

FCPA Digest

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

JULY 2016



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Recent Trends and Patterns in FCPA Enforcement

We are now halfway into 2016. After a few relatively slow years, it appears that 2016 may reflect a return to more active FCPA enforcement as, in the last six months, the two U.S. enforcement agencies, the DOJ and the SEC, have collectively brought as many cases as they did in the entire year of 2015 and more than in the two preceding years. What is interesting, however, is that, although some of the cases involved household corporate names, the penalties were relatively low—with the exception of the *VimpelCom* case—and the patterns of corruption, albeit with some exceptions, fairly mundane. More controversial have been some of the policy changes announced by the DOJ, placing a premium on voluntary disclosure and cooperation, including overtly and mandatorily “throwing employees under the bus” in exchange for allegedly deeper discounts on penalties and other forms of leniency. Finally, the government continues to explore different types of settlements, at least in form—although the basic elements remain blurry and overlapping—raising the age-old question of whether a rose is indeed a rose by any other name.

Among the highlights thus far from 2016 were:

- Twelve corporate enforcement actions with total sanctions of \$920.8 million, due in large part to the sanctions levied against *VimpelCom*, already makes 2016 the third highest year in corporate FCPA sanctions on record;
- The *VimpelCom* penalty, however, greatly distorts the picture, raising the average corporate sanction for 2016 to \$76.7 million, whereas the true average, with outliers excluded, is just \$12.5 million—comparable to the 2015 average sanction (excluding outliers) of \$11.8 million;
- The cases of *Qualcomm* and *VimpelCom* reflect new expansions of the scope of the term “anything of value” in FCPA bribery cases; and
- The DOJ announced the FCPA Pilot Program in an effort purportedly intended to increase transparency and efficiency in the DOJ’s FCPA enforcement practices, although its practical benefits may be somewhat illusory.

Enforcement Actions and Strategies

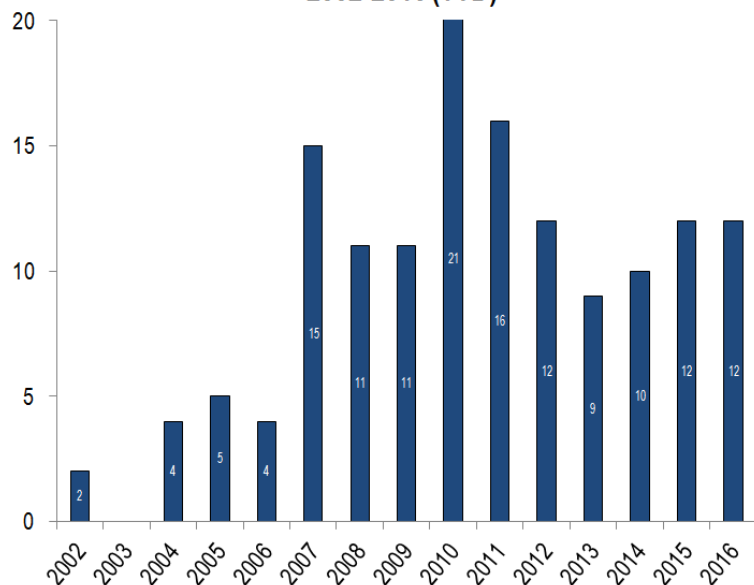
Statistics

Thus far in 2016, the DOJ and SEC have resolved twelve FCPA corporate enforcement actions: *SAP*, *SciClone*, *PTC*, *VimpelCom*, *Qualcomm*, *Olympus*, *Nordion*, *Novartis*, *Las Vegas Sands*, *Nortek*, *Akamai*, and *Analogic*.

Much like 2015, the SEC has been far more active than the DOJ, bringing charges in eleven of the twelve enforcement actions, while the DOJ brought parallel cases in three of those matters (*VimpelCom*, *PTC*, and *Analogic*) and a single standalone action in the twelfth case (against *Olympus*).

Of the FCPA enforcement actions against individuals, 2016 has seen eight new cases by the DOJ and SEC (*Cueto*, *Yuan*, *Gourevitch*, *Frost*, *Millan*, *Ramos*, *Maldonado*, and *Gravina*). It is worth noting, however, that only four—each raised by the SEC—are truly new (*Cueto*, *Yuan*, *Gourevitch*, and *Frost*). The remaining four DOJ cases (*Millan*, *Ramos*, *Maldonado*, and *Gravina*) are outgrowths of the 2015 cases of *Rincon* and *Shiera*.

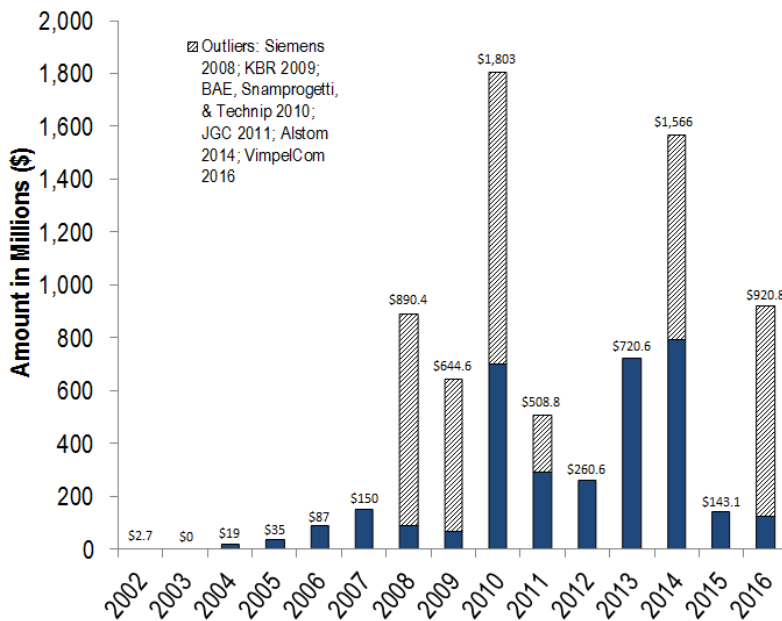
Total Aggregate Corporate Cases:
2002-2016 (YTD)



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

Total Criminal and Civil Fines Imposed on Corporations: 2002-2016 (YTD)



Of the 2016 corporate enforcement actions, the most significant, by far and away, is *VimpelCom*. In that case, the DOJ, SEC, and Dutch prosecutor's office alleged that VimpelCom, through its Uzbek subsidiary, Unitel, engaged in a decade-long bribery scheme which netted the company hundreds of millions of dollars in profits. In February 2016, after a lengthy investigation, the enforcement agencies announced that VimpelCom had agreed to pay a total sanction of \$795 million, divided between a \$230.1 million criminal penalty for the DOJ, \$167.5 million in disgorgement for the SEC, and \$397.5 million for the Dutch prosecutor's office. In addition, the DOJ filed a \$500 million civil forfeiture action against the Swiss bank account of the foreign official involved in the scheme. This civil forfeiture suit, combined with a separate \$300 million forfeiture action filed in 2015 that related to the same official's accounts, highlight the DOJ's ongoing interest in advancing its Kleptocracy Asset Recovery Initiative.

In addition to *VimpelCom*, a large number of cases have involved the improper use of gifts, travel, and entertainment to allegedly curry favor with foreign officials (*SciClone*, *PTC*, *Olympus*, *Novartis*, *Nortek*, and *Akama*). Each of these cases essentially involves the same fact pattern—a company allegedly offered or provided valuable gifts, travel, and entertainment, which served no legitimate business purpose, to acquire some form of business advantage.

Of the remaining enforcement actions:

- *SAP* stems from the conduct described in the 2015 enforcement action against Vicente Garcia, whereby Garcia allegedly bribed Panamanian officials through a third-party partner to win lucrative sales contracts. Significantly, although Garcia received a twenty-two month prison sentence for his conduct, the SEC did not bring substantive bribery charges or seek a penalty against SAP. It pursued SAP in this matter solely based on control violations and sought only disgorgement; the DOJ declined to prosecute SAP altogether.¹
- In *Qualcomm*, much like the 2015 case *Bank of New York Mellon*, the Commission accused Qualcomm of violating the FCPA by improperly offering job positions within the company to curry favor with Chinese officials. In addition, the SEC alleged that Qualcomm (much like in *SciClone*, *PTC*, *Olympus*, *Novartis*, *Nortek*, and *Akama*) offered improper gifts, travel, and entertainment to foreign officials and their family members in exchange for the foreign officials' willingness to purchase Qualcomm products.
- 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.
- In *Las Vegas Sands*, the SEC alleged that the Las Vegas-based casino and resort company violated the FCPA's books-and-records and internal controls provisions by making improper payments aimed at promoting the company's casinos in Macau within mainland China.

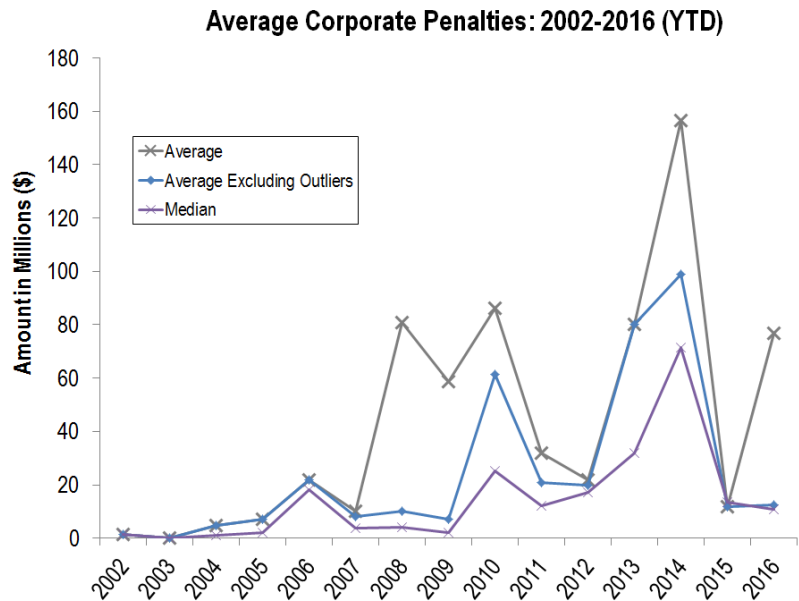
¹ Shearman & Sterling LLP represented SAP in the resolution of this matter with the SEC and DOJ.

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- 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.

Although 2016 has seen an uptick in the number of FCPA enforcement actions, the vast majority of those cases have resulted in relatively small corporate penalties. The sole reason the total corporate sanctions figure for 2016 is so high is because of *VimpelCom*—accounting for 86% of the total 2016 corporate penalties.

Setting aside *VimpelCom*, corporate sanctions have been relatively modest—ranging from \$322,058 in *Nortek* to \$28.2 million in *PTC*. As a result, while the pure average corporate penalty from 2016 thus far is \$76.7 million, when we exclude the outliers, the average corporate penalty is \$12.5 million. Notably, this is very similar to the average corporate penalties from 2015 (\$11.8 million) which, as we noted in our past *Trends & Patterns*, was among the lowest average corporate penalties in recent history. Moreover, the median 2016 corporate penalty is \$10.9 million, lower than even the 2015 median corporate penalty of \$13.4 million.

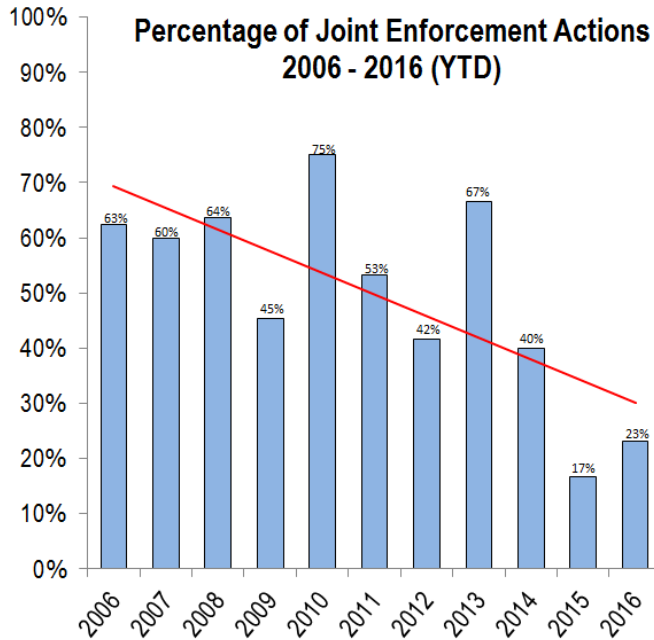


These statistics are not meant as a criticism of the government's efforts to enforce the FCPA. To the contrary, it confirms that the level of penalty is generally commensurate with the benefits obtained, although obviously affected by discounts related to voluntary disclosure and cooperation. In other words, the more you gain, the more you lose, with the presumable overall goal of depriving companies of their illicit gains and then some. Thus, although there are certainly companies that benefited greatly from endemic corrupt practices, the relatively consistent average penalty in the \$10 million to \$20 million range reflects that in most cases the corrupt conduct is limited and isolated, and, while occasionally profitable, is usually not the sole basis of a company's business model.

After several years, we have also been able to discern a pattern in the charging decisions between the SEC and DOJ. As we have noted in past *Trends & Patterns*, some of these decisions are likely related to jurisdiction (the SEC has broader jurisdiction over issuers through the filing of periodic reports) and evidence (the SEC has a lower burden of proof). However, it also appears that the DOJ may be husbanding its resources to focus on the most significant bribery investigations (*VimpelCom*) in favor of allowing the SEC to take the lead in other low value enforcement actions. Of the eight companies that were the subject of a standalone SEC action this year, six received a declination decision from the DOJ (*SAP*, *SciClone*, *Qualcomm*, *Nortek*, *Akamai*, and *Nordion*). We suspect that of the remaining companies that were subject to an SEC standalone FCPA enforcement action (*Las Vegas Sands* and *Novartis*), the DOJ declination has either not been publicly announced, will be provided in the near future, or the DOJ was never involved in the first place.

We don't want to overstate this trend. It is extremely hard for prosecutors to turn down cases and indeed, it is their job to do so. Where there is actual and admissible evidence of willfully corrupt conduct by a corporation, the DOJ will likely act. On the other hand, the cases from the last several years appear to reflect a tendency by the DOJ to defer to the SEC for reasons that are not always obvious. Although this apparent trend may reflect case-specific jurisdictional and evidentiary concerns, it may also reflect a sense, in certain instances, that a civil case which includes disgorgement is the appropriate resolution and that a criminal prosecution, particularly in the absence of a realistic opportunity to bring criminal charges against individuals, would not be. On the other hand, the next six months may prove that this hope is overly optimistic.

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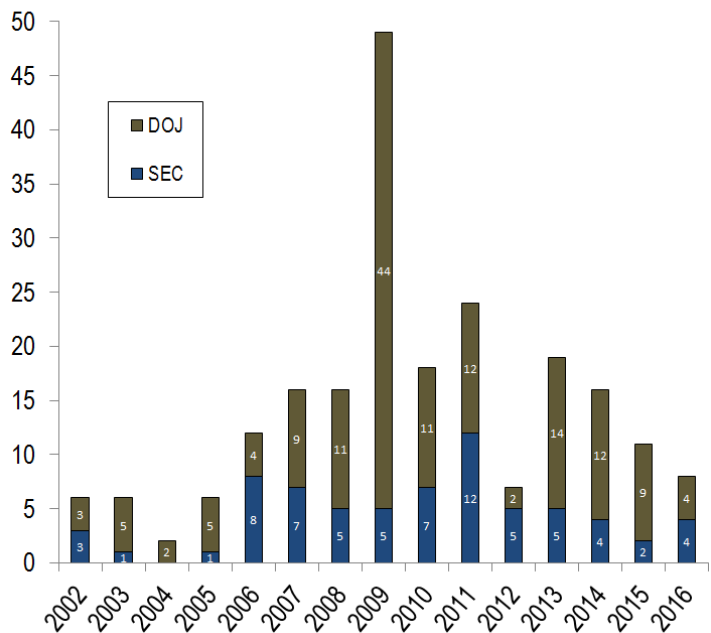
The 2016 FCPA enforcement actions against individuals have been a combination of new and old. Of the eight individual enforcement actions, the SEC has been responsible for four. In *Cueto*, LAN Airlines' current CEO paid a \$75,000 civil penalty after he was accused of violating the FCPA's book-and-records and internal controls provisions for engaging the services of a local Argentine consultant allegedly to bribe Argentine union officials. 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 (as, indeed, was the case with all of the SEC resolutions), agreed to pay a \$20,000 civil penalty. 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. In *Yuan*, the SEC accused the former PTC sales executive of facilitating

the improper use of gifts, travel, and entertainment to obtain sales contracts for PTC. Interestingly, the SEC agreed to settle its case against Yu Kai Yuan without requiring him to pay any form of monetary penalty.

In the cases of *Millan*, *Ramos*, *Maldonado*, and *Gravina*, the DOJ announced multiple charges, brought in 2015 but only unsealed in 2016, stemming from the PDVSA bribery investigation that already netted Abraham Jose Shiera Bastidas and Roberto Enrique Rincon Fernandez the previous year. Milan, a former employee of Shiera, pleaded guilty in January 2016 and admitted to having assisted in the bribery scheme. The other three individuals, Ramos, Maldonado, and Gravina, were all former PDVSA employees and thus not directly subject to the FCPA. Instead, the government charged each of them with conspiracy to commit money laundering (and, in the case of Gravina, also tax fraud). Each former government official pleaded guilty to the charges in December 2015.²

While the individual enforcement action numbers appear to be keeping pace with 2015, the lack of any new individual enforcement actions by the DOJ is curious. This is particularly true in light of the 2015 announcement of the Yates Memo, which set out a new policy framework that requires companies to provide the names of individuals responsible for the alleged corrupt schemes in exchange for cooperation credit.

Individuals Charged: 2002-2016 (YTD)



² Although Ramos, Maldonado, and Gravina were charged and pleaded guilty in 2015, we include these cases in our 2016 statistics because they were unsealed in 2016.

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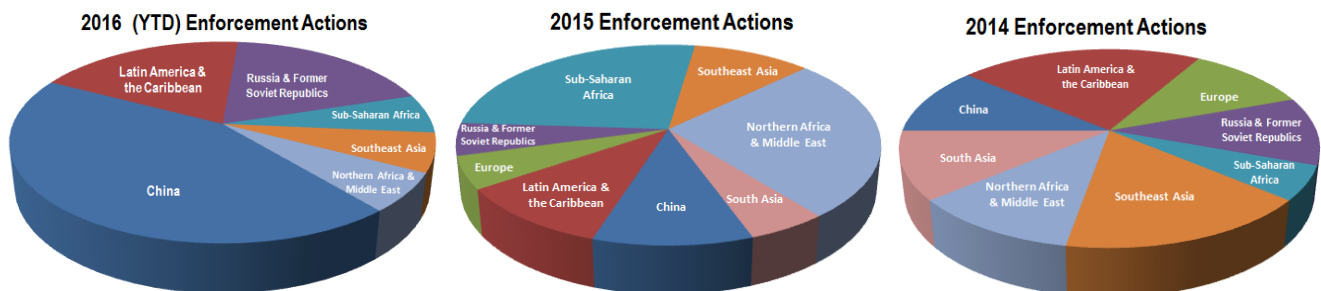
Indeed, while the focus on individual liability in the Yates Memo is understandable, the government has repeatedly encountered difficulties in convicting senior executives in FCPA cases—as opposed to lower-level operations or sales employees—even when the corporation has been fully cooperative and even admitted to the illegal activity. A recent example involving domestic conduct that is similar to the FCPA cases concerning the bribery of doctors and other healthcare professions (*e.g.*, *SciClone*, *PTC*, *Olympus*, and *Novartis*) involved an executive of Warner Chilcott, W. Carl Reichel. In that case, the former pharmaceutical company president was charged with allegedly conspiring to pay kickbacks to doctors in the United States in exchange for their agreement to prescribe the company’s drugs in violation of the anti-kickback statute. Following a jury trial in 2016, however, the jury acquitted him, even after the company agreed to plead guilty to healthcare fraud for the very same allegations—paying a \$125 million sanction—and several of his subordinates pleaded guilty and testified against him. While it remains relatively easy for the DOJ to secure plea agreements from junior executives and employees, the *Reichel* case is another example of how difficult it has become for federal prosecutors to secure convictions of high ranking executives who may be insulated from the specific transactions at issue, leaving the government often to have to argue that the senior executives set the tone that permitted corrupt conduct below (a theory better suited to control person civil liability under securities laws than to criminal culpability). Notably, the SEC, with its lower burden of proof, no jail time, and willingness to permit settlement without admissions, has experienced a better success rate and in 2016, the SEC successfully brought enforcement actions against two C-suite executives (*Cueto* and *Frost*).

Geography & Industries

In past *Trends & Patterns*, we have not always focused on the geographic and industry makeup of the year’s FCPA enforcement actions. However, the trend thus far in 2016 is striking. Unlike past years, where enforcement actions have involved a relatively diverse group of countries and industries, thus far, 2016 can be defined in large part by one country and one industry: China and healthcare.

Of the total thirteen enforcement actions (corporate and individual combined), seven involved alleged acts of bribery in China (*SciClone*, *PTC/Yuan*, *Qualcomm*, *Novartis*, *Las Vegas Sands*, *Nortek*, and *Akamai*). Certainly, while China has featured prominently in past FCPA enforcement years, never have we seen corruption cases involving China make up such a large percentage of FCPA cases 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-Meyers* 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-Meyers*, 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*, and *Akamai*). Enforcement agencies’, specifically the SEC’s, focus on China and the use of gifts, travel, and entertainment highlights the degree of scrutiny the SEC is placing on business activities in China—a fact that probably should come as little surprise.

Of the remaining six enforcement actions: three have involved the bribery of foreign officials in Latin America (*SAP*, *Cueto*, and *Olympus*); two involved the bribery of officials in Russia and the former Soviet republics (*Nordion/Gourtevitich* and *VimpelCom*); and one (*Analogic*) covered improper payments in a series of countries including Russia, Ghana, Israel, Kazakhstan, Ukraine, and Vietnam. The charts below detail the geographic breakdown of the FCPA enforcement actions (corporate and individual) from 2016, 2015, and 2014.



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In terms of industries, the DOJ's and SEC's focus has clearly been on healthcare, with technology companies coming in second. Of the thirteen enforcement actions (combined), six have involved the healthcare industry (*SciClone*, *PTC/Yuan*, *Nordion/Gourtevitich*, *Novartis*, *Olympus*, and *Analogic*) and four involved technology companies (*SAP*, *Qualcomm*, *Akamai*, and *Nortek*). This focus reflects an ongoing trend. In each year 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*. Moreover, with several investigations into various other pharmaceutical and medical technology companies still ongoing, we expect this pattern to continue into the foreseeable future.

Types of Settlements

For the most part, the agencies have continued prior practices of resolving matters using a variety of settlement structures, with the choice of structure apparently related—but not always in a clear or consistent manner—to the seriousness of the conduct or the timing and degree of disclosure and cooperation. For its part, the SEC has continued to rely on administrative proceedings to resolve its FCPA enforcement actions, using the mechanism to settle eight of its eleven corporate enforcement actions (*SAP*, *SciClone*, *PTC*, *Qualcomm*, *Nordion*, *Novartis*, *Las Vegas Sands*, and *Analogic*) and three of its four individual enforcement actions (*Cueto*, *Gourtevitich*, and *Frost*). The SEC's continued use of administrative proceedings comes in the face of several ongoing court challenges to the practice's constitutionality in *Tilton v. SEC*, *Spring Hill Capital Partners v. SEC*, and *Hill v. SEC*.

In other cases, however, the SEC has begun experimenting with settlements denominated as “deferred prosecution agreements” or “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. As we have noted in past *Trends & Patterns*, it is not clear 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.

In the case of *Yuan*, the SEC, for the first time, entered into a DPA with an individual. Though not earthshattering, the SEC's decision to utilize a DPA 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*. Instead, it apparently decided to use a DPA to reward *Yuan* for his cooperation in the investigation. The use of a DPA coupled with the fact that the SEC settled its case without leveling any monetary penalties on *Yuan* may represent a new approach by the SEC to give low-level employees incentives to cooperate with authorities.

The DOJ used a range of settlement devices in each of its four enforcement actions (*VimpelCom*-DPA/Plea Agreement; *Olympus*-DPA; *PTC*-NPA; *BK Medical ApS (Analogic)*-NPA). Much like the SEC, the DOJ's decision to use a particular settlement device depends on the severity of the underlying conduct, however, there are two noteworthy points regarding the DOJ's types of settlement for the 2016 FCPA enforcement year thus far.

First, the DOJ continued its past practice of requiring the subsidiary, at which most of the relevant misconduct took place, to enter a guilty plea, as it did in the *VimpelCom* case with *Unitel*. Its decision in this case is, however, somewhat surprising given the allegations that several high-ranking *VimpelCom* executives were aware that the company's entry into the Uzbek telecommunications market required it to make improper payments to a foreign official. In past instances where the DOJ concluded that the parent company's conduct was reprehensible enough, it pursued plea agreements—as was the case in *Alstom*. In many cases, however, the DOJ has avoided charging a global company to avoid collateral consequences for the company as a whole, e.g., debarment in the United States and European Union, resulting from criminal charges of bribery, and this appears to have been the approach here, although, perhaps reflecting the more significant involvement of the parent in the corrupt conduct, it did require *VimpelCom* to enter into a DPA with penalties and monitoring obligations, similar to the approach it followed in 2014 with *Avon*. Although *VimpelCom* likely falls somewhere between *Avon* and *Alstom* in terms of the severity of the conduct at the parent level, it remains difficult to precisely draw the line between when the DOJ will offer a DPA as opposed to a plea agreement in similar cases.

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Second, in June 2016, the DOJ publically announced two declination decisions against Akamai and Nortek in connection with the FCPA Pilot Program. Although discussed in greater detail below, the FCPA Pilot Program is a recently developed policy by the DOJ to create incentives for companies to self-report and cooperate with the DOJ's investigation. Although the SEC ultimately brought relatively minor civil actions against Akamai and Nortek, the companies appear to have met the DOJ's requirements for the FCPA Pilot Program and received declinations that were publically announced by the Department in June 2016. Although some parts of the business community and the FCPA blogosphere have urged the Department to be more transparent about its declination decisions, there was no indication within the DOJ's FCPA Pilot Program that declinations stemming from the policy would be announced publicly, and, therefore, the public declinations in *Nortek* and *Akamai* were unexpected. Indeed, although the companies were presumably happy to have escaped without the Department making specific allegations of wrongdoing in detailed statements of facts, to which the companies would have been required to admit as they would have done in resolutions involving pleas, DPAs, or NPAs, these declinations were also surprising in that the Department explicitly stated that it was declining *despite the companies having engaged in illegal conduct*. In other words, having done everything required of them by the FCPA Pilot Program, they were still publicly accused of wrongdoing as part of the resolution, thereby still taking a reputational hit to some degree.

Elements of Settlements

Sentencing Guidelines. In *VimpelCom* and *Olympus*, the DOJ awarded the two defendants a discounted sanction below the base fine recommended by the Sentencing Guidelines. These discounts are somewhat noteworthy because they were awarded even though neither company voluntarily disclosed the improper conduct to enforcement agencies. The last instance a company received a sanction within the Sentencing Guidelines range were the 2014 cases of *Alstom* and *Marubeni*, where neither company initially cooperated with authorities. This would suggest that the only way a company will not receive a discount is if it refuses to cooperate altogether with the DOJ's and SEC's investigations.

Monitors. In February 2016, Andrew Weissmann, Chief of the DOJ's Fraud Section, stated that the DOJ would review its approach to the use of monitors. That renewed focus likely resulted in the installation of three monitors in the cases of *VimpelCom*, *Olympus*, and *Las Vegas Sands*. The monitorships in the cases of *VimpelCom* and *Olympus* were set to last for three years while the monitorship in *Las Vegas Sands* would be in place for two years. Weissmann's comments coupled with *VimpelCom*, *Olympus*, and *Las Vegas Sands* suggests that companies might expect to see monitors used more frequently in the future.

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 Chinaea, 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, Chinaea, 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, presently scheduled for September 30, 2016. 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. Rincon's sentencing is also currently scheduled for September 30, 2016.

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Harder. In late 2015, Dimtrij Harder, the former owner and president of Chestnut Consulting Group Inc. charged with bribing a European Bank for Reconstruction and Development (“EBRD”) official, 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 on July 21, 2016.

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.

SBM Offshore. In February 2016, SBM Offshore announced that the DOJ had re-opened 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 re-open its investigation into the company.

Biomet. 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. Finally, 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. The reasons for the breach and the consequences thereof are not yet known, however, the DOJ is scheduled to file a status report in the case in September 2016. Breaches of DPAs are extremely uncommon—even more so in the FCPA context—and it will be important to understand how the DOJ approaches this case to achieve the appropriate deterrent effect.

Alstom. In May 2016, a jury in the Bahamas convicted Fred Ramsey, the 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.

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 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).

Och-Ziff. In May 2016, Och-Ziff Capital Management Group LLC announced that it has reserved \$200 million for a potential future settlement over possible FCPA violations arising out of the hedge fund’s business interactions with the Libyan Investment Authority. The DOJ and SEC have been investigating Och-Ziff’s activities since 2011, and the company has stated that it expects the total value of the

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settlement will be in excess of its \$200 million reserve. News sources have reported that settlement talks have become contentious and that the SEC is pushing for civil penalties upwards of \$400 million.

Siemens. According to press reports, in early May 2016, Siemens agreed to pay Israeli authorities \$42 million in penalties associated with allegations that the German engineering company bribed officials at the Israel Electric Corporation. Israeli officials have also filed indictments and arrested several Israel Electric Corporation officials accused of taking bribes from Siemens. The allegations are connected to the 2008 FCPA enforcement action against Siemens where the company admitted that it had paid approximately \$20 million in bribes to acquire a contract worth approximately \$786 million from the Israel Electric Corporation.

Declinations. Thus far in 2016, the DOJ has declined to prosecute the following companies for violations of the FCPA: SAP AG; Nortek, Inc.; Akamai Technologies, Inc.; Key Energy Services, Inc.; Qualcomm Inc.; Harris Corporation; SciClone Pharmaceuticals; and Nordion Inc. According to our records, the SEC not yet publically announced a declination decision in 2016.

Perennial Statutory Issues

Jurisdiction

Over the past decade, the DOJ has repeatedly asserted expansive theories of jurisdiction over foreign persons, particularly in cases in which foreign corporations have chosen to settle rather than contest the charges—and jurisdiction—in a U.S. court. Although some judges in specific cases have expressed some concerns about this approach, most recently in the *Hoskins* case, the DOJ has not apparently backed away from its commitment to reach foreign companies by any means. The clearest example from 2016 is the *VimpelCom* case in which the DOJ charged Unitel with conspiring to violate the FCPA with its parent VimpelCom. There, to establish territorial jurisdiction over the companies, the DOJ alleged that Unitel management “used U.S.-based email accounts to communicate with others and effectuate the scheme,” the much criticized theory the DOJ advanced in the 2011 action against *Magyar Telekom*. In addition, the DOJ alleged that VimpelCom and Unitel made “numerous corrupt payments” executed through correspondent bank accounts at New York financial institutions, a theory first introduced in the *Siemens* case, which effectively argues that the acts of the U.S. banks, the corrupt actor’s unwitting agents, satisfied the FCPA’s requirements of use of instrumentalities of interstate commerce or acts within the territory of the United States.

Books & Records Liability without Bribes

As a general matter, every FCPA case has involved the payment of a bribe to a “foreign official.” This year’s SEC enforcement actions, however, are a reminder that the “foreign official” element only applies to the FCPA’s anti-bribery provisions, not its books-and-records and internal controls provisions. Indeed, the books-and-records and internal controls provisions are much broader than the FCPA’s anti-bribery provision, and the government can charge companies with violating those accounting provisions whenever it can show the falsification of company records.

Take for example *Cueto*, where the SEC charged Ignacio Cueto Plaza, the CEO of LAN Airlines S.A., with books-and-records and internal violations for allegedly approving \$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. It is unlikely that a union official would constitute a “foreign official” under the FCPA, yet the SEC was able to proceed by charging Cueto with violating the accounting provisions of the FCPA. 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). Again, the failure to specify whether the funds were used to bribe a foreign official was not a problem because the Commission only charged Analogic with violations of the books-and-records and internal controls provisions.

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Parent-Subsidiary Liability

In past *Trends & Patterns*, we have raised concerns over 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. Instead, in several cases, the SEC applied a theory of strict liability, taking the position that a subsidiary was *ipso facto* an agent of its parent and that therefore, applying the test for liability applicable to an employee's or agent's actions, any illegal act 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 SEC appears to have reacted to criticism of this approach by alleging additional facts in *PTC* and *SciClone* 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 counter-party 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. Such additional facts do not, however, remedy the SEC's fundamentally flawed approach to parent-subsidiary liability.

The theory that a parent can be liable for the acts of its subsidiary by virtue of the parent's control over the subsidiary is problematic because it incorrectly relies on concepts of agency, rather than corporate law, to disregard the corporate form. The Commission assumes that if a parent exerts substantial control over a subsidiary, the parent must be strictly liable for any wrongful act the subsidiary commits, even if the parent was not aware and did not authorize the misconduct. The application of agency law in the context of parent-subsidiary liability blatantly disrespects the corporate form and runs afoul of traditional black-letter law (*i.e.*, piercing the corporate veil). To hold a parent corporation liable for the acts of its subsidiaries the SEC must either (i) allege that the parent was aware of or participated in the misconduct or (ii) establish that the subsidiary is a mere alter-ego of the parent corporation that would allow the Commission to disregard the corporate form when bringing charges. In *PTC* and *SciClone*, the SEC did neither. We acknowledge that this is, to some extent, a tempest in a teapot, in that the parent corporations were clearly liable under 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" vs. "books and records."

Interestingly enough, in the *Analogic* matter, the SEC took a more restrained approach, charging the parent company only with books-and-records and internal controls violations related to endemic falsification of books and records and questionable payments by its subsidiary BK Medical. In this case, the subsidiary agreed with distributors in Russia and elsewhere to accept inflated invoices, pay the accurate amount while retaining the excess in its account receivables ledger account, and then pay third parties from that account based on invoices that the subsidiary itself created—all under circumstances suggesting corrupt payments to officials. Despite the allegedly long-term practice and involvement of senior executives of the subsidiary, the SEC did not invoke the agency theory to hold the parent liable under the FCPA's bribery provisions for its subsidiary's actions (as had been the case in *PTC* and *SciClone*). Instead, the SEC fairly held the parent responsible under the FCPA's books-and-records and internal control provisions for not having sufficient controls to prevent the conduct from occurring, particularly in a case where the conduct was endemic and continued for almost a decade. This approach is consistent with the SEC's long-held position that the parent's books-and-records are inaccurate based on any falsification at a consolidated subsidiary, even where the subsidiary affirmatively conceals such falsification from the parent.

We hope that the *Analogic* case is the harbinger of a new trend, one in which the SEC—and the DOJ—will return to their prior position of holding parent issuers responsible for their obligations to ensure accurate books-and-records throughout the corporate family but not to charge bribery *by the parent* in the absence of evidence that the parent exercised "direction, control, or authorization" over the corrupt conduct itself. Unfortunately, one case probably isn't enough to declare a trend, and we therefore have to qualify that hope, in the time-honored mantra of these updates, with a "we will have to wait and see" and "the future will tell."

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Anything of Value

The cases of *Qualcomm* and *VimpelCom* raise two separate, but interesting, issues related to the DOJ's and SEC's definition of the phrase "anything of value" and again suggest that enforcement agencies are continuing to expand the scope of the FCPA.

In *Qualcomm*, the SEC continued to advance the theory that hiring children of foreign officials in an attempt to curry favor with those officials can give rise to FCPA liability. While we have indicated in past *Trends & Patterns* why this theory is potentially problematic, the *Qualcomm* case is also noteworthy because it 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 doesn't allege that the foreign official actually received any benefit. For example, in *Qualcomm*, the SEC stated "[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 phrase "anything of value" under the FCPA.

Separately in *VimpelCom*, the SEC alleged that VimpelCom violated the FCPA's anti-bribery provisions by virtue of the fact that the company donated approximately \$500,000 to the foreign official's charities even if none of the money that VimpelCom donated actually reached the pockets of the foreign official. This approach is in stark contrast to the DOJ's charges, which allege that VimpelCom's charitable contributions only violated the FCPA's book-and-records and internal controls provisions—similar to the SEC's own theory in past cases such as *Schering-Plough*, *Eli Lilly*, and *Stryker*. The SEC's theory in *VimpelCom* is the first instance 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.

Frankly, we believe the whole theory of "intangible benefit" is questionable. As in cases concerning the hiring of the children of foreign officials (e.g., *Bank of New York Mellon* and *Qualcomm*) and now cases concerning charitable contributions (e.g., *VimpelCom*), the theory that an intangible benefit, where the foreign official receives nothing more than the positive feeling of knowing that his or her child has received a prestigious job offer or that a charitable cause he or she promotes is supported by the company, is equivalent to (to use the statute's own words) "payment of . . . anything of value to any foreign official" is a step too far. The FCPA was intended to prohibit the exchange of tangible items such as money and gifts, and the question of whether a foreign official received "anything of value" as a result of an intangible object is entirely subjective and risks creating inconsistency in the application of the law. While the DOJ and SEC clearly had enough factual support in *VimpelCom* to allege that the foreign official indirectly received millions of dollars of bribes and therefore, to charge VimpelCom with violating the FCPA's anti-bribery provisions, the SEC's decision to assert that VimpelCom's charitable donations, even if intended to influence that same foreign official, also constituted bribery under the FCPA is concerning.

In fact, we note that the government's efforts to expand the definition of "anything of value" is not unlike the issue the government faced in the now seminal insider trading case of *U.S. v. Newman*.³ There, the Second Circuit Court of Appeals overturned the conviction of two hedge-fund managers because the government had not shown that the corporate insiders responsible for allegedly providing inside information received a "personal benefit" in breach of their fiduciary duties. In so ruling, the Court of Appeals dismissed the government's theory that "career advice" alone could constitute a personal benefit and, instead, concluded that a personal benefit must be "objective, consequential, and represent[] at least a potential gain of pecuniary or similarly valuable nature." Certainly while insider trading and the FCPA are two different areas of criminal law, the parallels between the meaning of "personal benefit" in the *Newman* case and enforcement agencies interpretation of the term "anything of value" in the FCPA cannot be ignored. If ever tested, we suspect that the DOJ or SEC may struggle to convince the courts that something as imperceptible as a good feeling is sufficient to meet the definition of "anything of value" as set out in the FCPA.

Modes of Payment

The 2015 FCPA enforcement actions have generally exhibited schemes similar to those seen in the past.

³ Shearman & Sterling LLP represented Todd Newman in *U.S. v. Newman*.

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- *Cash, Gifts, Travel, and Entertainment.* The most common mode of payment thus far in 2016 is the use of gifts, travel, and entertainment to influence foreign officials as seen in *SciClone*, *PTC/Yuan*, *Olympus*, *Qualcomm*, *Novartis*, *Las Vegas Sands*, *Akamai*, and *Nortek*. Enforcement agencies' focus on gifts, travel, and entertainment is interesting because, although these types of benefits have always been prohibited by the FCPA, only until the 2014 case of *Timms* was it clear that such benefits were not mere add-on conduct to more serious allegations but could serve as the basis of an enforcement action on their own.⁴ The 2016 cases are reminders, especially for those companies operating in China, that gifts, travel, and entertainment can give rise to enormous FCPA compliance headaches if not properly managed.
- *Third-Party Intermediaries.* Multiple companies in 2016 resolved FCPA violations arising from the use of third-party intermediaries. In the cases of *Cueto*, *Nordion/Gourevitch*, and *Las Vegas Sands*, the SEC accused the companies of violating the FCPA after they utilized local consultants with dubious qualifications to assist with certain business operations in high risk jurisdictions. In the cases of *SAP* and *Akamai*, company employees were allegedly able to funnel improper payments to foreign officials through the use of local channel partners. In the cases of *SciClone*, *Olympus*, *PTC*, and *Analogic*, local third-party distributors responsible for promoting the companies' products were allegedly used to offer improper benefits to foreign officials in exchange for sales.
- *Shell Companies.* *VimpelCom* illustrates how companies can use shell companies to funnel large amounts of money to bribe government officials. From 2006 to 2012, *VimpelCom* allegedly made most of the \$114 million in bribes through a shell company that was beneficially owned by the Uzbek government official. *VimpelCom* funneled money to the shell company in a number of ways including by providing put options that guaranteed least \$35.7 million in net profits, paying "consulting fees" for services that were never actually rendered, and directing \$10 million in funds to the shell company as part of a series of layered transactions associated with fake or inflated construction or research contracts.
- *Hiring Practices.* Continuing with the focus from previous years on hiring practices, in *Qualcomm*, the company offered to employ family members of Chinese telecommunications officials to influence decisions to promote the company's products to Chinese state-owned telecommunications companies.
- *Charitable Contributions.* As mentioned above, in the case of *VimpelCom* the SEC alleged that charitable contributions could serve as a mode of payment that would give rise to FCPA violations.
- *Medical Studies.* In *Novartis*, one of the several alleged methods used by the company's Chinese subsidiary involved medical studies. According to the SEC, in 2009 and 2010, the Chinese subsidiary paid healthcare professionals to collect and analyze patient medical data to purportedly better understand the use of a particular drug. These studies allegedly did not provide any legitimate medical data and served as a front to reward healthcare professionals who had prescribed the company's drug.
- *Investments.* The case of *Las Vegas Sands* includes an unusual example of investments in real estate as ostensible bribes to government officials. In December 2006, the company allegedly sought to establish a joint venture with a Chinese state-owned entity to buy portions of a building in Beijing from the state-owned entity for \$42 million. The CEO of the company allegedly planned to set up a business center in the building that would assist U.S. companies seeking to do business in China. According to the SEC, no research or analysis was done to determine the need for such a building or projected profits or losses. The SEC's cease-and-desist order notes that numerous employees were concerned that the purchase of the building was solely for political purposes and that after multiple setbacks and millions of dollars of fees to a consultant, the project for the business center was closed.
- *Inflated Sales Contracts.* In *Analogic*, the company's Danish subsidiary, BK Medical, allegedly organized a kickback scheme with a local Russian distributor. As part of that scheme, the subsidiary engaged in an elaborate effort to create fictitious and inflated sales contracts to generate the funds used as kickbacks.

⁴ For further discussion of these issues, you may wish to refer to our prior client publication, Shearman & Sterling LLP, [Gifts of Travel Luxury Watches to Saudi Officials Not Mere 'Icing on the Cake' for FCPA Charges](#).

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Compliance Guidance

FCPA Pilot Program

Among the most noteworthy events thus far in 2016 was the DOJ's announcement of a one-year FCPA Pilot Program that sets out the DOJ's expectations of how a company should manage an FCPA investigation and the potential rewards, including significant reductions in criminal fines, if a company chooses to follow the DOJ's guidance. This framework is intended to compliment the Yates Memo and the Principles of Federal Prosecution of Business Organizations (the "Filip Memo") and to 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 within the company 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.

We recognize that the FCPA Pilot Program is an effort by the DOJ to provide more certainty and transparency with respect to its enforcement practices.⁵ It is questionable, however, whether it achieves this goal in certain areas. Frankly, to some extent, this is because certainty is neither possible nor, from the viewpoint of DOJ prosecutors, desirable. For example, we understand that earlier versions of the program provided more concrete guarantees of declinations in exchange for voluntary disclosure and cooperation against individuals—much like proposals that had been made in the past by various business advocacy groups and practitioners. This approach would essentially have paralleled the Antitrust Division's leniency program, in which the first disclosing corporation is granted amnesty while the other corporate conspirators and executives are subject to prosecution. This parallel was, however, rejected internally by senior officials who recognized that FCPA violations rarely involve conspiracies amongst corporate entities (other than with agents and subsidiaries) and thus, the proposal would have given a corporation immunity solely for disclosing its own criminal conduct, a precedent that the DOJ was unwilling to establish. Moreover, existing DOJ policy already clearly establishes that a corporation *cannot* trade executives for immunity (nor, conversely, take the hit in exchange for leniency for its executives), although, as set out in the Yates Memo, it can obtain some form of lenient treatment short of immunity or declination. Accordingly, the final policy essentially memorializes what most practitioners would agree are practices that the DOJ has largely implemented on a more informal basis over recent years: lower penalties or consideration of alternative resolutions, including declinations, in exchange for voluntary disclosures and cooperation.

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. Again, however, although these may appear to be somewhat clear lines, it is worth noting that they largely reflect—or even rollback—the DOJ's current 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.

The FCPA Pilot Program's recommendations for compliance remediation also do not break new ground, but they do offer a gloss on the Department's previous guidance. To some extent, this may reflect the influence of Hui Chen, a former in-house compliance officer who was appointed as the Criminal Division's Compliance Consultant late last year. As mentioned above, among the criteria that a company

⁵ 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).

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must satisfy to receive credit from the DOJ, is appropriate remediation—including, but not limited to, enhancing a company’s compliance program. As part of this discussion, the FCPA Pilot Program listed the precise features that the DOJ believed an effective compliance program must have. Unsurprisingly, those features generally reflect the “Hallmarks of Effective Compliance Programs” set out in the DOJ/SEC FCPA Guide, however, there are a series of relatively new items that include:

- Whether the company dedicates sufficient resources to the compliance function;
- The quality and experience of the compliance personnel such that they can understand and identify the transactions identified as posing a potential risk; and
- How a company’s compliance personnel are compensated and promoted compared to other employees.

These three features focus on ensuring that compliance programs are adequately resourced and that companies make sure that they retain qualified and experienced individuals to sit in those positions. As Chen has publicly stated, compliance positions are not for the faint of heart and there are genuine concerns over whether compliance officers all too often become scapegoats for corporate misconduct. These three factors are likely a reflection of Chen’s concerns over the compliance industry as a whole and the recognition that as compliance programs become increasingly important, it will be incumbent on companies to ensure that its compliance departments are filled with skilled and dedicated professionals and do not become revolving doors.

Incomplete Voluntary Disclosure

In the four FCPA enforcement actions that the DOJ has brought this year (*VimpelCom*, *PTC*, *Olympus*, *Analogic*), it is telling that each defendant company either failed to voluntarily disclose or failed to provide all of the relevant facts at the time the company self-reported the misconduct. While we expect that there were other factors that also drove the DOJ to bring charges in the cases of *VimpelCom* (severity of the bribery scheme) and *Olympus* (lack of SEC jurisdiction), the fact that each of these companies failed to voluntarily disclose the improper conduct speaks to the significance this factor plays in the DOJ’s enforcement decisions.

This facet of the DOJ’s charging decisions is the most noteworthy in its case against *Analogic*. Specifically, the *Analogic* non-prosecution agreement is one of the rare cases in which even the DOJ was unable to find territorial jurisdiction to bring a bribery charge. Here all of the corrupt conduct was undertaken by an overseas subsidiary apparently without the knowledge of its issuer parent and, indeed, apart from providing SOX certifications to its parent, the foreign subsidiary appears to have done nothing within the U.S. at all. In most previous cases where the DOJ has concluded it was not able to bring an FCPA bribery charge, the DOJ has typically declined to prosecute the corporations, leaving it to the SEC to charge the issuer parent based on books and records jurisdiction. We are, of course, not privy to the company’s negotiations with the DOJ, but it is likely the DOJ decided to charge the subsidiary in this instance because of certain misstatements the company appears to have made after its voluntary disclosure. Specifically, although it apparently made a complete disclosure of the information it had at the time of that voluntary disclosure, it appears to have later learned of additional material facts that it failed to bring to the DOJ’s attention in as prompt a manner as the DOJ would have liked, leading the Department to allege that “the Company did not disclose . . . all relevant facts it learned during the course of its internal investigation.” Whether intentional or inadvertent, the DOJ may have concluded that it could not leave such conduct unaddressed.

Effective Internal Controls and Declinations

The 2016 case of *SAP* is an important reminder of how ineffective 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 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

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programs in place, they can still be forced to surrender profits if those controls are too easily circumvented by employees.

That said, the outcome of the *SAP* case was probably the best case scenario for the company. Indeed, compare *SAP* to the facts surrounding the 2013 *Peterson* case where the DOJ formally declined to pursue an enforcement action against Peterson's former employer 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, yet Morgan Stanley received a declination from both the DOJ and the SEC, while *SAP* still faced a SEC enforcement action (albeit a limited one). The answer is most likely that Morgan Stanley did not profit from Peterson's scheme while, according to the SEC, *SAP* earned \$3.7 million in revenues as a result of Garcia's improper payments.

Law Firm FCPA Opinion Letters

VimpelCom highlights an important issue companies must consider when engaging outside counsel for FCPA advice. In *VimpelCom*, executives authorized the purchase of a small Uzbek telecommunications company ("Buztel") that was indirectly controlled by a foreign official. When members of the board raised concerns that the transaction would run afoul of the FCPA, the board approved the transaction on the condition that an international law firm provide an FCPA legal opinion in support of the acquisition. The company's management complied, but, critically, failed to disclose to the law firm the foreign official's association with Buztel. This is an important reminder that while FCPA opinion letters can assist companies in the event a particular business transaction is scrutinized by the DOJ or SEC, the failure to disclose all relevant facts to the law firm performing the analysis will render any opinion letter of little assistance.

Unusual Developments

Limits on SEC's Pursuit of Disgorgement and Declaratory Relief

On May 26, 2016, in *SEC v. Graham*, the Eleventh Circuit became the first federal court of appeals to hold that claims brought by a government agency for disgorgement and declaratory relief are subject to the five-year statute of limitations set forth in 28 U.S.C. § 2462. While not a FCPA case, *Graham* has implications for (1) the time limitations of disgorgement and declaratory relief and (2) the government's treatment of disgorgement and forfeiture in future FCPA cases.

Graham, at least in the first instance, sets back the government's ability to pursue disgorgement for conduct occurring outside the five-year period set out in section 2462. In *Graham*, the district court dismissed an SEC complaint, which alleged that the defendants violated federal securities law by selling unregistered securities, on the grounds that the SEC's claims were time-barred. The Eleventh Circuit affirmed in part and found that disgorgement of ill-gotten gains is a kind of forfeiture—a remedy expressly covered by section 2462. In finding "no meaningful difference" between disgorgement and forfeiture, the Eleventh Circuit rejected the SEC's argument that disgorgement and forfeiture are fundamentally different.

Graham has created a circuit split at least as to disgorgement, as every other federal district and appellate court has held that section 2462 does not apply to disgorgement. For example, in 1994, in *SEC v. Lorin*, the Southern District of New York held that forfeiture and disgorgement reflect different characteristics and purposes. Disgorgement, the court held, is an equitable remedy that prevents unjust enrichment, while criminal forfeiture is a statutory legal penalty that is imposed as a punishment. Similarly, in 2010, the D.C. Circuit held in *Riordan v. SEC* that section 2462 does not to apply to disgorgement, if the disgorged amount is "causally related to the wrongdoing". On the other hand, *Graham* is consistent with a recent non-binding IRS Memorandum that had concluded disgorgement was not deductible because it was "punitive," a position that is inconsistent with the SEC's position that disgorgement is equitable and intended to deprive the company of ill-gotten gains—gains presumably already declared and taxed.

While federal courts—and administrative agencies—may continue to debate the meaning and nature of disgorgement, we expect that the SEC will be mindful of the need to accelerate the pace of investigations, particularly FCPA investigations that continue for years, and to file actions more expeditiously than in the past.

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Charging Decisions

In October of 2015, John Ashe, the former president of the U.N. General Assembly and former U.N. ambassador for Antigua and Barbuda, and several other defendants were charged in connection with a scheme to pay \$1.3 million in bribes to Ashe in exchange for support of certain Chinese business interests. According to DOJ documents, Ashe received bribes in various forms, including family vacations, the construction of a private basketball court in his home in New York, and money wired to his personal bank accounts.

Although the *Ashe* case was first raised in 2015, we believe it is worth mentioning here because it brings to light some interesting inside-baseball issues relating to the management and supervision of FCPA cases within the Department. The *United States Attorneys' Manual* provides that all FCPA cases must be approved by the Criminal Division's Fraud Section, a requirement intended to ensure consistent application of a statute with significant international implications. The *Ashe* case certainly looks on its face to be a FCPA case—bribery of a foreign official who is also an official of a public international organization with acts in furtherance within the territory of the United States—yet the U.S. Attorney's Office for the Southern District of New York (known colloquially within the Department and elsewhere as the Sovereign District) chose not to charge the obvious violation and instead to characterize the U.N. as the recipient of U.S. government program funds and thus charge a violation of 18 U.S.C. § 666—program fraud. Whether the Criminal Division had any role in this matter is not known but the *Ashe* case again highlights the various tools prosecutors have available to them to pursue acts of bribery.

Federal Court Challenges to DPAs

While not an FCPA case, 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 DOJ sends a message about the primacy of the government's role in DPAs, which are routinely used in FCPA cases. In 2010, Fokker, a Dutch aerospace company, voluntarily disclosed potential U.S. sanctions and export control violations to the DOJ. After an extensive investigation and remediation efforts, the company, the DOJ, and Dutch authorities came to a global settlement that involved an 18-month DPA, which required Fokker to fully cooperate with the government, implement a new compliance policy, and pay fines and penalties totaling \$21 million in disgorgement. Judge Leon denied the parties' request to exclude time under the Speedy Trial Act to allow for the DPA, citing to what he characterized as an anemic prosecution and the "too good a deal for the defendant." In April of this year, the D.C. Circuit vacated the court's decision and ruled that the court overstepped and intruded on the constitutional authority of the executive branch.

The appeals court's decision reinforces the notion that the government has discretion to use DPAs as it sees fit and that courts generally should not interfere with these agreements. The D.C. Circuit repeatedly pointed to the executive branch's authority over the use of DPAs and charging decisions, and that the filing of a DPA or charges did not provide the court any role in monitoring a defendant's compliance with a DPA. As a result, while *Fokker* gives defendants comfort that agreements with the government will not be disrupted by courts, the decision is a reminder to defendants of the extent to which the government has relatively unfettered discretion with respect to cooperation, charging decisions, DPAs, and monitoring of settlements. For those interested in comparative international law, we note that Judge Leon's approach would fit cleanly within the approach adopted by the U.K. for its DPAs, in which the courts play a critical role in determining whether the DPA is within the public interest.

Unaoil Corruption Investigation

The beginning of 2016 saw the birth of yet another corruption scandal that will likely span multiple countries for several years. The DOJ's rapid fire initiation of an investigation into Unaoil is the latest example of how scrutiny of a major player in a particular industry can spread to multiple companies across multiple jurisdictions. News of the alleged bribery scheme involving Unaoil broke in March through *The Huffington Post* and Fairfax Media. According to these reports, between 2002 and 2012, Unaoil, a Monaco-based company run by the well-connected Ahsani family, distributed bribes on behalf of iconic companies, such as Rolls-Royce, Halliburton, Samsung, Hyundai, and Leighton Holdings, in exchange for government contracts worth billions of dollars in multiple countries in the Middle East and Northern Africa. The DOJ, along with other foreign enforcement authorities, appears to have wasted no time investigating Unaoil and other multinational companies. In April, FMC Technologies and KBR disclosed in SEC filings that they were cooperating with the DOJ with respect to Unaoil-related inquiries. Given that nearly a dozen different companies (including FMC Technologies and KBR) have been implicated in the Unaoil scandal, we expect to see more companies report that enforcement agencies are scrutinizing their

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activities. The investigation appears to have already produced private litigation, as Unaoil disclosed in a June press release that it was commencing legal action against Fairfax Media for the “malicious and damaging allegations.”

Private Litigation

As seen in previous years, the first half of 2016 has seen what are now typical 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 accusing Qualcomm executives of “turn[ing] a blind eye” towards the company’s financials in part due to the investigations into possible FCPA violations. This latest suit is one among several that have now been brought against the company in relation to the FCPA investigations.

In another class action litigation related to the ongoing corruption investigation into Petrobras, Judge Rakoff 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 means that the ongoing Petrobras securities case has the potential to inflict even more harm on the now beleaguered Brazilian oil giant.

Enforcement in the United Kingdom

U.K. Government to Consult on Extending the Scope of Section 7 Bribery Act

On May 12, 2016, the U.K. Ministry of Justice (“MoJ”) announced that it would be considering whether to extend the scope of the U.K. Bribery Act’s section 7 offense of a corporate failing to prevent bribery to other economic crimes such as fraud and money laundering.

Justice Minister Dominic Raab MP said: “The [U.K.] government is finding new ways to tackle economic crime and we are taking a rigorous and robust approach to corporations that fail to prevent bribery or all the tax evasion on their behalf.” Mr. Raab added that the U.K. government wanted to “carefully consider whether the evidence justifies any further extension of this model to other areas of economic crime, so that large corporations are properly held to account.”

David Green CB QC, Director of the U.K. Serious Fraud Office (“SFO”), welcomed the announcement, saying that section 7 should be extended to include a corporate offence on a company for “failing to prevent acts of economic or financial crime by persons associated with it” and that this was “the way to get after errant corporations effectively.”

The MoJ’s consultation, which will be published this summer, will “explore whether the existing ‘failure to prevent’ model should be extended to complement existing legal and regulatory frameworks” and follows on the heels of the SFO’s first successful prosecution and conviction of a section 7 offense.

U.K. to Establish International Anti-Corruption Coordination Center

The U.K. government has announced plans to create the first-ever International Anti-Corruption Co-ordination Centre. The body, which the U.K. will establish in partnership with the U.S., Canada, Australia, New Zealand, Germany, Singapore, and Switzerland, will be based in London. Experts, including those from the U.K. National Crime Agency and Interpol, will provide international co-ordination and support to help local law enforcement agencies and prosecutors work together across borders to “investigate and punish corrupt elites and recover stolen assets”.

Speaking at the first Global Anti-Corruption Summit, U.K. Prime Minister the Rt. Hon. David Cameron MP said: “we will do everything possible to punish the corrupt and support those affected by corruption. We know that the web of corruption is global, so we will create an international anti-corruption coordination center to help police and prosecutors work together to pursue the corrupt across borders, joining the dots to identify and prosecute the corrupt and seize their assets, including by using the data made available by registers of beneficial ownership.”

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SFO Obtains Extra Funding for ENRC Investigation

The SFO has obtained additional funding from the U.K. government to pursue its investigation into Eurasian Natural Resources Corporation's ("ENRC") acquisition of various mines and prospects in the Democratic Republic of Congo. In 2010, the Congolese government sold the Kolwezi copper and cobalt mine to Dan Gertler for \$20 million. Mr. Gertler is a known close personal friend of Congolese president Joseph Kabila. ENRC subsequently paid Mr. Gertler \$175 million for a 50.5% stake in the mine before acquiring the remaining 49.5% in 2012 for \$550 million. The SFO launched its investigation in April 2013.

Under a "blockbuster" funding arrangement with the U.K. Treasury, the SFO may request additional money if an investigation is projected to require more than 10% of the SFO's annual £33 million budget.

Former Securrency PTY Ltd Manager Convicted of Bribing Nigerian Official Under Pre-Bribery Act Regime

On May 11, 2016, Peter Chapman, a former manager of Securrency PTY Ltd, a polymer banknote manufacturer, was convicted of four counts of making corrupt payments to a Nigerian official contrary to section 1 of the U.K. Prevention of Corruption Act 1906 (punishment of corrupt transactions with agents), applicable as the conduct in question pre-dated the July 2011 application of the Bribery Act 2010. Mr. Chapman was found to have paid bribes totaling approximately \$205,000 to an agent of Nigerian Security Printing and Minting PLC to secure orders for the purchase of reams of polymer substrate from Securrency. He was sentenced to 30 months imprisonment.

Mr. Chapman's conviction is the result of a joint investigation by the SFO and the Australian Federal Police. A number of other agencies also assisted the investigation, including the U.K. National Crime Agency, the London Metropolitan Police, the Nigerian Economic and Financial Crimes Commission, the Central Authority of Nigeria and as well as authorities in Brazil, Seychelles, South Africa, Canada and Spain.

Conclusion

Thus far, 2016 has been an active year for enforcement agencies and particularly for the SEC. Although in terms of the size of penalties, *VimpelCom* is clearly the outlier, the other run-of-the-mill cases with lower penalties reflect how the FCPA has become embedded in international business risk. No longer are only larger companies subject to enforcement risk, but smaller companies, with smaller bribes and smaller profits, in some cases just entering the international market, must be aware of the risk and address it proactively rather than remedially (*i.e.*, after the government comes calling).

Most significantly, however, enforcement agencies, particularly the DOJ, continue to struggle to present a coherent and convincing case for why companies should self-report and cooperate with prosecutors. The current effort by the DOJ which combines the Yates Memo's inducements for companies to "throw their employees under the bus" and the FCPA Pilot Program, which provides somewhat fuzzy assurances of leniency to induce voluntary disclosure and cooperation, in many ways, may simply create more distrust. Unless the private sector fundamentally believes that voluntary disclosure, cooperation, and remediation make good business sense, companies that identify and remedy potential violations of the FCPA will continue to ask whether they are not better off playing the lottery by not voluntarily disclosing the issue than they would by exposing themselves to the uncertain outcome, reputational risk, and undoubted expense of walking it in to the government.

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