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

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

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

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

This year could easily see the DOJ announce significantly more than two FCPA actions with respect to corporations; there are many corporate cases publicly reported to be in the pipeline, and the Department has dedicated significantly increased resources to anti-corruption enforcement. It

announced in 2015 that it is hiring ten additional FCPA prosecutors and is also adding at least a dozen FBI agents solely focused on FCPA cases. In early 2016, a senior DOJ official suggested that the number of cases may look very different after just a few months.

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

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

We have noted previously the importance of designing compliance programs that are sensitive to the risks posed by third-party payments. In 2015, as in recent years, third parties were involved in the majority of FCPA cases that required entering into a resolution with the government. Both of the DOJ corporate resolutions and six of the nine SEC corporate resolutions involved allegedly improper payments made through third parties.
The continued focus on compliance programs crystallized last year with the Fraud Section's hiring of Hui Chen as a dedicated compliance expert. Chen will assist section attorneys in evaluating company presentations about their compliance programs (which usually take place in the context of Filip factors analyses), will interface with monitors concerning their oversight of companies that have previously resolved with the DOJ, and will train DOJ attorneys on the features of an effective compliance program.

In addition, after several years of news reports about financial institution hiring cases, 2015 saw the first resolution of one. BNY Mellon—without admitting or denying the allegations—resolved the SEC's investigation into whether it hired interns in order to obtain business from a Middle East sovereign wealth fund. The SEC's Order sheds light on a gray area in FCPA enforcement: when, in the government's view, does hiring cross over from relationship building or providing a business

courtesy into bestowing a benefit on an official that is corrupt under the statute. WilmerHale represented BNY Mellon in this matter. The case, and the government's other 2015 resolutions, are discussed in more detail in Section III of this alert.

Finally, the DOJ had its wings clipped—ever so slightly—by two rulings that limited its ability to use conspiracy charges to pursue individuals who did not actually carry out any acts within the United States: *United States v. Hoskins*, No. 3:12-CR-00238-JBA, 2015 WL 4774918 (D. Conn. Aug. 13, 2015), and *United States v. Sidorenko*, 102 F. Supp. 3d 1124 (N.D. Cal. 2015). These rulings, which are consistent with a 2011 ruling in the "Africa Sting" case that addressed a similar issue without a written opinion, give some comfort to individuals and entities abroad who do not fall into the traditional categories for FCPA liability. The overall jurisdictional reach of the FCPA remains exceedingly broad, however, and there are no legal developments on the horizon that would change that.

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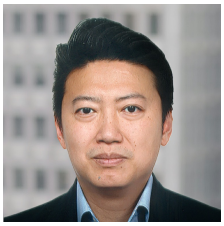

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