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Foreign Corrupt Practices Act Alert

Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018

This past year marked the 40th anniversary of the U.S. Foreign Corrupt Practices Act (“FCPA”). Since its enactment in 1977, the U.S. Department of Justice (the “DOJ”) has brought approximately 300 FCPA enforcement actions, while the U.S. Securities and Exchange Commission (the “SEC”) has brought approximately 200 cases.¹ This anniversary year, the first year of the Trump administration, demonstrated that the FCPA continues to be a powerful tool in combating corruption abroad and encouraging compliance at global companies.

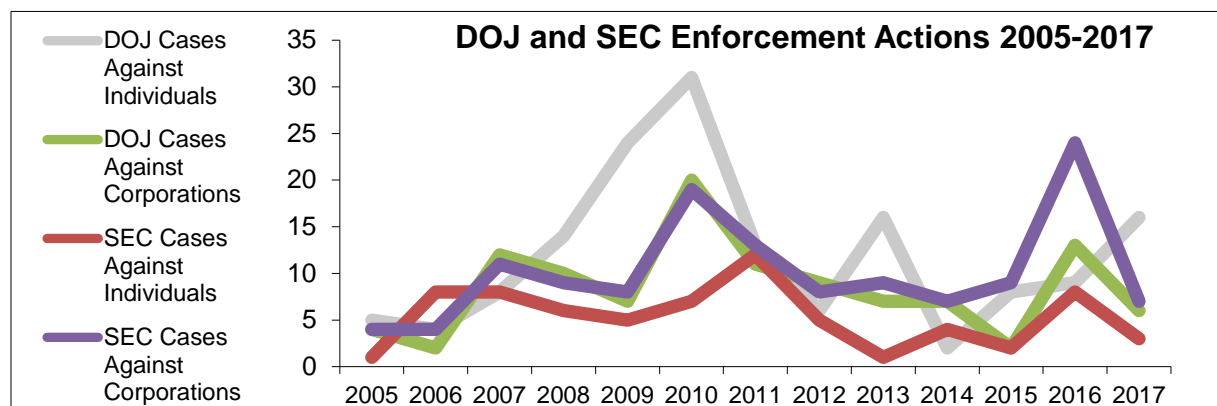
Below are **six key take-aways** regarding FCPA enforcement in 2017:

- **FCPA enforcement is alive in the Trump era. Statistics for enforcement actions may be slightly lower in 2017 than in years past, but significant activity continues and 2017 saw several blockbuster cases.** To learn more about 2017 FCPA enforcement trends and efforts, please refer to [Section I “2017 Enforcement Trends and Priorities”](#) and [Section III “Key Investigation-Related Developments.”](#)
- **Prosecution of individuals was high in 2017, and individuals continue to be charged long after corporations settle.** To read about individual prosecutions in 2017, please refer to [Section III.C “Notable Aspects of Individual Resolutions.”](#)
- **Non-U.S. companies were predominantly the targets, intentionally or unintentionally, of FCPA enforcement in 2017.** To read more about this development, please refer to [Section I “2017 Enforcement Trends and Priorities”](#) and [Section III.B.2 “Continued Rise in Global Enforcement and Cooperation.”](#)
- **International cooperation continues to be a hallmark of corruption enforcement worldwide, and non-U.S. enforcement continues to rise.** To learn more about this topic, please consult [Section III.B.2 “Continued Rise in Global Enforcement and Cooperation”](#) and [Section VII “Key International Legal Developments.”](#)

¹ Richard L. Cassin, *Someone had to be the first FCPA defendant*, THE FCPA BLOG (Dec. 19, 2017), http://www.fcpablog.com/blog/2017/12/19/someone-had-to-be-the-first-fcpa-defendant.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+fcablog%2FsLbh+%28The+FCPA+Blog%29.

- **The new 2017 FCPA Corporate Enforcement Policy is not a game changer. However, it places more value on voluntary disclosure. Whether that value outweighs potential costs will continue to require case-by-case evaluation.** To learn more about the FCPA Corporate Enforcement Policy, please refer to [Section II “Recent Policy Changes.”](#)
- **Recent enforcement cases indicate that bribery schemes continue to evolve and become more sophisticated.** Companies can learn from these developments to refine the elements and contours of their internal controls and corporate compliance programs. To learn more about this topic, please refer to [Section III.B “Notable Features of Corporate Resolutions.”](#)

Overall, FCPA enforcement continued at a strong pace in 2017 and has proved initial speculation about the FCPA’s demise under the Trump administration to be exaggerated. While several 2017 enforcement actions were initiated under the Obama administration, a large number of FCPA cases remain in the pipeline, investigations tend to last several years and straddle administrations, and the current leaders of both the DOJ and SEC have affirmed their commitment to prosecuting FCPA violations (with recent large settlements such as Telia and SBM showing that the government is taking action to back up its rhetoric).² Among others, Attorney General Jeff Sessions has emphasized the need to enforce the FCPA as a means of protecting “honest businesses” from corruption which “harms free competition, distorts prices and often leads to substandard products and services coming into our country.”³



² E.g., Dylan Tokar, *New criminal division deputy stresses ‘continuity’ in FCPA enforcement*, GLOBAL INVESTIGATIONS REVIEW (Feb. 16, 2017), <http://globalinvestigationsreview.com/article/1081451/new-criminal-division-deputy-stresses-%E2%80%99continuity%E2%80%99-in-fcpa-enforcement> (quoting then-Acting Principal Deputy Assistant Attorney General Trevor McFadden stating, “Attorney General Sessions explicitly noted his commitment to enforcing the FCPA, and to prosecuting fraud and corruption more generally”); Roger Hamilton-Martin and Adam Dobrik, *FCPA Docket: Rex Tillerson stands up to Trump on foreign bribery enforcement*, GLOBAL INVESTIGATIONS REVIEW (Mar. 10, 2017), <http://globalinvestigationsreview.com/article/1137887/fcpa-docket-rex-tillerson-stands-up-to-trump-on-foreign-bribery-enforcement> (describing Secretary of State Rex Tillerson reportedly defending the FCPA at White House).

³ Adam Dobrik, *Jeff Sessions sets out future of FCPA enforcement*, GLOBAL INVESTIGATIONS REVIEW (April 24, 2017), <http://globalinvestigationsreview.com/article/1139965/jeff-sessions-sets-out-future-of-fcpa-enforcement>.

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I. 2017 ENFORCEMENT TRENDS AND PRIORITIES

2017 was consequential for FCPA enforcement in numerous respects. At the forefront was the introduction of the FCPA Corporate Enforcement Policy in November 2017.⁴ This policy effectively makes permanent the FCPA Pilot Program, originally announced in April 2016, and attempts to increase the incentives for corporate self-disclosure by adding a “presumption” that the DOJ will issue declinations when a company’s self-disclosure, cooperation, remediation, and disgorgement of profits meet certain standards.⁵ The new policy signals that declinations—already a commonly employed tool—will become a permanent staple of the FCPA enforcement landscape.

U.S. authorities also appear to have signaled in 2017 that charging non-U.S. companies continues to be an FCPA enforcement priority. Four of the six DOJ and three of the seven SEC⁶ FCPA corporate enforcement actions this year involved non-U.S. parent companies.⁷ These enforcement actions are consistent with the Trump administration’s rhetoric of leveling the playing field for U.S. companies. However, time will tell whether this is a lasting, intentional priority for U.S. authorities under the current administration, as many of the cases resolved in 2017 were commenced before the Trump inauguration in January 2017.

In addition, as we predicted last year, notable FCPA enforcement trends from 2016 and other years continued in 2017, including a focus on individual prosecutions, continued efforts to increase cooperation with other countries’ enforcement agencies, blockbuster corporate penalties, and continued rise in criminal internal-controls cases. Specifically:

- **2017 saw 19 enforcement actions against individuals, including charges brought against four individuals in connection with the Rolls-Royce plc (“Rolls-Royce”) matter and two individuals pleading guilty in connection with the Petr leo Brasileiro S.A. (“Petrobras”) matter.** U.S. authorities also achieved significant trial victories against individuals in foreign corruption-related matters such as *United States v. Ng Lap Seng*, which involved an FCPA

⁴ Rod J. Rosenstein, Deputy Attorney General, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

⁵ FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS’ MANUAL § 9-47.120.

⁶ Included in this number is Orthofix International N.V., which is a Curacao-incorporated company that is headquartered in Texas.

⁷ Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, 17-CR-697 (E.D.N.Y. Dec. 22, 2017); Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686 (S.D. Tex. Nov. 30, 2017); Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581 (S.D.N.Y. Sept. 21, 2017); Deferred Prosecution Agreement, *United States v. Sociedad Qu mica y Minera De Chile, S.A.*, No. 17-CR-013 (D.D.C. Jan. 13, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195 (Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int’l N.V.*, Rel. No. 34-79828, File No. 3-17800 (Jan. 18, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Qu mica Y Minera De Chile, S.A.*, Rel. No. 34-79795, File No. 3-17774 (Jan. 13, 2017). As is common, the DOJ and SEC also charged two foreign subsidiaries of U.S. companies in related enforcement actions. Plea Agreement, *United States v. JERDS Luxembourg Holding S.A.R.L.*, No. 1:17-cr-00007 (D.D.C. Jan. 12, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cadbury Ltd.*, Rel. No. 34-79753, File No. 3-17759 (Jan. 6, 2017).

conviction, and *United States v. Mahmoud Thiam* and *United States v. Heon-Cheol Chi*, which involved convictions related to money laundering.⁸ Indeed, in a November 9, 2017 speech, then-Acting Assistant Attorney General Kenneth A. Blanco highlighted that the DOJ has “announced convictions or guilty pleas by 17 individuals in FCPA-related cases, which is more than in any previous year and there is more to come.”⁹ Likewise, the SEC has continued to emphasize the importance of individual accountability, with Co-Director of the SEC’s Division of Enforcement Steven Peikin explaining recently that “[t]he Division of Enforcement considers individual liability in every case it investigates; it is a core principle of our enforcement program . . . this approach applies with equal force in FCPA cases.”¹⁰

- **2017 also continued to see increasing cooperation among international enforcement agencies.** This is due to strengthened anti-corruption laws and enforcement efforts outside the United States. For example, certain countries in Latin America, which have historically been slow to adopt aggressive anti-corruption measures, have recently signaled a willingness to work with the United States and other foreign counterparts. This increased global cooperation was emphasized by the SEC’s Peikin, who said in a November 2017 speech: “[I]n an increasingly international enforcement environment, the U.S. authorities cannot – and should not – go it alone in fighting corruption,” and that he has “observed that the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory, particularly in matters involving corruption,” with the SEC having publicly acknowledged assistance from 19 different jurisdictions in FCPA matters in 2017.¹¹ In addition, in several of this year’s larger joint resolutions with foreign prosecutors (*Rolls-Royce*,¹² *Telia Company AB* (“*Telia*”),¹³ *SBM Offshore N.V.* (“*SBM*”),¹⁴ and *Keppel Offshore & Marine Ltd.* (“*Keppel*”)¹⁵), the DOJ credited penalties paid to foreign authorities in the calculation of the company’s U.S. fine. This suggests an

⁸ *United States v. Seng*, No. 1:15-CR-00706 (S.D.N.Y. July 27, 2017); *United States v. Chi*, No. 2:16-cr-00824 (C.D. Cal. July 17, 2017); *United States v. Thiam*, No. 1:17-CR-00047 (S.D.N.Y. Aug. 28, 2017). These cases are discussed in more detail in Section III.C below.

⁹ Kenneth A. Blanco, Acting Assistant Attorney General, DOJ, Remarks at Foreign Corrupt Practices Act/Organization for Economic Cooperation and Development Anniversary Conference at the NYU School of Law (Nov. 9, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-delivers-remarks-foreign-corrupt>.

¹⁰ Steven R. Peikin, Co-Director, Enforcement Division, SEC, Reflections on the Past, Present, and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017), <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

¹¹ Steven R. Peikin, Co-Director, Enforcement Division, SEC, Reflections on the Past, Present, and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017), <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

¹² Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-247 (S.D. Ohio Dec. 20, 2016).

¹³ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581 (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195 (Sept. 21, 2017).

¹⁴ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686 (S.D. Tex. Nov. 30, 2017).

¹⁵ Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (E.D.N.Y. Dec. 22, 2017).

increasing trend in not just global cooperation, but also in viewing settlements as global in nature.

- **This past year also saw a number of large FCPA resolutions.** The global resolution relating to Telia in September 2017 was one of the largest FCPA resolutions in history with U.S. penalties alone likely to range between \$482.5 million to \$691 million.¹⁶ The DOJ has signaled that more settlements of this scale are likely to come. At a conference in October 2017, Trevor McFadden, then-Acting Principal Deputy Assistant Attorney General in the DOJ's Criminal Division, acknowledged a lull in FCPA enforcement actions in early 2017 but indicated that Telia signals the start of a potential increase in activity.¹⁷ Though McFadden has since departed the DOJ, there has been no indication from current DOJ leadership that this enforcement strategy has changed. In fact, in a November 2017 speech, Deputy Attorney General Rod Rosenstein stated, "The FCPA is the law of the land. We will enforce it against both foreign and domestic companies that avail themselves of the privileges of the American marketplace."¹⁸
- **In 2017, the DOJ continued to exhibit a show of force related to criminal internal controls, a trend which started in 2016.** In the past, the DOJ rarely imposed this charge, which was difficult to obtain given the high burden of proof for criminal cases; however, the last two years marked a significant rise in criminal internal-controls cases.

II. RECENT POLICY CHANGES

A. DOJ FCPA Corporate Enforcement Policy

In November 2017, "[d]ue to the unique issues presented in FCPA matters," Deputy Attorney General Rosenstein announced a new FCPA Corporate Enforcement Policy published in a revision to the United States Attorneys' Manual ("USAM"). The new policy effectively makes permanent the FCPA Pilot Program originally announced by the DOJ Fraud Section in April 2016 and increases the incentives for corporate self-disclosure by adding a "presumption" that the DOJ will issue declinations when a

¹⁶ The ultimate amount to be paid to the United States assumes the \$548.6 million DOJ penalty will be offset by a \$274 million payment to Dutch authorities and depends on the \$457 million SEC penalty being offset by up to \$208.5 million for potential payments to Dutch or Swedish authorities. Overall, Telia agreed to pay a total of \$965 million in criminal and civil penalties as part of this global resolution. U.S. Securities and Exchange Commission Press Release No. 2017-171: Telecommunications Company Paying \$965 Million for FCPA Violations (Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195 (Sept. 21, 2017).

¹⁷ Waithera Junghae, *Expect more Telia-style settlements, says senior DOJ official*, GLOBAL INVESTIGATIONS REVIEW (Oct. 10, 2017), http://globalinvestigationsreview.com/article/1148713/expect-more-telia-style-settlements-says-senior-doj-official?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8766866_JA_C%20Headlines%2010%2F10%2F2017&dm_i=1KSF,57WK2,KVU2W2,K34FY,1.

¹⁸ Rod J. Rosenstein, Deputy Attorney General, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

company's self-disclosure, cooperation, remediation, and disgorgement meet certain standards.

The new policy states that, except where there are aggravating circumstances (such as executive management involvement in misconduct, significant profits gained from misconduct, pervasive misconduct within an organization, and criminal recidivism), the DOJ will presumptively resolve all FCPA voluntary self-disclosures through a declination where a company meets all standards of disclosure, full cooperation, and timely and appropriate remediation, as well as paying all disgorgement, forfeiture, and/or restitution.¹⁹ Consistent with the Pilot Program, the policy also provides that, even in the presence of aggravating factors, a company will receive a 50% reduction off the low end of the U.S. Sentencing Guidelines fine ranges where it has otherwise met the requirements for disclosure, cooperation, and remediation, or up to a 25% reduction where it does not self-disclose, but otherwise engages in full cooperation and remediation.²⁰ Interestingly, the new policy provides for "a 50%" reduction, where the original Pilot Program provided for "up to" a 50% reduction in cases with a voluntary disclosure, where the new policy retains the "up to" 25% language for reductions where no voluntary disclosure occurred. It is unclear whether this distinction was intentional, but the language suggests, in addition to the new presumption, substantial and more concrete benefits for voluntary disclosures.

The new policy defines the standards for "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation" that a company must meet in order to receive a declination or reduction in fine.²¹ With respect to the cooperation requirement, the policy states for the first time that requests by the DOJ for a company to defer internal investigation (such as by delaying company interviews) (so called "de-confliction" requests), must be narrowly tailored to a legitimate investigative purpose and will be made for only a limited period of time.²² Finally, the policy also provides clarity regarding a question that had been raised under the Pilot Program, stating that a "declination" pursuant to the policy is only "a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution."²³ If the DOJ fails to prosecute based on other factors, such as jurisdictional or proof challenges, the policy appropriately makes clear that this decision would not count as a declination, which by definition implies that the DOJ would otherwise have been able to bring a charge but for its discretionary decision not to proceed.

While the new presumption is clearly intended to further encourage companies to make voluntary disclosures, the "aggravating circumstances" factor still leaves substantial uncertainty for companies weighing whether to make a disclosure. Like the original Pilot Program, the new policy also says that the DOJ "generally will not require

¹⁹ FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS' MANUAL § 9-47.120(1).

²⁰ FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS' MANUAL § 9-47.120(1)-(2).

²¹ FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS' MANUAL § 9-47.120(3).

²² FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS' MANUAL § 9-47.120(4).

²³ FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS' MANUAL § 9-47.120(4).

appointment of a monitor” in cases where a company that has voluntarily disclosed has implemented an effective compliance program by the time of the resolution.²⁴ This also is a substantial incentive to take advantage of the new policy, although arguably a company that has an effective compliance program at the time of the resolution ought not receive a monitor regardless of whether the company voluntarily disclosed under the policy.

Significantly, the DOJ has indicated that it will follow the requirements of the new policy even for cases that began prior to the implementation of the policy (as it did for cases resolved in accordance with the requirements of the Pilot Program). Already, it appears that the DOJ followed the new policy in reducing the fine in the SBM settlement, which was announced the day after the release of the new policy, but investigated prior to it, and in which SBM received a 25% reduction in its fine based on its cooperation and remediation.²⁵

B. Evaluating Corporate Compliance Programs in FCPA Investigations

This year also saw new guidance from the DOJ regarding corporate compliance programs. In February 2017, the DOJ posted on its website (strangely with no formal seal and no press release or other public announcement) a guidance document entitled Evaluation of Corporate Compliance Programs (“Compliance Program Guidance”).²⁶ The Compliance Program Guidance includes a list of topics and “common questions” the Fraud Section has found relevant in evaluating corporate compliance programs.²⁷ The guidance consists of dozens of questions that fall within eleven broad topic areas, including Senior and Middle Management; Autonomy & Resources; Risk Assessment; Third-Party Management; and Operational Integration, among others.²⁸

Hardly a watershed document, many of the topics and questions in the Compliance Program Guidance build on prior DOJ guidance, including the 2012 FCPA Resource Guide,²⁹ and echo the USAM and U.S. Sentencing Guidelines. That said, the guidance does demonstrate a more nuanced focus on certain topics. For example, the guidance shows an increased focus on board members and senior management. Instead of the often-noted “*tone at the top*” compliance factor, the guidance denotes a focus on “[c]onduct at the top,”³⁰ asking “how does the company monitor its senior leadership’s behavior?” and “how has senior leadership modelled proper behavior to subordinates?” This shift was reiterated in March 2017 when DOJ’s FCPA Unit Chief Dan Kahn noted

²⁴ FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS’ MANUAL § 9-47.120(1).

²⁵ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686 (S.D. Tex. Nov. 30, 2017).

²⁶ U.S. Department of Justice, Evaluation of Corporate Compliance Programs (“Compliance Program Guidance”), at 1 (Feb. 8, 2017), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

²⁷ See Compliance Program Guidance.

²⁸ See Compliance Program Guidance at 1-7 (the eleven topic areas are: Analysis and Remediation of Underlying Misconduct; Senior and Middle Management; Autonomy and Resources; Policies and Procedures; Risk Assessment; Training and Communications; Confidential Reporting and Investigation; Incentives and Disciplinary Measures; Continuous Improvement, Periodic Testing and Review; Third-Party Management; and Mergers and Acquisitions).

²⁹ A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012).

³⁰ See Compliance Program Guidance at 2 (emphasis added).

that authorities are looking for more than “just talk” about compliance and noted “[w]e aren’t interested in company-wide communications alone.”³¹

The guidance also demonstrates the DOJ’s increased focus on compliance independence, auditing/monitoring, and compliance metrics.³² For example, the guidance highlights the need for compliance personnel to have unmitigated access to the company’s Board of Directors to ensure adequate independence.³³ The guidance also underscores the importance of internal auditing, control testing, providing guidance and training to gatekeepers, and monitoring of third-party arrangements, reflecting a greater emphasis on auditing and monitoring functions. Additionally, the guidance stresses the importance of compliance metrics, reinforcing the notion that the DOJ now places greater emphasis on “evidence and data.”³⁴

The Compliance Program Guidance will prove to be a useful checklist to companies seeking to design, enhance, and implement strong compliance programs (as well as for companies making compliance presentations to the DOJ in the context of settlement negotiations). At the same time, the guidance serves as a reminder that there is no one-size-fits-all compliance model. Indeed, the impact of the checklist has thus far seemed significantly less than that of the 2012 FCPA Resource Guide.

On the heels of the release of its Compliance Program Guidance, the DOJ saw the departure of its first compliance consultant and compliance expert, Hui Chen, in June 2017. Chen was a principal drafter of the Compliance Program Guidance, which therefore echoes many of the compliance principles she emphasized during her tenure.³⁵ Chen began drafting the Compliance Program Guidance over a year before it was released, and she drew from her experiences with prosecutors and companies under investigation in developing the guidance.³⁶

³¹ Dan Kahn, Criminal Division FCPA Chief, DOJ, Remarks at 34th Trace International FCPA Conference (Mar. 29, 2017), <http://globalinvestigationsreview.com/article/1138743/tone-at-the-top-is-not-enough-say-fcpa-unit-chiefs>.

³² See generally Compliance Program Guidance.

³³ See Compliance Program Guidance at 3.

³⁴ Thomas R. Fox, *Hui Chen-Propelling a New Level of Thinking on Compliance*, FCPA COMPLIANCE & ETHICS: BUSINESS SOLUTIONS TO COMPLIANCE AND LEGAL CHALLENGES (July 6, 2017), <http://fcpacompliancereport.com/2017/07/hui-chen-propelling-a-new-level-of-thinking-on-compliance/>.

³⁵ See Thomas R. Fox, *Hui Chen-Propelling a New Level of Thinking on Compliance*, FCPA COMPLIANCE & ETHICS: BUSINESS SOLUTIONS TO COMPLIANCE AND LEGAL CHALLENGES (July 6, 2017), <http://fcpacompliancereport.com/2017/07/hui-chen-propelling-a-new-level-of-thinking-on-compliance/>; see also Matt Kelly, *At Last! Hui Chen Talks Compliance*, RADICAL COMPLIANCE (June 30, 2017), <http://www.radicalcompliance.com/2017/06/30/hui-chen-talks-compliance/>.

³⁶ See Thomas R. Fox, *Hui Chen-Propelling a New Level of Thinking on Compliance*, FCPA COMPLIANCE & ETHICS: BUSINESS SOLUTIONS TO COMPLIANCE AND LEGAL CHALLENGES (July 6, 2017), <http://fcpacompliancereport.com/2017/07/hui-chen-propelling-a-new-level-of-thinking-on-compliance/>.

A few months after the guidance was released, Chen departed from the DOJ Criminal Division's Fraud Section, citing "cognitive dissonance" with the Trump administration.³⁷ The DOJ advertised for a replacement. The application deadline was in June and there has been speculation that the position is in the process of being filled.³⁸ The DOJ has not made any announcements regarding the position. It remains to be seen how a new compliance counsel may further shape the DOJ's assessment of corporate compliance programs going forward.

C. Global Magnitsky Sanctions

At the end of the year, on December 20, 2017, President Trump issued a new Executive Order ("EO") implementing the 2016 Global Magnitsky Human Rights Accountability Act ("the Magnitsky Act") which authorized the president to impose sanctions against non-U.S. individuals who have engaged in corruption.³⁹ Under the EO and the Magnitsky Act, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") is equipped with the broad power to block the property and property interests of any current and former non-U.S. government officials, any individual acting on their behalf, and leaders or officials of entities who engaged or attempted to engage in, among other things, bribery and corruption related to government contracts or the extraction of natural resources in any jurisdiction around the world.⁴⁰ Notably, President Trump's EO appears to contemplate that OFAC may impose sanctions against foreign government officials for not just significant corruption (as contemplated by the Magnitsky Act), but varying levels of corruption.⁴¹ The end-of-the-year EO sanctioned 15 individuals and 37 entities for human rights abuses and corruption in foreign jurisdictions.

III. KEY INVESTIGATION-RELATED DEVELOPMENTS

A. Declinations

In 2017, the DOJ issued two declinations under the FCPA Pilot Program. Both the DOJ and SEC also continued to close cases where no charges could be brought.

³⁷ Rachel Martin, *Former DOJ Lawyer On Prosecuting Corporate Crime Under Trump*, NPR, July 6, 2017. Chen was retained in 2015 as a full-time compliance counsel expert, and her duties included developing benchmarks for evaluating corporate compliance and remediation measures. She also helped prosecutors and monitors evaluate whether the implementation of compliance programs was effective. Joe Mont, *Why Hui Chen left the Justice Department*, COMPLIANCE WEEK (July 5, 2017), https://www.complianceweek.com/blogs/the-filing-cabinet/why-hui-chen-left-the-justice-department#.WgE_q7pFw2x.

³⁸ U.S. Department of Justice, Attorney Advisor (Compliance Counsel) Position Announcement (June 2017), <https://www.justice.gov/legal-careers/job/attorney-advisor-compliance-counsel>.

³⁹ Pub. L. No. 114-328, 130 Stat. 2533 et seq.

⁴⁰ WilmerHale, *Global Magnitsky Sanctions Target Human Rights Abusers and Government Corruption Around the World* (Dec. 22, 2017), <https://wilmerhalecommunications.com/26/2119/december-2017/president-trump-signs-new-executive-order-expanding-treasury-department-s-role-in-combating-global-corruption.asp?sid=a2b3559f-b8d3-4405-938d-f9cc6e07749c>.

⁴¹ WilmerHale, *Global Magnitsky Sanctions Target Human Rights Abusers and Government Corruption Around the World* (Dec. 22, 2017), <https://wilmerhalecommunications.com/26/2119/december-2017/president-trump-signs-new-executive-order-expanding-treasury-department-s-role-in-combating-global-corruption.asp?sid=a2b3559f-b8d3-4405-938d-f9cc6e07749c>.

1. FCPA Pilot Program Evolution and 2017 Pilot Program Declinations

As noted above, the DOJ's new FCPA Corporate Enforcement Policy announced in November 2017 effectively makes permanent, with some modifications, the FCPA Pilot Program announced in April 2016.⁴² Prior to Deputy Attorney General Rosenstein's announcement, in March 2017, then-Acting Assistant Attorney General Blanco announced the extension of the Pilot Program, which was set to expire on April 5, 2017.⁴³ In announcing the extension, Blanco explained that the Pilot Program provides "prosecutors, companies and the public clear metrics for what constitutes voluntary self-disclosure, full cooperation and full remediation," and outlines the benefits that can be attained by companies from such actions.⁴⁴ The Pilot Program's first year was a success in the prosecutors' eyes. For example, on May 12, 2017, then-Fraud Section Chief Andrew Weissmann was reported to have said that during the Pilot Program's first year, 22 companies self-reported potential foreign bribery violations, which was much higher than the 13 self-reports that had been made the year before the Pilot Program began.⁴⁵ In a separate speech, McFadden stated that companies continue to voluntarily disclose under the Pilot Program.⁴⁶

In 2017, the DOJ issued two declinations under the Pilot Program: one for Linde North America Inc. and one for CDM Smith, Inc.⁴⁷ The DOJ issued formal declination letters in these two cases, similar to those issued in 2016, and these letters included facts about corrupt conduct, actions taken by the companies, and reasons the DOJ declined

⁴² As previously reported last year, on April 5, 2016, the Fraud Section issued its FCPA Enforcement Plan and Guidance laying out steps to intensify FCPA enforcement. Among other things, the memo announced that the DOJ was introducing a one-year Pilot Program that rewarded companies for voluntary disclosure and cooperation. Under the Pilot Program, an organization that voluntarily disclosed, fully cooperated, and timely and appropriately remediated could be considered for a declination of prosecution if the company additionally disgorged all ill-gotten gains. U.S. Department of Justice Criminal Division, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), <https://www.justice.gov/criminal-fraud/file/838416/download>; WilmerHale, *DOJ Launches FCPA Pilot Program to Encourage Corporate Voluntary Disclosure and Cooperation* (Apr. 8, 2016), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179881469>.

⁴³ Kenneth A. Blanco, Acting Assistant Attorney General, DOJ, Remarks at American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national>; Jonathan Sack, *DOJ Announces It Will Extend FCPA "Pilot Program,"* FORBES (Mar. 13, 2017), <https://www.forbes.com/sites/insider/2017/03/13/doj-announces-it-will-extend-fcpa-pilot-program/#5f621a001d3e>.

⁴⁴ Blanco's sentiments were echoed by the then-Acting Principal Deputy Assistant Attorney General McFadden during a speech at the Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit on April 18, 2017. Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Remarks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>.

⁴⁵ Dylan Tokar and Adam Dobrik, *22 voluntary disclosures in first year of FCPA pilot program, says the DOJ*, GLOBAL INVESTIGATIONS REVIEW (May 16, 2017), <http://globalinvestigationsreview.com/article/jac/1141767/22-voluntary-disclosures-in-first-year-of-fcpa-pilot-programme-says-doj>.

⁴⁶ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Remarks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>.

⁴⁷ U.S. Department of Justice, Declinations (updated June 29, 2017), <https://www.justice.gov/criminal-fraud/pilot-program/declinations>.

to prosecute. In addition, the DOJ required these two companies to disgorge ill-gotten gains as part of their declinations, a continuing practice that started in 2016 in cases where there was no corresponding SEC enforcement action.⁴⁸

On June 16, 2017, the DOJ announced its first Pilot Program declination of 2017. The DOJ announced that, along with the U.S. Attorney's Office for the District of New Jersey ("DNJ"), it was closing the investigation of Linde North America Inc. and Linde Gas North America LLC (together, "Linde") without bringing an enforcement action against the company.⁴⁹ According to the DOJ, from approximately November 2006 to December 2009, Spectra Gases, Inc. (a New Jersey company that Linde acquired in 2006) made improper payments to officials from Republic of Georgia's state-owned and controlled National High Technology Center ("NHTC"). In January 2010, Linde dissolved Spectra Gases, still unaware of the misconduct. Linde later discovered Spectra Gases' corrupt arrangements and withheld \$10 million in payments due to Spectra executives and other payments owed to companies associated with the NHTC officials. Pursuant to the agreement between Linde and the DOJ and DNJ, Linde agreed to disgorge over \$7.8 million in ill-gotten gains and forfeit over \$3.4 million representing the corrupt proceeds owed to companies associated with the NHTC officials. The DOJ noted that it declined prosecution based on many factors, including Linde's timely, voluntary self-disclosure, its thorough and comprehensive investigation, full cooperation, disgorgement, enhancements to its compliance program and internal accounting controls, and full remediation that included terminating and disciplining executives and employees involved in the misconduct.

A week later, on June 21, 2017, the DOJ announced its second declination of 2017, closing its investigation of CDM Smith, Inc. ("CDM Smith") and declining to bring an enforcement action against the company.⁵⁰ According to the DOJ, between 2011 and 2015, CDM Smith—through its employees, agents, and its wholly owned subsidiary in India—paid approximately \$1.18 million in bribes to government officials in India, which resulted in net profits totaling approximately \$4 million. The payments were made to India's state-owned highway management agency to receive highway construction supervision and design contracts and to officials in the Indian State of Goa for a water project contract. Similar to Linde's declination, the DOJ noted CDM Smith's timely and voluntary disclosure, thorough and comprehensive investigation, full cooperation, disgorgement, enhancement to its compliance and internal accounting controls, and full remediation that included termination of all executives and employees who participated in the misconduct. CDM Smith agreed to disgorge ill-gotten gains of over \$4 million in four monthly installments.

⁴⁸ See WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2016 Developments and Predictions for 2017* (Feb. 7, 2017), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2017-02-07-fcpa-year-in-review.pdf.

⁴⁹ Declination Letter from U.S. Department of Justice, *In re Linde N. Am. Inc.* (June 16, 2017), <https://www.justice.gov/criminal-fraud/file/974516/download>.

⁵⁰ Declination Letter from U.S. Department of Justice, *In re CDM Smith, Inc.* (June 21, 2017), <https://www.justice.gov/criminal-fraud/page/file/976976/download>.

While it is unclear why the number of declinations was down from 2016, the DOJ will undoubtedly continue to use declinations in the future given the recent announcement of the new FCPA Corporate Enforcement Policy.

2. Cases Closed by the DOJ and SEC

On April 20, 2017, then-Acting Principal Deputy Assistant Attorney General McFadden noted that while there had only been five Pilot Program declinations as of that time, the “number [did] not include the many cases [the DOJ] routinely decline[s] for various reasons including insufficient evidence of corporate criminal misconduct.”⁵¹ In 2017, the DOJ and/or SEC publicly announced the closure of investigations of a total of fifteen companies. In some cases, the companies being investigated had parallel investigations closed in previous years; and in other cases, the parallel investigations appear to remain open, but no enforcement decision has yet been made. One somewhat new and notable development in 2017 was that the DOJ and SEC appeared to make a more concerted effort to send a letter officially informing the subject company of the closing of the investigation. In the past, it was not uncommon for U.S. authorities to stop pursuing the case without any communication of status, with the subject company left to wonder whether the investigation was closed.

As to the DOJ, in 2017, information became public regarding seven investigations that were closed by the DOJ.⁵² The investigations spanned three continents, involving alleged corrupt activity in South America, Asia, and Africa. According to public disclosures, all seven of the companies that received notices from the DOJ this year terminating investigations had or continue to have parallel inquiries pending with the SEC. The DOJ did not issue statements regarding its decisions to close the inquiries into any of the seven companies; instead, the companies reported the closures in press releases or their public SEC filings.⁵³ From the information made public, it appears that a company’s voluntary disclosure, cooperation during the investigation, and remediation efforts remain important factors the DOJ considers in deciding whether to bring charges.

⁵¹ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Remarks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>. One interesting point about this comment from McFadden is that it would not be a

“declination” if there was no corporate criminal misconduct. The DOJ simply could not bring a case.

⁵² From January through October 2017, Orthofix International N.V. (“Orthofix”), Cobalt International Energy, Inc. (“Cobalt”), Harris Corporation (“Harris”), Net 1 UEPS Technologies, Inc. (“Net 1”), Halliburton Company (“Halliburton”), Vantage Drilling International (“Vantage”), and Core Laboratories NV (“Core Lab”) announced that the DOJ closed its investigations. Orthofix Press Release: Orthofix Announces Resolution of SEC Investigations (Jan. 18, 2017),

<http://ir.orthofix.com/releasedetail.cfm?releaseid=1008341>; Cobalt International Energy Press Release: Cobalt Announces Closing of DOJ Investigation (Feb. 9, 2017); Harris Corporation, U.S. Securities and Exchange Commission Form 10-Q, May 3, 2017; Net 1 UEPS Technologies, Inc. Press Release: Net1 Announces Closure of FCPA Investigation by U.S. Department of Justice (July 27, 2017); Halliburton Company Press Release: Halliburton Resolves Investigations Regarding Angola and Iraq Operations (July 27, 2017), http://www.halliburton.com/public/news/pubsdata/press_release/2017/halliburton-resolves-investigations-regarding-angola-iraq-operations.html; MarketWired, *Vantage Drilling International Announces Closing of FCPA Investigation by the DOJ*, GLOBE NEWSWIRE, Aug. 16, 2017; Core Laboratories NV, U.S. Securities and Exchange Commission Form 10-Q, Oct. 25, 2017.

⁵³ The DOJ presumably closed other investigations that were not publicly announced by the relevant companies.

In addition to the seven company investigations mentioned above, the DOJ, along with the SEC, closed six more investigations into possible bribery conduct in foreign countries.⁵⁴ Finally, in 2017, there were two investigations that were closed by the SEC only. In both cases, the companies either made voluntary disclosures and/or cooperated with the SEC's investigation.⁵⁵

B. Notable Features of Corporate Resolutions

1. Corporate FCPA Repeat Offenders

As in years past, enforcement actions were taken against repeat offenders, whose recidivism resulted in increased penalties. This year, three corporate resolutions involved repeat offenders. Moving forward, as previously noted, under the new DOJ FCPA Corporate Enforcement Policy, criminal recidivism will be considered an "aggravating circumstance," which may weigh against a declination even if a company voluntarily discloses the conduct.

a. *Zimmer Biomet*

Zimmer Biomet Holdings Inc. ("Zimmer Biomet"), an Indiana-based medical device manufacturer, agreed to pay over \$30 million to settle parallel SEC and DOJ proceedings relating to the company's repeat violations of the FCPA.

Prior to its 2015 acquisition by Zimmer, Biomet entered into a deferred prosecution agreement ("DPA") with the DOJ and agreed to a civil judgment filed by the SEC in 2012, paying over \$22 million in civil and criminal penalties to resolve anti-bribery, books and records, and internal controls charges relating to improper payments made to public hospitals in Argentina, Brazil, and China.⁵⁶ With respect to Biomet's conduct in Brazil, the 2012 SEC complaint alleged that Biomet's U.S. subsidiary engaged a Brazilian distributor whose company paid bribes to doctors employed by state-owned hospitals in the form of "commissions" of 10-20% of the value of the medical devices purchased by the doctors.⁵⁷ As part of its settlement, Biomet agreed to terminate its

⁵⁴ From March through August 2017, Varian Medical Systems ("Varian"), Innodata, Inc. ("Innodata"), Newmont Mining Corp. ("Newmont"), Platform Specialty Products Corporation ("PSP"), International Business Machines Corporation ("IBM"), and MTS Systems Corporation ("MTS") announced that the DOJ and SEC closed their investigations. Varian Medical Systems, Inc., U.S. Securities and Exchange Commission Form 10-Q, Feb. 7, 2017; Innodata, Inc., U.S. Securities and Exchange Commission Form 10-K Mar. 15, 2017; Newmont Mining Corporation, U.S. Securities and Exchange Commission Form 10-Q, Apr. 24, 2017; Platform Specialty Products Corporation, U.S. Securities and Exchange Commission Form 10-Q May 9, 2017; International Business Machines Corporation, U.S. Securities and Exchange Commission Form 10-Q, July 25, 2017; MTS Systems Corp., U.S. Securities and Exchange Commission Form 10-Q, Aug. 7, 2017.

⁵⁵ In February 2017, Merck & Company ("Merck") and Crawford & Company ("Crawford") announced that the SEC had concluded its investigation. Merck & Co., U.S. Securities and Exchange Commission Form 10-K, Feb. 28, 2017; Crawford & Co., U.S. Securities and Exchange Commission Form 10-K, Feb. 27, 2017.

⁵⁶ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Biomet, Inc.*, Rel. No. 34-79780, File No. 3-17771, ¶ 11 (Jan. 12, 2017).

⁵⁷ Complaint, *SEC v. Biomet, Inc.*, No. 12-CV-00454, ¶ 39 (D.D.C. Mar. 26, 2012).

relationship with the Brazilian distributor and retain an independent compliance monitor for three years.⁵⁸

In 2013, however, Biomet discovered further anti-bribery violations relating to conduct in Brazil and Mexico, including alleged improprieties that predated the entry of the 2012 DPA, and notified the government as required by its 2012 consent agreement with the SEC and DPA with the DOJ.⁵⁹ In light of the continued bribery in Brazil and Mexico, Biomet's monitorship term was extended for one year; at the end of the extended term, the monitor was unable to certify that Zimmer Biomet's compliance program satisfied the requirements of the 2012 DPA and the Department notified the company that it was deemed to be in breach of the agreement.⁶⁰

With respect to Brazil, the DOJ and SEC found that Biomet had "knowingly and willfully" continued to interact and improperly record transactions with the prohibited Brazilian distributor "known to have paid bribes to government officials on Biomet's behalf."⁶¹ Though Biomet formally terminated its relationship with the Brazilian distributor "to ensure that bribers were not paid to sell its products," "Biomet continued to use [the Brazilian distributor]" from 2009 to 2013, and "knowingly and willfully failed to implement additional controls to ensure that [the Brazilian distributor and its affiliates] would not pay bribes."⁶² The DOJ found, for example, that "Biomet executives involved in developing, approving, and implementing Biomet's internal accounting controls and anti-corruption program . . . knew that Biomet was not implementing the internal accounting controls, policies, and procedures" designed by the company "to prevent or detect bribery of foreign officials."⁶³

The government further found that Biomet failed to implement internal controls that would have prevented the new bribery scheme in Mexico, whereby third-party customs brokers made improper payments to Mexican customs officials, from about 2008 to 2013, in order to smuggle contraband into the country.⁶⁴ Specifically, the Department found that Biomet's Mexican subsidiary failed to establish adequate internal controls (e.g., failed to require appropriate due diligence, documentation, and contracts for

⁵⁸ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Biomet, Inc.*, Rel. No. 34-79780, File No. 3-17771, ¶¶ 11-12 (Jan. 12, 2017).

⁵⁹ Consent Agreement, *SEC v. Biomet, Inc.*, No. 12-CV-00454, ¶¶ 3-4 (D.D.C. Mar. 26, 2012); Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, ¶ 4 (D.D.C. Mar. 26, 2012) (deferring prosecution for Biomet, Inc.).

⁶⁰ U.S. Department of Justice Press Release No. 17-045: Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017).

⁶¹ U.S. Department of Justice Press Release No. 17-045: Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Biomet, Inc.*, Rel. No. 34-79780, File No. 3-17771, ¶¶ 14-19, 31-32 (Jan. 12, 2017); Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶¶ 19, 25 (D.D.C. Jan. 12, 2017).

⁶² Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶¶ 24-25 (D.D.C. Jan. 12, 2017).

⁶³ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶ 27 (D.D.C. Jan. 12, 2017).

⁶⁴ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Biomet, Inc.*, Rel. No. 34-79780, File No. 3-17771, ¶¶ 20-30, 33 (Jan. 12, 2017); Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶¶ 51-54 (D.D.C. Jan. 12, 2017).

payments to third parties) even though its executives and employees were aware of red flags suggesting bribes were being paid.⁶⁵ Indeed, the DOJ found that between 2010 and 2013, Biomet's Mexican subsidiary paid over \$980,000 to a customs broker's subagents, "knowing that at least part of this amount would be passed on to customs officials," and then "falsified corporate records to disguise the bribe payments."⁶⁶ One employee of Biomet's Mexican subsidiary admitted that he/she "knew" that the customs broker's subagents "were being paid large amounts of money to smuggle . . . mislabeled products into Mexico."⁶⁷

Consequently, the DOJ determined that "despite being aware of red flags and prior corruption-related misconduct at Biomet's subsidiaries in Mexico and Brazil,"⁶⁸ Biomet "breached its obligations under the 2012 DPA"⁶⁹ and failed to devise and maintain adequate internal controls.⁷⁰ In 2017, the DOJ filed a superseding information charging Biomet's successor, Zimmer Biomet, with one count of violating the FCPA's Internal Controls Provision by "knowingly and willfully fail[ing] to implement a system of [effective] internal accounting controls."⁷¹ The same day, the company entered into a three-year DPA with the DOJ, under which it agreed to pay a criminal penalty of approximately \$17.4 million and retain a compliance monitor for an additional three years.⁷² In calculating the monetary penalty, the DOJ added two points to Zimmer Biomet's culpability score for committing an offense less than five years after a "criminal adjudication based on similar misconduct."⁷³ The company did not receive voluntary disclosure credit because it was subject to ongoing self-reporting obligations under the 2012 DPA.⁷⁴ RDS Luxembourg Holding S.á.r.l. ("JERDS"), an indirect subsidiary of Zimmer Biomet, agreed to plead guilty to a one-count criminal information, also filed in the District of Columbia, charging it with causing Biomet to violate the books and records provisions of the FCPA through the actions of 3i Mexico, a wholly owned subsidiary of JERDS. In a parallel civil action, Zimmer Biomet also agreed to pay \$13 million to settle charges with the SEC.⁷⁵

⁶⁵ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶ 20 (D.D.C. Jan. 12, 2017).

⁶⁶ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶ 20 (D.D.C. Jan. 12, 2017).

⁶⁷ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶ 57 (D.D.C. Jan. 12, 2017).

⁶⁸ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶ 18 (D.D.C. Jan. 12, 2017).

⁶⁹ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, ¶ 4 (D.D.C. Jan. 12, 2017).

⁷⁰ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶ 71 (D.D.C. Jan. 12, 2017).

⁷¹ Superseding Information, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶ 80 (D.D.C. Jan. 12, 2017).

⁷² Order Instituting Cease-and-Desist Proceedings, *In the Matter of Biomet, Inc.*, Rel. No. 34-79780, File No. 3-17771, ¶ 42 (Jan. 12, 2017).

⁷³ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, ¶ 7 (D.D.C. Jan. 12, 2017).

⁷⁴ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, ¶ 4 (D.D.C. Jan. 12, 2017).

⁷⁵ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Biomet, Inc.*, Rel. No. 34-79780, File No. 3-17771 (Jan. 12, 2017).

Notably, while the SEC and DOJ credited Zimmer Biomet's cooperation and remedial actions, both agencies highlighted the fact that the company was a repeat offender when announcing the charges.⁷⁶ In the DOJ's press release, then-Assistant Attorney General Leslie R. Caldwell commented that Zimmer Biomet "had the opportunity to avoid criminal charges," that the company's "misconduct allowed the bribes to continue," and that Zimmer Biomet was now paying the price for "disregarding its obligations" under the 2012 DPA.⁷⁷ Caldwell further stated, "In appropriate circumstances the department will resolve serious criminal conduct through alternative means, but there will be consequences for those companies that refuse to take these agreements seriously." Similarly, Kara Brockmeyer, then-Chief of the SEC Enforcement Division's FCPA Unit, commented that "Biomet didn't entirely learn its lesson the first time around as it continued to use a prohibited agent in Brazil and engaged in a new bribery scheme in Mexico."⁷⁸ While both the SEC and DOJ noted the repeat violations, neither brought an enforcement action for breach of the prior judgment or DPA, and neither agency commented on this decision.

b. *Orthofix*

Less than a week after the Zimmer Biomet resolution, the SEC announced its settlement with another FCPA recidivist—Texas-based medical device manufacturer Orthofix International N.V. ("Orthofix"). Orthofix agreed to pay the SEC over \$6 million in penalties after admitting to making improper payments—through its Brazilian subsidiary—to doctors employed by government-owned hospitals in Brazil, and improperly recording such payments in the company's books and records.⁷⁹ Orthofix learned of and disclosed the conduct to U.S. authorities in 2013. Only one year prior, in 2012, Orthofix had settled similar charges with both the SEC and DOJ in connection with bribes paid to government officials through its Mexican subsidiary.⁸⁰ Under the 2012 consent agreement, Orthofix was required to issue periodic reports to the SEC regarding the implementation of its compliance program and to pay approximately \$5.2 million to settle violations of the books and records and internal controls provisions.⁸¹ In 2012, Orthofix also paid a \$2.2 million criminal fine pursuant to its DPA with the DOJ to settle alleged violations of the internal controls provisions.⁸²

⁷⁶ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Biomet, Inc.*, Rel. No. 34-79780, File No. 3-17771, ¶ 37 (Jan. 12, 2017); Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, ¶ 4 (D.D.C. Jan. 12, 2017).

⁷⁷ U.S. Department of Justice Press Release No. 17-045: Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017).

⁷⁸ U.S. Securities and Exchange Commission Press Release No. 2017-8: Biomet Charged with Repeating FCPA Violations (Jan. 12, 2017).

⁷⁹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, at 2 (Jan. 18, 2017).

⁸⁰ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, ¶¶ 1-2 (Jan. 18, 2017).

⁸¹ Consent Agreement, *SEC v. Orthofix Int'l N.V.*, No. 12-CV-419, ¶ 3 (E.D. Texas July 10, 2012).

⁸² Deferred Prosecution Agreement, *United States v. Orthofix Int'l N.V.*, No. 12-CR-00150, ¶ 6 (E.D. Texas July 10, 2012); see also Information, *United States v. Orthofix Int'l, N.V.*, No. 12-CR-00150, (E.D. Texas July 10, 2012).

According to the SEC's 2017 cease-and-desist order, despite the 2012 enforcement actions, Orthofix failed to implement and maintain sufficient internal controls that would have enabled the company to detect and prevent the improper payments.⁸³

Similar to Zimmer Biomet, the SEC did not credit Orthofix for disclosing the improper conduct due to the company's ongoing self-reporting obligations under its 2012 settlement with the SEC.⁸⁴ While the SEC appeared to credit Orthofix's cooperation and remedial acts, it noted that Orthofix "did not start fully implementing sufficient remedial steps until after the discovery of the Brazil conduct in late 2013" and that the "controls in place during the relevant period were minimal and clearly deficient."⁸⁵ In an interesting contrast to Zimmer Biomet, the DOJ did not appear to consider Orthofix's conduct in Brazil to be a breach of the company's prior DPA and declined to take further action against the company.⁸⁶

c. *Halliburton*

In its third FCPA action of the year against a repeat offender, the SEC settled charges with Halliburton Company ("Halliburton") in connection with payments made to an Angolan firm for the purpose of fulfilling local content requirements under Angolan law.⁸⁷ Halliburton attempted to satisfy the local regulations in order to secure new contracts with Sonangol, Angola's state-owned oil company.⁸⁸ The SEC found that Halliburton's former Vice President—who was also individually charged for causing the company's violations⁸⁹—had intentionally bypassed internal accounting controls in order to direct two procurement contracts to the local Angolan company, and thereby satisfy local content regulations. The owner of the local Angolan company was a friend and neighbor of the Sonangol official who would ultimately approve the award of seven contracts to Halliburton.⁹⁰ The SEC determined that Halliburton's conduct was improper because Halliburton's own controls required that the supplier qualification process begin with an assessment of the necessary materials or services, not with a particular supplier.⁹¹ Yet, Halliburton's former Vice President "started with a particular supplier

⁸³ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, ¶ 16 (Jan. 18, 2017).

⁸⁴ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, ¶ 17 (Jan. 18, 2017).

⁸⁵ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, ¶¶ 14, 18 (Jan. 18, 2017).

⁸⁶ *Orthofix Announces Resolution of SEC Investigations* (Jan. 18, 2017), <http://ir.orthofix.com/releasedetail.cfm?releaseid=1008341>.

⁸⁷ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶ 7 (July 27, 2017).

⁸⁸ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶ 8 (July 27, 2017).

⁸⁹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶ 27 (July 27, 2017).

⁹⁰ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶¶ 8, 22 (July 27, 2017).

⁹¹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶ 12 (July 27, 2017).

(the local Angolan company) and then backed into a list of services it could provide.”⁹² In addition to internal controls violations, the SEC also found that Halliburton violated the books and records provision for failing to record the true nature of certain transactions.⁹³ As part of the settlement, Halliburton agreed to pay the SEC approximately \$29.2 million in penalties: \$14 million in disgorgement (which is the amount Halliburton allegedly profited from its dealings with Sonangol), \$1.2 million in pre-judgment interest, and a \$14 million civil penalty.⁹⁴ Halliburton also agreed to retain an independent compliance consultant for a period of eighteen months.⁹⁵

Prior to this, in 2009, Halliburton entered into a settlement with the SEC in connection with a long-running bribery scheme involving improper payments made by former Halliburton subsidiary Kellogg Brown & Root LLC (“KBR”) to Nigerian officials in order to win contracts for the construction of liquefied natural gas facilities on Bonny Island, Nigeria.⁹⁶ The 2009 SEC enforcement action against Halliburton, and the related SEC and DOJ actions against KBR, resulted in total criminal and civil penalties of approximately \$579 million,⁹⁷ among the largest in FCPA history. Of this amount, Halliburton was held jointly and severally liable for the disgorgement of \$177 million to the SEC.⁹⁸ Unlike Zimmer Biomet and Orthofix, whose repeat offenses occurred shortly after their initial settlements, Halliburton’s 2017 settlement took place several years after its 2009 resolution, and Halliburton was not under a DPA reporting obligation at the time.

Similar to Orthofix, the DOJ declined to take action against Halliburton.⁹⁹

⁹² Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶ 12 (July 27, 2017).

⁹³ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶¶ 3-4 (July 27, 2017).

⁹⁴ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, at 9 (July 27, 2017).

⁹⁵ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, at 10 (July 27, 2017).

⁹⁶ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶ 5 (July 27, 2017); see also U.S. Department of Justice Press Release No. 09-112: Kellogg Brown and Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2017).

⁹⁷ U.S. Department of Justice Press Release No. 09-112: Kellogg Brown and Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2017).

⁹⁸ Consent Agreement, *SEC v. Halliburton Co.*, No. 4:09-cv-00399, ¶ 2 (Jan. 9, 2009).

⁹⁹ *Halliburton Resolves Investigations Regarding Angola and Iraq Operations* (July 27, 2017), http://www.halliburton.com/public/news/pubsdata/press_release/2017/halliburton-resolves-investigations-regarding-angola-iraq-operations.html.

d. *Analysis*

While it may be difficult to know exactly how the DOJ and SEC will treat companies entering second (or third) FCPA settlements,¹⁰⁰ there are a few lessons one can draw from the 2017 enforcement actions.

First, in all three cases, the government emphasized the company's *failure* to devise, implement, and/or maintain sufficient internal controls despite the prior charges. For example, in Orthofix, the SEC pointed out that, in light of the prior corruption and internal controls issues at the company's Mexican subsidiary, Orthofix "was aware of the deficiencies in its controls and the FCPA risks at its subsidiaries' operations."¹⁰¹ Yet, Orthofix still "failed to establish better controls and supervision over its subsidiaries."¹⁰² The SEC acknowledged Orthofix's remediation efforts, however it is unclear how much remediation credit the company received as the SEC also noted the company's delay in implementing "sufficient" remedial steps.¹⁰³

In the Halliburton settlement, the SEC also scrutinized the *effectiveness* of the company's maintenance and enforcement of existing controls. In fact, the SEC found that, following the prior resolution, Halliburton had "clearly defined internal accounting controls governing, among other things, the selection and approval of vendors in high risk countries, commercial agents and single source suppliers."¹⁰⁴ Yet, according to the SEC, Halliburton ultimately failed to "maintain these controls" as evidenced by Halliburton employees' decision to ignore company policies in pursuit of certain business opportunities.¹⁰⁵

Also notable, as previously discussed, is the fact that the DOJ took action against Zimmer Biomet but did not pursue actions against the other two recidivists. One possible explanation may be that Zimmer Biomet repeated the very same misconduct in the very same country that was at the center of the 2012 enforcement actions—specifically, the use of a prohibited Brazilian distributor, which the 2012 DPA explicitly required Zimmer Biomet to terminate, whereas the recidivism in Orthofix and Halliburton did not entail repeat of the same wrongful conduct. In Zimmer Biomet, senior employees—including a high-level Biomet attorney responsible for ensuring effective accounting controls—not only had knowledge of Biomet's continued work with the prohibited distributor, but also took active steps to conceal and continue the

¹⁰⁰ As discussed in more detail in Section II.A above, the new FCPA Corporate Enforcement Policy cites "criminal recidivism" as an example of "aggravating circumstances," which may weigh against a declination by the DOJ even under the circumstances when a company voluntarily discloses the conduct at issue.

¹⁰¹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, ¶ 16 (Jan. 18, 2017).

¹⁰² Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, ¶ 16 (Jan. 18, 2017).

¹⁰³ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, ¶ 18 (Jan. 18, 2017).

¹⁰⁴ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶ 25 (July 27, 2017).

¹⁰⁵ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 34-81222, File No. 3-18080, ¶ 25 (July 27, 2017).

relationship.¹⁰⁶ In addition, the DOJ noted that Zimmer Biomet “knowingly and willfully” failed to implement adequate internal controls, despite being aware of red flags suggesting that bribes were being paid.¹⁰⁷ Thus, knowledge and intent at the more senior levels of the company, combined with repeat conduct in breach of the 2012 DPA, may have triggered the DOJ’s decision to bring a second enforcement action against Zimmer Biomet.¹⁰⁸

In contrast, the subsequent misconduct in Orthofix is arguably distinct from the company’s earlier violations, and may therefore explain the DOJ’s decision not to charge Orthofix. First, the 2012 action against Orthofix involved conduct in Mexico, while the subsequent 2017 SEC action related to conduct in Brazil. Second, the subsequent action related to a different scheme involving a Brazilian subsidiary’s improper payments made through third-party representatives and distributors to government-owned hospitals, whereas the 2012 scheme involved a Mexican subsidiary’s direct knowledge of bribes paid to government officials.¹⁰⁹ Thus, the DOJ may have considered that Orthofix’s later offenses were not an exact repeat of prior wrongful conduct when deciding not to bring an action against the company. Another possibility is that the DOJ simply did not have sufficient evidence to bring a criminal enforcement action.

As a side note, as noted above, it seems that the DOJ had the ability to bring an action for breach of the prior DPA with respect to each of these recidivists if it so wished. Moreover, proceeding on the basis of a breach would have allowed the DOJ the lower burden of proof associated with a breach of contract action, as opposed to a criminal enforcement action. Instead, the DOJ chose to either bring a new action (in the case of Zimmer Biomet) or to take no action at all (in the cases of Orthofix and Halliburton).

Similarly, the SEC’s 2009 action against Halliburton related to misconduct that was different than that alleged in the SEC’s 2017 cease-and-desist order. While the 2009 action related to an over decade-long bribery scheme in Nigeria executed by Halliburton’s then-subsiary, KBR, the 2017 action related to payments made to a local Angolan company for the purpose of fulfilling local content regulations. While in both SEC actions Halliburton was charged with violations of the books and records and internal controls provisions, the two cases involved conduct very different in nature. Additionally, in the subsequent action, the SEC primarily focused on Halliburton’s failure to “maintain” internal controls as opposed to its “lack” of controls.

Moreover, as the Zimmer Biomet resolution demonstrates, a company’s repeat-offender status can increase the criminal penalty amount owed. Zimmer Biomet’s final culpability

¹⁰⁶ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶¶ 26-28 (D.D.C. Jan. 12, 2017).

¹⁰⁷ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶¶ 25, 71-77 (D.D.C. Jan. 12, 2017).

¹⁰⁸ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, ¶ 4 (D.D.C. Jan. 12, 2017).

¹⁰⁹ Deferred Prosecution Agreement, *United States v. Orthofix, Int’l N.V.*, No. 12-CR-00150 (E.D. Texas July 10, 2012).

score was raised by two points because of its recidivism, leaving it with a total score of 10. Zimmer Biomet also did not receive any credit for its self-reporting due to its ongoing obligations under the 2012 DPA. Per Chapter 8 of the 2014 U.S. Sentencing Guidelines, a culpability score of 10 would trigger a penalty multiplier between 2.00 and 4.00.¹¹⁰ The DOJ ultimately applied a multiplier of 3.00, and fined the company \$17,460,300, “a criminal penalty at the middle of the [U.S. Sentencing Guidelines] fine range.”¹¹¹ Had Zimmer Biomet not breached its prior DPA, nor violated the FCPA less than five years after its previous violations, the resulting fines could have been much lower. Without the addition of two points, Zimmer Biomet’s final culpability score would have been an 8, resulting in a multiplier range between 1.60 and 3.20.¹¹² Assuming the DOJ would apply the same methodology and use a multiplier at the middle of the fine range, the total criminal penalty would be \$13,968,240. Additionally, without its ongoing obligations under the 2012 DPA, Zimmer Biomet would have likely received 5 points in voluntary reporting credit, resulting in a total culpability score of 5 and a multiplier range between 1.00 and 2.00.¹¹³ Again, assuming the DOJ would apply the same methodology, Zimmer Biomet would have been liable for a criminal penalty of \$8,730,15, which is exactly half the amount Zimmer Biomet ultimately paid the DOJ.

Lastly, among the three recidivists, Zimmer Biomet paid the highest civil penalty (in proportion to the disgorgement) to the SEC, which suggests that the SEC will also impose a higher fine for companies it considers to be more culpable. In addition to disgorging approximately \$5.8 million, Zimmer Biomet paid the SEC a civil penalty of \$6.5 million. Similarly, Halliburton disgorged \$14 million and paid a civil penalty of \$14 million, and Orthofix disgorged \$2.9 million and paid a civil penalty of \$2.9 million—a 100% penalty for both companies. Thus, while the penalty amount imposed by the DOJ is more clearly linked to a corporation’s recidivism, the SEC may also impose higher civil penalties for repeat offenders.

2. Continued Rise in Global Enforcement and Cooperation

As has become common in recent years, the DOJ and SEC continued to emphasize global enforcement and cooperation in 2017. DOJ and SEC officials made various public statements regarding the importance of foreign partnerships, and U.S. regulators resolved three significant actions involving joint resolutions with foreign prosecutors this year: the Rolls-Royce,¹¹⁴ Telia,¹¹⁵ and SBM matters.¹¹⁶ These matters built on the blockbuster global enforcement actions of 2016—particularly the Vimpelcom and Odebrecht/Braskem actions—and signified the solidification of U.S. partnerships with

¹¹⁰ U.S. SENTENCING GUIDELINES MANUAL ch. 8C2.6 (2014).

¹¹¹ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, ¶ 4 (D.D.C. Jan. 12, 2017).

¹¹² U.S. SENTENCING GUIDELINES MANUAL ch. 8C2.6 (2014).

¹¹³ U.S. SENTENCING GUIDELINES MANUAL ch. 8C2.5(g)(1) (2014).

¹¹⁴ Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-247 (S.D. Ohio Dec. 20, 2016).

¹¹⁵ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581 (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195 (Sept. 21, 2017).

¹¹⁶ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686 (S.D. Tex. Nov. 30, 2017).

key foreign prosecuting offices in countries such as the United Kingdom, the Netherlands, and Brazil.

a. *Public Remarks by the SEC and DOJ*

Throughout the year, DOJ and SEC officials emphasized an increasing focus on corruption by foreign countries and stressed, in particular, the United States' growing partnership with Brazil.

In April 2017, then-Acting Principal Deputy Assistant Attorney General McFadden, speaking at a compliance summit in Washington, D.C., asserted that other countries were beginning to “strengthen[] their domestic laws” and “increasingly prioritize[] anti-corruption prosecutions.”¹¹⁷ He went on to say that the DOJ was “proud to be partnering with countries like the UK, Brazil, the Netherlands and others who are taking new strides to fight corporate corruption at home and around the world.”¹¹⁸

The next month, in May 2017, McFadden reiterated the DOJ's focus on working with international partners and its relationship with Brazil at a conference in Sao Paulo. McFadden began by calling Brazil “one of the U.S. Justice Department's closest allies in the fight against corruption” and went on to state more generally that “cooperation with our foreign partners has become a hallmark of our work,” which has seen “an increase in multi-jurisdictional prosecutions of criminal conduct. . . .”¹¹⁹ McFadden cited examples of international partnership in the area of FCPA enforcement, including the Rolls-Royce action and the DOJ's indictment of Mahmoud Thiam, Minister of Mines and Geology of the Republic of Guinea.¹²⁰ He also noted that increased international coordination enabled the prosecution of culpable individuals and companies that could not be charged under the FCPA but were subject to foreign statutes.¹²¹

In July 2017, then-Acting Assistant Attorney General Blanco again focused on the U.S.-Brazil relationship in statements at an Atlantic Council conference in Washington, D.C., describing Brazil as “a country that shares our commitment to rooting out corruption at

¹¹⁷ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>.

¹¹⁸ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>.

¹¹⁹ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

¹²⁰ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

¹²¹ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

all levels.”¹²² Blanco noted that the Criminal Division’s largest investigations “are increasingly transnational, often involving multiple foreign jurisdictions,” leading the DOJ to “rely[] more and more on the use of various mechanisms of international cooperation with our foreign partners”¹²³

In September 2017, SEC Chairman Jay Clayton also commented on the internationalization of FCPA and anti-corruption efforts. Notably, prior to being appointed chair of the SEC, Clayton had helped author an article criticizing enforcement of the FCPA for creating an uneven playing field for U.S. companies, who were subject to restrictions against overseas bribery that their foreign counterparts were not.¹²⁴ At a panel hosted by NYU Law School, Clayton suggested that his prior criticism no longer applied now that “our pursuit of international corruption is no longer a unilateral exercise, which changes the dynamic substantially.”¹²⁵

b. *Increased Interaction and Discourse Between U.S. and Foreign Prosecutors*

The DOJ and SEC also increased interaction and discourse with foreign counterparts in 2017. For example, for the first time in history, the DOJ announced that it would be seconding a U.S. prosecutor to a foreign prosecuting office, in this case, the U.K. Serious Fraud Office (“SFO”) and Financial Conduct Authority (“FCA”).¹²⁶ The U.S. prosecutor (currently expected to be assistant chief of the DOJ FCPA unit, Albert Stieglitz¹²⁷) will spend one year at each U.K. office in order to “collaborate on financial

¹²² Kenneth A. Blanco, Acting Assistant Attorney General, DOJ, Acting Assistant Attorney General Kenneth A. Blanco Speaks at the Atlantic Council Inter-American Dialogue Event on Lessons From Brazil: Crisis, Corruption and Global Cooperation (July 19, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-atlantic-council-inter-american-1>.

¹²³ Kenneth A. Blanco, Acting Assistant Attorney General, DOJ, Acting Assistant Attorney General Kenneth A. Blanco Speaks at the Atlantic Council Inter-American Dialogue Event on Lessons From Brazil: Crisis, Corruption and Global Cooperation (July 19, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-atlantic-council-inter-american-1>.

¹²⁴ Committee on International Business Transactions, New York City Bar, *The FCPA and its Impact on International Business Transactions: Should Anything Be Done to Minimize the Consequences of the U.S.’s Unique Position on Combating Offshore Corruption?* (December 2011).

¹²⁵ Dylan Tokar, *SEC Chair Says Individual Accountability Is a Priority*, GLOBAL INVESTIGATIONS REVIEW (Sept. 6, 2017), <http://globalinvestigationsreview.com/article/jac/1147142/sec-chair-says-individual-accountability-is-a-priority>.

¹²⁶ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute’s 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>; see also Leslie R. Caldwell, New Fraud Position in London Aimed to Help Fight Economic Crime and Foreign Corruption, DEP’T OF JUSTICE (Dec. 9, 2016), <https://www.justice.gov/archives/opa/blog/new-fraud-position-london-aimed-help-fight-economic-crime-and-foreign-corruption>.

¹²⁷ Dylan Tokar, *Criminal Division Deputy Hails Significant of UK Secondment as Foreign Bribery Cooperation Grows*, GLOBAL INVESTIGATIONS REVIEW (May 24, 2017), <http://globalinvestigationsreview.com/article/1142018/criminal-division-deputy-hails-significance-of-uk-secondment-as-foreign-bribery-cooperation-grows>.

fraud and foreign bribery cases with the relevant UK authorities.”¹²⁸ McFadden stated that such collaboration was increasingly important given the “cross-border nature of many financial frauds.”¹²⁹

Requests for assistance from foreign governments relating to anti-corruption prosecution have also increased. McFadden noted that, in the last five years, the DOJ has seen an 147% increase in the “number of annual requests from foreign counterparts seeking U.S.-based evidence to support foreign bribery and corruption investigations.”¹³⁰ For its part, the United States has increased requests to foreign counterparts by 75% over the same time period.¹³¹ Notable requests for assistance in 2017 included a request by Venezuela’s National Assembly that the SEC open an FCPA investigation into various financial groups relating to the purchase of Venezuelan bonds. China also continued to press for U.S. assistance in repatriating Chinese nationals residing in the United States as part of Chinese President Xi Jinping’s highly publicized, multi-year campaign against domestic corruption.¹³²

As discussed in more detail in Section VII below on international developments, local anti-corruption efforts across the globe also appeared to increase in 2017. China’s high-profile anti-corruption campaign, which began five years ago with Xi’s assumption of office, continued as Xi reinforced his commitment to rooting out domestic graft at a keynote speech to the Communist Party Congress in 2017.¹³³ In November 2017, Saudi Arabia also announced a crackdown on corruption, reportedly detaining and arresting more than 200 people, including members of the royal family, and freezing billions of dollars of assets.¹³⁴ It is unclear what, if any, long-term effects these local campaigns will have on corrupt behavior in China and Saudi Arabia, and many critics suggest that, although styled as anti-corruption drives, the campaigns are aimed

¹²⁸ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute’s 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

¹²⁹ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute’s 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

¹³⁰ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute’s 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

¹³¹ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute’s 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

¹³² *China, US Agree to Deepen Cooperation on Fugitives*, INQUIRER.NET (Nov. 9, 2017), <http://newsinfo.inquirer.net/944210/china-us-agree-to-deepen-cooperation-on-fugitives>.

¹³³ *China’s Xi Vows to Carry On Anti-Corruption Crusade*, AL JAZEERA, Oct. 18, 2017, <http://www.aljazeera.com/news/2017/10/china-xi-vows-carry-anti-corruption-crusade-171018045437038.html>.

¹³⁴ Ben Hubbard, *Saudi Arabia Says 200 Detained in Anti-Corruption Crackdown*, N.Y. TIMES (Nov. 9, 2017); Simeon Kerr, *Saudi Elite Start Handing Over Funds in Corruption Crackdown*, FINANCIAL TIMES (Nov. 24, 2017).

primarily at consolidating political power and removing potential opponents in what are essentially one-party ruling regimes.¹³⁵

c. *Enforcement Actions*

The U.S. government brought four significant FCPA enforcement actions in 2017 involving coordination and joint resolution with foreign authorities.

i. *Rolls-Royce*

In one of the first FCPA actions of the year, the DOJ announced on January 17, 2017 that it had entered into a DPA with Rolls-Royce, a United Kingdom-based manufacturer and distributor of power systems for aerospace, defense, marine, and energy sectors, relating to one count of conspiracy to violate the anti-bribery provisions of the FCPA.¹³⁶ Rolls-Royce simultaneously settled enforcement actions with the U.K. SFO and the Brazilian Ministerio Publico Federal (“MPF”).¹³⁷ The amount of the total global settlement was approximately \$800 million, with the bulk of the settlement (£497.25 million, or approximately \$605 million) going to the U.K. SFO.¹³⁸ The DOJ received \$169.9 million and the Brazilian MPF \$25.6 million.¹³⁹

According to the DPA, from approximately 2000 to 2013, Rolls-Royce and its indirect U.S. subsidiary, Rolls-Royce Energy Systems, Inc. (“RRESI”), allegedly made improper payments to government officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Iraq, and Angola.¹⁴⁰ According to DOJ papers, in each country, RRESI paid commissions to third-party intermediaries, knowing that a portion of the commissions would be used to bribe government officials and thus aid RRESI in winning oil and gas-related government contracts.¹⁴¹ For example, in Thailand, RRESI employees arranged for payments to be made to a local oil and gas services intermediary, understanding that

¹³⁵ Rob Schmitz, *What Motivates Chinese President Xi Jinping's Anti-Corruption Drive?*, NPR (Oct. 24, 2017), <https://www.npr.org/sections/parallels/2017/10/24/559004647/what-is-the-motivation-behind-chinese-president-xi-jinpings-anti-corruption-drive>; *China's Corruption 'Tiger Hunt' – A Political Weapon for Xi Jinping?*, DEUTSCHE WELLE, Oct. 13, 2017, <http://www.dw.com/en/chinas-corruption-tiger-hunt-a-political-weapon-for-xi-jinping/a-40939473>; Kareem Fahim, *Crown Prince Gains Power After Sweeping Purge of Saudi Officials*, WASH. POST (Nov. 5, 2017).

¹³⁶ U.S. Department of Justice Press Release No. 17-074: Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 27, 2017).

¹³⁷ U.S. Department of Justice Press Release No. 17-074: Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 27, 2017). As we noted in last year's Year-in-Review, the SFO's settlement with Rolls-Royce represented the third time in history that a DPA had been used in the U.K. (the prior two instances of U.K. DPAs occurred in 2015 and 2016 and also involved bribery charges). See WilmerHale, *Global Anti-Bribery Year-in-Review: 2016 Developments and Predictions for 2017* (Feb. 7, 2017),

https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2017-02-07-fcpa-year-in-review.pdf.

¹³⁸ U.S. Department of Justice Press Release No. 17-074: Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 27, 2017).

¹³⁹ U.S. Department of Justice Press Release No. 17-074: Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 27, 2017).

¹⁴⁰ Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-247, Attachment A ¶ 18 (S.D. Ohio Dec. 20, 2016).

¹⁴¹ Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-247, Attachment A ¶ 18 (S.D. Ohio Dec. 20, 2016).

the intermediary had promised a 5.5% “commission” to the relevant government officials to help RRESI win lucrative oil and gas projects.¹⁴² Over the course of the scheme, RRESI paid over \$35 million in corrupt commissions and derived profits of at least \$80 million.¹⁴³

ii. Telia

In a second globally coordinated enforcement action, on September 21, 2017, the DOJ and SEC announced resolutions with Telia, a Sweden-based multinational telecommunications company.¹⁴⁴ Telia entered into a DPA with the DOJ relating to one count of conspiracy to violate the anti-bribery provisions of the FCPA and settled cease-and-desist proceedings with the SEC relating to alleged violations of the anti-bribery and accounting provisions of the FCPA.¹⁴⁵ Telia’s Uzbek subsidiary, Coscom, pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA.¹⁴⁶ Telia also settled with the Public Prosecution Service of the Netherlands (the Openbaar Ministerie, or “OM”).¹⁴⁷ On September 22, 2017, the day following its DOJ, SEC, and OM resolutions, Telia stated that Swedish authorities were bringing additional claims for disgorgement, but a settlement has not yet been announced.¹⁴⁸

As a side note, Telia admitted to the SEC’s jurisdiction despite the fact that the company ceased to be an issuer on September 5, 2007, a few months after the improper conduct began. According to the SEC cease-and-desist order, as of that date, Telia had entered into an agreement with an Uzbek government official’s shell company under which Telia agreed to pay approximately \$30 million to the shell company; however, no actual payments were made until December 2007 or after. The SEC order takes care to note several U.S. contacts, including emails concerning the government official that were sent on U.S.-based servers, improper payments denominated in U.S. dollars, the use of U.S.-based consultants, and the acquisition by Telia of Coscom’s U.S.-based parent company. None of these facts appears to fix the temporal limitation

¹⁴² Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-247, Attachment A ¶¶ 31-35 (S.D. Ohio Dec. 20, 2016).

¹⁴³ Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-247, Attachment A ¶¶ 18-25 (S.D. Ohio Dec. 20, 2016).

¹⁴⁴ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581 (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195 (Sept. 21, 2017).

¹⁴⁵ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581 (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195 (Sept. 21, 2017).

¹⁴⁶ Plea Agreement, *United States v. Coscom LLC*, No. 17-CR-581 (S.D.N.Y. Sept. 31, 2017).

¹⁴⁷ U.S. Department of Justice Press Release No. 17-1035: Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than \$965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017).

¹⁴⁸ Telia Company, Disgorgement Claims From the Swedish Prosecutor (Sept. 22, 2017), <https://www.teliacompany.com/en/news/press-releases/2017/9/disgorgement-claims-from-the-swedish-prosecutor/>.

to the SEC's jurisdiction. But as noted above, Telia nonetheless consented to the entry of the order against it for the full 2007-12 time period.¹⁴⁹

According to the DPA, from 2007 to 2012, Telia paid approximately \$331 in million bribes to an Uzbek government official to enter the mobile telecom market in Uzbekistan via its indirect subsidiary, Coscom.¹⁵⁰ Improper payments were structured in the form of various corporate agreements between different Telia entities, Takilant Ltd. (the government official's shell company), and third parties, including a stock buyback agreement and an acquisition of outstanding debt.¹⁵¹ Approvals for these agreements went as high as Telia executives and its board of directors.¹⁵² In return for payments ranging from \$2 million to \$220 million, the government official enabled Coscom to obtain rights to 3G and 4G frequencies and number blocks.¹⁵³ Notably, neither the SEC nor DOJ settlement papers explain what title or position the government official in question held within the Uzbek government or how the official was able to influence the award of frequencies and number blocks, but the government official is widely believed to be Gulnara Karimova, the eldest daughter of then-Uzbek President Islam Karimov.¹⁵⁴ The DPA estimated Telia's total gain from the scheme to be approximately \$457 million.¹⁵⁵

The total amount of Telia's global resolution was \$965 million.¹⁵⁶ The DOJ and SEC reserved the right to collect the full \$965 million in their resolutions, but, apart from a \$40 million forfeiture that Telia paid on behalf of Coscom, the regulators allowed for offsets of 50% for any criminal penalties or disgorgement paid to the Dutch and Swedish authorities.¹⁵⁷ Telia paid 50% of its criminal penalty (\$274 million) to the OM.¹⁵⁸ Telia may also pay disgorgement to the Swedish prosecuting authority when the claims noted above are resolved. Currently, the total amount due to U.S. authorities

¹⁴⁹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195 ¶¶ 2-3, 5, 13, 16-21 (Sept. 21, 2017).

¹⁵⁰ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, Attachment A ¶¶ 11-12 (S.D.N.Y. Sept. 21, 2017).

¹⁵¹ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, Attachment A ¶¶ 17-53 (S.D.N.Y. Sept. 21, 2017).

¹⁵² Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, Attachment A ¶¶ 12, 20, 22, 26, 28, 30, 36, 38, 46, 49 (S.D.N.Y. Sept. 21, 2017).

¹⁵³ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, Attachment A ¶ 12 (S.D.N.Y. Sept. 21, 2017).

¹⁵⁴ Tom Schoenberg and Chris Dolmetsch, Telia Agrees to Pay At Least \$965 Million Over Uzbek Bribes, BLOOMBERG (Sept. 21, 2017), <https://www.bloomberg.com/news/articles/2017-09-21/telia-to-seal-u-s-deferred-prosecuton-deal-over-uzbek-bribes>.

¹⁵⁵ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, Attachment A ¶ 11 (S.D.N.Y. Sept. 21, 2017).

¹⁵⁶ U.S. Department of Justice Press Release No. 17-1035: Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than \$965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017).

¹⁵⁷ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, Attachment A ¶ 7 (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195, ¶ IV.B (Sept. 21, 2017).

¹⁵⁸ Telia Company, Telia Company Reaches A Global Settlement with Authorities Regarding Uzbekistan Investigation (Sept. 21, 2017), <https://www.teliacompany.com/en/news/press-releases/2017/9/telia-company-reaches-a-global-settlement-with-the-authorities-regarding-uzbekistan-investigation/>.

ranges from \$482.5 million (if the full 50% disgorgement is paid to Swedish authorities) to \$691 million (if no disgorgement is paid to Swedish authorities).

iii. SBM

The third global resolution of the year was announced on November 30, 2017, when the DOJ entered into a DPA with SBM, a Netherlands-based manufacturer of offshore oil and gas drilling equipment, in connection with one count of conspiracy to violate the FCPA.¹⁵⁹ Simultaneously, SBM's U.S.-based subsidiary, SBM Offshore USA, Inc., pleaded guilty to a single count of the same charge.¹⁶⁰

According to the DPA, SBM and its Houston-based subsidiary engaged in a 16-year long bribery scheme involving payments of at least \$180 million in "commission" to intermediaries around the world.¹⁶¹ SBM and its subsidiary understood and intended that portions of those commissions would be paid to foreign officials in Brazil, Angola, Kazakhstan, Iraq, and Equatorial Guinea in order to enable SBM to win oil and gas-related contracts.¹⁶² The total amount of estimated gain to SBM from the scheme was \$2.8 billion.¹⁶³ The scheme involved high-level executives of the U.S.-based subsidiary, including U.K. citizen Anthony Mace and U.S. citizen Robert Zubiante, who directly authorized millions of dollars in commission payments to the Swiss and Monaco bank accounts of intermediaries.¹⁶⁴ As discussed above, Zubiante and Mace pleaded guilty to individual FCPA charges earlier in November 2017. In charging corrupt conduct in Kazakhstan, the DOJ also appears to have treated a commercial Italian oil and gas company as a government instrumentality due to the fact that that company had been awarded concessions by the Kazakh state-owned oil company—an unusual extension of the definition of "government instrumentality" under the FCPA.¹⁶⁵

As with the Telia matter, the SBM matter involves a Dutch company settling charges of domestic and foreign bribery with Dutch, U.S., and Brazilian authorities.¹⁶⁶ SBM resolved charges with each authority at a different time, however, suggesting that, although there may have been cooperation between the three countries, the countries did not coordinate their resolutions in the same way as in the Telia matter. For example, the Dutch OM resolved SBM's charges in 2014, resulting in SBM paying a

¹⁵⁹ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686 (S. D. Tex. Nov. 29, 2017).

¹⁶⁰ Plea Agreement, *United States v. SBM Offshore USA, Inc.*, No. 17-CR-685 (S.D. Tex. Nov. 29, 2017).

¹⁶¹ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶ 19 (S. D. Tex. Nov. 29, 2017).

¹⁶² Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶ 19 (S. D. Tex. Nov. 29, 2017).

¹⁶³ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶ 19 (S. D. Tex. Nov. 29, 2017).

¹⁶⁴ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶ 4, 6, 19, 28, 30-32, 41, 48-49, 55, 60 (S. D. Tex. Nov. 29, 2017).

¹⁶⁵ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶ 17, 55 (S. D. Tex. Nov. 29, 2017).

¹⁶⁶ U.S. Department of Justice Press Release No. 17-1348: SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017).

criminal penalty of \$240 million.¹⁶⁷ The DOJ then reached its resolution with SBM in 2017, with an additional criminal penalties of \$238 million.¹⁶⁸ Lastly, Brazilian prosecutors are still in the process of resolving SBM's charges; as of mid-2016, the parties were expected to reach a settlement valued at approximately \$280 million.¹⁶⁹ Thus, SBM to date has paid approximately \$478 million and can reasonably be expected to pay over \$750 million in total global settlements.

Interestingly, the total amount that SBM is expected to pay in all its resolutions is far less than the calculated criminal penalty range due under the relevant U.S. Sentencing Guidelines—an astounding \$4.5 billion to \$9 billion.¹⁷⁰ SBM did earn a 25% reduction off the bottom of the sentencing range for cooperation and remediation, which would reduce the fine amount to approximately \$3.4 billion. However, this still leaves a shortfall of approximately \$2.6 billion. The discrepancy between the fine recommended by the Sentencing Guidelines and SBM's actual penalty amount can likely be attributed to the DOJ's assessment of the company's ability to pay.¹⁷¹ The DPA and the DOJ settlement press release both indicate that the DOJ took care to assess a penalty that would “avoid substantially jeopardizing the continued viability of [SBM]” and accounted for “SBM's inability to pay a fine.”¹⁷² Although the discount extended SBM is dramatic (over 80% off the bottom of the sentencing calculation)—particularly when compared to the fact that SBM earned an estimated \$2.8 billion from its corrupt conduct—it is worth noting that there are likely few companies in the world that could bear a \$4.5 billion fine without jeopardizing ongoing operations.

iv. Keppel

This year's final global resolution was announced on December 22, 2017, when the DOJ entered into a DPA with Keppel, a Singapore-based shipyard and vessel repair company, to resolve charges brought by authorities in the United States, Brazil, and Singapore for Keppel's role in a decade-long bribery scheme involving officials in Brazil.¹⁷³ Notably, this resolution represents the DOJ's “first coordinated FCPA

¹⁶⁷ U.S. Department of Justice Press Release No. 17-1348: SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017).

¹⁶⁸ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶ 7 (S. D. Tex. Nov. 29, 2017).

¹⁶⁹ SBM Offshore, Leniency Agreement Signed between Brazilian Authorities, Petrobras and SBM Offshore (July 16, 2016), <http://www.sbmoffshore.com/?press-release=leniency-agreement-signed-brazilian-authorities-petrobras-sbm-offshore>. The leniency agreement contemplated a cash payment in the amount of \$162.8 million and reductions in future payments to SBM of \$179 million over a 15-year period, which carried a present cash value of \$112 million. The agreement is currently subject to re-negotiation, however, after failing to receive approval by an MPF council in December 2016. SBM Offshore, Update on Status of the Leniency Agreement (Dec. 15, 2016), <http://www.sbmoffshore.com/?press-release=update-status-lenency-agreement-2>.

¹⁷⁰ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶¶ 4, 7 (S. D. Tex. Nov. 29, 2017).

¹⁷¹ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶ 7 (S. D. Tex. Nov. 29, 2017).

¹⁷² Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, Attachment A ¶¶ 4, 7 (S. D. Tex. Nov. 29, 2017).

¹⁷³ Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (E.D.N.Y. Dec. 22, 2017).

resolution with Singapore” and advances the Department’s continued coordination and partnership with Brazil.¹⁷⁴ In related proceedings, Keppel settled with the MPF in Brazil and the Attorney General’s Chambers in Singapore. Keppel’s wholly owned U.S. subsidiary, Keppel Offshore & Marine USA Inc. (“Keppel USA”), also pled guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA.¹⁷⁵ Keppel and Keppel USA agreed to pay a combined total criminal penalty of over \$422 million. Half of the settlement (approximately \$211 million) was allocated to Brazil, with the remaining half split equally between the United States and Singapore (each receiving approximately \$105.5 million).¹⁷⁶

According to the DPA, between 2001 and 2014, executives at Keppel and Keppel USA knowingly and willfully conspired to violate the anti-bribery provisions of the FCPA, paying approximately \$55 million in bribes to Brazilian officials and profiting from over \$350 million in corruptly-obtained business.¹⁷⁷ Specifically, the DOJ found that Keppel and Keppel USA bribed officials at the Brazilian state-owned oil company Petrobras, as well as the then-governing political party in Brazil, in order to secure thirteen contracts with Petrobras and another Brazilian entity.¹⁷⁸ As described by the DOJ, Keppel made the bribes through “outsized commission payments to an intermediary, under the guise of legitimate consulting agreements,” who then used the “global financial system . . . to disguise the source and disbursement of the bribe payments” to the Brazilian officials and political party “by passing funds through a series of shell companies.”¹⁷⁹ In reaching the \$422 million resolution, the DOJ credited Keppel and Keppel USA’s substantial cooperation in the investigation and extensive remedial measures.¹⁸⁰

v. Analysis

One of the most obvious trends of the global resolutions announced in 2017 is the continuing strength of cooperation between key foreign prosecuting offices, such as the U.K. SFO, the Dutch OM, and the Brazilian prosecuting authority. In particular, the Telia action can be viewed as a continuation of the U.S.-Dutch partnership that began with the Vimpelcom action in 2016. Vimpelcom, a Netherlands-based telecommunications company, and its Uzbek subsidiary paid bribes of more than \$114 million to an Uzbek government official (again, believed to be Gulnara Karimova) to

¹⁷⁴ U.S. Department of Justice Press Release No. 17-1476: Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017).

¹⁷⁵ U.S. Department of Justice Press Release No. 17-1476: Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017).

¹⁷⁶ Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697, ¶ 7 (E.D.N.Y. Dec. 22, 2017).

¹⁷⁷ Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697, Attachment A ¶¶ 19-20 (E.D.N.Y. Dec. 22, 2017).

¹⁷⁸ Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697, Attachment A ¶ 19 (E.D.N.Y. Dec. 22, 2017).

¹⁷⁹ U.S. Department of Justice Press Release No. 17-1476: Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017).

¹⁸⁰ Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697, ¶ 4 (E.D.N.Y. Dec. 22, 2017).

enter the Uzbek telecommunications market.¹⁸¹ The DOJ, SEC, and Dutch OM reached a \$795 million global resolution with Vimpelcom in 2016.¹⁸² The OM extended its cooperation with the DOJ and SEC from Vimpelcom to the 2017 Telia action despite the fact that, unlike Vimpelcom, Telia is not based in the Netherlands.¹⁸³ The only connection between Telia's corrupt conduct and the Netherlands was Telia's use of Dutch corporate forms: Telia created multiple holding companies in the Netherlands, some of which were used to hold its Uzbek subsidiary, Coscom, and one of which was partially "sold" to the Uzbek official as a corrupt payment.¹⁸⁴ At least one other telecommunications company, Russia-based Mobile TeleSystems PJSC ("MTS"), is known to be under investigation in connection with its entry to the Uzbek market.¹⁸⁵

In 2017, the United States also coordinated actions with foreign prosecuting offices that, to date, have not been heavily involved in foreign anti-corruption enforcement—the Swedish prosecuting authority and, as previously noted, Singapore's Attorney General's Chambers. In each case, however, the Swedish and Singaporean authorities brought actions only where a domestic company was involved (Telia and Keppel, respectively).

The division of monetary payments in the Rolls-Royce, Telia and Keppel actions also shows, as have past global resolutions, that, as foreign partnerships increase, the United States' share of the pie grows correspondingly smaller in resolutions involving non-U.S. companies. In some cases, this occurs because non-U.S. authorities have imposed heavier penalties than the United States. This makes sense from a policy perspective given that a country will almost always have greater interest in prosecuting the corrupt conduct of its own citizens and companies than foreign authorities. Furthermore, from a notice and fairness perspective, companies can most expect to be held accountable under the laws of their own countries, and typically have the most knowledge of the criminal code and attendant punishments of their home jurisdictions.¹⁸⁶ As one example of this trend, the United Kingdom took the lion's share

¹⁸¹ U.S. Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016).

¹⁸² U.S. Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016).

¹⁸³ Historically, coordinated global resolutions have tended to be between the DOJ and SEC in the U.S. and the prosecuting authorities in an offender's home jurisdiction. These foreign authorities obviously have a clear interest in pursuing corrupt conduct perpetrated by their own companies and/or citizens. Some examples include the actions against Siemens (U.S.-German resolution); Embraer (U.S.-Brazil resolution); Odebrecht and Braskem (U.S.-Brazil resolution); Rolls-Royce (U.S.-U.K. resolution), and obviously Telia itself (U.S.-Sweden resolution).

¹⁸⁴ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195, ¶¶ 7-9, 21 (Sept. 21, 2017).

¹⁸⁵ Mobile TeleSystems PJSC Press Release: Ad-Hoc Notice (Nov. 5, 2015), <http://www.mtsgsm.com/news/2015-11-05-94056/>.

¹⁸⁶ Phrased differently, where a company's home jurisdiction is involved in prosecuting corruption, the United States no longer represents primary "supply-side" jurisdiction, and its interest becomes more incidental. Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 *FORDHAM L. REV.* 493, 496-97 (2015) (explaining that foreign corruption involves, at minimum, the interests of two countries—the country of the bribe-giver ("supply-side" jurisdiction) and the country of the briber-receiver ("demand-side" jurisdiction)—and that the U.S. interest is typically that of the supply-side).

of the monetary penalty paid by the U.K.-based Rolls-Royce in the 2017 Rolls-Royce action at approximately \$604 million, with the United States receiving \$169.9 million in penalties.¹⁸⁷

In other cases, division of monetary payments may reflect differing roles played by prosecuting offices in the investigation; alternatively, it may indicate the extent of the corrupt conduct that occurred within a jurisdiction, and therefore the harm suffered by that jurisdiction. In *Telia*, for example, the United States will receive at minimum approximately 50% of all payments.¹⁸⁸ This division may reflect the United States' more prominent role in the *Telia* investigation as the SEC and DOJ have claimed both criminal penalties and disgorgement from *Telia*, whereas Dutch and Swedish authorities have only pursued one or the other.¹⁸⁹ As a third example, in *Keppel*, Brazil collected half of the total criminal penalty, while the United States and Singapore (*Keppel's* home country) received only one quarter.¹⁹⁰ Given that the corrupt conduct in *Keppel* involved a decade-long scheme to bribe Brazilian officials, the monetary division suggests that Brazil suffered the most harm and therefore had the most interest in levying criminal penalties.

The SBM settlement also provides a fascinating glimpse into how the dynamics between multiple cooperating but ultimately independent foreign prosecuting offices can affect a company's resolution. As noted above, SBM did not reach a single global resolution with prosecuting authorities, but has entered (or anticipates entering) into serial settlements with the Netherlands, the United States, and Brazil. The different timing of the investigations appears to have affected how SBM was charged. In particular, when SBM resolved charges with the Dutch OM in 2014, the DOJ announced that it was closing its investigation into SBM in part based on the understanding that the United States did not have jurisdiction over SBM.¹⁹¹ At the time, however, SBM had not resolved charges with Brazilian authorities; thus, although the Dutch and U.S. investigations closed, the Brazilian investigation continued. As a result of Brazil's ongoing investigation, Brazil filed charges against several individuals in December 2015.¹⁹² Among those charged was Robert Zubiarte, a U.S. citizen and executive of SBM's U.S.-based subsidiary.¹⁹³ The discovery that Zubiarte was involved in the conduct (and therefore, presumably, provided a jurisdictional basis for FCPA charges)

¹⁸⁷ U.S. Department of Justice Press Release No. 17-074: Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 27, 2017).

¹⁸⁸ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, ¶ 7 (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195, ¶ IV.B (Sept. 21, 2017).

¹⁸⁹ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, ¶ 7 (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195, ¶ IV.B (Sept. 21, 2017).

¹⁹⁰ Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697, ¶ 7 (E.D.N.Y. Dec. 22, 2017).

¹⁹¹ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686, ¶ 4 (S. D. Tex. Nov. 29, 2017); SBM Offshore Press Release: SBM Offshore Update on Legacy Issues (Nov. 6, 2017).

¹⁹² SBM Offshore Press Release: SBM Offshore Update on Legacy Issues (Nov. 6, 2017).

¹⁹³ *Brazil prosecutors charge 12 in SBM Offshore graft scheme*, REUTERS (Dec. 17, 2015), <https://www.reuters.com/article/us-brazil-corruption-petrobras-sbm/brazil-prosecutors-charge-12-in-sbm-offshore-graft-scheme-idUSKBN0U017D20151218>.

led the DOJ to re-open its investigation.¹⁹⁴ Although it is impossible to determine the precise information flow between the Dutch, U.S., and Brazilian authorities, it seems possible that, absent the strong partnerships between the three countries, Brazil may never have initiated an investigation into the conduct of Netherlands-based SBM. And without Brazil's investigation, the DOJ may not have discovered a jurisdictional basis for bringing charges against SBM in the United States.¹⁹⁵

The increase in global resolutions against corporations has also led to foreign prosecutors investigating individuals implicated in corporate misconduct. Last year, for example, the globally coordinated FCPA action against Embraer led to charges against 11 individuals in Brazil and two in Saudi Arabia.¹⁹⁶ The blockbuster actions against Odebrecht and Braskem have led to a flood of investigations into individuals across Latin America, including potential charges against the former president of Peru, the CEO of Odebrecht, and the former CEO of Petrobras.¹⁹⁷ This year, the Swedish prosecuting authority has indicated that it is exploring charges against individuals tied to the Teli bribery scheme.¹⁹⁸ The U.K. SFO has similarly indicated that it is investigating individuals tied to the Rolls-Royce conduct and expects that charges may be brought sometime in 2018.¹⁹⁹

Finally, the Rolls-Royce and SBM settlements, both of which appear to arise out of global investigations into Monaco-based oil and gas intermediary Unaoil, illustrate the potential global reach of an industry sweep involving a foreign business partner. Government investigations into Unaoil, a company owned by the wealthy Ahsani family,²⁰⁰ began in early 2016 following news coverage alleging corrupt conduct by

¹⁹⁴ SBM Offshore Press Release: SBM Offshore Update on Legacy Issues (Nov. 6, 2017).

¹⁹⁵ It is unclear when Brazilian authorities learned of Zubiarte's involvement and, in particular, whether they were aware of it prior to when DOJ initially closed its investigation in 2014. To the extent that Brazilian prosecutors knew of a U.S. jurisdictional hook in 2014 and did not provide that information to the DOJ, the SBM timeline actually suggests a lack of coordination between jurisdictions. However, given the lapse of approximately one year between the DOJ's closing of its investigation and Brazil filing charges against Zubiarte, it is possible that Brazilian prosecutors learned of Zubiarte's involvement after 2014. SBM Offshore Press Release: SBM Offshore achieves settlement with Dutch Public Prosecutor's Office over alleged improper payments. United States Department of Justice closes out the matter (Nov. 12, 2014); *Brazil prosecutors charge 12 in SBM Offshore graft scheme*, REUTERS (Dec. 17, 2015), <https://www.reuters.com/article/us-brazil-corruption-petrobras-sbm/brazil-prosecutors-charge-12-in-sbm-offshore-graft-scheme-idUSKBN0U017D20151218>.

¹⁹⁶ U.S. Department of Justice Press Release No. 16-1240: Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016).

¹⁹⁷ Nicholas Casey and Andrea Zarate, *Corruption Scandals With Brazilian Roots Cascade Across Latin America*, N.Y. TIMES (Feb. 13, 2017); *Ecuador Arrests Five on Odebrecht Corruption Charges*, TELESUR (June 3, 2017), <https://www.telesurtv.net/english/news/Ecuador-Arrests-Five-Including-VPs-Uncle-in-Odebrecht-Sweep-20170603-0003.html>; Jack Dylan Cole, *Peru makes first arrests in Odebrecht corruption scandal*, PERU REPORTS (Jan. 23, 2017), <https://perureports.com/2017/01/23/first-public-official-to-be-arrested-over-odebrecht-bribing-scandal/>; Andres Shipani, *Ex-CEO of Petrobras charged with corruption*, FINANCIAL TIMES (Aug. 22, 2017), <https://www.ft.com/content/b166ea94-6cbe-306e-a80b-feba4936ea80>.

¹⁹⁸ Teli Company Press Release: Disgorgement Claims From the Swedish Prosecutor (Sept. 22, 2017).

¹⁹⁹ Peggy Hollinger and Catherine Belton, *UK investigation into Rolls-Royce turns its focus to individuals*, FINANCIAL TIMES (Jan. 20, 2017), <https://www.ft.com/content/f1344464-df23-11e6-9d7c-be108f1c1dce>.

²⁰⁰ David Segal, *Deals in Code, Arrests in Raids: The Risky Stakes of Oil Middlemen*, N. Y. TIMES (Sept. 23, 2017), <https://www.nytimes.com/2017/09/23/business/ahsani-middlemen-oil-unaoil.html>.

Unaoil across the Middle East, Africa, and Central Asia.²⁰¹ Unaoil served as an intermediary for several major oil and gas companies in these regions, including Rolls-Royce and SBM, and allegedly paid bribes on their behalf.²⁰² In 2017, SBM acknowledged that the United States’ investigation into the company included its relationship with Unaoil.²⁰³ In addition, although the Rolls-Royce settlement did not explicitly name Unaoil, the DOJ DPA described a key Rolls-Royce intermediary as a “Monaco-based oil and gas services intermediary” that “regularly bribed foreign officials” in Angola, Azerbaijan, Iraq, and Kazakhstan—all locations of Unaoil operations.²⁰⁴ Several other companies have announced they are under investigation based on their relationships with Unaoil, including U.K.-based Petrofac,²⁰⁵ Swiss-based ABB Ltd,²⁰⁶ U.S.-based FMC Technologies,²⁰⁷ and U.S.-based KBR.²⁰⁸ Many of these companies have disclosed investigations by U.S. and U.K. authorities and, following the pattern of the Rolls-Royce and SBM settlement, may face charges in multiple jurisdictions.

3. Increased Emphasis on Employee Discipline/Termination as a Necessary Component of Remediation

Several SEC and DOJ actions in 2017 reflected an increased focus on employee discipline by both companies and government agencies. Settlements that highlighted significant disciplinary actions include Telia, Las Vegas Sands Corporation (“Las Vegas Sands”), Sociedad Química y Minera de Chile, S.A. (“SQMC”), and Rolls-Royce.

As noted above, Telia ultimately entered into a global resolution for almost \$1 billion. According to the Criminal Information filed against Telia, its executives “understood that they had to regularly pay [an Uzbek government official] millions of dollars in order to enter the Uzbek telecommunications market and continue to operate there.”²⁰⁹ Telia further admitted that “certain Telia management,” including high-ranking executives with authority over its business operations in Europe and Asia, conspired to make “corrupt payments” in order to “enter the Uzbek telecommunications market.”²¹⁰ Agreements with the government official’s shell company went as high as the company’s board of directors. Ultimately, Telia fired its entire Board of Directors, its CEO, and all managers

²⁰¹ Nick Baumann, Akbar Shahid Ahmed, Jessica Shulberg, and Paul Blumental, *Unaoil’s Huge New Corporate Bribery Scandal, Explained*, HUFFINGTON POST (Mar. 30, 2016), https://www.huffingtonpost.com/entry/unaoil-scandal-explained_us_56fbd2f0e4b0daf53aee0cff.

²⁰² Nick Baumann, Akbar Shahid Ahmed, Jessica Shulberg, and Paul Blumental, *Unaoil’s Huge New Corporate Bribery Scandal, Explained*, HUFFINGTON POST (Mar. 30, 2016), https://www.huffingtonpost.com/entry/unaoil-scandal-explained_us_56fbd2f0e4b0daf53aee0cff.

²⁰³ SBM Offshore Press Release: SBM Offshore Update on Legacy Issues (Nov. 6, 2017).

²⁰⁴ Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-247, Attachment A ¶ 7 (S.D. Ohio Dec. 20, 2016).

²⁰⁵ U.K. Serious Fraud Office News Release: SFO confirms investigation into Petrofac PLC (May 12, 2017).

²⁰⁶ U.K. Serious Fraud Office News Release: SFO opens investigation into ABB Ltd (Feb. 10, 2017).

²⁰⁷ FMC Technologies, U.S. Securities and Exchange Commission Form 10-Q, April 28, 2016.

²⁰⁸ KBR Inc. Press Release: KBR Statement on SFO Investigation (Apr. 28, 2017).

²⁰⁹ Information, *United States v. Telia Co. AB*, No. 17-CR-581, ¶ 13 (S.D.N.Y. Sept. 21, 2017).

²¹⁰ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, Attachment A ¶¶ 4, 11 (S.D.N.Y. Sept. 21, 2017).

involved in the wrongdoing.²¹¹ The DOJ DPA extended credit for the employee discipline, noting that Telia “engaged in extensive remedial measures, including terminating all individuals involved in the misconduct” and those who “had a supervisory role over those engaged in the misconduct.”²¹² The DOJ press release regarding Telia further noted that “the companies received significant credit for their extensive remedial measures” which was a significant factor motivating “a 25% reduction off the bottom of the U.S. Sentencing Guidelines fine range.”²¹³

Several other 2017 DOJ settlements recognized employee discipline as a significant factor in earning remediation credit or otherwise reduced punishment. Las Vegas Sands entered into a non-prosecution agreement (“NPA”) with the DOJ to resolve allegations that certain of its executives knowingly and willfully failed to implement a system of internal accounting controls to ensure the legitimacy of payments to consultants in Macao and the People’s Republic of China (“PRC”).²¹⁴ Las Vegas Sands agreed to pay \$5.96 million, which reflected a 25% reduction off the bottom of the applicable U.S. Sentencing Guidelines fine range;²¹⁵ a significant factor in reaching this number was that Sands “fully remediated” by “no longer employ[ing]” the individuals implicated in the conduct, including multiple “senior executive[s]” leading Sands’ “China strategy.”²¹⁶ (Given that the DOJ action was settled approximately nine months after Las Vegas Sands settled an SEC action based on the same facts, these employees were likely fired in conjunction with the SEC settlement.) In another action, the DOJ’s DPA with SQMC credited SQMC with taking remedial measures, including firing the CEO who had misused his discretionary fund and disciplining other employees involved in or aware of the improper payments.²¹⁷ Again, the DOJ papers noted the terminations as a significant factor motivating a 25% discount from the bottom of the U.S. Sentencing Guidelines’ fine range.²¹⁸ Similarly, as part of its DPA with the DOJ, Rolls-Royce received a 25% reduction from the bottom of the U.S. Sentencing Guidelines fine range; the DOJ justified the reduction in part by indicating that Rolls-Royce had “taken significant remedial measures, including terminating business relationships with multiple

²¹¹ Megan Zwiebel, *Massive Telia Settlement Indicates International Cooperation Will Continue Under New Administration*, THE ANTI-CORRUPTION REPORT, October 4, 2017.

²¹² Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, ¶ 4(c) (S.D.N.Y. Sept. 21, 2017).

²¹³ U.S. Department of Justice Press Release No. 17-1035: Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than \$965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017).

²¹⁴ U.S. Department of Justice Press Release No. 17-101: Las Vegas Sands Corporation Agrees to Pay Nearly \$7 Million to Resolve FCPA Charges Related to China and Macao (Jan. 19, 2017).

²¹⁵ Non-Prosecution Agreement between U.S. Department of Justice and Las Vegas Sands Corporation (Jan. 17, 2017), <https://www.justice.gov/opa/press-release/file/929836/download>.

²¹⁶ Non-Prosecution Agreement between U.S. Department of Justice and Las Vegas Sands Corporation, Attachment A, ¶¶ 4, 5 (Jan. 17, 2017), <https://www.justice.gov/opa/press-release/file/929836/download>.

²¹⁷ Deferred Prosecution Agreement, *United States v. Sociedad Química y Minera de Chile, S.A.*, No. 17-CR-013, ¶ 4(c) (D.D.C. Jan. 13, 2017).

²¹⁸ Lori Tripoli, *\$30M SQM Settlement Demonstrates the Hazards of Discretionary Accounts for CEOs and Charitable Donations to the Politically Connected*, THE ANTI-CORRUPTION REPORT, February 15, 2017.

employees and third-party intermediaries who were implicated in the corrupt scheme.”²¹⁹

This trend towards more robust remediation through employee discipline finds support outside U.S. borders as well. For example, as a condition of his acceptance of the Rolls-Royce’s DPA with the U.K. SFO, a U.K. judge noted that he was “satisfied that both the senior management and those responsible for the [now proper] strategic direction of Rolls-Royce are different to those responsible for running the company (and its culture)” during the time Rolls-Royce was making these improper payments.²²⁰

This trend is noteworthy and raises difficult issues for companies investigating and remediating improper conduct. While U.S. enforcement authorities routinely inform companies that the government does not get involved in company disciplinary decisions, the governments’ record of seemingly awarding tangible monetary benefits for disciplinary action against employees places substantial pressure on companies to show the government that “heads have rolled.” While it is understandable that the government may take into account a company’s actions to ensure that bad conduct cannot continue and that proper messages are sent, the government should proceed with caution in the messages it sends and should avoid the suggestion that companies can save millions of dollars in penalties by tossing employees overboard. Companies ought to have wide latitude in following internal compliance and corporate employment procedures in reaching appropriate overall solutions to remediate compliance breakdowns. This will continue to be a challenging area for counsel representing both companies and individuals in corruption matters, particularly in countries with employee-friendly labor and employment laws, where it is difficult if not impossible to terminate employees involved in misconduct.

4. Monitorships on the Rise

Since the start of the DOJ Pilot Program in April 2016, there has been a sharp uptick in the imposition of monitors, a trend that has continued into 2017. In particular, since 2016, nearly all DOJ settlements involving criminal internal controls violations have been accompanied by the imposition of a monitor, a logical result given that companies with criminally inadequate controls would be the most likely to need an independent compliance expert to supervise the implementation of effective controls. And as discussed in more detail Section III.B.5.a below, the DOJ seems to be pursuing criminal internal control violations more aggressively in recent years, which may be contributing to the increase in monitorships.

The trend for several years prior to the FCPA Pilot Program was a decrease in monitorships. According to analysis by Global Investigations Review (“GIR”), only 34% of DOJ settlements between 2008 and April 2016 included the imposition of a

²¹⁹ U.S. Department of Justice Press Release No. 17-074: Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017).

²²⁰ Deferred Prosecution Agreement, *Serious Fraud Office v. Rolls-Royce PLC and Rolls-Royce Energy Systems Inc.*, No: U20170036 (Southwark Crown Court Jan. 17, 2017).

monitor.²²¹ At the time of the Pilot Program launch, the DOJ announced that if a company cooperated, remediated, and also voluntarily self-disclosed misconduct, the DOJ would generally not impose a monitor.²²² From the start of the Pilot Program in April 2016 to March 2017, however, GIR's analysis shows that 62% of DOJ settlements have included the imposition of a monitor—almost double the percentage of cases that involved monitors in the preceding years.²²³ (At the same time, it is worth noting that the DOJ's rate of declination has also increased under the Pilot Program. GIR's analysis suggests that resolutions under the Pilot Program are becoming more binary—more companies walk away without any charges, but the ones that do not tend to receive harsher penalties.) The increase in monitorship trends may be, at least in part, the result of the DOJ's first compliance consultant, who worked in the Fraud Section from September 2015 to June 2017 and likely brought a greater focus to compliance programs in general. Time will tell if this trend will change in 2018 in light of the new FCPA Corporate Enforcement Policy. As discussed in more detail in Section II.A above, the FCPA Corporate Enforcement Policy states that if a criminal resolution is warranted based on aggravating circumstances, but a non-recidivist company has otherwise met the self-disclosure, cooperation and remediation standards, the DOJ generally will not impose a monitor.²²⁴

Over the course of 2017, six out of thirteen DOJ and SEC resolutions with companies—just over 46%—resulted in the imposition of an independent corporate compliance monitor or consultant. Two out of the six DOJ and four out of the seven SEC settlements resulted in the imposition of a monitor or consultant. Perhaps not surprisingly, three repeat offender companies—Zimmer Biomet, Orthofix, and Halliburton—were required to retain a compliance monitor or consultant. The length of the monitorships varied from one year to three years. The scope of the monitorship and role of the compliance monitor has also varied.

As addressed in detail in Section III.B.1 above, the repeat offenders this year, Zimmer Biomet, Orthofix, and Halliburton, were each required to retain an independent monitor (and in Zimmer Biomet's case, a second monitor). In 2017, SQMC was also required to retain an independent monitor for a two-year term.²²⁵ According to the DOJ and SEC settlement agreements, SQMC management learned of the payments through an internal audit in 2014 but did not take adequate measures to stop the conduct until

²²¹ Adam Dobrik, *How the pilot programme has changed FCPA cases*, GLOBAL INVESTIGATIONS REVIEW (Mar. 21, 2017).

²²² U.S. Department of Justice Press Release: Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016).

²²³ Adam Dobrik, *How the pilot programme has changed FCPA cases*, GLOBAL INVESTIGATIONS REVIEW, March 21, 2017.

²²⁴ Rod J. Rosenstein, Deputy Attorney General, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

²²⁵ Deferred Prosecution Agreement, *United States v. Sociedad Química y Minera de Chile, S.A.*, No. 17-CR-00013 (D.D.C. Jan. 13, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Química y Minera de Chile, S.A.*, Rel. No. 34-79795, File No. 3-17774 (Jan. 13, 2017).

2015.²²⁶ At the time of settlement, the DOJ determined that an independent compliance monitor was required because, “[a]lthough the Company has taken a number of remedial measures, the Company is still in the process of implementing its enhanced compliance program, which has not had an opportunity to be tested.”²²⁷ Although the 2017 NPA with Las Vegas Sands did not specifically require Las Vegas Sands to retain a monitor, under the 2016 SEC settlement, Las Vegas Sands had agreed to retain an independent consultant for two years to review its FCPA-related internal controls, recordkeeping, and financial reporting policies and procedures and its ethics and compliance functions.²²⁸

As a counterpoint to the above cases, it is interesting to note that the global resolution with Telia—one of the largest FCPA resolutions in history, with U.S. penalties alone likely to range between \$482.5 million to \$691 million—did not involve the imposition of a monitor.²²⁹ This may have been due to significant remedial efforts on Telia’s part, including beginning its remediation as early as 2013.²³⁰ The government noted that the company’s remediation occurred “promptly” and was “extensive,” including terminating board members and senior executives (including individuals who were not involved in but failed to detect the misconduct), creating a “new and robust” compliance function, and “implementing a comprehensive anti-corruption program.”²³¹ Speaking at the American Bar Association’s (“ABA”) Sixth Annual London White Collar Crime Institute Conference in October 2017, Telia’s former chief ethics and compliance counsel, Michaela Ahlberg, also noted that she and Anna Romberg, Telia’s then-head of anti-corruption, traveled to Washington, D.C., on three separate occasions to pitch the company’s compliance program to prosecutors from the DOJ, SEC, and OM when giving her thoughts as to how Telia avoided the imposition of a compliance monitor.²³²

In addition to the increased percentage of monitorships since April 2016, the DOJ has been accelerating the monitor selection process by requiring companies reaching settlements involving monitors to provide the DOJ with three candidates for the role upon reaching a settlement agreement.²³³ Previously, companies facing monitorships

²²⁶ Deferred Prosecution Agreement, *United States v. Sociedad Química y Minera de Chile, S.A.*, No. 17-CR-00013 (D.D.C. Jan. 13, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Química y Minera de Chile, S.A.*, Rel. No. 34-79795, File No. 3-17774 (Jan. 13, 2017).

²²⁷ U.S. Department of Justice Press Release No. 17-065: Chilean Chemicals and Mining Company Agrees to Pay More Than \$15 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 13, 2017), <https://www.justice.gov/opa/pr/chilean-chemicals-and-mining-company-agrees-pay-more-15-million-resolve-foreign-corrup>.

²²⁸ U.S. Securities and Exchange Commission Press Release No. 2016-64: Las Vegas Sands Paying Penalty for FCPA Violations (Apr. 7, 2016).

²²⁹ Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581 (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195 (Sept. 21, 2017).

²³⁰ Telia Company Press Release: Telia Company Reaches a Global Settlement With the Authorities Regarding Uzbekistan Investigation (Sept. 9, 2017).

²³¹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 34-81669, File No. 3-18195, ¶ 31 (Sept. 21, 2017); Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581, ¶ 4(c) (S.D.N.Y. Sept. 21, 2017).

²³² Michael Griffiths, *Telia used DOJ guidelines to avoid compliance monitor*, GLOBAL INVESTIGATIONS REVIEW (Oct. 10, 2017).

²³³ Dylan Tokar, *DOJ accelerating FCPA monitor selection process*, GLOBAL INVESTIGATIONS REVIEW (Apr. 5, 2017).

were required to submit three monitors for consideration within 30 days of settlement.²³⁴ Peter Carr, a spokesperson for the DOJ's criminal division, said the goal for this policy change "is to speed up the time frame so the monitor can start sooner and end earlier, which [the DOJ] believe[s] is in the interest of the government, the company and the public."²³⁵

5. Continued Importance of Due Diligence and Active Monitoring of Third Parties

The SEC's and DOJ's actions in 2017 once again underscored the importance of third-party due diligence. In several cases where bribes were allegedly paid, the government attributed the payments to failures in internal controls and third-party due diligence. For example, the DOJ and SEC found Zimmer Biomet violated the internal controls provision of the FCPA for the company's failure to conduct adequate due diligence on proposed third parties such as customs brokers and distributors.²³⁶ The lack of controls ultimately resulted in improper payments made to Mexican customs officials, and the retention of a distributor that the company knew had previously made improper payments on its behalf.²³⁷ Similarly, SQMC was charged with internal controls violations for failing to conduct due diligence on or obtain anti-corruption representations from its third-party vendors.²³⁸ As a result, the DOJ and SEC determined that SQMC could not verify the justification for certain payments made to third parties or ensure improper payments were not made to politically exposed persons.²³⁹ In Orthofix as well, the SEC cited to the company's failure to monitor the activities of its subsidiaries in high-risk countries as a result of inadequate internal controls. In particular, the SEC stated that had Orthofix instituted sufficient policies and procedures, the company could have detected and prevented the discounts and high commissions that were ultimately provided to third-party representatives and distributors for the purposes of facilitating improper payments.²⁴⁰

Finally, the SEC's enforcement against the Massachusetts-based medical manufacturing company Alere Inc. ("Alere") involved, in part, the improper use of third parties.²⁴¹ In September 2017, the SEC settled accounting fraud and FCPA books and

²³⁴ Deferred Prosecution Agreement, *United States v. Sociedad Química y Minera de Chile, S.A.*, No. 17-CR-00013 (D.D.C. Jan. 13, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Química y Minera de Chile, S.A.*, Rel. No. 34-79795, File No. 3-17774 (Jan. 13, 2017).

²³⁵ Dylan Tokar, *DOJ accelerating FCPA monitor selection process*, GLOBAL INVESTIGATIONS REVIEW (Apr. 5, 2017).

²³⁶ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080, Attachment A ¶ 18 (D.D.C. Jan. 12, 2017).

²³⁷ Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080 (D.D.C. Jan. 12, 2017).

²³⁸ Deferred Prosecution Agreement, *United States v. Sociedad Química y Minera de Chile, S.A.*, No. 17-CR-00013 (D.D.C. Jan. 13, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Química y Minera de Chile, S.A.*, Rel. No. 34-79795, File No. 3-17774, ¶ 12 (Jan. 13, 2017).

²³⁹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Química y Minera de Chile, S.A.*, Rel. No. 34-79795, File No. 3-17774, ¶ 12 (Jan. 13, 2017).

²⁴⁰ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Orthofix Int'l N.V.*, Rel. No. 34-79828, File No. 3-17800, ¶ 15 (Jan. 18, 2017).

²⁴¹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alere Inc.*, Rel. No. 10417, File No. 3-18228 (Sep. 28, 2017).

records and internal controls violations charges with Alere. Without admitting or denying the findings, Alere agreed to pay disgorgement of ill-gotten gains and penalties totaling over \$13 million, including over \$3.3 million in disgorgement, almost half a million dollars in pre-judgment interest, and a \$9.2 million penalty. As to the FCPA charges, between 2011 to 2013, the SEC alleged that Alere's subsidiaries in India and Colombia improperly characterized or recorded payments in Alere's books and records.²⁴² Specifically, the SEC alleged that the Indian and Colombian subsidiaries received business by using distributors or consultants to make improper payments to government officials.²⁴³ According to the SEC, Alere failed to maintain adequate internal controls to prevent the payments, and the company inaccurately recorded the payments in its books and records.²⁴⁴ As part of the settlement, the SEC also alleged that Alere engaged in improper and premature revenue recognition for several of its international subsidiaries.²⁴⁵

a. *Aggressive Use of Internal Controls Provisions*

In addition to more run-of-the-mill cases involving third parties described above, SEC and DOJ brought actions against three companies in 2017—Cadbury Limited (“Cadbury”) and Mondelēz International, Inc (“Mondelēz”), and Las Vegas Sands—for violations of the internal controls provision in connection with third-party payments *absent* any evidence of bribery. In a particularly aggressive use of the internal controls provisions, the SEC and DOJ looked at whether these companies' practices and internal controls created merely a heightened risk of improper conduct.

In the case of Cadbury and Mondelēz, the SEC found that Cadbury's India subsidiary retained the services of a third-party agent to assist with securing necessary government licenses and approvals for certain facilities in India without conducting sufficient due diligence on the agent.²⁴⁶ Employees of the company paid nearly \$100,000 to the agent for services—such as completing the licensing applications—that

²⁴² Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alere Inc.*, Rel. No. 10417, File No. 3-18228, ¶ 4 (Sep. 28, 2017).

²⁴³ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alere Inc.*, Rel. No. 10417, File No. 3-18228, ¶¶ 61, 67-68 (Sep. 28, 2017).

²⁴⁴ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alere Inc.*, Rel. No. 10417, File No. 3-18228, ¶¶ 64, 67 (Sep. 28, 2017).

²⁴⁵ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alere Inc.*, Rel. No. 10417, File No. 3-18228, ¶¶ 3, 4, 15-16, 17-19, 20-21 (Sep. 28, 2017). One of the largest violations occurred at Standard Diagnostics, Alere's South Korean subsidiary. The SEC alleged that Standard Diagnostics improperly inflated revenues at or near the end of reporting periods. Standard Diagnostics did this by prematurely recording “early sales” for products that had not yet been delivered or were still being stored at warehouses. The improper revenue recognized from these “early sales” transactions ranged from \$25,000 to \$2 million, and this inflated revenue was included in Alere's SEC filings. As of the end of 2015, both the Standard Diagnostics Finance Director and Finance Manager were involved in the “early sales,” and they concealed this scheme in 2016 during an internal assessment conducted by Alere management. In addition to the scheme in South Korea, Alere allegedly engaged in other improper revenue recognition related to the timing of its reporting at its subsidiaries in Israel, South Africa, Ireland, and China, among other countries. When Alere revised and restated its revenue from 2011 through 2016, over \$260 million shifted to later reporting periods.

²⁴⁶ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cadbury Ltd.*, Rel. No. 34-79753, File No. 3-17759, ¶ 10 (Jan. 6, 2017).

the SEC later determined the employees completed themselves.²⁴⁷ Although the SEC did not allege that improper payments were provided to Indian government officials, the SEC cited to the fact that the company's failure to conduct due diligence "created the risk that funds paid to [the agent] could be used for improper or unauthorized purposes."²⁴⁸ Mondelēz—Cadbury's parent company—agreed to pay the SEC a total civil penalty of \$13 million to settle the matter.²⁴⁹

In Las Vegas Sands, the DOJ and SEC found that the company's executives knowingly and willfully failed to implement sufficient controls to ensure the legitimacy of nearly \$60 million in payments made to a business consultant for the purposes of promoting Las Vegas Sands' brand in Macau and the PRC.²⁵⁰ According to the DOJ, Las Vegas Sands' dealings with the consultant were undertaken "without appropriate due diligence of certain entities, consistent monitoring of or justifications for payments, and proper approvals and documentation, even after certain then-senior executives of [Las Vegas Sands] had been notified about the consultant's business practices and failure to account for over \$700,000."²⁵¹ Neither the DOJ nor the SEC presented any evidence that the payments to the consultant were used for improper purposes. Nonetheless, Las Vegas Sands settled charges with the DOJ and entered into an NPA, under which it paid a criminal penalty totaling \$6.96 million.²⁵² In an unusual delay, the DOJ action came some nine months after the company settled related charges with the SEC—Las Vegas Sands reached its SEC settlement in 2016, agreeing to pay a \$9 million penalty for "failing to properly authorize or document millions of dollars in payments" to the consultant facilitating business activities in the PRC and Macao.²⁵³ According to the SEC, the improper accounting for payments made to the consultant and the failure to conduct adequate due diligence were sufficient to violate the FCPA.

The actions in Cadbury, Mondelēz and Las Vegas Sands follow a line of reasoning that harkens back to a 2012 action against a technology company where the SEC charged the company with violating the books and records and internal accounting controls provisions of the FCPA for failing to prevent a subsidiary from secretly setting aside money and failing to accurately record off-the-books funds. In that case, while the SEC did not allege that the secret funds were in fact used for improper purposes, it alleged that the funds "created the potential" for bribery.

²⁴⁷ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cadbury Ltd.*, Rel. No. 34-79753, File No. 3-17759, ¶ 11 (Jan. 6, 2017).

²⁴⁸ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cadbury Ltd.*, Rel. No. 34-79753, File No. 3-17759, ¶ 13 (Jan. 6, 2017).

²⁴⁹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cadbury Ltd.*, Rel. No. 34-79753, File No. 3-17759, at 5 (Jan. 6, 2017).

²⁵⁰ Non-Prosecution Agreement between U.S. Department of Justice and Las Vegas Sands Corp., Attachment A ¶ 10 (Jan. 17, 2017), <https://www.justice.gov/opa/press-release/file/929836/download>.

²⁵¹ Non-Prosecution Agreement between U.S. Department of Justice and Las Vegas Sands Corp., at 2 (Jan. 17, 2017), <https://www.justice.gov/opa/press-release/file/929836/download>.

²⁵² Non-Prosecution Agreement between U.S. Department of Justice and Las Vegas Sands Corp., at 4 (Jan. 17, 2017), <https://www.justice.gov/opa/press-release/file/929836/download>.

²⁵³ U.S. Securities and Exchange Commission Press Release No. 2016-64: Las Vegas Sands Paying Penalty for FCPA Violations (Apr. 17, 2016).

C. Notable Aspects of Individual Resolutions

1. Continued Focus on Individual Accountability

a. *DOJ*

The DOJ continued to reiterate its focus on individual prosecutions in 2017, a priority that was re-emphasized in the September 2015 Yates Memorandum requiring, among other things, that companies provide the DOJ with “all relevant facts relating to the individuals responsible for the misconduct.”²⁵⁴ Prosecutors brought a high number of enforcement actions against individuals this year (19) and regulators continued to charge individuals long after the corporate settlement. In April 2017, then-Acting Principal Deputy Assistant Attorney General McFadden told attendees at a summit that “the department continues to prioritize prosecutions of individuals who have willfully and corruptly violated the FCPA” and that, more broadly, “Attorney General Sessions has noted the importance of individual accountability for corporate misconduct.”²⁵⁵ In October 2017, when speaking at a conference on white-collar crime, S.D.N.Y. Criminal Division Chief Lisa Zornberg touted her office’s record on individual FCPA prosecutions, in particular the recent conviction of Ng Lap Seng (discussed in Section III.C.1.a.ii below).²⁵⁶ Zornberg stated, “The southern district, I think at this point, has more convictions of FCPA violations than any district in the country,” adding that such work “is worth noting.”²⁵⁷ Also in October, McFadden again emphasized the DOJ’s focus on individual prosecutions, telling conference attendees, “This is something we’ve put a lot of focus into” and then referring to three recent successful corruption prosecutions: those of Mahmoud Thiam and Heon-Cheol Chi on money laundering charges and Ng Lap Seng on FCPA charges.²⁵⁸ These statements are in keeping with Attorney General Sessions’ own approach, which is that the DOJ “will continue to emphasize the importance of holding individuals accountable for corporate misconduct.”²⁵⁹

²⁵⁴ Sally Quillian Yates, Former Deputy Attorney General, U.S. Department of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download>.

²⁵⁵ Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, Remarks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>.

²⁵⁶ Adam Dobrik, SDNY Criminal Chief Touts Office’s FCPA Trial Record, GLOBAL INVESTIGATIONS REVIEW (Oct. 4, 2017), <http://globalinvestigationsreview.com/article/1148568/sdny-criminal-chief-touts-office-s-fcpa-trial-record>.

²⁵⁷ Adam Dobrik, SDNY Criminal Chief Touts Office’s FCPA Trial Record, GLOBAL INVESTIGATIONS REVIEW (Oct. 4, 2017), <http://globalinvestigationsreview.com/article/1148568/sdny-criminal-chief-touts-office-s-fcpa-trial-record>.

²⁵⁸ Waithera Junghae, Expect More Telia-Style Settlements, Says Senior DOJ Official, GLOBAL INVESTIGATIONS REVIEW (Oct. 10, 2017), <http://globalinvestigationsreview.com/article/1148713/expect-more-telia-style-settlements-says-senior-doj-official>; Dylan Tokar, After Years of Mixed Results, FCPA Prosecutors Bag Three Trial Victories, GLOB. INVESTIGATIONS REVIEW (Aug. 23, 2017), <http://globalinvestigationsreview.com/article/jac/1146590/after-years-of-mixed-results-fcpa-prosecutors-bag-three-trial-victories>.

²⁵⁹ Jeff Sessions, Attorney General, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>.

i. Individual Prosecutions in the Context of FCPA Enforcement Activity

Consistent with these proclamations, individual resolutions made up a large portion of the total FCPA resolutions in 2017. The DOJ charged 16 individuals with FCPA violations in 2017. In 2017, the DOJ also secured guilty pleas and convictions for seven individuals in cases where charges were filed before 2017 and/or involved non-FCPA charges. Looked at another way, however, of the six DOJ proceedings involving companies in 2017, only three also involved the prosecution of individuals.²⁶⁰ Given that there is often a delay between corporate resolutions and individual charges (almost a year and more than a year in the case of Rolls-Royce and Embraer, respectively), however, it is possible that individual charges relating to other corporate resolutions may be forthcoming in the future, including in cases resolved with declinations.²⁶¹ Further, in some cases, investigations by foreign authorities may be obviating the need for DOJ action.²⁶²

ii. Indictments, Pleas and Convictions²⁶³

In January 2017, the DOJ announced two guilty pleas as part of an ongoing investigation into bribery at Petr leos de Venezuela S.A. ("PDVSA"), Venezuela's state-

²⁶⁰ See U.S. Department of Justice Press Release No. 17-1275: Two Executives Plead Guilty to Role in Foreign Bribery Scheme (Nov. 9, 2017), <https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme>; U.S. Department of Justice Press Release No. 17-1253: Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>; U.S. Department of Justice Press Release No. 17-1476: Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017), <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>. It is possible that this number could change in the future as the DOJ's actions against individuals are often announced after the corporate resolution.

²⁶¹ The DOJ adhered to its standard practice and stated in its declinations issued for CDM Smith and Linde that each agreement did not protect against prosecution of individuals and both letters cited the corporations' provision of all known relevant facts about individuals as a factor in support of declination. U.S. Department of Justice Letter from Daniel Kahn to Nathaniel B. Edmonds, at 2 (June 21, 2017), <https://www.justice.gov/criminal-fraud/page/file/976976/download>; U.S. Department of Justice Letter from Jacob T. Elberg and Laura N. Perkins to Lucinda Low, Esq. and Thomas Best, Esq. re: Linde North America Inc., Linde Gas North America LLC, at 3 (June 16, 2017), <https://www.justice.gov/criminal-fraud/file/974516/download>.

²⁶² In the Telia matter, for example, Swedish authorities charged three former executives, including Telia's former CEO, with bribery. Dylan Tokar, *FCPA Docket: Sweden Charges Telia CEO with Bribery*, GLOBAL INVESTIGATIONS REVIEW (Sept. 25, 2017), <https://globalinvestigationsreview.com/article/jac/1147661/fcpa-docket-sweden-charges-telia-ceo-with-bribery>. At least two of these executives are foreign nationals, and, as such, might be more easily charged under Swedish statutes than under the FCPA. *Id.*

²⁶³ There is also one non-FCPA case that is worth noting in this context. In May 2017, Mahmoud Thiam was convicted of one count of transacting in criminally derived property and one count of money laundering, and in August he was sentenced to seven years in prison and three years of supervised release. U.S. Department of Justice Press Release No. 17-939: Former Guinean Minister of Mines Sentenced to Seven Years in Prison for Receiving and Laundering \$8.5 Million in Bribes From China International Fund and China Sonangol (Aug. 25, 2017), <https://www.justice.gov/opa/pr/former-guinean-minister-mines-sentenced-seven-years-prison-receiving-and-laundering-85>. When he was the Guinean minister of mines, Thiam accepted \$8.75 million in bribes from a Chinese company to secure mining rights in Guinea. *Id.* Thiam then laundered this money through the U.S. financial system. *Id.*

owned oil and gas company.²⁶⁴ Juan Jose Hernandez-Comerma and Charles Quintard Beech III both managed and owned closely held companies that attempted to secure contracts and conduct business with PDVSA.²⁶⁵ The DOJ alleged that they paid cash bribes and provided recreational travel and entertainment to PDVSA officials and purchasing analysts in return for assistance placing their companies on PDVSA bidding panels and assistance receiving payments for previously awarded contracts.²⁶⁶ Hernandez-Comerma pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA, while Beech pleaded guilty to one count of conspiracy to violate the FCPA.²⁶⁷ Their sentencings are scheduled to take place on February 8, 2018.²⁶⁸

Also in January 2017, the DOJ charged San Woo via complaint and unsealed the December 2016 indictment of Ban Ki Sang, Joo Hyun Bahn, and Malcom Harris, exposing an unusual FCPA conspiracy.²⁶⁹ The indictment alleges that Sang, an executive at a Korean construction company undergoing a liquidity crisis, convinced his company to hire Bahn, his son and a Manhattan real estate broker, to secure an investor to purchase a building in Hanoi owned by Sang's company.²⁷⁰ Harris, a blogger and consultant, pretended to be an agent of a foreign official and solicited bribes from Sang and Bahn.²⁷¹ In return for these bribes, which Harris pretended to pass on to the foreign official, Harris promised that the sovereign wealth fund of the foreign official's country would acquire the building in Hanoi.²⁷² Sang and Bahn agreed to pay \$500,000 upfront to the official and \$2 million upon the sale of the building, but Harris stole the \$500,000 and spent it on rent for a luxury apartment in New York and other expenses.²⁷³ Additionally, as the company's liquidity crisis worsened, Bahn allegedly lied to the company and its creditors about the status of the sale and forged

²⁶⁴ U.S. Department of Justice Press Release No. 17-025: Two Businessmen Plead Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme (Jan. 10, 2017), <https://www.justice.gov/opa/pr/two-businessmen-plead-guilty-foreign-bribery-charges-connection-venezuela-bribery-schemes>.

²⁶⁵ Information, *United States v. Hernandez-Comerma*, No. 17-CR-00005, ¶¶ 1-5 (S.D. Tex. Jan. 4, 2017); Information, *United States v. Beech*, No. 17-CR-00006, ¶¶ 1-4 (S.D. Tex. Jan. 4, 2017).

²⁶⁶ Information, *United States v. Hernandez-Comerma*, No. 17-CR-00005, ¶¶ 10-23 (S.D. Tex. Jan. 4, 2017); Information, *United States v. Beech*, No. 17-CR-00006, ¶¶ 6-13 (S.D. Tex. Jan. 4, 2017).

²⁶⁷ U.S. Department of Justice Press Release No. 17-025: Two Businessmen Plead Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme (Jan. 10, 2017), <https://www.justice.gov/opa/pr/two-businessmen-plead-guilty-foreign-bribery-charges-connection-venezuela-bribery-schemes>.

²⁶⁸ Sentencing Order, *United States v. Hernandez-Comerma*, No. 17-CR-00005, 1 (S.D. Tex. July 13, 2017); Sentencing Order, *United States v. Beech*, No. 17-CR-00006, 1 (S.D. Tex. July 13, 2017).

²⁶⁹ U.S. Department of Justice Press Release No. 17-029: Four Individuals Charged for Alleged Involvement in Foreign Bribery Scheme Involving \$800 Million International Real Estate Deal (Jan. 10, 2017), <https://www.justice.gov/opa/pr/four-individuals-charged-alleged-involvement-foreign-bribery-scheme-involving-800-million>.

²⁷⁰ Sealed Indictment, *United States v. Bahn*, No. 16-CR-00831-ER, ¶¶ 1-2 (S.D.N.Y. Dec. 15, 2016) (Indictment unsealed on Jan. 10, 2017, see Order to Unseal Indictment, ECF No. 3).

²⁷¹ Sealed Indictment, *United States v. Bahn*, No. 16-CR-00831-ER, ¶¶ 3, 7 (S.D.N.Y. Dec. 15, 2016) (Indictment unsealed on Jan. 10, 2017, see Order to Unseal Indictment, ECF No. 3).

²⁷² Sealed Indictment, *United States v. Bahn*, No. 16-CR-00831-ER, ¶¶ 3, 7 (S.D.N.Y. Dec. 15, 2016) (Indictment unsealed on Jan. 10, 2017, see Order to Unseal Indictment, ECF No. 3).

²⁷³ Sealed Indictment, *United States v. Bahn*, No. 16-CR-00831-ER, ¶¶ 3, 46 (S.D.N.Y. Dec. 15, 2016) (Indictment unsealed on Jan. 10, 2017, see Order to Unseal Indictment, ECF No. 3).

documents in support of his lies.²⁷⁴ Woo helped Sang and Bahn to obtain the \$500,000.²⁷⁵ Sang was charged with one count of conspiracy to violate the FCPA, three counts of violating the FCPA, and various other crimes.²⁷⁶ Bahn was charged with one count of conspiracy to violate the FCPA, three counts of violating the FCPA, and other crimes.²⁷⁷ Both men are awaiting trial.²⁷⁸ Harris who was charged with wire fraud, money laundering, and identity theft, pleaded guilty to the first two charges and was sentenced to 42 months in prison and ordered to pay forfeiture and restitution.²⁷⁹ Woo was charged with one count of conspiracy to violate the FCPA and is currently in settlement discussions with the government.²⁸⁰

In April and July 2017, the DOJ resolved the cases of three men who were involved in a bribery conspiracy centered on the United Nations (“U.N.”). Ng Lap Seng, the head of a Macau-based real estate development company, was convicted in July after a jury trial of two counts of violating the FCPA and various other charges.²⁸¹ The evidence established that he paid bribes to U.N. ambassadors to obtain the U.N.’s formal support for a multibillion dollar conference center that Seng hoped to build in Macau to host U.N. events.²⁸² He paid ambassadors and their family members through a business that he

²⁷⁴ Sealed Indictment, *United States v. Bahn*, No. 16-CR-00831-ER, ¶¶ 58, 60 (S.D.N.Y. Dec. 15, 2016) (Indictment unsealed on Jan. 10, 2017, see Order to Unseal Indictment, ECF No. 3).

²⁷⁵ Sealed Complaint, *United States v. Woo*, No. 17-MJ-00139-UA, ¶ 3(e) (S.D.N.Y. Jan. 10, 2017).

²⁷⁶ U.S. Department of Justice Press Release No. 17-029: Four Individuals Charged for Alleged Involvement in Foreign Bribery Scheme Involving \$800 Million International Real Estate Deal (Jan. 10, 2017), <https://www.justice.gov/opa/pr/four-individuals-charged-alleged-involvement-foreign-bribery-scheme-involving-800-million>.

²⁷⁷ U.S. Department of Justice Press Release No. 17-029: Four Individuals Charged for Alleged Involvement in Foreign Bribery Scheme Involving \$800 Million International Real Estate Deal (Jan. 10, 2017), <https://www.justice.gov/opa/pr/four-individuals-charged-alleged-involvement-foreign-bribery-scheme-involving-800-million>.

²⁷⁸ U.S. Department of Justice Press Release No. 17-1113: Middleman Who Lied About Being an Agent of a Foreign Official Sentenced to 3 ½ Years in Prison for Role in Foreign Bribery Scheme Involving \$800 Million International Real Estate Deal (Oct. 5, 2017), <https://www.justice.gov/opa/pr/middleman-who-lied-about-being-agent-foreign-official-sentenced-3-years-prison-role-foreign>.

²⁷⁹ U.S. Department of Justice Press Release No. 17-686: Middleman Pleads Guilty in Foreign Bribery and Fraud Scheme Involving Potential \$800 Million International Real Estate Deal (June 21, 2017), <https://www.justice.gov/opa/pr/middleman-pleads-guilty-foreign-bribery-and-fraud-scheme-involving-potential-800-million>; U.S. Department of Justice Press Release No. 17-1113: Middleman Who Lied About Being an Agent of a Foreign Official Sentenced to 3 ½ Years in Prison for Role in Foreign Bribery Scheme Involving \$800 Million International Real Estate Deal (Oct. 5, 2017), <https://www.justice.gov/opa/pr/middleman-who-lied-about-being-agent-foreign-official-sentenced-3-years-prison-role-foreign>; Consent Preliminary Order of Forfeiture/Money Judgment, *United States v. Harris*, No. 16-CR-00831-ER, 3 (S.D.N.Y. June 23, 2017); Order of Restitution, *United States v. Harris*, No. 16-CR-00831-ER, ¶ 1 (S.D.N.Y. Oct. 6, 2017).

²⁸⁰ Sealed Complaint, *United States v. Woo*, No. 17-MJ-00139-UA, ¶ 1 (S.D.N.Y. Jan. 10, 2017); Affirmation in Support of Application for Order of Continuance, *United States v. Woo*, No. 17-MJ-00139-UA, ¶ 6 (S.D.N.Y. Apr. 12, 2017).

²⁸¹ U.S. Department of Justice Press Release No. 17-849: Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center (July 28, 2017), <https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-role-scheme-bribe-united>.

²⁸² U.S. Department of Justice Press Release No. 17-849: Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center (July 28, 2017), <https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-role-scheme-bribe-united>.

established and with cash and wire transfers.²⁸³ In return for his bribes, the U.N. ambassadors submitted a document to the U.N. Secretary General in support of the conference center and later revised it to refer specifically to Seng's company as a partner.²⁸⁴ Seng orchestrated the scheme with Jeff Yin, an accountant and Seng's assistant.²⁸⁵ Yin pleaded guilty in April to conspiracy to defraud the United States along with Francis Lorenzo, the U.N. Ambassador from the Dominican Republic, who was one of the recipients of Seng's bribes and who pleaded guilty to conspiracy to violate the FCPA, substantive violations of the FCPA, and other charges.²⁸⁶ Seng, Yin, and Lorenzo will be sentenced in early 2018.²⁸⁷ Three other defendants were charged in connection with this matter: one passed away while the case was pending, and the other two pleaded guilty with one being sentenced to 20 months in prison.²⁸⁸

The government's victory in the Seng trial is noteworthy because it is the DOJ's first victory in court in an FCPA case since 2011.²⁸⁹ The DOJ's previous four attempts ended in disaster: one with the DOJ offering a plea to a reduced charged after a witness admitted giving false testimony; another with the trial judge dismissing the FCPA charges (and later dismissing all charges with prejudice) and expressing skepticism about the government's evidence; another with the dismissal of all charges after two

²⁸³ U.S. Department of Justice Press Release No. 17-849: Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center (July 28, 2017), <https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-role-scheme-bribe-united>.

²⁸⁴ U.S. Department of Justice Press Release No. 17-849: Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center (July 28, 2017), <https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-role-scheme-bribe-united>.

²⁸⁵ U.S. Department of Justice Press Release No. 17-849: Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center (July 28, 2017), <https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-role-scheme-bribe-united>; Superseding Indictment, *United States v. Seng*, No. 15-CR-00706-VSB, ¶ 8 (S.D.N.Y. Nov. 22, 2016).

²⁸⁶ Apr. 7, 2017, Docket Entry, *United States v. Ashe*, No. 15-CR-00706-VSB (S.D.N.Y.); Apr. 27, 2017, Docket Entry, *United States v. Ashe*, No. 15-CR-00706-VSB (S.D.N.Y.).

²⁸⁷ Aug. 10, 2017, Docket Entry, *United States v. Ashe*, No. 15-CR-00706-VSB (S.D.N.Y.); Aug. 17, 2017, Docket Entry, *United States v. Ashe*, No. 15-CR-00706-VSB (S.D.N.Y.); Oct. 5, 2017, Docket Entry, *United States v. Ashe*, No. 15-CR-00706-VSB (S.D.N.Y.); Nov. 3, 2017, Docket Entry, *United States v. Ashe*, No. 15-CR-00706-VSB (S.D.N.Y.).

²⁸⁸ U.S. Department of Justice Press Release No. 17-849: Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center (July 28, 2017), <https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-role-scheme-bribe-united>.

²⁸⁹ WilmerHale, *Anti-Corruption Enforcement Developments: 2011 Year-in-Review and 2012 Preview*, (Jan. 18, 2012), https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Anti-Corruption%20Enforcement%20Developments_2011%20Year-in-Review%20and%202012%20Preview.pdf.

mistrials; and another with the trial judge vacating all convictions and dismissing the indictment for prosecutorial misconduct.²⁹⁰

Compared with these four cases, the meaning of the DOJ's victory in the Seng case is not immediately clear. It could show either that the DOJ has learned from its previous difficulties in individual FCPA prosecutions and will be able to apply these lessons in the future, or it could be the exceptional case that the DOJ was able to win but not one that says anything about the DOJ's ability to prevail in future individual prosecutions. Only time and more cases will tell.²⁹¹

In September 2017, Amadeus Richers, the former director of two Florida telecommunications companies who managed the companies' relationship with a state-owned Haitian telecommunications company ("Haiti Teleco"), pleaded guilty to one count of conspiracy to violate the FCPA and was sentenced to time served plus three years of supervised release.²⁹² In addition to the crime to which he pleaded guilty, Richers was charged with substantive FCPA violations and non-FCPA crimes.²⁹³ His plea was part of a wide-ranging investigation into bribes paid by Florida telecommunications companies to officials at Haiti Teleco.²⁹⁴ The other defendants were both businessmen and Haitian government officials and their cases had a variety

²⁹⁰ Joel Schectman, *Ex-CEO Sigelman of PetroTiger Sentenced to Probation Over Bribery*, WALL ST. J. (June 16, 2015), <https://www.wsj.com/articles/ex-ceo-of-petrotiger-sentenced-to-probation-over-bribery-1434469990>; WilmerHale, *FCPA Year in-Review: Developments of 2012 and Predictions for 2013* (Jan. 31, 2013), https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/FCPA_Year_End_Letter_2012.pdf; Samuel Rubinfeld, *U.S. Drops Appeal in Lindsey Manufacturing FCPA Case*, WALL ST. J. (May 29, 2012), <https://blogs.wsj.com/corruption-currents/2012/05/29/u-s-drops-appeal-in-lindsey-manufacturing-fcpa-case/>; Christopher M. Matthews, *Government Drops High-Profile FCPA Sting Case*, WALL ST. J. (Feb. 21, 2012), <https://blogs.wsj.com/corruption-currents/2012/02/21/government-drops-high-profile-fcpa-sting-case/>.

²⁹¹ It appears that the DOJ's string of failures was partly the result of one-off issues, such as prosecutorial misconduct, and partly the result of other issues, such as unreliable witnesses and the necessity of relying on broad theories of conspiracy to charge defendants, that may be inherent in FCPA cases. See Joel Schectman, *Ex-CEO Sigelman of PetroTiger Sentenced to Probation Over Bribery*, WALL ST. J. (June 16, 2015), <https://www.wsj.com/articles/ex-ceo-of-petrotiger-sentenced-to-probation-over-bribery-1434469990>; WilmerHale, *FCPA Year in-Review: Developments of 2012 and Predictions for 2013* (Jan. 31, 2013), https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/FCPA_Year_End_Letter_2012.pdf; Samuel Rubinfeld, *U.S. Drops Appeal in Lindsey Manufacturing FCPA Case*, WALL ST. J. (May 29, 2012), <https://blogs.wsj.com/corruption-currents/2012/05/29/u-s-drops-appeal-in-lindsey-manufacturing-fcpa-case/>; Christopher M. Matthews, *Government Drops High-Profile FCPA Sting Case*, WALL ST. J. (Feb. 21, 2012), <https://blogs.wsj.com/corruption-currents/2012/02/21/government-drops-high-profile-fcpa-sting-case/>; see also Leslie Wayne, *Bribery Case Falls Apart, and Tactics Are Doubted*, N.Y. TIMES (Feb. 23, 2012), <http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html>. It does not appear that any of these issues were present in the Seng prosecution, although the Court of Appeals has not yet weighed in on his conviction.

²⁹² Second Superseding Indictment, *United States v. Vasconez Cruz*, No. 09-21010-CR-JEM, ¶¶ 9-10 (S.D. Fla. Jan. 19, 2012); Judgment, *United States v. Richers*, No. 09-21010-CR-JEM, 1-3 (S.D. Fla. Sept. 27, 2017).

²⁹³ Second Superseding Indictment, *United States v. Vasconez Cruz*, No. 09-21010-CR-JEM, 9-29, 32-35 (S.D. Fla. Jan. 19, 2012).

²⁹⁴ U.S. Department of Justice Press Release No. 11-1407: Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), <https://www.justice.gov/opa/pr/executive-sentenced-15-years-prison-scheme-bribe-officials-state-owned-telecommunications>.

of outcomes, with some pleading guilty and others being convicted after trial.²⁹⁵ Interestingly, Richers, who was a fugitive, served a little over two years in prison (approximately eight months in the United States and 48 months in Panama before his extradition) while the other individuals, Joel Esquenazi and Carlos Rodriguez, were sentenced to 15 and seven years in prison, respectively, in 2011. U.S. District Judge Jose E. Martinez sentenced all three defendants.

In October 2017, Joseph Baptiste was indicted on and pleaded not guilty to one count of conspiracy to violate the FCPA and other charges.²⁹⁶ The indictment alleged that Baptiste, who was a U.S. Army colonel, dentist, and a director of a nonprofit and a for-profit company, had solicited bribes from undercover FBI agents.²⁹⁷ The agents were posing as potential investors in the development of a port in Haiti, a project that would begin with the construction of a cement factory.²⁹⁸ Baptiste offered to funnel payments to Haitian officials through his nonprofit and also mentioned bribing an aide to a Haitian official by offering him a job on the port project.²⁹⁹

Also in October 2017, Fernando Ardila Rueda (“Ardila”) pleaded guilty to one count of conspiring to violate the FCPA and one count of violating the FCPA.³⁰⁰ Like Hernandez and Beech, Ardila’s plea arose out of the PDVSA investigation.³⁰¹ Ardila was the sales director, manager, and partial owner of companies bidding for contracts with PDVSA and paid bribes so that his companies would be placed on PDVSA bidding panels and to retain business with PDVSA.³⁰² He is the tenth individual to plead guilty in connection with this investigation.³⁰³ His sentencing is scheduled for February 2018.³⁰⁴

²⁹⁵ U.S. Department of Justice Press Release No. 17-798: Telecom Executive Pleads Guilty to FCPA Charge in Connection With Haitian Bribery Scheme (July 19, 2017), <https://www.justice.gov/opa/pr/telecom-executive-pleads-guilty-fcpa-charge-connection-haitian-bribery-scheme>.

²⁹⁶ U.S. Department of Justice Press Release No. 17-1109: Retired U.S. Army Colonel Indicted for Conspiring to Bribe Senior Government Officials of the Republic of Haiti (Oct. 4, 2017), <https://www.justice.gov/opa/pr/retired-us-army-colonel-indicted-conspiring-bribe-senior-government-officials-republic-haiti>.

²⁹⁷ Indictment, *United States v. Baptiste*, No. 17-CR-10305-ADB, ¶¶ 1, 9 (D. Mass. Oct. 4, 2017).

²⁹⁸ Indictment, *United States v. Baptiste*, No. 17-CR-10305-ADB, ¶ 9 (D. Mass. Oct. 4, 2017).

²⁹⁹ Indictment, *United States v. Baptiste*, No. 17-CR-10305-ADB, ¶¶ 9, 11(g) (D. Mass. Oct. 4, 2017).

³⁰⁰ U.S. Department of Justice Press Release No. 17-1138: Florida Businessman Pleads Guilty to Foreign Bribery Charges in Connection With Venezuela Bribery Scheme (Oct. 11, 2017), <https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreign-bribery-charges-connection-venezuela-bribery-scheme>.

³⁰¹ U.S. Department of Justice Press Release No. 17-1138: Florida Businessman Pleads Guilty to Foreign Bribery Charges in Connection With Venezuela Bribery Scheme (Oct. 11, 2017), <https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreign-bribery-charges-connection-venezuela-bribery-scheme>.

³⁰² Indictment, *United States v. Ardila-Rueda*, No. 17-CR-00515, ¶¶ 4, 9, 16-22 (S.D. Tex. Aug. 24, 2017).

³⁰³ U.S. Department of Justice Press Release No. 17-1138: Florida Businessman Pleads Guilty to Foreign Bribery Charges in Connection With Venezuela Bribery Scheme (Oct. 11, 2017), <https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreign-bribery-charges-connection-venezuela-bribery-scheme>.

³⁰⁴ U.S. Department of Justice Press Release No. 17-1138: Florida Businessman Pleads Guilty to Foreign Bribery Charges in Connection With Venezuela Bribery Scheme (Oct. 11, 2017), <https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreign-bribery-charges-connection-venezuela-bribery-scheme>.

In November 2017, the DOJ unsealed four informations with their corresponding guilty pleas and one indictment related to an investigation of Rolls-Royce payments in Asia.³⁰⁵ The conduct at issue involved improper payments to win equipment and services contracts with Asia Gas Pipeline, a state-owned joint venture between the Kazakh and Chinese oil and gas companies that was developing a gas pipeline between Kazakhstan and China.³⁰⁶ According to the papers filed by the DOJ, the individual defendants devised a scheme in which they would make payments to employees at an engineering consulting firm, who would then pass on part of the payments to foreign officials.³⁰⁷ The payments were booked as legitimate payments to Gravitass, a third-party agent and advisor on oil and gas projects.³⁰⁸ The five defendants are Petros Contogouris, the CEO of Gravitass, who was charged with one count of conspiracy to violate the FCPA, one count of conspiracy to launder money, seven counts of violating the FCPA, and 10 counts of money laundering. Contogouris pleaded not guilty and is currently a fugitive; James Finley, a former senior energy executive at Rolls-Royce who pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA; Aloysius Johannes Jozef Zuurhout, an energy sales employee at Rolls-Royce who pleaded guilty to one count of conspiracy to violate the FCPA; Andreas Kohler, a managing director at the engineering consulting firm who pleaded guilty to one count of conspiracy to violate the FCPA; and Keith Barnett, a regional director in energy at Rolls-Royce who pleaded guilty to one count of conspiracy to violate the FCPA.³⁰⁹ As part of their plea, Finley, Barnett, and Zuurhout admitted that they participated in a conspiracy to funnel bribes through third parties around the world.³¹⁰ As discussed in

³⁰⁵ U.S. Department of Justice Press Release No. 17-1253: Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>.

³⁰⁶ Indictment, *United States v. Contogouris*, No. 17-CR-00233-EAS, ¶ 18 U.S. Department of Justice Press Release No. 17-1253: Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>.

³⁰⁷ U.S. Department of Justice Press Release No. 17-1253: Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>.

³⁰⁸ U.S. Department of Justice Press Release No. 17-1253: Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>.

³⁰⁹ U.S. Department of Justice Press Release No. 17-1253: Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>.

³¹⁰ U.S. Department of Justice Press Release No. 17-1253: Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>.

Section III.B.2.c.i above, Rolls-Royce previously reached a coordinated settlement with anti-corruption authorities in Brazil, the United Kingdom, and the United States.³¹¹

Also in November 2017, two former executives at Dutch oil services company SBM and its U.S. subsidiary each pleaded guilty to one count of conspiracy to violate the FCPA.³¹²

Robert Zubiato was a sales and marketing executive at one of SBM's U.S. subsidiaries.³¹³ He admitted to using a third-party sales agent to pay bribes to officials at the Brazilian state-owned oil company in exchange for the agent's assistance with winning bids.³¹⁴ He also engaged in a kickback scheme with the same agent in which the agent paid Zubiato a portion of the commissions that the agent received from SBM.³¹⁵ When Anthony Mace became SBM's CEO in 2008, he joined in a long-running conspiracy in which employees and executives at SBM and its U.S. subsidiaries paid bribes to foreign officials, including those affiliated with the state-owned oil companies of Brazil, Angola, and Equatorial Guinea.³¹⁶ As CEO, Mace authorized payments in furtherance of the scheme and avoided learning that these payments were bribes despite his knowledge of risk factors surrounding the recipients of the payments and the way that the payments were made.³¹⁷ Zubiato's and Mace's sentencings are scheduled for early 2018.³¹⁸

In November 2017, the DOJ unsealed a complaint charging Chi Ping Patrick Ho and Cheikh Gadio with multiple counts of conspiracy to violate the FCPA, substantive violations of the FCPA, conspiring to commit international money laundering, and

³¹¹ U.S. Department of Justice Press Release No. 17-1253: Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>.

³¹² U.S. Department of Justice Press Release No. 17-1275: Two Executives Plead Guilty to Role in Foreign Bribery Scheme (Nov. 9, 2017), <https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme>. The DOJ settled with SBM on November 29, 2017. U.S. Department of Justice Press Release No. 17-1348: SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017), <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>.

³¹³ U.S. Department of Justice Press Release No. 17-1275: Two Executives Plead Guilty to Role in Foreign Bribery Scheme (Nov. 9, 2017), <https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme>.

³¹⁴ U.S. Department of Justice Press Release No. 17-1275: Two Executives Plead Guilty to Role in Foreign Bribery Scheme (Nov. 9, 2017), <https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme>.

³¹⁵ Information, *United States v. Zubiato*, No. 17-CR-00591, ¶ 15 (S.D. Tex. Oct. 6, 2017).

³¹⁶ U.S. Department of Justice Press Release No. 17-1275: Two Executives Plead Guilty to Role in Foreign Bribery Scheme (Nov. 9, 2017), <https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme>.

³¹⁷ U.S. Department of Justice Press Release No. 17-1275: Two Executives Plead Guilty to Role in Foreign Bribery Scheme (Nov. 9, 2017), <https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme>.

³¹⁸ Rearraignment Form, *United States v. Mace*, No. 17-CR-00618, 1 (S.D. Tex. Nov. 9, 2017); Order for Presentence Investigation and Disclosure & Sentencing Dates, *United States v. Zubiato*, No. 17-CR-00591, 1 (S.D. Tex. Nov. 6, 2017).

international money laundering.³¹⁹ The complaint alleged two separate schemes to bribe African government officials to secure business advantages for an unnamed multibillion-dollar energy company, which has its headquarters in Shanghai and operates globally in the financial and energy industries.³²⁰ Ho was the head of an NGO based in Hong Kong and Virginia that holds “Special Consultative Status” with the U.N. and is funded by the unnamed energy company, while Gadio is the former foreign minister of Senegal and the head of an international consulting firm.³²¹ In the first scheme, the DOJ alleged that Ho caused the unnamed energy company to offer a \$2 million bribe to the president of Chad, who, in return, gave the energy company the opportunity to obtain oil rights without international competition.³²² Gadio allegedly connected the President of Chad and Ho and gave the bribe to the president.³²³ In return for his assistance, Ho paid Gadio \$400,000.³²⁴

In the second scheme, Ho paid \$500,000 via wire transfer to the Ugandan Minister of Foreign affairs (who had recently completed a term as president of the U.N. General Assembly).³²⁵ In exchange for the minister’s assistance obtaining business advantages for the unnamed energy company, Ho also provided the same minister and the Ugandan president with gifts and promises of future benefits.³²⁶

³¹⁹ U.S. Department of Justice Press Release No. 17-1315: Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged With Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>.

³²⁰ U.S. Department of Justice Press Release No. 17-1315: Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged With Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>.

³²¹ U.S. Department of Justice Press Release No. 17-1315: Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged With Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>. “Special Consultative Status” means that the NGO can participate in many UN-sponsored events and in return is expected to contribute to the UN’s goals. Complaint, *United States v. Ho*, No. 17-MAG-8611, 12 n.4 (S.D.N.Y. Nov. 16, 2017).

³²² U.S. Department of Justice Press Release No. 17-1315: Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged With Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>.

³²³ U.S. Department of Justice Press Release No. 17-1315: Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged With Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>.

³²⁴ U.S. Department of Justice Press Release No. 17-1315: Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged With Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>.

³²⁵ U.S. Department of Justice Press Release No. 17-1315: Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged With Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>.

³²⁶ U.S. Department of Justice Press Release No. 17-1315: Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged With Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>.

In December 2017, Colin Steven, a former vice president of sales and marketing at Embraer, the Brazilian aircraft manufacturer, pleaded guilty to one count of violating the FCPA, one count of conspiracy to violate the FCPA, and five related counts.³²⁷ In so pleading, Steven admitted to misconduct that occurred in connection with negotiations between Embraer and Saudi Arabia's national oil company over a sale of aircraft.³²⁸ During the negotiations, Steven and a Saudi official agreed that the Saudi national oil company would award a contract to Embraer for new, instead of used, aircraft, and that, in return, Embraer would pay approximately \$1.5 million in bribes.³²⁹ Steven also admitted to disguising the bribes as commissions to a separate company, receiving part of the bribes as a kickback, and lying to law enforcement about the kickback.³³⁰

At the end of December 2017, at the same time the DOJ announced its resolution with Keppel, the DOJ unsealed charges against a former senior lawyer at Keppel.³³¹ The attorney, Jeffrey Chow, pleaded guilty in August 2017 to one count of conspiracy to violate the FCPA.³³² Chow, who was employed in Keppel's legal department from 1990 to 2017, admitted to drafting and executing contracts to conceal bribery payments to officials at Petrobras, Brazil's state-owned oil company.³³³ The contracts, which were between Keppel and consulting companies controlled by a third-party agent, appeared to compensate the agent for his assistance in discussions with prospective customers.³³⁴ In reality, a portion of these payments were funneled as bribes to Petrobras officials.³³⁵ As part of his plea, Chow agreed to cooperate with prosecutors in their investigation of Keppel and former Keppel executives.³³⁶ During his plea hearing,

³²⁷ U.S. Department of Justice Press Release: Former Embraer Sales Executive Pleads Guilty to Foreign Bribery and Related Charges (Dec. 21, 2017), <https://www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges>.

³²⁸ U.S. Department of Justice Press Release: Former Embraer Sales Executive Pleads Guilty to Foreign Bribery and Related Charges (Dec. 21, 2017), <https://www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges>.

³²⁹ U.S. Department of Justice Press Release: Former Embraer Sales Executive Pleads Guilty to Foreign Bribery and Related Charges (Dec. 21, 2017), <https://www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges>.

³³⁰ U.S. Department of Justice Press Release: Former Embraer Sales Executive Pleads Guilty to Foreign Bribery and Related Charges (Dec. 21, 2017), <https://www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges>.

³³¹ U.S. Department of Justice Press Release No. 17-1476: Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017), <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>.

³³² U.S. Department of Justice Press Release No. 17-1476: Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017), <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>; Information, *United States v. Chow*, No. 17-CR-00466-KAM, 1 (E.D.N.Y., Aug. 29, 2017).

³³³ Information, *United States v. Chow*, No. 17-CR-00466-KAM, 1-4 (E.D.N.Y., Aug. 29, 2017).

³³⁴ Information, *United States v. Chow*, No. 17-CR-00466-KAM, 4 (E.D.N.Y., Aug. 29, 2017).

³³⁵ Information, *United States v. Chow*, No. 17-CR-00466-KAM, 4 (E.D.N.Y., Aug. 29, 2017).

³³⁶ Nate Raymond, *Ex-Keppel Lawyer Cooperated with U.S. in Brazil Bribery Probe: Documents*, REUTERS (Dec. 29, 2017), <https://www.reuters.com/article/us-keppel-corp-settlement-lawyer/ex-keppel-lawyer-cooperated-with-u-s-in-brazil-bribery-probe-documents-idUSKBN1EL1C1>.

Chow apologized for his conduct and said, “I should have refused to draft the contract that we used for paying bribes and I should have resigned from Keppel.”³³⁷

iii. Sentencing Trends

Several defendants whose cases were resolved in prior years were sentenced in 2017.³³⁸ Five of the six defendants who pleaded guilty to bribing Mexican officials to secure aviation maintenance and repair contracts were sentenced in 2017. The defendants, a mixture of business people at U.S. companies seeking the contracts and Mexican government officials, received sentences ranging from probation to two years in prison, in addition to forfeiture and restitution for some.³³⁹ Samuel Mebiame, who was a consultant to Och-Ziff and allegedly paid bribes on its behalf, was sentenced to two years in prison.³⁴⁰ Finally, Frederic Pierucci, a former executive at Alstom, was sentenced to 30 months in prison and a \$20,000 fine.³⁴¹

Although these sentences are all relatively short, it is otherwise difficult to draw broad conclusions about FCPA sentencing practices based on the sentences that judges imposed in 2017.

b. SEC Individual Resolutions

Like the DOJ, the SEC, through its new chair, has affirmed the importance of individual accountability in FCPA resolutions. SEC Chairman Jay Clayton, speaking at a panel, stated that “individual liability” is “extremely important” to him personally.³⁴² Clayton also suggested that the SEC’s overall approach would not change, implying that the

³³⁷ Nate Raymond, *Ex-Keppel Lawyer Cooperated with U.S. in Brazil Bribery Probe: Documents*, REUTERS (Dec. 29, 2017), <https://www.reuters.com/article/us-keppel-corp-settlement-lawyer/ex-keppel-lawyer-cooperated-with-u-s-in-brazil-bribery-probe-documents-idUSKBN1EL1C1>.

³³⁸ The Mexican aviation defendants and Samuel Mebiame pleaded guilty in 2016. WilmerHale, *Global Anti-Bribery Year-in-Review: 2016 Developments and Predictions for 2017* (Feb. 7, 2017), https://auth.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2017-02-07-fcpa-year-in-review.pdf. Judgment, *United States v. Ray*, No. 16-CR-00409, 1 (S.D. Tex. Apr. 17, 2017). Frederic Pierucci pleaded guilty in 2013. U.S. Department of Justice Press Release No. 14-752: Former Executive of French Power Company Subsidiary Pleads Guilty in Connection with Foreign Bribery Scheme (July 17, 2014), <https://www.justice.gov/opa/pr/former-executive-french-power-company-subsidiary-pleads-guilty-connection-foreign-bribery>.

³³⁹ Judgment, *United States v. Hernandez-Montemayor*, No. 15-CR-00617, 2 (S.D. Tex. Jan. 23, 2017); Order Amending Preliminary Order of Forfeiture To Include Substitute Assets, *United States v. Hernandez-Montemayor*, No. 15-CR-00617, 1 (S.D. Tex. Jan. 12, 2017); Sentencing Form, *United States v. Perez*, No. 16-CR-01164, 1 (S.D. Tex. Feb. 2, 2017); Judgment, *United States v. Valdez Pinon*, No. 16-CR-00409, 2, 5 (S.D. Tex. Mar. 3, 2017); Preliminary Order of Forfeiture, *United States v. Valdez Pinon*, No. 16-CR-00409, 1 (S.D. Tex. Feb. 27, 2017); Sentencing Form, *United States v. Ramnarine*, No. 16-CR-01164, 1 (S.D. Tex. Feb. 2, 2017); Judgment, *United States v. Ray*, No. 16-CR-00409, 2, 5 (S.D. Tex. Apr. 17, 2017); Preliminary Order of Forfeiture, *United States v. Ray*, No. 16-CR-00409, 1 (S.D. Tex. Apr. 3, 2017).

³⁴⁰ Judgment, *United States v. Mebiame*, No. 16-CR-00627, 2 (E.D.N.Y. June 14, 2017).

³⁴¹ Sentencing Form, *United States v. Pierucci*, No. 12-CR-00238-JBA, 1 (D. Conn. Sept. 25, 2017).

³⁴² Dylan Tokar, *SEC Chair Says Individual Accountability is a Priority*, GLOBAL INVESTIGATIONS REVIEW (Sept. 6, 2017), <http://globalinvestigationsreview.com/article/1147142/sec-chair-says-individual-accountability-is-a-priority>.

SEC will continue to treat FCPA cases under the Trump administration as it has done in the past.³⁴³

Of the six individuals the SEC charged or reached resolutions with in 2017, only one is a U.S. citizen (and he has dual citizenship with the United Kingdom), one is a U.S. permanent resident, while the other four are citizens of other countries.³⁴⁴

The SEC's complaints and settlements with individuals in FCPA cases were all linked to prior or contemporaneous resolutions with companies. Six of the SEC's seven FCPA resolutions as of November 9, 2017, did not involve related actions against individuals.

In February and March 2017, three Magyar Telekom executives reached out-of-court settlements with the SEC.³⁴⁵ Elek Straub, the former CEO of Magyar Telekom, agreed to a \$250,000 fine and a five-year officer/director bar.³⁴⁶ Andras Balogh, the former chief strategy officer, paid a \$150,000 fine and agreed to a five-year officer/director bar.³⁴⁷ And Tamas Morvai, the former director of business development and acquisitions, paid a \$60,000 fine.³⁴⁸ During their time at Magyar Telekom, the company allegedly bribed Macedonian and Montenegrin authorities to secure competitive and regulatory advantages in those markets.³⁴⁹ Magyar Telekom previously settled charges arising from this conduct.³⁵⁰ All three executives were charged with violating the FCPA's anti-bribery provisions, aiding and abetting Magyar Telekom's violations of the anti-bribery provisions, aiding and abetting Magyar Telekom's violations of the FCPA's books and records and internal controls provisions, falsifying books and records, and making misleading statements to an auditor.³⁵¹

In May 2017, the SEC filed an amended complaint against Michael Cohen, a former Och-Ziff Partner and Head of its European Office, and Vanja Baros, a former Och-Ziff analyst.³⁵² The complaint alleges their involvement in numerous instances of bribery connected with Och-Ziff's investments in many African countries: Libya, Chad, Niger, Guinea, and the Democratic Republic of Congo.³⁵³ Both men also allegedly helped to

³⁴³ Dylan Tokar, *SEC Chair Says Individual Accountability is a Priority*, GLOBAL INVESTIGATIONS REVIEW (Sept. 6, 2017), <http://globalinvestigationsreview.com/article/1147142/sec-chair-says-individual-accountability-is-a-priority>.

³⁴⁴ Michael Cohen is a dual citizen of the United States and the United Kingdom, Jeannot Lorenz is a U.S. lawful permanent resident, Vanya Baros is an Australian citizen, and Elek Straub, Andras Balogh, and Tamas Morvai are Hungarian citizens.

³⁴⁵ U.S. Securities and Exchange Commission Press Release No. 2017-81: Telecom Executives Agree to Pay Penalties for FCPA Violations (Apr. 24, 2017), <https://www.sec.gov/news/press-release/2017-81>.

³⁴⁶ U.S. Securities and Exchange Commission Press Release No. 2017-81: Telecom Executives Agree to Pay Penalties for FCPA Violations (Apr. 24, 2017), <https://www.sec.gov/news/press-release/2017-81>.

³⁴⁷ U.S. Securities and Exchange Commission Press Release No. 2017-81: Telecom Executives Agree to Pay Penalties for FCPA Violations (Apr. 24, 2017), <https://www.sec.gov/news/press-release/2017-81>.

³⁴⁸ U.S. Securities and Exchange Commission Press Release No. 2017-81: Telecom Executives Agree to Pay Penalties for FCPA Violations (Apr. 24, 2017), <https://www.sec.gov/news/press-release/2017-81>.

³⁴⁹ Complaint, *SEC v. Straub*, No. 11-CIV-9645-RDS, ¶¶ 2-4 (Dec. 28, 2011).

³⁵⁰ U.S. Securities and Exchange Commission Press Release No. 2017-81: Telecom Executives Agree to Pay Penalties for FCPA Violations (Apr. 24, 2017), <https://www.sec.gov/news/press-release/2017-81>.

³⁵¹ Complaint, *SEC v. Straub*, No. 11-CIV-9645-RDS, ¶¶ 71-87 (Dec. 28, 2011).

³⁵² Amended Complaint, *SEC v. Cohen*, No. 17-CV-00430-NGG-LB, ¶¶ 17-18 (May 29, 2017).

³⁵³ Amended Complaint, *SEC v. Cohen*, No. 17-CV-00430-NGG-LB, ¶¶ 1-7 (May 29, 2017).

cover up the problematic conduct, Baros by directing the deletion of an incriminating section of an audit report.³⁵⁴ The SEC charged them with numerous violations of the FCPA as well as aiding and abetting Och-Ziff's violations of the FCPA and the Investment Advisers' Act.³⁵⁵ Litigation in this matter is ongoing and is covered in more detail in Section IV.D below.

In July 2017, the SEC entered into a cease-and-desist order with Halliburton and Halliburton vice president Jeannot Lorenz.³⁵⁶ The SEC found that Lorenz had caused Halliburton's violations of the FCPA's books and records and internal controls provisions; circumvented Halliburton's internal accounting controls; and falsified Halliburton's books and records.³⁵⁷ As a result, Lorenz paid a \$75,000 fine while Halliburton paid \$29.2 million.³⁵⁸ According to the SEC, after being told by the Angolan government that Halliburton was required to work with more Angolan-owned firms, Lorenz took steps to retain an Angolan company owned by a former Halliburton employee who was also a friend of the official at Angola's state-owned oil company and who was responsible for approving contracts.³⁵⁹ The SEC found that the contract was intended to satisfy the Angolan government's requirements about local contracting rather than to satisfy a particular scope of work.³⁶⁰ In addition, Lorenz had chosen the company before choosing the services it would provide, failed to conduct independent bidding, and did not have the contract reviewed by a special committee—all violations of Halliburton's internal controls.³⁶¹

IV. KEY FCPA LEGAL DEVELOPMENTS AND OBSERVATIONS

A. Kokesh v. SEC

On June 5, 2017, the Supreme Court's unanimous ruling in *Kokesh v. SEC* resolved a circuit split when it decided that disgorgement in SEC enforcement actions is subject to 28 U.S.C. § 2462, which imposes a five-year limitation on any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."³⁶² The Court concluded that, because disgorgement in SEC cases operates as punishment for violations of public laws rather than compensation for private wrongs, the disgorgement sanction "bears all the hallmarks of a penalty."³⁶³ This was the

³⁵⁴ Amended Complaint, *SEC v. Cohen*, No. 17-CV-00430-NGG-LB, ¶¶ 142-44 (May 29, 2017).

³⁵⁵ Amended Complaint, *SEC v. Cohen*, No. 17-CV-00430-NGG-LB, ¶¶ 204-35 (May 29, 2017).

³⁵⁶ U.S. Securities and Exchange Commission Press Release No. 2017-133: Halliburton Paying \$29.2 Million to Settle FCPA Violations (July 27, 2017), <https://www.sec.gov/news/press-release/2017-133>.

³⁵⁷ U.S. Securities and Exchange Commission Press Release No. 2017-133: Halliburton Paying \$29.2 Million to Settle FCPA Violations (July 27, 2017), <https://www.sec.gov/news/press-release/2017-133>.

³⁵⁸ U.S. Securities and Exchange Commission Press Release No. 2017-133: Halliburton Paying \$29.2 Million to Settle FCPA Violations (July 27, 2017), <https://www.sec.gov/news/press-release/2017-133>.

³⁵⁹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 81222, File No. 3-18080, ¶ 8 (July 27, 2017).

³⁶⁰ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 81222, File No. 3-18080, ¶¶ 12-21 (July 27, 2017).

³⁶¹ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Halliburton Co.*, Rel. No. 81222, File No. 3-18080, ¶¶ 12-21 (July 27, 2017).

³⁶² *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

³⁶³ *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017).

Supreme Court's second unanimous decision in recent years that soundly rejected agency arguments for a broader statute of limitations.³⁶⁴ The implications of *Kokesh* are still crystalizing, but there can be no doubt that the SEC is already feeling pressure from the ruling to conduct investigations and bring actions more quickly.³⁶⁵ Further, the ruling has led to speculation over whether this will also affect the DOJ's use of disgorgement in FCPA matters. Finally, the finding that SEC disgorgement is punitive resulted in the Internal Revenue Service ("IRS") Office of Chief Counsel reversing its previous guidance regarding whether SEC disgorgement is deductible for tax purposes.³⁶⁶

As a result of the ruling, the SEC has said that it plans to intensify and prioritize quicker FCPA investigations, as well as increase cooperation and coordination among regulators and law enforcement. While the SEC has continued filing enforcement actions in federal district courts seeking disgorgement,³⁶⁷ the Commission has also admitted that the "very significant" ruling already impacted how it conducts its cases and that it will have "particular significance" for the Commission's FCPA matters.³⁶⁸

On October 26, 2017, Charles Cain, who was appointed Chief of the SEC's FCPA Unit on November 2, 2017, shared with the audience at the Securities Enforcement Forum that one consequence of the ruling in *Kokesh* is that there is now "a greater sense of urgency," to resolve cases than in the past.³⁶⁹ This sentiment was echoed by the SEC's Peikin on November 9, 2017, when he said the SEC now has "no choice but to respond by redoubling our efforts to bring cases as quickly as possible."³⁷⁰ While the effects of *Kokesh* are clearly significant, the SEC has urged caution regarding any broader effects of *Kokesh*. One potential area of *Kokesh* fallout could be the use of tolling agreements. The use of tolling agreements between the SEC and companies under investigation is now widespread; it remains to be seen, however, whether companies will be more hesitant to enter tolling agreements given the now clearly applicable five-year limitation. On the flip side of that coin, however, is the prospect that the SEC could penalize from a cooperation standpoint companies that do not enter tolling agreements.

³⁶⁴ See *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (holding that no discovery rule applies to the limitations period in Section 2462).

³⁶⁵ Steven Peikin, Co-Director of the Division of Enforcement, SEC, Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017), <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

³⁶⁶ I.R.S. Gen. Couns. Mem. 201748008 (Dec. 1, 2017).

³⁶⁷ See, e.g., *SEC v. Carton*, No. 17-6764 (S.D.N.Y. filed Sept. 6, 2017) (seeking disgorgement and civil monetary

penalties); *SEC v. Bennett*, No. 17-2453 (D. Md. filed Aug. 25, 2017) (same); *SEC v. Tennstar Energy Inc.*, No. 17-151-WTM-GRS (S.D. Ga. filed Aug. 11, 2017) (same).

³⁶⁸ Steven Peikin, Co-Director of the Division of Enforcement, SEC, Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017), <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

³⁶⁹ Waithera Junghae, *Kokesh Ruling Has Created More Urgency, SEC Foreign Bribery Chief Says*, GIR: JUST ANTI-CORRUPTION (Oct. 26, 2017).

³⁷⁰ Steven Peikin, Co-Director of the Division of Enforcement, SEC, Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017), <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

Kokesh's clear application to SEC enforcement actions has not prevented speculation that the decision will affect the DOJ's ability to pursue disgorgement in FCPA matters. Indeed, some commentators argue that a footnote in the ruling suggests the possibility of future challenges to the DOJ's use of disgorgement.³⁷¹ The footnote states: "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."³⁷² To some, the footnote is an invitation to "challenge whether the federal court has an ability to enact disgorgement at all."³⁷³

One possible argument proceeds along the following lines: although *Kokesh* addressed disgorgement only "as it is applied in SEC enforcement proceedings,"³⁷⁴ its rationale could apply equally to disgorgement sought by other financial regulatory agencies.³⁷⁵ Like the SEC, these agencies can seek disgorgement through courts' "inherent equity power to grant relief ancillary to an injunction,"³⁷⁶ but they can also seek disgorgement using their statutory authorities.³⁷⁷ It is not uncommon for agencies to seek such remedies beyond the five-year limitation in Section 2462—*Kokesh* calls this approach into serious doubt.

Finally, as a result of the Supreme Court's decision in *Kokesh*, which characterized disgorgement as punitive for the purpose of the statute of limitations in 28 U.S.C. 2462, the IRS Office of Chief Counsel released guidance regarding whether SEC disgorgement is deductible for tax purposes. The IRS Office of Chief Counsel memorandum found that the Supreme Court's opinion in *Kokesh* amounts to a holding that SEC disgorgement is invariably punitive and therefore a non-deductible penalty for the purposes of IRC Section 162(f).³⁷⁸ This memorandum effectively revises an earlier position taken by the IRS Chief Counsel in January 2016 that called for a facts-and-

³⁷¹ Dylan Tokar, *Will the Supreme Court Ruling Affect FCPA Pilot Programme Disgorgement?*, GIR: JUST ANTI-CORRUPTION (June 23, 2017); WilmerHale, *Implications of the Supreme Court's Kokesh Decision* (June 19, 2017), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179884758>.

³⁷² *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017).

³⁷³ Dylan Tokar, *Will the Supreme Court Ruling Affect FCPA Pilot Programme Disgorgement?*, GIR: JUST ANTI-CORRUPTION (June 23, 2017).

³⁷⁴ *Kokesh v. SEC*, 137 S. Ct. 1635, 1645 (2017).

³⁷⁵ Under 12 U.S.C. § 1818(b), the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation can order institutions subject to cease-and-desist proceedings to take "affirmative action"—including the provision of "restitution" or "reimbursement"—in order to "remedy any conditions resulting from any violation" of the laws these agencies enforce. WilmerHale, *Implications of the Supreme Court's Kokesh Decision* (June 19, 2017), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179884758>.

³⁷⁶ *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (S.D.N.Y. 1970). The Federal Trade Commission claims similar authority.

³⁷⁷ Matthew Martens, et al., *Why Kokesh Really Matters*, LAW 360 (Sept. 22, 2017), <https://www.law360.com/articles/966419/why-kokesh-really-matters> (citing the Consumer Financial Protection Bureau as an example, as it is expressly authorized by statute to seek disgorgement as a remedy under 12 U.S.C. § 5565).

³⁷⁸ I.R.S. Gen. Couns. Mem. 201748008 (Nov. 17, 2017).

circumstances evaluation of SEC disgorgement orders to determine whether in any given instance an order was “primarily compensatory” or “primarily punitive.”³⁷⁹

B. United States v. Hoskins

In the 2016 WilmerHale Global Anti-Bribery Year-in-Review, we noted that oral arguments were scheduled in the Second Circuit for *United States v. Hoskins*, a case that could have significant ramifications, particularly for conspiracy or aiding and abetting charges, regarding the scope of liability of foreign nationals under the FCPA. The Second Circuit heard oral arguments on March 2, 2017,³⁸⁰ and no decision has yet been released.

The DOJ charged Hoskins, a British national who was based in Alstom’s France office, with conspiring to participate in a bribery scheme involving a \$118 million project to build power stations for Indonesia’s state electricity company. Even though Hoskins was not accused of acting in furtherance of the scheme while in the United States, the DOJ asserted that Hoskins could be charged as a conspirator even if he was not considered an agent of Alstom Power—essentially claiming that Hoskins could be charged with conspiracy absent an act in furtherance in the United States and absent status as a domestic concern.³⁸¹ The district court held that although accomplice liability under the general conspiracy and aiding and abetting statutes applied generally across the U.S. Code, “a non-resident foreign national could not be subject to criminal liability under the FCPA pursuant to accomplice theories of liability or aiding and abetting violations of the FCPA where he is not acting as an agent of a domestic concern or does not act while physically present in the United States.”³⁸² Thus, the District of Connecticut held Hoskins could only be charged pursuant accomplice liability if he could be charged under the statute itself. Because Hoskins was not considered an agent of a domestic concern—as it was undisputed that he had not acted while physically present in the United States—he could not be charged.

On appeal, the defense asserted, among other arguments, that the government was prevented from circumventing Congress’s deliberate decision to exclude from the scope of the FCPA’s anti-bribery provisions foreign nationals who did not act within the territory of the United States and were not officers, directors, employees, or agents of a U.S. domestic concern or U.S. issuer. In one notable exchange during oral argument, Judge Lynch questioned whether “Congress meant to exclude Section 2 [aiding and

³⁷⁹ I.R.S. Gen. Couns. Mem. 201619008 (May 6, 2016).

³⁸⁰ Mark Hamblett, *Second Circuit Weighs Limits on FCPA Reach*, NEW YORK LAW JOURNAL (Mar. 2, 2017), <https://www.law.com/newyorklawjournal/almID/1202780382511/?slreturn=20171017162255>.

³⁸¹ Ruling Denying Government’s Motion for Reconsideration, *United States v. Hoskins*, No. 3:12-cr-238 (D. Conn. March 16, 2016).

³⁸² Ruling Denying Government’s Motion for Reconsideration, *United States v. Hoskins*, No. 3:12-cr-238 (D. Conn. March 16, 2016).

abetting] and Section 371 [conspiracy] when they made a list of principal violators under the [FCPA].”³⁸³

The government responded that it should be allowed to proceed against Hoskins by proving that he was an accomplice in a conspiracy to violate the FCPA because “Congress . . . was well-aware of the principle that foreigners can be liable as accessories,”³⁸⁴ even if Congress did not specifically include people like Hoskins in a section listing potential defendants. Judge Katzmman appeared to question this argument, noting that “[Congress] could have listed them. They didn’t.”³⁸⁵

C. United States v. Firtash

Conspiracy charges against prominent Ukrainian businessman Dmitry Firtash also have courts in the United States and abroad considering the territorial reach of the FCPA. In June 2013, a grand jury indicted Firtash for conspiracy to violate the FCPA and other charges for allegedly authorizing at least \$18.5 million in bribes to Indian government officials to secure licenses to mine minerals.³⁸⁶ Since the DOJ unsealed the indictment in 2014, the case has been under scrutiny for the attenuated ties between the foreign nationals charged and the United States: the only alleged connection between Firtash and the United States were two co-conspirators’ travel to the United States, one co-conspirator alleged to be a domestic concern, and the transmission of funds through the United States.³⁸⁷

Firtash was arrested in Austria in March 2014 but released after paying a \$174 million bail.³⁸⁸ In April 2015, an Austrian court denied the DOJ’s extradition request, swayed by arguments from Firtash’s counsel that the arrest was motivated by U.S. foreign policy concerns with Firtash’s connection to the Ukraine’s exiled former president, Victor Yanukovich.³⁸⁹ In February 2017, an Austrian appeals court reversed that decision, authorizing extradition to the United States.³⁹⁰ The decision on extradition now rests with the Austrian justice minister,³⁹¹ and as of September 2017, Firtash’s counsel expected the issue to be resolved within four months.³⁹² The resolution had not been reached as of publication.

³⁸³ Pete Brush, *2nd Circ. Struggles with Scope of FCPA in Alstom Exec Case*, LAW 360 (Mar. 2, 2017), <https://www.law360.com/articles/897673>.

³⁸⁴ Pete Brush, *2nd Circ. Struggles with Scope of FCPA in Alstom Exec Case*, LAW 360 (Mar. 2, 2017), <https://www.law360.com/articles/897673>.

³⁸⁵ Pete Brush, *2nd Circ. Struggles with Scope of FCPA in Alstom Exec Case*, LAW 360 (Mar. 2, 2017), <https://www.law360.com/articles/897673>.

³⁸⁶ Indictment, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. June 20, 2013).

³⁸⁷ Indictment, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. June 20, 2013).

³⁸⁸ Melissa Eddy, *Austria Holds Ukrainian Pending Extradition Decision*, NY TIMES (Mar. 14, 2014).

³⁸⁹ David M. Herszenhorn, *Judge Rebuffs U.S. in Rejecting Extradition of Ukraine Billionaire*, NY TIMES (Apr. 30, 2015).

³⁹⁰ Ivan Nechepurenko, *Austrian Court Backs Ukrainian Gas Mogul’s Extradition to U.S.*, NY TIMES (Feb. 21, 2017).

³⁹¹ Ivan Nechepurenko, *Austrian Court Backs Ukrainian Gas Mogul’s Extradition to U.S.*, NY TIMES (Feb. 21, 2017).

³⁹² Kim Janssen, *Feds claim ‘thousands of intercepts’ in the case of Ukrainian billionaire, Trump ex-campaign boss*, CHICAGO TRIBUNE (Sept. 15, 2017).

Meanwhile, perhaps in anticipation of imminent extradition to the United States, Firtash's counsel filed a motion to dismiss the indictment in May 2017, arguing improper venue, lack of jurisdiction based on the FCPA and RICO statutes, and violation of Firtash's due process rights.³⁹³ The motion emphasized that not only has Firtash "never set foot in the country," but also that the indictment against him "fails to allege a single illicit act by Firtash that either occurred in the United States or affected the United States."³⁹⁴ The government's July 2017 opposition brief asked the district court to delay decision on the motion because "[p]rinciples of international comity require . . . this Court [to] defer to the Austrian courts until they complete their extradition proceedings."³⁹⁵ As to jurisdiction and venue, the government maintained that a charge of conspiracy to violate the FCPA does not require the government to allege that a conspirator committed bribery within the United States, and Firtash need not be a "domestic concern" to be prosecuted for conspiracy to violate the FCPA.³⁹⁶ Oral argument on the motion was heard in September.³⁹⁷ Firtash submitted supplemental briefing on venue in September,³⁹⁸ and the government submitted a response in October.³⁹⁹

While the motion to dismiss is still pending, a development in Firtash's extradition proceedings in Austria makes it unlikely that he will be extradited in the immediate future. On December 20, 2017, Firtash's counsel notified the court that the Austrian Supreme Court put Firtash's extradition on hold.⁴⁰⁰ On December 12, 2017, the Austrian Supreme Court stayed the extradition pending decision on the request for retrial, and further stayed the extraordinary appeal proceedings until the Court of Justice of the European Union, which has been described as "notoriously slow,"⁴⁰¹ reaches a preliminary ruling on the applicability of the E.U. Charter on Human Rights to the extraordinary appeal proceedings.

³⁹³ Dmitry Firtash's Memorandum of Law in Support of His Motion to Dismiss the Indictment, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. May 9, 2017).

³⁹⁴ Dmitry Firtash's Memorandum of Law in Support of His Motion to Dismiss the Indictment, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. May 9, 2017).

³⁹⁵ Government's Consolidated Response to Defendant Firtash's and Knopp's Motions to Dismiss Indictment, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. July 24, 2017).

³⁹⁶ Government's Consolidated Response to Defendant Firtash's and Knopp's Motions to Dismiss Indictment, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. July 24, 2017).

³⁹⁷ Minute Entry, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. Sept. 11, 2017).

³⁹⁸ Dmitry Firtash and Andras Knopp's Supplemental Brief in Further Support of Their Motions to Dismiss the Indictment, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. Sept. 20, 2017). Firtash filed supplemental briefing in order to distinguish two cases on venue—*U.S. v. Knox*, 540 F.3d 708 (7th Cir. 2008) and *U.S. v. Lowrance*, 534 F. App'x 564 (7th Cir. 2013)—that the government cited for the first time at oral argument for the claim an indictment need only allege that the crime occurred in the district in order to establish venue under Seventh Circuit precedent. The government's response disputed Firtash's characterization of these cases and reiterated the claim that the indictment sufficiently alleged venue.

³⁹⁹ Government's Supplemental Brief in Response to Defendants Firtash's and Knopp's Motions to Dismiss Indictment, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. Oct. 3, 2017).

⁴⁰⁰ Letter regarding Update on the Austrian Expedition Proceedings, *United States v. Firtash*, No. 13-CR-00515 (N.D. Ill. Dec. 20, 2017).

⁴⁰¹ Kim Janssen, *Ukrainian Oligarch with Ties to Manafort and Wanted in Chicago Gets Holiday Reprieve*, Chicago Tribune (Dec. 20, 2017).

D. SEC v. Cohen & Baros

The SEC's case against former Och-Ziff executives Michael L. Cohen and Vanja Baros, discussed in Section III.C.1.b above, also represents a relatively rare instance of the SEC being put to its burden of proof in an FCPA enforcement action. On June 27, 2017,⁴⁰² Baros and Cohen each filed motions to dismiss, arguing the claims against them should be dismissed for numerous reasons, most notably relating to untimeliness and lack of personal jurisdiction.⁴⁰³

Both Baros and Cohen have argued that the SEC's claims are barred by the FCPA's five-year statute of limitations, as much of the conduct alleged occurred as many as ten years ago, and none of the charges are saved by tolling.⁴⁰⁴ Cohen's brief emphasized that limitations periods were enacted for precisely such situations, where the SEC's lengthy inquiry has unfair consequences on defendants: "With the SEC having taken over six years to investigate, Mr. Cohen is now left in the position of trying to secure witnesses and evidence about decade-old events throughout Africa."⁴⁰⁵ Cohen also claimed that tolling agreements he signed for an FCPA investigation titled "In the Matter of the Libyan Investment Authority" do not apply in this case, as the Och-Ziff investigation from which the present claims stem was separate.⁴⁰⁶

Baros, an Australian citizen residing in the United Kingdom,⁴⁰⁷ made an additional argument against the SEC's allegations based on personal jurisdiction. Personal jurisdiction under the FCPA is controlled by the Due Process Clause, which requires the plaintiff to allege both (1) that the defendant had minimum contacts with the forum state and (2) that the exercise of personal jurisdiction would be reasonable.⁴⁰⁸ Baros claimed the SEC could not meet either part of this test, as "Baros was a nonresident foreigner

⁴⁰² The filings relating to the motions to dismiss all bear the docketing date of August 18, 2017; the dates in the above description match the dates of service listed on the individual submissions, whereas the dates in the footnoted citations conform to the filing date.

⁴⁰³ Memorandum of Law of Vanja Baros in Support of His Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430 (E.D.N.Y. Aug. 18, 2017); Memorandum of Law in Support of Defendant Michael L. Cohen's Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430 (E.D.N.Y. Aug. 18, 2017).

⁴⁰⁴ See Memorandum of Law of Vanja Baros in Support of his Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430 (E.D.N.Y. Aug. 18, 2017); Memorandum of Law in Support of Defendant Michael L. Cohen's Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430 (E.D.N.Y. Aug. 18, 2017).

⁴⁰⁵ Memorandum of Law in Support of Defendant Michael L. Cohen's Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 6-7 (E.D.N.Y. Aug. 18, 2017).

⁴⁰⁶ Memorandum of Law in Support of Defendant Michael L. Cohen's Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 11-12 (E.D.N.Y. Aug. 18, 2017).

⁴⁰⁷ See, e.g., Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, ¶ 17 (E.D.N.Y. May 29, 2017).

⁴⁰⁸ Memorandum of Law of Vanja Baros in Support of his Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 15 (E.D.N.Y. Aug. 18, 2017) (citing *SEC v. Sharef*, 942 F. Supp. 2d 539 (S.D.N.Y. 2013); *Blau v. Allianz Life Ins. Co. of N. Am.*, 124 F. Supp. 3d 161, 172 (E.D.N.Y. 2015)).

working abroad for a foreign employer on transactions with foreign counterparties and foreign business partners relating to natural resources in African countries.”⁴⁰⁹

In an opposition brief submitted July 28, 2017, the SEC argued that its claims were timely for a host of reasons. The SEC’s complaint sought injunctive relief in addition to fines and disgorgement, and the SEC’s primary arguments against dismissal for untimeliness hinged on whether the statute of limitations applies to injunctive relief, and whether such questions can be resolved on a motion to dismiss.⁴¹⁰ The SEC also characterized its claims against Cohen as timely because the tolling agreements he signed covered claims “arising out of the investigation” in Libya, and the SEC’s Och-Ziff investigation “arose out of” the Libyan investigation.⁴¹¹ Finally, the SEC asked the court to delay decision on whether disgorgement claims are time-barred because the disgorgement claims may not accrue at the same time as underlying violations.⁴¹²

As to personal jurisdiction over Baros, the SEC alleged that Baros had sufficient minimum contacts with the United States based on “extensive, pervasive and consistent contacts” including business and acts within the United States, as well as effects in the United States by acts undertaken elsewhere.⁴¹³ The SEC also argued that Baros failed to demonstrate how exercising personal jurisdiction over him would be unreasonable and noted that, as no alternate forum was available, if the federal court does not have jurisdiction over Baros, he “will effectively have been immunized for the securities violations with which he is charged.”⁴¹⁴

On August 18, the defendants filed replies.⁴¹⁵ Regarding the statute of limitations for injunctive relief, Cohen argued that the reasoning under *Kokesh*—which applied the five-year statute of limitations to disgorgement—applied with equal force to injunctive relief.⁴¹⁶ Regarding disgorgement, both defendants disputed that accrual is triggered by

⁴⁰⁹ Memorandum of Law of Vanja Baros in Support of his Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 15 (E.D.N.Y. Aug. 18, 2017).

⁴¹⁰ Plaintiff Securities and Exchange Commission’s Opposition to Defendant Cohen’s and Defendant Baros’s Motions to Dismiss, *SEC v. Cohen & Baros*, No. 17-CV-00430 (E.D.N.Y. Aug. 18, 2017).

⁴¹¹ Plaintiff Securities and Exchange Commission’s Opposition to Defendant Cohen’s and Defendant Baros’s Motions to Dismiss, *SEC v. Cohen & Baros*, No. 17-CV-00430 at 18 (E.D.N.Y. Aug. 18, 2017) (citing *SEC v. Mannion*, No. 1:10-cv-3374-WSD, 2013 WL 5999657 (N.D. Ga. Nov. 12, 2013) (tolling agreement applied to claims that were based on facts developed in a separate and subsequent investigation that was not referenced in the agreement)).

⁴¹² Plaintiff Securities and Exchange Commission’s Opposition to Defendant Cohen’s and Defendant Baros’s Motions to Dismiss, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 21 (E.D.N.Y. Aug. 18, 2017).

⁴¹³ Plaintiff Securities and Exchange Commission’s Opposition to Defendant Cohen’s and Defendant Baros’s Motions to Dismiss, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 70 (E.D.N.Y. Aug. 18, 2017).

⁴¹⁴ Plaintiff Securities and Exchange Commission’s Opposition to Defendant Cohen’s and Defendant Baros’s Motions to Dismiss, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 93 (E.D.N.Y. Aug. 18, 2017).

⁴¹⁵ Reply Memorandum of Law in Support of Vanja Baros’s Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430 (E.D.N.Y. Aug. 18, 2017); Reply Memorandum of Law in Further Support of Defendant Michael L. Cohen’s Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430 (E.D.N.Y. Aug. 18, 2017).

⁴¹⁶ Reply Memorandum of Law in Further Support of Defendant Michael L. Cohen’s Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 2 (E.D.N.Y. Aug. 18, 2017) (citing *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)).

the receipt of compensation rather than the fraudulent conduct itself.⁴¹⁷ Finally, regarding personal jurisdiction, Baros contended that the contacts the SEC alleges are all “either impermissibly vague and conclusory or relate to contacts between *other parties* and the U.S.,” which cannot support personal jurisdiction against Baros.⁴¹⁸

The motions to dismiss are still pending. Per an October 24, 2017, court order, oral argument has been granted and will be scheduled.⁴¹⁹

E. Second Circuit Ruling on DPAs

In July 2017, the Second Circuit joined the D.C. Circuit in finding that federal courts have only limited power over supervising DPAs. In *United States v. HSBC Bank USA, N.A.*, the defendant companies (collectively, “HSBC”) and the DOJ agreed to a five-year DPA.⁴²⁰ Under the DPA, HSBC retained an independent compliance monitor, who submitted periodic reports to HSBC and the government detailing his findings and making recommendations for improving HSBC’s compliance program.⁴²¹

As is the case with all DPAs—including in the FCPA context—for the DPA to function properly, the parties had to obtain exemption from the Speedy Trial Act requirement that a criminal trial begin within 70 days after charges were filed.⁴²² Without the exemption, the charges against the company would be subject to mandatory dismissal once the 70-day period had run, rendering the DPA and its mandate for corporate reform powerless.⁴²³

In July 2013, the district court granted a waiver of the Speedy Trial Act but conditioned its approval on the court’s monitoring of the DPA’s implementation. In April 2015, pursuant to a court order, the government filed the independent compliance monitor’s first annual report under seal. In 2016, an individual not party to the lawsuit moved to unseal the monitor’s report. The court granted the motion, referring to the report as a “judicial record,” which carries with it a right of public access.⁴²⁴

On appeal, the Second Circuit overturned the district court, citing the D.C. Circuit’s decision in *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016), throughout. The Second Circuit’s ruling was based on three reasons. First, courts do not have “freestanding supervisory power to monitor the implementation of a DPA.”⁴²⁵ The Second Circuit allowed that there could be instances where misconduct in the

⁴¹⁷ Reply Memorandum of Law in Further Support of Defendant Michael L. Cohen’s Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 8 (E.D.N.Y. Aug. 18, 2017); Reply Memorandum of Law in Support of Vanja Baros’s Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 5 (E.D.N.Y. Aug. 18, 2017).

⁴¹⁸ Reply Memorandum of Law in Support of Vanja Baros’s Motion to Dismiss the Amended Complaint, *SEC v. Cohen & Baros*, No. 17-CV-00430, at 7 (E.D.N.Y. Aug. 18, 2017) (emphasis in original).

⁴¹⁹ Order, *SEC v. Cohen & Baros*, No. 17-CV-00430 (E.D.N.Y. Oct. 24, 2017).

⁴²⁰ *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 129-130 (2d Cir. 2017).

⁴²¹ *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 130 (2d Cir. 2017).

⁴²² *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 130 (2d Cir. 2017) (internal citations omitted).

⁴²³ *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 130 (2d Cir. 2017).

⁴²⁴ *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 131-133 (2d Cir. 2017).

⁴²⁵ *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 137 (2d Cir. 2017).

implementation of a DPA comes to light—i.e. through a whistleblower—and the court must invoke its supervisory power to take appropriate action. However, absent clear evidence to the contrary, the district court must presume that prosecutors have “properly discharged their official duties.”⁴²⁶ Second, the Second Circuit found that the existence of the Speedy Trial Act does not give district courts the right to proactively monitor the implementation of a DPA.⁴²⁷ And third, the Second Circuit ruled that the monitor’s report was not a judicial document because at the point it was unsealed it was not relevant to a judicial function.⁴²⁸

The ruling provides significant protection from outside scrutiny for companies that enter into DPAs with the government. Given the large role DPAs play in FCPA enforcement, looking ahead, FCPA legal observers should take note on whether other circuits follow suit in limiting federal courts’ power in supervising DPAs, or whether a circuit split emerges on the issue.

F. Kleptocracy Asset Recovery Initiative

This year saw the DOJ’s continued use of the Kleptocracy Asset Recovery (“KAR”) Initiative. Launched in 2010, the KAR Initiative is a joint effort between the DOJ Criminal Division’s Asset Forfeiture and Money Laundering Section and other federal agencies to identify and recover the proceeds of foreign official corruption and eventually repatriate the funds for the benefit of those who were harmed. As described in the 2016 WilmerHale Global Anti-Bribery Year-in-Review, the DOJ filed two civil forfeiture complaints in 2016—one against 1Malaysia Development Berhad (“1MDB”) for more than \$1 billion, and one against VimpelCom for \$850 million.⁴²⁹

In June 2017, the DOJ built on its case against 1MDB, a sovereign wealth fund created to promote economic development in Malaysia, and announced the filing of civil forfeiture complaints seeking the forfeiture and recovery of a combined total of \$640 million in assets.⁴³⁰ The total assets now subject to forfeiture by 1MDB under the DOJ complaints are almost \$1.7 billion.

In these most recent filings, the DOJ alleges that in 2014, 1MDB misappropriated approximately \$850 million, which was used to purchase a 300-foot luxury yacht, certain movie rights, high-end properties, tens of millions of dollars of jewelry, and artwork. Additionally, a portion of the diverted loan proceeds were allegedly used in an

⁴²⁶ *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 136 (2d Cir. 2017) (internal citations omitted).

⁴²⁷ *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 138-139 (2d Cir. 2017).

⁴²⁸ *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 139 (2d Cir. 2017).

⁴²⁹ U.S. Department of Justice Press Release No. 16-839: United States Seeks to Recover More Than \$1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund (July 20, 2016). U.S. Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016). WilmerHale, *Global Anti-Bribery Year-in-Review: 2016 Developments and Predictions for 2017* (Feb. 7, 2017), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2017-02-07-fcpa-year-in-review.pdf.

⁴³⁰ U.S. Department of Justice Press Release No. 17-655: U.S. Seeks to Recover Approximately \$540 Million Obtained From Corruption Involving Malaysian Sovereign Wealth Fund (June 15, 2017).

elaborate, Ponzi-like scheme to create the false appearance that an earlier 1MDB investment had been profitable.

V. COLLATERAL LEGAL DEVELOPMENTS

A. FOIA Litigation

1. 100 Reporters, LLC

As described in the 2016 WilmerHale Global Anti-Bribery Year-in-Review, Judge Rudolph Contreras of the U.S. District Court for the District of Columbia presides over a Freedom of Information Act (“FOIA”) action in which press organization 100 Reporters, LLC (“100 Reporters”) seeks the release of the monitor reports and other materials produced to regulators after Siemens and three of its subsidiaries settled FCPA charges with the SEC and DOJ in 2008. In 2016, the DOJ, Siemens, and Theo Waigel, who served as monitor, filed motions for summary judgment arguing that disclosure of the requested materials would have a severe chilling effect on companies contemplating resolutions involving monitorships and that the documents were protected from disclosure pursuant to FOIA Exemptions 4, 5, 6, and 7(C).⁴³¹ 100Reporters brought a cross-motion for summary judgment.⁴³²

In March 2017, the court denied 100Reporters’ motion, and granted in part and denied in part the motions brought by the DOJ, Siemens, and the monitor. In addition to material that the court described as “classic attorney work-product,” the court found that the monitor’s reports and work plans and material related to Siemens trainings and compliance policies were protected pursuant to Exemption 4 in that its disclosure would likely cause Siemens competitive harm.⁴³³ However, the court found that the DOJ had failed to show that certain material was protected by the deliberate process privilege in Exemption 5, and had failed to establish the material’s disclosure would cause an unwarranted invasion of privacy pursuant to Exemptions 6 and 7(C).⁴³⁴ The court ordered the DOJ to produce a representative subset of material for *in camera* review.⁴³⁵

On September 26, 2017, the DOJ filed a renewed motion for summary judgment and included additional declarations by former heads of DOJ’s FCPA Unit as further support to its contention that the requested materials fall under the FOIA exemptions in that they are were integral to its deliberative process, commercial and confidential, and implicate the privacy interest of Siemens’ employees and government employees.⁴³⁶

⁴³¹ *100Reporters LLC v. U.S. Dep’t of Justice*, 248 F. Supp. 3d 115 (2017); Dylan Tokar, *DOJ: Releasing monitor reports would give Siemens competitors unfair compliance advantage*, GIR: JUST ANTI-CORRUPTION, Aug. 22, 2016.

⁴³² *100Reporters LLC v. U.S. Dep’t of Justice*, 248 F. Supp. 3d 115, 131 (2017).

⁴³³ *100Reporters LLC v. U.S. Dep’t of Justice*, 248 F. Supp. 3d 115, 144, 158 (2017).

⁴³⁴ *100Reporters LLC v. U.S. Dep’t of Justice*, 248 F. Supp. 3d 115, 145-46 (2017).

⁴³⁵ *100Reporters LLC v. U.S. Dep’t of Justice*, 248 F. Supp. 3d 115, 166-67 (2017).

⁴³⁶ Motion for Summary Judgment (Renewed), *100Reporters LLC v. U.S. Dep’t of Justice*, No. 14-CV-1264-RC (D.D.C. Sept. 26, 2017).

100Reporters filed its response on October 27, 2017,⁴³⁷ and the DOJ filed its reply on December 11, 2017.⁴³⁸ The court's decision is still pending.

2. Dylan Tokar

On December 9, 2016, "Just Anti-Corruption" reporter Dylan Tokar brought a FOIA lawsuit alleging that the DOJ failed to release documents relating to the selection of corporate compliance monitors appointed in connection with DPAs. According to the complaint, these records are necessary so that the public can assess whether "monitors have been nominated and selected in a manner that effectively screens for conflicts of interest."⁴³⁹ Tokar's FOIA requests seek the names of corporate-monitor candidates nominated by 15 companies that settled criminal FCPA charges, records about the DOJ officials that make the final decisions about monitor selections, and any objection letters submitted by the 15 companies in response to the first FOIA request.⁴⁴⁰

On January 27, 2017, the DOJ provided Tokar with a table of information it deemed responsive to Tokar's narrowed FOIA request,⁴⁴¹ but withheld certain information, such as the names of the unselected monitor candidates, under privacy Exemptions 6 and 7(C).⁴⁴² On May 22, 2017 the DOJ released "non-exempt portions" of responsive records and withheld certain information under FOIA Exemptions 4, 6, and 7(C).⁴⁴³

On July 19, 2017, the DOJ filed a motion for summary judgment arguing (a) it need not respond to the portion of the request that seeks information rather than documents, and (b) pursuant to the personal privacy Exemptions 6 and 7(C) it properly redacted names of nominees that were not selected for monitor positions and the names of monitor selection committee members who were not part of senior DOJ management.⁴⁴⁴ In his opposition and cross-motion for summary judgment, Tokar argued that the DOJ improperly invoked Exemptions 6 and 7(C), failed to establish that the individuals have any privacy interests, or that any privacy interest outweighed the public interests in disclosure.⁴⁴⁵ The court's decision on the motions is still pending.

⁴³⁷ Plaintiff's Opposition to DOJ's Renewed Motion for Summary Judgment, *100Reporters LLC v. U.S. Dep't of Justice*, No. 14-CV-1264-RC (D.D.C. Oct. 27, 2017).

⁴³⁸ Reply in Support of Motion for Summary Judgment, *100Reporters LLC v. U.S. Dep't of Justice*, No. 14-CV-1264-RC (D.D.C. Dec. 11, 2017).

⁴³⁹ Complaint, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, ¶ 1 (D.D.C. Dec. 9, 2016).

⁴⁴⁰ Complaint, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, ¶ 2 (D.D.C. Dec. 9, 2016).

⁴⁴¹ Complaint, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, ¶ 16 (D.D.C. Dec. 9, 2016).

⁴⁴² Joint Status Report, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, ¶ 4 (D.D.C. May 31, 2017).

⁴⁴³ Joint Status Report, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, ¶ 7 (D.D.C. May 31, 2017); Defendant's Statement of Material Facts Not in Genuine Dispute, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, ¶ 14 (D.D.C. July 19, 2017); Plaintiff's Combined Statement of Material Facts as to Which There is No Genuine Issue and Response to Defendant's Statement of Material Facts, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, ¶ 14 (D.D.C. Aug. 23, 2017).

⁴⁴⁴ Memorandum in Support of Defendant's Motion for Summary Judgment, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, at 3 (D.D.C. July 19, 2017).

⁴⁴⁵ Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment, *Tokar v. U.S. Dep't of Justice*, No. 1:16-cv-02410-RC, at 16 (D.D.C. Aug. 23, 2017).

B. Shareholder Lawsuits

1. Doshi v. General Cable Corporation et al.

On January 5, 2017, just one week after Kentucky-based wire and cable manufacturer General Cable Corporation (“GCC”) agreed to pay more than \$75 million to resolve SEC and DOJ investigations,⁴⁴⁶ a shareholder filed a putative class action lawsuit against GCC and two of its executives, Gregory B. Kenny and Brian J. Robinson.⁴⁴⁷ In the December 2016 agreements with the DOJ and SEC, GCC admitted to making improper payments through its subsidiaries to foreign government officials in Angola, Bangladesh, China, Egypt, Indonesia, and Thailand, to corruptly gain business in violation of the FCPA, resulting in profits of more than \$50 million.⁴⁴⁸

Referring to these admissions in their class action complaint filed in the Southern District of New York, plaintiffs allege that GCC, Kenny, and Robinson made false and/or misleading statements and/or failed to disclose that GCC paid millions of dollars in bribes in violation of the FCPA, which led to financial penalties and profit disgorgements.⁴⁴⁹ The case was transferred to the U.S. District Court for the Eastern District of Kentucky, and an amended complaint is due January 19, 2018.

2. Crandall Shareholder Litigation

In March 2016, a month after PTC Inc. and two of its Chinese subsidiaries (“PTC”) resolved FCPA issues with the DOJ and SEC, a shareholder class action law suit alleging securities fraud was filed against PTC and eight of its executives and directors.⁴⁵⁰ Plaintiffs alleged that PTC’s public disclosures regarding the FCPA investigation were misleading, and the defendants disputed the allegations and moved to dismiss.⁴⁵¹ The dispute was settled for \$2.1 million in July 2017 with both the plaintiffs and defendants maintaining that their positions had merit.⁴⁵²

3. In re Eletrobras Securities Litigation

On March 25, 2017, Judge John G. Koeltl of the U.S. District Court for the Southern District of New York granted in part and denied in part a motion to dismiss brought by

⁴⁴⁶ U.S. Securities and Exchange Commission Press Release No. 2016-283: Wire and Cable Manufacturer Settles FCPA and Accounting Charges (Dec. 29, 2016); U.S. Department of Justice Press Release No. 16-1536: General Cable Corporation Agrees to Pay \$20 Million Penalty for Foreign Bribery Schemes in Asia and Africa (Dec. 29, 2016).

⁴⁴⁷ Complaint, *Doshi v. General Cable Corporation*, No. 1:17-cv-00092-WHP (S.D.N.Y. Jan. 5, 2017).

⁴⁴⁸ Non-Prosecution Agreement between U.S. Department of Justice and General Cable Corporation, Attachment A ¶¶ 7-31 (Dec. 22, 2016), <https://www.justice.gov/criminal-fraud/file/921801/download>.

⁴⁴⁹ Complaint, *Doshi v. General Cable Corporation* No. 1:17-cv-00092-WHP, ¶¶ 4, 8-11, (S.D.N.Y. Jan. 5, 2017).

⁴⁵⁰ Amended Complaint, *Crandall Shareholder Litigation*, No. 1:16-cv-10471-WGY, ¶¶ 4-10 (D. Mass. July 11, 2017).

⁴⁵¹ Memorandum of Law in Support of Defendants’ Motion to Dismiss, *Crandall Shareholder Litigation*, No. 1:16-cv-10471-WGY, 2-5 (D. Mass. Aug. 30, 2016).

⁴⁵² Order, *Crandall Shareholder Litigation*, No. 1:16-cv-10471-WGY (D. Mass. July 14, 2017); Letter/request (non-motion) from Parties Regarding Amended Stipulation of Settlement, *Crandall Shareholder Litigation*, No. 1:16-cv-10471-WGY (D. Mass. March 1, 2017).

Brazilian energy corporation Centrais Eléctricas Brasileiras S.A. (“Eletrobras”) and three of the four named senior executives.⁴⁵³ Plaintiffs alleged that defendants violated Section 10(b) and Rule 10b-5 by making material misstatements or omissions with respect to the company’s ethics and integrity, and in its annual reports disclosing the financial condition of the company. Plaintiffs further alleged control person liability for the four senior executives under Section 20(a).⁴⁵⁴

The court dismissed all claims against the former CEO, finding that his signature on the Code of Ethics and public statement representing such signature were insufficient to raise a strong inference of scienter.⁴⁵⁵ However, the court ruled that plaintiffs had pleaded sufficient facts to support an inference that the three remaining individuals acted with scienter.⁴⁵⁶ As such, the court upheld the Section 10(b) and Rule 10b-5 claims against Eletrobras and the three remaining individuals, and the Section 20(a) claim against the remaining individuals. With several claims still alive, the parties are briefing class certification.⁴⁵⁷

4. Villella et al v. Chemical & Mining Co. of Chile Inc. et al.

On March 19, 2015 and April 14, 2015, two separate shareholder class actions were filed against Chemical & Mining Co. of Chile Inc. et al. (“SQMC”) alleging violations of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5.⁴⁵⁸ On February 9, 2016 a consolidated complaint was filed alleging that between 2010 and 2016, SQMC paid millions of dollars’ worth of illegal campaign donations, all the while misrepresenting to investors that it was in compliance with all applicable laws, maintained effective internal controls over the reporting of financial and non-financial information, had in place a code of ethics, and complied with applicable accounting standards.⁴⁵⁹

On March 30, 2016, SQMC filed a motion to dismiss on the basis of *forum non conveniens*, or alternatively, for failure to state a claim due to the plaintiff’s failure to plead a material misstatement or facts to create an inference of scienter.⁴⁶⁰ On March 28, 2017, Judge Edgardo Ramos denied SQMC’s motion to dismiss on the basis of *forum non conveniens*. The court further denied defendant’s motion to dismiss plaintiff’s claims that SQMC made material misstatements with respect to its compliance with applicable law, internal controls, and financial reporting and accounting, but dismissed plaintiff’s claim that SQMC made material misrepresentations regarding its code of ethics. The court found the mere adoption of a code of ethics, without statements

⁴⁵³ *In re Eletrobras Sec. Litig.*, 245 F. Supp. 3d 450, 456 (S.D.N.Y. 2017).

⁴⁵⁴ *In re Eletrobras Sec. Litig.*, 245 F. Supp. 3d 450, 458-61 (S.D.N.Y. 2017).

⁴⁵⁵ *In re Eletrobras Sec. Litig.*, 245 F. Supp. 3d 450, 467 (S.D.N.Y. 2017).

⁴⁵⁶ *In re Eletrobras Sec. Litig.*, 245 F. Supp. 3d 450, 468-69 (S.D.N.Y. 2017).

⁴⁵⁷ See Revised Scheduling Order, *In re Eletrobras Sec. Litig.*, No. 1:15-cv-05754-JGK (S.D.N.Y. Oct. 25, 2017).

⁴⁵⁸ Complaint, *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 1:15-cv-02106-ER (S.D.N.Y. Mar. 19, 2015); Complaint, *Molinero v. Chemical & Mining Co. of Chile Inc.*, No. 1:15-cv-02884-ER (S.D.N.Y. Apr. 14, 2015).

⁴⁵⁹ Corrected Consolidated Complaint, *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 1:15-cv-02106-ER (S.D.N.Y. Feb. 9, 2016).

⁴⁶⁰ Memorandum of Law in Support of Defendant’s Motion to Dismiss the Consolidated Complaint, *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 1:15-cv-02106-ER, at 1-4 (S.D.N.Y. Mar. 30, 2016).

assuring investors that its employees are in compliance with the code, is not misleading. The court also dismissed plaintiff's claim that SQMC failed to disclose that the company's inadequate corporate governance might jeopardize its lease negotiations with the Chilean government organization Corporación de Fomento de la Producción de Chile ("Corfo"), finding SQMC's statement that it was confident in its position in the Corfo arbitration as forward looking and accompanied by sufficient cautionary language.⁴⁶¹ Finally, the court found that plaintiff's allegations taken as a whole create an inference of scienter, noting that in its DPA and SEC order SQMC admitted that it knowingly and willfully made misrepresentations in its SEC filings.⁴⁶² The court set a discovery schedule on June 8, 2017, with fact discovery deadline of July 23, 2018.⁴⁶³

5. In re Petrobras Securities Litigation

On December 8, 2014, a shareholder filed a securities class action against Petrobras, an oil and gas company headquartered in Brazil, and its senior executives. Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York consolidated the case with similar cases in February 2015. In a March 31, 2015 Consolidated Amended Complaint, plaintiffs alleged defendants violated Section 10(b), Rule 10b-5, and Section 20(a) of the Exchange Act, Section 11, 12, and 15 of the Securities Act, and various Brazilian laws by misrepresenting material facts and failing to disclose a multi-year, multibillion-dollar money-laundering and bribery scheme in which Petrobras executives received \$800 million in bribes from construction and engineering firms.⁴⁶⁴

In 2016, Judge Rakoff certified two classes for money damages—one class asserts claims under the Securities Exchange Act of 1934 and the second under the Securities Act of 1933. On July 7, 2017, the Second Circuit affirmed Judge Rakoff's ruling that the plaintiffs satisfied their burden of showing that Petrobras traded in efficient markets under *Basic v. Levinson*, 485 U.S. 224 (1988).⁴⁶⁵ Although the Second Circuit held that Rule 23 does not include "a freestanding administrative feasibility requirement,"⁴⁶⁶ it vacated Judge Rakoff's class certification "insofar as [the class] include all otherwise eligible class members who acquired their Securities in 'domestic transactions.'"⁴⁶⁷ In its ruling, the Second Circuit explained that in order to determine if plaintiffs satisfied Rule 23(b)(3)'s predominance requirement the district court needed to assess "each

⁴⁶¹ *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 15 CIV. 2106 (ER), 2017 WL 1169629, at *15 (S.D.N.Y. Mar. 28, 2017).

⁴⁶² *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 15 CIV. 2106 (ER), 2017 WL 1169629, at *15 (S.D.N.Y. Mar. 28, 2017).;

⁴⁶³ Order, *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 1:15-cv-02106-ER (S.D.N.Y. June 8, 2017). On January 13, 2017, SQM paid more than \$30 million to resolve parallel civil and criminal cases regarding FCPA violations. See U.S. Securities and Exchange Commission Press Release No. 2017-13: Chemical and Mining Company in Chile Paying \$30 Million to Resolve FCPA Cases (Jan. 13, 2017); Deferred Prosecution Agreement, *United States v. Sociedad Química y Minera de Chile*, No. 17-CR-00013 (D.D.C. Jan. 13, 2017).

⁴⁶⁴ Deferred Prosecution Agreement, *United States v. Sociedad Química y Minera de Chile*, No. 17-CR-00013 (D.D.C. Jan. 13, 2017).

⁴⁶⁵ *In re Petrobras Sec.*, 862 F.3d 250, 278-79 (2d Cir. 2017).

⁴⁶⁶ *In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017).

⁴⁶⁷ *In re Petrobras Sec.*, 862 F.3d 250, 274 (2d Cir. 2017).

class member's over-the-counter transactions for markers of domesticity under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).⁴⁶⁸

On November 1, 2017, defendants filed a petition for a writ of certiorari asking the Supreme Court to clarify whether “the legal standard to invoke *Basic*'s presumption of reliance at a minimum require[s] empirical evidence that a security generally reacted in a directionally appropriate manner to new material information . . . or, as the Second Circuit ruled, can the presumption be based entirely on other factors unrelated to whether the alleged misstatement had price impact” and whether Rule 23 require proponents of class certification to show that class membership can be ascertained through administratively feasible means.⁴⁶⁹

On January 3, 2018, Petrobras announced that it agreed to pay \$2.95 billion to settle the class action lawsuit.⁴⁷⁰ That same day, the parties filed a joint petition to defer consideration of the writ of certiorari.⁴⁷¹ In their joint motion to the Supreme Court the parties explained that they expect to submit their settlement agreement to the district court for preliminary approval on or before January 31, 2018.⁴⁷²

6. VEON Ltd./VimpelCom Shareholder Litigation

On September 19, 2017, Judge Andrew L. Carter, Jr. of the U.S. District Court for the Southern District of New York denied in large part VEON Ltd.'s (“VEON”) (formerly known as VimpelCom) motion to dismiss the securities class action led by Plaintiff Westway Alliance Corp. on behalf of all persons or entities that purchased VEON securities between December 4, 2010 and November 3, 2015.⁴⁷³

In the Amended Complaint, plaintiffs allege violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and describe the criminal information against VimpelCom and DPA with the DOJ.⁴⁷⁴ Judge Carter dismissed the portions of plaintiffs' 10(b) claim based on “disclosures regarding the government authorities in Uzbekistan responsible for overseeing the telecommunications sector”⁴⁷⁵ and any

⁴⁶⁸ *In re Petrobras Sec.*, 862 F.3d 250, 256-57 (2d Cir. 2017).

⁴⁶⁹ Petition for a Writ of Certiorari, *Petróleo Brasileiro S.A. – Petrobras v. Universities Superannuation Scheme Ltd.*, pending petition, No. 17-664.

⁴⁷⁰ Brendan Pierson, *Petrobras to pay \$2.95 billion to settle U.S. corruption lawsuit*, REUTERS (Jan. 3, 2018), <https://www.reuters.com/article/us-petrobras-classaction/petrobras-to-pay-2-95-billion-to-settle-u-s-corruption-lawsuit-idUSKBN1ES0L2>.

⁴⁷¹ Joint Emergency Motion to Defer Consideration of Petition for a Writ of Certiorari, *Petróleo Brasileiro S.A. – Petrobras v. Universities Superannuation Scheme Ltd.*, pending petition, No. 17-664.

⁴⁷² Joint Emergency Motion to Defer Consideration of Petition for a Writ of Certiorari, *Petróleo Brasileiro S.A. – Petrobras v. Universities Superannuation Scheme Ltd.*, pending petition, No. 17-664.

⁴⁷³ *In re VEON Ltd. Sec. Litig.*, No. 15-CV-08672 (ALC), 2017 WL 4162342, at *1 (S.D.N.Y. Sept. 19, 2017).

⁴⁷⁴ *In re VEON Ltd. Sec. Litig.*, No. 15-CV-08672 (ALC), 2017 WL 4162342, at *1 (S.D.N.Y. Sept. 19, 2017).

⁴⁷⁵ *In re VEON Ltd. Sec. Litig.*, No. 15-CV-08672 (ALC), 2017 WL 4162342, at *7 (S.D.N.Y. Sept. 19, 2017).

“claim [] based merely on the failure to follow internal controls, without more.”⁴⁷⁶ Veon must file an answer by January 12, 2018.

Individual defendants who have appeared in the action must move to dismiss the Amended Complaint, and Veon must file an answer, by mid-January 2018.⁴⁷⁷

C. Whistleblower Lawsuits

1. Wadler v. Bio-Rad Laboratories, Inc. et al.

In February 2017, a federal jury awarded former Bio-Rad Laboratories Inc. (“Bio-Rad”) General Counsel and Executive Vice President Sanford Wadler \$2.96 million in back wages and \$5 million in punitive damages for a FCPA whistleblower-retaliation case brought under the Sarbanes-Oxley Act, Dodd-Frank Wall Street Reform Act (“Dodd-Frank Act”), and California state law.⁴⁷⁸ Wadler, who had spent 24 years working in several executive roles at BioRad, alleged that he was terminated shortly after he reported FCPA concerns to Bio-Rad’s audit committee. The complaint alleges that the CEO, CFO, and other members of management had “stonewalled” Wadler after he questioned the veracity of the conclusions of an internal investigation of potential FCPA violations in Vietnam, Thailand, and Russia, and was subsequently terminated.⁴⁷⁹

In November 2014, a little over a year after Wadler was terminated, Bio-Rad agreed to pay the SEC \$40 million in disgorgement and prejudgment interest for improper payments to foreign officials in Vietnam, Thailand and Russia, and paid \$14.35 million to the DOJ to resolve allegations of books and records and internal controls violations in connection to payments made in Russia. In May 2015, Wadler sued Bio-Rad for retaliation.

BioRad has filed a Ninth Circuit appeal seeking to overturn Wadler’s \$8M award on the grounds that (1) Wadler failed to prove he had an objectively reasonable belief of FCPA violations, (2) the jury was improperly instructed that reporting an FCPA violation is protected activity under Sarbanes-Oxley, and (3) Dodd-Frank Act does not apply to internal reporting.⁴⁸⁰ The case is still pending.

2. Digital Realty Trust v. Somers

On November 28, 2017, the U.S. Supreme Court heard oral arguments for *Digital Realty Trust v. Somers*, which addresses the issue of whether the Dodd-Frank Act protects corporate whistleblowers who report securities violations internally but not to the SEC. A decision against the SEC could, according to commentators, significantly

⁴⁷⁶ *In re VEON Ltd. Sec. Litig.*, No. 15-CV-08672 (ALC), 2017 WL 4162342, at *8 (S.D.N.Y. Sept. 19, 2017).

⁴⁷⁷ Stipulation and Order, *In re VEON Ltd. Sec. Litig.*, No. 15-CV-08672-ALC, (S.D.N.Y. Nov. 13, 2017).

⁴⁷⁸ Jury Verdict, *Wadler v. Bio-Rad Labs., Inc.*, No. 3:15-cv-2356 (N.D. Cal. Feb. 6, 2017).

⁴⁷⁹ Complaint, *Wadler v. Bio-Rad Labs., Inc.*, No. 3:15-cv-2356, ¶¶ 30-33 (N.D. Cal. May 25, 2015).

⁴⁸⁰ Notice of Appeal, *Wadler v. Bio-Rad Labs., Inc.*, No. 3:15-cv-2356, ¶ 35 (N.D. Cal. June 7, 2017); Brief for Appellants, *Wadler v. Bio-Rad Labs., Inc.*, No. 17-16193 (9th Cir. Oct. 16, 2017).

affect companies by undermining “the goal of a transparent workplace where problems are raised and resolved without reprisal.”⁴⁸¹ Instead, employees would be incentivized to go to the SEC directly, rather than reporting issues internally.

In 2014, Respondent Paul Somers, then a Vice President of Portfolio Management in Petitioner Digital Realty Trust’s Asian Pacific region, notified company executives of potential securities law violations. However, he did not report his concerns to the SEC. Somers was subsequently fired and later filed a wrongful termination suit against the company in federal district court in San Francisco. The company filed a motion to dismiss, arguing that Somers did not qualify as a whistleblower under Dodd-Frank Act, which was denied in district court and on appeal at the Ninth Circuit.

Dodd-Frank Act defines a whistleblower as an individual “who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”⁴⁸² The company has argued that a plain reading of Dodd-Frank Act covers only those individuals who report to the SEC. The Commission, on the other hand, has broadly interpreted the Dodd-Frank Act to cover individuals, like Somers, who only report internally and not to the SEC.

Early reports indicate that a majority of the justices were skeptical of the Commission’s broad interpretation, instead favoring the plain language of the statute.

Legal experts stated that a ruling in favor of Digital Realty would have a negative effect on companies, as individuals would be less likely to report internally, for fear of being fired; instead it would provide incentives for whistleblowers “to go directly to the SEC.”⁴⁸³ On the other hand, a ruling in favor of the SEC would seem to allow whistleblowers to recover from companies in circumstances not covered by the plain language of the statute. A ruling against the SEC would prevent recovery under Dodd-Frank Act for employees who report violations internally but not to the SEC, but those employees would still be protected under Sarbanes-Oxley, provided they file a complaint with the Labor Department within 180 days.

D. Employee Defamation Action

On October 13, 2016, Alejandro Yeatts sued his former employer Zimmer Biomet for defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress arising out of alleged misstatements made by Zimmer Biomet’s Chief Compliance Officer in October 2014.⁴⁸⁴ In his lawsuit, Yeatts alleged that while he was working as general manager of Zimmer Biomet’s Argentina subsidiary (“Biomet

⁴⁸¹ Marcia Coyle, *Justices Seem Poised to Curtail SEC’s Broad Whistleblower Protections*, NAT’L L.J., (Nov. 29, 2017).

⁴⁸² 15 U.S.C. § 78u-6(a)(6) (a whistleblower is an individual).

⁴⁸³ David G. Savage, *Supreme Court to Decide Who Is a Protected Whistleblower in Corporate America*, L.A. TIMES (Nov. 28, 2017), <http://www.latimes.com/politics/la-na-pol-court-whistleblower-20171127-story.html>.

⁴⁸⁴ *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, 2017 WL 1375117, at *1 (N.D. Ind. Apr. 17, 2017).

Argentina”), he discovered that, in violation of its 2012 DPA with the DOJ, Zimmer Biomet continued to maintain a relationship with an entity known to provide improper payments.⁴⁸⁵ Shortly after this discovery, a company attorney met with Yeatts and accused him of working with the third party at issue.⁴⁸⁶ Biomet Argentina subsequently terminated Yeatts on September 4, 2015.⁴⁸⁷ On October 24, 2014, Zimmer Biomet’s Chief Compliance Officer sent an email notifying the recipients that Yeatts was on the “Restricted Parties” list and was “suspended in connection with a corruption-related investigation involving Brazil.”⁴⁸⁸ Zimmer Biomet moved to dismiss the lawsuit, appending a release of claims signed by Yeatts upon his termination in 2015.⁴⁸⁹

On April 17, 2017, a federal district court found that Yeatts had sufficiently alleged a defamation claim against Zimmer Biomet and denied the company’s motion to dismiss Yeatts’ complaint.⁴⁹⁰ The court declined to consider the release of claims appended to the motion and based its ruling solely on the allegations contained in the complaint.⁴⁹¹ The court dismissed Yeatts’ claims of intentional and negligent infliction of emotional distress arising from the allegedly defamatory email.⁴⁹²

E. Civil Fraud/RICO Actions

1. Government of Bermuda v. Lahey Clinic, Inc. et al.

On February 14, 2017, the Government of Bermuda filed a suit against Lahey Clinic, Inc. and Lahey Clinic Hospital, Inc. alleging violations of RICO, unfair business practices under Massachusetts General Laws, and the common law theories of unjust enrichment, civil conspiracy, and fraud.⁴⁹³ The Government of Bermuda alleged that, for almost two decades, defendants bribed former premier of Bermuda, Dr. Ewart Brown, to obtain lucrative healthcare contracts.⁴⁹⁴ The allegedly improper payments were disguised as “consulting fees” and donations to Brown’s political party.⁴⁹⁵

⁴⁸⁵ Amended Complaint, *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, ¶¶ 27, 28 (N.D. Ind. May 1, 2017).

⁴⁸⁶ Amended Complaint, *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, ¶ 28 (N.D. Ind. May 1, 2017).

⁴⁸⁷ Amended Complaint, *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, ¶ 1 (N.D. Ind. May 1, 2017).

⁴⁸⁸ *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, 2017 WL 1375117, at *2 (N.D. Ind. Apr. 17, 2017).

⁴⁸⁹ *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, 2017 WL 1375117, at *1 (N.D. Ind. Apr. 17, 2017).

⁴⁹⁰ *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, 2017 WL 1375117, at *8 (N.D. Ind. Apr. 17, 2017).

⁴⁹¹ *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, 2017 WL 1375117, at *4 (N.D. Ind. Apr. 17, 2017).

⁴⁹² *Yeatts v. Zimmer Biomet Holdings, Inc.*, No. 3:16-CV-706-MGG, 2017 WL 1375117, at *6-7 (N.D. Ind. Apr. 17, 2017).

⁴⁹³ Complaint, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 1:17-cv-10242-IT, ¶ 4 (D. Mass. Feb. 14, 2017).

⁴⁹⁴ Complaint, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 1:17-cv-10242-IT, ¶¶ 1, 45 (D. Mass. Feb. 14, 2017).

⁴⁹⁵ Complaint, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 1:17-cv-10242-IT, ¶¶ 1, 45 (D. Mass. Feb. 14, 2017).

In April 2017, the defendants moved to dismiss the suit asserting that the Government of Bermuda failed to allege with particularity the official acts that Brown took to benefit the defendants, the RICO claims are barred by the statute of limitations, and the alleged violations did not proximately cause the alleged injuries.⁴⁹⁶ A month later, Bermudian legislators including Brown filed a motion for leave to file an amici curiae brief, arguing that the “complaint is time-barred and that the lawsuit is plainly politically motivated.”⁴⁹⁷ The Government of Bermuda filed an opposition to the motion arguing that the court should reject the amici curiae brief because the legislators do not have a relevant tangible or special interest in the lawsuit. The Government of Bermuda argued that “[the legislators] clearly have an interest in advocating on behalf of Lahey, that partisan interest is not only *not* sufficient, it provides a basis, in and of itself, for denying the Motion.”⁴⁹⁸

2. EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.

On March 30, 2017, the court granted in part and denied in part defendants’ motion to dismiss plaintiff’s RICO suit, a case arising out of what Judge Amit Mehta described as “the largest modern political scandal in the history of Brazil.”⁴⁹⁹

Petrobras, a Brazilian state-owned oil company, was under investigation by Brazil’s federal police for corruption.⁵⁰⁰ The highly publicized investigation, known as “Operation Car Wash,” which included the prosecutions of Odebrecht and Braskem and resulted in the largest fines in a corruption-related investigation in history, revealed that Petrobras had been soliciting bribes in exchange for awarding construction and service contracts to certain entities and giving payments to government officials in three continents.⁵⁰¹

After the police investigation, on February 23, 2016, a group of investment funds and their investment advisor (collectively, the “Fund”) sued Petrobras and various shipyards (collectively, the “Shipyards”) that paid bribes in exchange for construction contracts.⁵⁰² The Fund alleged that Petrobras made materially false statements and omissions in order to induce the Fund to invest in Sete Brasil Participações (“Sete”), an entity

⁴⁹⁶ Motion to Dismiss, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 1:17-cv-10242-IT, at 5-6, 9-13, 17-18 (D. Mass. Apr. 14, 2017).

⁴⁹⁷ Motion for Leave to File Amici Curiae Brief, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 1:17-cv-10242-IT, at 2 (D. Mass. May 15, 2017).

⁴⁹⁸ Opposition to Motion for Leave to File Amici Curiae Brief, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 1:17-cv-10242-IT, at 1 (D. Mass. May 17, 2017).

⁴⁹⁹ *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 60 (D.D.C. 2017).

⁵⁰⁰ See *Brazil Police Begin New Round of Raids in Petrobras Investigation*, REUTERS (May 4, 2017), <http://www.reuters.com/article/brazil-corruption-petrobras/brazil-police-begin-new-round-of-raids-in-petrobras-investigation-idUSL1N1I60AT>.

⁵⁰¹ See Tom Schoenberg, Jessica Brice, and Erik Larson, *Brazil ‘Carwash’ Probe Yields Largest-Ever Corruption Penalty*, BLOOMBERG (Dec. 21, 2016), <https://www.bloomberg.com/news/articles/2016-12-21/odebrecht-braskem-agree-to-carwash-penalty-of-3-5-billion>.

⁵⁰² *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 60 (D.D.C. 2017).

Petrobras setup to funnel bribes.⁵⁰³ The Fund also alleged that Petrobras aided and abetted Sete and that Petrobras engaged in a civil conspiracy to defraud the Fund.⁵⁰⁴

On August 12, 2016, Petrobras and the Shipyard Defendants filed a motion to dismiss.⁵⁰⁵ On March 30, 2017 the court found, among other things, that the investment adviser did not have standing to bring an action against Petrobras.⁵⁰⁶ The court also declined to dismiss the claims of fraud and aiding and abetting against Petrobras but dismissed all counts against the Shipyard Defendants.⁵⁰⁷ Petrobras appealed the District Court's order denying in part its motion to dismiss the Fund's amended complaint on sovereign-immunity grounds and oral argument is currently set for January 19, 2018.⁵⁰⁸ WilmerHale represented Sembcorp in the matter.⁵⁰⁹

VI. LEGISLATIVE DEVELOPMENTS

A. Foreign Business Bribery Prohibition Act 2017 (H.R. 1549)

On March 15, 2017, U.S. Representative Ed Perlmutter (D-Colo.) introduced a bill that would “authorize certain private rights of action under the Foreign Corrupt Practices Act of 1977 for violations that damage certain businesses, and for other purposes” and would also allow for treble damages and attorney’s fees.⁵¹⁰ Perlmutter has introduced similar bills in prior years and they have not moved forward.⁵¹¹ This past year, in connection with the legislation, Perlmutter stated “[t]his legislation is more important than ever given the lack of clarity from the new administration and the new leadership at the DOJ and SEC Since it’s unclear if FCPA enforcement will remain a priority, this bill will encourage U.S. and foreign companies to play by the rules or face the consequences.”⁵¹² As discussed above, as 2017 unfolded, the DOJ and SEC

⁵⁰³ Amended Complaint, *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, No. 1:16-cv-00333-APM, ¶ 1 (D.D.C. May 18, 2016); *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 61 (D.D.C. 2017).

⁵⁰⁴ Amended Complaint, *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, No. 1:16-cv-00333-APM, ¶¶ 72-83, 84-97, 98-111 (D.D.C. May 18, 2016).

⁵⁰⁵ Motion to Dismiss, *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, No. 1:16-cv-00333-APM (D.D.C. Aug. 12, 2016).

⁵⁰⁶ *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 61 (D.D.C. 2017).

⁵⁰⁷ *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 62 (D.D.C. 2017).

⁵⁰⁸ Final Appeal Brief for Appellant, *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, No. 17-7067 (D.C. Cir. Nov. 20, 2017).

⁵⁰⁹ *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 60 (D.D.C. 2017).

⁵¹⁰ H.R. 1549 - Foreign Business Bribery Prohibition Act of 2017, 115th Cong. (2017),

<https://www.congress.gov/bill/115th-congress/house-bill/1549/text>.

⁵¹¹ U.S. Representative Ed Perlmutter, CONGRESS.GOV, <https://www.congress.gov/member/ed-perlmutter/P000593?q=%7B%22subject%22%3A%22Commerce%22%7D> (listing Foreign Business Bribery Prohibition Acts from 2008, 2009, 2011, and 2016).

⁵¹² U.S. Representative Ed Perlmutter, *Perlmutter Introduces Legislation to Help Stop Corruption and Foreign Bribery under the Trump Administration* (March 16, 2017),

<https://perlmutter.house.gov/news/documentsingle.aspx?DocumentID=1652>.

leadership reaffirmed their commitment to enforce the FCPA. There has been no action on the bill since March 31, 2017, and it seems unlikely that the bill will go forward.⁵¹³

B. SEC Resource Extraction Disclosure Rules Repealed

On February 14, 2017, President Trump approved a resolution passed under the Congressional Review Act (“CRA”) to eliminate the SEC’s rule requiring resource extraction disclosures.⁵¹⁴ This rule, adopted in June 2016, would have required resource extraction issuers to report payments over \$100,000 made to governments for “the commercial development of oil, natural gas or minerals.”⁵¹⁵ Resource extraction issuers were required to begin reporting with fiscal years ending on or after September 30, 2018.⁵¹⁶

This rule was the second SEC resource extraction disclosure rule. The first rule was adopted in August 22, 2012 and was overturned by a district court after a challenge was brought by “associations of oil, natural gas, and mining companies” in 2013.⁵¹⁷ The court found that there is no statutory mandate for public disclosure or clear evidence that Congress intended for issuers’ annual reports on such payments to be publicly disclosed.⁵¹⁸ Additionally, the court found that the SEC’s “denial of any exemption for countries that prohibit payment disclosure was arbitrary and capricious.”⁵¹⁹ The SEC then re-proposed a modified version of the rule in 2015, and this version was later adopted in June 2016.⁵²⁰ The repeal of the current resource extraction disclosures rule will likely be final because a rule repealed under the CRA “may not be reissued in substantially the same form” unless the rule is specifically authorized by a new law.⁵²¹

C. Financial CHOICE Act of 2017 (H.R. 10)

On June 8, 2017, the House of Representatives passed H.R. 10, the Financial CHOICE Act of 2017 (“FCA”).⁵²² The FCA, which still needs to be approved by the Senate,

⁵¹³ H.R. 1549 - Foreign Business Bribery Prohibition Act of 2017, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1549/all-actions> (last accessed November 16, 2017).

⁵¹⁴ Pub. L. No. 115-4, 131 Stat. 9.

⁵¹⁵ U.S. Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249b, Release No. 34-78167, at 151-52 (June 27, 2016).

⁵¹⁶ See U.S. Securities and Exchange Commission Press Release No. 2016-132: SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016).

⁵¹⁷ *American Petroleum Institute v. SEC & Oxfam*, No. 12-1668-JDB, at 11-15 (D.D.C. July 2, 2013), <https://www.sec.gov/rules/final/2013/34-67717-court-decision-vacating-rule.pdf>.

⁵¹⁸ *American Petroleum Institute v. SEC & Oxfam*, No. 12-1668-JDB, at 22 (D.D.C. July 2, 2013), <https://www.sec.gov/rules/final/2013/34-67717-court-decision-vacating-rule.pdf>.

⁵¹⁹ *American Petroleum Institute v. SEC & Oxfam*, No. 12-1668-JDB, at 22 (D.D.C. July 2, 2013), <https://www.sec.gov/rules/final/2013/34-67717-court-decision-vacating-rule.pdf>.

⁵²⁰ U.S. Securities and Exchange Commission Press Release No. 2016-132: SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016); see U.S. Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249b, Release No. 34-78167, at 9 (June 27, 2016).

⁵²¹ 5 U.S.C. § 801(b)(2).

⁵²² Geoff Bennett, *House Passes Bill Aimed at Reversing Dodd-Frank Financial Regulations*, NPR (June 8, 2017), <https://www.npr.org/2017/06/08/532036374/house-passes-bill-aimed-at-reversing-dodd-frank-financial-regulations>; H.R. 10 – Financial CHOICE Act of 2017, 115th Cong. (2017).

would limit the Dodd-Frank Act and certain aspects of the SEC's enforcement authority. For example, the FCA would exempt banking organizations that "maintain a leverage ratio of at least 10 percent" from certain Dodd-Frank Act regulatory requirements.⁵²³ Additionally, section 823 of the FCA would allow a defendant to compel the SEC to move an administrative proceeding to federal court.⁵²⁴ Moreover, section 824 would require approval by the Division of Economic and Risk Analysis and Chief Economist before the SEC can impose civil money penalties against issuers.⁵²⁵

Notably, the FCA would also increase civil penalties for securities law violations. Section 211 provides a new maximum penalty in cases involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," which will be "\$300,000 for a natural person or \$1,450,000 for any other person," "3 times the gross amount of pecuniary gain to the person who committed the act or omission" or "the amount of losses incurred by victims as a result of the act or omission," whichever is greatest.⁵²⁶

On June 13, 2017, the FCA was referred to the Senate Committee on Banking, Housing, and Urban Affairs, which held a hearing on this legislation and is currently reviewing the FCA.⁵²⁷

VII. KEY INTERNATIONAL LEGAL DEVELOPMENTS

A. United Kingdom

1. Investigation and Enforcement Trends

Looking back to the end of 2016, it was clear that 2016 had been a year of promise, but not delivery, for the U.K. SFO. As U.K. SFO Director David Green said plaintively to his audience during his annual speech to the Cambridge Symposium on Economic Crime: "Be patient – I have to be."⁵²⁸

A year later, and it appears that Green's patience has paid off. In 2017, the U.K. SFO secured two additional DPAs, obtained a conviction rate by defendant of 89.5% for the financial year 2016–2017, commenced 14 new investigations, saw several corporate and individual defendants charged and awaiting trials, and mounted a successful challenge to claims of legal professional privilege. The U.K. SFO also demonstrated itself to be not only effective, but also profitable, with a net contribution of £460 million to

⁵²³ House Committee on Financial Services, *The Financial CHOICE Act: Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs* (Apr. 24, 2017), https://financialservices.house.gov/uploadedfiles/2017-04-24_financial_choice_act_of_2017_comprehensive_summary_final.pdf.

⁵²⁴ H.R. 10 – Financial CHOICE Act of 2017, 115th Cong. (2017).

⁵²⁵ H.R. 10 – Financial CHOICE Act of 2017, 115th Cong. (2017).

⁵²⁶ H.R. 10 – Financial CHOICE Act of 2017, 115th Cong. (2017).

⁵²⁷ All Actions H.R. 10 – 115th Cong. (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/10/all-actions?overview=closed#tabs>.

⁵²⁸ David Green speech delivered to the Cambridge Symposium on Economic Crime 2016, Jesus College, Cambridge (5 September 2016), <https://www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/>.

the U.K. Treasury over the past four years—equivalent to around £1 million per member of SFO staff.

Buoyed by these concrete successes, the U.K. SFO has become increasingly confident, even aggressive, in its investigative tactics. However, the future of the U.K. SFO is still to some extent marred by uncertainty. Although government plans to “incorporate” the U.K. SFO into the National Crime Agency (“NCA”) were quietly dropped this September, Home Secretary Amber Rudd later announced the creation of a new “National Economic Crime Centre” (“NECC”). The new NECC will sit within the NCA, and will be tasked with tackling high-level fraud and money laundering.⁵²⁹ Although Green is confident that the NECC will not impinge on the U.K. SFO’s independence, the fact remains that the NECC will have powers to task the U.K. SFO with investigations. Shortly after the NECC announcement, the Government began to advertise publicly for Green’s replacement as U.K. SFO Director. This role will, according to Attorney-General Jeremy Wright QC, be “pivotal in driving through the package of reforms.”⁵³⁰ Despite Green’s assurances, it appears that the U.K. SFO’s status as an independent agency going forward may not be as secure as he would like us to believe.

2. Significant Cases

In 2016, the U.K. SFO announced an investigation into alleged bribery, corruption and money-laundering activities at Monaco-based firm Unaoil.⁵³¹ The announcement followed investigative reports published by various media outlets, which were based on hundreds of thousands of leaked internal emails and documents.⁵³² While the wider investigation is ongoing, on November 16, 2017, the U.K. SFO announced it had charged Ziad Akle and Basil Al Jarah with offenses of conspiracy to make corrupt payments to secure the award of Unaoil client contracts in Iraq.⁵³³ A third man, Saman Ahsani, is subject to an extradition request to Monaco on related charges. Two weeks later, the U.K. SFO charged two further individuals, Paul Bond and Stephen Whiteley, in connection with the same alleged conspiracy.⁵³⁴ Since the alleged misconduct took place between 2005 and 2011, Akle, Al Jarah, Bond and Whiteley have been charged

⁵²⁹ HM Government Press Release: Home Secretary announces new national economic crime centre to tackle high level fraud and money laundering (11 December 2017), <https://www.gov.uk/government/news/home-secretary-announces-new-national-economic-crime-centre-to-tackle-high-level-fraud-and-money-laundering>.

⁵³⁰ HM Government Press Release: The Attorney General Jeremy Wright QC MP: Economic crime (December 13, 2017), <https://www.gov.uk/government/news/the-attorney-general-jeremy-wright-qc-mp-economic-crime>.

⁵³¹ SFO Press Release: Unaoil Investigation (19 July 2016), <https://www.sfo.gov.uk/2016/07/19/unaoil-investigation/>.

⁵³² Michael Bachelard, *Unaoil: the Company that Bribed the World*, HUFFINGTON POST (undated), <http://www.theage.com.au/interactive/2016/the-bribe-factory/day-1/the-company-that-bribed-the-world.html>.

⁵³³ SFO Press Release: Two charged in SFO’s Unaoil investigation (16 November 2017), <https://www.sfo.gov.uk/2017/11/16/two-charged-sfos-unaoil-investigation/>.

⁵³⁴ SFO Press Release: Two further individuals charged in SFO’s Unaoil investigation (30 November 2017), <https://www.sfo.gov.uk/2017/11/30/two-individuals-charged-sfos-unaoil-investigation/>.

under laws that were in effect prior to the enactment of the U.K. Bribery Act 2010 (“UKBA”).

In addition to charging decisions in the original investigation, the U.K. SFO’s work on Unaoil has generated a number of additional related investigations. In April 2017, the SFO announced it had opened an investigation into KBR, Inc.’s U.K. subsidiaries (“KBR U.K.”), in relation to alleged bribery and corruption offenses.⁵³⁵ In its announcement, the U.K. SFO confirmed that its investigation into KBR U.K. was related to its ongoing investigation into Unaoil. In May 2017, the U.K. SFO confirmed it was also investigating the activities of Petrofac PLC for alleged bribery, corruption, and money laundering,⁵³⁶ again in connection with the Unaoil investigation.

July 2017 saw the announcement of two new investigations by the U.K. SFO. On July 11, the U.K. SFO confirmed it was investigating the activities of Amec Foster Wheeler plc in connection with alleged bribery and corruption offenses.⁵³⁷ Two weeks later, an investigation was announced into alleged corruption in relation to Rio Tinto Group’s business in the Republic of Guinea.⁵³⁸

In August 2017, the U.K. SFO announced it was investigating suspicions of corruption in the conduct of business by British American Tobacco, plc.⁵³⁹ This followed a 2015 television report by the BBC’s Panorama program on the company’s business activities.⁵⁴⁰

The U.K. SFO announced that it had secured six individual convictions and one corporate conviction in its case against logistics and freight operations company F.H. Bertling Ltd in September 2017.⁵⁴¹ The charges were first announced in July 2016,⁵⁴² and related to corrupt payments made in 2005 and 2006 to an agent of the Angolan state oil company Sonangol. By March 2017, six of the seven individuals charged had pleaded guilty, with the company following suit in August. The remaining individual, Peter Ferdinand, was acquitted by a jury on September 21, 2017.

The U.K. SFO has two trials scheduled for 2018 in its long-running investigation into alleged corruption at Alstom Network UK Limited and Alstom Power Limited. With

⁵³⁵ SFO Press Release: Investigation opened into KBR, Inc. (28 April 2017), <https://www.sfo.gov.uk/2017/04/28/kbr/>.

⁵³⁶ SFO Press Release: SFO confirms investigation into Petrofac PLC (12 May 2017), <https://www.sfo.gov.uk/2017/05/12/sfo-confirms-investigation-petrofac-plc/>.

⁵³⁷ SFO Press Release, SFO confirms investigation into Amec Foster Wheeler (11 July 2017), <https://www.sfo.gov.uk/2017/07/11/sfo-confirms-investigation-amec-foster-wheeler/>.

⁵³⁸ SFO Press Release: SFO opens investigation into the Rio Tinto group (24 July 2017), <https://www.sfo.gov.uk/2017/07/24/sfo-opens-investigation-into-the-rio-tinto-group/>.

⁵³⁹ SFO Press Release: SFO investigating British American Tobacco p.l.c. (1 August 2017), <https://www.sfo.gov.uk/2017/08/01/sfo-investigating-british-american-tobacco-plc/>.

⁵⁴⁰ *The Secret Bribes of Big Tobacco*, BBC PANORAMA (30 November 2015), <http://www.bbc.co.uk/news/av/uk-34970163/panorama-the-secret-bribes-of-big-tobacco>.

⁵⁴¹ SFO Press Release: SFO secures seven convictions in \$20m F.H. Bertling corruption case (26 September 2017), <https://www.sfo.gov.uk/2017/09/26/sfo-secures-7-convictions-20m-f-h-bertling-corruption-case/>.

⁵⁴² SFO Press Release, F.H. Bertling Ltd and seven individuals charged with bribery (13 July 2016), <https://www.sfo.gov.uk/2016/07/13/f-h-bertling-ltd-seven-individuals-charged-bribery/>.

seven individuals and two corporate defendants charged across the various portions of the investigation, the outcome of these trials will be significant for the U.K. SFO.

3. DPAs

At the close of 2016, the role of the DPA in the United Kingdom was uncertain. With only two DPAs in place, it was unclear whether DPAs would become a tool used more widely by the U.K. SFO, and if so, what companies needed to do in order to secure one.

The year 2017 has provided some degree of clarity on both questions. In January 2017, the U.K. SFO entered its third and largest DPA to date with Rolls-Royce PLC (“Rolls-Royce”).⁵⁴³ Under the terms of the U.K. DPA, Rolls-Royce paid a total of just over £497 million, composed of disgorgement of profits of £258 million and a financial penalty of £239 million. The company also paid almost £13 million of the U.K. SFO’s costs, and agreed to implement, at its own expense, an internal anti-bribery and corruption compliance program. The conduct for which Rolls-Royce was investigated spanned three decades, and took place across seven jurisdictions.

In April 2017, the U.K. SFO concluded its fourth DPA, this time with Tesco Stores Limited in relation to alleged accounting irregularities. Under the DPA, Tesco Stores Limited agreed to pay a £129 million financial penalty and to bear the U.K. SFO’s costs.⁵⁴⁴

Both of these DPAs—and the Rolls-Royce DPA in particular—were significantly larger in financial terms than either of their predecessors. In addition, since each DPA requires approval from the court, both the Rolls-Royce and the Tesco judgments provided helpful guidance on the nascent jurisprudence in this area.

4. Corporate Criminal Liability

The issue of corporate criminal liability in the United Kingdom has been a thorn in the side of the U.K. SFO for many years. In order to convict a company of virtually any economic offense, prosecutors are currently required to identify and prove their case to the criminal standard against the “controlling mind” of that company, the exception to this being a prosecution for failure to prevent bribery under Section 7 of the UKBA. U.K. SFO Director Green and others have long campaigned for an extension of the “failure to prevent” model to other economic crimes in order to ease the evidentiary burden on prosecutors bringing cases against companies.

In early 2017, the Ministry of Justice launched a consultation on reforming corporate liability for economic crime. Although promising from Green’s point of view, the results of the consultation have yet to be announced. In light of the U.K.’s referendum vote to leave the European Union, corporate criminal liability reform may not be the highest

⁵⁴³ SFO Press Release: SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC (17 January 2017), <https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/>.

⁵⁴⁴ SFO Press Release: SFO agrees Deferred Prosecution Agreement with Tesco (10 April 2017), <https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/>.

item on the government's political agenda. However, those campaigning for overhaul were given a glimmer of hope in the form of the Criminal Finances Act 2017, which introduced a new, UKBA-style corporate offense of failure to prevent the facilitation of tax evasion.

5. Concluding Thoughts

Given the U.K. SFO's recent financial and investigative successes, the trend for the U.K. SFO—and therefore, for its Director Green's legacy in his final year at the helm—has been broadly positive. The future of the agency is, for the time being, no longer under threat (although the exact role of the planned NECC and its interaction with the U.K. SFO and other agencies is not yet clear), and the U.K. SFO has a healthy roster of active matters. Also notable has been the U.K. SFO's increasing confidence and bullishness in pursuing investigations.

Looking forward to 2018, and particularly in light of the U.K. SFO's proactive attitude in recent months, it seems likely that many companies under U.K. SFO investigation will look to try and demonstrate the “extraordinary co-operation” required to secure a DPA. Whether this becomes, in the words of the U.K. SFO, “the new normal,”⁵⁴⁵ remains to be seen. However, the U.K. SFO is at pains to emphasize that this does not equate to taking a light touch on individual criminality: “[i]t should never be thought that a DPA with a company somehow lets culpable former senior management off the hook: far from it.”⁵⁴⁶

B. Germany

1. Enforcement Efforts

In May 2017, the German Federal Court of Justice reached an important decision in a landmark criminal law case concerning tax fraud for declaring bribes as tax-deductible business expenses. The case involved the sale of goods by a German defense company to the government of Greece, a sale which was allegedly made in exchange for the payment of improper commissions to a consulting company with ties to a Greek government official. The employee who authorized these payments was charged criminally as an individual with indirectly committing tax fraud by falsely declaring bribes as business expenses. The charge was based on his alleged knowledge of an informal agreement between the company's management and the Greek government official. The court upheld the indirect tax fraud charge against the individual employee. In the same case, the court also assessed whether the company, which under German law is not subject to criminal law, should be fined under an administrative offense for having

⁵⁴⁵ Ben Morgan, U.K. Joint Head of Bribery and Corruption, Speech delivered to a seminar for General Counsel and Compliance Counsel, The future of Deferred Prosecution Agreements after Rolls-Royce (8 March 2017), <https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/>.

⁵⁴⁶ David Green CB QC, Director, Speech delivered to the Cambridge Symposium on Economic Crime 2017, Jesus College, Cambridge (4 September 2017), <https://www.sfo.gov.uk/2017/09/04/cambridge-symposium-2017/>.

benefited by the wrongdoings of its management. With respect to an appeal of the Public Prosecutors Office regarding the amount of the fine, the court overruled a lower court decision and declared obiter dicta that whether or not a corporate compliance system existed and was implemented at the company needed to be considered when deciding on the amount of a fine.⁵⁴⁷ This ruling on the corporate aspect of the case has been widely interpreted as an important signal that courts will consider the existence of a strong compliance program as a mitigating factor in determining punishment for offenses and provides a strong incentive for companies to strengthen their compliance efforts in order to avail themselves of that potential mitigation.

In March 2017, the Munich Public Prosecutors Office searched the German premises of Volkswagen and Audi, and the offices of U.S. law firm Jones Day, in order to locate information that Jones Day had collected during its internal investigation of Volkswagen's and Audi's diesel exhaust gas emission system. The prosecutors seized documents containing communications between Jones Day, acting as the companies' lawyers, claiming that the company had not divulged relevant information to the prosecutors. After the seizure was upheld by a Munich local court, Volkswagen and Jones Day took the case to the German Constitutional Court to challenge the seizure of the documents asserting, inter alia, legal privilege under German law. By order of an injunction, the court ruled that the prosecutors were not allowed to examine the documents until a final judgment on the merits has been rendered.⁵⁴⁸ While the case does not relate to anti-bribery enforcement, the decision of the German constitutional court is expected to have far-reaching implications for any type of internal investigation of alleged corporate misconduct.

In June 2017, Atlas Elektronik, a joint venture between Airbus and ThyssenKrupp, reached a settlement with the Bremen Public Prosecutor's Office in an anti-corruption investigation involving Atlas Elektronik's alleged bribes to Turkish government officials. The company agreed to pay a €48 million fine to settle the allegations.⁵⁴⁹

The Munich Public Prosecutor's Office is widely expected to file indictments against Airbus employees with regard to allegedly improper payments that were made to intermediaries in relation to the sale of Eurofighter planes to the Austrian government. The charges will be based on the criminal offense of embezzlement of company funds,

⁵⁴⁷ Bundergerichtshof [BGH][Federal Court of Justice] May 9, 2017, 1 StR 265/16, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=78723&pos=0&anz=1>.

⁵⁴⁸ Jack Ewing and Bill Vlasic, *German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/business/volkswagen-diesel-emissions-investigation-germany.html>; Bundesverfassungsgericht Press Release, July 26, 2017, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2017/bvg17-062.html>.

⁵⁴⁹ Michael Griffiths, *German prosecutors reward cooperation in Atlas foreign bribery settlement*, GLOBAL INVESTIGATIONS REVIEW (June 6, 2017), <https://globalinvestigationsreview.com/article/1142640/german-prosecutors-reward-cooperation-in-atlas-foreign-bribery-settlement>.

rather than corruption offenses, because of the difficulties prosecutors have had in identifying the ultimate recipient of the improper payments.⁵⁵⁰

Following an anti-bribery investigation by the Public Prosecutor's Office in Würzburg into alleged bribes made in connection with business in Turkey, German automotive and industrial supplier Schaeffler has brought damages claims against eight former managers. The claims were rejected by the labor court in Würzburg, but Schaeffler has appealed the decision.⁵⁵¹ Schaeffler's lawsuit highlights a recent trend among German companies to claim damages from employees and managers for compliance violations. In the past, Siemens and ThyssenKrupp, among others, had taken similar legal steps.⁵⁵²

2. Legislative Developments

After having tightened rules on corruption in the healthcare sector in 2016, the German legislature, in April 2017, adopted a new law to combat corruption involving sports. The new legislation introduces sections 265c (betting fraud in sports), 265d (manipulation of professional sports competitions) and 265e (especially serious cases of betting fraud in sports and manipulation of professional sports competitions) to the German Criminal Code.⁵⁵³ Offenders face fines or imprisonment of up to five years.

In February 2017, the German Corporate Governance Code on management and supervision of German-listed companies was amended to incorporate the concept of the "reputable businessperson."⁵⁵⁴ The German Corporate Governance Code is aimed at providing listed companies with recommendations for best practices of good corporate governance. Listed companies must explain deviations from the recommendations contained in the Code and disclose such deviation with their annual declaration of conformity.⁵⁵⁵ This includes not only a requirement that companies comply with the law

⁵⁵⁰ Handelsblatt Global, *Airbus rocked by corruption allegations* (Oct. 9, 2017), <https://global.handelsblatt.com/companies-markets/airbus-rocked-by-corruption-allegations-ceo-tom-enders-boeing-rival-837108>; Der Spiegel, *Airbus Corruption Scandal May Lead Straight to the Top* (Oct. 9, 2017), <http://www.spiegel.de/international/business/airbus-corruption-scandal-threatens-ceo-tom-enders-a-1171533.html>.

⁵⁵¹ Uwe Ritzer, *Kultur des Wegsehens*, Sueddeutsche Zeitung (23 August 2017), <http://www.sueddeutsche.de/wirtschaft/schaeffler-kultur-des-wegsehens-1.3637576>.

⁵⁵² Reuters, *Siemens settles last bribery suit against former executives* (Dec. 12, 2014), <https://www.reuters.com/article/us-siemens-settlement/siemens-settles-last-bribery-suit-against-former-executives-idUSKBN0JQ1FB20141212>; <http://www.faz.net/aktuell/wirtschaft/unternehmen/schienenkartell-thyssen-krupp-scheitert-mit-millionen-forderung-an-manager-13381349.html>.

⁵⁵³ Christian Keidel, *A guide to Germany's new criminal law against betting fraud and match-fixing in sports*, LawInSport (Sept. 14, 2017), https://www.lawinsport.com/articles/anti-corruption/item/a-guide-to-germany-s-new-criminal-law-against-betting-fraud-and-match-fixing-in-sports?category_id=114; 51. Gesetz zur Änderung des Strafgesetzbuches-Strafbarkeit von Sportwettbetrug und der Manipulation von berufssportlichen Wettbewerben vom 11.04.2017, BGBl. I, pp. 815-816 [2017], https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl117s0815.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl117s0815.pdf%27%5D_1512388920485.

⁵⁵⁴ The German Corporate Governance Code, (7 February 2017), http://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214_Code.pdf.

⁵⁵⁵ The German Corporate Governance Code, (7 February 2017), http://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214_Code.pdf.

but also a requirement that companies' Management Boards take ethically sound and responsible actions. Moreover, in section 4.1.3. (as amended), the Code recommends that a company's Management Board institute appropriate measures reflecting the company's risk situation (a "compliance management system") and disclose the main features of those measures in their annual report. In addition, a company's Management Board is encouraged to establish a whistleblowing system that gives employees and third parties the opportunity to report, in a manner protected from retaliation, suspected breaches of the law within the company.⁵⁵⁶

In April 2017, Germany implemented EU Directive 2014/95/EU, adding a section to the German Commercial Code requiring the disclosure of certain information. Capital-market oriented companies, credit institutions, and insurance companies with more than 500 employees are now required to include a statement on diversity and non-financial information in their annual reports. They must report on efforts in the fight against corruption, as well as on social, environmental, employment, and human rights-related issues. Companies can choose from different reporting standards including national, European, or international frameworks. If, for example, a company opts not to implement a dedicated system to combat corruption, the company needs to provide clear reasons for its decision in this report.⁵⁵⁷

Another law enhancing transparency came into effect in July 2017. Germany introduced a centralized Competition Register, which the Federal Cartel Office in Bonn ("BKartA") will have to host and implement by 2020. Government entities and instrumentalities offering public tenders worth €30,000 or more are required to check their partners against the register to make sure that they are not excluded from public procurement due to past offenses. The register will list companies that have been involved with various offenses, in particular offenses relating to corruption, financing of terrorism, money laundering, subsidy fraud, or tax evasion. The BKartA is said to be working on a guideline to clarify the register's standards, as well as to respond to procedural questions.

The reform of disgorgement proposed in 2016 came into effect in July 2017 with Germany implementing EU Directive 2014/42/EU. The new rules will have an effect on anti-bribery enforcement by loosening the requirements for prosecutors to obtain disgorgement and facilitating the seizure of assets obtained through criminal acts.⁵⁵⁸

⁵⁵⁶ The German Corporate Governance Code, (7 February 2017), http://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214_Code.pdf.

⁵⁵⁷ Deutscher Bundestag, Ds. 18/11450 v. 08.03.2017, <http://dip21.bundestag.de/dip21/btd/18/114/1811450.pdf>; co2ol, *European CSR Directive comes into force in Germany* (March 10, 2017), <https://www.co2ol.de/en/european-csr-directive-comes-into-force-in-germany/>.

⁵⁵⁸ Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung vom 13.04.2017, BGBl. I, pp. 872-877 [2017], https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl117s0872.pdf%27%5D_1512406550175.

C. France

As we reported last year, the Sapin II Law (“Sapin II”) was adopted by the French Parliament in December 2016 with the purpose of strengthening already existing anti-corruption laws in France.⁵⁵⁹ The new law, which came into force in June 2017 enhanced the legal protection of French whistleblowers, established the Agence Française Anticorruption (“AFA”), a national agency tasked with detecting and preventing corruption, and obligated large companies to implement corruption prevention plans.⁵⁶⁰ Sapin II also introduced the “convention judiciaire d’intérêt public,” which created a way for companies under investigation to achieve a stay of criminal proceedings before the case is referred for trial.⁵⁶¹

In November 2017, French National Prosecutors entered into the first DPA under the new Sapin II law with HSBC Private Bank (Suisse) SA (“PBRs”), HSBC’s Geneva-based private banking unit.⁵⁶² Under the terms of the DPA, PBRs agreed to pay €300 million in order to resolve allegations that the bank helped French clients launder money and evade local tax obligations.⁵⁶³ Specifically, PBRs was ordered to pay €86.4 million in disgorgement of profits, a €7.5 million penalty, and €142 million in damages to the French state.⁵⁶⁴ The DPA stated that PBRs had, since 2011, “initiated a complete overhaul of its structure, controls and procedures,” increased oversight and reporting lines of its subsidiaries, withdrawn from certain markets, and instituted “strict financial crime, regulatory compliance[,] and tax transparency standards.”⁵⁶⁵

D. European Union

The European Union Commission published a follow-up to a study conducted in 2012 on corruption in the European Union healthcare sector as one of the fields considered to be most vulnerable to corrupt practices. The study makes recommendation to

⁵⁵⁹ Michael Rose, *France adopts U.S.-style anti-corruption settlement system*, REUTERS (Nov. 8, 2016), <http://www.reuters.com/article/us-france-corruption-idUSKBN1332G1>.

⁵⁶⁰ French Government Press Release: Sapin II Law: transparency, the fight against corruption, modernisation of the economy (6 April 2016), <http://www.gouvernement.fr/en/sapin-ii-law-transparency-the-fight-against-corruption-modernisation-of-the-economy>.

⁵⁶¹ LOI no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, Texte 2 Sur 146, (Dec. 10, 2016).

⁵⁶² Convention judiciaire d’intérêt public between the National Financial Prosecutor of the Paris first instance court and HSBC Private Bank (Suisse) SA, ¶¶ 13, 29, Federal Registration number CH-660.0.074-001-4, Cour D’Appel de Paris, Tribunal de Grande Instance de Paris, N/Réf: PNF 11 024 092 018, Nov. 28, 2017.

⁵⁶³ Convention judiciaire d’intérêt public between the National Financial Prosecutor of the Paris first instance court and HSBC Private Bank (Suisse) SA, ¶¶ 49, Federal Registration number CH-660.0.074-001-4, Cour D’Appel de Paris, Tribunal de Grande Instance de Paris, N/Réf: PNF 11 024 092 018, Nov. 28, 2017.

⁵⁶⁴ Convention judiciaire d’intérêt public between the National Financial Prosecutor of the Paris first instance court and HSBC Private Bank (Suisse) SA, ¶¶ 49, Federal Registration number CH-660.0.074-001-4, Cour D’Appel de Paris, Tribunal de Grande Instance de Paris, N/Réf: PNF 11 024 092 018, Nov. 28, 2017.

⁵⁶⁵ Convention judiciaire d’intérêt public between the National Financial Prosecutor of the Paris first instance court and HSBC Private Bank (Suisse) SA, ¶¶ 34, Federal Registration number CH-660.0.074-001-4, Cour D’Appel de Paris, Tribunal de Grande Instance de Paris, N/Réf: PNF 11 024 092 018, Nov. 28, 2017.

European Union Member States on how to strengthen corruption prevention in the healthcare sector, with special attention paid to Greece, Croatia, Hungary, Lithuania, Poland, and Romania. The study concluded that bribery with respect to medical services presents the most challenging problem in this area. The Commission urges the Member States to develop more transparent rules and encourages companies in the healthcare sector to reevaluate their policies and procedures to ensure that they are sufficiently addressing corruption issues. The Commission expressed satisfaction with attempts at both the European Union and national level to prevent improper marketing. Also at the European Union level, the European Federation of Pharmaceutical Industries and Associations (“EFPIA”) introduced a Disclosure Code that requires its members to reveal all transfers of value made to healthcare professionals and healthcare organizations. In addition, MedTech Europe, a non-governmental trade association representing the medical technology industries, introduced the Code of Ethical Business Practice. The Code sets ethical standards for the relationship between healthcare organizations and professionals in order for those organizations to maintain the trust of regulators and patients.⁵⁶⁶

The European Union Commission this year decided to cease its anti-corruption report, which was first published in 2014 and was originally planned to be updated every other year.⁵⁶⁷ The European Union Commission signaled that this should not be considered as a sign of a more relaxed approach to anti-corruption prevention and stressed that other initiatives like the Experience Sharing Program will continue.⁵⁶⁸

E. China

1. Enforcement Efforts

In 2017, China launched the next phase of its anti-corruption campaign following the recently closed 19th National Congress of the Communist Party of China (“CPC” or the “Party”). President Xi, who began his second five-year term in October 2017, vowed to maintain the “irreversible” momentum of the campaign to root out corruption in China. In the past five years, 1.545 million cases involving corruption were filed, with 1.537 million people disciplined. Criminal charges were brought against some 58,000 individuals in these cases, which are currently working their way through the courts.⁵⁶⁹ From January to September 2017, the CPC Central Commission for Discipline

⁵⁶⁶ European Commission, Updated Study on Corruption in the Healthcare Sector, Final Report, September 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/20170928_study_on_healthcare_corruption_en.pdf.

⁵⁶⁷ Nikolaj Nielsen, *EU commission drops anti-corruption report*, EUOBSERVER (Feb. 2, 2017), <https://euobserver.com/institutional/136775>.

⁵⁶⁸ Chris Harris, *Why won't Brussels release report on EU-wide corruption?*, Euronews (June 28, 2017), <http://www.euronews.com/2017/06/28/why-won-t-brussels-release-report-on-eu-wide-corruption>; Cornelia Spörl, *EU stoppt Anti-Korruptionsbericht, Heimlich begraben*, Legal Tribune Online (Apr. 25, 2017), <https://www.lto.de/recht/hintergruende/h/eu-kommission-schafft-anti-korruptionsbericht-ab-heimlich-begraben/>.

⁵⁶⁹ Sina News: *Yang Xiaodu: 1.537 million people have been disciplined, and 58,000 have been transferred to judicial departments for investigation of criminal liabilities in the past five years* (杨晓渡 : 5 年处分 153.7 万人 , 5.8 万人移送司法) (October 19, 2017), <http://news.sina.com.cn/c/2017-10-19/doc-ifymzqpq2344231.shtml>.

Inspection (“CCDI”), China’s top anti-corruption agency and the highest internal-control institution of the CPC, brought 383,000 cases involving corruption. A total of 47,005 officials involved in 33,471 cases have been tried for corruption or bribery and sentenced to imprisonment or fined for corruption, including 56 officials at the ministerial, provincial, or higher level and more than 2,300 at the regional level.⁵⁷⁰

China also continued the international manhunt “Sky Net” that we reported on last year, which is a campaign by the Chinese government to prosecute corruption suspects and repatriate money procured through illegal means. As of the end of August 2017, 3,339 fugitives (including 628 former officials) were captured from more than 90 countries and regions, and approximately USD 1.41 billion was recovered through this operation.⁵⁷¹

Corruption investigations of several officials at the ministerial, provincial, or higher level continued in 2017. Xiang Junbo, Chairman of the China Insurance Regulatory Commission, a key official in the financial supervisory sector, was expelled from the Party and removed from office in April. This removal was confirmed in September by the Party as having been the result of a disciplinary investigation for accepting bribes, engaging in corruption, and abusing supervisory and approval power for his own political and economic benefit.⁵⁷² In July, Sun Zhengcai, who was previously considered a viable candidate for prime minister, was removed as the Secretary of Chongqing Municipal Communist Party Commission for alleged corruption.⁵⁷³ The cases for both Sun and Xiang have now been transferred to the relevant courts for further investigation of criminal offenses.

In July, Yao Gang, the former Vice Chairman of China’s securities regulator, was prosecuted for taking bribes and abusing power to obtain illegal benefits.⁵⁷⁴ This prosecution was followed, in November, by the news that Lu Wei, the Vice Minister of the Publicity Department of CPC Central Committee, was reportedly under investigation by the CCDI for corruption.⁵⁷⁵ CCDI published a special commentary on its website

⁵⁷⁰ China Central Government News: *CCDI of CPC Circulated the Information on the National Discipline Inspection Work from January to September, 2017* (中央纪委通报 2017 年 1 至 9 月 全国纪检监察机关纪律审查情况) (October 30, 2017), http://www.gov.cn/xinwen/2017-10/30/content_5235373.htm.

⁵⁷¹ Sohu News: For the five year the Party has been in serious discipline, 3,339 fugitives were captured, RMB9.36 billion were recovered (从严治党这五年：追逃 3339 人追赃 93.6 亿), October 4, 2017, http://www.sohu.com/a/196216348_100029584.

⁵⁷² CPC News: *Xiang Junbo is now under the organizational Investigation for alleged serious violation of the Party Discipline* (项俊波涉嫌严重违纪目前正接受组织审查) (Apr. 9, 2017), <http://fanfu.people.com.cn/n1/2017/0409/c64371-29197745.html>; and http://www.ccdi.gov.cn/jlsc/zqgb/djcf_zqgb/201709/t20170923_107759.html.

⁵⁷³ XinhuaNet News: *CPC Central Committee has decided to expel Sun Zhengcai from the Party, remove him from office and transfer to Judiciary Department for investigation of criminal liability in accordance with law* (中共中央决定给予孙政才开除党籍、开除公职处分 将孙政才涉嫌犯罪问题及线索移送司法机关依法处理) (September 29, 2017), http://news.xinhuanet.com/2017-09/29/c_1121747644.htm.

⁵⁷⁴ Sina Financial News: *CCDI published the news that Yao Gang has be expelled from the Party and removed from the office for taking bribes and abusing power to get illegal benefits* (中纪委公布姚刚被“双开”内情：政治攀附、重金受贿、以权谋私) (July 20, 2017), <http://finance.sina.com.cn/roll/2017-07-20/doc-ifyihrwk1546675.shtml>.

⁵⁷⁵ CCDI Official Website Key News: *Lu Wei, the Vice Minister of the Publicity Department of CPC Central Committee, is now undergoing the investigation by CCDI for corruption* (中共中央宣传部原副部长鲁炜涉嫌严重违纪接受组织审查) (November 21, 2017), http://www.ccdi.gov.cn/yw/201711/t20171122_112253.html.

stating that the investigation of Lu has showed “the firm resolution on corruption of the CPC’s Central Committee” and has sent “a strong signal that the Party will never be lenient on its members.”⁵⁷⁶

Among these investigations and prosecutions of high-ranking officials in China for corruption, one of the most significant was the conviction of Donald Tsang, former Chief Executive of Hong Kong, in February 2017.⁵⁷⁷ Tsang was convicted of one count of misconduct in office and sentenced to 20 months in prison. In 2012, Wave Media, a radio station in which Hong Kong businessman Bill Wong was majority shareholder, applied for a broadcasting license from the Hong Kong government. The Hong Kong cabinet approved the license application at a time when Tsang was renting a penthouse apartment from a company owned by Wong for his retirement. The jury found Tsang guilty because he approved Wave Media’s license without disclosing this conflict of interest relating to the real estate transaction.⁵⁷⁸

However, the jury was unable to reach a majority verdict on a corruption charge alleging that Tsang had accepted free renovation services from Wong in exchange for approving Wong’s license application.⁵⁷⁹ The charge was retried in September, but that too ended in a hung jury.⁵⁸⁰ Prosecutors have since indicated that they will not seek a third retrial.⁵⁸¹

2. Legislative Developments

Following the Pilot Plans for State Supervision Institution Reform in Beijing, Shanxi, and Zhejiang (“Pilot Plans”) implemented by the CPC’s Central Committee last year, the National People’s Congress (“NPC”) on November 7, 2017 published the Draft Supervision Law to Further Improve the Supervision of Those Serving the Public Offices (“Draft Law”).⁵⁸² Pursuant to the Draft Law, a new National Supervision Commission

⁵⁷⁶ CCDI Official Website, Special Commentary Column, <http://www.ccdi.gov.cn/special/bwzp/>.

⁵⁷⁷ Richard L. Cassin, *Former Hong Kong Leader jailed for graft*, THE FCPA BLOG, (Feb. 23, 2017), <http://www.fcpablog.com/blog/2017/2/23/former-hong-kong-leader-jailed-for-graft.html>.

⁵⁷⁸ Julia Hollingsworth, Chris Lau, Stuart Lau, *Donald Tsang guilty of misconduct in office, making him first Hong Kong leader convicted in criminal trial*, SOUTH CHINA MORNING POST (18 February 2017), <http://www.scmp.com/news/hong-kong/law-crime/article/2071852/donald-tsang-guilty-misconduct-office-making-him-first-hong>; Alan Wong, *Donald Tsang, Former Hong Kong Leader, Gets 20 Months for Misconduct*, N.Y. TIMES (February 22, 2017), <https://www.nytimes.com/2017/02/22/world/asia/donald-tsang-sentence-hong-kong.html>.

⁵⁷⁹ Julia Hollingsworth, Chris Lau, Stuart Lau, *Donald Tsang guilty of misconduct in office, making him first Hong Kong leader convicted in criminal trial*, SOUTH CHINA MORNING POST (18 February 2017), <http://www.scmp.com/news/hong-kong/law-crime/article/2071852/donald-tsang-guilty-misconduct-office-making-him-first-hong>; Alan Wong, *Donald Tsang, Former Hong Kong Leader, Gets 20 Months for Misconduct*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/world/asia/donald-tsang-sentence-hong-kong.html>.

⁵⁸⁰ Danny Lee, *Getting Donald Tsang back in the dock for second retrial will be hard for Hong Kong prosecutors, legal experts say*, SOUTH CHINA MORNING POST (4 November 2017), <http://www.scmp.com/news/hong-kong/economy/article/2118424/getting-donald-tsang-back-dock-second-retrial-will-be-hard>.

⁵⁸¹ *(Donald Tsang Trial) Prosecutors will not seek retrial*, THE STANDARD (6 November 2017), <http://www.thestandard.com.hk/breaking-news.php?id=99186&sid=4>.

⁵⁸² See The National People’s Congress of the People’s Republic of China: Draft Laws for Comment, http://www.npc.gov.cn/COBRS_LFYJNEW/user/UserIndex.jsp?ID=8430697.

will be established and work with the CCDI, expanding the purview of the anti-corruption campaign to include employees at state-sponsored institutions. The new National Supervision Commission will have the power to investigate illegal activities such as graft, misuse of authority, neglect of duty, and waste of public funds. The National Supervision Commission is also intended to be a stand-alone law enforcement agency tasked with facilitating greater cooperation with international law enforcement.

In addition, supervisory commissions will be set up at provincial, municipal, and local levels across the country to ensure that all public servants exercising public power are subject to supervision. Public servants covered by the supervision scheme include: 1) civil servants in the organs of the Party, People's Congress, administration, political consultative conference, supervision, judicial, prosecution, democratic parties, federation of industry and commerce as well as personnel subject to the Civil Servant Law; 2) people in public affairs management organizations authorized by law or entrusted by government authorities; and 3) management of state-owned enterprises.

On November 4, 2017, the Standing Committee of the National People's Congress passed the amendment to the Anti-Unfair Competition Law (the "Amendment")⁵⁸³ which provides more clarity on the scope of commercial bribery, and creates increased penalties thereto. The Amendment came into effect on January 1, 2018 and is the first amendment to the law since its implementation in 1993. This important development indicates that China's anti-corruption campaign continues to escalate.

The Amendment defines commercial bribery as "a business operator using cash, property or other means to seek transaction opportunities or competitive advantage by bribing (i) employees of a transaction counterparty; (ii) entities or individuals entrusted by a transaction counterparty to handle relevant affairs such as subcontractors and agents; or (iii) entities or individuals that use authority or influence to influence a transaction."⁵⁸⁴ The range of penalties has significantly increased from RMB100,000 to RMB3 million, in addition to confiscation of illegal gains. The authorities also have the power to revoke the business license in severe cases. The Amendment reflects the government's increased understanding of the nature of commercial bribery, which follows global anti-corruption trends, but it remains to be seen how the newly defined bribery will be implemented.

F. India

In 2017, there were several significant FCPA enforcement actions involving India, including the SEC administrative order settlement with Alere, CDM Smith's entry into a declination with disgorgement with the DOJ, and the SEC enforcement action against Cadbury and Mondelēz, each of which is discussed in more detail in Section III.B.5.a above.

⁵⁸³ See The National People's Congress of the People's Republic of China: The People's Republic of China Anti-Unfair Competition Law; http://www.npc.gov.cn/npc/xinwen/2017-11/04/content_2031432.htm.

⁵⁸⁴ See The National People's Congress of the People's Republic of China: The People's Republic of China Anti-Unfair Competition Law; http://www.npc.gov.cn/npc/xinwen/2017-11/04/content_2031432.htm.

Meanwhile, Indian authorities continued their efforts to stem widespread corruption and crack down on India's vast shadow economy. In 2014, Prime Minister Narendra Modi came to power promising to tackle the problems of money laundering and tax evasion. In a controversial move, Modi announced in November 2016 the demonetization of 500 and 1,000 rupee bank notes. The purpose given was to curtail the black economy and to crack down on the use of unaccounted (and therefore untaxed) and counterfeit cash to fund illegal activities and terrorism.⁵⁸⁵ People were given until December 30, 2016 to return these notes to banks, or else risk losing their value.⁵⁸⁶

Following the demonetization, in January 2017, the Income Tax Department launched Operation Clean Money in an effort to detect unreported income and increase tax compliance. In the first phase of the operation, which took place between February and April, the Income Tax Department analyzed cash deposit data to identify persons whose cash transactions did not appear in line with their tax paying profile.⁵⁸⁷ Nearly 1.8 million individuals were identified using this process, and those people were subjected to a further verification process which required them to verify cash transactions online, including by specifying the source of the cash.⁵⁸⁸

In the second phase of Operation Clean Money, the Income Tax Department assessed the various cases and categorized them according to different levels of risk.⁵⁸⁹ Enforcement actions (including searches and seizures of assets) were taken in high-risk cases, while low-risk cases were monitored for tax compliance.⁵⁹⁰

Meanwhile, the Ministry of Corporate Affairs has been investigating deposits made by approximately 20,000 companies during the demonetization period, and the Serious Fraud Investigation Office has been investigating over 1500 companies for allegedly violating the Companies Act.⁵⁹¹ These investigations were prompted by the surge in shell companies depositing cash in banks after demonetization.⁵⁹² As of July 2017, Indian authorities had shut down nearly 200,000 shell companies, and hundreds of

⁵⁸⁵ Government of India, Income Tax Department: Operation Clean Money Status Report, at 2 (May 2017), https://www.cleanmoney.gov.in/pdf/OCM_Status_Report-16_May_2017.pdf; Vrishti Beniwal, Jeanette Rodrigues and Hannah Dormido, *Was Modi's Grand Cash Ban a Big Waste of Time?* BLOOMBERG (Nov. 5, 2017), <https://www.bloomberg.com/news/articles/2017-11-05/modi-s-big-economic-gamble-in-tatters-as-cash-remains-king>.

⁵⁸⁶ Bhaskar Chakravorti, *Early Lessons from India's Demonetization Experiment*, HARVARD BUSINESS REVIEW (Mar. 14, 2017), <https://hbr.org/2017/03/early-lessons-from-indias-demonetization-experiment>.

⁵⁸⁷ Government of India, Income Tax Department: Operation Clean Money Status Report, at 4 (May 2017), https://www.cleanmoney.gov.in/pdf/OCM_Status_Report-16_May_2017.pdf.

⁵⁸⁸ Government of India, Income Tax Department: Operation Clean Money Status Report, at 4 (May 2017), https://www.cleanmoney.gov.in/pdf/OCM_Status_Report-16_May_2017.pdf.

⁵⁸⁹ Government of India, Income Tax Department: Operation Clean Money Status Report, at 6 (May 2017), https://www.cleanmoney.gov.in/pdf/OCM_Status_Report-16_May_2017.pdf.

⁵⁹⁰ Government of India, Income Tax Department: Operation Clean Money Status Report, at 7 (May 2017), https://www.cleanmoney.gov.in/pdf/OCM_Status_Report-16_May_2017.pdf.

⁵⁹¹ Shruti Srivastava, *India Unearths \$1 Billion of Suspicious Cash in Corruption Crackdown*, BLOOMBERG (Oct. 24, 2017), <https://www.bloomberg.com/news/articles/2017-10-24/india-s-crackdown-on-shell-companies-set-to-intensify-minister>.

⁵⁹² Paritosh Bansal, Sanjeev Miglani, Rahul Bhatia, *Cracking down on 'black' money, India steps up scrutiny of shell firms*, REUTERS (Aug. 16, 2017), <https://www.reuters.com/article/us-india-corruption-companies/cracking-down-on-black-money-india-steps-up-scrutiny-of-shell-firms-idUSKCN1AW0U1>.

thousands more were still under investigation.⁵⁹³ In a speech in August, Prime Minister Modi claimed that demonetization had helped unearth over 300,000 shell companies.⁵⁹⁴

In other enforcement efforts, in March, the Central Bureau of Investigation (“CBI”) filed a charge sheet against Himachal Pradesh Chief Minister Virbhadra Singh for allegedly amassing assets worth approximately USD 1.54 million which was disproportionate to his total income during his tenure as a Union minister.⁵⁹⁵ This case is still working its way through the courts.

G. Russia

The year 2017 was a busy one for Russian anti-corruption efforts. Several amendments to the country’s anti-corruption laws were enacted or went into force, and several other draft corruption-related bills have been introduced in Parliament. On the enforcement front, several high-ranking politicians have been charged with corruption, and a prominent opposition leader was convicted of embezzlement in a trial that may have been politically motivated.

1. Legislative Developments

On April 15, 2017, a set of amendments entered into force⁵⁹⁶ requiring the chief executives of the regions of the Russian Federation to check whether information disclosed by municipal officials is complete and correct. Specifically, the new law requires the chief executives to check whether these individuals have correctly reported their income, property, and any obligations that are owed to them or by them to other people.⁵⁹⁷

On July 1, 2017, another set of amendments was signed into law by the Russian president requiring the publication and dissemination on the internet of a list of persons who have been dismissed from public service because they have committed a

⁵⁹³ Paritosh Bansal, Sanjeev Miglani, Rahul Bhatia, *Cracking down on ‘black’ money, India steps up scrutiny of shell firms*, REUTERS (Aug. 16, 2017), <https://www.reuters.com/article/us-india-corruption-companies/cracking-down-on-black-money-india-steps-up-scrutiny-of-shell-firms-idUSKCN1AW0U1>.

⁵⁹⁴ Shruti Srivastava, *India Unearths \$1 Billion of Suspicious Cash in Corruption Crackdown*, BLOOMBERG (Oct. 24, 2017), <https://www.bloomberg.com/news/articles/2017-10-24/india-s-crackdown-on-shell-companies-set-to-intensify-minister>.

⁵⁹⁵ *DA case adjourned: Court directs CBI to give papers to HP CM Virbhadra Singh*, HINDUSTAN TIMES (Aug. 30, 2017), <http://www.hindustantimes.com/india-news/da-case-against-himachal-chief-minister-virbhadra-singh-adjourned-to-oct-31/story-TdaFbomfVgyTb1sl6wNU8O.html>; <http://www.firstpost.com/politics/virbhadra-singh-da-case-delhi-high-court-rejects-plea-to-quash-investigation-against-himachal-pradesh-chief-minister-3771719.html>.

⁵⁹⁶ Russian Federation, Official Internet portal legal information, Federal Law. No. 64-FZ of 03.04.2017: “On amendments to certain legislative acts of the Russian Federation made with the purpose of modernization of the state policy in the area of counteraction against corruption,” <http://publication.pravo.gov.ru/Document/View/0001201704040011?index=0&rangeSize=1>.

⁵⁹⁷ Russian Federation, Official Internet portal legal information, Federal Law. No. 64-FZ of 03.04.2017: “On amendments to certain legislative acts of the Russian Federation made with the purpose of modernization of the state policy in the area of counteraction against corruption,” <http://publication.pravo.gov.ru/Document/View/0001201704040011?index=0&rangeSize=1>; President Putin signs amendments to anti-corruption legislation: New anti-corruption bill submitted to State Duma, Rapsi (Apr. 4, 2017), http://www.rapsinews.com/legislation_news/20170404/278162539.html.

corruption offense.⁵⁹⁸ This amendment will enter into force in January 2018.⁵⁹⁹ The list is purportedly intended to help government agencies access information on whether potential employees have complied with ethical and anti-corruption laws.⁶⁰⁰

In addition, two significant draft bills were introduced in Parliament by the government:

- A bill making corporations liable if they bribe someone to advance the interests of their subsidiaries or persons affiliated with them. At present, corporations can only be held liable if they bribe someone to advance their own interests.⁶⁰¹
- A bill extending certain state protections to civil servants and private company employees who report incidents of corruption in their workplace.⁶⁰² In particular, such employees cannot be dismissed without the approval of a special commission, their vacation cannot be shortened, and they cannot be deprived of bonuses and other payments. The information provided by these employees must be treated as confidential, and such employees are entitled to free legal aid.

2. Significant Convictions and Pending Investigations

In February, Alexei Navalny, a prominent opposition leader, was found guilty of embezzlement and given a five-year suspended prison sentence and fined approximately \$8,400.⁶⁰³ Navalny previously had been convicted of embezzlement in 2013, but that verdict was sent for re-trial after the European Court of Human Rights found that the Russian proceedings violated Navalny's right to a fair hearing.⁶⁰⁴ Many observers believe that the court decision in February was a move by Russian President Vladimir Putin to eliminate a key political rival, as Russian law bars individuals with

⁵⁹⁸ See "On amendments of certain legislative acts of the Russian Federation in part on publishing of information on penalty in the form of dismissal due to the loss of confidence caused by the commitment of the corruption offenses in the state information system for state service" dated 1 July 2017 No. 132-FZ.

⁵⁹⁹ See Irina Fedorova, *The Duma supported the creation of a roster of dismissed corrupt officials*, PRAVO.RU (May 24, 2017), <https://pravo.ru/news/view/141116/>; *President Putin signs law on blacklist of corrupt officials*, RAPSI (Mar. 7, 2017), <https://pravo.ru/news/view/141116/>; *President Putin signs law on blacklist of corrupt officials*, RAPSI (Mar. 7, 2017), http://www.rapsinews.com/legislation_news/20170703/279185545.html.

⁶⁰⁰ *President Putin signs law on blacklist of corrupt officials*, RAPSI (Mar. 7, 2017), http://www.rapsinews.com/legislation_news/20170703/279185545.html.

⁶⁰¹ Irina Fedorova, *In Russia, a fine will appear for legal entities for bribes in the interests of "daughters,"* PRAVO.RU (July 25, 2017), <https://pravo.ru/news/view/142977/>.

⁶⁰² See Draft Amendments to the Federal Law "On counteraction against corruption," introduced by the Ministry of Labor in the Parliament in October 2017, <https://www.kommersant.ru/doc/3440448?query=%D0%BA%D0%BE%D1%80%D1%80%D1%83%D0%BF%D1%86%D0%B8%D1%8F>.

⁶⁰³ Alec Luhn, *Alexei Navalny: Russian opposition leader found guilty of embezzlement*, THE GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/world/2017/feb/08/alexei-navalny-russian-opposition-leader-found-guilty-embezzlement>.

⁶⁰⁴ Alec Luhn, *Alexei Navalny: Russian opposition leader found guilty of embezzlement*, THE GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/world/2017/feb/08/alexei-navalny-russian-opposition-leader-found-guilty-embezzlement>.

criminal convictions from running for office.⁶⁰⁵ Navalny appealed the conviction, but it was upheld in May.⁶⁰⁶

In December, Alexey Ulyukaev, a former economic development minister, was found guilty of soliciting a \$2 million bribe from the country's largest oil company, and sentenced to eight years in prison.⁶⁰⁷ Ulyukaev is the highest-ranking Russian official to be convicted of corruption.⁶⁰⁸ Some observers consider his conviction to be politically motivated, rather than an attempt to fight graft.⁶⁰⁹

In addition, there are several pending cases involving high-ranking Russian politicians that are currently wending their way through the courts. These include the cases of Dmitry Zakharchenko, the acting head of an anti-corruption agency at the Russian interior ministry, who is accused of accepting over \$120 million in cash bribes,⁶¹⁰ and Nikolay Barinov, former deputy director of the Federal Penitentiary Service, who is suspected of accepting approximately \$2 million in bribes.⁶¹¹

H. Brazil

2017 saw the trend of robust anti-corruption enforcement efforts by Brazil continue apace. Several important U.S. enforcement actions involved Brazil this year. In November 2017, as discussed above, SBM agreed to pay a total penalty of \$238 million including a \$500,000 criminal fine and \$13.2 million in forfeiture.⁶¹² In January 2017, Rolls-Royce entered into an \$800 million resolution with U.S., U.K., and Brazilian

⁶⁰⁵ Neil MacFarquhar, Ivan Nechepurenko, *Aleksei Navalny, Viable Putin Rival, Is Barred From a Presidential Run*, THE NEW YORK TIMES (Feb. 8, 2017),

<https://www.nytimes.com/2017/02/08/world/europe/russia-aleksei-navalny-putin.html>; Alexander Reshetnikov, Maria Tsvetkova, *Russia opposition leader Navalny says Kremlin sabotaging his presidential bid*, REUTERS (February 8, 2017), <https://www.reuters.com/article/us-russia-politics-navalny/russia-opposition-leader-navalny-says-kremlin-sabotaging-his-presidential-bid-idUSKBN15N12P>.

⁶⁰⁶ *Russian Court Upholds Navalny's Latest Embezzlement Verdict*, RADIO FREE EUROPE/RADIO LIBERTY (May 3, 2017), <https://www.rferl.org/a/russia-navalny-court-upholds-embezzlement-verdict/28465569.html>.

⁶⁰⁷ *Russian ex-economy minister Ulyukayev sentenced to 8 years in prison in \$2mn bribery case*, RT (Dec. 15, 2017), <https://www.rt.com/politics/413289-ulyukayev-minister-corruption-guilty/>; Sofia Miroedova, *The Stunning Story of Russian Minister Ulyukayev's Arrest for Bribery, Explained*, THE MOSCOW TIMES (August 8, 2017), <https://themoscowtimes.com/articles/the-stunning-arrest-of-russian-minister-ulyukaev-for-bribery-explained-58602>; Polina Nikolskaya, Olesya Astakhova, *Russia bribery trial: Former minister directly accuses key Putin ally of framing him*, INDEPENDENT (Aug. 16, 2017), <http://www.independent.co.uk/news/world/europe/alexei-ulyukayev-bribery-trial-russia-latest-vladimir-putin-igor-sechin-a7897256.html>.

⁶⁰⁸ *Russian ex-economy minister Ulyukayev sentenced to 8 years in prison in \$2mn bribery case*, RT (Dec. 15, 2017), <https://www.rt.com/politics/413289-ulyukayev-minister-corruption-guilty/>.

⁶⁰⁹ See, e.g., Shaun Walker, *Russian economy minister in court over alleged \$2m bribe*, THE GUARDIAN (Nov. 15, 2016), <https://www.theguardian.com/world/2016/nov/15/russia-economy-minister-detained-over-alleged-2m-bribe>; Daniel Schearf, *Russia's Extortion Charges Against Economy Minister Seen as Politics*, VOA NEWS (Nov. 15, 2016), <https://www.voanews.com/a/russia-s-extortioncharges-against-economy-minister-seen-as-politics/3596807.html>.

⁶¹⁰ *Russia's anti-corruption boss arrested with \$120 million in cash*, THE TELEGRAPH (Sept. 13, 2016), <http://www.telegraph.co.uk/news/2016/09/13/russias-anti-corruption-boss-arrested-with-120-million-in-cash/>.

⁶¹¹ *Ex-deputy director of Russian Penitentiary Service suspected of taking \$2 mln bribes*, RAPSİ (Feb. 11, 2017), http://www.rapsinews.com/anticorruption_news/20171102/280788686.html.

⁶¹² Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, Crim. No. 17-686, ¶ 7 (S.D. Tex. Nov. 29, 2017).

authorities related to bribery conduct in Brazil. Additionally, in December 2017, Keppel settled with U.S., Singaporean, and Brazilian authorities related to a decades-long bribery scheme involving officials in Brazil.

Investigations by Brazilian authorities into corruption at Petrobras and its related company, Odebrecht, collectively known as “Operação Lava Jato” or “Operation Car Wash” continued in 2017, though not without controversy. The investigation is now in its fourth year and has continued to expand considerably in scope. In April 2017, the Operation Car Wash prosecutors opened new investigations into dozens of politicians from both the Workers Party and others; among them eight members of the President’s cabinet.⁶¹³

In January 2017, Teori Zavascki, the Supreme Court Justice overseeing several Operation Car Wash-related inquiries, including the ratification of Odebrecht’s plea deal, died in a small plane crash.⁶¹⁴ A number of commentators in Brazilian political and legal circles, including a Brazilian prosecutor, questioned whether foul play was involved in the crash.⁶¹⁵ Brazilian President Michel Temer appointed a close ally and justice minister, Alexandre de Moraes, to the Supreme Court to replace Zavascki.⁶¹⁶

On March 17, federal police raided several of the country’s largest meatpacking companies, including JBS S.A. (“JBS”) and BRF S.A. (“BRF”), and accused more than 100 people (mostly health inspectors) of falsifying export paperwork, failing to perform inspections, and taking bribes in connection with the export of rotten meat.⁶¹⁷

Thousands of pages of evidence have been presented in connection with the conduct, which has been under investigation since 2015 (known as “Operation Weak Flesh”), to support charges of systemic fraud with respect to meat exports and inspections.⁶¹⁸ In April 2017, federal prosecutors charged 60 individuals in connection with the scheme, including two executives of BRF S.A..⁶¹⁹

⁶¹³ Jonathan Watts, *Operation Car Wash: Is this the biggest corruption scandal in history?* THE GUARDIAN (June 1, 2017), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>.

⁶¹⁴ Simon Romero, *Supreme Court Justice Helping to Oversee Brazil Graft Inquiry Dies in Plane Crash*, NEW YORK TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/world/americas/brazil-judge-zavascki-petrobras-investigation-killed-plane-crash.html>.

⁶¹⁵ Simon Romero, *Supreme Court Justice Helping to Oversee Brazil Graft Inquiry Dies in Plane Crash*, NEW YORK TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/world/americas/brazil-judge-zavascki-petrobras-investigation-killed-plane-crash.html>.

⁶¹⁶ Jonathan Watts, *Operation Car Wash: Is this the biggest corruption scandal in history?* THE GUARDIAN (June 1, 2017), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>.

⁶¹⁷ Brad Brooks and Stephen Eisenhammer, *Brazil meat probe will show further evidence of graft-sources*, REUTERS (March 24, 2017), <https://www.reuters.com/article/brazil-corruption-food-probe/brazil-meat-probe-will-show-further-evidence-of-graft-sources-idUSL2N1H00DQ?src=ilaw>.

⁶¹⁸ Brad Brooks and Stephen Eisenhammer, *Brazil meat probe will show further evidence of graft-sources*, REUTERS (March 24, 2017), <https://www.reuters.com/article/brazil-corruption-food-probe/brazil-meat-probe-will-show-further-evidence-of-graft-sources-idUSL2N1H00DQ?src=ilaw>.

⁶¹⁹ *BRF executives among 60 charged in Brazil bribery scandal*, REUTERS (Apr. 20, 2017), <https://www.reuters.com/article/us-brazil-corruption-food/brf-executives-among-60-charged-in-brazil-bribery-scandal-idUSKBN17N037>.

On July 12, 2017, as part of Operation Car Wash, Brazil's former president Luis Inácio Lula da Silva was sentenced to nine and a half years in prison after he was found guilty of accepting \$1.2 million in bribes from OAS, an engineering firm.⁶²⁰ Per prosecutors, the money was spent by the company remodeling an apartment for Lula in exchange for Lula's help in ensuring that Petrobras contracts were awarded to OAS.⁶²¹ Just a week prior to Lula's sentencing, Brazil's Federal Police announced that it was shutting down the Operation Car Wash anti-corruption task force.⁶²² While the Federal Police explained that the resources and personnel from the task force would be reshuffled and absorbed into the Federal Police's main anti-corruption division, prosecutors who were part of the task force deemed the shutdown of the task force a "clear setback."⁶²³

In May 2017, Wesley and Joesley Batista, two brothers who control and run JBS, along with seven other company executives, reached a plea deal with prosecutors in connection with an investigation into fraudulent transactions involving JBS, the brothers' holding company, state-run banks, and pension funds.⁶²⁴ In exchange for leniency, J&F Investimentos, which is the controlling shareholder of JBS, agreed to pay a record \$3.2 billion fine.⁶²⁵ As part of the deal, the Batista brothers also submitted to the Supreme Court a recording of Temer authorizing bribe payments to silence politician Eduardo Cunha, currently in prison.⁶²⁶ In June 2017, prosecutors brought criminal bribery charges against Temer. However, Temer avoided trial after convincing enough members of Brazil's lower House of Congress to block the charges from reaching the Supreme Court—the only court in Brazil where elected officials can be prosecuted.⁶²⁷

In September 2017, a judge ordered the arrest of Joesley Batista and a former chairman of JBS, despite Batista's entry into a plea deal in May, as noted above. The arrest was ordered after Joesley Batista accidentally submitted a tape recording to prosecutors related to the investigation of Temer that prosecutors allege showed Joesley Batista was concealing evidence from prosecutors.⁶²⁸ Several days later, police also arrested Wesley Batista on suspicion of insider trading, in which Joesley

⁶²⁰ Brad Brooks, *Ex-Brazil President Lula sentenced to nearly 10 years for corruption*, REUTERS (July 12, 2017), <https://www.reuters.com/article/us-brazil-corruption-lula/ex-brazil-president-lula-sentenced-to-nearly-10-years-for-corruption-idUSKBN19X2FO>.

⁶²¹ Brad Brooks, *Ex-Brazil President Lula sentenced to nearly 10 years for corruption*, REUTERS (July 12, 2017), <https://www.reuters.com/article/us-brazil-corruption-lula/ex-brazil-president-lula-sentenced-to-nearly-10-years-for-corruption-idUSKBN19X2FO>.

⁶²² Ernesto Londoño, *Brazil Shuts Down Successful Corruption-Fighting Task Force*, NEW YORK TIMES (July 7, 2017), <https://www.nytimes.com/2017/07/07/world/americas/brazil-corruption-lava-jato.html>.

⁶²³ Ernesto Londoño, *Brazil Shuts Down Successful Corruption-Fighting Task Force*, NEW YORK TIMES (July 7, 2017), <https://www.nytimes.com/2017/07/07/world/americas/brazil-corruption-lava-jato.html>.

⁶²⁴ Gerson Freitas, Jr., *Batista Brothers' Latest Deal Drags Brazil into Fresh Crisis*, BLOOMBERG MARKETS (May 18, 2017, 11:40 AM), <https://www.bloomberg.com/news/articles/2017-05-18/batista-brothers-latest-deal-drags-brazil-into-fresh-turmoil>.

⁶²⁵ Ricard Brio and Tatiana Bautzer, *Brazil's J&F agrees to pay record \$3.2 billion fine in leniency deal*, REUTERS (May 31, 2017), <https://www.reuters.com/article/us-brazil-corruption-jbs/brazils-iff-agrees-to-pay-record-3-2-billion-fine-in-leniency-deal-idUSKBN18R1HE>.

⁶²⁶ BBC News, *Brazil meat-packing giant JBS to pay record \$3.2bn corruption fine*, BBC NEWS (31 May 2017), <http://www.bbc.com/news/world-latin-america-40109232>.

⁶²⁷ Shasta Darlington, *President Temer of Brazil Faces New Corruption Charges*, NEW YORK TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/world/americas/brazil-temer-corruption-janot.html>.

⁶²⁸ David Meyer, *JBS's Batista Brothers Arrested as Brazil Corruption Probes Spiral*, FORTUNE (Sept. 14, 2017), <http://fortune.com/2017/09/14/jbs-batista-brazil-temer-corruption-insider-trading/>.

Batista was also allegedly implicated.⁶²⁹ The arrests coincided with the arrest of a former Rio de Janeiro state governor, Anthony Gartoinho, on unrelated corruption charges.⁶³⁰

Also in September, additional charges of obstruction of justice were brought against Temer for being part of a criminal conspiracy to prevent authorities from finding out about a vast bribery scheme.⁶³¹ As with the first round of corruption charges, Temer was able to avoid trial. In October, the President persuaded 251 Congressional members to vote against having him stand trial on the second round of charges.⁶³² Temer's approval numbers are at 6% (an improvement from the 3% in October), indicating his deep unpopularity with the Brazilian public.⁶³³

The effects of these non-stop corruption scandals in Brazil are twofold: on the one hand, Brazilians are running out politicians they can trust; on the other, there are too few politicians left capable of governing that have not been caught up in corruption-related scandal.⁶³⁴

I. Mexico

1. Ongoing Investigations

In 2017, there were several FCPA enforcement actions announced that involved Mexico, including the SEC administrative order settlement with Zimmer Biomet and the related action by the DOJ for allowing its Mexican subsidiary to pay bribes to customs officials via brokers and sub-agents. These proceedings are discussed in more detail above. There also are several ongoing investigations involving conduct in Mexico, both by the U.S. and the Mexican government.

Since January 1, only three companies have publicly disclosed that they are currently under investigation for FCPA and corruption-related misconduct by the United States and Mexico for potential violations related to Mexico. Interestingly, the first case involves Mexico's state-run petroleum company, Petróleos Mexicanos ("Pemex") which is currently under investigation by the Mexico Federal Attorney General's Office in

⁶²⁹ David Meyer, *JBS's Batista Brothers Arrested as Brazil Corruption Probes Spiral*, FORTUNE (Sept. 14, 2017), <http://fortune.com/2017/09/14/jbs-batista-brazil-temer-corruption-insider-trading/>.

⁶³⁰ David Meyer, *JBS's Batista Brothers Arrested as Brazil Corruption Probes Spiral*, FORTUNE (Sept. 14, 2017), <http://fortune.com/2017/09/14/jbs-batista-brazil-temer-corruption-insider-trading/>.

⁶³¹ Shasta Darlington, *President Temer of Brazil Faces New Corruption Charges*, NEW YORK TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/world/americas/brazil-temer-corruption-janot.html>.

⁶³² *Michel Temer, Brazil's Unpopular President, Avoids Corruption Trial*, THE GUARDIAN (26 October 2017), <https://www.theguardian.com/world/2017/oct/26/michel-temer-brazils-unpopular-president-avoids-corruption-trial>.

⁶³³ Mateus Maia, *Poll Shows Improvement in Brazil President Temer's Low Approval Rating*, REUTERS (Dec. 20, 2017), <https://www.reuters.com/article/us-brazil-politics-poll/poll-shows-improvement-in-brazil-president-temers-low-approval-rating-idUSKBN1EE1H3>.

⁶³⁴ Shasta Darlington, *President Temer of Brazil Faces New Corruption Charges*, NEW YORK TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/world/americas/brazil-temer-corruption-janot.html>; *Michel Temer, Brazil's Unpopular President, Avoids Corruption Trial*, THE GUARDIAN (26 October 2017), <https://www.theguardian.com/world/2017/oct/26/michel-temer-brazils-unpopular-president-avoids-corruption-trial>.

relation to allegations that its officers accepted bribes in exchange for awarding business.⁶³⁵ According to Pemex, its own Liabilities Unit launched the investigation in December 2016, reported its findings to the Federal Attorney General, and lodged a complaint with the Office. Pemex states that the company is cooperating with the Federal Police, as well as the Attorney General's Office, "in order to hold those responsible for these acts accountable."⁶³⁶ Finally, World Acceptance Corporation ("World Acceptance"), a consumer finance business, disclosed to the SEC and DOJ potential violations of the FCPA in its Mexico operations in June 2017.⁶³⁷ World Acceptance stated, "The Company has voluntarily contacted the [SEC] and the [DOJ] to advise both agencies that an internal investigation is underway and that the Company intends to cooperate with both agencies."⁶³⁸ The second case is that of a multinational retail corporation, which has been under investigation by the SEC and DOJ for alleged bribery in Mexico since 2011.

Earlier this year, the new National Anti-Corruption System ("SNA") undertook its first case involving corruption in the construction of the busy Cuernavaca-Acapulco highway, where a sinkhole killed two people. According to various reports, the highway's construction suffered from corruption at all levels of government. The coordinating committee's supreme audit institution uncovered approximately \$15 million in unjustified payments and services that did not comply with the specifications of the contracts.⁶³⁹ Other Mexican government agencies, including Mexico's Civil Service Secretary, also are investigating this matter.⁶⁴⁰

Separately, Brazil's wide-ranging Operation Car Wash investigation has reached Mexico and individuals close to the current Mexican president, Enrique Peña Nieto. In late October, media reports alleged that \$1.5 million in bribery payments from Odebrecht's subsidiary, Braskem, was deposited into the account of a company linked to Emilio Lozoya, the former director of Pemex, who is close to Peña Nieto.⁶⁴¹ In August, three ex-directors of Odebrecht claimed that Lozoya had received at least \$10 million in bribes from the company in exchange for a contract worth \$115 million for

⁶³⁵ Petróleos Mexicanos, Annual Report (Form 20-F) (Apr. 28, 2017) at 228.

⁶³⁶ Petróleos Mexicanos, Annual Report (Form 20-F) (Apr. 28, 2017) at 228.

⁶³⁷ World Acceptance Corporation, Annual Report (Form 10-K) (June 15, 2017).

⁶³⁸ World Acceptance Corporation, Annual Report (Form 10-K) (June 15, 2017).

⁶³⁹ *Hay Siete Investigaciones Iniciadas por Socavón en el Paso Expres: Comité del SNA*, PROCESO.COM.MX (Sept. 6, 2017), <http://www.proceso.com.mx/501966/siete-investigaciones-iniciadas-socavon-en-paso-expres-comite-del-sna>; see also SNA Investigará Irregularidades que Derivaron en el Socavón del Paso Express, NOTICIEROS TELEvisa (Sept. 5, 2017), <http://noticieros.televisa.com/ultimas-noticias/nacional/2017-09-05/sna-investigara-irregularidades-que-derivaron-socavon-paso-expres/>.

⁶⁴⁰ Abigaíl Cruz, *SCT obligada a entregar informe por construcción del Paso Express*, EL SOL DE MÉXICO (Nov. 16, 2017), <https://www.elsoldemexico.com.mx/mexico/sociedad/sct-obligada-a-entregar-informe-por-construccion-del-paso-expres-313348.html>.

⁶⁴¹ Javier Lafuente, *Una filial de Odebrecht ingresó 1,5 millones en una cuenta vinculada a Emilio Lozoya durante la campaña de Peña Nieto*, EL PAÍ, (Oct. 23, 2017), https://elpais.com/internacional/2017/10/23/mexico/1508777930_255075.html.

work on an oil refinery.⁶⁴² Lozoya has denied the charges.⁶⁴³ In September, the SFP identified approximately \$6.7 million in accounting irregularities in a contract between Pemex and Odebrecht and had begun sanction procedures.⁶⁴⁴ In October, the lead prosecutor tasked with investigating and prosecuting electoral crimes was fired by the Attorney General's office after publicly accusing Lozoya of pressuring his office to declare Lozoya innocent.⁶⁴⁵

2. Legislative Developments

As we reported in 2016, in recent years Mexico undertook sweeping reforms of its anti-corruption laws, including, in May 2014, the creation of the SNA, which coordinates Mexican federal, state, and local authorities in combatting corruption.⁶⁴⁶ Legislation implementing the SNA was enacted in July 2016 and came into effect in July 2017. These new laws established an overall framework for anti-corruption efforts, created a new federal tribunal to hear anti-corruption cases, and established an independent anti-corruption prosecutor's office. The SNA also sought to decentralize anti-corruption efforts by providing for local anti-corruption systems to be enacted at the state and local levels by creating a committee of citizen participants ("CPC") composed of notable citizens. The CPC's chair is also chair of the SNA's coordinating committee, which develops anti-corruption policies and monitors and evaluates progress.

Evaluating the SNA's effectiveness in practice is not yet possible but some early developments show signs of progress. First, observers have praised the creation of the new CPC and its work, with members being named in January 2017.⁶⁴⁷ However, the SNA's current budget is not suitable to support the robust structure called for by the new laws.⁶⁴⁸ Additionally, key appointments for the SNA have not yet been made—for example, specialized anti-corruption judges have not been confirmed, the SNA's anti-

⁶⁴² Javier Lafuente, *Una filial de Odebrecht ingresó 1,5 millones en una cuenta vinculada a Emilio Lozoya durante la campaña de Peña Nieto*, EL PAÍS (Oct. 23, 2017), https://elpais.com/internacional/2017/10/23/mexico/1508777930_255075.html.

⁶⁴³ Christine Jenkins and Fabiana Batista, *Ex-Pemex CEO Lozoya Denies Receiving \$10 million Odebrecht Bribe*, BLOOMBERG (Aug. 13, 2017), <https://www.bloomberg.com/news/articles/2017-08-13/ex-pemex-ceo-lozoya-denies-receiving-10-million-odebrecht-bribe>.

⁶⁴⁴ Secretaría de La Función Pública, Comunicado 173, Abre SFP nuevos procedimientos administrativos en contra de filial de Odebrecht (Sept. 11, 2017), <https://www.gob.mx/sfp/articulos/abre-sfp-nuevos-procedimientos-administrativos-en-contra-de-filial-de-odebrecht-126170?idiom=es>.

⁶⁴⁵ Javier Lafuente, *Destituido Santiago Nieto, el fiscal que denunció presiones del exdirector de Pemex Emilio Lozoya*, EL PAÍS (Oct. 20, 2017), https://elpais.com/internacional/2017/10/20/mexico/1508525796_028616.html.

⁶⁴⁶ Adams, Jonathan & Christian Leo, "New Mexican Anti-Corruption Law Enters into Force July 19, 2017," *Global Compliance News*, available at <https://globalcompliance.com/new-mexican-anti-corruption-law-20170713/>.

⁶⁴⁷ Javier Risco, *La "Trampa" que Nunca Existió*, EL FINANCIERO (July 3, 2017), <http://www.elfinanciero.com.mx/opinion/la-trampa-que-nunca-existio.html>. "[T] here is nothing dark in the creation of an entity for the fight against corruption . . . some are starting to shake, but this is normal, it is a sign that this group of citizens in taking the right path."

⁶⁴⁸ *Arrancará Sistema Nacional Anticorrupción con 214 mdp de Presupuesto*, SDP NOTICIAS (June 26, 2017), <https://www.sdpnoticias.com/nacional/2017/06/26/arrancara-sistema-nacional-anticorrupcion-con-214-mdp-de-presupuesto>. See also Hector Molina and Jorge Monroy, *Plantean Presupuesto Transversal para el SNA*, EL ECONOMISTA (Sept. 12, 2017), <http://eleconomista.com.mx/sociedad/2017/09/12/plantean-presupuesto-transversal-sna>.

corruption prosecutor's office has become the subject of political controversy, and only eight of 32 local governments have implemented their required local anti-corruption systems.⁶⁴⁹

J. Argentina

Argentina made important strides in its efforts to combat corruption 2017.

1. Ongoing Investigations

In March 2017, an Argentine judge ordered Argentina's former president, Cristina Fernández de Kirchner, to stand trial for defrauding the government of approximately \$3.5 billion.⁶⁵⁰ Fourteen other officials were also ordered to stand trial in the case.⁶⁵¹ In April, Kirchner was again indicted on corruption-related charges, including money laundering, along with her daughter and son, in a case involving a family real estate business.⁶⁵² In October, just weeks after Kirchner was elected to the Senate (thereby granting her immunity from prosecution during her term), Argentina's former Planning Minister Julio De Vido was arrested on charges including embezzlement.⁶⁵³ In November, Kirchner's former economy minister and vice president Amado Boudou was arrested on corruption charges.⁶⁵⁴

2. Legislative Developments

On November 8, 2017, Argentina's Congress passed the Corporate Liability Bill, a law that for the first time permits companies, not just individuals, to be held accountable for bribery both inside and outside of Argentina.⁶⁵⁵ Under the law, companies may be prosecuted for bribery committed on their behalf in Argentina, and, in the case of

⁶⁴⁹ Enrique Cardenas, *¿Por qué no se ha nombrado al fiscal anticorrupción?*, EL FINANCIERO (Aug. 17, 2017), <http://www.elfinanciero.com.mx/opinion/por-que-no-se-ha-nombrado-al-fiscal-anticorrupcion.html>; Armando Ríos Piter, *Fiscal Anticorrupción en Julio*, Excelsior (July 3, 2017), <http://www.excelsior.com.mx/opinion/armando-rios-piter/2017/07/03/1173327>; Zorayda Gallegos, *México se resiste al cambio anticorrupción*, EL PAÍS (Nov. 17, 2017), https://elpais.com/internacional/2017/11/17/mexico/1510873678_406809.html.

⁶⁵⁰ Daniel Politi, *Argentine Ex-President Faces Trial in \$3.5 Billion Fraud Case*, NEW YORK TIMES (March 24, 2017), available at <https://www.nytimes.com/2017/03/24/world/americas/argentina-christina-kirchner-trial-peso-macri.html>.

⁶⁵¹ Daniel Politi, *Argentine Ex-President Faces Trial in \$3.5 Billion Fraud Case*, NEW YORK TIMES (March 24, 2017), available at <https://www.nytimes.com/2017/03/24/world/americas/argentina-christina-kirchner-trial-peso-macri.html>.

⁶⁵² Daniel Politi, *Ex-President of Argentina Indicted Again, Now With Her Children*, NEW YORK TIMES (April 4, 2017), available at <https://www.nytimes.com/2017/04/04/world/americas/argentina-cristina-fernandez-de-kirchner-corruption-indictment.html>.

⁶⁵³ *Argentine ex-minister De Vido held on corruption charges*, BBC NEWS (Oct. 26, 2017), available at <http://www.bbc.com/news/world-latin-america-41760892>.

⁶⁵⁴ Renee Picard, *Argentina: Congress Passes Corporate Corruption Bill*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (Nov. 9, 2017), available at <https://www.occrp.org/en/27-ccwatch/cc-watch-briefs/7236-argentina-congress-passes-corporate-corruption-bill>.

⁶⁵⁵ Clara Hudson, *Argentina introduces corporate criminal liability laws*, GLOBAL INVESTIGATIONS REVIEW (Nov. 13, 2017), available at <http://globalinvestigationsreview.com/article/1150080/argentina-introduces-corporate-criminal-liability-laws>.

Argentine companies, for bribery committed abroad.⁶⁵⁶ Courts can punish companies with fines up to five times the quantity fraudulently acquired.⁶⁵⁷ Under the new law, companies can also be blacklisted from public contracts for up to ten years, and are prohibited from participating in public contract bids if they do not have an anti-bribery compliance program in place.⁶⁵⁸ Companies may negotiate leniency agreements in exchange for providing relevant information to prosecutors.⁶⁵⁹ The law takes effect 90 days after it was signed on November 8.⁶⁶⁰ As discussed in more detail in Section VII.M.2.a, below, in its March 2017 report on anti-corruption efforts in Argentina, the Organisation for Economic Co-operation and Development (“OECD”) Working Group on Bribery noted the importance of the bill, but emphasized the need to train judges and prosecutors on foreign bribery, and to protect whistleblowers.⁶⁶¹

K. Canada

The year was an important one in Canada’s anti-corruption fight with significant developments on both the legislative and enforcement front.

1. Legislative Developments

In 2017, the Canadian government took two significant steps to bolster its anti-corruption efforts.

First, on September 25, the Canadian government launched a public consultation to seek input on whether to institute a DPA scheme in Canada.⁶⁶² In the accompanying discussion paper,⁶⁶³ the Canadian government notes that several other jurisdictions already have in place or are considering instituting DPA or DPA-like mechanisms.⁶⁶⁴

⁶⁵⁶ Clara Hudson, *Argentina introduces corporate criminal liability laws*, GLOBAL INVESTIGATIONS REVIEW (Nov. 13, 2017), available at <http://globalinvestigationsreview.com/article/1150080/argentina-introduces-corporate-criminal-liability-laws>.

⁶⁵⁷ Renee Picard, *Argentina: Congress Passes Corporate Corruption Bill*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (Nov. 9, 2017), available at <https://www.occrp.org/en/27-ccwatch/cc-watch-briefs/7236-argentina-congress-passes-corporate-corruption-bill>.

⁶⁵⁸ Clara Hudson, *Argentina introduces corporate criminal liability laws*, GLOBAL INVESTIGATIONS REVIEW (Nov. 13, 2017), available at <http://globalinvestigationsreview.com/article/1150080/argentina-introduces-corporate-criminal-liability-laws>.

⁶⁵⁹ Renee Picard, *Argentina: Congress Passes Corporate Corruption Bill*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (Nov. 9, 2017), available at <https://www.occrp.org/en/27-ccwatch/cc-watch-briefs/7236-argentina-congress-passes-corporate-corruption-bill>.

⁶⁶⁰ Clara Hudson, *Argentina introduces corporate criminal liability laws*, GLOBAL INVESTIGATIONS REVIEW (Nov. 13, 2017), available at <http://globalinvestigationsreview.com/article/1150080/argentina-introduces-corporate-criminal-liability-laws>.

⁶⁶¹ OECD, “Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina” (March 2017), at 4, available at <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

⁶⁶² Government of Canada News Release, *Government of Canada seeks views on addressing corporate wrongdoing* (Sept. 25, 2017), available at https://www.canada.ca/en/public-services-procurement/news/2017/09/government_of_canadaseeksvisionaddressingcorporatewrongdoing.html.

⁶⁶³ Government of Canada, Discussion Paper for Public Consultation, Deferred Prosecution Agreement Stream, *Expanding Canada’s Toolkit to Address Corporate Wrongdoing*, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/volet-stream-eng.pdf>.

⁶⁶⁴ Government of Canada, Discussion Paper for Public Consultation, Deferred Prosecution Agreement Stream, *Expanding Canada’s Toolkit to Address Corporate Wrongdoing*, at p. 5, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/volet-stream-eng.pdf>.

The paper also lists some of the potential advantages and disadvantages of a DPA regime.⁶⁶⁵ The consultation period closed in November, and the government is currently considering the proposed legislation in light of those comments.

Second, on October 30, the Canadian government announced that it was repealing the facilitation payment exception under the Canadian Corruption of Foreign Public Officials Act (“CFPOA”).⁶⁶⁶ Effective October 31, 2017, facilitation payments (i.e., “payments made to foreign government officials to speed up or facilitate routine transactions such as permits”) will now be considered bribes under the CFPOA.⁶⁶⁷ Such facilitation payments include payments made to officials to expedite the processing of permits, licenses, and visas, or to expedite the provision of services normally offered to the public, such as mail pickup, telecommunications services, and water and power supply.⁶⁶⁸

This repeal has been expected since the introduction of Bill S-14 back in February 2013. Canada delayed the implementation of this change by four years to give companies time to adjust their internal practices and procedures.⁶⁶⁹

2. Enforcement of the CFPOA

Enforcement of the CFPOA continued steadily this year, with a few notable developments, particularly in the courts.

On July 6, the Court of Appeal for Ontario upheld the 2013 conviction of Nazir Karigar, the first individual prosecuted under the CFPOA.⁶⁷⁰ As previously reported,⁶⁷¹ in 2013, Karigar was convicted and sentenced to three years in jail for offering bribes to Air India officials to secure a security software contract, even though the prosecution was unable to prove that the bribes were actually paid to the officials.⁶⁷²

The Court of Appeal found in the Karigar case that the CFPOA applied to conspiracies to bribe, even without actual transfer of monies.⁶⁷³ The court reasoned that this

⁶⁶⁵ Government of Canada, Discussion Paper for Public Consultation, Deferred Prosecution Agreement Stream, *Expanding Canada’s Toolkit to Address Corporate Wrongdoing*, at p. 6, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/volet-stream-eng.pdf>.

⁶⁶⁶ Government of Canada, News Release, Canada repeals facilitation payments exception in Corruption of Foreign Public Officials Act (Oct. 30, 2017), available at https://www.canada.ca/en/global-affairs/news/2017/10/canada_repeals_facilitationpaymentsexceptionincorruptionofforeig.html.

⁶⁶⁷ Government of Canada, News Release, Canada repeals facilitation payments exception in Corruption of Foreign Public Officials Act (Oct. 30, 2017), available at https://www.canada.ca/en/global-affairs/news/2017/10/canada_repeals_facilitationpaymentsexceptionincorruptionofforeig.html.

⁶⁶⁸ Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, section 4 (repealed), available at <http://laws-lois.justice.gc.ca/eng/acts/c-45.2/page-1.html>.

⁶⁶⁹ The Canadian Trade Commissioner Service, *Canada repeals facilitation payments exception* (Nov. 16, 2017), available at <http://tradecommissioner.gc.ca/canadexport/0002067.aspx?lang=eng>.

⁶⁷⁰ R. v. Karigar, 2017 ONCA 576.

⁶⁷¹ WilmerHale, *Global Anti-Bribery Year-in-Review: 2014 Developments and Predictions for 2015* (Jan. 27, 2015), pp. 30-31,

https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/FCPA%20YIR%20Alert_01%2027%2015.pdf.

⁶⁷² See R. v. Karigar, 2013 ONSC 5199.

⁶⁷³ R. v. Karigar, 2017 ONCA 576 at paras. 34-45.

interpretation was consistent with the OECD Convention of Combating Bribery of Foreign Public Officials, to which Canada is a signatory,⁶⁷⁴ and that requiring proof of actual bribery would hamper efforts to enforce the CFPOA.⁶⁷⁵

The Court of Appeal also held that Canada had territorial jurisdiction over Karigar, even though many of the dealings occurred in India.⁶⁷⁶ The court reasoned that there was a “real and substantial” link to Canada because Karigar was a Canadian citizen acting on behalf of a Canadian company, much of the contract work was to be done in Canada, and all or nearly all of the documents and witnesses were from Canada.⁶⁷⁷

On the other hand, in February, three individuals were acquitted by the Ontario Superior Court in the SNC-Lavalin case, more than four years after they were charged with CFPOA violations in connection with the Padma Bridge project in Bangladesh.⁶⁷⁸ The Superior Court had refused to admit wiretap evidence against the defendants, reasoning that the initial wiretap application was based on uncorroborated “speculation, gossip and rumour,” and the wiretaps should never have been approved.⁶⁷⁹ The prosecution then elected to call no witnesses, reasoning that it had “no reasonable prospect of conviction” after the court’s decision to exclude the wiretap evidence. The court therefore acquitted the defendants.

L. Australia

Like Canada, in 2017, Australia also considered whether to institute a DPA scheme. Australia also considered proposed revisions to the foreign bribery offense which expanded the offense to include recklessness and failure to prevent foreign bribery.

1. Legislative Developments

a. *Proposed DPA Scheme*

In March, the Australian Attorney General released a consultation paper outlining a scheme of DPAs and invited comments.⁶⁸⁰ Under the proposed scheme, prosecutors could reach agreement with companies under investigation to defer charges if the company complies with certain conditions. These conditions include cooperation with the investigation, admission of an agreed set of facts relating to the alleged offense, payment of a financial penalty (including disgorgement of profits), and implementation of a program to ensure future compliance, possibly under the supervision of an

⁶⁷⁴ R. v. Karigar, 2017 ONCA 576 at paras. 40-43.

⁶⁷⁵ R. v. Karigar, 2017 ONCA 576 at para. 44.

⁶⁷⁶ R. v. Karigar, 2017 ONCA 576 at paras. 23-33.

⁶⁷⁷ R. v. Karigar, 2017 ONCA 576 at paras. 31-32.

⁶⁷⁸ *Ex-SNC-Lavalin execs acquitted of bribery charges after wiretap evidence nixed*, THE CANADIAN PRESS (Feb. 13, 2017), <http://www.ctvnews.ca/business/ex-snc-lavalin-execs-acquitted-of-bribery-charges-after-wiretap-evidence-nixed-1.3283418>.

⁶⁷⁹ R. v. Karigar, 2017 ONSC 132, para. 71.

⁶⁸⁰ Australian Government, Attorney-General's Department, *Deferred prosecution agreements public consultation*, <https://www.ag.gov.au/consultations/pages/Deferred-prosecution-agreements-public-consultation.aspx>.

independent monitor.⁶⁸¹ The scheme would apply to “serious corporate crimes,” which include fraud, bribery and money laundering.⁶⁸² Guidance would be provided on the factors a prosecutor would consider when deciding whether to offer a DPA.⁶⁸³

The commentary period on the DPA proposal closed on May 1. Seventeen responses were received from academics, law firms, bar associations, non-profits, and private companies.⁶⁸⁴

In mid-December, a corporate crime bill was introduced to Parliament which included a proposed DPA scheme, among other things. Debate on the Bill is expected to begin in early February, and a decision may be reached within the first half of 2018.

b. *Proposed Revisions to the Criminal Code Act*

In April, the Attorney General issued a consultation paper on proposed revisions to the foreign bribery offense under the Criminal Code Act.⁶⁸⁵ These changes included the creation of two new offenses. The first made it an offense to recklessly bribe a foreign official, with recklessness defined as circumstances where a person is aware of a substantial risk of conduct that would lead to improper influence on a foreign official.⁶⁸⁶ The second is a new corporate offense for failure to prevent foreign bribery. This offense would make a company automatically liable for bribery by employees,

⁶⁸¹ Australian Government, Attorney-General's Department, *Improving Enforcement Options for Serious Corporate Regime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, Public Consultation Paper (March 2016), pp. 20-21, available at <https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Deferred-Prosecution-Agreements-Discussion-Paper.pdf>.

⁶⁸² Australian Government, Attorney-General's Department, *Improving Enforcement Options for Serious Corporate Regime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, Public Consultation Paper (March 2016), p. 15, available at <https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Deferred-Prosecution-Agreements-Discussion-Paper.pdf>.

⁶⁸³ Australian Government, Attorney-General's Department, *Improving Enforcement Options for Serious Corporate Regime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, Public Consultation Paper (March 2016), p. 17, available at <https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Deferred-Prosecution-Agreements-Discussion-Paper.pdf>.

⁶⁸⁴ Australian Government, Attorney-General's Department, *Deferred prosecution agreements public consultation*, <https://www.ag.gov.au/consultations/pages/Deferred-prosecution-agreements-public-consultation.aspx>.

⁶⁸⁵ Australian Government, Attorney-General's Department, *Combating bribery of foreign public officials, Proposed amendments to the foreign bribery offence in the Criminal Act Code 1995* (April 2017), <https://www.ag.gov.au/Consultations/Documents/Foreign-bribery-offence/public-consultation-paper-amendments-to-the-foreign-bribery-offence.pdf>.

⁶⁸⁶ Australian Government, Attorney-General's Department, *Combating bribery of foreign public officials, Proposed amendments to the foreign bribery offence in the Criminal Act Code 1995* (April 2017), <https://www.ag.gov.au/Consultations/Documents/Foreign-bribery-offence/public-consultation-paper-amendments-to-the-foreign-bribery-offence.pdf>.

contractors, and agents, except where the company can show it had a proper system of internal controls and compliance in place to prevent the bribery from occurring.⁶⁸⁷

The proposed changes also included a number of clarifications to existing offenses, including revising the definition to clarify that the core of the foreign bribery offense was “improperly influencing” a public official, removing the requirement that the bribe be offered with the intention of influencing a public official “in their official capacity,” and clarifying that the bribe can be offered to secure business or advantage for someone else, or even with no particular business or advantage in mind.⁶⁸⁸

The commentary period on these proposed revisions to the criminal law ended May 1.⁶⁸⁹ The new corporate crime bill that was introduced to Parliament in December, discussed above, included provisions making a company automatically liable for failure to prevent foreign bribery undertaken by officers, employees, contractors, and agents, except where companies can prove that they had adequate procedures in place designed to prevent the conduct.⁶⁹⁰

2. Significant Cases

In April 2017, the Victoria Supreme Court upheld a civil charge brought by the Australian Securities and Investment Commission alleging that former Australian Wheat Board (“AWB”) Chairman and Director Trevor Flugge failed to investigate improper payments that were made in contravention of U.N. sanctions in place against Iraq.⁶⁹¹ The payments were disguised as transportation fees in relation to the AWB’s sales of wheat to Iraq under the UN’s Oil-For-Food program.⁶⁹² The court found Flugge should have made inquiries after being told in 2000 that the U.N. was looking into whether the payments to Iraq were appropriate, and his failure to do so breached his duties of care

⁶⁸⁷ Australian Government, Attorney-General’s Department, *Combating bribery of foreign public officials, Proposed amendments to the foreign bribery offence in the Criminal Act Code 1995* (April 2017), <https://www.ag.gov.au/Consultations/Documents/Foreign-bribery-offence/public-consultation-paper-amendments-to-the-foreign-bribery-offence.pdf>.

⁶⁸⁸ Australian Government, Attorney-General’s Department, *Combating bribery of foreign public officials, Proposed amendments to the foreign bribery offence in the Criminal Act Code 1995* (April 2017), <https://www.ag.gov.au/Consultations/Documents/Foreign-bribery-offence/public-consultation-paper-amendments-to-the-foreign-bribery-offence.pdf>.

⁶⁸⁹ Australian Government, Attorney-General’s Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, <https://www.ag.gov.au/consultations/pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx>.

⁶⁹⁰ Australian Government, Attorney-General’s Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, <https://www.lexology.com/library/detail.aspx?g=30d274aa-a3ea-4780-8548-cbb21f8f8230>.

⁶⁹¹ 2017 VSC 117; Emma Younger, AWB ex-chairman Trevor Flugge fined \$50k over Iraq food-for-oil scandal, ABC News, Apr. 9, 2017, <http://www.abc.net.au/news/2017-04-10/awb-trevor-flugge-fined-banned-iraq-food-for-oil-scandal/8430032>.

⁶⁹² Jane Lee, *Former AWB Chairman Trevor Flugge banned for five years over oil-for-food scandal*, THE SYDNEY MORNING HERALD (Apr. 10, 2017), <http://www.smh.com.au/business/former-awb-chairman-trevor-flugge-banned-for-five-years-over-oilforfood-scandal-20170410-gvhisp.html>.

and diligence.⁶⁹³ The court imposed a fine of AUD 50,000 (USD 38,962) and barred Flugge from managing a corporation for five years.⁶⁹⁴

M. International Organizations

1. World Bank

Last year, we reported that the Integrity Vice Presidency (“INT”) of the World Bank Group (“World Bank”) had been investigating representatives of SNC-Lavalin for bribery of Bangladeshi government officials since 2011 in connection with the Padma Bridge project. While the Canadian government ultimately dropped the charges against several individuals involved due to procedural hurdles, SNC-Lavalin already had entered into a ten-year debarment from any World Bank projects.⁶⁹⁵

This year, the INT’s Director of Operations, Stephen Zimmerman, cited the SNC-Lavalin case as support for the World Bank’s position that administrative remedies are an important tool for combating corruption and can be quite effective at uncovering corruption and misconduct.⁶⁹⁶ In 2010, the World Bank began using negotiated resolution agreements (“NRAs”) which “expedite the outcome of an ongoing investigation, prompt companies to self-report . . . and . . . provide for restitution.”⁶⁹⁷ The World Bank’s view, according to Zimmerman, is that administrative penalties are often more effective than traditional debarment remedies because they are more easily imposed while still posing “huge disincentives” to corruption.⁶⁹⁸

Part of the World Bank’s commitment to resolution of its cases hinges on cooperation with local national law enforcement regimes. The World Bank’s annual INT report noted that often, it is only through the help of local law enforcement that it gathers enough documentary evidence of corruption and fraud to initiate proceedings, and that this evidence often is material that the World Bank “could not have otherwise obtained.”⁶⁹⁹ Of significance, however, is that cooperation in most cases are from local authorities in the country in which the investigated company is incorporated; cooperation with local authorities where World Bank projects are underway—typically developing nations with less-developed anti-corruption and law enforcement regimes—“remain more

⁶⁹³ Jane Lee, *Former AWB Chairman Trevor Flugge banned for five years over oil-for-food scandal*, THE SYDNEY MORNING HERALD (Apr. 10, 2017), <http://www.smh.com.au/business/former-awb-chairman-trevor-flugge-banned-for-five-years-over-oilforfood-scandal-20170410-gvhisp.html>; see also [2017] VSC 117 at paras. 27-29.

⁶⁹⁴ Jane Lee, *Former AWB Chairman Trevor Flugge banned for five years over oil-for-food scandal*, THE SYDNEY MORNING HERALD (Apr. 10, 2017), <http://www.smh.com.au/business/former-awb-chairman-trevor-flugge-banned-for-five-years-over-oilforfood-scandal-20170410-gvhisp.html>; see also [2017] VSC 117 at paras. 27-29.

⁶⁹⁵ The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 38 (2017).

⁶⁹⁶ Stephen Zimmerman, *The importance of administrative remedies in the fight against corruption*, FCPA BLOG, June 8, 2017, <http://www.fcpablog.com/blog/2017/6/8/stephen-zimmermann-the-importance-of-administrative-remedies.html>.

⁶⁹⁷ The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 6 (2017).

⁶⁹⁸ Stephen Zimmerman, *The importance of administrative remedies in the fight against corruption*, FCPA BLOG, June 8, 2017, <http://www.fcpablog.com/blog/2017/6/8/stephen-zimmermann-the-importance-of-administrative-remedies.html>.

⁶⁹⁹ The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 10 (2017).

challenging.”⁷⁰⁰ The World Bank also cites its cross-debarment agreement with multilateral development banks as a factor in the increase in sanctions and debarments.⁷⁰¹

This year, the World Bank announced that Leonard McCarthy, the longtime vice president for Integrity, would step down and Pascale Helene Dubois would become the new vice president for Integrity. Dubois has been at the World Bank since 1997, most recently serving as Chief Suspension and Debarment officer for the past ten years, and as head of the Voluntary Disclosure Program at INT prior to that.⁷⁰²

In July 2017, a week after CDM Smith received a declination under the DOJ’s Pilot Program for bribery conduct in India, it received sanctions and a “conditional non-debarment” from the World Bank for 18 months, through an NRA.⁷⁰³ Under the terms of the conditional non-debarment, the term may be reduced by 15 months if CDM Smith meets certain conditions.⁷⁰⁴ Among the requirements imposed by the NRA, CDM Smith must adopt a “Corporate Compliance Program consistent with the World Bank Group Integrity Compliance Guidelines, and fully cooperate with the Bank in advancing its anti-corruption work.”⁷⁰⁵

In Fiscal Year 2017, the World Bank entered into 26 NRAs with 29 respondents and debarred 58 entities and individuals ranging from periods as short as five months in the case of Spanish company Intitec Energia to as long as 14 years for Danish company Consia Consultants ApS.⁷⁰⁶ During the same period the World Bank opened 179 “preliminary inquiries” and selected 51 for full investigations which cover 55 different projects in 33 countries.⁷⁰⁷

This year, research showed that the World Bank tends to reward companies that settle with shorter debarments.⁷⁰⁸ The research shows that negotiating a settlement with the World Bank’s Integrity Vice Presidency tended to result in a median debarment of one year; in contrast, companies that chose not to settle or appeal the group’s findings

⁷⁰⁰ The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 10 (2017).

⁷⁰¹ The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 10 (2017).

⁷⁰² Press Release: World Bank Group President Appoints Pascale Dubois as Vice President of Integrity, The World Bank, Apr. 27, 2017, <http://www.worldbank.org/en/news/press-release/2017/04/27/world-bank-group-president-appoints-pascale-dubois-as-vice-president-of-integrity>.

⁷⁰³ Press Release: World Bank Announces End of Fiscal Year Investigative Outcomes, The World Bank, June 30, 2017, <http://www.worldbank.org/en/news/press-release/2017/06/30/world-bank-announces-end-of-fiscal-year-investigative-outcomes>.

⁷⁰⁴ Press Release: World Bank Announces End of Fiscal Year Investigative Outcomes, The World Bank, June 30, 2017, <http://www.worldbank.org/en/news/press-release/2017/06/30/world-bank-announces-end-of-fiscal-year-investigative-outcomes>.

⁷⁰⁵ Press Release: World Bank Announces End of Fiscal Year Investigative Outcomes, The World Bank, June 30, 2017, <http://www.worldbank.org/en/news/press-release/2017/06/30/world-bank-announces-end-of-fiscal-year-investigative-outcomes>.

⁷⁰⁶ The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 30, 38-40 (2017).

⁷⁰⁷ The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 23 (2017).

⁷⁰⁸ Dylan Tokar, *World Bank Rewarding Companies that Settle with Shorter Debarments, Report Shows*, GLOBAL INVESTIGATIONS REVIEW, May 9, 2017.

typically faced a three-year debarment.⁷⁰⁹ INT’s Zimmerman verified this view when he stated that “[W]e exist to protect the interest of our bank and our clients, the member countries[,] [a]nd a settlement gets us there more quickly.”⁷¹⁰

2. OECD

In 2017, the OECD continued its “Phase 4” anti-bribery monitoring efforts, which included scheduled visits by the OECD’s Working Group on Bribery to some of the 43 countries that are signatories to the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force in 1999.⁷¹¹

a. *Argentina*

In March 2017, the Working Group issued a second Phase 3 report (“Phase 3bis report”) after the Working Group’s “exceptional decision in 2014 to conduct a supplemental evaluation of Argentina.”⁷¹² According to the report, “Argentina remains in serious non-compliance with key articles of the Convention,” despite the current government’s attempts to implement the Phase 3 recommendations after taking office in December 2015.⁷¹³ One of the Working Group’s chief concerns was that Argentina had yet to approve a Corporate Liability Bill that was introduced to Congress in October 2016.⁷¹⁴ The bill—which permits courts to impose fines on companies five times greater than the amount the company fraudulently obtained and to blacklist companies from public contracts for ten years—passed Congress in November 2017, following the arrests in October of two officials from the administration of former-President Cristina

⁷⁰⁹ Dylan Tokar, *World Bank Rewarding Companies that Settle with Shorter Debarments, Report Shows*, GLOBAL INVESTIGATIONS REVIEW, May 9, 2017.

⁷¹⁰ Dylan Tokar, *World Bank Rewarding Companies that Settle with Shorter Debarments, Report Shows*, GLOBAL INVESTIGATIONS REVIEW, May 9, 2017.

⁷¹¹ OECD, *Phase 4 Country Monitoring of the OECD Anti-Bribery Convention*, <http://www.oecd.org/corruption/oecd-anti-bribery-convention-phase-4.htm>. The OECD issued reports for the following countries: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.

⁷¹² OECD, *Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina* (Mar. 2017), at 4, available at <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

⁷¹³ OECD, *Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina* (Mar. 2017), at 4, available at <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

⁷¹⁴ OECD, *Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina* (Mar. 2017), at 4, available at <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

Fernandez de Kirchner.⁷¹⁵ President Mauricio Macri stated that the law was necessary in order for Argentina to move forward on the Odebrecht corruption case.⁷¹⁶

Nevertheless, the report noted that while passing the bill would be a step in the right direction, Argentina should focus on imposing corporate liability for corruption-related false accounting; adequately imposing fines for foreign bribery and sanctions for accounting fraud; and protecting public-and-private-sector whistleblowers from reprisal.⁷¹⁷ The Working Group also stated that it is “seriously concerned about the enforcement of Argentina’s foreign bribery laws,” noting “signs of politicization and lack of neutrality of the Attorney General’s Office.”⁷¹⁸ The report recommended that Argentina adjust the composition of the Judicial Council to protect the independence of judges; work to find a solution to the “extraordinary delays” in complex economic crime investigations and prosecutions; enhance international cooperation in foreign bribery investigations and prosecutions; and improve training to relevant investigative judges and prosecutors on foreign bribery.⁷¹⁹

b. *Czech Republic*

The Working Group issued a Phase 4 report on the Czech Republic’s progress in March 2017. The report noted “a strong determination by the Czech Republic to improve its system for combating foreign bribery” since its Phase 3 evaluation in March 2013.⁷²⁰ The Czech Republic has implemented key recommendations from the Phase 3 evaluation, including compiling bribery-related statistics, but had not implemented other recommendations.⁷²¹ The Working Group expressed concern that 17 years after ratifying the OECD Convention, the country had yet to prosecute a case for foreign bribery, despite the “export-oriented nature of the Czech economy.”⁷²² The Working Group called on the Czech Republic to strengthen its capacity to detect foreign bribery,

⁷¹⁵ Renee Picard, *Argentina: Congress Passes Corporate Corruption Bill*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (Nov. 9, 2017), available at <https://www.occrp.org/en/27-ccwatch/cc-watch-briefs/7236-argentina-congress-passes-corporate-corruption-bill>.

⁷¹⁶ *Argentina Congress Passes Law to Fight Corporate Corruption*, REUTERS (Nov. 8, 2017), available at <https://www.reuters.com/article/us-argentina-corruption/argentina-congress-passes-law-to-fight-corporate-corruption-idUSKBN1D83AX>.

⁷¹⁷ OECD, *Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina*, OECD Publishing (Mar. 2017), at 4, available at <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

⁷¹⁸ OECD, *Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina*, OECD Publishing (Mar. 2017), at 4, available at <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

⁷¹⁹ OECD, *Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina*, OECD Publishing (Mar. 2017), at 4, available at <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

⁷²⁰ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Czech Republic*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>.

⁷²¹ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Czech Republic*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>.

⁷²² OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Czech Republic*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>.

implement greater protections for whistleblowers, encourage the Czech National Bank to report suspicious activities revealed in disclosure documents, and “engage closely with the private sector to raise awareness” of the importance of “adequate compliance measures.”⁷²³

c. *United Kingdom*

In March 2017, the OECD issued a Phase 4 report on the United Kingdom.⁷²⁴ The Working Group on Bribery found that since 2012, when the United Kingdom was evaluated as part of the Phase 3 monitoring process, the “UK has taken significant steps ... to increase enforcement of the foreign bribery offense and is now one of the major enforcers among the Working Group countries.”⁷²⁵ The report noted that the United Kingdom had concluded nine foreign bribery cases since 2012, with more cases in progress, and had made significant legislative reforms in the anti-corruption area, including the introduction of deferred-prosecution agreements.⁷²⁶ The Working Group emphasized “high-level political commitments, such as those made at the May 2016 London Anti-Corruption Summit” demonstrate a continued commitment to combating foreign bribery.⁷²⁷

While praising the United Kingdom’s progress, the Working Group nevertheless identified areas for improvement, and “some key issues that may undermine the effective enforcement of foreign bribery laws in the UK,” including ensuring that the United Kingdom continues to fund the U.K. SFO and making sure that Scotland’s foreign bribery and enforcement mechanisms more closely align with those in other parts of the United Kingdom.⁷²⁸

d. *Finland*

In March 2017, the Working Group issued a Phase 4 report on Finland. The report praised the country’s anti-corruption detection efforts, noting that Finland had made nine “independently detected” corruption allegations since its prior 2010 evaluation, of which

⁷²³ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Czech Republic*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>.

⁷²⁴ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: United Kingdom*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>.

⁷²⁵ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: United Kingdom*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>.

⁷²⁶ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: United Kingdom*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>.

⁷²⁷ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: United Kingdom*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>.

⁷²⁸ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: United Kingdom*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>.

seven were pursued by investigators and five were prosecuted.⁷²⁹ However, all five of the cases prosecuted resulted in acquittals for the accused on charges of foreign bribery, which the Working Group found reflective of the misinterpretation and misapplication of the foreign bribery offense by some Finnish courts.⁷³⁰ The report recommended that Finland provide training to law enforcement and the judiciary on the foreign bribery offense, and consider establishing a body of courts or judges specialized in evaluating foreign bribery cases.⁷³¹

VIII. CONCLUSION AND PREDICTIONS FOR 2018

The predictions of those who said that FCPA enforcement might dry up under a president who once said the law was “ridiculous,” “horrible” and “should be changed”⁷³² appear to have been erroneous. The change in administration and recent leadership turnover at the DOJ and SEC have no doubt raised some uncertainty in the FCPA enforcement space. At the SEC, Clayton has assumed the role of Chairman and Cain became the new Chief of the FCPA Unit, replacing Brockmeyer.⁷³³ At the DOJ, notable recent departures include Weissmann, former Chief of the Criminal Division’s Fraud Section, McFadden, former Acting Principal Deputy Assistant Attorney General of the Criminal Division, and Blanco, former Acting Assistant Attorney General of the Criminal Division.⁷³⁴

However, FCPA enforcement appears to have remained a priority both in the public statements of the enforcement authorities and their actions, and many trends pre-dating the Trump administration continued to play out in 2017 and will likely extend into the future. On December 18, 2017, the White House released its National Security Strategy (“NSS”), which includes countering foreign corruption among its top five priority actions, and vows to use the United States’ economic and diplomatic tools to “target corrupt

⁷²⁹ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/Finland-Phase-4-Report-ENG.pdf>.

⁷³⁰ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/Finland-Phase-4-Report-ENG.pdf>.

⁷³¹ OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland*, OECD Publishing (Mar. 2017), at 5, available at <http://www.oecd.org/corruption/anti-bribery/Finland-Phase-4-Report-ENG.pdf>.

⁷³² Jim Zarroli, *Trump Used To Disparage An Anti-Bribery Law; Will He Enforce It Now?*, NPR, Nov. 8, 2017, available at <https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now>.

⁷³³ U.S. Securities and Exchange Commission Press Release No. 2017-206: Charles Cain Named Chief of Foreign Corrupt Practices Unit (Nov. 2, 2017); Sarah N. Lynch, *U.S. Senate Votes to Confirm Jay Clayton as SEC Chairman*, REUTERS (May 2, 2017), <https://www.reuters.com/article/us-senate-sec-clayton/u-s-senate-votes-to-confirm-jay-clayton-as-sec-chairman-idUSKBN17Y2KS>; U.S. Securities and Exchange Commission Press Release No. 2017-76: Kara Novaco Brockmeyer, Chief of FCPA Unit, to Leave SEC After 17 Years of Service (Apr. 4, 2017).

⁷³⁴ Dylan Tokar, *Weissmann to Leave Fraud Section for Russia Investigations Team*, GLOBAL INVESTIGATIONS REVIEW (May 31, 2017), <http://globalinvestigationsreview.com/article/1142170/weissmann-to-leave-fraud-section-for-russia-investigations-team>; Adam Dobrik, *Ken Blanco Leaving DOJ*, GLOBAL INVESTIGATIONS REVIEW (Nov. 8, 2017), <http://lbrbroadcast.com/1KSF-5A2CH-KVU2W2-2VKVBM-1/c.aspx>; Tim Ryan, *Nominee for DC Federal Breezes Through Confirmation*, COURTHOUSE NEWS SERVICE (Oct. 30, 2017), <https://www.courthousenews.com/nominee-dc-federal-breezes-confirmation/>.

foreign officials and work with countries to improve their ability to fight corruption so U.S. companies can compete fairly in transparent business climates.”⁷³⁵ The NSS is important as setting the agenda for the executive branch of the government, including the DOJ and SEC, and in signaling anti-corruption as a priority to Congress and to other countries. Against the backdrop of this policy, there continues to be a focus on individual accountability in conjunction with pursuing large corporate fines from both U.S. and non-U.S. companies, often in coordination with foreign authorities. We are also likely to see a continued emphasis on self-reporting and cooperation, through the DOJ’s more-frequent use of declinations, which began with the introduction of the FCPA Pilot Program in 2016 and will continue under the new FCPA Corporate Enforcement Policy. However, as was the case under the Pilot Program, there remains no SEC equivalent, and companies will have to continue to grapple with the risk that, even where they meet the DOJ’s standards for declination, the SEC may decide to go forward with an expensive and burdensome enforcement action. While we do not expect the SEC to adopt a similar program to the DOJ’s, there is hope for greater clarity from the SEC on its approach to corporate prosecutions in the near term.

Future clarification on the SEC’s and DOJ’s enforcement policies may also be on the horizon. On October 26, 2017, the SEC’s Peikin suggested that the SEC may be moving away from the “broken windows” enforcement policy, which promotes pursuing minor infractions to deter major infractions, and that it will work to provide greater clarity regarding why a company receives cooperation credit.⁷³⁶ On October 25, 2017, Deputy Attorney General Rosenstein also stated that the DOJ is creating a “Working Group on Corporate Enforcement and Accountability, which will offer recommendations on promoting individual accountability and corporate cooperation.”⁷³⁷ However, few details regarding the composition or responsibilities of this proposed group have emerged. In April 2017, then-Acting Principal Deputy Assistant Attorney General McFadden also stated that the DOJ is working to expedite corporate investigations, that it expects cooperating companies to assist in this effort, and that it is the DOJ’s intent for “FCPA investigations to be measured in months, not years.”⁷³⁸ What steps may be taken to achieve this is still yet to be seen.

Regarding industries of focus for FCPA enforcement, oil and gas continues to remain a key target. There are approximately 27 open and disclosed global anti-corruption investigations of companies in the oil and gas sector, including roughly six newly

⁷³⁵ National Security Strategy of the United States of America (Dec. 2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

⁷³⁶ Waithera Junghae, *SEC Enforcement Chief Signals end to ‘broken windows’ policy*, GLOBAL INVESTIGATIONS REVIEW (Oct. 27, 2017), http://globalinvestigationsreview.com/article/1149481/sec-enforcement-chief-signals-end-to-broken-windows-policy?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8827700_JAC%20Headlines%2027%2F10%2F2017&dm_i=1KSF,597HW,KVU2W2,K8ZNY,1.

⁷³⁷ Rod Rosenstein, Deputy Attorney General, Remarks at Morning Keynote Address at the U.S. Chamber Institute for Legal Reform (Oct. 25, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-morning-keynote-address-us-chamber-institute>.

⁷³⁸ Trevor N. McFadden, then-Acting Principal Deputy Assistant Attorney General, Remarks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>.

disclosed investigations in 2017 of companies in either the oil and gas services or oil and gas exploration and production business. Of these 27 investigations, approximately 13 involve enforcement actions taken by the DOJ and/or SEC, including four newly disclosed investigations in 2017, and three involve potential FCPA investigations where companies have publicly disclosed that they have relayed FCPA-related conduct to the SEC or DOJ.⁷³⁹ Additionally, the government has signaled continued pursuit of the banking industry. In February, Cain indicated that the SEC will “likely” bring more FCPA cases in the financial sector.⁷⁴⁰ While this prediction did not materialize in 2017, possibly due to a shift in priorities or delays resulting from leadership changes at the SEC, there are currently several banks with open disclosed FCPA investigations,⁷⁴¹ and the banking and financial services industry remains an area to watch.

Finally, there is likely to be continued geographic focus on Latin America and China. Approximately eight of the estimated 34 newly opened and disclosed global anti-corruption investigations in 2017 involve Brazil, including two investigations involving enforcement actions taken by the DOJ and/or SEC.⁷⁴² Four out of the 34 investigations involve FCPA-related conduct in China, including two potential investigations where companies have publicly disclosed to the DOJ and/or SEC. We do not expect this focus on Latin America and China to slow down anytime soon.

⁷³⁹ FCPA TRACKER, <https://fcpatracker.com/dashboard/industry/> (last visited Jan. 11, 2018) (collecting public disclosures).

⁷⁴⁰ Roger Hamilton-Martin, *More Financial Sector Cases “likely,” says SEC Foreign Bribery Unit Official*, GLOBAL INVESTIGATIONS REVIEW (Feb. 7, 2017), <http://globalinvestigationsreview.com/article/1106159/more-financial-sector-cases-%E2%80%9Clikely%E2%80%9D-says-sec-foreign-bribery-unit-official> (quoting Cain stating “you are likely to see more cases in the financial services sector; I think you will see us using cooperation tools, NPAs and DPAs as appropriate”).

⁷⁴¹ FCPA TRACKER, <https://fcpatracker.com/dashboard/industry/> (last visited Jan. 11, 2018) (collecting public disclosures).

⁷⁴² FCPA TRACKER, <https://fcpatracker.com/dashboard/industry/> (last visited Jan. 11, 2018) (collecting public disclosures).

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