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The FCPA's Record-Breaking Year

Mike Koehler

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The FCPA's Record-Breaking Year

MIKE KOEHLER

On a number of levels, 2016 was a record-breaking year for Foreign Corrupt Practices Act enforcement. This article, part of annual series, highlights how 2016 witnessed the largest number of corporate enforcement action and largest aggregate corporate settlement amounts in the FCPA's nearly 40 year history.

FCPA enforcement in 2016 was also notable given the wide spectrum of enforcement actions. For instance, there were FCPA enforcement actions against U.S. companies as well as foreign companies; enforcement actions that alleged egregious instances of corporate bribery executed at the highest levels of a company as well as enforcement actions finding bribery based on allegations of "golf in the morning and beer-drinking in the evening" and internship and hiring practices; enforcement actions against large multinational companies as well as small publicly-traded companies, privately-held companies and limited liability companies; enforcement actions across a wide spectrum of industries such as technology, oil and gas, pharmaceutical and medical device, airlines, and financial services; and enforcement actions involving conduct across the globe from Latin America to South America, to Eastern Europe to Africa with a majority of enforcement actions focusing in whole or in part on conduct occurring in China.

2016 was notable not just for record-breaking and diverse enforcement activity often tied to expansive and evolving enforcement theories, but also FCPA policy developments. For instance, both the Department of Justice and Securities and Exchange Commission renewed their long-standing FCPA enforcement commitment and the DOJ released a one year FCPA Pilot Program designed in large part to further motivate business organizations to voluntarily disclose FCPA issues to better facilitate enforcement actions against culpable individuals.

In short, much happened in the FCPA space in 2016 and this article provides a detailed analysis of the most notable FCPA enforcement and policy developments and will be value to anyone seeking to elevate their FCPA knowledge.

ARTICLE CONTENTS

INTRODUCTION	93
I. 2016 FCPA ENFORCEMENT STATISTICS AND HISTORICAL COMPARISONS	94
A. CORPORATE DOJ FCPA ENFORCEMENT ACTIONS.....	95
B. CORPORATE SEC FCPA ENFORCEMENT ACTIONS.....	101
C. AGGREGATE CORPORATE FCPA ENFORCEMENT ACTIONS	107
D. INDIVIDUAL DOJ AND SEC FCPA ENFORCEMENT ACTIONS	109
II. NOTEWORTHY ISSUES FROM 2016	111
A. FCPA ENFORCEMENT ACTION FIRSTS AND OTHER QUALITATIVE HIGHLIGHTS.....	111
B. EXPANSIVE AND EVOLVING FCPA ENFORCEMENT THEORIES	119
C. FCPA POLICY DEVELOPMENTS	138
CONCLUSION	160



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INTRODUCTION

On a number of levels, 2016 was a record-breaking year for Foreign Corrupt Practices Act enforcement. This article, part of an annual series, highlights how 2016 witnessed the largest number of corporate enforcement actions and largest aggregate corporate settlement amounts in the FCPA's nearly forty-year history.

FCPA enforcement in 2016 was also notable given the wide spectrum of enforcement actions. For instance, there were FCPA enforcement actions against U.S. companies as well as foreign companies; enforcement actions that alleged egregious instances of corporate bribery executed at the highest levels of a company, as well as enforcement actions finding bribery based on allegations of “golf in the morning and beer-drinking in the evening,” and internship and hiring practices; enforcement actions against large multinational companies, as well as small publicly traded companies, privately held companies, and limited liability companies; enforcement actions across a wide spectrum of industries such as technology, oil and gas, pharmaceutical and medical device, airlines, and financial services; and

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This article is part of a continuing series of yearly analysis by the author of FCPA enforcement and related issues. For 2015, see Mike Koehler, *Foreign Corrupt Practices Act Statistics, Theories, Policies, and Beyond*, __ CLEV. ST. L. REV. __ (forthcoming 2017). For 2014, see Mike Koehler, *A Snapshot of the Foreign Corrupt Practices Act*, 14 SANTA CLARA J. INT’L L. 143 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584661. For 2013, see Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT’L L. REV. 961 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428555. For 2012, see Mike Koehler, *An Examination of Foreign Corrupt Practices Act Issues*, 12 RICH. J. GLOBAL L. & BUS. 317 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298644. For 2011, see Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191149. For 2010, see Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971021. For 2009, see Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599725.

enforcement actions involving conduct across the globe from Latin America to South America, to Eastern Europe to Africa, with a majority of enforcement actions focusing in whole or in part on conduct occurring in China.

The year 2016 was notable not just for record-breaking and diverse enforcement activity often tied to expansive and evolving enforcement theories, but also FCPA policy developments. For instance, both the Department of Justice and Securities and Exchange Commission renewed their long-standing FCPA enforcement commitment, and the DOJ released a one-year FCPA Pilot Program designed in large part to further motivate business organizations to voluntarily disclose FCPA issues to better facilitate enforcement actions against culpable individuals.

In short, much happened in the FCPA space in 2016 and this article provides a detailed analysis of the most notable FCPA enforcement and policy developments and will be value to anyone seeking to elevate their FCPA knowledge.

I. 2016 FCPA ENFORCEMENT STATISTICS AND HISTORICAL COMPARISONS

On a number of levels, 2016 was a record-breaking year for FCPA enforcement. While it is beyond the scope of this article to provide a detailed overview of each enforcement action, this section highlights certain quantitative and qualitative statistics from 2016, as well as historical comparisons, in the following ways: corporate DOJ enforcement actions; corporate SEC enforcement actions; aggregate corporate enforcement actions; and individual DOJ and SEC enforcement actions. In doing so, the following salient points will be highlighted: (i) the continued prominence of NPAs and DPAs¹ and other alternative resolution vehicles to resolve corporate FCPA enforcement actions; and (ii) the continued gap between corporate enforcement actions and related individual prosecutions of company employees.

¹ DPA refers to a deferred prosecution agreement and NPA refers to a non-prosecution agreement. To learn more about DPAs and NPAs in the FCPA context, see Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517. Declinations with disgorgement are discussed in more detail in Section II of this article. See *infra*, Section II.

A. Corporate DOJ FCPA Enforcement Actions

As demonstrated in Table I, in thirteen corporate FCPA enforcement actions² in 2016, the DOJ collected approximately \$1.2 billion in net settlement amounts.

Table I - 2016 DOJ Corporate FCPA Enforcement Actions

Company (Industry)	Settle- -ment Amount ³	Resolution Vehicle	Origin ⁴	Related Indiv- -idual Action ⁵
PTC ⁶ (Technology)	\$14.5 million	NPA	Voluntary Disclosure	No
Unitel (VimpelCom) ⁷ (Telecommunication)	\$230.1 million ⁸	Plea / DPA ⁹	Unclear	No
Olympus Latin	\$22.8	DPA	Unclear	No

² Corporate FCPA enforcement statistics in this article use the “core” approach. The core approach focuses on unique instances of corporate conduct regardless of whether the conduct at issue involved a DOJ or SEC enforcement action, or both (as is frequently the case); regardless of whether the corporate enforcement action involved a parent company, a subsidiary, or both (as is frequently the case); and regardless of whether the DOJ and/or SEC brought any related individual enforcement action (as is occasionally the case). For additional information on this method of quantifying FCPA enforcement, see *What is an FCPA Enforcement Action?*, FCPA PROFESSOR (Jan. 7, 2013), <http://www.fcpaprofessor.com/what-is-an-fcpa-enforcement-action>. This method of computing FCPA statistics is consistent with the DOJ’s approach. See *Friday Roundup*, FCPA PROFESSOR (Mar. 22, 2013), <http://www.fcpaprofessor.com/friday-roundup-72> (quoting DOJ’s FCPA Unit Chief). Further, it is a commonly accepted method used by other scholars in other areas. See, e.g., Michael Klausner & Jason Hegland, *SEC Practice in Targeting and Penalizing Individual Defendants*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 3, 2013), <http://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants/> (discussing how the SEC names and penalizes defendants believed to have engaged in misconduct).

³ Historically, the settlement amount in a DOJ FCPA enforcement action was always a criminal fine amount. However, in the HMT and NCH matters (announced on the same day), the DOJ invented a new way to bring an FCPA enforcement action, a so-called “declination with disgorgement” pursuant to which the company agreed to pay a disgorgement amount. This new form of resolving corporate FCPA enforcement actions is discussed in more detail in Section II of this article. *Infra*, Section II.

⁴ Refers to the event or events that initially prompted the scrutiny that resulted in the FCPA enforcement action. See Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22.3 MICH. ST. INT’L L. REV. 961, 965, 973 (including further information about events initially prompting the scrutiny).

⁵ Refers to employees of the corporate entity resolving the FCPA enforcement action. *Id.* at 965, 970–71 n.29, 988.

⁶ Memorandum from the U.S. Dep’t of Justice including a Non-Prosecution Agreement (Feb. 16, 2016), <http://www.corporatecrimereporter.com/wp-content/uploads/2016/02/PTC-NPA.pdf>.

⁷ Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of more than \$795 Million (Feb. 18, 2016), <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>.

⁸ *Id.* (value is for numerical calculation after accounting for various credits and deductions).

⁹ *Id.* The enforcement action involved criminal information against Unitel LLC resolved via a plea agreement, and criminal information against VimpelCom resolved via a DPA. *Id.*

America ¹⁰ (Medical Device)	million			
BK Medical (Analogic) ¹¹ (Medical Device)	\$3.4 million	NPA	Voluntary Disclosure	No
LAN / LATAM Airlines ¹² (Airline)	\$12.75 million	DPA	Foreign Media Reports	No
Och-Ziff ¹³ (Financial Services)	\$213 million	Plea /DPA ¹⁴	DOJ/SEC Information Requests ¹⁵	No
HMT LLC ¹⁶ (Oil and Gas)	\$335,000	Declination with Disgorgement	Voluntary Disclosure	No
NCH ¹⁷ (Maintenance)	\$2.7 million	Declination with Disgorgement	Voluntary Disclosure	No
Embraer ¹⁸ (Airline)	\$107.3 million	DPA	DOJ/SEC Information	No

¹⁰ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Medical Equipment Company will Pay \$646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America (Mar. 1, 2016), <https://www.justice.gov/opa/pr/medical-equipment-company-will-pay-646-million-making-illegal-payments-doctors-and-hospitals>.

¹¹ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Analogic Subsidiary Agrees to Pay More than \$14 Million to Resolve Foreign Bribery Charges (Jun. 21, 2016), <https://www.justice.gov/opa/pr/analogic-subsidiary-agrees-pay-more-14-million-resolve-foreign-bribery-charges>.

¹² Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$12.75 Million Criminal Penalty (Jul. 25 2016), <https://www.justice.gov/opa/pr/latam-airlines-group-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1275>.

¹³ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine (Sept. 29, 2016), <https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213>.

¹⁴ *Id.* (the enforcement action involved a criminal information against OZ Africa Management GP LLC resolved via a plea agreement, and a criminal information against Och-Ziff Capital Management resolved via a DPA).

¹⁵ See Shareholders Foundation Inc., *Update in Lawsuit for Investors in Och Ziff Capital Management Group LLC (NYSE:OZM) Shares Announced by Shareholders Foundation*, NASDAQ GLOBENEWSWIRE (May 10, 2016, 9:45 PM), <https://globenewswire.com/news-release/2016/05/10/838385/0/en/Update-in-Lawsuit-for-Investors-in-Och-Ziff-Capital-Management-Group-LLC-NYSE-OZM-shares-announced-by-Shareholders-Foundation.html> (explaining that the company previously disclosed, “[b]eginning in 2011, and from time to time thereafter, we have received subpoenas from the SEC and requests for information from the U.S. Department of Justice (the “DOJ”) in connection with an investigation involving the FCPA and related laws”).

¹⁶ Memorandum from U.S. Dep't of Justice, Criminal Division, closing the investigation of NCH Corporation (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899121/download>.

¹⁷ See *id.* (further explaining NCH).

¹⁸ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Embraer Agrees to Pay More Than \$107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 26, 2016), <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>.

			Requests ¹⁹	
JPMorgan Securities (Asia Pacific) (JPMorgan) ²⁰ (Financial Services)	\$72 million	NPA	SEC Information Request ²¹	No
Odebrecht / Braskem ²² (Construction / Petrochemical)	\$252 million ²³	Plea / Plea	Foreign Law Enforcement Investigation	No
Teva Pharmaceutical ²⁴ (Pharmaceutical)	\$283 million	Plea / DPA	SEC Information Request / Voluntary Disclosure	No
General Cable ²⁵ (Wire & Cable)	\$20.5 million	NPA	Voluntary Disclosure	No
TOTAL	\$1.2 billion			

¹⁹ In previous SEC filings, Embraer stated: “In September, 2010, we received a subpoena from the Securities and Exchange Commission, or SEC, and associated inquiries from the U.S. Department of Justice, or DOJ, concerning possible non-compliance with the U.S. Foreign Corrupt Practices Act, or FCPA, in relation to certain aircraft sales outside of Brazil.” Embraer S.A., Annual Report (Form 20-F) 12 (Mar. 29, 2016); Embraer S.A., Annual Report (Form 20-F) 12 (Mar. 27, 2015).

²⁰ Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, JPMorgan’s Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016), <https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>.

²¹ See *JPMorgan Hiring in China Under U.S. Scrutiny - Report*, REUTERS (Aug. 17, 2013, 10:56 PM), <http://www.reuters.com/article/jpmorgan-investigation-china-idUSL2N0GJ01F20130818> (stating that the company in an SEC filing had stated that it received “a request from the SEC Division of Enforcement seeking information and documents relating to, among other matters, the firm’s employment of certain former employees in Hong Kong and its business relationships with certain clients”).

²² Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties (Dec. 21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

²³ Braskem agreed to pay the United States \$94.8 million in criminal penalties and \$65 million in disgorgement. See *id.* (“Braskem agreed to pay a total criminal penalty of \$632 million . . . [of which] [t]he United States will receive \$94.8 million”); Press Release, U.S. Sec. and Exch. Comm’n, Petrochemical Manufacturer Braskem S.A. to Pay \$957 Million to Settle FCPA Charges (Dec. 21, 2016), <https://www.sec.gov/news/pressrelease/2016-271.html> (“Braskem agreed to pay \$325 million in disgorgement, including \$65 million to the SEC”). Odebrecht agreed to a (reduced) penalty of \$93 million. Sentencing Memorandum at 4, *United States v. Odebrecht S.A.*, No. 16-643 (RJD) (E.D.N.Y. Apr. 11, 2017).

²⁴ Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than \$283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>.

²⁵ Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, General Cable Corporation Agrees to Pay \$20 Million Penalty for Foreign Bribery Schemes in Asia and Africa (Dec. 29, 2016), <https://www.justice.gov/opa/pr/general-cable-corporation-agrees-pay-20-million-penalty-foreign-bribery-schemes-asia-and>.

As highlighted in Tables II and III below, in 2016 DOJ corporate FCPA enforcement—measured both in terms of the number of core actions and aggregate settlement amounts—was significantly higher than historical averages, indeed record-setting in terms of the largest yearly DOJ settlement amounts.

Table II - Corporate DOJ FCPA Enforcement Actions (2010 – 2016)

Year	Core Actions
2016	13
2015	2
2014	7
2013	7
2012	9
2011	11
2010	17

Table III – Corporate DOJ FCPA Enforcement Action Settlement Amounts (2010 – 2016)

Year	Settlement Amounts
2016	\$1.2 billion
2015	\$24.2 million
2014	\$1.25 billion
2013	\$420 million
2012	\$142 million
2011	\$355 million
2010	\$870 million

Even though DOJ FCPA enforcement in 2016 was record-setting, few meaningful big-picture conclusions should be drawn.

For starters, year-to-year FCPA enforcement statistics, and the arbitrary cutoffs associated with them, are of marginal value given that many non-substantive factors can influence the timing of an actual corporate FCPA enforcement action.²⁶ Moreover, and as highlighted in more detail in Table

²⁶ Because FCPA enforcement actions that involve both a DOJ and SEC component are typically announced on the same day, and because the DOJ and SEC are separate enforcement agencies, it is common for FCPA enforcement actions to be delayed while one agency waits for the other to finish its investigation of the conduct at issue and its negotiation of a resolution with a company. Although far from an exclusive list, additional non-substantive factors that can influence the timing of an FCPA enforcement action include DOJ and SEC staffing issues (including employee departures or leaves), as well as securing corporate board approval for resolving an FCPA enforcement action.

VII below, FCPA enforcement statistics in most years are impacted by a few unique events and often one or a small group of enforcement actions significantly skew enforcement statistics.²⁷

Nevertheless, two DOJ FCPA enforcement statistics from 2016 are worthy of further exploration: (i) the continued prominence of NPAs and DPAs and other alternative resolution vehicles to resolve corporate FCPA enforcement actions; and (ii) the continued lack of related individual DOJ prosecutions in connection with corporate enforcement actions.

The first notable statistic is that twelve of the thirteen (92%) corporate enforcement actions (all but Odebrecht / Braskem) were resolved either through an NPA, DPA, or a so-called declination with disgorgement—a new method the DOJ invented in 2016 to resolve corporate FCPA enforcement actions.²⁸ This is consistent with the trend in the FCPA's modern era of the DOJ resolving corporate FCPA enforcement actions through such controversial resolution vehicles.²⁹ Indeed, since 2010 approximately 85% of corporate DOJ enforcement actions have involved alternative resolution vehicles.³⁰

The second notable statistic is that none of the 2016 corporate enforcement actions have (at least yet) resulted in any related DOJ charges against company employees. This statistic, while troubling, is not a significant anomaly given that approximately 80% of DOJ corporate enforcement actions since 2006 have not resulted in any related DOJ charges against company employees.³¹ However, this statistic was more notable in 2016 compared to prior years given the DOJ's release in late 2015 of a policy memo titled "Individual Accountability for Corporate Wrongdoing." In the so-called Yates Memo, the DOJ stated:

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is

²⁷ *Id.* For instance, in 2017 there is likely to be an approximately \$900 million enforcement action that alone will eclipse total FCPA settlement amounts in several prior years. See *The Burgeoning Uzbekistan Telecommunication Investigations*, FCPA PROFESSOR (Nov. 9, 2015), <http://www.fcpaprofessor.com/the-burgeoning-uzbekistan-telecommunication-investigations>.

²⁸ See Mike Koehler, *DOJ Enforcement of the FCPA – 2016 Year In Review*, FCPA PROFESSOR (Jan. 10, 2017), <https://fcpaprofessor.com/doj-enforcement-fcpa-2016-year-review/> (containing links to statistics for prior years).

²⁹ To learn more about NPAs and DPAs, including why such alternative resolution vehicles are controversial, see Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 910–924 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517; Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 499, 528–29 (2015); Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT'L L. REV. 961, 978–87 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428555.

³⁰ To determine each action's resolution vehicle, see SEC Enforcement Actions: FCPA Cases, U.S. Sec. & Exch. Comm'n, *infra* note 75, and view the "related documents" under each case.

³¹ *Id.*

important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.³²

In subsequent public comments, Deputy Attorney General Sally Yates stated, that towards the above objectives, “[t]he revised factors [in the Yates Memo] now emphasize the primacy in any corporate case of holding individual wrongdoers accountable and list a variety of steps that prosecutors are expected to take to maximize the opportunity to achieve that goal.”³³ Specifically in the FCPA context, Yates stated:

[W]e cannot forget that behind every bribe and illegal payment is one or more individuals who knew what they were doing was wrong and nonetheless broke the law. . . . [W]e must do our best to ensure that whoever is responsible is held accountable. . . . [T]he best way to deter individual conduct is the threat of going to jail. That’s what truly changes behavior. That’s what changes the calculus as employees and executives decide whether to participate in an illegal scheme.³⁴

Additionally, Assistant Attorney General Leslie Caldwell stated that “certainly . . . there has been an increased emphasis on, let’s get some individuals” and that it is “very important for [the DOJ] to hold accountable individuals who engage in criminal misconduct in white-collar (cases), as we do in every other kind of crime,” and DOJ FCPA Unit Chief Patrick Stokes stated that the DOJ is “very focused” on prosecuting individuals as well as companies and that “going after one or the other is not sufficient for deterrence purposes.”³⁵

Yet, similar to prior years, actual statistics prove how hollow the DOJ’s rhetoric is when it comes to holding individuals accountable for conduct giving rise to corporate FCPA enforcement actions.

³² Memorandum from the U.S. Dep’t of Justice, Office of the Deputy Attorney General on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

³³ Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Deputy Attorney General Sally Quillian Yates Delivers Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Convergence (Nov. 16, 2015), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>.

³⁴ Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Deputy Attorney General Sally Q. Yates Delivers Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act (Nov. 30, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international>.

³⁵ Mike Koehler, *A Focus on DOJ Individual Actions*, FCPA PROFESSOR (Jan. 26, 2017) <http://fcpaprofessor.com/focus-doj-individual-actions/>.

B. *Corporate SEC FCPA Enforcement Actions*

As demonstrated in Table IV, in twenty-four corporate FCPA enforcement actions in 2016 the SEC collected approximately \$1.07 billion in settlement amounts.

Table IV - 2016 SEC Corporate FCPA Enforcement Actions

Company (Industry)	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
SAP ³⁶ (Technology)	\$3.9 million	Admin. Action	SEC Investigation ³⁷	Yes
SciClone Pharmaceuticals ³⁸ (Pharmaceutical)	\$12.8 million	Admin. Action	SEC Investigation	No
PTC ³⁹ (Technology)	\$13.7 million	Admin. Action	Voluntary Disclosure	Yes
VimeplCom ⁴⁰ (Telecommunications)	\$167.5 million ⁴¹	Settled Civil Complaint	Unclear	No
Qualcomm ⁴² (Technology)	\$7.5 million	Admin. Action	DOJ/SEC Investigation ⁴³	No
Nordion ⁴⁴	\$375,000	Admin.	Voluntary	Yes

³⁶ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Software Company With FCPA Violations (Feb. 1, 2016), <https://www.sec.gov/news/pressrelease/2016-17.html>.

³⁷ See *id.* ("An SEC investigation found that SAP's deficient internal controls allowed a former SAP executive to pay \$145,000 in bribes to a senior Panamanian government official and offer bribes to two others in exchange for lucrative sales contracts.")

³⁸ For more information on SciClone Pharmaceuticals, see United States of America Before the Securities and Exchange Commission, SciClone Pharmaceuticals, Inc., *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order* (Feb. 4, 2016), <https://www.sec.gov/litigation/admin/2016/34-77058.pdf>.

³⁹ For more information on PTC, see United States of America Before the Securities and Exchange Commission, PTC INC., *Order Instituting Cease-And Desist Proceedings Pursuant To Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order* (Feb. 16, 2016), <https://www.sec.gov/litigation/admin/2016/34-77145.pdf>.

⁴⁰ *Id.* For more information on VimpelCom, see Press Release, U.S. Sec. & Exch. Comm'n, VimpelCom to Pay \$795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016), <https://www.sec.gov/news/pressrelease/2016-34.html>.

⁴¹ After accounting for various credit and deductions.

⁴² Qualcomm Inc., Securities Exchange Act of 1934 No. 3-17145 (Mar. 1, 2016) (Administrative Proceeding).

⁴³ Qualcomm's FCPA scrutiny was, at least partially, related to a September 2010 formal order of private investigation from the SEC that arose from a "whistleblower's" allegations made in December 2009 to the audit committee of the Company's Board of Directors and to the SEC. As Qualcomm previously disclosed, "the audit committee completed an internal review of the allegations with the assistance of independent counsel and independent forensic accountants. This internal review into the whistleblower's allegations and related accounting practices did not identify any errors in the Company's financial statements." Qualcomm Inc., Quarterly Report (Form 10-Q) (Dec. 25, 2011). More directly related to the FCPA scrutiny, according to Qualcomm's previous disclosure: "On January 27, 2012, the Company learned that the U.S. Attorney's Office for the Southern District of California/DOJ has begun a preliminary investigation regarding the Company's compliance with the Foreign Corrupt Practices Act (FCPA), a topic about which the SEC is also inquiring." *Id.*

⁴⁴ Press Release, SEC Charges Engineer and Former Employer with Bribe Scheme in Russia, U.S. Sec. & Exch. Comm'n (Mar. 3, 2016), <https://www.sec.gov/litigation/admin/2016/34-77288-s.pdf>.

(<i>Health Science</i>)		Action	Disclosure	
Novartis ⁴⁵ (<i>Pharmaceutical</i>)	\$25 million	Admin. Action	SEC Investigation ⁴⁶	No
Las Vegas Sands ⁴⁷ (<i>Gaming</i>)	\$9 million	Admin. Action	SEC Investigation ⁴⁸	No
Nortek ⁴⁹ (<i>Construction</i>)	\$322,000	NPA	Voluntary Disclosure	No
Akamai Technologies ⁵⁰ (<i>Technology</i>)	\$672,000	NPA	Voluntary Disclosure	No
Analogic ⁵¹ (<i>Medical Device</i>)	\$11.5 million	Admin. Action	Voluntary Disclosure	Yes
LAN Airlines ⁵² (<i>Airline</i>)	\$9.4 million	Admin. Action	Foreign Media Reports	Yes
Johnson Controls ⁵³ (<i>Business Services</i>)	\$14.4 million	Admin. Action	Voluntary Disclosure	No
Key Energy ⁵⁴ (<i>Oil & Gas</i>)	\$5 million	Admin. Action	SEC Information Request ⁵⁵	No
AstraZeneca ⁵⁶ (<i>Pharmaceutical</i>)	\$5.5 million	Admin. Action	Industry Sweep ⁵⁷	No

⁴⁵ Novartis AG, Exchange Act Release No. 77,431 at 8–9, 113 SEC Docket 15 (Mar. 23, 2016).

⁴⁶ The SEC's order states: "In connection with the SEC Staff's investigation and in response to media reports concerning a competitor in August 2013, Novartis instituted an expansive review of its relationships in China with travel and event planning vendors." *Id.* at 5.

⁴⁷ Las Vegas Sands Corp., Exchange Act Release No. 77,555 at 10, 113 SEC Docket 17 (Apr. 7, 2016).

⁴⁸ The SEC's order states: "In connection with the investigation by the Staff, the LVSC Audit Committee retained outside counsel to conduct an internal investigation." *Id.* at 9.

⁴⁹ Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016), <https://www.sec.gov/news/pressrelease/2016-109.html>.

⁵⁰ *Id.*

⁵¹ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Medical Device Manufacturer with FCPA Violations (June 21, 2016), <https://www.sec.gov/news/pressrelease/2016-126.html>.

⁵² LAN Airlines S.A., Exchange Act Release No. 78,402 at 10, 114 SEC Docket 13 (July 25, 2016).

⁵³ Johnson Controls, Inc., Exchange Act Release No. 78,287 at 7, 114 SEC Docket 11 (July 11, 2016).

⁵⁴ Key Energy Servs., Inc., Exchange Act Release No. 78,558 at 8, 114 SEC Docket 15 (Aug. 11, 2016).

⁵⁵ The SEC's order states: "In or around January 2014, the staff of the Commission contacted Key Energy with respect to potential FCPA violations by Key Energy. In April 2014, Key Mexico employees reported to Key Energy information they had received suggesting the recently resigned country manager had promised bribes to one or more Pemex employees during his employment with Key Mexico. Upon learning of these allegations, Key Energy reported the allegations to the staff of the Commission." *Id.* at 6.

⁵⁶ AstraZeneca PLC, Exchange Act Release No. 78,730 at 6, 114 SEC Docket 18 (Aug. 30, 2016).

⁵⁷ In an August 2010 filing, the company disclosed: "AstraZeneca PLC has received inquiries from the US Department of Justice and the Securities and Exchange Commission in connection with an investigation into Foreign Corrupt Practices Act issues in the pharmaceutical industry. AstraZeneca is cooperating with their inquiries." AstraZeneca PLC, Annual Report (Form 6-K) (Aug. 9, 2010).

Nu Skin ⁵⁸ (<i>Healthcare Products</i>)	\$765,000	Admin. Action	Voluntary Disclosure	No
AB InBev ⁵⁹ (<i>Beverage</i>)	\$6 million	Admin. Action	SEC Information Request ⁶⁰	No
Och-Ziff ⁶¹ (<i>Financial Services</i>)	\$199 million	Admin. Action	DOJ/SEC Information Requests ⁶²	Yes
GlaxoSmithKline ⁶³ (<i>Pharmaceutical</i>)	\$20 million	Admin. Action	Industry Sweep ⁶⁴	No
Embraer ⁶⁵ (<i>Airline</i>)	\$79.4 million ⁶⁶	Settled Civil Complaint	DOJ/SEC Information Requests ⁶⁷	No
JPMorgan ⁶⁸	\$130.6	Admin.	SEC	No

⁵⁸ Nu Skin Enters., Inc., Exchange Act Release No. 78,884 at 5, 115 SEC Docket 1 (Sept. 20, 2016).

⁵⁹ Anheuser-Busch InBev SA/NV, Exchange Act Release No. 78,957 at 9, 115 SEC Docket 2 (Sept. 28, 2016).

⁶⁰ The SEC's order states: "AB InBev did not report the 2009 and 2011 complaints to the Commission staff before the Commission first contacted AB InBev in October 2011." *Id.* at 7.

⁶¹ Press Release, U.S. Sec. & Exch. Comm'n, Och-Ziff Hedge Fund Settles FCPA Charges (Sept. 29, 2016), <https://www.sec.gov/news/pressrelease/2016-203.html>.

⁶² The company previously disclosed: "Beginning in 2011, and from time to time thereafter, we have received subpoenas from the SEC and requests for information from the U.S. Department of Justice (the "DOJ") in connection with an investigation involving the FCPA and related laws." Och-Ziff Capital Management Group LLC, Annual Report (Form 10-K) (Dec. 31, 2013).

⁶³ Press Release, U.S. Sec. & Exch. Comm'n, GlaxoSmithKline Pays \$20 Million Penalty to Settle FCPA Violations (Sep. 30, 2016), <https://www.sec.gov/litigation/admin/2016/34-79005-s.pdf>.

⁶⁴ The company previously disclosed: "The US Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ) initiated an industry-wide enquiry in 2010 into whether pharmaceutical companies may have engaged in violations of the US Foreign Corrupt Practices Act (FCPA) relating to the sale of pharmaceuticals, including in Argentina, Brazil, Canada, China, Germany, Italy, Poland, Russia and Saudi Arabia. The Group is one of the companies that has been asked to respond to this enquiry and is cooperating with the SEC and DOJ. The Group has informed the DOJ and SEC about the investigation of its China operations by the Chinese government that was initiated in 2013 and the outcome of that investigation. The Group also has briefed the DOJ and SEC regarding other countries and issues." GlaxoSmithKline PLC, Annual Report (Form 20-F) (Mar. 18, 2016).

⁶⁵ Press Release, U.S. Sec. & Exch. Comm'n, Embraer Paying \$205 Million to Settle FCPA Charges (Oct. 24, 2016), <https://www.sec.gov/news/pressrelease/2016-224.html>.

⁶⁶ The SEC's resolution documents mention \$83.8 million in disgorgement and \$14.4 million in prejudgment interest. However, the SEC agreed to credit a disgorgement amount that Embraer agreed to pay to Brazilian authorities and that disgorgement amount is approximately \$18.6 million. *See* Embraer S.A., Annual Report (Form 6-K) (Oct. 24, 2016) ("We agreed to pay US\$98.2 million to the SEC (of which up to US\$20.0 million may be deducted if such amount is actually paid to the MPF and the CVM under the TCAC, as described below), as disgorgement of profits.")

⁶⁷ In SEC filings, Embraer stated: "In September, 2010, we received a subpoena from the Securities and Exchange Commission, or SEC, and associated inquiries from the U.S. Department of Justice, or DOJ, concerning possible non-compliance with the U.S. Foreign Corrupt Practice Act, or FCPA, in relation to certain aircraft sales outside of Brazil." Embraer, S.A., Annual Report (Form 20-F) (Dec. 31, 2014).

⁶⁸ Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016), <https://www.sec.gov/news/pressrelease/2016-241.html>.

(Financial Services)	million	Action	Information Request ⁶⁹	
Braskem ⁷⁰ (Petrochemical)	\$65 million ⁷¹	Settled Civil Complaint	Foreign Law Enforcement Investigation	No
Teva Pharmaceutical ⁷² (Pharmaceutical)	\$236 million	Settled Civil Complaint	SEC Information Request / Voluntary Disclosure	No
General Cable ⁷³ (Wire & Cable)	\$55.3 million	Admin. Action	Voluntary Disclosure	Yes
TOTAL	\$1.07 billion			

As highlighted in Tables V and VI below, SEC corporate FCPA enforcement in 2016 was up compared to historical averages—indeed record-setting in terms of both the largest number of SEC corporate enforcement actions and the largest yearly SEC settlement amounts.

Table V – Corporate SEC FCPA Enforcement Actions (2010 – 2016)

Year	Core Actions
2016	24
2015	9
2014	7
2013	8
2012	8
2011	13
2010	19

⁶⁹ In an SEC filing, the company stated: “A request from the SEC Division of Enforcement seeking information and documents relating to, among other matters, the Firm’s employment of certain former employees in Hong Kong and its business relationships with certain clients.” JPMorgan Chase & Co., Annual Report (Form 10-Q) (Jun. 30, 2013).

⁷⁰ Press Release, U.S. Sec. & Exch. Comm’n, Petrochemical Manufacturer Braskem S.A. to Pay \$957 Million to Settle FCPA Charges (Dec. 21, 2016), <https://www.sec.gov/news/pressrelease/2016-271.html>.

⁷¹ After accounting for various credits and deductions. *See id.* (noting that Braskem agreed to pay \$65 million to the SEC).

⁷² Press Release, U.S. Sec. & Exch. Comm’n, Teva Pharmaceutical Paying \$519 Million to Settle FCPA Charges (Dec. 22, 2016), <https://www.sec.gov/news/pressrelease/2016-277.html>.

⁷³ Press Release, U.S. Sec. & Exch. Comm’n, Wire and Cable Manufacturer Settles FCPA and Accounting Charges (Dec. 29, 2016), <https://www.sec.gov/news/pressrelease/2016-283.html>.

Table VI – SEC FCPA Enforcement Action Settlement Amounts (2010 – 2016)

Year	Settlement Amounts
2016	\$1.07 billion
2015	\$114 million
2014	\$327 million
2013	\$300 million
2012	\$118 million
2011	\$148 million
2010	\$530 million

Even though SEC FCPA enforcement in 2016 was record-setting, for the same reasons discussed above, few meaningful conclusions should be drawn. Nevertheless, two statistics are noteworthy: (i) the continued prominence of SEC administrative actions, as well as alternative resolution vehicles; and (ii) the continued gap between SEC corporate enforcement actions and related individual prosecutions.

The first noteworthy statistic is that twenty of the twenty-four (83%) corporate enforcement actions were resolved either through an administrative order or an NPA. As a result of these controversial resolution vehicles, there was no judicial scrutiny of 83% of SEC FCPA enforcement actions from 2016.⁷⁴ This statistic furthers a clear trend regarding SEC corporate FCPA enforcement. For instance, in 2015 there was no judicial scrutiny of 89% of SEC FCPA enforcement actions, and in 2014 there was no judicial scrutiny of 86% of SEC FCPA enforcement actions.⁷⁵

The second noteworthy statistic is the continued gap between SEC corporate enforcement actions and related individual prosecutions. Even though SEC Enforcement Director Andrew Ceresney stated in 2016, similar to prior years, that “pursuing individual accountability [in FCPA enforcement actions] is a critical part of deterrence . . . and the Division of Enforcement will continue to do everything we can to hold individuals accountable,”⁷⁶ the fact remains that seventeen of the twenty-four (71%)

⁷⁴ For an extended discussion of the origins and controversy of SEC administrative orders and DPAs, see generally Mike Koehler, *A Snapshot of the Foreign Corrupt Practices Act*, 14 SANTA CLARA J. INT’L L. 143 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584661.

⁷⁵ Of the nine enforcement actions in 2015, only the Hitachi settlement was subject to judicial scrutiny. SEC Enforcement Actions: FCPA Cases, U.S. Sec. & Exch. Comm’n, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Sept. 10, 2017) (follow hyperlinks under the appropriate year’s heading to find the SEC press releases for each enforcement action). Additionally, of the eight enforcement actions in 2014, only the Avon Products settlement was subject to judicial scrutiny. *Id.*

⁷⁶ Andrew Ceresney, Dir., Div. of Enf’t, U.S. Sec. & Exch. Comm’n, Keynote Address at ACI’s 33rd International Conference on the FCPA (Nov. 30, 2016), <https://www.sec.gov/news/speech/speech-ceresney-113016.html>.

corporate enforcement actions did not result in related enforcement actions against company employees. Again, this statistic, while troubling, is consistent with prior years, as approximately 80% of corporate SEC FCPA enforcement actions since 2006 have not (at least yet) resulted in any related charges of company employees.⁷⁷

Analyzing DOJ and SEC FCPA enforcement data separately in Tables I through VI above is informative given that the DOJ and SEC are separate law enforcement agencies and different issues may arise in DOJ and SEC FCPA enforcement actions.⁷⁸ On the other hand, analyzing DOJ and SEC FCPA enforcement data in the aggregate is also informative because it provides a more holistic view of FCPA enforcement.

C. Aggregate Corporate FCPA Enforcement Actions

In 2016, the DOJ and SEC together collected approximately \$2.3 billion in twenty-seven core corporate enforcement actions—both yearly records in terms of the number of core corporate enforcement actions, as well as aggregate settlement amounts.

Table VII, below, aggregates DOJ and SEC FCPA enforcement statistics over time and highlights unique circumstances which may have significantly skewed enforcement data statistics in any particular year.

Table VII – Corporate FCPA Enforcement Actions (2007 – 2016)

Year	Core Actions	Settlement Amount	Of Note
2007	15	\$149 million	Six enforcement actions involved Iraq Oil for Food conduct and these enforcement actions comprised 40% of all enforcement actions and approximately 50% of the \$149 million amount.

⁷⁷ Mike Koehler, *A Focus on SEC Individual Actions*, FCPA PROFESSOR (Jan. 23, 2016), <http://fcpaprofessor.com/focus-sec-individual-actions/>.

⁷⁸As a general matter, the SEC has jurisdiction over “issuers” (companies—domestic and foreign—with shares registered on a U.S. exchange or otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. Thus, certain DOJ corporate enforcement actions from 2016 did not have an SEC component because the companies (for instance HMT and NCH) were private companies not subject to SEC jurisdiction. As a general matter, the DOJ has criminal jurisdiction over “issuers,” “domestic concerns,” (i.e., any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involved conduct “while in the territory of the U.S.” Compared to the SEC’s civil burden of proof of preponderance of the evidence, the DOJ has a higher burden of proof of beyond a reasonable doubt in a criminal prosecution. Perhaps based on this difference, several SEC enforcement actions in 2016 (such as SAP, SciClone Pharmaceuticals, Qualcomm, Nordion, Novartis, Key Energy, AstraZeneca, Nu Skin, AB InBev, and GlaxoSmithKline) did not involve a related DOJ component.

2008	10	\$885 million	The \$800 million Siemens enforcement action comprised approximately 90% of the \$885 million amount.
2009	11	\$645 million	The \$579 million KBR / Halliburton Bonny Island, Nigeria enforcement action comprised approximately 90% of the \$645 million amount.
2010	21	\$1.4 billion	Six enforcement actions, all resolved on the same day, involved various oil and gas companies' use of Panalpina in Nigeria. Panalpina also resolved an enforcement action on the same day. Two enforcement actions (Technip and Eni / Snamprogetti) involved Bonny Island conduct. In other words, there were 14 unique corporate enforcement actions in 2010. Of further note, the two Bonny Island enforcement actions, Technip (\$338 million) and Eni/Snamprogetti (\$365 million) comprised approximately 50% of the \$1.4 billion amount.
2011	16	\$503 million	The \$219 million JGC Corp. enforcement action involved Bonny Island conduct and comprised approximately 44% of the \$503 million amount.
2012	12	\$260 million	No enforcement actions significantly skewed the statistics.
2013	9	\$720 million	The \$398 million Total enforcement action comprised approximately 55% of the \$720 million amount.
2014	10	\$1.6 billion	Two enforcement actions (Alstom - \$772 million and Alcoa - \$384 million) comprised approximately 72% of the \$1.6 billion amount.
2015	11	\$139 million	No enforcement actions significantly skewed the statistics.
2016	27	\$2.3 billion	Three enforcement actions (Teva, Odebrecht/Braskem and VimpelCom) comprised approximately 56% of the \$2.41 billion amount and five enforcement actions (the three mentioned above plus JP Morgan and Embraer) comprised approximately 72% of the amount.
TOTAL	142	\$8.7 billion	

D. Individual DOJ and SEC FCPA Enforcement Actions

The statistics highlighted above regarding the notable gap between corporate FCPA enforcement and related individual enforcement against company employees are not meant to suggest that the DOJ or SEC do not bring individual FCPA enforcement actions. The next section highlights 2016 DOJ and SEC individual FCPA enforcement actions and also provides historical comparisons.

As demonstrated in Table VIII, in 2016 the DOJ filed or announced FCPA criminal charges against eight individuals.

Table VIII – 2016 DOJ Individual FCPA Enforcement Actions

Individual	Employer / Former Employer	Related Corporate Enforcement Action
Moises Abraham Millan Escobar ⁷⁹	Associated with various privately-held energy companies	No
Samuel Mebiame ⁸⁰	Connected to Och-Ziff	Yes
Ng Lap Seng and Jeff Yin ⁸¹	Associated with an Unnamed Non-Governmental Organization	No
Daniel Perez, Kamta Ramnarine, Victor Valdez, and Douglas Ray ⁸²	Associated with Hunt Pan Am Aviation Inc.	No

As highlighted in Table IX, the number of DOJ individual FCPA enforcement actions in 2016 was generally below historical averages.

⁷⁹ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme (Mar. 23, 2016), <https://www.justice.gov/opa/pr/miami-businessman-pleads-guilty-foreign-bribery-and-fraud-charges-connection-venezuela>.

⁸⁰ Complaint, United States v. Mebiame, 2016 WL 8411041 (E.D.N.Y. 2016) (No. 1:16CR00627), <https://www.justice.gov/criminal-fraud/file/943131/download>.

⁸¹ Indictment, United States v. NG Lap Seng, 2017 WL 2693625 (S.D.N.Y. 2016) (No. S5 15 Cr. 706 (VSB)), <https://www.justice.gov/criminal-fraud/file/913286/download>.

⁸² Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Four Businessmen and Two Foreign Officials Plead Guilty in Connection with Bribes Paid to Mexican Aviation Officials (Dec. 27, 2016), <https://www.justice.gov/opa/pr/four-businessmen-and-two-foreign-officials-plead-guilty-connection-bribes-paid-mexican>.

Table IX - DOJ Individual FCPA Enforcement Actions (2007 – 2016)⁸³

Year	Individuals Charged with Criminal FCPA Offenses
2016	8
2015	8
2014	10
2013	12
2012	2
2011	10
2010	33 (including 22 in the Africa Sting case)
2009	18
2008	14
2007	7

As demonstrated in Table X, in 2016 the SEC brought FCPA civil charges against eight individuals.

Table X – 2016 SEC Individual FCPA Enforcement Actions

Individual	Employer / Former Employer	Related Corporate Enforcement Action
Ignacio Cueto Plaza ⁸⁴	LAN Airlines	Yes
Yu Kai Yuan ⁸⁵	PTC	Yes
Mikhail Gourevitch ⁸⁶	Nordion	Yes
Lars Frost ⁸⁷	BK Medical (Analogic)	Yes
Jun Ping Zhang ⁸⁸	CareFx China / Harris Corp	No
Daniel Och ⁸⁹ Joel Frank	Och-Ziff	Yes
Karl Zimmer ⁹⁰	General Cable	Yes

⁸³ Mike Koehler, *A Focus on DOJ Individual Actions*, FCPA PROFESSOR (Jan. 26, 2017) <https://fcpaprofessor.com/focus-doj-individual-actions/>.

⁸⁴ Ignacio Cueto Plaza, Respondent, Exchange Act Release No. 77057, Accounting and Auditing Enforcement Act Release No. AE-3738, 2016 WL 683570 (Feb. 4, 2016) (cease and desist order).

⁸⁵ Press Release, U.S. Sec. & Exch. Comm'n, SEC: Tech Company Bribed Chinese Officials (Feb. 16, 2016), <https://www.sec.gov/news/pressrelease/2016-29.html>.

⁸⁶ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Engineer and Former Employer with Bribe Scheme in Russia (Mar. 3, 2016), <https://www.sec.gov/litigation/admin/2016/34-77288-s.pdf>.

⁸⁷ Analogic Corp., Exchange Act Release No. 78113, Accounting and Auditing Enforcement Act Release No. AE-3784, 2016 WL 4363422 (July 21, 2016) (cease and desist order).

⁸⁸ Jun Ping Zhang, Exchange Act Release No. 78825, Accounting and Auditing Enforcement Act Release No. AE-3800, 2016 WL 4761087 (Sept. 13, 2016) (cease and desist order).

⁸⁹ Och-Ziff Capital Management Group LLC, Exchange Act Release No. 78989, Investment Advisors Act Release No. IA-4540, 2016 WL 5461964 (Sept. 29, 2016) (cease and desist order).

⁹⁰ Karl J. Zimmer, Exchange Act Release No. 79704, 2016 WL 7474486 (Dec. 29, 2016) (cease and desist order).

As highlighted in Table XI, the number of SEC individual FCPA enforcement actions in 2016 was generally higher than historical averages—likely the result of the record number of corporate FCPA enforcement actions brought by the SEC in 2016.

Table XI - SEC Individual FCPA Enforcement Actions (2007 – 2015)⁹¹

Year	Individuals Charged with Civil FCPA Offenses
2016	8
2015	2
2014	2
2013	0
2012	4
2011	12
2010	7
2009	5
2008	5
2007	7

II. NOTEWORTHY ISSUES FROM 2016

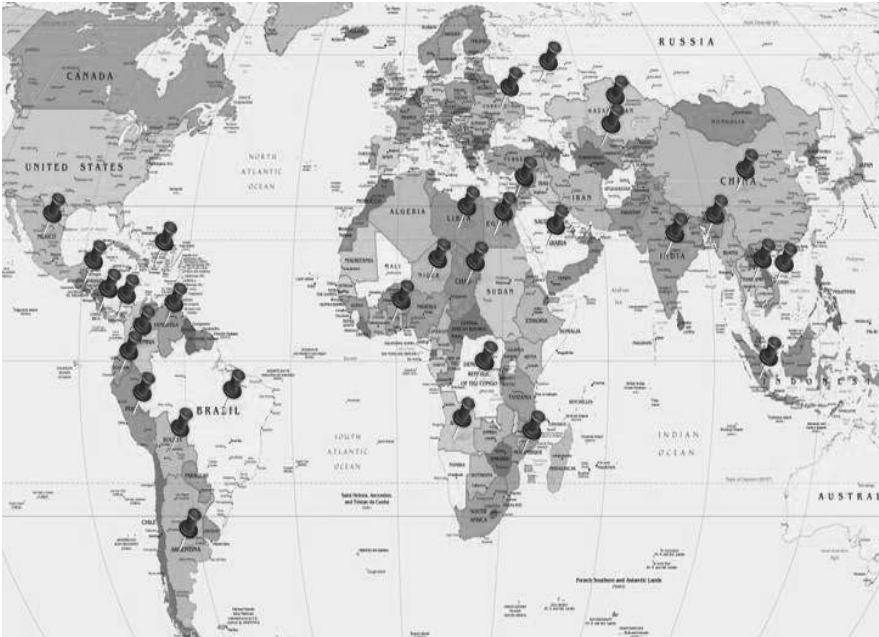
Compared to the quantitative statistics set forth above, this section highlights various qualitative issues from 2016 FCPA enforcement, including several FCPA enforcement action firsts, expansive and evolving enforcement theories, and FCPA policy developments.

A. *FCPA Enforcement Action Firsts and Other Qualitative Highlights*

FCPA enforcement in 2016 was also notable given the wide spectrum of enforcement actions. For instance, as highlighted in Table XII below, there were FCPA enforcement actions against U.S. companies as well as foreign companies subject to the FCPA's jurisdiction; enforcement actions that alleged egregious instances of corporate bribery executed at the highest levels of a company (such as VimpelCom and Odebrecht/Braskem) as well as enforcement actions based on allegations of “golf in the morning and beer-drinking in the evening” (SciClone Pharmaceuticals) and internship and hiring practices such as JPMorgan as discussed in more detail below; enforcement actions against large multinational companies (such as SAP and Qualcomm) as well as small publicly-traded companies (such as Nortek, Akamai Technologies and General Cable) and privately-held, limited liability companies such as HMT; enforcement actions against business

⁹¹ Mike Koehler, *A Focus on SEC Individual Actions*, FCPA Professor (Jan. 23, 2017), <https://fcpaprofessor.com/focus-sec-individual-actions/>.

organizations across a wide spectrum of industries such as technology, oil and gas, pharmaceutical and medical device, airlines, and financial services; and enforcement actions, depicted in the below map, involving conduct across the globe from Latin America to South America, to Eastern Europe to Africa, with a majority of enforcement actions focusing in whole or in part on conduct occurring in China.



In 2016, FCPA enforcement also witnessed several FCPA enforcement action firsts and other qualitative highlights.

In terms of firsts, foreign companies with shares listed on a U.S. exchange are subject to the FCPA. Given that companies headquartered in Canada and Israel comprise approximately 40% of foreign companies with shares listed on a U.S. exchange,⁹² it was only a matter of time before a Canadian and Israeli company resolved an FCPA enforcement action.

In 2016, Nordion (Canada) Inc. became the first Canadian company to resolve an FCPA enforcement action as the SEC found in an administrative order that it violated the FCPA's books and records and internal controls provisions "in connection with payments made to a third party agent to

⁹² U.S. SEC. & EXCH. COMM'N, NUMBER OF FOREIGN COUNTRIES REGISTERED AND REPORTING WITH THE U.S. SECURITIES AND EXCHANGE COMMISSION (2013), <https://www.sec.gov/divisions/corpfin/internat/foreignsummary2013.pdf>.

obtain Russian government approval to distribute TheraSphere, Nordion's liver cancer treatment, in Russia."⁹³ According to the SEC,

Nordion failed to record those payments in a manner that accurately and fairly reflected the transactions in its books and records [and] also failed to devise and maintain adequate internal accounting controls to provide sufficient reassurances that Nordion funds were used as authorized, that third-party agents were appropriately vetted, and that Nordion adequately trained its employees to conduct business in countries with significant corruption risks.⁹⁴

While the \$375,000 settlement amount was not notable, the fact that it was the first FCPA enforcement action against a Canadian company was notable.

Also in 2016, Teva Pharmaceutical Industries Ltd. became the first Israeli company to resolve an FCPA enforcement action. In pertinent part, the parallel DOJ and SEC enforcement action focused on Copaxone, a drug used in the treatment of multiple sclerosis and Teva's most profitable product during the relevant time period.⁹⁵ Although there was no allegation or finding that Copaxone was an inferior product or that it compromised patient health, the enforcement action alleged that Teva Russia and Teva Mexico engaged in various schemes to provide things of value to alleged foreign officials to influence product purchase. In addition, the enforcement action alleged that Teva Ukraine provided various things of value to a Ukrainian official to induce him to use his official position within the Ukrainian government to improperly influence the registration of Teva pharmaceutical products in Ukraine. The bulk of the alleged improper conduct focused on Russia, and specifically Teva Russia's relationship with a Russian company owned, controlled, and managed by a Russian official with influence over the purchase of pharmaceutical products by the Russian government. In this regard, the DOJ specifically alleged that "employees and agents of Teva Russia concealed negative information about Russian Company when Teva was undertaking due diligence, including information about Russian Official's alleged involvement in corruption related to Russian government drug procurement auctions."⁹⁶ The \$519-million overall settlement amount in the Teva enforcement action was by far the

⁹³ Nordion (Canada) Inc., Respondent, Exchange Act Release No. 77290, 2016 WL 825662 (Mar. 3, 2016) (cease and desist order).

⁹⁴ *Id.*

⁹⁵ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Teva Pharmaceutical Industries Ltd. Agrees to Pay More than \$283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>.

⁹⁶ Information at 15, United States v. Teva LLC, Case No. 1:16-cr-20967-KMW (S.D. Fla. Dec. 22, 2016), <https://www.justice.gov/opa/press-release/file/920236/download>.

largest ever FCPA enforcement action against a pharmaceutical company⁹⁷ and the fourth-largest FCPA settlement amount of all time.⁹⁸

In terms of other FCPA enforcement firsts, the SEC's 2016 FCPA enforcement action against Och-Ziff Capital Management Group executives Daniel Och and Joel Frank stands out. In connection with a \$412-million parallel DOJ and SEC enforcement action against the hedge fund for alleged improper practices in various African countries,⁹⁹ the SEC also found in an administrative order that Och (CEO and Chairman of the company) was a cause of certain of the company's FCPA books and records violations, and that Frank (CFO of the company) was a cause of certain of the company's FCPA books and records and internal controls violations.¹⁰⁰ The SEC findings as to Och and Frank are believed to be the first time in FCPA history that the SEC found the current CEO and CFO of an issuer company liable for company FCPA violations.¹⁰¹ "Without admitting or denying the SEC's findings, Och agreed to pay approximately \$2.2 million (\$1,900,000—reflecting his estimated share of gain to Och-Ziff resulting from the transactions with a Democratic Republic of Congo Partner and \$273,718 in prejudgment interest)," the largest settlement amount in FCPA history by an individual in an SEC enforcement action.¹⁰²

⁹⁷ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than \$283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>.

⁹⁸ See Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), <https://www.sec.gov/news/press/2008/2008-294.htm> (providing that Siemens paid \$450 million to DOJ and \$350 million to SEC); Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), <https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> (providing that Alstom paid \$772 million to DOJ); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), <https://www.sec.gov/news/press/2009/2009-23.htm> (providing that KBR and Halliburton paid \$402 million to DOJ and \$177 million to SEC); Press Release, U.S. Sec. & Exch. Comm'n, Teva Pharmaceuticals Paying \$519 Million to Settle FCPA Charges (Dec. 22, 2016), <https://www.sec.gov/news/pressrelease/2016-277.html> (providing that Teva Pharmaceuticals paid \$283 million to DOJ and \$236 million to SEC).

⁹⁹ See Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine, (Sept. 29, 2016), <https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213> (releasing information about Och-Ziff's three-year deferred prosecution agreement); Press Release, U.S. Sec. & Exchange Comm'n, Och-Ziff Hedge Fund Settles FCPA Charges (Sept. 29, 2016), <https://www.sec.gov/news/pressrelease/2016-203.html> (announcing Och-Ziff's agreement to pay "nearly \$200 million to the SEC to settle civil charges of violating the [FCPA]").

¹⁰⁰ Och-Ziff Capital Management Group LLC, *supra* note 90.

¹⁰¹ See Ceresney, *supra* note 77 (emphasizing that Och-Ziff African Bribery case was the first FCPA action against a hedge fund and one that emphasized individual liability of the senior executives).

¹⁰² *Id.*

Similar to the SEC's charges against Och and Frank, in 2016 the SEC also brought an FCPA enforcement action against Ignacio Cueto Plaza, the current CEO of LAN Airlines.¹⁰³ In pertinent part, the SEC found:

In 2006 and 2007, Ignacio Cueto Plaza ("Cueto"), the CEO of LAN Airlines S.A. ("LAN"), authorized \$1.15 million in improper payments to a third party consultant in Argentina in connection with LAN's attempts to settle disputes on wages and other work conditions between LAN Argentina S.A. ("LAN Argentina"), a subsidiary of LAN, and its employees. At the time, Cueto understood that it was possible the consultant would pass some portion of the \$1.15 million to union officials in Argentina. The payments were made pursuant to an unsigned consulting agreement that purported to provide services that Cueto understood would not occur. Cueto authorized subordinates to make the payments that were improperly booked in the Company's books and records, which circumvented LAN's internal accounting controls.¹⁰⁴

Without admitting or denying the SEC's findings, Cueto agreed to cease and desist from future legal violations and to pay a \$75,000 civil penalty.¹⁰⁵ A few months later, and based on the same core conduct, the DOJ and SEC also brought a parallel \$22-million FCPA enforcement action against LAN Airlines.¹⁰⁶ The enforcement action was notable because in the resolution documents the DOJ criticized the company for allowing Cueto to remain in his position. Specifically, the DOJ stated: "[T]he Company has failed to remediate adequately, including significantly by failing to discipline in any way the employees responsible for the criminal conduct recounted in the statement of facts . . . including misconduct by at least one high-level Company executive, and thus the ability of the compliance program to be effective in practice is compromised."¹⁰⁷ The LAN enforcement action was also notable in that it was believed to be the first FCPA enforcement in history against a company headquartered in South America.¹⁰⁸ This unique

¹⁰³ Ignacio Cueto Plaza, *supra* note 85.

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Id.* at 9.

¹⁰⁶ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$12.75 Million Criminal Penalty (July 25, 2016), <https://www.justice.gov/opa/pr/latam-airlines-group-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1275>; Press Release, U.S. Sec. & Exch. Comm'n, LAN Airlines Settles FCPA Charges (July 25, 2016), <https://www.sec.gov/news/pressrelease/2016-151.html>.

¹⁰⁷ Deferred Prosecution Agreement at 4, United States v. Latam Airlines Group S.A., Case No. 16-60195-DTKH (S.D. Fla. July 25, 2016), <https://www.justice.gov/criminal-fraud/file/879136/download>.

¹⁰⁸ Mike Koehler, *Issues to Consider from the LAN Airlines Enforcement Action*, FCPA PROFESSOR (July 27, 2016), <http://fcpaprofessor.com/issues-consider-lan-airlines-enforcement-action/>.

list soon expanded as 2016 also witnessed FCPA enforcement actions against Brazil-based companies Embraer and Odebrecht/Braskem.

The Cueto / LAN Airlines enforcement action based on allegations that a Chilean company engaged in improper conduct in Argentina, as well as the other 2016 FCPA enforcement actions against foreign companies highlighted in Table XII below, raise important questions about the proper scope of FCPA enforcement and related policy issues.

Table XII – 2016 FCPA Enforcement Actions Against Non-U.S. Companies

Company (Headquarters)	General Allegations	Jurisdictional Basis
SAP (Germany)	Improper payments to official(s) in Panama and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange
VimpelCom (The Netherlands)	Improper payments to official(s) in Uzbekistan and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange
LAN Airlines (Chile)	Improper payments in Argentina and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange
Nordion (Canada)	Improper payments to official(s) in Russia and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange
Novartis (Switzerland)	Improper payments to official(s) in China and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange
AstraZeneca (United Kingdom)	Improper payments to official(s) in China and Russia, and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange

ABInBev (<i>Belgium</i>)	Improper payments to official(s) in India and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange
GlaxoSmithKline (<i>United Kingdom</i>)	Improper payments to official(s) in China and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange
Embraer (<i>Brazil</i>)	Improper payments to official(s) in Dominican Republic, Saudi Arabia, Mozambique, and India; and associated books and records and internal controls deficiencies	Securities registered with the SEC and listed on a U.S. exchange; Embraer's wholly-owned U.S. subsidiary was active in the bribery schemes, including by making payments from its New York-based bank account.
Odebrecht / Braskem (<i>Brazil</i>)	Improper payments to official(s) in Brazil, Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela; and associated books and records and internal controls deficiencies	Odebrecht: Money connected to the bribery scheme flowed through New York-based bank accounts Braskem: Securities registered with the SEC and listed on a U.S. exchange; money connected to the bribery scheme flowed through New York-based bank accounts
Teva Pharma (<i>Israel</i>)	Improper payments to official(s) in Russia, Ukraine, and Mexico	Securities registered with the SEC and listed on a U.S. exchange; e-mails in connection with the bribery schemes passed through U.S. servers; payments in connection with the bribery schemes were wired through U.S. correspondent banks.

While many of the above FCPA enforcement actions against foreign companies were technically resolved through “only” FCPA books and records and internal controls charges or findings (provisions which have no specific jurisdictional elements other than a U.S. securities listing), the policy issue remains: what legitimate U.S. law enforcement interests are implicated when, for example, a German company interacts with

Panamanian officials, a Canadian company interacts with Russian officials, or a United Kingdom or Swiss company interacts with Chinese officials?

Even those FCPA enforcement actions highlighted above that did charge or find violations of the FCPA's anti-bribery provisions (which do have a specific U.S. nexus requirement for foreign companies), do random payments or e-mails passing through the U.S. implicate legitimate U.S. law enforcement interests when, for instance, a Brazilian company interacts with officials in the Dominican Republic, Saudi Arabia, Mozambique, and India, or an Israeli company interacts with officials in Russia, Ukraine, and Mexico?

The FCPA enforcement action against Brazilian companies Odebrecht/Braskem presented unique policy issues never before seen in FCPA enforcement prior to 2016. What made the enforcement action unique is that it was believed to be the first FCPA enforcement action in history against a foreign issuer for allegedly bribing its *own domestic officials*. In other words, a large portion of the U.S. enforcement action against the Brazilian companies was that they made improper payments to Brazilian officials.

The closest FCPA enforcement came to this unique dynamic was in a 1996 SEC FCPA enforcement action against Italy-based Montedison (the first SEC FCPA enforcement action against a foreign issuer).¹⁰⁹ Despite SEC allegations that the company made improper payments to Italian officials, the SEC (while charging the company with books and records and internal controls violations) did not charge the company with violating the FCPA's anti-bribery provisions.¹¹⁰ According to a knowledgeable source at the SEC at the time, there was a belief that there were no "foreign" officials involved because Montedison, an *Italian* company, allegedly made improper payments to *Italian* officials.¹¹¹

The flip side of the U.S. enforcement action against Odebrecht/Braskem would be Brazilian law enforcement bringing a multi-million-dollar enforcement action against a U.S. company for making allegedly improper payments to U.S. officials because the U.S. company has securities listed on a Brazilian exchange and/or a portion of the bribe payments may have flowed through a Brazil-based account.

Is the U.S. prepared for this to happen? Long before the unique 2016 FCPA enforcement against Odebrecht/Braskem, Senator Christopher Coons (D-DE) stated during a 2010 Senate FCPA hearing: "Today we are the only nation that is extending extraterritorial reach and going after the citizens of

¹⁰⁹ Exchange Act Release No. 15164, Civil Action No. 1:96CV02631 (HHG) (D.D.C. Nov. 21, 1996), <https://www.sec.gov/litigation/litreleases/lr15164.txt>.

¹¹⁰ *See id.* (announcing charges of financial fraud and violations of the "corporate reporting, books and records, and internal control provisions of the Securities Exchange Act of 1934").

¹¹¹ *See id.* ("[T]he scheme was designed to conceal hundreds of millions of dollars of payments that, among other things, were used to bribe politicians in Italy and other persons.").

other countries, we may someday find ourselves on the receiving end of such transnational actions.”¹¹² Regardless of the answer to the above question, in the minds of some, FCPA enforcement has become a convenient cash cow for the U.S. government.¹¹³ The above enforcement actions in 2016 against foreign companies, which resulted in approximately \$1.5 billion flowing into the U.S. treasury, only amplify these concerns.

Moreover, all of the 2016 FCPA enforcement actions against foreign companies were against companies headquartered in countries that, like the U.S., are parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).¹¹⁴ In other words, Germany, Switzerland, the Netherlands, Canada, Brazil, Israel, Belgium, and Chile are all “peer” countries with mature FCPA-like laws governing the conduct of their companies coupled with a reputable legal system to prosecute such offenses. Given this reality, as well as the specific provision in Article 4 of the OECD Convention that “when more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution,” can it truly be said that the U.S. is the most appropriate jurisdiction to prosecute certain foreign companies for alleged interactions with non-U.S. officials?

In this regard, it is worth highlighting that part of the FCPA reform discussion in the 1980s were bills seeking to waive the FCPA’s provisions “in the case of any country which the Attorney General has certified to have (1) effective bribery or corruption statutes; and (2) an established record of aggressive enforcement of such statutes.”¹¹⁵

B. *Expansive and Evolving FCPA Enforcement Theories*

Substantively, the FCPA’s core anti-bribery provisions have not changed since the 1998 amendments to the statute. However, with each passing year the range of conduct the enforcement agencies view to be in violation of the FCPA seems to expand. There are several practical and

¹¹² *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcommittee on Crime and Drugs of the Committee on the Judiciary*, 111th Cong. 23 (2010) (statement of Sen. Coons).

¹¹³ See Michael F. Perlis & Wrenn E. Chais, *Investigating the FCPA*, FORBES (Dec. 8, 2009, 1:06 PM), <https://www.forbes.com/2009/12/08/foreign-corrupt-practices-act-opinions-contributors-michael-perlis-wrenn-chais.html> (“While these causes have increased investigations, governments will keep pursuing corrupt business practices for one very simple reason—it’s lucrative.”).

¹¹⁴ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, <http://www.oecd.org/corruption/oecdantibriberyconvention.html>.

¹¹⁵ See S. 1797, 99th Cong. (1985) (Competitive America Trade Reform Act of 1985, introduced on October 29, 1985, by Senator Gary Hart (D-CO)); H.R. 3813, 99th Cong. (1985) (Competitive America Trade Reform Act of 1985, introduced on November 21, 1985 by Representative Vic Fazio (D-CA)).

provocative reasons for the general increase in FCPA enforcement since 2004¹¹⁶ and expansive and evolving enforcement theories are certainly at the top of the list. What makes this dynamic problematic from a policy perspective is that the expansion has generally occurred in the absence of any meaningful judicial scrutiny. In this regard, 2016 witnessed the continued expansion and evolution of two prominent enforcement theories: (i) healthcare workers as “foreign officials,” and (ii) internship and hiring practices being a form of bribery.

1. *Healthcare Workers As “Foreign Officials”*

The legislative history is clear that the recipient category Congress had in mind when enacting the FCPA was bona fide foreign government officials such as presidents, prime ministers, and other heads of state.¹¹⁷ However, modern FCPA enforcement actions rarely involve such “foreign officials,” but rather individuals deemed “foreign officials” under creative enforcement theories not generally subjected to any meaningful judicial scrutiny.

For instance, as highlighted in Table XIII below, eight corporate FCPA enforcement actions involved foreign healthcare workers.

Table XIII – 2016 Corporate Enforcement Actions Involving Foreign Healthcare Workers

Enforcement Action	Alleged “Foreign Officials” ¹¹⁸
SciClone	“Healthcare professionals . . . who were employed by state-owned hospitals in China” ¹¹⁹
Olympus	Healthcare professionals in Brazil, Bolivia, Colombia, Argentina, Mexico, and Costa Rica ¹²⁰

¹¹⁶ See Mike Koehler, *FCPA 101*, FCPA PROFESSOR (last visited Oct. 15, 2017) <https://fcpaprofessor.com/fcpa-101/> (click on “Why has FCPA enforcement generally increased?”).

¹¹⁷ See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 883, 934 (discussing the events that prompted the passage of the FCPA and the types of foreign officials involved in those events).

¹¹⁸ Certain of the enforcement actions technically only involved FCPA books and records and internal control charges or findings. However, actual charges in many FCPA enforcement actions hinge on voluntary disclosure, cooperation, collateral consequences, and other non-legal issues. Thus, even if an FCPA enforcement action is resolved without FCPA anti-bribery charges, most such actions remain very much about the “foreign officials” involved—a fact evident when reading the actual enforcement action.

¹¹⁹ SciClone Pharmaceuticals, Inc., File No. 3-17101, at 2 (Sec. & Exch. Comm’n Feb. 4, 2016).

¹²⁰ See Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc.*, No. 16-3525(MF) at A5–A13 (D. N.J. Mar. 1, 2016) (including healthcare professionals in Brazil, Bolivia, Colombia, Argentina, Mexico, and Costa Rica).

Nordion	“Russian government officials to obtain approval for TheraSphere” (the company’s liver cancer treatment product) ¹²¹
Novartis	Chinese healthcare professionals ¹²²
Analogic	Individuals at “hospitals or other medical facilities that were controlled by the government of Russia” ¹²³
AstraZeneca	“Health care providers, at state-owned and state-controlled entities in China and Russia” ¹²⁴
GlaxoSmithKline	Healthcare professionals in China ¹²⁵
Teva Pharma	<p>Russian official described as a high-ranking government official in the Russian Federation who held official positions on government committees and who had the ability to influence matters related to the purchase of pharmaceutical products by the Russian government, including purchases made during annual auctions held by the Russian Ministry of Health</p> <p>Ukrainian official described as a high-ranking official within the Ukrainian Ministry of Health who held official positions at government agencies and on government committees and who could take official action on, and exert official influence over, matters related to the registration and pricing of pharmaceutical products in Ukraine</p> <p>Physicians and other healthcare providers at state-owned and state-managed hospitals and healthcare facilities in Mexico¹²⁶</p>

¹²¹ See Nordion Inc., File No. 3-17153, at 3 (Mar. 3, 2016) (“Russian government officials to obtain approval for TheraSphere.”).

¹²² See Novartis AG, File No. 3-17177, at 3 (Sec. & Exch. Comm’n Mar. 23, 2016) (centering on the action of Chinese healthcare professionals).

¹²³ Analogic Non-Prosecution Agreement, at A-2 (Dep’t of Justice June 21, 2016).

¹²⁴ AstraZeneca PLC, File No. 3-17517, at 2 (Sec. & Exch. Comm’n Aug. 30, 2016).

¹²⁵ GlaxoSmithKline PLC, File No. 3-17606, at 2 (Sec. & Exch. Comm’n Sept. 30, 2016).

¹²⁶ Press Release No. 16-1522, Dep’t of Justice, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than \$283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>.

Because pharmaceutical and other healthcare companies risk debarment from U.S. government healthcare programs upon actual conviction of a federal crime, it is not surprising that all of the above companies agreed to resolve their alleged FCPA scrutiny through SEC administrative actions and/or DOJ non-prosecution or deferred prosecution (resolution vehicles which generally do not implicate debarment).¹²⁷ Although the enforcement theory that individuals associated with foreign healthcare systems are “foreign officials” on par with presidents and prime ministers was first used in an FCPA enforcement action in 2002,¹²⁸ including the eight corporate enforcement actions from 2016, this enforcement theory has been used in approximately twenty-five corporate enforcement actions.¹²⁹

None of these corporate actions based on this creative enforcement theory were subjected to any meaningful judicial scrutiny. However, a useful data point in examining the legitimacy and validity of this enforcement theory is examining whether it has been used in any individual FCPA enforcement action. The answer is no, and this is meaningful because individuals, as opposed to business organizations, are more likely to contest FCPA charges and put the enforcement agencies to their respective burdens of proof.

2. *Internship and Hiring Practices*

The FCPA has specific elements that must be met in order for there to be a violation. With increasing frequency, however, it appears that the DOJ and SEC have transformed FCPA enforcement into a free-for-all corporate ethics statute in which any conduct the enforcement agencies find objectionable is fair game to extract a multi-million-dollar settlement from a risk-averse corporation.

An instructive example in 2016 was the \$202.6-million FCPA enforcement action against JPMorgan based on alleged improper hiring and internship practices in the Asia-Pacific region. After discussing the main features of the problematic enforcement action, this section highlights why the SEC’s enforcement action finding violations of the FCPA’s anti-bribery, books and records, and internal controls provisions represents a trifecta of

¹²⁷ See DAVID W. OGDEN & ELISEBETH COLLINS COOK, U.S. CHAMBER INST. FOR LEGAL REFORM, *THE EXCLUSION ILLUSION: FIXING A FLAWED HEALTH CARE FRAUD ENFORCEMENT SYSTEM* 2–3 (2012) (describing the current FCPA enforcement system of “huge out-of-court settlements”), https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/The-Exclusion-Illusion.pdf.

¹²⁸ See U.S. Sec. & Exch. Comm’n v. Syncor Int’l Corp., No. 1:02CV02421 (D.D.C. Dec. 10, 2002), Litigation Release No. 17887 (Dec. 10, 2002), <https://www.sec.gov/litigation/litrelases/lr17887.htm> (discussing a 2002 DOJ and SEC enforcement action against Syncor as the first action based on the “foreign official” theory).

¹²⁹ *Id.*

off-the-rails FCPA enforcement and why anyone who values the rule of law should be alarmed.¹³⁰

To best understand how the JPMorgan enforcement action represents off-the-rails FCPA enforcement, a brief overview of the FCPA's statutory framework and key elements is first provided. Generally speaking, the elements of an FCPA anti-bribery violation are: (i) paying or offering money or anything of value, (ii) with a corrupt intent, (iii) to a foreign official, and (iv) for purposes of influencing the foreign official in order to obtain or retain business.¹³¹ While the FCPA does not specifically define the term "corrupt," legislative history instructs that the term was "used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position" and "connotes an evil motive or purpose."¹³² The FCPA contains so-called third party payment provisions that further prohibit money or things of value given to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official."¹³³

In addition to the above elements specific to the FCPA's anti-bribery provisions, it is black-letter law that legal liability does not ordinarily hop, skip, and jump around a multinational company absent limited exceptions due to abuse of corporate form or other alter ego factors. In short, separate legal entities (including even those within the same corporate hierarchy) are not liable for the legal liability of other entities (whether that liability arises in tort, contract or under the FCPA).

Regarding parent company liability for subsidiary conduct, even the 2012 FCPA Guidance issued by the DOJ and SEC stated:

There are two ways in which a parent company may be liable for bribes paid by its subsidiary. First, a parent may have *participated sufficiently* in the activity to be directly liable for the conduct—as, for example, when it *directed its subsidiary's misconduct or otherwise directly participated in the bribe scheme*. Second, a parent may be liable for its subsidiary's conduct under traditional agency principles. The fundamental characteristic of agency is *control*. Accordingly, DOJ and SEC evaluate the parent's control—including the *parent's knowledge and direction of the subsidiary's actions*, both

¹³⁰ Based on the same core conduct as the SEC enforcement action, the DOJ also entered into a non-prosecution agreement with JPMorgan Securities (Asia Pacific) Limited pursuant to which the company agreed to pay a \$72-million criminal penalty. While this section focuses on the SEC's enforcement action, the DOJ enforcement action is problematic for many of the same reasons discussed in this section.

¹³¹ 15 U.S.C. § 78dd-1 et seq. (2012).

¹³² H.R. REP. NO. 95-640, at 7 (1977) (Conf. Rep.).

¹³³ 15 U.S.C. § 78dd-1(a)(3).

generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent.¹³⁴

Relevant to agency principles, the Supreme Court recently held that just because a subsidiary may have engaged in conduct that is “sufficiently important” to the parent company does not mean that the subsidiary’s conduct is imputed to the parent company.¹³⁵

The FCPA’s books and records and internal controls provisions specifically state that issuers shall:

[M]ake and keep books, records, and accounts, which, in reasonable detail, accurately and fairly *reflect the transactions and dispositions of the assets of the issuer* . . . [D]evis[e] and maintain a system of internal accounting controls sufficient to provide *reasonable assurances* that: (i) *transactions* are executed in accordance with management's general or specific authorization; (ii) *transactions* are recorded as necessary (I) to permit preparation of *financial statements* in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for *assets*; (iii) access to *assets* is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for *assets* is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences . . .

¹³⁶

The FCPA defines “reasonable assurances” and “reasonable detail” to mean “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”¹³⁷ Regarding the books and records provisions, the SEC has stated:

[R]ecords which are not relevant to accomplishing the objectives specified in the statute for the system of internal controls are not within the purview of the recordkeeping provision¹³⁸

¹³⁴ CRIM. DIV., U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 27 (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> (emphasis added) (footnote omitted).

¹³⁵ Daimler AG v. Bauman, 134 S. Ct. 746, 761–62 (2014).

¹³⁶ 15 U.S.C. §§ 78m(b)(2)(A)–(B) (2012) (emphasis added).

¹³⁷ *Id.* § 78m(b)(7) (2012).

¹³⁸ Harold M. Williams, Chairman, U.S. Sec. & Exch. Comm’n, Address at the SEC Developments Conference for the American Institute of Certified Public Accountants (Jan. 13, 1981), <https://www.sec.gov/news/speech/1981/011381williams.pdf> (emphasis added).

[T]his provision is not an independent and unrestrained mandate to the [SEC] to establish novel or unprecedented corporate recordkeeping standards; it is, rather, an integral part of Congress' efforts to assure that the business community *records transactions and assets* in such a way as to maintain adequate control over them. And, this leads to two important conclusions: First, the [FCPA] does not establish any absolute standard of exactitude for corporate records. And, second, *records which are not related to internal or external audits or to the four internal control objectives set forth in the [FCPA] are not within the purview of the [FCPA's] accounting provisions.*¹³⁹

Likewise, in the 2012 FCPA Guidance the DOJ and SEC state:

The FCPA's accounting provisions operate in tandem with the anti-bribery provisions and prohibit off-the-books *accounting*. Company management and investors rely on a *company's financial statements* and internal accounting controls to ensure transparency in the *financial health* of the business, the risks undertaken, and *the transactions* between the company and its customers and business partners. The accounting provisions are designed to "strengthen the accuracy of the *corporate books and records and the reliability of the audit process* which constitute the foundations of our system of corporate disclosure."¹⁴⁰

Regarding the internal controls provisions, *SEC v. World-Wide Coin*, the only judicial decision that directly addresses the substance of the provisions, states:

The definition of accounting controls does comprehend *reasonable*, but not absolute, assurances that the objectives expressed in it will be accomplished by the system. . . . It does not appear that either the SEC or Congress, which adopted the SEC's recommendations, intended that the statute should require that each affected issuer install a *fail-safe accounting control system* at all costs.¹⁴¹

Similarly, the SEC's most extensive guidance on the internal controls provisions states in pertinent part:

The Act does *not* mandate any particular kind of internal controls system. The test is whether a system, taken as a

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ CRIM. DIV., *supra* note 137 at 47 (emphasis added) (footnote omitted).

¹⁴¹ *SEC. v. World-Wide Coin Invs., Ltd.*, 567 F.Supp. 724, 751 (N.D. Ga. 1983) (emphasis added).

whole, *reasonably* meets the statute's specified objectives. "Reasonableness," a familiar legal concept, depends on an evaluation of all the facts and circumstances. . . . The accounting provisions principal objective is to reaching knowing or reckless conduct.¹⁴²

It is against this backdrop that the SEC brought an enforcement action against JPMorgan based on alleged improper hiring and internship practices in the Asia-Pacific region.¹⁴³ The administrative order, not subjected to any judicial scrutiny, found in summary fashion that:

Investment bankers at JPMorgan's subsidiary in Asia, JPMorgan Securities (Asia Pacific) Limited ("JPMorgan APAC"), created a client referral hiring program to leverage the promise of well-paying, career building JPMorgan employment for the relatives and friends of senior officials with its clients in order to assist JPMorgan APAC in obtaining or retaining business.¹⁴⁴

According to the SEC, many of JPMorgan APAC's clients were state-owned entities and the jobs and internships to relatives and friends of alleged "foreign officials" constituted a "personal benefit to the requesting officials

¹⁴² Foreign Corrupt Practices Act of 1977, Exchange Act Release No. 17500, 21 S.E.C. Docket 1466 (Jan. 29, 1981) (emphasis added).

¹⁴³ Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016), <https://www.sec.gov/news/pressrelease/2016-241.htm>. Prior to the JPMorgan action, the SEC brought two similar FCPA enforcement actions focused on alleged improper hiring and internship practices. In August 2015, the SEC found in an administrative order not subjected to any judicial scrutiny that BNY Mellon violated the FCPA's anti-bribery and internal controls provisions by providing "valuable internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund." Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html>. Without admitting or denying the SEC's findings, BNY Mellon agreed to pay \$14.8 million to resolve the action. *Id.* Similarly, in March 2016 the SEC found that Qualcomm violated the FCPA's anti-bribery, books and records, and internal controls provisions for providing or offering "full-time employment and paid internships to family members and other referrals of foreign officials." Qualcomm Inc., Exchange Act Release No. 77261, Accounting and Auditing Enforcement Act Release No. 3751, 2016 WL 792232, at 5 (Mar. 1, 2016). Without admitting or denying the SEC's findings, Qualcomm agreed to pay \$7.5 million to resolve the action. *Id.* An interesting aspect of the Qualcomm enforcement action is that the company maintained during its FCPA scrutiny that it was in compliance with the FCPA. *Id.* For instance, even when Qualcomm's FCPA scrutiny escalated in March 2014 upon receiving a Wells Notice from the SEC, the company disclosed that it responded to the SEC "explaining why the Company believes it has not violated the FCPA and therefore enforcement action is not warranted." *Id.* Thereafter, in November 2015 Qualcomm continued to insist in the midst of the SEC's inquiry that it had not violated the FCPA and that an enforcement action was not warranted. *Id.*

¹⁴⁴ JPMorgan Chase & Co., Exchange Act Release No. 3824, 2016 WL 6804113 (Nov. 17, 2016), <https://www.sec.gov/litigation/admin/2016/34-79335.pdf>.

in order to obtain or retain investment banking business or other benefits from the firm.”¹⁴⁵

While the SEC’s order contains extensive findings regarding JPMorgan APAC personnel (a separate and distinct legal entity from JPMorgan), the order contains nary a meaningful substantive finding regarding individuals at JPMorgan (the actual respondent in the SEC’s action). At the risk of stating the obvious, this is an important point to consider from the SEC’s order because there was no finding or inference that anyone at JPMorgan had corrupt intent, a required statutory element.

Indeed, the SEC’s many other findings about JPMorgan’s FCPA compliance program strongly suggest the absence of corrupt intent. For instance, the SEC acknowledged, among other things: that JPMorgan “recognized the FCPA risks in hiring the relatives of foreign government officials,” “took steps to educate its employees on the potential dangers,” and “instituted training for employees in the [APAC] region specifying that pre-clearance from compliance was required before JPMorgan APAC could hire Referral Hires”¹⁴⁶ Rather, the order simply states in conclusory fashion that “JPMorgan violated the anti-bribery provisions of the federal securities laws by corruptly providing valuable internships and employment to relatives and friends of foreign government officials in order to assist JPMorgan in retaining and obtaining business.”¹⁴⁷

In other words, the SEC allowed legal liability to hop, skip, and jump around JPMorgan’s organizational structure even though—to use the terms found in the DOJ and SEC’s FCPA Guidance—there were no findings that JPMorgan itself “participated sufficiently in the activity,” “directed its subsidiary’s misconduct or otherwise directly participated in the bribe scheme,” or had “knowledge and direct[ed] the subsidiary’s actions.” In prior recent FCPA enforcement actions, the SEC has articulated alter ego agency theories of liability based on the facts to hold a parent company liable for its subsidiary’s conduct.¹⁴⁸ The absence of such findings in the JPMorgan enforcement action would seem to suggest that such facts simply did not exist.

Commenting on this aspect of the JPMorgan enforcement action, FCPA practitioners at Debevoise & Plimpton stated:

For at least 90 years, it has been black letter law that a wholly owned subsidiary is not an agent merely by virtue of ownership, and agency between a parent and subsidiary is seldom a basis for ignoring the corporate form as agency is a

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See, e.g.,* SciClone Pharmaceuticals, Inc., Exchange Act Release No. 77058, Accounting and Auditing Enforcement Act Release No. 3739, 2016 WL 683571, at 2 (Feb. 4, 2016) (providing an example of a recent case in which the SEC asserted the “alter ego” theory).

consensual relationship. Instead, the corporate distinction between a parent and subsidiary can be disregarded only when the parent “authoriz[es]” the activity (as provided for in the FCPA itself) or where the parent has ignored the corporate formalities such that the distinction between the companies is mere form. Neither of these circumstances is alleged in the [JPMorgan enforcement action]. There is no basis for suggesting that the term “agent” in the FCPA should be interpreted to differ from the common law meaning.¹⁴⁹

Even if the corrupt intent of JPMorgan APAC employees could somehow be imputed to JPMorgan (and black letter law strongly cautions against this), the problematic issue still remains: as required by the anti-bribery provisions, what thing of value did the alleged Chinese “foreign officials” receive?

Surely the internships and jobs constituted a thing of value to the individuals who received them, but the FCPA’s statutory provisions clearly state that the thing of value must go “to” a foreign official.¹⁵⁰ Perhaps recognizing this statutory requirement, the SEC creatively found that the internships and jobs to relatives were a “personal benefit to the requesting officials.” Whether a court would agree with this dubious assertion is an open question (as are many other issues in certain recent FCPA enforcement actions) because there was no judicial scrutiny of the SEC’s enforcement action against JPMorgan.

Notwithstanding this salient fact and the other above-described legal deficiencies in the SEC’s enforcement action, then SEC Director of Enforcement Andrew Ceresney boldly proclaimed:

In the wake of some of the Commission’s prior hiring practices cases, including our cases against Bank of New York Mellon and Qualcomm, some questioned whether providing internships could amount to an FCPA violation. But the JPMorgan case should put that debate to rest.¹⁵¹

Exercising leverage against risk-averse corporations to extract a settlement amount on a disputed legal theory in the absence of judicial scrutiny puts little to rest other than the fact that the government possesses leverage. Indeed, around the same time the JPMorgan enforcement action was resolved in the absence of judicial scrutiny, there was judicial scrutiny of the same enforcement narrative in two cases.

In the first case, the Libyan Investment Authority (LIA) brought a civil action in a United Kingdom court against Goldman Sachs to rescind certain

¹⁴⁹ *Beyond “Sons and Daughters”: JPMorgan Resolves Hiring Practices Probe*, FCPA UPDATE (Debevoise & Plimpton, New York, NY), Nov. 2016, at 8–9 (footnotes omitted).

¹⁵⁰ 15 U.S.C. § 78dd-1(a) (2012).

¹⁵¹ Ceresney, *supra* note 77.

transactions and to obtain the repayment of premiums from Goldman Sachs.¹⁵² The LIA's main claim asserted that Goldman Sachs procured the LIA to enter into the transactions by the exercise of undue influence, and as to a certain transaction (the so-called April Trades), the LIA alleged that Goldman Sachs improperly influenced the deputy chairman of the LIA, Mustafa Zarti, to cause the LIA to agree to the trades by offering his younger brother, Haitem Zarti, a prestigious internship at the bank.¹⁵³ However, the judge concluded:

In my judgment it is going much too far to say that the internship influenced Mr. Zarti to place more business with Goldman Sachs than he otherwise would have done or that the offer had a material influence over the LIA's decision to enter into the April Trades. . . . I find that Mr Mustafa Zarti was keen for his younger brother to work as an intern, though there is no evidence as to why he thought this was important. Although the offer of the internship may have contributed to a friendly and productive atmosphere during the negotiation of the April Trades, it did not have a material influence on the decision of Mr. Zarti and the LIA to enter into the April Trades.¹⁵⁴

In the second case, *United States v. Tavares*, the government alleged that defendants ran a corrupt hiring scheme at the Massachusetts Office of the Commissioner of Probation (OCP) by catering to the hiring requests from members of the state legislature with the hope of obtaining favorable legislation for the Department of Probation and OCP.¹⁵⁵ At trial, the defendants were convicted of various criminal offenses and an appeal followed. The First Circuit began its opinion by noting that the defendants "misran the Probation Department and made efforts to conceal the patronage hiring system."¹⁵⁶ However, the court noted "bad men, like good men, are entitled to be tried and sentenced in accordance with the law" and that "not all unappealing conduct is criminal."¹⁵⁷

In short, the First Circuit found that the "government had not in fact demonstrated that the conduct satisfies the appropriate criminal statutes."¹⁵⁸ Citing the Supreme Court's opinion in *United States v. Sun-Diamond Growers of California*, the court stated that the "government must prove a

¹⁵² *Libyan Investment Authority v. Goldman Sachs Int'l* [2016] EWHC (Ch) 2530 [1–13] (Eng.), <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/lia-v-goldman.pdf>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *United States v. Tavares*, 844 F.3d 46, 49–53 (1st Cir. 2016).

¹⁵⁶ *Id.* at 53.

¹⁵⁷ *Id.* at 53–54.

¹⁵⁸ *Id.* at 54.

link between a thing of value conferred upon a public official and a specific official act for or because of which it was given.”¹⁵⁹ The court next stated:

In that vein, the Government cannot show the requisite linkage merely be demonstrating that the gratuity was given ‘to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future. . . . The Government’s evidence as to the gratuities predicates does not show adequate linkage between the thing of “substantial value” conferred by [defendant] (the jobs) and an “official act” performed or to be performed. . . . Many of the Government’s arguments are predicated on bootstrapping: because [defendant] was constantly conferring with legislators and hiring based on legislative preferences, any “official act” taken by an affected legislator must satisfy the nexus requirement. But we do not read the gratuities statute so broadly: the Supreme Court in *Sun–Diamond* “offered a strictly worded requirement that the government show a link to a ‘specific official act’ to supply a limiting principle that would distinguish an illegal gratuity from a legal one,” a principle unnecessary “in the extortion or bribery contexts.” Given a choice between treating a gratuities statute as “a meat axe or a scalpel,” the Supreme Court chose the latter, and we follow suit.¹⁶⁰

Just because two courts recently rejected narratives similar to the JPMorgan enforcement narrative does not of course definitely prove that the SEC’s case, if subjected to judicial scrutiny, would have failed to establish an FCPA anti-bribery violation. It is hard to ignore, however, the parallels from the two recent contested actions including the First Circuit’s reminder that “not all unappealing conduct” is in violation of potentially relevant statutes.¹⁶¹ Yet, it sure seems that the enforcement agencies have transformed FCPA enforcement into a free-for-all corporate ethics statute in which any conduct the enforcement agencies find objectionable is fair game to extract a multi-million-dollar settlement from a risk-averse corporation, and the JPMorgan action is merely the latest example.¹⁶²

Because the DOJ or SEC rarely face the prospect of judicial scrutiny in FCPA enforcement actions, they have, in certain circumstances, used the FCPA as a meat axe rather than a scalpel. The cure for “meat-axe”

¹⁵⁹ *Id.* at 55 (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 414 (1999) (internal citations omitted)).

¹⁶⁰ *Id.* at 55–56 (internal citations omitted).

¹⁶¹ *Id.* at 49–53.

¹⁶² *E.g.*, Mike Koehler, *Why You Should Be Alarmed by the ADM FCPA Enforcement Action*, in BLOOMBERG BNA WHITE COLLAR CRIME REP. 1–2 (2014).

enforcement is judicial scrutiny, but because of how the DOJ and SEC have chosen to enforce the FCPA (largely through resolution vehicles not subjected to any meaningful judicial scrutiny), and given the dynamics of corporate settlements, the meat-axe approach to FCPA enforcement prevails regardless of: Congressional intent in enacting the FCPA; the FCPA's statutory provisions; other relevant legal principles; and whether or not a court would agree. The SEC's finding that JPMorgan violated the FCPA's anti-bribery provisions is merely one component of the trifecta of off-the-rails FCPA enforcement represented by the JPMorgan enforcement action.

A second component relates to the SEC's finding that JPMorgan violated the FCPA's books and records provisions. Under the heading "books and records violations," the SEC's order stated:

JPMorgan violated the books and records provisions of the FCPA in conjunction with certain Referral Hires. Under [the books and records provisions] JPMorgan was required to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer. JPMorgan APAC's controls required that investment bankers submit accurate questionnaires to compliance for review before client referrals from SOEs and foreign government officials could be hired. Contrary to that requirement, JPMorgan APAC personnel *submitted, reviewed, and approved inaccurate compliance questionnaires* containing false and incomplete information which failed to disclose the intended, improper purpose of making certain client Referral Hires. *JPMorgan's internal records* also inaccurately reflected the true number of client Referral Hires in the APAC region by taking steps to withhold certain headcount information relating to Referral Hires.¹⁶³

Elsewhere the SEC stated:

JPMorgan also violated the books and records provisions of the FCPA. JPMorgan APAC personnel created and implemented a system by which *inaccurate or incomplete questionnaires were submitted, reviewed, and approved by compliance in contravention of the internal policy* created to prevent improper hiring of Referral Hires. The records reflected that they were hired for legitimate business purposes rather than as hires made to improperly benefit JPMorgan APAC investment banking business. JPMorgan APAC's *internal records* also inaccurately reflected the true number of

¹⁶³ JPMorgan Chase & Co., Exchange Act Release No. 3824, 2016 WL 6804113 (Nov. 17, 2016), at 21 (emphasis added).

client Referral Hires in the APAC region by taking steps to disguise the headcount relating to Referral Hires from others within the firm.¹⁶⁴

However, the only books and records the SEC found to be problematic were JPMorgan APAC questionnaires and other internal records related to its internship and hiring program. No JPMorgan books or records were found to be problematic and even the problematic JPMorgan APAC books and records are clearly not financial or accounting documents which reflect “transactions and disposition of the assets” of JPMorgan as required by the FCPA’s provisions. Recall, in the words of the SEC itself: “records which are not relevant to accomplishing the objectives specified in the statute for the system of internal controls are not within the purview of the recordkeeping provision.”¹⁶⁵

The observation of FCPA practitioner and former DOJ prosecutor Michael Schachter prior to the recent internship and hiring enforcement actions seems particularly appropriate: “[T]he books and records provision is, in fact, narrower than the Justice Department and the SEC interpretations suggest. . . . [B]oth agencies may be using the provision to punish behavior falling outside the FCPA’s reach.”¹⁶⁶

Tellingly, and perhaps in recognition of the FCPA’s statutory provisions and prior SEC guidance, in the prior BNY Mellon internship enforcement action, the SEC cited several internal documents in connection with the company’s problematic internship practices, but did *not* find that BNY Mellon violated the FCPA’s books and records provisions. If nothing else, the SEC’s finding that BNY Mellon did *not* violate the provisions, but that JPMorgan *did*, represents inconsistent law enforcement and is just as alarming for rule of law purposes.

The third component of the trifecta of off-the-rails FCPA enforcement represented by the JPMorgan enforcement action relates to the SEC’s finding that JPMorgan violated the FCPA’s internal controls provisions.

However, the SEC’s order contained an entire section titled “JP Morgan’s Policies Prohibited the Hiring of Client Referrals in Exchange for Business,” which found in pertinent part as follows: (1) JPMorgan recognized the FCPA risk of hiring the relative of foreign officials and thereafter took steps to educate employees, including those at JPMorgan APAC, on the potential risk including specific training examples concerning the risk; (2) JPMorgan’s anti-corruption policy explicitly prohibited hiring individuals to win business and required legal and compliance pre-clearance for internships or training for relatives of public officials and JPMorgan

¹⁶⁴ *Id.* at 3 (emphasis added).

¹⁶⁵ Williams, *supra* note 141, at 3.

¹⁶⁶ Michael S. Schachter, *Defending an FCPA Books And Records Violation*, 249 N.Y.L.J. 1, 1 (2013).

APAC specifically trained employees on the risk including that pre-clearance from compliance was required.¹⁶⁷

Nevertheless, under the heading “internal controls violations,” the SEC’s order stated:

JPMorgan violated the internal accounting controls provisions of the FCPA in conjunction with certain Referral Hires. JPMorgan *failed to devise and maintain an effective system of internal accounting controls*. JPMorgan’s internal accounting controls were *insufficiently designed to prevent* the corruption risks inherent in the hiring of Referral Hires, and therefore inadequate to enforce or effectuate JPMorgan’s referral hiring policy. JPMorgan recognized the inherent risks in hiring Referral Hires, yet proceeded with a system that *failed adequately* to address those risks. The safeguards put in place by JPMorgan APAC to minimize compliance and FCPA risks were not effective to curb the true purpose of the Client Referral Program. JPMorgan APAC’s referral hiring questionnaire was designed to ensure that Referral Hires were hired based on merit and not for improper purposes. However, in practice the Client Referral Program operated as a separate tier of employment within JPMorgan APAC where hiring and retention decisions were based on client relationships and potential revenue and not employee merit. . . . JPMorgan APAC attempted to put in place protections to mitigate the inherent conflicts and FCPA risks in hiring Referral Hires. However, these protections *were insufficient to prevent the violations*.¹⁶⁸

The SEC’s findings are alarming on several levels. For starters, the statutory standard is that JPMorgan was required to have internal accounting controls “sufficient to provide reasonable assurance” that the statutory objectives are met, with “reasonable” specifically defined to mean “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”¹⁶⁹ The SEC’s finding that JPMorgan lacked an “*effective system of internal controls*” or that its controls were “*insufficient to prevent*” or *detect* the problematic internships or hires are simply standards that do not exist in the FCPA.

Not only are these SEC-articulated standards not found in the FCPA, but the only judicial decision to directly address the substance of the internal controls provisions specifically states that “[t]he definition of accounting

¹⁶⁷ JPMorgan Chase & Co., Exchange Act Release No. 3824, 2016 WL 6804113 (Nov. 17, 2016).

¹⁶⁸ *Id.* at 21–22 (emphasis added).

¹⁶⁹ 15 U.S.C. § 78m (2012).

controls . . . comprehend[s] reasonable, but not absolute, assurances . . . ”¹⁷⁰ Moreover, even SEC guidance relevant to the internal controls provisions states that the “accounting provisions principal objective is to reach knowing or reckless conduct” by the issuer.¹⁷¹

Further alarming is that many of the internal controls the SEC found most problematic were those of JPMorgan APAC, not JPMorgan the actual respondent in the SEC’s enforcement action. Per the SEC’s own findings, JPMorgan had existing internal controls relevant to internship and hiring practices but JPMorgan APAC employees acted in contravention of company policy and failed to follow the firm’s internal accounting controls. Per the SEC’s own findings, JPMorgan APAC employees “often provided inaccurate or incomplete information as part of the legal and compliance review designed to prevent these violations or withheld key information so that the Referral Hires would pass compliance review” and otherwise “provided inaccurate or incomplete answers to secure approval for hires without revealing the links to business as a result of certain Referral Hires.”¹⁷²

Against this backdrop, it is nothing short of astonishing that the SEC found JPMorgan in violation of the internal controls provisions which require issuers to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” that the statutory objectives are satisfied.¹⁷³ Even more astonishing is how SEC enforcement officials described JP Morgan’s conduct (as opposed to JPMorgan APAC’s conduct) in its press release announcing the enforcement action. In the words of then SEC Director of Enforcement Ceresney:

JPMorgan engaged in a systematic bribery scheme by hiring children of government officials and other favored referrals who were typically unqualified for the positions on their own merit. JPMorgan employees knew the firm was potentially violating the FCPA yet persisted with the improper hiring program because the business rewards and new deals were deemed too lucrative.¹⁷⁴

Kara Brockmeyer (Chief of the SEC Enforcement Division’s FCPA Unit) stated:

The misconduct was so blatant that JPMorgan investment bankers created ‘Referral Hires vs Revenue’ spreadsheets to track the money flow from clients whose referrals were

¹⁷⁰ SEC v. World-Wide Coin Invs., Ltd., 567 F.Supp. 724, 751 (N.D. Ga. 1983).

¹⁷¹ Williams, *supra* note 141, at 4.

¹⁷² JPMorgan Chase & Co., Exchange Act Release No. 3824, 2016 WL 6804113 (Nov. 17, 2016).

¹⁷³ 15 U.S.C. § 78m (2012).

¹⁷⁴ Press Release, U.S. Sec. & Exch. Comm’n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016), <https://www.sec.gov/news/pressrelease/2016-241.htm>.

rewarded with jobs. The firm's internal controls were so weak that not a single referral hire request was denied.¹⁷⁵

The merging of conduct of two separate and distinct legal entities, particularly given the actual findings in the SEC's order, should be alarming to anyone who values the rule of law. Perhaps it is not astonishing though when one recognizes that FCPA enforcement is not necessarily about the law and facts, but a game of risk aversion in which issuers have little appetite for putting their primary financial regulator to its burden of proof. As the Second Circuit has observed, "trials are primarily about the truth" whereas other forms of SEC settlement "are primarily about pragmatism."¹⁷⁶

What is interesting about the JP Morgan enforcement action and numerous other SEC FCPA enforcement actions in recent years that have been resolved in the absence of any judicial scrutiny is that they have occurred during the leadership of Mary Jo White. As Chair of the SEC, White rightly noted that the "public airing of facts, literally in open court, creates accountability for both defendants and the government."¹⁷⁷ White further stated:

How we resolve disputes and how we decide the guilt or innocence of an accused are the true measure of our democracy. . . . [T]rials allow for more thoughtful and nuanced interpretations of the law in a way that settlements and summary judgments cannot. . . . [T]he death of trials would. . . remove a source of disciplined information about matters of public significance . . . [i]t would mean the end of an irreplaceable public forum and would mean that more of the legal order would proceed behind closed doors.¹⁷⁸

Of further interest is that some of the most forceful commentary about the SEC's internship and hiring practice inquiries has come from former SEC Chairman Arthur Levitt who stated in a *Wall Street Journal* op-ed:

[SEC] regulators now suggest that such hiring overseas is a form of untoward influence, akin to bribing foreign officials to win business. The accusation is scurrilous and hypocritical. If you walk the halls of any institution in the U.S.—Congress, federal courthouses, large corporations, the White House, American embassies and even the offices of the SEC—you are

¹⁷⁵ *Id.*

¹⁷⁶ SEC v. Citigroup Global Markets, Inc., 752 F.3d 285, 295 (2d Cir. 2014).

¹⁷⁷ Mary Jo White, Chair, U.S. Sec & Exch. Comm'n, 5th Annual Judge Thomas A. Flannery Lecture at the Ceremonial Courthouse of the United States Courthouse: The Importance of Trials to the Law and Public Accountability (Nov. 14, 2013), <https://www.sec.gov/news/speech/2013-spch111413mjw>.

¹⁷⁸ *Id.*

likely to run into friends and family members of powerful and wealthy people.¹⁷⁹

Even a *New York Times* columnist (hardly a media source to often question aggressive SEC enforcement) stated after JPMorgan's FCPA scrutiny surfaced:

But hiring the sons and daughters of powerful executives and politicians is hardly just the province of banks doing business in China: it has been a time-tested practice here in the United States.¹⁸⁰

Double standard issues aside, it is difficult to square existing legal authority, as well as enforcement agency guidance, with the findings in the JPMorgan enforcement action, and anyone who values the rule of law should be alarmed. Indeed, one of the supreme ironies of the JPMorgan enforcement action is that JPMorgan's counsel was Mark Mendelsohn, the former DOJ FCPA Unit Chief and self-described "architect" of the DOJ's "modern [FCPA] enforcement program."¹⁸¹ According to reports, during the settlement negotiation process Mendelsohn reportedly authored a white paper submitted to the DOJ and SEC setting out the bank's concern about the enforcement approach.¹⁸²

Sure, JPMorgan could have forced the SEC to prove its enforcement theories to someone other than itself. But for that to happen, the SEC would have first had to file a civil complaint in federal court—an event which surely would have caused the company's stock price to fall. As Andrew Weissmann (DOJ Fraud Section Chief at the time of the JPMorgan action) previously stated regarding the FCPA: "the grayness of a statute that is enforced against corporations is particularly heinous because there's no way to actually have that litigated as a realistic matter."¹⁸³

Even if the drop to JPMorgan's stock would have been small—say 3% and short-lived—the hit to JPMorgan's market capitalization, an important data point for investors and an important metric by which business manager performance is judged, would have been much higher than the \$202.6-

¹⁷⁹ Arthur Levitt, 'Influence Peddling' Makes the World Go Round, WALL ST. J. (Dec. 25, 2013, 3:55 PM), https://www.wsj.com/articles/8216influence-peddling8217-makes-the-world-go-round-1388004902?mod=WSJ_Opinion_LEFTTopOpinion&tesla=y.

¹⁸⁰ Andrew Ross Sorkin, *Hiring the Well-Connected Isn't Always a Scandal*, N.Y. TIMES (Aug. 19, 2013, 9:14 PM), https://dealbook.nytimes.com/2013/08/19/hiring-the-well-connected-isnt-always-a-scandal/?ref=business&_r=2.

¹⁸¹ *Professionals: Mark F. Mendelsohn*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, <https://www.paulweiss.com/professionals/partners-and-counsel/mark-f-mendelsohn.aspx> (last visited Aug. 1, 2017).

¹⁸² Jean Eaglesham et al., *Wall Street Pushes Back on Foreign Bribery Probe*, WALL ST. J. (Apr. 29, 2015), <https://www.wsj.com/articles/wall-street-pushes-back-on-foreign-bribery-probe-1430349863>.

¹⁸³ *Andrew Weissmann on the FCPA (2)* (C-SPAN television broadcast Aug. 29, 2016), <https://www.c-span.org/video/?c4618539/andrew-weissmann-fcpa>.

million settlement amount. Against this backdrop, resolving an FCPA enforcement action (even if based on dubious theories of enforcement) seems like a rational corporate decision in the best interest of shareholders.

Consider, however, the long-term effects of such corporate risk aversion. In this regard, the alarming JPMorgan enforcement action should serve as a reminder that the business community is, at least in part, responsible for the current aggressive FCPA enforcement climate. Indeed, as Homer Moyer (a dean of the FCPA bar) has observed:

One reality is the enforcement agencies' [FCPA] views on issues and enforcement policies, positions on which they are rarely challenged in court. The other is what knowledgeable counsel believe the government could sustain in court, should their interpretations or positions be challenged. The two may not be the same. The operative rules of the game are the agencies' views unless a company is prepared to go to court or to mount a serious challenge within the agencies.¹⁸⁴

There are many who cheer more FCPA enforcement *regardless of the enforcement theories*. For these cheerleaders, there is much to cheer in the JPMorgan enforcement action and its \$202.6-million settlement amount will be blindly inserted into FCPA enforcement statistics and trotted out at every available opportunity to demonstrate how the U.S. is the leader in anti-bribery enforcement.

Yet for those who value the rule of law, there is much to lament in the JPMorgan enforcement action. When speaking of FCPA enforcement, the DOJ's Assistant Attorney General previously delivered a speech titled "International Criminal Law Enforcement: Rule of Law, Anti-Corruption and Beyond."¹⁸⁵ As suggested by the title of the speech, the DOJ official spoke about FCPA enforcement and how the increase in FCPA enforcement was consistent with the U.S.'s global approach to promote the rule of law. The speech began with two rhetorical questions: is the rule of law "more than just a catch phrase" and "does the rule of law have any real meaning."¹⁸⁶ These are great questions to ask in the aftermath of the JPMorgan enforcement action.

Regardless of the legitimacy of the JPMorgan enforcement action and accepting the DOJ's and SEC's enforcement theories at face value, there is a compliance message to the business community in the enforcement action: FCPA compliance is not just a legal function—not just a finance and

¹⁸⁴ Homer E. Moyer, Jr., *Becoming an FCPA-Savvy Director*, N.Y.S.E. GOVERNANCE SERV. (Jan. 3, 2014), <https://www.nyse.com/corporate-services/nysegs/hot-topics/general-counsel-corporate-secretary/becoming-fcpa-savvy-director>.

¹⁸⁵ Lanny A. Breuer, Assistant Attorney General for the Criminal Division, Sec. & Exch. Comm'n, Remarks to the Council on Foreign Relations (May 4, 2010), <http://www.justice.gov/criminal/icitap/pr/2010/05-04-10AAG-breuer-remarks.pdf>.

¹⁸⁶ *Id.*

auditing function—but also a human resources function. In overseeing internship and hiring practices, human resources professionals should ask the following questions to minimize FCPA scrutiny:

- Does the company’s anti-corruption policy explicitly address the hiring of family members, relatives, etc. of “foreign officials”?
- Do HR employees receiving FCPA training?
- Does the company require that every application for a full-time hire or an internship be routed through a centralized HR application process?
- Does the company’s application process require that each applicant indicate whether he/she is related to or otherwise connected to a “foreign official” or has recently been a “foreign official”?
- Is a “foreign official” requesting that the company provide an internship or job opportunity?
- Is there an actual open internship or job position or is the company creating a new internship or job position?
- Does the internship or job applicant possess the requisite skills and qualifications for such a position?
- Does the company’s Code of Conduct require that every year each employee certify that he or she is not responsible for hiring through a non-centralized channel?

C. FCPA Policy Developments

The year 2016 was notable not just for record-breaking and diverse FCPA enforcement activity often tied to expansive and evolving enforcement theories, but for FCPA policy developments as well. As discussed in this section, both the DOJ and SEC renewed their long-standing FCPA enforcement commitment and the DOJ released a one-year FCPA Pilot Program designed in large part to further motivate business organizations to voluntarily disclose FCPA issues to better facilitate enforcement actions against culpable individuals.

Consistent with previous years, DOJ and SEC enforcement officials renewed their commitment to robust FCPA enforcement. For instance, Deputy Attorney General Sally Yates stated: “At the Justice Department, we are committed to ensuring that individuals and corporations in the marketplace are operating on a level playing field. Deceit, fraud and corruption distort that balance, and so it is important that we all do our part to keep the scales evenly weighted.”¹⁸⁷ Likewise, SEC Director of Enforcement Andrew Ceresney stated: “Investigating and bringing

¹⁸⁷ Sally Q. Yates, Deputy Attorney General, Dep’t of Justice, Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act (Nov. 30, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international>).

enforcement actions for FCPA violations has been an important priority for us at the SEC and we have taken a lead role in fighting corruption worldwide.”¹⁸⁸ Similarly, SEC Chair Mary Jo White stated: “Vigorous enforcement of the FCPA is a high priority for both the SEC and the Department of Justice.”¹⁸⁹

Beyond such unsurprising statements, the most notable enforcement agency policy development of 2016 was the release of a DOJ policy document titled “The Fraud Section’s FCPA Enforcement Plan and Guidance.”¹⁹⁰ The non-binding policy document outlined three steps in the DOJ’s “enhanced FCPA enforcement strategy.”¹⁹¹ Two of the steps outlined in the policy document (an increase in the DOJ’s and FBI’s FCPA resources as well as the DOJ “strengthening its coordination with foreign counterparts”) were previously articulated by the DOJ and thus represented rather humdrum developments.¹⁹² The third step outlined by the DOJ, that its Fraud Section “is conducting an FCPA enforcement pilot program,”¹⁹³ is the focus of this section which grades the pilot program by addressing the following issues:

- The obvious logical gap in the pilot program;
- How the pilot program, both in terms of rhetoric and substance, is really nothing new;
- Why the corporate community should take the pilot program with a grain of salt;
- How the pilot program falls short of best achieving the laudable goals articulated by the DOJ compared to other alternatives previously advanced; and
- The pilot program in practice including how the pilot program is currently failing as measured against the DOJ’s “main goal” of the program.

Logical Gap in the Pilot Program

Prior to addressing the obvious logical gap in the pilot program, it is important to understand the informational gap which the pilot program seeks to address. This gap is best demonstrated by the below picture.

¹⁸⁸ Ceresney, *supra* note 77.

¹⁸⁹ Mary Jo White, Chair, Sec. & Exch. Comm’n, Keynote Remarks at the International Bar Association Annual Conference (Sept. 21, 2016), <https://www.sec.gov/news/speech/securities-regulation-in-the-interconnected-global-marketplace.html>.

¹⁹⁰ See U.S. DEP’T OF JUSTICE, THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE (Apr. 5 2016), <https://www.justice.gov/opa/file/838386/download> (providing a comprehensive overview of the pilot program).

¹⁹¹ Memorandum from Andrew Weissman, Chief, Fraud Sec. Crim. Div. at the U.S Dep’t of Just., on the Fraud Sec.’s Foreign Corrupt Practices Act Enforcement Plan & Guidance (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download>.

¹⁹² *Id.*

¹⁹³ *Id.*



In other words, business organizations (whether through internal audits, compliance hotlines, or other means) often possess information suggesting that employees within the organization or third parties engaged by the organization have violated the FCPA. Because business organizations generally do not have a legal obligation to disclose this information, a fact rightly recognized in the pilot program, the FCPA’s dual enforcers—the DOJ and SEC—often do not learn about FCPA violations. Indeed, at the pilot program press conference, Assistant Attorney General Leslie Caldwell candidly admitted as much when she stated that the DOJ is “confident that there are lots of FCPA violations” that do not come to the DOJ’s attention.¹⁹⁴

In other words, there are likely many FCPA violations (at least based on current enforcement theories) that occur in the global marketplace that are not disclosed to the enforcement agencies. Because, such violations (again in the eyes of the enforcement agencies) are not disclosed to the enforcement agencies, there is no enforcement action. Because there is no enforcement action, the individual or individuals engaging in the problematic conduct will not be held legally accountable. Because the individuals are not being held legally accountable, FCPA enforcement is not as effective as it could be in achieving maximum deterrence.

As depicted in the picture above, the FCPA enforcement landscape thus has a deep gorge and how to bridge this gorge has long perplexed the FCPA enforcement agencies. As highlighted below, encouraging voluntary disclosure by business organizations of FCPA violations has long been the DOJ’s best answer. Indeed, in the words of previous DOJ officials, the DOJ “absolutely needs companies through their firms to provide us with their [FCPA] investigations”¹⁹⁵ and in most years approximately 50% of

¹⁹⁴ Mike Koehler, *DOJ Announces “New” One-Year FCP “Pilot Program,”* FCPA PROFESSOR (Apr. 5, 2016), <http://fcpprofessor.com/doj-announces-new-one-year-fcpa-pilot-program/>.

¹⁹⁵ Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 2, 2012), <https://www.wsj.com/articles/SB10000872396390443862604578028462294611352>.

corporate FCPA enforcement actions originate with voluntary disclosures.¹⁹⁶

The pilot program represented the DOJ's latest attempt to encourage voluntary disclosures and was "intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement." In comments after the release of the pilot program, Caldwell stated:

[The] idea of the Pilot Program, in part, is get the company to self-report by giving it some incentives so that when it comes in and self-reports, it will give us the information that it has . . . that will in turn enable us to prosecute individuals because we recognize that prosecution of individuals is the biggest deterrent . . . to corporate wrongdoing, and criminal wrongdoing . . . that is really one of the main goals of the Pilot Program.¹⁹⁷

This objective, however, suffers from an obvious logical gap in that for years the DOJ has had the opportunity to do just what the pilot program seeks to accomplish. Specifically, between 2011 and 2015, nineteen corporate DOJ FCPA enforcement actions originated with voluntary disclosures. However, in only five of those instances (26%) was there a related DOJ prosecution of individuals. The DOJ's stated objective in establishing the pilot program thus seems to lack credibility for the simple fact that if the goal of the pilot program is to encourage voluntary disclosures to permit the DOJ to prosecute individuals, then why have 74% of corporate DOJ FCPA enforcement actions over the past five years that originated with a voluntary disclosure not resulted in any related DOJ prosecution of individuals?¹⁹⁸ Logical gap aside, it is important to recognize that the pilot program, both in terms of rhetoric and substance, was really nothing new.

Nothing New in the Pilot Program

It's been said that "there's a sucker born every minute" and to some, the pilot program represented a new DOJ policy. However, just because the DOJ held a press conference to announce the pilot program and ascribed a new label to pre-existing DOJ rhetoric and practice, this did not make the pilot

¹⁹⁶ See Mike Koehler, *Voluntary Disclosure Statistics*, FCPA PROFESSOR (Dec. 10 2014), <http://fcpaprofessor.com/voluntary-disclosure-statistics/> (illuminating how in fact 59% of SEC FCPA enforcement actions and 55% of DOJ FCPA enforcement actions have been based on voluntary disclosures).

¹⁹⁷ *Assistant AG Caldwell on the DOJ's Pilot Program* (C-SPAN 2 television broadcast Nov. 4, 2016), <https://www.c-span.org/video/?c4629540/assistant-ag-caldwell-doj-pilot-program>.

¹⁹⁸ For a hypothesis why so few DOJ corporate FCPA enforcement actions result in related individual prosecutions, see Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on FCPA Enforcement*, 49 U.C. DAVIS L. REV. 497, 499–500 (2015).

program new. Knowledgeable observers quickly recognized this upon digesting the specifics of the pilot program. For instance, former DOJ FCPA Unit Chief Chuck Duross and former DOJ FCPA Unit Assistant Chief James Koukios stated: “in fact, there is not much that is new in the guidance.”¹⁹⁹ Indeed, for over a decade the DOJ has encouraged voluntary disclosure of FCPA violations coupled with repeated assurances that voluntary disclosure will result in meaningful credit.

For instance, in 2006 then-DOJ Assistant Attorney General Alice Fisher stated:

When serious FCPA issues do arise, we strongly encourage you and your clients to voluntarily disclose those issues. . . . [W]hat I can say is that there is always a benefit to corporate cooperation, including voluntary disclosure The fact is, if you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you *will* get a benefit. It may not mean that you or your client will get a complete pass, but you will get a real, tangible benefit.²⁰⁰

Likewise, in 2009 then DOJ Assistant Attorney General Lanny Breuer stated:

I strongly urge any corporation that discovers an FCPA violation to seriously consider making a voluntary disclosure and always to cooperate with the Department. The Sentencing Guidelines and the Principles of Federal Prosecution of Business Organizations obviously encourage such conduct, and the Department has repeatedly stated that a company will receive meaningful credit for that disclosure and that cooperation.²⁰¹

Indeed, one of Breuer’s favorite talking points on the FCPA circuit was to encourage voluntary disclosure of FCPA violations and offer repeated assurances that it would result in meaningful credit by the DOJ. In 2009,

¹⁹⁹ Charles Duross, *DOJ’s New FCPA Pilot Program Will Have Only Marginal Impact*, LAW360 (Apr. 8, 2016, 4:44 PM), <http://www.law360.com/articles/781113/doj-s-new-fcpa-pilot-program-will-have-only-marginal-impact>.

²⁰⁰ Alice S. Fisher, Assistant Att’y Gen., U.S. Dep’t of Justice, Address at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/10-16-06AAGFCPASpeech.pdf>.

²⁰¹ Lanny A. Breuer, Assistant Att’y Gen., U.S. Dep’t of Justice, Address to the Twenty-Second National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), <http://online.wsj.com/public/resources/documents/111709breuerremarks.pdf>.

Breuer stated: “I want to assure you that the Department’s commitment to meaningfully reward voluntary disclosures and full and complete corporate cooperation will continue to be honored in both letter and spirit.”²⁰² In another 2010 FCPA speech, Breuer stated: “If you come forward and if you fully cooperate with our investigation, you will receive meaningful credit for having done so.”²⁰³ In yet another 2010 FCPA speech, Breuer stated:

As a former defense lawyer, I understand that the question of whether to self-report is a difficult one. But I can assure you that if you do not voluntarily disclose your organization’s conduct, and we discover it on our own, or through a competitor or a customer of yours, the result will not be the same [T]here is no doubt that a company that comes forward on its own will see a more favorable resolution than one that doesn’t.²⁰⁴

In a 2013 FCPA speech, then Deputy Attorney General James Cole stated:

What is the benefit of voluntary disclosure and cooperation? We fully understand that companies will act in their own best interest. So we have sought to incentivize companies with tangible benefits for their voluntary disclosure and cooperation—beyond the reductions already built into the Sentencing Guidelines. Such benefits have taken the form of declinations . . . , resolutions short of a guilty plea like deferred prosecution agreements and non-prosecution agreements, and allowing companies to self-report their remediation efforts instead of being subject to the oversight of a corporate monitor. We have also, in appropriate cases, supported reduced penalties below those suggested by the Sentencing Guidelines.²⁰⁵

Bringing DOJ rhetoric on this issue to the months leading up to the pilot program, Assistant Attorney General Caldwell stated in November 2015:

[V]oluntary self-disclosure in the FCPA context does have particular value to the department. Because of that, we want to

²⁰² *Id.* at 4.

²⁰³ Mike Koehler, *FCPA Insanity: Doing the Same Thing Over and Over Again and Expecting Different Results*, FCPA PROFESSOR (Apr. 11, 2016), <http://fcpaprofessor.com/fcpainsanity/>.

²⁰⁴ Lanny A. Breuer, Assistant Att’y Gen., U.S. Dep’t of Justice, Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-24th-national-conference-foreign-corrupt>.

²⁰⁵ James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, Address at the Foreign Corrupt Practices Act Conference (Nov. 19, 2013), <https://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-speaks-foreign-corrupt-practices-act-conference>.

encourage self-disclosure by making clear that, when combined with cooperation and remediation, voluntary disclosure does provide a tangible benefit when it comes time to make a charging decision.²⁰⁶

Albert Einstein is credited with saying that insanity is “doing the same thing over and over again and expecting different results.” You don’t need to be an Einstein to realize, as the above examples clearly demonstrate, that the main thrust of the pilot program (that is to encourage voluntary disclosure through meaningful credit) was nothing new as the DOJ has been saying the same thing over and over again for a decade. If anything, the DOJ’s latest attempt in the pilot program to encourage voluntary disclosure should be viewed as an acknowledgement that the DOJ’s long-standing efforts on this issue have not been as successful as hoped.

The rhetoric in the pilot program is not the only aspect of the program that was not new. As discussed next, the substance of the pilot program was also not new. The key language in the pilot program that the DOJ said it will now use to encourage voluntary disclosure (along with cooperation and timely and appropriate remediation) was set forth in two sections. The first section addresses what *may* happen if a company voluntarily discloses, cooperates, and timely and appropriately remediates:

In such cases, if a criminal resolution is warranted, the Fraud Section’s FCPA Unit: may accord up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought; and generally should not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program. Where those same conditions are met, the Fraud Section’s FCPA Unit will consider a declination of prosecution. . . . To qualify for any mitigation credit under this pilot . . . the company should be required to disgorge all profits from the FCPA misconduct at issue.²⁰⁷

The second section addressed what *may* happen if a company does not voluntarily disclose, yet nevertheless cooperates and timely and appropriately remediates:

If a company has not voluntarily disclosed its FCPA misconduct . . . , it may receive limited credit under this pilot

²⁰⁶ Leslie R. Caldwell, Assistant Att’y Gen., U.S. Dep’t of Justice, Address at American Conference Institute’s 32nd Annual International Conference on Foreign Corrupt Practices Act (Nov. 17, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference>.

²⁰⁷ U.S. DEP’T OF JUSTICE, THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 8 (Apr. 5 2016), <https://www.justice.gov/opa/file/838386/download>.

program if it later fully cooperates and timely and appropriately remediates. Such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing . . . Specifically, in circumstances where no voluntary self-disclosure has been made, the Fraud Section's FCPA Unit will accord at most a 25% reduction off the bottom of the Sentencing Guidelines fine range.²⁰⁸

The specific percentages above that the DOJ *may* offer in the pilot program are nothing new because there have been numerous instances, prior to the pilot program, in which the DOJ resolved corporate FCPA enforcement actions using the same thresholds it “may” use going forward.

Specifically, the DOJ had already offered companies that voluntarily disclosed, cooperated, and remediated up to, and indeed over, a 50% reduction off the minimum amount suggested by the guidelines. Examples include: Avon (58% below the minimum amount suggested by the guidelines score) and Pride International (55% below the minimum amount suggested by the guidelines score).²⁰⁹ Other enforcement actions that originated with voluntary disclosure and involved the company cooperating and effectively remediating came close to 50% or at the very least exceeded 25% off the minimum amount suggested by the guidelines. Examples include: ABB (38% below the minimum amount suggested by the guidelines score), ADM (35% below the minimum amount suggested by the guidelines score), and Pfizer (34% below the minimum amount suggested by the guidelines score).²¹⁰ In short, the carrot embedded in the pilot program for voluntarily disclosing, cooperating, and remediating was really nothing new.

Nor is the other carrot embedded in the pilot program new (that is even if there is no voluntary disclosure, a company that cooperates and remediates may receive 25% below the minimum amount suggested by the guidelines score). For instance, the Data Systems and Solutions enforcement action did not originate from a voluntary disclosure, yet the settlement amount was 30% below the minimum amount suggested by the guidelines score. Likewise, the HP enforcement action did not originate from a voluntary disclosure, yet the DOJ settlement amount was 30% below the minimum amount suggested by the guidelines score. Notably, the JGC of Japan enforcement action did not originate from a voluntary disclosure nor did the company fully and completely cooperate, yet the DOJ settlement amount was 30% below the minimum amount suggested by the guidelines score. Further, the Technip enforcement action did not originate from a voluntary

²⁰⁸ *Id.*

²⁰⁹ Mike Koehler, *The Numbers Prove that the DOJ's FCPA Pilot Program is Really Nothing New*, FCPA PROFESSOR (Apr. 12, 2016), <http://fcpaprofessor.com/the-numbers-prove-that-the-doj-s-fcpa-pilot-program-is-really-nothing-new/>.

²¹⁰ *Id.*

disclosure, yet the DOJ settlement amount was 25% below the minimum amount suggested by the guidelines score.

In short, the numbers tell the true story and it is that both in terms of rhetoric and substance, the DOJ's FCPA pilot program was really nothing new.²¹¹

This alone should cause the corporate community to yawn at the pilot program. However, as highlighted below there were also several other reasons why the corporate community should take the pilot program with a grain of salt.

The Corporate Community Should Take the Pilot Program with a Grain of Salt

To be clear, the corporate community should not ignore the pilot program. After all, the DOJ has extreme leverage over business organizations subject to FCPA scrutiny and it is always wise to at least be cognizant of what an adversary possessing a big and sharp stick is saying. Nevertheless, absent limited circumstances not often present in instances of FCPA scrutiny, how to respond to internal breaches of FCPA compliance policies is a business decision entrusted to those charged with managing the business organization. In exercising this business judgment, the corporate community should take the pilot program with a grain of salt for reasons described above and for the additional four reasons described below.

First, the pilot program is non-binding and commits the DOJ to absolutely nothing. Like prior DOJ guidance on the FCPA, such as the 2012 FCPA Guidance, the pilot program stated: "This memorandum is for internal use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, organization, party or witness in any administrative, civil, or criminal matter."²¹²

Moreover, eligibility for the specific percentage reductions highlighted above is contingent upon a company meeting the DOJ's definition of "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation." As to these key concepts, the DOJ possesses absolute, unreviewable discretion in determining whether the concepts have been satisfied to its satisfaction. In addition, the specific percentage reductions are littered with qualifying discretionary terms such as "may" and "will consider." As FCPA practitioners have rightly observed, the pilot program "is riddled with caveats that provide plenty of room for FCPA prosecutors to award something less than full mitigation credit to a cooperating

²¹¹ *Id.*

²¹² U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Nov. 14, 2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>; U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 1 n.1 (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download>.

company.”²¹³ Finally, the specific percentage thresholds in the pilot program only address the final number that results from the sentencing guidelines equation for determining a fine range. As knowledgeable observers recognize, the reality is that this final number is the product of and contingent upon several less-than-transparent discretionary calls made by the DOJ earlier in the equation. Again, FCPA practitioners rightly observed that even under the pilot program “prosecutors and agents continue to wield significant discretion, and factors such as the severity of the underlying conduct, the completeness of the disclosure, and the sufficiency of remediation efforts are still likely to play a major role in determining the disposition of the case.”²¹⁴

The second reason why the corporate community should take the pilot program with a grain of salt is perhaps obvious, but bears repeating: the DOJ is an adversary. Imagine a business organization facing an adversary in other legal actions and the adversary states that it “may” or “will consider” a lower settlement amount should it prevail if the business organization acts according to the adversary’s discretionary commands.²¹⁵ It is doubtful that any business organization, and rightly so, would accede to the demands of this adversary. While the DOJ possesses bigger and sharper sticks than most legal adversaries, the facts remain that the DOJ is an adversary to a business organization under FCPA scrutiny and the business organization has no legal or moral obligation to assist the DOJ. As the pilot program correctly noted: “Nothing in the [pilot program] is intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options and forego the credit available under the pilot program.”²¹⁶

The third reason why the corporate community, at least so-called issuers under the FCPA, should take the pilot program with a grain of salt is that it is an incomplete program because issuers are subject to FCPA enforcement by both the DOJ and SEC, but the pilot program is a DOJ program only. To be sure, just like the DOJ, the SEC has long encouraged voluntary disclosure of FCPA violations coupled with repeated assurances that voluntary

²¹³ *Will DOJ's FCPA Pilot Program Fly with Companies Considering Self-Disclosure?*, STEPTOE & JOHNSON LLP (Apr. 11, 2016), <http://www.step toe.com/publications-11194.html>.

²¹⁴ Drew A. Harker et al., *DOJ Launches FCPA Enforcement Pilot Program to Encourage Voluntary Disclosure*, ARNOLD & PORTER ADVISORY (Apr. 8, 2016), <http://www.arnoldporter.com/en/perspectives/publications/2016/04/doj-launches-fcpa-pilot>.

²¹⁵ Mike Koehler, *Six Reasons Why the Corporate Community Should Take the DOJ's "Pilot Program" With a Grain of Salt*, FCPA PROFESSOR (Apr. 19, 2009, 12:04 AM), <http://fcpaprofessor.com/reasons-why-the-corporate-community-should-take-the-doj-s-pilot-program-with-a-grain-of-salt/>.

²¹⁶ U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 4 (Apr. 5 2016), <https://www.justice.gov/opa/file/838386/download>.

disclosure will result in meaningful credit.²¹⁷ However, unless and until the SEC articulates a similar FCPA program (a program that will likely suffer from the same deficiencies as the DOJ's program), the DOJ's FCPA pilot program addresses only half of the enforcement landscape facing issuers.

The fourth and perhaps biggest reason why the corporate community should take the pilot program with a grain of salt is that it only addresses a relatively minor component of the overall financial consequences to a business organization that is the subject of FCPA scrutiny and enforcement. For obvious reasons, settlement amounts in FCPA enforcement actions tend to get the most attention. After all, settlement amounts are mentioned in DOJ/SEC press releases, press releases generate media coverage, and the corporate community reads the media. However, knowledgeable observers recognize, as depicted in the below picture, that FCPA scrutiny and enforcement results in "three buckets" of financial exposure to a business organization.



In nearly every instance of FCPA scrutiny and enforcement, bucket one (pre-enforcement action professional fees and expenses) is the largest financial hit to a business organization. The reasons for this are both practical and potentially provocative. In terms of the practical, all instances of FCPA scrutiny have a point of entry. For instance, problematic conduct in China that then often results in the "where else" question from the enforcement agencies which often prompts the company under scrutiny to conduct a much broader review. In terms of the provocative, FCPA scrutiny can easily become a billing boondoggle for FCPA Inc. participants.

A couple of specific examples highlight how extensive pre-enforcement action professional fees and expenses can become. For instance, Avon resolved an FCPA enforcement action for \$135 million in aggregate DOJ and SEC settlement amounts, but disclosed approximately \$550 million in pre-enforcement professional fees and expenses (a 2.5:1 ratio compared to

²¹⁷ Ceresney, *supra* note 77 ("The Commission launched its formal cooperation program a little more five years ago, and . . . it has been a great success overall. Even before that . . . the SEC was rewarding cooperation in FCPA matters, and it has continued to do so under the more formal program.").

the settlement amount).²¹⁸ Likewise, Bruker Corp. resolved an FCPA enforcement action for \$2.2 million, but disclosed approximately \$22 million in pre-enforcement action professional fees and expenses (a 10:1 ratio).²¹⁹ Perhaps most eye-popping, Hyperdynamics resolved an FCPA enforcement action for \$75,000, but disclosed approximately \$12.7 million in pre-enforcement action professional fees and expenses (a 170:1 ratio).²²⁰

Even if the pilot program was binding on the DOJ, which it is not, the fact is the pilot program only addresses bucket two (settlement amount) and does not address pre-enforcement action professional fees and expenses—the biggest financial hit to a business organization subject to FCPA scrutiny. Sure, consistent with Assistant Attorney General Caldwell's April 2015 speech that the DOJ “do[es] not expect companies to aimlessly boil the ocean” in FCPA investigations,²²¹ the pilot program does contain the following footnote:

[A]bsent facts to suggest a more widespread problem, evidence of criminality in one country, without more, would not lead to an expectation that an investigation would need to extend to other countries.²²²

Yet here again, the DOJ has been highlighting the excesses of FCPA internal investigations (and pointing the finger at FCPA Inc. and not itself as the root cause) for years prior to the pilot program with no observable impact. For instance, in 2013 then-DOJ FCPA Unit Chief Charles Duross called out FCPA Inc. at an American Bar Association event.

Duross suggested that other company lawyers are seeking to over do it through a global search of operations for FCPA issues. He discussed a case in which a company and its professional advisors came to a meeting with a global search plan and he said ‘no, no, no, that is not what I want.’ [Duross] indicated that the lawyers and other professional advisors in

²¹⁸ Mike Koehler, *Issues to Consider from the Avon Enforcement Action*, FCPA PROFESSOR (Dec. 22, 2014, 12:03 AM), <http://fcpaprofessor.com/issues-to-consider-from-the-avon-enforcement-action/>.

²¹⁹ See Bruker Corp., Annual Report (Form 10-K) (Feb. 27, 2015) (“In the fiscal years ended December 31, 2014, 2013 and 2012, \$3.2 million, \$6.1 million and \$11.1 million, respectively, was recorded for legal and other professional services incurred related to the internal investigation of these matters.”).

²²⁰ See Hyperdynamics Corp., Annual Report (Form 10-K) (Sept. 22, 2016) (“We have been subject to a Department of Justice and Securities and Exchange Commission FCPA investigation into how we obtained or retained the Concession and spent approximately \$12.8 million in legal fees in working with the US Government.”).

²²¹ Caldwell, *supra* note 210.

²²² U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 6 n.5 (Apr. 5, 2016), <https://www.justice.gov/criminal-fraud/file/838416/download>.

the room ‘looked unhappy,’ but the general counsel of the company was happy.²²³

In addition to not meaningfully addressing bucket one, pre-enforcement action professional fees and expenses, the pilot program also does not meaningfully address bucket three, post-enforcement action professional fees and expenses. Sure, the pilot program does state, consistent with the DOJ’s prior rhetoric on the issue, that voluntary disclosure, cooperation and remediation “generally should not require appointment of a monitor.”²²⁴ But even FCPA enforcement actions resolved without a monitor typically require reporting obligations by the business organization to the enforcement agencies, and in some cases, “enhanced compliance obligations” complete with audits.²²⁵ While bucket three is the smallest of the “three buckets” of financial exposure, post-enforcement action professional fees and expenses, even in garden-variety FCPA corporate enforcement actions, often exceed millions of dollars per year for the one to three years of the requirements.

The corporate community needs to fully understand and appreciate that the pilot program only addresses a relatively minor component of the overall financial consequences that typically result from FCPA scrutiny and enforcement. Related to this key point is the fact that a company (particularly an issuer) subject to FCPA scrutiny and enforcement will often also experience several other negative financial consequences above and beyond the “three buckets” of financial exposure. Such financial consequences often include a drop in market capitalization, an increase in the cost of capital, a negative impact on merger and acquisition activity, lost or delayed business opportunities, and shareholder litigation. In certain cases, these other negative financial consequences can far exceed even the “three buckets” of financial exposure discussed above.

In short, corporate leaders need to fully understand and appreciate (in addition to the specific topics discussed above) that a voluntary disclosure of potential FCPA violations is going to set into motion a wide-ranging sequence of events that will be far costlier to the company than any marginal

²²³ Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Sept. 20, 2013, 12:05 AM), <http://fcpaprofessor.com/friday-roundup-93/>.

²²⁴ THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE, *supra* note 226.

²²⁵ See generally Nathaniel Edmonds, Morgan Heavener & Ian Herbert, *DOJ’s FCPA Enforcement Plan Highlights the Need for Robust Anti-Corruption Compliance Programs*, PAUL HASTINGS LLP (April 2016), <https://www.paulhastings.com/docs/default-source/PDFs/stay-current-doj-39-s-fcpa-enforcement-plan-highlights-the-need-for-robust-anti-corruption-compliance-programs.pdf> (explaining enhanced compliance obligations); Gary DiBianco & Bernd R. Mayer, *A Window to the U.S. – Developments in Health Care and Life Sciences Investigations, Enforcement and Litigation, and the Effects on Transactions* 39, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (May 7, 2013), https://files.skadden.com/eVites%2FFRA%2FWindowtotheUS_DevelopmentsinHealthcare_PPT_2.PDF (explaining FCPA “enhanced compliance obligations in pharma and device settlements”).

benefit obtained through the pilot program's non-binding promise of a reduced settlement amount.²²⁶

No doubt there are some who are likely to respond that if a business organization does not voluntarily disclose FCPA violations, it is likely that the enforcement agencies will independently find out about the violations, and when this happens the company is going to experience the same negative financial consequences highlighted above plus, because of the lack of voluntary disclosure, a larger settlement amount. However, this line of reasoning represents pure speculation.²²⁷

Notwithstanding the many shortcomings in the pilot program, going forward there no doubt will be companies (perhaps persuaded by FCPA counsel eyeing lucrative billings that flow from voluntary disclosures) that choose to voluntarily disclose FCPA issues in the hopes of being "rewarded" under the pilot program. Certain commentators are likely to then proclaim the pilot program a success. However, this line of reasoning completely misses the point that business organizations were often voluntarily disclosing prior to the pilot program.

Rather, the key issue to track is whether the pilot program is motivating voluntary disclosure of potential FCPA violations *that did not occur* prior to the pilot program. It will be impossible to empirically measure this issue. Likewise, it will be difficult (if not impossible) to assess whether the DOJ is acting consistent with the pilot program for the reasons discussed above regarding how the final sentencing guidelines amount is the product of, and contingent upon, several less-than-transparent discretionary calls made by the DOJ earlier in the sentencing guidelines equation.

The Pilot Program Falls Short of Best Achieving Laudable Goals

The deep gorge in the FCPA enforcement landscape depicted above is a concerning policy issue and it is a laudable goal of the pilot program to encourage "companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement."²²⁸ However, the

²²⁶ Recall that under the pilot program, even if a company does not voluntarily disclose it may receive a 25% credit off the minimum amount suggested by the guidelines if it cooperate and remediates. Mike Koehler, *The Numbers Prove that the DOJ's FCPA Pilot Program is Really Nothing New*, FCPA PROFESSOR (Apr. 12, 2016, 2:04 AM), <http://fcpaprofessor.com/the-numbers-prove-that-the-doj-s-fcpa-pilot-program-is-really-nothing-new/>.

²²⁷ The following is anecdotal and not offered to establish the truth of the matter asserted. The author has been actively involved in the FCPA space for approximately 15 years both as a lawyer in private practice who conducted FCPA internal investigations around the world and in other professional capacities. To the author's knowledge, never once did the DOJ independently find out about the underlying conduct and in speaking to other FCPA practitioners about this precise topic, it has never happened to their clients either.

²²⁸ U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 9 (Apr. 5 2016), <https://www.justice.gov/opa/file/838386/download>.

pilot program falls short of best bridging this gorge compared to other alternatives previously advanced.

Indeed, a supreme irony of the pilot program was that it bore the signature of Andrew Weissmann, Chief of the DOJ's Fraud Section. Prior to Weissmann assuming this position in January 2015, he was a vocal critic of various aspects of the DOJ's FCPA enforcement program, as well as corporate criminal liability principles generally. Among other things, Weissmann advocated for an FCPA compliance defense and stated:

The FCPA should incentivize the company to establish compliance systems that will actively discourage and detect bribery, but should also permit companies that maintain such effective systems to avail themselves of an affirmative defense to charges of FCPA violations. This is so because in such countries even if companies have strong compliance systems in place, a third-party vendor or errant employee may be tempted to engage in acts that violate the business's explicit anti-bribery policies. It is unfair to hold a business criminally liable for behavior that was neither sanctioned by or known to the business.²²⁹

According to Weissmann, an FCPA compliance defense, as well as the other FCPA reforms he advocated, were "best suited for Congressional action."²³⁰ In other words, Weissmann did not believe that changes to DOJ policy, which is all the pilot program represented, were enough.

Prior to the pilot program, in Fall 2015 the DOJ announced the appointment of a compliance counsel to assist DOJ prosecutors in evaluating corporate compliance programs at the time of improper conduct to determine if fine reductions are warranted.²³¹ Weissmann was widely viewed as being the architect of this position and stated that a motivation in creating the position was to "empower a robust compliance function within organizations."²³² Asked what he "hope[d] to accomplish in general and specifically to assist the compliance professional," Weissmann responded: "I hope that, in seeing how seriously the Department of Justice takes compliance, we will strengthen the voice of the compliance professionals

²²⁹ ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE, PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INST. FOR LEGAL REFORM 6-7 (Oct. 2010), http://globalinvestigationsreview.com/digital_assets/f07abd4c-cf8b-44dd-8151-64cc73cfd56e/76-2-Chamber_Foreign_Corrupt_Practices_Book_s_Book.pdf.

²³⁰ *Id.*

²³¹ U.S. DEP'T OF JUSTICE, NEW COMPLIANCE COUNSEL EXPERT RETAINED BY THE DOJ FRAUD SECTION, <https://www.justice.gov/criminal-fraud/file/790236/download>.

²³² Laura Jacobus, *DOJ's Andrew Weissmann and Hui Chen Talk Corporate Compliance in Exclusive Interview*, ETHICS & COMPLIANCE INITIATIVE (Feb. 2, 2016, 8:47), <https://www.ethics.org/blogs/laura-jacobus/2016/02/01/doj-interview>.

and help them get a stronger seat at the table as a key stakeholder in how businesses are run.”²³³

Whether it's the pilot program's stated goal to “encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations” or to best “empower a robust compliance function within organizations” and best “strengthen the voice of the compliance professional [to] help them get a strong seat at the table,”²³⁴ Weissmann should have listened to his former self because his former self seemed to recognize that the DOJ's recent announcements were not the best answer to accomplish its stated goals.

Like several former high-ranking DOJ officials and others, this author has long argued that an FCPA compliance defense (an actual statutory amendment, not merely a change in DOJ internal policy) can best allow the FCPA enforcement agencies to accomplish their stated objectives. The 2012 article “Revisiting a Foreign Corrupt Practices Act Compliance Defense” stated:

An FCPA compliance defense will better facilitate the DOJ's prosecution of culpable individuals and advance the objectives of its FCPA enforcement program. At present, business organizations that learn through internal reporting mechanisms of rogue employee conduct implicating the FCPA are often hesitant to report such conduct to the enforcement authorities. In such situations, business organizations are rightfully diffident to submit to the DOJ's opaque, inconsistent, and unpredictable decision-making process and are rightfully concerned that its pre-existing FCPA compliance policies and procedures and its good faith compliance efforts will not be properly recognized. The end result is that the DOJ often does not become aware of individuals who make improper payments in violation of the FCPA and the individuals are thus not held legally accountable for their actions. An FCPA compliance defense surely will not cause every business organization that learns of rogue employee conduct to disclose such conduct to the enforcement agencies. However, it is reasonable to conclude that an FCPA compliance defense will cause more organizations with robust FCPA compliance policies and procedures to disclose rogue employee conduct to the enforcement agencies. Thus, an FCPA compliance defense can better facilitate DOJ

²³³ *Id.*

²³⁴ *Id.*; U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 9 (Apr. 5 2016), <https://www.justice.gov/opa/file/838386/download>.

prosecution of culpable individuals and increase the deterrent effect of FCPA enforcement actions.²³⁵

Another policy objective that a compliance defense can better achieve compared to the pilot program is increasing “soft enforcement” of the FCPA. In other words, a compliance defense can best incentivize business organizations to implement more robust FCPA policies and procedures, and more robust policies and procedures can reduce instances of improper conduct and thereby advance the FCPA’s objectives. Critics of an FCPA compliance defense have ignored its potential “soft enforcement” impact focusing instead on “hard enforcement” issues, including assertions that the defense would prove to be unworkable in a contested proceeding or lack practical value given that business organizations tend not to put the FCPA enforcement agencies to their burdens of proof.²³⁶

Such criticisms of a compliance defense miss the point. In passing the FCPA, Congress anticipated that the “criminalization of foreign corporate bribery will to a significant extent act as a self-enforcing preventative mechanism.”²³⁷ Likewise, since the FCPA’s earliest days the DOJ has recognized that the “most efficient means of implementing the FCPA is voluntary compliance by the American business community.”²³⁸ Indeed, Weissmann himself has previously stated that FCPA reform should best motivate compliance “on a daily basis” and “regardless of what the DOJ is doing.”²³⁹

This is precisely what a compliance defense can better accomplish compared to the pilot program. To best conceptualize this issue, consider two scenarios:

- Scenario A – The existing landscape for at least the past decade with the underlined language representing the recent pilot program and DOJ compliance counsel position.
- Scenario B – The landscape if the FCPA were amended to include a compliance defense.

Ask yourself under which scenario is a compliance officer most likely to receive the budget and internal support to adopt best-in-class FCPA compliance policies?

²³⁵ Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 659 (2012) (citation omitted).

²³⁶ Thomas R. Fox, *Why a Compliance Defense Will Not Make Compliance Program Effective*, FCPA COMPLIANCE & ETHICS (2013), <http://fcpacompliancereport.com/2013/09/why-a-compliance-defense-will-not-make-a-compliance-program-effective/>.

²³⁷ S. REP. No. 95-114, at 10 (1977), as reprinted in 1977 U.S.C.A.N. 4098, 4108.

²³⁸ Philip B. Heyman, *Justice Outlines Priorities in Prosecuting Violations of For. Corrupt Practices Act*, AM. BANKER 4 (Nov. 21, 1979).

²³⁹ Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the S. Subcomm. on Crime & Drugs of the Comm. on the Judiciary, 111th Cong. 20 (2010) (statement of Andrew Weissmann, Partner, Jenner & Block, LLP).

Scenario A

Compliance Officer: Boss, I need more money and resources to devote to FCPA compliance.

Executive: Why?

Compliance Officer: Well, boss, if anything ever happens within our business organization, an effective FCPA compliance program can lessen the impact of our legal liability.

Executive: What do you mean?

Compliance Officer: Well, the money we spend on FCPA compliance will not eliminate our legal exposure, but the DOJ and SEC have said that the existence of an effective compliance program may perhaps lower our criminal or civil fine or penalty amount and perhaps even persuade an enforcement attorney to go lightly on us in case our compliance program is ever circumvented by an employee. Indeed, the DOJ recently announced in non-binding guidance that it may offer us a criminal fine reduction to the extent we voluntarily disclose the conduct, cooperate with the enforcement agencies, and remediate. Moreover, the DOJ recently announced that it has a compliance consultant on its staff who is going to assist DOJ prosecutors in evaluating our compliance program at the time of the improper conduct to see if we should include qualify for a fine reduction.

Scenario B

Compliance Officer: Boss, I need more money and resources to devote to FCPA compliance.

Executive: Why?

Compliance Officer: Well, boss, an effective FCPA compliance program can reduce our legal exposure as a matter of law.

Executive: What do you mean?

Compliance Officer: Well, the money we spend on investing in FCPA best practices will be relevant as a matter of law. In other words, if we make good faith efforts to comply with the FCPA when doing business in the international marketplace, we will not face any legal exposure when a non-executive employee or agent acts contrary to our compliance policies and/or circumvents our policies.

Most compliance professionals are likely to answer the above question by saying that Scenario B will best allow the compliance officer to receive the budget and support needed to most effectively do his/her job.²⁴⁰

An FCPA compliance defense will not magically result in 100% best-in-class FCPA compliance in all business organizations or cause all business

²⁴⁰ For instance, the author runs the FCPA Institute (a two-day active learning experience for FCPA professionals such as in-house counsel and compliance professionals from leading companies, lawyers in private practice, as well as other compliance and business professionals) and every time the above scenario has been used, Scenario B has been the unanimous answer.

organizations to disclose all FCPA violations. However, the DOJ announcement of a pilot program in 2016 and prior to that a compliance counsel position were not the best answers if the DOJ's true goals are to encourage "companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement" and to best "empower a robust compliance function within organizations" and best "strengthen the voice of the compliance professional [to] help them get a strong seat at the table."

The Pilot Program in Practice

Since the release of the pilot program in April 2016 through the end of 2016, the DOJ has self-identified five corporate matters resolved through so-called declinations consistent with the pilot program: Nortek, Akamai Technologies, Johnson Controls, HMT LLC, and NCH Corp.²⁴¹ Nevertheless, these instances raise more questions than answers concerning the pilot program.

For starters, none of the five instances were "pure" voluntary disclosures "pursuant" to the pilot program. In other words, all of the companies disclosed and were under FCPA scrutiny prior to April 2016. Moreover, three of the instances (Nortek, Akamai, and Johnson Controls) merely reference "possible" FCPA violations and the salient question needs to be asked: just what viable criminal charges did the DOJ actually decline?²⁴² Based on the information in the public domain (the SEC's related civil administrative actions against the companies) the answer appears to be none, and the three instances would appear to be attempts by the DOJ to market its nascent pilot program.²⁴³

The other two instances the DOJ self-identified as being resolved through so-called declinations consistent with the pilot program were HMT and NCH and these matters were materially different than the prior three examples in at least three respects.

²⁴¹ Declinations, U.S. DEP'T OF JUSTICE (June 29, 2017), <https://www.justice.gov/criminal-fraud/pilot-program/declinations>.

²⁴² Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, Criminal Division, Fraud Section, to Luke Cadigan (June 3, 2016), <https://www.justice.gov/criminal-fraud/file/865406/download>; Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, Criminal Division, Fraud Section, to Ryan Rohlfesen (June 6, 2016), <https://www.justice.gov/criminal-fraud/file/865411/download>; Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, Criminal Division, Fraud Section, to Jay Holtmeier (June 21, 2016), <https://www.justice.gov/criminal-fraud/file/874566/download>.

²⁴³ For additional analysis, see Mike Koehler, *Nortek/Akamai—Don't Believe the Hype, Rather Ask What Viable Criminal Charges Did The DOJ Actually Decline?*, FCPA PROFESSOR (June 9, 2016, 12:04 AM), <http://fcpaprofessor.com/nortek-akamai-just-what-charges-did-the-doj-decline/>; Mike Koehler, *Once Again, Don't Believe the Hype—Rather Ask What Viable Criminal Charges Against Johnson Controls Did the DOJ Actually Decline*, FCPA PROFESSOR (July 12, 2016, 12:03 AM), <http://fcpaprofessor.com/dont-believe-hype/>.

First and most important is that HMT and NCH paid money “pursuant to” declination letters whereas Nortek, Akamai Technologies, and Johnson Controls did not. Specifically, HMT agreed to disgorge approximately \$2.7 million²⁴⁴ and NCH agreed to disgorge approximately \$335,000.²⁴⁵ Second, the prior three examples occurred against the backdrop of SEC enforcement actions against the issuer companies. However, HMT and NCH were both private business organizations not subject to SEC jurisdiction and thus the only information in the public domain is the information in the DOJ’s letters. Perhaps because of this difference, the HMT and NCH letters were comparatively more substantive than the prior three examples. Third, and presumably the reason for the first difference noted above, the prior three examples involved “possible” FCPA violations that left significant open questions about whether any actual viable FCPA criminal violations were actually declined. However, the HMT and NCH letters (certain statute of limitations issues aside) seemingly articulate viable FCPA violations against the companies based on the DOJ’s current enforcement theories.

Despite this material difference, the HMT and NCH “declination with disgorgement” letters were nevertheless concerning because the DOJ literally invented a new way to enforce the FCPA. In terms of historical background, from 1977 to 2004 there were only two ways in which the DOJ resolved alleged instances of corporate FCPA scrutiny: it either charged the company or it did not charge the company. In late 2004 and thereafter, the DOJ brought non-prosecution agreements and deferred prosecution agreements, neither of which are mentioned in the FCPA, to the FCPA context. In April 2016, with release of the pilot program, the DOJ formally unveiled so-called “declinations” and in September 2016 the DOJ unveiled in the HMT and NCH matters declinations with disgorgement. In many respects, DOJ enforcement of the FCPA has strayed from traditional law enforcement to something akin to a buffet line.

The HMT and NCH matters are all the more concerning because the FCPA explicitly provides the DOJ a non-criminal option for enforcing the FCPA against non-issuer companies such as HMT and NCH. For instance, both the 78dd-2 prong of the FCPA (applicable to “domestic concerns”—FCPA-speak for all forms of U.S. business organizations not issuers and U.S. nationals) and the 78dd-3 prong of the FCPA (applicable to “persons other than issuers or domestic concerns”—FCPA-speak for foreign companies not issuers and foreign nationals) specifically authorize the DOJ to bring civil actions for FCPA violations.

²⁴⁴ Letter from Daniel Kahn, Deputy Chief, U.S. Dep’t of Justice, Criminal Division, Fraud Section, to Steven A. Tyrrell, Weil, Gotshal & Manges LLP (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899116/download>.

²⁴⁵ Letter from Daniel Kahn, Deputy Chief, U.S. Dep’t of Justice, Criminal Division, Fraud Section to Paul E. Coggins and Kiprian Mendrygal, Locke Lord LLP (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899121/download>.

Section 78dd-2(d) under the heading “Injunctive Relief” specifically states in pertinent part:

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond. . . . All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.²⁴⁶

Between 1991 and 2001, the DOJ resolved four corporate FCPA enforcement actions consistent with this express statutory authority.²⁴⁷ While four enforcement actions over a 10-year period may not sound like many, there were only eleven DOJ corporate FCPA enforcement actions between 1991 and 2001.²⁴⁸ Thus, the four enforcement actions comprised 36% of all DOJ corporate FCPA enforcement actions during this time frame. When asked why the DOJ has stopped civilly enforcing the FCPA, the DOJ’s press office simply responded: “We decline to comment. Thank you.”²⁴⁹ Among the many other policy concerns raised by the DOJ’s pilot program discussed above, the HMT and NCH “declinations with disgorgement” present the additional issue that perhaps instead of creating new ways to enforce the FCPA not even mentioned in the statute, the DOJ should enforce the FCPA in ways expressly authorized by Congress.

As mentioned above, it is impossible to empirically measure various aspects of the pilot program. However, it is possible to assess whether a “main goal” of the pilot program is working, and at present, the undeniable answer is that the pilot program is currently failing. In the pilot program, the DOJ clearly stated that a “main goal” of the program is to use voluntarily disclosures to learn about information that will allow it to prosecute individuals. Specifically, the pilot program states: “[T]his pilot program is intended to encourage companies to disclose FCPA misconduct to permit

²⁴⁶ 15 U.S.C. § 78dd-2(d) (1), (3) (1998).

²⁴⁷ Mike Koehler, *Why Has the DOJ Stopped Civilly Enforcing The FCPA?*, FCPA PROFESSOR (Mar. 23, 2017, 12:03 AM), <http://fcpaprofessor.com/doj-stopped-civilly-enforcing-fcpa/>.

²⁴⁸ Mike Koehler, *Why Has the DOJ Stopped Civilly Enforcing the FCPA?*, FCPA Professor (Mar. 23, 2017), <https://fcpaprofessor.com/doj-stopped-civilly-enforcing-fcpa/>.

²⁴⁹ Email from the Dep’t of Justice Press Office to author (Feb. 27, 2017) (on file with author).

the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement.”²⁵⁰

At the DOJ's April 2016 Pilot Program press conference, Assistant Attorney General Leslie Caldwell stated that the goal of the “pilot program” is to “encourage self-reporting” because companies have information about individuals who have violated the FCPA and have documents relevant to FCPA violations. According to Caldwell, the goal of the program is to “encourage” companies to give the DOJ this information. In subsequent public comments, Caldwell stated:

[The] idea of the Pilot Program, in part, is get the company to self-report by giving it some incentives so that when it comes in and self-reports, it will give us the information that it has . . . that will in turn enable us to prosecute individuals because we recognize that prosecution of individuals is the biggest deterrent . . . to corporate wrongdoing, and criminal wrongdoing . . . that is really one of the main goals of the Pilot Program.²⁵¹

Likewise, Caldwell stated:

We want that information because we want to be able to make cases against those individuals, but we don't have that evidence . . . [the idea of the pilot program] is to get that information that we know is out there about culpable individuals so that we can make the cases against culpable individuals. Companies can't go to jail. Individuals can . . . and the biggest deterrent to wrongdoing is prosecuting individuals.²⁵²

Measuring this “main goal” is fairly easy by comparing the corporate resolutions that the DOJ has self-identified as being resolved consistent with the pilot program and then seeing whether there have been any individual prosecutions related to those matters. As highlighted above, the DOJ has self-identified five corporate matters as being resolved consistent with the pilot program (Nortek, Akamai Technologies, Johnson Controls, HMT LLC, and NCH Corp) and none of these matters have involved, at least yet, prosecution of individuals. Thus, measured against the DOJ's own “main goal” of its pilot program, the program is currently failing.

²⁵⁰ U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 9 (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download>.

²⁵¹ *Assistant AG Caldwell on the DOJ's Pilot Program* (C-SPAN 2 television broadcast Nov. 4, 2016), <https://www.c-span.org/video/?c4629540/assistant-ag-caldwell-doj-pilot-program>.

²⁵² *Id.*

CONCLUSION

The year 2016 was certainly a record-breaking year for FCPA enforcement and it is hoped that this article has highlighted various quantitative and qualitative issues of value to anyone seeking to elevate their FCPA knowledge. Yet, as the FCPA approaches its 40th anniversary, many legal and policy issues surround FCPA enforcement that need to be addressed if the FCPA is to best achieve its laudable goals of reducing bribery in ways consistent with the rule of law.