COVINGTON

Trends and Developments in Anti-Corruption Enforcement

Winter 2018

Anti-Corruption

Our message this year is simple: FCPA enforcement is here to stay. Despite pre-election statements to the contrary, various senior officials in the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC") have, over the past year, consistently reaffirmed DOJ's and the SEC's commitment to FCPA enforcement. By the numbers, DOJ and the SEC collected a total of $1.13 billion in 2017 from 13 corporate defendants, including through their share of several high-value, multi-jurisdictional enforcement actions. DOJ also initiated FCPA prosecutions against 20 individuals in 2017, representing 70 percent of the Department's total enforcement actions, and the SEC commenced enforcement actions against three individuals. Leaving the recoveries aside, staffing of the dedicated FCPA enforcement units in DOJ and the SEC continues to be strong, even if perhaps no longer growing or even slightly contracting from historical highs in recent years. Robust FCPA enforcement depends on political will, DOJ and SEC prioritization, and adequate resources. All three continue to be present and, when considered alongside the continued rise in multi-jurisdictional enforcement efforts, it seems fairly plain that anti-corruption enforcement has weathered recent tectonic political changes in Washington.

At the same time, a growing number of countries outside the U.S. have become active in bringing their own anti-corruption investigations and enforcement actions, in part due to the implementation of new laws providing enforcement authorities with a range of enforcement tools—such as corporate settlement mechanisms—similar to those that have been used in the U.S. for many years.

Part I: U.S. Trends

Last year, we observed that FCPA enforcement was at a crossroads, given that President Trump and certain key individuals selected for leadership positions at DOJ and the SEC had expressed some skepticism about the FCPA or white collar enforcement priorities more generally. In certain respects, the year may have marked a retreat from a high-water mark in FCPA enforcement, embodied most notably in the "broken windows" approach to enforcement championed by former SEC Chair Mary Jo White. But 2017 also showed that FCPA enforcement withstood the transition in administrations and, under the direction of new leadership at DOJ and the SEC, remains a key enforcement priority. In April, for instance, Attorney General Sessions praised the FCPA's ability "to create an even playing field for law-abiding companies" and pledged to "continue to strongly enforce the FCPA and other anti-corruption laws." Likewise, in November, the SEC's Co-Director of Enforcement Steven Peikin, reaffirmed the SEC's commitment to robust FCPA enforcement. And in December, the Trump

administration included anti-corruption enforcement as part of its National Security Strategy, stating that anti-corruption measures and enforcement actions are "important parts of [the] broader strategies to deter, coerce, and constrain adversaries." Of course, actions speak louder than words. As discussed below, last year's developments at DOJ appeared to send relatively clear signals about the Department's priorities, whereas the SEC was more opaque.

1. **The FCPA Corporate Enforcement Policy further incentivizes companies to voluntarily disclose potential violations, but prosecutorial discretion in key areas means that some uncertainty remains as to how DOJ will approach cases that are self-reported. Despite this uncertainty, it is clear that the effectiveness of a company's compliance program will take on even greater significance under the new policy.**

In November 2017, DOJ announced an FCPA Corporate Enforcement Policy (the "Policy"), which is now incorporated in the United States Attorneys' Manual. As we observed when it was announced, the Policy made two key changes to the Fraud Section's *Foreign Corrupt Practices Act Enforcement Plan and Guidance*, which DOJ introduced, on a pilot basis, in April 2016 (the "Pilot Program").

- *First*, it establishes, in the absence of "aggravating circumstances," a presumption of a declination for a company that: (i) voluntarily discloses misconduct in an FCPA matter; (ii) fully cooperates; (iii) timely and appropriately remediates; and (iv) agrees to disgorge profits resulting from the misconduct and pay restitution.
- *Second*, the Policy commits DOJ to recommending a 50 percent reduction off the low end of the U.S. Sentencing Guidelines (the "Guidelines") fine range in those cases (except cases involving recidivists) in which a company does not qualify for a declination but otherwise voluntarily discloses the conduct, fully cooperates, and remediates. The Policy also makes clear that, in cases where a company qualifies for a 50 percent reduction, DOJ "generally will not require appointment of a monitor" if the company has implemented an effective compliance program at the time of the resolution.

The Policy appears to reflect DOJ's view that the recent uptick in voluntary disclosures—22 in the first year of the Pilot Program according to a recent speech by Deputy Attorney General Rod Rosenstein, as compared to 13 the year before—was driven by the increased certainty of favorable resolutions that companies received under the Pilot Program. The Policy does make predicting the benefits of self-reporting in FCPA cases somewhat more certain, which could lead more companies to self-report. But the additional clarity and predictability that the Policy is intended to achieve is offset in part by the fact that prosecutors retain considerable discretion to confer, or not, the potential benefits of self-disclosure. This discretion is embodied in the Policy's "aggravating circumstances" exception, which allows prosecutors to depart from the presumption of a declination and resolve matters through a non-prosecution agreement, deferred prosecution agreement ("DPA"), guilty plea, or even indictment. The non-exhaustive list of "aggravating circumstances" includes "involvement by executive management of the company" in the misconduct, a "significant profit to the company" resulting from the misconduct, the "pervasiveness" of the misconduct within the company, and "criminal recidivism." We will be watching to see whether, as we would expect, DOJ applies the "aggravating circumstances" exception sparingly. And as a richer data set of resolutions under the Policy emerges, we expect that companies may be able to predict with even greater confidence the likely outcome following a voluntary disclosure.

The Policy also speaks to what DOJ expects with respect to a company's cooperation and remediation, and in two respects differs from earlier guidance:

- *First*, the Policy provides greater guidance on DOJ's use of "de-confliction" requests, i.e., situations in which DOJ asks a company to defer an investigative step—typically, interviewing employees—until after the government has an opportunity to do so. As in the Pilot Program, compliance with de-confliction requests is a requirement of full cooperation in the Policy. Both in public comments and in our interactions with DOJ, we have raised concerns that de-confliction requests can put a company in a challenging position in which its ability to conduct an investigation and take remedial action expeditiously—and thus satisfy directors' and officers' fiduciary duties, as well as other regulatory obligations—are in tension with a desire to accede to DOJ's request in order to earn full cooperation credit. Unlike the Pilot Program, which provided no guidance on how DOJ intended to use de-confliction requests, the new Policy seems to credit these concerns by making clear that such requests will be "narrowly tailored" and employed only for a "limited period of time." Moreover, under the new Policy, DOJ is obligated to notify the company "[o]nce the justification [for de-confliction] dissipates."
- *Second*, as part of the requirements for full remediation, the Policy requires "[a]ppropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications." Although DOJ has not expounded on its expectations on this front, we think companies would be well advised to consider prohibiting employees from using personal devices for work-related communications and from using certain well-known messaging platforms for work-related communications, unless preservation of such communications can be assured.

Finally, the new Policy provides further evidence that effective compliance programs are critical in DOJ's assessment of whether a company will secure a declination. In its recitation of the items required to demonstrate "timely and appropriate" remediation—a prerequisite for qualifying for the presumption of a declination—the Policy identifies many of the same elements present in the Pilot Program (e.g., culture of compliance, risk assessments). But the Policy goes one step further than the Pilot Program by incorporating certain guidance published by DOJ in February 2017 titled *Evaluation of Corporate Compliance Programs*, which we previously analyzed. In particular, the Policy requires (i) that companies conduct a "root cause analysis" into compliance lapses, and "where appropriate," take remedial steps "to address the root causes"; and (ii) the "availability of compliance expertise to the board." We note, moreover, that while DOJ's former Compliance Counsel left DOJ in 2017, the Department signaled its commitment to the evaluation of compliance programs by retaining the position.

What to watch for in 2018:

- *With respect to the aggravating circumstance of "involvement by executive management," will DOJ be focused on parent-level executives, or will misconduct by executives in country-level subsidiaries qualify as "aggravating circumstances"? How will DOJ interpret and apply the "significant profit" exception?*
- *How will DOJ interpret the requirement related to the retention of business records, which is a condition to receiving full cooperation credit? Will we see cases where companies actually lose potential cooperation credit or are otherwise penalized for failing to ensure reasonable preservation of business-related communications?*

2. Coordinated, multi-jurisdiction enforcement continued at a robust clip.

We observed last year that cooperation between U.S. and non-U.S. regulators had become the new norm. This was best evidenced by the coordinated resolutions in the VimpelCom matter, a $795 million settlement involving U.S. and Dutch prosecutors, and the Odebrecht / Braskem matter, a $3.5 billion resolution involving U.S., Brazilian, and Swiss enforcers.

Evidence of this new norm was even more pronounced in 2017, with a noticeable trend toward enforcement actions involving non-U.S. companies that also are not issuers:

- Rolls-Royce: In January, as part of an $800 million global settlement, Rolls-Royce resolved anti-bribery enforcement actions brought by DOJ, the UK's Serious Fraud Office ("SFO"), and Brazilian authorities. The settlements resulted from allegations that Rolls-Royce paid bribes to officials in more than 10 countries between 1989 and 2013. DOJ asserted jurisdiction over Rolls-Royce—which is neither an issuer nor a domestic concern—by alleging that the company conspired with an indirect U.S. subsidiary in Ohio, as well as with certain U.S. citizens. In November 2017, DOJ unsealed charges against five individuals involved in the matter; four pleaded guilty, and one remains a fugitive.
- Telia Company AB ("Telia"): In September, Swedish telecom company Telia agreed to pay a total of more than $965 million to authorities in the U.S. (i.e., DOJ and the SEC), the Netherlands, and Sweden. Notably, as in VimpelCom, the Telia resolution related to bribes paid in connection with operations in Uzbekistan's telecom market. Of interest, DOJ and the SEC asserted jurisdiction based on the fact that certain bribe payments occurred when Telia was an issuer—even though the company deregistered as an issuer in September 2007. DOJ also alleged that certain conduct related to the bribery scheme occurred in the U.S., and that the company conspired with agents who were domestic concerns.
- SBM Offshore N.V. ("SBM"): In November, Dutch oil and gas services provider SBM agreed to pay $238 million in connection with a DPA with DOJ. As a prelude to this resolution, in November 2014, SBM entered into a $240 million settlement with Dutch authorities and is expected to enter into a further settlement with Brazilian authorities and Petrobras in the near term. In 2014, DOJ had declined to pursue enforcement action against SBM based on the apparent absence of a jurisdictional nexus, but DOJ re-opened the case in 2016 based on new information reportedly showing that a U.S. subsidiary and a U.S. executive were involved in the misconduct at issue. In pursuing the enforcement action, DOJ alleged that SBM conspired with its U.S. subsidiary and the subsidiary's agents. Aside from being another data point in the constellation of multi-jurisdictional enforcement actions, SBM is notable for other reasons:
  - While SBM voluntarily disclosed the conduct to U.S. authorities, it did not receive full credit for this disclosure because the company allegedly did not disclose the full facts to DOJ for one year. While one year seems to clearly exceed DOJ's view of what constitutes a "timely" disclosure, we will be watching to see where the Department draws the line for disclosures made within a shorter period.
  - Driven in significant part by the fact that SBM reportedly generated $2.8 billion in profits from bribes paid to government officials in five countries, the company faced a recommended fine range of $4.51 billion to $9.02 billion under the U.S. Sentencing Guidelines. The fact that SBM paid only a small fraction of that amount was due, in

significant part, to DOJ's stated desire to avoid "a penalty that would substantially jeopardize the continued viability of the Company." Similar "ability to pay" issues have factored in to recent resolutions, including the Odebrecht / Braskem matter in 2016.

- SBM is yet another example of the long arm of the ongoing Operation Car Wash ("*Lava Jato*") investigation involving the Brazilian state oil company Petrobras. SBM allegedly paid bribes to Petrobras officials in Brazil, as well as officials in other countries.
- DOJ announced guilty pleas in November 2017 for two former executives of SBM. Both executives pleaded guilty to one count of conspiracy to violate the FCPA. The plea agreement for one of the executives, former CEO Anthony Mace, was notable because it relied on a theory of "willful blindness"—instead of actual knowledge—to establish the defendant's knowledge of improper payments (the purpose of the conspiracy). Specifically, Mr. Mace admitted that he approved certain high-risk payments and deliberately avoided learning that the payments were in fact bribes. DOJ has rarely brought FCPA enforcement actions based on willful blindness, with the 2009 prosecution of Frederic Bourke being the most notable example.

- Keppel Offshore and Marine Ltd. ("Keppel"): In December, Keppel, a Singaporean company that specializes in offshore rig design, construction, and repair, agreed to pay more than $422 million to authorities in the U.S. (DOJ), Brazil, and Singapore to resolve allegations that the company paid bribes to a Brazilian political party and to employees of Petrobras. While Keppel is neither an issuer nor a domestic concern, DOJ alleged that it conspired with its U.S. subsidiary and the subsidiary's agents. In addition to announcing the Keppel settlement, DOJ also unsealed charges against a senior member of Keppel's legal department who had pleaded guilty in August 2017 to conspiring to violate the FCPA and cooperated in the investigation. In connection with his plea agreement, the Keppel lawyer—a U.S. citizen living in Singapore—admitted that he drafted contracts used to overpay a third-party agent with the understanding that the excess funds would be passed on to Brazilian officials. Outside the U.S., a senior official in Singapore has testified that authorities there are continuing to investigate the conduct of particular Keppel employees.

Increased coordination was also evidenced in DOJ's acknowledgement, in various enforcement actions, of assistance from non-U.S. law enforcement authorities. To take one example, the Telia enforcement action reportedly involved assistance from authorities in more than a dozen jurisdictions that did not participate in the settlements: Austria, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Cyprus, France, Hong Kong, Ireland, the Isle of Man, Latvia, Luxembourg, Norway, Switzerland, and the UK.

Also of note, in 2017, DOJ and the SEC continued the recent practice of crediting fines and disgorgement paid to non-U.S. regulators in determining penalties and disgorgement amounts assessed by U.S. authorities. These offsets, which are discretionary, provide a significant incentive for companies to cooperate in multi-jurisdiction investigations. The chart below summarizes the multi-jurisdictional enforcement actions described above and demonstrates the significance of these offset amounts:

Matter	Global Settlement	Amounts by Regulator		U.S. Offsets / Credits
Rolls-Royce	$800.2 million	U.S. (DOJ)	$169.9 million criminal penalty	$169.9 million reflects $25.5 million credit for amount paid to MPF
		UK (SFO)	$604.8 million	
		Brazil (Ministério Público Federal ("MPF"))	$25.5 million	
Telia	$965.6 million	U.S. (DOJ)	$548.6 million criminal penalty before offsets (includes $40 million forfeiture and $500K fine paid by Telia's Uzbek subsidiary, Coscom)	DOJ: Offset of up to $274 million, based on amount to be paid to OM SEC: $40 million offset for DOJ forfeiture; offset of up to $208.5 million, based on confiscation or forfeiture payments to OM or SPA
		U.S. (SEC)	$457 million disgorgement before offsets	
		Netherlands (Openbaar Ministerie ("OM"))	$274 million criminal penalty	
		Sweden (Swedish Prosecution Authority ("SPA")) / Netherlands (OM)	Up to $208.5 million in confiscation or forfeiture payments	
SBM	$478 million + to-be-determined amount of Brazil settlement	U.S. (DOJ)	$238 (includes $13.2 million forfeiture and $500K fine paid by SBM's U.S. subsidiary)	In determining the final penalty of $238 million, DOJ credited amounts paid in 2014 Netherlands settlement ($240 million) and SBM's provision for anticipated settlement in Brazil with the MPF
		Netherlands (OM)	$200 million (disgorgement in 2014 settlement) $40 million (fine in 2014 settlement)	
		Brazil (MPF)	Amount to be determined; a 2016 settlement of $342 million was rejected by the Fifth Chamber for Coordination and Review and Anti-corruption	
Keppel	$422.2 million	U.S. (DOJ)	$422.2 million criminal penalty before offsets	Up to $316.6 million offset (equal to amount to be paid to authorities in Singapore and Brazil)
		Brazil (MPF)	$211.1 million	
		Singapore (Attorney General's Chambers)	$105.5 million	

3. With the exception of repeat offenders, DOJ and the SEC may be moving away from imposing corporate monitors—even in cases involving widespread and systematic violations—when companies make significant and early investments in compliance.

In another notable development, U.S. regulators did not require independent compliance monitors in connection with the four largest FCPA settlements in 2017: Rolls-Royce, Telia, SBM, and Keppel (all discussed above). Rolls-Royce, SBM, and Keppel do have annual self-reporting obligations in their settlement agreements requiring them to submit annual reports to DOJ regarding the status of their compliance programs, while Telia has no reporting obligation. The Telia resolution is particularly notable given that a monitor was imposed in the 2016 Vimpelcom resolution, with both cases focusing on similar bribery schemes in the telecom sector in Uzbekistan. In each case, DOJ highlighted the companies' compliance efforts while the investigation was ongoing:

- In Rolls-Royce, DOJ cited the company's steps to enhance compliance procedures to review and approve intermediaries; its implementation of enhanced internal controls; and other remedial measures, including terminating business relationships with employees and intermediaries, as reasons it declined to require a monitor.
- In Telia, DOJ pointed in its DPA to the company's remediation during the investigation as among the reasons it would not require a monitor. The remediation was of particular importance, as Telia terminated not only the individuals involved in the misconduct but also their supervisors, including directors who participated in the decision to enter the Uzbek market without conducting sufficient due diligence.
- In SBM, DOJ noted approvingly that, prior to resolution, the company hired a full-time Governance and Compliance Officer who could report to the Board of Directors; engaged a compliance consultant to enhance its program; initiated a whistleblower hotline; trained its business personnel; and had completed three years of monitoring under the supervision of Dutch authorities.
- In Keppel, DOJ cited the company's "extensive remedial measures" in its decision not to impose a monitor. Among these measures were personnel actions against 17 current and former employees (including nearly $9 million in financial sanctions against certain employees), individualized anti-corruption and compliance training for certain employees, and ongoing reviews of its compliance program with the assistance of outside advisors.

In contrast, monitors were imposed in the three FCPA resolutions in 2017 involving companies that had previously resolved other FCPA matters: (i) Zimmer Biomet Holdings, Inc. (formerly Biomet, Inc.), which agreed to a three-year monitorship as part of a $30 million resolution with DOJ and the SEC, and which previously had resolved FCPA charges in 2012; (ii) Halliburton, which in July agreed to an 18-month monitorship as part of a $29 million resolution with the SEC, and which previously had resolved FCPA charges in 2009; and (iii) Orthofix International N.V., which in November agreed to a one-year monitorship as part of a $6 million resolution with the SEC, and which previously had resolved FCPA charges in 2012.

The only other company in 2017 to receive a monitor was the Chilean chemical and mining company Sociedad Química y Minera de Chile ("SQM"), which reached a $30 million settlement with DOJ and the SEC. SQM agreed to a two-year monitor with self-reporting in the third year. While the conduct at issue in the SQM case does not appear to be more egregious or systemic

than other cases in 2017 where companies avoided monitors, DOJ's insistence on a monitor in the SQM case seems to be due to the fact that at the time of the resolution, the company was still in the process of implementing an enhanced compliance program and had not had the opportunity to test the effectiveness of that program.

What to watch for in 2018:

- *Did the absence of corporate monitors in the Telia, Rolls-Royce, SBM, and Keppel resolutions portend a growing aversion to monitorships by DOJ and the SEC, so long as a company makes a significant investment in compliance program enhancements during the pendency of its investigation or at least as a condition of the resolution? In other words, will monitorships be reserved for recidivists?*

4. DOJ's focus on individual prosecutions could lead to a stronger tether between individual and corporate enforcement actions.

We have previously discussed how DOJ's focus on individual accountability—as announced in the September 2015 "Yates Memo"—appeared to influence the actions of prosecutors, and particularly that prosecutors are placing enhanced import on securing evidence related to individuals at the outset of investigations. The new administration has not revised the policy described in the Yates Memo, and statements from DOJ's leadership indicate that the Department will continue to focus on individual accountability. Attorney General Sessions, for example, explained in an April 2017 speech that DOJ "will continue to emphasize the importance of holding individuals accountable for corporate misconduct."

DOJ's actions in 2017 underscore its prioritization of individual prosecutions, including at trial:

- DOJ charged 20 individuals with FCPA violations last year, the second highest number since the statute's passage.
- DOJ also secured its first FCPA trial victory in six years when a jury convicted Macau businessman Ng Lap Seng in connection with a bribery scheme intended to secure the construction of a United Nations facility in Macau.
- In addition, DOJ won convictions in two non-FCPA corruption cases involving the receipt of bribe payments and the subsequent laundering of funds by a former Guinean Minister of Mines and the Director of South Korea's Earthquake Research Center.

While the overall number of individual prosecutions increased in 2017, that number is lower than we might expect given the stated goal of the Yates Memo—to increase individual accountability in cases involving corporate wrongdoing. Notably, of the nine corporate enforcement actions brought by DOJ in 2017, only three have involved corresponding prosecutions of individuals to date: Rolls-Royce, SBM, and Keppel. Of course, 2018 could result in further prosecutions of individuals—or the unsealing of existing charges—relating to the six other corporate defendants that resolved FCPA charges in 2017, much like DOJ announced charges in 2017 against a former sales executive of Embraer SA a year after the 2016 resolution with Embraer itself.

We continue to see examples of the potential pitfalls for company counsel post-Yates, including the possibility that employees who are the subject of criminal prosecution or civil enforcement actions may seek discovery of attorney work product created by company counsel (e.g., interview memoranda) and used in the company's cooperation efforts. For example, in

December a federal magistrate judge in the Southern District of Florida held in *SEC v. Herrera* that company counsel's "oral downloads" of witness interviews to SEC attorneys waived work product protection over the underlying interview memoranda, and ordered the company's law firm to produce the subject interview memoranda to the individual defendants in an SEC enforcement action.

Given the continued focus on individual accountability, not to mention the requirement under agency law and the Yates Memo that individual wrongdoing is the foundation for corporate liability, we could envision a situation in which DOJ's decisions on whether to pursue corporate resolutions could increasingly turn on the ability to pursue cases against individuals. We do not mean to suggest that individual charges will need to be brought in every instance before corporate charges are pursued, or that DOJ will make individual prosecutions a *sine qua non* for corporate enforcement actions. But, given the continued drumbeat of emphasis on individual accountability, it seems reasonable to wonder whether DOJ might decline to pursue certain corporate prosecutions when a clear plan to prosecute individuals is lacking.

Of course, we would not expect DOJ to bring charges against all individual wrongdoers subject to FCPA jurisdiction, particularly in cases involving non-U.S. citizens whose conduct principally occurred outside the U.S. Consistent with a theme that we explored last year, we expect that there will continue to be cases where DOJ will defer to non-U.S. regulators in locations with proven track records of enforcement. In connection with the Department's 2016 prosecution of Embraer, then-Assistant Attorney General Leslie Caldwell observed that DOJ would not pursue charges against individuals given prosecutions by authorities in Brazil—a country that appears to have established its anti-corruption enforcement bona fides in the eyes of DOJ—and Saudi Arabia. As an interesting footnote to Caldwell's statement (and as noted above), in December 2017 DOJ did announce a plea agreement with one former Embraer executive, a UK citizen who resided in the United Arab Emirates. The Embraer example suggests that DOJ will apply an increasingly nuanced analysis to individual prosecutions, as part of what we expect will be an increased effort to more closely link individual and corporate prosecutions.

What to watch for in 2018:

- *Does DOJ announce any other charges of individuals involved in the conduct underlying the corporate resolutions announced in 2017?*
- *Will the trend of unsealing charges against individuals around the same time as the announcement of a corporate settlement accelerate?*
- *Will certain corporate resolutions be delayed or abandoned because individual accountability cannot be assured?*

5. "Broken windows" and the aggressive interpretation of the internal controls provisions may be on the wane at the SEC.

Ever since 2013, when then-SEC Chairwoman Mary Jo White endorsed a "broken windows" approach to securities law enforcement, we have seen evidence of the SEC pursuing what many view as relatively minor FCPA violations, or, as noted in past years, advancing aggressive interpretations of the scope of the internal controls provision. For example, the SEC's first enforcement action in 2017 (which occurred during the Obama administration) involved books and records and internal controls violations against Mondelēz International, Inc. ("Mondelēz") —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.

Based on comments from the current SEC leadership, the "broken windows" era may be winding down. For example, SEC Commissioner Michael Piwowar called the approach "misguided" in an October speech. According to Mr. Piwowar, the "broken windows approach" did "boost[] our enforcement statistics, [but] it did not meaningfully improve investor protection." We do not yet have enough data points to assess how this statement will translate in practice, and we will be watching whether the SEC continues to pursue small cases arising out of non-systematic problems.

6. Other notable U.S. anti-corruption developments in 2017.

The Supreme Court's *Kokesh* decision could affect the SEC's enforcement strategies in FCPA cases.

In June 2017, the Supreme Court in *Kokesh v. SEC* limited the SEC's ability to impose disgorgement as a remedy in enforcement matters. The SEC had long asserted that disgorgement is an equitable remedy not subject to any statute of limitations, and had applied disgorgement well beyond the statutory five-year limitations period applicable to penalties under 28 U.S.C. § 2462. The Court disagreed, holding unanimously that disgorgement is a penalty within the meaning of § 2462, and therefore is limited to ill-gotten gains flowing from conduct falling within the five-year limitations period. The Court rejected the SEC's argument that disgorgement is remedial, finding instead that the principal purpose of disgorgement is to punish and deter future misconduct.

While the *Kokesh* action related to violations of the Investment Companies Act and Investment Advisors Act, the case has potential implications for FCPA enforcement:

- The most likely consequence of *Kokesh* is that the SEC will request tolling agreements more frequently and earlier in FCPA investigations to preserve its ability to obtain disgorgement in cases where the date of the conduct may post limitations issues. In a similar vein, we will be watching to see if the SEC is less willing to provide extensions in connection with document requests and, potentially, seeks to bring investigations to a close faster. SEC Co-Director of Enforcement Steven Peikin suggested as much when he explained that, in light of *Kokesh*, "we have no choice but to respond by redoubling our efforts to bring cases as quickly as possible." A question that is likely to result from more aggressive tolling requests is whether companies faced with such requests will be

willing to risk the loss of cooperation credit—or the SEC initiating proceedings—by resisting demands for tolling agreements.

- Disgorgement accounts for an overwhelming percentage of the SEC's financial recoveries in FCPA resolutions in recent years. After *Kokesh*, absent a tolling agreement, the SEC can only obtain disgorgement of gains that flow from conduct occurring within the five years prior to the resolution. However, because the SEC retains great flexibility in determining the penalties that it assesses in enforcement actions (e.g., assessing separate penalties for each violation of the books and records and internal controls provisions), the SEC may be able to demand increased penalties to offset potential decreases in available disgorgement.
- The *Kokesh* decision could have collateral consequences given that disgorgement is now deemed a penalty for some purposes. For example, the IRS issued guidance in December 2017 that, in light of *Kokesh*, disgorgement amounts for securities violations may not be deducted from personal income taxes. Likewise, characterizing disgorgement as a penalty may have implications in efforts to obtain insurance or indemnification for disgorgement awards.
- In a footnote in the *Kokesh* opinion, the Supreme Court left open the possibility that the SEC lacks the authority to order disgorgement at all. As a result, *Kokesh* may call into question whether the SEC can order disgorgement in an FCPA case, especially where the defendant has not been found liable for any underlying offense. Defendants in an FCPA prosecution of former Och-Ziff hedge fund executives have gone even further, arguing in a pending motion to dismiss in the Eastern District of New York that the SEC lacks the authority to impose *any* punitive relief outside the five-year limitations period, including injunctive relief.

Healthcare remains a focus area—and DOJ is consolidating forces to increase efficiencies in this space.

In August, DOJ Fraud Section Acting Chief Sandra Moser announced that attorneys from the section's Healthcare Fraud Unit Corporate Strike Force would begin to work together with prosecutors in the FCPA Unit to jointly investigate corruption cases spanning both foreign and domestic conduct. Moser cited the Department's resolution with a global medical device manufacturer in 2016 as an example of successful partnership between healthcare and FCPA prosecutors. DOJ charged the manufacturer with violations of both the Anti-Kickback Statute (related to conduct in the U.S.) and the FCPA (related to conduct in Latin America).

Expansion of corruption-related investigations and enforcement in the sports industry.

In 2017, DOJ continued an aggressive investigation of corruption in international soccer. In total, the Department has charged more than 40 individuals in the ongoing investigations of the Fédération Internationale de Football Association ("FIFA"), and related entities and individuals. In December, DOJ secured convictions at trial under racketeering and wire fraud statutes of the former president of the South American soccer federation, Juan Ángel Napout, and the former president of Brazil's federation, José Maria Marin. A third individual, former Peruvian soccer federation chief Manuel Burga, was acquitted. DOJ's focus is not limited to soccer: in September, DOJ announced the arrest of 10 individuals alleged to have engaged in steering NCAA college basketball players to particular financial advisors.

These prosecutions are important reminders that anti-corruption enforcement is not limited to the FCPA, and that the racketeering and fraud statutes are important tools that allow DOJ to pursue corruption charges, including against bribe recipients.

The sports industry has been active on the compliance front as well; the International Olympic Committee and City of Los Angeles included a novel anti-corruption covenant in the host city agreement for the 2028 summer games to demonstrate their commitment to clean procurement and planning.

Data breaches and hacking incidents will prompt more investigations.

2017 continued to produce ripple effects from corporate data breaches and hacking incidents. For instance, the disclosure in early 2016 of the Panama Papers, a massive trove of documents relating to the Panamanian law firm Mossack Fonseca, led more than 70 governments around the world to launch investigations that encompassed inquiries into more than 6,500 companies and individuals, according to the International Consortium of Investigative Journalists. The release continues to spur both new investigations and legislative action, such as the EU's December 2017 anti-money laundering directive, which will require companies to disclose the true identity of their ultimate beneficial owners. A similar leak of financial documents occurred in late 2017—the so-called Paradise Papers—which are comprised principally of materials obtained from offshore legal service provider Appleby and corporate services provider Estera. It remains to be seen whether the Paradise Papers will result in significant investigative activity.

Part II: International Trends

Enforcement activity outside the U.S. continued to rise in 2017 and appears set to continue on an upward trend. At the same time, legislative developments gave (or are set to give) several countries new legal and enforcement tools to use in the fight against corruption, with a focus on strengthening anti-corruption laws, incentivizing effective compliance programs, and rewarding cooperation with government investigations.

1. Enforcement

Europe

United Kingdom

The Serious Fraud Office had an active year in anti-corruption enforcement against both companies and individuals, beginning with its record-setting £497 million (~$605 million) DPA with Rolls-Royce in January:

- In September 2017, the agency reported that it had secured seven convictions in a matter involving corrupt payments in Angola by freight forwarding company F.H. Bertling Ltd., following guilty pleas entered by the company and six of its former employees.
- In November, the agency brought charges against four former executives of Monaco-based Unaoil and its Dutch client SBM Offshore in connection with allegations of improper payments made to secure contracts in Iraq.
- The SFO also opened a number of new investigations—in September, SFO Director David Green reported that 12 bribery-related investigations had been opened in the

preceding 12 months. A number of those investigations involve major multinational companies.

Although the SFO's future was in question in the early part of the year, when the Conservative Party called a general election and included in its election manifesto a pledge to incorporate the SFO into the National Crime Agency ("NCA")—the FBI-style agency that Prime Minister Theresa May established while acting as Home Secretary—that plan appears to have been shelved after the Conservative Party lost its Parliamentary majority in the election. More broadly, the UK government has taken steps over the course of the past year that reflect a continuing commitment to enforcement of anti-corruption and anti-money laundering laws. The Criminal Finances Act, which was passed in April 2017, introduced a series of measures designed to help UK authorities tackle money laundering, including (among others) the introduction of new offenses relating to the facilitation of tax evasion, new seizure and forfeiture powers, changes to the suspicious activity reporting regime, and unexplained wealth orders (which allow a UK court to order a politically exposed person or individual suspected of involvement in serious crime to explain how he lawfully acquired specified assets). The UK Anti-Corruption Strategy, published in December 2017, describes additional steps the UK government intends to take to strengthen its response to economic crime, including the appointment of a new Minister for Economic Crime, the creation of a National Economic Crime Centre within the NCA, and a continued commitment to transparency-enhancing measures such as registers of public beneficial ownership.

France

2017 saw France secure its first *Convention judiciaire d'intérêt public* ("CJIP")—the DPA-like mechanism that was introduced to French law in 2016 by *Loi Sapin II*—in a €300 million settlement with HSBC Private Bank Suisse SA. Although the charges underlying the settlement were not bribery-related, the HSBC CJIP likely signals the introduction of high-value settlements in future French anti-corruption enforcement matters. French authorities also secured the conviction of Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea (and himself the country's former Vice President), who was alleged to have embezzled more than €150 million from the public treasury. He was fined €30 million, received a suspended three-year prison sentence, and had his assets in France confiscated.

France's *Agence française anticorruption* ("AFA") commenced operations in 2017. The AFA's responsibilities include, among others, publishing recommendations to help private and public entities prevent and detect corruption, and overseeing the implementation of the mandatory anti-corruption compliance program requirements introduced by Article 17 of *Loi Sapin II.* Those requirements include a Code of Conduct; systems to collect and respond to whistleblower reports; risk assessments; risk-based due diligence procedures for clients, suppliers, and intermediaries; accounting controls; training; disciplinary procedures; and measures to track the implementation of the foregoing measures.

In December 2017, the AFA published recommendations for the implementation of an effective compliance program. Although the AFA has indicated on its website that it does not wish to dictate the specific methods through which companies achieve their compliance objectives, the recommendations will undoubtedly inform the measures that companies subject to Article 17 of *Loi Sapin II* put in place to meet its requirements. The recommendations are largely consistent with OECD best practices and the guidance that has emerged relating to the FCPA and UK Bribery Act; indeed, the AFA has indicated on its website that it sought to integrate into its recommendations the requirements of international anti-bribery legislation to ensure that French

standards are consistent with international best practices. Accordingly, companies that have already implemented compliance programs consistent with the guidance relating to the FCPA and/or the UK Bribery Act and are subject to the Article 17 compliance program requirements in France will likely be able to retain the core elements of their compliance programs, although additional measures may be required to meet some of the prescriptive requirements set forth in *Loi Sapin II*.

The AFA has reportedly commenced its compliance program reviews for a small number of companies subject to the Article 17 requirements, beginning with off-site document reviews, which are expected to be followed by on-site audits. The reviews are mandatory for French companies—including French subsidiaries of multinational companies—that meet the Article 17 thresholds (i.e., those with 500 or more employees and annual turnover of at least €100 million). In addition to incentivizing large French companies to bolster their compliance programs, the AFA's review work may serve as a source of referrals leading to increased French enforcement actions, as the AFA has an obligation to refer to French prosecutors violations that are brought to its attention.

Other European Enforcement Developments

There were several other notable European enforcement developments in 2017.

As discussed above, the **Swedish** and **Dutch** authorities took part in a $965 million coordinated global settlement with Telia to resolve allegations that improper payments were made to a government official in Uzbekistan in connection with Telia's operation in the Uzbek telecom market. Swedish prosecutors also brought related charges against three former Telia executives.

In **Switzerland**, Geneva-based oil and gas company Addax Petroleum entered into a $32 million settlement with Geneva prosecutors to resolve a criminal investigation into allegations of corrupt payments in Nigeria.

In **Portugal**, prosecutors brought charges against four former TAP Airlines employees in connection with allegations that they laundered funds procured through a false invoicing arrangement with Angolan air transport provider SonAir and an intermediary. Money laundering charges were also filed against three lawyers accused of providing assistance with the scheme.

European aerospace company Airbus SE is the target of ongoing corruption and fraud investigations by the SFO in the **UK**, the *Parquet National Financier* in **France** and authorities in **Germany** and **Austria**. In late 2017, multiple press reports indicated that Airbus's chief executive had written to employees to warn them to expect "significant penalties" as a result of the investigations. The SFO inquiry reportedly was launched after Airbus admitted to having failed to notify export credit authorities about the use of third-party consultants in certain transactions, which highlights the potential role that export credit agencies can play in anti-corruption enforcement.

Also in **Germany**, Thyssenkrupp AG subsidiary Atlas Elektronik entered into a €48 million (~$58.7 million) settlement with the Bremen Public Prosecution Office related to allegations that it made improper payments through intermediaries to win contracts in Greece and Peru.

Ongoing domestic and foreign bribery investigations against both individuals and entities have been reported in various other jurisdictions in Europe, some of which are expected to lead to resolutions in 2018.

2. Privilege Developments

Europe

As government enforcement and corporate investigations have become more prevalent in Europe, differences in the scope (and regulators' views) of applicable legal privileges in various countries have come into focus. In the UK, the potential scope of legal privileges in the context of corporate investigations was a matter of significant judicial scrutiny in 2017, which will continue through this year. In other jurisdictions, new questions are being raised concerning the scope of privilege in the context of anti-corruption investigations and enforcement actions.

In the **UK**, SFO representatives have moved away from public statements suggesting that privilege waivers will be required to obtain cooperation credit, a posture that had previously generated controversy. It remains apparent, however, that companies seeking to cooperate with the SFO in order to secure a DPA will need to develop strategies to convey the substance of their investigation findings in a manner that is acceptable to the SFO. Companies will often have to weigh that imperative against the risk of being found to have waived the privilege for purposes of litigation in other jurisdictions; for example, although a selective waiver concept is well-established in English law, U.S. federal courts are divided on whether a disclosure can be made to the government without effecting a broader waiver of privilege with respect to civil litigants and other third parties. Based on the UK DPAs that have been entered into thus far, it seems that different approaches to sharing materials may satisfy the SFO, depending on the circumstances of the case. For example, although the steps that Rolls-Royce took to obtain cooperation credit (which have been described by SFO representatives as "extraordinary") included voluntarily waiving privilege over interview memos, and even providing audio recordings of certain interviews, in the XYZ Ltd. matter, which was also resolved through a DPA, oral summaries of interviewee accounts were accepted by the SFO as part of the company's "full and genuine cooperation."

The SFO may be more likely to challenge privilege claims, however, in light of the recent decisions in *Re the RBS Rights Issue Litigation*, [2016] EWHC 3161 (Ch) ("RBS") and *Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd.*, [2017] EWHC 1017 (QB) ("ENRC"), which have brought into focus certain potential limitations of English law privileges in the context of internal investigations. The *RBS* case, for example, confirmed the position that the legal advice privilege does not apply to interviews of employees who are not specifically authorised to seek and receive legal advice on behalf of the company, a narrower standard than exists under U.S. law. In 2017, the *ENRC* decision (which is currently on appeal) brought into question the status of the litigation privilege, suggesting that it will not necessarily apply in the context of a criminal *investigation* because not every investigation leads to criminal *prosecution*.

In **Germany**, the Munich Public Prosecutor's office raided a local office of Jones Day, the law firm that had conducted an investigation into allegations that Volkswagen equipped diesel vehicles with devices designed to bypass emissions tests. Jones Day and Volkswagen filed a complaint with the German Constitutional Court and obtained a preliminary injunction barring the prosecutors from using the documents while the Court considers a challenge to an earlier decision allowing prosecutors to review the documents. The final decision of the German

Constitutional Court is expected to clarify the status of the attorney-client privilege in corporate investigations in Germany.

In **France**, the AFA has issued guidance indicating that entities subject to AFA oversight may not resist disclosure to the AFA based on *secret professionel*, France's version of the attorney-client privilege. In light of the AFA's broad powers to request documents relevant to its compliance program oversight responsibilities, multinational organizations with practices of conducting privileged risk assessments or internal investigations may wish to consider how related documents are created and maintained with respect to any French affiliates subject to AFA oversight.

Africa

In October 2017, **South Africa**'s Supreme Court of Appeal upheld a High Court ruling to reinstate 783 charges of corruption, fraud, racketeering, and money laundering against President Jacob Zuma, which had been set aside by the National Prosecuting Authority eight years earlier. In December 2017, the High Court ordered President Zuma to open an inquiry into influence peddling allegations relating to his relationship with the Gupta family. As detailed in a 350-page report compiled by South Africa's former Public Protector, the Guptas have been accused of exploiting their relationship with President Zuma to influence ministerial and other government appointments and, in turn, the award of state contracts to businesses owned by the Guptas. Meanwhile, media reports in late 2017 indicated that U.S. and UK authorities had opened probes into potential local ties to the Guptas, including the potential handling of funds by U.S. and UK banks. Several professional services firms and corporations also have become ensnared in investigations relating to dealings with the Gupta family.

In **Nigeria**, fighting corruption remained a priority for President Buhari, who campaigned on a promise to wage a "war on corruption." The Nigerian Senate passed several bills in 2017 aimed at enhancing the country's anti-corruption enforcement efforts, including a witness protection bill, a whistleblower protection bill, and a mutual legal assistance bill intended to enhance collaboration between Nigeria and other countries in tackling corruption and money laundering. In addition, steps were taken to advance the establishment of dedicated anti-corruption courts to reduce delays in the resolution of corruption and other financial crime cases.

Asia

In **China**, the government's anti-corruption campaign continued to ensnare officials through the 19th Party Congress in November, where Xi Jinping reiterated and expanded upon the theme that corruption remains the greatest threat to the Party's survival. The government announced the creation of a new National Supervision Commission to consolidate supervision and enforcement powers against public servants (including detention, investigation, and interrogation powers) into a single anti-corruption agency. China is also expected to pass a National Supervision Law in early 2018. The amended Anti-Unfair Competition Law, which took effect on January 1, 2018, expands the scope of bribery-related offenses (by defining broadly the categories of entities and individuals who may be recipients of bribes), increases penalties, clarifies vicarious liability, and provides specific monetary penalties for obstructing an investigation. In the life sciences sector, new regulations regulating the "two invoice" distribution system and medical representative registration have created new compliance challenges and risks.

In **Korea**, anti-corruption investigations felled the country's president and threatened senior executives at several large corporations. In addition, the government slightly revised the Improper Solicitation and Graft Act, which first went into effect in fall 2016, to change the limits on certain gifts and condolence money (some limits increased while others were lowered).

In **Vietnam**, the government continued a significant corruption crackdown movement in 2017, particularly targeting individuals in the natural resource and financial services sectors. The government recently amended its Penal Code to criminalize private-sector bribery and is debating revisions to tighten the Law on Anti-Corruption.

In **Indonesia**, the Corruption Eradication Commission for the first time charged a corporation in a corruption case after a Supreme Court ruling in 2016 allowing law enforcement agencies to name a company as a suspect in in a criminal case involving corruption.

Governments in **India**, **Thailand**, and **Malaysia** released official guidance and standards on how companies should implement anti-bribery controls.

Latin America

Latin America remained a focal point of U.S. enforcement efforts in 2017, with multiple U.S. enforcement actions involving conduct in the region. Domestic enforcement also was active, as several Latin American countries pursued investigations into dealings with Odebrecht (including in Ecuador, Colombia, Chile, Peru, Panama, and Argentina), among other matters. In addition, several countries have taken steps to bolster their anti-corruption laws. Below, we discuss a selection of key developments in the region.

Public corruption cases remained prominent in **Argentina** in 2017, with multiple senior politicians and politically connected individuals imprisoned and new charges being brought on a regular basis. The circumstances giving rise to these cases are varied, including allegations of a $60 million money laundering scheme known as the *ruta del dinero K* (which implicates two former presidents), allegations that the country's former planning minister diverted over $10 million in public funds from a coal mine project, and allegations that former senior cabinet members diverted millions of dollars in funds intended for use by municipalities to improve their waste management programs. Other matters have a significant international dimension, including an investigation into the dealings of Odebrecht, which admitted in its settlement with the U.S., Brazilian, and Swiss authorities to paying $35 million in bribes to Argentine officials between 2007 and 2014, and several matters stemming from the Panama Papers.

In November 2017, the Congress passed an expansive new anti-corruption law, which subjects corporations to liability when corrupt activities, such as bribery or influence peddling, are undertaken in their name or for their benefit. The new law provides that companies may avoid liability when they have adequate anti-corruption controls in place, promptly disclose to authorities the illicit conduct, and return any benefit obtained through the improper conduct.

In July 2017, **Mexico**'s *Ley General de Responsabilidades Administrativas* (General Law of Administrative Liabilities, or "GLAL") entered into effect. The law forms an integral part of the new legal framework established by the 2016 National Anti-Corruption System (*Sistema Nacional Anti-Corrupción*, or "SNA") to combat private and public sector corruption by coordinating and developing anti-corruption enforcement efforts across all levels of the Mexican government. The GLAL establishes administrative offenses applicable to Mexican public officials, including bribery and influence peddling, and also provides for corporate liability. In

addition to monetary fines, the potential sanctions for GLAL violations by a corporation include debarment from public procurement, suspension of activities in Mexico for up to three years, and forced dissolution. Like many other newer anti-corruption laws, the GLAL provides that companies can avoid liability or benefit from reduced penalties if they put into place an "integrity program" that includes certain prescribed elements. The GLAL also provides for cooperation credit where companies or individuals voluntarily disclose misconduct and cooperate with government investigations. The degree to which Mexico's new anti-corruption laws will be vigorously enforced remains to be seen.

The ongoing *Lava Jato* investigation continues to result in an array of high-profile individual prosecutions and leniency agreements between companies and **Brazilian** authorities. For example:

- In January 2017, Rolls-Royce reached a $25 million settlement with the MPF as part of the coordinated settlement discussed above.
- In April 2017, the Supreme Court Justice overseeing the *Lava Jato* investigation authorized the investigation of eight government ministers, twenty-four senators, thirty-nine deputies in the lower house of congress, and three state governors.
- In July 2017, former President Luiz Inácio Lula da Silva was convicted of accepting bribes and sentenced to nine and a half years in prison. In January 2018, an appellate court upheld the conviction and voted to increase the sentence to 12 years.
- *Lava Jato* prosecutors have continued to return funds recovered through leniency and collaboration agreements to Petrobras, which to date has received approximately $447 million in recovered funds.

In early 2018, Petrobras announced that it had agreed to pay $2.95 billion to settle a securities class action lawsuit filed in a federal court in New York by shareholders who alleged that they had lost money because of corruption at the company.

In another noteworthy settlement, J&F Investimentos, the controlling shareholder of the world's largest meatpacking company, JBS SA, agreed in May 2017 to pay a record 10.3 billion reais (~$3.2 billion) fine under a leniency agreement to resolve two separate corruption investigations by Brazilian authorities. J&F's owners, Joesley and Wesley Batista, admitted to paying 600 million reais in bribes to nearly 1,900 politicians and provided an audio tape purporting to record a conversation between Joesley Batista and Brazilian President Michel Temer. President Temer has since been charged with corruption, obstruction of justice, and racketeering based on the Batistas' testimony.

Enforcement by International Financial Institutions Remains Active

The World Bank's Integrity Vice Presidency ("INT") remains a prominent player in anti-corruption enforcement. In its annual update for the 2017 fiscal year, INT reported that it had sanctioned 60 entities and individuals (in nearly all cases imposing a period of debarment), honored 84 cross-debarments from other development banks, made 32 referrals to national enforcement authorities, and opened 51 new investigations into alleged fraud and corruption in World Bank-financed activities. As suggested by the high number of cross-debarments honored by the World Bank (up from 38 in the 2016 fiscal year), other international financial institutions have also increased their focus on rooting out fraud and corruption in development projects.

More Countries Considered the Introduction of DPA Regimes

As discussed above, the introduction of corporate settlement mechanisms in the UK and France led to high-value corporate settlements in both countries this year. Several other countries have begun to consider developing similar tools to incentivize cooperation with government investigations. In particular, the Australian government introduced a bill in December 2017 introducing DPAs to Australian law (together with a new "failure to prevent bribery" offense), the Canadian Government held a consultation, which closed in November 2017, to consider introducing a DPA regime, and Singapore's Minister for Home Affairs and Law announced in January 2018 that the government of Singapore is considering introducing DPAs in an upcoming round of amendments to the Criminal Procedure Code and Evidence Act.

Global Trends

As we reported in a recent seminar, more companies are considering whether to implement the International Standards Organization's ISO 37001 Anti-Bribery Management System, which was issued in October 2016. ISO 37001 is a voluntary set of standards for corporate anti-bribery compliance, accompanied by voluntary independent third-party certification and periodic audits. The standard seeks to provide a single set of harmonized guidelines to allow companies and regulators to develop, improve, and monitor anti-bribery compliance systems. While it is not specific to any single anti-corruption legal regime, the standard is generally consistent with international regulatory guidance, including guidance issued by DOJ and the SEC. ISO certification does not provide a safe harbor against regulatory enforcement but is intended to be evidence that a certified company has taken meaningful steps toward effective compliance.

ISO 37001 received a boost in 2017 with the announcements by Microsoft and Wal-Mart that they would seek certification, and the announcement by French transportation systems company Alstom that it had been certified following an audit at multiple sites in Europe.

What to look for in 2018:

- *Will U.S. certifying organizations emerge?*
  - The market for U.S.-based certifying organizations for ISO 37001 has yet to mature, and thus far the large accounting firms, to which business organizations often turn to support controls assessments and audits, have not entered the market. We expect that until this market matures, many business organizations will continue to take a wait-and-see approach rather than seeking certification in 2018.
- *Will regulators give ISO 37001 certification any weight when assessing a corporate compliance program?*
  - U.S. regulators have not yet made many statements about whether they view ISO 37001 as a meaningful compliance tool or if certification will be seen as evidence of an effective compliance program. We believe that DOJ and the SEC will continue to exercise their own independent assessments of the compliance programs of companies that are under investigation, and companies are well advised to continue to focus on DOJ and SEC guidance on effective compliance programs. In our view, companies would be well served by conducting a privileged compliance program assessment, focused on prevailing DOJ and SEC guidance

(and other regulatory guidance, as applicable), before undertaking the certification process.

- *Will smaller companies and third-party representatives (including distributors) see ISO 37001 as a market differentiator and/or means of managing competing compliance efforts pushed out by business partners?*
  - Major multinationals in higher-risk industries increasingly focus on the compliance programs of their sales agents, distributors, regulatory consultants, lobbyists, customs brokers, and other government-facing representatives, often collecting compliance documentation as part of due diligence, pushing out anti-corruption training, conducting compliance audits, and imposing other compliance measures on their highest-risk business partners. Representatives that work with many multinationals can find themselves on the receiving end of such efforts from multiple companies. We will be interested to see whether such representatives seek ISO certification, either because they view it as a competitive advantage to winning business with major multinationals or as a strategy for avoiding multiple, overlapping compliance efforts by business partners.

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