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# Trends and Developments in Anti-Corruption Enforcement

Winter 2017

Anti-Corruption

Anti-corruption enforcement is at a crossroads. In many respects, global anti-corruption enforcement has never been more active. The U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") in 2016 collected a total of $2.41 billion through FCPA enforcement actions against 27 corporate defendants, including through their share of a record-setting $3.5 billion global resolution with Brazilian construction conglomerate Odebrecht S.A. and its affiliate Braskem S.A., and a $515 million resolution with Teva Pharmaceuticals (the largest-ever FCPA resolution with a life sciences company). Those settlements are certainly noteworthy, but 2016 will be remembered for more than large-dollar resolutions. The Fraud Section of DOJ's Criminal Division launched an FCPA Pilot Program to encourage voluntary disclosures and heightened cooperation; the U.S. announced several major coordinated, parallel enforcement actions with its foreign counterparts; and, perhaps reflecting a new trend, numerous individuals faced charges in the U.S. and abroad at the same time as settlements were reached with the relevant corporate entity.

With the recent results noted above, the continuing prospect of significant payouts to whistleblowers at the SEC under the Dodd-Frank Act, and more resources devoted to FCPA enforcement than ever before, there is good reason to believe that DOJ and the SEC will continue to enforce the FCPA vigorously. But it is likely that the Trump Administration will refine the approach. Many commentators have pointed to past public comments by President Trump and his nominees to head DOJ and the SEC that, in one form or another, have been critical of FCPA or white collar enforcement priorities, more generally. Notwithstanding more recent written statements by the Attorney General that DOJ would continue to enforce the FCPA, some degree of retrenchment, perhaps through a shift in emphasis toward compliance and regulation over enforcement, should be expected in the coming years at DOJ, the SEC, or both. At the same time, there is now more momentum than ever before in the UK, Brazil, China, the Netherlands, and elsewhere to enforce their anti-corruption laws. As a result, continued investment in a strong anti-corruption compliance program will remain a company's best strategy for mitigating the risk of an enforcement action or helping to best position the company if an enforcement action is pursued.

## Part I: U.S. Trends

FCPA enforcement in the U.S. has been heavily influenced in recent years by several interrelated developments. At the SEC, former Chairwoman Mary Jo White championed a "broken windows" approach to enforcement—one where even minor violations would be pursued. That—along with strong monetary incentives to whistleblowers under the Dodd-Frank Act, and expansive theories of liability and jurisdiction advanced by SEC enforcement attorneys—has created a prevailing climate of aggressive enforcement at the agency. At DOJ,

FCPA enforcement has focused on vigorous investigation of companies and individuals connected to larger-scale, more pervasive conduct, with a parallel emphasis on incentivizing companies to self-report and cooperate in its investigations through the promise of more favorable resolutions. The dynamics at DOJ have been shaped by the enforcement priorities set by senior leaders in DOJ's Criminal Division—including through the one-year FCPA enforcement Pilot Program that began in April 2016—and the September 2015 guidance issued by former Deputy Attorney General Sally Yates regarding corporate cooperation and prosecution of individuals.

When the impact of the Yates Memo and Pilot Program are assessed together, a picture emerges of DOJ fine-tuning the process of *how* it investigates corruption cases—including developing evidence against individuals—rather than any fundamental shift in DOJ's view of what constitutes an FCPA violation. By contrast, the SEC has continued to push what many FCPA practitioners consider to be expansive theories of FCPA liability. For FCPA practitioners, the resulting dynamic is one in which there is increasing complexity and nuance in both *what* may constitute a violation and *how* an investigation is likely to unfold.

## DOJ

### 1. The Yates Memo and Pilot Program combine to embolden prosecutors, but critical questions about the Pilot Program remain, and outcomes still turn on prosecutorial discretion.

With the Pilot Program, DOJ sought to incentivize companies to voluntarily disclose potential misconduct. While the Pilot Program promised more lenient outcomes, it was not intended to be an amnesty program for minor violations. As DOJ explained in guidance describing the Pilot Program, "even a company that voluntarily self-discloses, fully cooperates, and remediates will be required to *disgorge* all profits resulting from the FCPA violation" in order to qualify for mitigation credit (up to and including a declination) under the Pilot Program. Thus, a new resolution vehicle—a declination with disgorgement—has emerged under the Pilot Program in which a company that obtains a declination from DOJ must pay disgorgement to the government pursuant to either an enforcement action brought by the SEC (in the case of "issuers") or a letter agreement with DOJ. After almost a year, DOJ can point to a handful of examples where voluntary disclosures have resulted in these declinations with disgorgement, a relatively lenient outcome. In the Pilot Program era, there are also certain guideposts that can help to predict penalties in FCPA cases. But at the end of the day, outcomes under the Pilot Program largely remain a matter of prosecutorial discretion, resulting in continued uncertainty for companies considering whether to self-disclose.

- The Yates Memo emboldens prosecutors in outside counsel-led investigations.

  Consistent with the directive in the Yates Memo, prosecutors appear to be thinking more about securing evidence related to individuals at the outset of investigations. This focus has emboldened prosecutors to more aggressively pursue information earlier in cases and to more frequently second-guess matters of investigative strategy and tactics typically left to the company's discretion. This more active involvement can manifest itself in a number of ways, including:

  - "de-confliction" requests, in which prosecutors ask companies to defer interviewing certain employee witnesses until after the government has had an opportunity to do so;

- more active involvement by the government in reviewing companies' work plans for conducting the investigation;
- requirements of real-time production of documents identified during the investigation, the failure of which can result in diminished cooperation credit (as discussed below);
- an expectation of receiving advance notice when an employee will be leaving the company; and
- more systematic, witness-by-witness proffers, as opposed to relying on outside counsel to present composite narratives that pull from across witness interviews.

With these changes come greater potential pitfalls for external and in-house counsel. De-confliction requests, for example, can create a tension between meeting DOJ's expectations—which can affect the amount of cooperation credit a company earns—and upholding a board's basic fiduciary duty to identify and remediate significant misconduct. Other than having an open line of communication with the prosecutors, there may not be an easy solution to requests of this nature.

An equally vexing dynamic has emerged in the U.S. with respect to claims of attorney-client privilege. Although it is longstanding DOJ policy not to ask for waivers of the attorney-client privilege or to penalize companies for asserting the attorney-client privilege, DOJ appears to have withheld full cooperation credit from Teva Pharmaceuticals in part because of privilege claims that DOJ deemed to be "vastly overbroad." Without commenting on the situation involving Teva (the details of which are not public), this dynamic is one to watch in 2017. There will continue to be instances in which companies make privilege claims that DOJ may believe are overbroad. It will be important to engage in a healthy dialogue on such issues, focusing on whether the company has a good-faith basis to assert the privilege. After all, a broad privilege claim is not necessarily an invalid one, and it would not be consistent with DOJ policy to withhold cooperation credit in such circumstances.

More generally, efforts to satisfy increasingly emboldened prosecutors may result in greater wariness by employees involved in company-led investigations, particularly as employees become more sensitive to the fact that DOJ is actively pursuing evidence related to, and cases against, individuals. This dynamic creates cultural challenges for in-house lawyers who need to avoid appearing to their colleagues as *de facto* government agents, and can also accelerate the need to make decisions about whether and when to provide an individual with separate counsel.

*What to watch for in 2017:*

- Where does DOJ allocate its resources? Last year's increase in FCPA enforcement may have resulted, at least in part, from the addition of prosecutors to the FCPA Unit and FBI agents to the International Corruption Unit. Will DOJ keep those resources in place or shift them to new priorities (e.g., immigration or national security)?
- How often will privilege claims affect DOJ's determination of how much cooperation credit to give to a company? And will DOJ provide any insights into what it considers to be overbroad privilege claims?

- Has DOJ's Pilot Program achieved its goal of increased transparency?

When DOJ introduced its Pilot Program in April 2016, we identified a number of questions that the new guidance did not answer, but that we hoped might be answered over time. Reflecting on developments since April 2016, many of the questions that we asked remain largely unanswered, including:

- How will DOJ apply the policy that companies will not receive credit for self-reports required by "law, agreement, or contract"?
- How will DOJ evaluate the timeliness of a self-report in circumstances where the company was first contacted by a would-be whistleblower?
- What will "full cooperation" look like in practice?
- What credit is available for voluntary disclosure when cooperation or compliance and remediation fail to meet the Fraud Section's expectations?

We also asked last year whether the Pilot Program portended harsher resolutions for companies that do not self-report. It appears that DOJ meant what it said in terms of capping reductions of fines at 25 percent off the bottom end of the Sentencing Guidelines range for companies that cooperate but do not self-disclose. In the Pilot Program era, no company has received a discount greater than 25 percent without voluntary disclosure, a stark contrast to the example of VimpelCom Limited, which obtained a 45 percent reduction without a voluntary disclosure in a settlement just two months before the Pilot Program took effect. For companies that cooperate but do not voluntarily disclose the underlying conduct, uncertainty still remains—most notably with respect to whether the company receives the maximum 25 percent discount for cooperation and remediation (like Odebrecht), or a lower amount for partial cooperation, such as 20 percent (like Och-Ziff, Embraer, and Teva) or 15 percent (like Braskem). Based on the language in the settlement agreements for these cases, it appears that the facts affecting this calculus include, for example, whether the company produced documents to DOJ in a "timely" fashion, or made privilege claims that DOJ perceived to be overbroad. Och-Ziff and Teva, for example, both received 20 percent reductions—as opposed to 25 percent—because, at least in part, they reportedly failed to "timely" produce materials to DOJ. That begs the question: how quickly must a production occur in order for DOJ to consider it "timely"?

With respect to one of our unanswered questions—what would DOJ do in instances of an incomplete or imperfect voluntary disclosure?—the BK Medical resolution in June 2016 provides one interesting data point. According to its Non-Prosecution Agreement ("NPA") with DOJ, BK Medical voluntarily disclosed some, but not all, facts known to the company at the time related to the underlying misconduct. Despite this apparent shortcoming, the NPA states that the company earned "full credit" for a timely and voluntarily disclosure, but only partial *cooperation* credit because the initial disclosure did not include all known facts. BK Medical ultimately received a 30 percent reduction off the bottom end of the Sentencing Guidelines range, well under the maximum 50 percent reduction available under the Pilot Program that only one company received in 2016 (General Cable Corporation).

The result in BK Medical may indicate that DOJ is willing to incentivize self-reporting through a somewhat flexible approach as to what constitutes a voluntary disclosure—thus allowing companies to qualify for reductions above 25 percent—while preserving the ability to use the more discretionary cooperation credit calculus to account for any

deficiencies in the nature of the disclosure. The end result for BK Medical was that it received a slightly higher reduction (30 percent vs. 25 percent) than a company like Odebrecht that did not voluntarily disclose but was deemed to fully cooperate. In sum, we are beginning to discern trends, but not precision, in how DOJ makes determinations on mitigation credit.

- Is the Pilot Program even a carrot in practice?

  In November 2016, then-Assistant Attorney General Leslie Caldwell stated that the "pilot program is having an effect," adding that while she could not "share precise figures, anecdotally [DOJ had] seen an uptick in the number of companies coming in to voluntarily disclose potential FCPA violations." This trend came into sharper focus after DOJ announced in late September that, pursuant to the Pilot Program, it would not pursue an enforcement action against two domestic concerns, HMT LLC or NCH Corporation, based on the companies' (1) voluntary disclosure of the misconduct; (2) extensive cooperation; (3) full remediation; and (4) agreement to disgorge ill-gotten profits.

  Drilling down on the HMT resolution, it certainly appears that this was a favorable result for the company, given that the conduct appeared to be quite significant (e.g., the company paid $500,000 in bribes over a period of nine years). But we must ask: Is what HMT and NCH obtained from DOJ truly a "declination"? This question seems worthy of consideration given that:

  - HMT and NCH disgorged $2.8 million and $335,000, respectively; and
  - both declination letter agreements contained detailed factual recitations, to which the companies specifically agreed and consented.

  To be clear, not every public declination under the Pilot Program in 2016 required the company to agree to the underlying facts in a publicly disclosed letter agreement with DOJ. Three "issuers"—Johnson Controls, Inc., Nortek, Inc., and Akamai, Inc.—received declination letters from DOJ that required disgorgement to the SEC under parallel enforcement actions. In each of those cases, however, DOJ's declination letters did not include a detailed description of the underlying facts or a corresponding requirement that the company agree to the facts. Nor, for that matter, did the SEC resolutions require admissions. So in that sense, the requirements for issuers and non-issuers to obtain declinations from DOJ appear to differ—i.e., non-issuers must admit the facts underlying the FCPA violation.

  Prior to the Pilot Program, we understood a "declination" to mean a discretionary decision by DOJ not to pursue an enforcement action—even if there was evidence of a violation—due to some combination of factors, such as a voluntary disclosure, cooperation, remediation, or other consideration. This type of pre-Pilot Program discretionary declination, which did not include disgorgement or a public, agreed-upon statement of facts, may be extinct in cases where a violation of the FCPA has been found. In its place, we now have the Pilot Program version of a declination—i.e., no enforcement action, but a requirement of disgorgement and a public, agreed-upon statement of facts. In other words, a full and complete declination that does not impose any requirements on the recipient may now be available only when no violation has been found.

*What to watch for in 2017:*

- In situations where a company voluntarily discloses, fully cooperates, and remediates, will DOJ continue to insist on declinations with disgorgement whenever a minor violation of the FCPA occurred, or will the Department consider full and complete declinations (without disgorgement or an agreed-upon statement of facts) in certain cases?
- Will we continue to see the anomalous result of DOJ requiring non-issuers—but not issuers—to agree to public factual statements in order to receive declinations under the Pilot Program?
- If the Pilot Program—which is set to expire in April 2017—is extended, will DOJ include a presumption of a declination (with disgorgement and an agreed-upon statement of facts) for those companies that voluntary disclose misconduct, have effective compliance programs in place, and fully cooperate?
- As discussed in last year's update, DOJ reportedly considered a presumption of a declination in 2015 before concluding that it was tantamount to an amnesty program. As leadership positions at DOJ are filled in the next administration, we will be watching to see whether there is a renewed appetite for embracing this more concrete benefit for voluntary disclosure.

**2. DOJ compliance counsel creates new opportunities . . . and risks.**

Last year, we observed that DOJ recently had hired an internal compliance counsel resource, Hui Chen, and we wondered whether Ms. Chen would follow the Department's own advice of assessing compliance programs based on business-specific risks instead of a "one size fits all" approach. Our experience to date suggests that Ms. Chen not only has adhered to this advice, but also has ushered in some welcome flexibility and sophistication in terms of making compliance less burdensome and more practical.

There are a number of other takeaways that compliance practitioners should take to heart in the era of a dedicated compliance counsel at DOJ:

- DOJ appears to be applying a more discerning review of companies' compliance programs, which benefits those companies that make front-end investments and imperils those that do not.
- There is a sharpened focus on the ability of a company to measure the effectiveness of its compliance program, including, for example:
  - How many third-party vendors were rejected and/or terminated as a result of the company's integrity due diligence process?
  - How many employees have been terminated as a result of compliance-related violations?
  - Are controls auditable to ensure that they are working?

The compliance counsel role also adds a new wrinkle in the strategic calculus for companies that are negotiating resolutions with DOJ—namely, whether to fold compliance into a broader "Filip Factors" presentation, or to have a stand-alone "compliance day" presentation. There are a host of factors that may affect this determination, and practitioners should give careful consideration to this new dynamic.

*What to watch for in 2017:*

- Will the compliance counsel role be a permanent position at DOJ? Or will the resources used for the position eventually be deployed elsewhere?
- Under a Trump Administration, will there be a renewed push by the business community to add an "adequate procedures" defense to the FCPA?

**3. Cooperation with foreign regulators is now the norm—and replete with pitfalls.**

Over the past several years, cooperation between U.S. and foreign regulators has become increasingly commonplace, to the point where such cooperation is now the new norm. Over the same period, non-U.S. enforcement of anti-bribery laws has become more robust. In 2016, we saw notable examples of this intersection of greater cooperation and more robust enforcement outside the U.S., including:

- VimpelCom, a $795 million resolution involving FCPA charges brought by DOJ and the SEC and a parallel enforcement action by authorities in the Netherlands. In addition to cooperation between U.S. and Dutch prosecutors, the investigation reportedly included assistance from law enforcement in Belgium, France, Ireland, Latvia, Luxembourg, Sweden, Switzerland, and the United Kingdom.
- Odebrecht / Braskem, a $3.5 billion resolution involving parallel enforcement actions brought by authorities in Brazil, Switzerland, and the U.S.
- Embraer SA, which resolved both FCPA charges brought by DOJ and the SEC and anti-bribery charges in Brazil, following an investigation that reportedly involved cooperation among authorities in the U.S., Brazil, France, Saudi Arabia, Switzerland, South Africa, Uruguay, and Spain. Brazil and Saudi Arabia both charged individuals for their alleged involvement in the misconduct.

In this new reality, resolving anti-corruption charges is complex and multi-dimensional, with conduct in certain jurisdictions potentially having an impact in the U.S. and elsewhere. For example:

- Last November, then-Assistant Attorney General Leslie Caldwell stated that DOJ would "defer" to foreign regulators in certain cases where the foreign enforcement was "vigorous and fair." Caldwell cited the Embraer case as an example—and she specifically stated that the prosecution of individuals by authorities in Brazil and Saudi Arabia obviated the need to bring enforcement actions against those individuals in the U.S. Implicit in Caldwell's comments is the reality that, for cross-border cooperation to work, it often will need to extend to include deference to foreign regulators in how they choose to handle the prosecution of their citizens. In other words, international comity may now play a more prominent role in cross-border anti-corruption enforcement, particularly between countries with more mature anti-corruption enforcement regimes.
- Different countries have different investigatory practices and standards of proof for resolving cases. A company might be asked, for example, to admit to certain facts in a foreign jurisdiction that could affect not only a parallel enforcement action in the U.S. (or other jurisdiction), but also downstream civil litigation in the U.S. As another example, certain non-U.S. regulators may request the production of attorney interview summaries, potentially risking a privilege waiver in the U.S., or, conversely, damaging the relationship with the local regulator if the summaries are not turned over.

- Finally, countries have different conflict of interest rules that may permit, for example, foreign counsel to represent multiple defendants involved in the same underlying conduct. Understanding the relevant rules and practices, and how those practices may be perceived by a U.S. regulator, will be crucial going forward.

All of these issues highlight the need for strong coordination and communication, both internally across the relevant countries affected by the investigation and externally with regulators in the those countries.

*What to watch for in 2017:*

- To what extent will DOJ defer to foreign regulators on questions of both process and substance—i.e., regarding evidence collection, prosecution decisions relating to foreign nationals, and other issues where international comity may be important?

**The SEC**

In 2016, the SEC continued its vigorous pursuit of potential violations large and small under the FCPA.

1. **"Broken windows" is still going strong . . . at least for now.**

In the fall of 2013, SEC Chair Mary Jo White announced her intention to pursue a "broken windows" approach to securities law enforcement, including the FCPA. We continued to see the effects of that policy in 2016 and early 2017, including the following enforcement actions:

- Nordion (Canada) Inc., which agreed in March to pay $375,000 to settle allegations that it violated the FCPA's accounting provisions. Notably, the SEC pursued this enforcement action against Nordion—as well as a parallel enforcement action against a former Nordion employee, Mikhail Gourevitch—notwithstanding the fact that Nordion voluntarily reported the misconduct, cooperated, and took prompt remedial action.
- Nu Skin Enterprises, which agreed in September to pay $765,000 to settle allegations that it violated the FCPA's accounting provisions. The case involved a charitable donation made by Nu Skin's Chinese subsidiary to a charity established by an entity "associated" with a Chinese party official, but notably lacked any allegations that the party official received a financial benefit from the donation.
- Mondelēz International, Inc. (discussed below)

One of the issues we will be watching in 2017 is whether the SEC continues a "broken windows" approach to enforcement under new Chair Jay Clayton (assuming that he is confirmed). There are hints that Mr. Clayton may be disinclined to pursue minor FCPA violations as aggressively as his predecessor, and that he might instead emphasize a regulatory approach to the FCPA. For example, in December 2011, a committee of the New York City Bar Association that Mr. Clayton chaired published an article expressing skepticism about certain aspects of FCPA enforcement. The article appeared to embrace a proposal made by former SEC General Counsel James Doty to create a "Reg. FCPA" similar to "Regulation D under the Securities Act of 1933 and other administrative schemes, which 'would establish a permissive filing regime; by making the filing, a registrant would benefit from a regulatory presumption of compliance.'" While it is not clear exactly how this model would work in practice, this proposal suggests that Mr. Clayton could be favorably inclined to approach the FCPA using an SEC regulatory framework. Alternatively, the SEC could consider a regulatory disclosure model for potential FCPA violations, perhaps akin to the regime in place for disclosure of potential trade controls

violations to the U.S. Department of State. Under the trade controls regime, companies routinely make voluntary disclosures to the State Department (or mandatory disclosures if the potential violation involves an embargoed country). The State Department, in turn, has the authority to bring a civil enforcement action, but typically does so only in egregious cases. And in cases where the State Department believes that a criminal violation may have occurred, it will refer the matter for investigation and potential prosecution. If the SEC were to move towards a regulatory FCPA model, DOJ would of course continue to bring enforcement actions in more serious cases. In the same vein, the 2011 article also suggests that prosecutions of individuals who commit FCPA violations is more effective than corporate prosecutions, which would dovetail with DOJ's focus on individuals under the Yates Memo.

**2. The SEC continues to push an expansive view of the internal controls provisions.**

The internal controls provisions of the FCPA require issuers to "devise and maintain a *system* of internal *accounting* controls sufficient to provide *reasonable assurances*" of compliance. In practice, the SEC has tended not to focus on the overall *system of accounting controls* across geographies and business units in determining whether a violation has occurred. Rather, the SEC often finds violations even when core accounting activities are not implicated and even when the alleged bribery is fairly characterized as isolated or insignificant in time, place, amount, or substance.

- Hiring-related enforcement actions continued, including outside the financial services industry.

  Following on the heels of last year's settlement with the Bank of New York Mellon, the SEC continued to use the FCPA's internal controls provisions to bring enforcement actions for alleged deficiencies in controls related to hiring practices. In March, Qualcomm agreed to pay $7.5 million to settle charges that its hiring of relatives of Chinese officials (among other conduct) to influence decisions related to wireless communications technologies violated the FCPA's anti-bribery, books and records, and internal controls provisions. And in November, JPMorgan agreed to pay over $202 million to the SEC and DOJ to settle allegations that it violated the FCPA's anti-bribery, books and records, and internal controls provisions by giving jobs and internships to friends and relatives of government officials in Asia. JPMorgan also paid a $61.9 million penalty to the Federal Reserve Board of Governors, which does not have FCPA enforcement authority, based on the Federal Reserve's determination that JPMorgan violated the law and engaged in "unsafe or unsound practices."

- Expanded application of the internal controls provisions to domestic bribery.

  In early December, United Continental Holdings, Inc., the parent company of United Airlines, resolved charges that it violated the FCPA's books and records and internal controls provisions when United instituted a nonstop flight route at the behest of a public official of the Port Authority of New York and New Jersey so that the official could return home more conveniently. According to the SEC, this conduct violated the internal controls provisions because the route was initiated without obtaining the necessary approval for an exception to United's policies, including the Code of Conduct. Like the hiring decision cases, this conduct is far removed from core internal *accounting* controls. The United settlement is also a rare example of an FCPA enforcement action involving domestic bribery.

- Control deficiencies can include failure to conduct "appropriate" third-party due diligence, even in the absence of actual bribes.

  In early January 2017, the SEC announced that it had resolved books and records and internal controls violations against Mondelēz International, Inc.—and its subsidiary Cadbury Limited—in connection with certain payments that Cadbury India made to a third-party agent. Notably, the SEC did not allege that the agent paid bribes, but rather that the company's failure to conduct "appropriate due diligence" on the agent or to monitor the agent's activities created the "risk" that the funds could be used for an improper purpose.

  The Mondelēz enforcement action thus suggests that a failure to conduct sufficient integrity due diligence and/or monitor a third party's conduct can violate the FCPA's internal controls provisions, a step that appears to reach further than any previous case.

  *What to watch for in 2017:*

  - Is Mondelēz an outlier, or will the SEC pursue other internal controls cases on the basis of a failure to monitor or conduct appropriate integrity due diligence on higher-risk third parties? And could the SEC advance a similar argument if a company failed to conduct anti-corruption training for certain employees?
  - Does the United resolution portend an expanded focus on using the FCPA to target domestic bribery (potentially including commercial bribery)?
  - Will the SEC in the Trump Administration adopt a stricter construction of the internal controls provisions—one that focuses more on controls related to core accounting activities and finds violations only where the entire system of internal accounting controls across the company is not sufficient to provide reasonable assurances of compliance?

**3. Enforcement of Dodd-Frank accelerates, opening potential new fronts in FCPA investigations.**

Last year, we predicted that the SEC would aggressively enforce Dodd-Frank whistleblower protections relating to employee confidentiality obligations, building on the SEC's *KBR* order in April 2015. The relevant regulation 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." Beginning in mid-2016 and continuing through the end of the year, we witnessed a steady stream of settlements involving this provision, including: Merrill Lynch, Pierce, Fenner & Smith Inc. (in June); Health Net, Inc. and BlueLinx Holdings (in August); AB InBev (in September); and NeuStar, Inc. and SandRidge Energy, Inc. (in December). Covington represented AB InBev in its 21F-17(a) resolution, as well as in a parallel enforcement action that the SEC brought under the FCPA's accounting provisions.

In June 2016, the SEC brought its first enforcement action for whistleblower retaliation under Dodd-Frank against hedge fund advisory firm Paradigm Capital. The provision at issue in Paradigm Capital is Section 21F(h)(1) of the Securities Exchange Act of 1934, which was enacted pursuant to Dodd-Frank and prohibits employers from terminating, demoting, suspending, threatening, harassing or otherwise discriminating against an employee for reporting potential violations to the SEC or cooperating in an investigation. Paradigm Capital agreed to pay more than $2 million to resolve allegations that it retaliated against a trader who

had reported to the SEC that Paradigm failed to disclose a potential conflict of interest to a client. The SEC subsequently announced two other settlements involving alleged retaliation in violation of Section 21F(h)(1): International Game Technology (in September) and SandRidge (in December).

Company counsel need to be prepared for the SEC to pursue multi-pronged investigations coupling substantive securities law issues with Dodd-Frank issues, particularly when former employees may be cooperating with the government. There are a host of related implications, including, for example, whether to resolve the FCPA and Dodd-Frank (or other) issues simultaneously or piecemeal. And the SEC may view the Dodd-Frank provisions (or other, accounting-based charges) as potential bargaining chips in global resolutions involving alleged violations of the FCPA.

*What to watch for in 2017:*

- If the Trump Administration makes good on its promise to re-visit Dodd-Frank, will any changes affect the whistleblower provisions in the statute?

## Part II: International Trends

Anti-corruption activity outside of the United States continued to grow at a record pace in 2016. Practitioners also should be aware of significant legislative and enforcement developments that may foreshadow further expansion of anti-corruption enforcement across the globe.

**Europe**

1. **There is increased European enforcement and cooperation with international counterparts.**

2016 saw continuing enforcement activity throughout Europe, including the following:

- In the **Netherlands**, the enforcement action against VimpelCom (discussed above) entailed a combined $795 million settlement, an amount that was divided equally between U.S. and Dutch authorities. U.S. and Dutch authorities also are in settlement discussions with Swedish telecommunications company TeliaSonera in connection with alleged misconduct relating to the company's entry into the Uzbek market in 2007—in September 2016, TeliaSonera reported that it was analyzing a settlement proposal of $1.4 billion received from U.S. and Dutch authorities.
- In the **United Kingdom**, the Serious Fraud Office ("SFO") secured its second DPA in July 2016. The settlement was with an unnamed corporate defendant (currently referred to as "XYZ Ltd." due to reporting restrictions), which agreed to pay £6.5 million to settle allegations that its subsidiary paid bribes through intermediary agents to win overseas contracts. In February 2016, Sweett Group plc was sentenced and ordered to pay £2.25 million following its December 2015 guilty plea to a "failure to prevent bribery" offense under Section 7 of the Bribery Act. And in January 2017, Rolls Royce entered into a DPA with the SFO to resolve violations of the UK Bribery Act, the Criminal Law Act 1977 and the Theft Act 1968, and agreed to pay £497 million (~$600 million) to UK authorities. In addition, as part of a global settlement that totaled $800 million, Rolls Royce resolved anti-bribery enforcement actions brought by DOJ (in the U.S.) and Brazilian authorities.

- In **France**, the Paris Court of Appeals in February 2016 overturned a prior ruling that had acquitted French oil company Total SA and Swiss-headquartered Vitol SA of corruption charges relating to the United Nations' Oil-for-Food programme in Iraq. The Paris Court of Appeals imposed fines of €750,000 on Total (the maximum allowable penalty at the time of the offense) and €300,000 on Vitol.
- In **Italy**, oil company Eni, its minority-owned subsidiary Saipem, and several individuals, were re-indicted in July 2016 for alleged improper payments made by Saipem to win contracts in Algeria. The July indictment followed an acquittal on prior charges, which was overturned in February 2016. And in early February 2017, Italian prosecutors charged Eni, as well as Eni's CEO and Royal Dutch Shell, with corruption in connection with the acquisition of an oil license in Nigeria.
- In **Romania**, the National Anti-Corruption Directorate in May 2016 placed an unnamed pharmaceutical company, four of its executives, and 77 oncologists under investigation in connection with allegations that the company paid for holidays for the oncologists under the pretext of sponsoring their participation in a breast cancer congress.
- In **Switzerland**, prosecutors continued to play an active role in anti-corruption investigations, including Odebrecht / Braskem (in which Swiss authorities collected a similar portion of the criminal fines as U.S. authorities), as well as the on-going investigations into 1MDB (the Malaysian sovereign wealth fund) and FIFA.

Efforts to strengthen anti-corruption laws in European countries are likely to contribute to even greater enforcement activity in coming years. For example, in April 2016, the German parliament adopted a law that expands the term "public official" in the context of bribery offenses to doctors and pharmacists. The amendment followed a case in which a court acquitted a German doctor who accepted payments from a pharmaceutical company's representative for prescribing the company's drug, on the basis that doctors were not public officials within the meaning of Germany's anti-corruption law. In December 2016, France's *Loi Sapin II* (also discussed below) expanded the extra-territorial jurisdiction of the country's anti-corruption laws and introduced a DPA-like settlement mechanism into French law, both of which should help to facilitate domestic prosecutions of French companies for overseas corruption offenses.

In addition to a strengthening of anti-corruption laws, enhancements to money laundering laws that EU member states must implement by June 2017 (to comply with the EU's Fourth Anti-Money Laundering Directive) will enhance the ability of national authorities to identify money laundering activity, which may lead to evidence of underlying corruption offenses. For example, the directive seeks to increase transparency around the ownership of corporate and other legal entities (including trusts and similar structures) by requiring member states to ensure that corporate and other legal entities incorporated within their territory obtain and hold adequate, accurate, and current information on their beneficial ownership. Member states also must create central registers of beneficial ownership, which must be accessible to national authorities such as financial intelligence units. The directive also extends the scope of individuals who are considered to be politically exposed persons ("PEPs") and includes requirements to conduct enhanced due diligence to establish the source of wealth and funds involved in business relationships or transactions with PEPs (as well as their family members and close associates), and to conduct enhanced monitoring of those business relationships.

**2. Anti-corruption statutory reforms include increased focus on corporate compliance programs.**

Last year, we observed that regulatory trends in Europe were leading companies to focus more on anti-corruption compliance. Since the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions came into effect, a number of European countries have passed laws recognizing the value of corporate compliance programs. Certain countries, such as Poland, Germany, and Switzerland, have done so by making the absence of adequate compliance measures a component of corporate liability. In Switzerland, for example, "defective organization" is a condition for corporate criminal liability, meaning that the prosecutor must establish that the corporation has not taken "all reasonable and necessary organizational measures" to prevent the commission of the offense. Other countries, including Italy, the United Kingdom, and Spain, have sought to incentivize compliance by creating a defense to corporate liability where a corporation charged with an offense had adequate compliance measures in place. In Spain, for example, a law was passed in 2015 that expanded criminal liability for corporations and simultaneously created a defense to such liability where a corporation can establish that it had a compliance program in place that included certain prescribed features.

In December 2016, France passed a law known as *Loi Sapin II*, which introduced a host of measures focused on enhancing compliance with France's existing anti-corruption and trading in influence laws. Among the measures are prescribed compliance program obligations that will come into effect in June 2017 and that will apply to companies with 500 or more employees (or groups of companies for which the parent company's statutory headquarters is in France) and annual turnover (or consolidated turnover) of at least €100 million. The obligations also expressly apply to the directors and officers of such companies. The required measures include: a Code of Conduct prohibiting bribery and trading in influence; an internal system to enable the collection of whistleblower reports; risk assessments; risk-based due diligence procedures for clients, major suppliers, and intermediaries; accounting controls designed to ensure books and records are not used to conceal corruption; training of managers and employees most exposed to corruption risk; disciplinary processes for Code of Conduct violations; and internal evaluation and control mechanisms for all of these measures.

Although the required compliance measures outlined in *Loi Sapin II* are broadly consistent with conditions outlined in other European laws (such as the Italian and Spanish laws noted above) and other sources of government guidance (for example, in the U.S. and the UK), France has taken a unique approach to incentivizing corporations to implement the measures. While most European countries have used a "carrot" approach by offering corporations exemptions to liability for implementing compliance measures, France has taken a "stick" approach by making a failure to implement compliance measures—regardless of whether any offense is committed as a result—punishable by fines of up to €200,000 for individuals and €1,000,000 for corporations. *Loi Sapin II* also provides for the creation of a new anti-corruption agency, which will include a sanctions committee with the power to impose financial penalties and issue injunctions where corporations fail to comply with the compliance program requirements.

The increasing number of European laws formally recognizing the value of compliance programs, along with other EU regulatory developments that we have previously noted, is likely to affect the extent to which European companies—particularly those that are not subject to the FCPA—dedicate resources and attention to developing robust anti-corruption compliance programs.

## Asia

We observed an ongoing trend in Asia that is familiar to FCPA practitioners—namely, the sheer number of FCPA enforcement actions involving conduct that occurred in China. To illustrate this point, 27 corporate defendants resolved FCPA violations in 2016, and more than half of those cases (15 of 27) involved conduct in China. We anticipate that there are more China-related FCPA cases in the pipeline.

Last year did not see any fundamental changes in the domestic anti-corruption enforcement landscape in China. Instead, certain tweaks were made to the charging instruments available to prosecutors, including:

- An April 2016 judicial opinion that clarified amendments to the PRC Criminal Law that took effect in 2015, including by (1) expanding the definition of bribes to include certain intangible benefits and (2) making clear that the provision of an improper gift of money or property after a benefit is received still qualifies as a bribe.
- The publication of amendments in February 2016 to the PRC Anti-Unfair Competition Law, which, among other changes, proposed a new and more specific definition of "commercial bribery" under the law.

Other noteworthy anti-corruption developments in Asia included:

- In **Korea**, a more expansive anti-corruption law, which was enacted in May 2015, took effect in September 2016.
- In **Singapore**, authorities continued their investigation into alleged corruption involving 1MDB, which led to the revocation of two Swiss banks' Singapore charters (BSI Bank Ltd. and Falcon Private Bank Ltd.), fines against at least two other financial institutions (DBS and UBS), a 10-year ban from participating in Singapore's security industry for a former Goldman Sachs banker, and criminal convictions of several bankers from BSI and Falcon Bank. Parallel investigations related to 1MDB reportedly are underway in nine other countries, including the U.S., UK, and Switzerland.
- In **Thailand**, the government opened a specialized corruption court in October 2016.
- In **Vietnam**, the government introduced a draft Anti-Corruption Law in November 2016. The draft would, among other things, expand liability for corrupt conduct to certain leading managers in private enterprises, and impose certain requirements on enterprises to issue policies and Codes of Conduct to prevent, detect, and address corruption.
- In **India**, authorities launched a sweeping demonetization effort in November 2016 in order to reduce the amount of "black money" in circulation, which was allegedly being used for corruption, counterfeiting, and terrorist activities, although the practical effect on corruption is still being debated.

## Americas

Brazilian authorities continued to actively pursue anti-corruption enforcement actions in 2016, not only in connection with the ongoing Petrobras "Lava Jato" matter, but also more broadly. In addition to the Odebrecht / Braskem enforcement action described above, we note the following:

- In July 2016, Brazilian authorities agreed to a $340 million leniency agreement with Dutch oil services company SBM Offshore NV to resolve allegations that the company made corrupt payments to win contracts from Petrobras.
- In September 2016, Brazilian authorities reportedly opened a federal anti-corruption investigation known as "Operation Greenfield," which is focused on a number of Brazil's largest pension funds.
- In October 2016, Embraer (discussed above) agreed to pay $205 million to resolve long-running corruption probes by U.S. and Brazilian authorities into conduct in the Dominican Republic, Saudi Arabia, and Mozambique. Embraer agreed to pay $107 million to DOJ, $98 million to the SEC, and $20 million to Brazilian authorities.
- Throughout 2016, in a probe known as "Operação Zelotes," Brazilian authorities continued to investigate a number of companies, including multinationals, for allegedly making improper payments to members of Brazil's Administrative Board of Tax Appeals in exchange for reductions in tax liabilities.

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As this advisory suggests, 2016 provided additional clarity regarding how DOJ and the SEC approach enforcement of the FCPA. As DOJ fine-tunes its approach to enforcement in the Yates Memo era, companies must engage with increasingly aggressive demands from prosecutors. And the SEC's broad enforcement of the statute has swept more and more potential conduct into the FCPA's purview. Last year also provided evidence that coordinated, multi-jurisdiction investigations are now the norm, adding a further level of complexity for companies facing corruption-related investigations.

With the arrival of the Trump Administration, there is considerable uncertainty regarding how DOJ and the SEC will approach FCPA enforcement, and it is still too early to make reliable predictions. But anti-corruption compliance and investigations almost certainly will continue to demand considerable attention and resources from companies in the near-term, and likely for the foreseeable future.

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