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SIX TRENDS IN 2015 FCPA ENFORCEMENT

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As we kick off our second decade of updates on the state of play in international anti-corruption enforcement, the stakes for multinational companies have never been higher. On the U.S. front, the U.S. Department of Justice (DOJ) continues its push to demonstrate that financial penalties for Foreign Corrupt Practices Act (FCPA) violations are not simply the cost of doing business internationally by putting culpable individuals in prison. Meanwhile, the Securities and Exchange Commission (SEC) has stepped up as the predominant corporate enforcer, bringing cases founded on creative theories that ride the edges of the statute's contours.

Overall, we observed six notable trends emerge from the year 2015 in FCPA enforcement: (*i*) the DOJ's focus on individual accountability in investigations of corporate misconduct; (*ii*) the SEC's lead in corporate FCPA enforcement actions; (*iii*) the focus on the financial services industry, as demonstrated by the first financial services FCPA enforcement action regarding a foreign sovereign wealth fund; (*iv*) reminders that the FCPA's contours reach beyond government officials; (*v*) DOJ's hiring of a compliance expert; and (*vi*) the SEC's formal inclusion of self-reporting as a threshold requirement for civil alternative resolution vehicles.

1. DOJ Focuses on Individual Accountability

On September 9, 2015, U.S. Deputy Attorney General Sally Yates issued a memorandum to all federal prosecutors announcing a policy of holding individual corporate officers accountable in investigations of corporate misconduct. The "Yates Memorandum," as it has become known, did not depart substantially from existing Departmental policy, but nevertheless is the latest in a series of increasingly direct statements from senior DOJ officials that demonstrates a renewed focus on the subject.

The Yates Memorandum outlines the following six key steps intended to strengthen DOJ's focus on pursuing individual wrongdoers:

1. To qualify for any cooperation credit, companies must provide DOJ with all relevant facts relating to the individuals involved in the corporate misconduct;

2. Criminal and civil investigations should focus on individuals from their inception;

3. Criminal and civil DOJ attorneys handling corporate investigations should be in routine communication with one another;

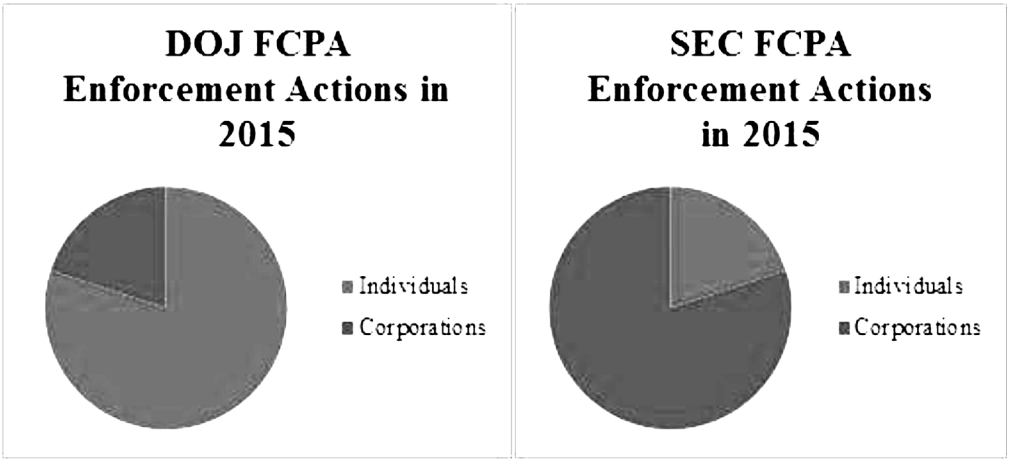
4. Absent extraordinary circumstances or approved Departmental policy, DOJ will not release individuals from civil or criminal liability when resolving a matter with a corporation;

5. DOJ attorneys should not resolve matters with a corporation unless there is a clear path to resolve related individual cases, and they should memorialize any declinations as to individuals in such cases; and

6. Civil DOJ attorneys consistently should focus on individuals, and should evaluate whether to bring suit against an individual based on considerations beyond ability to pay.

The increased focus on individual defendants is a Department-wide phenomenon that goes well beyond FCPA enforcers, but yet it is exemplified in the year's criminal FCPA enforcement statistics. Not only did individuals make up 80% of DOJ's FCPA enforcement docket in 2015, but in no case this year did DOJ bring an enforcement action against a corporation without also prosecuting officers associated with that corporation. While the SEC has made clear that holding individuals accountable for FCPA misconduct is likewise a focus of the Commission, 2015 statistics do not bear out this prioritization in the same way that DOJ's statistics do. Indeed, the breakdown of FCPA enforcement actions against corporations and individuals at the SEC in 2015 was exactly the inverse of DOJ's, with corporations constituting 80% of the SEC's FCPA enforcement docket.

A graphic breakdown of FCPA charges by DOJ and the SEC in 2015 follows:



The latest example of DOJ's focus on individual defendants is the December 10, 2015 indictment of Roberto Enrique Rincon-Fernandez and Abraham Jose Shiera-Bastidas, respectively the president and a third-party agent of Texas-based oil services company Tradequip Services &

Marine. Charging documents unsealed after the two were arrested in Houston and Miami allege that between 2009 and 2014 they conspired together and with others to secure energy contracts from Venezuela's state-owned energy company, Petróleos de Venezuela S.A. (PDVSA), via corrupt payments to PDVSA officials. Among other things, Rincon-Fernandez and Shiera-Bastidas are alleged to have paid millions of dollars to their "aliados" (allies) on PDVSA's contract steering committees to stack the list of companies eligible to bid on contracts with multiple companies owned or controlled by the defendants, thus giving the false appearance that the bids were competitive. In addition to substantive and conspiracy FCPA bribery charges, Rincon-Fernandez and Shiera-Bastidas are charged with money laundering.

This case demonstrates convincingly the proposition that focusing on individual defendants does not mean that DOJ is in any way "going small" or shying away from major corruption cases. Testimony adduced at the detention hearing appears to have been even more extensive than the indictment, with U.S. Magistrate Judge Nancy K. Johnson finding that the conspiracy may involve as much as $1 billion in illicit proceeds. This, coupled with the facts that Rincon-Fernandez is a citizen of Venezuela (which has no extradition treaty with the United States) who has revoked his legal permanent residence status in the United States, owns homes in Spain and Aruba, and is suspected to have moved at least $100 million through Swiss bank accounts, led Judge Johnson to conclude that there are no conditions of release that could outweigh the serious risk of flight that Rincon-Fernandez presents. He was thus ordered detained pending trial. Shiera-Bastidas is also being held in a Miami jail pending a January 2016 detention proceeding.

Another recent example of DOJ's focus on individual defendants is the FCPA guilty plea of Daren James Condrey. Condrey, who operated a Maryland-based company specializing in the importation of uranium into the United States, was charged initially via a criminal wire fraud complaint in October 2014. Although the substantive allegations concerned a scheme to pay approximately $2 million to an official of JSC Techsnabexport (TENEX)—a Russian state-owned supplier of uranium and uranium enrichment services—in return for directing $33 million in sole-source uranium transportation contracts to Condrey's company, the initial charges did not allege violations of the FCPA. Then, on June 16, 2015, DOJ unsealed a criminal information charging Condrey with one count of conspiracy to violate the FCPA's anti-bribery provision and to commit wire fraud.

Charged along with Condrey in 2014 were his wife, Carol, the TENEX official alleged to have received the corrupt payments, Vadim Mikerin, and a businessman alleged to have served as a middleman for the corrupt payments, Boris Rubizhevsky. The wire fraud charges against Mrs. Condrey were dismissed in April 2015, shortly before Mr. Condrey reached a plea agreement with DOJ. Separately, Rubizhevsky and Mikerin pleaded guilty to one count each of conspiracy to commit money laundering on June 15 and August 31, 2015, respectively. Mikerin was sentenced on December 15 to 48 months' imprisonment and to forfeit more than $2.1 million in illicit proceeds. Condrey and Mikerin are scheduled to be sentenced in January 2016.

Another point illustrated by the Condrey case

is the manner in which FCPA statistics account for but a portion of the anti-corruption enforcement efforts undertaken by DOJ. While only Mr. Condrey's case was ultimately resolved with an FCPA charge, three additional individuals were charged and two were convicted of related offenses. Thus, what from a resources perspective is a four-person prosecution shows up only as a single case in the FCPA enforcement statistics.

Yet another example of a case that began on non-FCPA grounds but may well trend FCPA in the near future is the recent money laundering plea of a government aviation official from Tamaulipas, one of the 31 Mexican states. On December 9, 2015, Ernesto Hernandez-Montemayor pleaded guilty to conspiracy to commit money laundering based on allegations that between 2006 and 2010 he received more than $200,000 in bribes from two unnamed employees of an unidentified Texas aviation company. Hernandez-Montemayor has been ordered held pending a February 2016 sentencing date. We expect charges against additional defendants to follow.

An example of DOJ prosecuting corporate executives together with their company is the July 17, 2015 resolutions with New Jersey engineering and infrastructure firm Louis Berger International, Inc. (LBI) and two of its former senior vice presidents, Richard Hirsch and James McClung. In coordinated resolutions, DOJ entered into a deferred prosecution agreement with the corporation and plea agreements with the individuals on FCPA bribery and conspiracy charges alleging that between 1998 and 2010 LBI (including through Hirsch and McClung) paid nearly $4 million in bribes to government officials in India, Indonesia, Kuwait, and Vietnam.

LBI agreed to pay a $17.1 million criminal penalty and to retain an independent compliance monitor for the three-year term of the deferred prosecution agreement. Notably, LBI's criminal fine was reduced substantially based on its voluntary disclosure of the conduct in question, even though the disclosure came after DOJ was already investigating LBI's predecessor entity for alleged False Claims Act violations associated with its work for the U.S. military in Iraq and Afghanistan. LBI's parent company also entered into a February 2015 resolution with the World Bank in which it consented to a one-year debarment from Bank-financed projects based on the alleged misconduct. Hirsch and McClung are scheduled to be sentenced in the U.S. District Court for the District of New Jersey in February 2016.

Finally, in an example of an individual defendant resolving FCPA charges without (and potentially in advance of) his employer, on August 12, 2015 DOJ and the SEC announced resolutions with former regional director of SAP International Inc., Vincente Eduardo Garcia. In the only joint DOJ-SEC FCPA case of 2015, the agencies alleged that between 2009 and 2013 Garcia orchestrated a scheme to pay $145,000 in bribes to at least one Panamanian official in order to secure $3.7 million in software supply contracts for his employer. Garcia allegedly accomplished this by authorizing discounts to a channel partner that exceeded 80%, which allowed the partner to set up a slush fund from which to make corrupt payments. Garcia also allegedly received kickbacks from this slush fund himself.

To resolve the criminal charges, Garcia pleaded guilty to a single count of conspiracy to violate the FCPA's anti-bribery provisions and,

on December 16, 2015, was sentenced to 22 months in prison, to be followed by a three-year term of supervised release. To resolve the civil charges, Garcia consented to the filing of a settled administrative proceeding alleging violations of the FCPA's anti-bribery, books-and-records, and internal controls provisions, and agreed to pay more than $92,000 in disgorgement and prejudgment interest.

In sum, 12 individual defendants were sentenced for criminal FCPA and FCPA-related charges in 2015. Prison sentences ranged from probationary, non-custodial sentences to four years in prison. Interestingly, the data shows that one of the most pertinent factors in the sentencing of a defendant involved in an FCPA prosecution is not the FCPA charge, but rather whether the defendant additionally (or instead) faces a money laundering charge. Whereas the FCPA carries a statutory maximum of five years per violation, the statutory maximum for money laundering is four-times greater, or 20 years. Further, the way in which sentences for money laundering offenses are calculated pursuant to the U.S. Sentencing Guidelines generally leads to higher advisory prison terms presented to the Court. Indeed, the longest sentence ever handed down in an FCPA case (15 years imposed upon Joel Esquenazi in 2011) involved more money laundering than FCPA counts of conviction.

The sentences imposed in FCPA and FCPA-related cases (including foreign official bribe recipients charged only with money laundering offenses) in 2015 follows. Although sentences in each category vary by a wide degree depending upon the unique facts of the given case, the average sentence for FCPA convictions not including a money laundering count was 17.5 months, while the average of those including a money laundering count was twice as long, at 35 months.

2015 INDIVIDUAL SENTENCING DOCKET FOR FCPA AND FCPA-RELATED CHARGES

Defendant	Sentence	Date	Court (Judge)	$ Laundering Conviction?
Asem Elgawhary	42 months	03/23/15	D. Md. (Chasanow)	Yes (no FCPA charge)
Benito Chinea	48 months	03/27/15	S.D.N.Y. (Cote)	No
Joseph DeMeneses	48 months	03/27/15	S.D.N.Y. (Cote)	No
Joseph Sigelman	0 months	06/16/15	D. N.J. (Irenas)	No
Knut Hammarskjold	Time served (0.5 months)	09/14/15	D. N.J. (Irenas)	No
Gregory Weisman	0 months	09/10/15	D. N.J. (Irenas)	No
James Rama	4 months	10/09/15	E.D. Va. (Lee)	No
Ernesto Lujan	24 months	12/4/15	S.D.N.Y. (Cote)	Yes
Tomas Clarke	24 months	12/08/15	S.D.N.Y. (Cote)	Yes
Jose Hurtado	36 months	12/15/15	S.D.N.Y. (Cote)	Yes
Vadim Mikerin	48 months	12/15/15	D. Md. (Chuang)	Yes (no FCPA charge)
Vicente Garcia	22 months	12/16/15	N.D. Cal. (Breyer)	No

2. The SEC Takes the Lead in Corporate Enforcement Actions

Much as DOJ led the charge with respect to individual accountability, the SEC set the pace for corporate FCPA enforcement during 2015. Eight of the ten corporate enforcement actions filed in 2015 were brought by the SEC. Further, there were no joint DOJ/SEC FCPA prosecutions of companies in 2015, which is a stark departure from prior years in which it was more probable than not that a company subject to the jurisdiction of both agencies (corporate issuers) would resolve with both. Although it is too soon to draw any trend lines, the more discerning footprint of corporate enforcement by DOJ is consistent with statements made by Assistant Attorney General Leslie R. Caldwell at the ABA White Collar Crime Conference on March 6, 2015, in which Caldwell stated that DOJ was rethinking its "over use[]" of deferred and non-prosecution agreements in the past and predicted an "uptick in [DOJ] declinations for companies" in the future.

Select corporate enforcement brought by the SEC in 2015, not covered elsewhere in this update, include the following:

Mead Johnson Nutrition Co.—On July 28, 2015, Mead Johnson Nutrition, one of the world's largest manufacturers of infant formula, agreed to pay $12 million to the SEC, without admitting or denying the findings, to resolve allegations that it violated the accounting provisions of the FCPA in connection with certain medical marketing activities in China. In particular, the SEC alleged that between 2008 and 2013 certain employees of the company's Chinese subsidiary improperly compensated state-employed healthcare professionals in China to recommend Mead Johnson's formula to new and expectant mothers. According to the SEC's cease-and-desist order, funding for these payments came from funds generated by discounts provided to Mead Johnson China's network of distributors. Under contracts between Mead Johnson China and its distributors, Mead Johnson China provided the distributors a discount for Mead Johnson's products that was allocated for funding certain marketing and sales efforts. Although these funds contractually belonged to the distributors, the SEC contended that certain employees of the Chinese subsidiary retained some control over how this money was spent, including providing funding for the payments to healthcare professionals. Mead Johnson's purported failure to record a portion of the discounts as payments to healthcare professionals and to implement internal controls to ensure that Mead Johnson China's method of funding marketing and sales expenditures through its distributors was not used for unauthorized purposes, allegedly ran afoul of the FCPA's accounting provisions.

Without admitting or denying the allegations, Mead Johnson agreed to the entry of an administrative order and to pay disgorgement of $7.77 million, prejudgment interest of $1.26 million, and a civil penalty of $3 million (for a total of just over $12 million). Gibson Dunn represented Mead Johnson in its settlement with the SEC.

Bristol-Myers Squibb Co.—On October 5, 2015, the SEC announced another settled FCPA cease-and-desist proceeding arising out China, this time against pharmaceutical company BMS. The SEC alleged that, between 2009 and 2014, certain sales representatives at a joint venture in which BMS was a majority owner made improper payments to healthcare professionals—in the form of cash, gifts, meals, travel, entertainment, and sponsorships for conferences and meetings—in exchange for prescribing BMS products. According to the SEC, the company did not respond adequately to "red flags," including claims by certain terminated employees that it was an "open secret" that healthcare professionals in China rely upon "gray income" to maintain their livelihood and that providing various benefits to the doctors was the only way to meet sales quotas.

Without admitting or denying the allegations, BMS consented to the entry of a cease-and-desist order and agreed to pay disgorgement of more than $11.4 million prejudgment interest of $500,000, and a $2.75 million civil penalty (for a total of just under $14.7 million). The SEC acknowledged in its order BMS's "significant measures" to improve upon its compliance program, including a 100% pre-reimbursement review of all expense claims, termination of more than 90 employees, and a revised compensation structure. BMS agreed to report to the SEC regarding its compliance efforts for a two-year period. Gibson Dunn represented BMS in its settlement with the SEC

The breadth of talent across the SEC's FCPA Unit was also showcased prominently in 2015. In addition to the Home Office in Washington, D.C., the FCPA Unit has members in six regional offices: Boston, Fort Worth, Los Angeles, Miami, Salt Lake City, and San Francisco. Each of these seven offices was responsible for at least one of the SEC's 10 FCPA enforcement actions in 2015. DOJ's FCPA Unit is based entirely in Washington, D.C., although certain members have been known to operate remotely from other cities as their caseloads dictate and DOJ's FCPA Unit routinely partners with U.S. Attorney's Offices from around the country on their matters. DOJ also recently added 10 new prosecutors to focus on FCPA enforcement.

3. The First Financial Services / Sovereign Wealth Fund FCPA Enforcement Action

It was October 2008 when the then-head of DOJ's Fraud Section announced at a SIFMA conference that DOJ and the SEC were focused on interactions between financial services firms and foreign sovereign wealth funds. Nearly seven years later, the SEC announced the first FCPA charges arising out of this highly publicized industry sweep.

On August 18, 2015, the SEC brought a settled cease-and-desist proceeding for alleged FCPA violations by The Bank of New York Mellon Corp. The SEC's allegations were that the bank corruptly provided internships to relatives of foreign officials overseeing the sovereign wealth fund of an unnamed Middle Eastern country that BNY Mellon had serviced since 2000. In February 2010, two of the officials allegedly requested internships for their relatives, including the officials' sons and one of the official's nephews. These prospective interns purportedly did not meet BNY Mellon's "rigorous criteria" for its internship program, but BNY nevertheless hired them outside of the normal process "before even meeting or interviewing them." The SEC further alleged that the experiences given to these interns were "customized one-of-a-kind training programs," including above-scale salaries, coordination of visa services, and a "bespoke" experience that included longer-than-normal terms. The SEC's allegations cite twice to a BNY Mellon employee's e-mail referring to the internships an "expensive favor." In return for these internships, the SEC alleges that that BNY Mellon was allocated $689,000 in additional funds under management, a rather paltry difference in the $55 billion in funds managed by the bank over the course of its relationship with the sovereign wealth fund.

For these allegedly improper internships, BNY Mellon agreed to pay $8.3 million in disgorgement, prejudgment interest of $1.5 million, and a $5 million civil penalty (for a total of $14.8 million). BNY Mellon consented to the entry of a cease-and-desist order without admitting or denying the allegations, which included violations of the FCPA's anti-bribery and internal controls provisions.

SEC Director of Enforcement Andrew J. Ceresney emphasized in announcing the settlement that "The FCPA prohibits companies from improperly influencing foreign officials with 'anything of value,' and therefore cash payments, gifts, internships, or anything else used in corrupt attempts to win business can expose companies to an SEC enforcement action." The SEC's cease-and-desist order found that although BNY Mellon had a compliance program and a FCPA-specific policy at the time of the alleged

misconduct, the bank "maintained few specific controls around the hiring of customers and relatives of customers, including foreign government officials." Specifically, the SEC alleged that "human resources personnel were not trained to flag potentially problematic hires" and that there was "no mechanism for review [of these prospective hires] by legal or compliance staff." The SEC did note, however, that BNY Mellon had already begun the process of enhancing its control processes before being approached in connection with this investigation.

4. Reminders that the FCPA's Contours Reach Beyond Government Officials

The focal point of most FCPA compliance discussions is rightly corrupt payments to officials of foreign government entities (including state-owned entities). But the anti-bribery provisions also proscribe corrupt payments to foreign political parties and officials thereof, candidates for public office, and employees of "public international organizations." On September 28, 2015, the SEC brought a rare FCPA enforcement action concerning allegedly corrupt payments to a foreign political party. The SEC alleged that Japanese conglomerate and foreign issuer Hitachi Ltd. sold a 25% stake in its South African subsidiary to a "front company" for the African National Congress (ANC), South Africa's ruling political party since the end of Apartheid in 1994. This arrangement allegedly allowed the ANC—via this front company, Chancellor House Holdings (Pty) Ltd.—to share in the profits generated from two multi-billion dollar power station contracts awarded to Hitachi's South African subsidiary by an entity owned and operated by the South African government and whose chairman simultaneously served as a member of the ANC's National Executive Committee. Chancellor paid less than $191,000 for this 25% share, in return for which it ultimately received more than $10.5 million in "dividends," "success fees," and the repurchased value of the shares—a more than 5,000% return on investment over the course of 19 months.

Of interest from the Hitachi case is the level of knowledge ascribed to Hitachi concerning the allegation that Chancellor was actually a front for the ANC. The SEC alleged that "Hitachi knew or could have learned"—a departure from the "knew or should have known" standard more frequently espoused by the SEC—about the political connections of Chancellor's executives and the fact that the partner "lacked any engineering or operational capabilities." Among other sources, the SEC cited press reports linking Chancellor to the ANC that were published at around the time the two power station contracts were awarded to Hitachi's South African subsidiary.

To resolve the charges, and without admitting or denying the charges, Hitachi consented to the filing of a settled civil enforcement action alleging violations of the FCPA's books-and-records and internal controls provisions. Hitachi did not disgorge profits, which is significant given that the face value of the power plant contracts exceeded $5.5 billion. Instead, Hitachi agreed only to pay a $19 million civil penalty.

The FCPA's prohibition of corrupt payments to employees of non-governmental "public international organizations" is evidenced by the January 2015 indictment of Dmitrij Harder, the former owner and president of a Pennsylvania-based consulting company. The indictment alleges that Harder made "consulting" payments totaling more than $3.5 million to the sister of an official

of the European Bank for Reconstruction and Development to corruptly influence contract awards to Harder's clients. The European Bank for Reconstruction and Development, a multilateral development bank based in London and owned by more than 60 sovereign nations, has been designated by Executive Order as a "public international organization" such that its employees qualify as "foreign officials" for purposes of the FCPA's anti-bribery provisions. The current status of Harder's case, including a challenge to the constitutionality of this "public international organization" provision, is covered below.

The reach of the FCPA's accounting provisions to cover even commercial corruption is evidenced, in part, by the SEC's February 2015 settlement with ***Goodyear Tire & Rubber Company***. The SEC alleged that Goodyear violated the FCPA's books-and-records and internal controls provisions by making approximately $3.2 million in corrupt payments to obtain contracts from both state- and privately-owned companies in Angola and Kenya.

5. DOJ Hires Compliance Expert

It is not uncommon for companies caught in the snares of an FCPA investigation—particularly those entering the negotiation phase of a potential FCPA resolution—to make a comprehensive presentation to DOJ and/or the SEC describing their FCPA compliance program. In particular, these presentations typically focus on the extent that the company's anti-corruption policies, procedures, diligence, and training programs have been remediated since the conduct at issue such that recurrence of the conduct is less likely. Over the years, DOJ and SEC FCPA Unit attorneys have become increasingly sophisticated in these matters, and so too have their expectations for the presenters.

In November 2015, DOJ upped the ante even further by hiring Hui Chen as a dedicated compliance expert to assist its FCPA attorneys in evaluating these and other compliance issues. Chen comes to this role with significant experience in government and industry, having served as a federal prosecutor in the Criminal Division and the U.S. Attorney's Office for the Eastern District of New York as well as more recently in high-level in-house legal and compliance positions in the financial (Standard Chartered Bank), healthcare (Pfizer), and technology (Microsoft) sectors, including posts in Beijing and Munich. Assistant Attorney General Caldwell described Chen's main responsibilities in a recent speech as bringing an "expert eye" to helping prosecutors assess the effectiveness of companies' compliance programs, including what remedial compliance measures should be required as part of a corporate resolution. DOJ Fraud Section Chief Andrew Weissmann also has suggested that Chen will play a key role in overseeing compliance monitorships and other corporate post-resolution reporting relationships.

6. The SEC's New Threshold Requirement for Alternative Resolution Vehicles

Since announcing its Cooperative Initiative in 2010, which among other things allows for the use of deferred and non-prosecution agreements as an alternative to administrative or civil enforcement actions, the SEC has resolved only nine corporate cases by means of one of these alternative resolution vehicles. Fully one-third of these, however, have been in FCPA cases, including Tenaris S.A., Ralph Lauren Corp., and PBSJ Corp.

In November 2015, SEC Enforcement Director Ceresney announced a new threshold requirement for companies hoping to secure a deferred or non-prosecution agreement with the SEC in the future. At the ACI's annual FCPA Conference, Ceresney stated that only those companies who self-report the misconduct in question will be eligible for these alternative resolution vehicles. But even then, self-reporting does not guarantee a deferred or non-prosecution agreement, as the ultimate decision will continue to be based upon the factors set forth in the SEC's 2001 "Seaboard Report." Indeed, FLIR Systems Inc. self-disclosed corrupt payments resulting in a 2015 FCPA resolution with the SEC and still was subjected to a cease-and-desist proceeding.