WILMERHALE

LITIGATION/CONTROVERSY

February 7, 2017

Foreign Corrupt Practices Act Alert

Global Anti-Bribery Year-in-Review: 2016 Developments and Predictions for 2017

1. Introduction: Enforcement Trends and Priorities

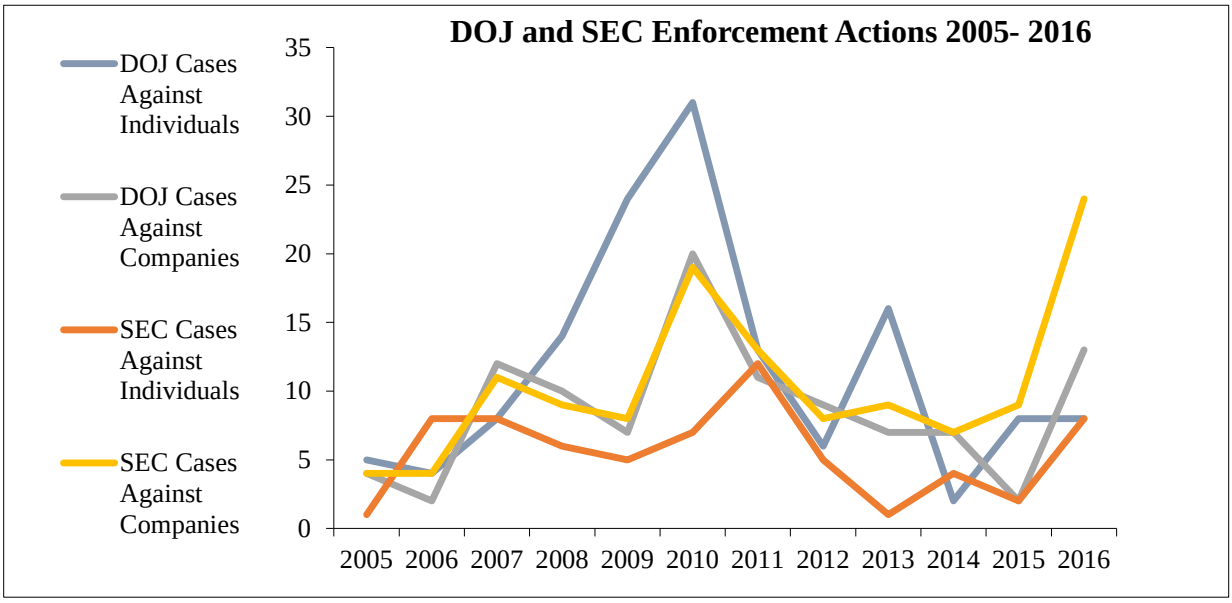
The past year was consequential for FCPA enforcement in numerous respects, including blockbuster penalties, new policy initiatives, and the SEC's first DPA with an individual for FCPA violations. In April 2016, the DOJ's Fraud Section introduced the Foreign Corrupt Practices Act Enforcement Plan and Guidance, which included a one-year pilot program (the "Pilot Program") to encourage voluntary disclosure, extraordinary cooperation and demonstrated remediation in exchange for cooperation credit, a reduction in financial penalties under the US Sentencing Guidelines ("USSG"), and more lenient charges or even a declination. In 2016, the DOJ settled multiple cases consistent with the principles of the Pilot Program, offering discounts ranging between 20 and 50 percent off the bottom of the USSG range and in some cases declining to prosecute, while requiring disgorgement of ill-gotten gains in those cases. The DOJ also made clear its intention to use the Pilot Program as a stick as well as a carrot: it refused to provide full credit under the Pilot Program where, in its view, companies failed to self-disclose, fully cooperate or properly remediate.

Like the DOJ, the SEC focused on cooperation and compliance in 2016, concluding a DPA with an individual, Yu Kai Yuan, a former sales executive at PTC Inc./Parametric Technology (Shanghai) Software Company Ltd. and Parametric Technology (Hong Kong) Ltd. (collectively, "PTC China"), and NPAs with two corporations, Nortek Inc. ("Nortek") and Akamai Technologies, Inc. ("Akamai") based on their voluntary disclosure and extraordinary cooperation. The SEC resolved 24 corporate investigations in 2016, and the DOJ concluded 13. Of these, the enforcement agencies cooperated on 12 parallel resolutions. The SEC also concluded several "package" resolutions, in which they resolved individual and corporate actions in the same proceedings. In general, the SEC maintained its focus on China and renewed its commitment to investigating misconduct in the pharmaceutical and financial services industries. Both the DOJ and the SEC reviewed carefully the corporate relationships with and oversight over third parties and critically examined the robustness and efficacy of corporate compliance programs in detecting and preventing misconduct, including the monitoring of foreign subsidiaries. Where companies failed to maintain sufficient internal controls, the DOJ has become quick to allege criminal internal-controls violations, something the DOJ had only done rarely in prior years. After a decline in recent years of the use of external monitors to oversee post-resolution remediation, 2016 saw a marked uptick in their use.

The DOJ and the SEC both resolved eight actions with individuals in 2016; the DOJ's individual actions were on par with those from 2015 and the SEC's quadrupled (from two in 2015 to eight in 2016). The DOJ's individual actions included cases against James McClung and Richard Hirsch (former senior executives at Louis Berger), whom the DOJ said had provided

extraordinary cooperation. It also reached individual resolutions with groups of defendants in the Banco de Desarrollo Económico y Social de Venezuela ("BANDES")/Direct Access Partners ("DAP") and Petroleos de Venezuela ("PDVSA") investigations, notably without the cooperation of, or in connection with, a related charge for the corporations or organizations for which those individuals worked.

Over the course of 2016, almost 30 companies paid about $2.5 billion to resolve FCPA actions, making it the biggest enforcement year in FCPA history in terms of dollars collected. In fact, four of the top ten largest FCPA enforcement actions occurred in 2016: Teva Pharmaceutical Industries Ltd. ("Teva") paid $519 million; Odebrecht S.A. ("Odebrecht")/Braskem S.A. ("Braskem") totaled $419.8 million in penalties; Och-Ziff Capital Management Group ("Och-Ziff") paid $412 million; and VimpelCom Limited's ("VimpelCom") combined penalty was $397.6 million in 2016.



In court, the DOJ did not prevail on its motion to reconsider a district court ruling preventing it from charging Lawrence Hoskins, a former Alstom France executive and UK national, with conspiracy to violate the anti-bribery provisions of the FCPA. The Court found that foreign nationals acting outside the United States could not be held criminally liable under accomplice or aiding and abetting theories if the government lacked jurisdiction on the underlying charge, in this case, alleged violations of the anti-bribery provisions. While the case is currently being appealed and the ultimate outcome is uncertain, the DOJ's loss on this front is likely to translate into an increased reliance on alternative theories to allow it to pursue individual enforcement actions against foreign nationals. The SEC, on the other hand, prevailed in its theory that Magyar Telekom officials could be held civilly liable for accounting violations related to falsified SEC filings that implicated interstate commerce, even if they did not act within US borders.

Finally, a long-running dispute over the nature of disgorgement came to a head in 2016, with the Tenth and Eleventh Circuits disagreeing over whether disgorgement is a penalty such that it is subject to a five-year statute of limitations or an equitable remedy such that it is not. On January 13, 2017, the Supreme Court granted certiorari on the question; argument will be heard this term or next.

2. Key Investigation-Related Developments

A. The DOJ Announced the Pilot Program as an Incentive to Voluntarily Disclose

On April 5, 2016, the Fraud Section issued its Foreign Corrupt Practices Act Enforcement Plan and Guidance laying out steps to intensify FCPA enforcement.[1] The memo announced that the DOJ was (1) enhancing its enforcement efforts by increasing the number of prosecutors and FBI agents; (2) strengthening its coordination with foreign counterparts; and (3) introducing a one-year Pilot Program that rewards companies for voluntary disclosure and cooperation.[2] The first two aspects of the memo were clearly announced together with the Pilot Program to emphasize that misconduct was more likely to be discovered and therefore companies would benefit from making voluntary disclosures.

Under the Pilot Program, an organization that voluntarily discloses, fully cooperates, and timely and appropriately remediates may obtain a reduction of up to 50 percent off the bottom end of the USSG fine range and may potentially avoid a monitor or, if the company additionally disgorges all ill-gotten gains, receive a declination of prosecution.[3] Some aspects of the Pilot Program are non-negotiable. Credit is only available if a company meets the mandates set out in the Guidance, including the reporting of relevant facts about the individuals involved in the wrongdoing. In May 2016, then-Acting FCPA Unit Chief Daniel Kahn[4] noted that a company's decision to self-report could also be considered when assessing the extent of the company's compliance credit.[5]

Presumably in connection with the Pilot Program, the DOJ provided greater transparency in 2016 into its compliance and remediation priorities by continuing to publish its declination decisions, as well as by outlining four potential areas of inquiry on which DOJ compliance expert, Hui Chen, would focus: (1) "what low-level employees believe their compliance function is"; (2) "tone at the top"—i.e., management's commitment to compliance and ethics; (3) compliance monitoring, including whether "individual business units are being held responsible for their own compliance obligations" and if those units work with compliance staff to develop metrics to

---

[1] US Department of Justice Criminal Division, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download; WilmerHale, *DOJ Launches FCPA Pilot Program to Encourage Corporate Voluntary Disclosure and Cooperation* (Apr. 8, 2016), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179881469.

[2] Dylan Tokar, *Weissmann: Fraud Section will work to 'fast-track' self-reported FCPA cases*, GLOBAL INVESTIGATIONS REVIEW, Feb. 5, 2016. Foreshadowing the issuance of the Guidance, Fraud Chief Andrew Weissmann stated in February 2016 that the DOJ would expedite cases of self-reported foreign bribery, noting that the department did not want lengthy investigations to deter companies from making the beneficial decision to self-report wrongdoing; Leslie R. Caldwell, Criminal Division Launches New FCPA Pilot Program, THE U.S. DEP'T OF JUSTICE (Apr. 5, 2016), https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program. She explained that "transparency informs companies what conduct will result in what penalties and what sort of credit they can receive for self-disclosure and cooperation with an investigation. This in turn, enables companies to make more rational decisions when they learn of foreign corrupt activity by their agents and employees."

[3] US Department of Justice Criminal Division, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download. In considering whether a declination may be warranted in cases where a company has met all the requirements for full credit, the Guidance states that Fraud Section prosecutors must also take into account countervailing interests, including (a) whether there has been involvement by executive management of the company in the FCPA misconduct; (b) whether the company gained a significant profit from the misconduct in relation to the company's size and wealth; (c) whether the company has a history of non-compliance; or (d) whether there was a prior resolution by the company with the DOJ within the past five years.

[4] Daniel S. Kahn was named Chief of the FCPA Unit on June 1, 2016.

[5] US Department of Justice, Criminal Division, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

report to CEOs; and (4) professional qualifications and experience of compliance staff to determine whether they had an "appropriate background" for their positions.[6]

While some resolutions in 2016 were not technically part of the Pilot Program because the investigations had begun before the implementation of the Program, the DOJ rewarded companies under principles "consistent with" the Program and penalized those that did not meet its requirements, or did so only partially.

1. Criminal Penalty Reductions

Both before and after the introduction of the Pilot Program, the DOJ provided substantial discounts off the calculated USSG fine range in corporate FCPA settlements where companies cooperated and remediated, and in some cases voluntarily disclosed. On February 18, 2016, for example, Amsterdam-based VimpelCom and its wholly-owned Uzbek subsidiary, Unitel LLC ("Unitel"), entered resolutions with the DOJ, the SEC and Dutch authorities to settle FCPA charges and related violations of Dutch law.[7] All three actions were based on the same alleged core conduct.

Between 2006 and 2012, VimpelCom and Unitel paid more than $114 million in bribes to an Uzbek government official to enter into the Uzbek telecommunications market, gain telecommunications assets, and seek government-issued licenses.[8] The bribes were allegedly made through sham contracts or, in some cases, disguised as charitable donations or sponsorships.[9] VimpelCom admitted to falsifying its books and records, attempting to hide the bribes,[10] and withholding information from outside counsel who were engaged by the company's board of directors to assess FCPA corruption risks involved in the transactions, among other admissions.[11] The DOJ's criminal resolution included a guilty plea by Unitel to conspiracy to violate the anti-bribery provisions of the FCPA,[12] a DPA for VimpelCom for internal-controls violations and conspiracy to violate the anti-bribery and books-and-records provisions, a $230.1 million criminal penalty, and the retention of an external compliance monitor.[13]

VimpelCom and Unitel received "significant credit" from the DOJ, in the form of a 45 percent reduction from the bottom of the USSG fine range—25 percent for extensive cooperation with the DOJ's investigation, and 20 percent for prompt acknowledgement of wrongdoing after being informed of the DOJ's investigation and for a willingness to resolve criminal liability on an expedited basis.[14] The companies, however, did not receive "more significant mitigation credit" because they failed to voluntarily self-disclose their misconduct after an internal investigation

---

[6] Dylan Tokar, *Weissmann: DOJ to publish compliance questions*, GLOBAL INVESTIGATIONS REVIEW, Feb. 9, 2016.
[7] US Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016); US Securities and Exchange Commission Press Release No. 2016-34: VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016).
[8] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, No. 16-CR-137, Attachment A ¶¶ 11-12 (S.D.N.Y. Feb. 18, 2016).
[9] Complaint, *SEC v. VimpelCom LTD*, No. 16-CV-1266, ¶ 3 (S.D.N.Y. Feb. 18, 2016); Information, *United States v. VimpelCom Ltd*., No. 16-CR-137, ¶¶ 16, 36 (S.D.N.Y. Feb. 18, 2016).
[10] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, 16-CR-137, Attachment A ¶¶ 71-73 (S.D.N.Y. Feb. 18, 2016).
[11] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, 16-CR-137, Attachment A ¶¶ 25, 42 (S.D.N.Y. Feb. 18, 2016).
[12] Plea Agreement, *United States v. Unitel LLC*., No. 16-CR-137 (S.D.N.Y. Feb. 18, 2016).
[13] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd*., No. 16-CR-137 (S.D.N.Y. Feb. 18, 2016).
[14] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd*., No. 16-CR-137, ¶¶ 3-4, 7 (S.D.N.Y. Feb. 18, 2016); US Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016).

uncovered wrongdoing.[15] Interestingly, the companies received more credit than would be available under the Pilot Program, which provides a maximum credit of 25 percent off the bottom of the USSG range for cooperation and remediation if a company does not voluntarily disclose. The SEC also entered into a civil resolution with VimpelCom[16] for alleged violations of the anti-bribery, books-and-records, and internal-controls provisions; VimpelCom agreed to a total of $375 million in disgorgement of profits and prejudgment interest.[17] In total, the VimpelCom resolution is one of the largest FCPA settlements to date. In addition to the US penalties, VimpelCom also paid $397.5 million to the Dutch authorities.[18]

In June 2016, the DOJ provided partial credit (without saying what full credit would be) to Analogic Corporation's ("Analogic") Danish subsidiary, BK Medical ApS ("BK Medical"), as part of its NPA to settle alleged FCPA books-and-records and internal-controls violations relating to transactions in Russia and other countries.[19] In the related SEC action, the SEC alleged that BK Medical made more than $20 million in payments to third parties in Russia, Belize, the British Virgin Islands, Cyprus and Seychelles.[20] The DOJ asserted that BK Medical had not initially fully disclosed certain facts that it learned during its internal investigation and therefore awarded the company a 30 percent discount off the bottom of the USSG range for its "partial cooperation," self-disclosure and remediation.[21]

2. DOJ Declinations Under the Pilot Program, Including Two Standalone Declinations with Disgorgement

The DOJ referred to the Pilot Program in issuing five declinations in 2016. In three letters issued in the summer of 2016, the DOJ declined to prosecute Nortek, Akamai and Johnson Controls, Inc. ("JCI") for conduct by their subsidiaries' employees in China, citing these companies' "fulsome cooperation," including the identification of all individuals involved in or responsible for the misconduct, among other factors considered under the Pilot Program, including voluntary disclosure.[22] These companies did not pay criminal fines; as discussed below, the companies disgorged related profits to the SEC. In two additional letters issued on September 29, 2016, the DOJ declined to pursue charges against NCH Corporation ("NCH"), a Texas-based industrial supply and maintenance company, and HMT LLC, a Texas-based oil supply company. The SEC was not involved in these resolutions, but the DOJ's declinations required disgorgement.

---

[15] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, No. 16-CR-137, ¶¶ 3-4, 7 (S.D.N.Y. Feb. 18, 2016); US Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016).

[16] Complaint, *SEC v. VimpelCom Ltd.*, No. 16-CV-1266 (S.D.N.Y. Feb. 18, 2016).

[17] Final Judgment, *SEC v. VimpelCom Ltd.*, No. 16-CV-1266, ¶ 4 (S.D.N.Y. Feb. 22, 2016); US Securities and Exchange Commission Press Release No. 2016-34: VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016).

[18] US Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016).

[19] Non-Prosecution Agreement between US Department of Justice and BK Medical ApS (June 21, 2016), https://www.justice.gov/opa/file/868771/download.

[20] US Securities and Exchange Commission Press Release No. 2016-126: SEC Charges Medical Device Manufacturer with FCPA Violations (June 21, 2016).

[21] Non-Prosecution Agreement between US Department of Justice and BK Medical ApS (June 21, 2016), https://www.justice.gov/opa/file/868771/download.

[22] US Department of Justice Letter from Daniel Kahn to Luke Cadigan, Esq. re: Nortek Inc. (June 3, 2016), https://www.justice.gov/criminal-fraud/file/865406/download; US Department of Justice Letter from Daniel Kahn to Josh Levy, Esq., and Ryan Rohlfson, Esq. re: Akamai Technologies, Inc. (June 6, 2016), https://www.justice.gov/criminal-fraud/file/865411/download; US Department of Justice Letter from Daniel Kahn to Jay Holtmeier, Esq. and Erin Sloane, Esq., Re: Johnson Controls, Inc. (June 21, 2016), https://www.justice.gov/criminal-fraud/file/874566/download.

a. DOJ Declinations with Disgorgement

The DOJ found that NCH's subsidiary in China provided approximately $44,545 in cash, gifts, meals and entertainment to Chinese government officials between 2011 and 2013 to influence their purchasing decisions. These payments allegedly generated $335,342 in profits for NCH, and the DOJ required the company to disgorge this amount.[23] Similarly, the DOJ alleged that between 2002 and 2011 an HMT sales agent in Venezuela paid over $500,000 in bribes through a third-party sales agent to secure contracts with PDVSA, Venezuela's state-owned oil company. A Chinese HMT subsidiary also allegedly paid bribes to Chinese government officials to purchase HMT products from approximately 1999 through 2011. According to the DOJ, these improper payments generated $2.7 million in net profits to HMT, and the company was required to disgorge this amount.[24] Both declinations noted that the DOJ's decision to close its investigation was based on the factors outlined under the Pilot Program, including both companies' "full cooperation."[25]

The inclusion of disgorgement in the NCH and HMT declination letters is a new component of DOJ declinations, consistent with the stated process under the Pilot Program, and is a significant development in FCPA enforcement. Previously, a declination meant that a company would not face criminal charges or monetary penalties. Although not explicitly stated, the DOJ may have considered amounts paid to other enforcement authorities in prior cases. In the NCH and HMT declinations, however, payment of disgorgement was noted as a factor in the DOJ's declination decisions. These declinations evidence a new tool in the DOJ's toolbox, where the range of potential outcomes available to a corporate defendant includes a "middle road" of a declination with a monetary penalty. While a declination is no doubt still a superior result for a company as compared to an NPA, DPA or guilty plea, the new form of declination, with disgorgement and a lengthier description of the alleged conduct, is a harsher result than prior declinations.

B. The SEC Advanced New Forms of Resolution, with a Focus on Compliance and Cooperation

The SEC's resolution of several FCPA enforcement actions in 2016 through the use of NPAs and DPAs illustrates its continued emphasis on voluntary disclosure, cooperation and remediation from individuals and companies.[26] These settlements are in line with the SEC's 2010 Cooperation Initiative,[27] as well as its recent efforts to "incentivize" self-reporting and cooperation by rewarding corporations who self-disclose and offer assistance in the investigation with "reduced charges, including [DPAs and NPAs], and in certain instances when the violations are minimal, no charges."[28]

---

[23] US Department of Justice Letter from Daniel Kahn to Paul Coggins, Esq. and Kiprian Mendrygal, Esq. re: NCH Corporation, at 1 (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899121/download.
[24] US Department of Justice Letter from Daniel Kahn to Steve Tyrell, Esq. re: HMT LLC, at 2 (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download.
[25] US Department of Justice Letter from Daniel Kahn to Paul Coggins, Esq. re: NCH Corporation, at 2 (Sept. 2016); US Department of Justice Letter from Daniel Kahn to Steve Tyrell, Esq. re: HMT LLC, at 2 (Sept. 29, 2016).
[26] US Securities and Exchange Commission, SEC Spotlight: Enforcement Cooperation Program, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.
[27] US Securities and Exchange Commission Press Release No. 2010-6: SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010). In 2011, the SEC announced its first-ever DPA: US 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). Later, in 2013, the SEC issued its first-ever NPA for FCPA conduct: US Securities and Exchange Commission Press Release No. 2013-65: SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013).
[28] Andrew Ceresney, Former Director of the Division of Enforcement, SEC, Keynote Speech at 33rd International Conference on the Foreign Corrupt Practices Act (Nov. 30, 2016), https://www.sec.gov/news/speech/speech-ceresney-113016.html.

1. Emphasis on Cooperation in SEC Non-Prosecution Agreements

On June 7, 2016, the SEC resolved the Akamai and Nortek investigations with NPAs[29] (only the second and third NPAs used by the SEC since it launched the 2010 Cooperation Initiative[30]) because the companies "promptly self-reported the misconduct, took remedial measures, including improving their internal controls, and cooperated extensively with the SEC's investigation, thereby justifying NPAs."[31] The SEC alleged that from 2013 through 2015, Akamai's Chinese subsidiary agreed with a third party to provide two Chinese state-owned entities with gifts and entertainment that were recorded as legitimate business expenses. Akamai discovered and self-reported the conduct to the SEC, conducted a "timely and thorough investigation," and agreed to disgorge $652,452.[32] As to Nortek, the SEC alleged that Nortek's indirect wholly-owned subsidiary in China "made or approved improper payments and gifts" to local Chinese officials from 2009 to 2014 "to receive preferential treatment, relaxed regulatory oversight, and/or reduced customs duties, taxes, and fees," which were inaccurately recorded in the books, records and accounts of Nortek's Chinese subsidiary. Like Akamai, Nortek "timely self-reported" the matter to the SEC, conducted a "prompt and thorough investigation," and ultimately agreed to disgorge $291,403.[33]

In the SEC's press release announcing the two matters, Kara Brockmeyer, Chief of the SEC Enforcement Division's FCPA Unit, commented that "Akamai and Nortek each promptly tightened their internal controls after discovering the bribes and took swift remedial measures to eliminate the problems. They handled it the right way and got expeditious resolutions as a result."[34]

2. The SEC Criticized "Paper" Compliance Programs, Underscored the Importance of Monitoring Subsidiaries

The SEC's actions in 2016 underscored the need for rigorous anti-corruption programs and effective internal controls that are monitored and followed up on by well-trained and adequately supported compliance, audit and finance personnel.[35] In its first action of the year, the SEC settled books-and-records and internal-controls charges with SAP SE ("SAP"). The SEC's Order alleged that SAP's deficient internal accounting controls allowed SAP's former Vice President, Eduardo Garcia Vicente ("Garcia"), to conspire to bribe two Panamanian officials and to pay $145,000 in bribes to a third official to obtain four government software sales contracts worth

---

[29] US Securities and Exchange Commission Press Release No. 2016-109: SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016).
[30] US Securities and Exchange Commission, SEC Spotlight: Enforcement Cooperation Program, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.
[31] Andrew Ceresney, Former Director of the Division of Enforcement, SEC, Keynote Speech at 33rd International Conference on the Foreign Corrupt Practices Act (Nov. 30, 2016), https://www.sec.gov/news/speech/speech-ceresney-113016.html.
[32] Non-Prosecution Agreement between the US Securities and Exchange Commission and Akamai Technologies, Inc., ¶¶ 4a, 3-5, 8 (June 7, 2016), https://www.sec.gov/news/press/2016/2016-109-npa-akamai.pdf.
[33] Non-Prosecution Agreement between the US Securities and Exchange Commission and Nortek, Inc., ¶¶ 3-9 (June 7, 2016), https://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf.
[34] US Securities and Exchange Commission Press Release No. 2016-109: SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016).
[35] US Department of Justice & US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 57 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf. The SEC and the DOJ stated in their November 2012 FCPA Guide: "DOJ and SEC have often encountered companies with compliance programs that are strong on paper but that nevertheless have significant FCPA violations because management has failed to effectively implement the program even in the face of obvious signs of corruption." See Section 2 for a discussion of monitoring and due diligence as it relates to third parties.

approximately $3.7 million.[36] Garcia allegedly orchestrated a bribery scheme in which SAP provided excessively large discounts (of up to 82 percent) to SAP's local Panamanian partner—which were used to create a fund out of which the local partner paid the bribes. Although SAP initially flagged Garcia's scheme, due to a last minute local Panamanian partner change, Garcia used his knowledge of SAP's discount approval process to work around the red flag, and falsely justified in internal approval forms that the proposed high discount was necessary to compete against other software companies.[37] According to the SEC, SAP failed to devise and maintain an adequate system of internal controls—SAP's employees had "wide latitude" in seeking and approving discounts to local partners and the company did not apply heightened anti-corruption scrutiny for large discounts.[38]

On March 23, 2016, Novartis AG ("Novartis") and the SEC resolved an investigation into books-and-records and internal-controls violations for $25 million.[39] The SEC alleged that Novartis's employees and agents at two of Novartis's China-based subsidiaries, Shanghai Novartis Trading Ltd ("Sandoz China") and Beijing Novartis Pharma Co. Ltd ("Beijing Novartis"), provided gifts, travel, entertainment and favors to Chinese healthcare professionals ("HCPs"), and other government officials, and their relatives. These benefits were allegedly intended to influence HCPs to purchase Novartis products and increase sales. Employees at Novartis's subsidiaries maintained spreadsheets linking the items of value provided to the projected number of prescriptions sold each month, and this information was shared and approved by certain senior managers at Sandoz China and Beijing Novartis. The payments were then allegedly improperly recorded as legitimate selling and marketing costs. In addition, Sandoz China allegedly paid HCPs for collecting and analyzing patient medical data with a stated purpose of better understanding patient reactions to a Novartis drug.[40] However, it was alleged that the payments were actually financial rewards for HCPs who had prescribed the relevant drug, and that the studies allegedly did not provide any legitimate medical data.

Importantly, the parent Novartis allegedly approved and paid the expenses with little or no supporting documentation. The SEC faulted Novartis for its weak internal controls and compliance mechanisms,[41] noting that it failed to: (a) adequately train its sales staff and managers to prevent and detect inappropriate payments made to and/or through third-party vendors in a high-risk country; (b) conduct proper due diligence on these vendors; and (c) collect sufficient supporting documentation for the expenses submitted by these vendors. The Novartis action underscores the importance of rigorous audits that include follow-up inquiries related to financial controls.

[36] Order Instituting Cease-and-Desist Proceedings, *In the Matter of SAP SE*, Rel. No. 77005, File No. 3-17080, ¶ 1 (Feb. 1, 2016).
[37] Order Instituting Cease-and-Desist Proceedings, *In the Matter of SAP SE*, Rel. No. 77005, File No. 3-17080, ¶ 14 (Feb. 1, 2016).
[38] Order Instituting Cease-and-Desist Proceedings, *In the Matter of SAP SE*, Rel. No. 77005, File No. 3-17080, ¶ 20 (Feb. 1, 2016).
[39] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Novartis AG*, Rel. No. 77431, File No. 3-17177, ¶ IV, B (Mar. 23, 2016).
[40] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Novartis AG*, Rel. No. 77431, File No. 3-17177, ¶¶ 3, 8-13, 14-17 (Mar. 23, 2016).
[41] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Novartis AG*, Rel. No. 77431, File No. 3-17177, ¶¶ 2, 12, 16 (Mar. 23, 2016).

C. Tone at the Top: Both Enforcement Agencies Target Leadership and Compliance Culture Through Compliance Staffing and Remedial Employee Actions

1. Compliance Staff Should Be Robust and Adequately Trained

The SEC and the DOJ have made clear that a robust and adequately trained compliance staff is an essential element of a rigorous anti-corruption program, starting with strong leadership from a Chief Executive Officer ("CEO") or Chief Compliance Officer ("CCO").[42] The SEC's focus on compliance staffing has been clear in its resolutions with Qualcomm Incorporated ("Qualcomm"), Key Energy Services, Inc. ("Key"), and AstraZeneca PLC ("AZN"), describing each company's compliance staffing and training as inadequate and a root cause of its FCPA violations.

On March 1, 2016, Qualcomm settled anti-bribery, books-and-records and internal-controls charges with the SEC.[43] Qualcomm allegedly provided things of value to high-ranking employees of state-owned enterprises and government officials in China to influence these decision-makers to favor or promote Qualcomm technology. The SEC's cease-and-desist order alleged that even though international operations accounted for more than 90 percent of Qualcomm's revenue, its internal controls were insufficient to prevent or detect improper payments to foreign officials. Qualcomm also lacked a full-time CCO in China and allegedly failed to provide appropriate FCPA training to either its employees in key business functions, such as Human Resources and hospitality planning, or to the employees of its subsidiaries. Without admitting or denying the SEC's findings, Qualcomm consented to the entry of the SEC's Order, agreed to pay $7.5 million, and to self-report on its remediation and compliance measures for the next two years.[44]

When settling books-and-records and internal-controls charges with Key in August 2016, the SEC noted the importance of Key's decision to promptly hire a new CCO to oversee a renovation and enhancement of the company's compliance program.[45] Similarly, the SEC acknowledged AZN's "significant increase to both capital and human resources available to compliance at the corporate level and in the local markets," when AZN settled charges that it violated books-and-records and internal-controls provisions of the FCPA through improper payments to foreign officials by its Chinese and Russian subsidiaries.[46]

Companies have also started to take to heart the need to establish a clear sense of responsibility for FCPA compliance at the top of the organization—and to sanction company leaders when those companies fail in their anti-corruption compliance. Cognizant Technology Solutions Corporation ("Cognizant"), for example, is currently under investigation after it self-disclosed to the SEC and the DOJ on September 30, 2016 potential FCPA issues uncovered in an internal investigation into potential improper payments made relating to facilities in India.[47]

---

[42] Thomas R. Fox, *CCO Independence, Authority and Resources as Indicia of an Effective Compliance Program*, FCPA COMPLIANCE & ETHICS BUSINESS SOLUTIONS TO COMPLIANCE AND LEGAL CHALLENGES (May 25, 2016). Fraud Chief Andrew Weissmann and associate director in the SEC's enforcement division, Stephen Cohen, have both explained that they review the resources granted a CCO, whether the CCO is on or has access to the executive team, and whether the CCO makes use of that access to assess if the CCO has sufficient company support.

[43] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Qualcomm Incorporated*, Rel. No. 7261, File No. 3-17145 (Mar. 1, 2016).

[44] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Qualcomm Incorporated*, Rel. No. 7261, File No. 3-17145, ¶¶ 1, 2, 17-27, 33 (Mar. 1, 2016).

[45] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Key Energy Services, Inc.*, Rel. No. 3794, File No. 3-17379, ¶ 22 (Aug. 11, 2016).

[46] Order Instituting Cease-and-Desist Proceedings, *In the Matter of AstraZeneca PLC*, Rel. No. 3798, File No. 3-17517, ¶ 16 (Aug. 30, 2016).

[47] Cognizant Technology Solutions Corporation, Form 8-K (Sept. 27, 2016), https://www.sec.gov/Archives/edgar/data/1058290/000119312516726679/d263091d8k.htm.

Gordon Coburn resigned as President of Cognizant on the day that Cognizant reported this information, though the resignation was not explicitly linked to the FCPA disclosure.[48]

Cognizant subsequently updated its disclosure in November, stating that "we did not maintain an effective tone at the top as certain members of senior management may have participated in or failed to take action to prevent the making of potentially improper payments by either overriding or failing to enforce the controls established by the Company relating to real estate and procurement principally in connection with permits for certain facilities in India."[49]

2. Employee Actions Cited as Important by Both the DOJ and the SEC

Relatedly, several recent actions, including AZN, LATAM Airlines Group S.A. ("LATAM"), and Embraer S.A. ("Embraer")[50] have demonstrated the importance of remediation efforts—specifically, employee discipline—in achieving a more favorable resolution with the government. The charges in the AZN matter stemmed from alleged improper payments made to foreign government HCPs by AZN's subsidiaries in China and Russia, where staff and "multiple levels of management . . . designed and authorized" the payment-related schemes.[51] In its resolution, the SEC emphasized AZN's personnel actions against employees involved in the misconduct, including "reassignment to lower-risk areas of responsibility, voluntary separations, and dismissals."[52]

Conversely, the DOJ declined to give LATAM full cooperation credit considering the DOJ's perception that the company did not adequately discipline employees, noting "LATAM did not . . . remediate adequately" when it "failed to discipline in any way the employees responsible for the criminal conduct, including at least one high-level company executive."[53] As a result, LATAM paid a criminal fine within the USSG range instead of receiving a discount off the bottom of the range.[54]

Similarly, Embraer's criminal penalty was discounted 20 percent to reflect its full cooperation but incomplete remediation.[55] According to the DOJ, Embraer did not engage in full remediation when it "disciplined a number of company employees and executives engaged in the misconduct, but did not discipline a senior executive who was (at the very least) aware of bribery discussions in emails in 2004 and had oversight responsibility for the employees engaged in those discussions."[56]

---

[48] Jing Cao, Cognizant Tumbles as President Leaves Amid Investigation, BLOOMBERG, Sept. 30, 2016.
[49] Cognizant Technology Solutions Corporation, Form 10-Q, (Sept. 30, 2016), https://www.sec.gov/Archives/edgar/data/1058290/000105829016000076/ctsh2016930-10q.htm.
[50] See Section 2 for further discussion of the LATAM and Embraer actions.
[51] Order Instituting Cease-and-Desist Proceedings, *In the Matter of AstraZeneca PLC*, Rel. No. 3798, File No. 3-17517, at ¶ 2 (Aug. 30, 2016).
[52] Order Instituting Cease-and-Desist Proceedings, *In the Matter of AstraZeneca PLC*, Rel. No. 3798, File No. 3-17517, ¶ 16 (Aug. 30, 2016).
[53] US Department of Justice Press Release No. 16-862: LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $12.75 Million Criminal Penalty (July 25, 2016); Deferred Prosecution Agreement, *United States v. LATAM Airlines Group, S.A.*, No. 16-CR-60195, ¶ 4 (S.D. Fla. July 25, 2016).
[54] Deferred Prosecution Agreement, *United States v. LATAM Airlines Group, S.A.*, No. 16-CR-60195, ¶ 7 (S.D. Fla. July 25, 2016).
[55] US Department of Justice Press Release No. 16-1240: Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016); Deferred Prosecution Agreement, *United States v. Embraer S.A.*, No. 16-CR-60294, ¶ 4 (S.D. Fla. Oct. 24, 2016); Complaint, *SEC v. Embraer, S.A.*, No. 16-CR-62501, ¶ 5 (Oct. 24, 2016).
[56] Deferred Prosecution Agreement, *United States v. Embraer S.A.*, No. 16-CR-60294, ¶ 4 (S.D. Fla. Oct. 24, 2016).

D. The DOJ Flexes Its Muscles with Criminal Internal-Controls Charges

Prior to 2015, criminal internal-controls charges were quite rare, presumably due to the burden of proving beyond a reasonable doubt that an issuer company knowingly failed to devise or maintain (or circumvented) an adequate system of internal accounting controls. Indeed, prior to 2008, the DOJ had not brought criminal internal-controls charges against a company in the thirty years since the statute was enacted. In the last year or so, the DOJ has made criminal internal-controls allegations in a handful of cases, suggesting that the DOJ's view as to the appropriate use of the provision may be changing.

On October 24, 2016, Embraer reached a global resolution with the SEC, the DOJ and Brazilian authorities to pay more than $205 million to resolve corruption allegations.[57] Embraer entered into a three-year DPA with the DOJ, admitting to its involvement in a conspiracy to violate the FCPA's anti-bribery and books-and-records provisions and to its willful failure to implement an adequate system of internal accounting controls. Under the settlement, Embraer must retain an independent monitor for at least three years.

The global resolution was based on a common set of underlying facts alleging that between May 2008 and February 2011, Embraer made more than $83 million in profits connected to bribe payments from its US-based subsidiary through third-party agents to foreign government officials in the Dominican Republic, Saudi Arabia and Mozambique. The DOJ also alleged that approximately $5.76 million was paid to an agent in India in connection with the sale of three highly specialized military aircraft for India's air force and that these payments were allegedly falsely recorded in Embraer's books and records to conceal the nature of the payments.[58]

Embraer's internal controls were found inadequate because they failed to prevent the bribe payments or detect obvious red flags which should have alerted its employees that these payments, in whole or in part, were bribes to foreign government officials. For example, Embraer failed to require (1) adequate due diligence before retaining third-party consultants or agents; (2) fully executed contracts before making payments to third parties; or (3) concrete evidence of services rendered before making payments to third parties. Embraer also failed to institute any payment process oversight that would have ensured that payments were made only pursuant to appropriate controls.[59] Interestingly, while the DOJ only charged Embraer with failing to devise and maintain adequate internal controls, the SEC additionally focused on Embraer employees circumventing controls that did exist. According to the SEC, Embraer employees circumvented the company's internal controls in order to authorize payments to third parties that were (1) illegal in the host country; (2) had little or no supporting documentation; or (3) "concealed through unrelated business transactions in an effort to avoid detection."[60]

In July 2016, LATAM entered into a three-year DPA with the DOJ based on allegations that it failed to keep accurate books and records, and failed to maintain adequate internal accounting controls.[61] In October 2006, LATAM's predecessor-in-interest LAN Airlines S.A. executed a $1.15 million consulting agreement for a purported study of existing air routes in Argentina, when in fact the money was paid to union officials to settle wage disputes. LAN made more than $6.7 million as a result of these bribes.[62] In this case, the DOJ may have included a criminal

[57] US Department of Justice Press Release No. 16-1240: Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016); Deferred Prosecution Agreement, *United States v. Embraer S.A.*, No. 16-CR-60294, ¶ 4 (S.D. Fla. Oct. 24, 2016).
[58] Deferred Prosecution Agreement, *United States v. Embraer S.A.*, No. 16-CR-60294, ¶ 59 (S.D. Fla. Oct. 24, 2016).
[59] Deferred Prosecution Agreement, *United States v. Embraer S.A.*, No. 16-CR-60294, ¶ 67 (S.D. Fla. Oct. 24, 2016).
[60] Deferred Prosecution Agreement, *United States v. Embraer S.A.*, No. 16-CR-60294, ¶ 67 (S.D. Fla. Oct. 24, 2016).
[61] US Department of Justice Press Release No. 16-862: LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $12.75 Million Criminal Penalty (July 25, 2016).
[62] Deferred Prosecution Agreement, *United States v. LATAM Airlines Group, S.A.*, No. 16-CR-60195, ¶ 26 (S.D. Fla. July 25, 2016).

internal-controls charge because LATAM's alleged improper payments were made to a consultant, not government officials, thereby depriving the DOJ of a potential anti-bribery charge.

On September 29, 2016, Och-Ziff entered into a three-year DPA with the DOJ for violating the books-and-records and internal-controls provisions of the FCPA, as well as for conspiracy to violate the anti-bribery provisions. Och-Ziff's wholly-owned subsidiary, OZ Africa Management GP LCC ("OZ Africa"), pleaded guilty to conspiracy to violate the anti-bribery provisions. The SEC entered a cease-and-desist order against Och-Ziff and concurrently charged Och-Ziff CEO, Daniel S. Och, and Och-Ziff Chief Financial Officer ("CFO"), Joel M. Frank. The case marks the first time a hedge fund has been held accountable for violating the FCPA, and the fourth largest FCPA enforcement action in history, in terms of penalties paid to enforcement authorities. In total, Och-Ziff paid $412 million to resolve the FCPA charges, and Och agreed to pay nearly $2.2 million to settle the SEC charges against him.[63]

The joint resolution was based on allegations that between 2007 and 2011, Och-Ziff paid bribes through intermediaries, agents and business partners to high ranking government officials in various African countries, including Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo ("DRC"). In most cases, the improper transactions were made using managed investor funds rather than Och-Ziff's own capital. OZ Africa authorized the use of funds in transactions in which bribes were paid to foreign government officials to obtain or retain business for Och-Ziff and its business partners. Och-Ziff categorized these transactions as investments or convertible loans even though certain Och-Ziff employees knew that investor funds would be used to pay bribes. In total, Och-Ziff paid millions to foreign officials in exchange for access to profitable investment opportunities.[64]

The DOJ's criminal internal-controls charges were based on Och-Ziff's failure to implement an adequate system of internal accounting controls, failure to enforce the internal accounting controls that it did have in place, and failure to take corrective measures when the potential improper use of funds was identified.[65] In the DRC, for example, Och-Ziff partnered with a local businessman known to gain access to investment opportunities by making corrupt payments to senior government officials. Och-Ziff commissioned a due diligence report that uncovered the DRC partner's history of dubious business dealings, along with allegations of illegal conduct, and extensive connections with multiple DRC government officials.[66] Och-Ziff's principals, Och and Frank, received this report and Och instructed Frank (over the latter's objections) to move forward on potential transactions. Samuel Mebiame, son of a former Prime Minister of Gabon and Och-Ziff consultant entered a guilty plea on December 9, 2016 for conspiracy to violation the anti-bribery provisions due to his role in facilitating bribe payments to government officials in Chad, Guinea, and Niger.[67] As part of its settlement with the DOJ, Och-Ziff admitted that it knew that investor funds would be used, in part, to pay substantial sums of money to high-

[63] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank*, Rel. No. 78989, File No. 3-17595 (Sept. 29, 2016); Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, No. 16-CR-516 (E.D.N.Y. Sept. 29, 2016); Plea Agreement, *United States v. OZ Africa Management GP, LLC*, No. 16-CR-515 (E.D.N.Y. Sept. 29, 2016).

[64] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank*, Rel. No. 78989, File No. 3-17595 (Sept. 29, 2016); Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, No. 16-CR-516 (E.D.N.Y. Sept. 29, 2016); Plea Agreement, *United States v. OZ Africa Management GP, LLC*, No. 16-CR-515 (E.D.N.Y. Sept. 29, 2016).

[65] Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, No. 16-CR-516, Attachment A ¶ 93 (E.D.N.Y. Sept. 29, 2016).

[66] Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, No. 16-CR-516, Attachment A ¶ 25 (E.D.N.Y. Sept. 29, 2016).

[67] Plea Agreement, *United States v. Samuel Mebiame*, No. 16-CR-627 (E.D.N.Y. Dec. 9, 2016).

ranking DRC officials to secure access to, and preference for, the investment opportunities.[68] Ultimately, the DRC partner paid tens of millions of dollars in bribes to DRC officials in exchange for investment opportunities that resulted in more than $90 million in profits for Och-Ziff.

On December 22, 2016, Teva entered into a DPA with the DOJ for, among other things, failing to implement adequate internal controls at its Mexican subsidiary.[69] Teva admitted that, starting no later than 2005, its Mexican subsidiary had bribed doctors employed by the Mexican government so that they would prescribe more of Teva's medications. Even though executives were aware of these payments, they purposely failed to implement adequate internal controls.[70] Teva agreed to pay more than $283 million to the DOJ and about $236 million to the SEC to resolve a parallel investigation.

On January 13, 2017, Chilean chemicals and mining company Sociedad Quimica y Minera de Chile ("SQM") entered into a DPA with the DOJ for violations of the internal-controls provisions.[71] The DOJ based the charge on SQM's alleged knowing failure to implement internal controls sufficient to ensure that payments from a fund it controlled were not made to politically connected individuals in Chile.[72] According the DOJ, SQM paid third-party vendors $15 million with no evidence that they provided any services; the company also allegedly falsified books and records to cover up the improper payments. SQM agreed to pay a criminal penalty of more than $15 million and an additional $15 million to the SEC to resolve a parallel civil investigation into its violation of the books-and-records provisions and internal-controls provisions.[73]

On January 19, 2017, Las Vegas Sands Corp. ("Las Vegas Sands") entered into an NPA and agreed to pay a $6.96 million to resolve the DOJ's investigation into the same allegations for which it settled with the SEC (as discussed in Section 3).[74] The DOJ's criminal internal-controls allegations were based on admissions by Las Vegas Sands that its executives knowingly and willfully failed to implement a system of internal accounting controls to adequately ensure the legitimacy of payments to a business consultant who assisted the casino in promoting its brand in Macau and the PRC. The company continued to pay the consultant despite warnings from its own finance employee and an outside auditor that some portion of the funds could not be accounted for, instead terminating the employee.[75] As discussed below, Las Vegas Sands paid $9 million to the SEC in April 2016[76] to settle alleged books-and-records and internal-controls violations. While the DOJ and the SEC do not always settle matters simultaneously, it is highly unusual to see resolutions concluded more than six months apart and it is unclear why the DOJ took so much longer to conclude its investigation.

---

[68] Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, No. 16-CR-516, Attachment A ¶¶ 48-49 (E.D.N.Y. Sept. 29, 2016).
[69] US Department of Justice Press Release No. 16-1522: Teva Pharmaceutical Industries Ltd. Agrees to Pay More than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2014).
[70] Deferred Prosecution Agreement, *United States v. Teva Pharmaceutical Industries Ltd.*, No. 16-CR-20968, Attachment A ¶¶ 77, 78 (S.D. Fla. Dec. 22, 2016).
[71] Deferred Prosecution Agreement, *United States v. Sociedad Quimica Y Minera de Chile, S.A.*, No. 16-CR-00013 (D.D.C. Jan. 13, 2017).
[72] Deferred Prosecution Agreement, *United States v. Sociedad Quimica Y Minera de Chile, S.A.*, No. 16-CR-00013, Attachment A ¶¶ 7-8 (D.D.C. Jan. 13, 2017).
[73] Deferred Prosecution Agreement, *United States v. Sociedad Quimica Y Minera de Chile, S.A.*, No. 16-CR-00013, ¶ 7 (D.D.C. Jan. 13, 2017).
[74] Non-Prosecution Agreement between US Department of Justice and Las Vegas Sands Corp. (Jan. 17, 2017), https://www.justice.gov/opa/press-release/file/929836/download.
[75] Non-Prosecution Agreement between US Department of Justice and Las Vegas Sands Corp., ¶¶ 11-22, 30-35 (Jan. 17, 2017), https://www.justice.gov/opa/press-release/file/929836/download.
[76] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp.*, Rel. No. 77555, File No. 3-17204 IV.C.1-2,4,13 (Apr. 7, 2016).

E. Return of the External Monitor—and How to Avoid One

The year saw the return of the external monitor after several years of DOJ and SEC resolutions that required self-reporting but no monitors. The DOJ's renewed focus on external monitors was reflected in its resolutions with LATAM (27-month monitor term), with Olympus Latin America ("OLA"), Embraer, VimpelCom and Och-Ziff (three-year term each), and with SQM (two-year term).[77]

On March 1, 2016, for example, OLA, a Miami-based subsidiary of Olympus Corporation of the Americas ("OCA"), agreed to pay a $22.8 million criminal penalty for violating the FCPA.[78] OLA, a distributer of medical equipment, allegedly made illicit payments to HCPs to increase the purchase of Olympus products and/or prevent public institutions from purchasing products from OLA competitors.[79] OLA's FCPA violations occurred from 2006 to 2011 when OLA's senior management implemented a plan to increase medical equipment sales in Central and South America. Under the plan, OLA provided cash, personal or non-Olympus medical education travel, free or heavily discounted equipment, and other things of value to HCPs employed at government-owned and private health care facilities who had the authority to increase sales of Olympus equipment. To pay HCPs, OLA established "training centers." One purpose of the training centers was to provide education, but mostly the centers allowed OLA to pay HCPs management fees.[80] OLA paid HCP managers $65,000 per year and provided them a 50 percent discount on Olympus equipment and a $130,000 "VIP Management" budget. Moreover, in 2008 OLA started a "Miles Program" where one "mile" was equal to one US dollar. OLA offered certain HCPs that operated training centers between 5,000 and 30,000 "miles," which HCPs could spend on personal travel. OLA did not require pre-approval or review submitted expenses under the Miles Program.[81] From its use of training centers and unlawful payments/conduct, OLA recognized at least $7.5 million in profits.[82] OLA agreed to pay a $22.8 million criminal penalty, strengthen its compliance program, and retain an external compliance monitor for three years. OLA received a monitor in part because it did not voluntarily disclose in a timely manner.[83]

---

[77] Deferred Prosecution Agreement, *United States v. LATAM Airlines Group, S.A.*, No. 16-CR-60195, ¶¶ 11-14 (S.D. Fla. July 25, 2016); Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc*., No. 16-CR-3525, ¶¶ 11-12 (D.N.J. Mar. 1, 2016); Deferred Prosecution Agreement, *United States v. Embraer S.A.*, No. 16-CR-60294, ¶¶ 11-13 (S.D. Fla. Oct. 24, 2016); Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, No. 16-CR-00137, ¶¶ 13-15 (S.D.N.Y. Feb. 22, 2016); Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, No. 16-CR-516, ¶¶ 11-13 (E.D.N.Y. Sept. 29, 2016); Non-Prosecution Agreement between US Department of Justice and Las Vegas Sands Corp., Attachment C (Jan. 17, 2017) (retaining "independent compliance consultant"), https://www.justice.gov/opa/press-release/file/929836/download.

[78] US Department of Justice Press Release No. 16-234: Medical Equipment Company Will Pay $646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America (Mar. 1, 2016); Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc*., No. 16-CR-3525, ¶ 1 (D.N.J. Mar. 1, 2016).

[79] Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc*., No. 16-CR-3525, Attachment A ¶ 6 (D.N.J. Mar. 1, 2016); US Department of Justice Press Release No. 16-234: Medical Equipment Company Will Pay $646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America (Mar. 1, 2016).

[80] Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc*., No. 16-CR-3525, Attachment A ¶ 6 (D.N.J. Mar. 1, 2016).

[81] Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc*., No. 16-CR-3525, Attachment A ¶¶ 8-10 (D.N.J. Mar. 1, 2016).

[82] Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc*., No. 16-CR-3525, Attachment A ¶ 15 (D.N.J. Mar. 1, 2016).

[83] US Department of Justice Press Release No. 16-234: Medical Equipment Company Will Pay $646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America (Mar. 1, 2016) (noting "The department reached this resolution based on a number of factors, including that OLA did not voluntarily disclose the misconduct in a timely manner, but OLA did receive credit of a 20 percent reduction on its penalty for its cooperation, including its extensive internal investigation, translation of numerous foreign language documents and collecting, analyzing and organizing voluminous evidence.").

The year 2016 also saw a renewal of the government's investigations into Zimmer Biomet Holdings Inc. In 2012, Biomet entered into a DPA with the DOJ.[84] However, in June 2016, the DOJ stated that Biomet had breached its 2012 DPA and had failed to maintain an effective FCPA compliance program.[85] Biomet breached its DPA despite the appointment of a monitor,[86] prompting criticism from Judge Rakoff[87] on the ineffectiveness of monitors and compliance requirements in DPAs generally. The DOJ stated that it was talking to the company to resolve the breaches without a trial, and said it was not currently seeking any hearings or other relief.[88] Subsequently, in August, Zimmer Biomet announced that "it is probable that Biomet will incur additional liabilities related to" investigations into new FCPA violations that occurred during the term of its DPA.[89] Zimmer Biomet's forecast proved true; on January 12, 2017, the SEC announced that Biomet agreed to pay more than $30 million to resolve parallel investigations by the SEC and the DOJ.[90]

As discussed above, for companies under investigation with the DOJ, participation in the Pilot Program offers a potential route to avoiding a monitor. The SEC also imposes corporate monitors and has indicated that it will require external oversight when compliance programs are not well-established at the time of resolution. The SEC's Order in the Las Vegas Sands resolution appointed a monitor to review and evaluate Las Vegas Sands' internal controls and recordkeeping for FCPA compliance. Las Vegas Sands received an external monitor even though it had developed a state of the art compliance program. The SEC said it imposed the monitor because the compliance program had been developed too recently to guarantee future results.[91]

The resurgence of external monitors—which are expensive and prolong the involvement of enforcement agencies with a corporation—will likely encourage companies to fulfill the Pilot Program's and the Cooperation Initiative's expectations of self-disclosure, cooperation and remediation in the hopes of avoiding one.

F. The DOJ and the SEC Still Work Together: Parallel Resolutions Remain Steady

In February 2016, SEC FCPA Chief Kara Brockmeyer predicted that the number of parallel resolutions between the DOJ and the SEC would decline as the SEC focused on cases

---

[84] Deferred Prosecution Agreement, *United States v. Biomet, Inc.*, No. 12-CR-00080 (D.D.C. Mar. 26, 2012).
[85] DOJ Status Report filed in *USA v. Biomet Inc.* in the US District Court for the District of Columbia (Case No. 12-cr-80).
[86] US Department of Justice Press Release No. 12-373: Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012); Stephen Dockery, Biomet Breached Deferred Prosecution Agreement, DOJ Finds, WALL ST. J. (Jun. 14, 2016, 4:43 PM), http://blogs.wsj.com/riskandcompliance/2016/06/14/biomet-breached-deferred-prosecution-agreement-doj-finds/.
[87] Adam Dobrik, *Judge Rakoff: DOJ Compliance Requirements Aren't Working*, GLOBAL INVESTIGATIONS REVIEW, Apr. 8, 2016. In April 2016, then-Assistant Attorney General Caldwell and Judge Rakoff spoke at Harvard Law School just days after the US Court of Appeals for the District of Columbia ruled that judges cannot reject deferred prosecution agreements and that oversight lies with the executive, not the judiciary. Rakoff bemoaned the DOJ's use of compliance and remediation requirements in DPAs, pointing to the five separate settlement agreements between the DOJ and Pfizer as an example of the ineffectiveness of compliance and remediation requirements. Because companies "every so often . . . fear a federal judge," Judge Rakoff proposed that judges should be included in overseeing companies' remediation efforts to help ensure businesses remediate.
[88] DOJ Status Report filed in *USA v. Biomet Inc.* in the US District Court for the District of Columbia (Case No. 12-cr-80).
[89] Zimmer Biomet Holdings, Inc., Form 10-Q, at 30-31 (June 30, 2016), https://www.sec.gov/Archives/edgar/data/1136869/000119312516675281/d223996d10q.htm.
[90] US Securities and Exchange Commission Press Release No. 2017-8: Biomet Charged With Repeating FCPA Violations (Jan. 12, 2017).
[91] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp.*, Rel. No. 77555, File No. 3-17204, § IV.C.1-2, 4, 13. (Apr. 7, 2016).

involving books-and-records and internal-controls violations.[92] 2016 did not seem to pan out that way, with 12 parallel resolutions, far more than either 2015 (which had none) or 2014 (which had four).[93] The DOJ and the SEC reached parallel resolutions in PTC, VimpelCom, Akamai/Nortek, JCI, Analogic/BK Medical, LATAM/LAN, Och-Ziff, Embraer, JPMorgan Chase & Co. ("JPMC"), Odebrecht/Braskem, Teva and General Cable Corporation ("GCC").

In July 2016, LATAM reached parallel civil and criminal resolutions, including fines totaling over $22 million.[94] LATAM entered into a three-year DPA with the DOJ and an administrative order with the SEC to resolve charges that it failed to keep accurate books and records, and failed to maintain adequate internal accounting controls.[95]

On December 22, 2016, Teva agreed to pay a total of more than $519 million to resolve FCPA charges, including $236 million in disgorgement and interest to the SEC and a $283 million criminal penalty to the DOJ.[96] In its DPA with the DOJ, Teva admitted that Teva executives paid bribes to Russian and Ukrainian government officials to increase pharmaceutical sales and influence the approval of its drug registrations. Teva also failed to implement adequate internal accounting controls at its Mexican subsidiary, thus allowing bribes to be paid to doctors employed by the Mexican government to prescribe its drugs since at least 2005.[97] Similarly, the SEC complaint alleged that Teva made more than $214 million in illicit profits through payments to increase its market share, obtain regulatory approvals, and garner favorable drug purchase and prescription decisions.[98] Teva's wholly-owned Russian subsidiary also pleaded guilty to a criminal information, filed in the Southern District of Florida, charging the subsidiary with one count of conspiracy to violate the anti-bribery provisions of the FCPA.[99]

The final parallel resolution of the year, announced December 29, 2016, involved Kentucky-based wire and cable manufacturer GCC, which agreed to pay more than $75 million to resolve the SEC and the DOJ investigations (with over $20 million to the DOJ, as part of an NPA, and over $55 million in disgorgement and interest to the SEC, which filed a cease-and-desist order).[100] GCC admitted to making improper payments through its subsidiaries to foreign government officials in Angola, Bangladesh, China, Egypt, Indonesia and Thailand, to corruptly gain business in violation of the FCPA since 2002, resulting in profits of more than $50 million.[101] The DOJ noted that GCC voluntarily and timely disclosed the conduct at issue and cooperated fully in the investigation and remediation, which earned the company a 50 percent

---

[92] Dylan Tokar, *Brockmeyer: SEC to focus again on the pharma industry*, GLOBAL INVESTIGATIONS REVIEW, Feb. 22, 2016.
[93] *See* US Securities and Exchange Commission, SEC Enforcement Actions: FCPA Cases, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml; US Department of Justice, Related Enforcement Actions: 2015, https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2015; US Department of Justice, Related Enforcement Actions: 2015, https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2014.
[94] Deferred Prosecution Agreement, *United States v. LATAM Airlines Group, S.A.*, No. 16-CR-60195, ¶ 7 (S.D. Fla. July 25, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of LAN Airlines S.A.*, Rel. No. 78402, File No. 3-17357, IV.C. (July 25, 2016).
[95] Deferred Prosecution Agreement, *United States v. LATAM Airlines Group, S.A.*, No. 16-CR-60195 (S.D. Fla. July 25, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of LAN Airlines S.A.*, Rel. No. 78402, File No. 3-17357 (July 25, 2016).
[96] US Department of Justice Press Release No. 16-1522: Teva Pharmaceutical Industries Ltd. Agrees to Pay More than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2014).
[97] Deferred Prosecution Agreement, *United States v. Teva Pharmaceutical Industries Ltd.*, No. 16-CR-20968, Attachment A ¶¶ 16-17 (S.D. Fla. Dec. 22, 2016).
[98] Complaint, *SEC v. Teva Pharmaceutical Industries Ltd.*, No. 16-CV-25298, ¶ 2 (S.D. Fla. Dec. 22, 2016).
[99] Plea Agreement, *United States v. Teva LLC*, No. 16-CR-20967, ¶ 1 (S.D. Fla. Dec. 22, 2016); Information, *United States v. Teva LLC*, No. 16-CR-20967, ¶ 48 (S.D. Fla. Dec. 22, 2016).
[100] U.S. Securities and Exchange Commission Press Release No. 2016-283: Wire and Cable Manufacturer Settles FCPA and Accounting Charges (Dec. 29, 2016); US Department of Justice Press Release No. 16-1536: General Cable Corporation Agrees to Pay $20 Million Penalty for Foreign Bribery Schemes in Asia and Africa (Dec. 29, 2016).
[101] Non-Prosecution Agreement between US Department of Justice and General Cable Corporation, Attachment A ¶¶ 7-31 (Dec. 22, 2016), https://www.justice.gov/criminal-fraud/file/921801/download.

reduction off the bottom of the USSG range.[102] GCC paid an additional $6.5 million penalty to the SEC to settle accounting-related violations, while neither admitting nor denying the SEC's findings.[103] The SEC also individually charged Karl J. Zimmer, GCC's former senior vice president responsible for sales in Angola, who agreed to pay a $20,000 penalty while neither admitting nor denying allegations that he knowingly circumvented internal accounting controls and caused FCPA violations when he approved improper payments.[104]

In addition to the parallel resolutions discussed above, 2016 also saw several instances where the DOJ declined to prosecute FCPA charges, partially in reliance on the SEC's resolution regarding the same conduct, including Akamai, Nortek and AZN, discussed above. The Akamai and Nortek declinations, which were the first issued under the principles of the DOJ's Pilot Program, relied on the companies' corrective conduct and the fact that they were disgorging the full amount of their profits to the SEC.[105]

A typical feature of parallel resolutions is for the SEC not to impose a civil fine if the DOJ has imposed a criminal one. Zimmer Biomet, which entered into a parallel resolution in January 2017, is an exception to this practice. The company paid over $30 million, likely because the government viewed it as a recidivist after breaching its 2012 DPA with ongoing violations of the FCPA.[106]

G. DOJ Individual Resolutions Remain Steady

Throughout 2016, DOJ officials emphasized its focus on individual prosecutions, following its September 2015 Yates Memorandum requiring companies to provide the DOJ with "all relevant facts relating to the individuals responsible for the misconduct."[107] The DOJ and the FBI both devoted more resources to individual prosecutions in 2016, shining the spotlight on individual accountability as a key in changing corporate compliance culture.[108] Andrew Weissmann, Chief of the DOJ's Fraud Section, commented that the DOJ FCPA unit had added ten attorneys, as well as five supervisors, to increase its prosecution of individuals involved in FCPA violations.[109] The FBI also added three additional squads of agents to assist in the investigation of FCPA cases.[110]

The number of DOJ actions against individuals, however, remained steady at eight each in 2015 and 2016. In January 2016, Fraud Section Chief Andrew Weissmann cautioned that numbers

---

[102] Non-Prosecution Agreement between US Department of Justice and General Cable Corporation, ¶ 1 (Dec. 22, 2016), https://www.justice.gov/criminal-fraud/file/921801/download.
[103] Order Instituting Cease-and-Desist Proceedings, *In the Matter of General Cable Corporation*, Rel. No. 79702, File No. 3-17754, II, IV.B. (Dec. 29, 2016).
[104] Order Instituting Cease-and-Desist Proceedings, *In the Matter of General Cable Corporation*, Rel. No. 79704, File No. 3-17756, II, IV.B. (Dec. 29, 2016).
[105] US Department of Justice Letter from Daniel Kahn to Luke Cadigan, Esq. re: Nortek Inc. (June 3, 2016), https://www.justice.gov/criminal-fraud/file/865406/download; US Department of Justice Letter from Daniel Kahn to Josh Levy, Esq., and Ryan Rohlfson, Esq. re: Akamai Technologies, Inc. (June 6, 2016), https://www.justice.gov/criminal-fraud/file/865411/download.
[106] US Securities and Exchange Commission Press Release No. 2017-8: Biomet Charged with Repeating FCPA Violations (Jan. 12, 2017); US Department of Justice Press Release No. 17-045: Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017).
[107] Sally Quillian Yates, Former Deputy Attorney General, US Department of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.
[108] Adam Dobrik, *FBI: Target Executives to Change Compliance Culture*, GLOBAL INVESTIGATIONS REVIEW, June 27, 2016; Sally Q. Yates, Former Deputy Attorney General, US Department of Justice, Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association.
[109] Q&A with DOJ Fraud Chief Andrew Weissmann, TRACE INT'L BLOG (Jan. 26, 2016), http://www.traceinternational.org/blog/750/Q_A_with_DOJ_Fraud_Chief_Andrew_Weissmann.
[110] US Department of Justice Criminal Division, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

may remain low because individual enforcement actions were more complex than actions brought against companies, and thus require greater resources and tend to take longer to resolve.[111]

H. SEC Covered New Ground with Individual Resolutions

The SEC continued to pursue resolutions against individuals, resolving enforcement actions against eight individuals in 2016. One of these resolutions, with Yu Kai Yuan, signified the SEC's first-ever DPA to resolve FCPA charges with an individual.[112] As discussed in further detail below, the SEC entered into a three-year DPA with Yuan, a former sales executive at PTC China, on February 26, 2016, alleging that Yuan caused PTC to violate the books-and-records and internal-controls provisions of the FCPA.[113]

I. Third Parties Continue to be Major Focus

In 2016, as in recent years, third parties continued to be a major focus of the government's enforcement actions. The continued emphasis on third parties underscores the importance of conducting thorough due diligence before and after retaining third parties, and of fully investigating and resolving any red flags in third-party relationships, especially in high-risk areas.

1. Due Diligence on Third Parties and Monitoring of Business Partners of Crucial Importance

Many cases in 2016 showed the need for appropriate due diligence on agents, including Novartis, Nordion (Canada) Inc. ("Nordion"), Anheuser-Busch InBev SA/NV's ("AB InBev"), VimpelCom, PTC, SciClone Pharmaceuticals Inc. ("SciClone") and Key.[114]

---

[111] Q&A with DOJ Fraud Chief Andrew Weissmann, TRACE INT'L BLOG (Jan. 26, 2016), http://www.traceinternational.org/blog/750/Q_A_with_DOJ_Fraud_Chief_Andrew_Weissmann.

[112] This is the SEC's second DPA with an individual; the first was with a different individual for non-FCPA charges.

[113] Deferred Prosecution Agreement between the US Securities and Exchange Commission and Yu Kai Yuan, ¶¶ 1, 3 (Dec. 10, 2015). The SEC entered an administrative cease-and-desist order with PTC Inc., PTC China's parent company,on the same day. Order Instituting Cease-and-Desist Proceedings, *In the Matter of PTC Inc.*, Rel. No. 77145, File No. 3-17118 (Feb. 16, 2016).

[114] *See, e.g.*, Order Instituting Cease-and-Desist Proceedings, *In the Matter of Novartis AG*, Rel. No. 77431, File No. 3-17177, ¶ 16 (Mar. 23, 2016) (alleging that Novartis "failed to conduct proper due diligence in connection with [Chinese] vendors."); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nordion (Canada) Inc.*, Rel. No. 77290, File No. 3-17153, ¶¶ 12, 22-23 (Mar. 3, 2016) (describing how Nordion "failed to conduct adequate due diligence" on its agent and failed to follow its own internal controls procedures, leading to alleged books-and-records and internal-controls violations); Information, *United States v. VimpelCom Ltd.*, 16-CR-137, ¶ 66 (S.D.N.Y. Feb. 18, 2016) (discussing how VimpelCom did not have "a system for conducting, recording, and verifying due diligence on third parties" and how VimpelCom did not undertake sufficient due diligence even after "board members, executives, and employees . . . identified serious concerns with third parties"); Order Instituting Cease-and-Desist Proceedings, *In the Matter of PTC Inc.*, Rel. No. 77145, File No. 3-17118, ¶ 25 (Feb. 16, 2016) (noting that PTC did not "properly vet PTC-China's business partners" and failed to "properly scrutinize travel related expenses to prevent reimbursement for employees' airfare, lodging, and other expenses that were either personal in nature or gifts for customers."); Order Instituting Cease-and-Desist Proceedings, *In the Matter of SciClone Pharmaceuticals, Inc.*, Rel. No. 77058, File No. 3-17101, ¶ 11 (Feb. 4, 2016) (pointing out a "lack of due diligence" for third party vendors and a "lack of controls," which made it difficult to ensure that events had legitimate educational purposes or were not overwhelmingly recreational.); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Key Energy Services, Inc.*, Rel. No. 78558, File No. 3-17379, ¶ 9 (Aug. 11, 2016) (faulting Key Mexico for "fail[ing] to conduct due diligence on the Consulting Firm, despite Key Energy policies requiring such due diligence be performed."); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Anheuser-Busch InBev SA/NV,* Rel. No. 78957, File No. 3-17586, ¶¶ 1, 11, 18 (Sept. 28, 2016) (citing the lack of due diligence on "third-party sales promoters").

a. Retaining Inexperienced and Poorly Vetted Third Parties Leads to FCPA Violations

Nordion provides a prime example of how a company that has little experience operating in high-risk areas, and fails to conduct any due diligence, runs particular risks for violating the FCPA.[115] Nordion allegedly provided minimal, if any, anti-corruption compliance training to its employees and, relatedly, failed to establish rigorous due diligence measures. For example, after little due diligence, Nordion authorized an agent that had no experience with nuclear medicine or medical isotopes to obtain medical isotopes from a Russian government agency.[116]

Because Nordion's alleged FCPA violations stemmed heavily from its lack of third-party due diligence, Nordion's remedial measures focused on its interactions with third-party agents.[117] As part of its remedial measures, Nordion enacted a strict protocol governing the use of, and payments to, third-party agents and implemented policies and procedures to conduct third-party risk assessments. The company also now requires all agents to enter contracts that include FCPA warranties and representations to adopt its anti-corruption policies.[118]

On September 28, 2016, the SEC resolved its inquiry into AB InBev's alleged violations of the books-and-records and internal-controls provisions.[119] Between 2009 and 2012, AB InBev held a 49 percent interest in InBev India International Private Limited ("IIIPL"), an Indian joint venture, which managed the marketing and distribution of beer made by AB InBev's Indian subsidiary—Crown Beers India Private Limited ("Crown"). The SEC alleged that during those years, IIIPL hired two third-party sales promoters that made improper payments to Indian government officials so that Crown could obtain additional beer orders and increase its brewery hours in the Indian states of Andhra Pradesh and Tamil Nadu.[120] IIIPL failed to adequately vet the promoters beforehand and engaged them despite their lack of relevant experience. For example, IIIPL hired one promoter company in 2009 to expand its business in Andhra Pradesh, though the promoter lacked any experience in the alcohol industry for that state. Additionally, neither IIIPL nor Crown conducted any due diligence on that promoter before engaging it, and due diligence forms were never completed for this promoter company. According to the SEC, Crown was on notice of these internal-controls failures at IIIPL. But even in the face of an internal complaint about possible FCPA concerns and a subsequent internal audit in 2010, it took no follow-up action to resolve known concerns until more than a year later.[121] AB InBev paid the SEC $2,712,955 in disgorgement (plus interest of $292,381), a civil fine of $3,002,955,[122] and agreed

---

[115] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nordion (Canada) Inc.*, Rel. No. 77290, File No. 3-17153, ¶¶ 1, 6-7 (Mar. 3, 2016) (mentioning that Nordion "had little experience operating in jurisdictions with a high-risk of corruption" and that when Nordion first started working with one of its agents it "had performed virtually no due diligence on the Agent.").

[116] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nordion (Canada) Inc.*, Rel. No. 77290, File No. 3-17153, ¶¶ 6-7 (Mar. 3, 2016).

[117] *See*, Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nordion (Canada) Inc.*, Rel. No. 77290, File No. 3-17153, ¶ 21 (Mar. 3, 2016) (discussing Nordion's remedial measures which included a "strict protocol" regarding third-party agents and "policies and procedure to conduct third-party risk assessments.").

[118] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nordion (Canada) Inc.*, Rel. No. 77290, File No. 3-17153, ¶ 21 (Mar. 3, 2016).

[119] US Securities and Exchange Commission Press Release No. 2016-196: SEC Charges Anheuser-Busch InBev with Violating FCPA and Whistleblower Protection Laws (Sept. 28, 2016).

[120] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Anheuser-Busch InBev SA/NV,* Rel. No. 78957, File No. 3-17586, ¶ 1 (Sep. 28, 2016).

[121] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Anheuser-Busch InBev SA/NV,* Rel. No. 78957, File No. 3-17586, ¶¶ 10-12 (Sep. 28, 2016).

[122] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Anheuser-Busch InBev SA/NV,* Rel. No. 78957, File No. 3-17586, ¶¶ II, IV. B. (Sep. 28, 2016).

to a two-year period of self-reporting. The DOJ declined to pursue its investigation in June 2016.[123]

b. Third Parties Providing Non-Existent Services

Companies were also held accountable in 2016 for routing money through third parties that provided non-existent services.[124] For example, Unitel paid a $30 million fee to a shell company that never provided VimpelCom any legitimate consulting services. The supposed consulting services consisted of reports and presentations that VimpelCom and Unitel did not need and that "were almost entirely plagiarized from Wikipedia entries, other internet sources, and internal VimpelCom documents." [125] VimpelCom justified similar payments as consulting fees, which it also supported with false documents.

Individuals have also been charged with facilitating bribes through third parties that did not provide any legitimate services.[126] Two businessmen, Roberto Enrique Rincon-Fernandez and Abraham Jose Shiera-Bastidas, were indicted for their roles in a scheme to corruptly secure contracts with Venezuela's state-owned oil and gas company, Petroleos de Venezuela S.A. ("PDVSA").[127] The indictment against Rincon-Fernandez and Shiera-Bastidas stated that Rincon-Fernandez, Shiera-Bastidas and others concealed bribes as "commissions." They allegedly managed to make the payments by inventing justifications for the bribes and receiving invoices for equipment and/or services that were never performed and/or received.[128]

c. Handling of Confidential Information

Key's FCPA violations stemmed from payments to a contract employee at Petróleos Mexicanos ("Pemex"), a Mexican state-owned oil company. Key Mexico, Key Energy's Mexican subsidiary, hired a consulting firm to advise it on contracts with Pemex.[129] Through the consulting firm, Key Mexico allegedly made payments totaling approximately $561,000 to an employee that provided Key Mexico with inside information, advice and assistance on Pemex contracts. The employee

---

[123] Anheuser-Busch InBev Sa/NV, Admission to Listing and Trading Ordinary Shares on Euronext Brussels (SEC Form 425) (Aug. 29, 2016). Anheuser-Busch's SEC Form 425 indicates it received a declination letter from the DOJ: "On 8 June 2016, the U.S. Department of Justice notified AB InBev that it was closing its investigation and would not be pursing enforcement action in this [FCPA] matter."

[124] *See, e.g.*, Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, No. 16-CR-00137, Attachment A ¶ 48 (S.D.N.Y. Feb. 22, 2016) (paying for supposed consulting services consisting of reports and presentations that VimpelCom and Unitel did not need and that "were almost entirely plagiarized from Wikipedia entries, other internet sources, and internal VimpelCom documents"); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Key Energy Services, Inc.*, Rel. No. 78558, File No. 3-17379, ¶¶ 15-16 (Aug. 11, 2016) (making 58 payments with no record that it received any legitimate consulting services); Non-Prosecution Agreement between US Department of Justice and PTC Inc., Attachment A ¶ 9 (Feb. 16, 2016), http://www.corporatecrimereporter.com/wp-content/uploads/2016/02/PTC-NPA.pdf (describing how "partners provided PTC China with false documents indicating that they had performed subcontracted services even though there were no such services contemplated or performed").

[125] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, No. 16-CR-00137, Attachment A ¶¶ 4, 33, 48 (S.D.N.Y. Feb. 22, 2016).

[126] *See* Indictment, *United States v. Rincon-Fernandez and Shiera-Bastidas*, No. 15-CR-654-EGT (S. D. Tex. Dec. 21, 2015).

[127] US Department of Justice Press Release No. 16-698: Businessman Pleads Guilty to Foreign Bribery and Tax Charges in Connection with Venezuela Bribery Scheme (June 16, 2016).

[128] Indictment, *United States v. Rincon-Fernandez and Shiera-Bastidas*, No. 15-CR-654-EGT, ¶ 36 (S. D. Tex. Dec. 21, 2015).

[129] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Key Energy Services, Inc.*, Rel. No. 78558, File No. 3-17379, ¶¶ 1, 7, 15 (Aug. 11, 2016).

allegedly gave Key Mexico non-public information about Pemex and lobbied for Key Energy within Pemex.[130]

In sum, third parties have long been the most prevalent and highest risk area in FCPA enforcement matters, a point emphasized in the DOJ's and the SEC's 2012 Resource Guide.[131] As discussed above, lack of due diligence, adequate monitoring and/or training regarding third parties can lead to FCPA violations and expensive settlements. In 2016, we saw a continued focus from enforcement agencies on third parties and corresponding responses from companies to remediate their third-party dealings with strategies such as heightened screenings and language-appropriate training. We would expect that third parties will continue to be the most difficult area for companies to police and will continue to play a significant role in most major enforcement actions.

3. Notable Features of Corporate Resolutions and Significant Ongoing Investigations

A. The SEC Maintained Its Focus on China, Revived Its Interest in the Pharmaceutical and Financial Services Industries

Approximately 60 percent of the SEC's FCPA cases in 2016 had touchpoints with China. The SEC's focus on China spanned industries but was concentrated in the pharmaceutical and financial services sectors. First, the SEC announced in early 2016 that it was "going back to the pharma industry after a break for a period of years," noting that the pharmaceutical industry had had a "difficult time addressing . . . risks."[132] In 2016, the SEC married its focus on China with emphasis on the industry: all five of the pharmaceutical companies that the SEC filed charges against between October 2015 and October 2016 were alleged to have been involved in conduct in China.[133]

In September 2016, GlaxoSmithKline plc ("GSK") paid $20 million to settle charges with the SEC for alleged violations of the FCPA's books-and-records and internal-controls provisions[134] by its subsidiary, GlaxoSmithKline China Investment Co., Ltd. ("GSKCI"), and a China-based joint venture which allegedly made improper payments to Chinese HCPs (with approval from regional and district managers) to increase prescriptions and sales of GSK's products. The company allegedly provided benefits that ranged from shopping excursions to cash and were allegedly improperly recorded in GSK's books as legitimate travel and entertainment expenses, marketing expenses, speaker payments and other business-related expenses. A portion of these expenses went through third-party vendors, on which GSKCI spent approximately $225 million related to planning and travel services between 2010 and 2013.[135] Of that total sum, the SEC alleged that about "44 percent of the sampled invoices were inflated and approximately 12 percent were for events that did not occur."[136] The SEC alleged that GSK's internal audit team had identified control deficiencies in 2010 but treated these issues as isolated incidents, rather than system-wide red flags, and did not properly remedy them. As part of the settlement, GSK

---

[130] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Key Energy Services, Inc.*, Rel. No. 78558, File No. 3-17379, ¶ 8 (Aug. 11, 2016).
[131] *See* US Department of Justice & US Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 22-23, 60-61 (2012).
[132] *See* Dylan Tokar, *Brockmeyer: SEC to focus again on the pharma industry*, GLOBAL INVESTIGATIONS REVIEW, Feb. 22, 2016.
[133] Roger Hamilton-Marin, *SEC's Kara Brockmeyer: Rise in Latin America FCPA Enforcement Imminent*, GLOBAL INVESTIGATIONS REVIEW, Oct. 13, 2016.
[134] US Securities and Exchange Commission Press Release No. 3-17606: GlaxoSmithKline Pays $20 Million Penalty to Settle FCPA Violations (Sept. 30, 2016).
[135] Order Instituting Cease-and-Desist Proceedings, *In the Matter of GlaxoSmithKline plc*, Rel. No. 3810, File No. 3-17606, ¶¶ I, J, L (Sept. 30, 2016).
[136] Order Instituting Cease-and-Desist Proceedings, *In the Matter of GlaxoSmithKline plc*, Rel. No. 3810, File No. 3-17606, ¶ L (Sept. 30, 2016).

also agreed to self-monitor and report on its remediation and anti-corruption compliance measures to the SEC for two years.[137] GSK announced in September 2016 that the DOJ had concluded its investigation and declined to prosecute the case.[138] The DOJ may have considered a 2014 Chinese court decision, in which the court fined GSK $500 million for allegedly bribing hospital and doctors. [139] GSK "fully accept[ed] the facts and evidence of the investigation, and the verdict of the Chinese judicial authorities."[140] As discussed above, Novartis also agreed in March 2016 to disgorge $21.5 million, pay $1.5 million in prejudgment interest, and pay a $2 million civil penalty[141] to resolve alleged books-and-records and internal-controls violations related to payments to HCPs.[142]

SEC FCPA Chief Kara Brockmeyer foreshadowed an increase in enforcement matters in the financial services sector in early 2016,[143] and the year witnessed a renewed focus on financial services firms with two ground-breaking resolutions. First, in September, the DOJ and the SEC resolved FCPA charges with Och-Ziff and OZ Africa,[144] holding a hedge fund accountable for the first time for violating the FCPA. Second, JPMC, and its wholly-owned subsidiary, JPMorgan Securities (Asia Pacific) Ltd. ("JPMC APAC"), agreed in November 2016 to pay $264.4 million[145] to resolve investigations by the DOJ, the SEC and the Federal Reserve System's Board of Governors (the "Fed") related to JPMC APAC's "Client Referral Program," also known as the "Sons and Daughters Program."[146] Through the program, JPMC APAC allegedly offered jobs and internships to relatives of Chinese government officials in hopes of incentivizing those officials to award business to JPMC APAC.[147] On a number of occasions, referrals were alleged to have been hired specifically as part of a "quid pro quo" arrangement designed to ensure that JPMC APAC won particular business.[148]

---

[137] Order Instituting Cease-and-Desist Proceedings, *In the Matter of GlaxoSmithKline plc*, Rel. No. 3810, File No. 3-17606, ¶¶ O, S (Sept. 30 2016).
[138] Dylan Tokar, *GSK Resolves FCPA Case with US $20 Million SEC Settlement and DOJ Declination*, GLOBAL INVESTIGATIONS REVIEW, Sept. 30, 2016.
[139] Keith Bradsher and Chris Buckley, *China Fines GlaxoSmithKline Nearly $500 Million in Bribery Case*, N.Y. TIMES (Sept. 19, 2014).
[140] Keith Bradsher and Chris Buckley, *China Fines GlaxoSmithKline Nearly $500 Million in Bribery Case*, N.Y. TIMES (Sept. 19, 2014).
[141] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Novartis, AG*, Rel. No. 77431, File No. 3-17177, ¶¶ 4-5, IV. B. (Mar. 23, 2016).
[142] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Novartis, AG*, Rel. No. 77431, File No. 3-17177, ¶¶ II, 1 (Mar. 23, 2016).
[143] Dylan Tokar, *Brockmeyer: SEC to Focus Again on the Pharma Industry,* GLOBAL INVESTIGATIONS REVIEW, Feb. 19, 2016.
[144] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank*, Rel. No. 78989, File No. 3-17595 (Sept. 29, 2016); Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, No. 16-CR-516 (E.D.N.Y. Sept. 29, 2016); Plea Agreement, *United States v. OZ Africa Management GP, LLC*, No. 16-CR-515 (E.D.N.Y. Sept. 29, 2016).
[145] US Department of Justice Press Release No. 16-1343: JPMorgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016). The $264.4 million paid by JPMC and JPMC APAC to resolve the matter with the DOJ and the SEC included $72 million in criminal penalties paid to the DOJ, $130.5 million in disgorgement and prejudgment interest paid to the SEC, and $61.9 million paid to the Federal Reserve System's Board of Governors.
[146] US Department of Justice Press Release No. 16-1343: JPMorgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016).
[147] Non-Prosecution Agreement Between US Department of Justice and JPMorgan Securities (Asia Pacific), Attachment A ¶¶ 11-12 (Nov. 17, 2016), https://www.justice.gov/opa/press-release/file/911206/download.
[148] Non-Prosecution Agreement Between US Department of Justice and JPMorgan Securities (Asia Pacific), Attachment A ¶ 11 (Nov. 17, 2016), https://www.justice.gov/opa/press-release/file/911206/download; US Department of Justice Press Release No. 16-1343: JPMorgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016).

JPMC's resolution with the Fed[149] marked the first time the Fed has entered into a settlement related to FCPA violations. This resolution maintained a spotlight on hiring practices in the financial services sector that is likely to continue throughout 2017 and possibly beyond.[150]

Companies across several other industries resolved FCPA investigations in 2016 that related to conduct in China, including Las Vegas Sands and JCI, both of which are discussed below. Closing out the year, the DOJ and the SEC announced resolution of FCPA investigations into GCC, which agreed on December 29, 2016 to pay more than $75 million[151] to resolve SEC and DOJ charges alleging improper payments to government officials in several countries, including China.[152]

B. The DOJ and the SEC Examine Charitable Contributions with Renewed Vigor

In February 2016, the SEC and the DOJ announced settlements with telecommunications provider VimpelCom, which paid more than $795 million in penalties[153] based on $114 million in bribe payments and at least $502,000 in donations to a charity affiliated with a foreign official.[154] Andrew J. Ceresney, then Director of the SEC Enforcement Division, specifically highlighted this aspect of the case, stating, "[t]hese old-fashioned bribes, hidden through sham contracts and charitable contributions, left the company's books and records riddled with inaccuracies."[155]

In September 2016, Nu Skin Enterprises, Inc. ("Nu Skin US") settled books-and-records and internal-controls charges for $765,688 after the SEC investigated the company's $154,000 donation to a charity affiliated with a foreign official.[156] Unlike VimpelCom, this FCPA enforcement action involved a one-time charitable contribution made by Nu Skin's subsidiary, Nu Skin Daily Use & Health Products Co. Ltd. ("Nu Skin China").[157] Nu Skin China was under investigation by a local agency[158] and was informed it would be charged and fined approximately $431,000. In response, a Nu Skin China employee expressed the company's desire to "donate some money instead of [paying] a fine" and reached out to a communist party official to help coordinate the donation (as well as to provide recommendation letters for US

---

[149] Board of Governors of the Federal Reserve System Press Release (Nov. 17, 2016), https://www.federalreserve.gov/newsevents/press/enforcement/20161117a.htm; Cease-and-Desist Order, *In the Matter of J.P. Morgan Chase & Co.*, Docket No. 16-22-B-HC (Nov. 17, 2016) (Board of Governors of the Federal Reserve System).

[150] US Department of Justice Press Release No. 16-1343: JPMorgan's Investment Bank in Hong Kong Agrees to pay $72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016).

[151] US Securities and Exchange Commission Press Release No. 2016-283: Wire and Cable Manufacturer Settles FCPA and Accounting Charges (Dec. 29, 2016). Included in that amount was a $20 million criminal penalty to the DOJ, and $55 million in disgorgement and pre-judgment interest to the SEC. Separately, GCC agreed to pay an additional $6.5 million penalty to settle accounting-related allegations.

[152] Non-Prosecution Agreement between US Department of Justice and General Cable Corporation (Dec. 22, 2016), https://www.sec.gov/litigation/admin/2016/34-79703.pdf; Order Instituting Cease-and-Desist Proceedings, *In the Matter of General Cable Corporation*, Rel. No. 79702, File No. 3-17754 (Dec. 29, 2016).

[153] US Securities and Exchange Commission Press Release No. 2016-34: VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016); US Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016).

[154] Complaint, *SEC v. VimpelCom Ltd.*, No. 16-CV-01266, ¶¶ 17, 36 (S.D.N.Y. Feb. 18, 2016).

[155] US Securities and Exchange Commission Press Release No. 2016-34: VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016).

[156] US Securities and Exchange Commission Press Release No. 3-17556: SEC Charges Nu Skin Enterprises, Inc. with FCPA Violation (Sept. 20, 2016).

[157] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nu Skin Enterprises Inc.*, Rel. No. 78884, File No. 3-17556, ¶¶ 8-14 (Sept. 20, 2016).

[158] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nu Skin Enterprises Inc.*, Rel. No. 78884, File No. 3-17556, ¶¶ 4-7 (Sept. 20, 2016). The investigation related to potential violations of local laws on direct selling.

colleges for the official's child).[159] Shortly after Nu Skin China made the donation at a public ceremony attended by the party official and a top agency official, the Chinese agency ended its investigation without fining Nu Skin China.[160]

In both the VimpelCom and NuSkin resolutions, the SEC highlighted the failure of each company's internal controls to identify and appropriately address FCPA violations. The SEC alleged that VimpelCom made at least $502,000 in payments to charities affiliated with a foreign official.[161] It is unclear to what extent these charitable donations benefitted the foreign official, but the SEC ultimately concluded that the payments were made "under the guise of legitimate charitable contributions" that were "improperly characterized in the books of records of VimpelCom's subsidiaries as legitimate expenses, and consolidated in VimpelCom's financial statements . . . ."[162] Nu Skin involved a different type of alleged compliance failure. Nu Skin US reviewed the donation agreement and instructed Nu Skin China to include FCPA compliance language but did not follow up and the FCPA language was later removed from the donation agreement.[163]

The SEC's 2016 resolutions in this area both involved additional conduct—more than $100 million in bribe payments in the case of VimpelCom and the obtaining of recommendation letters in Nu Skin. However, the re-emergence of charitable contributions as an FCPA issue should be of concern for corporate counsel and companies as they evaluate their charitable giving. Nu Skin, like the SEC's 2004 Schering Plough and 2012 Eli Lilly resolutions, are like the recent hiring cases brought by the SEC in that the government official does not receive the benefit but rather an intangible "thing of value" based on the benefit provided to the charitable organization.

Thus far, these intangible benefit cases have been premised on violations of the FCPA's accounting provisions, but it is clear that the SEC views conduct of this nature as potential bribery. Such benefits can be challenging to identify for corporate compliance officers, and robust charitable review procedures should be an important component of an anti-corruption compliance program.

C. The SEC Keeps Its Focus on Gifts and Hospitality Involving Foreign Officials and Their Families

In 2016, the SEC and the DOJ brought several actions against companies that provided improper gifts, travel and entertainment to foreign officials to acquire business advantages. The actions against PTC, GSK, Nortek, Novartis and OLA, all discussed above, involved the provision of gifts and hospitality to government officials to obtain a business advantage, with the items of value improperly recorded as legitimate expenses. OLA, for example, established training centers in Central and South America ostensibly to provide medical education, but actually used these training centers to provide benefits to HCPs with purchasing power at state-owned medical facilities.[164] These cases underscore the need for proper recording of business expenses and effective internal controls, especially for companies doing business in high-risk countries.

---

[159] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nu Skin Enterprises Inc.*, Rel. No. 78884, File No. 3-17556, ¶¶ 9, 10-11 (Sept. 20, 2016).
[160] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nu Skin Enterprises Inc.*, Rel. No. 78884, File No. 3-17556, ¶¶ 14-15 (Sept. 20, 2016).
[161] Complaint, *SEC v. VimpelCom Ltd.*, No. 16-CV-01266, ¶ 36 (S.D.N.Y. Feb. 18, 2016).
[162] Complaint, *SEC v. VimpelCom Ltd.*, No. 16-CV-01266, ¶ 36 (S.D.N.Y. Feb. 18, 2016).
[163] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nu Skin Enterprises Inc.*, Rel. No. 78884, File No. 3-17556, ¶ 13 (Sept. 20, 2016).
[164] Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc.*, No. 16-CR-3525, Attachment A ¶¶ 6-7 (D.N.J. Mar. 1, 2016).

In 2016, the government also took issue with inadequate gift vetting as an internal-controls problem. In August 2016, Key disgorged $5 million to settle FCPA violations that Key Mexico made improper payments to a Pemex employee through a consulting company.[165] In 2012, Key Mexico was in contract negotiations with Pemex.[166] The same year, Key Mexico requested approximately $118,000 in holiday raffle gifts for Pemex's annual Christmas party. Key Mexico, without disclosure to Key, planned to spend at least $55,000 of this budget on gifts to 130 Pemex officials.[167] Key allegedly approved the request without questioning the amount, which was greater than what Key spent on raffle gifts the previous year. The SEC faulted the company for "failing to respond effectively to signs indicating that gifts provided by Key Mexico to Pemex officials were being given as rewards for providing Key Mexico with increased business that year."[168]

As always, gifts and benefits to foreign officials' family members can run afoul of the FCPA, even if they do not directly benefit a foreign official. In March 2016, as part of a $7.5 million resolution, the SEC alleged that Qualcomm offered improper gifts, travel and entertainment to foreign officials' family members in exchange for business.[169] Gifts included airplane tickets for officials' children and event tickets for officials' spouses. Moreover, a Qualcomm executive provided an official's son with a $70,000 home loan.[170]

D. The SEC Continued Its "Strict Liability" Approach to Books-and-Records and Internal-Controls Violations

A company need not know about or be on notice of an improper payment to a foreign official if that payment is inaccurately recorded in the company's books and records or demonstrates a lack of appropriate internal controls. Furthermore, a payment in those circumstances need not be used to improperly influence a government official in order to violate the FCPA's accounting provisions.

1. Parent liable for accounting violation even in the absence of a link to an improper payment

In 2016, the Las Vegas Sands resolution furnished a good example of this principle. Las Vegas Sands, a Nevada-based owner and operator of integrated resorts and casinos in Asia and the United States, paid a $9 million civil penalty to settle alleged books-and-records and internal-controls violations with the SEC.[171] The SEC charged the company with failing to properly account for payments associated with a Beijing real estate project and a Macau ferry operator.[172] The SEC also held Las Vegas Sands accountable for a transaction involving a Chinese basketball team, despite no evidence that the payments relating to the team were used

[165] US Securities and Exchange Commission Press Release No. 3-17379: SEC Charges Key Energy Services, Inc. with FCPA Violations (Aug. 11, 2016).
[166] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Key Energy Services, Inc.*, Rel. No. 78558, File No. 3-17379, ¶ 19 (Aug. 11, 2016).
[167] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Key Energy Services, Inc.*, Rel. No. 78558, File No. 3-17379, ¶ 19 (Aug. 11, 2016).
[168] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Key Energy Services, Inc.*, Rel. No. 78558, File No. 3-17379, ¶¶ 19, 21 (Aug. 11, 2016). The SEC faulted the company for "failing to respond effectively to signs indicating that gifts provided by Key Mexico to Pemex officials were being given as rewards for providing Key Mexico with increased business that year."
[169] US Securities and Exchange Commission Press Release No. 2016-36: SEC: Qualcomm Hired Relatives of Chinese Officials to Obtain Business (Mar. 1, 2016).
[170] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Qualcomm Inc*., Rel. No. 77261, File No. 3-17145, ¶¶ 24, 29 (Mar. 1, 2016).
[171] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp.*, Rel. No. 77555, File No. 3-17204, ¶¶ 1, 8, IV. B. (Apr. 7, 2016).
[172] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp.*, Rel. No. 77555, File No. 3-17204, ¶¶ 33, 39 (Apr. 7, 2016).

to influence government employees in their official duties. According to the SEC, Las Vegas Sands wished to purchase the team to improve the company's image and generate casino traffic, but the Chinese Basketball Association would not permit a gaming company to own a league team. Las Vegas Sands used a Chinese consultant, who claimed to be a former Chinese government official with political connections, as a "beard" to purchase the team.[173] The Las Vegas Sands consultant established an entity to purchase and own the team, enabling Las Vegas Sands to benefit from association with the team while avoiding legal ownership.

Notably, the SEC did not allege that the consultant assisted Las Vegas Sands to obtain government approval for owning the team. However, the SEC did assert that the company knowingly failed to account properly for the payments associated with the team. According to the SEC, when a finance executive raised questions about the arrangement, he was put on administrative leave and eventually terminated, although the company did engage an international accounting firm to review the transaction. That review identified $700,000 in unaccounted-for funds before the accounting firm was told to stop its work. Nonetheless, Las Vegas Sands paid one-third of the $14.8 million it paid the consultant after the accounting firm had identified significant unaccounted for funds.[174] The SEC charged that these payments established books-and-records and internal-controls liability, regardless of whether the money was actually used to influence the conduct of a government official. Overall, including the payments associated with the Beijing building and the ferry service, the SEC asserted that Las Vegas Sands transferred, without proper authorization and/or documentation, over $62 million to the consultant.[175]

To remediate, Las Vegas Sands agreed to hire a new general counsel and new heads of the internal audit and compliance functions, establish a new Board of Directors Compliance Committee, and update its Code of Business Conduct and Anti-Corruption Policy. Las Vegas Sands also developed and implemented enhanced anti-corruption training and strengthened its screening of third parties and new hires.[176] As discussed above, Las Vegas Sands resolved a DOJ investigation into the same conduct in January 2017.[177]

The Analogic resolution provides another example of an SEC resolution related to books-and-records and internal-controls charges where no underlying bribery was alleged.[178]

2. Parent liable for conduct of subsidiary with no prior knowledge of improper payment

The SEC resolution with JCI was a reminder that a parent company's lack of knowledge over its foreign subsidiary's misconduct may not shield an issuer from books-and-records or internal-controls liability.[179] On July 11, 2016, JCI settled with the SEC charges that certain employees of JCI's wholly-owned Chinese subsidiary, China Marine, made improper payments of approximately $4.9 million between 2007 and 2013 to employees of Chinese government-

[173] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp.*, Rel. No. 77555, File No. 3-17204, ¶¶ 17, 18, 29 (Apr. 7, 2016).
[174] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp.*, Rel. No. 77555, File No. 3-17204, ¶¶ 21, 23, 25 (Apr. 7, 2016).
[175] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp.*, Rel. No. 77555, File No. 3-17204, ¶ 7 (Apr. 7, 2016).
[176] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp.*, Rel. No. 77555, File No. 3-17204, ¶ 50 (Apr. 7, 2016).
[177] See Section 2.
[178] Order Instituting Cease-and-Desist Proceedings*, In the Matter of SAP SE*, Rel. No. 77005, File No. 3-17080, ¶¶ 24-27 (Feb. 1, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Analogic Corp. and Lars Frost*, Rel. No. 78113, File No. 3-17305, ¶¶ 22-25 (June 21, 2016).
[179] US Securities and Exchange Commission Press Release No. 3-17337: Global HVAC Provider Settles FCPA Charges (July 11, 2016).

owned shipyards, ship-owners and others to obtain and retain business, as well as for personal enrichment.[180] The conduct allegedly occurred at China Marine, which JCI had taken over as part of its 2005 acquisition of York International Corporation ("York"). In 2007, York had been the subject of an FCPA enforcement action that included conduct in China,[181] and while the SEC credited JCI with remedial efforts following its acquisition of China Marine, it noted that "despite [JCI's] efforts to remediate China Marine, the bribery continued."[182]

The SEC noted that JCI's Denmark office, which oversaw JCI's Global Marine business, provided "very little oversight" of China Marine's operations. The China Marine employees fashioned the vendor scheme to evade thresholds that would trigger review by JCI Denmark.[183] Without admitting or denying the SEC's allegations, JCI agreed to pay $11.8 million in disgorgement, $1.38 million in prejudgment interest and a $1.18 million civil penalty.[184] JCI must also report to the SEC for one year on the status of its anti-corruption and FCPA-related remediation efforts.

As noted above, in both the Akamai and Nortek cases, the companies did not have prior knowledge of the improper payments by their subsidiaries. Both companies paid disgorgement and interest,[185] but the SEC did not charge either one with violating the FCPA or assess any additional penalties. Both companies received a declination from the DOJ, but it is unclear from the public papers to what extent the lack of prior knowledge contributed to the declination, as opposed to the companies' immediate disclosure and cooperation.

3. SEC Agency Theory

Using an expansive approach to agency theory, the government held several parent companies liable under the FCPA for the acts of their foreign subsidiaries. In both SciClone and PTC, the SEC analyzed the parent company's level of control over its subsidiary and, ultimately, determined that the parent company was liable for the actions of its subsidiary.[186] In SciClone, the SEC noted that "SciClone directs the relevant operations of" its direct and indirect subsidiaries in question.[187] Specifically, SciClone appointed directors and officers of its direct subsidiary, directed the subsidiary's business operations, and consolidated the subsidiary's books and records into its financial statements. Further, the SEC observed that "[d]uring relevant periods, some SciClone officers also served as officers and/or directors of [subsidiary], traveled frequently to China to participate in the management of [the subsidiary], and were responsible for negotiating its [subsidiary's] contracts with its Chinese distributors."[188]

---

[180] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Johnson Controls, Inc.*, Rel. No. 78287, File No. 3-17337, ¶ 1 (July 11, 2016).
[181] Deferred Prosecution Agreement, *United States v. York Int'l Corp.*, No. 07-CR-254 (D.D.C. Oct. 1, 2007); Complaint, *SEC v. York Int'l Corp.*, No. 07-CV-1750 (D.D.C. Oct. 1, 2007).
[182] US Securities and Exchange Commission Press Release No. 3-17337: Global HVAC Provider Settles FCPA Charges (July 11, 2016).
[183] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Johnson Controls, Inc.*, Rel. No. 78287, File No. 3-17337 (July 11, 2016).
[184] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Johnson Controls, Inc.*, Rel. No. 78287, File No. 3-17337 (July 11, 2016).
[185] US Securities and Exchange Commission Press Release No. 2016-109: SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016).
[186] US Securities and Exchange Commission Press Release: SciClone Charged with FCPA Violations (Feb. 4, 2016); US Securities and Exchange Commission Press Release No. 2016-29: SEC: Tech Company Bribed Chinese Officials (Feb. 16, 2016).
[187] Order Instituting Cease-and-Desist Proceedings, *In the Matter of SciClone Pharmaceuticals, Inc*., Rel. No. 77058, File No. 3-17101, ¶ 4 (Feb. 4, 2016).
[188] Order Instituting Cease-and-Desist Proceedings, *In the Matter of SciClone Pharmaceuticals, Inc*., Rel. No. 77058, File No. 3-17101, ¶ 4 (Feb. 4, 2016).

Similarly, PTC's subsidiary, PTC China allegedly disguised improper payments as commission payments or subcontracting fees to fund, either directly or indirectly, 24 trips for Chinese government officials.[189] Overall, PTC, PTC China's parent company, booked over $13.5 million in contracts from Chinese state owned entities whose employees went on the trips.[190] Two subsidiaries of PTC, Parametric Technology (Shanghai) Software Company Ltd. and PTC China, entered into an NPA with the DOJ and agreed to pay $14.54 million.[191] The SEC concluded that "PTC exercised substantial control over PTC-China" because PTC oversaw PTC-China's sales process and various PTC-China employees reported directly to PTC employees.[192] The SEC held that "under applicable agency principles, PTC-China and its employees acted as agents of PTC during the relevant time . . . ."[193] Based on this "control," the SEC charged both SciClone and PTC with violations of the FCPA's anti-bribery provisions.[194]

4. Notable Aspects of Individual Resolutions

A. Significant Individual Prosecutions

The DOJ resolved eight individual enforcement actions in 2016. Among the notable DOJ actions, by the close of 2016, all three defendants charged with violating the FCPA by bribing PDVSA employees Roberto Enrique Rincon-Fernandez, Abraham Jose Shiera-Bastidas and Moises Abraham Millan Escobar (the "2016 PDVSA Defendants")—had pleaded guilty.[195] In a break with the typical pattern in FCPA cases, neither the SEC nor the DOJ pursued charges against the company[196] owned by Rincon-Fernandez, opting instead to pursue charges solely against individuals. The 2016 PDVSA Defendants were charged with offering bribes and other items of value (including meals and entertainment) to employees working for the PDVSA and its procurement subsidiary in order to ensure the selection of Rincon-Fernandez's and Shiera-Bastidas's companies for lucrative oil and gas contracts.[197] Though sentencing for the 2016 PDVSA Defendants has not yet taken place, the US District Court for the Southern District of

---

[189] Non-Prosecution Agreement between US Department of Justice and PTC Inc., Attachment A ¶¶ 6-7, 15 (Feb. 16, 2016), https://www.justice.gov/criminal-fraud/file/825576/download.

[190] Non-Prosecution Agreement between US Department of Justice and PTC Inc., Attachment A ¶¶ 12-14 (Feb. 16, 2016), https://www.justice.gov/criminal-fraud/file/825576/download (stating "Within a year of the trip, PTC booked several contracts with the SOE totaling over $1 million." After another trip, "The SOE entered into over $9 million worth of contracts with PTC," and a third example states, "The Chinese SOEs whose employees went on the trip collectively entered into more than $3.5 million in contracts with PTC.").

[191] US Department of Justice Press Release No. 16-179: PTC Inc. Subsidiaries Agree to Pay More Than $14 Million to Resolve Foreign Bribery Charges (Feb. 16, 2016); Non-Prosecution Agreement between US Department of Justice and PTC Inc. (Feb. 16, 2016), https://www.justice.gov/criminal-fraud/file/825576/download.

[192] Order Instituting Cease-and-Desist Proceedings, *In the Matter of PTC, Inc*., Rel. No. 77145, File No. 3-17118, ¶ 5 (Feb. 16, 2016).

[193] Order Instituting Cease-and-Desist Proceedings, *In the Matter of PTC, Inc*., Rel. No. 77145, File No. 3-17118, ¶ 28 (Feb. 16, 2016).

[194] US Securities and Exchange Commission Press Release: SciClone Charged with FCPA Violations (Feb. 4, 2016); US Securities and Exchange Commission Press Release No. 2016-29: SEC: Tech Company Bribed Chinese Officials (Feb. 16, 2016).

[195] Transcript of Rearraignment Before the Honorable Gray H. Miller, *United States v. Millan Escobar*, No. 16-CR-00009 (S.D. Tex. Jan. 19, 2016); US Department of Justice Press Release No. 16-334: Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme (Mar. 23, 2016); US Department of Justice Press Release No. 16-698: Businessman Pleads Guilty to Foreign Bribery and Tax Charges in Connection with Venezuela Bribery Scheme (June 16, 2016). In addition to the 2016 PDVSA Defendant, three PDVSA employees pleaded guilty in 2015 to conspiracy to commit money laundering and making false statements on their federal income tax returns in connection with their participation in the scheme. US Department of Justice Press Release No. 16-334: Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme (Mar. 23, 2016).

[196] These companies appear to have been fully operational entities.

[197] Indictment, *United States v. Rincon-Fernandez and Shiera-Bastidas*, No. 15-CR-00654, ¶¶ 25, 27-34 (S.D. Tex. Dec. 10, 2015); Information, *United States v. Rincon-Fernandez*, No. 15-CR-00654, ¶¶ 25, 27-34 (S.D. Tex. June 15, 2016); Information, *United States v. Millan Escobar*, No. 16-CR-00009, ¶¶ 10, 12-27 (S.D. Tex. Jan. 7, 2016); Indictment, *United States v. Millan Escobar*, No. 16-CR-00009, ¶¶ 10, 12-27 (S.D. Tex. Jan. 7, 2016).

Texas has already entered orders imposing a monetary judgment on Millan Escobar of $534,000 and granting the DOJ's motion for Shiera-Bastidas's forfeiture of $979,000.[198] The government has separately sought a monetary judgment against Shiera-Bastidas for $18.8 million.[199]

Similarly, in late December, the DOJ announced guilty pleas relating to four individuals charged in a scheme to bribe Mexican officials to secure aircraft maintenance and repair contracts (the "Aviation Pleas").[200] Like the cases involving the 2016 PDVSA Defendants, the DOJ opted here to pursue charges against multiple individuals involved in misconduct who all worked for the same company, but not against the company itself. Two of those charged—Douglas Ray and Victor Hugo Valdez Pinon—pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA and conspiracy to commit wire fraud.[201] According to the charging documents filed in their cases, between 2006 and 2016, Ray, who was the president of an aviation company based in Houston, Texas, and Valdez Pinon, who worked as an agent for Ray's company, made a series of bribes and kickbacks to Mexican officials with the aim of securing additional business for Ray's company.[202] Two additional individuals charged—Kamta Ramnarine, the former president and general manager of the same aviation company and Daniel Perez, a part owner of the company—pleaded guilty to one count of conspiring to violate the FCPA. Also like the 2016 PDVSA Defendants, two Mexican officials who had accepted bribes each pleaded guilty to one count of conspiracy to commit money laundering.[203]

In contrast with many recent FCPA cases, the DOJ pursued the PDVSA cases without the cooperation or self-reporting of the individuals or companies involved, noting that the cases "demonstrate our commitment to building cases from the ground up, instead of counting on companies and other wrongdoers to self-disclose their crimes."[204] While the court documents do not make clear what was meant by "from the ground up," it may be that the three PDVSA employees who entered guilty pleas in 2015[205] for their role in the scheme provided the information that formed the basis of the FCPA investigations against the 2016 PDVSA Defendants. There is no indication that anyone from Shiera-Bastidas's or Rincon-Fernandez's companies self-reported potential violations. Likewise, PDVSA, which has referred to the DOJ's investigation as an "international campaign to discredit" the company,[206] was not involved in reporting misconduct. The DOJ's decision to pursue cases against the 2016 PDVSA Defendants without company cooperation may offer an early example of a new trend.

---

[198] Court Order Granting United States Unopposed Motion for Order Imposing Money Judgment, *United States v. Millan Escobar*, No. 16-CR-0009 (S.D. Tex. Aug. 30, 2016); Preliminary Order of Forfeiture ($978,939.23), *United States v. Shiera-Bastidas*, No 15-CR-00654 (S.D. Tex. Nov. 17, 2016).
[199] United States Unopposed Amended Motion for Order Imposing Monetary Judgment, *United States v. Shiera-Bastidas*, No. 15-CR-00654 (S.D. Tex. Dec. 27, 2016).
[200] The pleas were entered in October and November 2016. Plea Agreement, *United States v. Perez*, No. 16-CR-01164 (S.D.Tex. Nov. 2, 2016); Plea Agreement, *United States v. Montemayor*, No. 16-CR-01164 (S.D.Tex. Dec. 9, 2016); Plea Agreement, *United States v. Ramnarine*, No. 16-CR-01164 (S.D.Tex. Nov. 2, 2016); Plea Agreement, *United States v. Pinon*, No. 16-CR-00409 (S.D.Tex. Oct. 26, 2016); Waiver of Indictment, *United States v. Nevarez*, No. 15-CR-00252 (S.D.Tex. Mar. 4, 2016). The Plea Agreement of one of the individuals, Douglas Ray, remains under seal.
[201] US Department of Justice Press Release No. 16-1531: Four Businessmen and Two Foreign Officials Plead Guilty in Connection with Bribes Paid to Mexican Aviation Officials (Dec. 27, 2016).
[202] Information, *United States v. Douglas Ray*, No. 16-CR-00409, ¶¶ 15-24 (Sept. 15, 2016); Information, *United States v. Victor Hugo Valdez Pinon*, No. 16-CR-00409, ¶¶ 7-18 (Oct. 17, 2016).
[203] US Department of Justice Press Release No. 16-1531: Four Businessmen and Two Foreign Officials Plead Guilty in Connection with Bribes Paid to Mexican Aviation Officials (Dec. 27, 2016).
[204] US Department of Justice Press Release No. 16-334: Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme (Mar. 23, 2016).
[205] Jose Luis Ramos Castillo, Christian Javier Maldonado Barillas and Alfonzo Eliezer Gravina Munoz (all former PDVSA officials) pleaded guilty (under seal) in December 2015 to conspiracy to commit money laundering. US Department of Justice Press Release No. 16-334: Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme (Mar. 23, 2016).
[206] *REFILE-Venezuela PDVSA Reiterates It Is a Victim of Corruption Smear Campaign,* REUTERS (Mar. 29, 2016).

In another significant individual enforcement action, in April 2016, US District Court Judge Jesse M. Furman entered final judgments in the cases of Iuri Rodolfo Bethancourt, Benito Chinea, Tomas Alberto Clarke Bethancourt, Joseph DeMeneses, Jose Alejandro Hurtado, Ernesto Lujan and Haydee Leticia Pabon, effectively ending the cases that stemmed from the SEC's and the DOJ's 2010 investigation of the broker-dealer company DAP.[207] The seven defendants were charged with fraud for their participation in a scheme to bribe the Vice President of Finance at BANDES, a Venezuelan state-owned and controlled economic development bank, in exchange for the executive's directing BANDES trading business to DAP.[208] A parallel criminal investigation by the DOJ concluded with Lujan, Clarke and Hurtado pleading guilty to six counts in 2013, including violating the FCPA and conspiracy to violate the FCPA,[209] and DeMeneses and Chinea pleading guilty to conspiracy to violate the FCPA and the Travel Act in 2014.[210] Through the April 2016 settlements with the SEC, Chinea, Clarke, DeMeneses, Hurtado and Lujan were ordered to pay a total of $42.5 million in disgorgement and prejudgment interest.[211] Both monetary orders were deemed satisfied, however, by the forfeiture orders entered against the defendants in the parallel criminal case.[212]

B. Significant SEC Individual Resolutions

In 2016, a full 25 percent of the SEC's enforcement docket involved individuals. While only one of these actions involved charges under the anti-bribery provisions, many of the SEC's individual FCPA resolutions involved charges that an individual had "caused" the books and records of an issuer to be inaccurate or circumvented the internal controls of an issuer.[213]

Three of the cases, those of Lars Frost, Jun Ping Zhang and Ignacio Cueto Plaza, involved the former CEO or CFO of a corporation that was also being investigated by the SEC.[214] According

---

[207] Final Judgment as to Defendant Benito Chinea, *SEC v. Tomas Alberto Clarke Bethancourt, et. al.*, No. 13-CV-3074 (S.D.N.Y. Apr. 6, 2016); Final Judgment as to Defendant Ernesto Lujan, *SEC v. Tomas Alberto Clarke Bethancourt, et. al.*, No. 13-CV-3074 (S.D.N.Y. Apr. 6, 2016); Final Judgment as to Defendant Tomas Alberto Clark Bethancourt, *SEC v. Tomas Alberto Clarke Bethancourt, et. al.*, No. 13-CV-3074 (S.D.N.Y. Apr. 6, 2016); Final Judgment as to Defendant Jose Alejandro Hurtado, *SEC v. Tomas Alberto Clarke Bethancourt, et. al.*, No. 13-CV-3074 (S.D.N.Y. Apr. 6, 2016); Final Judgment as to Defendant Joseph Flores Demeneses Jr., *SEC v. Tomas Alberto Clarke Bethancourt, et. al.*, No. 13-CV-3074 (S.D.N.Y. Apr. 6, 2016); Final Judgment as to Defendant Haydee Leticia Pabon, *SEC v. Tomas Alberto Clarke Bethancourt, et. al.*, No. 13-CV-3074 (S.D.N.Y. Apr. 6, 2016); Final Judgment as to Defendant Iuri Rodolfo Bethancourt, *SEC v. Tomas Alberto Clarke Bethancourt, et. al.*, No. 13-CV-3074 (S.D.N.Y. Apr. 6, 2016).

[208] Second Amended Complaint, *SEC v. Tomas Alberto Clarke Bethancourt, et. al.*, No. 13-CV-3074, ¶¶ 1-13 (S.D.N.Y. Apr. 28, 2014).

[209] US Department of Justice Press Release No. 13-980: Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering, and Conspiracy to Obstruct Justice (Aug. 30, 2013).

[210] US Department of Justice Press Release No. 14-1421: CEO and Managing Director of U.S. Broker-Dealer Plead Guilty to Massive International Bribery Scheme (Dec. 17, 2014).

[211] US Securities and Exchange Commission Press Release No. 23513: SEC Obtains Settlement in Kickback Scheme to Secure Business of Venezuelan Bank (Apr. 8, 2016).

[212] US Securities and Exchange Commission Press Release No. 23513: SEC Obtains Settlement in Kickback Scheme to Secure Business of Venezuelan Bank (Apr. 8, 2016).

[213] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Ignacio Cueto Plaza*, Rel. No. 77057, File No. 3-17100, ¶ 31 (Feb. 4, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Analogic Corp. and Lars Frost*, Rel. No. 78113, File No. 3-17305 (June 21, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Grp., LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank*, Rel. No. 78989, File No. 3-17595, ¶¶ 6, 117, 118 (Sept. 29, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mikhail Gourevitch*, Rel. No. 77288, File No. 3-17152, ¶ 18 (Mar. 3, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Jun Ping Zhang*, Rel. No. 78825, File No. 3-17535, ¶ 24 (Sept. 13, 2016); Deferred Prosecution Agreement between US Securities and Exchange Commission and Yu Kai Yuan, ¶ 1 (Dec. 10, 2015).

[214] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Ignacio Cueto Plaza*, Rel. No. 77057, File No. 3-17100, ¶ 1 (Feb. 4, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Analogic Corp. and Lars Frost*, Rel. No. 78113, File No. 3-17305, ¶ 4 (June 21, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Jun Ping Zhang*, Rel. No. 78825, File No. 3-17535, ¶ 2 (Sept. 13, 2016).

to the facts in the SEC's administrative cease-and-desist orders (which Frost, Jun Ping Zhang and Cueto Plaza neither admitted nor denied), Frost, Jun Ping Zhang, and Cueto Plaza all had direct knowledge that corporate transactions which they authorized violated the FCPA's books-and-records or internal-controls provisions.[215] For example, in Jun Ping Zhang's cease-and-desist order, the SEC charged that "[w]ith Ping's knowledge and under his management, CareFx China sales staff submitted bogus expense receipts labeled as 'entertainment,' 'office expenses,' or 'transportation' to CareFx China's accounting department . . . Ping and the supervisors he managed authorized the bogus expense claims, knowing that they were fabricated . . . ."[216]

The SEC also pursued allegations against one former employee—Mikhail Gourevitch—who was not a high-ranking executive but who was alleged to have been directly involved in violations of the FCPA. According to the SEC's cease-and-desist order (the findings in which Gourevitch neither admitted nor denied), Gourevitch, a former engineer at Nordion, Inc., facilitated Nordion's payment of bribes to Russian government officials with the goal of securing approval for Nordion to register and license a liver cancer treatment in Russia.[217] Taking advantage of the apparent lack of due diligence, Gourevitch and another agent conspired to use Nordion's funds to bribe Russian government officials to obtain treatment approvals.[218] Nordion, which did not conduct adequate due diligence on the agent and did not follow its own controls in place at the time, paid the agent's invoices even though they lacked detail and directed Nordion to make the payment to offshore bank accounts.[219] As was the case with the SEC's allegations against Frost, Jun Ping Zhang and Cueto Plaza, the agency's cease-and-desist order against Gourevitch alleged both that he "caused" his former employer to violate the FCPA's accounting provisions, and that he did so knowingly.[220]

But as the cases of Daniel Och and Joel Frank, the current CEO and CFO of Och-Ziff Capital Management Group, demonstrate, it may not be necessary for the SEC to show that an individual "knew" that bribery had taken place to pursue books-and-records and internal-controls charges against a non-issuer individual. The SEC's administrative resolution order in the Och and Frank cases (the findings of which Och and Frank neither admitted nor denied) expressly noted that neither Och nor Frank had direct knowledge that the transactions that they approved were related to bribes.[221] According to the SEC's alleged facts, between 2007 and 2011, Och-Ziff paid millions of dollars in bribes through intermediaries, agents and business partners to high ranking government officials in various African countries, including Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo. These bribes were intended to obtain or retain business for Och-Ziff and its business partners.[222] Despite the fact that Och himself lacked direct knowledge of the bribes, the SEC alleged that Och was liable for causing the company's books-and-records and internal-controls violations because, as the company's CEO,

---

[215] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Ignacio Cueto Plaza*, Rel. No. 77057, File No. 3-17100, ¶¶ 1, 20, 28 (Feb. 4, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Analogic Corp. and Lars Frost*, Rel. No. 78113, File No. 3-17305, ¶¶ 4, 21 (June 21, 2016); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Jun Ping Zhang*, Rel. No. 78825, File No. 3-17535, ¶¶ 8, 9, 11 (Sept. 13, 2016).
[216] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Jun Ping Zhang*, Rel. No. 78825, File No. 3-17535, ¶ 8 (Sept. 13, 2016).
[217] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mikhail Gourevitch*, Rel. No. 77288, File No. 3-17152, ¶¶ 4-13 (March 3, 2016).
[218] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nordion (Canada) Inc.*, Rel. No. 77290, File No. 3-17153, ¶¶ 9-10 (Mar. 3, 2016).
[219] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nordion (Canada) Inc.*, Rel. No. 77290, File No. 3-17153, ¶ 12 (Mar. 3, 2016).
[220] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mikhail Gourevitch*, Rel. No. 77288, File No. 3-17152, ¶¶ 16-18 (March 3, 2016).
[221] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Grp LLC, OZ Management, Daniel S. Och, and Joel M. Frank*, Rel. No. 78989, File No. 3-17595, ¶ 6 (Sept. 29, 2016).
[222] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Grp LLC, OZ Management, Daniel S. Och, and Joel M. Frank*, Rel. No. 78989, File No. 3-17595, ¶ 1 (Sept. 29, 2016).

he was aware of the risks of corruption in the transactions, and yet authorized them anyway.[223] Frank was liable, the SEC alleged, because as the company's CFO, he had approved payments for which he believed there was a high risk of corruption, and, notwithstanding his own concerns about these payments, "deferred to Och as the final decision maker."[224] On January 26, 2017, the SEC charged two additional Och-Ziff executives with violations of the books-and-records, internal-controls and anti-bribery provisions of the FCPA and with aiding and abetting Och-Ziff's violations. These executives were Michael L. Cohen, who headed Och-Ziff's European office, and Vanja Baros, an investment executive who allegedly caused tens of millions of dollars in bribes to be paid to high-level government officials in Africa. Cohen was also charged with violating the Investment Advisers Act.[225]

C. Employees of International Institutions Remain Squarely within the Definition of Foreign Official

Individual matters in 2016 also demonstrated that bribing officials of international institutions is subject to enforcement action. In April 2016, Dmitrij Harder, the former owner and president of Pennsylvania consulting business Chestnut Consulting Group Inc., pleaded guilty in the Eastern District of Pennsylvania to two FCPA charges for bribing an official at the European Bank for Reconstruction and Development ("EBRD"), a development bank headquartered in London owned by more than 60 sovereign nations that provides financing for projects in emerging countries.[226] Harder admitted during his guilty plea to participating in a scheme to pay about $3.5 million in bribes to a bank official to influence application for bank financing that Chestnut Consulting clients had submitted. [227] The Chestnut Group earned approximately $8 million in "success fees" after the EBRD approved two financing applications from the Chestnut Group's clients.

On a motion to dismiss, Harder had argued that the indictment improperly substituted the bank, a "public international organization," for "foreign government or instrumentality thereof" under the FCPA. The court rejected this argument, holding that under the FCPA, a "foreign official" "includes any officer of a public international organization," and therefore, the FCPA "makes it a crime to bribe a third party if the payor knows that foreign official will ultimately receive the payment and will thus be induced to act unlawfully."[228] Harder is scheduled to be sentenced before Judge Paul Diamond in June 2017.[229]

D. Value of Cooperation in Individual Cases

As discussed above, the DOJ and the SEC also rewarded individuals who provided extraordinary cooperation with favorable resolutions. On July 7, 2016, James McClung, the former senior vice president for Louis Berger International's ("LBI") Asian operations was sentenced to one year and one day in prison for his July 2015 plea to one count of conspiracy to violate the FCPA and one substantive count of violating the FCPA.[230] According to the DOJ, McClung cooperated with its investigation by identifying other executives at LBI who had knowledge of bribery, and US District Court Judge Mary Cooper, who appears to have also

---

[223] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Grp LLC, OZ Management, Daniel S. Och, and Joel M. Frank*, Rel. No. 78989, File No. 3-17595, ¶ 104 (Sept. 29, 2016).
[224] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Grp LLC, OZ Management, Daniel S. Och, and Joel M. Frank*, Rel. No. 78989, File No. 3-17595, ¶¶ 105-106 (Sept. 29, 2016).
[225] Complaint, *SEC v. Cohen, et. al.,* No. 17-CV-00430 (E.D.N.Y. Jan. 27, 2017).
[226] US Department of Justice Press Release No. 16-476: Former Owner and President of Pennsylvania Consulting Companies Pleads Guilty to Bribing Official at European Bank for Reconstruction and Development (Apr. 20, 2016).
[227] US Department of Justice Press Release No. 16-476: Former Owner and President of Pennsylvania Consulting Companies Pleads Guilty to Bribing Official at European Bank for Reconstruction and Development (Apr. 20, 2016).
[228] Order on Motion to Dismiss, *United States v. Harder*, No. 15-CR-00001 (E.D. Pa. Mar. 2, 2016).
[229] Notice of Hearing, *United States v. Harder*, No. 15-CR-00001 (E.D. Pa. Oct. 21, 2016).
[230] US Department of Justice Press Release No. 16-201: Two Former Executives of Louis Berger International Sentenced in Foreign Bribery Scheme (July 8, 2016).

considered McClung's personal circumstances—his dependents—noted McClung's sentence was "lenient."[231]

Relatedly, Richard Hirsch was sentenced to two years of probation and a $10,000 fine on July 8, 2016. Hirsch was another former senior vice president for LBI's Asian operations who, in July 2015, pleaded guilty to one count of conspiracy to violate the FCPA and one substantive count of violating the FCPA. At sentencing, the DOJ's motion to reduce Hirsch's sentence from the USSG range between 57 and 71 months was granted, apparently in part due to the government's representation that Hirsch's cooperation was "an absolute game-changer."[232] Judge Cooper also stated that she had considered the extent of Hirsch's cooperation, but none of the sentencing documents (including the transcript of the sentencing hearing) are publicly available, providing little insight into the nature of Hirsch's "game-changing" cooperation.

In 2016, the SEC also concluded its first DPA with an individual in an FCPA case.[233] Although the SEC settled civil and criminal actions against PTC and two of its Chinese subsidiaries, the Commission agreed to forego an enforcement action for three years against Yu Kai Yuan, a former PTC sales executive based on the "significant cooperation" he provided during the SEC's investigation.[234] The DPA stated that Mr. Yuan "offered to accept full responsibility for his conduct and to not contest or contradict factual statements contained in [the DPA]" and admitted to causing books-and-records and internal-controls violations of the FCPA.[235] However, the DPA does not contain any discussion of how Mr. Yuan caused these violations or details regarding his cooperation. Mr. Yuan also agreed to "refrain from violating the federal and state securities laws" and "to refrain from violating applicable rules promulgated by any self-regulatory organization or professional licensing board."[236]

5. Key FCPA Legal Developments and Observations

A. The DOJ Was Challenged and The SEC Was Bolstered by Jurisdictional Decisions

1. Hoskins Appeal

The DOJ and the SEC had mixed success in 2016 in court decisions related to the US nexus requirement for cases against foreign-resident foreign nationals. First, on March 16, 2016, the US District Court for the District of Connecticut denied the DOJ's motion to reconsider the court's ruling that it did not have jurisdiction under the FCPA over Lawrence Hoskins, a foreign

---

[231] Roger Hamilton-Martin, *Former Louis Berger VP Given "Lenient" Sentence for Foreign Bribery*, GLOBAL INVESTIGATIONS REVIEW, July 7, 2016.
[232] Roger Hamilton-Martin, *Former Louis Berger Exec Avoids Prison After "Game-Changing" FCPA Cooperation*, GLOBAL INVESTIGATIONS REVIEW, July 8, 2016.
[233] US Securities and Exchange Commission Press Release No. 2016-29: SEC: Tech Company Bribed Chinese Officials (Feb. 16, 2016).
[234] US Securities and Exchange Commission Press Release No. 2016-29: SEC: Tech Company Bribed Chinese Officials (Feb. 16, 2016). In announcing the DPA with Yuan, the SEC stated that "DPAs facilitate and reward cooperation in SEC investigations by foregoing an enforcement action against an individual who agrees to cooperate fully and truthfully throughout the period of deferred prosecution."
[235] Deferred Prosecution Agreement between the US Securities and Exchange Commission and Yu Kai Yuan, ¶ 1 (Dec. 10, 2015).
[236] Deferred Prosecution Agreement between the US Securities and Exchange Commission and Yu Kai Yuan, ¶ 7 (Dec. 10, 2015). The previous (and only other) DPA entered into by the SEC since announcing its Cooperation Initiative was with a former hedge fund administrator, Scott Herckis, in 2013. Deferred Prosecution Agreement between the US Securities and Exchange Commission and Scott Jonathan Herckis (Nov. 8, 2013); US Securities and Exchange Commission Press Release No. 2013-241: SEC Announces First Deferred Prosecution Agreement with Individual (Nov. 12, 2013). According to the SEC, Herckis provided "voluntary and significant" cooperation with the SEC against a hedge fund manager who misappropriated millions from investors. The DPA stated that Herckis's cooperation included contacting government authorities, voluntarily producing documents and describing the fraudulent scheme to Enforcement staff.

citizen and resident, unless he was an agent of a domestic concern or committed acts in the United States.[237]

The DOJ alleged that Hoskins, who was based in Alstom's France office, conspired to participate in a bribery scheme that aimed to secure for Connecticut-based Alstom Power Inc. a $118 million project to build power stations for Indonesia's state electricity company. Hoskins's responsibilities included overseeing the hiring of consultants, and the DOJ alleged that Hoskins approved payments to "consultants" retained to pay bribes to Indonesian officials who could influence the award of the power project. It is not disputed that Hoskins took no actions within the territory of the United States.

The DOJ charged Hoskins with conspiracy to violate 15 U.S.C. § 78dd-2, which prohibits any "domestic concern" or one of its agents, from bribing a foreign official. The government argued that even if a jury were to find that Hoskins was not himself an agent of a domestic concern given his high level at the company, Hoskins could nonetheless be liable under 15 U.S.C. § 78dd-2 for conspiring *with* a domestic concern to commit bribery under 18 U.S.C. § 371.[238] The court held that although accomplice liability under the general conspiracy and aiding and abetting statutes applied generally across the US Code, "a non-resident foreign national could not be subject to criminal liability under the FCPA pursuant to accomplice theories of liability or aiding and abetting violations of the FCPA where he is not acting as an agent of a domestic concern or does not act while physically present in the United States."[239] The court based its ruling on *Gebardi v. United States*, 287 U.S. 112, 123 (1932), in which the Supreme Court held that where a substantive criminal statute excludes a certain class of people of liability, those people cannot be charged with conspiring to violate the same statute. Thus, the District of Connecticut held Hoskins could only be charged with conspiring to commit bribery under 15 U.S.C. § 78dd-2 if he was an agent of a domestic concern, subject to direct liability. The DOJ has appealed the Court's ruling to the Second Circuit;[240] oral argument is scheduled for February 27, 2017.[241]

2. The SDNY Accepted the SEC's Broad Interpretation of Interstate Commerce in the *Straub* Ruling

In a case related to the SEC's 2011 civil FCPA charges against former executives of Magyar Telekom, Plc. for allegedly participating in a scheme to bribe Macedonian officials, [242] on September 30, 2016, SDNY Judge Richard Sullivan affirmed the viability of a SEC theory that jurisdiction over a foreign national company executive can exist if the individual participated in preparing false securities filings which were then posted on EDGAR—even if the executive did not act within US borders.

The SEC filed a complaint against Richard Straub and two other former Magyar executives (the same day that the DOJ announced that it had entered into a DPA with Magyar to pay almost $64 million in penalties).[243] At summary judgment in the SEC action, the parties did not dispute that the executives were involved in the preparing and/or filing of Magyar's SEC filings on the

---

[237] Ruling Denying Government's Motion to Reconsider, *United States v. Hoskins*, No. 12-CR-238 (D. Conn. Mar. 16, 2016).
[238] Ruling on Defendant's Second Motion to Dismiss the Indictment, *United States v. Hoskins*, No. 12-CR-238 (D. Conn. Aug. 13, 2015).
[239] Ruling Denying Government's Motion to Reconsider, *United States v. Hoskins*, No. 12-CR-238 (D. Conn. Mar. 16, 2016).
[240] Brief for Appellant United States of America, *United States v. Hoskins*, No. 12-CR-238 (2nd Cir. Sept. 9, 2017).
[241] Argument Notice, *United States v. Hoskins*, No. 12-CR-238 (2nd Cir. Sept. 9, 2017), Docket No. 64.
[242] US Department of Justice Press Release No. 11-1714: Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011).
[243] *SEC v. Straub*, No. 11 CIV. 9645 (RJS), 2016 WL 5793398, at *7 (S.D.N.Y. Sept. 30, 2016).

SEC's EDGAR website. The parties did disagree as to whether the undisputed facts were sufficient to show that the executives used an instrumentality of interstate commerce to commit bribery, such that the court had jurisdiction over the executives. The court held that it had jurisdiction over the executives because their knowing participation in the falsification of SEC filings implicated interstate commerce.[244] The court held that these actions "followed a course of conduct directed at the society or economy existing within the jurisdiction of" the United States, such that jurisdiction attached.[245] The court also held that an individual makes use of an instrumentality of interstate commerce for purposes of the FCPA if he acts with knowledge that the use of the instrumentality "will follow in the ordinary course of business, or that such use can reasonably be foreseen, even though not actually intended."[246] In so holding, the court relied on a 1954 Supreme Court decision, *Pereira v. United States*, 347 U.S. 1 (1954), which applied a "foreseeability-based inquiry" in determining jurisdiction in a mail fraud case. This is the first time this foreseeability test was applied to the FCPA.[247] A jury trial is scheduled to begin in May 2017.[248]

B. Disgorgement and Other Penalties

1. Tenth and Eleventh Circuits Split over the Statute of Limitations for FCPA Disgorgement

Several decisions in 2016 have addressed the question of whether the general five-year statute of limitations for governmental actions, set forth in 28 U.S.C. § 2462, applies to actions seeking disgorgement. 28 U.S.C. § 2462 states, "except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." In its 2013 decision in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), the Supreme Court ruled that an SEC action for civil penalties for aiding and abetting fraud was subject to the five-year statute of limitations set forth in 28 U.S.C. § 2462, rejecting the SEC's argument that the "discovery rule" tolled these claims until they were discovered.

Gabelli dealt with an action seeking civil penalties, but the question of whether the same limitation applies to actions seeking disgorgement is less straightforward. Several circuit courts have already rejected the argument that disgorgement constitutes a "penalty" under Section 2462, finding that disgorgement is an equitable remedy—a view also shared by the SEC. In 2016, the Tenth and Eleventh Circuits reached conflicting conclusions on this question.

In *SEC v. Graham,* 823 F.3d 1357 (11th Cir. 2016), the Eleventh Circuit affirmed a district court's application of Section 2462 to an action seeking disgorgement of gains realized from alleged violations of the securities laws, finding that although disgorgement is not mentioned in Section 2462, the "ordinary meaning" of the term is "effectively" synonymous with forfeiture, which is captured under Section 2462. Accordingly, the court held that Section 2462, and the five-year statute of limitations therein, applies to SEC disgorgement.

In *SEC v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016), however, the Tenth Circuit recognized but disagreed with the decision in *Graham*, finding that forfeiture referred narrowly to the punitive remedy of seizing "tangible property used in criminal activity," and that the meaning of the term

---

[244] *SEC v. Straub*, No. 11 CIV. 9645 (RJS), 2016 WL 5793398, at *11 (S.D.N.Y. Sept. 30, 2016) (citations and internal quotation marks omitted).
[245] *SEC v. Straub*, No. 11 CIV. 9645 (RJS), 2016 WL 5793398, at *8 (S.D.N.Y. Sept. 30, 2016) (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011)).
[246] *SEC v. Straub*, No. 11 CIV. 9645 (RJS), 2016 WL 5793398, at *11 (S.D.N.Y. Sept. 30, 2016) (citations and internal quotation marks omitted).
[247] *See* Dylan Tokar, *SEC's Jurisdiction Over Foreign Executives Bolstered by Magyar Telekom Judgment,* GLOBAL INVESTIGATIONS REVIEW, Oct. 11, 2016.
[248] Scheduling Order, *SEC v. Straub*, No. 11-CV-09645 (S.D.N.Y. Oct. 6, 2016).

in the "historical sense" is distinct from disgorgement. The Tenth Circuit also followed other circuit courts in holding that disgorgement does not constitute a penalty under Section 2462 because it "does not inflict punishment" but rather "just leaves the wrongdoer in the position he would have occupied had there been no misconduct." *Kokesh*, 834 F.3d at 1164.

Given that the use of disgorgement as a remedy often drives SEC FCPA settlement amounts and is often calculated using ill-gotten gains from schemes that go back in time longer than five years, the absence of a clear consensus on whether disgorgement actions are subject to a five-year statute of limitations could have serious ramifications for the SEC's FCPA enforcement strategies. The agency has indicated a clear desire to resolve the split, joining *Kokesh* in petitioning for Supreme Court review of the Tenth Circuit's decision and stating that that the Court's review is warranted "because the issue is important to the administration of the securities laws, and the courts of appeals have reached conflicting conclusions."[249] On January 13, 2017, the Supreme Court accepted certiorari in *Kokesh*, and will examine the question of "whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to claims for disgorgement" either this term or next.[250]

2. The IRS Concludes That FCPA Disgorgement Is a Non-Deductible "Penalty"

The IRS also stepped into the debate regarding whether disgorgement should be considered "punitive" for tax purposes and therefore non-deductible. On May 6, 2016, the IRS publicly released an internal Chief Counsel Advice Memorandum ("CCA") concluding that Section 162(f) of the Tax Code prohibited a corporate taxpayer who allegedly violated the FCPA accounting provisions from deducting an amount disgorged under a consent agreement with the SEC. [251] The IRS's reasoning was that the disgorgement was a civil penalty imposed based on punitive motives, which is not deductible, rather than a civil penalty based on compensatory motives, which is deductible. Under the CCA, disgorgement "can be primarily punitive for tax purposes . . . where it serves primarily to prevent wrongdoers from profiting from their illegal conduct and deters subsequent illegal conduct." It further notes that for "FCPA cases in particular, it is important to consider the sharply defined Congressional policy to deter and punish such violations, as shown in the overall statutory scheme of the FCPA."[252] Although the CCA is not precedential and is unlikely to impact the outcome of the circuit split regarding Section 2462, it does illustrate one position the IRS could take to bar deductions of FCPA settlements by other taxpayers, and is at least suggestive that the Eleventh Circuit's view that disgorgement is punitive may carry some weight.

3. Civil Penalties Are Raised Under the Inflation Adjustment Act

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 entered into force on August 1, 2016. It requires federal agencies to: (a) adjust the level of civil monetary

---

[249] Brief for Respondent, *SEC v. Kokesh,* No. 16-CV-529 (Dec. 15, 2016).
[250] *Kokesh v. SEC*, No. 16-529, 2017 WL 125673 (U.S. Jan. 13, 2017).
[251] US Internal Revenue Service Chief Counsel Advice Memorandum, 2016-19-008 (May 6, 2016). As a general matter, under Section 162(f), a fine or similar penalty paid to a government for violating the law is not deductible for tax purposes. Compensatory damages, on the other hand, can be deducted. The CCA's analysis starts with the premise that disgorgement payments in federal securities law cases can be primarily compensatory or primarily punitive, depending on the facts and circumstances of a case. The CCA's decision regarding the disgorgement at issue was based entirely on the absence of certain facts. The taxpayer presented "nothing" to indicate "that the purpose of the disgorgement payment was to compensate the United States Government or some non-governmental party for its specific losses caused by Taxpayer's violations of the FCPA." C.C.A. 2016-19-008, at 10 (May 6, 2016). Consequently, the CCA advised that the disgorgement payment was not deductible pursuant to Section 162(f) because the payment was primarily punitive. *Id*.
[252] US Internal Revenue Service Chief Counsel Advice Memorandum, 2016-19-008 (May 6, 2016).

penalties with an initial "catch-up" adjustment; and (b) implement subsequent annual adjustments for inflation based on the Office of Management and Budget's annual guidance,

After August 1, 2016, the civil penalties for violations of the FCPA anti-bribery provisions have increased from a maximum fine of $16,000 to a maximum fine of $19,787 for corporations or individuals. Corporations who violate the FCPA accounting provisions now face a fine of $89,078 to $890,780 (up from $80,000 to $775,000), while individuals who violate these provisions face a fine range of $8,908 to $178,156 (up from $7,500 to $160,000), depending on the nature and scope of the violation. Note that the changes under this Act only affect the standard civil penalties imposed if the SEC does not estimate the amount of the ill-gotten gain as basis for calculating a fine. If the SEC knows the amount of the ill-gotten gain, it will generally use that figure as the basis for the civil penalty it imposes.

C. Kleptocracy Asset Recovery Initiative

The past year was an active one for the DOJ's Kleptocracy Asset Recovery ("KAR") Initiative, which the DOJ launched in 2010. Under the KAR Initiative, the Criminal Division's Asset Forfeiture and Money Laundering Section and various federal law enforcement agencies collaborate to identify and recover the proceeds of foreign official corruption. The Initiative relies on civil forfeiture laws to recover assets that have been laundered by bribe recipients through US financial institutions, and to repatriate the funds for the benefit of those who were harmed.

The DOJ announced the filing of civil forfeiture complaints seeking the forfeiture and recovery of more than $1 billion in assets associated with an international conspiracy to launder funds misappropriated from 1Malaysia Development Berhad ("1MDB"), a sovereign wealth fund created to promote economic development in Malaysia.[253] According to the DOJ, from 2009 through 2015, more than $3.5 billion in funds belonging to 1MDB was allegedly misappropriated by high-level officials of 1MDB (including associates of Malaysian Prime Minister, Najib Razak) over the course of at least three schemes. In total, $1 billion of the stolen funds was allegedly laundered into the United States through a series of complex transactions and fraudulent shell companies with bank accounts located in Singapore, Switzerland, Luxembourg and the United States. The forfeiture complaints represent the largest single action ever brought under the KAR Initiative.

In an action related to the VimpelCom matter, discussed above, the DOJ also filed two civil complaints seeking the forfeiture of more than $850 million restrained in Switzerland, Belgium, Luxembourg and Ireland, which constitutes proceeds of illegal bribes made by VimpelCom and two telecommunications companies to an Uzbek official, or funds involved in the laundering of those payments.[254] The DOJ also sought forfeiture of illegal proceeds from several individuals who pleaded guilty to money laundering charges as part of an investigation into bribes paid to secure PDVSA energy contracts.[255]

6. Collateral Legal Developments

A. SEC and Whistleblower-related suits

Rule 21F-17 of the Securities Exchange Act of 1934 provides that "[n]o person may take any action to impede an individual from communicating directly with the [SEC] staff about a possible

[253] US Department of Justice Press Release No. 16-783: United States Returns $1.5 Million in Forfeited Proceeds from Sale of Property Purchased with Alleged Bribes Paid to Family of Former President of Taiwan (July 7, 2016).
[254] US Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016).
[255] US Department of Justice Press Release No. 16-334: Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme (Mar. 23, 2016).

securities law violation."[256] In 2016, the SEC continued to pursue enforcement actions against companies for such whistleblower-related violations.

1. First Standalone Retaliation Action—*International Game Technology*

On September 29, 2016, Nevada-based casino-gaming company International Game Technology ("IGT") settled a whistleblower retaliation claim brought by the SEC.[257] The whistleblower raised concerns about IGT's cost accounting model, but IGT's internal investigation and the SEC found no violations of law.[258] In announcing this first standalone retaliation action, the SEC signaled that it plans to take whistleblower suits seriously and that it places a "high priority . . . on ensuring a safe environment for whistleblowers" even when whistleblowers' claims prove to be unsubstantiated.[259] Then Director of the SEC's Division of Enforcement, Andrew J. Ceresney, stated that the "whistleblower noticed something that he felt might lead to inaccurate financial reporting and law violations, and he was wrongfully targeted for doing the right thing and reporting it."[260] Further, Ceresney stated that "[s]trong enforcement of the anti-retaliation protections is critical to the success of the SEC's whistleblower program."[261]

In its order, the SEC alleged that IGT terminated a director of an IGT division after he raised concerns regarding IGT's accounting methodology, even though the director had received positive performance evaluations from 2008 through his mid-year review in 2014.[262] The whistleblower apparently presented his concerns about IGT's accounting methodology to his supervisors on July 30, 2014, after which one supervisor sent an email stating, "I can't allow [the whistleblower] to place those inflammatory statements into presentations, if there is no basis in fact."[263] Shortly after the presentation, on August 15, 2014, the same supervisor recommended the termination of the whistleblower. Between August 20, 2014 and October 30, 2014, IGT conducted an internal investigation, found no accounting inaccuracies, and terminated the whistleblower after its investigation.[264] Prior to his termination, IGT had never formally disciplined the whistleblower for his job performance.[265] IGT agreed to a $500,000 penalty and to cease and desist from committing or causing any further violations of Section 21F(h) of the Securities Exchange Act of 1934.[266]

---

[256] WilmerHale, *SEC Settlements Put Severance Agreements Under Increased Scrutiny* (Aug. 17, 2016), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179882393 (quoting 17 C.F.R. § 240.21F-17(a)).
[257] Order Instituting Cease-and-Desist Proceedings, In the Matter of International Game Technology, Rel. No. 78991, File No. 3-17596 (Sept. 29, 2016).
[258] US Securities and Exchange Commission Press Release No. 2016-204: SEC: Casino-Gaming Company Retaliated Against Whistleblower (Sept. 29, 2016).
[259] US Securities and Exchange Commission Press Release No. 2016-204: SEC: Casino-Gaming Company Retaliated Against Whistleblower (Sept. 29, 2016) (quoting Jane A. Norberg, Chief of the SEC's Office of the Whistleblower).
[260] US Securities and Exchange Commission Press Release No. 2016-204: SEC: Casino-Gaming Company Retaliated Against Whistleblower (Sept. 29, 2016).
[261] US Securities and Exchange Commission Press Release No. 2016-204: SEC: Casino-Gaming Company Retaliated Against Whistleblower (Sept. 29, 2016).
[262] Order Instituting Cease-And-Desist Proceedings, *In the Matter of International Game Technology*, Rel. No. 78991, File No. 3-17596, ¶ 1 (Sept. 29, 2016).
[263] Order Instituting Cease-And-Desist Proceedings, *In the Matter of International Game Technology*, Rel. No. 78991, File No. 3-17596, ¶¶ 7, 11-12 (Sept. 29, 2016).
[264] Order Instituting Cease-And-Desist Proceedings, *In the Matter of International Game Technology*, Rel. No. 78991, File No. 3-17596, ¶¶ 17, 19 (Sept. 29, 2016).
[265] Order Instituting Cease-And-Desist Proceedings, *In the Matter of International Game Technology*, Rel. No. 78991, File No. 3-17596, ¶ 4 (Sept. 29, 2016).
[266] Order Instituting Cease-And-Desist Proceedings, *In the Matter of International Game Technology*, Rel. No. 78991, File No. 3-17596, IV (Sept. 29, 2016). Rule 21F-17 provides that "[n]o person may take any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation."

2. The SEC Paid $3.75 Million to BHP Billiton Employee for Detailed Insider Information

On May 20, 2015, the SEC announced that BHP Billiton ("BHP"), an Australian-based global resources company, agreed to pay a $25 million penalty to settle charges with the SEC.[267] The SEC alleged that BHP violated the books-and-records and internal-controls provisions of the FCPA in connection with sponsoring foreign government officials, primarily from Asia and Africa, to attend the 2008 Beijing Summer Olympics.[268] In August 2016, sources reported that the SEC paid $3.75 million to a BHP whistleblower "for detailed information" relating to BHP's bribing of government officials during the Beijing Olympics.[269] BHP stated that it was "not aware of the involvement of any whistleblower as part of the SEC's or the DOJ's investigation."[270] If true, the award would be the first publicly known example of an SEC award to an Australian-employed whistleblower for an FCPA tip.[271]

3. Anheuser-Busch InBev Pays for Chilling a Whistleblower

On September 28, 2016, the SEC announced that AB InBev agreed to pay $6 million to settle charges that it violated the FCPA and chilled a whistleblower who reported the misconduct. According to the SEC, Anheuser-Busch InBev included "a substantial financial penalty" in its "separation agreement that chilled an employee from communicating with the SEC." [272] Acting Chief of the SEC's Office of the Whistleblower, Jane Norberg, stated that the "[t]hreat of financial punishment for whistleblowing is unacceptable" and that the SEC "will continue to take a hard look at these types of provisions and fact patterns."[273] As part of its remediation, Anheuser-Busch InBev agreed to make "reasonable efforts to notify certain former employees that Anheuser-Busch InBev does not prohibit employees from contacting the SEC about possible law violations."[274]

B. ISO 37001

In October 2016, the International Organization for Standardization ("ISO") announced the issuance of a document entitled "Anti-bribery management systems — Requirements with guidance for use."[275] The ISO is an independent, non-governmental international organization that brings together experts to share knowledge and develop voluntary standards to promote collaboration and support innovation. According to the ISO, the publication, which it has designated as "ISO 37001," constitutes the first anti-bribery management system standard for international organizations.[276] Not surprisingly, the standards require many of the features that have become familiar to compliance professionals over the last several years: regular risk

---

[267] US Securities and Exchange Commission Press Release No. 2015-93: SEC Charges BHP Billiton with Violating FCPA at Olympic Games (May 20, 2015).
[268] US Securities and Exchange Commission Press Release No. 2015-93: SEC Charges BHP Billiton with Violating FCPA at Olympic Games (May 20, 2015); Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton Plc.*, Rel. No. 3-16546, File No. 3-16546, ¶ 3 (May 20, 2015).
[269] Sonali Paul, *U.S. SEC paid $3.75 million to BHP Billiton whistleblower: report*, REUTERS, Aug. 28, 2016.
[270] Sonali Paul, *U.S. SEC paid $3.75 million to BHP Billiton whistleblower: report*, REUTERS, Aug. 28, 2016.
[271] Sonali Paul, *U.S. SEC paid $3.75 million to BHP Billiton whistleblower: report*, REUTERS, Aug. 28, 2016.
[272] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Anheuser-Busch InBev SA/NV,* Rel. No. 78957, File No. 3-17586, ¶¶ II, IV. B. (Sep. 28, 2016).
[273] US Securities and Exchange Commission Press Release No. 2016-196: SEC Charges Anheuser-Busch InBev With Violating FCPA and Whistleblower Protection Laws (Sept. 28, 2016).
[274] US Securities and Exchange Commission Press Release No. 2016-196: SEC Charges Anheuser-Busch InBev With Violating FCPA and Whistleblower Protection Laws (Sept. 28, 2016).
[275] International Organization for Standardization, Anti-Bribery Management Systems, Requirements with Guidance for Use, http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=65034.
[276] Elizabeth Gasiorowski-Denis, *ISO Publishes Powerful New Tool to Combat Bribery,* ISO (Oct. 14, 2016).

assessments, creation of an anti-bribery policy, training, diligence and monitoring of third parties, structures for reporting compliance concerns internally, and regular internal audits.[277]

The authors state that the guidance "reflects international good practice and can be used in all jurisdictions."[278] Relatedly, its scope is broad. It is designed to prevent and detect bribery of individuals at private entities as well as public officials.[279] It is also intended to stop outsiders from bribing individuals working at the organization implementing the guidance. Given the various competing anti-bribery regimes and standards around the world, companies and organizations will of course need to analyze what measures are appropriate for their own operations given their risks.

The ISO 37001 standards appear generally thorough and well thought out. Of course, for a US company, or any person or entity over whom US authorities could claim jurisdiction, the anti-bribery compliance standards that matter most are those held and endorsed by the DOJ and the SEC. It will be worth watching whether the publication of ISO standards creates additional pressure on the DOJ and the SEC to update the now four-year-old resource manual with more specificity concerning what they view as the features of an adequate compliance program.

C. Disclosure Rules for Extraction Companies

On June 27, 2016, the SEC announced a rule that requires "resource extraction issuers" to report payments over $100,000 made to governments for "the commercial development of oil, natural gas or minerals."[280] The SEC originally adopted this rule on August 22, 2012, but the rule was vacated by the US District Court for the District of Columbia and the SEC rewrote and re-proposed the rule in 2015.[281] This rule is intended to further "U.S. foreign policy interests by promoting greater transparency about payments related to resource extraction."[282]

This disclosure rule applies to "resource extraction issuers," which includes all US and foreign companies that must file annual reports under Section 13 or 15(d) of the Exchange Act and "engages in the commercial development of oil, natural gas or minerals."[283] Under the FCPA, a company is considered an "issuer" if it has a class of securities registered under Section 12 of the Exchange Act[284] or is required to file reports with the SEC under Section 15(d) of the Exchange Act.[285] Commercial development involves "exploration, extraction, processing, and export, or the acquisition of a license for any such activity."[286] However, post-extraction activities such as marketing and distribution do not fall under commercial development.[287] Relevant

---

[277] Anti-Bribery Management Systems: Requirements with Guidance for Use, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, §§ 4.5, 5.2, 7.3, 8.5, 8.6, 8.9, 9.2 (Oct. 13, 2016).
[278] Anti-Bribery Management Systems, Requirements with Guidance for Use, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, at VI (Oct. 13, 2016).
[279] Anti-Bribery Management Systems, Requirements with Guidance for Use, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, at 1 (Oct. 13, 2016).
[280] US Securities and Exchange Commission Press Release No. 2016-132: SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016).
[281] US Securities and Exchange Commission Press Release No. 2016-132: SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016); *see* US Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249, Release No. 34-78167, at 9 (June 27, 2016).
[282] US Securities and Exchange Commission Press Release No. 2016-132: SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016).
[283] *See* US Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249, Release No. 34-78167, at 25 (June 27, 2016).
[284] 15 U.S.C. § 78*l*.
[285] 15 U.S.C. § 78*o*(d).
[286] *See* US Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249, Release No. 34-78167, at 25 (June 27, 2016).
[287] *See* US Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249, Release No. 34-78167, at 43, n. 152 (June 27, 2016).

payments include those made to further the commercial development of the resources such as taxes, royalties, and licensing fees.[288] There are a few exemptions to this rule. An exemption applies to a resource extraction issuer that has recently acquired a company. Also, the SEC may grant a one-year reporting delay for exploratory activities.[289] The SEC can also provide discretionary relief on a case-by-case basis.

Resource extraction issuers that fall under this re-proposed rule are required to comply with the rules starting with the fiscal year ending on or after September 30, 2018 and must file their required disclosure no later than 150 days after the end of its fiscal year.[290] Because this rule applies to payments to governments, and not individual government officials, it is unclear whether this rule will lead to more FCPA investigations; however, the government may use these disclosures to focus on resource extraction issuers with large foreign commercial developments and potential related FCPA violations. Notably, however, on February 1, 2017, the House of Representatives passed a bill, which is currently before the Senate, that would nullify this rule.[291]

D. Monitor Reports and Public Disclosure

In 2016, third parties attempted to gain access to monitor reports submitted to regulators, which are generally not publicly disclosed. In January 2016, former District Court Judge John Gleeson ordered the release of a redacted copy of HSBC's monitor report submitted to the US Attorney's Office for the Eastern District of New York in relation to HSBC's 2012 DPA. The United States and HSBC appealed the order to the Second Circuit; the Second Circuit's decision is pending.[292]

In July 2014, press organization 100Reporters sought the release of the monitor reports produced after Siemens and three of its subsidiaries settled FCPA charges and paid $800 million in penalties to the SEC and the DOJ in 2008, along with $800 million in penalties paid to German prosecutors.[293] The DOJ, however, refused to release the reports on the basis that disclosing the monitor reports would cause harm to Siemens because competitors could copy Siemens's compliance program without incurring the same costs.[294] In 2016, both the DOJ and 100Reporters filed motions for summary judgment.[295] Theo Waigel, who served as monitor, and Siemens also filed short briefs in support of the DOJ's position.[296]

---

[288] *See* US Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249, Release No. 34-78167, at 43 (June 27, 2016).
[289] US Securities and Exchange Commission Press Release No. 2016-132: SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016).
[290] *See* US Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249, Release No. 34-78167, at 151 (June 27, 2016).
[291] H.R.J. Res. 41, 115th Cong. (2017-2018).
[292] Reply briefs were filed in December 2016. Reply Brief of Plaintiff-Appellant, *United States v. HSBC Bank USA, N.A.*, No. 16-308, at 2 (2nd Cir. Dec. 2, 2016); Reply Brief of Defendants-Appellants, *United States v. HSBC Bank USA, N.A.*, No. 16-308 (2nd Cir. Dec. 2, 2016). The hearing date is March 1, 2017. Notice of Hearing Date, *United States v. HSBC Bank USA*, N.A., No. 16-308 (2nd Cir. Jan. 13, 2017).
[293] Complaint, *100 Reporters LLC v. U.S. Dep't of Justice*, No. 14-CV-1264-RC (D.D.C. July 24, 2014); Dylan Tokar, *DOJ: Releasing monitor reports would give Siemens competitors unfair compliance advantage*, GLOBAL INVESTIGATIONS REVIEW, Aug. 22, 2016.
[294] Dylan Tokar, *DOJ: Releasing monitor reports would give Siemens competitors unfair compliance advantage*, GLOBAL INVESTIGATIONS REVIEW, Aug. 22, 2016.
[295] Dylan Tokar, *DOJ: Releasing monitor reports would give Siemens competitors unfair compliance advantage*, GLOBAL INVESTIGATIONS REVIEW, Aug. 22, 2016.
[296] Dylan Tokar, *DOJ: Releasing monitor reports would give Siemens competitors unfair compliance advantage*, GLOBAL INVESTIGATIONS REVIEW, Aug. 22, 2016.

E. The Federal Communications Commission Fined Siemens Corporation and Siemens Medical Solutions $175,000

In 2008, Siemens AG disgorged $350 million and $450 million to the SEC and the DOJ, respectively, to resolve investigations into alleged FCPA violations.[297] Siemens AG subsidiaries in South America and Bangladesh pleaded guilty to conspiracy to violate the FCPA.[298] The Federal Communications Commission ("FCC") requires FCC wireless license holders, like Siemens, to disclose criminal convictions,[299] which Siemens AG and Siemens Medical failed to do at the time the resolution was announced.

On September 22, 2016, the FCC made public its decision to fine Siemens Corporation and Siemens Medical Solutions $175,000 for failing to disclose corporate felony convictions on "numerous FCC wireless license applications."[300] Travis LeBlanc of the FCC noted that "[a] felony conviction is a serious offense that the Commission considers when deciding whether a company is fit to hold a license or other authorization" and that it is the duty of the FCC "to ensure that any person or company that fails to submit candid, complete, and accurate information about their background—criminal or otherwise—will be held accountable."[301] The companies agreed to adopt a compliance plan to ensure future compliance with communications laws and prevent failures to disclose any other material factual information in future FCC license applications.[302] To ensure such compliance, the companies agreed to designate a senior manager to serve as a compliance officer to develop, implement and administer the compliance plan.[303]

7. Key International Legal Developments

A. International Cooperation

Both the DOJ and the SEC have continued to emphasize the importance of international cooperation in the fight against corruption in their public statements. For example, in an October 2016 speech, then Attorney General Loretta Lynch stressed that the DOJ will continue to seek international assistance in its anti-corruption efforts, and gave the example of the charges the DOJ brought against more than 40 individuals affiliated with FIFA, which involved the cooperation of several international law enforcement agencies, including agencies in Italy, Switzerland and other countries.[304]

Similarly, on November 30, 2016, Andrew Ceresney, then Director of the Enforcement Division at the SEC, told the audience at the ACI's annual FCPA Conference that "[c]ollaboration with international regulators and law enforcement is critical to [the SEC's] success in the FCPA space."[305] Ceresney pointed to the VimpelCom and Embraer cases (discussed above in Section 2) as examples of cases where the SEC collaborated with international colleagues to reach

---

[297] US Securities and Exchange Commission Press Release No. 2008-294: SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008); Judgment, *Untied States v. Siemens Aktiengesellschaft*, No. 08-CR-367 (D.D.C. Jan. 6, 2009).
[298] Plea Agreement, *United States v. Siemens S.A. (Argentina)*, No. 08-CR-00368-RJL, ¶ 2 (D.D.C. Dec. 15, 2008); Plea Agreement, *United States v. Siemens S.A. (Venezuela)*, No. 08-CR-00370-RJL, ¶ 2 (D.D.C. Dec. 15, 2008); Plea Agreement, *United States v. Siemens Bangladesh Ltd.*, No. 08-CR-00369-RJL, ¶ 2 (D.D.C. Dec. 15, 2008).
[299] 47 C.F.R §§ 1.17, 1.65.
[300] Order, *In the Matter of Siemens Corp. et. al.,* No. EB-IHD-16-00021037, ¶ 1 (Sept. 22, 2016).
[301] Federal Communications Commission Press Release No. 16-1411: Siemens to Pay $175,000 Fine for Failing to Disclose Felony Convictions (Sept. 22, 2016).
[302] Consent Decree, *In the Matter of Siemens Corp. et. al.,* No. EB-IHD-16-00021037, ¶ 12 (Sept. 22, 2016).
[303] Consent Decree, *In the Matter of Siemens Corp. et. al.,* No. EB-IHD-16-00021037, ¶ 12 (Sept. 22, 2016).
[304] Loretta E. Lynch, Former Attorney General, DOJ, Remarks on Department of Justice Efforts in the Fight Against International Fraud and Corruption (Oct. 20, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-department-justice-efforts-fight.
[305] Andrew Ceresney, Former Director of the Division of Enforcement, SEC, Keynote Speech at 33rd International Conference on the FCPA, https://www.sec.gov/news/speech/speech-ceresney-113016.html.

global settlements. He also stressed that the Enforcement Division would continue to work closely with foreign law enforcement and regulators, and that he expected to see more global settlements involving foreign authorities in the coming years.[306]

Foreign authorities have also emphasized the value of international cooperation. In October 2016, Hannah von Dadelszen, Joint Head of Fraud at the UK Serious Fraud Office ("SFO") delivered a speech at the TRACE Global Anti-Bribery In-House Network ("GAIN") Conference emphasizing the importance of cooperation with overseas law enforcement agencies.[307] Similarly, at the G20 summit in September, Chinese President Xi Jinping emphasized the importance of enhancing cooperation between law enforcement authorities and proposed a three-pronged approach to anti-corruption cooperation, which included formulating principles to chase down high-level fugitives, setting up a research center on fugitives and stolen assets, and drawing up a 2017-2018 anti-corruption "action plan."[308]

These public remarks by the DOJ, the SEC and their foreign counterparts are reflected in the large number of investigations involving international cooperation that have taken place in 2016. In practice, international cooperation can mean that national authorities share information about bribery schemes, report schemes to one another, coordinate strategies and use of investigative techniques such as search warrants, raids, and red notices, and execute Mutual Legal Assistance Treaty requests and responses.

However, this increased international cooperation with foreign authorities does not mean that companies can evade US enforcement by settling with foreign authorities. Instead, as Andrew Weissmann, Chief of the Fraud Section of the DOJ has explained, increased international cooperation means working with foreign enforcement agencies to achieve joint resolutions.[309] For example, as discussed below, Odebrecht and its Brazilian affiliate Braskem both reached global settlements with the Brazilian, US, and Swiss authorities in connection with the Operation Car Wash investigation. Similarly, as discussed below, Rolls-Royce reached a coordinated settlement with anti-corruption authorities in Brazil, the United Kingdom and the United States.[310]

B. United Kingdom

The year 2016 was one in which several promising developments happened for the UK SFO although perhaps not yet a year in which those promises were delivered. The structure and complexity of the cases currently under investigation, as well as the challenges of getting court time, has meant that 2016 may not have been as much of a landmark year as SFO Director David Green may have hoped. In his annual speech to the Cambridge Symposium on Economic Crime, Green's frustrations were clear, as he told attendees: "Be patient – I have to be."[311] That said, 2016 was not entirely without note, with two significant fines imposed for bribery offenses, the United Kingdom's second DPA, and several new corporate investigations announced. Add to that an industrious first few weeks of 2017 for the organization, and it appears that work done by the SFO in 2016 will lead to several interesting developments in 2017, including the largest

---

[306] Andrew Ceresney, Former Director of the Division of Enforcement, SEC, Keynote Speech at 33rd International Conference on the FCPA, https://www.sec.gov/news/speech/speech-ceresney-113016.html.
[307] Hannah von Dadelszen, Joint Head of Fraud, SFO, Speech at TRACE GAIN Conference 2016 (Oct. 27, 2016), https://www.sfo.gov.uk/2016/10/27/gain-2016-serious-fraud-offices-current-direction-enforcement-priorities/.
[308] Xinhua, *China's Intl Anti-Corruption Cooperation Yields Fruitful Results*, CHINA DAILY, Dec. 9, 2016. *See also* Michael Martina, *China To Promote Anti-Corruption Efforts at G20: Minister*, REUTERS, May 26, 2016.
[309] Andrew Weissmann, Chief of Fraud Section, ACI FCPA Keynote Speech (May 20, 2015), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/06/08/06-02-2015-aci-keynote.pdf.
[310] US Department of Justice Press Release No. 17-047: Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017).
[311] David Green, Director of SFO, Speech at the Cambridge Symposium on Economic Crime (Sept. 5, 2016), https://www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/.

corporate bribery resolution to date, two trials in the Alstom investigation, the possibility of further DPAs, and consultation on reform of corporate liability for economic crime.

1. Significant Cases

The year 2016 began on a promising note in January, when printing company Smith and Ouzman Ltd was sentenced[312] and ordered to pay £2.2 million for making corrupt foreign payments contrary to Section 1(1) of the Prevention of Corruption Act 1906,[313] which is the predecessor statute to the UK Bribery Act ("UKBA"). The company, together with its chairman and its sales and marketing manager, were convicted of corruptly agreeing to make payments totaling nearly half a million pounds. These payments were used to influence the award of business contracts in Kenya and Mauritania. This was the first SFO trial resulting in conviction of a corporation for foreign bribery.

The SFO enjoyed another success in February 2016 as Sweett Group PLC ("Sweett Group") was ordered to pay £2.25 million for failure to prevent bribery.[314] The Sweett Group case was the SFO's first successful conviction under the new corporate offense of failure to prevent bribery, contained in Section 7 of the UKBA. The £2.25 million included a £1.4 million fine, over £851,000 in confiscation, and additional costs that were awarded to the SFO. Sweett Group was charged with failing to prevent an act of bribery and was not offered a DPA as the SFO did not deem the company as having been cooperative, citing the company's unwillingness to provide to the SFO information that the company had gathered during its internal investigation.

Also in 2016, the SFO continued its long-running investigation into alleged corruption at Alstom Network UK Limited and Alstom Power Limited. In that case, the SFO is pursuing the alleged payment of bribes in various jurisdictions, including India, Lithuania and Hungary, by British companies within the Alstom group. Since the alleged misconduct pre-dates the UKBA, prosecutions are being brought under the pre-UKBA legal regime. In March 2016, the SFO charged an additional defendant in the matter,[315] bringing the total number of individual defendants across the investigation to seven. Two portions of the investigation are currently scheduled to begin trial in 2017.

In July 2016, the SFO charged logistics and freight operations company F.H. Bertling Ltd, along with seven individuals, with conspiracy to make corrupt payments, under the pre-UKBA legal regime. The charges relate to corrupt payments which the SFO alleges were made in 2005 and 2006 to an agent of the Angolan state oil company Sonangol either to win or retain business.[316]

Also in July 2016, the SFO announced an investigation into Monaco-based firm Unaoil, on unspecified alleged offences of bribery, corruption and money laundering.[317] The investigation appears to have been prompted by reports published by Fairfax Media and the Huffington Post that were based on hundreds of thousands of leaked internal emails and documents.[318] These reports led to a raid of Unaoil premises in Monaco in March 2016 by local authorities, apparently following a request for assistance from the SFO. In November 2016, it was reported that the

---

[312] Smith and Ouzman Limited was convicted in December 2014.
[313] UK Serious Fraud Office Press Release: Convicted Printing Company Sentenced and Ordered to Pay £2.22 million (Jan. 8, 2016).
[314] UK Serious Fraud Office Press Release: Sweett Group PLC Sentenced and Ordered to Pay £2.25 million After Bribery Act Conviction (Feb. 19, 2016).
[315] UK Serious Fraud Office Press Release: Further Charge in Alstom Investigation (Mar. 29, 2016).
[316] UK Serious Fraud Office Press Release: F.H. Bertling Ltd and Seven Individuals Charged with Bribery (July 13, 2016).
[317] UK Serious Fraud Office Press Release: Unaoil Investigation (July 19, 2016).
[318] Richard Baker and Nick McKenzie, *Unaoil: the Company that Bribed the World,* HUFFINGTON POST AND FAIRFAX MEDIA, Mar. 20, 2016, available at: http://www.theage.com.au/interactive/2016/the-bribe-factory.

SFO has been given "special funding" to pursue the criminal investigation into Unaoil.[319] The SFO has not yet filed criminal charges against the company or any individuals. The DOJ's investigation of Unaoil is also ongoing.

In August 2016, the SFO confirmed that it had opened a criminal investigation into allegations of fraud, bribery and corruption in the civil aviation business of Airbus Group.[320] The allegations reportedly relate to "irregularities concerning third party consultants."[321]

Finally, in December 2016, the SFO announced that it was abandoning its bribery investigation into the Somali oil explorer, Soma Oil & Gas.[322] The investigation, which was opened in July 2015, was based on allegations that the company had made payments totaling £315,000 to the Somali Ministry of Petroleum and Mineral Resources. In the end, the SFO concluded that there was insufficient evidence to provide a realistic prospect of conviction, stating that "[w]hilst there were reasonable grounds to suspect the commission of offences involving corruption, a detailed review of the available evidence led us to the conclusion that the alleged conduct, even if proven and taken at its highest, would not meet the evidential test required to mount a prosecution for an offence."[323]

2. Deferred Prosecution Agreements

The United Kingdom's DPA regime came of age in 2016, beginning, in November 2015, with the first agreement between the SFO and Standard Bank (now ICBC Standard Bank Plc) for $25.2 million.[324] The Standard Bank DPA was not only the first DPA in the United Kingdom, but also the first instance of a company being brought before the courts for failure to prevent bribery under Section 7 of the UKBA, which is a corporate offense of failure to prevent bribery. UK DPAs must be examined and approved by the court, and therefore the process followed by the court in approving the Standard Bank DPA provided much-needed clarity on the court's expectations of cooperation for a company seeking a DPA.[325]

The SFO's second DPA, which involved a company anonymized as XYZ Limited, received court approval in July 2016.[326] XYZ Limited faced an indictment alleging conspiracy to corrupt and to bribe under the pre-UKBA legal regime, as well as the new UKBA Section 7 offense of failure to prevent bribery, in connection with overseas supply contracts. Under the terms of the DPA, XYZ Limited agreed to pay £6,553,085, comprised of a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. Once again, significant emphasis was placed on XYZ Limited's cooperation with the SFO and its investigation—the judgment describes the company as showing the "highest standards of corporate integrity."[327] In his judgment, Lord Justice Leveson made clear that notwithstanding the cooperation demonstrated by the company, "[i]ndividuals who are involved in wholesale corporate corruption and bribery can expect severe punishment."[328] By early 2017, shortly before this review went to press, the SFO had concluded its third DPA, this time with Rolls Royce for £497.25 million, which represents the largest

---

[319] David Pegg, Rob Evans & Holly Watt, *Serious Fraud Office Given Extra Funds to Investigate Unaoil Bribery Claims,* THE GUARDIAN, Nov. 1, 2016.
[320] UK Serious Fraud Office Press Release: Airbus Group Investigation (Aug. 8, 2016).
[321] UK Serious Fraud Office Press Release: Airbus Group Investigation (Aug. 8, 2016).
[322] UK Serious Fraud Office Press Release: Soma Oil & Gas (Dec. 14, 2016).
[323] UK Serious Fraud Office Press Release: Soma Oil & Gas (Dec. 14, 2016).
[324] UK Serious Fraud Office Press Release: SFO Agrees First UK DPA with Standard Bank (Nov. 30, 2015).
[325] Deferred Prosecution Agreement, *Serious Fraud Office v Standard Bank PLC*, No: U20150854 (Southwark Crown Court Nov. 30, 2015).
[326] UK Serious Fraud Office Press Release: SFO Secures Second DPA (July 8, 2016).
[327] Deferred Prosecution Agreement, *Serious Fraud Office v XYZ Limited*, Case No: U20150856, ¶ 67 (Southwark Crown Court July 8, 2016).
[328] Deferred Prosecution Agreement, *Serious Fraud Office v XYZ Limited*, Case No: U20150856, ¶ 69 (Southwark Crown Court July 8, 2016).

financial penalty ever secured by the SFO.[329] The SFO investigation began when internet posts raising concerns about Rolls Royce's civil business in China and Indonesia came to the attention of the SFO. Despite Rolls Royce not self-reporting to the SFO, Lord Justice Leveson approved the DPA referring to what the SFO described as "the extraordinary cooperation of Rolls Royce."[330]

In a related development, in April 2016, the Glasgow-based freight and logistics company Braid Group agreed to pay £2.2 million after self-reporting bribery and failure to prevent bribery.[331] The laws of Scotland differ from the laws of England and Wales and Scotland does not currently have a DPA procedure in place, but it is notable that Braid Group was able to enter into a civil settlement rather than a criminal one. The company was "commended" for its conduct during the investigation by the Scottish Prosecution Service, and the case was "deemed suitable for civil recovery settlement" based on Braid Group's prompt self-reporting and implementation of new policies and procedures.[332] Although this case provides an interesting example, companies conducting business in England and Wales should not be looking to the Braid Group settlement as an example of likely outcome in similar circumstances.

3. Expanding the Concept of Corporate Criminal Liability

Ahead of an anti-corruption summit held in May 2016 in London, then-Prime Minister David Cameron promised to consult on extending the criminal offense of "failure to prevent" bribery to other economic crimes, such as fraud and money laundering.[333] At the summit itself, the UK government further stated that it would introduce a new corporate offense of failure to prevent tax evasion.[334]

These developments were no doubt music to David Green's ears. Currently, to prosecute a company for an economic offense other than bribery under Section 7 of the UKBA, the 'identification principle' requires the prosecutor to identify the 'controlling mind' of the company and prove that this person was complicit in the offense under investigation. This is an evidentially burdensome process, and Green has campaigned for a reform of corporate criminal liability for many years. According to Green, a "failure to prevent economic crime" offense would "significantly increase the prosecutors' reach in those cases where a company should be held to account for the conduct of persons associated with it."[335]

The good news continued for David Green when the Ministry of Justice announced in early 2017 plans to launch a consultation on reforming corporate liability for economic crime.[336] This move is not without precedent: in 2014, the Attorney General announced similar plans to introduce an offense of corporate failure to prevent economic crime,[337] but these were quietly dropped in September 2015 on the basis that there had, at the time, been no prosecutions

---

[329] UK Serious Fraud Office Press Release: SFO Completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC (Jan. 17, 2017).
[330] UK Serious Fraud Office Press Release: SFO Completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC, ¶ 22 (Jan. 17, 2017).
[331] Scotland Crown Office & Procurator Fiscal Service Press Release: Glasgow-based Logistics Company to Pay £2.2 million After Self-reporting Over Bribery and Failure to Prevent Bribery (Apr. 5, 2016).
[332] Scotland Crown Office & Procurator Fiscal Service Press Release: Glasgow-based Logistics Company to Pay £2.2 million After Self-reporting Over Bribery and Failure to Prevent Bribery (Apr. 5, 2016).
[333] David Cameron, *The Fight Against Corruption Begins with Political Will*, THE GUARDIAN, May 11, 2016.
[334] UNITED KINGDOM, U.K. COUNTRY STATEMENT (May 12, 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522749/United_Kingdom.pdf.
[335] David Green, Director of SFO, Speech at the Cambridge Symposium on Economic Crime (Sept. 5, 2016), https://www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/.
[336] UK Ministry of Justice Press Release: Corporate Liability for Economic Crime: Call for Evidence (Jan. 13, 2017).
[337] Jeremy Wright, Attorney General for England and Wales, Keynote Address to the 32nd Cambridge International Symposium on Economic Crime (Sept. 2, 2014), https://www.gov.uk/government/speeches/attorney-generals-keynote-address-to-the-32nd-cambridge-international-symposium-on-economic-crime-on-tuesday-2-september-2014.

under the model UKBA offense in Section 7, and "little evidence of [corporate economic] wrongdoing going unpunished."[338] The latest consultation is wider in scope than the 2014 proposal, and opens the door for wholesale reform of the law in this area.

4. Concluding Thoughts

With the momentum of three DPAs under its belt, and a record-breaking fine of nearly half a billion pounds for Rolls Royce, 2017 is shaping up to be a very eventful year for the SFO. The first Alstom trial in May 2017 will be one to watch, and depending on its outcome, could set the tone for the SFO's large corporate bribery prosecutions going forward. With additional DPAs possibly in the SFO's pipeline, it will be interesting to see what these DPA's bring in terms of further guidance on cooperation, particularly regarding issues of privilege waiver. Finally, with the planned introduction (announced in 2016) of a new corporate criminal offense of failure to prevent the facilitation of tax evasion, as well as the announcement of a more far-reaching consultation on corporate criminal liability, it is possible that the government will hold true to its pledge to reconsider wider reform in this area.[339]

C. Brazil

Anti-corruption efforts in Brazil continued apace throughout 2016, with several investigations culminating in convictions and/or significant fines. Several significant FCPA enforcement actions in 2016 involved Brazil—including the joint US/Brazilian/Swiss investigation into the Odebrecht/Braskem settlement, discussed in detail in this section—and the Embraer and Olympus resolutions, both of which are discussed in more detail above.

1. Significant Convictions and Settlements

Investigations by Brazilian authorities into wide-spread corruption at Petrobras, collectively dubbed "Operation Car Wash," continued in 2016, with the investigation now in its third year. Individuals at the highest political levels were prosecuted in 2016. In March, Brazilian authorities conducted raids at properties belonging to former Brazilian president Luis Inácio "Lula" da Silva and hauled da Silva in for questioning.[340] In May, Lula's Chief of Staff, José Dirceu, was convicted and sentenced to 23 years in prison for his involvement with corruption unearthed by Operation Car Wash.[341] Additionally, Lula's successor as president of Brazil, Dilma Rousseff, who was impeached and removed from office in August 2016, is currently under investigation for obstruction of justice and allegations that she attempted to appoint Lula to a cabinet post to help him avoid prosecution.[342] The scandal has yet to reach current Acting President Michel Temer, although three of his ministers resigned in May/June 2016 after audio recordings linking them to Operation Car Wash were released.[343]

Operation Car Wash is reverberating in the United States as well, with perhaps the most significant development being the December 20, 2016 announcement that Odebrecht, a global

---

[338] Eduardo Reyes, *MOJ Drops 'Failure to Prevent Economic Crime' Offence Plans*, THE LAW SOCIETY GAZETTE, Sept. 29, 2015.
[339] Susannah Cogman and James Bewley, *New Corporate Offenses In UK: What US Cos. Should Know,* LAW 360, May 23, 2016.
[340] Simon Romero, *Brazil's Ex-Leader, Luiz Inacio Lula da Silva, Is Held and His Home Raided*, NY TIMES, Mar. 4, 2014; Simon Romero, *Brazil Prosecutors Seek Arrest of 'Lula,' Former President, in Graft Case*, NY TIMES, Mar. 10, 2016.
[341] Michelle Cannes, *In Brazil, Former Chief of Staff José Dirceu Sentenced to 23 Years in Prison*, AGENCIA BRASIL, May 18, 2016.
[342] Maria Pia Palermo and Guillermo Parra-Bernal, *Brazil Justice Authorizes Probe on Rousseff, TV Says*, REUTERS, Aug. 16, 2016. Ms. Rousseff was impeached and suspended from office in August on unrelated charges of manipulating the federal budget.
[343] Jeffrey T. Lewis, *Brazil Tourism Minister Resigns Amid Graft Allegations*, WALL ST. J., June 16, 2016.

construction conglomerate based in Brazil, and a related affiliate Braskem, a Brazilian petrochemical company, had agreed to pay a combined total amount of at least $3.5 billion to resolve charges with authorities in Brazil, the United States and Switzerland related to bribes paid to government officials around the world.[344]

Odebrecht admitted that it had paid approximately $788 million in bribes to government officials, their representatives and political parties in a number of countries in order to win business.[345] According to authorities, Odebrecht and its co-conspirators allegedly created a stand-alone bribe department within Odebrecht that operated to account for and disburse bribe payments to foreign government officials and political parties.[346] Braskem was charged with creating false books and records to conceal the bribe payments.[347]

Odebrecht agreed in its plea agreement with the DOJ that the appropriate criminal fine is $4.5 billion, though it has said it can only afford to pay $2.6 billion.[348] Under the plea agreement, the United States and Switzerland will receive 10 percent each of the total criminal fine, with Brazil receiving the remaining 80 percent.[349] Accordingly, the fine is subject to an inability to pay analysis, and sentencing has been scheduled for April 17, 2017.[350]

Meanwhile, Braskem agreed to pay a total criminal penalty of $632 million, and to disgorge $325 million.[351] Of that penalty and disgorgement, Brazilian authorities are to receive 70 percent, Swiss authorities 15 percent, and the United States 15 percent ($94.8 million) of the total.[352] Relatedly, earlier in the year, in March, Marcelo Odebrecht, CEO of Odebrecht was sentenced to 19 years in prison on charges of money laundering and corruption.[353]

In another example of parallel prosecution involving conduct in Brazil, Embraer, in addition to the settlement it entered into with US authorities, described in detail above in Section 2, also entered into a settlement with the Brazilian Federal Public Prosecutor's Office and the Brazilian Securities and Exchange Commission in which it acknowledged violations of certain Brazilian laws between 2007 and 2011 and agreed to pay a total of R$64 million (approximately $20 million), out of which R$58 million is disgorgement of illegal profits and R$6 million is damages and penalty.[354]

---

[344] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).
[345] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).
[346] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).
[347] Complaint, *SEC v. Braskem, S.A.*, No. 16-CV-02488, ¶ 8 (D.D.C. Dec. 21, 2016)
[348] Plea Agreement, *United States v. Odebrecht S.A.*, Cr. No. 16-643 (RJD), ¶ 21(b) (E.D.N.Y. Dec. 21, 2016).
[349] Plea Agreement, *United States v. Odebrecht S.A.*, Cr. No. 16-643 (RJD), ¶ 21(d) (E.D.N.Y. Dec. 21, 2016); US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).
[350] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).
[351] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016); US Securities and Exchange Commission Press Release No. 2016-271, Petrochemical Manufacturer Braskem S.A. to Pay $957 Million to Settle FCPA Charges (Dec. 21, 2016).
[352] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).
[353] Vinod Sreeharsha, *Brazilian Businessman Gets Stiff Sentence in Petrobras Scandal*, NY TIMES, Mar. 8, 2016.
[354] Embraer S.A. Press Release: Material Fact (Oct. 24, 2016).

2. Ongoing Investigations

a. Operation Black Blood

Investigations by Brazilian authorities into allegations of corruption at Dutch oil and gas services firm SBM Offshore NV ("Operation Black Blood") continued in 2016. In late 2014, SBM had paid $240 million to Dutch authorities to settle allegations that it had bribed government officials in Angola, Brazil and Equatorial Guinea.[355] The company had previously announced that an internal investigation in 2014 found "certain red flags" in Brazil but "did not find any credible evidence that the company or the company's agent made improper payments to government officials (including state company employees)."[356]

However, the investigation of SBM returned with renewed vigor in 2016. In January, SBM's former CEO and a former SBM board member both entered into separate agreements with Brazilian prosecutors, under which each executive agreed to pay R$250,000 (approximately $60,000) to settle accusations brought against them, with no admission of guilt.[357] In February, the DOJ re-opened its investigation into SBM, though the scope of this renewed investigation is unclear.[358]

Subsequently, in July, SBM signed a leniency agreement with the Brazilian Ministry of Transparency, Oversight and Control, Public Prosecutor's Office, the General Counsel for the Republic, and Petrobras to settle the corruption claims.[359] Under the leniency agreement, SBM agreed to pay a total of $149.2 million ($149.2 to Petrobras, $6.8 million to the Public Prosecutor's Office and $6.8 million to the Council of Control of Financial Activities), as well as a reduction of 95 percent in future performance bonus payments, representing a present value for SBM of approximately $112 million.[360] However, the status of the leniency agreement is currently uncertain—the leniency agreement is subject to approval by Brazilian prosecutors,[361] who in September announced that they had rejected the leniency agreement.[362] This rejection of the leniency agreement has subsequently been upheld upon further review.[363]

b. Zelotes

The two-year old probe into suspected corruption at the Brazilian federal tax appeals division and related tax evasion—dubbed "Operation Zelotes"—continued in 2016, with charges being presented against several high-ranking members of Brazil's business elite. In March, prosecutors charged Joseph Safra, the world's wealthiest banker, over his alleged involvement in the Zelotes scheme,[364] although these charges were later dropped for lack of evidence.[365] In May, the chief executives of steelmaker Gerdau SA, and Banco Bradesco SA, Brazil's second-

---

[355] SBM Offshore Press Release: SBM Offshore Achieves Settlement with Dutch Public Prosecutor's Office Over Alleged Improper Payments. United States Department of Justice Closes Out the Matter (Nov. 12, 2014).
[356] SBM Offshore Press Release: SBM Offshore Findings of Internal Investigation (Apr. 2, 2014).
[357] SBM Offshore Press Release: Settlement Regarding Accusations against CEO and Member of the Supervisory Board (Jan. 25, 2016).
[358] SBM Offshore Press Release: SBM Offshore 2015 Full-Year Earnings (Feb. 10, 2016).
[359] SBM Offshore Press Release: Leniency Agreement Signed between Brazilian Authorities, Petrobras and SBM Offshore (July 16, 2016).
[360] SBM Offshore Press Release: Leniency Agreement Signed between Brazilian Authorities, Petrobras and SBM Offshore (July 16, 2016).
[361] SBM Offshore Press Release: Clarification On the Approval Process of the Leniency Agreement (Sept. 23, 2016).
[362] Rogerio Jelmayer, *Brazil Prosecutors Suspends Leniency Deal With SBM Offshore*, WALL ST. J., Sept. 2, 2016.
[363] SBM Offshore Press Release: Update on Status of the Leniency Agreement (Dec. 15, 2016).
[364] Silvio Cascione and Guillermo Parra-Bernal, *Brazil prosecutors charge billionaire Safra in bribery scheme*, REUTERS, Mar. 31, 2016, http://www.reuters.com/article/us-brazil-corruption-safra-idUSKCN0WX2MD.
[365] Jeffrey Lewis, *Brazilian Court Drops Bribery Charges Against Banco Safra's Owner,* WALL ST. J., Dec. 13, 2016.

largest non-state bank, were indicted for tax evasion.[366] Also in May, the president of MMC Automotores, Mitsubishi Motors' distributor and assembler in Brazil, was sentenced to four years in jail over related allegations of bribing politicians to secure tax breaks.[367] The Operation Zelotes investigation, which has been referred to as Brazil's "other corruption investigation," appears less significant only in comparison to the massive Operation Car Wash investigation.

D. India

In 2016, the DOJ and the SEC continued to investigate alleged violations in relation to business in India, including the SEC settlement with AB InBev (discussed above) related to conduct in India, and the disclosure by Cognizant and Mondelez[368] of ongoing government investigations into potential FCPA violations. Meanwhile, the Indian authorities increased their enforcement activity, and the Indian Supreme Court significantly increased the coverage of the country's anti-corruption statutes.

1. Case Law Developments

In March 2016, the Indian Supreme Court issued a landmark decision that expanded the reach of the Indian Prevention of Corruption Act 1988 to the banking sector.[369] Prior to this decision, the Act contained a definition of "public servant" that was narrow and focused primarily on demand-side corruption. In the decision, the Indian Supreme Court expanded this definition of "public servant" to also include private bankers.[370] Commentators have described this holding as "more than a little aggressive" and have viewed it as reflecting the impatience of many within the Indian judiciary with stalled legislative efforts to expand the scope of India's anti-corruption laws to include private bribery and bribe-givers.[371]

In June, India's Central Vigilance Commission requested permission to prosecute 149 employees of both private and public sector banks for alleged corruption.[372] Commentators have speculated that the Commission's request was prompted by the Indian Supreme Court's March 2016 decision.

2. Enforcement Efforts

The Indian Central Bureau of Investigation ("CBI") continued its investigation into the AgustaWestland bribery scandal in 2016. Launched in 2012, the investigation centers on the sale of 12 luxury helicopters to the Indian government. On April 8, 2016, the Milan Court of

---

[366] Julia Leite and Francisco Marcelino, *Bradesco CEO Trabuco, Two Managers Face Charges in Brazil,* BLOOMBERG, May 31, 2016; R.T. Watson*, Gerdau Delays Earnings Release Amid Tax Evasion Investigation*, BLOOMBERG, Feb. 29, 2016.

[367] Lisandra Paraguassu and Caroline Stuaffer, *Judge Convicts Head of Mitsubishi Motors Representative in Brazil,* REUTERS, May 4, 2016.

[368] On January 9, 2017, the SEC announced an enforcement action (the first of 2017) against Mondelez International, Inc. alleging that Cadbury, a subsidiary of Mondelez, Inc., and its subsidiaries, including Cadbury India, failed to conduct appropriate due diligence on and monitor the activities of its agent, which "created the risk" that funds paid to the agent in the amount of $100,000 could be used for improper or unauthorized purposes. The SEC also alleged that Cadbury India's books and records did not accurately reflect the agent's services. Mondelez agreed to pay $13 million without admitting or denying the SEC's findings. Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cadbury Limited and Mondelez International, Inc*., Rel. No. 79753 (Jan. 6, 2017).

[369] Judgment*, Central Bureau of Investigation, Bank Securities & Fraud Cell v. Ramesh Gelli and Others,* Criminal Appeal Nos. 1077-1081 of 2013 (Supreme Ct. of India Feb. 23, 2016).

[370] Judgment, *Central Bureau of Investigation, Bank Securities & Fraud Cell v. Ramesh Gelli and Others,* Criminal Appeal Nos. 1077-1081 of 2013, ¶ 27 (Supreme Ct. of India Feb. 23, 2016).

[371] Russel Stamets, Compliance Alert: India Supremes Say Private Bankers Are 'Public Servants,' FCPA BLOG (Mar. 9, 2016, 9:28 AM), http://www.fcpablog.com/blog/2016/3/9/compliance-alert-india-supremes-say-private-bankers-are-publ.html#sthash.27bW52bc.dpuf.

[372] PTI, *At Least 149 Banks Officials Under CVC Scanner for Corruption,* THE INDIAN EXPRESS, June 16, 2016.

Appeals in Italy sentenced Giuseppe Orsi, former Finmeccanica boss, to 4.5 years in prison.[373] The Milan Court also sentenced Bruno Spagnolini, former head of AgustaWestland, a subsidiary of Finmeccanica, to four years in prison.[374] In its decision, the Milan Court noted that there were "unmistakable indications regarding corruption of an Indian officer," identified as the cousin of SP Tyagi, the former Indian Air Force chief.[375]

Following these convictions, the CBI requested a copy of the Milan Court's decision, and expanded the CBI investigation. On December 9, 2016, the CBI arrested Tyagi, along with his cousin and a Delhi-based lawyer for allegedly receiving and facilitating bribes.[376] The CBI said that all three people were arrested for violations of the Prevention of Corruption Act, 1988.[377] According to the CBI, Tyagi was involved in changing the Air Force's technical requirements for helicopters in such a way that allowed AgustaWestland to compete for Air Force contracts for the first time.[378] The CBI also said that the investigation revealed that undue favor was shown and that AgustaWestland accepted illegal gratification from the accused vendors through middlemen and relatives, including Tyagi's cousin and the lawyer.[379]

E. China

The year 2016 saw continued enforcement of anti-corruption law by Chinese officials, including the prosecution of Chinese government officials at all levels of government, and new legislation implementing anti-corruption laws.

1. Enforcement Efforts

In 2016, more than 40 officials at the ministerial or higher level were tried and sentenced to imprisonment or fined for taking bribes together with other criminal offenses. For example, Ling Jihua, the former Vice Chairman of the Chinese People's Political Consultative Conference ("CPPCC") and former Minister of the United Front Work Department under the CPC Central Committee, was sentenced by the Court of First Instance to lifetime imprisonment for accepting bribes, illegally obtaining state secrets and abusing his powers. All his individual properties were confiscated.[380]

Over 900 suspects were seized and RMB2.312 billion (approximately $336 million) was recovered in the international manhunt "Sky Net," which is an ongoing Chinese campaign to prosecute corruption suspects and repatriate money procured through illegal means. Some of the suspects seized by Chinese authorities had been at large for more than ten years. Of the list of 100 people wanted for corruption issued by Interpol's National Central Bureau of China, 37 have been seized.

In addition, in 2016, a growing number of lower-ranking officials were investigated and charged with corruption offenses, as part of a Chinese government campaign to pursue not only high-ranking officials but also lower-level officials. The Communist Party of China Central Committee for Discipline Inspection and Supervision Department (the "Committee") has dispatched several work teams to conduct both random and regular investigations for suspected corruption in large state-owned enterprises, provincial and lower-level Party's Commissions, and government departments. From January to November 2016, the Committee and its local-level counterparts

---

[373] Guilia Segreti, *Finmeccanica's Ex-CEO Sentenced to 4-1/2 Years in Jail in Bribery Case,* REUTERS, Apr. 7, 2016.
[374] Guilia Segreti, *Finmeccanica's Ex-CEO Sentenced to 4-1/2 Years in Jail in Bribery Case,* REUTERS, Apr. 7, 2016.
[375] Express News Service, *VVIP Chopper Scam: Italy Court Points Finger at Ex-IAF Chief S P Tyagi*, THE INDIAN EXPRESS, Apr. 27, 2016.
[376] *CBI Arrests Former Air Force Chief SP Tyagi in AgustaWestland Chopper Case*, HINDUSTAN TIMES, Dec. 10, 2016.
[377] *CBI Arrests Former Air Force Chief SP Tyagi in AgustaWestland Chopper Case*, HINDUSTAN TIMES, Dec. 10, 2016.
[378] *CBI Arrests Former Air Force Chief SP Tyagi in AgustaWestland Chopper Case*, HINDUSTAN TIMES, Dec. 10, 2016.
[379] *CBI Arrests Former Air Force Chief SP Tyagi in AgustaWestland Chopper Case*, HINDUSTAN TIMES, Dec. 10, 2016.
[380] *China Focus: Corrupt Ling Jihua gets life sentence*, XINHUA, July 4, 2016.

brought 360,000 cases for corruption and bribery. Through these cases, 337,000 officials of various levels have been penalized, of which 72 are provincial- or ministry-level officials (an increase of 30.9 percent), 2,319 are prefectural- or bureau-level officials (50.3 percent increase) and 14,756 are county- or department-level officials (34.2 percent increase).[381]

2. Legislative Developments

In early 2016, the Supreme People's Court and the Supreme People's Procuratorate jointly issued an Interpretation on Issues Concerning Application of Law in Handling Criminal Cases of Corruption and Bribery, effective April 18, 2016 (the "Interpretation").[382] The Interpretation sets forth detailed rules for the application of 2015 Amendment IX to the Criminal Law and clarifies changes concerning bribery offenses, including (a) monetary thresholds for the seriousness of bribery offenses; (b) aggravating factors that the court should consider when sentencing; and (c) mitigating factors that the court should consider when sentencing. The Interpretation sets out three categories for bribes: "relatively large" (RMB30,000 (approximately $4,300) to RMB200,000 (approximately $29,000)), "huge" (RMB200,000 to RMB3 million (approximately $436,000) and "especially huge" (more than RMB3 million). Punishment for "relatively large" bribes include imprisonment of up to three years and monetary fines; "huge" bribes is punishable by imprisonment between three and ten years, fines and confiscation of property; and "especially huge" bribes are punishable by prison sentences ranging between ten years and life, or even the death penalty.

On November 7, 2016, the Communist Party of China's Central Committee promulgated the Pilot Plans for State Supervision Institution Reform in Beijing, Shanxi and Zhejiang ("Pilot Plans").[383] Pursuant to these Pilot Plans, China will set up a new anti-graft body (i.e., the Supervision Committees) to consolidate separate state agencies and oversee all public servants. A Supervision Committee will be established in each of Beijing, Shanxi and Zhejiang on a pilot basis to address corruption through institutional reform. The Supervision Committees are expected to be implemented throughout the rest of the nation later in accordance with the Pilot Plans. The goal was to build a state anti-corruption organ under the Party's leadership which will integrate separate government anti-graft agencies and cover all public servants, including officials at the local People's Congress, courts, and prosecutors' offices, who are all expected to come under the supervision of the new Supervision Committee. The new Supervision Committee will in theory be independent of the administrative departments.[384]

F. Germany

1. Enforcement Efforts

Germany saw two major settlements with authorities, and two new criminal investigations related to allegations of foreign bribery, in 2016.

In April 2016, a German Rolls-Royce subsidiary paid €12 million to German authorities as part of a settlement of a corruption case related to sales in South Korea; at the same time, media reports indicated that German prosecutors were expanding their bribery investigation to other

---

[381] Chen Shangying, Wu Mengda, and Li Jinfeng, *The Determination and Strength of "Forever on the Road" – The Six Aspects of Anti-Corruption in 2016*, SOHU NEWS, Dec. 12, 2016; Chen Yinghua, *The Ironclad Crackdown on Corruption – Authorities Open 360,000 Investigations in the First 11 Months of 2016*, JIEMIAN, Jan. 2, 2017.
[382] Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Corruption and Bribery (Supreme People's Ct. of China Apr. 19, 2016).
[383] Huaxia, *Xinhua Insight: China Starts Supervision Efficiency Pilot Schemes*, XINHUA, Nov. 11, 2016.
[384] The Supervision Committee, though nominally independent, will report to the National People Congress, which is a Communist Party body. Jonathan Webb, *China to Launch New Anti-Corruption System*, FORBES, Dec. 29, 2016.

Asian countries.[385] In October 2016, Schenker, a logistics company, agreed with the Cologne State Prosecutor's Office to pay an administrative fine of €2 million to end an investigation into Schenker's business in Russia.[386] At issue in that case were allegations that a former Schenker subsidiary in Russia had paid bribes to Russian customs officials between 2010 and 2012 in order to accelerate the shipment of automotive parts for a customer in St. Petersburg.[387]

As part of an ongoing anti-corruption investigation, the Bremen Public Prosecutor's Office is investigating Atlas Elektronik, a joint venture company of Airbus and ThyssenKrupp, and prosecutors searched ThyssenKrupp headquarters in Essen in June.[388] The investigation relates to allegations that employees of Atlas Elektronik had paid bribes to Turkish government officials in order to obtain contracts. Another anti-corruption investigation, this one led by the Public Prosecutor's Office of Wuerzburg, is focused on alleged bribes paid by employees of Schaeffler, an automotive and industrial supplier, in relation to deals involving Turkey.[389] Several Schaeffler employees are under investigation, including a former CEO, in relation to allegations of bribery, breach of trust, and tax fraud between 2004 and 2011.[390]

2. Legislative Developments

In April 2016, the German Parliament adopted a law designed to fight corruption in the healthcare sector, which came into effect in June 2016.[391] The law introduces two new sections to the German Criminal Code ("Strafgesetzbuch"): Section 299a (passive bribery) and 299b (active bribery), which make it a criminal act (a) to offer doctors and other healthcare professionals; and (b) for such doctors and other healthcare professionals to receive, bribes in exchange for prescribing or purchasing medical products or for referring patients or test material, provided that the doctor thereby unduly favors the briber in a competitive situation.

The Federal Ministry of Justice is still analyzing a draft proposal for a new statute that would establish corporate criminal liability in Germany.[392] Currently, it is only possible to punish individuals under the Criminal Code, while corporations are fined under the Administrative Offenses Act.

In December 2016, Germany completed the ratification procedure regarding the Criminal Law Convention on Corruption of the Council of Europe (1999) and its Additional Protocol.[393] Both documents aim at the coordinated criminalization of numerous types of corruption by installing

---

[385] Karin Matussek, *Rolls-Royce Unit Mired in German Bribery Probe Over Asian Sales,* BLOOMBERG, July 29, 2016; Ben Dipietro, Corruption Currents: German Prosecutors Expand Rolls-Royce Bribery Probe, WALL ST. J. (July 29, 2016, 2:28 PM), http://blogs.wsj.com/riskandcompliance/2016/07/29/corruption-currents-german-prosecutors-expand-rolls-royce-bribery-probe/.

[386] Deutsche Bahn Press Release: Agreement Reached to Terminate Investigation into Compliance Violations in Russia (Oct. 7, 2016).

[387] Robin Meczes, *DB Schenker Pays Out Over Allegations of Bribery in Russia; Ford Still Under Investigation*, AUTOMOTIVE LOGISTICS (Oct 18, 2016).

[388] Rahul Rose, *German Corruption Investigation of Atlas Elektronik Spreads to Legal Staff*, GLOBAL INVESTIGATIONS REVIEW, July 25, 2016.

[389] *German Prosecutors Probe Ex-Schaeffler CEO Over Alleged Bribery*, REUTERS, Mar. 15, 2016.

[390] *German Prosecutors Probe Ex-Schaeffler CEO Over Alleged Bribery*, REUTERS, Mar. 15, 2016.

[391] German Federal Ministry of Justice, Country Commitments, https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Country_Commitments_Germany.pdf?__blob=publicationFile&v=1.

[392] Transparency International Deutschland e. V. Press Release: Bundesjustizministerium will Unternehmen stärker zur Verantwortung ziehen (Nov. 16, 2016).

[393] Gesetz zu dem Strafrechtsübereinkommen des Europarats vom 27. Januar 1999 über Korruption und dem Zusatzprotokoll vom 15. Mai 2003 zum Strafrechtsübereinkommen des Europarats über Korruption vom 14. Dezember 2016, BGBl. II, p. 1322 (No. 35). [Act of 14 December 2016 regarding the Criminal Law Convention on Corruption of the Council of Europe of 27 January 1999 and the Additional Protocol to the Criminal Law Convention on Corruption of the Council of Europe of 15 May 2003, Federal Law Gazette II, p. 1322 (No. 35).]

and improving a minimum standard for cooperation between the member states in fighting corruption offenses.[394] Under the Convention, states are required to implement effective sanctions and measures, including provisions that allow extradition. The Convention includes liability of legal entities for offenses committed to benefit them and requires that legal entities be subject to criminal or non-criminal sanctions, including monetary sanctions.[395]

Moreover, Germany has taken another important step towards more effective anti-bribery enforcement. In 2016, a draft bill to reform the rules on disgorgement was proposed, which would facilitate the seizure of assets of criminals by loosening the requirements for proving the connection between a criminal's assets and a specific criminal act.[396] However, some legal experts recently criticized the reforms on the basis that the reforms neglect victim protection and compensation, as well as raise constitutional concerns.[397]

G. Europe

In June 2016, the Council of Europe's Group of States against Corruption ("GRECO") published a report on Germany, which expressed satisfaction with Germany's work on anti-bribery legislation, but encouraged it to increase transparency into financing of political parties, including donations. [398]

The European Commission continues to monitor the judicial reform process and efforts of Bulgaria and Romania in combatting corruption.[399] In January 2016, new annual reports on progress under the Cooperation and Verification Mechanism in both member states were published.[400] The European Commission found that good progress was made in Romania, particularly with regard to Romania's latest reforms and its commitment to anti-corruption prosecution.[401] The European Commission was more critical of Bulgaria, however, noting that, in general, while Bulgaria had taken some important steps, the country needed to accelerate its progress towards combatting corruption.[402] In particular, Bulgaria's anti-corruption agenda was set back when a draft bill was rejected by the country's National Assembly.[403] The European Commission also commented on what it viewed as a lack of commitment towards progress in important areas of judicial governance.[404]

---

[394] Council of Europe, Criminal Law Convention on Corruption, Details of Treaty No. 173 (1999), http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/173.
[395] Council of Europe, Criminal Law Convention on Corruption, Details of Treaty No. 173 (1999), http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/173.
[396] German Federal Ministry of Justice Press Release: Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung (July 13, 2016).
[397] Beck-Aktuell: *Anhörung: Experten halten geplante Reform der strafrechtlichen Vermögensabschöpfung für nachbesserungsbedürftig,* BECK-ONLINE (Nov. 24, 2016).
[398] Council of Europe's Group of States Against Corruption (GRECO), Second Compliance Report on Germany (June 16, 2016), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c6398.
[399] *See* European Commission, Reports on Progress in Bulgaria and Romania (2017), https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en.
[400] European Commission, Report from the Commission to the European Parliament and the Council: On Progress in Romania Under the Co-operation and Verification Mechanism (Jan, 27, 2016); European Commission, Report from the Commission to the European Parliament and the Council: On Progress in Bulgaria Under the Co-operation and Verification Mechanism (Jan, 27, 2016).
[401] European Commission, Report from the Commission to the European Parliament and the Council: On Progress in Romania Under the Co-operation and Verification Mechanism (Jan, 27, 2016).
[402] European Commission, Report from the Commission to the European Parliament and the Council: On Progress in Bulgaria Under the Co-operation and Verification Mechanism (Jan, 27, 2016).
[403] European Commission, Report from the Commission to the European Parliament and the Council: On Progress in Bulgaria Under the Co-operation and Verification Mechanism, at 8 (Jan, 27, 2016).
[404] European Commission, Report from the Commission to the European Parliament and the Council: On Progress in Bulgaria Under the Co-operation and Verification Mechanism, at 10 (Jan, 27, 2016).

In November 2016, the Sapin II law ("Sapin II") was adopted by the French Parliament. The law is designed to combat corruption by strengthening anti-corruption instruments. Sapin II follows Sapin I, a law from 1993 designed to improve transparency in politics and public procurement. The new bill is aimed at further enhancing transparency by creating a national electronic register, which makes it mandatory for representatives of various interests to register and declare their business operations, thereby enabling supervision of their activities.[405] Furthermore, Sapin II will increase legal protection for French whistleblowers and also establish the Agence Française Anticorruption ("AFA"), a new national agency responsible for detecting and preventing corruption.[406] The law also requires large companies (with over 500 employees and annual turnover of over €100 million) to implement corruption prevention plans.[407] Finally, the law introduces the "convention judiciaire d'intérêt public," which creates a way for companies under investigation to achieve a stay of criminal proceedings before the case is referred to trial, a new procedure that will have some similarities with a DPA under US law.[408] To obtain a stay, a company must fulfill the following three conditions: (1) acceptance of a fine of up to 30 percent of the company's annual average turnover; (2) implementation of a three-year long compliance program—monitored by AFA; and (3) in some cases additional compensation for victims.[409] It remains to be seen how the new avenues for anti-bribery enforcement introduced by Sapin II will be implemented in practice.

H. Canada

The year 2016 saw a reduction in anti-corruption enforcement efforts in Canada in comparison to the past few years, which saw several significant enforcement actions as part of renewed efforts to enforce the Corruption of Foreign Public Officials Act ("CFPOA"). That said, Canadian investigations proceeded apace, and one FCPA resolution in the United States in 2016 involved a Canadian company, Nordion, as discussed in detail above.

1. Enforcement Efforts

a. SNC-Lavalin

The longstanding investigation of SNC-Lavalin, a Montreal-based engineering and construction firm, for corruption in Bangladesh, Libya, Cambodia and Algeria continued in 2016, with interesting developments involving conduct in Bangladesh and Libya.

The Integrity Vice Presidency ("INT") of the World Bank Group ("World Bank") has been investigating representatives of SNC-Lavalin for bribery of Bangladeshi government officials to obtain a contract to construct a bridge over the Padma River since 2011.[410] INT shared some of its findings with the Royal Canadian Mounted Police ("RCMP") who, using the INT information and other information they gathered, were able to obtain judicial authorization for a wiretap.[411] As a result, Canadian authorities were ultimately able to gather sufficient evidence to charge four individuals under the CFPOA.[412] However, the individuals challenged the wiretap

[405] French Government Press Release: Sapin II Law: Transparency, The Fight Against Corruption, Modernisation of the Economy (Apr. 6, 2016).
[406] French Government Press Release: Sapin II Law: Transparency, The Fight Against Corruption, Modernisation of the Economy (Apr. 6, 2016).
[407] French Government Press Release: Sapin II Law: Transparency, The Fight Against Corruption, Modernisation of the Economy (Apr. 6, 2016).
[408] Maria Knapp, *Will The Sapin II Anti-Corruption Law Shepherd France Into A New Era Of Transparency?*, FORBES, Dec. 14, 2016.
[409] Maria Knapp, *Will The Sapin II Anti-Corruption Law Shepherd France Into A New Era Of Transparency?*, FORBES, Dec. 14, 2016.
[410] The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 12 (2016).
[411] The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 12 (2016).
[412] The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 12 (2016).

authorizations in the Ontario Superior Court of Justice, and successfully obtained an order requiring disclosure of INT records and validation of two subpoenas of INT investigators.[413]

In April 2016, the Supreme Court of Canada overturned the lower court's order, reasoning that it could not compel the World Bank to produce certain internal documents and require INT investigators to testify before the court because the INT is part of the World Bank and therefore enjoys the same immunities granted to other World Bank entities.[414] The INT noted in its 2016 annual report that it regarded the Canada Supreme Court's decision as highlighting the importance of cooperation between state and non-state actors in the fight against corruption, and noted that if INT's cooperation with the Canadian authorities had been construed by the Supreme Court of Canada as an implied waiver of the World Bank's privileges and immunities, this would have had a chilling effect on collaboration between the World Bank and national law enforcement, as well as on the INT's ability to protect whistleblowers and confidential witnesses against discovery of their identities.[415]

In relation to Libya, as previously reported last year, Canadian prosecutors filed fraud and corruption charges against three of SNC-Lavalin's legal entities in connection with business ventures in Libya.[416] However, in December 2015, SNC-Lavalin announced that it had signed the first-ever administrative agreement with the Government of Canada under the Integrity Regime, which bars companies and their related legal entities from bidding on government contracts if they are charged with or convicted of certain criminal or administrative charges.[417] The administrative agreement allows SNC-Lavalin to continue to contract with or supply the Government of Canada until the final conclusion of those charges.[418] This administrative agreement may represent a significant step towards addressing what is perceived to be unduly harsh debarment rules and provides companies facing criminal charges with the alternative of signing administrative agreements.

b. Canadian General Aircraft

In November 2016, the RCMP charged Larry Kushniruk, the president of Canadian General Aircraft, with allegedly conspiring to bribe Thai public officials to secure the sale of a commercial aircraft from Thailand's national airline under the CFPOA.[419] Interestingly in terms of the development of CFPOA case law, charges were brought despite the fact the investigation did not reveal evidence that Thai officials were in fact bribed or were involved in the alleged conspiracy. [420]

I. Mexico

In 2016, Mexico undertook sweeping reforms of its anti-corruption laws, which has prompted an increase in enforcement activity by the Mexican authorities under the new laws, a trend that seems likely to continue. In addition, there have been several significant FCPA investigations in

---

[413] The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 12 (2016).
[414] Judgement, *World Bank Group v. Wallace*, 2016 SCC 15 (Supreme Ct. of Canada Apr. 29, 2016), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15915/index.do.
[415] The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 12 (2016).
[416] WilmerHale, *Global Anti-Bribery Year-in-Review: 2015 Developments and Predictions for 2016* (Feb. 2, 2016), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2016-02-02-FCPA-Year-in-Review.pdf.
[417] SNC-Lavalin Press Release: SNC-Lavalin Signs an Administrative Agreement Under the Government of Canada's New Integrity Regime (Dec. 10, 2015).
[418] SNC-Lavalin Press Release: SNC-Lavalin Signs an Administrative Agreement Under the Government of Canada's New Integrity Regime (Dec. 10, 2015).
[419] *Canadian General Aircraft president charged with conspiring to bribe Thai officials in plane deal,* CBS NEWS, Nov. 24, 2016.
[420] *Canadian General Aircraft president charged with conspiring to bribe Thai officials in plane deal,* CBS NEWS, Nov. 24, 2016.

2016 involving business activities in Mexico, including the Key and Zimmer Biomet resolutions detailed above.

1. Legislative Developments

On July 18, 2016, Mexico implemented a National Anticorruption System (known as the "SNA") which enacted sweeping reforms to its anti-corruption laws, including creating four new statutes:

- The General Law of the SNA, which creates a national system administered by a coordinating committee responsible for deploying and coordinating the SNA at all levels of Mexico's government, from the federal to the local/municipal level and facilitates interstate cooperation in fighting corruption.

- The General Administrative Responsibilities Law ("Responsibilities Law"), which contains many of the substantive changes to the anti-corruption laws, as described in more detail below.

- The Organic Law of the Administrative Justice Federal Court, which provides that the Administrative Justice Federal Court has the authority to sanction both public servants and private parties for serious administrative violations under the new SNA.

- The Federal Accounting and Accountability Law, under which a company can be held liable for failing to cooperate with the Federal Superior Auditor during an anti-corruption investigation.[421]

Several amendments to existing laws were also enacted. With a couple of exceptions, these laws and amendments became effective in July 2016. Key provisions of the new Responsibilities Law include:

- Government officials are now required to complete and file a transparency declaration which includes (a) an asset declaration; (b) a conflict of interest declaration; and (c) tax return information.[422]

- Companies can now be held liable if they are found to have engaged in bribery, influence peddling, using false information to obtain an authorization or benefit, collusion in public procurement processes, misappropriation of public funds, and wrongful recruitment of former public servants, among other things.

- Penalties for violations of the Responsibilities Law include, among other things, a fine of up to two times the benefits obtained, debarment, suspension of activities and liquidation of the company, and a requirement that the company indemnify government agencies.

- A company can avoid liability if it has in place an adequate anti-corruption and compliance program that includes (a) an organization chart that delineates the functions and responsibilities of each of the company's areas; (b) a code of conduct that is publicly available and sets out mechanisms for its application; (c) adequate internal accounting controls; (d) a whistleblower program; (e) training programs on ethics policies; (f) human resources screening policies designed to prevent hiring individuals that increase the risk of corruption at the company; and (g) mechanisms that ensure transparency.

[421] Leonel Pereznieto, Creel, Garcia-Cuellar, Aiza y Enriquez, S.C., *Bribery & Corruption, Mexico*, at 151 (2017).
[422] Leonel Pereznieto, Creel, Garcia-Cuellar, Aiza y Enriquez, S.C., *Bribery & Corruption, Mexico*, at 151 (2017).

- The Responsibilities Law also establishes a leniency program, under which the first person or entity that submits to leniency may receive a reduction of between 50-75 percent off fines and up to total acquittal from debarment. Persons or companies that come forward subsequently may be granted a reduction of up to 50 percent of fines.[423]

2. Enforcement Actions

Since the passage of the new laws in July, Mexican authorities have commenced several high-profile enforcement efforts under the new anti-corruption framework. For example, in Nuevo León state, authorities are investigating the former Governor of Nuevo León and ten other state government officials who served during his administration. The investigation is reportedly focused on allegations of overpricing and bid rigging on 8,000 government contracts awarded during the Governor's administration, as well as allegations that illegal benefits were granted to the car manufacturer KIA for building a manufacturing facility in Nuevo León.[424]

J. Other Jurisdictions

In addition to the developments in the foreign jurisdictions discussed above, there were also some noteworthy developments in South Korea and Israel in 2016. In South Korea, high-level South Korean business leaders and government officials are currently embroiled in a major corruption scandal. The South Korean National Assembly voted in December to impeach President Park Geun-Hye for alleged involvement in corruption, including helping her friend, Choi Soon-sil, extort money from corporations, peddle influence and meddle in state affairs.[425] The South Korean Constitutional Court is currently reviewing the evidence for Ms. Park's impeachment.[426] In January 2017, Korean prosecutors requested the arrest of Jae Yeong Lee, vice chairman of Samsung, who is accused of instructing Samsung subsidiaries to make payments totaling 43 billion won ($36 million) to the family of Ms. Choi.[427] However, on January 18, 2017, a South Korean court denied the request, ruling that there was no need to detain Mr. Lee at this stage.[428]

In legislative developments, the new anti-graft law, known as the "Youngran Kim Act" took effect in September 2016.[429] That law calls for criminal liability to attach to public servants, journalists and teachers who accept gifts valued at more than 1 million won (approximately $865) per occasion or 3 million won (approximately $2,593) in the aggregate per fiscal year.[430] Moreover, acceptance of meals worth more than 30,000 won (approximately $27), gifts worth more than 50,000 won (approximately $45), or gifts worth more than 100,000 won (approximately $90) on festive occasions and funerals is also prohibited.[431] Prior to the passage of the law, graft was only punishable when it was established in court that a person had accepted a gift in return for a specific favor. The new law criminalizes the acceptance of gifts regardless of whether the bribe taker gives favors in return.[432]

---

[423] Leonel Pereznieto, Creel, Garcia-Cuellar, Aiza y Enriquez, S.C., *Bribery & Corruption, Mexico,* at 154 (2017).
[424] Leonel Pereznieto, Creel, Garcia-Cuellar, Aiza y Enriquez, S.C., *Bribery & Corruption, Mexico*, at 154 (2017).
[425] Celeste Arrington, *South Korea's President Was Just Impeached. This Is What It Means and What Comes Next,* WASHINGTON POST, Dec. 12, 2016.
[426] Choe Sang-Hun, *Park Geun-hye, South Korean President, Is a No-Show at Impeachment Trial*, NY TIMES, Jan. 3, 2017.
[427] Choe Sang-Hun, *Samsung Heir Faces Arrest on Charges of Bribing South Korea's President,* NY TIMES, Jan. 15, 2017.
[428] Eun-Young Jeong, *Court Denies Arrest Warrant for Samsung Heir Lee Jae-yong,* WALL ST. J., Jan. 18, 2017.
[429] Choe Sang-Hun, *Antigraft Law Stirs Up Wariness Over South Koreans Bearing Gifts*, NY TIMES, Sept. 29, 2016.
[430] Myungsuk Sean Choi and Michael H. Yu, *Korea: Anti-Corruption Compliance*, GLOBAL INVESTIGATIONS REVIEW, Sept. 22, 2015.
[431] Choe Sang-Hun, *Antigraft Law Stirs Up Wariness Over South Koreans Bearing Gifts*, NY TIMES, Sept. 29, 2016.
[432] Choe Sang-Hun, *Antigraft Law Stirs Up Wariness Over South Koreans Bearing Gifts*, NY TIMES, Sept. 29, 2016.

In Israel, in November 2016, the Tel Aviv District Prosecutor's office brought the first enforcement action under Israel's Bribery of Foreign Public Officials statute, which was enacted in 2008. Nikuv International Projects Ltd. was accused of paying more than $500,000 in bribes to advance its business interests in Lesotho. The company pleaded guilty and agreed to pay a fine of 4.5 million NIS (approximately $1.2 million).[433] This enforcement action was swiftly followed in December by another, when Israeli authorities detained Beny Steinmetz on suspicion of money laundering and the bribery of Guinean government officials.[434]

8. Predictions/Office Pool

A central theme of 2016 has been the focus within both enforcement agencies on compliance. The DOJ's Pilot Program has proven effective in encouraging self-disclosure, cooperation, and remediation in exchange for leniency at sentencing and flexibility in charging decisions. While the Pilot Program is set to expire in 2017, we expect that its principles will continue to guide the DOJ in its approach to corporate resolutions. One related component is the DOJ's continued commitment to compliance and its focus on sanctioning "paper" compliance programs and encouraging the development of comprehensive and effective ones. To this end, the DOJ has reportedly extended the contract of its compliance expert, Hui Chen, and with it the role of compliance in the resolution process.

Operation CarWash, the name given to the set of investigations related to Brazil's Petrobras scandal, is now in its third year and 2016 saw the resolution of the Odebrecht and Braskem actions. We expect to see the resolution of additional actions related to the Petrobras corruption allegations in 2017.

In 2016, the DOJ exhibited a show of force related to criminal internal controls. In the past, the DOJ has rarely imposed this charge, which was difficult to obtain given the high burden of proof for criminal cases. Recently, the DOJ appears to be hewing closer to the SEC's strict liability standard in assessing control failures in companies, and have based their finding of criminal intent by the issuer on facts that in some cases look more like negligence or intentional circumvention by a small group of employees. The rise of criminal internal-controls cases in 2016 seemed to mark the start of a trend: 2017 has already seen two DOJ resolutions with criminal internal-controls charges, Las Vegas Sands and SQM.

Finally, it is yet unclear what impact the new Trump Administration will have on FCPA enforcement actions by the DOJ and the SEC. Prior to this election, President Trump was on record as a critic of the FCPA, concerned that burden of FCPA compliance unfairly fell on US businesses.[435] As is clear from the discussion in Section 7, businesses across the world are recognizing the need to comply with anti-corruption laws and to strengthen their compliance systems.

President Trump's choice for SEC Commissioner, Jay Clayton, has a measured track record in private practice in FCPA enforcement and has publicly commented on enforcement of the FCPA, as well as the need for businesses to fight corruption. He has noted in trade articles that the United States is a forerunner in the enforcement of anti-bribery statutes and he apparently sees the benefits of fighting corruption, noting at a 2011 ABA conference that "exposure to international transactions and business confirms the view that corruption has a corrosive influence on business, government and society generally and that the identification and

---

[433] First Israeli Enforcement Action Against a Company for Bribery of Foreign Government Officials, LEXOLOGY (Dec. 16, 2016), http://www.lexology.com/library/detail.aspx?g=540f271f-666a-42a4-a387-acc2520b4850.
[434] Jesse Riseborough, Thomas Biesheuvel, and Franz Wild, Billionaire Steinmetz Under House Arrest on Bribe Suspicion, BLOOMBERG, Dec. 19, 2016.
[435] John Aquino, Trump Enforcement of Foreign *Bribery Law Uncertain*, BLOOMBERG, Dec. 22, 2016 (quoting Mr. Trump's May 2012 interview with CNBC).

eradication of corruption provides societal and economic benefits that merit the expenditure of significant private and government resources."[436]

[436] Committee on International Business Transactions, New York City Bar Association, The FCPA and Its Impact on International Business Transactions – Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combatting Offshore Corruption? ¶ 23 (Dec. 2011).

For more information on this or other FCPA matters, contact:

Roger M. Witten +1 212 230 8850 roger.witten@wilmerhale.com

Kimberly A. Parker +1 202 663 6987 kimberly.parker@wilmerhale.com

Jay Holtmeier +1 212 295 6413 jay.holtmeier@wilmerhale.com

Erin G.H. Sloane +1 212 295 6458 erin.sloane@wilmerhale.com

Lillian Howard Potter +1 202 663 6561 lillian.potter@wilmerhale.com

Chavi Keeney Nana +1 212 295 6515 chavi.nana@wilmerhale.com