation once the SEC opened its inquiry.[147] It is unclear exactly how serious these alleged omissions were in the SEC's view, but the Commission noted them before praising Mead Johnson for "subsequently provid[ing] extensive and thorough cooperation."[148] Withholding from the government an unconfirmed allegation should not, of course, be viewed as gravely as a company's failure to self-report confirmed wrongdoing. Still, this case suggests that when the government opens an investigation, it will expect companies to disclose previous related allegations.

H. The SEC in Several Cases Took the Relatively Rare Step of Allowing a Company to Resolve By Paying Only a Civil Penalty Without Paying Disgorgement

Three times in 2015, the SEC did something it normally does not do: Allow a company to resolve a case by paying only a civil penalty and not disgorging the profits it supposedly obtained through its alleged improper payments. In addition to the *BHP* case, discussed above, the SEC also did not seek disgorgement in its 2015 resolutions with Hyperdynamics and Hitachi.

On September 29, 2015, Houston-based oil and gas exploration company Hyperdynamics Corporation ("Hyperdynamics") and the SEC resolved an FCPA investigation into books-and-records violations with an administrative cease-and-desist order and payment of a $75,000 civil penalty.[149] The Order stated that Hyperdynamics violated the books-and-records and internal-controls provisions when it failed to record accurately $130,000 in payments made from July 2007 to October 2008 by its subsidiary based in the Republic of Guinea.[150] Although the payments were recorded as public relations and lobbying expenses, the SEC stated, Hyperdynamics lacked sufficient supporting documentation to determine whether the services were actually provided and to identify the ultimate recipient of the funds.[151] It appears that the SEC may not have required Hyperdynamics to pay disgorgement because the total amount of improper payments was relatively small, and there was apparently no conclusive evidence that the payments were bribes. The case thus seems similar to the *Oracle* case from 2012, in which Oracle Corporation was only required to pay a $2.1 million penalty, with no disgorgement.[152] If payments are not bribes, there ought not be any profits to disgorge. That said, in other cases the SEC has often taken an expansive view of its ability to collect disgorgement without a clear causal connection to profits.

The other two cases in which the SEC did not require a company to pay disgorgement last year involved significantly larger amounts of improper payments, and the SEC's decisions were thus more interesting. One is the *BHP* case. As noted above in Section III.C, BHP was alleged to have hosted 60 government officials at the Olympics; if each of these officials truly granted the company a profitable contract, BHP's disgorgement figure in theory could have been quite large. It may have been that the SEC could not demonstrate that any contracts were provided in connection with the entertainment at issue.

The other is a September 2015 case in which the Japan-based multinational conglomerate Hitachi, Ltd. ("Hitachi") agreed to pay a civil penalty of US$19 million to settle SEC charges, without admitting or denying the SEC's allegations that Hitachi violated the books-and-records and internal-controls provisions of the FCPA.[153] According to the SEC, Hitachi inaccurately recorded improper payments funneled through a front company to South Africa's ruling political party in connection with contracts to build two multi-billion dollar power plants.[154]

The SEC alleged that, in 2005, Hitachi Power Europe GmbH ("HPE"), a German-based subsidiary wholly owned by Hitachi, sold 25% of the stock in Hitachi Power Africa ("HPA"), a newly created South Africa-based subsidiary, at a below market value to Chancellor House Holdings (Pty) Ltd. ("Chancellor"), a South African investment firm.[155] Hitachi allegedly recognized that Chancellor had strong ties with the political party in power, the African National Congress ("ANC").[156] HPA allegedly agreed in a contract separate from the stock sale agreement to pay Chancellor "success fees" for exercising Chancellor's influence with the ANC to assist HPA in obtaining government contracts.[157] The SEC's Order also suggested that, as a result of Chancellor's assistance, HPA was awarded two power station contracts that together accounted for approximately $5.6 billion in business being awarded to Hitachi.[158] According to the SEC, therefore, HPA paid approximately $1.12 million in "success fees" that were recorded in HPA's books and records as "consulting fees."[159] The SEC alleged that HPA also paid Chancellor approximately $5 million in "dividends" based on profits derived from the contracts.[160] The Order noted that as HPA was bidding for the contracts, and by the time the "success fees" and "dividends" were paid, Chancellor had been publicly reported to be a "funding vehicle" and a "front" for the ANC.[161] HPA allegedly failed to reflect in its books and records that these amounts were actually paid to the ANC in exchange for aiding HPA in securing government contracts.[162] The SEC further claimed that Hitachi's internal controls failed when the dividends paid to Chancellor were not flagged as payments to a foreign political party in exchange for obtaining government contracts.[163]

In neither of these two cases did the Commission explain the reasons for these departures from its usual practice. Two factors might be at play. First, in both cases, had the SEC applied its legal theory rigidly, the disgorgement numbers could have been extremely large. The potential business at stake from some 60 government officials in the *BHP* case could have been enormous, and the SEC asserted that HPA's power station contracts accounted for approximately $5.6 *billion* in business for Hitachi. Second, at least with respect to the *BHP* case, the SEC's Order provides no indication that the travel and entertainment in that case actually caused *any* business benefits. Whatever the reasons, both cases are precedents that SEC enforcement attorneys will hear cited frequently by defense counsel in 2016.

IV. Notable Aspects of Individual Resolutions

Consistent with the DOJ's statements that it was emphasizing holding individuals accountable for FCPA violations, the DOJ either resolved through pleas, or filed charging instruments against, eight individuals in 2015. The SEC charged two individuals in 2015, slightly down from its count of four individuals in 2014. Noteworthy features of these resolutions are summarized below.

A. The DOJ's Two Resolutions Were Both "Package" Resolutions

As noted above, the DOJ took guilty pleas from one or more individuals alongside and at the same time as both of its announcements of corporate resolutions in 2015. As the Department announced the DPA in the *Louis Berger* case, it also announced that two company executives, Richard Hirsch and James McClung, had pleaded guilty to counts of conspiracy to violate the FCPA and violating the FCPA. Hirsch had been responsible for LBI's operations in Indonesia, Thailand, the Philippines, and Vietnam.[164] McClung had the same role for India and, subsequent to Hirsch, Vietnam.[165] In connection with the IAP NPA, the DOJ announced that it had taken a guilty plea from James Michael Rama to one count of conspiracy to violate the FCPA for his role in the company's bribery scheme.[166] Rama, who was IAP's Vice President of Special Programs and Projects, was sentenced in October 2015 to four months in prison.[167]

Notably, the government appeared to have significant evidence of these executives' knowledge of the bribe payments and the use of third parties as intermediaries. For example, when an agent emailed Hirsch suggesting a plan to use a consultant as lead contractor, so that LBI would be insulated from making bribe payments directly, Hirsch responded: "[e]xcellent idea to sub to another firm as the lead which would be responsible for client relations. I am not willing to pay any commitment fees, however we could agree to a 'management fee' taken from our invoices by the lead firm."[168] McClung similarly received email messages describing government officials' demands to be paid and bribe payments that had already gone out.[169] Hirsch and McClung are scheduled to be sentenced in February 2016.

B. The DOJ Charged or Resolved with Seven Individuals Independent of Any Resolution with a Corporation

In the summer of 2015, the DOJ secured guilty pleas from three individuals in connection with a scheme to influence corruptly the awarding of contracts with a Russian state-owned nuclear fuel company.[170] Daren Condrey, Vadim Mikerin, and Boris Rubizhevsky, all U.S. residents, were charged with conspiring to transmit funds from the United States to offshore shell bank accounts located in various European countries, for the purpose of making corrupt payments to officials affiliated with Russia's State Atomic Energy Corporation.[171]

Only Condrey, a U.S. citizen who pleaded guilty on June 17, 2015, was charged with conspiracy to violate the FCPA's anti-bribery provision—Mikerin and Rubizhevsky both pleaded guilty to conspiracy to commit money laundering. Mikerin was sentenced to four years in prison (plus forfeiture of $2.1 million in ill-gotten gains) on December 15, 2015; Condrey and Rubizhevsky have yet to be sentenced.[172]

The most notable aspect of this case was its broad application of who qualifies as a "foreign official" under the FCPA. The "foreign official" who was bribed was Mikerin—a Maryland resident who was the

president of TENAM Corporation, a nuclear fuel company incorporated in Maryland with its headquarters in Bethesda. The DOJ alleged that TENAM was a wholly owned subsidiary of the joint stock company Techsnabexport ("TENEX"), which is based in Moscow and acts as Russia's sole supplier and exporter of uranium and uranium enrichment services. TENEX is in turn a subsidiary of Russia's State Atomic Energy Corporation, and thus the DOJ considered Mikerin's employer to be an entity "indirectly owned and controlled by, and" to have "performed functions of, the government of the Russian Federation."[173]

Interestingly, it does not appear that any party challenged the DOJ's stance as to Mikerin's status as a "foreign official." Mikerin himself conceded his "foreign official" status—which did not expose him to FCPA liability, since a foreign official cannot be charged under the FCPA for receiving a bribe.[174] Condrey chose not to contest the issue.[175] This case appears to show the continuing—and potentially expanding—impact of the broad definition of a government "instrumentality" as laid out in last year's landmark decision in *United States v. Esquenazi* (11th Cir. 2014).[176]

In January, a federal grand jury indicted Dmitrij Harder, the former owner and president of Chestnut Consulting Group Inc. and Chestnut Consulting Group Co. (together, the "Chestnut Group").[177] The DOJ charged Harder with one count of conspiracy to violate the FCPA and Travel Act, five counts of violating the FCPA, and eight other counts related to money laundering and violating the Travel Act.[178] Between 2007 and 2009, Harder allegedly paid more than $3.5 million in five installments to the sister of an official at the European Bank for Reconstruction and Development ("EBRD").[179] The EBRD, a multilateral development bank in London, provides financing for development projects in emerging markets.[180] Harder allegedly disguised the payments as consulting fees to the official's sister for services she never performed.[181] In exchange, the EBRD official allegedly approved financing applications for approximately $300 million from two of the Chestnut Group's corporate clients, earning the Chestnut Group about $8 million in "success fees."[182] Harder pleaded not guilty to all counts, and the case is currently set for trial in May 2016.[183]

In August, a former regional director of SAP International Inc. ("SAP"), Vicente Garcia, pleaded guilty to conspiracy to violate the FCPA.[184] Garcia also settled anti-bribery, books-and-records, and internal-controls charges with the SEC for the same conduct.[185] Garcia had bribed Panamanian government officials through an intermediary to earn software license sales for SAP.[186] To generate funds for the bribes, Garcia caused SAP to sell its software to SAP's Panamanian corporate partner at large discounts.[187] The corporate partner's excessive earnings acted as a slush fund for the bribe payments.[188] Garcia conspired to pay two Panamanian officials, one directly and the other through an agent, and disguised $145,000 in completed bribes to a third official through sham contracts and false invoices.[189] In exchange, the Panamanian government awarded four contracts, between 2010 and 2013, to SAP's local partner for the sale of SAP software.[190] The sale resulted in revenues of $3.7 million for SAP.[191] Garcia received kickbacks totaling nearly $86,000.[192]

In December, the DOJ charged Roberto Enrique Rincon-Fernandez and Abraham Jose Shiera-Bastidas with conspiring to violate and violating the FCPA anti-bribery provisions.[193] Rincon is the president of Texas-based oil services company Tradequip Services & Marine, and Shiera is a Venezuelan businessman living in the United States.[194] Both men controlled a number of closely held U.S. companies.[195] The indictment alleged that between 2009 and 2014, Rincon and Shiera made nine unlawful payments totaling $790,000 to officials at Venezuela's state-owned energy company, Petróleos de Venezuela S.A. ("PDVSA"), to secure energy contracts for their companies.[196] These payments allegedly originated from the bank accounts of Rincon, Rincon's companies, and Shiera's companies, and they were routed to the bank accounts of PDVSA officials, their relatives, and other individuals designated by PDVSA officials to receive the funds.[197] The defendants also allegedly provided the officials with recreational travel, meals, and entertainment.[198] The court's order of detention against Rincon stated that investigators have traced $1 billion of illegal transactions from the conspiracy.[199] The court also noted that Rincon paid $2.5 million in bribes to one official alone, suggesting that the $790,000 of payments cited in the indictment represents only a fraction of the total bribe amounts.[200] The DOJ also charged Rincon and Shiera with money laundering.[201]

It could be said that the cases against Harder, Garcia, Rincon, and Shiera do not jump off the page. They apparently do not involve particularly novel means of carrying out bribes or the award of enormous contracts by FCPA standards. But that may be exactly the point. These somewhat "plain" cases *may* signal the government's increased determination to hold individuals accountable for wrongdoing, and the absence of simultaneous resolutions with corporations based on the same conduct *may* reflect the DOJ's having de-prioritized corporate resolutions. However, substantially more cases will need to play out before conclusions like this can be drawn with confidence.

C. The SEC Resolved with One Individual and Filed Civil Charges Against One Other

The SEC's only actions against individuals last year were either in connection with a DOJ plea (Garcia, summarized above in Section IV.B) or in connection with a resolution it reached with a company.

In the *PBSJ* case, described above in Section III.D, the Commission also charged Walid Hatoum in an order instituting a settled administrative proceeding.[202] Hatoum was a U.S. citizen who began as an employee of PBSJ in the 1980s and later became a senior executive of PBSJ's international subsidiary, PBS&J-I.[203] Hatoum allegedly offered bribes to a Qatari official who helped PBS&J-I obtain contracts for construction and development projects. In particular, Hatoum promised and authorized PBS&J-I to pay the Qatari official "agency fees" of nearly $1.4 million through a local partnering company he owned and controlled, in exchange for influence that helped PBS&J-I secure a $35.6 million contract for a light rail transit project in Qatar and a $25 million design contract on a project to develop a resort in Morocco.[204] The scheme was discovered and stopped by PBSJ and its contractual partner, a Qatari real estate investment firm—and some of the contractual work terminated—before the agency fees were actually paid.[205]

The SEC alleged that Hatoum personally violated the anti-bribery provisions of the FCPA, and that he caused violations of the accounting (both books-and-records and internal-controls) provisions on the part of PBSJ.[206] To settle these charges, without admitting or denying the factual findings in the administrative order, Hatoum agreed to pay a civil penalty of $50,000.[207]

V. Key FCPA Legal Developments and Observations

A. The *Hoskins* Case Restricted the Government's Ability to Charge Conspiracy and Accomplice Liability in FCPA Crimes

In July 2013, Lawrence Hoskins, a former senior vice president for French power company Alstom, was charged in the District of Connecticut with conspiracy and substantive FCPA and money laundering charges.[208] The DOJ alleged that Hoskins and others bribed Indonesian officials for their help in winning a $118 million contract in Indonesia. Other executives of Alstom and its U.S.-based subsidiary—William Pomponi, Frederic Pierucci, and David Rothschild—as well as the company's consortium partner Marubeni Corporation have also been charged with FCPA violations emerging from the same bribery scheme, and all have pleaded guilty.[209]

Hoskins moved to dismiss the conspiracy count against him "on the basis that it charges a legally invalid theory that he could be criminally liable for conspiracy to violate the [FCPA] even if the evidence does not establish that he was subject to criminal liability as a principal, by being an 'agent' of a 'domestic concern.'"[210] The basis of Hoskins's argument was a change in the language of the operative indictment against him: while the government originally charged Hoskins with "being a domestic concern and an employee and agent of [Alstom Power U.S.]," the Third Superseding Indictment alleged only that he acted "together with" a domestic concern to violate the FCPA.[211] The government opposed Hoskins's motion, maintaining that it still intended to prove Hoskins acted as an agent of a domestic concern,[212] but filed a related motion *in limine* to preserve its right to argue that Hoskins might also be liable as an accomplice.[213] Together, those "two motions put before the Court the question of whether a non-resident foreign national could be subject to criminal liability under the FCPA, even where he is not an agent of a domestic concern and does not commit acts while physically present in the territory of the United States,

under a theory of conspiracy or aiding and abetting a violation of the FCPA by a person who is within the statute's reach."[214]

Looking at the text, structure, and legislative history of the FCPA, the court concluded that Congress did not intend for non-resident foreign nationals to be subject to the FCPA unless they were agents of a domestic concern or acted "while physically present" within the territory of the United States. Accordingly, the judge granted Hoskins's motion in part and denied the government's motion *in limine*, prohibiting the government from arguing that Hoskins could be liable for conspiracy absent proof that he was an agent of a domestic concern; the judge did not, however, dismiss the conspiracy count altogether, since the government might proceed under the theory that Hoskins was such an agent.[215] The *Hoskins* decision is consistent with a decision made by Judge Richard Leon as part of the 2011 Africa Sting case, in which he dismissed charges against an alleged co-conspirator whose only connection to the United States was that he sent a DHL package containing a purchase agreement relevant to the corrupt scheme.[216] Though the decision was rendered without written reasoning, Judge Leon made clear at oral argument that he was skeptical that a sufficient connection existed to the United States.[217] The DOJ filed a motion for reconsideration in *Hoskins* in August 2015 with its own views on the legislative history of the FCPA.[218] Trial has been set for April 18, 2016.[219]

B. The DOJ Dropped Its Appeal of an Adverse Extraterritoriality Ruling in the *Sidorenko* Case

In a case raising somewhat similar issues to *Hoskins*, on April 21, 2015, the U.S. District Court for the Northern District of California dismissed a criminal case that, although not brought under the FCPA, could significantly impact the viability of future U.S. bribery prosecutions against foreign actors with a tenuous U.S. nexus. In *United States v. Sidorenko*, 102 F. Supp. 3d 1124 (N.D. Cal. 2015), the U.S. Attorney for Northern California indicted three individuals—two Ukrainian citizens and a Venezuelan national residing in Canada—and charged them with conspiracy, honest services wire fraud, and soliciting and giving bribes involving a federal program, all in connection with an alleged scheme to defraud the Montreal-based International Civil Aviation Organization ("ICAO," a specialized agency of the United Nations).[220] The government alleged that businessmen Yuri Sidorenko and Alexander Vassiliev paid bribes to Mauricio Siciliano, an employee of ICAO, in exchange for official actions to benefit their personal "consortium," a conglomerate of Ukrainian companies.[221]

But the indictment did not include any allegations that any of the three defendants were U.S. citizens or that they lived, worked, or undertook any of the alleged criminal conduct inside the United States. U.S. District Judge Charles Breyer dismissed the indictment after concluding that neither the bribery statute (18 U.S.C. § 666) nor the fraud statute (18 U.S.C. § 1343) at issue applied extraterritorially, and that criminal prosecution in the face of such minimal domestic nexus would offend due process.[222] Though the government argued that it had both a security and a financial interest in the ICAO, which receives federal funds, Judge Breyer said at oral argument that this was the most "misguided prosecution" he had seen in fifty years of criminal practice and suggested that the dismissal should be appealed immediately so that the Circuit Court could weigh in.[223] The government at first did appeal the ruling, but then reversed course and dropped the appeal, which was dismissed on July 23, 2015.[224]

As the employee of an international organization under the auspices of the UN, Siciliano would likely have qualified as a "foreign official" for purposes of the FCPA. The DOJ may have simply determined that it would be easier to establish statutory jurisdiction over these three individuals under the wire fraud and bribery statutes than under the FCPA. But Judge Breyer's ruling is an important reminder that whether or not the government can establish statutory jurisdiction over foreign individuals (under the FCPA or any other law), it still must show that those individuals have "minimum contacts" with the United States, or else criminal prosecution may be an unconstitutional violation of due process.[225]

C. A Setback for the DOJ in the *Sigelman* Trial Again Raised Questions Concerning the DOJ's Trial Record in FCPA Cases

In May 2014, a federal grand jury indicted Joseph Sigelman, a former co-chief executive officer of PetroTiger Ltd., on six counts including FCPA charges for allegedly bribing a Colombian official in order to secure approval from Ecopetrol, Colombia's state-controlled oil company, for a $39.6 million contract.[226] Sigelman was alleged to have made at least four unlawful payments totaling approximately $333,500 to the Colombian official.[227] Sigelman allegedly first attempted to make the payments indirectly by providing them to the official's wife under a sham consulting services arrangement, but later made the payments directly to the official.[228]

Sigelman's trial began on June 1, 2015.[229] The key witness for the government at Sigelman's trial was to be former PetroTiger general counsel Gregory Weisman, who had previously pleaded guilty to violating the FCPA for misconduct similar to that alleged against Sigelman.[230] As part of his cooperation with the DOJ—which took place while Weisman was still serving as general counsel for another company run by Sigelman[231]—Weisman recorded private conversations with Sigelman.[232] Ambiguities in Sigelman's admissions, however, apparently meant the government's evidence was less powerful at trial than it had hoped.[233]

In addition, Weisman's testimony at trial caused the government's case against Sigelman to end abruptly.[234] During cross-examination, Weisman admitted to having given inaccurate testimony about the terms of his cooperation agreement only a couple of days earlier.[235] Shortly thereafter, the government offered and Sigelman accepted a plea deal under which Sigelman pleaded guilty to one count of conspiracy to violate the FCPA with a recommended prison sentence of no more than one year and one day.[236] The judge, however, sentenced Sigelman to three years of probation[237] and ordered him to pay $239,000 in restitution to PetroTiger and a $100,000 fine.[238] While the DOJ's press release on the case spun the guilty plea as a victory,[239] the result was viewed as a disappointment to the DOJ given the initially expansive charges against Sigelman and the lack of jail time imposed.[240]

The unraveling of the *Sigelman* case at trial is just the latest episode in a string of unsuccessful FCPA trials for the government in recent years. Since September 2011, the DOJ has gone to trial four times on substantive FCPA charges and in each of those cases, the result has either been a dismissal, an acquittal, or the limited "victory" obtained in *Sigelman*.[241] This particular result, like the "Africa Sting" cases from 2011 and 2012,[242] raises questions about the government's use of recordings and sting tactics in FCPA cases. On the other hand, it is always dangerous to make predictions based on such a limited number of cases. Weisman may simply have been a weak cooperator who testified unexpectedly poorly. Perhaps the strongest conclusion that can be drawn is that the two FCPA trials currently scheduled for this spring—*Hoskins* (scheduled for April, although subject to postponement based on the DOJ's reconsideration motion) and *Harder* (scheduled for May)—will be closely watched. Continued setbacks at trial could undercut the government's renewed effort to hold individuals accountable for FCPA violations.

In any event, the government appears undeterred with respect to the use of monitoring in FCPA investigations. Outgoing FBI Public Corruption Chief Jeff Sallet stated at the annual ACI FCPA conference in November that there are "Title III's and undercover operations targeting FCPA [violations] around the country right now."[243]

On the same day that Sigelman pleaded guilty, the DOJ publicly announced its decision to decline prosecution of PetroTiger for the conduct of Sigelman and his two co-conspirators.[244] The DOJ stated that it based its decision not to prosecute on "PetroTiger's voluntary disclosure, cooperation, and remediation, among other factors."[245] This was only the second time that the DOJ has publicly announced its declination of an FCPA case.[246] In 2012, the DOJ announced that it had declined to prosecute Morgan Stanley for the conduct of its former managing director in evading the company's internal controls because of Morgan Stanley's robust compliance program.[247] At the same annual ACI FCPA conference in November, Caldwell commented that nothing more would be gained by prosecuting PetroTiger because of the company's exemplary handling of the case.[248] Caldwell did not mention whether PetroTiger's

compliance program played any role in DOJ's decision to publicly announce its declination, as it had in the Morgan Stanley case.[249] Given that numerous companies voluntarily disclose misconduct and cooperate in government investigations, it is difficult to tell why PetroTiger seems to have received different treatment from many other companies, or whether PetroTiger may be a predictor of the DOJ's future treatment of such companies.

VI. Collateral Legal Developments

A. Judicial Wariness Persists Regarding DPAs

In 2015, federal judges continued to assert their right to scrutinize DPAs. As DPAs are filed in court, they are subject to judicial oversight. In the past, judges tended to limit their role in the DPA approval process to excluding time under the Speedy Trial Act, holding the case in abeyance for the term of the agreement, and dismissing the charges following the defendant's satisfaction of its obligations under the agreement. In recent years, however, judges have increasingly sought to take a more active role in determining whether to approve DPAs. As discussed below, two decisions in 2015 sought to define further the appropriate degree of judicial scrutiny in the context of DPAs.

1. Judge Leon rejects Fokker Services DPA in February

On February 5, 2015, Judge Leon of the D.C. District Court rejected a proposed DPA with Fokker Services B.V. in connection with an alleged scheme to violate U.S. export laws.[250] He stated that "the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct."[251] Judge Leon concluded that the DPA was "grossly disproportionate to the gravity of Fokker Services' conduct"—which had allegedly involved more than 1,110 transactions occurring in Iran, Burma, and Sudan over the span of five years—and pointed to the fact that the DPA did not charge any individuals, did not call for a monitor, and did not impose any reporting requirements.[252] He therefore refused to approve the agreement.[253] He did, however, express willingness to review a "modified" DPA "should the parties agree to different terms and present such an agreement for my approval."[254]

This decision, which is currently pending appeal, suggests that the negotiation of DPAs may now need to include consideration by all parties involved as to whether the agreement's terms will prove acceptable to the court. Moreover, the now very real possibility that a court might reject a DPA may also factor into a company's decision as to whether to disclose misconduct to the government in the first place, and into the government's decision as to whether to proceed with a DPA, rather than with a plea agreement or with an NPA, which does not require court approval.

2. Judge Sullivan approves two DPAs in October (but criticizes the DOJ's use of them)

Judge Emmet Sullivan of the D.C. District Court also explored a court's role in determining whether to approve DPAs in an opinion on October 21, 2015, in which he ultimately approved two separate DPAs with Saena Tech Corp. and Intelligent Decisions, Inc. involving alleged domestic (non-FCPA) bribery in connection with certain government contracts.[255] Similar to Judge Leon, Judge Sullivan concluded that a court's supervisory powers allow it to reject a DPA that is "especially unfair or lenient," where approval of the agreement would "implicate the integrity of the Court."[256] His concern was that, without such authority, courts could "becom[e] accomplices in illegal or untoward actions."[257]

Judge Sullivan also explored whether DPAs in the corporate context are inconsistent with the Speedy Trial Act. He stated that, in allowing for deferral of prosecutions under the Speedy Trial Act, Congress intended to encourage rehabilitation of *individuals* charged with certain non-violent criminal offenses while avoiding the collateral consequences associated with a criminal conviction.[258] This intent contrasts, in Judge Sullivan's view, with the government's current practice of frequently using DPAs as a means of permitting corporations to avoid conviction by paying a fine and implementing compliance measures.[259]

Although Judge Sullivan did not find that practice to be improper *per se*, he called upon the DOJ to "consider expanding the use of [DPAs] and other similar tools to use in appropriate circumstances when an individual who might not be a banker or business owner nonetheless shows all of the hallmarks of significant rehabilitation potential."[260] Judge Sullivan thus joined the growing ranks of judges who push back against a passive role in the DPA approval process.

B. The SEC Announced Its First "Pre-taliation" Case

On April 1, 2015, the SEC announced its first enforcement action against a company for stifling potential whistleblowers.[261] Without admitting or denying the findings in a cease-and-desist order, Houston-based technology and engineering firm KBR Inc. agreed to pay a $130,000 penalty to settle allegations that it required witnesses in certain internal investigations to sign confidentiality agreements prohibiting them from "discussing any particulars regarding th[eir] interview and the subject matter discussed during the interview, without the prior authorization of [KBR's] Law Department," and warning them they could face discipline, including job termination, for failing to comply with the prohibition.[262]

Although the SEC acknowledged that it was unaware of any instance in which the confidentiality agreement or KBR's actions had, in fact, interfered with whistleblowing activity, the agency found that the language in KBR's agreement violated Rule 21F-17 (enacted under the Dodd-Frank Wall Street Reform and Consumer Protection Act), which prohibits companies from taking any action to impede whistleblowers from reporting possible securities law violations to the SEC.[263] According to the SEC, KBR has since amended its confidentially statement by adding language expressly clarifying that employees may report possible violations to the SEC and other federal agencies without prior KBR approval.[264]

The KBR action is the most recent indication that the SEC takes a broad view of the Dodd-Frank whistleblower protections. It is also the first action in what is reportedly a wider investigation into companies that may have improperly silenced whistleblowers through employment-related documents.[265] According to *The Wall Street Journal*, the SEC has sent letters to several companies requesting the production of nondisclosure agreements, employment contracts, and other documents.[266] In the SEC press release regarding the *KBR* case, Sean McKessy, Chief of the SEC's Office of the Whistleblower, warned that "[o]ther employers should … review and amend existing and historical agreements that in word or effect stop their employees from reporting potential violations to the SEC," and Ceresney stated that the SEC "will vigorously enforce" Rule 21F-17.[267] Thus, more "pre-taliation" cases may be yet to come.

C. The SEC Continued to Bring Cases Administratively

Administrative cease-and-desist proceedings were the primary channel for resolutions of FCPA enforcement actions by the SEC in 2015. All but one of the SEC's nine corporate FCPA resolutions in 2015 were brought through administrative proceedings.

Given the SEC's success before administrative law judges ("ALJs") and the fact that those judges are employees of the Commission, there have been questions about whether the administrative cases are biased in favor of the Commission. In June, one of the five SEC administrative law judges declined the SEC's request to submit an affidavit in an appeal of an administrative decision stating that he did not feel pressure to rule for the Commission. According to news reports, the judge had found that all of the 28 defendants who had come before him in contested cases were liable on at least some of the SEC's charges.[268] And in November, it was reported that SEC Chief Judge Brenda Murray explained her decision in a 2014 case not to dismiss charges before holding a hearing by saying, "For me to say I am wiping it out, it looks like I am saying to these presidential appointee commissioners, 'I am reversing you.' And they don't like that."[269]

There were several legal challenges in 2015 to the SEC's use of administrative proceedings. These challenges have focused on whether the ALJs' exercise of authority violates the Appointments Clause of the Constitution, which states that "inferior officers" may only exercise "significant authority" if they are appointed "by the President, courts of law, or department heads." Two federal courts of appeals have

held that district courts do not have jurisdiction to hear challenges to the SEC's use of the administrative forum.[270] However, in August 2015, the U.S. District Court for the Southern District of New York found that the court had jurisdiction and granted a preliminary injunction against the SEC based on a finding that the appointment of the ALJ was likely unconstitutional under the Appointments Clause.[271]

The SEC has recently pulled back somewhat on filing contested cases in administrative proceedings. *The Wall Street Journal* found that in fiscal 2014, the SEC filed 43% of its cases in the administrative tribunal; however, in fiscal 2015, the SEC filed only 28% of contested cases in the administrative tribunal.[272] It is worth noting that this issue is primarily significant with respect to contested matters. It is often beneficial for both the SEC and the respondent to settle a case in an administrative proceeding rather than in district court.

D. The *Kellogg Brown & Root II* Decision Generated Rulings on Corporate Privilege Issues That Were Generally Favorable to Holders of the Privilege

Attorney-client privilege in corporate investigations was tested in *In re Kellogg Brown & Root, Inc.* ("*KBR II*") when the U.S. Court of Appeals for the D.C. Circuit upheld a company's assertion of privilege over materials relating to an internal investigation for a second time in the same case.[273] Last year, the D.C. Circuit had granted Kellogg Brown & Root, Inc. ("KBR") a writ of mandamus preventing the production of privileged documents and sent the case back to the district court.[274] On remand, the district court again ordered production of the same documents based on implied waiver of the privilege. Once again, the company sought to prevent production with a writ of mandamus, which the D.C. Circuit again granted.

The court's latest opinion has three major holdings. First, it rejected the district court's conclusion that documents related to the company's internal investigation must be produced under Federal Rule of Evidence 612 because the company's Rule 30(b)(6) witness had "reviewed the documents in preparation for his deposition" on the topic of the internal investigation.[275] Second, it held that KBR did not disclose the results of its investigation, and therefore implicitly waive the privilege, by stating in a brief that the company (1) generally reported findings of wrongdoing to the government, (2) investigated the plaintiff's allegations of kickbacks, but (3) made no report of misconduct to the government.[276] And third, it held that the district court incorrectly compelled production of documents relating to the company's internal investigation that went beyond "fact work product" and implicated privileged materials.[277] *KBR II* ultimately upheld the company's privilege but acknowledged that the case presented difficult questions.[278] Overall, the legal effect of these rulings is helpful to companies trying to protect their privilege. The substantial legal fees and more than a year of additional court proceedings incurred by KBR should also warn litigants not to venture too close to the line.

VII. Key International Legal Developments

A. United Kingdom

During 2015, scrutiny of the lack of convictions secured against corporate entities under section 7 of the UK Bribery Act 2010 ("the Bribery Act"), the strict liability corporate offense of failing to prevent bribery, continued to grow. In November 2015, the Serious Fraud Office ("SFO") secured its first DPA with a company that admitted acting contrary to section 7 of the Bribery Act and, shortly after this was announced, the SFO announced it would receive its first guilty plea in relation to an offense contrary to section 7.

1. Significant Cases

On 7 September 2015, SFO Director David Green CB QC made a speech to the 33rd Cambridge Economic Crime Symposium.[279] He described "significant results" for the prosecutor and cited the case of Sustainable AgroEnergy as the first SFO convictions under the Bribery Act and the case of Smith & Ouzman as the first conviction of a company for bribery of a foreign public official. According to public reports, investigations by the SFO are ongoing into Rolls-Royce, GlaxoSmithKline, ENRC, and GPT.

Green also discussed the investigation into Soma Oil & Gas, which began in July 2015 and concerns allegations of corruption in Somalia.[280] Green noted that 32 defendants, individual and corporate, are charged and awaiting trial in eight cases.

In December 2014, Gary West, James Whale, and Stuart Stone were convicted of various offenses relating to a conspiracy to commit fraud by false representation and Bribery Act offenses.[281] This case, which centered on West's company, Sustainable AgroEnergy, was the first conviction by the SFO under the Bribery Act.[282] The fraud involved misleading investors in connection with the selling and promotion of self-invested pension plans ("SIPPs") relating to "green biofuel" plantations in Cambodia. The bribery offenses were a minor element of the conspiracy and involved the giving and receipt of bribes in respect of the creation of false invoices by West and Stone, allowing Stone to obtain unearned commissions.[283] The three men were sentenced to prison terms ranging from six to thirteen years.[284]

The second case mentioned in Green's speech was Smith & Ouzman, which was a printing firm that was convicted, along with two employees, of corrupt payments totaling £395,074 made to Foreign Public Officials ("FPOs") in Kenya and Mauritania.[285] This case is significant as it represents the first conviction by the SFO of a company for illegal payments made to an FPO. These convictions were secured under section 1(1) of the Prevention of Corruption Act 1906, not the Bribery Act, because all the relevant conduct took place prior to the effective date of the Bribery Act. Nonetheless, the content of the respective sections of the two acts is similar, meaning that these convictions could equally have been secured under the new legislation.

In April 2015, further charges were brought against Alstom Network UK and an Alstom employee in phase three of the SFO's ongoing investigation into suspected corruption offenses related to the supply of trains to the Budapest Metro in 2006 and 2007.[286]

In May 2015, British National Graham Marchment pleaded guilty to a conspiracy to corrupt in relation to the award of contracts in a series of high-value infrastructure projects.[287] The former Philippines resident was handed down three concurrent 2.5-year sentences for his part in the conspiracy, which involved collusion to obtain payments by "deliberately leak[ing]" confidential information in relation to oil and gas engineering projects in Egypt, Russia, and Singapore "in exchange for payments disguised as commission."

2. Corporate Bribery Prosecutions

In November 2015, the SFO secured a DPA against ICBC Standard Bank for offenses committed contrary to section 7 of the Bribery Act. This case is discussed in more depth below.

At the start of December 2015, the SFO announced that construction and infrastructure service company Sweett Group plc had admitted an offense under section 7 of the Bribery Act following an internal investigation into two contracts in the Middle East. The SFO confirmed formal charges against Sweett Group on December 9, 2015. The case will come before the courts in 2016.

3. Deferred Prosecution Agreements

In November 2015, the SFO announced its first DPA, with ICBC Standard Bank plc, formerly known as Standard Bank plc, and the DPA received judicial approval on November 30, 2015.[288] Standard Bank agreed to pay compensation of $6 million and over $1 million in interest; to disgorge a transaction profit of $8.4 million; and to pay a financial penalty of $16.8 million. Significantly, the DPA was negotiated after the company admitted conduct contrary to section 7 of the Bribery Act.

In the Standard Bank case, the Tanzanian government sought to raise funds through a sovereign note private placement. Standard Bank plc and Stanbic Bank Tanzania Ltd, a subsidiary of the Standard Bank Group, sought to share the government note placement. Efforts stalled until Stanbic entered into a contract with a Tanzanian company, EGMA, for consultancy services, and subsequently transferred $6

million to EGMA. There was no evidence that any consultancy services were provided in exchange for the sum paid and the vast majority of the sum was swiftly withdrawn in cash. Two of the three directors of EGMA were politically connected individuals. The court determined that this payment was a bribe because the money was paid with the intention that the recipients perform their roles improperly in appointing Standard Bank and Stanbic. Standard Bank, which did not have adequate measures in place to guard against corruption risks, was found to have failed to prevent the bribery by relying on Stanbic to conduct due diligence and failing to make any inquiries of its own.

Although the Standard Bank DPA is a very public success for the SFO, pressure remains on the SFO to conclude a second DPA, as has been publicly announced. According to Green, one of the main obstacles to the successful negotiation of DPAs has been that corporate entities may have concluded that prosecution of a company under English law is so difficult that it would not be in their interests to agree to a DPA.[289] To counter this, Green has advocated a move away from the identification (or "directing mind") principle of corporate criminal liability, which requires guilty knowledge to be proven against a person at or close to board level to secure a conviction, towards a looser liability standard. However, in September 2015, the UK government announced that it was abandoning plans to introduce a general corporate offense of failure to prevent economic crime, which would essentially represent an expansion of section 7 liability beyond bribery and corruption.[290]

It remains to be seen what the effect of the first successfully negotiated DPA will be on the prospects of future agreements, but it seems unlikely to open the floodgates on companies proactively reporting wrongdoing within their organizations to the SFO. While there are reputational benefits for a company in transparency and cooperation, a high threshold for establishing corporate criminal liability will continue to influence companies' decisions about whether or not to come forward.

B. Germany

1. Enforcement

In 2015, U.S. and Swiss investigations into alleged corruption within FIFA also triggered law enforcement actions in Germany. The public prosecutor's office in Frankfurt am Main is investigating the award of the 2006 Football World Championship to the German Football Association, Deutscher Fussballbund ("DFB").[291] DFB is the world's largest national football association. According to media reports, DFB representatives tapped into a fund worth approximately €6.7 million to influence FIFA officials to grant the hosting of the 2006 championship to DFB.[292] The investigation focuses on tax issues, as bribery offenses, if applicable, would be time-barred.

Large German multinationals were accused of being involved in bribery schemes overseas in 2015. A subsidiary of German construction company Bilfinger is alleged to have paid bribes to Brazilian government officials in exchange for contracts to build traffic control centers in connection with the 2014 World Cup in Brazil.[293] Bilfinger, which is under a DOJ monitorship following its settlement of FCPA charges related to bribery in Nigeria, became the first known company to voluntarily disclose potential misconduct under Brazil's new anti-corruption laws, as described below in our summary of Brazilian developments.[294]

Greek investigators also pursued German companies. In the defense sector, companies like Rheinmetall and Atlas Elektronik are subject to investigations by law enforcement agencies in crisis-ridden Greece.[295] A spokesman of the Greek secretary of defense claimed that Greece would be entitled to compensation of more than US$100 million. More criminal proceedings in Greece were opened against former managers and other representatives of German multinational Siemens.[296] Siemens, which came into public focus in connection with worldwide bribery allegations in 2008, is now accused of having paid bribes of €70 million to a Greek telecommunications company in the late 1990s.[297] In a similar proceeding, Greek authorities accused managers of the German carmaker Daimler of having bribed Greek government officials in order to obtain contracts for military vehicles worth more than €100 million.[298]

2. Legislation

At the end of 2015, new German legislation came into force that enhances criminal liability for the corrupt conduct of individuals. First, the scope of Sections 331 and 333 of the German Criminal Code were widened to include accepting or granting something of value for the mere performance of official duties by, or to, a government official of the European Union. Until the amendment, corrupt payments to EU officials were not subject to criminal prosecution in Germany unless it could be proven that the payment had been made in order to induce an official to act in violation of an official's duties. Second, the scope of the prohibition against commercial bribery in the German Criminal Code was extended. It is now a criminal act to make a corrupt payment to an employee to cause the employee to violate his or her duties vis-à-vis the employer in a situation where the company is ordering goods or services. Before the amendment, commercial bribery was treated as a criminal act only insofar as the payment was made while a competitor was offering similar goods or services and the payment was made to seek preferential treatment. Finally, the new legislation incorporates into the German Criminal Code provisions that extend the scope of German criminal law to cover foreign bribery. While these provisions are not entirely new, they used to be found in ancillary statutes. Their new place in the German Criminal Code itself illustrates the importance the German legislature attributes to combatting international bribery.

Legislation under consideration would significantly tighten individual criminal liability in the health sector in 2016. The amendments to Section 299a would make it a criminal act for a doctor, or another member of a healthcare profession, to request, accept the promise of, or accept an advantage for himself or a third party as a quid pro quo for purchasing, prescribing, administering or dispensing medical products or for referring patients or test material, provided the doctor thereby unduly favors someone else in a competitive situation or otherwise breaches his professional duties. Likewise, an employee of, for example, a pharmaceutical company, could be prosecuted criminally for offering, promising or giving an advantage to a doctor or member of a healthcare profession under such circumstances. This legislation is designed to close a widely criticized loophole in German law that was created by a prior judicial decision; the bill has not yet obtained final parliamentary approval.

Draft legislation in North Rhine Westphalia, the largest of Germany's sixteen states, to introduce corporate criminal liability remains widely discussed among important stakeholders, and key government leaders have not taken final positions on the bill yet. Most observers do not expect that corporate criminal liability will be introduced into German law during the current legislative period.

Meanwhile, as we have described in previous updates, corporations lacking an adequate compliance organization will remain punishable in Germany under the Administrative Offenses Act and be subject to ancillary sanctions, such as fines and disgorgement orders.[299]

C. European Union

In the EU, 2015 began with two reports by the European Commission on progress in Bulgaria[300] and Romania[301] under the Co-Operation and Verification Mechanism ("CVM"). The CVM was set up at the accession of Bulgaria and Romania to the European Union in 2007 to address and monitor judicial reforms and the fight against corruption by Bulgarian and Romanian authorities. The CVM report for Bulgaria indicates that corruption remains a serious issue in Bulgaria due to a lack of effective enforcement authorities and an outdated Criminal Code. In contrast, Romania has seen a wide range of high-level cases being prosecuted by a special enforcement unit, and a former Romanian Prime Minister, former Ministers, Members of Parliament, mayors and magistrates have been charged or convicted for corruption. However, political resistance to investigations and legal system reforms, particularly with regard to asset recovery, remain major issues in Romania.

In September 2015, the European Economic and Social Committee ("EESC") issued an Opinion Paper on "Fighting corruption in the EU: meeting business and civil society concerns."[302] The EESC is a consultative body of the European Union that provides representatives of Europe's social interest groups with a formal platform to express their views on EU issues to the European Commission and European Parliament. The EESC Opinion Paper made a number of recommendations to EU institutions, among

them the recommendation to develop a "coherent and comprehensive five-year anti-corruption strategy and an accompanying action plan" endorsed by all EU institutions. According to the EESC, the EU should promote the adoption and implementation of compliance, anti-bribery codes and standards in individual companies; should encourage companies to ensure that anti-corruption standards are upheld throughout their supply chain; and should ensure that compliance measures are also adopted by small and medium-sized enterprises.

In last year's review, we reported on the EU Commission's first Anti-Corruption Report. An update of that report is expected in 2016.

D. Brazil

As reported last year, Brazil enacted a new anti-corruption law, the Clean Company Act, in August 2013 that came into force on January 29, 2014.[303] The law imposes civil and administrative liability on companies, both domestic and foreign, for acts of corruption and bid rigging by their employees or agents. The Brazilian Criminal Code also provides for criminal liability for individuals who engage in bribery of domestic and foreign public officials.

In March 2015, the government issued implementing regulations for the Clean Company Act that clarified five areas in particular: (1) process for administrative enforcement of the law; (2) penalty calculation; (3) leniency agreements; (4) compliance programs; and (5) suspended and sanctioned companies lists.[304] Of particular note, the regulations indicate that companies with robust compliance programs may be eligible for reductions in monetary fines of up to 4% of the company's gross annual revenues in the event it is implicated in corruption-related offenses.[305] The regulations also outline guidelines for evaluating the effectiveness of a compliance program (which the regulations call "integrity programs"), including factors such as tone at the top, ongoing training and risk assessment, a designated compliance officer, accurate accounting records, and effective due diligence.[306] Finally, the regulations grant the Federal Comptroller's Office (the "CGU") jurisdiction to enter into leniency agreements in federal investigations under the Clean Company Act.[307]

Shortly thereafter, the CGU released additional implementing regulations and a guide for companies seeking to comply with the Clean Company Act and develop strong compliance programs.[308] The regulations set forth specific documentation that should be maintained as part of a company's compliance program. In the event of an investigation, a company will have 30 days to submit evidence and documentation in its defense; thus, it is to the company's benefit to have the relevant documentation easily accessible.[309]

While many questions remain about how these regulations will be applied in practice, they appear to represent a critical step forward in operationalizing the Clean Company Act and equipping regulators and companies with key information about how to evaluate a company's compliance efforts.

In a significant development in Brazilian enforcement efforts, the German firm Bilfinger SE became the first international company to disclose misconduct voluntarily in an effort to seek leniency under the Clean Company Act, as noted above.[310] In announcing the disclosure, the CGU noted that while Bilfinger would not be exempt from fines as a result of seeking leniency, it could be guaranteed the right to keep operating in Brazil. Several other companies tied to the ongoing corruption investigations at Brazil's state-owned oil company Petrobras also are pursuing leniency agreements. Of those companies, Netherlands-based SBM Offshore has entered into a framework for discussions with the CGU to resolve corruption allegations arising from the Petrobras investigation, and may be the first company to reach a leniency agreement in that inquiry.[311]

The possibility of leniency agreements remains controversial in Brazil, with prosecutors objecting on the grounds that such agreements may hinder ongoing criminal investigations by allowing corporations to resolve allegations without providing any new evidence, and others viewing them as yet another loophole for well-connected parties to avoid meaningful penalties. But government officials have stated that they view leniency agreements as a means of allowing recovery to begin within the hard-hit oil and gas sector

of the economy, and note that it will simply take time to adjust to the new methods of resolving corruption-related allegations.[312] The Brazilian justice system is still wrestling with how and when it will allow corporations to obtain leniency agreements, and much remains to be seen about how these agreements will be implemented in practice.

Arrests and indictments related to corruption at Petrobras continued with renewed intensity throughout 2015, and are expected to continue apace in 2016. Petrobras officials now estimate that the total value of all bribes given or received in connection with work performed for the company may have risen as high as $3 billion, evidencing an institutionalized level of corruption unprecedented in Brazil's history.[313] In August 2015, speaker of the house Eduardo Cunha became the first sitting politician to be charged in the scandal in connection with allegations that he accepted a $5 million bribe related to contracts for drill ships.[314] Prosecutors also charged former president Fernando Collor de Mello, who resigned the presidency in 1992 due to unrelated corruption allegations and later became a senator.[315] Over 30 additional sitting politicians are also said to be under investigation for bribery allegations, as well as a number of former politicians.[316] In addition to politicians, prosecutors arrested Marcelo Odebrecht, the head of Latin America's largest engineering and construction firm, Otavio Marques Azevedo, head of Brazil's second-largest construction firm,[317] billionaire investment banker Andre Esteves, and numerous others.[318] Rolls-Royce also has confirmed that it is cooperating with a bribery investigation in Brazil, and was named in court filings as allegedly paying bribes to obtain a contract to supply equipment for Petrobras oil rigs.[319] President Dilma Rousseff, who previously served as the head of Petrobras during some of the time period under investigation, thus far has not been implicated in the investigation. However, lawmakers initiated impeachment proceedings in relation to government accounting issues, and she has been the target of protests across the country for failing to eradicate corruption in the government.[320]

E. India

In recent years, India has expanded efforts to combat corruption in both the public and private sectors. The Lokpal and Lokayuktas Act, which created an independent ombudsman's office tasked with investigating and prosecuting cases of misconduct by politicians and government agents, took effect in January 2014.[321] Parliament is currently considering amendments to the law that would consolidate anti-corruption investigations and enforcement authority into a single, centralized agency.[322] The Whistleblowers' Protection Act, which also took effect in 2014, aims to provide "adequate protection to persons reporting corruption or wilful misuse of power or wilful misuse of discretion which causes demonstrable loss to the Government or commission of a criminal offense by a public servant."[323]

Since assuming office in May 2014, Prime Minister Narendra Modi has made anti-corruption a top priority of his administration.[324] India's recent anti-corruption legislation aims to effectively implement the United Nations Convention Against Corruption, which India ratified in May 2011, and to bring domestic law in line with international practices.[325]

In April 2015, the Union Cabinet approved amendments to the Prevention of Corruption Act of 1988 to include tougher prison terms for individuals convicted under the law; liability for commercial entities that induce public servants; an expansion of the types of corruption covered under the law; and a "speedy trial" provision aimed at reducing the trial period for cases brought under the law from an average of eight years to two years.[326] These amendments are currently pending before one house of Parliament.[327]

In July 2015, the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (popularly known as the "Black Money Act") took effect. The law aims to curb undisclosed foreign assets and income by imposing a tax and penalty on undeclared bank accounts and assets abroad.[328]

While India has long criminalized the bribery of Indian officials, the country does not currently criminalize foreign bribery.[329] However, the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, initially introduced in 2011, was reintroduced in August 2015.[330] The proposed bill provides for prison terms and fines for individuals who offer bribes to foreign public officials or to officials of public international organizations, and also penalizes foreign officials who accept bribes.[331]

Anti-corruption enforcement efforts are continuing. In July 2015, the Supreme Court of India transferred the ongoing "Vyapam" case involving widespread corruption in a state government examination board to the Central Bureau of Investigation.[332] To date, more than 2,000 individuals have been charged in the case.[333] In 2012, an Indian politician brought suit against Sonia Gandhi, President of the Indian National Congress Party, and her son, Rahul Gandhi, for allegedly misappropriating $300 million through the purchase of a newspaper non-profit company.[334] The graft case is ongoing, with court appearances and hearings scheduled for 2016.[335]

F. China

1. Enforcement

In April 2015, Jiang Jiemin, former chairman of China National Petroleum Corporation ("CNPC"), went on trial on charges of bribery, abuse of power of a state-owned enterprise, and owning properties that he could not have afforded from his legitimate earnings.[336]

Between 2004 and 2013, Jiang was the deputy general manager, general manager and chairman of CNPC, and concurrently served as chairman and CEO of PetroChina Company Limited. In 2013, Jiang was promoted to the head of the state-owned Assets Supervision and Administration Commission.[337] The court found that Jiang took advantage of his office to benefit others with projects and job promotions and accepted bribes valued at RMB14 million, paid either to himself or his wife. As of August 2013, Jiang's personal and family property and expenditures had apparently surpassed his and his family's legal income and Jiang could not identify the sources for the surplus. The court further found that Jiang abused his power to gain huge benefits for others by obtaining oil and gas field exploration rights and bidding for gas turbine power generation projects, thereby harming state interests.[338] Jian pleaded guilty to all charges and on October 12, 2015 was sentenced to 16 years in prison.[339]

In July 2015, a Chinese lawyer lodged a complaint with China's Supreme People's Procuratorate, urging the top prosecutor to launch an anti-graft investigation into Mead Johnson in the wake of its $12.03 million settlement with the SEC.[340] The SEC alleged that Mead Johnson made over $2 million in improper payments to officers and doctors in public hospitals in China.[341] Mead Johnson settled with the SEC on a neither admit nor deny basis. However, the Chinese complaint argues that acceptance by Mead Johnson of the penalties imposed by the SEC is proof that Mead Johnson has admitted conduct that constitutes a bribery offense under Chinese law. It is unclear at this point how Chinese authorities will handle this complaint; if Chinese authorities pursue the complaint, that could be a significant development for any U.S. companies who settle with U.S. authorities in relation to conduct that occurred in China.

Finally, in April 2015, the China National Central Bureau of the Interpol released a list of China's 100 most wanted economic crime fugitives, as part of "Sky Net," an initiative lead by the central government to repatriate suspects of duty-related crimes and economic fugitives, recover their illicit gains, and prevent other suspects from fleeing overseas.[342] Since the release of this list, 18 of the 100 most wanted have been caught. As of November 2015, Sky Net also had hunted down 863 fugitives, of whom 738 returned from overseas, and 125 were identified within China and were arrested. Among the 738 who returned from overseas, 305 were directly arrested from overseas, 300 came back upon persuasion, 30 were repatriated, and 103 were expatriated or through other means. Forty-eight of these returnees were from the United States. Illicit gains of RMB1.2 billion have been recovered to date.[343]

2. Legislation

In August 2015, China enacted Amendment IX to the Criminal Law, which came into effect in November 2015. A new clause was added to the law that punishes those individual or entities who seek illegitimate interests by giving bribes to the close relatives of—or others with close ties to—former or current national government officials. The amendment to the law was passed in response to an increase in recent years of the provision of gifts and bribes to government officials indirectly, through people close to government officials, such as the officials' family members, secretaries, or domestic employees. In addition to adding jail time for bribe givers, the new law also adds financial penalties.[344] This amendment reflects a change

in emphasis by Chinese authorities, who previously have focused attention and punishment on bribe takers as opposed to bribe givers.[345]

G. Canada

In 2015, Canada's enforcement of its newly strengthened Corruption of Foreign Public Officials Act ("CFPOA"), continued apace. At the same time, Canada passed legislation softening its approach to debarring corporations convicted of anti-corruption offenses from bidding on government contracts.

As previously reported last year, the Royal Canadian Mounted Police ("RCMP"), which has primary enforcement authority for the CFPOA, and provincial authorities have been since 2014 investigating SNC-Lavalin ("SNC"), a Montreal-based engineering and construction firm for corruption of foreign officials in Bangladesh, Cambodia, Libya, and Algeria. Following this investigation, the Public Prosecution Services of Canada charged SNC and two of its affiliates with fraud and corruption in connection with business ventures in Libya.[346] The government alleges that SNC paid $47.7 million in bribes to Libyan public officials between 2001 and 2011 in exchange for contracts.[347] SNC denies the accusations and has stated that the company intends to plead not guilty.[348]

In a separate matter, SNC settled bribery allegations with the African Development Bank Group on October 1, 2015 related to SNC's securing of two construction contracts in Mozambique and Uganda.[349] The settlement agreement required SNC to pay $1.5 million to support anti-corruption programs, and imposed a conditional non-debarment for a period of two years and ten months.

In January 2015, the RCMP raided the headquarters of MagIndustries, a Toronto-based mining company, apparently in pursuit of evidence of improper payments made to foreign officials in the Republic of Congo.[350] A whistleblower claimed that MagIndustries paid bribes to Congo officials to advance its potash mine and processing facility in the region. MagIndustries subsequently conducted an internal investigation, confirming that shareholder Evergreen Holding Company, a Chinese firm, and its Congolese subsidiaries paid such bribes.[351] The illicit exchanges included payments of as much as $51,000 to Congolese officials to reduce the company's tax liability as well as an agreement to construct a villa for a government official. The RCMP has not yet filed charges, but this investigation could become one of Canada's largest CFPOA cases to date.

While Canada has pursued cases under its newly expanded anti-corruption law this year, Canada has also softened its debarment regulations. Until recently, Canada had one of the toughest debarment regimes of any industrialized nation. Companies and their affiliates convicted anywhere in the world of an anti-corruption offense were banned for up to ten years from bidding on Canadian government contracts.[352] Critics lamented this inflexible approach as harsh and unfair and resulting in staggering economic losses for Canada.[353] In response, the Canadian government passed three major amendments to its debarment policies on July 3, 2015.[354] First, companies are now debarred based on convictions acquired within the past three years, instead of ten. Second, the term of debarment is reduced from ten to five years when a company cooperates and remediates the wrongdoing. And finally, companies are no longer responsible for the actions of their affiliates absent evidence of the company's involvement. The new rules also encourage self-reporting by permitting companies to seek advanced determination of their debarment risk.[355] The rules, however, have become broader in one respect: companies merely charged—and not convicted—with an anti-corruption violation may be debarred for up to 18 months.[356]

H. World Bank

The World Bank's Integrity Vice Presidency ("INT"), which investigates allegations of fraud and corruption in activities financed by the World Bank, opened 99 investigations in fiscal year 2015.[357] This was a return to previous levels following a fall in investigations during fiscal year 2014, when only 40 investigations were opened.[358] Despite these fluctuating numbers, the INT case substantiation rate (the proportion of cases in which sufficient evidence was uncovered to conclude that it is more likely than not that the firm and/or individual under investigation has participated in one of the Bank Group's five sanctionable practices) continues an upwards trajectory and now stands at 74%.[359]

The number of entities debarred by INT this year—65—remained similar to last year's figure.[360] Debarred entities are suspended from bidding on contracts or obtaining access to loans financed by the World Bank; in addition, the matter may be referred to the relevant national government for further investigation. Debarment is usually time-limited, or conditional, compelling entities to meet certain compliance conditions before reinstatement will be considered. Other sanctions issued include conditional non-debarments and letters of reprimand. The longest debarment issued this year was thirteen years, given to Liberia-based N.C. Sanitors & Service Corporation, for engaging in fraudulent practices and "making payments to various public officials involved with the [projects] and to staff of a supervising consultant, in order to facilitate the processing of [the company's] invoices and to maintain good relations."[361]

The World Bank's 2015 Annual Update highlighted the Bank's growing forensic capability, which has allowed it to go "beyond quantifying fraud and corruption in procurement to tracking losses of funds."[362] A more detailed assessment of global transactions has facilitated the implementation of early warning systems designed to ensure high-risk operations meet their objectives. The Bank says it is also taking proactive steps with debarred entities to restore their participation in World Bank contract-bidding and loan-financing mechanisms; in the fiscal year 2015, seven companies had their debarment lifted after fulfilling the conditions of their sanctions.[363]

In July 2015, the World Bank approved an exhaustive overhaul of the procurement policy and procedures relating to World Bank-financed projects.[364] The new framework, to be implemented in 2016, contains relatively minimal amendments to fraud and corruption provisions.[365] Instead, the primary focus is on boosting consistency and efficiency for example by creating bespoke integrity measures designed around the individual procurement, rather than a one-size-fits-all approach. Companies that foresee involvement in the procurement process will not need to make significant adjustments to current anti-corruption measures but should remain alert to possible future changes that may be more comprehensive in this area.

VIII. Predictions

A year with only two DOJ corporate resolutions, after years of seven or more, is a reminder of just how unforeseeable certain major developments can be. That said, we see the following as events and trends that companies and practitioners should prepare for, if not count on:

- An increase in the number of DOJ corporate resolutions seems very likely. There are too many cases in the pipeline, and the DOJ has too many dedicated FCPA resources, to remain at two per year.

- On the civil side, we expect the SEC to continue to settle enforcement actions, primarily through administrative proceedings, at the pace we have seen in recent years. The SEC will continue to push the envelope on what qualifies as a "thing of value" under the statute, especially in the area of intangible benefits provided to government officials. To that end, we expect that additional cases relating to corporate hiring will begin to settle at some point this year.

- The government may make publicly available more details concerning what it views as appropriate compliance practices. DOJ compliance expert Hui Chen will naturally begin to refine her views as she reviews actual programs from actual cases. Information on exactly what those views are will be accumulated piecemeal by practitioners as resolutions and declinations take place. It would also be logical—and fair—for the Fraud Section to promulgate more information about its developing standards in public speeches and articles. An early indication of this trend may have come in late January 2016, when Fraud Section Chief Andrew Weismann indicated the Fraud Section was considering refreshing the FCPA *Resource Guide*.[366] Over the very long term, Hui Chen's hiring may be the first step in a kind of federal common law for compliance.

- The DOJ may follow through on indications that it plans to announce more declinations publicly. As noted above, Assistant Attorney General Leslie R. Caldwell has indicated an intention to

announce more declinations publicly. To the extent this means the DOJ will grant more declinations in the first place, this shift would, of course, be good for companies. At the same time, some declinations that have remained private remained so because the company itself did not wish to publicize the fact that it had FCPA issues. Companies must carefully consider the implications when the DOJ offers to reward the company not only by declining, but also by making a public announcement.

- Prosecutions against individuals will likely increase as the DOJ implements the policy behind the Yates Memorandum, discussed above. Because individuals have less incentive than companies to settle with enforcement authorities, this trend may lead to additional judicial scrutiny of some of the agency's long-held positions.

- The Dodd-Frank whistleblower reward regime will continue to incentivize employees, former employees and others to bring allegations to the attention of the government, often packaged by counsel on a contingent-fee basis, which will help keep the government's pipeline full.

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[1] Those cases involved Dmitrij Harder, James Michael Rama, Richard Hirsch, James McClung, Vicente Eduardo Garcia, Daren Condrey, Roberto Enrique Rincon-Fernandez, and Abraham Jose Shiera-Bastidas.

[2] Those cases involved Benito Chinea and Joseph DeMeneses.

[3] Those resolutions involved IAP Worldwide Services Inc. and Louis Berger International Inc.

[4] Those resolutions involved Alcoa World Alumina, Marubeni Corporation, Hewlett-Packard A.O., Hewlett-Packard Polska, Hewlett-Packard Mexico, Bio-Rad Laboratories, Dallas Airmotive Inc., Avon Products Inc., Avon Products (China) Co. Ltd., Alstom S.A., Alstom Grid Inc., Alstom Power Inc., and Alstom Network Schweiz AG.

[5] IAP Worldwide Services Inc. agreed to pay a $7.1 million penalty, and Louis Berger International Inc. agreed to pay a $17.1 million penalty.

[6] WilmerHale treats actions against a group of corporations stemming from related facts as a single case, and actions against multiple individuals stemming from related facts as separate cases. Actions filed under seal and later made public are counted in the year in which they were originally filed.

[7] *Q&A with DOJ Fraud Chief Andrew Weissmann*, TRACE TRENDS: A COMPLIANCE CONVERSATION (Jan. 26, 2016), http://www.traceinternational.org/qa-with-doj-fraud-chief-andrew-weissmann.

[8] Those resolutions were with PBSJ Corporation, Goodyear Tire & Rubber Co., FLIR Systems, Inc., BHP Billiton Ltd. and BHP Billiton Plc, Mead Johnson Nutrition Company, The Bank of New York Mellon Corporation, Hitachi, Ltd., Hyperdynamics Corp., and Bristol-Myers Squibb Co.

[9] Those resolutions were with Walid Hatoum and Vicente Garcia.

[10] The so-called Filip factors, which were established in 2008 by former Deputy Attorney General Mark Filip, are the DOJ's internal guidance for providing cooperation credit to companies and include the strength of a corporate compliance program.

[11] Ross Todd, *DOJ, SEC Officials Share Views, Defend Record*, THE RECORDER, Jan. 30, 2015.

[12] Ross Todd, *DOJ, SEC Officials Share Views, Defend Record*, THE RECORDER, Jan. 30, 2015.

[13] Ross Todd, *DOJ, SEC Officials Share Views, Defend Record*, THE RECORDER, Jan. 30, 2015.

[14] Leslie R. Caldwell, Assistant Attorney General, U.S. Department of Justice, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (Apr. 17, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law.

[15] Leslie R. Caldwell, Assistant Attorney General, U.S. Department of Justice, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (Apr. 17, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law.

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[17] Leslie R. Caldwell, Assistant Attorney General, U.S. Department of Justice, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (Apr. 17, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law.

[18] Leslie R. Caldwell, Assistant Attorney General, U.S. Department of Justice, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (Apr. 17, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law.

[19] Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download.

[20] Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing at 3 (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download.

[21] The Yates Memorandum also instructs criminal and civil attorneys for the government to focus on individuals from the inception of an investigation. It stresses early communication between criminal and civil attorneys, instructing prosecutors to discuss civil referrals in the event of a decision not to prosecute and directing civil attorneys to involve prosecutors when they believe that an individual identified in a corporate investigation should face criminal charges. Civil attorneys should also focus on individuals and evaluate whether to bring suit against them based on considerations beyond an individual's ability to pay. In addition, the memo provides new guidance for the resolution of investigations. Absent extraordinary circumstances, the Department will not agree to a corporate resolution that protects an individual from criminal or civil liability. In cases where the investigation of an individual will continue after prosecutors seek authorization to resolve a corporate investigation, government attorneys must identify in writing the potentially liable individuals and propose a plan to resolve the matter before the applicable statute of limitations expires. If the government ultimately decides not to charge individuals, prosecutors must memorialize that determination and have it approved by the U.S. Attorney or Assistant Attorney General or their designees. *See* Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing, at 4-7 (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download.

[22] Leslie R. Caldwell, Assistant Attorney General, U.S. Department of Justice, Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0.

[23] Leslie R. Caldwell, Assistant Attorney General, U.S. Department of Justice, Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0.

[24] United States Attorneys' Manual § 9-28.700 (Nov. 2015), http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.720.

[25] Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015), http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0.

[26] U.S. Attorneys' Manual § 9-28.710 (Aug. 2008), http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

[27] Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing, at 4 (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download.

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[31] *See Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1418-20, 1423-27 (3d Cir. 1991) (surveying the law of attorney-client privilege before concluding that disclosure of information obtained during an internal investigation to the SEC and DOJ resulted in waiver of a corporation's privilege).

[32] Andrew Ceresney, Director, Division of Enforcement, SEC, American Conference Institute's 32nd FCPA Conference Keynote Address (Nov. 17, 2015), http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

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[36] U.S. Securities and Exchange Commission Press Release No. 2013-65: SEC Announces Non-Prosecution Agreement With Ralph Laurent Corporation Involving FCPA Misconduct (Apr. 22, 2013); Non-Prosecution Agreement between U.S. Securities and Exchange Commission and Ralph Lauren Corporation (Apr. 18, 2013); U.S. Securities and Exchange Commission Press Release No. 2011-112: Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011); Deferred Prosecution Agreement between U.S. Securities and Exchange Commission and Tenaris, S.A. (May 17, 2011).

[37] Ellen Nakashima, *Justice Department could give firms a pass on foreign bribery if they confess*, WASH. POST, Nov. 11, 2015.

[38] Josh Kovensky, Transcript: Stokes and Brockmeyer remarks, MAIN JUSTICE (Nov. 25, 2015), http://www.mainjustice.com/justanticorruption/2015/11/25/transcript-stokes-and-brockmeyer-remarks/.

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[56] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, Rel. No. 3679, File No. 3-16762, ¶ 1 (Aug. 18, 2015).

[57] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, Rel. No. 3679, File No. 3-16762, ¶ 31 (Aug. 18, 2015).

[58] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, Rel. No. 3679, File No. 3-16762, ¶¶ 14-15 and 17 (Aug. 18, 2015).

[59] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, Rel. No. 3679, File No. 3-16762, ¶¶ 14-18 (Aug. 18, 2015).

[60] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, Rel. No. 3679, File No. 3-16762, ¶ 18 (Aug. 18, 2015).

[61] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, Rel. No. 3679, File No. 3-16762, ¶ 18 (Aug. 18, 2015).

[62] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, Rel. No. 3679, File No. 3-16762, ¶¶ 19-20 (Aug. 18, 2015).

[63] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, Rel. No. 3679, File No. 3-16762, ¶¶ 21-22 and 24 (Aug. 18, 2015).

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[66] Non-Prosecution Agreement between U.S. Department of Justice and IAP Worldwide Services, Inc., at 3 (June 16, 2015), http://www.justice.gov/opa/file/478281/download.

[67] Non-Prosecution Agreement between U.S. Department of Justice and IAP Worldwide Services, Inc., (June 16, 2015), Attachment A ¶¶ 11-12.

[68] Non-Prosecution Agreement between U.S. Department of Justice and IAP Worldwide Services, Inc., Attachment A ¶¶ 13-14 (June 16, 2015).

[69] Non-Prosecution Agreement between U.S. Department of Justice and IAP Worldwide Services, Inc., Attachment A ¶ 23 (June 16, 2015).

[70] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, ¶ 7 (D.N.J. July 7, 2015).

[71] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, Attachment A ¶ 8 (D.N.J. July 7, 2015).

[72] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, Attachment A ¶ 10 (D.N.J. July 7, 2015).

[73] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, Attachment A ¶¶ 15, 22, 24, 30 (D.N.J. July 7, 2015).

[74] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, ¶ 4 (D.N.J. July 7, 2015).
[75] U.S. Securities and Exchange Commission Press Release No. 2015-93: SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015).
[76] U.S. Securities and Exchange Commission Press Release No. 2015-93: SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015).
[77] U.S. Securities and Exchange Commission Press Release No. 2015-93: SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015).
[78] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶ 8 (May 20, 2015).
[79] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶ 1 (May 20, 2015).
[80] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶¶ 1, 15 (May 20, 2015).
[81] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶ 15 (May 20, 2015).
[82] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶¶ 1, 11 (May 20, 2015).
[83] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶¶ 11 (May 20, 2015).
[84] Andrew Ceresney, Director, Division of Enforcement, SEC, American Conference Institute's 32nd International Conference on the Foreign Corrupt Practices Act (Nov. 17, 2015), http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.
[85] U.S. Securities and Exchange Commission Press Release No. 2015-62: SEC Charges Oregon-Based Defense Contractor With FCPA Violations (Apr. 8, 2015).
[86] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stephen Timms and Yasser Ramahi*, Rel. No. 73616, File No. 3-16281 (Nov. 17, 2014).
[87] Order Instituting Cease-and-Desist Proceedings, *In the Matter of FLIR Systems, Inc.*, Rel. No. 74673, File No. 3-16478, ¶¶ 1, 10-11, 19 (Apr. 8, 2015).
[88] U.S. Securities and Exchange Commission Press Release No. 2015-62: SEC Charges Oregon-Based Defense Contractor With FCPA Violations (Apr. 8, 2015).
[89] U.S. Securities and Exchange Commission Press Release No. 2015-62: SEC Charges Oregon-Based Defense Contractor With FCPA Violations (Apr. 8, 2015).
[90] Order Instituting Cease-and-Desist Proceedings, *In the Matter of FLIR Systems, Inc.*, Rel. No. 74673, File No. 3-16478, ¶¶ 22-24 (Apr. 8, 2015).
[91] Order Instituting Cease-and-Desist Proceedings, *In the Matter of FLIR Systems, Inc.*, Rel. No. 74673, File No. 3-16478, ¶ 4 (Apr. 8, 2015).
[92] Order Instituting Cease-and-Desist Proceedings, *In the Matter of FLIR Systems, Inc.*, Rel. No. 74673, File No. 3-16478, ¶ 4 (Apr. 8, 2015).
[93] Order Instituting Cease-and-Desist Proceedings, *In the Matter of FLIR Systems, Inc.*, Rel. No. 74673, File No. 3-16478, ¶ 5 (Apr. 8, 2015).
[94] Order Instituting Cease-and-Desist Proceedings, *In the Matter of FLIR Systems, Inc.*, Rel. No. 74673, File No. 3-16478, ¶ 6 (Apr. 8, 2015).
[95] Order Instituting Cease-and-Desist Proceedings, *In the Matter of FLIR Systems, Inc.*, Rel. No. 74673, File No. 3-16478, ¶¶ 10-15 (Apr. 8, 2015).
[96] U.S. Securities and Exchange Commission Press Release No. 2015-62: SEC Charges Oregon-Based Defense Contractor With FCPA Violations (Apr. 8, 2015).
[97] Order Instituting Cease-and-Desist Proceedings, *In the Matter of FLIR Systems, Inc.*, Rel. No. 74673, File No. 3-16478, ¶ 17 (Apr. 8, 2015).
[98] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶ 2 (May 20, 2015).
[99] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶¶ 17-18 (May 20, 2015).
[100] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶ 22 (May 20, 2015).
[101] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶¶ 19-20 (May 20, 2015).
[102] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton plc*, Rel. No. 74998, File No. 3-16546, ¶¶ 21, 23-25 (May 20, 2015).
[103] U.S. Securities and Exchange Commission Press Release No. 2015-93: SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015).

[104] U.S. Securities and Exchange Commission Press Release No. 2015-13: SEC Charges Former Executive at Tampa-based Engineering Firm With FCPA Violations; Company to Pay $3.4 Million in Deferred Prosecution Agreement (Jan. 22, 2015).
[105] U.S. Securities and Exchange Commission Press Release No. 2015-13: SEC Charges Former Executive at Tampa-based Engineering Firm With FCPA Violations; Company to Pay $3.4 Million in Deferred Prosecution Agreement (Jan. 22, 2015).
[106] Deferred Prosecution Agreement between U.S. Securities and Exchange Commission and The Atkins North America Holdings Corporation, Exhibit A ¶¶ 2, 4 (Jan. 22, 2015).
[107] Deferred Prosecution Agreement between U.S. Securities and Exchange Commission and The Atkins North America Holdings Corporation, Exhibit A ¶¶ 5-17 (Jan. 22, 2015)
[108] Deferred Prosecution Agreement between U.S. Securities and Exchange Commission and The Atkins North America Holdings Corporation, Exhibit A ¶¶ 19-22 (Jan. 22, 2015).
[109] Deferred Prosecution Agreement between U.S. Securities and Exchange Commission and The Atkins North America Holdings Corporation, Exhibit A ¶ 18 (Jan. 22, 2015).
[110] Deferred Prosecution Agreement between U.S. Securities and Exchange Commission and The Atkins North America Holdings Corporation, Exhibit A ¶¶ 27-29 (Jan. 22, 2015).
[111] U.S. Securities and Exchange Commission Press Release No. 2015-38: SEC Charges Goodyear With FCPA Violations (Feb. 24, 2015).
[112] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, § IV (Feb. 24, 2015).
[113] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶ 1 (Feb. 24, 2015).
[114] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶ 7 (Feb. 24, 2015).
[115] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶¶ 8-10 (Feb. 24, 2015).
[116] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶ 10 (Feb. 24, 2015).
[117] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶ 8 (Feb. 24, 2015).
[118] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶¶ 12-14 (Feb. 24, 2015).
[119] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, § IV.D (Feb. 24, 2015).
[120] 15 U.S.C. § 78m(b)(2)(A) (issuers shall make and keep books and records "which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer").
[121] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶ 19 (Feb. 24, 2015).
[122] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Bristol-Myers Squibb Co.*, Rel. No. 76073, File No. 3-16881, at 7 (Oct. 5, 2015).
[123] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Bristol-Myers Squibb Co.*, Rel. No. 76073, File No. 3-16881, at 1 (Oct. 5, 2015).
[124] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Bristol-Myers Squibb Co.*, Rel. No. 76073, File No. 3-16881, ¶ 11 (Oct. 5, 2015).
[125] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Bristol-Myers Squibb Co.*, Rel. No. 76073, File No. 3-16881, ¶ 12 (Oct. 5, 2015).
[126] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Bristol-Myers Squibb Co.*, Rel. No. 76073, File No. 3-16881, ¶¶ 5-10 (Oct. 5, 2015).
[127] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400 (Feb. 24, 2015).
[128] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶ 19 (Feb. 24, 2015).
[129] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goodyear Tire & Rubber Co.*, Rel. No. 74356, File No. 3-16400, ¶ 19 (Feb. 24, 2015).
[130] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704 (July 28, 2015).
[131] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶ 12 (July 28, 2015).
[132] *See, e.g.*, Harold Williams, Chairman, SEC, Address at the SEC Developments Conference (Jan. 13, 1981), at 3, https://www.sec.gov/news/speech/1981/011381williams.pdf.

[133] Sarah N. Lynch, *Exclusive: SEC Launched Civil Probe into FIFA Bribery Case*, REUTERS, July 17, 2015, http://www.reuters.com/article/us-sec-fifa-probe-idUSKCN0PS00120150718#TKbuAJOohZPYST0i.97.
[134] 15 U.S.C. § 78m(b)(2)(B).
[135] Complaint, *SEC v. Peterson*, No. 12-cv-2033 (E.D.N.Y. Apr. 25, 2012).
[136] 15 U.S.C. § 78m(b)(2)(B).
[137] U.S. Securities and Exchange Commission Press Release No. 2015-154: SEC Charges Mead Johnson Nutrition With FCPA Violations (July 28, 2015).
[138] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶¶ 2-3 (July 28, 2015).
[139] U.S. Securities and Exchange Commission Press Release No. 2015-154: SEC Charges Mead Johnson Nutrition With FCPA Violations (July 28, 2015).
[140] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, § IV.B (July 28, 2015).
[141] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶ 9 (July 28, 2015).
[142] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶ 10 (July 28, 2015).
[143] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶¶ 5, 7 (July 28, 2015).
[144] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶¶ 7, 11 (July 28, 2015).
[145] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶ 14 (July 28, 2015).
[146] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶ 14 (July 28, 2015).
[147] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶ 14 (July 28, 2015).
[148] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mead Johnson Nutrition Co.*, Rel. No. 75532, File No. 3-16704, ¶ 16 (July 28, 2015).
[149] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Hyperdynamics Corp.*, Rel. No. 76006, File No. 3-16843, pp. 3-4 (Sept. 29, 2015).
[150] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Hyperdynamics Corp.*, Rel. No. 76006, File No. 3-16843, ¶¶ 4-5 (Sept. 29, 2015).
[151] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Hyperdynamics Corp.*, Rel. No. 76006, File No. 3-16843, ¶¶ 4-6 (Sept. 29, 2015).
[152] U.S. Securities and Exchange Commission Press Release: SEC Charges Oracle Corporation With FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012).
[153] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶ 1 (D.D.C. Sept. 28, 2015).
[154] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 3, 13-15, and 17 (D.D.C. Sept. 28, 2015); Consent of Defendant, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶ 2 (D.D.C. Sept. 28, 2015); Final judgment, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, at 1-2 (D.D.C. Sept. 28, 2015).
[155] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 13-17 and 28-30 (D.D.C. Sept. 28, 2015).
[156] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 3-4 and 22-26 (D.D.C. Sept. 28, 2015).
[157] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 32-36 (D.D.C. Sept. 28, 2015).
[158] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 46-57 (D.D.C. Sept. 28, 2015).
[159] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 58-62 and 70-71 (D.D.C. Sept. 28, 2015).
[160] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 63-67 (D.D.C. Sept. 28, 2015).
[161] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 40-45 (D.D.C. Sept. 28, 2015).
[162] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 70-71 (D.D.C. Sept. 28, 2015).
[163] Complaint, *SEC v Hitachi, Ltd.*, No. 15-CV-01573, ¶¶ 71 (D.D.C. Sept. 28, 2015).
[164] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, Attachment A ¶ 3 (D.N.J. July 7, 2015).
[165] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, Attachment A, ¶¶ 37, 41 (D.N.J. July 7, 2015).
[166] Plea Agreement, *United States v. James M. Rama*, No. 1:15-cr-00143-GBL (E.D. Va. June 16, 2015).
[167] *See* Stephen Dockery, Defense Contractor Jailed Over Kuwait Bribery, WALL ST. J., Oct. 9, 2015, http://blogs.wsj.com/riskandcompliance/2015/10/09/defense-contractor-jailed-over-kuwait-bribery/.
[168] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, Attachment A, ¶ 18 (D.N.J. July 7, 2015).
[169] Deferred Prosecution Agreement, *United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624, Attachment A, ¶¶ 37, 41 (D.N.J. July 7, 2015).

[170] U.S. Department of Justice Press Release No. 15-066: Russian Nuclear Energy Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act (Aug. 31, 2015).
[171] U.S. Department of Justice Press Release No. 15-066: Russian Nuclear Energy Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act (Aug. 31, 2015).
[172] U.S. Department of Justice Press Release No. 15-1531: Former Russian Nuclear Energy Official Sentenced to 48 Months in Prison for Money Laundering Conspiracy Involving Foreign Corrupt Practices Act Violations (Dec. 15, 2015).
[173] Information, *United States v. Daren Condrey*, Cr. No. 15-0336, ¶ 2 (D. Md. June 16, 2015).
[174] Motion to Dismiss Indictment, *United States v. Mikerin*, 14-cr-00529-TDC, at 4 (D. Md. Mar. 13, 2015) ("Mr. Mikerin is a "foreign official" under the FCPA.").
[175] Plea Agreement, *United States v. Daren Condrey*, Cr. No. 15-0336 (D. Md. June 17, 2015).
[176] *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014) (defining "instrumentality" under the FCPA as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own") *cert. denied*, 135 S. Ct. 293 (2014).
[177] U.S. Department of Justice Press Release No 15-008: Former Owner and President of Pennsylvania Consulting Companies Charged with Foreign Bribery (Jan. 6, 2015).
[178] Indictment, *United States v. Dmitrij Harder*, No. 15-CR-00001-PD (E.D. Pa. Jan. 6, 2015).
[179] U.S. Department of Justice Press Release No 15-008: Former Owner and President of Pennsylvania Consulting Companies Charged with Foreign Bribery (Jan. 6, 2015).
[180] U.S. Department of Justice Press Release No 15-008: Former Owner and President of Pennsylvania Consulting Companies Charged with Foreign Bribery (Jan. 6, 2015).
[181] U.S. Department of Justice Press Release No 15-008: Former Owner and President of Pennsylvania Consulting Companies Charged with Foreign Bribery (Jan. 6, 2015).
[182] U.S. Department of Justice Press Release No 15-008: Former Owner and President of Pennsylvania Consulting Companies Charged with Foreign Bribery (Jan. 6, 2015).
[183] *See United States v. Dmitrij Harder*, No. 15-CR-00001-PD (E.D. Pa. Nov. 5, 2015).
[184] U.S. Department of Justice Press Release No 15-1005: Former Executive Pleads Guilty to Conspiring to Bribe Panamanian Officials (Aug. 12, 2015).
[185] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vicente E. Garcia*, Rel. No. 75684, File No. 3-16750, ¶ 1 (Aug. 12, 2015). On February 1, 2016, the SEC resolved with software manufacturer SAP SE, Garcia's employer, based on Garcia's conduct. The company agreed to pay $3,700,000 to disgorge profits from contracts allegedly awarded based on bribes, and an additional $188,896 in prejudgment interest. Order Instituting Cease-and-Desist Proceedings, *In the Matter of SAP SE*, Rel. No. 77005, File No. 3-17080, at 7 (Feb. 1, 2016). The SEC's Order found that SAP SE violated the books-and-records and internal-controls provisions. *Id.* at ¶¶ 26-27.
[186] U.S. Securities and Exchange Commission Press Release No. 2015-165: SEC Charges Former Software Executive with FCPA Violations (Aug. 12, 2015).
[187] U.S. Securities and Exchange Commission Press Release No. 2015-165: SEC Charges Former Software Executive with FCPA Violations (Aug. 12, 2015).
[188] U.S. Securities and Exchange Commission Press Release No. 2015-165: SEC Charges Former Software Executive with FCPA Violations (Aug. 12, 2015).
[189] U.S. Department of Justice Press Release No 15-1005: Former Executive Pleads Guilty to Conspiring to Bribe Panamanian Officials (Aug. 12, 2015); U.S. Securities and Exchange Commission Press Release No. 2015-165: SEC Charges Former Software Executive with FCPA Violations (Aug. 12, 2015); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vicente E. Garcia*, Rel. No. 75684, File No. 3-16750, ¶¶ 6, 14, 20 (Aug. 12, 2015).
[190] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vicente E. Garcia*, Rel. No. 75684, File No. 3-16750, ¶ 16 (Aug. 12, 2015).
[191] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vicente E. Garcia*, Rel. No. 75684, File No. 3-16750, ¶ 16 (Aug. 12, 2015).
[192] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vicente E. Garcia*, Rel. No. 75684, File No. 3-16750, ¶ 20 (Aug. 12, 2015).
[193] Indictment, *United States v. Rincon-Fernandez*, No. 15-CR-00654 (S.D. Tex. Dec. 10, 2015).
[194] Nate Raymond, *U.S. Makes Arrests Over Venezuelan Energy Corruption Scheme*, REUTERS, Dec. 20, 2015; José De Córdoba and Dudley Althaus, *Contractor Arrested in U.S. Amid Probe of Venezuelan Oil Giant*, WALL ST. J., Dec. 21, 2015.
[195] Indictment, *United States v. Rincon-Fernandez*, No. 15-CR-00654, ¶¶ 4-5 (S.D. Tex. Dec. 10, 2015).
[196] Indictment, *United States v. Rincon-Fernandez*, No. 15-CR-00654, ¶¶ 24-25, 85-88 (S.D. Tex. Dec. 10, 2015).
[197] Indictment, *United States v. Rincon-Fernandez*, No. 15-CR-00654, ¶ 29 (S.D. Tex. Dec. 10, 2015).
[198] Indictment, *United States v. Rincon-Fernandez*, No. 15-CR-00654, ¶ 30 (S.D. Tex. Dec. 10, 2015).

[199] Order of Detention Pending Trial, *United States v. Rincon-Fernandez*, No. 15-CR-00654, ¶ 4 (S.D. Tex. Dec. 21, 2015).
[200] Order of Detention Pending Trial, *United States v. Rincon-Fernandez*, No. 15-CR-00654, ¶ 4 (S.D. Tex. Dec. 21, 2015).
[201] Indictment, *United States v. Rincon-Fernandez.*, No. 15-CR-00654, ¶¶ 100-103 (S.D. Tex. Dec. 10, 2015).
[202] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Walid Hatoum*, Rel. No. 74112, File No. 3-16352 (Jan. 22, 2015).
[203] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Walid Hatoum*, Rel. No. 74112, File No. 3-16352, ¶ 2 (Jan. 22, 2015).
[204] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Walid Hatoum*, Rel. No. 74112, File No. 3-16352, ¶¶ 5-18 (Jan. 22, 2015).
[205] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Walid Hatoum*, Rel. No. 74112, File No. 3-16352, ¶¶ 20-22 (Jan. 22, 2015).
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