January 20, 2017

FCPA ENFORCEMENT AND ANTI-CORRUPTION DEVELOPMENTS: 2016 YEAR IN REVIEW

2016 was, by any measure, an extraordinary year for the enforcement of the Foreign Corrupt Practices Act. The Department of Justice and the Securities and Exchange Commission assessed a record-shattering total of nearly $2.5 billion in penalties. But despite those record numbers, open questions remain as to the impact of the Yates Memo, which instructs prosecutors to focus on prosecutions of individuals, and of the FCPA Pilot Program, which encourages corporate self-reporting of wrongdoing. Looking at anti-corruption developments more broadly, we see notable increases in the extent and sophistication of international cooperation and coordination and in the activities of the DOJ's Kleptocracy Asset Recovery Initiative. Our thoughts on the most significant developments in anti-corruption and FCPA enforcement and policy are below.

A Record-Breaking Year for Corporate Resolutions

In 2016, the DOJ and SEC brought enforcement actions resulting in a record-breaking $2.46 billion in fines, penalties, disgorgement and pre-judgment interest, $1.52 billion of which was assessed by the DOJ and $944 million of which was assessed by the SEC. This total was amassed primarily through seven cases (Teva Pharmaceuticals, Och-Ziff Capital Management, VimpelCom, Odebrecht, JPMorganChase, Braskem and Embraer[1]) each topping the $100 million mark for combined DOJ and SEC penalties and together accounting for over $2 billion of the total.

[1] *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Embraer SA Pays $205 Million to the SEC and DOJ to Settle FCPA Violations (Nov. 1, 2016), https://www.paulweiss.com/media/3797994/1nov16embraer.pdf.

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FCPA ENFORCEMENT ACTIONS
CORPORATE RESOLUTIONS
2012–2016

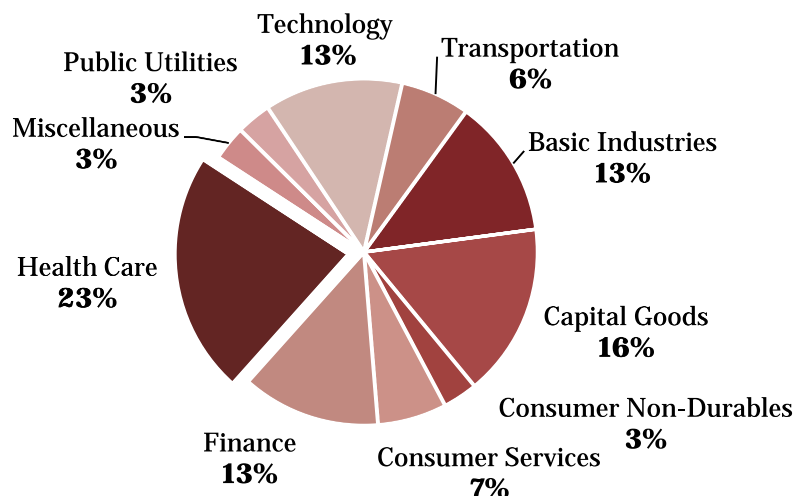
In total, the SEC brought 24 enforcement actions and the DOJ brought 14 prosecutions against companies in 2016.[2] These totals were easily the highest in the past five years.

Broad Enforcement Across Industries and Regions

The DOJ and the SEC entered into corporate resolutions in 2016 with companies across a wide variety of industries and throughout the world. U.S. authorities were most active in the healthcare industry, with

[2] Enforcement actions were counted based on the year they were announced. *See* https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml; https://www.justice.gov/criminal-fraud/case/related-enforcement-actions.

actions against AstraZeneca, GlaxoSmithKline,[3] Novartis,[4] Nu Skin,[5] SciClone Pharmaceuticals[6] and Teva.[7]



2016 FCPA
CORPORATE ENFORCEMENT ACTIONS
BY INDUSTRY

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3 *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Recent DOJ and SEC Actions Underscore Regulators' Pronouncements That "Vigorous Enforcement" of FCPA Violations Remains a "High Priority" (Oct. 13, 2016) ("Oct. 13 Client Alert"), at 4-5, https://www.paulweiss.com/media/3758362/13oct16fcpa.pdf.

4 *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Novartis AG Settles SEC FCPA Action Involving China Subsidiaries' Improper Gifts, Travel and Entertainment Payments to Healthcare Providers (Mar. 29, 2016), https://www.paulweiss.com/media/3413252/29mar16fcpaalert.pdf.

5 *See* Oct. 13 Client Alert at 2-3.

6 *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, SciClone Pharmaceuticals Settles FCPA Action Over China Business Practices (Feb. 16, 2016), https://www.paulweiss.com/media/3351743/16feb16fcpaalert.pdf.

7 Industry percentages were calculated based on the number of actions brought against companies in each industry in 2016. Industries were defined according to classifications set by NASDAQ. *See* http://www.nasdaq.com/screening/industries.aspx.

Meanwhile, China continued to be a hotspot with allegations of improper activity there central to the resolutions with Akamai Technologies, AstraZeneca, General Cable, GlaxoSmithKline, Johnson Controls, JPMorganChase, Las Vegas Sands, Nortek, Novartis, Nu Skin, Parametric Technology, Qualcomm and SciClone. In particular, it appears that enforcement authorities are aggressively pursuing cases against companies that make improper payments to healthcare providers at Chinese state-owned healthcare institutions, as four of the six resolutions against healthcare companies (AstraZeneca, GlaxoSmithKline, Novartis and SciClone) included allegations of such payments.

The map below demonstrates the global span of FCPA cases by showing the locations of the headquarters of all companies that resolved FCPA actions in 2016 and the locations of the alleged improper conduct.

DOJ Corporate Resolutions and the FCPA Pilot Program

While 2016 was undoubtedly a banner year for the DOJ's enforcement of the FCPA against corporations, it is not yet clear whether the FCPA Pilot Program has played, or will in the future play, a meaningful role in incentivizing corporate self-reporting and fueling the DOJ's enforcement pipeline.

Background. On April 5, 2016, the DOJ Fraud Section announced the establishment of the FCPA Pilot Program in its "Enforcement Plan and Guidance" memorandum.[8] The Pilot Program was established, in part, because of criticism from the corporate community about a lack of transparency from the DOJ regarding the benefits of self-reporting. In announcing the program, Assistant Attorney General Leslie Caldwell noted the Department's goal of promoting "transparency and accountability" in FCPA prosecutions.[9] Under the Pilot Program, in order to qualify for full mitigation credit, a company must (1) voluntarily self-disclose; (2) fully cooperate with a DOJ investigation; (3) remediate, as appropriate, internal controls and compliance programs; and (4) disgorge ill-gotten gains. Full compliance with these requirements can result in up to a 50 percent reduction off the bottom end of the U.S. Sentencing Guidelines fine range. Full compliance may even result in a declination to prosecute, an outcome which the DOJ memorandum suggests is itself more likely if a company takes part in the Pilot Program. The DOJ indicated that, at the conclusion of one year, it would assess the effectiveness of the Pilot Program and determine whether to continue it in its present or some other form. In light of the DOJ's stated goals of promoting transparency and accountability, we hope the Department makes public its assessment of the Pilot Program.

Assessing the Pilot Program. From our perspective, nine months into the Pilot Program, it is too early to assess the effectiveness of the program in encouraging corporate self-reporting. DOJ officials, however, have expressed the opinion that the Pilot Program has promoted self-reporting. Fraud Section Assistant Deputy Chief Leo Tsao has stated, "Companies are coming in; they are trying to take advantage of the Pilot Program, and specifically raising that when they do voluntarily disclose. It is working in generating more voluntary disclosures. . . ."[10] Many of the enforcement actions announced in 2016 stemmed from self-reporting before the Pilot Program was announced. It will be interesting to see whether there is an

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[8] *See* U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan & Guidance (Apr. 5, 2016), https://www.justice.gov/opa/file/838386/download; https://www.paulweiss.com/media/3479613/fcpa6apr16.pdf.

[9] Leslie R. Caldwell, *Criminal Division Launches New FCPA Pilot Program* (Apr. 5, 2016), https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program; *see also* Mark Mendelsohn, Alex Oh & Farrah Berse, *Shedding Further Light On The FCPA Pilot Program*, LAW360 (July 29, 2016), https://www.law360.com/securities/articles/822817/shedding-further-light-on-the-fcpa-pilot-program.

[10] Marieke Breijer, *DOJ Prosecutor: FCPA Pilot Programme Generating More Voluntary Disclosures*, GLOBAL INVESTIGATIONS REV., Oct. 26, 2016, http://globalinvestigationsreview.com/article/1069920/doj-prosecutor-fcpa-pilot-programme-generating-more-voluntary-disclosures.

increased level of enforcement activity in 2017 and 2018 from matters that were self-reported under the Pilot Program.

It can be argued, however, that the Pilot Program offers companies little new insight into the DOJ's analysis with respect to resolving FCPA investigations or new incentives for self-reporting. Self-disclosure, cooperation, remediation and disgorgement were longstanding and widely known considerations that the DOJ weighed before the Pilot Program. And substantial mitigation credit was already available prior to the initiation of the Pilot Program, as demonstrated by the 45 percent reduction in the VimpelCom settlement. While the Pilot Program memorandum provides guidance in stating that a declination is unlikely if senior management takes part in the misconduct, if the company has made a relatively significant profit from the misconduct or if there has been a prior resolution between the company and the DOJ within the past five years, the benefits of self-disclosure under the Pilot Program are not necessarily clear in investigations that are unlikely to end in a declination. The effect of self-disclosure would seem to depend more on the seriousness of the misconduct at issue than on any of the factors cited in the Pilot Program. Under these circumstances, it is not clear whether the Pilot Program is serving its purpose of providing more transparency and predictability to DOJ charging decisions in order to promote self-disclosure by companies. This raises an important question as to how the new administration will assess the Pilot Program, and whether it will be renewed when it expires in three months, and if so, whether it will be updated or clarified in any way.[11]

Declinations. One area, however, where the Pilot Program does appear to break new ground is in its treatment of declinations, five of which the DOJ made public in 2016 by releasing its declination letters to Akamai, HMT LLC, Johnson Controls, NCH Corporation, and Nortek. The Pilot Program sets out a path by which a company may be able to obtain a declination from the DOJ for FCPA misconduct and arguably presents the possibility of greater predictability for companies that disclose to the DOJ relatively less serious misconduct and otherwise comply with all aspects of the Pilot Program. So far, the public declinations have been limited to smaller-scale matters. The declination involving the most significant conduct in financial terms was the Johnson Controls case, in which the DOJ declined prosecution, but the

[11] When the administration assesses the Pilot Program, it will also want to consider, among other issues, providing guidance as to how a U.S. target should calculate potential fines in a multi-jurisdictional investigation where the United States is not the lead jurisdiction. For example, in the Odebrecht and Braskem resolutions, the DOJ announced reductions of fines under the U.S. Sentencing Guidelines, but did not make clear if or how these reductions applied to the significantly larger penalties paid to foreign jurisdictions.

SEC reached a $14 million resolution.[12] The other four declinations announced in 2016 all involved resolutions under $1 million.[13]

Perhaps the most novel aspect to the Pilot Program's declination component is the creation of a new form of resolution for the DOJ—the declination with disgorgement of ill-gotten gains—at least where such gains have not been clawed back by another authority.[14] Of the five declinations announced by the DOJ in 2016, two (HMT and NCH) were declinations with disgorgement, in which the DOJ formally declined prosecution in a public announcement and imposed disgorgement of ill-gotten gains. The DOJ may have considered the HMT case, in particular, to have included conduct more egregious than that typically leading to a declination, as two individuals were charged with wire fraud conspiracy, although not with FCPA violations. In the cases of HMT and NCH, it also appears from the declination letters that there was jurisdiction under the FCPA, while in the cases of Akamai, Nortek and Johnson Controls, the basis for jurisdiction is not clear. And more generally, it is not clear from the DOJ's recitation of factors considered in deciding to decline these matters whether these are cases that would have been prosecuted absent the Pilot Program. Thus, while we continue to believe that under the right circumstances a company can vindicate itself in an FCPA investigation and receive a full declination, and that the declination with disgorgement has not supplanted the full declination, a company considering self-reporting even a relatively less significant violation from which it profited must now prepare for the possibility of a public announcement and disgorgement of ill-gotten gains. The DOJ's evolving approach to declinations is a development we will watch closely in 2017.

SEC Corporate Resolutions and the Whistleblower Program

The SEC's FCPA enforcement results in 2016 were also quite strong, with nearly $1 billion in penalties collected and 24 corporate resolutions, exceeding the SEC's total number of resolutions from the previous three years combined. The SEC's cases ranged widely in size, from its $236 million share of the Teva resolution to the $332,000 resolution with Nortek, a case which the DOJ declined. Here, we see the flexibility of the SEC's approach, with its lower civil burden of proof; its pursuit of cases that do not involve a quid pro quo; and its willingness to pursue smaller cases in order to send a focused message to the markets.

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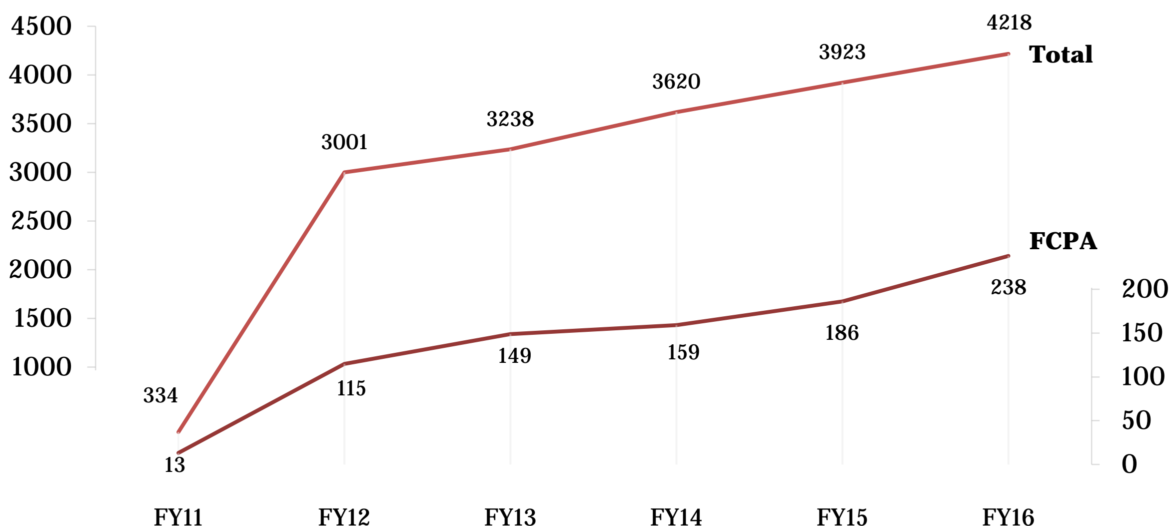
12 *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Analogic and Johnson Controls Settlements Shed Further Light On The Implementation of DOJ's FCPA Pilot Program (July 27, 2016), https://www.paulweiss.com/media/3651396/27jul16fcpa.pdf.

13 *See* Mark F. Mendelsohn, *DOJ Declination Letters and the FCPA*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG., July 4, 2016, https://www.paulweiss.com/media/3620246/2016-07-04-doj-declination-letters-and-the-fcpa.pdf.

14 *See* Oct. 13 Client Alert at 5-7.

The SEC's whistleblower program also had a record-breaking year in 2016. The SEC issued awards totaling more than $80 million to 15 whistleblowers, representing a total higher than all award amounts issued in prior years combined. Seven of the ten largest whistleblower awards were made by the Commission last year.

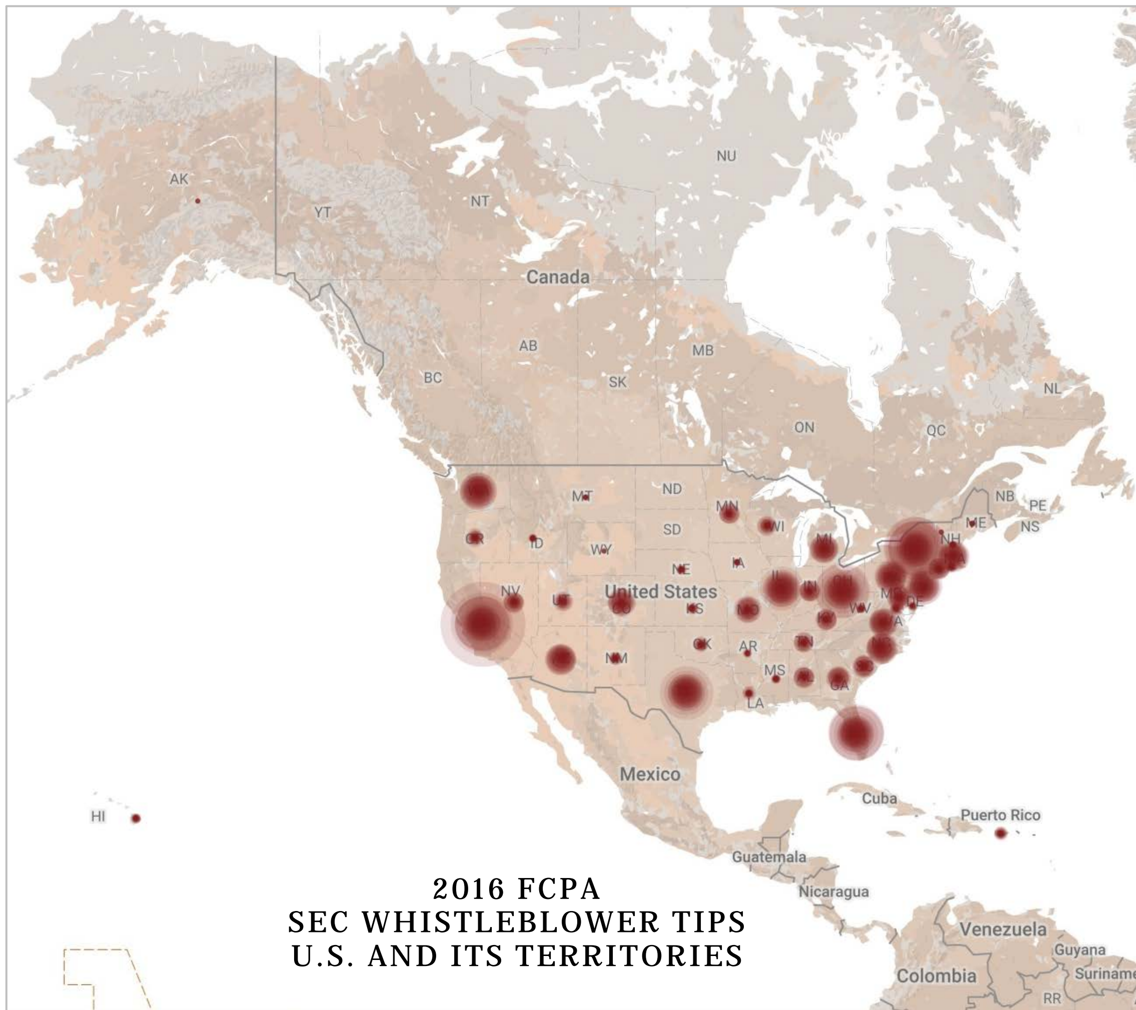
In total, the SEC has issued more than $136 million to 37 whistleblowers since the program's inception in 2011. Since the program began, the SEC has received more than 18,000 whistleblower tips, and has received tips from individuals in 103 countries outside the United States. In 2016, the Commission received 4,218 tips, of which 238 related to the FCPA, and also received tips from individuals in 67 foreign countries.[15] The steady growth in the overall whistleblower program and in FCPA tips can be seen in the chart below, with FCPA tips steadily making up between 3.8% and 5.6% of all SEC tips each year.



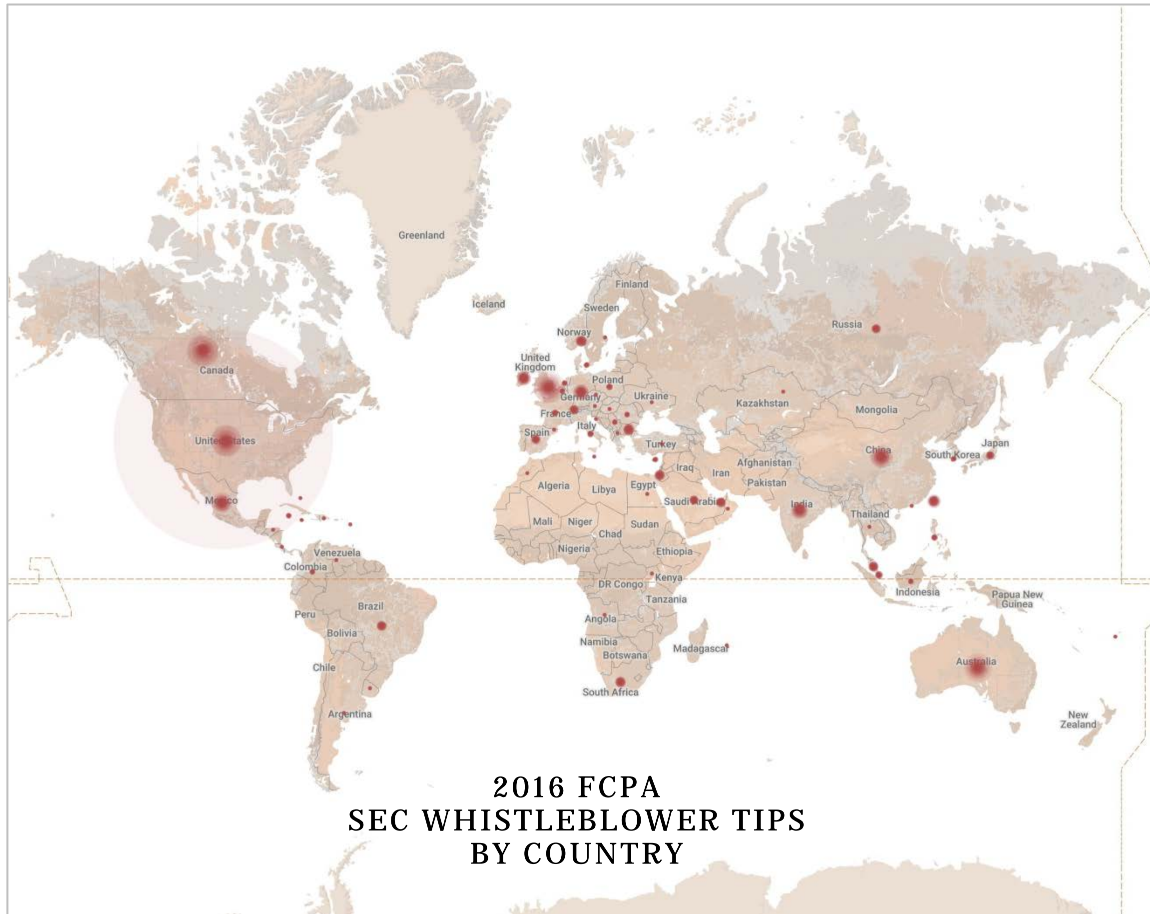
SEC WHISTLEBLOWER REPORTS
2012–2016

15 U.S. SEC. AND EXCHANGE COMM'N, 2016 ANNUAL REPORT TO CONGRESS ON DODD-FRANK WHISTLEBLOWER PROGRAM (Nov. 15, 2016), https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf. As stated in the SEC's report, statistics regarding whistleblower tips are current through the end of its fiscal year on September 30, 2016.

The maps below show the geographic distribution of all whistleblower tips in 2016, both within the United States and internationally, with larger red circles representing a greater number of tips. Domestically, it is not surprising to see the greatest number of tips in the Northeast, California, Florida and Texas.



Worldwide, we see tips emanating from a large number of countries, suggesting that norms discouraging whistleblowing may be receding in many jurisdictions.



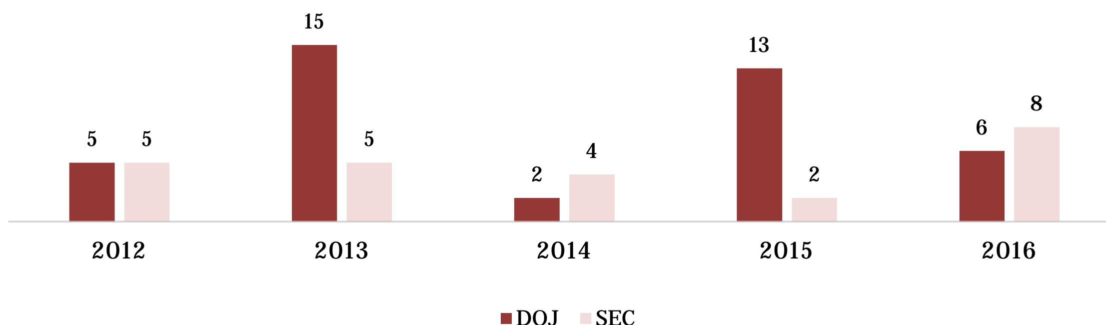
The SEC also sent new warnings to companies in 2016 to ensure that confidentiality clauses in employee separation agreements do not inadvertently silence potential whistleblowers and risk a violation of Exchange Act Rule 21F-17(a), which prohibits impeding any individual from communicating with the Commission about potential securities law violations.

That warning was delivered in 2016 when the SEC filed an action against Anheuser-Busch InBev. AB InBev was charged with violations of the FCPA's internal controls and books and records provisions. In addition, it was charged with violating Rule 21F-17(a) for entering into a separation agreement with an employee that included a substantial financial penalty for violating a strict non-disclosure provision with

an employee who had been communicating with SEC staff about potential FCPA violations at a subsidiary in India. After signing the agreement, the employee terminated all communications with the Commission. AB InBev ultimately paid $6 million in penalties and disgorgement to the SEC to resolve the case. Companies should take caution that their separation or settlement agreements with employees do not restrict employees from reporting potential misconduct to the SEC.[16]

Relatively Few FCPA Actions Were Brought Against Individuals in 2016

While we caution against reading too much into an analysis of an inherently small sample size, the DOJ's and the SEC's success in corporate resolutions in 2016 does not appear to have carried over directly to individual prosecutions. Based on publicly filed charging instruments, in 2016, the DOJ brought FCPA charges against six individuals, while the SEC brought charges against eight individuals.[17] This is consistent with fluctuations in individual prosecutions over the last five years.



FCPA ENFORCEMENT ACTIONS
INDIVIDUAL ACTIONS
2012–2016[18]

The DOJ has historically been more active than the SEC in bringing FCPA cases against individuals. It appears that, as compared to the DOJ, the SEC has not made individual prosecutions as much of a programmatic focus, perhaps because of its regulatory role with respect to issuers. Notably, while the

16 *See* Oct. 13 Client Alert at 3-4.

17 Included in these totals are individual prosecutions and enforcement actions for FCPA charges, not other charges, such as money laundering. Actions are listed in the year of their initial filing, even if unsealed in a later year.

18 These figures have been corrected since this memorandum was published on January 20, 2017.

DOJ has announced the Yates Memo, and we can track any increase in the number of DOJ prosecutions of individuals in the coming years, the SEC has not announced an equivalent policy.

DOJ Individual Prosecutions and the Yates Memo

Background. The Yates Memo was released on September 9, 2015 by Deputy Attorney General Sally Quillian Yates as a statement of enforcement priorities for the entire DOJ, not just the FCPA Unit. The overarching principle set forth in the Yates Memo is that any investigation into corporate wrongdoing must focus on underlying individual wrongdoing. This refocusing of priorities followed criticism of the DOJ by politicians, commentators and the general public for reaching numerous large resolutions against financial institutions without bringing charges against individuals. The Yates Memo identified various principles focused on "maximizing [the DOJ's] ability to deter misconduct and to hold those who engage in it accountable." [19] The principles for investigations laid out in the Yates Memo include that, to be eligible for any cooperation credit, corporations must provide the DOJ with all relevant facts about the individuals involved in corporate misconduct; that, absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals; and that corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires.

Analysis. Even after 16 months, it is still too early to make definitive statements about the effect of the Yates Memo on prosecutions of individuals for FCPA violations, given the duration and complexity of FCPA investigations. It is reasonable, however, to acknowledge that, despite the DOJ's best efforts to target individual wrongdoing in addition to corporate wrongdoing, there are several factors that make individual prosecutions for FCPA misconduct particularly challenging.

First, the foreign location of FCPA misconduct may limit access both to individuals involved in and evidence of misconduct. Individuals who may be the "best" targets for prosecution because of the nature of their misconduct may be located overseas beyond the legal or practical reach of the DOJ. Similarly, relevant evidence of FCPA misconduct may be located overseas or subject to data privacy laws or blocking statutes that prevent the transfer of that evidence to the United States.

Second, there are inherent challenges to charging individuals located in the United States. Because FCPA investigations necessarily involve overseas bribery, potential targets in the United States are frequently far removed from direct misconduct and at most responsible only for internal controls and books and records types of violations. In addition, because the DOJ often asserts jurisdiction in FCPA cases on the basis of a foreign company's listing securities on a U.S. exchange, because of funds passed through the U.S. banking

[19] *See* Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

system or because only limited activities in a larger conspiracy took place in the United States, there simply may not be domestic targets of interest to the DOJ in some investigations.

Third, litigating FCPA cases against individuals may prove more challenging for the government. An individual facing an FCPA prosecution may aggressively litigate challenging issues, such as intent to bribe a foreign official, while a corporation is much more likely to seek a resolution. The DOJ has also suffered various setbacks in trying FCPA charges against individuals. The DOJ has seen firsthand that there may be little jury appeal in putting a foreign cooperating witness on the stand against a U.S. citizen. In particular, the DOJ has experienced issues with witnesses in recent trials, such as in the Africa Sting, O'Shea and Sigelman FCPA trials.[20]

Fourth, it appears that judges may be skeptical of FCPA charges against individuals. The DOJ has experienced substantial difficulties from the bench, including pro-defendant jury instructions and reprimands from presiding judges for the theory underlying the DOJ's prosecution.[21]

International Enforcement and Multi-Jurisdictional Coordination

2016 also saw dramatic increases in international cooperation in anti-corruption enforcement. As demonstrated by landmark global resolutions reached with Odebrecht and VimpelCom and the continuing investigation and prosecution of individuals involved in the international soccer corruption scandal, U.S. authorities have achieved huge successes in the fight against global corruption by coordinating with and leveraging the resources of their foreign counterparts. The successes are not only a reflection of the U.S. government's firm commitment to international cooperation, but also the result of foreign governments taking more aggressive stances through legislation and enforcement to attack the problem of international corruption.

Senior DOJ and SEC officials made numerous public statements over the course of the year reaffirming the agencies' commitment to coordinate with foreign authorities and signaling that such coordination, once a rare event in FCPA investigations and resolutions, may be here to stay.[22] For example, in

[20] For accounts of the issues with DOJ witnesses, see the following: Richard L Cassin, *O'Shea Acquitted On All Counts*, THE FCPA BLOG (Jan. 17, 2012) http://www.fcpablog.com/blog/2012/1/17/oshea-acquitted-on-all-counts.html; Richard L Cassin, *DOJ Ends Africa Sting Prosecution*, THE FCPA BLOG (Feb. 21, 2012) http://www.fcpablog.com/blog/2012/2/21/doj-ends-africa-sting-prosecution.html; Joel Schectman, *PetroTiger Trial Witness Says He Gave Inaccurate Testimony*, WSJ (June 11, 2015) http://blogs.wsj.com/riskandcompliance/2015/06/11/petrotiger-trial-witness-says-he-gave-inaccurate-testimony/.

[21] *See, e.g.*, 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.

[22] On December 9, 2016, the DOJ signaled its commitment to cooperation with U.K. authorities when it created a new attorney position within the Fraud Section assigned to work for two years in London, the first year with the U.K. Financial Conduct Authority ("FCA") and the second year with the Serious Fraud Office ("SFO"). AAG Caldwell stated in a press release about the

announcing the FCPA Pilot Program in April, the DOJ stated that "an international approach is being taken to combat an international problem. We are sharing leads with our international law enforcement counterparts, and they are sharing them with us."[23] In November, Andrew Weissmann, Chief of the DOJ's Fraud Section, speaking at the 33rd ACI International Conference on the FCPA, elaborated on this theme when he indicated that companies should assume that information shared with the DOJ will also be shared with foreign law enforcement authorities.

The SEC has also made strong public statements declaring its commitment to coordination with its foreign counterparts. In September, Mary Jo White, Chair of the SEC, stated that "[t]o effectively combat bribes paid by global companies that benefit from access to our capital markets by listing their stock on U.S. exchanges, the SEC is often dependent on our international counterparts to provide vital cooperation and assistance."[24] In November, Andrew Ceresney, Director of the SEC's Division of Enforcement, echoed this sentiment when he stated: "Collaboration with international regulators and law enforcement is critical to our success in the FCPA space. As global markets become more interconnected and complex, no one country or agency can effectively fight bribery and corruption alone."[25]

Representative Cases

The statements made by U.S. authorities signaling the importance of multi-jurisdictional cooperation have been amply supported by the enforcement actions resolved in the last year. Several of the largest FCPA resolutions in the last year involved coordination among numerous jurisdictions' law enforcement and regulatory agencies. In some of these settlements, we see not only increased cooperation with other countries, but specifically with countries that did not have a history of assisting in international law enforcement activities or of bringing their own actions.

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new position that the DOJ's relationship with the SFO and FCA was "vitally important" to the efforts of the DOJ "[t]o address crime on a global scale." Press Release, Dep't of Just., New Fraud Position in London Aimed to Help Fight Economic Crime and Corruption (Dec. 9, 2016), https://www.justice.gov/opa/blog/new-fraud-position-london-aimed-help-fight-economic-crime-and-foreign-corruption.

[23] U.S. Dep't of Just., Fraud Section, Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

[24] Mary Jo White, Chair, Sec. and Exchange Comm'n, Keynote Remarks at the International Bar Association Annual Conference (Sept. 21, 2016), https://www.sec.gov/news/speech/securities-regulation-in-the-interconnected-global-marketplace.html.

[25] Andrew Ceresney, Director, Division of Enforcement, Sec. and Exchange Comm'n, Keynote Speech at the ACI's 33rd International Conference on the FCPA (Nov. 30, 2016), https://www.sec.gov/news/speech/speech-ceresney-113016.html.

Odebrecht and Braskem

On December 21, 2016, Odebrecht S.A., a Brazilian conglomerate and the largest construction company in Latin America, and its affiliate Braskem S.A., a Brazilian petrochemical company, pleaded guilty to FCPA charges and agreed to pay a combined penalty of at least $3.5 billion to U.S, Brazilian and Swiss authorities. The combined settlements represent the largest global FCPA resolution to date and the fifth-largest in terms of payments made to the DOJ and SEC.

According to its plea agreement, Odebrecht engaged in a bribe scheme dating as far back as 2001 in which it paid $788 million in bribes to officials in Brazil, Angola, Argentina, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru and Venezuela. Braskem admitted to participating in the scheme by paying approximately $250 million into Odebrecht's off-the-books accounts and authorizing disbursements from the accounts to government officials in Brazil. Braskem received numerous benefits from such officials, including contracts with the Brazilian state-owned oil company Petrobras. In total, Odebrecht's and Braskem's conduct resulted in corrupt payments and profits totaling approximately $3.8 billion.

Odebrecht pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA. Although Odebrecht agreed that the appropriate total criminal fine was $4.5 billion, it has represented that it is only able to pay a maximum of $2.6 billion. The DOJ and Brazilian authorities are currently engaged in an analysis of the company's ability to pay. When the final penalty is determined, Brazil will receive 80% of the recovery, with the United States and Switzerland receiving 10% each.[26] Braskem separately pleaded guilty to conspiracy to violate the FCPA and agreed to pay a total criminal penalty of $632 million.[27] Brazil will receive 70%, with the United States and Switzerland receiving 15% each. Braskem also reached a settlement with the SEC on books and records charges, agreeing to pay $325 million in disgorgement – $65 million to the SEC and $260 million to Brazilian authorities. Odebrecht received a 25% reduction in its penalty for full cooperation with the investigation, and Braskem received a 15% reduction in its penalty for partial cooperation. Neither company voluntarily self-disclosed the underlying misconduct to U.S. authorities and thus did not receive any reduction for self-disclosure.

The Odebrecht and Braskem resolutions are notable not only for the scale of the penalties, but also for the lead role played by Brazilian authorities in investigating and prosecuting the crimes. Operation Lava Jato ("Carwash"), the Brazilian authorities' sweeping investigation of money laundering and corruption associated with Petrobras, has rocked Brazil, implicating officials at the highest levels of government,

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[26] *See* Plea Agreement, *United States* v. *Odebrecht S.A.*, No. 16-644 (RJD) (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/opa/press-release/file/919916/download.

[27] *See* Plea Agreement, *United States* v. *Braskem S.A.*, No. 16-644 (RJD) (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/opa/press-release/file/919906/download.

including two former presidents, and major Brazilian companies and their executives. To date, Brazilian investigators have uncovered R$6.2 billion in bribes paid and total losses to the state estimated at between R$29 billion and R$42 billion. They have charged 179 people with criminal offenses and secured 93 convictions. Added together, the sentences equal nearly 1,000 years in jail.

Due to the scale of corruption uncovered by Operation Carwash and the ongoing nature of the investigation, the Odebrecht and Braskem settlements are likely to be only the first in a series of large corporate resolutions associated with bribery of officials in Brazil.

VimpelCom

On February 18, 2016, the DOJ and the SEC, together with the Public Prosecution Service of the Netherlands ("OM"), entered into a $795 million global settlement with the world's sixth-largest telecommunications company, Amsterdam-based VimpelCom Limited, and its wholly-owned Uzbek subsidiary, Unitel LLC.[28] The settlement resolved allegations that VimpelCom and Unitel violated the FCPA and Dutch laws by funneling over $114 million in bribe payments from 2006 to 2012 to a shell company beneficially owned by a government official, in exchange for the official's influence over decisions made by an Uzbek telecommunications agency. The news media openly presumes the official to be Gulnara Karimova, the eldest daughter of Uzbek President Islam Karimov. According to settlement documents, the bribery scheme included entering into partnerships with companies indirectly owned by Karimova.[29]

VimpelCom entered into a deferred prosecution agreement with the DOJ on charges of conspiracy to violate the FCPA's anti-bribery and books and records provisions and a separate substantive violation of the FCPA's internal controls provisions, and Unitel pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions. The SEC charged VimpelCom with civil violations of the FCPA's anti-bribery, books and records and internal controls provisions. VimpelCom agreed to pay $230.2 million to the DOJ, $167.5 million to the SEC and $397.5 million to the OM. Notably, VimpelCom received a 45 percent reduction off of the bottom of the Sentencing Guidelines fine range, despite the fact that VimpelCom did not disclose its misconduct even after an internal investigation uncovered wrongdoing. We discuss companion civil forfeiture actions brought in conjunction with the VimpelCom resolution in our section on the Kleptocracy Initiative below.

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[28] *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, VimpelCom Agrees to Landmark $795 Million FCPA Resolution (Feb. 26, 2016), https://www.paulweiss.com/media/3367479/26feb16fcpaalert.pdf.

[29] *See* Deferred Prosecution Agreement, Attachment A ¶¶ 11-13, *United States* v. *VimpelCom Ltd.*, No. 1:16-CR-00137 (S.D.N.Y. Feb. 18, 2016); Information ¶¶ 13-15, *United States* v. *Unitel LLC*, No. 1:16-CR-00137 (S.D.N.Y. Feb. 18, 2016); Complaint ¶¶ 18-37, *SEC* v. *VimpelCom Ltd.*, No. 1:16-CV-01266 (S.D.N.Y. Feb. 18, 2016).

The DOJ proclaimed the VimpelCom settlement "one of the most significant coordinated international and multi-agency resolutions in the history of the FCPA."[30] The Justice Department thanked law enforcement agencies in a number of countries, including the Netherlands, Sweden, Switzerland, Latvia, Belgium, France, Ireland, Luxembourg and the United Kingdom, but notably not Uzbekistan. Media reports suggest that Swiss, Swedish and Dutch authorities may have opened investigations before the United States entered the fray.

The VimpelCom settlement may be the first of several corporate resolutions by companies that operated in the Uzbek telecommunications market. On September 15, 2016, U.S. and Dutch authorities presented Telia Company AB, a global telecommunications company partially owned by the Swedish government, with a settlement offer requiring Telia to pay $1.4 billion to resolve allegations that it paid hundreds of millions of dollars in bribes to secure entry into the Uzbek market. The proposed settlement with Telia confirms that the investigation into alleged corruption in the Uzbek telecommunications market by U.S. and Dutch authorities is active and ongoing.[31]

International Soccer Corruption

U.S. authorities' investigation and prosecution of individuals and entities associated with international soccer continued to develop in 2016. While no FCPA charges have been brought, this investigation demonstrates the DOJ's commitment to international cooperation. Attorney General Loretta Lynch has stated that the DOJ's successful investigation "would not have been possible without the cooperation of several of our international partners . . . . Our coordinated efforts . . . show what is possible when the international community takes a stand against corruption."[32] Notably, U.S. authorities have cooperated extensively with Swiss law enforcement, including coordinating arrests and evidentiary raids.

Since May 2015, U.S. authorities have charged over 42 individuals and entities with racketeering, wire fraud, money laundering and other offenses in connection with a decades-long scheme to enrich themselves by awarding lucrative marketing contracts in exchange for bribes. To date, 22 defendants have pleaded guilty. In 2016, seven individuals pleaded guilty to criminal charges in the case, including

[30] Press Release, Dep't of Just., VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016) ("DOJ VimpelCom Press Release"), http://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

[31] *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, $1.4 Billion Global Settlement Offer to Telia Portends Major Foreign Bribery Prosecution (Sept. 23, 2016), https://www.paulweiss.com/media/3733225/23sep16fcpa.pdf.

[32] Loretta E. Lynch, Attorney General, Dep't of Just., Remarks on Department of Justice Efforts in Fight Against International Fraud and Corruption (Oct. 20, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-department-justice-efforts-fight.

the former president of Honduras and former officials of regional and national soccer federations. The DOJ also entered into a deferred prosecution agreement with Torneos y Competencias S.A., an Argentine sports marketing company.

The investigation is ongoing and will no doubt produce developments in the months to come. Trial for several defendants has been set for November 6, 2017, although prosecutors have indicated that they are in plea negotiations with some of the defendants.

Foreign Jurisdictions Enhancing Their Anti-Corruption Laws

Due to international and domestic pressures, more foreign jurisdictions are enacting new legislation or enhancing existing legislation to combat corruption. In the last year, two of the more dramatic examples of enhanced legislation emerged from two of the key members of the Organization for Economic Co-operation and Development ("OECD") – France and South Korea.

France

In recent years France has come under intense international criticism for its lax enforcement of anti-corruption laws. Since 2010, major French companies, including Alstom, Total and Technip, have paid over $1 billion to U.S. authorities to resolve charges that they violated the FCPA. Meanwhile, no major French companies have been prosecuted for corruption by French authorities. The OECD Working Group on Bribery highlighted this discrepancy in a public statement it made in October 2014: "To this day, no French company has yet been convicted for foreign bribery in France, whereas French companies have been convicted abroad for that offence, and the sanctions for convictions of natural persons have not been dissuasive."[33]

On November 8, 2016, France's National Assembly adopted the Law on Transparency, the Fight Against Corruption and Modernization of Economic Life (also known as "Sapin II"), which attempts to address much of the criticism directed at France's anti-corruption regime. Sapin II significantly improves France's existing anti-corruption legislation and provides the French government with new enforcement and regulatory tools. The law includes five major developments:

- *Expanded jurisdiction*. French authorities can more easily investigate and prosecute conduct that is committed abroad, including overseas conduct that is committed by foreign companies that have operations in France.

[33] Press Release, OECD Working Group on Bribery, Statement of the OECD Working Group on Bribery on France's implementation of the Anti-Bribery Convention (Oct. 23, 2014), http://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm.

- *Development of a new anti-corruption agency.* Sapin II established Agence Française Anti-corruption ("AFA") to ensure, among other things, that companies are fulfilling their requirement to adopt anti-corruption compliance programs and to oversee corporate monitorships. The AFA does not have the authority to investigate or prosecute offenses; those responsibilities remain in the hands of French prosecutors.

- *Anti-corruption compliance program requirement.* Companies with over 500 employees and €100 million in revenue must implement an anti-corruption compliance program that includes a code of conduct, a corruption risk assessment mechanism, third-party due diligence procedures, employee training, reporting processes for internal reporting of suspected conduct, a disciplinary policy, an internal whistleblower policy and accounting controls.

- *Additional whistleblower protections.* Retaliation against whistleblowers or preventing whistleblowers from making a report can result in one year's imprisonment and a fine of up to €15,000, and disclosing the identity of a whistleblower can result in two years' imprisonment and a fine of up to €30,000.

- *Introduction of deferred prosecution agreements.* Companies seeking a deferred prosecution agreement will have to agree to stipulate to the facts listed in the deferred prosecution agreement, but will not have to admit guilt. Penalties under a deferred prosecution agreement are capped at 30 percent of the average of the last three years of earnings. Prior to execution, deferred prosecution agreements must be reviewed and approved by a court at a public hearing.

South Korea

On September 28, 2016, South Korea's tough new anti-corruption legislation, commonly referred to as the "Kim Young-ran Act," took effect, significantly expanding the set of conduct and individuals that could be subject to bribery offenses. Prior to the new legislation, Korea's Criminal Act already prohibited the giving of bribes and also prohibited public officials from receiving or demanding a bribe in connection with their official duties. The Kim Young-ran Act expanded the definition of public official to include private school officials and certain journalists.

The Act also prohibits improper solicitations to officials, and improper solicitations are defined broadly. The new law does not require that solicitations be accompanied by any payment, offer or promise to pay or provide money or anything of value. The Act enumerates specific requests or uses of influence that qualify as improper solicitations, including using influence to receive information about public tenders, influencing the distribution of licenses or other authorizations and influencing any decisions regarding taxes, fines or penalties.

Finally, the Act sets specific monetary limits for giving money or anything of value to public officials and also prohibits public officials from requesting or receiving specific benefits above the defined thresholds. The limits do not require any corrupt purpose on the part of the giver or the recipient of the benefit. The Act limits the giving of money or other benefits to a public official to KRW1 million (approximately $830) for a single occasion and KRW3 million (approximately $2,500) for a single year. The Act also sets ceilings for specific types of benefits: KRW30,000 (approximately $25) for meals and drinks, KRW50,000 (approximately $41) for presents, and KRW100,000 (approximately $82) for congratulatory or condolence payments which are customarily given at festive occasions and funerals. Notably, the Act's restrictions have had a significant impact on the Korean economy, particularly on small businesses. According to a major Korean news outlet, a month after the passage of the law, restaurants reported a 40% decrease in sales and flower shops experienced a 22% drop in sales.[34]

Passage of the Act came at a time when South Korea's president, Park Guen-hye, was coming under increasing public scrutiny for alleged involvement in a widespread corruption scandal. In November, Korean prosecutors opened an investigation into Ms. Park and indicted three of her associates, including her close friend and spiritual advisor, who was alleged to have used her influence to pressure major Korean conglomerates to donate money to non-profit foundations under her control. Under significant public pressure, the National Assembly impeached Ms. Park in December for her alleged involvement in the scandal. While Ms. Park waits to see if the country's constitutional court upholds her impeachment, prosecutors and lawmakers are beginning to shift their focus to the role the country's major conglomerates may have played in the alleged corruption scheme. In the last several weeks, executives from major conglomerates have been questioned about their connections to Ms. Park and her associates. On January 15, 2017, Korean prosecutors announced that they were seeking the arrest of Jay Y. Lee, the de facto head of Samsung.[35]

Anti-Money Laundering and the Kleptocracy Initiative

2016 saw several significant developments in anti-money laundering enforcement and regulation, including the two largest asset forfeiture actions ever under the Kleptocracy Initiative. In addition, the U.S. Department of the Treasury implemented multiple new anti-money laundering statutes and regulations. These developments suggest that money laundering enforcement and asset recovery proceedings will be a regulatory focus in the years to come.

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[34] *A Month into the Enactment of Kim Young-ran Act . . . Restaurant and Distribution Businesses Suffering* (translation), YONHAP NEWS TV (Oct. 28, 2016), http://www.yonhapnewstv.co.kr/MYH20161028002600038/print.

[35] Choe Sang-Hun, *Samsung Heir Faces Arrest on Charges of Bribing South Korea's President*, N.Y. TIMES, Jan. 15, 2017, https://www.nytimes.com/2017/01/15/world/asia/south-korea-samsung-arrest-jay-lee-park-geun-hye.html.

VimpelCom Forfeiture Action

As discussed above, on the same day that the DOJ, the SEC and OM settled with VimpelCom and Unitel, the DOJ separately filed a civil forfeiture action seeking to recover approximately $550 million from Swiss bank accounts alleged to hold improper payments made by VimpelCom, Telia and Mobile Telesystems OJSC, a Russian telecommunications company, to an unnamed official widely presumed to be Karimova. A related DOJ forfeiture action seeking to recover $300 million from bank accounts in Belgium, Luxembourg and Ireland was filed in June 2015. Taken together, these actions constituted at the time the largest forfeiture effort commenced under the Kleptocracy Initiative, which was established to recover for the benefit of victim countries proceeds of corruption involving foreign officials that are laundered through the U.S. financial system. In announcing the settlement, AAG Caldwell commented that FCPA enforcement and the Kleptocracy Initiative "are two sides of the same anti-corruption coin."[36]

The VimpelCom proceedings also demonstrate some of the thorny issues with attempting to return seized assets. In October 2016—more than eight months after commencement of the forfeiture proceedings—press outlets reported that American and Uzbek officials were still negotiating about what to do with the seized assets.[37] In a *Washington Post* op-ed, Uzbek exile and activist Sanjar Umarov argued that returning the seized property to the Uzbek government would be "[t]antamount to returning it to the people who stole it."[38] The same day, a group of activists, including Mr. Umarov, sent an open letter to the governments of Belgium, Ireland and the United States, among others, arguing that the funds "should be used as redress for the people of Uzbekistan, truly the victims of state organized corruption."[39] It is not yet clear what the DOJ intends to do with any recovered assets.

1MDB

VimpelCom's tenure as the largest asset forfeiture action under the Kleptocracy Initiative did not last long. In June, the DOJ announced that it was seeking the forfeiture of more than $1 billion of assets in connection with investigations of corruption at 1Malaysia Development Berhad ("1MDB"), a Malaysian

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36 DOJ VimpelCom Press Release.

37 Mike Eckel, *Gulnara's Millions: U.S. Tracks Down Illicit Funds, But Not Ready to Hand Them Over to Uzbek Officials*, RADIOFREEEUROPE RADIOLIBERTY (Oct. 2, 2016), http://www.rferl.org/a/uzbekistan-karimova-us-seized-funds-returning-to-whom/28027243.html.

38 Sanjar Umarov, Opinion, *Uzbekistan's Last Hope: The Trump Administration*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/opinions/global-opinions/uzbekistans-last-hope-the-trump-administration/2016/11/29/98dc58a4-b667-11e6-959c-172c82123976_story.html.

39 Letter of Uzbek Activists to the Governments of Belgium, Ireland, Luxembourg, The Netherlands, Sweden, Switzerland and the United States of America (Nov. 29, 2016),), http://www.ahrca.eu/pdf/29.11.2016_Letter_to_European_states_Uzbek_assets_Eng-media.pdf.

sovereign wealth fund.[40] The 1MDB forfeiture proceedings are unprecedented in scope—the assets to be seized include real estate in New York, Beverly Hills and London; private jets; and art, including paintings by Vincent Van Gogh and Claude Monet. Some commentators view the 1MDB seizures as the culmination of the DOJ's increased investment in the Kleptocracy Initiative;[41] at the least, they are a testament to the scope of the 1MDB investigation and international cooperation. Also noteworthy is that, at this point, it appears that U.S. authorities are pursuing 1MDB as a money laundering case, not an FCPA case.

Anti-Money Laundering Statutes and Regulation

In 2016, the Department of the Treasury promulgated multiple regulations and sent proposed legislation to Congress designed to identify the beneficial owners of assets, providing a potentially important source of information for anti-corruption and money laundering investigations.

On January 13, 2016, Treasury's Financial Crimes Enforcement Network ("FinCEN") issued Geographic Targeting Orders ("GTOs") that require U.S. title insurance companies to identify the beneficial owners behind limited liability companies, partnerships and other legal entities that make all-cash purchases of high-end residential real estate in Manhattan and Miami-Dade County.[42] Due to the initial program's success in assisting law enforcement in identifying possible illicit activity and individuals of interest, on July 27, 2016, FinCEN expanded the issuance of GTOs to cover all the boroughs of New York City, two counties immediately north of Miami, Los Angeles County, San Diego County, the San Francisco area and the county that includes San Antonio.[43]

In addition, on May 5, 2016, FinCEN issued final Customer Due Diligence Rules, which require financial institutions to establish procedures by which they can identify and verify who owns or controls legal entities holding accounts with those financial institutions.[44] Gathering this information may prove

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[40] Press Release, Dep't of Justice, United States Seeks to Recover More Than $1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund (July 20, 2016), https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign.

[41] Aruna Viswanatha, *1MDB Case Shines Spotlight on U.S. 'Kleptocracy' Group*, WALL ST. J. (July 21, 2016), http://www.wsj.com/articles/1mdb-case-shines-spotlight-on-u-s-kleptocracy-group-1469128825.

[42] Press Release, Financial Crimes Enforcement Network, FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami (Jan. 13, 2016), https://www.fincen.gov/news/news-releases/fincen-takes-aim-real-estate-secrecy-manhattan-and-miami.

[43] Press Release, Financial Crimes Enforcement Network, FinCEN Expands Reach of Real Estate "Geographic Targeting Orders" Beyond Manhattan and Miami (July 27, 2016), https://www.fincen.gov/news/news-releases/fincen-expands-reach-real-estate-geographic-targeting-orders-beyond-manhattan.

[44] Press Release, Dep't of Treasury, Treasury Announces Key Regulations and Legislation to Counter Money Laundering and Corruption, Combat Tax Evasion (May 5, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0451.aspx.

difficult, and financial institutions may face significant hurdles in complying with the rules ahead of the mandated compliance date of May 11, 2018.

In the same press release in which Treasury announced the final Customer Due Diligence Rules, it also reported that it was sending proposed legislation to Congress which would amend the Bank Secrecy Act to require entities formed within the U.S. to report certain beneficial ownership information to Treasury.[45] In August, Treasury announced proposed rules that would extend certain anti-money laundering requirements to all banks, not just those subject to federal regulation.[46] AAG Caldwell espoused the importance of these initiatives in a *Bloomberg* op-ed in November, arguing that, without action, the U.S. was in danger of falling behind other countries in preventing the flow of illicit money through its financial markets.[47] Although the Customer Due Diligence rules are now final, Congress has not yet taken any action on Treasury's proposed legislation.

Looking Forward into 2017: The Trump Administration

With tomorrow's inauguration, it is necessary to begin to think about what FCPA enforcement might look like in the Trump administration. At this time, Senator Jeff Sessions has been nominated for Attorney General and Jay Clayton has been nominated for SEC Chair. A great deal of day-to-day FCPA prosecution decisions, however, are made by the DOJ's Assistant Attorney General for the Criminal Division and the SEC's Director of Enforcement, who have not yet been nominated.

While Senator Sessions did not discuss the FCPA during his confirmation hearing, toward the end of the hearing, he made a strong statement about white collar criminal prosecutions: "Corporations are subject as an entity to fines and punishment for violating the law and so are the corporate officers. And sometimes, it seems to me . . . that the corporate officers who caused the problem should be subjected to more severe punishment than the stockholders of the company who didn't know anything about it."[48] Senator Sessions's pitting of shareholders against executives is of a piece with the President-Elect's populist tendencies. It signals that a focus on individual criminal culpability, as reflected in the Yates Memo, may survive the transition of administrations.

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45 *Id.*

46 Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator, 81 Fed. Reg. 58425 (proposed Aug. 25, 2016) (to be codified at 31 CFR 1020).

47 Leslie Caldwell, Opinion, *End the Corporate Shell Games*, BLOOMBERG (Nov. 30, 2016), https://www.bloomberg.com/view/articles/2016-11-30/end-the-corporate-shell-games.

48 *Attorney General Nomination: U.S. Senate Confirmation Hearing of Jeff Sessions Before the S. Judiciary Comm.*, 115th Cong. 125 (2017) (statement of Jeff Sessions, Senator from Alabama).

The nomination of Mr. Clayton offers deeper insight into how the Trump administration might proceed. While in private practice, he represented numerous large domestic and foreign institutions in transactions and in at least one FCPA investigation, and is knowledgeable about and sympathetic to the concerns of corporations that find themselves under the microscope in a federal inquiry. He does not have a background as a prosecutor or regulator.

In December 2011, as chairman of the New York City Bar Association's Committee on International Business Transactions, Mr. Clayton participated in the drafting of a report, "The FCPA and Its Impact on International Business Transactions – Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?" The report criticized the DOJ's and the SEC's "broad view" of the term "foreign official" in the FCPA, which it said "finds little support in legislative history, other statutory language or other countries' approaches to foreign corruption."[49] It argued that U.S. corporations face significantly higher FCPA compliance and due diligence costs and must forego foreign business opportunities because of FCPA risks.[50] The report concluded that the U.S. anti-corruption regime was "causing lasting harm to the competitiveness of U.S. regulated companies and the U.S. capital markets," and that "unilateral and zealous enforcement of the FCPA" is not the most effective way to combat corruption and may, in some circumstances, exacerbate it.[51] The report recommended that regulators attempt to reduce "regulatory asymmetry" between those companies subject to the FCPA and those not by shifting the focus of FCPA enforcement from companies to individuals and increasing cooperation with other countries.[52]

It is important not to attempt to infer too much about Mr. Clayton's potential approach as a regulator from a report he contributed to over five years ago while in the private sector. Much has changed since the report was issued in 2011, including increases in international cooperation, prosecution of foreign corporations and the size of fines. If confirmed, Mr. Clayton may not want to back the SEC away from these developments. Under Mr. Clayton's leadership, it is possible that the SEC will weigh issues of global economic competitiveness more heavily when enforcing the FCPA and may read the statute more conservatively. Foreign corporations, to the degree that the SEC can touch their conduct, may find themselves subject to greater scrutiny. This approach would seemingly dovetail with the President-Elect's consistent rhetoric about leveling the playing field for U.S. companies.

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49 New York City Bar Association, Committee on International Business Transactions, The FCPA and Its Impact on International Business Transactions – Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption? (2011), at 3-4.

50 *Id.* at 7-11.

51 *Id.* at 23.

52 *Id.* at 24.

We will watch these developments with interest and look forward to providing you with further updates in 2017.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

James L. Brochin
212-373-3582
jbrochin@paulweiss.com

David W. Brown
212-373-3504
dbrown@paulweiss.com

Michael E. Gertzman
212-373-3281
mgertzman@paulweiss.com

Mark F. Mendelsohn
202-223-7377
mmendelsohn@paulweiss.com

Alex Young K. Oh
202-223-7334
aoh@paulweiss.com

Jacqueline P. Rubin
212-373-3056
jrubin@paulweiss.com

Kaye N. Yoshino
81-3-3597-6303
kyoshino@paulweiss.com

Farrah R. Berse
212-373-3008
fberse@paulweiss.com

Peter Jaffe
202-223-7326
pjaffe@paulweiss.com

Justin D. Lerer
212-373-3766
jlerer@paulweiss.com

Associates Matthew Driscoll, Brian A. Hunt, Robby L.R. Saldaña and Jonathan Silberstein-Loeb contributed to this client alert.