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FCPA:
2016 YEAR IN REVIEW &
2017 ENFORCEMENT PREDICTIONS

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INTRODUCTION

U.S. Foreign Corrupt Practices Act (FCPA) enforcement has never been more aggressive or coordinated. Both in terms of settlement amounts and number of enforcement actions, 2016 was a record-breaking year. It is no longer uncommon for companies to pay in excess of \$100 million in civil and criminal penalties to resolve FCPA actions. Statistics from 2016 include:

- ✦ 53 combined FCPA enforcement actions with U.S. enforcement agencies, which includes Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) enforcement actions brought against corporations and individuals
- ✦ 27 corporations paid a total of \$2.48 billion to resolve the enforcement actions
- ✦ 5 corporate fines were in excess of \$100 million
- ✦ 27 individuals charged with FCPA-related offenses
 - ▶ 10 individuals entered into criminal guilty pleas for violations of the FCPA
 - ▶ 2 individuals were criminally charged with FCPA violations but have not yet resolved the charges
 - ▶ 15 individuals settled civil FCPA charges brought by the SEC
- ✦ 12 companies received declinations
 - ▶ 5 companies received formal declinations of prosecution, which were published by the DOJ or SEC (2 of these companies received “declinations with disgorgement,” a type of FCPA resolution never seen before passage of the DOJ’s pilot program)
 - ▶ 7 companies disclosed in public filings they received declinations from the DOJ, the SEC or both agencies



FCPA ENFORCEMENT STATISTICS & SIGNIFICANT 2016 CORPORATE ENFORCEMENT ACTIONS

CORPORATE RESOLUTIONS

Corporate Settlement Amounts from 2012 to 2016		
Year	Number of Corporate Resolutions	Aggregate Settlement Amount (approximate)
2016	27	\$2.48 billion
2015	11	\$133 million
2014	10	\$1.56 billion
2013	12	\$731.1 million
2012	12	\$259.4 million

FOUR LARGEST RESOLUTIONS IN 2016 (IN CHRONOLOGICAL ORDER)

- **VimpelCom.** In February 2016, Dutch telecommunications company VimpelCom Ltd. entered into a \$795 million global foreign bribery resolution with U.S. and Dutch regulators. The company was accused of having paid more than \$114 million to a government official in Uzbekistan, falsely recording the bribes on its books and records, and laundering payments through bank accounts around the world. The settlement included a U.S. criminal fine of more than \$230 million and \$375 million in disgorgement to the SEC and Dutch officials. The United States also pursued an additional \$850 million forfeiture action for corrupt proceeds derived from the alleged scheme. In prosecuting this case, the DOJ worked with and received assistance from law enforcement authorities in the Netherlands, Sweden, Switzerland, Latvia, Belgium, France, Ireland, Luxembourg and the United Kingdom - an example of the increasing role cross-border cooperation is playing in anti-corruption enforcement.
- **Och-Ziff.** In September 2016, U.S. hedge fund Och-Ziff Capital Management Group agreed to pay a total \$412 million to resolve allegations that it had bribed government officials in the Democratic Republic of the Congo and Libya and had improperly recorded the payments in its books and records. As a component of the resolution, the company agreed to retain a corporate compliance monitor for three years and to continue cooperating with the U.S. investigation, including facilitating interviews of relevant individuals. The company's CEO also agreed to pay \$2.2 million to resolve books and records SEC charges.

- **Odebrecht / Braskem.** In the largest-ever global anti-corruption resolution, in December 2016, Brazilian construction and petrochemical giants Odebrecht S.A. and Braskem S.A. agreed to pay a combined penalty of \$3.5 billion to U.S., Swiss and Brazilian regulators. The fines were limited only by each company's ability to pay. The scheme involved hundreds of millions of dollars in improper payments to foreign government officials in exchange for preferential rates for purchasing raw materials, contracts, and favorable legislation and government programs to reduce tax liabilities. The fines paid to the United States represented only a small percentage of the overall amounts, with the bulk going instead to foreign authorities. The allocation of the assessed penalties highlights the degree of international coordination involved in this settlement.

Notably, at the time of the violations, the companies reportedly did not have in place an anti-corruption compliance program or adequate internal controls. As part of the settlements, the firms either disciplined or terminated employees involved in the misconduct, adopted heightened controls and anti-corruption protocols, and increased compliance resources and personnel. They also agreed to retain an independent corporate compliance monitor for three years, to continue to cooperate with ongoing investigations and to facilitate interviews with relevant individuals.

- **Teva Pharmaceutical.** In December 2016, Teva Pharmaceutical Industries, Ltd., the world's largest manufacturer of generic drugs, entered into a \$519 million FCPA resolution. The settlement included \$236 million in disgorgement, the second highest in FCPA history. The conduct involved allegations that the company made improper payments to government officials in Russia and Ukraine, and government doctors in Mexico, to increase drug sales and obtain requisite government approvals. U.S. regulators also alleged that the company had intentionally failed to implement internal controls that may have prevented bribery. As with the other major settlements in 2016, Teva committed to retain an independent corporate monitor for three years and to cooperate with the government's ongoing investigation, including by facilitating interviews with relevant individuals.

INDIVIDUAL RESOLUTIONS

Individuals also face potential criminal and civil exposure for FCPA violations. In 2016, 27 individuals were charged with FCPA-related offenses. Ten individuals entered into criminal guilty pleas, two individuals were criminally charged but have not yet resolved the charges and 15 individuals settled civil FCPA charges with the SEC. These numbers make clear that enforcement agencies continue to focus on individual prosecutions for corporate wrongdoing.



2016 DEVELOPMENTS & TRENDS

CORPORATE RESOLUTION PENALTIES ARE AT AN ALL-TIME HIGH

After a temporary lull in 2015, enforcement actions in 2016 resulted in record-breaking resolutions and penalties. In 2016, the DOJ and SEC collected approximately \$2.48 billion in settlement amounts in 53 combined FCPA enforcement actions, including DOJ and SEC actions against corporations and individuals. In five of last year's 27 corporate resolutions, corporate penalty amounts exceeded \$100 million. As a point of comparison, in 2015, the DOJ and SEC collected approximately \$133 million in settlement amounts in 20 combined FCPA enforcement actions, resulting in 11 corporate resolutions.

DECLINATIONS OF PROSECUTION, THE FCPA PILOT PROGRAM AND ANTI-CORRUPTION COMPLIANCE PROGRAMS

Although 2016 was certainly a banner year in terms of enforcement actions, equally noteworthy was the uptick in the number of declinations. In 2016, there were 12 declinations of prosecution in FCPA matters. The increase in declinations of prosecution can be traced, at least in part, to the one-year "FCPA Pilot Program" launched by the DOJ in April 2016.

The DOJ issued five published declinations under the Pilot Program last year, of which, two were "declinations with disgorgement," a new category of resolution. In addition to the five publicly released declination letters issued under the Pilot Program, the following seven corporations disclosed they have received declination letters from either the DOJ, the SEC or both agencies: (1) Xylem Inc., (2) Key Energy Services, Inc., (3) Owens-Illinois Inc., (4) Cisco Systems Inc., (5) Harris Corporation, (6) GlaxoSmithKline plc, (7) Grifols SA, (8) Quanta Services Inc. (9) and Fairmount Santrol Holdings Inc.¹ To be clear, a declination of prosecution is not a finding by an enforcement agency that an FCPA violation did not occur. To the contrary, in the majority of cases, companies receiving declinations did engage in conduct that could be considered a violation of the FCPA. Oftentimes, it is the relative strength of an existing compliance program that puts companies on the path to avoidance of prosecution.

Under the Pilot Program, companies that voluntarily self-disclose FCPA misconduct, fully cooperate and engage in appropriate remediation, may be eligible for a declination of prosecution or, in the alternative, significant penalty and fine reductions. As noted, in 2016, the DOJ has published five declinations of prosecution made pursuant to the Pilot Program: Nortek, Akamai Technologies, Johnson Controls, NCH Corporation (NCH), and HMT LLC (HMT).²

In both the NCH and HMT declinations, the companies were required to disgorge improperly-obtained profits.³ A DOJ declination with an accompanying disgorgement requirement constitutes a never-before-seen category of resolution.

¹ See The FCPA Blog post "The 2016 FCPA Enforcement Index" (Jan. 3, 2017) ("The FCPA Blog 2016 Enforcement Index"), available at <http://www.fcpablog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html>.

² DOJ Declination Letter to Nortek, Inc. (June 7, 2016) (Nortek Declination Letter), available at <https://www.justice.gov/criminal-fraud/file/865406/download>; DOJ Declination Letter to Akamai Technologies, Inc. (June 7, 2016) (Akamai Declination Letter), available at <https://www.justice.gov/criminal-fraud/file/865411/download>; DOJ Declination Letter to Johnson Controls (June 21, 2016) (Johnson Controls Declination Letter), available at <https://www.justice.gov/criminal-fraud/file/874566/download>; DOJ Declination Letter to HMT, LLC (Sept. 29, 2016) (HMT Declination Letter), available at <https://www.justice.gov/criminal-fraud/file/899116/download>; and DOJ Declination Letter to NCH Corporation (Sept. 29, 2016) (NCH Declination Letter), available at <https://www.justice.gov/criminal-fraud/file/899121/download>.

³ It is not uncommon for DOJ to publish a declination of prosecution accompanied by a parallel SEC enforcement action requiring disgorgement of ill-gotten profits. NCH and HMT, however, are privately-held companies not subject to the SEC's FCPA jurisdiction. That DOJ required these companies to disgorge profits - and admit to a set of facts contemplating violations of the FCPA - make these declinations noteworthy.

As mentioned above, seven declinations of prosecution apparently arose outside the Pilot Program. Like those issued under the parameters of the Pilot Program, these declinations reaffirmed what government enforcers look for in deciding whether or not to charge a company. A robust pre-existing anti-corruption compliance program, remediation and disclosure can pay dividends for a company in the form of a declination or reduced penalties. These declinations together with the addition of Hui Chen, the DOJ's first dedicated compliance counsel, signal enforcement agencies' heightened expectations regarding a company's pre-existing compliance programs: paper-based, one-size-fits-all programs are no longer sufficient.

For example, both the DOJ (November 2015) and SEC (September 2016) declined to prosecute the Harris Corporation for FCPA violations related to the payment of \$1 million in bribes to Chinese health officials by one of its employees, Jun Ping Zhang, who was individually prosecuted for FCPA violations. In determining not to bring charges against the company, the government expressly took into account the strength of Harris' anti-corruption compliance program stating: "[t]he SEC determined not to bring charges against Harris, taking into consideration the company's efforts at self-policing that led to the discovery of Ping's misconduct shortly after the acquisition, prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC's investigation."⁴ Notably, what the government highlighted was not the strength of the company's policies and procedures or other paper-based elements of Harris' program, but rather the mechanisms it had in place to detect and respond to potential violations - "the company's efforts at self-policing" and "thorough remediation" - of misconduct when it did occur.⁵ In so doing, the government has demonstrated the tangible, financial and reputational benefit to companies with an effective compliance program.

Unlike Harris and other companies that earned declinations in 2016, LATAM Airlines Group S.A. (LATAM), a Chilean commercial airline company, failed to properly remediate its compliance problem prior to being investigated, which resulted in a settlement payment of more than \$22 million to the DOJ and SEC in July 2016, including a \$12.75 million criminal penalty. According to the DOJ, even though LATAM cooperated with the DOJ investigation, the company paid a penalty within the U.S. Sentencing Guidelines range instead of receiving a discount off the bottom of the range.

The DOJ stated:

LATAM failed to discipline in any way the employees responsible for the criminal conduct, including at least one high-level company executive, and thus the ability of the compliance program to be effective in practice is compromised.⁶

The conduct at LATAM involved a sham agreement for consulting services. The agent performed no work and instead funneled the money to labor union officials in exchange for lower wages and to not enforce a costly labor rule against the company.⁷

These cases indicate that cooperation, alone, may not result in settlement discounts or a declination of prosecution for a company facing investigation where the underlying facts indicate the company did not properly identify and remediate its compliance problems.

INDIVIDUAL PROSECUTIONS

In 2016, the DOJ and SEC continued to hold individuals accountable for FCPA violations. These decisions to bring enforcement actions against individuals, can, in part, be attributed to the Yates Memorandum. On September 9, 2015, former Deputy Attorney General Sally Yates issued a memorandum to all DOJ offices and U.S. Attorney's Offices, which provided a directive to DOJ attorneys, among other things, to require corporations provide facts regarding culpable individuals in order to receive any cooperation credit.⁸

In 2016, 15 individuals settled civil FCPA charges (compared to two in 2015 and six in 2014), 10 individuals pleaded guilty to FCPA criminal charges (compared to four in 2015 and six in 2014), two individuals were indicted for FCPA criminal charges but have not entered a plea

“ A robust pre-existing anti-corruption compliance program, remediation and disclosure can pay dividends for a company in the form of a declination or reduced penalties. ”

⁴ See SEC Administrative Proceeding File No. 3-17535 (Sept. 12, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78825-s.pdf>.

⁵ *Id.*

⁶ DOJ press release announcing LATAM FCPA settlement (July 25, 2016), available at <https://www.justice.gov/opa/pr/latam-airlines-group-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1275>.

⁷ *Id.*

⁸ A copy of the Yates Memorandum is available at <http://www.justice.gov/dag/file/769036/download>.

agreement (compared to two in 2015 and six in 2014), and two individuals were sentenced (compared to eight in 2015 and one in 2014).⁹ Moreover, by our estimates, in 2016, there were six corporate resolutions with related individual resolutions in 2016 (compared to two per year in 2014 and 2015).¹⁰

Despite the relative uptick in individual enforcement, we are still far from a landscape in which all - or almost all - corporate resolutions have accompanying individual prosecutions, something many commentators predicted following the issuance of the Yates Memorandum. In fact, many of the corporate enforcement actions of 2016 did not include accompanying individual prosecutions.

INCREASED MULTI-JURISDICTIONAL COOPERATION AND ENFORCEMENT

This year was marked by increased multi-jurisdictional cooperation and enforcement in anti-corruption. For example, just in prosecuting the four record-breaking settlements previously discussed, U.S. regulators cooperated with law enforcement authorities from, at a minimum of, Belgium, Brazil, France, Ireland, Latvia, the Netherlands, Luxembourg, Switzerland and the United Kingdom.¹¹

Perhaps the most striking multi-jurisdictional enforcement trend in 2016 was the increased focus on “geographic sweeps.” While the type of industries and violations involved varied wildly, last year’s enforcement actions consistently focused on particular geographies - most notably China, followed by Latin America, Russia and India. More than half of 2016’s corporate FCPA resolutions alleged misconduct involving China. The U.S. regulators’ proclivity for prosecuting Chinese corruption is nothing new, but the marked improvement in their ability to collect and exploit evidence from within that country’s borders is. In light of the number of pending FCPA prosecutions involving China, we do not anticipate this trend to slow in 2017.

“ More than half of 2016’s corporate FCPA resolutions alleged misconduct involving China. ”

Likewise, the continued proliferation of foreign anti-corruption laws and international investigatory bodies, such as the International Foreign Bribery Taskforce (a consortium of U.S., Canadian, Australian and British anti-corruption law enforcement agencies), ensures that multi-jurisdictional information sharing, investigations and prosecutions will continue to some degree into 2017 and beyond. An effective response to this trend (as with the others discussed here) requires global companies subject to the FCPA to not only create and implement robust anti-corruption policies and procedures, but to constantly monitor their effectiveness and fully investigate discovered violations.

CONTINUING EXPANSIVE DEFINITION OF “FOREIGN GOVERNMENT OFFICIAL”

The enforcement actions arising out of multinationals’ pharmaceutical operations in China continue to demonstrate an expansive interpretation of what constitutes a “foreign government official.” This trend carries a particular significance to foreign pharmaceutical companies operating in China, as many hospitals in China qualify as state-owned enterprises (SOEs) for FCPA purposes. As such, the DOJ and SEC consider healthcare professionals (HCPs), such as doctors and other hospital staff, who are employees of state-owned hospitals in China, to be “foreign officials” under the FCPA. In 2016, the SEC brought charges against four pharmaceutical companies involving improper payments to HCPs in China: (1) SciClone Pharmaceuticals, Inc. (SciClone); (2) GlaxoSmithKline plc (GSK); (3) AstraZeneca PLC (AstraZeneca); (4) and Novartis AG (Novartis). Each of these actions relied on an expansive definition of foreign government official as a predicate to the U.S.’s assertion of FCPA jurisdiction.

The SEC brought an administrative action against SciClone, a California-based pharmaceutical company, concerning its operations in China where its sales employees in China are alleged to have provided vacations, gifts, meals, foreign language classes, and entertainment to HCPs, who were employed by state-owned hospitals, in order to influence the number of SciClone products prescribed

9 DOJ Related Enforcement Actions Chronological List, available at <https://www.justice.gov/criminal-fraud/chronological-list>. See also, The FCPA Blog 2016 Enforcement Index; The FCPA Blog post, “The 2015 FCPA Enforcement Index,” (Jan. 4, 2016) (“The FCPA Blog 2015 Enforcement Index”), available at <http://www.fcpablog.com/blog/2016/1/4/the-2015-fcpa-enforcement-index.html>; and The FCPA Blog post, “The 2014 FCPA Enforcement Index,” (Jan. 5, 2015) (“The FCPA Blog 2014 Enforcement Index”), available at <http://www.fcpablog.com/blog/2015/1/5/the-2014-fcpa-enforcement-index.html>.

10 See The FCPA Blog 2016 Enforcement Index, The FCPA Blog 2015 Enforcement Index and The FCPA Blog 2014 Enforcement Index.

11 See DOJ press release announcing VimpelCom global resolution (Feb. 18, 2016), available at <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>; DOJ press release announcing Odebrecht and Braskem global resolutions (Dec. 21, 2016), available at <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

by the HCPs. On February 4, 2016, SciClone agreed to pay \$12.8 million to the SEC to settle SEC's allegations.¹²

The SEC brought similar allegations against Novartis, AstraZeneca and GSK. On March 23, 2016, Novartis paid \$25 million to settle the SEC's allegations that its China-based subsidiaries provided money and gifts to HCPs to boost sales.¹³ On August 30, 2016, AstraZeneca, a U.K.-based global biopharmaceutical company, agreed to pay \$5.5 million, in part, to settle allegations that the sales staff provided improper gifts and payments to HCPs, who were employed by various government entities in China, to increase sales of the company's products.¹⁴ Lastly, on September 30, 2016, GSK agreed to pay a \$20 million civil penalty and agreed to provide status reports about its remediation and compliance programs to the SEC for two years.¹⁵ The SEC alleged that GSK had engaged in a pay-to-prescribe scheme by improperly providing cash, gifts, improper entertainment and shopping excursions to HCPs employed at China's state health institutions.¹⁶

¹² *In the Matter of SciClone Pharmaceuticals, Inc.*, The SEC's Securities Exchange Act of 1934 Release No.77058, Accounting and Auditing Enforcement Release No. 3739, and Administrative Proceeding File No.3-17101, available at <https://www.sec.gov/litigation/admin/2016/34-77058.pdf>.

¹³ *In the Matter of Novartis AG*, The SEC's Securities Exchange Act of 1934 Release No. 77431, Accounting and Auditing Enforcement Release No. 3759, and Administrative Proceeding File No. 3-17177, available at <https://www.sec.gov/litigation/admin/2016/34-77431.pdf>.

¹⁴ *In the Matter of AstraZeneca PLC*, The SEC's Securities Exchange Act of 1934 Release No. 78730, Accounting and Auditing Enforcement Release No. 3798, and Administrative Proceeding File No. 3-17517, available at <https://www.sec.gov/litigation/admin/2016/34-78730.pdf>.

¹⁵ *In the Matter of GlaxoSmithKline plc*, The SEC's Securities Exchange Act of 1934 Release No. 79005, Accounting and Auditing Enforcement Release No. 3810, and Administrative Proceeding File No. 3-17606, available at <https://www.sec.gov/litigation/admin/2016/34-79005.pdf>. See SEC press release, "GlaxoSmithKline Pays \$20 Million Penalty to Settle FCPA Violations" (Sept. 30, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-79005-s.pdf>.

¹⁶ *Id.*



A LOOK FORWARD: 2017 FCPA ENFORCEMENT PREDICTIONS

Looking into our crystal ball for the upcoming year, four key questions arise:

- ✦ Will the larger international community continue to focus on anti-corruption enforcement actions?
- ✦ Will the FCPA Pilot Program be extended?
- ✦ Will we continue to see an aggressive stance from the DOJ and SEC?
- ✦ Will Congress amend the FCPA?

On the international front, we would expect that U.S. regulators will continue to cooperate with their foreign counterparts on anti-corruption enforcement, particularly in light of the recent implementation of numerous new foreign anti-corruption measures. In November 2016, for example, France amended its anti-corruption laws to establish a new anti-corruption agency, expand prosecutorial jurisdiction, require certain mandatory compliance programs, provide greater whistleblower protections and allow for deferred prosecution agreements.¹⁷ Already in early 2017, the U.K. has announced its largest enforcement action under the 2010 Bribery Act, an \$800 million combined global resolution with Rolls Royce.

The DOJ's FCPA Pilot Program is slated to come to an end on April 6, 2017. Nevertheless, in light of the number of settlements deriving from voluntary self-disclosures in 2016,¹⁸ and the DOJ's apparent enthusiasm for affording mitigation credit to cooperating companies, we anticipate the Pilot Program to be extended - perhaps with little change - throughout 2017 and the coming years.

On the U.S. enforcement front, although it is impossible to reliably predict the long-term future of FCPA enforcement, statistics alone suggest that 2016's upward tick in enforcement will continue in 2017. By some estimates, U.S. enforcement agencies are currently investigating nearly 200 companies for FCPA violations - more than were reportedly under investigation at this time last year.¹⁹ Simply looking at the pipeline of cases, we would expect that potential for aggressive FCPA enforcement will continue into 2017 and beyond.

Legal predictions would be incomplete without consideration of the potential impact of the new U.S. presidential administration. Though a reliable prediction on how a Trump administration may impact anti-corruption enforcement cannot be made, President Trump has made statements suggesting he is no fan of the FCPA.²⁰ Jay Clayton, a Sullivan & Cromwell partner and Trump's selection to chair the SEC, seems to share President Trump's views regarding the FCPA. Though Clayton is not the first Wall Street attorney to head the SEC, he replaces Mary Jo White, who had pushed for greater FCPA enforcement and was known for her no-nonsense approach to holding firms accountable. Clayton, who focuses his legal practice on mergers and acquisitions and capital markets offerings, chaired the drafting committee for a 2011 paper titled: *"The FCPA and its Impact on International Business Transactions - Should Anything*

¹⁷ On November 8, 2016, France's National Assembly adopted the Law on Transparency, the Fight Against Corruption and Modernization of Economic life (also known as "Sapin II"), a copy of the text is available at: <http://www.assemblee-nationale.fr/14/ta/ta0830.asp>.

¹⁸ See "Assistant Attorney General Leslie R. Caldwell Delivers Remarks Highlighting Foreign Corrupt Practices Act Enforcement at The George Washington University Law School", Justice News (Nov. 3, 2016), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-highlighting-foreign> (reporting that "anecdotally we've seen an uptick in the number of companies coming in to voluntarily disclose potential FCPA violations").

¹⁹ See The FCPA Blog post "The Corporate Investigations List" (Jan. 9, 2017), available at <http://www.fcpablog.com/blog/2017/1/9/the-corporate-investigations-list-january-2017.html>.

²⁰ For example, even before his bid for the U.S. Presidency, Trump called the FCPA a "horrible law [that] should be changed" and its enforcement "absolutely crazy." See e.g., FCPA Professor blog post "Trump on the FCPA" (Nov. 9, 2016), available at <http://fcpaprofessor.com/trump-on-the-fcpa/> (citing Trump's remarks on FCPA allegations against Wal-Mart during an interview with CNBC SquawkBox on May 15, 2015).

be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?" The paper argued that the FCPA puts companies subject to its jurisdiction at a competitive disadvantage. The report suggested that the United States could: "(1) dial back the scope of FCPA enforcement with respect to companies and focus more on individuals engaged in foreign corruption; (2) encourage other countries to do the same; and (3) agree with other countries to cooperate on international matters such as information sharing, investigations, and extradition."²¹

As we have explored throughout this update, the United States has already taken several important steps down the path proposed by Clayton's report, including engaging in widespread international cooperation and focusing on prosecuting individual wrongdoers. We have not, however, seen a corresponding reduction in prosecutions against companies, as the report suggested. Separately, since the publication of the 2011 report, numerous foreign countries have in fact ramped up their own anti-bribery legislation and enforcement efforts.

Potential policy shifts notwithstanding, in 2017 and beyond, we fully expect aggressive global anti-corruption enforcement to continue. For one thing, during Senator Jeff Sessions' confirmation hearings, he stated that, if confirmed as U.S. Attorney General, he will enforce the FCPA "as appropriate based on the facts and circumstances of each case." In any event, companies should remain cognizant of the investigative efforts and collected records already within the possession of the DOJ, the SEC and regulators abroad. Companies must continue to protect themselves from risk of corruption-related investigations and prosecutions. Proactively creating and maintaining an anti-corruption compliance program should be viewed as the best defense, which leads us to our last prediction.

Finally, do not be surprised to see one or more proposed legislative amendments, including an adoption of the good faith compliance or "adequate procedures" defense that already exists in the U.K. Bribery Act. Other amendments may seek to clarify the definition of "foreign official" or establish a *de minimis* exception for minimal transfers. Closing line addition end of paragraph four on page 10: January 2017 was the busiest January of all time for FCPA corporate resolutions - and one of the busiest months ever. Six companies paid more than \$250 million to the DOJ and SEC.

One thing is certain: not all compliance programs are created equal. A one-size-fits-all approach to anti-corruption compliance never works. Companies must create and implement flexible programs that are tailored to the specific needs of the organization and that account for the company's unique risk indicators. As the recent declinations of prosecution in the United States demonstrate, investing in an anti-corruption compliance program can pay dividends if and when a company becomes the target of an investigation.

²¹ A copy of the paper by New York Bar Association is available at: https://www.sullcrom.com/siteFiles/Publications/Clayton_FCPA_Impacton_International_Business_Dec_2011.pdf; see also FCPA Professor blog post "Trump's Pick for SEC Chairman Has an Informed and Sophisticated Understanding of FCPA Issues" (Jan. 4, 2017), available at <http://fcpprofessor.com/trumps-pick-sec-chairman-informed-sophisticated-understanding-fcpa-issues/>.



ABOUT BASS, BERRY & SIMS

The Bass, Berry & Sims' Foreign Corrupt Practices Act (FCPA) practice group has substantial experience in compliance, anti-corruption and compliance matters across the globe. As global anti-corruption counsel to Fortune 500 companies and public, private and nonprofit entities, our team has deeply rooted experience in more than 40 countries across a breadth of industries including manufacturing, medical devices, healthcare, healthcare information technology, logistics, media, technology and retail.

Our Washington, D.C.-based team members have strong relationships and regular interactions with enforcement agencies, uniquely positioning them to stay abreast of the compliance risks morphed by the ever-evolving global economy. The FCPA practice group has a proven track record of successfully representing companies and individuals internationally in FCPA-related matters, including internal and government investigations, enforcement actions, anti-corruption risk assessments and the design and implementation of cost-effective compliance programs.

For more information, please visit our [website](#).



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