FCPA Update

A Global Anti-Corruption Newsletter

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The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions

2016 was a record year for enforcement of the U.S. Foreign Corrupt Practices Act ("FCPA") and other anti-corruption laws. In response to 2015's lower level of FCPA enforcement activity by the U.S Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"), we had suggested that this dip likely reflected that "we [were] in the eye of an unpredictable storm rather than a trend of clear decline in FCPA enforcement."[1] Much the same, one year's experience still should not be considered a trend. But 2016 was notable in several respects, and the probable forecast remains stormy.

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1. Paul R. Berger *et al.*, "The Year 2015 in Anti-Bribery Enforcement: Are Companies in the Eye of an Enforcement Storm?" FCPA Update, Vol. 7, No. 6 (Jan. 2016), http://www.debevoise.com/insights/publications/2016/01/fcpa-update-january-2016.

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In April, DOJ launched its "FCPA Enforcement Plan and Guidance" (the "Pilot Program"), designed in large part to encourage corporate self-reporting, cooperation with DOJ in investigations, and timely and robust remediation.[2] The Pilot Program's rules took effect immediately, including as to a number of matters that predated the Pilot Program but nevertheless were resolved under the relatively novel basis of "declination with disgorgement." 2016 also witnessed the likely (but as-yet unconfirmed) uptick in self-reporting, as well as the long tails of ongoing or resolved investigations, such as those relating to hiring practices, Brazil's "Operation Car Wash" ("Lava Jato"), and FIFA, to name a few.

Potentially of greatest significance, anti-corruption laws and their enforcement around the world continue to proliferate. This year, new laws appeared in Latin America and Asia. Even more surprising to some, anti-corruption enforcement outside the United States continues to mature. In addition to increased enforcement by non-U.S. anti-corruption authorities, 2016 included substantial cooperation among such authorities: both active sharing of evidence and several notable multilateral resolutions, including VimpelCom, Braskem/Odebrecht, and Embraer, as well as ongoing investigations relating to FIFA and 1MDB.

At the same time, 2017 will be a year of significant change in the United States, including a new President who in 2012 referred to the FCPA as a "horrible law"[3] and whose nominee for SEC Chair has been accused of hostility to the FCPA.[4] Even so, consider that Senator Jeff Sessions, nominee for United States Attorney General, stated that "if confirmed as attorney general, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case."[5] In the past, vigorous enforcement of the FCPA has flourished under both Democratic and Republican administrations, and the imminent demise of active FCPA enforcement seems highly unlikely.

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2. United States Dep't of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" ("Pilot Program") (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/pilot-program; *see also* Paul R. Berger, Andrew M. Levine, Bruce E. Yannett, and Philip Rohlik, "U.S. Department of Justice Issues New FCPA Guidance and Launches Pilot Enforcement Program," FCPA Update, Vol. 7, No. 9 (Apr. 2016), http://www.debevoise.com/insights/publications/2016/04/fcpa-update-april-2016.

3. *Trump: Dimon's Woes & Zuckerberg's Prenuptial* (CNBC television broadcast May 15, 2012) ("CNBC Video"), http://video.cnbc.com/gallery/?video=3000089630&play=1.

4. *See* Editorial, *Will Jay Clayton Protect Investors?*, N.Y. Times (Jan. 7, 2017), https://www.nytimes.com/2017/01/07/opinion/sunday/will-jay-clayton-protect-investors.html.

5. Responses to Senator Whitehouse's Questions for the Record, Nomination of Jeff Sessions to be Attorney General of the United States, 115th Cong, at 6, q. 13 (submitted Jan. 17, 2017) https://www.judiciary.senate.gov/download/sessions-responses-to-whitehouse-questions-for-the-record-01-10-17.

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I. FCPA Enforcement Trends, Lessons, and Things to Watch

A. Enforcement Statistics

2016 was a record year for corporate enforcement of the FCPA. Without double-counting parallel actions, the DOJ and SEC brought a total of 27 corporate enforcement actions, collecting approximately $2.41 billion in fines, penalties, disgorgement, and interest.

"In the past, vigorous enforcement of the FCPA has flourished under both Democratic and Republican administrations, and the imminent demise of active FCPA enforcement seems highly unlikely."

After combining related enforcement actions (such that multiple parallel actions in the same investigation are counted as one), the DOJ brought 11 traditional corporate enforcement actions (in the form of non-prosecution agreements, deferred prosecution agreements, and plea agreements)[6] and disclosed two DOJ-specific "declinations."[7]

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6. Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to Roger Witten, Esq., "Re: Parametric Technology (Shanghai) Software Co. Ltd. and Parametric Technology (Hong Kong) Limited", Feb. 16, 2016 ("PTC NPA"), https://www.justice.gov/criminal-fraud/file/825576/download; Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to Mark Rochon, Esq., "Re: *United States v. VimpelCom* Deferred Prosecution Agreement 16-cr-137 (ER) ("VimpelCom DPA"), https://www.justice.gov/criminal-fraud/file/828301/download; Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to Mark Rochon, Esq. "Re: *United States v. Unitel LLC*, 16-cr-137 (ER) Feb. 10, 2016 ("Unitel Plea Agreement"), https://www.justice.gov/criminal-fraud/file/827511/download/; *United States v. Olympus Latin America, Inc.*,Case No: 16-3525 (MF), Deferred Prosecution Agreement (D.N.J. Mar. 3, 2016) ("Olympus DPA"), https://www.justice.gov/criminal-fraud/file/831256/download; Letter from U.S. Dep't of Justice, Criminal Division, Fraud Section, to William H. Paine, Esq., "Re: In re: BK Medical ApS", June 21, 2016, ("BK Medical NPA"), https://www.justice.gov/criminal-fraud/file/869661/download; *United States v. LATAM Airlines Group S.A.* Case No: 16 Cr. 60195 DTHK, Deferred Prosecution Agreement (S.D.Fl. Jul. 25, 2016) ("LATAM DPA"), https://www.justice.gov/criminal-fraud/file/879136/download; *United States v. Och-Ziff Capital Management Group LLC*, Case No: 16-CR-00516(NGG), Deferred Prosecution Agreement, at 4 (E.D.N.Y. Sept. 29, 2016) ("Och-Ziff DPA"), https://www.justice.gov/opa/file/899306/download; *United States v. OZ Africa Management GP, LLC*, Case No: 16 Cr. 00515 NGG, Plea Agreement (E.D.N.Y. Sep. 29, 2016) ("Oz Africa Plea Agreement"), https://www.justice.gov/criminal-fraud/file/900276/download; *United States v. Embraer S.A.*, Case No. 16-cr-06294-JIC, Deferred Prosecution Agreement at 4 (S.D.Fla. Oct. 24, 2016) ("Embraer DPA"), https://www.justice.gov/criminal-fraud/file/911356/download; Letter from U.S. Dep't of Justice, Criminal Division, Fraud Section to Mark F. Mendelsohn, Esq., "Re: JPMorgan Securities (Asia Pacific) Limited Criminal Investigation," Nov. 17, 2016 ("JPMorgan NPA"), at 2, https://www.justice.gov/criminal-fraud/file/911356/download; *United States v. Braskem S.A.* Case No. 16-CR-644, Plea Agreement at 2-3 (E.D.N.Y. Dec. 21, 2016) ("Braskem Plea Agreement") https://www.justice.gov/criminal-fraud/fcpa/cases/braskem-sa; *United States v. Odebrecht S.A.* Case No: 16 Cr. 643, Plea Agreement (E.D.N.Y. Dec. 21, 2016) ("Odebrecht Plea Agreement"), https://www.justice.gov/criminal-fraud/file/920101/download; *United States v. Teva Pharmaceutical Industries Ltd.* Deferred Prosecution Agreement, No. Cr. 20968 FAM (S.D.Fla. Dec. 22, 2016) ("Teva DPA") https://www.justice.gov/criminal-fraud/fcpa/cases/teva-pharmaceutical-industries-ltd; *United States v. Teva LLC* Case No: 16 Cr. 20967 KMW, Plea Agreement (S.D. Fl. Dec 22, 2016) ("Teva LLC Plea Agreement"), https://www.justice.gov/criminal-fraud/file/920426/download; Letter from U.S. Dep't of Justice, Criminal Division, Fraud Section, "Re: General Cable Corporation Criminal Investigation", Dec. 22, 2106 ("General Cable NPA"), https://www.justice.gov/criminal-fraud/file/921801/download.

7. Letter from U.S. Dep't of Justice. Criminal Division, Fraud Section to Steven A. Tyrell, Esq. "Re: HMT LLC", Sept. 29, 2016, ("HMT Declination") https://www.justice.gov/criminal-fraud/file/899116/download; Letter from U.S. Dep't of Justice, Criminal Division, Fraud Section to Letter to Paul E. Coggins, Esq., "Re: *NCH Corporation*, Sept. 29, 2016 ("NCH Declination"), https://www.justice.gov/criminal-fraud/file/899121/download.

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While a declination has traditionally been understood as a decision to exercise discretion not to take enforcement action despite a potential basis to do so, the DOJ's declinations with respect to HMT LLC and NCH Corporation involved the publication of some facts about the underlying conduct and resulted in a transfer of funds (identified as disgorgement of profits) from the companies to the U.S. Treasury. We therefore treat those "declinations" as a new type of enforcement action.[8]

The DOJ's 13 enforcement actions netted $1.34 billion in penalties and disgorgement to the U.S. Treasury and in excess of $2.3 billion when settlement payments to other countries in the Odebrecht/Braskem, Embraer, and Vimpelcom enforcement actions are included. The DOJ also resolved individual FCPA actions against eight individuals in 2016, none of which was directly related to any corporate enforcement action. Further, the DOJ entered into publicized "declinations" with three additional companies – Nortek,[9] Akamai,[10] and Johnson Controls[11] – which did not result in any DOJ-directed disgorgement given disgorgement required by parallel SEC proceedings.

In 2016, the SEC brought 24 corporate enforcement actions,[12] 12 of which were SEC-only actions, including three associated with DOJ "declinations." Six of the SEC's corporate enforcement actions included related enforcement actions against

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8. *See* Bruce E. Yannett, Andrew M. Levine, and Philip Rohlik, "The Difficulty of Defining a Declination: An Update on the DOJ's Pilot Program," FCPA Update, Vol. 8, No. 3 (Oct. 2016), http://www.debevoise.com/insights/publications/2016/10/fcpa-update-october-2016.
9. Letter from U.S. Dep't of Justice, Criminal Division, Fraud Section to Luke Cadigan, Esq., "Re: Nortek, Inc." June 3, 2016 ("Nortek Declination") https://www.justice.gov/criminal-fraud/file/865406/download.
10. Letter from U.S. Dep't Justice, Criminal Division, Fraud Section to Josh Levy, Esq., "Re: Akamai Technologies, Inc." June 6, 2016 ("Akamai Declination") https://www.justice.gov/criminal-fraud/file/865411/download.
11. Letter from U.S. Dep't of Justice, Criminal Division, Fraud Section to Jay Holtmeier, "Re: Johnson Controls, Inc." June 21, 2016 ("Johnson Declination") https://www.justice.gov/criminal-fraud/file/874566/download.
12. *In the Matter of SAP SE,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77005, Accounting and Auditing Enforcement Rel. No. 3736, Administrative Proceeding File No. 3-17080 (Feb. 1, 2016) ("SAP Order") https://www.sec.gov/litigation/admin/2016/34-77005.pdf; *In the Matter of SciClone Pharmaceuticals, Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77058, Accounting and Auditing Enforcement Rel. No. 3739, Administrative Proceeding File No. 3-17101 (Feb. 4, 2016) ("SciClone Order"), https://www.sec.gov/litigation/admin/2016/34-77058.pdf; *In the Matter of PTC, Inc.*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77145, Accounting and Auditing Enforcement Rel. No. 3743, Admin. Proc. File No. 17118 (Feb. 16, 2016) ("PTC Order") httpvs://www.sec.gov/litigation/admin/2016/34-77145.pdf; *Securities and Exchange Comm'n v. Vimpelcom Ltd.*, Complaint (S.D.N.Y. Feb. 18, 2016) ("Vimpelcom Complaint") https://www.sec.gov/litigation/complaints/2016/comp-pr2016-34.pdf; *In the Matter of Qualcomm Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77261, Accounting and Auditing Enforcement Rel. No. 3751, Administrative Proceeding File No. 3-17145 (Mar. 1, 2016) ("Qualcomm Order"), https://www.sec.gov/news/pressrelease/2016-36.html; *In the Matter of Nordion, Inc.* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77290, Administrative Proceeding File No. 3-17153 (Mar. 3, 2016) ("Nordion Order") https://www.sec.gov/litigation/admin/2016/34-77290.pdf;

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In the Matter of Novartis AG, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77431, Accounting and Auditing Enforcement Rel. No. 3759, Admin. Proc. File No. 3-17177 (Mar. 23, 2016) ("Novartis Order"), https://www.sec.gov/litigation/admin/2016/34-77431.pdf; *In the Matter of re Las Vegas Sands Corp*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77555, Administrative Proceedings File No. 3-17204 (Apr. 7, 2016) ("Las Vegas Sand Order"), https://www.sec.gov/litigation/admin/2016/34-77555.pdf; United States Securities and Exchange Comm'n, Non-Prosecution Agreement with Nortek, Inc. (June 7, 2016) ("Nortek NPA"), https://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf; United States Securities and Exchange Comm'n, Non-Prosecution Agreement with Akamai Technologies. (June 7, 2016) ("Akamai NPA") https://www.sec.gov/news/press/2016/2016-109-npa-akamai.pdf; *In the Matter of Analogic Corporation and Lars Frost*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78113, Accounting and Auditing Enforcement Rel. No. 3784, Administrative Proceedings File No. 3-17305 (June 21, 2016) ("Analogic Order"), https://www.sec.gov/litigation/admin/2016/34-78113.pdf.; *In the Matter of Johnson Controls, Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78287, Administrative Proceeding File No. 3-17337 (July 11, 2016) ("Johnson Order"), https://www.sec.gov/litigation/admin/2016/34-78287.pdf; *In the Matter of Key Energy Services, Inc.*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No.78558, Accounting and Auditing Enforcement Rel. No. 3794. Admin. Proc. File No. 3-17379 (Aug. 11, 2016) ("Key Energy Order"), https://www.sec.gov/litigation/admin/2016/34-78558.pdf; *In the Matter of AstraZeneca plc*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78730, Accounting and Auditing Enforcement Rel. No. 3798, Administrative Proceeding File. No. 3-17517 (Aug. 30, 2016) ("AstraZeneca Order"), https://www.sec.gov/litigation/admin/2016/34-77431.pdf; *In the Matter of Nu Skin Enterprises, Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78884, Accounting and Auditing Enforcement Rel. No. 78884, Administrative Proceeding File No. 3-17556 (Nov. 17, 2016) ("Nu Skin Order"), https://www.sec.gov/litigation/admin/2016/34-78884-s.pdf; *In the Matter of Anheuser-Busch InBev SA/NV*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78957, Accounting and Audit Enforcement Rel. No. 3808, Admin. Proc. File No. 3-17586 (Sept. 28, 2016) ("Anheuser Order"), https://www.sec.gov/litigation/admin/2016/34-78957.pdf; *In the Matter of LAN Airlines SA*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78402, Accounting and Auditing Enforcement Rel. no. 3792, Administrative Proceedings File No. 3-17357 (July 25, 2016) ("LAN Order") https://www.sec.gov/litigation/admin/2016/34-78402.pdf; *In the Matter of Och-Ziff Capital Management Group LLC*, *OZ Management LP*, *Daniel S. Och*, and *Joel M. Frank*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78989, Investment Advisors Act of 1940 Rel. no. 4540, Administrative Proceedings File No. 3-17595 (Sept. 29, 2016) ("Och Ziff – Oz Order"), https://www.sec.gov/litigation/admin/2016/34-78989.pdf; *In the Matter of GlaxoSmithKline plc*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 79005, Accounting and Auditing Enforcement Rel. No. 3810, Administrative Proceeding File No. 3-17606 (Sept. 30, 2016) ("Glaxo Order"), https://www.sec.gov/litigation/admin/2016/34-78730.pdf; *Securities and Exchange Comm'n v. Embraer SA*, Case No. 0:16-cv-62501, Complaint (S.D. Fla. Oct. 24, 2016) ("Embraer Complaint") https://www.sec.gov/litigation/complaints/2016/comp-pr2016-224.pdf; *In the Matter of JP Morgan Chase & Co.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 79335, Accounting and Auditing Enforcement Rel. No. 3824, Administrative Proceeding File No. 3-17684 (Nov. 17, 2016) ("JPMorgan Order"), https://www.sec.gov/news/pressrelease/2016-241.html; *Securities and Exchange Comm'n v. Braskem*, No. 1:16-cv-02488, Complaint (D.D.C. Dec. 21, 2016) ("Braskem Complaint"), https://www.sec.gov/litigation/complaints/2016/comp-pr2016-271.pdf; *Securities and Exchange Comm'n v. Teva Pharmaceutical Industries Ltd.*, Case No. 1:16-cv-25298, Document 1, Complaint,(S.D. Fla. Dec. 22, 2016) ("Teva Complaint"); *In the Matter of General Cable Corp*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 79703, Administrative Proceeding File No. 3-17755 (Dec. 29, 2016) ("General Cable Order"), https://www.sec.gov/litigation/admin/2016/34-79703.pdf.

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seven individuals brought in 2016,[13] with one additional corporate enforcement action following an individual action brought in 2015.[14] In addition, the SEC brought an enforcement action against an individual, Jun Ping Zhang, without taking any action against his former employer, Harris Corporation.[15]

In total, the SEC collected almost $1.07 billion in disgorgement, penalties, and prejudgment interest, almost all of which involved disgorgement and pre-judgment interest. The fact that the amounts collected in disgorgement and pre-judgment interest in 2016 rivaled the amounts collected in fines and penalties is potentially important, with implications for the Pilot Program and companies' decisions regarding self-reporting.

As in past years, a significant percentage of the $2.41 billion was associated with the largest enforcement actions. During 2016, six unrelated resolutions each involved combined disgorgement, penalties, and pre-judgment interest of more than $100 million: VimpelCom (just under $400 million), Teva Pharmaceuticals (approximately $519 million), Braskem (approximately $160 million, plus as as-yet-not-finalized, but very large, penalty for Odebrecht), Och-Ziff (approximately $412 million), JPMorgan (just over $200 million), and Embraer (approximately $187 million), which together comprised almost 90% of the total settlements. Buried in all the zeroes of 2016's enforcement activity, there were a number of resolutions involving penalties that once would have been considered significant. These include five resolutions in excess of $20 million – Parametric Technology/PTC, Olympus Latin America, Novartis, LATAM/LAN, and GlaxoSmithKline – and the larger resolution of the General Cable enforcement action ($75.8 million).

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13. Yu Kai Yuan entered into a DPA in connection with the PTC Cease & Desist Order; Mikhail Gourevitch entered into a consent decree and paid almost $180,000 is disgorgement, interest and penalty in connection with the Nordion Cease & Desist Order; Lars Frost entered into a consent decree and paid a $20,000 penalty in connection with the Analogic Cease & Desist Order; Daniel Och and Joel M. Frank settled charges with the SEC in connection with the Och-Ziff Cease & Desist Order, with Och paying nearly $2.2 million in settlement; Karl Zimmer agreed to pay $20,000 in connection with the General Cable Corp. Cease & Desist Order; and Ignacio Cueto Plaza entered into a separate Cease and Desist Order with the SEC five months before LAN Airlines resolved its enforcement action, agreeing to pay $75,000 to settle charges.
14. Vincente Garcia settled with the SEC in 2015 in connection with the same conduct that resulted in 2016's SAP SE Cease & Desist Order.
15. United States Securities and Exchange Comm'n, Admin. Proc. File. No. 3-17535, Press Release: "SEC Charges Former Information Technology Executive with FCPA Violations; Former Employer Not Charged Due to Cooperation with SEC" (Sept. 13, 2016), https://www.sec.gov/litigation/admin/2016/34-78825-s.pdf.

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B. The FCPA Pilot Program

Although the large FCPA settlements from 2016 are eye-catching, arguably the most significant FCPA-related development during 2016 was the initiation in April of the DOJ's "Foreign Corrupt Practices Act Enforcement Plan and Guidance," more commonly known as the "Pilot Program."[16] The DOJ presented the Pilot Program as a 12-month experiment to encourage, among other things, voluntary self-reporting by companies on a going-forward basis. The DOJ also has referred to and applied the Pilot Program's principles to DOJ resolutions that already were in the pipeline before the Pilot Program's rollout on April 5, 2016.

"Although the large FCPA settlements from 2016 are eye-catching, arguably the most significant FCPA-related development during 2016 was the initiation in April of the DOJ's 'Foreign Corrupt Practices Act Enforcement Plan and Guidance,' more commonly known as the 'Pilot Program.'"

The Pilot Program set forth one precondition and three considerations that the DOJ will use in assessing the resolution of FCPA enforcement actions:

- As a precondition for any favorable treatment on the basis of cooperation, companies must disclose all relevant information about individuals involved in the alleged misconduct, as set forth in the Memorandum of Deputy Attorney General Sally Q. Yates on "Individual Accountability for Corporate Wrongdoing" (the "Yates Memo").[17]
- If a company clears that hurdle, it may then receive mitigating credit of up to a 50% reduction from the lower end of the penalty range provided by the U.S. Sentencing Guidelines (the "Guidelines") for: (i) voluntary self-reporting, (ii) full cooperation, and (iii) timely remediation.[18] A company that does not self-disclose, but fully cooperates and timely remediates may receive mitigating credit of up to a 25% reduction from the bottom of the Guidelines range.[19]

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16. *See* Pilot Program, *supra* n.2.
17. Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015) ("Yates Memo"), https://www.justice.gov/dag/file/769036/download.
18. *See* Pilot Program, *supra* n.2 at 8.
19. *Id.*

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At length, the Pilot Program describes what constitutes self-reporting, cooperation, and remediation.[20] The DOJ has indicated that it will consider the same factors in determining the eligibility of a company for a "declination" (only available to self-reporting companies)[21] and whether to require the appointment of a monitor.[22] It is worth noting, however, that encouraging self-reporting results in potentially less generous credit than was available as recently as February 2016. For example, VimpelCom did not self-report, but received a 45% reduction from the bottom of the applicable Guidelines range based on cooperation and acceptance of responsibility, more than it would have received under the Pilot Program.[23]

The Pilot Program's ultimate fate under new DOJ leadership remains a significant open question. Only time will tell whether the DOJ will extend the Pilot Program beyond its nominal one-year expiration date, introduce a replacement, or possibly abandon it altogether.

1. Self-Disclosure

Following the Pilot Program's launch, self-reporting to the DOJ resulted in three NPAs and five "declinations," including two DOJ-only "declinations". A fourth enforcement action, involving Teva Pharmaceuticals, is also relevant to assessing voluntary self-disclosure under the Pilot Program.

(a) Declinations

Of the five declinations, three involved parallel SEC actions. Nortek[24] and Akamai[25] entered into NPAs with the SEC, and Johnson Controls[26] settled with the SEC through a cease-and-desist order. All three involved activities limited to each company's subsidiary in China, with factual allegations that could be described as run-of-the-mill to those who have followed FCPA enforcement actions relating to China.[27] In those cases, the SEC required disgorgement. Consistent with the Pilot Program, the DOJ required HMT and NCH to disgorge profits, given the absence of parallel SEC proceedings (as neither company is an issuer).

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20. *See* Berger, *et al.*, "U.S. Department of Justice Issues New FCPA Guidance and Launches Pilot Enforcement Program," *supra* n.2.
21. *See* Pilot Program, *supra* n.2 at 9.
22. *Id.* at 8.
23. *See* VimpelCom DPA, *supra* n.6, at 3-4.
24. Nortek NPA, *supra* n.12.
25. Akamai NPA, *supra* n.12.
26. Johnson Order, *supra* n.12.
27. *See* Andrew M. Levine, Bruce E. Yannett, and Philip Rohlik, "Early Thoughts on the DOJ's Pilot Program and the Continued Breadth of the Accounting Provisions, and Possible Implications for Self-Reporting," FCPA Update, Vol. 7, No. 12 (July 2016), http://www.debevoise.com/insights/publications/2016/07/fcpa-update-july-2016.

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While the publication of information about declinations can prove informative to the marketplace, such publication complicates how best to classify the DOJ's declinations under the Pilot Program. At a minimum, it is unclear whether a declination under the Pilot Program is as favorable for a company obtaining such a declination as the more traditional form of unpublicized declination. In contrast to a DPA, a DOJ declination letter under the Pilot Program is not filed with a court. Similarly, unlike an NPA, a DOJ declination letter under the Pilot Program does not contain obligations undertaken by the companies vis-à-vis the DOJ.

Even though preferable to DPAs and NPAs in these respects, the new declination letters nevertheless are public statements by the U.S. government making allegations (in the absence of a prosecution) that often go beyond the carefully negotiated wording of more traditional forms of resolution. The five declinations that the DOJ has identified under the pilot program all involved letters alleging that the DOJ found "bribery" or "improper payments." Nortek and Akamai's NPAs with the SEC did not specify which part of the FCPA the companies allegedly violated, but the DOJ declination letters refer to "bribery by an employee"[28] or "employees"[29] of the companies in China.

The two DOJ-only declinations, against HMT and NCH, are more detailed and explicit in suggesting that each declination involves declining to bring an action under the anti-bribery provisions of the FCPA. The HMT declination states "[t]he Department's investigation found that HMT through employees and agents, paid … bribes to government officials"[30] and the NCH declination states that the DOJ's investigation "found that … NCH's subsidiary in China … illegally provided things of value … to Chinese government officials."[31] Most surprisingly, despite the fact that Johnson Controls settlement with the SEC was limited to violations of the accounting provisions,[32] the DOJ's declination letter also referred to "bribery by employees of JCI's subsidiaries in China."[33] While the companies involved avoided prosecution in the United States, such statements obviously run the risk of damaging their reputations, being used against them in debarment proceedings in the United States and elsewhere, or forming the foundation of civil proceedings or foreign investigations.

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28. Akamai Declination, *supra* n.10.
29. Nortek Declination, *supra* n.9.
30. HMT Declination, *supra* n.7.
31. NCH Declination, *supra* n.7.
32. Johnson Order, *supra* n.12 at ¶¶ 1, 17-18.
33. Johnson Declination, *supra* n.11.

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It also is unclear how consistent the DOJ has been with regard to declinations. This is particularly true with regard to companies that have settled with the SEC. The DOJ's first three declinations under the Pilot Program were with Akamai, Nortek, and Johnson Controls. As noted, Johnson Controls received a declination suggesting bribery, even though its settlement with the SEC was limited to books-and-records and internal controls. There were numerous other SEC settlements not alleging violations of the anti-bribery provisions in 2016, at least four of which were announced after the Pilot Program's launch and involved companies that previously had announced joint SEC/DOJ investigations:

"The Pilot Program's ultimate fate under new DOJ leadership remains a significant open question. Only time will tell whether the DOJ will extend the Pilot Program beyond its nominal one-year expiration date, introduce a replacement, or possibly abandon it altogether."

- Anheuser-Busch InBev SA/NV announced in its 20-F, filed in March 2016, that its Indian operations were under investigation by both the DOJ and SEC.[34] In late September, it settled with the SEC based on violations of the books-and-records and internal controls provisions.[35]
- GlaxoSmithKline plc disclosed in March 2016 that it had informed the SEC and DOJ of the Chinese government's investigation of its operations and that it had been cooperating with a broader investigation by both entities since 2010.[36] In September, GlaxoSmithKline settled with the SEC for violating the internal controls and books-and-records provisions in connection activities by employees of its China-based subsidiaries.[37]
- On August 11, Key Energy Services settled with the SEC regarding violations of the books-and-records and internal controls provisions in connection with

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34. Anheuser-Busch InBev SA/NV, Form 20-F at 159 (filed Mar. 14, 2016) www.ab-inbev.com/content/dam/universaltemplate/ab-inbev/.../20F_14032016.pdf.
35. Anheuser Order, *supra* n.12.
36. GlaxoSmithKline plc, Form 20-F, Exh. 15.2 at 209.
37. *See* Glaxo Order, *supra* n.12 at ¶¶ A, B.

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its activities in Mexico.[38] Several months earlier, on April 28, 2016 (three weeks after the publication of the Pilot Program), Key Energy announced that the DOJ "ha[d] decided to decline prosecution" of Key Energy.[39]

- In its 20-F for 2015, AstraZeneca stated that it had received inquiries from the SEC and DOJ and that its investigation "has involved indications of inappropriate conduct in certain countries, including China."[40] In August 2016, AstraZeneca settled with the SEC for books-and-records and internal controls violations related to its subsidiaries in China and Russia.[41]

It is unclear why Johnson Controls, which self-reported, received a "declination" referring to bribery, while there was no DOJ action in certain other cases where there was no self-reporting.[42] It is possible in other instances that the DOJ declined to say anything given a conclusion that it lacked jurisdiction, particularly absent any indication of U.S. involvement in the related SEC resolutions. However, there is no such indication of jurisdiction in the Johnson Controls SEC settlement, either. Given the discrepancies above and the DOJ's usually aggressive approach to jurisdiction, those considering self-reporting will be forced to consider carefully the experience of other companies under the Pilot Program.

(b) Insufficient Self-Disclosure

The Pilot Program makes clear that self-disclosure must take place prior to imminent threat of an investigation, it must take place "within a reasonably prompt time after becoming aware of the offense," and must involve disclosure of all facts know to the disclosing company.[43] Two enforcement actions from 2016 make clear that these conditions are strictly enforced.

Parametric Technology (now known as PTC) is a software company based in Massachusetts. In February 2016, it settled with the SEC,[44] and its Chinese and Hong Kong subsidiaries entered into an NPA with the DOJ[45] in connection with

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38. *See* Key Energy Order, *supra* n.12 at ¶ 1.

39. Key Energy Services, Inc., Form 8-K, Item 8.01 (filed Apr. 28, 2016) http://phx.corporate-ir.net/phoenix.zhtml?c=78965&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTEwODk4MTE4JkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVEIPTI9FTIRJUkUmc3Vic2lkPTU3.

40. AstraZeneca, Annual Report and Form 20-F Information 2015, 191 (filed Mar. 21, 2016), http://www.astrazeneca-annualreports.com/2015/assets/pdf/AZ_Annual_Report_2015.pdf.

41. *See* AstraZeneca Order, *supra* n.12 at 2.

42. Anheuser Order, *supra* n. 12 at ¶ 30 (noting lack of self reporting); Glaxo Order, *supra* n.12 at ¶ R (not mentioning self-reporting in discussion of cooperation and remediation); Key Energy Order, *supra* n.12 at ¶ 21 (noting that Key Energy reported the relevant facts after having first received inquiries from the SEC); AstraZeneca Order, *supra* n.12 at ¶ 15 (noting lack of self reporting).

43. *See* Pilot Program, *supra* n.2 at 4.

44. PTC Order, *supra* n.12.

45. *See* PTC NPA, *supra* n.6.

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improper benefits provided to employees of state-owned entities in China, including payments made through third parties and provision of improper travel, by its Chinese and Hong Kong subsidiaries. It paid a penalty of slightly over $14.5 million to the DOJ, and "disgorgement" and prejudgment interest of approximately $13.6 million to the SEC. Although the NPA entered into between the DOJ and PTC's Chinese and Hong Kong subsidiaries pre-dated the Pilot Program, the NPA appears to pre-figure the calculus outlined in the Pilot Program. PTC self-reported to the SEC and DOJ in 2011, but it did not receive voluntary disclosure credit as it "did not voluntarily disclose relevant facts known to PTC Inc. at the time of the initial disclosure until the Office uncovered salient facts regarding … improper travel and entertainment."[46] As a result, it not only received zero credit for self-disclosure, but also received only partial credit for cooperation (15% out of a maximum 25%).[47]

PTC was penalized by not receiving credit for voluntary disclosure or cooperation for failing to disclose facts known to it at the time of its disclosure. In contrast, Analogic / BK Medical, a medical equipment company that settled alleged violations of the FCPA's accounting provisions with the SEC[48] and had its Danish subsidiary enter into an NPA with the DOJ for knowing and willful violations of the books-and-records provisions, did receive full credit for voluntary disclosure.[49] However, it received a significantly discounted benefit with regard to cooperation credit, as it did not reveal all the facts learned in the course of its investigation.[50] BK Medical only received a total discount of 30%, meaning that with full self-disclosure credit (25%) it received only 5% (out of 25%) for cooperation.[51] PTC and BK Medical suggest the need for caution. If a company self-discloses after learning of significant information, it should disclose all such information. If a company self-discloses early and later learns of additional relevant information, it should update its disclosure. Failure in either respect may result in a significant loss of credit when resolving the investigation.

An even more intriguing question arises out of stray language in the DOJ's DPA with Teva Pharmaceuticals. Teva is an Israeli pharmaceutical company and the largest generic drug manufacturer in the world.[52] It settled with the SEC and

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46. *Id.* at 1. Interestingly, the SEC Cease-and-Desist Order is more forgiving, noting that "PTC voluntarily self-reported the results of its internal investigation to the Commission and responded to information requests from the Commission staff. PTC did not, however, uncover or disclose the full scope and extent of PTC-China's FCPA issues until 2014." PTC Order, *supra* n.12 at ¶ 33.
47. *See* PTC NPA, *supra* n.12.
48. *See* Analogic Order, *supra* n.12 at ¶ 1.
49. *See* BK Medical NPA, *supra* n.6.
50. *Id.* at 1.
51. *Id.* at 2.
52. *See* Teva Complaint, *supra* n.12 at ¶ 11.

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entered into a DPA with the DOJ,[53] while its Russian subsidiary, Teva LLC (Russia), pled guilty to conspiracy to violate the FCPA.[54] According to the SEC's Complaint, Teva realized more than $214 million in profits on business obtained through illegal payments,[55] the vast majority of which related to business obtained through over $197 million in payments to a senior Russian official, who also beneficially owned and controlled Teva's Russian distributor.[56] According to the DPA, Teva's profits resulting from its relationship with the distributor controlled by the Russian official were approximately $204 million.[57] As a result of its settlements, Teva paid approximately $519 million in penalties, disgorgement, and prejudgment interest, and agreed to a three-year monitorship, making it the largest single resolution – in terms of funds to the U.S. Treasury[58] – of 2016 (although it may soon be overtaken by the Braskem/Odebrecht settlement once the amount of Odebrecht's fine is finalized).

The Teva DPA notes that Teva did not receive self-disclosure credit. However, with regard to Teva's cooperation, the DPA states that Teva "disclos[ed] to the Fraud Section conduct in Russia and Ukraine of which the Fraud Section was previously unaware."[59] Given that most of Teva's statement of facts describes conduct in Russia involving a single distributor, it unclear whether the DOJ is referring to information not contained in the statement of facts. In any event, Teva received no self-reporting credit for reporting new information after the investigation had begun.

(c) General Cable and the Risks of Self-Disclosure

2016's last corporate resolution under the FCPA, involving General Cable Corporation, serves as a reminder that even companies receiving full credit under the Pilot Program still face the harsh mathematics of mandatory disgorgement and the Sentencing Guidelines.

General Cable is a publicly-traded manufacturer of copper, aluminum, and fiber optic wire and cable products based in Kentucky.[60] Despite self-reporting to the SEC and DOJ, it settled with the SEC by means of a cease-and-desist order that

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53. *See* United States Securities and Exchange Comm'n, Press Rel. 2016-277, "Teva Pharmaceutical Paying $519 Million to Settle FCPA Charges" (Dec. 22, 2016), https://www.sec.gov/news/pressrelease/2016-277.html; Teva DPA, *supra* n.6.
54. *See* Teva LLC Plea Agreement, *supra* n.6.
55. *See* Teva Complaint, *supra* n.12 at ¶ 2.
56. *Id.* at ¶ 16.
57. *See* Teva DPA, *supra* n.6, Attachment A at ¶ 54.
58. The settlements by both VimpelCom and Braskem/Odebrecht were larger when taking into account payments to foreign authorities.
59. Teva DPA, *supra* n.6 at ¶ 4(b).
60. *See* General Cable Order, *supra* n.12 at ¶ 4.

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alleged violations of the anti-bribery, books-and-records, and internal controls provisions of the FCPA,[61] and entered into an NPA with the DOJ.[62] Under the NPA, General Cable agreed to a pay a penalty of just under $20.5 million and disgorgement of approximately $51 million plus pre-judgment interest, for a total of over $70 million.[63] An equivalent amount of disgorgement and prejudgment interest was levied by the SEC and offset against the DOJ total.[64]

The allegations in the NPA involve bribes paid over a ten-year period in Angola, Thailand, Indonesia, Bangladesh, and China. According to the NPA, more than $13 million was paid, consisting of just over $9 million paid in Angola between 2003 and 2013 (mostly occurring after 2009);[65] $2 million paid to freight forwarders in Indonesia between 2010 and 2014, part of which was used for corrupt purposes;[66]

"One of the challenges inherent in self-reporting is that companies that do business in difficult jurisdictions, despite their best efforts, almost invariably find problems."

$43,700 paid to an agent in Bangladesh during the same period;[67] $1.5 million in rebates paid to a distributor in Thailand between 2012 and 2013; and $500,000 paid to agents and distributors in China between 2012 and 2015.[68] The SEC Order has a slightly different valuation of bribes paid, stating that, between 2003 and 2015, $19 million in improper payments were made in the same countries identified by the DOJ, plus Egypt.[69]

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61. *Id.* at II, ¶¶ 1, 48-49.
62. *See* Letter from Dep't of Justice, Criminal Division, Fraud Section to Eric W. Sitarchuk, Esq., "Re: General Cable Corporation Criminal Investigation," Dec. 22, 2016 ("General Cable NPA"), at 1, http://www.corporatecrimereporter.com/wp-content/uploads/2016/12/General-Cable-NPA.pdf.
63. *Id.* at 4.
64. *Id.* at 4-5; *see* General Cable Order, *supra* n.12 at IV(B).
65. *See* General Cable NPA, *supra* n.62 Attachment A at ¶11.
66. *Id.* at ¶ 18.
67. *Id.*
68. *Id.* at ¶ 22, 28.
69. General Cable Order, *supra* n.12 at ¶ 2.

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One of the challenges inherent in self-reporting is that companies that do business in difficult jurisdictions, despite their best efforts, almost invariably find problems. This can be a sign of a strong compliance program, and even has been recognized as such as recently as November 2016 by then-Assistant Attorney General Leslie Caldwell, who said:

> We recognize that any big company can't control all of its employees all of the time, we recognize that. If you are a company operating in certain geographies you are going to be paying possibly small, but you will be paying some kind of inappropriate payment, we recognize that. … it's impossible for a big global company to make sure that all of its employees are following the law all of the time.[70]

(d) Cooperation Credit

During 2016, the main reason that companies apparently did not receive full cooperation credit related to failures early in an investigation. Braskem not only failed to receive voluntary disclosure credit due to the fact that it only notified the DOJ after the allegations became public, but it also received only partial credit for cooperation because its cooperation did not begin until after the DOJ already had developed significant evidence in the case.[71] As with the PTC DPA, it is not entirely clear whether lagging behind the DOJ should properly be considered as part of self-disclosure credit or cooperation credit, but the DOJ appears to consider it under both headings, giving no self-disclosure credit and 15% (out of 25%) credit for cooperation.[72] The DOJ noted that Braskem did not produce documents or information until seven months after its initial contact with the DOJ.[73] The DPA did not include an explanation of the delay, though it is not uncommon for investigations to get off to a slow start as a result of local law, data processing or other issues. It is also probable that Braskem was busy dealing with Brazilian investigations. Nonetheless, the DOJ's decision to include the seven-month figure in the DPA serves as a reminder to cooperating companies that it is important to produce information in the early stages of cooperation.

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70. Michael Koehler, "Must See Video Clips From Assistant AG Caldwell's Recent FCPA Speech," FCPA Professor, Nov. 7, 2016, http://fcpaprofessor.com/must-see-video-clips-assistant-ag-caldwells-recent-fcpa-speech/. A video of the speech is available at https://www.c-span.org/video/?c4629541/assistant-ag-caldwell-voluntary-disclosures.
71. Braskem Plea Agreement, *supra* n.6 at 2-3.
72. *Id.* at 2-3, 5.
73. *Id.* at 3.

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As with Braskem, Och-Ziff Capital Management Group and Teva Pharmaceuticals failed to receive full cooperation credit due to what the DOJ perceived as deficiencies early in the investigations. Teva cooperated with the DOJ by making employees available for interviews, deferring its own interviews, collecting, analyzing, translating, and organizing "voluminous" documents and providing all non-privileged facts, including some about which the DOJ was not aware.[74] However, it received 20% (as opposed to 25%) credit "because of issues that resulted in delays to the early stages of the investigations, including vastly overbroad assertions of attorney client privilege and not producing documents on a timely basis in response to certain Fraud Section document requests…"[75]

Similar language is used in the Och-Ziff DPA, which also allocated 20% (out of a possible 25%) cooperation credit. Specifically, the DPA acknowledged "issues that resulted in the early stages of the investigation, including failures to produce important, responsive documents on a timely basis, and in some instances producing documents only after the Offices flagged for the Company that the documents existed and should be produced…"[76] Again, it is impossible to know the precise reasons for the delays in the early stages of the investigations, but Braskem, Teva, and Och-Ziff make clear that there are potential risks to taking a conservative approach to production early in the investigation while internal investigators try to get a sense of what happened.

2. Remediation

As with self-reporting and cooperation, the Pilot Program requires significant efforts in order to gain credit for remediation. In particular, several 2016 resolutions demonstrate the importance of employee discipline to the DOJ when considering remediation efforts:

- Teva was praised for causing at least 15 employees to be removed from the company.[77]
- JPMorgan Securities (Asia Pacific), the only corporation in 2016 that resolved an investigation with an NPA (as opposed to a DPA or plea agreement) that did not self-report, was similarly praised, both for causing involved employees to be removed from the company and for financially sanctioning relevant current and former employees.[78]

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74. *See* Teva DPA, *supra* n.6 at 3-4.
75. *Id.* at 3-5.
76. Och-Ziff DPA, *supra* n.6 at 4.
77. *See* Teva DPA, *supra* n.6 at 4.
78. *See* JPMorgan NPA, *supra* n.6 at 2.

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- Similarly, the DOJ noted in the Braskem plea agreement that a failure to discipline employees was not held against the company "[b]ecause the senior management at the Defendant [sic] were in a position to discipline employees were themselves involved in the misconduct, the Defendant was unable to discipline wrongdoers until after the senior management resigned or were terminated, at which point there were no longer any employees left" to discipline.[79]
- Conversely, Embraer[80] and LATAM Airlines Group S.A.,[81] were noted as having engaged in "partial" or "inadequate[]" remediation (respectively) due to a failure to discipline senior executives who were aware of or involved in the wrongdoing. In the case of LATAM, the executive may have been Ignacio Cueto Plaza, who settled with the SEC in February 2016 for $75,000 for his involvement in dealings with Argentine unions ten years earlier.[82]

"[I]ndividual criminal actions under the FCPA face numerous jurisdictional and evidentiary hurdles. … The SEC, given its ability to use administrative proceedings with a lower standard of proof and more relaxed procedural rules (and only civil penalties available), faces none of these hurdles."

C. Individual Prosecutions

None of DOJ's corporate resolutions during 2016 has yet been accompanied or followed by criminal charges against individuals. Consistent with the Pilot Program, though, the DOJ has noted in resolution documents that companies have cooperated by providing information, "including information about individuals involved in the misconduct" which, in the case of Embraer,[83] "assisted in the prosecutions of individuals by foreign authorities for the misconduct described in the [DPA], and, in the case of Braskem, "facilitate[ed] the cooperation of its former executives in Brazil as part of Brazilian leniency proceedings."[84]

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79. Braskem Plea Agreement, *supra* n.6 at 4.
80. *See* Embraer DPA, *supra* n.6 at 4.
81. *See* LATAM DPA, *supra* n.6 at 4.
82. *See In the Matter of Ignacio Cueto Plaza*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77057, Accounting and Auditing Enforcement Rel. No. 3738; Administrative Proceedings File No. 3-17100, at ¶ 1-2, IV(B) (Feb. 4, 2016) ("Cuento Plaza Order"), https://www.sec.gov/litigation/admin/2016/34-77057.pdf.
83. Embraer DPA, *supra* n.6 at 3.
84. Braskem Plea Agreement, *supra* n.6 at 3.

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The SEC, though, has actively pursued enforcement activity against individuals during 2016, settling with individuals involved with the PTC,[85] LAN Airlines,[86] Nordion,[87] Analogic,[88] Och-Ziff,[89] and General Cable[90] enforcement actions, as well as bringing individual charges against Zhang Jun Ping[91] in the absence of a corporate resolution. The lack of a corporate enforcement action in the Zhang resolution should be heartening to companies and practitioners involved in acquisitions, as Zhang was the CEO of a Chinese subsidiary of a company acquired by Harris Corporation and was responsible for providing, or directing others to provide, things of value to employees of Chinese state-owned entities, while deliberately hiding the expenses from the parent company and from Harris's due diligence team.[92] After the acquisition, Harris instituted a compliance program, trained employees, and implemented an anonymous hotline resulting in the discovery of the illicit payments within five months of the acquisition.[93] In other words, Harris followed the advice regarding acquisitions provided numerous times by the enforcement agencies, most recently in DOJ Opinion Release 14-02, and was not punished for doing so, despite a technical books and records violation arising from the few months of ownership prior to discovering the wrongdoing.

Perhaps most notable from a compliance point of view is the individual enforcement action against General Cable's former CFO, Karl J. Zimmer. While the other individual actions involved employees and executives who either participated in making payments or authorized such payments in the presence of "red flags," Zimmer paid a civil penalty of $20,000 primarily because he authorized a payment to an agent in Angola knowing that General Cable had commenced an internal investigation of that agent.[94]

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85. *See* United States Securities and Exchange Commission, Deferred Prosecution Agreement with Yu Kai Yuan (Feb. 16, 2016) ("Yu Kai Yuan DPA"), https://www.sec.gov/news/pressrelease/2016-29.html.
86. *See* Cuento Plaza Order, *supra* n.82.
87. *See In the Matter of Mikhail Gourevitch*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No.77288, Administrative Proceedings File No. 3-17152 (Mar. 3, 2016) ("Gourevitch Order"), https://www.sec.gov/litigation/admin/2016/34-77288.pdf.
88. *See* Analogic Order, *supra* n.12.
89. *See* Och-Ziff – Oz Order, *supra* n.12.
90. *See In the Matter of Karl J. Zimmer*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 79704 (Dec. 29, 2016) ("Karl Zimmer Order"), https://www.sec.gov/litigation/admin/2016/34-79704.pdf.
91. *See In the Matter of Jun Ping Zhang*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78825, Accounting and Auditing Enforcement Rel. No. 3800, Administrative Proceedings File No. 3-17535 (Sept. 13, 2016), https://www.sec.gov/litigation/admin/2016/34-78825.pdf.
92. *Id.* at ¶¶ 6-10.
93. *See* Andrew Ceresney, Director, Division of Enforcement, SEC, Keynote Speech, ACI's 33rd International Conference on the FCPA (Nov. 30, 2016), https://www.sec.gov/news/speech-cerensey-113016.html.
94. *See* Karl Zimmer Order, *supra* n.90 at ¶ 12-15, IV(B).

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Given the DOJ's stated commitment to bringing individual actions, it is notable that the SEC has more frequently sought to hold individuals accountable in connection with corporate enforcement actions. However, individual criminal actions under the FCPA face numerous jurisdictional and evidentiary hurdles. As with other white collar criminal prosecutions, corporate enforcement actions often involve novel and untested legal theories and difficult *mens rea* issues. Unlike companies, which have substantial incentives to settle, individuals facing jail are more likely to challenge these theories, presenting the DOJ with the real prospect of losing at trial or encountering an adverse ruling that could limit its use of a particular theory going forward.[95] The SEC, given its ability to use administrative proceedings with a lower standard of proof and more relaxed procedural rules (and only civil penalties available), faces none of these hurdles.

D. International Cooperation

The United States has for many years cooperated with other countries in criminal matters, either through multinational legal assistance treaties (MLATs) or more informal mechanisms. In the field of anti-corruption, as the Pilot Program stresses, such cooperation has been commonplace,[96] and often is mentioned at the end of SEC or DOJ press releases.

Less common are joint resolutions involving US and foreign authorities. Absent unusual circumstances,[97] FCPA offenses, by definition, take place primarily abroad and implicate the interests of more than one sovereign, and indeed may cause more harm abroad than in the United States. In part, joint resolutions of corruption allegations are welcome in that they avoid potential issues arising under the principle of *ne bis in idem*, under which a company should not be punished twice for the same thing, and which, in most of the rest of the world, but not the United States, applies to double jeopardy under separate sovereigns.[98] Thus, joint resolutions can foreclose a situation in which a corporation fined in the United States cannot be punished for the same conduct in the country in which the bribery took place or where the corporation is headquartered.

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95. *See* Matthew E. Fishbein, "Why Individuals Aren't Prosecuted for Conduct Companies Admit," N.Y.L.J. (Sept. 9, 2014), http://www.newyorklawjournal.com/id=1202670499295/Why-Individuals-Arent-Prosecuted-for-Conduct-Companies-Admit?slreturn=20170018010401.

96. *See* Pilot Program, *supra* n.2 at 2.

97. *See, e.g., United States v. Ng Lap Seng and Jeff C. Yin*, Case No. 15-cr-00706 (VSB), Docket No. 322, Superseding Indictment (S.D.N.Y., filed Nov. 22, 2016), https://www.justice.gov/criminal-fraud/file/913286/download (relating to bribery of a UN official).

98. *See* Frederick T. Davis and Antoine F. Kirry, "A Recent Decision in France Applies 'International Double Jeopardy' Principles to U.S. DPAs," FCPA Update, Vol. 7, No. 2, at 2-3 (Sept. 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/09/fcpa_update_september_2015.pdf.

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Three of the largest corporate FCPA resolutions of 2016 involved coordinated resolutions between the United States and other countries: VimpelCom, Embraer, and Odebrecht/Braskem:

VimpelCom, a Dutch company with U.S.-issued securities, resolved allegations that its Uzbek subsidiary paid over $114 million in bribes to a government official in Uzbekistan.[99] In a joint settlement with U.S. and Dutch authorities, the company agreed to pay just over $795 million, split evenly between the authorities.

Embraer is a Brazilian aircraft company which, like VimpelCom, is a U.S. issuer. Embraer settled an SEC action and entered into a DPA with the DOJ resulting in a net payment of approximately $187 million to the U.S. Treasury as a result of allegations of bribery in the Dominican Republic, Saudi Arabia, and Mozambique, as well as payments to third parties in India. Simultaneously, and credited against the disgorgement assessed by the SEC, Embraer entered into a settlement to pay disgorgement of $20 million to Brazilian authorities.[100]

Odebrecht and Braskem are two related Brazilian companies, in that Odebrecht controls Braskem, which also is a U.S. issuer.[101] Each company pled to one count of conspiracy to violate the anti-bribery provisions of the FCPA.[102] According to the Odebrecht plea agreement, Odebrecht and its co-conspirators effectively paid over $788 million in bribes to officials, political parties, candidates, and third parties in Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.[103] Odebrecht agreed to a calculation of the total criminal penalty as just over $4.5 billion, reflecting a 25% discount off the bottom of the applicable Sentencing Guidelines range, due to its full cooperation and remediation. However, because of financial limitations, Odebrecht agreed to pay a lesser criminal penalty of $2.6 billion; in coming months, U.S. and Brazilian authorities will determine whether the company can pay anything additional. The total penalties against Odebrecht therefore will range between $2.6 billion and approximately $4.5 billion. The United States and Switzerland each will receive 10% of the total criminal fine, with Brazil receiving the remaining 80%.

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99. *See* United States Dep't of Justice Press Rel. 16-194, "VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme" (Feb. 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

100. *See* United States Dep't of Justice Press Rel. 16-1240, "Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges" (Oct. 24, 2016), https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges; *see also* "Embraer Bribery Schemes Result in Net $187 Million FCPA Enforcement Action," FCPA Professor (Oct. 25, 2016), http://fcpaprofessor.com/embraer-bribery-schemes-result-net-185-5-million-fcpa-enforcement-action/.

101. *See* Braskem Plea Agreement, *supra* n.6 Attachment B at ¶¶ 1-3; Odebrecht Plea Agreement, *supra* n.6 Attachment B at ¶¶ 1, 3.

102. *See* Braskem Plea Agreement, *supra* n.6 at 5; Odebrecht Plea Agreement, *supra* n.6 at 4.

103. *See* Odebrecht Plea Agreement, *supra* n.6 Attachment B at ¶¶ 19-21.

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According to the Braskem plea agreement, the company participated in this conspiracy primarily by generating funds partially used for bribery payments, transferring them to a unit in charge of making improper payments, and authorizing bribes to Brazilian officials and employees of Petrobras, Brazil's state-owned oil company, between 2002 and 2014.[104] In addition, the Braskem plea agreement states that the company failed to maintain internal controls and falsified its books and records.[105]

"One possible reason why these types of coordinated resolutions are likely to continue, particularly in large cases, is the fine inflation that has taken place in the United States over the past decade."

Under its DOJ plea agreement, after set-offs and credits, Braskem agreed to pay a total fine of $632,625,336.81.[106] The United States and Switzerland each will receive 15% of this amount ($94.89 million), and Brazil will receive the remaining 70% ($442.84 million).[107] Under a separate settlement with the SEC and Brazilian and Swiss authorities, Braskem also agreed to disgorge $325 million in profits, which was credited by the DOJ.[108] The disgorgement will be split between the SEC and Brazil, with the SEC receiving $65 million and Brazil receiving $260 million.[109] Thus, the U.S. Treasury will receive a total of just under $165 million from Braskem, with Brazil receiving just over $700 million, and Switzerland receiving just under $95 million. As a result, the total amount to be paid to the U.S. Treasury is approximately $420 million. The VimpelCom and Embraer resolutions involved splitting fines and disgorgement between the United States and countries in which the companies are headquartered, and did not directly involve compensation to countries in which the bribes were paid. Odebrecht/Braskem is different in that

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104. Braskem Plea Agreement, *supra* n.6 Attachment B at ¶¶ 24-29, 32.

105. *Id.* Attachment B at ¶¶ 32-33.

106. *Id.* at 21.

107. *Id.* at 21.

108. *Id. See also* United States Securities and Exchange Comm'n, Press Rel. 2016-271, "Petrochemical Manufacturer Braskem S.A. to Pay $957 Million to Settle FCPA Charges," Dec. 21, 2016, https://www.sec.gov/news/pressrelease/2016-271.html.

109. United States Securities and Exchange Comm'n, Press Rel. 2016-271, "Petrochemical Manufacturer Braskem S.A. to Pay $957 Million to Settle FCPA Charges," Dec. 21, 2016, https://www.sec.gov/news/pressrelease/2016-271.html.

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one of the countries (Brazil) sharing in the settlement proceeds (and receiving the majority) is the country that is the seat of the companies as well as the place where much of the bribery took place.

One possible reason why these types of coordinated resolutions are likely to continue, particularly in large cases, is the fine inflation that has taken place in the United States over the past decade. That inflation, including in recent settlements outside the FCPA context,[110] generally has not yet been exported to other jurisdictions. As a result, one could speculate that other countries benefit from joint resolutions with U.S. authorities, as it potentially gives them access to a quantum of penalties otherwise unlikely to be obtained at home.

E. Hiring Practices and Charitable Donations

2016 saw three FCPA resolutions dealing directly with "things of value" that were arguably provided neither "to a foreign official" nor to "any person, while knowing that all or a portion of such money or thing of value will be offered … to a foreign official": specifically, employment opportunities and charitable donations. The SEC's Cease-and-Desist Order against Qualcomm[111] and the joint SEC[112] and DOJ[113] resolutions against JPMorgan and its Hong Kong subsidiary involved hiring practices, while the SEC's Cease-and-Desist Order against Nu Skin[114] involved charitable donations.

Like last year's SEC enforcement action against Bank of New York Mellon,[115] the Qualcomm and JPMorgan enforcement actions make clear that providing employment or internships, paid or unpaid, outside of the normal hiring process to anyone referred by a foreign official (not just sons and daughters of foreign officials)

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110. *See, e.g.*, Jack Ewing and Hiroko Tabuchi, "Volkswagen Set to Plead Guilty and to Pay U.S. $4.3 Billion in Deal," *N.Y. Times* (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/business/volkswagen-diesel-settlement.html; Joseph Ax, Aruna Viswanatha and Maya Nikolaeva, "U.S. imposes record fine on BNP in sanctions warning to banks," *Reuters* (July 1, 2014), http://www.reuters.com/article/us-bnp-paribas-settlement-idUSKBN0F52HA20140701 (reporting agreement to pay almost $9 billion in sanctions-related penalties).

111. *See In the Matter of Qualcomm Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77261, Accounting and Auditing Enforcement Rel. No. 3751, Administrative Proceeding File No. 3-17145 (Mar. 1, 2016) ("Qualcomm Order"), https://www.sec.gov/news/pressrelease/2016-36.html.

112. *See* JPMorgan Order, *supra* n.12.

113. *See* JPMorgan NPA, *supra* n.6.

114. *See* Nu Skin Order, *supra* n.12.

115. *See In the Matter of The Bank of New York Mellon Corporation*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 75720, Accounting and Auditing Enforcement Rel. No. 3679, Administrative Proceeding File No. 3-16762, (Aug. 18, 2015) ("BNYM Order"), https://www.sec.gov/litigation/admin/2016/34-78884-s.pdf.

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risks being seen as violating the FCPA.[116] This is especially true in cases in which the candidate is clearly unqualified. That said, the NPA entered into by JPMorgan's Hong Kong subsidiary with the DOJ is the first time the DOJ has resolved an enforcement proceeding regarding this issue, and it is significantly different from the two earlier SEC resolutions that involved the same issue.

The Bank of New York Mellon Order included quotes from internal emails relating hires to the general ability to influence future decisions by the relevant public officials.[117] Similarly, the Qualcomm Order contained internal communications about how a hire might relate to maintaining customer relationship, such as where a hire would be important "given our cooperation" with the relevant SOE or that a hire was "quite important from a customer relationship perspective."[118] More importantly, although all the candidates in the Bank of New York Mellon Order were alleged to be unqualified,[119] in the Qualcomm Order, there were no such allegations relating to two of the three hires described.[120] As a result, after Qualcomm, there was significant question as to whether a relationship could be taken into account in hiring – the proverbial "thumb on the scale" – without triggering an FCPA violation. Given the possibility that a stray email commenting on the importance of a relationship could later be used as the basis for a FCPA action, a more practical question also exists as to whether it is ever worth hiring someone referred by a foreign official.

The JPMorgan resolutions, on the other hand – at least insofar as they are presented in the Order and NPA – clearly relate to *quid pro quo* hires for near-term expected business. JPMorgan's Hong Kong subsidiary engaged in hiring under selection criteria that included whether the hire involved had "[d]irectly attributable linkage to business opportunity," was focused on "generating near term revenue," and employees recorded on a spreadsheet "that tracked hires to specific clients, while tracking revenue attributable to those hires."[121] As a result, the question remains, at least with regard to the DOJ, as to whether, absent a *quid pro quo*, it is ever acceptable to take a relationship into account in the hiring process – and how the DOJ and SEC will approach enforcement in this area under the new presidential administration.

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116. *See* Bruce E. Yannett, Andrew M. Levine, and Philip Rohlik, "Beyond 'Sons and Daughter': JPMorgan Resolves Hiring Practices Probe," FCPA Update, Vol. 8 No. 4 (Nov. 2016), http://www.debevoise.com/insights/publications/2016/11/fcpa-update-november-2016.

117. *See* BNYM Order, *supra* n.115, at ¶ 18; *see also* Sean Hecker, Bruce E. Yannett, Philip Rohlik, and David Sarratt, "The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials," FCPA Update, Vol. 7, No. 1 (Aug. 2015), http://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015

118. Qualcomm Order, *supra* n.111, at ¶¶ 23-26.

119. BNYM Order, *supra* n.115, at ¶ 2.

120. *See* Qualcomm Order, *supra* n.111, at ¶¶ 23, 26.

121. JPMorgan NPA, Attachment A, *supra* n.6, at ¶ 23; JPMorgan Order, *supra* n.12, at ¶¶ 39, 43.

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The Nu Skin resolution, 2016's sole case focusing on charitable donations, continued the pattern established by earlier similar cases in penalizing donations made with a *quid pro quo* intent of obtaining improper government action, rather than where there was merely a general desire to build goodwill or provide support to the community in which a company operates. Nu Skin is a manufacturer and seller of cosmetics, primarily through multi-level marketing.[122] In order to avoid an adverse administrative proceeding that could impact its future ability to obtain licenses in China, Nu Skin's Chinese subsidiary made a one million RMB (approximately $154,000) donation to a charity associated with a high-ranking provincial Communist Party official with the intention that the official would influence other officials not to institute the administrative proceeding. As a result, Nu Skin paid a civil penalty of $300,000 plus disgorgement and interest of approximately $465,000.

"As a result, the question remains, at least with regard to the DOJ, as to whether, absent a *quid pro quo*, it is ever acceptable to take a relationship into account in the hiring process – and how the DOJ and SEC will approach enforcement in this area under the new presidential administration."

F. Continued "Virtual Strict Liability" Enforcement of the Accounting Provisions

While 2016 was dominated by large joint SEC and DOJ enforcement actions, the SEC also continued to bring smaller proceedings – under the books-and-records and internal controls provisions of the FCPA – against companies based on actions of employees of foreign subsidiaries, even if unknown to or deliberately hidden from company management:

- SciClone, a pharmaceutical manufacturer, paid almost $13 million to settle charges relating to trips, vacations, gifts, and entertainment provided to Chinese healthcare professionals and other officials.[123]
- Novartis paid $25 million to settle similar charges relating to its Chinese subsidiaries, even though the employees involved "attempted to conceal the true nature of the transactions."[124]

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122. *See* Nu Skin Order, *supra* n.12, at ¶ 1.

123. *See* SciClone Order, *supra* n.12.

124. *See* Novartis Order, *supra* n.12, at ¶ 2.

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- AstraZeneca paid just over $5.5 million to settle similar charges relating to conduct by its subsidiaries in China and Russia.[125]
- GSK paid $20 million based on similar behavior by its Chinese subsidiaries.[126]
- Nortek entered into a NPA with the SEC,[127] received a declination from the DOJ,[128] and paid just over $300,000 to the SEC as a result of hundreds of relative small payments made by its Chinese subsidiary to various municipal officials.
- Akamai Technologies obtained a similar result and paid just over $670,000 as a result of kickbacks and gifts provided to customers by one regional sales manager at its Chinese subsidiary as well as other "improper gifts and entertainment" which the NPA does not specify.[129]
- Johnson Controls, also the beneficiary of a DOJ declination, paid over $14 million to settle SEC charges relating to payments made by its Chinese subsidiary, even though these payments occurred "despite efforts taken by [Johnson Controls]" and deliberate efforts by managers of the Chinese subsidiary to hide the practice through making small payments to third parties.[130]
- Nu Skin[131] paid approximately $765,000 to the SEC because despite the fact that Nu Skin instructed its Chinese subsidiary to consult with FCPA counsel, the Chinese subsidiary still made a charitable donation while withholding key information and ignoring FCPA counsel's advice.

G. Significant Case Developments

Given the preference of companies to avoid litigating cases through indictment and trial, buttressed by the availability of alternative forms of resolution such as DPAs and NPAs, judicial decisions regarding the FCPA are rare. That said, during 2016, several courts ruled on issues that may impact FCPA enforcement.

As we reported last year, in August 2015, the United States District Court for the District of Connecticut granted a partial motion to dismiss in the *Hoskins*[132] prosecution related to the Alstom resolution. The ruling limited the scope of

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125. *See* AstraZeneca Order, *supra* n.12.

126. *See* GlaxoSmithKline Order, *supra* n.12.

127. *See* Nortek NPA, *supra* n.12.

128. *See* Nortek Declination, *supra* n.9.

129. Akamai NPA, Exhibit A, at ¶ 5, *supra* n.12.

130. Johnson Order, *supra* n.12.

131. *See* Nu Skin Order, *supra* n.12.

132. *United States v. Hoskins*, No. 3:12-cr-00238-JBA, Ruling on Defendant's Second Motion to Dismiss the Indictment (D. Conn. Aug. 13, 2015) ("Hoskins").

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conspiracy and aiding and abetting charges in FCPA matters when the defendant is a non-resident foreign national, not an agent of a domestic concern.[133] The DOJ moved for reconsideration, which was denied in March 2016.[134] The DOJ then appealed to the Second Circuit, and briefing began in September.[135] A hearing is scheduled for March 2017.[136] As noted last year, a ruling in Hoskins's favor would limit the FCPA's extraterritorial jurisdiction over non-US persons who are not agents of issuers or domestic concerns.

In May 2016, the Eleventh Circuit Court of Appeals ruled in *SEC v. Graham*, a non-FCPA case, that the five-year statute of limitations in 28 U.S.C. § 2462 prohibits the SEC from seeking disgorgement or declaratory relief for conduct predating the five-year statute of limitations.[137] In August 2016, the Tenth Circuit reached a contrary ruling in *SEC v. Kokesh*,[138] finding that neither an injunction against future violations of the federal securities laws nor disgorgement was a "forfeiture" or "penalty," and therefore neither was subject to the five-year statute of limitations.[139] The resulting circuit split resulted in the Supreme Court granting a writ of certiorari in January 2017[140] to review the following question: "Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to claims for 'disgorgement?'"[141] Should the Supreme Court side with the Eleventh Circuit over the Tenth, SEC enforcement of the FCPA in cases dating back more than five years, such as the LAN Airlines case, would be substantially impacted.

In a victory for the SEC, in August 2016, the D.C. Circuit Court of Appeals rejected a constitutional challenge to the SEC's use of administrative proceedings to resolve matters under its jurisdiction.[142] The *Lucia* decision arose under the anti-fraud provisions of the Investment Advisers Act and dealt with a challenge to the constitutionality of the appointment of administrative law judges. A loss for the SEC would have been significant for SEC enforcement actions. Since the passage of the Dodd-Frank Act, the SEC has brought most of its enforcement actions before its own administrative tribunals. Use of administrative hearings to resolve SEC FCPA

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133. *Id.*

134. *Hoskins*, Ruling Denying Government's Motion for Reconsideration (D. Conn. Mar. 16, 2016).

135. *Hoskins*, Notice of Appeal (D. Conn. Apr. 1, 2016).

136. *United States v. Pierucci (Hoskins)*, Case 16-1010, Notice of Hearing Date (2d Cir. Jan. 13, 2017).

137. *See Sec. & Exch. Comm'n v. Graham*, 823 F.3d 1357 (11th Cir. 2016).

138. *Sec. & Exch. Comm'n v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016).

139. *Id.* at 1167.

140. *Sec. & Exch. Comm'n v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016), *cert. granted*, 2017 WL 125673 (U.S. Jan. 13, 2017) (No. 16-529).

141. *Id.*

142. *Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n*, 832 F.3d 277 (D.C. Cir. 2016).

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enforcement actions stems in part from the SEC's ability to impose monetary penalties in such proceedings, a power granted to it under Section 929Pa of the Dodd-Frank Act.[143]

Finally, although not directly relevant to the FCPA, in June 2016, the U.S. Supreme Court ruled on the domestic corruption prosecution of former Virginia governor Bob McDonnell.[144] The Supreme Court held that, while "distasteful" and "tawdry," loans and gifts, including flights on a private jet, rounds of golf, designer clothes, a Rolex, a loaned Ferrari, a $50,000 loan, and a $10,000 wedding gift for the governor's daughter, did not constitute bribery under the domestic bribery statute, when provided purely to build stronger relations and not tied to specific governmental action.[145] While the domestic bribery statute does not share exact language with the FCPA, it is nevertheless puzzling because many of the things of value provided to McDonnell would be considered bribes akin to examples provided by the SEC and DOJ in numerous enforcement actions and listed in the FCPA Resource Guide.[146] It is clear from 2016's enforcement actions that FCPA enforcement has not changed since the *McDonnell* decision, notwithstanding this disconnect between domestic and foreign bribery laws.

H. Looking Ahead

Donald J. Trump won the 2016 presidential election and became the forty-fifth president of the United States on January 20, 2017. At the same time, the Republican Party retained control of both houses of Congress, giving the party control over both the executive and legislative branches of U.S. government.

When speculating on the future of the FCPA under the Trump administration, it is important to remember that: (i) the FCPA was not an issue in the 2016 election; (ii) there are a significant number of FCPA investigations in the pipeline, many well-developed, and any change in enforcement strategy is unlikely to be obvious for several years; (iii) although there are significant concerns about how the FCPA is enforced as well as proposals for reform, the FCPA appears to continue to enjoy broad support; (iv) actual FCPA enforcement is largely carried out by career attorneys at the SEC and DOJ, even if higher-level political appointees can influence enforcement policy; and (v) Trump and the Republican Party have identified a

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143. 15 U.S.C.A. § 77h-1.

144. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

145. *Id.* at 2375; *see also* Colby Smith, Bruce E. Yannett, and Simon Leen, "Should the Supreme Court's Ruling in the *McDonnell* Influence SEC and DOJ Enforcement Under the FCPA," FCPA Update, Vol. 7, No. 12 (July 2016), http://www.debevoise.com/insights/publications/2016/07/fcpa-update-july-2016."

146. A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 16 (2012), http://www.justice.gov/criminal/fraud/fcpa/guidance.

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significant number of other legislative and policy changes (including the repeal of the Affordable Care Act and corporate tax reform) that are likely to take precedence over any changes to the FCPA or its enforcement.

The one concrete proposal that could have a significant impact on the FCPA is the desire, both in the Trump administration and the Republican Congress, to repeal the 2010 Dodd-Frank Act.[147] The Dodd-Frank Act not only granted the SEC the power to seek civil penalties in administrative hearings (discussed above), but also instituted the Dodd-Frank whistleblower program, providing for percentage bounties to whistleblowers who report violations of the federal securities laws,

"Given that the FCPA is a widely-accepted and generally popular statute, its repeal seems unlikely, though legislative reforms could be pursued. … In addition, there remains the possibility that the DOJ or SEC may adopt certain less aggressive approaches to enforcing the FCPA."

including the FCPA.[148] Contrary to predictions at the time of its inception,[149] the whistleblower program to date has not had a significant impact on FCPA enforcement, with only one SEC enforcement action rumored to have resulted in the payment of a bounty.[150] That said, the whistleblower provisions could still become a significant source of enforcement actions, and the repeal of the SEC's ability to levy monetary penalties in administrative actions would likely change the manner in which the SEC enforces the FCPA. At the same time, it is important to remember that "repeal" of Dodd-Frank, should it happen, does not necessarily mean the repeal of all of its provisions.

In 2012, Trump called the FCPA a "horrible law" and suggested that it should be repealed.[151] Trump's nominee for SEC Chair, Jay Clayton, was also Chair of the International Business Transactions Committee of the Association of the

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147. *See* Ryan Tracy, "Donald Trump's Transition Team: We Will 'Dismantle' Dodd-Frank," Wall St. J. (Nov. 10, 2016), http://www.wsj.com/articles/donald-trumps-transition-team-we-will-dismantle-dodd-frank-1478800611.

148. 15 U.S.C. § 78u-6.

149. *See* Peter J. Henning, *Bribery and the Gathering Storm over Compliance*, N.Y. Times (Apr. 11, 2011), https://dealbook.nytimes.com/2011/04/01/bribery-and-the-gathering-storm-over-compliance.

150. *See* Sonali Paul, *U.S. SEC paid $3.75 million to BHP Billiton whistleblower: report*, Reuters, Aug. 28, 2016, http://www.reuters.com/article/us-bhp-billiton-sec-idUSKCN1130WD.

151. CNBC Video, *supra* n.3.

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Bar of the City of New York, which published a report critical of some aspects of FCPA enforcement in December 2011.[152] While Trump's statement, made off-handedly at the end of an interview on other topics, was clearly hostile to the FCPA, the Committee report reflected well-known concerns in the business community regarding FCPA enforcement rather than an interest in scrapping the law.[153]

As 2016's internationally coordinated enforcement actions and other developments demonstrate, combatting international corruption is not a concern unique to the United States. As currently enforced, the FCPA affords U.S. authorities a leading role in international enforcement efforts, a role that would be ceded to others, possibly to the detriment of U.S. business, depending on the FCPA's ultimate fate. Given that the FCPA is a widely-accepted and generally popular statute, its repeal seems unlikely, though legislative reforms could be pursued. For example, in 2011 and 2012,[154] proposals for legislative reform focused on providing for a compliance defense and clarifying the meaning of "foreign official." In addition, there remains the possibility that the DOJ or SEC may adopt certain less aggressive approaches to enforcing the FCPA.

II. Developments Outside the United States

A. United Kingdom

2016 was a year of mixed fortunes for the Serious Fraud Office ("SFO"), the UK's primary investigator and prosecutor of complex fraud and corruption offences. The year began with the acquittal of five defendants in the SFO's ongoing investigation into the manipulation of LIBOR and continued speculation as to the SFO's future. That speculation was perhaps quelled by the announcement that its Director, David Green QC, would remain in charge for a further two years and with the first-ever conviction of a company under Section 7 of the Bribery Act 2010. A second Deferred Prosecution Agreement ("DPA") was approved by the court in the middle of the year, and new, high profile investigations were announced as well as additional funding provided for existing cases.

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152. *See* Int'l Bus. Transactions Comm. of the N.Y.C. Bar Ass'n., "The FCPA and its Impact on International Business Transactions – Should anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combatting Offshore Corruption?" (2011), http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-fcpa-and-its-impact-on-international-business-transactions-should-anything-be-done-to-minimize-the-consequences-of-the-uss-unique-position-on--combating-offshore-corruption.

153. *Cf.* Editorial, *Will Jay Clayton Protect Investors?*, N.Y. Times (Jan. 7, 2017), https://www.nytimes.com/2017/01/07/opinion/sunday/will-jay-clayton-protect-investors.html.

154. *See, e.g.*, Paul R. Berger, Sean Hecker and Jane Shvets, "House Subcommittee Holds Hearing on FCPA Reform; Judge Mukasey Testifies," FCPA Update, Vol. 2, No. 11 (June 2011), http://www.debevoise.com/insights/publications/2011/06/fcpa-update.

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The UK government also indicated that it would seek to introduce further "corporate offences" whereby companies can be held strictly liable for failing to prevent offences such as tax evasion, fraud, and money laundering. The end of 2016 saw a potentially very significant decision on legal professional privilege, casting into doubt whether lawyer-produced interview notes in an internal investigation can rightly be deemed privileged. Such is its importance, that the decision has been appealed directly to the Supreme Court.

1. The United Kingdom's Second DPA

On July 8, 2016, the SFO secured court approval for its second DPA in relation to bribery and corruption. The case concerns a relatively small UK company referred to as "XYZ" due to continuing related legal proceedings against former employees. XYZ is a wholly-owned subsidiary of a U.S. corporation, in the judgment referred to as "ABC Companies LLC."

XYZ operates in the steel sector and generates most of its revenue from exports to Asia. In August 2012, serious issues were uncovered as part of the rolling-out of ABC's global compliance program. A law firm was retained to conduct an internal investigation, and the SFO was informed that XYZ would make a written self-report when the internal investigation had been completed. Following agreement with the SFO, in January 2013, XYZ delivered a first self-report, which was followed by supplementary self-reports as the scope of the investigation grew. The SFO's independent investigation ran in parallel.

The internal investigation showed that, from June 2004 to June 2012, XYZ had been involved in payments and/or offers of bribes through a small group of senior employees and local agents to secure contracts, mainly in Asia. Of the 74 contracts examined during the course of the investigations, 28 were said to have been procured as a result of bribes. These contracts generated approximately £17.24 million in revenue, resulting in £6,553,085 of gross profit (20.82% of the company's £31.4 million total gross profit during the approximately eight-year period). XYZ estimated that its net profit on the implicated contracts was approximately £2.5 million.

The draft indictment presented to the court contained three counts of corruption, one under the old 1906 Act and two under the Bribery Act 2010, including one "corporate offence" of failure to prevent bribery.

In finding that the proposed DPA would be in the interests of justice, and that the draft terms were "fair, reasonable and proportionate," the judge, Sir Brian Leveson, assessed the relevant factors. On the one hand he noted that the offense involved

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significant and systematic misconduct, within a corporate culture characterized by a "wilful disregard as to the commission of offences by employees or agents with no effort to put effective systems in place," and that XYZ's compliance program had been inadequate during the period of the offending.

On the other, the judge considered that from 2011 XYZ had implemented ABC's global compliance program, which led to the discovery of the offense and, ultimately, the self-report. The judge also held that XYZ had self-reported promptly upon discovering the misconduct, which may otherwise have remained unknown, and that it had provided "full and genuine co-operation" with the SFO, including oral summaries of first accounts of interviewees.

"The UK government also indicated that it would seek to introduce further 'corporate offences' whereby companies can be held strictly liable for failing to prevent offences such as tax evasion, fraud, and money laundering."

The judge approved a settlement whereby XYZ disgorged profits of £6,201,085 to be paid in installments over five years (and partly by ABC repaying dividends), but a fine of only £352,000, agreed to be the maximum XYZ could pay. The precarious financial position of XYZ and the likelihood that a prosecution would have led to its insolvency were expressly taken into account by the judge when determining that a DPA was appropriate.

2. Other SFO Activity

(a) Charges Involving Bribery in Angola

On July 13, 2016, the SFO charged F.H. Bertling Ltd (a logistics and freight operations company) and seven current and former executives with one count of conspiring to make corrupt payments contrary to Section 1 of the Prevention of Corruption Act 1906 and Section 1 of the Criminal Law Act 1977.[155] The case concerns an alleged conspiracy to pay bribes between January 2005 and December 2006 to an agent of Angolan state oil company, Sonangol, in order to obtain freight-forwarding services contracts in Angola. As the conduct at issue took place before the introduction of the Bribery Act 2010, the case is being prosecuted

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155. Case information and status are available on the SFO's website at https://www.sfo.gov.uk/cases/f-h-bertling-ltd/.

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under older anti-corruption legislation. Trial is scheduled for September 2017. Separately, the SFO continues to investigate the company's operations in Azerbaijan, following a self-report to the SFO in late 2015.[156]

(b) Investigations

2016 saw two major new SFO investigations involving allegations of international corruption. In July 2016, the SFO opened an investigation into allegations of fraud and corruption relating to the civil aviation business of Airbus Group. The investigation is focusing on Airbus's use of third-party consultants and intermediaries. This follows decisions by the UK, French, and German export credit authorities in April 2016 to suspend Airbus Group's export credit facilities as a result of discrepancies in applications for export credit relating to third party consultants.

Also in July 2016, the SFO announced the launch of an investigation into Unaoil, an international oil and gas services firm, in connection with suspected bribery, corruption and money laundering offences. The investigation follows a release of leaked internal Unaoil documents in March 2016, which purportedly showed wide-spread use of improper payments by Unaoil to win projects throughout the world on behalf of major oil and gas and OEM companies. Unaoil has publicly denied these allegations and in December 2016 launched judicial review proceedings challenging a raid on its office in Monaco organized by the SFO.

(c) Sentencings

(i) *Individuals*

In May 2016, Peter Chapman, the former business manager of Securency International PTY Ltd., was convicted on four counts of corruption under Section 1 of the Prevention of Corruption Act 1906 ("1906 Act") for paying bribes to a foreign official totaling £139,000. The conduct at issue occurred between January and March 2009 and related to bribes paid in order to secure orders for the supply of polymer substrate (used in the printing of bank notes) to the Nigerian Security Printing and Minting PLC. Chapman was sentenced to a 30-month custodial sentence.

On December 21, 2016, Richard Kingston, a former Managing Director of Sweett Group plc in the Middle East, was convicted under Section 2(16) Criminal Justice Act 1987 for destroying evidence during an investigation into overseas bribery. Kingston was jailed for one year for "concealing, destroying or otherwise disposing of" two mobile phones, knowing or suspecting that data on those phones

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156. Mara Lemos Stein, "F.H. Bertling Under SFO Investigation for Azerbaijan Dealings," Wall St. J. (Aug. 15, 2016), http://blogs.wsj.com/riskandcompliance/2016/08/15/f-h-bertling-under-sfo-investigation-for-azerbaijan-dealings/.

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would be relevant to an SFO investigation. The charges did not relate to the SFO's investigation into Sweett Group plc (discussed below); rather they arise out of an investigation into alleged corruption relating to construction projects in Iraq.

(ii) *Companies*

Smith & Ouzman, a family printing company in Eastbourne, and two of its directors, Christopher Smith and Nicholas Smith, were convicted in December 2014 under the 1906 Act for making corrupt payments totaling £395,074 to public officials in Kenya and Mauritania. Both directors were sentenced in December 2014, but the sentencing of the company was adjourned until January 8, 2016 when a confiscation hearing took place in respect of the two individuals and the company.

At the January 2016 hearing, Smith & Ouzman was ordered to pay a total of £2.2 million comprising a fine of £1,316,799, £881,158 in confiscation and £25,000 in costs. The court applied the sentencing guidelines for the 2010 Act, despite the conviction being under the 1906 Act, calculating the fine as a 300% multiplier of the value of the bribes. The confiscation value was calculated by identifying the gross profits gained on the contracts, plus the value of the bribes paid, and indexed at printing sector rates to account for inflation.

The individuals' benefits from the bribery were calculated by looking at the advantage Smith & Ouzman had received from the bribery, namely the contracts on which bribes were paid. Those contracts were capable of being expressed as a percentage of the value of the company's total income, and it was that percentage which was applied to Nicholas and Christopher Smith's own individual income as directors to calculate the value of their benefit. Nicholas Smith was ordered to pay a confiscation order of £18,693 and £75,000 in costs. Christopher Smith was ordered to pay £4,500 in confiscation and £75,000 in costs.

In February 2016, Sweett Group PLC was sentenced for Bribery Act offences and ordered to pay £2.25 million (£1.4 million as a fine and £851,152.23 in confiscation), following a guilty plea in December 2015. This case is important as it marks the SFO's first conviction of a corporate for the strict liability offence under Section 7 of the 2010 Act.

Sweett Group admitted it had failed to prevent the bribery of an individual by its Cypriot subsidiary (Cyril Sweet International Limited), which was intended to obtain or retain business, and/or an advantage in the conduct of business, for Sweett Group, namely securing and retaining a contract with Al Ain Ahlia Insurance Company for project management and cost consulting services in relation to building a hotel in Dubai, contrary to Section 7(1) of the Act.

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(d) Legal Professional Privilege

There were two notable judgments in the course of 2016 for white collar practitioners relating to legal professional privilege ("LPP"). The *McKenzie* case concerned how the SFO should approach the collection of seized electronic material potentially subject to LPP. The *RBS Rights* case considered, among other things, whether interview notes from an internal investigation are subject to LPP.

(i) *McKenzie*

The decision in *R (on the application of Colin McKenzie) v Director of the SFO* [2016] EWHC 102 (Admin) arose in an investigation by the SFO of Colin McKenzie, a director and major shareholder of Welsh construction company MIB Facades Ltd. The SFO arrested McKenzie on suspicion of conspiracy to bribe another person contrary to Section 1 of the Bribery Act 2010, as well as seized and required him to produce a number of devices, including a USB stick, mobile phones and a laptop. McKenzie claimed that the devices stored LPP material and challenged the SFO's policy for handling such material.

The Court rejected McKenzie's challenge, holding that the SFO's policy of employing in-house technical staff to sift through the documents, before sending them to independent counsel to assess whether they are subject to LPP, is lawful. It noted "[t]here is a world of difference between determining whether something is protected by LPP, which involves close consideration of the content and context of a document or communication, and identifying a document, file or communication as potentially attracting LPP, which does not."[157] While the court acknowledged the importance of ensuring that the investigative team does not have access to LPP material, it would be "too onerous" to ask the SFO to ensure there is "no real risk of that happening" and to engage external contractors to isolate potentially privileged documents.[158] The court considered the SFO's policy and concluded that it "can reasonably be expected to ensure" the investigative team does not access such documents. It is worth noting the SFO's policy also applies to hard copy documents, especially where privileged material cannot be readily extracted.

The decision in *McKenzie* confirms the need to carefully consider whether a challenge to the SFO's procedures for dealing with potentially LPP material brings any genuine likelihood of a beneficial outcome. In this case, the court described the risk that SFO investigators could access privileged material as "very unlikely."[159]

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157. *R (on the application of Colin McKenzie) v Director of the SFO* [2016] EWHC 102 (Admin), para. 40.

158. *Id.*, para. 32.

159. *Id.*, para. 33.

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If a party has genuine concerns that material, seized by or provided to the SFO, is subject to privilege, it should raise such concerns immediately. Furthermore, it is in such party's interest to assist the SFO to identify privileged material quickly and effectively, including by providing a comprehensive set of key words to isolate potentially privileged material embedded in electronic devices. Without doubt, the SFO team reviewing documents for privilege needs to remain functionally independent from the team conducting the investigation and parties under investigation should ensure they obtain satisfactory confirmation that this is the case.

"The Court [in the RBS Rights Litigation] held that the interview notes were not communications between a client and its legal advisers, and therefore legal advice privilege did not apply, on the basis that the interviewees did not constitute the client."

(ii) *RBS Rights Litigation*

The decision in *Re The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) (Dec. 8, 2016) arose in litigation brought by shareholders of the Royal Bank of Scotland ("RBS") against RBS alleging that the bank provided inaccurate or incomplete information in a prospectus that led them to subscribe for shares in a rights issue in 2008. The shareholders applied for disclosure and inspection of certain transcripts, notes and other records of interviews of RBS employees.

RBS asserted that the interview notes were subject to legal advice privilege, or alternatively were lawyers' privileged working papers. RBS did not contend that litigation privilege applied.

As a general principle, legal advice privilege protects confidential communications between a client and its legal advisers that were created for the purpose of giving or receiving legal advice. It does not extend to communications between a client or its legal advisers and third parties.

The Court held that the interview notes were not communications between a client and its legal advisers, and therefore legal advice privilege did not apply, on the basis that the interviewees did not constitute the client. Following the reasoning in

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Three Rivers,[160] the leading (and much-debated) authority on legal advice privilege, the Court held that what constitutes the 'client' is to be narrowly interpreted and consists only of those employees of the company who are authorized to seek and receive legal advice from the company's lawyers. In this case, the Court held that the interviewees had provided information to RBS's lawyers in their capacity as RBS employees, not as clients.

In addition, the judge commented that only individuals who were part of the "directing mind and will" of the company would constitute the client or an emanation of the client for the purpose of legal advice privilege. This comment was made '*obiter*' (*i.e.,* outside the narrow reasoning behind the decision) and is therefore not binding.

Lawyers' working papers can be considered privileged under English law if their disclosure would indicate the trend of advice given to a client by its lawyer. The Court considered that determining whether privilege applied was essentially an evidentiary question, in this case whether RBS had demonstrated that the interview notes provided a clue as to the legal advice (or some aspect of the legal advice) given to the bank by reason of the legal input reflected in the interview notes.

RBS submitted that the interview notes in question were privileged on a number of grounds: the interview notes were not simply transcripts of the interviews but included the lawyers' 'mental impressions,' they reflected the lawyers' train of inquiry in preparing for the interviews, they recorded the lawyers' selection of the points covered in the interviews, and interviewees were told (and often acknowledged) that the interviews were subject to attorney-client privilege. The judge held that these factors were not enough to establish privilege, as RBS had failed to provide examples of how the interview notes contained any analysis or legal input, or revealed the trend of legal advice provided to RBS.

This decision is being appealed directly to the Supreme Court and, if upheld, could have significant implications for the conduct of internal investigations in the UK. Where litigation privilege does not apply because no adversarial proceedings were contemplated at the time of an interview, in-house and external lawyers should not operate under the assumption that their notes of confidential employee interviews are privileged. It will not be enough to provide, as RBS's lawyers did, what is typically referred to as an *Upjohn* warning at the beginning of an interview that the discussions are confidential and privileged. Nor will including language in an interview note that it is a summary of the interview and reflects the impressions and judgment of lawyers of itself be sufficient.

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160. *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556.

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Notably, the Court's *obiter* statement that only the "directing mind and will" of a company – a person at or close to board level – should constitute the client for the purposes of legal advice privilege has the potential to affect substantially the conduct of internal investigations. Taken to its logical conclusion, this would impose such a high threshold that in-house lawyers and senior compliance personnel (for example) would not be able to seek and receive legal advice on behalf of the company under cover of legal advice privilege. It remains to be seen whether this theory receives more judicial attention and is further developed.

B. Germany

1. Legislative Developments

Legal services are usually provided to a German company by an external attorney admitted to practice (professionally independent, self-employed), a non-admitted internal jurist (professionally dependent, instructions-bound and employed), or an (employed) in-house attorney ("Syndikusrechtsanwalt"), who is an admitted attorney with limited powers to represent his employer.

Effective January 1, 2016, the Reform Act on the Law of In-House Attorney[161] redefined the professional position of an in-house attorney in proceedings of its employer: provided that the in-house attorney is professionally independent and not bound by instructions, the attorney generally can represent the employer as an attorney in civil, administrative, and criminal proceedings, but with certain exceptions. First, representation is not permitted in criminal proceedings relating to the employer or in administrative misdemeanor proceedings involving fines concerning company-related charges. Second, an in-house attorney cannot represent an employer in civil proceedings in higher courts, including labor courts, in cases where representation by an attorney is required.

With respect to privilege in civil proceedings, an in-house attorney has the right to refuse to testify. Regarding criminal proceedings, the legislature confirmed prior law that an in-house attorney has no right to refuse to testify, and an attorney's documents can be seized.

The German legislature justified this denial of privilege with reference to the need for effective criminal prosecution. It referred also to a 2010 decision involving Akzo/Nobel, holding that an in-house lawyer is less able to deal effectively with any conflicts between professional obligations and a client's aims than a lawyer who is truly independent from a client. The court thus concluded that privilege protects communications only with independent lawyers.

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161. Gesetz zur Neuordnung des Rechts der Syndikusanwälte und zur Änderung der Finanzgerichtsordnung, Federal Law Gazette 2015, Part I, pages 2517 et seq.

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2. Judicial Decisions

(a) Whistleblower Documents in Possession of External Lawyers as Ombudspersons

As a key element of an effective whistleblowing program, German companies often appoint an external attorney as an ombudsperson. The aim is to ensure that allegations are made to an independent person that deals with the initial information on an anonymous and confidential basis. Some companies also provide that any communication with a lawyer as ombudsperson will not only remain confidential, but also subject to privilege and thus protected from seizure by state authorities. This has not been widely accepted among legal advisors because of uncertainty whether privilege would cover this situation in favor of the whistleblower. The basis for such concern was confirmed recently by a German court.

"[The guilty plea by Swiss bank Reyl & Cie S.A.] was the first time that a corporation pleaded guilty under relatively new criminal procedures, which had been introduced in France to permit a corporate plea in relation to economic and financial crimes."

On March 16, 2016, the Regional Court of Bochum ruled on the seizure of a document from an attorney who had received an anonymous report in her role as external Compliance Ombudsperson for her client. The information in the report came from a whistleblower who alleged that a senior employee of the company had engaged in serious misconduct. The prosecution learned about the existence of the document, and the lower court issued a warrant to search the Ombudsperson's firm to get access to the anonymous report.

To avoid having her premises searched, the attorney handed over the report and at the same time filed a complaint about the search warrant based on attorney-client privilege and the trust placed in her by the whistleblower. The Court dismissed her appeal, concluding that the Ombudsperson was acting on behalf of her company client, which prevented her from also having a privileged relationship with the whistleblower. The Court further held that the promise of confidentiality vis-à-vis the whistleblower had no implication on third parties like the prosecuting authorities. It thus found that the seizure had been lawful.

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(b) Termination of Employees

In a decision dated July 13, 2016, the Higher Labor Court for the State of Hesse found the termination of a German bank employee improper under German labor law, even though the bank issued the termination in response to a U.S. authority's request. The German bank, which does business in the United States, had agreed with the New York State Department of Financial Services ("NYDFS"), in a Consent Order for sanctions violations, to take all necessary steps to terminate a particular employee in Germany. The company assumed this obligation under the explicit condition that a German court would need to review the termination.

The court found no legally valid ground for this employee's termination. In particular, the court reasoned that the consent order was an insufficient basis for a so-called termination based on external pressure, in which case the employer needs to show irresistible pressure from co-workers, customers, or government agencies. In such a case, the employer would be obliged to try to protect the employee and to do everything in its power to defend against this pressure. According to the ruling, a termination on the grounds of external pressure would be permissible only in the rare circumstances of being the sole way for an employer to prevent particular damage.

The Court did not specify under which conditions pressure from a government agency meets the requirements for a termination based on external pressure. In the case at hand, the Court argued that those requirements were not met because the NYDFS wanted the termination to serve as a deterrent for others, just as it does when demanding that supervisory measures be taken in the U.S. The Court held that a supervisory measure intended as a punishment to be implemented by the employer does not qualify as a circumstance under which German case law permits termination based on external pressure.

C. France

1. Enforcement Activity

(a) First Corporate Guilty Plea

In January 2016, Swiss bank Reyl & Cie S.A. ("Reyl") entered into a guilty plea agreement with the French national financial prosecutor ("NFP") to resolve money laundering charges.[162] This was the first time that a corporation pleaded guilty under relatively new criminal procedures, which had been introduced in France to permit

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162. "Fraude fiscale : la banque Reyl accepte une amende de 2,8 millions d'euros," Le Monde.fr (Jan. 21, 2016), http://www.lemonde.fr/evasion-fiscale/article/2016/01/21/fraude-fiscale-la-banque-reyl-accepte-une-amende-de-2-8-millions-d-euros_4851416_4862750.html#oYWhL2x5C3jDVvcH.99; Rahul Rose, "France's financial prosecutor secures first-ever corporate plea bargain," Global Investigations Review (Jan. 26, 2016), http://http://globalinvestigationsreview.com/article/1024790/france%E2%80%99-financial-prosecutor-secures-corporate-plea-bargain.

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a corporate plea in relation to economic and financial crimes.[163] As part of the plea agreement, the bank agreed to pay a fine of €2.8 million.

Under a procedure known as "CRPC", which stands for "*Comparution sur Reconnaissance Préalable de Culpabilité*", the prosecutor can make a proposal to a defendant to plead guilty to specific charges and to agree to a penalty; the defendant then may accept or reject this proposal. If accepted, the proposal is submitted to the trial judge, who will proceed to review it and will have the final word regarding its acceptance after a public proceeding. Under article 180-1 of the French Code of Criminal Procedure introduced in 2011, the CRPC was also made available for prosecutions of complex corporate crimes, in particular those overseen by an investigating magistrate.[164]

The CRPC entered between Reyl and the NFP was never made public, and the few public facts raise questions regarding the procedure and the agreement. First, it appears that the agreement was nothing more than a guilty plea, and did not involve any negotiation or include remedial measures and a "cooperation" agreement such as normally found in U.S. or UK deferred prosecution agreements. While the plea arose only shortly after the two individuals who had been investigated were cleared of personal culpability, there is no suggestion that the corporate negotiation caused the dismissal of the potential charges against the individuals. Second, the agreement came at a time of intensifying discussions within the French government concerning the possibility of a French law introducing a procedure equivalent to a DPA, which ultimately was adopted eleven months later by the so-called *Loi Sapin II*, in December 2016.

It is noteworthy that, in the five years since a CRPC procedure was made applicable to financial crimes, Reyl – a Swiss, not a French, bank – is the only corporate defendant to have availed itself of the procedure, from which it may appear that the procedure did not offer sufficient advantages to appeal more broadly. In any event, the procedure would appear to be obsolete where corporations may choose procedures under the new *Loi Sapin II*, discussed below, which offers greater potential advantages.

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163. *See* Frederick T. Davis, Sean Hecker, and Charlotte Gunka "In France's First Corporate Plea Agreement, Swiss Bank Resolves Money Laundering Investigation", FCPA Update, Vol. 7, No. 7 (Feb. 2016), http://www.debevoise.com/~/media/files/insights/publications/2016/02/fcpa_update_february_2016.pdf; Frederick T. Davis, "First Corporate Guilty Plea in France – Will There be More?", Ethic Intelligence.com (Feb. 2016), http://www.ethic-intelligence.com/experts/11539-first-corporate-guilty-plea-france-will/.

164. *See* Code de procédure pénale, Art. 180-1, https://www.legifrance.gouv.fr/affichCode.do;jsessionid=B52C77B317AAAE0776E59FEFDB5E6B6A.tpdila11v_1?idSectionTA=LEGISCTA000006167431&cidTexte=LEGITEXT000006071154&dateTexte=20160220.

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(b) Oil-for-Food Decision

In February 2016, the Paris Court of Appeals issued the third but almost certainly not the last decision to emerge from the two so-called Oil-for-Food ("OIP") cases pending in French courts. The decision addresses two important issues: the interpretation and enforcement of France's anti-bribery law and the deference French courts must give to criminal judgments entered outside of France under the principle of *ne bis in idem* (or, as it is known in the United States, double jeopardy).

The OIP cases grew out of a program supervised by the United Nations that brought food, medicine, and other forms of humanitarian relief to citizens of Iraq, notwithstanding the sanctions otherwise applicable to the regime of then-President Saddam Hussein. Under UN rules, Iraq could sell oil and then use the sale proceeds, which were kept in a UN escrow account, to purchase humanitarian goods for the Iraqi people. In connection with this program, an investigation later determined that numerous companies – both among those buying Iraq's oil and selling Iraq humanitarian goods – made kickback payments to the Iraqi regime.

In France, two groups of companies and individuals were brought to trial on corruption charges related to the OIP program. The first group – known as Oil-for-Food I – went to trial in 2013, and the second – known as Oil-for-Food II – in 2015. In both trials, all defendants were acquitted on the ground that a payment to the Iraqi regime itself – rather than to a faithless agent of a regime – did not constitute bribery.

Both Oil-for-Food I and Oil-for-Food II involved slightly different *ne bis in idem* issues. In Oil-for-Food I, the defendant Vitol SA had previously pleaded guilty in New York to state charges of grand larceny and paid a significant fine. It successfully argued in France that it could not be prosecuted twice for the same facts. A year later, in the Oil-for-Food II trial against different defendants, the trial court went a step further and ruled that four French companies whose parents had entered into either a DPA or non-prosecution agreement with the U.S. DOJ (and, in some instances, other U.S. authorities), in each instance to resolve claims under the FCPA, could not be prosecuted further in France.[165]

The February 2016 decision of the Paris Court of Appeals was in the Oil-for-Food I case, and under French appellate procedures was essentially a retrial of the 2013 acquittal.[166] The Court reversed both elements of the trial court ruling and convicted the defendants. On the merits, it held that, even though the illicit payments were to a regime rather than a faithless agent, the payments were nonetheless corrupt

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165. None of the judgments in the OIP cases summarized here has been officially reported or made publicly available.

166. Frederick T. Davis & Antoine Kirry, "France" *The International Investigations Review* (2016) at 122.

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since they violated applicable rules and laws, and were hidden from the relevant authorities; this, the Court concluded, violated France's anti-bribery statute. With respect to *ne bis in idem*, the Court barred multiple prosecutions of "the same offense," rather than of "the same facts," as is the case under certain treaties. It emphasized that the corruption charges Vitol faced in France were different from, and implicitly much more important than, the grand larceny charge to which it had pleaded guilty in New York – even though the fine paid by Vitol in New York was much larger than the maximum fine it faced in France – and thus that a French court was not bound by the New York result.

This story is not over. The supreme judicial court of France (*Cour de Cassation*) will review the February 2016 decision of the Paris Court of Appeals in Oil-for-Food I, and the Paris Court of Appeals will review the 2015 decision in Oil-for-Food II sometime in 2017.

"[The Loi Sapin II] provides for significant changes in the current French anti-corruption legal and regulatory administrative structure."

2. Legislative Developments

(a) Loi Sapin II

In December 2016, France finally passed the long-pending "Law Regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life,"[167] known as the Loi Sapin II. The law provides for significant changes in the current French anti-corruption legal and regulatory administrative structure.

The principal measures introduced by the Loi Sapin II are the following:

- **Establishing a new French Anti-corruption Agency** ("AFA"): A new agency will be empowered to (i) assist and encourage relevant public and private entities in preventing and detecting acts of corruption (not only limited to

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167. *Loi N°2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Journal Officiel* (Dec. 10, 2016) ("*Loi Sapin II*"), https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000033558528. See also Frederick T. Davis, Sean Hecker, and Charlotte Gunka, "France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?", FCPA Update, Vol. 7, No. 10 (May 2016), http://www.debevoise.com/insights/publications/2016/05/fcpa-update-may-2016; Frederick T. Davis, Andrew M. Levine, and Charlotte Gunka, "France's New Anti-Corruption Framework: Potential Impact for Businesses in a Multijurisdictional World", FCPA Update, Vol. 8, No. 4 (Nov. 2016), http://www.debevoise.com/~/media/files/insights/publications/2016/11/fcpa_update_november_2016.pdf.

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bribery); (ii) report identified potential offenses to the prosecutor; (iii) monitor implementation of the French Blocking Statute[168] in the context of compliance programs imposed by foreign authorities on companies incorporated in France; (iv) ensure that companies required to adopt compliance programs under the new law have introduced such programs; (v) monitor corporate implementation of compliance programs imposed as a penalty; and (vi) issue an annual public report of its activities.[169] Although it has no criminal investigative or enforcement power, the AFA will include a Sanctions Commission empowered to impose administrative sanctions on companies that fail to implement a required compliance program.[170]

- **Expanding extraterritorial application of French law in relation to certain corruption-related offenses:** French criminal laws will now be applicable to acts of public corruption if committed outside of France by a French citizen, or by a person who has his/her habitual residence in France, or by a person – including legal entities – "carrying out all or part of his/her/its economic activity on the French territory."[171]
- **Introducing obligatory compliance programs:** All medium and large companies will be required to have a compliance program meeting certain specifications, notably: (i) a code of conduct; (ii) an internal whistleblowing mechanism; (iii) a regular corruption risk mapping exercise; (iv) a risk assessment process; (v) third-party due diligence procedures; (vi) accounting controls; (vii) training programs for employees exposed to high risks of corruption and influence peddling; (viii) disciplinary procedure; and (ix) an audit mechanism to assess the effectiveness of the compliance program.[172] Companies and their directors, presidents, and managers may be sanctioned by the AFA for not implementing compliance procedures meeting these requirements. AFA's Sanctions Commission will be able to impose administrative sanctions,[173] and French courts will have the power to sanction entities found guilty of an offense related to public probity (e.g., bribery and influence peddling of public officials) to compel the implementation of a compliance program.[174]

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168. French law No. 68-678 of July 26, 1968, as amended, is the "French Blocking Statute" that prohibits a person or company in France from providing certain kinds of information to a non-French authority for the use in a judicial or administrative proceeding without going through an internationally approved procedure such as under The Hague Convention.
169. *Loi Sapin II*, art. 3.
170. *Id.*, at art. 2 and 3.
171. *Id.*, at art. 21(1) and (2).
172. *Id.*, at art. 17(II).
173. *Id.*, at art. 17(IV and V).
174. *Id.*, at art. 18(I).

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- **Enhancing the status and protection of whistleblowers in accordance with international standards:** The law defines a whistleblower broadly,[175] and introduces a number of new measures and sanctions to ensure the anonymity and non-liability of whistleblowers, especially in employment.[176]
- **Adopting a DPA procedure:** This new procedure, known as JCPI for "Judicial Convention in the Public Interest," will permit a negotiated outcome for legal entities – but not individuals –that avoids a criminal conviction for offenses related to public and private corruption, whether domestic or foreign, as well as of laundering the proceeds of tax crimes.[177] Similar in concept to the U.S. or UK DPA procedures, the corporation will have to acknowledge facts sufficient to demonstrate the commission of a relevant crime and will agree to: (i) a fine proportionate to the benefit secured through the illicit activity, up to 30% of the company's average annual turnover over the previous three years; and (ii) a compliance program under a monitorship overseen by the AFA for an agreed-upon period up to three years.[178] Any JCPI will have to be approved first by the president of the regional court after a public hearing, at which any victims, as well as corporate representatives, will be heard.[179] Once approved, the JCPI will be published on the AFA's website and will be the subject of a press release by the prosecutor.[180]

Since France's adoption in 2000 of anti-corruption laws compliant with the Organization for Economic Co-operation and Development Anti-Bribery Convention, not a single corporation has been convicted in France of classic overseas bribery. This is while a number of large French companies have paid, in the aggregate, over $2 billion to resolve FCPA charges through DPAs, NPAs and guilty pleas negotiated with the U.S. DOJ. The *Loi Sapin II* appears designed to address this situation by making a French outcome more attractive to French and perhaps other multinational companies. Whether it will succeed remains to be seen; in particular, it is unclear whether corporate decision-makers will elect to pursue negotiations with the French prosecutor when doing so means giving up a potential defense of lack of corporate criminal responsibility, and without assurances that U.S. authorities will not pursue a "me, too" investigation seeking further penalties.[181]

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175. *Id.*, at art. 6.
176. *Id.*, at art. 8, 9(I) and 10.
177. *Id.*, at art. 22.
178. *Id.*, at art. 22(I).
179. *Id.*, at art. 22(II).
180. *Id.*
181. *See* Frederick T. Davis, "The US Needs To Show More Respect For Foreign Prosecution", The Global Anticorruption Blog (Nov. 3, 2016), https://globalanticorruptionblog.com/2016/11/03/guest-post-the-us-needs-to-show-more-respect-for-foreign-prosecutions/.

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(b) Ethics Rules for Internal Investigations

While internal investigations are already widely practiced in many jurisdictions, there has been much debate in France about the scope and rules surrounding them, and in particular the professional responsibilities of attorneys.[182]

To address this uncertainty, in March 2016, the Paris Bar published an opinion on the conduct of internal investigations by French lawyers. The opinion made substantial progress by making it clear for the first time that a French attorney may conduct an internal investigation,[183] even of the attorney's regular client, and that the conduct of such an investigation is covered by *le secret professional*, which is the rough equivalent of (but in some respects different from) the U.S. attorney-client privilege.

"In 2016, Russian law enforcement authorities had some success in investigating and combatting bribery. For the first time in several years, the majority of the cases involved bribe-taking, rather than bribe-giving, and involved significant bribe amounts."

The opinion also provided preliminary guidelines as to the circumstances in which the lawyer conducting the internal investigation has to hear the witness in presence of the witness' counsel, or at least to ask the witness if he or she wishes to be accompanied by a counsel. It expressly left open, subject to further consultation with members of the Bar, a number of important questions about exactly *how* such an investigation should be conducted, noting in particular that Paris Bar rules require sensitivity ("*délicatesse*") in such circumstances.

Following further discussions under this report, in September 2016, the Paris Bar adopted ethics rules specific to internal investigations.[184] These rules include the following:

- the company's usual counsel may be the attorney undertaking the internal investigation on behalf of the company;[185]

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182. *See* Bruno Walter, "*Quand l'avocat mène l'enquête*", LJA Magazine (July/Aug. 2016), http://www.cercle-montesquieu.fr/global/gene/link.php?doc_id=799&fg=1.

183. Paris Bar Association Internal Rules, as a counsel (Art. 6.1 and 6.2(2)) or as an expert (Art. 6.2(5)).

184. Paris Bar Association Internal Rules, Appendix XXIV, http://dl.avocatparis.org/reglement_interieur/RIBP.htm#_Toc468461544.

185. *Id.*, at Art. 2.1.

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- the internal investigation report is subject to the *secret professionnel*, which concerns only the information shared between the company and its lawyer (under French rules, only the client is entitled to share privileged information with a third person, including the authorities);[186]
- the attorney conducting the internal investigation must, in a manner similar to the *Upjohn* warning in the U.S., make sure that the witness being interviewed understands that the attorney is not the witness's attorney, and also that the *secret professionnel* does *not* apply to their interview with the attorney representing the corporation;[187]
- if the company's lawyer has reason to believe that the witness being interviewed could reveal sensitive information during the interview, the company's lawyer must propose that the witness hire his or her own lawyer;[188] and
- the attorney who conducted the internal investigation on behalf of the company can represent the company in the context of a subsequent trial, though not in a proceeding against a witness that had been interviewed by him/her.[189]

The conduct of American-style internal investigations has not been part of French legal culture. The new rules open the door to their careful use in France by lawyers. Many questions remain, both as to the manner in which they are conducted and, at least as importantly, whether their fruits will be useful in discussions with French prosecutors under the *Loi Sapin II* or otherwise, as to which there is little track record in France.

D. Russia

In 2016, Russian law enforcement authorities had some success in investigating and combatting bribery. For the first time in several years, the majority of the cases involved bribe-taking, rather than bribe-giving, and involved significant bribe amounts. The number of cases against bribe-takers increased by 19.7% in comparison with 2015, while the number of cases against bribe-givers increased by only 4.4%. The number of initiated cases of aiding and abetting bribery also increased by 89.9% compared to 2015.[190]

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186. *Id.*, at Art. 1.3 and 2.3.

187. *Id.*, at Art. 2.2 and 2.3.

188. *Id.*, at Art. 2.4.

189. *Id.*, at Art. 2.6.

190. *See* Analytical Note on the Status of Investigation of Corruption Crimes in the First Half of 2016, available at http://genproc.gov.ru/anticor/doks/document-1124023/.

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Notably, the focus on bribe-takers was not limited to lower-level officials, with Russian authorities signaling willingness to fight corruption at higher levels. In 2016, the authorities initiated or completed several anti-corruption cases against high-ranked state officials and top managers of major Russian companies. For example:

- In June 2016, the Governor of the Kirov region, a well-known politician, was arrested for allegedly receiving a bribe of over EUR 400,000 in exchange for "patronage" of certain companies operating in the region.[191]
- In August 2016, former mayor of Yaroslavl city and his assistant were sentenced to 12.5 years and 7 years of imprisonment, respectively, for extorting bribes from commercial entities in amounts exceeding RUB 30 million (approximately $500,000). The former mayor was also ordered to pay a fine of RUB 60 million (approximately $1 million).[192]
- In September 2016, the Managing Director of Renova Group and the CEO of T Plus, a Renova Group company, were arrested on suspicion of paying bribes of RUB 800 million (approximately $13.5 million) to the former officials of the Komi Republic in exchange for preferential treatment of their companies in the region. An arrest warrant was also issued for the former CEO of VimpelCom in connection with his pre-VimpelCom employment as the CEO of T Plus. These actions were taken as part of a corruption investigation into the former head of the Komi Republic, who was accused of leading a criminal conspiracy aimed at embezzlement of state property.[193]
- In November 2016, the Minister of Economic Development of Russia was charged with accepting a $2 million bribe in exchange for green-lighting the participation of Rosneft, Russian state-controlled oil company, in a bid for another oil company. He was put under home detention.[194]

Russian law enforcement authorities also initiated corruption cases against legal entities, mostly small and medium-sized businesses. In the first half of 2016, they initiated over 250 cases against companies for illegal remuneration offered or paid on

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191. *See* "Protiv Nikity Belykh vozbudili delo o vzyatke," Rianovosti (June 24, 2016), https://ria.ru/incidents/20160624/1451114939.html.

192. *See* "Sud vynes prigovor po delu Urlashova: dvoikh v koloniyu, odin opravdan," Rianovosti (Aug. 3, 2016), https://ria.ru/incidents/20160803/1473516327.html.

193. *See* German Petelin, Elena Platonova, and Andrey Vinokurov, "Firmy Vekselberga popali v delo Gaizera," *Gazeta.ru* (Sept. 5, 2016), https://www.gazeta.ru/social/2016/09/05/10177583.shtml#.

194. *See* "Zaderzhan glava Minekonomrazvitya Alexey Ulukaev," *Lenta.ru* (Nov. 15, 2016), https://lenta.ru/news/2016/11/15/ulykaev/; Alexander Morozov, "Ulukaev protiv FSB," Gazeta.ru (Nov. 28, 2016), https://www.gazeta.ru/social/2016/11/28/10381541.shtml.

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the companies' behalf. As a result, 190 legal entities were held liable and fined a total of RUB 341 million (approximately $6 million) in aggregate.[195]

In an effort to increase the effectiveness of anti-corruption enforcement against legal entities, Russian legislation was amended to provide for extraterritorial application of administrative liability for bribery in some cases. Under the amended law, Russian and foreign companies on whose behalf illegal remuneration is offered or paid may be subject to administrative liability even if the offer or payment is made entirely outside Russia as long as the offense is deemed to target the interests of Russia.[196]

Practical implications of this new provision are uncertain, including under what circumstances Russian authorities would consider an extraterritorial offense to target Russian interests. Because evidence concerning these offenses is likely to reside outside Russia, enforcement will depend in part on effective cooperation between Russian and foreign law enforcement authorities.

In a positive development in this area, the Russian parliament did not pass a bill that would have required companies to obtain prior approval of Russian authorities before responding to information requests from foreign law enforcement agencies.[197] Moreover, the Russian National Plan on Counteracting Corruption for 2016-17 declared international cooperation in this field to be one of its main aims, stating that such cooperation would assist with discovery, seizure, and return of ill-gotten assets. In any event, the issue of cross-border cooperation between Russian and foreign authorities remains fraught and subject to possible political influence.

E. China

2016 saw a continuation of China's long-running anti-corruption crackdown. At least 28 "tigers" (provincial and ministerial level officials) were convicted and sentenced in 2016, according to a government source.[198] These included life sentences for Ling Jihua, the former vice-Chairman of the Chinese People's Political Consultative Conference (and senior aide to former President Hu Jintao), and

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195. *See* Analytical Note on the Status of Prosecutor Office Oversight over Compliance with Federal Legislation on Counteracting Corruption for 2014 – First Half of 2016, available at http://genproc.gov.ru/anticor/doks/document-1124021/.

196. For more details, see Dmitri V. Nikiforov, Jane Shvets, Anna V. Maximenko, and Elena Klutchareva, "Russia Extends Extraterritorial Effect of its Anti-Corruption Legislation," FCPA Update, Vol. 7, No. 9 (Apr. 2016), http://www.debevoise.com/~/media/files/insights/publications/2016/04/fcpa_update_april_2016.pdf.

197. For more details, see Paul R. Berger, et al., "The Year 2015 in Anti-Bribery Enforcement: Are Companies in the Eye of an Enforcement Storm?" *supra* n.1.

198. *China's Anti-Corruption Campaign in 2016*, The State Council Information Office of China (Dec. 21, 2016), http://www.scio.gov.cn/32618/Document/1536540/1536540.htm.

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Guo Boxiong, a former top military leader. As in prior years, thousands more low-level officials were investigated, disciplined, or arrested for corruption offenses.

The Supreme People's Court and Supreme People's Procuratorate also released a new "interpretation" relating to enforcement of PRC Criminal Law on bribery (both public and commercial).[199] While this interpretation is neither a binding law nor a binding regulation, it is effectively a binding set of standards for lower courts and prosecutors, which easily can be changed. Among other provisions, the interpretation raises the minimum thresholds at which prosecutors should charge bribery as a crime (non-criminal penalties and discipline are not subject to these thresholds). For public bribery, for example, bribing a state functionary (or a state functionary accepting a bribe) should be treated as a criminal matter if the benefit provided exceeds RMB 30,000 (approximately $4,400) or RMB 10,000 (approximately $1,470) in the presence of aggravating factors. The thresholds for commercial bribery are double that amount.[200]

"The relative uptick in recent years of anti-corruption enforcement in Latin America continued in 2016, with scandals and investigations increasingly making headlines."

Also in 2016, the State Council proposed amendments to China's Anti-Unfair Competition Act, which includes China's non-criminal commercial bribery legislation.[201] The amendments to the commercial bribery provisions updated the law generally and will be of interest to international companies once they are passed, as commercial bribery under the Anti-Unfair Competition Act, enforced by regional Administrations for Industry and Commerce, generally covers bribery of employees of state-owned enterprises, the type of bribery most commonly charged as an FCPA offense.

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199. "Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases Involving Embezzlement and Bribery" [in Chinese: Zui Gao Ren Min Fa Yuan Zui Gao Ren Min Jian Cha Yuan Guan Yu Ban Li Tan Wu Fu Bai Hui Hu Xing Shi An Jian Shi Yong Fa Yu Ruo Gan Wen Ti De Jie Shi] (effective on Apr. 18, 2016) ("Interpretations"). Unofficial English translation available at Westlaw China, http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i000000000000015427721 1dd6c4c7851&lang=en (unless otherwise indicated, quoted language from the Interpretation is derived from this translation); see generally Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, and Christina Jie Wang, "China Releases New Criminal Judicial Interpretation on Bribery," FCPA Update, Vol. 7, No. 10 (May 2016).

200. Interpretations, *supra* n.199, Arts. 1, 11-12.

201. *See* Andrew M. Levine, Philip Rohlik, and Christina Jie Wang, "China Proposes Amendments to its Commercial Bribery Legislation," FCPA Update, Vol. 7, No. 8 (Mar. 2016), http://www.debevoise.com/insights/publications/2016/03/fcpa-update-march-2016.

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Although not specifically related to bribery, in November 2016, China passed its Network Security Law, which will enter into force on June 1, 2017.[202] The Network Security Law codifies data protection and content monitoring requirements for companies deemed "network operators," defined as "owners and managers of networks and network service providers," a definition that would include companies doing business in China that own or manage internal networks. More significantly, the law imposes data localization and cyber-security obligations on "critical information infrastructure operators," which includes entities involved in a wide range of sectors including communications, information services, energy, transportation, finance, utilities, and e-commerce.[203] While many parts of the law, including the definition of "critical information infrastructure operator" await further clarification through implementing regulations, it is significant for those working in the anti-corruption compliance field. Both the data protection and, for entities deemed "critical information infrastructure operators," the data localization requirements, will add to the difficulties of conducting China-related investigations, in particular relating to the export of data from China.

F. Latin America

The relative uptick in recent years of anti-corruption enforcement in Latin America continued in 2016, with scandals and investigations increasingly making headlines. Not only that, several Latin American countries have considered and, in some cases, passed new laws, and also adopted new initiatives, regulations, and decisions that may impact significantly the anti-corruption landscape.

1. Argentina

Argentina's government seems to be taking concrete steps to act on campaign promises to combat corruption. In December 2015, President Mauricio Macri sent to Congress three bills known as the "anti-corruption package."[204] First, the

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202. Nat'l People's Cong. of China, *Network Security Law of the People's Republic of China* [in Chinese: Wang Luo An Quan Fa], XinhuaNet (Nov. 11, 2015), http://news.xinhuanet.com/legal/2016-11/07/c_1119867015.htm.

203. *See generally* Jeremy Feigelson, Jim Pastore, Mark Johnson, and Philip Rohlik, "China Passes Network Security Law," Debevoise & Plimpton Client Update, (Nov. 10, 2016), http://www.debevoise.com/insights/publications/2016/11/china-passes-network-security-law.

204. *See* Andrew M. Levine, Sarah Coyne, Lucila I. M. Hemmingsen, and Carolina Kupferman, "Argentine Government Considers New Anti-Corruption Legislation" FCPA Update, Vol. 8, No. 3 (Oct. 2016), http://www.debevoise.com/insights/publications/2016/10/fcpa-update-october-2016. *See also* Gustavo Ybarra, Retoma el Senado su actividad con las leyes anticorrupción [Senate Returns to Work with Anticorruption Laws], La Nacion (Aug. 1, 2016), http://www.lanacion.com.ar/1923574-retoma-el-senado-su-actividad-con-las-leyes-anticorrupcion; Espelta et al., Argentina: Bills Propose Plea-Bargaining And Asset-Recovery For Corruption Cases, Mondaq (July 11, 2016), http://www.mondaq.com/Argentina/x/508466/White+Collar+Crime+Fraud/Bills+Propose+PleaBargaining+And+AssetRecovery+For+Corruption+Cases.

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plea-bargaining bill – which became law on October 19, 2016[205] – authorized prosecutors to offer reduced sentences in exchange for admissions of guilt and cooperation with the prosecution of criminals in corruption cases.[206]

Second, the proposed asset-recovery bill provides for accelerating the seizure of assets acquired as a result of or related to corrupt activities.[207] The House of Representatives approved this bill, which also received preliminary approval from the Senate, though continues undergoing some modifications.[208]

Third, and most significantly, the international bribery bill – which remains pending in the Argentine legislature – seeks to punish those engaging in bribery in connection with international transactions.[209] If enacted, this bill would empower the Argentine government to prosecute local businesspeople for paying bribes outside the borders of Argentina, as well as public officials who accept bribes.[210] The proposed legislation extends the current law by authorizing prosecution of companies (not just individuals) for corruption-related crimes.[211] It also enables Argentine judges to try public officials for corruption-related crimes committed outside the country, without first having to prove those crimes had effects in Argentina, as required under the current law.[212]

These legislative efforts exemplify the Macri administration's attempts to increase transparency and promote Argentina worldwide as a trustworthy recipient of foreign investments.[213] In fact, one goal of the proposed legislation is facilitating Argentina's entry into the OECD, given that introducing corporate liability for foreign bribery has long been among OECD's key recommendations to Argentina. The approval of the pending legislative package would be a strong step in the right direction and can be viewed as a direct response to the OECD's prior recommendations and criticisms.

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205. *See* Laura Serra, *Es ley la figura del arrepentido para casos de corrupción [In Cases of Corruption, the Repentent Person is Law]*, LA NACION (Oct. 20, 2016), http://www.lanacion.com.ar/1948638-es-ley-la-figura-del-arrepentido-para-casos-de-corrupcion; *Diputados aprobó la Ley del Arrepentido [Representatives Pass the Law of the Repentant]*, INFOBAE, (Oct. 19, 2016), http://www.infobae.com/politica/2016/10/19/se-vota-una-ley-clave-para-la-lucha-contra-la-corrupcion/.

206. Proyecto de ley del arrepentido [Bill of the Repentant], arts. 1, 5 (2016), https://www.argentina.gob.ar/sites/default/files/oa_proyecto_colaboracion_eficaz.pdf *see also* Ybarra, *supra* n.204; *Argentina: Expansion of Plea Bargain in Corruption Cases*, The Law Library of Congress. http://www.loc.gov/law/foreign-news/article/argentina-expansion-of-plea-bargain-in-corruption-cases/.

207. Proyecto de ley de extinción de dominio [Asset-forfeiture Bill], Capítulo 1, art. 1 (2016), https://www.argentina.gob.ar/sites/default/files/oa_proyecto_de_ley_extincion_de_dominio.pdf.

208. Ybarra, *supra* n.204.

209. Fórmula de sanción [Endorsement Petition], Proyecto de ley de responsabilidad penal de las personas jurídicas [Legal Persons Responsibility Bill] (2016), https://www.argentina.gob.ar/sites/default/files/oa-responsabilidad_penal_personas_juridicas_-_proyecto_pen.pdf.

210. *Id.*

211. Proyecto de ley de responsabilidad penal de las personas jurídicas, arts. 1, 3 (2016), https://www.argentina.gob.ar/sites/default/files/oa-responsabilidad_penal_personas_juridicas_-_proyecto_pen.pdf.

212. *Id.* art. 3.

213. *Id.*

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If the new bills are passed and vigorously enforced, they could have a significant impact on companies in Argentina not already subject to a transnational corruption law, such as the FCPA, the U.K. Bribery Act, or Brazil's Clean Company Act. Under the international bribery bill, a company may be able to mitigate its legal culpability and potential penalties when it takes an active role in preventing and detecting crimes against the public administration. Further, the bill penalizes a company for any corrupt acts undertaken by a person acting on behalf of the company or by those acts from which the company could derive a benefit carried out by suppliers, contractors, agents, distributors, or any other person that has a contractual relationship with the company.

"[S]everal Latin American countries have considered and, in some cases, passed new laws, and also adopted new initiatives, regulations, and decisions that may impact significantly the anti-corruption landscape."

Argentina's latest steps in fighting corruption come at a time when local authorities are investigating former President Cristina Kirchner, who was indicted in December 2016, and some of her cabinet members for corruption and money laundering. Kirchner's former Secretary for Public Works was arrested in summer 2016 while allegedly trying to bury millions in cash and jewels close to a convent in the outskirts of Buenos Aires.[214] The Kirchner probe has drawn close even to current President Macri, as some of his close allies and family members have been accused of involvement in the Petrobras scandal.[215] Argentinian prosecutors are reportedly investigating about 100 companies possibly connected to facts stemming from Operation *Lava Jato* in Brazil.[216]

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214. *La detención de José López, ex número dos de Julio De Vido: ya llevan contados 8 millones de dólares [Detention of Jose Lopez, Julio De Vido's No. 2: Already Reached 8 Million Dollars]*, LA NACION (June 14, 2016), http://www.lanacion.com.ar/1908811-detuvieron-a-jose-lopez-ex-numero-dos-de-de-vido-en-un-convento-de-general-rodriguez-tenia-bolsas-con-dolares.

215. Nicolás Misculin, *As Argentine corruption probe grows Macri allies feel the heat*, REUTERS (May 9, 2016), http://www.reuters.com/article/us-argentina-court-idUSKCN0Y01OA.

216. Waithera Junghae, *Argentinian probe finds potential Petrobras president link*, GLOBAL INVESTIGATIONS REVIEW (May 10, 2016), http://globalinvestigationsreview.com/article/1035603/argentinian-probe-finds-potential-petrobras-president-link.

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2. Brazil

The Brazilian Federal Prosecutor's Office's "Ten Measures Against Corruption" are now pending as legislation before the Brazilian Congress.[217] These measures, which received supporting signatures of over two million Brazilian citizens, include proposed amendments such as higher sentences for corruption offenses, the criminalization of slush funds, and the extension of criminal statutes of limitation in certain circumstances.[218]

Also, in a precedent expected to impact significantly the *Lava Jato* investigation and other corruption investigations in the country, Brazil's highest court ("STF") decided in two different cases over the past year that criminal defendants can serve jail time upon confirmation of the conviction by a court of second instance, even if the decision is still subject to appeal.[219] The 2016 rulings altered STF's previous understanding that prison sentences could be executed only after a final, unappealable judgment.

More recently, in December 2016, Brazil's Ministry of Transparency, Supervision and Control ("MoT") and the country's Office of the Attorney General ("AGU") issued a joint ordinance (Interministerial Ordinance No 2,278/2016) establishing new rules for negotiating leniency agreements by legal entities under Brazil's Clean Company Act.[220] Under the ordinance, members of both the MoT and AGU will be part of the joint commission tasked with negotiating leniency agreements with companies willing to cooperate. The commission might also include, upon MoT's request, an employee of the public entity allegedly harmed by the wrongdoing.

The joint commission will assess the requirements for a legal entity to sign a leniency agreement under the Act, which include:

- being the first to express interest in cooperating with authorities;
- admitting participation in the wrongdoing;
- ceasing involvement in the misconduct;
- effectively cooperating with authorities; and
- identifying other involved parties.[221]

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217. *See* "10 Medidas Contra a Corrupcao," Ministerio Publico Federal, http://www.dezmedidas.mpf.mp.br/.

218. *Id.*

219. More information is available at http://www.loc.gov/law/foreign-news/article/brazil-confirmation-that-enforcement-of-sentences-begins-after-first-appellate-ruling/; http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=326754.

220. The text of the ordinance is available at http://s.conjur.com.br/dl/portaria-interministerial-acordo.pdf; http://www.cgu.gov.br/noticias/2016/12/ministerio-da-transparencia-e-agu-assinam-portaria-para-celebrar-acordos-de-leniencia.

221. *See* Andrew M. Levine, Sean Hecker, Daniel Aun, and Bernardo Becker Fontana, "Brazil Further Regulates Its Anti-Corruption Framework," *FCPA Update*, Vol. 6, No. 9 (Apr. 2015), http://www.debevoise.com/insights/publications/2015/04/fcpa-update.

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Among other things, the commission also will be tasked with evaluating a company's compliance program, the adoption and implementation of which shall be mitigating factors when the government calculates fines.[222] Under applicable rules, a company may benefit from one or more of the following outcomes by entering into a leniency agreement in Brazil:

- exemption from publication of the decision sanctioning its conduct;
- exemption from the prohibition against receiving incentives, subsidies, subventions, donations, or loans from government bodies, public entities, or financial institutions owned or controlled by the government;
- reduction of applicable fines by up to two-thirds; and
- exemption from, or mitigation of, administrative or civil sanctions set out in certain statutes governing public tenders and government contracts.[223]

Meanwhile, on the enforcement front, Brazil's Operation *Lava Jato* (Operation Car Wash) continues to unfold in dramatic fashion, making it among the most significant corruption cases ever. According to the Brazil Federal Prosecutor's Office, as of January 2017, *Lava Jato*'s multi-authority task force already has conducted over 730 police raids, arrested more than 180 individuals, and submitted or received at least 120 requests for international cooperation from more than 30 countries, in a case involving alleged bribery of around BRL 6.4 billion.[224] Thus far, the operation has led to the criminal prosecution of over 250 individuals and the investigation of over 20 companies.[225] More than seventy individuals have signed collaboration agreements, and seven companies have entered into leniency agreements with authorities.[226] The investigation contributed in part to last year's impeachment of former President Dilma Rousseff[227] and has included formal charges against numerous other senior politicians, including former President Lula da Silva.[228]

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222. *See id.*

223. *See* Andrew M. Levine, Bruce E. Yannett, Steven S. Michaels, Daniel Aun, and Bernardo Becker Fontana, "Brazil Issues Long-Awaited Decree Implementing the Clean Company Act," FCPA Update, Vol. 6, No. 8 (Mar. 2015), http://www.debevoise.com/insights/publications/2015/03/fcpa-update-march-2015.

224. More information is available at http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros-1.

225. *Id.*

226. *Id.*

227. Jonathan Watts and Donna Bowater, "Brazil's Dilma Rousseff Impeached By Senate In Crushing Defeat," The Guardian (Sept. 1, 2016), https://www.theguardian.com/world/2016/aug/31/dilma-rousseff-impeached-president-brazilian-senate-michel-temer.

228. Sergio Spagnuolo, "Brazil's Lula Charged as 'Top Boss' of Petrobras Graft Scheme," Reuters (Sept. 14, 2016), http://www.reuters.com/article/us-brazil-corruption-idUSKCN11K2C6; Marla Dickerson and Reed Johnson, "Brazil Prosecutors File Charges Against Ex-President da Silva and His Wife," Wall St. J. (Sept. 14, 2016), http://www.wsj.com/articles/brazil-prosecutors-to-file-charges-against-ex-president-da-silva-and-his-wife-1473876218.

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Also noteworthy, the so-called Operation *Zelotes* involves the investigation of large multinationals and major Brazilian enterprises for an alleged multi-billion-dollar scheme to bribe members of Brazil's tax appellate council in order to reduce fines or dismiss tax evasion claims.[229] Several senior executives have been criminally indicted in Brazil, and shareholders recently have brought federal securities class actions in the United States to recover alleged losses.[230] More recently, Brazil's Operation *Greenfield* is investigating alleged fraud and corruption involving numerous government-controlled pension funds, individuals, and companies.[231]

3. Colombia

In February 2016, Colombia adopted Law 1778 (*Ley Antisoborno*),[232] which for the first time under Colombian law established an administrative procedure for investigating and sanctioning legal entities involved in acts of transactional bribery or corruption.[233] The law authorizes Colombia's Superintendence of Companies ("Superintendence") to sanction entities registered in Colombia, as well as foreign parents of Colombian subsidiaries and foreign subsidiaries of Colombian companies, for conduct in Colombia or abroad.[234] The new law also expands vicarious liability, explicitly holding companies that benefit from a crime liable for the acts of contractors and associates, terms not defined in the law.[235]

Under the new regime, the Superintendence is empowered to impose sanctions including fines of up to approximately US $40.5 million and prohibitions from contracting with any state or state-owned entity for up to 20 years.[236] The law also provides detailed guidance for assessing aggravating and mitigating factors in determining sanctions.[237] Mitigating factors include the existence and implementation of compliance programs and whether the legal entity has denounced the employees involved in the commission of the crime and provided

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229. Samantha Pearson, "Prosecutors tackle Brazil's 'Other' Corruption Probe," Financial Times (June 22, 2016), https://www.ft.com/content/ffc52688-349c-11e6-bda0-04585c31b153.

230. Reese Ewing and Jeb Blount, "U.S. Firm Files Class Action Against Brazil Steelmaker Gerdau," Reuters (May 26, 2016), http://www.reuters.com/article/us-brazil-gerdau-br-classaction-idUSKCN0YH2FN; Jonathan Stempel and Tatiana Bautzer, "Update 1- Banco Bradesco Faces Shareholder Lawsuit in U.S.," Reuters (June 3, 2016), http://www.reuters.com/article/banco-bradesco-lawsuit-idUSL1N18V1ZE.

231. Julia Leite and Gerson Freitas Jr., "Brazil's Biggest Pension Funds Targeted in New Fraud Probe," Bloomberg (Sept. 5, 2016), https://www.bloomberg.com/news/articles/2016-09-05/police-target-brazil-s-four-biggest-pension-funds-in-fraud-probe.

232. L. 1,778, febrero 2, 2016, Presidencia de la República, http://www.presidencia.gov.co/.

233. *See* Andrew M. Levine, Bruce E. Yannett, and Jorge I. Valencia, "Colombia Adopts New Law on Transnational Corruption," FCPA Update, Vol. 7, No. 11 (June 2016), http://www.debevoise.com/insights/publications/2016/06/fcpa-update-june-2016.

234. *Id.*, art. 2-3.

235. Id., art. 2.

236. *Id.*, art. 5-7.

237. *Id.*, art. 7.

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evidence for their prosecution.[238] Under Law 1778, legal entities that self-report to the Superintendence and cooperate with the investigation are eligible for a waiver or reduction of the penalties at the Superintendence's discretion.[239] Additionally, to prevent legal entities from hiding or refusing to disclose information needed in the course of investigations, Law 1778 authorizes hefty fines, even on third parties not under investigation, for refusing to disclose information.[240]

Most recently, Colombian President Juan Manuel Santos declared that battling corruption will be his government's paramount priority in 2017.[241] Among other initiatives, the President introduced two anti-corruption bills, the first seeking to increase transparency regarding who controls companies conducting business in Colombia, and the second aiming to make it more difficult for criminal defendants accused of corruption to receive reduced sentences for pleading guilty after the prosecutor has enough evidence to convict.[242]

"The Brazilian Federal Prosecutor's Office's 'Ten Measures Against Corruption' … include proposed amendments such as higher sentences for corruption offenses, the criminalization of slush funds, and the extension of criminal statutes of limitation in certain circumstances."

Although Colombia still lags behind many other Latin American countries in anti-corruption enforcement, there has been an increase in recent years. That includes actions against individual employees of companies such as Ecopetrol, which has been embroiled in a multi-jurisdictional corruption scandal in the oil and gas industry. Also, President Santos's recent anti-corruption initiatives come amidst an investigation related to Brazil's *Lava Jato* operation, which already has led to the arrest of a former deputy minister and a former senator in Colombia.[243]

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238. *Id.*, art. 35.

239. *Id.*, art. 19.

240. *Id.*, art. 21. *But see* Constitución Política de Colombia [C.P.] art. 74, Secretaría General del Senado, Congreso de la República de Colombia, http://www.secretariasenado.gov.co/ (guaranteeing the attorney-client privilege, which cannot be overridden by Law 1778 when privilege applies).

241. "Lucha anticorrupción, prioridad número uno para el 2017" Presidencia de la Republica (Jan. 23, 2017), http://es.presidencia.gov.co/noticia/170123Luchaanticorrupcionprioridadnumerounoparael2017.

242. "Presidente Santos firma decreto que busca frenar actos de corrupción" El Tiempo (Jan. 23, 2017), http://www.eltiempo.com/politica/gobierno/medidasdejuanmanuelsantoscontralacorrupcion/16799292.

243. Julia Symmes Cobb and Guillermo ParraBernal, "Colombia arrests exsenator linked to Odebrecht graft scandal" Reuters (Jan. 15, 2017), http://www.reuters.com/article/brazil-corruption-odebrecht-colombia-idUSL1N1F5073 "Colombia Arrests Former Uribe Minister over Odebrecht Case" teleSUR (Jan. 13, 2017), http://www.telesurtv.net/english/news/Colombia-Arrests-Former-Uribe-Minister-over-Odebrecht-Case--20170113-0009.html.

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4. Mexico

In 2016, new and amended laws in Mexico established the most sweeping anti-corruption system in the nation's history. Among other significant reforms, the new laws include steep penalties for corruption-related offenses committed by individuals and corporate entities, offer incentives for implementing robust corporate compliance programs and for cooperating with authorities, and provide for coordination among federal, state, and local government institutions tasked with fighting corruption.[244]

The new General Law of Administrative Liabilities,[245] which will become effective in July 2017 and abrogate several existing laws, establishes that legal entities can be held liable for "serious administrative offenses" when related acts are committed by individuals acting in the name of or representing the entity.[246] In addition, individuals and legal entities committing various corruption-related offenses – such as bribery, collusion in public bid procedures, influence peddling, wrongful use of public resources, or wrongful recruitment of ex-public servants – will face steep monetary penalties and temporary ineligibility to participate in public procurement, leases, services, or projects.[247] Although the language in the new law seems to limit extraterritorial reach to cases of "collusion" (broadly defined to include antitrust violations),[248] the law ultimately will apply within Mexico at every level of public procurement: local, state, and federal.[249]

Under the new law, entities may mitigate penalties by maintaining an adequate compliance program or "integrity policy."[250] Legal entities may receive credit also for self-reporting misconduct and cooperating with government investigations.[251] An individual's penalty may be lessened if he or she confesses and cooperates. The new law also provides additional protections for whistleblowers.[252] Unlike the FCPA, the General Law of Administrative Liabilities explicitly prohibits public servants from accepting, and implicitly proscribes private parties from making, facilitation payments.[253]

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244. http://www.reuters.com/article/brazil-corruption-odebrecht-colombia-idUSL1N1F5073; http://www.telesurtv.net/english/news/Colombia-Arrests-Former-Uribe-Minister-over-Odebrecht-Case--20170113-0009.html; http://www.diariolibre.com/mundo/latinoamerica/santos-declara-guerra-frontal-contra-corrupcion-en-medio-de-escandalo-odebrecht-CD6005675.

245. *See* Sean Hecker, Andrew M. Levine, and Eileen Zelek, "Mexico Adopts New Anti-Corruption Legislation," FCPA Update, Vol. 8, No. 2 (Sept. 2016), http://www.debevoise.com/insights/publications/2016/09/fcpa-update-september-2016.

246. Ley General de Responsabilidades Administrativas ("LGRA") [Gen. L. of Admin. Liabilities] (Mex.), July 18, 2016.

247. LGRA, art. 24; *see also* "New Rules on Anti-Bribery and Corruption Matters for Privately Owned Entities in Mexico," Lexology (July 28, 2016), http://www.lexology.com/library/detail.aspx?g=23964663-1aa4-4d24-bee0-1680d458e97e.

248. LGRA, arts. 65-72.

249. Id.

250. *Id.*, art. 70.

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Mexico also recently amended some of the country's existing laws. The Federal Criminal Code now includes new corruption offenses and penalties for both public servants and private parties.[254] As an example, for influence peddling, private parties will face up to six years' imprisonment and fines up to 100-days of wages.[255] Additionally, the Organic Law of the Attorney General's Office was amended to create an independent anti-corruption prosecutor's office, which will be a member of the Coordinating Committee of Mexico's National Anti-corruption System.[256] The government also amended the Organic Law of the Federal Public Administration, strengthening the Secretary of the Public Function's ability to prevent and combat corruption.[257]

The reforms to Mexico's anti-corruption regime occur on the heels of growing enforcement and a series of recent scandals battering the administration of President Enrique Peña Nieto. For example, a government contractor was accused of lending and paying taxes for Miami apartments used or owned by Mexico's First Lady, Angélica Rivera.[258] Additionally, several former state governors recently were hit with domestic and international corruption charges.[259] With regard to domestic enforcement, in March 2016, the Mexican securities regulator (CNBV) imposed a fine of 71.7 million *pesos* ($4.1 million) on OHL Mexico for inadequacies in its financial reporting, but found no evidence of fraud.[260] OHL will be required to work with its external advisors to develop acceptable reporting practices."[261]

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251. *Id.*, art. 135.

252. *Id.*, art. 81.

253. *Id.*, arts. 88-89.

254. 15 U.S.C. § 78dd–2(b); LGRA, arts. 7, 66.

255. Código Penal Federal [CPF] [Federal Criminal Code], Aug. 14, 1931, last amended July 18, 2016.

256. *Id.*, art. 221.

257. Ley Orgánica de la Procuraduría General de la República [LOPGR] [Organic Law of the Attorney General's Office] (Mex.), May 29, 2009, last amended July 18, 2016, Id. art. 10 Ter. II.

258. Ley Orgánica de la Administración Pública Federal [LOAPF] [Organic Law of the Federal Public Administration] (Mex.), Dec. 29, 1976, last amended July 18, 2016, Art. 37.

259. Rafa Fernandez de Castro, "Mexico's First Lady linked to Florida apartment owned by potential government contractor," Fusion (Sept. 20, 2016), http://fusion.net/story/334733/mexicos-first-lady-linked-to-florida-apartment-owned-by-potential-government-contractor/.

260. Luis Fernando Alonso, "5 Former Mexico Governors Accused of Corruption in 2016" InSight Crime (Nov. 14, 2016), http://www.insightcrime.org/news-briefs/five-former-mexico-governors-accused-of-corruption-in-2016; Jose de Cordoba and Juan Montes, "Mexico Issues Arrest Warrant for Veracruz State Governor Javier Duarte" Wall St. J. (Oct. 19, 2016), http://www.wsj.com/articles/mexico-issues-arrest-

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III. Conclusion

As we noted in discussing the relatively modest enforcement statistics associated with FCPA enforcement in 2015, a single year does not a trend make. The same caution applies to the blockbuster settlements associated with FCPA enforcement in 2016, at least some of which can be associated with regulators' interest in closing cases before a change of presidential administration. That said, a pipeline of publicly-disclosed investigations, aggressive enforcement abroad (especially by UK and Brazilian regulators), and the possibility of increased self-reporting under the FCPA Pilot Program suggest that anti-corruption enforcement will remain a focus for global business and regulators, even if the new U.S. administration prioritizes other areas of enforcement. We look forward to examining and reporting on anti-corruption enforcement and related legal developments throughout 2017.

– The Editors

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