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# Foreign Corrupt Practices Act Statistics, Theories, Policies, and Beyond

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# FOREIGN CORRUPT PRACTICES ACT STATISTICS, THEORIES, POLICIES, AND BEYOND

MIKE KOEHLER<sup>1</sup>

## ABSTRACT

The Foreign Corrupt Practices Act (FCPA) is not a new law; it was enacted in 1977. Nevertheless, 2015 was a commemorative year, as it marked the fifth anniversary of the Department of Justice declaring a “new era” of FCPA enforcement, the fifth anniversary of Congressional FCPA reform hearings, and the third anniversary of the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) issuing FCPA guidance.<sup>2</sup> In addition to these mileposts, 2015 was also a notable year in several other respects as highlighted in this article.

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<sup>1</sup> Mike Koehler is an Associate Professor, Southern Illinois University School of Law. Professor Koehler is the founder and editor of the website FCPA Professor ([www.fcpaprofessor.com](http://www.fcpaprofessor.com)) and author of the book *THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA* (Edward Elgar Publishers, 2014). Professor Koehler’s FCPA expertise and views are informed by a decade of legal practice experience at a leading international law firm. The issues covered in this article, current as of January 1, 2016, assume the reader has sufficient knowledge and understanding of the FCPA, as well as FCPA enforcement, including the role of the Department of Justice and Securities and Exchange Commission in enforcing the FCPA and the resolution vehicles typically used to resolve FCPA scrutiny. Interested readers can learn more about these topics and others by reading the author’s FCPA Professor website (<http://www.fcpaprofessor.com>), specifically the FCPA 101 page of the site (<http://www.fcpaprofessor.com/fcpa-101>).

This article is part of a continuing series of yearly analysis by the author of FCPA enforcement data and related issues.

For 2014, see Mike Koehler, *A Snapshot of the Foreign Corrupt Practices Act*, 14 SANTA CLARA J. INT’L L. 143 (2016) [hereinafter Koehler, *A Snapshot*].

For 2013, see Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT’L L. REV. 961 (2014) [hereinafter Koehler, *Narrative*].

For 2012, see Mike Koehler, *An Examination of Foreign Corrupt Practices Act Issues*, 12 RICH. J. GLOBAL L. & BUS. 317 (2013).

For 2011, see Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PENN. J. BUS. L. 1 (2012).

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).

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).

<sup>2</sup> Interested readers can learn more about these developments at the following sources: *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, DOJ & ENFORCEMENT DIV. SEC (Nov. 14, 2012), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>; *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing on S. 111-1005 Before the Subcomm. on Crime and Drugs, Comm. on the Judiciary*, 111th Cong. (2010); *Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act*, DOJ (Nov. 16, 2010), <http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-24th-national-conference-foreign-corrupt>.

This article, part of an annual series, paints a picture of FCPA and related developments from 2015. Specifically, this article dissects FCPA enforcement in a number of ways and highlights meaningful statistics from 2015 as well as historical comparisons. Thereafter, this article discusses a range of noteworthy issues from 2015 such as: expansive and evolving FCPA enforcement theories, judicial scrutiny of FCPA and related enforcement theories, policy pronouncements and developments relevant to FCPA issues, and developments beyond the FCPA that nevertheless touch upon FCPA issues or are otherwise relevant to a similar space.

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#### I. INTRODUCTION

This article paints a picture of Foreign Corrupt Practices Act (FCPA) and related developments from 2015. Specifically, Part II of this article dissects FCPA enforcement in a number of ways and highlights statistics from 2015 as well as historical comparisons. Thereafter, Part III of this article discusses a range of noteworthy issues from 2015 such as: expansive and evolving FCPA enforcement theories, judicial scrutiny of FCPA and related enforcement theories, policy pronouncements and developments relevant to FCPA issues, and developments beyond the FCPA that nevertheless touch upon FCPA issues or are otherwise relevant to a similar space.

In addressing these topics, this article will benefit anyone seeking an informed base of FCPA knowledge and related legal and policy issues in the FCPA's modern era.

#### II. 2015 FCPA ENFORCEMENT STATISTICS AND HISTORICAL COMPARISONS

Part II of this article dissects FCPA enforcement and highlights meaningful statistics from 2015 as well as historical comparisons in the following ways: Department of Justice (DOJ) corporate FCPA enforcement, Securities and Exchange Commission (SEC) corporate FCPA enforcement, aggregate corporate FCPA enforcement, and individual FCPA enforcement.

##### *A. DOJ Corporate FCPA Enforcement*

As demonstrated in Table I, in two corporate FCPA enforcement actions<sup>3</sup> in 2015 the DOJ collected approximately \$24.2 million in settlement amounts.

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<sup>3</sup> 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

Table I—2015 DOJ Corporate FCPA Enforcement Actions

Company	Fine	Resolution Vehicle <sup>4</sup>	Origin <sup>5</sup>	Related Individual Action <sup>6</sup>
Louis Berger International <sup>7</sup>	\$17.1 million	DPA	Related civil investigation <sup>8</sup>	Yes
IAP Worldwide <sup>9</sup>	\$7.1 million	NPA	Unclear <sup>10</sup>	Yes
<b>Total</b>	\$24.2 million			

As highlighted in Tables II and III below, in 2015 DOJ corporate FCPA enforcement, measured both in terms of the number of core actions and settlement amounts, was significantly below historical averages.

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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). *What is an FCPA Enforcement Action?*, FCPA PROFESSOR (Jan. 7, 2013), <http://www.fcprofessor.com/what-is-an-fcpa-enforcement-action> (providing additional information on this method of quantifying FCPA enforcement). This method of computing FCPA statistics is consistent with the DOJ's approach. See *Friday Roundup*, FCPA PROFESSOR (Mar. 22, 2013), <http://www.fcprofessor.com/friday-roundup-72> (quoting DOJ's FCPA Unit Chief), and 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. LAW SCH. F. ON CORPORATE GOVERNANCE AND FIN. REG. (Sept. 3, 2013), <http://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants/>.

<sup>4</sup> DPA refers to a deferred prosecution agreement and NPA refers to a non-prosecution agreement. To learn more about these agreements in the FCPA context, see Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010) [hereinafter Koehler, *Façade of FCPA*].

<sup>5</sup> Koehler, *Narrative*, *supra* note 1, at 965 n.3. "Refers to the event or events which initially prompted the scrutiny that resulted in the FCPA enforcement action." *Id.*

<sup>6</sup> *Id.* at 965 n.4. "Refers to employees of the corporate entity resolving the FCPA enforcement action." *Id.*

<sup>7</sup> Press Release, DOJ, Louis Berger International Resolves Foreign Bribery Charges (July 17, 2015), <http://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges> [hereinafter Louis Berger International].

<sup>8</sup> *DOJ Enforcement of the FCPA—Year in Review*, FCPA PROFESSOR (Jan. 6, 2016), <http://fcprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-6/> [hereinafter, *2016 Year in Review*]. The DPA states: "after the government had made [the company] . . . aware of a False Claim Act investigation, [the company] conducted an internal investigation, discovered potential FCPA violations, and voluntarily self-reported to the [DOJ] the misconduct." *Id.*

<sup>9</sup> *IAP Worldwide Services Inc. Resolves Foreign Corrupt Practices Act Investigation*, FCPA PROFESSOR (June 16, 2015), <http://www.justice.gov/opa/pr/iap-worldwide-services-inc-resolves-foreign-corrupt-practices-act-investigation> [hereinafter *IAP Worldwide Services*].

<sup>10</sup> See *id.* The NPA makes no mention of voluntary disclosure or other potential origins of the action.

Table II—Corporate DOJ FCPA Enforcement Actions (2010–2015)

<b>Year</b>	<b>Core Actions</b>
2015	2 <sup>11</sup>
2014	7 <sup>12</sup>
2013	7 <sup>13</sup>
2012	9 <sup>14</sup>
2011	11 <sup>15</sup>
2010	17 <sup>16</sup>

Table III—Corporate DOJ FCPA Enforcement Action Settlement Amounts (2010–2015)

<b>Year</b>	<b>Settlement Amounts</b>
2015	\$24.2 million <sup>17</sup>
2014	\$1.25 billion <sup>18</sup>
2013	\$420 million <sup>19</sup>
2012	\$142 million <sup>20</sup>
2011	\$355 million <sup>21</sup>
2010	\$870 million <sup>22</sup>

<sup>11</sup> *Corporate FCPA Enforcement in 2015 Compared to Prior Years*, FCPA PROFESSOR (Jan. 7, 2016), <http://fcpaprofessor.com/corporate-fcpa-enforcement-in-2015-compared-to-prior-years/> [hereinafter *Corporate Enforcement in 2015*].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Tempting as it might be, few meaningful conclusions should be drawn from 2015 DOJ corporate FCPA enforcement. 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.<sup>23</sup> Moreover, and as highlighted in more detail in Table 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.<sup>24</sup>

Notwithstanding the above limitations of yearly enforcement statistics, not to mention the small quantity of DOJ corporate FCPA enforcement actions in 2015 on which to calculate statistics, two statistics are nevertheless noteworthy.

The first notable statistic is that both enforcement actions were resolved through either a non-prosecution agreement (“NPA”) or deferred prosecution agreement (“DPA”).<sup>25</sup> These resolutions are consistent with the FCPA’s modern trend of the DOJ resolving corporate FCPA enforcement actions through such controversial alternative resolution vehicles.<sup>26</sup> Indeed, since 2010 approximately 85% of corporate DOJ enforcement actions have involved either an NPA or DPA.<sup>27</sup>

The second notable statistic is that both corporate enforcement actions in 2015 also included related charges against company employees.<sup>28</sup> While such actions may seem like an obvious result given that business organizations can only be exposed to criminal FCPA violations based on the conduct of actual employees,<sup>29</sup> this 2015 statistic is notable because 72% of DOJ corporate FCPA enforcement actions since 2008 have not (at least yet) resulted in *any* DOJ charges against company

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<sup>23</sup> Koehler, *A Snapshot*, *supra* note 1. 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. Additional non-substantive factors that can influence the timing of an FCPA enforcement action, although far from an exclusive list, include DOJ and SEC staffing issues (including employee departures or leaves) as well as securing corporate board approval for resolving an FCPA enforcement action. *Id.*

<sup>24</sup> In this regard, in 2016 there may be an approximate \$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.fcprofessor.com/the-burgeoning-uzbekistan-telecommunication-investigations>.

<sup>25</sup> Koehler, *Façade of FCPA*, *supra* note 4, at 909.

<sup>26</sup> To learn more about NPAs and DPAs, including why such alternative resolution vehicles are controversial, see, e.g., Koehler, *Narrative*, *supra* note 1; Koehler, *Façade of FCPA*, *supra* note 4; Mike Koehler, *Measuring the Impact of Non-Prosecution Agreements and Deferred Prosecution Agreements on FCPA Enforcement*, 49 U.C. DAVIS L. REV. 499 (2015) [hereinafter Koehler, *Measuring the Impact*].

<sup>27</sup> *2016 Year in Review*, *supra* note 8.

<sup>28</sup> *A Focus on DOJ Individual Actions*, FCPA PROFESSOR (Jan. 12, 2016), <http://fcprofessor.com/a-focus-on-doj-individual-actions>.

<sup>29</sup> *Id.*

employees.<sup>30</sup> Only time will tell whether 2015 was the beginning of a trend reversal on prosecution of company employees or merely a statistical outlier.

### B. SEC Corporate FCPA Enforcement

As demonstrated in Table IV, in nine corporate FCPA enforcement actions in 2015 the SEC collected approximately \$114.8 million in settlement amounts.

Table IV—2015 SEC Corporate FCPA Enforcement Actions

Company	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
Bristol-Myers Squibb <sup>31</sup>	\$14.7 million	Administrative Order	Unclear	No
Hyperdynamics <sup>32</sup>	\$75,000	Administrative Order	SEC investigation <sup>33</sup>	No
Hitachi <sup>34</sup>	\$19.1 million	Settled Civil Complaint	Unclear	No
BNY Mellon <sup>35</sup>	\$14.8 million	Administrative Order	Unclear	No
Mead Johnson <sup>36</sup>	\$12 million	Administrative Order	SEC investigation <sup>37</sup>	No

<sup>30</sup> *Id.* (emphasis in original). For a hypothesis why so few DOJ corporate enforcement actions result in related charges against company employees, see Koehler, *Measuring the Impact*, *supra* note 26.

<sup>31</sup> Press Release, SEC, SEC Charges Bristol-Myers Squibb With FCPA Violations (Oct. 5, 2015), <http://www.sec.gov/news/pressrelease/2015-229.html>.

<sup>32</sup> *Hyperdynamics Announces Settlement with the SEC*, HYPERDYNAMICS (Sept. 29, 2015), <http://investors.hyperdynamics.com/releasedetail.cfm?ReleaseID=934289>.

<sup>33</sup> According to the company's disclosure—"the SEC had issued a subpoena to Hyperdynamics concerning possible violations of the FCPA." *Id.*

<sup>34</sup> Press Release, SEC, SEC Charges Hitachi With FCPA Violations (Sept. 28, 2015), <https://www.sec.gov/news/pressrelease/2015-212.html>.

<sup>35</sup> Press Release, SEC, SEC Charges BNY Mellon With FCPA Violations (Aug. 18, 2015), <http://www.sec.gov/news/pressrelease/2015-170.html> [hereinafter BNY Mellon].

<sup>36</sup> Press Release, SEC, SEC Charges Mead Johnson Nutrition With FCPA Violations (July 28, 2015), <http://www.sec.gov/news/pressrelease/2015-154.html> [hereinafter Mead Johnson].

<sup>37</sup> The administrative order states:

In 2011, Mead Johnson received an allegation of possible violations of the FCPA in connection with the Distributor Allowance in China. In response, Mead Johnson conducted an internal investigation, but failed to find evidence that Distributor

<b>Company</b>	<b>Settlement Amount</b>	<b>Resolution Vehicle</b>	<b>Origin</b>	<b>Related Individual Action</b>
BHP Billiton <sup>38</sup>	\$25 million	Administrative Order	SEC investigation <sup>39</sup>	No
FLIR Systems <sup>40</sup>	\$9.5 million	Administrative Order	Voluntary Disclosure	Yes
Goodyear Tire and Rubber Co. <sup>41</sup>	\$16.3 million	Administrative Order	Voluntary Disclosure	No
The PBSJ Corporation <sup>42</sup>	\$3.4 million	DPA	Voluntary Disclosure	Yes

As highlighted in Tables V and VI below, SEC corporate FCPA enforcement in 2015 was up slightly compared to historical averages, even though the slight increase in enforcement activity resulted in settlement amounts lower than historical averages.

Table V—Corporate SEC FCPA Enforcement Actions (2010–2015)

<b>Year</b>	<b>Core Actions</b>
2015	9 <sup>43</sup>

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Allowance funds were being used to make improper payments to HCPs. Thereafter, Mead Johnson China discontinued Distributor Allowance funding to reduce the likelihood of improper payments to HCPs, and discontinued all practices related to compensating HCPs by 2013. Mead Johnson did not initially self-report the 2011 allegation of potential FCPA violations and did not thereafter promptly disclose the existence of this allegation in response to the Commission’s inquiry into this matter. In the Matter of Mead Johnson Nutrition Co., at 4 (July 28, 2015), <https://www.sec.gov/litigation/admin/2015/34-75532.pdf>.

<sup>38</sup> Press Release, SEC, SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015), <http://www.sec.gov/news/pressrelease/2015-93.html> [hereinafter BHP Billiton].

<sup>39</sup> The company disclosed that it received information requests from the SEC in August 2009. See *Issues To Consider From The Recent BHP Billiton Enforcement Action*, FCPA PROFESSOR (May 27, 2015), <http://www.fcpaprofessor.com/issues-to-consider-from-the-recent-bhp-billiton-enforcement-action>.

<sup>40</sup> Press Release, SEC, SEC Charges Oregon-Based Defense Contractor With FCPA Violations (Apr. 8, 2015), <http://www.sec.gov/news/pressrelease/2015-62.html>.

<sup>41</sup> Press Release, SEC, SEC Charges Goodyear With FCPA Violations (Feb. 24, 2015), [http://www.sec.gov/news/pressrelease/2015-38.html#\\_VOy19fnF91Z](http://www.sec.gov/news/pressrelease/2015-38.html#_VOy19fnF91Z).

<sup>42</sup> Press Release, SEC, SEC Charges Former Executive at Tampa-Based Engineering Firm With FCPA Violations (Jan. 22, 2015), <http://www.sec.gov/news/pressrelease/2015-13.html> [hereinafter Tampa-Based Engineering Firm].



2014	7 <sup>44</sup>
2013	8 <sup>45</sup>
2012	8 <sup>46</sup>
2011	13 <sup>47</sup>
2012	19 <sup>48</sup>

Table VI—SEC FCPA Enforcement Action Settlement Amounts (2010–2015)

<b>Year</b>	<b>Settlement Amounts</b>
2015	\$114 million <sup>49</sup>
2014	\$327 million <sup>50</sup>
2013	\$300 million <sup>51</sup>
2012	\$118 million <sup>52</sup>
2011	\$148 million <sup>53</sup>
2010	\$530 million <sup>54</sup>

For the same reasons discussed above, few meaningful conclusions should be drawn from 2015 SEC corporate FCPA enforcement. Nevertheless, two statistics are noteworthy.

The first noteworthy statistic is that eight of the nine corporate enforcement actions (89%) in 2015 were resolved either through an administrative order or a DPA.<sup>55</sup> As a result of these controversial resolution vehicles, there was no judicial scrutiny of 89% of SEC FCPA enforcement actions from 2015.<sup>56</sup> This statistic is consistent with a clear trend regarding SEC corporate FCPA enforcement. For

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<sup>43</sup> 2016 Year in Review, *supra* note 8.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* It should be noted that the numbers in Table VI are approximate figures.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

instance, in 2014 there was no judicial scrutiny of 86% of SEC FCPA enforcement actions,<sup>57</sup> and in 2013 there was no judicial scrutiny of 50% of SEC FCPA enforcement actions.<sup>58</sup>

The second noteworthy statistic is that seven of the nine corporate enforcement actions (78%) in 2015 did not result in related enforcement actions against company employees.<sup>59</sup> Again, this statistic is consistent with prior years as 83% of corporate SEC FCPA enforcement actions since 2008 have not (at least yet) resulted in any related charges of company employees.<sup>60</sup> Similar to the criminal context, business organizations only can be exposed to civil FCPA violations based on the conduct of actual employees.<sup>61</sup> Indeed, the 83% statistic is even more striking than the comparable 72% DOJ statistic given that the SEC, as a civil law enforcement agency, has a lower burden of proof in an enforcement action.<sup>62</sup>

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.<sup>63</sup> On the other hand, analyzing DOJ and SEC FCPA enforcement data in the aggregate is also informative because such a perspective provides a more holistic view of FCPA enforcement.

### C. Aggregate Corporate FCPA Enforcement

In 2015, the DOJ and SEC together collected approximately \$139 million in eleven core corporate enforcement actions.<sup>64</sup> The average settlement amount was

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<sup>57</sup> *Id.* For an extended discussion of the origins and controversy of SEC administrative orders and DPAs, see Koehler, *A Snapshot*, *supra* note 1, at 166-69.

<sup>58</sup> *2016 Year in Review*, *supra* note 8.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *A Focus on SEC Individual Actions*, FCPA PROFESSOR (Jan. 11, 2016), <http://www.fcpaprofessor.com/a-focus-on-sec-individual-actions>.

<sup>62</sup> *FCPA 101*, FCPA PROFESSOR (Nov. 11, 2016), <http://fcpaprofessor.com/fcpa-101/> (found under drop down menu labeled “Q. What about FCPA-related civil litigation?”).

<sup>63</sup> As a civil law enforcement agency, the SEC’s burden of proof is preponderance of the evidence compared to the DOJ’s criminal burden of proof beyond a reasonable doubt. *How Rare Are Parallel DOJ And SEC FCPA Enforcement Actions Against Individuals?*, FCPA PROFESSOR (Aug. 14, 2015), <http://fcpaprofessor.com/how-rare-are-parallel-doj-and-sec-fcpa-enforcement-actions-against-individuals/> [hereinafter *How Rare*].

<sup>64</sup> As 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). *Comparing DOJ FCPA Enforcement to SEC FCPA Enforcement is Not a Valid Comparison*, FCPA PROFESSOR (July 17, 2014), <http://fcpaprofessor.com/comparing-doj-fcpa-enforcement-to-sec-fcpa-enforcement-is-not-a-valid-comparison/> [hereinafter *Not a Valid Comparison*]. In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. *Id.* Thus, the two DOJ corporate enforcement actions from 2015 did not have an SEC component because the companies (Louis Berger International and IAP Worldwide) were private companies not subject to SEC jurisdiction. *2016 Year in Review*, *supra* note 8. As a general matter, the DOJ has criminal jurisdiction over “issuers,” “domestic concerns,” (i.e. any business entity with a principal

approximately \$12.6 million and the median was approximately \$14.7 million.<sup>65</sup> The range of settlements was, on the high end, \$25 million (BHP Billiton),<sup>66</sup> and on the low end, \$75,000 (Hyperdynamics).<sup>67</sup>

A popular issue, or so it seems, is to analyze whether corporate FCPA enforcement is up or down in any given year compared to prior years. Again, 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.

Nevertheless, and accepting year-to-year FCPA statistics for what they are, the issue remains: how best to analyze and interpret FCPA statistics over time? Consider the following analogy. In Year One, a city issues 100 speeding tickets and collects \$20,000 in fines on those tickets. In Year Two, a city issues ninety speeding tickets; however, because certain drivers were going really fast, the city collects \$25,000 in fines on those tickets. Was there less enforcement in Year Two compared to Year One? Most, it is assumed, would say that enforcement in Year Two was less than in Year One even though the city collected more money from speeding tickets in Year Two.

The same logic applies to year-to-year FCPA statistics and the more accurate and reliable way to keep and analyze FCPA enforcement statistics is by focusing on unique instances of FCPA scrutiny (not settlement amounts) and tracking enforcement actions using the ‘core’ approach.<sup>68</sup> Using this approach, corporate FCPA enforcement in 2015 was up slightly compared to 2014 and 2013 and generally consistent with historical norms, notwithstanding the fact that DOJ corporate enforcement in 2015 was substantially down compared to prior years and that settlement amounts in 2015 were significantly below historical averages.<sup>69</sup>

These points are best demonstrated by the below table which aggregates DOJ and SEC enforcement statistics over time and highlights unique circumstances which significantly skewed enforcement data statistics in any particular year.

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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. *Not a Valid Comparison*, *supra* note 64. Compared to the SEC’s civil burden of proof of preponderance of the evidence, the DOJ has a higher beyond a reasonable doubt burden of proof in a criminal prosecution. *How Rare*, *supra* note 63.

A notable statistic from 2015—in contrast to prior years—is that each SEC corporate enforcement action, actions in which the DOJ theoretically could have also brought an action, did not result in a parallel DOJ enforcement action. *2016 Year in Review*, *supra* note 8.

<sup>65</sup> *Corporate Enforcement in 2015*, *supra* note 11.

<sup>66</sup> *2016 Year in Review*, *supra* note 8.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Corporate Enforcement in 2015*, *supra* note 11.

Table VII—Corporate FCPA Enforcement Actions (2007–2015)

<b>Year</b>	<b>Core</b>	<b>Settlement Amounts</b>	<b>Of Note</b>
<b>2007</b>	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. <sup>70</sup>
<b>2008</b>	10	\$885 million	The \$800 million Siemens enforcement action comprised approximately 90% of the \$885 million amount. <sup>71</sup>
<b>2009</b>	11	\$654 million	The \$579 million KBR / Halliburton Bonny Island, Nigeria enforcement action comprised approximately 90% of the \$645 million amount. <sup>72</sup>
<b>2010</b>	21	\$1.4 billion	<p>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.<sup>73</sup></p> <p>Two enforcement actions (Technip and Eni / Snamprogetti) involved Bonny Island conduct.<sup>74</sup></p> <p>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.<sup>75</sup></p>
<b>2011</b>	16	\$503 million	The \$219 million JGC Corp. enforcement action involved Bonny Island conduct and comprised approximately 44% of the \$503 million amount. <sup>76</sup>
<b>2012</b>	12	\$260 million	No enforcement actions significantly skewed the statistics. <sup>77</sup>

<sup>70</sup> *Id.*<sup>71</sup> *Id.*<sup>72</sup> *Id.*<sup>73</sup> *Id.*<sup>74</sup> *Id.*<sup>75</sup> *Id.*<sup>76</sup> *Id.*<sup>77</sup> *Id.*

Year	Core	Settlement Amounts	Of Note
2013	9	\$720 million	The \$398 million Total enforcement action comprised approximately 55% of the \$720 million amount. <sup>78</sup>
2014	10	\$1.6 billion	Two enforcement actions (Alstom - \$772 million and Alcoa - \$384 million) comprised approximately 72% of the \$1.6 billion amount. <sup>79</sup>
2015	11	\$139 million	No enforcement actions significantly skewed the statistics. <sup>80</sup>
<b>Totals</b>	115	\$6.37 billion	

#### D. Individual FCPA Enforcement

FCPA enforcement by the DOJ and SEC against business organizations is just one prong of FCPA enforcement. Both the DOJ and SEC have repeatedly stressed the importance of also enforcing the FCPA against individuals.<sup>81</sup> For instance, 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.”<sup>82</sup> Likewise, Deputy Assistant Attorney General Sung-Hee Suh stated that “the prosecution of individuals for corporate wrongdoing has been and continues to be a high priority for the Criminal Division and for the Justice Department as a whole.”<sup>83</sup> Similarly, SEC Enforcement Director Andrew Ceresney stated, “Holding individuals accountable for their wrongdoing is critical to effective deterrence and, therefore, the Division considers individual liability in every case. . . . The Commission is committed to holding individuals accountable and I expect you will continue to see more FCPA cases against individuals.”<sup>84</sup> The next section highlights 2015 DOJ and SEC individual FCPA enforcement actions as well as historical comparisons.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *A Focus on SEC Individual Actions*, *supra* note 61.

<sup>82</sup> *DOJ Prosecution of Individuals—Are Other Factors at Play?*, FCPA PROFESSOR (Jan. 21, 2015), <http://www.fcprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play-4>.

<sup>83</sup> Sung-Hee Suh, Deputy Assistant Attorney Gen., Keynote at the ABA-CJS Global White Collar Crime Institute 2015, 3 (Nov. 19, 2015), (transcript available at [http://www.americanbar.org/content/dam/aba/events/criminal\\_justice/2015/2015shanghai\\_keynote.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/criminal_justice/2015/2015shanghai_keynote.authcheckdam.pdf)).

<sup>84</sup> Andrew Ceresney, Dir., Div. of Enf’t, Keynote Address at the ACI’s 32nd FCPA Conference, 4 (Nov. 17, 2015), (transcript available at

As demonstrated in Table VIII, in 2015 the DOJ filed or announced FCPA criminal charges against eight individuals.

Table VIII—2015 DOJ Individual FCPA Enforcement Actions

<b>Individual</b>	<b>Employer/Former Employer</b>	<b>Related Corporate Enforcement Action</b>
Roberto Rincon Abraham Shiera <sup>85</sup>	Various Private Companies Seeking Business with Petroleos de Venezuela S.A.	No
Daren Condrey <sup>86</sup>	Transports Logistic International	No
Vicente Garcia <sup>87</sup>	SAP International	No
Richard Hirsch James McClung <sup>88</sup>	Louis Berger International	Yes
James Rama <sup>89</sup>	IAP Worldwide Services	Yes
Dmitrij Harder <sup>90</sup>	Chestnut Consulting Group Inc.	No

As highlighted in Table IV, the number of DOJ individual FCPA enforcement actions in 2015 was generally below historical averages.

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<https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html> [hereinafter Ceresney, Keynote Address].

<sup>85</sup> See Indictment at 4, *United States v. Roberto Enrique Rincon-Fernandez*, No. 15CR654, <https://www.scribd.com/doc/294158102/U-S-v-Rincon-Shiera-Indictment>.

<sup>86</sup> See Press Release, DOJ, Russian Nuclear Energy Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act, (Aug. 31, 2015), <http://www.justice.gov/opa/pr/russian-nuclear-energy-official-pleads-guilty-money-laundering-conspiracy-involving>.

<sup>87</sup> See Press Release, DOJ, Former Executive Pleads Guilty to Conspiring to Bribe Panamanian Officials (Aug. 12, 2015), <http://www.justice.gov/opa/pr/former-executive-pleads-guilty-conspiring-bribe-panamanian-officials>.

<sup>88</sup> See *Louis Berger International*, *supra* note 7.

<sup>89</sup> See *IAP Worldwide Services*, *supra* note 9.

<sup>90</sup> See Press Release, DOJ, Former Owner and President of Pennsylvania Consulting Companies Charged with Foreign Bribery (Jan. 6, 2015), <http://www.justice.gov/opa/pr/former-owner-and-president-pennsylvania-consulting-companies-charged-foreign-bribery>.

Table IX—DOJ Individual FCPA Enforcement Actions (2007–2015)<sup>91</sup>

<b>Year</b>	<b>Individual Charged with Criminal FCPA Offenses</b>
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 2015 the SEC brought FCPA civil charges against 2 individuals.

Table X—2015 SEC Individual FCPA Enforcement Actions

<b>Individual</b>	<b>Employer/Former Employer</b>	<b>Related Corporate Enforcement Action</b>
Vicente Garcia <sup>92</sup>	SAP International	No
Walid Hatoum <sup>93</sup>	The PBSJ Corporation	Yes

As highlighted in Table XI, similar to the above DOJ historical comparison, while the number of SEC individual FCPA enforcement actions in 2015 was generally consistent with the prior two years, the number of actions was generally below historical averages.

<sup>91</sup> See *A Focus on DOJ Individual Actions*, *supra* note 28.

<sup>92</sup> See Press Release, SEC, SEC Charges Former Software Executive With FCPA Violations (Aug. 12, 2015), <http://www.sec.gov/news/pressrelease/2015-165.html>.

<sup>93</sup> Tampa-Based Engineering Firm, *supra* note 42.

Table XI—SEC Individual FCPA Enforcement Actions (2007–2015)<sup>94</sup>

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

### III. NOTEWORTHY ISSUES FROM 2015

With a proper foundation in FCPA statistics both in 2015 and over time, Part III of this article discusses a range of noteworthy issues from 2015 such as: expansive and evolving FCPA enforcement theories, judicial scrutiny of FCPA and related enforcement theories, policy pronouncements and developments relevant to FCPA issues, and developments beyond the FCPA that nevertheless touch upon FCPA issues or are otherwise relevant to a similar space.

#### A. *Expansive and Evolving FCPA Enforcement Theories*

As highlighted above, approximately 80% of corporate FCPA enforcement actions in 2015 were brought by the SEC.<sup>95</sup> As discussed below, most of these enforcement actions were based on expansive, evolving—and controversial—enforcement theories not subjected to any judicial scrutiny because of the resolution vehicles typically used by the SEC.<sup>96</sup>

<sup>94</sup> See *A Focus on SEC Individual Actions*, *supra* note 61.

<sup>95</sup> See *A Focus on DOJ Individual Actions*, *supra* note 28; see also *A Focus on SEC Individual Actions*, *supra* note 61.

<sup>96</sup> See generally BNY Mellon, *supra* note 35; Mead Johnson, *supra* note 36; BHP Billiton, *supra* note 38.



In the minds of some, the FCPA is simple: “Just don’t bribe.”<sup>97</sup> However, more sophisticated observers recognize the absurdity of such an absolutist position. In short, a company can do things with customer or prospective customer X and it is generally not a legal violation. Yet, when the same company does the same thing with customer or prospective customer Y the U.S. government might call it bribery. Several SEC corporate enforcement actions from 2015 highlight this controversial aspect of FCPA enforcement.<sup>98</sup>

Consistent with several prior enforcement actions in the FCPA’s modern era,<sup>99</sup> the SEC brought two enforcement actions against healthcare companies for their alleged corrupt interactions with physicians employed by foreign healthcare systems.

In the first enforcement action, Mead-Johnson, without admitting or denying the SEC’s findings in an administrative cease-and-desist order, agreed to pay approximately \$12 million based on the following SEC’s findings:

Despite prohibitions in the FCPA and Mead Johnson’s internal policies, certain employees of Mead Johnson’s majority-owned subsidiary in China . . . (“Mead Johnson China”), made improper payments to certain health care professionals (“HCPs”) at state-owned hospitals in China to recommend Mead Johnson’s nutrition products to, and provide information about, expectant and new mothers.<sup>100</sup>

The Mead Johnson enforcement action contained several other notable features. For starters, the action lacked any meaningful factual allegation against the corporate defendant resolving the action. Rather, the SEC merely found in conclusory fashion that: (i) “Mead Johnson China’s books and records were consolidated into Mead Johnson’s books and records, thereby causing Mead Johnson’s consolidated books and records to be inaccurate;” and (ii) “Mead Johnson failed to devise and maintain an adequate system of internal accounting controls over Mead Johnson China’s operations sufficient to prevent and detect the improper payments that occurred over a period of years.”<sup>101</sup>

Moreover, the SEC made seemingly contradictory findings regarding Mead Johnson’s internal controls. On the one hand, the SEC found:

Mead Johnson has established internal policies to comport with the FCPA and local laws, and to prevent related illegal and unethical conduct. Mead Johnson’s internal policies include prohibitions against providing improper payments and gifts to HCPs that would influence their recommendation of Mead Johnson’s products. . . . The use of the

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<sup>97</sup> “Good Companies Don’t Bribe—Period” was the title of a Minneapolis Star Tribune business column which assailed those who have criticized various aspects of the FCPA or FCPA enforcement. See *Issues to Consider from the Recent BHP Billiton Enforcement Action*, *supra* note 39.

<sup>98</sup> See generally BNY Mellon, *supra* note 35; Mead Johnson, *supra* note 36; BHP Billiton, *supra* note 38.

<sup>99</sup> See 2 *Enforcement Theories, 17 DOJ Corporate Enforcement Actions, 0 Individual Prosecutions*, FCPA PROFESSOR (Sept. 24, 2015), <http://fcpaprofessor.com/2-enforcement-theories-17-doj-corporate-enforcement-actions-0-individual-prosecutions/>.

<sup>100</sup> *In the Matter of Mead Johnson Nutrition Co.*, *supra* note 37, at 2.

<sup>101</sup> *Id.* at 2, 4.

Distributor Allowance to improperly compensate HCPs was contrary to management's authorization and Mead Johnson's internal policies.<sup>102</sup>

Yet on the other hand, the SEC order also found that "Mead Johnson failed to devise and maintain an adequate system of internal accounting controls over Mead Johnson China's operations sufficient to prevent and detect the improper payments that occurred over a period of years."<sup>103</sup>

In the second enforcement action against a healthcare company, Bristol-Myers Squibb, without admitting or denying the SEC's findings in an administrative cease-and-desist order, agreed to pay \$14.7 million based on the following SEC findings:

Through various mechanisms . . . certain sales representatives of [a joint venture of a Chinese subsidiary] improperly generated funds that were used to provide corrupt inducements to [healthcare professionals] in the form of cash payments, gifts, meals, travel, entertainment, and sponsorships for conferences and meetings in order to secure new sales and increase existing sales.<sup>104</sup>

The Bristol-Myers Squibb enforcement action, like the Mead-Johnson action and many others from prior years, subjected corporate interaction with foreign healthcare professionals to different standards than interaction with U.S. healthcare professionals who frequently receive gifts, meals, sponsorships for conferences, and other things of value from healthcare companies.<sup>105</sup>

SEC enforcement actions in 2015 against BHP Billiton and BNY Mellon further highlight the absurdity of the absolutist "just don't bribe" position. The key findings from the SEC's administrative cease-and-desist order against BHP Billiton ("BHPB"), which the company neither admitted nor denied, were as follows:<sup>106</sup> "[B]HP Billiton was an official sponsor of the 2008 Summer Olympics in Beijing, China.<sup>107</sup> As such, the company received 'priority access to tickets, hospitality suites and accommodations for during the games.'<sup>108</sup> Not surprisingly, the company invited 650 people (customers, suppliers, etc.) to attend the Olympic Games with three to four day hospitality packages.<sup>109</sup> According to the SEC's findings, approximately

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<sup>102</sup> *Id.* (numeration omitted).

<sup>103</sup> *Id.*

<sup>104</sup> In the Matter of Bristol-Myers-Squibb Co., at 2 (Oct. 5, 2015), <https://www.sec.gov/litigation/admin/2015/34-76073.pdf>.

<sup>105</sup> To learn more about this double standard in the healthcare context, see Mike Koehler, *The Uncomfortable Truths and Double Standards of Bribery Enforcement*, 84 *FORDHAM L. REV.* 525 (2015) [hereinafter Koehler, *The Uncomfortable Truths*].

<sup>106</sup> See BHP Billiton, *supra* note 38; see also Scott Patterson, *SEC Fines BHP \$25 Million After Gifts Probe*, *WALL ST. J.* (May 20, 2015), <http://www.wsj.com/articles/sec-charges-bhp-with-violating-fcpa-at-2008-summer-olympics-1432127870>.

<sup>107</sup> Patterson, *supra* note 106.

<sup>108</sup> *Id.*

<sup>109</sup> See In the Matter of BHP Billiton Ltd. and BHP Billiton PLC (May 20, 2015), <https://www.sec.gov/litigation/admin/2015/34-74998.pdf>.

75% of these invitees were not alleged ‘foreign officials.’ Thus no problem.<sup>110</sup> However, the SEC found that approximately 25% of the people invited were alleged ‘foreign officials’ primarily from Africa and Asia and that an even smaller percentage of these invited ‘foreign officials’ actually attended the Olympic Games.<sup>111</sup>

Based on the above findings, the SEC found:

BHPB recognized that inviting government officials to the Olympics created a heightened risk of violating anti-corruption laws and the company’s own Guide to Business Conduct, but the internal controls it developed and relied upon in an effort to address this risk were insufficient. As a result, BHPB invited government officials who were directly involved in, or in a position to influence, pending contract negotiations, efforts to obtain access rights, regulatory actions, or business dealings affecting BHPB in multiple countries. In addition, BHPB’s books and records, namely certain internal forms that employees prepared in order to invite a government official to the Olympics, did not, in reasonable detail, accurately and fairly reflect BHPB’s pending negotiations or business dealings with the government official at the time of the invitation.<sup>112</sup>

From a settlement amount perspective, the \$25 million BHPB enforcement action was the largest corporate enforcement action of 2015 and the second largest SEC only FCPA enforcement action of all-time.<sup>113</sup> The fact that a travel and entertainment action such as BHPB represented the second largest SEC only FCPA enforcement action of all-time is remarkable and further demonstrates that FCPA settlement amounts seem to be getting bigger each year just because.<sup>114</sup>

With good reason, the BHPB enforcement action generated much critical commentary in the FCPA space. FCPA practitioners at Debevoise & Plimpton rightly noted:

[The BHPB enforcement action] may well turn out to be one of the more notable FCPA resolutions in several years. This is because the case addresses issues of recurring concern to multinational corporations that have long been sought out as sponsors of—or, at least, purchasers of hospitality packages for—marquee sporting events.

As good corporate citizens, these firms have come to view the purchase of tickets and hospitality packages as part of the collaboration with host entities managing such events, including national governments. This is an

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<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (numeration omitted).

<sup>113</sup> See *Issues to Consider from the Recent BHP Billiton Enforcement Action*, *supra* note 39 (meaning the enforcement action only involved an SEC component).

<sup>114</sup> See *Have FCPA Settlement Amounts Increased . . . Just Because?*, FCPA PROFESSOR (Feb. 17, 2015), <http://www.fcprofessor.com/have-fcpa-settlement-amounts-increased-just-because>.

integral element of brand management and corporate strategy. In the course of such collaboration, these companies also receive due credit for making the event a successful interlude during which governments, business, and society at large, pause to celebrate the endeavor of sport. Yet the very process of supporting such an event leads to the inevitable question of “whom may we invite?” From there, the issue of anti-bribery compliance becomes a central issue for in-house compliance personnel.

The BHPB resolution likely will lead U.S. issuers choosing to provide hospitality of this kind to expend significant additional time, resources, and money devising and maintaining controls suggested by the resolution. Even though the settlement lacks the force of law, it will no doubt raise considerable pressure on companies to exercise even greater care if inviting foreign officials to such events, and may cause some firms subject to the books and records and internal controls provisions of the FCPA, i.e., those subject to SEC jurisdiction, to reconsider altogether this practice.<sup>115</sup>

Similarly, FCPA practitioners at Steptoe & Johnson rightly noted:

This settlement . . . represents one of the most aggressive uses by the SEC to date of its accounting, and particularly its internal controls, authorities in an FCPA context. Instead of being predicated on specific questionable payments, the factual basis of the charges was that the company recognized the risk that improper *quid pro quo* arrangements *could* develop in connection with the hospitality program, and that such risks were not appropriately managed by the company’s program, including through the manner in which they were documented in company compliance approval tracking forms.

. . . .

The case also suggests that programs in the areas of hospitality and sponsorship – common and recurring areas of activity for many companies – may face enhanced scrutiny for systemic adequacy from a regulatory point of view, at least where larger amounts are involved. Such a position—if the SEC indeed intends to pursue enforcement actions on this basis as a matter of enforcement policy—would significantly expand the scope of risks facing US issuers with appreciable FCPA/anti-corruption risks to their business.<sup>116</sup>

Troubling as it was, the BHPB enforcement action was likely not the most controversial SEC corporate enforcement action of 2015. That distinction likely belongs to the BNY Mellon enforcement action in which the company agreed to pay

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<sup>115</sup> Andrew M. Levine et al., *Internal Controls of Olympic Proportions: BHP Billiton Settles SEC Investigation of Olympic Hospitality*, FCPA UPDATE, (May 2015), [http://www.debevoise.com/~media/files/insights/publications/2015/05/fcpa\\_update\\_may\\_2015.pdf](http://www.debevoise.com/~media/files/insights/publications/2015/05/fcpa_update_may_2015.pdf).

<sup>116</sup> Lucinda A. Low & Tom Best, *Does SEC’s Enforcement Action Against BHP Billiton Take the FCPA’s Accounting Provisions Too Far?*, STEPTOE, <http://www.stepto.com/publications-10482.html> (emphasis in original).

\$14.8 million.<sup>117</sup> The enforcement action was based on SEC findings, which the company neither admitted nor denied in an administrative cease-and-desist order, that BNY Mellon provided “valuable student internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund.”<sup>118</sup> As stated by the SEC:

The violations took place during 2010 and 2011, when employees of BNY Mellon sought to corruptly influence foreign officials in order to retain and win business managing and servicing the assets of a Middle Eastern sovereign wealth fund.

These officials sought, and BNY Mellon agreed to provide, valuable internships for their family members. BNY Mellon provided the internships without following its standard hiring procedures for interns, and the interns were not qualified for BNY Mellon’s existing internship programs.

BNY Mellon failed to devise and maintain a system of internal accounting controls around its hiring practices sufficient to provide reasonable assurances that its employees were not bribing foreign officials in contravention of company policy.<sup>119</sup>

Previous SEC FCPA enforcement actions found that companies violated the FCPA (albeit merely the FCPA’s books and records and internal controls provisions) for making donations to bona fide charitable foundations favored by an alleged “foreign official.”<sup>120</sup> However, the BNY Mellon enforcement action went a step further by finding that the company also violated the FCPA’s anti-bribery provisions.<sup>121</sup> In this regard, the key language from the SEC was the following: “The internships were valuable work experience, *and the requesting officials derived significant personal value in being able to confer this benefit on their family members.*”<sup>122</sup>

Notwithstanding the SEC’s findings that the interns did not meet BNY’s Mellon’s supposed “rigorous criteria” for hiring and were not evaluated and hired through the company’s “established internship programs,” the following SEC findings were notable.<sup>123</sup> One of the interns (Intern C) was not paid. As to the other two interns, the SEC’s order states that “because Interns A and B had already

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<sup>117</sup> BNY Mellon, *supra* note 35.

<sup>118</sup> *Id.*

<sup>119</sup> In the Matter of Bank of New York Mellon Corp. (Aug. 18, 2015), <https://www.sec.gov/litigation/admin/2015/34-75720.pdf> (numeration omitted).

<sup>120</sup> See, e.g., Press Release, SEC, SEC Files Settled Enforcement Action Against Schering-Plough Corporation for Foreign Corrupt Practices Act Violations (June 9, 2004), <https://www.sec.gov/litigation/litreleases/lr18740.htm>.

<sup>121</sup> *Issues To Consider From The BNY Mellon Enforcement Action*, *supra* note 39.

<sup>122</sup> *In the Matter of Bank of New York Mellon Corp.*, *supra* note 119 (emphasis added).

<sup>123</sup> *Id.*

graduated from college,” BNY paid the interns “above the normal salary scale for BNY Mellon undergraduate interns but below the scale for postgraduate interns.”<sup>124</sup>

In other words, the SEC found that BNY Mellon violated the FCPA’s anti-bribery provisions, not necessarily because of the compensation offered to the interns, but rather the SEC found that the interns should never have been interns at BNY Mellon in the first place, and because of this—in the words of the SEC—the alleged “foreign officials” “derived significant personal value in being able to confer this benefit on their family members.”<sup>125</sup>

Like the BHPB enforcement action, the BNY Mellon enforcement action also generated much critical commentary in the FCPA space. For instance, Jay Darden (a recent Assistant Chief of the DOJ’s Fraud Section) stated, “It’s not the U.S. government’s job to regulate hiring policy.”<sup>126</sup> FCPA practitioners at Debevoise & Plimpton rightly noted:

[T]he government’s investigations in this area face a key threshold legal issue under the FCPA: can providing a job or internship to an official’s relative constitute a thing of value to the official him/herself? Can offering the purely psychological benefit of helping a child or relative land a job give rise to an actionable attempt at bribery? The official does not stand to see any personal financial gain from the internship, except in the arguable circumstance of reducing the official’s financial obligations to a dependent. But the SEC seems to have purposely disclaimed—or at least strained—that theory here, given that one of the internships at issue was unpaid. The SEC addressed this thorny issue in a single sentence in the Order, asserting that “[t]he internships were valuable work experience, and the requesting officials derived significant personal value in being able to confer this benefit on their family members.”

...  
[The enforcement action highlights an area of frequent criticism of FCPA enforcement that] the activity under scrutiny bears a strong similarity to what are perceived as common practices in the private sector in which firms seek to accommodate client representative requests in order to maintain good relations with key decision makers. In this way, enforcement authorities risk criticism that they are using the FCPA to excise business practices affecting relationships with foreign officials abroad that are routinely tolerated in the private sector in the United States—and that are not unprecedented or even rare in the context of companies’ relationships with officials employed by the United States federal, state, and local governments.<sup>127</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Jacob Batchelor, *SEC Strikes Series Of FCPA Firsts With BNY Mellon Deal*, LAW360 (Aug. 18, 2015), <http://www.law360.com/banking/articles/692484/sec-strikes-series-of-fcpa-firsts-with-bny-mellon-deal>.

<sup>127</sup> Sean Hecker et al., *The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring or Relatives of Foreign Officials*, FCPA UPDATE (Aug. 2015), [http://www.debevoise.com/~media/files/insights/publications/2015/08/fcpa\\_update\\_august\\_2015.pdf](http://www.debevoise.com/~media/files/insights/publications/2015/08/fcpa_update_august_2015.pdf). For additional reading on how the BNY Mellon and related FCPA inquiries of the

The expansive and evolving enforcement theories that largely defined SEC FCPA enforcement in 2015 were presumably further to the SEC's goal of enforcing the FCPA to its "fullest extent"—a term used by SEC Director of Enforcement Andrew Ceresney in a November 2015 FCPA speech.<sup>128</sup> While acknowledging certain criticism of the BNY Mellon enforcement action—the SEC's first internship action against a financial institution that is expected to be a template for future enforcement action against similar companies—Ceresney nevertheless stated:

I would suggest that there was ample basis for viewing the internships as something of value to the foreign officials who requested them for their relatives, and for concluding that they were given in an attempt to influence the foreign officials in connection with the performance of their official duties or to obtain an improper advantage from the foreign officials.

As I've said before, bribes come in many shapes and sizes. And in my view, the FCPA is properly read to cover providing valuable favors to a foreign official, as well as providing cash, tangible gifts, travel or entertainment.<sup>129</sup>

The question nevertheless arises: just what is the fullest extent of the FCPA? And in the minds of whom, recognizing that all of the above highlighted enforcement actions were resolved in the absence of any judicial scrutiny and in the context of the SEC exercising its leverage against risk averse business organizations allowed to resolve the actions without admitting or denying the SEC's findings?<sup>130</sup> Indeed, commenting generally on the SEC's evolving and expansive FCPA enforcement theories, Richard Grime (the former Assistant Director of SEC Enforcement) stated:

It's not that you couldn't intellectually [conceive of] the violation. It's that the government is sort of probing every area where there is an interaction with government officials and then working backwards from there to see if there is a violation, as opposed to starting out with the statute . . . and what it prohibits.<sup>131</sup>

Compliance professionals advising business organizations on FCPA compliance do not have the pleasure of working backwards, but must anticipate FCPA risks on a pro-active basis. Thus, regardless of the validity or legitimacy of the recent expansive and evolving FCPA enforcement theories, business organizations would be wise to heed the words of the enforcement agencies which possess the sticks. In

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financial services industry highlight a double standard, see Koehler, *The Uncomfortable Truths*, *supra* note 105.

<sup>128</sup> Ceresney, Keynote Address, *supra* note 84.

<sup>129</sup> *Id.*

<sup>130</sup> See Melissa Maleske, *The FCPA Predictions GCs Can't Afford To Ignore*, LAW360 (Mar. 25, 2015), [http://www.law360.com/whitecollar/articles/635068?nl\\_pk=571fe56c-690f-457e-b151-102a5685d9eb&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=whitecollar](http://www.law360.com/whitecollar/articles/635068?nl_pk=571fe56c-690f-457e-b151-102a5685d9eb&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar).

<sup>131</sup> *Id.* (alterations in original).

this regard, Ceresney did offer the following guidance in his speech regarding “less traditional items of value.”<sup>132</sup> Relevant questions that compliance personnel should ask include:

- Was the gift, donation, favor, or hiring asked for by the foreign official?
- Did the company official believe that the gift, donation, favor, or hiring would advance their business interests and help them obtain particular business, or at least obtain an improper advantage with the foreign official?
- Was the gift, donation, favor, or hiring consistent with company policy and practice?
- Were the company’s normal procedures followed in connection with the gift, donation, favor, or hiring?
- Would the gift, donation, favor, or hiring have been made if there were no potential business benefit?<sup>133</sup>

Returning to the absurdity of the absolutist “just don’t bribe” position discussed at the beginning of this section, the expansive enforcement theories in 2015 concerning “things of value” demonstrate once again why the meaning of the FCPA’s key “foreign official” element matters.<sup>134</sup> To some, the meaning of “foreign official” matters only to those intent on engaging in bribery.<sup>135</sup> However, the proper scope and meaning of the “foreign official” is an issue of extraordinary practical significance to businesses and individuals subject to the FCPA. Not because business organizations want to bribe, but because business organizations competing in good faith in the global marketplace want to engage in conduct, such as offering internships or providing entertainment, that is legal and socially acceptable in most other situations.<sup>136</sup>

Despite the significance of the meaning of “foreign official” and notwithstanding the first judicial decision of precedent in 2014 concerning the contours of the term, much remains foggy about this key FCPA element.<sup>137</sup> For instance, in 2015, consistent with prior years, 55% of corporate FCPA enforcement actions involved, in whole or in part, employees of alleged state-owned or state-controlled entities (SOEs).<sup>138</sup> Such entities ranged from health care providers, to sovereign wealth

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<sup>132</sup> Ceresney, Keynote Address, *supra* note 85.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.*

<sup>135</sup> Doug Cornelius, *What is an “Instrumentality” Under the FCPA?*, COMPLIANCE BUILDING (May 21, 2014), <http://www.compliancebuilding.com/2014/05/21/what-is-an-instrumentality-under-the-fcpa/>.

<sup>136</sup> *Why the Meaning of “Foreign Official” Matters*, FCPA PROFESSOR (Nov. 2, 2016), <http://fcpprofessor.com/meaning-foreign-official-matters-2/>.

<sup>137</sup> To learn more about this decision, *United States v. Esquenazi* (regarding the question of whether employees of alleged state-owned or state-controlled enterprises can be “foreign officials” under the FCPA), as well as extended discussion of how the decision was flawed, see Koehler, *A Snapshot*, *supra* note 1.

<sup>138</sup> *The “Foreign Officials” of 2015*, FCPA PROFESSOR (Jan. 8, 2016), <http://www.fcpprofessor.com/the-foreign-officials-of-2015>.



funds, to a real estate development firm, a sugar factory, a cement company, a diamond mine, and an oil and gas company.<sup>139</sup>

Moreover, the meaning of “foreign official” was further expanded in a 2015 DOJ individual enforcement action alleging that a Maryland resident (Vadim Mikerin), working for a Maryland corporation (TENAM Corporation), was a Russian “foreign official.”<sup>140</sup> The reason, according to the DOJ, was because “TENAM was a wholly-owned subsidiary on TENEX—an entity ‘indirectly owned and controlled by, and perform[ing] functions of, the government of the Russian Federation.’”<sup>141</sup>

Commenting on the ambiguities inherent in FCPA enforcement, George Terwilliger (former DOJ Acting Attorney General) stated:

It is fundamental to due process that a person of ordinary intelligence should be able to read a law and understand what is required or prohibited, as the case may be. Many people of great intelligence on both sides of an FCPA question debate just such issues . . . . That does not produce the fair warning that those subject to the law deserve to have.<sup>142</sup>

Specific to the “foreign official” element, Timothy Dickinson (a veteran of the FCPA bar) stated, “Ten years ago, I would have been happy to bet anyone a doughnut that I could accurately define what a foreign official is. Now, with various court definitions and a lack of clarity from the DOJ, I fear I might actually lose my doughnut.”<sup>143</sup>

#### *B. Judicial Scrutiny of FCPA and Related Enforcement Theories*

Doughnuts of course have a hole, and a hole in the DOJ’s modern FCPA enforcement program has been its struggles when put to its burden of proof. In a legal system founded on the rule of law, success is best measured when an enforcement agency is put to its burden of proof in the context of an adversarial system, not when an enforcement agency exercises its leverage to secure corporate settlements against risk-averse business organizations through resolution vehicles not subjected to any meaningful judicial scrutiny.<sup>144</sup> This section highlights how, similar to prior years, the DOJ struggled in 2015 in contested individual FCPA enforcement actions.

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<sup>139</sup> *Id.*

<sup>140</sup> See *Analyzing The DOJ’s Recent “Foreign Official” Enforcement Theory*, FCPA PROFESSOR (Sept. 15, 2015), <http://www.fcprofessor.com/analyzing-the-dojs-recent-foreign-official-enforcement-theory> (containing links to original source documents).

<sup>141</sup> *Id.*

<sup>142</sup> Jeannie O’Sullivan, *FPCA Challenges Make for Spotty Trial Record for DOJ*, LAW360 (July 21, 2015), [http://www.law360.com/whitecollar/articles/677837?nl\\_pk=571fe56c-690f-457e-b151-102a5685d9eb&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=whitecollar](http://www.law360.com/whitecollar/articles/677837?nl_pk=571fe56c-690f-457e-b151-102a5685d9eb&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar).

<sup>143</sup> Tom Webb, *FCPA Enforcement Critic to Become DOJ Fraud Section Chief*, GLOBAL INVESTIGATIONS REVIEW (Jan. 13, 2015), <http://globalinvestigationsreview.com/article/1016905/fcpa-enforcement-critic-doj-fraud-section-chief>.

<sup>144</sup> See *Books*, FCPA PROFESSOR, <http://fcprofessor.com/Books/> (last visited Jan. 15, 2017).

For the first time since its FCPA trial court debacles in 2011 and 2012,<sup>145</sup> in 2015 the DOJ was put to its burden of proof in an FCPA trial by Joseph Sigelman (a former executive of PetroTiger who was criminally charged with, among other things, making improper payments to alleged Colombian officials).<sup>146</sup> Unlike his co-defendants, Sigelman exercised his constitutional right to a jury trial, and the case was expected to shine light on the DOJ's expansive "foreign official" theory given that Sigelman was expected to call witnesses—including Colombian judges—to testify that the officials Sigelman allegedly bribed were not "foreign officials" because they did not work for a company that performed government functions.<sup>147</sup>

The DOJ's case against Sigelman relied extensively on his former lawyer, Gregory Weisman (a cooperating co-defendant who pleaded guilty in connection with the same alleged scheme), who was expected to implicate Sigelman.<sup>148</sup> Evidence in the case was to include secretly recorded conversations with Sigelman.<sup>149</sup> However, early in the trial the DOJ's case imploded when Weisman acknowledged giving false testimony during the trial, which prompted the presiding judge to ask Weisman, "[D]id you have a hallucination?"<sup>150</sup>

The trial quickly adjourned as the DOJ contemplated what to do, recognizing of course, that the DOJ can control if it is ultimately put to its burden of proof by pulling a case if it feels it will not prevail. In the end, that is what the DOJ did as it offered Sigelman a plea agreement to substantially reduced charges and Sigelman was not sentenced to any jail time.<sup>151</sup> Moreover, at sentencing the judge blasted the DOJ's oft-stated rhetoric about the purported difficulty of prosecuting FCPA cases, which notably in the Sigelman case originated from a corporate voluntary disclosure.<sup>152</sup>

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<sup>145</sup> To learn more about these cases, see generally Mike Koehler, *What Percentage of DOJ FCPA Losses is Acceptable?*, 90 CRIM. L. REV. 823, 733 (2012) (discussing previous FCPA trial outcomes).

<sup>146</sup> Press Release, DOJ, Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company (Jan. 6, 2014), <https://www.justice.gov/opa/pr/foreign-bribery-charges-unsealed-against-former-chief-executive-officers-oil-services-company>.

<sup>147</sup> *The Coming Battle Over the Status of Ecopetrol*, FCPA PROFESSOR (Apr. 30, 2015), <http://fcpaproffessor.com/the-coming-battle-over-the-status-of-ecopetrol/>.

<sup>148</sup> *DOJ Prosecution of Sigelman Ends with No Jail Time*, FCPA PROFESSOR (June 16, 2015) <http://fcpaproffessor.com/doj-prosecution-of-sigelman-ends-with-no-jail-time-judge-criticizes-doj-defense-counsel-issues-release/>.

<sup>149</sup> See Paul Barrett, *U.S. Undercover Tactics Go on Trial in Foreign Bribery Case*, BLOOMBERG, (June 3, 2015), <http://www.bloomberg.com/news/articles/2015-06-03/u-s-undercover-tactics-go-on-trial-in-foreign-bribery-case>.

<sup>150</sup> See *After Judge Asks DOJ's Star Witness "Did You Have a Hallucination?" Sigelman Pleads Guilty to Substantially Reduced Charges*, FCPA PROFESSOR (June 16, 2015), <http://fcpaproffessor.com/after-judge-asks-doj-s-star-witness-did-you-have-a-hallucination-sigelman-pleads-guilty-to-substantially-reduced-charges/>. (containing links to original source documents).

<sup>151</sup> *Id.*

<sup>152</sup> See *In Sentencing Sigelman, Judge Irenas Blasts the DOJ*, FCPA PROFESSOR (June 17, 2015), <http://fcpaproffessor.com/in-sentencing-sigelman-judge-irenas-blasts-the-doj/>.

If your only source of FCPA information were the DOJ, you would be in the dark about the above dynamics from the Sigelman trial because the DOJ's press release announcing Sigelman's plea did not mention them.<sup>153</sup> However, less biased and more sophisticated observers recognized full well that the DOJ had suffered yet another FCPA trial court debacle. For instance, Paul Calli, a lawyer who previously prevailed on behalf of a client in an FCPA trial, stated:

Make no mistake: this is a loss for the government and a win for Mr. Sigelman.

. . . .

[The DOJ's press release is not only] silly [but] it is also offensive to the spirit of justice. The release is written as though all the things that went badly at trial for DOJ never happened. It fails to mention the lies of the cooperator whom the government had decided to embrace. In doing so, it is a clear demonstration that the DOJ press office does not exist to inform the public, but to serve as the propaganda arm of DOJ.<sup>154</sup>

Likewise, FCPA practitioners at Miller Chevalier stated:

The DOJ's prosecution and trial of Joseph Sigelman deserves special notice, as it was the DOJ's first trial of an individual on FCPA charges since the acquittal in January 2012 of John Joseph O'Shea. Sigelman's trial . . . lasted nine days and ended with prosecutors entering into a negotiated guilty plea with Sigelman on only one of the six counts with which he was charged after a key government witness admitted to lying on the stand. Sigelman's sentence of probation with no imprisonment was essentially a victory for Sigelman, and the judge was particularly critical of the government's key witness as well as its sentencing recommendation. The trial adds to a string of recent FCPA prosecutions involving individuals in which the government has failed to secure a conviction or its recommended sentence, highlighting the difficulties the DOJ has sometimes encountered when forced to bear its burden of proof in court.<sup>155</sup>

The DOJ further stumbled in 2015 when a judge substantially trimmed its criminal charges against Lawrence Hoskins, a foreign national criminally charged for allegedly authorizing improper payments to alleged Indonesian officials.<sup>156</sup>

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<sup>153</sup> Press Release, DOJ, Former Chief Executive Officer of Oil Services Company Pleads Guilty to Foreign Bribery Charge (June 15, 2015), <https://www.justice.gov/opa/pr/former-chief-executive-officer-oil-services-company-pleads-guilty-foreign-bribery-charge>.

<sup>154</sup> *Silly DOJ Press Release Belies Government's Failure in Joseph Sigelman FCPA Prosecution*, FCPA PROFESSOR (July 1, 2015), <http://fcpprofessor.com/silly-doj-press-release-belies-governments-failure-in-joseph-sigelman-fcpa-prosecution/>.

<sup>155</sup> *FPCA Summer Review 2015*, MILLER & CHEVALIER (July 15, 2015), <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=150501>.

<sup>156</sup> See Press Release, DOJ, Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme (July 30, 2013),

Unlike his co-defendants who pleaded guilty, Hoskins elected to put the DOJ to its burden of proof and in pre-trial briefing argued that the indictment charged “a legally invalid theory” by suggesting that he “could be criminally liable for conspiracy to violate the FCPA even if the evidence [did] not establish that he was subject to criminal liability as a principal, by being an ‘agent’ of a ‘domestic concern.’”<sup>157</sup> The issue as stated by the court was:

whether a nonresident foreign national could be subject to criminal liability under the FCPA, even where he is not an agent of a domestic concern and does not commit acts while physically present in the territory of the United States, under a theory of conspiracy or aiding and abetting a violation of the FCPA by a person who is within the statute’s reach.<sup>158</sup>

The court held, “Based on the text and structure of the FCPA and the legislative history accompanying its enactment and its amendment . . . that Congress did not intend to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability.”<sup>159</sup>

FCPA practitioners at King & Spalding rightly observed the following regarding the DOJ’s setback in Hoskins:

[T]he Government argued for an accomplice theory, consistent with the Resource Guide to the Foreign Corrupt Practices Act. . . . The District Court rejected that theory, based on the U.S. Supreme Court’s decision in *Gebardi v. United States*, which established that whenever Congress has intentionally excluded certain individuals from liability for a specific law, this congressional intent must not be circumvented by prosecuting such individuals based on accomplice liability. While the District Court rejected accomplice liability as an additional basis for FCPA jurisdiction, it remains to be seen how other courts will address this question, and whether the DOJ and the SEC will revisit their guidance on the matter. Given the rarity of written judicial opinions interpreting the FCPA, this ruling is likely to have an outsized impact on future FCPA enforcement actions.<sup>160</sup>

The Sigelman and Hoskins matters were not the only notable DOJ enforcement actions in 2015 in which the DOJ struggled. Two other cases from 2015 relevant to FCPA enforcement were also noteworthy.

In *United States v. Vassilieve*, the DOJ criminally charged two foreign nationals for allegedly providing money and other things of value to an executive of the

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<https://www.justice.gov/opa/pr/former-senior-executive-french-power-company-charged-connection-foreign-bribery-scheme>.

<sup>157</sup> See *Judge Trims DOJ’s FCPA Enforcement Action Against Lawrence Hoskins*, FCPA PROFESSOR (Aug. 17, 2015), <http://fcpaprofessor.com/judge-trims-doj-fcpa-enforcement-action-against-lawrence-hoskins/>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *DOJ Loses Argument for FCPA Jurisdiction Based Merely on Accessory Liability*, KING & SPALDING (Sept. 1, 2015), <http://www.kslaw.com/imageserver/KSPublic/library/publication/ca090115b.pdf>.

International Civil Aviation Organization (ICAO), a United Nations agency responsible for standardizing machine-readable passports.<sup>161</sup> The DOJ's indictment did not contain any U.S. jurisdictional allegations, and, likely because of this, the bribery scheme was not charged as an FCPA offense.<sup>162</sup> Even so, the conduct was in the same general space and "the indictment alleged that the U.S. was a member of ICAO and provided support to ICAO by, among other things, annual monetary contributions."<sup>163</sup> Presumably on the basis of this allegation, the DOJ charged the defendants with, among other things, conspiracy to solicit and to give bribes involving a federal program, soliciting bribes involving a federal program, and giving bribes involving a federal program.<sup>164</sup>

The defendants moved to dismiss the indictment and argued it was "a most unusual indictment. It levels charges against foreign nationals and is based solely on foreign conduct. The indictment candidly states that the alleged offenses were committed in their entirety outside the United States."<sup>165</sup>

The court granted the motion to dismiss and the judge's comments from the bench should be of an interest to anyone interested in extraterritorial application of U.S. law. In pertinent part, the judge stated:

My first reaction in reading this indictment is that your office is to be congratulated because, apparently, you have reduced crime in the Northern District of California, and indeed in the United States of America, to such a point that you are using resources of your office to go after criminal activity that occurs in foreign countries and for that—that's a rather interesting concept that, apparently, you thought this is a good use of assets and resources of the United States Attorney's Office for the Northern District of California.

.....

And I never in my life, in 50 years of criminal practice, seen a more misguided prosecution as the one that you've brought. I just don't even get it. I don't get it, how you can—how you can use resources of the United States Attorney's Office to prosecute some foreign nationals involved in a foreign company, engaged in conduct which was foreign, on

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<sup>161</sup> See *The DOJ Gets Benchslapped in Foreign Bribery Case*, FCPA PROFESSOR (Apr. 23, 2015), <http://fcpaprofessor.com/the-doj-gets-benchslapped-in-foreign-bribery-case/> [hereinafter *The DOJ Gets Benchslapped*].

<sup>162</sup> Although ICAO officials would likely be "foreign officials" under the FCPA, as it related to the foreign national defendants charged, the FCPA's anti-bribery provisions contain the following jurisdictional element: "while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance" of a bribery scheme. See 15 U.S.C. § 78dd-3 (2016) (requiring that persons subject to the statute are "in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance" of a bribery scheme).

<sup>163</sup> See *The DOJ Gets Benchslapped*, *supra* note 161.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

doing things that weren't directly related to the contribution of the United States to that entity.<sup>166</sup>

The final notable instance of judicial scrutiny—albeit *foreign* judicial scrutiny—of DOJ enforcement in 2015 occurred in a high-profile FCPA enforcement action against Dmitry Firtash, a wealthy Ukrainian businessman with alleged ties to Russia, who was criminally charged along with others in an alleged bribery scheme involving Indian officials to secure mining licenses.<sup>167</sup> Upon being criminally charged by U.S. law enforcement, coincidentally during the same general timeframe that U.S. relations with Russia escalated due to a conflict in Ukraine, Firtash stated that the charges were “completely absurd and unfounded” and that “it [was] apparent that [the action], including the US extradition request, [was] politically motivated.”<sup>168</sup> The first step in the DOJ's enforcement action was to seek Firtash's extradition from Austria where he was arrested.<sup>169</sup> However, an Austrian judge refused the DOJ's request to extradite Firtash and called the case against him “politically motivated” and lacking “sufficient proof.”<sup>170</sup>

In short, while the DOJ's modern FCPA enforcement program has been successful in exercising leverage against risk averse business organizations to secure settlement amounts through resolution vehicles not subjected to any meaningful judicial scrutiny, 2015 again witnessed several DOJ struggles when put to its burden of proof in the context of an adversarial system. As noted by FCPA practitioner Michael Levy:

We've seen several trials in which the judges have been skeptical, if not outwardly hostile, to some of the government's more aggressive interpretations of the FCPA. While those trials may have fallen apart for other reasons, that skepticism still played, I believe, a substantial role. Without the development of the law through judicial decisions, it's very unclear what judges believe the FCPA means compared to what the DOJ think the FCPA means.<sup>171</sup>

### C. Policy Pronouncements and Developments Relevant to FCPA Issues

While 2015 DOJ FCPA enforcement was substantially down compared to prior years, as highlighted in this section 2015 was nevertheless an active year from the standpoint of the DOJ articulating to the corporate community what they think the FCPA means or otherwise outlining policy positions relevant to FCPA issues.

<sup>166</sup> *Id.*

<sup>167</sup> See Press Release, DOJ, Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals (Apr. 2, 2014), <https://www.justice.gov/opa/pr/six-defendants-indicted-alleged-conspiracy-bribe-government-officials-india-mine-titanium> [hereinafter Six Defendants Indicted].

<sup>168</sup> *An Address by Dmitry Firtash*, GROUP DF (Apr. 3, 2014), <https://groupdf.com/en/press-center/news/an-address-by-dmitry-firtash/>.

<sup>169</sup> Six Defendants Indicted, *supra* note 167.

<sup>170</sup> See David M. Herszenhorn, *Judge Rebuffs U.S. in Rejecting Extradition of Ukraine Billionaire*, N.Y. TIMES (Apr. 30, 2015), [http://www.nytimes.com/2015/05/01/world/europe/dmitry-v-firtash-extradition.html?\\_r=3](http://www.nytimes.com/2015/05/01/world/europe/dmitry-v-firtash-extradition.html?_r=3).

<sup>171</sup> O'Sullivan, *supra* note 142.

The year started in a most curious fashion as prior FCPA enforcement critic and reform advocate Andrew Weissmann was named head of the DOJ's Fraud Section.<sup>172</sup> Understanding Weissmann's previous positions put into clear focus many of the DOJ's policy pronouncements in 2015 relevant to FCPA issues and thus, his positions are set forth below in detail.

In 2010, Weissmann was the lead author of *Restoring Balance: Proposed Amendments to the FCPA*, an advocacy piece written on behalf of the U.S. Chamber Institute for Legal Reform.<sup>173</sup> Publication of *Restoring Balance* soon led to a Senate FCPA reform hearing in November 2010 and thereafter a House FCPA reform hearing in June 2011.<sup>174</sup> In *Restoring Balance*, Weissmann stated:

In spite of this rise in enforcement and investigatory action, judicial oversight and rulings on the meaning of the provisions of the FCPA is still minimal. Commercial organizations are rarely positioned to litigate an FCPA enforcement action to its conclusion, and the risk of serious jail time for individual defendants has led most to seek favorable terms from the government rather than face the expense and uncertainty of a trial. Thus, the primary statutory interpretive function is still being performed almost exclusively by the DOJ Fraud Section and the SEC. Notably, these enforcement agencies have been increasingly aggressive in their reading of the law. The DOJ has expressed its approach primarily through its opinion releases, but also in its decisions as to what FCPA enforcement actions to pursue. Many commentators have expressed concern that the DOJ effectively serves as both prosecutor and judge in the FCPA context, because it both brings FCPA charges and effectively controls the disposition of the FCPA cases it initiates.<sup>175</sup>

Using phrases such as “how far the DOJ has pressed the limits of enforcement,” “DOJ's aggressive pursuit” of companies as an “indication of how far the DOJ is willing to expand the scope of FCPA enforcement,” and “the highly aggressive stance the DOJ is taking to expand the FCPA net beyond its borders,”<sup>176</sup> Weissmann stated:

The current FCPA enforcement environment has been costly to business. Businesses enmeshed in a full-blown FCPA investigation conducted by the U.S. government have and will continue to spend enormous sums on legal fees, forensic accounting, and other investigative costs before they are even confronted with a fine or penalty, which . . . can range into the

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<sup>172</sup> Press Release, DOJ, Andrew Weissmann Selected as Chief of Criminal Division's Fraud Section (Jan. 9, 2015), <https://www.justice.gov/opa/pr/andrew-weissmann-selected-chief-criminal-divisions-fraud-section-0>.

<sup>173</sup> See ANDREW WEISSMANN & ALIXANDRA SMITH, *RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 1* (2010), <http://www.millerchevalier.com/portalresource/RestoringBalance>.

<sup>174</sup> See generally *House Hearing—Overview and Observations*, FCPA PROFESSOR, <http://fcpaprofessor.com/house-hearing-overview-and-observations/>. (last visited Oct. 30, 2016).

<sup>175</sup> WEISSMANN & SMITH, *supra* note 173.

<sup>176</sup> *Id.*

tens or hundreds of millions. In fact, one noteworthy innovation in FCPA enforcement policy has been the effective outsourcing of investigations by the government to the private sector, by having companies suspected of FCPA violations shoulder the cost of uncovering such violations themselves through extensive internal investigations.

From the government's standpoint, it is the best of both worlds. The costs of investigating FCPA violations are borne by the company and any resulting fines or penalties accrue entirely to the government. For businesses, this arrangement means having to expend significant sums on an investigation based solely on allegations of wrongdoing and, if violations are found, without any guarantee that the business will receive cooperation credit for conducting an investigation.<sup>177</sup>

Elsewhere in *Restoring Balance*, Weissmann argued:

[T]he FCPA should be modified to make clear what is and what is not a violation. The statute should take into account the realities that confront businesses that operate in countries with endemic corruption (e.g., Russia, which is consistently ranked by Transparency International as among the most corrupt in the world) or in countries where many companies are state-owned (e.g., China) and it therefore may not be immediately apparent whether an individual is considered a "foreign official" within the meaning of the act. As the U.S. government has not prohibited U.S. companies from engaging in business in such countries, a company that chooses to engage in such business faces unique hurdles. 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. The imposition of criminal liability in such a situation does nothing to further the goals of the FCPA; it merely creates the illusion that the problem of bribery is being addressed, while the parties that actually engaged in bribery often continue on, undeterred and unpunished. The FCPA should instead encourage businesses to be vigilant and compliant.

For this reason, and given the current state of enforcement, the FCPA is ripe for much needed clarification and reform through improvements to the existing statute. Such improvements, which are best suited for Congressional action, are aimed at providing more certainty to the business community when trying to comply with the FCPA, while promoting efficiency and enhancing public confidence in the integrity of the free market system as well as the underlying principles of our criminal justice system.<sup>178</sup>

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*



On behalf of the U.S. Chamber, Weissmann also testified at the November 2010 Senate hearing. In his written testimony, Weissmann stated:

The FCPA had been tailored to balance various competing interests, but that balance has been altered, at times, by aggressive application and interpretations of the statute by the government. Instead of serving the original intent of the statute, which was to punish companies that participate in foreign bribery, actions taken under more expansive interpretations of the statute may ultimately punish corporations whose connection to improper acts is attenuated at best and nonexistent at worst.

The result is that the FCPA, as it currently written and implemented, leaves corporations vulnerable to civil and criminal penalties for a wide variety of conduct that is in many cases beyond their control and sometimes even their knowledge. It also exposes businesses to predatory follow-on civil suits that often get filed in the wake of a FCPA enforcement action. In fact, there is reason to believe that the FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure.<sup>179</sup>

In concluding his written testimony, Weissmann stated:

The recent dramatic increase in FCPA enforcement, coupled with the lack of judicial oversight, has created significant uncertainty among the American business community about the scope of the statute. In addition, some of the enforcement actions brought by the SEC and DOJ are not commensurate with the original goals of the FCPA, in that they fail to reach the true bad actors and instead assign criminal liability to corporate entities with attenuated or non-existent connections to potential FCPA violations.<sup>180</sup>

During the hearing, Weissmann stated:

One of the reasons it is important to have a clearer statute, particularly in the FCPA arena, is that corporations cannot typically take the risk of going to trial and, thus, there is a dearth of legal rulings on the provisions of the FCPA as it applies to organizations. Thus, the government's interpretation can be the first and the last word on the scope of the statute as it applies to a company. The lack of judicial oversight, expansive government interpretation of the FCPA, and the increased enforcement that you heard about from [the DOJ witness] have led to considerable concern and uncertainty about how and when the FCPA applies to overseas business activities.<sup>181</sup>

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<sup>179</sup> *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the S. Subcomm. On Crime and Drugs of the Comm. on the Judiciary*, 111th Cong. 1005 (2010) (written testimony of Andrew Weissmann, U.S. Chamber of Commerce, U.S. Chamber Inst. for Legal Reform), [http://amlawdaily.typepad.com/10252011weissmann\\_testimony.pdf](http://amlawdaily.typepad.com/10252011weissmann_testimony.pdf).

<sup>180</sup> *Id.*

<sup>181</sup> *FCPA Enforcement Critic and Reform Advocate Selected as New DOJ Fraud Section Chief*, FCPA PROFESSOR (Jan. 12, 2015), <http://fcpaprofessor.com/fcpa-enforcement-critic->

During the hearing, Senator Arlen Specter asked Weissmann: “Overall, do you think that the act is fairly well balanced and fairly well enforced or too tough?”<sup>182</sup> Weissmann responded:

I think there is no question that many of the cases that were brought up today, such as Siemens, fall far, far, far into the—that it is amply warranted for the application of the statute. The problem is that every company in America and many companies overseas worry about the statute daily. And so regardless of what the Department of Justice is doing, people think about the statute and could their conduct fall on one side of it versus the other and will they be subject to an investigation. So it is a difficult question to answer, because I have seen many prosecutions where you say, of course, that seems like a just result and should have been warranted, but there are many companies that are hurt by the ambiguities in the statute and what I think is the over-breadth of some of its provisions on a daily basis.<sup>183</sup>

Beyond the FCPA, Weissmann has also been a vocal advocate of reforming corporate criminal liability principles. In *Rethinking Corporate Criminal Liability*, Weissmann challenged traditional notions of corporate criminal liability and argued that when the DOJ seeks to charge a corporation as a defendant, the government should bear the burden of establishing as an additional element that the corporation failed to have reasonably effective policies and procedures to prevent the conduct.<sup>184</sup>

When Weissmann became the head of the DOJ’s Fraud Section in January 2015, some were dismissive of his previous FCPA positions and comments. For instance, in connection with her Senate confirmation, then Attorney General Nominee Loretta Lynch was specifically asked about Weissmann being “an outspoken critic of DOJ’s FCPA program.”<sup>185</sup> Lynch stated, “It is my understanding that Mr. Weissmann made these comments while in private practice and in connection with his representation of the U.S. Chamber Institute for Legal Reform.”<sup>186</sup> Lynch’s response was a dodge and conveniently ignored that Weissmann, in his personal capacity, challenged traditional notions of corporate criminal liability.<sup>187</sup> Moreover, public reports

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and-reform-advocate-selected-as-new-doj-fraud-section-chief/ [hereinafter *FCPA Enforcement Critic*] (quoting Andrew Weissmann, Hearing Before the Subcomm. on Crime and Drugs of the Comm. on the Judiciary U.S. Senate, 111th Congress, 2d Sess. (2010) (transcript available at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf>)).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (quoting Andrew Weissmann & David Newmann, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411, 414 (2007)).

<sup>185</sup> Loretta E. Lynch, Nomination of Loretta E. Lynch to be Attorney General of the United States, Questions for the Record: Meeting Before the S. Comm. on the Judiciary (2015) (transcript available at <http://www.judiciary.senate.gov/imo/media/doc/Lynch%20QFR%202-9-15.pdf>).

<sup>186</sup> *Id.*

<sup>187</sup> See *In the FCPA Space, Who Speaks for Whom?*, FCPA PROFESSOR (Mar. 10, 2015), <http://fcpaprofessor.com/in-the-fcpa-space-who-speaks-for-whom/>.

suggested that “a person familiar with Weissmann’s thinking said he viewed most of his [FCPA] congressional testimony as giving his personal views rather than doing work for a client.”<sup>188</sup>

At the very least, Weissmann’s previous FCPA comments shine a light on a reoccurring issue, involving individuals like Weissmann who move in and out of government service, of whether any genuine or legitimate beliefs are being articulated by people who are willing to be held accountable.

As Weissmann correctly noted during his Senate FCPA testimony, a hallmark of modern FCPA inquiries is business organizations often spending “enormous sums on legal fees, forensic accounting, and other investigative costs before they are even confronted with a fine or penalty, which . . . can range into the tens or hundreds of millions.”<sup>189</sup> Indeed, as highlighted by the below examples, pre-enforcement action professional fees and expenses typically exceed, often by a wide margin, settlement amounts in an FCPA enforcement action.<sup>190</sup>

For instance, Avon resolved an FCPA enforcement action concerning alleged conduct in China by agreeing to a \$135 million settlement.<sup>191</sup> Yet, the most notable aspect of Avon’s FCPA scrutiny was the approximate \$500 million the company spent on pre-enforcement action professional fees and expenses.<sup>192</sup> The DOJ’s resolution document contained the following unusual statement:

The Department also considered that the Company, taking into account its own business interests, expended considerable resources on a company wide review of and enhancements to its compliance program and internal controls. While the Company’s efforts in this regard were taken without Department request or guidance, and at times caused unintended delays in the progress of the Department’s narrower investigations, the Department recognizes that the Company’s efforts resulted in important compliance and internal controls improvements.<sup>193</sup>

Avon’s ratio of pre-enforcement action professional fees and expenses to settlement amount paled in comparison to the ratio in connection with the FCPA scrutiny of Hyperdynamics. Specifically, the company resolved an FCPA enforcement action

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<sup>188</sup> Robert Schmidt, *U.S.’s New Fraud Chief Will Enforce Laws He Was Paid to Blunt*, BLOOMBERG (Feb. 27, 2015), <http://www.bloomberg.com/news/articles/2015-02-27/u-s-s-new-fraud-chief-will-enforce-laws-he-was-paid-to-blunt>.

<sup>189</sup> WEISSMANN & SMITH, *supra* note 173, at 5.

<sup>190</sup> *See infra* note 192.

<sup>191</sup> Press Release, DOJ, Avon China Pleads Guilty to Violating the FCPA by Concealing More Than \$8 Million in Gifts to Chinese Officials (Dec. 17, 2014), <http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials>.

<sup>192</sup> *See* Tom Schoenberg & David Voreacos, *Avon Bribe-Probe Tab Neared \$500 Million as Sales Slumped*, BLOOMBERG (May 2, 2014), <http://www.bloomberg.com/news/articles/2014-05-02/avon-bribe-probe-tab-neared-500-million-as-sales-slumped>.

<sup>193</sup> Deferred Prosecution Agreement, UNITED STATES V. AVON PRODS., INC. (2014).

concerning alleged conduct in Guinea by agreeing to a \$75,000 settlement.<sup>194</sup> Yet, the company's annual report stated that it incurred \$12.7 million in "legal and other professional fees associated with the FCPA investigations"—an astonishing 170:1 ratio.<sup>195</sup> During an investor conference call shortly after resolution of the enforcement action, company executives stated:

Speaking of legal fees I do want to address the fees we incurred during the FCPA investigation. As you know, we spent \$12 MM from inception to closure of that investigation. We were unhappily aware that FCPA investigations can take years to conclude . . . This came at a very heavy legal cost to say the least.<sup>196</sup>

Hyperdynamics executives (and shareholders) should be unhappy and should ask some serious questions because, in the eyes of many, pre-enforcement action professional fees and expenses have spiraled out of control, and FCPA scrutiny often becomes a boondoggle for FCPA Inc. participants involved in a matter.<sup>197</sup>

Against this backdrop, Assistant Attorney General Leslie Caldwell delivered a 2015 speech in which she made the following notable observation:

All too often, criticism is leveled against the Justice Department for purportedly causing companies to spend years, and many millions of dollars, investigating potential violations. This is particularly true in the FCPA context where the need for international evidence can add to the expense and burden of an investigation. Critics wrongly question the wisdom of disclosing misconduct and cooperating with the government in light of what they perceive to be the department's requirement that companies then must conduct unnecessarily costly, time consuming and widespread investigations.

There is no question that some cooperating companies spend large sums of money investigating potential misconduct and correcting internal controls issues that allowed the misconduct to occur. The decision to incur those costs, however, is one made by those companies, not a requirement of the department. When a company chooses to cooperate

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<sup>194</sup> Hyperdynamics Corp., Exchange Act Release No. 76006 (Sept. 29, 2015), <https://www.sec.gov/litigation/admin/2015/34-76006.pdf>.

<sup>195</sup> Hyperdynamics Corp., Annual Report (Form 10-K) (Sept. 16, 2015), <http://files.shareholder.com/downloads/HDY/786556382x0xS1047469-15-7344/937136/filing.pdf>.

<sup>196</sup> Hyperdynamics Corp., Current Report (Form 8-K) (Jan. 19, 2016), <http://investors.hyperdynamics.com/secfiling.cfm?filingID=1104659-16-90284>.

<sup>197</sup> See, e.g., Steven Pearlstein, *Cashing in on Corruption*, WASH. POST (Apr. 25, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/24/AR2008042403461.html>. See generally *The Anti-Bribery Business*, THE ECONOMIST (May 9, 2015), <http://www.economist.com/news/business/21650557-enforcement-laws-against-corporate-bribery-increases-there-are-risks-it-may-go>; Nathan Vardi, *The Bribery Racket*, FORBES (June 7, 2010), <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html>; Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 2, 2012) <http://www.wsj.com/articles/SB10000872396390443862604578028462294611352>.

with the government, the manner in which the company approaches its cooperation, and its own investigation of the conduct, can significantly affect the length of the investigation and the costs incurred by the company.

Although we expect internal investigations to be thorough, we do not expect companies to aimlessly boil the ocean. Indeed, there have been some instances in which companies have, in our view, conducted overly broad and needlessly costly investigations, in some cases delaying our ability to resolve matters in a timely fashion.

For example, if a company discovers an FCPA violation in one country, and has no basis to suspect that violations are occurring elsewhere, we would not necessarily expect it to extend its investigation beyond the conduct in that country. On the other hand, if the same people involved in the violation also operated in other countries, we likely would expect the investigation to be broader.

This example is not intended to suggest the proper scope of an investigation of any given matter. My point instead is that, to receive cooperation credit, we expect companies to conduct appropriately tailored investigations designed to root out misconduct, identify wrongdoers and provide all available facts. To the extent a company decides to conduct a broader survey of its operations, that decision, and any attendant delay and cost, are the result of the company's choices, not the department's requirement.<sup>198</sup>

Caldwell's statement about pre-enforcement action professional fees and expenses, a sensitive topic because it implicitly calls into question the decisions and motivations of FCPA Inc. participants, set off a war-of-words in the FCPA space. For instance, "defense attorneys . . . balked at the idea that they're spending too much time or money on investigations they're conducting in large part for the government's sake, saying they're not willfully adding unnecessary work to an FCPA probe."<sup>199</sup>

Most notably, Paul Pelletier (former Principal Deputy Chief of the Criminal Division's Fraud Section) stated:

Somewhat surprisingly . . . Caldwell seemed to place the blame for the arduousness of government FCPA investigations squarely on companies for "spend[ing] years, and many millions of dollars, investigating potential violations. . . . As an initial observation, it remains an unavoidable fact that companies simply are not incentivized to incur

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<sup>198</sup> Press Release, DOJ, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (Apr. 17, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law>.

<sup>199</sup> Stephanie Russell-Kraft, *Mixed Messages On Internal FCPA Probes Exasperate Attys*, LAW360 (Apr. 27, 2015), <https://www.law360.com/articles/646370/mixed-messages-on-internal-fcpa-probes-exasperate-attys>.

substantial costs by acting needlessly in the conduct of those internal inquiries. Moreover, while it may be true that, on occasion, a company has “boiled the ocean” in the conduct of an internal investigation, the notion that federal investigators would routinely permit an “aimless” internal inquiry to negatively affect the course or duration of the government’s investigation is, at base, unconvincing.<sup>200</sup>

Caldwell quickly shot-back when asked about companies that “wrack up massive legal bills and do massive worldwide investigations” by saying, “That’s not us. That’s the companies.”<sup>201</sup> Regardless of who is at fault for the extent of pre-enforcement action professional fees and expenses in a typical instance of FCPA scrutiny, the fact remains that such expenses are often the most serious hit to the bottom-line of a company under FCPA scrutiny.<sup>202</sup>

As Assistant Attorney General Caldwell rightly recognized, the time it takes to resolve FCPA scrutiny is often intertwined with the expense of FCPA scrutiny. Legal scrutiny—whether in the FCPA context or otherwise—is a cloud hanging over a business organization. When the legal scrutiny can result in potential criminal liability, the cloud is black or at the very least gray. For many companies, the cloud of FCPA scrutiny simply lasts too long.<sup>203</sup> Indeed, the alleged conduct in many corporate enforcement actions occurred 5-7 years, 7-10 years, and in some instances, 10-15 years prior to the enforcement action.<sup>204</sup> What makes this dynamic particularly troubling is that even the DOJ has long voiced concerns about protracted investigations. For instance, in 2005 then DOJ Assistant Attorney General Christopher Wray stated, “Simply put, speed matters in corporate fraud investigations. The days of five-year investigations, of agreement after agreement tolling the statute of limitations—while ill-gotten gains are frittered away and investor confidence sinks—are increasingly a thing of the past.”<sup>205</sup>

The gray cloud of scrutiny most certainly is not a thing of the past and in 2015 needed attention was focused on this troubling aspect of FCPA enforcement. As

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<sup>200</sup> Paul E. Pelletier, *Getting Real: FCPA Investigations Shouldn't 'Boil the Ocean'*, FCPA BLOG (May 11, 2015, 9:18 AM), <http://www.fcpablog.com/blog/2015/5/11/getting-real-fcpa-investigations-shouldnt-boil-the-ocean.html>.

<sup>201</sup> Joel Schectman, *DOJ Wants Faster Anti-Bribery Investigations, Too*, WALL ST. J. (May 19, 2015), <http://blogs.wsj.com/riskandcompliance/2015/05/19/doj-wants-faster-anti-bribery-investigations-too/>.

<sup>202</sup> See *Friday Roundup*, FCPA PROFESSOR (Feb. 20, 2015), <http://fcpaprofessor.com/friday-roundup-152/>.

<sup>203</sup> See *The Gray Cloud of FCPA Scrutiny Simply Lasts Too Long*, FCPA PROFESSOR (Sept. 9, 2014), <http://www.fcpaprofessor.com/the-gray-cloud-of-fcpa-scrutiny-simply-lasts-too-long> (containing discussion of specific examples).

<sup>204</sup> *Id.*

<sup>205</sup> Christopher A. Wray, Assistant Attorney General, Criminal Div., Remarks to the ABA White Collar Crime Luncheon (Feb. 25, 2005) (transcript available at [http://securities.stanford.edu/filings-documents/1031/INVN04-01/2005628\\_r17d\\_04CV3181.pdf](http://securities.stanford.edu/filings-documents/1031/INVN04-01/2005628_r17d_04CV3181.pdf)).

often is the case, a vocal critic was a former senior DOJ official.<sup>206</sup> In a *Wall Street Journal* editorial titled “The Foreign Bribery Sinkhole at Justice,” Pelletier wrote:

Absurdly long and costly investigations . . . may cause companies to reassess the value of reporting FCPA violations to the federal government.

When bribery investigations are publicly resolved in a timely fashion, other businesses can more readily identify ongoing bribery schemes operating within their industry or region and ensure that their anti-bribery compliance programs adequately address those current schemes. That opportunity is lost when criminal resolutions drag out for five or more years. Deterrence then is principally the size of the monetary penalty.

The Justice Department needs to do more than churn out resolutions to foreign bribery cases notable only for their record-breaking penalties. Rigorous and prompt FCPA enforcement can have a dramatic impact on the insidious and corrosive effect of corruption overseas and provide . . . restorative justice.<sup>207</sup>

Given Pelletier’s former DOJ position, his insight on this issue is notable and is thus set forth below in more detail. In a follow-up article, Pelletier further observed:

[T]he pattern of costly delay in FCPA investigations continues unabated. While every government investigation and resolution poses unique facts and circumstances that may serve to delay the investigatory process, these recent long-developing FCPA resolutions . . . are convincingly problematic. The staggering investigative costs, ultimately borne by employees and shareholders alike . . . also can reach unconscionable levels.<sup>208</sup>

Countering the DOJ’s assertion that the delay in many FCPA investigations is due to the complexity of obtaining foreign evidence, Pelletier argued:

[This explanation] fails to explain the more than twofold increase in investigatory durations from historical norms. A dispassionate, experience-based analysis of this overly broad assertion exposes a faulty premise. Simply put, the DOJ can and must do better.

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With a cooperating corporation, FCPA investigators routinely find themselves in the unique position of having prompt access to overseas

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<sup>206</sup> See, e.g., *A Former Enforcement Official is Likely to Say (Or Has Already Said) the Same Thing*, FCPA PROFESSOR (Oct. 21, 2013), <http://www.fcpaprofessor.com/a-former-enforcement-official-is-likely-to-say-or-has-already-said-the-same-thing>.

<sup>207</sup> Paul Pelletier, *The Foreign-Bribery Sinkhole at Justice*, WALL ST. J. (Apr. 20, 2015), <http://www.wsj.com/articles/the-foreign-bribery-sinkhole-at-justice-1429572436>.

<sup>208</sup> Paul Pelletier, *Lengthy and Costly FCPA Investigations Disserve Both Business and Justice*, THOMAS REUTERS: LEGAL SOL. BLOG (May 22, 2015), <http://blog.legalsolutions.thomsonreuters.com/current-awareness-2/lengthy-and-costly-fcpa-investigations-dissolve-both-business-and-justice/>.

evidence and witnesses without a need to resort to cumbersome international treaty requests. Such cooperation is much like the prosecution having secured a cooperator with unfettered access to the critical evidence.

Regardless of the reason or reasons for these protracted investigations, both the continued vitality of the DOJ's FCPA enforcement efforts and the prominence of the United States as the global leader of anti-corruption enforcement would seem to demand a renewed effort to dramatically reduce the time frame necessary to achieve resolution.<sup>209</sup>

Pelletier next rightly highlighted the many benefits of prompt law enforcement.

Legitimate enterprises benefit from those kinds of real-time revelations, and criminal political regimes can be immediately identified and deterred. Moreover, when a criminal resolution discloses and punishes criminal conduct that occurred five or more years earlier, any deterrent effect of the resolution is significantly diminished. This is particularly true in industries where the overseas corrupt conduct flourishes with abandon.

At that late stage, the principal deterrent effect is relegated to the size of the monetary penalty—something the DOJ continues to emphasize with all too much frequency and relish. As recent cases have demonstrated, lengthy FCPA investigations also place untenably wasteful financial burdens on corporations, their employees and their shareholders.

Given that the DOJ's FCPA unit within the Fraud Section has more than doubled in size from 2009 to today and has been fortified by a dedicated squad of FBI agents, it is puzzling that many of these investigations seem to drag on interminably. The DOJ must strive to be more than just "FCPA Inc.," churning out stale resolutions notable only for their record-breaking penalties.<sup>210</sup>

In conclusion, Pelletier stated:

The interests of justice are neither served nor advanced when FCPA investigations routinely drag on for five or more years. Rigorous and prompt FCPA enforcement with respect to current bribery schemes can have a dramatic impact on the insidious and corrosive effect of corruption overseas.

Curing the deficiencies that lead to costly and wasteful delays will require a systemic and sustained effort, primarily by the DOJ. It will also require a more focused approach by outside counsel. Although the ameliorative benefits resulting from such change will not be achieved overnight, the long-term vitality and efficacy of the DOJ's anti-corruption enforcement

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*



efforts ultimately rests on the government's ability to sustainably alter the status quo.<sup>211</sup>

In short, the gray cloud of FCPA scrutiny simply lasts too long in the FCPA's modern era and results in a host of problematic policy issues as highlighted above.<sup>212</sup> Like several other problematic issues that define the FCPA's modern era, blame for the gray cloud is shared by the enforcement agencies as well as business organizations subject to FCPA scrutiny (and their counsel). Simply put, cooperation is often the name-of-the-game in most FCPA enforcement actions and the roll-over-and-play-dead mentality of most companies,<sup>213</sup> which results in waiver of statute of limitation defenses or execution of tolling agreements, has broad policy consequences.<sup>214</sup> If business organizations would actually mount bona fide legal defenses in the face of FCPA scrutiny the FCPA's modern era, including the troubling gray cloud of scrutiny, would look much different.<sup>215</sup>

Yet, the government also shares in the blame. As stated by Pelletier:

From 2002 through 2010, the average Criminal Division tenure of a Fraud Section prosecutor exceeded 5 years and . . . during that same time frame, the average duration of a foreign bribery investigation measured from the last act of the offense to resolution was approximately 3 years. Commentators have noted an increasingly high and troubling turnover rate in the Fraud Section since 2010, radically altering the average tenure of Section prosecutors. Moreover, since 2010 the average investigatory duration of foreign bribery matters has doubled to more than six years.

Whatever explanation may be offered for these jaw dropping statistics, the practical effect is that most FCPA investigations will be passed from prosecutor to prosecutor, almost certainly leading to unnecessarily protracted investigations.<sup>216</sup>

A final 2015 policy pronouncement relevant to FCPA enforcement was the announcement of a new "compliance counsel" at the DOJ.<sup>217</sup> In terms of background, a frequent criticism of the modern FCPA enforcement program is that the DOJ (and SEC) fail to give proper credit to a company's good faith efforts to comply with the

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<sup>211</sup> *Id.*

<sup>212</sup> See *The Foreign-Bribery Sinkhole at Justice*, FCPA PROFESSOR (Apr. 22, 2015), <http://fcpaprofessor.com/the-foreign-bribery-sinkhole-at-justice/>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Paul Pelletier, *Will the Yates Memo Further Delay Corporate FCPA Resolutions?*, FCPA BLOG (Oct. 5, 2015), <http://www.fcablog.com/blog/2015/10/5/paul-pelletier-will-the-yates-memo-further-delay-corporate-f.html>.

<sup>217</sup> See Editorial, *Corporate Compliance Counsel Draws Mixed Reviews, Even State of the Art Programs Can Turn Out to Be Corrupt*, CORP. CRIME REP. (Aug. 5, 2015), <http://www.corporatecrimereporter.com/news/200/corporate-compliance-counsel-draws-mixed-reviews-even-state-of-the-art-programs-can-turn-out-to-be-corrupt/> [hereinafter *Corporate Compliance Counsel Draws Mixed Reviews*].

FCPA when a single employee or small group of actors engage in conduct contrary to the company's pre-existing FCPA compliance policies and procedures.<sup>218</sup> In such situations, the enforcement agencies often hold the company liable for FCPA violations based on respondeat superior principles in what amounts to strict liability.<sup>219</sup>

This aspect of FCPA enforcement was a major topic in both the Senate's 2010 FCPA hearing as well as the House's 2011 FCPA hearing.<sup>220</sup> Against the backdrop of several former high-ranking DOJ officials (including Weissmann) supporting an FCPA compliance defense (a defense consistent with the FCPA-like laws of many peer nations), the DOJ has remained defiant in its opposition to the concept, calling a compliance defense, among other things, "novel and . . . risky" and that "the time is not right" to consider it.<sup>221</sup> In pertinent part, the DOJ has long maintained that an actual FCPA statutory amendment setting forth a compliance defense is not necessary because the DOJ already declines to prosecute business organizations for FCPA violations under respondeat superior principles when, among other reasons, the organization had pre-existing compliance policies and procedures, only a rogue employee was involved in the improper conduct, or the improper conduct was limited in scope.<sup>222</sup>

Accepting the DOJ's statement as true, the fact remains that DOJ consideration of pre-existing FCPA compliance policies and procedures is opaque, unpredictable, and, in the minds of many, inconsistent.<sup>223</sup> An actual FCPA compliance defense would accomplish, among other things, the policy goal of removing factors relevant to corporate criminal liability from the opaque, inconsistent, and unpredictable world of DOJ decision making towards a more transparent, consistent, and predictable model.<sup>224</sup> Indeed, as Weissmann previously stated, improvements to the FCPA, including a compliance defense, "are best suited for Congressional action."<sup>225</sup>

Presumably Weissmann encountered substantial political opposition to an actual compliance defense along the lines he previously advocated for because, in the minds of some, an FCPA compliance defense weakens the FCPA and creates a "race

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<sup>218</sup> See *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, FCPA PROFESSOR (Jan. 18, 2012), <http://fcpprofessor.com/revisiting-a-foreign-corrupt-practices-act-compliance-defense/>.

<sup>219</sup> See *Friday Roundup*, FCPA PROFESSOR (Mar. 8, 2013), <http://fcpprofessor.com/friday-roundup-70/>.

<sup>220</sup> For an extended discussion of issues relevant to an FCPA compliance defense, see Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609 (2012).

<sup>221</sup> *Id.*

<sup>222</sup> See *id.*

<sup>223</sup> *FCPA Enforcement Critic*, *supra* note 181.

<sup>224</sup> *That's Strengthening, Not Weakening and That's A Race to the Top, Not the Bottom*, FCPA PROFESSOR (Apr. 11, 2012), <http://www.fcpprofessor.com/thats-strengthening-not-weakening-and-thats-a-race-to-the-top-not-the-bottom> [hereinafter *Strengthening, Not Weakening*].

<sup>225</sup> *FCPA Enforcement Critic*, *supra* note 181.

to the bottom.”<sup>226</sup> Such criticism of course ignores both the fact that most peer nations with FCPA-like laws have compliance defense concepts in their laws and the many positive policy objectives that can be accomplished with a compliance defense. Indeed, as Weissmann previously stated, the FCPA “should incentivize the company to establish compliance systems that will actively discourage and detect bribery.”<sup>227</sup>

Compliance is a cost center within business organizations and expenditure of finite resources on FCPA compliance is an investment best sold if it can *reduce* legal exposure, not merely *lessen* the impact of legal exposure.<sup>228</sup> Moreover, at present, the incentives organizations have to adopt FCPA compliance policies and procedures solely are to *lessen* the impact of legal exposure. These present incentives thus represent “baby carrots” when what is needed to better incentivize more robust FCPA compliance are real “carrots.” An FCPA compliance defense is a real “carrot” that will better incentivize compliance across the business landscape. Organizations with existing FCPA compliance policies and procedures will be incentivized to make existing programs better. Likewise, organizations currently without stand-alone FCPA policies and procedures will be incentivized to spend finite resources to implement FCPA compliance policies and procedures.<sup>229</sup>

Against this relevant backdrop and the policy discussion surrounding an FCPA compliance defense, in late 2015 the DOJ announced:

[T]he Department of Justice Fraud Section has retained Hui Chen as a full-time compliance expert. She will report to Andrew Weissmann, the Chief of the Fraud Section . . .

Among her duties as a consulting expert, Chen will provide expert guidance to Fraud Section prosecutors as they consider the enumerated factors in the United States Attorneys’ Manual concerning the prosecution of business entities, including the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing. Chen will help prosecutors develop appropriate benchmarks for evaluating corporate compliance and remediation measures and communicating with stakeholders in setting those benchmarks. Relatedly, after a corporate resolution is reached requiring ongoing Fraud Section assessments of a company’s compliance and remediation efforts, Chen will provide expert guidance to help prosecutors and monitors evaluate

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<sup>226</sup> *Strengthening, Not Weakening*, *supra* note 224.

<sup>227</sup> *FCPA Enforcement Critic*, *supra* note 181.

<sup>228</sup> *SEC Enforcement Official Acknowledges the Underlying Logic Supporting a Compliance Defense*, FCPA PROFESSOR (Oct. 16, 2013), <http://fcpaprofessor.com/sec-enforcement-official-acknowledges-the-underlying-logic-supporting-a-compliance-defense/> (emphasis added).

<sup>229</sup> *Id.* (emphasis added).

whether the implementation of such measures is effective and in keeping with the terms and purposes of Fraud Section resolutions.<sup>230</sup>

At the same time, Assistant Attorney General Caldwell delivered a speech in which she rhetorically asked, “What will the compliance counsel do?”<sup>231</sup> and offered the following:

She will help us evaluate each compliance program on a case-by-case basis—just as the department always has—but with a more expert eye, and she will work with our prosecutors to assess:

- Does the institution ensure that its directors and senior managers provide strong, explicit and visible support for its corporate compliance policies?
- Do the people who are responsible for compliance have stature within the company? Do compliance teams get adequate funding and access to necessary resources? Of course, we won’t expect that a smaller company has the same compliance resources as a Fortune-50 company.
- Are the institution’s compliance policies clear and in writing? Are they easily understood by employees? Are the policies translated into languages spoken by the company’s employees?
- Does the institution ensure that its compliance policies are effectively communicated to all employees? Are its written policies easy for employees to find? Do employees have repeated training, which should include direction regarding what to do or with whom to consult when issues arise?
- Does the institution review its policies and practices to keep them up to date with evolving risks and circumstances? This is especially important if a U.S.-based entity acquires or merges with another business, especially a foreign one.
- Are there mechanisms to enforce compliance policies? Those include both incentivizing good compliance and disciplining violations. Is discipline even handed? The department does not look favorably on situations in which low-level employees who may have engaged in misconduct are terminated, but the more senior people who either directed or deliberately turned a blind eye to the conduct suffer no consequences. Such action sends the wrong message—to other employees, to the market and to the government—about the institution’s commitment to compliance.
- Does the institution sensitize third parties like vendors, agents or consultants to the company’s expectation that its partners are also serious about compliance? This means more than including

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<sup>230</sup> Press Release, DOJ, New Compliance Counsel Expert Retained By the DOJ Fraud Section (Nov. 3, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download>.

<sup>231</sup> Leslie R. Caldwell, Assistant Attorney General, Assistant Attorney General Leslie R. Caldwell Speaks at SIFMA Compliance and Legal Soc’y N.Y. Reg’l Seminar (Nov. 2, 2015) (transcript available at <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-sifma-compliance-and-legal-society>).

boilerplate language in a contract. It means taking action—including termination of a business relationship—if a partner demonstrates a lack of respect for laws and policies. And that attitude toward partner compliance must exist regardless of geographic location.<sup>232</sup>

To knowledgeable observers, Caldwell's speech was nothing new. As Professor Samuel Buell (a former DOJ prosecutor) stated:

So why does the Department of Justice need to appoint a special lawyer to do the job of assessing what prosecutors have long assessed, especially when that lawyer will be exercising the same broad discretion, with no governing law, that federal prosecutors have been exercising up to now? Will this lawyer have some particular expertise in the connection between crime and corporate compliance efforts that other prosecutors have lacked? If so, where will this expertise come from? It's hard to see how adding another person to the process of exercising existing discretion in this area is really going to change the landscape much.<sup>233</sup>

Indeed, rather than support Weissmann's (and others) call for an FCPA compliance defense and more broad revisions to corporate criminal liability, the DOJ's announcement of a compliance counsel position appears to be little more than a public relations campaign that masks the underlying substantive issues.

As FCPA practitioner Derek Andreson rightly observed, "It's a clever move because it avoids the Justice Department having to confront a formal compliance defense, which I think can be seen as giving bad incentives. And it gives them a chance to push back on the criticism that they don't place enough weight on compliance efforts."<sup>234</sup>

Even FCPA commentators that normally tilt towards DOJ positions were critical of the compliance counsel position. For instance, FCPA practitioner Michael Volkov (a former DOJ prosecutor) stated:

To suggest that [the DOJ] need[s] some assistance is just a little too politically cute for me. As a former federal prosecutor, I am not so sure that the position was really needed. In my mind, career prosecutors at the Department and in US Attorneys' Offices across the country are quite familiar with these issues already and there does not seem to be a real need for such compliance assistance. Federal prosecutors have more than enough expertise in this area, and to suggest otherwise is a slap at the professionalism and care that prosecutors bring to their jobs.<sup>235</sup>

DOJ motivations aside, the new compliance counsel position was just one of several notable DOJ policy pronouncements relevant to the FCPA discussed in this

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<sup>232</sup> *Id.*

<sup>233</sup> *Corporate Compliance Counsel Draws Mixed Reviews*, *supra* note 217.

<sup>234</sup> Joel Schectman, *Compliance Counsel to Help DOJ Decide Whom to Prosecute*, WALL ST. J.: RISK & COMPLIANCE J. (July 30, 2015), <http://blogs.wsj.com/riskandcompliance/2015/07/30/compliance-counsel-to-help-doj-decide-whom-to-prosecute/>.

<sup>235</sup> *Corporate Compliance Counsel Draws Mixed Reviews*, *supra* note 217.

section. In short, 2015 was an interesting year from a policy perspective as FCPA enforcement critic and reform advocate Weissmann assumed the head of the DOJ's Fraud Section.

#### D. *Developments Beyond the FCPA*

As highlighted above, 2015 was notable for its expansive and evolving FCPA enforcement theories, judicial scrutiny of FCPA and related enforcement theories, and policy pronouncements and developments relevant to FCPA issues. As discussed in this section, 2015 also witnessed several notable developments beyond the FCPA that nevertheless touch upon FCPA issues or are otherwise relevant to a similar space.

##### 1. FCPA-Related Civil Litigation

Although courts have held that the FCPA does not provide a private right of action,<sup>236</sup> plaintiff lawyers representing shareholders frequently use instances of FCPA scrutiny or the core facts from FCPA enforcement actions in civil suits.<sup>237</sup> Many of these cases are derivative actions in which a shareholder claims that officers and directors breached fiduciary duties by allegedly allowing the company to operate without sufficient FCPA compliance policies or procedures and/or not properly monitoring and supervising those policies and procedures in place.<sup>238</sup>

A notable instance of FCPA scrutiny in recent years has involved Wal-Mart,<sup>239</sup> and in connection with the company's FCPA scrutiny, civil suits began to rain down on the company and its current or former executive officers and board members.<sup>240</sup> Several of the civil suits were consolidated, and as summarized by the court, plaintiff shareholders alleged that various individual defendants "breached their fiduciary duties of loyalty and good faith by: (1) permitting violations of foreign and federal laws and Wal-Mart's code of ethics; (2) permitting the obstruction of an adequate investigation of known potential (and/or actual) violations of foreign and federal laws; and (3) covering up (or attempting to cover up) known potential (and/or actual) violations of foreign and federal laws."<sup>241</sup> In short, the complaint "consistently implic[d] that Defendants should have or must have known about the alleged

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<sup>236</sup> See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029-30 (6th Cir. 1980).

<sup>237</sup> See, e.g., Nathan Vardi, *Plaintiff Lawyers Join the Bribery Racket*, FORBES (Aug. 16, 2010), <http://www.forbes.com/sites/nathanvardi/2010/08/16/plaintiff-lawyers-fcpa-bribery-racket/#689fdef43e50>.

<sup>238</sup> *Just Because the FCPA is Not Commonly the Subject of Litigation Does Not Create a Substantial Federal Interest in State Law Claims Related to the FCPA*, FCPA PROFESSOR (Mar. 26, 2015), <http://fcpaprofessor.com/just-because-the-fcpa-is-not-commonly-the-subject-of-litigation-does-not-create-a-substantial-federal-interest-in-state-law-claims-related-to-the-fcpa/>.

<sup>239</sup> See, e.g., *Wal-Mart's FCPA Scrutiny Grows*, FCPA PROFESSOR (Apr. 21, 2012), <http://www.fcpaprofessor.com/wal-marts-fcpa-scrutiny-grows>.

<sup>240</sup> See, e.g., *Friday Roundup*, FCPA PROFESSOR (June 8, 2012), <http://www.fcpaprofessor.com/friday-roundup-43> (highlighting recent disclosure from Wal-Mart regarding civil suits).

<sup>241</sup> *In re Wal-Mart Stores Inc.*, No. 4:12-CV-4041 (W.D. Ark. Mar. 31, 2015) (dismissing case).

misconduct by virtue of their positions and the supposed reporting structure at Wal-Mart.”<sup>242</sup>

Like the fate of many such FCPA-related civil suits, the suit was dismissed as the court stated, “Nothing in the Complaint suggests any particularized basis to infer that a majority of the Board had actual or constructive knowledge of the alleged misconduct, let alone that they acted improperly with scienter.”<sup>243</sup>

A second type of FCPA-related civil claim frequently brought in the aftermath of FCPA scrutiny or enforcement is a securities fraud action. In such actions, plaintiff shareholders allege that the company and various executive officers violate Section 10(b) of the Securities Exchange Act by making false or misleading statements concerning the company’s business and/or its compliance with the FCPA or related laws.<sup>244</sup>

For instance, in connection with its FCPA scrutiny Hyperdynamics shareholders brought such a claim.<sup>245</sup> The shareholders alleged that the company’s prior statements regarding FCPA compliance were false or misleading statements by omission.<sup>246</sup> The alleged FCPA violations occurred when the company made “donations to the government of Guinea during three phases of negotiations” concerning a project.<sup>247</sup> However, the court dismissed the complaint and concluded, “Plaintiffs have not alleged FCPA-related facts which would render either the [disclosures] misleading by omission and which Defendants had a duty to disclose. Furthermore, Plaintiffs have failed to allege facts which would render the specific denials false or misleading.”<sup>248</sup> In pertinent part, after reviewing the FCPA’s statutory scheme, the court stated, “[The FCPA’s anti-bribery provision] does not bar a company from giving anything of value to a foreign government, as opposed to a foreign official personally, or to a third party such as a nonprofit in order to generate corporate goodwill, even if the gift indirectly influences government officials.”<sup>249</sup>

This was a notable statement in that it followed on the heels of the above-mentioned BNY Mellon FCPA enforcement action,<sup>250</sup> an action not subjected to any judicial scrutiny, in which the SEC found that BNY Mellon violated the FCPA’s

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> See, e.g., *Development From The “Other Universe”—In Dismissing FCPA-Related Securities Fraud Claims, Judge Repudiates FCPA Enforcement Theory*, FCPA PROFESSOR (Sept. 9, 2015), <http://www.fcprofessor.com/development-from-the-other-universe-in-dismissing-fcpa-related-securities-fraud-claims-judge-repudiates-fcpa-enforcement-theory>.

<sup>245</sup> See Stephanie Russell-Kraft, *Hyperdyamics Faces Investor Suit Over FCPA Disclosures*, LAW360 (Mar. 14, 2014), <http://www.law360.com/articles/518550/hyperdyamics-faces-investor-suit-over-fcpa-disclosures>.

<sup>246</sup> *Id.*

<sup>247</sup> *Parker v. Hyperdynamics Corp.*, 126 F. Supp. 3d 830, 844 (S.D. Tex. 2015).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> DEBEVOISE & PLIMPTON, 7 FCPA UPDATE 1 (2015), [http://www.debevoise.com/~media/files/insights/publications/2015/08/fcpa\\_update\\_august\\_2015.pdf](http://www.debevoise.com/~media/files/insights/publications/2015/08/fcpa_update_august_2015.pdf).

anti-bribery provisions by providing internships to family members of alleged “foreign officials” because the internships “were valuable work experience[s], and the requesting officials derived significant personal value in being able to confer this benefit on their family members.”<sup>251</sup>

The above dichotomy demonstrates that FCPA issues often co-exist in two parallel universes. One universe is ruled by all-powerful gods with big and sharp sticks in which subjects would not dare challenge the gods.<sup>252</sup> Another universe consists of checks and balances in which independent actors call the balls and strikes.<sup>253</sup> The first universe refers to FCPA enforcement by the DOJ and SEC. The second universe refers to litigation of FCPA-related claims in which judges make decisions in the context of an adversarial legal system.<sup>254</sup> The second universe is often referred to as the rule of law universe, and the above decision in the Hyperdynamics case is telling for the reasons discussed above.<sup>255</sup>

A final FCPA-related civil litigation development from 2015 raises the question of where the truth lies in FCPA enforcement. In other words, if the DOJ and/or SEC make allegations in a FCPA enforcement action, and a risk-averse corporation agrees to resolve the enforcement action in the absence of judicial scrutiny, does that mean the allegations are true?<sup>256</sup> As an FCPA-related civil suit against Hewlett-Packard Co. (HP) demonstrates, the answer is not necessarily.

In terms of background, a component of the 2014 HP FCPA enforcement action involved DOJ and SEC allegations concerning improper business conduct in Mexico.<sup>257</sup> Specifically, in a non-prosecution agreement, the DOJ alleged that HP Mexico indirectly made cash payments to a Pemex Chief Information Officer in order to obtain contracts and the SEC found the same in an administrative order.<sup>258</sup> Notably, neither resolution vehicle was subjected to any judicial scrutiny. Interestingly, in the aftermath of the enforcement action, Pemex brought a civil

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<sup>251</sup> BNY Mellon, *supra* note 35.

<sup>252</sup> *Development from the “Other Universe”—In Dismissing FCPA-Related Securities Fraud Claims, Judge States that Merely Conducting Business in Countries “Rife with Corruption Does Not Demonstrate Knowledge of FCPA Violations”*, FCPA PROFESSOR (Apr. 20, 2016), <http://fcpprofessor.com/development-universe-dismissing-fcpa-related-securities-fraud-claims-judge-states-merely-conducting-business-countries-rife-corruption-not-demonstrate-knowled/>.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Where Does the Truth Lie?*, FCPA PROFESSOR (Sept. 21, 2015), <http://fcpprofessor.com/where-does-the-truth-lie/>.

<sup>257</sup> See DOJ Non-Prosecution Agreement, DOJ (Apr. 9, 2014), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/04/10/hp-mexico-mpa.pdf>; In the Matter of Hewlett-Packard Co. (April 9, 2014), <https://www.sec.gov/litigation/admin/2014/34-71916.pdf>.

<sup>258</sup> See Petróleos Mexicanos, Annual Report (Form 20-F) (May 16, 2016), [http://www.pemex.com/ri/reguladores/ReportesAnuales\\_SEC/2014\\_20F\\_i.pdf](http://www.pemex.com/ri/reguladores/ReportesAnuales_SEC/2014_20F_i.pdf).



claim against HP alleging that HP paid bribes to win the Pemex contracts.<sup>259</sup> In defense, HP pointed to a Pemex annual report that stated:

On April 9, 2014, the SEC issued an order imposing sanctions against Hewlett-Packard Company (or HP) based on its findings that HP's subsidiaries in Mexico, Russia and Poland made improper payments to certain public officials in order to obtain public contracts in violation of the U.S. Foreign Corrupt Practices Act. In the case related to Mexico, the sanctions related in part to allegations that [HP Mexico] paid a Mexican information-technology and consulting company more than U.S. \$1 million to win a software and licensing contract with [Pemex] worth approximately U.S. \$6 million. The SEC's order alleged that a former officer of [Pemex] received a portion of the HP subsidiary's unlawful payment to the consulting company. The Internal Control Body of [Pemex] concluded its investigation after finding no improper payment.<sup>260</sup>

The civil action against HP was ultimately dismissed.<sup>261</sup> So where does the truth lie: did HP make an improper payment to a Pemex official or not? The public will likely never know, but this much is true. The DOJ and SEC allegations, while accepted by a risk averse company, were not subjected to any judicial scrutiny. Moreover, there are no consequences to the DOJ and SEC should the allegations not be accurate and there is no accountability for untrue statements. On the other hand, Pemex's statement was contained in an SEC filing and are thus statements to the market actionable under Section 10(b) and Rule 10b-5 for false or misleading statements.<sup>262</sup>

## 2. Historic Firsts in the U.K.

The U.S. is not the only country with a law prohibiting bribery of foreign officials for a business purpose. For instance, in 2011 the U.K. Bribery Act ("Bribery Act") went into effect and this section highlights two historic firsts that occurred in the U.K. in 2015.<sup>263</sup>

Prior to discussing these developments, this section provides relevant background regarding the Bribery Act and its early enforcement. The Bribery Act replaced a hodgepodge of antiquated U.K. bribery and corruption statutes that generally required a "controlling mind" of a corporation (generally a member of the board of directors or a high-ranking executive) to be involved in the alleged improper conduct in order to criminally charge the entity.<sup>264</sup>

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<sup>259</sup> See *In the Matter of Hewlett-Packard Co.*, *supra* note 257.

<sup>260</sup> *Where Does the Truth Lie?*, *supra* note 256.

<sup>261</sup> See *Pemex Ends Corruption Suit Against HP*, THE RECORDER (Nov. 5, 2015), <http://www.therecorder.com/id=1202741754885/Pemex-Ends-Corruption-Suit-Against-HP#ixzz3rHK37i9H>.

<sup>262</sup> *Where Does the Truth Lie?*, *supra* note 256.

<sup>263</sup> See *The Bribery Act 2010, Guidance*, MINISTRY OF JUSTICE, <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (last visited Nov. 22, 2016) [hereinafter *The Bribery Act 2010*].

<sup>264</sup> *Id.*

To bypass this general U.K. legal principle, the Bribery Act contains a so-called “failure to prevent bribery offense” which provides that a commercial organization will be subject to prosecution if a person associated with the corporation bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organization.<sup>265</sup> However, the Bribery Act also contains a so-called “adequate procedures defense” which provides that a “commercial organization will have a full defense if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.”<sup>266</sup> According to the U.K. Ministry of Justice (“MOJ”), the adequate-procedures defense is included in the Bribery Act “to encourage commercial organizations to put procedures in place to prevent bribery by persons associated with them,”<sup>267</sup> and “the objective of the Bribery Act is not to bring the full force of the criminal law to bear upon well run commercial organizations that experience an isolated incident of bribery on their behalf.”<sup>268</sup>

Related to Bribery Act enforcement, in 2014 U.K. prosecutors gained authorization to use deferred prosecution agreements to resolve alleged instances of corporate fraud including Bribery Act offenses.<sup>269</sup> Even though the U.K. adopted a DPA regime, it is materially different from the U.S. DPA regime in that the U.K. regime contemplates active and early involvement by the judiciary.<sup>270</sup>

Against this backdrop, two historic firsts occurred in the U.K. in a 2015 enforcement action against Standard Bank: (i) the first use of the so-called failure to prevent bribery offense in a foreign bribery action and (ii) the first use of a deferred prosecution agreement in the U.K.<sup>271</sup>

In terms of “what” was resolved in the \$25 million Standard Bank (“SB”) enforcement action—a violation of the Bribery Act’s failure to prevent bribery offense—the key points from the enforcement action—all based on the Serious Fraud Office’s<sup>272</sup> charging document and/or the court’s judgment—were as follows.

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> See *Deferred Prosecution Agreements*, SFO, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/c>. (last visited Nov. 22, 2016).

<sup>270</sup> See, e.g., *U.K. Opens Consultation Period On Deferred Prosecution Agreements, Yet Rejects Non-Prosecution Agreements*, FCPA PROFESSOR (June 12, 2012), <http://www.fcprofessor.com/u-k-opens-consultation-period-on-deferred-prosecution-agreements-yet-rejects-non-prosecution-agreements>.

<sup>271</sup> See Press Release, SFO, SFO Agrees First UK DPA with Standard Bank (Nov. 30, 2015), <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/> [hereinafter SFO Agrees].

<sup>272</sup> The U.K. Serious Fraud Office (“SFO”) is the functional equivalent of the U.S. Department of Justice. To learn more about the SFO, see *SFO*, <https://www.sfo.gov.uk/>. (last visited Jan. 15, 2017).

- The enforcement action against SB was based on the conduct of its former “sister company” (Stanbic Bank Tanzania Limited (ST)) and two former employees at ST in relation to just one transaction.<sup>273</sup>
- The transaction was a private placement offering for the Government of Tanzania (GOT).<sup>274</sup>
- In connection with the transaction, SB conducted due diligence on GOT and the enforcement action found no fault in this regard.<sup>275</sup>
- However, the enforcement action faulted SB for not conducting effective diligence on a local partner inserted into the transaction by ST.<sup>276</sup>
- SB’s oversight in this regard was the result of an apparent misunderstanding at SB based on—in the words of the SFO—“a reasonable interpretation” of SB’s own written guidelines.<sup>277</sup>
- The end result was that SB relied on ST to conduct due diligence and to raise any concerns regarding the local partner. Indeed, the SFO alleged that SB was provided a “two page checklist from ST of the steps it had taken” in regards to due diligence of the local partner.<sup>278</sup>
- SB’s alleged failure, however, was in allowing—and trusting—that its sister company would conduct effective due diligence of a local partner in one transaction.<sup>279</sup>
- As stated by the Judge, “[T]he SFO has reached the conclusion that there is insufficient evidence to suggest that any of Standard Bank’s employees committed a [bribery] offence: whilst a payment of US \$6 million was made available to EGMA (the local partner), the evidence does not demonstrate with the appropriate cogency that anyone within Standard Bank knew that two senior executives of Stanbic intended the payment to constitute a bribe, or so intended it themselves.”<sup>280</sup>
- Elsewhere, the Judge repeated, “The evidence does not reveal that executives or employees of Standard Bank intended or knew of an intention to bribe.”<sup>281</sup>
- The above-alleged conduct occurred against the backdrop of SB having—as specifically highlighted in the resolution documents—various policies and procedures designed to the same conduct giving rising to the enforcement action.<sup>282</sup>

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<sup>273</sup> SFO Agrees, *supra* note 271.

<sup>274</sup> *Id.*

<sup>275</sup> Statement of Facts, at 32, SERIOUS FRAUD OFFICE V. STANDARD BANK PLC, (No. U20150854) [hereinafter Statement of Facts].

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 33.

<sup>278</sup> *Id.* at 26.

<sup>279</sup> *Id.* at 33.

<sup>280</sup> The Preliminary Judgment, at 7, SERIOUS FRAUD OFFICE V. STANDARD BANK PLC, (No. U20150854) [hereinafter Preliminary Judgment].

<sup>281</sup> *Id.* at 12.

<sup>282</sup> Statement of Facts, *supra* note 275, at 31.

- Indeed, the SFO’s statement of facts contained an appendix titled “Training Schedule and Interview Excerpts re Training & Awareness of Policies” and identified—for three SB employees—extensive training courses and dates completed.<sup>283</sup>
- SB’s alleged failure also took place against the backdrop of—in the words of the Judge—“Standard Bank [having] no previous convictions for bribery and corruption nor has it been the subject of any other criminal investigations by the SFO.”<sup>284</sup>
- Moreover, the Judge stated, “[T]here is no evidence that the failure to raise concerns about anti-bribery and corruption risks . . . was more widespread within the organization.”<sup>285</sup>

In terms of “how” the enforcement action was resolved (the U.K.’s first DPA), the judge who approved the DPA complimented SB’s voluntary disclosure and cooperation and stated,

Standard Bank immediately reported itself to the authorities and adopted a genuinely proactive approach to the matter . . . In this regard, the promptness of the self-report and the extent to which the prosecutor has been involved are to be taken into account . . . In this case, the disclosure was within days of the suspicions coming to the Bank’s attention, and before its solicitors had commenced (let alone completed) its own investigation.

Credit must also be given for self-reporting which might otherwise have remained unknown to the prosecutor. . . . In this regard, the trigger for the disclosure was incidents that occurred overseas which were reported by Stanbic’s employees to Standard Bank Group. Were it not for the internal escalation and proactive approach of Standard Bank and Standard Bank Group that led to self-disclosure, the conduct at issue may not otherwise have come to the attention of the SFO.

. . . .

Standard Bank fully cooperated with the SFO from the earliest possible date by, among other things, providing a summary of first accounts of interviewees, facilitating the interviews of current employees, providing timely and complete responses to requests for information and material and providing access to its document review platform. The Bank has agreed to continue to cooperate fully and truthfully with the SFO and any other agency or authority, domestic or foreign, as directed by the SFO, in any and all matters relating to the conduct which is the subject matter of the present DPA. Suffice to say, this self-reporting and cooperation

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<sup>283</sup> *Id.* at 272.

<sup>284</sup> Preliminary Judgment, *supra* note 280, at 8.

<sup>285</sup> *Id.* at 13 (containing links to the Deferred Prosecution Agreement, the Statement of Facts, the preliminary judgment and full judgment).

militates very much in favour of finding that a DPA is likely to be in the interests of justice.<sup>286</sup>

In conclusion, the judge stated:

It is obviously in the interests of justice that the SFO has been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business. It can also serve to underline the enormous importance which is rightly attached to the culture of compliance with the highest ethical standards that is so essential to banking in this country.<sup>287</sup>

David Green (Director of the SFO) stated that the SB DPA was a “landmark DPA [that] will serve as a template for future agreements”<sup>288</sup> Ben Morgan (Joint Head of Bribery and Corruption at the SFO) applauded the conduct of SB and its counsel and stated: “It is maybe strange for a prosecutor to say—but credit to the parties involved for the way they have dealt with a corruption incident once it has surfaced. The bank, certain of its employees and its advisers . . . have had the courage to innovate where others will now follow.”<sup>289</sup>

However, beyond the pomp and circumstance of the historic nature of the SB action, it raises several important issues as the U.K. begins to enforce the Bribery Act and begins to use DPAs. For instance, given the SFO’s allegations and judicial findings, it is curious why SB even voluntarily disclosed the conduct at issue, particularly in light of the Bribery Act’s adequate procedures defense.<sup>290</sup> In pertinent part, the SB action would appear, based on the allegations, to be an instance where an otherwise well-run commercial organization experienced an isolated instance of bribery in its organization—a circumstance in which the U.K. MOJ previously said was not the goal of the Bribery Act.<sup>291</sup>

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<sup>286</sup> *Id.* at 7-8 (numeration omitted).

<sup>287</sup> *Id.* at 17.

<sup>288</sup> Press Release, SFO, SFO Agrees First UK DPA with Standard Bank (Nov. 30, 2015), <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>.

<sup>289</sup> Ben Morgan, Joint Head of Bribery and Corruption, at the Managing Risk and Mitigating Litigation Conference (Dec. 1, 2015) (transcript available at <https://www.sfo.gov.uk/2015/12/01/first-use-of-dpa-legislation-and-of-s-7-bribery-act-2010/>).

<sup>290</sup> *The Bribery Act 2010*, *supra* note 263, at 7.

<sup>291</sup> *Id.* at 9.

In short, the U.K.'s first use of the "failure to prevent bribery" offense seems dubious (albeit with judicial blessing). As U.K. practitioner Eoin O'Shea observed:

The issue of whether the company might have had a defence of "adequate procedures" to a section 7 charge was also considered by the court, albeit briefly, when considering culpability. The discussion here is disappointing because it focuses on the specific compliance problems connected to the conduct in Tanzania, rather than whether there was an effective anti-bribery policy or culture across the bank as a whole. I'm not sure this is the right approach. When sentencing an organisation, it is relevant to consider whether the misfeasance was a case of "a few bad apples" or more widespread systemic failings.<sup>292</sup>

Likewise, practitioners at Gibson Dunn stated, "[A] number of important elements of the [failure to prevent bribery] offence are not addressed in detail in [the SB] judgment, and will remain a source of uncertainty for corporations in considering their exposure under that offence."<sup>293</sup>

Yet, the first "failure to prevent bribery" enforcement action in the U.K. is similar to several FCPA enforcement actions<sup>294</sup> where the enforcement theory seems to be, with the benefit of perfect hindsight, to zero in on one transaction (against the universe of thousands of similar transactions) to find an FCPA violation in what amounts to a "should have, could have, would have" theory of liability.<sup>295</sup>

Relevant to SB's disclosure, the resolution documents state, "The disclosure was within days of the suspicions coming to the Bank's attention, and before its solicitors had commenced (let alone completed) its own investigation."<sup>296</sup> Given this context, SB's disclosure (far from being "innovative") could be viewed as premature, careless, and indeed reckless. But then again, counsel to SB (like counsel in FCPA or other related internal investigations) no doubt secured substantially more in legal fees by making the disclosure compared to the other reasonable alternative of not disclosing and remedying any internal control deficiencies.<sup>297</sup> In addition, the SB DPA imposes upon SB various post-enforcement action compliance obligations that will further increase the company's professional fees and expenses.<sup>298</sup>

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<sup>292</sup> Eoin O'Shea, *UK Bribery: For Cooperating Companies, Virtue Has At Least Some Rewards*, REED SMITH (Dec. 2, 2015), <http://www.reedsmith.com/UK-Bribery-For-Cooperating-Companies-Virtue-Has-At-Least-Some-Rewards-12-02-2015/>.

<sup>293</sup> Patrick Doris et al., *Serious Fraud Office v. Standard Bank Prosecution Agreement*, GIBSON DUNN (Dec. 3, 2015), <http://www.gibsondunn.com/publications/pages/Serious-Fraud-Office-v-Standard-Bank-Plc-Deferred-Prosecution-Agreement.aspx>.

<sup>294</sup> *A Closer Look At The U.K.'s First Sec. 7 "Failure To Prevent Bribery" Action*, FCPA PROFESSOR (Dec. 7, 2015), <http://fcpaprofessor.com/a-closer-look-at-the-u-k-s-first-sec-7-failure-to-prevent-bribery-action/> [hereinafter *A Closer Look*].

<sup>295</sup> *See id.*

<sup>296</sup> Preliminary Judgment, *supra* note 280, at 7.

<sup>297</sup> *A Closer Look*, *supra* note 294, at 3.

<sup>298</sup> Deferred Prosecution Agreement, at 2, *SERIOUS FRAUD OFFICE V. STANDARD BANK PLC*, (2015), (No. U20150854).

Notwithstanding the important issues raised by the SB action (and perhaps not too much should be read into the action as it was, after all, only one action), it was nevertheless incredibly refreshing to read resolution documents in connection with an alleged corporate bribery offense drafted by someone other than the prosecuting authority as frequently happens in the U.S. given the prominence of NPAs, DPAs, and SEC administrative orders to resolve corporate FCPA enforcement actions.

#### IV. CONCLUSION

As the FCPA nears its 40th anniversary, 2015 was a commemorative year that witnessed several notable developments. The goal of this article was to paint a picture for anyone seeking an informed base of knowledge regarding the FCPA and related legal and policy issues in the FCPA's modern era; dissecting FCPA enforcement in a number of ways and highlighting statistics from 2015 as well as historical comparisons and discussing a range of noteworthy issues from 2015 such as expansive and evolving FCPA enforcement theories,<sup>299</sup> judicial scrutiny of FCPA and related enforcement theories,<sup>300</sup> policy pronouncements and developments relevant to FCPA issues,<sup>301</sup> and developments beyond the FCPA that nevertheless touch upon FCPA issues or are otherwise relevant to a similar space.<sup>302</sup>

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<sup>299</sup> *See supra* Section III.A.

<sup>300</sup> *See supra* Section III.B.

<sup>301</sup> *See supra* Section III.C.

<sup>302</sup> *See supra* Section III.D.