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STEPTOE & JOHNSON LLP

2016 FCPA Year in Review

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2016 FCPA Year in Review[1]

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INTRODUCTION

2016 was a banner year for global anti-corruption and US Foreign Corrupt Practices Act (FCPA) enforcement. Coming on the heels of 2015, a year in which the US Department of Justice (DOJ) and US Securities and Exchange Commission (SEC) brought their lowest number of enforcement actions for a decade, 2016 not only resulted in the largest number and highest dollar-value of FCPA corporate enforcement actions in a single year, but also reflected the impact of new policy directions. In 2015, the agencies brought a combined total of 23 FCPA-related enforcement actions, 11 by the DOJ, and 12 by the SEC, accounting for a combined US $142.7 million in monetary sanctions. In contrast, 2016 saw 37 SEC and 24 DOJ enforcement actions resulting in US $2.43 billion in monetary penalties (including disgorgement) to be paid to the federal Treasury. Those numbers were not just the result of one or two large, "blockbuster" matters as has been the case in some prior years, but rather a larger number of all types of settlements: large matters imposing monetary sanctions running into the hundreds of millions of dollars; prosecutions of individuals; and a number of smaller resolutions by the SEC where the DOJ either would not or could not prosecute. This heightened level of 2016 activity also spilled into the first weeks of 2017, with a number of corporate and individual enforcement actions announced just after the new year as well.

The 2016 enforcement resurgence is less the result of any renewed commitment to FCPA enforcement (as we explained in our 2015 Year in Review), than a reflection of a number of factors: the targeting of individuals; DOJ's willingness to progress some investigations more quickly than in the past; multiple investigations arising out of common facts in the same industry or country; and unprecedented cooperation and coordination between US enforcement authorities and their counterparts in Brazil, the UK and other countries around the world. While the longer-term outlook for FCPA and transnational criminal law enforcement is less certain with the change in administration than it may have been at any time in recent decades, we nevertheless see these trends continuing into 2017.[3]

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[3] The first weeks of 2017 have already seen a major multi-jurisdictional resolution involving UK engineering company Rolls-Royce; a number of individual resolutions, including guilty pleas entered into by two businessmen related to their role in a scheme to corruptly secure business from Venezuela's state-owned and state-controlled energy company Petróleos de Venezuela S.A. (PDVSA) and an indictment against four individuals alleged to have engaged in a corrupt scheme to bribe government officials in a Middle East country to facilitate the sale of a commercial building in Vietnam. Additional corporate resolutions, including settlements between the SEC and Mondelez for alleged inadequate controls over a consultant relationship in India, and SQM for making payments to Chilean political figures funneled through third parties and vendors, have also already been concluded in 2017.

More important than the headline numbers and trends, however, are the enforcement policy developments which drove the DOJ's and SEC's enforcement efforts in 2016. Whereas September 2015 saw the DOJ release the so-called *Yates* memorandum, which highlighted the DOJ's enforcement focus on individuals, in April 2016 the DOJ announced its FCPA "Pilot Program", which was aimed at incentivizing corporate self-reporting in order to generate more and better information regarding individual misconduct in return for significantly more lenient terms of settlement or even outright declinations. Although not formalized in a written policy document, the SEC also appeared to institute its own enhanced incentives to reward voluntary disclosure and focus on individuals. Both the DOJ and SEC appeared to advance their stated goals of focusing more on cases consistent with their core mission – the DOJ on larger, criminal matters, and the SEC those affecting US issuers, and both on individuals.

2016 also saw the continuation of some longer-term enforcement trends we have previously identified: the use of alternative or additional means to investigate and prosecute transnational corruption, such as through the DOJ's Kleptocracy Initiative; using non-FCPA statutory tools to bring prosecutions (such as in connection with the FIFA-related scandals); and significantly enhanced cooperation with overseas enforcement officials. There was continued unpredictability in what countries or activities would produce the next set of investigations and enforcement priorities. Where in years past it may have been less common for allegations to find their way unexpectedly into the public domain, 2016 saw the *Unaoil* exposé, numerous investigations resulting from internal and external whistleblower reports (many prompted by Dodd-Frank-promised bounties), and the Panama Papers data leaks expose the extent of the use of offshore tax structures and secret bank accounts by a large number of corporations, politicians and wealthy individuals. Coupled with the ever-increasing formal and informal links between domestic US enforcement officials and their counterparts overseas, the unpredictable source and nature of global investigations is a phenomenon that is very likely to continue.

Of course, political developments in the US, UK and elsewhere in 2016 have made the policy and enforcement outlook for 2017 and beyond more uncertain. While the agencies' enforcement programs may not visibly change in the short-term as a result of the change in US administration, we would not be surprised to see legislative proposals to amend the FCPA, which failed to gain traction in prior years, re-introduced into the US Congress, along with other legal, regulatory and policy initiatives intended to foster a less-regulated business climate.[4] Whether the enforcement authorities will enjoy the same level of resources and foreign cooperation as in recent years is also uncertain, but those expecting wholesale change in the statute and/or dramatic enforcement changes are in our view likely to be disappointed. The FCPA is no longer the unilateral measure that it once was, but operates in an international context. While both the

[4] Indeed, in February 2017, Congress passed a joint resolution under the Congressional Review Act to nullify the Disclosure of Payments by Resource Extraction Issuers Rule, which mandates that extractive industry issuers disclose certain payments to foreign governments to the SEC. At this writing, the resolution has been presented to the President for signature. *See* Congress, *Actions Overview: H.J. Res. 41 — 115th Congress (2017–2018)* (last visited February 10, 2017), https://www.congress.gov/bill/115th-congress/house-joint-resolution/41/actions. Acting SEC Chairman Michael Piwowar also announced that the agency intends to reconsider enforcement of the Dodd-Frank 'Conflict Minerals' rule, which requires companies to disclose information about the origination of certain ores and derivative metals in the supply chain. Dave Michaels, *SEC to Reconsider Enforcing 'Conflict Minerals' Rule, Acting Chief Says*, WALL ST. J. (JAN. 31, 2017, 8:43 PM), https://www.wsj.com/articles/sec-to-reconsider-enforcing-conflict-minerals-rule-acting-chief-says-1485913422.

statute and the enforcement program can be improved, in our view it would be unwise for companies to conclude that they no longer need to invest in compliance.

Table of Contents

INTRODUCTION ..... **I**

I. 2016 FCPA ENFORCEMENT STATISTICS **1**
A. Number of Enforcement Actions 1
B. Monetary Sanctions 2
C. Geography and Types of Conduct 3
D. Monitorships 5

II. FCPA CORPORATE AND INDIVIDUAL SETTLEMENTS **6**
A. Policy and Legal Developments 6
1. Pilot Program 6
2. Disgorgement-Related Developments 6
3. Jurisdiction-Related Developments 7
B. 2016 Corporate Enforcement 7
1. Grand Corruption Cases 8
2. Gifts, Meals and Entertainment 13
3. Enforcement Actions Featuring Third-Party Conduct 16
4. Hiring Practices 21
5. Charitable Contributions 22
6. Other - AB InBev and Dodd-Frank Whistleblower Retaliation Charges 22
C. DOJ Pilot Program Declinations and Related SEC Enforcement Actions 23
1. DOJ Declinations Accompanied by SEC Enforcement Actions 24
2. DOJ Declinations with Disgorgement 25
3. SEC Declinations 26
4. 2016 Enforcement Efforts Against Individuals 26

III. FCPA 2016 ONGOING AND NEW INVESTIGATIONS **33**
A. Energy and Extractives 33
1. *Lava Jato*/Petrobras 33
2. Unaoil 34
3. Rio Tinto/Guinea 35
B. Health Care 37
C. Financial Services 38
D. Manufacturing 38
E. Telecommunications 40
F. Other Investigations 40

IV. RELATED DOJ/SEC ENFORCEMENT EFFORTS **42**
A. Whistleblower Activity 42
B. SEC 2016 Whistleblower Report 42
C. Recent Dodd-Frank Whistleblower Awards 42
D. Dodd-Frank Whistleblower Retaliation Developments 43
E. Other Significant Whistleblower Developments 44
F. FIFA Investigation 44

G. KLEPTOCRACY ASSET RECOVERY INITIATIVE 45

V. FCPA/RELATED CIVIL/DERIVATIVE LITIGATION 46
A. PLATFORM SPECIALTY PRODUCTS CORPORATION 46
B. QUALCOMM 47
C. COGNIZANT 47
D. PTC 48
E. ALERE 48
F. BRISTOL-MYERS SQUIBB 49
G. YAHOO/BAKER & MCKENZIE 50
H. SIEMENS 50
I. WAL-MART 51
J. OCH-ZIFF 51
K. GERDAU 52
L. BANCO BRADESCO 52
M. LAS VEGAS SANDS 52
N. HYPERDYNAMICS 53
O. KEY ENERGY 54
P. COBALT 54
Q. EMBRAER 55
R. OPERATION LAVA JATO LITIGATION 55

VI. NON-US ENFORCEMENT, ONGOING INVESTIGATIONS AND LEGAL DEVELOPMENTS 56
A. UNITED KINGDOM 56
1. UK Legal Developments 57
2. Enforcement Against Individuals 60
3. National Crime Agency Bribery Cases 61
4. Isle of Man/Ireland 61
B. OTHER EUROPEAN JURISDICTIONS 62
1. The European Union 62
2. France 62
3. Germany 63
4. Italy 64
5. The Nordics 65
6. The Netherlands 65
C. CHINA 66
D. BRAZIL 67
E. CANADA 69
F. AUSTRALIA 70

VII. WORLD BANK/OTHER INTERNATIONAL FINANCIAL INSTITUTIONS 71
A. THE WORLD BANK 71
B. OTHER IFIS 72

VIII. CONCLUSION 72

I. 2016 FCPA ENFORCEMENT STATISTICS

A. Number of Enforcement Actions

2016 can be seen as a "comeback year" from 2015's lower enforcement levels, registering the highest one-year enforcement numbers ever, and reinforcing that single years in FCPA enforcement can rarely can be treated as trends. The numbers are similar in raw terms to the 2009-2011 period (41, 56, and 49 enforcement actions, respectively), but significantly larger in terms of the aggregate and average monetary sanction levels, and the number of companies reaching settlements. The DOJ and SEC concluded a total of 61 enforcement actions against companies and individuals in 2016: 24 by the DOJ and 37 by the SEC. Notably, enforcement actions included the resolution of a number of complex, multijurisdictional investigations involving misconduct in multiple countries and requiring coordination among multiple country enforcement officials with total fine levels reaching into the billions of dollars.

Twenty-five separate companies faced charges from the SEC or DOJ,[5] representing a significant increase from 2015 enforcement levels, in which 10 separate companies were subject to enforcement action. Of the 25 companies, 14 were US-based, and 11 were headquartered abroad.

Unlike 2015, in which no parallel enforcement actions were brought against companies by the DOJ and SEC (a departure from historical enforcement patterns), the US enforcement authorities reverted to their historical practice by bringing a total of 10 parallel enforcement actions. Furthermore, both agencies brought a significant number of actions against individuals (13 by each of the SEC and DOJ). These enforcement patterns are consistent with the agencies' recently announced policy priorities – in particular the focus on individual prosecutions pursuant

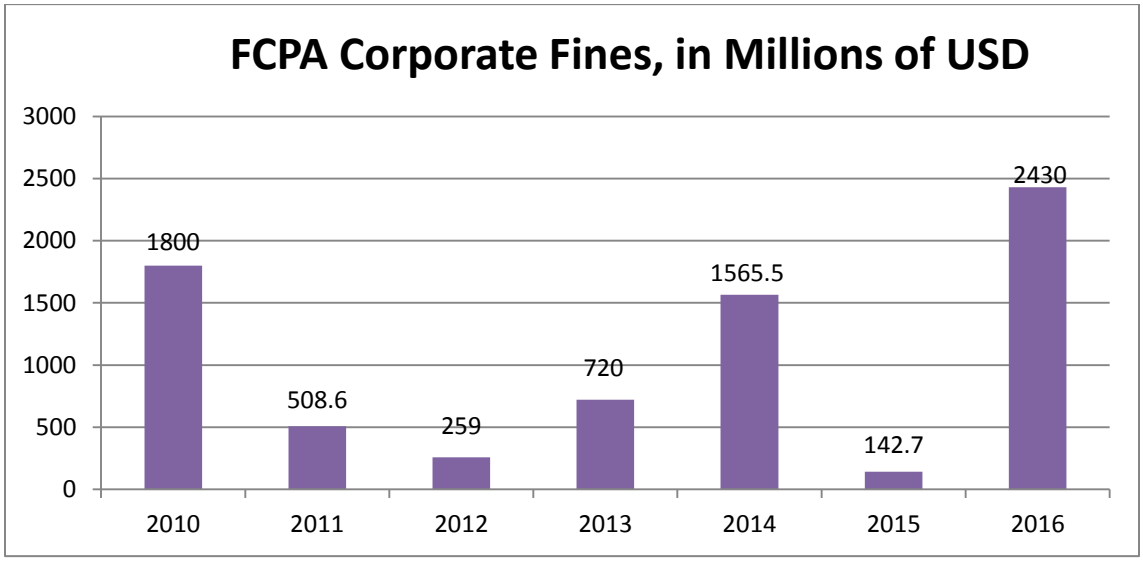
[5] The SEC brought 24 corporate enforcement actions; while the DOJ brought 11 such actions (10 actions represented parallel SEC and DOJ efforts).

to the so-called *Yates* memorandum, and furthered by the DOJ FCPA Unit's Pilot Program, announced in April 2016 (see Section II.A.1 below).

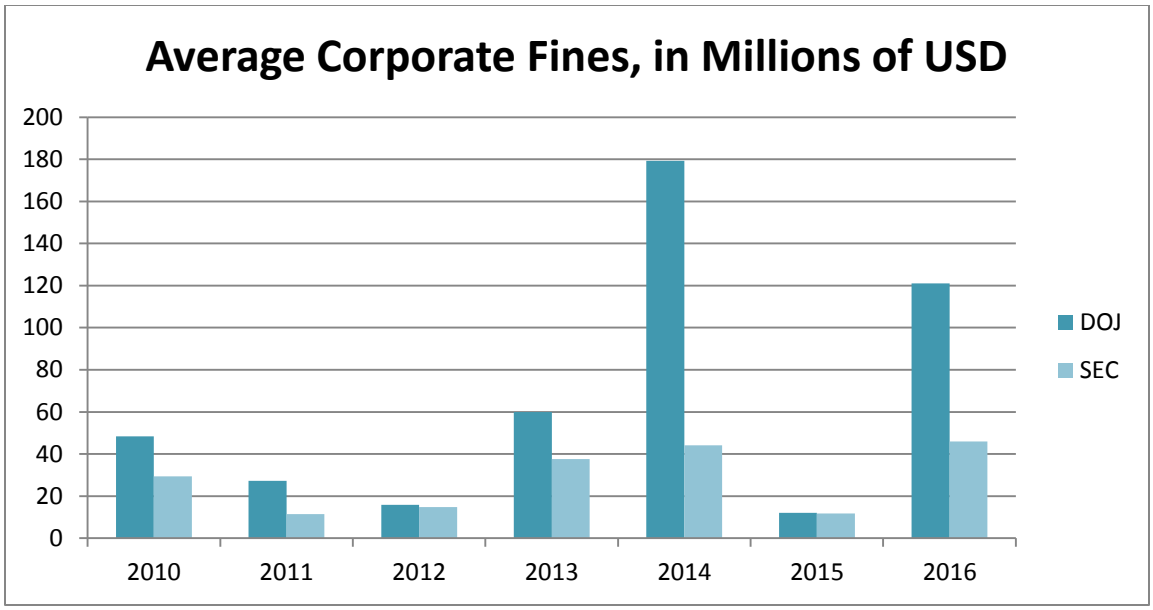
Declinations of prosecution, or at least their publicization, also increased in 2016. These included the first DOJ declinations under the Pilot Program (Akamai, Nortek, Johnson Controls, HMT, and NCH) and a number of non-Pilot Program declinations by both DOJ and SEC. Pilot Program-related declinations broke new – and some would way questionable – legal ground in DOJ's enforcement program by for the first time requiring disgorgement of ill-gotten gains in cases where the SEC itself had not sought that remedy. Some declinations raised questions about whether they were true declinations (where the DOJ could have prosecuted based on both the conduct at issue and adequate jurisdiction over the conduct, but chose not to) or more on the order of file closures.

B. Monetary Sanctions

The aggregate dollar value of monetary sanctions levied by the DOJ and SEC in 2016 was an order of magnitude higher than in 2015. Totals reached record levels, reaching over US $2.43 billion in fines, penalties, and disgorgement paid pursuant to DOJ and SEC resolutions,[6] as compared to US $142.7 million in 2015 and US $1.56 billion in 2014. Unlike 2014, which included a number of smaller resolutions and one large criminal fine – the record US $772 million criminal penalty against Alstom SA – the record monetary sanction amounts in 2016 were broad-based and made up of a number of larger and smaller matters.



[6] Totals reflect minimum expected payments to US authorities relating to the Odebrecht/Braskem settlement (as discussed in Section II below) and may increase pending an independent ability-to-pay analysis to be conducted by US and Brazilian authorities.

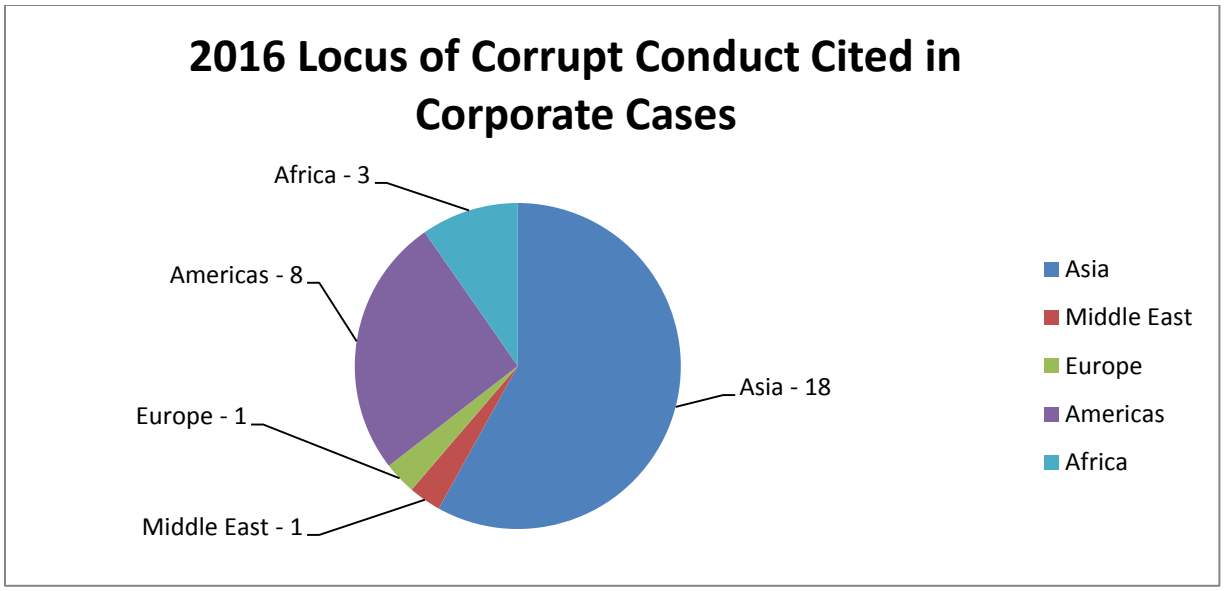


These included Teva Pharmaceuticals (US $519 million), Och-Ziff (US $412 million), VimpelCom (US $398 million), JP Morgan (US $264 million), Embraer (US $205 million) and Odebrecht/Braskem, each of which featured parallel DOJ and SEC resolutions and, except for JP Morgan, involved allegations of misconduct in multiple countries. (Some previously reported large-scale investigations, such as Wal-Mart, were not resolved, however.) A number of additional small-to-mid-size enforcement actions also were included in the totals, with sanctions ranging in the seven-to-eight-figure range, often reflecting the fact that the underlying conduct was local in nature and targeted at relatively low-return activities. 2016 also included a significant number of individual enforcement actions, some of which uncharacteristically carried significant monetary components of their own.

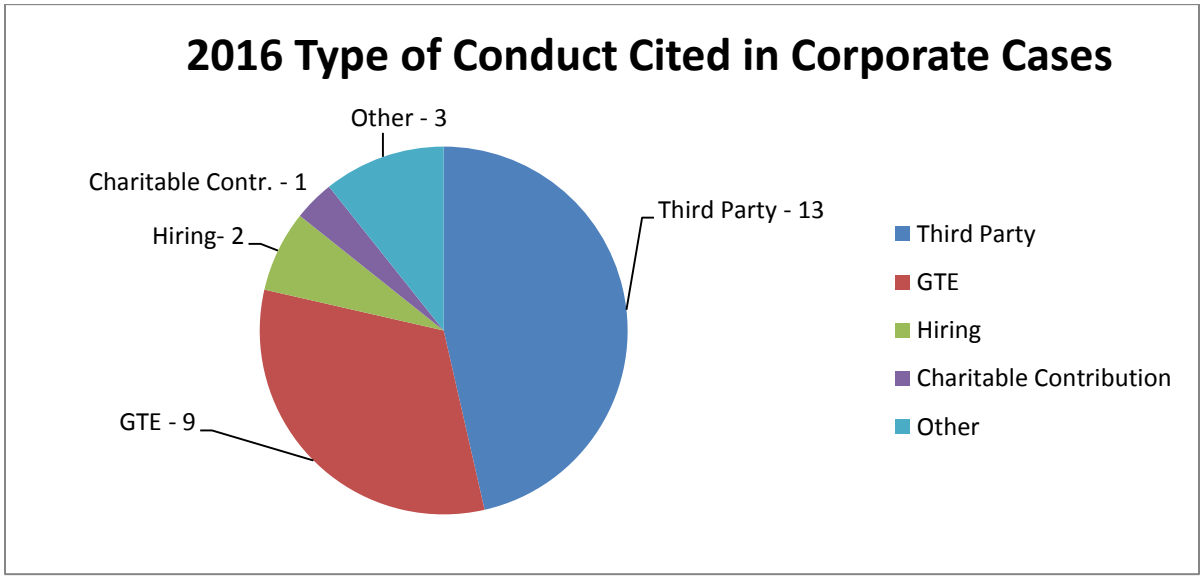
C. Geography and Types of Conduct[7]

Most of 2016's corporate enforcement activity was focused on a few key geographical areas. The largest single country concentration was on Asia-based conduct and, in particular, on conduct in China. Brazil and Latin America featured prominently given Brazilian domestic enforcement events surrounding the so-called *Lava Jato* ("Car Wash") investigation. As for the industries affected, enforcement activity clustered in the healthcare, pharmaceutical and medical device industry (for example, Johnson Controls, GlaxoSmithKline (GSK), NuSkin, AstraZeneca, Novartis, and SciClone), and in the technology and oil and oilfield services industries.

[7] For the purposes of the charts in this subsection, statistics are based on corporate conduct only. Parallel actions brought by both enforcement authorities have been treated as one action.



Corporate enforcement activity clustered around a few types of conduct. A significant number of enforcement actions involved gifts, meals, travel and entertainment provided to local officials. The year was unusual in the number of large, often multi-jurisdictional, resolutions involving grand corruption, including Odebrecht/Braskem, Och-Ziff, JP Morgan, Embraer, and VimpelCom, all of which resulted in at least nine-figure settlements with US and often other countries' enforcement authorities. Consistent with prior years, a significant majority of the year's enforcement actions involved third-parties. The year also saw the first significant enforcement action (JP Morgan) arising out of the DOJ and SEC investigations into hiring practices of major Wall Street banks in Asia.



D. Monitorships

Another significant contrast to 2015 was the agencies' renewed enthusiasm for compliance monitorships as conditions of settlement. Whereas both 2014 and 2015 saw one monitorship imposed (Avon and Louis Berger, respectively),[8] seven monitorships were required in 2016 by DOJ and/or SEC (Olympus, LATAM, VimpelCom, Och-Ziff, Embraer, Odebrecht/Braskem, and Teva Pharmaceuticals). As described more fully below, the increase in monitorships most likely reflects the fact that there were more cases of large-scale, institutionalized corruption at companies without compliance programs settled in 2016, rather than any renewed focus on or new push to impose more monitors in FCPA settlements over the past year. Indeed, the agencies appear to continue to recognize that compliance monitorships are sub-optimal outcomes for both the government and the companies involved, and continue to impose them only where they are necessary.

[8] Zimmer-Biomet's monitorship was extended in 2015, and the Company disclosed on March 25, 2016 that the DOJ and SEC continued to investigate alleged misconduct in Brazil and Mexico. *See* Zimmer Biomet Holdings, Inc., Current Report (Form 8-K) (Mar. 25, 2016), http://investor.zimmerbiomet.com/secfiling.cfm?filingID=1193125-16-518185&CIK=1136869. As a result of that investigation, the DOJ found that Zimmer Biomet breached its obligations under the 2012 deferred prosecution agreement, and, on January 12, 2017, Zimmer Biomet entered into a new three-year DPA in connection with superseding criminal information charging the company with failing to implement adequate internal controls in Brazil and Mexico. Pursuant to the new agreement, Zimmer Biomet agreed to pay a US $17.4 million criminal penalty and retain an independent corporate monitor. See DOJ Press Release, *Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges* (Jan. 12, 2017), https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act. Zimmer Biomet also settled charges with the SEC related to the same conduct and agreed to pay a US $6.5 million civil penalty and over US $6 million in disgorgement and prejudgment interest. *See* SEC Press Release, *Biomet Charged with Repeating FCPA Violations* (Jan. 12, 2017), https://www.sec.gov/news/pressrelease/2017-8.html.

II. FCPA CORPORATE AND INDIVIDUAL SETTLEMENTS

A. Policy and Legal Developments

2016 saw a number of legal and policy developments that drove much of the context of the DOJ and SEC FCPA enforcement program during the year.

1. Pilot Program

Perhaps gaining the most attention during the year, on April 5, 2016, the DOJ issued an update to its FCPA enforcement guidance, which included its so-called "Pilot Program." (Please see Steptoe's April 11, 2016 client alert here). The guidance explained that DOJ was enacting a new enforcement policy to incentivize companies to self-report potential violations and bring to DOJ's attention individuals engaged in wrongdoing, and to provide policy transparency on the extent of mitigation credit available to companies in FCPA enforcement matters. It announced that companies that voluntarily self-report violations, fully cooperate consistent with the so-called "Yates" Memorandum[9] and Principles of Federal Prosecution of Business Organizations,[10] and timely and appropriately remediate in FCPA matters may obtain up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, usually will not require the appointment of a monitor, and will be considered to receive a declination of prosecution. It also set in policy that companies that do not voluntarily self-disclose would be eligible to receive no more than a 25% reduction off the bottom end of the Sentencing Guidelines fine range, even where they cooperate, timely and appropriately remediate, and meet all other requirements of the Pilot Program. Viewed in the context of the September 2015 announcement of the Yates Memorandum and statements from then-SEC Director of Enforcement Andrew Ceresney in fall 2015, the Pilot Program underscored DOJ's and SEC's desire to incentivize corporate self-reporting by conditioning the most favorable outcomes on voluntary disclosures, while at the same time stopping short of a leniency program in order to preserve prosecutorial discretion.

2. Disgorgement-Related Developments

In connection with the Pilot Program and more generally, 2016 saw two key disgorgement-related developments. First, on May 6, 2016, the IRS issued a Chief Counsel Advice Memorandum (CCA)[11] analyzing whether a taxpayer company that had entered into an FCPA settlement would be entitled to claim a tax deduction for amounts disgorged to the SEC. While companies that have paid disgorgement pursuant to past FCPA resolutions may have taken tax deductions for those payments over the years, the May 6, 2016 CCA establishes that in the highly fact-specific context described, where disgorgement could be characterized as having been imposed not only for remedial purposes, but also for punitive purposes, the IRS will not allow a tax deduction.

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[9] Memorandum from Sally Quillian Yates, Deputy Attorney General, US Dep't of Justice (Sept. 9, 2015) ("Yates Memo"), http://www.justice.gov/dag/file/769036/download; see also Steptoe Client Alert, "DOJ's New Focus On Executives May Mean Fewer Corporate Settlements", http://www.steptoe.com/publications-10767.html

[10] USAM §§ 9-28.000 et seq.

[11] *See* (CCA 201619008)

Second, circuit courts split in 2016 as to whether disgorgement should be viewed as a penalty or forfeiture and, thus, subject to the five-year civil statute of limitations pursuant to 28 U.S.C. § 2462.[12] The US Supreme Court agreed to hear a case on appeal from the Tenth Circuit that will address the issue during the upcoming term.[13]

3. Jurisdiction-Related Developments

In a significant ruling on the extent of personal jurisdiction in FCPA matters, the District Court for the Southern District of New York ruled on September 30, 2016 that the defendants in a long-running enforcement action by the SEC relating to its 2011 settlement with Magyar Telecom, three former Magyar Telecom executives, were subject to personal jurisdiction in the United States as a result of having signed management certifications and other representation letters that foreseeably would be incorporated into the company's financial disclosures filed with the SEC. Because the company's online securities filings were a foreseeable result of the defendants' certifications, the SEC was granted its summary judgment motion on the issue of whether the defendants had sufficient minimum contacts with the United States such that it was constitutional to subject them to personal jurisdiction. This ruling was significant in that it highlighted how non-US nationals, not otherwise subject to the FCPA in their personal capacity, could nevertheless be subject to enforcement as a result of their having acted as directors and officers of a publicly traded company.[14]

In other 2016 litigation, the DOJ filed an interlocutory appeal of an order of the District Court for the District of Connecticut partially dismissing charges against former Alstom executive Lawrence Hoskins. The district court had held that Hoskins could not be held liable criminally for aiding and abetting or conspiracy to violate the FCPA's anti-bribery provisions where he was not acting as an agent of a "domestic concern" that itself was involved in the unlawful conduct. At this writing, the appeal is pending before the Second Circuit, and arguments are scheduled for March 2, 2017.[15]

B. 2016 Corporate Enforcement

In light of the number of enforcement actions brought by the DOJ and SEC in 2016, we have departed from our past practice in how we present them in our FCPA Year in Review piece. Rather than group them by enforcement agency (i.e., SEC- and DOJ-only, and parallel enforcement actions), we set out 2016's enforcement actions grouped by the types of matters that were resolved by the agencies during the year.

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[12] *See SEC v. Graham*, 823 F.3d 1357, 1363–64 (11th Cir. 2016) (holding disgorgement is akin forfeiture and subject to five-year federal civil statute of limitations); *SEC v. Kokesh*, 834 F.3d 1158, 1164 (10th Cir. 2016), *cert. granted* No. 16-529, 2017 WL 125673 (Jan. 13, 2017) (holding that disgorgement is remedial and exempt from the five-year federal civil statute of limitations). The Eleventh Circuit holds the minority position, as both the DC Circuit and Second Circuit previously held that, in most instances, disgorgement is not subject to the federal civil five-year statute of limitations. *See Kokesh*, 834 F.3d at 1164.

[13] *See Kokesh v. SEC*, No. 16-529, 2017 WL 125673 (Jan. 13, 2017).

[14] *See SEC v. Straub*, No. 11-cv-9645, 2016 WL 5793398 (S.D.N.Y. Sept. 30, 2016).

[15] *See* Case Calendaring, *United States v. Pierucci (Hoskins)*, No. 16-1010 (2d Cir. Jan. 12, 2017).

1. Grand Corruption Cases

a. VimpelCom

On February 18, 2016, the US District Court for the Southern District of New York approved the sixth-largest FCPA monetary settlement in history, at least as of the end of 2016.[16] The Netherlands-based telecom company VimpelCom Ltd. (VimpelCom) and its wholly-owned Uzbek subsidiary, Unitel LLC (Unitel), agreed to a joint US $795 million coordinated settlement with US and Dutch authorities, with just over half that amount – US $397.6 million – paid to DOJ and SEC in connection with US charges. The settlement relates to VimpelCom's and Unitel's more than US $114 million in improper payments to an Uzbek government official (likely former president Islam Karimov's daughter, Gulnara Karimova) between 2006 and 2012, in order to enter the Uzbek mobile communications market and to secure regulatory approvals.

VimpelCom and Unitel employees facilitated multiple bribe payments to a Gibraltar-based shell corporation owned by the specified Uzbek government official, who in addition to being "a close relative of a high ranking government official" had influence over the national telecommunications regulator.[17] VimpelCom and Unitel admitted that their employees were aware of the government official's stake in the shell company, and that the company had made various payments to gain market entry. Employees concealed the scheme by classifying payments as legitimate expenses, such as equity transactions and consulting fees, and withheld information relating to the transaction from the VimpelCom board. The SEC and DOJ resolutions also alleged that VimpelCom failed to implement and enforce adequate internal accounting controls, which allowed bribe payments to occur without detection or remediation.

The SEC brought a settled complaint alleging anti-bribery, books and records and internal controls charges in connection with the conduct. In the DOJ resolution, the parent company entered into a deferred prosecution agreement (DPA) charging criminal violations of the FCPA's internal controls provisions, as well as conspiracy to violate the FCPA's anti-bribery and books and records provisions.[18] Unitel pleaded guilty to a single count of conspiracy to violate the anti-bribery provisions of the FCPA.[19] In addition, the monetary sanctions paid to the SEC, DOJ and Dutch authorities, VimpelCom also agreed to retain an independent compliance monitor.[20]

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[16] SEC Press Release, *VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations* (Feb. 18, 2016), https://www.sec.gov/news/pressrelease/2016-34.html; DOJ Press Release, *VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of more than $795 Million* (Feb. 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

[17] Information, *United States v. VimpelCom Ltd.*, No. 1:16-cr-00137 (S.D.N.Y. Feb. 18, 2016), https://www.justice.gov/opa/file/826786/download; Complaint, *SEC v. VimpelCom Ltd.*, No. 1:16-cv-01266-VM (S.D.N.Y. Feb. 18, 2016), https://www.sec.gov/litigation/complaints/2016/comp-pr2016-34.pdf.

[18] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, No. 1:16-cr-00137 (S.D.N.Y. Feb. 18, 2016), https://www.justice.gov/criminal-fraud/file/828301/download.

[19] Plea Agreement, *United States v. Unitel LLC*, No. 1:16-cr-00137 (S.D.N.Y. Feb. 18, 2016), https://www.justice.gov/opa/file/827181/download.

[20] SEC Press Release, *VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations* (Feb. 18, 2016), https://www.sec.gov/news/pressrelease/2016-34.html.

As part of its Kleptocracy Asset Recovery Initiative, DOJ continues to seek forfeiture of over US $850 million in assets traceable to bribes made to the same Uzbek official. For more information on those proceedings, see Section IV.G below.

b. Och-Ziff

On September 29, 2016, Och-Ziff Capital Management Group LLC (Och-Ziff) and its subsidiary OZ Management LP settled SEC and DOJ enforcement actions charging that they violated the anti-bribery, books and records, and internal control provisions of the FCPA. Begun as part of a broader inquiry into financial services firms and sovereign wealth funds, particularly in Libya, in 2011, the SEC found that Och-Ziff used a variety of intermediaries, agents, and business partners to facilitate bribes to government officials in Africa that were intended to secure investment in Och-Ziff funds, obtain mining rights, and improperly influence officials.[21] Och-Ziff paid a total of US $199 million to settle the SEC allegations, and Och-Ziff also agreed to hire an independent monitor for three years, implement enhanced internal accounting controls, and hire a separate Chief Compliance Officer.[22]

Och-Ziff also entered into a DPA with the DOJ in which it agreed to pay a US $213 million criminal penalty, install an independent compliance monitor for three years, enhance its internal controls, and cooperate with the DOJ's ongoing investigations, including investigations of specific individuals.[23] As with the SEC, the DOJ DPA charged violations of the anti-bribery, books and records, and internal control provisions of the FCPA relating to Och-Ziff's conduct in Africa. Additionally, Och-Ziff's African also subsidiary pleaded guilty to conspiracy to violate the anti-bribery provision of the FCPA.[24] The agreement noted that, while Och-Ziff did not self-report, it would receive some credit off the bottom range of the Federal Sentencing Guidelines for its internal investigation and remediation efforts.[25]

In total, Och-Ziff was subject to US $412 million in combined SEC and DOJ monetary sanctions. The resolution marks the first instance of a hedge fund being held accountable for FCPA violations.

c. Embraer

On October 24, 2016, Embraer SA (Embraer), a Brazilian aircraft manufacturer, settled alleged violations of the FCPA with the SEC and DOJ. The SEC resolution included books and records, internal control and anti-bribery charges in connection with payments resulting in US

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[21] SEC Press Release, *Och-Ziff Hedge Fund Settles FCPA Charges* (Sept. 29, 2016) https://www.sec.gov/news/pressrelease/2016-203.html.
[22] Order Instituting Cease-and-Desist Proceedings, *In re Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank*, Exchange Act Release No. 78,989, at 32-35 (Sept. 29, 2016), https://www.sec.gov/litigation/admin/2016/34-78989.pdf.
[23] In early 2017, the SEC filed a complaint against former Och-Ziff executives Michel Cohen and Vanja Baros. Complaint, *Securities and Exchange Commission v. Cohen et al.*, No. 1:17-cv-00430 (E.D.N.Y. Jan. 26, 2017).
[24] DOJ Press Release, *Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine* (Sept. 29, 2016), https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213.
[25] Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, No. 16-cr-516-NGG, at 3-5 (Sept. 29, 2016), https://www.justice.gov/opa/file/899306/download.

$83 million in profits from its US subsidiary to government officials in the Dominican Republic, Saudi Arabia, and Mozambique in order to secure aircraft sales. The SEC also alleged that Embraer engaged in an accounting scheme in India to conceal an improper consulting agreement. Embraer paid US $205 million to settle the SEC charges.[26]

With DOJ, Embraer entered into DPA in which it agreed to pay US $107 million, hire an independent compliance monitor for three years, and continue to cooperate with the DOJ's investigation. The DOJ resolution credited Embraer for cooperating fully with the investigation, but also noted that the company had not fully remediated the misconduct because it failed to discipline a senior executive with oversight for employees involved in the scheme who had knowledge of potential issues.[27] As a result, Embraer did not receive as much cooperation and remediation credit as it might have from the DOJ.

d. JP Morgan

On November 17, 2016, JP Morgan Chase & Co. (JP Morgan) agreed to pay over US $264 million to the SEC, DOJ and Federal Reserve Board of Governors related to allegations that it violated the anti-bribery, books and records, and internal control provisions of the FCPA.[28] JP Morgan employees based primarily in the Asia-Pacific region violated the FCPA by establishing a program to offer short-term employment, summer internships, and permanent positions to the family members of officials in exchange for business and preferential regulatory treatment from those officials.[29] The family members of officials were not employed using JP Morgan's normal hiring process, were not otherwise qualified for their positions, and their employment was explicitly linked to potential business advantages.[30] Although JP Morgan implemented a process to review new hires related to government officials, JP Morgan personnel in the Asia-Pacific region supplied false and incomplete information and failed to disclose the intended, improper purpose of the hires.[31]

JP Morgan paid a US $72 million criminal fine to the DOJ (a 25% discount off the low end of the Guidelines penalty range), US $130 million in disgorgement and pre-judgment interest

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[26] SEC Press Release, *Embraer Paying $205 Million to Settle FCPA Charges* (Sept. 29, 2016), https://www.sec.gov/news/pressrelease/2016-224.html.

[27] DOJ Press Release, *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* Deferred Prosecution Agreement, *United States v. Embraer S.A.*, No. 16-60294-cr-COHN (Oct. 24, 2016), https://www.justice.gov/opa/press-release/file/904581/download.

[28] *See* SEC Press Release, *JP Morgan Chase Paying $264 Million to Settle FCPA Charges* (Nov. 17, 2016), https://www.sec.gov/news/pressrelease/2016-241.html; Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶ 81 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf.

[29] *See* Non-Prosecution Agreement, *JP Morgan Securities (Asia Pacific) Ltd. Criminal Investigation* ¶ 4 (Nov. 17, 2016), https://www.justice.gov/criminal-fraud/file/911356/download; Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶¶ 45, 48 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf.

[30] *See* Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶¶ 14–15, 29, 33, 77 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf.

[31] *See* Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶¶ 20, 74 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf.

to the SEC, and a US $61.9 million civil penalty to the Federal Reserve Board of Governors.[32] The DOJ and SEC noted JP Morgan's cooperation and extensive remediation, including terminating or disciplining employees that engaged in or failed to stop the misconduct, imposing more than US $18.3 million in financial sanctions on current or former employees, doubling the resources devoted to compliance, and creating a centralized human resources application process and control function.[33] Although JP Morgan is not subject to an independent monitor, the company must, among other things, cooperate with the DOJ in investigations of JP Morgan affiliates, former directors, officers, employees, agents, and consultants; disclose all credible evidence or allegations of violations of the FCPA; and file periodic reports for a three-year period regarding the implementation of JP Morgan's remediation and compliance program.[34]

e. Odebrecht and Braskem

On December 21, 2016, Odebrecht SA (Odebrecht) and its majority-owned subsidiary Braskem SA (Braskem), which is listed with the SEC, pleaded guilty and agreed to pay between US $ 3.5 billion and US $5.4 billion in penalties to the United States, Brazil, and Switzerland to settle charges that the companies paid hundreds of millions of dollars in bribes to secure construction projects around the world.[35]

Odebrecht pleaded guilty to a one-count criminal information and agreed to pay a criminal fine of at least US $2.6 billion and up to US $4.5 billion.[36] The total is subject to an inability-to-pay analysis to be performed by US and Brazilian authorities within three months of the settlements' announcements.

Separately, Braskem, in which Odebrecht maintained a controlling interest,[37] pleaded guilty to a one-count criminal information and agreed to a criminal penalty of US $632 million to

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[32] *See* Non-Prosecution Agreement, *JP Morgan Securities (Asia Pacific) Ltd. Criminal Investigation*, at 2 (Nov. 17, 2016), https://www.justice.gov/criminal-fraud/file/911356/download; Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶ 27 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf; Board of Governors of the Federal Reserve System, *Press Release* (Nov. 17, 2016), https://www.federalreserve.gov/newsevents/press/enforcement/20161117a.htm.

[33] *See* Non-Prosecution Agreement, *JP Morgan Securities (Asia Pacific) Ltd. Criminal Investigation*, at 2 (Nov. 17, 2016), https://www.justice.gov/criminal-fraud/file/911356/download; Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶ 80 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf.

[34] *See* Non-Prosecution Agreement, *JP Morgan Securities (Asia Pacific) Ltd. Criminal Investigation*, at 3–4 (Nov. 17, 2016), https://www.justice.gov/criminal-fraud/file/911356/download; Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335, at 24–25 (Nov. 17, 2016).

[35] DOJ Press Release, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve; *see also* Plea Agreement, *United States v. Odebrecht*, No. 16-cr-643-RJD (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/opa/press-release/file/919916/download; Plea Agreement, *United States v. Braskem*, No. 16-cr-644-RJD (E.D.N.Y. 2016), https://www.justice.gov/opa/press-release/file/919906/download.

[36] Although recognizing that "the appropriate total criminal penalty" was US $4.5 billion, Odebrecht has stated that it is unable to pay a criminal fine in excess of US $2.6 billion. Plea Agreement, *United States v. Odebrecht*, No. 16-cr-643-RJD, paras. 21(a), 21(b) (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/opa/press-release/file/919916/download. Assuming that the company pays at least $2.6 billion, 80% (or US $2 billion) will be paid to Brazilian authorities, while 10% (or US $260 million) will go to Swiss and US authorities.

[37] Notably, Petrobras, the Brazilian oil company, is also a significant shareholder of Braskem, holding 36.1%.

US, Brazilian, and Swiss authorities. Braskem also reached a settlement with the SEC agreeing to pay US $325 million in disgorgement to US and Brazilian authorities.[38]

According to the DOJ, Odebrecht engaged in a large-scale bribery and bid-rigging scheme for over a decade, which resulted in Odebrecht paying nearly US $788 million in bribes to government officials in connection with more than 100 projects in 12 jurisdictions, including Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.[39] The bribes were transferred through a system of shell companies, off-book transactions, and off-shore bank accounts in order to avoid detection, and the conduct was known to and directed by individuals at the highest level of the company. Odebrecht eventually created a "Division of Structured Operations", which in effect operated as a "stand-alone bribe department."[40] Braskem participated in a similarly wide-ranging bribery scheme and paid roughly US $250 million in bribes using the Odebrecht system.[41]

Notably, most of the cited bribes were to Brazilian authorities such as individuals employed by Petrobras, making the case the first time the DOJ and SEC have treated a foreign company's own officials as "foreign officials" under the FCPA.

In assessing the penalties, the DOJ noted a variety of aggravating factors including the failure to disclose, the seriousness of the offenses, the involvement of senior company officials, and lack of an effective compliance program, among others. The companies did receive some credit for their cooperation and remediation efforts.[42] Both companies remain under investigation in several other jurisdictions.

f. Teva Pharmaceuticals

On December 22, 2016, the SEC and DOJ announced that Israel-based generic pharmaceutical manufacturer Teva Pharmaceutical Industries Ltd. (Teva) and its wholly-owned Russian subsidiary, Teva LLC (Teva Russia) had agreed to pay US $519.2 million to settle charges related to improper payments made to officials in Russia, Ukraine, and Mexico.[43] Teva admitted to a scheme under which Teva Russia and its predecessors-in-interest made over US $65 million in improper payments (via inflated profit margins) to a high-ranking Russian government official to increase sales of Copaxone, a multiple sclerosis drug. Beginning in 2010, Teva designated a Russian company controlled by the official as the exclusive distributor and

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[38] DOJ Press Release, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[39] Information, *United States v. Odebrecht S.A.*, No. 16-643, para. 21 (E.D.N.Y.), https://www.justice.gov/opa/press-release/file/919911/download.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] DOJ Press Release, *Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges* (Dec. 22, 2016), https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt; SEC Press Release, *Teva Pharmaceutical Paying $519 Million to Settle FCPA Charges* (Dec. 22, 2016), https://www.sec.gov/news/pressrelease/2016-277.html.

repackaging agent for Copaxone in Russia. In return, the official used his influence to increase bids for Copaxone in annual drug purchase auction (yielding US $200 million in additional profits).[44] In Ukraine, Teva admitted that its Kiev-based subsidiary had provided a Ukrainian health official (employed by Teva as a "registration consultant") over US $200,000 in exchange for assistance with obtaining approval for "registrations" for Teva products, including Copaxone.[45] The subsidiary also provided the official with luxury vacations to Israel. Finally, Teva admitted that its internal anti-corruption compliance policies were insufficient to stop a pay-to-prescribe arrangement carried out by employees of Mexico-based subsidiaries that netted Teva an additional US $16.9 million in sales in 2011 and 2012.[46]

As part of the DPA with the DOJ, Teva agreed to pay US $283.2 million in criminal penalties and retain an independent corporate compliance monitor for three years due to violations of the FCPA's internal control provisions and a conspiracy to violate the FCPA's anti-bribery provision. The DOJ granted Teva partial cooperation credit, but criticized the company for its "vastly overbroad assertions of attorney-client privilege", and delayed document production during the investigation.[47] Teva Russia consented to a plea agreement charging the company with conspiring to violate the anti-bribery provisions of the FCPA.[48] In addition, the SEC's civil settlement required that Teva disgorge US $236 million in profits and prejudgment interest.

2. Gifts, Meals and Entertainment

2016 featured a number of cases involving gifts, meals and entertainment (GME). While in some of the cases, GME was the only conduct on which the charges were focused, in other cases it accompanied other charged practices. Many of the cases focused on conduct in China.

a. SciClone

On February 4, 2016, SciClone Pharmaceuticals, Inc. (SciClone) agreed to settle with the SEC charges that it violated the books and records and internal control provisions of the FCPA.[49] The SEC alleged that between 2007 and 2012 SciClone employees engaged in a scheme to give money and gifts, including trips, vacations, meals, language classes and other entertainment, to personnel at state-owned Chinese hospitals to procure orders of SciClone pharmaceuticals. The SEC also alleged the scheme was known to and at least tacitly approved by managers within SciClone's China operations.[50] The SEC charged that gifts and payments were improperly

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[44] Complaint, *SEC v. Teva Pharmaceutical Industries Ltd.*, No. 1:16-cv-25298 (S.D. Fla. Dec. 22, 2016), at 9; Information, *United States v. Teva LLC (Russia)*, No. 1:16-20967-KMW (S.D. Fla. Dec. 22, 2016), at 8, https://www.justice.gov/opa/press-release/file/920236/download.
[45] *SEC v. Teva Pharmaceutical Industries Ltd*. Complaint, *supra* note 43, at 12.
[46] *Id.* at 14.
[47] DOJ Press Release, *Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges* (Dec. 22, 2016), https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt.
[48] Plea Agreement, *United States v. Teva LLC (Russia)*, No. 1:16-20967-KMW (S.D. Fla. Dec. 22, 2016), https://www.justice.gov/opa/press-release/file/920241/download.
[49] Order Instituting Cease-and-Desist Proceedings, *In re SciClone Pharmaceuticals, Inc.*, Exchange Act Release No. 77,058 (Feb. 4, 2016), https://www.sec.gov/litigation/admin/2016/34-77058.pdf.
[50] *Id.* at 3.

recorded in SciClone's books as legitimate business expenses related to a variety of activities, including sponsorships, travel, entertainment, conferences, honoraria, and promotions.[51]

SciClone agreed to disgorge US $9.426 million and pay a US $2.5 million civil monetary penalty,[52] and to make periodic reports to the SEC regarding remediation and implementation of compliance procedures for a three-year period.[53]

b. Novartis

On March 23, 2016, Novartis AG (Novartis) agreed to pay US $25 million in disgorgement, civil penalties and prejudgment interest to settle books and records and internal control charges relating to the actions of its Chinese subsidiaries between 2009 and 2013.[54] The SEC alleged that Novartis's Shanghai subsidiary provided improper benefits to healthcare professionals, including gifts, meals, travel, improper sightseeing trips, and favors for the families of healthcare professionals in return for increased sales. Those benefits were improperly recorded as legitimate employee expenses, sponsorships, conferences, medical studies, and marketing costs, and, in at least one instances, as a sham clinical study.[55] Novartis's Beijing subsidiary also provided direct cash payments to healthcare professionals through complicit event-planning and travel agencies, which were recorded as legitimate selling and marketing expenses. The SEC specifically cited Novartis' failure to maintain sufficient internal controls over third-party vendors and its failure to train sales staff and managers to prevent and detect inappropriate payments as the basis for the charges.[56]

The SEC noted Novartis's cooperation and remediation, including an expansive internal review, revisions to its anti-corruption policies and procedures, the termination or discipline of culpable employees, suspension of vendor relationships and payments, and elimination of the use of vendors to support external meetings.[57] Novartis committed to report to the SEC regarding its remediation and to disclose further findings of non-compliance for two years.[58]

c. AstraZeneca

On August 30, 2016, AstraZeneca PLC (AstraZeneca), a UK biopharmaceutical company, agreed to pay over US $5 million to settle SEC charges that it violated the books and records and internal control provisions of the FCPA. According to the SEC, AstraZeneca's wholly owned subsidiaries in China (AZ China) and its representative office in Russia (AZ Russia) made improper payments to government-employed healthcare professionals in those countries. AZ China allegedly made these payments from 2007-2010 to encourage officials to purchase or prescribe AstraZeneca pharmaceuticals. In addition, the SEC claimed that AZ China sales staff and management maintained records of forecasted or actual payments of "maintenance

[51] *Id.* at 2.
[52] *Id.* at 8.
[53] *Id.* at 6.
[54] Order Instituting Cease-and-Desist Proceedings, *In re Novartis AG*, Exchange Act Release No. 77,431, at ¶¶6, 8–9 (Mar. 23, 2016), https://www.sec.gov/litigation/admin/2016/34-77431.pdf.
[55] *Id.* at ¶ 8.
[56] *Id.* at ¶¶ 14, 16.
[57] Id. at ¶¶ 17–18.
[58] *Id.* at ¶7.

fees", gifts, entertainment, and other expenses. The SEC alleged that, from 2005-2010, AZ Russia provided similar improper payments and gifts to government-employed healthcare professionals in connection with sales.[59]

According to the SEC, AstraZeneca falsely recorded these payments in its consolidated financial statements and did not adequately enforce its corporate policy against making improper payments to government officials with respect to its subsidiaries. The SEC noted that despite the company having a written policy, there were insufficient controls to detect and prevent improper payments as well as insufficient training. AstraZeneca agreed to pay US $4.325 million in disgorgement, US $822,000 in prejudgment interest, and a US $375,000 civil penalty.

d. PTC Inc.

On February 16, 2016, PTC Inc. (PTC), a software company, reached settlements with the DOJ and SEC related to charges that it provided Chinese officials with improper travel.[60] Two PTC subsidiaries based in Shanghai and Hong Kong (PTC China) admitted to covering travel expenses for officials visiting the United States. Although the trip was purportedly for training purposes at PTC's Massachusetts headquarters, PTC China spent over US $1 million on travel expenses to New York, Los Angeles, Las Vegas, and Hawaii while entering into contracts with state-owned enterprises (SOEs) valued at over US $13 million during the same period.[61] "Excessive entertainment" and improper gifts valued at up to US $600, such as cell phones, iPods, and GPS systems, were also provided.[62] PTC failed to conduct appropriate due diligence on business partners responsible for finding prospective contracts with Chinese state-owned entities, and paying commissions ("influence fees") to these partners to win contracts.[63] Travel payments sometimes were disguised in total business partner commissions paid rather than being included as a separate line item.[64]

As part of a non-prosecution agreement (NPA) with the DOJ, two PTC subsidiaries paid a US $14.5 million penalty.[65] The DOJ considered the fact that PTC did not voluntarily report the misconduct; however, the companies received 15% cooperation credit for conducting an internal investigation and cooperating with the DOJ.[66] The companies also engaged in remedial efforts and enhanced their compliance program, but were subject to reporting requirements on the status of these efforts for a three-year period.[67] With respect to the SEC, PTC agreed to pay US $13.6 million in disgorgement and pre-judgement interest to settle anti-bribery, internal

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[59] Order Instituting Cease-and-Desist Proceedings, *In re AstraZeneca PLC*, Release No. 78,730 (Aug. 30, 2016), https://www.sec.gov/litigation/admin/2016/34-78730.pdf.
[60] DOJ Press Release, *PTC Inc. Subsidiaries Agree to Pay More than $14 Million to Resolve Foreign Bribery Charges* (Feb. 16, 2016), https://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges.
[61] *Id.*
[62] Order Instituting Cease-and-Desist Proceedings, *In re PTC Inc.*, Exchange Act Release No. 77,145, at 7 (Feb. 16, 2016), https://www.sec.gov/litigation/admin/2016/34-77145.pdf.
[63] Non-Prosecution Agreement, *Parametric Technology (Shanghai) Software Co. Ltd. and Parametric Technology (Hong Kong) Limited*, at A-2–A-3 (Feb. 16, 2016), https://www.justice.gov/opa/file/824911/download.
[64] *Id.*
[65] *Id.* at 4.
[66] *Id.* at 1.
[67] *Id.* at 2.

control and books and records claims.[68] As described below, the SEC also entered into a DPA with former PTC employee Yu Kai Yuan for books and records violations.

3. Enforcement Actions Featuring Third-Party Conduct

a. Las Vegas Sands

On April 7, 2016, Las Vegas Sands Corp. (LVSC) settled an SEC enforcement action alleging inadequate internal controls and books and records violations relating to its operations in mainland China and Macao.[69] According to SEC documents, LVSC allegedly paid US $62 million to a consultant to facilitate Chinese transactions that LVSC allegedly was prohibited under local law from undertaking. In settling the matter, LVSC agreed to pay a civil penalty of US $9 million and to retain an independent consultant for a period of two years to review and enhance the company's internal controls.[70]

b. Nordion

On March 4, 2016, Nordion Inc. (Nordion), a Canadian global health sciences company, agreed to settle SEC charges that it violated the FCPA's books and records and internal control provisions from 2004-2011. The SEC claimed that during that period Nordion employee Mikhail Gourevitch, through a third-party agent, made illicit payments to Russian officials in order to obtain government approval to license, register, and distribute a liver cancer treatment.[71] In total, Nordion paid the third-party agent approximately US $235,000, forming the basis of the ultimate civil penalty of US $375,000. Because it ultimately was unable to distribute the treatment in Russia, Nordion earned no profits as a result of the scheme.

As part of its order, the SEC noted that Nordion had performed virtually no due diligence on the third party, provided little anti-corruption compliance training to its employees, and failed to implement sufficient internal controls to detect the bribe payments. As contributing to the settlement, the SEC's order also cited Nordion's voluntary self-disclosure to US and Canadian authorities, full cooperation with the parallel investigations, and extensive remediation.[72]

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[68] Order Instituting Cease-and-Desist Proceedings, *In the Matter of PTC Inc.*, Exchange Act Release No. 77,145, at 8–11 (Feb. 16, 2016), https://www.sec.gov/litigation/admin/2016/34-77145.pdf.
[69] Order Instituting Cease-and-Desist Proceedings, *In re Las Vegas Sands Corp.*, Exchange Act Release No. 77,555 (Apr. 7, 2016), https://www.sec.gov/litigation/admin/2016/34-77555.pdf.
[70] On January 19, 2017, LVSC entered into a Non-Prosecution Agreement with the DOJ in connection with same facts. *See* DOJ Press Release, *Las Vegas Sands Corporation Agrees to Pay Nearly $7 Million Penalty to Resolve FCPA Charges Related to China and Macao* (Jan. 19, 2017), https://www.justice.gov/opa/pr/las-vegas-sands-corporation-agrees-pay-nearly-7-million-penalty-resolve-fcpa-charges-related.
[71] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Nordion (Canada) Inc.*, Release No. 772,900 (March 3, 2016), https://www.sec.gov/litigation/admin/2016/34-77290.pdf. Mr. Gourevitch was also charged separately by the SEC as an individual. See Section C.4.e, below.
[72] *See id.*

c. Key Energy Services, Inc.

On August 11, 2016, Key Energy Services, Inc. (Key Energy) settled with the SEC charges of violating the books and records and internal control provisions of the FCPA.[73] According to the agreement, Key Energy's Mexican subsidiary (Key Mexico) had made improper payments to an employee at Petróleos Mexicanos (Pemex), a Mexican state-owned oil company, in order to gain assistance on contracts. The payment was transferred via an entity that purportedly provided consulting services to Key Mexico. However, there was no authorization of the relationship with the consulting firm and no supporting documentation of the work provided. Instead, Key Mexico had simply recorded the services as providing expert advice. Although Key Energy had created written compliance policies and a FCPA compliance manual, it failed to implement accounting controls in its Mexico subsidiary sufficiently to prevent the improper payments. It was aware of the consulting firm, but did not stop the relationship despite the lack of written contract or due diligence in place.

The SEC discovered potential violations in January 2014, and contacted Key Energy. In April 2014, Key Energy received information from Key Mexico which suggested the recently resigned country manager had promised bribes to Pemex employees. Upon learning of these allegations, Key Energy alerted the SEC and undertook a broad internal investigation. It continued to cooperate with the agency throughout the investigation.

In issuing the settlement agreement, the SEC ordered Key Energy to disgorge US $5 million. However, given the level of cooperation Key Energy provided, a civil penalty was not imposed. The DOJ declined to bring an enforcement action in connection with the matter.

d. SAP

On February 1, 2016, SAP SE (SAP) agreed to settle alleged violations of the books and records and internal control provisions of the FCPA related to business procurement activities in Panama.[74] SAP allegedly paid US $145,000 in bribes to three Panamanian government officials to secure US $3.7 million in sales contracts and other kickbacks, allegedly using a slush fund generated by a third party using proceeds sales to the partner at a discount of 82% under the typical end-user price. The responsible SAP employee falsified SAP's standard approval form for the discounts, which were recorded improperly as legitimate discounts in the books and records of SAP's Mexican subsidiary.[75] SAP's failure to implement sufficient controls to prevent this practice, including specific anti-corruption reviews, was cited as the basis for the SEC's internal control charges.[76]

SAP agreed to disgorge US $3.7 million in profits from the illegal scheme. The SEC noted SAP's cooperation and remediation in reaching the settlements, citing SAP's internal investigation, the production of relevant documents, an audit of other Latin American

[73] Order Institution Cease-and-Desist Proceedings, *In re Key Energy Services, Inc*., Release No. 78,558 (Aug. 11, 2016), https://www.sec.gov/litigation/admin/2016/34-78558.pdf .
[74] Order Instituting Cease-and-Desist Proceedings, *In re SAP SE*, Exchange Act Release No. 77,005 (Feb. 1, 2016), https://www.sec.gov/litigation/admin/2016/34-77005.pdf.
[75] *Id.* at 2.
[76] *Id.* at 5.

transactions, implementation of new policies and procedures, and the elevation of its Chief Compliance Officer within the corporate hierarchy.[77]

e. GlaxoSmithKline plc

On September 30, 2016, UK-based pharmaceutical company GlaxoSmithKline plc (GSK) agreed to a US $20 million civil penalty to settle SEC allegations that its China-based subsidiary and joint venture caused GSK to violate the internal control and recordkeeping provisions of the FCPA.[78] The settlement related to alleged improper payments made by subsidiary and joint venture sales employees to Chinese officials, including state-employed physicians and hospital administrative staff. Payments were made through third-party event planning and travel vendors, and included gifts, travel and entertainment. Payments were intended to increase sales of GSK pharmaceutical products through increased prescriptions by individual healthcare providers and purchases of GSK products by hospital administrative staff.[79] The improper practices were "pervasive" among sales and marketing representatives, and were allegedly condoned by regional and district managers.[80] The SEC investigation concluded that GSK had earned millions of dollars in additional sales to Chinese state health institutions due to the alleged pay-to-prescribe scheme.[81]

In reaching this US $20 million settlement, the SEC cited GSK's cooperation and prompt remedial measures (including producing documents from GSK's internal investigation) and GSK's company-wide compliance-related policy changes as of 2013.[82] GSK has since sought to end the practice of making payments to doctors and to alter the compensation structure for its sales force to eliminate incentive pay based on the number of prescriptions generated.[83]

f. Olympus Corp. of the Americas

On March 1, 2016, the DOJ announced that Olympus Corp. of the Americas settled with the agency for US $623.2 million, US $22.8 million of which reflected a criminal penalty for FCPA violations in Latin America.[84] Olympus Latin America Inc. (OLA) entered into a separate DPA with DOJ relating to FCPA violations, the only non-joint settlement the DOJ entered into this year. By entering into the DPA, OLA settled criminal charges that it made improper payments to health officials, including cash, money transfers, grants, travel, and free or steeply

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[77] *Id.*
[78] SEC Press Release, *GlaxoSmithKline Pays $20 Million Penalty to Settle FCPA Violations* (Sept. 30, 2016), https://www.sec.gov/litigation/admin/2016/34-79005-s.pdf.
[79] Order Instituting Cease-and-Desist Proceedings, *In re GlaxoSmithKline plc*, Exchange Act Release 79,005, at 2 (Sept. 30, 2016), https://www.sec.gov/litigation/admin/2016/34-79005.pdf.
[80] *Id.* at 2.
[81] SEC Press Release, *GlaxoSmithKline Pays $20 Million Penalty to Settle FCPA Violations* (Sept. 30, 2016), https://www.sec.gov/litigation/admin/2016/34-79005-s.pdf.
[82] Order Instituting Cease-and-Desist Proceedings, *In re GlaxoSmithKline plc*, Exchange Act Release 79,005, at 5 (Sept. 30, 2016), https://www.sec.gov/litigation/admin/2016/34-79005.pdf.
[83] *Id.*
[84] Olympus also agreed to pay a US $312.4 million criminal penalty and US $310.8 million civil penalty to settle charges under federal and state False Claims Acts. DOJ Press Release, *Medical Equipment Company Will Pay $646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America* (Mar. 1, 2016), https://www.justice.gov/opa/pr/medical-equipment-company-will-pay-646-million-making-illegal-payments-doctors-and-hospitals.

discounted equipment. Many of these benefits were delivered through "training centers" purportedly set up to educate and train doctors.[85] OLA paid an estimated US $3 million as part of this scheme, resulting in profits of over US $7.5 million.[86]

As part of the settlement, OLA agreed to pay a US $22.8 million penalty, implement a number of compliance measures, and retain an independent compliance monitor for three years.[87] The DPA took into consideration OLA's past and future cooperation (which included a 20% credit for OLA's extensive internal investigation), and its remedial efforts and commitment to enhance its compliance program.[88] However, the DPA also noted OLA's failure to voluntarily disclose misconduct as a relevant consideration in reaching settlement terms.[89]

g. Analogic Corp.

On June 21, 2016, Massachusetts-based medical device manufacturer Analogic Corp. (Analogic) settled parallel civil and criminal actions related to improper payments made by a wholly-owned Danish subsidiary, BK Medical ApS (BK Medical).[90] Both the SEC and DOJ had launched investigations into BK Medical's "sham transactions" with distributors, through which distributors funneled approximately US $20 million to third parties, including government employees in Russia and apparent shell companies in Belize, the British Virgin Islands, Cyprus, and Seychelles. As part of the scheme, BK Medical inflated invoices for the sale of devices to distributors, who would then use these funds to bribe doctors employed by Russian state-owned entities.[91] In total, BK Medical channeled approximately US $20 million to third parties over the course of about 180 sham transactions.

To settle the SEC's charges that Analogic violated FCPA's internal control and recordkeeping provisions, Analogic agreed to pay US $7.67 million in disgorgement and US $3.8 million in prejudgment interest and to a cease-and-desist order.[92] As part of DOJ's non-prosecution agreement with BK Medical, the subsidiary paid a US $3.4 million criminal penalty and admitted to engaging in a scheme that caused parent Analogic to falsify books and records in violation of the FCPA.[93] DOJ only granted partial cooperation credit, as it claimed that Analogic and BK Medical did not initially disclose all relevant facts uncovered during an internal

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[85] *Id.*
[86] *Id.*
[87] Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc.*, at 7–11 (Mar. 1, 2016), https://www.justice.gov/usao-nj/file/829716/download.
[88] *Id.* at 3.
[89] *Id.*
[90] SEC Press Release, *SEC Charges Medical Device Manufacturer with FCPA Violations* (June 21, 2016), https://www.sec.gov/news/pressrelease/2016-126.html; DOJ Press Release, *Analogic Subsidiary Agrees to Pay More than $14 Million to Resolve Foreign Bribery Charges* (June 21, 2016), https://www.justice.gov/opa/pr/analogic-subsidiary-agrees-pay-more-14-million-resolve-foreign-bribery-charges.
[91] Non-Prosecution Agreement, *In re BK Medical ApS*, A-4 (June 21, 2016), https://www.justice.gov/opa/file/868771/download.
[92] Order Instituting Cease-and-Desist Proceedings, *In re Analogic Corporation* and *Lars Frost*, Exchange Act Release 78,113 (June 21, 2016), https://www.sec.gov/litigation/admin/2016/34-78113.pdf.
[93] Non-Prosecution Agreement, *In re BK Medical ApS* (June 21, 2016), https://www.justice.gov/opa/file/868771/download.

investigation.[94] Despite this, Analogic received a 30% aggregate reduction of its fine for otherwise being cooperative in the investigation and committing to extensive remedial actions.[95]

h. LATAM

On July 25, 2016, South American commercial airline LATAM Airlines Group SA (LATAM) agreed to pay US $22.2 million in penalties, disgorgement, and prejudgment interest to settle DOJ and SEC allegations that it violated the FCPA's internal control and accounting provisions.[96] The settlement related to a scheme under which LATAM executives entered into a sham consulting agreement with an Argentinian government adviser who may have funneled US $1.15 million in bribes to a union representing airline employees in efforts to avoid enforcement of a labor law (netting an estimated US $6.7 million in profits for LATAM).[97] Payments were concealed as legitimate fees to conduct a study of Argentinian airline routes, although LATAM officials admitted that they knew no study would be completed.

As part of DOJ's three-year deferred prosecution agreement, LATAM agreed to pay a US $12.75 million criminal penalty.[98] According to the DOJ, LATAM was not entitled to a discount off the bottom of the Guidelines range because the company failed to disclose the FCPA violation until *after* the Argentinian media had uncovered the scheme, and because it failed to discipline employees responsible for the criminal conduct. Under the settlement terms, LATAM must continue to cooperate with DOJ's investigation, improve its internal compliance program, and hire an independent corporate compliance monitor. In light of the large criminal penalty, SEC declined to seek a civil penalty, but nonetheless received US $6.7 million in disgorgement and US $2.7 million in prejudgment interest.[99]

i. General Cable Corp.

On December 29, 2016, in the last enforcement action of the year, the SEC and DOJ announced settlements with General Cable Corp. (General Cable) relating to certain FCPA and accounting-related allegations. According to the DOJ and SEC, General Cable's overseas subsidiaries used third parties to pay bribes to officials in Angola, Bangladesh, China, Indonesia, and Thailand to win business, resulting in over US $50 million in profits worldwide.[100] Payments were approved by high-level executives, and executives with knowledge that payments were made for corrupt purposes did not investigate the payments.

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[94] Order Instituting Cease-and-Desist Proceedings, *In re Analogic Corporation* and *Lars Frost*, Exchange Act Release 78,113, p.1 (June 21, 2016), https://www.sec.gov/litigation/admin/2016/34-78113.pdf.
[95] *Id.* at pp. 1-2.
[96] DOJ Press Release, *LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $12.75 Million Criminal Penalty* (July 25, 2016), https://www.justice.gov/opa/pr/latam-airlines-group-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1275; SEC Press Release, *LAN Airlines Settles FCPA Charges* (July 25, 2016), https://www.sec.gov/news/pressrelease/2016-151.html.
[97] *Id.*
[98] *Id.*
[99] Order Instituting Cease-and-Desist Proceedings, *In re LAN Airlines S.A.*, Exchange Act Release No. 78,402, at 10 (July 25, 2016), https://www.sec.gov/litigation/admin/2016/34-78402.pdf.
[100] DOJ Press Release, *General Cable Corporation Agrees to Pay $20 Million Penalty for Foreign Bribery Schemes in Asia and Africa* (Dec. 29, 2016), https://www.justice.gov/opa/pr/general-cable-corporation-agrees-pay-20-million-penalty-foreign-bribery-schemes-asia-and; SEC Press Release, *Wire and Cable Manufacturer Settles FCPA and Accounting Charges* (Dec. 29, 2016), https://www.sec.gov/news/pressrelease/2016-283.html.

As part of a Non-Prosecution Agreement with DOJ, General Cable paid a US $20 million penalty (reflecting a 50% reduction off of the bottom of the Guidelines fine range as a result of General Cable's voluntary self-disclosure, cooperation with the investigation, and commitment to enhancing its compliance program).[101] The SEC ordered General Cable to pay US $55 million in disgorgement and prejudgment interest for anti-bribery, books-and-records, and internal control violations.[102] The SEC also settled with former Vice President, Karl J. Zimmer, in a separate proceeding (see Section II.C.4.l below).

4. Hiring Practices

2016 saw two significant prosecutions in the area of hiring practices.

a. JP Morgan

As noted above, JP Morgan agreed to pay over US $264 million to the SEC, DOJ, and Federal Reserve Board of Governors to settle charges that its employees violated the FCPA by establishing a program to offer short-term employment, summer internships, and permanent positions to the family members of officials in exchange for business and preferential regulatory treatment from those officials.[103] The family members of officials were not employed using JP Morgan's normal hiring process, were not otherwise qualified for their positions, and their employment was explicitly linked to potential business advantages.[104] Although JP Morgan implemented a process to review new hires related to government officials, JP Morgan personnel in the Asia-Pacific region supplied false and incomplete information and failed to disclose the intended, improper purpose of the hires.[105]

b. Qualcomm

On March 1, 2016, Qualcomm Inc. (Qualcomm) agreed to pay US $7.5 million in civil penalties to settle books and records and internal control charges relating to its practice of providing full-time employment and paid internships to relatives and referrals of Chinese government officials with authority over purchasing decisions for Qualcomm products.[106] Qualcomm also allegedly provided meals, gifts and entertainment to Chinese officials and their families, ranging from hospitality packages to world-class sporting events, and even provided an official's son with a US $75,000 research grant to a US university and a US $70,000 loan to buy

[101] Non-Prosecution Agreement, *General Cable Corporation Criminal Investigation, at 1-3 (Dec. 22, 2016).*
[102] Order Instituting Cease-and-Desist Proceedings, *In the Matter of General Cable Corporation*, Release No. 79,703 (Dec. 29, 2016), https://www.sec.gov/litigation/admin/2016/34-79703.pdf.
[103] *See* Non-Prosecution Agreement, *JP Morgan Securities (Asia Pacific) Ltd. Criminal Investigation* ¶ 4 (Nov. 17, 2016), https://www.justice.gov/criminal-fraud/file/911356/download; Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶¶ 45, 48 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf.
[104] *See* Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶¶ 14–15, 29, 33, 77 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf.
[105] *See* Order Instituting Cease-and-Desist Proceedings, *In re JP Morgan Chase & Co.*, Exchange Act Release No. 79,335 ¶¶ 20, 74 (Nov. 17, 2016), http://www.sec.gov/litigation/admin/2016/34-79335.pdf.
[106] SEC Press Release, *SEC: Qualcomm Hired Relatives of Chinese Officials to Obtain Business* (Mar. 1, 2016), https://www.sec.gov/news/pressrelease/2016-36.html.

a home.[107] In addition to the payment of monetary sanctions, Qualcomm is required to report the status of its remediation and implementation of compliance measures to the SEC periodically for a two-year term.[108]

5. Charitable Contributions

a. Nu Skin

In a case showing the continuing challenges China presents to the beauty and multi-level marketing industries[109] after the *Avon* case, on September 20, 2016, Nu Skin Enterprises, Inc. (Nu Skin) paid approximately US $750,000 to settle SEC charges that it violated the internal control and books-and-records provisions of the FCPA. Nu Skin's subsidiary in China (Nu Skin China) allegedly held an unauthorized promotion meeting in a city where it did not have a selling license or a physical location, in violation of Chinese direct selling laws. As a result, the province's regulatory agency opened an investigation and informed Nu Skin China that it planned to impose an approximately US $431,088 fine. In an effort to avoid regulatory action against the company, Nu Skin China made a charitable contribution of US $154,000 to a charity suggested by an official connected to the relevant regulatory agency, and Nu Skin China asked Nu Skin to expedite an existing request to obtain a college recommendation from an influential US person for that official's child.[110]

The SEC noted that, although Nu Skin China informed Nu Skin of the donation, Nu Skin China did not disclose the any links with the official or the fine. Without Nu Skin's knowledge, Nu Skin China also removed the anti-corruption language from the final version of the donation agreement. The SEC stated that Nu Skin China inaccurately described the purpose of the payment and that Nu Skin failed to conduct adequate due diligence with respect to charitable donations. Nu Skin agreed to pay disgorgement of US $431,088, prejudgment interest of US $34,600, and a civil money penalty in the amount of US $300,000.

6. Other - AB InBev and Dodd-Frank Whistleblower Retaliation Charges

On September 28, 2016, Anheuser-Busch InBev SA/NV (AB InBev), without admitting or denying liability, paid approximately US $6 million to settle allegations that it violated the books and records and internal control provisions of the FCPA and the SEC's whistleblower non-retaliation protections. The SEC alleged that a marketing company used by AB InBev hired third-party promoters that used one-time payments, excessive commissions, and fraudulent

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[107] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Qualcomm Incorporated*, Release No. 77,261 (Mar. 1, 2016), https://www.sec.gov/litigation/admin/2016/34-77261.pdf.
[108] *Id*.
[109] On January 20, 2017, Herbalife Ltd. - another company in the multi-level marketing industry - disclosed that the SEC requested documents related to the Company's anti-corruption compliance in China and that the company is conducting its own review. *See* Herbalife Ltd., Current Report (Form 8-K), at 20 (Jan. 20, 2017).
[110] Order Instituting Cease-and-Desist Proceedings, *In re Nu Skin Enterprises, Inc.*, Release No. 78,884 (Sept. 20, 2016), https://www.sec.gov/litigation/admin/2016/34-78884.pdf.

reimbursements to make payments to government officials with India's state-controlled marketing corporations, which were responsible for selling beer to consumers.[111]

The settlement emphasizes that the SEC requires robust internal controls, even as to third-parties engaged by other third parties. Based on a whistleblower complaint in 2009, AB InBev accelerated a previously planned internal audit of the marketing company. The SEC noted, however, that AB InBev's Indian subsidiary failed to address a number of control deficiencies until 2011 or early 2012, and the audit failed to uncover wrongdoing with respect to promoters engaged by the marketing company at that time.[112] The SEC stated that the relationship between the marketing company and promoters was not defined by contract, and the marketing company failed to complete due diligence on the promoters.[113] Notably, the SEC cited failures in due diligence and internal controls even though AB InBev provided FCPA due diligence forms to the marketing company. In spite of AB InBev's efforts, the marketing company took affirmative steps to hide the results of that due diligence after it was conducted and the marketing company and AB InBev's Indian subsidiary also failed to notify AB InBev of efforts by the marketing company to destroy documents.[114]

The settlement also highlights that confidentiality agreements that do not specifically exempt reporting possible violations of law to the government may violate the whistleblower protections in the Dodd-Frank Act. The SEC specifically noted the presence of a US $250,000 liquidated damages clause and broad confidentiality obligations that prohibited disclosure to "any person" other than a spouse, attorney, or tax advisor, except as required by law.[115] The SEC noted that, after signing the confidentiality agreement, the whistleblower ceased speaking with the SEC until it issued an administrative subpoena.[116]

C. DOJ Pilot Program Declinations and Related SEC Enforcement Actions

As discussed in Section II.A.1, in April 2016, the DOJ launched a one-year FCPA "Pilot Program" to encourage corporate voluntary disclosures and offer greater transparency into its decision-making process for bringing charges.[117] The new program offers companies mitigation credit, up to a declination of prosecution, for self-reporting, cooperating fully with the DOJ during investigations, and remediating misconduct.

To date, five declinations have been issued by the DOJ under the Pilot Program.[118] Three, involving issuers, were accompanied by non-prosecution agreements by the SEC (see

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[111] Order Instituting Cease-and-Desist Proceedings, *In re Anheuser-Bush InBev SA/NV*, Exchange Act Release No. 78,957, at ¶¶ 10, 15–16 (Sept. 28, 2016), https://www.sec.gov/litigation/admin/2016/34-78957.pdf.
[112] *Id.* at ¶¶ 12, 13.
[113] *Id.* at ¶¶ 11, 15.
[114] *Id.* at ¶¶ 11, 18, 29.
[115] *Id.* at ¶¶ 24–26.
[116] *Id.* at ¶¶ 27.
[117] DOJ Justice Blog, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.
[118] DOJ Declination Letter, *NCH Corporation* (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899121/download; DOJ Declination Letter, *HMT LCC (*Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download; DOJ Declination Letter, *Johnson Controls, In*c. (June 21, 2016), https://www.justice.gov/criminal-fraud/file/874566/download; DOJ Declination Letter, *Nortek, Inc.* (June 3, 2016),

Nortek, Akamai, and Johnson Controls in Section C.1 below). In each case, improper activities were undertaken by Chinese subsidiaries of US parent companies, and there was scant evidence of any territorial nexus to the United States, raising the question of whether they were true declinations, rather than a matter over which DOJ did not have jurisdiction.

Two other declinations, described below, have been issued under the Pilot Program. Both involved private business organizations which were not subject to SEC jurisdiction, and produced the first DOJ declinations-with-disgorgement on record. In addition, there was one SEC declination accompanied by an individual prosecution following a prior year's DOJ declination.

1. DOJ Declinations Accompanied by SEC Enforcement Actions

a. Nortek, Inc.

Rhode Island-based building products manufacturer Nortek Inc. (Nortek) signed a non-prosecution agreement with the SEC on May 3, 2016 for FCPA-related charges. According to the agreement, Nortek made approximately US $290,000 in improper payments and gifts to Chinese officials through an indirect, wholly-owned subsidiary in Shenzhen, China. The payments included cash, gift cards, meals, travel, accommodation, and entertainment, and were allegedly made in order to receive preferential treatment and reduced regulatory oversight and fees. The agreement did not suggest any participation or authorization of the improper payments by anyone at Nortek Inc., nor did it suggest veil piercing or alter-ego finding. However, it did cite to Nortek's "inadequate internal accounting controls and inaccurate books and records" as a reason for the illicit payments.[119]

The misconduct was identified by Nortek's internal audit function, and was promptly disclosed to the SEC. As a result of this cooperation, the SEC imposed disgorgement of US $291,403 in profit with prejudgment interest of US $30,655. Separately, the DOJ issued a declination letter under the pilot program closing their inquiry into the matter.

b. Akamai Technologies, Inc.

Similar to Nortek, Akamai Technologies, Inc. (Akamai) entered into a non-prosecution agreement with the SEC on May 3, 2016 related to allegations that its wholly-owned subsidiary made improper payments to Chinese officials. According to the agreement, an Akamai-China Sales Manager schemed with a channel partner to bribe employees of three customers, two of which were Chinese state-owned entities, in order to obtain business. Again, there was no evidence that the parent company had any knowledge of participation in the payment scheme. However, the SEC cited to the fact that Akamai had "failed to devise and maintain a system of internal accounting controls" as a reason the improper payments were possible.[120]

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https://www.justice.gov/criminal-fraud/file/865406/download; DOJ Declination Letter, *Akamai Technologies, Inc.* (June 6, 2016), https://www.justice.gov/criminal-fraud/file/865411/download.

[119] Non-Prosecution Agreement, *Nortek, Inc.* (May 3, 2016), https://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf.

[120] Non-Prosecution Agreement, *Akamai Technologies, Inc.* (May 3, 2016), https://www.sec.gov/news/press/2016/2016-109-npa-akamai.pdf.

Again, similar to Nortek, Akamai promptly self-disclosed the wrongdoing after an investigation, identified all individuals involved in the misconduct, and enhanced its compliance program and internal controls. As part of the agreement, Akamai disgorged US $652,452 in profit and paid prejudgment interest of US $19,433. DOJ issued a declination letter under the Pilot Program.

c. Johnson Controls, Inc.

On July 11, 2016, the SEC issued a cease-and-desist order against Johnson Controls, Inc. (JCI) for violating the books and records and internal controls provisions of the FCPA relating to JCI's wholly-owned subsidiary, China Marine.[121] Despite the steps undertaken by JCI and prior owners of the business in question to implement an effective compliance program in the wake of a prior enforcement action involving the same operation, the SEC held JCI liable because of its failure to make and keep accurate books and records, and its overreliance on management at the subsidiary to monitor and self-police the entity. Additionally, the SEC noted that although the China Marine business had formal reporting lines to Denmark, in reality it operated with very little oversight.

In its cease-and-desist order, the SEC noted JCI's voluntary disclosure, internal investigation and cooperation with the SEC's own investigation, and remedial measures. As part of the settlement, JCI paid disgorgement of US $11.8 million, prejudgment interest of US $1,382,561, and a civil penalty of US $1,180,000. DOJ issued a declination letter under the Pilot Program.

2. DOJ Declinations with Disgorgement

a. HMT LLC

On September 29, 2016, the DOJ issued a declination letter to HMT LLC (HMT), a privately-held company incorporated in Delaware and based in Texas. The Department had found that HMT, through its employees and agents, paid approximately US $500,000 in bribes to government officials in Venezuela and China. For both schemes, regional HMT managers who were based in the United States had access to information regarding the payments and had reason to know that bribes were being paid. In the Venezuelan scheme, the payments were made through a bank account in Texas.

The DOJ, in issuing its declination letter, noted HMT's voluntary self-disclosure, comprehensive global investigation of the matter, full remediation measures, and agreement to disgorge US $2.7 billion in profits from the illegally obtained sales in Venezuela and China.[122]

[121] Order Institution Cease-and-Desist Proceedings, *In the Matter of Johnson Controls, Inc*., Release No. 78,287 (July 11, 2016), https://www.sec.gov/litigation/admin/2016/34-78287.pdf.
[122] DOJ Declination Letter, *HMT LCC (*Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download.

b. NCH Corp.

On the same day it announced the HMT declination, the DOJ issued a declination of prosecution for NCH Corporation (NCH). The Texas-based maintenance company had, through its Chinese subsidiary, made illegal payments of approximately US $44,000 to Chinese government officials. These payments included gifts, meals, cash, and a ten-day trip to the United States and Canada (only one half-day of which involved business-related activities). An NCH executive in the United States who was responsible for overseeing NCH's business in China had reviewed and signed off on the expenditures.

Again, citing NCH's voluntary self-disclosure, thorough and comprehensive internal investigation, enhancement of its compliance program, and full remediation, the DOJ opted to decline to prosecute. As with HMT, NCH agreed to disgorge the US $335,342 in profits made from the illegal conduct as obtained sales in China.[123]

3. SEC Declinations

On September 12, 2016, the SEC announced that it had declined to bring charges against Harris Corporation (Harris), a Florida-based communications and technology company, following an investigation into alleged FCPA violations related to Harris's acquisition of Carefx Corp. and its Chinese subsidiary in April 2011.[124] Within five months of its purchase, Harris took "immediate and significant steps" to improve the subsidiary's internal accounting controls and discovered the alleged bribery scheme through a tip on its anonymous complaint hotline.[125] The SEC cited Harris's self-policing, prompt self-reporting, thorough remediation, and "exemplary cooperation",[126] and the announcement marked the first time that the SEC issued a declination against a company while charging an employee.[127] The SEC's declination came nearly a year after the DOJ informed Harris that it would not pursue criminal penalties related to the same conduct.[128]

4. 2016 Enforcement Efforts Against Individuals

a. Direct Access Partners (DAP)

As noted in our 2015 Year in Review, in 2015, five executives at Direct Access Partners (DAP) were sentenced for their roles in a scheme to bribe a senior official in Venezuela's state economic development bank. The sentences included prison terms and forfeiture for all five

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[123] DOJ Declination Letter, *NCH Corporation* (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899121/download.
[124] SEC Press Release, *SEC Charges Former Information Technology Executive with FCPA Violations; Former Employer Not Charged Due to Cooperation with SEC* (Sept. 12, 2016), https://www.sec.gov/litigation/admin/2016/34-78825-s.pdf.
[125] *Id.*
[126] *Id.*
[127] Ben DiPietro, *The Morning Report: Harris FCPA Case Shows Cooperation Benefits*, WALL ST. J.: RISK & COMPLIANCE J. (SEPT. 26, 2016, 7:07 AM), http://blogs.wsj.com/riskandcompliance/2016/09/26/the-morning-risk-report-harris-fcpa-case-shows-cooperation-benefits/.
[128] Harris Corp., Quarterly Report (Form 10-Q) (May 4, 2016), https://www.sec.gov/Archives/edgar/data/202058/000020205816000007/hrs41201610-q.htm.

defendants. Earlier, the SEC settled cases against seven former DAP executives.[129] The settlements permanently enjoined the former executives from further securities violations, prohibited their future involvement in certain securities-related activities, and reiterated the disgorgement from the criminal cases.[130]

b. John W. Ashe UN Bribery Allegations

2016 brought further developments in the case filed last year against multiple individuals for paying more than US $1.3 million in bribes paid to John W. Ashe, former Ambassador for Antigua and Barbuda, and President of the UN General Assembly.[131] Mr. Ashe, who had not been charged with bribery, but had been charged with two counts of subscribing to false and fraudulent income tax returns, passed away on June 22, 2016.[132] One of the individuals accused of bribing Mr. Ashe, Chinese national Shiwei Yan, pleaded guilty in January 2016 and was sentenced on July 29, 2016 to serve 20 months in prison and two years' supervised release.[133] Ms. Yan was also fined US $12,500 and ordered to forfeit US $300,000. Ms. Yan, along with a co-defendant, Heidi Hong Piao, were alleged to have provided payments totaling over US $800,000 to Mr. Ashe on behalf of Chinese businessmen seeking to invest in or obtain favors from Antiguan government officials.[134] Ms. Piao also pleaded guilty on January 14, 2016 to charges of, among other things, bribery and money laundering.[135]

On November 22, 2016, the government issued a superseding indictment against Ng Lap Seng and Jeff C. Lin alleging violations of the FCPA, among other offenses, for bribing Mr. Ashe in an attempt to acquire business in Antigua and to obtain UN support for a UN Macau Conference Center. The superseding indictment claims that Ng and Yin also bribed Francis Lorenzo, the former deputy U.N. ambassador from the Dominican Republic.[136] Francis Lorenzo pleaded guilty to bribery, money laundering, and other charges on March 16, 2016.[137]

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[129] The five sentenced by the DOJ in 2015, as well as Iuri Rodolfo Bethancourt and Haydee Leticia Pabon.
[130] SEC Litigation Release, *SEC Obtains Settlement in Kickback Scheme to Secure Business of Venezuelan Bank*, Litigation Release No. 23,513 (Apr. 8, 2016), https://www.sec.gov/litigation/litreleases/2016/lr23513.htm.
[131] Notice of Hearing, *U.S. v. Harder*, No. 2015-CR-01 (E.D. Pa. Oct. 21, 2016).
[131] DOJ Press Release, *Former UN General Assembly President and Five Others Charged In US $1.3 Million Bribery Scheme* (Oct. 6, 2106), https://www.justice.gov/usao-sdny/pr/former-un-general-assembly-president-and-five-others-charged-13-million-bribery-scheme.
[132] Melissa Daniels, Ex-UN Leader Dies 5 Days Before Hearing in Bribery Case, LAW360.COM (June 22, 2016), http://www.law360.com/articles/810158/ex-un-leader-dies-5-days-before-hearing-in-bribery-case.
[133] DOJ Press Release, *Former Head Of Foundation Sentenced To 20 Months In Prison For Bribing Then-Ambassador And President Of United Nations General Assembly* (July 29, 2106). https://www.justice.gov/usao-sdny/pr/former-head-foundation-sentenced-20-months-prison-bribing-then-ambassador-and-president.
[134] DOJ Press Release, *Former UN General Assembly President and Five Others Charged In US $1.3 Million Bribery Scheme* (Oct. 6, 2106), https://www.justice.gov/usao-sdny/pr/former-un-general-assembly-president-and-five-others-charged-13-million-bribery-scheme.
[135] DOJ Press Release, *Former Head Of Foundation Sentenced To 20 Months In Prison For Bribing Then-Ambassador And President Of United Nations General Assembly* (July 29, 2106). https://www.justice.gov/usao-sdny/pr/former-head-foundation-sentenced-20-months-prison-bribing-then-ambassador-and-president; *see also* Superseding Information, US v Heidi Hong Piao et al. 1:15-cr-00706-VSB (S.D.N.Y. Jan. 14, 2016),
[136] Superseding Indictment, US v. Ng Lap Sen et al. 1:15-cr-00706-VSB (S.D.N.Y. Nov. 22, 2016).
[137] DOJ Press Release, *Former Head Of Foundation Sentenced To 20 Months In Prison For Bribing Then-Ambassador And President Of United Nations General Assembly* (July 29, 2106); *see also* Superseding Information, US v Francis Lorenzo et al. 1:15-cr-00706-VSB (S.D.N.Y. Mar. 16, 2016).

c. Ignacio Cueto Plaza (LATAM)

On February 4, 2016 (nearly six months before LATAM's settlement with the SEC and DOJ was announced), the SEC announced that it had settled charges with Ignacio Cueto Plaza, the former Chief Executive Officer and president of LAN Airlines (LAN (now LATAM)), stemming from alleged violations of the FCPA's internal control and books and records provisions.[138] Shortly after LAN entered the Argentinian market in the mid-2000s, Cueto purportedly authorized a sham US $1.15 million consulting agreement with an adviser to the Argentinian Ministry of Transportation (described in Section II.B.3.h, above).[139] According to the SEC, Cueto understood that it was possible that the consultant might pass along some of the US $1.15 million as bribes to labor union officials.[140] Cueto agreed to pay a US $75,000 civil penalty to settle the SEC charges, but did not admit or deny any of the SEC's allegations.[141] As part of the settlement, Cueto agreed to certify his compliance with LATAM's anti-corruption policies and procedures and attended anti-corruption training.[142]

d. Yu Kai Yuan (PTC Inc.)

The SEC announced its first DPA with an individual, Yu Kai Yuan, in conjunction with its February 16, 2016 settlement with PTC. Mr. Yuan was a former sales executive at PTC China who provided items of value, including lavish travel, to Chinese health officials.[143] Senior executives at PTC China also engaged in methods to conceal these payments to avoid scrutiny from PTC. In reaching the DPA, the SEC noted Mr. Yuan's full cooperation.[144]

e. Mikhail Gourevitch (Nordion Inc.)

In addition to SEC enforcement against Nordion, discussed in Section II.B.3.b above, the SEC separately resolved the charges against Mikhail Gourevitch, the employee behind the Nordion bribery scheme. In its order, the SEC claimed that Mr. Gourevitch had received at least US $100,000 in kickbacks for his involvement with the third-party agent, and that he knowingly provided false documentation to Nordion to circumvent existing internal controls. Mr. Gourevitch agreed to pay US $100,000 in disgorgement, US $12,950 in prejudgment interest, and a US $66,000 civil penalty.[145]

f. Dmitrij Harder

The former owner and president of Chestnut Consulting Group Inc. and Chestnut Consulting Group Co., Dmitrij Harder, pleaded guilty on April 20, 2016 to bribing an official at

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[138] SEC Press Release, *Airline Executive Settles FCPA Charges* (Feb. 4, 2016), https://www.sec.gov/litigation/admin/2016/34-77057-s.pdf.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] Deferred Prosecution Agreement, Yu Kai Yuan (Nov. 18, 2015), at 3, https://www.sec.gov/litigation/admin/2016/34-77145-dpa.pdf.
[144] *Id.* at 1-2.
[145] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mikhail Gourevitch*, Release No. 77,288 (Mar. 3, 2016), https://www.sec.gov/litigation/admin/2016/34-77288.pdf.

the European Bank for Reconstruction and Development (EBRD) in violation of the FCPA.[146] Mr. Harder admitted that he paid approximately US $3.5 million in bribes to an EBRD official in return for favorable outcomes on the Chestnut Group's corporate clients' financing applications as well as for the official to send business to the Chestnut Group. The EBRD approved applications for two Chestnut Group clients amounting to an US $85 million investment and €90 million loan, and a US $40 million investment and US $60 million convertible loan. The Chestnut Group earned approximately US $8 million in "success fees" for these approvals. Harder's sentencing has been postponed to June 28, 2017.[147]

The DOJ noted that the City of London Police's Overseas Anticorruption Unit, the Criminal Division's Office of International Affairs, Germany, Jersey and Guernsey all provided assistance in the matter.[148]

g. PDVSA Individuals

On June 16, 2016, Roberto Enrique Rincon Fernandez (Rincon), owner of multiple US-based energy companies, pleaded guilty to one count of conspiracy to violate the FCPA for bribing Venezuela's state-owned and state-controlled energy company, Petróleos de Venezuela SA (PDVSA). According to the plea, Rincon collaborated with another US-based Venezuelan businessman, Abraham Jose Shiera Bastidas, to pay bribes and other things of value to ensure that their companies were considered for lucrative PDVSA contracts. He also admitted that he willfully failed to report over US $6 million in foreign dividend income he received from a Venezuelan corporation in 2010.[149]

The bribery scheme undertaken by Rincon is a part of a larger, ongoing investigation into bribery at the PDVSA. In January 2016, four former PDSVA officials (all residents of Texas) pleaded guilty to conspiracy to commit money laundering and admitted receiving bribes from Rincon and Shiera. In connection with the allegations, Shiera pleaded guilty to the conspiracy on March 22, 2016.[150]

h. Lars Frost (Analogic Corp.)

On June 21, 2016, the SEC announced that it had settled charges against Lars Frost, former Chief Financial Officer of a Denmark-based subsidiary of Analogic Corp. (Analogic),

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[146] DOJ Press Release, *Former Owner and President of Pennsylvania Consulting Companies Pleads Guilty to Bribing Official at European Bank for Reconstruction and Development* (Apr. 20, 2106), https://www.justice.gov/opa/pr/former-owner-and-president-pennsylvania-consulting-companies-pleads-guilty-bribing-official.

[147] Notice of Hearing, *U.S. v. Harder*, No. 2015-CR-01 (E.D. Pa. Oct. 21, 2016).

[148] DOJ Press Release, *Former Owner and President of Pennsylvania Consulting Companies Pleads Guilty to Bribing Official at European Bank for Reconstruction and Development* (Apr. 20, 2106), https://www.justice.gov/opa/pr/former-owner-and-president-pennsylvania-consulting-companies-pleads-guilty-bribing-official.

[149] DOJ Press Release, *Businessman Pleads Guilty to Foreign Bribery and Tax Charges in Connection with Venezuela Bribery Scheme* (June 16, 2016), https://www.justice.gov/opa/pr/businessman-pleads-guilty-foreign-bribery-and-tax-charges-connection-venezuela-bribery-scheme.

[150] DOJ Press Release, *Businessman Pleads Guilty to Foreign Bribery and Tax Charges in Connection with Venezuela Bribery Scheme* (June 16, 2016), https://www.justice.gov/opa/pr/businessman-pleads-guilty-foreign-bribery-and-tax-charges-connection-venezuela-bribery-scheme.

relating to his role in creating false records and authorizing improper payments to third parties on behalf of distributors in connection with the bribery scheme.[151] The SEC found that between 2008 and 2011, Frost had personally authorized 150 improper "conduit payments" for Analogic's distributors, and subsequently falsified quarterly sub-certifications to Analogic. Frost, a Danish citizen, agreed to pay a US $20,000 penalty, but neither admitted or denied the allegation that he caused Analogic's FCPA violations and violated additional securities laws that prohibit the knowing circumvention of internal controls and knowing falsification of books and records.

i. Jun Ping Zhang (Harris Corp.)

On September 12, 2016, the SEC settled charges against Jun Ping Zhang (Ping), a US national and the former head of a China-based subsidiary of Harris Corporation (Harris), in connection with his role in facilitating improper gifts to Chinese regional health officials and hospital staff.[152] The SEC alleged that Ping knew that China-based sales staff under his management regularly submitted fraudulent expense claims for cash reimbursement that were used to buy gifts for Chinese officials, such as new smartphones for members of a regional health department and vacation expenses for high-level staff at a Wuhan hospital.[153] Further, the SEC stated that Ping deliberately concealed these improper payments from Harris by approving monthly expense reports with false information related to bogus expense requests, and he knowingly circumvented Harris's internal control procedures when he failed to disclose the bribery scheme to Harris attorneys during the pre-acquisition due diligence process.[154]

Ping agreed to pay US $46,000 in civil penalties in connection with violations of the anti-bribery, books and records, and internal control provisions of FCPA. On the same day, the SEC declined to bring charges against Harris – Ping's employer – until his termination in April 2012.[155]

j. Och-Ziff Individuals

The conduct leading to SEC and DOJ action against Och-Ziff, described above, also led to individual actions against Daniel Och, Joel Frank, Samuel Mebiame, and two European-based individuals. As the CEO and Chairman of Och-Ziff, Daniel Och had final decision-making power over all private investments by Och-Ziff, including those leading to the alleged illegal conduct. The SEC stated that Och personally approved two transactions between Och-Ziff and its partners in the Democratic Republic of the Congo where illegal bribes were paid. Although, Och did not know at the time that bribes would be paid, he was aware of the high-risk nature of the transactions. [156] Och agreed to pay US $2.2 million to settle the SEC charges.[157]

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[151] SEC Press Release, *SEC Charges Medical Device Manufacturer with FCPA Violations* (June 21, 2016), https://www.sec.gov/news/pressrelease/2016-126.html.
[152] *Id.* at 2.
[153] *Id.* at 4.
[154] *Id.* at 3, 5–6.
[155] *Id.* at 7.
[156] Order Instituting Cease-and-Desist Proceedings, *In re Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank*, Exchange Act Release No. 78,989, at 5 (Sept. 29, 2016), https://www.sec.gov/litigation/admin/2016/34-78989.pdf.

As the CFO of Och-Ziff, Joel Frank had primary responsibility for maintaining Och-Ziff's books and records and ensuring Och-Ziff implemented an appropriate system of internal accounting controls. Although Frank did not have direct knowledge that bribes would be paid, he nonetheless approved various transactions in which illegal payments were made and was generally aware of the high risk of corruption in at least some of those transactions.[158] The penalty amount assessed against Frank has yet to be announced.[159]

Finally, on August 16, 2016, Samuel Mebiame was arrested in connection with the Och-Ziff case and charged with conspiring to bribe foreign officials in Chad, Niger, and Guinea in an attempt to secure certain mining rights.[160] Mebiame pleaded guilty and is awaiting sentencing.[161]

k. Mexican Aviation Defendants

On December 27, 2016, the DOJ announced that four individuals – Douglas Ray, Victor Hugo Valdez Pinon, Kamta Ramnarine, and Daniel Perez – pleaded guilty to, among other things, conspiracy to violate the FCPA. The charges arose from a scheme to bribe Mexican officials to obtain aviation maintenance, repair, and overhaul contracts from Mexican government-owned customers.[162] Nevarez was sentenced to 15 months in prison, and the others are awaiting sentencing.[163]

Although the FCPA does not reach the conduct of foreign officials, the DOJ continues to use the anti-money laundering laws to prosecute officials who bring the proceeds of bribery into the United States. In conjunction with the plea agreements noted above, two former foreign officials – Ernesto Hernandez Montemayor and Ramiro Ascencio Nevarez –both of whom previously worked for state government entities in Mexico, pleaded guilty to conspiracy to commit money laundering as part of an effort to hide the proceeds of the scheme.[164]

l. Karl Zimmer (General Cable)

On December 29, 2016, in connection with the General Cable matter, the SEC instituted cease-and-desist proceedings against former General Cable Senior Vice President, Europe and Africa Supply Chain and Global Supply Chain, Karl Zimmer. According to the order, Zimmer approved improper commission payments to an Angolan third party knowing that they were

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[157] *Id.* at 35.
[158] *Id.*
[159] On January 26, 2017, the SEC announced charges against additional defendants: the Och-Ziff executive who led the company's European office and an investment executive on Africa-related deals. *See* SEC Press Release, *SEC Charges Two Former Och-Ziff Executives with FCPA Violations* (Jan. 26, 2017), https://www.sec.gov/news/pressrelease/2017-34.html.
[160] DOJ Press Release, *Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay US $213 Million Criminal Fine* (Sept. 29, 2016), https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213.
[161] Plea Agreement with Samuel Mebiame, *United States v. Mebiame*, No. 16-cr-627-NGG (E.D.N.Y. Dec. 9, 2016), https://www.justice.gov/opa/press-release/file/917336/download.
[162] DOJ Press Release, *Four Businessmen and Two Foreign Officials Plead Guilty in Connection with Bribes Paid to Mexican Aviation Officials* (Dec. 27, 2016) https://www.justice.gov/opa/pr/four-businessmen-and-two-foreign-officials-plead-guilty-connection-bribes-paid-mexican.
[163] *Id.*
[164] *Id.*

excessive and that General Cable had commenced an investigation into potentially improper payments to said third party.[165] As part of the settlement, Zimmer was ordered to pay a civil penalty in the amount of US $20,000.

[165] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Karl J. Zimmer,* Release No. 79,704 (Dec. 29, 2016), https://www.sec.gov/litigation/admin/2016/34-79704.pdf.

III. FCPA 2016 ONGOING AND NEW INVESTIGATIONS

A number of new investigations were announced in 2016, and several major ongoing investigations are continuing from previous years. These include investigations in the energy/extractives, health care, financial services, manufacturing, telecommunications, and other sectors.

A. Energy and Extractives

1. *Lava Jato*/Petrobras

The energy and extractive industries have long been a focus of enforcement activity, a trend that continued in 2016. The DOJ and SEC reportedly continued coordinating with their Brazilian counterparts in the investigation of individuals and companies implicated in a high-profile bribery probe (dubbed "*Operação Lava Jato*" or "Operation Car Wash") into Brazilian state-owned oil company Petróleo Brasileiro SA (Petrobras).[166] The DOJ and SEC had opened their investigations in October 2014, and the DOJ reportedly "stepped up" its investigation in 2016, although Petrobras has not reached any FCPA-related settlement as of our publication date.[167] Several companies and individuals are under investigation by US enforcement agencies for some aspect of their dealings with Petrobras or the Brazilian authorities. The long list of companies reportedly under investigation includes, among others, Eletrobrás (a Brazilian electric utility company);[168] Transocean Corp. (a Switzerland-based offshore drilling company);[169] and Vantage Drilling Company (a Houston-based offshore drilling company).[170]

In addition, the DOJ has reportedly re-opened its investigation into alleged bribery by Dutch oilfield company SBM Offshore (SBM) of government officials in Brazil, Angola, and Equatorial Guinea between 2007 and 2011.[171] SBM had reached a US $240 million settlement with Dutch authorities in 2014, and had announced that the DOJ had closed its investigations in the same matter.[172] In January 2016, reports indicated that SBM Offshore CEO Bruno Chabas and supervisory board member Sietze Hepkema had reached a settlement for around US $60,000 each with the Brazilian authorities tied to the Petrobras probe, with no admission of guilt.[173]

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[166] Tom Schoenberg and Jessica Brice, *Petrobras Corruption Investigation Said to Ramp Up in US*, BLOOMBERG (May 13, 2016), https://www.bloomberg.com/news/articles/2016-05-13/petrobras-corruption-investigation-said-to-ramp-up-in-u-s.
[167] *Id*.
[168] Caroline Stauffer, *Internal investigation of Brazil's Eletrobras expands – source*, REUTERS (Jan. 7, 2016), http://www.reuters.com/article/brazil-corruption-eletrobras-idUSL1N13W21720160107.
[169] Transocean Ltd., Quarterly Report (Form 10-Q) (Nov. 2, 2016).
[170] Vantage Drilling Company, Quarterly Report (Form 10-Q) (Nov. 10, 2016).
[171] *SBM Offshore says US authorities re-open corruption probe*, REUTERS (Feb. 10, 2016), http://www.reuters.com/article/us-sbm-offshore-corruption-idUSKCN0VJ25L.
[172] *Id*.
[173] SBM Offshore, *Settlement Regarding Accusations against CEO and Member of the Supervisory Board* (Jan. 25, 2016), http://www.sbmoffshore.com/?press-release=settlement-regarding-accusations-ceo-member-supervisory-board.

SBM also reached a settlement with Brazilian authorities in July 2016 (see Section VI.D below).[174]

Outside of Brazil, Frank's International NV (Frank's), a Netherlands-based, NYSE-listed oilfield services company, disclosed on June 13, 2016 that it was "conducting an internal investigation of the operations of certain of [its] foreign subsidiaries in West Africa" for possible FCPA violations.[175] Frank's International confirmed that it had disclosed the matter to both the DOJ and SEC.

2. Unaoil

The UK investigation of Monaco-based, BVI-incorporated Unaoil SAM (Unaoil) led by the UK Serious Fraud Office (SFO) may be among the most significant new investigations of 2016. On March 30, 2016, the *Huffington Post* and *Fairfax Media* published allegations that Unaoil had served as a corrupt intermediary for numerous blue chip companies in order to help them secure "billions of dollars of government contracts" from 2002 to 2012, and potentially even more recently.[176] It cited as its source a "massive leak of confidential documents" that led to a "six-month investigation" into "hundreds of thousands" of the emails and documents of the Ahsani family, who are reportedly the owners of Unaoil.

The *Huffington Post/Fairfax* report states that the DOJ, UK National Crime Agency and Australian Federal Police are investigating the allegations against Unaoil, along with many of the other companies named. Authorities in Monaco reportedly raided Unaoil's offices and the homes of its executives in March 2016 pursuant to a request from the SFO, which the Monaco authorities called "part of a vast, international corruption scandal implicating numerous foreign oil industry firms."[177] In July, reports surfaced that the SFO had opened a criminal bribery and money laundering investigation into Unaoil and others associated with it.[178] The SFO reportedly has received blockbuster funding from HM Treasury to pursue the Unaoil case.[179] There are also indications that the recent Rolls-Royce settlement may have been, in part, linked to Unaoil.[180] In

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[174] SBM Offshore, *2015 Full-Year Earnings* (Feb. 10, 2016), http://www.sbmoffshore.com/?press-release=sbm-offshore-2015-full-year-earnings.
[175] Frank's International N.V., Current Report (Form 8-K) (Jun. 13, 2016), https://www.sec.gov/Archives/edgar/data/1575828/000119312516619625/d209982d8k.htm.
[176] Nick McKenzie et al., *The Bribe Factory Exposed: World's Biggest Bribe Scandal,* THE AGE AND HUFFPOST (March 30, 2016), http://www.theage.com.au/interactive/2016/the-bribe-factory/.
[177] Kevin Rawlinson, *Authorities in Monaco Raid Oil Firm HQ in Corruption Investigation,* THE GUARDIAN (March 31, 2016), https://www.theguardian.com/business/2016/apr/01/authorities-monaco-raid-oil-firm-unaoil-hq-corruption-investigation.
[178] David Pegg, *Serious Fraud Office Opens Criminal Investigation into Unaoil,* THE GUARDIAN (July 19, 2016), https://www.theguardian.com/business/2016/jul/19/serious-office-opens-criminal-investigation-into-unaoil.
[179] David Pegg et al., *Serious Fraud Office Given Extra Funds to Investigate Unaoil Bribery Claims,* THE GUARDIAN (Nov. 1, 2016), https://www.theguardian.com/law/2016/nov/01/serious-office-given-extra-funds-to-investigate-unaoil-bribery-claims.
[180] Rob Evans et al., *Rolls-Royce Middlemen May Have Used Bribes to Land Major Contracts,* THE GUARDIAN (Oct. 31, 2016), https://www.theguardian.com/business/2016/oct/31/rolls-royce-middlemen-may-have-used-bribes-to-land-major-contracts; *see also* Deferred Prosecution Agreement, *United States v. Rolls-Royce Plc*, No. 2: 16-CR-247 (S.D. OH Dec. 20, 2016), https://www.justice.gov/criminal-fraud/file/929126/download (referring to a "Monaco-incorporated and based oil and gas services intermediary" that owned a US-based subsidiary and that "regularly

mid-2016, several companies confirmed that they had been contacted by the DOJ or are conducting an internal investigation in connection with these reports, including KBR, Core Laboratories, Petrofac and FMC Technologies.[181] On February 10, 2017, the UK Serious Fraud Office announced that it had opened an investigation into the UK subsidiaries' of Swiss company ABB Ltd. past dealings with Unaoil.

The *Huffington Post/Fairfax* report alleges that Unaoil's clients engaged in sham consultancies or other arrangements with Unaoil, which in turn distributed bribes to a network of local fixers and officials across the developing world. In exchange, the recipients allegedly provided confidential bid information, helped to rig bid structures, and coordinated false competitions among companies, some of whose executives themselves allegedly took kickbacks from Unaoil and engaged in other corrupt tactics. Some of the payments Unaoil reportedly made to executives of its clients were allegedly intended to increase the size of the commissions that the clients paid to Unaoil. The article points out that Unaoil had been certified by Trace International since 2007. In denying these allegations, Ata Ahsani stated that Unaoil's business is to "integrate Western technology with local capability."[182] Unaoil stated that it has taken legal action against Fairfax Media and its partners in response to the publication of these allegations.[183]

3. Rio Tinto/Guinea

In the mining sector,[184] the investigations into the involvement of Rio Tinto plc (Rio Tinto) and other parties in the Simandou iron ore deposit in Guinea expanded this year. Rio Tinto had been exploring Simandou, one of the largest undeveloped iron ore resources in the world, until 2008, when Guinea's President at the time, Lansana Conté, stripped the company of its rights to two of four blocks, claiming it had failed to develop them in a timely manner, and awarded those rights to BSG Resources Ltd. (BSGR).[185] In 2010, BSGR sold a 51% stake in its Simandou blocks to Brazil's Vale SA (Vale) for US $2.5 billion.[186] In 2014, Guinea's new

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bribed foreign officials and others in order to secure work for Rolls-Royce and [a US-based subsidiary of Rolls-Royce].").

[181] *See, e.g.*, KBR, Inc. Quarterly Report (Form 10-Q) (Apr. 29, 2016), http://d1lge852tjjqow.cloudfront.net/CIK-0001357615/6bf9d011-5e6d-498f-bf5f-80d6f5c166fe.pdf (stating that the DOJ had contacted the company about its connections to Unaoil); Core Laboratories N.V., Registration Statement (Form S-3) (May 11, 2016), https://www.sec.gov/Archives/edgar/data/1000229/000119312516587092/d190526ds3asr.htm (stating that the DOJ had contacted the company about its connections to Unaoil); *Petrofac Initiates Board Review*, NEWS (Apr. 7, 2016), https://www.petrofac.com/en-gb/media/news/petrofac-initiates-board-review/ (stating that the company was conducting an internal investigation related to certain allegations); FMC Technologies, Inc., Quarterly Report (Form 10-Q) (Apr. 28, 2016), https://www.sec.gov/Archives/edgar/data/1135152/000113515216000043/fmc20160331-10q.htm (stating that the DOJ had contacted the company about its connections to Unaoil and that it was conducting an internal investigation).

[182] *Id.*

[183] *Statement from Unaoil*¸ UNAOIL S.A.M., June 14, 2016, http://www.unaoil.com/news/press-releases/statement-from-unaoil/.

[184] Also in the mining sector, Newmont Mining Corporation ("Newmont") announced that it had engaged outside counsel to review its FCPA compliance in connection with SEC and DOJ investigations. Newmont Mining Corporation, Quarterly Report (Form 10-Q) (April 20, 2016), pg. 41; *see also* http://blogs.wsj.com/riskandcompliance/2016/04/20/newmont-mining-discloses-bribery-review/.

[185] Patrick Radden Keefe, *Buried Secrets*, THE NEW YORKER (July 8, 2013), http://www.newyorker.com/magazine/2013/07/08/buried-secrets.

[186] *Id.*

government under President Alpha Condé revoked the rights from BSGR and Vale, saying a committee had found evidence of corruption in awarding the licenses.[187]

In February 2016, Rio Tinto took a US $1.1 billion impairment charge on its Simandou rights, although it was still seeking to develop the project at that time.[188] Then, in late October, Rio Tinto reportedly agreed to relinquish its 46.6% stake in the project to its partner, Aluminium Corporation of China (Chinalco).[189] On November 8, 2016, Rio Tinto disclosed that it had launched an internal investigation, after becoming aware of emails from 2011 discussing "contractual payments totalling [sic] US $10.5 million made to a consultant providing advisory services on the Simandou project."[190] Rio Tinto said in the disclosure that it had notified the US and UK authorities and was in the process of contacting the Australian authorities.[191] The Australian Federal Police are reportedly considering initiating an investigation into the matter.[192]

Rio Tinto said it became aware of the 2011 emails after they were briefly posted on an open internet forum.[193] *The Wall Street Journal* reported that the emails allegedly show various senior executives, including then-CEO Tom Albanese, had approved the payments in 2011 to consultant François de Combret, a former managing director at Lazard Frères, who the emails described as "close" to President Condé.[194] According to reports, the emails allegedly show that Energy & Minerals chief executive Alan Davies sought approval for the payments from Sam Walsh, the head of Rio Tinto's iron-ore division at the time.[195] According to reports, Mr. Walsh then recommended to Mr. Albanese that the company proceed with the payment, which Mr. Albanese replied was "worth" a "try."[196]

Rio Tinto's disclosure stated that Mr. Davies had been suspended, and that Legal & Regulatory Affairs group executive Debra Valentine had stepped down after previously notifying the company of her intention to retire.[197]

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[187] *Crying Foul In Guinea*, The Economist, http://www.economist.com/news/business/21635522-africas-largest-iron-ore-mining-project-has-been-bedevilled-dust-ups-and-delays-crying-foul.
[188] 2015 Full Year Results, RIO TINTO (Feb. 11, 2016), http://www.riotinto.com/documents/160211_Rio%20Tinto%202015%20full%20year%20results.pdf.
[189] Thomas Biesheuvel, *Rio Gives Away Giant Iron Ore Field Once Worth Fighting For*, BLOOMBERG (Oct. 28, 2016), https://www.bloomberg.com/news/articles/2016-10-28/rio-gives-away-giant-iron-ore-field-once-worth-fighting-for.
[190] Rio Tinto plc, Report of Foreign Private Issuer (Form 6-K) (Nov. 8, 2016), http://hsprod.investis.com/ir/rio_tinto/jsp/sec_item_new.jsp?ipage=11220500&DSEQ=&SEQ=&SQDESC.
[191] *Id.*
[192] Matt Chambers and Ben Butler, *AFP 'Aware' of Rio Tinto Bribery Scandal,* THE AUSTRALIAN (Nov. 24, 2016), http://www.theaustralian.com.au/business/mining-energy/afp-aware-of-rio-tinto-bribery-scandal/news-story/c8dd1042ebf08fe45a1f24bd0f45f32e.
[193] Rhiannon Hoyle and Scott Patterson, *Rio Tinto Executive Suspended, Another Steps Down Amid Payments Probe*, WALL ST. J. (Nov. 10, 2016), http://www.wsj.com/articles/rio-tinto-executive-alan-davies-suspended-amid-payments-probe-1478654690.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] Rio Tinto plc, Report of Foreign Private Issuer (Form 6-K) (Nov. 8, 2016), http://hsprod.investis.com/ir/rio_tinto/jsp/sec_item_new.jsp?ipage=11220500&DSEQ=&SEQ=&SQDESC=.

An additional report alleged that, on November 18, 2016, Mahmoud Thiam, the former Minister of Mines and Geology in Guinea and former UBS banker, said in a phone interview with *Bloomberg* that the head of Rio Tinto's Guinea operation, Steven Din, offered him a bribe in February 2010 in order to win back control of the two Simandou blocks the company had lost.[198] Mr. Din reportedly has denied this.[199]

Another report alleged that, on December 12, 2016, BSGR sent a "letter before action" to Rio Tinto alleging that Rio Tinto had contributed to the loss of BSGR's mining rights, including by paying Mr. de Combret to bribe officials to assist with negotiations that led to Rio Tinto's regaining the rights, and by making false accusations of corruption, illegal arms trading and other conduct by BSGR. The letter reportedly cited some of the Rio Tinto emails that had been released online, and BSGR reportedly threatened to sue Rio Tinto in the UK unless Rio Tinto offered to pay "billions of US dollars" in damages.[200]

On December 13, 2016, Mr. Thiam, a US citizen, was arrested in New York and charged with two counts of money laundering, based on an allegation that he received US $8.5 million in bribes from an unnamed Chinese company, in exchange for granting "near total control of Guinea's valuable mining sector."[201]

BSGR reportedly remains under investigation in the US, France, Switzerland and Guinea for possible bribery related to Simandou.[202] On December 19, 2016, Mr. Steinmetz reportedly was arrested and placed under house arrest in Israel in connection with this investigation, in which the Israeli police stated that they have been working with authorities in the US, Switzerland and Guinea.[203] The Israeli authorities reportedly released him without charge in January 2017,[204] although Swiss prosecutors have reportedly said they plan to question Mr. Steinmetz in early 2017.[205]

B. Health Care

Apart from a number of settlements concluded in 2016 involving health care companies, several new investigations were announced in this sector. On September 27, 2016, medical device manufacturer Misonix Inc. (Misonix) disclosed to the SEC and DOJ that the company "may have had knowledge of certain business practices of the independent Chinese entity that

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[198] Jesse Riseborough and Franz Wild, *Rio Tinto Offered Bribe for Mine, Ex-Guinea Minister Says*, BLOOMBERG (Nov. 18, 2016), https://www.bloomberg.com/news/articles/2016-11-18/rio-tinto-offered-bribe-for-iron-mine-ex-guinea-official-says.
[199] *Id.*
[200] *Id.*
[201] Sealed Complaint, *United States v. Mahmoud Thiam*, No. 16-MAG-7960 (Dec. 12, 2016) (SDNY).
[202] Riseborough and Wild, *supra* note 197.
[203] Jesse Riseborough, Thomas Biesheuvel and Franz Wild, *Billionaire Steinmetz Under House Arrest on Bribe Suspicion*, BLOOMBERG (Dec. 19, 2016), https://www.bloomberg.com/news/articles/2016-12-19/billionaire-steinmetz-said-to-be-detained-on-bribery-suspicion.
[204] Jon Yeomans, *BSG Resources' Beny Steinmetz Released Without Charge in Guinea Bribery Probe*, THE TELEGRAPH (Jan. 4, 2017), http://www.telegraph.co.uk/business/2017/01/04/bsg-resources-beny-steinmetz-released-without-charge-guinea/.
[205] *Steinmetz to be Questioned in Geneva over Guinea Bribery Claim*, ANTI-CORRUPTION DIGEST (Jan. 24, 2017), http://anticorruptiondigest.com/anti-corruption-news/2017/01/24/steinmetz-to-be-questioned-in-geneva-over-guinea-bribery-claim/#axzz4YDJlmXms.

distributes its products in China, which practices raise questions under the FCPA."[206] In addition, Massachusetts-based medical diagnostics firm Alere, Inc. (Alere) disclosed on March 14, 2016 that, in addition to an ongoing SEC investigation, it had received a grand jury subpoena from the DOJ "requiring the production of documents relating to, among other things, sales, sales practices and dealings with third parties (including distributors and foreign governmental officials) in Africa, Asia and Latin America and other matters related to the US Foreign Corrupt Practices Act."[207] Abbott Laboratories, which had agreed to acquire Alere in early 2016, reportedly filed suit in Delaware in December, seeking to terminate the merger agreement on the grounds that the DOJ investigation is a material adverse change.[208]

C. Financial Services

Government-led investigations of several major international banks continued to expand in 2016. On March 1, 2016, Barclays plc (Barclays) announced that it was being investigated by the SEC and DOJ in connection with its hiring practices in Asia. This is in addition to a separate SEC and DOJ investigation regarding whether the bank's relationships with third parties are FCPA-compliant.[209] The hiring investigation is part of a broader probe that includes approximately 10 US and European banks.[210] On February 22, 2016, HSBC plc (HSBC) had also disclosed that the SEC was investigating its hiring practices in Asia.[211]

In May 2016, Standard Chartered plc (Standard Chartered) reportedly informed the DOJ about possible bribery involving MAXpower Group Pte., an Indonesian power company in which Standard Chartered is a minority shareholder that may have been linked to US $750,000 in allegedly corrupt payments to government officials in Indonesia. After discovering the allegations, Standard Chartered reportedly removed the company's founding board members and installed its own directors in their place.[212]

D. Manufacturing and Other

Several new investigations were announced in the manufacturing sector in 2016. On September 23, 2016, Mexico-based cement manufacturer Cemex SAB de CV (Cemex) disclosed that an internal investigation into its conduct as well as that of its subsidiary, Cemex Latam

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[206] Misonix, Inc., Current Report (Form 8-K) (Sept. 27, 2016), https://www.sec.gov/Archives/edgar/data/880432/000161577416007430/s104223_8k.htm.
[207] Alere, Inc., Current Report (Form 8-K) (Mar. 14, 2016), https://www.sec.gov/Archives/edgar/data/1145460/000095015716001734/form8k.htm.
[208] Steven Davidoff Solomon, *In Abbott's Bid to Halt Purchase of Alere, the MAC Makes a Comeback*, N.Y. TIMES: DealBook (Dec. 7, 2016), http://www.nytimes.com/2016/12/07/business/dealbook/abbott-laboratories-alere-mac-clause.html?_r=0.
[209] Barclays PLC, Annual Report, at 22 (Mar. 1, 2016), https://www.home.barclays/content/dam/barclayspublic/docs/InvestorRelations/ResultAnnouncements/2015FYResults/20160301_Barclays_Bank_PLC_2015_Annual_Report.pdf.
[210] Margot Patrick, *Barclays Falls Under SEC Spotlight for Asian Hiring*, WALL ST. J. (Mar. 1, 2016), http://www.wsj.com/articles/barclays-falls-under-sec-spotlight-for-asian-hiring-1456826347.
[211] HSBC PLC, Annual Results (Form 6-k) (Feb. 22, 2016) https://www.sec.gov/Archives/edgar/data/1089113/000119163816001689/hsba201602226k1.htm.
[212] Chanyaporn Chanjaroen, *Standard Chartered Said to Tell US of Alleged MAXpower Bribery*, BLOOMBERG (May 18, 2016), https://www.bloomberg.com/news/articles/2016-05-19/standard-chartered-said-to-tell-u-s-of-alleged-maxpower-bribery.

Holdings, SA (Cemex Latam), in connection with their construction of a new cement plant in Maceo, Colombia, had "raised questions about the payment procedures related to the acquisition of the land and mining rights and benefits of the free tax zone in which the new cement plant is being built in Maceo. These payments – which the company said amounted to approximately US $20 million – did not adhere to Cemex's and Cemex Latam's established protocols."[213] The disclosure revealed that two senior executives were terminated as a result of the findings, the CEO of the subsidiary resigned, and the company informed the Colombian Attorney General of its findings.[214] On December 9, 2016, Cemex disclosed that it had received an SEC subpoena seeking information about possible FCPA violations in connection with this project.[215]

A number of investigations in this sector reportedly arise out of alleged conduct within acquired entities. For example, Mondelez International, Inc. (Mondelez), an Illinois-based food manufacturer, disclosed on February 19, 2016 that it had received a Wells notice informing the company that the SEC had made a preliminary determination to file an enforcement action.[216] Mondelez and the SEC reached agreement on a settlement that was announced on January 9, 2017. Mondelez agreed to a cease-and-desist order alleging books and records and internal control violations of the FCPA, and to pay US $13 million in monetary sanctions.

In addition, Florida-based chemicals manufacturer Platform Specialty Products Corporation (Platform) disclosed on March 13, 2016 that it had "discovered certain payments made to third-party agents in connection with Arysta's government tender business in West Africa which may be illegal or otherwise inappropriate."[217] Platform had purchased Arysta in February 2015, but stated that it did not learn of these potential FCPA violations until it began to implement its internal controls at the newly-acquired subsidiary. Platform stated that it voluntarily notified the SEC and DOJ about this matter.

Lennox International Inc. (Lennox) disclosed on October 17, 2016 that its subsidiary in Russia had made a payment of 30,000 rubles (approximately US $475) to a "Russian customs broker or official", which was done "purportedly" to release a shipment of goods being held by Russian customs due to inaccurate paperwork.[218] The company stated that it had initiated an investigation, which, according to the disclosure, "has raised questions regarding possible irregularities with respect to other Russian customs documents."[219]

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[213] Cemex S.A.B. de C.V., Report of Foreign Private Issuer (Form 6-K) (Sept. 23, 2016), https://www.sec.gov/Archives/edgar/data/1076378/000119312516718679/d244688d6k.htm.
[214] *Id.*
[215] Cemex S.A.B. de C.V., Report of Foreign Private Issuer (Form 6-K) (Dec. 9, 2016), https://www.sec.gov/Archives/edgar/data/1076378/000119312516789808/d351046d6k.htm.
[216] Mondelez International, Annual Report (Form 10-K) (Feb. 19, 2016), https://www.sec.gov/Archives/edgar/data/1103982/000119312516469394/d51394d10k.htm#tx513946.
[217] Platform Specialty Products Corp., Annual Report (Form 10-K) (Mar. 13, 2016), https://www.sec.gov/Archives/edgar/data/1590714/000159071416000097/pah10-k20151231document.htm?_ga=1.164439423.1182819648.1481655525.
[218] Lennox International Inc., Quarterly Report (Form 10-Q) (Oct. 17, 2016), https://www.sec.gov/Archives/edgar/data/1069202/000106920216000024/lii-2016930x10q.htm.
[219] Lennox International Inc., Quarterly Report (Form 10-Q) (Sept. 30, 2016), https://www.sec.gov/Archives/edgar/data/1069202/000106920216000024/lii-2016930x10q.htm.

On December 15, 2015, Sociedad Química y Minera de Chile SA (SQM), a Chile-based producer of potassium nitrate and iodine chemicals, publicly released the findings of its internal investigation into allegations that its dismissed CEO had authorized illegal payments to the country's largest conservative political party.[220] SQM's April 7, 2016 SEC filing stated that both the US and Chilean authorities were reviewing the company's conduct,[221] and, in January 2017, SQM agreed to settlements with the DOJ and SEC.[222]

E. Telecommunications

Millicom International Cellular SA (Millicom) announced in 2015 that it had conducted an investigation into, and reported to the US and Swedish enforcement authorities about, possible improper payments relating to a joint venture in Guatemala.[223] On May 4, 2016, Millicom reported that the Swedish Public Prosecutor had discontinued the preliminary investigation due to a lack of jurisdiction, but that the US investigation was ongoing.[224]

On June 6, 2016, Sweden-based telecommunications company Telefonaktiebolaget LM Ericsson (Ericsson) revealed that, in March 2013, it had "received a voluntary request from US authorities to answer a number of questions relating to Ericsson's operations."[225] The request reportedly related to Ericsson's "anti-corruption program and questions related to the Foreign Corrupt Practices Act."[226] Svenska Dagbladet, a Stockholm-based newspaper, citing unnamed sources, has reported that the SEC is investigating a matter that began with an internal whistleblower report about a China-based Ericsson manager possibly acquiring an interest in a subcontractor.[227]

F. Other Investigations

In April 2016, the Mossack Fonseca data leak, commonly referred to as the "Panama Papers", reportedly revealed 11.5 million documents containing confidential company and

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[220] Sociedad Química y Minera de Chile S.A. (SQM) Press Release, *SQM Informs Results of Shearman & Sterling Report* (Dec. 15, 2015), http://ir.sqm.com/English/investor-relation/press-releases/press-release-details/2015/SQM-Informs-Results-of-Shearman--Sterling-Report/default.aspx; Rosalba O'Brien, *Chile's Campaign Finance Scandal Fells CEO of SQM Fertilizer*, REUTERS (Mar. 17, 2015), http://www.reuters.com/article/chile-scandal-sqm-idUSL2N0WJ16220150317.

[221] Societad Quimica y Minera de Chile S.A., Report of Foreign Private Issuer (Form 6-K) (Apr. 7, 2016), https://www.sec.gov/Archives/edgar/data/909037/000114420416093235/v436293_6k.htm.

[222] Deferred Prosecution Agreement, *United States of America v. Sociedad Quimica y Minera de Chile, S.A.*, No. 1:17-cr-00013 (D.D.C. Jan. 13, 2017), https://www.justice.gov/criminal-fraud/file/930786/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Quimica y Minera de Chile, S.A.*, Exchange Act Release 79795 (Jan. 13, 2017), https://www.sec.gov/litigation/admin/2017/34-79795.pdf.

[223] Millicom Pres Release, *Millicom Reports to Authorities Potential Improper Payments on Behalf of its Guatemala Joint Venture*, (Oct. 21, 2015), http://mb.cision.com/Main/950/9852447/434107.pdf.

[224] *Swedish Prosecutor Notifies Millicom That It Has Discontinued Its Preliminary Investigation Due to Lack of Jurisdiction*, BUSINESS WIRE (May 9, 2016), http://www.businesswire.com/news/home/20160508005054/en/Swedish-Prosecutor-Notifies-Millicom-Discontinued-Preliminary-Investigation.

[225] Ericsson Press Release, *Ericsson Comments on Recent Media Reports on Questions Concerning Corruption* (Jun. 6, 2016), https://www.ericsson.com/news/2021434.

[226] *Id.*

[227] *Ericsson Faces US Corruption Probe –Swedish Newspaper*, REUTERS (Jun. 16, 2016), http://www.reuters.com/article/lm-ericsson-probe-idUSL8N1985OW.

banking data of the law firm's clients.[228] Among other possible revelations was that shell companies reportedly created by Mossack Fonseca allegedly were being used for possible fraud, tax evasion, bribery, sanctions evasion, and other purposes.[229] As of December 1, 2016, the Panama Papers reportedly have resulted in at least 150 inquiries, audits, and investigations in the US, UK, and other countries.[230] For example, one report states that, in a case that allegedly involved the use of shell companies created by Mossack Fonseca and others to conceal bribes, Italian prosecutors alleged that a nephew of a former Algerian foreign minister arranged about US $275 million in bribe payments to help Saipem win US $10 billion worth of pipeline contracts from Sonatrach, the Algerian national energy company.[231]

Wal-Mart Stores, Inc. (Wal-Mart) remains the subject of an SEC and DOJ investigation dating back to 2011. In October 2016, Wal-Mart reportedly rejected a US $600 million offer to settle investigations into alleged bribes paid in India, China, and Mexico to speed up zoning and building permits.[232]

Cognizant Technology Solutions Corporation (Cognizant) disclosed on September 27, 2016 that it was "conducting an internal investigation into whether certain payments relating to facilities in India were made improperly and in possible violation of the US FCPA and other applicable laws."[233] The company stated that it had voluntarily notified the DOJ and SEC.[234]

On March 31, 2016, Elbit Imaging Ltd. (Elbit Imaging), an Israel-based holding company with real estate interests in Eastern Europe, publicly disclosed that it was investigating potential FCPA violations related to a project in Romania.[235]

Dun & Bradstreet Corporation disclosed on November 2, 2016 that its investigation involving its China operations is ongoing and the company is continuing discussions with the SEC and DOJ.[236]

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[228] The International Consortium of Investigative Journalists, *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*, ICIJ (Apr. 3, 2016), https://panamapapers.icij.org/20160403-panama-papers-global-overview.html.
[229] *Id.*
[230] Will Fitzgibbon and Emilia Díaz-Struck, *Panama Papers Have Had Historic Global Effects- and the Impacts Keep Coming*, ICIJ (Dec. 1, 2016), https://panamapapers.icij.org/20161201-global-impact.html.
[231] Scott Shane, *Panama Papers Reveal Wide Use of Shell Companies by African Officials*, N.Y. TIMES (Jul. 25, 2016), http://www.nytimes.com/2016/07/25/world/americas/panama-papers-reveal-wide-use-of-shell-companies-by-african-officials.html.
[232] Tom Schoenberg & Matt Robinson, *Wal-Mart Balks at Paying US $600-Million-Plus in Bribery Case*, BLOOMBERG MARKETS (Oct. 6, 2016), https://www.bloomberg.com/news/articles/2016-10-06/wal-mart-said-to-balk-at-paying-600-million-plus-in-bribe-case.
[233] Cognizant Technology Solutions Corporation, Current Report (Form 8-K) (Sept. 27, 2016), https://www.sec.gov/Archives/edgar/data/1058290/000119312516726679/d263091d8k.htm.
[234] *Id.*
[235] Elbit Imaging Ltd., Audited Consolidated Financial Statements as of Dec. 31, 2015 (Attachment to Form 8-K) (Mar. 31, 2016), https://www.sec.gov/Archives/edgar/data/1027662/000121390016012118/f8k0316ex99i_elbit.htm.
[236] Dun & Bradstreet Corp., Quarterly Report (10-Q) (Nov. 2, 2016), https://www.sec.gov/Archives/edgar/data/1115222/000111522216000071/a2016q310-q.htm.

IV. RELATED DOJ/SEC ENFORCEMENT EFFORTS

A. Whistleblower Activity

Fiscal year 2016 was another active year for the SEC's whistleblower program, with awards to 13 whistleblowers.[237] Litigation regarding the scope of the Dodd Frank Act's anti-retaliation provisions also continued in 2016.

B. SEC 2016 Whistleblower Report

According to the SEC's annual report, the number of whistleblower tips continued to climb, with 4,218 reports during the 2016 fiscal year report compared to 3,923 reported in the previous year. There continued to be only a small percentage of FCPA-related tips, with only 238 reported (or 5.6% of the total amount) in fiscal year 2016.[238]

C. Recent Dodd-Frank Whistleblower Awards

Thirteen whistleblowers were awarded over US $57 million during the 2016 fiscal year, which is over half of the US $111 million that had been awarded since the whistleblower program began in August 2011. (The SEC has awarded another US $38 million since publishing its annual report for fiscal year 2016 in November.[239]) Six of the ten largest whistleblower awards were made in fiscal 2016, with the largest (and second-largest to date) being for approximately US $22 million.[240] In what appears to be the Commission's first FCPA whistleblower award, the SEC in May reportedly paid US $3.75 million to a BHP Billiton insider who informed the Commission that the company had given foreign officials luxury trips to the Beijing Olympics.[241]

Awards were made not only to company insiders and those whose tips allowed the SEC to initiate enforcement actions: one award was made to a company outsider whose detailed analysis allowed the SEC to bring a successful enforcement action, and others were made to individuals whose tips substantially aided existing investigations.[242] To date, 65% of awards have gone to company insiders, and 60% have gone to whistleblowers whose tips helped the SEC to initiate investigations.[243]

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[237] *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, SEC (Nov. 2016), https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf
[238] *Id.*
[239] Press Release, SEC, *SEC Announces $7 Million Whistleblower Award* (Jan. 23, 2017), https://www.sec.gov/news/pressrelease/2017-27.html.
[240] SEC, *supra* note 236.
[241] Nick McKenzie, Michael Bachelard & Richard Baker, *US awards $5 million to BHP Billiton whistleblower*, Austl. Fin. Rev. (Aug. 29, 2016); Press Release, SEC, *SEC Charges BHP Billiton With Violating FCPA at Olympic Games* (May 20, 2015).
[242] *Id.*
[243] Jon Eisenberg & Vince Martinez, *12 Things To Know About The SEC Whistleblower Program*, Law360 (Dec. 8, 2016), https://www.law360.com/articles/868792/12-things-to-know-about-the-sec-whistleblower-program.

D. Dodd-Frank Whistleblower Retaliation Developments

The SEC continued to bring enforcement actions against companies for alleged retaliation against whistleblowers. In September, the SEC brought its first stand-alone retaliation case, finding in administrative proceedings that a casino gaming company had terminated an employee after he reported potential financial statement issues to the company's senior management and the SEC.[244]

Also for the first time, the SEC charged a company for retaliating against an internal whistleblower. The Commission settled with SandRidge Energy Inc. on charges that an employee was fired for raising concerns to management about the company's accounting practices.[245]

The Second and Fifth Circuits remain split on whether the Dodd-Frank Act protects whistleblowers who report potential securities laws violations to company management, but not to the SEC.[246] This question is currently on appeal to four other circuits, one of which has heard oral argument already.[247]

The Commission also continued its enforcement stance against companies that seek to impede whistleblowers from reporting to the SEC. As described above (see Section II.B.6), in September 2016 the SEC settled charges that Anheuser-Busch InBev had prevented a former employee from communicating potential FCPA violations to the SEC by including nondisclosure terms in a separation agreement that would impose significant financial penalties for any violation.[248] In other actions, the SEC settled with companies found to have required outgoing employees to waive any whistleblower awards resulting from complaints they filed with the SEC,[249] and with others that had included overbroad nondisclosure or nondisparagement clauses in severance agreements, one of which allegedly hindered a former employee from sharing information with the SEC.[250]

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[244] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Int'l Game Tech.,* Release No. 78991 (Sept. 29, 2016), https://www.sec.gov/litigation/admin/2016/34-78991.pdf.
[245] Order Instituting Cease-and-Desist Proceedings, *In the Matter of SandRidge Energy, Inc.*, Release No. 79607 (Dec. 20, 2016), https://www.sec.gov/litigation/admin/2016/34-79607.pdf.
[246] *Compare Berman v. Neo@Ogilvy*, 801 F.3d 145, 155 (2nd Cir. 2015) (holding that protections apply to internal whistleblowers), *with Asadi v. G.E. Energy*, 720 F. 3d 620, 630 (5th Cir. 2013) (holding that only whistleblowers who report to the SEC are protected).
[247] *Verfuerth v. Orion Energy Sys., Inc.*, No. 16-3502 (7th Cir. filed Sept. 23, 2016); *Duke v. Prestige Cruises Int'l*, No. 16-15426 (11th Cir. filed Aug. 11, 2016); *Danon v. Vanguard Grp. Inc.*, No. 16-2881 (3d Cir. filed June 22, 2016); *Somers v. Digital Realty Trust Inc.*, No. 15-17352 (9th Cir. filed Dec. 1, 2015).
Although this question was also before the Sixth Circuit, that court disposed of the issue without resolving it. *Verble v. Morgan Stanley Smith Barney*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017).
[248] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Anheuser-Busch InBev SA/NV*, Release No. 78957 (Sept. 28, 2016), https://www.sec.gov/litigation/admin/2016/34-78957.pdf.
[249] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BlackRock, Inc.*, Release No. 79804 (Jan. 17, 2017), https://www.sec.gov/litigation/admin/2017/34-79804.pdf; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Health Net, Inc.*, Release No. 78590 (Aug. 16, 2016), https://www.sec.gov/litigation/admin/2016/34-78590.pdf; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Blue Linx Holdings Inc.*, Release No. 78528 (Aug. 10, 2016), https://www.sec.gov/litigation/admin/2016/34-78528.pdf.
[250] Order Instituting Cease-and-Desist Proceedings, *In the Matter of NeuStar, Inc.*, Release No. 79593 (Dec. 19, 2016), https://www.sec.gov/litigation/admin/2016/34-79593.pdf; Order Instituting Administrative and Cease-and-

E. Other Significant Whistleblower Developments

In a development with importance for compliance and legal professionals, a federal district court has ruled that privileged documents can be offered as evidence in an ex-general counsel's retaliation trial against his former employer. In *Wadler v. Bio-Rad Laboratories Inc.*, the plaintiff claimed that he had been fired for exposing FCPA violations in the company's China operations. The court decided that federal common law and the Sarbanes-Oxley Act preempt state rules respecting attorney-client privilege, and that the plaintiff could use any privileged or confidential documents "reasonably necessary to any claim or defense in the case."[251]

The Eighth Circuit joined three other federal appeals courts in adopting a reasonableness standard for Sarbanes-Oxley Act whistleblowers. In *Beacom v. Oracle America Inc.*, a whistleblower alleged that he had been unlawfully terminated for alerting management to revenue mis-projections of approximately US $10 million. Under the adopted standard, which no federal circuit has rejected so far, a whistleblower must establish that a reasonable person in his or her circumstances would believe that the employer had violated one of the laws specified by Sarbanes-Oxley. The Eighth Circuit affirmed summary judgment for the defendant employer, holding that US $10 million was a "minor discrepancy" in the company's overall revenue of US $31 billion and, therefore, that the whistleblower's "belief that Oracle was defrauding its investors was objectively unreasonable."[252]

F. FIFA Investigation

Since May 2015, the US Attorney's Office in Brooklyn, New York, has been pursuing charges against individuals and companies connected with the Fédération Internationale de Football Association (FIFA).[253] According to the indictments and guilty pleas in this matter, sports marketing companies and their corporate officers bribed officials of certain FIFA member associations in return for the lucrative media and marketing rights that these officials controlled. Charges include racketeering conspiracy, wire fraud and wire fraud conspiracy, money laundering and money laundering conspiracy, tax fraud, obstruction of justice and conspiracy to obstruct justice, and unlawful procurement of naturalization. In June 2016, FIFA reported the findings of an internal investigation, which described inside dealing by three former, high-level FIFA officials.[254]

Desist Proceedings, *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corp.*, Release No. 78141 (June 23, 2016), https://www.sec.gov/litigation/admin/2016/34-78141.pdf.

[251] *Wadler v. Bio-Rad Labs., Inc.*, No. 15-CV-02356-JCS, 2016 WL 7369246, at *14 (N.D. Cal. Dec. 20, 2016). On February 6, 2017, a jury awarded US $8 million to Andrew Wadler on his retaliation claim. Cara Bayles, *Jury Awards Bio-Rad's Ex-GC $8M For Retaliatory Firing*, Law360 (Feb. 6, 2017), https://www.law360.com/trials/articles/888816/jury-awards-bio-rad-s-ex-gc-8m-for-retaliatory-firing.

[252] *Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 381 (8th Cir. 2016).

[253] *United States v. Webb et al.*, No. 1:15-cr-00252 (E.D.N.Y. filed May 20, 2015).

[254] Media Release – Governance, *Attorneys for FIFA Provide Update on Internal Investigation and Details on Compensation for Former Top Officials*, FIFA (June 3, 2016), http://www.fifa.com/governance/news/y=2016/m=6/news=attorneys-for-fifa-provide-update-on-internal-investigation-and-detail-2799851.html.

To date, twenty individuals and two corporate defendants have pled guilty in the DOJ's FIFA corruption case. Some defendants have been charged in their home countries, which have declined to extradite these individuals to the US. In addition, Torneos y Competencias, an Argentinian sports marketing company accused of participating in the bribery scheme, entered into a four-year deferred prosecution agreement with the DOJ in December 2016 and agreed to pay forfeiture and penalties of US $112.8 million.[255] Trial in the FIFA corruption case has been scheduled for November 2017.

G. Kleptocracy Asset Recovery Initiative

In 2016, the DOJ's Kleptocracy Asset Recovery Initiative continued to recover proceeds related to foreign official corruption. The Kleptocracy Initiative is one of two teams that work under DOJ's Asset Forfeiture and Money Laundering Section (AFMLS). The Initiative partners with DOJ's Office of International Affairs, the FBI, and the Department of Homeland Security to "recover the proceeds of foreign official corruption", focusing on "assets in the US or which used the US financial system."[256] The Initiative started in 2010 with five DOJ attorneys and has plans to grow to twenty-three.[257]

As of February 2016, the Initiative had filed 25 cases against 20 foreign officials[258] and, according to *The New York Times*, has frozen "some US $3 billion" in corruption proceeds from its inception through the end of 2016.[259] However, it was reported earlier in 2016 that the DOJ had taken possession of only US $120 million, or about 8% of the assets it had sought, and a later report indicated that DOJ had returned only 5% of intercepted assets.[260] Included in this figure is US $1.5 million that was returned to Taiwan in July, which represented part of a US $6 million bribe received by the family of former President Chen Shui-Bian.[261]

The DOJ brought multiple new proceedings in 2016 under the Initiative. Several notable examples are summarized below:

- **1MDB**: 1Malaysia Development Berhad (1MDB) is a state-owned company that was established to aid Malaysia's economy through strategic investments. Investigators in the United States and elsewhere say that Malaysia's prime

[255] *United States v. Torneos y Competencias S.A.*, No. 1:16-cr-00634 (E.D.N.Y. filed Dec. 9, 2016).
[256] DOJ, Asset Forfeiture and Money Laundering Section (AFMLS), https://www.justice.gov/criminal-afmls.
[257] Dylan Tokar, *DOJ's Kleptocracy Initiative hiring seven new prosecutors*, Global Investigations Review (Nov. 16, 2016), http://globalinvestigationsreview.com/article/1076313/DoJ%E2%80%99s-kleptocracy-initiative-hiring-seven-new-prosecutors.
[258] Leslie Wayne, *Wanted by US: The Stolen Millions of Despots and Crooked Elites*, N.Y. Times (Feb. 16, 2016), http://www.nytimes.com/2016/02/17/business/wanted-by-the-us-the-stolen-millions-of-despots-and-crooked-elites.html?_r=1.
[259] Leslie Wayne, *Shielding Seized Assets From Corruption's Clutches*, N.Y. Times (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/business/justice-department-tries-to-shield-repatriations-from-kleptocrats.html?_r=0.
[260] David J. Lynch, *DOJ's kleptocracy unit faces 1MDB test*, Financial Times (Aug. 9, 2016), https://www.ft.com/content/d1321776-5b4e-11e6-9f70-badea1b336d4.
[261] Press Release, DOJ, *United States Returns $1.5 Million in Forfeited Proceeds from Sale of Property Purchased with Alleged Bribes Paid to Family of Former President of Taiwan* (July 7, 2016), https://www.justice.gov/opa/pr/united-states-returns-15-million-forfeited-proceeds-sale-property-purchased-alleged-bribes.

minister used the company as a slush fund from which he and his associates misappropriated US $3.5 billion. The DOJ has filed civil forfeiture actions to recover over US $1 billion in assets that allegedly were laundered through the United States.[262]

- **VimpelCom**: As noted above, the DOJ in February 2016 resolved bribery charges against the Dutch company VimpelCom Ltd. (VimpelCom), the world's sixth-largest telecommunications firm. The DOJ also filed a civil forfeiture complaint in February 2016 to seek the return of US $550 million from an Uzbek official to whom VimpelCom allegedly made corrupt payments. This follows a forfeiture complaint filed in June 2015 seeking the return of an additional US $300 million from the same official.

V. FCPA/RELATED CIVIL/DERIVATIVE LITIGATION

Government-led FCPA investigations again resulted in significant collateral civil litigation last year, including shareholder derivative and class action lawsuits, RICO, breach of contract, whistleblower retaliation, and other civil matters. Below we provide a brief overview of many of these matters.

A. Platform Specialty Products Corporation

Platform Specialty Products Corporation (Platform) faced both a putative shareholder class action lawsuit and a derivative shareholder lawsuit following its March 2016 disclosure of an internal investigation into potential FCPA violations by a recently-acquired subsidiary. Platform had acquired Arysta LifeScience Limited (Arysta) on February 17, 2015, and stated in a March 11, 2016 SEC filing that it had "discovered certain payments made to third-party agents in connection with Arysta's government tender business in West Africa which may be illegal or otherwise inappropriate."[263]

In a March 30, 2016 complaint, a class action plaintiff argued that Platform violated federal securities laws by making material misrepresentations and omissions regarding Arysta's alleged FCPA violations during the thirteen months between the Arysta acquisition and the disclosure of the internal investigation.[264] As evidence of false statements and omissions, the complaint pointed to a number of Platform's public statements about the general health of Arysta's business, as well as broad statements about Platform's internal FCPA compliance policies.[265] On December 8, the US District Court for the Southern District of Florida granted Platform's Motion to Dismiss[266] on the grounds that the class failed to identify any materially

[262] Press Release, DOJ, *United States Seeks to Recover More Than $1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund* (July 20, 2016), https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign.
[263] Platform Specialty Products Corp., Annual Report (Form 10-K) (Mar. 11, 2016), https://www.sec.gov/Archives/edgar/data/1590714/000159071416000097/pah10-k20151231document.htm.
[264] Complaint, *Brenda Dillard, et al. v. Platform Specialty Products Corp., et al.*, No. 9:16-cv-80490-DMM (S.D. Fla. Mar. 30, 2016).
[265] *Id.*
[266] Motion to Dismiss Amended Class Action Complaint, *Brenda Dillard, et al. v. Platform Specialty Products Corp., et al.*, No. 9:16-cv-80490-DMM (S.D. Fla. Sep. 7, 2016); Defendant Wayne Hewett's Motion to Dismiss

false statements or omissions with sufficient particularity, and that Platform and its officers lacked the required intent to violate securities laws.[267] Another Platform shareholder brought a derivative lawsuit against Platform's board on April 18, pursuing the same legal arguments,[268] but voluntarily sought and was granted dismissal without prejudice two months later.[269]

B. Qualcomm

On February 3, 2016, a Qualcomm Inc. (Qualcomm) shareholder initiated a derivative lawsuit against the directors of the telecommunications company, claiming the defendants had, among other things, "fail[ed] to implement a sufficient and proper system of internal controls for the purpose of detecting and preventing FCPA violations."[270] The complaint, filed in the US District Court for the Southern District of California, referred to a 2012 DOJ investigation and then-ongoing SEC investigation into Qualcomm's alleged payments to Chinese officials. In addition to the alleged lack of adequate internal controls, the plaintiff criticized the resources that Qualcomm had subsequently expended in order to investigate and defend the FCPA-related charges. Just weeks later, on March 1, 2016, the SEC and Qualcomm announced a settlement related to alleged FCPA violations in China.[271] The derivative shareholder lawsuit is currently pending.

C. Cognizant

New Jersey-based Cognizant Technology Solutions Corporation (Cognizant) has been named a defendant in four putative class action shareholder lawsuits in the wake of a September 30, 2016 SEC filing. In its Form 8-K, Cognizant announced the resignation of its CEO, and confirmed that it had disclosed to DOJ and SEC that "certain payments relating to facilities in India were made improperly and in possible violation of the FCPA and other applicable laws."[272] Since October 5, 2016, three separate plaintiffs have filed class action suits in the US District Court in Newark,[273] and, on February 3, 2017, the district court judge consolidated the three

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Amended Class Action Complaint, *Brenda Dillard, et al. v. Platform Specialty Products Corp., et al.*, No. 9:16-cv-80490-DMM (S.D. Fla. Sep. 7, 2016).

[267] Order Granting Motions to Dismiss, *Brenda Dillard, et al. v. Platform Specialty Products Corp., et al.*, No. 9:16-cv-80490-DMM (S.D. Fla. Dec. 8, 2016).

[268] Complaint, *Justin A. Tuttleman v. Martin E. Franklin, et al.*, No. 0:16-cv-60856-FAM (S.D. Fla. Apr. 18, 2016).

[269] Order Granting Voluntary Dismissal Without Prejudice, *Justin A. Tuttleman v. Martin E. Franklin, et al.*, No. 0:16-cv-60856-FAM (S.D. Fla. Jun. 23, 2016).

[270] Verified Shareholder Derivative Complaint, *Danny Huntley v. Steven M. Mollenkopf, et al.*, No. 3:16-cv-00294-BTM-MDD, at 4 (S.D. Cal. Feb. 3, 2016).

[271] Order Instituting Cease-and-Desist Proceedings, *In re Qualcomm Incorporated*, Exchange Act Release No. 77261 (Mar. 1, 2016), https://www.sec.gov/Archives/edgar/data/1058290/000119312516726679/d263091d8k.htm.

[272] Cognizant Technology Solutions Corp., Current Report (Form 8-K) (Sep. 30, 2016), https://www.sec.gov/Archives/edgar/data/1058290/000119312516726679/d263091d8k.htm.

[273] Class Action Complaint for Violations of Federal Securities Laws, *Shane Park, et al. v. Cognizant Technology Solutions Corp., et al.*, No. 2:16-cv-06509-WHW-CLW. (D. N.J. Oct. 5, 2016); Class Action Complaint, *Anna Marie Daddabbo, et al. v. Cognizant Technology Solutions*, No. 2:16-cv-08010-WHW-CLW (D.N.J. Oct. 27, 2016); Complaint for Violation of Federal Securities Laws, *Ann Beck Johnson, et al. v Cognizant Technology Solutions, et al.*, No. Case 2:16-cv-08641-KSH-CLW (D.N.J. Nov. 18, 2016).

actions into a single case.[274] Another plaintiff has initiated a suit in New Jersey state court.[275] Each federal plaintiff has alleged that Cognizant and top officials intentionally deceived the public by failing to disclose in regulatory filings that improper payments were made to Indian government officials.

D. PTC

On March 7, 2016, a putative shareholder class action lawsuit was filed in the US District Court in Boston against Massachusetts-based PTC, Inc. (PTC) relating to then-ongoing DOJ and SEC investigations into the dealings of PTC's Chinese subsidiaries.[276] The complaint alleged, among other things, that PTC had not cooperated sufficiently with SEC and DOJ during an investigation into whether PTC China improperly provided recreational travel to Chinese government officials in violation of the FCPA.[277] As a result, the plaintiff alleged, PTC incurred higher penalties in its February 2016 settlements with DOJ and SEC[278] than it would have had it cooperated more fully with the agencies.[279] The plaintiff alleged that PTC's public statements related to the SEC and DOJ investigations were "false and misleading at all relevant times" during the class period between November 2011 and July 2015.[280] The parties reached an agreement-in-principle to settle the lawsuit in October 2016, and, on November 1, the court issued a settlement order of dismissal.[281]

E. Alere

Shareholder plaintiffs brought two putative class action suits against Alere, Inc. (Alere) shortly after the Massachusetts-based medical device manufacturer announced on March 14, 2016 that it was the subject of a DOJ FCPA investigation and that it had improperly reported revenues in earlier financial statements.[282] Alere, which was already cooperating with an ongoing SEC probe into possible FCPA violations, disclosed that it had received a DOJ

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[274] Order Appointing the Institutional Investor Group as Lead Plaintiff, Approving Its Selection of Lead Counsel, and Consolidating Related Actions, *Shane Park, et al. v. Cognizant Technology Solutions Corp., et al*., No. 2:16-cv-06509-WHW-CLW. (D.N.J. Feb. 3, 2017)

[275] Cognizant's Quarterly Report, filed on November 7, 2016, stated "[o]n October 31, 2016, a lawsuit was filed in the Bergen County Superior Court - Law Division, New Jersey, naming us, all of our directors and certain of our current and former executive officers as defendants. The Company has not yet been served with the complaint." Cognizant Technology Solutions Corp. Quarterly Report (Form 10-Q) (Nov. 7, 2016), https://www.sec.gov/Archives/edgar/data/1058290/000105829016000076/ctsh2016930-10q.htm#s22ac583bc6bb44d0a5cb4a4490e0fd2c.

[276] Class Action Complaint for Violations of Federal Securities Laws, *Matthew Crandall, et al. vs. PTC Inc., et al.*, No. 1:16-cv-10471-WGY (D. Mass. Mar. 7, 2016).

[277] *Id.* at 4-5.

[278] Order Instituting Cease-and-Desist Proceedings, *In re PTC Inc.*, Exchange Act Release No. 77145 (Feb. 16, 2016), https://www.sec.gov/litigation/admin/2016/34-77145.pdf; Non-Prosecution Agreement, *In re Parametric Technology (Shanghai) Software Co. Ltd. and Parametric Technology (Hong Kong) Limited* (Feb. 16, 2016), https://www.sec.gov/litigation/admin/2016/34-77145.pdf.

[279] Class Action Complaint, *Crandall v. PTC*, *supra* note 275, at 4-5.

[280] *Id.* at 10.

[281] Settlement Order of Dismissal, *Matthew Crandall, et al. vs. PTC Inc., et al.*, No. 1:16-cv-10471-WGY (D. Mass. Nov. 1, 2016).

[282] Class Action Complaint for Violations of the Federal Securities Laws, *Judith Godinez, et al. v. Alere, Inc., et al.*, No. 1:16-cv-10766-PBS (D. Mass. Apr. 21, 2016); Class Action Complaint for Violations of the Federal Securities Laws, *Michael P. Breton, et al. v. Alere, Inc. et al.*, No. 1:16-cv-10834-PBS (D. Mass. May 4, 2016).

subpoena "requiring the production of documents relating to, among other things, sales, sales practices and dealings with third parties (including distributors and foreign governmental officials) in Africa, Asia and Latin America and other matters related to the US Foreign Corrupt Practices Act."[283] Pharmaceutical firm Abbott Laboratories had agreed to acquire Alere in early 2016, but, in December 2016, initiated litigation to terminate the merger.[284]

The consolidated complaint, filed in the US District Court for the District of Massachusetts on September 23, 2016, focused primarily on the purported accounting irregularities and their implications for the impending Abbott-Alere merger, but also accused Alere of making a material omission in violation of securities laws when it failed to disclose that it was aware of potential FCPA violations as early as 2013.[285] The court has yet to rule on Alere's November 8 motion to dismiss the complaint.[286]

F. Bristol-Myers Squibb

On August 5, 2016, a Bristol-Myers Squibb Co. (BMS) investor filed a derivative lawsuit against the directors of the New York-based pharmaceutical company related to earlier FCPA penalties incurred by BMS, one of three such lawsuits to be filed in New York state court since December 2015.[287] BMS had reached a settlement with the SEC related to alleged FCPA violations by a China-based joint venture on October 5, 2015, which is discussed in Steptoe's 2015 FCPA Year in Review.[288] The plaintiff in *Reese* alleged that BMS directors "breached their fiduciary duties by failing to stop [BMS] officials in China from making cash payments and providing other improper benefits to healthcare providers…at state-owned and state-controlled hospitals in exchange for prescription sales controls."[289] The plaintiff claimed that, in addition to the US $14.7 million in penalties and disgorgement under the 2015 SEC order, BMS had also incurred "millions" in FCPA-related investigative costs and expenses, and will incur "millions more" in costs and expenses arising from the implementation of remedial measures in the SEC order.[290]

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[283] Alere, Inc., Current Report (Form 8-K) (Mar. 14, 2016), https://www.sec.gov/Archives/edgar/data/1145460/000095015716001734/form8k.htm

[284] Steven Davidoff Solomon, *In Abbott's Bid to Halt Purchase of Alere, the MAC Makes a Comeback*, *N.Y. TIMES*: DealBook (Dec. 7, 2016), http://www.nytimes.com/2016/12/07/business/dealbook/abbott-laboratories-alere-mac-clause.html?_r=0.

[285] Consolidated Class Action Complaint for Violations of the Federal Securities Laws, *Judith Godinez, et al. v. Alere, Inc., et al.*, No. 1:16-cv-10766-PBS (D. Mass. Sep. 23, 2016).

[286] Defendants' Motion to Dismiss the Consolidated Amended Class Action Complaint, *Judith Godinez, et al. v. Alere, Inc., et al.*, No. 1:16-cv-10766-PBS (D. Mass. Nov. 8, 2016).

[287] Verified Shareholder Derivative Complaint, *Richard L. Reese v. Lamberto Andreotti, et al.*, 654132/2016 (N.Y. Sup. Ct. Aug. 4, 2016); Shareholder Derivative Complaint for Breach of Fiduciary Duty of Loyalty and Unjust Enrichment, *Albert Deckter v. Lamberto Andreotti, et. al*, 654390/2015 (N.Y. Sup. Ct. Dec. 23, 2015); Bristol-Myers Squibb Company, Quarterly Report (Form 10-Q), Oct. 27, 2016, https://www.sec.gov/Archives/edgar/data/14272/000001427216000491/bmy-20160930x10q.htm.

[288] Order Instituting Cease-and-Desist Proceedings, *In re Bristol-Myers Squibb Company*, Exchange Act Release No. 76073 (Oct. 5, 2015), https://www.sec.gov/litigation/admin/2015/34-76073.pdf.

[289] Derivative Complaint, *Reese v. Andreotti*, *supra* note 286, at 6.

[290] *Id.* at 23.

G. Yahoo/Baker & McKenzie

On March 31, 2016, Judge Alison Nathan in the Southern District of New York dismissed with prejudice a RICO complaint filed by two Mexican corporate directory listing service companies alleging that Yahoo! Inc. (Yahoo) and its attorneys at Baker & McKenzie LLP (Baker & McKenzie) had bribed officials in the Mexican judiciary – both at the trial level and, when that was unsuccessful, on appeal of a US $2.7 billion judgment that had been issued against Yahoo.[291] The complaint was filed on September 10, 2014, and it once again showed the many ways that allegations of foreign bribery can lead to legal headaches. Its dismissal was significant in part for the finding that the US mail fraud, wire fraud and Travel Act statutes do not apply extraterritorially. Baker & McKenzie had represented Yahoo in the underlying Mexican litigation that led to the judgment in favor of the plaintiffs, which had to do with Yahoo's alleged breach of a contract to produce phone directories. The plaintiffs' SDNY RICO claim alleged that the defendants sought to obtain a favorable result in the Mexican litigation through bribery. The Court concluded that the plaintiffs failed to plausibly allege a pattern of racketeering activity by any of the defendants. Judge Nathan further ruled that plaintiffs' allegations, which focused on activity in Mexico, were insufficient to state violations of mail fraud, wire fraud, and of the Travel Act because those statutes do not apply extraterritorially; therefore, the allegations could not serve as the basis for a RICO claim.

H. Siemens

On July 24, 2014, 100Reporters LLC, a nonprofit anti-corruption-focused news organization, sued DOJ in the District Court for the District of Columbia under the Freedom of Information Act (FOIA) in an effort to obtain the records of the 2008 guilty pleas of Siemens AG (Siemens) and three of its subsidiaries and the subsequent four-year independent monitorship by former German Finance Minister Dr. Theodore Waigel.[292] Siemens and the monitor were allowed to intervene to protect their non-disclosure interests. On March 22, 2016, DOJ and the intervenors moved for summary judgment on the grounds that the monitor's records should not be released under FOIA because they fall under the exemptions for law enforcement and business proprietary information. Siemens argued that the monitor possessed records that contained extensive details about its business operations and compliance practices, which should not be subject to public release. The court has still not ruled on the motions for summary judgment.[293] If the court were to grant public release of the records of an FCPA monitorship, it would have a profound impact on companies' willingness to agree to those arrangements in the future as part of their FCPA settlements, and would sound alarm bells for companies that have been subject to monitorships in the past.

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[291] Order Granting Motion to Dismiss, *Worldwide Directories, S.A. De C.V. et al. v. Yahoo! Inc. et al.*, No. 1:14-cv-07349-AJN (SDNY March 31, 2016).
[292] Complaint for Injunctive Relief, *100 Reporters LLC v. United States*, No. 1:14-cv-01264-RC, 2014 WL 6817009 (D.D.C. July 24, 2014).
[293] The last docket entry as of December 15, 2016 is the Reply to Opposition to Motion for Summary Judgment by 100Reporters LLC, *100 Reporters LLC v. United States*, No. 1:14-cv-01264-RC, 2014 WL 6817009 (D.D.C. September 22, 2016).

I. Wal-Mart

Wal-Mart Stores, Inc. (Wal-Mart) came under investigation for alleged FCPA violations in Mexico in 2012, and continues to face collateral litigation (including derivative suits and class actions) in federal and state court. Shareholder derivative suits were filed and consolidated into two actions, one in federal district court in Arkansas and one in state court in Delaware. On March 31, 2015, Judge Susan Hickey of the US District Court for the Western District of Arkansas dismissed the federal case on the basis that the plaintiff failed to serve a demand on the board.[294]

The shareholders appealed to the Eighth Circuit, which affirmed the decision on July 22, 2016. In doing so, the Eighth Circuit upheld strict requirements for alleging demand futility and thus heightened the barrier to shareholders bringing derivative suits.[295]

With the Arkansas decision affirmed on appeal, the Delaware Chancery Court granted Wal-Mart's directors' motion to dismiss on the grounds of issue preclusion.[296] The Delaware plaintiffs have appealed to the Delaware Supreme Court.

J. Och-Ziff

Och-Ziff Capital Management Group LLC (Och-Ziff), the only publicly traded hedge fund, has been the target of several shareholder claims arising from allegations and subsequent settlements for FCPA violations in Zimbabwe, the Republic of the Congo, the Democratic Republic of the Congo, and elsewhere. As discussed above in Section II.B.1.b, on September 29, 2016, the SEC announced that Och-Ziff Capital Management Group has agreed to pay nearly US $200 million to settle civil charges of violating the FCPA.[297] On the same day, Och-Ziff and OZ Africa Management GP LLC entered into a three-year deferred prosecution agreement with the DOJ and agreed to pay a criminal penalty of more than US $213 million.[298]

On September 2, 2015, a shareholder filed a derivative action in New York County against Och-Ziff claiming failure to prevent and disclose FCPA violations in Africa.[299] A putative class action was also filed in the Southern District of New York in 2014, claiming failure to disclose the details of the activities that gave rise to the federal FCPA investigations.[300]

The derivative suit was dismissed by New York Supreme Court Judge Eileen Bransten on September 23, 2016 on the grounds that Och-Ziff had met its obligation to investigate the

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[294] Amended Order, *In re Wal-Mart Stores, Inc. Shareholder Derivative Litigation*, No. 12-cv- 4041 (W.D. Ark. Apr. 3, 2015).
[295] *Cottrell v. Duke*, No. 15-1869, 2016 WL 3947811 (8th Cir., July 22, 2016).
[296] *In re Wal-Mart Stores, Inc. Delaware Derivative Litigation*, No. 7455cB, 2016 WL 2908344 (Del. Ch. Ct., May 13, 2016).
[297] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank*, Exchange Act Release No. 78989 (Sept. 29, 2016), https://www.sec.gov/litigation/admin/2016/34-78989.pdf.
[298] Plea Agreement, *United States v. Oz Africa Management GP, LLC,* No. 16-515, (Sept. 29, 2016), https://www.justice.gov/opa/file/899316/download.
[299] Summons and Complaint, *Kumari et al. v. Och et al.*, No. 653016/2015 (N.Y. Sup. Ct. Sept. 2, 2015).
[300] *Menaldi v Och-Ziff Capital Management Group LLC et al,* No. 14-03251, (S.D.N.Y. May 5, 2014).

investors' 2014 demand letter. In a written opinion, Judge Bransten said that the "committee considered plaintiff's demand and the nature of her claims over the course of a few months, and thus…the board acted in good faith and reasonably with respect to plaintiff's letter demand."[301]

Regarding the class action, Judge Oetken of the Southern District of New York dismissed several claims in February 2016, including securities fraud claims. Judge Oetken certified the class on September 14, 2016, only to vacate it six hours later when told that the company had not had a chance to object.[302] The plaintiffs filed a second amended class action complaint on November 17, 2016, and defendants filed a motion to dismiss the consolidated second amended class action complaint on January 11, 2017. In moving for dismissal, the defendants argued that plaintiffs failed to plead facts giving rise to a strong inference of fraudulent intent.[303]

K. Gerdau

A class action complaint for violations of the federal securities laws was filed on May 26, 2016 against Gerdau SA, a Brazilian manufacturer of commercialized steel products.[304] According to the complaint, the defendants made materially false and misleading statements regarding the company's business and operational policies by engaging in a bribery scheme in Brazil. Specifically, plaintiffs alleged that Gerdau had defrauded Brazilian tax authorities of roughly US $429 million through money laundering and influence peddling. A consolidated complaint was filed on October 31, 2016, and Gerdau filed a motion to dismiss on January 17, 2017.[305]

L. Banco Bradesco

Similarly, Banco Bradesco SA has been accused of corruption-related offenses as part of an investigation into bribery of Brazilian tax officials. The country's second-biggest private sector bank was alleged to have engaged in a bribery scheme in collusion with the Brazilian Finance Ministry's Administrative Board of Tax Appeals (CARF), avoided a US $828 million tax liability, and engaged in bribery, money laundering, and corruption. A class action complaint for violations of US securities law was filed on June 3, 2016.[306] No class has yet been certified by the court, and defendants filed a motion to dismiss on December 23, 2016, arguing failure to state a Section 10(b) claim.[307]

M. Las Vegas Sands

Las Vegas Sands Corporation settled SEC and DOJ enforcement actions in April 2016 and February 2017, respectively (see Section II.B.3.a, above).[308]

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[301] *Kumari et al. v. Och et al.*, No. 653016/2015 (N.Y. Sup. Ct. Sept. 2, 2015).
[302] *Menaldi* at ECF No. 67.
[303] *Id. at* ECF No. 103.
[304] *Boland et al v. Gerdau S.A. et al*, No. 16-3925, (S.D.N.Y. May 26, 2016), ECF No. 1.
[305] *Id.* at ECF No. 37.
[306] *In re Banco Bradesco S.A. Securities Litigation*, No. 16-4155 (S.D.N.Y. Nov. 21, 2016).
[307] *Id.* at ECF. No.61.
[308] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Las Vegas Sands Corp*., Exchange Act Release No. 77555 (April 7, 2016), https://www.sec.gov/litigation/admin/2016/34-77555.pdf.

Sands also was sued by its former top Macau executive Steve Jacobs for wrongful termination. The six-year-long lawsuit reportedly settled on June 1, 2016.[309] As an outgrowth of the recent litigation, a shareholder filed a derivative lawsuit on July 8, 2016, alleging breach of fiduciary duty and wasting corporate assets.[310] The same shareholder has filed similar suits twice before, which both have been dismissed by a Nevada federal judge.[311]

N. Hyperdynamics

On October 6, 2016, a shareholder voluntarily dismissed a derivative lawsuit against Hyperdynamics Corporation (Hyperdynamics) relating to a SEC investigation involving public relations and lobbying expenses paid to third parties in the Republic of Guinea that were later found to have been controlled by a Hyperdynamics employee.[312] Hyperdynamics had resolved the SEC action in September 2015.[313]

In addition, Hyperdynamics' wholly-owned subsidiary, SCS Corporation, filed breach of contract actions against its partners in an offshore Guinea exploration operating agreement and a production sharing contract with the Government of Guinea, alleging that they wrongly used the SEC investigation against Hyperdynamics as a pretext to stop work on their joint projects.[314] The defendants are Tullow Guinea Ltd. (Tullow), a wholly-owned subsidiary of Tullow Oil, plc, and Dana Petroleum (E&P) Limited (Dana), a wholly-owned subsidiary of the Korean National Oil Company.[315] However, Hyperdynamics voluntarily dismissed the court action shortly after filing its complaint.[316] It also announced a settlement in a related arbitration proceeding on August 17, 2016.[317] SCS released all claims against Tullow and Dana in return for Tullow and Dana withdrawing from the production sharing contract, and transferring their interests in the project along with US $686,570 to SCS.[318] SCS agreed to pay Dana a success fee based upon the certified reserves of the project if it results in a discovery.[319]

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[309] Kate O'Keeffe and Alexandra Berzon, *Las Vegas Sands to Pay More Than $75 Million to Settle Suit Filed by Former Macau CEO*, WALL ST. J. (June 1, 2016), http://www.wsj.com/articles/las-vegas-sands-to-pay-more-than-75-million-to-settle-suit-filed-by-former-macau-ceo-1464752315.

[310] Richard N. Velotta, *Shareholder sues Sands officials, accusing them of wasting millions of dollars*, LAS VEGAS REVIEW-JOURNAL, (July 8, 2016), http://www.reviewjournal.com/news/crime-courts/shareholder-sues-sands-officials-accusing-them-wasting-millions-dollars.

[311] Dani Meyer, *No Sanctions for Attys in Twice-Dismissed Vegas Sands Suit*, LAW360, (January 28, 2016), http://www.law360.com/articles/751834/no-sanctions-for-attys-in-twice-dismissed-vegas-sands-suit.

[312] Notice of Voluntary Dismissal without Prejudice, *Stahelin v. Hyperdynamics*, No. 4:14-cv-00649 (S.D. Tex. Oct. 6, 2016).

[313] SEC Order Instituting Cease-and-Desist Proceedings, Release No. 76006 (Sept. 29, 2015).

[314] Plaintiff's Original Complaint, Request for Emergency Declaratory Relief & Injunction, *SCS Corporation Ltd. v. Tullow Guinea Ltd., and Dana Petroleum (E&P) Ltd.*, Case 4:16-cv-00076 (S.D.Tex. Jan. 8, 2016); *Hyperdynamics Announces Filings of Legal Proceedings Concerning Contract Breaches by Tullow and Dana* (Jan. 11, 2016), http://investors.hyperdynamics.com/releasedetail.cfm?ReleaseID=984717.

[315] Plaintiff's Original Complaint, Request for Emergency Declaratory Relief & Injunction, *SCS Corporation Ltd. v. Tullow Guinea Ltd., and Dana Petroleum (E&P) Ltd.*, Case 4:16-cv-00076 (S.D.Tex. Jan. 8, 2016).

[316] Plaintiff's Notice of Nonsuit without Prejudice *SCS Corporation Ltd. v. Tullow Guinea Ltd., and Dana Petroleum (E&P) Ltd*., Case 4:16-cv-00076 (S.D.Tex. Jan. 28, 2016).

[317] Hyperdynamics Press Release, *Hyperdynamics Announces Settlement of Arbitration with Tullow and Dana* (Aug. 17, 2016), http://investors.hyperdynamics.com/releasedetail.cfm?ReleaseID=984717.

[318] *Id.*

[319] *Id.*

O. Key Energy

On March 31, 2016, a court granted a motion by Key Energy Services Inc. (Key Energy) to dismiss a securities fraud lawsuit.[320] The action was brought in the wake of the company's announcement that Mexico's state-owned Petróleos Mexicanos was conducting an audit of its dealings with Key Energy, along with the disclosure that the SEC was investigating potential FCPA violations in Russia.[321] The SEC had resolved its investigation on August 11, 2016 after Key Energy agreed to pay US $5 million in disgorgement.[322]

P. Cobalt

Cobalt International Energy Inc. (Cobalt) continues to be involved in a securities fraud class action stemming from FCPA allegations in Angola. At issue is an agreement between Cobalt and Sonangol EP (Sonangol), the Angolan national oil company, to acquire an interest in an offshore oil exploration block in Angola.[323] In 2009, Angola's Parliament issued two decrees assigning an interest in the blocks to Nazaki Oil & Gaz (Nazaki), Sonangol P&P, and Alper Oil, Limitada.[324] Due to an SEC investigation regarding a possible connection between Nazaki and senior government officials in Angola, the SEC and DOJ began formal investigations into whether Cobalt had violated the FCPA.[325] The SEC terminated the investigation without enforcement action in early 2015, and the DOJ reportedly terminated its investigation without charges in February 2017.[326]

Two securities fraud cases were brought against Cobalt by shareholders and underwriters of Cobalt stock offerings. These cases were consolidated on March 3, 2015 in the Southern District of Texas.[327] In their consolidated class action complaint, the shareholders claimed that Cobalt misrepresented how it gained access to oil wells as well as the value of the wells in Angola. On January 19, 2016, the court denied the defendants' motion to dismiss on almost all grounds.[328] On November 2, 2016, the plaintiffs filed a motion to certify a class, which is still

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[320] Opinion and Order, *In re Key Energy Services, Inc. Securities Litigation*, Civ. A. No. 4:14-CV-2368 (S.D.Tex. April 1, 2016).
[321] See Steptoe's 2015 FCPA Year in Review at 38, http://www.steptoe.com/assets/htmldocuments/Steptoes 2015 FCPA Year in Review.pdf.
[322] SEC Order Instituting Cease-and-Desist Proceedings, Release No. 78558/3794 (Aug. 11, 2015).
[323] Complaint for Violations of the Federal Securities Law, *St. Lucie County Fire District Firefighters' Pension Trust Fund et al. v. Bryant et a*l., No. 4:2014-cv-03428 (S.D.Tex. Nov. 11 2014); Complaint, *Neuman v. Cobalt International Energy, Inc., et al.*, No. 4:14-cv-03488 (S.D.Tex. Dec. 5, 2014).
[324] *Id.*
[325] Cobalt International Energy, Current Report (Form 8-K), (March 11, 2011), http://www.sec.gov/Archives/edgar/data/1471261/000110465911013928/a11-7846_18k.htm; *see also* Memorandum and Order, *Ogden v. Bryant et al*., Case 4:15-cv-00139 (S.D.Tex. Feb. 2, 2016).
[326] Cobalt Press Release, Cobalt Announces Termination of SEC Investigation (Jan. 28, 2015), http://www.cobaltintl.com/newsroom/cobalt-announces-termination-of-sec-investigation; Cobalt Press Release, Cobalt Announces Closing of DOJ Investigation (Feb. 9, 2017), http://www.cobaltintl.com/newsroom/cobalt-announces-closing-of-doj-investigation.
[327] Order to Consolidate Cases, *In re Cobalt International Energy, Inc. Securities Litigation*., Case 4:14-cv-3428 (S.D.Tex. March 3, 2015).
[328] Memorandum and Order, *In re Cobalt International Energy, Inc. Securities Litigation*., Case 4:14-cv-3428 (S.D.Tex. Jan. 19, 2016).

pending before the court.[329] The case has been administratively closed pending a decision by the court on the Class Certification Motion.[330]

In addition to the class actions, a shareholder derivative suit was brought in the Southern District of Texas. On November 25, 2015, the court granted the defendants' motion to dismiss, as the plaintiff had not alleged a factual basis for demand futility on a director-by-director and claim-by-claim basis or alleged when he held shares of Cobalt stock.[331] Although the court allowed the plaintiff a chance to file an amended complaint to fix the defects, the plaintiff did not do so, and the case was dismissed on February 2, 2016.[332]

Q. Embraer

As described above, Embraer SA (Embraer) paid the SEC over US $205 million to resolve allegations that the company violated the FCPA. In August 2016, shareholders filed a lawsuit against Embraer alleging that the company, among other things, failed to disclose that it had paid bribes to secure contracts in the Dominican Republic.[333]

R. Operation *Lava Jato* Litigation

Brazilian energy company Petróleo Brasileiro SA (Petrobras) continues to be the target of lawsuits stemming from Brazil's Operation *Lava Jato* (Car Wash), which uncovered an alleged fraud, corruption and bid-rigging scheme in which funds derived from inflated Petrobras contracts were siphoned off to political parties, politicians and others in Brazil. As a result of an SEC and DOJ investigation, nearly 20 shareholder derivative lawsuits were launched against the company in the United States and consolidated in the Southern District of New York.[334] The district court certified the class, and the Second Circuit stayed litigation in August 2016, pending an interlocutory appeal of class certification.[335] Notably, a number of plaintiffs have stipulated to dismissal of the claims against Petrobras with prejudice, precluding those plaintiffs from raising the claims at a later date.[336]

On April 30, 2015, Centrais Eletricas Brasileiras SA (Eletrobras), Brazil's national power company, disclosed that a cooperating witness in Operation *Lava Jato* stated that "there were discussions negotiating the payment of alleged bribes" to the CEO of an Eletrobras subsidiary

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[329] Plaintiff's Motion for Class Certification and Appointment of Class Representatives and Class Counsel, *In re Cobalt International Energy, Inc. Securities Litigation*, Case 4:14-cv-3428 (S.D.Tex. Nov. 2, 2016).
[330] Order, *In re Cobalt International Energy, Inc. Securities Litigation*, Case 4:14-cv-3428 (S.D.Tex. Dec. 22, 2016). On February 3, 2017, the court granted an extension for the defendants to respond to the motion for class certification in light of the plaintiffs' filing under seal a motion for leave to amend their complaint. Order, *In re Cobalt International Energy, Inc. Securities Litigation*, Case 4:14-cv-3428 (S.D.Tex. Feb. 3, 2016).
[331] Memorandum and Order, *Ogden v. Bryant et al*., Case 4:15-cv-00139 (S.D.Tex. Feb. 2, 2016).
[332] Order of Dismissal, *Ogden v. Bryant et al*., Case 4:15-cv-00139 (S.D.Tex. Feb. 2, 2016).
[333] Complaint, *Kukkadapu v. Embraer S.A.*, No. 16-cv-6277 (S.D.N.Y. Aug. 8, 2016).
[334] *See* Scheduling and Consolidation Order, *In re Petrobras Securities Litigation*, No. 14-cv-9662 (S.D.N.Y. Mar. 24, 2015), ECF No. 105.
[335] Order of US Court of Appeals, *In re Petrobras Securities Litigation*, No. 14-cv-9662 (S.D.N.Y. Aug. 8, 2016) (US Court of Appeal Case No. 16-1914), ECF No. 701.
[336] *See, e.g.*, Stipulated Dismissal Pursuant to Fed. R. Civ. P. 41, *In re Petrobras Securities Litigation*, No. 14-cv-9662 (S.D.N.Y. Dec. 13, 2016), ECF No. 729.

regarding the construction of a nuclear a power plant.[337] In 2016, the CEO of the subsidiary was sentenced in Brazil to serve 43 years for corruption and obstruction of an investigation.[338] In 2015, shareholders filed a lawsuit claiming that Eletrobras, among other things, maintained deficient internal controls and failed to disclose that senior leadership was in non-compliance with the Eletrobras Code of Ethics.[339] The cases were consolidated in the Southern District of New York, and a motion to dismiss is currently pending.[340]

On December 14, 2016, Brazilian chemical company Braskem SA (Braskem) – an entity controlled by Petrobras and others affiliated with Operation *Lava Jato* – agreed to pay Brazilian prosecutors approximately US $957 million in fines and penalties to resolve corruption allegations stemming from the Petrobras investigation.[341] In 2015, shareholders filed a lawsuit in response to allegations arising from Operation *Lavo Jato*, claiming that Braskem, among other things, made false and misleading representations about the status of its internal controls.[342] The cases were consolidated in the Southern District of New York, and two motions to dismiss currently are pending.[343]

VI. NON-US ENFORCEMENT, ONGOING INVESTIGATIONS AND LEGAL DEVELOPMENTS

A. United Kingdom

The investigation and prosecution of corporate and individual wrongdoing has continued to gain significant momentum in the UK in 2016, with the SFO entering into its second Deferred Prosecution Agreement (DPA) and initiating new investigations against a number of companies. There has been a continued emphasis by both prosecutors and regulators on individual and corporate responsibility, as well as a heightened focus on money laundering. In order to expand the range of offenses for which corporates can be held strictly liable, significant steps have been taken to introduce new offenses of corporate failure to prevent tax evasion and corporate failure to prevent economic crime.

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[337] Adam Klasfeld, *Brazilian Bribery Claims Splash to Electric Utility*, COURTHOUSE NEWS SERVICE (July 22, 2015), http://www.courthousenews.com/2015/07/22/brazilian-bribery-claims-splash-to-electric-utility.htm.
[338] Brazil Electronuclear CEO Gets 43-Year Sentence for Corruption, REUTERS (Aug. 4, 2016), http://www.reuters.com/article/brazil-corruption-eletrobras-idUSL1N1AL16E.
[339] Complaint, *In re Eletrobras Securities Litigation*, No. 15-cv-5457 (S.D.N.Y. July 22, 2015).
[340] Order Granting Motion for Consolidation, *In re Eletrobras Securities Litigation*, No. 15-cv-5457 (S.D.N.Y. Oct. 2, 2015), ECF No. 26; Motion to Dismiss, *In re Eletrobras Securities Litigation*, No. 15-cv-5457 (S.D.N.Y. July 22, 2015), ECF No. 44.
[341] Jeffrey T. Lewis, *Brazil's Braskem to Pay US $957 Million in Corruption Case*, WALL ST. J. (Dec. 14, 2016), http://www.wsj.com/articles/brazils-braskem-to-pay-957-million-in-corruption-case-1481757644. See also discussion of Odebrecht and Braskem resolutions at Section II.B.1.e.
[342] Complaint, *In re Braskem Securities Litigation*, No. 15-cv-5132 (S.D.N.Y. July 1, 2015).
[343] Opinion and Order, *In re Braskem Securities Litigation*, No. 15-cv-5132 (S.D.N.Y. Sept. 8, 2015), ECF. No. 24; Motion to Dismiss the Second Amended Class Action Complaint, *In re Braskem Securities Litigation*, No. 15-cv-5132 (S.D.N.Y. July 6, 2016), ECF No. 70; Motion to Dismiss, *In re Braskem Securities Litigation*, No. 15-cv-5132 (S.D.N.Y. Nov. 14, 2016), ECF No. 96.

1. UK Legal Developments

a. Failure to prevent tax evasion and failure to prevent economic crime

Following a consultation on the wording of new draft legislation to make companies liable for a failure to prevent tax evasion, the Criminal Finances Bill was introduced to parliament on October 13, 2016. The proposed offense, which is modelled on the "failure to prevent" offence used in section 7 of the Bribery Act 2010 (Bribery Act) signals an intention on the part of the UK government to crack down on tax evasion and penalize those companies deemed to be facilitating it.[344]

In the aftermath of the Brexit vote and the change of Prime Ministers in the UK, September 2016 saw the UK's Attorney-General, Jeremy Wright QC, announced at The Cambridge International Symposium on Economic Crime that the government intended to continue with the former Premier's agenda as set out at the UK Anti-Corruption Summit, to consult on plans to introduce legislation to make companies liable for a failure to prevent economic crimes, such as money laundering, false accounting and fraud. It is likely that any new offense would also be modelled on section 7 of the Bribery Act.[345] While, to date, the government's promised consultation has not occurred, a "call to evidence" was published in January 2017 to gain views and evidence on whether changes to corporate criminal liability are required, with failure to prevent being one of the five options considered.

In May 2016, the UK Anti-Corruption Summit was attended by representatives of 40 countries from around the world. A common approach to tackling corruption was agreed by the participating countries, which focused on (1) exposing corruption by increasing the transparency of government budgets and ending the misuse of anonymous companies to conceal the proceeds of corruption, (2) actively enforcing anti-corruption laws and working together to prosecute and punish corrupt actors, and (3) targeting entrenched corruption, linking up institutions and professions around the world to build capacity and foster a shared culture of integrity.[346]

b. Deferred Prosecution Agreements

On July 8, 2016, the UK's second-ever DPA was approved for "X, Y, Z", a UK small and medium sized enterprise that cannot yet be named due to ongoing, related legal proceedings.[347] Following the implementation by X, Y, Z's parent company of a global compliance program concerns were raised about a number of X, Y, Z's contracts, which led to an informal self-report to the Serious Fraud Office (SFO). A number of X, Y, Z's employees and agents were alleged to

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[344] Criminal Finances Bill (as amended in Public Bill Committee), http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0097/cbill_2016-20170097_en_1.htm.
[345] Attorney General's Office Press Release, *Attorney General Jeremy Wright speech to the Cambridge Symposium on Economic Crime* (Sept. 5, 2016), https://www.gov.uk/government/speeches/attorney-general-jeremy-wright-speech-to-the-cambridge-symposium-on-economic-crime.
[346] Cabinet Office Policy Paper, *Anti-Corruption Summit London 2016: Communiqué 12 May*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf.
[347] SFO Press Release, *SFO secures second DPA* (Jul. 8, 2016), https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/.

have been involved in the systematic offering and/or payment of bribes to secure contracts in foreign jurisdictions between 2004 and 2012. Of 74 contracts examined by the SFO, 28 were found to have been procured as a result of bribes. X, Y, Z was subject to conspiracy to corrupt and bribe charges, contrary to section 1 of the Criminal Law Act 1977, as well as a failure to prevent bribery charge contrary to Section 7 of the Bribery Act.

Due to a very early self-report and the high level of cooperation provided to the SFO by both X, Y, Z and its parent company, a DPA was formally approved on July 8, 2016. Under the terms of the DPA, X, Y, Z was ordered to pay a penalty of £6,553,085. This penalty comprises £6,201,085 in disgorgement of the gross profits made on the 28 contracts and a £352,000 fine. £1,953,085 of the disgorgement was to be paid by the SME's US registered parent company as repayment of a significant proportion of the dividends that it received from the SME over the period during which the bribes allegedly were paid. The SME also agreed to continue cooperating fully with the SFO and to provide a report addressing all of the SME's third party intermediary transactions, as well as the implementation and effectiveness of the SME's existing anti-bribery and corruption controls, policies and procedures within twelve months of the DPA's approval and every twelve months for the duration of the DPA. In approving the DPA, Lord Justice Leveson commented that the lenient outcome for the SME "provides an example of the value of self-report[ing] and co-operat[ing] along with the introduction of appropriate compliance mechanisms."

In January 2017 Rolls-Royce also obtained approval for a UK DPA[348], while simultaneously reaching agreements with the US DOJ and with Brazil's Ministério Público Federal. In total, these agreements will result in the payment of approximately £671 million (including US $170 million to the United States and US $25 million to Brazil). The total sum in the UK settlement is the highest-ever enforcement action against a company in the UK for criminal conduct - £497.25m plus interest. This figure comprises disgorgement of profit of £258,170,000, a financial penalty of £239,082,645, and the SFO's costs of £13m.

The indictment included 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. Lord Justice Leveson highlighted the aggravating features of the case, including that it involved significant and well planned bribe payments, approved by senior management, spanning three decades, to government officials and the private sector, resulting in gross profit of over £250m. The bribery took place in three of Rolls-Royce's business sectors – Civil Aerospace, Defence Aerospace and its former Energy business – and covered seven jurisdictions.

In spite of the seriousness of the case and the fact that the company did not self-report, the SFO having approached Rolls Royce first, Lord Justice Leveson approved the DPA. This was in large measure because of the "exceptional cooperation" provided, which included voluntary provision of vast quantities of evidence, deferring internal interviews until after the SFO had first spoken to witnesses, and the provision of privileged interview memoranda. The court also cited the significant efforts made by Rolls Royce to improve compliance and change the culture, for example by removing employees and Board members involved in wrongdoing, and the importance of incentivizing the exposure and self- reporting of corporate wrongdoing.

[348] SFO Press Release, https://www.sfo.gov.uk/cases/rolls-royce-plc/.

c. FCA Business Plan 2016/2017

On April 5, 2016, the Financial Conduct Authority (FCA) published its Business Plan for 2016/2017 (Business Plan).[349] Among other things, the Business Plan emphasized the FCA's continued prioritization of measures to address financial crime and money laundering. During 2017, the FCA will focus on the use of its enforcement powers to send a deterrent message to firms with material weaknesses in their financial crime controls. Specifically, the FCA intends to bring tough and significant enforcement action against both firms and individuals that break its rules.

In recognition of the important role whistleblowers can play in identifying wrongdoing, the FCA also will focus on further encouraging the collection and analysis of good whistleblowing intelligence, following the introduction of new rules on whistleblowing procedures issued by the FCA and Prudential Regulation Authority in October 2015.[350]

d. UK Enforcement Efforts

In 2016, the SFO continued its investigations into LIBOR, Tesco, GlaxoSmithKline, Barclays Bank, ENRC, GPT, and Quindell, and is continuing its investigation into individuals in Rolls Royce. The SFO also launched investigations into Speciality Steels (a business unit of Tata Steel (UK) Ltd), Unaoil, and the Airbus Group. The SFO announced in March and December 2016, respectively, that it had closed its investigations into allegations of fraudulent conduct in Forex, and allegations of corruption involving Soma Oil in Somalia, respectively.

e. Enforcement Against Companies

Sentencing occurred in January 2016 for Smith and Ouzman Ltd, a company specialising in printing security documents, which was convicted in December 2014 under the Prevention of Corruption Act 1906 for making corrupt payments totaling £395,074 to public officials for business contracts in Kenya and Mauritania. At the sentencing, it was ordered to pay £2.2 million. This penalty included a fine of £1,316,799, as well as £881,158 to satisfy a confiscation order applied for by the SFO and £25,000 in costs.[351]

As discussed in our 2015 FCPA Year in Review, the Sweett Group PLC, a property and construction consultancy, pleaded guilty in December 2015 to a charge of failing to prevent an act of bribery intended to secure and retain a contract with Al Ain Ahlia Insurance Company, contrary to section 7(1)(b) of the Bribery Act. A sentencing hearing took place in February 2016, at which the Sweett Group PLC was fined £2.25 million. This penalty includes a fine of £1.4m, a confiscation order for £851,152.23 and £95,031.97 in costs awarded to the SFO. During sentencing, His Honour Judge Beddoe stated that "[t]he whole point of section 7 is to impose a duty on those running such companies throughout the world properly to supervise

[349] Financial Conduct Authority, *Business Plan 2016/17*, https://www.fca.org.uk/publication/corporate/business-plan-2016-17.pdf.
[350] FCA Press Release, *FCA introduces new rules on whistleblowing* (Oct. 6, 2015), https://www.fca.org.uk/news/press-releases/fca-introduces-new-rules-whistleblowing.
[351] SFO Press Release, *Convicted printing company sentenced and ordered to pay £2.2 million* (Jan. 8, 2016), https://www.sfo.gov.uk/2016/01/08/convicted-printing-company-sentenced-and-ordered-to-pay-2-2-million/.

them. Rogue elements can only operate in this way – and operate for so long – because of a failure properly to supervise what they are doing and the way they are doing it."[352]

In July 2016, F.H. Bertling Ltd, a logistics and freight operations company, and seven individuals (Peter Ferdinand, Marc Schweiger, Stephen Emler, Joerg Blumberg, Dirk Juergensen, Giuseppe Morreale, and Ralf Peterson) were charged with one count of making corrupt payments, contrary to section 1 of the Prevention of Corruption Act 1906. The company and individuals were allegedly involved in the bribery of an agent of the Angolan state oil company, Sonangol, between January 2005 and December 2006.[353]

2. Enforcement Against Individuals

In February 2016, the SFO charged Michael Sorby (former director of Sarclad Ltd) and Adrian Leeks (former sales manager of Sarclad Ltd) with one count of conspiracy to corrupt contrary to section 1 of the Prevention of Corruption Act 1906, and one count of conspiracy to bribe under section 1 of the Bribery Act. The alleged offenses happened between 2004 and 2012 and concerned "financial inducements offered to secure contracts for Sarclad."[354]

In March 2016, the SFO charged Terence Stuart Watson, the Alstom Country President for the UK and Managing Director of Alstom Transport UK and Ireland, with violating section 1 of the Prevention of Corruption Act 1906 and with conspiracy to corrupt contrary to section 1 of the Criminal Law Act 1977. Mr. Watson was the seventh individual to be charged in this matter. Mr. Watson's alleged offenses occurred between 2003 and 2008, and related to the supply of trains to the Budapest Metro.[355]

In May 2016, Peter Chapman (former manager of Securency PTY Ltd.'s Africa office) was convicted of four counts of making corrupt payments to a foreign official under the Prevention of Corruption Act 1906. Mr. Chapman is said to have paid bribes amounting to US $205,000 to an agent of the Nigerian Security Printing and Minting PLC to win orders for reams of polymer substrate for Securency. Mr. Chapman was sentenced to two and a half years imprisonment for each of the four counts. Due to Mr. Chapman having already served time, the remainder of his sentence will be served on license.[356]

In September 2016, six individuals were convicted and sentenced for their involvement in a bribery and kickback scheme concerning the award of prestigious contracts for mechanical and

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[352] SFO Press Release, *Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction* (Feb. 19, 2016), https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/.
[353] SFO Press Release, *F.H. Bertling Ltd and seven individuals charged with bribery* (Jul. 13, 2016), https://www.sfo.gov.uk/2016/07/13/f-h-bertling-ltd-seven-individuals-charged-bribery/.
[354] Laurence Kilgannon, *Criminal Charges for Former Tech Firm Employees*, INSIDER MEDIA LIMITED (Feb. 25, 2016), http://www.insidermedia.com/insider/yorkshire/former-technology-firm-employees-charged-with-bribery-and-corruption.
[355] SFO Press Release, *Further charge in Alstom investigation* (Mar. 29, 2016), https://www.sfo.gov.uk/2016/03/29/charge-alstom-investigation/.
[356] SFO Press Releases, *Former Securency manager convicted of corruption* (May 11, 2016), and *Former Securency manager sentenced for corruption* (May 12, 2016), https://www.sfo.gov.uk/2016/05/11/former-securency-manager-convicted-corruption/, https://www.sfo.gov.uk/2016/05/12/former-securency-manager-sentenced-corruption/.

electrical work in Buckingham Palace, the Queen's Gallery, St James's Palace and Kensington Palace.[357] These individuals included Ronald Harper (a former deputy property manager within the Royal Household), who was found guilty of conspiring to receive corrupt payments totaling at least £100,000 from the former owners of Melton Power Services (MPS) and BSI Nordale. Mr. Harper received a sentence of 5 years imprisonment. Christopher Murphy and Aseai Zlaoui were found guilty of conspiracy to make corrupt payments, receiving sentences of 18 months imprisonment and a suspended sentence of 12 months, respectively. Steven Thompson (the former owner of MPS) and Glynn Orridge (a subcontractor to MPS) also pleaded guilty to conspiracy to commit fraud, receiving sentences of 18 months imprisonment and a community order, respectively. Robert Harper's brother-in-law, Alan Rollinson, was convicted of money laundering and received a suspended sentence of 12 months imprisonment.

3. National Crime Agency Bribery Cases

The National Crime Agency (NCA) continued to investigate and pursue cases involving bribery and corruption in 2016. In April 2016, a civil recovery order was imposed on Elena Kotova, a Russian banker who was found to have used her position to solicit corrupt payments from her clients in return for assistance in securing funding for their projects. Ms. Kotova was ordered to hand over her apartment in Mayfair, valued at £1.5 million, and £230,000 in cash.[358]

Since May 2016, the NCA has been investigating the sale of Northern Ireland assets owned by the Republic of Ireland's National Assets Management Agency (NAMA). Among other things, the NCA is investigating allegations of corruption pertaining to the sale of NAMA's Northern Irish loan book portfolio.[359]

In September 2016, the NCA published its third annual National Strategic Assessment (NSA), an analysis of the serious organized crime threats facing the United Kingdom. The NCA identified high-end money laundering as one of the top five threats for the year ahead in this year's NSA. Bribery and corruption also was identified as a threat. The NSA enables UK law enforcement as a whole to prioritize, coordinate and target its response to the identified threats.[360]

4. Isle of Man/Ireland

In April 2016, the Isle of Man became the first British Crown Dependency to commit to an initiative spearheaded by the G5 – the five largest economies in the European Union – on automatic exchange of company beneficial ownership information – a move being driven by the UK, Germany, Italy, France and Spain to increase transparency and combat corruption and other

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[357] CPS Press Release, *Six sentenced for corruption over Royal Household contracts* (Sept. 28, 2016), http://www.cps.gov.uk/news/latest_news/six_sentenced_for_corruption_over_royal_household_contracts/.
[358] NCA Press Release, *Disgraced Russian banker hands over Mayfair property* (Apr. 28, 2016), http://www.nationalcrimeagency.gov.uk/index.php/news-media/nca-news/850-disgraced-russian-banker-hands-over-mayfair-property.
[359] NCA Press Release, *NCA investigation into the sale of NAMA's NI loan book update* (Oct. 6, 2016), http://www.nationalcrimeagency.gov.uk/index.php/news-media/nca-news/926-nca-investigation-into-the-sale-of-nama-s-ni-loan-book-update.
[360] NCA Press Release, *NCA publishes latest analysis of UK crime threats* (Sept. 9, 2016), http://www.nationalcrimeagency.gov.uk/news/909-nca-publishes-latest-analysis-of-uk-crime-threats.

crimes. The initiative is focused on developing a global system for the systematic and reciprocal exchange of beneficial ownership information, which is secure, searchable and respects confidentiality.

Similarly, in November 2016, the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (2016 Regulations) took effect in Ireland. The 2016 Regulations affect Irish incorporated legal entities such as companies and limited partnerships, which are required to take all reasonable steps to obtain and hold adequate, accurate and current information on their beneficial ownership in a beneficial ownership register. Failure to keep such a register is a criminal offense and can result in a fine of up to €5,000.

B. Other European Jurisdictions

1. The European Union

Fighting corruption remains a policy priority in the EU. In March 2016, a study commissioned by the European Parliament found that corruption could cost the European Union hundreds of billions of Euros each year.[361] On October 25, 2016, the European Parliament passed a resolution urging the European Commission to review current EU anti-corruption efforts and, in particular, to establish a European Action Plan to address organized crime, fraud and corruption.[362] This resolution was approved with an overwhelming majority.[363]

2. France

On November 8, 2016, France adopted its new Law on Transparency, the Fight against Corruption and Modernization of Economic Life (nicknamed the "Sapin II" Law after the French Minister of Finance, Michel Sapin).

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[361] European Parliamentary Research Service, *The Cost of Non-Europe in the area of Organised Crime and Corruption* (Mar. 2016), http://www.rand.org/pubs/research_reports/RR1483.html.

[362] European Parliament, *MEPs demand new EU rules to improve fight against organised crime and corruption* (Oct. 25, 2016), http://www.europarl.europa.eu/news/en/news-room/20161020IPR47883/meps-demand-new-eu-rules-to-improve-fight-against-organised-crime-and-corruption.

[363] Investigations involving companies with operations in EU member countries often implicate data protection issues. Following the October 2015 annulment of the EU-US Safe Harbour program through the European Court of Justice's decision in *Maximillian Schrems v. Data Protection Commissioner*, Case C‑362/14, Judgment of the Grand Chamber (Oct. 6, 2015), the EU and US implemented a new agreement that permits the transfer of data between jurisdictions in compliance with the EU Data Protection Directive. The new "Privacy Shield" was jointly announced in February 2016, and became effective on July 12, 2016, when it was adopted by the European Commission. Largely similar to the Safe Harbour program, the Privacy Shield contains enhanced compliance requirements and enforcement mechanisms in order to more closely align the Privacy Shield with EU data protection legislation. The enforcement of data protection laws still rests with national authorities in EU member states, which have wide powers to investigate and sanction violations. For example, German data protection authorities began audits targeting over 500 firms to ensure their compliance with German data protection law in November 2016. Virtuelles Datenschutzbüro, *Datenschutzaufsichtsbehörden prüfen grenzüberschreitende Datenübermittlungen* (Nov. 3, 2016), https://www.datenschutz.de/datenschutzaufsichtsbehoerden-pruefen-grenzueberschreitende-datenuebermittlungen/.

France's lack of bribery and corruption enforcement actions was sharply criticized by the OECD in 2014.[364] This criticism, coupled with concern over the recent wave of fines imposed on French companies by US FCPA enforcement authorities, is thought to be the driving force behind Sapin II, which undoubtedly will bring significant changes to the anti-corruption legal framework in France.

In particular, Sapin II creates (1) an obligation on companies to take measures designed to prevent and detect corruption, (2) additional penalties for companies that fail to comply with the requirements of Sapin II, (3) a protected status for whistleblowers, (4) a French Anti-Corruption Agency, and (5) an alternative to criminal prosecution for companies in the form of deferred prosecution agreements.

One of the most significant changes introduced by Sapin II is the introduction of a new obligation on companies with at least 500 employees or that belong to a group of companies with a French headquartered parent company whose workforce includes at least 500 employees, to take measures to prevent corruption and bribery. French companies that meet these criteria are required to take appropriate measures to combat corruption by, among other things, (1) adopting an ethics code, (2) implementing an internal whistleblowing procedure, (3) conducting risk mapping, (4) implementing assessment procedures for customers, major suppliers and intermediaries, (5) performing accounting checks, (6) conducting employee training, (7) implementing appropriate disciplinary sanctions, and (8) conducting internal checks and implementing assessment systems to monitor the effectiveness of the foregoing measures.

This new obligation to prevent corruption will be overseen by the new French Anti-Corruption Agency. Failure to comply with the requirements of Sapin II could lead to fines of up to € 200,000 for individuals and €1million for companies.

3. Germany

In May 2016, new legislation specifically aimed at bribery and corruption in the healthcare sector was passed into law, which took effect on June 4, 2016. The law contains two new provisions which criminalize active bribery and passive corruption in the healthcare sector. These provisions apply to both public and private health professionals.

Enforcement efforts by German authorities also continued in 2016. German prosecutors are investigating a number of companies and individuals. For example, Danish Hempel's German subsidiary is being investigated[365] in connection with allegations that it paid bribes to ship owners in return for the award of contracts. Atlas Elektronik (a joint venture between Airbus and ThyssenKrupp) is also being investigated for allegedly paying millions of Euros in bribes to consultants in order to secure contracts with the Turkish military[366] and former

[364] Organisation for Economic Co-operation and Development Report, *Statement of the OECD Working Group on Bribery on France's implementation of the Anti-Bribery Convention* (Oct. 23, 2014), http://www.oecd.org/corruption/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm.
[365] Hempel Press Release, *Hempel identifies and apologises for illegal practices* (Oct. 6, 2016), http://www.hempel.com/en/about-hempel/news/2016/hempel-identifies-and-apologises-for-illegal-practices.
[366] Martin Murphy, *ThyssenKrupp Hit by Fresh Bribery Allegations*, HANDELSBLATT (Jul. 13, 2016), https://global.handelsblatt.com/companies-markets/thyssen-krupp-hit-by-fresh-bribery-allegations-566359.

employees of Schaeffler related to deals made in Turkey.[367] German authorities also expanded their ongoing investigation into Rolls-Royce's German unit to encompass five more individuals. Rolls-Royce is alleged to have made corrupt payments in up to seven Asian countries.[368]

4. Italy

Enforcement efforts by Italian authorities also continued in 2016. In February 2016, the Bologna public prosecutor opened an investigation into Bilal Erdogan (the son of the current Turkish President) for alleged money laundering. Mr. Erdogan is alleged to have brought large sums of money into Italy during 2015, which is allegedly linked to a political corruption scandal involving the Turkish ruling political party AKP.[369]

In March 2016, Italian prosecutors opened an investigation into Royal Dutch Shell PLC's acquisition of a stake in an oil field in Nigeria (with Eni as a co-owner), which allegedly involved bribery and corruption.[370]

In December 2016, the Italian Supreme Court of Cassation ordered the re-trial of Giuseppe Orsi and Bruno Spagnolini (the former CEOs of Finmeccanica and AgustaWestland, respectively), who were convicted earlier in 2016 for paying bribes to Indian government officials to win a 2010 contract for the sale of twelve helicopters. Mr. Orsi was sentenced in April, 2016 to four and a half years in jail for false accounting and corruption, and Mr. Spagnolini was sentenced to four years on the same charges.[371]

The long-running Saipem case is also ongoing. The case revolves around allegations that Saipem bribed Algerian officials to win work from Sonatrach, the Algerian state-owned oil company. In October 2015, Paolo Scaroni (former CEO of Eni), Antonio Vella (former head of Eni's North African operations) and Eni were acquitted by an Italian judge on corruption-related charges involving the Algerian deals. However, in February 2016, an Italian appeals court overturned the ruling and the matter was subsequently sent back to prosecutors for further examination. In July 2016, a Milan court ordered that Eni, Saipem and Messrs. Scaroni and Vella stand trial, along with five other individuals, in connection with allegations of corruption

[367] Arno Schuetze, Alexander Huebner and Sabine Wollrab, *German prosecutors probe ex-Schaeffler CEO over alleged bribery*, REUTERS (Mar. 15, 2016), http://www.reuters.com/article/schaeffler-corruption-investigation-idUSL5N16N2D8.
[368] Karin Matussek, *Rolls-Royce Unit Mired in German Bribery Probe Over Asian Sales*, BLOOMBERG (Jul. 29, 2016), https://www.bloomberg.com/news/articles/2016-07-29/rolls-royce-unit-mired-in-german-bribery-probe-over-asian-sales.
[369] Michael Day, *Bilal Erdogan: Italy names Turkish president's son in money laundering investigation allegedly connected to political corruption*, INDEPENDENT (Feb. 17, 2016), http://www.independent.co.uk/news/world/europe/bilal-erdogan-italy-investigates-turkish-presidents-son-over-money-laundering-allegedly-connected-to-a6879871.html.
[370] Eric Sylvers and Sarah Kent, *Shell Under Investigation in Italy Over Nigerian Oil Deal*, WSJ (Mar. 30, 2016), http://www.wsj.com/articles/shell-meets-investigators-about-role-in-nigeria-deal-1459337791.
[371] *Italy's top court orders re-trial in AgustaWestland case*, THE HINDU (Dec. 17, 2016), http://www.thehindu.com/news/national/Italy%E2%80%99s-top-court-orders-re-trial-in-AgustaWestland-case/article16896531.ece.

and fraudulent tax returns. The trial against Eni and the related individuals was scheduled to commence on December 5, 2016, but was subsequently postponed until 2017.[372]

5. The Nordics

Following their convictions for corruption by a Norwegian court in 2015, three former Yara senior executives – Thorleif Enger (former CEO), Tor Holba and Daniel Clauw – were acquitted on appeal on December 2, 2016.[373] The conviction of Kendrick Wallace (former General Counsel) was upheld. The individual prosecutions followed the imposition of a fine of US $ 48,000,000 on Yara in 2014.

In April 2016, Norwegian telecommunications giant Telenor's Chief Financial Officer, Richard Olav Aa, and General Counsel, Pål Wien Espen, resigned following publication of a report regarding Telenor's handling of corruption allegations at VimpelCom, in which Telenor owned a 33% shareholding.[374] VimpelCom reached a settlement with US and Dutch authorities in early 2016, following allegations related to bribery in Uzbekistan.

6. The Netherlands

In February 2016, VimpelCom and its subsidiary Silkway Holdings BV (together VimpelCom) agreed to pay a fine of US $397,500,000 to settle an investigation by the Dutch Public Prosecution Service (OM) concerning the manner in which VimpelCom gained access to the Uzbek telecoms market between 2006 and 2012. According to OM, VimpelCom paid bribes amounting to US $114,500,000 via a subsidiary in connection with obtaining telecommunication licenses for 3G and LTE frequencies in Uzbekistan, as well as a further US $30,000,000 in sponsorships and charitable contributions. A parallel investigation concerning VimpelCom's entry into the Uzbek market also was conducted by the US DOJ and SEC, pursuant to which Vimpelcom agreed to pay a further US $397,600,000 in fines and confiscation.[375] The OM is conducting an ongoing criminal investigation into several individuals in connection with VimpelCom's entry into the Uzbek market.[376]

In October 2016, Dutch Volkswagen/Audi distributor Pon agreed to pay a fine of approximately €12,000,000 to settle an investigation by the OM concerning a tender for the procurement of 3,000 cars by the Dutch police force and Ministry of Defense. According to the OM, between 2001 and 2011, representatives of Pon provided bribes in the form of discounts on cars, foreign trips and exclusive gifts in order to influence the outcome of the tender. An

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[372] Manuela D'Alessandro and Stephen Jewkes, *UPDATE 1-Eni, Saipem to be tried in Algeria corruption case*, REUTERS (Jul. 27, 2016), http://af.reuters.com/article/nigeriaNews/idAFL8N1AD5K2. Also see *Eni-Saipem: chiesta astensione giudice in processi su Algeria, rinvio al 16/1 -2*, CORRIERE (Dec. 5, 2016), http://www.corriere.it/notizie-ultima-ora/Economia/Eni-Saipem-chiesta-astensione-giudice-processi-Algeria-rinvio/05-12-2016/1-A_035937626.shtml.

[373] Stine Jacobsen, *Former Yara CEO acquitted of corruption, legal chief convicted*, REUTERS (Dec. 2, 2016), http://uk.reuters.com/article/yara-intl-corruption-idUKL8N1DX1T0.

[374] Richard Milne, *Telenor executives quit after damning report into VimpelCom stake*, FT (Apr. 29, 2016), https://www.ft.com/content/d1adbd76-0dde-11e6-9cd4-2be898308be3.

[375] *See* Section II.B.1.a.

[376] Openbaar Ministerie Press Release, *Vimpelcom pays close to 400 million dollars to the Netherlands for bribery in Uzbekistan* (Feb. 18, 2016), https://www.om.nl/algemeen/english/@93227/vimpelcom-pays-close/.

investigation remains ongoing into six police officers and civil servants who allegedly accepted bribes in exchange for contracts worth hundreds of millions of Euros.[377]

C. China

Anti-corruption efforts remained strong in China this year, both in terms of legislative and enforcement developments. New legal interpretations were released by the Supreme People's Court and the Supreme People's Procuratorate on April 18, 2016 for criminal cases involving bribery and corruption, the *Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Cases of Bribery and Corruption* (the "Interpretations").[378] The Interpretations provided monetary thresholds and standards for bribery prosecutions. The Interpretations increased the general standard for prosecuting the offense of offering bribers to officials from the previous RMB10,000 (approximately US $1,400) to RMB30,0000 (approximately US $4,200); however, offering bribes of RMB10,000 or more to officials can still be prosecuted under specified circumstances.[379] The Interpretations also clarified that "money and property" that can constitute bribes include proprietary interests, in addition to currency and property. According to the Interpretations, proprietary interests refer to material interests that could be translated into currency, such as house decorations or waiver of a debt, as well as other interests that would require payment, such as membership services or travel.[380]

In addition, the *Anti-Unfair Competition Law* is being amended and a draft amendment was released by the Legislative Affairs Office of the State Council on February 25, 2016.[381] In relation to commercial bribery, the draft amendment states that a company will be liable for its employees' acts if an employee uses commercial bribery to seek a transaction opportunity or competitive advantage for the company.[382]

On the enforcement side, China's anti-corruption campaign continued in 2016. Central Commission for Discipline Inspection (CCDI) statistics show that 5,886 officials were disciplined for accepting gifts and cash from January through October in 2016.[383] China also continued its efforts to bring back corrupt officials and other economic fugitives who have fled abroad. The "Operation Fox Hunt 2016" reportedly has resulted in 634 fugitives returning to China as of October 20, 2016.[384]

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[377] Anthony Deutsch, *Dutch prosecutors settle bribery case with car importer*, REUTERS (Oct. 20, 2016), http://uk.reuters.com/article/netherlands-corruption-autos-idUKL8N1CQ39T.
[378] *Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Cases of Bribery and Corruption*, issued by the Supreme People's Court and the Supreme People's Procuratorate on Apr. 18, 2016, http://www.spp.gov.cn/zdgz/201604/t20160418_116334.shtml.
[379] *Id.*, Article 1.
[380] *Id.*, Article 12.
[381] *Anti-Unfair Competition Law of the People's Republic of China (Draft Amendment for Review)*, released by the Legislative Affairs Office of the State Council for seeking public comments on Feb. 25, 2016, http://zqyj.chinalaw.gov.cn/readmore?id=987.
[382] *Id.*, Article 7.
[383] Press Release, CCDI (Nov. 27, 2016), http://www.ccdi.gov.cn/xwtt/201611/t20161125_90177.html .
[384] *See* Xinhua (Oct. 24, 2016), http://news.xinhuanet.com/legal/2016-10/24/c_1119779059.htm.

Also, China's focus on corruption and bribery in industries that are deemed closely related to people's daily life, particularly the healthcare and pharmaceutical industry, continued in 2016.[385] For example, China ordered the arrest of 125 individuals and put 37 officials under investigation in connection with a vaccine sales scandal in early 2016, and 14 of the 37 officials were investigated for suspected bribery violations. The officials allegedly accepted bribes from pharmaceutical sales representatives and vaccine sellers.[386] In a separate commercial bribery investigation in Hainan, the local Administration for Industry and Commerce fined a pharmaceutical company RMB830,000 for bribing a former hospital director, reportedly to recover an outstanding payment for drugs that the company sold to the hospital.[387]

D. Brazil

In 2016, Brazil continued to actively combat bribery and corruption. Consistent with the trend in recent years, aggressive enforcement against individuals remained a top priority, in particular at the federal level. The year also saw increased enforcement against corporations under the *Clean Company Act*, originally enacted in 2013 to provide for corporate civil and administrative liability for acts against the public administration, including bribery and bid-rigging. 2016 marked the first successful conclusion of a leniency agreement under the statute, between Dutch company SBM Offshore and Brazil's Ministry of Transparency, Audit and Control (MTFC, the acronym in Portuguese, formerly the General Comptroller's Office, CGU). The agreement was subsequently vacated; however, at the request of the Federal Public Prosecutor's Office, thus raising questions about which agency retains the ultimate authority to enter into such agreements.[388]

The main enforcement action in 2016 continued to be Operation *Lava Jato* (Car Wash), originally launched by the Federal Justice of the State of Parana in March 2014 and dramatically expanded in 2016. *Lava Jato* originally unveiled a bribery scheme pursuant to which construction companies colluded with state-owned oil producer Petrobras to inflate the price of contracts to pay kickbacks to political and financial operators. In 2016, the scope of the investigations expanded to encompass acts of corruption in other government agencies, including the payment of bribes in connection with the construction of facilities for the 2016 Rio Olympics, contracts with Eletronuclear for the provision of services at the nuclear plant Angra 3, and the provision of informatics systems to state-owned bank *Caixa Economica Federal*, among others.

By the end of 2016, *Lava Jato* had resulted in 1,434 different criminal proceedings in Brazil, leading to the indictment of 259 individuals for corruption, crimes against the international financial system, racketeering, and money laundering.[389] As many as 182

[385] Comments, CCDI (Jan. 12, 2016), http://www.ccdi.gov.cn/special/lcqh/pl_lcqh/201601/t20160112_72573.html.
[386] Press Release, Supreme People's Procuratorate (May 20, 2016), http://www.spp.gov.cn/xwfbh/wsfbt/201605/t20160520_118363.shtml .
[387] *See* People's Daily (Apr. 15, 2016), http://hi.people.com.cn/n2/2016/0415/c231190-28156717.html.
[388] A Ministry of Transparency press release indicates that the SBM settlement included US $162.8 million in fines and US $179 million in reduction in payments due under Petrobras contracts http://www.cgu.gov.br/noticias/2016/07/ministerio-da-transparencia-celebra-acordo-de-leniencia-com-a-sbm-offshore.
[389] http://lavajato.mpf.mp.br/, last visited on January 10, 2017.

individuals were provisionally arrested during the course of investigations.[390] Sanctions thus far have totaled R $10.1 billion (approximately US $3.26 billion), between disgorgement and fines.[391] Another distinctive feature of *Lava Jato* is its multi-jurisdictional character. In the course of the investigations, Brazilian authorities have issued a total of 120 requests for information to authorities in 44 different jurisdictions.[392] Conduct unveiled in the course of *Lava Jato* has led to the initiation of investigations in the United States against companies from a variety of jurisdictions, including, for example, Rolls Royce (UK), Vantage Drilling Company (Norway), SBM Offshore (Netherlands), Technip SA (France), and Keppel Corporation (Singapore).

Prominent among the individuals criminally prosecuted by *Lava Jato* in 2016 was former President Luiz Inacio "Lula" da Silva, who has been charged with corruption and money laundering in connection with bribes allegedly received from construction companies OAS and Odebrecht in their contracts with Petrobras. Similar allegations have led to the provisional imprisonment of other high-profile politicians in 2016, such as former Finance Minister Antonio Palocci, and former Rio de Janeiro Governor Sergio Cabral Filho. These criminal prosecutions are based primarily on evidence disclosed in connection with a US $3.5 billion global settlement reached by construction company Odebrecht and its chemical subsidiary Braskem and authorities in Brazil, the United States and Switzerland. (See discussion of the companies' settlements with the US DOJ and SEC in December 2016 in Section II.B.1.e.) At this writing, the terms of the plea agreements between Odebrecht, Braskem, and 77 executives of these companies and the Brazilian Federal Prosecutor's Office had not been made public.

In the rule-making front, the most important development in 2016 was the congressional vote on a draft bill amending Brazil's anti-corruption framework. The bill had originally been proposed in 2015 by the Federal Public Prosecutor's Office, and consisted of 10 distinct measures to strengthen Brazil's criminal anti-corruption statutes and their enforcement. Among the innovations introduced by the Bill are the establishment of maximum timeframes for criminal and administrative prosecution of corruption cases; criminal sanctions for illicit enrichment by public officials; longer statutes of limitations for corruption; more flexible rules for the provisional seizure of assets; and criminal sanctions for off-the-books campaign financing.[393]

On November 29, 2016, the House of Representatives voted to adopt a significantly diluted version of the Draft Bill. Among other things, a vast majority of the House rejected the provision creating the crime of illicit enrichment by public officials, rejected longer statutes of limitation for crimes of corruption, and proposed rules addressing the provisional seizure of assets. In addition, and more controversially, in a thinly-disguised attempt to intimidate Brazilian public prosecutors and judges, a majority of Representatives amended the Bill to provide for criminal liability for "abuse of authority." The House's dilution of the original Draft Bill was met with substantial opposition by both the Federal Prosecutors and the Brazilian public more broadly, which took to the streets to protest in the millions. At this writing, the Brazilian Senate had yet to vote on the amended Draft Bill.

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[390] *Id.*
[391] *Id.*
[392] *Id.*
[393] Draft Bill 4850/2016.

E. Canada

Canada continued its enforcement of the Corruption of Foreign Public Officials Act (CFPOA) in 2016. The Ontario Securities Commission (OSC) also implemented a whistleblower bounty program partly inspired by a similar program under Dodd-Frank.

As discussed in detail in our 2013 Year in Review, Canada amended the CFPOA, its anti-bribery statute, in 2013 to comply with its obligations under the OECD Convention by expanding the jurisdictional scope of the Act and adding a bookkeeping offense that criminalizes committing or concealing bribery using improper accounting techniques.

The Royal Canadian Mounted Police (RCMP) is actively investigating several CFPOA cases. Notably, in November 2016, the RCMP charged the president of Canadian General Aircraft, a Canadian commercial aircraft company, under the CFPOA for allegedly conspiring to bribe Thai public officials in connection with a proposed commercial passenger deal from Thailand's national airline.[394] RCMP initiated the investigation after receiving a tip from the US Federal Bureau of Investigation in 2013.[395] The investigation did not reveal any evidence that the Thai officials in fact received bribes or were involved in the alleged conspiracy. The charge is nonetheless consistent with the Ontario Superior Court of Justice's decision in *R v. Karigar*, in which the court confirmed that a conspiracy or agreement to bribe is sufficient to establish a violation of section 3 of the CFPOA and that it is not necessary to establish that a bribe was actually paid to a foreign official.[396]

SNC-Lavalin Group Inc., a prominent engineering firm in Canada that has been accused of bribery in Bangladesh and Libya, as well as in connection with a contract to build the McGill University hospital in Montreal, was named in the Panama Papers as paying a company in the Caribbean nearly US $22 million to help secure contracts in Algeria.[397] SNC reportedly had secured contracts worth US $4 billion in Algeria over a span of a decade.[398] In connection with the investigation into SNC-Lavalin, the RCMP also charged the former president of the Federal Bridge Corporation of fraud and breach of trust in connection with payments related to a US $120-million contract that the federal agency awarded in 2000 to a consortium that included SNC-Lavalin.[399]

In July 2016, the Ontario Securities Commission (OSC) launched the Office of the Whistleblower, the first whistleblower bounty program in Canada. The program is partly inspired by a similar program under Dodd-Frank (discussed in Section IV.D above). The

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[394] *Canadian General Aircraft president charged with conspiring to bribe Thai officials in plane deal* (Nov. 24, 2016), CBC NEWS, http://www.cbc.ca/news/canada/calgary/rcmp-bribery-larry-kushniruk-canadian-general-aircraft-thai-airways-1.3866073.
[395] *Id*.
[396] *R. v. Karigar*, 2013 ONSC 5199, No. 10-G30208 (Ontario Super. Ct. Justice Aug. 15, 2013), ¶ 33, http://www.canlii.org/en/on/onsc/doc/2013/2013onsc5199/2013onsc5199.html.
[397] *SNC-Lavalin Named in Panama Papers*, HUFFINGTON POST CANADA (May 19, 2016), http://www.huffingtonpost.ca/2016/05/18/snc-lavalin-panama-papers_n_10031200.html.
[398] *Id*.
[399] *Former Liberal official charged over alleged payments from SNC-Lavalin*, THE GLOBE AND MAIL (Jun. 29, 2016), http://www.theglobeandmail.com/news/politics/ex-bureaucrat-faces-fraud-charge-over-alleged-payments-from-snc-lavalin/article30673207/.

program is intended to encourage the reporting of serious securities-related misconduct in Ontario to the OSC. Under the program, whistleblowers can be awarded up to US $5 million.[400]

A study by Transparency International Canada pointed out the ease with which anonymous companies and trusts can be established in Canada.[401] The report notes that Mossack Fonseca, the law firm at the center of Panama Papers leak, marketed Canada to its clients as an attractive place to set up anonymous companies.[402]

F. Australia

Australia stepped up its anti-bribery enforcement efforts and made legislative changes in 2016 to comply with its obligations under the OECD Convention. In April 2016, the Australian government committed an additional US $15 million in funding over three years to bolster law enforcement efforts against foreign bribery.[403] The funds will be used to expand and support the investigation teams of the Fraud and Anti-Corruption Center (FAC), a multi-agency initiative based within the Australian Federal Police (AFP).[404] FAC reportedly had 18 ongoing foreign bribery investigations as of April 2016.[405] The AFP has established specialist fraud and anti-corruption teams in Perth, Sydney and Melbourne that will prioritize foreign bribery investigations.[406] On the legislative front, the Criminal Code Act was amended to introduce false accounting offenses.[407] The legislature is also considering permitting the use of deferred prosecution agreements[408] and reforming whistleblower laws,[409] both of which could significantly affect the enforcement landscape.

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[400] OSC Policy 15-601 (Whistleblower Program), Part 5, http://www.osc.gov.on.ca/en/SecuritiesLaw_20160714_15-601_policy-whistleblower-program.htm.
[401] *No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts, Transparency International Canada* (Dec. 2016), http://www.transparencycanada.ca/what-we-do/our-projects/beneficial-ownership-transparency/.
[402] *Id*. at 15.
[403] *Boosting Efforts to Tackle Foreign Bribery*, Prime Minister of Australia release (April 23, 2016), https://www.pm.gov.au/media/2016-04-23/boosting-efforts-tackle-foreign-bribery.
[404] *Id*.
[405] *Id*.
[406] *Specialist fraud, bribery and corruption team established in Perth*, Minister for Justice release (Sep. 5, 2016), https://www.ministerjustice.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Specialist-fraud-bribery-and-corruption-team-established-in-Perth.aspx.
[407] *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016*, No. 15, 2016, Schedule 2 (False Accounting), https://www.legislation.gov.au/Details/C2016A00015.
[408] *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia: Public Consultation Paper* (March 2016), Australian Government Attorney-General's Department, https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Deferred-Prosecution-Agreements-Discussion-Paper.pdf.
[409] Adele Ferguson & Ruth Williams, *Calls for reform to weak whistleblower protections*, THE SYDNEY MORNING HERALD (April 21, 2016), http://www.smh.com.au/business/workplace-relations/calls-for-reform-to-weak-whistleblower-protections-20160421-gobnnp.html.

VII. WORLD BANK/OTHER INTERNATIONAL FINANCIAL INSTITUTIONS

A. The World Bank

The World Bank (the Bank) had a somewhat mixed enforcement record in its fiscal year 2016. According to the Integrity Vice Presidency's (INT) Annual Report, INT opened only 64 full investigations in 2016 (down from 99 full investigations in fiscal year 2015).[410] This downward trend can potentially be explained by the Bank's efforts to pursue more complex cases, but may also be a reflection of budget reductions over the past few years.[411] Investigations focused on allegations of corruption (an allegation included in 48 of the 64 investigations) and spanned 60 projects across 36 countries.[412] Overall, a total of 58 companies and individuals were sanctioned in fiscal year 2016 (40 as a result of sanctions proceedings, and 18 as a result of a negotiated resolution).[413] Despite a downward trend in the number of investigations opened, however, the Bank saw a number of successes, including in resolving ongoing litigation and in proceedings before the Sanctions Board.

INT continued its practice of referring parties to national authorities, making 62 referrals to other countries or other multilateral development banks (MDBs) in fiscal year 2016.[414] This trend is likely to continue in light of what is perhaps the most important development for the Bank in 2016 – the Bank's success in an ongoing matter before the Supreme Court of Canada in *World Bank Group v. Wallace*.[415] In *Wallace*, the criminal defendant challenged the evidentiary basis behind a wiretap authorization – including evidence provided by INT. The Supreme Court overturned the Ontario Superior Court of Justice ruling, which had ordered the Bank to produce the records.[416] Most significantly, the decision preserves INT's ability to collaborate with law enforcement authorities around the world while keeping its immunities intact, facilitating broader cooperation and evidence-sharing in ongoing investigations.

The Sanctions Board issued seven decisions in 2016,[417] as compared to nine decisions in 2014 and fourteen decisions in 2014. Conduct at issue in 2016 spanned all regions, but the majority of decisions involved allegations of fraudulent practices. Lower enforcement numbers may indicate a shift in INT's focus towards higher-value, more egregious conduct. Among the higher impact cases in 2016 was Sanctions Board Decision No. 87, involving Ukrainian company Information Computer Systems CJSC (Incom).[418] The case was notable for the extensive debarment period imposed on the company – 22 years and six months – for involvement in a corrupt and collusive scheme to secure Bank-funded contracts worth US $43 million. Several factors likely contributed to this result, including Incom's obstruction,

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[410] WORLD BANK GROUP, INTEGRITY VICE PRESIDENCY, ANNUAL UPDATE FISCAL YEAR 2016, 21 (2016), http://pubdocs.worldbank.org/en/118471475857477799/INT-FY16-Annual-Update-web.pdf.
[411] *Id.* at 4, 32.
[412] *Id.* at 21.
[413] *Id.* at 4.
[414] *Id.* at 13.
[415] *World Bank Group v. Wallace*, 2016 SCC 15 (Can.).
[416] *World Bank Group v. Wallace et al.*, No. CR-13-900000727, 2014 ONSC 7449 (Dec. 23, 2014).
[417] Including one denial of a request for reconsideration relating to a 2015 decision. *See* Sanctions Board Decision No. 89 (2016).
[418] Sanctions Board Decision No. 87 (2016).

involvement in multiple forms of misconduct, failure to cooperate in the investigation, and past misconduct.[419]

B. Other IFIs

Although the remaining IFIs release less public information regarding their decisions, the enforcement actions of those banks can have a broad impact. The African Development Bank (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank (IDB), and the World Bank mutually recognize and cross-debar firms and individuals subject to a term of suspension or debarment greater than one year.[420]

The ADB, EBRB, IDB and AfDB have not yet released annual reports outlining anti-corruption enforcement and investigations in 2016. However, some information is available, and enforcement appears to be generally consistent from 2015 to 2016. The ADB reported receiving 252 complaints, and levied sanctions against 47 firms and 37 individuals as of December 15, 2016.[421] The IDB disclosed that it had sanctioned 43 individuals and entities with terms of debarment beginning in 2016.[422] According to the IDB, 81 firms and individuals were cross debarred with terms beginning in 2016, of which 67 came from the World Bank, 11 from the ADB, and 3 from the EBRD.[423] The AfDB continued its focus on financial settlements rather than debarments, the most notable of which was the significant settlement reached with Hitachi in late 2015.

2016 also saw the launch of the Asian Infrastructure Investment Bank (AIIB) by China and other participating countries (not including the United States). We will separately report on the recent announcement of AIIB's sanctions regime.

VIII. CONCLUSION

2016 saw enforcement authorities attack both grand and lesser-scale corruption around the globe. In the developing world, Brazil and China continue to pursue an aggressive investigation and enforcement strategy, with Brazil's efforts featuring significantly more multijurisdictional engagement than China. Enforcement systems continue to mature in the UK, Canada and Australia, with the UK having notable success in its first large-scale case involving Rolls Royce. A number of Western and Northern European countries continue to show enforcement activity, and on the legislative front, France's new legislation could portend a sea change for French companies.

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[419] *Id.* ¶¶ 72-118.
[420] *See* Cross Debarment, http://lnadbg4.adb.org/oai001p.nsf/.
[421] *See* Asian Development Bank, Anticorruption and Integrity Investigations (last visited Jan. 5, 2017), https://www.adb.org/site/integrity/investigations; Asian Development Bank, *Office of Anti-Corruption and Integrity: 2015 Annual Report* 2 (2016), https://www.adb.org/documents/office-anticorruption-and-integrity-annual-report-2015.
[422] *See* Inter-American Development Bank, *Sanctioned Firms and Individuals* (last visited Jan. 5, 2017) (excluding individuals and firms with terms beginning due to cross-debarment), http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/sanctioned-firms-and-individuals,1293.html.
[423] *See* Inter-American Development Bank, *Sanctioned Firms and Individuals* (last visited Jan. 5, 2017), http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/sanctioned-firms-and-individuals,1293.html.

And while 2016 was a blockbuster year for the United States, showing the continued maturation of the DOJ and SEC enforcement programs, its success may bring challenges. The new Administration's commitment to FCPA enforcement will likely be manifested by deeds not words. The success of FCPA enforcement in recent years has garnered more attention from political appointees in government than in its early years, and that attention could prove to be a two-edged sword. Yet backing off enforcement also has perils, political and otherwise. Key early signals in 2017 will include what happens in April 2017, when the Pilot Program reaches the end of its term, whether legislative reform proposals from several years back are renewed, and statements of the new political hierarchy in the DOJ and SEC. "Broken windows" is unlikely to be the new mantra of SEC enforcement, and proposals for a Regulatory FCPA are being discussed anew. 2017 may also bring Supreme Court attention to the issue of disgorgement, a practice that has led to dramatically enhanced FCPA sanctions.