Shearman & Sterling LLP

FCPA Digest

Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act

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Recent Trends and Patterns in FCPA Enforcement

The 2016 FCPA enforcement year has left us no shortage of topics to discuss. By nearly any measure, 2016 has been a banner year for FCPA enforcement. The DOJ's and SEC's combined twenty-seven corporate enforcement actions and $6 billion in total corporate sanctions are the highest since the statute's enactment. That said, it is important to put these figures into context. While the 2016 enforcement year has seen a series of blockbuster FCPA enforcement actions (*VimpelCom*, *Och-Ziff*, *Embraer*, *JPMorgan*, *Odebrecht/Braskem*, and *Teva*), by and large, the remainder of the 2016 FCPA cases have involved relatively small-to-medium-sized penalties over relatively run-of-the-mill bribery schemes.

As we explain in this year-end *Trends & Patterns*, among the highlights from 2016 were:

- Twenty-seven corporate enforcement actions with total sanctions of $6 billion, due in large part to the sanctions levied against Odebrecht, makes 2016 the busiest and highest value FCPA enforcement year on record;
- The *Odebrecht*, *VimpelCom*, *Teva*, *Och-Ziff*, *JPMorgan*, and *Embraer* enforcement actions have distorted the average corporate sanctions for 2016, raising the figure to $223.4 million, while the median corporate sanction of $14.4 million is comparable to past years;
- China and the healthcare/life science industries dominated the headlines for the 2016 FCPA enforcement actions;
- The cases of *Qualcomm*, *JPMorgan*, and *VimpelCom* reflect new expansions of regulators' views as to the scope of the term "anything of value" in FCPA bribery cases;
- A ruling in the SEC's ongoing case against the Magyar executives upheld a novel theory on the Commission's jurisdiction to enforce the FCPA;
- The DOJ has generally continued its practice of declining to bring charges where the SEC successfully forced a company to disgorge the illicit profits, reserving criminal charges for the most part—as it should in all cases—for only instances in which the company's conduct was sufficiently egregious;
- In April 2016, the DOJ announced the FCPA Pilot Program, which, although flawed in some respects, represented an effort to increase transparency and efficiency in the Department's enforcement practices; and
- The incoming Trump administration raises new questions over the future of enforcement policies and priorities both at the DOJ and the SEC in relation to the FCPA.

Enforcement Actions and Strategies

Statistics

In 2016, the DOJ and SEC resolved twenty-seven[1] corporate enforcement actions: *SAP*, *LATAM*, *SciClone*, *PTC*, *VimpelCom*, *Olympus*, *Qualcomm*, *Nordion*, *Novartis*, *Las Vegas Sands*, *Akamai*, *Nortek*, *Analogic*, *Johnson Controls*, *Key Energy*, *AstraZeneca*, *Nu Skin*, *AB InBev*, *HMT*, *NCH*, *Och-Ziff*, *GlaxoSmithKline* ("GSK"), *Embraer*, *JPMorgan*, *Odebrecht/Braskem*, *Teva*, and *General Cable*.

Consistent with past years, the DOJ exhibited a degree of restraint, apparently deferring to the SEC to bring civil enforcement cases in the less egregious matters. As a result, the SEC has been the more active of the two agencies, initiating charges in twenty-four of the twenty-seven FCPA enforcement actions from 2016—fourteen of which were raised only by the SEC. For its part, the DOJ was responsible for thirteen of the twenty-seven FCPA enforcement actions from 2016 and independently brought charges in only three of those cases.

[1] This count includes public declinations issued by the DOJ under the FCPA Pilot Program, discussed below in further detail.

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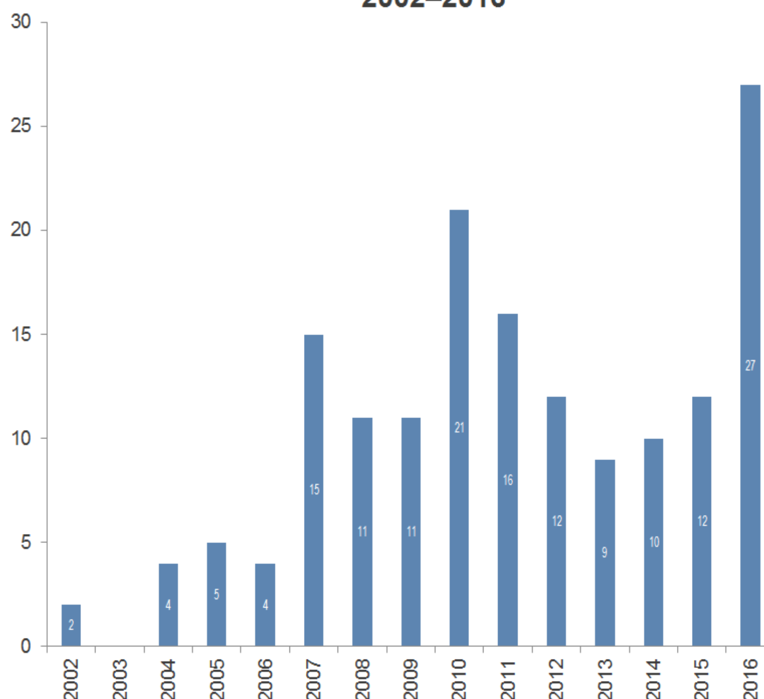
Separately, the DOJ and SEC brought FCPA-related charges against twenty-seven individuals in 2016 (*Cueto*, *Frost*, *Yuan*, *Gourevitch*, *Millan*, *Ramos*, *Maldonado*, *Gravina*,[2] *Mebiame*, *Och*, *Frank*, *Ping*, *Ashe*,[3] *Lorenzo*, *Ng*, *Yin*, *Yan*, *Piao*, *Wang*, *Thiam*, *Ray*,[4] *Valdez*, *Ramnarine*, *Perez*, *Hernandez-Montemayor*, *Nevarez*, and *Zimmer*). The cases are noteworthy because they include a set of C-suite executives (*Cueto*, *Frost*, *Och*, *Frank*, *Ping*, *Ng*, *Ray*, *Ramnarine*, *Perez*, and *Zimmer*) as well as a series of foreign officials (*Ramos*, *Maldonado*, *Gravina*, *Ashe*, *Lorenzo*, *Thiam*, *Hernandez-Montemayor*, and *Nevarez*).

We discuss the 2016 corporate enforcement actions followed by the individual enforcement actions in greater detail below.

Corporate Enforcement Actions

The 2016 corporate FCPA enforcement actions, while similar in a number of ways, encompass a wide variety of alleged bribery schemes ranging from the novel to the mundane. The most significant have been *VimpelCom*, *Och-Ziff*, *Embraer*, *JPMorgan*, *Odebrecht/Braskem*, and *Teva* because of the size of the associated sanctions as well as the breadth of the alleged bribery schemes.



In the case of *VimpelCom*, the DOJ, SEC, and Dutch prosecutor's office announced in February 2016 that VimpelCom agreed to pay a $795 million sanction as a result of an alleged decade-long bribery scheme. Specifically, according to the authorities, VimpelCom paid an Uzbek official and close family member to the former president of Uzbekistan millions of dollars to facilitate the company's entrance into and continued operation within the Uzbek telecommunications market. The total sanction of $795 million was comprised of a $230.1 million criminal penalty for the DOJ, $167.5 million in disgorgement for the SEC, and a $397.5 million sanction for the Dutch prosecutor's office. In addition, the DOJ filed a civil forfeiture action against the Swiss bank account of the foreign official involved in the scheme seeking to recover over $550 million. This civil forfeiture suit, combined with a separate $300 million forfeiture action filed in 2015 that related to the same official's accounts, highlights the DOJ's ongoing interest in advancing its Kleptocracy Asset Recovery Initiative.

In *Och-Ziff*, the DOJ and SEC jointly initiated an FCPA enforcement action in September 2016 against (i) the New York-based hedge fund Och-Ziff Capital Management Group LLC; (ii) a pair of Och-Ziff subsidiaries; and (iii) two Och-Ziff executives. According to the agencies, between 2007 and 2011, Och-Ziff engaged in a series of bribery schemes in multiple African countries in exchange for various lucrative investment opportunities. As a result of the charges, Och-Ziff agreed to pay a total sanction of $412 million—$213 million of

[2] The cases of *Millan*, *Ramos*, *Maldonado*, and *Gravina* (collectively *Millan, et al.*) are outgrowths of the 2015 FCPA enforcement actions against Roberto Enrique Rincon Fernandez and Abraham Jose Shiera Bastidas. The cases of *Ramos*, *Maldonado*, and *Gravina* were each filed in 2015 under seal and were only announced in 2016 after the cases were unsealed. As a result, we count these cases as part of our 2016 FCPA statistics.

[3] The cases of *Ashe*, *Lorenzo*, *Ng*, *Yin*, *Yan*, *Piao*, and *Wang* are all part of a single enforcement action. For purposes of this note, we will use the title *Ashe, et al.*, to refer to the larger enforcement action and the italicized names of the defendants to refer to the Department's case against each individual.

[4] The cases of *Ray*, *Valdez*, *Ramnarine*, *Perez*, *Hernandez-Montemayor*, and *Nevarez*, are all part of a single enforcement action. For purposes of this note, we will use the title *Ray, et al.*, to refer to the larger enforcement action and the italicized names of the defendants to refer to the Department's case against each individual.

which went to the DOJ and $199 million of which went to the SEC. *Och-Ziff* marked the first time a hedge fund was prosecuted for violating the FCPA and is one of only a handful of FCPA cases involving the financial industry (*see also JPMorgan*).

In *Embraer*, the enforcement agencies accused the Brazilian aircraft manufacturer of bribing various foreign officials in the Dominican Republic, Saudi Arabia, Mozambique, and India in exchange for aircraft sales contracts. As part of the resolution, Embraer agreed to pay the DOJ $107.3 million and the SEC $98.2 million. The DOJ also offered to credit the company for up to $20 million depending on the amount of disgorgement paid to Brazilian authorities.

In November 2016, the DOJ, SEC, and, in a new twist, the Federal Reserve, announced the resolution of an FCPA enforcement action against JPMorgan for its alleged improper hiring practices in China.[5] According to all three agencies, JPMorgan's Chinese subsidiary engaged in the practice—between 2006 and 2013—of providing valuable jobs and internships to the relatives and friends of foreign officials to obtain or retain business for the firm. JPMorgan agreed to collectively pay the DOJ, SEC, and Federal Reserve $264.5 million, making the enforcement action the largest of the "princeling" cases to date (*see also BNYM* and *Qualcomm*).

In December, U.S., Brazilian, and Swiss authorities announced that they had resolved an enforcement action against the Brazilian conglomerate Odebrecht S.A. and its partially-owned subsidiary, Braskem S.A. In the case of *Odebrecht*, the DOJ accused the company of engaging in systematic acts of bribery, going so far as to set up an internal division in the company solely dedicated to the bribery of foreign officials. As a result, Odebrecht allegedly bribed government officials in twelve different countries in exchange for various forms of benefits. Braskem was charged separately by the DOJ and SEC, in connection with a slightly more discrete but no less significant bribery scheme involving Brazilian officials. According to the DOJ and SEC, Braskem, with the assistance/at the behest of Odebrecht, bribed an official at Brazil's state-owned oil company, Petrobras, and various Brazilian government officials in exchange for (i) the continuation of a joint-venture contract with Petrobras; (ii) advantageous supply contracts; and (iii) tax advantages from the Brazilian government. The resolution required Odebrecht and Braskem to pay a total sanction of $3.55 billion (split between U.S., Swiss, and Brazilian authorities)—dwarfing the $1.6 billion sanction lodged against Siemens in 2010—and, according to the DOJ's pleadings, the penalty could have been almost $2 billion more but was reduced to account for Odebrecht's inability to pay anything greater.

Wasting no time, the day after announcing the historic case against Odebrecht and Braskem, the DOJ and SEC announced that they had resolved an enforcement action against the Israeli pharmaceutical company, Teva. According to the enforcement agencies, Teva made improper payments to various officials in Russia, Ukraine, and Mexico to secure the sale of certain pharmaceutical products. As part of the resolution, the company agreed to pay a total of $519.2 million in sanctions to the DOJ and SEC.

The remaining twenty-one enforcement actions range in penalties worth between $335,000 (*NCH*) and $28 million (*PTC*) and, as discussed below, are best divided into three categories: (i) schemes involving gifts, travel, and entertainment; (ii) schemes involving local consultants or agents; and (iii) miscellaneous acts of bribery.

First, the cases of *SciClone*, *PTC, Olympus, Novartis*, *Akamai*, *Nortek*, *Johnson Controls*, *AstraZeneca*, *NCH*, and *GSK* each illustrate essentially the same fact pattern; namely, the companies (frequently corporate subsidiaries) allegedly offered or provided gifts, travel, and entertainment, which served no legitimate business purpose, to acquire some form of business advantage. The frequency of this specific type of fact pattern among the 2016 FCPA enforcement actions may show that the DOJ and SEC view these "gifts, travel, and entertainment" schemes as low-hanging fruit.

Second, the cases of *Nordion*, *Key Energy*, *Las Vegas Sands*, *HMT*, and *General Cable* are each examples of companies who engaged local consultants/sales agents to allegedly funnel improper payments to foreign officials in exchange for a business advantage. For example, in *Nordion*, the SEC accused the pharmaceutical company of engaging a sham consultant to bribe Russian officials in exchange for regulatory approvals needed to distribute the company's cancer treatment drugs in Russia. Similarly, in *Key Energy*, the SEC concluded that Key Energy's Mexican subsidiary made payments to an official at the Mexican state-owned oil company, Pemex, through a consultant. The facts of *LATAM* similarly involved the engagement of local consultants/sales agents to allegedly funnel improper payments; in that case, though, the alleged bribes were paid to union officials, rather than foreign officials.

[5] To our knowledge, *JPMorgan* marks the first time the Fed has brought charges in connection with an FCPA enforcement action.

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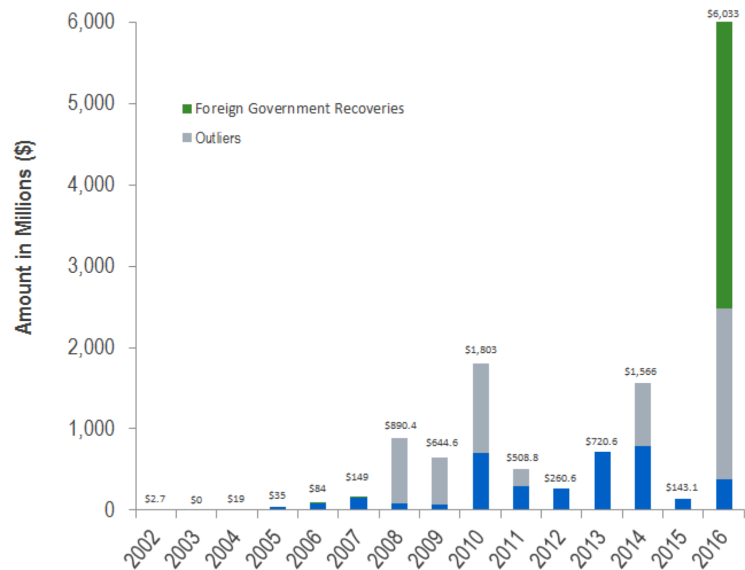
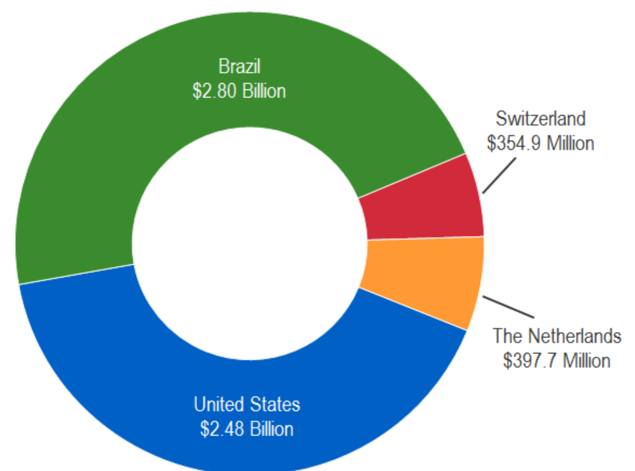
Third, the remaining cases are a set of miscellaneous types of bribery schemes briefly described below.

- *SAP* stems from the conduct described in the 2015 enforcement action against Vicente Garcia, wherein Garcia allegedly bribed Panamanian officials through a third-party partner to win lucrative sales contracts for the company.[6]
- In *Qualcomm*, much like *JPMorgan* and the 2015 case, *BNYM*, the SEC accused Qualcomm of violating the FCPA by improperly offering job positions within the company to curry favor with Chinese officials.
- In *Analogic*, a Danish subsidiary of the U.S.-based medical device company was accused of engaging in a scheme, mostly in Russia, to create hundreds of sham contracts to generate kickbacks in exchange for securing sales of the company's products.
- In *Nu Skin*, the Utah-based personal care products company was accused of violating the FCPA after allegedly making a donation of approximately $154,000 (RMB 1 million) to a local charity with the intention of influencing a high-ranking Chinese Communist party official to impact an ongoing investigation into Nu Skin by a provincial regulatory agency.
- In *AB InBev*, an Indian subsidiary of the global brewer allegedly bribed Indian officials through third-party sales promoters in exchange for increased sales and permission to increase brewery hours in contravention of local laws.



Upshot

As mentioned above, the 2016 FCPA corporate enforcement actions netted sanctions totaling $6 billion—the highest since the FCPA's enactment in 1977.[7] Although the majority of the 2016 corporate FCPA enforcement actions are small-to-medium value cases, the record-breaking sanction total was buoyed by *Odebrecht/Braskem*, *VimpelCom*, *Teva*, *Och-Ziff*, *Embraer*, and *JPMorgan*. Indeed, these six cases make up approximately 95% of the $6 billion in sanctions from the 2016 FCPA enforcement actions.



Furthermore, while the total $6 billion figure represents the total sanctions assessed by U.S. authorities, a substantial portion of those sanctions will be paid to foreign governments rather than the U.S. Treasury. Specifically, in the cases of *VimpelCom*,

[6] Shearman & Sterling LLP represented SAP in the resolution of this matter with the SEC and DOJ.
[7] The "Outliers" included in the "Total Criminal and Civil Fines Imposed on Corporations: 2002-2016" are as follows: Siemens (2008); KBR (2009); BAE, Snamprogetti, and Technip (2010); JGC (2011); Alstom (2014); Odebrecht/Braskem, Teva, VimpelCom, Och-Ziff, JP Morgan, Embraer (2016).

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Odebrecht/Braskem, and *Embraer*, the DOJ and SEC agreed to a total sanction amount that the defendant would have to pay and then divided the sum between U.S. and foreign enforcement authorities. According to the FCPA resolution agreements, if the corporate defendant failed to pay the sums due to the foreign enforcement authorities, it would have to pay the balance to U.S. Treasury—ensuring that, regardless of which government the money went to, the company still paid the total sanction.

The result has been that the corporate penalties associated with *Odebrecht/Braskem*, *VimpelCom*, *Teva*, *Och-Ziff*, *Embraer*, and *JPMorgan* skewed the average penalties upward. Thus, for 2016, while the pure average penalty is $223.4 million and the average penalty excluding any outliers[8] is $73 million, the median penalty is $14.4 million. In 2015, the pure average corporate penalty was $11.9 million, the average penalty excluding outliers was $11.8 million, and the median was $13.3 million. In our opinion, the 2016 median is the most representative of the actual size of 2016 corporate penalties and reflects a general trend that FCPA enforcement actions generally range between $10 million and $30 million (excluding the median from 2014, which appears to be an outlier). Indeed, setting aside *Odebrecht/Braskem*, *VimpelCom*, *Teva*, *Och-Ziff*, *Embraer*, and *JPMorgan*, the pure average and average excluding outliers are $13.2 million and $9.9 million, respectively.

The takeaway from the figures above is that while 2016 will be remembered as one of the most active years for FCPA enforcement in the past decade, the headlines may be somewhat misleading; cases involving systematic payments or significant profits will generate extraordinary penalties, but the average FCPA case—the bread and butter for FCPA prosecutors—remains the smaller, opportunistic bribery scheme.

What remains to be seen is whether the current pace will continue in the next year. There are certainly some large cases in the pipeline that have not yet been resolved. Moreover, DOJ and SEC officials have stated that they have an active docket of other cases and have substantially increased the investigative and prosecutorial resources dedicated to FCPA enforcement at the FBI, DOJ, and SEC. Further, through the Pilot Program and other initiatives, the current leadership of the Fraud Section has sought both to encourage and reward companies for making voluntary disclosures and to streamline the resolution process. On the other hand, many of the larger cases from 2016 had been kicking around for some time, and it is not clear how many of the pipeline cases are ripe for settlement in the near term. It is also worth noting that the increased activity could be the product of an election year effort by the DOJ and SEC to clear the books before new officials are appointed.

[8] For purposes of our statistics, the "average excluding outliers" refers to the pure average sanction excluding the top and bottom 10% of the sanctions.

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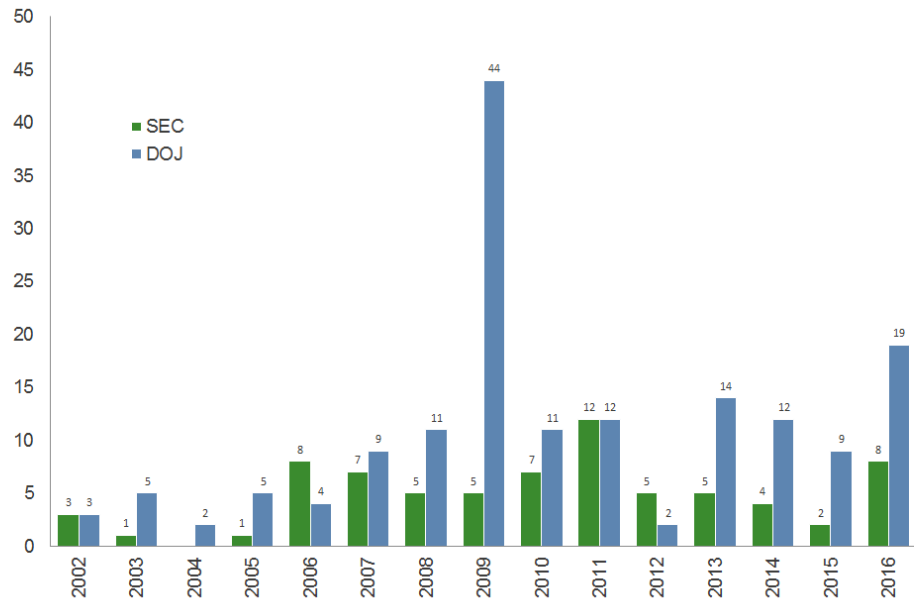
Overall, the message from the DOJ and SEC remains: the more you profit and the less you cooperate, the more you pay. Indeed, for a large number of the 2016 FCPA enforcement actions, the single largest component of the total sanction was the disgorgement of profits. Such disgorgement-centric sanctions show that the DOJ's and SEC's principal concern is to ensure that companies do not profit from illicit schemes, with criminal and civil penalties, although still relevant, having taken a back seat to ensuring adequate deterrence.

Individual Enforcement Actions

On the individual side of the 2016 FCPA enforcement year, the defendants have been a mix of individuals serving varying roles in multiple alleged bribery schemes. Of the twenty-seven different defendants, the DOJ brought charges against nineteen as part of five separate enforcement actions: (i) *Millan, Ramos, Maldonado, Gravina*; (ii) *Mebiame*; (iii) *Ashe, Lorenzo, Seng, Yin, Yan, Piao*, and *Wang*; (iv) *Thiam*, and (v) *Ray*, *Valdez*, *Ramnarine*, *Perez*, *Hernandez-Montemayor*, and *Nevarez*. The SEC separately brought charges against eight individual defendants in seven separate enforcement actions: (i) *Cueto*; (ii) *Yuan*; (iii) *Gourevitch*; (iv) *Frost*; (v) *Ping*; (vi) *Och* and *Frank*, and (vii) *Zimmer*. As discussed below, those individuals have included (i) C-suite executives; (ii) foreign officials; (iii) corporate managers; and (iv) middlemen/fixers.

C-Suite Executives



The cases of *Cueto*, *Frost*, *Ping*, *Och*, *Frank*, *Ng*, *Ray*, *Ramnarine*, *Perez*, and *Zimmer* are significant because they mark the enforcement agencies' increasing interest in pursuing charges against high-ranking executives.

In *Cueto*, LAN Airlines' current CEO was accused of violating the FCPA's books-and-records and internal controls provisions for engaging the services of a local Argentine consultant to allegedly bribe Argentine union officials. As part of the resolution, the SEC ordered Cueto to pay a $75,000 civil penalty. Notably, as discussed below, it appears that LATAM's decision not to discipline Cueto for the alleged improper payments played a role in the DOJ's decision to impose a relatively significant criminal penalty on the company.

In *Frost*, the former CFO of Analogic's Danish subsidiary was charged by the SEC with having allegedly approved hundreds of improper kickback payments, which he knew were based on fictitious invoices and were later improperly recorded on the company's books and records. As part of the resolution, Frost, while neither admitting nor denying the charges, agreed to pay a $20,000 civil penalty.

In *Ping*, the SEC accused the former Chairman and CEO of Harris Corporation's Chinese subsidiary, Hunan CareFx Information Technology, LLC, of overseeing and promoting a practice within the subsidiary of providing Chinese officials improper gifts. The money used to provide the gifts was generated by false sales receipts, which were misreported in CareFx's books and records. As part of the enforcement action, Ping was required to pay a civil penalty of $46,000.

In the SEC's enforcement action against Och-Ziff, Daniel Och, the sitting CEO, founder, and board chairman of the New York hedge fund, was charged with violating the FCPA's books-and-records provisions for approving and misreporting multiple transactions with an allegedly corrupt business partner located in the Democratic Republic of the Congo. As a result of the SEC's charges, Och was ordered to pay a total sanction of $2,173,718. Och-Ziff's CFO, officer, and partner, Joel Frank, was also charged with violating the FCPA's

books-and-records and internal controls provisions for his involvement and tacit approval of alleged bribery schemes in the Democratic Republic of the Congo and Libya. At the time of the enforcement action, the Commission stated that the penalty against Frank would be determined at a later date.

In *Ashe, et al.*, although initially charged with multiple non-FCPA charges, in November 2016 the U.S. Attorney's Office for the Southern District of New York filed a superseding indictment against Ng Lap Seng and his subordinate, Jeff Yin (detailed below), that accused the individuals of violating the FCPA. According to the DOJ, Ng, a Macau-based real estate executive, paid former U.N. officials John Ashe and Francis Lorenzo hundreds of thousands of dollars to obtain formal U.N. support for the construction of a multi-billion dollar conference center in Macau to host the annual UNOSSC Expo and other U.N.-sponsored events. The charges against Ng are not only noteworthy for Ng's status as a wealthy Chinese real estate tycoon but also because Ng had been previously accused of improperly funneling hundreds of thousands of dollars to the Democratic National Committee in the mid-1990s. Ng has pleaded not guilty to the charges.

In *Ray, et al.*, the U.S. Attorney for the Southern District of Texas charged three officials (presidents, directors, and owners) from a group of aviation maintenance, repair, and overhaul companies located in Texas: Douglas Ray, Kamta Ramnarine, and Daniel Perez. According to the charges that were unsealed in December 2016, Ray, Ramnarine, and Perez, along with others, conspired to bribe foreign officials in Mexico in exchange for securing business for their companies. Each of the defendants pleaded guilty to conspiracy to violate the FCPA and Ray also pleaded guilty to one count of conspiracy to commit wire fraud.

Finally, as part of the SEC's enforcement action against General Cable, the Commission charged a Senior Vice President, Karl J. Zimmer, with causing General Cable to violate the FCPA and circumventing internal accounting controls by approving improper commissions to a third-party agent in Angola. As part of the enforcement action, Zimmer was ordered to pay a $20,000 civil penalty.

We note that in the majority of corporate cases brought by the DOJ this year, there have been no apparent charges against individuals. That may be because of jurisdictional or evidentiary issues and the differing incentives to settle between corporations and individuals, but we also note that the DOJ has in the past obtained indictments under seal and only announced the charges after an arrest or extradition request was filed. It is, therefore, possible that there are, indeed, additional individual cases out there of which we are not yet aware.

Foreign Officials

The 2016 FCPA enforcement actions against individual defendants include four groups of foreign officials: (i) Alfonzo Gravina, Jose Ramos, and Christian Maldonado, which stem from the 2015 FCPA enforcement action against Abraham Jose Shiera Bastidas and Roberto Enrique Rincon Fernandez; (ii) John Ashe and Francis Lorenzo, stemming from the FCPA charges against Ng Lap Seng and Jeff Yin; and (iii) Mahmoud Thiam, stemming from a separate bribery scheme involving a group of unnamed Chinese companies; and (iv) Ernesto Hernandez-Montemayor and Ramiro Ascencio Nevarez, stemming from the FCPA enforcement action, *Ray et al.* The FCPA, of course, does not apply to the recipients of bribes, and thus foreign officials cannot be charged with either the substantive offense or conspiracy. However, as these cases remind us, the DOJ has many other statutes, including the mail and wire fraud, tax fraud, and money laundering statutes, with which it can go after corrupt officials.

In the cases of *Gravina, Maldonado*, and *Ramos*, three former officials of the Venezuelan state-owned oil company, PDVSA, allegedly accepted bribes from Rincon and Shiera (as well as Millan, as discussed below) in exchange for rigging PDVSA's bidding process in Rincon's and Shiera's favor. Gravina, Maldonado, and Ramos each pleaded guilty to one count of conspiracy to commit money laundering (and, in the case of Gravina, also tax fraud). Sentencing for Gravina, Maldonado, and Ramos is scheduled for July 2017.

In the DOJ's case against former U.N. officials John Ashe and Francis Lorenzo (*Ashe, et al.*), the Department alleged that Ashe, at times with the assistance of Lorenzo, coordinated three separate bribery schemes through which he received hundreds of thousands of dollars in improper benefits. According to the DOJ, Ashe used his position as U.N. General Assembly President and U.N. Ambassador for Antigua and Barbuda to promote the business interests of the bribe payors. In the case against Lorenzo, the DOJ claims that Lorenzo accepted bribes from two individuals, Ng Lap Seng and Jeff Yin, for his assistance in funneling additional payments to Ashe. Ashe pleaded not guilty to the charges of tax fraud but passed away in June 2016 before his case could go to trial. Lorenzo separately pleaded guilty to multiple counts of *inter alia* conspiracy, bribery, money laundering, and tax fraud.

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On December 13, 2016, U.S. authorities arrested the former Guinean Minister of Mines, Mahmoud Thiam, in New York and charged him with money laundering. According to the DOJ, Thiam had attempted to conceal approximately $8.5 million in bribes from two unnamed Chinese companies in exchange for "official actions" he took to secure the companies valuable mining rights in Guinea. As of December 2016, Thiam had yet to enter a plea. Thiam's arrest, although not related to any current FCPA enforcement action, is noteworthy for Thiam's relationship to the corruption scandal and litigation involving BSGR and Rio Tinto in the Simandou region of Guinea—Thiam was a named defendant in Rio Tinto's lawsuit against BSGR in 2014.

Finally, in *Ray, et al*, two Mexican officials were charged with and pleaded guilty to one count of conspiracy to commit money laundering. According to the charges, Ernesto Hernandez-Montemayor, an employee of the government of the Mexican state, Tamaulipas, and Ramiro Ascencio Nevarez, an employee of a public state university in Mexico, allegedly received bribes in exchange for diverting business to a group of aviation companies based in Texas.

Corporate Managers

The 2016 FCPA enforcement actions also included two cases against corporate managers (*Gourevitch* and *Yuan*). Each of these cases is an example of how mid-level managers, often operating in foreign subsidiaries, were allegedly able to engage in sometimes extensive acts of bribery in exchange for sales contracts and other business advantages.

In *Gourevitch*, an engineer at the global health science company Nordion allegedly caused the company to engage the services of a Russian consultant to funnel bribes to Russian officials in exchange for certain regulatory approvals that would allow Nordion to sell its cancer treatment drug, TheraSphere, in the Russian market. The engineer, Mikhail Gourevitch, agreed to pay a total penalty of $178,950 as part of the SEC's action against him.

In *Yuan*, the SEC vaguely alleged that the PTC sales executive facilitated the improper use of gifts, travel, and entertainment to obtain sales contracts for PTC. We use the word "vaguely" because the allegations contained in the SEC's deferred prosecution agreement with Yuan fail to actually state what Yuan did to violate the FCPA. Although the implication of the SEC's enforcement action is that Yuan engaged in some form of improper conduct, the SEC's statement of facts only provides details of what the company, PTC, not Yuan, did. Possibly as a result, the SEC agreed to settle its case against Yuan without requiring him to pay any form of monetary penalty.

Middlemen/Fixers

Among the twenty-seven individual defendants charged in connection with an FCPA enforcement action, several served as middlemen who funneled bribes from another individual/entity to a foreign official (*Millan*, *Yin*, *Mebiame*, *Yan*, *Wang*, *Piao*, and *Valdez*).

In *Millan,* the DOJ accused Moises Millan—an employee of Abraham Jose Shiera Bastidas—of facilitating the payment of bribes to Gravina, Ramos, and Maldonado. Millan pleaded guilty to the charges, was ordered to forfeit $533,578, and is scheduled to be sentenced in July 2017.

The cases of *Yin, Yan*, *Piao*, and *Wang* all involve the corruption scandal involving John Ashe and Francis Lorenzo. Of the four, Jeff Yin is the only individual specifically charged with an FCPA violation. Sheri Yan, Heidi Piao, and Julia Wang were each charged with multiple crimes including conspiracy, money laundering, and bribery. The allegations against each individual are described below.

- *Yin.* According to prosecutors, Yin served as the middleman who facilitated the payment of hundreds of thousands of dollars from Ng to Ashe and Lorenzo. Yin has pleaded not guilty to the charges.
- *Yan* and *Piao.* In a second scheme involving Ashe, Yan and Piao allegedly funneled hundreds of thousands of dollars to Ashe on behalf of a series of unnamed Chinese businessmen in exchange for Ashe's willingness to grant the businessmen access to lucrative investment opportunities and government contracts. Both Yan and Piao pleaded guilty to the charges.
- *Wang.* Finally, in a third scheme involving Ashe, Julia Wang allegedly paid the U.N. official at least $500,000 to purchase Antiguan diplomatic positions for her late husband and another Chinese businessman. Wang has pleaded not guilty to the charges.

Recent Trends and Patterns in FCPA Enforcement

The case of *Mebiame* involves charges against the Gabonese national, Samuel Mebiame, for his alleged involvement in the *Och-Ziff* enforcement action. According to court documents, Mebiame was a "fixer" who allegedly helped funnel bribes, including cash and gifts, to various African officials to obtain valuable mining concessions for Och-Ziff. Mebiame pleaded guilty to the charges in December 2016.

Finally, in the case of *Ray, et al.*, Victor Hugo Valdez Pinon was charged with and pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit wire fraud. Valdez was a sales agent for an unnamed aviation company who was allegedly responsible for bringing the company Mexican customers in need of parts and aircraft maintenance services. According to the charges, the aviation company used Valdez to funnel bribes to foreign officials in Mexico.

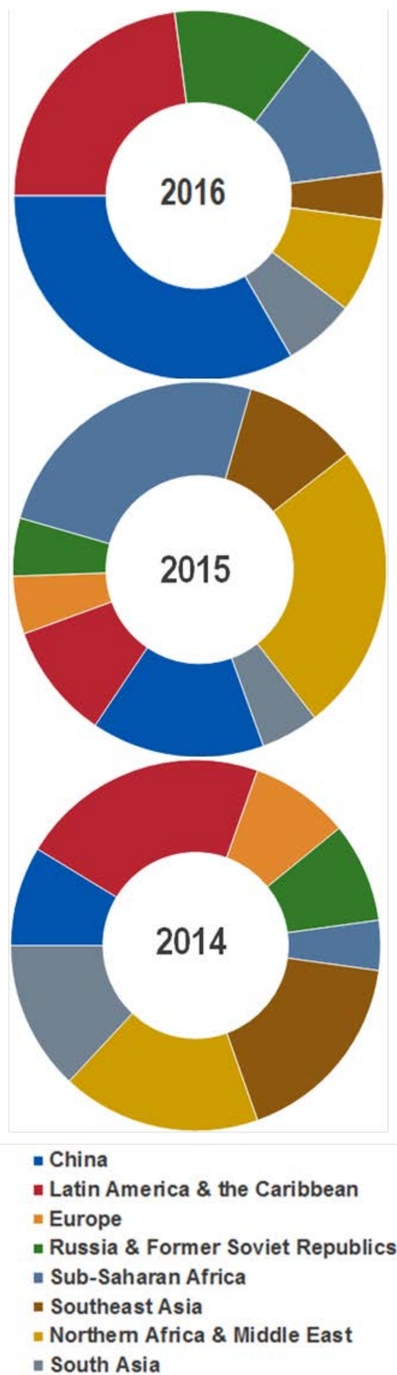
Upshot

Though the total number of individuals charged in connection with an FCPA enforcement action in 2016 is an increase from 2015 (up to twenty-seven from ten), we're not certain that the uptick should be viewed as a fundamental shift in FCPA enforcement and is not proof that enforcement agencies are having any more or less success pursuing charges against individuals. Instead, the 2016 totals are only slightly above what we have seen in past years. For example, with a few outliers (2009, 2012, and 2015), the DOJ and SEC have brought charges against fifteen to twenty-five individuals in connection with an FCPA enforcement action on an annual basis since 2007. That said, there are still a few points worth highlighting.

First, 2016 is interesting for the number of high-ranking executives against whom the SEC successfully pursued charges. The SEC's enforcement actions appear to be, at least in part, the product of the SEC's lower burden of proof when compared to the DOJ's, proof beyond a reasonable doubt standard. In addition, as the SEC has continued to settle cases on a "neither admit nor deny" basis, the executives who have settled FCPA charges with the SEC have been able to do so without admitting to any personal culpability or, of course, being exposed to jail time, a factor which may not have helped their reputation in the short term but may have benefits in the longer term with respect to future employment, particularly in regulated industries, and the ability to conduct business with U.S., state, and foreign governments.

Second, although we have credited the DOJ with bringing charges against nineteen individuals in 2016, several of the cases stem from charges that were either filed in 2015 (and only unsealed in 2016) or only include non-FCPA offenses (although part of a broader FCPA enforcement action). As a result, *Mebiame*, *Ng*, *Yin*, *Ray*, *Valdez*, *Ramnarine*, and *Perez* are the only new FCPA enforcement actions against individuals in 2016. This is not to say that the DOJ hasn't been actively pursuing FCPA-related charges against individuals, we only note that (especially when compared to the SEC), the DOJ has yet to secure that elusive marquee conviction. Indeed, despite bringing some of the largest FCPA corporate enforcement actions in history, the DOJ did not charge a single individual in connection with those cases (though as we note above it is possible that the DOJ has charged some individuals under seal). Instead, maybe with the exception of *Ng* (who appears prepared to put the Department to its burden), the DOJ is electing to pursue charges against low-level individuals or officials at relatively small privately-held companies. We suspect that the DOJ's current tact is out of an abundance of caution and that the DOJ is spending greater time and resources to ensure that the cases it does elect to bring are successful. As we have mentioned in the past, the DOJ has struggled to successfully secure convictions of individual defendants while at trial (*e.g.*, *Sigelman*) and, with the heightened burden of proof that the DOJ must satisfy to bring criminal charges, the Department may be picking its battles carefully.

Recent Trends and Patterns in FCPA Enforcement



Third, the DOJ may actually be achieving the deterrent effect it has sought to promote through its focus on individual prosecutions (per the Yates Memo) by way of the remediation requirements it has imposed on corporate defendants. Specifically, as discussed below, the DOJ has conspicuously decided to bring charges against companies that have actively failed to discipline the wrongdoers (*LATAM*, *Och-Ziff*, and *Embraer*). Conversely, in a large number of corporate enforcement actions from 2016 brought only by the SEC, the Commission reported that the companies either terminated or disciplined the culpable employees (*SAP*, *SciClone*, *Nordion*, *Akamai*, *Nortek*, *Johnson Controls*, *HMT*, and *General Cable*). Moreover, in several cases where the DOJ decided to get involved, the Department gave the company credit for adequately disciplining the malfeasant employees (*Odebrecht, VimpelCom, Teva*, *JPMorgan*, *Olympus*, and *General Cable*). Indeed, the FCPA Pilot Program expressly sets out that one of the ways in which a company can receive remediation credit is: "Appropriate discipline of employees, including those identified by the corporation as responsible for the misconduct, and a system that provides for the possibility of disciplining others with oversight of the responsible individuals . . . ."

Geography & Industries

Unlike past years, where enforcement actions have involved a relatively diverse group of countries and industries, 2016 can be defined in large part by one country and one industry: China and healthcare/life sciences. The charts to the left show the geographic breakdown of the FCPA enforcement actions from 2016, 2015, and 2014 (corporate and individual).

Of the total thirty-one enforcement actions (corporate and individual combined), sixteen involved alleged acts of bribery in China (*SciClone*, *PTC/Yuan*, *Qualcomm*, *Novartis*, *Las Vegas Sands*, *Nortek*, *Akamai*, *Johnson Controls*, *AstraZeneca*, *Ping*, *Nu Skin*, *HMT*, *NCH*, *GSK*, *JPMorgan*, and *General Cable*). While China has featured prominently in past FCPA enforcement years, 2016 is unique because we have never seen such a significant portion of FCPA enforcement actions arising from a single country in a single year. For example, of the sixteen FCPA enforcement actions in 2015 (corporate and individual combined), only two involved the bribery of Chinese officials (*Bristol-Myers* and *Mead Johnson*). Similarly, in 2014, only two of the twelve enforcement actions (corporate and individual) concerned Chinese officials (*Bruker* and *Avon*). Ironically, three of those four cases (*Bruker, Bristol-Myers,* and *Mead Johnson*) were near-carbon copies of several of the 2016 cases involving the improper transfer of gifts, travel, and entertainment to Chinese officials (*SciClone*, *PTC*, *Novartis*, *Nortek*, *Akamai*, *Johnson Controls*, *AstraZeneca*, *Ping*, *NCH*, and *GSK*). The rise in China-related FCPA enforcement actions in 2016 appears to be due to (i) China's size (both as a matter of geography and population); (ii) China's role in the global economy; (iii) the similarity between bribery schemes arising out of China (*i.e.*, gifts, travel, and entertainment); and (iv) the fact that many of the China-related bribery schemes involved the same industry (*i.e.,* the healthcare and life science sectors).

Of additional note is that eleven of the 2016 FCPA enforcement actions (including several of the largest actions) involved Latin America (*SAP*, *LATAM*, *Olympus*, *Millan, et al.*, *Key Energy*, *HMT*, *Embraer, Ashe, et al.,*[9] *Odebrecht/Braskem*, *Teva*, and *Ray, et al.*). This trend is noteworthy because enforcement agency officials have publicly stated that they

[9] We have treated *Ashe* as an FCPA enforcement action arising out of Latin America and the Caribbean because the officials involved in the scheme were from Antigua and Barbuda and the Dominican Republic. Notably, however, many of the individuals who allegedly paid bribes to Ashe and Lorenzo were based in China.

expect an increase in the number of FCPA enforcement actions coming out of the region. We suspect that the officials' statements are probably based on the significant number of entities in the region currently under investigation (*e.g.,* Petrobras and Wal-Mart), additional cases likely arising from the 2014 World Cup and 2016 Olympics in Brazil, and ongoing cooperation between U.S. and Latin American enforcement agencies.

Finally, six of the 2016 FCPA enforcement actions have involved officials from sub-Saharan Africa (*Analogic*, *Och-Ziff*, *Embraer*, *Odebrecht*, *Thiam*, and *General Cable*); five have involved officials in Russia and the former Soviet republics (*Nordion/Gourevitch*, *VimpelCom*, *Analogic*, *AstraZeneca*, and *Teva*); four have included officials from the Middle East and Northern Africa (*Analogic*, *Och-Ziff*, *Embraer*, and *General Cable*); three have centered on bribery schemes in South Asia (*AB InBev*, *Embraer*, and *General Cable*); and two have involved improper conduct in Southeast Asia (*Analogic* and *General Cable*).

With regard to industries, the DOJ and SEC have shown a specific interest in the healthcare and life sciences industries (*SciClone*, *Nordion/Gourevitch*, *Novartis*, *Olympus*, *Analogic*, *AstraZeneca*, *Nu Skin*, *GSK*, and *Teva*)—particularly in the first six months of the year. Indeed, as we have mentioned in the past, the DOJ's and SEC's focus on the healthcare industry in 2016 is part of a much longer trend. Since 2011, either the DOJ or SEC has brought an FCPA enforcement action against at least one company in the healthcare sector: 2011—*Johnson & Johnson*; 2012—*Biomet*, *Pfizer*, *Eli Lilly*, *Orthofix*; 2013—*Stryker*; 2014—*Bio-Rad*, *Bruker*; 2015—*Bristol-Myers*, *Mead Johnson*. With several investigations into various other pharmaceutical and medical technology companies still ongoing, we expect this pattern to continue into the foreseeable future.

However, while the healthcare and life science industries have been the most prominent sector in 2016, in truth, the 2016 FCPA enforcement actions have encompassed a broad array of additional industries including:

- Aerospace & Airlines – *LATAM*, *Embraer*, *Ray, et al.*
- Technology – *SAP*, *PTC*, *Qualcomm*, *Akamai*, *Nortek*, and *Ping*
- Telecommunications – *VimpelCom*
- Oil & Gas – *Millan, et al.* and *Key Energy*
- Petrochemicals – *Braskem*
- Engineering & Construction – *Odebrecht*[10]
- Entertainment – *Las Vegas Sands*
- Industrial Manufacturing and Maintenance – *Johnson Controls*, *HMT*, *NCH*, and *General Cable*
- Beverage – *AB InBev*
- Finance – *Och-Ziff* and *JPMorgan*
- Real Estate – *Ashe*

Of these remaining industries, the aerospace and airlines as well as the finance industries are of note.

First, much like the healthcare and life science industries, the DOJ and SEC have historically paid close attention to the aerospace and airlines industries. With *LATAM*, *Embraer*, and *Ray, et al.*, the agencies have raised enforcement actions against the aerospace and airlines industries six times since 2012 (*LATAM*, *Embraer*, *Ray, et al. Dallas Airmotive*, *NORDAM*, and *BizJet/Lufthansa*). Indeed, the

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[10] Odebrecht is a Brazilian conglomerate that owns interests in a variety of companies operating in the engineering, construction, chemicals, and petrochemical industries. Because the bulk of alleged bribery schemes described in the DOJ's plea agreement with Odebrecht involved engineering and construction contracts, we have categorized the enforcement action as such in our list.

agencies' interest in the aerospace and airlines industries dates as far back as 1978 and the SEC's very first FCPA enforcement action against Page Airways.

Second, the DOJ's and SEC's enforcement actions against *Och-Ziff* and *JPMorgan* are interesting because they may portend a future trend. Specifically, *Och-Ziff* and *JPMorgan* are just two of a handful of cases involving the financial industry (*DAP* and *BNYM*) after the SEC announced an "industry sweep" of the finance industry in 2011. More than five years later, the enforcement actions against the employees of the former broker-dealer DAP, BNYM, Och-Ziff, and JPMorgan all appear to be the products of the agencies' interest in scrutinizing the finance industry. With a number of investigations concerning various Wall Street banks still pending, it seems likely that we will see more FCPA enforcement actions involving the finance industry in the future.

Types of Settlements

While the agencies have continued the practice of resolving matters using a variety of settlement structures—with the choice of structure apparently related (albeit inconsistently) to the seriousness of the conduct or the timing and degree of disclosure and cooperation—the most noteworthy development in the types of settlement devices seen in 2016 has been the advent of the DOJ's public declinations (*Akamai*, *Nortek*, and *Johnson Controls*) and public declinations with disgorgement (*HMT* and *NCH*). We discuss the SEC's and DOJ's settlement devices below.

SEC

In 2016, the SEC continued to rely on administrative proceedings to resolve its FCPA enforcement actions, using the mechanism to settle eighteen of its twenty-four corporate enforcement actions (*SAP*, *LAN, SciClone*, *PTC*, *Qualcomm*, *Nordion*, *Novartis*, *Las Vegas Sands*, *Analogic*, *Johnson Controls*, *Key Energy*, *AstraZeneca*, *Nu Skin*, *AB InBev*, *Och-Ziff*, *GSK*, *JPMorgan*, and *General Cable*) and in the case of seven of the eight individuals against whom the Commission brought enforcement actions (*Cueto, Gourevitch*, *Frost*, *Ping*, *Och*, *Frank*, and *Zimmer*). That said, while the D.C. Circuit's recent ruling in *Lucia v. SEC* upholding the constitutionality of the Commission's administrative proceedings came as a boon to the Commission's FCPA enforcement strategy, the looming threat of amendments to Dodd-Frank with the incoming presidential administration and a recent decision by the 10th Circuit that found the SEC's administrative proceedings unconstitutional, once again places the SEC's ongoing use of administrative proceedings at risk.

In its other cases, the SEC continued experimenting with deferred prosecution and non-prosecution agreements, which purportedly parallel their DOJ counterparts. Thus, in *Nortek* and *Akamai*, the SEC resolved its cases against these two companies through the use of NPAs. In the case of *Yuan*, the SEC, for the first time, entered into a DPA with an individual. The SEC's use of NPAs and DPAs in these cases is noteworthy for two reasons:

- First, while the Commission's use of DPAs and NPAs is somewhat novel, as we have noted before, it is unclear what benefit, apart from the cosmetics of nomenclature, result from a DPA or NPA with the SEC. Given that the SEC has almost uniformly continued to settle civil and administrative matters on a "neither admit nor deny" basis, the DPAs and NPAs appear effectively identical to SEC enforcement actions involving complaints and administrative actions, absent, of course, the formal order, as all involve detailed allegations of wrongdoings, continuing oversight, and the payment of sometimes substantial penalties.

- Second, though not earthshattering, the SEC's decision to utilize a DPA in *Yuan* is interesting. According to Dodd-Frank, the SEC has the authority to use an administrative proceeding against any individual associated with an entity that violated U.S. securities laws—such as the FCPA. Thus, in theory, the SEC could have raised an administrative proceeding against Yuan. The use of a DPA coupled with the fact that the SEC settled its case without leveling a monetary penalty on Yuan may represent a new approach by the SEC to give low-level employees incentives to cooperate with authorities.

In each of *VimpelCom*, *Embraer*, *Braskem*, and *Teva*, the SEC opted to file a formal complaint in the U.S. courts followed by a consent order within which the company formally agreed to the Commission's sanctions. Again, it is unclear what precisely motivated the SEC to file a complaint over any of the other settlement devices it has used before; however, given that Braskem, Teva, VimpelCom, and Embraer were subject to among the highest sanctions of 2016, the Commission likely views the use of civil complaints as a means of publicly shaming the company further. In this way, the SEC's use of civil complaints is reserved for the most severe of bribery schemes and serves as an analogue to the DOJ's use of corporate plea agreements.

Finally, in its only public declination of the year, the SEC declined to bring charges against Harris Corporation in connection with the FCPA enforcement action against a former executive of the company, Jun Ping Zhang. In a public speech, SEC Enforcement Director Andrew Ceresney stated that following Harris Corporation's acquisition of CareFx, the subsidiary that Ping managed, Harris Corporation took:

> Significant steps . . . to train staff in China and integrate the subsidiary into Harris's system of internal accounting controls. As a result of these measures, including the implementation of an anonymous complaint hotline, Harris discovered and reported the misconduct within five months of the acquisition. The SEC determined not to bring charges against Harris, taking into consideration the company's efforts at self-policing that led to the discovery of the misconduct, prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC's investigation.

DOJ

For its part, while the DOJ continues to use a combination of NPAs, DPAs, and Plea Agreements to resolve its FCPA enforcement actions, its recent decision to issue public declination letters and public declinations with disgorgement shows that the Department's enforcement practices are continuing to evolve. However, even these new settlement devices fit within the Department's practice of using settlement devices to reflect the severity of the underlying crime. The list below sets out the various settlement devices the DOJ has used in its 2016 FCPA enforcement actions against corporate entities:

- Plea Agreements – *Unitel* (VimpelCom's Uzbek subsidiary),*OZ Africa Management* (Och-Ziff's holding company of certain business interests in Africa), *Odebrecht S.A.*, *Braskem S.A.*, and *Teva LLC* (Teva's Russian subsidiary)
- Deferred Prosecution Agreements – *VimpelCom*, *Olympus*, *LATAM*, *Och-Ziff*, *Embraer,* and *Teva*
- Non-Prosecution Agreements – *PTC* (specifically PTC's Hong Kong and Shanghai subsidiaries), *BK Medical ApS* (Analogic's Danish subsidiary), and *JPMorgan Securities (Asia Pacific) Limited* (JPMorgan's Chinese subsidiary)
- Public Declinations with Disgorgement – *HMT* and *NCH*
- Public Declinations – *Akamai*, *Nortek*, and *Johnson Controls*

There are a number of items of note about the DOJ's use of settlement devices in the 2016 FCPA enforcement actions.

First, the D.C. Circuit's reversal of U.S. District Court Judge Richard J. Leon's refusal to approve a DPA between Fokker Services B.V. and the Department all but ensured that the DOJ's (and SEC's for that matter) use of pre-trial agreements like DPAs would be essentially free from judicial scrutiny. As the D.C. Circuit explained, the executive branch maintains the authority over the use of DPAs and the filing of a DPA did not provide the court any role in scrutinizing the agreement.

Second, as we highlighted in our mid-year update, the DOJ continued its past practice of requiring the subsidiary, at which much of the relevant misconduct took place, to enter a guilty plea, as it did in the *VimpelCom* case with Unitel and in the *Teva* case with Teva LLC (Russia). The Department's decision in both cases to award the parent companies a DPA, however, was somewhat surprising given the allegations that several high-ranking executives within the parent companies themselves were aware of (or at a minimum were willfully blind to) the alleged acts of bribery. Where the DOJ has concluded that the parent company's conduct was reprehensible enough, it has historically pursued plea agreements with the parent company—as was the case in *Alstom* as well as *Odebrecht/Braskem*. It is possible, however, that the DOJ declined to take the step of forcing a guilty plea from the company to avoid the collateral consequences (*e.g.*, debarment in the United States and European Union, resulting from criminal charges).

Third, as discussed in greater detail below, the Fraud Section's FCPA Pilot Program was designed to provide incentives for companies to self-report and cooperate with the DOJ's investigation by specifying potential quantifiable benefits in terms of penalty discounts and holding out the promise of the holy grail of a declination. Over the course of 2016, the DOJ publicly announced five declination decisions in *Akamai*, *Nortek*, *Johnson Controls*, *HMT*, and *NCH* as part of the FCPA Pilot Program (although in the latter two declinations, *HMT* and *NCH*, the DOJ required the company to disgorge the profits of the alleged bribery scheme). It has become apparent, however, that the

declinations afforded by the Pilot Program are of a different nature than the traditional declination, in which the government simply closes the matter without bringing charges. Here, the declinations are accompanied by a public statement from the DOJ that, notwithstanding the declination, the company had, in fact, engaged in acts of bribery and a requirement that the company agree to disgorgement (either by virtue of a separate SEC enforcement action or per the terms of the DOJ's declination letter). In light of these features, we wonder how substantial the difference is between a Pilot Program declination and an NPA, DPA, or Plea Agreement. At the present, it is difficult to say one way or another.

One critical distinction is whether the Department's declinations operate as an admission of guilt. If not, the Department's declination letters would help the company to avoid certain collateral consequences associated with FCPA enforcement actions such as civil litigation and debarment by U.S. and E.U. authorities. However, the declination letters' determination that the companies had in fact engaged in acts of bribery and the lack of details associated with the findings could still give rise to the collateral consequences that a company was hoping to avoid. For example, on the question of debarment, we suspect that procurement authorities would still have the discretion to consider the declinations when deciding whether to award a company future business.

On the other hand, while the government has suggested that the Pilot Program provides a financial incentive for companies that make voluntary disclosures and cooperate, that benefit is limited to companies that settle via a DPA or NPA, in which the financial penalty is calculated by reference to the Sentencing Guidelines with varying discounts coming off the bottom of the applicable Guidelines range. As such, the penalty may well ultimately be less than the gain. However, by focusing on disgorgement, in the case of public declinations, the Department has, in some ways, tied its hands (as is the case with the SEC) because the Department cannot give a discount off the disgorgement amount—it would be politically and philosophically difficult for prosecutors to take the position that they will permit any company to retain some of the illicit profits. (Interestingly, as a side note, that is exactly what was proposed by the Chamber of Commerce's proposed compliance defense and previously advocated by Andrew Weissmann, the current head of the Fraud Section. It will, of course, be interesting to see if that proposal makes any headway in the new administration.)

In our estimation, the Pilot Program declinations appear to be yet another point along a continuum of settlement, most of which is aimed at reflecting the DOJ's assessment of the company's culpability. Thus, while the Pilot Program declinations appear primarily cosmetic in nature, in an area of the law where appearance is everything and mitigating reputational harm is key, cosmetics must count for something.

Elements of Settlements

Within Guidelines Sanctions. In those cases in which the DOJ settled via a plea, DPA, or NPA, the financial penalty is set by reference to the Sentencing Guidelines. Notably, however, in only one of the Department's thirteen enforcement actions did the company receive a penalty within the applicable Guidelines ranges: *LATAM*. All others received below-Guidelines penalties. The fact that LATAM is an outlier is not surprising because the government's pleadings allege that the company failed to self-disclose, cooperate, and remediate, all of which are factors that were present in past cases in which a Guidelines penalty was imposed (*e.g.*, *Marubeni* and *Alstom*). According to the DOJ, LATAM did not disclose the alleged violations or cooperate with the Department until after news reports surfaced that Argentine and Chilean law enforcement agencies were investigating the matter, resulting in the potential loss of relevant evidence. Furthermore, the Department stated that the "[c]ompany [] failed to remediate adequately, including significantly by failing to discipline in any way the employees responsible for the criminal conduct . . . including misconduct by at least one high-level [c]ompany executive." Although neither the SEC nor the DOJ has confirmed, it is likely that the "high-level company executive" is Ignacio Cueto, LAN airlines' then and current CEO (Cueto settled FCPA charges with the SEC in February 2016).

Criminal Sanctions. Although LATAM was the only company to receive a within-the-Guidelines sanction, nearly all of the other DOJ actions included some of the elements that apparently led the DOJ to seek such a stiff penalty (namely, the failure to self-disclose, cooperate, and remediate). In the cases of *PTC*, *VimpelCom*, *Olympus*, *Och-Ziff*, *Embraer*, *Odebrecht/Braskem*, and *Teva* the companies failed to self-report. In the cases of *PTC*, *Analogic*, *Braskem*, *Teva*, and *Och-Ziff*, the companies failed to fully disclose all relevant facts to the Department when the company first learned the new information and made overbroad assertions of privilege. Finally, in the case of *Embraer*, the DOJ only gave the company partial remediation credit because it allegedly "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."

Recent Trends and Patterns in FCPA Enforcement

The only exception to the rule above appears to have been *General Cable* where the DOJ decided to seek a criminal penalty from the company despite giving General Cable complete credit for voluntarily disclosing the improper payments, cooperating with the Department, and engaging in significant remedial efforts to enhance the company's compliance program and internal controls. The only factor apparently counting against General Cable was the "nature and seriousness of the offense"—suggesting that even if a company follows the Department's guidance, it may not be able to entirely avoid a criminal sanction (although the DOJ's total penalty was a 50% discount from the bottom of the Sentencing Guidelines).

Interestingly, based on the factors discussed above, AB InBev, a company charged only by the SEC, would have appeared to be a case for the DOJ. According to the SEC, AB InBev did not self-report the improper conduct, engaged in plans to destroy documents, did not respond to subpoenas in a timely manner, made broad assertions of privilege, and impeded the Commission's investigation by forcing a whistleblower to sign a confidentiality agreement that prevented the individual from speaking with the SEC. All other things being equal, however, the SEC papers did not disclose any acts within the United States to support a bribery charge, and the Department may have concluded that the conduct of the Indian subsidiary was not sufficient to support a willful books-and-records or internal controls charge against the parent.

Internationalization of Sentencing Guidelines. As mentioned above, several of this year's largest FCPA enforcement actions have seen various enforcement agencies, both U.S. and foreign, dividing a single total penalty among themselves (*Odebrecht/Braskem*, *VimpelCom*, *Embraer*). The total penalty in each case was calculated according to the U.S. Sentencing Guidelines, which the foreign authorities apparently accepted as a useful tool to fashion the sanction. As foreign enforcement authorities become more involved in FCPA enforcement actions, many, including ourselves, have wondered how the various agencies will calibrate the sanctions to avoid overpenalizing a company. If the 2016 enforcement actions are any indication, the apparent trend is for foreign authorities to accept the U.S. Sentencing Guidelines as a uniform standard. This obviously ensures coordination between the enforcement agencies, but it is also possible that the U.S. Sentencing Guidelines will result in a higher sanction than might otherwise be available under applicable foreign law.

Monitors. In February 2016, Andrew Weissmann stated that the DOJ would review its approach to the use of monitors. That renewed focus has seemingly resulted in an increase in the number of corporate monitors. Indeed, nine companies that were subject to FCPA enforcement actions in 2016 saw the DOJ or SEC impose a corporate monitor requirement as part of the sanction (*VimpelCom*, *Olympus*, *Las Vegas Sands*, *LATAM*, *Och-Ziff*, *Embraer*, *Odebrecht*, *Braskem*, and *Teva*). By way of comparison, 2014 and 2015 saw only one corporate compliance monitor in each year (*Avon* and *Louis Berger*). In the past, the monitors were routinely appointed, but over time the pendulum appeared to have swung towards self-monitoring or, in some cases, hybrids in which a monitor was appointed for only a portion of the DPA period. It appears now that the pendulum has swung back.

Recidivism. There is a rare and still relatively small group of recidivist FCPA violators (*e.g., Marubeni, Vetco Gray*). The 2016 case against Johnson Controls both is and isn't such a case. The SEC charged Johnson Controls as the result of the conduct of its Chinese subsidiary, China Marine, which had been acquired by Johnson Controls in 2005 as part of its acquisition of York International. Significantly, in the midst of the acquisition, York International itself had been charged with FCPA violations in which some of the relevant conduct had involved China Marine. The DOJ settlement with York and the subsequent monitorship spanned the period in which York was integrated into Johnson Controls. Thus, Johnson Controls was aware of the problems concerning China Marine but was unable to remediate the improper conduct, a fact pattern similar to other recidivist cases. Nevertheless, although the SEC brought a books-and-records case against Johnson Controls, the DOJ publicly declined to bring charges through the FCPA Pilot Program.

Lengthy Investigations. A noteworthy feature of several of the 2016 FCPA enforcement actions is the length of the agencies' investigations into the companies' operations. According to the companies' public filings, the government's investigations into SciClone, PTC, Las Vegas Sands, AstraZeneca, Och-Ziff, and Embraer had lasted for five or more years. In the case of *AstraZeneca*, it was first reported that the SEC began investigating the company's European operations in October 2006, almost ten years before the settlement. The length of the Commission's investigation into AstraZeneca is all the more striking when one considers that the total sanction against the company was only $5 million. It is worth noting in this respect that the Wal-Mart investigation has now been in progress since at least December 2011, with no sense of how or whether it will result in an enforcement action, and every year the company discloses yet more investigation fees and remediation costs. Although we doubt that the enforcement agencies place any weight on the length and cost of an investigation when determining the appropriate sanction, it is worth pointing out that, as was likely the case for AstraZeneca, the cost

of the investigation itself may in some cases be more of a deterrent than the actual sanction. The simple truth is that investigations involving corporate acts of bribery are expensive and thus, the longer those investigations go on, the more costly they become. In addition, the longer an investigation lingers, the less deterrent effect an enforcement action might have as the conduct becomes old and can be blamed on former management and ex-employees. While the enforcement agencies (particularly the DOJ) have made concerted efforts to resolve enforcement actions in a more efficient and timely manner, the 2016 enforcement actions illustrate just how significant a problem lengthy investigations have become.

Case Developments

Direct Access Partners. In April 2016, seven individuals associated with the now defunct broker-dealer Direct Access Partners settled the SEC's charges against them for bribing a former official at the Venezuelan state development bank, Banco de Desarrollo Económico y Social de Venezuela ("BANDES"). Those individuals included: Iuri Rodolfo Bethancourt, Benito Chinea, Tomas Alberto Clarke Bethancourt, Joseph DeMeneses, Jose Alejandro Hurtado, Ernesto Lujan, and Haydee Leticia Pabon. The settlement resulted in a permanent injunction against each of the defendants from violating U.S. securities laws and, collectively, Chinea, Clarke, DeMeneses, and Lujan were ordered to pay $42.5 million in disgorgement and prejudgment interest—a sanction that was deemed satisfied by the amounts already paid in connection with the criminal action against those four defendants.

Maria de los Angeles Gonzalez de Hernandez. In January 2016, the BANDES official, Maria de los Angeles Gonzalez de Hernandez, accused of receiving $5 million in bribes in connection with the Direct Access Partners scheme, was sentenced to time served after she spent a little over a year in jail following her arrest in Miami in 2013. Gonzalez pleaded guilty to conspiracy to violate the Travel Act and conspiracy to commit money laundering as well as two substantive counts of the offenses. Gonzalez was also required to forfeit the $5 million in ill-gotten gains.

Rincon & Shiera. Abraham Jose Shiera Bastidas pleaded guilty on March 22, 2016 to one count of conspiracy to violate the FCPA and commit wire fraud. Shiera has since been released on a $1 million bond and has been placed under house arrest until his sentencing. Roberto Enrique Rincon Fernandez separately pleaded guilty on June 16, 2016 to one count of conspiracy to violate the FCPA, one substantive count of violating the FCPA, and one count of making false statements on his tax return. Both Shiera's and Rincon's sentencing is also scheduled for July 2017.

Harder. In late 2015, Dimitrij Harder, the former owner and president of Chestnut Consulting Group Inc. charged with bribing an official of the European Bank for Reconstruction and Development ("EBRD"), attempted to challenge the DOJ's case against him by arguing that the designation of the EBRD as a "public international organization" as defined by the FCPA was unconstitutional. Specifically, the FCPA includes officials of "public international organizations" within the definition of "foreign official" in the statute. In March 2016, Judge Diamond of the U.S. District Court for the Eastern District of Pennsylvania rejected Harder's argument, explaining that it would lead to an "absurd result." Following the court's decision, Harder pleaded guilty to two counts of violating the FCPA in April 2016. Sentencing is scheduled to take place in June 2017.

Hoskins. In 2015, Judge Arterton of the U.S. District Court for the District of Connecticut ruled that a non-resident foreign national cannot be charged with conspiracy to violate the FCPA or with aiding and abetting a violation of the FCPA without satisfying the jurisdictional requirements of the statute. As a result, portions of the DOJ's case against the former Alstom executive and U.K. national Lawrence Hoskins were placed in jeopardy (though other substantive charges against Hoskins remain intact). According to the DOJ's theory, prosecutors have the authority to charge non-resident nationals who never set foot in the United States with conspiracy to violate the FCPA, even if the agencies did not otherwise have jurisdiction to charge the defendant with a substantive violation of the FCPA. The DOJ subsequently petitioned the court to reconsider the decision, and in March 2016, the court affirmed its ruling. The DOJ has since appealed the decision to the Second Circuit Court of Appeals. The Second Circuit's ruling on this decision could have serious implications for the DOJ's approach to FCPA enforcement, as the DOJ frequently charges individuals with conspiracy to violate the FCPA to avoid some of the jurisdictional prerequisites in the law.

Magyar Executives. In December 2011, the SEC filed a civil complaint in the Southern District of New York against three former executives of the Hungarian telecommunications provider, Magyar Telekom Plc., for violations of the FCPA. The charges came alongside an FCPA enforcement action by both the DOJ and SEC against Magyar and its parent corporation, Deutsche Telekom AG.

Recent Trends and Patterns in FCPA Enforcement

Since December 2011, the Commission's case against the three executives has lingered in the courts as the executives sought to challenge the SEC's charges on multiple grounds, including jurisdiction. As discussed in greater detail below, in September 2016, Judge Richard Sullivan ruled that the Commission's case against the three executives could proceed on the grounds that participating in the preparation of false securities filings, which were later posted to the Commission's U.S.-based EDGAR website, was sufficient to establish the Commission's jurisdiction over the defendants. A trial in the case is currently scheduled to begin in May 2017.

SBM Offshore. In February 2016, SBM Offshore announced that the DOJ had reopened its investigation into alleged acts of bribery concerning the company's operations in Angola, Brazil, and Equatorial Guinea. The announcement comes after the DOJ closed its probe without bringing charges and the company reached a $240 million settlement with Dutch authorities over the very same allegations in November 2014. It is unclear what caused the DOJ to reopen its investigation into the company.

Alstom. In May 2016, a jury in the Bahamas convicted Fred Ramsey, a former board member of the Bahamas Electricity Corporation, of taking bribes from officials at Alstom. The charges underlying Ramsey's conviction were connected to the 2014 FCPA enforcement action against Alstom, where the French engineering firm pleaded guilty to multiple violations of the FCPA after the DOJ accused the company of bribing foreign officials in the Bahamas, Indonesia, Saudi Arabia, and Egypt. In July 2016, Ramsey was ordered to disgorge the illicit payments he received as part of the bribery scheme and pay a $14,000 criminal fine. Ramsey was able to avoid jail time due to his poor health.

Sweett Group plc. In December 2015, the U.K.-based construction and management services company, Sweett Group plc, pleaded guilty to violating section 7 of the U.K. Bribery Act for allegedly bribing foreign officials in the Middle East. This was the first instance in which a company pleaded guilty to violating section 7—the section of the Bribery Act making companies strictly liable for failing to prevent acts of bribery by associated persons. Perhaps significantly, there was no mention in this matter of the company seeking to avail itself of the affirmative defense provided in section 7 to companies that have "adequate procedures" to prevent bribery. In February 2016, the Sweett Group was sentenced and was ordered to pay a £2.25 million sanction (approximately $3.3 million).

Firtash. In 2014, U.S. prosecutors charged Dmytro Firtash, the politically-connected Ukrainian oligarch and former owner of the gas company RosUkrEnergo, with violating the FCPA, RICO, and the federal money laundering statute after he allegedly paid $18.5 million to Indian officials in exchange for valuable mining rights in the country. Following his arrest in Vienna, Austria, the U.S. sought to extradite Firtash to the United States, but an Austrian court denied the request, finding it was "politically motivated." Both Firtash and the U.S. appealed that decision, Firtash arguing that the extradition request should have been rejected on the grounds that the U.S.-Austrian extradition treaty was unconstitutional under Austrian law. In August 2016, Firtash's appeal was rejected. The appellate court's decision to reject Firtash's appeal now opens the door for the Austrian courts to consider the U.S.'s appeal of the lower court's initial denial of extradition.

Richard Hirsch & James McClung. In 2015, Richard Hirsch and James McClung, two former executives at the engineering and construction firm, Louis Berger, pleaded guilty to one count of conspiracy to violate the FCPA and one substantive count of violating the FCPA's anti-bribery provisions. In July 2016, Hirsch was sentenced to two years of probation and fined $10,000 and McClung was sentenced to one year and a day in prison.

Recent Trends and Patterns in FCPA Enforcement

Perennial Statutory Issues

Jurisdiction

The DOJ and SEC have historically interpreted the FCPA's jurisdictional requirements extremely broadly, claiming that such slight touches on U.S. territory such as transaction between two foreign banks that cleared through U.S. banks or, even more tenuously, an email between two foreign persons outside the U.S. that transited through a U.S. server, were sufficient. In 2016, the agencies doubled down on these expansive views, particularly in the *Teva* case.

Court Decisions

The *Magyar Telekom* case was the first to reveal the government's theory that an email not sent or received in the U.S., but passed through a U.S. server, was enough to satisfy FCPA jurisdictional requirements over foreign persons. More recently, in the same case, the SEC proposed—and, surprisingly, got the court to accept—an even more attenuated connection between foreign persons and the bribery provisions. In that case, *SEC v. Straub*, in September, Judge Richard Sullivan of the Southern District of New York upheld a novel jurisdictional theory from the SEC, holding that the SEC retained jurisdiction to pursue charges against three foreign defendants, who had never set foot in the United States during the period of the alleged bribery scheme, because the three defendants participated in the preparation of Magyar's SEC filings that were posted on the Commission's EDGAR website for public consumption. Although these acts clearly are relevant to books-and-records charges, it is far from clear how the filing of the reports somehow constituted an "act in furtherance" of the bribes using wires or instrumentalities of interstate commerce—the requirement for jurisdiction under the bribery provisions.

On the other hand, in *U.S. v. Hoskins,* U.S. District Court Judge Janet Arterton from the District of Connecticut issued a ruling that checked the DOJ's efforts to expand jurisdiction. The court there found that former Paris-based Alstom Executive Lawrence Hoskins, a British national, could not be charged with conspiracy to violate the FCPA or with aiding and abetting a violation of the FCPA absent a showing that he either (1) acted as the agent of a U.S. "domestic concern" or (2) committed acts in furtherance of the conspiracy while physically present in the territory of the United States. If affirmed on appeal by the U.S. Court of Appeals for the Second Circuit, where it is currently pending, this case would represent a significant limitation on the FCPA jurisdiction as to non-resident foreign nationals. Briefing for the appeal is ongoing as of December 2016.

Teva

The DOJ's and SEC's broad jurisdictional theories were on full display in their enforcement actions against Teva and its Russian subsidiary, Teva LLC.

In the DOJ's plea agreement with Teva Russia, the only jurisdictional ground alleged by the DOJ was that "employees and agents of Teva Russia sent emails through the United States." Although the plea agreement described various emails between employees and executives at Teva Russia and its parent—an Israeli company—there are no other allegations that the emails were sent to, received in, or even passed through the United States. Notably, the DOJ could not even come up with a single specific instance of an act within the territory of the United States to form the basis for a substantive count and charged only a vague conspiracy with overt acts consisting of emails that we assume are alleged, although no details are provided, to have somehow touched a server in the U.S.

Further, the SEC's allegations against the corporate parent were equally lacking details. While Teva is an issuer, because it is also a foreign person, the SEC still must establish *territorial* jurisdiction to charge the company with a violation of the anti-bribery provision of the FCPA. Though the SEC's complaint included allegations that Teva's Mexican subsidiary, which also allegedly made corrupt payments, was managed in Miami, its jurisdictional allegations concerning Teva's Russian and Ukrainian subsidiaries apparently rely on emails that "were sent through U.S. servers" or U.S. dollar payments that allegedly "were wired through U.S. correspondent banks."

Separately, in the SEC's complaint against Teva, the SEC's jurisdictional grounds state the following: "Teva, directly or indirectly, made use of the means or instrumentalities of interstate commerce, of the mails, *or of the facilities of national securities exchange* in connection with the transactions, acts, practices, and courses of business alleged in this Complaint." The SEC then, in the factual allegations with

respect to payments by the subsidiaries in Russia, Ukraine, and Mexico, in traditional books-and-records language, recites either that the subsidiaries "mischaracterized the payments . . . in its books and records" (in the case of Russia and Ukraine) or that the subsidiaries' "inaccurate books and records and financial statements were consolidated into Teva's financial statements, which were filed with the Commission" (in the case of Mexico). The reference to "the facilities of national securities exchange" is a relatively new component of the SEC's pleadings and is likely a nod to Judge Sullivan's opinion in *SEC v. Straub* that the mere filing of reports with the SEC somehow qualifies as a territorial act in furtherance of an improper payment—though for the reasons above, we find the SEC's reliance on such a theory dubious at best. Perhaps to cover all its bases, the SEC did not, in its first claim, which charges bribery under 15 U.S.C. § 78dd-1, allege any specific jurisdictional nexus for that count, but merely incorporated *all* of the preceding paragraphs.

Foreign Officials

The question of who constitutes a "foreign official" has been a long-debated issue, mostly focused on whether employees of state-owned entities qualified, an answer settled by the Eleventh Circuit in 2014 in the *Esquenazi* case. This year's FCPA enforcement cases, however, saw new twists and new uses of the statute in cases where it is not even clear there is a foreign official involved.

The FCPA, of course, consists of two sets of provisions: the bribery prohibitions and the books-and-records/internal controls requirements. Only the first requires that there be payments to a foreign official; but in many instances, the government has used the books-and-records/internal provisions to prosecute cases that apparently began as bribery investigations but where it is unable to satisfy the bribery provision's jurisdictional requirements or where it is less than certain whether the recipient of an improper payment is, in fact, a government official. In 2016, the government continued this approach, including in cases with somewhat fuzzy allegations concerning exactly how it viewed the recipients of unlawful payments or, in one case, without ever identifying those recipients at all.

Fuzzy Theories on Foreign Officials

In *LATAM*, the DOJ and SEC charged the company with books-and-records and internal controls violations after the current CEO of LATAM's subsidiary, LAN Airlines S.A., allegedly approved $1.15 million in payments to a local Argentine consultant with the understanding that some portion of those funds would be used to bribe Argentine union officials to resolve an ongoing labor dispute. While it is theoretically possible that union officials may somehow be considered "government officials" under Argentine law, it is unlikely that a union official would otherwise constitute a "foreign official" under the FCPA. As a result, the DOJ and SEC did not expressly argue that the company bribed "foreign officials" as defined by the FCPA, but nevertheless described the payments that resulted in the inaccurate books and records in terms that sound very much like FCPA bribery without actually charging it. Similarly, in *Analogic*, the SEC alleged that the company's Danish subsidiary engaged in a kickback scheme with its third-party distributors, but did not state whether any of those kickbacks actually went into the pockets of foreign officials (although it alleged that such payments created a "risk" of bribery).

Anti-Bribery Charges Connected to Private Individuals and Entities

The *JPMorgan* case raises the converse problem seen in *LATAM* and *Analogic* (*i.e.*, cases where no "foreign official" was identified). In *JPMorgan*, while the SEC and DOJ alleged that foreign officials received improper benefits from the bank, the DOJ's charges included extensive allegations concerning improper benefits made to private individuals. The focus of the *JPMorgan* case was on whether the bank had provided a corrupt benefit to foreign government officials by engaging in a practice of offering employment positions to their friends and relatives. However, of the multiple examples of allegedly corrupt hiring practices identified by the DOJ, two explicitly involved relatives of executives at *private* companies. Indeed, both the DOJ's and SEC's charges cast a wide net, broadly alleging that the practice of hiring employees based on their relationships to potential clients—foreign official or not—was improper. It is unclear why the DOJ and SEC decided to allege facts in their submissions concerning the hiring of friends and relatives of non-foreign officials. Certainly, such conduct does not trigger an FCPA violation. By all appearances, the DOJ and SEC used *JPMorgan* as an opportunity to publicly shame the company for a hiring practice that the agencies found unsavory.

Public International Organizations

The DOJ's case against Ng Lap Seng and Jeff Yin involving the former U.N. officials, John Ashe and Francis Lorenzo, is the second time in recent years that the Department appears to have brought charges under the FCPA's anti-bribery provisions in a case alleging that

corrupt payments were made to an official at a "public international organization." This follows *U.S. v. Harder*—discussed at length in last year's *Trends & Patterns*—which involved payments to an official of the European Bank for Reconstruction and Development. As in *Harder*, Ng and Yin allegedly paid bribes to Ashe and Lorenzo, who served as U.N. ambassadors from Antigua and Barbuda and the Dominican Republic, respectively. While the facts concerning the Department's case against Ng and Yin present a distinct fact pattern that most companies are unlikely to face, the case, much like *Harder*, is a reminder that business dealings with officials from public international organizations can give rise to FCPA violations.

Parent-Subsidiary Liability

The SEC's habit of charging parent issuers with violations of the anti-bribery provisions of the FCPA for the acts of a subsidiary without establishing that the parent authorized, directed, or controlled the subsidiary's corrupt conduct continues to be a problem. Instead of applying traditional concepts of corporate liability, the SEC commonly applies a theory of strict liability, taking the position that a subsidiary was *ipso facto* an agent of its parent. Therefore, applying the test for liability applicable to an employee's or agent's actions, any illegal act committed within the scope of the employee's or agent's duties and at least in part for the benefit of the corporation results in corporate criminal liability. The cases of *PTC*, *SciClone*, *Analogic*, and *JPMorgan* suggest that the Commission's position on this issue is evolving, but whether that holds true in the future is anyone's guess.

The SEC's first response to the criticism of its position appears to have been, in *PTC* and *SciClone*, to more specificly allege facts to establish the parent corporation's general control of the subsidiary. For example, in *PTC*, the SEC explained that many of PTC-China's officers and directors were also members of PTC's legal and finance departments, PTC-China employees had global functional reporting lines to PTC that provided PTC with control over the subsidiary's activities, and that PTC (not PTC-China) was the counterparty on most contracts with PTC-China's customers. Similarly, in *SciClone,* the SEC highlighted the fact that the corporate parent controlled the subsidiary through the appointment of the subsidiary's officers and directors, reviewed and approved the subsidiary's annual budget, and oversaw the subsidiary's legal, audit, and compliance functions. None of these allegations, however, established that the parent company directed, authorized, or controlled the alleged corrupt conduct of the subsidiary or that anyone in the parent, including the employees with roles in both companies, was even aware of it. These cases, therefore, represented the same *ipso facto* approach, just with more window dressing.

By contrast, the SEC's allegations in *Analogic* reflected a more restrained approach. Specifically, in the *Analogic* matter, the SEC charged the parent company only with violations of the FCPA's accounting provisions related to endemic falsification of books and records and questionable payments by its subsidiary, BK Medical ApS. Under the theory of liability seen in *PTC* and *SciClone*, the Commission could have chosen to charge Analogic with anti-bribery violations but apparently decided against it. Our hope was that *Analogic* was a harbinger of a new trend for the Commission.

Those hopes appear to have been premature, as the SEC's allegations in *JPMorgan* show the Commission following the approach seen in *PTC* and *SciClone* and charging the parent with bribery even though there are no allegations the parent was involved in, knew about, directed, or authorized the unlawful conduct. Indeed, the allegations almost uniformly suggest that the bank's Asian subsidiary, JPMorgan APAC, misled and concealed from its parent its allegedly improper hiring practices. Although there are some allegations that bankers from JPMorgan's offices in New York acceded to JPMorgan APAC's repeated requests to find positions for foreign officials' sons in New York, it is unclear whether the positions that the individuals ultimately received were with JPMorgan APAC, JPMorgan (the parent), or another JPMorgan entity altogether. Furthermore, at least in one instance, the SEC's allegations demonstrate that JPMorgan officials in New York were very resistant to hiring a foreign official's son—demonstrating a clear separation between the parent and its subsidiary and making it difficult to argue that JPMorgan APAC was a mere alter-ego of JPMorgan. Thus, similar to other cases, it appears that the SEC, for whatever reason, is determined to charge bribery even when there is no evidence that the issuer participated in the scheme, and the Commission has, therefore, continued to follow the very problematic approach of deeming the issuer's subsidiaries to be its agent solely as a result of the corporate organization.

We acknowledge that this debate is a bit academic because the parent corporations in *PTC*, *SciClone,* and *JPMorgan* were also charged with violations of the FCPA's accounting provisions, which apply to their own books (consolidating the inaccurate books of the subsidiaries) and their own failure to implement effective internal controls. For that reason, the companies probably did not see any benefit to contesting the SEC's charges, particularly when they were permitted to settle on a "neither admit nor deny" basis.

Nevertheless, we respectfully submit that the SEC, like any other enforcement agency, ought not to charge an offense without the proper predicates, particularly one with the obviously greater negative connotations of "bribery" versus "books-and-records."

Anything of Value

Several significant FCPA developments this year related to the DOJ's and SEC's definition of the phrase "anything of value." Once more, these developments suggest that enforcement agencies are continuing to expand the scope of the FCPA.

Charitable Donations

In *VimpelCom*, the SEC alleged that VimpelCom violated the FCPA's anti-bribery provisions by donating approximately $500,000 to the foreign official's charities, even if none of the money that VimpelCom donated reached—or was intended to reach—the pockets of the foreign official. This approach is in stark contrast to the DOJ's, which did *not* charge bribery with respect to these particular payments, alleging only that the charitable contributions violated the FCPA's accounting provisions—similar to the SEC's own theory in past cases such as *Schering-Plough*, *Eli Lilly*, and *Stryker*. Although the improper payments described in *VimpelCom* were more than just a single charitable contribution, *VimpelCom* is the first instance in which either enforcement agency has alleged that the intangible benefit of donating money to a *bona fide* charity is sufficient to satisfy the "anything of value" element of the FCPA's anti-bribery provision.

In contrast, in *Nu Skin*, the SEC returned to the prior approach and charged the company only with violating the books-and-records and internal controls provisions of the FCPA. Specifically, in *Nu Skin*, the Utah-based personal care company attempted to avoid sanctions from a provincial Chinese regulatory agency by seeking favors from a high-ranking Communist party official. Nu Skin allegedly made a significant monetary contribution to a charitable organization controlled by that official and assisted the official's child to obtain college letters of recommendation from an "influential U.S. person." In exchange, Nu Skin asked the official to persuade the Chinese authorities not to issue a fine, and, indeed, the provincial regulatory agency later dropped its investigation.

We will have to see if the DOJ or SEC will ever allege that a charitable contribution, in and of itself, is sufficient to trigger liability under the FCPA's anti-bribery provision, but given the agencies' expansive interpretation of the "anything of value" element, we doubt that the agencies would hesitate to pull the trigger if the appropriate case presented itself.

Family Members

With *Qualcomm* and *JPMorgan*, in addition to the 2015 case *BNYM*, the DOJ and SEC have clearly established their belief that the practice of hiring the friends and relatives of foreign officials to influence those foreign officials violates the FCPA's anti-bribery provision, a proposition we view as questionable but that, because it has only been put forward in settled cases, has not been tested in court.

What we have found interesting about *BNYM*, *Qualcomm*, and *JPMorgan* is the enforcement agencies' repeated emphasis on the fact that the friends and relatives of foreign officials who received jobs were largely unqualified for the positions they were offered. One of our concerns with the government's approach—and there are many—is that it would prohibit companies from hiring qualified candidates simply because their parents were government officials, a prohibition that does not extend to the children of U.S. officials and that, in our view, is not supported by the language of the statute. It seems that the emphasis on "unqualified" may be the government's response to these concerns by implying that these internships were more in the nature of "no-show jobs" that provided some sort tangible benefit to the official because he did not have to support his unqualified child. In fact, although we are concerned about the apparently limitless scope to the government's approach, we are somewhat reassured by the fact that the three cases they have brought to fruition thus far all involved allegedly unqualified hires. This leaves, in our mind, the door open for hiring qualified relatives with, of course, appropriate controls.

We still have a second concern to the extent that the government's enforcement policy encompasses payments meant to influence foreign officials without providing any tangible benefit to that official. The statute does not prohibit unseemly efforts to influence government officials, but rather prohibits efforts to bribe them—a *quid pro quo* agreement that involves the transfer of a tangible benefit ("money or other thing of value"). Again, the "unqualified" element may be a partial answer to that concern, as one could argue that if these children are truly unqualified their upkeep would be a financial burden on their parents if not for their employment by the defendants in these cases. Moreover, at least in the *JPMorgan* case, the government alleges that some of the hires of unqualified

candidates were, in fact, part of a *quid pro quo* agreement with the related foreign official, which at least moves the ball somewhat from an amorphous intent to influence to a more obviously corrupt agreement.

Finally, we have to acknowledge that our last point above might be somewhat overly optimistic. While the *Qualcomm* case is most noteworthy for the SEC's theory on improper hiring practices, the case also suggests that the SEC believes the provision of gifts, travel, and entertainment to family members of foreign officials is sufficient to violate the anti-bribery provision of the FCPA—*even if the SEC does not allege that the foreign official actually received any benefit*. In *Qualcomm*, the SEC stated that "[m]any gifts—airplane tickets for children of government officials, event tickets for spouses of foreign officials, and luxury goods—had no valid purpose. Similarly, Qualcomm paid for sightseeing for spouses and children of foreign officials and arranged golf outings." The provision of such benefits to family members without the allegation that those benefits were transferred to the foreign officials themselves is something of a new twist on the SEC's expanding definition of the phrase "anything of value" under the FCPA.

Recent Trends and Patterns in FCPA Enforcement

Compliance Guidance

FCPA Pilot Program

As we noted in our mid-year update, one of the most noteworthy events in 2016 was the DOJ's announcement of a one-year FCPA Pilot Program that set out the DOJ's expectations for how a company should manage an FCPA investigation and the potential rewards—including significant reductions in criminal fines—if a company chose to follow the DOJ's guidance.[11] The DOJ's new framework is intended to complement the Yates Memo and the Principles of Federal Prosecution of Business Organizations (the "Filip Memo"), as well as improve the transparency of DOJ charging decisions.

In essence, the FCPA Pilot Program is divided into two components: (1) the DOJ's guidance on how a company should respond to an FCPA violation and (2) the potential benefits a company could receive if it follows the DOJ's recommendations. The guidance states that the DOJ expects companies to (i) voluntarily disclose the wrongful conduct to the DOJ in a timely manner; (ii) fully cooperate with the DOJ over the course of the investigation; and (iii) if necessary, make the appropriate remedial efforts to ensure that similar conduct is prevented from occurring again. If, over the course of the investigation, a company establishes that it has met the three requirements to the DOJ's satisfaction, it "may" receive a 50% reduction off the bottom of the Sentencing Guidelines fine range, will "generally" not be directed to appoint a monitor, and the DOJ will consider declining prosecution altogether (provided that the company disgorges all of the profits from the alleged scheme). The FCPA Pilot Program also states that if a company does not voluntarily disclose the wrongful conduct, it may still receive up to a 25% reduction from the bottom of the Sentencing Guidelines fine range in recognition of its cooperation.

With the FCPA Pilot Program now in place for approximately eight months, there are a few points worth mentioning as we take stock of the Program's impact on FCPA enforcement.

- *Voluntary Disclosure Credit.* Although the FCPA Pilot Program purports to move the ball somewhat by providing for specific maximum percentages in exchange for voluntary disclosure, complete cooperation, and appropriate remediation, these clear lines largely reflect—or even roll back—the DOJ's prior informal approach to FCPA enforcement. In pre-Program cases such as *VimpelCom*, the DOJ awarded a 45% reduction below the guidelines range even though the company had not voluntarily disclosed the improper conduct. The same is true for the 2014 cases of *Alcoa* and *HP*. It is curious, then, that the effect of the FCPA Pilot Program, which says that the Department will award "at most" a 25% reduction without a voluntary disclosure, actually reduces the incentives for cooperation to foster the goal of inducing more voluntary disclosures.

- *Cooperation Credit.* The Program also provides that, in the absence of a voluntary disclosure, a company may still receive up to 25% off the bottom of the Guidelines if it cooperates with the government's investigation. In several cases that were settled after the Pilot Program's announcement, the DOJ has granted slightly under a 25% reduction to companies that allegedly did not voluntarily disclose; for example, both *Och-Ziff* and *Embraer* received 20% discounts off the bottom of the fine range. We also can't help but note that all seems negotiable: in *Teva*, the DOJ awarded the company a 20% discount for cooperation, thus paying only a 5% penalty for having failed to cooperate in earlier stages of the investigation, including by making "vastly overbroad assertions of attorney-client privilege" and failing to provide documents on a timely basis. Even more glaring is the government's agreement in the *Odebrecht/Braskem* case to award the full 25% discount for cooperation even after including in the Statement of Facts an entire section entitled "Obstruction of Justice" (and including a three-point enhancement in the Guidelines calculation) that describes an organized effort, including the payment of additional bribes, to prevent the production of certain records and to destroy other records or to degrade certain data.

- *De-confliction.* One area of uncertainty has been the Pilot Program's statements on "de-confliction." Specifically, for full cooperation credit the DOJ's guidelines require: "[w]here requested, de-confliction of an internal investigation with the government investigation." The Pilot Program used the term without any real explanation as to its meaning or practical aspects, thus causing confusion among

[11] For further discussion of these issues, you may wish to refer to our prior client publication, Shearman & Sterling LLP, *To Self-Report or Not to Self-Report, That Remains the Question After the Justice Department's Latest Effort to Encourage Self-Reporting* (discussing how the guidance reduces the Justice Department's flexibility to reward cooperation, is vague on what sort of cooperation is required, and gives the DOJ significant latitude to deny cooperation credit to companies that self-report and cooperate).

companies and defense counselors. As a result, the DOJ felt compelled to make public statements that confirmed that "de-confliction" means taking steps during an internal investigation to ensure that certain individuals are interviewed first by the DOJ, rather than the company's counsel. Indeed, the DOJ cited Teva's willingness to "defer[] witness interviews to de-conflict with the Fraud Section's investigation" as a relevant consideration in Teva's DPA. Although the DOJ's demands for de-confliction are probably limited as a practical matter, they are nevertheless particularly invasive requests—even for a government authority investigating a crime. Companies, as much as investigators, have numerous good faith reasons to investigate an alleged impropriety (*e.g.*, human resource management, accounting, financial disclosures, risk management) and an order to stop or delay such an investigation could impair a company's ability to appropriately manage itself.

- *Declinations.* As discussed above, another consequence of the FCPA Pilot Program has been the advent of two novel settlement devices, namely (i) public declinations and (ii) public declinations with disgorgement. The first wave of these public declinations arrived in June, when the DOJ issued public declination letters to *Nortek*, *Akamai Technologies*, and *Johnson Controls* alongside separate settlements with the SEC that required the companies to disgorge the profits of the alleged illicit schemes. In late September, the DOJ issued another set of public declination letters for two companies (*HMT* and *NCH*) that required the companies to disgorge all profits that resulted from the bribery. Notably, these companies were not issuers and were thus outside the SEC's jurisdiction—making it necessary for the DOJ under the terms of the Pilot Program to find an alternative mechanism to force the companies to disgorge the profits of the alleged schemes. As explained above, the benefits of these declination letters are muddled at best. Certainly, avoiding prosecution and receiving credit for cooperating with investigators is a reputational boon. However, the DOJ's decision to include a finding that the company's employees paid bribes, coupled with a somewhat questionable legal basis for demanding disgorgement, could present new problems for the companies and enforcement agencies.

We can only speculate as to whether the DOJ will seek to make the Pilot Program permanent after its one-year lifespan comes to a close in April 2017. Indeed, as we discuss below, its future will depend on the attitudes of the new administration.

Yates Memo – One Year Later

The Yates Memo, announced in September 2015, set out an ostensibly new policy at the DOJ that sought to improve the Department's track record for securing the conviction of individual wrongdoers. Unsurprisingly, the Yates Memo drew an enormous amount of fanfare when it was initially announced, and commentators debated whether it would result in a meaningful difference in the way the DOJ conducts an FCPA investigation. From our perspective, the Yates Memo primarily served the purpose of memorializing what had been an informal, though widespread, expectation by prosecutors that corporations purporting to cooperate may not protect, and indeed must disclose, the identity of wrongdoing executives, employees, and individuals (sometimes referred to as "the open kimono" or more pejoratively as "throwing under the bus"). Thus, our expectations at the time of the Yates Memo's announcement were that, as a practical matter, little would change. Now, more than a year after its release, those predictions appear to have been more or less correct.

If anything, the DOJ's efforts to pursue charges against individuals, particularly those at the top of the corporate food chain, have actually slackened following the announcement of the Yates Memo. It may be surprising to some that the DOJ decided not to pursue charges against certain individuals given the facts underlying some of the 2016 FCPA enforcement actions. In *Och-Ziff*, for example, two of the employees alleged to be primarily involved in the conduct were the company's Chief Executive Officer, Daniel Och, and the company's Chief Financial Officer, Joel Frank. The SEC's order made clear that, in its view at least, both of these individuals were aware of the high risk of corruption in transactions entered into with a partner in the Democratic Republic of the Congo, yet Frank approved these transactions and Och had final decision-making authority on all investments by the company. However, whether due to concerns over a lack of evidence, lack of resources, a general reluctance to bring charges after past setbacks, or a perception that the SEC's sanctions were sufficient (or some combination thereof), the DOJ declined to bring charges. Moreover, as noted above, it is entirely possible that in some of the corporate cases from 2016, the government has obtained sealed indictments against individuals that will not become public until arrests are made or extradition requests are filed.

We don't mean to say that the Yates Memo was all for naught. Indeed, it is not particularly surprising that the Yates Memo hasn't yielded an instantaneous spike in individual criminal prosecutions by the DOJ, as any effect of the policy change will surely take time to work its way through the lengthy ongoing investigations that the DOJ is currently undertaking. Moreover, while we remain skeptical that the prosecutorial guidelines contained in the Yates Memo will result in increased numbers of convictions for the DOJ, we have discerned

differences in how prosecutors deal with disclosures by cooperating companies, often now requiring that the traditional presentation on the so-called "Filip factors" now also includes a "Yates presentation." Further, in some cases, as suggested by the Yates Memo itself, this presentation is demanded even earlier in the investigation, requiring companies to make delicate judgments about culpability and responsibility before they have completed their investigation.

Finding the Right Amount of Voluntary Disclosure

A theme that we have noticed in many of this year's FCPA enforcement actions is that companies are struggling to find the correct balance between over-disclosing and under-disclosing potential FCPA violations. On the one hand, a number of companies failed to obtain full voluntary disclosure credit because they allegedly weren't adequately forthcoming (*e.g.*, *LATAM*, *PTC*, *Analogic*, *VimpelCom*, *Och-Ziff*, *Embraer*, *JPMorgan*, *Odebrecht/Braskem*, and *Teva*). On the other hand, we saw one of the potential negative side effects of the FCPA Pilot Program when we saw another company disclose a $475 bribe in a Form 10-Q filing with the SEC. The theme that unites these cases is that companies still face great uncertainty when it comes to the level of disclosure that the DOJ and SEC expect from companies when self-policing.

In recent years, DOJ and SEC officials have consistently warned companies not to spend enormous amounts of time and money on internal FCPA investigations. Assistant Attorney General Leslie Caldwell, in particular, has on numerous occasions stated that the DOJ does not expect companies to "boil the ocean" in undertaking scorched-earth internal investigations of vast scope. At the same time, the DOJ, particularly following the Yates Memo and the initiation of the FCPA Pilot Program, has created heavy incentives for companies to self-report and fully cooperate during DOJ investigations. The practical consequence of the DOJ's carrots-and-sticks approach is that there is now, maybe more than ever, an inclination for companies to over-disclose and over-investigate. Indeed, while the upside risk of ferreting out and disclosing information to the DOJ is a known quantity, the downside risk of saving time and money on investigations is a gray area.

Effective Internal Controls and Declinations

As we discussed in our mid-year update, the 2016 case of *SAP* is an important reminder of how an evasion of internal controls can still land a company in hot water even if the company itself shared very little of the blame for the underlying FCPA violations. Former SAP Vice President Vicente Garcia was separately charged by the DOJ and SEC in 2015 and received a twenty-two month prison sentence after pleading guilty to FCPA violations. Garcia was able to successfully evade SAP's internal controls to funnel improper payments to Panamanian officials in exchange for lucrative sales contracts. Based on the SEC's statement of facts, Garcia's efforts triggered red flags within SAP's compliance department, but Garcia was ultimately able to circumvent SAP's controls to execute the alleged scheme. Garcia was, in many ways, the "rogue employee" that many companies fear, and for that reason the DOJ declined to prosecute SAP altogether and the SEC declined to seek any substantive bribery charges against, or penalty from, SAP. Nonetheless, the SEC did require SAP to disgorge its $3.7 million in profits from the affected transaction in Panama. The SEC's decision to do so is a reminder that even if companies have compliance programs in place, they can still be forced to surrender profits if those controls are too easily circumvented by employees.

The resolution of the SAP case, although not covered by the FCPA Pilot Program, is consistent with the Program in that the DOJ declination was implicitly tied to the SEC having required disgorgement. It raises the interesting question of how the FCPA Pilot Program would apply to cases in which the company failed to realize any profit as a result of corrupt payments. As a potential indication, we could compare *SAP* to the facts surrounding the 2012 *Peterson* case where the DOJ formally declined to pursue an enforcement action against Peterson's former employer Morgan Stanley—a case that many regard as a significant win for Morgan Stanley. In *Peterson*, a former Morgan Stanley employee was able to circumvent the firm's internal controls to organize a lucrative bribery scheme with Chinese officials. Peterson's and Garcia's conduct were similar and the only apparent reason that SAP faced an enforcement action was that Morgan Stanley did not profit from Peterson's scheme while SAP earned $3.7 million in revenues.

Confidentiality Clauses in Termination Agreements and Other Restrictions on Whistleblowers

The 2016 FCPA year reiterated that companies must pay careful attention to how they manage whistleblower allegations. In *AB InBev*, the SEC was highly critical of the company's use of a restrictive separation agreement to hush an FCPA whistleblower. Specifically, the

separation agreement drew the Commission's ire because it imposed strict non-disclosure terms on the whistleblower that would have prevented the individual from communicating with the SEC during the course of the Commission's investigation.

In fact, the Commission has brought at least six other actions in the past twenty months that penalized companies for impeding whistleblowers from reporting to the SEC by including certain language in confidentiality and severance agreements. In 2015, for example, the SEC brought an enforcement action against KBR, a Texas engineering company, for using improperly restrictive language in confidentiality agreements that had the potential to stifle whistleblowers. In June 2016, the SEC also filed an action against Merrill Lynch for "using language in severance agreements that operated to impede employees from voluntarily providing information to the SEC." Most recently, in December 2016, the SEC announced two enforcement actions against Neustar Inc. and SandRidge Energy, Inc. for *inter alia* allegedly employing separation agreements that prohibited former employees from cooperating with government agencies in any complaint or investigation concerning the company.

The number of recent enforcement actions involving whistleblowers over the course of the past two years reflects the SEC's vigorous monitoring of perceived corporate-sanctioned practices that could inhibit whistleblower reports to the SEC. Accordingly, companies should pay close heed to any of its practices—including provisions of employment or severance agreements—that could be perceived to impact the effectiveness of government whistleblower programs.

Slow Compliance Program Rollouts

As a final note in the Compliance Guidance section, the SEC's allegations in *Teva* indicate that the slow rollout of an FCPA compliance program can give rise to a violation of the FCPA's internal controls provision. Specifically, the SEC alleged that despite learning of the FCPA violations in 2007 and confirming the violations in 2008, Teva only rolled out an anti-corruption policy in Latin America in 2009 at the behest of Teva's Latin American Division. Further, according to the SEC, despite the anti-corruption risks presented in various other countries where the company operated, Teva did not roll out the anti-corruption policy worldwide until 2010. This all goes to show that U.S. enforcement agencies believe that companies must take immediate action to institute compliance programs across their entire operations.

Recent Trends and Patterns in FCPA Enforcement

Unusual Developments

Trump's Impact on FCPA Enforcement

The election of Donald Trump as president of the United States has raised serious questions among bloggers and commentators over the future of the FCPA. Predictions on potential FCPA enforcement policy changes have ranged from "the sky is falling" to a continuance of the status quo. The reality is likely to fall somewhere in between the two extremes, but in truth, we find it more probable that little will change under the Trump administration.

Certainly, Trump's statement on CNBC that the FCPA was a "horrible law and it should be changed" may have raised some eyebrows, but such a passing comment on a television program from 2012 (especially for a politician that is known for bluster) doesn't necessarily signal a fundamental change in FCPA enforcement in the future. In fact, the discussion on the television program and Trump's comments appear to have been primarily aimed at the use of grease or facilitation payments to secure low-level regulatory permissions, such as building permits, in the context of the Wal-Mart Mexico investigation. If the 2016 FCPA enforcement actions are any indication, facilitation payments simply aren't a priority for the enforcement agencies. Instead, the DOJ and SEC are more interested in pursuing charges against companies and individuals for far more significant bribery schemes.

Ultimately, it is impossible to predict with certainty how the Trump administration will affect FCPA enforcement policy, but, there are a few areas of interest that we will be monitoring over the course of the next four years.

Enforcement Policy Changes at the DOJ and the SEC

The president himself does not change enforcement policy by instructing prosecutors which cases to pursue and which to drop—or, at least, he's not supposed to. His appointees, however, will set priorities and influence attitudes to some degree, thus potentially shifting enforcement policies at the DOJ and SEC.

At the DOJ, the most immediate policy adjustments that we might expect from Trump's appointees would be a decision on whether to continue the FCPA Pilot Program, which is set to expire in April 2017. If Trump's appointees agree with the Pilot Program's focus on incentivizing voluntary disclosure, cooperation, and remediation in exchange for discounted sanctions, they may extend the Pilot Program beyond its present expiration date. It is even possible that Trump's appointees could expand the program to include an informal compliance defense or push for statutory incorporation of this defense. Indeed, according to a November 2015 article in the Washington Post, it appears that an even more generous version of the FCPA Pilot Program had been rejected by the current leadership of the Department, and we wonder whether the drafters of the initial version might renew their efforts if they needed the new appointees to be a more receptive audience.

At the SEC, similar policy shifts are possible (per the potential reforms to Dodd-Frank discussed below), and the departure of Chair Mary Jo White and Enforcement Director Andrew Ceresney could also result in a lack of continuity in the SEC's enforcement strategies during a Trump administration. Ceresney, who has overseen a record increase in the number of FCPA enforcement actions by the SEC since his tenure began in 2013, has been among the individuals most responsible for shaping the SEC's current application and enforcement of the FCPA. It is entirely possible that the SEC's new Enforcement Director will not pursue an FCPA enforcement as aggressively as the SEC did under Ceresney—which, in our view, isn't necessarily a bad thing given the inherent unfairness in holding issuers twice liable for alleged misconduct, with concomitantly higher penalties, than similarly situated private companies.

Reform of the Dodd-Frank Act

During the course of the presidential election season, Trump repeatedly promised to repeal (or at minimum significantly amend) the Dodd-Frank Act. While we do not yet know how Trump will approach Dodd-Frank, a repeal of the statute could impact the SEC's current FCPA enforcement strategies in a number of ways.

First, and most significantly, a repeal of Dodd-Frank would limit the ability of the SEC to use administrative proceedings in future FCPA enforcement actions. The loss of the administrative proceeding mechanism would force the SEC to pursue its FCPA enforcement actions through the federal courts. Although we doubt that this would have a significant impact on the number of corporate enforcement

actions brought by the SEC, particularly as most such actions are presented to the courts with consent orders and thus are usually not examined closely (unless the SEC has the misfortune of drawing certain inquisitive judges), the loss of administrative proceedings would almost undoubtedly make it more difficult to pursue charges against individuals willing to put the Commission to its burden.

Second, a repeal of Dodd-Frank would potentially do away with the SEC's Whistleblower Program (at least in the form that currently exists). Whether the Whistleblower Program has generated actual FCPA enforcement actions is a bit of a black box given the program's confidentiality requirements (although it has been reported that the 2015 enforcement action against BHP Billiton was the result of a whistleblower). According to the SEC's statistics, FCPA violations reported through the Whistleblower Program have made up a relatively small portion of the overall tips (approximately 4%–5% over the last three years). As a result, a loss of the SEC's Whistleblower Program, though significant for other areas of SEC enforcement, may not have that significant of an impact on the FCPA.

Chamber of Commerce Reforms

The U.S. Chamber of Commerce has been among the most vocal critics of the FCPA and has lobbied to reform the statute off and on for the past half-decade. Now, with a Republican Congress and president paired with DOJ Fraud Chief Andrew Weissmann, the author of the U.S. Chamber of Commerce's 2010 white paper "Restoring Balance," which called for dramatic changes to FCPA enforcement, there may be no better opportunity for the U.S. Chamber of Commerce to press for change.

We do not, however, want to overstate the scope of the U.S. Chamber of Commerce's influence. Certainly, while conservative politicians have criticized the law, their attention is more likely to be elsewhere during the initial phases of the Trump administration. Further, while Weissmann critiqued FCPA enforcement practices in 2010, he did so as an advocate for his client, the U.S. Chamber of Commerce. In his two years as DOJ Fraud Chief Weissmann has shown a demonstrated commitment to enforcing the FCPA while attempting to balance the need for robust enforcement against the need for transparency and efficiency.

In short, we expect to see a renewed effort by the U.S. Chamber of Commerce to alter the current enforcement environment, but what that will actually mean for the future of the statute is anybody's guess.

Biomet DPA Breach

Deferred prosecution agreements were designed as settlement devices that corporate defendants could enter into with the prosecuting authority to avoid a judgment of conviction. So long as the corporate defendant agreed to abide by the terms of the agreement, the government would defer prosecution for a specified term, at which point in time the charges would be dropped. If, however, the company failed to live up to its end of the bargain, the government always retained the authority to renew its enforcement efforts. Since the advent of FCPA DPAs, although some DPAs had been extended, no corporate defendant had been declared in breach of a DPA, until 2016, when the DOJ announced that Biomet had violated its agreement with the DOJ.

In March 2012, Biomet, Inc. entered into a three-year DPA with the DOJ to resolve an FCPA enforcement action where it agreed to pay a total sanction of $22.7 million. A little over two years after the parties resolved the charges, in July 2014, Biomet reported that it had discovered additional potential misconduct at its operations in Brazil and Mexico, causing the DOJ to initiate a new investigation. In March 2015, the month the DPA was set to expire, the DOJ stated that the DPA would be extended for another year because the company's independent compliance monitor could not certify that Biomet's compliance and ethics program satisfied the terms of the DPA and the DOJ's investigation was ongoing. Approximately a year later, in April 2016, after the DPA was extended a second time, the DOJ informed Biomet that it determined the company had breached the terms of the DPA. According to a September 2016 SEC filing, Biomet reported that it was probable that the company would incur additional liabilities as a result of the alleged FCPA violations that occurred after Biomet's 2012 DPA and most recently, on December 8, 2016, the DOJ filed a status report with the court stating that settlement negotiations were ongoing and that the government expected to resolve the matter in the coming weeks.

While the final resolution of the DPA breach remains to be seen, the experience shows that DPAs are not merely lip service to ongoing compliance. We doubt that a DPA breach would ultimately cause the DOJ to carry through on its threat of a potential indictment and prosecution, but as Biomet's 10-Q indicates, failing to carefully abide by the terms of a pre-trial settlement device could have costly ramifications.

Recent Trends and Patterns in FCPA Enforcement

DOJ Returns $1.5 Million in Forfeited Proceeds

The DOJ announced on July 7, 2016 that it had succeeded in returning $1.5 million in proceeds to Taiwan from the forfeiture of properties in New York and Virginia that had been purchased by the family of Taiwan's former president, Chen Shui-bian, with funds gained in a bribery scheme.

The DOJ obtained judgments in New York and Virginia against Shui-bian in 2012, after it determined that his wife accepted approximately $6 million in bribes from a securities firm seeking to avoid opposition by Taiwanese authorities during a merger with a financial holding company. Shui-bian and his family then transferred the money through various bank accounts, trusts, and shell companies to ultimately purchase properties in the U.S. The DOJ seized these assets and collected the proceeds from the forfeiture, but rather than depositing the money in the U.S. Treasury, it returned the funds to the Taiwanese government.

The *Shui-bian* case represents one of about two dozen civil asset forfeiture cases pursued by the DOJ's Kleptocracy Asset Recovery Initiative, which then-Attorney General Eric Holder initiated in 2010. With the goal of preventing what Kendall Day, the Chief of Asset Forfeiture and Money Laundering at the DOJ, calls "grand foreign corruption" from finding sanctuary in the U.S., the Kleptocracy Initiative pursues illegally obtained property in the U.S. and then returns the property to the countries that initially suffered the harm from the corruption.

Although now five years old, the Kleptocracy Initiative has only returned the proceeds of a bribery scheme to the origin country in one other case involving a South Korean official in 2015.[12] Thus, while the DOJ has actively promoted the initiative in past years, it may be too early to say whether the Department's efforts are beginning to bear fruit.

Limits on SEC's Pursuit of Disgorgement and Declaratory Relief: SEC v. Graham

On May 26, 2016, the Eleventh Circuit issued its opinion in *SEC v. Graham*, becoming the first circuit court to hold that disgorgement and declaratory relief sought in enforcement actions by the SEC are subject to the five-year statute of limitations for claims brought by a government agency, as per 28 U.S.C. § 2462.

In *Graham*, the SEC brought charges against several defendants for allegedly selling condominiums in violation of securities laws from 2004 to 2008. The SEC sought injunctive and declaratory relief, as well as disgorgement of profits. The district court held that the entire action was time-barred by § 2462 since more than five years had passed since the alleged violations occurred. On appeal, the Eleventh Circuit affirmed the ruling pertaining to declaratory relief and disgorgement, but reversed the holding relating to injunctive relief.

Specifically, the court in *Graham* held that disgorgement was subject to the five-year limitation on the "enforcement of any civil fine, penalty, or forfeiture" in § 2462 because disgorgement is functionally the same as forfeiture. The Eleventh Circuit reached a similar conclusion in finding that declaratory relief represents a "penalty" under § 2562, in accordance with the definition used by the Supreme Court in *Gabelli v. SEC*. The court rested its decision on the finding that declaratory relief functions mainly to punish actors for past behavior, thus representing a form of penalty.

The court reached a different conclusion regarding the injunctive relief in *Graham*, reversing the district court and finding that § 2462 does not apply to equitable remedies that are forward-looking. Unlike declaratory relief, injunctions aim to prevent future behavior and thus are not subject to the statute of limitations in § 2462. Therefore, at least in the Eleventh Circuit, the SEC now faces restrictions on its ability to claim disgorgement and declaratory judgment, leaving only less attractive injunctive relief at its disposal after the five-year limitation in § 2462 has passed; and given the strong reasoning of the opinion, we expect that it may over time be accepted law throughout federal courts and its resonance with the Supreme Court's *Gabelli* decision. The practical effect may be limited, however, as the SEC, has accelerated enforcement actions in recent years, thus limiting the advantages of *Graham* for defendants.

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[12] In an earlier matter, where the DOJ was able to freeze funds of senior Kazakh officials in Swiss bank accounts, it brokered an arrangement by which it forfeited the funds and then caused them to be deposited into a World Bank trust account for the benefit of projects in Kazakhstan.

Recent Trends and Patterns in FCPA Enforcement

Disclosure of Compliance Monitor Reports: 100Reporters LLC v. DOJ & United States v. HSBC Bank United States, NA

While the DOJ commonly requires FCPA violators to make regular monitoring reports as part of the requirements of deferred prosecution and non-prosecution agreements, those reports are generally treated as confidential. Recent developments in an ongoing case over the compliance monitor reports from the Siemens enforcement action threaten to expand the reports' readership.

In 2013, 100Reporters LLC, a nonprofit investigative news organization, filed an FOIA request for the compliance monitor reports prepared in connection with the 2008 FCPA enforcement action. The DOJ rejected the request because the DOJ claimed that the reports fell under an FOIA exemption that restricted the release of information compiled for law enforcement purposes that could reasonably be expected to interfere with proceedings. Upon receipt of the Department's rejection, 100Reporters filed a suit against the DOJ in the District Court for the District of Columbia. The case is still pending but the DOJ, now backed by Siemens and the compliance monitor, Theo Waigel, have vigorously objected to the FOIA request.

Relatedly, HSBC's monitor reports associated with its 2012 DPA relating to sanctions violations and money laundering are also at risk of public exposure through an FOIA request. In 2015, Judge John Gleeson of the Southern District of New York ordered redacted versions of the HSBC monitor reports to be made available in a case brought by an HSBC customer over a mortgage dispute. Citing the First Amendment right of public access, Gleeson stated that the monitor reports should be unsealed because the release is part of the court's judicial function in determining whether the DPA is contrary to public interest. He also analogized the monitor reports to plea agreements, statement of admitted facts by criminal defendants, and the terms of DPAs, which are all publicly accessible. Both HSBC and the DOJ appealed the order to the Second Circuit, claiming that the reports were executive documents and are therefore not subject to First Amendment claims. Further, they noted that the DPA categorized the reports as non-public and had been approved by the SDNY.

We raise these cases here because the release of compliance monitor reports could dramatically impact the use of these compliance tools in the future. This is all the more significant given the DOJ's and SEC's penchant for imposing compliance monitors as part of the 2016 FCPA enforcement actions. If compliance monitor reports were made readily available, we suspect that companies could become far more reluctant to accept compliance monitors in the future for fear that the release of those reports could have costly collateral consequences (*e.g.*, civil litigation).

Recent Trends and Patterns in FCPA Enforcement

Private Litigation

Consistent with private FCPA-related litigation in the past, 2016 has seen a number of derivative and securities lawsuits filed due to the disclosure of FCPA investigations and enforcement actions. For example, it is not surprising that shareholders have filed a civil suit against Qualcomm executives accusing them of "turn[ing] a blind eye" towards the company's financials in part due to the investigations into possible FCPA violations.

In another class-action litigation related to the ongoing corruption investigation into Petrobras, Judge Rakoff of the Southern District of New York certified two classes of plaintiffs. The plaintiffs filed suit in 2014, claiming that Petrobras's financial statements included misstatements for failure to disclose information to investors. The class certification, currently subject of a pending interlocutory appeal, means that the ongoing Petrobras securities case has the potential to inflict even more harm on the now-beleaguered Brazilian oil giant.

One new development in private litigation arising in 2016 is the decision by civil engineering firm Louis Berger to sue former executives following the company's settlement with the DOJ in July 2015. The former executives, Richard J. Hirsch and James McClung, pleaded guilty to criminal violations of the FCPA in connection with Louis Berger's 2015 FCPA enforcement action, which resulted in a $17.1 million criminal penalty for the company. Louis Berger's case against Hirsch, filed in New Jersey state court in June 2016, sought to recover damages for this fine and other costs incurred by the company, as well as for the reputational harm suffered as the result of the defendant's "admittedly criminal misconduct that took place in connection with his management and oversight of LBG projects . . . in direct violation of company policies and procedures, and of his fiduciary duties to Berger." Louis Berger and Hirsch settled the case in August 2016 on terms that were not publicly disclosed; the case against Hirsch's co-defendant James McClung is ongoing (and includes allegations that McClung embezzled funds from the company by setting up third-party consulting companies that submitted false or inflated charges to Louis Berger for worker placement, rent, and construction).

Such cases against specific former employees have not been prevalent in past FCPA cases. With the recent shift in focus toward individual accountability asserted by the Yates Memo and the DOJ's FCPA Pilot Program, however, we may see an increase in the percentage of corporate enforcement actions that involve separate actions against individual employees. If this occurs, companies may be keen to recoup some of the penalties paid to enforcement authorities through civil suits against former employees, particularly if the *Louis Berger* case demonstrates that courts are amenable to this type of action.

Enforcement in the United Kingdom

U.K. Government Creating New "Failure to Prevent" Offences

The U.K. Bribery Act broke new ground by expanding corporate liability beyond the traditional "directing mind" model and establishing strict corporate criminal liability for the wrongful acts of an "associated person," albeit subject to an affirmative compliance defense. This new model, although so far only modestly used in corruption cases, appears to have won supporters in the U.K. government who intend to expand it beyond the corruption context. Following a public consultation in the early part of this year, in October 2016, the U.K. Government presented its Criminal Finances Bill to Parliament. The Bill introduces two new criminal offences for a body corporate or partnership (referred to in the Bill as a "relevant body"), wherever incorporated or formed: (i) of failure to prevent the facilitation of U.K. tax evasion offences ("U.K. Offence"); and (ii) of failure to prevent the facilitation of foreign tax evasion offences ("Foreign Offence") by a person with whom the relevant body is associated, provided that the person commits the facilitation of tax evasion offence in their capacity as the relevant body's associated person. Notably, in May 2016, the U.K. Government also announced that it was considering additional offences of failure to prevent other economic crimes, such as fraud, false accounting, and money laundering.

The Bill is expected to pass through the House of Commons (the lower chamber) in Q1 2017 before being introduced in the House of Lords (the upper chamber). We do not expect it to come into force before Q3 2017 at the earliest.

On September 5, 2016, in a speech to the Cambridge International Symposium on Economic Crime, the U.K. Attorney General stated that the government would be consulting on those plans and commented that the U.K.'s "current system of limited corporate liability incentivizes a company's board to distance itself from the company's operations. In this way, it operates in precisely the opposite way to the Bribery Act 2010, one of whose underlying policy rationales was to secure a change in corporate culture by ensuring boards set an appropriate tone from the top."

The Attorney General concluded his remarks, stating that when "considering the question 'where does the buck stop?' and 'who is responsible for economic crime', it is clear that the answer is to be found at every level, from the boardroom down. Both corporates and individuals are responsible."

This has led to some speculation that the government intends to make individual directors and officers personally liable for the acts of company employees, agents, subsidiaries, contractors, and other representatives. However, we consider that this is unlikely and that, as with the new offence of failure to prevent the facilitation of tax evasion, these proposed additional offences will also be modelled on section 7 of the U.K. Bribery Act 2010 and will focus on corporate liability only.

The government has yet to announce any details of or a timetable for the consultation.

SFO Update – Second UK DPA Approved

On July 8, 2016, the English High Court approved the U.K.'s second DPA between the Serious Fraud Office and a U.K. company ("XYZ Ltd"), which has not been named due to ongoing and related criminal proceedings.[13]

According to the DPA, a substantial proportion of the company's employees and agents, for a period of nearly ten years, engaged in the systematic use of bribes to obtain contracts to supply XYZ's products. XYZ was allegedly paid £17.24 million under those contracts. XYZ's total gross profit from the implicated contracts was £6,553,085, representing 20.82% of its total gross profit in the period (£31.4 million).

XYZ was faced with charges of conspiracy to corrupt and conspiracy to bribe under section 1 of the U.K. Criminal Law Act 1977, together with the corporate strict liability offence of failure to prevent bribery under section 7 of the U.K. Bribery Act 2010.

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[13] For a further discussion of this case, and the Court's reasoning for approving the DPA, you may wish to refer to our prior client publication, available at Shearman & Sterling, *UK Serious Fraud Office Secures Its Second DPA* (July 13, 2016).

The matter apparently came to light in August 2012, shortly after XYZ's parent company implemented a global compliance program. XYZ took immediate action, retaining external legal counsel to undertake an investigation. Following an initial oral and anonymous approach to the SFO in October 2012, XYZ formally and fully self-reported on January 31, 2013, and the SFO subsequently commenced its own investigation into XYZ's activities.

Under the terms of the DPA—which will expire on December 31, 2020—XYZ is required to pay £6,201,085 in disgorgement of gross profits, together with a financial penalty of £352,000.[14] In respect of the financial penalty, the parties initially had submitted that XYZ's gross profit from the implicated contracts be subject to a harm multiplier figure of 250% (*i.e.,* £16.38 million), in accordance with U.K. Sentencing Guidelines where the culpability level of the harm (*i.e.*, the gross profit) is high.[15] However, the Court considered that, under the circumstances, a 50% discount (reducing the figure to £8.19 million) was appropriate given XYZ's: (1) "genuinely proactive approach to the wrongdoing it uncovered" and early admission of guilt and (2) production of the oral summaries of witness interviews, its facilitation of further witness interviews, and its prompt and complete responses to the SFO's requests for information and documentation which, taken together, the Court considered was consistent with "full and genuine cooperation." The Court also considered that the 50% discount was appropriate as it would "encourage others to conduct themselves as XYZ has when confronting criminality."

The Court further considered that a financial penalty of £8.19 million was "wholly unrealistic" for XYZ, given its precarious financial position, and that it was "essential to consider all the circumstances," which included (although the Court did not specify any other considerations) the conclusion that it was not in the interests of justice for XYZ to be "pursued into insolvency" and that, accordingly, "XYZ's means and the impact of any financial penalty on XYZ's staff, service users, customers and the local economy are all significant factors."

The SFO accepted that a financial penalty of £352,000 was a reasonable estimate of the sum available to XYZ. The Court noted that a financial penalty, together with the disgorgement of £6,201,085, equated to the gross profit on the implicated contracts and that this overall sum (£6,553,085) "sufficiently marks the offending and is itself fair, reasonable and proportionate."

The initial 50% discount, and subsequent additional reduction, represent a significant departure from the U.K. Sentencing Guidelines (which provide for a one-third maximum discount on the financial penalty, once the harm multiplier has been applied) for section 7 Bribery Act offences and provide an interesting indication for future DPAs.

SFO Admits One-Third Discounts on DPA Penalties Insufficient to Incentivize Self-Reporting and Offers Practical Guidance on DPAs

Following the XYZ DPA, the SFO has further signaled its openness to penalty discounts which exceed the one-third limit set by the U.K. Sentencing Guidelines for companies that self-report.

Giving the keynote speech at GIR Live New York on September 15, 2016, the SFO's Joint Head of Bribery and Corruption conceded that the one-third penalty discount is insufficient to adequately incentivize companies to self-report. It "has long been said that the one third discount on a penalty, being equivalent to the maximum available on a guilty plea, is not sufficiently attractive. As it happens, at the SFO we can see the force in that argument. It is clear . . . that in the right circumstances the [English] court will support a deeper discount up to 50% [as it did in the XYZ DPA], and separately, might take into account other relevant financial matters. If taken together with the other benefits of a DPA, these have the effect of more companies coming forward, then that can only be a good thing in the overall interests of justice. [The SFO] fully support[s] it and in the right cases would look to build overall resolutions that include more than one third discounts on the financial penalty component."

Discussing recent developments in corporate culture and companies' relationships with the SFO, Morgan noted that there has been a "pronounced" change "in the way companies are routinely approaching" the SFO, and that more companies are self-reporting to the SFO

[14] The published redacted preliminary and final judgments can be found at(*SFO v XYZ Ltd (Preliminary Redacted Judgment)* and *SFO v XYZ Ltd (Final Redacted Judgment)*.

[15] The U.K. Sentencing Guidelines provide that the multiplier figure in respect high level culpability should be between 250% and 400%.

"now than at any time in the last four years." Nevertheless, whistle-blowers continue to represent the SFO's primary source of information.

Morgan commented further on the circumstances in which the SFO will seek the English Court's approval to grant a DPA in place of a prosecution. In an address to the Annual Bar and Young Bar Conference in London on October 17, 2016, Morgan noted that the key factor for the SFO in determining how it will look to resolve a case "is the stance the company takes once it becomes aware of the issue" and whether the company and its advisers are "properly cooperating" with the SFO. Morgan explained that indicators of 'proper cooperation' include: (1) the point at which the company approached the SFO; (2) what work the company has already taken to investigate the matter; (3) what approach the company is intending to take to provide the SFO with access to the factual elements of that work; (4) how the company has handled data identification, collection, preservation and continuity, as well as the provision of such data to the SFO; and (5) the extent to which the company is willing to respond to the SFO's interests in work that remains to be done in the investigation, such as sequencing interviews with the SFO, drawing relevant material to the SFO's attention whether or not the SFO has requested such material, and allowing the SFO to do its "job fairly, without seeking to exert pressure through the media, [the U.K. government or Civil Service] or other means."

Morgan stressed that a DPA "must be a punishment. It cannot be a cosy deal . . . It also needs to incentivise others to [self-report and cooperate]. It must be lenient enough to reward the company for having the courage and integrity to self-report a crime and to cooperate with the SFO's investigation into it." Getting this balance right is, as Morgan conceded, "extremely difficult."

SFO – Continuing Uncertainty Over Approach to Internal Investigations

In a September 2016 discussion with Patrick Stokes, the former head of the DOJ's FCPA unit, at GIR Live New York, Morgan commented that since the Bribery Act came into force in July 2011 "essentially [the U.K. is] now aligned with what's going on in the States. Add to that [DPAs] and further legislation coming into place in the U.K., we start to come even closer together."

When asked by Stokes whether the SFO had any intention of following the DOJ's approach and would publish guidance about co-operation, self-disclosure and how that may impact upon the SFO's approach to resolving an investigation or prosecution, Morgan responded that the SFO had no such plans, but that "substantively there isn't even a cigarette paper between [the DOJ's and the SFO's respective approaches]."

However, in our view, the SFO has been taking a somewhat different approach in its public position on the application of privilege in such investigations, in particular to the recording of witness interviews conducted by counsel. The SFO's stated position remains that it has "no interest in communications between client and lawyer on questions of liability or rights," but that it will: (1) treat companies that make "false or exaggerated claims of privilege" as being uncooperative; and (2) "view as a significant mark of co-operation a company's decision to structure its [internal] investigation in such a way as not to attract privilege claims over interviews of witnesses."

This might reasonably be said to indicate a divergence. In a December 2016 judgment, the High Court held that notes and summaries prepared by counsel of employee and ex-employee witness interviews do not attract legal advice privilege on the basis that the privilege does not "extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer." The Court also held that lawyers' working papers privilege will not apply to interview notes or summaries unless such notes or summaries reveal "from an evident process of selection the trend of legal advice being given," the privilege will not apply to notes or summaries merely because they reflect the lawyer's mental impressions of the interview.

We would expect the ruling to be appealed. Nevertheless, this case, together with the SFO's stated public approach, raises the question as to the types of notes which lawyers ought to make in interviews, and whether such notes should incorporate the lawyers' advice as well.

That said, it appears that in both the Standard Bank and the XYZ DPA cases, oral summaries of witness interviews—as opposed to, for example, transcripts—were provided to the SFO, and experience indicates that the SFO may not rigidly insist on such records being provided.

Recent Trends and Patterns in FCPA Enforcement

Most recently, the SFO has served a notice under section 2 of the U.K. Criminal Justice Act 1987 on a lawyer representing the subject of one of its investigations, compelling the lawyer in question to provide the SFO with information and documentation in respect of that investigation. This followed the lawyer filing a claim in the English High Court for a judicial review of the SFO's conduct against his client. Limited details of the request are available but the exercise of the section 2 power against a lawyer in this context is in itself of note.

SFO – Former Sweett Group Executive Convicted for Destroying Evidence

A former executive of Sweett Group PLC has been convicted of two destruction of evidence offences, contrary to section 2(16) of the UK Criminal Justice Act 1987. On December 21, 2016, Richard Kingston, previously a Managing Director of Sweett's Middle East and India operations, was found guilty of concealing, destroying or otherwise disposing of two mobile phones, knowing or suspecting that the data stored on those phones—namely emails, text and Whatsapp messages—was pertinent to the SFO's investigation into suspected bribes paid by Sweett. Kingston has been sentenced to 12 months' imprisonment on each count, to run concurrently.

The SFO's General Counsel, Alun Milford, said that Kingston "actively took steps to frustrate our inquiries into his involvement, and that of others, in the suspected payment of bribes. We will not hesitate to pursue those who may set out similarly to disrupt our investigations."

The SFO's prosecution and successful conviction of Kingston highlights its commitment to investigate and pursue not just those who engage in bribery and corruption, but also those who facilitate, fail to prevent or otherwise seek to conceal evidence of such conduct.

Recent Trends and Patterns in FCPA Enforcement

Conclusion

With the 2016 FCPA enforcement year now over and 2017 to come, it is anyone's guess what lies in store for the future of the FCPA. Though the DOJ's, SEC's and FBI's increased prosecutorial and investigatory resources are finally starting to have an impact on FCPA enforcement, we will have to see whether the incoming presidential administration attempts to pull back from the current record levels of enforcement. That said, as global anti-bribery efforts gain momentum across the world and enforcement agencies across jurisdictions continue to interface, in our opinion, it would appear that other jurisdictions, particularly as they realize the benefits from the substantial fines, may, in the future, become as active as the U.S. has been.

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