FCPA Update

A Global Anti-Corruption Newsletter

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With deep gratitude, the editors dedicate this issue to **Steven S. Michaels**, Executive Editor of *FCPA Update*. As Steve departs Debevoise to tackle a new professional challenge, we applaud his singular drive and dedication in making this publication as informative and useful as possible for our clients. He will be greatly missed.

The Year 2015 in Anti-Bribery Enforcement: Are Companies in the Eye of an Enforcement Storm?

I. Major Trends and Developments in Global Anti-Bribery Enforcement

While one year's statistics do not, standing alone, make trends, several things about anti-bribery enforcement in 2015 are inescapable. In the United States, long perceived as the most vigorous jurisdiction in terms of bringing large-scale anti-bribery cases against multinational corporations, there were no large-scale corporate resolutions.1 The total monetary recovery in corporate FCPA resolutions ($139,737,524) and the number of corporate criminal matters (two) brought by the U.S. Department of Justice ("DOJ") were in each instance the lowest since 2006.

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1. A chart identifying the principal features of the FCPA-related corporate resolutions in 2015 [hereinafter "FCPA 2015 Corporate Enforcement Chart"] appears at the end of this article.

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The first of those DOJ matters, IAP Worldwide Services, Inc. ("IAP"), was resolved in June by a Non-Prosecution Agreement ("NPA") that imposed a $7.1 million penalty.[2] A month later, Louis Berger International Ltd. ("LBI") resolved the only other corporate criminal case in 2015 by a Deferred Prosecution Agreement ("DPA"), paying $17.1 million and agreeing to a compliance monitor.[3] This was the only case, civil or criminal, in which a monitor or consultant was required.

The U.S. Securities and Exchange Commission ("SEC") concluded nine civil corporate resolutions, including one civil DPA and total recoveries of $115,537,524.[4] Of these, the SEC's largest monetary recovery was a $25 million penalty against BHP Billiton Ltd. related to hospitality for foreign officials at the 2008 Beijing Olympics.[5]

This amount was less than four percent of the largest FCPA penalty recovered in 2014, which was reached via a guilty plea by Alstom S.A. to criminal FCPA books and records and internal controls violations.[6]

FCPA recoveries were also a small percentage of overall U.S. law enforcement recoveries. Although apples-to-apples comparisons are difficult because of the way in which statistics are reported, total Fiscal Year ("FY") 2015 DOJ recoveries amounted to roughly $23.1 billion,[7] while in the same period the SEC obtained orders for $4.2 billion in penalties and disgorgement.[8] Even with several large settlements occurring in the last calendar quarter of 2014, which count toward the U.S. agencies' self-reported FY 2015 totals, these figures emphasize that the drop in the number and size of resolved FCPA cases cannot be explained away by the government's lack of ability to win or interest in seeking large recoveries.

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2. *See* DOJ Press Rel. 15-745, IAP Worldwide Services Inc. Resolves Foreign Corrupt Practices Act Investigation (June 16, 2015) [hereinafter "IAP Worldwide DOJ Press Rel."], http://www.justice.gov/opa/pr/iap-worldwide-services-inc-resolves-foreign-corrupt-practices-act-investigation.
3. *See United States v. Louis Berger International, Inc.*, Mag. No. 15-3624, Deferred Prosecution Agreement (D.N.J. July 7, 2015); *see also* DOJ Press Rel. 15-903, Louis Berger International Resolves Foreign Bribery Charges (July 17, 2015) [hereinafter "LBI DOJ Press Rel."], http://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges.
4. One of these resolutions, *In re Hyperdynamics Corp.*, SEC Admin. Pro. 3-16843 (Sept. 29, 2015), is not listed on the SEC's website as an FCPA matter, but is widely considered, including by the company itself, to be a case that arose out of FCPA allegations. *See* Hyperdynamics Corp. Press Rel., Hyperdynamics Announces Settlement with the SEC (Sept. 29, 2015), http://investors.hyperdynamics.com/releasedetail.cfm?ReleaseID=934289.
5. *See In re BHP Billiton Ltd. and BHP Billiton Plc*, SEC Admin. Pro. 3-16546 (May 20, 2015) [hereinafter "*BHP Billiton* Cease-and-Desist Order"]; *see also* SEC Press Rel. 2015-93, SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015), http://www.sec.gov/news/pressrelease/2015-93.html.
6. *See* DOJ Press Rel. 14-1448, Alstom Pleads Guilty and Agrees to Pay $772 Million to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.
7. *See* DOJ Press Rel. 15-1474, Justice Department Collects More Than $23 Billion in Civil and Criminal Cases in Fiscal Year 2015 (Dec. 3, 2015) http://www.justice.gov/opa/pr/justice-department-collects-more-23-billion-civil-and-criminal-cases-fiscal-year-2015. The government's fiscal year begins October 1 and ends September 30.
8. *See* SEC, Agency Financial Report Fiscal Year 2015 (Nov. 13, 2015), at 2.

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Even adding in amounts agreed or ordered to be recovered from individuals in FCPA cases, last year was by any objective measure one of more muted FCPA enforcement.

Various theories can be advanced to explain these figures. One, and probably the most plausible, is that, in a system of FCPA enforcement against companies that almost never ends in a trial, corporate resolutions require companies' consent. It was only a matter of time for there to be a dry spell of large corporate resolutions. Thus, there were no large settlements last year because of the mundane fact that none of the larger cases in the pipeline was ready to be settled. Because of potential negotiation delays of various kinds in cases in the pipeline, it is conceivable if not likely there will be large settlements in 2016, which may dampen urges to downplay enforcement risk.

Still, a theory warranting consideration is that more companies subject to the FCPA are "getting it," the possibility being that after a decade of vigorous enforcement the number of big cases that could be brought is markedly decreased. That the number of FCPA-related investigations reported by public companies declined by about 20 percent, year over year, arguably supports this theory.[9]

"Various theories can be advanced to explain these [2015 enforcement] figures. One, and probably the most plausible, is that, in a system of FCPA enforcement against companies that almost never ends in a trial, corporate resolutions require companies' consent. It was only a matter of time for there to be a dry spell of large corporate resolutions. Thus, there were no large settlements last year because of the mundane fact that none of the larger cases in the pipeline was ready to be settled."

But negating this theory is the large number of new foreign corruption matters reported daily in the media, and the kinds of political upheaval and developments in technology, social media culture, whistle-blowing, and transparency movements that drive anti-bribery enforcement.[10] Given the broad jurisdictional reach of the

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9. *Compare* Richard L. Cassin, "The Corporate Investigations List (Jan. 2016 List)," *FCPA Blog* (Jan. 5, 2016), http://www.fcpablog.com/blog/2016/1/5/the-corporate-investigations-list-january-2016.html, *with* Richard L. Cassin, "The Corporate Investigations List (Jan. 2015 List)," *FCPA Blog* (Jan. 6, 2015), http://www.fcpablog.com/blog/2015/1/6/the-corporate-investigations-list-january-2015.html. One possible explanation for the reported reduction in pending investigations is the government's clearing of weaker cases from its dockets through declinations, possibly in response to criticism of delay in resolving FCPA investigations. However, with the data pertaining to declinations remaining largely opaque, it is difficult to test this hypothesis.

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FCPA (particularly as construed by the DOJ and SEC), a large percentage of the new cases reported in the media could well subject companies and individuals alike to future FCPA enforcement risks. These risks are magnified by a growing level of cross-border cooperation among anti-bribery enforcement agencies.[11] And as the Obama Administration heads into its final year, with a new Attorney General and Assistant Attorney General for the Criminal Division now settled into their roles, the likelihood of increased enforcement seems relatively high.

Indeed, the DOJ recently charged individuals allegedly involved in over $100 million in improper payments to officials of Venezuela's state-owned oil company, PDVSA,[12] and the likelihood of more case filings appears significant, given that the DOJ FCPA Unit plans to grow by at least fifty percent.[13] The complexity of DOJ scrutiny is also likely to increase as its compliance expert, hired in the fall and charged with imposing rigor and consistency in the department's review of compliance programs in the course of charging decisions, gains her footing in 2016.[14]

The statistics for 2015 thus might be best seen as illustrating that we are in

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10. *See, e.g.,* Mia Lamar et al., "U.S. Examines Goldman Sachs Role in 1MDB Transactions," *The Wall Street Journal* (Oct. 14, 2015), http://www.wsj.com/articles/goldman-entangled-in-malaysia-fund-scandal-1444795262; James Hookway, "Malaysian Leader Najib Razak Faces Political Test," *The Wall Street Journal* (Oct. 12, 2015), http://www.wsj.com/articles/malaysian-leader-faces-political-test-1444653757; Michael Forsythe, "China Sentences 2 Former Top Communist Party Officials Over Bribes," *The New York Times* (Oct. 12, 2015), http://www.nytimes.com/2015/10/13/world/asia/china-sentences-2-former-top-communist-party-officials-over-bribes.html?_r=0; Raphael Minder, "Spain's Many Indicted Politicians Undercut 'Red Line' Against Graft," *The New York Times* (May 23, 2015), http://www.nytimes.com/2015/05/24/world/europe/spains-many-indicted-politicians-undercut-red-line-against-graft.html; Stephanie Saul and Dan Levin, "Charged With Graft in China, Some Fugitives Are Finding Luxury in U.S.," *The New York Times* (May 15, 2015), http://www.nytimes.com/2015/05/16/world/asia/china-hunts-fugitives-accused-of-corruption-many-in-us.html; Simon Romero, "Brazil's Power Dynamics Shifting Amid Political Scandals," *The New York Times* (Apr. 26, 2015), http://www.nytimes.com/2015/04/27/world/americas/brazils-power-dynamics-shifting-amid-legislative-scandals.html; Austin Ramzy, "China Cracks Down on Golf, the 'Sport for Millionaires,'" *The New York Times* (Apr. 18, 2015), http://www.nytimes.com/2015/04/19/world/asia/chinas-crackdown-on-corruption-targets-golf-a-sport-for-millionaires.html; Rogerio Jelmayer and Jeffrey T. Lewis, "Brazil Police Arrest Workers' Party Treasurer Joao Vaccari Neto," *The Wall Street Journal* (Apr. 15, 2015), http://www.wsj.com/articles/brazil-police-arrest-workers-party-treasurer-joao-vaccari-neto-1429100123; Will Connors, "Petrobras CEO and Five Other Executives Resign," *The Wall Street Journal* (Feb. 4, 2015), http://www.wsj.com/articles/petrobras-ceo-and-5-other-executives-resign-1423055419; Andrew Jacobs, "In China's Antigraft Campaign, Small Victories and Bigger Doubts," *The New York Times* (Jan. 15, 2015), http://www.nytimes.com/2015/01/16/world/asia/in-chinas-antigraft-campaign-small-victories-and-bigger-doubts.html?_r=0. In one of the more interesting developments from a corporate compliance perspective, Transparency International did not update in 2015 its Corruption Perceptions Index, and rather chose to focus on more direct advocacy of programs designed to facilitate the reporting and prosecution of bribery. *See* Transparency International (last visited Jan. 22, 2016), www.transparency.org.

11. Cooperation with specific foreign government and development bank entities was noted in the press releases in the following cases: IAP (UK Serious Fraud Office); FLIR (United Arab Emirates Securities and Commodities Authority); BHP Billiton (Austrian Federal Police); Hitachi (African Development Bank). The DOJ also noted the role of the Criminal Division's Office of International Affairs, which works to coordinate cross-border evidence gathering, in its press releases commenting on both DOJ corporate resolutions (IAP and LBI) in 2015. *See* FCPA 2015 Corporate Enforcement Chart, *infra*, and the press releases and urls cited therein.

12. *See United States v. Shiera-Bastides & Rincon-Fernandez*, No. 15 Cr. 654, Indictment (S.D. Tex. Dec. 10, 2015).

13. *See* Leslie R. Caldwell, Assistant Attorney Gen., Criminal Division, DOJ, Remarks at American Conference Institute's 32nd Annual International Conference on Foreign Corrupt Practices Act (Nov. 17, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference.

14. Andrew M. Levine, David A. O'Neil, and Steven S. Michaels, "Risks and Opportunities Arising from DOJ's New 'Compliance Counsel,'" *FCPA Update*, Vol. 7, No. 1 (Aug. 2015), http://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015.

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the eye of an unpredictable storm rather than a trend of clear decline in FCPA enforcement. This seems especially likely given the dynamics reflected in the so-called Yates Memorandum issued by Deputy Attorney General Sally Quillian Yates on September 10, 2015. As we have said, the Yates Memorandum made clear what had been apparent in DOJ officials' speeches for some time: that the DOJ is placing a premium on prosecution of individuals responsible for white collar offenses, including FCPA violations.[15] The Yates Memorandum thus places new pressures on companies to cooperate with DOJ investigations and provide "actionable evidence" for use in prosecuting employees and other individuals.

Yet the ultimate effect on enforcement of the Yates Memorandum remains to be seen. On the one hand, given the DOJ's reinforcement of the view that prosecutions against companies and individuals should go hand-in-hand, the paucity of corporate resolutions may signify a new restraint as the DOJ recognizes the difficulty of prosecuting individuals for FCPA offenses and the injustice of seeking resolutions against companies if no individuals are charged.[16] On the other hand, as some companies make – and lose – the bet not to self-report or engage in the kind of robust cooperation the DOJ expects, the consequences could be severe. Even companies providing the robust cooperation the Yates Memorandum and related policies at the SEC incentivize may not be as easily able to win the cooperation credit they think they should. Cooperation takes resources, even if it results in a lower penalty or a less harsh form of disposition.

The DOJ may have recognized these costs in the context of the two corporate matters it settled in 2015. Given the Yates Memorandum's protocols, it is unsurprising that both the IAP and LBI settlements were accompanied by guilty pleas by one or more company personnel, in contrast to past patterns in which a corporate resolution preceded the resolution of related individual prosecutions, if any.[17] As expectations by companies, individuals, and outside counsel adjust to the DOJ's expectations, it can be anticipated that these packaged resolutions in U.S. criminal matters will become more common, and pressures will mount to accelerate internal investigations, which could potentially reduce their costs, to assure that individuals may be at least charged at roughly the time of a corporate resolution.

In the short to medium term, it seems clear that the DOJ's new policy will put a

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15. The 'Yates Memorandum': Has DOJ Really Changed Its Approach to White Collar Criminal Investigations and Individual Prosecutions," Debevoise & Plimpton Client Update (Sept. 15, 2015), http://www.debevoise.com/insights/publications/2015/09/the-yates-memorandum-has-doj-really-changed.

16. *Id.*

17. *See* IAP Worldwide DOJ Press Rel., note 2, *supra*; LBI DOJ Press Rel., note 3, *supra*.

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more intense spotlight on developments in the courts as individual defendants – the number of whom the Yates Memorandum clearly intends to see grow – who have far greater incentives to go to trial in FCPA cases pursue their rights to do so.

These developments, moreover, will not all be positive for the DOJ, as illustrated in two FCPA cases last year.[18] In what we consider the most important individual case development, in the *Hoskins* prosecution arising from the Alstom matter, the U.S. District Court for the District of Connecticut granted a partial motion to dismiss that limits the scope of conspiracy and aiding-and-abetting charges in FCPA matters, an outcome that, if it survives any further judicial scrutiny, could change in significant ways how FCPA cases are investigated and prosecuted against individuals and companies – or, at a minimum, how DOJ has stated it intends to prosecute them.[19]

Similarly, in the *Sigelman* case, a key government witness admitted giving false testimony at trial, leading the government in the middle of trial to settle for a guilty plea to a single conspiracy charge and the defendant to receive no jail time.[20]

At the same time, the government scored some significant victories in individual cases. In the sentencings in the Direct Access Partners individual matters, for example, the U.S. District Court for the Southern District of New York handed down significant sentences of three to four years to several of the broker-dealer participants.[21]

Other developments in the U.S. white collar arena, including the D.C. Circuit's pending decision in the *Fokker Services* DPA litigation, in which the appeals court has been asked to assess the standard of review for federal judicial approval of U.S. DPAs,[22] and the Second Circuit's pending decision in the *Microsoft* "Irish server" subpoena appeal,[23] could have implications for the way the DOJ gathers evidence in

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18. In a third foreign bribery criminal matter, brought under the federal program bribery statute, the DOJ was defeated on a motion to dismiss the indictment for want of a U.S. nexus, a recurring issue given the now-decades-old jurisdictional concepts that limit U.S. anti-bribery law in a way that contrasts with its more modern English cousin, the UK Bribery Act. *See United States v. Sidorenko*, No. 3:14-cr-00341-CRB, Order Granting Motions to Dismiss at 10 (N.D. Cal. Apr. 21, 2015) ("[T]he United States has some interest in eradicating bribery, mismanagement, and petty thuggery the world over. But under the government's theory, there is no limit to the United States's ability to police foreign individuals, in foreign governments or in foreign organizations, on matters completely unrelated to the United States's investment, so long as the foreign governments or organizations receive at least $10,000 of federal funding. This is not sound foreign policy, it is not a wise use of scarce federal resources, and it is not, in the Court's view, the law.").

19. *See United States v. Hoskins*, No. 3:12-cr-00238-JBA, Ruling on Defendant's Second Motion to Dismiss the Indictment (D. Conn. Aug. 13, 2015) [hereinafter "*Hoskins* Second MTD Ruling"].

20. *See United States v. Sigelman*, No. 1-14-cr-00263, Sentencing Tr. (D.N.J. June 16, 2015).

21. DOJ Press Rel. 15-382, CEO and Managing Director of US Broker-Dealer Sentenced for International Bribery Scheme (Mar. 27, 2015), http://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-sentenced-international-bribery-scheme; *see also United States v. Clarke Bethancourt et al.*, Nos. 13-cr-00670, 13-cr-00671, 13-cr-00673 (S.D.N.Y. Dec. 4, 8, and 15, 2015).

22. *See United States v. Fokker Services B.V.*, 79 F. Supp. 3d 160 (D.D.C. Feb. 5, 2015), *appeal argued*, Nos. 15-3016 & 15-3017, (D.C. Cir. Sept. 11, 2015).

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FCPA cases and other cross-border investigations of related offenses.

While deploying the less powerful tool of civil remedies, the SEC was responsible for the lion's share of the corporate FCPA resolutions as well as its own docket of individual cases. The agency's 83 percent share of the dollar value of corporate resolutions illustrates that, in a down year, the SEC's ability to prosecute the virtually strict liability civil offenses under the FCPA's books and records and internal controls provisions can be a daunting risk. In light of the lower burden of proof and broader reach of its statute, it was not surprising that the SEC went its own way and charged when the DOJ did not.

While expressing appreciation in many of its case-resolution-announcing press releases for cooperation by the DOJ, the SEC concluded no joint resolutions with the DOJ, and also broke with the DOJ in announcing in November a new policy pursuant to which companies that do not self-report FCPA and other white collar issues will be ineligible for a DPA or NPA. This policy is more aggressive with respect to self-reporting than the DOJ's, though the inconsistency may be more apparent than real given the unique dynamics of criminal law enforcement.[24]

Beyond consideration of the reasons for last year's statistics are three lessons about U.S. enforcement: (1) the U.S. government continues to pursue a vigorous line with regard to business practices, such as lavish travel and hospitality, that remain tempting for pressured sales personnel at companies competing globally for government business; (2) the risks of improper third-party payments remain among the most serious for companies subject to the FCPA; and (3) as indicated in the SEC's settlement with Bank of New York Mellon for hiring of relatives of foreign officials, the government's aggressive view of statutory terms, including the FCPA's books and records and internal controls provisions, remains a feature of the landscape.

Moreover, for all the government's emphasis on the importance of corporate self-reporting and cooperation, the manner in which those features of an FCPA case motivate the government's discretion remains opaque, notwithstanding DOJ and SEC representatives' repeated statements emphasizing their benefits.[25] Among the apparent anomalies in last year's dispositions, IAP received an NPA without

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23. *See In re a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, No. 14-2985-CV (2d Cir. argued Sept. 9, 2015).
24. *See* Paul R. Berger, Andrew M. Levine, Sean Hecker, Bruce E. Yannett, and Steven S. Michaels, "The SEC's Most Recent Nudge to Self-Report: Will it Make a Difference?," *FCPA Update*, Vol. 7, No. 5 (Dec. 2015), http://www.debevoise.com/insights/publications/2015/12/fcpa-update-december-2015.
25. *See, e.g.*, Andrew Ceresney, The SEC's Cooperation Program: Reflections on Five Years of Experience, Remarks at University of Texas School of Law's Government Enforcement Institute in Dallas, Texas (May 13, 2015), http://www.sec.gov/news/speech/sec-cooperation-program.html (noting how FLIR reduced its penalty by more than 85 percent through its cooperation).

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self-reporting while LBI received a DPA, which is often interpreted as signifying greater culpability, and was required to engage a monitor, even though it did self-report. Although the case documents indicate that the amount of LBI's gain from the alleged misconduct was greater than IAP's, one is left to speculate about why the highly burdensome requirement of a monitor was imposed. Reading the tea leaves, it is possible to see how the DOJ may have perceived some obstruction of LBI's internal investigation and why DOJ may not have fully credited LBI's self-reporting because it had already been under investigation.[26]

Similarly, the SEC's rationale for imposing particular penalty levels – $25 million in the case of BHP Billiton's travel packages for the Olympics, the largest FCPA civil penalty on record, and $5 million in the case of Bank of New York Mellon's hiring of relatives of Chinese officials – remains largely a mystery. And this lack of transparency in how the SEC computes penalties is compounded by the fact that the SEC continues to seek large disgorgement amounts for books and records and internal controls violations that have no necessary connection to "ill-gotten gains."[27]

While enforcement events waned (in all probability temporarily) in the United States, they waxed elsewhere, including in Brazil, where a raft of investigations arising out of alleged bribery at state-owned energy company Petrobras has threatened to bring down the government, as well as in the United Kingdom, China, and a host of other countries. The United Kingdom, joining the United States in the use of DPAs, utilized for the first time its new authority to conclude such agreements and received judicial approval for a path-breaking DPA to settle charges against Standard Bank plc under the UK Bribery Act's virtually strict liability corporate offense.[28] Other countries such as Brazil took further steps to

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26. *See* LBI DOJ Press Rel., note 3, *supra; United States v. Louis Berger Int'l, Inc.*, Mag. No. 15-3624 (MF), Criminal Complaint (D.N.J. July 7, 2015), ¶ 7 (noting how on Sept. 15, 2008, "in anticipation of an interview by the Company's lawyers of Employee 1 in connection with the bribery scheme, an agent of the Company sent an e-mail to Employee 1 with a draft letter purporting to be from Employee 1 to [a high level executive] for the purpose of passing on to the Company's lawyers, stating, 'I do not wish that the [Company] lawyers call me regarding their on-going internal reviews due to the long time that I have not worked with [the Company] and my current age, health and memory problems"); *see also id.* ¶ 10 (executive's e-mail to Employee 1 stating that it was necessary "not to create [sic] the impression you are working for us now, and thus subject to inquiry by the lawyers," but "[a]t some point these questions will end and we can get back to a normal relationship"). As to previous matters, LBI had been debarred by the World Bank for one year on February 5, 2015, based on alleged misconduct in Vietnam that appeared to overlap in part with that alleged in the 2015 DOJ matter. *See* World Bank Press Rel., World Bank Group Debars Louis Berger Group (Feb. 4, 2015), http://www.worldbank.org/en/news/press-release/2015/02/04/world-bank-group-debars-louis-berger-group. In addition, in 2010, LBI had agreed to a DPA and related civil settlement in a DOJ case related to its work in Iraq and Afghanistan. *See* U.S. Att'y D.N.J. Press Rel. No. 10-318, Scheme to Defraud Government on Reconstruction Contracts Leads to Criminal Charges and Civil Penalties Against Louis Berger Group, Inc. (Nov. 5, 2010), https://oig.usaid.gov/sites/default/files/pressrelease_110510_DOJ_LBG_Penalties.pdf.

27. Virtually all of the SEC settlements reflect this pattern, as to which we have written before. *See* Paul R. Berger, Steven S. Michaels, and Amanda M. Ulrich, "Do FCPA Remedies Follow FCPA Wrongs? 'Disgorgement' in Internal Controls and Books and Records Cases," *FCPA Update*, Vol. 3, No. 1 (Aug. 2011), http://www.debevoise.com/insights/publications/2011/08/fcpa-update.

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implement remedies against firms, leading to increasing global convergence of civil law and common law enforcement.

Against this backdrop of shifting prosecutorial priorities in the United States and the coming-of-age of enforcement elsewhere, the next year presents a number of uncertainties for companies and individuals facing the challenges of implementing robust anti-bribery compliance programs and addressing the inevitable issues that arise. Below we canvass in more detail case-related developments in the United States, as well as key points of interest from anti-bribery enforcement and related topics in the United Kingdom, Brazil, Germany, France, China, and Russia.

II. FCPA Enforcement in 2015: Lessons, Trends, and Things to Watch

The trends of 2015 have long been familiar to experienced compliance professionals. Several cases dealt with recurring issues surrounding the provision of travel, hospitality, and benefits for foreign officials and their relatives, while many of the rest illustrated once again the risk of third-party transactions and merger activity.

In cases against individuals, the DOJ suffered two significant setbacks, one of which – Judge Janet Arterton's rulings regarding accessory liability in the *Hoskins* litigation – could upend a variety of FCPA prosecution practices, including the longstanding use of conspiracy and aiding-and-abetting charges to extend the limitations period and avoid the technical statutory requirements (sometimes called "jurisdictional" limits) of the FCPA and as a means of inducing settlement for parties covered by debarment laws triggered by substantive bribery charges but not by accessory liability.

The DOJ has also lodged a raft of new charges against individuals, which will likely lead to more litigation.[29] A significant number of individuals were sentenced for FCPA offenses, leading in some cases to substantial terms of imprisonment and forfeiture, though these outcomes were not as dramatic as some have been in the past.

Finally, although arising in other kinds of white collar matters, the *Fokker Services* and *Microsoft* appeals remain on the watch list for 2016 because of their potential impact on U.S. government investigations and settlements.

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28. *See* Karolos Seeger, Matthew Getz, and Alex Parker, "The United Kingdom's First Deferred Prosecution Agreement," *FCPA Update*, Vol. 7, No. 5 (Dec. 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/12/fcpa_update_december_2015.pdf.

29. Among these cases in addition to those discussed elsewhere in this article is *United States v. Harder*, No. 2:15-cr-00001-PD (E.D. Pa. filed Jan. 6, 2015), in which a motion to dismiss challenging the indictment's allegations of basic elements of an FCPA charge, has been argued and is pending.

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A. The 2015 Gifts, Hospitality, Entertainment, and Hiring Cases: Bristol-Myers Squibb, FLIR, BHP Billiton, and Bank of New York Mellon

Four of the nine SEC resolutions focused on recurring problems arising from the line between legitimate relationship building or payments in exchange for legitimate contract performance by a foreign official and improper *quid pro quo* arrangements. The overall lesson learned from these cases is how marketing plans likely to be deemed lavish in the eye of U.S. government authorities continue to require careful scrutiny and oversight. Because in a number of respects they also involve legitimate disagreements over how the FCPA was intended to address the underlying business issues presented by the cases, they have provoked more controversy than the other matters resolved in 2015, which involve more traditional and objectively illegal forms of corporate wrongdoing.

1. Bristol-Myers Squibb

In the case of Bristol-Myers Squibb Company ("BMS"), the SEC alleged that, while recording in its books a range of expenses in its China subsidiary as "advertising and promotional expenses, cash payments and expenses for gifts, meals, travel, entertainment, speaker fees, and sponsorships for conferences and meetings," the company was making "gray income" payments to Chinese health care professionals ("HCPs") "to meet their sales targets."[30] Illustrating that transparency issues in the Chinese health care market did not cease when the era of aggressive FCPA enforcement began roughly a decade ago, the Cease-and-Desist Order alleges that this activity continued at least until January 2011 and possibly even later.[31]

In addition to charging violations of the FCPA's books and records provisions, the SEC alleged internal controls deficiencies based on BMS's lack of follow-up to qualified opinions from the company's internal audit department that identified in the China subsidiary a "lack of due diligence assessments of distributor compliance, . . . the failure to properly document and approve agreements with HCPs who served as speakers, and the lack of a mechanism to ensure that services were received in exchange for sponsorships."[32] The SEC noted that BMS had remediated the issues by implementing independent pre-reimbursement review of all expense claims as well as related, new accounting systems, and surprise spot inspections of sales representative-sponsored events; the company also terminated

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30. *See In re Bristol-Myers Squibb Co.*, SEC Admin. Pro. 3-16881 (Oct. 5, 2015) [hereinafter "*Bristol-Myers Squibb Co.* Cease-and-Desist Order"], ¶¶ 7-16; *see also* SEC Press Rel. 2015-229, SEC Charges Bristol-Myers Squibb With FCPA Violations (Oct. 5, 2015), https://www.sec.gov/news/pressrelease/2015-229.html.

31. *Bristol-Myers Squibb Co.* Cease-and-Desist Order ¶¶ 5-7.

32. *Id.* ¶ 10.

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more than 90 employees and disciplined 90 more.[33] To settle the case, and without admitting the SEC's allegations, BMS agreed to pay nearly $12 million and to self-monitor and report to the SEC for two years and to certify its compliance.[34]

2. FLIR Systems, Inc.

In contrast to that in BMS, the settlement in FLIR Systems, Inc. did not identify any evidence that directly indicated expenditures were intended to cause foreign officials to breach their duties, but did note an array of lavish expenditures in 2009 and 2010, such as a "world tour" for officials of the Saudi Ministry of Interior incident to a "Factory Acceptance Test" in Boston, involving travel to Casablanca, Paris, Dubai, and Beirut, and considerable leisure days in Boston following short visits to the FLIR factory.[35] Additional official travel related to sales to the Egyptian Ministry of Defense involved a non-essential visit to Paris and extended leisure time at the test site city, Stockholm;[36] other misconduct cited by the SEC included the giving of five watches costing $1,900 each to various Saudi officials.[37] A manager in the firm's Middle East office admitted the "World Tour" was a mistake, and another employee agreed that an expense report for the watches had understated their price.[38]

FLIR settled internal controls and books and records charges after self-reporting the matter to the SEC, including actions to terminate personnel and vendors, provision of additional training and policy dissemination (including in local languages), and tightened gifts, travel, and hospitality policies.[39] The company paid $9,504,584 and submitted to self-reporting similar to that required of BMS.[40]

3. BHP Billiton Ltd. and BHP Billiton plc

As we commented last year, the SEC's settled Cease-and-Desist Order arising out of BHP Billiton's program for inviting foreign officials to the 2008 Beijing Olympics[41] puts many companies between the rock of abandoning these world-class sporting events as locations for relationship building and the hard place of

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33. *Id.* ¶ 17.
34. *Id.* at 7-8.
35. *See In re FLIR Systems, Inc.*, SEC Admin. Pro. 3-16478 (Apr. 8, 2015) [hereinafter "*FLIR Systems, Inc.* Cease-and-Desist Order"], ¶¶ 5-6; *see also* SEC Press Rel. 2015-62, SEC Charges Oregon-Based Defense Contractor With FCPA Violations (Apr. 8, 2015), http://www.sec.gov/news/pressrelease/2015-62.html.
36. *FLIR Systems, Inc.* Cease-and-Desist Order ¶¶ 7, 11.
37. *Id.* ¶ 15.
38. *Id.*
39. *Id.* ¶ 20.
40. *Id.* at 6-8.
41. *See BHP Billiton* Cease-and-Desist Order; *see also* SEC Press Rel. 2015-93, SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015), http://www.sec.gov/news/pressrelease/2015-93.html.

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devising the rigorous controls needed to satisfy the agency's seeming demand for the most intense scrutiny of these expenditures.[42] BHP Billiton ("BHPB") spent roughly $12,000 to $16,000 per participant, not including airfare, on between 150 and 200 foreign officials to enable them to attend the games, as well as various marketing events.[43] While the SEC did not charge BHPB with FCPA anti-bribery violations, it noted two key facts that appear to have driven the agency's concern: (1) payments for attendance by spouses; and (2) payments to foreign officials to support their attendance at Olympic events at the very time BHPB had pending business before those officials or others over whom they may have had influence.[44]

The company recognized the bribery risks inherent in Olympic hospitality and created a detailed program to address them, requiring a multi-question survey to be filled out for each invitee, including questions relating to existing or expected business with the invitee; whether there was a specific transaction which the invitee might be in a position to influence; whether the invitation could create the appearance of impropriety; and whether, with regard to the company's Guide to Business Conduct, the employee believed other matters should be considered before tendering the invitation.[45]

The SEC identified five reasons these controls "did not adequately address the anti-bribery risks associated with offering expensive travel and entertainment packages to government officials":[46]

- There was no independent legal review of the hospitality applications outside of the business group submitting the invitation;
- Some answers were inaccurate or incomplete, while others were examples provided by BHPB rather than individualized descriptions;
- BHPB "did not provide its employees and executives with any specific training on how to fill out the hospitality forms or how to evaluate whether an invitation to a government official complied with" its Guide to Business Conduct;

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42. *See* Andrew M. Levine, Bruce E. Yannett, Matthew Getz, Steven S. Michaels, and Philip Rohlik, "Internal Controls of Olympic Proportions: BHP Billiton Settles SEC Investigation of Olympic Hospitality," *FCPA Update*, Vol. 6, No. 10 (May 2015), http://www.debevoise.com/insights/publications/2015/05/fcpa-update-may-2015.
43. *BHP Billiton* Cease-and-Desist Order ¶ 11.
44. *Id.* ¶¶ 2, 15.
45. *Id.* ¶¶ 18-24.
46. *Id.* ¶ 18.

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- BHPB did not institute a procedure for updating or reconsidering the hospitality applications if circumstances changed; and
- Hospitality applications were filled out by disparate groups within BHPB, without a formal process to determine whether the invitee also had business with another company group.[47]

The SEC's proposed list of controls improvements will be potentially costly to implement and suggests the agency, at least as far as marquee hospitality for foreign officials is concerned, takes an aggressive view of the "reasonable assurances" language of the FCPA's accounting provisions.[48] The Cease-and-Desist Order implies that, having implemented a specific control (*i.e.*, the invitation application), BHPB nevertheless implemented that control deficiently because "some applications were inaccurate or incomplete"; the SEC, relatedly, charged a books and records violation as there were errors in "certain Olympic hospitality applications."[49]

"[I]n the BHPB resolution, the agency has left companies to guess what is really required to make these hospitality programs lawful. Whereas the *Resource Guide* makes clear that 'hallmarks of appropriate gift-giving [include] when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law,' the BHPB settlement arguably leaves this aspect of analysis by the wayside."

By focusing on accuracy and completeness, the BHPB resolution runs some risk of promoting the very "'check the box' compliance approach" that the agency criticized in its press release announcing the settlement.[50] The settlement also leaves unclear whether the agency truly accepts genuine relationship building without *quid pro quo* exchanges as acceptable,[51] as has been held in any number of U.S. court decisions.[52]

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47. *Id.* ¶¶ 19-24.
48. 15 U.S.C. § 78m(b).
49. *BHP Billiton* Cease-and-Desist Order ¶¶ 21, 38.
50. SEC Press Rel. 2015-93, SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015), http://www.sec.gov/news/pressrelease/2015-93.html.
51. *BHP Billiton* Cease-and-Desist Order ¶ 11.
52. *See* Bruce E. Yannett, Sean Hecker, Steven S. Michaels, and Noelle Grohmann Duarte, "Corrupt Intent, Relationship Building, and *Quid Pro Quo* Bribery: Recent Domestic Bribery Cases," *FCPA Update*, Vol. 3, No. 2 (Sept. 2011), http://www.debevoise.com/insights/publications/2011/09/fcpa-update [hereinafter "Yannett, *et al.*, "Relationship Building"].

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The 2012 FCPA *Resource Guide* states that "[t]he larger or more extravagant the gift, . . . the more likely it was given with an improper purpose,"[53] and that gift, travel, and hospitality analysis is also properly animated, at least implicitly, by a principle of proportionality that takes into account the income and stature of the public official at issue.[54] But in the BHPB resolution, the agency has left companies to guess what is really required to make these hospitality programs lawful. Whereas the *Resource Guide* makes clear that "hallmarks of appropriate gift-giving [include] when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law,"[55] the BHPB settlement arguably leaves this aspect of analysis by the wayside.

4. Bank of New York Mellon

Since August 2013, debate has persisted over whether and how the DOJ and SEC would address the potential hiring of relatives of foreign officials for prestigious jobs and internships in connection with efforts to win or retain business. This was resolved in part with the August 2015 announcement by the SEC of a settled Cease-and-Desist Order against Bank of New York Mellon Corporation ("BNYM"). The SEC alleged, and BNYM neither admitted nor denied, charges related to the bank's hiring of three interns who were related to officials employed by a Middle Eastern sovereign wealth fund that placed assets for management with the bank.[56] The SEC put forward an expansive view of how the FCPA applies in this context, particularly with respect to the definition of "thing of value" and how a benefit provided to a foreign official's relative could be deemed to be the conferral of a thing of value on the official, even in one instance involving an unpaid internship.

The BNYM case concerned certain subsidiaries of BNYM's global investment management division (the "BNYM subsidiaries") that had long relationships with an unidentified sovereign wealth fund for a Middle Eastern country (the "Sovereign Wealth Fund").[57] The Order alleged that, in about February 2010, two officials employed by the Sovereign Wealth Fund, who had discretion over whether to

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53. *See* DOJ, A Resource Guide to the U.S. Foreign Corrupt Practices Act 15 (2012) [hereinafter "Resource Guide], http://www.justice.gov/criminal/fraud/fcpa/guidance/.

54. Such a principle inheres in the requirement of "corrupt intent." *See id.*; *see also id.* at 17-18 (discussing examples). The *Guidance* by the UK Ministry of Justice relating to the Bribery Act 2010, one of the world's most stringent cross-border anti-bribery laws, states: "Bona fide hospitality . . . which seeks to improve the image of a commercial organisation . . . or establish cordial relations, is recognised as an established and important part of doing business." UK Ministry of Justice, The Bribery Act 2010 Guidance ¶ 26 (Mar. 2011) [hereinafter "Guidance"], https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

55. Resource Guide, note 53, *supra*, at 15.

56. *See In re The Bank of New York Mellon Corp.*, SEC Admin. Pro. 3-16762 (Aug. 18, 2015) [hereinafter "*BNYM* Cease-and-Desist Order"].

57. *Id.* ¶¶ 10-13.

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maintain or place new assets for management with the BNYM subsidiaries, requested BNYM hire three individuals for internships, and that the bank granted the requests.[58] As the Order noted, "delivering the internships as requested was seen by certain relevant BNY Mellon employees as a way to influence the officials' decisions."[59]

The first official, "Official X," requested internships for his son and his nephew, allegedly calling the requests an "opportunity" for the BNYM subsidiaries and suggesting that, alternatively, he could "secure internships for his family members from a competitor of BNY Mellon."[60] BNYM sought to accommodate the requests, despite their "personal" nature, allegedly believing that "by not allowing the internships to take place, we potentially jeopardize our mandate" with the Sovereign Wealth Fund.[61] One employee allegedly expressed a desire to obtain "more money for this," given that the bank was "doing [Official X] a favor."[62]

At about the same time, the second official, "Official Y," sought an internship at BNYM for his son. The relevant BNYM relationship manager allegedly explained to more senior officers at BNYM that granting the request was likely to "influence any future decisions taken within the [Sovereign Wealth Fund]," and that if BNYM did not hire the official's son as an intern, one of its competitors would, potentially resulting in BNYM's loss of market share.[63] The relationship manager allegedly expressed a belief that it is "silly things like this that help influence who ends up with more assets / retaining dominant position," and that granting the official's request was the "only way" to increase BNYM's market share with the Sovereign Wealth Fund.[64]

The bank ultimately hired all three interns, allegedly with the "support" and "blessing" of "senior BNY Mellon employees."[65] Two of the internships were in Boston, and the third was in London.[66] As noted, one was unpaid.[67] The Order alleges that the candidates did not have the necessary qualifications to be hired

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58. *Id.* ¶¶ 14-18.
59. *Id.* ¶ 14.
60. *Id.* ¶ 15.
61. *Id.* ¶ 16.
62. *Id.* (alteration in original).
63. *Id.* ¶ 18.
64. *Id.*
65. *Id.* ¶ 23.
66. *Id.* ¶ 21.
67. *Id.* ¶ 22.

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through BNYM's ordinary internship hiring process; the internships lasted longer than BNYM's standard summer internships; and the internships were not expected to lead to full-time employment.[68] The Order alleges that the interns proved to be "less than exemplary."[69] The Sovereign Wealth Fund stayed a client of the BNYM subsidiaries, placing an additional $689,000 out of a total of approximately $55 billion placed with BNYM by the Sovereign Wealth Fund, shortly before the internships began.[70]

The SEC charged BNYM with violating the FCPA's anti-bribery provisions "by corruptly providing valuable internships to relatives of foreign officials from the Middle Eastern Sovereign Wealth Fund in order to assist BNY Mellon in retaining and obtaining business," as well as with failing to "maintain a system of internal accounting controls sufficient to provide reasonable assurances that its employees were not bribing foreign officials."[71] Although the practice of hiring relatives of well-connected individuals had been well known for years without the SEC taking action, and in 2010 very few compliance programs had specific controls related to hiring relatives of foreign officials, the SEC found fault with BNYM's compliance program.

As noted in the Order, although the bank had "a specific FCPA policy" in place during the relevant period, the SEC charged BNYM for not providing employees with training and "guidance that was tailored to the types of risks relating to hiring faced by BNY Mellon's international asset services unit," noting that BNYM had "few specific controls relating to the hiring of customers and relatives of customers, including foreign government officials."[72] The SEC commended BNYM for "enhancing its anti-corruption compliance program," even before the SEC's investigation began, and noted the bank's remediation. BNYM paid disgorgement of $8.3 million, prejudgment interest of $1.5 million, and a penalty of $5 million.

The SEC did not explain how experience provided to an official's adult relative constituted benefits to the official absent the official's legal obligation to support that relative. The SEC stated, merely, that "[t]he internships were valuable work experience, and the requesting officials derived significant personal value in being able to confer this benefit on their family members."[73] Here, the BNYM Order

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68. *Id.* ¶¶ 19-22.
69. *Id.* ¶ 24.
70. *Id.* ¶¶ 11-13.
71. *Id.* ¶ 31.
72. *Id.* ¶¶ 25, 27.
73. *Id.* ¶ 21.

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went beyond the SEC's previous "family benefit" resolution in the *Schering-Plough* matter,[74] which treated donations to a castle-restoration foundation affiliated with a Polish health minister's spouse as an accounting provision violation (instead of a primary anti-bribery violation),[75] and which involved transfers of funds at the official's specific request as opposed to unpaid internship experiences. The BNYM Order, moreover, did not articulate any tie to a concrete business opportunity and did not identify the rationale for the $8.3 million disgorgement amount, notwithstanding that the investment associated with the internships was less than $1 million. Although the SEC appears to have followed the "*quid pro quo* lite" theory from criminal domestic bribery prosecutions, the case does little to lessen the opacity in the way U.S. agencies approach the task of settling the terms of FCPA resolutions.[76]

By also including allegations of internal controls failures, the BNYM Order likely will be viewed as putting other FCPA-covered companies that are exposed to similar risks on notice that the SEC views targeted training efforts and other controls as required elements of an adequate system of internal controls. Based on the order, a list of steps companies can take to reduce risk in this arena includes:

- Anti-corruption policies and training programs should explicitly address the hiring of government officials' relatives;
- Applications for employment (full-time or internship) should be routed through a centralized HR application process;
- Employees should be required to certify (on an annual or other periodic basis) that they have not circumvented or made hires outside of that centralized process;
- Candidates for employment should be required to indicate as a standard process step whether they are related or closely associated with a current or recent government official; and
- For cases involving a connection to a foreign official, the application should be reviewed by the company's anti-corruption compliance group.[77]

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74. *In re Schering-Plough Corp.*, SEC Admin. Pro. 3-1117 (June 9, 2004), https://www.sec.gov/litigation/admin/34-49838.htm.
75. *Id.* (Part V).
76. *See* Yannett, *et al.*, "Relationship Building," note 52, *supra*.
77. *See BNYM* Cease-and-Desist Order ¶ 32.

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In addition to these measures, companies should make sure any connected internship or employment candidate is objectively qualified for the position he/she is seeking; that the position reflects a genuine open requirement for the company (rather than a manufactured position); and that the hiring could not be perceived in any manner as being connected to winning or retaining a particular business opportunity.

B. The 2015 Third-Party Payment and Merger Cases: IAP, LBI, Hitachi, Mead Johnson, PBSJ, Goodyear, and Hyperdynamics

The remaining corporate resolutions last year could all be fairly characterized as involving the recurring issue of third-party controls, or, their cousins, anti-corruption due diligence and compliance program implementation.

While not presenting issues that gave rise to the nine-figure settlements of the past, these resolutions illuminate how embedded corruption remains in the Middle East, China, South and Southeast Asia, Africa, and elsewhere in the world. They also illustrate a variety of schemes – some sophisticated and some not – to conceal bribery, including cases involving alleged misconduct as late as 2013, long after the modern era of FCPA enforcement began.

1. The Corporate Criminal Matters

Complex financial dealings used to hide bribery characterized the allegations underlying the two corporate criminal FCPA matters resolved with affirmative recoveries, IAP and LBI.

In the first matter, resolved by an NPA on June 16, 2015, the DOJ alleged that IAP engaged in an array of misconduct in connection with bids for nationwide surveillance capabilities for the Kuwait Security Program, a project of the Kuwait Ministry of the Interior. In addition to the routing of bribe money through a third party, the company allegedly set up a shell corporation to submit the formal bid for a first phase of the work designing the specifications for the project that enabled IAP later to win the Phase II contract actually to build the system. During the course of the two phases of work, IAP and the shell company set up by IAP executives and senior employees, including James Rama, diverted $1,783,688 to a third-party consultant with the understanding that some or all of the funds would be used to bribe Kuwaiti government officials to induce them to provide confidential information about the project that would facilitate IAP's unfairly winning the bids through rigged specifications and outright bribery.[78]

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78. *See* IAP Worldwide DOJ Press Rel., note 2, *supra*.

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The case illustrates, once again, the risks of work in the Middle East and of design-build projects in which private parties are charged with formulating project specifications. IAP agreed to pay a $7.1 million penalty and received an NPA on the basis of "a variety of factors, including but not limited to IAP's cooperation."[79] Rama, in turn, simultaneously pleaded to one count of conspiring to violate the anti-bribery provisions of the FCPA and received a sentence of four months in prison.[80]

In the second criminal resolution, LBI admitted to allegations that it bribed foreign officials in India, Indonesia, Vietnam, and Kuwait to secure government construction management projects, and received a DPA that required payment of a $17.1 million penalty and appointment of a corporate monitor for at least three years.[81] Allegedly improper payments of roughly $3.9 million were routed to foreign officials by disguising them in various ways such as by naming them as "commitment fees" or "counterpart per diems," or by making payments to sub-contractors, consultants, or other vendors for services never rendered, sharing bribe obligations with consortium partners, creating phony contracts with other partners, or, in Vietnam, by using a local labor pool ("the Foundation") as a conduit.[82]

The DPA identified an array of incriminating evidence, including evidence in private e-mails to and from company employees suggesting a scheme to obstruct company lawyers conducting an internal review in 2008 from learning the truth about corrupt conduct.[83] This apparent obstruction, which may have served to enable the misconduct to continue, may account for why the company was required to engage a corporate monitor even though it was praised by the DOJ for self-reporting.

2. The Corporate Civil Matters

Hitachi, Ltd., entered into the second-largest civil FCPA enforcement resolution of 2015 – a settled civil action requiring the payment of $19 million – that was based on payments and property transfers to a third party.[84] That party, Chancellor House Holdings (Pty) Ltd. ("Chancellor"), was a South African company that the SEC alleged was "a front" for the African National Congress.[85] This resolution reflects

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79. *Id.*

80. *Id.; see also United States v. Rama*, Cr. No. 1:15-CR-143-GBL, Sentencing Tr. (E.D. Va. Oct. 9, 2015).

81. *United States v. Louis Berger International, Inc.*, Mag. No. 15-3624, Deferred Prosecution Agreement (D.N.J. July 7, 2015) [hereinafter "*LBI* Deferred Prosecution Agreement"], at Att. A ¶ 9; *see also* LBI DOJ Press Rel., note 3, *supra*.

82. *LBI* Deferred Prosecution Agreement, at Att. A ¶¶ 9, 11, 12, 26, 27, 29, 35, 39, 43.

83. *Id.* ¶ 20.

84. *See SEC v. Hitachi, Ltd.*, Civil Action No. 1:15-cv-01573, Mem. and Opinion (D.D.C. Nov. 24, 2015).

85. *See SEC v. Hitachi, Ltd.*, No. 1:15-cv-01573, Complaint (D.D.C. Sept. 28, 2015), ¶ 3; *see also* SEC Press Rel. 2015-212, SEC Charges Hitachi with FCPA Violations (Sept. 28, 2015), http://www.sec.gov/news/pressrelease/2015-212.html.

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how the FCPA's inclusion of foreign political parties within the definition of "foreign officials" can ensnare the unwary. It also represents a classic instance in which a local partner's alleged "ability to exert political influence" was transformed from the selling point of an internal business plan into an FCPA enforcement action.[86] Benefits that Chancellor received for its support of Hitachi's bids for local power grid projects included a below-market purchase price for equity in Hitachi's South African subsidiary Hitachi Power Africa (Pty) Ltd. ("HPA") and an above-market repurchase of that stake, as well as various dividend payments, yielding $10.5 million in income or a 5,000 percent return on investment, and $1,123,382 in various success fees for ostensible lobbying work in connection with the power project tenders.[87]

Hitachi was charged with violating the books and records and internal controls provisions of the FCPA in large measure because of the lack of transparency in these transactions, which were disguised in various ways, as well as lack of due diligence concerning Chancellor and the local consultant that advised Hitachi to pursue the scheme with Chancellor. The SEC alleged the payments to Chancellor violated Hitachi's corporate policies prohibiting contributions to political parties and that payments described as "consulting expenses" were improperly disguised as "consulting fees," when they were apparently intended to support political lobbying or outright influence peddling.[88] Without alleging Hitachi violated any substantive law, the SEC alleged, as an internal controls failure, the lack of training at the local subsidiary on the FCPA, local law, and Hitachi policies.[89]

Goodyear Tire and Rubber Company also settled an Africa-centered FCPA civil administrative action, for $17,028,065, as a result of bribes allegedly paid by local subsidiaries in Kenya and Angola.[90] Charging only books and records and internal controls violations in a Cease-and-Desist Order, the SEC alleged that Goodyear's subsidiary in Kenya, known as Treadsetters, paid more than $1.5 million in bribes in connection with tire sales in the five years after Goodyear acquired a majority stake in Treadsetters in 2006. The SEC also alleged that "Goodyear did not detect or prevent these improper payments because it failed to conduct adequate due diligence when it acquired Treadsetters, and failed to implement adequate FCPA compliance training and controls after the acquisition."[91] Similarly, Goodyear was found at fault

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86. *See SEC v. Hitachi, Ltd.* Complaint ¶ 22 .
87. *Id.* ¶¶ 59, 69.
88. *Id.* ¶ 60.
89. *Id.* ¶¶ 19, 72.
90. *See In re The Goodyear Tire and Rubber Co.*, SEC Admin. Pro. 3-16400 (Feb. 24, 2015) [hereinafter "*The Goodyear Tire and Rubber Co.* Cease-and-Desist Order"]; *see also* SEC Press Rel. 2015-38, SEC Charges Goodyear with FCPA Violations (Feb. 24, 2015), http://www.sec.gov/news/pressrelease/2015-38.html.
91. *In re The Goodyear Tire and Rubber Co* Cease-and-Desist Order *Co.* ¶ 11.

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for the conduct of Trentyre, its wholly-owned subsidiary in Angola, formed in 2007, which allegedly paid more than $1.6 million in bribes in the same five-year period.[92] The SEC alleged that "Goodyear did not prevent or detect these improper payments because it failed to implement adequate FCPA compliance training and controls."[93]

Mead Johnson Nutrition Company settled books and records and internal controls allegations for more than $12 million arising out of alleged improper payments to HCPs in China.[94] Here again, third parties were the issue, though the matter was not due diligence or training of those third parties, but rather an alleged improper knowing use of those third parties to make corrupt payments through excessive discounting that created funds at the distributor level (a so-called "Distributor Allowance") that were then used to make payments.[95] Because the discounts were not genuine, the company was alleged to have violated the books and records provision of the FCPA, and, because the underlying payments to HCPs violated Mead Johnson policy, the SEC alleged an internal control violation.[96]

In its only DPA of the year, the SEC settled books and records and internal controls allegations against PBSJ Corporation, a Florida-based engineering and construction firm that allegedly offered and authorized bribes and employment to foreign officials to secure Qatari government contracts.[97] The SEC alleged that Walid Hatoum, the former President of PBS&J International, and, in the relevant period, a Director of International Marketing, had paid bribes on behalf of PBSJ through a local Qatari company that was owned and controlled by a foreign official; the alleged bribes, disguised as "agency fees," were for the purpose of obtaining confidential sealed bid and pricing information that was used to win a bid for a hotel resort development project in Morocco and a light-rail transit project in Qatar.[98] The agency noted no due diligence was conducted of the local partner, even though it was well known that the local company employed the wife of an official of the Qatari government entity funding one of the projects, and, "[i]n fact, during the period, PBSJ considered but declined adopting due diligence controls over

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92. *Id.* ¶ 13.

93. *Id.* ¶ 15.

94. *In re Mead Johnson Nutrition Company*, SEC Admin. Pro. 3-16704 (July 28, 2015) [hereinafter "*Mead Cease*-and-Desist Order"]; *see also* SEC Press Rel. 2015-154, SEC Charges Mead Johnson Nutrition With FCPA Violations (July 28, 2015), http://www.sec.gov/news/pressrelease/2015-154.html.

95. *Mead* Cease-and-Desist Order ¶¶ 12-13.

96. *Id.*

97. SEC Press Rel. 2015-13, SEC Charges Former Executive at Tampa-Based Engineering Firm With FCPA Violations: Company to Pay $3.4 Million in Deferred Prosecution Agreement (Jan. 22, 2015), http://www.sec.gov/news/pressrelease/2015-13.html; *see also* PBSJ Deferred Prosecution Agreement (executed Nov. 24, 2014 and announced Jan. 22, 2015), http://www.sec.gov/news/press/2015/2015-13-dpa.pdf.

98. *See* sources cited note 97, *supra*.

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its contractors and joint venture partners."[99] The company paid $3,407,875 to settle the charges against it; Hatoum, a U.S. national, settled individual charges and paid a $50,000 penalty.[100]

Finally, in an indication of how little it takes to get in the SEC's cross-hairs, emerging independent oil and gas exploration company Hyperdynamics Corporation settled a books and records and internal controls charge based on the discovery that $130,000 had been paid to two supposed lobbying firms in the Republic of Guinea in West Africa and the company lacked records sufficient to show what was done with the money; the company undertook no due diligence regarding the lobbying firms, but discovered about 15 months after payments started being made to the lobbying firms that one of its Guinean employees apparently controlled the two third parties.[101]

As stated in the Cease-and-Desist Order, entered on the next-to-last day of the 2015 fiscal year, "[t]here is no evidence that these funds were in fact spent on legitimate public relations and lobbying activities, yet Hyperdynamics's books and records continued to reflect that the funds were spent for these purposes."[102] While a fair inference to be drawn is that it was irrelevant to the SEC whether the case involved embezzlement or bribery, the fact that such a loss could provoke an SEC action makes this case unusual if not stunning. The Company paid a $75,000 penalty to resolve the SEC proceeding, after having replaced its senior management team and its entire Board of Directors, hired in-house counsel, increased accounting staff, and instituted procedures to more strictly control the transfers of funds to Guinea.[103]

C. Individual Prosecutions

1. The Hoskins Prosecution

Although discussed in the daily blogs when it was issued, Judge Arterton's August 13, 2015 order granting Lawrence Hoskins' motion to dismiss the Alstom-related FCPA conspiracy and aiding-and-abetting charges against him has received less publicity than it deserves given its potential to upend the doctrinal architecture supporting the DOJ's FCPA enforcement program.[104]

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99. PBSJ Deferred Prosecution Agreement ¶ 23.

100. *Id.* ¶ 9; *see also In re Walid Hatoum*, SEC Admin. Pro. 3-16352 (Jan. 22, 2015).

101. *In re Hyperdynamics Corp.*, SEC Admin. Pro. 3-16843 (Sept. 29, 2015).

102. *Id.* ¶ 5.

103. *Id.* at 3-4.

104. *See Hoskins* Second MTD Ruling, note 19, *supra*.

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That program has relied heavily on aiding-and-abetting, and, even more importantly, conspiracy charges, to expand the reach of the FCPA. Such charges have been used, for example, to charge companies and individuals alike who are not issuers or domestic concerns or who, but for the manner in which the accessory liability statutes attribute conduct, have ever set foot in the United States or caused their agents to do so.[105] The use of conspiracy charges is also a key weapon in the DOJ's arsenal of criminal charges in the transnational bribery context because its deployment extends the end-date of the statute of limitations period to the date of the last act in furtherance of the conspiracy.[106] And in settled cases, aiding-and-abetting and conspiracy charges have been a mainstay of corporate resolutions because they are perceived not to count as substantive bribery offenses, a species of fraud, for purposes of debarment laws.[107]

"Although discussed in the daily blogs when it was issued, Judge Arterton's August 13, 2015 order granting Lawrence Hoskins' motion to dismiss the Alstom-related FCPA conspiracy and aiding-and-abetting charges against him has received less publicity than it deserves given its potential to upend the doctrinal architecture supporting the DOJ's FCPA enforcement program. That program has relied heavily on aiding-and-abetting, and, even more importantly, conspiracy charges, to expand the reach of the FCPA."

Given all this, the *Hoskins* case, where a DOJ motion to reconsider the August 13 ruling is pending, is one of the key cases in the United States to watch in 2016.

The reasons for doing so lie in a number of features of the *Hoskins* case that set the stage for the District Court's potentially broad August ruling. Hoskins, a British national who was never formally employed by the U.S. Alstom subsidiary whose corrupt conduct he is alleged to have furthered, has maintained that his business unit was in a position remote from or superior to the U.S. entity and thus the DOJ's theory that Hoskins was an "agent" of the U.S. entity is misguided.[108] Although the District Court refused to dismiss the DOJ's "agency" theory that is based on the text

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105. *See* Resource Guide, note 53, *supra*, at 34.

106. *See, e.g., Smith v. United States*, 133 S. Ct. 714 (2013).

107. *See, e.g.*, 48 C.F.R. § 9.406-2(a). Recently, the European Union relaxed what had been one of the strictest laws globally with respect to corruption-related debarment; that strict, automatic character is now evolving toward a discretionary debarment approach. *See* Amanda Wetzel, "How Companies Can 'Self-Clean' Corruption, Thanks to EU Reforms," *FCPA Update*, Vol. 7, No. 1 (Aug. 2015), http://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015.

108. *See Hoskins* Second MTD Ruling, note 19, *supra*.

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of the FCPA, leaving that matter for trial, after the government filed a superseding indictment charging aiding-and-abetting and conspiracy Hoskins moved to dismiss these new theories. The District Court granted this relief under a line of cases beginning with *Gebardi v. United States*,[109] which held that a woman could not be convicted of conspiracy to violate the Mann Act, outlawing transporting across state lines "any woman or girl for the purposes of prostitution or debauchery, or for any other immoral purpose," even if she was an accomplice in her own transport.

Judge Arterton held that because the FCPA "carefully delineates the classes of people subject to liability and excludes non-resident foreign nationals where they are not agents of a domestic concern or did not take actions in furtherance of a corrupt payment within the territory of the United States," accessory liability had no place in the case against Hoskins: it was forbidden by the clear structure of the statute.[110]

As noted by the District Court, the Supreme Court in *Gebardi* "perceive[d] in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished," and, from this holding and its progeny, the District Court reasoned that in excluding from liability a situation in which an individual who was *not* an agent (as set out in the FCPA) of a covered actor, Congress had precluded conspiracy and aiding-and-abetting liability as well.[111]

The broad nature of the order led the DOJ to move for reconsideration,[112] including to argue that the District Court's reliance on *Gebardi* went too far.[113] Although the *Gebardi* rule has been applied to prohibit charging foreign officials with conspiring in the act of being bribed,[114] as Justice Douglas wrote for the Court in perhaps the most famous conspiracy case in U.S. law, *Pinkerton v. United States*, the *Gebardi* doctrine is "of a limited character."[115] It has been recently interpreted by the Supreme Court as standing for a narrower point: "[W]here a statute treats

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109. 287 U.S. 112 (1932).

110. *See Hoskins* Second MTD Ruling, note 19, *supra*.

111. *Id.* at 8 (internal quotation marks and citation omitted).

112. *See United States v. Hoskins*, 3:12-cr-00238-JBA, Motion for Reconsideration (D. Conn. Aug. 27, 2015).

113. It is not clear that, before *Hoskins*, the DOJ has charged aiding-and-abetting or conspiracy in a litigated matter, or even in settled resolutions, without at least giving lip service to the agency theory and the predicates Judge Arterton held reflected Congress's intention to preclude accessory liability. *See, e.g., United States v. Marubeni Corp.*, No. 12-cr-00022, Information (S.D. Tex. Jan. 17, 2012); *United States v. JGC Corp.*, No. 4:11-cr-00260, Information (S.D. Tex. Apr. 6, 2011); *United States v. Snamprogetti Netherlands*, B.V., No. 4:10-cr-00460, Information (S.D. Tex. July 7, 2010). The DOJ and SEC, however, have stated clearly that aiding-and-abetting and conspiracy theories apply without any agency predicate, or without any U.S. nexus other than that attending the acts by a principal or co-conspirator. *See* Resource Guide, note 53, *supra*, at 34.

114. *See United States v. Castle*, 925 F.2d 831, 832, 836 (5th Cir. 1991).

115. 328 U.S. 640, 643 (1946).

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one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature, a line of reasoning exemplified in the courts' consistent refusal to treat noncriminal liquor purchases as falling under the prohibition against aiding or abetting the illegal sale of alcohol."[116]

Another reason it remains uncertain whether the District Court's ruling will survive rests on the more general principle of statutory construction that disfavors implied repeals.[117] Given that the FCPA was enacted long after the general conspiracy and aiding-and-abetting statutes were passed, it remains questionable at best whether the *Hoskins* ruling will stand or be followed elsewhere. Judge Arterton, for her part, has reserved decision on the government's motion for reconsideration, in part to await the Supreme Court's upcoming guidance about the extraterritorial application of another complex statute, the Racketeer Influenced and Corrupt Organizations Act, which may provide a way out of the doctrinal tangle before her.[118] That case is awaiting argument.[119]

2. Other Individual Prosecutions

The DOJ suffered a setback in the *Sigelman* prosecution arising out of the PetroTiger matter, when the cooperating former general counsel of the company, Gregory Weisman, testified inconsistently (and, he admitted, falsely, in part) at the trial of Joseph Sigelman, his CEO. This led the DOJ to offer and Sigelman to accept a plea deal pursuant to which the District Court imposed no jail time.[120] Generally, the case was a notable exception in a year in which the DOJ obtained some significant sentences in FCPA matters, though none threatened the fifteen-year record term set in the *Esquenazi* case.[121]

Perhaps most important in terms of their impact were the four-year sentences imposed on the former CEO and Managing Director of Direct Access Partners ("DAP"), a now bankrupt broker-dealer whose bribery schemes involved payments to a senior official employed by Venezuela's state economic development bank,

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116. *United States v. Abuelhawa*, 556 U.S. 816, 820 (2009).

117. *See, e.g., Branch v. Smith*, 538 U.S. 254, 273 (2003).

118. *See United States v. Hoskins*, 3:12-cr-00238-JBA, Tr. at 4 (D. Conn. Oct. 30, 2015).

119. *See RJR Nabisco, Inc. v. European Commission*, No. 11-2475 (2nd Cir. Aug. 20, 2014), *cert. granted*, No. 15-138 (S. Ct. Oct. 1, 2015).

120. DOJ Press Rel. 15-741, Former Chief Executive of Oil Services Company Pleads Guilty to Foreign Bribery Charge (June 15, 2015), http://www.justice.gov/opa/pr/former-chief-executive-officer-oil-services-company-pleads-guilty-foreign-bribery-charge; *see United States v. Sigelman*, No. 14-cr-00263, Sentencing Tr. (D.N.J. June 16, 2015) (sentencing Sigelman to probation and conditions).

121. *See United States v. Esquenazi*, 752 F.3d 912 (11th Cir.), *cert. denied*, 135 S. Ct. 293 (2014).

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Banco de Desarrollo Económico y Social de Venezuela, in return for bond trading business that generated more than $60 million in commissions to DAP.[122] Three other defendants in the DAP matter received two or three years sentences.[123] Collectively, the five defendants were ordered to forfeit more than $40 million.[124]

On the bribe-taker side of the ledger, Asem Elgawhary and Vadim Mikerin were sentenced by the U.S. District Court for the District of Maryland to terms of 42 and 48 months, respectively, for roles in separate schemes, based on money-laundering and other charges not subject to *Gebardi* preclusion. Elgawhary was sentenced for his role in taking bribes to provide business from a joint venture between his employer Bechtel and an Egyptian power authority, while Mikerin was punished for his role taking bribes at TENAM Corporation, an indirect subsidiary of Russia's State Atomic Energy Corporation, otherwise known as Rosatom.[125]

D. Related White Collar Developments

While the U.S. white collar landscape evolved on many fronts in 2015 and developments in the law of privilege, data protection, and collateral litigation had a number of effects on FCPA practice,[126] two pending cases briefed and argued in 2015 may well have significant impact on anti-bribery compliance during calendar 2016.

First, the decision, now on appeal, by Judge Richard Leon of the U.S. District Court for the District of Columbia to reject the DPA between Fokker Services B.V. and the DOJ in a sanctions matter presents important questions over the role of the federal trial courts in supervising DPAs.[127] Whereas the United Kingdom has a system of robust judicial supervision of DPAs,[128] the role of the trial court in the United States

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122. DOJ Press Rel. 15-382, CEO and Managing Director of US Broker-Dealer Sentenced for International Bribery Scheme (Mar. 27, 2015), http://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-sentenced-international-bribery-scheme; *see also United States v. Clarke Bethancourt et al.*, Nos. 13-cr-00670, 13-cr-00671, 13-cr-00673 (S.D.N.Y. Dec. 4, 8, and 15, 2015) (sentencing defendants Tomas Clarke Bethancourt, Ernesto Lujan, and Jose Hurtado to, respectively, 24, 24, and 36 months in prison).

123. *See* sources cited note 122, *supra*.

124. *See* sources cited note 122, *supra*.

125. *See* DOJ Press Rel. 15-1531, Former Russian Nuclear Energy Official Sentenced to 48 Months in Prison for Money Laundering Conspiracy Involving Foreign Corrupt Practices Act (Dec. 15, 2015), http://www.justice.gov/opa/pr/former-russian-nuclear-energy-official-sentenced-48-months-prison-money-laundering-conspiracy; FBI Press Rel. 15-355, Former Bechtel Executive Sentenced to 42 Months in Prison and Ordered to Forfeit $5.2 Million In Connection With Kickback Scheme (Mar. 23, 2015), https://www.fbi.gov/baltimore/press-releases/2015/former-bechtel-executive-sentenced-to-42-months-in-prison-and-ordered-to-forfeit-5.2-million-in-connection-with-kickback-scheme.

126. *See* Colby A. Smith, Andrew M. Levine, and Johanna Skrzpczyk, "D.C. Circuit Again Issues Mandamus to Protect Internal Investigation Documents," *FCPA Update*, Vol. 7, No. 1 (Aug. 2015), http://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015; Andrew M. Levine, Bruce E. Yannett, Steven S. Michaels, and Miheer Mhatre, "Attorney Client Privilege and Work Product Protection in Internal Investigations: Recent Decisions in the Southern District of New York," *FCPA Update*, Vol. 6, No. 7 (Feb. 2015), http://www.debevoise.com/insights/publications/2015/02/fcpa-update-february-2015.

127. *See United States v. Fokker Services B.V.*, 79 F. Supp. 3d 160 (D.D.C. Feb. 5, 2015), *appeal argued*, Nos. 15-3016 & 15-3017, (D.C. Cir. Sept. 11, 2015).

128. *See infra* pp. 27-33.

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has never been settled by the appellate courts. In 2014, the U.S. Court of Appeals for the Second Circuit held that federal trial courts were not empowered intrusively to review civil settlements between private parties and the SEC.[129] But this civil-context ruling only highlights the ways in which U.S. criminal settlements differ in that court approval in a DPA context of necessity requires the district court to make appropriate findings under the Speedy Trial Act. Judge Leon is not the only trial judge to question the DOJ's position that the trial courts have almost no substantive role in approving DPAs,[130] and the *Fokker Services* appeal is likely to be decided sometime during 2016.

Also awaiting decision is a ruling by the U.S. Court of Appeals for the Second Circuit in a landmark investigative subpoena case involving DOJ demands that Microsoft turn over in the United States e-mails housed on servers in Ireland.[131] Coming at a time of considerable tension between the United States and Europe over the scope of data protection, a ruling in favor of the government could provide the DOJ an extensive new tool for obtaining electronic evidence in FCPA investigations.

III. Developments Outside the United States

A. United Kingdom

The year 2015 was a one of many firsts in anti-bribery matters in the United Kingdom. The UK authorities and, where required, courts approved the first UK DPA, the first civil settlement with a company under the section 7 corporate offense of the UK Bribery Act 2010 (the "UKBA"), the first guilty plea for a company under section 7, and the first use of new sentencing guidelines for corporate entities.

1. The United Kingdom's first DPA

The introduction of DPAs in 2014 was heralded as one of the most important developments in anti-corruption enforcement in the United Kingdom. DPAs may be entered into by the Director of the Serious Fraud Office ("SFO") or the Director of Public Prosecutions (the head of the Crown Prosecution Service) with a corporate offender with respect to a list of financial or economic crimes, including bribery offenses under the UKBA or under the previous UK anti-bribery legislation. Under a DPA, a prosecution is suspended for a specified term and ultimately abandoned at the expiry of that term, if the company agrees to comply with certain conditions (and then actually does so).

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129. *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014).

130. *See also United States v. Saena Tech. Corp.*, 2015 WL 6406266 (D.D.C. Oct. 21, 2015); *United States v. HSBC Bank USA*, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

131. *See In re a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, No. 14-2985-CV (2d Cir. argued Sept. 9, 2015).

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These conditions typically include financial payments, changes to systems and procedures, monitorship, and on-going cooperation with the prosecutor. In contrast to the U.S. system of DPAs, DPAs in the United Kingdom provide for a high level of court oversight and approval: a two-stage process of scrutiny by the courts, first in private, when the terms are agreed in principle and again, in public, before final approval. The court must give careful consideration on both occasions to whether the DPA is in the interests of justice, and must provide detailed reasons for its decision.[132]

On November 30, 2015, the first DPA was approved by the English courts. The DPA was concluded between the SFO and ICBC Standard Bank plc ("Standard Bank") in respect of a US$6 million payment made by Stanbic Bank Tanzania ("Stanbic"), Standard Bank's sister company, in March 2013 to a local partner in Tanzania, Enterprise Growth Market Advisors ("EGMA"). One of the three shareholders of EGMA was the Commissioner of the Tanzania Revenue Authority, a foreign public official. The payment was alleged to be intended to induce members of the Tanzanian government to show favor to Stanbic and Standard Bank's proposal to carry out a US$600 million private placement on behalf of the government.

This was also the first use of the UKBA corporate offense in a criminal action and of the new corporate sentencing guidelines. Under the corporate offense, commercial organizations carrying on business in the United Kingdom can be found liable for failing to prevent bribery on their behalf by an employee, agent, or other "associated person," regardless of whether the company or company officials had knowledge of the bribe. The corporate offense requires proof that the associated person committed one of the underlying bribery offenses under the UKBA (bribing another person or bribing a foreign public official). However, as was true in the Standard Bank case, the prosecution is not required to secure (or seek) a conviction for the underlying bribery offense for the commercial organization to be subject to liability. The offense is subject to the sole, but complete, defense of the commercial organization having adequate procedures in place to prevent bribery.

The court's consideration of this DPA will, according to David Green, Director of the SFO, "serve as a template for future agreements."[133] Green said the "judgment from Lord Justice Leveson provides very helpful guidance to those advising corporates. It also endorses the SFO's contention that the DPA in this case was in the interests of justice and its terms fair, reasonable and proportionate."[134]

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132. *See* Lord Goldsmith QC, Karolos Seeger, Matthew Getz, and Robin Lööf, "Deferred Prosecution Agreements Enter into Force in the UK," Debevoise & Plimpton Client Update (Feb. 24, 2014), http://www.debevoise.com/insights/publications/2014/02/deferred-prosecution-agreements-enter-into-force__.

133. SFO Press Rel., SFO Agrees First UK DPA with Standard Bank (Nov. 30, 2015), https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/sfo-agrees-first-uk-dpa-with-standard-bank.aspx.

134. *Id.*

(a) Standard Bank Judgment

Court approval of DPAs in the United Kingdom involves a two-part test: (i) is the DPA in the interests of justice; and (ii) are the terms of the DPA fair, reasonable, and proportionate? Approving the DPA in the Standard Bank case, Lord Justice Leveson found that both limbs of the test were satisfied. Looking at the interests of justice, the court found the following elements to be of importance:

(i) The seriousness of the criminal conduct: There was no evidence Standard Bank or its staff were guilty of bribery, simply for failing to prevent it.

(ii) Self-reporting and cooperation: Considerable weight was placed by Lord Justice Leveson on Standard Bank's expeditious self-reporting to the SFO. Green later stated that he applauded "Standard Bank for their frankness with the SFO and their prompt and early engagement with us."[135]

(iii) Standard Bank had no prior convictions for bribery and corruption.

(iv) Change in structure of the organization: Standard Bank in its current form was a different entity from that which existed at the time of the bribery; it had new board members and made significant enhancements to its anti-money laundering and anti-corruption procedures since the time of offense.

Further, these six conditions imposed on Standard Bank were considered reasonable by the court:

(i) Payment of a financial penalty of US$16.8 million;

(ii) Compensation of US$6 million plus interest to be paid to the Government of Tanzania (equivalent to the fee paid to EGMA by Stanbic);

(iii) Disgorgement of the US$8.4 million fee earned by Standard Bank and Stanbic in respect of the transaction;

(iv) Launching policies and procedures to comply with the UKBA and related laws and submit to an independent review of its existing controls;

(v) Payment of the SFO's costs of £330,000; and

(vi) Continued cooperation with the SFO.

Four features of the case are of particular interest: the definition of "associated persons" under the corporate offense; the role of cooperation in obtaining a DPA; the importance of "adequate procedures"; and sentencing of corporates in bribery cases.

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135. *Id.*

(i) *Associated Persons*

Standard Bank was found liable under the corporate offense for its failure to prevent bribery on its behalf by "associated persons." Section 8(3) of the UKBA provides some examples of who qualifies as an associated person within the scope of the corporate offense: an employee, agent, or subsidiary. However, the Standard Bank case demonstrates that the concept can have a much broader application. Here, two Stanbic executives were alleged to have made the bribe, and it was accepted that they had no direct relationship with Standard Bank. Further, the judge in his preliminary judgment described Stanbic as "a sister company the management of which is unconnected to [Standard Bank]"[136] and an entity "in respect of which Standard Bank had no interest, oversight, control or involvement."[137] The Stanbic executives were still held to be associated persons. The key factors were that the banks were mandated to work jointly as lead managers on the transaction and worked closely together with an equal fee split. Standard Bank also had a significant level of control over the structure of the deal and responsibility for much of the contractual drafting.

Thus, commercial organizations should be attuned to the fact that where they are jointly involved in transactions with affiliates, they cannot rely on the different corporate structures or responsibilities to avoid liability. If the affiliates are working on a common endeavor and ultimately sharing the fees earned, the acts of an affiliate (or its employees) may well be attributed to those of the other and engage its liability.

(ii) *Importance of Cooperation*

In concluding that the DPA was in the interests of justice, considerable weight was placed by the court on Standard Bank's prompt and high-level of cooperation with the SFO. This cooperation included identifying and making available relevant witnesses, providing summaries of first accounts of interviews, providing access to its document review platform, and providing timely and complete responses to requests for information, as required in the United Kingdom's DPA Code of Practice.

Commenting on the DPA, the SFO's joint head of bribery and corruption, Ben Morgan, lauded Standard Bank's cooperation, distinguishing it from what he called "pseudo-cooperation," whereby a company and its lawyers promise cooperation but "seek to hinder, delay and generally disrupt what [the SFO] are doing." Morgan said the SFO "will only invite a company into DPA negotiations if our Director is persuaded they have offered genuine cooperation," *i.e.*, "prompt reporting, scoping

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136. *Serious Fraud Office v. Standard Bank Plc (now known as ICBC Standard Bank Plc)*, Case No. U20150854, Approved Judgment (Nov. 30, 2015) [hereinafter "*Standard Bank Plc* Judgment"], ¶ 26.

137. *Id.* ¶ 21.

and conducting your own investigation in conjunction with us, taking into account our interests in doing so and providing access to the kind of material we need to test the quality of evidence gathered and your own conclusions on it."[138]

(iii) *Importance of Adequate Procedures*

As noted above, the sole defense to the corporate offense for a commercial organization is having adequate procedures to prevent bribery. Standard Bank had extensive anti-bribery and anti-corruption procedures in place, but they were not deemed "adequate" to prevent bribery and provide Standard Bank the statutory defense.

The UK Ministry of Justice's guidance on the UKBA has always made clear that it is not sufficient for commercial organizations to simply have bribery prevention policies and procedures in place: these policies and procedures must be properly implemented within the organizations in order to be deemed adequate.

Standard Bank's policies were criticized for lacking clarity and sufficient implementation via training and communication. There were also failures in the coordination between the group's entities, *i.e.*, Standard Bank's procedures were not adequately implemented in its transaction with Stanbic. Standard Bank was engaged as a joint lead manager in a transaction with a government of a high risk country where a third party was engaged and received a large fee. Despite this, only basic KYC checks were carried out and were assigned to Stanbic, an entity in respect of which Standard Bank "had no interest, oversight, control or involvement."[139]

If adequate procedures had been in place, Standard Bank would have likely avoided prosecution given the lack of active bribery on its part. This highlights why companies should pay careful attention to the compliance procedures they have in place and ensure they are adequately implemented. Group-wide policies should be drafted to ensure compliance checks are coordinated and that the responsibility for compliance in third-party transactions lies with all group employees working the deal.

(iv) *Sentencing in DPA Cases*

The financial penalties reflect the sentencing guidelines introduced in October 2014 for corporate offenders convicted of fraud, bribery, and money laundering.[140]

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138. Ben Morgan, First DPA and use of s.7 Bribery Act (Dec. 1, 2015), http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/first-dpa-and-use-of-s7-bribery-act.aspx.

139. *Standard Bank Plc* Judgment ¶ 21.

140. *See* Lord Goldsmith QC, Karolos Seeger, Matthew Getz, and Robin Lööf, "Proposed UK Sentencing Guidelines for Corporate Offences," Debevoise & Plimpton Client Update (July 1, 2013), http://www.debevoise.com/clientupdate20130701a.

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The penalties that can be applied, in addition to a fine, include compensation, confiscations, and various "adjustments." For corporate bribery offenses, the guidelines provide that fines will be calculated based on the harm caused and the company's culpability. The court is to apply a multiplier of between 20% and 400% to the gross profit of the contract obtained or sought by that company. Standard Bank's fine was US$16.8 million. This equals a penalty of 300% of Standard Bank's gross profit as Standard Bank's culpability was assessed to be on the high side of medium culpability. It also included a reduction of one-third in light of Standard Bank's cooperation. This equated to the reduction that would have been given for an early guilty plea in contested proceedings. The court took note that the penalty proposed was comparable to what would have been imposed in the United States.

The compensation of US$6 million was calculated on the basis that this was the amount of the bribe paid to EGMA and consequently the loss suffered by the Tanzanian government. The disgorgement, or confiscation, of US$8.4 million amounted to the total fee paid to both Standard Bank and Stanbic, of which Standard Bank received only US$4.2 million. It is unclear why Standard Bank agreed to pay the full fee, as it appears to be more than disgorgement of its profit, but this was the amount agreed between Standard Bank and the SFO and was not disturbed by the judge.

Thus, Standard Bank's total payments including costs amounted to approximately US$32 million. As the sentencing guidelines require the penalties for DPAs to be assessed according to the same criteria as for contested prosecutions, there appears to be no financial advantage for companies in entering into a DPA. Morgan acknowledged as much, emphasizing that cooperating in the DPA process is still justified by the speed, lower costs, and lesser impact on reputation it enables.[141]

The Standard Bank case shows that DPAs will be a tool available to the SFO in bribery and corruption cases. However, the SFO continues to state that DPAs will not be a standard or easy option out of a prosecution for companies; the SFO will continue to pursue a prosecution where it considers it appropriate. Indeed, Green has continually emphasized that the SFO is first and foremost a prosecutor.

This case illustrates several points. First, while the corporate offense is plainly appropriate for resolution by way of a DPA, Lord Justice Leveson's judgment has cast some doubt on the circumstances in which DPAs will be available for the offense of active bribery, given its greater culpability. It will remain to be seen how such cases are approached in future DPAs. Second, any company wishing to consider entering into a DPA with a UK prosecutor will be expected to provide an early and high level

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141. *See* Rahul Rose, "Asking US about foreign bribery fines is the 'new norm', SFO corruption head says," *Global Investigations Review* (Dec. 3, 2015), http://globalinvestigationsreview.com/article/4705/asking-us-foreign-bribery-fines-new-norm-sfo-corruption-head-says.

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of cooperation. Third, in light of the sentencing guidelines, there is probably no financial incentive to enter into a DPA: companies will need to assess the non-financial benefits instead. Further guidance is expected from further DPAs. A second UK DPA is expected in early 2016.[142]

2. First Guilty Plea for Company Under Section 7 of the UKBA - Sweett Group plc

Two days after the Standard Bank DPA was announced, the SFO announced that Sweett Group Plc ("Sweett"), a construction company listed on the London Stock Exchange, had become the first company to plead guilty to the corporate offense in connection with the securing of a contract for project management and cost consulting services in respect of the construction of a hotel in Dubai. A sentencing hearing has been scheduled for February 12, 2016.

"The Standard Bank case shows that DPAs will be a tool available to the SFO in bribery and corruption cases. However, the SFO continues to state that DPAs will not be a standard or easy option out of a prosecution for companies; the SFO will continue to pursue a prosecution where it considers it appropriate."

The SFO has prosecuted Sweett rather than enter into a DPA. The reasons are unclear, but we should learn more when Sweett is sentenced. However, the SFO stated at the end of 2014 that it considered Sweett to be non-cooperative because it had continued to carry out its own internal investigation.

3. First Civil Settlement Under Section 7 of the UKBA – Brand-Rex Limited

The government also entered into its first civil settlement with a company in respect of the corporate offense. The settlement was entered into between the Civil Recovery Unit of the Scottish Crown Office, Scotland's prosecutor, and Brand-Rex Limited ("Brand-Rex"), an international infrastructure and industrial cabling company. The offense concerned a sales reward incentive scheme Brand-Rex ran for its installers and distributors, whereby rewards included foreign holidays. One of the company's installers offered a number of the holiday tickets he won to a Brand-Rex customer, who had influence over the customer's acquisition of Brand-Rex products.

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142. For more detailed analysis, see Lord Goldsmith QC, Karolos Seeger, Matthew Getz, Robin Lööf, and Ramsay McCulloch, "First UK DPA Starts to Answer Questions about Bribery Act Enforcement," Debevoise & Plimpton Client Update (Dec. 1, 2015) http://www.debevoise.com/insights/publications/2015/12/first-uk-dpa-starts-to-answer, and Karolos Seeger, Matthew Getz, Alex Parker, "The United Kingdom's First Deferred Prosecution Agreement," *FCPA Update*, Vol. 7, No. 5 (Dec. 2015), http://www.debevoise.com/insights/publications/2015/12/fcpa-update-december-2015.

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Following discovery of this issue during an internal review, Brand-Rex self-reported to the Scottish Crown Office in June 2015. A civil settlement of £212,800, paid as compensation, was agreed between the prosecutor and Brand-Rex within four months of the self-report. No criminal action or fine was pursued by the prosecutor.

The case highlighted that third-party contractors can be "associated persons," meaning that companies can be held liable for such persons' actions. Thus, as was also highlighted in the Standard Bank case, companies should ensure they have adequate anti-bribery and corruption policies and procedures in place to prevent liability for actions of third parties. It is unknown whether Brand-Rex had an anti-bribery and corruption policy in place at the time of the offense, but the company does not appear to have put forward any "adequate procedures" defense.

The Brand-Rex settlement was relatively small, which may have assisted in the speed of resolution, although the Scottish self-reporting system is different in several key ways from the English system, which may also have expedited the settlement. For example, the Scottish "Guidance on the approach of the Crown Office and Procurator Fiscal Service to reporting by businesses of bribery offenses" accepts self-reports from corporate entities "with a view to consideration being given by the Crown to refraining from prosecuting the business and referring the case to the Civil Recovery Unit ('CRU') for civil settlement." This is similar to the approach taken by the SFO between July 2009 and October 2012, one rejected by the current SFO Director in October 2012 in favor of a more prosecution-focused policy.

The case's impact is limited in that the settlement occurred under the Scottish system, which has a more open approach than the current SFO policy. However, it does illustrate the first use of corporate offense and shows that civil settlement can be an expeditious and cost-effective means to resolve corruption cases.[143]

4. Other Successful Prosecutions

There were a number of other successful prosecutions by the SFO for anti-bribery, money laundering, and corruption matters in the courts of England and Wales. The SFO's Morgan stated in May 2015: "[I]n terms of trial outcomes relating to corruption [the SFO] have built a good trajectory over the last year . . . in total the SFO convicted 18 defendants (corporates and individuals) in the last calendar year. If that trajectory continues through our current case load, then common sense tells you that we will soon have convictions of major organizations under the Bribery Act."[144]

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143. For more detailed analysis, see Karolos Seeger, Matthew Getz, and Robin Lööf, "UK "Corporate Offence" – Scottish Company Enters First Settlement Expressly Relating to Section 7 of the Bribery Act," *FCPA Update*, Vol. 7, No. 3 (Oct. 2015), http://www.debevoise.com/insights/publications/2015/10/fcpa-update-october-2015.

144. Ben Morgan, Compliance and Cooperation (May 20, 2015), http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/ben-morgan-compliance-and-cooperation.aspx.

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Additional prosecutions of interest include:

- The SFO's first contested prosecution and sentencing of a corporate entity for foreign bribery in the case of Smith and Ouzman Ltd, a UK printing company. Along with two of its employees, Smith and Ouzman's convictions were for pre-UKBA corruption offenses under the Prevention of Corruption Act 1906, in respect of bribes paid to public officials in Africa to win contracts relating to security documents.
- Graham Marchment, a former procurement engineer, was convicted and sentenced in respect of pre-UKBA offenses under section 1(1) of the Criminal Law Act 1977. The offenses related to the leaking of confidential information to bidders for contracts in high-value oil and gas projects in Egypt, Russia, and Singapore in exchange for payments. Four of Marchment's co-conspirators had been successfully convicted in respect of the same matters in 2012. However, Marchment had been living in the Philippines at that time and refused to return to the United Kingdom for questioning. He was arrested and charged following his return to the United Kingdom in 2014.[145]

Further corruption charges have also been brought in respect of the Alstom investigation. Jean-Daniel Lainé, former Senior Vice President for Ethics & Compliance at Alstom, and Michael Anderson, a former business director for Alstom Transport SA, were each charged with two counts of corruption under section 1 of the Prevention of Corruption Act 1906 and two counts of conspiracy to corrupt under section 1 of the Criminal Law Act 1977. The charges relate to the supply of trains to the Budapest Metro between January 2006 and October 2007. Trials relating to the latest Alstom charges are expected in 2016 and early 2017.

5. Introduction of the NCA's International Corruption Unit

In May 2015, a new International Corruption Unit ("ICU") was set up as part of the United Kingdom's National Crime Agency ("NCA"). The NCA is the United Kingdom's national law enforcement agency. It replaced the Serious Organised Crime Agency in 2013. It is the lead agency for investigating organized and serious crime both nationally and internationally. The NCA has a strategic role and works closely with regional crime units and more specialist units, such as the SFO.

The ICU combines the previously separate Metropolitan Police Proceeds of Corruption Unit, the City of London Police Overseas Anti-Corruption Unit, and sections of the NCA Economic Crime command. It is intended to be the central

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145. For a more detailed analysis of this case, see Karolos Seeger, Alex Parker, Matthew Getz, Ceri Chave, and Pam Shearing, "Victories for UK Law Enforcement in Corruption and Fraud Cases," *FCPA Update*, Vol. 6, No. 10 (May 2015), http://www.debevoise.com/insights/publications/2015/05/fcpa-update-may-2015.

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unit for the investigation of international bribery and corruption and related money laundering offenses. The ICU's main functions are to investigate:

- Money laundering in the United Kingdom resulting from corruption involving high-ranking overseas officials;
- International bribery involving UK-based companies or nationals; and
- Cross-border bribery with a link to the United Kingdom.

The ICU's remit appears to overlap with the SFO's mandate, which includes anti-bribery matters, and it is currently unclear how the two will mesh. Despite the SFO's recent successes, the SFO's Green has conceded the SFO could still potentially be merged into a larger NCA under plans being considered by the government.

B. Brazil

The year 2015 was a watershed for anti-corruption enforcement in Brazil. Against the backdrop of unprecedented corruption investigations, the federal government worked to build an increasingly sophisticated regulatory structure around Law No. 12.846, the country's so-called Clean Company Act (the "Act"). Through Decree No. 8.420, four new regulations, a set of guidelines on compliance programs, and, more recently, a provisional decree amending the Act, the federal government continued to build out Brazil's anti-corruption regime. Still, some uncertainty concerning the boundaries of the legal framework persists, and the full magnitude of the new standards will be clarified only as local regulators enforce them.

1. Overview of Recent Legislative Developments

The Act,[146] which came into force in 2014, imposes strict civil and administrative liability on corporate entities doing business in Brazil for corruption and bribery of Brazilian or foreign public officials and for fraud in connection with public tenders.[147] The Act applies broadly to corporations, partnerships, proprietorships, and other for-profit and non-profit entities. It authorizes monetary fines ranging from 0.1% to 20% of an offending company's annual gross revenues. When it was signed into law, the Act represented a major step forward, yet required implementing regulations that arrived over a year after the Act was signed.[148]

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146. Federal Law No. 12.846/2013 (Aug. 1, 2013), http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm.

147. Brazil's Parliament currently is considering a bill that would subject legal entities to criminal liability for bribery and corruption – not available under the current framework – in addition to other measures recently presented as part of a package to tackle corruption. *See* Adriana Dantas, "Brazil," *in* Andrew M. Levine and Bruce E. Yannett (eds.), "Latin Lawyer Reference – Anti-Corruption 2016," *Latin Lawyer*, http://latinlawyer.com/reference/topics/74/jurisdictions/6/brazil/.

148. *See* Andrew M. Levine, Bruce E. Yannett, Renata Muzzi Gomes de Almeida, Steven S. Michaels, and Ana L. Frischtak, "Brazil Enacts Long-Pending Anti-Corruption Legislation," *FCPA Update*, Vol. 5, No. 1 (Aug. 2013), http://www.debevoise.com/insights/publications/2013/08/fcpa-update; *see also* Andrew M. Levine, Bruce E. Yannett, Steven S. Michaels, Daniel Aun, and Bernardo Becker Fontana, "Brazil Issues Long-Awaited Decree Implementing the Clean Company Act," *FCPA Update*, Vol. 6, No. 8 (Mar. 2015) [hereinafter, "Brazil Issues Decree"], http://www.debevoise.com/insights/publications/2015/03/fcpa-update-march-2015.

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On March 18, 2015, Brazil's President Dilma Rousseff signed Decree No. 8.420 (the "Decree") implementing the Act.[149] The Decree took effect the following day. It regulates the process for imposing administrative liability on legal entities found in violation of the Act; sets forth guidelines for calculating fines; establishes rules governing leniency agreements; and provides the criteria by which Brazilian regulators will assess anti-corruption compliance programs, among other topics.[150]

On April 8, 2015, Brazil's Comptroller-General of the Union ("CGU") issued four new regulations further clarifying the Act. Ordinance Nos. 909 and 910 and Instruction Nos. 1 and 2 (the "Regulations")[151] took effect immediately and further regulated fine calculation, compliance programs, leniency agreements, and the administrative liability process.[152]

On September 22, 2015, the CGU issued non-binding guidelines (the "CGU Guidelines")[153] on how companies ought to structure their compliance programs to conform to the Brazilian anti-corruption framework. These focus on a compliance strategy including policies, procedures, training, monitoring, remediation, and, most importantly, corporate culture and support by senior executives and boards.[154]

Most recently, President Rousseff enacted Provisional Decree No. 703 ("*Medida Provisória*" or "MP 703")[155] provisionally amending the Act's rules on leniency agreements.[156] With the declared aim of "decreasing uncertainty and preserving jobs,"[157] MP 703 took effect on December 21, 2015, anticipating changes to the Act contained in a bill pending before Brazil's Congress. Among other things, MP 703 provides for enhanced participation of prosecutors and government attorneys in the negotiation of leniency agreements; the possibility that more than one company may apply for leniency in connection with the same set of facts; and the adoption of an effective compliance program as a prerequisite for an application for leniency.

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149. Decree No. 8.420/2015 (Mar. 18, 2015), http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Decreto/D8420.htm.

150. *See* Andrew M. Levine *et al.*, "Brazil Issues Decree," note 148, *supra*.

151. Ordinance 909/2015 (Apr. 7, 2015); Ordinance 910/2015 (Apr. 7, 2015); Normative Instruction 1/2015 (Apr. 7, 2015); Normative Instruction 2/2015 (Apr. 7, 2015), http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=08/04/2015&jornal=1&pagina=2&totalArquivos=84.

152. *See* Andrew M. Levine, Sean Hecker, Daniel Aun, and Bernardo Becker Fontana, "Brazil Further Regulates Its Anti-Corruption Framework," *FCPA Update*, Vol. 6, No. 9 (Apr. 2015), http://www.debevoise.com/insights/publications/2015/04/fcpa-update.

153. "CGU lança guia de integridade para auxiliar empresas no combate à corrupção," *Controladoria-Geral da União* (Sept. 22, 2015), http://www.cgu.gov.br/noticias/2015/09/cgu-lanca-guia-de-integridade-para-auxiliar-empresas-no-combate-a-corrupcao.

154. *See* Andrew M. Levine, Sean Hecker, Steven S. Michaels, Daniel Aun, and Bernardo Becker Fontana, "Brazil Issues Guidelines for Compliance Programs," *FCPA Update*, Vol. 7, No. 3 (Oct. 2015), http://www.debevoise.com/insights/publications/2015/10/fcpa-update-october-2015.

155. Provisional Decree No. 703 (Dec. 18, 2015), http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Mpv/mpv703.htm.

156. Brazil's Constitution allows the President unilaterally to enact provisional decrees under "relevant and urgent" circumstances. Such decrees are initially valid for 60 days, renewable for the same period, and lose force if not converted into law by Congress.

157. *See* President Dilma Rousseff, Speech on the Occasion of MP 703's Signature (Dec. 18, 2015), http://www2.planalto.gov.br/acompanhe-o-planalto/discursos/discursos-da-presidenta/discurso-da-presidenta-da-republica-dilma-rousseff-durante-assinatura-da-medida-provisoria-do-acordo-de-leniencia-palacio-do-planalto.

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The measure also builds new incentives into the existing fine and sanction framework, including the exemption of leniency signatories from debarment; the possibility of fine exemptions for the companies that are first to report a violation; and the suspension or termination of judicial proceedings related to the same set of facts dealt with under an entity's leniency agreement.

Below we provide a brief overview of the main features of Brazil's anti-corruption framework, as shaped by these recent legislative and legal developments.

2. The Current Legal Framework

(a) Administrative Liability Process

The Act establishes the process ("*Processo Administrativo de Responsabilização*" or "PAR") for assessing administrative liability of legal entities. A PAR must be concluded within 180 days from the official publication that the process has been initiated against a particular entity, though extensions are authorized. During this period, prosecutors may request competent authorities for permission to conduct searches for and seizures of evidence. Any conduct charged as violating both the Act and Brazilian law on public bids and government contracts must be adjudicated in a joint proceeding. Under MP 703, the Prosecutor's Office must be notified upon commencement of any PAR.

The CGU has exclusive authority over enforcement involving alleged bribery of foreign public officials, and concurrent jurisdiction, with other competent federal authorities, over corruption cases involving federal officials. The CGU may also act if another authority tasked with handling a PAR does not do so and can exercise concurrent jurisdiction with federal bodies in special circumstances, in which case the CGU may act at the request of the public entity harmed by the corrupt practice. The "complex" or "relevant" matters in which such extraordinary circumstances might exist, however, are yet to be defined under Brazilian law. State and local authorities will conduct the PAR with respect to acts committed within their jurisdictions.

(b) Fines & Other Sanctions

The potential consequences for companies that violate the Act include: (i) fines; (ii) publication of sanctions in a local or national newspaper and in notices at the company's headquarters and on its website; and (iii) debarment, in the event that conduct also violates Brazilian legislation on public bids and government contracts.

The Decree sets forth specific rules for calculating fines. The maximum fine shall be set at the lower of: (i) a percentage of a company's gross revenues, capped at 20% thereof based on the presence of specific aggravating and mitigating factors; or

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(ii) three times the value of the benefit obtained or sought through the misconduct.[158] The Decree likewise establishes minimum fine levels, to be set at the higher of: (i) the value of the benefit intended or obtained; or (ii) 0.1% of gross revenues, or BRL 6,000, when it is not possible to utilize the company's gross revenues.

Companies that enter into leniency agreements with competent authorities may benefit from fine exemption, reduction, or other benefits, as explained below.

(c) Leniency Agreements

A company that has violated the Act or Brazilian laws regulating public bids and government contracts may enter into a leniency agreement to mitigate possible sanctions. Under the Act's framework, entry into a leniency agreement requires ceasing involvement in the misconduct, cooperating with the government's investigation and the PAR, identifying other involved parties, and quickly providing information and documents evidencing the misconduct to the government. MP 703 supplements that list by requiring reporting companies to implement an effective compliance program or improve an existing one. At the same time, MP 703 eliminated the Act's requirement that a company applying for leniency be the first to report, thereby enabling multiple companies to apply for leniency based on the same set of facts; this possibility did not exist under the original text of the Act.

Pursuant to the current text of the Act, as amended by MP 703, leniency negotiations will be conducted by the internal controlling body at the federal, state, or local level, acting alone or in conjunction with the Prosecutor's Office or the competent Government Attorney's Office.[159] The amended Act also authorizes Brazil's Antitrust Commission ("CADE") to participate in negotiations related to conduct that violates Brazil's antitrust laws. It also creates the opportunity for a company to enter into a leniency agreement even if the Prosecutor's Office has initiated judicial proceedings.

Although a company will not be released from providing appropriate compensation for the damages it causes, it may benefit, under the Act as amended by MP 703, from one or more of the following outcomes by entering into a leniency agreement: (i) exemption from publication of the decision sanctioning its conduct;

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158. This formula may affect litigation under the Act. If the benefit obtained or sought exceeds the 20%-of-annual-gross-revenue figure, for example, the rules for calculating the default fine will place pressure on accused parties and the government alike to learn the facts relevant to the factors that could affect the fine calculation. And, because calculation of benefits sought or obtained can also be a subject of dispute, it is possible that both alternative fine calculation methods may be litigated. Similar considerations may animate calculation of the minimum fine amount.

159. In the absence of internal controlling bodies at the state or local level, state governors or mayors will conduct the negotiations, and the participation of the Prosecutor's Office will be mandatory.

(ii) exemption from the prohibition on participating in public bids or otherwise contracting with government entities; (iii) reduction of up to two-thirds of the applicable fine; or even (iv) complete fine exemption for the first company to report the misconduct. Provided that the Prosecutor's Office and the competent Government Attorney's Office participate in the negotiation of a leniency agreement, such agreement bars the initiation or continuation of any related judicial proceedings, including any administrative improbity proceedings under Law No. 8.429 of 1992. In addition, the amended text provides for the suspension of any other administrative proceedings relating to public bids or government contracts in connection with the same facts, or their termination if the company fulfills its obligations under the agreement.

(d) Compliance Programs

Brazilian law now provides substantial direction relating to corporate compliance programs. It recognizes an effective program must be risk-based and tailored to a company's size, structure, and industry, where it does business, whether it relies on third parties, and the degree to which it interacts with government entities.

The Decree sets out parameters for assessing a compliance program, including: (i) upper management's commitment to the program; (ii) standards of conduct and codes of ethics applicable to employees, managers, and third-party service providers; (iii) periodic training; (iv) internal controls; (v) specific procedures to prevent fraud and wrongdoing in the context of bidding procedures and the performance of government contracts, among other contexts; (vi) independence and authority of the internal body responsible for applying and overseeing the program; and (vii) disciplinary measures applicable in the event of violations of the program.

The Regulations provide that companies under investigation must submit a "profile report" identifying key facts about the firm and risk factors faced by the business, as well as an "observance report" on the company's implementation of and adherence to a compliance program. The adequacy of the program will affect the degree to which a fine is reduced.

The CGU Guidelines highlight the way compliance programs ought to be developed and implemented, identifying five pillars of an effective compliance program: (i) commitment and support of a company's senior management; (ii) designation of a specific department responsible for handling compliance issues within the company; (iii) risk analysis based on the company's profile; (iv) structuring of compliance rules and tools; and (v) strategies for continuous monitoring.

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While the CGU Guidelines harmonize with other regulators' guidance, certain aspects are comparatively more detailed and may require closer attention from companies with Brazilian operations. Among other steps, the CGU Guidelines recommend that all employees receive compliance training. The CGU Guidelines also contain potentially strict language that, if read expansively and literally, could require the initiation of internal investigations upon the receipt of any evidence of wrongdoing.

Most importantly, the CGU Guidelines emphasize that a company's compliance program should be tailored to its particular profile. The CGU Guidelines characterize compliance programs as part of a company's defense, stressing the need for businesses to properly document all actions taken as part of compliance efforts. Although nonbinding, the CGU Guidelines provide an important resource for companies, reflecting local regulators' expectations under the Brazilian anti-corruption framework.

3. Enforcement Activity

These regulatory developments have arrived amidst proliferating anti-corruption investigations and enforcement actions in Brazil. Most famously, "operation *Lava Jato*" or "Car Wash" continues to evolve, reflecting unprecedented efforts by Brazilian federal prosecutors and the federal judiciary, federal police, CADE, and the CGU. The scandal has had an acute impact on Brazil's political and economic stability.[160] More than 20 construction companies and 50 individuals, including renowned businesspeople, politicians, and government officials, have been implicated in alleged corruption, bribery, money-laundering, and antitrust violations related to dealings with oil giant Petrobras.[161] Close cooperation between Brazil and U.S. enforcement authorities has been widely reported as Petrobras itself is subject to investigation by the DOJ and the SEC,[162] in addition to being targeted by private class actions and other suits in U.S. courts.[163] And, as part of an investigation that predates *Lava Jato*, known as "Operation Black Blood," Brazilian prosecutors

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160. *See* David Segal, "Petrobras Oil Scandal Leaves Brazilians Lamenting a Lost Dream," *The New York Times* (Aug. 7, 2015), http://www.nytimes.com/2015/08/09/business/international/effects-of-petrobras-scandal-leave-brazilians-lamenting-a-lost-dream.html?_r=0.

161. *See* Michael Smith, Blake Schmidt, and Sabrina Valle, "Brazil's Epic Scandal Takes Down a Banker," *Bloomberg* (Dec. 11, 2015), http://www.bloomberg.com/news/articles/2015-12-11/brazil-s-epic-scandal-takes-down-a-banker.

162. *See* Jeb Blount and Mica Rosenberg, "Exclusive: U.S. Graft Probes May Cost Petrobras Record $1.6 Billion or More – Source," *Reuters* (Aug. 18, 2015), http://www.reuters.com/article/us-brazil-petrobras-corruption-idUSKCN0QN0BB20150818.

163. *See* Asher Levine and Nate Raymond, "Petrobras Must Face U.S. Lawsuit Over Bribery, Judge Says," *Reuters* (Jul. 10, 2015), http://www.reuters.com/article/brazil-petrobras-classaction-idUSL1N0ZQ0QG20150710; Will Connors, "Ohio Attorney General Files Motion to Join Suit Against Brazil's Petrobras," *The Wall Street Journal* (Feb. 9, 2015), http://www.wsj.com/articles/ohio-attorney-general-files-motion-to-join-suit-against-brazils-petrobras-1423508513.

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recently have charged 12 individuals in connection with an alleged bribery scheme implicating various Petrobras executives and Dutch company SBM Offshore.[164]

Meanwhile, Brazilian federal police and prosecuting authorities' "Operation Zealots" is investigating more than 70 companies and more than 20 individuals, allegedly including large multinationals such as Ford Motor Company, Banco Santander, and meatpacker JBS, for bribes allegedly paid to members of Brazil's appellate tax council to reduce fines or dismiss tax evasion claims of more than BRL 19 billion.[165] Publicized early last year, the investigation reportedly began in 2013, in an effort joined by Brazil's Finance Ministry and Internal Revenue Service.[166]

As anti-corruption investigations continue in Brazil, it is only a matter of time before the government takes further action under the new, expanded rules. It is critical that companies doing business in Brazil take heed of the country's emergent regulatory framework and implement measures to ensure robust compliance with it, especially given the active enforcement environment.

C. Germany

1. Legislative Developments

(a) Anti-Corruption

In 2015, the German Parliament passed the Act on Fighting of Corruption, which amends various sections of the German Criminal Code with a view to align German law with international and European law requirements.[167]

For example, the revised provision on commercial bribery states that in connection with the purchase of goods or services, an employee or agent of a business must not solicit, accept, or allow to be promised a benefit as consideration for the breach of a duty owed to the business. It likewise outlaws the offer, promise, or granting of a benefit to an employee or agent of a business under such circumstances. Pursuant to the revised provision, criminal liability attaches irrespective of whether or not the criminal act was committed in the context of (unfair) competition.

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164. *See* "Brazil Prosecutors Charge 12 in SBM Offshore Graft sSheme," *Reuters* (Dec. 17, 2017), http://www.reuters.com/article/us-brazil-corruption-petrobras-sbm-idUSKBN0U017D20151218.

165. *See* Paulo Trevisani, "Brazil Probes Alleged Corruption Among Tax Officials," *The Wall Street Journal* (Apr. 7, 2015), http://www.wsj.com/articles/brazil-probes-alleged-mass-tax-fraud-1428439915.

166. *Id.*

167. Gesetz zur Bekämpfung der Korruption, *Federal Law Gazette I*, No. 46 (2015).

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Moreover, the Act: (i) extends the definition of "foreign officials" to all EU officials; (ii) introduces criminal liability of EU public officials located in Germany (*e.g.*, employees of the ECB in Frankfurt or of the EPO in Munich); and (iii) eliminates the requirement of a violation of the public official's duties (*i.e.*, looks only at the fact that a benefit has been given to the official).

In the health care sector, the German Federal Court of Justice held in 2012 that physicians working in private practice, and thus being neither public officials nor private agents, do not commit a criminal offense if they accept benefits from representatives of the pharmaceutical industry to encourage them to prescribe certain drugs. In response to this decision, the government adopted in October 2015 a draft proposal of an Act against corruption in the health care sector.[168] Once enacted, the new offense would criminalize requests by medical professionals, or granting of benefits to medical professionals, with the intent to achieve a favorable treatment in domestic or foreign competition, or to exercise undue influence on decisions to acquire, prescribe, or release medical products, or on the assignment of patients.

"In the health care sector, the German Federal Court of Justice held in 2012 that physicians working in private practice, and thus being neither public officials nor private agents, do not commit a criminal offense if they accept benefits from representatives of the pharmaceutical industry to encourage them to prescribe certain drugs. In response to this decision, the government adopted in October 2015 a draft proposal of an Act against corruption in the health care sector."

(b) EU Safe Harbor Decision and Related Actions

In a landmark judgment of October 6, 2015, the Court of Justice of the European Union invalidated the European Commission decision on the Safe Harbor Privacy Principles (the "Safe Harbor"). Until the Judgment, the Safe Harbor was one of the routes that permitted, under certain conditions, the transfer of personal data from the EU to organizations in the United States that self-certified their adherence to the Safe Harbor standards to the U.S. Department of Commerce. After the decision, data transfers to the United States can no longer be solely based on the Safe Harbor.

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168. Gesetz zur Bekämpfung von Korruption im Gesundheitswesen.

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According to the European Commission, data transfers from the EU can still be based on alternative routes like Standard Contractual Clauses, Binding Corporate Rules, or exceptions like the establishment, exercise or defense of legal claims or consent.[169] But the Safe Harbor decision's rationale arguably drew in question the Standard Contractual Clauses and the Binding Corporate Rules as bases for transfers.

The Article 29 Working Party, an independent advisory body that brings together representatives of all European data protection authorities, issued a statement confirming that data transfers can no longer be based on the Commission's invalidated Safe Harbor Decision. It further held that Standard Contractual Clauses can in the meantime be used as a basis for data transfers, although the Article 29 Working Party also stated that it will continue to analyze the impact of the judgment on these alternative tools. The statement further calls on Member States and EU Institutions to enter into discussions with the U.S. authorities to find legal and technical solutions for data transfers; the current negotiations around a new Safe Harbor could, in the view of the Article 29 Working Party, be part of this solution.

The Article 29 Working Party announced that if, by the end of January 2016, no appropriate solution with the U.S. authorities was found, and depending on the assessment of alternative tools for data transfer, the national data protection authorities will take all necessary and appropriate actions, including coordinated enforcement actions. The EU and the United States are currently in the process of finalizing negotiations about a new safe harbor regime, Safe Harbor II, and seek to meet the Article 29 Working Party deadline of end of January 2016.

And while transfers of data outside of the EU and the means to regulate them have been hotly debated, discussion continues over intra-EU regulation and reform. In 2012, the European Commission proposed a General Data Protection Regulation to reform the 1995 EU data protection regime. The reform aimed at establishing a single, pan-European law for data protection, thus replacing the current patchwork of 28 EU data protection laws. The rules will apply to companies doing business in Europe, irrespective of their place of establishment. Companies having outlets in several EU Member States will deal with a single authority only ("one-stop-shop mechanism"). Non-compliance with EU rules may result in fines amounting to 2% of the firm's worldwide turnover. The EU Parliament voted in March 2014 in favor of new data protection laws, and in June 2015 the EU Council, in which the national ministers sit, approved of the approach to the General Data Protection Regulation.

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169. *See* European Commission Press Rel., Q&A: Guidance on transatlantic data transfers following the Schrems ruling (Nov. 6, 2015), http://europa.eu/rapid/press-release_MEMO-15-6014_en.htm.

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The EU Parliament and the EU Council are co-legislators of the regulation and the EU Commission moderates the coordination in so-called trialogue-proceedings.

An agreement emanating from those proceedings was reached at the end of 2015 and the Regulation, following the EU Parliament resolution in January 2016, is expected to enter into force two years after the date of its publication.

D. France

1. Enforcement Activity

(a) The Safran Acquittal

In January 2015, the Court of Appeals in Paris acquitted French company Safran of corruption charges of which it had been convicted after a trial in 2013. The acquittal is significant because now not a single company has ever been convicted under French laws relating to overseas bribery since their adoption in 2000 as a consequence of France's signature to the OECD Anti-Bribery Convention; in addition, the court's reasoning and the position of the prosecutor are significant.

After a lengthy investigation, Safran and several of its officers were bound over to trial in 2013 on charges that the officers had made a significant payment to individuals connected to the government of Nigeria, which led to the company receiving an advantageous contract in that country. At trial, the individuals were acquitted based on insufficiency of the evidence, but the company was convicted.

At the time, that conviction was the first – and only – corporate conviction under the provision in the French Penal Code making overseas bribery of foreign officials illegal.[170] The company was fined €500,000 – the maximum amount then possible under the bribery laws, but a tiny sum compared to the approximate €170 million value of the contract it had obtained.

The company thereupon appealed its conviction, and the prosecutor appealed the acquittal of the individuals. On appeal, the prosecutor urged that the company be acquitted because the evidence did not show a basis for corporate criminal responsibility under Article 121-2 of the Penal Code, which provides that a corporation can be held criminally responsible for the acts of its "organs" or "representatives." The apparent reasoning of the prosecutor was that the individuals in question did not have a sufficiently high status to bind their employer and thus render it criminally liable for their acts. The prosecutor insisted, nonetheless, that the individuals should be found personally responsible.

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170. Code Pénal, Art. 435-3.

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In its decision, the court acquitted all of the defendants. It did not reach the issue of corporate criminal responsibility raised by the prosecutor because it concluded that all of the defendants had not been shown to have participated in an actual act of bribery. Specifically, the court noted that even though it appeared to have been proven that large sums of money were paid to Nigerian authorities, and that the company ultimately received a lucrative contract, there was insufficient evidence showing the connection between the two, or a *quid pro quo*.

This decision is likely to add to concerns about the efficacy of the French fight against overseas corruption. The court's conclusion that the evidence of an intentional bribe was insufficient, while fact-specific, is perplexing. Further, the prosecutor's position with respect to potential criminal responsibility of corporations, if followed, will make it very hard to pursue such corporations in the future.

In this context, it is worth noting that over the last several years four very large French companies – Alstom,[171] Technip,[172] Alcatel,[173] and Total[174] – have all entered into very expensive DPAs with the United States in order to resolve FCPA allegations by the DOJ. In some instances, the connection of their apparent activities to the United States was rather slim, and, in all cases, the companies could easily have been the target of a French prosecution. It is clear that U.S. authorities have concluded that they must be vigilant in prosecuting French companies subject to their jurisdiction in the absence – so far – of meaningful French efforts. The Safran acquittal will add support for that conclusion.

(b) The Oil-for-Food Decision

In 2013, a number of French and other companies were bound over for trial for violations of various criminal statutes, including corruption and fraud, related to their participation in the so-called "Oil-for-Food" program previously administered by the United Nations. Under that program, companies selling products in Iraq during the regime of Saddam Hussein were given limited exemptions from an

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171. DOJ Press Rel. 14-1448, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

172. DOJ Press Rel. 10-751, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (June 28, 2010), http://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million.

173. DOJ Press Rel. 10-481, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), http://www.justice.gov/criminal-fraud/case/united-states-v-alcatel-lucent-france-sa-et-al-court-docket-number-10-cr-20906.

174. DOJ Press Rel. 13-613, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international.

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embargo of that country in order to facilitate humanitarian aid. The essence of the charges was that these companies disregarded strict regulations that prohibited payments to the regime in order to induce the decisions to purchase their products. In June 2015, the trial court issued a decision acquitting all of the defendants, which was explained in a written judgment made public in September 2015.[175]

Most of the defendants were acquitted on the basis of the insufficiency of evidence against them. Four defendants, however, were subsidiaries of corporate parents that had previously entered into either a DPA or NPA with the DOJ (and, in some instances, into resolutions with the SEC). These four defendants raised a defense under the principle of *ne bis in idem* (generally comparable to the U.S. principle of double jeopardy), arguing that they could not be pursued a second time after having made substantial payments under the DPA/NPAs they had signed in the United States.

The court first found that French domestic law concerning *ne bis in idem* did not limit the prosecutor's ability to pursue these companies. It then reasoned that the International Covenant on Civil and Political Rights ("ICCPR"), signed by France in 1966 and transposed into its law, applied to the matter and that its Article 14.7 barred prosecution based on facts already prosecuted elsewhere. The court found the facts underlying the U.S. DPA/NPAs were the same as those alleged in France; critically, and controversially, the court reasoned that the signature of either a DPA or an NPA sufficed as a prior "final conviction" triggering application of the *ne bis in idem* / double jeopardy provision of the ICCPR.

The prosecutor has appealed this decision, and it is unclear whether it will come to be viewed as the applicable law in France. The decision will in any event raise interesting questions. It appears highly unlikely that any court in the United States would rule in a reciprocal fashion: Even though the United States signed the ICCPR, it did so with certain specific reservations and has never transposed its obligations into domestic law; as a result, the Supreme Court of the United States has clearly indicated that it confers no rights in U.S. courts.[176]

The Oil-for-Food decision may thus create the odd incentive for companies in France (and other countries that may follow its lead with respect to the *ne bis in idem* principle) to reach an early agreement with U.S. authorities on the assumption that such an agreement will preclude further prosecution in their home countries.

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175. *See* Frederick T. Davis and Antoine F. Kirry, "A Recent Decision in France Applies 'International Double Jeopardy' Principles to U.S. DPAs," *FCPA Update*, Vol. 7, No. 2 (Sept. 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/09/fcpa_update_september_2015.pdf.

176. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *see also United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002) (recognizing that "the ICCPR does not create judicially-enforceable rights").

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2. Legislative Developments

(a) Guidelines on Prevention of Corruption in Commercial Transactions

In March 2015, France's Central Service for Prevention of Corruption ("SCPC")[177] issued Guidelines for the Reinforcement of Prevention of Corruption in Commercial Transactions ("the SCPC Guidelines").[178] The purpose of the SCPC Guidelines is to provide French companies and other professional organizations, regardless of their size, with recommendations to help them to develop effective internal policies aimed at detecting and preventing corruption, at both national and transnational levels. Corruption, under these guidelines, includes bribery and trading in influence as defined by the French Penal Code. The recommendations were drafted in consultation with other relevant French public bodies and private sector representatives.

The SCPC Guidelines are formulated around six principles, mostly inspired by the six principles of the UK Bribery Act Guidance published in March 2011 by the UK Ministry of Justice: (i) top-level management commitment to "zero tolerance" (which could be referred to as the "tone at the top" principle); (ii) regular risk assessment; (iii) implementation of an anti-corruption compliance program; (iv) internal and external control mechanisms; (v) communication, training, and monitoring of the anti-corruption compliance program; and (vi) internal sanction policy with appropriate disciplinary proceedings.[179] The SCPC Guidelines indicate that setting up an anti-corruption compliance program requires drafting a reference document that "allows the dissemination of a culture of integrity," designating a compliance officer, designing appropriate procedures, and adopting a whistle-blowing mechanism.

The SCPC recommends that the companies and organizations draw upon those principles to implement anti-corruption compliance programs. The SCPC Guidelines stress that the risk-based approach, not the quantity of measures, should be the cornerstone of an effective program. In this context, an initial identification and assessment of the corruption-related risks faced by the company or organization are needed in order to implement operational measures proportionate to the major identified risks.

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177. The SCPC, an inter-ministerial agency part of the French Ministry of Justice, created in 1993, has a general role of prevention of corruption-related risks.

178. http://www.justice.gouv.fr/include_htm/pub/Lignes_directrices_EN.pdf.

179. Guidance, note 54, *supra*.

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Although the SCPC Guidelines are not legally binding, the document highlights that they were adopted in the context of an "increased legal and financial risk resulting from enhancement of French legislation."[180] Absent a framework that encourages a negotiated outcome where a robust compliance program is an important positive element, as in the United States, or a defense as exists under the UK Bribery Act, compliance programs in France, while increasingly encouraged, have little if any legal significance. These Guidelines should thus be viewed in the longer-term context of possible future developments in France as will be described in the next section.

(b) Enhancement of the Legislative Framework to Effectively Fight Corruption

In July 2015, France's Finance Minister, Michel Sapin, announced that the government was contemplating a legislative reform intended to enhance the transparency of economic and financial businesses. In this context, a bill "For the Transparency of the Economic Life" ("Loi Sapin II") was presented to the Council of Ministers, and should be submitted for debate at the National Assembly in early 2016. The bill reportedly aims at: (i) creating a new anti-corruption authority (which will replace the current SCPC that has no investigative powers); (ii) providing better protection of whistleblowers; (iii) strengthening measures aimed at preventing and punishing corruption (inspired by the "monitoring" procedures and practices in the United States and the United Kingdom); and (iv) implementing the EU fourth Anti-Money Laundering Directive promulgated on May 20, 2015.[181]

The most controversial measure contemplated by the government is the possible introduction into French Law of a DPA procedure. While there already exists a "guilty plea" procedure in France, called the *Comparution sur Reconnaissance Préalable de Culpabilité* ("CRPC"), it does not avoid a criminal judgment (such as under a DPA or an NPA). Nor is it based upon real negotiation as has been developed elsewhere. The current French bill may not include a DPA provision due to opposition of some members of the legislature and judiciary to such a "transactional process," according to people familiar with the matter. There has been much debate in France about American DPA/NPAs, with many opining that they do not fit within French criminal procedures or legal traditions. Further discussion is expected to take place at the French Parliament, which may lead to the enactment of some new provisions in the course of the year.

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180. SCPC Guidelines, note 178, *supra*, at 3.

181. "L'action du Gouvernement en faveur de la transparence et de la probité des acteurs économiques et financiers" (Report of the Council of Ministers), *Gouvernement.fr* (July 22, 2015), http://www.gouvernement.fr/conseil-des-ministres/2015-07-22/l-action-du-gouvernement-en-faveur-de-la-transparence-et-de-.

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(c) Data Protection

As in Germany and elsewhere, recent enforcement and legislative developments show how data protection is becoming increasingly important in France. In September 2015, the French highest court (*Cour de cassation*) decided that data were considered "personal data," and their processing should follow the French Data Protection Authority ("CNIL") procedures, regardless whether they concern only one person and contain little information.[182]

In addition, a draft law related to the digital strategy of the government was adopted by the Council of Ministers on December 9, 2015 and is currently subject to further debate at the Parliament.[183] It contains some provisions aiming at strengthening the protection of individuals' personal data in the context of a digital society. The CNIL's opinion on the draft law highlights that a number of issues remain to be addressed, notably with respect to the consistency of the proposed French legislation with the draft EU Data Protection Regulation (including in terms of Data Portability), and the low level of financial penalties for violation of data protection provisions.[184] These measures could well have effects on internal investigations and on cross-border law enforcement generally.

E. People's Republic of China ("PRC")

1. Developments in the PRC

China's anti-corruption campaign continued without respite in 2015, with active enforcement by the Central Committee on Discipline and Inspection ("CCDI") (the Communist Party's internal disciplinary organ), netting numerous lower level officials ("flies") and the most significant high-level official ("tiger") to date.

In the course of 2015, the focus of the crackdown appears to have turned to state-owned enterprises and, starting in the fall, to the financial services industry in conjunction with insider-trading and other securities laws violations following the stock market slump over the summer. China also passed the ninth amendment to the

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182. Cass., Crim., n° 13-85.587 (Sept. 9, 2015).

183. "Projet de loi pour une République numérique," *Republique numérique* (Sept. 26, 2015), http://www.republique-numerique.fr/project/projet-de-loi-numerique/step/projet-de-loi-adopte-par-le-conseil-des-ministres. As of today, the project has not been adopted by the legislative chambers.

184. "Projet de loi République numérique: Publication de l'Avis de la CNIL," *CNIL* (Dec. 17, 2015), http://www.cnil.fr/linstitution/actualite/article/article/projet-de-loi-republique-numerique-publication-de-lavis-de-la-cnil/.

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PRC Criminal Law effective on November 1, 2015.[185] It also promulgated other anti-corruption related regulations, including specific regulations concerning the health care sector. China's anti-corruption crackdown shows no sign of abating in 2016.

(a) Developments in Enforcement

The year 2015 began with President Xi Jinping vowing to maintain "zero tolerance" for corruption.[186] In just the first quarter of 2015, Chinese prosecutors investigated 2,573 public officials for corruption and bribery, and 1,891 individuals for offering bribes.[187] As of the end of October, at least 25 provincial, ministerial, or higher-level officials (including senior executives from state-owned enterprises ("SOEs")) have faced criminal investigations or discipline of the Communist Party of China ("CPC").[188] Most significantly, in June Zhou Yongkang – the former Politburo member and domestic security chief – was sentenced to life imprisonment for bribery and other crimes, the highest level official ever to be convicted of such crimes.[189]

An increasing number of investigations were also launched at SOEs in 2015. Many of these were akin to "industry sweeps" – wide-ranging investigations into multiple companies within a particular industry where the government believes corrupt practices are prevalent. For example, CCDI has launched three rounds of special inspection this year. Each round of inspection targeted several key SOEs in highly-regulated sectors such as energy, telecommunication, and automobiles. Companies under fire include oil and gas conglomerates CNPC and CNOOC (which were historically connected with Zhou Yongkang), as well as telecommunication giants China Telecom and China Mobile.[190] Although such sweeps have largely focused on SOE officials, these publicized investigations, arrests, and disappearances pose

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185. National People's Congress of China, "Amendment to the Criminal Law of the People's Republic of China (IX)" [in Chinese: *Zhong Hua Ren Min Gong He Guo Xing Fa Xiu Zheng An (Jiu)*], *XinhuaNet* (Aug. 30, 2015), http://news.xinhuanet.com/2015-08/30/c_1116414724.htm. Unofficial English translation available at Westlaw China, http://app.westlawchina.com/maf/ china/app/document?&src=nr&docguid=i00 0000000000014f819472336c4ba8f0&lang=en. For a detailed analysis of the amendment, please see Sean Hecker, Bruce E.Yannett, and Philip Rohlik, "China Amends Its Bribery Laws," *FCPA Update*, Vol. 7, No. 2 (Sept. 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/09/fcpa_update_september_2015.pdf.

186. Ting Shi, "Xi Vows to Wage Enduring Anti-Corruption Campaign in China," *Bloomberg Business* (Jan. 14, 2015), http://www.bloomberg.com/news/articles/2015-01-14/xi-vows-to-wage-protracted-campaign-against-corruption-in-china.

187. PRC Supreme People's Procuratorate, "Features of Anti-Corruption and Anti-Bribery Works in the First Quarter of 2015," *SPP* (Apr. 27, 2015), http://www.spp.gov.cn/ztk/2015/cbzwfz/dxal/201504/t20150427_96244.shtml (Chinese).

188. "The CCDI Cracked Down Two 'Tigers' in Three Days, and 25 Provincial Level Officials Have Fallen Down This Year," *CPCNews* (Nov. 6, 2015), http://fanfu.people.com.cn/n/2015/1106/c64371-27783895.html (Chinese).

189. James T. Areddy, "China's Former Security Chief Zhou Yongkang Sentenced to Life in Prison," *The Wall Street Journal* (June 11, 2015), http://www.wsj.com/articles/chinas-former-security-chief-zhou-yongkang-sentenced-to-life-in-prison-1434018450.

190. Keira Lu Huang, "China's State-Owned Firms Get Their 'Report Card' on Corruption," *South China Morning Post* (June 17, 2015), http://www.scmp.com/news/china/policies-politics/article/1823022/chinas-state-owned-firms-get-their-report-card.

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challenges for multinational companies doing business with SOEs whose senior executives appear on the front pages in connection with corruption investigations.

Following market turmoil in the summer, the enforcement focus appears to have shifted to financial and banking sectors. On October 23, the CCDI announced its third round of special inspection, the targets including the People's Bank of China (the central bank), the securities regulator China Securities Regulatory Commission ("CSRC"),[191] several major state-owned banks, insurers, and brokerages, including the major financial conglomerate CITIC Group.[192] The CCDI also investigated Yao Gang – CSRC's vice-chairman – over suspected corruption,[193] and demoted four banking officials for corruption-related violations of the party's rules.[194]

The crackdowns in financial sectors show the overlap of anti-corruption and securities laws, and potentially may address the close relationship between China's political elite and the markets, an arena of potential corruption that has been neglected.[195] In early November, Chinese police arrested Xu Xiang – viewed as the most successful hedge fund manager in China – for suspected insider trading.[196] Then, the CSRC initiated an investigation into major brokerage firms CITIC Securities and Guosen Securities for suspected insider dealing and leaking inside information.[197] Despite the market misconduct triggering them, the timing of these investigations – immediately after the CCDI inspected the financial sector – may suggest that the current anti-corruption campaign aims at cleaning up the financial market.

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191. Daniel Ren, "China's Graft Watchdog Sends Inspection Teams to Review Financial Authorities," *South China Morning Post* (Nov. 2, 2015), http://www.scmp.com/news/china/policies-politics/article/1874791/chinas-graft-watchdog-sends-inspection-teams-review.

192. "China to Target Financial Sector in New Anti-Graft Inspection," *China Daily* (Oct. 23, 2015), http://www.chinadaily.com.cn/china/2015-10/23/content_22270405.htm.

193. "Top Official at China's Securities Watchdog Caught in Anti-Corruption Crackdown," *South China Morning Post* (Nov. 13, 2015), http://www.scmp.com/news/china/policies-politics/article/1878631/deputy-head-chinas-securities-regulator-placed-under.

194. Shu Zhang and Matthew Miller, "China's Anti-Graft Watchdog Demotes Four Banking Regulators," *Reuters* (Nov. 22, 2015), http://www.reuters.com/article/2015/11/23/china-corruption-demotions-idUSL3N13I19G20151123#jMUOHBQLqKI4MzHM.97.

195. *See* Shirley Yam, "Princelings and patronage pose barriers to cleaner IPOs," *South China Morning Post* (July 5, 2014), http://www.scmp.com/business/article/1547033/princelings-and-patronage-pose-barriers-cleaner-ipos (remarking on the lack of an investigation of the CSRC given the connections between company listing and powerful political families).

196. Daniel Ren, "Billionaire Hedge Fund Manager Known as 'China's Warren Buffett' in Dramatic Highway Arrest for Insider Trading," *South China Morning Post* (Nov. 3, 2015), http://www.scmp.com/news/china/policies-politics/article/1875135/police-arrest-chinas-no-1-hedge-fund-manager-insider.

197. Xie Yu, "Three CITIC Securities Executives in Chinese Police Probe Suspected of Insider Dealing and Leaking Inside Information," *South China Morning Post* (Sept. 16, 2015), http://www.scmp.com/news/china/money-wealth/article/1858617/citic-securities-top-executives-held-investigation.

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China also increased cooperation with other governments, seeking the return of corrupt officials who fled aboard. With a program called "Operation Foxhunt," launched in 2014,[198] and "Operation Skynet"[199] in 2015, China has sought repatriation of potentially thousands of officials who left China over the past two decades with the proceeds of corruption. Despite the lack of extradition treaties with many Western nations (and due process concerns about the Chinese justice system), China has repatriated 91 individuals suspected of corruption from abroad (including the United States, Canada, and New Zealand) from October 2014 to November 2015.[200]

"[I]n connection with China's 2014 crackdown on pharmaceutical companies, the 2015 Donation Rules represent a continued focus by Chinese regulators on corruption and improprieties in the health care sector which can provide valuable guidance for companies to evaluate and control donation-related bribery risks."

(b) Legislation

On November 1, 2015, China passed the Ninth Amendment to its Criminal law, containing significant changes regarding bribery. The amendment (i) explicitly criminalizes the giving of bribes to close relatives of state functionaries,[201] and (ii) narrows the circumstances under which a bribe payer can seek leniency.[202] Under prior law, only acceptance of a bribe by, not tendering one to, a relative of an official was a crime. There were also many provisions that allowed bribe-payers to avoid punishment. The Ninth Amendment seeks to equalize treatment of bribe-takers and bribe-payers, signaling that anti-corruption enforcement may shift in focus to bribe-payers.[203] The amendment also specifies new circumstances

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198. James Anderlini, "China Takes Anti-Corruption Drive Overseas," *Financial Times* (Sept. 16, 2014), http://www.ft.com/intl/cms/s/0/6ec199d0-3cc5-11e4-871d-00144feabdc0.html#axzz3toiP81KP.

199. Jamie Fullerton, "Operation Skynet: China's Anti-Corruption Campaign Goes International as Beijing Reaches Out to Uncover Officials Fled Abroad," *Independent* (Mar. 30, 2015), http://www.independent.co.uk/news/world/asia/operation-skynet-chinas-anti-corruption-campaign-goes-international-as-beijing-reaches-out-to-10142310.html.

200. Zhang Yi, "91 Suspects Repatriated in Past Year," *China Daily* (Nov. 26, 2015), http://www.chinadaily.com.cn/china/2015-11/26/content_22519243.htm.

201. Criminal Law Amendment IX § 46.

202. *Id.* § 45(2).

203. Bribe-takers may still face more severe punishments. For example, only state functionaries who take bribes are eligible for the most severe penalties for bribery, including the death penalty. *See id.* § 44 (expanding the possibility of capital punishment for state functionaries who accept "especially huge" bribes causing "especially serious loss to the interests of the state").

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in which individual offenders (including senior managers/employees responsible for an organization's bribery) will face monetary penalties.[204] It also adopts more flexible sentencing for state functionaries who accept bribes, granting courts and prosecutors more discretion, which may lead to more severe punishment, especially in cases of smaller bribes.[205]

Another key development is a new set of rules governing acceptance of donations by healthcare entities.[206] The rules, "Administrative Measures on Accepting Donations for Public Welfare by Healthcare Entities" (the "2015 Donation Rules"), replaced a regulation from 2007.[207] The 2015 Donation Rules (i) expand the scope of "donation" to include, for example, both foreign and domestic donors,[208] (ii) detail the circumstances in which donations are allowed or prohibited,[209] (iii) require healthcare entities to set up a pre-acceptance evaluation mechanism,[210] and (iv) include other more stringent restrictions on accepting and using donations, such as periodic audits[211] and disclosure.[212] As with its 2007 predecessor, the 2015 Donation Rules regulate only healthcare entities that accept donations and they have no binding effect on any pharmaceutical/medical device company making donations. However, in connection with China's 2014 crackdown on pharmaceutical companies, the 2015 Donation Rules represent a continued focus by Chinese regulators on corruption and improprieties in the health care sector which can provide valuable guidance for companies to evaluate and control donation-related bribery risks.

Finally, in a development that bears watching in 2016, on December 30, 2015, the State Administration of State Assets Control ("SASAC"), the Ministry of Finance, and the National Development and Reform Commission jointly issued

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204. Amendment IX §§ 10, 44-49.

205. *Compare id.* § 44, *with* Criminal Law before Amendment IX, Art. 390(1).

206. On October 20, China's National Health and Family Planning Commission published the 2015 Donation Measures on its website, which were actually passed on August 26 and became effective the same day. *See* "2015 Donation Measures," *NHFPC* (Oct. 20, 2015), http://www.nhfpc.gov.cn/caiwusi/s3573/201510 /761f2a9e36f74c1e9f00849f8de61f49.shtml (Chinese).

207. Interim Administrative Measures for the Acceptance of Public Donations and Financial Aid by Medical and Health Care Institutions (Apr. 6, 2007). Unofficial English translation available at Westlaw China, http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i3cf76ad30000011ef35911c063489e94&lang=en.

208. 2015 Donation Rules, Art. 3.

209. *Id.* Arts. 5 & 6.

210. *Id.* Arts 11-15.

211. *Id.* Art. 49.

212. *Id.* Arts. 40-46.

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Guidelines on Functions and Classification of State-Owned Enterprises[213] (the "Joint Guidelines"), setting forth the basic structure of long awaited reforms to Chinese state-owned enterprises.

Under the Joint Guidelines, SOEs will be divided into "commercial" SOEs and "public interest" SOEs, with the former having the primary purpose of improving the economy and "maintaining and increasing value of state-owned assets"[214] and the latter having the main objective of "serving social purposes" and "providing public products and services."[215] The Guidelines do not provide much detail about how specific SOEs are to be classified (a determination initially left to local SASAC branches[216] and there are several sub-categories of "commercial" SOEs described: SOEs in competitive industries;[217] SOEs in key industries;[218] SOEs in natural monopolies;[219] and SOEs that must be solely state funded.[220] Although there is considerable uncertainty about how (and if) SOE reform will play out in practice, eventual designations under the Guidelines could raise interesting questions for compliance officers and pose a challenge to U.S. regulators' one-size-fits-all approach to the definition of "instrumentality" under the test articulated in *United States v. Esquenazi*.[221]

F. Russia

Last year, Russian courts heard a number of corruption-related cases, both new ones and those resolving longstanding investigations, with the total number of completed criminal corruption cases rising by nine percent in comparison with 2014. The majority of the cases involved charges against bribe-payers and relatively small bribe amounts.

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213. "Guidelines on Functions and Classification of State-Owned Enterprises" [in Chinese: *Guan Yu Guo You Qi Ye Gong Neng Jie Ding Yu Fen Lei De Zhi Dao Yi Jian*], *Sasac.gov.cn* (Dec. 30, 2015), http://www.sasac.gov.cn/n85881/n85921/c2169765/content.html.

214. *Id.* § 1.

215. *Id.*

216. *Id.* § 3.

217. *Id.* § 2(1). SOEs in competitive industries are encouraged to have mixed-ownership (for example, absolutely or relatively controlled by the State, or having a minority stake held by the State), or to be listed on stock exchanges.

218. *Id.* SOEs in key industries are those important to national security or economy. The government is required to maintain a controlling stake in such SOEs.

219. *Id.* SOEs in natural monopolies are to be separated from the government, and the government will take on a supervising role.

220. *Id.* SOEs that must be solely state funded should also bring in government funds from different sources, in order to diversify their state ownership.

221. 752 F.3d at 920-26.

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Three large cases against bribe-givers are worthy of note:

- A former Defense Ministry official was sentenced to five years' imprisonment for fraud, money laundering, and exceeding and abusing authority in the so-called Oboronservis case;[222]
- A former Deputy Minister of Regional Development was sentenced to 6.5 years' imprisonment and a fine of RUB 1 million for embezzlement of RUB 40 million in government funds allocated to the 2012 APEC summit;[223] and
- An investigator of the Russian Ministry for Internal Affairs was sentenced to ten years' imprisonment and a RUB 500,000 fine for taking a large bribe.[224]

Two other large criminal cases, one involving the former governor of the Sakhalin region and his subordinates and the other involving the head of the Republic of Komi and his deputies, have been initiated by Russian authorities.[225]

Russian prosecutors have continued to pursue cases against companies for failure to adopt anti-corruption compliance policies and take other measures to prevent corruption,[226] with approximately 600 such cases resolved in 2015.[227]

Despite these developments, Russia's commitment to pursuing large-scale bribery cases against companies and their employees remains uncertain. It is telling in this regard that none of the foreign enforcement actions dealing with Russian companies or foreign companies doing business in Russia appears to have spurred Russian authorities to undertake their own enforcement action.[228]

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222. For more details, see Alyona N. Kucher, Bruce E. Yannett, Jane Shvets, Anna V. Maximenko, and Elena M. Klutchareva, "Evolution and Revolution in Anti-Corruption Regulation in Russia," *FCPA Update*, Vol. 6, No. 11 (June 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/06/fcpa_update_june_2015.pdf.

223. "Byvshy zamgalvy Minregionrazvitya poluchil 6.5 let lisheniya svodoy za khishenia," *Lenta.ru* (June 15, 2015), http://lenta.ru/news/2015/06/15/panov1/.

224. "Eks-sledovatelya MVD prigovorili k 10 godam kolonii za krupnuyu vzyatku," *Rossiyskaya gazeta* (June 8, 2015), http://m.rg.ru/2015/06/08/vzyatka-anons.html.

225. *See* Nikolay Osipov, "Korruptsiya po-sakhalinski: podrobnosti dela Khoroshavina," *Radiovesti* (Mar. 5, 2015), http://radiovesti.ru/article/show/article_id/162096; "Sud do 27 fevralya prodlil arest ex-gubernatoru Sakhalina Khoroshavinu," *Rianovosti* (Nov. 25, 2015), http://ria.ru/incidents/20151125/1328360577.html; "Zaderjanny Gayzer rukovodil ne tolko Komi, no i prestupnoy gruppoy," *Rianovosti* (Sept. 19, 2015), http://ria.ru/incidents/20150919/1264339855.html; "Protiv Glavy Komi Gayzera zaveli novoye ugolovnoye delo," *Forbes* (Sept. 25, 2015), http://www.forbes.ru/news/301123-protiv-glavy-komi-gaizera-zaveli-novoe-ugolovnoe-delo.

226. For more details see Kucher *et al.*, "Evolution and Revolution in Anti-Corruption Regulation in Russia," note 222, *supra*.

227. *See Sudact* (last visited Jan. 15, 2016), http://sudact.ru/regular/doc/?page=1&regular-doc_type=&regular-court=&regular-date_from=01.01.2015&regular-case_doc=&regular-workflow_stage=10&regular-date_to=18.12.2015&regular-area=&regular-txt=13.3+%D0%97%D0%B0%D0%BA%D0%BE%D0%BD%D0%B0+%D0%BE+%D0%BF%D1%80%D0%BE%D1%82%D0%B8%D0%B2%D0%BE%D0%B4%D0%B5%D0%B9%D1%81%D1%82%D0%B2%D0%B8%D0%B8+%D0%BA%D0%BE%D1%80%D1%80%D1%83%D0%BF%D1%86%D0%B8%D0%B8&_=1450447994972&regular-judge=.

228. *See* Alyona N. Kucher, Andrew M. Levine, Bruce E. Yannett, Steven S. Michaels, Jane Shvets, and Alisa Melekhina, "Spotlight on Russia and its Neighbours," *FCPA Update*, Vol. 6, No. 11 (June 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/06/fcpa_update_june_2015.pdf.

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In fact, recent legislation and legislative proposals may make it more difficult for companies doing business in Russia to comply with requests from foreign regulators. In the most recent example, a proposed amendment to the Russian Federal Law on Information, Information Technologies, and Protection of Information currently under consideration by the Russian Duma would require companies to notify and obtain approval from Russian authorities before responding to information requests from foreign agencies.[229] The explanatory note prepared in connection with the legislative proposal states that the law is intended to prevent Western countries, and the United States in particular, from bypassing the MLAT process for requesting information.[230] Other previously-enacted amendments to the Russian Data Protection Law may also complicate companies' ability effectively to gather data to conduct internal investigations or to produce Russia-based documents to locations outside of Russia.[231]

IV. Conclusion

Despite a year in which the U.S. enforcement authorities even more firmly shifted focus to prosecuting individuals and, in general, FCPA enforcement was muted, the risks to companies and individuals alike are likely to increase in the coming year. Perhaps more importantly, home-grown anti-corruption efforts outside the United States are coming into their own in unprecedented ways that will magnify the complexity of the compliance challenges. Between the cases in the U.S. and other pipelines and the growing clamor throughout the globe for an end to corrupt practices, those subject to transnational anti-bribery laws continue to have their work cut out for them.

– The Editors

This month's issue of FCPA Update was prepared by Debevoise partners Paul R. Berger, Sean Hecker, Andrew M. Levine, David A. O'Neil, Dimitri Nikiforov, Dr. Thomas Schürrle, Karolos Seeger, and Bruce E. Yannett, of counsel Frederick T. Davis, counsel Steven S. Michaels, international counsel Matthew Getz, Philip Rohlik, and Jane Shvets,

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229. The text of the bill is available at: *Asozd2* (last visited Jan. 15, 2016), http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&work/dz.nsf/ByID&41EEC0F59E267E0643257EF20045CBF6.

230. The text of the explanatory note is available at: *Asozd2* (last visited Jan. 15, 2016), http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&work/dz.nsf/ByID&1F1C3E9F08D9852543257EF2004590BD.

231. *See* Karolos Seeger, Colby A. Smith, Anna V. Maximenko, and Jane Shvets, "Russia: Recent Developments Bearing Upon Counterparty Selection Process and Data Domestication," *FCPA Update*, Vol. 7, No. 2 (Sept. 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/09/fcpa_update_september_2015.pdf; Alan V. Kartashkin, Andrew M. Levine, Dmitri V. Nikiforov, Anna V. Maximenko, and Jane Shvets, "Bringing Money and Data Back to Russia," *FCPA Update*, Vol. 5, No. 12 (July 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/07/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_july2014.pdf.

associates Daniel Aun, Bernardo Becker Fontana, Lucy Grouse, Charlotte Gunka, Elena M. Klutchareva, Anna V. Maximenko, Dr. Friedrich Popp, and Eileen C. Zelek, and law clerk Jessica Polebaum.

They may be reached at prberger@debevoise.com, shecker@debevoise.com, amlevine@debevoise.com, daoneil@debevoise.com, dvnikiforov@debevoise.com, tschuerr@debevoise.com, kseeger@debevoise.com, beyannett@debevoise.com, ftdavis@debevoise.com, ssmichaels@debevoise.com, mgetz@debevoise.com, prohlik@debevoise.com, jshvets@debevoise.com, daun@debevoise.com, bbeckerf@debevoise.com, lgrouse@debevoise.com, cgunka@debevoise.com, emklutchareva@debevoise.com, avmaximenko@debevoise.com, fpopp@debevoise.com, eczelek@debevoise.com, and jpolebau@debevoise.com. Their biographies and additional contact information are available at www.debevoise.com.

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Company	Settlement Amount	Citations
Bank of New York Mellon Corporation	SEC: $14,800,000, consisting of $8,300,000 (disgorgement), $1,500,000 (pre-judgment interest), and $5,000,000 (penalty)	*In re The Bank of New York Mellon Corp.*, SEC Admin. Pro. 3-16762 (Aug. 18, 2015) SEC Press Rel. 2015-170, SEC Charges Bank of New York Mellon With FCPA Violations, (Aug. 18, 2015), http://www.sec.gov/news/pressrelease/2015-170.html
BHP Billiton Ltd. and BHP Billiton Plc	SEC: $25,000,000 (penalty)	*In re BHP Billiton Ltd. and BHP Billiton Plc*, SEC Admin. Pro. 3-16546 (May 20, 2015) SEC Press Rel. 2015-93, SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015), http:www.sec.gov/news/pressrelease/2015-93.html
Bristol-Myers Squibb Company	SEC: $14,692,000, consisting of $11,442,000 (disgorgement), $500,000 (pre-judgment interest), and $2,750,000 (penalty)	*In re Bristol-Myers Squibb Co.*, SEC Admin. Pro. 3-16881 (Oct. 5, 2015) SEC Press Rel. 2015-229, SEC Charges Bristol-Myers Squibb With FCPA Violations (Oct. 5, 2015), http://www.sec.gov/news/pressrelease/2015-229.html
FLIR Systems, Inc.	SEC: $9,504,584, consisting of $7,534,000 (disgorgement), $970,584 (pre-judgment interest), and $1,000,000 (penalty)	*In re FLIR Systems, Inc.*, SEC Admin. Pro. 3-16478 (Apr. 8, 2015) SEC Press Rel. 2015-62, SEC Charges Oregon-Based Defense Contractor With FCPA Violations (Apr. 8, 2015), http://www.sec.gov/news/pressrelease/2015-62.html

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Company	Settlement Amount	Citations
Goodyear Tire and Rubber Company	SEC: $17,028,065, consisting of $14,922,525 (disgorgement), and $2,105,540 (prejudgment interest)	*In re The Goodyear Tire and Rubber Company,* SEC Admin. Pro. 3-16400 (Feb. 24, 2015) SEC Press Rel. 2015-38, SEC Charges Goodyear with FCPA Violations (Feb. 24, 2015), http://www.sec.gov/news/pressrelease/2015-38.html
Hitachi, Ltd.	SEC: $19,000,000 (penalty)	*SEC v. Hitachi, Ltd.,* Civil Action No. 1:15-cv-01573 (D.D.C. filed Sept. 28, 2015) SEC Press Rel. 2015-212, SEC Charges Hitachi with FCPA Violations (Sept. 28, 2015), http://www.sec.gov/news/pressrelease/2015-212.html
Hyper-dynamics Corp.	SEC: $75,000 (penalty)	*In re Hyperdynamics Corp.,* SEC Admin. Pro. 3-16843 (Sept. 29, 2015)
IAP Worldwide, Services, Inc.	DOJ: $7.1 million (penalty)	Non-Prosecution Agreement (executed June 16, 2015) DOJ Press Rel. 15-745, IAP Worldwide Services Inc. Resolves Foreign Corrupt Practices Act Investigation (June 16, 2015), http://www.justice.gov/opa/pr/iap-worldwide-services-inc-resolves-foreign-corrupt-practices-act-investigation
Louis Berger International, Inc.	DOJ: $17.1 million (penalty)	*United States v. Louis Berger International, Inc.*, Mag. No. 15-3624, Deferred Prosecution Agreement (D.N.J. July 7, 2015)DOJ Press Rel. 15-903, Louis Berger International Resolves Foreign Bribery Charges (July 17, 2015), http://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges

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Company	Settlement Amount	Citations
Mead Johnson Nutrition Company	SEC: $12,030,000, consisting of $7,770,000 (disgorgement), $1,260,000 (prejudgment interest), $3,000,000 (penalty)	*In re Mead Johnson Nutrition Company*, SEC Admin. Pro. 3-16704 (July 28, 2015) SEC Press Rel. 2015-154, SEC Charges Mead Johnson Nutrition With FCPA Violations (July 28, 2015), http://www.sec.gov/news/pressrelease/2015-154.html
PBSJ Corporation	SEC: $3,407,875, consisting of $2,892,504 (disgorgement), $140,371 (prejudgment interest), $375,000 (penalty)	Deferred Prosecution Agreement (executed Nov. 24, 2015 and announced Jan. 22, 2015) SEC Press Rel. 2015-13, SEC Charges Former Executive at Tampa-Based Engineering Firm With FCPA Violations: Company to Pay $3.4 Million in Deferred Prosecution Agreement (Jan. 22, 2015) http://www.sec.gov/news/pressrelease/2015-13.html

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Paul R. Berger
Co-Editor-in-Chief
+1 202 383 8090
prberger@debevoise.com

Sean Hecker
Co-Editor-in-Chief
+1 212 909 6052
shecker@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Steven S. Michaels
Executive Editor
+1 212 909 7265
ssmichaels@debevoise.com

Erich O. Grosz
Co-Managing Editor
+1 212 909 6808
eogrosz@debevoise.com

Jane Shvets
Deputy Managing Editor
+1 212 909 6573
jshvets@debevoise.com

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Matthew Getz
Co-Managing Editor
+44 20 7588 4180
mgetz@debevoise.com

Philip Rohlik
Co-Managing Editor
+852 2160 9856
prohlik@debevoise.com

Eileen C. Zelek
Assistant Editor
+1 212 909 6767
eczelek@debevoise.com

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