How to Improve Efficiency and Control Costs in Internal Investigations

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Best Practices For Corporate Internal Investigations

Law360, New York (March 11, 2014, 6:36 PM ET) -- A CEO receives an anonymous call claiming that someone is stealing company trade secrets or that an employee is taking kickbacks from a vendor. A general counsel gets a call from the human resources director who has an employee accusing the company of submitting false bills to a government agency. You are served by a government agency with a subpoena seeking records indicating a criminal investigation is underway for violations of environmental laws, insider trading, tax laws or fraud. Your company receives a credible threat of litigation.

These are all real scenarios that occur daily in companies of all sizes all over the world. They trigger critical internal investigations that require substantial time and resources. Regardless of the nature of the investigation, it is vital that it be conducted efficiently, with clear direction and attention to preservation of the attorney-client privilege. This article sets out best practices for doing so.

Internal investigations are very complex, and organization and planning is crucial. Preserving privilege is critical and employee interviews must be handled with care. Companies often grapple with whether to conduct the investigation internally or retain outside counsel, recognizing that disclosure decisions are complex. The possibility of future criminal or civil litigation must be continually assessed.

When initiating the investigation, companies should consider the advisability of conducting the investigation in-house, or whether it would be more beneficial to conduct the investigation through outside counsel. Experience dictates that there is a much greater likelihood of maintaining the confidentiality of the investigation if conducted through outside counsel.

It is critical to develop a plan defining both the scope and objectives. In most cases, outside counsel should take the lead to preserve the attorney-client and work product privileges. Nonattorneys (management, human resources, internal audit, security, internal/external experts) also play a role. Separate representation issues should be addressed and a protocol and lines of reporting and supervision established. Key is anticipating possible problems.
Preservation of the attorney-client privilege and work product doctrine are key considerations. Only attorney-client communications are protected, not the underlying facts themselves. A common mistake made by many employees is that they believe that copying an attorney on an email or memo transforms it into a privileged communication. This is not the case.

The communication itself must be confidential and for the purpose of obtaining the attorney’s legal advice. Alternatively, if a communication contains an attorney’s mental thoughts, impressions or opinion, then it is protected attorney work product.

Care must be given to distinguish between opinion as opposed to factual work product. Additionally, documents prepared in anticipation of litigation may be protected. Materials prepared by corporate employees for an attorney may enjoy a qualified immunity, but again, there are pitfalls that must be considered and avoided.

For example, care must be taken to avoid an inadvertent disclosure/waiver of the privilege. Where a company relies on advice of counsel as a defense, then the communication is placed at issue and is discoverable. Voluntary disclosure and disclosure to government authorities also operates as a waiver.

The process of gathering and organizing documents is another key consideration. First, the company should be able to show that documents have been preserved, collected and controlled. Critical is the issuance and timing of a “Do Not Destroy” notice. Document retention policies and destruction timing will be at issue. Companies often find themselves receiving the ire of investigating authorities and courts for failure to preserve potential evidence.

Next, the sources of the documents must be identified and procedures established for identifying and tracking documents. It is not uncommon for an outside vendor to be retained to process and manage documents. Consideration should be given to whether relevant documents may be in the hands of third parties. Documents must be reviewed and analyzed in a coherent, methodological manner and indexed and coded for easy retrieval/incorporation into issue outlines. Categories such as chronologies are usually critical, as are key documents.

Witness interviews can be particularly tricky. First, in the preliminary statement to the witness, the investigator must make it clear that he represents the company and not the employee. The purpose of the investigation should be described (i.e., to obtain factual information in order to provide the company with legal advice).

The attorney-client privilege and work product doctrines should be explained in layman’s terms and the employee informed that under certain circumstances, federal rules impose an obligation on the company to inform the government if the company has discovered credible evidence of intentional or reckless conduct.

The employee should also be informed that the company may choose to disclose to anyone any information obtained from the investigation. Employees must be given an opportunity to ask questions about the process. The admonition given to the employee should be clearly memorialized in the interview memorandum.
Thought should be given to preparation and organization of the interviews, including who should be interviewed, in what sequence, and the location. Questions should be set forth in an outline to determine: the date, location and time of each incident; exactly who was present, what was said or done; subsequent actions; and documentation in the witness’ possession or in possession of others.

Generally, it is best to move from general to specific lines of questions. The interview should be conducted using open-ended questions. This permits the interviewer to evaluate credibility and not influence the employees’ answers. Sometimes it is appropriate to record an interview or obtain a signed witness statement. There should always be two people present for the company during the interview.

Interview notes and summaries of the interview should be prepared and maintained. The employee should be informed about the potential for contact by government investigators.

Planning for potential issues and pitfalls that sometimes arise during the interview process should be given thorough consideration, including, for example:

- the employee who asks for legal advice
- the reluctant employee
- the employee who places conditions on the interview and/or seeks to leverage his or her cooperation for some employment advantage
- the employee who purports to “blow the whistle” on others
- the employee who is untruthful or evasive
- the employee who admits wrongdoing, perhaps as to matters unrelated to the investigation
- former employees
- avoiding witness tampering or obstruction by interviewer

The company’s and employees’ rights and duties also require detailed consideration. The employee may be entitled to certain contractual rights, as well as legal rights, such as the right to privacy, privilege against self-incrimination and certain “whistleblower” and Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., protections. In given situations, an employee also may have the right to counsel.

The company, on the other hand, will need to be apprised of its options and any limitations against seeking to terminate employees for being a whistleblower, for failure to cooperate with the investigation, or while asserting rights against self-incrimination. Each situation brings unique circumstances that require careful analysis in conjunction with applicable laws. The company also may have a duty to pay the fees of certain employee’s counsel. Joint defense or common interest privileges also may apply.
The report of the internal investigation is critically important, and its discoverability should be thoughtfully assessed. Not only does the decision about whether to prepare a written report as opposed to providing an oral report require careful consideration, but in the event a written report is drafted, one must determine whether to produce an interim draft prior to a final report.

A written report should contain a privilege legend, an executive summary, an explanation of the origin of the investigation, a summary of relevant facts and any relevant, unknown factual issues, application of the law to the facts, an analysis of the company’s and the subject employee’s potential liability and/or disclosure obligations, and should identify any corrective action or preventive measures that have been taken, or that management should consider taking.

In dealing with the government, there are a number of factors to consider. If the government investigation already has begun, it is important that the company’s investigation stay a step or two ahead. Define the scope of cooperation with the government and develop a strategy for dealing with the government. Consider the need for retaining separate counsel for certain employees. Determine how to deal with third parties and former employees. This is all part of the careful planning that should take place at the outset.

At some point, the company must decide whether disclosure of investigation results to third parties is required. There are legal mandatory disclosure requirements such as the Federal Acquisition Regulation Mandatory Disclosure Rule, 73 Fed. Reg. 67064. Under the FAR, the company must “timely” disclose, in writing, “credible evidence” of (1) any violation of the civil False Claims Act, 31 U.S.C. §§ 3729–3733, and (2) any violation of Title 18 of the United States Code involving fraud, conflict of interest, bribery or the gratuity laws, in connection with the award, performance or closeout of a government contract.

The company risks suspension and debarment for a “knowing failure” by a “principal” of a government contractor to timely disclose credible evidence of a covered violation or a “significant overpayment.” In addition, other legal bases, such as the Sarbanes-Oxley Act, 15 U.S.C. § 7201, et seq., or the Anti-Kickback Act, 18 U.S.C. § 874, as well as administrative agreements also may require mandatory disclosure.

In addition, there are times when a voluntary disclosure is appropriate. The company should be sure to coordinate disclosure with all relevant players, such as the U.S. Department of Justice, U.S. Department of Defense, contracting officers and other customer representatives. The company must consider the effects of disclosure on attorney-client and work product protections.

All of these issues highlight the complex nature of internal investigations and demonstrate how crucial organization and careful planning are throughout. Detailed efforts must be made to preserve privileges, and employee interviews must be handled with care and precision. Disclosure decisions are complex and the possibility of future criminal or civil litigation must continually be assessed.

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Recent years have seen an increase in the number of internal investigations into possible export control violations and voluntary self disclosures. Key to the success of an investigation is a clear focus and understanding of procedure. Daniel Pickard provides his five-point checklist to a successful internal investigation process.

I. Clearly defined scope

Perhaps least understood and practised is the need for a clearly defined, mutually agreed upon scope of an internal investigation at the outset. It is well known that certain high-profile internal investigations have become exceedingly expensive and time-consuming because of the high stakes involved. However, this certainly does not always need to be the case. A clearly defined scope – substantively, geographically, and temporally – will increase the efficiency and accuracy of the investigation.

In terms of substance, the investigation should clearly define the nature of the potential violations investigated. For example, the scope can be limited to one particular realm of export controls (e.g., International Traffic in Arms Regulations (‘ITAR’)), or can be broader to include, for example, export controls, anti-corruption, and economic sanction concerns. By keeping the focus of the investigation appropriately defined, this will alleviate concerns regarding ‘mission creep’ and as new areas of concern may be discovered, then either the scope can be re-defined or the new concern can be dealt with as a separate matter.

Temporally, the scope should define the period of time that the investigation will examine. The typical period in an investigation under U.S. law is a five-year ‘look back’ due to the statute of limitations for most non-capital offences. However, there may be grounds for either expanding or shortening the period of time covered.

Geographic considerations are also key to a clearly defined scope. Specifically, determine whether the investigation will cover only one country, an entire region, or an examination of global operations.

A clearly defined scope of an investigation protects not only the client, but counsel as well. The benefits to a client are more immediately apparent, i.e., the company is protected from potential over-reach in an investigation. However, a clearly defined scope also protects counsel from potential claims of malpractice. As just one example, a clearly defined scope that indicates (for example) that a review only relates to a company’s ITAR compliance in its Latin American operations will prevent against any claim that the counsel should have detected an FCPA violation that occurred in a Russian subsidiary.
While an initial scope definition may be the least commonly practiced key component discussed in this article, its importance should not be minimized.

II. Effective maintenance of privilege
If the importance of a clearly defined scope may be the least well understood component of an internal investigation, the importance of maintaining the attorney-client privilege may be the best appreciated. Obviously, the maintenance of privilege is a critical element to a successful investigation.

There is also a growing understanding of the applicability (or lack thereof) of privilege in regard to in-house versus outside counsel, both under U.S. law and other jurisdictions. While this topic alone could be the source of an entire article, there is a growing appreciation that in regard to the attorney-client privilege and attorney work product doctrine, courts have applied stricter standards to in-house counsel when determining whether material is protected. Similarly, a number of foreign countries have held that in-house counsel do not have the same privilege and work-product protections as they do in the United States. Indeed, the European Court of Justice has held that certain communications between in-house counsel and the company may not be privileged because in-house counsel are unable to exercise professional independence from the companies that employ them.

Thus, while it is understandable that companies may wish to avoid expense by conducting their investigations with their own employees, it bears emphasising that this may come with the cost of forfeiting attorney-client privilege. In the age of whistle-blower claims, the avoided expense of obtaining outside counsel, may pale in comparison to the increase in liability exposure.

III. Issuance of a document hold memo/document review
It is standard practice in internal investigations, as it is in similar litigation matters, that as soon as possible, a document hold memo should be issued to ensure that all potentially relevant documents are preserved. The memo should make clear to all relevant parties that they must preserve documents and communications related to the investigation. The memo typically indicates the applicable time period, the type of documents covered, and clarifies that ‘documents’ and ‘communications’ should be interpreted broadly to include information stored in any medium. The memo will confirm that the company’s normal document retention schedule and disposition policies for the materials are suspended and provide a contact person for any questions. Lastly, document hold memos generally clarify that that the company must preserve its attorney-client privilege and will advise, among other things, that the memo (a privileged communication) is not to be forwarded to others.

There are two phases to a document review: ‘hard’ and ‘soft’ document reviews. During a hard document review, counsel reviews the tangible paper documents that are relevant to the transactions at issue. The collection and review of said documents are particularly straight-forward.

The second phase of document review involves retrieval and analysis of email communications and other electronically stored information. These documents will generally be retrieved with the help of the company’s IT professionals and may involve use of outside vendors for hosting and search capabilities of the retrieved documents. For multinational investigations, special attention must be paid to domestic privacy laws.

IV. Conducting interviews
Witness interviews are another key part of the internal investigation process and are generally done only after all relevant documents have been reviewed. Again, the importance of maintaining attorney-client privilege is difficult to overstate.

While styles of interviews vary, frequently depending on the skill and experience of the investigator, the importance of the Upjohn warning is widely acknowledged. In Upjohn v. United States, 449 U.S. 383 (1981), the Supreme Court held that communications between company counsel and company employees are privileged, but the privilege belongs to the company, not the employee. This warning makes it clear that counsel only represents the company and that anything the employee states in the interview is privileged only between counsel and the company and the company may choose to waive the privilege in the future, potentially disclosing the employee’s statements to the government.

V. Report/summary
At the conclusion of an investigation, the company may determine that a written report summarising the investigation’s findings is necessary and/or appropriate. Such a report may also provide recommendations as to potential voluntary self-disclosures (‘VSDs’) and any appropriate remedial measures, including termination decisions, necessary to prevent future issues. Standard compliance improvements are connected with the corporate policy statement and/or the company’s written code of conduct, the extent of centralised compliance oversight, incorporation of compliance-related obligations in contracts and other business agreements, periodic training requirements, record-keeping, and reporting procedures and disciplinary mechanisms.

While there is no standard or checklist for internal investigations, these five key components are important to ensuring a successful outcome. Without them, investigations can be excessively expensive, unfocused, and ineffective.

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DOJ Provides “Best Practices” for Corporate Internal Investigations

Posted by Eugene Illovsky, Morrison & Foerster LLP, on Sunday, June 28, 2015

Tags: Compliance & ethics, Corporate crime, DOJ, Misconduct
More from: Eugene Illovsky, Morrison & Foerster

Editor's Note: Eugene Illovsky is a partner at Morrison & Foerster LLP. This post is based on a Morrison & Foerster publication by Mr. Illovsky.

What does the Department of Justice think is a high-quality internal investigation? How does DOJ decide whether an investigation was good enough to help a company avoid, or at least mitigate, criminal charges? In recent speeches, DOJ has provided important guidance on its view of best practices, and some useful common-sense reminders, for our clients’ counsel and their investigating board committees. Much of that guidance came in May 19, 2015 remarks by Criminal Division head Assistant Attorney General Leslie Caldwell, as well as in other recent speeches.

AAG Caldwell made clear that DOJ does indeed take the time to scrutinize and “evaluate the quality of a company’s internal investigation.” She explained that the Department does this evaluation “through our own investigation” as well as “in considering what charges to bring against a company.”

DOJ decides whether to charge a company using the Principles of Federal Prosecution of Business Organizations, also known as the nine Filip factors. The charging decision, under Filip factor 5, is based partly on “the existence and effectiveness of the corporation’s pre-existing compliance program.” U.S. Attorneys Manual 9-28.300. DOJ asks whether the company “has established corporate governance mechanisms that can effectively detect and prevent misconduct.” USAM 9-28.800.

This DOJ guidance reinforces the point that an internal investigation should be understood as part of a company’s compliance program. Here’s why. A company will get credit from DOJ only if its compliance program is “effective.” And DOJ says effective compliance programs must have procedures designed to (1) “uncover wrongdoing” in the company and (2) “expose individuals responsible for criminal behavior.” Those “procedures” are the tools the company uses in its investigation.

DOJ on Best Practices

DOJ “will not tell a company how it should conduct an investigation.” In connection with evaluating a company’s efforts, however, the AAG says that the Department “ha[s] seen some ‘best practices’ with regard to internal investigations.” On that front, the AAG has repeatedly delivered two messages: (1) companies that over-investigate do so at their own cost and peril; and (2) companies’ internal investigations must identify and deliver evidence against individual wrongdoers. The quality of the company’s investigation, then, will also determine how effectively the company is deemed to have cooperated with the government in delivering that evidence. See USAM 9-28.300 (Filip factor 5: “company’s willingness to cooperate in the investigation of its agents”).

Tailor and Target. DOJ is placing a premium on targeted investigations. A company should set out to “root[] out relevant facts, identify[] and interview[] the knowledgeable actors and captur[e] and preserv[e] relevant documents and other evidence.” If an investigation “uneart[hs] criminal conduct,” then the continued “inquiry should be thorough enough to
identify the relevant facts, players, documents and other evidence, and to get a sense of the pervasiveness of the misconduct.

**Money and Time.** The AAG insists it is “reasonable to take resources—time and money—into account” in tailoring the investigation. She warns that the Department has seen “needlessly costly and overbroad investigations.” It is not “necessary or productive for a company to employ its internal investigators to look under every rock and pebble.” Or, as the AAG has previously phrased it, a company will not earn extra credit with DOJ if it “aimlessly boil the ocean.” To the contrary, she stresses “doing so will cost companies much more in the end” not only in fees but “because it ultimately will delay [the government’s] investigation and delay resolution and closure for the company.” The devil, of course, resides in the details and in the judgments about scope to be made by experienced investigators.

**Communicate and Cooperate.** Companies choosing to cooperate with the government will reap the benefit of additional help in “appropriately targeting their investigations.” To the “extent possible, [DOJ] will make clear to those companies [its] areas of interest.” The AAG said, “I tell my prosecutors that where possible, if it would not compromise our own investigation, we should share information with a cooperating company to help focus the company’s internal inquiry.” Finally, the AAG “encourage[s] an open dialogue between company counsel and our prosecutors about the progress of the internal investigation.” This dialogue “comes easily” to companies truly committed to demonstrating cooperation.

**Recommendations**

Here are some suggestions for specific steps to consider in light of the guidance in the AAG’s speeches:

**Develop Your Investigative Procedures Now.** We know that a company’s “pre-existing compliance program” must have procedures designed to “uncover wrongdoing.” Of course, the precise investigative “procedures” will vary with future circumstances. But don’t wait for a crisis. General investigative procedures can be developed now and incorporated into the compliance program. If the need for an investigation arises, the company will be able to move more swiftly and smoothly.

**The Compliance Program’s Investigations Playbook.** Think of those general procedures, tailored to the organization, as comprising an investigations “Playbook” for the in-house lawyer’s or director’s bookshelf. Develop them after discussions with pertinent corporate constituencies and with outside counsel or advisors about what would happen in a hypothetical investigation: How would it be staffed? Who would be the points of contact and authority? What evidence collection issues might arise unique to how the company operates? The Playbook might also include information for critical IT personnel and vendors, the latest data map (an inventory of the company’s electronic and other data sources), HR policies and employment/collective bargaining agreements, templates, company policies regarding whistleblower complaints, and any other information key personnel may need for an investigation.

**Prepare to Manage the Project!** The AAG’s exhortation that it is “reasonable” to take “time and money” into account to avoid investigations that cause undue delay highlights the importance of actively managing the internal investigation. The company’s point of contact—the investigating board committee or in-house lawyer—should use project management techniques with the investigators: scope the project (reassess as needed); map out team responsibilities; use timelines and budgets; and schedule regular dialogue with DOJ to keep the investigation tailored and avoid the risks of under- or over-investigation.

**Conclusion**

Companies should treat an internal investigation as part of their compliance program, rather than something they must undertake as a result of having a compliance program. An ineffective investigation could prevent the company from getting full credit from DOJ for its costly and otherwise state-of-the-art compliance efforts as well as for its cooperation.

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Introduction

Corporations regularly face a myriad of situations that require investigation and fact-finding. An anonymous caller, for example, calls the company fraud-line alleging that an employee may be receiving bribes from a vendor. A government agency serves a subpoena seeking business and sales records. The company receives a credible threat of litigation. Whatever triggers an investigation, it is important that the investigation be conducted competently and efficiently.

A thoughtful and carefully structured approach to investigations is essential. Severe consequences beyond “losing the case” may result if the matter is not handled appropriately, including unintentional waiver of the attorney client privilege, spoliation sanctions, adverse jury instructions, obstruction of justice convictions, and damage to corporate reputation.

This article outlines several fundamental steps that should be considered in a typical corporate internal investigation. This article is intended to serve as a general checklist. It does not thoroughly discuss all issues related to corporate internal investigations, and is not intended to be legal advice for any specific situation. The views expressed here are solely the views of the authors and not of their firms.

Geographical Considerations. In the current global marketplace one of the first considerations is the geographic scope of the investigation. Some of the key issues when foreign operations are involved include: a) in which countries are the people, documents and data located; 2) the U.S. parent company’s degree of control over those operations; 3) foreign laws and regulations that impact aspects of investigations, such as conducting interviews or accessing and analyzing business or personal information maintained in other countries; and 4) U.S. laws that apply in foreign jurisdictions.

Outside the United States, more than a dozen countries have enacted data protection laws and regulations that can significantly impact international investigations. For example, the European Union Data Protection Directive established certain standards and protections, such as requirements to give employees notice and in some cases receive their consent as a condition of reviewing their private information. Some EU countries, like France, Switzerland and Greece have also enacted their own country-specific regulations that are even more restrictive.

The potential challenges associated with conducting investigations on a global basis can add time, complexity, cost and frustration to investigations. These challenges may include:

- legal and regulatory issues, as mentioned above.
- geographic considerations, including language, culture, lack of skills, and physical infrastructure.
- technological considerations, including information management, foreign language processing and searching, technical infrastructure, and redaction capabilities.

Organizations can often deal with these challenges and complexities by having multiple legal perspectives on the investigative team. In many cases this is facilitated through the use of not only in-house counsel, but also investigative counsel and even data privacy counsel.

Regardless of the geographical considerations, the following basic elements should be considered for most
investigations.

**Initial Steps**

**A. Reporting the Allegations and Issues to the Appropriate Party.** If the issues or allegations have the potential to be material to the entity, a business leader or attorney who learns of the issue should consider whether to immediately notify the Audit Committee of the Board of Directors or the highest governing body of the organization. The Audit Committee’s independence from company management can help ensure that the investigation will not be unduly influenced by management who could have been involved in the matter being investigated. Less serious allegations may be reported through normal reporting channels, to the legal department, or through the Company’s fraud or ethics hotline.

**B. Identifying the Investigation Leader.** When it is determined that an investigation should be conducted, a qualified individual should be designated to lead and to be responsible for the investigation. The choice may depend on the seriousness of the allegation. Generally, the more serious the allegation, the more formal and independent the investigation may need to be. For minor routine matters, it may be appropriate for the investigation to be conducted by a leader within the business unit involved. For more significant issues, it may not be appropriate for the business unit to investigate itself due to apparent conflicts of interest. In such situations, the investigation may be assigned to a leader in another department such as Human Resources, Legal, Compliance, Internal Audit, or Corporate Security. For serious issues, such as misconduct by a senior executive, or a matter involving potential criminal liability, the investigation may be guided by the General Counsel, a member of by the Board of Directors, the Audit Committee, or a Special Committee of the Board, who will direct outside legal counsel conducting the investigation. This is particularly important in the absence of internal resources that are very experienced at a) conducting workplace investigations; b) understanding how to obtain and protect evidence in support of potential regulatory action, criminal or civil litigation, or c) conducting sensitive interviews with all level of personnel, including senior management.

Internal investigations can at times be resolved more efficiently and with lower risks of litigation for improperly conducting the investigation when overseen by independent outside counsel with investigation experience, in tandem with outside experts, such as auditors, investigators and forensic computer specialists. This is almost always the case if potential wrongdoing by high-level officers is being investigated. Some regulators have made it clear that they give more credence to investigations conducted by outside attorneys.

When the allegation raises potential legal issues, the investigation should be under the direction of an attorney. The use of an attorney to provide legal advice in anticipation of litigation generally allows the investigation to be protected from disclosure under the attorney-client privilege and the attorney work product rule.[2] Nevertheless, if outside legal counsel is to lead the investigation, a corporate leader with significant authority in the company still should be appointed to assist outside counsel throughout the investigation. This corporate leader may be the head of Internal Audit, Human Resources, Compliance or Corporate Security, or the General Counsel or a deputy. Designating a corporate leader with sufficient stature and appreciation of the investigative process can be critical. The corporate leader should communicate the importance of the investigation and the necessity of complete cooperation to the employees who may be interviewed, or from whom records or information may be sought. This will help the attorney and investigators working at the attorney’s direction achieve the best results. The corporate leader can also emphasize that there will be no retaliation or reprisals for cooperating with the investigation. The corporate leader also can help free up employees’ time to gather records and participate in interviews.

**C. Determining the scope of the investigation.** The investigation leader’s initial task will likely be to determine the investigation’s initial scope. This generally includes identifying the relevant time frame, the key individuals involved, and locations or sources of potential evidence. Generally, the investigation should be limited to the particular allegation that has been made. However, the investigative scope may need to cover other tangential
facts that should be assessed to mitigate further risk to the company. The scope should be sufficiently broad to accurately obtain all the facts to: a) confirm or refute the allegation, and b) provide a foundation for remedial measures, if appropriate. If the company ultimately intends to seek credit for its diligent investigation efforts from the government, the scope should be broad enough to cover areas of interest to the government.

D. Records freeze order and data acquisition. If word of an investigation is prematurely leaked within the organization, valuable electronic and hard-copy documents may be removed, destroyed or altered. Determining what records may be useful and isolating them or discreetly obtaining copies can help protect the organization. If certain materials cannot be obtained without compromising the existence of the investigation prematurely, consideration should be given to alternate ways to protect them until they can be safely obtained. It is also important to create a list of potential witnesses or “parties of interest” (hereafter “Key Players”) and consider securing electronic images of their server files, email files, or individual laptop/desktop hard drives. Where the investigation can be disclosed internally, it may be critical to quickly secure certain highly important and relevant records, even if on a limited basis. Experienced attorneys know that it is easier to explain a “bad document” than to justify its untimely destruction. Many corporations have a document retention policy and destruction schedule. Potentially relevant records – electronic and paper – should be identified and removed from the normal record destruction schedule. Also, key current and former employees who may have knowledge or relevant records regarding the incident should be identified and given a copy of the freeze order.

Likewise, company employees responsible for electronic databases and business file records should be identified (hereafter “Information Custodians”). These are employees with technical ability to harvest e-mails and relevant records stored in systems such as Microsoft Outlook, and document management systems like SAP, the company Intranet, Instant Messaging, Shared Drives, etc. The freeze order should describe the potentially relevant records, or categories of records, that are subject to the freeze. It may be necessary to consult select Key Players and Information Custodians to prepare this description. [A sample records freeze order can be downloaded from Brian Neuffer’s webpage at www.agdglaw.com.]

The freeze order may also notify employees that they may be asked to participate in a witness interview as necessary to locate records. If the investigation is to be privileged, this notice should state that employee interviews are necessary to provide legal advice to the company in anticipation of litigation. The notice should clearly state that both the inside and outside attorneys represent the corporation and not individual employees. The notice also should state that employee cooperation is required, and that they must keep the interviews confidential.

E. Investigation plan and timeline. Consider establishing a plan and timeline that includes each step that will be taken and a target completion date for each. Consider how each phase of the investigation supports the next step. The investigation plan states how the investigation will be conducted, and generally varies in complexity depending on the circumstances. Elements present in a typical plan may include:

1. Overview of the allegation or event being investigated, including a summary of the laws or company policies that are alleged to have been violated. If appropriate, include potential legal defenses or mitigating circumstances that may be relevant.
2. Summary or chronology of the facts known thus far.
3. List of the opposing parties with contact information. (e.g., regulatory body or attorney that issued the subpoena).
4. Legal issues to be researched and a completion date.
5. Sources of information, including the records to be reviewed and their locations.
6. Plan and timetable for gathering and reviewing records.
7. Consideration of the practicality and benefits of using early case assessment (ECA) procedures and technology to locate relevant emails and other information. Effective ECA strategy can help identify potential interview targets that might otherwise be overlooked, and shape the scope and focus of the
interviews to be conducted.

8. Initial list of Key Players and Information Custodians should be developed. Co-workers who may have worked where the alleged misconduct occurred should be considered. The plan should include the order for interviews and a timetable to complete. As a general rule, consider interviewing first those who may help locate records and provide background information. During interviews, witnesses should be asked to identify any other people who may be able to provide relevant information. Individuals not interviewed may be asked to prepare and sign a written statement of any facts they can contribute. If possible, consider postponing key interviews until the documents have been reviewed.

9. A communication plan describing to whom and with what frequency the investigation leader or attorney will report the status of the investigation.


The plan might be modified as the investigation proceeds, and the factual chronology may be supplemented with new facts. New witnesses could be added to the interview list, while others dropped. If the investigation was triggered by a subpoena or discovery request, the scope of the request may be narrowed by agreement, eliminating the need to review and produce certain records. Legal research may reveal additional defenses or potential counterclaims that should be pursued.

Gathering Records

Identifying the kinds of records considered to be “in scope” in any investigation is important. Following is a list of the types of records and information that might be considered relevant. It is not intended to be all inclusive.

- Company rules, policies and procedures
- memoranda or notes regarding the incident
- time cards, logs or diaries
- expense reports and receipts
- communications to employees – including historical email files
- prior complaints
- personnel and security files
- managers’ notes and files
- samples of the employee’s and others’ work for comparison
- analyses prepared by the subject and maintained in shared servers, network files and personal hard drives

When in doubt, err on the side of obtaining/preserving more potentially “perishable” (subject to easy destruction or alteration by investigative targets) data or documents than fewer. In some instances, it might be better to have data and not need it than to need data and not be able to get it.

To improve odds that all requested records are located and gathered, consider meeting personally with employees who will search for records. At these meetings, discuss the records freeze order, and learn the individual employee’s record retention practices, including e-mail retention. Consider showing examples of responsive documents, and giving employees a plainly written list of records and categories to search for.

When records are ready to be gathered from employees, a records index or table is prepared. The index should list each employee or custodian, assign file numbers, indicate the location the records originated from and have space for inserting comments. All records to be turned over to an opponent are generally Bates numbered in some fashion. Once documents have been numbered, the index should then be updated with the identification numbers.

For larger investigations, consider retaining a vendor who specializes in early case assessment, electronic discovery and litigation support. There are many. These vendors provide data acquisition, processing, copy,
scanning and tiffing services, numbering, and are able to load electronic records onto web-accessible searchable databases and provide auditable “first level review” services. Because they specialize in this area, these vendors can often manage these functions more efficiently, cost effectively and with better project controls than law firms.

**Reviewing Records**

The primary objective of the record review is to identify critical documents as soon as possible. The record review can be as revealing and important as interviews. With large scale reviews, again consider retaining outside vendors or contract attorneys for the first level review to reduce expense.

For large scale matters, the review team should be fully briefed on the issues, the governing law, and potential claims and defenses. They should be given a “review protocol” in writing that instructs how the documents should be tagged. Some typical tags include: privileged document, responsive, non-responsive, hot document, needs further review. Also, tags naming each Key Player to be interviewed are often used. Witness files are later created containing documents related to each interviewee, and these files are reviewed and an interview outline is created for each interview.

As important documents are identified, these “hot documents” are typically loaded onto an electronic file or database and copies are put into a binder in chronological order. An index summarizing each “hot document” is included in the front of the binder. The hot documents binder becomes a useful tool during witness interviews, and when reporting the results of the investigation.

**Witness Interviews**

Careful preparation for interviews is very important. The Six Sigma concept of “first pass yield” is analogous here. First pass yield is the proportion of units that, on average, go through a process the first time without defects or re-work. With investigations, time and resources are conserved when witnesses are interviewed just once.

Multiple interviews of the same witness sometimes are unavoidable, as new facts or theories surface during the investigation. But careful preparation can greatly improve the first pass yield. Following are some practice tips to consider:

1. Review legal research related to the issues being investigated. Understanding the legal framework gives interviews focus. It allows one to place newly learned facts in proper legal context – either supporting or refuting a claim or defense – like hanging ornaments on a Christmas tree.
2. Thoughtfully prepare an interview outline. This can help ensure all important topics are covered and improve efficiency. Review documents related to the witness (witness file) before the interview, and use key documents to fill in the interview outline. The outline, however, should include appropriate key topics even though there may be no specific documents to show that interviewee. If standard questions are used for multiple witnesses, the answers can be compared and contrasted. Consider giving copies of documents to be used in the interview to the witness in advance. Then, the witness will not need to spend valuable interview time reading documents.
3. Attorneys, and investigators working at their direction, should give an *Upjohn* warning. *See Upjohn v. United States*, 449 U.S. 383 (1981). Employees should be told whom the attorney represents (e.g., the corporation, and not the employee individually), that the privilege belongs to the corporation, and that the corporation may waive the privilege and disclose the substance of the interview to third parties. A recent decision by the Ninth Circuit U.S. Court of Appeals highlights the importance of the *Upjohn* warnings.[3] A sample *Upjohn* warning may be downloaded from Brian Neuffer’s webpage at www.agdglaw.com.
4. After the *Upjohn* warning is given, questions typically focus first on the employee’s background and employment history with the company as well as any reporting responsibilities. These non-threatening questions can put the witness at ease.
5. Where appropriate and feasible, two individuals should conduct the interviews, one to lead the questioning,
and the other to take notes. The note taker may later act as the “prover” if the witness tries to recant the testimony.

6. The order of interviews can be important. First and foremost, under no circumstances should the subject of an investigation be interviewed prematurely. This is the most frequent and most significant mistake made during the early stages of a poorly conducted investigation, and can be devastating in terms of successfully concluding the investigation. Telling an investigative target even a few details of the allegations that might have been asserted against him or her and asking for an explanation, before necessary investigative procedures have been performed, can ruin an investigation. Interviewing a subject or witness after reviewing initial documentation allows the interviewer to gain a better feel for the interviewee’s knowledge and candor, and can help the interviewer to control the interview.

7. Secure a handwritten, signed statement from any witness or subject if appropriate and possible.

Final Report

The report of the investigation may be either written or oral depending on the circumstances and the desired outcome. A well-written report discussing facts and law that is provided to an investigating agency may be essential to dissuade government attorneys from prosecution. On the other hand, the same report may be turned against the client, and in the process, privileges may be waived and the report could become a weapon against the company in later litigation by third parties. Under certain circumstances, (often determined by industry or whether the company’s equities or debt are publicly traded) the company may be legally required to self report under agency regulations. A written report of investigation could be very helpful if the company was the victim of fraud and wished to disclose the crime to law enforcement for possible prosecution. Similarly, the company may decide to make an insurance claim which would likely entail a written disclosure. The company may also choose to self-report to obtain leniency under the Federal Sentencing Guidelines if there is potential for a criminal prosecution against the company. And where the outcome of an independent, competent investigation shows that the company acted properly, it may be prudent to have a thorough written report. On the other hand, if there is no legal obligation or strategic reason to disclose, the company may choose to keep the final report oral to help maintain confidentiality under the attorney client privilege while it implements remedial measures. Thus, whether the final report is to be oral or written deserves careful consideration. Some writers suggest that oral reports are far preferable to a written report.[4]

If the report is to be written, it should be drafted in a manner that reduces risks of inadvertent waiver of the attorney client privilege and work product protections. It should state clearly that it is attorney work-product and contains attorney-client privileged information, that its purpose is to provide legal advice to the corporation in anticipation of litigation, and the attorney’s legal analysis and thought process should be evident throughout. The report should state the objective of the investigation, should distill information learned from document reviews and interviews (avoiding verbatim statements) in a balanced and objective manner. It should state the attorney’s factual analysis and legal conclusions, and remedial recommendations. The report should be distributed to a very limited audience with instructions to keep it strictly confidential.

Conclusion

Each investigation is different, and should be tailored to the specific situation based on sound judgment and common sense. But for many investigations, the fundamental steps outlined above can help facilitate an effective investigation, and help avoid common pitfalls, including subsequent litigation resulting from mistakes during an initial investigation.

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[3] See United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009). The case involved an internal investigation related to backdating of stock option grants. Attorneys from the law firm of Irell & Manella represented both the Broadcom corporation and its CFO, William Ruehle, individually. Irell attorneys interviewed Ruehle during the internal investigation, but the trial court later found they failed to give adequate Upjohn warnings before the interview. Broadcom disclosed information from the interview to the government. The government subsequently sought testimony from the Irell attorneys regarding Ruehle’s interview, and Ruehle objected based on the attorney client privilege. The trial court agreed and blocked the testimony. The Ninth Circuit reversed, stating that Ruehle’s interview statements were not “made in confidence” because he understood, based on his role in the internal investigation, that “the fruits of [the attorneys] searching inquiries would be disclosed” to Broadcom’s outside auditors. Id. 583 at 609. Accordingly, the Ninth Circuit held that the trial court erred in barring the government from calling the Irell attorneys to testify at Ruehle’s criminal trial. The case underscores the importance of clearly warning the employee that the privilege belongs to the corporation, and is the corporation’s to waive. Interview notes should reflect that the Upjohn warning was given and that the witness indicated she understood the warning.


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Senior management, human resources teams, and compliance personnel of corporations of all sizes and in a wide variety of industries are confronted every day with evidence or allegations of potential wrongdoing at their companies. These scenarios may range from notification of a government investigation into allegations of violations of federal law by the corporation or senior management to a routine internal complaint of violations of the employee code of conduct or other company policy. In most instances, the company would be best served by conducting some type of internal investigation into the allegations. However, deciding whether and how to conduct an internal investigation requires consideration of a variety of factors. Such factors typically include the nature of the corporation, the specific conduct or subject matter at issue, the applicable law, and, where appropriate, the government’s enforcement priorities. And in the event an internal investigation is undertaken, there are a number of decisions that should be made at the outset, including who should conduct the investigation, the goals and parameters of the review, and whether a report—written or oral—will be issued. This article sets forth a framework of best practices for conducting internal investigations, as well as the most common pitfalls to avoid.

I. DECIDING WHETHER TO INITIATE AN INVESTIGATION

The threshold issue to be considered upon learning of potential wrongdoing is whether to initiate an internal investigation at all. Is it worth the costs and distraction? On balance, most cases demand an internal investigation, both for business purposes and potential litigation. Increasing regulatory and government scrutiny of corporations has become a fact of life. U.S. regulators increasingly expect that companies will monitor their own conduct and report potential wrongdoing to the appropriate enforcement agencies. Likewise, private plaintiffs are filing more and more cases with significant
allegations that attempt to call corporations’ conduct into question. Under the right circumstances, conducting an effective internal investigation protected by the attorney-client privilege can benefit the company in a number of ways:

• Developing a comprehensive understanding of the facts necessary to assess a company’s potential criminal and civil exposure;
• Remediying the conduct to prevent further violations;
• Memorializing the company’s good faith response to the facts as they become known;
• Insulating senior management and/or the company board against allegations of complicity; and
• Promoting a culture of transparency and compliance.

If it appears that the government has already initiated an investigation into the alleged conduct or that one is probable, then the case for initiating an internal investigation is even more compelling. It is almost always in the best interests of the company to gather information to allow it to respond effectively to the government. By controlling the facts, counsel is best equipped to argue against prosecution and to respond to government requests. An internal investigation also reduces surprises that may arise during a government investigation, allowing the company’s legal advisors to stay ahead of the outside investigators.

The results of an internal investigation also can help the company determine whether it should seek to settle the government investigation, or persuade the government to agree to a favorable settlement. In the event that a government investigation is threatened but has not yet been initiated, disclosing the results of an internal investigation may assist the company in persuading the government that no government investigation is necessary, or that the government investigation need not be as far-reaching as it might otherwise be.²

A careful internal investigation also allows the corporation to discuss the subject matter of the investigation with employees and potentially mitigate unnecessarily harmful testimony down the road. It may provide an opportunity to help lock in the testimony of witnesses at an early stage. An internal investigation is also particularly prudent if private litigation has been commenced or is probable. A prompt and effective internal investigation and appropriate remediation of certain allegations of misconduct may assist a company in mounting a successful affirmative defense in private litigation. Finally, an internal investigation allows a company to assess its systems and controls, and to develop an appropriate system of remedial measures to address any deficiencies.

Whether to initiate an internal investigate may be a more difficult decision when government has not yet initiated an investigation, or is unlikely to do so. Despite its many benefits, an internal investigation does have certain costs. They generally do not override the need for an internal investigation, but the potential costs of such a review must nevertheless be addressed. For instance, if the investigation is not privileged, it could create a roadmap for government officials and private (perhaps class action) litigants. Even if general counsel has faithfully cloaked an investigation with layers of privilege, the company may be forced (or, at least, strongly encouraged) to waive that privilege and share all aspects of its internal investigation with the government. Finally, an internal investigation can be disruptive and costly in terms of fees and lost business opportunities. Document collection, e-mail review, and difficult questions in interviews may be distracting and impact employee morale. Ideally, the internal review remains privileged and confidential from the public, but there also could be reputational concerns if the investigation becomes known to the public.

But despite the potential costs, it is almost always preferable to get to the bottom of the matter. For one thing, a company’s willingness and capacity to conduct an effective internal investigation is an important component of an effective compliance program. And senior management has an obligation to take appropriate steps when confronted with indications of potential misconduct.
Conducting an internal review now also can avoid exposing the company and board to risk of regulatory action or private litigation later—if, for instance, the problem goes undetected or is not remediated and ultimately recurs.

II. STAFFING THE INVESTIGATION

Despite the potential costs, in most instances an internal investigation is necessary. The next decision is who should conduct the investigation. Generally speaking, the answer to this question depends on the nature and seriousness of the allegations, as well as the strength of the evidence suggesting misconduct has occurred.

Counsel, auditors, or human resources

Allowing internal auditors, compliance personnel, or human resources staff to conduct the investigation (as opposed to in-house or outside counsel) may be less disruptive and could decrease the employees’ level of concern over the seriousness of the situation. Such internal reviewers may also be the most economical solution. In-house or retained counsel, however, may be more experienced or better skilled at conducting an investigation. Counsel may also have greater objectivity and independence in assessing the progress and results of the investigation. Further, attorneys are often asked to provide legal services based on the results of the investigation. For instance, it is possible that there will be the need for company counsel to deal with law enforcement or regulatory agencies in connection with the subject matter under review, and it may be most advantageous for these attorneys to be intimately familiar with the facts and results of the internal investigation. Most important, counsel will cloak the investigation with the attorney-client and work product privilege.

In-house counsel or outside counsel

If counsel is selected to lead the internal investigation, the next question is whether the company should use in-house or outside counsel. The following general factors should be considered in determining whether the investigation is sufficiently serious to warrant the retention of outside counsel: the seniority and prominence of the individuals who will likely be the subject of the investigation; the potential financial exposure to the company; and the extent to which the subject matter of the review is likely to result in law enforcement activity.

Outside counsel present a number of benefits. For instance, in most cases, outside counsel will be more objective and, perhaps more important, will appear more objective to outsiders, including the government. Such independence may be important to prosecutors who may seek to rely on reports or presentations provided by counsel conducting the investigation. If the subject matter of the investigation implicates senior management or the legal department, the independence of the outside law firm might provide the board of directors additional comfort in relying on the results of the investigation.

Outside counsel also frequently have greater resources and more experience in conducting internal investigations. In-house corporate counsel are busy running a business or managing disparate litigations. Outside counsel, on the other hand, are in the business of conducting investigations.

Outside counsel also may provide a greater degree of privilege protection. While the attorney-client privilege and attorney work product doctrine can apply to the work of an in-house attorneys, courts have applied stricter standards to in-house counsel in determining whether material is protected. The work of in-house counsel is more likely to be viewed as “business” in nature, whereas courts are less likely to find that a business purpose was the primary purpose of an internal investigation if that investigation is conducted by outside counsel.

On the other hand, in-house counsel have a greater familiarity with their own organization and will not have to spend time learning the industry. And the presence of outside counsel may increase the level of concern among employees. Depending on the circumstances, it may make the most sense to implement a staged approach, with in-house counsel handling the investigation during its early
stages, consulting with outside counsel as needed, and ultimately turning the investigation over if it escalates. For one thing, the expense of outside counsel cannot be undertaken every time a company needs to conduct an inquiry into potential wrongdoing. In addition, especially at the early stages, it may make the most sense to leverage in-house counsel’s superior knowledge of the company’s business, procedures, and personnel.

In the event the decision is made that outside counsel should lead the investigation, additional consideration should be given to whether the company’s existing outside counsel or an unaffiliated law firm should conduct the investigation. This decision turns in large part on the need for a truly “independent” review. For instance, if the allegations involve the board as a whole, it may make the most sense to form a committee of new directors or independent directors, who should retain an unaffiliated law firm to assist. If the allegations implicate high-level executive officers, the investigation most likely should be overseen by the Audit Committee or other independent directors, which typically will choose an unaffiliated law firm to assist. If the allegations involved non-executive managers or other employees, in-house counsel or other regular outside counsel generally should oversee the investigation.

Other outside consultants or forensic investigators

Internal investigations often require the assistance of private investigators, forensic accountants, technology experts, and other specialized consultants who can be helpful in fact-finding and analysis of data. One of the decisions that must be made early in an investigation is whether to rely on in-house expertise or outside experts for that expertise. Although personnel who are already familiar with the matters at issue may be most efficient in many cases, this may put these personnel at risk of having to testify regarding the factual analysis performed in connection with this work.³

Steps also must be taken when using non-attorney consultants or investigators to protect the privileged nature of the work. Among other things, counsel, preferably outside counsel, should retain the consultant. Retainer letters should state that the consultant is retained by counsel in anticipation of litigation, subjecting all consulting work to the attorney-client privilege and work product doctrine. Reports, if any, should be created only upon request of counsel, and, if created, such reports should state at the outset that they were created at the direction of counsel. All documents should be addressed and sent to counsel with the usual and appropriate “Privileged and Confidential; Attorney Work Product” label.

III. GOALS AND PARAMETERS OF THE INVESTIGATION

Once decisions are made to investigate and regarding who is going to handle the investigation, the company must set the goals and parameters of its work. A typical internal investigation can accomplish a number of goals, including: (i) developing the facts and evidence; (ii) determining the extent of potential civil and criminal liability; (iii) formulating a strategy for future compliance; and (iv) remedying past misconduct.

Once the goals are established, the team should determine the appropriate scope of the review. Internal investigations of every size require balancing efficiency with quality, thoroughness, and completeness. Approaching an investigation in phases and staying focused on specific issues or allegations can help manage costs and avoid “mission creep.” Likewise, it is generally sensible to start with a set of preliminary investigative steps to identify supporting evidence that would help the company determine the need to probe further. While a broad investigation will likely produce more information and will put the company in a better position to assess its overall exposure, the more detailed the investigation, the greater the internal disruption and the more likely the investigation will open the proverbial “Pandora’s box.”

A related point to consider at the outset is the timing of the investigation. Depending on the nature of the investigation, this could be dictated by outside factors, most notably, the
government. The length of the investigation is, of course, also contingent on its scope: how much information needs to be gathered and reviewed. But an extended investigation risks information leaks and further disrupts business.

To ensure the effectiveness of the investigation, a control group should be established and be involved in developing a strategy for the investigation. Among other things, this group will determine who needs to be informed about the investigation. Although confidentiality must be considered and carefully preserved, certain supervisors and managers will need to know what is happening in order to facilitate the collection of documents and the scheduling of employee interviews.

Clear direction also must be provided to employees and managers as to the confidentiality of the investigation. Employees should be instructed as to how they should respond to inquiries from the government, media, or other outside parties. Cooperation of employees should be expected and received, but employees, of course, have competing concerns: If an employee is a subject or target of a criminal investigation, the employee may choose to invoke the Fifth Amendment and refuse to cooperate, regardless of the employment ramifications.

The investigative team should identify key documents, employees, and other information to be evaluated during the investigation at the outset. Finally, the team should consider how the results of the investigation will ultimately be reported. Beginning with the end in mind will save time and help the investigation stay more organized as it moves ahead.

IV. DOCUMENT REVIEW

Document review is a critical component of any internal investigation. Among other things, documents can assist counsel in obtaining information from witnesses, and in educating law enforcement officials on the issues under review. As soon as the company becomes aware of allegations or evidence of misconduct, it should suspend normal document retention procedures and preserve all relevant documents relevant to the subject matter of the investigation, including e-mails. If the company has become a target or subject of an investigation, potentially responsive documents cannot be destroyed, regardless of general document retention policies. A diligent search should be conducted to locate and secure documents that relate to the subject transaction or incident.

It is important to review and become familiar with all documents potentially relevant to the investigation, even those that are not responsive to any pending document requests or subpoenas, including:

- Policies, procedures, and manuals;
- All emails and other electronic data, including, if economically feasible, archived emails;
- Personnel files;
- Minutes from Board of Directors meetings and related Board materials; and
- Privileged documents that are not subject to production.

If the government has opened its own investigation, it may request that the company produce documents on certain topics. A thorough document review gives investigators a preliminary understanding of the factual landscape so that it may position the company in the best light while remaining forthcoming to the government. It also provides context for the next step of the investigation—witness interviews—and helps the investigators develop the facts and questions for each interview.

V. WITNESS INTERVIEWS

Witness interviews are a key part of the investigative process and, along with documents, are generally the primary source of information that will be gathered during the investigation. While interviews have great potential to provide useful information, they come with significant challenges. Thoughtful planning and execution are critical to maximize the former and minimize the latter. Careful consideration should be given to who should conduct the
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Interviews, and whether anyone from the company should be present.

It generally is best if attorneys conduct the interviews. For one thing, having an attorney conduct the interview strengthens the argument that what is said during the interview is covered by the attorney-client privilege, and that notes or memoranda documenting the interview are similarly privileged. Further, counsel generally have more training and experience in synthesizing relevant facts and questioning witnesses.

Other logistical factors also play a significant role in conducting effective interviews. The timing and location of the interviews should be convenient for the employee. The interviewer should make the employee feel comfortable. If the employee is “on guard,” it is less likely that he or she will be candid during the interview.

Interviews should be conducted of all company personnel likely to have knowledge regarding the relevant transaction or the alleged violation. Before interviewing personnel, counsel should review the relevant documents and interviews, prepare an outline of topics to be covered with the witness, and select the documents that should be shown to the witness during the interview. The interviews should be prioritized, as the order in which they are conducted makes a difference. The investigative team also should be alert to sensitivities in interviewing directors and senior management, and consider whether senior management really needs to be interviewed. On the other hand, it is important to ensure that all necessary interviews are conducted and that there is no perception of favoritism shown to senior management.

When considering whom to interview, the investigative team should also look beyond current employees. Former employees may have knowledge of the alleged wrongdoing. If that is the case, assess whether they are willing to cooperate. An employee’s willingness may be influenced by the circumstances under which she or he left the company. If the employee left on unfavorable terms, she or he may be less likely to assist the company.

And if particularly disgruntled, the employee may pose a risk of disclosing unfavorable information to the government or the media. By diligently researching these matters, investigators increase the likelihood of gaining useful information and simultaneously reinforce another benefit of internal investigations: reducing surprises.

Conducting the Interview

Suffice to say, it is critical to preserve the attorney-client privilege and the work product doctrine at each stage of an internal investigation. Employee interviews are subject to the attorney-client privilege. Recordings of interviews, however, may be considered purely factual communications that, as verbatim transcriptions, are not subject to the attorney work product doctrine. Accordingly, it is best not to record interviews and instead have the interviewer (or, more likely, another attorney in the room) take written notes which include his or her thoughts and mental impressions. Because opinion work product receives greater protection than fact work product, it is more likely that written notes including an attorney’s thoughts and impressions will be protected.

Counsel also should give the employee an Upjohn warning. In Upjohn v. United States, 449 U.S. 383 (1981), the Supreme Court held that communications between company counsel and company employees are privileged, but the privilege belongs to the company, not to the employee. Providing the warning makes clear that counsel represents only the company. Anything the employee states in the interview is privileged only between counsel and the company. The company may choose to waive the privilege in the future, and in that event, the employee’s statements may be disclosed to the government. If clearly given, an Upjohn warning sets the boundaries of the interview and removes any doubt about whether counsel represents the employee. Of course, if employees know that they will not control the fate of their own statements, they may be less likely to speak candidly with the interviewer. But given the ethical consequences posed by an ambiguous or altogether omitted Upjohn warning, some loss of candor is a necessary risk.
After giving the Upjohn warning, counsel should clarify his or her role. Inform the employee about the scope of counsel's representation and the general purpose of the investigation. But stick to generalities. It is best not to discuss strategies and theories of the case with people who do not need to know them. In the same vein, consider whether anyone from the company should be present during the interviews. Sometimes this may be preferable, but usually it is best to minimize the presence of observers in the room. Think twice about addressing sensitive topics with employees. The employee may repeat the information the interviewer discloses to the government or become otherwise unfavorable to the company's case. These tips are small parts of a bigger objective: carefully controlling what information is disclosed, and to whom.

**Separate Counsel and Joint Defense Agreements**

In some circumstances, it may be appropriate to recommend that a current or former employee hire separate counsel. This may be advisable if, for example, the employee's interests may become adverse to the company's interests at some time in the future. The same holds true if the government may interview the employee down the road. So, too, if counsel representing the company faces a conflict of interest. Even if there is no current conflict, counsel may potentially be forced to withdraw if a conflict becomes evident at a later date.

If an employee does obtain separate counsel, company counsel should explore the possibility of a joint defense agreement ("JDA") between the company and the employee. The joint defense privilege, sometimes a "common interest privilege," was recognized by courts as early as 1964 as an exception to the normal rule that attorney-client privilege and attorney work product protections are waived whether otherwise privileged communications or materials are disclosed to a third party. Pursuant to this exception, privileged communications between a client and his attorney, and that attorney's work product, remained protected even if disclosed to certain third parties. In essence, pursuant to the joint defense privilege, information is permitted to be shared among defendants as if they were represented by joint counsel, but with each defendant having the benefit of individual counsel to fully protect and advocate for its own separate interests.

The privilege can be asserted defensively, to avoid having to disclose information to the government, and also offensively, to prevent another party to the joint defense group from disclosing joint defense information. The party seeking to establish the existence of a joint defense privilege and assert its protections must demonstrate that (1) the communications were made in the course of a joint defense effort; (2) the communications were designed to further the joint defense effort; (3) the communications were intended to be kept confidential; and (4) the privilege has not otherwise been waived. JDAs need not be written and can be formed by anything from simple oral undertakings to detailed written agreements. Some attorneys choose not to reduce agreements to writing so that the agreements are not subject to production. Others wish to avoid lengthy negotiations regarding nuanced waiver and limitations concerning issues that may or may not ever come into play.

At the same time, there are risks to JDAs. It is important for counsel to remember that, even though they are preparing a joint defense, they still owe an independent professional duty to their individual clients. Company counsel must do what is best for the company; the employee's counsel must do what is best for the employee. If counsel anticipate that their clients' interests may diverge in the future, they should structure the JDA accordingly. One solution is to restrict the JDA to a limited issue on which the parties have common interests. Furthermore, the common interest privilege only protects the confidentiality of information exchanged to further the joint defense.

Companies may also want to consider indemnifying their current and former employees and advancing their legal fees, if they have separate counsel. Doing so may improve employee cooperation, save time, and improve the company's control over the litigation. The government, however, may view indemnification as inconsistent.
with cooperation or as an endorsement of misconduct. Companies should compare the perceived benefit from indemnification with the risk that the government will adopt this view, and the consequences it if does so.

**Preemptive Disciplinary Action**

Not surprisingly, investigations often identify misconduct. In these instances, the company may consider taking preemptive disciplinary action against the responsible individuals. Whether or not this is advisable will depend on a variety of factors, including the seriousness of the employee’s conduct and strength of evidence against him or her, the need to stop further misconduct, and the company’s obligations under federal and state employment laws. For instance, while discipline may be helpful in that it stops or limits the actions of people who are damaging the company’s interests, it may also be harmful by creating discontented, disloyal employees who become more willing to cooperate with the government against the company. However, sometimes the wrongdoers’ actions are so egregious that there is no question discipline will be administered; it is just a matter of timing. If discipline is inevitable, the company may wish to put the matter behind it by addressing it early. The company also should consider what will happen if the company does not discipline the wrongdoers. If the company must discipline someone to prevent future harm from occurring, the case for preemptive action becomes stronger.

The company needs to consider how the government will interpret discipline. Depending on the circumstances, the government could plausibly interpret it as a good faith effort to remedy the problem, or as an admission of wrongdoing. Finally, depending on the seniority of the personnel and the nature of the conduct warranting discipline, such employment actions could trigger some reporting requirement, which could cause the subject of the investigation to become known outside the company earlier than anticipated.

**VI. ESTABLISH A PUBLIC RELATIONS STRATEGY**

Corporate misconduct can damage a company’s reputation. Controlling the timing and content of the information disseminated to the public is important. Companies, in conjunction with counsel, should designate a spokesperson to whom all outside inquiries should be directed. In-house or outside counsel may be adept at handling these inquiries. Another option is hiring a public relations firm. Companies should be aware that disclosure of investigation reports to the public may waive attorney-client privilege merely by referencing protected information. Mandatory disclosures made in the normal course of business—including, for example, quarterly reports—should conform to the public relations strategy. The goal is to control the message to the greatest extent possible. But at no point should the public relations message trump the litigation strategy. And, indeed, public relations mistakes can adversely impact the investigation itself. Early public denials, pronouncements of innocence, or, worse yet, statements of questionable veracity may provoke the government into a more vigorous investigation than it would otherwise undertake. Above all, the goal of an investigation is to resolve the alleged misconduct in the way that best suits the company’s interests. Public relations should not be ignored, but it also should not distract from that goal.

**VII. CONCLUDING THE INVESTIGATION**

The final consideration after the investigative team’s workplan is complete are (1) how to report out the investigative team’s findings, and (2) how to proceed with the information that has been ascertained. While the company’s next steps and decisions about possible disclosures will ultimately be dictated by the investigative team’s substantive findings, decisions regarding the form of the investigative report to senior management and the company’s boards should be considered at the outset of the investigation.
CONDUCTING EFFECTIVE INTERNAL INVESTIGATIONS

Reports

At the conclusion of the investigation, counsel may wish to prepare a written report which summarizes the investigation, predicts risk of liability, presents arguments against prosecution, and recommends corrective action the company can take. There are many reasons why counsel may do this. A written report can be a useful tool to present the investigative team’s findings to management or the company board. This is particularly the case if the factual evidence is voluminous or the issues are particularly complex. A report may be necessary to justify and document employee disciplinary actions that arise out of the investigation. It may also be used as the basis for an eventual oral or written submission to the government, if the company chooses to do so. The report can highlight the remedial measures the company takes to prevent similar misconduct in the future, and the report may be necessary proof of the thoroughness of the investigation. Whatever the reason, counsel should consider the benefits and risks of drafting a written report before beginning the task.

A report can demonstrate the thoroughness of the investigation, setting forth the company’s goals in opening the investigation, as well as the steps it has taken to achieve those goals. Indeed, if a report is not prepared, the government may suspect the investigation was cursory. The company should understand, however, that a report, if prepared, may have to be disclosed. If a written report is prepared, it may be inevitable that the government will request a copy once the investigation becomes known to them. And once privilege has been waived, the report can be obtained for use by private litigants. Thus, counsel and consultants should anticipate the risk of having to produce the report when they draft it.

As counsel consider the question whether to prepare a report at the end of an investigation, it is worthwhile to return to the beginning: the goals of the investigation. Will an oral report, rather than a written one, accomplish the goals and objectives of the investigation? If a written report will not further the goals, it may be better to avoid it. But if a report will meaningfully address the investigation’s goals, it may be worth producing one.

Whether the report of the investigative findings is delivered orally or in written form, it usually includes: (1) identification of the evidence or allegations that prompted the investigation and a statement that the investigation was conducted in anticipation of litigation and for the purpose of providing legal advice; (2) a description of the work plan that was implemented; (3) a summary of the relevant background facts; (4) analysis of the key evidence; (5) an outline of the pertinent law; (6) an application of the law to the evidence; (7) a description of the remedial measures that should be considered (or have been taken) as a result of any issues identified during the investigation; and (8) a recommendation as to whether there should be a self-report or disclosure to the government.

Disclosure to the Government

Depending on the circumstances, at the end of an investigation the company may be forced to decide whether to voluntarily disclose the contents of the investigation to the government. As with producing a report, voluntary disclosure may persuade the government that the company has greater transparency and integrity. In other words, the company is not hiding anything from the government; it is simply investigating an alleged problem and reporting what it found. This, in turn, may lead to a more favorable resolution of the issue. Of course, self-reporting will not necessarily prevent prosecution, but it may lead to better settlement terms by demonstrating cooperation and good faith. And, at a minimum, voluntary disclosure provides the government with the company’s version of the facts. The government may use these facts to structure its own investigation, allowing the company to shape the matter as it moves forward.

Disclosure also has significant risks that the company should consider before it proceeds. First, disclosure to the government may waive the attorney-client privilege and work product protection in all other contexts. And by waiving privilege, the company may provide a roadmap
for liability to civil litigants, including class action litigants. Although the case law is not uniform, courts typically do not uphold non-waiver or selective waiver agreements. To reduce the possibility of waiver, the company should frame disclosures in terms of possible settlement negotiations with the government. Settlement discussions generally receive greater protection, but even these ultimately may not remain privileged. The company also should consider entering into a confidentiality agreement with the government, in which the government agrees not to disclose company information to third parties.

Second, disclosure can chill future discussions between company employees and attorneys and may thereby impair the corporation’s ability to detect and prevent future wrongdoing. If employees believe that the company will report misconduct to the authorities, they are less likely to cooperate with the company’s investigation. The company does not want to develop an “us vs. them” relationship with its own employees.

Third, the company should be careful about preemptively disclosing materials. It should time the disclosures so as not to interfere with the ongoing investigation (if indeed it is ongoing) and to ensure that unnecessary materials are not disclosed. To do so, it may seek to limit the disclosure to a limited issue or subject matter.

Sometimes, an internal investigation uncovers misconduct that is not yet on the government’s radar screen. Should the company disclose this misconduct? Here again, the government may view voluntary disclosure as forthcoming, but disclosure may not prevent prosecution. At the same time, if the government is already conducting its own investigation, and if it is likely to discover the misconduct anyway, self-reporting may be the preferred course.

Remedial Measures

Based on the information gathered during the investigation, the investigative team should recommend and the company should decide what remedial measures, if any, should be undertaken. Disciplining employees tends to demonstrate that the company takes wrongdoing seriously. Some discipline may be necessary from a business standpoint to ensure that employees do not continue to cause trouble. There is a risk that employee discipline could be viewed as an admission of wrongdoing. And, if disciplined, employees could refuse to cooperate with the company and instead cooperate with the government. Unwarranted or overly severe discipline may also damage morale. Employees who feel a connection to their colleagues may take the discipline personally. If the company does decide to discipline an employee, it may have to create a memorandum or report to justify its action. That record, though, may be deemed part of the employee’s personnel file and may need to be disclosed.

If the investigation revealed evidence of potential ongoing or recurring violations, the company also should consider taking procedures necessary to prevent any further violations. This might include instituting new procedures, instituting new training sessions, revising compliance materials or developing new internal audits or oversight committees to review compliance on a periodic basis. Policing internal misconduct through an investigation is, in many ways, no different than other business matters. It is best to be thorough in preparation and action, learn from mistakes, and make improvements when necessary.

An internal investigation can be a critical tool when allegations or evidence of misconduct within a company, or within a company’s industry, arise. Internal investigations of every size require balancing efficiency with quality, thoroughness, and completeness. And above all else, an effective internal review requires careful planning at the outset. While the best compliance program and training regime cannot completely prevent some types of misconduct—or, at the very least, allegations of misconduct—from occurring, practical preparedness and a carefully scoped internal review of the situation is the best defense.
CONDUCTING EFFECTIVE INTERNAL INVESTIGATIONS

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Endnotes:

1. Mr. Braceras and Ms. Chunias would like to thank Christine Dieter and Ted Koehler, associates at Goodwin Procter LLP, for their assistance preparing this article.

2. In addition, in the criminal context, the federal sentencing guidelines for corporations provide for an increase in criminal fines to be imposed on corporations in connection with criminal violations of federal law if senior corporate personnel “participated in, condoned, or [were] willfully ignorant of the offense” or if “tolerance of the offense by substantial authority personnel was pervasive throughout the corporation.” U.S.S.G. § 8C2.5(b)(1)(A)(i)-(ii). Likewise, the guidelines provide for a reduction in a corporate fine under certain circumstances, if the criminal offense occurred despite “an effective program to prevent and detect violations of law.” § 8C2.5(f)(i). There is a presumption that the program was not effective if senior management participated in, condoned, or were willfully ignorant of the offensive conduct. § 8C2.5(f)(i)(B). On the other hand, it, upon learning of potential misconduct, a company promptly undertook an internal investigation and implemented appropriate remedial action, this can assist a company in arguing against the imposition of criminal or civil penalties.

3. See, e.g., In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992).


5. The Federal Rules of Criminal Procedure also require production of contemporaneously recorded statements after the witness has testified on direct examination at trial. Fed. R. Crim. P. 26.2.

6. However, counsel should be aware that the fact that interview memoranda contain mental impressions can result in complexities later if the memoranda are disclosed to the government. Although the Department of Justice may no longer request (and corporations need not produce) protected notes and memoranda as a condition of a company receiving cooperation credit for providing factual information, to receive such credit, the corporation does need to produce, and the government may request relevant factual information obtained through witness interviews. See August 8, 2008 Memorandum from Deputy Attorney General Mark R. Filip to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (the “Filip Memorandum”) at 10 n. 3.

7. This section is intended to provide general information regarding the use of JDAs, with a focus on federal law. Courts’ recognition of the existence and scope of the joint defense privilege varies across federal and state jurisdictions, and practitioners should research local law to confirm applicability to their particular circumstances.

8. See Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964).

9. See, e.g., Continental Oil Co., 330 F.2d at 350.

10. Id.

11. Some courts have held that JDAs are not privileged and are subject to production for at least in camera review. See, e.g., United States v. Stepney, 246 F. Supp. 2d 1069, 1074-75 (N.D. Cal. 2003).

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Conducting Internal Investigations

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In the wake of recent corporate scandals, the financial crisis and the enactment of tougher corporate accountability standards under the Sarbanes-Oxley Act of 2002 (“SOX”)\(^1\) and the Dodd-Frank Act,\(^2\) internal investigations have become an important exercise of good corporate governance. Internal investigations can be initiated for a variety of reasons, including allegations of significant corporate misconduct that could violate federal or state law, a complaint from an employee, ethical lapses or wrongdoings by a competitor.

Indeed, under certain circumstances, an internal investigation may be required by law or corporate policy or, at a minimum, strongly warranted to assist the corporation in staving off regulatory action, limiting significant civil monetary penalties, or avoiding suspension and bar orders. A thorough and credible internal investigation may help determine, and often improve, the course of regulatory and criminal investigations, as well as shareholder and third-party litigation. Conversely, a poorly conducted investigation can place a corporation, and its directors and officers, in a worse position than they would have been in the absence of such an investigation.

Internal investigations may take many forms, depending upon the nature of the conduct at issue and the scope of the investigation. If the suspected misconduct is limited and discrete, an internal investigation may be conducted by the corporation’s in-house counsel, compliance department or its internal audit department. However, if the suspected misconduct is significant, or involves senior management or the board of directors, it likely should be conducted by outside counsel.

While every internal investigation has unique characteristics, to be most effective they should be timely, thorough, accurate, fair, objective and credible. If an internal investigation does not meet all of these goals, it likely will be ineffective. Credibility is key, and as the seriousness of the conduct at issue increases, so should the independence of counsel conducting the investigation.

This article discusses some of the considerations that are important to the decision whether to conduct an internal investigation, the benefits and pitfalls of such investigations, and the techniques for properly steering the course and conduct of the investigation.

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A decision whether to initiate an internal investigation is sometimes extremely difficult to make and may require significant analysis. It is an important decision as once the decision to initiate an internal investigation is made, it likely cannot be reversed. Conversely, great harm can result if a regulator believes that an internal investigation should have been done and the decision was made not to conduct one.

In deciding whether to conduct an internal investigation, a company should take into consideration a number of factors including: (a) whether such an investigation is required by any law, regulation or corporate policy; (b) the scope and severity of the alleged misconduct and potential violations of law and regulation; (c) potential or actual interest or litigation by civil regulators, criminal authorities, and third parties; and (d) the benefits and risks to the corporation and/or its officers, directors and employees of such an investigation. Depending on the nature of the misconduct at issue, an internal investigation can consume tremendous resources, at great cost to the company, and potentially expose the company and its officers to greater liability by setting forth a blueprint for regulatory and private actions. The cost of inaction to a company, however, could swiftly outweigh any expense and litigation risk associated with a properly conducted investigation. Failure to complete the investigation in a credible, timely and thorough manner could also be viewed as an attempt to cover-up wrongdoing.3

By the same token, a company’s basis for conducting an investigation will determine the manner in which the investigation is conducted, and how the results of the investigation will be reported and addressed. Internal investigations can be used as a means for identifying and remedying misconduct within a company, as well as a defensive mechanism for addressing regulatory and prosecutorial investigations and private claims.

STATUTORY AND REGULATORY OBLIGATION TO INVESTIGATE

The use of internal investigations as a defensive mechanism has its roots in the SEC’s “voluntary disclosure program” of the 1970s, which arose in response to widespread allegations of corruption and bribery, and led to the enactment of the Foreign Corrupt Practices Act of 1977 (“FCPA”). Under that program, companies established special committees of their boards of directors to retain outside counsel in order to conduct internal investigations, prepare reports of the findings, and disclose the reports from the investigation to the SEC.4 In the following years, federal and state regulators continued to promote voluntary disclosure programs as an enforcement mechanism.5 These programs rewarded companies who responded to reports of misconduct by initiating internal investigations and disclosing their results to regulators, with reductions in sanctions or even complete avoidance of enforcement action.

Nevertheless, corporations and regulated entities may also have legal obligations to conduct an independent investigation depending on the circumstances of the alleged conduct. For instance, SOX requires, among other things, corporations to establish audit committees with responsibility for developing procedures to receive, retain and investigate complaints of financial fraud involving auditing, accounting or internal controls issues.6 The chief executive officer and chief financial officer are required to certify that the company’s public filings fairly present, in all material respects, the company’s

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5 These include the Department of Justice’s Antitrust Division Voluntary Disclosure Program and Corporate Leniency Policy, the joint Departments of Justice and Defense Voluntary Disclosure Program; and the Department of Health and Human Services’ Operation Restore Trust.
6 SOX § 301, 15 U.S.C. § 78j-1 (2006) (also requiring that audit committees be empowered to retain independent counsel or experts to fulfill such duties).
Financial services firms such as broker-dealers and investment advisers who are regulated by SROs may have obligations to self-report violations of law and SRO rules to the regulators.

Financial services firms such as broker-dealers and investment advisers who are regulated by SROs may have obligations to self-report violations of law and SRO rules to the regulators. In derivative lawsuits brought on behalf of corporations by shareholders, corporations may be required by courts to conduct an independent investigation of alleged misconduct, often by establishing a special litigation committee of the board of directors. Indeed, such an investigation may be warranted in order for corporate directors to satisfy their duty of care.\(^7\) Moreover, in situations involving potential fraud or material misstatement in a company's financial statements, an internal investigation may be a prerequisite for the company's outside auditors to continue to perform the company's audit or, where new auditors are necessitated, for successor auditors to agree to undertake the audit engagement.\(^\)\(^\)\(^\)\(^\)

Conducting a thorough internal investigation may be critical in responding to whistleblower complaints in light of the SEC's Whistleblower Program established pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.\(^\)\(^\)\(^\) The SEC does not require that a company conduct its own investigation after receiving an internal tip, but encourages whistleblowers to first report their complaint internally before approaching the SEC. The SEC factors whether and how such internal reporting occurred and the company's response in determining whether to bring an enforcement action against the company and, if so, whether to award money to the whistleblower. An award could range between 10 and 30 percent of the monetary sanctions collected in an SEC action and any related actions. To that end, the SEC will assess whether the whistleblower: (i) “participated in internal compliance systems”\(^12^\); (ii) “unreasonably delayed reporting the securities violations”\(^13^\); or (iii) “undermined the integrity” of the company's internal compliance systems.\(^14^\)

While the process for determining awards is not outwardly transparent, the SEC has brought enforcement actions where the entity failed to investigate and take corrective measures or responded by retaliating against the reporting employee.\(^\) Conducting a thorough internal investigation may help a company defend itself in an enforcement investigation by demonstrating that the alleged violations were investigated and, if found reliable, promptly and effectively remedied.

### EXTENT OF MISCONDUCT AND POTENTIAL VIOLATIONS

Not all reports of misconduct at a company will necessitate an internal investigation conducted by outside counsel under the aegis of a board committee. Generally, where the alleged misconduct involves an individual employee and does not implicate potential violations of federal or state law, in-house counsel, often in conjunction with a company's internal audit department, can investigate the allegations and recommend to management appropriate remedial and personnel actions. However, an internal investigation conducted by outside counsel under board supervision should be strongly considered where the misconduct is widespread or may involve corporate officers or directors, affect the company's governance, potentially violate federal or state law, or corporate policy, or subject the company to regulatory or prosecutorial investigation and possible enforcement action.

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3. See generally In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (a director has "a duty to attempt in good faith to assure that a corporate information and reporting system . . . is adequate, [and] exists . . .").
4. See generally Codification of Auditing Standards and Procedures, Statement on Auditing Standards No. 1, § 110.02 (Am. Inst. of Certified Pub. Accountants 1972) ("The auditor has a responsibility to . . . obtain reasonable assurance about whether the financial statements are free of material misstatement").
5. Illegal Acts by Clients, Statement on Auditing Standards No. 54, § 317.10 (Am. Inst. of Certified Pub. Accountants 1988) (requiring that "[w]hen the auditor becomes aware of information concerning a possible illegal act, the auditor should obtain an understanding of the nature of the act, the circumstances in which it occurred, and sufficient other information to evaluate the effect on the financial statements.").
RESPONDING TO REGULATORY OR ENFORCEMENT INQUIRIES

If a company is aware that it is under investigation or the subject of complaint to a regulatory or law enforcement entity, the company should consider initiating its own investigation. To do so will set an important tone with the regulators by demonstrating that the company is diligently and independently seeking to discover the facts and evidence, and take appropriate steps to expose and remedy the misconduct. It will also enable the company to better understand the veracity of the allegations, the extent of any misconduct and any defenses the company may have. Proactive steps to investigate not only assist the regulators in quickly gathering the facts and any evidence, but also allow the investigated company to stay several steps ahead of the regulators and focus its energies on crafting appropriate corrective action that may be used to persuade regulators that the misconduct has been thoroughly investigated and remedied.
INTERNAL INVESTIGATIONS AS A FORM OF COOPERATION

Internal investigations have grown in importance amidst heightened scrutiny of corporate conduct and an emphasis on a culture of corporate compliance and responsibility. When considering whether to impose civil or criminal penalties, both the SEC and DOJ will consider a corporation’s willingness to undertake and voluntarily disclose the results of a properly conducted internal investigation. The government welcomes internal investigations and self-disclosure in part because they conserve enforcement resources. Such investigations are useful mechanisms for assisting a company in identifying personnel who should be terminated, and deficient systems and procedures that need to be improved.

In some cases, undertaking an internal investigation, sharing the results of the investigation with regulators and taking remedial steps may enable a company to avoid charges against the corporation even as individuals become the targets of an investigation or litigation. In other cases, such investigation may reduce the amount of civil penalties imposed by the SEC, or eliminate any civil money penalty. In the case of criminal investigations, where a company may be held criminally liable for its employees’ illegal conduct, tangible efforts to cooperate with authorities, including through the conduct of an independent investigation and disclosure of its results, may garner avoidance or deferment of criminal prosecution. By contrast, failure to investigate reported wrongdoing or to respond effectively to “red flags” can bolster the government’s case for imposing a civil penalty.

Moreover, an internal investigation may enable the company to identify more quickly information that will likely be obtained by the government, and thereby enable the company to respond more effectively to the government’s investigation. An internal investigation will further assist the company in gathering information, fashioning defenses and crafting a remedy for the misconduct. Internal investigations also enable a company to assess the level of potential wrongdoing that can inform the decision whether to settle and, if so, to determine an appropriate settlement threshold. At times, a company may be able to forestall or limit the scope of a government investigation by demonstrating that the company is independently and reliably gathering facts and evidence that can be assessed by regulators with limited resources of their own. Alternatively, an internal investigation may help a company persuade the government or law enforcement entities to focus the investigation on particular individuals responsible for the misconduct. Finally, internal investigations enable companies more effectively to assist board members, officers and employees in preparing for and giving testimony.

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22 See Seaboard Report at *3.
24 See, e.g., United States v. Inv. Enter., Inc., 10 F.3d 263, 266 (5th Cir. 1993) (a corporation can be held liable for the unlawful acts of its agents if their conduct is within scope of their actual or apparent authority). See generally Joseph S. Hall, Corporate Criminal Liability, 35 AM. CRIM. L. REV. 549 (1998).
26 See United States v. Phelps Dodge Indus., Inc., 589 F. Supp. 1340, 1363 (S.D.N.Y. 1984) (observing that a demonstration of good or bad faith is an important factor in determining the appropriate level of civil monetary penalty, and noting that the company “responded with insufficient vigor to tangible indications of (an employee’s) illegal conduct.”).
IDENTIFYING REMEDIAL STEPS AND PREVENTING FUTURE MISCONDUCT

Irrespective of any impact on potential civil or criminal liability, there are sound business reasons to investigate reports of wrongdoing. Failure to investigate may send the message that the company does not take wrongdoing seriously. By contrast, quick action in investigating and remedying misconduct will help the company in showing employees that it expects them to abide by established codes of conduct and demonstrating to the government that the company is a good corporate citizen.

THE RISKS OF INVESTIGATION

While the benefits of conducting an internal investigation are substantial given the post-Enron regulatory environment, there are risks that should be considered and, where possible, minimized. The costs, expenses and disruptions to the company associated with such investigations can be significant, depending on the magnitude of the conduct at issue, and how the investigation will be staffed and conducted.

Beyond such issues, an internal investigation will result in the development of a factual record that may serve as a blueprint to regulators and private litigants seeking to assert claims against the company and its officers and directors. These disclosures to the government and potential third party claimants may include not only the identity of any malfeasant, but also information regarding relevant witnesses and documents, witness statements and interview memoranda, as well as any written report of the investigation. The extent of such a blueprint may largely depend on whether the company waives its attorney-client or attorney work product privileges to disclose the investigation’s findings. Nevertheless, at a minimum, the facts and evidence identified in an internal investigation may be discoverable by third parties who could in turn be advantaged by the prior development of a readily accessible record of the wrongdoing.

An internal investigation may also result in discovery of misconduct beyond the scope of the initial allegations of wrongdoing. The credibility of an investigation may suffer if all appropriate and relevant leads are not pursued. To the extent apparently unrelated misconduct is identified, a thorough analysis should be done to determine whether it should be included in the scope of the investigation.

There are significant limitations to an internal investigation that should be considered. The success of any internal investigation may be dependent on the extent of cooperation given by current and former employees, as well as third party witnesses. Given that subpoena power is not present in internal investigations, cooperation cannot be compelled by law. Moreover, confidentiality and business considerations may limit investigating counsel from contacting and interviewing third-party witnesses. However, the company may be able to link cooperation by current and former employees to continued employment and/or indemnification for legal fees and expenses, assuming there are no contracted or legal rights to indemnification.

While the benefits of conducting an internal investigation are substantial given the post-Enron regulatory environment, there are risks that should be considered and, where possible, minimized.
THE INVESTIGATION PROCESS

ESTABLISHING THE IDENTITY OF THE CLIENT AND THE SCOPE OF THE INVESTIGATION

Once the decision to undertake an internal investigation has been made, the next step is to determine precisely on whose behalf the investigation is being conducted, as well as its scope. Those decisions should be memorialized in writing, such as in the form of a detailed engagement letter setting forth the agreement to retain outside counsel to conduct the investigation.

In many cases, the investigation will be conducted by management of the company. In other situations, the investigation will be controlled by the company’s Board of Directors, a standing committee of the board (such as the audit committee) or a special investigatory committee formed to assume responsibility for the investigation. Such committees may be required in the context of derivative lawsuits, or warranted where senior officers or even board members are subjects of the investigation. A special committee can help protect the investigation from being controlled or unduly influenced by individuals with conflicted interests in the outcome of the investigation.

The scope and purpose of the investigation should be specifically identified. At the same time, an investigation should not be so narrowly circumscribed as to undermine inquiries that may well serve the purpose of an internal investigation even if they are not directly related to the initial suspected misconduct. Because investigations are, by their very nature, generally initiated at any early stage of a client’s knowledge of the extent of misconduct, it may be necessary for counsel to re-evaluate the investigation’s scope throughout the course of an investigation.

PREVENTING COMMON PITFALLS

Preservation of Evidence and Records

Failure to preserve relevant documents immediately after an investigation is initiated can seriously hamper an internal investigation. At worst, it can result in charges of obstruction of justice where government investigations have been initiated or are anticipated. In large investigations, a document preservation notice should be issued to the company’s relevant employees informing them of the investigation, and requiring that they not destroy any documents potentially relevant to the subject matter of the investigation. Identifying relevant employees may be difficult as the scope of the conduct to be investigated may not be known at the outset. The notice should give sufficient detail so that employees will know what documents need to be preserved, but not so much that it gives a roadmap of the investigation. Further, all automated data destruction or deletion processes should cease. Particular care should be taken to preserve all electronic communications and documents, including images of relevant employee hard drives, laptops and email devices or PDAs, including even, if possible, employees’ personal computers, back-up tapes, and PDAs.

Preserving Privileges

Both the investigative record and the documents and data created in the course of the investigation are typically protected by the attorney-client privilege, the work product doctrine, or both. These protections are critical to maintaining the maximum control over the results and underlying documentation of the investigation. While there are situations in which the company will choose on its own to waive some or all of the protections on the investigatory record, the company may not reach that decision at the beginning of the investigation. Failure to maintain the privilege may leave some of the company’s most sensitive information, including the findings and report of the investigation, in the hands of regulators, litigation opponents, and even competitors. Although the corporation may choose to disclose the results of an investigation, management and counsel should take every precaution to ensure that disclosure remains a viable option and not a forced circumstance based upon failure to protect privileges during the course of the investigation. All personnel involved in the investigatory process must be strictly warned about the importance of confidentiality.

24 SOX includes new penalties for any person who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence” any government investigation. 18 U.S.C. § 1519 (2006).
25 See infra Section D.2.
Conducting Internal Investigations

and the need to avoid any disclosures about the nature or conduct of the investigation, except as deemed necessary by counsel. The Supreme Court has made it clear that when internal investigations are undertaken by in-house counsel, communications between counsel and employees concerning matters within the scope of the employees’ corporate duties and undertaken for the purpose of securing legal advice are protected by the attorney-client privilege. Since the landmark 1981 Supreme Court decision in Upjohn, courts have generally held that counsel’s efforts to uncover facts as part of an internal investigation are sufficiently legal in nature to warrant application of the attorney-client privilege. Management should take particular notice that preliminary investigations conducted by management will not receive the benefits of privilege protection, even if the company subsequently retains counsel to conduct a full investigation. It will therefore generally be advisable that company personnel who are carrying out investigatory tasks as agents of the attorney(s) with oversight of the investigation be careful to document that the investigation is peripheral involvement (rather than mere peripheral involvement) of attorneys at the earliest possible stage of any investigatory effort. The protections of the attorney-client privilege apply to employee communications with counsel if:

1. The communication was made for the purpose of securing legal advice;
2. The employee making the communication did so at the direction of his corporate superior;
3. The superior made the request so that the corporation could secure legal advice;
4. The subject matter of the communication is within the scope of the employee’s corporate duties; and
5. The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Consequently, counsel conducting internal investigations should be careful to document that the investigation is being conducted at the client’s request and is undertaken for the purpose of providing legal advice. That fact should be documented by the engagement letter and should be repeated wherever appropriate, including during interviews and in any written summaries of interviews with employees. Counsel should also ensure that management directs employees to cooperate with the investigation. Any documentation of interviews with employees should specify that the information provided falls within the scope of employment and aids the investigation.

Although the attorney-client privilege will not attach absent the involvement of an attorney, the privilege may extend to non-attorney personnel who are carrying out investigatory tasks as agents of the attorney(s) with oversight over the investigation. The services of knowledgeable employees or experts may thus be used to assist with the investigation provided proper steps have been taken to document that the investigatory efforts are being carried out at the behest of counsel in performance of legal services. Additionally, the investigators may also retain experts to assist the attorneys with technical issues. Any privileges belonging to the internal investigation team can be better protected by clearly establishing that the experts were retained directly by counsel.

Courts distinguish between “factual” and “opinion” work product. Factual work product refers to documents that contain information essentially factual in nature, while opinion work product refers to documents containing mental impressions, legal theories or legal opinion and analysis. As specified by the Federal Rules of Civil Procedure, while factual work product is technically covered by the work product doctrine, it may be discoverable upon a showing of “substantial need” for the information. Opinion work product, by contrast, enjoys virtually absolute protection. Attorneys can maximize the potential for work product protection by integrating legal analysis into documents rather than merely recounting facts. For instance, if counsel chooses to prepare a record of an employee interview, the record should not be a substantially verbatim transcript or summary of the interview, but should instead incorporate the mental impressions of counsel about the substance of the interview, and should prominently state that it does so on the interview memorandum.

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26 The protections of the attorney-client privilege apply to employee communications with counsel if:

(1) the communication was made for the purpose of securing legal advice;
(2) the employee making the communication did so at the direction of his corporate superior;
(3) the superior made the request so that the corporation could secure legal advice;
(4) the subject matter of the communication is within the scope of the employee’s corporate duties; and
(5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Consequently, counsel conducting internal investigations should be careful to document that the investigation is being conducted at the client’s request and is undertaken for the purpose of providing legal advice. That fact should be documented by the engagement letter and should be repeated wherever appropriate, including during interviews and in any written summaries of interviews with employees. Counsel should also ensure that management directs employees to cooperate with the investigation. Any documentation of interviews with employees should specify that the information provided falls within the scope of employment and aids the investigation.

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26 Communications between corporate employees and counsel during an internal investigation are privileged as long as “providing legal advice was one of the significant purposes of the internal investigation.” In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758, 760 (D.C. Cir. 2014) (holding that the privilege was not defeated where the investigation was initiated to satisfy a regulatory requirement or corporate policy such as federal defense contractor regulations).


28 Id., see also Upjohn, 449 U.S. at 401.

29 Cases involving accounting fraud lend themselves particularly well to the retention of accounting experts to assist the investigators with accounting questions.

The biggest hurdle to a work product claim over documents prepared during the course of an investigation is typically the “anticipation of litigation” requirement. Generally, there must be an identifiable prospect of litigation to warrant work product protection. Some courts have adopted a restrictive “predominating purpose” test, according to which a document must have been created or prepared primarily to assist in pending or impending litigation. However, a majority of courts have adopted a more flexible “because of” test, holding that documents are prepared in anticipation of litigation when they were prepared “because of” the prospect of litigation. Courts adopting this test have generally required that the expectation of litigation be objectively reasonable, as well as guided by a subjective belief. Because every investigation is unique, the validity of a work product claim will depend upon the circumstances. A work product claim will be strongest when an investigation is opened up in response to a government inquiry. Several courts have held that investigations by regulatory authorities present more than simply a remote possibility of litigation. A work product claim will be more tenuous when a corporation undertakes an investigation in response to internal reports of potential wrongdoing. Nevertheless, a corporation may strengthen a work product claim if it can prove that it was responding to specific claims, and determined that an internal investigation would be helpful in responding to anticipated litigation or regulatory investigations. Consequently, documents identifying the scope of the investigation or reporting the results of the investigation should record, where appropriate, that the investigation was undertaken to provide legal advice in anticipation of litigation. There should be recognition at the outset of any investigation that certain materials prepared during the course of the investigation may eventually be subject to disclosure to law enforcement authorities or other third parties. Consequently, counsel should instruct all personnel participating in the investigation that documents should only be created as deemed necessary, and in the manner prescribed by counsel. Although final decisions about whether and how to report the results of an investigation may be left to the end of the investigation, early consideration should be given to the likely final product. Anticipating the nature of the final product can help ensure that the documentary and oral information necessary to prepare the final report is obtained during the course of the investigation.

Several steps can be taken to prevent the inadvertent waiver of the privilege. First, and most simply, all privileged and work-product documents should be clearly labeled “Confidential,” and should note which protection applies. This will help to demonstrate the intent to maintain the confidentiality of the documents. Further, any disclosures, even to the government, should be subject to a “non-disclosure agreement” (or something similar), restricting the right of the receiving party to share the information with third parties. Such agreements may be seen as evidence of the continuing efforts to maintain some degree of confidentiality and may be helpful in limiting the scope of any waiver that has been affected by the disclosure.

To the extent that information is shared with other parties, such as current or former employees, care must be taken not to inadvertently effect a waiver. A “joint defense” or “common interest” agreement may be formed between parties as “part of an ongoing and joint effort to set up a common defense strategy,” and will generally create a “joint defense privilege” that acts as an exception to the rule that disclosure to a third party will act as a waiver of privileged communications. Though such an agreement may be found to have been created orally, the burden of establishing the existence of the joint defense privilege will fall to the party claiming it. Therefore, it may be preferable to obtain a written “joint defense agreement” from any party with whom information is shared. As a general rule, courts have found that joint defense privileges apply as long as the parties have some common interests, even if their interests

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37 See, e.g, Adlam, 134 F.3d at 1202 (extending a work product claim to a document

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40 In re Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001) (citation omitted).
41 The common elements for establishing the existence of a joint defense privilege are that: (1) the communications were made in the course of a joint defense effort; (2) the statements were made in furtherance of that effort; and (3) the privilege has not been waived. See, e.g., United States v. LeCroy, 348 F. Supp. 2d 375, 381 (E.D. Pa. 2004).
42 See United States v. Weissman, 195 F.3d. 96, 99 (2d Cir. 1999), LeCroy, 348 F. Supp. 2d at 381.
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are not identical, but have rejected such a privilege claim in instances where the parties’ interests are so divergent as to make them effectively adversaries. Accordingly, a careful analysis should be performed of the extent to which parties’ interests do or may potentially diverge prior to the sharing of information between these parties.

Further, because internal investigations can be international in scope, it is important to note that attorney-client privilege varies significantly from country to country. For example, while every European Union member state has at least some form of attorney-client privilege, the extent of this protection varies from country to country. Additionally, at least for enforcement actions taken by the European Commission, the European Court of Justice has ruled that “legal professional privilege” does not apply to communications between the corporation and its in-house counsel because, in the eyes of the court, these attorneys are not sufficiently independent of the client. For this reason, companies facing a government enforcement action or considering conducting an internal investigation should understand the extent to which attorney-client privilege applies in each relevant country and should consider hiring outside counsel to protect legal communications.

STAFFING THE INVESTIGATION

Retaining Outside Counsel

There are obvious benefits to relying upon in-house counsel to perform an internal investigation. Aside from the costs involved in retaining outside counsel, in-house counsel are more likely than outside counsel to understand a company’s general business operations and be most familiar with relevant personnel. Management may also feel more comfortable with having insiders investigating potential wrongdoing.

There are, however, more compelling reasons to retain outside counsel to perform the investigation. At a minimum, the retention of outside counsel gives greater assurance that an investigation is perceived as independent. This can be very significant to the DOJ, SEC, and other regulators. Additionally, while the attorney-client privilege may be extended to investigations undertaken by in-house counsel, outside counsel generally have an easier task in proving that they are acting in a legal rather than business capacity. Further, outside counsel may have developed expertise in the conduct of internal investigations, including investigatory techniques, protecting privileges, knowledge of applicable law, working with enforcement authorities and crafting reports prepared for disclosure. The investigated conduct may also require counsel who specializes in particular substantive areas of the law, such as compliance with federal securities laws, or government procurement statutes. Outside counsel will often also be better equipped to devote the requisite resources to an investigation. It is generally better to complete an investigation as quickly as possible, typically in a matter of weeks or months. Investigations may require analysis of hundreds of thousands of documents, dozens of employee interviews and the near full-time participation of dozens of attorneys and support staff. In some cases, the advice of in-house counsel may itself be under investigation, or may become a subject of investigation, resulting in a conflict of interest if they are responsible for the investigation. Lastly, any enforcement authorities are more likely to perceive outside counsel as independent.

If outside counsel is engaged to conduct an investigation, a further decision is whether to use outside counsel with pre-existing relationships to the company. Outside counsel with longstanding relationships to the company will have insights into the company’s general operations and personnel that could prove invaluable in undertaking an investigation, as well as effective working relationships with in-house counsel. However, the greater the prior relationship between the company and counsel, the greater the risk to the independence and objectivity of the investigation.

Establishing Reporting Lines of Authority and Supervision

Outside counsel conducting an internal investigation may have to coordinate new lines of supervision and authority. Depending on the nature of alleged wrongdoing, senior management or even the general counsel’s office itself may be implicated in the misconduct. In such situations the investigatory team should not “report” through the normal chain of command (i.e., to the general counsel). Instead, the establishment of a special committee or other committee

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42 See United States v. Weissman, No. 5194 Cr. 760, 1996 U.S. Dist. LEXIS 19066, at *33 (S.D.N.Y. 1996) (holding “that a joint defense may be made by somewhat unsteady bedfellows does not in itself negate the existence or viability of the joint defense”) (citing In re Grand Jury Subpoena Dues Tecum, 406 F. Supp. 381 (S.D.N.Y. 1975)).

43 See, e.g., McNally Tunneling Corp. v. City of Evanston, No. 00 C 6979, 2001 U.S. Dist. LEXIS 17090, at *9 (N.D. Ill. Oct 18, 2001) (common interest privilege not available as to communications concerning matter in which parties were adverse).

44 Laurel S. Temy, Introductory Note to the Court of Justice of the European Union: The Akzo Nobel EU Attorney-Client Privilege Case, 50 I.L.M. 1 (2011) (“Each EU Member State has its own set of rules or case-law governing the confidentiality or privileged nature of communications between clients and their lawyers . . . . Although EU Member States differ with respect to the nature, scope, and source of the confidentiality protection, all EU Member States offer some sort of protections.”).


of the Board, to whom outside counsel will report, may be preferable, and reporting lines should be established that are closely related to the way in which the client has been defined. Accordingly, care should be taken to insulate other board members and senior management from the conduct of the investigation so as not to prejudice the development of the investigation.

**GATHERING EVIDENCE AND CONDUCTING INTERVIEWS OF WITNESSES**

One of the first priorities of investigating counsel is to quickly gather all relevant documents and identify potential witnesses. These tasks will require that counsel promptly understand the nature of the company's business, its reporting processes and its policies and procedures. Time should be spent identifying the various categories of documents that could yield relevant information and knowledge.\(^{47}\) This is an area where the retention of outside experts, such as forensic accountants or engineers, by counsel will be particularly useful.

**Obtaining, Managing, and Analyzing Documents**

In conducting any investigation, the two most important sources of information will be witness interviews and the documentary record. The two are interlocking, and effective management of each is essential to the proper execution of the other. Careful and thorough review of the documentary evidence is crucial for uncovering the underlying facts of an investigation. Especially where the conduct under investigation did not occur recently, documents are crucial to piecing together a coherent narrative, given that witness recollections may not be fresh. This section addresses the critical issues involved in ensuring the proper management and analysis of documents in the course of an internal investigation.

In structuring and conducting an investigation, counsel will be more effective if all relevant documents are identified, secured and analyzed. Counsel will need to be familiar with the types of documents that might be relevant to the investigation, the systems that the company uses to produce and store documents and the individuals within the company who are available to assist with document issues. Counsel will also have to implement an appropriate system for identifying and tracking documents. Finally, counsel may have to manage the simultaneous use of documents for the internal investigation, as well as for production in any parallel civil, criminal or regulatory proceedings.

From the outset, counsel should identify an individual or individuals within the company who can serve as a coordinator for document issues. This person will often be an in-house lawyer or paralegal who is not otherwise involved in the matters under investigation and who should have a good working knowledge of the company’s document management systems and document retention policies. This person will need to be able to quickly identify for counsel potential sources of documents, as well as maintain a system for identifying which documents are new and which are duplicative of previously reviewed documents. This person will generally also be responsible for tracking document requests from litigation opponents, regulators or law enforcement, and ensuring that such requests are responded to in a timely and comprehensive fashion.

**Document Preservation**

Right from the outset of any investigation, counsel must take steps to ensure that relevant documents are preserved, segregated and collected. If the investigation was initiated as a result of the company’s receipt of a subpoena or document request, it is critical that all employees in possession of or with access to potentially relevant documents be instructed to refrain from altering, discarding, destroying or concealing any such documents. Even in the absence of a subpoena, a preservation notice is necessary to ensure that documents are not destroyed or disposed of in the ordinary course of business, so that they will be available to counsel in the course of conducting their investigation.\(^{48}\) The credibility of the investigation will be seriously impaired by a failure to identify and secure relevant documents right from the start. For that reason, the scope and distribution of any document preservation notice should, at the outset of the investigation, err on the side of overinclusiveness. Employees should be encouraged to contact counsel or one of its agents with any questions regarding document preservation, and provided with instructions on how to do so.

At the start of the investigation, the company should immediately cease the regular deletion of relevant documents, including emails. Similarly, copies should be made or backup tapes pulled of relevant databases or similar resources. If appropriate, counsel or someone working under counsel’s supervision should be sent to search for and retrieve documents from the various offices or off-site facilities where documents may be located.

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\(^{47}\) For instance, in a case involving potential accounting fraud, counsel should familiarize themselves with the relevant accounting reporting systems, and the internal processes followed by the company’s financial management for assessing and externally reporting the company’s financial results.

\(^{48}\) The preservation notice should be directed not only at employees, but also at any third-party vendor who maintains documents or data for the company.
Employees should be provided a comprehensive list of the types of documents that they are to search for and provide to counsel. There should be explicit instructions to provide drafts and notes, in addition to finalized documents, as it will often be crucial to the investigative process to be able to track the evolution of particular documents over time. In addition, employees should be instructed to search for potentially relevant documents not only in their offices and workspaces, but also in any records in off-site storage, as well as their homes and personal offices and devices. Counsel may want to consider obtaining a written, signed certification from employees stating that they have provided all responsive documents and data. Such a certification will be useful to the company if additional documents from employees are identified in the course of a subsequent regulatory investigation. Efforts should also be made to obtain documents from former employees, even if they have no obligation to cooperate.

Careful attention should be paid to ensure the timely and comprehensive retrieval of electronic documents. In recent years, email has become perhaps the single most important source of information for the conduct of an investigation. Counsel must have access to personnel who understand the capabilities and limitations of the company’s information systems, so that they will know exactly what is available, and how long it will take to retrieve that data.

Effective use of document management technology can greatly increase the efficiency and quality of an investigation. Counsel should seriously consider having all documents electronically scanned and catalogued as soon as they are gathered. The maintenance of such a database will provide the team with the ability to search and organize the vast amount of data that is collected in even smaller investigations, as well as to be able to retrieve and produce documents with a minimum of turnaround time. Counsel may choose to use the services of an outside vendor to handle this process. \(^\text{69}\) Vendors will also be able to assist with copying and analyzing data sources such as hard drives, PDAs and encrypted files, should it become necessary in the course of the investigation. Vendors possess certain sophisticated search and management technologies that can drastically increase the efficiency of a document review by refining data sets to the most relevant information.

**Organizing Document Review**

It is crucial for both the investigative process and for the credibility of the investigation that documents be carefully tracked throughout the investigation. An individual or team should be designated to be responsible for managing documents as they are collected. A log or electronic identification system should be used to identify for each document its source, who possessed it, where it was found and the date that it was collected. It may be helpful to use an electronic numbering system for each of the documents, so that they can be tracked as they are used during the investigation. The document coordinator should retain all original versions of documents, so there are no chain-of-custody issues in any subsequent litigation.

When documents are received, they should be reviewed for relevance and privilege. Any documents that are determined to be privileged should be segregated immediately in order to prevent any inadvertent waiver of the privilege. Access to privileged documents should be limited to counsel and its agents. A privilege log should be maintained, in which the document number should be noted, as well as the date, the author, the recipients, and the basis on which privilege is being claimed. Regulators or civil litigants will frequently request such a log, and counsel will benefit greatly if it has tracked that information from the outset, rather than attempting to recreate it later in the investigation.

If possible, a preliminary list of potential interviewees should be assembled prior to the review of documents. This will allow reviewers to assemble sets of documents that are relevant to particular interviewees, so that they can be used to prepare for, or use in, the interviews. The reviewers should be cognizant of which names are or are not on the list, so that they can add new names as necessary, based on the contents of the documents being reviewed. It is often the case that the most informative witnesses are ones that were not known to the investigators at the outset of the investigation. In addition, documents should be identified and assembled by subject area. At the outset of the investigation, it is better to cast a wide net of potential interviewees and areas of interest. The topics of interest will likely change and be refined over the course of the investigation.

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\(^\text{69}\) If a vendor is used, the vendor should, for purposes of maintaining the privilege, be retained as an agent of counsel, rather than the company.
It is important that “hot documents” be identified and circulated to relevant personnel on the investigation team. The document coordinator should also maintain a file of these documents. In addition, the document coordinator should keep copies of all the different witness and topic binders, so that it is easy to determine what documents were shown to particular witnesses during their interviews. Counsel should take care to use numbered versions of the relevant documents in these binders, so that they may be easily cross-referenced with documents used in other contexts.

The document review team will also generally be responsible for assembling and maintaining a detailed chronology of the event or events under investigation. This chronology should be cross-referenced with the available documents, and should be continuously updated over the course of the investigation. For each event, the chronology should list, at a minimum, the date, the event and the source. If the source is a document, the chronology should note the author, any known recipients, and the custodian from whom the document was obtained.

**Interviews**

While considerable information may be gleaned from documents, interviews of individual employees, former employees and other personnel inside or outside of the firm are indispensable in fleshing out the meaning of documents, can help direct investigators to important documents, and generally help investigators evaluate facts and assess credibility. Because they assume such extensive importance in an investigation, particular care must be given to planning for and conducting witness interviews.

In many situations, it is beneficial to begin interviews at an early stage of an investigation, even before a significant number of documents have been reviewed. This will allow the investigators to get a greater understanding of the facts as quickly as possible and will “lock-in” the story of significant witnesses before they are influenced by other events. This strategy may only be advisable if the investigators will have more than one opportunity to interview a witness.

It may be advantageous to schedule interviews with lower level employees first, before speaking with more senior officials in the organization. In some situations, counsel will have only a single opportunity to interview senior officials, so it is best to do so only at a later stage in the investigation. Wherever possible, it is helpful to interview employees with information on similar subject matters in close proximity. It is also preferable to have the same counsel interview all employees who are able to provide similar types of information.

Counsel will not always be able to follow these strategies. For instance, government requests, employee resignations or disciplinary action may force counsel to interview some officials earlier than might otherwise be preferable. The persons to be interviewed, and the order of those interviews, should be frequently assessed. Counsel should be flexible to accommodate the exigencies and changes of the investigation. Counsel should also be prepared to conduct follow-up interviews, particularly where the initial interview took place at an early stage of the investigation, before counsel had an opportunity to review and digest many relevant documents.

Wherever possible, interviews should be staffed by two lawyers. Having two people present enables one individual to focus on conducting the interview while the other takes notes. Moreover, interviews should generally not be recorded or transcribed (to protect privileges and to avoid intimidating a witness), and having two people present can facilitate recollection of what a witness said on a particular subject. In addition, the recollections of two interviewers may be helpful if a witness subsequently denies a statement made during the interview.

Given the significant exposure faced by individuals in internal investigations, it is increasingly common for employees to retain their own individual counsel. Retention of individual counsel should normally be allowed unless it unnecessarily delays or impedes the investigation. The company may be contractually or statutorily obligated to pay for counsel for an individual, and should evaluate whether it has such obligations at the outset of the investigation. Even if there is no legal obligation, the company may still decide to pay for counsel.\(^\text{50}\)

If it is decided that counsel for individuals is necessary, steps should be taken to limit cost and inefficiencies. In some situations, individuals may need and want independent counsel. However, in other situations, it may be desirable for the company to recommend counsel for individuals whom the company believes will not be unduly disruptive to the investigation. It also may be possible, subject to conflicts, for that counsel to represent more than one employee in the investigation. Finally, it may further be appropriate for “shadow” counsel to be retained to consult with employees on an “as needed” basis.

At the beginning of every interview, counsel should provide what is commonly known as an “Upjohn warning.” This warning, at a minimum, specifies that counsel has been

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\(^{51}\) These warnings evolved as a result of the Supreme Court’s ruling in *United States v. Upjohn*, 449 U.S. 383 (1991).
Conducting Internal Investigations

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Information from employees presented to counsel may be more easily overcome. Thus, should a privilege be deemed to provide information unmediated by counsel, the work and perhaps the investigation. Such warnings are particularly important if the interviewee is a current employee and is not represented by individual counsel. Depending on the circumstances, additional warnings may be given. For example, it may be appropriate to disclose to witnesses that there is a related governmental investigation ongoing, that the company is cooperating fully with that investigation, that it may turn over notes of the interview to the government, or that the company intends to waive the privilege. Failure to make such disclosures could cause the witness to challenge the propriety of the interview and perhaps the investigation.

Documents are indispensable in conducting interviews. Even where investigations are conducted in close temporal proximity to alleged misconduct, documents are often necessary to refresh a witness’ memory. Strategic use of documents may also be helpful in assessing individual witnesses’ credibility. Generally, it is useful to begin by asking relatively open-ended questions of witnesses without direct use of documents, in order to determine what the witness is able to remember independently.

Interviewers should generally avoid using questionnaires to elicit information from witnesses. In-person interviews (and to a lesser extent telephone interviews) will enable fuller communication, likely yield more information and provide a basis on which to assess the witness’ credibility. Questionnaires also introduce significant privilege concerns, even though Upjohn makes it clear that responses to questionnaires are generally protected by the attorney-client privilege. Because employee responses to questionnaires provide information unmediated by counsel, the work product protection that attaches to these materials may be more easily overcome. Thus, should a privilege be deemed to have been waived or never to have attached in the first place, information from employees presented to counsel may be deemed to be purely factual work-product, and more easily subject to discovery. Questionnaires should therefore be used only sparingly and in connection with information that investigators determine would not pose a risk for the client. For instance, a questionnaire may serve a useful purpose of helping to narrow the scope of individuals to interview in person by inquiring as to the recipient’s basic factual involvement with a particular transaction or set of events.

While many of the documents key to an investigation may be collected centrally through a corporation’s information technology and records management personnel, it is critical that counsel ask interviewees whether they have additional documents in their possession not previously made available to counsel. Employees may have files in their office, at their homes or on cellphones, laptops or other personal computer devices. Witnesses should also be asked if they are aware of any relevant documents that have been destroyed.

Interviews should be memorialized in writing to maximize their utility to the investigation, particularly by promptly sharing key information from the interview with other team members, and to assist counsel in identifying any discrepancies in witness statements. Interviews should not be transcribed or recorded, however, because transcripts or recordings could be discoverable. Memoranda of the interviews will be more likely to be protected by attorney-client and work product privileges to the extent they incorporate counsel’s legal conclusions and mental impressions of the interview, rather than a verbatim transcript. The need for accuracy in interview memos is obviously important and counsel should take the necessary time in an interview to make sure the witness’ statements are understood.

To help preserve the attorney-client privilege and work product doctrine, interview memos should be prominently marked “Attorney-Client Privilege” and “Attorney Work Product.” In addition, an introduction to the summary should indicate that the interview was undertaken to render legal advice. The summary should also specify that the appropriate warnings were given to the employee and that the summary contains the mental impressions of counsel and does not represent a substantially verbatim transcript of the interview.

16 See In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 339-40 (4th Cir. 2005), cert. denied, 546 U.S. 1131 (2006) (holding that, after receiving Upjohn warning, employees could not have reasonably believed that the investigating attorneys represented them personally, and therefore rejecting employees’ attempt to prevent company’s production of privileged interview memoranda on basis of assertion of joint defense privilege); cf. United States v. LeCroy, 348 F. Supp. 2d 375, 383 (E.D. Pa. 2006) (though implicit joint defense agreement may have existed, employees “voluntarily and knowingly waived” the protection of that agreement when they conducted interviews with company counsel after being advised that company might waive the privilege if government so requested).


18 See, e.g., In re John Doe Corp., 675 F.3d 482, 492 (2d Cir. 1982).

19 See, e.g., In re Royal Ahold, N.V. Sec. & ERISA Litig, 230 F.R.D. 453, 436-37 (D. Md. 2005) (allowing discovery of typed memoranda of potential witnesses when contents of memoranda were “fairly straightforward recitation[s] of the information provided by the witness(es”).) Note that under Rule 26(b)(3) of the Federal Rules of Civil Procedure, a party to litigation has an absolute right to obtain “a statement concerning the action or its subject matter previously made by that party.” FED. R. CIV. P. 26(b)(3). For purposes of the Rule, a “statement” is defined as: “(A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.” Id. Interview memoranda that are not expressly adopted by the interviewee are not discoverable under Rule 26(b)(3). See, e.g., Robinson v. Time Warner, Inc., 187 F.R.D. 144, 147 (S.D.N.Y. 1999).

20 See Upjohn, 449 U.S. at 399 (“Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes.”).
REPORTING THE FINDINGS OF THE INVESTIGATION

The client likely will want some kind of report at the conclusion of the investigation, in either oral or written form, or both. This final report will be the culmination of the investigation, and may be the first time that the client is apprised of the key facts that were uncovered. It may also be the only opportunity for counsel to articulate the legal conclusions dictated by the findings of the investigation. For these reasons, one of the most important decisions the client will have to make is what form that report will take. The determination whether to produce an oral or a written report is not an easy one, as there are potentially important advantages and disadvantages to either approach. Counsel should understand the risks and benefits of both approaches, and should ensure that the client makes a careful and informed decision.

In the event that the client chooses to proceed with a written report, counsel must act carefully to ensure that it is drafted in such a manner so as to protect the client to the maximum extent possible, including the maintenance of all applicable privileges. This section explores the advantages and disadvantages of producing a written report of an internal investigation, what that report should look like and what alternatives exist. This section also addresses the issue of whether or not to provide the report to law enforcement or other regulators, or to release it publicly.

Advantages and Disadvantages of a Written Report

A written report can provide the client with all of the key facts and legal conclusions in a single document, allowing for informed consideration of any remedial or disciplinary actions to be taken. A written report also provides tangible evidence that the client (whether the company or the board) has sanctioned a thorough and complete examination of the issues being investigated. Written reports of internal investigations are frequently provided to regulators or law enforcement authorities in order to demonstrate cooperation. Finally, companies frequently use written reports of investigations to refute charges of wrongdoing in litigation.

In some cases, there is no practical choice other than producing a detailed written report. Both the SEC and DOJ have made numerous statements that credit may be given to companies that conduct internal investigations. Thus, companies may feel compelled to turn over the results of an internal investigation.

However, there are compelling arguments against producing a written report, and the decision to do so should not be entered into lightly. A written report will frequently contain findings or information that are potentially embarrassing or even damaging to the company. Even if the company intends to keep the report’s findings confidential, maintaining the confidentiality of the written report can be exceedingly difficult. In addition, while the report may have some usefulness in dealing with regulators or law enforcement, it may also provide a roadmap for them to conduct their own investigations. It may also provide a similar roadmap to civil litigants, who otherwise might not become aware of the issues under investigation. Finally, statements in the written report may be used as “admissions” by the company under the Federal Rules of Evidence.58

Assuming that a thorough written report is not required to be produced, counsel should carefully review with the client the various alternatives. Two of the more common alternatives are either a limited written report or an oral report. A limited written report can include only certain of the issues investigated or be more of an executive summary without significant or identifying details (though, of course, it must still be accurate in what it does contain). An oral report provides the client with the necessary findings of the investigation without producing a written document that may be open to misinterpretation or misuse.59

Given the increased flexibility and protections of confidentiality attendant to the choice of an oral report over a written report, the oral report is an appealing alternative to a written report. However, there are drawbacks to this approach as well. If the existence of the investigation is already known to the public or regulators, the client’s choice not to receive a written report of the investigation may expose the company to accusations that it is trying to conceal the

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58 See FED. R. EVID. 801(d)(2).
59 Counsel’s notes prepared for use in making an oral report are almost certainly protected from discovery by adverse parties as opinion work product.
findings of the investigation, or prevent particular facts from getting out. Indeed, if the findings of the report do not create a particularly high level of exposure for the company, it is quite possible that the perception created by the failure to obtain a written report could be more damaging to the company than would the release of those findings. The client will need to assess the relative benefits and dangers of each approach, and make a decision that maximizes the utility of the report, in whatever form, while minimizing the dangers, both legal and reputational.

Structuring the Report

The entire investigation should be conducted with an eye toward preparing some kind of final report and the decision whether to produce a written or an oral report can be made late in the process. It is imperative that counsel proceed with the utmost care in preparing the report. By recognizing the likely uses of the report, either by the client or by law enforcement, regulators or private litigants, counsel can prepare the report in a manner that best serves the client’s interests. While the following section describes the preparation of a written report, the principles articulated apply equally to an oral report.

Even if it is decided early in the process to prepare only an oral report, counsel should begin assembling an outline of a report early in the investigative process. This outline should be protected by the work product doctrine. Facts can be added or changed to the outline as the investigation continues. In addition, the outline should contain cites of the source of the information so that it can be tracked quickly if necessary. What follows is a description of the various general subject matters that may be addressed by the report, along with a brief explanation of each.

Background and Mandate

The first section of the report should address the procedural background that led to the retention of counsel to conduct the investigation (e.g., whether the investigation was precipitated by the receipt of a subpoena, a whistleblower letter, facts uncovered in testimony, etc.). This section should describe counsel’s understanding of all of the events leading up to its retention. This section will lay out counsel’s understanding of the posture of the matter prior to the investigation, in order to provide context to later portions of the report. If the investigation was undertaken pursuant to an outside mandate, such as from a bankruptcy examiner or as part of a settlement, that information should be disclosed in this section.

Perhaps most importantly, this first section should also contain an explicit identification of the client (i.e., whether it is the company, the board, or a special committee) and a description of counsel’s mandate in undertaking the investigation. The report should state in clear and precise terms exactly what issues counsel was hired to investigate, and what limitations, if any, were placed on counsel by the client. The report should state whether counsel was limited to investigating the matter that led to the investigation in the first place, or whether counsel had the discretion to explore any related matters as deemed appropriate. Finally, in order to obtain the maximum protection of the attorney-client privilege, when applicable, this section of the report should state explicitly that counsel was retained to provide legal advice to the client.

Executive Summary

This section should provide a summary of the findings and conclusions. This section makes it easier for the reader to review the report, particularly if the written report is extensive. Also, since the written report may be read by persons with different agendas and objectives, an executive summary should be written for readers with various perspectives.

Review of the Investigation

The next section should focus on reviewing the steps that counsel took in order to conduct the investigation. This section can note the time it took to conduct the investigation, the number of counsel who worked on the investigation, the total number of hours worked on the matter, the number and types of documents collected and analyzed, all of the locations visited and searched for relevant documents (including storage facilities), the number and identity of the people interviewed, and whether any outside experts were retained and consulted. It is also important to identify any witnesses who declined to cooperate or were otherwise unavailable to counsel, and the reasons they provided, as well as, to the extent possible, a description of any known documents or data that could not be reviewed. Finally, counsel should provide a narrative assessment of whether they believe they had sufficient cooperation from the client and others to conduct the investigation. Clients and others who are aware that this will be discussed in the report of an investigation may be more likely to be fully cooperative in the course of the investigation.
Findings

This section should lay out a narrative description of the relevant facts. The organization of this section will depend on the number and types of matters that were investigated. In some instances, this section may lay out the facts in chronological order, while in other instances it may make sense to group the facts by, for example, transactions, business groups or issues. However it is organized, this section may include either a detailed recitation of the facts or a more summary-type description.

The contents of this section will serve as the basis for the later legal conclusions and recommendations. To the extent that the report will include significant details, it is crucial to the credibility of the report as a whole that counsel should be able to identify the basis for each and every statement in this section. If assertions by witnesses are contradictory, or conflict with documentary evidence, that should be stated clearly, but in a non-inflammatory manner, focusing only on the fact of the inconsistency. Any areas where counsel was unable to verify information or where there are questions as to the accuracy or authenticity of particular documents or information should also be noted and explained.

Conclusions

This section is significant as it provides an assessment of the potential legal vulnerabilities of the company based on the facts identified during the investigation. The report should lay out the legal standards used, and should be limited to only those facts that were discussed in the “Findings” section.

The structure of this section is heavily dependent on the purpose of the investigation. If, for example, the investigation was intended to determine the persuasiveness of a particular practice within a company, the legal conclusions section may focus on the potential liability of the company and particular employees for offenses related to that practice. On the other hand, if the investigation is being undertaken as, for example, counsel to a bankruptcy examiner, the focus of the legal conclusions may be an assessment of the relative strength of the bankruptcy estate’s claims for recoveries against various parties.

In laying out its legal conclusions, counsel may want to address not just those laws that may have been violated, or those claims that can be asserted, but also violations or claims that it considered but found lacking in support. This can help the client by providing a framework for analyzing potential culpability should new information come to light.

More importantly, a well-reasoned discussion of why the company’s conduct was not violative of any law or regulation can be used by the company to persuade the relevant authorities that charges against the company are not warranted.

Recommendations

To the extent requested by a client, there may be a section on counsel’s recommendations for any actions it believes the company should or is compelled to take. The types of recommendations which are generally included in such reports include:

- Personnel actions, such as firing, suspending, reassigning, or otherwise disciplining particular employees;
- Structural reforms, such as changes to reporting lines or review structures, the creation of new committees or positions, the elimination of particular business practices, or even the sale of part or all of the company;
- Improvements to the company’s internal control processes;
- Description of areas requiring additional scrutiny, whether by the same counsel or as part of a separate investigation;
- Legal actions to be taken by the company, such as a civil suit, regulatory action, or filing for bankruptcy protection.

Careful attention should be given if recommendations are made. If the company declines to follow the recommended course of action, it may expose itself to scrutiny by regulators or civil litigants. Therefore, counsel should be wary of the potentially burdensome effects of its recommendations (both individually and cumulatively) as it crafts this section of the report.

The elements of an effective report of the investigation will be the same no matter what form the report takes. Even if no written report is produced, counsel should be prepared to address all of the topics noted above in an oral report. By keeping these elements of the final report in mind during the course of the investigation, counsel will be able to conduct the investigation in a manner calculated to maximize its utility to the client.

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60 As a general matter, statements presented as “facts” are more vulnerable to later claims of defamation than those clearly characterized as “opinion.” See, e.g., Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1500 (D.D.C. 1987) (noting, in the context of discussing a defamation suit by a company employee against the author of an investigative report, that “statements of opinion are absolutely exempt from libel suits under the first amendment.”) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)). Therefore, to avoid potential defamation claims from employees who are included in the report, it is important to clearly note that any judgment as to the employee’s veracity is counsel’s opinion, in light of the known facts. This may provide some measure of protection under the absolute exemption for opinions referenced in Pearce.

Disclosure of the Report

After the completion of the investigation, the company will be faced with the question of whether or not to disclose the report or the findings of the investigation, and if so, how it will go about doing so. With respect to the first issue, whether the report or the findings should be disclosed at all, the answer will depend first on whether the company is legally obligated to make such disclosure. Even if no legal obligation exists, the company may nevertheless choose to voluntarily disclose the findings. Whether by compulsion or by choice, the disclosures must be handled with recognition of the likely consequences of making public such sensitive information about the workings and conduct of the company, as well as with an eye towards maintaining any available protections for information that is not part of the company’s disclosures.

Required Disclosure

At the conclusion of the investigation, counsel and the client should carefully analyze the nature of the information uncovered in the course of the investigation, as well as the legal conclusions laid out by counsel, to determine whether any agreements, statutes, regulations or other legal rules require some disclosure by the company. In some instances, the company may be committed to make some disclosure as a condition of a previous agreement or settlement. Regulators will sometimes require as part of a settlement a company agreement, statutes, regulations or other legal rules require some disclosure by the company. In some instances, the company may be committed to make some disclosure as a condition of a previous agreement or settlement. Regulators will sometimes require as part of a settlement a company to appoint an independent person to conduct an internal investigation to examine the pervasiveness of a particular practice within that company and prepare a written report to be turned over to the regulator.62

Publicly reporting companies must make a separate determination of whether they are required to disclose in a public filing the findings of an internal investigation. In some instances, disclosure may be required by specific regulations that require public companies to disclose certain facts or events to investors. For instance, evidence of certain environmental compliance issues may require specific disclosure.63 Similarly, companies that do business with the federal government are required to disclose in writing to the Inspector General of the contracting agency if the company has “reasonable grounds” to believe that kickbacks may have been paid.64 Federally insured banks are subject to similar requirements if they believe they have been defrauded.65

As to other types of misconduct, while the company is not required to disclose any and all negative facts in its possession, the rules governing the content of filings under both the Securities Act and the Securities Exchange Act mandate that those filings must include material information if that information is needed to make any of the company’s statements not misleading.66 Materiality, in this context, is defined as information of which there is a “substantial likelihood that a reasonable shareholder would consider it important.”67 If the investigation did uncover evidence of illegal activity by the company or its agents, the weight of authority holds that there is no requirement that the company disclose its illegal conduct unless such disclosure is necessary to make other statements not misleading.68 The SEC also may take the position that ethical lapses by senior officers of a company are material. While these rules dictate that certain information may be required to be disclosed in some instances, it will rarely be the case that the entire report of the investigation must be disclosed. However, the company should be aware of the danger of selective disclosure, as the sharing of the report with some investors but not others would almost certainly constitute a violation of Regulation FD.69

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63 See 17 C.F.R. § 229.10(b)(6) (Regulation S-K) (2006) (“The appropriate disclosure . . . shall be made as to the material effects that compliance with [environmental regulations] may have upon the capital expenditures, earnings and competitive position of the registrant.”).
66 See, e.g., Exchange Act §10(b), Exchange Act §12b-20, 17 C.F.R. § 229.308(a)(13)(iv) (2006) (Regulation S-K) (requiring MD&A disclosure to include “any known trends or uncertainties that have had or that the registrant reasonably expects will have a material . . . unfavorable impact” on the company’s net sales or revenues).
67 TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). There must also be “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).
68 Courts have consistently held that, absent an affirmative duty to disclose under a particular law or regulation, there can be no criminal liability for failure to disclose uncharged wrongful conduct. See United States v. Matthews, 787 F.2d 38, 49 (2d Cir. 1986) (holding that uncharged criminal conduct need not be disclosed in proxy statements pursuant to Rule 14a-9); United States v. Crop Growers Corp., 954 F. Supp. 335, 346-47 (D.D.C. 1997); In the civil context, courts have reached conflicting decisions. Compare Roeder v. Alpha Indust., Inc., 814 F.2d 22, 28 (1st Cir. 1987) (holding that plaintiff had failed to state a claim for a violation of Rule 10b-5 against defendant for failing to disclose, until indictment was imminent, bribery payments by executive, because, even if payments were material, no duty to disclose existed); Menkes v. Stoll-Nielsen S.A., No. 3:03cv409, 2005 U.S. Dist. LEXIS 28038, at *28-29 (D. Conn. Nov. 10, 2005) (“Rule 10b-5 generally does not require management to accuse itself of antiscalar or illegal policies” (quoting Amalgamated Clothing & Textile Workers Union, AFL-CIO v. J.P. Stevens & Co., 475 F. Supp. 328, 331 (S.D.N.Y. 1979), vacated as moot, 638 F.2d 7 (2d Cir. 1980)); Galati v. Commerce Bancorp, Inc., No. 04-3252, 2005 U.S. Dist. LEXIS 26881, at *17 (D.N.J. Nov. 7, 2005), aff’d, No. 05-5157, 2007 U.S. App. LEXIS 7315 (2007) (citing Roeder); see, e.g., In re Fohn, 97 F.3d 47, 1269-91 (9th Cir. 1996), cert. denied, 522 U.S. 833 (1997); In re Par Pharm., Inc. Sec. Litig., 733 F. Supp. 668, 675 (S.D.N.Y. 1990) (plaintiffs stated 10b-5 claim when they alleged that defendant corporation had failed to disclose allegedly illegal payments to government officials to speed drug approval process, but had touted company’s ability to obtain such approvals without describing how); Ballan v. Wilfred Am. Educ. Corp., 720 F. Supp. 241, 249 (E.D.N.Y. 1989) (defendant violated Rule 10b-5 when it failed to adequately and timely disclose that it was likely to be indicted for failure to comply with government regulations regarding student loan applications); Cf. In re Teledyne Def. Contracting Derivative Litig., 849 F. Supp. 1369, 1382-83 (C.D. Cal. 1993) (neither investigation nor underlying fraudulent conduct are required to be disclosed until charged or proven).
Voluntary Disclosure

Even when the company is not compelled to make disclosure of the findings of the investigation, there are still reasons to consider voluntarily disclosing those findings. Voluntary disclosure allows the company to control the timing, content and manner of any release of news to the public, and can be of significant use to the company in attempting to manage the potential adverse consequences of disclosure. In addition, there may be certain legal and/or regulatory advantages to making a full and voluntary disclosure. However, in practical terms, some of these advantages may be overstated.

In circumstances where information about the investigation or the underlying conduct has already become public, the company can use the public disclosure of the investigation findings as a method of trying to regain some measure of control over public perception. A thorough, well-written report can be used to refute any inaccurate information that may have been disseminated. Even if the report has uncovered wrongdoing, the company may feel a frank and forthcoming appraisal of its own behavior will resonate positively with investors and the public generally. This tactic may be especially attractive to the company in instances where the wrongdoing was of a less serious nature (i.e. where there is likely no criminal or material financial exposure for the company), or was restricted to the actions of a limited number of individuals. In such circumstances, the public release of the report is more likely to provide at least a measure of finality to the investigation. Even if the potential consequences of the underlying conduct are more severe, the company may choose to make full public disclosure in order to begin to restore public confidence by getting all of the “bad news” out at one time, as opposed to piecemeal revelations that might constantly raise suspicion regarding what further news might emerge. If it is decided to release publicly a report, it may be useful for public companies to provide a copy to the SEC beforehand.

If a report is not publicly disclosed, the company may decide to disclose the results of the investigation to regulatory or law enforcement officials. The company may seek to foreclose potential regulatory action or criminal prosecution by presenting the underlying facts in a manner more favorable to the company. Such a disclosure can be a means for the company to present to authorities any argument or authority that may dissuade them from taking action against the company, or to be more lenient in settlement discussions.

In recent years, the SEC and other government authorities have increasingly sought to encourage voluntary disclosure of misconduct by companies. A notable example of this has been in the Justice Department’s guidelines for prosecution of corporate entities, the “McNulty Memorandum,” named after its author, Deputy Attorney General Paul McNulty. The McNulty Memorandum dictates that one of the considerations for prosecutors to take into account in assessing whether a corporation’s cooperation with government investigators is sufficient to prevent an indictment is “[t]he corporation’s timely and voluntary disclosure of wrongdoing, . . . .” The McNulty Memorandum was followed in 2008 by a Memorandum by Deputy Attorney General Mark Filip. The Filip Memorandum confirmed that the DOJ “understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system.” The Filip Memorandum further stated that cooperation credit would be based on the disclosure of the “relevant facts” and not on the waiver of the attorney-client privilege or the attorney work product protection.

Recently, the DOJ has indicated that it will place increased emphasis on the prosecution of individuals in corporate crime cases and will rely on the Filip Factors to encourage corporate cooperation in these efforts, including “[i]n the investigation of its agents.” In his September 2014 remarks, Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller stated that “[v]oluntary disclosure of corporate misconduct does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible.” According to Mr. Miller, the DOJ will deny cooperation credit to companies who fail to provide information and evidence about executive and employee criminal misconduct. These points were reiterated by Deputy Assistant Attorney General Sung-Hee Suh in January 2015.

30 The McNulty Memorandum was an update of an earlier version of the guidelines known as the “Thompson Memorandum,” after its author, former Deputy Attorney General Lary Thompson. The McNulty Memo was issued in response to wide-ranging criticism of the Justice Department’s perceived insensitivity on companies waiving the attorney-client privilege in order to obtain credit for cooperating with prosecutors. As stated in the McNulty Memorandum, companies can receive credit for waiving the privilege, but may not be penalized for not doing so. McNulty Memorandum at § VIII.B.2. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2006) (allowing for lowering of sentence if defendant organization has “within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.”).

31 McNulty Memorandum at § III.A.4.

32 Filip Memorandum (August 28, 2008) at 8.

33 Id. at 4.


35 Mr. Miller specifically identified two cases in which corporations “paid a historic price not only for their criminal conduct, but also for their insulation of culpable corporate employees.” See, e.g., United States v. BNP Paribas SA, No. 1:14-cr-00460-LGS (S.D.N.Y. 2014) (discussing Filip Factor Four) (transcript available at www.justice.gov/criminal/pr-speeches/2014/crm-speech-1409171.html).

36 Filip Memorandum (August 28, 2008) at 8.

Similarly, the SEC has also taken steps to encourage corporate and individual cooperation with investigations. In the 2001 Seaboard Report laying out its criteria for assessing cooperation by companies who have engaged in potentially violative conduct, the SEC suggested that it seeks an affirmative response to all of the following questions:

Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation? 77

Additionally, in 2010 the SEC announced the creation of its Enforcement Cooperation Program. 78 Borrowing from the approach used by DOJ and other agencies, the SEC announced that it would assess the actions of entities and individuals to determine when it may be appropriate to give credit for cooperation. Since this program took effect, the SEC has repeatedly provided such credit through the use of cooperation agreements, deferred prosecution agreements, and non-prosecution agreements. 79

The benefits of seeking credit for cooperation are clear. In many cases, it is both necessary and appropriate for the company to take any steps reasonably available to it in order to avoid indictment or a fraud accusation. However, both the Justice Department and the SEC are extremely exacting in their assessment of cooperation, and will frequently make additional demands on the company beyond the disclosure of an independent investigation. 80 By making such an approach to the authorities, the company may find itself without any further leverage against the ever-increasing demands of the government investigators. For this reason, the company may find that it has sacrificed more than it has gained when it takes the dramatic step of voluntarily producing its findings.

Disclosure of the report, whether to the public or to the government, may also create significant pressure on the company to take disciplinary action against the individuals identified as having participated in any wrongdoing. By exposing these identities to the public, the company may lose the flexibility to make its own determination of the appropriate punishment for the various levels of culpability typically found in an internal investigation. 81 Similarly, the company may find itself subject to public pressure to constrain or abandon certain business or governance practices that were the subject of the investigation. By publicizing the results of the investigation, a situation is created where failure to take certain remedial action may cause the company to be perceived as indifferent to or ignoring perceived responsibilities. This pressure may undermine the company’s ability to act without public influence.

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80. Disclosure to governmental authorities has certain other risks. In two instances, the government has brought obstruction of justice charges against executives who provided false or misleading information to counsel conducting an internal investigation of their employer. In both cases, the charges were brought under 18 U.S.C. § 1512(c)(2), which makes liable anyone who “corruptly … obstruct(s), influence(s), or impede(s) any official proceeding.” The charge was first used in this context in 2004, when federal prosecutors charged several former executives of Computer Associates, Inc., with obstruction in connection with allegedly false statements that the executives made to outside counsel in the course of an internal investigation of accounting fraud at the company. The government’s case rested on the theory that the executives were aware of the company’s intention to provide the results of the investigation to the government. See, e.g., Information, United States v. Wighton, Cr. No. 04-847 (E.D.N.Y) (Sept. 22, 2004). The SEC, in the civil context, included similar charges against the executives. See, e.g., SEC v. Computer Assocs. Int’l Inc., Litig. Release No. 18891, 2004 SEC LEXIS 2157, at *6 (Sept. 22, 2004). The Deferred Prosecution Agreement with Computer Associates itself makes reference to the obstruction by its executives as well. See supra note 20. Then, in 2006, the United States District Court for the Southern District of Texas refused to dismiss the indictment of a gas trader who was charged under § 1512(c) (2) with lying to counsel conducting an internal investigation relating to charges of false reporting of gas prices by the trader, marking the first time this theory had survived judicial scrutiny. See United States v. Singleton, 178 F. App’x 259 (S.D. Tex. 2006), cert. denied, 127 S. Ct. 420 (2006).

81. The public disclosure of the report also exposes the company to potential libel claims by the individuals identified. See, e.g., Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490 (D.D.C. 1987), where former United States Attorney General Griffin Bell, then in private practice, was sued for stating in an investigative report (the findings of which were disclosed publicly at a press conference) that, inter alia, as to plaintiff’s conduct, “no reasonable person could have believed that this conduct was proper,” that the plaintiff had “actually engaged in wrongdoing,” and that the plaintiff was “a moving force in improprieties.” Id. at 1501. The court, noting the widespread dissemination of the report (via the press conference) rejected Bell’s contention that the statements in the report should be protected by the “absolute privilege” that attaches to statements of opinion, and instead ruled that a negligence standard should apply. Id. at 1503-06. For a fuller discussion of the potential exposure of counsel to libel claims for investigative reports, see Edwin G. Shalett & Natalie R. Williams, Report of the Investigation, in INTERNAL CORPORATE INVESTIGATIONS (Brad D. Brian & Barry F. McNeil eds., 2d ed. 1993).
The biggest drawback to voluntary disclosure is the likelihood that such disclosure will lead to the loss of the attorney-client privilege, or even of work product protection, for not only the report, but for the underlying documents and investigative record as well. While exceptions exist, as a general rule, disclosure to the government of the report of an internal investigation will serve as a waiver of the privilege as to that report, and thus expose it to discovery by civil litigants. Thus, while the company may desire to avail itself of the opportunity to receive credit for cooperation with government investigators by turning over the report, it needs to recognize that the report may be discoverable in any parallel civil proceedings as well.

Companies have frequently attempted to argue that an independent report should remain protected from discovery on the basis of a finding that there was only a “selective” or “limited” waiver of the attorney-client privilege. The Eighth Circuit, in its 1977 decision in *Diversified Indus., Inc. v. Meredith*, held that the plaintiff company’s disclosure to the SEC, pursuant to a subpoena, of certain privileged information developed in the course of an internal investigation did not constitute a blanket waiver of the attorney-client privilege. The court reasoned that “[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.” A limited number of other courts have also acknowledged the possibility of limited waiver, though typically relying on the existence of a confidentiality agreement between the disclosing party and the government as a basis for their finding.

The vast majority of courts that have examined the issue, however, have rejected the selective waiver theory, though they have differed to some extent on the scope of the waiver effected after disclosure to the government. Most of the objections to the theory of selective waiver center around the premise that the privilege only attaches to those communications that are not intended to be revealed to third parties and that selective waiver will allow the abrogation of that confidentiality only when it benefits the company. In the face of the overwhelming reluctance of courts to accept selective waiver, there has been some pressure to create legislative action a statutory exemption from total waiver in order to incentivize companies to share investigative reports with government prosecutors.

Though courts have been resistant to attempt to maintain the confidentiality of the report once it has been disclosed to the government, there are certain steps a company can take in order to maximize its control of where and how the report is used. Certain courts have held that disclosure made to the government pursuant to a subpoena may not act as a blanket waiver of all protections. Therefore, the company may want to consider requesting that the government issue a formal request for the document prior to turning it over. In addition, the company should try to obtain a signed confidentiality agreement from the government prior to turning over the report. At a minimum, the agreement should state that the disclosure of the report is not intended as a waiver of any privilege, and that the government will not contend that such a waiver has taken place. The agreement should also bar the government from unilaterally disclosing the contents of the report to third parties, including, if possible, to the government enforcement agency “without any agreement regarding confidentiality.”

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82 *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).
83 Id.
84 See, e.g., Dellowood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1126-27 (7th Cir. 1997); In re Steinhardt Partners, L.P., 9 F.3d 236, 239 (2d Cir. 1993). Other courts have explicitly rejected this rationale. See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 302 (6th Cir. 2002), cert. dismissed, 539 U.S. 977 (2003). In addition, certain courts have suggested that waiver may be avoided if the company can show that the protected information was shared with the government in furtherance of “a common interest in developing legal theories and analyzing information.” See Steinhardt, 9 F.3d at 236; In re Cardinal Health, Inc. v. Sekiguchi, No. M8-85, 2007 U.S. Dist. Lexis 36000, *at* 26-28 (S.D.N.Y. Jan. 26, 2007) (citing Steinhardt and holding that Audit Committee’s investigation of potential financial misstatements, undertaken after commencement of SEC and DOJ investigations and with the intention to be shared with those agencies, was for purpose of ensuring that company’s accounting and financial practices be clean, and that, as such, the Audit Committee’s interests were “in common” with SEC and DOJ). In re LTV Sec. Litig., 89 F.R.D. 596, 614-15 (N.D. Tex. 1981) (after agreeing in consent decree to appointment of special investigatory officer, SEC and corporation shared common interest in analyzing facts and legal theories, and therefore no waiver took place upon sharing of documents with SEC).
86 See, e.g., Columbia/HCA, 293 F.3d at 302 (“[A]ny form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”) (quotations omitted); Permian, 665 F.2d at 1221 (“The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit . . . . The attorney-client privilege is not designed for such tactical employment.”).
87 The Second Circuit in particular has focused on the issue of the company’s intent to maintain the confidentiality of the report in deciding whether a waiver has occurred. Compare In re Leslie Fay Cos. Sec. Litig., 161 F.R.D. 274, 282-84 (S.D.N.Y. 1995) (holding no waiver when company had obtained “explicit confidentiality agreements with the authorities . . . .”), with Bank of Am., N.A. v. Terra Nova Ins. Co., 212 F.R.D. 166, 172-73 (S.D.N.Y. 2002) (waiver found when work-product disclosed to law enforcement agency “without any agreement regarding confidentiality”).
other government entities.88 Some courts have held that such agreements are sufficient to prevent a limited waiver of at least the protection of the work-product privilege, if not of the attorney-client privilege, and could therefore help the company avoid the potential disclosure of not only the report but the underlying documentary record of the investigation as well.89

In addition, courts have focused on the manner in which the report is used in determining whether a waiver has taken place. Specifically, several courts have found that a waiver occurred when the company undertook the “offensive” use of the report, by, for example, basing its defense on the existence of an exculpatory investigative report, while simultaneously asserting that the report is privileged.90 Therefore, the company may have a better chance of preserving privileges with respect to the report if it bases its defense on the underlying facts developed in the report, rather than the report itself.

**DISCIPLINING EMPLOYEES**

Many internal investigations will lead at some point to the company disciplining or even terminating an employee, whether a low-level “rogue” employee, or senior officer who failed to prevent a problem. Sometimes it is a result of the facts or conduct underlying the reasons for the investigation having been initiated in the first place. Other times, the employee’s actions in the course of the investigation may lead the company to punish that person. The company also may take disciplinary action in order to satisfy the explicit or perceived demands of regulators, prosecutors or external auditors. In each of these situations, the company must take great care to act in a manner that will not either create new problems or exacerbate those problems that sparked the internal investigation to begin with.

When actual or potential employee wrongdoing comes to light, several competing considerations must be weighed in determining the appropriate course of action for the company. The effect on the company’s other employees, ongoing operations, the continuing investigation and the company’s relations with regulators and/or law enforcement are all part of the equation. In addition, there are varying degrees of discipline, ranging from a written reprimand to termination. How the company balances these considerations is necessarily a function of both the timing and the precipitating cause of the disciplinary action. Each will have an effect on the decisions of whether, when and how to discipline an employee.

**Discipline for Failing to Cooperate with the Investigation**

In certain instances, employees may refuse to cooperate with the company’s internal investigation. In the vast majority of circumstances, there is no Fifth Amendment right against self-incrimination in the context of an internal investigation by a private employer.91 However, the company should consider several factors in choosing whether to punish an employee in such a situation. First and foremost is the question of why the employee is refusing to cooperate. The employee’s resistance may be indicative of the existence of additional, undiscovered issues for the company to explore as part of its investigation. Alternatively, the employee’s lack of cooperation may be a signal that the perception by the employees of the investigation itself is that it is not being pursued in an evenhanded manner. Even if the company chooses to terminate the employee for not cooperating, it should still undertake to understand the reasoning behind the employee’s decision.

Terminating an employee who refuses to cooperate should not be done reflexively. Taking action against an employee can have serious consequences for the company, from antagonizing other employees to instigating a civil suit by the fired employee. Prior to taking any such action, the company should take into account the seriousness of the investigation, the basis for the employee’s refusal to cooperate, the company’s treatment of similarly situated employees, and whether the information sought is available by alternative means.

It should be recognized that regulators or prosecutors may not look favorably on the company if it fails to discipline appropriately an employee who refuses to cooperate with an internal investigation. If the company is perceived to be encouraging, implicitly or explicitly, the intransigence of its employees, it may have a negative effect on the company’s ability to receive credit for cooperating with investigating authorities. Therefore, the company should document its attempts to encourage employee cooperation with the internal investigation. For example, the company should make

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88 In at least one case, a court rejected a claim of selective waiver despite the presence of a confidentiality agreement with the SEC, because the agreement permitted the SEC to disclose information as required by law or in furtherance of its discharge of its duties and responsibilities. The court determined that such an agreement was “conditional,” and therefore “inconsistent with those cases . . . allowing selective waiver.” See In re Syncor ERISA Litig., 229 F.R.D. 636, 646 (C.D. Cal. 2005).
90 See, e.g., Granite Partners, L.P. v. Bear, Stearns & Co., 184 F.R.D. 49, 55 (S.D.N.Y. 1999) (“Waiver typically occurs when the party asserting the privilege placed a protected document in issue through some affirmative act intended to insure [sic] to that party’s benefit or where the party makes selective use of the privileged materials.”) (citation omitted).
sure that the individual has been fully informed of both his obligation to cooperate and the potential consequences for not doing so.

In the event that the company chooses to discipline an employee for failing to cooperate with an internal investigation, counsel should be consulted prior to any action being taken. State law in the relevant jurisdiction may require that the company only terminate employees for “good cause,” which will be defined differently in each jurisdiction. In addition, some states prohibit the termination of an employee “in violation of public policy.”92 Finally, certain aspects of employees’ collective bargaining agreements, if applicable, may be relevant. The company should be aware of the applicable law in the relevant jurisdiction, as well as its contractual obligations, prior to acting.

**Discipline for Underlying Conduct Uncovered During an Investigation**

If facts come to light during an investigation that indicate that there was misconduct, whether intentional or not, by an employee or employees of the company, it is essential that that information be conveyed immediately to the client or appropriate personnel at the company. If the misconduct is ongoing, action should be taken to stop it. In addition to the obvious benefit of halting the inappropriate behavior or practices, taking immediate action can serve as a signal to regulators and law enforcement, as well as the investment community, that the company is taking its obligations seriously, is operating in good faith and is willing to take difficult actions if necessary.

Despite these advantages, there are also drawbacks to acting swiftly in these situations. With respect to the conduct of the investigation itself, disciplining an employee will make it less likely that an employee will cooperate fully with the continuing investigation. If the employee is terminated, the company may lose all access to that employee, and thereby short-circuit completely at least that aspect of the investigation. For these reasons, the company should endeavor to obtain as much information as possible from such employees prior to undertaking any disciplinary action.

The company must also be cognizant of the risks of acting prior to the completion of the fact-finding portion of the investigation. While certain conduct may initially appear to warrant a sanction, facts developed later may mitigate or excuse the conduct or actions at issue. In such instances, the company may face liability to the disciplined employee for acting too hastily. Thus, it is often advisable to wait until the investigation has made significant progress prior to taking any action. In addition, if at all feasible (i.e., in any non-emergency situation), employees should be provided an opportunity to respond, formally or informally, prior to any action being taken against them. This will allow the investigation to obtain more facts, while simultaneously helping to insulate the company from any claim that it acted unfairly.

Any disciplinary action taken in the midst of an investigation may also alert the SEC, other law enforcement or potential third party litigants of possible wrongdoing. It is not uncommon, especially in the heavily-regulated securities industries, for employee discipline to lead to a formal or informal inquiry by the SEC into the circumstances underlying the company’s actions. The company must be prepared to face scrutiny at that time not only about the decision to discipline the employee, but also about the underlying facts and circumstances that prompted the investigation in the first place.

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92 Specifically, courts have recognized that at least “at will” employees may have a common law cause of action against their employer in such circumstances. See, e.g., *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733 (Id. 2003); *Porterfield v. Mascari II, Inc.*, 823 A.2d 590 (Md. 2003); *Little v. Auto Stigler, Inc.*, 63 P.3d 979 (Cal. 2003).
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Foreign Corrupt Practices Act Alert
Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018

This past year marked the 40th anniversary of the U.S. Foreign Corrupt Practices Act (“FCPA”). Since its enactment in 1977, the U.S. Department of Justice (the “DOJ”) has brought approximately 300 FCPA enforcement actions, while the U.S. Securities and Exchange Commission (the “SEC”) has brought approximately 200 cases.¹ This anniversary year, the first year of the Trump administration, demonstrated that the FCPA continues to be a powerful tool in combating corruption abroad and encouraging compliance at global companies.

Below are six key take-aways regarding FCPA enforcement in 2017:

- **FCPA enforcement is alive in the Trump era.** Statistics for enforcement actions may be slightly lower in 2017 than in years past, but significant activity continues and 2017 saw several blockbuster cases. To learn more about 2017 FCPA enforcement trends and efforts, please refer to Section I “2017 Enforcement Trends and Priorities” and Section III “Key Investigation-Related Developments.”

- **Prosecution of individuals was high in 2017, and individuals continue to be charged long after corporations settle.** To read about individual prosecutions in 2017, please refer to Section III.C “Notable Aspects of Individual Resolutions.”

- **Non-U.S. companies were predominantly the targets, intentionally or unintentionally, of FCPA enforcement in 2017.** To read more about this development, please refer to Section I “2017 Enforcement Trends and Priorities” and Section III.B.2 “Continued Rise in Global Enforcement and Cooperation.”

- **International cooperation continues to be a hallmark of corruption enforcement worldwide, and non-U.S. enforcement continues to rise.** To learn more about this topic, please consult Section III.B.2 “Continued Rise in Global Enforcement and Cooperation” and Section VII “Key International Legal Developments.”

The new 2017 FCPA Corporate Enforcement Policy is not a game changer. However, it places more value on voluntary disclosure. Whether that value outweighs potential costs will continue to require case-by-case evaluation. To learn more about the FCPA Corporate Enforcement Policy, please refer to Section II “Recent Policy Changes.”

Recent enforcement cases indicate that bribery schemes continue to evolve and become more sophisticated. Companies can learn from these developments to refine the elements and contours of their internal controls and corporate compliance programs. To learn more about this topic, please refer to Section III.B “Notable Features of Corporate Resolutions.”

Overall, FCPA enforcement continued at a strong pace in 2017 and has proved initial speculation about the FCPA’s demise under the Trump administration to be exaggerated. While several 2017 enforcement actions were initiated under the Obama administration, a large number of FCPA cases remain in the pipeline, investigations tend to last several years and straddle administrations, and the current leaders of both the DOJ and SEC have affirmed their commitment to prosecuting FCPA violations (with recent large settlements such as Telia and SBM showing that the government is taking action to back up its rhetoric). Among others, Attorney General Jeff Sessions has emphasized the need to enforce the FCPA as a means of protecting “honest businesses” from corruption which “harms free competition, distorts prices and often leads to substandard products and services coming into our country.”

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I. 2017 Enforcement Trends and Priorities

2017 was consequential for FCPA enforcement in numerous respects. At the forefront was the introduction of the FCPA Corporate Enforcement Policy in November 2017.4 This policy effectively makes permanent the FCPA Pilot Program, originally announced in April 2016, and attempts to increase the incentives for corporate self-disclosure by adding a “presumption” that the DOJ will issue declinations when a company’s self-disclosure, cooperation, remediation, and disgorgement of profits meet certain standards.5 The new policy signals that declinations—already a commonly employed tool—will become a permanent staple of the FCPA enforcement landscape.

U.S. authorities also appear to have signaled in 2017 that charging non-U.S. companies continues to be an FCPA enforcement priority. Four of the six DOJ and three of the seven SEC6 FCPA corporate enforcement actions this year involved non-U.S. parent companies.7 These enforcement actions are consistent with the Trump administration’s rhetoric of leveling the playing field for U.S. companies. However, time will tell whether this is a lasting, intentional priority for U.S. authorities under the current administration, as many of the cases resolved in 2017 were commenced before the Trump inauguration in January 2017.

In addition, as we predicted last year, notable FCPA enforcement trends from 2016 and other years continued in 2017, including a focus on individual prosecutions, continued efforts to increase cooperation with other countries’ enforcement agencies, blockbuster corporate penalties, and continued rise in criminal internal-controls cases. Specifically:

- 2017 saw 19 enforcement actions against individuals, including charges brought against four individuals in connection with the Rolls-Royce plc (“Rolls-Royce”) matter and two individuals pleading guilty in connection with the Petróleo Brasileiro S.A. (“Petrobras”) matter. U.S. authorities also achieved significant trial victories against individuals in foreign corruption-related matters such as United States v. Ng Lap Seng, which involved an FCPA

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5 FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS’ MANUAL § 9-47.120.
6 Included in this number is Orthofix International N.V., which is a Curacao-incorporated company that is headquartered in Texas.
conviction, and United States v. Mahmoud Thiam and United States v. Heon-Cheol Chi, which involved convictions related to money laundering.8 Indeed, in a November 9, 2017 speech, then-Acting Assistant Attorney General Kenneth A. Blanco highlighted that the DOJ has “announced convictions or guilty pleas by 17 individuals in FCPA-related cases, which is more than in any previous year and there is more to come.”9 Likewise, the SEC has continued to emphasize the importance of individual accountability, with Co-Director of the SEC’s Division of Enforcement Steven Peikin explaining recently that “[t]he Division of Enforcement considers individual liability in every case it investigates; it is a core principle of our enforcement program . . . this approach applies with equal force in FCPA cases.”10

- 2017 also continued to see increasing cooperation among international enforcement agencies. This is due to strengthened anti-corruption laws and enforcement efforts outside the United States. For example, certain countries in Latin America, which have historically been slow to adopt aggressive anti-corruption measures, have recently signaled a willingness to work with the United States and other foreign counterparts. This increased global cooperation was emphasized by the SEC’s Peikin, who said in a November 2017 speech: “[I]n an increasingly international enforcement environment, the U.S. authorities cannot – and should not – go it alone in fighting corruption,” and that he has “observed that the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory, particularly in matters involving corruption,” with the SEC having publicly acknowledged assistance from 19 different jurisdictions in FCPA matters in 2017.11 In addition, in several of this year’s larger joint resolutions with foreign prosecutors (Rolls-Royce,12 Telia Company AB (“Telia”),13 SBM Offshore N.V. (“SBM”),14 and Keppel Offshore & Marine Ltd. (“Keppel”),15 the DOJ credited penalties paid to foreign authorities in the calculation of the company’s U.S. fine. This suggests an

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increasing trend in not just global cooperation, but also in viewing settlements as global in nature.

- **This past year also saw a number of large FCPA resolutions.** The global resolution relating to Telia in September 2017 was one of the largest FCPA resolutions in history with U.S. penalties alone likely to range between $482.5 million to $691 million.\(^{16}\) The DOJ has signaled that more settlements of this scale are likely to come. At a conference in October 2017, Trevor McFadden, then-Acting Principal Deputy Assistant Attorney General in the DOJ’s Criminal Division, acknowledged a lull in FCPA enforcement actions in early 2017 but indicated that Telia signals the start of a potential increase in activity.\(^{17}\) Though McFadden has since departed the DOJ, there has been no indication from current DOJ leadership that this enforcement strategy has changed. In fact, in a November 2017 speech, Deputy Attorney General Rod Rosenstein stated, “The FCPA is the law of the land. We will enforce it against both foreign and domestic companies that avail themselves of the privileges of the American marketplace.”\(^{18}\)

- **In 2017, the DOJ continued to exhibit a show of force related to criminal internal controls, a trend which started in 2016.** In the past, the DOJ rarely imposed this charge, which was difficult to obtain given the high burden of proof for criminal cases; however, the last two years marked a significant rise in criminal internal-controls cases.

II. **RECENT POLICY CHANGES**

A. **DOJ FCPA Corporate Enforcement Policy**

In November 2017, “[d]ue to the unique issues presented in FCPA matters,” Deputy Attorney General Rosenstein announced a new FCPA Corporate Enforcement Policy published in a revision to the United States Attorneys’ Manual (“USAM”). The new policy effectively makes permanent the FCPA Pilot Program originally announced by the DOJ Fraud Section in April 2016 and increases the incentives for corporate self-disclosure by adding a “presumption” that the DOJ will issue declinations when a

\(^{16}\) The ultimate amount to be paid to the United States assumes the $548.6 million DOJ penalty will be offset by a $274 million payment to Dutch authorities and depends on the $457 million SEC penalty being offset by up to $208.5 million for potential payments to Dutch or Swedish authorities. Overall, Telia agreed to pay a total of $965 million in criminal and civil penalties as part of this global resolution. U.S. Securities and Exchange Commission Press Release No. 2017-171: Telecommunications Company Paying $965 Million for FCPA Violations (Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, In the Matter of Telia Co. AB, Rel. No. 34-81669, File No. 3-18195 (Sept. 21, 2017).


company’s self-disclosure, cooperation, remediation, and disgorgement meet certain standards.

The new policy states that, except where there are aggravating circumstances (such as executive management involvement in misconduct, significant profits gained from misconduct, pervasive misconduct within an organization, and criminal recidivism), the DOJ will presumptively resolve all FCPA voluntary self-disclosures through a declination where a company meets all standards of disclosure, full cooperation, and timely and appropriate remediation, as well as paying all disgorgement, forfeiture, and/or restitution. Consistent with the Pilot Program, the policy also provides that, even in the presence of aggravating factors, a company will receive a 50% reduction off the low end of the U.S. Sentencing Guidelines fine ranges where it has otherwise met the requirements for disclosure, cooperation, and remediation, or up to a 25% reduction where it does not self-disclose, but otherwise engages in full cooperation and remediation. Interestingly, the new policy provides for “a 50%” reduction, where the original Pilot Program provided for “up to” a 50% reduction in cases with a voluntary disclosure, where the new policy retains the “up to” 25% language for reductions where no voluntary disclosure occurred. It is unclear whether this distinction was intentional, but the language suggests, in addition to the new presumption, substantial and more concrete benefits for voluntary disclosures.

The new policy defines the standards for “voluntary self-disclosure,” “full cooperation,” and “timely and appropriate remediation” that a company must meet in order to receive a declination or reduction in fine. With respect to the cooperation requirement, the policy states for the first time that requests by the DOJ for a company to defer internal investigation (such as by delaying company interviews) (so called “de-confliction” requests), must be narrowly tailored to a legitimate investigative purpose and will be made for only a limited period of time. Finally, the policy also provides clarity regarding a question that had been raised under the Pilot Program, stating that a “declination” pursuant to the policy is only “a case that would have been prosecuted or criminally resolved except for the company’s voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution.” If the DOJ fails to prosecute based on other factors, such as jurisdictional or proof challenges, the policy appropriately makes clear that this decision would not count as a declination, which by definition implies that the DOJ would otherwise have been able to bring a charge but for its discretionary decision not to proceed.

While the new presumption is clearly intended to further encourage companies to make voluntary disclosures, the “aggravating circumstances” factor still leaves substantial uncertainty for companies weighing whether to make a disclosure. Like the original Pilot Program, the new policy also says that the DOJ “generally will not require

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19 FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS’ MANUAL § 9-47.120(1).
20 FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS’ MANUAL § 9-47.120(1)-(2).
21 FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS’ MANUAL § 9-47.120(3).
22 FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS’ MANUAL § 9-47.120(4).
23 FCPA Corporate Enforcement Policy, UNITED STATES ATTORNEYS’ MANUAL § 9-47.120(4).
appointment of a monitor” in cases where a company that has voluntarily disclosed has implemented an effective compliance program by the time of the resolution. This also is a substantial incentive to take advantage of the new policy, although arguably a company that has an effective compliance program at the time of the resolution ought not receive a monitor regardless of whether the company voluntarily disclosed under the policy.

Significantly, the DOJ has indicated that it will follow the requirements of the new policy even for cases that began prior to the implementation of the policy (as it did for cases resolved in accordance with the requirements of the Pilot Program). Already, it appears that the DOJ followed the new policy in reducing the fine in the SBM settlement, which was announced the day after the release of the new policy, but investigated prior to it, and in which SBM received a 25% reduction in its fine based on its cooperation and remediation.

B. Evaluating Corporate Compliance Programs in FCPA Investigations

This year also saw new guidance from the DOJ regarding corporate compliance programs. In February 2017, the DOJ posted on its website (strangely with no formal seal and no press release or other public announcement) a guidance document entitled Evaluation of Corporate Compliance Programs (“Compliance Program Guidance”). The Compliance Program Guidance includes a list of topics and “common questions” the Fraud Section has found relevant in evaluating corporate compliance programs. The guidance consists of dozens of questions that fall within eleven broad topic areas, including Senior and Middle Management; Autonomy & Resources; Risk Assessment; Third-Party Management; and Operational Integration, among others.

Hardly a watershed document, many of the topics and questions in the Compliance Program Guidance build on prior DOJ guidance, including the 2012 FCPA Resource Guide, and echo the USAM and U.S. Sentencing Guidelines. That said, the guidance does demonstrate a more nuanced focus on certain topics. For example, the guidance shows an increased focus on board members and senior management. Instead of the often-noted “tone at the top” compliance factor, the guidance denotes a focus on “[conduct at the top],” asking “how does the company monitor its senior leadership’s behavior?” and “how has senior leadership modelled proper behavior to subordinates?” This shift was reiterated in March 2017 when DOJ’s FCPA Unit Chief Dan Kahn noted

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24 FCPA Corporate Enforcement Policy, United States Attorneys’ Manual § 9-47.120(1).
27 See Compliance Program Guidance.
28 See Compliance Program Guidance at 1-7 (the eleven topic areas are: Analysis and Remediation of Underlying Misconduct; Senior and Middle Management; Autonomy and Resources; Policies and Procedures; Risk Assessment; Training and Communications; Confidential Reporting and Investigation; Incentives and Disciplinary Measures; Continuous Improvement, Periodic Testing and Review; Third-Party Management; and Mergers and Acquisitions).
30 See Compliance Program Guidance at 2 (emphasis added).
that authorities are looking for more than "just talk" about compliance and noted "[w]e aren't interested in company-wide communications alone."31

The guidance also demonstrates the DOJ’s increased focus on compliance independence, auditing/monitoring, and compliance metrics.32 For example, the guidance highlights the need for compliance personnel to have unmitigated access to the company’s Board of Directors to ensure adequate independence.33 The guidance also underscores the importance of internal auditing, control testing, providing guidance and training to gatekeepers, and monitoring of third-party arrangements, reflecting a greater emphasis on auditing and monitoring functions. Additionally, the guidance stresses the importance of compliance metrics, reinforcing the notion that the DOJ now places greater emphasis on “evidence and data.”34

The Compliance Program Guidance will prove to be a useful checklist to companies seeking to design, enhance, and implement strong compliance programs (as well as for companies making compliance presentations to the DOJ in the context of settlement negotiations). At the same time, the guidance serves as a reminder that there is no one-size-fits-all compliance model. Indeed, the impact of the checklist has thus far seemed significantly less than that of the 2012 FCPA Resource Guide.

On the heels of the release of its Compliance Program Guidance, the DOJ saw the departure of its first compliance consultant and compliance expert, Hui Chen, in June 2017. Chen was a principal drafter of the Compliance Program Guidance, which therefore echoes many of the compliance principles she emphasized during her tenure.35 Chen began drafting the Compliance Program Guidance over a year before it was released, and she drew from her experiences with prosecutors and companies under investigation in developing the guidance.36

32 See generally Compliance Program Guidance.
33 See Compliance Program Guidance at 3.
A few months after the guidance was released, Chen departed from the DOJ Criminal Division’s Fraud Section, citing “cognitive dissonance” with the Trump administration. The DOJ advertised for a replacement. The application deadline was in June and there has been speculation that the position is in the process of being filled. The DOJ has not made any announcements regarding the position. It remains to be seen how a new compliance counsel may further shape the DOJ’s assessment of corporate compliance programs going forward.

C. Global Magnitsky Sanctions

At the end of the year, on December 20, 2017, President Trump issued a new Executive Order (“EO”) implementing the 2016 Global Magnitsky Human Rights Accountability Act (“the Magnitsky Act”) which authorized the president to impose sanctions against non-U.S. individuals who have engaged in corruption. Under the EO and the Magnitsky Act, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) is equipped with the broad power to block the property and property interests of any current and former non-U.S. government officials, any individual acting on their behalf, and leaders or officials of entities who engaged or attempted to engage in, among other things, bribery and corruption related to government contracts or the extraction of natural resources in any jurisdiction around the world. Notably, President Trump’s EO appears to contemplate that OFAC may impose sanctions against foreign government officials for not just significant corruption (as contemplated by the Magnitsky Act), but varying levels of corruption. The end-of-the-year EO sanctioned 15 individuals and 37 entities for human rights abuses and corruption in foreign jurisdictions.

III. Key Investigation-Related Developments

A. Declinations

In 2017, the DOJ issued two declinations under the FCPA Pilot Program. Both the DOJ and SEC also continued to close cases where no charges could be brought.

37 Rachel Martin, Former DOJ Lawyer On Prosecuting Corporate Crime Under Trump, NPR, July 6, 2017. Chen was retained in 2015 as a full-time compliance counsel expert, and her duties included developing benchmarks for evaluating corporate compliance and remediation measures. She also helped prosecutors and monitors evaluate whether the implementation of compliance programs was effective. Joe Mont, Why Hui Chen left the Justice Department, COMPLIANCE WEEK (July 5, 2017), https://www.complianceweek.com/blogs/the-filing-cabinet/why-hui-chen-left-the-justice-department#.WgE_q7pFw2x.


1. FCPA Pilot Program Evolution and 2017 Pilot Program Declinations

As noted above, the DOJ’s new FCPA Corporate Enforcement Policy announced in November 2017 effectively makes permanent, with some modifications, the FCPA Pilot Program announced in April 2016. As previously reported last year, on April 5, 2016, the Fraud Section issued its FCPA Enforcement Plan and Guidance laying out steps to intensify FCPA enforcement. Among other things, the memo announced that the DOJ was introducing a one-year Pilot Program that rewarded companies for voluntary disclosure and cooperation. Under the Pilot Program, an organization that voluntarily disclosed, fully cooperated, and timely and appropriately remediated could be considered for a declination of prosecution if the company additionally disgorged all ill-gotten gains. U.S. Department of Justice Criminal Division, The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download; WilmerHale, DOJ Launches FCPA Pilot Program to Encourage Corporate Voluntary Disclosure and Cooperation (Apr. 8, 2016), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179881469.

Prior to Deputy Attorney General Rosenstein’s announcement, in March 2017, then-Acting Assistant Attorney General Blanco announced the extension of the Pilot Program, which was set to expire on April 5, 2017. In announcing the extension, Blanco explained that the Pilot Program provides “prosecutors, companies and the public clear metrics for what constitutes voluntary self-disclosure, full cooperation and full remediation,” and outlines the benefits that can be attained by companies from such actions. The Pilot Program’s first year was a success in the prosecutors’ eyes. For example, on May 12, 2017, then-Fraud Section Chief Andrew Weissmann was reported to have said that during the Pilot Program’s first year, 22 companies self-reported potential foreign bribery violations, which was much higher than the 13 self-reports that had been made the year before the Pilot Program began. In a separate speech, McFadden stated that companies continue to voluntarily disclose under the Pilot Program.

In 2017, the DOJ issued two declinations under the Pilot Program: one for Linde North America Inc. and one for CDM Smith, Inc. The DOJ issued formal declination letters in these two cases, similar to those issued in 2016, and these letters included facts about corrupt conduct, actions taken by the companies, and reasons the DOJ declined

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42 As previously reported last year, on April 5, 2016, the Fraud Section issued its FCPA Enforcement Plan and Guidance laying out steps to intensify FCPA enforcement. Among other things, the memo announced that the DOJ was introducing a one-year Pilot Program that rewarded companies for voluntary disclosure and cooperation. Under the Pilot Program, an organization that voluntarily disclosed, fully cooperated, and timely and appropriately remediated could be considered for a declination of prosecution if the company additionally disgorged all ill-gotten gains. U.S. Department of Justice Criminal Division, The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download; WilmerHale, DOJ Launches FCPA Pilot Program to Encourage Corporate Voluntary Disclosure and Cooperation (Apr. 8, 2016), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179881469.
to prosecute. In addition, the DOJ required these two companies to disgorge ill-gotten gains as part of their declinations, a continuing practice that started in 2016 in cases where there was no corresponding SEC enforcement action.\textsuperscript{48}

On June 16, 2017, the DOJ announced its first Pilot Program declination of 2017. The DOJ announced that, along with the U.S. Attorney’s Office for the District of New Jersey (“DNJ”), it was closing the investigation of Linde North America Inc. and Linde Gas North America LLC (together, “Linde”) without bringing an enforcement action against the company.\textsuperscript{49} According to the DOJ, from approximately November 2006 to December 2009, Spectra Gases, Inc. (a New Jersey company that Linde acquired in 2006) made improper payments to officials from Republic of Georgia’s state-owned and controlled National High Technology Center ("NHTC"). In January 2010, Linde dissolved Spectra Gases, still unaware of the misconduct. Linde later discovered Spectra Gases’ corrupt arrangements and withheld $10 million in payments due to Spectra executives and other payments owed to companies associated with the NHTC officials. Pursuant to the agreement between Linde and the DOJ and DNJ, Linde agreed to disgorge over $7.8 million in ill-gotten gains and forfeit over $3.4 million representing the corrupt proceeds owed to companies associated with the NHTC officials. The DOJ noted that it declined prosecution based on many factors, including Linde’s timely, voluntary self-disclosure, its thorough and comprehensive investigation, full cooperation, disgorgement, enhancements to its compliance program and internal accounting controls, and full remediation that included terminating and disciplining executives and employees involved in the misconduct.

A week later, on June 21, 2017, the DOJ announced its second declination of 2017, closing its investigation of CDM Smith, Inc. (“CDM Smith”) and declining to bring an enforcement action against the company.\textsuperscript{50} According to the DOJ, between 2011 and 2015, CDM Smith—through its employees, agents, and its wholly owned subsidiary in India—paid approximately $1.18 million in bribes to government officials in India, which resulted in net profits totaling approximately $4 million. The payments were made to India’s state-owned highway management agency to receive highway construction supervision and design contracts and to officials in the Indian State of Goa for a water project contract. Similar to Linde’s declination, the DOJ noted CDM Smith’s timely and voluntary disclosure, thorough and comprehensive investigation, full cooperation, disgorgement, enhancement to its compliance and internal accounting controls, and full remediation that included termination of all executives and employees who participated in the misconduct. CDM Smith agreed to disgorge ill-gotten gains of over $4 million in four monthly installments.


While it is unclear why the number of declinations was down from 2016, the DOJ will undoubtedly continue to use declinations in the future given the recent announcement of the new FCPA Corporate Enforcement Policy.

2. Cases Closed by the DOJ and SEC

On April 20, 2017, then-Acting Principal Deputy Assistant Attorney General McFadden noted that while there had only been five Pilot Program declinations as of that time, the “number [did] not include the many cases [the DOJ] routinely decline[s] for various reasons including insufficient evidence of corporate criminal misconduct.” In 2017, the DOJ and/or SEC publicly announced the closure of investigations of a total of fifteen companies. In some cases, the companies being investigated had parallel investigations closed in previous years; and in other cases, the parallel investigations appear to remain open, but no enforcement decision has yet been made. One somewhat new and notable development in 2017 was that the DOJ and SEC appeared to make a more concerted effort to send a letter officially informing the subject company of the closing of the investigation. In the past, it was not uncommon for U.S. authorities to stop pursuing the case without any communication of status, with the subject company left to wonder whether the investigation was closed.

As to the DOJ, in 2017, information became public regarding seven investigations that were closed by the DOJ. The investigations spanned three continents, involving alleged corrupt activity in South America, Asia, and Africa. According to public disclosures, all seven of the companies that received notices from the DOJ this year terminating investigations had or continue to have parallel inquiries pending with the SEC. The DOJ did not issue statements regarding its decisions to close the inquiries into any of the seven companies; instead, the companies reported the closures in press releases or their public SEC filings. From the information made public, it appears that a company’s voluntary disclosure, cooperation during the investigation, and remediation efforts remain important factors the DOJ considers in deciding whether to bring charges.

51 Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Remarks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti. One interesting point about this comment from McFadden is that it would not be a “declination” if there was no corporate criminal misconduct. The DOJ simply could not bring a case.


53 The DOJ presumably closed other investigations that were not publicly announced by the relevant companies.
In addition to the seven company investigations mentioned above, the DOJ, along with the SEC, closed six more investigations into possible bribery conduct in foreign countries. Finally, in 2017, there were two investigations that were closed by the SEC only. In both cases, the companies either made voluntary disclosures and/or cooperated with the SEC’s investigation.

B. Notable Features of Corporate Resolutions

1. Corporate FCPA Repeat Offenders

As in years past, enforcement actions were taken against repeat offenders, whose recidivism resulted in increased penalties. This year, three corporate resolutions involved repeat offenders. Moving forward, as previously noted, under the new DOJ FCPA Corporate Enforcement Policy, criminal recidivism will be considered an “aggravating circumstance,” which may weigh against a declination even if a company voluntarily discloses the conduct.

a. Zimmer Biomet

Zimmer Biomet Holdings Inc. ("Zimmer Biomet"), an Indiana-based medical device manufacturer, agreed to pay over $30 million to settle parallel SEC and DOJ proceedings relating to the company’s repeat violations of the FCPA.

Prior to its 2015 acquisition by Zimmer, Biomet entered into a deferred prosecution agreement ("DPA") with the DOJ and agreed to a civil judgment filed by the SEC in 2012, paying over $22 million in civil and criminal penalties to resolve anti-bribery, books and records, and internal controls charges relating to improper payments made to public hospitals in Argentina, Brazil, and China. With respect to Biomet’s conduct in Brazil, the 2012 SEC complaint alleged that Biomet’s U.S. subsidiary engaged a Brazilian distributor whose company paid bribes to doctors employed by state-owned hospitals in the form of “commissions” of 10-20% of the value of the medical devices purchased by the doctors. As part of its settlement, Biomet agreed to terminate its

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relationship with the Brazilian distributor and retain an independent compliance monitor for three years.\textsuperscript{58}

In 2013, however, Biomet discovered further anti-bribery violations relating to conduct in Brazil and Mexico, including alleged improprieties that predated the entry of the 2012 DPA, and notified the government as required by its 2012 consent agreement with the SEC and DPA with the DOJ.\textsuperscript{59} In light of the continued bribery in Brazil and Mexico, Biomet’s monitorship term was extended for one year; at the end of the extended term, the monitor was unable to certify that Zimmer Biomet’s compliance program satisfied the requirements of the 2012 DPA and the Department notified the company that it was deemed to be in breach of the agreement.\textsuperscript{60}

With respect to Brazil, the DOJ and SEC found that Biomet had “knowingly and willfully” continued to interact and improperly record transactions with the prohibited Brazilian distributor “known to have paid bribes to government officials on Biomet’s behalf.”\textsuperscript{61} Though Biomet formally terminated its relationship with the Brazilian distributor “to ensure that bribers were not paid to sell its products,” “Biomet continued to use [the Brazilian distributor]” from 2009 to 2013, and “knowingly and willfully failed to implement additional controls to ensure that [the Brazilian distributor and its affiliates] would not pay bribes.”\textsuperscript{62} The DOJ found, for example, that “Biomet executives involved in developing, approving, and implementing Biomet’s internal accounting controls and anti-corruption program . . . knew that Biomet was not implementing the internal accounting controls, policies, and procedures” designed by the company “to prevent or detect bribery of foreign officials.”\textsuperscript{63}

The government further found that Biomet failed to implement internal controls that would have prevented the new bribery scheme in Mexico, whereby third-party customs brokers made improper payments to Mexican customs officials, from about 2008 to 2013, in order to smuggle contraband into the country.\textsuperscript{64} Specifically, the Department found that Biomet’s Mexican subsidiary failed to establish adequate internal controls (e.g., failed to require appropriate due diligence, documentation, and contracts for

\textsuperscript{58} Order Instituting Cease-and-Desist Proceedings, \textit{In the Matter of Biomet, Inc.}, Rel. No. 34-79780, File No. 3-17771, ¶¶ 11-12 (Jan. 12, 2017).


payments to third parties) even though its executives and employees were aware of red flags suggesting bribes were being paid. Indeed, the DOJ found that between 2010 and 2013, Biomet’s Mexican subsidiary paid over $980,000 to a customs broker’s subagents, “knowing that at least part of this amount would be passed on to customs officials,” and then “falsified corporate records to disguise the bribe payments.” One employee of Biomet’s Mexican subsidiary admitted that he/she “knew” that the customs broker’s subagents “were being paid large amounts of money to smuggle . . . mislabeled products into Mexico.”

Consequently, the DOJ determined that “despite being aware of red flags and prior corruption-related misconduct at Biomet’s subsidiaries in Mexico and Brazil,” Biomet “breached its obligations under the 2012 DPA” and failed to devise and maintain adequate internal controls. In 2017, the DOJ filed a superseding information charging Biomet’s successor, Zimmer Biomet, with one count of violating the FCPA’s Internal Controls Provision by “knowingly and willfully fail[ing] to implement a system of [effective] internal accounting controls.” The same day, the company entered into a three-year DPA with the DOJ, under which it agreed to pay a criminal penalty of approximately $17.4 million and retain a compliance monitor for an additional three years. In calculating the monetary penalty, the DOJ added two points to Zimmer Biomet’s culpability score for committing an offense less than five years after a “criminal adjudication based on similar misconduct.” The company did not receive voluntary disclosure credit because it was subject to ongoing self-reporting obligations under the 2012 DPA. RDS Luxembourg Holding S.á.r.l. (“JERDS”), an indirect subsidiary of Zimmer Biomet, agreed to plead guilty to a one-count criminal information, also filed in the District of Columbia, charging it with causing Biomet to violate the books and records provisions of the FCPA through the actions of 3i Mexico, a wholly owned subsidiary of JERDS. In a parallel civil action, Zimmer Biomet also agreed to pay $13 million to settle charges with the SEC.

Notably, while the SEC and DOJ credited Zimmer Biomet’s cooperation and remedial actions, both agencies highlighted the fact that the company was a repeat offender when announcing the charges. In the DOJ’s press release, then-Assistant Attorney General Leslie R. Caldwell commented that Zimmer Biomet “had the opportunity to avoid criminal charges,” that the company’s “misconduct allowed the bribes to continue,” and that Zimmer Biomet was now paying the price for “disregarding its obligations” under the 2012 DPA. Caldwell further stated, “In appropriate circumstances the department will resolve serious criminal conduct through alternative means, but there will be consequences for those companies that refuse to take these agreements seriously.” Similarly, Kara Brockmeyer, then-Chief of the SEC Enforcement Division’s FCPA Unit, commented that “Biomet didn’t entirely learn its lesson the first time around as it continued to use a prohibited agent in Brazil and engaged in a new bribery scheme in Mexico.” While both the SEC and DOJ noted the repeat violations, neither brought an enforcement action for breach of the prior judgment or DPA, and neither agency commented on this decision.

b. Orthofix

Less than a week after the Zimmer Biomet resolution, the SEC announced its settlement with another FCPA recidivist—Texas-based medical device manufacturer Orthofix International N.V. (“Orthofix”). Orthofix agreed to pay the SEC over $6 million in penalties after admitting to making improper payments—through its Brazilian subsidiary—to doctors employed by government-owned hospitals in Brazil, and improperly recording such payments in the company’s books and records. Orthofix learned of and disclosed the conduct to U.S. authorities in 2013. Only one year prior, in 2012, Orthofix had settled similar charges with both the SEC and DOJ in connection with bribes paid to government officials through its Mexican subsidiary. Under the 2012 consent agreement, Orthofix was required to issue periodic reports to the SEC regarding the implementation of its compliance program and to pay approximately $5.2 million to settle violations of the books and records and internal controls provisions. In 2012, Orthofix also paid a $2.2 million criminal fine pursuant to its DPA with the DOJ to settle alleged violations of the internal controls provisions.

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According to the SEC’s 2017 cease-and-desist order, despite the 2012 enforcement actions, Orthofix failed to implement and maintain sufficient internal controls that would have enabled the company to detect and prevent the improper payments.83

Similar to Zimmer Biomet, the SEC did not credit Orthofix for disclosing the improper conduct due to the company’s ongoing self-reporting obligations under its 2012 settlement with the SEC.84 While the SEC appeared to credit Orthofix’s cooperation and remedial acts, it noted that Orthofix “did not start fully implementing sufficient remedial steps until after the discovery of the Brazil conduct in late 2013” and that the “controls in place during the relevant period were minimal and clearly deficient.”85 In an interesting contrast to Zimmer Biomet, the DOJ did not appear to consider Orthofix’s conduct in Brazil to be a breach of the company’s prior DPA and declined to take further action against the company.86

c. Halliburton

In its third FCPA action of the year against a repeat offender, the SEC settled charges with Halliburton Company (“Halliburton”) in connection with payments made to an Angolan firm for the purpose of fulfilling local content requirements under Angolan law.87 Halliburton attempted to satisfy the local regulations in order to secure new contracts with Sonangol, Angola’s state-owned oil company.88 The SEC found that Halliburton’s former Vice President—who was also individually charged for causing the company’s violations89—had intentionally bypassed internal accounting controls in order to direct two procurement contracts to the local Angolan company, and thereby satisfy local content regulations. The owner of the local Angolan company was a friend and neighbor of the Sonangol official who would ultimately approve the award of seven contracts to Halliburton.90 The SEC determined that Halliburton’s conduct was improper because Halliburton’s own controls required that the supplier qualification process begin with an assessment of the necessary materials or services, not with a particular supplier.91 Yet, Halliburton’s former Vice President “started with a particular supplier

(the local Angolan company) and then backed into a list of services it could provide.”

In addition to internal controls violations, the SEC also found that Halliburton violated the books and records provision for failing to record the true nature of certain transactions. As part of the settlement, Halliburton agreed to pay the SEC approximately $29.2 million in penalties: $14 million in disgorgement (which is the amount Halliburton allegedly profited from its dealings with Sonangol), $1.2 million in pre-judgment interest, and a $14 million civil penalty. Halliburton also agreed to retain an independent compliance consultant for a period of eighteen months.

Prior to this, in 2009, Halliburton entered into a settlement with the SEC in connection with a long-running bribery scheme involving improper payments made by former Halliburton subsidiary Kellogg Brown & Root LLC (“KBR”) to Nigerian officials in order to win contracts for the construction of liquefied natural gas facilities on Bonny Island, Nigeria. The 2009 SEC enforcement action against Halliburton, and the related SEC and DOJ actions against KBR, resulted in total criminal and civil penalties of approximately $579 million, among the largest in FCPA history. Of this amount, Halliburton was held jointly and severally liable for the disgorgement of $177 million to the SEC. Unlike Zimmer Biomet and Orthofix, whose repeat offenses occurred shortly after their initial settlements, Halliburton’s 2017 settlement took place several years after its 2009 resolution, and Halliburton was not under a DPA reporting obligation at the time.

Similar to Orthofix, the DOJ declined to take action against Halliburton.

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d. Analysis

While it may be difficult to know exactly how the DOJ and SEC will treat companies entering second (or third) FCPA settlements, there are a few lessons one can draw from the 2017 enforcement actions.

First, in all three cases, the government emphasized the company's failure to devise, implement, and/or maintain sufficient internal controls despite the prior charges. For example, in Orthofix, the SEC pointed out that, in light of the prior corruption and internal controls issues at the company’s Mexican subsidiary, Orthofix “was aware of the deficiencies in its controls and the FCPA risks at its subsidiaries’ operations.” Yet, Orthofix still “failed to establish better controls and supervision over its subsidiaries.” The SEC acknowledged Orthofix’s remediation efforts, however it is unclear how much remediation credit the company received as the SEC also noted the company’s delay in implementing “sufficient” remedial steps.

In the Halliburton settlement, the SEC also scrutinized the effectiveness of the company’s maintenance and enforcement of existing controls. In fact, the SEC found that, following the prior resolution, Halliburton had “clearly defined internal accounting controls governing, among other things, the selection and approval of vendors in high risk countries, commercial agents and single source suppliers.” Yet, according to the SEC, Halliburton ultimately failed to “maintain these controls” as evidenced by Halliburton employees’ decision to ignore company policies in pursuit of certain business opportunities.

Also notable, as previously discussed, is the fact that the DOJ took action against Zimmer Biomet but did not pursue actions against the other two recidivists. One possible explanation may be that Zimmer Biomet repeated the very same misconduct in the very same country that was at the center of the 2012 enforcement actions—specifically, the use of a prohibited Brazilian distributor, which the 2012 DPA explicitly required Zimmer Biomet to terminate, whereas the recidivism in Orthofix and Halliburton did not entail repeat of the same wrongful conduct. In Zimmer Biomet, senior employees—including a high-level Biomet attorney responsible for ensuring effective accounting controls—not only had knowledge of Biomet’s continued work with the prohibited distributor, but also took active steps to conceal and continue the

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100 As discussed in more detail in Section II.A above, the new FCPA Corporate Enforcement Policy cites “criminal recidivism” as an example of “aggravating circumstances,” which may weigh against a declination by the DOJ even under the circumstances when a company voluntarily discloses the conduct at issue.
In addition, the DOJ noted that Zimmer Biomet “knowingly and willfully” failed to implement adequate internal controls, despite being aware of red flags suggesting that bribes were being paid. Thus, knowledge and intent at the more senior levels of the company, combined with repeat conduct in breach of the 2012 DPA, may have triggered the DOJ’s decision to bring a second enforcement action against Zimmer Biomet.

In contrast, the subsequent misconduct in Orthofix is arguably distinct from the company’s earlier violations, and may therefore explain the DOJ’s decision not to charge Orthofix. First, the 2012 action against Orthofix involved conduct in Mexico, while the subsequent 2017 SEC action related to conduct in Brazil. Second, the subsequent action related to a different scheme involving a Brazilian subsidiary’s improper payments made through third-party representatives and distributors to government-owned hospitals, whereas the 2012 scheme involved a Mexican subsidiary’s direct knowledge of bribes paid to government officials. Thus, the DOJ may have considered that Orthofix’s later offenses were not an exact repeat of prior wrongful conduct when deciding not to bring an action against the company. Another possibility is that the DOJ simply did not have sufficient evidence to bring a criminal enforcement action.

As a side note, as noted above, it seems that the DOJ had the ability to bring an action for breach of the prior DPA with respect to each of these recidivists if it so wished. Moreover, proceeding on the basis of a breach would have allowed the DOJ the lower burden of proof associated with a breach of contract action, as opposed to a criminal enforcement action. Instead, the DOJ chose to either bring a new action (in the case of Zimmer Biomet) or to take no action at all (in the cases of Orthofix and Halliburton).

Similarly, the SEC’s 2009 action against Halliburton related to misconduct that was different than that alleged in the SEC’s 2017 cease-and-desist order. While the 2009 action related to an over decade-long bribery scheme in Nigeria executed by Halliburton’s then-subsidiary, KBR, the 2017 action related to payments made to a local Angolan company for the purpose of fulfilling local content regulations. While in both SEC actions Halliburton was charged with violations of the books and records and internal controls provisions, the two cases involved conduct very different in nature. Additionally, in the subsequent action, the SEC primarily focused on Halliburton’s failure to “maintain” internal controls as opposed to its “lack” of controls.

Moreover, as the Zimmer Biomet resolution demonstrates, a company’s repeat-offender status can increase the criminal penalty amount owed. Zimmer Biomet’s final culpability

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score was raised by two points because of its recidivism, leaving it with a total score of 10. Zimmer Biomet also did not receive any credit for its self-reporting due to its ongoing obligations under the 2012 DPA. Per Chapter 8 of the 2014 U.S. Sentencing Guidelines, a culpability score of 10 would trigger a penalty multiplier between 2.00 and 4.00.\textsuperscript{110} The DOJ ultimately applied a multiplier of 3.00, and fined the company $17,460,300, “a criminal penalty at the middle of the [U.S. Sentencing Guidelines] fine range.”\textsuperscript{111} Had Zimmer Biomet not breached its prior DPA, nor violated the FCPA less than five years after its previous violations, the resulting fines could have been much lower. Without the addition of two points, Zimmer Biomet’s final culpability score would have been an 8, resulting in a multiplier range between 1.60 and 3.20.\textsuperscript{112} Assuming the DOJ would apply the same methodology and use a multiplier at the middle of the fine range, the total criminal penalty would be $13,968,240. Additionally, without its ongoing obligations under the 2012 DPA, Zimmer Biomet would have likely received 5 points in voluntary reporting credit, resulting in a total culpability score of 5 and a multiplier range between 1.00 and 2.00.\textsuperscript{113} Again, assuming the DOJ would apply the same methodology, Zimmer Biomet would have been liable for a criminal penalty of $8,730,15, which is exactly half the amount Zimmer Biomet ultimately paid the DOJ.

Lastly, among the three recidivists, Zimmer Biomet paid the highest civil penalty (in proportion to the disgorgement) to the SEC, which suggests that the SEC will also impose a higher fine for companies it considers to be more culpable. In addition to disgorging approximately $5.8 million, Zimmer Biomet paid the SEC a civil penalty of $6.5 million. Similarly, Halliburton disgorged $14 million and paid a civil penalty of $14 million, and Orthofix disgorged $2.9 million and paid a civil penalty of $2.9 million—a 100% penalty for both companies. Thus, while the penalty amount imposed by the DOJ is more clearly linked to a corporation’s recidivism, the SEC may also impose higher civil penalties for repeat offenders.

2. Continued Rise in Global Enforcement and Cooperation

As has become common in recent years, the DOJ and SEC continued to emphasize global enforcement and cooperation in 2017. DOJ and SEC officials made various public statements regarding the importance of foreign partnerships, and U.S. regulators resolved three significant actions involving joint resolutions with foreign prosecutors this year: the Rolls-Royce,\textsuperscript{114} Telia,\textsuperscript{115} and SBM matters.\textsuperscript{116} These matters built on the blockbuster global enforcement actions of 2016—particularly the Vimpelcom and Odebrecht/Braskem actions—and signified the solidification of U.S. partnerships with

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\textsuperscript{110} U.S. SENTENCING GUIDELINES MANUAL ch. 8C2.6 (2014).
\textsuperscript{112} U.S. SENTENCING GUIDELINES MANUAL ch. 8C2.6 (2014).
\textsuperscript{113} U.S. SENTENCING GUIDELINES MANUAL ch. 8C2.5(g)(1) (2014).
key foreign prosecuting offices in countries such as the United Kingdom, the Netherlands, and Brazil.

a. Public Remarks by the SEC and DOJ

Throughout the year, DOJ and SEC officials emphasized an increasing focus on corruption by foreign countries and stressed, in particular, the United States’ growing partnership with Brazil.

In April 2017, then-Acting Principal Deputy Assistant Attorney General McFadden, speaking at a compliance summit in Washington, D.C., asserted that other countries were beginning to "strengthen[] their domestic laws" and "increasingly prioritize[] anti-corruption prosecutions." He went on to say that the DOJ was "proud to be partnering with countries like the UK, Brazil, the Netherlands and others who are taking new strides to fight corporate corruption at home and around the world."118

The next month, in May 2017, McFadden reiterated the DOJ’s focus on working with international partners and its relationship with Brazil at a conference in Sao Paolo. McFadden began by calling Brazil “one of the U.S. Justice Department’s closest allies in the fight against corruption” and went on to state more generally that “cooperation with our foreign partners has become a hallmark of our work,” which has seen “an increase in multi-jurisdictional prosecutions of criminal conduct. . . .”119 McFadden cited examples of international partnership in the area of FCPA enforcement, including the Rolls-Royce action and the DOJ’s indictment of Mahmoud Thiam, Minister of Mines and Geology of the Republic of Guinea.120 He also noted that increased international coordination enabled the prosecution of culpable individuals and companies that could not be charged under the FCPA but were subject to foreign statutes.121

In July 2017, then-Acting Assistant Attorney General Blanco again focused on the U.S.-Brazil relationship in statements at an Atlantic Council conference in Washington, D.C., describing Brazil as “a country that shares our commitment to rooting out corruption at

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all levels.” Blanco noted that the Criminal Division’s largest investigations “are increasingly transnational, often involving multiple foreign jurisdictions,” leading the DOJ to “rely[] more and more on the use of various mechanisms of international cooperation with our foreign partners . . . .”

In September 2017, SEC Chairman Jay Clayton also commented on the internationalization of FCPA and anti-corruption efforts. Notably, prior to being appointed chair of the SEC, Clayton had helped author an article criticizing enforcement of the FCPA for creating an uneven playing field for U.S. companies, who were subject to restrictions against overseas bribery that their foreign counterparts were not. At a panel hosted by NYU Law School, Clayton suggested that his prior criticism no longer applied now that “our pursuit of international corruption is no longer a unilateral exercise, which changes the dynamic substantially.”

b. **Increased Interaction and Discourse Between U.S. and Foreign Prosecutors**

The DOJ and SEC also increased interaction and discourse with foreign counterparts in 2017. For example, for the first time in history, the DOJ announced that it would be seconding a U.S. prosecutor to a foreign prosecuting office, in this case, the U.K. Serious Fraud Office (“SFO”) and Financial Conduct Authority (“FCA”). The U.S. prosecutor (currently expected to be assistant chief of the DOJ FCPA unit, Albert Stieglitz) will spend one year at each U.K. office in order to “collaborate on financial

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fraud and foreign bribery cases with the relevant UK authorities.”

McFadden stated that such collaboration was increasingly important given the “cross-border nature of many financial frauds.”

Requests for assistance from foreign governments relating to anti-corruption prosecution have also increased. McFadden noted that, in the last five years, the DOJ has seen an 147% increase in the “number of annual requests from foreign counterparts seeking U.S.-based evidence to support foreign bribery and corruption investigations.” For its part, the United States has increased requests to foreign counterparts by 75% over the same time period. Notable requests for assistance in 2017 included a request by Venezuela’s National Assembly that the SEC open an FCPA investigation into various financial groups relating to the purchase of Venezuelan bonds. China also continued to press for U.S. assistance in repatriating Chinese nationals residing in the United States as part of Chinese President Xi Jinping’s highly publicized, multi-year campaign against domestic corruption.

As discussed in more detail in Section VII below on international developments, local anti-corruption efforts across the globe also appeared to increase in 2017. China’s high-profile anti-corruption campaign, which began five years ago with Xi’s assumption of office, continued as Xi reinforced his commitment to rooting out domestic graft at a keynote speech to the Communist Party Congress in 2017. In November 2017, Saudi Arabia also announced a crackdown on corruption, reportedly detaining and arresting more than 200 people, including members of the royal family, and freezing billions of dollars of assets. It is unclear what, if any, long-term effects these local campaigns will have on corrupt behavior in China and Saudi Arabia, and many critics suggest that, although styled as anti-corruption drives, the campaigns are aimed

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134 Ben Hubbard, Saudi Arabia Says 200 Detained in Anti-Corruption Crackdown, N.Y. TIMES (Nov. 9, 2017), Simeon Kerr, Saudi Elite Start Handing Over Funds in Corruption Crackdown, FINANCIAL TIMES (Nov. 24, 2017).
primarily at consolidating political power and removing potential opponents in what are essentially one-party ruling regimes.135

c. Enforcement Actions

The U.S. government brought four significant FCPA enforcement actions in 2017 involving coordination and joint resolution with foreign authorities.

i. Rolls-Royce

In one of the first FCPA actions of the year, the DOJ announced on January 17, 2017 that it had entered into a DPA with Rolls-Royce, a United Kingdom-based manufacturer and distributor of power systems for aerospace, defense, marine, and energy sectors, relating to one count of conspiracy to violate the anti-bribery provisions of the FCPA.136 Rolls-Royce simultaneously settled enforcement actions with the U.K. SFO and the Brazilian Ministerio Publico Federal (“MPF”).137 The amount of the total global settlement was approximately $800 million, with the bulk of the settlement (£497.25 million, or approximately $605 million) going to the U.K. SFO.138 The DOJ received $169.9 million and the Brazilian MPF $25.6 million.139

According to the DPA, from approximately 2000 to 2013, Rolls-Royce and its indirect U.S. subsidiary, Rolls-Royce Energy Systems, Inc. (“RRESI”), allegedly made improper payments to government officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Iraq, and Angola.140 According to DOJ papers, in each country, RRESI paid commissions to third-party intermediaries, knowing that a portion of the commissions would be used to bribe government officials and thus aid RRESI in winning oil and gas-related government contracts.141 For example, in Thailand, RRESI employees arranged for payments to be made to a local oil and gas services intermediary, understanding that

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the intermediary had promised a 5.5% "commission" to the relevant government officials to help RRESI win lucrative oil and gas projects. Over the course of the scheme, RRESI paid over $35 million in corrupt commissions and derived profits of at least $80 million.

ii. Telia

In a second globally coordinated enforcement action, on September 21, 2017, the DOJ and SEC announced resolutions with Telia, a Sweden-based multinational telecommunications company. Telia entered into a DPA with the DOJ relating to one count of conspiracy to violate the anti-bribery provisions of the FCPA and settled cease-and-desist proceedings with the SEC relating to alleged violations of the anti-bribery and accounting provisions of the FCPA. Telia’s Uzbek subsidiary, Coscom, pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA. Telia also settled with the Public Prosecution Service of the Netherlands (the Openbaar Ministrie, or “OM”). On September 22, 2017, the day following its DOJ, SEC, and OM resolutions, Telia stated that Swedish authorities were bringing additional claims for disgorgement, but a settlement has not yet been announced.

As a side note, Telia admitted to the SEC’s jurisdiction despite the fact that the company ceased to be an issuer on September 5, 2007, a few months after the improper conduct began. According to the SEC cease-and-desist order, as of that date, Telia had entered into an agreement with an Uzbek government official’s shell company under which Telia agreed to pay approximately $30 million to the shell company; however, no actual payments were made until December 2007 or after. The SEC order takes care to note several U.S. contacts, including emails concerning the government official that were sent on U.S.-based servers, improper payments denominated in U.S. dollars, the use of U.S.-based consultants, and the acquisition by Telia of Coscom’s U.S.-based parent company. None of these facts appears to fix the temporal limitation

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to the SEC’s jurisdiction. But as noted above, Telia nonetheless consented to the entry of the order against it for the full 2007-12 time period.\footnote{Order Instituting Cease-and-Desist Proceedings, In the Matter of Telia Co. AB, Rel. No. 34-81669, File No. 3-18195 ¶¶ 2-3, 5, 13, 16-21 (Sept. 21, 2017).}

According to the DPA, from 2007 to 2012, Telia paid approximately $331 in million bribes to an Uzbek government official to enter the mobile telecom market in Uzbekistan via its indirect subsidiary, Coscom.\footnote{Deferred Prosecution Agreement, United States v. Telia Co. AB, No. 17-CR-581, Attachment A ¶¶ 11-12 (S.D.N.Y. Sept. 21, 2017).} Improper payments were structured in the form of various corporate agreements between different Telia entities, Takilant Ltd. (the government official’s shell company), and third parties, including a stock buyback agreement and an acquisition of outstanding debt.\footnote{Deferred Prosecution Agreement, United States v. Telia Co. AB, No. 17-CR-581, Attachment A ¶¶ 17-53 (S.D.N.Y. Sept. 21, 2017).} Approvals for these agreements went as high as Telia executives and its board of directors.\footnote{Deferred Prosecution Agreement, United States v. Telia Co. AB, No. 17-CR-581, Attachment A ¶¶ 12, 20, 22, 26, 28, 30, 36, 38, 46, 49 (S.D.N.Y. Sept. 21, 2017).} In return for payments ranging from $2 million to $220 million, the government official enabled Coscom to obtain rights to 3G and 4G frequencies and number blocks.\footnote{Deferred Prosecution Agreement, United States v. Telia Co. AB, No. 17-CR-581, Attachment A ¶ 12 (S.D.N.Y. Sept. 21, 2017).} Notably, neither the SEC nor DOJ settlement papers explain what title or position the government official in question held within the Uzbek government or how the official was able to influence the award of frequencies and number blocks, but the government official is widely believed to be Gulnara Karimova, the eldest daughter of then-Uzbek President Islam Karimov.\footnote{Tom Schoenberg and Chris Dolmetsch, Telia Agrees to Pay At Least $965 Million Over Uzbek Bribes, BLOOMBERG (Sept. 21, 2017), https://www.bloomberg.com/news/articles/2017-09-21/telia-to-seal-u-s-deferred-prosecution-deal-over-uzbek-bribes.} The DPA estimated Telia’s total gain from the scheme to be approximately $457 million.\footnote{Deferred Prosecution Agreement, United States v. Telia Co. AB, No. 17-CR-581, Attachment A ¶ 12 (S.D.N.Y. Sept. 21, 2017).}

The total amount of Telia’s global resolution was $965 million.\footnote{U.S. Department of Justice Press Release No. 17-1035: Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017).} The DOJ and SEC reserved the right to collect the full $965 million in their resolutions, but, apart from a $40 million forfeiture that Telia paid on behalf of Coscom, the regulators allowed for offsets of 50% for any criminal penalties or disgorgement paid to the Dutch and Swedish authorities.\footnote{Deferred Prosecution Agreement, United States v. Telia Co. AB, No. 17-CR-581, Attachment A ¶ 11 (S.D.N.Y. Sept. 21, 2017).} Telia paid 50% of its criminal penalty ($274 million) to the OM.\footnote{Deferred Prosecution Agreement, United States v. Telia Co. AB, No. 17-CR-581, Attachment A ¶ 7 (S.D.N.Y. Sept. 21, 2017).} Telia may also pay disgorgement to the Swedish prosecuting authority when the claims noted above are resolved. Currently, the total amount due to U.S. authorities

\footnote{Order Instituting Cease-and-Desist Proceedings, In the Matter of Telia Co. AB, Rel. No. 34-81669, File No. 3-18195 ¶¶ 2-3, 5, 13, 16-21 (Sept. 21, 2017).}
ranges from $482.5 million (if the full 50% disgorgement is paid to Swedish authorities) to $691 million (if no disgorgement is paid to Swedish authorities).

iii. SBM

The third global resolution of the year was announced on November 30, 2017, when the DOJ entered into a DPA with SBM, a Netherlands-based manufacturer of offshore oil and gas drilling equipment, in connection with one count of conspiracy to violate the FCPA. Simultaneously, SBM’s U.S.-based subsidiary, SBM Offshore USA, Inc., pleaded guilty to a single count of the same charge.

According to the DPA, SBM and its Houston-based subsidiary engaged in a 16-year long bribery scheme involving payments of at least $180 million in “commission” to intermediaries around the world. SBM and its subsidiary understood and intended that portions of those commissions would be paid to foreign officials in Brazil, Angola, Kazakhstan, Iraq, and Equatorial Guinea in order to enable SBM to win oil and gas-related contracts. The total amount of estimated gain to SBM from the scheme was $2.8 billion. The scheme involved high-level executives of the U.S.-based subsidiary, including U.K. citizen Anthony Mace and U.S. citizen Robert Zubiate, who directly authorized millions of dollars in commission payments to the Swiss and Monaco bank accounts of intermediaries. As discussed above, Zubiate and Mace pleaded guilty to individual FCPA charges earlier in November 2017. In charging corrupt conduct in Kazakhstan, the DOJ also appears to have treated a commercial Italian oil and gas company as a government instrumentality due to the fact that that company had been awarded concessions by the Kazakh state-owned oil company—an unusual extension of the definition of “government instrumentality” under the FCPA.

As with the Telia matter, the SBM matter involves a Dutch company settling charges of domestic and foreign bribery with Dutch, U.S., and Brazilian authorities. SBM resolved charges with each authority at a different time, however, suggesting that, although there may have been cooperation between the three countries, the countries did not coordinate their resolutions in the same way as in the Telia matter. For example, the Dutch OM resolved SBM’s charges in 2014, resulting in SBM paying a

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criminal penalty of $240 million.\textsuperscript{167} The DOJ then reached its resolution with SBM in 2017, with an additional criminal penalties of $238 million.\textsuperscript{168} Lastly, Brazilian prosecutors are still in the process of resolving SBM’s charges; as of mid-2016, the parties were expected to reach a settlement valued at approximately $280 million.\textsuperscript{169} Thus, SBM to date has paid approximately $478 million and can reasonably be expected to pay over $750 million in total global settlements.

Interestingly, the total amount that SBM is expected to pay in all its resolutions is far less than the calculated criminal penalty range due under the relevant U.S. Sentencing Guidelines—an astounding $4.5 billion to $9 billion.\textsuperscript{170} SBM did earn a 25% reduction off the bottom of the sentencing range for cooperation and remediation, which would reduce the fine amount to approximately $3.4 billion. However, this still leaves a shortfall of approximately $2.6 billion. The discrepancy between the fine recommended by the Sentencing Guidelines and SBM’s actual penalty amount can likely be attributed to the DOJ’s assessment of the company’s ability to pay.\textsuperscript{171} The DPA and the DOJ settlement press release both indicate that the DOJ took care to assess a penalty that would “avoid substantially jeopardizing the continued viability of [SBM]” and accounted for “SBM’s inability to pay a fine.”\textsuperscript{172} Although the discount extended SBM is dramatic (over 80% off the bottom of the sentencing calculation)—particularly when compared to the fact that SBM earned an estimated $2.8 billion from its corrupt conduct—it is worth noting that there are likely few companies in the world that could bear a $4.5 billion fine without jeopardizing ongoing operations.

\textbf{iv. Keppel}

This year’s final global resolution was announced on December 22, 2017, when the DOJ entered into a DPA with Keppel, a Singapore-based shipyard and vessel repair company, to resolve charges brought by authorities in the United States, Brazil, and Singapore for Keppel’s role in a decade-long bribery scheme involving officials in Brazil.\textsuperscript{173} Notably, this resolution represents the DOJ’s “first coordinated FCPA

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resolution with Singapore" and advances the Department’s continued coordination and partnership with Brazil. In related proceedings, Keppel settled with the MPF in Brazil and the Attorney General’s Chambers in Singapore. Keppel’s wholly owned U.S. subsidiary, Keppel Offshore & Marine USA Inc. ("Keppel USA"), also pled guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA. Keppel and Keppel USA agreed to pay a combined total criminal penalty of over $422 million. Half of the settlement (approximately $211 million) was allocated to Brazil, with the remaining half split equally between the United States and Singapore (each receiving approximately $105.5 million).

According to the DPA, between 2001 and 2014, executives at Keppel and Keppel USA knowingly and willfully conspired to violate the anti-bribery provisions of the FCPA, paying approximately $55 million in bribes to Brazilian officials and profiting from over $350 million in corruptly-obtained business. Specifically, the DOJ found that Keppel and Keppel USA bribed officials at the Brazilian state-owned oil company Petrobras, as well as the then-governing political party in Brazil, in order to secure thirteen contracts with Petrobras and another Brazilian entity. As described by the DOJ, Keppel made the bribes through “outsized commission payments to an intermediary, under the guise of legitimate consulting agreements,” who then used the “global financial system . . . to disguise the source and disbursement of the bribe payments” to the Brazilian officials and political party “by passing funds through a series of shell companies.” In reaching the $422 million resolution, the DOJ credited Keppel and Keppel USA’s substantial cooperation in the investigation and extensive remedial measures.

v. Analysis

One of the most obvious trends of the global resolutions announced in 2017 is the continuing strength of cooperation between key foreign prosecuting offices, such as the U.K. SFO, the Dutch OM, and the Brazilian prosecuting authority. In particular, the Telia action can be viewed as a continuation of the U.S.-Dutch partnership that began with the Vimpelcom action in 2016. Vimpelcom, a Netherlands-based telecommunications company, and its Uzbek subsidiary paid bribes of more than $114 million to an Uzbek government official (again, believed to be Gulnara Karimova) to

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enter the Uzbek telecommunications market. The DOJ, SEC, and Dutch OM reached a $795 million global resolution with Vimpelcom in 2016. The OM extended its cooperation with the DOJ and SEC from Vimpelcom to the 2017 Telia action despite the fact that, unlike Vimpelcom, Telia is not based in the Netherlands. The only connection between Telia’s corrupt conduct and the Netherlands was Telia’s use of Dutch corporate forms: Telia created multiple holding companies in the Netherlands, some of which were used to hold its Uzbek subsidiary, Coscom, and one of which was partially “sold” to the Uzbek official as a corrupt payment. At least one other telecommunications company, Russia-based Mobile TeleSystems PJSC (“MTS”), is known to be under investigation in connection with its entry to the Uzbek market.

In 2017, the United States also coordinated actions with foreign prosecuting offices that, to date, have not been heavily involved in foreign anti-corruption enforcement—the Swedish prosecuting authority and, as previously noted, Singapore’s Attorney General’s Chambers. In each case, however, the Swedish and Singaporean authorities brought actions only where a domestic company was involved (Telia and Keppel, respectively).

The division of monetary payments in the Rolls-Royce, Telia and Keppel actions also shows, as have past global resolutions, that, as foreign partnerships increase, the United States’ share of the pie grows correspondingly smaller in resolutions involving non-U.S. companies. In some cases, this occurs because non-U.S. authorities have imposed heavier penalties than the United States. This makes sense from a policy perspective given that a country will almost always have greater interest in prosecuting the corrupt conduct of its own citizens and companies than foreign authorities. Furthermore, from a notice and fairness perspective, companies can most expect to be held accountable under the laws of their own countries, and typically have the most knowledge of the criminal code and attendant punishments of their home jurisdictions. As one example of this trend, the United Kingdom took the lion’s share

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183 Historically, coordinated global resolutions have tended to be between the DOJ and SEC in the U.S. and the prosecuting authorities in an offender’s home jurisdiction. These foreign authorities obviously have a clear interest in pursuing corrupt conduct perpetrated by their own companies and/or citizens. Some examples include the actions against Siemens (U.S.-German resolution); Embraer (U.S.-Brazil resolution); Odebrecht and Braskem (U.S.-Brazil resolution); Rolls-Royce (U.S.-U.K. resolution), and obviously Telia itself (U.S.-Sweden resolution).
186 Phrased differently, where a company’s home jurisdiction is involved in prosecuting corruption, the United States no longer represents primary “supply-side” jurisdiction, and its interest becomes more incidental. Jay Holtmeier, Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities, 84 FORDHAM L. REV. 493, 496-97 (2015) (explaining that foreign corruption involves, at minimum, the interests of two countries—the country of the bribe-giver (“supply-side” jurisdiction) and the country of the briber-receiver (“demand-side” jurisdiction)—and that the U.S. interest is typically that of the supply-side).
of the monetary penalty paid by the U.K.-based Rolls-Royce in the 2017 Rolls-Royce action at approximately $604 million, with the United States receiving $169.9 million in penalties.187

In other cases, division of monetary payments may reflect differing roles played by prosecuting offices in the investigation; alternatively, it may indicate the extent of the corrupt conduct that occurred within a jurisdiction, and therefore the harm suffered by that jurisdiction. In Telia, for example, the United States will receive at minimum approximately 50% of all payments.188 This division may reflect the United States’ more prominent role in the Telia investigation as the SEC and DOJ have claimed both criminal penalties and disgorgement from Telia, whereas Dutch and Swedish authorities have only pursued one or the other.189 As a third example, in Keppel, Brazil collected half of the total criminal penalty, while the United States and Singapore (Keppel’s home country) received only one quarter.190 Given that the corrupt conduct in Keppel involved a decade-long scheme to bribe Brazilian officials, the monetary division suggests that Brazil suffered the most harm and therefore had the most interest in levying criminal penalties.

The SBM settlement also provides a fascinating glimpse into how the dynamics between multiple cooperating but ultimately independent foreign prosecuting offices can affect a company’s resolution. As noted above, SBM did not reach a single global resolution with prosecuting authorities, but has entered (or anticipates entering) into serial settlements with the Netherlands, the United States, and Brazil. The different timing of the investigations appears to have affected how SBM was charged. In particular, when SBM resolved charges with the Dutch OM in 2014, the DOJ announced that it was closing its investigation into SBM in part based on the understanding that the United States did not have jurisdiction over SBM.191 At the time, however, SBM had not resolved charges with Brazilian authorities; thus, although the Dutch and U.S. investigations closed, the Brazilian investigation continued. As a result of Brazil’s ongoing investigation, Brazil filed charges against several individuals in December 2015.192 Among those charged was Robert Zubiate, a U.S. citizen and executive of SBM’s U.S.-based subsidiary.193 The discovery that Zubiate was involved in the conduct (and therefore, presumably, provided a jurisdictional basis for FCPA charges)

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led the DOJ to re-open its investigation.194 Although it is impossible to determine the precise information flow between the Dutch, U.S., and Brazilian authorities, it seems possible that, absent the strong partnerships between the three countries, Brazil may never have initiated an investigation into the conduct of Netherlands-based SBM. And without Brazil’s investigation, the DOJ may not have discovered a jurisdictional basis for bringing charges against SBM in the United States.195

The increase in global resolutions against corporations has also led to foreign prosecutors investigating individuals implicated in corporate misconduct. Last year, for example, the globally coordinated FCPA action against Embraer led to charges against 11 individuals in Brazil and two in Saudi Arabia.196 The blockbuster actions against Odebrecht and Braskem have led to a flood of investigations into individuals across Latin America, including potential charges against the former president of Peru, the CEO of Odebrecht, and the former CEO of Petrobras.197 This year, the Swedish prosecuting authority has indicated that it is exploring charges against individuals tied to the Telia bribery scheme.198 The U.K. SFO has similarly indicated that it is investigating individuals tied to the Rolls-Royce conduct and expects that charges may be brought sometime in 2018.199

Finally, the Rolls-Royce and SBM settlements, both of which appear to arise out of global investigations into Monaco-based oil and gas intermediary Unaoil, illustrate the potential global reach of an industry sweep involving a foreign business partner. Government investigations into Unaoil, a company owned by the wealthy Ahsani family,200 began in early 2016 following news coverage alleging corrupt conduct by

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195 It is unclear when Brazilian authorities learned of Zubiate’s involvement and, in particular, whether they were aware of it prior to when DOJ initially closed its investigation in 2014. To the extent that Brazilian prosecutors knew of a U.S. jurisdictional hook in 2014 and did not provide that information to the DOJ, the SBM timeline actually suggests a lack of coordination between jurisdictions. However, given the lapse of approximately one year between the DOJ’s closing of its investigation and Brazil filing charges against Zubiate, it is possible that Brazilian prosecutors learned of Zubiate’s involvement after 2014. SBM Offshore Press Release: SBM Offshore achieves settlement with Dutch Public Prosecutor’s Office over alleged improper payments. United States Department of Justice closes out the matter (Nov. 12, 2014); Brazil prosecutors charge 12 in SBM Offshore graft scheme, REUTERS (Dec. 17, 2015), https://www.reuters.com/article/us-brazil-corruption-petrobras-sbm/brazil-prosecutors-charge-12-in-sbm-offshore-graft-scheme-idUSKBN0U017D20151218.
199 Peggy Hollinger and Catherine Belton, UK investigation into Rolls-Royce turns its focus to individuals, FINANCIAL TIMES (Jan. 20, 2017), https://www.ft.com/content/f1344464-df23-11e6-9d7c-be108f1c1dce.
Unaoil across the Middle East, Africa, and Central Asia.\textsuperscript{201} Unaoil served as an intermediary for several major oil and gas companies in these regions, including Rolls-Royce and SBM, and allegedly paid bribes on their behalf.\textsuperscript{202} In 2017, SBM acknowledged that the United States’ investigation into the company included its relationship with Unaoil.\textsuperscript{203} In addition, although the Rolls-Royce settlement did not explicitly name Unaoil, the DOJ DPA described a key Rolls-Royce intermediary as a “Monaco-based oil and gas services intermediary” that “regularly bribed foreign officials” in Angola, Azerbaijan, Iraq, and Kazakhstan—all locations of Unaoil operations.\textsuperscript{204} Several other companies have announced they are under investigation based on their relationships with Unaoil, including U.K.-based Petrofac,\textsuperscript{205} Swiss-based ABB Ltd,\textsuperscript{206} U.S.-based FMC Technologies,\textsuperscript{207} and U.S.-based KBR.\textsuperscript{208} Many of these companies have disclosed investigations by U.S. and U.K. authorities and, following the pattern of the Rolls-Royce and SBM settlement, may face charges in multiple jurisdictions.

3. Increased Emphasis on Employee Discipline/Termination as a Necessary Component of Remediation

Several SEC and DOJ actions in 2017 reflected an increased focus on employee discipline by both companies and government agencies. Settlements that highlighted significant disciplinary actions include Telia, Las Vegas Sands Corporation (“Las Vegas Sands”), Sociedad Química y Minera de Chile, S.A. (“SQMC”), and Rolls-Royce.

As noted above, Telia ultimately entered into a global resolution for almost $1 billion. According to the Criminal Information filed against Telia, its executives “understood that they had to regularly pay [an Uzbek government official] millions of dollars in order to enter the Uzbek telecommunications market and continue to operate there.”\textsuperscript{209} Telia further admitted that “certain Telia management,” including high-ranking executives with authority over its business operations in Europe and Asia, conspired to make “corrupt payments” in order to “enter the Uzbek telecommunications market.”\textsuperscript{210} Agreements with the government official’s shell company went as high as the company’s board of directors. Ultimately, Telia fired its entire Board of Directors, its CEO, and all managers

\textsuperscript{201} Nick Baumann, Akbar Shahid Ahmed, Jessica Shulberg, and Paul Blumenthal, \textit{Unaoil’s Huge New Corporate Bribery Scandal, Explained}, HUFFINGTON POST (Mar. 30, 2016), \url{https://www.huffingtonpost.com/entry/unaoil-scandal-explained_us_56fbd2f0e4b0daf53aee0cff}.

\textsuperscript{202} Nick Baumann, Akbar Shahid Ahmed, Jessica Shulberg, and Paul Blumenthal, \textit{Unaoil’s Huge New Corporate Bribery Scandal, Explained}, HUFFINGTON POST (Mar. 30, 2016), \url{https://www.huffingtonpost.com/entry/unaoil-scandal-explained_us_56fbd2f0e4b0daf53aee0cff}.

\textsuperscript{203} SBM Offshore Press Release: SBM Offshore Update on Legacy Issues (Nov. 6, 2017).


\textsuperscript{205} U.K. Serious Fraud Office News Release: SFO confirms investigation into Petrofac PLC (May 12, 2017).


\textsuperscript{207} FMC Technologies, U.S. Securities and Exchange Commission Form 10-Q, April 28, 2016.


involved in the wrongdoing. The DOJ DPA extended credit for the employee discipline, noting that Telia “engaged in extensive remedial measures, including terminating all individuals involved in the misconduct” and those who “had a supervisory role over those engaged in the misconduct.” The DOJ press release regarding Telia further noted that “the companies received significant credit for their extensive remedial measures” which was a significant factor motivating “a 25% reduction off the bottom of the U.S. Sentencing Guidelines fine range.”

Several other 2017 DOJ settlements recognized employee discipline as a significant factor in earning remediation credit or otherwise reduced punishment. Las Vegas Sands entered into a non-prosecution agreement (“NPA”) with the DOJ to resolve allegations that certain of its executives knowingly and willfully failed to implement a system of internal accounting controls to ensure the legitimacy of payments to consultants in Macao and the People’s Republic of China (“PRC”). Las Vegas Sands agreed to pay $5.96 million, which reflected a 25% reduction off the bottom of the applicable U.S. Sentencing Guidelines fine range; a significant factor in reaching this number was that Sands “fully remediated” by “no longer employ[ing]” the individuals implicated in the conduct, including multiple “senior executive[s]” leading Sands’ “China strategy.” (Given that the DOJ action was settled approximately nine months after Las Vegas Sands settled an SEC action based on the same facts, these employees were likely fired in conjunction with the SEC settlement.) In another action, the DOJ’s DPA with SQMC credited SQMC with taking remedial measures, including firing the CEO who had misused his discretionary fund and disciplining other employees involved in or aware of the improper payments. Again, the DOJ papers noted the terminations as a significant factor motivating a 25% discount from the bottom of the U.S. Sentencing Guidelines’ fine range. Similarly, as part of its DPA with the DOJ, Rolls-Royce received a 25% reduction from the bottom of the U.S. Sentencing Guidelines fine range; the DOJ justified the reduction in part by indicating that Rolls-Royce had “taken significant remedial measures, including terminating business relationships with multiple

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employees and third-party intermediaries who were implicated in the corrupt scheme.\textsuperscript{219}

This trend towards more robust remediation through employee discipline finds support outside U.S. borders as well. For example, as a condition of his acceptance of the Rolls-Royce's DPA with the U.K. SFO, a U.K. judge noted that he was "satisfied that both the senior management and those responsible for the [now proper] strategic direction of Rolls-Royce are different to those responsible for running the company (and its culture)" during the time Rolls-Royce was making these improper payments.\textsuperscript{220}

This trend is noteworthy and raises difficult issues for companies investigating and remediating improper conduct. While U.S. enforcement authorities routinely inform companies that the government does not get involved in company disciplinary decisions, the governments' record of seemingly awarding tangible monetary benefits for disciplinary action against employees places substantial pressure on companies to show the government that "heads have rolled." While it is understandable that the government may take into account a company's actions to ensure that bad conduct cannot continue and that proper messages are sent, the government should proceed with caution in the messages it sends and should avoid the suggestion that companies can save millions of dollars in penalties by tossing employees overboard. Companies ought to have wide latitude in following internal compliance and corporate employment procedures in reaching appropriate overall solutions to remediate compliance breakdowns. This will continue to be a challenging area for counsel representing both companies and individuals in corruption matters, particularly in countries with employee-friendly labor and employment laws, where it is difficult if not impossible to terminate employees involved in misconduct.

4. Monitorships on the Rise

Since the start of the DOJ Pilot Program in April 2016, there has been a sharp uptick in the imposition of monitors, a trend that has continued into 2017. In particular, since 2016, nearly all DOJ settlements involving criminal internal controls violations have been accompanied by the imposition of a monitor, a logical result given that companies with criminally inadequate controls would be the most likely to need an independent compliance expert to supervise the implementation of effective controls. And as discussed in more detail Section III.B.5.a below, the DOJ seems to be pursuing criminal internal control violations more aggressively in recent years, which may be contributing to the increase in monitorships.

The trend for several years prior to the FCPA Pilot Program was a decrease in monitorships. According to analysis by Global Investigations Review ("GIR"), only 34% of DOJ settlements between 2008 and April 2016 included the imposition of a


monitor.\textsuperscript{221} At the time of the Pilot Program launch, the DOJ announced that if a company cooperated, remediated, and also voluntarily self-disclosed misconduct, the DOJ would generally not impose a monitor.\textsuperscript{222} From the start of the Pilot Program in April 2016 to March 2017, however, GIR’s analysis shows that 62% of DOJ settlements have included the imposition of a monitor—almost double the percentage of cases that involved monitors in the preceding years.\textsuperscript{223} (At the same time, it is worth noting that the DOJ’s rate of declination has also increased under the Pilot Program. GIR’s analysis suggests that resolutions under the Pilot Program are becoming more binary—more companies walk away without any charges, but the ones that do not tend to receive harsher penalties.) The increase in monitorship trends may be, at least in part, the result of the DOJ’s first compliance consultant, who worked in the Fraud Section from September 2015 to June 2017 and likely brought a greater focus to compliance programs in general. Time will tell if this trend will change in 2018 in light of the new FCPA Corporate Enforcement Policy. As discussed in more detail in Section II.A above, the FCPA Corporate Enforcement Policy states that if a criminal resolution is warranted based on aggravating circumstances, but a non-recidivist company has otherwise met the self-disclosure, cooperation and remediation standards, the DOJ generally will not impose a monitor.\textsuperscript{224}

Over the course of 2017, six out of thirteen DOJ and SEC resolutions with companies—just over 46%—resulted in the imposition of an independent corporate compliance monitor or consultant. Two out of the six DOJ and four out of the seven SEC settlements resulted in the imposition of a monitor or consultant. Perhaps not surprisingly, three repeat offender companies—Zimmer Biomet, Orthofix, and Halliburton—were required to retain a compliance monitor or consultant. The length of the monitorships varied from one year to three years. The scope of the monitorship and role of the compliance monitor has also varied.

As addressed in detail in Section III.B.1 above, the repeat offenders this year, Zimmer Biomet, Orthofix, and Halliburton, were each required to retain an independent monitor (and in Zimmer Biomet’s case, a second monitor). In 2017, SQMC was also required to retain an independent monitor for a two-year term.\textsuperscript{225} According to the DOJ and SEC settlement agreements, SQMC management learned of the payments through an internal audit in 2014 but did not take adequate measures to stop the conduct until

\textsuperscript{221} Adam Dobrik, \textit{How the pilot programme has changed FCPA cases}, GLOBAL INVESTIGATIONS REVIEW (Mar. 21, 2017).
\textsuperscript{222} U.S. Department of Justice Press Release: Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016).
\textsuperscript{223} Adam Dobrik, \textit{How the pilot programme has changed FCPA cases}, GLOBAL INVESTIGATIONS REVIEW, March 21, 2017.
At the time of settlement, the DOJ determined that an independent compliance monitor was required because, “[a]lthough the Company has taken a number of remedial measures, the Company is still in the process of implementing its enhanced compliance program, which has not had an opportunity to be tested.” Although the 2017 NPA with Las Vegas Sands did not specifically require Las Vegas Sands to retain a monitor, under the 2016 SEC settlement, Las Vegas Sands had agreed to retain an independent consultant for two years to review its FCPA-related internal controls, recordkeeping, and financial reporting policies and procedures and its ethics and compliance functions.

As a counterpoint to the above cases, it is interesting to note that the global resolution with Telia—one of the largest FCPA resolutions in history, with U.S. penalties alone likely to range between $482.5 million to $691 million—did not involve the imposition of a monitor. This may have been due to significant remedial efforts on Telia’s part, including beginning its remediation as early as 2013. The government noted that the company’s remediation occurred “promptly” and was “extensive,” including terminating board members and senior executives (including individuals who were not involved but failed to detect the misconduct), creating a “new and robust” compliance function, and “implementing a comprehensive anti-corruption program.”

Speaking at the American Bar Association’s (“ABA”) Sixth Annual London White Collar Crime Institute Conference in October 2017, Telia’s former chief ethics and compliance counsel, Michaela Ahlberg, also noted that she and Anna Romberg, Telia’s then-head of anti-corruption, traveled to Washington, D.C., on three separate occasions to pitch the company’s compliance program to prosecutors from the DOJ, SEC, and OM when giving her thoughts as to how Telia avoided the imposition of a compliance monitor.

In addition to the increased percentage of monitorships since April 2016, the DOJ has been accelerating the monitor selection process by requiring companies reaching settlements involving monitors to provide the DOJ with three candidates for the role upon reaching a settlement agreement. Previously, companies facing monitorships

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232 Michael Griffiths, Telia used DOJ guidelines to avoid compliance monitor, GLOBAL INVESTIGATIONS REVIEW (Oct. 10, 2017).
were required to submit three monitors for consideration within 30 days of settlement.234

Peter Carr, a spokesperson for the DOJ’s criminal division, said the goal for this policy change “is to speed up the time frame so the monitor can start sooner and end earlier, which [the DOJ] believe[s] is in the interest of the government, the company and the public.”235

5. **Continued Importance of Due Diligence and Active Monitoring of Third Parties**

The SEC’s and DOJ’s actions in 2017 once again underscored the importance of third-party due diligence. In several cases where bribes were allegedly paid, the government attributed the payments to failures in internal controls and third-party due diligence. For example, the DOJ and SEC found Zimmer Biomet violated the internal controls provision of the FCPA for the company’s failure to conduct adequate due diligence on proposed third parties such as customs brokers and distributors.236 The lack of controls ultimately resulted in improper payments made to Mexican customs officials, and the retention of a distributor that the company knew had previously made improper payments on its behalf.237 Similarly, SQMC was charged with internal controls violations for failing to conduct due diligence on or obtain anti-corruption representations from its third-party vendors.238 As a result, the DOJ and SEC determined that SQMC could not verify the justification for certain payments made to third parties or ensure improper payments were not made to politically exposed persons.239 In Orthofix as well, the SEC cited to the company’s failure to monitor the activities of its subsidiaries in high-risk countries as a result of inadequate internal controls. In particular, the SEC stated that had Orthofix instituted sufficient policies and procedures, the company could have detected and prevented the discounts and high commissions that were ultimately provided to third-party representatives and distributors for the purposes of facilitating improper payments.240

Finally, the SEC’s enforcement against the Massachusetts-based medical manufacturing company Alere Inc. (“Alere”) involved, in part, the improper use of third parties.241 In September 2017, the SEC settled accounting fraud and FCPA books and

records and internal controls violations charges with Alere. Without admitting or denying the findings, Alere agreed to pay disgorgement of ill-gotten gains and penalties totaling over $13 million, including over $3.3 million in disgorgement, almost half a million dollars in pre-judgment interest, and a $9.2 million penalty. As to the FCPA charges, between 2011 to 2013, the SEC alleged that Alere’s subsidiaries in India and Colombia improperly characterized or recorded payments in Alere’s books and records. Specifically, the SEC alleged that the Indian and Colombian subsidiaries received business by using distributors or consultants to make improper payments to government officials. According to the SEC, Alere failed to maintain adequate internal controls to prevent the payments, and the company inaccurately recorded the payments in its books and records. As part of the settlement, the SEC also alleged that Alere engaged in improper and premature revenue recognition for several of its international subsidiaries.

a. **Aggressive Use of Internal Controls Provisions**

In addition to more run-of-the-mill cases involving third parties described above, SEC and DOJ brought actions against three companies in 2017—Cadbury Limited (“Cadbury”) and Mondelēz International, Inc (“Mondelēz”), and Las Vegas Sands—for violations of the internal controls provision in connection with third-party payments absent any evidence of bribery. In a particularly aggressive use of the internal controls provisions, the SEC and DOJ looked at whether these companies’ practices and internal controls created merely a heightened risk of improper conduct.

In the case of Cadbury and Mondelēz, the SEC found that Cadbury’s India subsidiary retained the services of a third-party agent to assist with securing necessary government licenses and approvals for certain facilities in India without conducting sufficient due diligence on the agent. Employees of the company paid nearly $100,000 to the agent for services—such as completing the licensing applications—that

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245 Order Instituting Cease-and-Desist Proceedings, In the Matter of Alere Inc., Rel. No. 10417, File No. 3-18228, ¶¶ 3, 4, 15-16, 17-19, 20-21 (Sep. 28, 2017). One of the largest violations occurred at Standard Diagnostics, Alere’s South Korean subsidiary. The SEC alleged that Standard Diagnostics improperly inflated revenues at or near the end of reporting periods. Standard Diagnostics did this by prematurely recording “early sales” for products that had not yet been delivered or were still being stored at warehouses. The improper revenue recognized from these “early sales” transactions ranged from $25,000 to $2 million, and this inflated revenue was included in Alere’s SEC filings. As of the end of 2015, both the Standard Diagnostics Finance Director and Finance Manager were involved in the “early sales,” and they concealed this scheme in 2016 during an internal assessment conducted by Alere management. In addition to the scheme in South Korea, Alere allegedly engaged in other improper revenue recognition related to the timing of its reporting at its subsidiaries in Israel, South Africa, Ireland, and China, among other countries. When Alere revised and restated its revenue from 2011 through 2016, over $260 million shifted to later reporting periods.
the SEC later determined the employees completed themselves.\textsuperscript{247} Although the SEC did not allege that improper payments were provided to Indian government officials, the SEC cited to the fact that the company’s failure to conduct due diligence “created the risk that funds paid to [the agent] could be used for improper or unauthorized purposes.”\textsuperscript{248} Mondelēz—Cadbury’s parent company—agreed to pay the SEC a total civil penalty of $13 million to settle the matter.\textsuperscript{249}

In Las Vegas Sands, the DOJ and SEC found that the company’s executives knowingly and willfully failed to implement sufficient controls to ensure the legitimacy of nearly $60 million in payments made to a business consultant for the purposes of promoting Las Vegas Sands’ brand in Macau and the PRC.\textsuperscript{250} According to the DOJ, Las Vegas Sands’ dealings with the consultant were undertaken “without appropriate due diligence of certain entities, consistent monitoring of or justifications for payments, and proper approvals and documentation, even after certain then-senior executives of [Las Vegas Sands] had been notified about the consultant’s business practices and failure to account for over $700,000.”\textsuperscript{251} Neither the DOJ nor the SEC presented any evidence that the payments to the consultant were used for improper purposes. Nonetheless, Las Vegas Sands settled charges with the DOJ and entered into an NPA, under which it paid a criminal penalty totaling $6.96 million.\textsuperscript{252} In an unusual delay, the DOJ action came some nine months after the company settled related charges with the SEC—Las Vegas Sands reached its SEC settlement in 2016, agreeing to pay a $9 million penalty for “failing to properly authorize or document millions of dollars in payments” to the consultant facilitating business activities in the PRC and Macao.\textsuperscript{253} According to the SEC, the improper accounting for payments made to the consultant and the failure to conduct adequate due diligence were sufficient to violate the FCPA.

The actions in Cadbury, Mondelēz and Las Vegas Sands follow a line of reasoning that harkens back to a 2012 action against a technology company where the SEC charged the company with violating the books and records and internal accounting controls provisions of the FCPA for failing to prevent a subsidiary from secretly setting aside money and failing to accurately record off-the-books funds. In that case, while the SEC did not allege that the secret funds were in fact used for improper purposes, it alleged that the funds “created the potential” for bribery.

C. Notable Aspects of Individual Resolutions

1. Continued Focus on Individual Accountability
   
   a. DOJ

   The DOJ continued to reiterate its focus on individual prosecutions in 2017, a priority that was re-emphasized in the September 2015 Yates Memorandum requiring, among other things, that companies provide the DOJ with "all relevant facts relating to the individuals responsible for the misconduct." Prosecutors brought a high number of enforcement actions against individuals this year (19) and regulators continued to charge individuals long after the corporate settlement. In April 2017, then-Acting Principal Deputy Assistant Attorney General McFadden told attendees at a summit that "the department continues to prioritize prosecutions of individuals who have willfully and corruptly violated the FCPA" and that, more broadly, "Attorney General Sessions has noted the importance of individual accountability for corporate misconduct." In October 2017, when speaking at a conference on white-collar crime, S.D.N.Y. Criminal Division Chief Lisa Zornberg touted her office’s record on individual FCPA prosecutions, in particular the recent conviction of Ng Lap Seng (discussed in Section III.C.1.a.ii below). Zornberg stated, "The southern district, I think at this point, has more convictions of FCPA violations than any district in the country," adding that such work “is worth noting.” Also in October, McFadden again emphasized the DOJ’s focus on individual prosecutions, telling conference attendees, "This is something we’ve put a lot of focus into" and then referring to three recent successful corruption prosecutions: those of Mahmoud Thiam and Heon-Cheol Chi on money laundering charges and Ng Lap Seng on FCPA charges. These statements are in keeping with Attorney General Sessions’ own approach, which is that the DOJ “will continue to emphasize the importance of holding individuals accountable for corporate misconduct.”

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i. Individual Prosecutions in the Context of FCPA Enforcement Activity

Consistent with these proclamations, individual resolutions made up a large portion of the total FCPA resolutions in 2017. The DOJ charged 16 individuals with FCPA violations in 2017. In 2017, the DOJ also secured guilty pleas and convictions for seven individuals in cases where charges were filed before 2017 and/or involved non-FCPA charges. Looked at another way, however, of the six DOJ proceedings involving companies in 2017, only three also involved the prosecution of individuals. Given that there is often a delay between corporate resolutions and individual charges (almost a year and more than a year in the case of Rolls-Royce and Embraer, respectively), however, it is possible that individual charges relating to other corporate resolutions may be forthcoming in the future, including in cases resolved with declinations. Further, in some cases, investigations by foreign authorities may be obviating the need for DOJ action.

ii. Indictments, Pleas and Convictions

In January 2017, the DOJ announced two guilty pleas as part of an ongoing investigation into bribery at Petróleos de Venezuela S.A. (“PDVSA”), Venezuela’s state-

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262 In the Telia matter, for example, Swedish authorities charged three former executives, including Telia’s former CEO, with bribery. Dylan Tokar, FCPA Docket: Sweden Charges Telia CEO with Bribery, GLOBAL INVESTIGATIONS REVIEW (Sept. 25, 2017), https://globalinvestigationsreview.com/article/jac/1147661/fcpa-docket-sweden-charges-telia-ceo-with-bribery. At least two of these executives are foreign nationals, and, as such, might be more easily charged under Swedish statutes than under the FCPA. Id.

263 There is also one non-FCPA case that is worth noting in this context. In May 2017, Mahmoud Thiam was convicted of one count of transacting in criminally derived property and one count of money laundering, and in August he was sentenced to seven years in prison and three years of supervised release. U.S. Department of Justice Press Release No. 17-939: Former Guinean Minister of Mines Sentenced to Seven Years in Prison for Receiving and Laundering $8.5 Million in Bribes From China International Fund and China Sonangol (Aug. 25, 2017), https://www.justice.gov/opa/pr/former-guinean-minister-mines-sentenced-seven-years-prison-receiving-and-laundering-85. When he was the Guinean minister of mines, Thiam accepted $8.75 million in bribes from a Chinese company to secure mining rights in Guinea. Id. Thiam then laundered this money through the U.S. financial system. Id.
owned oil and gas company. Juan Jose Hernandez-Comerma and Charles Quintard Beech III both managed and owned closely held companies that attempted to secure contracts and conduct business with PDVSA. The DOJ alleged that they paid cash bribes and provided recreational travel and entertainment to PDVSA officials and purchasing analysts in return for assistance placing their companies on PDVSA bidding panels and assistance receiving payments for previously awarded contracts. Hernandez-Comerma pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA, while Beech pleaded guilty to one count of conspiracy to violate the FCPA. Their sentencings are scheduled to take place on February 8, 2018.

Also in January 2017, the DOJ charged San Woo via complaint and unsealed the December 2016 indictment of Ban Ki Sang, Joo Hyun Bahn, and Malcom Harris, exposing an unusual FCPA conspiracy. The indictment alleges that Sang, an executive at a Korean construction company undergoing a liquidity crisis, convinced his company to hire Bahn, his son and a Manhattan real estate broker, to secure an investor to purchase a building in Hanoi owned by Sang's company. Harris, a blogger and consultant, pretended to be an agent of a foreign official and solicited bribes from Sang and Bahn. In return for these bribes, which Harris pretended to pass on to the foreign official, Harris promised that the sovereign wealth fund of the foreign official's country would acquire the building in Hanoi. Sang and Bahn agreed to pay $500,000 upfront to the official and $2 million upon the sale of the building, but Harris stole the $500,000 and spent it on rent for a luxury apartment in New York and other expenses. Additionally, as the company's liquidity crisis worsened, Bahn allegedly lied to the company and its creditors about the status of the sale and forged

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documents in support of his lies.oo274  Woo helped Sang and Bahn to obtain the
$500,000.oo275  Sang was charged with one count of conspiracy to violate the FCPA,
three counts of violating the FCPA, and various other crimes.oo276  Bahn was charged
with one count of conspiracy to violate the FCPA, three counts of violating the FCPA,
and other crimes.oo277  Both men are awaiting trial.oo278  Harris who was charged with wire
fraud, money laundering, and identity theft, pleaded guilty to the first two charges and
was sentenced to 42 months in prison and ordered to pay forfeiture and restitution.oo279
Woo was charged with one count of conspiracy to violate the FCPA and is currently in
settlement discussions with the government.oo280

In April and July 2017, the DOJ resolved the cases of three men who were involved in a
bribery conspiracy centered on the United Nations (“U.N.”). Ng Lap Seng, the head of a
Macau-based real estate development company, was convicted in July after a jury trial
of two counts of violating the FCPA and various other charges.oo281  The evidence
established that he paid bribes to U.N. ambassadors to obtain the U.N.’s formal support
for a multibillion dollar conference center that Seng hoped to build in Macau to host U.N.
events.oo282  He paid ambassadors and their family members through a business that he

oo274  Sealed Indictment, United States v. Bahn, No. 16-CR-00831-ER, ¶¶ 58, 60 (S.D.N.Y. Dec. 15, 2016)
(Indictment unsealed on Jan. 10, 2017, see Order to Unseal Indictment, ECF No. 3).
oo276  U.S. Department of Justice Press Release No. 17-029: Four Individuals Charged for Alleged
Involvement in Foreign Bribery Scheme Involving $800 Million International Real Estate Deal (Jan. 10,
2017), https://www.justice.gov/opa/pr/four-individuals-charged-alleged-involvement-foreign-bribery-
scheme-involving-800-million.
oo277  U.S. Department of Justice Press Release No. 17-029: Four Individuals Charged for Alleged
Involvement in Foreign Bribery Scheme Involving $800 Million International Real Estate Deal (Jan. 10,
2017), https://www.justice.gov/opa/pr/four-individuals-charged-alleged-involvement-foreign-bribery-
scheme-involving-800-million.
oo278  U.S. Department of Justice Press Release No. 17-1113: Middleman Who Lied About Being an Agent
of a Foreign Official Sentenced to 3 ½ Years in Prison for Role in Foreign Bribery Scheme Involving $800
Million International Real Estate Deal (Oct. 5, 2017), https://www.justice.gov/opa/pr/middleman-who-lied-
about-being-agent-foreign-official-sentenced-3-years-prison-role-foreign.
oo279  U.S. Department of Justice Press Release No. 17-849: Chairman of a Macau Real Estate
Development Company Convicted on All Counts for Role in Bribe United Nations
Ambassadors to Build a Multi-Billion Dollar Conference Center (July 28, 2017),
https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-
role-scheme-bribe-united.

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established and with cash and wire transfers. In return for his bribes, the U.N. ambassadors submitted a document to the U.N. Secretary General in support of the conference center and later revised it to refer specifically to Seng’s company as a partner. Seng orchestrated the scheme with Jeff Yin, an accountant and Seng’s assistant. Yin pleaded guilty in April to conspiracy to defraud the United States along with Francis Lorenzo, the U.N. Ambassador from the Dominican Republic, who was one of the recipients of Seng’s bribes and who pleaded guilty to conspiracy to violate the FCPA, substantive violations of the FCPA, and other charges. Seng, Yin, and Lorenzo will be sentenced in early 2018. Three other defendants were charged in connection with this matter: one passed away while the case was pending, and the other two pleaded guilty with one being sentenced to 20 months in prison.

The government’s victory in the Seng trial is noteworthy because it is the DOJ’s first victory in court in an FCPA case since 2011. The DOJ’s previous four attempts ended in disaster: one with the DOJ offering a plea to a reduced charged after a witness admitted giving false testimony; another with the trial judge dismissing the FCPA charges (and later dismissing all charges with prejudice) and expressing skepticism about the government’s evidence; another with the dismissal of all charges after two

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mistrials; and another with the trial judge vacating all convictions and dismissing the indictment for prosecutorial misconduct.290

Compared with these four cases, the meaning of the DOJ’s victory in the Seng case is not immediately clear. It could show either that the DOJ has learned from its previous difficulties in individual FCPA prosecutions and will be able to apply these lessons in the future, or it could be the exceptional case that the DOJ was able to win but not one that says anything about the DOJ’s ability to prevail in future individual prosecutions. Only time and more cases will tell.291

In September 2017, Amadeus Richers, the former director of two Florida telecommunications companies who managed the companies’ relationship with a state-owned Haitian telecommunications company (“Haiti Teleco”), pleaded guilty to one count of conspiracy to violate the FCPA and was sentenced to time served plus three years of supervised release.292 In addition to the crime to which he pleaded guilty, Richers was charged with substantive FCPA violations and non-FCPA crimes.293 His plea was part of a wide-ranging investigation into bribes paid by Florida telecommunications companies to officials at Haiti Teleco.294 The other defendants were both businessmen and Haitian government officials and their cases had a variety

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291 It appears that the DOJ’s string of failures was partly the result of one-off issues, such as prosecutorial misconduct, and partly the result of other issues, such as unreliable witnesses and the necessity of relying on broad theories of conspiracy to charge defendants, that may be inherent in FCPA cases. See Joel Schectman, Ex-CEO Sigelman of PetroTiger Sentenced to Probation Over Bribery, WALL ST. J. (June 16, 2015), https://www.wsj.com/articles/ex-ceo-of-petrotiger-sentenced-to-probation-over-bribery-1434469990; WilmerHale, FCPA Year in-Review: Developments of 2012 and Predictions for 2013 (Jan. 31, 2013), https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/FCPA_Year_End_Letter_2012.pdf; Samuel Rubenfeld, U.S. Drops Appeal in Lindsey Manufacturing FCPA Case, WALL ST. J. (May 29, 2012), https://blogs.wsj.com/corruption-currents/2012/05/29/u-s-drops-appeal-in-lindsey-manufacturing-fcpa-case/; Christopher M. Matthews, Government Drops High-Profile FCPA Sting Case, WALL ST. J. (Feb. 21, 2012), https://blogs.wsj.com/corruption-currents/2012/02/21/government-drops-high-profile-fcpa-sting-case/; see also Leslie Wayne, Bribery Case Falls Apart, and Tactics Are Doubted, N.Y. TIMES (Feb. 23, 2012), http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html. It does not appear that any of these issues were present in the Seng prosecution, although the Court of Appeals has not yet weighed in on his conviction.


of outcomes, with some pleading guilty and others being convicted after trial. 295
Interestingly, Richers, who was a fugitive, served a little over two years in prison
(approximately eight months in the United States and 48 months in Panama before his
extradition) while the other individuals, Joel Esquenazi and Carlos Rodriguez, were
sentenced to 15 and seven years in prison, respectively, in 2011. U.S. District Judge
Jose E. Martinez sentenced all three defendants.

In October 2017, Joseph Baptiste was indicted on and pleaded not guilty to one count of
conspiracy to violate the FCPA and other charges. 296 The indictment alleged that
Baptiste, who was a U.S. Army colonel, dentist, and a director of a nonprofit and a for-
profit company, had solicited bribes from undercover FBI agents. 297 The agents were
posing as potential investors in the development of a port in Haiti, a project that would
begin with the construction of a cement factory. 298 Baptiste offered to funnel payments
to Haitian officials through his nonprofit and also mentioned bribing an aide to a Haitian
official by offering him a job on the port project. 299

Also in October 2017, Fernando Ardila Rueda (“Ardila”) pleaded guilty to one count of
conspiring to violate the FCPA and one count of violating the FCPA. 300 Like Hernandez
and Beech, Ardila’s plea arose out of the PDVSA investigation. 301 Ardila was the sales
director, manager, and partial owner of companies bidding for contracts with PDVSA
and paid bribes so that his companies would be placed on PDVSA bidding panels and
to retain business with PDVSA. 302 He is the tenth individual to plead guilty in
connection with this investigation. 303 His sentencing is scheduled for February 2018. 304

295 U.S. Department of Justice Press Release No. 17-798: Telecom Executive Pleads Guilty to FCPA
Charge in Connection With Haitian Bribery Scheme (July 19, 2017),
scheme.
Conspiring to Bribe Senior Government Officials of the Republic of Haiti (Oct. 4, 2017),
https://www.justice.gov/opa/pr/retired-us-army-colonel-indicted-conspiring-bribe-senior-government-
officials-republic-haiti.
300 U.S. Department of Justice Press Release No. 17-1138: Florida Businessman Pleads Guilty to Foreign
Bribery Charges in Connection With Venezuela Bribery Scheme (Oct. 11, 2017),
https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreign-bribery-charges-connection-
venezuela-bribery-scheme.
301 U.S. Department of Justice Press Release No. 17-1138: Florida Businessman Pleads Guilty to Foreign
Bribery Charges in Connection With Venezuela Bribery Scheme (Oct. 11, 2017),
https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreign-bribery-charges-connection-
venezuela-bribery-scheme.
Bribery Charges in Connection With Venezuela Bribery Scheme (Oct. 11, 2017),
https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreign-bribery-charges-connection-
venezuela-bribery-scheme.
Bribery Charges in Connection With Venezuela Bribery Scheme (Oct. 11, 2017),
https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreign-bribery-charges-connection-
venezuela-bribery-scheme.
In November 2017, the DOJ unsealed four informations with their corresponding guilty pleas and one indictment related to an investigation of Rolls-Royce payments in Asia. The conduct at issue involved improper payments to win equipment and services contracts with Asia Gas Pipeline, a state-owned joint venture between the Kazakh and Chinese oil and gas companies that was developing a gas pipeline between Kazakhstan and China. According to the papers filed by the DOJ, the individual defendants devised a scheme in which they would make payments to employees at an engineering consulting firm, who would then pass on part of the payments to foreign officials. The payments were booked as legitimate payments to Gravitas, a third-party agent and advisor on oil and gas projects. The five defendants are Petros Contoguris, the CEO of Gravitas, who was charged with one count of conspiracy to violate the FCPA, one count of conspiracy to launder money, seven counts of violating the FCPA, and 10 counts of money laundering. Contoguris pleaded not guilty and is currently a fugitive; James Finley, a former senior energy executive at Rolls-Royce who pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA; Aloysius Johannes Jozef Zuurhout, an energy sales employee at Rolls-Royce who pleaded guilty to one count of conspiracy to violate the FCPA; Andreas Kohler, a managing director at the engineering consulting firm who pleaded guilty to one count of conspiracy to violate the FCPA; and Keith Barnett, a regional director in energy at Rolls-Royce who pleaded guilty to one count of conspiracy to violate the FCPA. As part of their plea, Finley, Barnett, and Zuurhout admitted that they participated in a conspiracy to funnel bribes through third parties around the world.

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Section III.B.2.c.i above, Rolls-Royce previously reached a coordinated settlement with anti-corruption authorities in Brazil, the United Kingdom, and the United States.  

Also in November 2017, two former executives at Dutch oil services company SBM and its U.S. subsidiary each pleaded guilty to one count of conspiracy to violate the FCPA.

Robert Zubiate was a sales and marketing executive at one of SBM’s U.S. subsidiaries. He admitted to using a third-party sales agent to pay bribes to officials at the Brazilian state-owned oil company in exchange for the agent’s assistance with winning bids. He also engaged in a kickback scheme with the same agent in which the agent paid Zubiate a portion of the commissions that the agent received from SBM. When Anthony Mace became SBM’s CEO in 2008, he joined in a long-running conspiracy in which employees and executives at SBM and its U.S. subsidiaries paid bribes to foreign officials, including those affiliated with the state-owned oil companies of Brazil, Angola, and Equatorial Guinea. As CEO, Mace authorized payments in furtherance of the scheme and avoided learning that these payments were bribes despite his knowledge of risk factors surrounding the recipients of the payments and the way that the payments were made. Zubiate’s and Mace’s sentencings are scheduled for early 2018.

In November 2017, the DOJ unsealed a complaint charging Chi Ping Patrick Ho and Cheikh Gadio with multiple counts of conspiracy to violate the FCPA, substantive violations of the FCPA, conspiring to commit international money laundering, and
international money laundering. The complaint alleged two separate schemes to bribe African government officials to secure business advantages for an unnamed multibillion-dollar energy company, which has its headquarters in Shanghai and operates globally in the financial and energy industries. Ho was the head of an NGO based in Hong Kong and Virginia that holds “Special Consultative Status” with the U.N. and is funded by the unnamed energy company, while Gadio is the former foreign minister of Senegal and the head of an international consulting firm. In the first scheme, the DOJ alleged that Ho caused the unnamed energy company to offer a $2 million bribe to the president of Chad, who, in return, gave the energy company the opportunity to obtain oil rights without international competition. Gadio allegedly connected the President of Chad and Ho and gave the bribe to the president. In return for his assistance, Ho paid Gadio $400,000.

In the second scheme, Ho paid $500,000 via wire transfer to the Ugandan Minister of Foreign affairs (who had recently completed a term as president of the U.N. General Assembly). In exchange for the minister’s assistance obtaining business advantages for the unnamed energy company, Ho also provided the same minister and the Ugandan president with gifts and promises of future benefits.

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321 “Special Consultative Status” means that the NGO can participate in many UN-sponsored events and in return is expected to contribute to the UN’s goals. Complaint, United States v. Ho, No. 17-MAG-8611, 12 n.4 (S.D.N.Y. Nov. 16, 2017).
In December 2017, Colin Steven, a former vice president of sales and marketing at Embraer, the Brazilian aircraft manufacturer, pleaded guilty to one count of violating the FCPA, one count of conspiracy to violate the FCPA, and five related counts. In so pleading, Steven admitted to misconduct that occurred in connection with negotiations between Embraer and Saudi Arabia’s national oil company over a sale of aircraft. During the negotiations, Steven and a Saudi official agreed that the Saudi national oil company would award a contract to Embraer for new, instead of used, aircraft, and that, in return, Embraer would pay approximately $1.5 million in bribes. Steven also admitted to disguising the bribes as commissions to a separate company, receiving part of the bribes as a kickback, and lying to law enforcement about the kickback.

At the end of December 2017, at the same time the DOJ announced its resolution with Keppel, the DOJ unsealed charges against a former senior lawyer at Keppel. The attorney, Jeffrey Chow, pleaded guilty in August 2017 to one count of conspiracy to violate the FCPA. Chow, who was employed in Keppel’s legal department from 1990 to 2017, admitted to drafting and executing contracts to conceal bribery payments to officials at Petrobras, Brazil’s state-owned oil company. The contracts, which were between Keppel and consulting companies controlled by a third-party agent, appeared to compensate the agent for his assistance in discussions with prospective customers. In reality, a portion of these payments were funneled as bribes to Petrobras officials. As part of his plea, Chow agreed to cooperate with prosecutors in their investigation of Keppel and former Keppel executives. During his plea hearing,
Chow apologized for his conduct and said, “I should have refused to draft the contract that we used for paying bribes and I should have resigned from Keppel.”337

### iii. Sentencing Trends

Several defendants whose cases were resolved in prior years were sentenced in 2017.338 Five of the six defendants who pleaded guilty to bribing Mexican officials to secure aviation maintenance and repair contracts were sentenced in 2017. The defendants, a mixture of business people at U.S. companies seeking the contracts and Mexican government officials, received sentences ranging from probation to two years in prison, in addition to forfeiture and restitution for some.339 Samuel Mebiame, who was a consultant to Och-Ziff and allegedly paid bribes on its behalf, was sentenced to two years in prison.340 Finally, Frederic Pierucci, a former executive at Alstom, was sentenced to 30 months in prison and a $20,000 fine.341

Although these sentences are all relatively short, it is otherwise difficult to draw broad conclusions about FCPA sentencing practices based on the sentences that judges imposed in 2017.

#### b. SEC Individual Resolutions

Like the DOJ, the SEC, through its new chair, has affirmed the importance of individual accountability in FCPA resolutions. SEC Chairman Jay Clayton, speaking at a panel, stated that “individual liability” is “extremely important” to him personally.342 Clayton also suggested that the SEC’s overall approach would not change, implying that the

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SEC will continue to treat FCPA cases under the Trump administration as it has done in the past.343

Of the six individuals the SEC charged or reached resolutions with in 2017, only one is a U.S. citizen (and he has dual citizenship with the United Kingdom), one is a U.S. permanent resident, while the other four are citizens of other countries.344

The SEC’s complaints and settlements with individuals in FCPA cases were all linked to prior or contemporaneous resolutions with companies. Six of the SEC’s seven FCPA resolutions as of November 9, 2017, did not involve related actions against individuals.

In February and March 2017, three Magyar Telekom executives reached out-of-court settlements with the SEC.345 ElekStraub, the former CEO of Magyar Telekom, agreed to a $250,000 fine and a five-year officer/director bar.346 Andras Balogh, the former chief strategy officer, paid a $150,000 fine and agreed to a five-year officer/director bar.347 And Tamas Morvai, the former director of business development and acquisitions, paid a $60,000 fine.348 During their time at Magyar Telekom, the company allegedly bribed Macedonian and Montenegrin authorities to secure competitive and regulatory advantages in those markets.349 Magyar Telekom previously settled charges arising from this conduct.350 All three executives were charged with violating the FCPA’s anti-bribery provisions, aiding and abetting Magyar Telekom’s violations of the anti-bribery provisions, aiding and abetting Magyar Telekom’s violations of the FCPA’s books and records and internal controls provisions, falsifying books and records, and making misleading statements to an auditor.351

In May 2017, the SEC filed an amended complaint against Michael Cohen, a former Och-Ziff Partner and Head of its European Office, and Vanja Baros, a former Och-Ziff analyst.352 The complaint alleges their involvement in numerous instances of bribery connected with Och-Ziff’s investments in many African countries: Libya, Chad, Niger, Guinea, and the Democratic Republic of Congo.353 Both men also allegedly helped to

344 Michael Cohen is a dual citizen of the United States and the United Kingdom, Jeannot Lorenz is a U.S. lawful permanent resident, Vanya Baros is an Australian citizen, and Elek Straub, Andras Balogh, and Tamas Morvai are Hungarian citizens.

cover up the problematic conduct, Baros by directing the deletion of an incriminating section of an audit report.\textsuperscript{354} The SEC charged them with numerous violations of the FCPA as well as aiding and abetting Och-Ziff’s violations of the FCPA and the Investment Advisers’ Act.\textsuperscript{355} Litigation in this matter is ongoing and is covered in more detail in Section IV.D below.

In July 2017, the SEC entered into a cease-and-desist order with Halliburton and Halliburton vice president Jeannot Lorenz.\textsuperscript{356} The SEC found that Lorenz had caused Halliburton’s violations of the FCPA’s books and records and internal controls provisions; circumvented Halliburton’s internal accounting controls; and falsified Halliburton’s books and records.\textsuperscript{357} As a result, Lorenz paid a $75,000 fine while Halliburton paid $29.2 million.\textsuperscript{358} According to the SEC, after being told by the Angolan government that Halliburton was required to work with more Angolan-owned firms, Lorenz took steps to retain an Angolan company owned by a former Halliburton employee who was also a friend of the official at Angola’s state-owned oil company and who was responsible for approving contracts.\textsuperscript{359} The SEC found that the contract was intended to satisfy the Angolan government’s requirements about local contracting rather than to satisfy a particular scope of work.\textsuperscript{360} In addition, Lorenz had chosen the company before choosing the services it would provide, failed to conduct independent bidding, and did not have the contract reviewed by a special committee—all violations of Halliburton’s internal controls.\textsuperscript{361}

IV. Key FCPA Legal Developments and Observations

A. Kokesh v. SEC

On June 5, 2017, the Supreme Court’s unanimous ruling in \textit{Kokesh v. SEC} resolved a circuit split when it decided that disgorgement in SEC enforcement actions is subject to 28 U.S.C. § 2462, which imposes a five-year limitation on any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.”\textsuperscript{362} The Court concluded that, because disgorgement in SEC cases operates as punishment for violations of public laws rather than compensation for private wrongs, the disgorgement sanction “bears all the hallmarks of a penalty.”\textsuperscript{363} This was the

\begin{footnotes}
\item[362] \textit{Kokesh v. SEC}, 137 S. Ct. 1635 (2017).
\end{footnotes}
Supreme Court’s second unanimous decision in recent years that soundly rejected agency arguments for a broader statute of limitations. The implications of *Kokesh* are still crystalizing, but there can be no doubt that the SEC is already feeling pressure from the ruling to conduct investigations and bring actions more quickly. Further, the ruling has led to speculation over whether this will also affect the DOJ’s use of disgorgement in FCPA matters. Finally, the finding that SEC disgorgement is punitive resulted in the Internal Revenue Service (“IRS”) Office of Chief Counsel reversing its previous guidance regarding whether SEC disgorgement is deductible for tax purposes.

As a result of the ruling, the SEC has said that it plans to intensify and prioritize quicker FCPA investigations, as well as increase cooperation and coordination among regulators and law enforcement. While the SEC has continued filing enforcement actions in federal district courts seeking disgorgement, the Commission has also admitted that the “very significant” ruling already impacted how it conducts its cases and that it will have “particular significance” for the Commission’s FCPA matters.

On October 26, 2017, Charles Cain, who was appointed Chief of the SEC’s FCPA Unit on November 2, 2017, shared with the audience at the Securities Enforcement Forum that one consequence of the ruling in *Kokesh* is that there is now “a greater sense of urgency,” to resolve cases than in the past. This sentiment was echoed by the SEC’s Peikin on November 9, 2017, when he said the SEC now has “no choice but to respond by redoubling our efforts to bring cases as quickly as possible.” While the effects of *Kokesh* are clearly significant, the SEC has urged caution regarding any broader effects of *Kokesh*. One potential area of *Kokesh* fallout could be the use of tolling agreements. The use of tolling agreements between the SEC and companies under investigation is now widespread; it remains to be seen, however, whether companies will be more hesitant to enter tolling agreements given the now clearly applicable five-year limitation. On the flip side of that coin, however, is the prospect that the SEC could penalize from a cooperation standpoint companies that do not enter tolling agreements.

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364 See *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (holding that no discovery rule applies to the limitations period in Section 2462).
Kokesh’s clear application to SEC enforcement actions has not prevented speculation that the decision will affect the DOJ’s ability to pursue disgorgement in FCPA matters. Indeed, some commentators argue that a footnote in the ruling suggests the possibility of future challenges to the DOJ’s use of disgorgement.371 The footnote states: “[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.”372 To some, the footnote is an invitation to “challenge whether the federal court has an ability to enact disgorgement at all.”373

One possible argument proceeds along the following lines: although Kokesh addressed disgorgement only “as it is applied in SEC enforcement proceedings,”374 its rationale could apply equally to disgorgement sought by other financial regulatory agencies.375 Like the SEC, these agencies can seek disgorgement through courts’ “inherent equity power to grant relief ancillary to an injunction,”376 but they can also seek disgorgement using their statutory authorities.377 It is not uncommon for agencies to seek such remedies beyond the five-year limitation in Section 2462—Kokesh calls this approach into serious doubt.

Finally, as a result of the Supreme Court’s decision in Kokesh, which characterized disgorgement as punitive for the purpose of the statute of limitations in 28 U.S.C. 2462, the IRS Office of Chief Counsel released guidance regarding whether SEC disgorgement is deductible for tax purposes. The IRS Office of Chief Counsel memorandum found that the Supreme Court’s opinion in Kokesh amounts to a holding that SEC disgorgement is invariably punitive and therefore a non-deductible penalty for the purposes of IRC Section 162(f).378 This memorandum effectively revises an earlier position taken by the IRS Chief Counsel in January 2016 that called for a facts-and-

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circumstances evaluation of SEC disgorgement orders to determine whether in any given instance an order was “primarily compensatory” or “primarily punitive.”

B. United States v. Hoskins

In the 2016 WilmerHale Global Anti-Bribery Year-in-Review, we noted that oral arguments were scheduled in the Second Circuit for United States v. Hoskins, a case that could have significant ramifications, particularly for conspiracy or aiding and abetting charges, regarding the scope of liability of foreign nationals under the FCPA. The Second Circuit heard oral arguments on March 2, 2017, and no decision has yet been released.

The DOJ charged Hoskins, a British national who was based in Alstom’s France office, with conspiring to participate in a bribery scheme involving a $118 million project to build power stations for Indonesia’s state electricity company. Even though Hoskins was not accused of acting in furtherance of the scheme while in the United States, the DOJ asserted that Hoskins could be charged as a conspirator even if he was not considered an agent of Alstom Power—essentially claiming that Hoskins could be charged with conspiracy absent an act in furtherance in the United States and absent status as a domestic concern. The district court held that although accomplice liability under the general conspiracy and aiding and abetting statutes applied generally across the U.S. Code, “a non-resident foreign national could not be subject to criminal liability under the FCPA pursuant to accomplice theories of liability or aiding and abetting violations of the FCPA where he is not acting as an agent of a domestic concern or does not act while physically present in the United States.” Thus, the District of Connecticut held Hoskins could only be charged pursuant accomplice liability if he could be charged under the statute itself. Because Hoskins was not considered an agent of a domestic concern—as it was undisputed that he had not acted while physically present in the United States—he could not be charged.

On appeal, the defense asserted, among other arguments, that the government was prevented from circumventing Congress’s deliberate decision to exclude from the scope of the FCPA’s anti-bribery provisions foreign nationals who did not act within the territory of the United States and were not officers, directors, employees, or agents of a U.S. domestic concern or U.S. issuer. In one notable exchange during oral argument, Judge Lynch questioned whether “Congress meant to exclude Section 2 [aiding and

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abetting] and Section 371 [conspiracy] when they made a list of principal violators under the [FCPA].”

The government responded that it should be allowed to proceed against Hoskins by proving that he was an accomplice in a conspiracy to violate the FCPA because “Congress . . . was well-aware of the principle that foreigners can be liable as accessories,” even if Congress did not specifically include people like Hoskins in a section listing potential defendants. Judge Katzmann appeared to question this argument, noting that “[Congress] could have listed them. They didn’t.”

C. United States v. Firtash

Conspiracy charges against prominent Ukrainian businessman Dmitry Firtash also have courts in the United States and abroad considering the territorial reach of the FCPA. In June 2013, a grand jury indicted Firtash for conspiracy to violate the FCPA and other charges for allegedly authorizing at least $18.5 million in bribes to Indian government officials to secure licenses to mine minerals. Since the DOJ unsealed the indictment in 2014, the case has been under scrutiny for the attenuated ties between the foreign nationals charged and the United States: the only alleged connection between Firtash and the United States were two co-conspirators’ travel to the United States, one co-conspirator alleged to be a domestic concern, and the transmission of funds through the United States.

Firtash was arrested in Austria in March 2014 but released after paying a $174 million bail. In April 2015, an Austrian court denied the DOJ’s extradition request, swayed by arguments from Firtash’s counsel that the arrest was motivated by U.S. foreign policy concerns with Firtash’s connection to the Ukraine’s exiled former president, Victor Yanukovych. In February 2017, an Austrian appeals court reversed that decision, authorizing extradition to the United States. The decision on extradition now rests with the Austrian justice minister, and as of September 2017, Firtash’s counsel expected the issue to be resolved within four months. The resolution had not been reached as of publication.

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390 Ivan Nechepurenko, Austrian Court Backs Ukrainian Gas Mogul’s Extradition to U.S., NY TIMES (Feb. 21, 2017).
391 Ivan Nechepurenko, Austrian Court Backs Ukrainian Gas Mogul’s Extradition to U.S., NY TIMES (Feb. 21, 2017).
Meanwhile, perhaps in anticipation of imminent extradition to the United States, Firtash’s counsel filed a motion to dismiss the indictment in May 2017, arguing improper venue, lack of jurisdiction based on the FCPA and RICO statutes, and violation of Firtash’s due process rights.\textsuperscript{393} The motion emphasized that not only has Firtash “never set foot in the country,” but also that the indictment against him “fails to allege a single illicit act by Firtash that either occurred in the United States or affected the United States.”\textsuperscript{394} The government’s July 2017 opposition brief asked the district court to delay decision on the motion because “[p]rinciples of international comity require . . . this Court [to] defer to the Austrian courts until they complete their extradition proceedings.”\textsuperscript{395} As to jurisdiction and venue, the government maintained that a charge of conspiracy to violate the FCPA does not require the government to allege that a conspirator committed bribery within the United States, and Firtash need not be a “domestic concern” to be prosecuted for conspiracy to violate the FCPA.\textsuperscript{396} Oral argument on the motion was heard in September.\textsuperscript{397} Firtash submitted supplemental briefing on venue in September,\textsuperscript{398} and the government submitted a response in October.\textsuperscript{399}

While the motion to dismiss is still pending, a development in Firtash’s extradition proceedings in Austria makes it unlikely that he will be extradited in the immediate future. On December 20, 2017, Firtash’s counsel notified the court that the Austrian Supreme Court put Firtash’s extradition on hold.\textsuperscript{400} On December 12, 2017, the Austrian Supreme Court stayed the extradition pending decision on the request for retrial, and further stayed the extraordinary appeal proceedings until the Court of Justice of the European Union, which has been described as “notoriously slow,”\textsuperscript{401} reaches a preliminary ruling on the applicability of the E.U. Charter on Human Rights to the extraordinary appeal proceedings.

\textsuperscript{393} Dmitry Firtash’s Memorandum of Law in Support of His Motion to Dismiss the Indictment, United States v. Firtash, No. 13-CR-00515 (N.D. Ill. May 9, 2017).
\textsuperscript{394} Dmitry Firtash’s Memorandum of Law in Support of His Motion to Dismiss the Indictment, United States v. Firtash, No. 13-CR-00515 (N.D. Ill. May 9, 2017).
\textsuperscript{397} Minute Entry, United States v. Firtash, No. 13-CR-00515 (N.D. Ill. Sept. 11, 2017).
\textsuperscript{398} Dmitry Firtash and Andras Knopp’s Supplemental Brief in Further Support of Their Motions to Dismiss the Indictment, United States v. Firtash, No. 13-CR-00515 (N.D. Ill. Sept. 20, 2017). Firtash filed supplemental briefing in order to distinguish two cases on venue—U.S. v. Knox, 540 F.3d 708 (7th Cir. 2008) and U.S. v. Lowrance, 534 F. App’x 564 (7th Cir. 2013)—that the government cited for the first time at oral argument for the claim an indictment need only allege that the crime occurred in the district in order to establish venue under Seventh Circuit precedent. The government’s response disputed Firtash’s characterization of these cases and reiterated the claim that the indictment sufficiently alleged venue.
\textsuperscript{401} Kim Janssen, Ukrainian Oligarch with Ties to Manafort and Wanted in Chicago Gets Holiday Reprieve, Chicago Tribune (Dec. 20, 2017).
D. SEC v. Cohen & Baros

The SEC’s case against former Och-Ziff executives Michael L. Cohen and Vanja Baros, discussed in Section III.C.1.b above, also represents a relatively rare instance of the SEC being put to its burden of proof in an FCPA enforcement action. On June 27, 2017, Baros and Cohen each filed motions to dismiss, arguing the claims against them should be dismissed for numerous reasons, most notably relating to untimeliness and lack of personal jurisdiction.

Both Baros and Cohen have argued that the SEC’s claims are barred by the FCPA’s five-year statute of limitations, as much of the conduct alleged occurred as many as ten years ago, and none of the charges are saved by tolling. Cohen’s brief emphasized that limitations periods were enacted for precisely such situations, where the SEC’s lengthy inquiry has unfair consequences on defendants: “With the SEC having taken over six years to investigate, Mr. Cohen is now left in the position of trying to secure witnesses and evidence about decade-old events throughout Africa.” Cohen also claimed that tolling agreements he signed for an FCPA investigation titled “In the Matter of the Libyan Investment Authority” do not apply in this case, as the Och-Ziff investigation from which the present claims stem was separate.

Baros, an Australian citizen residing in the United Kingdom, made an additional argument against the SEC’s allegations based on personal jurisdiction. Personal jurisdiction under the FCPA is controlled by the Due Process Clause, which requires the plaintiff to allege both (1) that the defendant had minimum contacts with the forum state and (2) that the exercise of personal jurisdiction would be reasonable. Baros claimed the SEC could not meet either part of this test, as “Baros was a nonresident foreigner

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402 The filings relating to the motions to dismiss all bear the docketing date of August 18, 2017; the dates in the above description match the dates of service listed on the individual submissions, whereas the dates in the footnoted citations conform to the filing date.
405 Memorandum of Law in Support of Defendant Michael L. Cohen’s Motion to Dismiss the Amended Complaint, SEC v. Cohen & Baros, No. 17-CV-00430, at 6-7 (E.D.N.Y. Aug. 18, 2017).
working abroad for a foreign employer on transactions with foreign counterparties and foreign business partners relating to natural resources in African countries.409

In an opposition brief submitted July 28, 2017, the SEC argued that its claims were timely for a host of reasons. The SEC’s complaint sought injunctive relief in addition to fines and disgorgement, and the SEC’s primary arguments against dismissals for untimeliness hinged on whether the statute of limitations applies to injunctive relief, and whether such questions can be resolved on a motion to dismiss.410 The SEC also characterized its claims against Cohen as timely because the tolling agreements he signed covered claims “arising out of the investigation” in Libya, and the SEC’s Och-Ziff investigation “arose out of” the Libyan investigation.411 Finally, the SEC asked the court to delay decision on whether disgorgement claims are time-barred because the disgorgement claims may not accrue at the same time as underlying violations.412

As to personal jurisdiction over Baros, the SEC alleged that Baros had sufficient minimum contacts with the United States based on “extensive, pervasive and consistent contacts” including business and acts within the United States, as well as effects in the United States by acts undertaken elsewhere.413 The SEC also argued that Baros failed to demonstrate how exercising personal jurisdiction over him would be unreasonable and noted that, as no alternate forum was available, if the federal court does not have jurisdiction over Baros, he “will effectively have been immunized for the securities violations with which he is charged.”414

On August 18, the defendants filed replies.415 Regarding the statute of limitations for injunctive relief, Cohen argued that the reasoning under Kokesh—which applied the five-year statute of limitations to disgorgement—applied with equal force to injunctive relief.416 Regarding disgorgement, both defendants disputed that accrual is triggered by

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411 Plaintiff Securities and Exchange Commission’s Opposition to Defendant Cohen’s and Defendant Baros’s Motions to Dismiss, SEC v. Cohen & Baros, No. 17-CV-00430 at 18 (E.D.N.Y. Aug. 18, 2017) (citing SEC v. Mannion, No. 1:10-cv-3374-WSD, 2013 WL 5999657 (N.D. Ga. Nov. 12, 2013) (tolling agreement applied to claims that were based on facts developed in a separate and subsequent investigation that was not referenced in the agreement)).
the receipt of compensation rather than the fraudulent conduct itself.\textsuperscript{417} Finally, regarding personal jurisdiction, Baros contended that the contacts the SEC alleges are all “either impossibly vague and conclusory or relate to contacts between other parties and the U.S.,” which cannot support personal jurisdiction against Baros.\textsuperscript{418}

The motions to dismiss are still pending. Per an October 24, 2017, court order, oral argument has been granted and will be scheduled.\textsuperscript{419}

E. Second Circuit Ruling on DPAs

In July 2017, the Second Circuit joined the D.C. Circuit in finding that federal courts have only limited power over supervising DPAs. In \textit{United States v. HSBC Bank USA, N.A.}, the defendant companies (collectively, “HSBC”) and the DOJ agreed to a five-year DPA.\textsuperscript{420} Under the DPA, HSBC retained an independent compliance monitor, who submitted periodic reports to HSBC and the government detailing his findings and making recommendations for improving HSBC’s compliance program.\textsuperscript{421}

As is the case with all DPAs—including in the FCPA context—for the DPA to function properly, the parties had to obtain exemption from the Speedy Trial Act requirement that a criminal trial begin within 70 days after charges were filed.\textsuperscript{422} Without the exemption, the charges against the company would be subject to mandatory dismissal once the 70-day period had run, rendering the DPA and its mandate for corporate reform powerless.\textsuperscript{423}

In July 2013, the district court granted a waiver of the Speedy Trial Act but conditioned its approval on the court’s monitoring of the DPA’s implementation. In April 2015, pursuant to a court order, the government filed the independent compliance monitor’s first annual report under seal. In 2016, an individual not party to the lawsuit moved to unseal the monitor’s report. The court granted the motion, referring to the report as a “judicial record,” which carries with it a right of public access.\textsuperscript{424}

On appeal, the Second Circuit overturned the district court, citing the D.C. Circuit’s decision in \textit{United States v. Fokker Services B.V.}, 818 F.3d 733 (D.C. Cir. 2016), throughout. The Second Circuit’s ruling was based on three reasons. First, courts do not have “freestanding supervisory power to monitor the implementation of a DPA.”\textsuperscript{425} The Second Circuit allowed that there could be instances where misconduct in the

\textsuperscript{420} \textit{United States v. HSBC Bank USA, N.A.}, 863 F.3d 125, 129-130 (2d Cir. 2017).
\textsuperscript{421} \textit{United States v. HSBC Bank USA, N.A.}, 863 F.3d 125, 130 (2d Cir. 2017).
\textsuperscript{422} \textit{United States v. HSBC Bank USA, N.A.}, 863 F.3d 125, 130 (2d Cir. 2017) (internal citations omitted).
\textsuperscript{423} \textit{United States v. HSBC Bank USA, N.A.}, 863 F.3d 125, 130 (2d Cir. 2017).
\textsuperscript{424} \textit{United States v. HSBC Bank USA, N.A.}, 863 F.3d 125, 131-133 (2d Cir. 2017).
\textsuperscript{425} \textit{United States v. HSBC Bank USA, N.A.}, 863 F.3d 125, 137 (2d Cir. 2017).
implementation of a DPA comes to light—i.e. through a whistleblower—and the court must invoke its supervisory power to take appropriate action. However, absent clear evidence to the contrary, the district court must presume that prosecutors have “properly discharged their official duties.”426 Second, the Second Circuit found that the existence of the Speedy Trial Act does not give district courts the right to proactively monitor the implementation of a DPA.427 And third, the Second Circuit ruled that the monitor’s report was not a judicial document because at the point it was unsealed it was not relevant to a judicial function.428

The ruling provides significant protection from outside scrutiny for companies that enter into DPAs with the government. Given the large role DPAs play in FCPA enforcement, looking ahead, FCPA legal observers should take note on whether other circuits follow suit in limiting federal courts’ power in supervising DPAs, or whether a circuit split emerges on the issue.

F. Kleptocracy Asset Recovery Initiative

This year saw the DOJ’s continued use of the Kleptocracy Asset Recovery (“KAR”) Initiative. Launched in 2010, the KAR Initiative is a joint effort between the DOJ Criminal Division’s Asset Forfeiture and Money Laundering Section and other federal agencies to identify and recover the proceeds of foreign official corruption and eventually repatriate the funds for the benefit of those who were harmed. As described in the 2016 WilmerHale Global Anti-Bribery Year-in-Review, the DOJ filed two civil forfeiture complaints in 2016—one against 1Malaysia Development Berhad (“1MDB”) for more than $1 billion, and one against VimpelCom for $850 million.429

In June 2017, the DOJ built on its case against 1MDB, a sovereign wealth fund created to promote economic development in Malaysia, and announced the filing of civil forfeiture complaints seeking the forfeiture and recovery of a combined total of $640 million in assets.430 The total assets now subject to forfeiture by 1MDB under the DOJ complaints are almost $1.7 billion.

In these most recent filings, the DOJ alleges that in 2014, 1MDB misappropriated approximately $850 million, which was used to purchase a 300-foot luxury yacht, certain movie rights, high-end properties, tens of millions of dollars of jewelry, and artwork. Additionally, a portion of the diverted loan proceeds were allegedly used in an

426 United States v. HSBC Bank USA, N.A., 863 F.3d 125, 136 (2d Cir. 2017) (internal citations omitted).
428 United States v. HSBC Bank USA, N.A., 863 F.3d 125, 139 (2d Cir. 2017).
elaborate, Ponzi-like scheme to create the false appearance that an earlier 1MDB investment had been profitable.

V. COLLATERAL LEGAL DEVELOPMENTS

A. FOIA Litigation

1. 100 Reporters, LLC

As described in the 2016 WilmerHale Global Anti-Bribery Year-in-Review, Judge Rudolph Contreras of the U.S. District Court for the District of Columbia presides over a Freedom of Information Act ("FOIA") action in which press organization 100 Reporters, LLC ("100 Reporters") seeks the release of the monitor reports and other materials produced to regulators after Siemens and three of its subsidiaries settled FCPA charges with the SEC and DOJ in 2008. In 2016, the DOJ, Siemens, and Theo Waigel, who served as monitor, filed motions for summary judgment arguing that disclosure of the requested materials would have a severe chilling effect on companies contemplating resolutions involving monitorships and that the documents were protected from disclosure pursuant to FOIA Exemptions 4, 5, 6, and 7(C).431 100Reporters brought a cross-motion for summary judgment.432

In March 2017, the court denied 100Reporters’ motion, and granted in part and denied in part the motions brought by the DOJ, Siemens, and the monitor. In addition to material that the court described as "classic attorney work-product," the court found that the monitor’s reports and work plans and material related to Siemens trainings and compliance policies were protected pursuant to Exemption 4 in that its disclosure would likely cause Siemens competitive harm.433 However, the court found that the DOJ had failed to show that certain material was protected by the deliberate process privilege in Exemption 5, and had failed to establish the material’s disclosure would cause an unwarranted invasion of privacy pursuant to Exemptions 6 and 7(C).434 The court ordered the DOJ to produce a representative subset of material for in camera review.435

On September 26, 2017, the DOJ filed a renewed motion for summary judgment and included additional declarations by former heads of DOJ’s FCPA Unit as further support to its contention that the requested materials fall under the FOIA exemptions in that they are were integral to its deliberative process, commercial and confidential, and implicate the privacy interest of Siemens’ employees and government employees.436

100Reporters filed its response on October 27, 2017, and the DOJ filed its reply on December 11, 2017. The court’s decision is still pending.

2. Dylan Tokar

On December 9, 2016, “Just Anti-Corruption” reporter Dylan Tokar brought a FOIA lawsuit alleging that the DOJ failed to release documents relating to the selection of corporate compliance monitors appointed in connection with DPAs. According to the complaint, these records are necessary so that the public can assess whether “monitors have been nominated and selected in a manner that effectively screens for conflicts of interest.” Tokar’s FOIA requests seek the names of corporate-monitor candidates nominated by 15 companies that settled criminal FCPA charges, records about the DOJ officials that make the final decisions about monitor selections, and any objection letters submitted by the 15 companies in response to the first FOIA request.

On January 27, 2017, the DOJ provided Tokar with a table of information it deemed responsive to Tokar’s narrowed FOIA request, but withheld certain information, such as the names of the unselected monitor candidates, under privacy Exemptions 6 and 7(C). On May 22, 2017 the DOJ released “non-exempt portions” of responsive records and withheld certain information under FOIA Exemptions 4, 6, and 7(C).

On July 19, 2017, the DOJ filed a motion for summary judgment arguing (a) it need not respond to the portion of the request that seeks information rather than documents, and (b) pursuant to the personal privacy Exemptions 6 and 7(C) it properly redacted names of nominees that were not selected for monitor positions and the names of monitor selection committee members who were not part of senior DOJ management. In his opposition and cross-motion for summary judgment, Tokar argued that the DOJ improperly invoked Exceptions 6 and 7(C), failed to establish that the individuals have any privacy interests, or that any privacy interest outweighed the public interests in disclosure. The court’s decision on the motions is still pending.

B. Shareholder Lawsuits

1. Doshi v. General Cable Corporation et al.

On January 5, 2017, just one week after Kentucky-based wire and cable manufacturer General Cable Corporation (“GCC”) agreed to pay more than $75 million to resolve SEC and DOJ investigations, a shareholder filed a putative class action lawsuit against GCC and two of its executives, Gregory B. Kenny and Brian J. Robinson. In the December 2016 agreements with the DOJ and SEC, GCC admitted to making improper payments through its subsidiaries to foreign government officials in Angola, Bangladesh, China, Egypt, Indonesia, and Thailand, to corruptly gain business in violation of the FCPA, resulting in profits of more than $50 million.

Referring to these admissions in their class action complaint filed in the Southern District of New York, plaintiffs allege that GCC, Kenny, and Robinson made false and/or misleading statements and/or failed to disclose that GCC paid millions of dollars in bribes in violation of the FCPA, which led to financial penalties and profit disgorgements. The case was transferred to the U.S. District Court for the Eastern District of Kentucky, and an amended complaint is due January 19, 2018.

2. Crandall Shareholder Litigation

In March 2016, a month after PTC Inc. and two of its Chinese subsidiaries (“PTC”) resolved FCPA issues with the DOJ and SEC, a shareholder class action lawsuit alleging securities fraud was filed against PTC and eight of its executives and directors. Plaintiffs alleged that PTC’s public disclosures regarding the FCPA investigation were misleading, and the defendants disputed the allegations and moved to dismiss. The dispute was settled for $2.1 million in July 2017 with both the plaintiffs and defendants maintaining that their positions had merit.

3. In re Eletrobras Securities Litigation

On March 25, 2017, Judge John G. Koeltl of the U.S. District Court for the Southern District of New York granted in part and denied in part a motion to dismiss brought by

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Brazilian energy corporation Centrais Eléctricas Brasileiras S.A. ("Eletrobras") and three of the four named senior executives.\footnote{In re Eletrobras Sec. Litig., 245 F. Supp. 3d 450, 456 (S.D.N.Y. 2017).} Plaintiffs alleged that defendants violated Section 10(b) and Rule 10b-5 by making material misstatements or omissions with respect to the company’s ethics and integrity, and in its annual reports disclosing the financial condition of the company. Plaintiffs further alleged control person liability for the four senior executives under Section 20(a).\footnote{In re Eletrobras Sec. Litig., 245 F. Supp. 3d 450, 458-61 (S.D.N.Y. 2017).}

The court dismissed all claims against the former CEO, finding that his signature on the Code of Ethics and public statement representing such signature were insufficient to raise a strong inference of scienter.\footnote{In re Eletrobras Sec. Litig., 245 F. Supp. 3d 450, 467 (S.D.N.Y. 2017).} However, the court ruled that plaintiffs had pleaded sufficient facts to support an inference that the three remaining individuals acted with scienter.\footnote{In re Eletrobras Sec. Litig., 245 F. Supp. 3d 450, 468-69 (S.D.N.Y. 2017).} As such, the court upheld the Section 10(b) and Rule 10b-5 claims against Eletrobras and the three remaining individuals, and the Section 20(a) claim against the remaining individuals. With several claims still alive, the parties are briefing class certification.\footnote{See Revised Scheduling Order, In re Eletrobras Sec. Litig., No. 1:15-cv-05754-JGK (S.D.N.Y. Oct. 25, 2017).}

4. Villella et al v. Chemical & Mining Co. of Chile Inc. et al.

On March 19, 2015 and April 14, 2015, two separate shareholder class actions were filed against Chemical & Mining Co. of Chile Inc. et al. ("SQMC") alleging violations of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5.\footnote{Complaint, Villella v. Chemical & Mining Co. of Chile Inc., No. 1:15-cv-02106-ER (S.D.N.Y. Mar. 19, 2015); Complaint, Molinaro v. Chemical & Mining Co. of Chile Inc., No. 1:15-cv-02884-ER (S.D.N.Y. Apr. 14, 2015).} On February 9, 2016 a consolidated complaint was filed alleging that between 2010 and 2016, SQMC paid millions of dollars’ worth of illegal campaign donations, all the while misrepresenting to investors that it was in compliance with all applicable laws, maintained effective internal controls over the reporting of financial and non-financial information, had in place a code of ethics, and complied with applicable accounting standards.\footnote{Corrected Consolidated Complaint, Villella v. Chemical & Mining Co. of Chile Inc., No. 1:15-cv-02106-ER (S.D.N.Y. Feb. 9, 2016).}

On March 30, 2016, SQMC filed a motion to dismiss on the basis of forum non conveniens, or alternatively, for failure to state a claim due to the plaintiff’s failure to plead a material misstatement or facts to create an inference of scienter.\footnote{Memorandum of Law in Support of Defendant’s Motion to Dismiss the Consolidated Complaint, Villella v. Chemical & Mining Co. of Chile Inc., No. 1:15-cv-02106-ER, at 1-4 (S.D.N.Y. Mar. 30, 2016).} On March 28, 2017, Judge Edgardo Ramos denied SQMC’s motion to dismiss on the basis of forum non conveniens. The court further denied defendant’s motion to dismiss plaintiff’s claims that SQMC made material misstatements with respect to its compliance with applicable law, internal controls, and financial reporting and accounting, but dismissed plaintiff’s claim that SQMC made material misrepresentations regarding its code of ethics. The court found the mere adoption of a code of ethics, without statements...
assuring investors that its employees are in compliance with the code, is not misleading. The court also dismissed plaintiff’s claim that SQMC failed to disclose that the company’s inadequate corporate governance might jeopardize its lease negotiations with the Chilean government organization Corporación de Fomento de la Producción de Chile (“Corfo”), finding SQMC’s statement that it was confident in its position in the Corfo arbitration as forward looking and accompanied by sufficient cautionary language.\(^{461}\) Finally, the court found that plaintiff’s allegations taken as a whole create an inference of scienter, noting that in its DPA and SEC order SQMC admitted that it knowingly and willfully made misrepresentations in its SEC filings.\(^{462}\) The court set a discovery schedule on June 8, 2017, with fact discovery deadline of July 23, 2018.\(^{463}\)

5. **In re Petrobras Securities Litigation**

On December 8, 2014, a shareholder filed a securities class action against Petrobras, an oil and gas company headquartered in Brazil, and its senior executives. Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York consolidated the case with similar cases in February 2015. In a March 31, 2015 Consolidated Amended Complaint, plaintiffs alleged defendants violated Section 10(b), Rule 10b-5, and Section 20(a) of the Exchange Act, Section 11, 12, and 15 of the Securities Act, and various Brazilian laws by misrepresenting material facts and failing to disclose a multi-year, multibillion-dollar money-laundering and bribery scheme in which Petrobras executives received $800 million in bribes from construction and engineering firms.\(^{464}\)

In 2016, Judge Rakoff certified two classes for money damages—one class asserts claims under the Securities Exchange Act of 1934 and the second under the Securities Act of 1933. On July 7, 2017, the Second Circuit affirmed Judge Rakoff’s ruling that the plaintiffs satisfied their burden of showing that Petrobras traded in efficient markets under *Basic v. Levinson*, 485 U.S. 224 (1988).\(^{465}\) Although the Second Circuit held that Rule 23 does not include “a freestanding administrative feasibility requirement,”\(^{466}\) it vacated Judge Rakoff’s class certification “insofar as [the class] include all otherwise eligible class members who acquired their Securities in ‘domestic transactions.’”\(^{467}\) In its ruling, the Second Circuit explained that in order to determine if plaintiffs satisfied Rule 23(b)(3)’s predominance requirement the district court needed to assess “each

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\(^{461}\) *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 15 CIV. 2106 (ER), 2017 WL 1169629, at *15 (S.D.N.Y. Mar. 28, 2017).

\(^{462}\) *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 15 CIV. 2106 (ER), 2017 WL 1169629, at *15 (S.D.N.Y. Mar. 28, 2017).

\(^{463}\) Order, *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 1:15-cv-02106-ER (S.D.N.Y. June 8, 2017).


\(^{465}\) *In re Petrobras Sec.*, 862 F.3d 250, 278-79 (2d Cir. 2017).

\(^{466}\) *In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017).

\(^{467}\) *In re Petrobras Sec.*, 862 F.3d 250, 274 (2d Cir. 2017).
class member’s over-the-counter transactions for markers of domesticity under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)."468

On November 1, 2017, defendants filed a petition for a writ of certiorari asking the Supreme Court to clarify whether “the legal standard to invoke *Basic*’s presumption of reliance at a minimum require[s] empirical evidence that a security generally reacted in a directionally appropriate manner to new material information . . . or, as the Second Circuit ruled, can the presumption be based entirely on other factors unrelated to whether the alleged misstatement had price impact” and whether Rule 23 require proponents of class certification to show that class membership can be ascertained through administratively feasible means.469

On January 3, 2018, Petrobras announced that it agreed to pay $2.95 billion to settle the class action lawsuit.470 That same day, the parties filed a joint petition to defer consideration of the writ of certiorari.471 In their joint motion to the Supreme Court the parties explained that they expect to submit their settlement agreement to the district court for preliminary approval on or before January 31, 2018.472

6. **VEON Ltd./VimpelCom Shareholder Litigation**

On September 19, 2017, Judge Andrew L. Carter, Jr. of the U.S. District Court for the Southern District of New York denied in large part VEON Ltd.’s (“VEON”) (formerly known as VimpelCom) motion to dismiss the securities class action led by Plaintiff Westway Alliance Corp. on behalf of all persons or entities that purchased VEON securities between December 4, 2010 and November 3, 2015.473

In the Amended Complaint, plaintiffs allege violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and describe the criminal information against VimpelCom and DPA with the DOJ.474 Judge Carter dismissed the portions of plaintiffs’10(b) claim based on “disclosures regarding the government authorities in Uzbekistan responsible for overseeing the telecommunications sector”475 and any

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468 *In re Petrobras Sec.*, 862 F.3d 250, 256-57 (2d Cir. 2017).
“claim [] based merely on the failure to follow internal controls, without more.” Veon must file an answer by January 12, 2018.

Individual defendants who have appeared in the action must move to dismiss the Amended Complaint, and Veon must file an answer, by mid-January 2018.

C. Whistleblower Lawsuits


In February 2017, a federal jury awarded former Bio-Rad Laboratories Inc. (“Bio-Rad”) General Counsel and Executive Vice President Sanford Wadler $2.96 million in back wages and $5 million in punitive damages for a FCPA whistleblower-retaliation case brought under the Sarbanes-Oxley Act, Dodd-Frank Wall Street Reform Act (“Dodd-Frank Act”), and California state law. Wadler, who had spent 24 years working in several executive roles at BioRad, alleged that he was terminated shortly after he reported FCPA concerns to Bio-Rad’s audit committee. The complaint alleges that the CEO, CFO, and other members of management had “stonewalled” Wadler after he questioned the veracity of the conclusions of an internal investigation of potential FCPA violations in Vietnam, Thailand, and Russia, and was subsequently terminated.

In November 2014, a little over a year after Wadler was terminated, Bio-Rad agreed to pay the SEC $40 million in disgorgement and prejudgment interest for improper payments to foreign officials in Vietnam, Thailand and Russia, and paid $14.35 million to the DOJ to resolve allegations of books and records and internal controls violations in connection to payments made in Russia. In May 2015, Wadler sued Bio-Rad for retaliation.

BioRad has filed a Ninth Circuit appeal seeking to overturn Wadler’s $8M award on the grounds that (1) Wadler failed to prove he had an objectively reasonable belief of FCPA violations, (2) the jury was improperly instructed that reporting an FCPA violation is protected activity under Sarbanes-Oxley, and (3) Dodd-Frank Act does not apply to internal reporting. The case is still pending.

2. Digital Realty Trust v. Somers

On November 28, 2017, the U.S. Supreme Court heard oral arguments for Digital Realty Trust v. Somers, which addresses the issue of whether the Dodd-Frank Act protects corporate whistleblowers who report securities violations internally but not to the SEC. A decision against the SEC could, according to commentators, significantly

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affect companies by undermining “the goal of a transparent workplace where problems are raised and resolved without reprisal.” Instead, employees would be incentivized to go to the SEC directly, rather than reporting issues internally.

In 2014, Respondent Paul Somers, then a Vice President of Portfolio Management in Petitioner Digital Realty Trust’s Asian Pacific region, notified company executives of potential securities law violations. However, he did not report his concerns to the SEC. Somers was subsequently fired and later filed a wrongful termination suit against the company in federal district court in San Francisco. The company filed a motion to dismiss, arguing that Somers did not qualify as a whistleblower under Dodd-Frank Act, which was denied in district court and on appeal at the Ninth Circuit.

Dodd-Frank Act defines a whistleblower as an individual “who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” The company has argued that a plain reading of Dodd-Frank Act covers only those individuals who report to the SEC. The Commission, on the other hand, has broadly interpreted the Dodd-Frank Act to cover individuals, like Somers, who only report internally and not to the SEC.

Early reports indicate that a majority of the justices were skeptical of the Commission’s broad interpretation, instead favoring the plain language of the statute.

Legal experts stated that a ruling in favor of Digital Realty would have a negative effect on companies, as individuals would be less likely to report internally, for fear of being fired; instead it would provide incentives for whistleblowers “to go directly to the SEC.” On the other hand, a ruling in favor of the SEC would seem to allow whistleblowers to recover from companies in circumstances not covered by the plain language of the statute. A ruling against the SEC would prevent recovery under Dodd-Frank Act for employees who report violations internally but not to the SEC, but those employees would still be protected under Sarbanes-Oxley, provided they file a complaint with the Labor Department within 180 days.

D. Employee Defamation Action

On October 13, 2016, Alejandro Yeatts sued his former employer Zimmer Biomet for defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress arising out of alleged misstatements made by Zimmer Biomet’s Chief Compliance Officer in October 2014. In his lawsuit, Yeatts alleged that while he was working as general manager of Zimmer Biomet’s Argentina subsidiary (“Biomet

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482 15 U.S.C. § 78u-6(a)(6) (a whistleblower is an individual).
Argentina”), he discovered that, in violation of its 2012 DPA with the DOJ, Zimmer Biomet continued to maintain a relationship with an entity known to provide improper payments. Shortly after this discovery, a company attorney met with Yeatts and accused him of working with the third party at issue. Biomet Argentina subsequently terminated Yeatts on September 4, 2015. On October 24, 2014, Zimmer Biomet’s Chief Compliance Officer sent an email notifying the recipients that Yeatts was on the “Restricted Parties” list and was “suspended in connection with a corruption-related investigation involving Brazil.” Zimmer Biomet moved to dismiss the lawsuit, appending a release of claims signed by Yeatts upon his termination in 2015.

On April 17, 2017, a federal district court found that Yeatts had sufficiently alleged a defamation claim against Zimmer Biomet and denied the company’s motion to dismiss Yeatts’ complaint. The court declined to consider the release of claims appended to the motion and based its ruling solely on the allegations contained in the complaint. The court dismissed Yeatts’ claims of intentional and negligent infliction of emotional distress arising from the allegedly defamatory email.

E. Civil Fraud/RICO Actions


On February 14, 2017, the Government of Bermuda filed a suit against Lahey Clinic, Inc. and Lahey Clinic Hospital, Inc. alleging violations of RICO, unfair business practices under Massachusetts General Laws, and the common law theories of unjust enrichment, civil conspiracy, and fraud. The Government of Bermuda alleged that, for almost two decades, defendants bribed former premier of Bermuda, Dr. Ewart Brown, to obtain lucrative healthcare contracts. The allegedly improper payments were disguised as “consulting fees” and donations to Brown’s political party.
In April 2017, the defendants moved to dismiss the suit asserting that the Government of Bermuda failed to allege with particularity the official acts that Brown took to benefit the defendants, the RICO claims are barred by the statute of limitations, and the alleged violations did not proximately cause the alleged injuries.496 A month later, Bermudian legislators including Brown filed a motion for leave to file an amici curiae brief, arguing that the “complaint is time-barred and that the lawsuit is plainly politically motivated.”497 The Government of Bermuda filed an opposition to the motion arguing that the court should reject the amici curiae brief because the legislators do not have a relevant tangible or special interest in the lawsuit. The Government of Bermuda argued that “[the legislators] clearly have an interest in advocating on behalf of Lahey, that partisan interest is not only not sufficient, it provides a basis, in and of itself, for denying the Motion.”498


On March 30, 2017, the court granted in part and denied in part defendants’ motion to dismiss plaintiff’s RICO suit, a case arising out of what Judge Amit Mehta described as “the largest modern political scandal in the history of Brazil.”499 Petrobras, a Brazilian state-owned oil company, was under investigation by Brazil’s federal police for corruption.500 The highly publicized investigation, known as “Operation Car Wash,” which included the prosecutions of Odebrecht and Braskem and resulted in the largest fines in a corruption-related investigation in history, revealed that Petrobras had been soliciting bribes in exchange for awarding construction and service contracts to certain entities and giving payments to government officials in three continents.501

After the police investigation, on February 23, 2016, a group of investment funds and their investment advisor (collectively, the “Fund”) sued Petrobras and various shipyards (collectively, the “Shipyards”) that paid bribes in exchange for construction contracts.502 The Fund alleged that Petrobras made materially false statements and omissions in order to induce the Fund to invest in Sete Brasil Participações (“Sete”), an entity

Petrobras setup to funnel bribes. The Fund also alleged that Petrobras aided and abetted Sete and that Petrobras engaged in a civil conspiracy to defraud the Fund.

On August 12, 2016, Petrobras and the Shipyard Defendants filed a motion to dismiss. On March 30, 2017 the court found, among other things, that the investment adviser did not have standing to bring an action against Petrobras. The court also declined to dismiss the claims of fraud and aiding and abetting against Petrobras but dismissed all counts against the Shipyard Defendants. Petrobras appealed the District Court’s order denying in part its motion to dismiss the Fund’s amended complaint on sovereign-immunity grounds and oral argument is currently set for January 19, 2018. WilmerHale represented Sembcorp in the matter.

VI. LEGISLATIVE DEVELOPMENTS

A. Foreign Business Bribery Prohibition Act 2017 (H.R. 1549)

On March 15, 2017, U.S. Representative Ed Perlmutter (D-Colo.) introduced a bill that would “authorize certain private rights of action under the Foreign Corrupt Practices Act of 1977 for violations that damage certain businesses, and for other purposes” and would also allow for treble damages and attorney’s fees. Perlmutter has introduced similar bills in prior years and they have not moved forward. This past year, in connection with the legislation, Perlmutter stated “[t]his legislation is more important than ever given the lack of clarity from the new administration and the new leadership at the DOJ and SEC . . . . Since it’s unclear if FCPA enforcement will remain a priority, this bill will encourage U.S. and foreign companies to play by the rules or face the consequences.” As discussed above, as 2017 unfolded, the DOJ and SEC

leadership reaffirmed their commitment to enforce the FCPA. There has been no action on the bill since March 31, 2017, and it seems unlikely that the bill will go forward. \(^{513}\)

**B. SEC Resource Extraction Disclosure Rules Repealed**

On February 14, 2017, President Trump approved a resolution passed under the Congressional Review Act (“CRA”) to eliminate the SEC’s rule requiring resource extraction disclosures. \(^{514}\) This rule, adopted in June 2016, would have required resource extraction issuers to report payments over $100,000 made to governments for “the commercial development of oil, natural gas or minerals.” \(^{515}\) Resource extraction issuers were required to begin reporting with fiscal years ending on or after September 30, 2018. \(^{516}\)

This rule was the second SEC resource extraction disclosure rule. The first rule was adopted in August 22, 2012 and was overturned by a district court after a challenge was brought by “associations of oil, natural gas, and mining companies” in 2013. \(^{517}\) The court found that there is no statutory mandate for public disclosure or clear evidence that Congress intended for issuers’ annual reports on such payments to be publicly disclosed. \(^{518}\) Additionally, the court found that the SEC’s “denial of any exemption for countries that prohibit payment disclosure was arbitrary and capricious.” \(^{519}\) The SEC then re-proposed a modified version of the rule in 2015, and this version was later adopted in June 2016. \(^{520}\) The repeal of the current resource extraction disclosures rule will likely be final because a rule repealed under the CRA “may not be reissued in substantially the same form” unless the rule is specifically authorized by a new law. \(^{521}\)

**C. Financial CHOICE Act of 2017 (H.R. 10)**

On June 8, 2017, the House of Representatives passed H.R. 10, the Financial CHOICE Act of 2017 (“FCA”). \(^{522}\) The FCA, which still needs to be approved by the Senate,


\(^{521}\) 5 U.S.C. § 801(b)(2).

would limit the Dodd-Frank Act and certain aspects of the SEC’s enforcement authority. For example, the FCA would exempt banking organizations that “maintain a leverage ratio of at least 10 percent” from certain Dodd-Frank Act regulatory requirements. Additionally, section 823 of the FCA would allow a defendant to compel the SEC to move an administrative proceeding to federal court. Moreover, section 824 would require approval by the Division of Economic and Risk Analysis and Chief Economist before the SEC can impose civil money penalties against issuers.

Notably, the FCA would also increase civil penalties for securities law violations. Section 211 provides a new maximum penalty in cases involving “fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement,” which will be $300,000 for a natural person or $1,450,000 for any other person, “3 times the gross amount of pecuniary gain to the person who committed the act or omission” or “the amount of losses incurred by victims as a result of the act or omission,” whichever is greatest.

On June 13, 2017, the FCA was referred to the Senate Committee on Banking, Housing, and Urban Affairs, which held a hearing on this legislation and is currently reviewing the FCA.

VII. KEY INTERNATIONAL LEGAL DEVELOPMENTS

A. United Kingdom

1. Investigation and Enforcement Trends

Looking back to the end of 2016, it was clear that 2016 had been a year of promise, but not delivery, for the U.K. SFO. As U.K. SFO Director David Green said plaintively to his audience during his annual speech to the Cambridge Symposium on Economic Crime: “Be patient – I have to be.”

A year later, and it appears that Green’s patience has paid off. In 2017, the U.K. SFO secured two additional DPAs, obtained a conviction rate by defendant of 89.5% for the financial year 2016–2017, commenced 14 new investigations, saw several corporate and individual defendants charged and awaiting trials, and mounted a successful challenge to claims of legal professional privilege. The U.K. SFO also demonstrated itself to be not only effective, but also profitable, with a net contribution of £460 million to

the U.K. Treasury over the past four years—equivalent to around £1 million per member of SFO staff.

Buoyed by these concrete successes, the U.K. SFO has become increasingly confident, even aggressive, in its investigative tactics. However, the future of the U.K. SFO is still to some extent marred by uncertainty. Although government plans to “incorporate” the U.K. SFO into the National Crime Agency (“NCA”) were quietly dropped this September, Home Secretary Amber Rudd later announced the creation of a new “National Economic Crime Centre” (“NECC”). The new NECC will sit within the NCA, and will be tasked with tackling high-level fraud and money laundering. Although Green is confident that the NECC will not impinge on the U.K. SFO’s independence, the fact remains that the NECC will have powers to task the U.K. SFO with investigations. Shortly after the NECC announcement, the Government began to advertise publicly for Green’s replacement as U.K. SFO Director. This role will, according to Attorney-General Jeremy Wright QC, be “pivotal in driving through the package of reforms.” Despite Green’s assurances, it appears that the U.K. SFO’s status as an independent agency going forward may not be as secure as he would like us to believe.

2. Significant Cases

In 2016, the U.K. SFO announced an investigation into alleged bribery, corruption and money-laundering activities at Monaco-based firm Unaoil. The announcement followed investigative reports published by various media outlets, which were based on hundreds of thousands of leaked internal emails and documents. While the wider investigation is ongoing, on November 16, 2017, the U.K. SFO announced it had charged Ziad Akle and Basil Al Jarah with offenses of conspiracy to make corrupt payments to secure the award of Unaoil client contracts in Iraq. A third man, Saman Ahsani, is subject to an extradition request to Monaco on related charges. Two weeks later, the U.K. SFO charged two further individuals, Paul Bond and Stephen Whiteley, in connection with the same alleged conspiracy. Since the alleged misconduct took place between 2005 and 2011, Akle, Al Jarah, Bond and Whiteley have been charged


under laws that were in effect prior to the enactment of the U.K. Bribery Act 2010 (“UKBA”).

In addition to charging decisions in the original investigation, the U.K. SFO’s work on Unaoil has generated a number of additional related investigations. In April 2017, the SFO announced it had opened an investigation into KBR, Inc.’s U.K. subsidiaries (“KBR U.K.”), in relation to alleged bribery and corruption offenses. In its announcement, the U.K. SFO confirmed that its investigation into KBR U.K. was related to its ongoing investigation into Unaoil. In May 2017, the U.K. SFO confirmed it was also investigating the activities of Petrofac PLC for alleged bribery, corruption, and money laundering, again in connection with the Unaoil investigation.

July 2017 saw the announcement of two new investigations by the U.K. SFO. On July 11, the U.K. SFO confirmed it was investigating the activities of Amec Foster Wheeler plc in connection with alleged bribery and corruption offenses. Two weeks later, an investigation was announced into alleged corruption in relation to Rio Tinto Group’s business in the Republic of Guinea.

In August 2017, the U.K. SFO announced it was investigating suspicions of corruption in the conduct of business by British American Tobacco, plc. This followed a 2015 television report by the BBC’s Panorama program on the company’s business activities.

The U.K. SFO announced that it had secured six individual convictions and one corporate conviction in its case against logistics and freight operations company F.H. Bertling Ltd in September 2017. The charges were first announced in July 2016, related to corrupt payments made in 2005 and 2006 to an agent of the Angolan state oil company Sonangol. By March 2017, six of the seven individuals charged had pleaded guilty, with the company following suit in August. The remaining individual, Peter Ferdinand, was acquitted by a jury on September 21, 2017.

The U.K. SFO has two trials scheduled for 2018 in its long-running investigation into alleged corruption at Alstom Network UK Limited and Alstom Power Limited. With

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seven individuals and two corporate defendants charged across the various portions of
the investigation, the outcome of these trials will be significant for the U.K. SFO.

3. **DPAs**

At the close of 2016, the role of the DPA in the United Kingdom was uncertain. With
only two DPAs in place, it was unclear whether DPAs would become a tool used more
widely by the U.K. SFO, and if so, what companies needed to do in order to secure one.

The year 2017 has provided some degree of clarity on both questions. In January
2017, the U.K. SFO entered its third and largest DPA to date with Rolls-Royce PLC
("Rolls-Royce").\(^{543}\) Under the terms of the U.K. DPA, Rolls-Royce paid a total of just
over £497 million, composed of disgorgement of profits of £258 million and a financial
penalty of £239 million. The company also paid almost £13 million of the U.K. SFO’s
costs, and agreed to implement, at its own expense, an internal anti-bribery and
corruption compliance program. The conduct for which Rolls-Royce was investigated
spanned three decades, and took place across seven jurisdictions.

In April 2017, the U.K. SFO concluded its fourth DPA, this time with Tesco Stores
Limited in relation to alleged accounting irregularities. Under the DPA, Tesco Stores
Limited agreed to pay a £129 million financial penalty and to bear the U.K. SFO’s
costs.\(^{544}\)

Both of these DPAs—and the Rolls-Royce DPA in particular—were significantly larger
in financial terms than either of their predecessors. In addition, since each DPA
requires approval from the court, both the Rolls-Royce and the Tesco judgments
provided helpful guidance on the nascent jurisprudence in this area.

4. **Corporate Criminal Liability**

The issue of corporate criminal liability in the United Kingdom has been a thorn in the
side of the U.K. SFO for many years. In order to convict a company of virtually any
economic offense, prosecutors are currently required to identify and prove their case to
the criminal standard against the “controlling mind” of that company, the exception to
this being a prosecution for failure to prevent bribery under Section 7 of the UKBA. U.K.
SFO Director Green and others have long campaigned for an extension of the “failure to
prevent” model to other economic crimes in order to ease the evidentiary burden on
prosecutors bringing cases against companies.

In early 2017, the Ministry of Justice launched a consultation on reforming corporate
liability for economic crime. Although promising from Green’s point of view, the results
of the consultation have yet to be announced. In light of the U.K.’s referendum vote to
leave the European Union, corporate criminal liability reform may not be the highest

\(^{543}\) SFO Press Release: SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce
PLC (17 January 2017), [https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-
prosecution-agreement-rolls-royce-plc/](https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-
prosecution-agreement-rolls-royce-plc/).

\(^{544}\) SFO Press Release: SFO agrees Deferred Prosecution Agreement with Tesco (10 April 2017),
item on the government’s political agenda. However, those campaigning for overhaul were given a glimmer of hope in the form of the Criminal Finances Act 2017, which introduced a new, UKBA-style corporate offense of failure to prevent the facilitation of tax evasion.

5. Concluding Thoughts

Given the U.K. SFO’s recent financial and investigative successes, the trend for the U.K. SFO—and therefore, for its Director Green’s legacy in his final year at the helm—has been broadly positive. The future of the agency is, for the time being, no longer under threat (although the exact role of the planned NECC and its interaction with the U.K. SFO and other agencies is not yet clear), and the U.K. SFO has a healthy roster of active matters. Also notable has been the U.K. SFO’s increasing confidence and bullishness in pursuing investigations.

Looking forward to 2018, and particularly in light of the U.K. SFO’s proactive attitude in recent months, it seems likely that many companies under U.K. SFO investigation will look to try and demonstrate the “extraordinary co-operation” required to secure a DPA. Whether this becomes, in the words of the U.K. SFO, “the new normal,” remains to be seen. However, the U.K. SFO is at pains to emphasize that this does not equate to taking a light touch on individual criminality: “[i]t should never be thought that a DPA with a company somehow lets culpable former senior management off the hook: far from it.”

B. Germany

1. Enforcement Efforts

In May 2017, the German Federal Court of Justice reached an important decision in a landmark criminal law case concerning tax fraud for declaring bribes as tax-deductible business expenses. The case involved the sale of goods by a German defense company to the government of Greece, a sale which was allegedly made in exchange for the payment of improper commissions to a consulting company with ties to a Greek government official. The employee who authorized these payments was charged criminally as an individual with indirectly committing tax fraud by falsely declaring bribes as business expenses. The charge was based on his alleged knowledge of an informal agreement between the company’s management and the Greek government official. The court upheld the indirect tax fraud charge against the individual employee. In the same case, the court also assessed whether the company, which under German law is not subject to criminal law, should be fined under an administrative offense for having

benefited by the wrongdoings of its management. With respect to an appeal of the Public Prosecutors Office regarding the amount of the fine, the court overruled a lower court decision and declared obiter dicta that whether or not a corporate compliance system existed and was implemented at the company needed to be considered when deciding on the amount of a fine.\textsuperscript{547} This ruling on the corporate aspect of the case has been widely interpreted as an important signal that courts will consider the existence of a strong compliance program as a mitigating factor in determining punishment for offenses and provides a strong incentive for companies to strengthen their compliance efforts in order to avail themselves of that potential mitigation.

In March 2017, the Munich Public Prosecutors Office searched the German premises of Volkswagen and Audi, and the offices of U.S. law firm Jones Day, in order to locate information that Jones Day had collected during its internal investigation of Volkswagen’s and Audi’s diesel exhaust gas emission system. The prosecutors seized documents containing communications between Jones Day, acting as the companies’ lawyers, claiming that the company had not divulged relevant information to the prosecutors. After the seizure was upheld by a Munich local court, Volkswagen and Jones Day took the case to the German Constitutional Court to challenge the seizure of the documents asserting, inter alia, legal privilege under German law. By order of an injunction, the court ruled that the prosecutors were not allowed to examine the documents until a final judgment on the merits has been rendered.\textsuperscript{548} While the case does not relate to anti-bribery enforcement, the decision of the German constitutional court is expected to have far-reaching implications for any type of internal investigation of alleged corporate misconduct.

In June 2017, Atlas Elektronik, a joint venture between Airbus and ThyssenKrupp, reached a settlement with the Bremen Public Prosecutor’s Office in an anti-corruption investigation involving Atlas Elektronik’s alleged bribes to Turkish government officials. The company agreed to pay a €48 million fine to settle the allegations.\textsuperscript{549}

The Munich Public Prosecutor’s Office is widely expected to file indictments against Airbus employees with regard to allegedly improper payments that were made to intermediaries in relation to the sale of Eurofighter planes to the Austrian government. The charges will be based on the criminal offense of embezzlement of company funds,


rather than corruption offenses, because of the difficulties prosecutors have had in identifying the ultimate recipient of the improper payments.550

Following an anti-bribery investigation by the Public Prosecutor’s Office in Würzburg into alleged bribes made in connection with business in Turkey, German automotive and industrial supplier Schaeffler has brought damages claims against eight former managers. The claims were rejected by the labor court in Würzburg, but Schaeffler has appealed the decision.551 Schaeffler’s lawsuit highlights a recent trend among German companies to claim damages from employees and managers for compliance violations. In the past, Siemens and ThyssenKrupp, among others, had taken similar legal steps.552

2. Legislative Developments

After having tightened rules on corruption in the healthcare sector in 2016, the German legislature, in April 2017, adopted a new law to combat corruption involving sports. The new legislation introduces sections 265c (betting fraud in sports), 265d (manipulation of professional sports competitions) and 265e (especially serious cases of betting fraud in sports and manipulation of professional sports competitions) to the German Criminal Code.553 Offenders face fines or imprisonment of up to five years.

In February 2017, the German Corporate Governance Code on management and supervision of German-listed companies was amended to incorporate the concept of the “reputable businessperson.”554 The German Corporate Governance Code is aimed at providing listed companies with recommendations for best practices of good corporate governance. Listed companies must explain deviations from the recommendations contained in the Code and disclose such deviation with their annual declaration of conformity.555 This includes not only a requirement that companies comply with the law


but also a requirement that companies’ Management Boards take ethically sound and responsible actions. Moreover, in section 4.1.3. (as amended), the Code recommends that a company’s Management Board institute appropriate measures reflecting the company’s risk situation (a “compliance management system”) and disclose the main features of those measures in their annual report. In addition, a company’s Management Board is encouraged to establish a whistleblowing system that gives employees and third parties the opportunity to report, in a manner protected from retaliation, suspected breaches of the law within the company.556

In April 2017, Germany implemented EU Directive 2014/95/EU, adding a section to the German Commercial Code requiring the disclosure of certain information. Capital-market oriented companies, credit institutions, and insurance companies with more than 500 employees are now required to include a statement on diversity and non-financial information in their annual reports. They must report on efforts in the fight against corruption, as well as on social, environmental, employment, and human rights-related issues. Companies can choose from different reporting standards including national, European, or international frameworks. If, for example, a company opts not to implement a dedicated system to combat corruption, the company needs to provide clear reasons for its decision in this report.557

Another law enhancing transparency came into effect in July 2017. Germany introduced a centralized Competition Register, which the Federal Cartel Office in Bonn (“BKartA”) will have to host and implement by 2020. Government entities and instrumentalities offering public tenders worth €30,000 or more are required to check their partners against the register to make sure that they are not excluded from public procurement due to past offenses. The register will list companies that have been involved with various offenses, in particular offenses relating to corruption, financing of terrorism, money laundering, subsidy fraud, or tax evasion. The BKartA is said to be working on a guideline to clarify the register’s standards, as well as to respond to procedural questions.

The reform of disgorgement proposed in 2016 came into effect in July 2017 with Germany implementing EU Directive 2014/42/EU. The new rules will have an effect on anti-bribery enforcement by loosening the requirements for prosecutors to obtain disgorgement and facilitating the seizure of assets obtained through criminal acts.558

C. France

As we reported last year, the Sapin II Law ("Sapin II") was adopted by the French Parliament in December 2016 with the purpose of strengthening already existing anti-corruption laws in France. The new law, which came into force in June 2017, enhanced the legal protection of French whistleblowers, established the Agence Française Anticorruption ("AFA"), a national agency tasked with detecting and preventing corruption, and obligated large companies to implement corruption prevention plans. Sapin II also introduced the "convention judiciaire d'intérêt public," which created a way for companies under investigation to achieve a stay of criminal proceedings before the case is referred for trial.

In November 2017, French National Prosecutors entered into the first DPA under the new Sapin II law with HSBC Private Bank (Suisse) SA ("PBRS"), HSBC's Geneva-based private banking unit. Under the terms of the DPA, PBRS agreed to pay €300 million in order to resolve allegations that the bank helped French clients launder money and evade local tax obligations. Specifically, PBRS was ordered to pay €86.4 million in disgorgement of profits, a €7.5 million penalty, and €142 million in damages to the French state. The DPA stated that PBRS had, since 2011, "initiated a complete overhaul of its structure, controls and procedures," increased oversight and reporting lines of its subsidiaries, withdrawn from certain markets, and instituted "strict financial crime, regulatory compliance[,] and tax transparency standards."

D. European Union

The European Union Commission published a follow-up to a study conducted in 2012 on corruption in the European Union healthcare sector as one of the fields considered to be most vulnerable to corrupt practices. The study makes recommendation to

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European Union Member States on how to strengthen corruption prevention in the healthcare sector, with special attention paid to Greece, Croatia, Hungary, Lithuania, Poland, and Romania. The study concluded that bribery with respect to medical services presents the most challenging problem in this area. The Commission urges the Member States to develop more transparent rules and encourages companies in the healthcare sector to reevaluate their policies and procedures to ensure that they are sufficiently addressing corruption issues. The Commission expressed satisfaction with attempts at both the European Union and national level to prevent improper marketing. Also at the European Union level, the European Federation of Pharmaceutical Industries and Associations (“EFPIA”) introduced a Disclosure Code that requires its members to reveal all transfers of value made to healthcare professionals and healthcare organizations. In addition, MedTech Europe, a non-governmental trade association representing the medical technology industries, introduced the Code of Ethical Business Practice. The Code sets ethical standards for the relationship between healthcare organizations and professionals in order for those organizations to maintain the trust of regulators and patients.566

The European Union Commission this year decided to cease its anti-corruption report, which was first published in 2014 and was originally planned to be updated every other year.567 The European Union Commission signaled that this should not be considered as a sign of a more relaxed approach to anti-corruption prevention and stressed that other initiatives like the Experience Sharing Program will continue.568

E. China

1. Enforcement Efforts

In 2017, China launched the next phase of its anti-corruption campaign following the recently closed 19th National Congress of the Communist Party of China (“CPC” or the “Party”). President Xi, who began his second five-year term in October 2017, vowed to maintain the “irreversible” momentum of the campaign to root out corruption in China. In the past five years, 1.545 million cases involving corruption were filed, with 1.537 million people disciplined. Criminal charges were brought against some 58,000 individuals in these cases, which are currently working their way through the courts.569 From January to September 2017, the CPC Central Commission for Discipline

569 Sina News: Yang Xiaodu: 1.537 million people have been disciplined, and 58,000 have been transferred to judicial departments for investigation of criminal liabilities in the past five years (杨晓渡：5年处分 153.7 万人，5.8 万人移送司法) (October 19, 2017), http://news.sina.com.cn/c/2017-10-19/doc-ifyrmzgpq2344231.shtml.
Inspection ("CCDI"), China’s top anti-corruption agency and the highest internal-control institution of the CPC, brought 383,000 cases involving corruption. A total of 47,005 officials involved in 33,471 cases have been tried for corruption or bribery and sentenced to imprisonment or fined for corruption, including 56 officials at the ministerial, provincial, or higher level and more than 2,300 at the regional level.570

China also continued the international manhunt “Sky Net” that we reported on last year, which is a campaign by the Chinese government to prosecute corruption suspects and repatriate money procured through illegal means. As of the end of August 2017, 3,339 fugitives (including 628 former officials) were captured from more than 90 countries and regions, and approximately USD 1.41 billion was recovered through this operation.571

Corruption investigations of several officials at the ministerial, provincial, or higher level continued in 2017. Xiang Junbo, Chairman of the China Insurance Regulatory Commission, a key official in the financial supervisory sector, was expelled from the Party and removed from office in April. This removal was confirmed in September by the Party as having been the result of a disciplinary investigation for accepting bribes, engaging in corruption, and abusing supervisory and approval power for his own political and economic benefit.572 In July, Sun Zhengcai, who was previously considered a viable candidate for prime minister, was removed as the Secretary of Chongqing Municipal Communist Party Commission for alleged corruption.573 The cases for both Sun and Xiang have now been transferred to the relevant courts for further investigation of criminal offenses.

In July, Yao Gang, the former Vice Chairman of China’s securities regulator, was prosecuted for taking bribes and abusing power to obtain illegal benefits.574 This prosecution was followed, in November, by the news that Lu Wei, the Vice Minister of the Publicity Department of CPC Central Committee, was reportedly under investigation by the CCDI for corruption.575 CCDI published a special commentary on its website


571 Sohu News: For the five year the Party has been in serious discipline, 3,339 fugitives were captured, RMB9.36 billion were recovered (从严治党这五年:追逃 3339 人追赃 93.6 亿), October 4, 2017, http://www.sohu.com/a/196216348_100029584.


573 XinhuaNet News: CPC Central Committee has decided to expel Sun Zhengcai from the Party, remove him from office and transfer to Judiciary Department for investigation of criminal liability in accordance with law (中共中央决定给予孙政才开除党籍、开除公职处分 将孙政才涉嫌犯罪问题及线索移送司法机关依法处理) (September 29, 2017), http://news.xinhuanet.com/2017-09/29/c_1121747644.htm.

574 Sina Financial News: CCDI published the news that Yao Gang has been expelled from the Party and removed from the office for taking bribes and abusing power to get illegal benefits (中纪委公布姚刚被“双开”内情:政治攀附、重金受贿、以权谋私) (July 20, 2017), http://finance.sina.com.cn/roll/2017-07-20/doc-ifyihwrk1546675.shtml.

575 CCDI Official Website Key News: Lu Wei, the Vice Minister of the Publicity Department of CPC Central Committee, is now undergoing the investigation by CCDI for corruption (中共中央宣传部原副部长鲁炜涉嫌严重违纪接受组织审查) (November 21, 2017), http://www.ccdi.gov.cn/yw/201711/t20171122_112253.html.
stating that the investigation of Lu has showed “the firm resolution on corruption of the CPC’s Central Committee” and has sent “a strong signal that the Party will never be lenient on its members.”

Among these investigations and prosecutions of high-ranking officials in China for corruption, one of the most significant was the conviction of Donald Tsang, former Chief Executive of Hong Kong, in February 2017. Tsang was convicted of one count of misconduct in office and sentenced to 20 months in prison. In 2012, Wave Media, a radio station in which Hong Kong businessman Bill Wong was majority shareholder, applied for a broadcasting license from the Hong Kong government. The Hong Kong cabinet approved the license application at a time when Tsang was renting a penthouse apartment from a company owned by Wong for his retirement. The jury found Tsang guilty because he approved Wave Media's license without disclosing this conflict of interest relating to the real estate transaction.

However, the jury was unable to reach a majority verdict on a corruption charge alleging that Tsang had accepted free renovation services from Wong in exchange for approving Wong’s license application. The charge was retried in September, but that too ended in a hung jury. Prosecutors have since indicated that they will not seek a third retrial.

2. Legislative Developments

Following the Pilot Plans for State Supervision Institution Reform in Beijing, Shanxi, and Zhejiang (“Pilot Plans”) implemented by the CPC’s Central Committee last year, the National People’s Congress (“NPC”) on November 7, 2017 published the Draft Supervision Law to Further Improve the Supervision of Those Serving the Public Offices (“Draft Law”). Pursuant to the Draft Law, a new National Supervision Commission

will be established and work with the CCDI, expanding the purview of the anti-corruption campaign to include employees at state-sponsored institutions. The new National Supervision Commission will have the power to investigate illegal activities such as graft, misuse of authority, neglect of duty, and waste of public funds. The National Supervision Commission is also intended to be a stand-alone law enforcement agency tasked with facilitating greater cooperation with international law enforcement.

In addition, supervisory commissions will be set up at provincial, municipal, and local levels across the country to ensure that all public servants exercising public power are subject to supervision. Public servants covered by the supervision scheme include: 1) civil servants in the organs of the Party, People’s Congress, administration, political consultative conference, supervision, judicial, prosecution, democratic parties, federation of industry and commerce as well as personnel subject to the Civil Servant Law; 2) people in public affairs management organizations authorized by law or entrusted by government authorities; and 3) management of state-owned enterprises.

On November 4, 2017, the Standing Committee of the National People’s Congress passed the amendment to the Anti-Unfair Competition Law (the “Amendment”)\(^ {583}\) which provides more clarity on the scope of commercial bribery, and creates increased penalties thereto. The Amendment came into effect on January 1, 2018 and is the first amendment to the law since its implementation in 1993. This important development indicates that China’s anti-corruption campaign continues to escalate.

The Amendment defines commercial bribery as “a business operator using cash, property or other means to seek transaction opportunities or competitive advantage by bribing (i) employees of a transaction counterparty; (ii) entities or individuals entrusted by a transaction counterparty to handle relevant affairs such as subcontractors and agents; or (iii) entities or individuals that use authority or influence to influence a transaction.”\(^ {584}\) The range of penalties has significantly increased from RMB100,000 to RMB3 million, in addition to confiscation of illegal gains. The authorities also have the power to revoke the business license in severe cases. The Amendment reflects the government’s increased understanding of the nature of commercial bribery, which follows global anti-corruption trends, but it remains to be seen how the newly defined bribery will be implemented.

F. India

In 2017, there were several significant FCPA enforcement actions involving India, including the SEC administrative order settlement with Alere, CDM Smith’s entry into a declination with disgorgement with the DOJ, and the SEC enforcement action against Cadbury and Mondelēz, each of which is discussed in more detail in Section III.B.5.a above.


Meanwhile, Indian authorities continued their efforts to stem widespread corruption and crack down on India’s vast shadow economy. In 2014, Prime Minister Narendra Modi came to power promising to tackle the problems of money laundering and tax evasion. In a controversial move, Modi announced in November 2016 the demonetization of 500 and 1,000 rupee bank notes. The purpose given was to curtail the black economy and to crack down on the use of unaccounted (and therefore untaxed) and counterfeit cash to fund illegal activities and terrorism. People were given until December 30, 2016 to return these notes to banks, or else risk losing their value.

Following the demonetization, in January 2017, the Income Tax Department launched Operation Clean Money in an effort to detect unreported income and increase tax compliance. In the first phase of the operation, which took place between February and April, the Income Tax Department analyzed cash deposit data to identify persons whose cash transactions did not appear in line with their tax paying profile. Nearly 1.8 million individuals were identified using this process, and those people were subjected to a further verification process which required them to verify cash transactions online, including by specifying the source of the cash.

In the second phase of Operation Clean Money, the Income Tax Department assessed the various cases and categorized them according to different levels of risk. Enforcement actions (including searches and seizures of assets) were taken in high-risk cases, while low-risk cases were monitored for tax compliance.

Meanwhile, the Ministry of Corporate Affairs has been investigating deposits made by approximately 20,000 companies during the demonetization period, and the Serious Fraud Investigation Office has been investigating over 1500 companies for allegedly violating the Companies Act. These investigations were prompted by the surge in shell companies depositing cash in banks after demonetization. As of July 2017, Indian authorities had shut down nearly 200,000 shell companies, and hundreds of companies have been ordered to repay amounts to the government.

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thousands more were still under investigation.\footnote{Paritosh Bansal, Sanjeev Miglani, Rahul Bhatia, \textit{Cracking down on ‘black’ money, India steps up scrutiny of shell firms}, \textit{REUTERS} (Aug. 16, 2017), https://www.reuters.com/article/us-india-corruption-companies/cracking-down-on-black-money-india-steps-up-scrutiny-of-shell-firms-idUSKCN1AW0U1.} In a speech in August, Prime Minister Modi claimed that demonetization had helped unearth over 300,000 shell companies.\footnote{Shruti Srivastava, \textit{India Unearths $1 Billion of Suspicious Cash in Corruption Crackdown}, \textit{BLOOMBERG} (Oct. 24, 2017), https://www.bloomberg.com/news/articles/2017-10-24/india-s-crackdown-on-shell-companies-set-to-intensify-minister.}

In other enforcement efforts, in March, the Central Bureau of Investigation (“CBI”) filed a charge sheet against Himachal Pradesh Chief Minister Virbhadra Singh for allegedly amassing assets worth approximately USD 1.54 million which was disproportionate to his total income during his tenure as a Union minister.\footnote{DA case adjourned: Court directs CBI to give papers to HP CM Virbhadra Singh, \textit{HINDUSTAN TIMES} (Aug. 30, 2017), http://www.hindustantimes.com/india-news/da-case-against-himachal-chief-minister-virbhadra-singh-adjourned-to-oct-31/story-TdaFbomFVgyTBlsl6wNU8O.html; http://www.firstpost.com/politics/virbhadra-singh-da-case-delhi-high-court-rejects-plea-to-quash-investigation-against-himachal-pradesh-chief-minister-3771719.html.} This case is still working its way through the courts.

G. Russia

The year 2017 was a busy one for Russian anti-corruption efforts. Several amendments to the country’s anti-corruption laws were enacted or went into force, and several other draft corruption-related bills have been introduced in Parliament. On the enforcement front, several high-ranking politicians have been charged with corruption, and a prominent opposition leader was convicted of embezzlement in a trial that may have been politically motivated.

1. Legislative Developments

On April 15, 2017, a set of amendments entered into force\footnote{Russian Federation, Official Internet portal legal information, Federal Law. No. 64-FZ of 03.04.2017: “On amendments to certain legislative acts of the Russian Federation made with the purpose of modernization of the state policy in the area of counteraction against corruption,” http://publication.pravo.gov.ru/Document/View/0001201704040011?index=0&rangeSize=1.} requiring the chief executives of the regions of the Russian Federation to check whether information disclosed by municipal officials is complete and correct. Specifically, the new law requires the chief executives to check whether these individuals have correctly reported their income, property, and any obligations that are owed to them or by them to other people.\footnote{President Putin signs amendments to anti-corruption legislation: New anti-corruption bill submitted to State Duma, Rapsi (Apr. 4, 2017), http://www.rapsinews.com/legislation_news/20170404/278162539.html.}

On July 1, 2017, another set of amendments was signed into law by the Russian president requiring the publication and dissemination on the internet of a list of persons who have been dismissed from public service because they have committed a
corruption offense. This amendment will enter into force in January 2018. The list is purportedly intended to help government agencies access information on whether potential employees have complied with ethical and anti-corruption laws.

In addition, two significant draft bills were introduced in Parliament by the government:

- A bill making corporations liable if they bribe someone to advance the interests of their subsidiaries or persons affiliated with them. At present, corporations can only be held liable if they bribe someone to advance their own interests.

- A bill extending certain state protections to civil servants and private company employees who report incidents of corruption in their workplace. In particular, such employees cannot be dismissed without the approval of a special commission, their vacation cannot be shortened, and they cannot be deprived of bonuses and other payments. The information provided by these employees must be treated as confidential, and such employees are entitled to free legal aid.

2. Significant Convictions and Pending Investigations

In February, Alexei Navalny, a prominent opposition leader, was found guilty of embezzlement and given a five-year suspended prison sentence and fined approximately $8,400. Navalny previously had been convicted of embezzlement in 2013, but that verdict was sent for re-trial after the European Court of Human Rights found that the Russian proceedings violated Navalny’s right to a fair hearing. Many observers believe that the court decision in February was a move by Russian President Vladimir Putin to eliminate a key political rival, as Russian law bars individuals with

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598 See “On amendments of certain legislative acts of the Russian Federation in part on publishing of information on penalty in the form of dismissal due to the loss of confidence caused by the commitment of the corruption offenses in the state information system for state service” dated 1 July 2017 No. 132-FZ.


602 See Draft Amendments to the Federal Law “On counteraction against corruption,” introduced by the Ministry of Labor in the Parliament in October 2017, https://www.kommersant.ru/doc/3440448?query=%D0%BA%D0%BE%D1%80%D1%83%D0%BF%D1%86%D0%B8%D1%8F.


criminal convictions from running for office. Navalny appealed the conviction, but it was upheld in May.

In December, Alexey Ulyukaev, a former economic development minister, was found guilty of soliciting a $2 million bribe from the country’s largest oil company, and sentenced to eight years in prison. Ulyukaev is the highest-ranking Russian official to be convicted of corruption. Some observers consider his conviction to be politically motivated, rather than an attempt to fight graft.

In addition, there are several pending cases involving high-ranking Russian politicians that are currently wending their way through the courts. These include the cases of Dmitry Zakharchenko, the acting head of an anti-corruption agency at the Russian interior ministry, who is accused of accepting over $120 million in cash bribes, and Nikolay Barinov, former deputy director of the Federal Penitentiary Service, who is suspected of accepting approximately $2 million in bribes.

H. Brazil

2017 saw the trend of robust anti-corruption enforcement efforts by Brazil continue apace. Several important U.S. enforcement actions involved Brazil this year. In November 2017, as discussed above, SBM agreed to pay a total penalty of $238 million including a $500,000 criminal fine and $13.2 million in forfeiture. In January 2017, Rolls-Royce entered into an $800 million resolution with U.S., U.K., and Brazilian enforcement authorities.

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authorities related to bribery conduct in Brazil. Additionally, in December 2017, Keppel settled with U.S., Singaporean, and Brazilian authorities related to a decades-long bribery scheme involving officials in Brazil.

Investigations by Brazilian authorities into corruption at Petrobras and its related company, Odebrecht, collectively known as “Operação Lava Jato” or “Operation Car Wash” continued in 2017, though not without controversy. The investigation is now in its fourth year and has continued to expand considerably in scope. In April 2017, the Operation Car Wash prosecutors opened new investigations into dozens of politicians from both the Workers Party and others; among them eight members of the President’s cabinet.\(^{613}\)

In January 2017, Teori Zavascki, the Supreme Court Justice overseeing several Operation Car Wash-related inquiries, including the ratification of Odebrecht’s plea deal, died in a small plane crash.\(^{614}\) A number of commentators in Brazilian political and legal circles, including a Brazilian prosecutor, questioned whether foul play was involved in the crash.\(^{615}\) Brazilian President Michel Temer appointed a close ally and justice minister, Alexandre de Moraes, to the Supreme Court to replace Zavascki.\(^{616}\)

On March 17, federal police raided several of the country’s largest meatpacking companies, including JBS S.A. (“JBS”) and BRF S.A. (“BRF”), and accused more than 100 people (mostly health inspectors) of falsifying export paperwork, failing to perform inspections, and taking bribes in connection with the export of rotten meat.\(^{617}\) Thousands of pages of evidence have been presented in connection with the conduct, which has been under investigation since 2015 (known as “Operation Weak Flesh”), to support charges of systemic fraud with respect to meat exports and inspections.\(^{618}\) In April 2017, federal prosecutors charged 60 individuals in connection with the scheme, including two executives of BRF S.A.\(^{619}\)

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On July 12, 2017, as part of Operation Car Wash, Brazil’s former president Luis Inácio Lula da Silva was sentenced to nine and a half years in prison after he was found guilty of accepting $1.2 million in bribes from OAS, an engineering firm. Per prosecutors, the money was spent by the company remodeling an apartment for Lula in exchange for Lula’s help in ensuring that Petrobras contracts were awarded to OAS. Just a week prior to Lula’s sentencing, Brazil’s Federal Police announced that it was shutting down the Operation Car Wash anti-corruption task force. While the Federal Police explained that the resources and personnel from the task force would be reshuffled and absorbed into the Federal Police’s main anti-corruption division, prosecutors who were part of the task force deemed the shutdown of the task force a “clear setback.”

In May 2017, Wesley and Joesley Batista, two brothers who control and run JBS, along with seven other company executives, reached a plea deal with prosecutors in connection with an investigation into fraudulent transactions involving JBS, the brothers’ holding company, state-run banks, and pension funds. In exchange for leniency, J&F Investimentos, which is the controlling shareholder of JBS, agreed to pay a record $3.2 billion fine. As part of the deal, the Batista brothers also submitted to the Supreme Court a recording of Temer authorizing bribe payments to silence politician Eduardo Cunha, currently in prison. In June 2017, prosecutors brought criminal bribery charges against Temer. However, Temer avoided trial after convincing enough members of Brazil’s lower House of Congress to block the charges from reaching the Supreme Court—the only court in Brazil where elected officials can be prosecuted.

In September 2017, a judge ordered the arrest of Joesley Batista and a former chairman of JBS, despite Batista’s entry into a plea deal in May, as noted above. The arrest was ordered after Joesley Batista accidentally submitted a tape recording to prosecutors related to the investigation of Temer that prosecutors allege showed Joesley Batista was concealing evidence from prosecutors. Several days later, police also arrested Wesley Batista on suspicion of insider trading, in which Joesley

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Batista was also allegedly implicated. The arrests coincided with the arrest of a former Rio de Janeiro state governor, Anthony Gartoinho, on unrelated corruption charges.

Also in September, additional charges of obstruction of justice were brought against Temer for being part of a criminal conspiracy to prevent authorities from finding out about a vast bribery scheme. As with the first round of corruption charges, Temer was able to avoid trial. In October, the President persuaded 251 Congressional members to vote against having him stand trial on the second round of charges. Temer’s approval numbers are at 6% (an improvement from the 3% in October), indicating his deep unpopularity with the Brazilian public.

The effects of these non-stop corruption scandals in Brazil are twofold: on the one hand, Brazilians are running out politicians they can trust; on the other, there are too few politicians left capable of governing that have not been caught up in corruption-related scandal.

I. Mexico

1. Ongoing Investigations

In 2017, there were several FCPA enforcement actions announced that involved Mexico, including the SEC administrative order settlement with Zimmer Biomet and the related action by the DOJ for allowing its Mexican subsidiary to pay bribes to customs officials via brokers and sub-agents. These proceedings are discussed in more detail above. There also are several ongoing investigations involving conduct in Mexico, both by the U.S. and the Mexican government.

Since January 1, only three companies have publicly disclosed that they are currently under investigation for FCPA and corruption-related misconduct by the United States and Mexico for potential violations related to Mexico. Interestingly, the first case involves Mexico’s state-run petroleum company, Petróleos Mexicanos (“Pemex”) which is currently under investigation by the Mexico Federal Attorney General’s Office in

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relation to allegations that its officers accepted bribes in exchange for awarding business.\textsuperscript{635} According to Pemex, its own Liabilities Unit launched the investigation in December 2016, reported its findings to the Federal Attorney General, and lodged a complaint with the Office. Pemex states that the company is cooperating with the Federal Police, as well as the Attorney General’s Office, “in order to hold those responsible for these acts accountable.”\textsuperscript{636} Finally, World Acceptance Corporation (“World Acceptance”), a consumer finance business, disclosed to the SEC and DOJ potential violations of the FCPA in its Mexico operations in June 2017.\textsuperscript{637} World Acceptance stated, “The Company has voluntarily contacted the [SEC] and the [DOJ] to advise both agencies that an internal investigation is underway and that the Company intends to cooperate with both agencies.”\textsuperscript{638} The second case is that of a multinational retail corporation, which has been under investigation by the SEC and DOJ for alleged bribery in Mexico since 2011.

Earlier this year, the new National Anti-Corruption System (“SNA”) undertook its first case involving corruption in the construction of the busy Cuernavaca-Acapulco highway, where a sinkhole killed two people. According to various reports, the highway’s construction suffered from corruption at all levels of government. The coordinating committee’s supreme audit institution uncovered approximately $15 million in unjustified payments and services that did not comply with the specifications of the contracts.\textsuperscript{639} Other Mexican government agencies, including Mexico’s Civil Service Secretary, also are investigating this matter.\textsuperscript{640}

Separately, Brazil’s wide-ranging Operation Car Wash investigation has reached Mexico and individuals close to the current Mexican president, Enrique Peña Nieto. In late October, media reports alleged that $1.5 million in bribery payments from Odebrecht’s subsidiary, Braskem, was deposited into the account of a company linked to Emilio Lozoya, the former director of Pemex, who is close to Peña Nieto.\textsuperscript{641} In August, three ex-directors of Odebrecht claimed that Lozoya had received at least $10 million in bribes from the company in exchange for a contract worth $115 million for

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\textsuperscript{635} Petróleos Mexicanos, Annual Report (Form 20-F) (Apr. 28, 2017) at 228.
\textsuperscript{636} Petróleos Mexicanos, Annual Report (Form 20-F) (Apr. 28, 2017) at 228.
\textsuperscript{637} World Acceptance Corporation, Annual Report (Form 10-K) (June 15, 2017).
\textsuperscript{638} World Acceptance Corporation, Annual Report (Form 10-K) (June 15, 2017).
work on an oil refinery. In September, the SFP identified approximately $6.7 million in accounting irregularities in a contract between Pemex and Odebrecht and had begun sanction procedures. In October, the lead prosecutor tasked with investigating and prosecuting electoral crimes was fired by the Attorney General’s office after publicly accusing Lozoya of pressuring his office to declare Lozoya innocent.

2. Legislative Developments

As we reported in 2016, in recent years Mexico undertook sweeping reforms of its anti-corruption laws, including, in May 2014, the creation of the SNA, which coordinates Mexican federal, state, and local authorities in combatting corruption. Legislation implementing the SNA was enacted in July 2016 and came into effect in July 2017. These new laws established an overall framework for anti-corruption efforts, created a new federal tribunal to hear anti-corruption cases, and established an independent anti-corruption prosecutor’s office. The SNA also sought to decentralize anti-corruption efforts by providing for local anti-corruption systems to be enacted at the state and local levels by creating a committee of citizen participants (“CPC”) composed of notable citizens. The CPC’s chair is also chair of the SNA’s coordinating committee, which develops anti-corruption policies and monitors and evaluates progress.

Evaluating the SNA’s effectiveness in practice is not yet possible but some early developments show signs of progress. First, observers have praised the creation of the new CPC and its work, with members being named in January 2017. However, the SNA’s current budget is not suitable to support the robust structure called for by the new laws. Additionally, key appointments for the SNA have not yet been made—for example, specialized anti-corruption judges have not been confirmed, the SNA’s anti-

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647 Javier Risco, La “Trampa” que Nunca Existió, EL FINANCIERO (July 3, 2017), http://www.elfinanciero.com.mx/opinion/la-trampa-que-nunca-existio.html. “[T] here is nothing dark in the creation of an entity for the fight against corruption . . . some are starting to shake, but this is normal, it is a sign that this group of citizens in taking the right path.”

corruption prosecutor’s office has become the subject of political controversy, and only eight of 32 local governments have implemented their required local anti-corruption systems.649

J. Argentina

Argentina made important strides in its efforts to combat corruption 2017.

1. Ongoing Investigations

In March 2017, an Argentine judge ordered Argentina’s former president, Cristina Fernández de Kirchner, to stand trial for defrauding the government of approximately $3.5 billion.650 Fourteen other officials were also ordered to stand trial in the case.651 In April, Kirchner was again indicted on corruption-related charges, including money laundering, along with her daughter and son, in a case involving a family real estate business.652 In October, just weeks after Kirchner was elected to the Senate (thereby granting her immunity from prosecution during her term), Argentina’s former Planning Minister Julio De Vido was arrested on charges including embezzlement.653 In November, Kirchner’s former economy minister and vice president Amado Boudou was arrested on corruption charges.654

2. Legislative Developments

On November 8, 2017, Argentina’s Congress passed the Corporate Liability Bill, a law that for the first time permits companies, not just individuals, to be held accountable for bribery both inside and outside of Argentina.655 Under the law, companies may be prosecuted for bribery committed on their behalf in Argentina, and, in the case of

Argentine companies, for bribery committed abroad. Courts can punish companies with fines up to five times the quantity fraudulently acquired. Under the new law, companies can also be blacklisted from public contracts for up to ten years, and are prohibited from participating in public contract bids if they do not have an anti-bribery compliance program in place. Companies may negotiate leniency agreements in exchange for providing relevant information to prosecutors. The law takes effect 90 days after it was signed on November 8. As discussed in more detail in Section VII.M.2.a, below, in its March 2017 report on anti-corruption efforts in Argentina, the Organisation for Economic Co-operation and Development (“OECD”) Working Group on Bribery noted the importance of the bill, but emphasized the need to train judges and prosecutors on foreign bribery, and to protect whistleblowers.

K. Canada

The year was an important one in Canada's anti-corruption fight with significant developments on both the legislative and enforcement front.

1. Legislative Developments

In 2017, the Canadian government took two significant steps to bolster its anti-corruption efforts.

First, on September 25, the Canadian government launched a public consultation to seek input on whether to institute a DPA scheme in Canada. In the accompanying discussion paper, the Canadian government notes that several other jurisdictions already have in place or are considering instituting DPA or DPA-like mechanisms.

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The paper also lists some of the potential advantages and disadvantages of a DPA regime. The consultation period closed in November, and the government is currently considering the proposed legislation in light of those comments.

Second, on October 30, the Canadian government announced that it was repealing the facilitation payment exception under the Canadian Corruption of Foreign Public Officials Act (“CFPOA”). Effective October 31, 2017, facilitation payments (i.e., “payments made to foreign government officials to speed up or facilitate routine transactions such as permits”) will now be considered bribes under the CFPOA. Such facilitation payments include payments made to officials to expedite the processing of permits, licenses, and visas, or to expedite the provision of services normally offered to the public, such as mail pickup, telecommunications services, and water and power supply.

This repeal has been expected since the introduction of Bill S-14 back in February 2013. Canada delayed the implementation of this change by four years to give companies time to adjust their internal practices and procedures.

2. Enforcement of the CFPOA

Enforcement of the CFPOA continued steadily this year, with a few notable developments, particularly in the courts.

On July 6, the Court of Appeal for Ontario upheld the 2013 conviction of Nazir Karigar, the first individual prosecuted under the CFPOA. As previously reported, in 2013, Karigar was convicted and sentenced to three years in jail for offering bribes to Air India officials to secure a security software contract, even though the prosecution was unable to prove that the bribes were actually paid to the officials.

The Court of Appeal found in the Karigar case that the CFPOA applied to conspiracies to bribe, even without actual transfer of monies. The court reasoned that this

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interpretation was consistent with the OECD Convention of Combating Bribery of Foreign Public Officials, to which Canada is a signatory,674 and that requiring proof of actual bribery would hamper efforts to enforce the CFPOA.675

The Court of Appeal also held that Canada had territorial jurisdiction over Karigar, even though many of the dealings occurred in India.676 The court reasoned that there was a “real and substantial” link to Canada because Karigar was a Canadian citizen acting on behalf of a Canadian company, much of the contract work was to be done in Canada, and all or nearly all of the documents and witnesses were from Canada.677

On the other hand, in February, three individuals were acquitted by the Ontario Superior Court in the SNC-Lavalin case, more than four years after they were charged with CFPOA violations in connection with the Padma Bridge project in Bangladesh.678 The Superior Court had refused to admit wiretap evidence against the defendants, reasoning that the initial wiretap application was based on uncorroborated “speculation, gossip and rumour,” and the wiretaps should never have been approved.679 The prosecution then elected to call no witnesses, reasoning that it had “no reasonable prospect of conviction” after the court’s decision to exclude the wiretap evidence. The court therefore acquitted the defendants.

L. Australia

Like Canada, in 2017, Australia also considered whether to institute a DPA scheme. Australia also considered proposed revisions to the foreign bribery offense which expanded the offense to include recklessness and failure to prevent foreign bribery.

1. Legislative Developments

a. Proposed DPA Scheme

In March, the Australian Attorney General released a consultation paper outlining a scheme of DPAs and invited comments.680 Under the proposed scheme, prosecutors could reach agreement with companies under investigation to defer charges if the company complies with certain conditions. These conditions include cooperation with the investigation, admission of an agreed set of facts relating to the alleged offense, payment of a financial penalty (including disgorgement of profits), and implementation of a program to ensure future compliance, possibly under the supervision of an

independent monitor. The scheme would apply to “serious corporate crimes,” which include fraud, bribery and money laundering. Guidance would be provided on the factors a prosecutor would consider when deciding whether to offer a DPA.

The commentary period on the DPA proposal closed on May 1. Seventeen responses were received from academics, law firms, bar associations, non-profits, and private companies.

In mid-December, a corporate crime bill was introduced to Parliament which included a proposed DPA scheme, among other things. Debate on the Bill is expected to begin in early February, and a decision may be reached within the first half of 2018.

b. Proposed Revisions to the Criminal Code Act

In April, the Attorney General issued a consultation paper on proposed revisions to the foreign bribery offense under the Criminal Code Act. These changes included the creation of two new offenses. The first made it an offense to recklessly bribe a foreign official, with recklessness defined as circumstances where a person is aware of a substantial risk of conduct that would lead to improper influence on a foreign official. The second is a new corporate offense for failure to prevent foreign bribery. This offense would make a company automatically liable for bribery by employees,

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contractors, and agents, except where the company can show it had a proper system of internal controls and compliance in place to prevent the bribery from occurring.687

The proposed changes also included a number of clarifications to existing offenses, including revising the definition to clarify that the core of the foreign bribery offense was “improperly influencing” a public official, removing the requirement that the bribe be offered with the intention of influencing a public official “in their official capacity,” and clarifying that the bribe can be offered to secure business or advantage for someone else, or even with no particular business or advantage in mind.688

The commentary period on these proposed revisions to the criminal law ended May 1.689 The new corporate crime bill that was introduced to Parliament in December, discussed above, included provisions making a company automatically liable for failure to prevent foreign bribery undertaken by officers, employees, contractors, and agents, except where companies can prove that they had adequate procedures in place designed to prevent the conduct.690

2. Significant Cases

In April 2017, the Victoria Supreme Court upheld a civil charge brought by the Australian Securities and Investment Commission alleging that former Australian Wheat Board (“AWB”) Chairman and Director Trevor Flugge failed to investigate improper payments that were made in contravention of U.N. sanctions in place against Iraq.691 The payments were disguised as transportation fees in relation to the AWB’s sales of wheat to Iraq under the UN’s Oil-For-Food program.692 The court found Flugge should have made inquiries after being told in 2000 that the U.N. was looking into whether the payments to Iraq were appropriate, and his failure to do so breached his duties of care.

and diligence. The court imposed a fine of AUD 50,000 (USD 38,962) and barred Flugge from managing a corporation for five years.

M. International Organizations

1. World Bank

Last year, we reported that the Integrity Vice Presidency (“INT”) of the World Bank Group (“World Bank”) had been investigating representatives of SNC-Lavalin for bribery of Bangladeshi government officials since 2011 in connection with the Padma Bridge project. While the Canadian government ultimately dropped the charges against several individuals involved due to procedural hurdles, SNC-Lavalin already had entered into a ten-year debarment from any World Bank projects.

This year, the INT’s Director of Operations, Stephen Zimmerman, cited the SNC-Lavalin case as support for the World Bank’s position that administrative remedies are an important tool for combating corruption and can be quite effective at uncovering corruption and misconduct. In 2010, the World Bank began using negotiated resolution agreements (“NRAs”) which “expedite the outcome of an ongoing investigation, prompt companies to self-report . . . and . . . provide for restitution.” The World Bank’s view, according to Zimmerman, is that administrative penalties are often more effective than traditional debarment remedies because they are more easily imposed while still posing “huge disincentives” to corruption.

Part of the World Bank’s commitment to resolution of its cases hinges on cooperation with local national law enforcement regimes. The World Bank’s annual INT report noted that often, it is only through the help of local law enforcement that it gathers enough documentary evidence of corruption and fraud to initiate proceedings, and that this evidence often is material that the World Bank “could not have otherwise obtained.” Of significance, however, is that cooperation in most cases are from local authorities in the country in which the investigated company is incorporated; cooperation with local authorities where World Bank projects are underway—typically developing nations with less-developed anti-corruption and law enforcement regimes—“remain more

697 The World Bank Group, Annual Update, Integrity Vice Presidency (INT), at 6 (2017).
The World Bank also cites its cross-debarment agreement with multilateral development banks as a factor in the increase in sanctions and debarments.701

This year, the World Bank announced that Leonard McCarthy, the longtime vice president for Integrity, would step down and Pascale Helene Dubois would become the new vice president for Integrity. Dubois has been at the World Bank since 1997, most recently serving as Chief Suspension and Debarment officer for the past ten years, and as head of the Voluntary Disclosure Program at INT prior to that.702

In July 2017, a week after CDM Smith received a declination under the DOJ’s Pilot Program for bribery conduct in India, it received sanctions and a “conditional non-debarment” from the World Bank for 18 months, through an NRA.703 Under the terms of the conditional non-debarment, the term may be reduced by 15 months if CDM Smith meets certain conditions.704 Among the requirements imposed by the NRA, CDM Smith must adopt a “Corporate Compliance Program consistent with the World Bank Group Integrity Compliance Guidelines, and fully cooperate with the Bank in advancing its anti-corruption work.”705

In Fiscal Year 2017, the World Bank entered into 26 NRAs with 29 respondents and debarred 58 entities and individuals ranging from periods as short as five months in the case of Spanish company Intitec Energia to as long as 14 years for Danish company Consia Consultants ApS.706 During the same period the World Bank opened 179 “preliminary inquiries” and selected 51 for full investigations which cover 55 different projects in 33 countries.707

This year, research showed that the World Bank tends to reward companies that settle with shorter debarments.708 The research shows that negotiating a settlement with the World Bank’s Integrity Vice Presidency tended to result in a median debarment of one year; in contrast, companies that chose not to settle or appeal the group’s findings

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typically faced a three-year debarment. INT’s Zimmerman verified this view when he stated that "[W]e exist to protect the interest of our bank and our clients, the member countries[,] [a]nd a settlement gets us there more quickly."  

2. OECD

In 2017, the OECD continued its “Phase 4” anti-bribery monitoring efforts, which included scheduled visits by the OECD’s Working Group on Bribery to some of the 43 countries that are signatories to the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force in 1999.

a. Argentina

In March 2017, the Working Group issued a second Phase 3 report (“Phase 3bis report”) after the Working Group’s “exceptional decision in 2014 to conduct a supplemental evaluation of Argentina.” According to the report, “Argentina remains in serious non-compliance with key articles of the Convention,” despite the current government’s attempts to implement the Phase 3 recommendations after taking office in December 2015. One of the Working Group’s chief concerns was that Argentina had yet to approve a Corporate Liability Bill that was introduced to Congress in October 2016. The bill—which permits courts to impose fines on companies five times greater than the amount the company fraudulently obtained and to blacklist companies from public contracts for ten years—passed Congress in November 2017, following the arrests in October of two officials from the administration of former-President Cristina

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711 OECD, Phase 4 Country Monitoring of the OECD Anti-Bribery Convention, http://www.oecd.org/corruption/oecd-anti-bribery-convention-phase-4.htm. The OECD issued reports for the following countries: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.
Fernandez de Kirchner. President Mauricio Macri stated that the law was necessary in order for Argentina to move forward on the Odebrecht corruption case.

Nevertheless, the report noted that while passing the bill would be a step in the right direction, Argentina should focus on imposing corporate liability for corruption-related false accounting; adequately imposing fines for foreign bribery and sanctions for accounting fraud; and protecting public-and-private-sector whistleblowers from reprisal. The Working Group also stated that it is “seriously concerned about the enforcement of Argentina’s foreign bribery laws,” noting “signs of politicization and lack of neutrality of the Attorney General’s Office.” The report recommended that Argentina adjust the composition of the Judicial Council to protect the independence of judges; work to find a solution to the “extraordinary delays” in complex economic crime investigations and prosecutions; enhance international cooperation in foreign bribery investigations and prosecutions; and improve training to relevant investigative judges and prosecutors on foreign bribery.

b. Czech Republic

The Working Group issued a Phase 4 report on the Czech Republic’s progress in March 2017. The report noted “a strong determination by the Czech Republic to improve its system for combating foreign bribery” since its Phase 3 evaluation in March 2013. The Czech Republic has implemented key recommendations from the Phase 3 evaluation, including compiling bribery-related statistics, but had not implemented other recommendations. The Working Group expressed concern that 17 years after ratifying the OECD Convention, the country had yet to prosecute a case for foreign bribery, despite the “export-oriented nature of the Czech economy.” The Working Group called on the Czech Republic to strengthen its capacity to detect foreign bribery,
implement greater protections for whistleblowers, encourage the Czech National Bank to report suspicious activities revealed in disclosure documents, and “engage closely with the private sector to raise awareness” of the importance of “adequate compliance measures.”

c. United Kingdom

In March 2017, the OECD issued a Phase 4 report on the United Kingdom. The Working Group on Bribery found that since 2012, when the United Kingdom was evaluated as part of the Phase 3 monitoring process, the “UK has taken significant steps … to increase enforcement of the foreign bribery offense and is now one of the major enforcers among the Working Group countries.” The report noted that the United Kingdom had concluded nine foreign bribery cases since 2012, with more cases in progress, and had made significant legislative reforms in the anti-corruption area, including the introduction of deferred-prosecution agreements. The Working Group emphasized “high-level political commitments, such as those made at the May 2016 London Anti-Corruption Summit” demonstrate a continued commitment to combating foreign bribery.

While praising the United Kingdom’s progress, the Working Group nevertheless identified areas for improvement, and “some key issues that may undermine the effective enforcement of foreign bribery laws in the UK,” including ensuring that the United Kingdom continues to fund the U.K. SFO and making sure that Scotland’s foreign bribery and enforcement mechanisms more closely align with those in other parts of the United Kingdom.

d. Finland

In March 2017, the Working Group issued a Phase 4 report on Finland. The report praised the country’s anti-corruption detection efforts, noting that Finland had made nine “independently detected” corruption allegations since its prior 2010 evaluation, of which

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seven were pursued by investigators and five were prosecuted.\textsuperscript{729} However, all five of the cases prosecuted resulted in acquittals for the accused on charges of foreign bribery, which the Working Group found reflective of the misinterpretation and misapplication of the foreign bribery offense by some Finnish courts.\textsuperscript{730} The report recommended that Finland provide training to law enforcement and the judiciary on the foreign bribery offense, and consider establishing a body of courts or judges specialized in evaluating foreign bribery cases.\textsuperscript{731}

\textbf{VIII. CONCLUSION AND PREDICTIONS FOR 2018}

The predictions of those who said that FCPA enforcement might dry up under a president who once said the law was “ridiculous,” “horrible” and “should be changed”\textsuperscript{732} appear to have been erroneous. The change in administration and recent leadership turnover at the DOJ and SEC have no doubt raised some uncertainty in the FCPA enforcement space. At the SEC, Clayton has assumed the role of Chairman and Cain became the new Chief of the FCPA Unit, replacing Brockmeyer.\textsuperscript{733} At the DOJ, notable recent departures include Weissmann, former Chief of the Criminal Division’s Fraud Section, McFadden, former Acting Principal Deputy Assistant Attorney General of the Criminal Division, and Blanco, former Acting Assistant Attorney General of the Criminal Division.\textsuperscript{734}

However, FCPA enforcement appears to have remained a priority both in the public statements of the enforcement authorities and their actions, and many trends pre-dating the Trump administration continued to play out in 2017 and will likely extend into the future. On December 18, 2017, the White House released its National Security Strategy (“NSS”), which includes countering foreign corruption among its top five priority actions, and vows to use the United States’ economic and diplomatic tools to “target corrupt


foreign officials and work with countries to improve their ability to fight corruption so U.S. companies can compete fairly in transparent business climates.”  

The NSS is important as setting the agenda for the executive branch of the government, including the DOJ and SEC, and in signaling anti-corruption as a priority to Congress and to other countries. Against the backdrop of this policy, there continues to be a focus on individual accountability in conjunction with pursuing large corporate fines from both U.S. and non-U.S. companies, often in coordination with foreign authorities. We are also likely to see a continued emphasis on self-reporting and cooperation, through the DOJ’s more-frequent use of declinations, which began with the introduction of the FCPA Pilot Program in 2016 and will continue under the new FCPA Corporate Enforcement Policy. However, as was the case under the Pilot Program, there remains no SEC equivalent, and companies will have to continue to grapple with the risk that, even where they meet the DOJ’s standards for declination, the SEC may decide to go forward with an expensive and burdensome enforcement action. While we do not expect the SEC to adopt a similar program to the DOJ’s, there is hope for greater clarity from the SEC on its approach to corporate prosecutions in the near term.

Future clarification on the SEC’s and DOJ’s enforcement policies may also be on the horizon. On October 26, 2017, the SEC’s Peikin suggested that the SEC may be moving away from the “broken windows” enforcement policy, which promotes pursuing minor infractions to deter major infractions, and that it will work to provide greater clarity regarding why a company receives cooperation credit. On October 25, 2017, Deputy Attorney General Rosenstein also stated that the DOJ is creating a “Working Group on Corporate Enforcement and Accountability, which will offer recommendations on promoting individual accountability and corporate cooperation.” However, few details regarding the composition or responsibilities of this proposed group have emerged. In April 2017, then-Acting Principal Deputy Assistant Attorney General McFadden also stated that the DOJ is working to expedite corporate investigations, that it expects cooperating companies to assist in this effort, and that it is the DOJ’s intent for “FCPA investigations to be measured in months, not years.” What steps may be taken to achieve this is still yet to be seen.

Regarding industries of focus for FCPA enforcement, oil and gas continues to remain a key target. There are approximately 27 open and disclosed global anti-corruption investigations of companies in the oil and gas sector, including roughly six newly

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disclosed investigations in 2017 of companies in either the oil and gas services or oil and gas exploration and production business. Of these 27 investigations, approximately 13 involve enforcement actions taken by the DOJ and/or SEC, including four newly disclosed investigations in 2017, and three involve potential FCPA investigations where companies have publicly disclosed that they have relayed FCPA-related conduct to the SEC or DOJ. Additionally, the government has signaled continued pursuit of the banking industry. In February, Cain indicated that the SEC will “likely” bring more FCPA cases in the financial sector. While this prediction did not materialize in 2017, possibly due to a shift in priorities or delays resulting from leadership changes at the SEC, there are currently several banks with open disclosed FCPA investigations, and the banking and financial services industry remains an area to watch.

Finally, there is likely to be continued geographic focus on Latin America and China. Approximately eight of the estimated 34 newly opened and disclosed global anti-corruption investigations in 2017 involve Brazil, including two investigations involving enforcement actions taken by the DOJ and/or SEC. Four out of the 34 investigations involve FCPA-related conduct in China, including two potential investigations where companies have publicly disclosed to the DOJ and/or SEC. We do not expect this focus on Latin America and China to slow down anytime soon.

740 Roger Hamilton-Martin, More Financial Sector Cases “likely,” says SEC Foreign Bribery Unit Official, GLOBAL INVESTIGATIONS REVIEW (Feb. 7, 2017), http://globalinvestigationsreview.com/article/1106159/more-financial-sector-cases-%E2%80%9Clikely%E2%80%9D-says-sec-foreign-bribery-unit-official (quoting Cain stating “you are likely to see more cases in the financial services sector; I think you will see us using cooperation tools, NPAs and DPAs as appropriate”).
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