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# 2016 YEAR-END FCPA UPDATE

To Our Clients and Friends:

2016 was a precedent-setting year for the Foreign Corrupt Practices Act ("FCPA"). After several years of consistent enforcement numbers, the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") produced what arguably is the most significant year of enforcement in the statute's 39-year history. With 53 combined enforcement actions, more than $2 billion in corporate fines levied by U.S. enforcers and billions more by foreign regulators in coordinated prosecutions, early returns on the DOJ's FCPA Pilot Program, and an increasingly clear intersection between the FCPA and Dodd-Frank's whistleblower provisions, there is much to discuss.

This client update provides an overview of the FCPA, as well as domestic and international anti-corruption enforcement, litigation, and policy developments from the year 2016. To assist our clients in navigating these challenges, we are pleased to highlight Gibson Dunn 2016 lateral hires from DOJ, including FCPA Unit Chief Patrick Stokes, U.S. Attorney for the Eastern District of California Ben Wagner, and Acting Associate Attorney General Stuart Delery.

## FCPA OVERVIEW

The FCPA's anti-bribery provisions make it illegal to corruptly offer or provide money or anything of value to officials of foreign governments, foreign political parties, or public international organizations with the intent to obtain or retain business. These provisions apply to "issuers," "domestic concerns," and "agents" acting on behalf of issuers and domestic concerns, as well as to "any person" that violates the FCPA while in the territory of the United States. The term "issuer" covers any business entity that is registered under 15 U.S.C. § 78l or that is required to file reports under 15 U.S.C. § 78o(d). In this context, foreign issuers whose American Depository Receipts ("ADRs") are listed on a U.S. exchange are "issuers" for purposes of the FCPA. The term "domestic concern" is even broader and includes any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the United States.

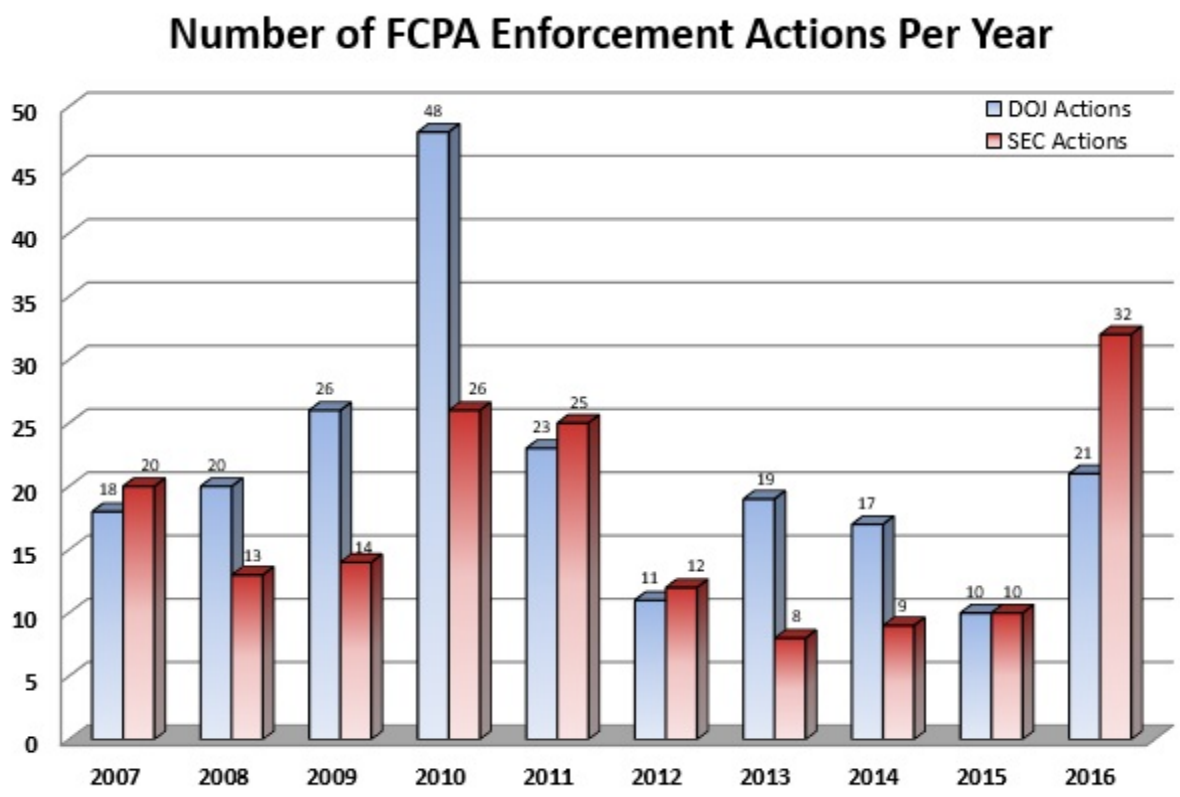
In addition to the anti-bribery provisions, the FCPA also has "accounting provisions" that apply to issuers and their agents. First, there is the books-and-records provision, which requires issuers to make and keep accurate books, records, and accounts that, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. Second, the FCPA's internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. Prosecutors and regulators frequently invoke these latter two sections when they cannot establish the elements for an anti-bribery prosecution or as a mechanism for compromise in settlement negotiations. Because there is no requirement that a false record or deficient control be linked to an improper payment, even a payment that does not constitute a violation of the

anti-bribery provisions can lead to prosecution under the accounting provisions if inaccurately recorded or attributable to an internal controls deficiency.

**FCPA ENFORCEMENT STATISTICS**

The following table and graph detail the number of FCPA enforcement actions initiated by the statute's dual enforcers, DOJ and the SEC, during each of the past ten years.

| 2007 | | 2008 | | 2009 | | 2010 | | 2011 | | 2012 | | 2013 | | 2014 | | 2015 | | 2016 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| DOJ | SEC | DOJ | SEC | DOJ | SEC | DOJ | SEC | DOJ | SEC | DOJ | SEC | DOJ | SEC | DOJ | SEC | DOJ | SEC | DOJ | SEC |
| 18 | 20 | 20 | 13 | 26 | 14 | 48 | 26 | 23 | 25 | 11 | 12 | 19 | 8 | 17 | 9 | 10 | 10 | 21 | 32 |




**2016 FCPA ENFORCEMENT TRENDS**

In each of our year-end FCPA updates, we seek not only to report on the year's FCPA enforcement actions but also to identify and synthesize the trends that stem from these actions. For 2016, five trends stand out:

1. Increased multi-jurisdictional anti-corruption enforcement;
2. Early returns on DOJ's FCPA Pilot Program;
3. The FCPA strikes back;
4. It's still China, China, China . . . but don't forget about Latin America; and
5. The intersection between the FCPA and Dodd-Frank's whistleblower provisions.

**Increased Multi-Jurisdictional Anti-Corruption Enforcement**

In February 2016, Fraud Section Chief Andrew Weissmann observed that DOJ's FCPA Unit is working "more closely and much more frequently with foreign counterparts." Days later, that point was driven home in a $795 million joint resolution between U.S. and Dutch prosecutors and Dutch telecom giant ***VimpelCom Ltd.***, covered in our 2016 Mid-Year FCPA Update. The second half of 2016 included two more significant anti-corruption enforcement actions coordinated between domestic and foreign regulators, as well as a third where the foreign prosecution was not coordinated but nevertheless played what appears to be a significant role in fashioning the U.S. remedy.

On December 21, 2016, Brazilian construction conglomerate ***Odebrecht S.A.*** and its petrochemical production subsidiary, ***Braskem S.A.***, reached a multi-billion-dollar resolution with authorities in Brazil, Switzerland, and the United States, which also is the first FCPA resolution arising from Brazil's Operation Car Wash. With combined penalties of at least $3.5 billion, this resolution now stands as the largest global foreign bribery settlement of all time.

On the U.S. front, both Odebrecht and Braskem pleaded guilty to DOJ charges of conspiring to violate the FCPA's anti-bribery provisions, while NYSE-listed Braskem additionally settled a civil SEC action charging violations of the FCPA's anti-bribery and accounting provisions. As noted above, the resolution stems from Operation Car Wash, the far-reaching money laundering investigation that has morphed into the largest corruption investigation in Brazilian history, stretching now well beyond Brazil's borders. According to the charging documents, the companies used Odebrecht's "Division of Structured Operations" as an effective "Department of Bribery" that allegedly had no purpose other than to systematically pay bribes to government officials around the world. The charges allege that, from 2001 to 2016, Odebrecht paid some $788 million in bribes in connection with more than 100 infrastructure and public works projects around the world, including in Angola, Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela, to obtain benefits of at least $3.3 billion. As for Braskem, the charging documents allege that it participated in the schemes from 2002 to 2014, paying approximately $250 million into Odebrecht's Division of Structured Operations that was used as bribes to secure benefits of approximately $465 million.

Between them, Odebrecht and Braskem are expected to pay approximately $419.8 million to resolve the U.S. enforcement actions. Specifically, Odebrecht is expected to pay approximately $260 million to resolve the DOJ criminal charges, while Braskem has agreed to pay $94.89 million to DOJ and $65

million to the SEC. This $419.8 million resolution places the Odebrecht/Braskem resolution fifth on the all-time Corporate FCPA Top 10 List.

And yet, the amounts that will be paid to U.S. regulators represent only a small fraction of the total penalties facing Odebrecht and Braskem. Odebrecht has agreed to pay a total criminal fine of at least $2.6 billion, 10% ($260 million) of which will go to each of DOJ and the Swiss Office of the Attorney General and 80% ($2.08 billion) to the Brazilian Ministerio Publico Federal. Similarly, Braskem has agreed that the appropriate total criminal fine is $632.63 million, 15% ($94.89 million) of which will go to each of DOJ and the Swiss Office of the Attorney General and 70% ($442.84 million) to the Brazilian Ministerio Publico Federal. Finally, Braskem will disgorge $325 million in illicit profits, 20% ($65 million) of which will go to the SEC and 80% ($260 million) to Brazilian authorities. The criminal fine amounts facing Odebrecht remain an open matter, however, as Odebrecht agreed in its criminal resolutions that the appropriate fine amount was as high as $4.5 billion, pending a review by DOJ and Brazilian authorities of Odebrecht's representation that it could pay no more than $2.6 billion. According to the agreements, that assessment will be completed by March 31, 2017.

As a condition of the DOJ and SEC resolutions, Odebrecht also agreed to the imposition of a corporate compliance monitor with a three-year term. In a related Brazilian enforcement action, on March 8, 2016, Odebrecht CEO Marcelo Odebrecht was sentenced to 19 years in prison for money laundering, corruption, and taking part in a criminal association.

In another example of close coordination in cross-border anti-corruption enforcement, on October 24, 2016, Brazilian-based aircraft manufacturer ***Embraer S.A.*** entered into a $205 million resolution with DOJ, the SEC, and Brazilian authorities. According to the charging documents, Embraer paid bribes through its subsidiary in the United States to government officials in the Dominican Republic, Mozambique, and Saudi Arabia, and entered into a false agency agreement to obtain business in India. Embraer allegedly generated $83 million in profits from these improper payments.

To resolve the DOJ charges, Embraer agreed to pay a $107.3 million criminal penalty as part of a deferred prosecution agreement alleging violations of the FCPA's internal controls provisions and conspiracy to violate the FCPA's anti-bribery and books and records provisions. To resolve the civil SEC charges of FCPA anti-bribery and accounting violations, Embraer agreed to pay more than $98 million in disgorgement and prejudgment interest. The company also agreed to retain a corporate compliance monitor for the three-year term of the deferred prosecution agreement. Finally, under terms finalized with the Brazilian Ministerio Publico Federal and the Brazilian Securities and Exchange Commission, Embraer acknowledged violations of Brazilian laws and agreed to pay approximately $19.5 million in disgorgement, damages, and penalties. Embraer will receive dollar-for-dollar credit for the Brazilian settlement as a reduction in its SEC disgorgement. In related enforcement actions, more than a dozen individuals have been charged in Brazil, the Dominican Republic, and Saudi Arabia in connection with the Embraer investigation.

Finally, in an example of an uncoordinated multi-jurisdictional enforcement action, on September 30, 2016, UK pharmaceutical giant ***GlaxoSmithKline plc*** agreed to settle the U.S. end of a long-running anti-corruption investigation concerning its sales activities in China. Without admitting or denying

allegations that employees and agents of its China-based subsidiary and joint venture provided cash, gifts, travel, entertainment, shopping excursions, and other things of value to drive prescriptions by public healthcare providers and purchases by hospital staff, GlaxoSmithKline consented to the entry of an SEC administrative order finding violations of the FCPA's accounting provisions and agreed to pay a $20 million civil penalty. The company further agreed to self-report to the SEC on the status of its anti-corruption compliance program over the course of the next two years.

As covered in our 2014 Year-End FCPA Update, Chinese authorities in 2014 prosecuted GlaxoSmithKline's Chinese subsidiary, imposing a corporate fine of approximately $489 million and sentencing several executives to prison, for substantially the same conduct that formed the basis for the 2016 SEC FCPA enforcement action. Although the U.S. and Chinese enforcement actions were not coordinated with one another, and the SEC papers nowhere even mention the Chinese enforcement action, it appears very likely that the SEC took the earlier prosecution into account by settling the case with the imposition of a civil penalty only and not requiring disgorgement of profits associated with the alleged misconduct. GlaxoSmithKline has reported that DOJ has closed its investigation of the company without taking any action itself.

**Early Returns on DOJ's FCPA Pilot Program**

As first covered in our 2016 Mid-Year FCPA Update, DOJ in April 2016 initiated an "FCPA Pilot Program" designed to provide greater transparency in expectations for mitigation credit for voluntary self-disclosure, cooperation, and remediation in FCPA investigations. Under the Pilot Program, a company that voluntarily self-discloses FCPA-related misconduct, fully cooperates in the ensuing investigation, and appropriately remediates the misconduct may be eligible for a declination of criminal prosecution. Even if there is no declination of prosecution, companies that self-disclose are eligible for "up to a 50% reduction" off of the bottom of the applicable U.S. Sentencing Guidelines fine range, whereas companies that do not self-disclose are capped at a 25% discount. In all events, companies that are found to have engaged in misconduct resulting in financial gain will be required to disgorge the ill-gotten gains from that misconduct.

**DOJ's declinations with disgorgement and admissions**

In the first nine months of the Pilot Program, DOJ has posted five declination notices attributed to the Pilot Program. In three of these cases (Johnson Controls covered below and Nortek and Akamai Technologies covered in our 2016 Mid-Year FCPA Update), the DOJ declinations were accompanied by parallel SEC enforcement actions in which disgorgement was ordered. DOJ declining criminal prosecution in cases where a regulatory action is sufficient to address the conduct at issue is nothing new and has been part of established DOJ policy (in FCPA and non-FCPA cases) for years. Where the Pilot Program has broken new ground concerns the other two 2016 declinations.

On September 29, 2016, DOJ reached letter agreements with two privately owned U.S. companies that, because of their non-issuer status, are generally not subject to SEC jurisdiction. These "declination" letter agreements came with two significant conditions: the companies were required to disgorge ill-gotten gains received as a result of the alleged misconduct and admit to DOJ's allegations. The letter

agreements were not filed in court as part of a legal proceeding, but much like a non-prosecution agreement were countersigned by company representatives and posted to DOJ's FCPA Website.

According to the letter agreement with industrial supply and maintenance company ***NCH Corporation***, from early 2011 to mid-2013, NCH's Chinese subsidiary provided nearly $45,000 in meals, gifts, entertainment, and cash to government officials to obtain sales that led to profits of $335,342. According to the letter agreement with oil and gas storage tank manufacturer ***HMT LLC***, from approximately 1999 to 2011, third parties in China and Venezuela paid $500,000 in bribes on behalf of the company to generate $2,719,412 in profits. Notably, the HMT DOJ letter agreement cites "two regional HMT managers based in Houston, Texas" as primarily responsible for the Venezuelan misconduct. The two regional managers have since been identified as Eduardo Betancourt and Franklin Marsan, who separately have entered guilty pleas for non-FCPA wire fraud conspiracy charges associated with a kickback scheme they were allegedly engaged in with HMT's third parties in Latin America. NCH and HMT each agreed to disgorge the purportedly illicit gains associated with the alleged misconduct.

As noted above, both NCH and HMT were required to agree to the facts as a part of their letter agreements with DOJ, which is a significant distinction from the Pilot Program declination of publicly traded Johnson Controls. Johnson Controls was not required to admit to the underlying facts in its SEC resolution and because it was able to effectuate the disgorgement via that vehicle, was not required to countersign its DOJ declination letter (which in any event did not recite any facts). Another notable aspect of the NCH and HMT agreements is that they are contractually prohibited from seeking a tax deduction for the amount disgorged. This is a departure from how corporations have typically treated disgorgement associated with SEC FCPA enforcement actions, but consistent with a recent IRS Chief Counsel Advice Memorandum that, as discussed in our 2016 Mid-Year FCPA Update, takes the position that a taxpayer may not claim a federal income tax deduction for FCPA-related disgorgement.

We have determined to count these declination letter agreements, where they are countersigned by the company with agreements to the alleged facts and to disgorge illicit gains, as enforcement actions for statistical purposes. Although we understand there could be a different view taken toward counting a so-called declination of prosecution as an enforcement action, these letter agreements bear significant similarities to other types of agreements (including DOJ and SEC non-prosecution agreements and SEC administrative proceedings) that we have been counting for statistical purposes for the 12 years we have been tracking FCPA enforcement. In our view, a company forced to pay hundreds of thousands or even millions of dollars to the U.S. Treasury as a result of publicized admissions to conduct that amounts to an FCPA violation has undergone a significant enforcement event that we believe warrants tracking.

**DOJ's maximum reduction from the Guidelines range under the Pilot Program**

Sneaking in just before the year's end, on December 29, 2016, DOJ and the SEC announced settled FCPA enforcement actions against Kentucky-based wire and cable manufacturer ***General Cable Corporation***. According to the charging documents, General Cable violated the FCPA's anti-bribery

and accounting provisions by, between 2002 and 2015, making or causing to be made $19 million in corrupt payments to employees of state-owned entities in Angola, Bangladesh, China, Egypt, Indonesia, and Thailand, netting the company more than $50 million in allegedly illicit profits.

To resolve the DOJ case, General Cable entered into a non-prosecution agreement pursuant to which it agreed to pay a $20.47 million criminal fine. This fine reflected a 50% reduction from the applicable U.S. Sentencing Guideline range (a $20.47 million value), the maximum available under DOJ's Pilot Program, based on the company's voluntary disclosure, cooperation, and remediation. This is in addition to the significant reduction in fine already built into the Sentencing Guidelines calculation for voluntary disclosure. In announcing the settlement, Assistant Attorney General Leslie R. Caldwell proclaimed, "This resolution demonstrates the very real upside to coming in and cooperating with federal prosecutors and investigators." True to the policy, DOJ did not after the Pilot Program's announcement grant more than a 25% discount from the Guidelines range for companies that did not voluntarily disclose matters.

To resolve the SEC charges, General Cable consented to the filing of an injunctive action and agreed to pay $55.28 million in disgorgement and prejudgment interest. General Cable will also self-report on the status of its anti-corruption compliance program for a three-year period.

Finally, the SEC also charged General Cable's former Senior Vice President for Europe and Africa Supply Chain ***Karl J. Zimmer*** with FCPA books-and-records and internal controls violations based on his alleged approval of commission payments to an Angolan agent under circumstances that purportedly should have alerted him to the fact that a portion of those commissions was going to be used for corrupt purposes. Without admitting or denying the findings, Zimmer agreed to pay a $20,000 civil penalty to resolve the charges.

**The FCPA Strikes Back**

More than a few FCPA commentators have spent the last several years opining erroneously on the certain demise of FCPA enforcement based on declining enforcement statistics from the previous high-water mark of 2010/2011. Informed by our own inventory of client matters, we have cautioned consistently against a view that suggests the U.S. Government is losing interest in anti-corruption enforcement. While we continue to advise against overreliance on any single year's enforcement statistics, the significant number of FCPA enforcement actions announced in 2016 demonstrates that DOJ and the SEC have not forgotten how to spell F-C-P-A. Indeed, given the lengthy incubation period of most FCPA cases, we know that these enforcers were working diligently during the supposedly quiet years on the cases that came to fruition in 2016.

The 53 FCPA enforcement actions filed by DOJ and the SEC in 2016 trails only 2010 (a year skewed by the infamous, yet numerous, SHOT Show arrests) for the most enforcement actions in the 39-year history of the statute. The SEC, in particular, set an agency record with 32 FCPA enforcement actions. But it is not just that there were many FCPA enforcement actions in 2016; it is that there were many significant FCPA enforcement actions, including five with corporate financial penalties eclipsing the $100 million mark. In addition to the Odebrecht/Braskem matter ($419.8 million) described above

and the VimpelCom matter ($397.6 million) described in our 2016 Mid-Year FCPA Update, there were the following $100 million-plus FCPA enforcement matters in 2016:

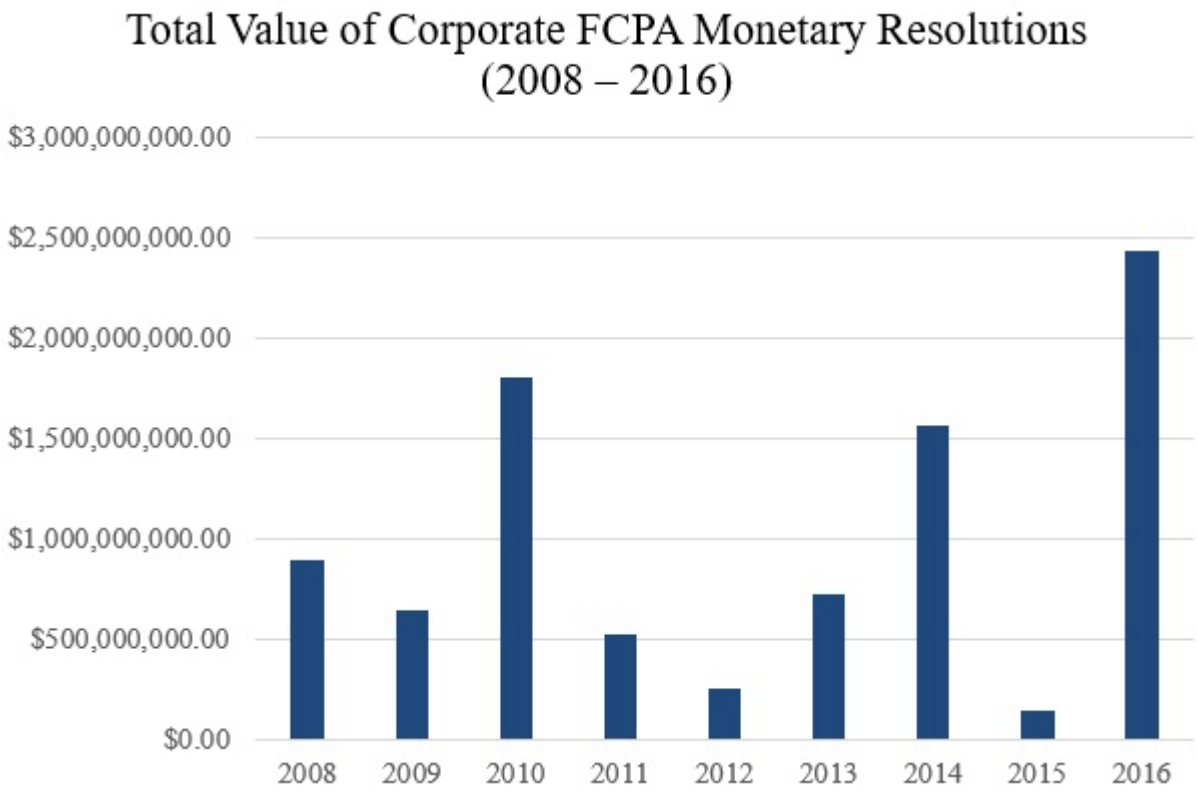
- ***Teva Pharmaceutical Industries Ltd.***, the world's largest manufacturer of generic pharmaceutical products, on December 22, 2016 agreed to pay more than $519 million to resolve FCPA charges with DOJ and the SEC arising from alleged corrupt payments made between 2002 and 2012 to high-ranking ministry of health officials in Russia and Ukraine to influence the approval of drug registrations and to state-employed physicians in Mexico to influence the prescription of products. To resolve the criminal charges, Teva entered into a deferred prosecution agreement charging FCPA anti-bribery and internal controls violations and its Russian subsidiary pleaded guilty to a one-count criminal information charging conspiracy to violate the FCPA's anti-bribery provision, with a combined criminal penalty of $283.18 million. On the civil side, Teva agreed to disgorge more than $236 million in profits and prejudgment interest to the SEC to resolve charges of FCPA anti-bribery, books-and-records, and internal controls violations. Teva also will retain a corporate compliance monitor with a three-year term.

- ***Och-Ziff Capital Management Group LLC***, a significant New York-based hedge fund, together with its investment advisor subsidiary, on September 29, 2016 agreed to pay just over $412 million to resolve FCPA charges with DOJ and the SEC arising from alleged corrupt payments to advance investment opportunities throughout Africa, including primarily the Democratic Republic of the Congo and Libya, but also Chad, Guinea, and Niger. On the criminal side, Och-Ziff avoided a guilty plea and entered into a three-year deferred prosecution agreement charging FCPA anti-bribery, books-and-records, and internal controls violations, with a subsidiary focused on African investments pleading guilty to conspiracy to violate the FCPA's anti-bribery provisions, and a combined criminal penalty of $213.06 million. The SEC charges against Och-Ziff and its investment advisor subsidiary include both allegations of FCPA anti-bribery and accounting violations as well as violation of the Investment Advisers Act, pursuant to which Och-Ziff agreed to disgorge $199.05 million in profits and prejudgment interest. Och-Ziff also will retain a corporate compliance monitor with a three-year term. In addition to the corporate dispositions, Och-Ziff CEO ***Daniel S. Och*** agreed to cease and desist from future violations of the FCPA's books-and-records provisions and to disgorge $2,173,718 in bonuses and prejudgment interest associated with the allegedly corrupt Congolese transactions, and Och-Ziff CFO ***Joel M. Frank*** agreed to cease and desist from future violations of the FCPA's books-and-records and internal controls provisions and pay a monetary penalty to be determined at a later date. ***Samuel Mebiame***, the son of the former Prime Minister of Gabon and a consultant to a mining company owned by a joint venture between Och-Ziff and another entity, pleaded guilty to a criminal conspiracy to violate the FCPA's anti-bribery provisions and awaits an April 2017 sentencing date. Gibson Dunn represented Och-Ziff in its resolution with DOJ and the SEC.

- ***JPMorgan Chase & Co.***, one of the world's leading investment banks, on November 17, 2016 agreed to pay nearly $264.5 million to resolve criminal and regulatory charges associated with the administration of a "Sons & Daughters" hiring program by its Hong Kong subsidiary between 2006 and 2013. The subsidiary allegedly provided jobs and paid internships to the friends and relatives of clients, including foreign officials, and in particular nearly 100 hires at the alleged request of

officials from more than 20 Chinese state-owned entities that directed more than $100 million in business to JPMorgan Chase and its affiliates. The Hong Kong subsidiary entered into a non-prosecution agreement with DOJ pursuant to which it agreed to pay a $72 million criminal fine. JPMorgan Chase itself resolved FCPA anti-bribery, books-and-records, and internal controls charges with the SEC, as well as a civil consent decree brought by the Federal Reserve Board of Governors, paying $130.59 million in disgorgement and prejudgment interest to resolve the former matter and a $61.9 million civil penalty to resolve the latter action. JPMorgan Chase will self-report to DOJ and the SEC on the state of its compliance program for a three-year term. The JPMorgan Chase enforcement action follows other corrupt hiring practices actions against Qualcomm and BNY Mellon, as discussed in our 2016 Mid-Year and 2015 Year-End FCPA updates, and together with the Och-Ziff matter discussed above reflects a significant focus on financial sector FCPA enforcement.

2016 corporate fines in FCPA cases topped $2 billion for the first time in the history of the FCPA. A chart tracking the total value of corporate FCPA monetary resolutions by year, since the advent of blockbuster fines brought in with the 2008 Siemens resolution, follows:



The Teva, Odebrecht/Braskem, Och-Ziff, and VimpelCom matters from 2016 have each landed on the Corporate FCPA Top 10 list, which currently reads as follows:

| No. | Company | Total Resolution | DOJ Component | SEC Component | Date |
|---|---|---|---|---|---|
| 1 | Siemens AG | $800,000,000 | $450,000,000 | $350,000,000 | 12/15/2008 |
| 2 | Alstom S.A. | $772,290,000 | $772,290,000 | -- | 12/22/2014 |
| 3 | KBR/Halliburton | $579,000,000 | $402,000,000 | $177,000,000 | 02/11/2009 |
| 4 | Teva | $519,000,000 | $283,000,000 | $236,000,000 | 12/22/2016 |
| 5 | Braskem/Odebrecht | $419,800,000 | $354,800,000 | $65,000,000 | 12/21/2016 |
| 6 | Och-Ziff | $412,000,000 | $213,000,000 | $199,000,000 | 09/29/2016 |
| 7 | BAE Systems* | $400,000,000 | $400,000,000 | -- | 02/04/2010 |
| 8 | Total S.A. | $398,200,000 | $245,200,000 | $153,000,000 | 05/29/2013 |
| 9 | VimpelCom | $397,600,000 | $230,100,000 | $167,500,000 | 02/18/2016 |
| 10 | Alcoa | $384,000,000 | $223,000,000 | $161,000,000 | 01/09/2014 |

* BAE pleaded guilty to non-FCPA conspiracy charges of making false statements and filing false export licenses, but the alleged false statements concerned the existence of the company's FCPA compliance program, and the publicly reported conduct concerned alleged corrupt payments to foreign officials.

**It's Still China, China, China . . . But Don't Forget About Latin America**

Nearly ten years ago, in our 2007 Year-End FCPA Update, we commented on the perils of doing business in China from an FCPA enforcement perspective. In our 2014 Year-End FCPA Update, we listed China as behind only Nigeria in the number of FCPA enforcement actions. With the year 2016 in FCPA enforcement now in the books, China has now overtaken Nigeria as the most frequent situs of FCPA violations, at 86 cases in China vs. 70 in Nigeria.

More than 40% of the 53 FCPA enforcement actions brought in 2016 involved allegations of FCPA misconduct in China, including the following:

- ***Johnson Controls, Inc.***, a Wisconsin-based temperature control systems manufacturer, settled an SEC-only cease-and-desist proceeding on July 11, 2016 arising from alleged violations of the FCPA's books-and-records and internal controls provisions associated with the alleged bribery of Chinese government-owned shipyard officials by employees of the company's Chinese subsidiary between 2007 and 2013. Without admitting or denying the SEC's findings, Johnson Controls agreed to pay $13.18 million in disgorgement plus prejudgment interest, as well as pay a $1.18 million civil penalty. Those who have followed FCPA enforcement for some time may recognize the name of the implicated Johnson Controls subsidiary--York Refrigeration Marine (China) Ltd.--as part of the York International business that entered into an FCPA resolution in 2007 just after being acquired by Johnson Controls. The SEC noted the recidivism in its charging document, observing that despite recommendations from the corporate compliance monitor imposed as part of the 2007 settlement to more closely integrate the China Marine business into the corporate compliance culture, Johnson Controls placed almost complete reliance on compliance in the business on a managing director who ultimately was found to have led the corrupt scheme. Nonetheless, the SEC prominently featured Johnson Control's voluntary disclosure and complete cooperation in the investigation, which also resulted in a declination of criminal prosecution by DOJ as noted above. Johnson Controls will self-report on the status of its anti-corruption compliance program for an unusually brief one-year period.

- ***AstraZeneca PLC***, the UK-based biopharmaceutical company and ADR issuer, on August 30, 2016 agreed to resolve FCPA charges with the SEC arising from alleged misconduct in China and Russia between 2005 and 2010. According to the charging document, employees of its Chinese subsidiary provided cash, gifts, speakers' fees, and other items of value to public healthcare providers in China as incentives to prescribe or purchase the company's products as well as to reduce or dismiss financial penalties proposed against the subsidiary. Further, employees of AstraZeneca's Russian subsidiary also allegedly made improper payments to incentivize public-sector pharmaceutical sales in that country. To resolve these charges, and without admitting or denying the allegations, AstraZeneca consented to the entry of an administrative order finding violations of the FCPA's books-and-records and internal controls provisions and paid $5,147,000 in disgorgement and prejudgment interest, as well as a $375,000 civil penalty. AstraZeneca announced that DOJ also has closed its investigation of the company without filing charges.

- ***Jun Ping Zhang***, the former Chairman and CEO of the Chinese subsidiary of Florida-based communications and information technology company Harris Corporation, consented to an FCPA administrative proceeding filed by the SEC on September 13, 2016. The charges arise from an alleged scheme whereby Ping's staff, under his direction, utilized false expense receipts (fapiaos) to generate reimbursements that funded between $200,000 and $1 million in illicit gifts for officials at public hospitals and departments of health in China. Without admitting or denying the SEC's allegations, Ping agreed to cease and desist from future violations of the FCPA's anti-bribery, books-and-records, and internal controls provisions and to pay a $46,000 civil penalty. Notably, the SEC commented in the proceeding against Ping that it had declined to take action against

Harris based on the fact that Harris discovered the conduct only five months after acquiring the Chinese business that Ping headed, thanks to significant post-acquisition compliance integration efforts of the parent company, and then self-reported the conduct to the SEC and DOJ. Although this case has been heralded by many as a signal of leniency in enforcement when companies take responsible steps, it is relevant to add that Harris has since terminated all employees of the subsidiary and closed down all of its operations in China. Harris has reported that DOJ also has closed its investigation without bringing charges against the company.

- ***Nu Skin Enterprises, Inc.***, a Utah-based personal care products producer, settled an SEC-only administrative action on September 20, 2016 to resolve allegations that its Chinese subsidiary made an RMB 1 million ($154,000) donation to a charity identified by a Communist party official in exchange for that official intervening on the company's behalf in a local enforcement action. Without admitting or denying the FCPA books-and-records allegations, Nu Skin consented to the entry of an administrative order and agreed to pay $465,700 in disgorgement and prejudgment interest, as well as a $300,000 civil penalty. For a comprehensive study on the FCPA risks of charitable donations, please see our recent article, "Coerced Corporate Social Responsibility and the FCPA."

- ***Ng Lap Seng*** and ***Jeff C. Yin***, a Chinese real estate mogul and his principal assistant, were on November 22, 2016 charged in a superseding indictment adding FCPA anti-bribery charges to their pre-existing criminal case alleging corruption at the United Nations. As reported in our 2015 Year-End FCPA Update, Seng, Yin, and two other Chinese businesspersons were indicted on non-FCPA federal program bribery charges together with former President of the U.N. General Assembly John Ashe and former U.N. Deputy Ambassador for the Dominican Republic Frances Lorenzo. The charges stem from an alleged scheme whereby the businesspersons paid $1.3 million in bribes to the U.N. officials (in the form of cash, a family vacation, a private home basketball court, and salary for a spouse) between 2011 and 2015 to advance the interests of those businesspersons before the United Nations, including most notably a plan to build a U.N.-sponsored conference center in Macau. Only this year did DOJ supersede the indictment with respect to Seng and Yin to add FCPA bribery charges in connection with the Macau conference center bribery scheme, based on the fact that U.N. officials qualify as "foreign officials" under the FCPA due to the U.N.'s designation by Executive Order as a "public international organization." Trial for Seng and Yin is currently set for May 15, 2017.

Even as U.S. compliance professionals seek to manage the risk of FCPA compliance on the other side of the globe, they cannot divert their attention from their own back yard as demonstrated by a busy 2016 in Latin American FCPA enforcement. Roughly one-third of the 53 FCPA enforcement actions of 2016 arose out of alleged misconduct in Mexico, Central America, or South America, including the following:

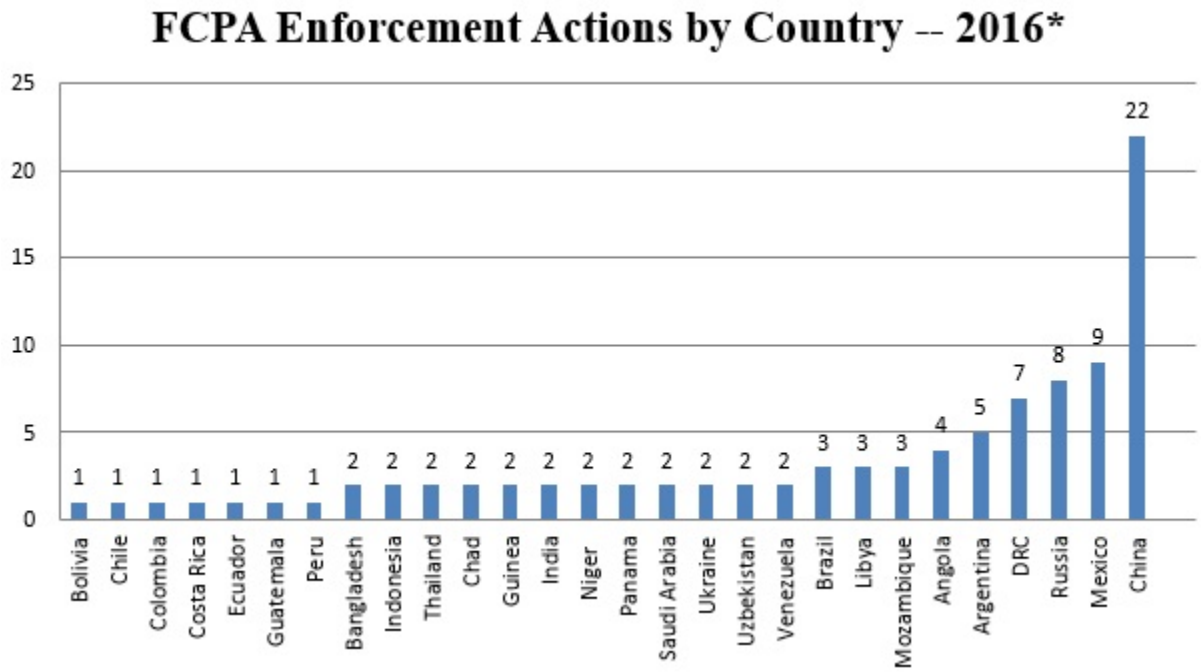
- ***LATAM Airlines Group S.A.***, the Chilean based airline company formerly known as ***LAN Airlines***, on July 25, 2016 entered into a joint resolution with DOJ and the SEC to resolve FCPA charges arising from the same fact pattern that led its CEO ***Ignacio Cueto Plaza*** to reach his own individual FCPA resolution with the SEC earlier this year as reported in our 2016 Mid-Year FCPA

Update. According to the charging documents, after the company encountered difficulties with Argentine labor unions, it executed a $1.15 million consulting agreement with an advisor to the Secretary of Argentina's Ministry of Transportation. Although the advisor was supposed to undertake a study of Argentine airline routes, that study allegedly was never done and a portion of the payments was instead allegedly used to influence labor union officials to resolve the negotiations on terms more favorable to LATAM. To resolve the DOJ investigation, LATAM entered into a three-year deferred prosecution agreement alleging FCPA books-and-records and internal controls violations and agreed to pay a $12.75 million criminal fine. LATAM further consented to the filing of an administrative cease-and-desist proceeding alleging violations of the FCPA's accounting provisions and imposing $9.44 million in disgorgement plus prejudgment interest. LATAM will further retain a corporate compliance monitor for a 27-month term.

- ***Key Energy Services, Inc.***, a Houston-based well-services provider, settled an SEC-only administrative action on August 11, 2016 to resolve allegations that its Mexican subsidiary used an unauthorized third party to funnel $229,000 in corrupt payments to an employee of Mexico's state-owned oil company, Petróleos Mexicanos ("PEMEX"), in exchange for nonpublic bidding information and other illicit assistance concerning PEMEX contracts between the years 2010 and 2013. Without admitting or denying the findings underlying the FCPA books-and-records and internal controls charges, Key Energy agreed to pay $5 million in disgorgement. In deciding not to impose a civil penalty, the SEC considered Key Energy's financial condition; on October 24, the company filed for chapter 11 protection and secured U.S. Bankruptcy Court approval of its restructuring plan on December 6, 2016. Key Energy has announced that DOJ has closed its investigation without filing charges against the company.

- Closing out a big year in big fashion, on December 27, 2016, DOJ announced guilty pleas by six individuals--four businessmen on FCPA charges, two government officials on money laundering charges--in connection with a bribery scheme involving the payment of more than $2 million by representatives of a Houston-based aviation services company to secure aircraft maintenance, repair, and overhaul contracts with Mexican government-owned customers. Company President ***Douglas Ray***, General Manager ***Kamta Ramnarine***, Director of Maintenance ***Daniel Perez***, and third-party agent ***Victor Hugo Valdez Pinon*** all pleaded guilty in 2016 to FCPA conspiracy charges. In addition, two Mexican government official recipients of these bribes--***Ernesto Hernandez-Montemayor*** and ***Ramiro Ascencio-Nevarez***--pleaded guilty in 2016 to money laundering charges connected to the receipt of some of those bribes (as foreign officials, Hernandez-Montemayor and Ascencio-Nevarez are not subject directly to the FCPA, but may be charged with offenses ancillary to the bribery, such as money laundering). We first reported on the charges against Hernandez-Montemayor in our 2015 Year-End FCPA Update, correctly predicting that the case would likely trend FCPA in the near future. The charges against all six defendants, save Hernandez-Montemayor, remained under seal until all defendants were in custody. All six defendants are scheduled to be sentenced in 2017.

A graphic depiction of the situs of FCPA violations from 2016 follows:




* Some enforcement actions involve conduct in more than one country.

**The Intersection Between the FCPA and Dodd-Frank's Whistleblower Provisions**

For years, we have been anticipating the intersection between purported Dodd-Frank whistleblowers and FCPA enforcement. We first wrote of the subject in our 2010 Year-End FCPA Update and our article, "Five Themes for General Counsel to Monitor With Respect to Dodd-Frank Whistleblowers and the FCPA." Finally, in 2016, we saw the first public proof of a phenomenon that we have been observing in our client matters for years. We expect more to follow.

On September 28, 2016, the SEC announced a settled cease-and-desist proceeding with ***Anheuser-Busch InBev SA/NV***, the Belgium-based international brewer and ADR issuer. According to the SEC's charges, between 2009 and 2012, a 49%-owned joint venture that managed the brewer's marketing and distribution in India caused its third-party promoters to make illicit payments to government officials to increase orders and extend permissible operating hours for Anheuser-Busch InBev's wholly owned subsidiary in India. In addition, in 2012, the company allegedly inserted a clause into a separation agreement with an employee of the Indian subsidiary prohibiting the employee from disclosing confidential information to external parties, with a $250,000 liquidated damages penalty if he did. This employee had been voluntarily cooperating with the SEC prior to entering into this agreement, but thereafter stopped, allegedly because of fear of the liquidated damages provision.

To resolve the SEC's charges, Anheuser-Busch InBev consented to the filing of FCPA books-and-records and internal controls charges, as well as charges alleging a violation of SEC Rule 21F-17(a),

which provides that "[n]o person may take any action to impede an individual from communicating directly with [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . ." Without admitting or denying the charges, Anheuser-Busch InBev agreed to pay just over $3 million in disgorgement and prejudgment interest, in addition to a penalty of just over $3 million, as well as to self-report on the status of its anti-corruption compliance program for a two-year term. The company further agreed to change the standard confidentiality clause in its separation agreement to include the following provision: "[The employee] understand[s] and acknowledge[s] that notwithstanding any other provision in this Agreement, [the employee is] not prohibited or in any way restricted from reporting possible violations of law to a governmental agency or entity, and [the employee is] not required to inform the Company if [s/he] make[s] such reports."

In another significant confluence between the FCPA and Dodd-Frank, a $3.75 million whistleblower bounty awarded by the SEC in August 2016 reportedly was connected to the 2015 FCPA enforcement action against BHP Billiton. As covered in our 2015 Mid-Year FCPA Update, BHP Billiton paid $25 million to resolve an SEC-only FCPA enforcement action arising from the alleged provision of luxury hospitality packages to government officials attending the 2008 Beijing Olympic Games. The $3.75 million whistleblower award, which at 15% of the total penalty imposed falls within the 10% to 30% range set by statute, reportedly went to an unidentified company insider who provided the SEC with original evidence of wrongdoing, helping the SEC bring its FCPA charges. The SEC, which holds whistleblower identification information in strict confidence, has not confirmed the media reports.

Another meeting point between the FCPA and Dodd-Frank concerns a whistleblower retaliation lawsuit filed by Bio-Rad's former general counsel against his former employer, which is covered below. For much, much more on the background of Dodd-Frank's whistleblower provisions and their intersection with the FCPA, please register for our upcoming webcast, "Navigating the Minefield of Dodd-Frank's Whistleblower Provisions and the FCPA (2016 Update)," on January 18, 2017 @ 12:30 p.m. (EST). The panelists will include Gibson Dunn partner Patrick F. Stokes and Phillips & Cohen partner Sean X. McKessy, respectively the former chiefs of DOJ's FCPA Unit and the SEC's Office of the Whistleblower.

## 2016 YEAR-END CHECK-IN ON FCPA ENFORCEMENT LITIGATION

### Magyar Telekom Defendants

It has been more than five years since the SEC first charged three former senior executives of Magyar Telekom, Plc.--***András Balogh***, ***Tamás Morvai***, and ***Elek Straub***--the initial report of which we first covered in our 2011 Year-End FCPA Update. Still, the litigation continues and indeed saw significant developments in 2016.

Oral argument on the parties' cross-motions for summary judgment was held on August 24, 2016 before the Honorable Richard J. Sullivan of the U.S. District Court for the Southern District of New York. Over the course of a 2.5-hour hearing, the parties argued numerous issues, including whether the Court has personal jurisdiction over the three Hungarian defendants, whether the defendants used

the mails or any means or instrumentality of interstate commerce in connection with the alleged bribery scheme, and whether the applicable five-year statute of limitations has run on the conduct.

In an opinion issued on September 30, 2016, the Court found that the defendants had sufficient minimum contacts with the United States to establish personal jurisdiction. Among other factors, Judge Sullivan cited the executives' signing Magyar's SOX certifications and other management representation letters submitted in connection with an audit of the company's financial disclosures. Judge Sullivan also concluded that Magyar--a foreign issuer--"clearly used an instrumentality of interstate commerce (the Internet) when it made filings through EDGAR." Because Magyar's online filings were a reasonably foreseeable consequence of the executives' personal certifications in support of the company's financial reporting, the Court found that the SEC was entitled to summary judgment on the issue of whether the defendants themselves "used" an instrumentality of interstate commerce. On the statute of limitations, Judge Sullivan found that with regard to Straub and Morvai, certain of the SEC's claims were time-barred because trips to the United States in 2005 triggered a five-year statute of limitations that ran out before the SEC filed the action in December 2011. However, because the SEC identified both a bribe payment (in May 2006) and a use of the mails (the filing of Magyar's quarterly report in November 2005) that occurred after Straub's and Morvai's 2005 trips, the judge concluded that at least some of the SEC's claims were not time-barred.

The long awaited trial for these defendants, which if it holds would be the first ever FCPA trial involving the SEC, is scheduled to begin on May 8, 2017.

**Alstom Defendants**

As reported in our 2016 Mid-Year FCPA Update, DOJ has filed an interlocutory notice of appeal to the U.S. Court of Appeals for the Second Circuit after the Honorable Janet Bond Arterton of the U.S. District Court for the District of Connecticut partially granted ***Lawrence Hoskins***'s motion to dismiss certain charges pending against him, holding that Hoskins could not be criminally liable for conspiring to violate or aiding and abetting a violation of the FCPA unless the government establishes that he was acting as an "agent" of a "domestic concern" (here, Alstom's U.S. subsidiary) in connection with the alleged bribery scheme. Oral argument is currently scheduled for the week of February 27, 2017.

The only other development of note this year in this long-running case is that, on July 6, 2016, DOJ moved in the U.S. District Court for the District of Connecticut to dismiss its case against former Alstom executive ***William Pomponi***, who had pleaded guilty in July 2014 to one count of conspiracy to violate the FCPA and died in May 2016 before he was sentenced. Judge Arterton granted DOJ's motion and terminated the case on July 19, 2016. We will continue to monitor this litigation and report on developments in future updates.

**PDVSA Defendants**

At the time of our 2016 Mid-Year FCPA Update, six individuals had pleaded guilty in a conspiracy case involving bribes paid to officials of Petróleos de Venezuela, S.A. ("PDVSA"). The defendants include three former PDVSA officials (***Alfonzo Eliezer Gravina Munoz***, ***Christian Javier Maldonado Barillas***, and ***José Luis Ramos Castillo***) charged with money laundering offenses; and three

businesspersons (***Moisés Abraham Millán Escobar***, ***Abraham José Shiera Bastidas***, and ***Roberto Enrique Rincón Fernandez***) charged with FCPA offenses.

Sentencing for all six--originally scheduled to take place in September 2016--has been continued until July 14, 2017 before the Honorable Gray H. Miller of the U.S. District Court for the Southern District of Texas. In the meantime, the government has moved to impose personal money judgments as to five of the six--Ramos ($210,625.79, plus forfeiture of real property); Maldonado ($165,000); Gravina ($590,440); Millán ($533,578.13); and Shiera ($18,824,797.67). The monetary judgment as to Rincón was filed under seal.

On November 30, Bariven S.A., the procurement arm of PDVSA and the former employer of Gravina, Maldonado, and Ramos, moved to seek recognition as a victim entitled to forfeiture from each of the defendants above. DOJ has moved to stay briefing on the motion pending the imposition of sentences, though it made clear in its motion that it does not believe Bariven will be able to qualify as a victim pursuant to either the Crime Victims' Rights Act or the Mandatory Victims Restitution Act. The Court has not yet ruled on these motions.

Reports suggest that prosecutors are preparing to charge several more individuals, including more former PDVSA executives. The Swiss government reportedly seized $118 million in related assets from Swiss banks, of which $51 million was released to U.S. authorities in October 2016.

**2016 SENTENCING DOCKET FOR FCPA CHARGES**

It was a slow year for sentencing FCPA defendants in 2016, with many of the cases in which sentencing hearings were scheduled having been postponed to 2017. Only two defendants, both former executives of Louis Berger International, were sentenced this year on FCPA charges as set forth below:

| Defendant | Sentence | Date | Court (Judge) | Comment |
|---|---|---|---|---|
| Richard Hirsch | 0 months | 07/08/16 | D. N.J. (Cooper) | Probation + $10,000 fine |
| James McClung | 12 months | 07/08/16 | D. N.J. (Cooper) | |

**OTHER 2016 FCPA-RELATED DEVELOPMENTS**

**Siemens FCC Fine**

On September 22, 2016, the Federal Communications Commission ("FCC") announced that it entered into a consent decree with ***Siemens Corporation*** and ***Siemens Medical Solutions, USA, Inc.*** imposing a $175,000 civil penalty after the companies allegedly failed to disclose the 2008 convictions involving their parent, ***Siemens AG***, and certain of its subsidiaries on FCC wireless license applications. In addition to the $175,000 civil penalty, the entities each agreed to designate a senior manager as

compliance officer, implement a new compliance plan to address the issues, report any noncompliance with relevant FCC regulations, and file regular compliance reports with the FCC.

**Additional Guilty Pleas in FIFA Corruption Investigation**

We have been following the corruption scandal that has engulfed the Fédération Internationale de Football Association ("FIFA") since the May 2015 pre-dawn raid at a luxury Swiss hotel made waves last year. As of our 2016 Mid-Year FCPA Update, more than a dozen defendants had pleaded guilty to non-FCPA charges in connection with the corruption scandal. With five more guilty pleas entered in the U.S. District Court for the Eastern District of New York during the second half of the year, the government's investigation shows no signs of ebbing. Those defendants include:

- ***Brayan Jimenez*** – In July, the former member of FIFA's Committee for Fair Play and Social Responsibility pleaded guilty to racketeering and wire fraud conspiracies. Jimenez allegedly awarded media and marketing rights for Guatemala's 2018 and 2022 World Cup qualifier matches in exchange for hundreds of thousands of dollars in bribes. Sentencing is scheduled for April 28, 2017.

- ***Eduardo Li*** – The former president of Costa Rica's soccer association pleaded guilty in October 2016 to three charges relating to racketeering conspiracy, wire fraud, and wire fraud conspiracy. Li admitted to accepting more than $500,000 in bribes from media and marketing companies in exchange for, among other things, television rights to Costa Rican qualifiers for the 2022 World Cup. Sentencing has not yet been set for Li.

- ***Aaron Davidson*** – The former president of Traffic Sports USA, a soccer event management company based in Miami, pleaded guilty in October 2016 to one count each of racketeering conspiracy and wire fraud conspiracy for agreeing to facilitate the payment of over $14 million in bribes for media and marketing rights contracts to FIFA-related events and World Cup qualifying matches. Sentencing for Davidson is set for April 24, 2017.

- ***Rafael Esquivel*** – The former president of the Venezuelan soccer federation and former vice president of CONMEBOL, the South American soccer confederation, pleaded guilty in November 2016 to seven counts involving racketeering, wire fraud, and money laundering. According to the indictment, Esquivel sold media and marketing rights to soccer tournaments in exchange for millions of dollars in bribes. The court has not yet set a date for Esquivel's sentencing.

- ***Julio Rocha*** – The former head of the Nicaraguan football federation responsible for overseeing FIFA's development program in Central America, Rocha pleaded guilty in December 2016 to two counts related to racketeering conspiracy and wire fraud conspiracy. Prosecutors alleged that Rocha accepted more than $150,000 in bribes to help Traffic Sports USA obtain media and market rights for Nicaraguan qualifiers to several World Cups.

Companies also have been targeted. On December 13, Argentine sports marketing company ***Torneos y Competencias S.A.*** entered into a $113 million, four-year deferred prosecution agreement with DOJ to

resolve wire fraud conspiracy charges. Torneos admitted to paying tens of millions of dollars in bribes and kickbacks to FIFA and other officials in exchange for soccer media and marketing rights, including rights to broadcast the 2018, 2022, 2026, and 2030 World Cups.

**2016 KLEPTOCRACY FORFEITURE ACTIONS**

For several years now, we have been reporting on DOJ's Kleptocracy Asset Recovery Initiative, which uses civil forfeiture actions to freeze, recover, and, in some cases, repatriate the proceeds of foreign corruption. In remarks delivered in November 2016, Assistant Attorney General Leslie R. Caldwell stated that because DOJ believes this is "such an important initiative," DOJ has "added resources, including increasing by more than 50 percent the number of prosecutors who will be devoted to investigating and prosecuting kleptocracy matters."

In addition to the activity described in our 2016 Mid-Year FCPA Update, the actions described below highlight DOJ's commitment to the initiative.

- On July 7, DOJ repatriated approximately $1.5 million to Taiwan following the sale of a forfeited Manhattan condominium and a Virginia home. As discussed in our 2012 Year-End FCPA Update, on November 14, 2012, DOJ announced forfeiture orders entered by two separate U.S. district courts against residences belonging to the former first family of Taiwan that allegedly were purchased with the proceeds of bribes accepted by Taiwan's then-first lady ***Wu Shu-Jen***. According to the civil forfeiture complaints, in 2004, ***Yuanta Securities Co. Ltd.*** paid Shu-Jen 200 million New Taiwan dollars (approximately $6 million) to ensure that then-president ***Chen Shui-Bian*** would not oppose the company's bid to acquire a financial holding company. Chen and Wu were convicted in 2009 of bribery, embezzlement, and money laundering offenses by the Taiwanese courts.

- On July 20, DOJ filed civil forfeiture complaints seeking the forfeiture of more than $1 billion in assets associated with ***1Malaysia Development Bhd*** ("1MDB")--the Malaysian sovereign fund focused on promoting economic development in the country. According to the complaints, from 2009 through 2015, government officials and their associates misappropriated more than $3.5 billion from 1MDB and used fraudulent documents and shell companies to launder the funds. On December 12, 2016, the Honorable Dale S. Fischer of the U.S. District Court for the Central District of California denied a motion by certain family members referenced in the complaints to intervene in the action. Then, on December 21, these same family members filed motions to dismiss the actions, advancing arguments that the Court lacks jurisdiction, venue is improper, and DOJ has failed to adequately plead a predicate offense. The motions remain pending as of this update.

**FCPA SPEAKERS' CORNER**

U.S. government anti-corruption enforcement personnel once again were active on the speaking circuit in 2016, providing insights into DOJ and SEC priorities and their expectations for companies that come before them.

- Attorney General Loretta E. Lynch: In an October 2016 speech in Italy, Lynch discussed DOJ's recent successes detecting and prosecuting corruption. Part of that success, Lynch noted, has been due to increased coordination with foreign law enforcement agencies. As for DOJ's FCPA Unit, Lynch lauded: "[S]ince 2009, under the Foreign Corrupt Practices Act, the department has brought more than 65 individual criminal cases and more than 65 cases against corporations in connection with foreign bribery charges – many of them in coordination with our foreign law enforcement partners. These investigations have resulted in the collection of more than $4.4 billion in penalties, and they have had the welcome effect of increasing corporate self-scrutiny, incentivizing companies to better train, monitor, and discipline their own agents and subsidiaries around the world."

- Assistant Attorney General Leslie R. Caldwell: In a speech at the Securities Enforcement Forum West in May 2016, Caldwell stated that DOJ "has never been interested in prosecuting as criminal FCPA violations discrete, small violations such as a one-time bribe to a customs official in name-that-country to get a shipment into that country earlier than they otherwise would have." Rather, she said DOJ is "looking for self-reports where there's a significant violation of the FCPA and the company opts to handle it in a way that we view as responsible and appropriate." Later, in a November 2016 speech at her alma mater George Washington University School of Law, Caldwell discussed two questions that companies should ask themselves when deciding whether to self-report a violation: (1) Was anyone in the United States involved in the violation?; and (2) Were high-ranking officers in the company involved, either foreign or domestic? If the answer to either question is "yes," Caldwell stated that this should weigh in favor of disclosure.

- Fraud Section Chief Andrew Weissmann: Discussing DOJ's increased focus on compliance at GIR Live DC in February 2016, Weissmann stated that DOJ is interested not only in how a corporate compliance program is designed, but also in how it is being implemented. He emphasized that a company no longer can expect to spend just a few hours pitching its compliance program to regulators to get compliance credit. Weissmann highlighted four factors DOJ is focused on: (1) the perception of employees at all levels of a company regarding their responsibility for compliance; (2) the "tone at the top"; (3) whether compliance is a shared responsibility throughout the company; and (4) the expertise of compliance personnel. Picking up on this theme at ACI's International Conference on the FCPA in November, Weissmann commented that companies are not focused enough on the remediation that should follow findings of misconduct, which can have a significant impact on the resolution, including in the fine amount and on the important question of whether a monitor is imposed. Weissmann noted that there would likely be an uptick in corporate compliance monitors in 2016 based on this comparative falloff in attention given to matters of remediation.

- SEC FCPA Unit Chief Kara Brockmeyer: In an October 2016 speech at Trace International's Global Anti-Bribery In-House Network conference in London, Brockmeyer stated that there are times when companies should not have management directing an internal investigation. She emphasized the importance of using external counsel, who report to outside directors and audit committees, when senior management is implicated. "There have certainly been instances where we have strongly recommended to the company that they [use] separate counsel other than their

normal corporate counsel and that they have an outside director overseeing the investigation . . . . The gold standard cooperation, the one that gets significant credit on our side, is where the counsel is not reporting to the company's management, but to outside directors."

- DOJ FCPA Unit Chief Daniel Kahn: Speaking at the same conference in London, Kahn addressed the topic of voluntary disclosure credit and stated that timely disclosure does not require self-reporting the moment wrongdoing is suspected--a company that self-reports within three months of discovering wrongdoing likely will obtain disclosure credit, while a company that waits a year likely will not qualify. Kahn added that internal investigations prior to self-reporting may work against a company's ability to receive credit if they hinder DOJ's ability to investigate an issue by alerting employees that their wrongdoing has been discovered. Specifically, he explained, "[t]o be timely, a company needs to bring things to our attention so we can do something about it. . . . If they go around and interview everyone and alert wrongdoers that we're on to them," it is likely that the organization has missed the opportunity for the greatest cooperation credit.

Although they are not commentary from the FCPA enforcement community, we would be remiss not to note statements on the FCPA by our president-elect, Donald J. Trump. In a May 2012 CNBC SquawkBox discussion, then-business mogul Trump called the FCPA a "horrible law [that] should be changed" because it puts U.S. businesses at a "huge disadvantage" vis-à-vis companies from nations that are not bound by aggressive international anti-corruption enforcement regimes. Proclaiming that foreign nations should prosecute corruption in their own country, Mr. Trump said that the FCPA makes the United States "the policeman for the world and it's ridiculous."

Although these comments stand in stark contrast to the message of the current administration, leading some to question whether the FCPA will be enforced in a Trump government, we do not predict a significant shift in FCPA enforcement. First, it must be remembered that FCPA enforcement is first and foremost the responsibility of dedicated career civil servants, separated by many layers from and generally unaffected by whoever happens to reside at 1600 Pennsylvania Avenue. Second, there are numerous treaty obligations pursuant to which the United States remains obligated to prosecute foreign corruption. Third, we are skeptical that even were he personally so inclined, there would be political benefit to a President Trump taking an active stance opposed to international anti-corruption enforcement.

## 2016 YEAR-END FCPA-RELATED PRIVATE CIVIL LITIGATION

We consistently note in these semiannual updates that the FCPA provides for no private right of action, but there are a variety of causes of action that have been used with varying degrees of success to pursue private redress for losses allegedly associated with purported FCPA-related misconduct. A selection of matters that saw developments in the second half of 2016 follows.

### Shareholder Lawsuits

Shareholder litigation frequently follows a company's announcement of an FCPA event, either through a class action lawsuit brought on behalf of shareholders whose stock value has dropped allegedly as a

result of the misconduct or a shareholder derivative lawsuit brought against the company's directors for allegedly violating their fiduciary duties to run the business in a compliant manner. Examples include:

- **Wynn Resorts Ltd.** – On July 18, 2016, the U.S. Court of Appeals for the Ninth Circuit affirmed the U.S. District Court for the District of Nevada's decision that shareholders who sued the company and certain directors derivatively for breaches of fiduciary duty and corporate waste failed to adequately plead demand futility. The derivative suit alleged that the company's board-approved $135 million donation to the University of Macau's development foundation represented an improper attempt to influence the Macau government to expedite approval of an application for a land concession agreement to build a new casino resort. The Ninth Circuit agreed with the District Court that the facts in the complaint failed to support a reasonable inference that a majority of the directors either were beholden to a director who lacked independence or faced a substantial likelihood of personal liability for approving the donation.

- **Bristol Meyers Squibb Co.** – On August 3, 2016, an investor filed a lawsuit in New York state court against the directors of BMS, alleging that they ignored red flags that the company's representatives were making improper payments to healthcare professionals to increase prescription sales. This suit followed BMS's October 2015 resolution with the SEC outlined in our 2015 Year-End FCPA Update. Gibson Dunn represented BMS in its settlement with the SEC.

- **Avon Products, Inc.** – This derivative action brought by shareholders against the company--discussed most recently in our 2015 Year-End FCPA Update--received final approval in the Southern District of New York on August 25, 2016. The $62 million settlement includes $11.2 million in attorneys' fees. On September 22, one investor filed a notice of appeal of the court's approval of the settlement. Avon investors demanded that the objector post a bond to continue his appeal, and a decision on that motion remains pending. As discussed in our 2014 Year-End FCPA Update, Avon resolved FCPA charges with DOJ and the SEC for a combined $135 million in December 2014.

- **Petróleo Brasileiro S.A. – Petrobras** – As noted in our 2015 Year-End FCPA Update, a number of lawsuits and one putative class action were filed against Petrobras arising from its alleged involvement in the Operation Car Wash scandal in Brazil. The plaintiffs alleged that in its public filings, Petrobras misrepresented its financial condition, financial controls, and ethical practices. On February 2, 2016, the Honorable Jed Rakoff of the U.S. District Court for the Southern District of New York certified two classes of investors: one making claims under the Exchange Act and the other making claims under the Securities Act. On June 15, the U.S. Court of Appeals for the Second Circuit ruled that it would hear an interlocutory appeal on the issue of class certification. Oral argument was held on November 2 and focused on whether Judge Rakoff had cited a practical way to distinguish which investors were party to a "domestic transaction" and thereby subject to the U.S. securities laws pursuant to the Supreme Court's decision in *Morrison v. National Australia Bank*, 561 U.S. 247 (2010). The Second Circuit has not yet ruled on the appeal. In October 2016, Petrobras reached a confidential settlement with four individual actions that had been part of the multi-district litigation pending before Judge Rakoff. In November 2016, Petrobras settled another 11 individual actions.

- **Och-Ziff Capital Management Group LLC** – On November 17, 2016, plaintiffs in the *Menaldi* shareholder putative class action in the U.S. District Court for the Southern District of New York filed a second amended complaint against Och-Ziff. The second amended complaint asserts claims under Sections 10(b) and 20(a) of the Exchange Act and alleges that information regarding the SEC's and DOJ's FCPA investigations, which as discussed above were settled in September 2016, was omitted from Och-Ziff's quarterly and annual reports between November 18, 2011 and April 11, 2016. Och-Ziff's motion to dismiss the second amended complaint is due in January 2017. Gibson Dunn represents Och-Ziff in this lawsuit.

- **Platform Specialty Products Corp.** – On December 8, the Honorable Donald Middlebrooks of the U.S. District Court for the Southern District of Florida granted defendants' motion to dismiss an FCPA-related securities class action against Platform and several of its officers and directors, including Wayne Hewett, former President of Platform, who is represented by Gibson Dunn. In March 2016, Platform disclosed that it had discovered certain third-party payments in West Africa that may be illegal or otherwise inappropriate. At the same time, Platform announced that it was conducting an internal investigation and had voluntarily reported the matter to DOJ and the SEC. On September 7, the defendants filed their motions to dismiss based on the plaintiffs' failure to adequately plead falsity, scienter, or loss causation. The Court found that the plaintiffs failed to adequately plead a material misrepresentation/omission or scienter sufficient to state a claim under Sections 10(b) and Rule 10b-5 of the Exchange Act. Because the plaintiffs failed to plead a primary violation of Section 10(b), they also failed to plead a violation of Section 20(a). The plaintiffs were allowed the opportunity to file a second amended complaint, but declined and instead dismissed the action with prejudice.

**Dodd-Frank Whistleblower Litigation**

We discussed above the intersection between the FCPA and the Dodd-Frank whistleblower provisions in enforcement matters. Another way in which these statutory regimes come together is in civil lawsuits brought by former employees claiming that they were fired or otherwise discriminated against in their employment based on protected whistleblower activity, in violation of the anti-retaliation provisions of Dodd-Frank. Examples from 2016 include:

- **Bio-Rad Laboratories, Inc.** – This lawsuit brought by former general counsel Sanford S. Wadler presents the knotty privilege question of the evidence that can be used by a company's former top lawyer against his or her former client. On October 21, 2016, Bio-Rad moved to exclude from evidence four categories of information: (1) Wadler's testimony that may be based on information he learned in the course of his service as general counsel; (2) other lawyers' testimony regarding the company's confidential information; (3) any reference to or introduction into evidence of the company's attorney-client privileged information; and (4) all questions and responses likely to elicit attorney-client privileged information from any witness or confidential information from any lawyer-witness. Of course, without this evidence, the former general counsel would have little left to prosecute his retaliation claim. The issue presented was thus programmatically significant enough to the SEC that it filed an *amicus curiae* brief in support of Wadler. In a December 20, 2016 opinion, the Honorable Joseph C. Spero denied Bio-Rad's motion to exclude the evidence

based on his finding that the motion did not comport with the Court's scheduling order. Nevertheless, proceeding to the merits, Magistrate Judge Spero found that the federal common law permits the introduction of otherwise privileged information in evidence if it is necessary to establish the retaliation claims of an in-house attorney, that the California ethics rules on maintaining privilege are preempted by SOX's Part 205 reporting "up the ladder" rules, and that Bio-Rad had itself waived privilege by the manner in which it defended the case, including by permitting a presentation to DOJ and the SEC to be attached as an exhibit to the complaint (even though it was filed under seal) and by filing affidavits of senior executives detailing their interactions with Wadler. Trial is currently set for January 31, 2017.

- ***Teva Pharmaceutical Industries Ltd.*** – Former Manager of Internal Controls Keisha Hall sued Teva in the U.S. District Court for the Southern District of Florida alleging that she was wrongfully terminated for cooperating in the DOJ/SEC FCPA investigation of her former employer. On September 30, 2016, the Honorable Beth Bloom granted summary judgment in Teva's favor, holding that Hall could not demonstrate a causal connection between her termination and the protected activity. Hall has appealed this decision to the U.S. Court of Appeals for the Eleventh Circuit.

### Monitor Candidate FOIA Lawsuit

On December 9, 2016, a journalist for *Just Anti-Corruption* filed a Freedom of Information Act ("FOIA") lawsuit in the U.S. District Court for the District of Columbia challenging DOJ's failure to respond to his request to release the names of corporate compliance monitor candidates nominated by 15 companies that resolved FCPA charges with a monitorship requirement, as well as information concerning the DOJ committee responsible for evaluating these nominations and making the ultimate selection. As of the publication of this update, DOJ has not yet filed its answer or other responsive pleading.

## 2016 INTERNATIONAL ANTI-CORRUPTION DEVELOPMENTS

### ISO 37001

On October 14, 2016, the International Organization for Standardization ("ISO") published the long-anticipated ISO 37001, *Anti-bribery management systems – Requirements with guidance for use*, a standard designed to help companies mitigate bribery-related risks. Intended to "help prevent, detect and deal with bribery . . . using a series of related measures and controls," ISO 37001 promulgates standards related to policies and procedures, tone at the top, the compliance function, training, risk assessments, due diligence, internal controls, reporting and investigations, and continuous monitoring.

These areas will be familiar to our readership as well-recognized components of an effective anti-corruption compliance program. As ISO recognizes, the requirements "are generic and are intended to be applicable to all organizations," and like any effective anti-corruption compliance program should be implemented in a risk-based manner to address companies' specific circumstances. Given its recent publication, it is not yet clear what will be the value of a 37001 certification.

### World Bank Enforcement

As discussed in our 2016 Mid-Year FCPA Update, investigations and enforcement by the World Bank's Integrity Vice Presidency ("INT") have continued apace following the Canadian Supreme Court's landmark decision in *World Bank Group v. Wallace*. The ruling, which found that the Bank did not waive its privileges and immunities by voluntarily providing to Canadian law enforcement evidence gathered in its own investigation related to SNC-Lavalin Group Inc., has prompted INT to resume referring cases to law enforcement following a suspension of this practice during the pendency of the *Wallace* decision. A senior INT official recently stated that the outcome in *Wallace* has provided the World Bank with "an opportunity to work much more closely with national authorities." The Bank reportedly made 62 referrals in FY 2016 to national authorities and other multilateral development banks, a 24% increase from FY 2015.

In its most recent fiscal year, the Bank sanctioned 58 entities, including debarring one entity for a staggering 22.5 years. Emphasizing the proactive nature of INT's work, the Bank announced that during the same period it declined to award more than $87 million in funds after identifying pre-award misconduct by would-be project participants.

For a detailed review of World Bank enforcement, please refer to our recent article in the *University of Pennsylvania Journal of Business Law*, "Sanctionable Practices at the World Bank."

### Europe

#### United Kingdom

There have been only two concluded enforcements for foreign bribery offenses in the United Kingdom during 2016 (resulting in nine enforcement actions), and a third in which the Serious Fraud Office ("SFO") has announced the closure of its investigation. This, however, tells only a small part of the story of anti-corruption enforcement in the UK. For a more fulsome picture of the state of play, we encourage our readers to read our forthcoming 2016 Year-End UK White Collar Crime Alert, which will be released on January 11, 2017.

##### *XYZ Limited*

On July 8, 2016, the SFO announced that it had concluded the UK's second deferred prosecution agreement with a company named only as XYZ Limited, a wholly owned subsidiary of a U.S. parent company named only as ABC Companies LLC. According to the public allegations, between 2004 and 2012, XYZ offered or paid bribes to secure 28 contracts in 7 foreign jurisdictions. In 2012, the parent company instituted a new global compliance program, which resulted in the discovery of the bribes. An internal investigation was launched and the company self-reported to the SFO and then continued to cooperate. XYZ Limited has agreed to pay £6.2 million in disgorgement, to pay a £352,000 financial penalty, and to self-report on the status of its anti-corruption compliance program on an annual basis throughout the term of the deferred prosecution agreement (between 2.5 and 5 years). The company is unnamed because of ongoing criminal proceedings against individuals related

to the company. The offenses were a mixture of giving corrupt payments under the Prevention of Corruption Act, as well as the section 1 and section 7 offenses under the Bribery Act.

***F.H. Bertling Limited***

On July 13, 2016, the SFO announced charges against F.H. Bertling, and seven individuals (***Peter Ferdinand***, ***Marc Schweiger***, ***Stephen Emler***, ***Joerg Blumberg***, ***Dirk Juergensen***, ***Giuseppe Morreale***, and ***Ralf Petersen***) pertaining to an alleged conspiracy to "bribe an agent of the Angolan state oil company, Sonangol, to further F.H. Bertling's business operations in that country." The offenses are alleged to have taken place in 2005 and 2006. The Pre-Trial Review is scheduled for July 20, 2017.

***Soma Oil and Gas Holdings Limited***

As reported in our 2016 Mid-Year UK White Collar Crime Update, Soma Oil and Gas was unsuccessful in its attempt to have the SFO's investigation of its alleged conduct in Somalia terminated. However, on December 14, 2016, the SFO announced that it had closed its investigation into Soma Oil and Gas on the basis of "insufficient evidence to provide a realistic prospect of conviction." The SFO noted that, while there were "reasonable grounds to suspect the commission of offences involving corruption," the evidence obtained during the investigation would be unlikely to meet the evidentiary burden required to mount a successful prosecution.

***Richard Kingston***

On December 21, 2016, former Sweett Group PLC Managing Director for the Middle East Richard Kingston was convicted of two offenses of destruction of evidence for destroying two mobile phones containing email, texts, and Whatsapp messages pertinent to SFO investigations of Sweett Group. Kingston was sentenced to 12 months' incarceration. As covered in our 2015 Year-End FCPA Update and 2015 Year-End United Kingdom White Collar Crime Update, Sweett Group was itself convicted of a section 7 Bribery Act offense in 2015.

**France**

We covered in our 2016 Mid-Year and 2015 Year-End FCPA updates developments regarding Loi Sapin II, the French anti-corruption legislation proposed by French Finance Minister Michel Sapin in July 2015. On November 8, 2016, France's National Assembly adopted a final version of the law, which includes (1) the creation of a French Anti-Corruption Agency, (2) mandated compliance programs for companies that meet certain size and profitability requirements, (3) strengthened whistleblower protections, (4) extraterritorial application of the anti-corruption laws to targets that carry on all or part of their business in France, and (5) the introduction of a deferred prosecution agreement mechanism. The provisions became effective on November 10, 2016, with the exception of Article 17--mandating compliance programs for certain companies--which will enter force in May 2017.

For a detailed analysis of Loi Sapin II, please refer to our separate client alert: New French Anti-Corruption Regime.

**Germany**

On July 13, 2016, the German federal cabinet passed a bill to comprehensively reform the public recovery of criminal assets (*Entwurf eines Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung*). The bill, which still needs to pass both German legislative bodies (*Bundestag* and *Bundesrat*) before entering into force, would substantially change the process for asset recovery by victims by providing that any kind of asset recovery will now be conducted exclusively by state authorities.

On March 16, 2016, the district court of Bochum issued a notable ruling regarding the seizure of documents from a law firm (*District Court of Bochum, Order from March 16, 2016, file reference 6 Qs 1/16*). In Germany, it is a common practice for companies to designate external attorneys as ombudspersons to ensure that allegations conveyed to an ombudsperson are fully privileged and thus protected from access by state authorities. According to the complaint in this case, the company's ombudswoman, an external attorney, had received relevant information from a whistleblower, but kept it from the state investigators based on a claim of privilege. Upon final seizure of the documentation by the prosecutor, the ombudswoman filed an appeal claiming a violation of the respective statutory restrictions arising from her capacity as an attorney and the whistleblower's trust in her professional confidentiality obligation. The Court ruled that the law did not protect the relationship between the non-accused, anonymous whistleblower and the attorney, because the court noted that the attorney was acting on behalf of the company in her capacity as the ombudswoman, which prevented the establishment of a privileged relationship between her and the whistleblower.

**The Netherlands**

On July 6, 2016, Dutch prosecutors asked a court in Amsterdam to seize more than $330 million in assets belonging to ***Takilant***, a Netherlands-based company alleged to have been used as a front to receive improper payments for ***Gulnara Karimova***, the daughter of the Uzbek President. Dutch prosecutors also asked the court to impose a fine of nearly $5.5 million on Takilant and to confiscate a 6% stake that Takilant held in the Uzbek subsidiary of ***Telia Company AB***. Dutch prosecutors alleged that VimpelCom and Telia made payments to Karimova through Takilant in return for allowing the Uzbek subsidiaries of VimpelCom and Telia to enter and operate in Uzbekistan. On July 20, the Amsterdam court ordered the seizure of approximately $135 million in assets from Takilant, imposed a fine of approximately $1.7 million on Takilant, and ordered Takilant to forfeit its 6% stake in the subsidiary.

**Romania**

Those active in the region will know that Romania's National Anti-Corruption Directorate ("NAD") is making a name for itself with its aggressive approach to anti-corruption investigations. We reported in our 2015 Year-End FCPA Update on the corruption investigation that led to the indictment of then-Prime Minister ***Victor Ponta*** on fraud and corruption charges and his subsequent resignation in

November 2015. In September 2016, NAD prosecutors announced that they were separately investigating allegations that Ponta misused his authority as Prime Minister and head of the Social Democratic Party to arrange for the visit of an international political figure to Romania. Prosecutors allege that, in 2012, Ponta offered Sebastian Ghita, a Romanian businessman, a seat in Parliament in return for Ghita paying more than $200,000 to facilitate the visit. In connection with this matter, in October 2016, prosecutors seized real property belonging to Ponta. In addition to these matters, NAD is actively engaged in numerous anti-corruption investigations implicating U.S. multinationals, with a particular focus on the technology and pharmaceutical industries.

**Switzerland**

Trial began on March 21, 2016 in the Swiss Federal Court in an aggressive case brought by the Swiss Office of the Attorney General against two current and former Gazprom executives, a former director of a subsidiary of ABB Group, and a former director of a subsidiary of Alstom, alleging that the former Alstom and ABB directors bribed the Gazprom executives between 2001 and 2006 in exchange for contracts related to the construction of a gas pipeline from Russia to Germany. Notably, the alleged misconduct did not occur in Switzerland or involve Swiss persons, but nevertheless the prosecution asserted jurisdiction on the basis that portions of the bribes allegedly landed in Swiss bank accounts. On April 1 and July 12, the Court dismissed the charges against all of the defendants. The Court concluded that the Gazprom officers had not been acting as Russian state officials when the alleged bribes were paid.

**Russia**

On June 24, ***Nikita Belykh***--three years into his second term as governor of the Kirov region--was arrested on bribery charges. He has been charged with accepting a €400,000 bribe in exchange for allegedly protecting the business interests of two companies in the forestry industry. Russia's Investigative Committee's spokesperson promptly refuted the notion that this arrest may have been politically motivated. Nevertheless, media outlets have pointed out Belykh's involvement in the alleged embezzlement scheme that led to the trial and incarceration of his former adviser, ***Alexei Navalny***, a prominent political activist and opposition leader, whose conviction was widely derided for its political motivations, before it was eventually vacated by Russia's Supreme Court. Indeed, recent reports suggest that Belykh has received and rejected an offer to be released and placed under house arrest in return for providing testimony against Navalny; however, President Vladimir Putin's press secretary has adamantly repudiated these rumors. Belykh remains imprisoned as he awaits trial.

Additionally, on November 15, the now-former minister of economic development, ***Alexey Ulyukaev***, was arrested for allegedly accepting a $2 million bribe in exchange for his agency's approval of state-owned oil company Rosneft's privatization of the government-owned block of shares of Bashneft, a smaller state-owned oil producer. Ulyukaev has since been placed under house arrest due to concerns about his access to and possible dissemination of government secrets. Various media outlets have linked this arrest to the fact that Ulyukaev voiced his criticism of the government-operated Rosneft's acquisition of a controlling stake in Bashneft, prior to President Putin's approval of the transaction.

### Ukraine

Currently in its second year of operation, the recently created National Anti-Corruption Bureau ("NACB") already appears to be making a difference. A report published by the agency showed that, as of July 29, 2016, the NACB was involved in 194 active proceedings, had issued 34 indictments, and had secured 2 convictions. The aggregate value of the illicit activities investigated by the NACB exceeded 23 billion hryvnias (approximately $900 million), and these investigations led to the seizure of approximately $75.5 million in cash and of the same amount in securities.

As further evidence of the effects of anti-corruption reforms in Ukraine, government officials had submitted more than 100,000 declarations of personal assets and earnings by October 31, as required by a recently instituted law. Although this constitutes just over a third of the intended yield (there are around 300,000 government officials in Ukraine), 417 of the 423 active members of Ukraine's parliament submitted declarations, as did President Petro Poroshenko. Despite some concerns about the accuracy and completeness of some submissions, this mandatory declaration procedure certainly has resulted in increased transparency, offering the public and enforcement agency an unprecedented opportunity to scrutinize the sources and reasonableness of assets and earnings declared by Ukraine's government officials. Indeed, based on the e-declarations, the NACB has recently launched criminal investigations against several government officials, including judges, for possible illegal enrichment.

## The Americas

### Argentina

The multitude of anti-corruption investigations engulfing former President ***Cristina Fernández de Kirchner***, covered in our 2016 Mid-Year FCPA Update, have continued and indeed expanded over the past six months. In August 2016, a federal judge ordered the reopening of a criminal complaint that accuses Fernández of having conspired to derail an investigation into the deadly 1994 bombing of the Israel-Argentina Mutual Association. The prosecutor who brought a complaint with similar allegations in a different case died under unusual circumstances in early 2015, the night before he was to testify about Fernández's alleged deal to conceal Iran's involvement in exchange for favorable trade agreements. The Federal Criminal Appeals Court has rejected multiple efforts to reopen the late prosecutor's case. Fernández also is implicated in potential irregularities and money laundering related to public works contracts awarded during her presidency. In October, she was subpoenaed to testify in an ongoing case against ***Lázaro Báez***, a construction baron from Patagonia who investigators believe overbilled on the government contracts he was awarded during Fernández's administration. In late December 2016, Fernández and others alleged to be involved were indicted on charges of corruption related to the public works contracts awarded to Báez. In connection with the charges, under which Fernández could face four to ten years in prison, a federal judge ordered approximately $6.4 million in Fernández's assets frozen. Fernández has denied all wrongdoing.

In an effort to further combat graft, in October 2016 the National Congress took up a series of proposed laws that would impose heavy sanctions on businesses that commit public-sector corruption. Argentinian law historically has punished individuals involved in corruption, but not

companies. The proposed laws would create fines for businesses of up to 20% of their gross annual income, or up to 10 years of disbarment, among other penalties, but also would allow for reduced punishments for companies that cooperate with ongoing investigations or take steps to reduce the possibility of future corruption. Notably, the law is drafted to allow for more severe punishments if high-ranking officials within a company were aware of the corrupt practices, or if a company's corrupt practices led, directly or indirectly, to grave harm to the community or environmental damage. The proposed laws will be considered in the coming months.

**Brazil**

Brazilian authorities continue to pursue Operation Car Wash, the largest corruption investigation in the nation's history. We have covered Operation Car Wash extensively in previous updates, and the investigation remains front-page news across Latin America. To date, the investigation into alleged corruption involving contracts with state-owned oil company ***Petrobras*** and other state-owned companies has resulted in 1,434 investigative proceedings and has led to 120 convictions, with sentences totaling more than 1,257 years in prison.

Since our 2016 Mid-Year FCPA Update, Brazilian authorities have carried out six new phases of the investigation. Continuing the recent focus, these phases centered on former politicians, including ***Antonio Palocci Filho*** (former Chief of Staff and Finance Minister), ***Sergio Cabral*** (former governor of Rio de Janeiro state), and ***Guido Mantega*** (former Finance Minister). Perhaps most notably, former President ***Luiz Inacio Lula da Silva*** faces five separate indictments, with charges including corruption, influence peddling, and money laundering. As discussed above, in December 2016, Brazilian petrochemical company Braskem S.A. and parent company Odebrecht S.A. finalized a multi-billion-dollar resolution with Brazilian, Swiss, and U.S. authorities.

Operation Car Wash has received extensive popular support within Brazil, as well as international acclaim. In November 2016, Transparency International selected the Car Wash Task Force as the winner of its "2016 Anti-Corruption Award." Nonetheless, the investigation may face increasing resistance from elected officials. On November 30, 2016, the Chamber of Deputies--during an overnight session--overwhelmingly passed an amended version of the Federal Public Ministry's "Ten Measures Against Corruption," a bill intended to increase the legal tools available to prosecute individuals and entities for corruption. The Chamber of Deputies, however, passed a version of the bill that, among other things, limits the amount of fines, reduces successor liability, and--most controversially--introduces "abuse of authority" liability for prosecutors and judges. The "abuse of authority" provision prompted protests across Brazil, with the Car Wash Task Force threatening to collectively resign if the amended bill is signed into law. On December 14, 2016, Supreme Court Minister Luiz Fux issued an injunction ordering the legislature to debate the bill in its original form.

**El Salvador**

In September 2016, El Salvador Attorney General Douglas Meléndez announced the creation of a special anti-impunity unit within the Attorney General's Office to investigate high-profile corruption cases. The unit reportedly will receive technical assistance, training, and, possibly, financial support

from the U.S. State Department. Unlike the International Commission Against Impunity in Guatemala and the Mission to Support the Fight Against Corruption and Impunity in Honduras, which both are international organizations, the anti-impunity unit is composed solely of Salvadoran prosecutors.

Over the past year, the Attorney General's Office and the Supreme Court have pursued several corruption investigations of high-ranking government officials in El Salvador. Most notably, former President ***Elías Antonio "Tony" Saca González***, who held office from 2004 to 2009, and six of his associates--former Communications Secretary ***Julio Rank***, former Youth Secretary ***César Funes***, Saca's former private secretary ***Elmer Charlaix***, and former staffers ***Pablo Gómez***, ***Francisco Rodríguez Arteaga***, and ***Jorge Alberto Herrera***--were detained in October 2016 in connection with allegations that they were involved in diverting $246 million in government funds into private accounts controlled by the secretaries. They face charges including embezzlement, illicit association, and money laundering. In November, after a three-day preliminary hearing, Judge Nelly Pozas ordered the defendants' assets seized and ruled that all seven should continue to be incarcerated pending trial. Saca and his wife, ***Ana Ligia de Saca***, also are the subjects of a civil investigation for illicit enrichment that began in February 2016 after an audit during which Saca was unable to explain the source of at least $5 million acquired during his presidency.

**Mexico**

In July 2016, after more than a year's wait, Mexico enacted implementing legislation in connection with 14 different constitutional amendments passed by the Congress and majority of federated states in May 2015 that were designed to overhaul the country's statutory framework for combatting corruption and establish a National Anti-Corruption System. Further, on July 18, 2016, Mexican president Enrique Peña Nieto signed several new statutes into law, including the General Law of the Anti-Corruption System, the General Law of Administrative Responsibilities, and the Federal Accounting and Accountability Law, and amended many more. This package of reforms represents a systemic change in the way Mexican authorities investigate, prosecute, and punish corruption.

Under the General Law of Administrative Responsibilities, companies can be held liable for a variety of corruption-related offenses, including bribing government officials and hiring former public officials before their one-year "cooling off" period has expired. Penalties for violating these provisions include fines of twice the amount of the benefit obtained (or approximately $6 million if there is no monetary benefit), debarment, suspension of activities, dissolution, and damages. Importantly, the law allows corporate entities to mitigate damages if they have in place an adequate "integrity policy," which must consist of several different internal controls, including a company manual covering the firm's organization and procedures and delineating the responsibilities and chain of command; a code of conduct; adequate and effective control, monitoring, and auditing systems; adequate systems for addressing whistleblower complaints; compliance training; and human resources policies that "prevent the hiring of individuals who could pose a threat to a company's integrity." Unlike the balance of reforms President Peña Nieto signed into law on July 18, 2016, the General Law of Administrative Responsibility will not take effect until July 2017.

## Asia

### China

Four years in, China's sweeping anti-corruption campaign continues to net high-profile officials and grab headlines. In October, Chinese courts handed down corruption convictions of former National Energy Administration official ***Wei Pengyuan***, former Yunnan and Qinghai Communist Party boss ***Bai Enpei***, and former state-owned coal company Longmay Group executive ***Yu Tieyi***, for receiving bribes of RMB 212 million (approximately $31.6 million), RMB 247 million (approximately $37 million), and RMB 306 million (approximately $45.8 million), respectively. Each received a suspended death penalty with no possibility for parole under the country's newly amended Criminal Law. In the Northeastern province of Liaoning, 45 National People's Congress representatives and 523 provincial legislature representatives lost their posts in a bribery and vote-buying scandal.

Outside its borders, China continues to pursue mutual cooperation and assistance with other nations on anti-corruption efforts, including pushing for the adoption of a G20 High-Level Principles on Cooperation on Corruption Fugitives and Related Asset Recovery and the establishment of an anti-corruption research center in Beijing that will focus on fugitive retrieval and asset recovery. In November, Assistant Attorney General Leslie Caldwell confirmed that DOJ is cooperating with Beijing on several criminal cases, including a corruption case. The return of former Wenzhou deputy mayor ***Yang Xiuzhu***, China's most wanted economic fugitive, from the United States was billed as an example of China's success in extraditing corrupt officials, even in the absence of formal extradition treaties.

The Chinese Communist Party's ("CCP") key role in driving anti-corruption efforts is likely to be strengthened with the planned creation of the State Supervision Commission, a new anti-corruption government agency that will pilot in Beijing, Shanxi, and Zhejiang. China already has governmental anti-corruption bodies, including the Ministry of Supervision under the State Council, but the Ministry's powers only reach the executive branch and do not cover officials in the legislative or judicial branches or public servants employed at SOEs or other public sector entities, such as hospitals. The CCP's Central Commission for Discipline Inspection ("CCDI"), on the other hand, only covers Party members. The new Commission will be established under the National People's Congress, and its enforcement scope will cover all public servants, regardless of branch of government or Party membership. The Commission will share staffing and offices with the CCDI, essentially expanding the CCDI's reach and turning the party watchdog into a national watchdog.

### India

Fallout from the FCPA enforcement action against Louis Berger International, Inc. (discussed in our 2015 Year-End FCPA Update) continues to be felt in India. In October 2016, former Louis Berger employees and public officials from the State of Goa in India were charged by police authorities in India. India's Central Bureau of Investigation also continued its investigations in the AgustaWestland bribery scandal (discussed in our 2016 Mid-Year FCPA Update), including with the arrest of a former Air Chief Marshal of the Indian Air Force (***Shashindra Pal Tyagi***) and two others.

The Indian Government also introduced measures in 2016 to tackle issues of unaccounted income, otherwise known as "black money." Most prominently, this included a November 2016 announcement that Indian 500 and 1,000 rupee bank notes would cease to be legal tender. Residents were provided until December 31, 2016, to exchange the old denominations for new bank notes issued by the government. This measure was aimed at curbing the rising incidence of fake notes and the hoarding of unaccounted wealth.

Finally, long-pending amendments to the Indian Prevention of Corruption Act, 1988 have been approved by the Indian Government and are expected to be debated in the Indian Parliament in 2017. The Prevention of Corruption (Amendment) Bill, 2013, which has been in the works for three years, now incorporates recommendations from the Law Commission of India and the Select Committee of the Upper House of the Indian Parliament. Key amendments include:

- Specific offense and fines for commercial organizations engaging in bribery in India;
- Specific offense for giving or offering a bribe (with certain safeguards), whereas the current version of the law only prohibits aiding and abetting the acceptance of a bribe;
- Directors, managers, secretaries, or other officers of the commercial organization will be liable for punishment (three-to-seven years of imprisonment) and fines if the offense is committed with the consent or connivance of such director, manager, secretary, or other officer of the commercial organization; and
- Potential liability of parent companies for acts committed by subsidiaries.

**South Korea**

Public corruption and anti-corruption efforts continued to dominate South Korean headlines throughout 2016. Most prominent was the impeachment of President ***Geun-Hye Park*** amidst allegations of influence peddling and corruption. In October, media outlets began reporting that President Park, already suffering from historically low approval ratings, was under investigation for providing confidential government documents and other information to ***Soon-Sil Choi***, a long-time personal friend of Park. The investigation also found evidence that Choi and government officials affiliated with President Park pressured South Korea's largest companies to make large donations to charitable organizations suspected of funneling money back to President Park's allies. The investigation prompted the opposition Democratic Party to submit a bill for President Park's impeachment. After a series of Parliamentary hearings, including a day-long grilling of the heads of Korea's eight largest conglomerates, the bill passed decisively on December 9, resulting in the impeachment of President Park. If the Constitutional Court upholds the results of the vote, President Park will become the first elected leader in the history of the country to be successfully impeached.

In enforcement news, on October 19, 2016, the Seoul Prosecutor's Office indicted 22 individuals affiliated with Lotte Group, including the company's Chairman, ***Dong-Bin Shin***, as well as two group companies. The charges stem from wide-ranging allegations of fraud, embezzlement, and bribery

involving Lotte's founding Shin family and several of the company's entities. In the wake of the scandal, Lotte Group's Vice Chairman, who was scheduled for questioning in connection with the investigation, was found dead in an apparent suicide.

Anti-corruption activists scored a landmark victory on the legislative front with the passage of the Improper Solicitation and Graft Act (Act No. 13728, March 27, 2015), which came into force on September 28, 2016. The Act prohibits a wide variety of listed acts, including solicitation (direct or through a third party) of any public official to act in violation of their duties with respect to granting permits and licenses, assessing punishments and fines, granting government employment, awarding government contracts, and settling legal matters.

#### The Philippines

***Gloria Macapagal Arroyo***, who served as the president of the Philippines from 2001 to 2010, scored a major victory in her long-running corruption case when the Supreme Court of the Philippines approved her application for dismissal. This case was initially brought in the Sandiganbayan, the country's anti-graft tribunal, by the Ombudsman in July 2012. The Ombudsman had accused Arroyo of misusing funds of the Philippine Charity Sweepstakes Office from 2008 to 2010. Arroyo pleaded not guilty and alleged that the charges were politically motivated.

In July 2016, the Supreme Court held that there was insufficient evidence and dismissed the charges. The Court ordered her release from a military hospital, where she had been detained since October 2012. The Ombudsman has filed a motion for the Supreme Court to reconsider its decision and further has commenced a new investigation against Arroyo based on the same conduct, but alleging violations during the 2004 to 2007 time frame.

### Middle East and Africa

#### Israel

The second half of 2016 saw the first-ever prosecution for violations of Israel's law prohibiting the bribery of foreign public officials (Article 291A of the Penal Law 1977). Israeli civil registry systems developer ***Nikuv International Projects Ltd.*** was charged in November 2016 after allegedly paying hundreds of thousands of dollars through its local agent to bribe a Lethoso official (Former Home Affairs Principal Secretary ***Retšelisitsoe Khetsi***) for assistance in securing government business worth millions of dollars without going through a public tender. Nikuv agreed to plead guilty and pay an NIS 4.5 million fine (approximately $1.18 million), in addition to agreeing to cooperate with Lesotho law enforcement and to implement an anti-corruption compliance program. Previously, in 2013, Lesotho authorities charged Khetsi with abuse of power, bribery, and corruption crimes and also charged Nikuv's agent for facilitating the payments to Khetsi. The case appears to be pending before the courts.

In another Israeli enforcement action, billionaire investor ***Beny Steinmentz*** of BSG Resources was arrested by Israeli authorities on December 16, 2016 on suspicion of paying bribes to Guinean officials and money laundering. He was placed under house arrest after posting bail of more than $20

million. Soon thereafter, Israeli police arrested ***Asher Avidan***, the former head of BSG Resources' operations in Guinea. These developments followed shortly on the heels of the December 13, 2016 arrest by U.S. authorities of ***Mahmoud Thiam***, the former Minister of Mines and Geology of the Republic of Guinea, on money laundering charges associated with the alleged receipt of bribes from a Chinese company to secure valuable investment rights in Guinea.

**CONCLUSION**

As has become our semiannual tradition, over the following three weeks Gibson Dunn will be publishing a series of enforcement updates for the benefit of our clients and friends as follows:

- Wednesday, January 4: 2016 Year-End Update on Corporate NPAs and DPAs;
- Thursday, January 5: 2016 Year-End False Claims Act Update;
- Monday, January 9: 2016 Year-End Criminal Antitrust and Competition Law Update and 2016 Year-End Activism Update;
- Tuesday, January 10: 2016 Year-End UK Employment Update
- Wednesday, January 11: 2016 Year-End FDA and Health Care Compliance and Enforcement Update – Drugs and Devices and 2016 Year-End UK White Collar Crime Update;
- Thursday, January 12: 2016 Year-End Securities Enforcement Update and 2016 Year-End Securities Litigation Update;
- Friday, January 13: 2016 Year-End German Law Update;
- Tuesday, January 17: 2016 Year-End E-Discovery Update;
- Wednesday, January 18: 2016 Year-End Sanctions Update;
- Thursday, January 19: 2016 Year-End Aerospace Update;
- Monday, January 23: 2016 Year-End Government Contracts Litigation Update;
- Wednesday, January 25: 2016 Year-End Health Care Compliance and Enforcement Update – Providers;
- Friday, January 27: 2016 Cybersecurity/Privacy Update (United States); and
- Monday, January 30: 2016 Cybersecurity/Privacy Update (European Union).

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