FCPA Winter Review 2017

International Alert
02.06.2017

Featured in This Edition

Introduction

The fourth quarter of 2016 capped off a particularly active year in U.S. Foreign Corrupt Practices Act (FCPA) enforcement, one featuring the second-highest number of FCPA dispositions resolved in a calendar year and a record $2.65 billion in corporate settlements, surpassing the prior record by $864 million. Together, the U.S. Securities and Exchange Commission (SEC or Commission) and the U.S. Department of Justice (DOJ or Department) resolved 57 FCPA enforcement actions over the course of the year -- 40 against corporations and 17 against individuals -- a significant increase from the 20 actions resolved by the U.S. authorities in 2015.

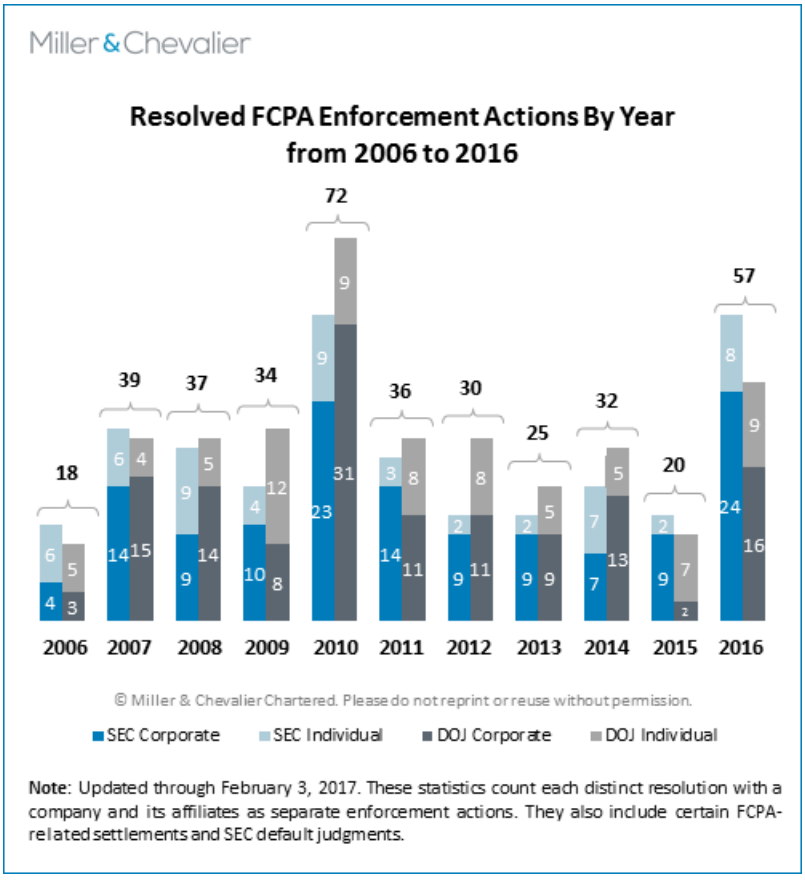
The scope and magnitude of several recent bribery-related settlements highlight the rise of global anti-corruption enforcement in 2016, a development driven in part by U.S. authorities and the FCPA. For example, in December, the Brazilian construction

company Odebrecht S.A. and its petrochemical producer subsidiary, Braskem S.A., resolved Petrobras-related bribery allegations with Brazilian, U.S., and Swiss authorities in a coordinated settlement that imposed the largest monetary disposition ever, with penalties, disgorgement and pre-judgment interest exceeding $3.5 billion. In total, four FCPA enforcement actions last year -- including the combined Odebrecht/Braskem settlements with the DOJ and SEC -- landed on the "top ten" list of FCPA settlements by dollar value, with settlement values ranging from $397.5 million to $519 million.

The flurry of enforcement activity to end 2016, together with the ten FCPA dispositions U.S. authorities entered into during the first 20 days of 2017, reflect a considerable spike in FCPA enforcement in the final weeks of the Obama presidency. Given the imminent change in DOJ and SEC leadership and the possibility that priorities and policies related to corporate liability and foreign public corruption could shift under the Trump administration, this recent uptick in FCPA enforcement activity appears to reflect a push by the agencies to conclude numerous ongoing FCPA investigations before January 20, 2017.

Enforcement Trends in 2016

The SEC entered into a record 24 corporate FCPA dispositions in 2016, a total that significantly exceeds any other year but the previous record-high of 23 from 2010. The DOJ, meanwhile, ended the year with 16 corporate FCPA dispositions, a total that is slightly higher than, but still generally on par with, its typical corporate enforcement levels over the last ten years. The agencies' totals for the year highlight the gradual shift in their respective focuses, which we have touched on in past FCPA Reviews, with the SEC casting a broader net for corporate violators, while the DOJ narrows its focus on larger, more significant enforcement actions.



The brisk pace of FCPA enforcement in 2016 accelerated further in the year's fourth quarter, with enforcement actions involving 13 corporations and six individuals. Of these, the DOJ entered into eight corporate dispositions and five individual plea agreements, surpassing the Department's total of 12 dispositions in the first three quarters of the year. The SEC, meanwhile, entered into five corporate dispositions and one individual settlement during the last quarter of 2016.

The steady flow of corporate settlements announced by the agencies over the last three months of 2016 reflected combined criminal and civil penalties and disgorgement ranging from $75 million to $519 million and allegations of improper conduct around the globe, without a particular emphasis on any one region. Given the general enforcement focus on China, which rose to extraordinary heights during the first nine months of 2016 (see, *e.g.*, our FCPA Autumn Review 2016), the geographic diversity of the investigations resolved this past quarter is notable because only two of them involve China.

After nearly two years of resolving most enforcement actions unilaterally, all of the SEC's FCPA dispositions during the fourth quarter of 2016 involved parallel proceedings by the DOJ. On October 24, 2016, in the quarter's first FCPA resolution, Brazilian aircraft manufacturer Embraer S.A. entered into a coordinated settlement with the DOJ, the SEC, and Brazilian authorities to resolve charges related to bribe payments to government officials in the Dominican Republic, Saudi Arabia, and Mozambique, as well as an improper accounting scheme in India. On the U.S. side, Embraer accepted the entry of a complaint by the SEC and entered into a three-year deferred prosecution agreement (DPA) with the DOJ, agreeing to pay approximately $205 million in combined penalties, disgorgement, and prejudgment interest, although the SEC agreed to credit the company up to $20 million depending on the amount to be disgorged by Brazilian authorities in a parallel civil proceeding.

On November 17, 2016, the DOJ and SEC entered into an FCPA settlement with U.S.-based JPMorgan Chase & Co (JPMC) and its Hong Kong subsidiary over an alleged scheme by the companies to gain advantage in banking deals by awarding jobs to the relatives and friends of certain Chinese government officials. In total, the companies agreed to pay a combined $202.5 million in fines, disgorgement, and prejudgment interest to resolve the alleged FCPA violations, as well as a $61.9 million civil penalty imposed by the Board of Governors of the Federal Reserve System for engaging in "unsafe and unsound practices" in the banking industry.

On December 20, 2016, U.K.-based power-systems manufacturer Rolls-Royce entered into a DPA with the DOJ as part of a coordinated resolution with the U.K., U.S., and Brazilian authorities over alleged bribes to win government contracts in Angola, Azerbaijan, Brazil, Iraq, Kazakhstan, and Thailand. The DPA stayed under seal until January 17, 2017, when the U.K. Serious Fraud Office (SFO) finalized its own DPA with the company, concluding the SFO's largest-ever investigation and foreign-bribery settlement. In total, Rolls-Royce agreed to pay approximately $800 million, including a nearly $170 million criminal penalty in the United States.

All the remaining corporate enforcement actions of the fourth quarter took place in December. On December 21, 2016, Brazilian, U.S., and Swiss authorities entered into coordinated settlements with Odebrecht and its subsidiary Braskem over an alleged bribery scheme spanning at least 11 countries -- the first of several anticipated multinational resolutions to arise out of "Operation Car Wash," the Brazilian corruption investigation into state oil company Petrobras. Although the exact resolution amount is uncertain pending Odebrecht's sentencing in April 2017, court documents suggest that the total amount of penalties and disgorgement the companies will pay worldwide will top $3.5 billion. In the United States, Odebrecht and Braskem each pled guilty to criminal charges in dispositions with the DOJ, with Braskem also entering into a civil settlement with the SEC. Under Odebrecht's plea agreement, its overall criminal fine is subject to an ability-to-pay analysis, with Brazil to receive 80 percent of the total imposed while the United States and Switzerland each will receive 10 percent. For its part, Braskem agreed to pay a criminal penalty of $94.8 million to the United States -- 15 percent of its $632 million criminal penalty, with the rest split between Brazilian authorities (70 percent) and Swiss authorities (15 percent) -- as well as $325 million in disgorgement, including $65 million to the SEC and $260 million to Brazilian authorities. Based on Odebrecht's representation that it can only afford to pay a criminal fine of $2.6 billion, and given the amount to be paid by Braskem, the companies will collectively pay at least $420 million to the U.S. authorities to resolve the FCPA enforcement actions.

On December 22, 2016, the DOJ and SEC entered into a combined settlement with Israeli company Teva Pharmaceutical Industries Ltd. (Teva) and its Russian subsidiary Teva LLC (Teva Russia) over the alleged bribery of government officials in Russia and Ukraine, and internal-controls violations in Mexico. To resolve the DOJ charges, Teva entered into a DPA with the Department and Teva Russia pled guilty to a conspiracy count, with Teva agreeing to a total criminal penalty of $283.2 million. To resolve the SEC's investigation, Teva agreed to pay more than $236 million in disgorgement and interest. At $519 million, the combined settlement is the fourth-highest in FCPA history.

The final FCPA settlement of the year, announced on December 29, 2016, involved the DOJ's and SEC's parallel settlements with U.S. cable and wire distributor General Cable Corporation (GCC) over allegations of improper payments to government officials in Angola, Bangladesh, China, Indonesia, and Thailand to win business. The company entered into a non-prosecution agreement (NPA) with the DOJ and consented to the imposition of an SEC Order, agreeing to pay a total of approximately $75.75 million in penalties, disgorgement, and prejudgment interest.

Odebrecht's settlement with the DOJ highlights an interesting aspect of the Department's FCPA Pilot Program, which promises certain incentives to companies that self-report potential FCPA violations and cooperate with the DOJ (see our FCPA Spring Review 2016). In parallel with the stated benefits of the Program, companies that do not voluntarily self-disclose can receive no more than a 25 percent reduction off the bottom of the fine range suggested by the U.S. Sentencing Guidelines (see Section B.1 of the Program guidance). Odebrecht's ultimate criminal penalty, however, will likely reflect a reduction larger than the 25 percent provided for in its DPA as a result of an ability-to-pay analysis to be performed by the court.

Although the DOJ has not expressly stated whether the 25 percent discount limit applies to investigations that commenced before the Program's launch, the guidance notes that the Program applies "to all FCPA matters handled by the Fraud Section." In practice, the Department appears to have applied the Program's terms retroactively: since the Program's announcement, no company that failed to voluntary disclose has obtained a fine reduction of more than 25 percent from the DOJ, regardless of its level of cooperation, even if the settlement papers did not explicitly refer to the Pilot Program; Odebrecht would be the first. In contrast, before the Pilot Program, the DOJ would periodically grant discounts of greater than 25 percent despite a failure to voluntarily self-disclose, such as 45 percent to VimpelCom Ltd. (see our FCPA Spring Review 2016), 53 percent to Alcoa Inc. (see our FCPA Spring Review 2014), and 30 percent to Data Systems & Solutions (see our FCPA Summer Review 2012).

Beyond corporate enforcement, the DOJ and SEC have continued to pursue FCPA cases against individuals, with the fourth quarter of 2016 capping off an active year that included nine individuals entering FCPA-related guilty pleas in DOJ prosecutions and eight individuals settling FCPA-related charges with the SEC.

Of the DOJ's nine prosecutions, five came in the fourth quarter of 2016. The first, Samuel Mebiame, pled guilty to conspiracy to violate the FCPA in connection with the underlying allegations raised in the September 2016 FCPA enforcement action against New York-based hedge fund Och-Ziff Capital Management Group LLC (Och-Ziff) (see our Autumn 2016 FCPA Review). Mebiame, a Gabonese national and son of the country's former prime minister, admitted that he acted as a "fixer" for Och-Ziff and its related entities, paying bribes to high-level government officials in Chad, Guinea, and Niger to obtain business opportunities, including mining rights. The other four individuals, Douglas Ray, Victor Hugo Valdez Pinon, Daniel Perez, and Kamta Ramnarine, pled guilty to FCPA and related charges in connection with more than $2 million in bribes paid to Mexican officials to secure contracts between U.S. aircraft maintenance companies and Mexican government-owned entities. Two of the Mexican officials pled guilty to related non-FCPA criminal charges. The DOJ also indicted four individuals on FCPA-related charges in the fourth quarter of 2016: NG Lap Sen and Jeff C. Yin in connection with bribery allegations relating to a United Nations construction project in Macau (covered in our FCPA Spring Review 2016); and Joo Hyun Bahn and Ban Ki Sang for allegedly conspiring to bribe a foreign official to close an $800 million deal for a skyscraper in Hanoi, Vietnam.

As noted in Miller & Chevalier's here and here) has not yet resulted in a substantial increase in FCPA enforcement against individuals. It may still be too early to expect more than one-off enforcement actions specifically triggered by the Yates

Memorandum, since building individual prosecutions can be time consuming even where an individual defendant chooses to plead guilty, let alone when the individual chooses to contest the charges. To the extent that charging decisions are a better indicator of the Yates Memorandum's impact, the number of newly initiated FCPA cases against individuals has also failed to increase significantly over the last year and a half. In 2015, for example, the Department charged eight individuals with FCPA offenses. In 2016, 10 were charged. It remains to be seen whether there will be a substantial uptick in the prosecution of executives, especially since this is one area in which the DOJ's charging decisions are more likely to reflect some attitudinal changes under the Trump administration, as we discuss in the *Future of FCPA Enforcement* section below.

The sole individual enforcement action by the SEC during the fourth quarter was brought in connection with the Commission's FCPA-related settlement with GCC. Karl J. Zimmer, the company's former senior vice president responsible for sales in Angola, settled with the SEC on December 29, 2016, alongside the company's resolution with the Commission, agreeing to pay a $20,000 penalty related to allegations that he knowingly circumvented internal-accounting controls when he approved certain improper commission payments in violation of the FCPA.

2017 Enforcement Actions to Date

As noted above, January 2017 was extraordinarily busy in terms of FCPA enforcement, as the DOJ and SEC entered into more FCPA dispositions last month than in any January on record, with nearly all of this activity occurring during the last three weeks of former President Obama's term. Specifically, the DOJ entered into four corporate and two individual FCPA dispositions, while the SEC entered into four corporate FCPA dispositions. These enforcement actions, which are summarized below, will be covered in depth in our forthcoming FCPA Spring Review 2017.

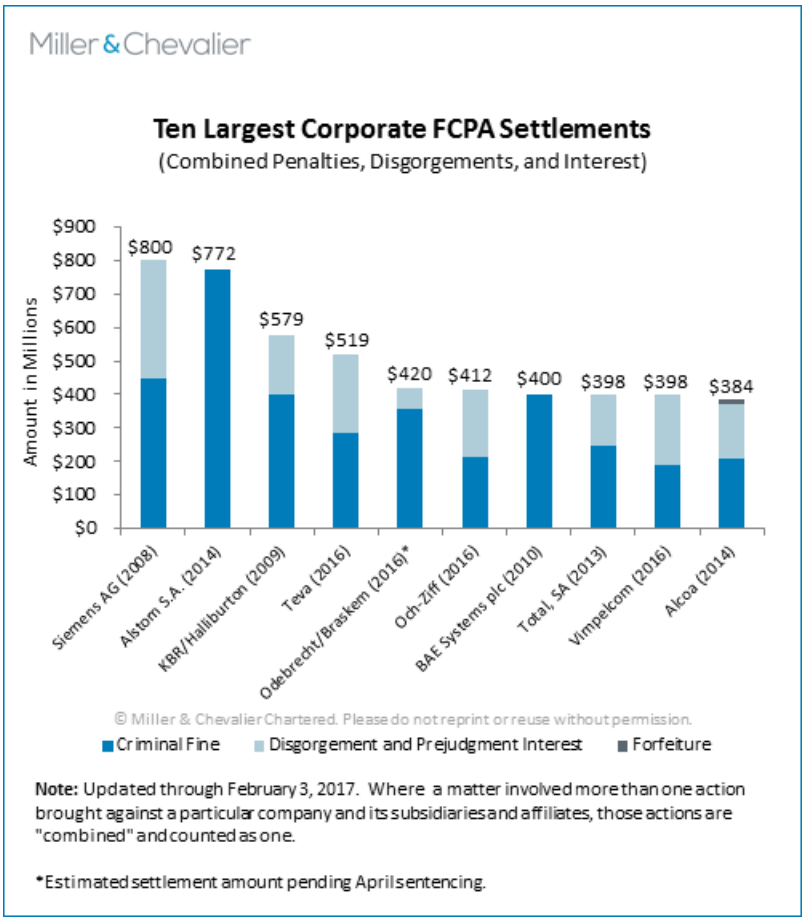
- **Mondelēz International, Inc. / Cadbury Limited:** On January 6, 2017, the U.S.-based confectionery, food, and beverage company (formerly Kraft Foods, Inc.) and its U.K. subsidiary, Cadbury Limited (Cadbury), settled with the SEC in connection with alleged internal-controls and books-and-records violations related to certain conduct of Cadbury's Indian subsidiary that occurred in early 2010. Mondelēz is responsible for Cadbury's violations due to its acquisition of Cadbury's stock in February 2010. As part of the disposition, Mondelēz and Cadbury agreed to pay a civil penalty of $13 million.
- **Charles Quintard Beech III and Juan Jose Hernandez Comerma:** On January 10, 2017, Beech, an owner of multiple Texas energy companies, and Comerma, a former general manager and owner of a Florida energy company, each pled guilty to one count of conspiracy to violate the FCPA, with the latter also pleading guilty to one count of violating the FCPA, in connection with the U.S. government's ongoing investigation into bribery involving Venezuela's state-owned and state-controlled oil company, Petroleos de Venezuela S.A. (PDVSA). According to court documents, the defendants offered or paid bribes and provided recreational travel and entertainment to multiple PDVSA officials to win business or secure favorable treatment. The defendants will be sentenced on July 14, 2017.
- **Zimmer Biomet Holdings, Inc. and JERDS Luxembourg Holding S.ár.l.:** On January 12, 2017, the U.S.-based manufacturer of medical implant devices settled FCPA charges with the DOJ and SEC related to its operations in Mexico and Brazil. As part of the parallel settlements, the company entered into a three-year DPA with the DOJ for violating the internal-controls provisions of the FCPA. The same day, the SEC ordered the Company to cease and desist violations of the FCPA's anti-bribery, books-and-records, and internal-controls provisions. The Company also agreed to retain an independent compliance monitor for not less than two years. In addition, the Company's Luxembourg subsidiary pled guilty to causing violations of the FCPA's books-and-records provisions in connection with its operations in Mexico. The agencies imposed more than $30 million in penalties, disgorgement, and prejudgment interest. Of note, the U.S.-based manufacturer's predecessor previously entered into a three-year FCPA-related DPA with the DOJ in March 2012. This settlement follows a June 2016 DOJ claim (discussed in our FCPA Summer Review 2016) that the U.S.-based manufacturer breached its earlier DPA based on unspecified conduct in Brazil and Mexico -- the same two countries at the center of the new resolution.
- **Sociedad Química y Minera de Chile:** On January 13, 2017, the Chilean chemicals and mining company settled with the

DOJ and SEC over allegations that it made payments through the use of fictitious invoices to Chilean politicians, political candidates, and other individuals close to them (collectively referred to as "politically exposed persons"), violating the books-and-records and internal-controls provisions of the FCPA. The company agreed to pay $30.5 million in criminal and civil penalties and to retain an independent compliance monitor for two years.

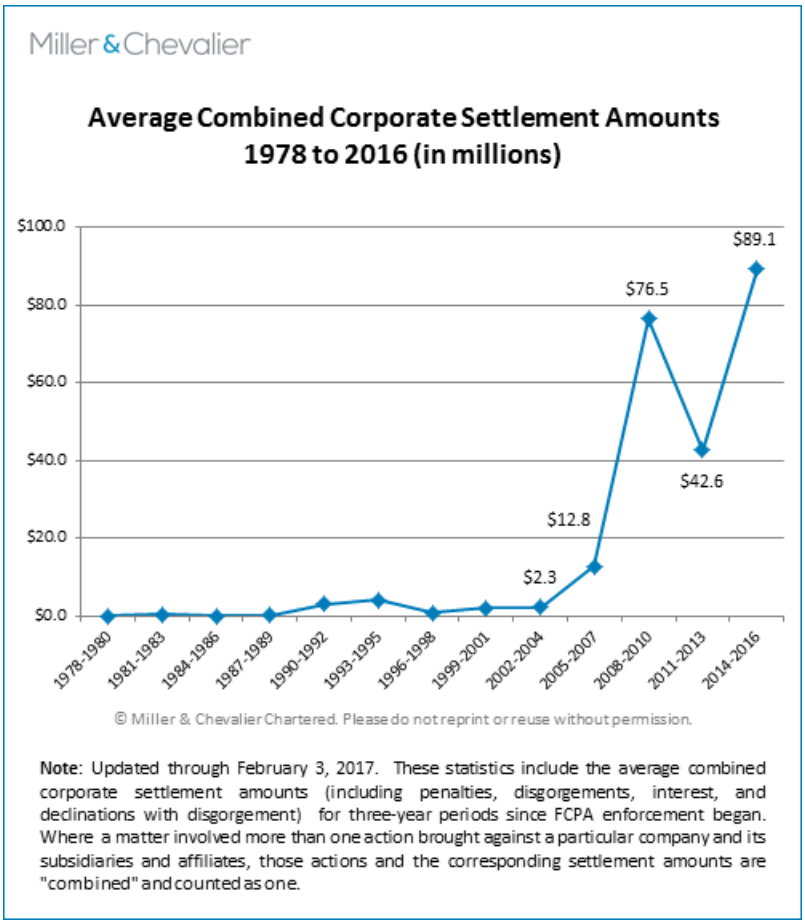
- **Las Vegas Sands Corp.:** On January 17, 2017, the U.S. gaming and resort company entered into a NPA with the DOJ, resolving charges that the company violated the FCPA's internal-controls and books-and-records provisions in connection with business transactions in China and Macao. As part of the agreement, the company agreed to pay a criminal penalty of nearly $7 million. This resolution comes approximately nine months after Las Vegas Sands Corp. entered into an FCPA-related resolution with the SEC, as described in our FCPA Summer Review 2016.
- **Orthofix International N.V.:** On January 18, 2017, the U.S.-based medical device manufacturer settled the SEC's charges that it violated the FCPA's books-and-records and internal-controls provisions based on allegations that the company's Brazilian subsidiary, Orthofix do Brasil Ltda., engaged third-party agents to make improper payments to doctors at government-owned hospitals to increase Orthofix's sales. The company agreed to pay $6.1 million in civil penalties and disgorgement and to retain an independent compliance monitor for one year. The same day, Orthofix released a statement noting that the DOJ "has decided to take no further action with respect to this matter."

Increase in Corporate Settlement Amounts

We have updated our chart of "Ten Largest Corporate Settlements" to include the Teva and the Odebrecht/Braskem settlements, which rank, respectively, as the fourth and fifth largest FCPA combined settlements of all time.



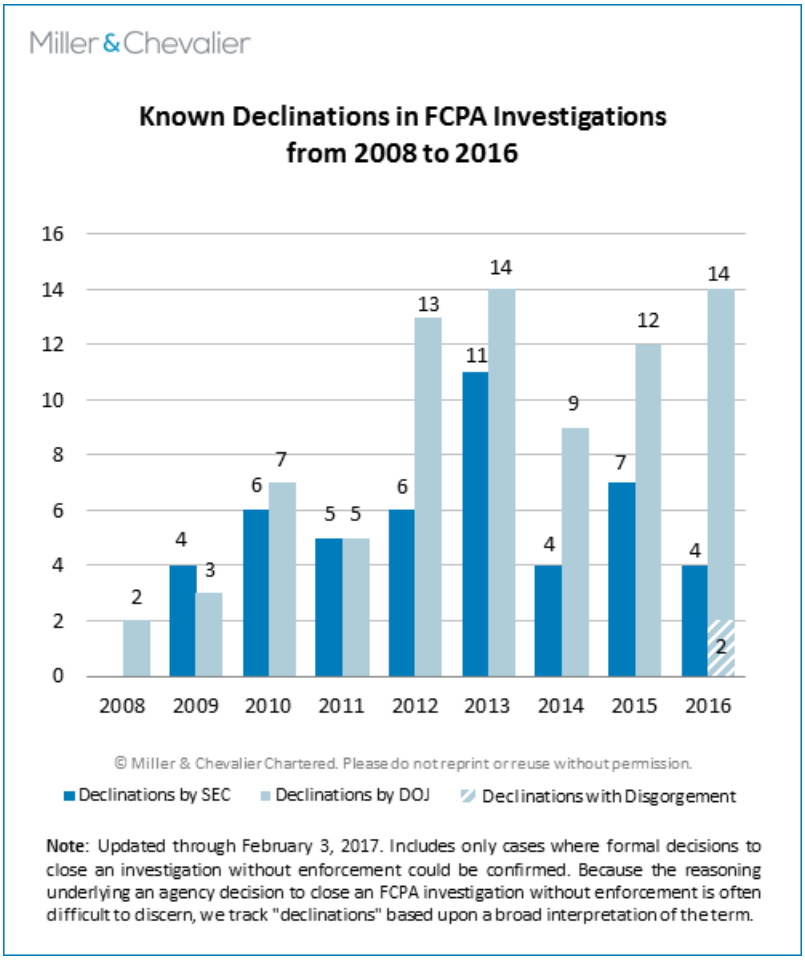
Of note, the oldest settlement in the top ten is Siemens AG's 2008 resolution, while six of the 10 settlements occurred in just the last three years. To get a better sense of how corporate FCPA settlement amounts have changed over time, we have also tracked the average size of corporate settlements dating back to the statute's enactment. As reflected in the chart below, we used three-year averages to mitigate the anomalous effect that a major settlement would have on the average for any one year and to provide readers with historical context.



As the chart details, the average corporate settlement amount for the 2014-2016 period is the highest in FCPA enforcement history and more than double the average amount for the 2011-2013 period. The variation within the last three periods is due, in part, to some prominent actions in the "Top Ten" chart above. However, settlement amounts over $100 million have become common and even settlement amounts in more routine enforcement actions over the last ten years have increased in size and scope. Indeed, while the median combined settlement amounts in FCPA cases were $325,000 in the 2002-2004 period and $2.98 million between 2005 and 2007, the median figures increased to $15.67 million, $15.85 million, and $14.75 million over the last three three-year periods, respectively. In fact, the lowest settlement amount of any FCPA case in the fourth quarter of 2016 was over $75 million. Overall, while the increase in average values is certainly susceptible to outliers, the use of three-year averages tends to even them out and the inclusion of six 2014-2016 settlements among the ten highest-ever settlement amounts is the strongest indication that settlement amounts are generally rising across the board.

Declinations

In addition to the 56 resolved FCPA enforcement actions in 2016, to date we have identified 19 declinations -- or decisions to close an active FCPA investigation without enforcement -- by the agencies issued last year. Thus far, we have identified only one fourth-quarter declination by the DOJ for a total of 14 DOJ declinations for the year, matching the Department's previous high from 2013. On the SEC side, we have identified two fourth-quarter declinations, for a total of four declinations for the year.



The three declinations issued by the agencies during the fourth quarter were:

- ***Quanta Services, Inc.***: In a Form 10-Q filed on November 8, 2016, the company, a provider of various services in the electric-power and oil-and-gas industries, disclosed that it received a declination from the SEC on October 27, 2016, in connection with the Commission's "inquiry into certain aspects of Quanta's activities in certain foreign jurisdictions, including South Africa and the United Arab Emirates." According to the company's disclosure, the "SEC did not allege any violations of law by Quanta or its employees" but had "requested that Quanta take necessary steps to preserve and retain categories of relevant documents, including those pertaining to Quanta's U.S. Foreign Corrupt Practices Act compliance program." Ultimately, the Commission "notified Quanta that it had concluded its investigation and, based on the information received, did not intend to pursue further action in connection with this inquiry."
- ***Fairmount Santrol Holdings Inc.***: In a Form 8-K filed on November 17, 2016, the company announced that "the Company was notified by the SEC [on November 3, 2016,] that the SEC staff completed its investigation regarding possible violations of the FCPA and that the SEC does not intend to pursue enforcement action against the Company." The company, a provider of high-performance sand and sand-based products used in the oil and gas industry, had previously disclosed that the Commission was investigation possible FCPA violations "relating to matters concerning certain of the Company's international operations."
- ***ABM Industries Inc.***: In a Form 10-K filed on December 21, 2016, the facility management company stated that in December 2011, it had voluntarily disclosed to the DOJ and SEC the results of its internal investigation into a matter relating to "services

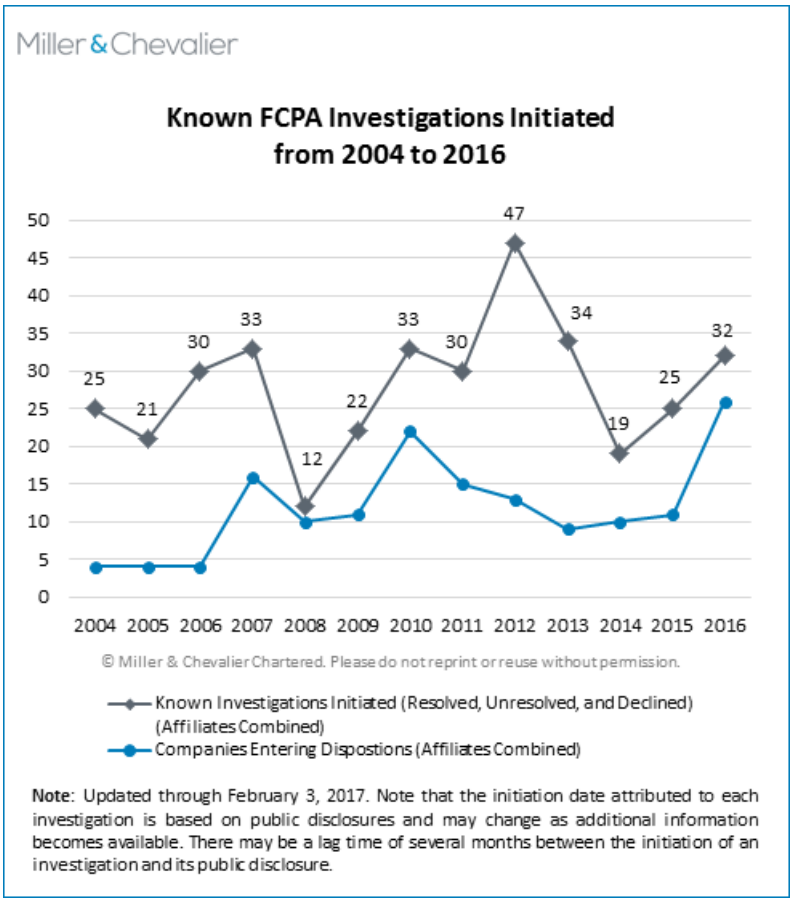
provided by a foreign entity affiliated with a former joint venture partner of" a company that ABM had acquired. ABM noted that it cooperated with the government's investigation, and on "November 14, 2016, the Department of Justice advised us that its investigation was being closed without any action against us. Neither ABM nor the SEC has provided any information about a potential parallel investigation by the SEC."

Since the launch of the DOJ's FCPA Pilot Program, tracking declinations has become somewhat easier because the Department now publishes certain declination decisions in connection with the Program. Of the 14 DOJ declinations identified in 2016, the Department publicly announced five as being connected with the Pilot Program, as discussed in our FCPA Autumn Review 2016. The DOJ's sole declination this quarter, provided to ABM Industries, was not issued under the Pilot Program and, consistent with pre-Program practice, not publicly acknowledged by the Department. Instead, we identified it through a disclosure in the company's securities filings, as we did the two new SEC declinations.

Of note, the number of known declinations provided by the SEC or DOJ in 2016 is likely to rise in the coming months, since companies generally wait to announce the closure of investigations in their quarterly securities filings or annual reports, if they choose to disclose them at all. This practice generally means that there is a lag in identifying new declination decisions. As such, our declination totals are always subject to revision.

Known Investigations Initiated in 2016

In parallel with an uptick in the resolution of existing FCPA investigations, the agencies initiated a substantial number of new FCPA-related investigations in 2016. To date, we have identified 32 FCPA-related investigations opened by the U.S. enforcement agencies in 2016, with that number likely to rise in the coming months as U.S. issuers make new disclosures in their upcoming annual reports filed with the SEC.

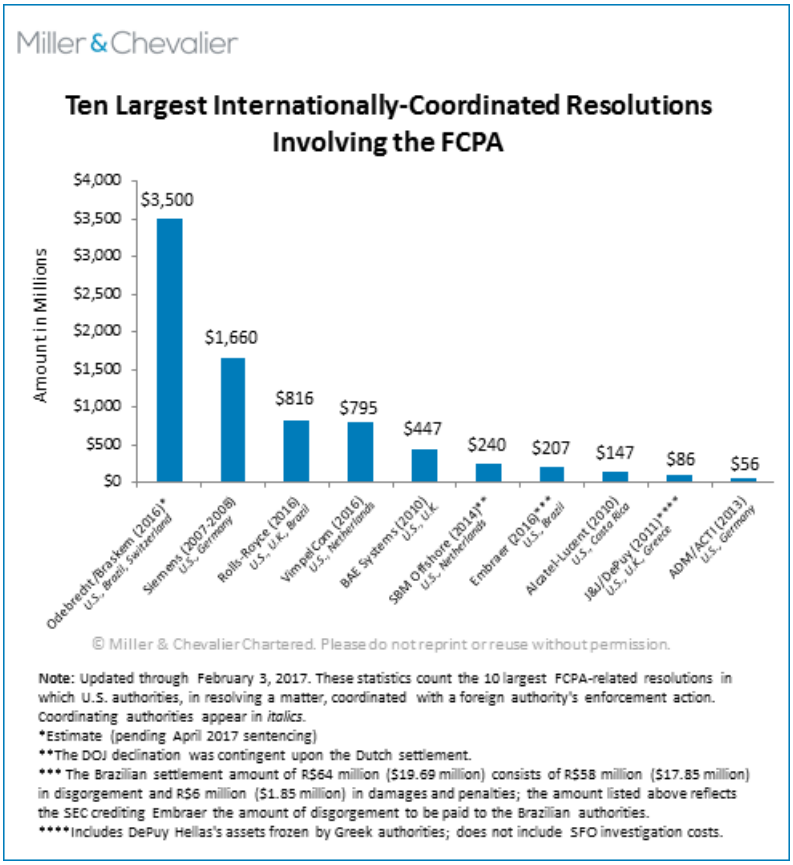


Although it might seem that the number of open investigations by the agencies has gone down over the course of the year -- with 56 resolved enforcement actions and 14 declinations on one side of the scale and 32 new investigations on the other -- this analysis ignores several relevant factors. More likely, the identification of a substantial number of FCPA investigations opened in 2016 suggests that the agencies' pipeline of cases remains full. One cannot directly compare the numbers of resolved enforcement actions, declinations, and new investigations, as a single investigation can often result in multiple enforcement actions or declinations. Moreover, there are likely additional investigations and declinations of which we are not yet aware because the government agencies or the companies involved have chosen to not publicly disclose them at this time. With respect to the chart above, since public companies sometimes wait months, or even years, to disclose the existence of an investigation in their securities filings -- with some choosing never to do so -- and since non-issuer companies often never disclose the existence of an investigation, the numbers in the chart are likely to rise, even for past years.

Rise in Coordinated International Resolutions

Odebrecht and Braskem's record settlements with Brazilian, U.S., and Swiss authorities, as well as the worldwide settlements entered into by Embraer and Rolls-Royce in the last several months, are only the latest in a succession of corruption investigations that the DOJ or SEC resolved in coordination with enforcement by foreign authorities. The following chart lists the top ten internationally-coordinated FCPA resolutions by overall settlement amount. We identified these resolutions based on language in settlement documents or official releases indicating that the U.S. and foreign authorities cooperated and coordinated with each other in bringing their respective enforcement actions. Note that our analysis excluded corporate resolutions with multiple authorities where coordination could not be established, such as resolved enforcement actions and follow-on resolutions premised

on the same or overlapping conduct as the earlier actions.



Siemens's 2008 settlement was among the first and, until recently, the largest anti-corruption resolution involving coordination between the United States and foreign enforcement authorities. It has been followed by a trickle of other internationally-coordinated settlements, reflecting the growing cooperation between U.S. and foreign authorities, particularly those in the United Kingdom, Germany, the Netherlands, and, more recently, Brazil. Statements from the DOJ attest to this increasing level of cooperation: in October 2016, for example, Fraud Section assistant chief Leo Tsao stated in an interview that the DOJ's anti-corruption attorneys "have lots of interactions with our foreign counterparts," and that such cooperation "has become a really useful tool, both in generating cases [and] in generating parallel cases where we work with counterparts." Mr. Tsao further remarked that the DOJ seeks to "encourage all of [its] partners to ... open up parallel investigations," adding that "when there are parallel investigations and other jurisdictions are actively pursuing the conduct that was relevant to their countries ... the DOJ is more than happy to step back at least for a part of the investigation to let everybody take a piece, relevant to that jurisdiction and to run with that."

The global Odebrecht / Braskem settlement took the phenomenon of multinational coordination of dispositions to a more complex level by involving enforcement authorities in three countries, with penalty and disgorgement amounts in each country calculated relative to each other and Brazil slated to receive the bulk of both. Less than a month later, the Rolls-Royce resolutions with the U.K., U.S., and Brazilian authorities again involved coordination among enforcement authorities from three nations, with the SFO to receive the largest share of the settlement amount this time.

This uptick in coordinated multinational resolutions, considered together with the emergence and enhancement of anti-corruption

legal regimes around the world, suggests that global settlements, once a rare phenomenon, are becoming a standard component of the DOJ's and SEC's current approach to anti-corruption enforcement.

Future of FCPA Enforcement

When discussing recent enforcement developments, trends, and statistics, the elephant in the room is how FCPA enforcement might be handled going forward by the Trump administration. While speculation about DOJ and SEC priorities under President Trump is rife, it is too soon to tell whether the change in administration might portend any specific changes in the DOJ's or SEC's enforcement or regulatory priorities, or even a renewed effort to amend the statute. Indeed, the new administration's approach to various policies has been characterized by an unpredictability that makes reading the tea leaves even more difficult than in the past.

It has been widely reported that President Trump criticized the FCPA in a 2012 interview, in which he stated that the statute is a "horrible law and it should be changed" because it puts U.S. businesses at a "huge disadvantage" relative to foreign businesses that he asserted are able to pay bribes to foreign officials without the same legal repercussions as U.S. companies. The President's comments evidence a general familiarity with the FCPA and provide a window into his views of the statute as of four-and-a-half years ago, before he began any formal campaigning for the U.S. presidency. One should be cautious, however, of reading too much into this stand-alone interview, as President Trump was a private citizen at the time whose businesses were potentially covered by the FCPA's scope. This view of the FCPA's effects was also consistent with other criticisms of the law that had been advanced by other U.S. corporate interests. In addition, the comments do not reflect the significant rise of international enforcement efforts in the intervening period (as we discuss above), which are directly relevant to the main criticism expressed in the interview. Finally, there is no indication that President Trump has given more thought to the FCPA or its enforcement since winning the election and taking office.

President Trump's nominee to head the SEC, Jay Clayton, likewise has expressed reservations about the agencies' "zealous" approach to FCPA enforcement. In his capacity as the Chairman of a New York City Bar Association committee, he was one of several authors of a paper released in 2011 discussing the FCPA and some proposed solutions to perceived problems with the statute and its enforcement. Notably, most of the committee's suggested improvements are incremental in nature and seek mainly to introduce more clarity and predictability into FCPA compliance and enforcement, rather than fundamentally alter the law or its objectives. And these proposals again were in line with other potential reforms being discussed by various business interests at the time. Moreover, the fact that a nominee has criticized the government's approach to enforcing the FCPA is not necessarily indicative of how the nominee will manage enforcement of the statute. For example, Andrew Weissmann, the current Chief of the Criminal Division's Fraud Section, was once heavily involved in a lobbying effort led by the U.S. Chamber of Commerce seeking reform of the FCPA, yet during his tenure at the DOJ, he has presided over a robust and assertive enforcement program and an expansion of international cooperation.

During his recent confirmation hearings, Senator Jeff Sessions, President Trump's nominee for U.S. Attorney General, addressed the FCPA, responding to a question from a member of the Senate Judiciary Committee with concerns about the Trump administration's commitment to enforcing the law. Although vague, Senator Sessions' response -- that "if confirmed as Attorney General, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case" -- does not indicate any particular disagreement with the statute or its enforcement. Senator Sessions' response to a question relating to alleged fraudulent sales practices by Wells Fargo & Company sheds some additional light on his FCPA-relevant views. Acknowledging that "[c]orporations are subject as an entity to fines and punishment for violating the law, and so are the corporate officers," Senator Sessions stated that "[s]ometimes it seems to me ... that it's the corporate officers who caused the problem and should be subjected to more severe punishment than the stockholders of the company who didn't know anything about it." This line of thinking suggests an emphasis on individual prosecutions over corporate penalties, but is consistent with existing guidance already in place in both the Yates Memorandum and the FCPA Pilot Program.

Aside from Clayton and Sessions, it is unclear how several other nominees Trump has recently selected to fill key DOJ positions view the FCPA. Thus, it is not yet clear whether or how those individuals will reshape the administration's approach to interpreting and enforcing the statute. For instance, the appointment of Trevor McFadden, a former federal prosecutor and law firm partner, to oversee the DOJ Criminal Division's Appellate and Fraud Sections (including the FCPA Unit) does not provide much insight into the Trump Administration's priorities. Mr. McFadden has FCPA-related experience from his private practice, as well as significant prosecution experience at DOJ; however, Mr. McFadden's background does not provide enough public data on which to predict how he will approach enforcement of the FCPA, especially when the views of those nominated to several more senior DOJ positions remain unclear.

In addition, although the President and his executive agencies may influence policies and priorities affecting FCPA enforcement, any change to the statute's elements or scope would require Congressional action, and there is no indication at this time that Congress has any intent to revisit the Act.

Setting aside the treaty implications associated with amending the FCPA, the potential benefits of doing so in an era of global enforcement are unclear. The FCPA is now only one of several prominent anti-corruption regimes that companies around the world must consider when conducting business abroad. As we discuss above, several recent internationally-coordinated anti-corruption settlements suggest that we have entered a new era of global enforcement -- one being driven not only by the DOJ and SEC, but by increasingly empowered and assertive enforcement authorities from a number of countries worldwide.

There is no doubt that the future will bring new information that will clarify some of the questions discussed here, and we will continue to monitor and report on those developments. Despite some of the signals noted above that may suggest changes to the current enforcement climate, we would strongly recommend that companies continue to do business in compliance with current norms and legal guidance, and not bank on any such changes yet.

Actions Against Corporations

Embraer Settles with DOJ, SEC, and Brazilian Authorities in Connection with Sales in the Dominican Republic, Saudi Arabia, Mozambique, and India

On October 24, 2016, the DOJ and SEC announced that they reached an agreement with Embraer to settle FCPA-related charges in connection with sales activities in the Dominican Republic, Saudi Arabia, Mozambique, and India. The disposition with the U.S. authorities was coordinated with a simultaneously announced settlement between Embraer and the Brazilian authorities. Embraer is a global aircraft manufacturer, incorporated and headquartered in Brazil, that produces aircraft and parts for the commercial, defense, and executive jet markets. The company, initially a state-owned entity, was privatized in 1994. Embraer's shares are traded on the New York Stock Exchange (NYSE) through American depository receipts (ADRs), making the company an "issuer" under the FCPA.

Embraer entered into a three-year DPA with the DOJ to resolve criminal FCPA charges filed in the Southern District of Florida: one count of conspiracy to violate the anti-bribery and books-and-records provisions and one count of violating the internal-controls provisions. As part of the DPA, Embraer agreed to pay a penalty of more than $107 million, which, according to the DOJ documents, reflects a 20 percent discount below the low end of the U.S. Sentencing Guidelines range. The company also agreed to retain an independent compliance monitor for three years.

In addition, Embraer settled the SEC's claims that it violated the FCPA's anti-bribery, books-and-records, and internal-accounting-controls provisions. The company agreed to pay $83.8 million in disgorgement and $14.4 million in prejudgment interest, and the SEC agreed to credit up to $20 million of the disgorgement that Embraer will pay to Brazilian authorities.

In Brazil, Embraer entered into a leniency accord with Brazil's federal prosecution ministry, the Ministério Público Federal (MPF),

and Brazil's Comissão de Valores Mobiliários, the country's equivalent of the U.S. Securities and Exchange Commission. The leniency accord, which was signed on October 6, 2016, but announced the same day as the U.S. settlement, addresses allegations that Embraer violated Law 6404/76, a Brazilian securities law, and that certain Embraer directors engaged in transnational active corruption, money laundering, and false accounting. The company agreed to pay 64 million reais (approximately $20.5 million) in disgorgement. According to the DOJ's press release announcing the settlement, Brazilian authorities have charged 11 individuals for their alleged involvement in Embraer's misconduct in the Dominican Republic. In addition, Saudi Arabian authorities have charged two individuals for their involvement in the Saudi Arabia scheme.

Each of the alleged schemes -- in the Dominican Republic, Saudi Arabia, Mozambique, and India -- is discussed below. The common theme is that, between 2008 and 2011, Embraer allegedly funneled bribes to government officials through sham contracts in order to facilitate the sale of aircraft. The U.S. government documents state that senior company executives approved the various schemes, which in sum netted the company over $83 million in profits. Two of Embraer's wholly-owned subsidiaries were also involved in the conduct that was subject to the dispositions: a U.S. subsidiary based in Delaware, Embraer Representations LLC (Embraer RL), as well as a Swiss subsidiary, ECC Investment Switzerland AG (ECC Investment).

Dominican Republic

In 2007, Embraer began efforts to sell military aircraft to the government of the Dominican Republic. There was no public bid or tender for this sale, and Embraer negotiated the sale directly with the Dominican Republic's Air Force, Fuerza A é rea de República Dominicana (FAD). In 2008, when many of the terms of the sale had been negotiated with the Dominican Senate but the Senate had not yet approved the deal's financing, Embraer executives began discussing how they could influence the Dominican Senate to provide the necessary approvals. According to the settlement documents, Embraer executives coordinated with a Dominican official to pay 3.7 percent value of the contract -- roughly $3.52 million -- to the official in exchange for the official's assistance in obtaining the Dominican Senate approval for the sale and financing.

According to the settlement documents, the Dominican official, a government official who could influence the FAD's decisions, promoted the Embraer deal before the Dominican Senate Finance Committee and the Dominican Senate. In September 2008, the Dominican Senate approved the financing for the deal. In December 2008, the Dominican Senate approved the sale and financing contracts, agreeing to purchase eight military aircraft for approximately $96.4 million. Emails exchanged between Embraer executives uncovered during the investigation suggest that part of the commission requested by the Dominican official may have been intended for transfer to a Dominican senator. Furthermore, an email sent from the Dominican official to an Embraer employee on April 24, 2009, demanding that Embraer begin making the agreed-upon payments, referenced the fact that "interested and compromised parties" were exerting pressure on the Dominican official to receive their part of the payments promised.

The improper payments to the Dominican official were made via an agent and shell companies using a sham contract. The documents state that one executive in Embraer's legal department provided senior Embraer managers with guidance on how to conceal the true nature of the illegal payments. When some employees raised questions about the sales commission and sought guidance from senior Embraer executives, senior executives allegedly instructed the subordinates to find a solution that did not involve the legal department. Embraer executives worked with an agent to sign a sham agency agreement whereby Embraer would pay the agent's company a commission on successful aircraft sales. The sham contract stated that Embraer would pay the agent's company a commission based on a sale of aircraft to the Jordanian Air Force. However, the government documents state that an internal Embraer memo referred to the payments as related to aircraft sold to the government of Dominican Republic, not Jordan. In fact, the government documents assert that the agent rendered no services in connection with attempted sale to Jordanian Air Force.

Saudi Arabia

In Saudi Arabia, Embraer paid bribes of about $1.5 million in exchange for a $93 million contract regarding the sale of business jets, according to the settlement documents. Embraer allegedly paid those bribes to officials of what the U.S. settlement documents refer to as a "Saudi Arabia Instrumentality." Based on public statements made by Saudi Arabian Oil Company (Saudi Aramco) and Embraer's settlement with Brazilian authorities, it appears that the instrumentality in question is Saudi Aramco, the state-owned Saudi Arabian oil giant.

According to the U.S. settlement documents, Embraer learned in 2007 that the Saudi Arabian Instrumentality was interested in purchasing executive jets; by 2009, the entity had narrowed down its possible supplier to Embraer and another competitor. The settlement documents state that Embraer executives and a Saudi Arabian official coordinated a deal whereby the official would help Embraer change the terms of the deal to make it more lucrative to Embraer in exchange for payments to the official. The Embraer executives, including one member of the legal department, allegedly devised a plan to conceal the payments to the Saudi Arabian official by funneling them through a South African agent that had no experience in the aircraft industry or in Saudi Arabia. According to the settlement documents, the South African agent transferred $1.4 million of the $1.65 million it received from Embraer RL to bank accounts in Saudi Arabia held by the Saudi Arabian official's longtime acquaintance, who in turn kept a portion of the $1.4 million and transferred the remainder to the Saudi Arabian official. The payments were made from Embraer RL's bank account in New York to the agent's bank account in South Africa.

Mozambique

According to the settlement documents, in 2008, Embraer submitted a formal proposal to Linhas Aereas de Mocambique, S.A. (LAM), a state-owned commercial airline in Mozambique, for the sale of two commercial aircraft with an option to buy two more at the same price. The company spent the following three years working to convince LAM to purchase from Embraer rather than competitors. During these negotiations, an agent who had never worked with Embraer contacted the company and stated that it would be serving as a consultant on the deal and emphasized that the company would need to pay a financial "gesture" upon delivering the aircraft to finalize the deal with LAM. The government papers state that, in response, Embraer executives worked with the agent to create a company to which Embraer could make consultancy payments, advising the agent that it should not be established in a tax-haven country. The Embraer executives and the agent negotiated the fee set-up that the agent would receive, and Embraer RL entered into an agreement with a company affiliated with the agent. The contract authorized the agent to sell Embraer aircraft to LAM, but the contract referred to the sale of aircraft that had already been completed several months prior to the execution of the agreement, and to services that the agent had not performed. The government's documents indicate that the negotiation for the alleged bribe started with Embraer offering $50,000 and concluded with Embraer ultimately paying $800,000 ($400,000 per aircraft) in exchange for the sale of two aircraft, each sold to LAM at a cost of $32 million.

India

In India, the settlement documents note that the company improperly accounted for payments made in connection with the sale of aircraft to the Indian Air Force. Specifically, in 2006, Embraer entered into an agreement with a U.K. shell company affiliated with an agent. Under this agreement, Embraer agreed to pay the shell company a commission of nine percent of the value of defense contracts. Embraer believed that the agent could help ensure that any contract would be awarded on a single-source, rather than competitive, basis. According to the settlement documents, Embraer personnel thought the agreement with the agent was illegal under Indian law and thus took extra steps to conceal its existence, including by keeping the contract in a safety deposit box in London.

Shortly thereafter, Embraer entered into a memorandum of understanding (MOU) with India's Defense Research and Development Organization, which it thought would ultimately result in Embraer securing a contract for aircraft sales. In 2008, the Indian Air Force agreed to purchase Embraer aircraft, and the following day the agent contacted Embraer and demanded a payment of the commission due to him under the contract with the shell company.

The settlement papers state that, more than a year after Embraer was awarded its aircraft contract, ECC Investment, Embraer's wholly-owned Swiss subsidiary, executed an agency agreement with a Singaporean shell company affiliated with the agent and made payments on the contract. The documents indicate that the payment was for the agent's purported services to sell Embraer aircraft, but the Singaporean entity allegedly never performed services related to that sale or the sale to the Indian Air force. Embraer's books-and-records did not reflect that the transaction in India related to its arrangement with the agent.

The documents state that the illegal payments in the Dominican Republic, Mozambique, and Saudi Arabia were inaccurately recorded by Embraer's U.S. subsidiary and were consolidated into Embraer's financial statements.

In deciding to enter into a DPA with Embraer, the DOJ considered that the company did not voluntarily disclose the violation and that the SEC had served Embraer with a subpoena. However, the DPA noted that the company fully cooperated with the investigation and provided all non-privileged relevant facts known to the company. The DPA noted that the company had an inadequate compliance program at the time of the criminal conduct, but that it is designing and implementing a more robust program.

Interestingly, the DPA noted that the company had engaged in what it defined as "partial remediation." It stated, that the company "has disciplined a number of Company employees and executives engaged in the misconduct described in the attached Statement of Facts, but did not discipline a senior executive who was (at the very least) aware of bribery discussions in emails in 2004 and had oversight responsibility for the employees engaged in those discussions."

Noteworthy Aspects

- **Impact of Discipline Decisions on DOJ Evaluation of Cooperation:** As noted above, the DPA indicates that the government did not consider the company's remediation efforts fully satisfactory, in part due to its failure in disciplining a senior executive who was aware of bribery discussions and had oversight responsibility for employees engaged in those discussions. Nevertheless, the company's cooperation was significant enough to receive a 20 percent discount below the low end of the U.S. Sentencing Guidelines on its penalty calculation, which helped reduce its penalty in the final fine calculation. This resolution, as well as the recent Och-Ziff and LATAM settlements, discussed in our FCPA Autumn Review 2016, demonstrate that the DOJ is willing to credit companies for remediation of FCPA problems even if it fails to terminate the employment of senior executives. This topic was recently discussed in greater detail by Dan Wendt and Alice Hsieh of Miller & Chevalier here.
- **First Enforcement Action Against Brazilian Company and First Joint Foreign Bribery Settlement between U.S. and Brazilian Authorities:** The DOJ and SEC's parallel enforcement against Embraer represents the first FCPA-related enforcement action against a company that is headquartered in Brazil. There have been enforcement actions where companies made improper payments to officials in Brazil (including Biomet, Eli Lilly, and Dallas Airmotive), but this is the first instance where the U.S. government brought charges against a Brazil-based company. Although this settlement marks the first FCPA-related enforcement action against a Brazil-based company and the first joint foreign bribery settlement between U.S. and Brazilian authorities, it did not have the distinction of being the only Brazil-based company that resolved an FCPA-related enforcement action for long. In December 2016, U.S. authorities, in cooperation with Brazilian and Swiss authorities, settled with Brazil-based Odebrecht and its subsidiary Braskem, as described below. Another example of U.S.-Brazilian cooperation in prosecuting foreign bribery is the Rolls-Royce settlement described below.
- **Cooperation with Foreign Authorities:** This case is another example of the increased cooperation among authorities around the world, as well as the increased enforcement by authorities outside the United States. In its press release, the DOJ expressed its gratitude to foreign enforcement authorities in Brazil, the Dominican Republic, and South Africa. The SEC thanked several Brazilian government agencies, the South African Financial Services Board, the Swiss Financial Market Supervisory Authority (FINMA), the Banco Central del Uruguay, the Spanish Comisión Nacional del Mercado de Valores, and the French Autorité des Marchés Financiers. Similar to the VimpelCom Limited settlement where, summarized in our FCPA Spring Review 2016, the SEC credited the disgorgement VimpelCom paid to Dutch authorities, in this case, the SEC agreed to credit the disgorgement

that Embraer will pay to Brazilian authorities.

- **The Detailed Nature of Brazil's Settlement Documents:** The Brazilian settlement documents (available here in Portuguese), which cover the same improper schemes as the U.S. settlement, are notable because they provide additional factual details not included in the U.S. documents. For example, the documents include some names of the companies and individuals allegedly involved in the schemes. When Brazil's Security and Exchange Commission initially uploaded the settlement documents online in October 2016, there were no names redacted. Since then, the agency has replaced the initial file and included some redactions. In addition, the Brazilian documents state that individuals allegedly linked to the Dominican official took the passports of two Embraer employees who were traveling in the Dominican Republic until the company wired a previously agreed upon payment to an account that the Dominican official indicated. The U.S. documents do not include information about this occurrence. This demonstrates the differing approaches that countries take in determining which information to publicly disclose.
- **Mandatory Reporting to Brazilian Authorities:** According to Embraer's settlement with Brazilian authorities, the company has agreed to share with Brazilian authorities' findings from its internal investigation and reports by the independent monitor imposed under the U.S. settlement. Although the details of this arrangement are unclear, the agreement to exchange information is particularly noteworthy given the confidential nature of independent monitor reports in FCPA settlements to date, despite recent litigation in U.S. federal courts to increase access to those reports.
- **Defense Industry and Debarment Proceedings:** The alleged violations in question relate to improper payments in the defense industry, which could trigger collateral issues for Embraer. In the United States, companies are mandatorily debarred from contracting with the U.S. government for violating some statutes, but debarment is not mandatory for contractors who violate the FCPA. Instead, with regard to the FCPA, each agency has discretion as to a debarment decision. Thus, the U.S. Department of Defense could initiate, if it has not already, debarment proceedings against the company making it difficult or impossible to sell aircraft to the U.S. military. It bears noting that Saudi Aramco publicly stated that it has ceased all dealings with Embraer and excluded Embraer from any future business. Additionally, it states that Saudi Aramco is taking appropriate legal measures against Embraer over the violations in question.

JPMorgan Chase Settles with DOJ and SEC Over Improper Hiring Practices in China

On November 17, 2016, JPMorgan Securities (Asia Pacific) Limited (JPMorgan APAC), a wholly owned subsidiary of investment bank JPMorgan Chase & Co. (JPMC), entered into a Non-Prosecution Agreement (NPA) with the DOJ and agreed to pay $72 million in criminal penalties in relation to its improper hiring practices, which violated the anti-bribery, books-and-records, and internal-controls provisions of the FCPA. On the same day, the SEC issued a Cease-and-Desist Order (SEC Order) against JPMC, in which the company agreed to pay $130.5 million in disgorgement. The Federal Reserve Board also issued a Consent Order to Cease and Desist and Assessment of Civil Money Penalty (Fed Order) in which JPMC agreed to pay a $61.9 million civil money penalty, bringing the total amount of penalties imposed by the three agencies to approximately $264.4 million.

According to the NPA, JPMorgan APAC bankers in Hong Kong created a "Client Referral Program" in 2006, known as the "Sons and Daughters Program," in order to generate business for the subsidiary. Under the Program, JPMorgan APAC would provide the relatives of government officials and employees of state-owned enterprises (SOEs) with internships and paid positions in exchange for favorable business deals. According to the SEC Order, "JPMorgan hired approximately 200 interns and full-time employees at the request of its APAC clients, prospective clients, and foreign government officials" over seven years. During this period, the company also hired candidates referred by more than 10 government agencies. JPMorgan APAC ultimately derived at least $100 million in revenue and $35 million in from business received from the Chinese SOEs.

JPMorgan APAC Executives Knew About Anti-Corruption Risks

The disposition documents state that JPMorgan APAC executives knew about the anti-corruption risks of the Client Referral Program. In 2006, the head of Junior Resources Management (JRM), which oversaw staffing for JPMorgan APAC, wrote in an

email to JPMorgan APAC investment bankers: "As you know, the Firm does not condone the hiring of children or other relatives of clients or potential clients of the Firm ... for the purpose of securing or potentially securing business for the Firm. In fact, the Firm's policies expressly forbid this. There are no exceptions." In order to monitor the Client Referral Program, JPMorgan APAC's legal and compliance team developed a questionnaire to screen candidates for anti-corruption risks in 2006. The questionnaire asked if the Referral Hire went "through the usual application/interview process," had the "necessary qualifications for the position," and was rated "against other applicants for the position." The questionnaire also contained a question about the expected business benefit of the hire.

According to the settlement papers, JPMorgan APAC's legal and compliance team restricted the confidential information that Referral Hires were able to access and stated that Referral Hires should be "walled off" from business or potential business from the referring person or company in order to avoid conflicts of interests. In 2007, JMPC expanded its global FCPA policy to cover JPMorgan APAC. According to the policy, hiring the relatives of foreign officials required legal pre-clearance. JPMorgan APAC trained its bankers on the required pre-clearance. That same year, JPMorgan APAC's legal and compliance team sent a message to employees that for Referral Hires, "[t]he firm should not be currently actively pitching for any transaction of such client." The legal and compliance team also stated that Referral Hires should go through the routine interview process and receive positive feedback from their interviewers in order to be hired.

JPMorgan APAC Executives Actively Circumvented the Ineffective Local Screening Process

However, according to the SEC Order, "the 'Sons and Daughters' questionnaire process was an ineffective review that failed to operate as an effective check on potential violations." The questionnaire did not prevent anti-corruption violations in part because JPMorgan APAC employees sometimes provided inaccurate or incomplete information. Moreover, according to the SEC Order, the failure of the anti-corruption checks " ... was also due to a fundamental misunderstanding of the Client Referral Program by JPMorgan APAC legal and compliance, and a failure to investigate potential issues when they arose." In response to an inquiry on the Sons and Daughters Program from JPMC's global legal team, one JPMorgan APAC attorney wrote: "'Sons & Daughters' is not an active programme to solicit connected persons to work for us in the hope of obtaining business." The attorney added that " [i]f we take a Son or Daughter, it is because they have applied for an internship like thousands of others, meet objective academic requirements, there are no FCPA concerns. No favours are done. They get treated like everyone else." According to the SEC, however , "[i]nvestment banking and legal and compliance support personnel frequently assisted the investment bankers with drafting and modifying questionnaires that failed to state the true purpose for some Referral Hires." The SEC Order further noted that JPMorgan APAC's legal and compliance staff did not turn down any Referral Hire candidate from 2007 to 2012.

In November 2009, a JPMorgan APAC banker created a PowerPoint presentation called "Emerging Asia Client Referral Program (CRP)." According to the presentation, the Client Referral Program was "designed to hire employees referred by our key clients who may not meet our regular hiring standard .... The current program is functional but could be further improved to optimize control/management and enhance contribution to business generation." The proposed criteria in the revised program for Referral Hires included "directly attributable linkage to business opportunity" and "clear accountability for deal conversion and accountability for abuse of program." According to the SEC Order, the creators of the revised program, which the head of investment banking at JPMorgan APAC authorized, did not seek approval from the JPMorgan APAC compliance team. Additionally, under the revised program, only senior managing directors had the power to "sponsor" referral hires and the cost of program would be "[f]ully allocated to the sponsor's team as a marketing expense," according to the NPA. Around the end of 2010 or the beginning of 2011, a JPMorgan APAC employee created a spreadsheet to track the revenues generated by the Referral Hires.

According the SEC Order, JPMorgan APAC " ... failed to properly review or stop the Client Referral Program until 2013." That year, a JPMorgan APAC compliance officer in a newly created position decided that hiring candidates at the request of clients or potential clients was not allowed under JPMC's anti-corruption policies. That decision terminated the Client Referral Program.

Referral Hires Were Less Qualified and Performed Ancillary Work

According to the resolution documents, the candidates that JPMorgan APAC hired through the Client Referral Program (Referral Hires) were typically less qualified in terms of grades, language skills, and quantitative ability than the regular pool of candidates, who underwent a competitive interview process. Additionally, the departments that hired the Referral Hires generally required fewer competencies, work product, and hours worked. Moreover, the Referral Hires were given "special consideration" in terms of work assignments and promotions in order to protect them from heavy workloads.

The NPA reveals that while the Referral Hires received pay and titles commensurate to other interns and entry-level bankers, they "performed ancillary work such as proof reading and provided little real value to any deliverable product." As a result, other JPMorgan APAC employees sometimes referred to these hires as "photocopiers." In one case, a JPMorgan APAC employee pushed for a Referral Hire to be given a permanent position despite the hire's "undeniable underperformance" because the "deal is large enough [and] we are pregnant enough with this person, that we'd be crazy not to accommodate her father's wants." In another case, one JPMorgan APAC banker asked another banker whether he could assist in getting the Referral Hire a full time analyst job in JMPC New York in exchange for the possibility of an investment banking mandate from the hire's father in Taiwan. The second banker responded, "Can try … [the hire's] napping habit will be an eye-opening experience for our NY colleagues if he gets the job." JMPC New York hired the Referral Hire in October 2010.

Penalties and Requirements under the Settlements

The DOJ did not give JMPC and JPMorgan APAC voluntary disclosure credit. However, JPMorgan APAC and JMPC received "full credit" for cooperation with the investigation, including producing documents, making employees in foreign countries available for interviews, and disclosing all relevant facts on the misconduct. According to the NPA, JMPC and JPMorgan APAC also engaged in "extensive remedial measures," including "causing five employees who participated in the misconduct … to separate from [JPMorgan APAC], disciplining over twenty employees who "failed to detect the misconduct, failed to supervise effectively those who were engaged in misconduct, failed to take appropriate steps to mitigate corruption and compliance risk," "adopting heightened controls" around the hiring program, and dedicating more resources to compliance. Additionally, JPMorgan APAC fined current or former employees almost $18.3 million as part of the remediation efforts. For these reasons, the DOJ discounted 25 percent off the bottom of the U.S. Sentencing Guidelines fine range and determined that an independent compliance monitor was unnecessary. The penalty of $72 million was based on the calculated profits of $35 million from the corrupt scheme.

Pursuant to the SEC Order, JMPC is obligated to report the status of its remediation and implementation of compliance measures at nine month intervals during the three-year period to the agency. During this period, JMPC agreed to conduct an initial review and submit an initial report of its FCPA and anti-corruption remediation efforts and its proposals for the improvement of its policies. JMPC is also obligated to conduct three follow-up reviews that incorporate comments from the SEC and assess whether its policies are reasonably designed to prevent violations of the FCPA and other anticorruption laws. Finally, JMPC must certify in writing that it has made a good faith effort to comply with its obligations.

Noteworthy Aspects

- **First Federal Reserve Board Cease-and-Desist Order Directly Related to FCPA Disposition:** This is the first FCPA settlement that has involved a related penalty from the Federal Reserve. In the Fed Order, the agency emphasized the importance of internal controls, stating that JMPC and JPMorgan APAC did not have "an effective and comprehensive risk management framework to ensure that the [banks'] employees complied with applicable laws, firm-wide policies and procedures, and internal controls in connection with hiring candidates who were referred, directly or indirectly, by foreign government officials." The Fed Order also stated that the agency had a role in " … conducting investigations into the hiring practices of JPMC and its … subsidiaries relating to whether certain referral hiring activities violated federal anti-bribery laws" along with the DOJ and SEC. The involvement of the Fed leads to questions on how the agency will sanction other banks with anti-corruption issues in

the future. The government's recent focus on FCPA violations in the banking industry is bringing new different regulatory bodies and laws into play. For example, the SEC charged the global hedge fund Och-Ziff in 2016 with violating the FCPA and the Investment Adviser's Act of 1940 (discussed in our FCPA Autumn Review 2016).

- **Hiring of Family Members as Improper Benefit to Officials:** Two other companies recently entered FCPA settlements for improperly hiring family members of foreign government officials in exchange for business opportunities. All three enforcement actions treated the hiring as an improper payment violating the anti-bribery prohibitions of the FCPA and the Act's internal-controls provisions. In 2015, the wealth-management company BNY Mellon paid $14.8 million to the SEC to for providing internships to family members of government officials associated with a Middle Eastern sovereign wealth fund (this case was covered in our FCPA Autumn Review 2015). As in JPMorgan APAC's Program, these internships were awarded to the family members of the fund without the regular interview process. Moreover, employees at BNY Mellon had wide control over hiring decisions without being subjected to review by the compliance staff. In 2016, the mobile technology company Qualcomm (covered in our FCPA Spring Review 2016) paid $7.5 million to the SEC for providing full-time employment to Chinese government officials' relatives, some of whom "did not satisfy Qualcomm's hiring standards" according to the SEC Order. These cases highlight the enforcement agencies' focus on companies offering internships and employment in exchange for favorable business opportunities.
- **Routine Circumvention of Insufficient Local Controls:** Although JPMC had a global anti-corruption policy that covered JPMorgan APAC beginning in 2007, the SEC Order stated that JPMorgan APAC failed to devise a system of internal controls sufficient to prevent corruption. According to the SEC, JPMorgan APAC's legal and compliance team were aware of the risk of hiring the relatives of government officials, but the questionnaire they instituted was inadequate to address the corruption risks posed by the Referral Program. In addition, JPMorgan APAC executives and employees who were determined to use the referral program to generate business actively hid the "quid pro quo" nature of the hires in the Client Referral Program. These actions are reminiscent of the Och-Ziff case (discussed in our FCPA Autumn Review 2016), where managers purposefully removed references to bribery in an internal audit report. The JPMC case also shares similarities to the SEC's 2016 settlement with cosmetics company Nu Skin Enterprises (discussed in our FCPA Autumn Review 2016), in which the company's Chinese subsidiary circumvented and contravened the parent company's recommended anticorruption measures in connection with a charitable donation, which was intended to influence a government official in a local Chinese investigation. These three cases illustrate that effective compliance on the ground is critical to the success of anticorruption efforts.

Odebrecht and Braskem Enter into the Largest Global Corruption Settlement Involving the FCPA

On December 21, 2016, two affiliated Brazilian companies, Odebrecht and Braskem, settled corruption charges with authorities in Brazil, United States, and Switzerland. In the United States, each company pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA. Braskem also entered into a settlement with the SEC over claims that the company falsified its books-and-records. In settling, the companies agreed to pay at least $3.5 billion in combined global penalties, the largest corruption settlement to date by a wide margin (the second largest is the $1.6 billion global settlement with Siemens). We discuss the allocation of penalties among the various authorities below.

Odebrecht is a Brazilian conglomerate with operations in engineering, infrastructure, energy, and chemicals industries; it is one of the largest engineering and construction companies in the world. Braskem is a Brazilian petrochemical company controlled by Odebrecht and partly owned by Odebrecht and Petróleo Brasileiro S.A. (Petrobras), Brazil's national oil company. Braskem is one of the largest petrochemical companies in the Americas, and its ADRs are traded on the NYSE.

The investigation and settlements are a part of the Operation Car Wash corruption investigation that has rocked Brazil politically, economically, and culturally since early 2014. According to press reports, the Operation Car Wash investigation first publicly targeted Odebrecht in late 2014. On June 19, 2015, Brazilian authorities arrested Odebrecht's CEO, Marcelo Odebrecht, who was sentenced on March 8, 2016, to 19 years in prison on bribery-related charges (this action was covered in our Summer 2015 and Spring 2016 FCPA Reviews). In April 2015, Braskem announced that it had self-reported bribery allegations against it to the

DOJ, the SEC, and Brazilian authorities. As discussed below, however, the U.S. authorities were by that time already aware of the corruption allegations against Braskem.

Common Allegations

According to court documents, the two companies made approximately $1.04 billion in improper payments, of which $863 million were confirmed to be bribes, and with those bribes, they secured at least $3.63 billion in ill-gotten benefits. A significant portion of Odebrecht's alleged bribes, and all of Braskem's alleged bribes, were made to Brazilian officials, including Petrobras executives and employees.

According to Odebrecht's Plea Agreement, all of the alleged bribes made by the two companies were paid through a secretive financial structure in Odebrecht, which began as a "slush fund" in 2001 and later evolved into a "Division of Structured Operations" in 2006. According to the DOJ, the Division of Structured Operations "effectively functioned as a bribe department within Odebrecht and its related entities." The Division managed a "shadow" budget using its own accounting system, called "MyWebDay," separate from Odebrecht's accounting system, and the funds within the shadow budget were not recorded on Odebrecht's books-and-records. The Plea Agreement also stated that the Division also had its own secure communications system, called "Drousys," that allowed Division employees to "communicate with one another and with outside financial operators and other co-conspirators using secure emails and instant messages." To further conceal their activities, Drousys users allegedly "utilized a series of codenames to mask their identities, and referred to bribe recipients and intermediaries using additional codes and passwords."

According to the Plea Agreement, the Division also established and managed a series of offshore entities officially unaffiliated with Odebrecht to make and conceal its improper payments. Funds in the shadow budget were first "funneled" to these offshore entities and then disbursed to recipients, many of whom were "foreign officials, foreign political parties, foreign political party officials, and foreign political candidates in various countries." The improper payments were sometimes made in cash, "in packages or suitcases at locations predetermined by the beneficiary," and sometimes via wire transfer. Many of the wire payment transactions "were layered through multiple levels of offshore entities and bank accounts throughout the world, often transferring the illicit funds through up to four levels of offshore bank accounts before reaching the final recipient."

Aside from the offshore entities, the Division intentionally used small banks in certain countries that had "distinct features that would aid in the scheme," such as stricter bank-secrecy laws. Certain Odebrecht employees even went to countries where the final beneficiaries were located and "brought them to the favored banks to open accounts to facilitate the illicit payment transfer." Moreover, according to the Plea Agreement, Odebrecht "frequently paid remuneration fees and higher rates to its [favored] banking institutions, and a percentage of each illicit transaction to certain complicit bank executives." Strikingly, after a particular favored bank in Antigua began to fail, Division employees and complicit bank executives bought the Antigua branch of an Australian bank so it could be used to conceal illicit transfers.

Odebrecht

According to its Plea Agreement, over a 15-year period between 2001 and 2016, Odebrecht "paid approximately $788 million in bribes in association with more than 100 projects in twelve countries" and benefited approximately $3.34 billion from those bribes.

Of the $788 million in bribes, Odebrecht paid approximately $349 million to Brazilian political parties and officials. Most significantly, Odebrecht allegedly participated in a cartel of construction companies that divided up contracts for Petrobras projects among them. The Plea Agreement states that, "[i]n order to guarantee the continued success of the bid rigging scheme," between 2004 and 2012, Odebrecht made millions of dollars of corrupt payments to several Petrobras executives and Brazilian politicians. Aside from the bid-rigging scheme, Odebrecht also allegedly made "corrupt payments" to other Brazilian officials to secure various infrastructure projects.

Outside of Brazil, Odebrecht allegedly made corrupt payments through various methods, including using cash drops and sometimes through local intermediaries, to government officials in 11 other countries, mostly to secure infrastructure projects. The countries include Angola, Argentina, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.

Braskem

According Braskem's Plea Agreement, over a 12-year period between 2002 and 2014, Braskem improperly diverted approximately $250 million into offshore companies managed by Odebrecht's Division of Structured Operations. The prosecuting authorities were able to determine that Braskem used $75 million of the $250 million to pay bribes that secured the company $289 million in benefits. But, the authorities stated that they were unable to determine whether Braskem benefitted illicitly from the remaining $175 million diverted.

The Plea Agreement states that all of Braskem's improper payments went to Brazilian officials and describes seven instances where Braskem successfully influenced policy or business decisions using bribes. Two of the seven instances related to retaining or securing contracts with Petrobras -- in one case, on terms that Petrobras employees and management initially strongly resisted. The remaining five instances all related to securing favorable tax treatment. In one interesting example, Braskem sought a new tax exemption and orchestrated a lobbying campaign to craft and introduce legislation in the Brazilian Congress. While in the Brazilian Congress, the proposed legislation faced various obstacles such as unfavorable amendments or opposition from particular legislative officials. The Plea Agreement asserts that, to overcome these obstacles, Braskem made improper payments to five or six different congressional and executive branch officials over time, eventually securing the bill's successful passage.

Penalties

Of the $3.5 billion combined global penalties, approximately $2.6 billion is attributable to Odebrecht's global settlement, to be shared among the DOJ (10 percent), Brazil's Ministerio Publico Federal (80 percent), and the Swiss Office of the Attorney General (10 percent). The $2.6 billion could be revised higher pending an "ability to pay" analysis (discussed below) to be completed by March 31, 2017.

The remaining $957 million is attributable to Braskem's settlement with the DOJ, the SEC, and the same Brazilian and Swiss authorities. Of Braskem's total penalty, $325 million is considered disgorgement ordered by the SEC and that portion will be shared between the SEC (20 percent) and Brazilian authorities (80 percent). The rest is considered criminal penalty to be shared among the DOJ (15 percent), Brazilian authorities (70 percent), and Swiss authorities (15 percent).

According to court documents and press releases, Odebrecht plans to fulfill its obligations to the U.S. and Swiss authorities in 2017, and it plans to pay its obligations to Brazilian authorities over a 23-year period (with interest). Braskem has similarly agreed to fulfill its obligations to the U.S. and Swiss authorities soon after settlement and pay its obligations to the Brazilian authorities over a six-year period (with inflation adjustment).

In addition to the criminal penalties, both companies have separately agreed to retain an independent compliance monitor for three years.

Noteworthy Aspects

- **Investigation Led by Brazilian Prosecutors:** Aside from being the largest corruption settlement to date, the Odebrecht and Braskem settlement is extraordinary also because Brazilian, not U.S., prosecutors, appear to have taken the lead in the investigation. Reflecting that reality, most of the fines and disgorgement will be paid to the Brazilian government. Before this settlement, most of the major multi-jurisdictional foreign-corruption prosecutions, including all of the top 10 FCPA settlements

by global settlement amount, have been led by U.S. prosecutors. The emergence of many more multi-jurisdictional investigations over the last few years makes it likely that we will see more global settlements in the future in which the U.S. agencies receive a smaller "piece of the pie." Also notable is that the Operation Car Wash investigation is considerably broader than the investigations of Odebrecht and Braskem, with many former high-level Brazilian executives and once-powerful Brazilian politicians already sentenced to long prison terms, and with many Brazilian and multinational companies still under investigation. Several of these companies are reportedly also under investigation by U.S. authorities; hence, we expect additional FCPA settlements linked to Operation Car Wash in the future.

- **Full Versus Partial Cooperation and No Benefit for Self-Disclosure:** According to court documents, Odebrecht received a 25 percent reduction from the bottom of the applicable U.S. Sentencing Guidelines fine range for full cooperation, the maximum allowed under the DOJ's Pilot Program guidelines for non-voluntary disclosing defendants. In contrast, Braskem received only a 15 percent reduction from the bottom of the applicable Sentencing Guideline fine range, apparently because Braskem "failed to produce any documents, information about witness statements, or information about facts gathered from its internal investigation until seven months after its initial contact with the Fraud Section and EDNY. " Furthermore, even though Braskem attempted to voluntarily self-disclose the allegations against it to the U.S. authorities, the DOJ did not give Braskem credit for that action, explaining that, by the time of Braskem's disclosure, the U.S. authorities were already aware of the allegations. The lower reduction percentage (15 percent rather than 25 percent) cost Braskem approximately $74.4 million, based on the final penalties.
- **Ability to Pay:** Odebrecht's criminal penalty, calculated based on the applicable Sentencing Guidelines formula and discounted by 25 percent for full cooperation, would have been approximately $4.5 billion. Because Odebrecht has represented that it is unable to pay more than $2.6 billion in criminal penalty, due to its heavy debt and frozen order book (reportedly, it is barred from public contracts in Brazil pending this resolution), according to the Plea Agreement, the three countries' authorities have tentatively agreed to a reduced penalty of $2.6 billion, subject to an ability-to-pay analysis to be completed by March 31, 2017. In the history of FCPA settlements, only a few other companies have been allowed this consideration, including Alcoa, Innospec, and Key Energy.
- **Full Cooperation Credit Given Despite Destruction and Concealment of Evidence:** According to its Plea Agreement, after Odebrecht became aware of the Brazilian authority's investigation, Odebrecht employees, including a senior company executive and executives of the Division of Structured Operations, "took steps to conceal or destroy evidence … and to hinder the various investigations." The specific steps included record destruction; in mid-2015, agreeing to pay $4 million in bribes to an Antigua government official in exchange for the official's agreement to refrain from providing to international authorities banking documents that would reveal illicit payments made by the Division; and, in or about January 2016, destruction of physical encryption keys needed to access the Division's secret accounting system, which rendered "significant evidence" inaccessible. Interestingly, in spite of these alleged obstructions, some of which appear on their face to have significantly hindered the investigation, the DOJ still credited Odebrecht for "full cooperation."

Teva Pharmaceuticals Settles with DOJ and SEC in Connection with Conduct in Russia, Ukraine, and Mexico

On December 22, 2016, Teva Pharmaceuticals agreed to a DPA and $519 million in penalties and disgorgement to resolve FCPA violations with the DOJ and SEC. Teva Russia, Teva's wholly-owned Russian subsidiary, also agreed to plead guilty to conspiracy to violate the anti-bribery provisions of the FCPA. Teva, the world's largest generic drugs manufacturer, is an Israeli company that is a U.S. issuer. The total settlement value is the fourth-largest payment ever made to settle FCPA violations. Although the government's investigation started in Latin America, Teva's settlement addresses different bribery schemes in three different countries.

Approximately $200 million of the $236 million in disgorgement and interest paid by Teva was a result of the scheme in Russia. Beginning in 2001, Teva Russia contracted with a Russian distributor, manufacturer, and re-packager. In 2003, the owner of the distributor became a high-level Russian government official, who assigned ownership of the company to his wife but maintained

complete operational control of it. According to the DPA and the plea agreement with Teva Russia, the official used his authority to increase sales for Teva's multiple sclerosis drug, Copaxone, in annual Ministry of Health tenders. In exchange, the Criminal Information stated, Teva paid the Russian distributor approximately $65 million in profits between 2006 and 2012, with some or all of that money given to the government official in connection with the sales of Copaxone. The DOJ noted that these payments occurred at the same time the Russian government was implementing a program to reduce the amount it spent on treatments for seven illnesses, including multiple sclerosis. Teva earned $200 million in profits related to those tenders.

According to the SEC Complaint, beginning in 2006, the Russian official pressured Teva to increase the amount of business Teva Russia did with his company and later threatened to reduce the price and sales volumes Teva obtained in government contracts if Teva did not continue to grow their relationship with the Russian official's company. According to the DPA, in 2010, Teva Russia employees secured approval for a new, exclusive distributor agreement with the official's company, despite internal complaints about a poor payment history. In the due diligence process, the Legal Director for Teva Russia noted the official's wife's ownership of the distributor, but did not reveal that the official retained operational control and had pressured the company to do the deal, that local press reports had suggested the official's corrupt dealings in drug tenders, or that the President of the distributor company was being investigated in Russia for corruption. Teva's regional compliance office approved the relationship.

In Ukraine, Teva's local, wholly-owned subsidiary hired a consultant who was a senior government official within the Ministry of Health who had the ability to influence government registration decisions. Between 2002 and 2011, Teva paid approximately $200,000 to the official to improperly influence registrations of Copaxone and Teva's insulin products. Among other payments, Teva paid for the official and his wife to travel to Israel each year.

In Mexico, multiple wholly-owned subsidiaries of Teva (collectively, "Teva Mexico") used a third-party distributor to make payments to healthcare professionals (HCPs) in exchange for prescribing Teva products. The DPA allegations as to Mexico focused on Teva's failure to implement adequate internal controls, but noted that Teva Mexico admitted it made direct payments to doctors in exchange for prescriptions until marketing budget cuts in 2011 caused Teva Mexico to funnel the payments through a distributor. According to the DPA, Teva Mexico paid the distributor an additional two percent margin on sales to government customers, to be used to make cash payments to HCPs at government hospitals. Moreover, the DPA discussed Teva Mexico management's repeated, open, and explicit rejection of Teva's compliance program requirements, including statements that the program was "not relevant" to the Latin America region and was "to be ignored." It is not clear from the public documents why DOJ did not treat the Mexico scheme as a violation of the anti-bribery prohibitions, though presumably at least some of the direct payments to HCPs were outside the statute of limitations and may not have had sufficient jurisdictional nexus to the United States. The SEC complaint, in contrast, did treat these payments as section 30A anti-bribery violations.

The company's resolution with the DOJ included a $283 million criminal penalty, which included a 20 percent reduction for cooperation and remediation. The DPA said that Teva received only partial cooperation credit because of "vastly overbroad assertions of attorney-client privilege" and untimely production of documents. Teva's remediation included terminating or causing the removal of 15 employees involved in the conduct, enhancing its compliance and anti-corruption training, and improving its due diligence procedures. Teva said in a statement that the entire Russian leadership team was replaced in 2013. That said, the DPA stated that Teva agreed to an independent monitor because "many of the changes to the compliance program were recent developments and therefore untested."

In addition to the penalty, the total payment by Teva also included $236 million in disgorgement to the SEC, which is the second-largest disgorgement in FCPA history.

Noteworthy Aspects

- **Ineffective Compliance Oversight:** The facts as described in the public documents show active manipulation of Teva's corporate compliance processes by Teva Russia and open rejection of those processes by Teva Mexico, illustrating the need for

parent companies to monitor subsidiaries' adherence to corporate requirements, and to question behavior that suggests circumvention (*e.g.*, a rush to push through an exclusive Russian distributor and an unexplained 2two percent inflation of the Mexican distributor's margin).

- **Pay-to-Prescribe Risk v. Tender Risk:** When the DOJ and SEC began investigating pharmaceutical companies in 2010, much of the discussion focused on pay-to-prescribe schemes at state-run hospitals where the doctors could be considered government officials. Regulators warned that the pharmaceutical industry was especially high-risk due to the frequent contact with government hospitals and doctors. While many pharmaceutical companies have reached settlements regarding pay-to-prescribe conduct, the penalties have generally been relatively small.
  For example, the August 2016 AstraZeneca settlement, which was based on payments to HCPs in China and Russia, resulted in fines and disgorgement of $5.5 million. Novartis paid $25 million in March 2016 relating to a pay-to-prescribe scheme, and in February 2016, SciClone paid $12.8 million to settle charges relating to the company paying and giving gifts to hospital officials to increase sales. Similarly, Bristol-Myers Squibb paid $14.7 million in October 2015 and Mead Johnson paid $12.8 million in July 2015 to resolve allegations relating to similar schemes. GlaxoSmithKline's September 2016 resolution resolving pay-to-prescribe schemes in China resulted in a $20 million civil penalty (though Glaxo's previous settlement of allegations with the Chinese government may have played a role in the DOJ closing its parallel investigation).

  In contrast, in the Teva settlement, which included both a tender component and a pay-to-prescribe component, approximately $200 million of the $236 million disgorgement resulted from payments to Russian officials to improperly influence tenders. A significantly smaller percentage of the disgorgement resulted from payments made to HCPs in Mexico. The scale of the penalties and disgorgement illustrates that although pay-to-prescribe presents a significant internal controls challenge and enforcement risk, the financial impact of violations in the context of government tenders can be expected to be much more significant -- just as it is in other industries.
- **Overly Broad Assertions of Privilege Apparently Decreased Cooperation Credit:** Teva received only partial cooperation credit because of "vastly overbroad assertions of attorney-client privilege" and untimely production of documents. Because it did not voluntarily self-disclose, the maximum reduction that Teva could have received under the pilot program was 25 percent. Teva received a 20 percent reduction for its cooperation and remediation, which translated to approximately $17.7 million in penalties).
- **No Credit for "Involuntary" Voluntary Disclosure:** Teva did not receive credit for voluntary disclosure even though they "disclos[ed] to the Fraud Section conduct in Russia and Ukraine of which the Fraud Section was previously unaware." This underscores the point described in the Pilot Program and in the U.S. Sentencing Guidelines that voluntary disclosure must occur "prior to an imminent threat of disclosure or government investigation." In Teva's case, the company did not receive credit for its disclosure of facts not known to the government at the time because it occurred after the investigation began.
- **Third Parties Remain a Key Risk Area:** Each of the three schemes involved a third-party distributor, causing the SEC to emphasize the risk of such relationships in its press release: "While distributors can help companies navigate complex regulatory environments and proved valuable industry relationship, they also can create significant corruption risks for companies." Unlike other cases in which companies fail to recognize or address red flags suggesting a third party may make improper payments, the facts described in the settlement documents show clear company intent to use the distributors in each of the three countries to make improper payments and, in Russia and Ukraine, company knowledge that the distributor was itself owned by the targeted official who could influence government decisions.
- **Civil Complaint:** The SEC filed a civil complaint against the company instead of initiating an administrative action. The Commission took a similar approach in 2016 with respect to both Braskem and VimpelCom, filing a complaint in federal district court in connection with each of those settlements. Thus, in three of the four largest settlements in 2016, the SEC initiated a civil action in federal court, with the exception of Och-Ziff, whose case was resolved with an administrative order. As discussed in our Summer 2016 Review, the SEC has been moving toward a "new normal" of handling FCPA actions through administrative proceedings rather than civil actions in federal court, even as that practice has drawn sharp criticism, as we described in our

Autumn 2016 Review. The SEC's filing of civil complaints in some its largest FCPA cases might be related to the ongoing debate. In addition, given the 10th Circuit's December 27, 2016, holding in *Bandimere v. SEC* (discussed below) that the SEC's use of administrative law judges (ALJs) is unconstitutional -- coming only months after the DC Circuit reached an opposite conclusion -- the SEC may seek to resolve more enforcement actions in federal court while the constitutionality of its in-house administrative proceedings is addressed by the courts.

General Cable Corporation and a Former Executive Settle with DOJ and SEC Over Allegations of Improper Payments to Officials

In the last days of December 2016, Kentucky-based wire and cable products manufacturer General Cable Corporation (GCC) entered into settlements with the DOJ and SEC over alleged violations of the FCPA's anti-bribery, books-and-records, and internal-accounting-controls provisions. As part of the settlements, GCC agreed to pay more than $75.7 million, including a $20,469,964.80 monetary penalty to the DOJ, disgorgement of $51,174,237, and prejudgment interest of $4,107,660 to the SEC.

On December 22, 2016, GCC and the DOJ entered into an NPA. The DOJ announced the NPA on December 29, 2016 -- the same day on which the SEC filed separate Cease-and-Desist orders against GCC and against Karl Zimmer, a U.S. resident and former Senior Vice President of GCC. Without admitting or denying the allegations, Zimmer agreed to pay a $20,000 civil penalty.

The DOJ and SEC alleged that between 2003 and 2015, GCC's subsidiaries made and inaccurately recorded improper payments to foreign officials in Angola, Thailand, China, Indonesia, and Bangladesh. During this time, according to the agencies, GCC failed to maintain an adequate system of internal accounting controls. The SEC also alleged that a GCC subsidiary made and inaccurately recorded improper payments in Egypt.

Angola

The DOJ and SEC alleged that two of GCC's subsidiaries made direct and indirect improper payments to Angolan officials between 2003 and 2013. Between 2003 and 2009, GCC's subsidiaries paid over $450,000 directly to officials at three state-owned enterprises. According to the DOJ, beginning in 2008, one of the subsidiaries made payments to an agent knowing that a portion of the payments was for officials at Angolan state-owned enterprises. The same subsidiary also made payments to another agent knowing that part of the payments would be passed on to a state-owned customer. The SEC alleged that GCC subsidiaries falsely recorded these indirect payments to foreign officials as payments for third-party consulting services and payments to third parties as offsets against sales. According to the SEC, many of the commission payments to the agents exceeded GCC's internal-controls limits.

According to the disposition documents, GCC's internal audit department raised several red flags to GCC executive management with respect to the Angolan subsidiary in 2012. However, GCC executive management did not implement additional internal accounting controls until almost a year later. At that point, according to the SEC, GCC executive management instructed the subsidiary to terminate the remaining agent, while allowing time for a transition. During this time, a manager approved a new contract—including a commission exceeding the percentage allowed by the company's policy—to the same agent. The manager also approved the payment of past-due commissions, which GCC executive management had prohibited.

Bangladesh, Indonesia and Thailand

According to the charging documents, a GCC subsidiary made payments to freight forwarders in Indonesia with the knowledge that part of the money would be used corruptly. The government documents also state that a subsidiary paid an agent in Bangladesh and provided improperly recorded "success fees" and "rebates" to a distributor in Thailand with the same

understanding. Subsidiary employees allegedly discussed the payments in multiple emails. The DOJ characterized GCC as "at least … willfully blind" to certain of the payments.

China

According to the DOJ and SEC, between 2012 and 2015, GCC's subsidiary in China made more than $500,000 in improper payments to distributors and agents in connection with sales to state-owned enterprises. A portion of the funds paid to the distributors and agents as rebates, special discounts, and technical service fees was given or intended to be given to employees of Chinese state-owned enterprises. According to the agencies, one GCC subsidiary employee emailed a supervisor and specifically noted that "a few key players at [the state-owned customer]… charge a certain amount of fees."

Egypt

The SEC alleged that certain GCC subsidiary employees gave or offered cash, gifts, or tips to certain employees of Egyptian state-owned enterprises and that the company improperly recorded some of the payments as "consultant fees."

Karl Zimmer

The SEC's Cease-and-Desist order against Zimmer alleged that Zimmer caused GCC's violations of the books-and-records and internal-accounting-controls provisions of the FCPA. According to the order, Zimmer did so by approving payments to an agent involved in sales to state-owned enterprises in Angola. The SEC alleged that, at the time, Zimmer knew that GCC's policies prohibited such excessive commissions, that GCC had initiated an investigation of the agent, and that GCC had specifically prohibited payments of past due commissions to the agent without further approval. Zimmer left GCC in 2015.

Noteworthy Aspects

- **Material Misstatements in SEC Filings Due to Weak Accounting Controls in Brazil:** On December 29, 2016, the SEC also filed a Cease-and-Desist order against GCC and determined to accept GCC's settlement offer of $6,500,000 in connection with its operations in Brazil. According to the Cease-and-Desist order, GCC violated both FCPA-related accounting provisions and other accounting provisions under the Exchange Act. In particular, the SEC alleged that GCC materially misstated its financial statements because of improper inventory accounting at its Brazilian subsidiary. According to the SEC, subsidiary employees created false entries for inventory values to cover missing copper inventory that resulted from accounting errors and / or theft of the inventory by subsidiary personnel. GCC executives knew that the company's accounting systems presented financial reporting risks and the misstatements went undetected because of the company's internal-accounting-controls failures.
- **Short Time Period Between Self-Disclosure and Settlement:** According to the Cease-and-Desist order, GCC self-reported its potential FCPA violations to the SEC in January 2014. Thus, the company went from disclosure to settlement in just under two years. Notably, GCC disclosed to the SEC "after it retained outside counsel to conduct an internal investigation," not after the completion of the internal investigation. It is not clear how much of the internal investigation had been completed by the time GCC disclosed, but according to DOJ documents, it was completed by the time of settlement. Both agencies appeared to appreciate that GCC kept the SEC and DOJ informed as its internal investigation progressed and "regularly updated" the agencies.
- **Monetary Penalty:** The agencies have continued to make efforts to explain the reasoning behind their awards of monetary credit to companies. The DOJ explained that GCC's monetary penalty represented a 50 percent reduction off of the bottom of the U.S. Sentencing Guidelines fine range. The DOJ's stated explanation for the 50 percent reduction included many of the now-standard disclosure and cooperation elements, such as voluntary self-disclosure, full cooperation, the provision of all relevant facts, commitment to enhancing internal controls and compliance programs, remediation, and agreeing to report to the DOJ for three years. Perhaps the most interesting of the steps particularly noted by the DOJ is that GCC made foreign-based

employees available for interview in the U.S., and not only produced documents (and translations) from foreign countries, but organized evidence for the DOJ. Similarly, the SEC praised GCC's self-disclosure, "substantial" cooperation (including presentations to the SEC on key investigation findings, production of thousands of documents and translations, "downloads" from interviews, and making current and former employees available for interview), "extensive" remediation, and restructuring of its compliance program and policies.

- **FBI's International Corruption Squads:** In its press release, the DOJ noted the work of the FBI's Washington, DC International Corruption Squad in investigating the case. The FBI, in conjunction with the DOJ's Fraud Section, created three International Corruption Squads at the beginning of 2015: in New York, Los Angeles, and Washington, DC. It appears that these squads are starting to take a leading role in investigating FCPA cases. For example, the DOJ also acknowledged the investigative work of the New York International Corruption Squad in its press release announcing the resolution with Odebrecht and Braskem (covered in detail here). As more investigations come to light, we are likely to hear more about the International Corruption Squads' efforts.

Rolls-Royce Settles with U.S., Brazilian, and U.K. Authorities Over Alleged Corruption in its Energy and Aerospace Business

On January 17, 2017, authorities in the United States, Brazil, and the United Kingdom announced that they had settled corruption-related charges with Rolls-Royce plc (Company). The Company, a publicly-traded holding company in the United Kingdom with business operations in the civil aerospace, defense aerospace, marine, and energy sectors worldwide, agreed to pay more than $800 million in combined global penalties.

Rolls-Royce entered into a DPA with U.S. authorities on December 20, 2016, under seal, agreeing to pay $195,496,880 (subject to an offset credit of $25,579,179 described below) for conspiring to violate the anti-bribery provisions of the FCPA. As part of the DPA, Rolls-Royce admitted that between 2000 and 2013, the Company and its U.S.-based indirect subsidiary, Rolls-Royce Energy Systems, Inc. (RRESI), and certain employees conspired to pay more than $35 million in bribes via intermediaries in connection with Rolls-Royce's energy business operations in Angola, Azerbaijan, Brazil, Iraq, Kazakhstan, and Thailand. The government alleges that in exchange for the corrupt payments, foreign officials provided confidential information and awarded contracts to Rolls-Royce and RRESI.

In coordination with the U.S. resolution, Rolls-Royce entered into a DPA with the U.K's SFO. As part of the U.K. DPA, Rolls-Royce will pay £497,252,645 (approx. $604,808,392), plus interest for conspiracy to corrupt, false accounting, and failure of a commercial organization to prevent bribery. Rolls-Royce must also reimburse the SFO's investigation costs (£13m) in full. The conduct addressed by the U.K. DPA is distinct from the conduct covered by the U.S. DPA and relates to the Company's energy, civil aerospace, and defense aerospace businesses. The U.K. resolution covers conduct that took place between approximately 1989 and 2013 across seven jurisdictions: Indonesia, Thailand, India, Russia, Nigeria, China, and Malaysia.

As part of its leniency agreement with Brazil's MPF, Rolls-Royce agreed to pay a penalty of approximately $25,579,170 for its role in a conspiracy to bribe foreign officials in Brazil from 2005 to 2008. The DOJ credited Brazil's $25,579,170 penalty against Rolls-Royce's total fine in the United States because it covered similar conduct.

Each of the alleged bribe schemes detailed in the U.S. resolution are discussed in turn below.

Angola

According to the DPA, the company and RRESI entered into multiple commercial advisor agreements with an Angolan-based intermediary from approximately 2009 to late 2011, knowing that there was a "high probability" that a portion of the commission payments would be passed on to officials at Angola's state-owned and controlled oil company, Sonangol. The settlement documents state that in exchange for a total of $2.4 million in commission payments made to the intermediary, the Company and

RRESI obtained confidential information from officials at Sonangol and won three Sonangol projects, resulting in $30 million in profits.

Azerbaijan

According to the DPA, the Company and RRESI engaged a Monaco-based oil and gas services intermediary (which has been identified by the press as Unaoil) from approximately 2000 through 2009 to serve as a commercial advisor to secure contracts to supply wind turbines to a consortium controlled by SOCAR, the state oil company of the Republic of Azerbaijan. Rolls-Royce, RRESI, and certain Company employees allegedly knew that the intermediary used portions of RRESI's commission payments to acquire confidential information and obtain contracts for Rolls-Royce and RRESI. As a result of the corrupt payments, Rolls-Royce and RRESI won contracts to provide over 40 turbines, worth more than $50 million in profits.

Brazil

According to the DPA, from approximately 2003 to 2013, RRESI entered into various commercial advisor agreements in Brazil with various intermediaries, including a Brazil-based oil and gas services intermediary. According to the DPA, RRESI employees were aware that portions of the commission payments would be transferred to foreign officials in exchange for contracts with Petrobras, the Brazil-based petroleum and energy-services company, majority-owned by the Brazilian government. In total, intermediaries received $9.3 million in commission payments, of which at least $1.6 million was paid to a Brazilian foreign official, to assist RRESI in obtaining various lucrative Petrobras contracts.

Iraq

According to the DPA, in Iraq, RRESI engaged the same intermediary used in Azerbaijan and Angola from approximately 2006 through 2009 to bribe Iraqi government officials, including officials at South Oil Company (SOC), an Iraqi state-owned and controlled oil company. In one instance, after obtaining inside information from an official at SOC, the Company and RRESI allegedly created a deal in which the intermediary purchased gas generators directly from RRESI to resell to SOC. According to the DPA, in 2009, when SOC officials raised concerns relating to RRESI's gas generators, the intermediary paid additional bribes to resolve the complaints and prevent SOC from "blacklisting" RRESI. As a result of the gas generator deal, Rolls-Royce and RRESI made more than $1.5 million in profits.

Kazakhstan

According to the DPA, from approximately 2009 to 2012, RRESI entered multiple commercial advisor agreements with various intermediaries in Kazakhstan, including with the intermediary used in Iraq, Angola, and Azerbaijan. The DPA alleges that Company employees entered into the agreements knowing that portions of the commission payments would be used to bribe foreign officials to secure contracts from Asia Gas Pipeline, LLP (AGP), a joint venture between Kazakh and Chinese state-owned and controlled entities that transported gas through a pipeline between Kazakhstan and China. Furthermore, in 2012, RRESI allegedly engaged a local distributor knowing that the distributor was beneficially owned by a high-ranking government official with the authority to impact the Company's ability to operate in Kazakhstan. While the amount paid in corrupt commission is not entirely clear, the DPA states, "[i]n total, RRESI made a financial gain, or alternatively made corrupt commission payments, totaling approximately $20 million on the relevant AGP contracts."

Thailand

According to the DPA, RRESI entered into commercial advisor agreements with intermediaries in Thailand from approximately from 2000 through 2012 to win government contracts. The DPA alleges that Rolls-Royce and RRESI employees knew that a portion of RRESI's commission payments would be used to bribe foreign officials at PTT Public Company Limited. (PTT) and its

subsidiary, PTT Exploration and Production Public Company Limited (PTTEP), both of which are Thai state-owned and controlled oil and gas companies. In one instance, employees of Rolls-Royce, RRESI, and an intermediary allegedly exchanged emails detailing a strategy to convince PTT officials to write bid specifications that ensured the Company would win. After Rolls-Royce was successful in securing said contract, it made a 7.5 percent commission payment to the intermediary, which allegedly passed on proceeds to officials. According to the DPA, RRESI made corrupt commission payments valued at more than $11.2 million to win approximately seven contracts.

Noteworthy Aspects

- **No Independent Compliance Monitor Due to Preemptive Appointment:** The U.S. resolution does not require Rolls-Royce to hire an independent compliance monitor because of, in part, the company's preemptive engagement of Lord Gold as an outside compliance advisor in 2013. Under the U.S. DPA, Rolls-Royce must only engage in self-monitoring and submit periodic reports to the DOJ. However, the U.K. DPA essentially converts the voluntary appointment of Lord Gold as a compliance advisor into a formal monitorship, requiring him to draft a third compliance report by March 31, 2017. The U.K. DPA also states, "[i]f Lord Gold resigns or is unable to fulfil his obligations, Rolls-Royce shall notify the SFO immediately. A replacement selected by Rolls-Royce must be approved by the SFO. The terms of this Agreement shall apply to the replacement."
- **Policies on Paper Are Not Enough:** As part of the Thai bribe scheme, employees of Rolls-Royce and RRESI allegedly initially disguised bribe payments to government officials by paying an intermediary inflated commissions as high as 7.5 percent of the contract price. A portion of those commissions were then allegedly transferred to government officials. However, Rolls-Royce subsequently instituted a new policy requiring additional approval from high-level executives for sales commissions to third-party advisors that exceed five percent. To get around this policy, employees allegedly began to conceal commissions exceeding five percent by classifying them as separate engineering fees or related expenses, which could be paid under a separate contract. This scenario highlights the importance of monitoring for changes in payment trends following the strengthening of compliance safeguards, to ensure they are not being circumvented.
- **First FCPA Case to Require Consumer Financial Fraud Fund Contribution:** The U.S. DPA requires Rolls-Royce to contribute $30 million of the $ 169,917,701 (after the Brazilian offset credit) penalty to the Consumer Financial Fraud Fund. Based on our internal tracking, this resolution marks the first FCPA case in which a party was required to contribute to the Consumer Financial Fraud Fund. The rationale for requiring the Company to contribute to the Consumer Financial Fraud Fund is unclear.
- **SFO's Largest Undertaking to Date:** The U.K. government's resolution with Rolls-Royce ends the SFO's largest investigation conducted to date and marks the highest ever enforcement action penalty imposed against a company in the United Kingdom for criminal conduct. This marks the third use of a DPA since 2014, when the tool became available to U.K. prosecutors. The SFO's resolution with the Company signals the continued ramp-up of U.K. foreign-corruption enforcement efforts and the SFO's adoption of U.S.-style strategies -- *e.g.*, resolution via a DPA -- to prosecute corruption.
- **SFO's Differing Approach for Charging Conduct that Occurred Before and After the UKBA:** Notably, much of the improper conduct covered by the U.K. agreement occurred prior to the enactment of the U.K. Bribery Act (UKBA) in 2011, which, in turn, impacted the charging decisions of prosecutors. For example, the conduct covered by counts 1-7 of the statement of facts attached to the DPA do not include a charge of failure by a commercial organization to prevent bribery, as the improper conduct occurred prior to 2011. Instead, prosecutors relied on the offenses of "conspiracy to corrupt" and "false accounting" to charge the company. However, counts 8-12 charge the Company with failure to prevent bribery, explicitly stating that the charges relate only to payments which were made after July 1, 2011. The prosecutors used the latter charge even in instances where parts of the schemes occurred prior to the enactment of the UKBA.
- **Comparing the Treatment of Privilege in the U.S. and U.K. Resolutions:** A comparison of the language used to describe the Company's cooperation in the U.S. and U.K. resolutions provides insight into how authorities in the respective countries view the issue of preserving privilege during an investigation. For example, in the U.K. judgement approving the DPA

with Rolls-Royce, the U.K. judge, Sir Brian Leveson, emphasized the "extraordinary cooperation" of Rolls-Royce during the investigation including the company's "disclosure of all interview memoranda … despite Rolls-Royce's belief that the material was capable of resisting an order for disclosure, on the basis that it was privileged." The U.S. DPA, on the other hand, does not mention a waiver of privilege, but instead notes that the company "provid[ed] facts learned during witness interviews," perhaps reflecting a heightened priority of protecting privilege in the United States. Although, in most cases, the DOJ does not require companies to waive privilege to obtain cooperation credit, producing privileged material to authorities in another jurisdiction will waive privilege, after which the DOJ would likely expect to receive the material.

- **Rolls-Royce's Liability under the UKBA for Conduct of "Associated Persons":** The UKBA expanded liability of companies for failure to prevent bribery undertaken by "associated persons," which includes not only its employees, but also third parties working on a company's behalf. A company may defend itself against this charge by demonstrating that it has "adequate procedures" in place to prevent the improper conduct. However, in this case, Rolls-Royce failed to do so, as Judge Leveson pointed out, "[i]n large part, the conduct in this case concerns the failure of Rolls-Royce to implement or enforce procedures to prevent bribery by its associated persons." Consistent with the expectations of U.S. authorities regarding third-party risk, the U.K. DPA underscores the importance of a company to proactively implement effective compliance measures that not only address the conduct of its own employees, but also of third parties working on its behalf.
- **Global Cooperation Continues:** The Rolls-Royce global settlement is the latest in a string of multi-jurisdictional efforts to prosecute corruption and is the second recent global resolution (after Odebrecht/Braskem) that involved the cooperation of three countries. Notably, the language of paragraph 13 of Judge Leveson's judgement approving the DPA suggested that U.K. authorities expedited the completion of the U.K. resolution so that it could be announced with the U.S. resolution before the U.S. administration change, highlighting the countries' commitment to work in concert. In addition, in a statement following the Rolls-Royce settlement, Brazilian prosecutor and member of the Operation Car Wash Task Force, Orlando Martello, credited the success of the global resolution to "the high degree of maturity of international cooperation and reflects the credibility that Brazilian authorities responsible for fighting corruption have won on the world stage …"

Actions Against Individuals

Several Individuals Plead Guilty to FCPA-related Charges in Connection with Mexican Aviation Contracts

On November 2, 2016, Kamta Ramnarine and Daniel Perez each pled guilty in the United States District Court for the Southern District of Texas to one count of conspiracy to violate the anti-bribery provisions of the FCPA. Ramnarine was the President of and Perez was the Director of Maintenance of an unidentified U.S. company that provides aircraft maintenance, repair and overhaul, and other services.

According to the documents released by the government, Ramnarine and Perez participated in a conspiracy lasting for nearly a decade to pay $2 million in bribes to two former officials of Mexican state-owned entities, Ernesto Hernandez Montemayor and Ramiro Ascencio Nevarez, along with other unnamed officials, to secure parts and servicing contracts with state-owned entities in Mexico. Montemayor pled guilty to one count of conspiracy to commit money laundering on December 9, 2015, and in that plea agreement admitted to conspiring with Ramnarine and Perez to launder the proceeds of the bribery scheme. Two others, Douglas Ray and Victor Hugo Valdez Pinon, admitted to similar conduct as Ramnarine and Perez and pled guilty to conspiracy to violate the FCPA and conspiracy to commit wire fraud on October 26, 2016, and October 28, 2016, respectively.

On February 2, 2017, Ramnarine and Perez were each sentenced to three years of probation and a $100 special assessment, even though each faced a maximum of five years of imprisonment, a fine of the greater of $250,000 or twice the gross gain to the conspirators or loss to its victims, full restitution, a special assessment, and three years of supervised release. Ray and Pinon are scheduled to be sentenced on February 23, 2017; however, the government has moved to continue Pinon's sentencing hearing to a date after March 27, 2017, "so that the parties can complete their analysis of the defendant's financial gain from his criminal conduct at issue in order to assist the court in accurately determining" an appropriate sentence.

Son of Former Prime Minister of Gabon Pleads Guilty to Conspiracy to Violate the FCPA

On December 9, 2016, Samuel Mebiame, a Gabonese and French citizen and son of the former Prime Minister of Gabon, pled guilty in federal court to a conspiracy charge stemming from a bribery scheme to pay government officials in Niger, Chad, and Guinea, among other countries, in violation of the FCPA.

According to the Information filed in the Eastern District of New York, Mebiame acted as a "fixer" on behalf of three entities: a Turks & Caicos corporation identified as the "Turks & Caicos Entity," a joint venture formed between a British Virgin Islands corporation identified as the "Turks & Caicos Subsidiary" and a subsidiary of U.S.-based hedge fund Och-Ziff Capital Management Group LLC (Och-Ziff), and a British Virgin Islands corporation active in Africa in which the Turks & Caicos Entity owned a controlling interest.

According to the Information, from June 2007 to November 2015, Mebiame caused payments to be made to a Niger foreign government official and intermediaries to Niger government officials, including payments for "nice cars," a payment to a charity run by an official, as well as cash and wire transfer payments. At the time, Mebiame was working to obtain and retain rights to uranium mining concessions in Niger, and the payments were made to influence an official with the power to grant uranium mining licenses. The Information further stated that from January 2007 to June 2008, Mebiame also made cash payments to, and paid for travel and reimbursed shopping expenses for, a foreign government official and his spouse in Chad to obtain uranium concessions. Further, from June 2010 to June 2012, Mebiame negotiated for mineral rights in Guinea, obtaining access to opportunities by providing benefits to foreign government officials, including cash payments, the use of a Mercedes Benz sedan, and the rental of a private jet.

The U.S. government pointed to a number of steps Mebiame took in furtherance of the conspiracy while in the United States. These included sending and receiving e-mails and receiving wire transfers into U.S. bank accounts he established. One of the e-mails Mebiame received while in the United States included an earlier e-mail between co-conspirators who were betting on "whether the United States could assert jurisdiction over their activities under the FCPA solely based on the use of correspondent banks in the United States to clear transactions dominated in U.S. Dollars."

As reported in our Autumn 2016 FCPA Review, the SEC and DOJ settled with Och-Ziff in September 2016 in a joint resolution amounting to more than $400 million.

Ongoing Developments and Related Litigation

Argentine Sports Marketing Company Enters into DPA Related to DOJ's Ongoing FIFA Investigation

On December 13, 2016, the U.S. Attorney's Office for the Eastern District of New York (the U.S. Attorney's Office) filed a criminal information against Torneos y Competencias S.A. (Torneos or the Company), an Argentine sports media and marketing business, charging the company with wire fraud conspiracy for its role in a scheme to pay bribes and kickbacks to high-ranking soccer executives. The same day, the Company entered into a four-year DPA with the government, agreeing to forfeit $89,062,616, which reflects the Company's profits from corrupt contracts, and to pay a criminal penalty of $23,760,000. This resolution marks the latest development in the DOJ's ongoing corruption investigation of Fédération Internationale de Football Association (FIFA), the international governing body for soccer. Earlier developments in the DOJ's FIFA investigation were discussed in our FCPA Summer Review 2015.

According to the Criminal Information, for approximately 15 years, Torneos, at the direction of several of its executives, paid tens of millions of dollars in bribes and kickbacks to officials of FIFA and various regional and national soccer governing bodies that operate under FIFA. In exchange, Torneos obtained media and marketing rights to soccer tournaments and matches including the FIFA World Cup, CONMEBOL Copa América, CONMEBOL/ CONCACAF Copa América Centenario, CONMEBOL Copa

Libertadores, CONMEBOL Copa Sudamericana, CONMEBOL Recopa Sudamericana, and international friendly matches featuring Argentina's men's national soccer team.

The U.S. Attorney's Office asserted that the Company and its co-conspirators, including high-ranking soccer officials, "used the wire facilities of the United States to facilitate and effect certain payments" in furtherance of its criminal scheme. This activity included the use of U.S. bank accounts of Torneos' subsidiaries and affiliates to transfer payments related to contracts obtained through bribes and the use of U.S. bank accounts of co-conspirators to transfer the illicit payments. The Company and its co-conspirators also "relied, in part, on the growing market for soccer in the United States to generate profits from the scheme, and conducted meetings in furtherance of the scheme in the United States."

Furthermore, Torneos and its co-conspirators "engaged in conduct designed to prevent the detection of their illegal activities, to conceal the location and ownership of proceeds of those activities, and to promote the carrying on of those activities." For example, the parties employed various instruments to create the appearance of legitimate payments, including the use of "consulting services" agreements and "sham" invoices; relied on intermediaries and shell companies to effectuate the illicit payments; and dealt in cash.

Notably, the U.S. Attorney's Office did not charge Torneos under the FCPA. Although the FCPA was amended in 1998 to expand the definition of "foreign official" to include employees and representatives of "public international organizations," neither FIFA nor the various soccer governing bodies that operate under its umbrella have been designated as such. Furthermore, according to the facts provided in the criminal information, no other foreign officials are alleged to have been involved in the bribe scheme. The FCPA's accounting provisions also appear to be inapplicable because Torneos itself is not an "issuer."

Under the four-year DPA, Torneos must accept responsibility for its conduct and that of its employees, continue to cooperate with the government's ongoing investigation, forfeit ill-gotten profits, and pay a criminal penalty. In addition, the Company must continue to engage in remediation efforts such as "implement[ing] enhanced internal controls and a rigorous corporate compliance program that includes policies and procedures designed to detect and deter violations of all applicable federal, state, and foreign anti-corruption laws." According to the DOJ's press release, prosecutors considered Torneos's past remediation efforts, including "the termination of its entire senior management and the hiring of a new General Manager, Chief Financial Officer, Legal Director and Chief Compliance Officer, and Compliance Manager," in their decision to enter the DPA.

U.S. Agency Developments

10th Circuit Holds SEC's Use of ALJ's Unconstitutional, Creating Circuit Split

On December 27, 2016, the U.S. Court of Appeals for the 10th Circuit issued an opinion in *Bandimere v. SEC*, holding that the SEC's use of ALJs -- who preside over administrative enforcement actions, including FCPA actions -- is unconstitutional because they are "inferior Officers" not appointed in conformity with the Appointments Clause in Article II of the U.S. Constitution. The court's ruling is at odds with the DC Circuit's August 9, 2016 decision in *Lucia v. SEC* (discussed in our FCPA Autumn Review 2016), which held that an SEC ALJ was an "employee," and thus did not require an appointment under the Appointments Clause. The *Bandimere* decision thus creates a circuit split regarding the constitutionality of the SEC's in-house adjudications.

The Appointments Clause requires that the President nominate and appoint officers of the United States, subject to the advice and consent of the Senate. However, the Appointments Clause provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Unlike employees, "inferior Officers" require appointment through the procedure set forth in the Appointments Clause.

The five ALJs currently employed by the SEC have not been appointed by the President, a court of law, or the head of a U.S. Department. Instead, they occupy positions established under the Administrative Procedure Act and were hired through a process

administered by the Office of Personnel Management. They conduct hearings during which they may administer oaths, examine witnesses, enter default judgments, rule on motions and evidentiary issues, and prepare initial decisions regarding liability and sanctions, among other duties.

Bandimere relies on the Supreme Court's 1991 ruling in *Freytag v. Commissioner of Internal Revenue*, reasoning that *Freytag* relied on three characteristics to hold that the special trial judges (STJs) used by the Tax Court were "inferior Officers," and that those three characteristics equally apply to SEC ALJs: (1) their positions are "established by Law, " (2) their "duties, salary, and means of appointment . . . are specified by statute, " and (3) they exercise "significant discretion" in "carrying out . . . important functions. " With respect to the third factor, *Bandimere* emphasizes the "important" and "more than ministerial" functions and tasks carried out by SEC ALJs. Based on these three characteristics, *Bandimere* holds that SEC ALJs are "inferior Officers."

Bandimere explicitly rejects the SEC's argument that lack of final decision-making authority distinguished SEC ALJs from the STJs in *Freytag*. This conclusion amounts to the key distinction between the 10th Circuit and the DC Circuit holdings. In her concurrence, Judge Briscoe highlights this split, noting "[t]he critical difference between the majority and ... *Lucia* is that the majority recognizes that *Freytag* does *not* make final decision-making authority the *sine qua non* of inferior Officer status. " In his dissent, Judge McKay not only disagrees with the majority's application of *Freytag* but further worries that the majority's holding " has effectively rendered invalid thousands of administrative actions. " He argues that "the probable consequences" of the decision "are too troublesome to risk without a clear mandate from the Supreme Court."

The circuit split increases the likelihood that the Supreme Court may ultimately have to resolve this issue, though that may not occur until there are further federal appellate decisions on the issue.

International Developments

ISO 37001 Provides Additional Anti-bribery Compliance Guidance for Companies

On October 14, 2016, the International Organization for Standardization (ISO) published a new standard on Anti-bribery Management Systems, ISO 37001, which covers both public and commercial bribery. According to the ISO press release, the ISO 37001 standard is meant to provide "transparency and clarity on the measures and controls that organizations should be putting in place" in order to prevent bribery. The standard is meant to apply to "organizations of all sizes, wherever they may do business." Organizations may retain third parties to perform audits and certify that their anti-bribery compliance programs are consistent with the ISO 37001 standard.

In large part, the ISO 37001 standard aligns with existing official guidance, including the DOJ's and SEC's 2012 FCPA Resource Guide, the OECD Working Group on Bribery's Good Practice Guide, and U.K. Ministry of Justice Guidance regarding the U.K. Bribery Act 2010. Similar to those standards, the ISO 37001 directs companies to adopt anti-bribery compliance management systems, written policies and procedures, due diligence of third parties, tailored training programs, and risk assessments.

However, the ISO 37001 standard diverges from existing guidance in some areas, and imposes some notable additional requirements, including:

- That companies perform due diligence on all persons before they are employed and perform due diligence on all personnel before they are transferred or promoted;
- That companies provide anti-bribery training and training on corporate policies to all business associates acting on the companies' behalf that pose "more than a low risk"; and
- That companies prohibit facilitation payments.

At the same time, the ISO 37001 standard does not address corruption risks posed by mergers and acquisitions, and only applies internal-controls obligations to affiliates that pose "higher than a low risk of bribery."

Despite the new standard's focus on certification by independent third parties, some enforcement officials have warned that companies should not view ISO certification as a guarantee against prosecution. In addressing the 2016 ACI Annual FCPA conference, DOJ Criminal Division's Fraud Section Chief, Andrew Weissmann, said that while "certification is a factor, the DOJ would have a lot of questions about what was done" and would evaluate "how the program was adopted at the time."

Miller & Chevalier Upcoming Speaking Engagements and Recent Articles

Upcoming Speaking Engagements

02.16.17	2nd Annual GIR Live DC (Kathryn Cameron Atkinson)
03.17.17	AAEI Customs Education & Solutions Seminar (Richard A. Mojica)
04.01.17	GWWIB Eighth Annual Spring Conference (Abigail E. Cotterill)

Recent Articles

02.03.17	Trade Compliance Flash: Trump Administration Sanctions Iranian Procurement Networks (Barbara D. Linney and Patrick Stewart)
01.31.17	Prosecution of Corporate Execs: The Latest Developments (Dawn E. Murphy-Johnson, Lauren E. Briggerman, Kirby D. Behre)
01.31.17	FBI International Corruption Squads: What Are They, and What Do They Do? (Ann Sultan)
01.30.17	The Language of Bribery in Latin America (Matteson Ellis and Leah Moushey)
01.23.17	Executives at Risk: Navigating Individual Exposure in Government Investigations - Winter 2016/2017 (Dawn E. Murphy Johnson, Lauren E. Briggerman, Kirby D. Behre, Jonathan D. Kossak, Andrew C. Strelka, Aiysha S. Hussain, Adam Braskich, Sarah A. Dowd, Dwight B. N. Pope, Theresa A. Androff)
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01.13.17	Trade Compliance Flash: Canadian Bank Faces Penalties for OFAC Violations and Lack of OFAC Compliance Program (Alejandra Montenegro Almonte, Abigail E. Cotterill, Timothy P. O'Toole)
01.09.17	Executives Investigated Under FCPA Can Fear Less (Daniel Patrick Wendt and Alice C. Hsieh)
12.31.16	Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges (Maryna Kavaleuskaya)

Editors: John E. Davis, James G. Tillen, Marc Alain Bohn,* Alice C. Hsieh, and Michael Skopets*

Contributors: Sarah Dowd,* Ben Gao,* Ian Herbert, Quinnie Lin,** Leah Moushey, Katherine E. Pappas, and Ann Sultan

**Former Miller & Chevalier attorney*
***Former Miller & Chevalier law clerk*
