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Anti-bribery and corruption:  
global enforcement and  
legislative developments 2017



# Trends in anti-bribery and corruption

This update provides an overview of anti-bribery and corruption legislative and enforcement developments in 2016 in over 30 jurisdictions. In this update, we set out the key trends from the past year and highlight what we can expect in this space in 2017.

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# Trends in anti-bribery and corruption

## 1

### International coordination on anti-bribery enforcement grows stronger

#### Coordinated investigations lead to blockbuster fines

US authorities had a record-breaking 2016 of Foreign Corrupt Practices Act (FCPA) enforcement actions, both in the number of corporate and individual resolutions and the total value of monetary penalties, spanning across jurisdictions and industries. Close to 30 companies paid over US\$2.4bn to resolve FCPA cases.

Perhaps the biggest story from 2016, however, was the extent to which prosecutors are now coordinating across borders. While not a new phenomenon, international and cross-agency cooperation on bribery and corruption investigations continued to grow in 2016 with some of the largest cases involving several authorities.

In February, VimpelCom agreed to pay a total of US\$795m to US and Dutch authorities after its Uzbek subsidiary admitted paying bribes in Uzbekistan to obtain telecom licenses and other benefits, with the penalties split equally between the Netherlands and the US. The investigation, which the US Department of Justice (DOJ) described as a 'landmark case,' involved law enforcement in at least 11 countries. And securities regulators in an additional nine countries assisted the US Securities and Exchange Commission (SEC) in its related investigation.

In December, Brazilian, Swiss and US authorities agreed to the world's largest ever foreign bribery and corruption resolution with Brazilian engineering conglomerate Odebrecht and its petrochemical arm, Braskem. The investigations found the companies had engaged in bribery in 12 countries across Latin America and Africa, including a large number of kickbacks paid in relation to contracts with Brazil's state-owned oil company Petróleo Brasileiro (Petrobras). The US and Swiss investigations commenced after Brazilian prosecutors began investigating allegations of large-scale bribery involving Petrobras, in what has become known as the 'Car Wash' investigation.

The deal, which will see the companies pay at least US\$3.5bn in criminal and civil penalties, involves settlements with the Brazilian Federal Prosecution Office, the US DOJ, and the Swiss Office of the Attorney General, and, in the case of Braskem, the US SEC. The vast majority of the monies will be paid to the Brazilian authorities (80 percent in the case of Odebrecht and 70 percent in the case of Braskem) with the remainder being split equally between Switzerland and the US. The final penalty is yet to be confirmed, and may even be higher, depending on the outcome of an ability to pay analysis which will be undertaken in early 2017.

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### International coordination on anti-bribery enforcement grows stronger

As a result of the settlement, Odebrecht may now bid again for public contracts in Brazil, from which it had been locked out during the investigation. The settlement news has, however, led to a string of other investigations across Latin America, with the company reportedly being blacklisted from public procurement in Ecuador, Panama and Peru, pending the outcome of local investigations into bribes paid in those countries.

#### Forty countries team up at international anti-corruption summit

This trend of cross-border coordination on investigations looks set to continue and grow as governments and prosecutors seek to strengthen ties with counterparts abroad. The May 2016 Anti-Corruption Summit, during which the UK hosted representatives from more than 40 countries to discuss and agree initiatives to combat corruption, is a clear illustration of this.

Measures announced at the Summit include:

- ▶ an international anti-corruption coordination center to be created in London to identify and help prosecute corruption and seize assets. The center will involve a partnership between the US, the UK, Canada, Australia, New Zealand, Switzerland, and Interpol;
- ▶ 18 countries agreed to enter into law enforcement partnerships to help strengthen anti-corruption agencies around the world by sharing best practices and technical assistance. The countries who committed to these 'Institutional Integrity Partnerships' are: the UK, Romania, Mexico, Georgia, Switzerland, Afghanistan, Australia, Norway, Nigeria, Kenya, Tanzania, Bulgaria, the Netherlands, Ghana, Korea, Ukraine, Germany, and the USA – as well as the UN and Commonwealth; and
- ▶ a global forum for asset recovery, which is expected to take place in 2017, will bring together governments and law enforcement agencies to work together to recover stolen assets.

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### International coordination on anti-bribery enforcement grows stronger

#### Increasing international focus on bribery and corruption issues

It is not just government agencies that have been coordinating across borders on bribery and corruption investigations, civil society organizations and media outlets have also raised the level of scrutiny on international business and have been working closely with counterparts abroad to uncover corruption.

This trend was starkly illustrated by the 'Panama Papers' and 'Unaoil' news stories which broke in 2016.

In April 2016, news broke of a massive leak, from Panama-based law firm Mossack Fonseca, of information on thousands of offshore entities.

An anonymous source reportedly leaked the documents, which became known as the 'Panama Papers', to the International Consortium of Investigative Journalists. The Consortium, in turn, worked with more than 100 media organizations to analyze the data, leading to coordinated news stories across the world alleging offshore entities in Panama had been used for illegal purposes, including corruption.

In February, media outlets The Huffington Post and The Age published a series of articles alleging Monaco-based Unaoil bribed officials in the Middle East, Central Asia, and North Africa to secure lucrative oil contracts for some of its clients. Again, the genesis of this story is said to be tens of thousands of e-mails and documents leaked to the journalists. For its part, Unaoil has denied the allegations which are the subject of ongoing investigations by the UK's Serious Fraud Office and US and Australian authorities.

With so much international focus and coordination on combating bribery and corruption and stronger enforcement agencies, particularly in emerging and developing economies, 2017 may see more investigations commencing locally that lead to enforcement action in several jurisdictions. As such, it will be even more important for companies to take steps to ensure all business units, regardless of where they are located, are complying with anti-bribery laws.

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## 2

### New mechanisms to encourage cooperation, remediation, and settlement

#### DOJ Pilot Program

In April, the DOJ launched a new one-year pilot program to encourage companies to self-report possible FCPA violations, fully cooperate in DOJ investigations and remediate any issues in return for potential mitigation credit. The pilot program sets out the extent of mitigation credit available to companies under investigation, and, for the first time, articulates a framework for penalty reductions below the low end of the US Sentencing Guidelines fine range.

The pilot program guidance states that when a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated with the DOJ's investigation (including providing all relevant information about individuals who may be involved), agreed to disgorge any profits obtained from the misconduct and appropriately remediated the issue in a timely manner, then the DOJ may consider a declination of prosecution.

Since then, it has become clear that declinations are a real possibility for companies meeting the pilot program requirements. Soon after the April 2016 launch, the DOJ released declination letters sent to three unrelated companies (Nortek, Inc., Akamai Technologies, Inc. and Johnson Controls, Inc.) stating that the DOJ had closed its inquiry 'despite the bribery by' employees of subsidiary companies. In each case, the companies agreed to disgorge the profits of the tainted business in separate settlements with the SEC.

Further declinations with HMT LLC and NCH Corporation followed in September 2016, with the DOJ noting the companies had illegally provided things of value to foreign officials in connection with sales made to state entities. As HMT and NCH were not issuers, there were no separate settlements with the SEC. Instead, the companies agreed to disgorge the profits in an agreement with the DOJ, essentially creating a new category of FCPA enforcement action.

As the program was originally set up as a one-year pilot, it remains to be seen whether the DOJ will continue the program beyond April 2017.

#### Prosecutors in various countries look to use settlement mechanisms

Prosecutors in other countries have also sought to encourage companies to self-report and cooperate with investigations by offering deferred prosecutions or leniency agreements.

In the UK, the Serious Fraud Office (SFO) entered into its second ever deferred prosecution agreement (DPA) in 2016 in relation to bribery and corruption offenses with an unnamed company. In passing judgment approving the DPA, Lord Justice Leveson said:

'[The conclusion] provides an example of the value of self-report and co-operation along with the introduction of appropriate compliance mechanisms...'

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### New mechanisms to encourage cooperation, remediation, and settlement

In France, new legislation passed in November introduces a French style DPA, which will enable the public prosecutor to offer corporates suspected of having committed bribery or laundering the proceeds of tax fraud the opportunity to enter into an agreement with the authorities to avoid a criminal trial and sentence.

Leniency and plea agreements have also been used by Brazilian authorities in recent years to resolve certain corruption investigations. For example, Brazilian prosecutors have reportedly made strategic use of leniency agreements with individuals to obtain their cooperation in the 'Car Wash' investigation. Leniency agreements may allow companies suspected of bribery to mitigate any sanctions they may be facing, such as fines or debarment.

Such agreements have not been used without challenge. In July 2016, Brazil's Ministry of Transparency, Oversight and Control, Attorney General's Office, Public Prosecutor's Office and Petrobras agreed a US\$273m deal with Dutch oil and gas services company SBM Offshore resolving allegations SBM Offshore had been involved in the Petrobras bribery scheme. Whilst this multi-agency agreement was hailed as ground-breaking when it was first announced, it has since stalled. In September, the Fifth Chamber for Coordination and Review and Anti-Corruption (part of the Public Prosecutor's Office) refused to approve the deal and in December 2016, the Higher Council, the highest body within the Public Prosecutor's office, returned the deal to the Fifth Chamber and the prosecutors involved for reconsideration.

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### Converging compliance standards

With the proliferation of anti-bribery and corruption laws and enforcement world-wide, getting compliance right across a range of jurisdictions has become more important than ever.

In many jurisdictions, companies may be able to obtain mitigation from fines or even have a full defense to bribery offenses if they can show they had a robust compliance program in place at the time of the misconduct. And new laws recently passed in France now require senior officers of certain companies to put in place a compliance program that meets defined standards. If they fail to do so, the companies and their senior officers may face sanctions.

In 2016, as part of resolutions with the DOJ and/or the SEC, nine companies were obliged to appoint an independent compliance monitor, and a further seven were required to make changes to their compliance programs and provide regular reports on the same. This shows a shift in focus, with the SEC in particular seeking more formal ongoing oversight of compliance improvements than in previous years. By way of comparison, only one case in each of 2014 and 2015 involved the imposition of a compliance monitor (being Avon and Louis Berger, respectively).

The increased focus on compliance is perhaps unsurprising following the DOJ's hiring of compliance expert Hui Chen in 2015. Her stated duties include assisting prosecutors in developing benchmarks to evaluate compliance programs at the time of the misconduct and subsequent remediation efforts, which can inform prosecution decisions, and to assist monitors in evaluating whether companies' efforts are in keeping with the terms of any resolutions entered into with the DOJ Fraud Section.

Against this back-drop, the International Organization for Standardization (the ISO) recently published an anti-bribery management system standard (ISO 37001 or the Standard) aimed at helping companies comply with 'international good practice' across multiple jurisdictions and legal frameworks.

The Standard provides a global framework for compliance programs that may serve as a helpful reference for companies when creating and reviewing their anti-bribery and corruption controls. It covers topics such as risk assessments, the investigation of bribery, and third-party due diligence. It also provides a benchmark against which local ISO certifying organizations can, at a company's request and expense, evaluate and certify the company's anti-bribery compliance.

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## 3

### Converging compliance standards

The Standard does not provide an automatic legal defense to bribery charges or serve as a proxy for performing robust due diligence. But the Standard does have an undoubted immediate benefit: it provides an objective, independent benchmark of international compliance principles and best practices, some of which are more detailed and more stringent than those currently required by some anti-bribery and corruption statutes or in some regulators' anti-bribery and corruption guidance. The Standard thus functions as a tool to guide compliance officers as they work to determine where and how to deploy resources, and also as a benchmark that can be used to justify such deployment to company leadership, regulators and key stakeholders.

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New laws and more potential for criminal liability

Several countries have introduced or propose to introduce new anti-bribery and corruption laws.

These include:

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Under new laws recently introduced or under consideration, corporates could face criminal liability for bribery in South Korea, Ireland, Vietnam, Argentina, and Slovakia, to name a few.

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## ▶ Australia

### Australia introduces new false accounting offenses to help combat foreign bribery and corruption

The Australian government has introduced new criminal offenses for false accounting under the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016. The amendment introduces two main offenses: intentional false dealing with accounting documents and reckless false dealing with accounting documents. The offenses were introduced in light of Article 8 of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions which requires parties to the convention to create offenses of false accounting for the purposes of concealing or enabling bribes to foreign public officials.

Under the amendment, the prosecution does not need to prove any benefits were incurred by any person. And the penalties for these offenses are significantly higher than similar offenses under the Corporations Act 2001. Companies convicted of intentional false dealing face a maximum penalty of approximately AU\$18m (approx. US\$12m), three times the value of any benefit attributed to the conduct, or 10 percent of annual turnover. And those convicted of reckless false dealing may face a penalty of half that which applies to the intentional offense.

The Act also amends the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 to expand the ability of agencies and officials to share information and to allow the Independent Commissioner Against Corruption of South Australia to access information held by AUSTRAC (Australia's financial intelligence agency).

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## ▶ The People's Republic of China

### Anti-corruption drive continues to target individuals internationally

The anti-corruption drive Chinese President Xi Jinping started in 2012 continued through 2016. According to figures released in December 2016 by the Central Commission for Discipline Inspection (the CCDI), China has arrested close to 2,500 people since 2014 as part of 'Skynet' and 'Foxhunt'—the campaigns to investigate allegedly corrupt officials who have absconded or sent assets abroad to evade the anti-corruption drive.

In a sign of international cooperation in the field of anti-corruption, following Skynet and Foxhunt, people have returned to China from 70 countries to face anti-corruption investigations.

As in 2015, when nearly 300,000 officials were disciplined by the CCDI and its local counterparts for graft, enforcement action in 2016 primarily focused on officials, including those at state-owned enterprises, rather than on private companies.

### China considers amendments to commercial bribery regime

China's State Council passed a revised draft amendment to the Anti-Unfair Competition Law at its executive meeting on November 23, 2016, and then submitted the draft to the National People's Congress for deliberation.

According to the State Council, the amendment aims to create a fair market environment to protect the legitimate rights of business operators and consumers.

If passed, the draft amendment would:

- ▶ prohibit a business operator from paying or promising to pay economic benefits to a counter-party in a commercial transaction, or to a third party able to influence the commercial transaction, if doing so would be detrimental to the legal rights of other business operators or consumers;
- ▶ place vicarious liability on employers for the actions of their employees in relation to commercial bribery unless the employee violated the company's interests in accepting the bribe;

- ▶ introduce a books and records provision prohibiting businesses from transferring economic benefits to other businesses without accurately documenting such transfers or reflecting them in the company accounts;
- ▶ introduce a new means of calculating penalties by reference to the percentage of illicit revenue attributable to the bribe; and
- ▶ introduce fines for those who knew or should have known bribery was occurring but still provided certain facilitation or support.

Under the proposals, companies may be able to claim cooperation credit, in certain circumstances, but those who fail to cooperate may face even tougher penalties.

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## ▶ The People's Republic of China

### New judicial interpretation on handling of corruption and bribery cases

In April 2016, the PRC Supreme People's Court and the Supreme People's Procuratorate jointly set out a new interpretation document on the handling of criminal cases on bribery and corruption.

The interpretation document is intended to give judges and prosecutors more teeth in their fight against corruption and bribery. Amongst other things, the interpretation document:

- ▶ specified new monetary thresholds to be used when determining whether the bribery and corruption of a public official involved a “relatively large,” “huge” or “especially huge” amount of money (RMB30,000, RMB200,000, and RMB3m, respectively (approx. US\$4,300, US\$29,000 and \$430,000))—thereby raising the minimum bar for prosecution. However, regardless of the thresholds, those involved in bribery of RMB10,000 (approx. US\$1,400) could still face prosecution if the offense is considered ‘relatively serious’;

- ▶ classified the meaning of ‘property benefits’ in commercial bribery into two types:
  - (a) material benefits that can be given a monetary value, such as home renovation and debt relief; and (b) other paid for benefits such as membership services and travel; and
- ▶ strictly clarified terms used in assessing leniency—under 2015 amendments made to PRC criminal law, a briber may be given a lighter penalty or be exempt from sanction if, for example, (a) the briber commits a relatively minor crime, or (b) the briber plays a crucial role in resolving an important case. The interpretation document adopts a narrow approach to terms such as ‘a relatively minor crime,’ ‘an important case’ and ‘play a crucial role.’

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## ▶ Hong Kong

### Appeal of high-profile convictions based on sweetener principle to be heard

Hong Kong property tycoon Thomas Kwok and ex-deputy leader Rafael Hui have been granted leave to appeal to the Hong Kong Court of Final Appeal after the appeals against their convictions and sentences were dismissed in February 2016 by the Hong Kong Court of Appeal. The detailed and unanimous judgment in their previous appeal confirmed the so-called ‘sweetener principle’ under Hong Kong law, which provides that benefits offered to develop or retain goodwill may fall foul of Hong Kong’s bribery laws—i.e. it is not necessary for prosecutors to prove a specific quid pro quo to establish misconduct in public office offenses. Applying the principle in this case, the court found Mr. Kwok had made payments to Mr. Hui to ensure the government maintained a ‘favorable disposition’ towards Mr. Kwok’s property company rather than to secure a specific benefit.

Mr. Kwok’s and Mr. Hui’s appeals will be heard in May 2017, together with the appeal of two others convicted at the same time. The appeals may give Hong Kong’s highest court the opportunity to look again at the ‘sweetener principle.’

In a separate high-profile case, a former chief executive of Hong Kong, Donald Tsang, is awaiting trial in early 2017 charged with official misconduct as well as accepting an advantage in his capacity as Chief Executive. Mr. Tsang has pleaded not guilty to the charges.

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# Asia and Asia Pacific

## ▶ India

### India seeks to tighten its anti-corruption laws

The Prevention of Corruption (Amendment) Bill 2013 was introduced in the Rajya Sabha (Upper House) in August 2013 to amend the Prevention of Corruption Act. Throughout 2016, the Bill continued its passage through the Rajya Sabha.

The Bill aims to:

- ▶ hold commercial organizations liable for bribes offered or given by their associated persons to a public servant in the conduct of business; and
- ▶ hold the directors, managers, secretaries or other officers of a commercial organization liable for an offense committed by the commercial organization with their consent or connivance.

Similar to the UK Bribery Act, the company would have a defense to the corporate offense if it could show it had adequate procedures to prevent corrupt behavior by its associates. But the Indian government has not, as yet, issued statutory guidance on what would constitute adequate procedures.

The Bill also contains more stringent sanctions for corruption and introduces provisions to confiscate assets obtained through bribery.

### Recent corruption investigations targeting multi-nationals

Following allegations published by the Wall Street Journal in late 2015, India's Central Vigilance Commission (CVC) started an investigation into whether US retailer Walmart made illegal payments to customs officials and to obtain other permits in India. This was the first investigation by the CVC into a private company. No criminal charges have been brought in relation to this investigation.

The Indian Central Bureau of Investigation (CBI) has been investigating the activities of various companies, including large Italian and Brazilian multi-nationals, in separate bribery investigations involving Indian officials. News reports suggest the CBI has been seeking assistance from governments in other countries in relation to these investigations.

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# Asia and Asia Pacific

## ▶ Japan

### OECD expresses concern over Japan's enforcement record

Japan's Unfair Competition Prevention Law (UCPL) was amended in 1999 to make it an offense to bribe foreign public officials to obtain advantages in international business. Since then, Japan has prosecuted only a handful of foreign bribery cases. In June 2016, the OECD Working Group on Bribery met with senior Japanese officials to discuss this and other issues. The Working Group chair subsequently praised Japan for its willingness to meet to discuss the "necessary improvements to the country's anti-bribery legislation and practice."

The Working Group, once again, recommended Japan do more to organize police and prosecution resources to proactively detect, investigate and prosecute cases of foreign bribery by Japanese companies.

### Low numbers of cases but some enforcement action on foreign and domestic bribery

There have only been a handful of notable domestic and foreign bribery enforcement actions from recent years in Japan. These include, for example:

- ▶ in February 2015, three former officers of a railway consulting company were sentenced under the UCPL to imprisonment with a suspended sentence for paying JPY 140m (approx. US\$1.2m) in total as a kickback to government officials of Vietnam, Indonesia and Uzbekistan. In addition, the railway consulting company was fined JPY 90m (approx. US\$773,000), and
- ▶ in August 2016, a president of a survey company was sentenced to imprisonment with a suspended sentence under the Criminal Code for paying JPY 2m (approx. \$17,000) to a public servant in order to facilitate an order from the relevant authority for survey works.

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# Asia and Asia Pacific

## ▶ Myanmar

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### New thresholds to be aware of when giving gifts in Myanmar

In April, the President's Office issued guidelines to civil servants on accepting gifts. The guidelines prohibit civil servants from accepting gifts from any organization or individual that could benefit from the exercise of their powers, including businesses seeking to win government tenders. The definition of gifts includes: money, travel, free meals, golf club membership fees etc.

Civil servants may, however, accept gifts costing no more than 25,000 kyats (approx. US\$20) (raising to 100,000 kyats (approx. US\$80) during holiday periods) provided that gifts received from an individual or an organization in a year do not exceed 100,000 kyats (approx. US\$80).

Shortly after the new rules came into effect, the President's Office announced a large media company had been notified of its violation of the gift-giving rules but no further action had been taken as the violation occurred during the 'grace period' following the issuance of the new rules.

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# Asia and Asia Pacific

## ▶ Singapore

### Prominent local enforcement targets bribe-givers in private sector

In December 2016, a former CEO of shipbuilding company ST Marine was sentenced to ten months' jail and a SGD\$100,000 (approx. US\$69,000) fine for his role in one of corporate Singapore's largest bribery cases. He is the fourth individual from the company to be sentenced and the third to be given a jail term for paying kick-backs to individuals at ST Marine's customers, which were disguised as entertainment expenses.

### Singapore commits to information sharing to disrupt money-laundering associated with corruption

As part of its country statement submitted at the Anti-Corruption Summit in London in May 2016, Singapore noted it would ensure law enforcement agencies: (1) had timely access to ownership information of companies and other legal entities, and (2) would share information with other law enforcement agencies to detect and disrupt money laundering associated with corruption and other crimes. Singapore also agreed to work with several other countries in establishing an International Anti-Corruption Coordination Centre.

These commitments are part of a broader trend of cross-border cooperation which has seen Singaporean authorities work with their counterparts abroad to investigate the Malaysian 1MBD corruption scandal in which Malaysian Prime Minister Najib Razak is accused of embezzling hundreds of millions of dollars from the state development fund.

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# Asia and Asia Pacific

## ▶ South Korea

### New law on bribery underlines importance of compliance procedures

On 28 July 2016, the Constitutional Court of Korea upheld the constitutionality of the Korean Anti-corruption and Bribery Prohibition Act (more well known as the Kim Young Ran Act), which was enacted in 2015.

As a whole, the Act contains several noteworthy features that represent significant departures from the existing anti-bribery regime, including:

- ▶ it introduces corporate criminal liability. Companies may face criminal penalties in relation to illegal payments made or benefits given by its employees to public officials, unless the company took due care to prevent such bribery;
- ▶ under the Act, criminal liability may be imposed without showing any link to the public official's duties if the value of benefits received by the public official exceeds KRW 1m (approx. \$1,000) in a single instance or the aggregate value of benefits received in a one-year period exceeds KRW 3m (approx. \$3,000);

- ▶ the Act expands the scope of “public official” for the purposes of South Korea’s anti-bribery laws. The Criminal Code applies to bribes paid to public officials and deemed public officials (e.g. employees of state-owned enterprises). The Act applies to these individuals but also to certain defined civilians, such as employees of public and private schools and some members of the media;
- ▶ the Act allows officials to accept gifts and hospitality only within certain very precise thresholds, which are set by way of a presidential decree; and
- ▶ the Act prohibits the making of an “improper request” (i.e. requests that, if complied with, would cause the official to violate the law or abuse their position or authority). This is irrespective of whether such request involves any payment or provision of benefits.

The Act came into effect from September 28, 2016.

### Political scandal at top levels of government

South Korean President Park Geun-hye stepped down following a vote by parliament on 9 December to impeach her over corruption allegations. At the center of the allegations is a close adviser to the president who is accused of using her presidential connections to pressure companies, including multinationals, into paying millions of dollars in donations to two non-profit foundations.

The case will be heard by the Constitutional Court in early 2017.

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# Asia and Asia Pacific

## ▶ Vietnam

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### Corporate criminal liability introduced and corruption offenses extended to private sector

Vietnam's new Penal Code took effect on July 1, 2016, introducing criminal liability for corporates and extending certain corruption-related offenses to the private sector, namely: (i) embezzlement, (ii) receiving bribes, (iii) giving bribes, and (iv) bribery brokerage. In regards to giving bribes, the new Penal Code also criminalizes the giving of bribes to foreign officials and officials of public international organizations.

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## ► Belgium

### Increased penalties for officials and longer debarment for companies

In 2016, Belgium substantially increased the criminal fines that may be levied for bribery committed by a public official of a foreign state or an intergovernmental organization (Law: 5 February 2016). Belgium also passed a law to implement three EU Directives that substantially extend the period of mandatory exclusion from public procurement, utilities procurement and concessions that economic operators may face when they (or certain persons within the operator) are convicted of bribery offenses (Law: 17 June 2016).

### Enforcement activity slows but with some significant influence-peddling cases

In terms of enforcement, activity in 2016 was lower than in previous years due to budget cuts and relocation of staff.

In criminal proceedings against a director and a manager of state-owned telecom provider Belgacom, who are accused of using their influence in relation to a real estate transaction involving a branch of the company and a third party, the Court of Cassation stated that the exercise of influence refers to *all* misconduct in the context of performing a public service and is not limited to conduct within the scope of the function or competence of the individual. The case has been referred to the Court of Appeals for further consideration.

Other notable cases ongoing in 2016 involved allegations of bribery and corruption within the police force and a Belgian senator accused of being paid to use his influence to expedite the passing of a new law in 2011.

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## ▶ France

### France introduces mandatory compliance obligations and strengthens its arsenal against corruption

France has passed the law commonly referred to as 'Sapin 2' which provides France with an improved arsenal in the fight against corruption and traffic d'influence (influence peddling).

Notably, Sapin 2:

- ▶ creates an obligation on companies that reach certain thresholds (in terms of turnover and employees) and their representatives, to implement a compliance program to detect and prevent corruption and influence peddling. This obligation may impact multinationals operating in France given the fact that French subsidiaries (or controlled companies) of foreign companies that employ at least 500 employees and whose turnover is over €100m fall within the law. This obligation to implement a compliance program will enter into force on June 1, 2017;

- ▶ creates an anti-corruption agency (Agence Française Anticorruption), an agency with national jurisdiction under the Ministry of Justice and the Ministry of Budget, which has a sanctions committee that will be empowered to (i) monitor the effectiveness of the compliance program implemented by companies and (ii) punish breaches of the legal obligations relating to the same;
- ▶ contains provisions to protect whistleblowers; and
- ▶ introduces a French style deferred prosecution agreement (DPA), which will enable the public prosecutor to offer a legal person suspected of bribery, influence peddling and/ or laundering of tax fraud the opportunity to enter into an agreement with the authorities to avoid a criminal trial and criminal sentence.

[For more on the new law see our detailed briefing on Sapin II.](#)

### First company held liable for bribery of a foreign official in French Courts

In February 2016, the Paris Court of Appeal sentenced oil major Total and oil services company Vitol to fines of €750,000 and €300,000 respectively, overturning a lower court's 2013 judgment in the United Nations Iraq oil-for-food program case. This was the first time companies were held liable by the French courts for the bribery of foreign public officials.

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## ► Germany

### New laws to combat bribery and corruption

The risk of criminal liability for bribery and corruption has considerably increased in Germany since the recent adoption of new anti-bribery and corruption laws.

In November 2015, a new German act to combat bribery entered into force marking a new era in the fight against corruption. The new law is aimed at combating corruption nationally and internationally and expanded the criminal liability relating to active and passive bribery in business transactions as well as to active and passive bribery of EU/foreign public officials. Concerning bribery in business transactions, the new law makes it an offense for employees or agents to accept or give any benefits without the consent of the business owner in exchange for a breach of an internal duty owed to the company in the context of purchasing goods or commercial services. Before this, bribes outside the context of market competition were not covered by the German law. Concerning bribery of public officials, the amendment extends criminal liability for bribery and corruption abroad and gives equal legal status to European and German public officials for the purposes of German anti-corruption law. For further information on these amendments see our client briefing [here](#).

In June 2016, new criminal offenses regarding active and passive bribery in the healthcare sector were implemented leading to a massive expansion of German anti-bribery and corruption laws in the healthcare area. The new offenses have a wide scope and apply to any benefits given to a healthcare professional or a third party including, for example, gifts, invitations to conferences and payments for studies. Before the new law entered into force, it was only an offense to bribe hospital doctors in Germany; no criminal liability attached to bribery involving self-employed healthcare professionals.

In parallel with these new provisions being introduced, this area has become the subject of growing public scrutiny. The last few years have seen a trend towards Federal States (most recently Bavaria) establishing specialized public prosecutors to focus specifically on corruption in healthcare. The intensity of prosecutions in this area is likely to increase in coming years. For more information see our client briefing [here](#).

In December 2016, Germany adopted legislation ratifying the Criminal Law Convention on Corruption of the Council of Europe (1999) and its additional protocol (2003); with the recent amendments to German anti-corruption laws, Germany now meets all the requirements set out in the convention and the protocol.

In addition, a new law reforming the regulation of criminal law asset recovery is being discussed in the German parliament. The core of the reform is the reorganization of victim compensation. It aims to simplify the procedures through which victims may request confiscation of ‘incriminated’ assets, including the proceeds of bribery and corruption. The draft law allows, in certain cases, the confiscation of assets with unclear origin and would introduce a reversal of the burden of proof in favor of the criminal authorities. It is inspired by the non-conviction-based confiscation/forfeiture remedies available in the Anglo-American legal systems.

There is a strong political desire to strengthen the liability of companies for criminal offenses, and several proposals are being discussed, including a draft act to introduce a special code for corporate criminal liability in Germany which was proposed in 2013 by the federal state North Rhine-Westfalia. Other proposals provide for a tightening of the current (administrative) sanctions regime allowing higher and more flexible sanctions based on revenue or profit. But the proposals have not yet reached the legislature

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## ▶ Germany (continued)

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### Enforcement

The German authorities continue to be active in enforcement and are increasingly also targeting managers.

Enforcement cases in 2016 include a €12m fine against MTU, a German engine manufacturer, for bribery concerning business in South Korea; and a €2m fine against Schenker, a logistics company and subsidiary of Deutsche Bahn, for bribery concerning business in Russia.

Regarding individuals, the Bremen public prosecutor is, for example, carrying out investigations into an alleged corruption case against former managers of Atlas Elektronik (a joint venture between ThyssenKrupp Marine Systems and Airbus). Amongst these former managers is the former Chief Compliance Officer of ThyssenKrupp who is accused of not having prevented corruption in the subsidiary. The individuals deny the charges.

In another case of public interest, a former department head at the Berlin-Brandenburg Airport has been sentenced to a three and a half year prison sentence after having admitted that he took bribes from the contractor Imtech. And two former Imtech employees were sentenced to jail in the same case.

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## ► Ireland

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### Ireland considers tougher anti-corruption laws

Legislation is pending in Ireland which, if passed, could have significant implications for doing business in Ireland and on Irish businesses operating abroad. Under the Criminal Justice (Corruption) Bill, which was first introduced in 2012, payments to public officials may be 'presumed' to be corrupt in certain circumstances.

The presumption would apply if the payer is an interested party, or if the public official has failed to declare their interests or has accepted a gift in breach of ethical or disciplinary codes.

The proposals also address the bribery of foreign public officials and would make corporate bodies liable for the corrupt actions of their directors, employees and agents.

Whilst passage of the Bill has stalled in the past, the Irish government said this legislation was a priority for the autumn 2016 program. However, passage of the Bill remains slow.

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## ► Italy

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### International investigations focus on natural resources sector

Italian authorities, together with their Dutch counterparts, launched an investigation in 2016 into the oil major Shell. The matter relates to OPL 245, an offshore block in Nigeria that has been the subject of a series of longstanding disputes with the federal government of Nigeria. Since 2014, Eni and its Chief Executive have been the focus of investigations by the public prosecutor in Milan over allegations of bribing Nigerian public officials. Both Shell and Eni deny any wrongdoing.

This follows a trend in recent years in Italian enforcement of focusing on natural resources deals in Africa. For example, in October 2015, a Milan judge held that Saipem and five people should stand trial for allegedly paying bribes to Algerian officials worth just under €200m (approx. US\$225m) to secure contracts worth around US\$11bn. Saipem denies any wrongdoing and the trial is still pending.

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## ► The Netherlands

### Landmark enforcement action follows significant international cooperation

2016 was the year of international cooperation for Dutch prosecutors.

In February, telecoms company VimpelCom agreed to pay a total of US\$795m to US and Dutch authorities after its Uzbek subsidiary admitted paying bribes in Uzbekistan to obtain telecom licenses and other benefits – in what the US Department of Justice (DOJ) described as a ‘landmark case.’

With this headline grabbing case, the Dutch Public Prosecutors Office (the OM) sought to send a clear message to the business community—international companies based in the Netherlands (including those based there for tax or financing reasons) must adhere to Dutch anti-bribery laws when trading abroad.

It is clear the OM is not a light touch. Changes to the Dutch Criminal Code in 2015 increased the maximum penalties for corruption to 10 percent of turnover for legal persons guilty of foreign bribery or false accounting. In the past, the OM has agreed a US\$240m foreign bribery settlement with oil platform company SBM Offshore. And the Dutch portion of the VimpelCom settlement was nearly US\$400m (US\$230m fine and US\$167.5m disgorgement).

In determining the penalty, the OM took into account the length of time during which the bribery took place (nearly seven years) and the value of the payments made.

Interestingly, the OM press release refers to one other criterion for calculating fines. Namely, it should be ‘a punishment that hurts.’ That, in itself, is a resounding warning to all companies falling within the OM’s jurisdiction to take Dutch foreign bribery laws seriously.

VimpelCom’s willingness to cooperate and provide its internal findings was also taken into account. As were its efforts to improve its compliance and the fact that the executives who had been involved, directly or indirectly, had left the company.

In addition to the US, Dutch authorities have been working with their counterparts elsewhere. For example, in the first quarter of 2016, the OM carried out raids at Shell headquarters in the Netherlands following a request from Italy in an ongoing corruption investigation in relation to activities in Nigeria. Shell has denied any wrongdoing.

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## ▶ Russia

### OECD recommends further anti-bribery reforms

In March 2016, Russia reported to the OECD on its progress in implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The report was published together with a summary of the OECD's Bribery Working Group's review and conclusions.

The report sets out further action the Working Group recommends Russia take to implement the Convention in areas such as: detection of foreign bribery, the liability of legal persons for failure to take measures to prevent bribery, the kinds of non-material advantages that may constitute bribery, and the breadth of false accounting offenses available in Russian law. The Working Group did, however, note Russian prosecutors had, in recent years, taken positive action to promptly respond to requests for mutual legal assistance from their counterparts abroad.

### Investigations and enforcement focus on officials

Anti-bribery and corruption investigations in Russia have tended to focus on government officials, including at the municipal level.

In 2016, there were investigations into various officials including a former mayor, managers in the Ministry for State Property of the Sverdlovsk Region, the Governor of the Kirov, and even Russia's own anti-corruption chief. But by far the most prominent corruption-related arrest was that of the Russian Economy Minister in November 2016.

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## ▶ Slovakia

### New law on corporate criminal liability

New Slovak legislation on the criminal liability of legal persons came into force on July 1, 2016.

Under the Criminal Liability of Legal Persons Act, companies can now be held criminally liable for certain offenses, including bribery and tax fraud, even where no specific natural person has been found guilty.

Under the Act, a legal person commits a criminal offense if the offense is done in its favor, on its behalf, within the scope of its activities, or through it, by:

- ▶ a statutory body or a member of the statutory body;
- ▶ a person who exercises control activities or supervision in the legal person;
- ▶ another person, who is entitled to represent the legal person or make decisions on its behalf; or
- ▶ any person acting within their specific authority, if any of the above failed in their obligation to properly supervise such person and so, through their negligence, enabled such person to commit an offense.

The level of penalties contemplated under the Act can severely affect the continued operation and profitability of legal entities and may include:

- ▶ winding-up;
- ▶ forfeiture of assets;
- ▶ pecuniary penalties;
- ▶ prohibition on specified activities; and
- ▶ debarment from public procurement.

The Act applies to criminal offenses committed from July 1, 2016 onwards.

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# Europe

## ▶ Spain

### Spain introduces criminal liability for companies

As reported in our 2016 update, Spain amended its criminal code in 2015 to introduce criminal liability for corporates.

Corporates can now be held liable for crimes committed on their behalf by their legal representatives or persons entitled to take decisions on behalf of the corporate – individually or in a committee – if the actions directly or indirectly benefited the corporate.

They may also be liable for the actions of persons who commit crimes for the corporate's benefit if the management grossly breached its duties of supervision, surveillance and control.

That said, corporates may have a defense if they have suitable compliance programmes in place.

The amended criminal code sets out the six elements of an effective compliance programme:

- ▶ risk assessment;
- ▶ standards and controls to mitigate criminal risks detected;
- ▶ financial controls to prevent crimes;
- ▶ an obligation to report any violations of standards and controls through a whistleblowing channel;
- ▶ a disciplinary system to sanction violations of the compliance programme; and
- ▶ periodic review of the compliance programme to make necessary adjustments after serious violations or organizational, structural or economic changes.

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## ► Switzerland

### OAG works with counterparts abroad on raft of high-level investigations

The Office of the Attorney General of Switzerland (OAG) has been involved in some of the most high-profile corruption investigations of recent years – including FIFA, Petrobras and 1MBD.

Petróleo Brasileiro, known as Petrobras, is said to have lost hundreds of millions of dollars over several years by entering into inflated contracts with a cartel of companies that allegedly used the gains to pay off politicians and bribe Petrobras directors. And the Swiss authorities have been working closely with their Brazilian counterparts, and others, to trace and freeze monies associated with this alleged bribery. This investigation led to the announcement, in December 2016, that Brazilian construction conglomerate, Odebrecht, and Braskem, its petrochemical arm, had pleaded guilty and agreed to pay a combined penalty of at least US\$3.5bn in agreements with Brazilian, Swiss and US authorities in the world's largest ever foreign bribery case to date.

The joint investigation found the defendant companies paid close to US\$1bn to government officials in several countries using shell companies to mask the bribes and moving the money through the US and Swiss financial systems, amongst others.

In each case, the total penalties paid will be split between the US, Swiss and Brazilian authorities with the Brazilian authorities receiving the vast majority (80 percent in the case of Odebrecht and 70 percent in the case of Braskem) and the remainder being split equally between Switzerland and the US.

Swiss authorities have also co-operated with the US DOJ on its investigation into corruption at the international federation of football associations, FIFA, and the OAG has opened up its own criminal investigation into allegations of bribery in international football.

The OAG is also investigating allegations of embezzlement and money-laundering involving Malaysia's development fund 1MDB, which is also the subject of investigations in Singapore, the US and elsewhere.

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### Recent resolutions of foreign bribery cases

In July 2016, the UK Bribery Act (UKBA) had its fifth anniversary. In 2011, the Act introduced, amongst other things, a corporate offense of failing to prevent bribery (the s.7 offense). Since then, the UK's SFO has resolved three s. 7 offenses—one in 2015 through the UK's first ever deferred prosecution agreement (DPA) and the others in 2016 by way of a guilty plea and a second DPA.

### First conviction for failing to prevent bribery

In February 2016, Sweett Group plc admitted to failing to prevent its wholly owned subsidiary from bribing a director of a UAE company to obtain a construction services contract with that company. After costs, the contract was worth about £851,000. Sweett Group was ordered to pay £2.25m. The amount is broken down into a £1.4m fine and a £851,000 confiscation order.

Additionally, the company was ordered to pay the SFO's costs of £95,000.

The court held that Sweett's actions amounted to a category A offense (the highest culpability) for several reasons including:

- ▶ Sweett had 'wilfully ignored' red flags and concerns raised by KPMG;
- ▶ some senior managers at Sweett's subsidiary must have known about the bribery;
- ▶ the bribery took place over a sustained period. The bribes were paid monthly over eighteen months; and
- ▶ Sweett had been uncooperative at the outset of the investigation and, in the court's view, had deliberately sought to mislead the SFO.

In a related matter, the ex-Middle East Managing Director of Sweett Group PLC, a Mr. Kingston, was sentenced in December 2016 to 12 months imprisonment for destroying evidence. Mr. Kingston was found guilty of concealing, destroying or otherwise disposing of mobile telephones, knowing or suspecting that the data on those phones (emails, text and Whatsapp messages) would be pertinent to the SFO bribery and corruption investigation.

Mr. Kingston was first arrested in December 2014 as part of the SFO investigation into suspected bribes paid by Sweett Group PLC. He was then arrested, again, in June 2015 in respect of a separate SFO investigation which remains ongoing.

### SFO agrees substantially reduced penalty with company in second DPA

In July 2016, a second DPA was approved by Lord Justice Leveson (who also approved the Standard Bank DPA entered into in late 2015). It is between an unnamed English company 'XYZ Limited' and the SFO. The company has not been named so as not to prejudice ongoing proceedings against individuals. As such, the DPA and statement of facts have not, yet, been published.

The time period of the misconduct in question straddled the pre and post UK Bribery Act regime. The indictment was, therefore, for conspiracy to corrupt and conspiracy to bribe, contrary to s.1 of the Criminal Law Act 1977 and failure to prevent bribery, contrary to s.7 of the UKBA.

XYZ agreed to pay £6.5m comprised of a £6.2m disgorgement of gross profits and a £352,000 financial penalty. It was agreed £2m of the disgorgement would be paid by XYZ's US parent, 'ABC' (although the Court recognized ABC was under no legal obligation to step in to support its subsidiary but it had agreed to do so in any event). XYZ was given five years to pay, in instalments. The SFO did not seek its costs and the Court did not order any compensation be paid.

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Under the sentencing guidelines, XYZ could have been facing a financial penalty of closer to £18m (including the disgorgement) but the Court approved the figure of £6.5m because it was satisfied this was all the company could afford. The Court did not believe it was in the interests of justice to let the company go into insolvency. Lord Justice Leveson recognized this was an 'exceptional' case.

### SFO active in investigating foreign bribery, including pre-UKBA cases

In another ongoing case, the Court of Appeal confirmed that, under English law, bribery of a foreign official or foreign public body was illegal prior to 2002 (under the 1906 Prevention of Corruption Act). The SFO had appealed a prior ruling that such behavior only became illegal under the 1906 Act following the Anti-Terrorism, Crime and Security Act 2001, which came into force in February 2002. This decision will likely have an impact on a number of cases the SFO has pending relating to historical corruption.

The SFO is pursuing at least nine investigations into companies related to foreign bribery and corruption and has stated that it intends to continue to bring prosecutions under the pre-UKBA anti-bribery laws as appropriate. For example, in July the SFO announced charges against FH Bertling and seven individuals in relation to an alleged conspiracy to bribe an agent of the Angolan state oil company, Sonangol, in 2005 and 2006. However, the SFO did formally close its investigation into Soma Oil and Gas in 2016 concluding there was insufficient evidence to provide a realistic prospect of conviction.

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## ▶ Argentina

### Argentina considering corporate liability for bribery

New legislation is being considered in Argentina to introduce corporate liability and heavy sanctions for businesses involved in public sector corruption. The Bill is still at an early stage and will be considered further in 2017.

### Argentina opens local investigations following tip from Brazil

Prosecutors in Argentina are investigating approximately 100 companies for involvement in bribery of government officials stemming from Brazil's Operation Car Wash, following a tip from Brazilian prosecutors. The probe, which is still at an early stage, includes inquiries into the Argentine operations of a number of Brazilian firms.

Meanwhile, former President Cristina Fernández de Kirchner continues to face a number of criminal investigations, including charges of corruption related to alleged over-billing in public works contracts awarded to construction companies owned by Lázaro Báez.

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## ▶ Brazil

### Local clampdown on corruption continues

The main anti-corruption story in Brazil continues to be the investigation into Brazil's Petróleo Brasileiro, known as Petrobras, which started in 2014 and has continued with force since then. 'Operation Car Wash,' as the investigation is known, has led to numerous arrests, leniency agreements, plea bargains, debarments and convictions, with a long list of politicians, corporate executives, and companies involved.

Carwash is one of several ongoing investigations started in recent years in what is seen as a new era of anti-corruption enforcement in Latin America's largest nation. Others include:

- ▶ an internal investigation at Brazil's largest power utility company, Centrais Elétricas Brasileiras (known as Eletrobras) into possible violations of anti-corruption laws;
- ▶ Operation Zealots into allegations companies, including Brazilian subsidiaries of some international companies, bribed administrative judges at the Brazilian tax authority to obtain favorable tax decisions;
- ▶ Operation Acronym which is investigating whether companies received undue benefits through the exercise of government policies (including an investigation into whether bribes were paid in exchange for low-interest loans from Brazil's development bank BNDES).

The political turmoil caused by these and other ongoing investigations, as well as the country's economic troubles, served as the backdrop to the suspension of Brazil's President Dilma Rousseff in May 2016, and her replacement with President Michel Temer (who has since been accused of corruption).

### Parallel settlements and cross-border cooperation lead to record fines

In 2016, Brazilian authorities have sought to enter into leniency agreements with a number of high-profile companies to resolve allegations of corruption, including the Brazilian arm of Dutch oil and gas services company SBM Offshore. However, the most notable settlements are those entered into in parallel with US authorities, namely the agreements with São Paulo-based aircraft builder Embraer, Brazilian construction conglomerate, Odebrecht, and Braskem, its petrochemical arm.

In Brazil, Embraer agreed to pay R\$64m (approx. US\$19m) in simultaneous agreements with the Brazilian federal prosecutor's office and securities and exchange commission. The Brazilian authorities acknowledged the company had pro-actively approached them and voluntarily conducted a broad internal investigation.

At the same time in the US, Embraer entered into a DPA with the DOJ and agreed to pay over US\$107m in criminal fines, plus US\$98m to the US SEC in disgorgement and interest (minus any credit for disgorgement paid to Brazilian authorities), to resolve charges relating to the bribery of government officials in the Dominican Republic, Saudi Arabia and Mozambique. Embraer also agreed to hire an independent corporate monitor, cooperate with the DOJ's continuing investigation, strengthen its compliance program and implement enhanced internal controls.

In December 2016, Odebrecht, and Braskem, its petrochemical arm, pleaded guilty and agreed to pay a combined penalty of at least US\$3.5bn in agreements with Brazilian, Swiss and US authorities in the world's largest ever foreign bribery case to date. Whilst some of the bribes were paid in kickbacks related to Petrobras, the investigation found the defendant companies paid close to US\$1bn to government officials in 12 countries using shell companies to mask the bribes and moving the money through the US and Swiss financial systems, amongst others.

In each case, the total penalties paid will be split between the US, Swiss and Brazilian authorities with the Brazilian authorities receiving the vast majority (80 percent in the case of Odebrecht and 70 percent in the case of Braskem) with the remainder being split equally between Switzerland and the US.

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For its part, Odebrecht has agreed that a total criminal fine of US\$4.5bn would be appropriate but has stated it can only pay US\$2.6bn, so the fine will be the subject of an ability to pay analysis.

Braskem will pay combined criminal and regulatory penalties of approx. US\$957m, which includes a settlement with the SEC.

The companies agreed to continue cooperating with the investigations into individuals, adopt enhanced compliance procedures and retain independent compliance monitors for three years.

The high level of the penalties were based on a number of factors including: the failure to voluntarily disclose the misconduct, the fact the misconduct spanned several years and reached high levels within the companies, the multiple countries involved and the high-levels of government officials who had been bribed, and the lack of an effective compliance program at the time of the conduct.

The companies did, however, get credit for cooperating with the investigations (25 percent off the bottom of the US Sentencing Guidelines fine range in the case of Odebrecht to reflect its full cooperation and 15 percent in the case of Braskem to reflect its partial cooperation). The companies have also taken remedial action including putting in place heightened controls and more resources dedicated to compliance and terminating and disciplining individuals involved.

These kinds of leniency agreements have not been used without challenge. In July 2016, Brazil's Ministry of Transparency, Oversight and Control, Attorney General's Office, Public Prosecutor's Office and Petrobras agreed a US\$273m deal with Dutch oil and gas services company SBM Offshore resolving allegations SMB Offshore had been involved in the Petrobras bribery scheme. Whilst this multi-agency agreement was hailed as ground-breaking when it was first announced, it has since stalled. In September, the Fifth Chamber for Coordination and Review and Anti-Corruption (part of the Public Prosecutor's Office) refused to approve the deal and in December 2016, the Higher Council, the highest body within the Public Prosecutor's office, returned the deal to the Fifth Chamber and the prosecutors involved for reconsideration.

In a related move, the Brazilian Government published Inter-ministerial Ordinance No. 910 in December, which authorizes the Office of the Comptroller General and the Attorney General's Office to act jointly in the review of self-reports and leniency applications under Brazil's Clean Companies Act (the legislation that imposes liability on companies for bid-rigging, public procurement fraud and bribery of domestic and foreign officials). While this formalizes the approach of two authorities involved in assessing leniency applications, it does not provide any further clarity on how the Public Prosecutor's office approaches such applications.

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## ▶ Canada

### Enhanced disclosure obligations in government procurement

In April 2016, the Canadian government amended the Integrity Regime for Public Procurement to impose an onerous new reporting requirement on bidders and suppliers to government requiring them to provide a certified list of all foreign criminal charges and convictions the supplier, its affiliates, and its subcontractors have faced. The penalty for providing a false or misleading certification is automatic ineligibility to enter into procurement contracts for ten years. The amendments also expanded the definition of 'affiliated' entities for the purposes of the integrity regime both in terms of the definition of control and the types of relationships that give rise to control.

### Canada Supreme Court supports World Bank anti-corruption efforts

The Supreme Court of Canada recently affirmed that documents from World Bank Group investigations remain immune from document production requests that are part of domestic court proceedings (World Bank Group v Wallace, 2016 SCC 15). The accused, former SNC-Lavalin employees, challenged the judicial authorization obtained by the Royal Canadian Mounted Police (RCMP) to conduct wiretaps. As part of that challenge the accused sought to subpoena investigators from the World Bank's investigative arm, the Integrity Vice Presidency (INT), and obtain the production of various documents from the INT's investigative file. The Court rejected the application holding the INT and World Bank documents and personnel enjoyed certain immunities. It emphasized these immunities were important in the fight against corruption and ensuring the independence of international organizations. The Court was concerned that cooperation between the World Bank and domestic law enforcement would suffer if the World Bank's immunity could be waived by virtue of the fact it had shared information with the RCMP.

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## ▶ Chile

### Corruption investigations into conduct at large Chilean companies continues

The following investigations involving large Chilean companies, which started in 2014 and 2015, have continued into 2016.

In March 2015, Chile's national prosecution service announced the detention of six defendants in a corruption scandal involving conglomerate Grupo Penta, one of Chile's largest companies, on charges of tax fraud, bribery and money laundering. The detained individuals included the company's owners and certain company officers, as well as Chile's former deputy mining minister, Pablo Wagner.

Chile's tax authority also issued a criminal complaint alleging tax fraud and bribery against Chilean mining and chemical company, Sociedad Química y Minera de Chile (SQM) in March 2015 for events between 2006 and 2014. According to local lawyers, the prosecutors used the issuance of a criminal complaint from the tax authorities to search for evidence of corrupt behavior.

The public prosecutor's office is also investigating a scheme involving LAN, an airline company that allegedly bribed the transport minister for authorization to enter Argentina in June 2014. In July 2016, LAN (now known as LATAM Airlines), entered into a three-year deferred prosecution agreement with the US DOJ and a settlement with the SEC in relation to the same issue. Under the settlement, the company agreed to pay over US\$22m in penalties and fines. The Chilean aspect of the investigation is understood to be ongoing.

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## ► Colombia

### New laws to combat bribery of foreign public officials

In February 2016, Colombia introduced a new anti-bribery law (Law 1778 of 2016) which, amongst other things, creates direct administrative liability for legal entities involved in foreign corruption. The Colombian Superintendence of Companies may now impose sanctions (including large fines and debarment of up to 20 years) on legal entities registered in Colombia, as well as foreign parent companies of Colombian subsidiaries and foreign subsidiaries of Colombian companies, for bribing, or offering to bribe, foreign public officials. The fact that such enforcement is administrative in nature is significant, not least because it means foreign bribery can be investigated and sanctions levied relatively quickly as compared to criminal proceedings in Colombia.

The law uses the possibility of a waiver or reduction in penalties to encourage self-reporting, cooperation with investigations and improved compliance. And companies should be aware that the Prosecutor General, under the new law, is specifically empowered to report any act of bribery or corruption it has notice of to the relevant foreign authorities.

The true impact of this new law is yet to be felt and will largely depend on how the Superintendence of Companies chooses to wield these new powers in the coming years.

### Extension of corporate liability for domestic corruption

Law 1778 of 2016 also expands the vicarious administrative liability of Colombian companies and subsidiaries of foreign companies registered in Colombia where their officers or directors are found guilty of domestic bribery or attempted bribery in the Colombian courts. Once such officers or directors have been sentenced, the Superintendence of Companies may now impose higher administrative fines (now equivalent to the fines imposed for foreign bribery) on the company if the company or its subsidiary benefited from the bribery. Mitigation is available for cooperation and improved compliance.

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### Implementation of new anti-corruption legislation

In 2015, the Mexican President signed legislation to amend Mexico's constitution to create a comprehensive national anti-corruption system (Sistema Nacional Anti-corrupción or SNA). And in July 2016, the Federal congress officially published a package of laws to implement the SNA (the SNA laws).

In the past, the absence of a nationwide accord to coordinate anti-corruption efforts at the federal and state levels has resulted in a lack of federal-state as well as inter-state cooperation on anti-corruption issues. One of the SNA laws, the General Law of the SNA, aims to address this issue. It provides for the coordination, on a nationwide basis, of an enhanced supervisory, enforcement and accountability framework. It also creates a coordinating committee, which is responsible for coordinating the SNA at the federal and state levels.

Another significant SNA law is the General Administrative Responsibilities Law (the Responsibilities Law). It sets out:

- ▶ requirements on public officials to file tax and other statements, which will be made public;
- ▶ sanctions for companies and individuals involved in corruption, including potential mitigation for self-reporting and cooperation, which may include up to a 70 percent reduction in the penalty;
- ▶ measures to protect those who file corruption complaints; and
- ▶ a broader definition of bribery and corruption—notably it defines bribes to include securities, sales below market value and gifts and employment or other benefits for the official, their family or business partners.

The Responsibilities Law provides that companies will be responsible for corruption offenses committed by persons acting on their behalf where the bribery has resulted in a benefit for the company. In assessing the company's liability, the question of whether or not the company had a functioning compliance program in place will be considered.

The Responsibilities Law sets out the various elements that such compliance programs (política de integridad) must contain.

These include:

- ▶ clearly documented leadership roles and responsibilities;
- ▶ a published code of conduct;
- ▶ adequate and effective control, supervision and audit systems;
- ▶ adequate systems to report issues internally and to the authorities, with mechanisms to sanction offenders;
- ▶ an adequate training program; and
- ▶ HR policies to screen high-risk individuals during the recruitment process.

State legislatures were given six months from July 19, 2016 to create or adjust local legislation to ensure consistency with the SNA.

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### Record-breaking year in US foreign anti-bribery enforcement actions

US authorities had a record-breaking 2016 of FCPA enforcement actions, both in the number of corporate and individual resolutions and the total value of monetary penalties, spanning across jurisdictions and industries. Close to 30 companies paid over US\$2.4bn to resolve FCPA cases.

The year 2016 marked the return of ‘blockbuster’ settlements including four of the largest FCPA resolutions of all time: (i) Teva Pharmaceutical’s nearly US\$520m resolution with the DOJ and the SEC in December 2016; (ii) Odebrecht S.A.’s DOJ resolution, and Braskem’s DOJ and SEC resolutions, of at least US\$419.8m in December 2016; (iii) hedge fund Och-Ziff Capital Management Group LLC’s approximately US\$412m resolution in September 2016; and (iv) VimpelCom Limited’s nearly US\$400m DOJ/SEC resolutions in February 2016. Indeed, the Odebrecht/Braskem resolution is the largest multijurisdictional foreign bribery case of all time, consisting of a US\$3.5bn global settlement with authorities in the United States, Brazil, and Switzerland.

It was also a year of ‘firsts,’ with the first FCPA action against a hedge fund (Och-Ziff); the SEC’s first deferred prosecution agreement with an individual in an FCPA case (in connection with the February 2016 PTC Inc. resolution); and the first FCPA resolution involving a penalty imposed by the Board of Governors of the Federal Reserve System (in connection with the November 2016 FCPA resolutions with JPMorgan Chase & Co. and Hong Kong-based subsidiary JPMorgan Securities (Asia Pacific) Limited). 2016 also saw the first declinations under the FCPA Pilot Program designed to ‘motiv[at]e companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.’

Last year also ushered in some significant ‘seconds,’ including a second resolution with a financial institution related to hiring practices (JPMorgan), following the SEC’s August 2015 resolution with BNY Mellon, and the second-largest FCPA disgorgement to the SEC ever (Teva Pharmaceutical’s December 2016 settlement included disgorgement of over US\$236m to the SEC). This past year also marked the second year since the introduction of the DOJ’s 2015 memorandum on ‘Individual Accountability for Corporate Wrongdoing’ (referred to as the ‘Yates Memo’) which limits corporate cooperation credit eligibility to companies that, among other requirements, share ‘all relevant facts’ about the individuals involved in corporate misconduct.

In addition, 2016 saw the continued importance of coordination and cooperation between U.S. and foreign authorities, leading to joint resolutions with Dutch authorities (VimpelCom), Brazilian authorities (Embraer S.A.), and Brazilian and Swiss authorities (Odebrecht/Braskem).

We highlight below certain trends and developments observed in 2016’s FCPA enforcement.

### International cooperation

As reported in our last installment, in February 2016, Amsterdam-based VimpelCom Limited and its wholly owned Uzbek subsidiary, Unitel LLC, entered into resolutions in relation to paying bribes in Uzbekistan to obtain telecom licenses. As part of the global settlement, VimpelCom agreed to pay a combined total of over US\$795m to the DOJ, the SEC, and Dutch authorities. It also agreed to retain an independent corporate compliance monitor for at least three years. In public statements, the DOJ and the SEC highlighted cooperation with, and assistance from, agencies and law enforcement colleagues around the world in this matter, demonstrating the importance of global cooperation by anti-corruption enforcement authorities.

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Such international cooperation continued throughout 2016, with three notable resolutions announced in parallel with the Brazilian authorities (two of which also involved authorities in Switzerland). First, in October 2016, Brazilian aircraft manufacturer Embraer entered into a deferred prosecution agreement with the DOJ and agreed to pay more than US\$107m in criminal fines, plus over US\$98m in disgorgement and interest (crediting disgorgement paid to the Brazilian authorities) to the SEC, to resolve charges relating to the bribery of foreign government officials in the Dominican Republic, Mozambique, and Saudi Arabia. Embraer also agreed to hire an independent corporate compliance monitor, cooperate with the DOJ's continuing investigation, strengthen its compliance program and implement enhanced internal controls.

Then, in December 2016, construction conglomerate Odebrecht and its petrochemical arm, Braskem, pleaded guilty to charges of conspiracy to violate the FCPA's anti-bribery provisions. They agreed to pay a combined penalty of at least US\$3.5bn in settlement agreements with Brazilian, Swiss, and US authorities in the world's largest-ever (in terms of financial penalties) global foreign bribery resolution to date. The investigation found that the defendant companies had paid approximately US\$1bn to government officials in twelve countries, using shell companies to mask the bribes and move the money through the US financial system, among others.

For its part, Odebrecht agreed that a total criminal fine of US\$4.5bn is appropriate but stated that it can only pay US\$2.6bn, so the ultimate fine will be the subject of an ability-to-pay analysis. Braskem agreed to pay combined criminal and regulatory penalties of approximately US\$957m, which included a settlement with the SEC. The companies agreed to continue cooperating with the authorities' investigations into culpable individuals, to strengthen their compliance measures, and to retain independent compliance monitors for three years.

The significant penalties against Odebrecht/Braskem were based on a number of factors, including the failure to voluntarily disclose the misconduct; the 'nature and seriousness of the offense,' which took place over several years in a number of countries and with the involvement of senior management within the companies; and the absence of an effective compliance program during the relevant time period. The companies did, however, receive 'credit' for cooperating with the investigations (despite failing to detect and self-report the issues to the US Government)—to Odebrecht, 25 percent off the bottom of the US Sentencing Guidelines fine range, reflecting its full cooperation with the US Government's

investigation; to Braskem, a 15 percent discount, reflecting its partial cooperation with the US Government's investigation. The companies have also taken remedial action, including implementing stronger controls, dedicating more resources to compliance, and terminating or disciplining the individuals involved in the misconduct. Marcelo Odebrecht, the company's former CEO, was also sentenced by Brazilian authorities to a 19-year prison sentence for his involvement in the corruption scandal.

The total penalties against Odebrecht/Braskem were split among the US, Swiss, and Brazilian authorities, with the Brazilian authorities receiving the vast majority in recognition of its role in investigating the matter and being the country most relevant to the underlying crimes (Odebrecht will pay 80 percent of its final criminal penalty to Brazil, 10 percent to Switzerland, and 10 percent to the US; Braskem will pay 70 percent of its final criminal penalty to Brazil, 15 percent to Switzerland, and 15 percent to the US).

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### Notable U.S.-only resolutions

In addition to the matters described above, this past year produced several other noteworthy FCPA resolutions, summarized below:

- ▶ Teva Pharmaceutical (December 2016)
  - Teva Pharmaceutical agreed to pay over US\$519m to settle FCPA charges relating to payments to foreign officials in Mexico, Russia and Ukraine. The company entered into a deferred prosecution agreement with the DOJ and agreed to pay over US\$283m in total criminal penalties (having received only partial cooperation credit due to ‘issues that resulted in delays to the early stages of the Fraud Section’s investigation’). The company also agreed to pay over US\$236m in disgorgement and prejudgment interest to the SEC and to retain an independent corporate compliance monitor for three years. The company’s wholly owned Russian subsidiary also entered into a plea agreement on charges that the subsidiary conspired to violate the FCPA’s anti-bribery provisions.
  - The Teva Pharmaceutical resolution has the distinction of being the largest FCPA resolution with a pharmaceuticals company – in line with SEC FCPA Unit Chief Kara Brockmeyer’s February 2016 prediction that the pharmaceuticals industry was on the SEC’s radar for 2016. The SEC’s resolutions with SciClone Pharmaceuticals, Inc. in February 2016, Novartis AG in March 2016, AstraZeneca PLC in August 2016, and GlaxoSmithKline plc in September 2016 were also consistent with this stated industry focus.
- ▶ Och-Ziff Capital Management Group (September 2016)
  - To resolve allegations of FCPA violations relating to conduct in several African countries including, the Democratic Republic of Congo and Libya, US hedge fund Och-Ziff Capital Management Group agreed to pay the DOJ and SEC US\$412m for criminal and civil FCPA violations. Och-Ziff entered into a three-year deferred prosecution agreement with the DOJ and agreed to hire an independent corporate compliance monitor, cooperate with the DOJ’s continuing investigation, and adopt strong internal controls. Subsidiary OZ Africa Management GP LLC pleaded guilty to charges that it conspired to violate the anti-bribery provisions of the FCPA.
  - In addition, Och-Ziff’s CEO settled charges with the SEC that he caused FCPA violations, and agreed to pay nearly US\$2.2m in disgorgement and interest to the SEC. The CFO also agreed to settle charges with the SEC (a penalty will be determined at a later date).
  - The Och-Ziff resolutions represent one of the largest FCPA resolutions (in terms of financial penalties) ever levied and ‘marks the first time a hedge fund has been held to account for violating’ the FCPA. The resolution also demonstrates the US Government’s focus on holding individuals in senior management accountable for corporate misconduct.
- ▶ JPMorgan Chase & Co. (November 2016)
  - JPMorgan Chase & Co. and its Hong Kong-based subsidiary (collectively, ‘JPMC’) agreed to pay a combined total of over US\$264m to the SEC, the DOJ (JPMC’s subsidiary entered into a non-prosecution agreement with the DOJ), and the Federal Reserve to resolve FCPA offenses for awarding prestigious jobs to relatives and friends of Chinese government officials to win banking deals. Under the terms of the resolutions JPMC has agreed to report on its remediation and compliance efforts over a three-year period.
  - The resolution is noteworthy because it marks the first FCPA action that has involved the Federal Reserve, which issued a consent cease and desist order, requiring the bank to pay a \$61.9m civil penalty for creating ‘unsafe and unsound practices’ for failing to have adequate enterprise-wide controls to ensure that referred candidates were appropriately vetted and hired in accordance with applicable anti-bribery laws and firm policies. It will be interesting to see the extent to which the Federal Reserve will pursue parallel FCPA-related enforcement in the future.

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- In addition, the JPMC resolution is yet another example of the US regulators' broad interpretation of what constitutes a bribe or 'anything of value' under the FCPA—US authorities took the position that hiring a family member or friend of a government official can constitute a bribe in violation of the FCPA if the hire of such family member or friend was intended to reward or induce the official. The SEC took this position in two earlier cases. First, in August 2015, BNY Mellon paid US\$14.8m to settle SEC charges that it violated the FCPA by giving student internships to family members of officials affiliated with a Middle Eastern sovereign wealth fund. Second, in March 2016, Qualcomm paid the SEC US\$7.5m to settle FCPA offenses for hiring relatives of Chinese government officials to win sales.
- ▶ Anheuser-Busch InBev SA/NV (September 2016)
  - The SEC also took measures to emphasize the importance of protecting whistleblowers who report issues to the US Government.
  - In September 2016, Anheuser-Busch InBev agreed to pay US\$6m to settle charges that it violated the FCPA and chilled a whistleblower who reported the misconduct. In public statements, the SEC criticized the company for having entered into a separation agreement with the employee-whistleblower that imposed substantial financial penalties on the employee in the event such employee violated the agreement's strict non-disclosure terms. The SEC alleged that such

contractual language stopped the whistleblower from continuing to voluntarily communicate with the SEC about potential FCPA violations, thereby impeding its investigation.

- Anheuser-Busch InBev amended its separation agreements that impose confidentiality restrictions on departing employees of its United States entities to make clear that they do not prohibit the employees from reporting possible violations of law to governmental agencies. In addition, the company agreed to cooperate with the SEC in any related proceedings and to report to the SEC on its FCPA and anti-corruption compliance program over a two-year period.

### FCPA Pilot Program

Building upon 2015's Yates Memo, DOJ Fraud Section Chief Andrew Weissmann issued a memorandum in April 2016 to the attorneys within the section of the DOJ primarily responsible for investigating and prosecuting criminal violations of the FCPA. In this memorandum (titled 'The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance'), the DOJ announced a one-year pilot program to encourage companies to voluntarily self-disclose FCPA-related misconduct, cooperate with the DOJ in related investigations, and remediate flaws in the companies' internal controls and compliance programs.

The Pilot Program shares the Yates Memo focus on promoting greater accountability for individuals, as well as companies, that engage in unlawful conduct. Under the Pilot Program, a company that voluntarily and promptly discloses all relevant facts known to it, including facts about individual misconduct, fully cooperates with the DOJ's investigation (including by providing all facts about culpable individuals), and timely and appropriately remediates the misconduct is eligible to receive up to a 50 percent reduction off the bottom end of the applicable fines range calculation. Less credit (a 25 percent reduction) is available under the Pilot Program for full cooperation and timely remediation where no voluntary disclosure has been made.

To be clear, self-disclosure under the Pilot Program does not guarantee that a company will be spared prosecution or the imposition of fines. The DOJ will, however, consider, in appropriate circumstances, whether to decline prosecution for voluntary self disclosure, full cooperation, and timely remediation.

In 2016, the DOJ declined prosecution of five companies citing to the Pilot Program. Three of the declinations (Nortek, Akamai, and Johnson Controls) involved the companies disgorging profits associated with the conduct at issue through parallel SEC enforcement actions. The two other declinations (HMT LLC and NCH Corporation) were declinations with disgorgement (i.e., without a parallel SEC settlement), essentially a new category of FCPA enforcement actions.

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The declinations under the Pilot Program have several features in common: (a) the companies' timely and voluntary self-disclosure of the violations; (b) the thorough and comprehensive investigation of the violations; (c) the fulsome cooperation with the DOJ (including by identifying all individuals involved in or responsible for the misconduct and providing all facts relevant to that misconduct to the DOJ); (d) the agreement to continue to cooperate in any ongoing investigations of individuals; (e) the disgorgement of all profits made from the bribery, as determined by the DOJ or in a concurrent settlement with the SEC; and (f) full remediation, including the suspension, discipline and/or termination of culpable employees, and the implementation of an effective compliance and ethics program.

As for the impact of the Pilot Program, Assistant Attorney General Leslie Caldwell (the head of the DOJ's Criminal Division) stated in November 2016 that 'what we're seeing is that the pilot program is having an effect. Although I can't share precise figures, anecdotally we've seen an uptick in the number of companies coming in to voluntarily disclose potential FCPA violations.'

### Regulators' continued focus on evaluating corporate compliance programs

As reported last year, the Fraud Section of the DOJ retained Hui Chen as a full-time corporate compliance expert in November 2015. Ms. Chen's role is to provide guidance to DOJ prosecutors concerning the prosecution of corporate entities; to evaluate the existence and effectiveness of compliance programs that companies had in place at the time of alleged misconduct; and to assess whether companies have taken meaningful remedial action, such as implementing new compliance measures, to detect and prevent future wrongdoing. The US Government had previously enumerated 'hallmarks' of an effective corporate compliance program, including within the DOJ and SEC's FCPA Guidance. With Ms. Chen's appointment, the DOJ can further develop appropriate benchmarks for evaluating corporate compliance and remediation measures.

The 2016 FCPA resolutions underscore the US Government's steady focus on evaluating corporate compliance programs and internal controls. The DOJ and SEC have continued to assess the effectiveness of corporate compliance programs and factored such assessments into the nature and magnitude of FCPA resolutions. In addition, the FCPA Pilot Program specifically notes that implementation of an effective compliance and ethics program is a significant factor in assessing whether a company should receive credit for timely and appropriate remediation under the Pilot.

During a November 2016 speech highlighting FCPA enforcement, then-AAG Caldwell stated that the DOJ 'has long placed emphasis when reaching corporate resolutions on the existence or lack of an effective corporate compliance program. A consistent theme of the fraud, corruption, money laundering and sanctions cases we've brought over the years has been a failure of corporate compliance.' Echoing these remarks in a November 2016 speech, Andrew Ceresney (then-Director of the SEC's Division of Enforcement) highlighted the JPMC enforcement action 'because it demonstrates that having an anti-corruption policy that addresses potential violations of the FCPA is not enough, without rigorous compliance review and testing. . . . It is not enough for a company to set up rules and controls, and to train its employees, if those controls are not enforced.'

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### Regulators' continued focus on individual accountability

The year 2016 also marked a continued focus on holding culpable individuals accountable for misconduct under the FCPA. (The DOJ has even launched a new website dedicated to the topic of individual accountability, posted at <https://www.justice.gov/dag/individual-accountability>).

As reported last year, in September 2015, Deputy Attorney General Sally Yates issued new guidance to DOJ attorneys outlining the importance of individual accountability in DOJ prosecutions. The new guidelines, referred to as the 'Yates Memo,' articulated several changes to DOJ policy, particularly regarding the definition of cooperation credit for corporations. The Yates Memo states in no uncertain terms that, 'To be eligible for *any* cooperation credit, corporations must provide to the [DOJ] all relevant facts about the individuals involved in corporate misconduct.' In other words, the DOJ expects companies to 'identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the [DOJ] all facts relating to that misconduct.' The Yates Memo explains that 'if a company seeking cooperation credit declines to learn of such facts or to provide the [DOJ] with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor....'

In other words, the DOJ has taken the position that the identification of individuals is a 'threshold requirement' to receive any cooperation credit. The extent of that cooperation credit 'will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.)'. As a result, if a company is seeking cooperation credit from the DOJ, it must be prepared to conduct a thorough investigation and identify all responsible individuals, as well as to assist the DOJ in investigating and possibly prosecuting such individuals in the event of unlawful conduct.

In remarks delivered at a November 2016 FCPA Conference, Deputy Attorney General Yates reflected on post-Yates Memo enforcement: 'We're pleased with what we've [i.e., DOJ] accomplished... [W]e're getting exactly what we wanted – companies showing up to their first meeting with the government with information about who did what, and our prosecutors are using that information both to build cases against individuals and to ensure that the companies are being properly credited for their cooperation at the end of the investigation.' As noted above, each of the declinations issued under the FCPA Pilot Program specifically reference the companies' identification of culpable employees.

The SEC has also focused on holding individuals accountable for alleged misconduct. In 2016, several individuals settled civil FCPA charges brought by the SEC, including a settlement with the CEO of Och-Ziff, who agreed to pay nearly \$2.2m to settle charges that he caused FCPA violations. In addition, the SEC announced its first deferred prosecution agreement with an individual in an FCPA matter in connection with the February 2016 resolution of the SEC's investigation into PTC Inc., a Massachusetts-based technology company and its Chinese subsidiaries.

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### Conclusion

Looking ahead to 2017, the Second Circuit (a very influential federal court in the United States) will be deciding an appeal of a lower court decision in *United States v. Hoskins*. In the underlying case, the lower court held that a non-resident foreign national defendant (a retired British executive of French multinational Alstom SA) could not be charged with conspiracy to violate the FCPA or with aiding and abetting a violation of the FCPA unless the US Government could show that he acted as an agent of a US ‘domestic concern’ or while physically present in the United States. The DOJ appealed the decision to the Second Circuit, seeking to overturn the lower court’s ruling. The Second Circuit’s opinion on this case will have a significant impact on the US Government’s and the White Collar Criminal Defense Bar’s respective abilities to prosecute and challenge certain FCPA enforcement actions involving foreign nationals.

Perhaps more fundamentally, this new year promises to be full of fresh interest in US enforcement as a general matter, as the change in US Presidential Administrations may usher in a new era of enforcement priorities.

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### Israel's foreign bribery and corruption laws: first company charged

Niko International Projects (NIP) became the first company to be charged in Israel with bribing officials abroad. It was accused of paying more than US\$500,000 in bribes via agents in Lesotho to help it win a government tender. The company agreed to plead guilty and pay a fine and forfeiture of ILS4.5m (approx. US\$1.2m). As part of the plea, NIP and its principals agreed to cooperate with law enforcement authorities in Lesotho, including providing evidence and testimony in local courts. The company also undertook to implement an enhanced anti-corruption compliance program. No charges were brought against individuals. This is the first enforcement action under Israel's Bribery of Foreign Public Officials statute, which was enacted in 2008 as part of Israel's ratification of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions.

Israel has also opened an investigation into suspected bribery and money-laundering in relation to iron-ore rights in Guinea. The individuals arrested by the Israeli police in connection with the matter include a prominent Israeli diamond magnate.

### Decades old domestic bribery case nears conclusion

Six former managers of the Israel Electric Corporation have been charged with bribery, money laundering, fraud and breach of trust in relation to allegations they took millions of shekels in bribes to help German company Siemens and its Israeli subsidiary win contracts with the state-owned utility between 1999 and 2005. Siemens agreed to pay approx. US\$43m to settle a matter related to the decade old investigation and no charges were brought against the company.

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## ▶ Jordan

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### New anti-corruption law introduces enhanced enforcement measures

Jordan implemented a new anti-corruption law in 2016 (the Integrity and Anti-Corruption Law No. 13 of 2016). The law sets out various corruption and related offenses and the maximum and minimum penalties for committing those offenses.

Amongst other things, the new law creates an Integrity and Anti-Corruption Commission (IMAC), to prosecute corruption and related offenses, and a special prosecution department to deal with corruption cases referred to it by the IMAC.

The law also creates a legal witnesses program, to help protect witnesses and informants who submit information to the IMAC.

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## ► Kenya

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### New legislation targets private sector

A new anti-bribery law (the Bribery Act 2016) was approved by the Kenyan National Assembly in 2016.

The Bribery Act 2016 extends anti-corruption laws to the private sector and provides higher criminal penalties for both the offering and receiving of bribes. Under the new law, private entities operating in Kenya must have procedures in place to help prevent bribery. Directors and senior officers of firms who fail to put in place such controls could face charges of abetting corruption if their employees engage in bribery.

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## ► South Africa

### President Zuma faces questions over links to wealthy family

President Zuma has come under fire for his links to the wealthy Gupta family, which has several interests in South African industry including in mining and the media. South Africa's Public Protector, an ombudsman type figure, has looked at whether Mr. Zuma's dealings with the Gupta family violated the Executive Ethics Act, legislation governing the ethics code of the Executive branch of government. The Public Protector's report stops short of accusing Mr. Zuma of breaking the law but it did call on him to set up a judicial inquiry into the influence of the Gupta family in government.

Mr. Zuma, who subsequently faced calls for his resignation, has indicated he will challenge the report and the Gupta family deny any wrongdoing.

### New gift and hospitality regulations announced for government employees

On 1 August, 2016, new regulations came into force setting out rules for senior managers within government departments governing how they should deal with gifts and hospitality and other remuneration offered to them. In particular, the regulations set out certain thresholds in terms of the value of gifts they can accept in the course of their employment (i.e. gifts from any person should not exceed the cumulative value of R350 per year (approx. US\$25).

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## ► United Arab Emirates

### New Dubai authority with broad powers to combat corruption

The Dubai Economic Security Centre (the DESC) was established in 2016 pursuant to Dubai Law No. 4 of 2016. The DESC is a government body with jurisdiction over government and private sector entities in Dubai. Its principal role is to protect the economic security of Dubai as a global financial and economic hub and to protect Dubai's financial stability and investments in Dubai from crimes that may harm the economy. The DESC's mandate includes, without limitation, combating corruption, fraud, bribery, embezzlement, money laundering, terrorist financing, and other crimes that may be committed by or through entities under the DESC's jurisdiction.

In combating corruption, the DESC may use 'all available means' to supervise, investigate and collect information, audit, detect crimes, and engage in information exchanges. The DESC is empowered to cooperate with the judiciary and other government agencies, as well as with authorities abroad.

The Dubai Law No. 4 of 2016, which established the DESC, also contains measures to protect whistleblowers from the private and public sector who report acts that may harm the economic security of Dubai (such as corruption).

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### Bribery Watch

Bribery Watch can help you keep track of new anti-bribery and corruption laws.

To answer our clients' questions, we developed Bribery Watch, an online summary and comparison of anti-bribery and corruption laws and enforcement activity across 150 countries.

For more information, please speak to your local Freshfields contact or email [briberywatch@freshfields.com](mailto:briberywatch@freshfields.com).

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## Global contacts



**David Scott**  
Global Head of Dispute Resolution

E david.scott@freshfields.com



**Marius Berenbrok**  
Global Investigations Co-head

E marius.berenbrok@freshfields.com



**Geoff Nicholas**  
Global Investigations Co-head

E geoff.nicholas@freshfields.com



**Adam Siegel**  
Global Investigations Co-head

E adam.siegel@freshfields.com

For further information please contact one of the above or your local Freshfields contact. We would be happy to talk to you in more detail about recent developments and global trends in this area, or about any issues involving corporate investigations, if it would be of interest.

## Knowledge contacts



**Michelle Bramley**  
Global Head of Knowledge

E michelle.bramley@freshfields.com



**Caroline Doherty de Novoa**  
Knowledge lawyer, Global Investigations

E caroline.dohertydenovoa@freshfields.com

With thanks to Daniel Cendan, counsel in the New York office, and the other various Freshfields lawyers who assisted in the preparation of this update.

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