

# Business Guide to Anti-Corruption Laws 2017

A Guide to the FCPA and the UK Bribery Act



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Several significant developments in 2016 will shape anti-corruption enforcement and compliance efforts in 2017.

2016 was a year of increasing enforcement activity and, at the same time, five cases in which the Department of Justice (DOJ) declined to bring charges despite a finding of wrongdoing. There was a significant increase in the number of cases resolved by the DOJ and the Securities and Exchange Commission (SEC), nearly doubling 2015's total. Two major settlements reflected the dizzying heights that FCPA monetary penalties can reach, with Odebrecht agreeing to a global resolution of approximately \$2.6 billion and VimpleCom agreeing to monetary payments totaling \$795 million.

The DOJ also announced a one-year pilot program describing its expectations for self-disclosure, cooperation, and remediation from corporations facing an FCPA investigation. Pursuant to this pilot program, the DOJ has expressly described how those factors drove many of its 2016 FCPA resolutions, including the five declinations. These developments reflect a dual approach by the DOJ in which it holds out a carrot of promised benefits for disclosure and cooperation and yet continues to burnish the stick of aggressive enforcement activity, including seeking extraordinarily large monetary penalties.

In the United Kingdom, the Serious Fraud Office (SFO) pursued corporate violations of the UK Bribery Act (UKBA). Although UKBA monetary penalties have not reached the levels seen under the FCPA, last year the SFO showed its will to impose substantial penalties, including penalties potentially sufficient to push a defendant corporation into insolvency. Like their US counterparts, SFO prosecutors also stressed that self-disclosure and cooperation are essential to a favorable settlement.

Outside of the enforcement context, the international standard setting organization ISO announced a new standard for anti-bribery compliance. The standard is intended to provide a flexible, universally applicable baseline for companies to adopt to show they have an adequate anti-bribery compliance regime. The standard, if widely adopted, could be a significant development in streamlining compliance-related obligations and due diligence.

Meanwhile, political developments both in the United States and the United Kingdom have the potential to unsettle anti-corruption enforcement. It is too soon to know, but the UK vote to leave the European Union and the change in US presidential administrations could have wide-ranging impacts on anti-corruption activities.

The *Guide* discusses these developments and what they may mean for anti-corruption enforcement and compliance. As with past versions, the *Guide* also offers practical guidance on how best to confront the reality of corruption in the world's marketplaces, both before and after the government becomes involved, if that occurs. We also provide an overview of the FCPA and the UKBA and address common questions that a company operating in the international marketplace may have about these laws. Naturally, the information presented here is not legal advice in any specific situation. Such advice could be provided only after a full evaluation of all of the facts and circumstances of a particular matter.

If you have any questions about this *Guide*, or the anti-corruption laws in general, please contact any of the lawyers listed in the Practice Member Listing at the back of this publication.

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## FCPA RECENT DEVELOPMENTS AND TRENDS

### FCPA ENFORCEMENT IN 2016: INCREASED ENFORCEMENT ACTIONS AND BIG PENALTIES

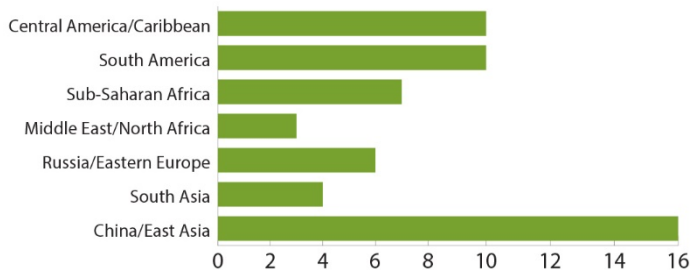
In 2016, DOJ and SEC FCPA enforcement actions included a number of significant developments.

Six enforcement actions included total monetary penalties of more than \$100 million. Two of the cases, resolved on a global basis where US enforcement agencies split the monetary penalties with foreign authorities, included massive monetary resolutions: Odebrecht agreed to a total resolution of \$2.6 billion and VimpelCom agreed to a total resolution of \$795 million. In both cases, investigation revealed that the companies had engaged in long-running bribery schemes and established hundreds of millions of dollars in improper payments. According to the DOJ, the amounts in the Odebrecht and VimpelCom resolutions included a *discount* off the fine recommended under the federal sentencing guidelines, reflecting the companies' cooperation with the DOJ's investigation.

In addition to large penalties, the number of resolutions, including those matters where the DOJ announced that it had declined to bring charges despite finding an FCPA violation, was up. The DOJ and SEC resolved almost twice as many cases in 2016 as the two agencies did in 2015.

Enforcement actions covered misconduct in 28 countries and many regions across the globe. Most prominently, China/East Asia was featured in 16 settlements. Enforcement actions covered nearly every high corruption-risk region as demonstrated in the chart below:

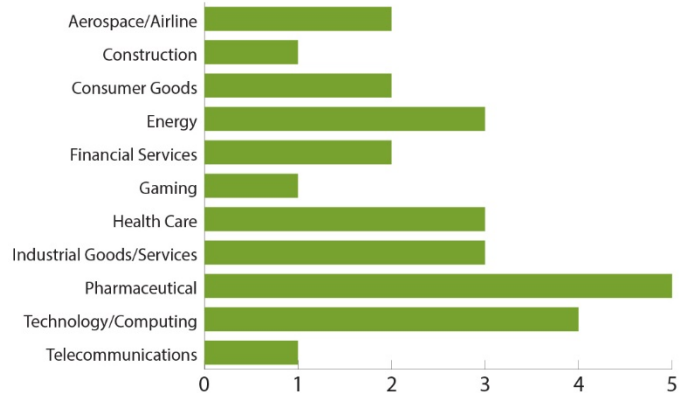
### FCPA Enforcement Actions in 2016 by Region



A complete map of all 2016 enforcement actions, by country, is included on page 31.

As in prior years, enforcement actions covered a number of industries, demonstrated in the chart below:

### FCPA Enforcement Actions in 2016 by Industry



In addition to the traditional enforcement priorities in the energy and oil and gas sectors, 2016 enforcement actions included several in the health and pharmaceutical industries. The SEC resolved a number of actions in this industry premised on a theory that doctors and other health officials employed by a government-run health care system are government officials within the meaning of the FCPA, and therefore inducements paid to them for preferential purchasing decisions violate the statute.

The financial services line reflected in the chart reflects a potentially significant development. In the JP Morgan resolution, the bank's regulator, the Federal Reserve, also joined in and settled an enforcement matter based on the FCPA violation, an apparent first time that the financial regulator has resolved an FCPA matter. The enforcement actions brought by the DOJ and SEC against Och-Ziff Capital Management Group LLC and certain of its subsidiaries and officers, though in many ways involving classic bribery fact patterns, are the first FCPA cases brought against a hedge fund. The DOJ and SEC have touted the case as an example that the FCPA reaches the financial services industry.

## ENFORCEMENT ACTIONS REFLECT DOJ'S AREAS OF EMPHASIS IN FCPA ENFORCEMENT

In 2015 and continuing throughout 2016, the DOJ has publicly emphasized FCPA enforcement priorities through speeches and other announcements, including (1) expanded enforcement capability; (2) greater international cooperation; (3) a focus on individual accountability; (4) transparency regarding charging decisions in its corporate prosecutions, intended to provide increased incentives for disclosure and cooperation; and (5) a growing commitment to corporate compliance.

In many respects, the DOJ's FCPA enforcement activity in 2016 reflects these public commitments. The DOJ has told us what it intends to do and, at least in 2016, has shown us how it will attempt to make good on these goals.

**Enforcement Capability.** In its April 2016 guidance announcing the FCPA Pilot Program, the DOJ announced that it “is substantially increasing its FCPA law enforcement resources.”

In a speech given November 3, 2016, the week before the US presidential election, Assistant Attorney General Leslie Caldwell (AAG Caldwell) confirmed that DOJ is making good on this promise. She confirmed that the FCPA unit was in the process of increasing the number of its prosecutors by more than 50 percent and that the FBI had established three new squads of special agents devoted to investigating international corruption. The FCPA unit now has more than 30 attorneys, a substantial increase over prior years.

**International Cooperation.** In a number of speeches in 2015 and 2016, DOJ officials have underscored that to address international corruption, the DOJ is forging international enforcement and regulatory authorities.

This effort to improve international cooperation to prosecute foreign corruption has been reflected in a number of its 2016 enforcement actions. Most prominently, the \$795 million resolution with Amsterdam-based VimpelCom Limited and its wholly-owned Uzbek subsidiary, Unitel LLC, came to DOJ by referral from Swiss and Dutch authorities and involved significant cross-border coordination, including with authorities in Sweden, Switzerland, Latvia, Belgium, France, Ireland, Luxembourg and the United Kingdom, and the United States and Netherlands authorities split the proceeds of

the penalty, with \$230 million going to the Public Prosecution Services of the Netherlands. Other matters resolved in 2016, including the \$2 billion Odebrecht resolution as well as settlements with Och-Ziff and Embraer, likewise involved significant international law enforcement coordination.

In 2015, Deputy Attorney General Sally Q. Yates issued a memorandum entitled “Individual Accountability for Corporate Wrongdoing,” known as the Yates Memo, to guide DOJ lawyers. The Yates Memo underscored the importance of prosecuting individual wrongdoing in connection with corporate crime by requiring, among other things, that a company seeking cooperation credit from the DOJ in resolving a matter provide all relevant information about the individuals involved in the crime.

**Individual Accountability.** The focus on individual accountability is the gravamen of the Yates Memo published in September 2015, which defined DOJ policy for prosecuting corporate defendants. The Yates Memo provides that for a corporation to “receive any consideration for cooperation credit ... the company must completely disclose ... all relevant facts about individual misconduct.” The FCPA Pilot Program established in April 2016 echoes the Yates Memo, stating that one of its goals is to “prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.” A more detailed analysis of the FCPA Pilot Program follows this overview.

In 2016, DOJ officials cited the Embraer matter as an example of its focus on individual accountability in action: the company received less favorable settlement terms and a higher fine because it failed to discipline a senior executive who was aware of the misconduct. Moreover, according to DOJ officials, the investigation has led to charges against dozens of Embraer employees and related parties in their home countries. Likewise, in letters regarding its decision to decline prosecution for foreign bribery by HMT, NCH, and Johnson Controls, the DOJ specifically noted that those companies provided “all known relevant facts about the individuals involved in or responsible for the misconduct.”

**Transparency in Corporate Penalties.** In 2015, the head of DOJ's Fraud Division, which prosecutes FCPA violations, stated that the DOJ is “working on becoming

increasingly transparent” about its decision-making process in resolving FCPA actions. The 2016 announcement of the FCPA Pilot Program included the stated goal of “providing greater transparency about what we require from companies seeking mitigation credit” by identifying specific factors that DOJ will take into account in making charging decisions and assessing penalty amounts. In particular, the pilot program notes that the DOJ may agree to monetary penalties below the fine recommended by the federal sentencing guidelines based on specific factors, including whether a company has self-reported, cooperated with the DOJ’s investigation, and remediated the violation.

In 2016, pursuant to the pilot program, the DOJ has provided specific details about its charging and penalty decisions, including how the enumerated factors affected FCPA resolutions. It has released five declination letters that tied its reasoning to the factors announced in the pilot program. In many of the other cases in which the DOJ brought an enforcement action, DOJ has specifically detailed the factors that went into the nature of the resolution and the penalty. For example, in announcing the General Cable non-prosecution agreement, the DOJ stated the resolution reflects the DOJ’s assessment that “General Cable voluntarily and timely disclosed the conduct at issue, fully cooperated in the investigation and fully remediated,” and “[b]ased on these actions and other considerations, the company received a non-prosecution agreement and an aggregate discount of 50 percent off of the bottom of the US Sentencing Guidelines fine range.” Likewise, in Embraer, the DOJ noted that the company received a penalty “based on a number of factors, including the fact that Embraer did not voluntarily disclose the FCPA violations, but did cooperate with the department’s investigation” and failed to discipline a senior executive who was aware of the misconduct. The DOJ explained that the monetary penalty, therefore, “is 20 percent below the bottom of the applicable range under the US sentencing guidelines, a discount that reflects Embraer’s full cooperation but incomplete remediation.”

**Commitment to Compliance.** In a 2015 speech, AAG Caldwell explained that “full-throated compliance programs are essential to preventing fraud and corruption” and that compliance programs will be “an important factor” in the DOJ’s decision about whether to bring charges against a corporation. Later that year, DOJ hired a full-time compliance expert to help evaluate corporate compliance programs.

In its 2016 FCPA enforcement actions, the DOJ highlighted corporate compliance and remediation as critical factors in its charging and penalty decisions. For example, in the LATAM Airlines matter, DOJ stated that the company’s inadequate compliance program at the time of its violation was one factor contributing to the size of the monetary penalty, which was higher than the range recommended by the federal sentencing guidelines.

Articles by Jenner & Block lawyers provide further analysis of the DOJ’s enforcement priorities and approaches and are available on our website. The article by Partners William Pericak and Robert Stauffer, [Twenty Questions Raised by the Justice Department’s Yates Memorandum](#), discusses the Yates Memo in detail. [An article](#) by Partner Nick Barnaby, Associate Emily Bruemmer, and former partner Jessie Liu, discusses ways that the DOJ could expand FCPA enforcement.

## FCPA PILOT PROGRAM: UPDATE

On April 5, 2016, the DOJ Fraud Section announced a one-year FCPA Pilot Program plan and issued a guidance memorandum entitled “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance.” A primary goal of the pilot program “is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate ... and ... remediate flaws in their controls and compliance programs.” The pilot program describes what the DOJ views as voluntary self-disclosure, cooperation, and remediation and what role these factors play in the DOJ’s charging decisions including whether to bring a charge or award of “mitigation credit.”

The FCPA Pilot Program provides guidance on DOJ’s expectations in order for a company to receive mitigation credit, including for:

- Voluntary disclosure
- Cooperation with the DOJ’s investigation
- Remediation of wrongdoing

**Defining Voluntary Disclosure, Cooperation, and Remediation.** First, the memorandum provides guidance on what constitutes voluntary disclosure, cooperation, and remediation. According to the guidance, the DOJ will consider giving credit for voluntary disclosure if a

company discloses potential misconduct reasonably promptly after the company discovers it and the company discloses all of the relevant information it has about it. The DOJ will not consider disclosure “voluntary” if it is required by law, agreement, or contract, or if there is an imminent threat of disclosure or a government investigation.

The guidance also lists several detailed steps a company under investigation should take to cooperate with the DOJ’s investigation. Those steps include making timely disclosure of relevant facts, including regarding individuals involved in the misconduct; collecting, preserving, and producing relevant evidence, including evidence located abroad; making witnesses available; and translating foreign language materials. Under the pilot program, the DOJ says it will consider providing full credit for cooperation if a company takes each of the steps listed in the guidance, although the guidance adds that the DOJ will consider whether a company provided full cooperation based on the facts and circumstances of each case.

The guidance also lists steps that a company can take in order to remediate an FCPA violation, including adopting an effective compliance program and disciplining employees involved in the misconduct. Under the pilot program, the DOJ will consider providing credit for remediation only if a company is eligible for cooperation credit noted above.

**Effect on Charging Decisions.** Second, the memorandum provides insight into the role of self-disclosure, cooperation, and remediation in the DOJ’s decisions as to whether to bring FCPA charges. Under the pilot program, if a company voluntarily self-discloses FCPA-related misconduct, fully cooperates with the DOJ’s investigation, and appropriately remediates, the DOJ will consider declining to prosecute the case. By providing transparency in its FCPA charging decisions, the DOJ hopes to encourage voluntary self-disclosure of overseas bribery by making it clear to companies that choosing not to self-disclose “will result in a significantly different outcome than if the company had voluntarily disclosed,” if there is a DOJ investigation.

**Cooperation Credit.** Under the pilot program, the DOJ will consider providing full cooperation credit based on the circumstances of the case and it has identified the following steps as examples of complete cooperation:

- Makes timely disclosure of all facts relevant to the wrongdoing, including facts related to involvement by corporate officers, employees, or agents;
- Provides proactive rather than reactive cooperation that discloses relevant facts even when not specifically asked to do so;
- Preserves, collects, and discloses relevant materials, and provides timely updates regarding the company’s internal investigation, including rolling disclosures of information;
- Coordinates between internal and government investigations;
- Provides all known facts relevant to potential third-party criminal activity;
- Upon DOJ request, makes officers and employees (including people overseas) available for DOJ interviews (subject to the individuals’ Fifth Amendment protections);
- Discloses all relevant facts gathered during a company’s independent investigation (including attribution of facts to specific sources, where it does not violate the attorney-client privilege);
- Produces overseas documents and provides information about how those documents were collected;
- Facilitates third-party production of documents and witnesses from foreign jurisdictions (where not legally prohibited); and
- Provides translations of relevant foreign language documents where requested.

**Remediation Credit.** Under the pilot program, the DOJ will consider whether the company fulfilled the following factors in deciding whether to award remediation credit:

- Has an established culture of compliance, including an awareness among employees that criminal conduct is not tolerated;
- Dedicates sufficient resources to compliance, including maintaining experienced and adequately compensated compliance personnel;
- Maintains an independent compliance function;
- Performs an effective risk assessment and tailors its compliance program based on the assessment;
- Performs regular audits of its compliance function;
- Maintains an appropriate reporting structure for compliance personnel within the company;
- Appropriately disciplines employees for violations and allows for the possibility of disciplining those with oversight of individuals responsible for violations, including consideration of how compensation should be affected by disciplinary violations; and
- Considers any additional steps necessary to signal the importance of accepting responsibility for misconduct and measures to reduce misconduct risks.

**Effect on Penalties.** Third, the memorandum provides guidance about the effect that self-disclosure, cooperation, or remediation will have on the DOJ's assessment of an appropriate penalty. Monetary penalties as part of a criminal resolution with the DOJ are ostensibly based on the recommended fine for the offense under the non-binding federal sentencing guidelines. In practice, the guidelines range is open to substantial interpretation and discussion, and companies have often negotiated a penalty below the guidelines range in settled matters. If the DOJ determines that a company meets all of the criteria of the pilot program, the DOJ may agree to a 50 percent reduction off the bottom end of the sentencing guidelines fine range and generally will not

require a monitor. By contrast, a company that does not voluntarily disclose FCPA-related misconduct can receive at most a 25 percent reduction off the bottom end of the sentencing guidelines fine range.

**Recent Resolutions under the Pilot Program.** As noted in the preceding section, the DOJ has tied many of its resolutions to the pilot program's factors. In 2016, the DOJ announced that it had declined prosecution in five FCPA investigations. In three of its letters announcing declinations (Johnson Controls, Inc., HMT LLC, and NCH Corporation) the DOJ listed the following specific factors that contributed to its decision not to prosecute, including: (1) the company's voluntary self-disclosure of the misconduct; (2) the company's full cooperation with DOJ's investigation; (3) the company's full remediation, including terminating or taking disciplinary action against the individuals who engaged in the misconduct; and (4) the company's enhancement of its compliance controls. Two other declinations, in the Akamai and Nortek matters, announced in June 2016, highlighted similar factors. In each case, the company agreed to disgorge the proceeds of the illegal conduct.

Many of the DOJ's recent settlements also discuss the credit provided (or not provided) based on the pilot program. For example, in the Embraer matter, the DOJ noted that Embraer's penalty is 20 percent below the applicable sentencing guidelines range, "a discount that reflects Embraer's full cooperation but incomplete remediation." And in the LATAM matter, the DOJ noted that the company's initial incomplete disclosure and cooperation led to a penalty above the low end of the guideline range.

**Analysis.** The pilot program's effectiveness in attracting self-disclosures and improving the DOJ's enforcement program is not yet clear. The DOJ reports that it is working. In a speech at the George Washington University Law School on November 3, 2016, AAG Caldwell stated, "What we're seeing is that the pilot program is having an effect. Although I can't share precise figures, anecdotally we've seen an uptick in the number of companies coming in to voluntarily disclose potential FCPA violations."

But the pilot program's effectiveness in achieving transparency to corporations potentially facing an FCPA prosecution remains unclear. Over the second half of 2016, the DOJ has repeatedly referenced the reasons for a resolution, providing some of the transparency the DOJ

has promised. Yet the central question for a corporation facing FCPA scrutiny is whether the transparency in the pilot program and these resolutions will meaningfully constrain the DOJ in assessing an appropriate resolution in future actions. It may. But elements of prosecutorial discretion, including the ability to select the baseline offense from which a fine will be calculated and further choose any aggravating factors applied under the sentencing guidelines, remain and still provide the DOJ with significant latitude in determining the amount of a monetary penalty in any resolution regardless of the amount of mitigation credit awarded.

For further discussion of the pilot program, please see our [Client Alert](#), *DOJ Issues Guidance Regarding Enhanced FCPA Enforcement and Credit for Voluntary Disclosure, Cooperation, and Remediation*, available on our website. In another [Client Alert](#), Partners Reid Schar and Kristin Rakowski and Associate Blake Sercye consider, in detail, the Embraer resolution and what it means for FCPA enforcement under the pilot program.

## EFFECT OF US PRESIDENTIAL ELECTION ON ENFORCEMENT UNCERTAIN

The president and attorney general of the United States set enforcement priorities, but what that means for the FCPA under the new presidential administration is far from certain.

The nominees for attorney general and chairman of the SEC have made only limited relevant public statements regarding FCPA enforcement in the past, and none since their nominations. Predicting any change in enforcement on the basis of such a thin record is fraught with error.

Although one could speculate that the election results will portend a decrease in enforcement activities, that result is far from certain. Unlike some other areas of law enforcement and regulation, anti-corruption enforcement has not been a partisan issue. The surge in FCPA enforcement over the last 15 years began during the Republican George W. Bush administration. Moreover, the DOJ and the SEC have professional staffs that have increased substantially in size in the last two years and are unlikely to change significantly as a result of the election, and the staffs will presumably remain as dedicated to their mission under the new administration.

Time will tell whether the new administration will alter FCPA enforcement. In the meantime, past enforcement practices remain the best predictor of future action.

It is uncertain whether or how the US presidential election will change FCPA enforcement priorities. For now, the best predictor of future FCPA enforcement likely remains past enforcement action.



## THE FOREIGN CORRUPT PRACTICES ACT

The FCPA includes both a direct prohibition on bribery, known as the “anti-bribery provisions,” and prohibitions on the failure to reflect the true nature of transactions in a company’s accounts accurately, known as the “books and records provisions.” These provisions work in tandem to prohibit both bribery of foreign officials and accounting practices that may conceal such activity. Importantly, however, the books and records provisions require a company to account for the disposition of assets accurately even where no improper payment has been made. The FCPA also includes provisions, known as the “internal controls provisions,” requiring an issuer to maintain adequate internal controls in order to provide reasonable assurance that transactions are authorized and recorded accurately and permit preparation of financial statements in compliance with generally accepted accounting principles.

These provisions are broadly worded and subject in certain instances to competing interpretations. Case law interpreting these provisions is rare, leaving companies seeking to comply with them to rely on the combination of the few decided cases, DOJ and SEC guidance, and established enforcement practice. While this can be a recipe for confusion, the discussion below is intended to provide a straightforward description of these provisions and answers to the frequently asked questions they prompt.

### THE FCPA'S ANTI-BRIBERY PROVISIONS

The FCPA’s anti-bribery provisions prohibit an offer of payment, promise to pay, or authorization of payment, of any money or anything of value to any foreign official, or to any other person (i.e., a third party) while knowing that any portion of the thing of value will be offered, given or promised, directly or indirectly, to a foreign official with corrupt intent for the purposes of influencing an official in order to obtain or retain business, or to direct business to any person.

The substantive elements of the FCPA’s Anti-Bribery Provisions are:

- An offer, payment, promise to pay or authorization of payment of any money or anything of value;
- To any foreign official or to any other person (a third party) while knowing that any portion of the thing of value will be offered, given or promised, directly or indirectly, to a foreign official;
- Corruptly;
- For purposes of influencing an official’s act or decision; and
- In order to obtain or retain business or to direct business to any person.

The FCPA contains certain limitations on who may be prosecuted under this provision and a few substantive affirmative defenses.

These statutory elements, limitations, and defenses are discussed in more detail below.

#### 1. Jurisdiction

FCPA jurisdiction is broad. It extends to all US companies or persons, as well as to foreign companies that are registered with the SEC and foreign companies or persons that act in furtherance of an improper payment or offer while in the United States.

Territorial-based jurisdiction extends to any “issuer,” “domestic concern,” officer, director, employee, or agent of such issuer or domestic concern, or stockholder acting on behalf of such issuer or concern, that makes use of any instrumentality of interstate commerce in furtherance of any improper payment or offer of payment. 15 U.S.C.

§ 78dd-1(a); *id.* § 78dd-2(a).<sup>1</sup> An “issuer” is any company – American or foreign – that either issues securities within the United States or is required to file reports with the SEC. *Id.* § 78c(a)(8). A “domestic concern” is a US citizen, national, or resident or a corporation or other business entity with its principal place of business in the United States or organized under the laws of the United States. *Id.* § 78dd-2(h).

*FAQ 1: Who is subject to the FCPA?*

Potentially anyone. The anti-bribery provisions identify three classes of possible offenders: “issuers,” 15 U.S.C. § 78dd-1; “domestic concerns,” *id.* § 78dd-2; and all other persons, *id.* § 78dd-3. An “issuer” is any company that issues securities within the United States or files reports with the SEC. A “domestic concern” is a US citizen, national, or resident or a business entity that either has its principal place of business in the United States or is organized under US law. The third, catch-all section applies to everyone else (which generally means foreign non-issuers, including non-US nationals), if acting within the territory of the United States.

Liability under the books and records provisions is limited to issuers, although individuals can be held liable under traditional vicarious liability principles for violations of the books and records provisions.

Another type of territorial-based jurisdiction extends to foreign citizens and foreign companies (or more specifically, foreign companies that are not issuers) that, while in the territory of the United States, commit any act in furtherance of an improper payment or offer. See 15 U.S.C. § 78dd-3(a).

Finally, nationality-based jurisdiction makes the FCPA anti-bribery provisions applicable, based on US nationality alone, to acts outside the United States in furtherance of an improper payment or offer by any of the following: (1) any issuer organized under the laws of the United States; (2) US persons who are officers, directors, employees, agents, and stockholders of such issuer and are acting on behalf of such issuer; (3) any other corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States; or (4) any other citizen or national of the United States. See 15 U.S.C. § 78dd-1(g); *id.* § 78dd-2(i). Thus, US companies and citizens are subject to the FCPA regardless of where the act in furtherance of an improper payment or offer takes place, and, if the act takes place overseas, even if no means of interstate commerce is used.

The issue often arises in the context of a company’s liability for conduct of foreign subsidiaries.

*FAQ 2: Can the US government prosecute foreign companies under the FCPA?*

Yes. Foreign companies that issue securities in the United States or that are required to file reports with the SEC are considered “issuers” and are treated just as any US issuer would be. Prosecution of foreign companies has been a growing enforcement trend. To date, eight of the top 10 largest FCPA enforcement actions, measured by dollar volume of total penalties and disgorgements, have been brought against foreign companies.

Furthermore, even non-issuer foreign companies and individuals are subject to the FCPA if they commit any act in furtherance of an improper payment while within the territory of the United States. The DOJ has advanced aggressive theories to support jurisdiction over such defendants. For example, in the 2003 Syncor Taiwan matter, the DOJ asserted jurisdiction over a foreign non-issuer company based on one of its officers sending an email while in the United States

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<sup>1</sup> Interstate commerce includes making use of the mail, telephones, email, and any form of interstate travel. See, e.g., *United States v. Brika*, 487 F.3d 450, 455 (6th Cir.

2007) (telephone); *United States v. Hausmann*, 345 F.3d 952, 959 (7th Cir. 2003) (interstate mail and wire communications systems); *Doe v. Smith*, 429 F.3d 706, 709 (7th Cir. 2005) (email and internet).

that contained a budget referring to the improper payments, thereby committing a relevant act “while in . . . the United States.” But in 2011, a federal court rejected an even more aggressive theory that a British national had acted within the United States when he mailed from London to the United States a purchase agreement related to an alleged bribery scheme. Finding no conduct within the United States under these circumstances, the court dismissed a substantive FCPA count against the British defendant. See *United States v. Patel*, No. 1:09-cr-00335 (D.D.C. July 7, 2011). Likewise, in 2015, a federal court held that a foreign defendant not otherwise subject to the FCPA cannot be charged with conspiracy to violate the FCPA. See *United States v. Hoskins*, No. 12CR238 (JBA), 2015 WL 4774918 (D. Conn. Aug. 13, 2015) (pending interlocutory appeal before the Second Circuit).

A company can be liable for its subsidiary’s improper payments under two theories: (1) because the parent authorized or knew of the payments or (2) because the subsidiary acted as the parent’s agent in making the payments. The DOJ and the SEC endorsed both theories of parent liability in their 2012 joint *Resource Guide* to FCPA enforcement. See Department of Justice and SEC, *A Resource Guide to the Foreign Corrupt Practices Act* (Nov. 14, 2012), at 27-28 (hereinafter “*Resource Guide*”).

In this context, the parent company’s potential liability does not turn on majority versus minority ownership. Instead, liability will arise under the anti-bribery provision if the parent authorizes a corrupt payment, or if the parent provides funds to the subsidiary while “knowing” that the funds are to be used for a corrupt purpose. The DOJ and SEC have taken fairly aggressive positions with respect to a parent’s liability for its subsidiary’s actions. In 2013, for example, both agencies reached non-prosecution agreements with Ralph Lauren Corporation for alleged bribes paid by an Argentine subsidiary to expedite customs clearances. The government did not allege actual knowledge or participation by the parent in the subsidiary’s conduct. Rather, liability appeared to be

premised on the fact that Ralph Lauren Corporation was the sole owner of the subsidiary and had appointed its general manager.

Moreover, it is important to be aware that a foreign subsidiary may be considered an “agent” of its parent, a situation that could trigger FCPA liability for both the foreign subsidiary and/or the parent corporation. The statute makes “agents” of issuers as well as “agents” of domestic concerns subject to the FCPA. In addition, under US common law principles of vicarious liability, a corporation can be held liable for the conduct of its agent. For example, in 2014, the SEC held Alcoa Inc. (Alcoa) liable for alleged improper payments by its subsidiaries, despite making “no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme.” *In re Alcoa Inc.*, Securities Exchange Act Release No. 71261 (Jan. 9, 2014). Rather, the SEC’s finding of liability was based on the level of control Alcoa exercised over its subsidiaries, including its appointment of key leadership for the subsidiaries, its development of business and financial goals for them, and its coordination of legal, audit, and compliance functions. This approach is consistent with the statement in the *Resource Guide* that “[t]he fundamental characteristic of agency is control.” *Resource Guide* at 27.

A company may also be held liable for or suffer other consequences from the prior illegal acts of a company that it acquires or with which it becomes associated as the result of a merger. In a 2014 Opinion Release,<sup>2</sup> the DOJ made clear that a mere act of acquisition cannot create liability where none existed before. The DOJ explained that a US company that wished to acquire a foreign target would not be liable for that target’s past extraterritorial conduct because the prior conduct had no connection to the United States, putting it beyond US jurisdiction in the first place. See Opinion Release 14-02. But where potential liability existed prior to an acquisition, the acquiring company can be held liable for the past conduct of its acquisition.

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<sup>2</sup> Under 15 U.S.C. § 78dd-1(e), the attorney general is obligated to have in place an opinion procedure by which the DOJ provides “responses to specific inquiries by issuers

concerning conformance of their conduct with the” FCPA. The opinion releases are available on the Department’s website.

The DOJ and SEC devote substantial space to this topic in their *Resource Guide*, in which they state that they do not typically take action against acquiring companies in cases where the acquirer discovers and quickly remedies possible violations. *Resource Guide* at 29. Rather, actions against the acquiring or successor company are generally reserved for cases “involving egregious or sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition.” *Id.* at 28; see, e.g., *SEC v. Alliance One Int’l, Inc.*, No. 1:10-cv-01319 (D.D.C. Aug. 6, 2010) (\$19.5 million in penalties and disgorgement paid by successor company and foreign subsidiaries). Consequently, the *Resource Guide* recommends that companies conduct extensive due diligence prior to acquisition and quickly integrate the target company into the parent’s compliance program and internal controls. See *Resource Guide* at 28.

A conspiracy charge may also provide for means of expanding FCPA jurisdiction. In an August 2015 decision, the district court in *United States v. Hoskins*, No. 12CR238 (JBA), 2015 WL 4774918 (D. Conn. Aug. 13, 2015), held that a person who is not himself subject to the FCPA cannot be charged as a co-conspirator or an accomplice to an FCPA violation. In *Hoskins*, the government alleged that, from 2002 through 2009, Alstom Power, Inc. (Alstom US), a company headquartered in Connecticut, was engaged in a bribery scheme to secure a \$118 million project to build power stations for Indonesia’s state-owned and state-controlled electricity company. From 2001 through 2004, defendant Lawrence Hoskins, a UK national, was employed by Alstom UK, a British company, and assigned to work for Alstom Resource Management SA, a French company, in France. The government claimed that Hoskins participated in the bribery scheme by approving and authorizing payments to individuals hired to pay bribes to Indonesian officials in order to influence the award of the power stations contract. The government alleged multiple theories of jurisdiction over Hoskins, who is not American and did not act within the United States. Among other theories of jurisdiction, the government alleged that even if Hoskins was not an agent of Alstom US, he conspired with others to violate the FCPA. The district court rejected that argument, reasoning that “where Congress chooses to exclude a class of individuals from liability under a statute, ‘the Executive [may not] . . . override the Congressional intent not to prosecute’” those parties by charging them for conspiracy to violate that statute. 2015

WL 4774918, at \*4. This decision is now on interlocutory appeal before the Second Circuit.

### *FAQ 3: Are companies liable for the prior illegal acts of companies they purchase?*

Yes, in some circumstances. The DOJ and SEC state in their *Resource Guide* that successor liability will generally be limited to circumstances where the successor company continued the misconduct or failed to stop it. A company may mitigate its risk by conducting due diligence prior to an acquisition or merger or, sometimes, immediately following an acquisition or merger, but that is not a legal defense and the company still may be legally susceptible to criminal prosecution.

Even where enforcement authorities do not take direct action against the acquiring company, actions against the acquired subsidiary can still have significant consequences for all parties. In 2007, eLandia International Inc. discovered after the fact that its recently acquired subsidiary, Latin Node Inc., had paid as much as \$2.2 million in bribes to officials in state-owned telecommunications firms in Honduras and Yemen. As a result of the ensuing investigation and remediation, Latin Node’s viability was weakened, and the company was eventually wound down. The acquiring company, eLandia, was ultimately spared a criminal charge of its own, it was obligated to pay the defunct Latin Node’s fine and, of course, saw its investment wiped out.

In Opinion Release 08-02, the DOJ advised a company regarding the post-acquisition due diligence required on a target company when pre-acquisition due diligence could not be undertaken. The DOJ permitted a “grace period” for the acquiring company to identify and disclose potential risk areas and required a complex and far-reaching internal investigation. The DOJ also indicated that it still would hold the company liable for both ongoing violations by the target company not uncovered during the first 180 days of due diligence and for prior violations by the target company disclosed to the DOJ to the extent that such violations were not “investigated to conclusion within one year of closing.”

While the ultimate fallout from *Hoskins* remains unknown, the district court opinion suggests that there may be a limit on the use of federal conspiracy charges to expand the scope of FCPA prosecutions.

## 2. Corrupt Intent

The FCPA requires that the pertinent acts be committed “corruptly.” The Act’s legislative history states that the payments “must be intended to induce the recipient to misuse his official position.” H.R. Rep. No. 95-640, at 8 (1977). “An act is ‘corruptly’ done if done voluntarily and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.” *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991); see also *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber*, 327 F.3d 173, 181-83 (2d Cir. 2003) (a “bad or wrongful purpose and an intent to influence a foreign official to misuse his official position” satisfy this element).

In *United States v. Kozeny*, 582 F. Supp. 2d 535 (S.D.N.Y. 2008), a federal district court considered whether a defendant may obtain a jury instruction that corrupt intent could be absent because the bribe was the result of extortion. The court agreed that “true extortion” can be a viable defense to an FCPA charge and held that, where a defendant presents sufficient evidence on that point, the court should instruct the jury as to what constitutes true extortion such that a defendant cannot be found to have the requisite corrupt intent. The *Kozeny* court was not called upon to decide the precise parameters of “true extortion,” but concluded that it must involve more than a simple demand for payment. Citing the FCPA’s legislative history, the court stated: “While the FCPA would apply to a situation in which a ‘payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,’ it would not apply to one in which payment is made to an official ‘to keep an oil rig from being dynamited’ . . . .” *Kozeny*, 582 F. Supp. 2d at 539.

## 3. Anything of Value

In analyzing whether something of value has been offered to a foreign official, the courts have looked not only to objective value but also to “the value the [official] subjectively attaches to the items received.” *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986). Things of value under the statute include both tangible and intangible objects. See, e.g., *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979). In addition to cash and cash equivalents (e.g., stock, stock options), things of value in the FCPA context have included: travel and entertainment (e.g., 2013 DOJ Diebold settlement); charitable contributions (e.g., 2004 SEC Schering-Lough settlement); college scholarships (e.g., 1993 DOJ McDade prosecution); the services of a prostitute (e.g., the DOJ *Girard* and *Marmolejo* matters); offers of future employment (the DOJ *Girard* matter); and offers of employment to friends and family of an official (e.g., the 2016 DOJ and SEC JP Morgan Chase matter).

*FAQ 4: Can a company make a charitable contribution at the request of a foreign official?*

Yes, but it should be very careful when doing so. Past enforcement actions (including the 2016 Nu Skin Enterprises matter) have relied on such contributions as evidence of an improper payment. Still, the DOJ and SEC have recognized that bona fide charitable contributions are permissible.

At a minimum, companies should conduct due diligence into the charity, take care to document the purpose of the donation, and evaluate whether the circumstances suggest the contribution will go to the charity and not to any government official.

Charitable contributions raise a particularly difficult issue. The DOJ and the SEC have both advised that legitimate charitable donations do not violate the FCPA. See *Resource Guide* at 19; see also Opinion Release 10-02 (declining to take enforcement action where requestor undertook adequate due diligence of recipient and imposed significant controls on the grant); and Opinion Release 97-02 (declining to take enforcement action where facts demonstrated that donation would be given directly to a government entity – “and not to any foreign government official” – for the purposes of building a school). Yet enforcement practice reflects that the

government will nevertheless closely scrutinize donations made to charitable organizations or for educational purposes to ensure that any officials requesting donations, or otherwise associated with the donees, have no possible role in reviewing matters for, or providing preferential treatment to, the donating business. For example, in 2012, the SEC brought an FCPA enforcement action against Eli Lilly & Co., alleging that a subsidiary of the pharmaceutical company made \$39,000 in donations to a Polish charity. The SEC claimed the donation had been made at the request of a government official who had influence over pharmaceutical purchases in Poland.

In 2015, the SEC's then-director of enforcement, Andrew Ceresney, emphasized that the SEC interprets the phrase "anything of value" broadly, viewing it as reaching any action taken with the intent to influence a foreign official in his or her official actions or obtain an improper benefit from the official.

#### 4. Authorization of Unlawful Payments

The FCPA prohibits not only the making, but also the "authorization," of any payment or giving of anything of value to a foreign official. 15 U.S.C. § 78dd-1(a).

*FAQ 5: Can a company be liable for the acts of a third party?*

Yes. The FCPA prohibits the "authorization" of improper payments, which could include payments made by agents and business partners.

Furthermore, the act specifically prohibits payments to third parties "while knowing" that all or a portion of the payment will be used as an illegal bribe. And a person's awareness "of a high probability of the existence of [a] circumstance" is sufficient to demonstrate knowledge of the circumstance: a company can therefore be liable for willful blindness toward the conduct of a third party acting on its behalf.

The FCPA does not define the term "authorization," and as with many aspects of the statute, the case law is undeveloped. The legislative history makes clear that authorization can be implicit or explicit. See H.R. Rep. 95-640 (Sept. 28, 1977) ("[I]n the majority of bribery cases . . . some responsible official or employee of the US parent company had knowledge of the bribery and either

explicitly or implicitly approved the practice . . . [S]uch persons could be prosecuted."); see also Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 414, 98th Cong., 1st Sess. (1983) at 38 (Memorandum from Deputy Attorney General Edward C. Schmults) (describing standard for implicit authorization under the FCPA, noting that one may implicitly authorize a corrupt payment merely by pursuing a course of conduct that conveys an intent that an illicit payment be made).

In past enforcement actions, the government has charged parent companies with directly authorizing improper payments.

*FAQ 6: What provisions should an agreement with a third party contain to minimize risk?*

An agreement should take into account the specific circumstances of any relationship, but as a general matter, a company entering into an agreement with a foreign representative should consider the elements outlined in the DOJ's Opinion Release 81-01, its most comprehensive pronouncement on the subject:

1. Payments be made (a) by check or bank transfer, (b) to the foreign representative by name, (c) at its business address in-country (or where services were rendered), and (d) upon the written instructions of the foreign representative;
2. A representation of the representative's familiarity with and commitment to adhere to the FCPA, including a requirement for the representative to notify the company of any request it receives for improper payments;
3. A representation that no member of the entity is a government official, an official of a political party, a candidate for political office, a consultant to a government official or affiliated with a government official;
4. The agreement is lawful in the foreign country;
5. Any assignment by the representative of any right, obligation and/or services to be performed under the agreement must be approved in writing by the company;

6. The company can terminate the agreement where the representative has violated any of its provisions;
7. The company is permitted to disclose the agreement, including to the foreign government;
8. Adequate controls over reimbursable expenses, including potentially audit rights; and
9. A representation that the representative is well-established with sufficient resources to perform the work. The agreement should also refer to the company's selection criteria for representatives, such as: years in operation; size and adequacy of support staff; business outlook; reputation; professional and/or technical expertise; and familiarity with and willingness to adhere to the FCPA. See Opinion Release 97-01 (documenting depth of due diligence).

In addition to those anti-bribery focused provisions, DOJ and SEC enforcement actions have emphasized that an agreement with a foreign representative should also include specific detail about the services that the representative should provide.

Note that it is *not* necessary that a company affirmatively authorize improper payments by its agents, vendors, distributors, or subcontractors in order for liability to attach. Simple knowledge of such payments will suffice, and, critically, knowledge is defined broadly enough to include even well-founded suspicions. For purposes of the FCPA, a person's awareness "of a high probability of the existence of [a] circumstance" is sufficient to demonstrate knowledge of the circumstance. 15 U.S.C. § 78dd-1(f)(2)(B). Companies therefore should be alert to possible warning signs, such as, for example, when a government official directs the use of a specific third party; where a provider's services are unclear or ill-defined; or where payments are made through non-traditional channels.

Certain factual situations raise unique questions about the "authorization" of a third-party improper payment. For example, distributors typically purchase goods and re-sell them to other end-users rather than facilitating a company's direct sales as an agent or representative. Because of this distinction, any illegal payments a distributor makes after taking title to the goods generally cannot be attributed to the original seller, absent a prior specific conspiratorial agreement to make the payment or an ongoing relationship between the seller and the distributor in which the seller knowingly benefits from the illicit activity. For example, in Opinion Release 87-01, the DOJ took no action on a US company's sale of a product to a foreign company that planned to resell the product to its government on terms to be negotiated. The US company represented that it was not aware of any illegal payment plans.

Nevertheless, distributor relationships are not immune to risk. Where a company is aware or reasonably suspects that its distributor is offering or making improper payments to government officials, the company can be liable for the distributor's actions. For example, in 2013, Weatherford International settled charges that stemmed in part from a distributor arrangement. The government alleged that Weatherford offered up to \$15 million in "volume discounts" to a distributor in an unnamed Middle Eastern country, believing that the discounts would be used to pay illegal bribes to employees of the national oil company.

In addition, foreign governments often require that a US contractor hire a local entity to do some portion of the work on a contract.

A company should carefully monitor and document such arrangements because a corrupt subcontractor easily could pad its subcontract price to include improper payments. A US company, as the original source for those payments, therefore may be liable if some portion is subsequently offered or paid to a foreign official. Accordingly, margins should be reasonable.

## 5. Knowing

In addition to prohibiting “authorizing” payments by a third party, the FCPA prohibits the provision of something of value to a third party while knowing that the third party will in turn provide it to a government official. The statute defines the term “knowing” broadly. Knowledge of a relevant circumstance exists “if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. § 78dd-1(f)(2)(B). Willful blindness to circumstances indicating a high probability of unlawful activity thus will satisfy the knowledge requirement.

Thus, while one might believe that it is safest to know as little as possible about what service partners and third parties do with the payments they receive, exactly the opposite is true. Under the FCPA liability framework, US companies should closely monitor and document their third-party relationships to ensure that they are not viewed as taking a “head in the sand” approach should payments ultimately be redirected to government officials.

### *FAQ 7: If necessary, how should a company make an overseas payment?*

Ideally, by wire transfer to a business partner’s bank account in its home country or the location where the work was done. The DOJ and SEC insist on visibility and transparency in payments made to agents and other business partners abroad. Therefore, wire transfers are preferable to checks because they provide proof that funds were sent to an agent’s primary business account. If checks are used, they should be retained to show the place of deposit. Companies should ensure that payments to business partners are accurately recorded in their books, and domestic parents should require their subsidiaries to follow US accounting rules regarding business expenditures.

## 6. Offers or Promises

The statute prohibits not only improper payments but offers or promises to make such payments; thus, the payment need not actually be made in order for a violation to occur.

## 7. Foreign Official

Under the FCPA, related case law, and DOJ and SEC guidance, the term “foreign official” includes elected and appointed government officials; officials of international organizations such as the International Monetary Fund, the World Bank, and the Red Cross; and employees of any “government instrumentality,” which the Eleventh Circuit held can include state-owned enterprises that provide what might otherwise be thought of as commercial services. *United States v. Esquenazi*, 752 F.3d 912 (11th Cir.), *cert. denied*, 135 S. Ct. 293 (2014).

In determining whether a state-affiliated entity qualifies as a “government instrumentality,” the Eleventh Circuit focused on two critical features: (1) government control and (2) public function. Assessing either of the features is a fact-intensive exercise, but the court identified several factors that will often affect the analysis.

Regarding government control, the court considered a non-exhaustive list of six factors: (1) the foreign government’s formal designation of the entity; (2) whether the government had a majority ownership interest; (3) the government’s authority to appoint or remove the entity’s principals; (4) the extent to which the entity’s profits are returned to the public treasury; (5) whether the entity would perform at a loss absent government subsidies; and (6) the length of time that the other factors indicated government control.

With respect to whether a state-affiliated entity performs a public function, the court considered these non-exhaustive factors: (1) whether the entity enjoys a monopoly over its goods or services; (2) the extent of government subsidies for the entity; (3) whether the entity’s goods and services are available to the public at large; and (4) whether the public and government perceive the entity as performing a governmental function.

*FAQ 8: Can a company make a payment, contribution, or donation to a foreign government entity?*

Yes, but it should be very careful when doing so. The FCPA prohibits payments to government officials, but not to government entities themselves.

Nonetheless, a payment to a government entity may be improper where it appears that it is substantially benefitting a particular government official. For example, in 2013, the SEC brought an enforcement action against medical device manufacturer Stryker Corporation. Among the alleged improper payments was a \$200,000 donation to fund a Greek public university laboratory for a public official with influence over the purchase of Stryker products.

There is also a risk that any payment to a foreign government may be improperly diverted to an individual official. Accordingly, any payments to government entities should be made to accounts clearly identified as such, in the country where the government operates, and supported by clear documentation, including written direction of the government entity. Compare Opinion Release 06-01 (approving payments to customs department of African nation as part of incentive program to improve anti-counterfeiting measures) and Opinion Release 97-02 (permitting \$100,000 donation to government entity to build a school) with Opinion Release 98-01 (stating DOJ's intention to initiate a criminal investigation if proposed payments of "fines" and "modalities" were made to foreign officials rather than to an agency account).

It is important to exercise caution when making payments, contributions or donations to foreign governments, even when acting with the best of intentions. As the DOJ and SEC warn, "companies contemplating contributions or donations to foreign governments should take steps necessary to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials." *Resource Guide* at 20

The Eleventh Circuit's ruling in *Esquenazi* closely tracks the past approach of the DOJ and the SEC as seen both in their prior enforcement actions, see, e.g., *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); *United States v. Carson*, 2011 WL 5101701, No. 09-cr-00077 (C.D. Cal. May 18, 2011), and in the joint *Resource Guide*. See *Resource Guide* at 20-21.

Members of royal families also present particular difficulty. Often, such individuals have no official role in government, but occupy important ceremonial roles and wield significant influence. In Opinion Release 12-01, the DOJ set out the following factors for assessing whether a royal is a foreign official: (1) the degree of control or influence the individual has over the levers of governmental power, execution, administration, finances, and the like; (2) whether the foreign government characterizes the individual as having governmental power; and (3) whether and under what circumstances the individual may act on behalf of, or bind, a government. Applying these factors, the DOJ concluded that the royal family member at issue in Opinion Release 12-01 was not a foreign official because he had no official or unofficial role in his country's government and no authority to bind the relevant governmental decision makers.

The FCPA also defines "foreign official" as including "any person acting in an official capacity" on behalf of a foreign government.

Thus, consultants and unofficial advisors to government officials, or others outside the formal government apparatus, may be deemed to be government officials under certain circumstances, particularly where they have decision-making authority or significant influence with respect to governmental actions. For example, in the 2006 *Statoil ASA* matter, Statoil was charged with making improper payments to the president of the National Iranian Oil Company. The DOJ did not allege, however, that this position in itself rendered him a foreign official, relying instead on assertions that he was an "advisor to the Iranian Oil Minister" and a "very important guest"; that his family "controlled all contract awards within oil and gas in Iran"; and that Statoil had tested his influence by having him send a message back to Statoil through the Iranian Oil Minister. *United States v. Statoil ASA*, No. 1:06-cr-00960 (S.D.N.Y. Oct. 13, 2006).

*FAQ 9: Can a US company do business with an entity in which a foreign official is a participant?*

Yes, but it should exercise great care in doing so. A US company does not violate the FCPA merely by doing business with an entity in which a foreign official is a passive owner. In general, to avoid violating the FCPA, a foreign official's participation in such an entity should be legal under the laws of the official's country and transparent to the official's government, and the official should not participate in any decision or transaction involving the US company.

The DOJ has issued a number of opinion releases addressing this issue. For example, in Opinion Release 08-01, the DOJ took no enforcement action where a US company entered into a joint venture with an entity in which a foreign official was a principal, because the US company had (1) conducted extensive due diligence and made disclosures; (2) obtained representations and warranties that its joint-venture partner had not violated and would not violate anti-corruption laws; and (3) retained a broad contractual right to terminate the joint venture agreement in the event of a violation of anti-corruption laws. Upon similar prophylactic measures, the DOJ took no action when a US firm sought to establish an agency agreement with a foreign company whose principals were related to and managed the affairs of a foreign country's head of state. See Opinion Release 84-01.

Finally, it is worth noting that the FCPA bans corrupt payments not only to foreign officials, but to foreign political parties, candidates for foreign political office, or any person (for example, a third-party agent), knowing that any portion of the payment will be passed on to a foreign official, political party, or political candidate.

## 8. Improper Purpose

A promise, payment, or offer to a foreign official must be given for one of four purposes in order to violate the FCPA: (1) to influence any act or decision of such foreign official in his official capacity; (2) to induce such foreign official to do or omit to do any act in violation of the lawful duty of such official; (3) to secure any improper advantage; or (4) to induce such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

These purposes encompass nearly every act a foreign official might take that could benefit the party making the promise, payment, or offer. The first applies when the foreign official has some sort of discretion within the laws of the pertinent foreign country and the promise, payment, or offer was made in order to influence the exercise of that discretion. The second comes into play when a foreign official breaks the laws of the pertinent foreign country. The third purpose, "securing any improper advantage," broadly concerns "something to which the company concerned was not clearly entitled, [such as] an operating permit for a factory which fails to meet the statutory requirements." *United States v. Kay*, 359 F.3d 738, 754 (5th Cir. 2004) (*Kay I*). An advantage that was not readily available to other competitors and that was secured by a payment could be deemed to fall within the scope of this provision. See *id.* at 750-55. The fourth purpose focuses on the foreign official's use of his or her influence within the foreign government. For example, in the 2006 *Statoil* matter, US authorities brought an enforcement action against a foreign oil company that entered into a \$15 million consulting agreement with an Iranian official, the purpose of which was to induce the official to use his influence to assist the company in obtaining a contract.

## 9. To Obtain or Retain Business

The leading case on this issue is *Kay I*, in which the Fifth Circuit held that this statutory requirement was satisfied by payments designed "to secure illegally reduced customs and tax liability" because lower tax payments would "more generally help[] a domestic payor obtain or retain business for some person in a foreign country." *Kay I*, 359 F.3d at 756. Thus, the "obtain or retain business" provision will be read broadly.

## 10. Use of Interstate Commerce in Furtherance of an Unlawful Payment

The FCPA's anti-bribery provisions require a nexus between an issuer's or a domestic concern's use of interstate commerce and the unlawful payment.<sup>3</sup> In most cases it is easily met – for example, by email or telephonic communications relating to the payments, or by the wiring of money or other payment mechanisms. Importantly, the DOJ reads the provision as encompassing a much broader range of circumstances. An example is the 2008 *AGA Medical Corporation* matter, which involved the payment of improper “commissions” to doctors and patent agents in China in connection with sales of and patent approvals for certain medical devices. While the charging documents described email communications relating to the payments, the DOJ also alleged that shipping *the products* to China qualified as the use of interstate commerce in furtherance of the unlawful payment. More recently, a federal district court held that even email sent and received in foreign locations may satisfy the interstate commerce requirement if the messages were routed through US-based servers. *SEC v. Straub*, 921 F. Supp. 2d 244, 262-64 (S.D.N.Y. 2013).

*FAQ 10: Does the FCPA forbid corrupt payments to obtain a business advantage, such as a lower tax rate or customs duty?*

Yes. The FCPA forbids corrupt payments to influence foreign officials to use their positions to assist “in obtaining or retaining business.” This prohibition is not limited to commercial transactions between a US company and a foreign government, such as the award or renewal of contracts. After a lengthy analysis of the statute’s legislative history, the Fifth Circuit reasoned in *Kay I*, 359 F.3d at 748, that the FCPA prohibits payments “intended to assist the payor” either directly or indirectly in obtaining or retaining business, and that it “encompass[es] the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states.” The court thus concluded that payments to Haitian officials to understate quantities of imported grain so as reduce import taxes violated the FCPA. See *id.*

## DEFENSES TO AN ANTI-BRIBERY PROSECUTION

The breadth of the FCPA is reinforced by the relatively narrow nature of the exceptions and affirmative defenses to liability. *Kay I*, 359 F.3d at 756 (“Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country.”). The recognized statutory exceptions and defenses are:

- **Facilitating Payments:** The FCPA does not apply to any payment to secure the performance of a routine governmental action.
- **Lawful under Local Law:** It is an affirmative defense that an action is permitted by the law of the official's country. This defense applies only to formal law, not the local custom.
- **Reasonable and Bona Fide Expenses:** It is an affirmative defense that an expense was a reasonable and bona fide business expense, such as reasonable travel for a product demonstration.

### 1. Facilitating Payments

The FCPA does not apply “to any facilitating payment or expediting payment to a foreign official, political party, or party official, the purpose of which is to expedite or to secure the performance of a routine governmental action.” 15 U.S.C. § 78dd-1(b). This so-called “facilitating” or “grease” payment exception is designed to permit companies to accelerate the normal operations of government without receiving special exercises of discretion by foreign officials. As such, it is meant to cover routine, nondiscretionary “ministerial activities performed by mid- or low-level foreign functionaries,” see *Kay I*, 359 F.3d at 750-51, such as:

<sup>3</sup> If the person is a non-US person or the entity a foreign non-issuer, the interstate commerce nexus is unnecessary.

Rather, such a defendant can be liable for *any act within the United States in furtherance of an unlawful element*.

- Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- Processing governmental papers;
- Providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods;
- Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; or
- Actions of a similar nature so long as the official's decision does not involve whether, or on what terms, to award new business to or to continue business with a particular party.

15 U.S.C. § 78dd-1(f). By carving out these narrow categories of payments from the FCPA's coverage, Congress sought to differentiate between those acts "that induce an official to act 'corruptly,' *i.e.*, actions requiring him 'to misuse his official position' and his discretionary authority," and those acts that are "essentially ministerial [and] merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action." *Kay I*, 359 F.3d at 747. The key is discretion – a payment that convinces an official to bestow his good graces upon a company is suspect, whereas a payment that merely expedites a routine action is less so but still subject to scrutiny where the applicant is not entitled to have the action expedited.

Those who seek to justify a payment under the "facilitating payment" exception should focus on the amount at issue and whether the official in question must exercise any discretion or judgment in deciding whether to take the requested action. Companies that permit such payments should ensure that they are reviewed and approved in advance by in-house or other counsel and that they are recorded properly in their books and records.

In their *Resource Guide*, the DOJ and SEC emphasize that the size of a payment is not determinative of whether it qualifies for the facilitating payment exception. See *Resource Guide* at 25. For example, in a 2009 matter brought against oilfield company Helmerich & Payne, Inc., the DOJ cited a series of infrequent payments to Venezuelan customs officials, each of which was less

than \$2,000 and which, together, totaled only \$7,000. In that case, however, the payments were allegedly made to avoid customs regulations and inspections rather than to obtain routine, non-discretionary action.

Even if a payment arguably fits within the exception for facilitating payments, issuers must be careful to ensure the transactions are properly recorded as such. In the 2014 Layne Christensen matter, the SEC faulted the company for some payments as small as \$4 where the payments were mischaracterized as "honoraries," "commissions," and "service fees," leading to books and records violations. *In re Layne Christensen*, Securities Exchange Act Release No. 73437 (Oct. 27, 2014).

Finally, it should be noted that the UK Bribery Act of 2010 does *not* contain a facilitating payments exception as described in detail below. The scope of the UK Bribery Act is quite broad, covering not only UK concerns but any companies conducting business in the United Kingdom, even where the charged conduct occurred elsewhere.

## 2. Lawful under Local Law

Under the FCPA, it is an affirmative defense that "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country." 15 U.S.C. § 78dd-1(c)(1). Note that the payments must be legal under the written laws or regulations of the foreign country and that such authorization must be express. While a country's laws may acknowledge the existence of certain payments – for example, by making provision in the tax code for how to treat them – this defense requires something much more: an explicit authorization for the payment itself.

*Kozeny* addressed the scope of this affirmative defense. In that case, the defendant was alleged to have paid bribes in Azerbaijan related to obtaining business with SOCAR, the state oil company. The defendant argued that the alleged payments were legal under local law because he had reported the payments to Azeri authorities, and under Azeri law, the payor of a bribe is relieved from punishment if he makes such a report. See 582 F. Supp. 2d at 538. The court disagreed, concluding that the Azeri legal provision may waive punishment but does not render the payment itself lawful. "[T]here is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality." *Id.* at 539.

### 3. Promotional Expenses

It is an affirmative defense that the payment or thing of value “was a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to . . . the promotion, demonstration, or explanation of products or services; or . . . the execution or performance of a contract. . . .” 15 U.S.C. § 78dd-1(c)(2). This provision creates a limited exception for expenses associated with ordinary product demonstration and testing by companies seeking government contracts or for ongoing inspections related to the execution of such a contract.

*FAQ 11: May a company sponsor an educational trip for a foreign official or provide other hospitality?*

Yes, but only under strict conditions. The FCPA itself provides an affirmative defense for “reasonable and bona fide expenditures, such as travel and lodging expenses” when directly connected with a legitimate promotion or product demonstration, or when a required part of contract performance.

Nevertheless, expenses should be reasonable, relate to legitimate educational or training needs, and not suggest an attempt to induce favorable treatment with regard to the company’s business. Indeed, both the DOJ and SEC have brought actions related to travel and entertainment expenses that have not met these guidelines.

What is clear from the DOJ Opinion Releases is that any expenditures must be closely tailored to the payor’s legitimate goals. For example, in connection with a product demonstration, the host may pay for foreign officials’ non-extravagant travel, lodging, and meals for a

period closely related to the length of time required to demonstrate the product. See Opinion Release 07-02 (approving expenses paid directly to providers for domestic air travel and other expenses of delegation of six junior to mid-level foreign officials for educational program at company’s US headquarters); Opinion Release 07-01 (approving domestic expenses for four-day trip by six-person delegation of the government of an Asian country).

The DOJ may permit some digression for the officials’ entertainment. In Opinion Release 07-02, for example, it approved payment for a modest four-hour city sightseeing tour for the six visiting foreign officials. But expenses cannot resemble added “perks” for the officials. In general, airfare should be economy class, see Opinion Release 07-02, but business class travel may be appropriate for higher-ranking officials, see Opinion Release 12-02. It must also be clear from the overall expense plan that the trip is for the purposes outlined in the statute and that the vast majority of expenses are advancing those ends.<sup>4</sup> Finally, although there may be situations in which an official’s family members may be included, see Opinion Release 83-02 (approving payment of less than \$5,000 to pay for the wife of a foreign official to travel with the official while in the United States visiting company sites), that is rarely appropriate and should be avoided.

The issues surrounding educational trips provide a sound framework to consider gifts and hospitality generally. Hospitality and gifts may be extended if they are reasonable, have a sound business purpose, and are not intended to influence a government official to use his authority improperly to the business advantage of the company. These common-sense guidelines dictate that reasonable entertainment expenses (e.g., meals) are usually acceptable if connected to conducting business. Similarly, low-value tangible gifts (e.g., marketing items with company logos, such as pens, caps, cups, and shirts)

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<sup>4</sup> See also Opinion Release 82-01 (approved reasonable travel, meals, and entertainment); Opinion Release 81-02 (approved provision of product samples to government officials for testing and quality assurance); Opinion Release 83-02 (approved travel and entertainment expenses for official’s wife) (note, however, that more recent enforcement actions suggest that companies should not pay any expenses for an official’s family); Opinion Release 85-01 (approved payment of travel

expenses for French ministry inspection tour in United States); Opinion Release 92-01 (approved annual expenditures of \$250,000 for training expenses of Pakistani officials); Opinion Release 96-01 (approved \$15,000/year training costs for 10 officials); and Opinion Release 11-01 (approved economy-class airfare and other expenses for two foreign officials to travel to the United States).

may be given, provided such gifts are acceptable under the applicable government rules of the official's home country and are permitted by the US company's ethics policies. The DOJ and SEC have advised that "[i]tems of nominal value" are less likely to curry improper influence, while "[t]he larger or more extravagant the gift . . . the more likely it was given with an improper influence." *Resource Guide* at 15.

Hospitality, travel, and entertainment that are unconnected to bona fide business activities or that include luxurious or extravagant expenses create potential FCPA risks. In 2013, both the DOJ and the SEC brought enforcement actions against Diebold, Inc., for providing leisure trips to Las Vegas and Disneyland, entertainment, and gifts to Chinese and Indonesian officials. Similarly, in 2014 the SEC charged that Bruker Corporation provided a series of non-business and leisure side-trips to Chinese officials at state-owned enterprises.

*FAQ 12: Is having an adequate compliance program a defense to corporate criminal liability for the actions of an employee violating company policy?*

No. The DOJ and SEC take the position that, under principles of agency law any action taken to benefit the company, even if also taken to benefit an employee and even if against company policy, can be attributed to the company.

While there is no formal defense for having an adequate (or superlative) compliance program (as there is under the UK Bribery Act, see below), DOJ and SEC guidance is that the effectiveness of a company's pre-existing compliance program may be a factor in making charging decisions or assessing the amount of a potential monetary sanction.

## THE FCPA'S BOOKS AND RECORDS AND INTERNAL CONTROLS PROVISIONS

The books and records provisions of the FCPA work in tandem with the anti-bribery provisions. They require public companies to account accurately for and report expenditures, as well as to maintain accurate records to support accounting entries and expenditures. The internal control provisions require that an issuer devise and maintain internal controls that allow for this accurate record keeping.

These provisions apply regardless of whether any improper payments have been made and have been used as the basis for liability by the DOJ and SEC in matters where they have not (and arguably could not have) brought anti-bribery charges.

### 1. Substantive Requirements

The books and records and internal controls provisions require that an issuer:

- A. Make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
- B. Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that –
  - i) transactions are executed in accordance with management's general or specific authorization;
  - ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
  - iii) access to assets is permitted only in accordance with management's general or specific authorization; and
  - iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. § 78m(b)(2). These provisions make clear that issuers must compile records in accordance with generally accepted accounting standards. These requirements are not based on any sense of “materiality” as that term is generally used in securities laws. Rather, the requirement is grounded in the concept of reasonableness and accuracy – what a business manager would reasonably want and expect in the day-to-day operation of a business.

Knowing violation of the books and records or internal controls requirements can trigger both civil and criminal liability. See 15 U.S.C. § 78m(b)(5) (“No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account . . .” of an issuer); 15 U.S.C. § 78m(b)(4) (imposing criminal liability for books and records violations where the defendant knowingly circumvented, or failed to adopt, internal controls, or falsified any book, record, or accounting entry).

*FAQ 13: Can an individual be prosecuted for conduct prohibited under the books and records or internal controls provisions?*

Yes. By their terms, the books and records and internal controls provisions apply to issuers only. But natural persons can be subject to criminal or civil liability as aiders and abettors; for causing an issuer’s books and records violations; and for knowingly falsifying books and records or circumventing or failing to implement adequate internal controls. They also can be subject to civil liability as control persons. In recent years, the DOJ and SEC have brought several cases against individuals under the books and records provisions.

Because liability under the books and records or internal controls provisions does not depend on an improper payment, they may be used to sanction a company in cases involving suspected improper payments in which, for whatever reason, the government is unable to prove, or chooses not to pursue, an anti-bribery charge. For example, the SEC brought a settled civil enforcement action against Oracle Corporation where an Indian subsidiary of Oracle created slush funds for the purpose of paying future bribes to foreign government officials even though there were no bribes offered or currently

contemplated. Companies should avoid all arrangements that cannot be or are not openly recorded in the books.

Indeed, recent enforcement actions have reflected how the enforcement agencies use the books and records provision to reach accounting misconduct associated with corrupt conduct outside the FCPA’s reach. In a landmark 2012 case, the SEC brought charges against FalconStor Software, Inc. related to bribes paid to private sector employees of a J.P. Morgan Chase subsidiary in exchange for lucrative contracts. According to the SEC, the bribes were paid to three executives of the J.P. Morgan Chase subsidiary and the executives’ relatives and included cash payments, gift cards, and lavish entertainment at casinos. The bribes were inaccurately recorded in FalconStor’s books as “compensation,” “sales promotion,” and “entertainment” expenses. The SEC charged FalconStor under the FCPA’s books and records provision for failing to accurately record the expenses associated with the bribes on the company’s books and records. FalconStor agreed to pay \$2.9 million to settle the charges.

Three years later, the SEC brought charges against Goodyear Tire & Rubber Company for violating the FCPA’s books and records provision by paying more than \$3.2 million in bribes to government officials and employees of private companies. These bribes were falsely recorded in the books and records of Goodyear’s subsidiaries as legitimate business expenses. Goodyear agreed to pay more than \$16 million to settle the SEC’s charges.

Although Goodyear and FalconStor both involved allegations of the failure to properly record payments associated with commercial bribery rather than official corruption, the SEC went one step further in the 2015 Polycom matter. There, the SEC applied the FCPA’s books and records provision to the accounting of benefits paid to a company’s own employee. The SEC alleged that Polycom’s former CEO used almost \$200,000 of company money to pay for personal meals, entertainment, travel, and gifts, and Polycom falsely recorded these personal expenses as business expenses in its books and records.

The theory of liability pursued by the SEC in these matters continues to potentially expand the scope of conduct subject to scrutiny under the FCPA’s books and records provisions. These resolutions also highlight certain inadequate expense reporting processes – i.e., Polycom

allowed its CEO to approve his own expenses and to book and charge airline flights without providing any description of their purpose – of which companies may want to take note and ensure the robustness of their own internal controls in the area of expense reporting.

In the 2016 LATAM Airlines matter, the DOJ brought criminal books and records charges against LATAM (the successor to LAN Airlines) based on underlying conduct that arguably did not involve official corruption. In that case, as described in further detail below, a South American airline entered into a sham consulting contract with a government official. Rather than perform services under the contract, the official paid a portion of the contract's proceeds to union officials in order to induce the union to acquiesce to more favorable terms in negotiations with the airline. The applicability of the anti-bribery provisions in these circumstances, where the official is making a corrupt payment and may not be acting in his official capacity, is not clear. Yet the DOJ brought criminal charges under the books and records and internal controls provisions in light of the fact that the sham consultant agreement and associated payments were not accurately recorded.

## 2. Applicability

The books and records and internal controls provisions apply only to issuers – that is, entities that have a class of securities registered pursuant to 15 U.S.C. § 78l and entities that are required to file reports with the SEC pursuant to 15 U.S.C. § 78o(d). See 15 U.S.C. § 78m(b)(2).

There is no “jurisdictional” requirement for civil liability for failure to maintain adequate books and records or internal controls pursuant to 15 U.S.C. § 78m(b)(2). Any “issuer” within the meaning of the statute must comply with the statute’s requirements to maintain accurate books and records and adequate internal controls, wherever the books and records may be kept.

Where a subsidiary’s financial results are consolidated with a parent issuer’s financial statements, the FCPA’s requirements have been found to apply to books and records or internal control deficiencies occurring at the subsidiary. Thus, inaccurate books and records or internal control failures at the subsidiary level can trigger civil liability for the parent issuer without any US nexus (beyond issuer status of the parent). See *SEC v. Hohol*, 2:14-CV-00041(RTR) (E.D. Wis. Jan. 14, 2014), SEC

Litigation Release No. 22906. Even where an issuer owns 50 percent or less of the voting power of a subsidiary, it must make “good faith” efforts to “use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with” the FCPA. 15 U.S.C. § 78m(b)(6).

But the jurisdictional limits of this section have not been fully tested in the courts; thus, for example, it is not entirely clear whether it would apply to a foreign non-issuer defendant who acts entirely outside the United States to knowingly falsify an issuer’s books and records. The government is likely to argue, however, that a US prosecution of such conduct would fall within established principles of extraterritorial jurisdiction, insofar as Congress clearly intended this provision to have extraterritorial reach and that the conduct at issue inherently has an impact on the United States (or the US securities market) because it involves the books and records of an issuer. See, e.g., *SEC v. Panalpina, Inc.*, 4:10-cv-4334 (S.D. Tex. Nov. 4, 2010), SEC Litigation Release No. 21727 (settled enforcement action against a foreign company that paid bribes for issuers and provided inaccurate invoices to support the improper payments).

The DOJ relied on the criminal prohibition on circumventing internal accounting controls and falsifying books in the 2008 Siemens FCPA matter to bring criminal charges against Siemens AG, a foreign issuer directly subject to this provision. Specifically, Siemens AG pleaded guilty to failing to address internal controls and books and records problems in the face of information that it had grave issues with its internal controls and with accuracy in books and records as a result of its ongoing engagement in bribery. No US jurisdictional nexus was alleged. In addition, one of Siemens AG’s foreign subsidiaries, Siemens Argentina, pleaded guilty to conspiracy to knowingly falsifying and causing to be falsified the books and records of an issuer (i.e., of its parent corporation, Siemens AG), in violation of 18 U.S.C. § 371 (the conspiracy statute). In order to bring this conspiracy charge, a jurisdictional hook was required, and in this case, the DOJ alleged two meetings in the United States and a bank transfer of bribe funds that went through a US correspondent bank account. See, e.g., *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998) (the United States may prosecute an extraterritorial conspiracy if there is an overt act within the United States in furtherance of the conspiracy).

The books and records and internal controls provisions apply only to issuers by their terms. But the FCPA and other principles of securities laws subject individuals to liability for participation in the violation of these provisions on a number of theories, including criminal or civil liability as aiders and abettors; for causing an issuer's books and records violations; and for knowingly falsifying books and records or circumventing or failing to implement adequate internal controls. They also can be subject to civil liability as control persons. Individuals have been charged with either criminal or civil violations of the books and records or internal controls provisions in a number of recent cases. For example, in 2016, the CEO and the CFO of Och-Ziff entered a civil settlement with the SEC for causing violations of the books and records provisions, and the CFO also settled allegations that he caused the internal controls violations. In 2012, a former managing director of Morgan Stanley pleaded guilty to conspiracy to circumvent internal controls in connection with a scheme to bribe a Chinese official. In 2011, the former CEO of Innospec, Inc. was charged civilly with aiding and abetting violations of the books and records and internal controls provisions, circumventing internal controls, falsifying books and records, making false statements to accountants, and signing false certifications. And in 2009, two executives of Nature's Sunshine Products were charged civilly, as control persons of the company, with violations of the books and records and internal controls provisions.

## RESOLUTION OF FCPA INVESTIGATIONS

Government investigations into suspected FCPA violations typically result in either a negotiated resolution between the enforcement agency and the company under investigation or a decision by the agency not to take action, often called a "declination" in cases where the enforcement agency has determined there was a violation of the law. Any resolution of a potential violation other than a declination typically carries a hefty fine or civil penalty, in addition to the extensive costs associated with conducting an internal investigation and/or defending against government inquiries, harm to reputation, imposition of a compliance program meeting specific requirements (or a compliance monitor overseeing a company's FCPA compliance program for a term of years); and the risk of imprisonment. Depending on the circumstances, resolutions of investigations may also carry collateral consequences for the company.

The DOJ and SEC have both asserted in speeches and other public pronouncements that voluntary disclosure and cooperation receive significant weight in their determination of an appropriate resolution. In addition, in 2016, the DOJ provided more specific guidance on the benefit it will offer in return for voluntary disclosure and cooperation, in connection with announcing its one-year FCPA Pilot Program. The pilot program is described further in *FCPA Recent Developments and Trends*.

### FAQ 14: Who enforces the FCPA?

The DOJ and SEC have joint enforcement responsibility.

- The DOJ has all criminal enforcement responsibilities for violations of the anti-bribery and books and records provisions of the FCPA.
- The SEC has civil enforcement responsibility for violations of the anti-bribery provisions committed by issuers (or agents of issuers, including individuals) and violations of the books and records provisions.

## 1. Types of Negotiated Resolutions

Broadly speaking, there are three ways that the government will resolve an FCPA investigation with a company through a negotiated resolution: (1) a non-prosecution agreement (NPA); (2) a deferred prosecution agreement (DPA); or (3) a negotiated entry of a judgment against the company, either a guilty plea for a criminal charge or, in a civil case, an administrative cease-and-desist order or entry of a civil injunctive order.

The basics of a non-prosecution and deferred prosecution agreement are the same in both civil and criminal contexts. An NPA is a letter agreement between the government and the defendant. As part of the NPA, the defendant corporation typically must agree not to contest the relevant facts, waive the statute of limitations, and agree to certain compliance undertakings for a specific period, usually two to three years. In exchange, the government agrees not to pursue charges if the company completes the undertakings and commits no additional wrongdoing during the NPA's term.

A DPA operates much the same as an NPA, except that in the DPA, the government actually files the agreement with a court along with formal charges against the corporation, and the case is stayed for the duration of the DPA. Generally, the DOJ and SEC reserve NPAs for cases involving less egregious conduct, though there is little practical difference between the two types of resolutions. Both carry the critical advantage that they avoid a final judgment entered against the company of an FCPA violation.

In some cases, the agreement will require certain remediation, including improvements to a company's internal controls or the appointment of an independent compliance monitor, at the company's expense, for some period of time (typically two or three years). The independent monitor is charged with making recommendations for FCPA compliance with which the company generally must comply and with reporting the state of the company's compliance to the government. Unsurprisingly, the independent monitor requirement is an expensive and burdensome proposition for any company subject to it. In other cases, the government will refrain from imposing an outside compliance monitor, but will require a company to self-review and self-report on its FCPA compliance for a period of time after a settlement, typically for two or three years.

The SEC has required reporting obligations in some of its negotiated resolutions. In both the Smith & Wesson and Layne Christensen matters, the SEC required the settling companies to agree to a two-year reporting period during which they would provide regular written updates about their remediation and compliance undertakings and report any credible evidence that "questionable or corrupt payments . . . may have been promised, paid, authorized . . . or that related false books and records have been maintained."

While different in scope from an independent monitor, this "monitor-light" requirement may nevertheless impose a significant burden. It sacrifices a measure of independence, requiring a company to provide the SEC with a detailed description of its compliance program. The review and preparation associated with the written reports likely will require a significant expenditure of corporate

resources. More importantly, this new remedial measure imposes an affirmative duty to disclose both actual violations as well as any "credible evidence" of a potential FCPA violation.

Another important factor in negotiated resolutions is what entity takes the charge. Companies have typically sought to have the subsidiary that was directly involved in the misconduct, rather than the parent company, formally enter into the settlement. In other cases, parent companies have entered into a less severe resolution than a subsidiary, e.g., a parent agreeing to a DPA while the subsidiary pleads guilty, or a subsidiary entering into a settlement while the parent is not charged at all. For example, in the 2014 investigation of Hewlett-Packard's operations in Russia, Poland, and Mexico, the foreign subsidiaries each entered into settlements with the DOJ, while the parent company agreed to undertakings with the DOJ as part of its subsidiaries' settlements (and settled a related matter with the SEC), but entered into no criminal deal of its own.

Such resolutions can reflect a compromise of sorts between the regulators' aggressive approach to vicarious liability through subsidiaries and corporate parent companies' insistence that they should not be responsible for the actions of rogue individuals at foreign subsidiaries.

## 2. Penalties

For individuals, the penalties for a criminal violation of the FCPA include imprisonment. Individuals may be sentenced to up to five years' incarceration per violation.<sup>5</sup> See 15 U.S.C. §§ 78ff(c)(1), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571.

Violations of the FCPA's provisions also can result in significant monetary penalties for both corporations and individuals. In particular, both the DOJ and SEC can and do regularly seek monetary sanctions, in the form of criminal fines or civil penalties respectively, on companies resolving alleged violations of the FCPA. As a practical matter, monetary sanctions typically range from the tens of millions to hundreds of millions of dollars, with the largest criminal fine ever paid to US authorities topping out at more than \$700 million in the 2013 Alstom

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<sup>5</sup> This penalty requires a "willful" violation. But, the Fifth Circuit has held that this element requires only that the defendant "acted intentionally, and not by accident or

mistake" and "with the knowledge that he was doing a 'bad' act under the general rules of law." *United States v. Kay*, 513 F.3d 432, 447-48 (5th Cir. 2007).

settlement. 2016 set a new record for the largest global settlement, with Brazilian company Odebrecht agreeing to pay a criminal fine expected to amount to \$2.6 billion, split among US, Brazilian, and Swiss authorities.

The large fine amounts flow from the statutory language that authorize the fine and the federal sentencing guidelines, which provide non-binding recommendations about the amount of a criminal fine based on various factors relating to the offense. The maximum statutory penalties per violation of the anti-bribery provisions are a \$2,000,000 criminal fine and a \$16,000 civil penalty for a corporate entity. For individuals, the maximum criminal fine per violation is \$250,000, and the maximum civil penalty per violation is \$16,000. In addition, a criminal fine of up to twice the gross amount of pecuniary gain may be levied under the Alternative Fines Statute and federal sentencing guidelines.

There are three tiers of civil penalties for violations of the books and records provisions, depending on a series of aggravating factors. The penalties range from \$7,500 to \$160,000 per violation for individuals and \$75,000 to \$775,000 (these were adjusted for inflation in 2013) per violation for corporate entities or may be calculated based upon the gross amount of the pecuniary gain. In addition, the SEC typically seeks disgorgement of any ill-gotten gains.<sup>6</sup> Violations of the books and records provisions are civil violations unless they are committed willfully, in which case they are punishable as criminal offenses. Criminal violations carry maximum penalties of a \$25 million fine per violation for entities and a \$5 million fine per violation and 20 years' incarceration for natural persons.

### 3. Other Collateral Consequences

The resolution of an FCPA investigation can also trigger collateral consequences outside the four corners of the settlement. These consequences are most likely to flow from a guilty plea or acknowledgment of criminal misconduct. For example, a criminal conviction may raise the possibility of suspension and debarment from participating in government contracts. As reflected in the section below discussing Private Litigation, FCPA

settlements may also draw collateral lawsuits relating to the alleged misconduct.

#### *FAQ 15 How are monetary FCPA penalties calculated?*

The statute provides specific maximum penalty amounts per violation: \$2,000,000 criminal fine and a \$16,000 civil penalty for a corporate entity. In addition, a criminal fine of up to twice the gross pecuniary gain may be levied under the Alternative Fines Statute.

As a practical matter, the fact that each violation may be a separate basis for a fine gives the enforcement agencies wide discretion in setting the amount of a monetary sanction. In many corporate settlements, the final amount paid is subject to negotiation between the settling defendant and the enforcing agency.

The amount of a criminal fine imposed as a result of an FCPA violation is ostensibly based on a calculation of the recommended fine under the federal sentencing guidelines, which provide federal courts with non-binding guidance governing criminal penalties arising from federal crimes. The guidelines contain a formula for calculating a corporation's criminal fine that takes into account the nature of crime, the amount of benefit obtained, and culpability factors such as the size of the organization, the company's policies, and involvement of senior management.

In many cases, following negotiation, a settling defendant will receive a "discount" off the DOJ's calculation of the recommended guidelines range. The DOJ's recent efforts to quantify the value of self-reporting and cooperation have reflected an attempt to make the process of setting the appropriate fine more transparent.

The SEC has not provided formal guidance regarding the amount of a monetary penalty in any given case. In addition, the SEC often seeks disgorgement of ill-gotten gains.

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<sup>6</sup> The values of all SEC penalties are subject to periodic inflation adjustments under the Debt Collection Improvement Act of 1996; the inflation-adjusted penalties are published in 17 C.F.R. § 201.1005. The most recent

adjustments to the civil penalties became effective March 5, 2013. See Securities & Exchange Comm'n, Adjustments to Civil Monetary Penalty Amounts, 78 Fed. Reg. 14179 (Mar. 5, 2013).

A company considering a resolution of an FCPA investigation should carefully identify and analyze potential collateral consequences prior to entering into the agreement.

#### 4. Cooperation, Voluntary Disclosure, and Remediation

In the context of the FCPA (and other corporate crime), the DOJ and SEC view “voluntary disclosure” as meaning a timely disclosure to the government of misconduct. To receive full credit, the government has stressed that a disclosure must both be made soon after the company discovers the wrongdoing and must not be delayed until the government’s own discovery of the wrongdoing is otherwise imminent. In such circumstances, the DOJ or SEC may not view the disclosure as voluntary.

The DOJ and SEC encourage companies to come forward with violations of the FCPA and promise leniency in exchange. They write in the *Resource Guide*, for example, that they “place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.” *Resource Guide* at 54.

In recent enforcement actions, both the DOJ and SEC emphasized the credit they gave to companies that self-disclosed their misconduct; conversely, they also pointed out that companies that did not self-disclose would receive harsher penalties and, at least with the SEC, may lose the ability to earn any cooperation credit.

Recent DOJ guidance and the pilot program appear to reflect an effort to further quantify the potential benefits in cooperation, disclosure, and remediation: if a company meets certain requirements in all three categories, the DOJ may grant an up to 50 percent reduction off the bottom-end of the DOJ’s calculation of the federal sentencing guidelines range. If a company cooperates and remediates but fails to self-disclose, the maximum reduction the DOJ may grant is only 25 percent.

Our analysis of recent FCPA settlements with both the DOJ and the SEC confirm that there is an observable reduction in the monetary penalty for corporations that are given full disclosure credit compared to companies engaged in similar conduct that are not given that credit.

Nonetheless, the rewards of voluntary disclosure in the FCPA context are nowhere near as clear-cut as those

under certain other programs, such as the DOJ Antitrust Division’s amnesty program, which can confer amnesty on a company that is “first in” to report participation in antitrust activity.

#### FAQ 16: Are there benefits to voluntary disclosure?

Yes, but the extent of the benefits is highly fact-specific. The DOJ and SEC encourage companies to make voluntary disclosures of wrongdoing and promise that such self-reporting will be rewarded with a lesser penalty. Our analysis of recent settlements reflects that there has been an observable benefit to self-disclosure, though the extent of the benefit is difficult to quantify as many other factors may affect the ultimate size of a penalty and the nature of any resolution.

The benefits to voluntary disclosure must be weighed against the potential downsides to disclosure, including possible public disclosure of an ongoing investigation and the possibility of additional investigation directed by the government following any disclosure.

Whether voluntary disclosure is advisable in any given situation is highly fact-specific. As noted above, self-reporting companies likely receive some benefit, but often it is not clear how much. A company that makes a voluntary disclosure is more likely to obtain a deferred or non-prosecution agreement than a company that does not disclose. But there may be many circumstances in which such an agreement will not be afforded even though there has been a disclosure. And, while preferable to a guilty plea, deferred or non-prosecution agreements do not provide ironclad insulation against future criminal prosecution. Indeed, a 2008 FCPA prosecution came about because the company – Aibel Group Ltd. – was found to have violated an FCPA deferred prosecution agreement from 2004. Furthermore, voluntary disclosure does not guarantee protection against substantial monetary penalties.

There can be significant additional downsides to voluntary disclosures. First, they frequently result in potential FCPA violations becoming public before they are resolved, often through SEC filings that are reported in the press. Such publicity can lead to shareholder suits and reputational damage. Second, self-reporting can increase a

company's legal costs, as the DOJ and SEC typically require additional investigation in the wake of a disclosure, sometimes encompassing business units or geographic areas well beyond those involved in the potential violations initially identified and disclosed. Indeed, in its 2014 settlement with Bruker Corporation, the SEC specifically cited, as an example of the company's cooperation, the fact that it had expanded the scope of its internal investigation at the agency's request.

Thus, any company contemplating a voluntary disclosure should carefully weigh the costs and benefits of voluntary disclosure in light of all the relevant facts.

Cooperation presents a similar dilemma. As with voluntary disclosure, the DOJ and the SEC have extolled the virtues of cooperation and emphasized that it can play an important factor in a favorable resolution. Indeed, many corporate resolutions attribute a modest fine amount in part to the defendant's cooperation. Our analysis of past DOJ resolutions likewise confirms that there is some benefit in that companies who received formal cooperation credit under the federal sentencing guidelines often receive a further "discount" below the recommended fine.

Although the pilot program and recent enforcement actions have included specific discussion of how cooperation and self-disclosure have influenced the size of the monetary penalty, skeptics may suggest that the significant charging discretion possessed by prosecutors will blunt the effect of the DOJ's quantification of cooperation credit and related guidance in the pilot program. The federal sentencing guidelines ranges form the basis of any federal criminal fine from which a reduction under the pilot program will be calculated. But the guidelines ranges are calculated based on the charged offenses and the facts and circumstances of a case, both of which are subject to the government's charging discretion. For example, a prosecutor seeking a \$10 million fine could charge the defendant with conduct supporting a fine of that size. Or, if a company is due a 50 percent discount under the pilot program, the prosecutor could charge the defendant with more severe conduct that supports a \$20 million fine, which is reduced to \$10 million by the discount, getting the same result regardless of the alleged cooperation credit. Thus, the government has the power to set the baseline from which a reduction in the fine is taken. While prosecutors will rightly note that they are bound by what the evidence shows and the law interpreting the guidelines, skeptics

will insist that these constraints leave significant play in the joints as to a baseline fine based on what offense is charged and which facts are emphasized.

#### *FAQ 17: What counts as "cooperation" with the government investigation?*

There is no magic formula for cooperating, but recent DOJ and SEC pronouncements and resolutions, including the DOJ FCPA Pilot Program, identify a number of concrete steps a company under investigation can take for which the government may give cooperation credit:

- Timely self-reporting of misconduct;
- Providing real-time reports about findings of the company's internal investigation, including making proactive (rather than reactive) disclosures to the government;
- Making overseas witnesses available;
- Summarizing witness interviews;
- Voluntarily producing relevant documents;
- Translating foreign-language documents;
- Providing topical collections of documents;
- Preparing and producing factual chronologies;
- Conducting voluntary risk assessments or reviews of other areas of the company's business;
- Assisting the government in overcoming challenges posed by foreign data privacy laws and blocking statutes;
- Providing evidence regarding the individuals involved in the misconduct; and
- Providing all known facts relevant to potential third-party criminal activity.

In its 2016 pilot program announcement and other recent public statements, the DOJ has stated that providing relevant information about the individuals involved in misconduct is a prerequisite to receiving any cooperation credit.

In addition, the potential benefits of cooperation must be weighed against the related drawbacks. First, cooperation can be costly. The DOJ and SEC have set a high bar for cooperation, frequently citing cooperation as

*FAQ 18: What counts as “remediation” of a violation or potential violation of the FCPA?*

The DOJ has identified a number of factors as relevant to its assessment of remedial actions, including many that are focused on ongoing compliance, including whether the company:

- Has an established culture of compliance, including an awareness among employees that criminal conduct is not tolerated;
- Dedicates sufficient resources to compliance, including maintaining experienced and adequately compensated compliance personnel;
- Maintains an independent compliance function;
- Performs an effective risk assessment and tailors its compliance program based on the assessment;
- Performs regular audits of its compliance function;
- Maintains an appropriate reporting structure for compliance personnel within the company;
- Appropriately compensates and promotes compliance personnel within the company as compared to other employees;
- Appropriately disciplines employees for violations and has a disciplinary system that allows for disciplining supervisors who oversee individuals responsible for misconduct;
- Allows for compensation to be altered based on disciplinary infractions or a failure to adequately supervise; and
- Considers any additional steps necessary to signal the importance of accepting responsibility for misconduct and measures to reduce misconduct risks.

The DOJ highlighted certain of these factors in its 2016 pilot program announcement. The announcement also makes clear that qualifying for cooperation credit, discussed above, is a prerequisite for receiving any remediation credit.

including resource-heavy undertakings, such as creating topical collection of documents, providing translation of foreign language document, making internationally-based witnesses available, and providing real-time updates to the government.

Second, cooperation can enhance the disruptive impact of the investigation. Especially since the Yates Memo re-emphasized the DOJ's emphasis on individual criminal liability as described more fully below, the DOJ (and to a lesser extent the SEC) have made identifying individual wrongdoers and developing evidence against them explicit requirements of cooperation. While in some circumstances, a company may feel victimized by a perpetrator of misconduct and be perfectly willing to aggressively assist in her prosecution, there are other circumstances where a company may have legitimate concerns about developing evidence for the prosecution of its once-valued employees. Individual employees also may be less willing to cooperate in an internal investigation knowing that it is undertaken in part with the purpose of identifying evidence to prosecute a fellow employee.

As with cooperation, adequately remediating an FCPA violation can be a difficult endeavor. In settlement papers that have discussed remediation, the DOJ and SEC have each commended companies that have improved their compliance programs and taken appropriate steps to discipline the employees involved in the misconduct. But what constitutes adequate remediation is highly case specific, as the DOJ recognized in its 2016 pilot program announcement.

As the DOJ's 2016 settlement with Embraer shows, the DOJ can have very specific actions in mind when the time comes for rewarding remedial measures. In announcing the Embraer settlement, the DOJ acknowledged that the company had disciplined several employees, but faulted the company for incomplete remediation because it failed to discipline a senior executive who was aware of bribery discussions over email and was responsible for overseeing the employees involved in those discussions. As a result, the DOJ gave Embraer only partial credit for remediation.

Although the DOJ and SEC have made clear that an adequate compliance program must be tailored to the company's specific circumstances and risks, the *Resource Guide* identifies five "hallmarks" of an effective FCPA compliance regime:

1. Commitment from senior management and a clearly articulated policy against corruption;
2. Code of conduct, policies, and procedures that clearly prohibit corruption;
3. Responsibility invested in an executive with adequate "oversight, autonomy, and resources";
4. A risk-based approach; and
5. Training and other communication sufficient to ensure knowledge of the policy.

## 5. Declinations

A declination is a decision by the enforcement authority to forgo charges notwithstanding a finding that misconduct occurred.

In recent years, the DOJ and SEC have taken steps to provide additional guidance, though continuing to stress that any declination decision is highly fact specific. In 2016, pursuant to its pilot program, the DOJ released letters in five matters in which it declined prosecution despite evidence of misconduct. Each of those letters highlighted certain factors, including:

- Voluntary self-disclosure;
- A comprehensive internal investigation;
- Cooperation with DOJ investigation;
- Remediation, including an enhanced compliance program and discipline of employees involved in the misconduct; and
- Agreement to disgorge ill-gotten gains.

Prior to the DOJ's recent emphasis on making additional declination information available, the SEC and DOJ provided some guidance in the *Resource Guide*. The agencies offered six anonymized examples of past declinations. The examples shared several common features that largely track the commonalities among the recent declination letters:

- Either a voluntary disclosure or the provision of the results of an internal investigation to the government;
- Prompt and thorough internal investigations;
- Cooperation with the government's investigation; and
- Significant remedial action, such as improved training and internal controls and termination of employees and business partners involved in wrongdoing.

Other factors included the small size of improper payments and potential profits and the strength of the company's preexisting compliance program. See *Resource Guide* at 77-79.

*FAQ 19: Under what circumstances will the DOJ or SEC decline to take enforcement action despite finding that misconduct occurred?*

Declination decisions are highly fact-specific. While there are no formal guidelines, DOJ and SEC guidance, including recent DOJ declination letters, have emphasized voluntary disclosure, cooperation, and remediation as critical factors in declination decisions.

## OTHER FEDERAL STATUTES THAT APPLY TO FOREIGN CORRUPTION

A number of other federal criminal statutes can apply to foreign bribery:

- **Money Laundering Statutes.** The federal money laundering statutes make it a felony to conduct a financial transaction knowing that the funds are the proceeds of “specified unlawful activity.” 18 U.S.C. § 1956(a)(1). The term “specified unlawful activity” expressly includes “any felony violation of the Foreign Corrupt Practices Act.” *Id.* § 1956(c)(7)(D). Accordingly, financial transactions that involve the proceeds of an FCPA violation (e.g., profits derived from an illicit payment) or improper payments to an agent that aid or abet money-laundering activities under 18 U.S.C. § 2, may give rise to criminal liability beyond that imposed by the FCPA itself.
- **Mail and Wire Fraud.** The DOJ also has used the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to prosecute foreign bribery. These statutes are extremely broad and can apply in certain circumstances to conduct not reached by the FCPA.
- **The Travel Act.** The Travel Act, 18 U.S.C. § 1952, prohibits the use of foreign travel or the instruments of interstate commerce to further “unlawful activity,” including activity made criminal by the state in which the offense was committed. Because many states prohibit commercial bribery, the Travel Act, unlike the FCPA, often reaches foreign *commercial* bribery.

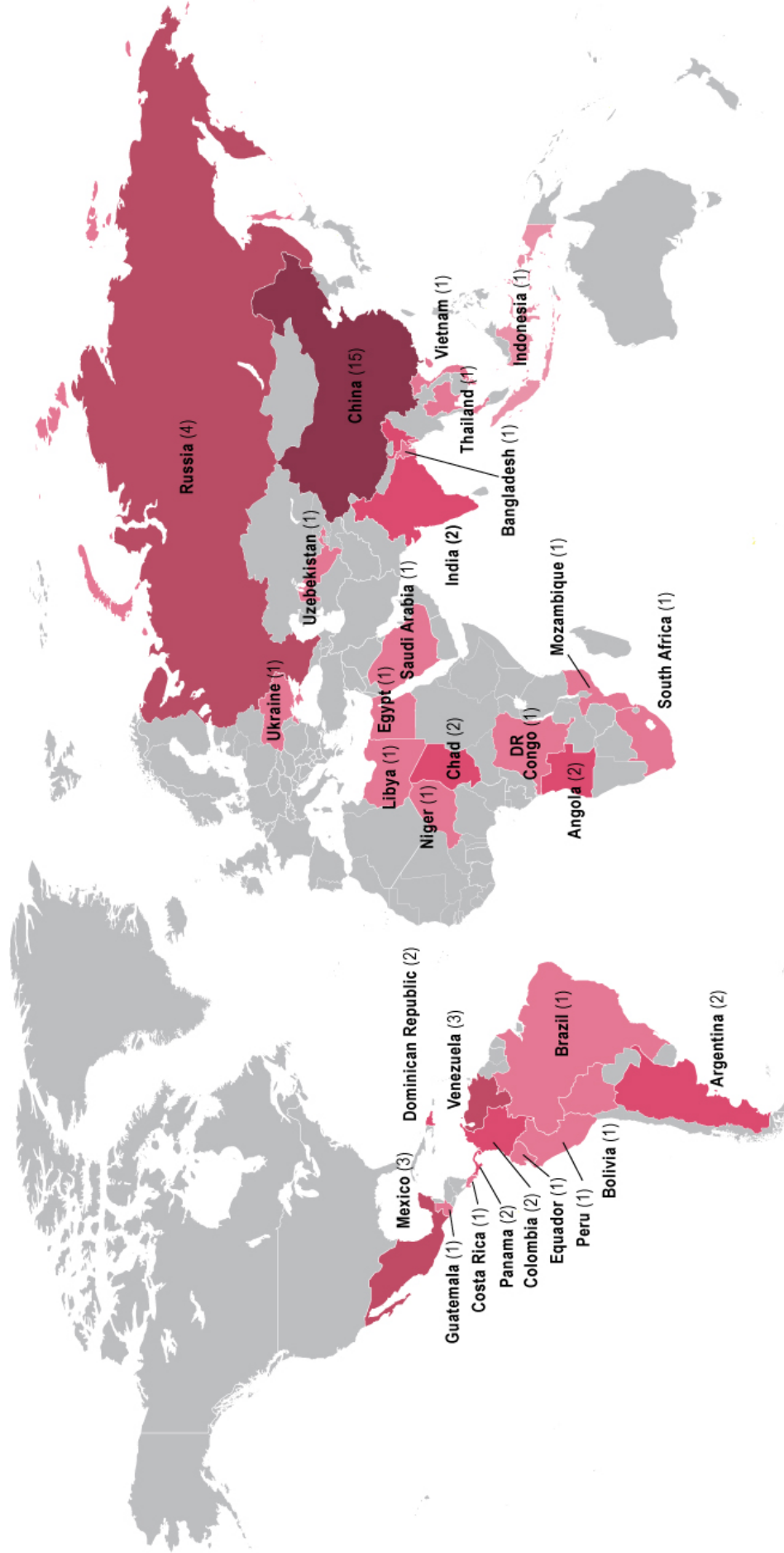
The DOJ indictments of nine Fédération Internationale de Football Association (FIFA) officials and five corporate executives illustrate the reach of these other law enforcement tools in reaching foreign corrupt conduct.

*FAQ 20: Can a US company engage in foreign bribery if it does not involve the bribing of a foreign official?*

No. Although that conduct is not prohibited by the FCPA, other federal criminal statutes, including the Travel Act and the mail and wire fraud statutes, likely would apply to it. The 2015 FIFA indictments for corrupt payments involving the international soccer organization show that US law enforcement can and will use other federal criminal statutes to investigate and prosecute alleged international wrongdoing, such as commercial bribery, outside the reach of the FCPA.

# COUNTRIES INVOLVED IN 2016 FCPA ENFORCEMENT ACTIVITY

Location of Alleged Improper Payment





## 2016 FCPA ENFORCEMENT ACTIVITY

The summaries below, presented in alphabetical order, describe the significant events in FCPA cases during 2016, including new complaints as well as significant developments in and resolutions of ongoing matters.

### AKAMAI TECHNOLOGIES

*Securities and Exchange Commission  
Non-Prosecution Agreement  
June 7, 2016*

*Department of Justice  
Declination of Prosecution  
June 7, 2016*

**Nature of Conduct:** Akamai (Beijing) Technologies, Co. Ltd. (Akamai-China), a wholly owned subsidiary of Akamai Technologies, Inc. (Akamai), contracted with third-party partners in China (as required by China's regulatory system) to deliver internet cloud services to end customers. From 2012 to 2015, an Akamai-China regional sales manager used a portion of monies provided by a partner to pay employees of end customers, two of which were state-owned entities. As a result of the payments, end customers purchased up to 100 times more network capacity than they needed. Employees of Akamai-China also provided gifts to end customer employees, which were recorded as legitimate business expenses. Akamai books and records consolidated these inaccurate records.

**Amount of Alleged Improper Payments:** Improper payments totaled \$187,500.

**Benefit Obtained:** The resolutions do not specify.

**Type of Resolution and Sanction:** The DOJ declined prosecution, and Akamai entered into a non-prosecution agreement with the SEC covering the alleged improper

payments by Akamai-China under which Akamai will disgorge \$652,452, plus prejudgment interest of \$19,433.

### ANALOGIC CORP., BK MEDICAL, AND LARS FROST

*Securities and Exchange Commission  
Settled Administrative Proceeding  
(Analogic Corp. and Lars Frost)  
June 21, 2016*

*Department of Justice  
Non-Prosecution Agreement (BK Medical)  
June 21, 2016*

**Nature of Conduct:** Over a period of at least 10 years, Analogic Corp.'s wholly owned Danish subsidiary BK Medical engaged in hundreds of sham transactions that posed a significant risk of corruption or other improper conduct, such as embezzlement. At the request of its distributors, BK Medical issued false or inflated invoices to the distributors and then directed the overpayments it received to third parties identified by the distributors. Over the course of the scheme, about \$20 million in overpayments were sent to third parties, including individuals in Russia and apparent shell companies in Belize, the British Virgin Islands, Cyprus, and Seychelles. Lars Frost, BK Medical's CFO, personally authorized many of these payments.

**Amount of Alleged Improper Payments:** The order does not allege a quid pro quo arrangement, but identifies about \$20 million in payments made to third parties as part of sham transactions.

**Benefit Obtained:** BK Medical made the sham transactions at the request of certain of its distributors.

**Type of Resolution and Sanction:** The SEC's order finds that Analogic violated the FCPA's internal controls provisions and that Frost knowingly circumvented BK

Medical's internal controls and falsified its books and records. Without admitting or denying the findings, Analogic consented to the order and agreed to pay \$7.67 million in disgorgement and \$3.8 million in pre-judgment interest. Frost also consented to the order, without admitting or denying the findings except for purposes of exceptions to discharge under the Bankruptcy Code, and agreed to pay a civil penalty of \$20,000.

BK Medical agreed to a non-prosecution agreement with the DOJ, under which it will pay a \$3.4 million fine.

**Of Note:** The settlement configuration, with the parent entering into a settlement with the SEC and a subsidiary entering into a settlement with the DOJ, shows the range of different potential settlement outcomes.

#### ANHEUSER-BUSCH INBEV SA/NV

*Securities and Exchange Commission  
Settled Administrative Proceeding  
September 28, 2016*

**Nature of Conduct:** According to the SEC, Anheuser-Busch InBev SA/NV (AB InBev) violated the books and records and internal controls provisions of the FCPA by allegedly using third-party sales promoters to make improper payments to government officials in India to increase sales and to extend plant production hours at AB InBev plants in India from 2010 through 2013. AB InBev reimbursed one sales promotion agent for unsubstantiated marketing expenses; the second sales promoter was a family member of an Indian government official and recorded the payments to third parties as legitimate business expenses. In addition, the SEC alleges that AB InBev failed to follow appropriate compliance practices in hiring these third-party promoters. For example, it failed to require written contracts with the agents, and an Indian affiliate backdated due diligence documents once an internal review was commenced.

**Amount of Alleged Improper Payments:** The SEC order did not specify the amount of the alleged corrupt payments.

**Benefit Obtained:** AB InBev agreed to pay disgorgement of \$2,712,955, reflecting the amount of alleged improper benefit.

**Type of Resolution and Sanction:** Without admitting or denying the findings in the Commission's order, AB InBev

agreed to pay disgorgement of \$2,712,955, pre-judgment interest of \$292,381, and a civil penalty of \$3,002,955. In addition, the settlement provided that the company must report its FCPA compliance efforts to the SEC.

**Of Note:** The SEC order and accompanying press release emphasize the importance of taking proper steps in engaging third parties that may act on the behalf of a company, including putting in place a written agreement that specifies the services the third party is to perform and undertaking due diligence as to the third party's legitimacy and government connections. Further, the SEC also noted that AB InBev had responded improperly to a whistleblower employee who reported the alleged misconduct, including by entering into a separation agreement with the employee that imposed a substantial financial penalty on the employee for voluntarily communicating with the SEC about potential FCPA violations.

#### ASTRAZENECA PLC

*Securities and Exchange Commission  
Settled Administrative Proceeding  
August 30, 2016*

**Nature of Conduct:** According to the SEC order, UK.-based biopharmaceutical company AstraZeneca plc (AstraZeneca) violated the FCPA's books and records and internal controls provisions by making improper payments in the form of cash, gifts, travel, and other items to foreign official healthcare providers as incentives to purchase or prescribe AstraZeneca pharmaceuticals in China and Russia and to resolve threatened regulatory fines against AstraZeneca's Chinese subsidiary. The improper payments continued over several years in separate schemes that were orchestrated or condoned by multiple levels of management at AstraZeneca's Chinese and Russian subsidiaries. These payments were not accurately recorded in AstraZeneca's books and records.

**Amount of Alleged Improper Payments:** The SEC order does not state the amount of the alleged payments.

**Benefit Obtained:** The order describes benefits received as including the prescription and purchase of AstraZeneca pharmaceuticals as well as the reduction or dismissal of proposed financial sanctions against the China subsidiary, but does not quantify those benefits.

**Type of Resolution and Sanction:** The SEC alleges that AstraZeneca violated the FCPA's internal controls and

books and records provisions. Without admitting or denying the findings in the Commission's order, AstraZeneca consented to the order and agreed to pay \$4.325 million in disgorgement, \$822,000 in prejudgment interest and a \$375,000 civil penalty.

**Of Note:** The SEC order specifically praised AstraZeneca's "significant cooperation," including that it "voluntarily and timely disclosed" findings from its internal investigation; provided translations of key documents; and disclosed facts that the SEC would not have been able to discover independently. The SEC noted that, although AstraZeneca did not self-report the violations, this cooperation and AstraZeneca's remedial efforts in developing an improved compliance program led to the relatively low civil penalty.

#### EMBRAER S.A.

*Department of Justice  
Deferred Prosecution Agreement  
October 24, 2016*

*Securities and Exchange Commission  
Settled Civil Injunctive Action  
October 24, 2016*

**Nature of Conduct:** Embraer S.A. (Embraer) admitted to paying government officials in order to obtain lucrative government contracts for aircraft sales in the Dominican Republic, Saudi Arabia, Mozambique, and India. According to the DOJ and SEC, Embraer used third parties – shell companies and agents who did not render any services in connection with the aircraft sales – to conceal the payments to the government officials and then falsely recorded the payments as legitimate business expenses. The company did not require adequate due diligence before hiring consultants and agents, did not require having a signed contract or proof that any services had been performed before paying a third party and did not have anyone overseeing the process to ensure payments were subject to controls. Several high-level executives knew about the misconduct and knowingly failed to remediate the control deficiencies that allowed it to continue.

**Amount of Alleged Improper Payments:** Embraer admitted to paying a total of approximately \$11.58 million in bribes to government officials.

**Benefit Obtained:** According to the DOJ, Embraer was awarded government contracts that earned the company nearly \$84 million in profits.

**Type of Resolution and Sanction:** Embraer entered into a deferred prosecution agreement with the DOJ under which it agreed that it had engaged in a conspiracy to violate the FCPA's anti-bribery provisions and violated the FCPA's books and records provisions. Embraer agreed to pay the DOJ a penalty of \$107,285,090. It also agreed to a three-year corporate monitorship and to implement a more adequate system of internal accounting controls.

Embraer reached a settlement with the SEC for violations of the anti-corruption and accounting provisions of the FCPA, under which it will pay \$83.8 million in disgorgement and \$14.4 million in prejudgment interest. The SEC agreed to credit the disgorgement payment that Embraer agreed to pay Brazilian authorities, which amounts to \$20 million.

**Of Note:** DOJ stated that Embraer's penalty is 20 percent below the applicable range in the sentencing guidelines, "a discount that reflects Embraer's full cooperation but incomplete remediation." Specifically, the DOJ faulted the company's remediation because, although certain employees were disciplined, the company did not discipline a senior executive who was aware of bribery discussions over email and was responsible for overseeing the employees involved in the discussions.

Reflecting the public emphasis by senior officials at the DOJ and SEC on international anti-corruption coordination, the Embraer investigation involved law enforcement authorities in many other jurisdictions, including Brazil, Switzerland, South Africa, Uruguay, Spain, and France.

The investigation and settlement also demonstrate potentially expansive FCPA jurisdiction over foreign companies. Embraer is an issuer within the meaning of the FCPA, but it is a Brazilian company and most of the misconduct took place outside the United States. US authorities asserted jurisdiction based on the use of US-based bank accounts and a US-based email account used by one of Embraer's co-conspirators.

Several DOJ resolutions in 2016 stressed the discipline of employees involved in, or knowledgeable of misconduct, as a key part of its assessment of the adequacy of the remediation of a FCPA violation, a factor in the DOJ's assessment of the appropriate resolution under the pilot program.

## GENERAL CABLE CORPORATION

*Department of Justice  
Non-Prosecution Agreement  
December 29, 2016*

*Securities and Exchange Commission  
Cease-and-Desist Order  
December 29, 2016*

**Nature of Conduct:** According to the SEC's order, General Cable's subsidiaries made improper payments to government officials in Angola, Bangladesh, China, Indonesia, Thailand, and Egypt to gain business from state-owned enterprises. These payments were either made directly to foreign government officials or through third-party agents and distributors and were concealed in the company's books and records as sales commissions, rebates, discounts, and other fees. The payments were discussed openly in email messages, some of which were sent to General Cable executives. The company failed to investigate the payments, failed to implement internal accounting controls designed to detect and prevent such corrupt payments, and failed to adequately train employees to ensure compliance with the FCPA.

**Amount of Alleged Improper Payments:** According to the SEC's order, the company paid approximately \$19 million to third-party agents and distributors, a portion of which was used to make unlawful payments to obtain business.

**Benefit Obtained:** General Cable received approximately \$51 million in profits worldwide as a result of the misconduct.

**Type of Resolution and Sanction:** Pursuant to the non-prosecution agreement with the DOJ, General Cable will pay a penalty of more than \$20.5 million and will continue to enhance its compliance program.

The SEC order finds that General Cable violated anti-bribery, books and records and internal accounting

controls provisions of the FCPA. Without admitting or denying, General Cable consented to the entry of the order and agreed to disgorge approximately \$55 million, including prejudgment interest.

**Of Note:** According to the DOJ, General Cable received a 50 percent reduction off the bottom of the US sentencing guidelines fine range, due to its voluntary self-disclosure; full cooperation, including its thorough internal investigation and identification, investigation and disclosure of conduct outside the scope of the initial voluntary self-disclosure; and full remediation, including terminating 13 employees involved in the misconduct and terminating relationships with 47 third-party agents and distributors who played a role in the illicit schemes.

## GLAXOSMITHKLINE

*Securities and Exchange Commission  
Settled Administrative Proceeding  
September 30, 2016*

**Nature of Conduct:** According to the SEC, employees and agents of GlaxoSmithKline's (GSK) China-based subsidiary and joint venture made alleged corrupt payments to Chinese health care professionals in order to increase sales of GSK pharmaceutical products. The corrupt payments were made under the guise of promotional charges, including travel expenses, and were not accurately recorded in GSK's books and records. The SEC also alleged that internal audit reviews discovered some of the improper payments, but GSK managers dismissed the possibility of a larger problem and treated them as isolated incidents.

**Amount of Alleged Improper Payments:** The SEC's order does not provide a total amount of improper payments, but identifies some payments that, in all or part, were likely improper, including \$225 million in planning and travel-related expenses; \$2.2 million in "speaker fees"; and \$2.3 million provided to government officials in the form of gifts such as tablets, laptops, and other electronic devices.

**Benefit Obtained:** The order describes the benefits received as including the purchase of GSK pharmaceuticals, but does not quantify those benefits.

**Type of Resolution and Sanction:** The SEC order finds that GSK violated the books and records and internal controls provisions of the FCPA. Without admitting or denying the findings in the SEC's order, GSK agreed to

the entry of the order and to pay a \$20,000,000 civil penalty. The order also requires GSK to periodically report to the SEC on its remediation and implementation of anti-corruption efforts for a two-year period.

**Of Note:** Although the charges are centered specifically on GSK's Chinese subsidiary, the SEC's order notes, without further explanation, that the "deficiencies in GSK's internal accounting controls and compliance program also led to instances of similar improper conduct in connection with sales in other countries." This general allegation of misconduct is unusual and noteworthy in light of the potential for related private securities litigation arising out of the settlement. Although by the terms of the agreement GSK is neither admitting nor denying the allegation, this allegation could be taken by the plaintiffs' bar as evidence that misconduct is more widespread.

#### DMITRIJ HARDER

*Department of Justice  
Plea Agreement  
April 20, 2016*

**Nature of Conduct:** The DOJ charged Dmitrij Harder, the former owner and president of Chestnut Consulting Group Inc. and Chestnut Consulting Group Co. (Chestnut Group), with paying bribes to a senior banker in the UK's Natural Resources Group of the European Bank for Reconstruction and Development (EBRD). As described in the DOJ press release accompanying the sealed plea agreement, Harder admitted that, between 2007 and 2009, he "engaged in a scheme to pay approximately \$3.5 million in bribes to an EBRD official to corruptly influence the official's actions on applications for EBRD financing submitted by the Chestnut Group's clients and to influence the official to direct business to the Chestnut Group."

**Amount of Alleged Improper Payments:** The total amount of alleged improper payments was \$3.5 million.

**Benefit Obtained:** \$8 million in "success fees."

**Type of Resolution and Sanction:** Sealed Plea. Sentencing is scheduled for June 28, 2017.

**Of Note:** First, the EBRD is based in the United Kingdom, which is not generally considered a high corruption-risk country. Second, the indictment relies on the "public international organization" prong of the FCPA's "foreign official" element, which is infrequently alleged. The court

rejected a motion to dismiss challenging this theory, reasoning that the indictment alleged sufficient facts that a jury could find that EBRD was a public international organization.

#### RICHARD HIRSCH AND JAMES MCCLUNG

*Department of Justice  
Sentencing  
July 7, 2016 (McClung)  
July 8, 2016 (Hirsch)*

**Nature of Conduct:** Louis Berger International Inc. (LBI), a wholly owned subsidiary of Berger Group Holdings, Inc. (BGH), and two employees, Richard Hirsch and James McClung, were charged with violating the FCPA. According to a deferred prosecution agreement between the DOJ and LBI, employees of LBI engaged in schemes to pay bribes to foreign officials in Indonesia, Vietnam, India and Kuwait, from 1998 to 2010, to secure construction management contracts with government entities.

**Amount of Alleged Improper Payments:** Across the four countries, LBI paid foreign officials approximately \$3,934,431.

**Benefit Obtained:** LBI was awarded construction management contracts with government entities in India, Indonesia, Kuwait, and Vietnam; but the value of these contracts has not been specified.

**Type of Resolution and Sanction:** Hirsch and McClung each pleaded guilty to one count of conspiracy to violate the FCPA. Hirsch was sentenced to two years' probation and McClung was sentenced to a year and one day of imprisonment.

**Of Note:** The LBI resolution has been cited by DOJ officials as an example of the principles articulated in the Yates Memo: LBI cooperated with the DOJ's investigation, and the DOJ was able to prosecute individual wrongdoers.

## HMT LLC

*Department of Justice  
Declination of Prosecution  
September 29, 2016*

**Nature of Conduct:** The Department alleged that HMT, through its employees and agents, paid bribes to government officials in Venezuela and China in order to influence those officials' government purchasing decisions. Under the bribery scheme in Venezuela, HMT's agent quoted Petroleos de Venezuela, S.A. (PDVSA), Venezuela's state-owned and state-controlled energy company, prices that were substantially higher than the prices HMT quoted the Venezuelan agent. When PDVSA paid HMT the inflated price, HMT paid the additional amount to the agent as "commission" and "subcontracting fees," and the agent used a portion of these monies to pay bribes to PDVSA employees and other Venezuelan government officials, as incentives for these officials to continue to purchase HMT products. At times, the agent would purchase HMT products from the company, resell them to PDVSA at an inflated rate, and use a portion of the difference to pay the Venezuelan officials. In China, a distributor engaged by an HMT subsidiary paid bribes to Chinese government officials on almost all its transactions in order to secure the purchase of HMT products by state-owned enterprises.

**Amount of Alleged Improper Payments:** The declination letter alleges that HMT made approximately \$500,000 in improper payments.

**Benefit Obtained:** Government purchasing decisions in China and Venezuela resulted in \$2,719,412 in net profits for the company.

**Type of Resolution and Sanction:** Declination of prosecution and disgorgement of all \$2,719,412 in net profits derived from the illicit conduct.

**Of Note:** The Department noted that its decision to close the matter was based on several factors, including HMT's timely, voluntary self-disclosure; its thorough and comprehensive global investigation; its full and ongoing cooperation; its agreement to disgorge all profits; its efforts to enhance its compliance program and internal accounting controls; and its full remediation, which included terminating eight employees involved in the conduct, sanctioning an additional 10 employees, and severing business relationships with the Venezuelan agent, Chinese distributor, and seven other agents and

distributors discovered during the company's investigation.

## JOHNSON CONTROLS, INC.

*Department of Justice  
Declination of Prosecution  
June 21, 2016*

*Securities and Exchange Commission  
Settled Administrative Proceeding  
July 11, 2016*

**Nature of Conduct:** According to the SEC, China Marine, a Chinese wholly owned subsidiary of Wisconsin-based Johnson Controls, Inc. (JCI), made payments to sham vendors that were used to make approximately \$4.9 million of improper payments to Chinese government owned shipyards, ship owners and others. The scheme required collusion between nearly every member of China Marine. JCI considered these transactions low-risk because they had a low dollar value and did not appear to involve the government; as a result, JCI did not review the payments. The payments were inaccurately recorded on JCI's books and JCI failed to develop internal controls adequate to detect such payments.

**Amount of Alleged Improper Payments:** JCI paid more than \$4.9 million for goods or services that were never delivered or were purchased at inflated rates.

**Benefit Obtained:** JCI obtained \$11.8 million in profits.

**Type of Resolution and Sanction:** The SEC's order finds that JCI violated the books and records and internal controls provisions of the FCPA. Without admitting or denying findings, JCI consented to the order and agreed to pay disgorgement of \$11,800,000, prejudgment interest of \$1,382,561, and a civil penalty of \$1,180,000. As part of the settlement, JCI also must submit two status reports over the next year detailing its remediation efforts.

The Department of Justice announced in a letter that it declined to prosecute JCI.

**Of Note:** The SEC highlighted JCI's cooperation with the investigation, including that JCI self-reported, assisted the SEC with the investigation and terminated the employees involved. The DOJ's letter declining to prosecute highlights these same factors.

## JP MORGAN CHASE & CO.

*Department of Justice  
Non-Prosecution Agreement  
November 17, 2016*

*Securities and Exchange Commission  
Settled Administrative Proceeding  
November 17, 2016*

**Nature of Conduct:** According to the SEC, a Hong Kong based subsidiary of JP Morgan Chase & Co. (JPMC), JP Morgan-APAC, set up and used a program that hired employees referred by clients for the purpose of influencing those clients to give business to JPMorgan-APAC. Many of the clients were government officials. The conduct took place from 2006 through 2013, and it was informal at first, but was institutionalized at JPMorgan-APAC in 2009. As a result of the conduct, JPMorgan-APAC entered into transactions with the referring clients worth more than \$100 million.

**Amount of Alleged Improper Payments:** Approximately 200 interns and employees were hired through the program.

**Benefits Obtained:** Transactions with the referring clients totaling more than \$100 million, resulting in at least \$35 million in profit.

**Type of Resolution and Sanction:** To resolve the DOJ case, JPMC entered into a non-prosecution agreement covering this alleged conduct. Under the agreement, JPMC paid a \$72 million monetary penalty. JPMC also undertook to adopt a revised corporate compliance program. JPMC will report on its progress annually for three years.

The SEC order finds that JPMC violated the anti-corruption, books and records and internal controls provisions of the FCPA. Without admitting or denying the findings, JPMC consented to the order and agreed to disgorge \$105,507,668 and pay prejudgment interest of \$25,083,737. JPMC also agreed to report on its remediation progress every nine months for three years.

In addition, the Federal Reserve System's Board of Governors also issued a consent cease-and-desist order that assessed a \$61.9 million civil penalty against JPMC for this conduct.

The resolution involving JP Morgan, discussed above, and the hedge fund Och-Ziff reflect the potential for FCPA exposure in the financial industry.

**Of Note:** According to the DOJ, JPMC received a 25 percent discount off the bottom of the US sentencing guidelines fine range for complying with the investigation and engaging in extensive remediation. JPMC did not receive voluntary disclosure credit from the DOJ. The SEC also noted that JPMC's cooperation and subsequent remediation played a role in deciding to accept the offer of settlement.

The Federal Reserve acted based on its authority to ensure that the banks it supervises, including JPMC, conduct their business in a safe and sound manner and comply with US law.

JPMC's program of hiring friends and family of clients had been publicly reported beginning in 2012 and 2013, and aspects of the DOJ and SEC investigation into the program have been leaked to the press over the last few years. Other companies have also recently settled FCPA actions with the SEC based on similar conduct, including BNY Mellon in 2015 and Qualcomm earlier in 2016.

## KEY ENERGY SERVICES

*Securities and Exchange Commission  
Settled Administrative Proceeding  
August 11, 2016*

**Nature of Conduct:** According to the SEC's order, Key Energy Services (Key Energy), an oil field services company, violated the FCPA as a result of payments made by its Mexican subsidiary, Key Mexico, through a consulting firm to a contract employee responsible for negotiating contracts at Petróleos Mexicanos (Pemex), Mexico's state-owned oil company. According to the SEC, Key Mexico made payments to the Pemex employee to induce him to provide advice, assistance and inside information that Key Energy and Key Mexico used in negotiating contracts with Pemex. The order also noted that the company had an FCPA Compliance Program on paper, but that it made no effort to ensure that these policies were made operational or enforced in Key Mexico. In addition, the company ignored red flags and had no independent compliance staff and no internal audit function that could have intervened in Mexico to prevent

Key Mexico from engaging in bribery and other misconduct.

**Amount of Alleged Improper Payments:** According to the SEC, from 2010 through at least 2013, Key Mexico paid the consulting firm at least \$229,000 for the purported consulting services.

**Benefit Obtained:** The Pemex employee who received the improper payments allegedly played a role in securing amendments to a pre-existing contract for oil field services that increased the contract's value by approximately \$60 million and also supplied Key Energy with non-public information regarding contract amendments.

**Type of Resolution and Sanction:** The SEC's order found that Key Energy violated the FCPA's books and records and internal controls provisions. Without admitting or denying the findings, Key Energy consented to the order and to pay \$5 million in disgorgement, as well as an undertaking in the event of bankruptcy to take all reasonable efforts to obtain authorization to pay the disgorgement amount.

**Of Note:** Key Energy reported the misconduct to the SEC after discovering the FCPA allegations relating to Mexico. As part of its remediation effort, Key Energy retained a chief compliance officer and gave the CCO independent authority to ensure compliance by all parts of Key Energy Services.

## LAS VEGAS SANDS CORPORATION

*Securities and Exchange Commission  
Settled Administrative Proceeding  
April 7, 2016*

**Nature of Conduct:** According to the SEC's order, Las Vegas Sands Corporation (LVS) failed to properly authorize or document millions of dollars in payments to a third-party consultant who facilitated business activities in China and Macao and improperly accounted for payments that may have gone to Chinese officials. Many of the payments were recorded as fictitious expenses, such as hundreds of thousands of dollars in property management fees for a building that had no property manager and more than a million dollars recorded for arts and crafts" when no artwork was ever purchased.

**Amount of Alleged Improper Payments:** No payments were specifically alleged to be improper. However, the

settlement reflects that LVS kept inaccurate books and records for more than \$62 million in payments that may have been passed on to Chinese officials.

**Benefit Obtained:** The order alleges no specific quid pro quo. According to the SEC, however, many of the potentially improper payments related to LVS transactions, including the purchase of a team in the Chinese Basketball Association; a purchase of a building in Beijing from a Chinese state-owned entity; and expansion of other aspects of the casino business in Macau.

**Type of Resolution and Sanction:** The SEC's order finds that LVS violated the FCPA's internal controls and books and records provisions. Without admitting or denying the findings, LVS consented to the order and agreed to pay a \$9 million civil penalty and to retain an independent consultant for two years to review its FCPA-related internal controls, recordkeeping, and financial reporting policies and procedures, as well as its ethics and compliance functions.

**Of Note:** A wrongful termination lawsuit filed by a former top LVS Macau executive in 2010 has been reported by the *Wall Street Journal* as having prompted the SEC and DOJ to open FCPA investigations. The parties settled the wrongful termination suit shortly before trial, in May of 2016, with LVS agreeing to pay the executive more than \$75 million.

## LATAM AIRLINES IGNACIO CUETO PLAZA

*Department of Justice  
Deferred Prosecution Agreement  
July 25, 2016*

*Securities and Exchange Commission  
Settled Administrative Proceeding  
February 4, 2016 (Cueto Plaza)  
July 25, 2016 (LATAM)*

**Nature of Conduct:** LAN Airlines (LAN), which became known as LATAM Airlines after a 2012 merger, was an airline headquartered in Chile, and Ignacio Cueto Plaza was its president and chief operating officer. When LAN entered the Argentinian market in 2005, it agreed with the Argentinian government to hire certain union workers. In 2006, after negotiations stalled, LAN hired a consultant, a government official, to negotiate with the unions regarding the terms of employment for the union workers. The

parties signed a sham consultancy agreement that falsely stated that the consultant would study air routes in Argentina. However, Cueto Plaza is alleged to have been aware that no such study would be performed and that the consultant might provide portions of the payments to union officials in Argentina, who would in turn seek to have their members accept a lower wage increase than demanded in negotiations. As a result of the bribes to union officials, the unions agreed to terms and wages that were more favorable to LAN. The payments to the consultant were inaccurately recorded as a legitimate business expense in LAN's books and records.

**Amount of Alleged Improper Payments:** LAN paid the sham consultant \$1.15 million, a portion of which was passed on to union officials.

**Benefit Obtained:** \$6,743,932.

**Type of Resolution and Sanction:** LATAM entered into a deferred prosecution agreement with the DOJ for violations of the FCPA's books and records and internal controls provisions. Under the agreement, LATAM will pay a fine of \$12,750,000 and engage an independent monitor for 27 months.

The SEC order finds that LATAM violated the FCPA's books and records and internal controls provisions. LATAM, without admitting or denying the order's findings, consented to the order and agreed to disgorge \$6,743,932 and pay \$2,693,856 in prejudgment interest. The SEC order also requires LATAM to engage an independent monitor for at least 27 months.

The SEC's order finds that Cueto Plaza violated the internal controls and books and records provisions of the FCPA. Without admitting or denying the findings, Cueto Plaza consented to the order and agreed to pay a \$75,000 penalty. He also agreed, as LAN's CEO, to certify his compliance with LATAM's new code of conduct and related policies. In addition, the SEC's order reported that he attended anti-corruption training and signed an amendment to his employment agreement acknowledging his responsibility to perform his duties with the highest ethical standards.

**Of Note:** The DOJ noted that the penalty reflected the DOJ's judgment that LATAM did not voluntarily disclose, failed to remediate after discovering the misconduct, and had an inadequate compliance program at the time of the incident, but did fully cooperate with the investigation and

is now implementing a compliance program. As a result of these factors, the penalty is 25 percent above the low end of the US sentencing guidelines range.

This case also illustrates how the FCPA's accounting provisions apply even if the underlying conduct that was not properly accounted for does not violate the FCPA's substantive anti-bribery provisions. Here, neither the DOJ nor the SEC charged LATAM with violating the FCPA's anti-bribery provisions. Although the sham consultant was a government official, it is not clear whether a government official's corrupt payments to a third party on behalf of LATAM violate the FCPA because it did not influence any official action. Nonetheless, the DOJ and SEC alleged that LATAM failed to accurately record the nature of the payments in LATAM's books and records and to devise an adequate system of internal controls.

## NCH CORPORATION

*Department of Justice  
Declination of Prosecution  
September 29, 2016*

**Nature of Conduct:** According to the DOJ letter announcing its declination of prosecution, from February 2011 until mid-2013, employees at a subsidiary of NCH Corporation (NCH), NCH China, provided cash and other things of value, including gifts, meals, and entertainment, to Chinese government officials to influence their purchasing decisions. In addition, while NCH had a bid pending before the official's employer, NCH arranged for Chinese government officials to travel for 10 days to the United States and Canada in June 2012. Although the NCH lost the bid before the trip, it paid approximately \$12,000 for non-business activities for the government officials during the trip and only one half-day of the trip involved business activities.

**Amount of Alleged Improper Payments:** Approximately \$44,545, including "things of value."

**Benefit Obtained:** The gifts to government officials were connected to sales generating profits of approximately \$335,342.

**Type of Resolution and Sanction:** The DOJ issued a letter of declination under its FCPA Pilot Program. The DOJ stated that its decision was based on (1) voluntary self-disclosure by NCH; (2) "NCH's thorough and comprehensive internal investigation of the matter"; (3) full cooperation by NCH, including provision of relevant

facts about individuals involved in the conduct; (4) agreement by NCH to disgorge all profits earned to the DOJ; (5) steps taken by NCH to enhance its compliance program and internal account controls; and (6) full remediation by NCH, including termination and/or disciplinary action against relevant employees.

**Of Note:** As noted in the Enforcement Trends section, this case is one example of the DOJ resolving cases without prosecution under the circumstances laid out in its pilot program.

## NORDION INC. AND MIKHAIL GOUREVITCH

*Securities and Exchange Commission  
Settled Administrative Proceeding  
March 3, 2016*

**Nature of Conduct:** According to the SEC's order, between 2005 and 2011 the health science company Nordion Inc. and its former employee Mikhail Gourevitch allegedly arranged bribes through a third-party agent to Russian officials for the purpose of obtaining Russian government approval to use the company's liver cancer treatment in Russia. Gourevitch allegedly concealed the bribes from Nordion and received at least \$100,000 in kickbacks from the Russian agent. Nordion, the SEC charged, lacked sufficient internal controls, failed to follow its own policies, and failed to conduct meaningful due diligence on the third-party agent.

**Amount of Alleged Improper Payments:** Nordion allegedly paid the Russian agent approximately \$235,043, a portion of which may have been passed on to Russian government officials.

**Benefit Obtained:** According to the SEC, Nordion received drug approvals to sell its liver cancer treatment in Russia. However, it ultimately was unable to do so and thus did not receive any profits from sales.

**Type of Resolution and Sanction:** The SEC's order with respect to Nordion alleges that the company violated the FCPA's internal controls and books and records provisions. Without admitting or denying the allegations, Nordion consented to the entry of the order and agreed to pay a \$375,000 civil penalty. In a separate order, the SEC alleged that Gourevitch violated the anti-bribery and books and records provisions. Without admitting or denying the allegations, he consented to the order and agreed to pay \$100,000 in disgorgement, \$12,950 in prejudgment interest, and a \$66,000 civil penalty.

**Of Note:** Although Nordion and Gourevitch are listed together, they are not similarly situated. Gourevitch concealed his misconduct from Nordion and was charged with violations of the FCPA's substantive anti-bribery section while Nordion was charged only with an internal controls violation. The company discovered the violation, investigated, and self-reported to both Canadian and US authorities. Additionally, Nordion terminated Gourevitch's employment, ended contact with the Russian agent, and implemented extensive remedial measures.

The Nordion and Gourevitch cases highlight the potential importance of the FCPA's internal controls provisions. Even where an employee conceals his misconduct and benefits from it at the expense of his employer, the employer can be held liable for the failure to maintain adequate internal controls.

## NORTEK, INC.

*Department of Justice  
Declination of Prosecution  
June 7, 2016*

*Securities and Exchange Commission  
Non-Prosecution Agreement  
June 7, 2016*

**Nature of Conduct:** According to the SEC's order, from 2009 to 2014, Linear Electronics (Shenzen) Co. Ltd. (Linear China), a subsidiary of Nortek, Inc., made more than 400 payments – in the form of cash, gift cards, meals, travel, accommodations, and entertainment – to local Chinese officials in multiple government departments. The payments were used to secure preferential treatment from Chinese officials, including through reduced customs duties, taxes, and other fees. Some payments were disguised with false or misleading information and documentation. Nortek consolidated Linear China's accounts into Nortek's books and records. Moreover, Nortek failed to establish adequate internal controls and policies to prevent or detect the improper payments.

**Amount of Alleged Improper Payments:** Approximately \$290,000.

**Benefit Obtained:** Preferential treatment, relaxed regulatory oversight and reduced customs duties, taxes, and fees.

**Type of Resolution and Sanction:** The DOJ declined to prosecute. Under a non-prosecution agreement with the SEC covering the misconduct at Linear China, Nortek will disgorge \$291,403, plus prejudgment interest of \$30,655.

**Of Note:** As noted above, this was one of two recent cases in which DOJ declined prosecution and the SEC entered into non-prosecution agreements in which the SEC obtained disgorgement but sought no additional civil penalty, based in part on the company's cooperation. The non-prosecution agreement highlighted the various ways Nortek cooperated. Nortek self-reported to the SEC and the DOJ before finishing its internal investigation. It fired the employees involved, improved its compliance and training programs, and assisted the SEC in its investigation.

Enforcement actions against Olympus, GlaxoSmithKline, SciClone, and Novartis reflect a continued focus on the health care industry. These cases follow a typical pattern in which a health care company pays kickbacks to health care professionals in exchange for an increase in sales.

Under the FCPA's broad definition, health care professionals, including doctors and administrators, who work for a state-run health care system count as "foreign officials."

## NOVARTIS AG

*Securities and Exchange Commission  
Settled Administrative Proceeding  
March 23, 2016*

**Nature of Conduct:** According to the SEC's order, Novartis AG's China-based subsidiaries engaged in pay-to-prescribe schemes with Chinese health care professionals to increase sales. Under the alleged schemes, from 2009 to 2013, Shanghai Novartis Trading Ltd. and Beijing Novartis Pharma Co. Ltd. employees "improperly provided things of value to [doctors and other health care professionals] (HCPs) in China in connection with pharmaceutical sales." These "things of value" included "gifts, travel, improper sightseeing or vacations, entertainment and favors for families of HCPs," as well as cash and gifts funded via falsified expense reports, some of less than \$50 in value. These payments, according to the SEC's order, were inaccurately recorded as legitimate

employee expenses, sponsorships, conferences, medical studies, and marketing costs.

**Amount of Alleged Improper Payments:** The SEC's order provides only examples of instances in which Novartis AG allegedly gave money, gifts, and other things of value to health care professionals to obtain business, mostly in small amounts, but these examples total several hundred thousand dollars in value.

**Benefit Obtained:** According to the SEC, Novartis AG received several million dollars from sales of pharmaceutical products to China's state health institutions.

**Type of Resolution and Sanction:** The SEC's order finds that Novartis AG violated the FCPA's internal controls and books and records provisions. Without admitting or denying the findings, Novartis AG consented to the order and agreed to pay a \$2 million civil penalty plus about \$21.5 million in disgorgement of profits and about \$1.5 million in prejudgment interest. Novartis AG also agreed to provide the SEC with status reports for the next two years on its remediation efforts and implementation of its anti-corruption measures.

**Of Note:** This settlement continues a recent trend in SEC enforcement actions of allowing companies to make periodic reports to the SEC regarding their remediation rather than imposing a more costly independent monitor. The SEC also noted that the settlement reflected the cooperation, including self-reporting, that the company provided.

## NU SKIN ENTERPRISES, INC.

*Securities and Exchange Commission  
Settled Administrative Proceeding  
September 20, 2016*

**Nature of Conduct:** According to the SEC order instituting a settlement administrative proceeding, Nu Skin Enterprises, Inc. (Nu Skin) violated the books and records and internal controls provisions of the FCPA in connection with alleged corrupt payments made by its Chinese subsidiary (Nu Skin China). The subsidiary donated to a charity in order to induce a high-ranking Chinese Communist party official to influence an on-going provincial agency investigation into Nu Skin China's compliance with the laws and regulations applicable to direct selling in China. Following the agency investigation, Nu Skin was informed that the Chinese

agency had enough evidence to charge its subsidiary with violations of Chinese law and threatened to seek a fine of RMB 2.8 million (approximately \$431,088). According to the SEC allegations, the subsidiary decided to request that the party official personally intervene in the matter in return for the subsidiary making an RMB 1 million donation to a charity identified by the party official. The donation was inaccurately recorded in Nu Skin China's books and records.

**Amount of Alleged Improper Payments:** The SEC administrative order alleged that the Chinese subsidiary paid RMBs 1 Million.

**Benefit Obtained:** The SEC administrative order alleged that the Chinese subsidiary saved \$431,088 in fines (equivalent to RMBs 2.8 million).

**Type of Resolution and Sanction:** The SEC order found that Nu Skin violated the FCPA's books and records and internal controls provisions. Without admitting or denying the findings, Nu Skin consented to the order and agreed to pay disgorgement of \$431,088, prejudgment interest of \$34,600, and a civil penalty of \$300,000.

**Of Note:** The nature of the alleged improper payment, a donation to an official's selected charity, reflects the breadth of the FCPA's prohibition on providing a government official with "anything of value." Case law and DOJ and SEC guidance make clear that what matters is the subjective value assigned by the government official: taking action that benefits a third party could be a corrupt payment if it is valued by the official and done with improper purpose to influence the official's action.

In the SEC's Nu Skin resolution, the "thing of value" allegedly provided to the government official was a donation to a favored charity. Under the FCPA, a payment may be improper regardless of its objective value.

OCH-ZIFF CAPITAL MANAGEMENT GROUP LLC  
OZ AFRICA MANAGEMENT GP LLC  
OZ MANAGEMENT LP  
DANIEL S. OCH  
JOEL M. FRANK  
SAMUEL MEBIAME

*Department of Justice  
Deferred Prosecution Agreement (Och-Ziff)  
September 29, 2016*

*Guilty Plea (OZ Africa)  
September 29, 2016*

*Guilty Plea (Samuel Mebiame)  
December 9, 2016*

*Securities and Exchange Commission  
Settled Administrative Proceeding (Och-Ziff, OZ  
Management LP, Daniel Och, and Joel Frank)  
September 29, 2016*

**Nature of Conduct:** According to the DOJ and SEC, Och-Ziff used intermediaries to bribe government officials in certain African countries for access to lucrative investment opportunities. For example, the DOJ and SEC resolutions state that in the Democratic Republic of the Congo (DRC), Och-Ziff paid a businessman to gain access to investment opportunities in the diamond and mining sectors, knowing that he used a portion of the funds they paid him to pay senior government officials to secure mining assets. The DOJ and SEC make similar allegations that in Libya, Och-Ziff used a third-party agent to secure an investment with the Libyan Investment Authority, knowing that the agent would pay a portion of the fees as a bribe to Libyan officials, and then falsified its books and records to conceal the bribes under a sham consulting agreement. The DOJ and SEC also alleged additional corrupt payments in Chad and Niger.

According to the DOJ and SEC, OZ Management and OZ Africa authorized transactions involved in the bribery schemes. The SEC also noted that Och-Ziff executives ignored red flags and corruption risks, and allowed the corrupt payments to proceed. The SEC alleged that Och (the CEO) and Frank (the CFO) approved the expenditure of funds in certain of the alleged transactions in which Och-Ziff made improper payments, and while Frank raised concerns about the transactions, he ultimately did not stop them from going forward. The SEC acknowledged that neither of them knew that bribes were being paid, but they were aware of the high risk of

corruption in transactions with Och-Ziff's DRC business partner.

Samuel Mebiame worked as a consultant for a mining company owned by a joint venture that was owned in part by Och-Ziff. According to the DOJ, Mebiame conspired with others at the joint venture to pay bribes, usually through intermediaries, to government officials in Chad and Niger.

**Amount of Alleged Improper Payments:** More than \$100 million.

**Benefit Obtained:** Och-Ziff and its subsidiaries gained access to lucrative investment opportunities. Och and Frank benefitted as chief executives of Och-Ziff.

**Type of Resolution and Sanction:** To resolve the criminal charges, Och-Ziff entered into a three-year deferred prosecution agreement with the DOJ for violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Under the agreement, Och-Ziff agreed to pay a penalty of \$213,055,689 and retain a corporate monitor for a term of three years.

OZ Africa pleaded guilty to one count of conspiring to violate the anti-bribery provisions of the FCPA. Sentencing is scheduled for March 29, 2017. The DOJ has agreed to recommend that if Och-Ziff pays its criminal penalty, the court should not impose an additional fine on OZ Africa.

Och-Ziff, OZ Management, Daniel Och, and Joel Frank entered into a civil settlement with the SEC for violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Och-Ziff and OZ Management jointly agreed to pay disgorgement of \$173,186,178, and prejudgment interest of \$25,858,989. Och agreed to pay disgorgement of \$1,900,000, reflecting his estimated share of the gain to Och-Ziff, and prejudgment interest of \$273,718. The SEC said that a penalty for Frank would be determined at a future date. Och and Frank entered into the settlement without admitting or denying the SEC's findings.

Samuel Mebiame pleaded guilty on December 9, 2016 to conspiring to make corrupt payments to government officials in violation of the FCPA. He has not yet been sentenced.

**Of Note:** This is the first case in which a hedge fund has been held liable for violating the FCPA, and illustrates how foreign investment may implicate anti-corruption concerns in the financial services industry. The SEC stated in its press release announcing the resolution that the SEC "detected the misconduct while proactively scrutinizing the way that financial services firms were obtaining investments from sovereign wealth funds overseas."

[ODEBRECHT S.A.](#)  
[BRASKEM S.A.](#)

*Department of Justice  
Plea Agreements  
December 21, 2016*

**Nature of Conduct:** According to the government's information filed with its plea agreement, between 2001 and 2016, Odebrecht S.A., a global construction conglomerate based in Brazil, engaged in a massive bribery and bid-rigging scheme by which the company paid approximately \$788 million in bribes in association with more than 100 projects in 12 countries. By 2006, Odebrecht had established a "Division of Structured Operations," which used an entirely separate and off-book communications system and communicated about bribes via secure emails and instant messages, using codenames and passwords. The government described the division as "a stand-alone bribe department within Odebrecht and its related entities." Braskem, a Brazilian petrochemical company, admitted to paying approximately \$250 million into Odebrecht's Division of Structured Operations between 2006 and 2014. That money was funneled into funds in a series of offshore entities that were not listed as related entities on Braskem's balance sheets.

**Amount of Alleged Improper Payments:** The government alleged that Odebrecht paid \$788 million in bribes and Braskem made \$250 million in potentially improper payments to Odebrecht.

The DOJ is touting the multibillion dollar resolution in Odebrecht as a record settlement, though the majority of the penalty will be paid to Brazilian authorities. The substantial size of the criminal penalty reflects the absolute size of the scheme, which involved \$788 million in bribes paid and resulted in billions of dollars of ill-gotten gains.

**Benefit Obtained:** The government alleged that Odebrecht's conduct resulted in corrupt payments and/or profits totaling approximately \$3.336 billion.

**Type of Resolution and Sanction:** Odebrecht and the government agreed that the appropriate total criminal penalty was \$4.5 billion, which reflected a 25 percent discount for Odebrecht's full cooperation and remediation. However, based on representations by the company of an inability to pay a fine in excess of \$2.6 billion, Odebrecht and the government agreed to a criminal penalty in that amount, subject to an ability to pay analysis to be completed on or before March 31, 2017. The final criminal penalty amount will be determined at a sentencing hearing set for April 17, 2017. Based on the terms of the plea agreement, Brazil will receive 80 percent of the criminal fine paid by Odebrecht, with the remaining 20 percent being split evenly between the United States and Switzerland.

Pursuant to its plea agreement, Braskem agreed to pay a total criminal penalty of \$632 million. Braskem, whose American Depositary Receipts (ADRs) are publicly traded on the New York Stock Exchange, also reached a settlement with the SEC, pursuant to which Braskem agreed to a total of \$325 million in disgorgement of profits with \$260 million going to Brazilian authorities.

Both companies are required to retain independent corporate monitors as a result of the settlements.

Odebrecht received cooperation credit from the DOJ for its conduct during the DOJ's investigation, notwithstanding the egregious and widespread violations uncovered during the investigation, including the creation of a business unit at Odebrecht dedicated specifically to criminal bribery.

**Of Note:** First, the DOJ has referred to the Odebrecht matter as the "largest foreign bribery case in history." Although the parties executed a plea agreement, the amount of the criminal fine to be assessed to Odebrecht is not yet final. Odebrecht appears to have negotiated the originally proposed criminal fine of \$4.5 billion down by another \$2 billion by representing its ability to pay as a maximum of \$2.6 billion of the total fine amount. The fine could be further reduced (or increased) depending on the result of the US and Brazilian authorities' review of Odebrecht's finances.

Second, the Odebrecht and Braskem settlements, which involved Brazilian, Swiss, and US authorities, reflect a growing trend of international cooperation and large global settlements to resolve FCPA cases.

Finally, as in many other matters the DOJ resolved in 2016, the DOJ specifically noted the factors that contributed to the assessment (and subsequent reduction) of the criminal penalty against Odebrecht and Braskem. Specifically, the DOJ noted (1) the failure of the companies to voluntarily disclose the conduct that triggered the investigation; (2) the nature and the seriousness of the offense, which spanned many years, involved the highest levels of the companies and occurred in multiple countries; (3) the lack of an effective compliance and ethics program at the time of the conduct; and (4) credit for each company's respective cooperation and remedial measures, including terminating and disciplining individuals involved in the misconduct, adopting heightened controls and anti-corruption compliance protocols, and increasing resources devoted to compliance. Odebrecht received a 25 percent reduction for full cooperation with the government's investigation, while Braskem received a 15 percent reduction for partial cooperation.

## OLYMPUS CORPORATION OF THE AMERICAS

*Department of Justice  
Deferred Prosecution Agreement  
March 1, 2016*

**Nature of Conduct:** According to the DOJ, a Miami-based subsidiary of Olympus Corporation of the Americas (OCA), Olympus Latin America (OLA), provided payments to health care practitioners at government-owned health care facilities in Central and South America with the intent to increase medical equipment sales in those countries. The payments were in the form of cash, personal travel, money transfers, personal grants, and free or discounted equipment. These benefits were primarily provided through "training centers" ostensibly set up to educate and train doctors.

**Amount of Alleged Improper Payments:** Almost \$3 million.

**Benefit Obtained:** More than \$7.5 million in profits.

**Type of Resolution:** OLA entered into a deferred prosecution agreement with the DOJ and the US Attorney's Office for the District of New Jersey. Under the

terms of the agreement, OLA must pay a \$22.8 million criminal penalty, retain a compliance monitor for three years and implement compliance changes.

**Of Note:** According to the DOJ, OLA did not voluntarily disclose the misconduct but did receive a 20 percent penalty reduction off the recommended federal sentencing guidelines penalty because of its cooperation, which included an extensive internal investigation and a significant amount of effort translating, collecting, analyzing, and organizing documents. In a related action, OLA's parent corporation, OCA, entered into a separate deferred prosecution agreement in connection with its admission that it had violated the domestic Anti-Kickback Statute (AKS). OCA agreed to pay a \$312.4 million criminal penalty and an additional \$310.8 million to settle civil claims under the federal and various state False Claims Acts, which the DOJ noted was the largest total amount paid in US history for violations involving the AKS by a medical device company.

#### JUN PING ZHANG

*Securities and Exchange Commission  
Settled Administrative Proceeding  
September 13, 2016*

**Nature of Conduct:** According to the SEC order, Jun Ping Zhang (Ping) facilitated a bribery scheme that provided illegal gifts to Chinese government officials in order to obtain and retain business for his company. Ping is the former chairman and CEO of Hunan CareFx Information Technology, LLC (CareFx), a Chinese subsidiary of the international communications and information technology company Harris Corporation. With Ping's knowledge and under his management, the subsidiary's sales staff used false expense receipts to generate cash for the gifts and fabricated false expenses that were inaccurately recorded in CareFx's books and records as legitimate expenses or fees and consolidated in Harris's financial statements.

**Amount of Alleged Improper Payments:** In total, CareFx employees made approximately \$200,000 to \$1 million in improper gifts to Chinese government officials between April 2011 and April 2012.

**Benefit Obtained:** According to the SEC, CareFx sales staff made these gifts to Chinese government officials who ultimately awarded CareFx more than \$9.6 million in contracts with state-owned entities.

**Type of Resolution and Sanction:** The SEC's order finds that Ping violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. Without admitting or denying the allegations, Ping consented to the order and agreed to pay a \$46,000 civil penalty.

**Of Note:** The SEC announced that it determined not to bring charges against Harris Corporation, taking into consideration the company's efforts at self-policing that led to the discovery of Ping's misconduct shortly after the acquisition of the Chinese subsidiary; prompt self-reporting within five months of opening the investigation; thorough remediation, including implementation of an anonymous complaint hotline; and exemplary cooperation with the SEC's investigation.

#### PTC, INC., PARAMETRIC TECHNOLOGY (SHANGHAI) SOFTWARE COMPANY LTD., PARAMETRIC TECHNOLOGY (HONG KONG) LTD. AND YU KAI YUAN

*Department of Justice  
Non-Prosecution Agreement (Parametric Technology (Shanghai) Software Company Ltd. and Parametric Technology (Hong Kong) Ltd.)  
February 16, 2016*

*Securities Exchange Commission  
Settled Administrative Proceeding (PTC, Inc.)  
Deferred Prosecution Agreement (Yuan)  
February 16, 2016*

**Nature of Conduct:** According to the DOJ, two subsidiaries of software company PTC, Inc. (collectively PTC China) used local business partners to coordinate and pay for employees of Chinese state-owned entities to travel to the United States. The trips were nominally for training at PTC, Inc.'s headquarters in Massachusetts, but were primarily for recreational travel to other places in the United States, including Hawaii, Las Vegas, Los Angeles, and New York. Yu Kai Yuan was a sales executive at PTC China and allegedly caused the company to fail to keep books and records that accurately reflected the company's transactions, and caused the company to fail to devise and maintain sufficient internal accounting controls.

**Amount of Alleged Improper Payments:** Although the papers did not specify the precise amount of improper payments, PTC, Inc. paid more than \$1 million in travel expenses through business partners.

**Benefit Obtained:** According to the DOJ, in the time period during which PTC China was funding travel to the United States, PTC China entered into more than \$13 million in contracts with Chinese state-owned entities. According to the SEC, PTC, Inc. made approximately \$11.8 million in profits from contracts with the state-owned entities whose employees received the improper benefits.

**Type of Resolution and Sanction:** PTC China entered into a non-prosecution agreement with the DOJ, under which it agreed to pay a \$14.54 million criminal penalty, continue to cooperate with the DOJ, implement compliance enhancements and periodically report on its compliance program to the DOJ. PTC Inc. entered into a settlement agreement with the SEC, under which it agreed to pay \$11,858,000 in disgorgement and \$1,764,000 in prejudgment interest.

Without admitting or denying the allegations against him, Yuan entered into a deferred prosecution agreement with the SEC under which he agreed not to violate securities laws and to continue to provide his cooperation, and the SEC agreed not to charge him in the absence of further evidence of misconduct.

**Of Note:** According to the DOJ, PTC China did not receive voluntary disclosure credit or full cooperation credit because during its initial disclosure the company withheld relevant facts it had learned during an internal investigation and did not disclose those facts until the DOJ uncovered the information independently.

The deferred prosecution agreement with Yuan is the SEC's first deferred prosecution agreement with an individual. The SEC's emphasized Yuan's cooperation with the SEC's investigation and stated that such agreements are intended to "facilitate and reward cooperation."

## QUALCOMM INC.

*Securities and Exchange Commission  
Settled Administrative Proceeding  
March 1, 2016*

**Nature of Conduct:** The world's largest mobile chipmaker, Qualcomm Inc., allegedly hired relatives of Chinese government officials who were deciding whether to select the company's mobile technology products amid increasing competition in the international telecommunications market. The SEC also charged that Qualcomm, over the course of a decade, provided gifts, travel, and entertainment to try to influence officials at government-owned telecommunications companies in China that had influence over decisions that allowed Qualcomm to participate in the Chinese market and that would impact the volume of Qualcomm's sales within that market. With insufficient internal controls to detect improper payments, Qualcomm misrepresented in its books and records that things of value provided to foreign officials were legitimate business expenses.

Travel and entertainment expenses have been a recent focus of FCPA enforcement actions.

The FCPA itself provides an affirmative defense for "reasonable and bona fide expenditures, such as travel and lodging expenses" when directly connected with legitimate promotions or product demonstrations or when a required part of contract performance.

Nevertheless, these recent enforcement actions reflect that companies must proceed with caution to ensure that expenses are reasonable, relate to legitimate educational or training needs, and are not provided in circumstances indicating an attempt to induce favorable treatment with regard to the company's business.

**Amount of Alleged Improper Payments:** The SEC order does not state a total value for the improper actions.

**Benefit Obtained:** According to the SEC, Qualcomm received billions of dollars of revenue from sales of chips and licenses for cellular phone manufacturers in China, but does not connect those revenues to the improper conduct.

**Type of Resolution and Sanction:** The SEC's order finds that Qualcomm violated the FCPA's anti-bribery, internal controls, and books and records provisions. Without admitting or denying the findings, Qualcomm consented to the order and agreed to pay about a \$7.5 million civil penalty and to self-report to the SEC for the next two years with annual reports and certifications of its FCPA compliance.

**Of Note:** The allegations related to the hiring of Chinese officials' relatives reflects the recent enforcement emphasis on such hiring practices, especially in Asia. Given the large sums alleged to have been paid and the revenues received, and the lack of any mention of cooperation, the amount of the required payment and the use of self-reporting (rather than an outside monitor) are themselves noteworthy. The company has also announced that the DOJ has closed its concurrent investigation.

ROBERTO ENRIQUE RINCON FERNANDEZ,  
ABRAHAM JOSE SHIERA BASTIDAS, MOISES  
ABRAHAM MILLAN ESCOBAR, JOSE LUIS RAMOS  
CASTILLO, CHRISTIAN JAVIER MALDONADO  
BARILLAS, AND ALFONZO ELIEZER GRAVINA  
MUNOZ

*Department of Justice  
Guilty Pleas*

*March 22, 2016 (Shiera Bastidas)*

*January 19, 2016, unsealed March 22, 2016*

*(Millan Escobar)*

*December 10, 2015, unsealed March 22, 2016*

*(Gravina Munoz)*

*December 3, 2015, unsealed March 22, 2016*

*(Moldonado Barillas, Ramos Castillo)*

*June 16, 2016 (Rincon Fernandez)*

**Nature of Conduct:** In an 18-count indictment, which included a notice of forfeiture, the DOJ charged Roberto Enrique Rincon Fernandez and Abraham Jose Shiera Bastidas, with paying bribes to obtain and retain lucrative energy contracts with Petroleos de Venezuela S.A. (PDVSA), a Venezuelan state-owned and state-controlled oil company. In his plea, Rincon Fernandez admitted that, beginning in 2009, he and Shiera Bastidas agreed to pay bribes and other things of value to PDVSA purchasing analysts, including through an independent contractor, to ensure that his and Shiera Bastida's companies were placed on PDVSA bidding panels. In a separate indictment, Christian Javier Moldonado Barillas, Alfonso

Gravina Munoz and Jose Luis Ramos Castillo were charged with being the foreign officials who received these payments. In a separate information, Moises Abraham Millan Escobar was charged as the independent contractor who helped facilitate certain of the improper payments.

**Amount of Alleged Improper Payments:** Approximately \$600,000 in bribe payments from companies owned by Rincon Fernandez to Venezuelan officials and another \$190,000 in bribe payments from companies owned by Shiera Bastidas.

**Benefit Obtained:** Obtaining and retaining lucrative PDVSA energy contracts, as well as obtaining payment priority over other PDVSA vendors.

**Type of Resolution:** Guilty pleas. Rincon Fernandez pleaded guilty to one count of conspiracy to violate the FCPA, one count of violating the FCPA's anti-bribery provisions, and one count of making false statements on his 2010 federal income tax return. He also agreed to a forfeiture. Sentencing is scheduled for July 14, 2017.

Shiera Bastidas pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions and commit wire fraud and one count of violating the FCPA. Sentencing is scheduled for July 14, 2017.

**Of Note:** Although charged separately, several of the foreign officials allegedly involved in Rincon Fernandez and Shiera Bastidas's scheme were charged with conspiring to violate the FCPA, as well as substantive FCPA violations.

## SAP SE

*Securities and Exchange Commission  
Settled Administrative Proceeding  
February 1, 2016*

**Nature of Conduct:** According to the SEC's order, an SAP SE vice president worked with local partners in Panama to pay bribes to a Panamanian official in order to obtain sales contracts for SAP software. Specifically, SAP sold software to a local partner at a large discount; the partner then resold the software to the Panamanian government at a significantly higher price and used the difference in price to pay bribes to officials who were in a position to steer the contracts to SAP. As a result, from 2010 to 2013, SAP secured four government contracts worth approximately \$3.7 million. SAP Mexico

inaccurately recorded the discounts as legitimate in its books and records, which were consolidated into SAP's financial statements. The SEC's order further alleges that SAP lacked adequate internal controls to detect the true nature of the improper payments.

**Amount of Alleged Improper Payments:** The payments totaled \$145,000.

**Benefit Obtained:** Four government contracts that generated revenues of approximately \$3.7 million.

**Type of Resolution and Sanction:** The SEC's order finds that SAP SE violated the FCPA's books and records and internal controls provisions. Without admitting or denying the allegations, SAP SE consented to the entry of the order and agreed to disgorge \$3.7 million, plus prejudgment interest of \$188,896.

**Of Note:** Upon the SEC's inquiry, according to the SEC order, SAP SE conducted a thorough investigation and cooperated with the SEC. The SEC's order highlighted that SAP SE produced a large volume of documents, translated Spanish-language materials, arranged interviews with involved employees, and initiated a third-party audit of the local Panamanian partner. SAP SE terminated the vice president responsible for the misconduct, Vincent E. Garcia, and worked to uncover other possible misconduct and to improve its compliance. The SEC charged Garcia in a separate action in 2015.

## SCICLONE PHARMACEUTICALS

*Securities and Exchange Commission  
Settled Administrative Proceeding  
February 4, 2016*

**Nature of Conduct:** According to the SEC, SciClone Pharmaceutical's (SciClone) subsidiaries gave money and other things of value to Chinese health care professionals, which led to millions of dollars of sales of pharmaceutical products in China. These payments were made through different schemes that provided money, gifts, and other services to health care professionals. For example, one scheme used third-party travel agencies to underwrite travel expenses that did not include legitimate educational expenses or for which the educational activities were minimal in comparison to the recreational activities. Various managers within SciClone's subsidiaries were aware of these improper payments and, in some cases, specifically approved them. The

payments were inaccurately recorded as legitimate business expenses.

The administrative order also alleges that SciClone failed to maintain an adequate system of internal controls. In particular, in 2007, SciClone discovered improper payments made by one employee to Chinese health care professionals, but conducted only a limited internal investigation and failed to take further remedial measures. SciClone's subsidiaries also failed to conduct due diligence on or impose other controls over local travel agencies used to serve Chinese officials.

In enforcing actions related to the FCPA's books and records and internal controls provisions, the SEC has often alleged that a parent company is liable for violations of its subsidiary because inaccurate entries in the subsidiary's books and records were consolidated into the parent's financial statements. This theory may expand potential parent company liability in situations where alleged misconduct was concentrated within a subsidiary.

**Amount of Alleged Improper Payments:** The administrative order does not specify the amounts paid.

**Benefit Obtained:** The disgorgement of nearly \$10 million reflected the amount of SciClone's ill-gotten gains.

**Type of Resolution and Sanction:** The SEC's order finds that SciClone violated the FCPA's anti-bribery, books and records, and internal controls provisions. Without admitting or denying the allegations, SciClone agreed to the entry of the order and further to pay a civil penalty of \$2 million and disgorgement of \$10 million, including pre-judgment interest.

**Of Note:** The theory of liability reflects the breadth of the term "foreign official" as it applies to employees of a state-run health care system. Many of the recipients of the improper payments were administrators within China's health care system.

TEVA PHARMACEUTICAL INDUSTRIES LTD.  
TEVA LLC (RUSSIA)

*Department of Justice  
Deferred Prosecution Agreement  
(Teva Pharmaceutical Industries Ltd.)  
Plea Agreement (Teva LLC Russia)  
December 22, 2016*

*Securities and Exchange Commission  
(Teva Pharmaceutical Industries Ltd.)  
Cease-and-Desist Order  
December 22, 2016*

**Nature of Conduct:** According to the deferred prosecution agreement, Teva Pharmaceutical Industries Ltd. (Teva), engaged in bribery schemes involving officials in Russia, Ukraine, and Mexico. In Russia, the company, through its Russian subsidiary Teva LLC (Russia), paid bribes to a high-ranking official via inflated profit margins granted to that official's company in order to persuade the official to use his authority to increase sales of Teva's pharmaceutical product. In Ukraine, Teva engaged a government official as a "registration consultant," paid him monthly fees, and provided travel and other valuables, in exchange for the official's assistance in influencing the registration of certain Teva pharmaceutical products, which the company needed in order to market and sell its products within the country. In Mexico, Teva's subsidiary paid bribes to Mexican government doctors to induce them to prescribe a Teva pharmaceutical product, and, although Teva's Israel executives knew of the Mexican bribery scheme, they approved policies and procedures that they knew were insufficient to detect the payments and approved managers who were unwilling or unable to enforce anti-corruption policies.

**Amount of Alleged Improper Payments:** In Russia, the company paid \$65 million in bribes; in Ukraine, \$200,000; and in Mexico, at least \$159,000.

**Benefit Obtained:** Teva's disgorgement of approximately \$230 million reflects its improper benefit.

**Type of Resolution & Sanction:** Teva entered into a deferred prosecution agreement to resolve charges that it violated the FCPA's anti-bribery provision and entered into a conspiracy to do so. Pursuant to the deferred prosecution agreement, Teva will pay \$283,177,348,

enhance its compliance program and internal controls, and retain an independent monitor for three years.

Teva's subsidiary Teva LLC (Russia) pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions. Contingent upon the payment of Teva Pharmaceutical's \$283 million penalty, the subsidiary's plea agreement did not contain an additional undertaking or monetary penalty beyond the terms contained in Teva's deferred prosecution agreement.

**Of Note:** The DOJ noted that Teva's sanction was based upon a number of factors, including both the company's failure to timely and voluntarily self-disclose the conduct, balanced with its cooperation following the SEC's subpoena. Teva received a 20 percent discount from the low-end of the fine recommended by the US sentencing guidelines due to its substantial cooperation and remediation, including its disclosure of conduct in Russia and the Ukraine that the Department was previously unaware of and the termination of 15 employees involved in misconduct. The DOJ noted that Teva did not receive full cooperation credit due to delays in the early stages of the investigation, including overbroad assertions of attorney-client privilege and failures to produce requested documents on a timely basis.

The SEC's order alleges that Teva violated the anti-bribery, books and records, and internal accounting controls provisions. Without admitting or denying the charges, Teva consented to the entry of the order and agreed to pay \$236 million in disgorgement and prejudgment interest. In the Teva Pharmaceutical Industries Ltd. settlement, a subsidiary entered a guilty plea while the parent company entered in a deferred prosecution agreement and agreed to pay all the monetary sanctions imposed in either settlement. The DOJ has reached similar resolutions in other matters involving misconduct at a foreign subsidiary.

## VIMPELCOM AND UNITEL

*Department of Justice*

*Deferred Prosecution Agreement (VimpelCom)*

*Guilty Plea (Unitel)*

*Securities and Exchange Commission*

*Settled Civil Action (VimpelCom)*

*February 22, 2016*

**Nature of Conduct:** VimpelCom, a Bermuda company headquartered in Moscow until 2010 and Amsterdam thereafter, provided mobile phone services in Uzbekistan through its wholly owned subsidiary, Unitel. According to the deferred prosecution agreement, VimpelCom, through Unitel, provided more than \$114 million in bribes to an Uzbek foreign official so that the official would influence the Uzbek telecommunications regulatory authority to make decisions in Unitel's favor. Unitel paid the foreign official multiple times between 2006 and 2012 to obtain and retain access to the telecommunications market in Uzbekistan. Unitel inaccurately recorded these payments as legitimate business expenses.

According to the SEC complaint, erroneous entries in Unitel's books and records were consolidated into VimpelCom's financial statements. In addition, according to the DOJ information, VimpelCom knowingly lacked adequate internal controls to prevent these payments.

**Amount of Alleged Improper Payments:** \$114 million.

**Benefit obtained:** Access to and continued ability to operate in the Uzbekistan telecommunications market.

**Type of Resolution and Sanction:** With respect to the financial component of the settlement, the DOJ, the SEC, and the Public Prosecution Service of the Netherlands entered into a global settlement with VimpelCom for a total payment of \$795 million.

VimpelCom entered into a deferred prosecution agreement with the DOJ that alleges that VimpelCom participated in a conspiracy to violate the anti-bribery and books and records provisions of the FCPA and violated the internal controls provision of the FCPA. The agreement requires VimpelCom to pay \$460 million, half of which can be offset by criminal penalties paid to the Public Prosecution Service of the Netherlands.

VimpelCom settled a civil action with the SEC that alleged that it violated the FCPA's anti-bribery, books and

records, and internal controls provisions. VimpelCom agreed to disgorge \$167.5 million to the SEC.

The deferred prosecution agreement and the SEC settlement also each provided for the appointment of a (single) independent monitor who, for a three-year period, will oversee VimpelCom's compliance with these settlements and its remediation of the alleged FCPA violations.

Unitel pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA. The plea included no criminal fine in light of the VimpelCom deferred prosecution agreement.

**Of Note:** The VimpelCom settlement is notable for a few reasons. First is the sheer size of the settlement. VimpelCom will pay approximately \$795 million to authorities in the United States and the Netherlands.

Second, the settlement reflects significant cross-border cooperation. Government agencies in the Netherlands, Norway, Sweden, Switzerland, and Latvia, among other countries, assisted the investigation.

Third, the settlement provides an example of the DOJ's explicit quantification of the value of cooperation. VimpelCom received a 45 percent reduction off the US sentencing guidelines fine range for its efforts to cooperate with the investigation. That discount included a 25 percent credit for its "substantial cooperation." VimpelCom provided evidence to the DOJ and the SEC; conducted additional investigations as requested; made foreign employees available for interviews and helped facilitate interviews of former employees; and organized, analyzed, and translated evidence for the government. The company also received an additional credit of 20 percent for its "prompt acknowledgement of wrongdoing" and its willingness to "resolve promptly its criminal liability on an expedited basis." Notably, the DOJ emphasized that VimpelCom was "not eligible for a more significant discount on the fine amount or the form of resolution" because it did not voluntarily self-disclose the wrongdoing.

Interestingly, VimpelCom received an amount of credit higher than the pilot program would provide for similar cooperation. Under the pilot program, a company that does not voluntarily disclose FCPA misconduct, but does fully cooperate and remediate, will receive, at most, a 25 percent reduction off the bottom of the US Sentencing

Guidelines fine range. This is significantly less of a reduction than the 45 percent reduction VimpelCom actually received in February 2016.

Fourth, the settlement reflects various ways that the SEC and DOJ charge parent companies for misconduct that occurred principally at a subsidiary. The DOJ, in an approach it has used in the past, entered into a plea agreement with the subsidiary and a deferred prosecution agreement with the parent.



## 2016 FCPA-RELATED PRIVATE LITIGATION

Below are summaries of key developments in FCPA-related suits brought by private litigants.

### SHAREHOLDER LITIGATION

#### *LOUISIANA MUNICIPAL POLICE EMPLOYEES RETIREMENT SYSTEM V. WYNN (9TH CIR.)*

*Affirming district court's dismissal  
July 18, 2016*

Shareholders of Wynn Resorts, Ltd. (Wynn Resorts) sued Wynn Resorts and 11 current and former members of its board of directors, alleging that the board (1) approved a \$135 million bribe to the Macau government in order to build a new resort and casino and (2) subsequently redeemed the shares of the only person to vote against the decision in an attempt to eliminate opposition and intimidate the remaining directors into complying with the board's decisions. The Ninth Circuit affirmed the district court's dismissal because the plaintiffs both failed to seek action from the corporation's directors prior to bringing the suit and failed to demonstrate that a demand of the board would be futile.

The prospect of private litigation presents a potential collateral consequence that companies should analyze in considering whether, when, and how to make of a potential FCPA violation public. Private plaintiffs have brought suit regarding alleged FCPA violations on a number of theories, including shareholder derivative suits alleging that management allowed the misconduct to occur, as well as suits alleging that management knowingly failed to disclose the misconduct.

#### *IN RE WAL-MART STORES, INC. SHAREHOLDER DERIVATIVE LITIGATION (8TH CIR.)*

*Affirming district court's dismissal  
July 22, 2016*

Shareholders of Wal-Mart Stores, Inc. (Wal-Mart) brought several suits in Arkansas and Delaware alleging that, beginning in 2003, senior executives of Wal-Mart's Mexican subsidiary engaged in a long-running campaign to bribe Mexican government officials in order to win approvals to build new stores and that members of Wal-Mart's board of directors permitted and concealed the illegal activity. The Arkansas suits were consolidated into a single action and, in 2015, dismissed on the ground that the shareholder-plaintiffs had failed to either demand that the board take appropriate action or demonstrate that such a demand would be futile.

In May 2016, the Delaware Court of Chancery held that the Arkansas decision preempted the Delaware action. The Delaware plaintiffs had waited to bring their claim until they obtained further information about the alleged misconduct through a section of Delaware law that permits shareholders to examine a company's books and records under appropriate circumstances. They argued that they should not be bound by the Arkansas decision because they had access to new and different information than the Arkansas plaintiffs. The Delaware court disagreed and dismissed the suit, holding that the two sets of plaintiffs were in privity and that the allegations in the suit had already been fully and fairly litigated. In July 2016, the Eighth Circuit affirmed the dismissal of the Arkansas suit.

*IN RE KEY ENERGY SERVICES INC. SECURITIES LITIGATION (S.D. TEX.)*

*Grant of motion to dismiss  
March 31, 2016*

Federal class action plaintiffs sued the management of Key Energy Services, an oilfield services company, alleging that it overstated business opportunities in high corruption-risk areas and failed to disclose certain deficiencies in the company's internal control systems. The suit arises out of Key Energy Service's 2014 disclosures relating to potential FCPA violations in Russia and Mexico. The plaintiffs claimed that the company's public reports on its strategy in Russia and Mexico were misleading because management did not attribute its growth strategy to conduct that violated the FCPA. The plaintiffs also alleged that Key Energy Services had an illusory FCPA compliance program that failed to detect the violations. The court granted the defendants' motion to dismiss, holding that the allegations did not establish management's knowledge of the misconduct and that the general business risk disclosure about doing business in high corruption-risk areas put investors on notice about the potential for corruption-related misconduct.

*KUMARI V. OCH (N.Y. SUP. CT.)*

*Grant of motion to dismiss  
September 20, 2016*

A shareholder of Och-Ziff Capital Management Group LLC (Och-Ziff) sued the company's board of directors, alleging that the board wrongfully opposed the plaintiff's demand for damages to the company by certain Och-Ziff executives. The plaintiffs alleged that the board allowed the company to engage in bribery and other criminal activities in several African nations and hid this misconduct – as well as DOJ and SEC investigations into it – from investors. The court dismissed the suit, reasoning that the board denied the demand in good faith because it formed a committee with two outside directors to review the plaintiff's demand and hired independent counsel to assist in the review.

*IN RE: PETROBRAS SECURITIES LITIGATION (S.D.N.Y. AND 2D CIR.)*

*Appeal of Class Certification  
November 2, 2016*

Class action plaintiffs alleged that Brazilian state-owned oil company Petróleo Brasileiro S.A. (Petrobras) and related entities violated US and Brazilian securities laws by making false statements about and failing to disclose a multi-year, multi-billion dollar bribery and money-laundering scheme. After dismissing some of the plaintiffs' claims in 2015, the district court certified two classes in February 2016. Petrobras's interlocutory appeal of the class certification was heard in November 2016. The class action is stayed pending the appeal.

*DEAN MAGRO, ET AL. V. FREEPORT-MCMORAN INCORPORATED, ET AL. (D. ARIZ.)*

*Amended Complaint  
December 6, 2016*

Shareholders filed an amended complaint in this securities fraud class-action against Freeport-McMoRan Inc. and several senior executives, alleging that the international mining company failed to disclose potential FCPA violations in connection with its attempts to secure mining contracts in Indonesia. According to the complaint, Freeport's stock price decreased, resulting in significant shareholder losses, following the public revelation of this alleged misconduct. The suit does not allege that the SEC or DOJ have investigated or are actively investigating Freeport for the alleged FCPA violations.

*MANIDHAR KUKKADAPU, ET AL. V. EMBRAER S.A., ET AL. (S.D.N.Y.)*

*Amended Complaint  
December 13, 2016*

Following Embraer's settlements with the DOJ and SEC for FCPA violations, plaintiffs brought a securities fraud class action alleging that the company failed to disclose the misconduct that led to these settlements. In their amended complaint, the plaintiffs alleged that the company made materially false and misleading disclosures throughout the class period by failing to accurately describe many of the company's actions. As a result, plaintiffs alleged, share prices decreased significantly once the truth regarding the bribery scheme was revealed.

Plaintiffs in shareholder lawsuits related to alleged FCPA violations have often sought access to the documents and materials provided to regulators during FCPA investigations.

## FOIA LITIGATION

### *ROBBINS, GELLER, RUDMAN & DOWD V. SEC (M.D. TENN.)*

*Grant of Summary Judgment  
March 12, 2016*

Securities plaintiffs' law firm Robbins, Geller, Rudman & Dowd, LLP (Robbins, Geller) sued the SEC for documents provided to the agency by Wal-Mart, which the agency had declined to produce in response to a Freedom of Information Act (FOIA) request. The SEC withheld the documents pursuant to FOIA Exemption 7(A), which protects from disclosure records compiled for law enforcement purposes. The SEC filed a motion for summary judgment asserting that disclosure of the records would interfere with an ongoing inquiry. The district court granted the SEC's motion. In doing so, the court rejected the plaintiff's argument that Wal-Mart's voluntary disclosure of certain materials eliminated the SEC's interest in withholding production of the documents, explaining that disclosure could still specifically compromise the SEC's investigation.

## RECOVERY SUIT

### *THE LOUIS BERGER GROUP INC. AND BERGER HOLDINGS INC. V. RICHARD J. HIRSCH AND THE LOUIS BERGER GROUP INC. AND BERGER HOLDINGS INC. V. JAMES ANDREW MCCLUNG (N.J. SUPER. CT. LAW DIV.)*

*Complaints  
June 10 and July 1, 2016*

Following a 2015 FCPA settlement with the DOJ, Louis Berger Group Inc. and Berger Holdings Inc. (collectively Berger) sued two former senior officers, Richard Hirsch and James McClung, who admitted approving many of the bribes that led to the DOJ enforcement action. In August 2016, Berger voluntarily dismissed the action against Hirsch without disclosing any settlement terms. As of December 2016, McClung had not answered the

complaint, and the court will review the case for dismissal on April 2, 2017.

## RETALIATION

### *WADLER V. BIO-RAD LABORATORIES, INC. (N.D. CAL.)*

*Order Granting the SEC Leave to File Amicus Curiae Brief in Support of Plaintiff  
December 13, 2016*

*Pre-trial conference  
December 15, 2016*

Sanford Wadler, the former general counsel of California-based life sciences company Bio-Rad Laboratories, Inc. (Bio-Rad), sued Bio-Rad and the members of its board of directors for retaliation in violation of the Sarbanes-Oxley and Dodd-Frank Acts. Wadler alleged that, following Bio-Rad's \$55 million settlement with the federal government regarding FCPA violations in Russia, Thailand and Vietnam, Bio-Rad fired Wadler for investigating and reporting his discovery that kickbacks were also paid to Chinese government entities in exchange for business. In the course of this litigation, the SEC has repeatedly supported Wadler, first by arguing that the Dodd-Frank Act protects not only whistleblowers who bring concerns to the government, but also those who raise concerns within the company, and, most recently, by seeking to file an amicus curiae brief supporting Wadler's position that he may use otherwise privileged information at trial. The case is set for trial in January 2017.

### *JACOBS V. LAS VEGAS SANDS CORP. (NEV. D. CT.)*

*Settlement  
May 31, 2016*

Steven Jacobs, a former top executive of gambling company Las Vegas Sands Corp. (LVSC) in Macau, and LVSC settled Jacobs's wrongful termination suit for \$75 million. Jacobs sued LVSC in 2010, claiming he was wrongfully terminated in July 2010 in retaliation for speaking out against LVSC's attempts to use improper "leverage" in order to influence various Macau government officials into taking beneficial action for the company. According to the company's SEC filings, Jacobs's allegations led the DOJ and SEC to investigate potential FCPA violations by LVSC. In April 2016, LVSC agreed to pay a \$9 million civil penalty to settle the SEC's allegations that the company violated the FCPA's books and records provisions.



## UK BRIBERY ACT

### STATUTE AND ELEMENTS OF OFFENCES UNDER THE UK BRIBERY ACT

The UK Bribery Act (UKBA or the Act) includes four principal offences: (1) bribing another person; (2) being bribed; (3) bribing a foreign public official; and (4) failure to prevent bribery. The statute also places certain limitations on who may be charged and sets forth penalties for violations.

This section first explains the background of the UKBA, then walks through the definitions that inform the reading of the statute, and finally describes the elements of the offences under the Act in detail. As with the FCPA, the UKBA is broadly worded and there continues to be little case law interpreting its provisions. In contrast to the FCPA, there is also relatively little enforcement practice or formal guidance to fill out the meaning of the statute. In many cases, there will be little if any concrete guidance about the likely application of the UKBA and companies potentially subject to its jurisdiction must tread carefully to ensure compliance.

#### Background

The UKBA was passed on 8 April 2010. It came into force on 1 July 2011 and applies to conduct that occurred on or after that date. Because of the relatively short period of time since then, and the length of time investigations into bribery tend to take in the United Kingdom, there have been few cases brought under the UKBA. Guidance from the courts on the interpretation of the UKBA is therefore almost non-existent.

The UKBA is essentially a codifying statute. Most of the offences “created” by the UKBA existed previously on the UK statute book, but in disparate and archaic forms. The UKBA was intended to simplify the outdated language and arrange the offences into one statutory location.

The UKBA did, however, create a new offence, the corporate offence of failing to prevent bribery (section 7). This offence is discussed in more detail below.

*FAQ 21: What are the important differences between the FCPA and UKBA?*

Setting aside the differences based on jurisdiction, there are two critical differences between the UKBA and the FCPA. First, the UKBA criminalizes commercial bribery as well as bribery of government officials. Second, under the UKBA, an adequate compliance programme is an affirmative defence against the crime of failure to prevent bribery.

#### Definitions

The UKBA uses a number of specific terms, which it defines and of which it provides examples to assist the reader with understanding how the offences should be construed.

#### *Function or activity to which the bribe relates (section 3)*

The offences in the UKBA refer to “relevant functions or activities.” A function or activity is relevant for the purposes of the UKBA if the function or activity is one of the following:

- (A) it is of a public nature;
- (B) it is connected with a business;
- (C) it is performed in the course of a person's employment; or

(D) it is performed by or on behalf of a body of persons (whether corporate or unincorporated).

The function or activity must also meet one or more of the following conditions:

(A) a person performing the function or activity is expected to perform it in good faith;

(B) a person performing the function or activity is expected to perform it impartially; or

(C) a person performing the function or activity is in a position of trust by virtue of performing it.

A function or activity is a relevant function or activity even if it has no connection with the United Kingdom and is performed in a country or territory outside the United Kingdom.

Essentially, all functions or activities of a commercial or public nature are relevant for the purposes of the UKBA. The act would cover actions of public servants, employees, contractors, agents, and most other types of business or governmental relationships.

#### ***Improper performance to which bribe relates (section 4)***

A relevant function or activity is performed improperly if it is performed in breach of a relevant expectation. A relevant function is also to be treated as being performed improperly if there is a failure to perform the function or activity and that failure itself is a breach of a relevant expectation.

Relevant expectations relate back to the conditions listed above. Where a function or activity meets condition (A) or (B) above, the relevant expectation is one or the other of those conditions. Where condition (C) is engaged, a relevant expectation is any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.

#### ***Expectation test (section 5)***

Where the UKBA refers to “expectations,” the test for that expectation is what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

Where the conduct concerned is to be performed outside of the United Kingdom and is not subject to the law of any part of the United Kingdom, any local custom or practice will be disregarded unless it is permitted or acquired for the written law applicable to the country or territory concerned. In this regard, written law means law contained in a written constitution, or provision made by or under legislation, which is applicable to the country or territory concerned. Written law may also mean any judicial decision which is applicable as law and is evidenced in published written sources.

#### **Offences under the UKBA**

There are four main offences under the UKBA:

1. Bribing another person (section 1);
2. Being bribed (section 2);
3. Bribing a Foreign Public Official (FPO) (section 6); and
4. Failing to prevent bribery (section 7).

#### ***Jurisdictional reach (section 12)***

Any offence committed under section 1, 2, or 6 that occurs within the United Kingdom is subject to the jurisdiction of the UKBA, irrespective of the nationality of the individual committing the offence.

To the extent that acts potentially constituting offences under sections 1, 2, or 6 take place outside of the United Kingdom, the UKBA applies if and to the extent that the individual alleged to have undertaken those acts has a “close connection” with the United Kingdom. This essentially means British citizens or other individuals who have some type of British nationality, or who are ordinarily resident in the United Kingdom. In relation to corporate entities, this means bodies incorporated under the law of any part of the United Kingdom or Scottish partnerships.

In relation to section 7, any organisation that is a “relevant commercial organisation” under the statute, i.e., it is either a British incorporated entity or an overseas incorporated entity that carries out a business or part of a business in the United Kingdom, is subject to the UKBA regardless of the location of the alleged bribery.

*FAQ 22: Is a non-UK company subject to the UKBA?*

Yes, depending on the circumstances. Where the alleged misconduct occurred within the United Kingdom, the conduct is subject to the UKBA.

Further, for the corporate offence of Failure to Prevent Bribery, the UKBA applies to all acts of a “relevant commercial organisation,” which includes both a British incorporated entity and any company that “carries out a business or part of a business” in the United Kingdom.

There is no case law that interprets “carries out a business” and its broad wording suggests that it may apply to any organisation that does business in the United Kingdom.

## Elements of Offences

For ease of reading, we use the language of the UKBA when discussing bribers (P) and recipients or intended recipients of bribes (R). In relation to the section 7 offence of failing to prevent bribery, which is a corporate offence, we use “C” as shorthand for the corporate entity, and “A” for its associated persons, as does the UKBA.

### *Bribing another person (section 1)*

The UKBA provides that bribing another person is an offence. As discussed above, this offence applies to commercial bribery as well as to bribery of government officials. The UKBA details two cases of bribery, which it criminalizes:

1. Case One is where P offers, promises or gives a financial or other advantage to another person and P intends the advantage either to induce a person to perform improperly a relevant function or activity or to reward a person for the improper performance of such a function or activity;
2. Case Two is where P offers, promises or gives a financial or other advantage to another person and P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

In relation to Case One, it is irrelevant whether the person to whom the advantage is offered, promised or given is

the same person as the person who is to perform, or has performed, the function or activity concerned.

In both cases it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

The offence is deliberately drawn widely and covers both the actual payment of bribes, as well as offers (genuine or otherwise) of payment of bribes. It covers payment or offers both before and after the corrupt action contemplated.

It is important to note that the corrupt action never needs to take place, nor does the recipient or intended recipient of the bribe have to accept the bribe or intend to take the corrupt action that P desires.

This offence can be committed by a commercial organisation as well as by individuals. The general English criminal law of identification would apply in this instance. The prosecution would have to show that an individual who can be identified as the directing mind and will of the organisation had committed the offence, and that in committing the offence, he or she had been acting on behalf of the organisation. It is this requirement to prove guilt on the part of such a high ranking individual within the organisation that is the primary reason for the comparatively low rate of corporate prosecutions in the United Kingdom.

Under background principles of English criminal law, corporate criminal liability is more limited than under US criminal law. Corporate liability for bribing, being bribed, and bribing a Foreign Public Official under the UKBA requires two elements:

- A person who can be identified as the directing mind and will of the organisation committed the offence
- That person was acting on behalf of the corporation when committing the offence

Section 7 of the UKBA expands corporate liability for bribery offences with the crime of Failing to Prevent Bribery, which applies when any person associated with a corporation commits bribery on behalf of the corporation regardless of whether the associated person can be identified as directing the mind and will of the organisation.

## **Being bribed (section 2)**

The UKBA provides four ways in which a person can be guilty of an offence of being bribed:

1. Where R requests, agrees to receive or accept a financial or other advantage intending that, as a consequence, a relevant function or activity should be performed improperly (whether by R or by another person);
2. Where R requests, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity;
3. Where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity; and
4. Where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R or by another person at R's request or with R's assent or acquiescence.

In all cases, it does not matter whether R requests, agrees to receive or accept (or is to request, agree to receive, or accept) the advantage directly or through a third party nor whether the advantage is (or is to be) for the benefit of R or another person.

In cases 2 to 4, it does not matter whether R knows or believes that the performance of the function or activity is improper.

In case 4, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

As with the section 1 offence, the section 2 offence is intended to be very wide. The four cases detailed are intended to cover all conceivable permutations of requesting or accepting bribes.

This offence can be committed by a commercial organisation as well as by individuals.

## **Bribery of FPOs (section 6)**

Under the UKBA, a person who bribes an FPO is guilty of an offence if it is P's intention to influence the FPO in the FPO's capacity as a foreign public official. P must also intend to obtain or retain business, or an advantage in the conduct of business.

P bribes the FPO if, and only if:

- (A) directly or through a third party, P offers, promises or gives any financial or other advantage;
  - i. to the FPO; or
  - ii. to another person at the FPO's request or with the FPO's assent or acquiescence; and
- (B) the FPO is neither permitted nor required by the written law applicable to the FPO to be in his or her capacity as a foreign public official by the offer, promise or gift.

References in the UKBA to "influencing the FPO in his or her capacity as a foreign public official" mean influencing the FPO in the performance of his or her functions as such an official, which includes:

- (A) any omission to exercise those functions; and
- (B) any use of the FPO position as such an official even if not within the FPO's authority.

## **Who is an FPO?**

An FPO is an individual who:

- (A) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside of the United Kingdom (or any sub-division of such a country or a territory);
- (B) exercises a public function;
  - i. for or on behalf of a country or territory outside of the United Kingdom; or
  - ii. for any public agency or public enterprise of that country or territory; or
- (C) is an official or agent of a public international organisation.

### **What is a public international organisation?**

A public international organisation is an organisation whose members are any of the following:

- (A) countries or territories;
- (B) governments of countries or territories;
- (C) other public international organisations; or
- (D) a mixture of any of the above.

### **Written law applicable**

The written law applicable to the FPO is:

- (A) where the performance of the functions of the FPO which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom;
- (B) where paragraph (A) in this subsection does not apply and the FPO is an official or agent of a public international organisation, the applicable written rules of that organisation; or
- (C) where paragraphs (A) and (B) in this subsection do not apply the law of the country or territory in relation to which the FPO is a foreign public official so far as that law is contained in;
  - i. any written constitution, or provision made by or under legislation, applicable to the country or territory concerned; or
  - ii. any judicial decision which is so applicable and is evidenced in published written sources.

The definition of bribery of an FPO provided by the UKBA is not entirely straightforward. However, as with the other offences under the UKBA, the intention is to create a wide offence that covers what would ordinarily be thought of as bribery of an FPO to induce or reward corrupt behavior.

This offence can be committed by a commercial organisation as well as by individuals.

*FAQ 23: What is the offence of failure to prevent bribery and does it differ from a bribery offence under the UKBA?*

The so-called Section 7 offence of failure to prevent bribery offence applies to “commercial organisations,” i.e. corporations, where a person or other corporation that performs services on behalf of the defendant commercial organisation bribes another person intending to obtain or retain business or a commercial advantage for the defendant commercial organisation.

The purpose of the offence is to broaden corporate liability under the UKBA beyond actions taken by people who can be identified as the will or mind of the company, the traditional test for corporate criminal liability under English common law.

Unlike the bribery offence, the Section 7 failure to prevent bribery offence applies only to corporations and includes an affirmative defence for maintaining an effective system of internal controls. The offences do not differ with respect to penalties.

### **Failure of commercial organisations to prevent bribery (section 7)**

This is the only section of the Act that is truly a new introduction to the law of the United Kingdom and the new so-called “section 7” offence expands the law of corporate criminal responsibility in this sphere.

The offence is drafted as follows:

A “relevant commercial organisation” (C) is guilty of an offence under this section if a person (A) associated with C bribes another person intending:

- (A) to obtain or retain business for C; or
- (B) to obtain or retain advantage in the conduct of business for C.

### Who is an “associated person”?

The UKBA (in section 8) defines an associated person as someone who performs services for or on behalf of C.

The capacity in which A performed services for or on behalf of C is irrelevant, as is the legal nature of the relationship. The UKBA provides three examples of an associated person: an employee, an agent or a subsidiary. The UKBA expressly states that the question of whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C. However, if A is an employee of C, it will be presumed that A is a person performing services for or on behalf of C, unless it can be shown to the contrary.

*FAQ 24: Can a corporation be liable for acts of third parties under the UKBA?*

Yes, section 7 of the UKBA applies to the actions of any persons “associated with” a corporation, including any third party that acts on behalf of the corporation. Under the statute, the third party could include an individual or another corporation performing services on behalf of the company.

It is necessary for the authorities to demonstrate that:

- (A) A is or would be guilty under section 1 (bribing another person) or section 6 (bribery of an FPO), whether or not A has been prosecuted for such an offence; or
- (B) A would be guilty of such an offence if the Act was applicable to him or her.

### What is a “relevant commercial organisation”?

The Act defines a “relevant commercial organisation” to which section 7 applies as:

- (A) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether within the United Kingdom or elsewhere);
- (B) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom;
- (C) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether within the United Kingdom or elsewhere); or
- (D) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

### Penalties (section 11)

An individual who is found guilty of an offence under section 1 (bribing another person), section 2 (being bribed), or section 6 (bribing an FPO) is liable to a maximum term of imprisonment of 10 years. He or she may also face an unlimited fine, or both imprisonment and a fine.

A commercial organisation guilty of an offence under sections 1, 2, or 6 is liable to an unlimited fine. Similarly, any commercial organisation guilty of a section 7 offence is liable to an unlimited fine.

The maximum fines for corporate violations of the UKBA are unlimited.

Although the maximum fine can be unlimited, to date the fines imposed under the UKBA have typically been much smaller than fines handed out by the US authorities in FCPA matters.

In practice, fines in the UK follow from the Sentencing Guidelines that govern punishment of corporate crime. The Sentencing Council for England and Wales publishes these Guidelines for the sentencing of offenders

convicted of committing offences of fraud, bribery, and money laundering. These Guidelines identify a number of factors that must be considered by judges when arriving at an appropriate level of fine. These include (but are not limited to):

- The level of culpability;
- The amount of harm done;
- Previous convictions;
- Level of cooperation with the authorities;
- Attempts to conceal the wrongdoing; and
- Whether there has been a change in management and/or the compliance programme since the offending was uncovered.

Under the Guidelines, a fine can be adjusted upward to ensure that it removes all gain obtained by the offending; punishing the corporate; and ensuring the appropriate level of deterrence. The Guidelines are clear that there should be a “real economic impact,” to bring home to management and shareholders the need to operate within the law. The fine can be so large as to put the company out of business if that is deemed the most appropriate outcome, as recognised in the DPA entered into by XYZ Ltd., in which the SFO cited the company’s cooperation as a key factor for its decision not to levy such a fine.

*FAQ 25: Are fines the only penalties that a corporation must consider in assessing exposure under the UKBA?*

No. The UK has strict laws around the confiscation of proceeds of crime as set out in the Proceeds of Crime Act 2002, which may result in the disgorgement of any proceeds that prosecutors can demonstrate are associated with a violation of the UKBA. In addition, a court sentencing a corporation for a violation of the UKBA will consider whether it is appropriate to order the payment of compensation to victims under the Powers of Criminal Courts (Sentencing) Act 2000.

In addition, the general law on confiscation of the proceeds of crime as set out in the Proceeds of Crime Act 2002 will also apply, as will the law on compensation of victims as set out in section 130 of the Powers of Criminal Courts (Sentencing) Act of 2000.

### *Liability of senior officers (section 14)*

As we set out above, the general English law of corporate identification will apply to determine whether corporate entities committed the offences under sections 1, 2, or 6. In addition, where the prosecution can prove a criminal offence on the part of the company, and a senior officer of the company (who must have a “close connection” to the United Kingdom) has consented or connived in the commission of the offence, that senior officer, as well as the company, is guilty of the offence and liable to be proceeded against and punished accordingly. This is the case even if the senior officer did not him or herself pay or receive a bribe.

### AFFIRMATIVE DEFENCES

It is a defence to a failure to prevent bribery charge under section 7 for a relevant commercial organisation to show that it has adequate procedures in place designed to prevent persons associated with it from committing bribery offences.

The Ministry of Justice has, as required by section 9 of the UKBA, published guidance for commercial organisations as to the procedures that ought to be put in place to prevent persons associated with the commercial organisations from committing bribery. It has yet to be tested, but in theory, if a commercial organisation complies with the guidance, it ought to have a defence to any allegation of a section 7 offence.

Aside from the defence under section 7, i.e., that the relevant commercial organisation had in place adequate procedures designed to prevent bribery, there are very few affirmative defences under the UKBA. Those that do exist (section 13) relate to the proper exercise of any function of a member of the intelligence services or the armed forces when engaged in active service. These defences do not apply to commercial organisations.

## RESOLUTION OF UKBA INVESTIGATIONS

There are a number of ways in which criminal investigations, including those relating to allegations of infringements of the UKBA, can be resolved.

### Charge

A criminal charge begins the legal process. The Code for Crown Prosecutors provides a two-stage test for whether an accused should be charged with a criminal offence. First, a prosecutor must be satisfied that there is sufficient evidence against the accused for there to be a realistic prospect of conviction. Second, the prosecutor must also be satisfied that the prosecution is in the public interest. There are a number of factors that are listed in the Code to determine the public interest.

Once charged, the accused must decide whether to plead guilty or not.

### Guilty plea

If a defendant pleads guilty at the earliest available opportunity, he will, according to the Sentencing Guidelines, receive a reduction in any sentence of one third. A sliding scale is then applied to the reduction given, reducing to a one tenth discount if the defendant pleads guilty at the door of the court or after the trial has begun.

### Not guilty plea

If a defendant pleads not guilty, a full criminal trial will ensue. The offences under sections 1, 2, and 6 of the UKBA can be tried in either the Magistrates' Court or the Crown Court, depending on the severity of the offence. The Crown Court has greater sentencing powers than the Magistrates' Court, but it is possible to be convicted by magistrates and referred to the Crown Court for sentencing, if the magistrates consider that their powers are insufficient. The section 7 offence can only be tried in the Crown Court.

### Deferred prosecution agreement (DPA)

As we have discussed above, a DPA is now a potential resolution for corporate offenders. DPAs were introduced in February 2014 through Schedule 17 of the Crime and Courts Act 2013. They are intended to allow a corporate offender to make reparations for criminal conduct, without a criminal conviction (and its attendant consequences) being imposed. DPAs are concluded subject to the supervision of a judge, who must be satisfied that the DPA

is in the interests of justice and its terms are fair, reasonable, and proportionate.

#### *FAQ 26: Who enforces the UKBA?*

The UK's Serious Fraud Office (SFO) enforces the UKBA. In 2014, the United Kingdom adopted a new framework for corporate bribery prosecutions and, in 2014, the SFO secured its first corporate conviction for a UKBA violation. In 2015 and 2016, the SFO reached its first two deferred prosecution agreements with corporate defendants.

A code of practice has been published, which sets out when and how prosecutors will use DPAs. Only two have so far been concluded (Standard Bank and XYZ Ltd.), so the jurisprudence in this area is still developing.

It is a discretionary matter as to whether a corporate offender will be invited to negotiate a DPA with the prosecutor – and it is for the prosecutor, not the company, to seek to initiate those discussions. However, the code of practice does provide some guidance on what factors the prosecutor will consider when deciding whether to initiate DPA discussions.

At a minimum, the corporate offender will need to have self-reported the alleged criminal conduct, and will need to cooperate fully with the investigation. A DPA will be more likely if a company has no previous convictions, has already implemented a full compliance programme, or the criminal conduct occurred long in the past and/or was the result of rogue activities by employees.

### Civil recovery

Prosecuting authorities have the power under the Proceeds of Crime Act 2002 to decline to bring criminal charges, but instead to bring an action in the civil courts to recover the proceeds of alleged criminal activity. The previous Director of the SFO made use of these powers on occasion, most notably in 2012 against the parent company of Mabey & Johnson Ltd.

The SFO's current public position is that it will continue to make use of civil recovery orders as an alternative to criminal charges under the right circumstances. However, the SFO has focused on bringing criminal charges, and it has not sought civil recovery since the advent of the DPA in 2014.



## UK ANTI-CORRUPTION DEVELOPMENTS

The following highlights UK anti-corruption developments in 2016.

### THE UNITED KINGDOM'S VOTE TO LEAVE THE EUROPEAN UNION AND ENFORCEMENT

In June 2016, the United Kingdom voted in a referendum to leave the European Union (EU). The details of the United Kingdom's exit are still being worked out, and the vote's ultimate impact, including on anti-corruption enforcement, remains unknown.

The vote could have far-reaching impacts on the United Kingdom's law enforcement activities. It is possible, for example, that the fallout from the vote could eventually affect the United Kingdom's access to certain EU law enforcement resources, including the European Arrest Warrant Scheme and Europol. The political and economic incentives following from the United Kingdom's exit of the single EU market could lead to the United Kingdom pursuing a less aggressive enforcement agenda as part of an overall effort to maintain a business-friendly environment to keep businesses from relocating away from the United Kingdom.

On the other hand, UK politicians and prosecutors at the SFO have publicly stated that the decision to leave the EU does not affect their priorities and will not meaningfully change enforcement capabilities. Moreover, whatever the eventual legal impact of the United Kingdom's exit from the EU may have on law enforcement, there may be other incentives for both the United Kingdom and the EU to continue to work collaboratively to prevent, detect, and punish all types of international criminal activity, including bribery and corruption.

For now, while the details of an exit are being worked out, the decision to leave the EU is unlikely to have any major impact on the United Kingdom's enforcement activity.

*For further analysis of the potential effects of the United Kingdom's vote to leave the EU on law enforcement, see the [recent article](#) by Partner Anthony Barkow and Associate David Lachman.*

### PRESENCE OF LAWYERS AT SECTION 2 INTERVIEWS

The SFO has powers under Section 2 of the Criminal Justice Act 1987 (the statute which created it) to compel the production of documents from individuals and companies, and to require individuals to attend interviews and answer questions. These interviews are colloquially known as "Section 2 interviews," and it is a criminal offence not to attend, to refuse to answer questions, or to answer questions untruthfully. Because the answers given to questions asked in a Section 2 interview are given under compulsion, information provided in the interview cannot be used against the interviewee in subsequent criminal proceedings. The only exception to this is in a prosecution for lying to the SFO during the Section 2 interview.

It has been the practice for the government to permit a lawyer to attend a Section 2 interview with the witness. In investigations into misconduct at a company, typically the lawyer is either a lawyer for the company that is under investigation, or paid for by that company.

On 6 June 2016, the SFO issued a new protocol under which a witness will be permitted to attend Section 2 interviews with a lawyer if, in the opinion of the case controller at the SFO, it is likely that the lawyer will assist with the purpose of the interview or the investigation, or will provide essential assistance by way of legal advice or pastoral support. Lawyers who also act for a person or company who may come under suspicion in the course of the investigation may not be allowed to attend at all. Even if attendance is permitted, the extent of the lawyer's role will be confined to advising the interviewee when legal

professional privilege may apply over a particular piece of information or a document, so that that information or document does not need to be disclosed to the SFO. According to the protocol, further involvement in the information exchange between the SFO and the interviewee is likely to be seen as obstruction and the lawyer will be asked to leave.

It is not clear whether this new guidance will achieve its aim of having witnesses provide comprehensive and complete information during a Section 2 interview. It will almost certainly have the effect of stopping some of what the SFO perceives to be the worst practices of lawyers: turning up in large numbers; misunderstanding (deliberately or otherwise) their role in the process and intervening in the questioning at inappropriate points; and sharing information gleaned from the Section 2 interview with suspects in the investigation.

However, it also brings with it some problems. Witnesses may be less inclined to assist the SFO by, for example, producing a witness statement following the Section 2 interview, if they feel as though their interests have not been accommodated in the process. A lawyer who is not abusing her role also can often help facilitate an interview, for example, by clarifying the issues for the witness.

The protocol also prohibits the lawyer from disclosing any information obtained as a result of the lawyer's participation in the Section 2 interview. However, witnesses cannot be prevented from discussing the documents or the content of the interview with third parties; witnesses are merely requested to keep the information confidential. This results in a situation where a witness can disclose information to a third party but the witness's lawyer could not do so on the witness's behalf.

Under established practice, a lawyer attending a Section 2 interview must sign an undertaking that they do not represent anyone who is a suspect in the investigation. The new guidance requires a higher standard than this undertaking: that the lawyer seeking to participate in the interview does not represent someone who may come under suspicion in the future. It is not at all clear how this will be resolved, but it is difficult to see how the guidance's standard could work in practice: All a lawyer can know is whether their client is currently a suspect, not whether authorities may in the future make a client a suspect.

## SFO SPEECHES DESCRIBE SFO'S VIEWS ON UKBA ENFORCEMENT

Recent speeches by Hannah von Dadelszen, one of the Joint Heads of the Fraud Division at the SFO, Ben Morgan, one of the Joint Heads of Bribery and Corruption, and Matthew Wagstaff, the other Joint Head of Bribery and Corruption, provide insight into the SFO's current priorities and practices with respect to enforcement of the UKBA against potential corporate defendants.

Von Dadelszen, speaking at the TRACE Global Anti-Bribery In-House Network Conference in October 2016, reaffirmed the SFO's commitment to take on the most complex and difficult cases, even if that means that its conviction rate remains low compared to other prosecutors around the world. She explained that increased cooperation with international counterparts by the SFO can be expected to lead to an increase in enforcing the UKBA. She also stressed that this commitment would not change after the United Kingdom's vote to leave the EU.

The SFO says that it will consider a deferred prosecution agreement based on how a corporation conducts itself after potential misconduct has come to light, including whether a corporation cooperates with the SFO's investigation.

The speeches by von Dadelszen, Wagstaff, and Morgan provided further context around when companies may be eligible for a deferred prosecution agreement in resolving an alleged UKBA violation. Each speaker emphasized that a deferred prosecution agreement, while entered into between the SFO and the defendant, is scrutinized and approved by a court. Accordingly, whether a company is eligible depends not just on the SFO's view but on an objective analysis of the circumstances of the case that can be applied in future matters.

The main criteria that these SFO prosecutors identified in their speeches was that they expect the company to self-report the alleged criminality and genuinely cooperate with the SFO's investigation. As Morgan put it in a speech in September 2015, how a company acts once it becomes aware of an issue "is very significant in determining how we will look to resolve the case." Morgan emphasized that a company must supply the SFO with information that it does not otherwise have to receive credit. It is not clear

whether, if a company cannot self-report because a whistleblower chooses to take the matter directly to the SFO rather than through the company's own procedures, it will be precluded from entering into a deferred prosecution agreement regardless of its cooperation.

Wagstaff, speaking in May 2016, also spelled out what the SFO means by cooperation. He said cooperation includes working with the SFO to identify the full extent of the alleged wrongdoing; assisting the SFO in its own investigation, including providing witness accounts already taken and making witnesses available; and ensuring that data and information is preserved for the SFO's investigation. Morgan added that cooperation requires a company under investigation to not "exert pressure through the media, Whitehall or other means."

Morgan also said that the penalty associated with a deferred prosecution agreement must balance the need to provide a serious criminal sanction for bribery with sufficiently favorable terms to encourage others to also self-report and cooperate in future investigations. Von Dadelszen, for example, noted that the deferred prosecution agreement entered into this year in the XYZ matter involved a discount off the sentencing guidelines' penalty starting point. She noted that, as recognised by the judge in that case, the purpose of such a discount was to encourage companies to cooperate with the SFO's investigations.

Maintaining adequate procedures to prevent bribery is an affirmative defence to a prosecution for Failure to Prevent Bribery, but the SFO has declined to provide guidance on what procedures meet this standard.

Von Dadelszen also discussed the affirmative defence of an adequate compliance programme, declining to provide any specific guidance. She said that the SFO will not provide guidance on what might, or might not, constitute adequate procedures for the purposes of defending against a section 7 UKBA offence. The SFO takes the view that advice or guidance of this kind would be outside of the scope of its statutory powers and purpose, which are to investigate and prosecute cases of serious and complex fraud. The phrase that the SFO likes to use, she added, is that it is "not in the business of telling people how not to rob a bank."

Partners Peter Pope and Nancy Jacobson authored a chapter in [The Strategic View: Business Crime 2016](#) that further discusses UK white collar crime enforcement.

## REPORTS OF OPEN INVESTIGATIONS SHOW UKBA ENFORCEMENT ACTIVITY EXPANDING

In addition to the enforcement actions described below, public reports of the SFO's UKBA investigations reflect further investigative activity during 2016.

The SFO's multi-year and multi-faceted investigation into the French engineering company Alstom SA and its UK subsidiaries Alstom Network UK Limited (formerly Alstom International Limited) and Alstom Power Limited continued with additional charges:

- Alstom Network UK Limited, Graham Hill and Robert Hallett, in relation to alleged corruption in India, Poland and Tunisia;
- Alstom Power Limited, Nicholas Reynolds and Johannes Venskus, in relation to alleged corruption in Lithuania;
- Alstom Network UK Limited, Michael Anderson, Jean-Daniel Lainé and Terence Watson (as to which see below), in relation to alleged corruption in the procurement of contracts to supply trains to the Budapest Metro.

The SFO has acknowledged investigations in other matters, including Unaoil, Airbus, and British American Tobacco (BAT). In March 2016, various media organisation reported, based on leaked company documents, that Unaoil had paid bribes on behalf of around 12 companies. Soon after these revelations, authorities in Monaco executed searches of the Unaoil headquarters and the homes of executives, following a request for assistance from the SFO. The SFO announced in July 2016 that it had opened a criminal investigation into Unaoil (as well as its officers, employees and agents) concerning suspected bribery, corruption and money laundering offences committed in the oil and gas sector. Unaoil has denied the allegations and stated that it will be taking legal action against the authors of the public report and filing a criminal complaint with law enforcement against the police in Monaco for theft of company information.

It was reported in April 2016 that Airbus had notified the UK government of alleged anomalies in the information Airbus provided to the UK government in connection with export credit financing. The UK government, in turn, notified the SFO of the alleged anomalies. In August 2016, the SFO also launched a criminal investigation into suspected fraud, bribery and corruption offences committed in Airbus Group's civil aviation business. The allegations relate to the identification of, and amounts of payments made to, third-party agents used by Airbus. The anomalies are understood to relate to Airbus's communications division, GPT, which is also under an ongoing investigation by the SFO in connection with a \$3.3 billion communications contract with Saudi Arabia.

In December 2015, a whistleblower, Paul Hopkins, gave the SFO a number of papers allegedly implicating BAT in corruption in East Africa. BAT allegedly bribed senior politicians and civil servants in East Africa in an attempt to prevent anti-smoking laws from being passed. BAT is also alleged to have paid bribes to cover up scandals, to maintain its corporate reputation, and to distort competitive markets. It is believed that the SFO has not formally opened an investigation, and BAT announced in February 2016 that it has appointed an external law firm to carry out an investigation into the allegations.



## UK ENFORCEMENT ACTIVITY

This section summarises UKBA and other foreign bribery related enforcement by UK authorities in 2016.

### BRAID LOGISTICS

#### *Civil settlement with Scottish authorities*

**Nature of conduct:** Braid Logistics, based in Glasgow, Scotland, accepted responsibility for contraventions of section 1 (bribing another person) and section 7 (corporate offence of failure to prevent bribery) of the UKBA. The allegations related to certain freight forwarding contracts. It was discovered that a former Braid employee had established an account, which was used by an employee of one of Braid's customers to fund vacations and to withdraw cash. During the investigation into this conduct, it was discovered that a separate profit-sharing arrangement had been established that rewarded the director of one of Braid's customers for placing orders with Braid.

**Amount of alleged improper payment:** Not alleged.

**Benefit obtained:** Freight forwarding contracts and customer orders.

**Type of resolution:** Civil settlement under the Proceeds of Crime Act 2002 (POCA) of £2.2 million.

**Of note:** This case highlights the difference between the treatment of corporate bribery offences in England and Wales and in Scotland. Scotland is a separate legal system, albeit that the UKBA applies in Scotland in the same way as it does in England and Wales. However, a deferred prosecution agreement is not available in Scotland. Therefore, in Scotland, the only method for prosecutors to dispose of cases without prosecution is to enter into a Civil Recovery Order (CRO) under the POCA.

In England, where a deferred prosecution agreement is available, the SFO has taken an increasingly tough stance towards corporate offenders and seems unlikely to continue to make use of CROs instead of a deferred prosecution agreement, which is criminal in nature and requires ongoing cooperation and compliance. CROs are not criminal in nature and only require the corporation to admit on the balance of probabilities that it is in possession of property which is or represents property obtained through unlawful conduct.

### PETER MICHAEL CHAPMAN

#### *Criminal Conviction*

**Nature of conduct:** On May 11, 2016, Mr. Chapman, the former manager of a polymer banknote manufacturer, Securrency PTY Ltd., was convicted on four counts of making corrupt payments to a Nigerian official, contrary to the Prevention of Corruption Act 1906, one of the previous UK anti-corruption statutes, which continues to apply to conduct occurring before the entry into force of the UKBA on July 1, 2011. Mr. Chapman paid bribes to an agent of Nigerian Security Printing and Minting plc to secure orders for the purchase of reams of polymer substrate from Securrency.

The UKBA applies only to crimes committed on or after July 1, 2011. Under the anti-corruption statutes that apply to conduct prior to that date, background principles of English criminal law limit vicarious liability to situations where a person who is the controlling mind or will of the corporation was involved in the crime.

**Amount of alleged improper payment:** The total value of the bribes was approximately \$205,000.

**Benefit obtained:** Unspecified customer orders.

**Type of resolution:** Mr. Chapman was sentenced to 30 months on each count, to be served concurrently.

**Of note:** The investigation leading to the conviction of Mr. Chapman was a joint investigation by the Serious Fraud Office and the Australian Federal Police into Securrency International PTY Ltd. This is another example of the SFO's continued focus on international corruption, and its increasing ability to work with international agencies to secure convictions.

**F.H. BERTLING LTD, PETER FERDINAND, MARC SCHWEIGER, STEPHEN EMLER, JOERG BLUMBERG, DIRK JUERGENSEN, GIUSEPPE MORREALE, RALF PETERSEN**

*Criminal Charge*  
July 13, 2016

**Nature of conduct:** The SFO charged FH Bertling Ltd, a logistics and freight operations company, and seven of its directors and employees with making corrupt payments, alleging that the defendants conspired with others to bribe an agent of the Angolan state oil company Sonangol, between January 2005 and December 2006, in order to further the company's business opportunities in Angola.

**Amount of alleged improper payment:** The charge does not allege the amount of the improper payments.

**Benefit obtained:** The charge does not specify the amount gained.

**Type of resolution:** None as of yet.

**Of note:** FH Bertling Ltd self-reported issues regarding its historical trading practices in Azerbaijan to the SFO in 2014. In September of that year, the SFO commenced an investigation into allegations connected to the company's operations in Angola, which resulted in the present charges. As the conduct to which these charges relate took place before the UKBA came into force, the charges were brought under POCA 1906.

**SMITH & OUZMAN LIMITED**

*Sentencing*

**Nature of conduct:** On December 22, 2014, Smith & Ouzman Limited and two of its employees were convicted

of corruptly agreeing to make payments to foreign public officials in Kenya and Mauritania contrary to section 1(1) of the Prevention of Corruption Act 1906.

**Amount of alleged improper payment:** Payments totaling £395,074.

**Benefit obtained:** The payments were alleged to have been made in order to obtain contracts for election ballot papers worth £2 million.

**Type of resolution:** Criminal conviction. The two employees, Nicholas Smith and Christopher Smith, were sentenced to three years' imprisonment and 18 months' imprisonment respectively on February 15, 2015. On January 8, 2016, Smith & Ouzman Limited was sentenced to financial penalties totaling approximately £2.2 million, comprising a fine of £1.3 million, a confiscation order of £880,000, and a costs award to be paid to the SFO in the sum of £25,000. In addition, Nicholas Smith was ordered to pay £19,000 in confiscation and £75,000 in costs, whilst Christopher Smith was ordered to pay £4,500 in confiscation and £75,000 in costs.

**Of note:** Owing to the relatively small size of Smith & Ouzman, and the involvement of senior management in the corrupt activity, this conviction is a comparatively rare example of a conviction of a company for a substantive corruption offence. This fine is substantially smaller than the fine levied on Standard Bank plc following the approval of its deferred prosecution agreement in November 2015 and the fine levied on Sweett Group plc (see below), which pleaded guilty to the section 7 offence. This may be explained by differences in the relative sizes of the corporate entities and in the alleged misconduct; no clear pattern of size of fines appears to be yet emerging.

**SWEETT GROUP PLC**

*Sentencing*

**Nature of conduct:** On December 18, 2015, Sweett Group plc pleaded guilty to an offence under section 7 of the UKBA. The charge was that Sweett Group plc failed to prevent the bribing of Khaled Al Badie, an official with the United Arab Emirates president's personal foundation, by a subsidiary, Cyril Sweett International.

**Amount of alleged improper payment:** Unknown.

**Benefit obtained:** The alleged aim of the bribery was to secure a contract for Sweett Group plc with Al Ain Ahlia

Insurance Company for project management and cost consulting services in relation to the building of a hotel in Dubai.

**Type of resolution:** Sweett Group plc pleaded guilty and was sentenced to a total financial penalty of approximately £2.35 million by Judge Martin Beddoe at Southwark Crown Court on February 19, 2016. The penalty was made up of a fine of £1.4 million, a confiscation order of £851,000, and a costs payment to the SFO of £95,000.

**Of note:** As the first fine to be levied on a company following a plea of guilty to the section 7 offence, the size of the financial penalty has some precedential value for other companies that may be in a similar situation to Sweett Group. In passing sentence, Judge Beddoe took into consideration the fact that the alleged corrupt payments continued for a period of at least 18 months, and that Sweett Group plc had attempted to mislead the SFO when it commenced its investigation.

## TERENCE STUART WATSON

### *Criminal Charge*

**Nature of conduct:** As mentioned above, the SFO is conducting a long-running and multi-faceted investigation into the conduct of the French engineering company Alstom. On March 29, 2016, the president of Alstom's UK operations, Terence Stuart Watson, also was charged with offences of corruption contrary to section 1 of the Prevention of Corruption Act 1906 and an offence of conspiracy to corrupt contrary to section 1 of the Criminal Law Act 1977, both in connection with the improper payments to secure a Budapest Metro contract.

**Amount of alleged improper payment:** Not alleged.

**Benefit obtained:** Contracts for the supply of trains to the Budapest Metro.

**Type of resolution:** None as of yet.

**Of note:** Mr. Watson is the seventh individual to be charged by the SFO in its investigation of Alstom. He has since stepped down from his role with Alstom.

## XYZ LIMITED

### *Deferred Prosecution Agreement*

July 8, 2016

**Nature of conduct:** XYZ Limited, a UK small/medium size enterprise, which cannot currently be named due to ongoing legal proceedings, was alleged to have conspired to corrupt and bribe, and failed to prevent bribery under section 7 of the UKBA. The anonymized judgment approving the deferred prosecution agreement states that between June 2004 and June 2012, a number of the company's employees and agents offered and paid bribes in order to be awarded contracts. Concerns had initially arisen in August 2012 after a global compliance programme had been introduced by the company's parent company in 2011. The SFO concluded (after a two-year investigation following an independent internal investigation) that 28 of the 74 contracts obtained by the company that it had considered had been procured through bribes.

**Amount of alleged improper payment:** Not stated.

**Benefit obtained:** Contracts to supply products in a number of foreign jurisdictions worth at least £6,201,085 in profits.

**Type of resolution:** XYZ entered into a deferred prosecution agreement to resolve the allegations. Under the agreement, the company will have to pay financial orders of £6,553,085, comprising a £6,201,085 disgorgement of gross profits (£1,953,085 of which will be paid by the company's US parent as repayment of dividends received during the indictment period) and a penalty of £352,000. The company has also agreed to maintain full cooperation with the SFO and to provide an annual report for the duration of the agreement to the SFO (a minimum of three years to a maximum of five years), addressing third-party intermediary transactions and the performance of anti-bribery checks and procedures.

**Of note:** This was the SFO's second application for a deferred prosecution agreement, after the first with Standard Bank plc was approved in November 2015. The Director of the SFO commented that this case demonstrated an example for companies of the need to cooperate with investigations. Here, the level of cooperation was key in tipping the balance against levelling a penalty that would have forced the company into insolvency.



## ANTI-CORRUPTION HIGHLIGHTS FROM AROUND THE GLOBE

The following discusses other significant anti-corruption highlights during 2016.

### INTERNATIONAL LAW

#### ISO Publishes Anti-Bribery Best Practices Standard

In October 2016, the Swiss-based International Organization for Standardization (ISO) published an anti-bribery management system standard known as ISO 37001. The standard is designed to assist organizations reduce the risk that they or their employees will commit bribery. It is also intended to serve as an international baseline standard for the measures all organizations should take to prevent bribery and corruption.

The standard is designed to reflect current best practices. The requirements for an anti-bribery management system, described as part of the standard, include an anti-bribery policy, anti-bribery training, and management commitment to anti-bribery compliance. These components of anti-corruption guidance are generally similar to those recommended by other authoritative sources, including the DOJ and SEC *FCPA Resource Guide*. The standard provides general guidance about these elements of an adequate anti-bribery program, and it is intended to be flexible enough to allow an implementing company to tailor its anti-bribery program to the appropriate local law and to the company's size and specific risk environment.

The publication of the anti-bribery standard is significant because of the possibility that it becomes a signal of an adequate compliance program. Compliance with ISO standards can be certified by third parties. If the anti-corruption standard becomes trusted, a certification that a company has a compliance program consistent with the standard could operate as an accepted indicator that the certified business has an adequate anti-bribery system. Other ISO business system standards have

The International Organization for Standardization announced an international standard for an anti-bribery compliance program. It is too soon to tell the impact of this development, but other standards by this organization have been relied upon in the international marketplace as a trusted signal. A similar widespread adoption of an accreditation that reflects a trusted and adequate anti-corruption program could have wide-ranging effects on the costs of compliance and due diligence for anti-corruption issues.

become widely adopted through the same certification mechanism that is intended for this standard. Most prominently, more than 1 million companies from around the world are certified under ISO 90001, which provides requirements for quality management systems.

It remains to be seen whether ISO 37001 will have a significant impact on anti-corruption compliance. In light of the significant anti-bribery risks associated with third parties, a globally recognizable symbol that a business's anti-bribery program can be trusted could be attractive. On the other hand, the flexibility needed to accommodate different laws and different size companies may drain the standard of its content, leaving it too unreliable for companies to rely on when vetting third parties.

For further discussion of ISO 37001, see the [Client Alert](#) published by Partners Katya Jestin, Nick Barnaby, and Anne Cortina Perry.

#### Trans-Pacific Partnership Agreement Includes Anti-Corruption Provisions

In February 2016, representatives from the United States and 11 other countries signed the Trans-Pacific Partnership Agreement (TPP). In addition to the United

States, signatories include: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico; New Zealand, Peru, Singapore, and Vietnam. The TPP seeks to promote trade and investment, in part, by strengthening and harmonizing the anti-corruption efforts of the signatory countries. Specifically, chapter 26 of the TPP, titled “Transparency and Anti-Corruption,” requires that the signatories adopt measures to promote integrity and disclosure of suspicious activities among public officials, including by establishing or maintaining criminal sanctions for the offering of undue advantages to foreign public officials or officials of public international organizations (or the solicitation of an undue advantage of such an official). The TPP further encourages the countries to observe the APEC Anti-Corruption Code of Conduct for Business, including its obligation to prohibit bribery through the implementation of anti-bribery programs. However, the TPP does not require the countries to specifically criminalize bribery by private entities.

However, the US presidential election has called the TPP’s future into question. Whether and how the new administration proceeds on the TPP remains to be seen.

The TPP will enter into force upon ratification by all signatory countries, if such ratification occurs before February 8, 2018. If not all parties have ratified by that date, the TPP will go into effect after ratification by at least six states that together have a GDP of 85 percent of all the signatories.

## ARGENTINA

### Argentina Proposes Anti-Corruption Legislation, Extends Whistleblower Protections

Argentina has recently enacted legislation, and its Congress is considering additional legislation, intended to help combat corruption. First, Argentina changed its whistleblower laws to include corruption cases. The new law provides certain protections to whistleblowers who report public corruption crimes, customs crimes, and financial crimes. Significantly, however, the law provides that whistleblowers who are implicated in the crime they report will not go unpunished. The law simply reduces the minimum and maximum punishments that the government can levy against the whistleblower.

Second, the Argentinian Congress is considering imposing liability on corporations for involvement in corruption. Currently, Argentinian law makes it impossible to prosecute companies involved in public corruption cases; only individuals can be punished. The proposed legislation would provide criminal sanctions for companies as well. Corporations that profit from bribes paid to foreign or domestic officials could be subject to prosecution, even if the corporation’s leaders were not involved. The proposed legislation contemplates the possibility of settlement agreements with those who cooperate in criminal corruption investigations, and affords corporations the opportunity to avoid sanctions if they can demonstrate the existence of mechanisms designed to prevent corruption.

## AUSTRALIA

### Australia Provides Additional Funding for Anti-Corruption Units, Continues to Consider Introduction of DPAs

The Australian federal government has allocated an additional \$15 million in funds to the Australian Federal Police to bolster the nation’s capability to respond to serious and complex fraud, foreign bribery, and corruption in the wake of media revelations about high-level foreign bribery, including the Unaoil scandal. The funds will support new teams of anti-corruption investigators in Sydney, Perth, and Melbourne.

The availability of a deferred prosecution agreement under a country’s anti-corruption laws is viewed by some as an important enforcement tool because the availability of agreements has been used by prosecutors in some countries, including the United States, to encourage corporations to cooperate with criminal investigations without having to accept a criminal judgment against the company.

As of publication, Australia is contemplating introducing DPAs into its anti-corruption program. The Australian Minister for Justice released a public discussion paper on this subject in March 2016. This paper called for interested parties to submit proposals detailing whether DPAs should be introduced and how they would operate. The discussion paper specifically asks for comments on whether the DPAs should be made available for individual

defendants, as well as for corporate defendants. The Attorney-General's Department is currently considering the responses to the public consultation paper.

## BRAZIL

### **Petrobras Probe Continues**

Brazil and the United States continue to cooperate in their respective investigations into the corruption involving state oil company Petrobras, known as Operation Carwash.

Because Brazilian criminal graft laws apply to individuals only, Brazilian authorities have focused their efforts on prosecuting individuals, including many high-ranking Brazilian political figures who allegedly received illegal campaign contributions in return for granting lucrative government contracts. Brazilian prosecutors recently indicted the former president of Brazil, Luiz Inácio Lula da Silva, for corruption and money laundering. In addition, current interim President Michel Temer – who took over after his predecessor, Dilma Rousseff, was impeached – is also implicated in the scheme.

As noted above, in December, two significant Petrobras contractors, Brazilian-based Odebrecht SA and Braskem SA agreed to a plea deal under which they will pay a combined total of at least \$3.5 billion to Brazilian, United States, and Swiss authorities. In addition, Odebrecht's former head, Marcelo Odebrecht, was one of approximately 77 individuals who signed plea deals in connection with the scheme. Under the agreements, the individuals will cooperate with prosecutors and provide testimony.

When news media began reporting the pleas, the lower house of Brazil's Congress – which has many members implicated in the corruption scheme – changed an anti-corruption bill to remove a number of anti-corruption protections and to include a provision that undermines the independence of judges and prosecutors. The lower house of Congress passed the revised bill, prompting mass protests in Brazil before the Senate blocked the bill.

## FRANCE

### **France Adopts New Anti-Corruption Legislation Allowing DPAs**

France has adopted new anti-corruption legislation that, among other things, specifically allows for the use of DPAs. Under the new legislation, a company may resolve charges of corruption through a negotiated DPA with a magistrate. A DPA may include a fine of up to 30 percent of the company's annual revenue. A judge is required to approve settlements under this legislation in a public hearing. The provision for DPAs was controversial in France, as many French citizens view DPAs to be non-transparent and in conflict with the aims of the French criminal justice system.

The legislation implements several additional measures targeting foreign and domestic corruption and bribery. These measures include creating a national agency tasked with monitoring the implementation of anti-bribery compliance programs in companies of a specified size and expanding protection for whistleblowers.

The enactment of this legislation comes in the wake of criticism of France's current anti-corruption measures. In 2014, the OECD Working Group on Bribery noted that no French company had been convicted of a foreign bribery offense in France, although France had opened 24 corruption cases between 2012 and 2014 and French companies faced convictions internationally.

## ISRAEL

### **Israel Brings First Enforcement Action under Bribery of Foreign Public Officials Statute**

In November 2016, Israeli authorities brought their first enforcement action under Israel's Bribery of Foreign Public Officials statute. The provision went into force in 2008 in connection with Israel's ratification of the OECD Convention on Combating Bribery.

In the enforcement action, the prosecutors charged Nikuv International Projects Ltd, an Israeli company that specializes in technology for a variety of civil registry systems, with paying more than \$500,000 in bribes to secure government contracts. According to the charges, between 2010 and 2012, Nikuv paid bribes to local agents in the African country of Lesotho in order to win a contract with the government of Lesotho. At the beginning of 2012, the company entered into contracts with the

government of Lesotho worth an estimated \$30 million. Nikuv has pleaded guilty to the charges and has agreed to pay \$1.2 million in fines, and to implement an anti-corruption compliance program.

## MEXICO

### **Mexico Enacts New Anti-Corruption Legislation**

In July 2016, Mexico enacted new anti-corruption legislation that creates an independent anti-corruption prosecutor and a system to improve coordination among enforcement authorities at the local and national level. This new legislation has both civil and criminal components and applies to domestic and foreign private entities operating in Mexico that commit violations in connection with, or related to, a Mexican government official at the federal, state or local level. The legislation also establishes protections for whistleblowers and provides significant new administrative and criminal liability for bribery and public corruption offenses. As in the United States, legal entities charged under the new regime can receive credit for self-reporting violations, cooperating with government investigations, and having an effective compliance program. The legislation takes effect in July 2017.

## MAP OF OUR WORLDWIDE ANTI-CORRUPTION REPRESENTATIONS



## OUR ANTI-CORRUPTION EXPERIENCE

Jenner & Block has a leading FCPA and anti-corruption practice representing global companies in all phases of compliance with the FCPA, the UK Bribery Act, and other anti-corruption laws, from internal investigations and negotiations with the US and other governments to development of internal controls, training, and compliance counseling. We offer clients a wealth of experience, with two former US Attorneys, the former Associate Attorney General (the third ranking official in the US Department of Justice), former criminal division and assistant US attorneys from jurisdictions throughout the country, the former Associate Director of the SEC's Division of Enforcement, and other former SEC enforcement attorneys. As a group, our lawyers have represented many dozens of companies in FCPA and anti-corruption matters of all types.

The hallmark of a strong anti-corruption practice is helping clients stay out of trouble in the first place. Our lawyers have developed anti-corruption compliance programs for major multi-national companies across numerous sectors of the economy, including, among others, defense, financial institutions, oil and gas, media, government contractors of all kinds, and retail establishments. We have provided training to tens of thousands of corporate personnel as well as smaller businesses with fewer than 500 employees. Our FCPA team also brings to the table a nuanced understanding of the intersections of the FCPA with federal securities laws, Sarbanes-Oxley, Dodd-Frank, export control laws, government contracting obligations, and other anti-corruption laws, including the UK Bribery Act.

When issues arise, our clients benefit from Jenner & Block's world-class reputation and skill in conducting internal investigations. Our range and depth of experience enables us to conduct internal investigations with care and rigor, ensuring that our clients have obtained the material facts and that the investigation will withstand the strictest of scrutiny by government enforcement agencies.

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