INTRODUCTION TO THE MID-YEAR UPDATE

To supplement our annual Anti-Corruption Business Guide, this mid-year update reports on FCPA and UK Bribery Act enforcement actions and developments between January and June 2017.

This mid-year update discusses the most significant anti-corruption enforcement developments from the first six months of 2017, with a focus on developments in the United States and the United Kingdom.

In the United States, officials new to the Department of Justice (DOJ) have made clear that enforcement of the Foreign Corrupt Practices Act (FCPA) will continue to be a priority under the new administration. The DOJ’s FCPA pilot program, which sets forth the DOJ's criteria for reflecting mitigation credit in an FCPA investigation, has remained in force. Pursuant to that pilot program, the DOJ announced declinations of prosecution in two matters where it said the company’s disclosure, cooperation, and remediation met its standards. One of those matters involved unusually severe conduct for a declination, including involvement of the parent company’s senior management in the corrupt activities.

The US Supreme Court also decided a case that could impact the Securities and Exchange Commission’s (SEC) frequent practice of seeking disgorgement of allegedly ill-gotten gains in FCPA matters. In Kokesh v. SEC, a case briefed and argued before the Supreme Court by Jenner & Block Partner Adam G. Unikowsky, the Supreme Court held that disgorgement is subject to a five-year statute of limitations, upending the SEC’s position that no limitation period applied to disgorgement actions. The Court’s decision also invites broader challenges to the SEC’s authority to impose disgorgement at all.

Meanwhile, in the United Kingdom, the Serious Fraud Office (SFO) continued aggressive enforcement of the UK Bribery Act (UKBA). Its settlement with Rolls-Royce included the largest fine imposed under the UKBA to date, a total of £671 million, including criminal penalties paid to authorities in the United States and Brazil.

The Rolls-Royce global resolution is a concrete example of the international cooperation on anti-corruption enforcement that the DOJ and SFO have stressed. In addition to information sharing and cooperating on global resolutions of corruption matters, the two agencies further cemented their relationship by embedding a DOJ liaison with the SFO (who will also spend time at the United Kingdom’s Financial Conduct Authority).

There was also a significant legal development that suggests that companies may not be able to use the legal advice privilege to shield attorney investigative materials from discovery in the United Kingdom. In two recent matters related to white-collar investigations, English courts held that third parties, including in one case the SFO, could obtain summaries of interviews and other facts gathered during an internal investigation, including materials gathered by US counsel. These investigative materials likely would be immune from compelled production under US law.

In addition to these developments and others related to FCPA and UK Bribery Act enforcement, the update discusses key developments in FCPA-related private litigation and other anti-corruption trends and developments from around the world.

The authors are Nicholas R. Barnaby, David Bitkower, Emily A. Bruemmer, Larry P. Ellsworth, D. Matthew Feldhaus, Kelly Hagedorn, Michael K. Lowman, Jessica A. Martinez, Marguerite L. Moeller, Coral A. Negron, William C. Pericak, Kristin L. Rakowski, Grace C. Signorelli-Cassady, Keisha N. Stanford, Robert R. Stauffer, and Jessica G. Veitch.
OUR ANTI-CORRUPTION EXPERIENCE

Jenner & Block has a leading FCPA and anti-corruption practice representing global companies in all phases of compliance with the FCPA, the UK Bribery Act, and other anti-corruption laws, from internal investigations and negotiations with the US and other governments to development of internal controls, training, and compliance counseling. We offer clients a wealth of experience, with two former US attorneys, the former associate attorney general (the third-ranking official in the US Department of Justice), the former principal deputy assistant attorney general of the Criminal Division, former criminal division and assistant US attorneys from jurisdictions throughout the country, the former associate director of the SEC’s Division of Enforcement, and other former SEC enforcement attorneys. As a group, our lawyers have represented many dozens of companies in FCPA and anti-corruption matters of all types.

The hallmark of a strong anti-corruption practice is helping clients stay out of trouble in the first place. Our lawyers have developed anti-corruption compliance programs for major multi-national companies across numerous sectors of the economy, including, among others, defense, financial institutions, oil and gas, media, government contractors of all kinds, and retail establishments. We have provided training to tens of thousands of corporate personnel as well as smaller businesses with fewer than 500 employees. Our FCPA team also brings to the table a nuanced understanding of the intersections of the FCPA with federal securities laws, Sarbanes-Oxley, Dodd-Frank, export control laws, government contracting obligations, and other anti-corruption laws, including the UK Bribery Act.

When issues arise, our clients benefit from Jenner & Block’s world-class reputation and skill in conducting internal investigations. Our range and depth of experience enables us to conduct internal investigations with care and rigor, ensuring that our clients have obtained the material facts and that the investigation will withstand the strictest of scrutiny by government enforcement agencies.
The FCPA’s anti-bribery provisions prohibit corrupt payments to foreign officials for the purpose of obtaining or retaining business. Their jurisdiction is broad, extending to all US companies and persons, public companies and foreign companies that are registered with the SEC, and foreign companies and persons that commit an act in furtherance of an improper payment or offer while in the United States. Fines and penalties under the FCPA can be significant, as demonstrated by the $772 million fine imposed on Alstom S.A. and last year's $2.6 billion settlement between Odebrecht S.A. and US, Swiss, and Brazilian authorities.

The books and records and internal controls provisions of the FCPA work in tandem with the anti-bribery provisions by requiring accurate accounting and reporting of expenditures, as well as adequate internal controls. The books and records and internal controls provisions also generally impose obligations to maintain accurate books and records, whether or not any improper payments have been made. These provisions apply only to companies registered with the SEC.

The UKBA contains a similar substantive anti-bribery provision that prohibits a corrupt payment to a foreign public official for the purpose of obtaining or retaining business. The UKBA also prohibits the “failure to prevent bribery” with a provision that holds a company vicariously liable for Bribery Act violations committed on its behalf by a person associated with the company. The UKBA broadly applies to any company that “carries out a business or part of a business” within the United Kingdom.

Our annual Business Guide to the Anticorruption Laws provides an in-depth look at the statutory provisions and frequently asked questions associated with FCPA and UKBA enforcement. The 2017 edition may be accessed here and hard copies are available upon request.
ANTI-CORRUPTION HIGHLIGHTS FROM THE FIRST HALF OF 2017

NEW ADMINISTRATION SIGNALS A CONTINUATION IN FCPA ENFORCEMENT POLICIES, INCLUDING FCPA PILOT PROGRAM

In the first half of 2017, officials from the new presidential administration have publicly signaled that FCPA enforcement remains a top law enforcement priority. Following the election results, some commentators raised questions as to whether the new administration would continue FCPA and other white-collar enforcement strategies pursued by the Obama and Bush administrations. Prior to taking office, both President Donald J. Trump and Jay Clayton, the incoming SEC chairman, had made public comments viewed as critical of aggressive FCPA enforcement. In the very early months of the administration, DOJ officials also focused on violent crime and immigration offenses, but said little about corporate wrongdoing. The DOJ’s budget proposals similarly prioritized areas other than white-collar enforcement. Moreover, since the new administration took over, the pace of FCPA enforcement resolutions has slowed from the fast pace of 2016. Very few new FCPA resolutions have been announced by either the DOJ or SEC, and meanwhile several public companies have announced that long running FCPA investigations were closed without charges. However, drawing too many conclusions about these early actions is unwarranted at this point. The flurry of resolutions at the end of the prior administration may have cleared the decks of cases at or near the resolution stage. In addition, both the DOJ and SEC are still in the process of filling, or have only recently filled, top enforcement posts, which may also have affected the pace of resolutions. More significantly, the administration itself has stated that FCPA enforcement will remain a priority.

The FCPA pilot program, announced in April 2016, sets forth criteria that a company must meet in order to receive mitigation credit, including a possible declination of prosecution, specifically:

- Voluntary disclosure
- Cooperation with the DOJ’s investigation
- Remediation of wrongdoing
- Disgorgement of profits

The DOJ has announced the pilot program will stay in force indefinitely as new leadership reviews FCPA enforcement practices.

DOJ officials have repeatedly identified the FCPA as an example of white-collar crime that the current administration will target in keeping with enforcement priorities of past administrations. In April, for example, Attorney General Jeff Sessions affirmed that his DOJ will strongly enforce the FCPA, noting, among other reasons, that corruption can distort the international marketplace. Other senior DOJ officials have echoed Attorney General Sessions, committing to aggressive FCPA enforcement and continuing certain enforcement policies from the previous administration. Among other practices, DOJ officials have noted that they will continue to follow the Memorandum on Individual Accountability (known as the “Yates Memo”), which was made part of the United States Attorney’s Manual under the prior administration, and which requires corporations to provide specific information about individual wrongdoers in order to receive credit for cooperating with a DOJ investigation. DOJ officials have also stressed continuing their cooperation with other prosecuting authorities in anti-corruption investigations, as discussed in more detail below.

Significantly, the DOJ specifically announced that the FCPA pilot program will continue while the DOJ assesses how to improve enforcement policy. The pilot program, announced last April, is an effort to increase transparency in FCPA charging decisions and resolutions. The pilot program sets forth the requirements for receiving mitigation credit, including a rigorous definition of what conduct the DOJ will credit as “cooperation.” It also defines the criteria necessary for the DOJ to consider a declination of prosecution despite a finding of wrongdoing: a company must voluntarily disclose the misconduct; cooperate with the DOJ’s investigation; remediate the violation; and agree to disgorge any profits from the misconduct. The DOJ says that this pilot program is still in force and in the past two months, the DOJ announced declinations pursuant to the pilot program with Linde North America and CDM Smith Inc.

There is no doubt that the pace of enforcement has decreased, but it is too soon to know whether that slowdown is the beginning of a trend in reduced enforcement activity, a return to the level of activity prior to 2016, or a result of the transition between administrations. For now, companies should expect that FCPA enforcement will continue to be a priority.

For more on enforcement priorities in the new administration see the recent Client Alert by Partners Katya Jestin and Nicholas R. Barnaby. For further discussion on the FCPA pilot program and FCPA enforcement practices, see the article “Carrots and Sticks: 2016 DOI Enforcement In View,” by Partners Nicholas R. Barnaby and Robert R. Stauffer.

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DOJ EMPHASIZES INTERNATIONAL ANTI-CORRUPTION ENFORCEMENT COOPERATION

In the first part of 2017, the DOJ continued a trend of cooperation with other jurisdictions to investigate and resolve major international cases. Over the last two years, the DOJ has announced that it has worked with authorities in countries such as, among others, the United Kingdom, Brazil, Mexico, the Netherlands, and Switzerland to investigate and resolve foreign bribery charges.

In recent speeches, DOJ officials from the new administration have highlighted their commitment to cooperative approaches to combating international corruption and other cross-border crimes. DOJ officials praised the increased anti-corruption enforcement activities by authorities in other jurisdictions, and highlighted their cooperation with the DOJ, including through sharing information about investigations of mutual interest.

DOJ officials have also underscored the importance of entering into global resolutions of anti-corruption violations as one aspect of this international cooperation. For example, the acting assistant attorney general of the Criminal Division noted in March that the DOJ “seek[s] to reach global resolutions that apportion penalties between the relevant jurisdictions so that companies seeking to accept responsibility for their prior misconduct are not unfairly penalized for the same conduct by multiple agencies.” In particular, in at least five major settlements in the last two years, including the Rolls-Royce matter unsealed in January 2017, the settling company has resolved cases brought in multiple jurisdictions with one “global” resolution. In those resolutions, the DOJ has agreed to “offset” the fines paid to the other jurisdictions by reducing the fine owed to the United States by the amount paid to other jurisdictions. In April, another senior DOJ official noted that there may be some limits to its willingness to offset penalties to foreign enforcement authorities, explaining that the DOJ’s willingness to provide such a credit “assumes that the company cooperated with our investigation and did not engage in forum shopping to avoid department involvement in the matter.”

In addition to global resolutions, the DOJ has continued to expand its physical presence around the world. It recently posted a liaison to the United Kingdom’s Serious Fraud Office and Financial Conduct Authority. The liaison is tasked with “enhancing cooperation with the FCA and the SFO in London.” The liaison will spend two years in London, followed by a third year in Washington, DC investigating and prosecuting transnational crimes and training US attorneys on best practices learned in London. Practical investments of this kind suggest that the trend of increased international cooperation in anti-corruption enforcement will continue.

For more on the DOJ’s approach to international enforcement please see the recent article “DOJ Signals More Fairness In Multinational Investigations,” by Partner Brandon D. Fox.

KOKESH: SUPREME COURT HOLDS THAT FIVE-YEAR LIMITATION PERIOD APPLIES TO SEC CLAIMS FOR DISGORGEMENT

In a case that could have significant implications for the SEC’s FCPA enforcement practices, the Supreme Court held in Kokesh v. SEC that a claim by the SEC for disgorgement, a remedy that requires a wrongdoer to give back proceeds associated with a securities law violation, is subject to the same five-year statute of limitations period that applies to SEC claims for civil penalties.

Disgorgement is a distinct remedy from the SEC’s statutorily provided authority to impose civil penalties on those found to have violated securities laws. Unlike civil penalties, which operate pursuant to a specific formula prescribed by statute, disgorgement is an implied equitable remedy designed to strip the wrongdoer of ill-gotten gains. Although disgorgement is not unique to the FCPA, it has taken on an important role in the SEC’s enforcement practice. The SEC typically seeks disgorgement in corporate FCPA cases. For example, of the 22 SEC corporate resolutions in 2016, all but four included disgorgement of some of the proceeds of the corrupt conduct. In addition, the DOJ’s FCPA pilot program requires that companies seeking to obtain a declination of prosecution under the program for disclosure, cooperation, and remediation also agree to disgorge the profits from the wrongdoing, a condition that was met in a number of the recent pilot program declinations via disgorgement to the SEC.

Kokesh addressed the question of what, if any, limitation period applied to SEC actions for disgorgement. The securities laws do not include an express limitation period for SEC actions seeking either a civil penalty or disgorgement. The limitation period for civil penalties instead is supplied by a general statute, 28 U.S.C. § 2462, which provides a five-year limitation period for any federal claim for a “penalty” or “forfeiture” where the law does not otherwise prescribe a more specific limitation period. The question in Kokesh was whether disgorgement, too, could be deemed a “penalty” or “forfeiture” and thus subject to the five-year limitation period. Prior to Kokesh, the SEC (and most federal courts) had taken the position that disgorgement was an equitable remedy and not a “penalty” subject to that limitation period. The Supreme Court disagreed, holding that the SEC’s disgorgement remedy operated in substance like a penalty and was subject to the same limitation period. Although the case arose in the context of a securities fraud enforcement action, this holding applies equally to FCPA enforcement actions.

Kokesh is potentially significant for SEC enforcement of the FCPA. Many FCPA cases involve past misconduct that has only recently been discovered or disclosed, and many present limitations period issues. For example, the 2015 PBSJ Corporation settlement focused on conduct that occurred in 2009. Although the SEC has other tools at its disposal to deal with older cases, such as seeking a tolling agreement with a company under investigation, applying a five-year statute of limitations to disgorgement could constrain the SEC’s enforcement options when the agency is presented with older cases.
Kokesh is also significant because the Supreme Court’s opinion included a footnote stating that the Court expressed no view on whether the SEC even has the power to seek disgorgement, or whether, if the SEC has that authority, it is subject to traditional equitable limitations, which would narrow the remedy significantly from its currently expansive scope. By characterizing those issues as unresolved—despite the frequent approval of disgorgement by lower courts—the Court’s decision invites future challenges to the SEC’s use of disgorgement.

For more on Kokesh v. SEC, which was briefed and argued in the Supreme Court by Jenner & Block Partner Adam G. Unikowsky, and its potential implications, please see Jenner & Block’s Client Alert.

DOJ PAPER ON EVALUATION OF CORPORATE COMPLIANCE PROGRAMS EMPHASIZES CULTURAL COMMITMENT TO COMPLIANCE IN ADDITION TO SUFFICIENT RULES AND PROCEDURES

In February, the DOJ’s Fraud Section, which enforces the FCPA, issued a list of topics and questions it considers when evaluating the effectiveness of corporate compliance programs. Although many of the topics appear in the Federal Sentencing Guidelines and in the 2012 DOJ and SEC FCPA Guide, this document sheds additional light on how the DOJ will assess the effectiveness of a company’s compliance program in 2017. The paper reiterates that the assessment of a corporate compliance program is highly individualized and depends on a company’s particular activities and risk profile, but provides some discussions of the factors it may consider.

Specifically, the paper identifies “common questions” that the DOJ frequently asks when making the individualized determination as to whether a company has an effective compliance program, such as when it evaluates whether a company has taken the necessary steps to enhance its compliance program and internal controls. The common questions stress the importance of corporate culture in addition to the nuts-and-bolts of the program. As to the culture, the questions underscore, among other topics, involvement of senior officials, the need for continuous improvement, whether the company imposed appropriate sanctions on those involved in wrongdoing, and the company’s remediation after violations. As to the meat of the program, the list underscores the importance of risk assessment and adequate monitoring of compliance.

Although the paper provides neither a checklist nor a rigid formula for success, it may be wise for companies to consider these areas when assessing their own compliance programs because the topics and sample questions are ones that the DOJ has “frequently found relevant in evaluating a corporate compliance program.”

DOJ’s compliance paper identifies 11 categories of questions the DOJ will use to assess the effectiveness of a compliance program:

1. Analysis and remediation of underlying conduct, including the company’s root cause analysis of the misconduct, prior indications of the misconduct, and remediation;
2. Involvement of senior and middle management in encouraging or discouraging the type of misconduct that occurred, and demonstrating commitment to compliance;
3. Autonomy and resources of the compliance department, including the compliance function’s stature within the company, the experience and qualifications of compliance personnel, and the funding and resources of the compliance department;
4. Strength of the company’s compliance policies and procedures, including the company’s process for designing and implementing new policies;
5. Methodology and effectiveness of the company’s risk assessment process;
6. Compliance training and communication, including the provision of tailored training for high-risk and control employees, whether the training has been offered in the form and language appropriate for the audience, and the resources that are available to employees to provide guidance to employees regarding compliance policies;
7. Effectiveness of the company’s reporting mechanism and the scope and effectiveness of compliance-related investigations;
8. Disciplinary actions taken in response to misconduct, including whether managers were held accountable for misconduct that occurred under their supervision, and the way that the company incentivizes compliance;
9. Continuous improvement, periodic testing, and review, including internal audit’s work and the company’s use of control testing;
10. Management of third-party risks, including due diligence performed on third parties to identify red flags; and
11. Risks related to M&A activities, including whether misconduct was identified during the pre-M&A due diligence process and how the company’s compliance function has been integrated into the M&A process.
This guidance will be interpreted and applied in part by the DOJ Fraud Section’s dedicated compliance officer, whose role is in part to help the Fraud Section evaluate the adequacy of compliance programs in the course of FCPA and other investigations. Hui Chen, the first person to fill the role, resigned in June. The post is currently vacant.

Taken as a whole, the guidance highlights that the Fraud Section will take an individualized approach to assessing a compliance program and will not be impressed by a strong on-the-books program unless there is also demonstrated engagement from all levels of the company.

For more on the DOJ fraud section’s paper on evaluation of compliance programs, please see “DOJ Releases Under-the-Radar Paper on ‘Evaluation of Corporate Compliance Programs’” written by Partner Erin R. Schrantz and Associate Nathaniel K.S. Wackman.

CONGRESSIONAL REPEAL OF SEC DISCLOSURE RULE FOR OIL, GAS AND MINERAL PAYMENTS TO GOVERNMENTS

On February 14, 2017, the President signed legislation repealing an SEC regulation adopted in June 2016 that required energy companies or subsidiaries to disclose their royalty, tax, and other payments to the federal government or any foreign government for the commercial development of oil, natural gas, or minerals (including coal). The rule was written pursuant to the 2010 Dodd-Frank financial reform law, which obligates the SEC to author a transparency rule for extractive industries.

Supporters of the rule argued that repeal allows companies to hide corrupt payments and that if the United States would take a leading role on foreign payment transparency, other major nations would follow. The European Union and Canada have adopted transparency initiatives similar to this now-repealed rule.

The rule was the SEC’s second try. It was originally adopted in 2012, but then vacated by the US District Court for the District of Columbia. The Congressional Review Act, which was used to repeal the regulation, mandates that an agency whose regulation was vacated may not publish a rule that is “substantially the same” as the overturned rule. However, the Dodd-Frank provision requiring the SEC to adopt the transparency rule has not been repealed itself. Time will tell how the SEC manages these competing obligations.
**RECENT FCPA ENFORCEMENT ACTIONS**

The summaries below, presented in alphabetical order, describe select significant events in FCPA enforcement matters from January through June 2017. Although not discussed, there are several other pending enforcement actions that we are tracking for new or significant developments.

**CADBURY LIMITED/MONDELÉZ INTERNATIONAL**

**Securities and Exchange Commission**  
**Settled Administrative Proceeding**  
**January 6, 2017**

**Nature of Conduct:** Cadbury India, a subsidiary of Cadbury Limited, a UK-based confectionary and snack beverage company, allegedly made illicit payments to obtain government licenses and approvals for a chocolate factory in Baddi, Himachal Pradesh, India. Cadbury India allegedly failed to conduct appropriate due diligence or monitor the activities of its local agent in India and did not accurately and fairly reflect the nature of the services rendered by the agent on the subsidiary’s books and records. The improperly recorded books and records were consolidated into the books and records of Cadbury and of Mondelēz International after Mondelēz acquired Cadbury. Cadbury also allegedly did not devise and maintain an adequate system of internal accounting controls.

**Amount of Alleged Improper Payments:** According to the SEC, from February 2010 to July 2010, Cadbury India paid the Indian agent $90,666.

**Benefit Obtained:** Cadbury India obtained certain licenses and approvals for a unit of its factory, including a demerger approval to designate the property as legally distinct from that of the existing manufacturing facility.

**Type of Resolution:** The SEC’s order found that Cadbury violated the FCPA’s books and records and internal controls provisions. The order also found that Mondelēz, which acquired Cadbury while the scheme was being carried out, was responsible for Cadbury’s violations as an acquiring entity. Without admitting or denying the findings in the order, Mondelēz and Cadbury consented to the entry of the order and agreed to pay a $13 million civil penalty for FCPA violations.

**Of Note:** The SEC’s emphasis on Mondelēz’s acquisition in its order underscores the importance of potential post-acquisition liability for acts of an acquired company. This is also another in a long line of cases where the SEC order describes allegations that potentially violated the FCPA’s anti-bribery provisions, but settled solely on the basis of the FCPA’s accounting provisions.

**CDM SMITH INC.**

**Department of Justice**  
**Declination**  
**June 21, 2017**

**Nature of Conduct:** According to a DOJ letter announcing that it was declining prosecution of CDM Smith Inc. (CDM), from approximately 2011 to 2015, CDM paid bribes to officials in India for infrastructure contracts. Specifically, employees of CDM, as well as employees of its wholly owned subsidiary in India (CDM India) paid bribes to officials in India’s state-owned highway management agency in order to receive highway construction and design contracts. The bribes were paid through fraudulent subcontractors and were generally 2-4 percent of the contract price. In addition, CDM paid approximately $25,000 to local officials in the Indian state of Goa for a water project contract. All senior management at CDM were allegedly aware of the bribes and approved or participated in the misconduct.

**Amount of Alleged Improper Payments:** Approximately $1.18 million in bribes to government officials in India.

**Benefit obtained:** Approximately $4 million in net profits from the contracts that CDM received on account of the bribes.

**Type of Resolution:** As part of the declination resolution, CDM agreed to disgorge approximately $4 million.

**Of Note:** This matter is one of two declinations the DOJ made under the FCPA pilot program in 2017. According to the DOJ’s letter announcing the declination, CDM met the requirements for a declination: CDM made a timely and voluntary self-disclosure; performed a thorough and comprehensive investigation; cooperated fully in the matter; and remediated fully, including by terminating all employees it identified as involved in the misconduct.

The conduct acknowledged in this declination, which included involvement and knowledge of senior company officials, is among the more severe conduct to date for which the DOJ has declined prosecution.

The company’s decision to terminate culpable employees may have proved decisive in achieving this favorable disposition. In contrast, in 2016, LATAM Airlines Group S.A., a commercial airline company based in Chile, failed to discipline in any way the employees responsible for the criminal conduct. As a result, the company paid a penalty within the US Sentencing Guidelines range instead of receiving a discount off the bottom of the range.

**DMITRY FIRTASH**

**Department of Justice**  
**Approval of Extradition Request**  
**February 21, 2017**  
**Motion to Dismiss**  
**May 9, 2017**

**Nature of Conduct:** According to an indictment unsealed in April 2014 against Dmitry Firtash and five co-defendants, Firtash was the leader of a scheme to pay $18.5 million in bribes to Indian officials for titanium mining rights. Although all of the FCPA defendants are foreign nationals, they allegedly used US financial institutions to transmit funds and traveled to Seattle, Washington and Greensboro, North Carolina, for the purpose of advancing the conspiracy.
In February 2017, an Austrian court approved the DOJ’s extradition request for Firtash, reversing a 2015 ruling that denied the request. In May, Firtash’s legal team filed a motion to dismiss, arguing that the FCPA did not apply to purely foreign conduct by foreign defendants, that the venue was not proper, and that the due process clause prevents the extra-territorial enforcement of criminal law sought by the DOJ.

**Amount of Alleged Improper Payments:** At least $18.5 million.

**Type of Resolution:** Unresolved.

**Of Note:** Firtash has yet to be formally extradited to the United States, pending resolution of an extradition request to Spain, where he is facing money laundering and racketeering charges.

**ERNESTO HERNANDEZ-MONTEMAYOR**
**DANIEL PEREZ**

*Department of Justice*
*Sentencing*
*January 23, 2017 (Hernandez-Montemayor)*
*February 13, 2017 (Perez)*

**Nature of Conduct:** On December 27, 2016, charges were unsealed against Ernesto Hernandez-Montemayor, Ramiro Ascencio Nevarez, Victor Hugo Valdez Pinon, Kamta Ramnarine, Douglas Ray, and Daniel Perez in connection with schemes to bribe Mexican state government officials, including Hernandez-Montemayor and Nevarez. According to the indictments and plea agreements, between 2006 and 2016, Ray conspired with Valdez and others, including Ramnarine and Perez, to bribe Mexican state officials in order to secure parts and servicing contracts with Mexican government-owned customers of an unnamed Texas-based aviation company.

**Amount of Alleged Improper Payments:** Approximately $2 million in bribe payments to Mexican officials.

**Benefit Obtained:** Aviation maintenance, repair, and overhaul contracts from a Mexican state government.

**Type of Resolution:** Guilty Pleas. Ray and Valdez Pinon pleaded guilty to conspiracy to violate the FCPA’s anti-bribery provision and conspiracy to commit wire fraud. Ramnarine and Perez pleaded guilty to one count of conspiring to violate the FCPA’s anti-bribery provision. Hernandez-Montemayor and Nevarez, both of whom were previously officials of Mexican state-owned entities, pleaded guilty to one count of conspiracy to commit money laundering.

For his part in the conspiracy, Hernandez-Montemayor was sentenced to 24 months’ imprisonment and one year of supervised release upon completion of the prison term. He also stipulated to forfeiture in the amount of $2,026,308.67. Perez was sentenced to three years’ probation.

**Of Note:** At this point, although senior officials from the aviation company have been charged in the scheme, the DOJ has not charged the aviation company itself.

Although the government alleged that approximately $2 million was made in bribe payments to Mexican officials, Hernandez-Montemayor alone stipulated to a judgment of $2,026,308.67, as well as forfeiture of real and personal property. Of the defendants who have been sentenced to date, Hernandez-Montemayor received the longest sentence.

While DOJ’s position is that the FCPA only criminalizes payment of bribes to foreign public officials, and does not criminalize a foreign public official’s receipt of a bribe, as it did here, DOJ will charge foreign officials who engage in financial transactions with the bribe money they receive with money laundering.

The substantive elements of the FCPA’s anti-bribery provisions are:

- An offer, payment, promise to pay or authorization of payment of any money or anything of value;
- To any foreign official or to any other person (a third party) while knowing that any portion of the thing of value will be offered, given or promised, directly or indirectly, to a foreign official;
- Corruptly;
- For purposes of influencing an official’s act or decision; and
- In order to obtain or retain business or to direct business to any person.

**JERDS LUXEMBOURG HOLDING S.A.R.L.**
**ZIMMER BIOMET, INC.**

*Department of Justice*
*Deferred Prosecution Agreement (Zimmer Biomet)*
*Guilty Plea (JERDS)*
*January 12, 2017*

*Securities and Exchange Commission*
*Settled Administrative Proceeding (Zimmer Biomet)*
*January 12, 2017*

**Nature of Conduct:** In 2012, Biomet, Inc. (a predecessor of Zimmer Biomet Holdings, Inc. (Biomet)) entered into a deferred prosecution agreement (DPA) with the DOJ and consented to the entry of an SEC administrative order to resolve allegations that it and its subsidiaries made improper payments to doctors at public hospitals in Brazil, China, and Argentina.

In 2017, Biomet acknowledged that it and its subsidiaries engaged in continued corrupt conduct in Brazil and Mexico, in violation of the 2012 agreement. In Brazil, Biomet allegedly used a Brazilian distributor to pay bribes to public health care providers to use Biomet’s products, including after Biomet entered into the 2012 agreements with the DOJ and SEC. In connection with the 2012 settlement, Biomet told the US government that it had terminated its
relationship with the Brazilian distributor in 2008. Nonetheless, from 2009 until 2013, Biomet allowed another of the Brazilian distributor’s companies to be its authorized distributor. Although senior Biomet employees were aware of the continuing relationship and potential bribes, they did not address it. In fact, a recommendation in a draft audit report that the new authorized distributor be fully separated from the prohibited distributor was removed from the final report by a member of Biomet’s legal team.

In Mexico, Biomet’s indirect subsidiary, Biomet 3i Mexico SA de CV (Biomet 3i), used a third party customs broker and subagents to bribe Mexican customs officials to allow the smuggling of unregistered and mislabeled dental products into Mexico, in violation of Mexican law, including after the 2012 settlement agreements. From 2010 to 2013, Biomet 3i recorded payments to the subagents as payments to the broker despite knowing that at least part of the payments would be paid to customs officials. In addition, Biomet 3i did not have a written contract with the customs broker or its subagents and did not receive anti-corruption representation from them, even though they were providing services in a high-risk country. JERDS Luxembourg Holding S.A.R.L. (JERDS) became the parent company of Biomet 3i in 2012, and the disguised payments by Biomet 3i were incorporated into JERDS’s books and records.

Amount of Alleged Improper Payments: The amount paid to the Brazilian distributor is not specified. Biomet 3i allegedly paid approximately $980,774 to the customs broker knowing that at least part would be passed onto customs officials.

Benefit obtained: The amount gained is not specified, but the SEC’s disgorgement claim of $5.82 million is meant to reflect the amount of pecuniary gain from the misconduct.

Type of Resolution: Biomet entered into a DPA with the DOJ for violations of the DOJ’s anti-bribery, books and records, and internal controls provisions, and agreed to pay a fine of more than $17.46 million. Biomet also consented to the entry of a new SEC order and agreed to pay disgorgement of $5.82 million, $702,705 in pre-judgment interest, and a $6.5 million civil penalty. In both agreements, Biomet also agreed to retain an independent compliance monitor for a three-year term.

In addition, JERDS pleaded guilty to a violation of the FCPA’s books and records provision. According to the DOJ, approximately $4.8 million of the $17.46 million fine against Biomet was due to JERDS’s conduct. In light of Biomet’s DPA with the DOJ, however, the DOJ agreed that no penalty would be imposed directly on JERDS and the penalty paid by Biomet would be credited to any penalty imposed on JERDS.

Of Note: As part of the 2012 settlement agreements with the DOJ and SEC, Biomet agreed to retain an independent compliance monitor for an initial term of 18 months. The DOJ extended that term to three years, and then to four, due to allegations of bribery in Brazil and Mexico and because the monitor could not certify that Biomet’s compliance program met the standards of the agreement. At the end of the fourth year, the monitor again could not certify that Biomet’s compliance program met the standards of the agreements.

In 2015, Zimmer Holdings, Inc. acquired Biomet and assumed its obligations under the 2012 agreements. In the current DPA, Zimmer Biomet did not receive voluntary disclosure credit because Biomet’s 2012 agreements required it to disclose the conduct.

Likewise, although JERDS did not acquire Biomet 3i until 2012, and Biomet 3i no longer sells products and is in the process of winding down, JERDS became responsible for Biomet 3i’s prior conduct.

JUAN JOSE HERNANDEZ-COMERMA
CHARLES BEECH III

Department of Justice
Guilty Pleas
January 10, 2017

Nature of Conduct: According to the DOJ, consultants Juan Jose Hernandez-Comerma and Charles Beech III paid bribes to officials at the Venezuela state-owned energy company Petroleos de Venezuela S.A. (PDVSA), including through payments to the officials’ relatives or other designees, in order to gain access to bidding opportunities for companies they represented. Hernandez-Comerma also provided travel and entertainment to PDVSA officials. Beech also concealed the payments of the bribes through the use of fictitious transaction records.

The criminal fine imposed as a result of an FCPA violation is ostensibly based on a calculation of the recommended fine under the federal Sentencing Guidelines, which provide federal courts with non-binding guidance governing criminal penalties arising from federal crimes, including criminal fines for corporate offenders.

In many FCPA settlements, the amount paid is subject to negotiation and often is below the recommended sentencing guidelines range. Through the FCPA pilot program and other pronouncements, the DOJ has attempted to quantify the value of self-reporting, cooperation, and remediation to make the process of setting the appropriate fine more transparent.

DOJ resolutions in 2016 and 2017 have often included explicit discussion of the amount of “discount” off of the guidelines reflected in the resolution penalty amount, tying that discount to specific factors such as a company’s cooperation.
Amount of Alleged Improper Payments: Beech made approximately $147,000 in improper payments. Hernandez made approximately $40,000 in improper payments, including payments of more than $15,000 for hotel and entertainment costs.

Benefit Obtained: Hernandez-Comerma and Beech both paid bribes to benefit companies they represented. Hernandez-Comerma gained access for his company to bidding opportunities and contracts. Beech gained access for his company to bidding opportunities.

Of Note: Hernandez-Comerma and Beech are two of eight people prosecuted thus far as part of an investigation into bribery at PDVSA.

LAS VEGAS SANDS CORP.

Department of Justice
Non-Prosecution Agreement
January 17, 2017

Nature of Conduct: According to the non-prosecution agreement with the DOJ, the Nevada-based Las Vegas Sands Corp. (Sands) entered into contracts with and made payments to a consultant in China that allegedly "had no discernible legitimate business purpose." This consultant was a former Chinese government official who advertised his political connections as his primary qualification.

According to the agreement, when confronted with red flags, Sands did not implement controls to mitigate the risks of violations, including due diligence of the consultant’s companies, demands for appropriate documentation and justification for payments, or additional audits.

Amount of Alleged Improper Payments: From 2006 through 2009, Sands paid more than $5.7 million to the consultant without a discernible legitimate business purpose.

Benefit obtained: Unknown.

Type of Resolution: Sands entered into a non-prosecution agreement with the DOJ and agreed to pay a criminal penalty of $6.96 million. Sands also agreed to make specific enhancements to its compliance program and internal controls, including revamping the functions and retaining new leaders. In addition, in 2016, Sands settled a related administrative proceeding with the SEC for substantially overlapping conduct and agreed to pay a civil penalty of approximately $7 million. As part of that resolution, Sands retained an independent compliance consultant, and Sands agreed to submit copies of all reports of the independent compliance consultant to the Fraud Section.

Of Note: Sands received a 25 percent reduction off the bottom of the US Sentencing Guidelines fine range, due in part to its full cooperation in the investigation and full remediation. In agreeing to this discount, the DOJ balanced those mitigating factors against the nature of the offense, including that senior executives did not implement adequate internal controls under the circumstances.

LINDE NORTH AMERICA INC.
LINDE GAS NORTH AMERICA LLC

Department of Justice
Declination of Prosecution
June 16, 2017

Nature of Conduct: The DOJ’s letter announcing the decision to decline prosecution of Linde North America Inc. and Linde Gas North America LLC (collectively “Linde”) noted that Linde made payments to high-level officials of the National High Technology Center (NHTC) of the Republic of Georgia, a state-owned and controlled entity. Executives at the Linde subsidiary agreed to share profits from the sale of boron gas with officials at the NHTC in return for those officials’ assistance in purchasing assets and equipment used to produce boron gas. To execute that agreement, the Linde subsidiary’s executives and the NHTC officials formed new entities with cross-ownership and profit sharing.

Amount of Alleged Improper Payments: The NHTC officials owned 51 percent of an entity created to execute the agreement and received approximately 75% of the approximately $7.8 million in profits.

Benefit obtained: Linde, either directly or through its subsidiary, received approximately $7.8 million in profits due to the conduct.

Type of Resolution: As part of the declination resolution, Linde agreed to disgorge $7.8 million in profits. In addition, Linde agreed to forfeit approximately $3.4 million in proceeds that were still owed to the NHTC officials when Linde discovered the scheme.

DOJ resolutions in 2016 and 2017 reflect the importance of employee discipline to receiving full remediation credit. In 2016, the DOJ specifically noted failure by LATAM Airlines and Embraer S.A. to discipline certain employees involved in the misconduct as a factor contributing to the size of the fine imposed on each company. In 2017, the DOJ declined prosecution in two cases in which the company disciplined or terminated all employees found to be involved in the misconduct.

Of Note: This is one of two publicly announced declinations pursuant to the FCPA pilot program. The DOJ explained that Linde satisfied the requirements of the FCPA pilot program: Linde made a timely and voluntary self-disclosure of the matter to the DOJ; conducted a proactive, thorough, and comprehensive investigation; cooperated fully in the DOJ’s investigation, including providing the DOJ with all relevant facts known to it about the individuals involved; enhanced its compliance program and internal controls; and fully remediated. Remediation included terminating or taking disciplinary action against the employees it found to be involved and withholding payments allegedly attributable to the conduct.
**ORTHOFIX INTERNATIONAL N.V.**

**Securities and Exchange Commission**

**Settled Administrative Proceeding**

**January 18, 2017**

**Nature of Conduct:** According to the SEC, Orthofix International, a medical device company organized under the laws of Curacao and headquartered in Texas, through its wholly-owned Brazilian subsidiary, Orthofix do Brasil LTDA, used improper payments to induce doctors under government employment to use Orthofix products. From at least 2011 to 2013, senior personnel at Orthofix do Brasil worked with third-party commercial representatives and distributors to undertake at least four improper payment schemes to increase sales by Orthofix International. As part of these schemes, Orthofix caused improper payments to be made to doctors employed at government-owned hospitals to induce them to use Orthofix’s products. Fake invoices for purported services that were never actually provided were used to conceal the corrupt payments.

**Amount of Alleged Improper Payments:** According to the SEC, from at least 2011 to 2013, various commissions and payments were made to doctors under different schemes. The total amount of the payments is not revealed in the SEC order.

**Benefit Obtained:** Orthofix’s profits as a result of the improper payment schemes were approximately $2,928,000.

**Type of Resolution:** The SEC’s order found that Orthofix violated the FCPA’s internal controls and books and records provisions. Without admitting or denying the findings in the Commission’s order, the company agreed to pay disgorgement of $2,928,000, prejudgment interest of $263,375, and a civil money penalty of $2,928,000. Orthofix agreed to retain an independent compliance consultant for one year to review and test its FCPA compliance program.

**Of Note:** The SEC’s order noted Orthofix’s cooperation and remediation as a factor in its settlement. In the company’s own announcement of the agreement, it stated that the DOJ had decided to take no further action regarding the conduct covered in the settlement with the SEC. Orthofix had previously entered into a DPA with DOJ in 2012 for FCPA violations in Mexico. In a separate order issued the same day by the SEC, Orthofix International agreed to admit wrongdoing and pay an $8.25 million civil penalty to settle charges that it improperly booked revenue in certain instances that caused the company to materially misstate certain financial statements from at least 2011 to the first quarter of 2013.

**ROLLS-ROYCE PLC**

**Department of Justice**

**Deferred Prosecution Agreement**

**December 20, 2016 (unsealed January 17, 2017)**

**Nature of Conduct:** According to the DPA, from 2000 to 2013, RRESI, a US-based subsidiary of the UK company Rolls-Royce plc, paid commissions knowing they would be used to bribe foreign officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, Iraq, and other countries. The foreign officials provided confidential information and awarded contracts to RRESI and affiliated entities. For example, the company made $11 million in commission payments in Thailand, which led to seven contracts for RRESI. Likewise, in Kazakhstan, the company made $5.44 million in commission payments to win contracts to supply turbines and also corruptly engaged a distributor of parts and services that was beneficially owned by a Kazakh government official with decision-making authority over the company’s ability to operate and win contracts in the country. The company made similar commission payments in Angola and Iraq, winning contracts worth $30 and $50 million in profits respectively.

**Amount of Alleged Improper Payments:** More than $35 million to foreign officials in various countries.

**Benefit Obtained:** Rolls-Royce obtained and retained numerous lucrative contracts in countries around the world.

In enforcement actions related to the FCPA’s books and records and internal controls provisions, the SEC has often alleged that a parent company is liable for violations of those provisions by its subsidiary because inaccurate entries in the subsidiary’s books and records were consolidated into the parent’s financial statements. This theory may expand potential parent company liability in situations where alleged misconduct was concentrated entirely within a subsidiary.

**Type of Resolution:** Rolls-Royce entered into a DPA with the DOJ for conspiracy to violate the FCPA. The company also settled with enforcement agencies in the United Kingdom and Brazil. It paid a total of $800 million to the three countries. The United States credited Rolls-Royce with a portion of the penalty it paid to Brazil because the conduct in both resolutions overlapped; Rolls-Royce ultimately paid nearly $170 million to the United States.

**Of Note:** This global resolution with authorities in the United States, United Kingdom, and Brazil continues the recent trend of US law enforcement working with anti-corruption offices in other countries to investigate and resolve bribery charges. In particular, this is an example of ‘offsetting’ part of the penalty the company paid to Brazil when calculating the penalty owed to the United States. (The conduct for which Rolls-Royce settled in the United Kingdom involved related but different facts.) The DOJ noted that the resolution took into account that the company did not voluntarily disclose, but did cooperate with the
investigation; the company has taken significant remedial measures; and the company paid significant fines to the United Kingdom and Brazil.

**SANG WOO, JOO HYUN BAHN, BAN KI SANG**

*Department of Justice*

*Criminal Complaint*

*January 10, 2017*

**Nature of Conduct:** According to the criminal complaints, Sang Woo, Joo Hyun Bahn, and Ban Ki Sang allegedly conspired to pay bribes through a third-party intermediary to a foreign official of a Middle Eastern country to induce that country to purchase a commercial building in Hanoi, Vietnam for its sovereign wealth fund. The conspirators attempted to sell the building for approximately $800 million, as well as obtain a $500,000 loan to pay further bribes to the foreign official. The scheme was not successful, in part because the intermediary did not have a relationship with the foreign official and was actually taking the intended bribes for himself.

**Amount of Alleged Improper Payments:** The co-conspirators allegedly paid $2.5 million in bribes to the intermediary, intending that bribes be paid to the Middle Eastern foreign official.

**Benefit obtained:** The conspirators stood to earn a portion of the commission on the sale of the property.

**Type of Resolution:** Unresolved.

**Of Note:** The intermediary, Malcolm Harris, was also charged as part of the conspiracy and pleaded guilty to wire fraud and money laundering charges arising from the scheme.

**SOCIEDAD QUIMICA Y MINERA DE CHILE**

*Department of Justice*

*Deferred Prosecution Agreement*

*January 13, 2017*

*Securities and Exchange Commission*

*Settled Administrative Proceeding*

*January 13, 2017*

**Nature of Conduct:** According to the DPA with the DOJ and the SEC Order, the Chilean-based chemicals and mining company Sociedad Quimica y Minera de Chile (SQM) made approximately $15 million in improper payments to five Chilean politicians and other politically exposed persons (PEPs) from 2008 to 2015. A senior executive at SQM, who was also one of the executives responsible for implementing SQM’s internal controls, directed that the payments be made from the CEO’s discretionary fund to the PEPs. Some of those payments were made to foundations supported or controlled by the PEPs. Other payments were pursuant to fictitious contracts and invoices with third party vendors associated with the PEPs. Some SQM employees assisted the executive in creating the fictitious contracts and invoices, and SQM did not verify that services were actually rendered, that there was evidence that services were rendered, or that the payments were reasonably priced and proper. Some of the improper payments were falsely recorded in SQM’s books and records.

Even after an internal audit in 2014 recommended to the board of directors that SQM terminate any active contracts with six of the vendors identified as high-risk, SQM continued to make payments to them, and to the PEPs, for another six months.

**Amount of Alleged Improper Payments:** Approximately $15 million in payments to Chilean PEPs and those connected to them.

**Benefit obtained:** Unknown.

**Type of Resolution:** SQM entered into a DPA with the DOJ for violating the FCPA’s books and records and internal controls provisions and agreed to pay a criminal fine of more than $15 million. Also on January 13, 2017, the SEC issued an administrative order finding that SQM violated the FCPA’s books and records and internal control provisions. Without admitting or denying the order’s allegations, SQM consented to its entry and agreed to pay a $15 million penalty. As part of both agreements, SQM agreed to retain an independent compliance monitor for two years and to self-report to the SEC and DOJ for one year after the monitor’s term is complete.

In several 2017 resolutions, the DOJ identified facts where senior-level personnel had knowledge of the misconduct and failed to act to prevent it or adequately ensure that their company’s internal controls stopped the misconduct. This was an important factor contributing to the size of the monetary penalty paid.

**Of Note:** The DOJ noted that SQM received a 25 percent reduction off the bottom of the US Sentencing Guidelines fine range because SQM conducted a thorough internal investigation, cooperated with the DOJ’s investigation, and implemented substantial remediation. In addition, SQM self-reported the potential violations to the SEC and fully cooperated with its investigation.

SQM’s remediation followed from its internal investigation, launched after a 2015 inquiry from Chilean tax authorities. As a result of that investigation, SQM fired the senior executive involved in the misconduct, created a separate compliance and risk management department, and took other remediation measures.

According to the DOJ, an independent monitor was necessary despite SQM’s enhancements to its compliance program because the new program was recently established and had not yet been tested. However, SQM’s enhancements to its compliance program contributed to the DOJ agreeing to a two-year, rather than a three-year, term for the monitor. The DOJ also took into consideration that SQM’s size and risk profile are such that an independent monitor should not need more than two years to test its compliance program.
FCPA-RELATED PRIVATE LITIGATION

Below are summaries of key developments in the first half of 2017 in FCPA-related suits brought by private litigants.

SHAREHOLDER LITIGATION

Danny Huntley v. Steven M. Mollenkopf, et al. (S.D. Cal.) Dismissed March 6, 2017

On February 3, 2016, a Qualcomm Inc. (Qualcomm) shareholder sued the telecommunications company’s directors, alleging that, as illustrated by the DOJ and SEC investigations into Qualcomm’s alleged payments to Chinese officials, defendants, among other things, failed to implement internal controls sufficient to detect potential FCPA violations. The case was dismissed without prejudice for want of prosecution on March 6, 2017. Qualcomm previously reached a $7.5 million settlement with the SEC on March 1, 2016, following allegations that the company, over the course of a decade, provided gifts, travel, entertainment, and other things of value, totaling in the millions of dollars, to try to influence officials at government-owned telecommunications companies in China who had influence over decisions that allowed Qualcomm to participate in the Chinese market and that impacted the volume of Qualcomm’s sales within that market.


Plaintiffs won significant discovery disputes in the FCPA-related securities fraud class action against Wal-Mart, Inc. and certain former executives. The suits alleged that the defendants made misleading statements about the company’s ongoing commitment to ethics and integrity despite paying millions of dollars in bribes to Mexican officials to secure benefits for the company, and the plaintiffs sought discovery related to Wal-Mart’s internal investigation, including its investigative files and the knowledge of senior officials about the investigation and its findings.

Plaintiffs in shareholder suits related to alleged FCPA violations have often sought access to documents collected in the course of internal investigations or produced to regulators. In the Wal-Mart case in 2017, the court permitted discovery of the results of an internal investigation after concluding that it was not conducted under the attorney-client privilege.

First, on May 5, 2017, the court held that the findings of Wal-Mart’s internal investigator, who collected facts and conducted internal employee interviews, were not protected by the attorney-client privilege or the work-product doctrine, because the investigator was not an attorney, because Wal-Mart failed to demonstrate that the investigator ever communicated his findings to Wal-Mart’s counsel, and because Wal-Mart failed to demonstrate that the investigator’s reports were prepared in anticipation of litigation. The court held that plaintiffs could depose the investigator and discover the investigator’s documents, including action plans, interview reports, and investigative reports. Second, on May 11, 2017, the court denied Wal-Mart’s request for a protective order barring the deposition of Wal-Mart’s President and Chief Executive Officer, C. Douglas McMillon, explaining that McMillon’s familiarity with the investigation and the disclosures at issues in the case made him a relevant witness.

The prospect of private litigation arising out of an alleged FCPA violation is a potential collateral consequence that a company should consider when determining whether, when, and how to make a potential FCPA violation public. Private plaintiffs have brought suits related to FCPA allegations on a number of theories, including shareholder derivative suits and the alleged knowing failure to disclose the misconduct.

RECOVERY SUIT

The Louis Berger Group Inc. and Berger Holdings Inc. v. James Andrew McClung (N.J. Super. Ct. Law Div.) Stipulated Dismissal June 1, 2017

Following a DOJ investigation into FCPA violations, Louis Berger Group Inc. and Berger Holdings Inc. (collectively Berger) separately sued two former senior officers—Richard Hirsch and James McClung—to recover damages resulting, in part, from their admitted approval of numerous bribes to foreign government officials in India, Indonesia, and Vietnam. The parties settled and voluntarily dismissed the suit against Hirsch in August 2016. On June 1, 2017, the court entered a stipulation of dismissal, concluding the case against McClung.

RETAILATION

Wadler v. Bio-Rad Laboratories, Inc. et al. (N.D. Cal.)

Jury Verdict February 6, 2017

Appeal Filed June 7, 2017

Sanford Wadler, the former general counsel of California-based life sciences company Bio-Rad Laboratories, Inc. (Bio-Rad), won his suit against Bio-Rad and the members of its board of directors for retaliation in violation of the Sarbanes-Oxley and Dodd-Frank Acts. Wadler alleged that, following BioRad’s $55 million settlement with the federal government regarding FCPA violations in Russia, Thailand and Vietnam, Bio-Rad fired Wadler for investigating and reporting his discovery that kickbacks were also paid to Chinese government entities in exchange for business. On February 6, 2017, after only three hours of deliberation, the jury found that Bio-Rad wrongfully terminated Wadler,
awarding Wadler nearly $8 million: $2.96 million in back wages and $5 million in punitive damages. Bio-Rad appealed the verdict on June 7, 2017.

DEFAMATION

Alejandro Yeatts v. Zimmer Biomet Holdings, Inc.  
(N.D. Ind.)  
Amended Complaint  
May 1, 2017

On April 17, 2017, the court dismissed former Zimmer Biomet Holdings, Inc. (Biomet) executive Alejandro Yeatts’s claims for intentional and negligent infliction of emotional distress, but concluded that Yeatts alleged sufficient facts to support his defamation claim arising out of Biomet’s alleged continuation of its corrupt activities in Brazil. These activities (along with continued corrupt activities in Mexico) led to Biomet’s settlements with the DOJ and SEC in January 2017. In his May 1, 2017 Amended Complaint pursuing that defamation claim, Yeatts alleged that the company misled the DOJ in connection with its 2012 DPA by inaccurately stating that the company had terminated its relationship with certain Brazilian distributors when, in fact, the company continued using the distributors via four newly formed intermediary distributors. Yeatts alleged that, after Biomet’s deceit was exposed, the company defamed Yeatts by using him “as an unwitting dupe” and therefore repeatedly included Yeatts’s name in a published list of persons who undermined the company’s efforts to comply with anti-corruption efforts.
UK ANTI-CORRUPTION DEVELOPMENTS

The following highlights UK anti-corruption developments from January through June 2017.

THE UKBA HAS FOUR MAIN OFFENCES:
- Bribing another person
- Being bribed
- Bribing a foreign public official
- Failing to prevent bribery

The fourth offence, failing to prevent bribery, is contained within section 7 of the UKBA and is the principal means by which UK prosecutors can seek criminal sanctions against a corporate entity for the actions of persons associated with it. Those associated persons could, for example, be agents, employees or subsidiary entities.

THE IMPACT OF POLITICAL DEVELOPMENTS ON ENFORCEMENT ACTIVITY IS YET TO BE SEEN

It continues to be a tumultuous time in the political life of the United Kingdom, with last year’s vote to leave the European Union (Brexit) followed by the May 2017 general election result in which no party won a majority, leading to a weakened Conservative party governing through a coalition with the Democratic Unionist Party of Northern Ireland. This political upheaval will inevitably have an effect on the enforcement of bribery and corruption offenses. What these effects will be is yet to be seen.

Much has been written about the potential impact of Brexit, but with the negotiations only starting in late June 2017, little can be said definitively at this stage. The general election result has been portrayed in the British press as a rejection by the electorate of a so called “hard Brexit” – leaving the EU without a new agreement in place governing the UK’s new relationship with the EU market. Whether that is true or not, and how the situation will play out over the next two years, is particularly difficult to predict at this stage given the uncertainty in the political system.

The European law enforcement consortia Europol and Eurojust are EU organisations. Brexit could accordingly affect the United Kingdom’s membership in those organisations, but there is no incentive on either side of the Brexit negotiations for there to be a breakdown in cooperation on issues of crime and security. It is likely that even if the United Kingdom formally leaves European law enforcement organizations, the arrangements will be replaced with functionally similar relationships.

A further variable is the promise by the Conservative Party to abolish the Serious Fraud Office (SFO) and roll part of its function into the National Crime Agency (NCA). Proponents of this plan argue that rolling the functions of the SFO into the NCA will ensure that the most up-to-date investigation methods are used, and that cases may perhaps move more quickly. But the plan has met serious and sustained criticism from a number of high profile and well regarded figures, including a former solicitor general, a former director of the SFO, a former director of public prosecutors, and a number of leading queen’s counsel who are involved in cases both for and against the SFO. It seems that this plan has been shelved in the wake of the election result, with the plan not making it into the Queen’s Speech (which sets out the Government’s legislative proposals for the forthcoming parliamentary session). It may of course be revived, but for now it appears that the SFO has been granted a stay of execution.

CONTINUED FOCUS ON INTERNATIONAL CORRUPTION

The SFO continues to focus on allegations of international corruption. Public reports reflect a number of active investigations. In the last six months, the SFO has increased the number of companies under review in connection with the Unaoil investigation. These now include Petrofac plc, KBR Inc.’s UK subsidiaries, and ABB Limited’s UK subsidiaries.

Charges have also been brought in the ongoing investigation into the activities of F.H. Bertling Limited in connection with allegedly corrupt payments made to secure contracts for freight-forwarding services related to a North Sea oil exploration project. These charges are covered in more detail below. The charges are in addition to charges that were brought in July 2016 related to alleged corrupt payments to an agent of the Angolan state oil company, Sonangol.

A theme that is emerging from the SFO’s most recent activity is – by chance or design – an apparent focus on the oil and gas sector as regards corruption investigations.

THE SFO STRESSES INTERNATIONAL COOPERATION

The trend among UK enforcement authorities toward international cooperation in investigations and resolutions continues. We have noted above that the DOJ is placing a liaison into the SFO and the Financial Conduct Authority, and we expect that this will strengthen the already good relationship between the DOJ and the UK authorities.

As can be seen from the case updates that follow, it is not just the US authorities with whom the UK authorities are working. The Rolls-Royce case involved the Brazilian authorities, the ongoing Unaoil investigation has involved Monaco (at least), and the Standard Bank DPA involved the Tanzanian authorities. We expect this level of cooperation will continue to increase over the short-to-medium term.

The UK’s Serious Fraud Office (SFO) enforces the UK Bribery Act. Public reports reflect the SFO continues to focus substantial resources on investigating and prosecuting foreign corruption.

SFO STRESSES INTERNATIONAL COOPERATION

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A non-UK company can be subject to the UKBA, depending on the circumstances. Where the conduct occurred within the United Kingdom, the conduct is subject to the UKBA.

In addition, for the corporate offence of failure to prevent bribery, the UKBA applies to all acts of a “relevant commercial organisation,” and extends to any company that “carries out a business or part of a business in the United Kingdom.”

There is no case law that interprets “carries out a business” and its broad wording suggests that it may apply to any organisation that does business in the United Kingdom.

**DECISIONS LIMIT USE OF PRIVILEGE TO PROTECT INVESTIGATIVE MATERIALS**

Two recent cases have impacted the right to assert privilege over interview memoranda generated by lawyers in internal investigations. In contrast to the general presumption in most US jurisdictions that attorney-interview materials can be protected as privileged or under the work-product doctrine, these cases held that under English law, interview memoranda, including memoranda prepared by US lawyers, may not be privileged, and may therefore be required to be disclosed in English civil and criminal proceedings.

The **RBS Rights Issue Litigation** concerned whether interview memoranda prepared by US and English counsel for the Royal Bank of Scotland were covered by the legal advice privilege, preventing their production in an unrelated civil proceeding that touched on certain of the issues covered in the memoranda.

The court reasoned that the memoranda were not covered by the legal advice privilege, and RBS was ordered to disclose the documents in the civil proceedings. The court applied English law to this question (the civil litigation in which the memoranda were sought being conducted in the English court), even though a number of the memoranda were prepared by US lawyers in the United States, in connection with a US government investigation related to potential violations of US law and the court’s acknowledgement that RBS likely expected US privilege law to apply to any such request for production.

The court also determined that the memoranda were not protected as lawyers’ working papers, a privilege similar to but more limited than the US attorney work-product doctrine. The court held that, for the working papers protection to apply, the documents must reflect the legal advice being provided by the lawyer.

**Serious Fraud Office v Eurasian Natural Resources Corporation Limited (ENRC)** similarly concerned interview memoranda, but in this instance the court primarily considered whether they were protected from disclosure to the SFO because they were covered by litigation privilege, another analogue to the US attorney work-product doctrine. Litigation privilege in English law covers (1) communications between lawyers and clients or third parties, (2) where litigation is in progress or is reasonably in contemplation, (3) the communications are made with the sole or dominant purpose of conducting that litigation or anticipated litigation, and (4) the litigation is adversarial, not investigative or inquisitorial.

Recent English law decisions required the disclosure of memoranda prepared by legal counsel during internal investigations to UK law enforcement authorities and in UK civil litigation. This highlights a risk that for clients with a potential link to England or Wales, interview memoranda or other privileged material could be subject to disclosure in the United Kingdom even if similar materials would be protected under US law.

In an investigation into allegations of corruption, ENRC had resisted the disclosure to the SFO of interview memoranda and forensic accountancy reports that it had commissioned on the basis that the interviews were conducted, and memoranda prepared, in anticipation of criminal litigation being brought against it by the SFO. The facts as found by the judge were that the SFO had not started a criminal investigation at the time that the memoranda were prepared; that ENRC had determined that it was going to cooperate with the SFO; and that the interviews were in part conducted with a view to seeking to persuade the SFO not to open an investigation into it. The judge held that adversarial litigation was not in reasonable contemplation,
and that the interviews had been conducted to avoid litigation, not for the purpose of litigation. Fact-finding aimed at obtaining legal advice on how to avoid a criminal investigation and prosecution is not covered by litigation privilege.

Even if an investigation had been opened, the judge held that a criminal investigation is not adversarial litigation for privilege purposes. The investigation is a preliminary step, following completion of which there may be a prosecution. It is only where a prosecution is in reasonable contemplation that litigation privilege can apply.

To be sure, future cases will turn on their own facts and circumstances, and there may be other bases to keep internal investigation materials privileged or confidential. But these two decisions mean that where there is a potential link between a client and the jurisdictions of England and Wales (which can be as broad as being a party to contracts subject to the jurisdiction of the English court), it cannot be assumed that interview memoranda can be protected from disclosure to UK authorities or in civil litigation. Even materials that would likely be privileged under US law may not be protected under English law.
RECENT UK ENFORCEMENT ACTIVITY

ROLLS-ROYCE PLC

Serious Fraud Office
Deferred Prosecution Agreement
16 January 2017

Nature of conduct: The alleged misconduct involved bribery and corruption committed by several of the company’s subsidiaries in seven jurisdictions over a 24-year period. The misconduct included: agreements to make corrupt payments; concealment or obfuscation of the use of intermediaries; failure to prevent bribery by employees or intermediaries; and failure to prevent the provision by its employees of inducements which constituted bribery. The conduct dates back to 1989 and involves two of Rolls-Royce’s subsidiaries associated with its defence, energy, and civil businesses. The illegal activities took place in Nigeria, Indonesia, Russia, Thailand, India, China, and Malaysia. Rolls-Royce entered into a global settlement of corruption-related charges with authorities in the United States, the United Kingdom, and Brazil. The resolutions with Brazil and the United States covered overlapping conduct, while the resolution with the United Kingdom covered related but distinct corrupt conduct.

Amount of alleged improper payment: Not stated.
Benefit obtained: Contracts in a number of foreign jurisdictions.
Type of resolution: DPA with the SFO. Under a global agreement involving authorities in the United States and Brazil in addition to the United Kingdom, Rolls-Royce Plc agreed to pay a total of approximately £671 million to the SFO, DOJ, and the Brazilian Ministério Público Federal.

Of note: This was the highest penalty ever imposed under a DPA (this is the third DPA used in the United Kingdom), and for the first time, the penalty imposed in the United Kingdom was significantly higher than that imposed by the DOJ. By securing this settlement, the company reduced the financial penalty it would have had imposed after a conviction by 50 percent. It is noteworthy that a DPA was even available to Rolls-Royce, given (1) that the conduct was not self-reported to the SFO (which is generally a prescribed step for the SFO to consider a DPA except in exceptional circumstances), and (2) the extremely serious nature of the allegations. The company’s ability to secure the DPA resulted from the very high level of cooperation maintained by Rolls-Royce throughout the SFO’s investigation, which should serve as an example for other large companies when confronting such issues of how DPAs can be used to avoid the potentially disastrous consequences resulting from a criminal conviction, even if the relevant conduct is long running and very serious.

Concerns over Rolls-Royce’s potential corrupt conduct first surfaced in 2012 as a result of internet articles. The SFO requested information from Rolls-Royce in response, and the company immediately launched an internal investigation, which marked the start of a lengthy and highly cooperative process. By way of example, Rolls-Royce conducted 229 internal interviews and reviewed more than 250 of its third-party relationships during the course of the four-year investigation.

F.H. BERTLING LTD

Serious Fraud Office
Criminal Charges
2 May 2017

Nature of conduct: On 2 May 2017, the SFO charged F.H. Bertling Ltd. (a logistics and freight operations company) and four individuals with one count of conspiracy to give or accept corrupt payments, contrary to the Prevention of Corruption Act 1906 (PCA) and the Criminal Law Act 1977 (CLA). The SFO has alleged that Robert McNally, Georgina Ayres, Giuseppe Morreale, Stephen Emler and the company itself conspired together and with others to give or accept corrupt payments. In addition, two further individuals (Christopher Lane and Peter Smith) have also been charged with separate counts of conspiracy to give or accept corrupt payments. The payments in question allegedly were for the purpose of helping the company win or retain supply contracts for freight forwarding services in relation to a North Sea oil exploration project known as Jasmine. The alleged misconduct took place between January 2010 and May 2013.

Amount of alleged improper payment: Not stated.
Benefit obtained: Award or retention of contracts by F.H. Bertling Ltd. for the supply of freight forwarding services in relation to an oil exploration project.
Type of resolution: None. The SFO has filed criminal charges.

The UKBA applies only to crimes committed on 1 July 2011, or later. Other anti-corruption laws, including the Prevention of Corruption Act of 1906, cover conduct prior to the effective date of the UKBA. Under those statutes, corporate liability for the acts of employees is limited to circumstances where a person who is the controlling mind or will of the corporation is convicted of the crime.

Of note: This was the second set of charges recently brought by the SFO against this company and a number of related individuals. On 13 July 2016, the SFO charged the company and seven of its directors and employees with making corrupt payments to an agent of the Angolan state oil company Sonangol, between January 2005 and December 2006, to further the company’s business opportunities in Angola. Both sets of charges have been brought under the PCA (as well as the CLA), which continue to apply to alleged corrupt conduct occurring prior to 1 July 2011.
The ISO 37001 Standard Begins To Make Its Mark

The ISO 37001 Standard, an anti-bribery management system standard published in 2016 by the International Organization for Standardization (ISO), is already beginning to make its mark around the globe. The standard is designed to reflect current best practices and provides guidance about the elements of an adequate anti-bribery program. Importantly, accredited third parties can certify compliance with this ISO standard. If widely used, such certification has the potential to become an accepted indicator of an adequate compliance program, which could lead to reduced costs associated with third-party corruption risks.

In October 2016, the International Organization for Standardization announced an international standard for an anti-bribery compliance program. In the first half of 2017, several large US corporations announced that they will become certified under the standard. A widespread adoption of a standard that reflects a trusted and adequate anti-corruption compliance program could have wide-ranging effects on the costs of compliance and due diligence for anti-corruption issues.

Two countries have already signaled approval for ISO 37001. Singapore adopted the standard in April, as the Singapore Standard (SS) ISO 37001 on Anti-bribery management systems. The agencies charged with launching the standard plan to implement an accreditation program later in 2017. Peru also released a translated version of the ISO 37001 Standard as a voluntary guideline.

In addition, major companies have already begun to announce their intent to seek certification under the ISO 37001. Both Walmart and Microsoft, for example, recently announced that they will seek certification. Microsoft announced its plan to adopt the standard in March, becoming the first US and multinational company to do so. In its announcement, the company cited the benefits of a globally consistent approach to anti-corruption programs and an objective and independent certification process and encouraged other major companies to adopt the standard as well.

World Bank Sanctions Decisions Highlight the Value of Cooperation and Strong Compliance Measures

In the first half of 2017, the World Bank’s Sanctions Board issued five enforcement decisions. The World Bank’s jurisdiction extends broadly over private sector companies that are involved in projects financed by the World Bank, and its rules prohibit corrupt, fraudulent, collusive, or coercive practices, as well as obstructing a World Bank investigation, inspection, or audit. All of the sanctioned parties in these cases were debarred for a period of time, meaning they are not eligible to participate in projects financed by the World Bank – or other banks with whom the World Bank has a mutual enforcement agreement – during that time.

Four of these decisions together highlight the value of strong compliance measures. Denmark-based Consia Consultants ApS was debarred for at least 14 years for fraudulent and corrupt practices, and the company’s managing director was debarred for three years and six months based on fraudulent practices, in connection with infrastructure and transportation projects in Indonesia and Vietnam. Among other issues, the Sanctions Board noted that Consia had inadequate compliance procedures demonstrated by its failure to review or audit such procedures for four years. The Sanctions Board also debarred three entities in connection with a health care reform project in Romania: France-based Ideal Medical Products Engineering for one year, Germany-based medical device manufacturer and distributor Karl Storz GmbH & Co. KG for two years, and Netherlands-based hospital supply company Dutchmed B.V. for a minimum of 14 years. All three made improper payments to a World Bank consultant to award a contract in his capacity as a public official, but Ideal’s and Karl Storz’s sanctions were mitigated because they cooperated and implemented compliance improvements. By contrast, Dutchmed received no mitigation credit and was also sanctioned for obstruction because it refused to permit a World Bank audit.

The fifth decision is notable in that the Sanctions Board found insufficient evidence to issue sanctions. The unnamed respondent entity and its managing and regional directors were alleged to have provided public officials with recreational “study tours” in connection with the officials’ support of project contracts in Vietnam. But the Sanctions Board concluded that the evidence did not establish that respondents knew about the alleged misconduct and that it could not be liable for the conduct of the employee who orchestrated the trips because the employee was acting primarily on behalf of a separate consulting firm and did not communicate details of his activities to the respondent entity.

AUSTRALIA

Australia Announces More Proposals to Strengthen Anti-Bribery Enforcement

In late March and early April, Australia’s Federal Government announced two proposals to strengthen anti-bribery enforcement. First, on March 30, the Minister for Justice released a public consultation paper on a proposed model for a DPA scheme, calling it “a key focus of the Australian government’s consideration of options to facilitate a more effective and efficient response to corporate crime by encouraging greater self-reporting by companies.”

Second, on April 4, the Australian government released a public consultation paper on proposed amendments to Australia’s foreign bribery regime. The proposed amendments to Australia’s bribery regime would create two new offenses: recklessly bribing a foreign public official and failing to prevent foreign bribery. Only corporations would
be held liable for the latter offense. According to the minister for justice, these reforms would create an incentive for companies to implement more effective compliance programs and promote a culture of integrity. The amendments also include extending the definition of “foreign public official” to include political candidates, and removing an existing requirement that the prosecution show that the person who paid the bribe gained an illegitimate benefit or business advantage. These changes would bring Australia’s foreign bribery offense more in line with the US Foreign Corrupt Practices Act, UK Bribery Act, and other similar laws.

The Australian government invited submissions on both proposals. The submission period closed on May 1, 2017, and the proposed amendments remain pending.

**BRAZIL**

**Operation Car Wash Continues and Entangles Brazil’s President**

March 17, 2017 marked the three-year anniversary of Operation Car Wash, the largest corruption investigation in Brazil. The investigation includes state oil company Petrobras, other state-owned enterprises and private contractors in Brazil, and hundreds of politicians. In December, two contractors – Odebrecht SA and Braskem SA – agreed to a plea deal with Brazilian, US, and Swiss authorities; approximately 77 current and former Odebrecht employees signed plea deals in connection with the bribery scheme. The president of Brazil’s Supreme Court accepted the pleas on January 30, 2017.

Also in January 2017, the judge overseeing the Operation Car Wash cases, Justice Teori Zavascki, died in a plane crash. Around the time of the crash, Zavascki was slated to review testimony from Odebrecht employees that was expected to implicate high-level political figures in corrupt activities. Brazilian authorities opened an investigation into the circumstances of the crash. On February 2, Brazil’s Supreme Court selected Justice Edson Fachin to replace Justice Zavascki.

In March, the former speaker of the lower house of Brazil’s Congress, Eduardo Cunha, was convicted of corruption, money laundering, and tax evasion as part of Operation Car Wash. Cunha was expelled from Congress in September 2016 while the charges were pending. He was sentenced to 15 years and four months in prison for receiving approximately $1.5 million in bribes in connection with Petrobras’s acquisition of exploration rights for an oil field in Benin in 2011. To date, Cunha is the highest-ranking official to be convicted as part of Operation Car Wash.

In April, Justice Fachin authorized investigations of several more politicians – including eight ministers in the Cabinet of Brazilian President Michel Temer, as well as three governors, 24 federal senators, and 39 federal deputies – based in large part on testimony from the Odebrecht employees as part of their plea deals. In May, Brazil’s highest court opened an investigation into President Temer himself after tapes surfaced in which he allegedly appeared to condone bribes to Cunha in exchange for his silence, apparently about information that could implicate Temer. In June, Brazilian prosecutors charged Temer with corruption, alleging that he accepted bribes from meatpacking company JBS SA and condoned paying hush money. This is the first time that a sitting president in Brazil has been charged with a crime.

**SPAIN**

**Spanish Prosecutors Secure First Foreign Bribery Conviction**

In February 2017, prosecutors in Spain secured their first convictions for bribery of a foreign public official. Spain amended its penal code in 2000 to make bribery of a foreign official a crime and signed on to the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 2001. Until this year, however, Spanish courts had not convicted a single Spanish company or individual for bribing a foreign public official.

In February, the Audiencia Nacional, a Spanish high court, accepted the plea agreements of Antonio Leal Parra and Basilio Martínez Abril, two executives of Spanish publishing company Aplicaciones Pedagógicas y Comercialización Editorial (APYCE). The defendants pleaded guilty to bribing Equatorial Guinea’s Deputy Minister of Education in 2009 to secure contracts for textbooks. The defendants each received a one-year jail sentence, a fine of €1,080 (approximately $1,200 USD), and a three-and-a-half year ban from receiving any state benefits or engaging in commercial contracts with public entities.

Spain has not yet prosecuted a company for bribery under the bribery law. APYCE could not face criminal charges in this matter because the Spanish Penal Code did not provide criminal liability for corporations until 2010, the year after the conduct at issue in the case. However, at least one Spanish company is currently being investigated related to allegations that it paid €46 million (approximately $52 million USD) to a company controlled by a former deputy minister of energy in Venezuela, in exchange for public procurement contracts for construction of a power plant.