COVINGTON

Anti-Corruption Enforcement: What to Watch in 2016

Winter 2016

Anti-Corruption

FCPA enforcement actions in 2015 were relatively smaller in scale and fewer in number than in years past. Together, the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") collected a total of $139 million across 11 corporate FCPA enforcement actions, a far cry from the $1.56 billion collected across 14 corporate FCPA enforcement actions in 2014. But, as in years past, the numbers are only one piece of the story. With DOJ's publication in 2015 of new guidance regarding corporate cooperation (the so-called "Yates Memo"), and as a new generation of FCPA enforcers at both DOJ and the SEC come into full stride, there are indications that the FCPA landscape may be undergoing changes. Both agencies continue to refine their enforcement approaches and adjust to a developing global paradigm where U.S. enforcement is far from the only show in town. Here, we discuss the anti-corruption enforcement trends that should be on the radar for companies and practitioners alike.

Part I: U.S. Trends

Last year, DOJ announced a new initiative to redouble its efforts to prosecute individuals for corporate wrongdoing, and separately, in the context of the FCPA, its intention to focus on "more significant, larger scale bribery schemes." Meanwhile, the SEC continued to build upon SEC Chairman Mary Jo White's announcement in October 2013 that the SEC would pursue a "broken windows" approach to securities law enforcement, policing securities violations both large and small. The SEC's more expansive enforcement approach has been notable, and it comes at a time when DOJ appears to be ratcheting up its expectations for cooperation by companies and devoting resources to pursuing serious violations by individuals. These dynamics within and between the two agencies—coupled with a marked increase in enforcement by foreign regulators—have ushered in a more challenging enforcement climate for companies and their executives.

DOJ

1. The impact of the Yates Memo becomes clearer

In our comments last winter, we observed that DOJ increasingly had emphasized the need for companies "to turn over evidence of individual culpability" to earn full cooperation credit. In September 2015, this message was memorialized as formal DOJ policy. In the Yates Memo, DOJ identified six steps it would take in "pursuit of individual corporate wrongdoing," including: (1) requiring companies to provide "all relevant facts relating to the individuals responsible for the misconduct" in order to qualify for "any cooperation credit"; (2) instructing DOJ attorneys and law enforcement agents to "focus on individuals from the inception of the investigation"; and (3) directing DOJ attorneys that they should not resolve corporate cases "without a clear plan to resolve related individual cases before the statute of limitations expires . . . ."

Understandably, the Yates Memo has generated extensive commentary and debate regarding its likely impact. For some—and particularly those practitioners accustomed to dealing with DOJ's Fraud Section and its expectations regarding candor and cooperation—the Yates Memo breaks new ground only at the margins. For others, however, the Yates Memo may shift the paradigm. Prosecutors now have a fresh policy memo and accompanying changes to the U.S. Attorneys' Manual that they can use as a hammer against those companies and practitioners who, while perhaps cooperative in tone, have failed—because of problems in document preservation, scope of fact finding, witness availability, candor, or otherwise—to offer real, meaningful, and substantial assistance to DOJ in the course of its investigation.

This commentary and debate is likely only to become more spirited in the months ahead. In early February 2016, the *Wall Street Journal* reported that DOJ will now require companies to certify that they have "fully disclosed" all non-privileged information about individuals involved in corporate wrongdoing "before finalizing a settlement agreement." The details of this potential certification requirement have not yet been articulated, and it is too soon to predict what effect any certification requirement might have on corporate cooperation. But certainly the mere addition of a certification requirement will be the source of much discussion as we move through 2016 and beyond.

As for the particulars of the Yates Memo, there are many open questions, but two strike us as particularly relevant for FCPA investigations:

- <u>Is cooperation credit really "all or nothing"?</u>

  The Yates Memo states that in order to be eligible for "any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct." The U.S. Attorneys' Manual likewise was amended and now requires a company to "identify all individuals involved in or responsible for the misconduct at issue . . . and provide to the Department all facts relating to that misconduct" in order to receive "any consideration for cooperation." So, at least in terms of black letter DOJ policy, the answer seems clear: Cooperation credit will be given only when these threshold requirements have been met.

  There remains the question of exactly how much credit can be earned, even if a company clears the initial hurdle described above. On that question, the U.S. Attorneys' Manual states: "The extent of the cooperation credit earned will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation)." This statement should be read alongside the provision of the U.S. Attorneys' Manual addressing voluntary disclosures, which states that "prosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program."

  In other words, it would seem that unless full factual information is provided regarding individual misconduct, cooperation credit will not be available. But even with the provision of full factual information regarding individual misconduct, the extent of the cooperation credit earned will depend on a host of factors, including whether the conduct was voluntarily disclosed to DOJ. At bottom, therefore, we are reminded of an old adage: Cooperation is in the eye of the beholder.

With that said, the key question, in our view, will be whether a company—through its investigative process and interactions with DOJ—has meaningfully and substantially assisted DOJ in developing and understanding the facts of the case, including with respect to the conduct of individuals. If companies follow a rigorous and carefully tailored investigative process and demonstrate cooperation (*e.g.*, by appropriately preserving evidence, making witnesses available for interviews, and offering full, candid, and truthful factual proffers), cooperation credit should be available post-Yates Memo, even in circumstances where the company's investigation does not turn up meaningful evidence of misconduct by any particular individual. To this very point, Assistant Attorney General Leslie Caldwell acknowledged in a September 2015 speech that "some investigations—despite their thoroughness—will not bear fruit." AAG Caldwell continued that, as in the past, DOJ would "carefully scrutinize and test" a company's findings, with added—and, we expect, earlier—scrutiny on the steps taken to identify and investigate individuals who potentially participated in, or had knowledge of, the alleged misconduct. The comments from AAG Caldwell and other senior officials in DOJ's Criminal Division seem to confirm that cooperation credit is highly dependent on the facts of a particular case and that there is still room under the Yates Memo for considerable discretion to be exercised by prosecutors as to whether and to what extent cooperation credit should be given.

- <u>What impact will the Yates Memo have on how DOJ and internal company investigations are conducted?</u>

In recent years, DOJ prosecutors have put increasing emphasis, from the very beginning of a corporate investigation, on taking steps to secure evidence against potentially culpable individuals, including insisting on conducting their own interviews of individuals before the company does; doing unannounced "knock and talks" at former and current employees' homes; obtaining, through search warrants, the contents of personal email accounts of potentially culpable individuals; and even conducting undercover recordings involving unrepresented company employees. With the Yates Memo's emphasis on individual prosecutions, we expect this trend to continue and to see investigations of companies and specific individuals occurring in tandem.

As a result of this shift in emphasis and timing, companies that are interested in receiving cooperation credit must devote even greater attention to ensuring that potentially relevant evidence is appropriately preserved. DOJ also may expect cooperating companies to facilitate earlier interviews of witnesses than in the past—including by pressuring current employees to submit to interviews and giving advance notice to DOJ of employee departures—and to make fulsome factual proffers based on the company's internal investigation. At bottom, given the Yates Memo's instruction to develop cases against individuals early and within the applicable limitations period, DOJ prosecutors will expect cooperating companies to meaningfully assist them in their evidence-gathering efforts.

Many commentators have wondered whether the Yates Memo will result in employees more quickly asking for separate legal counsel and resisting requests for interviews or other cooperation by company counsel. Thus far, we have not seen a paradigm shift on these issues. For any number of reasons, most employees continue to cooperate in internal investigations, and most employees (particularly those who believe they have done nothing wrong) do not immediately perceive a need for separate legal counsel. To be sure, there are always individuals who are less inclined to be cooperative and ask to be separately represented. That issue existed before the Yates Memo, and it is unclear whether the calculus will change appreciably after the Yates Memo. Time will tell. From our perspective, the more practical and immediate reality could be that companies will obtain separate legal representation for employees at earlier points in time than in the past, particularly if the Yates Memo leads prosecutors to ask for early interviews of individuals whom DOJ has labeled as subjects of the investigation. In that circumstance, company counsel may feel ethically bound to have the witnesses separately represented.

2. **Will DOJ clarify the benefits of voluntary disclosures?**

In our remarks last year, we observed that the potential benefits of voluntary disclosures were becoming clearer, though still uncertain. DOJ's enforcement actions over the past year did not meaningfully impact the calculus. There was, however, a continuing emphasis on voluntary disclosure, as evidenced by DOJ's decision to disaggregate voluntary disclosure and cooperation in its post-Yates Memo revisions to the United States Attorneys' Manual.

We also saw signs that DOJ was wrestling internally with how much credit to give companies that voluntarily disclose potential FCPA violations. In November 2015, the *Washington Post* reported that DOJ's Criminal Division was considering adopting a policy in which companies could avoid FCPA prosecutions by self-reporting misconduct. That policy did not come to fruition, possibly due to reported opposition by senior DOJ officials who viewed it as being "too lenient."

In February 2016, DOJ Fraud Section Chief Andrew Weissmann nevertheless reinforced the benefits of self-reporting, telling participants at a *Global Investigations Review* conference that, in an effort to decrease the uncertainty associated with lengthy investigations, DOJ intends to implement a "fast-track" process for companies that self-report potential FCPA violations. Weissmann stated that he hoped that investigations resulting from self-reports could be concluded within one year, but also acknowledged that issues such as overseas evidence collection could delay resolution beyond a year. Weissmann also indicated that DOJ would provide more detail and visibility in resolution documents on how and why companies received (or did not receive) credit for voluntary disclosure, cooperation, and remediation. Likewise, he stated that DOJ would seek to provide more information about cases where it declined prosecution (*e.g.*, through data and anonymized examples).

In sum, while we do not expect DOJ to adopt a formal "amnesty" policy for self-reports, we are optimistic that transparency surrounding the benefits of self-reporting, cooperation, and remediation will continue to increase.

3. **As DOJ further enhances its scrutiny of compliance programs, will it follow its own advice?**

2015 also saw DOJ sharpen its focus on FCPA compliance. In May, AAG Caldwell, in a speech to the *Compliance Week*'s 10th Annual Conference, provided further guidance on the hallmarks of an effective compliance program. At the outset, Caldwell focused on the need for companies to proactively tailor their compliance programs to actual industry- and business-specific risks—including those risks not "subject to regulation"—instead of employing a "one size fits all approach." She also identified ten "general hallmarks of an effective compliance program," expanding on the familiar guidance provided by DOJ and the SEC in the November 2012 *FCPA Resource Guide*.

It remains to be seen, however, whether DOJ will follow through on its own guidance—namely, that compliance programs can and should differ based on issues such as the company's size and industry. In November, DOJ announced that it had hired a full-time compliance expert, Hui Chen, to help "provide expert guidance to [DOJ Fraud Section] prosecutors" on issues such as "the existence and effectiveness" of companies' compliance programs and "whether the company has taken meaningful remedial action." We understand that Ms. Chen will participate in every corporate criminal resolution to determine whether the company's compliance program and remedial steps are adequate. Ms. Chen, a former federal prosecutor, previously served as Global Head for Anti-Bribery and Corruption at Standard Chartered and thus has experience in a highly regulated industry where robust, market-leading compliance programs are more common. Given Ms. Chen's background, we will be watching for signs of whether DOJ's guidance and analysis sufficiently reflect AAG Caldwell's observation that compliance programs, like risk, differ between companies and across industries. By the same token, we also think that companies that do fall within the core group of highly regulated industries should be prepared for DOJ to apply more exacting standards when assessing compliance programs, particularly over time as the compliance expert is exposed to peer companies with industry-leading programs that become the benchmark for comparison.

4. What does the focus on "egregious criminal conduct" mean in terms of how DOJ evaluates and resolves cases?

We will be watching in 2016 and beyond to see how the FCPA Unit implements its announced goal of focusing its resources on the most "egregious criminal conduct." In 2015, DOJ's most significant enforcement actions did seem to target serious and pervasive conduct. For example, last July, the U.S. construction firm Louis Berger International ("LBI") entered into a deferred prosecution agreement with DOJ in which LBI agreed to pay a $17.1 million penalty and retain a compliance monitor for three years. According to DOJ's complaint, LBI's conduct spanned more than a decade and involved bribes totaling $3.9 million, which the company had paid to officials in India, Indonesia, Vietnam, Kuwait, and elsewhere. Two former LBI executives involved in the conduct also pled guilty to FCPA charges and are awaiting sentencing. In addition to LBI's FCPA resolution with DOJ, LBI's parent company entered into a resolution with the World Bank based on the conduct in Vietnam, which resulted in a one-year debarment from World Bank-financed projects.

In 2016 and beyond, we expect this emphasis on prosecuting egregious violations to continue, but with the added backdrop of the Yates Memo. Thus, we can expect to see more individual prosecutions and trials, coupled with sharpened warnings to companies regarding the importance of cooperation. To support this effort, DOJ's FCPA Unit will benefit from the addition of 10 new prosecutors, a 50% increase in resources. It is less clear whether DOJ will decline to investigate certain types of allegations that are generally perceived as less serious, but certainly one potential result of the diversion of resources to pursuing individuals and emphasizing the most "egregious" cases is that DOJ may be even more inclined than in years past simply to leave the "broken windows" cases to the SEC.

5. How will DOJ approach resolutions involving non-U.S. enforcement agencies?

At the February 2016 *Global Investigations Review* conference that Covington hosted in Washington, DOJ Fraud Section Chief Andrew Weissmann made a special point to mention the critical need to ensure coordination in cross-border anti-corruption enforcement resolutions. He appeared to recognize that, as a matter of basic fairness, companies and individuals can rightly expect that U.S. and non-U.S. regulators will work together to ensure that the penalties imposed are proportional to the conduct at issue. Mr. Weissmann also acknowledged that DOJ has an interest in ensuring such coordination, noting that without predictability and fairness in so-called "global" resolutions, DOJ's policy interests in encouraging self-disclosure and cooperation are undermined. This issue is one to closely watch in the future.

The SEC

While there are open questions about how FCPA enforcement will proceed at DOJ in the coming year, it seems clear that the SEC will continue to aggressively pursue FCPA violations—whether large or small—and even push into other areas of enforcement in the course of routine FCPA investigations. We discuss below a few noteworthy trends to watch.

1. Continuing incremental expansion of the internal controls provisions

The FCPA's internal controls provisions require issuers to "devise and maintain a system of internal accounting controls . . . ." Two cases last year—*BHP Billiton* and *Bank of New York Mellon*—show that the SEC continues to take incremental steps to expand the reach of the internal controls provision to areas outside the realm of core accounting activities. Looking ahead, we will be watching to see whether the SEC continues to scrutinize controls in non-traditional areas when it identifies conduct that it views as improper, even if there is insufficient evidence to bring a case under the FCPA's anti-bribery provisions.

- *BHP Billiton:* In the largest settlement of 2015, commodities producer BHP Billiton (BHP) agreed in May to pay $25 million to settle allegations that the company violated the FCPA's internal controls and books and records provisions by sponsoring foreign officials and employees of state-owned businesses to attend the 2008 Beijing Olympics. The SEC's cease-and-desist order barely mentioned internal accounting controls, but instead focused on the purported deficiencies in BHP's internal controls over the company's "Olympic Hospitality Program." With the 2016 Olympics on the horizon, it is worth noting that in *BHP Billiton* (1) the SEC focused on the risk that travel and hospitality benefits could be provided corruptly, without alleging that such benefits actually had been provided corruptly; and (2) BHP in fact had a system in place for evaluating hospitality recipients. But the SEC viewed BHP's system as being deficient because, among other reasons, it failed to sufficiently screen officials who might have influence over BHP's business.
- *Bank of New York Mellon:* In August 2015, Bank of New York Mellon (BNY Mellon) paid $14.8 million to settle allegations that it violated the anti-bribery and internal controls provisions of the FCPA by corruptly providing internships to relatives of officials affiliated with a sovereign wealth fund in the Middle East. In the accompanying cease-and-desist order, the SEC observed that the bank had "failed to devise and maintain a system of internal accounting controls around its hiring practices . . . ." While hiring decisions involve the use of company assets, they are far removed from traditional accounting controls on which the SEC has previously focused.

The February 2015 *Goodyear Tire & Rubber Company* settlement also serves as a reminder that the SEC will use the FCPA's accounting provisions to reach commercial bribery. Goodyear paid more than $16 million to resolve allegations that the company's internal controls failed to prevent or detect two of its subsidiaries in sub-Saharan Africa from paying over $3.2 million in bribes to employees of both private companies and government-owned entities. *Goodyear*, which involved subsidiaries that collectively accounted for less than 0.25% of the company's global revenue during the period at issue in the settlement, also demonstrates that even the smallest subsidiaries are in the SEC's crosshairs.

2. Scrutiny of employee confidentiality agreements

2015 marked a period of increasing focus by the SEC on enforcing Dodd-Frank whistleblower protections as they relate to employee confidentiality obligations, which followed on the heels of the SEC's *KBR* order in April 2015. The regulation at issue in *KBR* is Rule 21F-17(a), which reads: "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." In *KBR*, the SEC issued a cease-and-desist order and imposed a fine of $130,000 based on a confidentiality provision used by a company with employee witnesses in internal investigations, which "prohibited" the employee from "discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department."

We believe that the SEC will aggressively pursue these Rule 21F-17(a) cases in the months and years ahead, even on facts that bear no resemblance to those in the *KBR* matter. As a policy matter, the SEC is intensely focused on removing any perceived impediments to whistleblowing. As a result, we now see issues surrounding confidentiality agreements routinely surfacing during otherwise unrelated FCPA investigations. We likely will see additional enforcement actions under Rule 21F-17(a) in the coming year, and companies would be well-advised to immediately scrutinize any employee agreements with confidentiality provisions in them and make appropriate revisions to address the SEC's concerns in this area.

3. Continuing focus on the pharmaceutical sector

Consistent with Andrew Ceresney's March 2015 remarks that the SEC has been "particularly focused" on the pharmaceutical industry in recent years, the SEC brought enforcement actions against *Bristol-Myers Squibb and Mead Johnson Nutrition* in 2015, resulting in settlements of over $14 million and $12 million, respectively. As Ceresney explained, the SEC is focused in particular on three types of cases: (1) "pay-to-prescribe" cases, in which companies pay bribes in exchange for prescribing or recommending medication; (2) cases in which bribes are paid in order to get products on an approved list or formulary; and (3) cases in which bribes are disguised as charitable contributions. *Bristol-Myers Squibb* and *Mead Johnson Nutrition*—which focused on allegations that the companies' Chinese operations improperly provided cash, gifts, and travel to employees of state-owned hospitals in order to obtain sales—are examples of the first type of case. We expect the SEC to continue focusing on the pharmaceutical sector in 2016, and indeed, last week, they announced a settlement with Sci-Clone Pharmaceuticals.

Part II: International Trends

Anti-corruption activity outside of the United States continued to grow at a record pace in 2015. Practitioners should be aware of significant legislative and enforcement developments that may foreshadow increasing anti-corruption enforcement across the globe.

Multilateral Development Banks

In recent years, the leading multilateral development banks ("MDBs")—including the World Bank, the Asian Development Bank, the Inter-American Development Bank, the European Bank for Reconstruction and Development, and the African Development Bank—have been active in bringing debarment actions against contractors that engage in misconduct on MDB-financed projects. Moreover, the leading MDBs have entered into a cross-debarment agreement under which a debarment by one MDB is presumptively recognized by the other signatories to the agreement. The MDBs play an important role in the global anti-corruption landscape, given that their enforcement regimes can reach companies that may not be subject to the more regularly enforced national anti-corruption laws, such as the FCPA.

We anticipate that the MDBs—particularly the World Bank—will continue to play an active enforcement role in 2016. In its most recent annual report, for instance, the World Bank's Integrity Vice Presidency ("INT"), which investigates and brings enforcement actions relating to misconduct, reported that it opened 323 preliminary inquiries in the 2015 fiscal year. Moreover, at the end of the year, 88 external cases remained under investigation and 65 of those cases involved allegations of corruption. The various sources of information available to INT suggest that it will continue to receive credible information sufficient to support extensive enforcement activity—for example, in its 2015 annual report, INT noted that it had received information from: companies that had agreed to cooperation obligations under negotiated resolution agreements; national law enforcement authorities; "in-depth forensic audits"; and "an increased rate of complaints reported by government project officials, whistleblowers inside companies, and citizens from developing countries."

The World Bank will also continue to play an active role in the development of debarred firms' compliance programs. In 2015, the World Bank's Integrity Compliance Office—which oversees the implementation of corporate compliance programs required as a condition of release from debarment—reported that it was actively engaged with 47 entities.

It remains to be seen whether the other leading MDBs—which have traditionally been less assertive than the World Bank in investigating corruption in their projects—will take a more active approach in the future. It also remains to be seen how the new multilateral development banks that have emerged recently—including, most notably, the China-led Asian Infrastructure Investment Bank ("AIIB")—will address corruption risk. Although senior officials at the AIIB have indicated that the agency will have a "zero tolerance" stance on corruption, it is unclear whether the AIIB will adopt an enforcement approach consistent with the harmonized approach currently followed by the other MDBs, or whether it will become a signatory to the MDB cross-debarment agreement.

Europe

1. **Anti-corruption enforcement actions are likely to proceed in the UK and throughout Europe**

Ten years ago, at an anti-corruption conference in Paris, U.S. and European prosecutors and leading private practitioners explored the implications of the "awakening giant" of European anti-corruption enforcement. While one can argue that the "giant" is still rubbing the sleep out of its eyes, there have been a number of important enforcement developments in Europe in the last year that should, in our judgment, have a meaningful impact on how international companies perceive anti-corruption risk.

For example, the past year saw the UK Serious Fraud Office ("SFO") resolve its first "failure to prevent bribery" enforcement action under Section 7 of the UK Bribery Act and secure the first UK Deferred Prosecution Agreement ("DPA"), in the UK Government's $33 million settlement with ICBC Standard Bank in November 2015.[1] Soon thereafter, the SFO secured a guilty plea in another Section 7 case, against construction company Sweet Group plc. The SFO is currently conducting a number of other bribery-related investigations against both corporations and individuals, some of which may result in settlements in 2016.

Notably, Standard Bank's cooperation with the SFO included self-reporting the issue, sharing interview summaries, making employees available for interviews, and even providing the SFO with access to its document review platform. Some of these steps go well beyond the steps that companies typically take to cooperate with DOJ and the SEC in FCPA investigations, and comments from SFO Director David Green and other SFO officials indicate that the SFO may have an appetite to obtain relatively more direct access to raw evidence, and to have a more direct role in investigations, than is typical in U.S. investigations.

We believe that it is premature to draw broad conclusions about corporate cooperation in the UK from the Standard Bank settlement alone, or from the SFO's public commentary. There is a dearth of data regarding how much credit can be expected as the result of corporate cooperation, which is ultimately—in the UK as in the United States—a matter to be evaluated on the basis of the facts and circumstances of each individual case. Suffice to say, as the UK authorities become more active in bringing corporate enforcement actions—in the anti-bribery context and in other areas—important questions will continue to arise as to what the expectations of the SFO and other UK enforcement authorities should be with regard to corporate cooperation, and how those expectations align with practices and expectations in other jurisdictions. It will also be interesting to see how the UK Government's anti-corruption investigation resources—which were augmented in August 2015 through the establishment of a new International Corruption Unit—will influence how the UK authorities investigate corrupt practices, and the types of enforcement actions they ultimately bring.

As we have previously noted, enforcement activity has increased elsewhere in Europe in recent years, a trend we expect to continue. Many of the recent and ongoing enforcement actions in Europe arise from international matters (such as the Brazil *Lava Jato* affair) that also have U.S. enforcement dimensions, and it is apparent that the European authorities are cooperating regularly with U.S. prosecutors and, in many cases (such as Brazil), enforcement authorities in the jurisdictions where bribes have allegedly been paid.

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[1] The Standard Bank DPA is described in detail in a prior Covington alert.

The following are some of the most noteworthy examples of enforcement actions in Europe over the last year:

- Authorities in **Norway** (which in 2014 entered into a corruption settlement that imposed one of the largest corporate fines in Norwegian history on fertilizer company Yara International ASA) are reportedly investigating a number of firms that have had business dealings with Petrobras or other Brazilian parties, in connection with the *Lava Jato* matter.
- Enforcement also remains active in **the Netherlands**, where the authorities entered into a $240 million settlement with oil services company SBM Offshore in 2014. For example, in November 2015, the Dutch-based telecommunications company VimpelCom announced that it had set aside a provision in the amount of $900 million in connection with ongoing investigations by U.S. and Dutch authorities into allegations of corruption in Uzbekistan. Telecommunications company TeliaSonera also is reportedly under investigation by U.S. and **Swedish** authorities in connection with alleged corruption in Uzbekistan.
- In **Italy**, oil services company Saipem has been ordered to stand trial for alleged bribery in Algeria and has confirmed that Milan prosecutors have opened an investigation into alleged corruption relating to a contract awarded by Petrobras in 2011.
- Enforcement activity has not been limited to Western and Northern Europe. Prosecutors in **Romania**, for example, commenced an investigation in 2015 into the practices of 11 international pharmaceutical manufacturers over allegations that they paid bribes to doctors to prescribe cancer drugs.
- Although **France** has still not brought a corruption case against a corporation, its financial prosecutor recently secured the country's first corporate plea bargain, in a money laundering action against Swiss bank Reyl & Cie. France's plea bargain procedure, the *Comparution sur reconnaissance préalable de culpabilité* ("CRPC") has only been available for complex white collar crime since 2011. Although the CRPC has not yet been used in a bribery case, it can be used for that purpose—prosecutorial guidelines suggest that the CRPC should be used in bribery cases where the underlying corruption represents an "isolated event, outside the established commercial practices of the company in question" (with more egregious cases reserved for full prosecution).

2. EU regulatory developments will lead to an increased emphasis on anti-corruption compliance programs in Europe

A number of EU regulatory developments may cause European companies to place an increased focus on their anti-corruption compliance programs.

In particular, a 2014 EU directive (Directive 2014/95/EU), which member states must implement by December 6, 2016, will require listed companies, banks, and insurance companies with over 500 employees ("public interest entities") to publish reports on non-financial information, including, *inter alia*, anti-corruption and bribery matters. The directive provides that the non-financial report should include a description of the company's anti-corruption policies, due diligence processes, the principal risks linked to the company's operations (including, where appropriate, risks in its supply and sub-contracting chains), and how the company manages those risks. The directive adopts a "comply or explain" model, which requires companies that do not pursue anti-corruption policies to "provide a clear and reasoned explanation for not doing so." Notably, the directive provides that companies required to submit reports "should provide adequate information in relation to matters that stand out as being most likely to bring about the materialisation of principal risks," which suggests that companies seeking to fully comply with the directive will need to conduct a meaningful anti-corruption risk assessment.

Separately, in 2014, a new EU public procurement directive was issued, which member states must implement by April 18, 2016 (some Member States have already done so in the course of the past year). The new procurement directive modifies the EU debarment rules that apply to contractors convicted of corruption in certain respects, including by introducing a "self-cleaning" mechanism to the rules pursuant to which a debarment period may be reduced where a company is able to demonstrate that it has adopted compliance measures "aimed at remedying the consequences of any criminal offences or misconduct and . . . effectively preventing further occurrences of the misbehaviour."

Developments in EU national law also may contribute to a shift in European compliance culture. For example, on January 22, 2016, Spain's State Prosecutor issued guidance to Spanish prosecutors on how to assess corporate compliance programs, particularly with respect to whether a company's compliance program is suitable to avoid or reduce criminal liability. Additionally, a legislative proposal is expected to be debated in France this year that would create a new anti-corruption authority and impose affirmative compliance obligations on large companies and corporate groups. The law would reportedly require French companies with over 500 employees (and corporate groups with over 500 employees and turnover of over €1 million) to develop anti-corruption compliance programs consistent with guidelines that would be issued by the new anti-corruption agency. In the event of non-conformity with those guidelines, the agency would have the power to impose administrative sanctions including financial penalties of up to €1 million. The law would also reportedly create a new penalty pursuant to which a company convicted of a corruption offense would be required to implement a compliance program under the oversight of the anti-corruption agency. Although the practical details of how that penalty would be administered are not yet clear, various commentators have compared the penalty to the compliance monitorships commonly imposed under U.S. settlements.

Finally, we note that Germany passed a new anti-corruption law on November 26, 2015. The key changes to the German Criminal Code's anti-corruption provisions include an extension of the scope of anti-corruption laws to include European public officials as well as foreign public officials, and an extension of the provisions relating to corruption in the private sector to include instances in which employees violate their duties toward employers (the private sector bribery offence previously had applied only to cases in which corruption had the effect of distorting competition).

3. Companies conducting investigations involving EU data will grapple with changes to the EU data privacy regulations

On December 15, 2015, after a lengthy negotiation process, the EU institutions agreed to the text of the new EU data protection law, the General Data Protection Regulation (the "GDPR"), which will apply directly in all Member States two years after the text is formally approved (the approval is expected in early 2016).[2] The new GDPR reshapes European data privacy law in a

[2] Further information on the GDPR can be found in a prior Covington alert.

number of key respects, including in how data privacy restrictions may impact the conduct of corporate anti-corruption investigations.

Of particular note, Article 43 of the GDPR includes a new provision, referred to by many as the "anti-FISA" provision (referencing the U.S. Foreign Intelligence Surveillance Act), clarifying that international transfers of personal data cannot be based purely on the judgment or decision of a foreign court, tribunal, or administrative authority, without the backing of an international agreement. That provision raises new questions as to how disclosures of EU data in FCPA investigations should be handled in circumstances where a U.S. regulator's request for information is not clearly tied to a mutual legal assistance process or other treaty framework. Moreover, in October 2015, the European Court of Justice ruled the U.S.-EU Safe Harbor framework invalid, thereby eliminating that mechanism for transferring personal data to the U.S. (Shortly thereafter, Swiss authorities invalidated the U.S.-Swiss Safe Harbor.) Companies that had previously relied on the Safe Harbor to transfer data in connection with audits and investigations will now need to find other avenues to do so.

It is unlikely that recent EU data privacy developments will materially change U.S. regulators' perspective as to the types of evidence that they may wish to obtain from European companies in FCPA investigations. As DOJ's Assistant Attorney General Leslie Caldwell recently commented, DOJ will challenge what it views to be "unfounded reliance" on data privacy laws, and companies should "refrain[] from making broad 'knee jerk' claims that large categories of information are protected from disclosure."

Nevertheless, the implications of breaching EU data privacy laws will be substantially greater once the GDPR comes into effect—the GDPR establishes corporate penalties of up to €20 million (approximately $22 million) or 4% of worldwide annual turnover, whichever is higher, for violations of provisions relating to the collection, processing, and international transfer of personal data. Accordingly, while managing data privacy compliance in anti-corruption investigations has always been a significant issue, the increased magnitude of potential penalties makes the issue a much more challenging one for companies with operations in Europe.

Asia

Legislative and enforcement activity also continues to increase in Asia. Of particular note:

- Authorities in **China** continued to aggressively enforce China's anti-bribery laws, implicating both domestic and multinational companies that are alleged to have paid bribes. In 2015, Chinese authorities announced the investigation and/or arrest or expulsion from the Communist Party of at least 74 high-ranking Chinese government officials based on allegations of corruption. On January 14, 2016, the Party's top anti-corruption enforcement agency, the Central Commission for Discipline Inspection, vowed to keep pressure on corruption issues in the new year.
- In a key legislative development, amendments to China's Criminal Law, effective November 1, 2015, expanded the law's reach and potential impact by: (1) adding the crime of providing bribes to former state functionaries as well as close relatives or other persons closely related to current and former state functionaries; (2) providing for monetary penalties against individuals in addition to preexisting penalties against corporate entities; (3) raising the bar for bribe-givers to be exempted from punishments;

and (4) replacing specific monetary figures that trigger different levels of punishments with more general standards.

- **Korean** lawmakers enacted enhancements to Korean anti-corruption law that eliminate the requirement, when establishing criminal conduct, to prove a direct link between the provision of a gift and a specific favor done in exchange. The law will take effect in September 2016.
- Amendments to **Thailand's** Organic Act on Counter-Corruption, effective July 9, 2015, expanded prohibitions on bribery to impose liability on a company for using a "related" party (*e.g.*, an agent) to engage in a corrupt act, unless the company can show that it has appropriate internal controls to prevent the offense. The amendments also prohibit bribes paid to government officials outside of Thailand and to officials of public international organizations.
- **Indian** lawmakers passed an amended version of the Prevention of Corruption Amendment Bill 2013, which would create a separate offense of bribe giving, enhance prison times for those convicted of bribery, and encompass non-monetary gratification. It remains to be seen whether the central government will approve the legislation, which has been under discussion for several years.

Brazil

The Petrobras investigation continues to result in an array of high-profile individual prosecutions and leniency agreements between companies and Brazilian authorities. To name just a few recent examples:

- On December 17, 2015, Brazilian prosecutors charged 12 individuals with the reported bribery scheme involving Petrobras and SBM Offshore NV, a Dutch oil and gas service provider that settled foreign corruption charges brought by Dutch authorities in November 2014 (noted above).
- On November 27, 2015, construction company Andrade Gutierrez agreed to pay a fine of $270 million as part of a leniency agreement with Brazilian authorities and admit to paying bribes for business with Petrobras and 2014 FIFA World Cup contracts.
- On August 20, 2015, Brazil's Attorney General filed corruption charges against President of the Chamber of Deputies Eduardo Cunha, and former President, now Senator, Fernando Collor de Mello, alleging the receipt of more than $12.5 million in bribes in connection with the *Lava Jato* scheme.

We are also watching Brazilian authorities' ongoing proceedings against eight current and former employees of Brazilian aircraft manufacturer Embraer S.A. in connection with allegations that the employees bribed an officer in the Dominican Republic's air force to obtain a $92 million contract to supply fighter planes. In May 2015, Embraer S.A. reportedly entered into discussions with U.S. authorities to resolve a parallel investigation.

On the legislative front, in September 2015, Brazil's Comptroller General's Office issued "Integrity Programs—Guidelines for Private Corporations" outlining five hallmarks of a corporate integrity program: (1) tone at the top; (2) an empowered compliance function; (3) a risk-based integrity program tailored to the company's risk profile; (4) structuring of corporate compliance rules and procedures; and (5) monitoring and testing. These guidelines follow Decree No. 8,420,2, which provided additional clarification regarding Brazil's Clean Companies Act as described in a prior Covington alert.

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As this advisory suggests, we are in a very interesting period for anti-corruption enforcement. There are a number of policy developments to watch in the United States that could meaningfully impact the conduct of investigations at DOJ and the SEC. While considerable uncertainty exists as to what the U.S. anti-corruption enforcement landscape will look like at this time next year, it does seem fairly clear that anti-corruption compliance and investigations will continue to demand considerable attention and resources from companies. The FCPA program in the United States is now well-entrenched and only becoming more challenging for companies and practitioners to navigate successfully. The rise of enforcement in non-U.S. countries only adds to the challenges, as these countries experience their own growing pains and evolution of their anti-corruption enforcement programs, including in how they interact with the United States in cases of parallel investigations. As always, we expect to publish updates on key anti-corruption developments throughout the year.

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