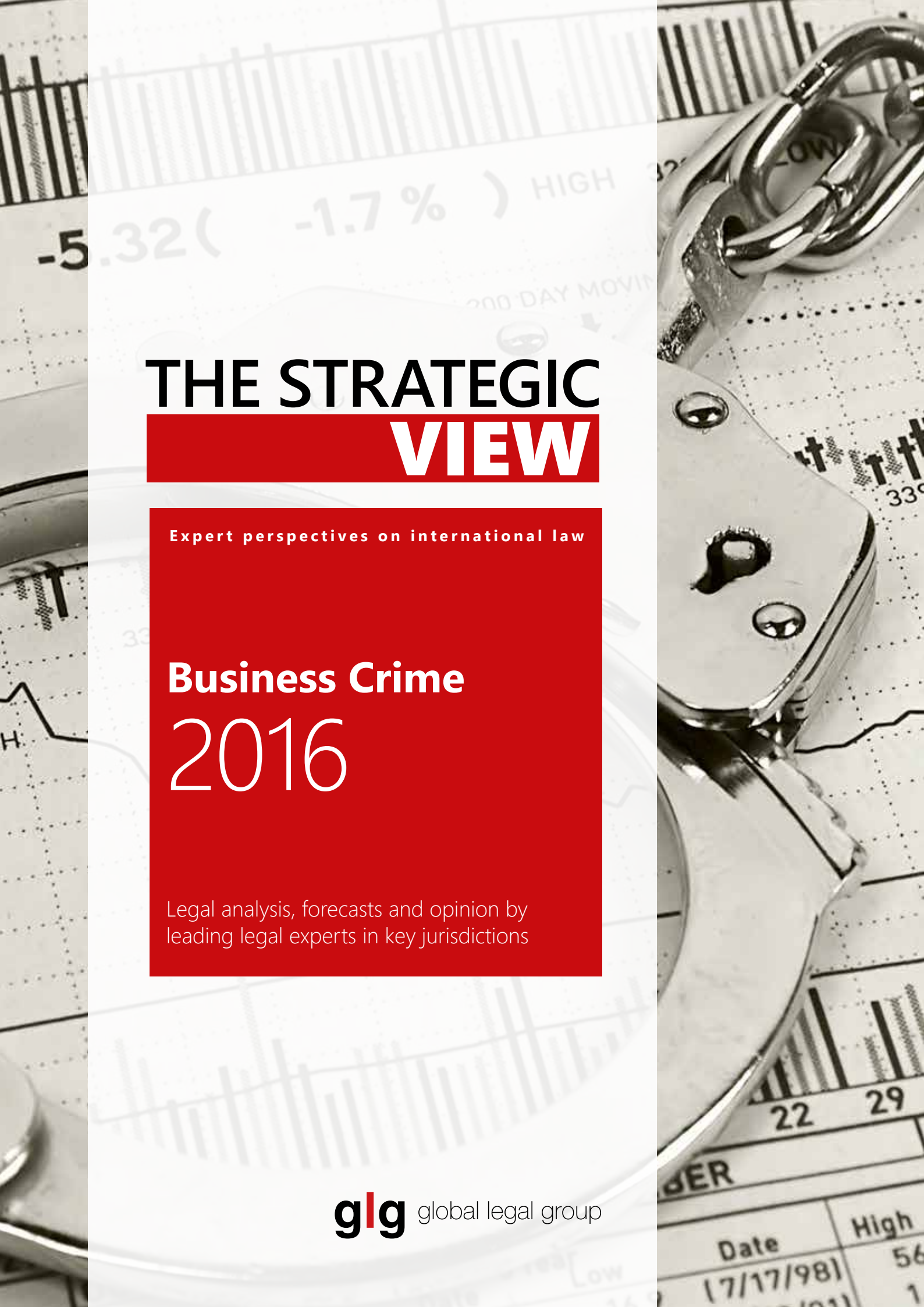

THE STRATEGIC VIEW

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Business Crime 2016

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USA

Keith Krakaur and Ryan Junck discuss various trends in business crime prosecution in the USA, the Yates Memo and the DOJ's and SEC's approach to tackling business crime on an individual and corporate level, as well as the incentives for individuals and entities to self-report

1. What trends, in terms of activity or focus, have you seen in the prosecution of business crimes in your jurisdiction in the last 12 months?

U.S. enforcement authorities have been increasingly focused on the prosecution of individuals. A September 2015 memorandum by Attorney General Sally Yates (the "Yates Memo") and subsequent changes to the U.S. Attorney's Manual direct Department of Justice ("DOJ") prosecutors to "focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct". The Yates Memo states that if a company wants any credit for cooperating with the DOJ, it must provide "all relevant facts relating to the individuals involved in corporate misconduct".

Explaining this change, Yates recently said: "In the past, cooperation credit was a sliding scale of sorts and companies could still receive at least some credit for cooperation, even if they failed to fully disclose all facts about individuals. That's changed now. As the policy makes clear, providing complete information about individuals' involvement in wrongdoing is a threshold hurdle that must be crossed before we'll consider any cooperation credit." Although this announcement is not, in theory, a big shift in longstanding DOJ practice to obtain the relevant facts about individual misconduct, it is the first formal statement of the DOJ's determination to focus on individuals and to

tie corporate cooperation credit to obtaining those facts.

With regard to anti-corruption enforcement, it is expected that both the DOJ and the Securities and Exchange Commission ("SEC") will announce significantly more enforcement actions in 2016 and 2017 because there are many corporate cases publicly reported to be in the agencies' pipelines. The DOJ in particular has significantly increased resources dedicated to anti-corruption and kleptocracy investigations. Recently, the DOJ hired ten additional FCPA prosecutors and added approximately a dozen FBI agents solely focused on FCPA cases. Likewise, the DOJ's Kleptocracy Asset Recovery Initiative, an effort to recover assets stolen by foreign officials, has grown to include a dozen attorneys and FBI and Homeland Security teams.

In addition, the DOJ Fraud Section announced in April 2016 the creation of a one-year "Pilot Program" and provided further guidance on what companies can expect with regard to self-disclosure and cooperation. Under the Pilot Program, companies can qualify for either a declination or 50 percent off the bottom of the penalty range if they self-report misconduct to the DOJ. Companies that fail to self-report, on the other hand, can only receive a maximum of 25 percent off the bottom of the penalty range in any subsequent foreign bribery settlement depending on their level of cooperation and remedial actions.

Where companies do not self-disclose violations, enforcement authorities are increasingly relying on whistleblower reports as an important source of information. According to the SEC's 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program, the SEC received 3,923 whistleblower tips in 2015, a 10 percent increase over 2014, and awarded over $37 million to whistleblowers for their provision of original information that led to successful enforcement actions.

Lastly, the DOJ is increasingly relying on large-scale sophisticated data analysis as well as cooperation with international enforcement authorities to prosecute business crimes including money laundering, tax evasion, insider trading, front-running, fraudulent performance reporting, etc.

2. Are enforcement agencies particularly focused on any specific industries or crimes?

Although no industry is immune from prosecution, the financial, pharmaceutical and energy industries have continued to be the subject of focused attention in recent years. In the pharmaceutical sector, both healthcare fraud and anti-corruption cases have continued to increase. In addition, enforcement authorities have focused on penalising anti-competitive behaviour, particularly as it relates to generic drug price increases. With respect to the financial industry, enforcement authorities continue to seek sizeable penalties totalling billions of dollars for violations of anti-money laundering laws, the circumvention of sanctions regimes, insider trading, market manipulation of securities, commodities, currencies and interest rates, tax evasion, and mortgage fraud and abuse. Lastly, the energy and extractive industries continue to be regular targets for enforcement authorities focused on anti-corruption compliance.

3. Are enforcement agencies more or less focused on pursuing cases against corporations or individuals?

As discussed above, the DOJ has recently emphasized its focus on individual prosecutions; however, both the DOJ and the SEC continue to pursue cases against corporations with equal vigour. The DOJ and the SEC are also continuing to incentivise corporations to self-disclose violations and to cooperate in the identification and prosecution of culpable individuals.

4. Does the legal framework concerning the prosecution of business crimes allow for extraterritorial enforcement? Are such matters being pursued?

Yes. U.S. enforcement authorities frequently target non-U.S. companies and individuals for prosecution, often with the cooperation of non-U.S. authorities. Some U.S. criminal laws explicitly provide or have been interpreted to provide for extraterritorial jurisdiction, and enforcement authorities have routinely used those laws to prosecute and secure convictions and large fines against foreign companies and individuals. In particular, authorities have exercised extraterritorial jurisdiction in a variety of enforcement actions, including: anti-competition; anti-bribery; anti-money laundering; failure to comply with U.S. sanctions; tax evasion, particularly with respect to failure to report; securities fraud involving U.S. transactions; and manipulation of international markets. Even where a U.S. criminal law is silent on extraterritorial jurisdiction, enforcement authorities are likely to pursue non-U.S. entities where U.S. persons (broadly defined) are involved, any illegal acts occurred in the territory of the U.S. or where the illegal acts had a substantial effect in the U.S.

However, in anti-corruption enforcement, a recent judicial ruling may limit the DOJ's ability to use conspiracy charges in an FCPA case to pursue individuals who did not actually carry out any acts within the U.S. In *United States v. Hoskins*, No. 3:12CR238JBA, 2015 WL 4774918 (D. Conn. Aug. 13, 2015), the Federal District Court for the District of Connecticut held that a non-resident foreign national cannot be charged with conspiracy to

violate the FCPA, or with aiding and abetting a violation of the FCPA, unless the government can show that he acted as an agent of a "domestic concern" or while physically present in the U.S. The DOJ is appealing the decision.

5. What judicial or legislative developments have impacted the prosecution of business crimes in your jurisdiction in the last 12 months? Are there any significant proposals for reform of the legal framework that govern business crimes in your jurisdiction?

In April 2016, the Court of Appeals for the District of Columbia Circuit overturned a lower court decision that had invalidated a deferred prosecution agreement ("DPA") reached between the DOJ and Fokker Services, a Netherlands-based defence contractor. Fokker Services had voluntarily disclosed violations of U.S. sanctions laws in 2010; cooperated fully with the DOJ over a four-year period; and was granted the DPA for its frank disclosure and close cooperation. In 2015, a lower court invalidated the DPA because it believed the agreement was too lenient; ordered the government and the company to renegotiate the DPA; and ordered them to present the renegotiated agreement to the court for its approval. The DOJ and Fokker Services appealed and the Court of Appeals, held that the lower court had overstepped its authority. The Court of Appeals determined that the decision to enter a DPA, or to prosecute a case at all, rests with the prosecutor and not with the court.

This decision is an important reaffirmation of long-standing DOJ policy to seek DPAs as an efficient settlement tool, and to obtain ongoing cooperation from corporate defendants.

More recently, another Court of Appeals' ruling weakened the SEC's ability to demand disgorgement of ill-gotten profits from illegal conduct such as through securities fraud or foreign bribery. The Court of Appeals for the Eleventh Circuit ruled that the SEC can only require disgorgement from conduct that occurred less than five years before the case was filed. The SEC had previously assumed there was no time-bar on disgorgement. In the last three years alone, the SEC has extracted more than $940 million from companies as part of FCPA-related civil enforcement actions, of which approximately $829 million has been disgorgement, $59 million has been civil fines and $53 million has been prejudgment interest. (Marc Alain Bohn, The FCPA Blog, Eleventh Circuit Ties SEC Disgorgement to Five-Year Statute of Limitations, *available at* http://www.fcpablog.com/blog/2016/6/8/eleventh-circuit-ties-sec-disgorgement-to-five-year-statute.html (last visited Jul. 11, 2016).) It is likely that this ruling will cause the SEC to increase its use of tolling agreements to reduce the chances of an enforcement action becoming time-barred by the statute of limitations. However, other jurisdictions, such as the District of Columbia Court of Appeals, have ruled that disgorgement is not covered by the five-year statute of limitations applicable to civil penalties.

"In the last three years alone, the SEC has extracted more than $940 million from companies as part of FCPA-related civil enforcement actions, of which approximately $829 million has been disgorgement, $59 million has been civil fines and $53 million has been prejudgment interest"

The legislative picture for business crime reform remains static given the impending Presidential elections and is unlikely to result in major changes in the near future. However, legislative reform remains an important issue for business groups that have long been concerned with federal over-criminalisation and overreach in the prosecution of business crimes. Several Republicans in the House of Representatives and the Senate recently introduced legislation that would limit criminal liability for executives and officers who did not possess actual knowledge of the commission of the business crime. The reform was kept in the House legislation but was stripped from the Senate version because it was deemed too controversial.

Also focusing on individual prosecutions, the U.S. Chamber of Commerce has heavily criticised the DOJ's Yates Memo. The Chamber has argued that the Yates Memo will discourage cooperation by individuals and that it will have a chilling effect on companies' ability to investigate themselves

given the data protection and attorney-client privilege issues that may be implicated when providing information to the DOJ.

6. How common is it for enforcement agencies in your jurisdiction to exchange information and cooperate internationally with other agencies? What are the consequences of cross-border cooperation on prosecutions of entities and individuals in your jurisdiction?

Cooperation with non-U.S. enforcement agencies is increasingly common in business crime prosecutions and enforcement actions, particularly in U.S.-led efforts. The U.S. has signed numerous Mutual Legal Assistance Treaties that allow for the exchange of evidence and information with major jurisdictions around the globe. The U.S. has also entered into more subject-matter specific financial information-sharing and asset sharing agreements with other countries. The DOJ, the Department of State, and the Treasury Department have aggressively sought cooperation with foreign enforcement agencies and secured billions in penalties and a large number of convictions with the help of non-U.S. jurisdictions in many areas including corruption, tax evasion, and money laundering. Accordingly, it is not uncommon that information disclosed to authorities in a non-U.S. jurisdiction will be shared with U.S. prosecutors and *vice versa*. Finally, in a cross-border context, companies that settle or plead guilty to criminal wrongdoing in the U.S. may expect follow-on criminal or civil actions in other jurisdictions.

7. What unique challenges do entities or individuals face when enforcement agencies in your jurisdiction initiate an investigation?

Entities and individuals facing an investigation in the U.S. have several unique challenges not necessarily present in other jurisdictions. Chief among these is the challenge of responding to enforcement actions initiated by federal and state authorities simultaneously. While cooperation between federal and state authorities is common, there is no guarantee that a company can resolve an issue within the confines of a single action. Companies may also face enforcement investigations by multiple federal regulators at the same time. These challenges require companies and individuals to develop a comprehensive and coordinated legal strategy in dealing with matters that may constitute violations of both federal and state laws or violations of multiple federal regulations.

Moreover, while companies and individuals may be shielded by the constitutional protection against double jeopardy, this protection does not extend to civil liability. Companies and individuals are often subject to collateral civil suits arising out of potentially criminal conduct; and, as a result, must carefully consider the consequences of any admission of culpability as it could be used against them in parallel or subsequent lawsuits.

8. Do enforcement agencies in your jurisdiction provide incentives for individuals or entities to self-report a business crime or otherwise provide assistance to the government? If so, what factors should individuals or entities consider when assessing whether to self-report a business crime or cooperate with a government investigation?

Yes, several incentives exist for both individuals and entities to self-report and provide assistance to the government and such disclosure and cooperation is highly encouraged by enforcement authorities. At the same time, enforcement authorities consistently emphasize that when entities and individuals fail to self-disclose and cooperate, they will seek to impose harsher penalties.

U.S. enforcement authorities have recently tried to become more transparent in how they factor self-disclosure and cooperation into prosecutorial discretion and the calculation of penalties. As discussed above, the DOJ Fraud Section recently announced a one-year "Pilot Program" where companies that self-disclose violations can qualify for either a declination or 50 percent off the bottom of the penalty range if they self-report misconduct to the DOJ. The DOJ recently publicised the benefits of self-disclosure through its Pilot Program by releasing two declination letters to Akamai Technologies Inc. and Nortek Inc. for foreign bribery violations in China on the same day that the SEC announced it had entered non-prosecution agreements ("NPAs") with the companies. In its decision to decline prosecution, the DOJ referenced both the Pilot Program and the Yates Memo as motivators for companies to self-disclose, cooperate, and provide relevant facts about individuals. The DOJ also highlighted that both companies had taken steps to improve their internal compliance programs and internal accounting controls.

For individuals, self-disclosure incentives include potential leniency for crimes in which they have participated. In addition, cooperating witnesses may also be granted lesser penalties, sentences, or some form of diversionary prosecution and ultimately avoid prison sentences. For example, in the case of tax evaders, the U.S. Internal Revenue Service initiated its first tax amnesty in 2009. Since 2009, 54,000 tax evaders have participated in such programs allowing the U.S. Government to collect $8 billion in previously undisclosed back taxes. (*See 2012 Offshore Voluntary Disclosure Program*, IRS.GOV, https://www.irs.gov/uac/2012-offshore-voluntary-disclosure-program (last visited Jul. 11, 2016); *see also* Press Release, U.S. Internal Revenue Service, Offshore Compliance Programs Generate $8 Billion; IRS Urges People to Take Advantage of Voluntary Disclosure Programs (Oct. 16, 2015), available at https://www.irs.gov/uac/newsroom/offshore-compliance-programs-generate-8-billion-irs-urges-people-to-take-advantage-of-voluntary-disclosure-programs (last visited Jul. 11, 2016).)

> "The SEC provides significant financial incentives to whistleblowers who voluntarily provide information that leads to successful enforcement actions resulting in monetary sanctions over $1 million"

The SEC also provides significant financial incentives to whistleblowers who voluntarily provide information that leads to successful enforcement actions resulting in monetary sanctions over $1 million. Whistleblower awards are made in an amount equal to 10 to 30 percent of the monetary sanctions collected. Since its inception in 2011, the SEC's whistleblower award program has awarded more than $62 million to 28 whistleblowers. (Press Release, U.S. Securities and Exchange Commission, Whistleblower Earns $3.5 Million Award for Bolstering Ongoing Investigation (May 13, 2016), available at https://www.sec.gov/news/pressrelease/2016-88.html (last visited Jul. 11, 2016).)

9. Do enforcement agencies in your jurisdiction use NPAs or DPAs? If so, how do such agreements work in practice and what can entities or individuals do to reach an NPA or a DPA with enforcement agencies?

If not, do you believe it is likely that such agreements will become part of the legal framework in the next five years?

Yes. U.S. enforcement authorities regularly use their prosecutorial discretion to grant NPAs and DPAs to resolve enforcement actions against entities. Typically, to obtain a DPA or NPA, an entity or individual under investigation must self-disclose the misconduct, cooperate fully in the investigation, pay an agreed penalty, and, in the case of a company, implement certain institutional improvements and remedial actions to prevent the misconduct from occurring again. In addition, authorities are increasingly requiring admissions of wrongdoing as a condition for settlement through a DPA or NPA. Such admissions may have severe collateral consequences in follow-on litigation or related criminal cases.

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