

Business Guide to Anti-Corruption Laws

2016 Mid-Year Update



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INTRODUCTION TO THE MID-YEAR UPDATE

To supplement our annual [Anti-Corruption Business Guide](#), this [Mid-Year Update](#) reports on FCPA and U.K. Bribery Act enforcement actions and developments between January and June 2016.

To date, 2016 has seen a number of significant anti-corruption enforcement developments. Perhaps the most significant among them was the DOJ's announcement of a new FCPA enforcement pilot program. The pilot program is intended to provide companies under investigation with clear incentives to cooperate by describing in detail the DOJ's expectations for disclosures to and cooperation with the DOJ. Shortly after establishing the pilot program, the DOJ announced that pursuant to the program it had declined prosecutions in two of its investigations where the company under investigation had self-disclosed and fully cooperated.

Vigorous and high-stakes FCPA enforcement activity continues. The Dutch telecom company VimpelCom entered into a global settlement with U.S. and Dutch authorities that totaled \$795 million, an amount that the DOJ says included a *discount* given to VimpelCom for its cooperation with the DOJ's investigation. The case also reflects the trend of increasing international cooperation in global corruption investigations and enforcement. Other DOJ and SEC cases show continued emphasis in areas of FCPA interest, including the health care industry, travel and entertainment expenses, and the hiring of relatives of foreign officials.

Meanwhile, U.K. enforcement activity continues to escalate. The Serious Fraud Office (SFO) obtained additional criminal fines against corporate entities in two Bribery Act cases and, according to public reports, is pursuing a number of additional investigations that have not yet been resolved.

The United Kingdom's June 2016 vote to leave the European Union could have far-reaching impacts, including on the U.K.'s law enforcement activities. But, for now, the implications of the vote are unknown. In the short term, the vote is unlikely to change the course of U.K. enforcement.

The first half of 2016 also saw the massive "Panama Papers" leak in which the files of a Panamanian law firm specializing in the creation of shell companies were made public, revealing the true beneficial owners of thousands of potentially hidden bank accounts. While the initial headlines focused on revelations related to tax evasion and money laundering, the Panama Papers also are a major potential source of leads for regulators seeking to identify and prosecute corrupt payments, which can be funneled through shell companies and hidden bank accounts. Indeed, U.S. authorities have identified the Panama Papers as an important source of information for FCPA investigations. In the U.K., the government is considering a new corporate registry intending to reduce U.K. persons' ability to have hidden bank accounts.

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

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MAP OF OUR WORLDWIDE ANTI-CORRUPTION REPRESENTATIONS



OUR ANTI-CORRUPTION EXPERIENCE

Jenner & Block has one of the leading FCPA and anti-corruption practices, representing global companies in all phases of compliance with the FCPA, the U.K. Bribery Act, and other anti-corruption laws, from internal investigations and negotiations with the U.S. and other governments to development of internal controls, training, and compliance counseling. We offer clients a wealth of experience, with two former U.S. Attorneys, the former Associate Attorney General (the third-ranking official in the U.S. Department of Justice), former criminal division and assistant United States 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 U.K. 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 regulators.

FCPA AND U.K. BRIBERY ACT BASICS

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 U.S. 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 this year's \$795 million settlement between VimpelCom and U.S. and Dutch 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 U.K. Bribery Act (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. It may be [accessed here](#).

ANTI-CORRUPTION HIGHLIGHTS FROM THE FIRST HALF OF 2016

DOJ FRAUD SECTION ISSUES GUIDANCE REGARDING FCPA ENFORCEMENT AND ESTABLISHES FCPA PILOT PROGRAM TO ENCOURAGE SELF-DISCLOSURE AND COOPERATION

On April 5, 2016, the DOJ Fraud Section issued a new guidance memorandum regarding FCPA enforcement, entitled “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance” (Guidance). This Guidance reaffirms the DOJ’s commitment to FCPA enforcement and announces a new pilot program that seeks to provide clarity regarding the benefits of cooperation during a DOJ FCPA investigation.

The Guidance states that the DOJ has enhanced its FCPA enforcement capability and strategy in three ways. First, the DOJ is increasing its FCPA enforcement resources. As the DOJ announced late last year, it is adding 10 new prosecutors to its FCPA unit, bringing the total to 29 prosecutors and six supervisors, representing a 50 percent increase from its previous total. In addition, three new FBI special agent squads dedicated to FCPA enforcement are being created, which will triple from 10 to 30 the number of FBI agents assigned exclusively to FCPA investigations. In short, according to the Guidance, the DOJ is “intensifying its investigative and prosecutorial efforts by substantially increasing its FCPA law enforcement resources.”

Second, the Guidance announces that the DOJ is improving its coordination with foreign regulators. It notes that the DOJ and foreign regulators have been more effectively “sharing leads” regarding potential FCPA violations, documents, and witness testimony. The Guidance lists several recent settlements and prosecutions reflecting the “fruits” of this enhanced cooperation, including this year’s VimpelCom settlement (which as we describe below involved close coordination with Dutch prosecutors).

The DOJ’s FCPA Plan and Guidance made three points:

- The DOJ has enhanced its FCPA law enforcement resources through new FBI agents and prosecutors.
- The DOJ is increasing cooperation with foreign authorities.
- The DOJ will conduct a one-year pilot program that is intended to provide clear incentives for corporations to cooperate with FCPA investigations.

Third, in the most significant new enforcement development, the Guidance establishes a one-year FCPA enforcement pilot program. The pilot program seeks to

“promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.” The Guidance explains that the pilot program is ultimately aimed at deterring individuals and companies from violating the FCPA, encouraging companies to implement strong anti-corruption compliance programs, and increasing the DOJ Fraud Section’s ability to prosecute individual wrongdoing. In June, the DOJ announced its first two dispositions under the pilot program, both declinations of prosecution.

The FCPA pilot program provides guidance on DOJ’s expectations in order for a company to receive mitigation credit, including:

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

Last fall, Deputy Attorney General Sally Quillian Yates issued a memorandum on Individual Accountability for Corporate Wrongdoing (the Yates Memo), which announced that a corporation must disclose to prosecutors all relevant facts relating to potential culpability of individual employees for the DOJ to consider conferring cooperation credit on the corporation. This new Guidance specifically defines DOJ’s cooperation expectations in the context of the new FCPA pilot program.

Through the pilot program, the DOJ seeks to increase transparency about the benchmarks that companies must meet to receive mitigation credit for full voluntary self-disclosure of violations, cooperation with investigators, and remediation of violations, as well as the nature of the mitigation credit that the DOJ will confer in a settlement agreement.

Consistent with the DOJ’s stated intent to provide transparency, the DOJ’s pilot program sets forth the standards for what a company must do in each of those three areas.

Voluntary Self-Disclosure. According to the Guidance, the DOJ will consider the circumstances of a company’s disclosure of a FCPA violation, but will not consider a disclosure “voluntary” if it was required by law, agreement, or contract. To receive consideration for self-disclosure mitigation credit under the pilot program, the DOJ will require that the company discloses (1) “prior to an imminent threat of disclosure or government investigation;” (2) within a reasonably prompt time after the company learns about the offense; and (3) all relevant facts known to it about the FCPA violation, including (as also prescribed by the Yates Memo) relevant facts about involved individuals and facts developed after the initial disclosure.

Cooperation with Investigators. Under the pilot program, the DOJ will offer full cooperation credit if a company takes each of the following steps:

- Makes timely disclosure of all facts relevant to the wrongdoing, including facts related to involvement by corporate officers, employees, or agents;
- Provides proactive rather than reactive cooperation that discloses relevant facts even when not specifically asked to do so;
- Preserves, collects, and discloses relevant materials, and provides timely updates regarding the company's internal investigation, including rolling disclosures of information;
- Coordinates between internal and government investigations;
- Provides all known facts relevant to potential third-party criminal activity;
- Upon DOJ request, makes officers and employees (including people overseas) available for DOJ interviews (subject to the individuals' Fifth Amendment protections);
- Discloses all relevant facts gathered during a company's independent investigation (including attribution of facts to specific sources, where it does not violate the attorney-client privilege);
- Produces overseas documents and provides information about how those documents were collected;
- Facilitates third-party production of documents and witnesses from foreign jurisdictions (where not legally prohibited); and
- Provides translations of relevant foreign language documents where requested.

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.

In many FCPA settlements, the amount paid is subject to negotiation and often is below the recommended sentencing guidelines range. The DOJ's recent efforts to quantify the value of self-reporting and cooperation have been an attempt to make the process of setting the appropriate fine more transparent.

If a company does not take each of these steps in cooperating with the DOJ, the DOJ will consider offering partial credit at best. According to the Guidance, the DOJ will consider each case on an individual basis, taking into account the scope, quantity, quality, and timing of cooperation based on the circumstances of each matter.

Remediation of Violations. The Guidance states that, to receive any credit under the pilot program for remediation efforts, a company must first be eligible for the cooperation credit noted above. If a company can satisfy the cooperation credit requirement, a company will receive further credit for remediation if it implements an effective compliance and ethics program appropriately tailored to its organization. Under the pilot program, the DOJ will consider whether the company:

- Has an established culture of compliance, including an awareness among employees that criminal conduct is not tolerated;
- Dedicates sufficient resources to compliance, including maintaining experienced and adequately compensated compliance personnel;
- Maintains an independent compliance function;
- Performs an effective risk assessment and tailors its compliance program based on the assessment;
- Performs regular audits of its compliance function;
- Maintains an appropriate structure of compliance personnel within the company;
- Appropriately disciplines employees for violations and allows for the possibility of disciplining others with oversight of individuals responsible for violations, including consideration of how compensation should be affected by disciplinary violations; and
- Considers any additional steps necessary to signal the importance of accepting responsibility for misconduct and measures to reduce misconduct risks.

Mitigation Credit under the Pilot Program. Over the last year, the DOJ has made assurances that it will provide "consistent" benefits for companies that cooperate with FCPA investigations and will increase transparency in that regard. For example, in accord with those assurances, the DOJ's recent settlement with VimpelCom Ltd. (see page 14) states that VimpelCom received a specific cooperation and remediation credit of 25 percent and another 20 percent reduction for promptly acknowledging wrongdoing, both applied to the bottom end of the recommended Sentencing Guideline fine range.

The pilot program continues these efforts to lend definition and consistency to the benefits of voluntary self-disclosure, cooperation and remediation. Specifically, if a company voluntarily self-discloses FCPA misconduct, fully cooperates, and timely and appropriately remediates, all viewed in accordance with the factors described above, the DOJ may:

- Grant up to a 50 percent reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought (at most, a 25percent reduction will be granted if the voluntary self-disclosure requirements have not been met);
- Not require the appointment of a monitor if the company has implemented an effective compliance program; and
- Consider a declination of prosecution.

Analysis. Corporations faced with decisions about whether to self-disclose a potential FCPA violation or cooperate with a DOJ inquiry have found it difficult to assess or quantify the potential benefits of self-disclosure and cooperation, partially because of insufficient transparency into how prior settlements were reached and partially because the unique circumstances of each case make it difficult to compare the penalties in cases that involve self-disclosure and cooperation with those in cases that do not. Many corporations may also be reluctant to self-report out of fear of triggering an aggressive and expensive government investigation that they otherwise would not need to endure. The Guidance appears to be an effort to address these issues by clearly identifying a specific formula to quantify the potential benefits in cooperation and disclosure. The Guidance couples this carrot with the stick of increased enforcement resources that may suggest that the likelihood of “getting caught” is increasing, with the hopes of further tipping the scales toward disclosure.

Whether this guidance will meaningfully affect the calculus in making a voluntary disclosure remains to be seen. Skeptics may suggest that the significant charging discretion possessed by prosecutors will blunt the effect of the DOJ’s quantification of cooperation credit and related guidance in the Pilot Program. The Federal Sentencing Guidelines ranges form the basis of any federal criminal fine from which a reduction under the pilot program will be calculated. But the Guidelines ranges are calculated based on the charged offenses and the facts and circumstances of a case, both of which are subject to the government’s charging discretion. For example, a prosecutor seeking a \$10 million fine could charge the defendant with conduct supporting a fine of that size. Or, if a company is due a 50 percent discount under the pilot program, the prosecutor could charge the defendant with more severe conduct that supports a \$20 million fine, which is reduced to \$10 million by the discount, getting the same result regardless of the alleged cooperation credit. Thus, the government has the power to set the baseline from which a reduction in the fine is taken. While prosecutors will rightly note that they are bound by what the evidence shows and the law interpreting the

guidelines, skeptics will insist that these constraints leave significant play in the joints as to a baseline fine based on what offense is charged and which facts are emphasized.

Skeptics also may point out that the pilot program does not significantly change cooperation incentives because it does not obligate the DOJ to anything; it does not address separate exposure to SEC charges; and it does not diminish the other enormous costs of an investigation, including fees to attorneys and consultants and the potential costs of submitting to a monitorship. Moreover, by failing to provide a clear description of the criteria and circumstances surrounding partial mitigation credit, the pilot program fails to resolve all difficulties in assessing the benefits of cooperation, especially where it is doubtful that a company can meet the DOJ’s stringent voluntary disclosure or cooperation requirements.

The most significant impact of the pilot program accordingly may be its specific guidance of what the DOJ expects from corporations that seek to benefit from self-disclosure, cooperation, and remediation, including that prosecutors will view the failure to self-disclose as a significant negative factor in negotiations.

For further information and analysis on the Guidance and the pilot program, please see our [Client Alert, DOJ Issues Guidance Regarding Enhanced FCPA Enforcement and Credit for Voluntary Disclosure, Cooperation, and Remediation](#), available on our website.

DOJ DECLINES PROSECUTION IN TWO INVESTIGATIONS IN FIRST IMPLEMENTATION OF THE FCPA PILOT PROGRAM

In June 2016, the DOJ declined prosecution in two FCPA investigations. The DOJ’s letters to the targets of these investigations, Nortek and Akamai Technology, explained that the DOJ’s decision to decline prosecution reflected the credit provided under DOJ’s FCPA pilot program to self-disclosing and cooperating companies. The letters each emphasized that the company’s voluntary disclosure and cooperation supported the declination despite corrupt conduct at a subsidiary, and that the company will be disgorging the full amount of ill-gotten gains as determined by the SEC. On the same day that the DOJ closed these investigations without action, the SEC announced non-prosecution agreements with each of these companies, likewise touting the company’s cooperation and that they will be disgorging the profits connected to the misconduct.

The public acknowledgment of the declination in these cases appears intended to reinforce the DOJ’s stated interest in improving transparency in its charging decisions and improving incentives to cooperate through the FCPA pilot program. In the past, the DOJ rarely announced a declination. These announcements, coming on the heels of the Guidance that established the pilot program, thus send a clear message. Indeed, although the DOJ began its investigations of each company prior to the April announcement of the FCPA pilot program, the DOJ specifically stated that each company met the pilot program’s requirements of timely voluntary disclosure and

cooperation with the investigation, including identification of individuals involved in the misconduct.

NINE MONTHS AFTER THE “YATES MEMO,” FEW INDIVIDUAL FCPA PROSECUTIONS

In our *Business Guide to Anti-Corruption Law 2016*, published in January, we discussed the September 2015 release of the Yates Memo in detail. As noted above, the Yates memo signaled an increased focus on individual liability for corporate actions. One of the DOJ enforcement policy principles announced in the memorandum was that corporations must provide the DOJ with “all relevant facts relating to the individuals responsible for the misconduct” to receive cooperation credit. This means identifying the responsible individuals. The DOJ has formally incorporated this principle, along with others in the Yates Memo, into the U.S. Attorneys’ Manual, which provides enforcement guidance to federal prosecutors.

Yet, despite the Yates Memo’s focus on individual prosecutions’, the DOJ has neither brought nor resolved any new individual FCPA prosecutions in the first half of 2016. The enforcement matters the DOJ resolved during this period included only one that involved individual charges, which had been brought last year. The DOJ likewise issued no new individual indictments in other FCPA matters. (The SEC, which has in recent years similarly announced an emphasis on pursuing individual wrongdoers in FCPA enforcement actions, resolved two matters against individuals in the first half of 2016.)

While this dearth of individual actions may be surprising, DOJ watchers should not draw too many conclusions. As we discussed in our 2016 *Guide*, the Yates Memo did not mean that a slew of individual cases would appear overnight.

Due to the timelines of internal and DOJ investigations, the policy principles of the Yates Memo will necessarily take time to take root in enforcement actions. Concurrent investigations of corporations and of individual employees are not new, but the standards for cooperation credit detailed in the Yates Memo could still change how those investigations play out. Government regulators require time to build cases against corporations and individuals.

The 2015 Yates memo underscored the importance of prosecuting individual wrongdoing in connection with corporate crime. Nearly one year after, however, the DOJ’s FCPA prosecutions have yet to reflect this emphasis. Despite continued corporate enforcement actions, the DOJ has brought no new FCPA individual charges in 2016.

Indeed, the Yates Memo contemplates that DOJ lawyers will not wait for companies to deliver employee information but will instead “proactively investigat[e] individuals at every step of the process – before, during, and after any corporate cooperation.”

The Yates Memo “serves to make companies fully aware that they cannot receive cooperation credit if they shield the criminality of individual employees.” Andrew Weissmann, Chief of the Fraud Section, February 2, 2016.

The Yates Memo could motivate corporations to dig deeper into their files and provide more information regarding individual employee conduct. Knowing that the DOJ will require “all relevant facts” related to implicated individuals may motivate companies to look more closely so as not to jeopardize the opportunity to receive cooperation credit.

While there are reasons that the Yates Memo may increase corporate cooperation, there are other reasons why the memorandum may not change things or—according to some critics—may even decrease cooperation. One argument is that corporations were already incentivized to provide information about individuals to gain cooperation credit, even if information regarding individuals was only one of multiple factors determining cooperation, and so the Yates Memo will not significantly alter corporate conduct. Another line of reasoning is that, with individuals at a perceived heightened risk of prosecution, employees may be less motivated to provide information that will assist the company in conducting its internal investigation because it could risk criminal liability for themselves or their colleagues.

For more on the Yates Memo, the [recent article](#) by Partners William Pericak and Robert Stauffer, *Twenty Questions Raised by the Justice Department’s Yates Memorandum*, is available on our website.

THE PANAMA PAPERS EXPOSE THE SECRET WORLD OF OFFSHORE SHELL COMPANIES

The April 2016 publication of information based on the Panama Papers—a trove of 11.5 million documents leaked from the files of Panamanian law firm Mossack Fonseca—exposed unprecedented details about the shadowy world of offshore domiciliary entities, potentially providing new leads and details about international corruption. The leaked documents detail how Mossack Fonseca helped its clients hide their assets and identities by creating domiciliary entities in tax haven jurisdictions. According to an analysis of the documents by the International Consortium of Journalists (ICIJ), Mossack Fonseca worked with more than 14,000 financial institutions, law firms, and other intermediaries to establish more than 210,000 offshore entities.

The fallout from the Panama Papers initially centered on offshore accounts linked to high-ranking public officials, including at least 12 current and former world leaders, and the issue of offshore tax evasion. The Panama Papers, however, raise broader corruption, money laundering, and sanctions compliance concerns. The revelations also underscore the heightened compliance risks involved in transactions with offshore domiciliary entities located in tax

haven jurisdictions. Such entities, while themselves legal, can be used to hide the proceeds of bribery or other forms of criminal activity, mask commercial transactions with sanctioned countries and individuals, and conceal income and assets from tax authorities. For example, in this year's Analogic Corp. settlement for violations of the books and records and internal controls provisions of the FCPA, the allegations centered on sham transactions involving offshore shell companies.

The Panama Papers already have attracted the keen interest of U.S. authorities. The U.S. Attorney's Office for the Southern District of New York, for example, announced that it has "opened a criminal investigation regarding matters to which the Panama Papers are relevant" and requested the ICIJ's cooperation.

The disclosure of information about the structure, beneficial ownership, and transactions of the offshore entities named in the Panama Papers likely will give rise to new FCPA probes and provide further evidence of foreign bribery in existing FCPA investigations. As noted above, the disclosures come at a time when the DOJ has added increased resources to its FCPA enforcement efforts. "I'm sure there are people sitting in the FCPA squads within the FBI, within the DOJ FCPA unit, that are quite interested in the names of the entities," said Scott Moritz, a former FBI special agent. The revelations are drawing the attention of the SEC as well. The chief of the SEC Enforcement Division's FCPA Unit, Kara Brockmeyer, has indicated that the SEC "will be looking at" the leaked data for possible evidence of FCPA violations.

The Panama Papers also are likely to enhance the ability of the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) to investigate potential sanctions violations. OFAC maintains a list of Specially Designated Nationals and Blocked Persons (the SDN List) as part of its efforts to enforce economic and trade sanctions against individuals and companies owned or controlled by, or acting for on behalf of, targeted countries or known to be involved in terrorism, weapons proliferation, or narcotics trafficking. Under OFAC regulations, U.S. persons generally may not engage in financial transactions or other dealings with any persons on the SDN list or any entity in which a blocked person has a 50 percent or greater ownership interest, even if the entity itself is not on the SDN list. OFAC may be able to use the Panama Paper revelations to identify violations of the regulations or, possibly, additional entities that should be added to the SDN list.

The FCPA's jurisdiction reaches all U.S. companies or persons (i.e., domestic concerns), as well as foreign companies that are registered with the SEC and foreign companies or persons that act in furtherance of an improper payment or offer while in the United States.

Liability under the books and records provisions of the FCPA is limited to issuers, although individuals can be held liable under traditional vicarious liability principles.

Hoskins presents the issue of whether a person that does not meet this definition can be liable for FCPA violations on conspiracy or aiding and abetting charges.

CASE TO WATCH: UNITED STATES V. HOSKINS – WILL THE SECOND CIRCUIT CLARIFY THE LIMITS OF CONSPIRACY AND AIDING AND ABETTING LIABILITY UNDER THE FCPA?

The government, in *United States v. Hoskins*, has signaled an intent to ask the Second Circuit Court of Appeals to adopt a theory of conspiracy and aiding and abetting liability under the FCPA that could bring a host of foreign nationals (and potentially foreign corporations) within the reach of the anti-corruption statute. Under one of the government's theories at the trial level, a non-resident foreign national could be subject to criminal liability under the FCPA, even where the defendant was not an agent of a domestic concern and did not commit acts while physically present in the territory of the United States. The government argued that such an individual could be liable for FCPA violations under a theory of conspiracy or aiding and abetting a violation of the FCPA by a person who was within the statute's reach. The district court twice rejected this argument and in April 2016 the government filed a Notice of Appeal to the Second Circuit. This notice announces the government's intent to pursue the novel application of federal conspiracy statutes to expand the scope of FCPA prosecutions.

Because FCPA cases are rarely appealed to appellate courts, any appeal that raises substantial new issues about the statute is noteworthy, but this case is particularly so. An affirmance by the Second Circuit would limit recent efforts to expand the extra-territorial reach of the FCPA, while a reversal would subject foreign nationals, who are not agents of a domestic concern and who have not committed acts related to the alleged crimes while physically present in the territory of the United States, to criminal liability under the FCPA.

For further analysis, a [recent article](#) by Partner Nicholas Barnaby, Associate Emily Bruemmer, and former partner Jessie Liu details other ways that the DOJ could seek to expand the scope of the FCPA. It is available on our website.

RECENT ENFORCEMENT ACTIONS

AKAMAI TECHNOLOGIES

*Securities and Exchange Commission
Non-Prosecution Agreement
June 7, 2016*

*Department of Justice
Declination of Prosecution
June 7, 2016*

Nature of Conduct: Akamai (Beijing) Technologies, Co. Ltd. (Akamai-China), a wholly owned subsidiary of Akamai Technologies, Inc. (Akamai), contracted with third-party partners in China (as required by China's regulatory system) to deliver Internet cloud services to end customers. From 2012 to 2015, an Akamai-China regional sales manager used a portion of monies provided by a partner to pay employees of end customers, two of which were state-owned entities. As a result of the payments, end customers purchased up to 100 times more network capacity than they needed. Employees of Akamai-China also provided gifts to end customer employees, which were recorded as legitimate business expenses. Akamai's books and records were thus inaccurate when consolidated with Akamai-China's books and records.

Amount of Alleged Improper Payments: Improper payments totaled \$187,500.

Benefit Obtained: End customers purchased from Akamai-China up to 100 times more network capacity than they needed.

Type of Resolution and Sanction: The DOJ declined prosecution, and Akamai entered into a non-prosecution agreement with the SEC covering the alleged improper payments by Akamai-China under which Akamai will disgorge \$652,452, plus prejudgment interest of \$19,433.

The substantive elements of the FCPA's Anti-Bribery Provisions:

- 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
- In order to obtain or retain business or to direct business to any person

Of Note: The non-prosecution agreement highlighted Akamai's conduct that contributed to the resolution. Among other factors, Akamai self-reported to the SEC within weeks of discovering the violation, and the Regional Sales Manager resigned his position. In addition, Akamai terminated its relationship with the channel partner, revised its compliance program, and cooperated with the SEC investigation.

ANALOGIC CORP., BK MEDICAL, AND LARS FROST

*Securities and Exchange Commission
Settled Administrative Proceeding (Analogic Corp. and Lars Frost)
June 21, 2016*

*Department of Justice
Non-Prosecution Agreement (BK Medical)
June 21, 2016*

Nature of Conduct: According to the SEC's order, Analogic Corp.'s wholly owned Danish subsidiary BK Medical engaged in hundreds of sham transactions over a period of at least 10 years that posed a significant risk of corruption or other improper conduct, such as embezzlement. At the request of its distributors, BK Medical issued false or inflated invoices to the distributors and then direct the overpayments it received to third parties identified the distributors. Over the course of the scheme, about \$20 million in overpayments were sent to third parties, including individuals in Russia and apparent shell companies in Belize, the British Virgin Islands, Cyprus, and Seychelles. Lars Frost, BK Medical's CFO, personally authorized many of these payments.

Amount of Alleged Improper Payments: The order does not allege a quid pro quo arrangement, but identifies about \$20 million in payments made to third parties as part of sham transactions.

Benefit Obtained: BK Medical made the sham transactions at the request of certain of its distributors.

Type of Resolution: The SEC's order finds that Analogic violated the FCPA's internal controls provisions and that Frost knowingly circumvented BK Medical's internal controls and falsified its books and records. Without admitting or denying the findings, Analogic consented to the order and agreed to pay \$7.67 million in disgorgement and \$3.8 million.

BK Medical agreed to a non-prosecution agreement with the DOJ, under which it will pay a \$3.4 million fine.

Of Note: The settlement configuration, with the parent entering into a settlement with the SEC and a subsidiary entering into a settlement with the DOJ, shows the range of different potential settlement outcomes.

IGNACIO CUETO PLAZA

*Securities and Exchange Commission
Settled Administrative Proceeding
February 4, 2016*

Nature of Conduct: According to the SEC's order, Ignacio Cueto Plaza authorized improper payments to a third-party consultant who may have paid money to a union official to influence a dispute between South American-based LAN Airlines and its unionized employees in Argentina. Cueto Plaza, the then-president and chief operating officer of LAN Airlines, allegedly authorized a sham consulting agreement under which the company made payments totaling \$1.15 million to the consultant's brokerage account. According to the SEC, the sham consulting agreement falsely stated that the consultant would study air routes in Argentina. However, Cueto Plaza is alleged to have been aware that no such study would be performed and that the consultant might provide portions of the payments to union officials in Argentina, who would in turn seek to have their members accept a lower wage increase than demanded in negotiations.

Amount of Alleged Improper Payments: The order does not specify the amount of improper payments, but \$1.15 million was paid to a third-party consultant who may have passed all or a portion of that money on to union officials.

Benefit Obtained: The potentially improper payments were made for the purpose of favorably settling a labor dispute.

Type of Resolution and Sanction: The SEC's order finds that Cueto Plaza violated the internal controls and books and records provisions of the FCPA. Without admitting or denying the findings, Cueto Plaza consented to the order and agreed to pay a \$75,000 penalty and to certify his compliance with LAN Airlines' policies and procedures, including attending anti-corruption training.

Of Note: Despite the SEC's settlement with Cueto Plaza, the agency has indicated that its investigation is still ongoing. The union official is not alleged to be a government official. This is another example, like last year's Goodyear Tire case, of the SEC using the books and records and internal controls provisions of the FCPA to go after commercial bribery conduct.

DMITRIJ HARDER

*Department of Justice
Plea Agreement
April 20, 2016*

Nature of Conduct: The DOJ charged Dmitrij Harder, the former owner and president of Chestnut Consulting Group Inc. and Chestnut Consulting Group Co. (Chestnut Group), with violations of the FCPA and the Travel Act as a result of bribes allegedly paid to a senior banker in the U.K.'s Natural Resources Group of the European Bank for Reconstruction and Development (EBRD). As described in the DOJ press release accompanying the sealed plea agreement, Harder admitted that, between 2007 and 2009,

he "engaged in a scheme to pay approximately \$3.5 million in bribes to an EBRD official to corruptly influence the official's actions on applications for EBRD financing submitted by the Chestnut Group's clients and to influence the official to direct business to the Chestnut Group." The Chestnut Group earned approximately \$8 million in "success fees" as a result of EBRD's approval of its clients' applications.

Amount of Alleged Improper Payments: The total amount of payments are alleged to be \$3.5 million.

Benefit Obtained: \$8 million in "success fees."

Type of Resolution: Sealed Plea. Sentencing is scheduled for July 21, 2016.

Of Note: First, the EBRD is based in the United Kingdom., which is not generally considered a high-corruption risk country. Second, the indictment relies on the "public international organization" prong of the FCPA's "foreign official" element, which is infrequently alleged. Harder had argued, in a motion to dismiss, that EBRD was not a public international organization under the FCPA. However, the court rejected the argument, finding that the indictment contained sufficient facts for a jury to determine that EBRD qualifies as a public international organization within the meaning of the FCPA.

LAS VEGAS SANDS CORPORATION

*Securities and Exchange Commission
Settled Administrative Proceeding
April 7, 2016*

Nature of Conduct: According to the SEC's order, Las Vegas Sands Corporation (LVS) failed to properly authorize or document millions of dollars in payments to a third-party consultant who facilitated business activities in China and Macao and certain other improperly accounted for payments that may have gone to Chinese officials. Many of the payments were recorded as fictitious expenses, such as hundreds of thousands of dollars in property management fees for a building that had no property manager and more than a million dollars recorded for "arts and crafts" when no artwork was ever purchased.

Amount of Alleged Improper Payments: No payments were specifically alleged to be improper. However, the settlement reflects that LVS kept inaccurate books and records for more than \$62 million in payments to a consultant in China that may have been passed on to Chinese officials.

Benefit Obtained: The order alleges no specific quid pro quo. According to the SEC, however, the consultant, a former Chinese official who touted his political connections, acted as an intermediary to obscure the LVS's role in certain business transactions, including to purchase a team in the Chinese Basketball Association, in violation of a league prohibition on gaming companies owning a team, and to purchase a building in Beijing from a Chinese state-owned-entity. Additional, other payments not properly accounted for related to a high-speed ferry

service and expansion of other aspects of the casino business in Macau.

Type of Resolution and Sanction: The SEC's order finds that LVS violated the FCPA's internal controls and books and records provisions. Without admitting or denying the findings, LVS consented to the order and agreed to pay a \$9 million civil penalty and to retain an independent consultant for two years to review its FCPA-related internal controls, recordkeeping, and financial reporting policies and procedures and its ethics and compliance functions.

Of Note: A wrongful termination lawsuit filed by a former top LVS Macau executive in 2010 has been reported by the *Wall Street Journal* as having prompted the SEC and DOJ to open FCPA investigations. The wrongful termination suit is scheduled for trial in the summer of 2016. LVS said it is continuing to respond to the DOJ's inquiry.

NORDION INC. AND MIKHAIL GOUREVITCH

*Securities and Exchange Commission
Settled Administrative Proceeding
March 3, 2016*

Nature of Conduct: According to the SEC's order, the health science company Nordion Inc. and its former employee Mikhail Gourevitch allegedly arranged bribes through a third-party agent to Russian officials between 2005 and 2011 for the purpose of obtaining Russian government approval for the use of the company's liver cancer treatment in Russia. Gourevitch allegedly concealed the bribes from Nordion and received at least \$100,000 in kickbacks from the Russian agent. Nordion, the SEC charged, lacked sufficient internal controls, failed to follow its own policies, and failed to conduct meaningful due diligence on the third-party agent

Amount of Alleged Improper Payments: Nordion allegedly paid the Russian agent approximately \$235,043, a portion of which may have been passed on to Russian government officials.

Benefit Obtained: According to the SEC, Nordion received drug approvals to sell its liver cancer treatment in Russia. However, it ultimately was unable to do so and thus did not receive any profits from sales.

Type of Resolution and Sanction: The SEC's order with respect to Nordion alleged that the company violated the FCPA's internal controls and books and records provisions. Without admitting or denying the allegations, Nordion consented to the entry of the order and agreed to pay a \$375,000 civil penalty. In a separate order, the SEC alleged that Gourevitch violated the anti-bribery and books and records provisions. Without admitting or denying the allegations, he consented to the order and agreed to pay \$100,000 in disgorgement, \$12,950 in prejudgment interest, and a \$66,000 civil penalty.

Of Note: Although Nordion and Gourevitch are listed together, they are not similarly situated. Gourevitch concealed his misconduct from Nordion and was charged

with violations of the FCPA's substantive anti-bribery section while Nordion was charged only with an internal controls violation. The company discovered the violation, investigated, and self-reported to both Canadian and U.S. authorities. Additionally, Nordion terminated Gourevitch's employment, ended contact with the Russian agent, and implemented extensive remedial measures.

The Nordion and Gourevitch cases highlight the potential importance of the FCPA's internal controls provisions. Even where an employee conceals his misconduct and benefits from it at the expense of his employer, the employer can be held liable for the failure to maintain adequate internal controls.

NORTEK, INC.

*Department of Justice
Declination of Prosecution
June 7, 2016*

*Securities and Exchange Commission
Non Prosecution Agreement
June 7, 2016*

Nature of Conduct: According to the SEC's order, from 2009 to 2014, Linear Electronics (Shenzen) Co. Ltd. (Linear China), a subsidiary of Nortek, Inc., made more than 400 payments—in the form of cash, gift cards, meals, travel, accommodations, and entertainment—to local Chinese officials in multiple government departments. The payments were used to secure preferential treatment from Chinese officials, including through reduced customs duties, taxes, and other fees. Some payments were disguised with false or misleading information and documentation. Nortek consolidated Linear China's accounts into Nortek's books and records. Moreover, Nortek failed to establish adequate internal controls and policies to prevent or detect the improper payments.

Amount of Alleged Improper Payments: Approximately \$290,000.

Benefit Obtained: Preferential treatment, relaxed regulatory oversight, and reduced customs duties, taxes and fees.

Type of Resolution and Sanction: The DOJ declined to prosecute. Under a non-prosecution agreement with the SEC covering the misconduct at Linear China, Nortek will disgorge \$291,403, plus prejudgment interest of \$30,655.

Of Note: As noted above, this was one of two recent cases in which DOJ declined prosecution and the SEC entered into non-prosecution agreements in which the SEC obtained disgorgement but sought no additional civil penalty, based in part on the company's cooperation. The non-prosecution agreement highlighted the various ways Nortek cooperated. Nortek self-reported to the SEC and the DOJ before finishing its internal investigation. It fired

the employees involved, improved its compliance and training programs, and assisted the SEC.

NOVARTIS AG

*Securities and Exchange Commission
Settled Administrative Proceeding
March 23, 2016*

Nature of Conduct: According to the SEC's order, Novartis AG's China-based subsidiaries engaged in pay-to-prescribe schemes with Chinese health care professionals to increase sales. Under the alleged schemes, from 2009 to 2013, Shanghai Novartis Trading Ltd. and Beijing Novartis Pharma Co. Ltd. employees "improperly provided things of value to [doctors and other health care professionals] (HCPs) in China in connection with pharmaceutical sales." These "things of value" included "gifts, travel, improper sightseeing or vacations, entertainment, and favors for families of HCPs," as well as "cash and gifts" funded via falsified expense reports, some of less than \$50 in value. These payments, according to the SEC's order, were "improperly recorded on the general ledger as legitimate employee expenses, sponsorships, conferences, medical studies, and marketing costs."

Amount of Alleged Improper Payments: The SEC's order provides only examples of instances in which Novartis AG allegedly gave money, gifts, and other things of value to health care professions to obtain business, mostly in small amounts, but these examples total several hundred thousand dollars in value.

Benefits Obtained: According to the SEC, Novartis AG received several million dollars from sales of pharmaceutical products to China's state health institutions.

Type of Resolution and Sanction: The SEC's order finds that Novartis AG violated the FCPA's internal controls and books and records provisions. Without admitting or denying the findings, Novartis AG consented to the order and agreed to pay a \$2 million civil penalty plus about \$21.5 million in disgorgement of profits and about \$1.5 million in prejudgment interest. Novartis AG also agreed to provide the SEC with status reports for the next two years on its remediation efforts and implementation of its anti-corruption measures.

Enforcement actions against Olympus, SciClone and Novartis reflect a continued focus on the health care industry. These cases follow a typical pattern in which a health care company pays kickbacks to health care professionals in exchange for an increase in sales.

Under the FCPA's broad definition, health care professionals, including doctors and administrators, who work for a state-run health care system count as "foreign officials."

Of Note: This settlement continues a recent trend in SEC enforcement actions of allowing companies to monitor themselves through periodic reporting to the SEC regarding their remediation, rather than imposing a more costly independent monitor. The SEC also noted that the settlement reflected the cooperation, including self-reporting, that the company provided.

OLYMPUS CORPORATION OF THE AMERICAS

*Department of Justice
Deferred Prosecution Agreement
March 1, 2016*

Nature of Conduct: According to the DOJ, a Miami-based subsidiary of Olympus Corporation of the Americas (OCA), Olympus Latin America (OLA), provided payments to health care practitioners at government-owned health care facilities in Central and South America with the intent to increase medical equipment sales in those countries. The payments were in the form of cash, personal travel, money transfers, personal grants, and free or discounted equipment. These benefits were primarily provided through "training centers" ostensibly set up to educate and train doctors.

Amount of Alleged Improper Payments: Almost \$3 million.

Benefit Obtained: More than \$7.5 million in profits.

Type of Resolution: OLA entered into a Deferred Prosecution Agreement with the DOJ and the U.S. Attorney's Office for the District of New Jersey. Under the terms of the agreement, OLA must pay a \$22.8 million criminal penalty, retain a compliance monitor for three years, and implement compliance changes.

Of Note: According to the DOJ, OLA did not voluntarily disclose the misconduct but did receive a 20 percent penalty reduction off the recommended federal sentencing guidelines penalty because of its cooperation, which included an extensive internal investigation and a significant amount of effort translating, collecting, analyzing, and organizing documents. In a related action, OLA's parent corporation, OCA, entered into a separate Deferred Prosecution Agreement in connection with its admission that it had violated the domestic anti-kickback statute (AKS). OCA agreed to pay a \$312.4 million criminal penalty and an additional \$310.8 million to settle civil claims under the federal and various state False Claims Acts, which the DOJ noted was the largest total amount paid in U.S. history for violations involving the AKS by a medical device company.

PTC, INC., PARAMETRIC TECHNOLOGY (SHANGHAI) SOFTWARE COMPANY LTD., PARAMETRIC TECHNOLOGY (HONG KONG) LTD. AND YU KAI YUAN

*Department of Justice
Non-Prosecution Agreement (Parametric Technology (Shanghai) Software Company Ltd. and Parametric Technology (Hong Kong) Ltd.)
February 16, 2016*

*Securities Exchange Commission
Settled Administrative Proceeding (PTC, Inc.)
Deferred Prosecution Agreement (Yu)
February 16, 2016*

Nature of Conduct: According to the DOJ, two subsidiaries of software company PTC, Inc., collectively “PTC China,” used local business partners to coordinate and pay for employees of Chinese state-owned entities to travel to the United States. The trips were nominally for training at PTC, Inc.’s headquarters in Massachusetts, but primarily for recreational travel to other places in the United States, including Hawaii, Las Vegas, Los Angeles, and New York.

Amount of Alleged Improper Payments: Although the papers did not specify the precise amount of improper payments, PTC, Inc. paid more than \$1 million in travel expenses through business partners.

Travel and entertainment expenses have been a recent focus of FCPA enforcement actions.

The FCPA itself provides an affirmative defense for “reasonable and bona fide expenditures, such as travel and lodging expenses” when directly connected with legitimate promotions or product demonstrations or when a required part of contract performance.

Nevertheless, these recent enforcement actions reflect that companies must proceed with caution to ensure that expenses are reasonable, relate to legitimate educational or training needs, and are not provided in circumstances indicating an attempt to induce favorable treatment with regard to the company’s business.

Benefit Obtained: According to the DOJ, in the time period during which PTC China was funding travel to the United States, PTC China entered into more than \$13 million in contracts with Chinese state-owned entities. According to the SEC, PTC, Inc. made approximately \$11.8 million in profits from contracts with the state-owned entities whose employees received the improper benefits.

Type of Resolution and Sanction: PTC China entered into a non-prosecution agreement with the DOJ, under which it agreed to pay a \$14.54 million criminal penalty, continue to cooperate with the DOJ, implement compliance enhancements, and periodically report on its compliance program to the DOJ. PTC Inc. entered into a

settlement agreement with the SEC, under which it agreed to pay \$11,858,000 in disgorgement and \$1,764,000 in prejudgment interest.

Yu Kai Yuan entered into a Deferred Prosecution Agreement with the SEC under which he agreed not to violate securities laws and to continue to provide his cooperation, and the SEC agreed not to charge him in the absence of further evidence of misconduct.

Of Note: According to the DOJ, PTC China did not receive voluntary disclosure credit or full cooperation credit because during its initial disclosure the company withheld relevant facts it had learned during an internal investigation and did not disclose those facts until the DOJ uncovered the information independently.

The Deferred Prosecution Agreement with Yu is the SEC’s first Deferred Prosecution Agreement with an individual. The SEC’s press release emphasized Yu’s cooperation with the SEC’s investigation and stated that such agreements are intended to “facilitate and reward cooperation.”

QUALCOMM INC.

*Securities and Exchange Commission
Settled Administrative Proceeding
March 1, 2016*

Nature of Conduct: The world’s largest mobile chipmaker, Qualcomm Inc., allegedly hired relatives of Chinese government officials who were deciding whether to select the company’s mobile technology products amid increasing competition in the international telecommunications market. The SEC also charged that Qualcomm, over the course of a decade, provided gifts, travel, and entertainment 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 impact the volume of Qualcomm’s sales within that market. With insufficient internal controls to detect improper payments, Qualcomm misrepresented in its books and records that things of value provided to foreign officials were legitimate business expenses.

Amount of Alleged Improper Payments: The SEC order provides many examples in which Qualcomm allegedly hired relatives of officials and provided them with money, airplane and event tickets, gifts, loans, and other things of value, totaling millions of dollars in value, but the order does not state a total value for these actions.

Benefit Obtained: According to the SEC, Qualcomm received billions of dollars of revenue from sales of chips and licenses for cellular phone manufacturers in China.

Type of Resolution and Sanction: The SEC’s order finds that Qualcomm violated the FCPA’s anti-bribery, internal controls, and books and records provisions. Without admitting or denying the findings, Qualcomm consented to the order and agreed to pay about a \$7.5 million civil penalty and to self-report to the SEC for the next two years with annual reports and certifications of its FCPA compliance.

Of Note: Qualcomm's 2013 10-K disclosed that the company had reported to the SEC in September 2010 that, in December 2009, it received a whistleblower complaint about its accounting, but the company's internal investigation, assisted by outside counsel, concluded that there were no violations. The allegations related to the hiring of Chinese officials' relatives reflects the recent enforcement emphasis on such hiring practices, especially in Asia. Given the large sums alleged to have been paid and revenues received, and the lack of any mention of cooperation, the amount of the required payment and the use of self-reporting (rather than an outside monitor), are themselves noteworthy. The company has also announced that the DOJ has closed its concurrent investigation.

The Qualcomm settlement is an example of the recent investigations by the SEC and DOJ into the hiring of foreign officials' relatives. Companies engaging in overseas hiring should consider FCPA and anti-corruption due diligence on prospective employees to identify potential risks.

ROBERTO ENRIQUE RINCON FERNANDEZ, ABRAHAM JOSE SHIERA BASTIDAS, MOISES ABRAHAM MILLAN ESCOBAR, JOSE LUIS RAMOS CASTILLO, CHRISTIAN JAVIER MALDONADO BARILLAS, AND ALFONZO ELIEZER GRAVINA MUNOZ

*Department of Justice
Guilty Pleas*

June 16, 2016 (Rincon Fernandez)

March 22, 2016 (Shiera Bastidas)

January 19, 2016, unsealed March 22, 2016 (Millan Escobar)

December 10, 2015, unsealed March 22, 2016 (Gravina Munoz)

December 3, 2015, unsealed March 22, 2016 (Moldonado Barillas, Ramos Castillo)

Nature of Conduct: In an 18-count indictment, which included a notice of forfeiture, the DOJ charged Roberto Enrique Rincon Fernandez and his co-defendant with violating the FCPA, conspiring to violate the FCPA, money laundering, and conspiring to commit money laundering. According to the indictment, Rincon Fernandez and his co-defendant, Abraham Jose Shiera Bastidas, conspired to obtain and retain lucrative energy contract with Petroleos de Venezuela S.A. (PDVSA), a Venezuelan state-owned and state-controlled oil company. In his plea, Rincon Fernandez admitted that, beginning in 2009, he and Shiera Bastidas agreed to pay bribes and other things of value to PDVSA purchasing analysts, including through an independent contractor, to ensure that his and Shiera Bastida's companies were placed on PDVSA bidding panels. According to the DOJ's press release, Rincon Fernandez also admitted to making bribe payments to

other PDVSA officials to ensure that his companies were placed on PDVSA-approved vendor lists and given payment priority so that they would get paid ahead of other PDVSA vendors with outstanding invoices. In a separate indictment, Christian Javier Moldonado Barillas, Alfonso Gravina Munoz, and Jose Luis Ramos Castillo were charged with being the foreign officials who received these payments. In a separate information, Moises Abraham Millan Escobar was charged as the independent contractor who helped facilitate certain of the improper payments.

Amount of Alleged Improper Payments: Approximately \$600,000 in bribe payments from companies owned by Rincon Fernandez to Venezuelan officials. Another \$190,000 in bribe payments was alleged to have been made from companies owned by Shiera Bastidas.

Benefit Obtained: Obtaining and retaining lucrative PDVA energy contracts, as well as obtaining payment priority over other PDVSA vendors.

Type of Resolution: Guilty pleas. Rincon Fernandez pleaded guilty to one count of conspiracy to violate the FCPA, one count of violating the FCPA, and one count of making false statements on his 2010 federal income tax return. He also agreed to a forfeiture. Sentencing is scheduled for September 30, 2016.

Shiera Bastidas pleaded guilty to one count of conspiracy to violate the FCPA and commit wire fraud and one count of violating the FCPA. Sentencing is scheduled for July 8, 2016.

Of Note: Although charged separately, several of the foreign officials allegedly involved in Rincon Fernandez and Shiera Bastidas's scheme were charged with conspiring to violate FCPA, as well as substantive FCPA violations. Charges against the three foreign officials (Moldonado Barillas; Gravina Munoz; and Ramos Castillo) were unsealed in March 2016 and, prior to that time, the foreign officials had admitted to accepting bribes from Rincon Fernandez and Shiera Bastidas and pleaded guilty to charges that they conspired to violate the FCPA. These are the only individual FCPA cases resolved by the DOJ in the first half of 2016.

SAP SE

*Securities and Exchange Commission
Settled Administrative Proceeding
February 1, 2016*

Nature of Conduct: According to the SEC's order, a SAP SE vice president worked with local partners in Panama to pay bribes to a Panamanian official in order to obtain sales contracts for SAP software. Specifically, SAP sold software to a local partner at a large discount; the partner then resold the software to the Panamanian government at a significantly higher price and used the difference in price to pay bribes to officials who were in a position to steer the contracts to SAP. As a result, from 2010 to 2013, SAP secured four government contracts worth approximately \$3.7 million. The discounts were wrongly recorded as legitimate in SAP Mexico's books, which were consolidated into SAP's financial statements. The SEC's order further alleges that SAP lacked adequate internal controls to detect the true nature of the improper payments.

Amount of Alleged Improper Payments: The payments totaled \$145,000.

Benefit Obtained: Four government contracts that generated revenues of approximately \$3.7 million.

Type of Resolution and Sanction: The SEC's order finds that SAP SE violated the FCPA's books and records and internal controls provisions. Without admitting or denying the allegations, SAP SE consented to the entry of the order and agreed to disgorge \$3.7 million, plus prejudgment interest of \$188,896.

Of Note: Upon the SEC's inquiry, according to the SEC order, SAP SE conducted a thorough investigation and cooperated with the SEC. The SEC's order highlighted SAP SE's production of a large volume of documents; its translation of Spanish-language materials; arranging interviews with involved employees; and initiating a third-party audit of the local Panamanian partner. SAP SE terminated its employee and worked to uncover other possible misconduct and to improve its compliance.

The SEC charged the SAP SE vice president, Vincent E. Garcia, in a separate action in 2015.

In enforcing 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 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 within a subsidiary.

SCICLONE PHARMACEUTICALS

*Securities and Exchange Commission
Settled Administrative Proceeding
February 4, 2016*

Nature of Conduct: According to the SEC, SciClone Pharmaceutical's (SciClone) subsidiaries gave money and other things of value to Chinese health care professionals, which led to millions of dollars of sales of pharmaceutical products in China. These payments were made through different schemes that provided money, gifts, and other services to health care professionals. For example, one scheme used third-party travel agencies to underwrite travel expenses that did not include legitimate educational expenses or for which the educational activities were minimal in comparison to the recreational activities. Various managers within SciClone's subsidiaries were aware of these improper payments and, in some cases, specifically approved them. These payments occurred over a period lasting at least five years. The SEC alleged that SciClone's books and records falsely reflected the payments as legitimate business expenses.

The administrative order also alleges that SciClone failed to maintain an adequate system of internal controls and did not have an effective anti-corruption compliance program. In particular, in 2007, SciClone discovered improper payments made by one employee to Chinese health care professionals, but conducted only a limited internal investigation and failed to take further remedial measures. SciClone's subsidiaries also failed to conduct due diligence on or impose other controls over local travel agencies hired to provide services to Chinese health care professionals.

Amount of Alleged Improper Payments: The administrative order does not specify the amounts paid.

Benefit Obtained: SciClone obtained millions of dollars in pharmaceutical sales as a result of the improper payments, and the disgorgement of nearly \$10 million was meant to reflect the amount of SciClone's ill-gotten gains.

Type of Resolution and Sanction: The SEC's order finds that SciClone violated the FCPA's anti-bribery, books and records, and internal controls provisions. Without admitting or denying the allegations, SciClone agreed to the entry of the order and further to pay a civil penalty of \$2 million and disgorgement of \$10 million, including pre-judgment interest.

Of Note: The theory of liability reflects the breadth of the term "foreign official" as it applies to employees of a state run health care system. Many of the recipients of the improper payments were administrators within China's health care system. The case also reflects a recent trend of SEC enforcement actions focusing on benefits provided to foreign officials through travel and entertainment expenses.

VIMPELCOM AND UNITEL

*Department of Justice
Deferred Prosecution Agreement (VimpelCom)
Guilty Plea (Unitel)*

*Securities and Exchange Commission
Settled Civil Action (VimpelCom)
February 22, 2016*

Nature of Conduct: VimpelCom, a Bermuda company headquartered in Moscow until 2010 and Amsterdam thereafter, provided mobile phone services in Uzbekistan through its wholly owned subsidiary, Unitel. According to the Deferred Prosecution Agreement, VimpelCom, through Unitel, provided more than \$114 million in bribes to an Uzbek foreign official so that the official would influence decisions made by the Uzbek telecommunications regulatory authority to be made in Unitel's favor. Unitel paid the foreign official multiple times between 2006 and 2012 to obtain and retain access to the telecommunications market in Uzbekistan. Unitel disguised these payments using various sham contracts that had purported legitimate business purposes.

According to SEC complaint, erroneous entries in Unitel's books and records were consolidated into VimpelCom's financial statements, which were filed with the SEC. In addition, according to the DOJ Information, VimpelCom knowingly lacked adequate internal controls to prevent these payments.

Amount of Alleged Improper Payments: \$114 million.

Benefit obtained: Access to and continued ability to operate in the Uzbekistan telecommunications market from 2006 to 2012.

Type of Resolution and Sanction: With respect to the financial component of the settlement, the DOJ, the SEC, and the Public Prosecution Service of the Netherlands entered into a global settlement with VimpelCom for a total payment of \$795 million.

Vimpelcom entered into a Deferred Prosecution Agreement with the DOJ that alleges that VimpelCom participated in a conspiracy to violate anti-bribery and books and records provisions of the FCPA and violated the internal controls provision of the FCPA and requires VimpelCom to pay \$460 million, half of which can be offset by criminal penalties paid to the Public Prosecution Service of the Netherlands.

VimpelCom settled a civil action with the SEC that alleged that it violated the FCPA's anti-bribery, books records, and internal controls provisions. VimpelCom agreed to disgorge \$167.5 million to the SEC.

The Deferred Prosecution Agreement and the SEC settlement also each provided for the appointment of a (single) independent monitor who, for a three-year period, will oversee VimpelCom's compliance with these settlements and its remediation of the alleged FCPA violations.

Unitel pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA. The plea included no criminal fine in light of the VimpelCom Deferred Prosecution Agreement.

Of Note: The VimpelCom settlement is notable for a few reasons. First is the sheer size of the settlement. VimpelCom will pay approximately \$795 million to authorities in the United States and the Netherlands.

Second, the settlement reflects significant cross-border cooperation. Government agencies in the Netherlands, Norway, Sweden, Switzerland, Latvia, and the United States, among other countries, assisted in the investigation. In addition, the global settlement resolved claims both in the United States and the Netherlands.

Third, the settlement provides an example of the DOJ's explicit quantification of the value of cooperation. VimpelCom received a 45 percent reduction off the U.S. Sentencing Guidelines fine range for its efforts to cooperate with the investigation. That discount included a 25 percent credit for its "substantial cooperation." VimpelCom provided evidence to the DOJ and the SEC; conducted additional investigations as requested; made foreign employees available for interviews and helped facilitate interviews of former employees; and organized, analyzed, and translated evidence for the government. The company also received an additional credit of 20 percent for its "prompt acknowledgement of wrongdoing" and its willingness to "resolve promptly its criminal liability on an expedited basis."

Notably, the DOJ emphasized that VimpelCom was "not eligible for a more significant discount on the fine amount or the form of resolution" because it had failed to voluntarily self disclose following an internal investigation that uncovered the wrongdoing.

Interestingly, VimpelCom received an amount of credit higher than the pilot program would provide for similar cooperation. Under the pilot program, a company that does not voluntarily disclose FCPA misconduct, but does fully cooperate and remediate, will receive, at most, a 25% reduction off the bottom of the U.S. Sentencing Guidelines fine range. This is a smaller reduction than VimpelCom actually received in February 2016.

Fourth, the settlement reflects various ways that the SEC and DOJ charge parent companies for misconduct that occurred principally at a subsidiary. The DOJ, in an approach it has used in the past, entered into a plea agreement with the subsidiary and a Deferred Prosecution Agreement with the parent

FCPA-RELATED PRIVATE LITIGATION

Below are summaries of key developments in FCPA-related suits brought by private litigants between January and June 2016.

IN RE KEY ENERGY SERVICES INC. SECURITIES LITIGATION

Grant of Motion to Dismiss (S.D. Texas)
March 31, 2016

Federal class action plaintiffs sued the management of Key Energy Services, an oilfield services company, alleging that it overstated business opportunities in high corruption risk areas and failed to disclose certain deficiencies in the company's internal control systems. The suit arises out of Key Energy Service's disclosures in early 2014 that the SEC was investigating its operations in Russia and that it was aware of potential violations of the FCPA in its Mexico operations. The suit alleges that the company's management knew or should have known about the FCPA violations in those markets. The plaintiffs claim that the company's public reports on its strategy in Russia and Mexico were misleading because management did not attribute its growth strategy to conduct that violated the FCPA. The plaintiffs also alleged that Key Energy Services had an illusory FCPA compliance program that failed to stop or detect the violations. The court granted the defendants' motion to dismiss, holding that the allegations did not establish knowledge on the part of Key Energy's management and further that the general business risk disclosure about doing business in high corruption risk areas put investors on notice about the potential for corruption-related misconduct.

IN RE WALMART STORES, INC.

Grant of Motion to Dismiss (Del. Ch.)
May 13, 2016

In another episode in the long-running litigation arising out of allegations regarding corruption in Wal-Mart's business operations in Mexico, the Delaware Chancery Court held that a Delaware shareholder derivative suit was preempted by a 2015 decision in Arkansas, which had dismissed earlier shareholder litigation arising out of the same circumstances. The Delaware plaintiffs had not pressed their case earlier, preferring to wait to obtain access to Wal-Mart's books and records through a section of Delaware law that permits shareholders to examine a company's books and records under appropriate circumstances. They argued that they should not be bound by the Arkansas decision. The Delaware court disagreed and dismissed the suit, holding that the two sets of plaintiffs were in privity and that the allegations in the suit had already been fully and fairly litigated.

IN RE PETROBRAS SECURITIES LITIGATION

Grant of Class Certification (S.D.N.Y.)
Feb. 2, 2016

In this class action suit, the plaintiffs allege that Brazilian state-owned oil company *Petróleo Brasileiro S.A.* (Petrobras) and related entities violated U.S. and Brazilian securities laws by making false statements about and failing to disclose a multi-year, multi-billion-dollar bribery and money laundering scheme. Last year, the district court allowed most of the case to proceed. Earlier this year, the court granted class certification. Discovery has since commenced, including discovery from multiple Brazilian entities.

Plaintiffs in shareholder lawsuits related to alleged FCPA violations have often sought access to the materials produced to regulators in the course of FCPA investigations.

ROBBINS, GELLER, RUDMAN & DOWD V. SEC

Grant of Summary Judgment (M.D. Tenn.)
March 12, 2016

Securities plaintiffs' law firm Robbins, Geller, Rudman & Dowd, LLP (Robbins, Geller) sued the SEC for documents provided to the agency by Wal-Mart, which the agency had declined to produce in response to a Freedom of Information Act (FOIA) request. The SEC withheld the documents pursuant to FOIA Exemption 7(A), which protects from disclosure records compiled for law enforcement purposes. The SEC filed a motion for summary judgment supported by a declaration from the SEC regional director in charge of the Wal-Mart investigation asserting that disclosure of the records would interfere with an ongoing inquiry. The district court granted the SEC's motion, holding that the SEC properly withheld the documents in light of the SEC's inquiry. In doing so, the court rejected the plaintiff's argument that Wal-Mart's voluntary disclosure of certain of the materials eliminated the SEC's interest in withholding production of the documents, explaining that disclosure could still specifically compromise the SEC's investigation.

U.K. ANTI-CORRUPTION DEVELOPMENTS

The following highlights U.K. anti-corruption developments from January through June 2016.

Beginning earlier this year, we have rebranded our annual *Business Guide to the FCPA* to become the *Business Guide to Anti-Corruption Laws*. This is in recognition of the increasing importance of anti-corruption enforcement in jurisdictions outside of the United States, particularly in the United Kingdom following the passing of the Bribery Act 2010 (UKBA). This also coincides with Jenner & Block opening a London office in early 2015, adding significant experience to the firm in advising clients with respect to the UKBA and other anti-corruption laws. The 2016 *Business Guide* includes an in-depth discussion of the elements of the UKBA.

BRITAIN'S VOTE TO EXIT THE EUROPEAN UNION AND ANTI-CORRUPTION ENFORCEMENT

On June 23, 2016, the United Kingdom held a referendum and voted in favor of the United Kingdom leaving the European Union (EU) the so-called "Brexit." At the time of writing, the timing and implications of the Brexit vote are unclear and it will likely take years to resolve all the related questions.

In terms of law enforcement, Brexit is unlikely to have any major impact on the U.K.'s enforcement activity in the short term. Over the longer period, it is possible that the fallout from the vote could eventually affect the U.K.'s access to certain EU law enforcement resources, including the European Arrest Warrant Scheme and Europol. However, whatever the eventual legal effects of Brexit on law enforcement, there may be other incentives for both the U.K. and EU to continue to work collaboratively to prevent, detect, and punish all types of international criminal activity, including bribery and corruption.

Under background principles of English criminal law, corporate criminal liability is more limited than under U.S. criminal law. Typically, corporate liability requires two elements:

- A person who can be identified as the directing mind and will of the corporation committed the offence.
- That person was acting on behalf of the corporation when committing the offence.

The UKBA expands corporate liability for bribery offenses with the crime of Failing to Prevent Bribery, which applies when any person associated with a corporation commits bribery on behalf of the corporation.

The current proposal would expand such liability of corporate entities to include economic crimes committed on behalf of the entity by its associated persons.

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 U.K. 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.

POTENTIAL EXTENSION OF FAILURE TO PREVENT OFFENCE TO ALL CORPORATE ECONOMIC CRIME

In conjunction with the anti-corruption conference hosted by the U.K. Prime Minister, on May 12, 2016, the U.K. government announced that it is to consult with all interested parties on establishing a new crime for corporate entities that fail to prevent economic crime being carried out on their behalves. If a new law were to be passed as a result of this consultation, it is expected that it would mirror the offence set out in section 7 of the UKBA, which penalizes the failure to prevent bribery. Such a law would expand a corporate entity's liability for any economic crime committed on its behalf by, for example, an employee, agent or subsidiary, unless it could show that it had adequate procedures in place designed to prevent such economic crime being committed.

PROPERTY OWNERSHIP REGISTER

In addition to the consultation on the extension of the "failure to prevent" offence, as part of a package of anti-corruption measures following the revelations contained in the Panama Papers, the U.K. government announced, on May 12, 2016, a new beneficial ownership register for corporate owners of U.K. property. Under the proposals, any company wishing to be registered as the owner of a property situated in the United Kingdom will be required to join a new register of beneficial ownership prior to executing the purchase. Companies that already own property in the United Kingdom, and those that wish to tender for government contracts, will also have to sign up to the register.

No information has been given about how the measure is to be implemented and enforced and whether there will be penalties for non-compliance.

CONTRACT EXTENSION FOR SFO DIRECTOR

The director of the U.K. Serious Fraud Office (SFO), David Green QC, will remain in post until April 2018 as a result of a two-year contract extension announced in February 2016. Mr. Green's term as director was originally planned to last four years, which is the usual term of office in that post.

Mr. Green is a vocal supporter of extending the ability of the SFO to prosecute corporate entities, far more so than his predecessor, who was perceived to be more amenable to reaching deals with corporations and stopping short of prosecution.

Mr. Green's tenure has seen the introduction of Deferred Prosecution Agreements, modeled after agreements in use in the United States, which provide a new tool for resolving corporate wrongdoing and has brought the first prosecutions of corporate entities under the UKBA "failure to prevent" offence.

Mr. Green is also widely credited with making improvements within the SFO, and this contract extension will ensure continuity of leadership within the organization for a further two years, both in relation to the organizational changes that Mr. Green has introduced and in relation to some of the longer running high-profile cases.

VIGOROUS UKBA ENFORCEMENT ACTIVITY CONTINUES

Public reports of the SFO's UKBA investigations reflect a flurry of enforcement and investigative activity during the first six months of 2016.

The SFO's multi-year and multi-faceted investigation into the French engineering company Alstom S.A. and its U.K. subsidiaries Alstom Network UK Limited (formerly Alstom International Limited) and Alstom Power Limited continues. Various charges have so far been brought against:

- Alstom Network UK Limited, Graham Hill and Robert Hallett, in relation to alleged corruption in India, Poland and Tunisia. According to the SFO, trial was scheduled for June 2016.
- Alstom Power Limited, Nicholas Reynolds and Johannes Venskus, in relation to alleged corruption in Lithuania. At the time of writing, the trial is scheduled to commence in January 2017; and
- Alstom Network UK Limited, Michael Anderson, Jean-Daniel Lainé and Terence Watson (as to which see below), in relation to alleged corruption in the procurement of contracts to supply trains to the Budapest Metro. At the time of writing, the trial is scheduled to commence in May 2017.

There have been a number of reports in the press recently concerning apparent enforcement activity being carried out by the SFO in relation to other matters, including Unaoil, Airbus and British American Tobacco (BAT). In March 2016, the authorities in Monaco executed searches of the Unaoil headquarters and the homes of executives, following a request for assistance from the SFO. The SFO

has neither confirmed nor denied its interest in the investigation, although it has been widely reported that it is leading an international investigation into Unaoil. It has been alleged in the press that Unaoil facilitated the payment of bribes on behalf of a number of multinational companies, following the leak of a large number of internal emails to certain media organizations.

A non-U.K. company can be subject to the UKBA depending on the circumstances.

Where the alleged misconduct occurred within the United Kingdom, the conduct is subject to the UKBA.

Further, for the corporate offense of Failure to Prevent Bribery, the UKBA applies to all acts of a "relevant commercial organization," which includes both a British incorporated entity and 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 organization that does business in the United Kingdom.

It was reported in April 2016 that Airbus had notified the U.K. government of alleged anomalies in the information Airbus provided to the U.K. government in connection with export credit financing. The U.K. government, in turn, notified the SFO of the alleged anomalies.

The anomalies are understood to relate to the identification of, and amounts of payments made to third party agents used by Airbus. Airbus's communications division, GPT, is also under investigation by the SFO in connection with a \$3.3 billion communications contract with Saudi Arabia, which is ongoing.

In December 2015, a whistleblower, Paul Hopkins, passed to the SFO a number of papers allegedly implicating BAT in corruption in East Africa. BAT allegedly bribed senior politicians and civil servants in East Africa in an attempt to prevent anti-smoking laws being passed. BAT is also alleged to have paid bribes to cover up scandals, to maintain its corporate reputation, and to distort competitive markets. It is believed that the SFO has not formally opened an investigation, and BAT announced in February 2016 that it has appointed an external law firm to carry out an investigation into the allegations.

U.K. ENFORCEMENT ACTIVITY

In January through June 2016, the U.K. authorities have taken the following enforcement actions.

BRAID LOGISTICS

Civil settlement with Scottish authorities

Nature of conduct: Braid Logistics, based in Glasgow, Scotland, accepted responsibility for contraventions of section 1 (bribing another person) and section 7 (corporate offence of failure to prevent bribery) of the UKBA. The allegations related to certain freight forwarding contracts. It was discovered that a former Braid employee had established an account, which was used by an employee of one of Braid's customers to fund vacations and to withdraw cash. During the investigation into this conduct, it was discovered that a separate profit-sharing arrangement had been established that rewarded the director of one of Braid's customers for placing orders with Braid.

Amount of alleged improper payment: Not alleged.

Benefit obtained: Freight forwarding contracts and customer orders.

Type of resolution: Civil settlement under the Proceeds of Crime Act 2002 (POCA) of £2.2 million.

Of note: This case highlights the difference between the treatment of corporate bribery offences in England and Wales and in Scotland. Scotland is a separate legal system, albeit that the UKBA applies in Scotland in the same way as it does in England and Wales. However, Deferred Prosecution Agreements (DPAs) are not available in Scotland. Therefore, in Scotland, the only method for prosecutors to dispose of cases without prosecution is to enter into a Civil Recovery Order under the POCA.

Civil Recovery Orders are effectively redundant in England and Wales following the introduction of DPAs. The SFO has taken an increasingly tough stance towards corporate offending and seems unlikely to continue to make use of Civil Recovery Orders when it can use a DPA, which is criminal in nature and which requires ongoing cooperation and compliance with the terms of the DPA. Civil Recovery Orders are not criminal in nature and only require the corporation to admit on the balance of probabilities that it is in possession of the property which is or represents property obtained through unlawful conduct.

PETER MICHAEL CHAPMAN

Criminal Conviction

Nature of conduct: On May 11, 2016, Mr. Chapman, the former manager of a polymer banknote manufacturer, Securrency PTY Ltd, was convicted on four counts of making corrupt payments to a Nigerian official, contrary to the Prevention of Corruption Act 1906, one of the previous U.K. anti-corruption statutes, which continues to apply to conduct occurring before the entry into force of the UKBA on July 1, 2011. Mr. Chapman paid bribes to an agent of Nigerian Security Printing and Minting PLC to secure

orders for the purchase of reams of polymer substrate from Securrency.

The U.K. Bribery Act applies only to crimes committed on July 1, 2011, or later. The United Kingdom has other anti-corruption statutes, including the Prevention of Corruption Act of 1906, which apply to conduct committed prior to the effective date of the UKBA. Under those statutes, which have no "failure to prevent" provision, vicarious liability is limited to background principles of English criminal law, which hold a company liable only if a person that is the controlling mind or will of the corporation was involved in the crime.

Amount of alleged improper payment: The total value of the bribes was approximately US\$205,000.

Benefit obtained: Unspecified customer orders.

Type of resolution: Mr. Chapman was sentenced to 30 months on each count, to be served concurrently. Due to time already served, he is serving the remainder of his sentence on license.

Of note: The investigation leading to the conviction of Mr. Chapman was a joint investigation by the Serious Fraud Office and the Australian Federal Police into Securrency International PTY Ltd. This is another example of the SFO's continued focus on international corruption, and its increasing ability to work with international agencies to secure convictions.

SMITH & OUZMAN LIMITED

Sentencing

Nature of conduct: On December 22, 2014, Smith & Ouzman Limited and two of its employees were convicted of corruptly agreeing to make payments to foreign public officials in Kenya and Mauritania contrary to section 1(1) of the Prevention of Corruption Act 1906.

Amount of alleged improper payment: Payments totaling £395,074.

Benefit obtained: The payments were alleged to have been made in order to obtain contracts for election ballot papers worth £2 million.

Type of resolution: Criminal conviction. The two employees, Nicholas Smith and Christopher Smith, were sentenced to three years' imprisonment and 18 months' imprisonment respectively on February 15, 2015. On January 8, 2016, Smith & Ouzman Limited was sentenced to financial penalties totaling approximately £2.2 million, comprising a fine of £1.3 million, a confiscation order of £880,000, and a costs award to be paid to the SFO in the sum of £25,000. In addition, Nicholas Smith was ordered to pay £19,000 in confiscation and £75,000 in costs, whilst Christopher Smith was ordered to pay £4,500 in confiscation and £75,000 in costs.

Of note: Owing to the relatively small size of Smith & Ouzman, and the involvement of senior management in the corrupt activity, this conviction is a comparatively rare example of a conviction of a company for a substantive corruption offence. It may also be a useful precedent for analyzing the size of fines that certain corporate entities can expect if they are convicted of bribery related crimes. It is worth noting, however, that this fine is substantially smaller than the fine levied on Standard Bank plc following the approval of its DPA in November 2015, and it is of a similar size to the fine levied on Sweett Group plc (see below), which pleaded guilty to the section 7 offence. This may be explained by differences in the relative sizes of the corporate entities and in the alleged misconduct; no clear pattern of size of fines appears to be yet emerging.

SWEETT GROUP PLC

Sentencing

Nature of conduct: On December 18, 2015, Sweett Group plc pleaded guilty to an offence under section 7 of the UKBA. The charge was that Sweett Group plc failed to prevent the bribing of Khaled Al Badie, an official with the United Arab Emirates President's personal foundation, by a subsidiary, Cyril Sweett International.

Amount of alleged improper payment: Unknown.

Benefit obtained: The alleged aim of the bribery was to secure a contract for Sweett Group plc with Al Ain Ahlia Insurance Company for project management and cost consulting services in relation to the building of a hotel in Dubai.

Type of resolution: Sweett Group plc pleaded guilty and was sentenced to a total financial penalty of approximately £2.35 million by Judge Martin Beddoe at Southwark Crown Court on February 19, 2016. The penalty was made up of a fine of £1.4 million, a confiscation order of £851,000, and a costs payment to the SFO of £95,000.

Of note: As the first fine to be levied on a company following a plea of guilty to the section 7 offence, the size of the financial penalty has some precedential value for other companies that may be in a similar situation to Sweett Group. In passing sentence, Judge Beddoe took into consideration the fact that the alleged corrupt payments continued for a period of at least 18 months, and that Sweett Group plc had attempted to mislead the SFO when it commenced its investigation.

TERENCE STUART WATSON

Criminal Charge

Nature of conduct: As mentioned above, the SFO is conducting a long-running and multi-faceted investigation into the conduct of the French engineering company Alstom. On March 29, 2016, the president of Alstom's U.K. operations, Terence Stuart Watson, also was charged with offences of corruption contrary to section 1 of the Prevention of Corruption Act 1906 and an offence of conspiracy to corrupt contrary to section 1 of the Criminal Law Act 1977, both in connection with the Budapest Metro contract discussed above.

Amount of alleged improper payment: Not alleged.

Benefit obtained: Contracts for the supply of trains to the Budapest Metro.

Type of resolution: None as of yet.

Of note: Mr. Watson is the seventh individual to be charged by the SFO in its investigation of Alstom. He has since stepped down from his role with Alstom.

ANTI-CORRUPTION HIGHLIGHTS FROM AROUND THE GLOBE

The following discusses other significant anti-corruption highlights from the first half of 2016.

INTERNATIONAL LAW

Trans-Pacific Partnership Agreement Includes Anti-Corruption Provisions

In February, representatives from the United States and 11 other countries signed the Trans-Pacific Partnership Agreement (TPP). In addition to the United States, signatories include: Australia; Brunei; Chile; Canada; Japan; Mexico; Malaysia; New Zealand; Peru; Singapore; and Vietnam. The TPP seeks to promote trade and investment, in part, by strengthening and harmonizing the anti-corruption efforts of the signatory countries. Specifically, chapter 26 of the TPP, titled "Transparency and Anti-Corruption," requires that the signatories adopt measures to promote integrity and disclosure of suspicious activities among public officials, including by establishing or maintaining criminal sanctions for the offering of undue advantages to foreign public officials or officials of public international organization (or the solicitation of an undue advantage of such an official). The TPP further encourages the countries to observe the APEC Code of Conduct for Business Integrity, including its obligation to prohibit bribery through the implementation of anti-bribery programs. However, the TPP does not require the countries to specifically criminalize bribery by private entities.

The TPP will enter into force upon ratification by all signatory countries, if such ratification occurs before February 8, 2018. If not all parties have ratified by that date, the TPP will go into effect after ratification by at least six states that together have a GDP of 85 percent of all the signatories.

AUSTRALIA

Australia takes steps to improve its anti-corruption program.

The first half of 2016 has seen multiple anti-corruption developments in Australia, including improvements to its anti-corruption law, a high-profile investigation in coordination with the United States, and the public consideration of Deferred Prosecution Agreements.

Although Australia is a signatory to the OECD Anti-Bribery Convention and has implemented anti-bribery legislation, there has been only one conviction for overseas bribery under Australian law since the law went into effect in 1999. In late 2015 and the first half of 2016, Australia took steps to improve its anti-bribery program. First, in November 2015, new laws clarified that intent is not an element of the offense of seeking to improperly influence a foreign official. Second, in March 2016, the government created an offense akin to the books and records provision of the FCPA for deliberately or recklessly falsifying accounting records to disguise the giving of a "benefit not legitimately due." The accounting law extends to not only Australian companies and their employees and agents, but also to

the conduct of foreign subsidiaries of Australian parent companies and their employees and agents. Even where the conduct occurs wholly outside Australia's territory and the person alleged to have committed the offense is not an Australian citizen, Australian resident or corporation incorporated under Australian domestic law, Australia can still prosecute the conduct if the Attorney-General approves.

Australia, like France (discussed below), is considering the introduction of Deferred Prosecution Agreements into its anti-corruption enforcement program. A Deferred Prosecution Agreement option is seen by some as a signal of a potentially stepped up enforcement activity because its availability has been used by prosecutors in other countries, especially in the United States, as a vehicle to incentivize corporate cooperation with criminal investigations. In March 2016, the Australian minister for justice released a public discussion paper on the use of Deferred Prosecution Agreements. The discussion paper specifically raises the issue of whether the Deferred Prosecution Agreements should be made available for individual defendants, as well as for corporate defendants. Submissions in response to the discussion paper were due in May 2016, and the matter is under advisement.

In addition to shoring up its anti-corruption laws, in March 2016, Australia, in coordination with the United States, launched an investigation into the 2010 transfer of \$200,000 to the U.S. account of a Cambodian consulting firm linked to the account of Cambodian Prime Minister Hun Sen. The payment was allegedly authorized by Tabcorp, a prominent Australian gaming company.

BRAZIL

Brazilian Prosecutors Expand Probe into Petrobras Corruption

Brazil and the United States continue to cooperate in their respective investigations into the corruption involving state oil company Petrobras. As of May 2016, media sources report that the U.S. authorities are in the process of investigating more than a dozen companies in connection with the Petrobras scandal. As Brazilian criminal graft laws apply to individuals only, Brazilian authorities have focused their efforts on prosecuting individuals, including many high-ranking Brazilian political figures, involved in the corruption.

The Brazilian side of the Petrobras probe faced considerable uncertainty over the last several months given the political turmoil associated with President Dilma Rousseff's impeachment proceedings. However, both a key member of the prosecution team, Deltan Dallagnol, and Brazil's new leader, Michel Temer, have vowed that the investigation will continue.

THE BAHAMAS

Public Official Convicted of Accepting Alstom Bribes in Jury Trial in the Bahamas

On May 3, 2016, a jury in the Bahamas convicted Fred Ramsey, a former board member of the Bahamas Electricity Corporation, of two counts of conspiracy to commit bribery and 12 counts of bribery, finding that he had accepted bribes from Paris-based engineering firm Alstom. The prosecution's lead witness, American Mark Smith, testified that he served as the middleman for the bribery operation, depositing hundreds of thousands of dollars in Ramsey's U.S. account in exchange for Ramsey's efforts, including his attempts to influence the board of the government-owned Bahamas Electricity Corporation to award contracts to Alstom and reduce fines related to Alstom's late performance.

The court held that it was no defense that Ramsey did not in fact have the power to exert influence over the board. This conviction comes in the wake of Alstom's guilty plea in federal court in Connecticut to bribing officials in the Bahamas, and in Indonesia, Saudi Arabia, and Egypt. Alstom paid \$772 million in penalties to settle the charges. In the plea agreement, Alstom acknowledged its use of middlemen like Smith to offer bribes to public officials in a scheme to cover up the company's involvement with corrupt acts in the Bahamas and in other countries. Smith was granted immunity in exchange for his testimony; Ramsey faces up to four years imprisonment and a \$10,000 fine.

FRANCE

France Considers Use of Deferred Prosecution Agreements

In the first half of 2016, France considered updating its anti-corruption enforcement laws. Draft legislation currently under consideration by France's Parliament seeks to implement several measures targeting foreign and domestic corruption and bribery. These measures include creating a national agency tasked with monitoring the implementation of anti-bribery compliance programs in companies of a specified size and expanding protection for whistleblowers. These provisions come in the wake of criticism of France's current anti-corruption measures, as no company has ever been convicted of overseas bribery through the traditional judicial process under French law.

An earlier draft of this proposed anti-corruption legislation included a section providing for the use of Deferred Prosecution Agreements for corporate defendants. However, at the advice of France's highest administrative court, the Conseil d'Etat, the government struck the section on settlements prior to the introduction of the bill to Parliament. Deferred Prosecution Agreements have been criticized by many in France as being non-transparent, and the court expressed concern that the use of Deferred Prosecution Agreements was in conflict with the aims of the French criminal justice system. The use of Deferred Prosecution Agreements could still be introduced through the parliamentary process, but commentators suggest that the Conseil d'Etat's guidance means that Deferred Prosecution Agreements are unlikely to become a part of the French anti-corruption law in the current round of legislation.

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