

# EXAMINING THE JPMORGAN “PRINCELING”<sup>1</sup> SETTLEMENT: INSIGHT INTO CURRENT FOREIGN CORRUPT PRACTICES ACT (FCPA) INTERPRETATION AND ENFORCEMENT

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## ABSTRACT

*Shortly after the November 2016 U.S. Presidential election, JP Morgan Chase and JP Morgan Securities (Asia Pacific) settled and signed a non-prosecution agreement (NPA) in which they agreed to pay over \$264 million to the DOJ, SEC and the Federal Reserve. The entities acknowledged that*

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<sup>1</sup> Princelings was used in the past in China to refer to children of rulers:

The term was coined in the early 20th century, referring to the son of Yuan Shikai (a self-declared emperor) and his cronies. It was later used to describe the relatives of the top four nationalist families; Chiang Kai-shek's kin, Soong Mei-ling's kin, Chen Lifu's kin, and Kong Xiangxi's kin. After the 1950s, the term was used to describe Chiang Ching-kuo, son of Chiang Kai-shek, and his friends in Taiwan. Today's princelings include the children of the Eight Elders and other recent senior national and provincial leaders.

*Princelings*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Princelings> (last visited July 29, 2017). The term is now used to describe the offspring of the ruling elite in China:

The children of veteran communists who held high-ranking offices in China before 1966, the first year of the Cultural Revolution, are commonly called 'princelings.' There are princelings by birth — sons and daughters of former high ranking officers and officials of the Chinese Communist Party (CCP) — and princelings by marriage. Princelings by birth could also be further divided into subcategories: princeling politicians, princeling generals, and princeling entrepreneurs.

Bo Zhiyue, *Who are China's Princelings?*, DIPLOMAT, Nov. 24, 2015, <http://thediplomat.com/2015/11/who-are-chinas-princelings>.

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*they had engaged in quid pro quo arrangements with Chinese officials for a number of years, employing relatives deemed “princelings” in return for favored treatment. Although JP Morgan Chase had ended the program in 2013, evidence of willful and widespread violations of the FCPA resulted in little prosecutorial credit. We examine this and other recent “princeling” cases and declinations, analyzing as well both the legal context of the very few litigated FCPA cases and recent corruption and insider trading cases for insight and guidance. We also consider the current political environment and assess its impact on FCPA enforcement. We conclude with lessons for companies trying to aggressively pursue business while complying with the law.*

Introduction..... 368

II. Current FCPA: Princeling Settlements et al..... 371

    A. FCPA Brief History ..... 371

    B. JPMorgan Settlement, November 17, 2016 ..... 373

    C. BNY Mellon and Qualcomm settlements ..... 379

    D. Declinations under the 2016 “Pilot Program” and its  
Extension..... 380

    E. Post-Princeling Settlements: Citigroup and Walmart?..... 383

III. Legal Context..... 384

    A. New Cases..... 385

        1. US v. Hoskins ..... 385

        2. Kokesh v. SEC ..... 386

        3. Bio Rad Whistleblower ..... 387

        4. PetroTiger ..... 389

    B. Non-FCPA decisions..... 390

        1. Skilling v. United States and Honest Services Fraud..... 390

        2. Redefining and restricting liability in public corruption  
cases ..... 391

            a) Blagojevich ..... 391

            b) McDonnell v. United States ..... 392

            c) O’Brien v. United States ..... 393

            d) Samson v. United States..... 394

            e) Silver ..... 396

        3. A Unanimous Supreme Court Affirms Liability in Insider  
Trading: Salman v. United States (2016)..... 397

        4. Looking at Over-Criminalization? Andersen, Bond and  
Yates ..... 400

IV. Political and Ethical Context ..... 403

V. Conclusion: Lessons Going Forward from the Princelings  
Settlements..... 408

## INTRODUCTION

The Foreign Corrupt Practices Act (FCPA), enacted by the U.S. Congress in 1977, criminalized the paying of bribes to foreign officials by individuals and entities from the United States as well as those whose transactions touched the United States.<sup>2</sup> Although prosecutions initially were very rare, their number increased substantially starting in 2007.<sup>3</sup>

In 2013, the government began investigating several U.S. companies with a pattern of hiring sons and daughters of public officials in China. Three years later, BNY and Qualcomm settled cases involving so-called “princeling” hiring programs.<sup>4</sup> During this time period, the Department of Justice (DOJ) also conducted an investigation of the “Sons and Daughters” hiring program at JPMorgan Chase and JPMorgan Securities (Asia Pacific) Limited (“JPMorgan APAC”) (a Hong Kong-based subsidiary of JPMorgan Chase & Co.) that lasted three years and included one hundred interns as well as full time employees hired based on referrals of foreign officials.<sup>5</sup>

In an interesting decision from a timing perspective, JPMorgan decided to resolve its dispute with the government in late November 2016, despite President-elect Trump’s public comments hostile to the FCPA in the past.<sup>6</sup> The company reached a \$264 million settlement agreement<sup>7</sup> regarding its

<sup>2</sup> 15 U.S.C. §§ 78dd-1-3 (2012).

<sup>3</sup> See *infra* note 19 and accompanying graph.

<sup>4</sup> See Beverley Earle & Anita Cava, *The “Princelings” and the Banks: When Does a Legitimate Business Practice Become Criminal Corruption in Violation of the Foreign Corrupt Practices Act?*, 37 NW. J. INT’L L. & BUS. 107, 114-16 (2016); Suzanne Barlyn, *U.S. Fines Qualcomm for Hiring Relatives of China Officials: SEC*, REUTERS (Mar. 1, 2016), <http://www.reuters.com/article/us-qualcomm-corruption-idUSKCN0W35G7>.

<sup>5</sup> Press Release, Dep’t of Just., JPMorgan’s Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme (Nov. 17, 2016), <https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>; Press Release, Sec. and Exchange Comm’n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016), <https://www.sec.gov/news/pressrelease/2016-241.html>. This enforcement action places JPMorgan on a “top ten Disgorgement list,” with the SEC calling \$130.5 million “disgorgement” and \$25 million “pre-judgment interest.” See Richard L. Cassin, *JPMorgan Lands on the FCPA Top Ten Disgorgement List*, FCPA BLOG (Nov. 23, 2016, 9:28 AM), <http://www.fcpablog.com/blog/2016/11/23/jpmorgan-lands-on-the-fcpa-top-ten-disgorgement-list.html>.

<sup>6</sup> See Sue Reisenger, *Trump Spoke Out Against Prosecuting Companies for Bribery*, CORP. COUNSEL (Nov. 10, 2016), <http://www.corpcounsel.com/id=1202772127968/Trump-Spoke-Out-Against-Prosecuting-Companies-for-Bribery> (discussing Trump’s May 2012 comments and showing video CNBC clip).

<sup>7</sup> Of that amount, \$72 million was to go to the Department of Justice (DOJ), \$130 million was to go to the Securities and Exchange Commission (SEC) and \$62 million was to go to the Federal Reserve. See Dep’t of Just., *supra* note 5; SEC, *supra* note 5; Press Release, Fed. Res., Federal Reserve Board Orders JPMorgan Chase & Co. to Pay \$61.9 Million Civil Money Penalty (Nov. 17, 2017), <https://www.federalreserve.gov/newsevents/press/enforcement/20161117a.htm>.

hiring individuals to obtain *quid pro quo* benefits from Chinese entities<sup>8</sup> and JPMorgan APAC signed a non-prosecution agreement (NPA),<sup>9</sup> despite reports that the case may not be completely over as some issues are still being investigated.<sup>10</sup>

Reportedly, other banks are still under review for their hiring practices in Asia.<sup>11</sup> In SEC filings, Citigroup recently disclosed an ongoing investigation “concerning compliance with Foreign Corrupt Practices Act and other laws . . . with respect to the hiring of candidates referred by or related to foreign government officials.”<sup>12</sup> In this instance, however, the country disclosed as involved was not China. It will not be a surprise if similar settlements follow.

CEO Jaime Dimon has made a passionate defense of the need to understand the importance of flexibility in doing business.<sup>13</sup> Recent commentators have expressed some sympathy for that argument:

JPMorgan was far from the first bank to use its princeling hires as leverage. According to a Bloomberg report, JPMorgan ramped up its hiring program after the bank lost a key deal to competitor Deutsche Bank in 2009. The daughter of the client’s chairman worked for Deutsche. It’s not hard to see how “quid pro quo” deals could be tempting for global banks operating in an often inhospitable market. Banking is a protected core industry under the Chinese Communist Party, and Western banks have been losing market share to domestic Chinese competitors over the last decade. Advisers to companies raising capital often come across sensitive corporate financial data—

<sup>8</sup> See Press Release, Dep’t of Just., *Letter to Attorney Mark F. Mendelsohn, Esq.*, (Counsel for JPMorgan) (Nov. 17, 2016), at 2, <https://www.justice.gov/opa/press-release/file/911206/download> (“certain senior executives and employees of the company conspired to engage in *quid pro quo* agreements with Chinese officials to obtain investment banking business, planned and executed a program to provide specific personal benefits to senior Chinese officials in the position to award or influence the award of banking mandates, and repeatedly falsified or caused to be falsified internal compliance documents in place to prevent the specific conduct at issue here.”).

<sup>9</sup> See Dep’t of Just., *supra* note 5.

<sup>10</sup> *Id.*

<sup>11</sup> See Aruna Viswanatha, *J.P. Morgan Settlement Lays Bare the Practice of Hiring “Princelings,”* WALL ST. J. (Nov. 17, 2016), <http://www.wsj.com/articles/j-p-morgan-to-pay-264-million-to-end-criminal-civil-foreign-corruption-cases-1479398628> (mentioning Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC Holdings, Morgan Stanley and UBS). See *infra* note 95 and accompanying text regarding Citigroup’s hiring practices.

<sup>12</sup> Richard L. Cassin, *Feds Investigate Citigroup for ‘Princeling’ Hiring Practices*, FCPA BLOG (Feb. 27, 2017, 7:08 AM), <http://www.fcpablog.com/blog/2017/2/27/feds-investigate-citigroup-for-princeling-hiring-practices.html>.

<sup>13</sup> See *infra* note 54 and accompanying text.

information Beijing may not want foreign banks to see.<sup>14</sup>

JPMorgan went to extreme lengths to obtain business from its Asian clients, reflecting a degree of insouciance about the enforcement of the FCPA that bears scrutiny and analysis. This paper attempts to examine this first and then considers consequent issues. One question is whether and how President Trump’s Department of Justice appointees will change the interpretation of the FCPA, thereby affecting settlement decisions. A more interesting question may be what will happen in future cases where the evidence is less damning than the apparent “smoking guns” in JPMorgan Chase emails, spreadsheets and faux-compliance policies. Would a referral of a candidate from either a foreign official or a well-connected foreign applicant be viewed as a normal course of business or a violation of federal law?

This paper will analyze current FCPA settlements and the sparse new case law. We will review recent decisions in the domestic legal environment for how *quid pro quo* is interpreted in the bribery and insider trading context to see if there is any analogy to the less-litigated FCPA context. We will look at cases with language regarding over-enforcement or criminalization of business conduct. In addition, we examine the political climate in light of the recent presidential election—including possible violations of election law prohibiting solicitations of “anything of value”<sup>15</sup>—for insight into FCPA enforcement. We conclude with some lessons for business gleaned from JPMorgan and other settlements and the broader legal environment.

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<sup>14</sup> Fan Yu, ‘Princeling’ Hirings Complicate Business in China for Global Banks, EPOCH TIMES (Mar. 1, 2017), <http://www.theepochtimes.com/n3/2227066-princeling-hires-complicate-global-banks-operations-in-china>.

<sup>15</sup> Bob Bauer, *Not Just a Personal Problem for Trump Jr.—Now Trouble for Trump Campaign and Trump Sr.*, JUST SECURITY (July 11, 2017, 12:11 PM), <https://www.justsecurity.org/43013/personal-problem-trump-jr-now-trouble-trump-campaign-trump-sr>:

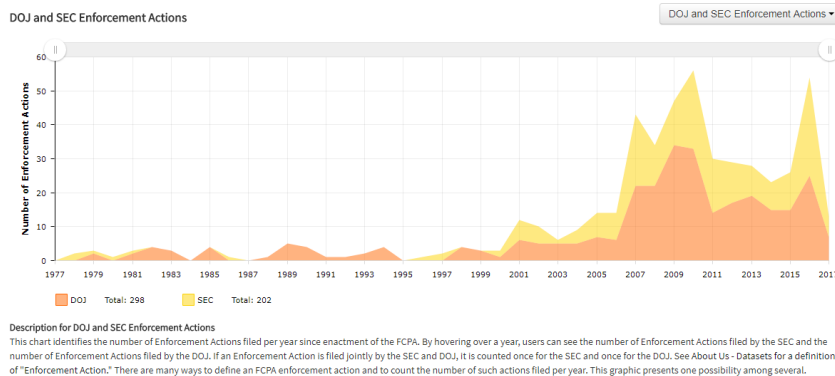
Under campaign finance regulations, the meeting could without question be considered a solicitation (at least under the facts so far known). The law defines a solicitation to include any request for a contribution, or “**anything of value**,” even if the request is implicit in the circumstances rather than expressly communicated. The regulations provide specifically that the solicitation “may be made directly or indirectly,” based on all relevant factors, including the “conduct of the persons involved in the communication.

(emphasis added).

## II. CURRENT FCPA: PRINCEING SETTLEMENTS ET AL.

### A. FCPA Brief History

The United States' Foreign Corrupt Practices Act (FCPA), passed in 1977, criminalized bribing foreign officials by offering them "anything of value" to assist in "obtaining or retaining business."<sup>16</sup> A section of the FCPA imposed additional obligations on publicly traded companies to maintain accurate books and records.<sup>17</sup> A violation of the books and records provision is easier to prove than the exchange of value for "obtaining or retaining business," a *quid pro quo* arrangement. The statute was not vigorously enforced until relatively recently, after the 1997 OECD Convention on Combating Bribery of Foreign Public Officials,<sup>18</sup> which reflected a growing international consensus on the corrosive corruption of bribery on economic development. This history is reflected in the statistics graphically displayed by Stanford researchers.<sup>19</sup>



In 2016, the U.S. government collected \$2.48 billion under the FCPA, the largest amount of money to date in one year.<sup>20</sup> The FCPA Blog reported the top ten biggest FCPA cases, including three new 2016 cases but not the

<sup>16</sup> 15 U.S.C. § 78dd-1(a) (2012).

<sup>17</sup> 15 U.S.C. § 78ff (2012).

<sup>18</sup> OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2011), [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf). For a discussion on how the OECD affected FCPA enforcement, see Beverley Earle & Anita Cava, *When is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT'L & COMP. L. Rev. 111, 142 (2013).

<sup>19</sup> DOJ and SEC Enforcement Actions, FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, <http://fcpa.stanford.edu/statistics-analytics.html> (last visited July 29, 2017).

<sup>20</sup> Richard L. Cassin, *The FCPA Enforcement Index*, FCPA BLOG (Jan. 3, 2017, 8:08 AM), <http://www.fcpcbog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html>.

## JPMorgan Chase case:

Siemens (Germany):	\$800 million, 2008
Alstom (France):	\$772 million, 2014
KBR/Halliburton (USA):	\$579 million, 2009
Teva Pharmaceutical (Israel):	\$519 million, 2016
Och-Ziff (USA):	\$412 million, 2016
BAE (UK):	\$400 million, 2010
Total SA (France):	\$398 million, 2013
VimpelCom (Holland):	\$397.6 million, 2016
Alcoa (USA):	\$384 million, 2014
Snamprogetti Netherlands B.V./ENI S.p.A (Holland/Italy):	\$365 million, 2010 <sup>21</sup>

Seven of the top ten include foreign companies, which fuels some international distrust that the United States' enthusiasm for this statute stems in part from a desire to punish foreign competitors.<sup>22</sup> This list also underscores the emerging effect of international cooperation in addressing bribery and corruption, notably the implementation of the UK Bribery Act<sup>23</sup> and increasingly zealous enforcement of national laws.<sup>24</sup> There is no doubt the last decade is a vastly different legal context from the early years of the FCPA.<sup>25</sup>

Thomas Fox, an influential FCPA blogger, dubbed 2016 the “Year in FCPA Corporate Enforcement” in his recently published book of the same

<sup>21</sup> Richard L. Cassin, *Teva Ranks Fourth on Our New Top Ten List*, FCPA BLOG (Dec. 27, 2016, 8:22 AM), <http://www.fcpablog.com/blog/2016/12/27/teva-ranks-fourth-on-our-new-top-ten-list.html>.

<sup>22</sup> See Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES (Sept. 3, 2012), <http://www.nytimes.com/2012/09/04/business/global/bribery-settlements-under-us-law-are-mostly-with-foreign-countries.html>.

<sup>23</sup> Bribery Act 2010, c. 23 § 7(2) (Eng.).

<sup>24</sup> See, e.g., Jason Jones, Amelia Medina & Kyle Sheahen, *After Odebrecht: Coordinated International Enforcement is the New Reality*, FCPA BLOG (Mar. 23, 2017, 7:08 AM), <http://www.fcpablog.com/blog/2017/3/23/after-odebrecht-coordinated-international-enforcement-is-the.html>; Michael Volkov, *Serious Fraud Office Makes Big Splash with UK Bribery Act Resolution with Rolls Royce*, CORRUPTION, CRIME & COMPLIANCE (Jan. 31, 2017), <https://blog.volkovlaw.com/2017/01/serious-fraud-office-makes-big-splash-uk-bribery-act-resolution-rolls-royce/>; Laura Clare & Rob Elvin, *Fighting Corruption and Fraud—the ICU and SFO*, ANTICORRUPTION BLOG (Apr. 6, 2016), <http://www.anticorruptionblog.com/uk-bribery-act/fighting-corruption-and-fraud-the-icu-and-sfo>.

<sup>25</sup> See, e.g., MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 31–38 (2014); Earle & Cava, *supra* note 4, at 111–12. For an understanding of FCPA enforcement over the last decade, see Thomas Fox, *Three Enforcement Weeks to Remember*, FCPA BLOG (Jan. 19, 2017, 12:56 PM), <http://www.fcpablog.com/blog/2017/1/19/tom-fox-three-enforcement-weeks-to-remember.html>; Cassin, *supra* note 20 (listing FCPA enforcement actions and amounts for the years 2008 through 2016).



title.<sup>26</sup> He underlines the flurry of enforcement activity between late December 2016 and President Trump's swearing-in-office in January of 2017, which amounted to almost "20 billion in fines and penalties" and exceeded what had been collected in the fiscal year 2016.<sup>27</sup> Fox suggests "[t]he reasons for the settlements vary from corporation to corporation but one overriding reason is certainty."<sup>28</sup> He also notes "timing" as a factor; companies that do not settle will have to negotiate with a whole new set of individuals.<sup>29</sup>

Knowing what the penalty might be provides certainty and often leads to a stock price rise.<sup>30</sup> It is worth noting, however, that Walmart appears to reject this fear of uncertainty as it has yet to make a deal with the government with respect to their longstanding bribery investigation.<sup>31</sup>

#### B. JPMorgan Settlement, November 17, 2016

JPMorgan Chase and its Asian entity started the "Sons and Daughters Program" in 2006 and ended it in 2013, when the government began its investigation.<sup>32</sup> As noted above, the entities entered into the close to quarter-billion-dollar settlement in late November 2016.<sup>33</sup> Prior to reaching the deal, JPMorgan fired six individuals and reportedly disciplined over twenty employees.<sup>34</sup> Interestingly, despite policy announcements promising

<sup>26</sup> THOMAS FOX, 2016 – THE YEAR IN CORPORATE FCPA ENFORCEMENT (2017); cf. Thomas Fox, *New Book Release: 2016 – The Year in Corporate FCPA Enforcement*, FCPA BLOG (May 26, 2017, 7:18 AM), <http://www.fcablog.com/blog/2017/5/26/new-book-release-2016-the-year-in-corporate-fcpa-enforcement.html>.

<sup>27</sup> See Fox, *supra* note 25.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* Perhaps companies have been guided by the common idiom: "Better the devil you know than the devil you don't."

<sup>30</sup> *Id.*; see also Sue Reisinger, *In Hectic Month, DOJ Rakes in Billions from Corporations*, CORP. COUNS. (Jan. 20, 2017), <http://www.corpcounsel.com/id=1202777331775/In-Hectic-Month-DOJ-Rakes-in-Billions-From-Corporations>.

<sup>31</sup> According to media reports in May 2017, Walmart is close to finalizing a \$300 million settlement with the government regarding FCPA violations in Mexico and Asia. This figure is about half of what was reportedly expected about six months ago, according to various sources. Tom Schoenberg, *Wal-Mart Close to Resolving Bribery Probe for \$300 Million*, BLOOMBERG (May 9, 2017, 3:40 PM), <https://www.bloomberg.com/news/articles/2017-05-09/wal-mart-said-close-to-resolving-bribery-probe-for-300-million>.

<sup>32</sup> See Ned Levin, *How a Chinese Company Pressed J.P. Morgan to Make Hires*, WALL ST. J. (Nov. 18, 2016, 3:08 PM), <https://www.wsj.com/articles/how-a-chinese-company-pressed-j-p-morgan-to-make-hires-1479498681>.

<sup>33</sup> See *supra* notes 6-10 and accompanying text. See also Earle & Cava, *supra* note 4, at 147-48.

<sup>34</sup> See Ben Prohess & Alexandra Stevenson, *JPMorgan Chase to Pay \$264 Million to Settle Foreign Bribery Case*, N.Y. TIMES (Nov. 17, 2016), [http://www.nytimes.com/2016/11/18/business/dealbook/jpmorgan-chase-to-pay-264-million-to-settle-foreign-bribery-charges.html?\\_r=0](http://www.nytimes.com/2016/11/18/business/dealbook/jpmorgan-chase-to-pay-264-million-to-settle-foreign-bribery-charges.html?_r=0) ("The bank . . . disciplined nearly two dozen employees and 'took

increased personal criminal liability in FCPA cases,<sup>35</sup> the DOJ did not pursue that option in this situation, even though there was particularly strong evidence of intent to garner business through the hiring program.<sup>36</sup> The DOJ describes the case in specific terms.

In 2006, responding to numerous requests from its clients, JPMorgan Chase and its Asian entities designed a “referral hiring” stream affording less-rigorous screening and less-demanding employment for targets of opportunity.<sup>37</sup> In the settlement agreement, the firm admitted that “[u]nder the revamped Client Referral Program, referred candidates for employment needed . . . a ‘[d]irectly attributable linkage to business opportunity’ to be considered for a job.”<sup>38</sup> A 2006 email regarding this policy makes clear that the firm both knew about and was concerned by the compliance issues arising under the program: “As you know, the firm does not condone the

significant employment action’ that led to the departure of six employees who participated in the misconduct.”).

<sup>35</sup> Memorandum from Sally Quillian Yates, Deputy Attorney General, to All United States Attorneys, et al. (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> (“Yates Memo”) (re: “Individual Accountability for Corporate Wrongdoing”). For more on the Yates Memo, see generally Leslie R. Caldwell, Assistant Att’y Gen., Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0>; *The Yates Memo*, FCPA PROFESSOR (Sept. 11, 2015), <http://fcpaprofessor.com/the-yates-memo>; *What Others are Saying About the “Yates Memo,”* FCPA PROFESSOR (Sept. 17, 2015), <http://fcpaprofessor.com/what-others-are-saying-about-the-yates-memo>.

<sup>36</sup> Yates made an impassioned argument that the DOJ would pursue individual criminal prosecutions in cases involving corporate fraud:

[R]egardless of how challenging it may be to make a case against individuals in a corporate fraud case, it’s our responsibility at the Department of Justice to overcome these challenges and do everything we can to develop the evidence and bring these cases. The public expects and demands this accountability. Americans should never believe, even incorrectly, that one’s criminal activity will go unpunished simply because it was committed on behalf of a corporation. We could be doing a bang-up job in every facet of the department’s operations – we could be bringing all the right cases and making all the right decisions. But if the citizens of this country don’t have confidence that the criminal justice system operates fairly and applies equally – regardless of who commits the crime or where it is committed – then we’re in trouble.

Sally Quillian Yates, Deputy Att’y Gen., Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>. Despite these promises, the number of FCPA enforcement actions dropped significantly following the Yates Memo. See Sharon Oded, *Yates Memo – Time for Reassessment?*, COMPLIANCE & ENFORCEMENT (Apr. 20, 2017), [https://wp.nyu.edu/compliance\\_enforcement/2017/04/20/yates-memo-time-for-reassessment/](https://wp.nyu.edu/compliance_enforcement/2017/04/20/yates-memo-time-for-reassessment/); Kristen Savelle, *FCPA Criminal Prosecutions One Year After the Yates Memo*, WALL ST. J.: RISK & COMPLIANCE BLOG (Oct. 7, 2016, 6:00 AM), <https://blogs.wsj.com/riskandcompliance/2016/10/07/fcpa-criminal-prosecutions-one-year-after-the-yates-memo/>; *The Yates Memo – One Year Later*, FCPA PROFESSOR (Sept. 12, 2016), <http://fcpaprofessor.com/yates-memo-one-year-later>.

<sup>37</sup> JP Morgan Chase & Co., Exchange Act Release No. 79, 355, at 5 (Nov. 17, 2016), <https://www.sec.gov/litigation/admin/2016/34-79335.pdf>.

<sup>38</sup> Dep’t of Just., *supra* note 8, at A-3-4, para. 12.

hiring of the children or other relatives of clients or potential clients of the Firm . . . for the purpose of securing or potentially securing business for the Firm. In fact, the Firm's policies expressly forbid this."<sup>39</sup>

Accordingly, in that same year, the firm developed a Compliance Questionnaire for the "Sons and Daughters" program with specific questions designed to assure that the intended hire had been appropriately vetted, had the necessary qualifications, and had been subjected to a screening process that included competitive applicants.<sup>40</sup> Without a doubt, however, the form was either completely ignored or filled out in advance, sometimes with the assistance of individuals charged with enforcing compliance rules within the bank.<sup>41</sup> For example, a question regarding the intended benefit to the firm of the intended hire was pre-filled with "no expected benefit".<sup>42</sup> In 2009, an email to a supervisor from a managing director stated:

One specific item that we may need your help is how to run a better sons and daughter program, which has almost a linear relationship with mandates in China. People believe [other investment banks] are doing a much better job. On the other hand, we J.P. Morgan have had a few disastrous cases which I can share with you later. We have more LoBs [lines of business] in China therefore in theory we can accommodate more 'powerful' sons and daughters that could benefit the entire platform.<sup>43</sup>

During the time period in question, "approximately 200 hires were made under the program, including almost 100 from referrals made by clients at Chinese SOEs [state-owned and controlled enterprises], which generated more than \$100 million revenue and at least \$35 million in profit for JPM APAC."<sup>44</sup>

A number of other emails were equally damaging. For example, regarding the hiring request of a Chinese executive of a private Chinese company, one JPMorgan executive in Hong Kong wrote: "I am supportive of bringing her on board given what's at stake. . . . how do you get the best

<sup>39</sup> *Id.* at A-4, para. 14.

<sup>40</sup> JP Morgan Chase & Co., Exchange Act Release No. 79, 355, at 6. (Nov. 17, 2016), <https://www.sec.gov/litigation/admin/2016/34-79335.pdf>.

<sup>41</sup> *Id.* at 6-7.

<sup>42</sup> Dep't of Just., *supra* note 8, at A-6, para. 18.

<sup>43</sup> *Id.* at A-6-7, para. 19.

<sup>44</sup> *Case Information: In the Matter of JPMorgan Chase & Co., FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE*, <http://fcpa.stanford.edu/enforcement-action.html?id=630> (last visited July 31, 2017).

*quid pro quo* from the relationship upon confirmation of the offer?”<sup>45</sup> The firm successfully secured the business. Unquestionably, such emails provided the proverbial “smoking gun” that directly linked business deals with accommodation of relatives’ expressed suggestions of employment.

Such language reflects textbook disregard for the requirements of the FCPA. Obviously, specifically referring to *quid pro quo* strategy eliminates any argument that such was not the intent. Indeed, the bank admitted that these hires did not meet minimum qualifications, even to the extent of recognizing that at least one of the hires functioned as a photocopier.<sup>46</sup> In addition, incriminating evidence included a spreadsheet created by the company to track the return on investment between particular hires and the resulting business.<sup>47</sup>

By 2011, the company had updated its Global Anti-Corruption Policy to include broad definitions that stated, “almost anything can meet the definition of a ‘bribe,’ including . . . internships [and] employment.”<sup>48</sup> The policy also stated, “[n]o employee may directly or indirectly offer, promise, grant or authorize the giving of money or anything else of value to a government official to influence official action or obtain improper action.”<sup>49</sup>

The investigation focused on occurrences before 2011 and details with specificity the “the corrupt use” of the program starting in 2007. JPMorgan Asia-Pacific Securities Ltd, JPMorgan APAC, and JPMorgan Chase & Co JPMC all acknowledged that they

conspired to engage in *quid pro quo* agreements with Chinese officials to obtain investment-banking business, planned and executed a program to provide specific personal benefits to senior Chinese officials in the position to award or influence that award of banking mandates, and repeatedly falsified or caused to be falsified internal compliance documents in place to prevent the specific conduct at issue . . . .<sup>50</sup>

As part of its settlement agreement, the company must report for three years on compliance programs and agreed to two follow-up “confidential” reviews to monitor compliance with the agreement.<sup>51</sup> It also agreed to address the deficiencies in compliance with a revamped monitoring program, training, internal investigation and enforcement, implementation

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<sup>45</sup> Dep’t of Just., *supra* note 8, at A-11, para. 33 (emphasis added).

<sup>46</sup> *See id.* at Att. A, para. 25.

<sup>47</sup> *Id.* at Att. A, para. 23.

<sup>48</sup> *Id.* at Att. A, para. 17.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 2.

<sup>51</sup> *Id.* at Att. C, 1-2.

of new policies, reviews and adequate procedures for mergers and acquisitions and third parties.<sup>52</sup>

Although JPMorgan did not “voluntarily and timely disclose,” the company earned cooperation credit from the government as a result of

conducting a thorough investigation, making regular factual presentations to the Offices, voluntarily making foreign-based employees available for interviews in the United States, producing documents to the Offices from foreign countries in ways that did not implicate foreign data privacy laws, and collecting, analyzing, and organizing voluminous information for the Offices.<sup>53</sup>

In a 2014 CNBC interview, Andrew Ross Sorkin asked JPMorgan Chase CEO Jamie Dimon about his company’s practice of hiring Chinese princelings. Dimon responded by implying it was common practice among banks and other large companies.

I think we’re trying to make decisions that try to make us as pure as possible, that we’re trying to do the right thing. And you know, I think the—I think everyone’s got to go look back at the rules, not just the banks by the way, this is, like—it’s been a norm of business for years that people hire, you know, ex government officials, they hire sons and daughters of companies, and give them proper jobs and don’t violate, you know, [the] Foreign Corrupt Practices Act. But we got to figure out exactly how to create a safe harbor for that so you don’t . . . [get] punished.<sup>54</sup>

Professor Mike Koehler, a critic of FCPA enforcement for straying too far from the law as written, has objected to the JPMorgan settlement.<sup>55</sup> In particular, he notes that the government made no findings regarding corrupt intent of individuals associated with JPMorgan, instead focusing on the

<sup>52</sup> *Id.* at Att. B, 1–7 (Corporate Compliance Program).

<sup>53</sup> *Id.* at 1.

<sup>54</sup> *CNBC Exclusive: CNBC Transcript: CNBC’s Andrew Ross Sorkin Sits Down with Jamie Dimon, JPMorgan Chase Chairman & CEO, Today*, (CNBC television broadcast Jan. 23, 2014), <https://www.cnbc.com/2014/01/23/cnbc-exclusive-cnbc-transcript-cnbc-andrew-ross-sorkin-sits-down-with-jamie-dimon-jpmorgan-chase-chairman-ceo-today.html>; see also Emily Glazer, Dan Fitzpatrick & Jean Eaglesham, *J.P. Morgan Knew of China Hiring Concerns Before Probe*, WALL ST. J. (Oct. 23, 2014, 11:56 AM), <https://www.wsj.com/articles/j-p-morgan-was-aware-of-overseas-hiring-concerns-before-u-s-probe-1413998056>; William K. Black, *Jamie Dimon: U.S. Must Create a “Safe Harbor” Where JPM’s Corruption is Not “Punished,”* NEW ECON. PERSPECTIVES (Oct. 24, 2014), <http://neweconomicperspectives.org/2014/10/jamie-dimon-u-s-must-create-safe-harbor-jpms-corruption-punished.html>.

<sup>55</sup> See generally Mike Koehler, *JPMorgan - A Trifecta of Off-the-Rails FCPA Enforcement*, 12 BLOOMBERG L. WHITE COLLAR CRIME REP. 1 (2017), <https://ssrn.com/abstract=2927327>.

intent of JPMorgan APAC.<sup>56</sup> Nonetheless, ignoring traditional agency theory the DOJ held JPMorgan responsible despite finding no individuals criminally culpable. Koehler also questioned what “thing of value” the Chinese officials received as well as the finding that the internships were a personal benefit to requesting officials.<sup>57</sup> According to Koehler, this broad interpretation of the law is simply not challenged as there is little to no judicial review of the government’s argument and analysis. In referring to this situation as “going off the rails,” Professor Koehler quotes former SEC chairman Arthur Levitt:

SEC regulators now suggest that such hiring overseas is a form of untoward influence, akin of bribing foreign officials to win business. This accusation is scurrilous and hypocritical. If you walk the halls of any institution in the U.S.—Congress, federal courthouses, large corporations, the White House, American embassies and even the SEC—you are likely to run into friends and family members of powerful and wealthy people.<sup>58</sup>

Koehler also quotes a *New York Times* columnist: “[b]ut hiring the sons and daughters of powerful executives and politicians is hardly just the province of banks doing business in China: it has been a time-tested practice here in the United States”<sup>59</sup> In announcing the settlement, exiting SEC Enforcement Director Andrew Ceresney noted, “some have argued that employment of a child, friend or relative could not possibly induce a foreign official to take action. Today’s action demonstrates the falsity of that assertion.”<sup>60</sup>

Subsequently, the Federal Reserve announced that it will go after two individual bankers serving as managing directors of J.P. Morgan Securities (Asia Pacific) Limited who were in charge. They will seek fines of \$1 million and \$500,000 respectively, and “permanent bans” from the banking industry.<sup>61</sup> Fang, the subject of the \$1 million fine, had reportedly said in

<sup>56</sup> *Id.* at 4.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 7–8 (quoting Arthur Levitt, Commentary, ‘Influence Peddling’ Makes the World Go Round, WALL ST. J. (Dec. 25, 2013, 3:55 PM), [http://www.wsj.com/news/articles/SB10001424052702304858104579262624243252560?mod=WSJ\\_Opinion\\_LEFTTopOpinion](http://www.wsj.com/news/articles/SB10001424052702304858104579262624243252560?mod=WSJ_Opinion_LEFTTopOpinion)).

<sup>59</sup> *Id.* at 8 (quoting Andrew Ross Sorkin, *Hiring the Well-Connected Isn’t Always a Scandal*, N.Y. TIMES: DEALBOOK (Aug. 19, 2013, 9:14 PM), <https://dealbook.nytimes.com/2013/08/19/hiring-the-well-connected-isnt-always-a-scandal/?mtrref=www.google.com&gwh=1A5D8BC92F50A22CDA50032F51EFFA0B&gwt=pay>).

<sup>60</sup> See Viswanatha, *supra* note 11.

<sup>61</sup> Press Release, Fed. Res., Federal Reserve Board Seeks to Fine and Prohibit Two Former Managing Directors at J.P. Morgan Securities (Asia Pacific) from Employment in Banking Industry (Mar. 10, 2017),

2009, “[y]ou all know I have always been a big believer of the sons and daughters program- it almost has a linear relationship with mandates, at least in China. We lost a deal to [a competitor] today because they got a chairman’s daughter work for them this summer. I am supportive to have our own program.”<sup>62</sup> He was reported to have approval power connected to hires.<sup>63</sup> Timothy Fletcher, the junior person, was also singled out and, according to the Fed, heard the business case for potential hires.<sup>64</sup> However, there have been no findings yet and Fang is planning to vigorously contest.<sup>65</sup>

### C. BNY Mellon and Qualcomm settlements

BNY Mellon entered into a settlement agreement over the SEC’s allegations of FCPA violations in hiring three interns between 2010 and 2011.<sup>66</sup> This case involved a much more limited set of facts than in JPMorgan. The three were relatives of government officials connected to a Middle East Sovereign Wealth Fund,<sup>67</sup> hired without interviews, and had not been eligible for the regular intern program because of their grade point average. Further, they were not enrolled in a graduate program.<sup>68</sup> Like the JPMorgan case, there were some incriminating emails, *e.g.*, “I want more money for this,” suggesting looking for an increase in deposits as a result of the favor.<sup>69</sup> The deposits then increased by \$689,000.<sup>70</sup> BNY made no admission of guilt but paid a total fine of \$14.8 million.<sup>71</sup>

Although Qualcomm did not admit or deny SEC findings, it settled with the SEC on March 1, 2016, for \$7.5 million for violating the FCPA when it

<https://www.federalreserve.gov/newsevents/pressreleases/enforcement20170310a.htm>; *see also* Richard L. Cassin, *Fed Seeks Lifetime Ban for Bankers Who Ran JP Morgan ‘Princeling’ Program*, FCPA BLOG (Mar. 13, 2017, 7:28 AM), <http://www.fcpablog.com/blog/2017/3/13/fed-seeks-lifetime-ban-for-bankers-who-ran-jp-morgan-princel.html>.

<sup>62</sup> Press Release, Fed. Res., Notice of Intent to Prohibit and Notice of Assessment, *In re Fang Fang*, Docket No. 17-006-E-I/CMP-I, at 5 (Mar. 9, 2017), <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20170310a1.pdf>.

<sup>63</sup> *Id.* at 4–5.

<sup>64</sup> Press Release, Fed. Res., Notice of Intent to Prohibit and Notice of Assessment, *In re Timothy Fletcher*, Docket No. 17-007-E-I/ CMP-I, at 5 (Mar. 9, 2017), <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20170310a2.pdf>.

<sup>65</sup> Cassin, *supra* note 61.

<sup>66</sup> *See* Press Release, SEC, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html>.

<sup>67</sup> The Bank of New York Mellon Corp., Exchange Act Release No. 75720, at 2 (Aug. 18, 2015), <https://www.sec.gov/litigation/admin/2015/34-75720.pdf>.

<sup>68</sup> *Id.* at 6.

<sup>69</sup> *Id.* at 5.

<sup>70</sup> *Id.* at 4.

<sup>71</sup> SEC, *supra* note 66.

hired relatives of foreign officials in China to increase the chances of being selected as a mobile technology provider.<sup>72</sup> There were only several identified instances of improper hires, but they were well-documented, including two interns deemed as “must place” or “g[iving] us great help for . . . new business development,” suggesting a return favor.<sup>73</sup> Qualcomm also gave a university \$75,000 for a research grant allowing the son of a Chinese foreign Official to stay in his Ph.D. program. A Qualcomm executive also personally loaned the son of a foreign official \$70,000 to buy a home.<sup>74</sup> The scope and organization of Qualcomm’s activities were only a fraction of JPMorgan’s, yet one can see that the CEO believed that reciprocal favors have long been a staple of business and the underlings at JPMorgan had been trying to systematize the messy process of doing favors in China to expand the business.

#### D. Declinations under the 2016 “Pilot Program” and its Extension

In April of 2016, the DOJ unveiled the Pilot Program, offering the possibility of a declination with voluntary disclosure, full cooperation and remedial compliance.<sup>75</sup> Although the DOJ has not issued its final report, it appears that twenty-two voluntary disclosures were made under this program between April 2016 and May 2017.<sup>76</sup> On March 10, 2017, the government announced an extension of the Pilot Program, with at least temporary effect.<sup>77</sup> According to Kristen Savelle of the *Wall Street Journal*:

Of the 18 entity groups that resolved FCPA claims with the DOJ during the first year of the pilot program, seven (or 39%) voluntarily disclosed their FCPA misconduct. . . . Fourteen of the 18 entity groups (78%) cooperated . . . and four entity groups (22%) partially

<sup>72</sup> Press Release, SEC, SEC: Qualcomm Hired Relatives of Chinese Officials to Obtain Business (Mar. 1, 2016), <https://www.sec.gov/news/pressrelease/2016-36.html>; Qualcomm Inc., Exchange Act Release No. 77261 (Mar. 1, 2016), <https://www.sec.gov/litigation/admin/2016/34-77261.pdf>.

<sup>73</sup> SEC, Qualcomm Hired Relatives, *supra* note 72.

<sup>74</sup> *Id.*

<sup>75</sup> Press Release, DOJ, Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program>; Sue Reisinger, *DOJ’s FCPA Pilot Program Wins Some White-Collar Praise, to a Point*, CORP. COUNS. (Apr. 14, 2017, 9:40 AM), <http://www.corpcounsel.com/id=1202783718706/DOJs-FCPA-Pilot-Program-Wins-Some-WhiteCollar-Praise-to-a-Point>; Ross Todd, *DOJ Sweetens Rewards for FCPA Cooperation*, RECORDER (Apr. 6, 2016, 5:51 PM), <http://www.therecorder.com/id=1202754323643>.

<sup>76</sup> Sue Reisinger, *FCPA Pilot Program Nets 22 Voluntary Disclosures in Past Year: DOJ*, NAT’L L.J. (May 17, 2017, 4:41 PM), <http://www.nationallawjournal.com/id=1202786528262/FCPA-Pilot-Program-Nets-22-Voluntary-Disclosures-in-Past-Year-DOJ>.

<sup>77</sup> Kristen Savelle, *The FCPA Pilot Program One Year Later*, WALL ST. J: Risk & Compliance J. (Apr. 19, 2017, 6:00 AM), <https://blogs.wsj.com/riskandcompliance/2017/04/19/the-fcpa-pilot-program-one-year-later/?mg=prod/accounts-wsj>.



cooperated. Similarly, 14 of the 18 entity groups (78%) voluntarily remediated flaws in their internal controls and compliance policies, while four entity groups (22%) partially remediated those flaws. The DOJ required nine of the 18 entity groups (50%) to retain an independent compliance monitor as a term of settlement.<sup>78</sup>

The scope of penalty reductions ranged from 50% to 30%; by comparison, the reductions for companies that did not self-report was 15-25%.<sup>79</sup> Of note, ten of the eighteen companies were foreign entities.

Although many lawyers see no harm in the program, the question really turns on quantifying the benefit. Indeed, corporate counsel still debate the wisdom of self-reporting. As one lawyer put it, the Pilot Program “does help to create some parameters ... but the biggest question—whether the Justice Department will decline or not—really is not defined in the program.”<sup>80</sup>

The DOJ will continue the program during its review.<sup>81</sup> Lanny Breuer, former Assistant Attorney General, commented, “[t]here are very desirable benefits to the program but they are still discretionary.”<sup>82</sup> He believes a problem with self-disclosure and cooperation is that a company may be asked to stop its internal investigation and let the government do the first interviews. In government speak, this is called “de-confliction.” He noted that asking publicly traded companies to stand down from an internal FCPA investigation is “an extraordinary request, in my view.”<sup>83</sup>

Our analysis of the five declinations offered by the DOJ in 2016<sup>84</sup> and

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

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

<sup>80</sup> See Reisinger, *supra* note 75.

<sup>81</sup> Richard L. Cassin, *DOJ Will Keep Pilot Program After April Expiry During Evaluation*, FCPA BLOG (Mar. 10, 2017, 11:28 AM), <http://www.fcpablog.com/blog/2017/3/10/doj-will-keep-pilot-program-after-april-expiry-during-evalua.html>.

<sup>82</sup> Samuel Rubinfeld, *Lanny Breuer Has Doubts About FCPA Pilot Program*, WALL ST. J.: Risk & Compliance J. (Oct. 26, 2016, 2:43 PM), <https://blogs.wsj.com/riskandcompliance/2016/10/26/lanny-breuer-has-doubts-about-fcpa-pilot-program>; see also -Richard L. Cassin, *Lanny Breuer: Pilot Program Falls Short*, FCPA BLOG (Oct. 28, 2016, 8:18 AM), <http://www.fcpablog.com/blog/2016/10/28/lanny-breuer-pilot-program-falls-short.html>.

<sup>83</sup> Rubinfeld, *supra* note 82.

<sup>84</sup> U.S. DEP'T OF JUSTICE, *In re Nortek, Inc.* (June 3, 2016), <https://www.justice.gov/criminal-fraud/file/865406/download> (DOJ Declination Letter to Nortek); U.S. DEP'T OF JUSTICE, *In re Akamai Tech, Inc.* (June 3, 2016), <https://www.justice.gov/criminal-fraud/file/865411/download> (DOJ Declination Letter to Akamai Technologies); U.S. DEP'T OF JUSTICE, *In re Johnson Controls, Inc.* (June 21, 2016), <https://www.justice.gov/criminal-fraud/file/874566/download> (DOJ Declination Letter to Johnson Controls); U.S. DEP'T OF JUSTICE, *In re HMT LLC* (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899116/download> (DOJ Declination Letter to HMT); U.S. DEP'T OF JUSTICE, *In re NCH Corp.* (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899121/download> (DOJ Declination Letter to NCH).

the two made public by mid-June 2017<sup>85</sup> reveals some tangible benefits of the Pilot Program. Focusing first on the 2016 group, each declination is specifically prefaced by a reference to the Pilot Program and then each lists the ways in which the target company met the requisite elements. Although the published Declination letters recite the different underlying facts, all give credit for: (a) prompt and voluntary self-disclosure; (b) thorough internal investigation; (c) “fulsome” cooperation, including identifying both the relevant facts and the individuals responsible for the wrongdoing; (d) enhanced compliance efforts; and (e) “full remediation” including termination of specific employees and, notably, high-level executives.

Of the five, *In re HMT LLC* offers the most detail, outlining a complex scheme involving transactions that hid commissions being paid to local agents for HMT, who funneled about \$500,000 to officials in Venezuela and China to secure business. According to the Declination, the company realized almost \$3 million in profits over a period of ten years, 2001–2011. Further, the letter refers to evidence, including emails, that U.S. based regional managers knew of these bribes being paid in both countries.<sup>86</sup>

June 16, 2017 marked the new administration’s first Declination with disgorgement with respect to a case involving foreign bribery,<sup>87</sup> followed the next week by a second, similar resolution, *In re CDM Smith*.<sup>88</sup> The first, *In re Linde*, concerned a subsidiary, Spectra, that had been purchased by Linde in 2006. Agents of that company made payments to public officials in the Republic of Georgia in connection with buying equipment used to make boron gas. As in the 2016 cases, the DOJ gave substantial credit to Linde for touching the requisite elements of the Pilot Program. Interestingly, “Linde trades on German stock exchanges . . . [b]ut neither it nor its U.S. entities have securities registered with the SEC.”<sup>89</sup>

Linde was ordered to disgorge its profit of \$1,430,000, Spectra’s profit of \$6,300,000, and \$3,415,000 that went to Georgian officials, a total of \$11,145,000<sup>90</sup> Linde had already segregated \$10 million, which the architects of the scheme were planning to pocket, so it was not a financially

<sup>85</sup> U.S. DEP’T OF JUSTICE, *In re Linde North America Inc.* (June 16, 2017), <https://www.justice.gov/criminal-fraud/page/file/976976/download> (DOJ Declination Letter to Linde North America); U.S. DEP’T OF JUSTICE, *In re CDM Smith* (June 21, 2017), <https://www.justice.gov/criminal-fraud/page/file/976976/download> (DOJ Declination Letter to CDM Smith).

<sup>86</sup> *In re HMT LLC*, *supra* note 84.

<sup>87</sup> *In re Linde*, *supra* note 85.

<sup>88</sup> *In re CDM Smith*, *supra* note 85.

<sup>89</sup> Richard Cassin, *Linde Pays \$11 Million for Declination with Disgorgement*, FCPA BLOG (June 20, 2017, 11:28 AM), <http://www.fcpablog.com/blog/2017/6/20/linde-pays-11-million-for-declination-with-disgorgement.html>.

<sup>90</sup> *In re Linde*, *supra* note 85.

difficult penalty. However, this declination with disgorgement is a new result in theory in that a declination involves no wrongdoing, but requiring disgorgement appears to suggest a penalty. It has been noted that three of the previous six declinations also involved non-issuers such as Linde.<sup>91</sup>

Lucinda Low is a legal powerhouse – formerly the President of the American Society of International Law and partner at Steptoe & Johnson LLP. It is interesting that such a knowledgeable practitioner is availing herself of this DOJ tool and going forward with self-disclosure although they had segregated the bulk of funds to disgorge and those who were out of pocket were the three executives planning to line their own pockets with ill-gotten gains. Sometimes when doing the right thing causes no financial pain, it is not a difficult choice.

A similar and familiar story is outlined in the Declination for CDM Smith, which secured about \$4 million in profits for contracts related to highway design and construction and water projects in India by paying about \$1.8 million in bribes to public officials.<sup>92</sup> Again, evidence revealed that senior managers of the firm knew that bribes were being paid to subcontractors, “who provided no actual services and understood that payments were meant to solely benefit the officials.”<sup>93</sup>

#### *E. Post-Princeling Settlements: Citigroup and Walmart?*

In February 2017, Citigroup announced it was being investigated for hiring practices<sup>94</sup> similar to those adopted by JPMorgan and Morgan Stanley. It is difficult to tell whether this is a minor situation of a half-dozen incidents or a more major scheme involving 200 or more hires and a much larger potential fine. The disclosure does not offer details other than Citigroup is cooperating and does not indicate whether there was self-disclosure.<sup>95</sup>

In October 2016, during the waning days of the Obama administration, Walmart purportedly rejected a proposal to pay \$600 million to settle the

<sup>91</sup> Cassin, *supra* note 89.

<sup>92</sup> *In re CDM Smith*, *supra* note 85.

<sup>93</sup> *Id.*

<sup>94</sup> See Cassin, *supra* note 12.

<sup>95</sup> The FCPA blog published the full text of the FCPA disclosure in Citigroup's SEC filing on February 24, 2017:

Government and regulatory agencies in the U.S., including the SEC, are conducting investigations or making inquiries concerning compliance with the Foreign Corrupt Practices Act and other laws with respect to the hiring of candidates referred by or related to foreign government officials. Citigroup is cooperating with the investigations and inquiries.

*Id.*

FCPA investigation that had dragged on for six years.<sup>96</sup> However, in May of 2017, reports surfaced that the parties were close to reaching a \$300 million settlement.<sup>97</sup> Walmart has spent \$840 million on the investigation into its compliance failures as well as in upgrading its compliance processes; currently, about 2,300 employees are involved in compliance operations.<sup>98</sup> Historically, an FCPA internal investigation takes an average of four years, but the process for Walmart has lasted about six years.<sup>99</sup>

The government's promises to act more efficiently are not new, but have been reiterated once again.<sup>100</sup> At a conference in early 2017, Trevor McFadden, DOJ Criminal Division Acting Principal Deputy Assistant Attorney General, spoke approvingly of executives who "want to get compliance right."<sup>101</sup> However, a recent Ernst & Young survey seems to contradict the notion of this being a pervasive attitude, as three-quarters of respondents indicate they "could justify unethical behavior if it would help business survive and 27% said using bribery to win contracts is a common practice in the business sector."<sup>102</sup>

### III. LEGAL CONTEXT

Understanding the legal context of FCPA enforcement requires a certain amount of imagination. Given the paucity of judicial pronouncements on a topic worthy of some serious comment,<sup>103</sup> scholars and counsel are forced to speculate on the strength of the government's legal case versus the cost of defending it. Other scholars have dissected the sparse record by analyzing the cases and opinion releases.<sup>104</sup> We will not do that, for those approaches

<sup>96</sup> Michael Addady, *Walmart Rejects Paying \$600 Million Settlement in Bribery Investigation*, FORTUNE (Oct. 7, 2016), <http://fortune.com/2016/10/07/Walmart-bribery>.

<sup>97</sup> Aruna Viswanatha & Sarah Nassauer, *U.S. Asks Wal-Mart to Pay \$300 Million to Settle Bribery Probe*, WALL ST. J. (May 9, 2017, 5:46 PM), <https://www.wsj.com/articles/u-s-asks-wal-mart-to-pay-300-million-to-settle-bribery-probe-1494366397>.

<sup>98</sup> *Id.*

<sup>99</sup> Reisinger, *supra* note 76.

<sup>100</sup> Sue Reisinger, *DOJ Pledges to Speed Up FCPA Investigations*, CORP. COUNS. (Apr. 19, 2017, 3:57 PM), <http://www.corpcounsel.com/id=1202784080772/DOJ-Pledges-to-Speed-Up-FCPA-Investigations>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See generally Earle & Cava, *supra* note 18 (discussing problems associated with interpreting the FCPA and similar laws given the lack of judicial opinions).

<sup>104</sup> See, e.g., Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 557–65 (2015); Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, B.Y.U. L. REV. 307, 317–19 (2015); Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 AM. CRIM. L. REV. 121, 123–28 (2014); Philip M. Nichols, *Are Facilitating Payments Legal?*, 54 VA. J. INT'L L. 127 (2013); Mike

have been sufficiently plumbed.<sup>105</sup> However, a spate of court cases in recent months offer interesting opportunities to analyze the FCPA. Because of the lack of cases litigated under the FCPA, we look to other areas of the law where we may be able explore analogies to the *quid pro quo* contemplated in FCPA for a crime.

### A. *New Cases*

#### 1. *US v. Hoskins*

Lawrence Hoskins, a former British executive of Alstom U.K. (based in Paris), was alleged to have employed consultants to bribe public officials in Indonesia in order to secure a \$118 million construction contract. Indicted by the U.S. government in 2013, Hoskins successfully argued that, as a non-resident foreign national, he could not be “charged with conspiracy to violate the Foreign Corrupt Practices Act or with aiding and abetting a violation of the FCPA, unless the government . . . show[s] that he acted as an agent of a ‘domestic concern’ or while physically present in the United States.”<sup>106</sup>

That the federal district court analyzed the jurisdictional framework of the FCPA and the legislative history of the statute to determine that the government’s attempt to impose liability on Hoskins directly, and not as an agent, runs afoul of limitations on accomplice liability established by *Gebardi v. United States* in 1932.<sup>107</sup> In that case, the Supreme Court held “that where Congress excludes a class of individuals from liability under a criminal statute, the government may not rely on accomplice theories of liability to prosecute those same individuals . . . [and] could not circumvent those limitations by charging Hoskins as an accomplice or co-

Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907 (2010).

<sup>105</sup> Koehler, *supra* note 104; see generally Philip M. Nichols, *The Good Bribe*, 49 U.C. DAVIS L. REV. 647 (2016); Philip M. Nichols, *The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act*, 53 HARV. J. ON LEGIS. 203 (2016); Matthew C. Stephenson, *Beware Blowback: How Attempts to Strengthen FCPA Deterrence Could Narrow the Statute’s Scope*, in THE RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2016); Andrew Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U. L. REV. 1365 (2014); Andrew B. Spalding et al., *3.14 Rio 2016 and the Birth of Brazilian Transparency*, in EXECUTIVE SUMMARY – GLOBAL CORRUPTION REPORT: SPORT (2016); Steve Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT’L L. 224 (1999).

<sup>106</sup> Ryan Rohlfesen & Joshua Asher, *No FCPA Jurisdiction Based Solely on Conspiracy and Accomplice Liability*, COURT RULES, FCPA BLOG (Apr. 22, 2016, 8:28 AM), <http://www.fcpcbog.com/blog/2016/4/22/no-fcpa-jurisdiction-based-solely-on-conspiracy-and-accomplice.html>; *United States v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. 2015).

<sup>107</sup> *Gebardi v. United States*, 287 U.S. 112 (1932).

conspirator.”<sup>108</sup>

The Second Circuit heard the appeal of this decision in March of 2017.<sup>109</sup> Commentators note that the DOJ has staked out a broad interpretation of its power to prosecute individuals associated with foreign companies with a U.S. entity even though no personal connection exists, even including this position in its official Guidance.<sup>110</sup> Accordingly, if the district court ruling is upheld, the government may have to rely more heavily on the Money Laundering Control Act (MLCA) in international bribery cases in the future.<sup>111</sup>

## 2. *Kokesh v. SEC*

In *Kokesh v. SEC*,<sup>112</sup> the Supreme Court resolved a split between the Tenth and the Eleventh Circuit Courts of Appeal regarding the SEC’s long-held position that disgorgement is not a penalty, but rather an equitable remedy intended to address ill-gotten gains.<sup>113</sup> The issue turned on a very interesting issue of public policy, namely identifying the underlying rationale for imposing disgorgement upon an SEC target. The unanimous Supreme Court agreed with the more conservative Eleventh Circuit, holding that “[d]isgorgement in the securities-enforcement context is a ‘penalty’ within the meaning of §2462, and so disgorgement actions must be commenced within five years of the date the claim accrues.”<sup>114</sup>

Although this was not an FCPA case, it has important ramifications as noted in the Stanford FCPA Clearinghouse:

Although disgorgement has been available as a monetary sanction since the 1970s, the SEC did not actually seek disgorgement in an FCPA action until *SC v. ABB Ltd.* in 2004. Since then, a large majority (122 of 178 or 60%) of the SEC’s FCPA enforcement actions have included disgorgement as a monetary sanction. In these 122 cases, the SEC sought over \$3.1 billion in disgorgement plus

<sup>108</sup> Rohlfen & Asher, *supra* note 106.

<sup>109</sup> *Second Circuit Hears Oral Argument in U.S. v. Hoskins*, FCPA PROFESSOR (Mar. 6, 2017), <http://fcpaprofessor.com/second-circuit-hears-oral-argument-u-s-v-hoskins/>.

<sup>110</sup> See U.S. DEP’T OF JUSTICE & U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11–14 (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [hereinafter RESOURCE GUIDE].

<sup>111</sup> Rohlfen & Asher, *supra* note 106.

<sup>112</sup> *Kokesh v. Sec. & Exch. Comm’n*, 137 S. Ct. 1635 (2017).

<sup>113</sup> *Id.*; see also George M. Clarke, *Kokesh v. SEC: Are Disgorgement Payments Still Deductible Under Code Section 162?*, BAKER MCKENZIE (June 23, 2017), <http://www.bakermckenzie.com/en/insight/publications/2017/06/kokesh-v-sec> (offering good background on *Kokesh*).

<sup>114</sup> *Kokesh*, 137 S. Ct. at 1639.

interest. When compared with the almost \$318 million that the SEC imposed in civil fines during the same period, it is clear that disgorgement has become a powerful tool in the SEC's arsenal.

The *Kokesh* decision has the potential to change the way the SEC approaches FCPA enforcement. Going forward, the SEC will have to focus on conduct and sanctions within the five-year statute of limitations period or seek tolling agreements from defendants, who may be less willing to comply in light of the Supreme Court's ruling. The decision may also result in pressure to resolve investigations more quickly in order to minimize potential limitations concerns, thereby also possibly reducing the agency's leverage in settlement negotiations.<sup>115</sup>

The impact of this decision will not be measured for several years.

### 3. *Bio Rad Whistleblower*

An interesting 2017 decision involves a former general counsel, Sanford Wadler, who sued Bio Rad Laboratories, Inc. for retaliatory termination in violation of the whistleblower protections of Sarbanes-Oxley and Dodd-Frank.<sup>116</sup> In 2013, Wadler had submitted a report to the Audit Committee revealing that company representatives were delivering free products as gifts to distributors in China.<sup>117</sup> Two years later, Bio Rad signed a NPA with the DOJ and paid \$55 million to conclude the ensuing FCPA investigation, with a \$14.35 million penalty for failure to maintain adequate books and records and failure to have adequate controls in Russia, and \$40.7 million as disgorgement to the SEC.<sup>118</sup> The calculations were based in part on the

<sup>115</sup> Email from FCPAC Mailing List, Supreme Court Tightens SEC's Ability to Seek Sanctions, (June 9, 2017, 1:16 PM) (on file with author); SULLIVAN & CROMWELL, LLP, *Kokesh v. SEC: U.S. Supreme Court Holds That a Five-Year Statute of Limitations Applies When the SEC Seeks Disgorgement in Enforcement Actions*, FCPA CLEARINGHOUSE (June 6, 2017), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Kokesh\\_v\\_SEC\\_US\\_Supreme\\_Court\\_Holds\\_That\\_a\\_Five\\_Year\\_Statute\\_of\\_Limitations\\_Applies\\_When\\_the\\_SEC\\_Seeks\\_Disgorgement\\_in\\_Enforcement\\_Actions.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Kokesh_v_SEC_US_Supreme_Court_Holds_That_a_Five_Year_Statute_of_Limitations_Applies_When_the_SEC_Seeks_Disgorgement_in_Enforcement_Actions.pdf).

<sup>116</sup> See Richard L. Cassin, *FCPA Whistleblower: Former Bio-RAD GC Awarded \$10 Million for Retaliatory Firing*, FCPA BLOG (Feb. 7, 2017, 7:53 AM), <http://www.fcpablog.com/blog/2017/2/7/fcpa-whistleblower-former-bio-rad-gc-awarded-10-million-for.html>; David Ruiz, *Ousted Bio-Rad GC Wins Whistleblower Case*, 123-28RECORDEE (Feb. 6, 2017, 8:20 PM), <http://www.therecorder.com/more-latest-news/id=1202778583134/Ousted-BioRad-GC-Wins-Whistleblower-Case>. For further background on the case, see *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005 (N.D. Cal. 2015).

<sup>117</sup> *Wadler*, 141 F. Supp. 3d at 1008-09.

<sup>118</sup> See Richard L. Cassin, *Bio-Rad Pays \$55 Million to Settle FCPA Offenses*, FCPA BLOG (Nov. 3, 2014, 1:46 PM), <http://www.fcpablog.com/blog/2014/11/3/bio-rad-pays-55-million-to-settle-fcpa->

\$35 million in profit, made both in China and in Russia, where agents for Bio Rad were paid commissions although they performed no services. Similar payments were made in Thailand and Vietnam.<sup>119</sup>

Despite Wadler's good job evaluation the previous year, Bio Rad asserted he had been fired for poor performance per a review dated July 2013. In fact, evidence showed that this assessment had been created one month *after* his termination, which itself happened shortly after he went to the Audit Committee.<sup>120</sup> Wadler had been with the company for twenty-four years and testified that its FCPA compliance program was only a "paper effort."<sup>121</sup>

In his opening statement, Wadler's counsel warned the jury that the defense would attempt to portray Wadler as clueless about compliance and an "FCPA slacker."<sup>122</sup> The company also offered evidence that Wadler seemed to be behaving in an erratic fashion and arguments that he had become a whistle-blower to avoid being held accountable for FCPA compliance failures.<sup>123</sup> Nonetheless, the jury's vote suggests the after-the-fact performance evaluation implied by metadata analysis persuaded the jury at least in part.<sup>124</sup> Further, as Wadler's counsel rhetorically asked on cross-examination of the company's external expert in trial: "[i]f Wadler's claims were so obviously without evidence, why did Davis Polk take five months to complete the investigation, generating billings of more than \$900,000?"<sup>125</sup>

After deliberating only three hours, the jury awarded Wadler \$2.9 million in back pay and stock options plus \$5 million in punitive damages.<sup>126</sup> Back pay damages were doubled per the provisions of Dodd-

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offenses.html.

<sup>119</sup> Press Release, DOJ, Bio-Rad Laboratories Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$14.35 Million Penalty (Nov. 3, 2014), <https://www.justice.gov/opa/pr/bio-rad-laboratories-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1435>.

<sup>120</sup> See Ruiz, *supra* note 116.

<sup>121</sup> David Ruiz, *Ousted GC Details 'Paper-Only' Compliance Program at Bio-Rad in Whistleblower Trial*, CORP. COUNS. (Jan. 18, 2017, 9:20 PM), <http://www.corpcounsel.com/id=1202777088503/Ousted-GC-Details-PaperOnly-Compliance-Program-at-BioRad-in-Whistleblower-Trial>.

<sup>122</sup> Cara Bayles, *Jury Awards Bio-Rad's Ex-GC \$8M for Retaliatory Firing*, LAW360 (Feb. 6, 2017, 10:12 PM), <https://www.law360.com/articles/888816/jury-awards-bio-rad-s-ex-gc-8m-for-retaliatory-firing>.

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

<sup>124</sup> See Ruiz, *supra* note 116.

<sup>125</sup> David Ruiz, *Davis Polk Partner Says Bio-Rad GC Kept Pushing Flimsy Claims*, AM. LAW. (Feb. 2, 2017, 4:18 PM), <http://www.americanlawyer.com/id=1202778339824/Davis-Polk-Partner-Says-BioRad-GC-Kept-Pushing-Flimsy-Claims>.

<sup>126</sup> See Ruiz, *supra* note 116; David Ruiz, *James Wagstaffe Defeated Bio-Rad with Storytelling*, CORP. COUNS. (Feb. 14, 2017, 5:52 PM), <http://www.corpcounsel.com/id=1202779172268/James-Wagstaffe-Defeated-BioRad-With-Storytelling>.



Frank, bringing the total to 10.8 million.<sup>127</sup> This case exposes the inner working of a company attempting to jettison an employee whom they blamed in part for this FCPA problem. It is unusual because the lawyer who could not find another job did not have much to lose, so he decided to sue the company. It shows some of the risk for employees involved in compliance if they deviate from the company's position. It also underscores the position companies find themselves in deciding whether to self-report while aware of rogue employees contemplating receiving a bounty as a whistleblower. The company has appealed the verdict.<sup>128</sup>

#### 4. *PetroTiger*

Gregory Weisman, general counsel of PetroTiger, received two years of probation after cooperating and wearing a wire to record a co-CEO of PetroTiger, Joseph Sigelman.<sup>129</sup> Allegedly, Weisman and the two co-CEOs of the company had used bribes in Colombia to win a \$39 million state contract. Both CEOs involved also pled guilty and received probation. Weisman was disbarred in New York (2014) and Pennsylvania (2015) and the SEC barred him from practicing before the Commission.<sup>130</sup> Of note in the DOJ's announcement:

The case was brought to the attention of the department through a voluntary disclosure by PetroTiger, which fully cooperated with the department's investigation. Based on PetroTiger's voluntary disclosure, cooperation, and remediation, among other factors, the department declined to prosecute PetroTiger.

No individuals went to jail based on these facts,<sup>131</sup> and many of the charges were dropped. This illustrates that even when there are cooperating witnesses, conviction of the charges the prosecutors initially brought may be difficult.<sup>132</sup> The pleas leave a lack of developed FCPA case law which

<sup>127</sup> See Bayles, *supra* note 122.

<sup>128</sup> Sue Reisinger, *Bio-Rad Appeals \$11 Million Verdict for Ousted General Counsel*, RECORDER (Oct. 23, 2017, 3:28 PM), <https://www.law.com/therecorder/sites/therecorder/2017/10/23/bio-rad-appeals-11-million-verdict-for-ousted-general-counsel/?slreturn=20180008221319> (the company alleges four errors including that Wadler's whistleblowing was not protected by Sarbanes-Oxley Act as well as "serious evidentiary errors").

<sup>129</sup> Richard L. Cassin, *SEC Bans Former PetroTiger GC*, FCPA BLOG (June 5, 2017, 7:18 AM), <http://www.fcpablog.com/blog/2017/6/5/sec-bans-former-petrotiger-gc.html>.

<sup>130</sup> *Id.*

<sup>131</sup> See Cassin, *supra* note 129.

<sup>132</sup> Compare Order Granting Motion to Dismiss, United States v. Enrique Faustino Aguilar, et al., (known as Lindsay Mfr.), No. CR 10-01031(A)-AHM (C.D. Cal. Dec. 1, 2011), <https://www.nacdl.org/criminaldefense.aspx?id=21772> (dismissing for prosecutor misconduct).

leads us to consider non-FCPA cases.

### B. *Non-FCPA decisions*

While some might argue cases that do not involve the FCPA are inapplicable, others believe that analogies are second best when there is a paucity of case law.<sup>133</sup> We turn to look at these cases because they elucidate *quid pro quo* in other contexts.

#### 1. *Skilling v. United States and Honest Services Fraud*

Much like the FCPA, the honest services fraud statute<sup>134</sup> was enacted to criminalize a certain type of behavior and, over the years, was very broadly interpreted to achieve the government's desired outcomes. In simple terms, the 1987 statute extended language of the mail and wire fraud statutes to specifically make it a crime to be involved in "a scheme or artifice to defraud another of the intangible right to honest services."<sup>135</sup> Over the next two decades,

[T]he federal Circuit Courts of Appeal . . . developed very different—and often inconsistent—standards to determine the existence of honest services fraud in the public sector and had virtually accepted the notion that a failure to honor fiduciary duties amounted to criminal corruption in the private sector.<sup>136</sup>

Jeffrey Skilling of Enron challenged his criminal conviction by arguing that the foundation for the government's prosecution, the honest services fraud statute, was unconstitutionally vague and therefore poisoned the entire case. In effect, Skilling won the philosophical war although he did not prevail in his personal battle: the Supreme Court limited the reach of the statute to "schemes to defraud involving bribes and kickbacks"<sup>137</sup> for both public and private actors. Skilling's prison sentence was reduced, but he was

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<sup>133</sup> See James Loonam, U.S. Attorney, PLI's The Foreign Corrupt Practices Act and International Anti-Corruption Developments 2017, April 24-25, 2017, N.Y., N.Y. (suggesting they make analogies to domestic bribery because there is not much FCPA case law) (on file with author); compare with Matthew Stephenson's criticism of this paper at ASIL Anti-Corruption Interest Group, University of Miami, Wharton and Bentley University conference on Controlling Corruption: Possibilities, Practicalities and Best Practices, January 13-14, 2017, Miami conference (questioning whether cases that were not FCPA ones were relevant) (on file with author).

<sup>134</sup> 18 U.S.C. § 1346 (2012).

<sup>135</sup> *Id.*

<sup>136</sup> Earle & Cava, *supra* note 4, at 127 (citing Anita Cava & Brian M. Stewart, *Quid Pro Quo Corruption is "So Yesterday": Restoring Honest Services Fraud After Skilling and Black*, 12 U.C. DAVIS BUS. L.J. 1, 7-9 (2012)).

<sup>137</sup> *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010).

not released from jail.<sup>138</sup>

Obviously, the tangible conduct now required for pursuing criminal corruption under the honest services fraud is possibly a new thread in the tapestry of future FCPA enforcement. The egregious language of the JPMorgan Chase emails – particularly the remarkably careless use of *quid pro quo* in discussing the expected benefits of employing a particular relative<sup>139</sup> – seems to meet this rather concrete and strict standard set up for a similar sort of criminal statute. We speculate that the language used in future efforts to obtain or retain business in creative ways will be subjected to a very high degree of scrutiny by compliance personnel and/or the emerging suites of computer programs being designed for that purpose.<sup>140</sup>

## 2. *Redefining and restricting liability in public corruption cases*

### a) *Blagojevich*

Another interesting analogy to the Princlings predicament presented by doing business abroad in the current hyper-competitive environment is found in a 2015 Seventh Circuit Court of Appeals decision, *United States v. Blagojevich*.<sup>141</sup> In that case, the appellate court considered the bases for former Governor of Illinois Rod Blagojevich's conviction (overturning four of the eighteen convictions) and offered insight into the distinction between "corruption" and "patronage." In the court's view, the explicit offer of a job or an opportunity in exchange for something of value, such as money, is criminal behavior.<sup>142</sup> On the other hand, the court explained that "political logroll[ing]" involves the rather expected "swap of one official act for another."<sup>143</sup> In effect, the decision recognized the reality of the political world of deal-making and the necessity of exchanging favors to accomplish

<sup>138</sup> See Dominic Rushe, *Enron's Jeffrey Skilling Sees Jail Sentence Reduced to 14 Years*, GUARDIAN (June 21, 2013, 5:01 PM), <https://www.theguardian.com/business/2013/jun/21/enron-jeff-skilling-sentence-reduced>.

<sup>139</sup> See *supra* note 45 and accompanying text.

<sup>140</sup> For example, IBM is developing its Watson technology in the regulatory and compliance environment to help promote adherence to business standards and detect departures from same by analyzing language in emails and other communications. Presentation by J. Torney and E. Herbst, "Cognitive Computing and Compliance" to UM Business Ethics Program Compliance Network on April 14, 2016 (on file with the author.) See also Robert Kugel, *IBM Watson and Cognitive Compliance*, VENTANA RESEARCH (Jan. 2, 2017, 10:30 PM), <https://robertkugel.ventanaresearch.com/ibm-watson-and-cognitive-compliance-1>.

<sup>141</sup> *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015).

<sup>142</sup> *Id.* at 739.

<sup>143</sup> *Id.* at 735. See also *Earle & Cava*, *supra* note 4 at 129–31.

desired goals.<sup>144</sup> While *Blagojevich* specifically involves public sector decision-making, it offers the opportunity to consider the hiring of well-educated and well-connected relatives of influential figures in the international private business sector from another perspective. However, at his resentencing, Blagojevich's fourteen-year sentence was not altered. We wonder whether CEO Dimon's plea for a degree of understanding and flexibility in this arena might find some support when viewed through the *Blagojevich* lens.

*b) McDonnell v. United States*

In June of 2016, a unanimous (8-0) Supreme Court reversed the conviction of former Virginia Governor Robert McDonnell and his wife,<sup>145</sup> who had been charged with honest services fraud and Hobbs Act violations for taking \$175,000 in gifts from a businessman seeking favors for his business of nutritional supplements. The government alleged that the governor had performed "official acts" interpreting Section 201 of the federal bribery statute in exchange for the gifts.<sup>146</sup> The District Court convicted, and the Fourth Circuit affirmed. The Supreme Court, however, rebuked the prosecutors and the lower courts by holding that merely setting up a meeting for a constituent does not rise to the level of a federal violation, especially given no state statute prohibiting gifts to elected officials at the time.

Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an "official act." In the Government's view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*.<sup>147</sup>

The Court found this too broad an interpretation.

There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes and ball gowns. It is instead with the broader legal implications of the

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<sup>144</sup> See *Blagojevich*, 794 F.3d at 735 ("A political logroll . . . is the swap of one official act of another. . . Governance would hardly be possible without these accommodations, which allow each public official to achieve more of his principal objective while surrendering something about which he cares less, but the other politician cares more strongly.")

<sup>145</sup> *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

<sup>146</sup> *Id.* at 2357–58.

<sup>147</sup> *Id.* at 2372.

Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.<sup>148</sup>

c) *O'Brien v. United States*

In another legal context, three Boston Department of Probation employees appealed their convictions<sup>149</sup> prosecuted by Carmen Ortiz, who has submitted her resignation.<sup>150</sup> A three-judge panel reversed the convictions December 19, 2016.<sup>151</sup> The First Circuit Court of Appeals refused to hear the appeal brought by prosecutors, thus letting the reversal of the convictions stand.<sup>152</sup>

The three were alleged to have rigged the hiring system in the Probation Department to curry favor with legislators, which led to increased funding of the department. They had been charged with RICO violations and Mail Fraud at the Massachusetts Office of the Commissioner of Probation (OCP). The court ruled:

Although the actions of the defendants may well be judged distasteful, and even contrary to Massachusetts personnel laws, the function of this court is limited to determining whether they violated the federal criminal statutes charged. We find that the Government overstepped its bounds in using federal criminal statutes to police the hiring practices of these Massachusetts state officials and did not provide sufficient evidence to establish a criminal violation of Massachusetts law under the Government's theory the case.<sup>153</sup>

Quoting the *McDonnell* case, the court noted: "the Supreme Court has warned against interpreting federal laws 'in a manner that . . . involves the Federal Government in setting standards' of 'good government for local and

<sup>148</sup> *Id.* at 2375.

<sup>149</sup> *United States v. Tavares*, 844 F.3d 46 (1st Cir. 2016); *see also* Milton Valencia, *Appeals Court Overturns Convictions in Probation Department Scandal*, BOSTON GLOBE (Dec. 19, 2016), <https://www.bostonglobe.com/metro/2016/12/19/appeals-court-overturns-convictions-probation-department-scandal/1SKDBY2QaVi3BVlqXAoK0K/story.html>.

<sup>150</sup> *See* Bob McGovern, *Carmen Ortiz to Step Down as U.S. Attorney*, BOSTON HERALD (Dec. 21, 2016), [http://www.bostonherald.com/news/local\\_coverage/herald\\_bulldog/2016/12/carmen\\_ortiz\\_to\\_step\\_down\\_as\\_us\\_attorney](http://www.bostonherald.com/news/local_coverage/herald_bulldog/2016/12/carmen_ortiz_to_step_down_as_us_attorney).

<sup>151</sup> *Tavares*, 844 F.3d at 49.

<sup>152</sup> Valencia, *supra* note 150.

<sup>153</sup> *Tavares*, *supra* note 152.

state officials.’’<sup>154</sup> The Court found no link between a “thing of value” conferred on an official and an official act.<sup>155</sup>

O’Brien is arguably distinguishable from the JPMorgan case, which involves a publicly traded company and subsidiary subject to the FCPA involved with referrals of relatives of foreign officials. The “thing of value” is a job, although there is a question whether this is a benefit to the official. That question has not been decided as JP Morgan settled rather than litigated the matter.

*d) Samson v. United States*

In a case that prosecutors referred to as the ultimate betrayal of the public’s trust in government, an individual with a long record of distinguished service pled guilty to having used the power of his office to “pressure” United Airlines to offer a non-stop flight from Newark, New Jersey to South Carolina.<sup>156</sup> David Samson, former New Jersey Attorney General and Chairman of the Port Authority Board, acknowledged having bribed the airline through its lobbyist and agent “solely because Samson wanted it to travel to his house” there.<sup>157</sup> Samson suggested the route, formerly offered by Continental Airlines, be reinstated in September of 2011. United considered the possibility and rejected it as unprofitable shortly thereafter. Conveniently for Samson, the Port Authority Board was scheduled to consider United’s request to build a maintenance hangar at Newark Airport at its November 2011 meeting.<sup>158</sup> As in the JPMorgan case, emails turned out to be the downfall of the parties involved.

Samson wrote [Jamie Fox, a paid consultant and lobbyist for United Continental Holdings] that he was “reviewing current Board agenda items of interest.” Referring to the hangar agreement, Fox suggested to Samson that “[m]aybe it needs further review!!!!,” to which Samson responded “[y]es, it’s already off this month’s agenda: I hate

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<sup>154</sup> *Id.* at 54.

<sup>155</sup> *Id.* at 55.

<sup>156</sup> Press Release, DOJ, Former New Jersey Attorney General and Chairman of the Port Authority Board of Commissioners Pleads Guilty to Bribery (July 14, 2016), <https://www.justice.gov/usao-nj/pr/former-new-jersey-attorney-general-and-chairman-port-authority-board-commissioners-pleads>.

This kind of case shakes public confidence in our institutions of government when people who are so accomplished, and who have occupied so many positions of public trust, misuse their authority to get something for themselves,” U.S. Attorney Fishman said. “It’s a betrayal of our trust and what we have the right to expect from those in public life and it makes the job of every honest public employee just that much harder.

*Id.*

<sup>157</sup> *Id.*

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

myself.” Following through on this exchange with Fox, Samson caused the hangar agreement to be removed from the Port Authority Board’s agenda.<sup>159</sup>

Similar sorts of communications ensued over the next few weeks, culminating in the following:

[T]he day before the Port Authority Board’s [December] meeting, Samson sent Fox an email telling him that Samson had given instructions to remove the hangar agreement from the agenda. Fox responded that he thought it was a good time to put the agreement back on the agenda and Samson agreed to do so. The Port Authority Board then considered the hangar agreement on Dec. 8, 2011 and approved it. Fox later emailed Samson: “Finally have their [United’s] attention. Having item off/on this week worked,” referring to the hangar agreement.<sup>160</sup>

This sort of pressure to obtain something “of value,” a personally convenient route deemed unprofitable by the airline, offers support for the analysis under consideration. Yet, once again, the case is relatively straightforward due to chatter through emails, leaving little room for doubting the misuse of official authority.

David Samson, a former New Jersey Attorney General, distinguished lawyer, and close confidant of Governor Christie appointed to the Port Authority, pled guilty to bribery for pressuring United Airlines to reinstate a discontinued unprofitable airline route to his vacation home in South Carolina.<sup>161</sup> In return, Samson secured approval for United’s hangar expansion in New Jersey. United Airlines was not prosecuted; however, it cooperated and paid \$2.25 million to settle securities violations of books and records and entered into a Non-Prosecution Agreement.<sup>162</sup> Samson, seventy-seven years old and in poor health, was sentenced to one year of home confinement and paid a fine of \$100,000.<sup>163</sup> The SEC order stated:

United violated Section 13(b)(2)(B) of the Exchange Act because, despite the significant potential corruption risks surrounding its

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

<sup>160</sup> *Id.*

<sup>161</sup> *See id.* *See also* United Continental Holdings, Inc., Exchange Act Release No. 79454 (Dec. 2, 2016), <https://www.sec.gov/litigation/admin/2016/34-79454.pdf>; Patrick McGeehan, *David Samson, a Christie Ally, is Sentenced to Home Confinement*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/nyregion/david-samson-bribery-port-authority-new-jersey.html>.

<sup>162</sup> *United Continental Holdings, Inc.*, Release No. 79454, *supra* note 162, at 3.

<sup>163</sup> *See* McGeehan, *supra* note 162.

dealings with public officials, United failed to design and maintain a system of internal accounting controls that was sufficient to prevent its officers from approving the use of United's assets in connection with the South Carolina Route in violation of United's Policies, which prohibited the use of assets for corrupt purposes. The ethics code in effect in 2011 provided that employees wishing to act in ways prohibited by the ethics code could request approval for an exception. In this instance, no exception was requested or granted. Indeed, the CEO was able to approve the South Carolina Route outside United's normal process because United lacked adequate controls to reasonably ensure that prior to authorization of the Transaction an exception was obtained from the Director of Ethics and Compliance or United's Board of Directors as required by United's Policies. The failure to seek such prior authorization of the Transaction—which required a written submission and any approval to be in writing—also caused United to violate Section 13(b)(2)(A) of the Exchange Act because its books and records did not, in reasonable detail, accurately or fairly reflect the South Carolina Route Transaction.<sup>164</sup>

The *Samson* case did not become ensnared in the *McDonnell* problem of no clear *quid pro quo*. In this case, an unprofitable route that continued to lose almost \$1 million was reinstated for the personal benefit of the powerful chairman of the New Jersey Port Authority. It was corruption at its clearest—it rarely looks like this.

*e) Silver*

In a “startling”<sup>165</sup> development resulting from the June 2016 *McDonnell* decision, the Second Circuit Court of Appeals made headline news in July of 2017 when it reversed the 2015 corruption conviction of New York State Assemblyman Sheldon Silver. The panel announced that *McDonnell* changed the legal definition of corruption and, as a result, tainted the trial court's jury instructions defining corruption in Silver's case.<sup>166</sup> The issue of *quid pro quo* came into focus once again as Silver (who was once the speaker of New York legislature) had his conviction reversed.<sup>167</sup> He had been convicted of honest services fraud, money laundering, and extortion in

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<sup>164</sup> *United Continental Holdings, Inc.*, Release No. 79454, *supra* note 162, at 2.

<sup>165</sup> Benjamin Weiser, *Sheldon Silver's 2015 Corruption Conviction is Overturned*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/nyregion/sheldon-silvers-conviction-is-overturned.html>.

<sup>166</sup> *United States v. Silver*, 864 F.3d 102, (2d Cir. 2017).

<sup>167</sup> *Id.* See also Weisser, *supra* note 166.



two schemes where favors were exchanged for over \$4 million in referral fees.<sup>168</sup> For example, in response to a favor for a doctor, the doctor referred mesothelioma patients to a law firm. The jury instruction did not incorporate the not-yet-issued *McDonnell* ruling.<sup>169</sup> Mr. Silver was sentenced to twelve years in prison. The three-judge panel found the jury instruction insufficient and that “a properly instructed jury might have reached a different conclusion.”<sup>170</sup> His counsel had argued at the time “there was no quid pro quo.”<sup>171</sup> The Court also used the *Skilling* case as a guide.

“Prosecutors were concerned from the start that the *McDonnell* decision would allow a lot of reprehensible behavior to go unpunished and that seems to be exactly what happened here. . . . This indeed may be the beginning of a parade of horrors.”<sup>172</sup> This line of cases suggests that there must be a specific action traded for money or other value. One nonprofit executive, Noah Bookbinder, states the obvious: These cases now provide

a blueprint to corrupt officials. They’ll understand that if you give \$50,000 or a Rolex watch, all I have to do is say I will introduce you to some people and it will be O.K. . . . Everybody will learn the language of corruption. It will still be a bribe, but it will fall outside anything that is technically illegal.<sup>173</sup>

The federal appeals court overturned the convictions in the Dean and Adam Skelos case, where the former Republican majority leader received five years in prison for attempting to use his office to benefit his son.<sup>174</sup> The *McDonnell* fallout may continue.

### 3. A Unanimous Supreme Court Affirms Liability in Insider Trading: *Salman v. United States* (2016)

In December 2016, the Supreme Court decided *Salman v. United States*,<sup>175</sup> unanimously (8-0 due to Justice Scalia’s death) reaffirming its

<sup>168</sup> *Silver*, No. 864 F.3d, at 104.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Weisser, *supra* note 166.

1. <sup>172</sup> ALAN FEUER, *SILVER MAY START ‘PARADE OF HORRIBLES’ OUT OF MCDONNELL CASE, CRITICS SAY*, N.Y. TIMES (JULY 13, 2017), [HTTPS://WWW.NYTIMES.COM/2017/07/13/NYREGION/SHELDON-SILVER-BOB-MCDONNELL.HTML](https://www.nytimes.com/2017/07/13/nyregion/sheldon-silver-bob-mcdonnell.html).

(quoting Peter R. Zeidenberg former public corruption prosecutor).

<sup>173</sup> *Id.*

<sup>174</sup> *United States v. Skelos*, 707 F. App’x 733 (2d Cir. 2017); see also Weisser, *supra* note 166; Feuer, *supra* note 173.

<sup>175</sup> *Salman v. United States*, 137 S. Ct. 420 (2016).

1980 decision in *Dirks v. SEC*<sup>176</sup> and settling a recent difference between two Circuit Courts of Appeal regarding the proof required to convict in insider trading cases. Maher Kara, a Citigroup investment banker, discussed his work with his brother, Michael Kara. Michael helped Maher understand some of the science germane to his work and investments. Without telling Maher, Michael traded on the relevant information and also gave it to their brother-in-law, Bassam Salman. Maher discovered this, but continued communicating with his brother, thereby enabling Michael to make over \$1.5 million in trades that he split with Salman.<sup>177</sup> Both Michael and Maher pled guilty to insider trading, but their brother-in-law went to trial. Salman was convicted and faced a 36-month sentence and \$730,000 in restitution.<sup>178</sup>

The Court upheld the conviction, providing an analysis relevant to the exchange of favors. Referring to *Dirks*, it stated:

In particular, we held that “[t]he elements of fiduciary duty and exploitation of nonpublic information also exist *when an insider makes a gift of confidential information to a trading relative or friend.*” In such cases, “[t]he tip and trade resemble trading by the insider followed by a gift of the profits to the recipient.”

Our discussion of gift giving resolves this case. Maher, the tipper, provided insider information to a close relative, his brother. *Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to “a trading relative,” and that rule is sufficient to resolve the case. . . .<sup>179</sup> (citations omitted).

The Court further stated that inside information given to a friend or relative is the equivalent of a cash gift.<sup>180</sup>

The Supreme Court went out of its way to clarify that the *Newman* case, where certiorari was denied, is not controlling: “to the extent the Second Circuit held that the tipper must also receive something of a ‘pecuniary or similar valuable nature’ in exchange for a gift to family or friends, we agree with the Ninth Circuit that this requirement is inconsistent with *Dirks*.”<sup>181</sup> *Salman* does not involve the FCPA, which focuses on offering “something of value . . . to obtain or retain business” – an exchange or *quid pro quo*. The JPMorgan settlement had admissions in emails outlining expected *quid pro quo*; therefore, despite early press that JPMorgan might vigorously

<sup>176</sup> 463 US 646 (1983).

<sup>177</sup> *Salman*, 137 S. Ct. at 424.

<sup>178</sup> *Id.* at 425.

<sup>179</sup> *Id.* at 427.

<sup>180</sup> *Id.* at 428.

<sup>181</sup> *Id.* (internal citation omitted).

defend the method of business of hiring friends to help business,<sup>182</sup> they decided to settle. No doubt it would have cost more to litigate and arguably the bank had already cleaned up its procedures since 2013.

In another case, *U.S. v. Mathew Martoma*, the United States Court of Appeals for the Second Circuit reaffirmed the 2014 conviction of the SAC Capital trader for using insider information from a doctor regarding a drug trial.<sup>183</sup> Martoma was a portfolio manager at S.A.C. Capital Advisors, Steven Cohen's hedge fund, where he was responsible for investments in pharmaceutical and healthcare.<sup>184</sup> Martoma paid consulting fees to two doctors who were involved in an Alzheimer's drug (bapineuzumab) trial.<sup>185</sup> The doctors violated their contract by sharing confidential non-public information. Although there were some promising results for a few participants in the drug trial, the majority of them saw no benefit.<sup>186</sup> Martoma knew this information, but the public did not until Dr. Gilman presented the results of the study at an International conference on July 29, 2008. The share price of the two participating companies declined by 42% and 12%.<sup>187</sup>

Because Martoma had advance knowledge, trading activity led to "\$80.3 million in gains and \$194.6 million in averted losses for SAC. Martoma personally received a \$9 million bonus based in large part on his trading activity in Elan and Wyeth."<sup>188</sup> Martoma argued "that his conviction should still be reversed under *Newman* because *Salman* did not overrule *Newman*'s requirement that a tipper have a "meaningfully close personal relationship" with a tippee to justify the inference that a tipper received a personal benefit from his gift of inside information." (citations omitted.)<sup>189</sup> However, in a two to one decision, the Second Circuit disagreed with Martoma's argument and went one step further, stating:

We conclude that the logic of *Salman* abrogated *Newman*'s "meaningfully close personal relationship" requirement and that the district court's jury instruction was not obviously erroneous. Further,

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<sup>182</sup> See *supra* note 54 and accompanying text.

<sup>183</sup> *United States v. Martoma*, 869 F.3d 58 (2d Cir. 2017); see also Jonathan Stempel, *SAC Capital's Martoma Fails to Overturn U.S. Insider Trading Conviction*, REUTERS (Aug. 23, 2017, 10:11 AM), <https://www.reuters.com/article/us-sac-insidertrading-martoma/sac-capitals-martoma-fails-to-overturn-u-s-insider-trading-conviction-idUSKCN1B310Q>.

<sup>184</sup> See *Martoma*, 869 F.3d at 61.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 62.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 62-3.

<sup>189</sup> *Id.* at 69.

any instructional error would not have affected Martoma's substantial rights because the government presented overwhelming evidence that at least one tipper received a financial benefit providing confidential information to Martoma.<sup>190</sup>

The court affirmed the conviction. However, after *Salman*, the Second Circuit's interpretation of the test for insider trading may be challenged in other cases.<sup>191</sup>

#### 4. *Looking at Over-Criminalization? Andersen, Bond and Yates*

Prosecutorial zeal can be dangerous in a context where over 90% of cases are plea-bargained.<sup>192</sup> If only the Rajaratnams of the world can afford to pay eight figure counsel fees and go to trial, what hope does the small business owner have to challenge the government's view?<sup>193</sup> An extreme critique of the system is found in *Three Felonies a Day: How the Feds Target the Innocent*, a book by Harvey A. Silverglate, with a forward by Alan M. Dershowitz.<sup>194</sup> While Silverglate has the perspective of a defense counsel, he makes an important point that is especially relevant in the FCPA context: cases generally are settled rather than tried before a judge, thus the government's view of the statute has been untested in the courts.<sup>195</sup>

Several cases in a non-FCPA context illustrate Silverglate's argument. In particular, in *Arthur Andersen LLP v. U.S.*,<sup>196</sup> the Supreme Court unanimously reversed a trial court conviction that had been upheld by the Fifth Circuit Court of Appeals. Arthur Andersen had surrendered their CPA license, which effectively put them out of business. The reversal, though gratifying, was too late. The Court stated:

As Enron Corporation's financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention

<sup>190</sup> *Id.* at 61.

<sup>191</sup> *Id.*

<sup>192</sup> LINDSEY DEVERS, U.S. DEP'T OF JUST.: BUREAU OF JUST. ASSISTANCE, PLEA & CHARGE BARGAINING (Jan. 24, 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

<sup>193</sup> Walter Pavlo, *The High Cost of Mounting a White-Collar Criminal Defense*, <https://www.forbes.com/sites/walterpavlo/2013/05/30/the-high-cost-of-mounting-a-white-collar-criminal-defense/#47799e4110bd> (discussing the forty million dollars Rajaratnam allegedly spent on his nine-week); cf. Jonathan Stempel, *Galleon's Rajaratnam Loses Bid to Cut Insider Trading Sentence*, REUTERS (Mar. 3, 2017, 2:02 PM), <http://www.reuters.com/article/us-usa-crime-rajaratnam-idUSKBN16A2DX> (discussing hedge fund mega-star's demise).

<sup>194</sup> See HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

<sup>195</sup> *Id.*

<sup>196</sup> 544 U.S. 696 (2005).

policy. A jury found that this action made petitioner guilty of violating 18 U. S. C. §§ 1512(b) (2) (A) and (B). These sections make it a crime to “knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.” The Court of Appeals for the Fifth Circuit affirmed. We hold that the jury instructions failed to convey properly the elements of a “corrup[t] persua[sion]” conviction under § 1512(b), and therefore reverse.<sup>197</sup>

The prosecutor charged Andersen with violations of Sections 1512(b)(2)(A) and (B), part of the witness tampering provisions, which provide in relevant part:

Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.

In this case, our attention is focused on what it means to “knowingly . . . corruptly persuad[e]” another person “with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.”<sup>198</sup>

The Court clarified that:

[a] “knowingly . . . corrup[t] persuaude[r]” cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.<sup>199</sup>

It is not criminal to have a document retention policy that requires periodic disposal of material. It is one thing to be ill-advised and another to be criminal. The vigilance born of the Enron debacle engendered prosecutorial overreach that was modified by the courts. In 2014, the

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<sup>197</sup> *Id.* at 698.

<sup>198</sup> *Id.* at 703.

<sup>199</sup> *Id.* at 708.

Supreme Court struck again with a unanimous decision written by Justice Roberts in *United States v. Bond*.<sup>200</sup> The Court found that the Chemical Weapons Convention Implementation Act of 1998 did not reach a “local crime: an amateur attempt by a jilted wife to injure her husband’s lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. . . . [I]t does not cover the unremarkable local offense at issue here.”<sup>201</sup>

The aggrieved wife was persistent, and she tried twenty-four times to injure the husband’s lover using different compounds. She was charged with a myriad of offenses including mail theft, mail tampering, and a chemical weapons charge (18 U.S.C. § 229 (9)).<sup>202</sup> She was convicted and sentenced to six years in federal prison, five years supervised release, a \$2,000 fine and \$9,902.79 restitution.<sup>203</sup> The Court reversed stating, “[i]n sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon.”<sup>204</sup> There was nothing funny about the wife’s action, but state law was sufficient to charge her with an offense without overcharging her with a disproportionate crime.

However, in 2015, the Supreme Court waded into waters that humorously and tangibly illustrate the problem of over-criminalization in *Yates v. U.S.*,<sup>205</sup> The Eleventh Circuit affirmed the conviction of a boat captain, finding that under 18 U.S.C. § 1519 of Sarbanes-Oxley, an undersized fish that was destroyed fell within the definition of “tangible object” forbidden from destruction under the statute.<sup>206</sup> The grouper ordered put back in the sea was undersized by several inches, but when the Captain was charged – a full thirty-two months after the incident – the regulation had been changed, and the grouper – if caught on this subsequent date – would not be undersized.<sup>207</sup> The Captain had been sentenced to only thirty days imprisonment with three years’ supervised release, but he would still

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<sup>200</sup> 134 S. Ct. 2077 (2014).

<sup>201</sup> *Id.* at 2083.

<sup>202</sup> *Id.* at 2085.

<sup>203</sup> *Id.* at 2085–86.

<sup>204</sup> *Id.* at 2093. S.

<sup>205</sup> 135 S. Ct. 1074 (2014); *see also* Dahlia Lithwick, *Scales of Justice*, SLATE (Nov. 5, 2014, 6:54 PM),

[http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2014/11/supreme\\_court\\_fish\\_destruction\\_of\\_evidence\\_case\\_jokes\\_outrage\\_and\\_hating.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2014/11/supreme_court_fish_destruction_of_evidence_case_jokes_outrage_and_hating.html) (discussing Supreme Court Justices’ questions and jokes at the oral argument of the case addressing the disposal of fish).

<sup>206</sup> *Yates*, 135 S. Ct. at 1078.

<sup>207</sup> *Id.* at 1080.

have a criminal record.<sup>208</sup> He appealed to the Supreme Court. The Court found, although not unanimously, “[f]or the reasons stated, we resist reading § 1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be. Leaving that important decision to Congress, we hold that a ‘tangible object’ within § 1519’s compass is one used to record or preserve information.”<sup>209</sup>

Reason seemed to prevail that a fish was not meant to be covered by Sarbanes-Oxley. The jokes at oral argument, however, covered the very serious issue of prosecutorial overcharging and how hapless individuals may be caught.<sup>210</sup> In these cases, the Supreme Court worked as a check on interpretation of statutes in a manner that defied common sense. While the prosecutors have not taken such extreme positions on FCPA interpretation, it would be helpful if more case law existed to delineate a thing “of value” and clarify *quid pro quo* in this context. Helping business acquaintances’ friends get jobs is commonplace in business; having case law clarifying where the line is would remove the uncertainty. Nonetheless, JPMorgan’s calculated comprehensive sons and daughters program probably would have been found to be a violation of the FCPA despite the question of how a job to a son is of value to the foreign official parent.<sup>211</sup> However, because there was a settlement, we do not definitively know this, and it is unlikely that companies will risk litigating this question further. After lengthy negotiations, and despite a large settlement in November 2016, JPMorgan announced a record profit in July of 2017.<sup>212</sup>

#### IV. POLITICAL AND ETHICAL CONTEXT

Donald Trump confounded all the pundits by winning the electoral vote in the 2016 Presidential election, which determines the outcome, while losing the popular vote, which is not dispositive. The new administration’s determination to deliver on myriad campaign promises made to its conservative base has provoked unprecedented commentary and even resistance. The ongoing national conversation

<sup>208</sup> *Id.* at 1080–81

<sup>209</sup> *Id.* at 1088–89.

<sup>210</sup> See Lithwick, *supra* note 206; see also SILVERGLATE, *supra* note 195 (commenting on prosecutor discretion and how that combined with plea bargaining allows many untested constructs of a statute be imposed on individuals who are unable to afford the cost or the punishment accompanying the risk of losing at trial).

<sup>211</sup> See Koehler, *supra* note 55, at 4.

<sup>212</sup> Hugh Son, *JPMorgan Just Had the Most Profitable Year in the History of Banking*, BLOOMBERG (July 14, 2017, 7:29 AM), <https://www.bloomberg.com/news/articles/2017-07-14/jpmorgan-proves-wall-street-bank-profits-don-t-depend-on-traders>; cf. Jamie Dimon Rails Against the State of US Politics, BBC NEWS (July 14, 2017), <http://www.bbc.com/news/business-40613169> (discussing Jamie Dimon’s concerns about business environment).

about the proposed “Trumpcare” bill, which was defeated in the Senate, has resulted in even further polarization between political parties.<sup>213</sup> Similarly, concerns about rolling back protections for immigrants, the environment, and even voting rights have dominated the news and fascinated commentators and satirists alike.<sup>214</sup> Nonetheless, there has been little notable comment regarding the new administration’s attitude toward the FCPA.<sup>215</sup> However, despite President Trump’s previous hostile comments about the FCPA,<sup>216</sup> Attorney General Jeff Sessions recently affirmed his support for enforcing the FCPA, stating:

One area where this is critical is enforcement of the Foreign Corrupt Practices Act (FCPA). Congress enacted this law 40 years ago, when some companies considered it a routine expense to bribe foreign officials in order to gain business advantages abroad. This type of corruption harms free competition, distorts prices, and often leads to substandard products and services coming into this country. It also increases the cost of doing business and hurts honest companies that don’t pay these bribes. Our department wants to create an even playing field for law-abiding companies. We will continue to strongly enforce the FCPA and other anti-corruption laws. Companies should succeed because they provide superior products and services, not because they have paid off the right

<sup>213</sup> See, e.g., Sandro Galea *The Dysfunction Behind Trumpcare Explained*, FORTUNE (Mar. 28, 2017), <http://fortune.com/2017/03/28/trumpcare-acha-aca> (discussing the outrage among citizens and the split between Republicans on early plans to repeal and replace the existing health care law); Robert Schlesinger, *You Can March But You Can’t Hide, So GOPers Hide*, U.S. NEWS & WORLD REPORT (July 5, 2017, 10:10 AM), <https://www.usnews.com/opinion/thomas-jefferson-street/articles/2017-07-05/republicans-keep-ducking-voters-on-trumpcare-repeal-of-obamacare> (“The festering disaster known as Trumpcare, the GOP’s shambling attempt to ‘repeal-and-replace’ Obamacare, is so radioactively unpopular that it’s barely an exaggeration at this point to say that lawmakers scarcely dare show their faces in public.”); Tom Jensen, *Health Care a Mine Field for Republicans; Many Trump Voters in Denial on Russia*, PUBLIC POLICY POLLING (July 18, 2017, 11:04 AM), <http://www.publicpolicypolling.com/main/2017/07/health-care-a-mine-field-for-republicans-many-trump-voters-in-denial-on-russia.html>.

<sup>214</sup> See, e.g., *President Trump is Making Satire Great Again*, ECONOMIST (Feb. 11, 2017), <https://www.economist.com/news/united-states/21716628-though-some-comedians-find-his-tendency-defy-parody-hard-handle-president-trump>; Marisa Guthrie, *Seth Meyers on the “Frustrating” Challenge of Keeping up with Trump*, HOLLYWOOD REP. (Apr. 20, 2017, 6:30 AM), <http://www.hollywoodreporter.com/news/seth-meyers-frustrating-challenge-keeping-up-trump-993354>; Avi Selk, *What Stephen Colbert Really Thinks About Donald Trump*, WASH. POST (May 22, 2017), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/05/22/stephen-colbert-on-how-he-does-comedy-under-a-petty-and-venal-trump-administration/?utm\\_term=.f1e933e986f6](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/05/22/stephen-colbert-on-how-he-does-comedy-under-a-petty-and-venal-trump-administration/?utm_term=.f1e933e986f6).

<sup>215</sup> For an early prediction of how the Trump administration might enforce the FCPA, see Robert J. Anello & Peter Janowski, *Corporate FCPA Enforcement in the Era of Trump*, L.J. NEWSL. (May 2017), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/05/01/corporate-fcpa-enforcement-in-the-era-of-trump/?slreturn=20170708145725>.

<sup>216</sup> See Sue Reisenger, *Trump Spoke Out Against Prosecuting Companies for Bribery*, CORP. COUNS. (Nov. 10, 2016, 12:00 AM), <http://www.corpcounsel.com/printerfriendly/id=1202772127968> (discussing Trump’s May 2012 comments and showing CNBC video clip).



people.<sup>217</sup>

As noted above, JPMorgan settled the case after the election, despite hostile comments about the statute made by Trump in 2012.<sup>218</sup>

Trump engaged in an initial honeymoon period with Preet Bharara, the U.S. Attorney for New York City at the time of the election, asking Bharara to continue to serve in his position.<sup>219</sup> As a New Yorker himself, Trump would have been familiar with Bharara's aggressive, high-profile and generally successful prosecutions against white collar criminals, including Raj Rajaratnam.<sup>220</sup> Within a few months, however, Bharara found himself out of a job when he, along with many of the U.S. Attorneys appointed by former President Obama, was asked to resign.<sup>221</sup> For reasons that are still unclear, Bharara refused the request to resign and was fired the next day.<sup>222</sup> Soon after, reports surfaced that Bharara had been overseeing an investigation involving questionable stock trades by Tom Price, Trump's Secretary of the Department of Health and Human Services.<sup>223</sup> There is no indication, however, that the FCPA is a concern in this particular context, or in the context of other investigations involving members of the Trump administration. Nonetheless, it may be significant that the DOJ's newly appointed compliance counsel, Hui Chen, resigned in a rather surprising and noisy departure in June 2017, writing an unusual post on LinkedIn stating she could not work for an administration whose compliance policies she would find unacceptable in a business.<sup>224</sup> Apparently, Chen was well received by the businesses she dealt with, according to an in-depth report

<sup>217</sup> Att'y Gen. Jeff Sessions, Remarks at the Ethics and Compliance Annual Conference (Apr. 24, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>.

<sup>218</sup> See Reisenger, *supra* note 217 (discussing Trump's May 2012 comments and showing video CNBC clip).

<sup>219</sup> See Melissa Fares & Nate Raymond, *Trump to Keep Manhattan Federal Prosecutor Bharara in Post*, REUTERS (Nov. 30, 2016, 12:31 PM), <http://www.reuters.com/article/us-usa-trump-bharara-idUSKBN13P2BI>.

<sup>220</sup> Cf. Stempel, *supra* note 194.

<sup>221</sup> See Charlie Savage & Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. TIMES (Mar. 10, 2017), [https://www.nytimes.com/2017/03/10/us/politics/us-attorney-justice-department-trump.html?\\_r=1](https://www.nytimes.com/2017/03/10/us/politics/us-attorney-justice-department-trump.html?_r=1).

<sup>222</sup> Charlie Savage & Maggie Haberman, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html>.

<sup>223</sup> See Robert Faturechi, *Fired U.S. Attorney Preet Bharara Said to Have Been Investigating HHS Secretary Tom Price*, PROPUBLICA (Mar. 17, 2017, 2:13 PM), <https://www.propublica.org/article/preet-bharara-fired-investigating-tom-price-hhs-stock-trading>.

<sup>224</sup> Joey Godoy, *DOJ Compliance Counsel Quits, Cites Administration Ethics*, LAW360 (July 3, 2017, 4:06 PM), <https://www.law360.com/articles/940857/doj-compliance-counsel-quits-cites-administration-ethics>.

by Bloomberg in the summer of 2016.<sup>225</sup> Upon her exit, Chen stated:

First, trying to hold companies to standards that our current administration is not living up to was creating a cognitive dissonance that I could not overcome. . . .

[I] felt not only hypocritical, but very much like shuffling the deck chair on the Titanic . . . . [O]n my mind were the numerous lawsuits pending against the President of the United States for everything from violations of the Constitution to conflict of interest, the ongoing investigations of potentially treasonous conducts, and the investigators and prosecutors fired for their pursuits of principles and facts . . . . Those are conducts I would not tolerate seeing in a company, yet I worked under an administration that engaged in exactly those conduct. I wanted no more part in it.<sup>226</sup>

She had been greeted by the legal community with modest praise because of her understanding of business reality and there was hope that she would be a moderating force in investigations.<sup>227</sup> Trump later nominated former Sullivan & Cromwell partner Jay Clayton to head the SEC. This sends a mixed signal on the FCPA because Clayton co-authored a paper presented at a 2011 meeting of the New York City Bar Committee on International Business Transactions titled *The FCPA and Its Impact on International Business Transactions — Should Anything Be Done to minimize the Consequences of the U.S.’s Unique Position on Combatting Offshore Corruption?*<sup>228</sup> It states:

This paper explores these questions and concludes with the findings that (1) the United States has pursued, and is currently pursuing, a virtually stand-alone approach to deterring foreign corruption (at least in terms of enforcement activity and the significance of fines

<sup>225</sup> Che Odom, *DOJ Compliance Expert Brings Different Touch, Attorneys Say*, BLOOMBERG BNA (July 1, 2016), <https://www.bna.com/doj-compliance-expert-n57982076377>.

<sup>226</sup> Sonam Sheth, *‘A Cognitive Dissonance That I Could Not Overcome’: The DOJ Corporate Fraud Watchdog Says She Resigned Because of Trump*, BUS. INSIDER (July 3, 2017, 12:03 PM), <http://www.businessinsider.com/hui-chen-justice-department-corporate-fraud-watchdog-resigns-trump-2017-7>.

<sup>227</sup> Matthew Stephenson, *NYU Roundtable on the DOJ Fraud Section’s New “Corporate Counsel”*: *The Video and Some Thoughts*, GLOBAL ANTICORRUPTION BLOG (Nov. 25, 2015), <https://globalanticorruptionblog.com/tag/hui-chen>.

<sup>228</sup> *The FCPA and its Impact on International Business Transactions—Should Anything be Done to Minimize the Consequences of the U.S.’s Unique Position on Combatting Offshore Corruption?*, NEW YORK CITY BAR INT’L BUS. TRANSACTIONS COMM. (2011), <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf>; see also Walter Olson, *To Head SEC, Trump Picks a FCPA Critic*, OVERLAWYERED (Jan 5, 2017), <https://www.overlawyered.com/2017/01/head-sec-trump-picks-fcpa-critic>.

and other sanctions), (2) this approach places significant costs on companies that are subject to the FCPA as compared to their competitors that are not—i.e., there is a significant asymmetry in regulation and enforcement—and (3) if these circumstances are unlikely to change (e.g., through a substantial portion of other relevant countries adopting similar enforcement postures), **the United States should reevaluate its approach to the problem of foreign corruption.**<sup>229</sup>

No doubt the landscape has changed since 2011; the UK Bribery Act and significantly increased international cooperation and enforcement have resulted in a global shift toward more symmetry. One need only consider the top ten FCPA enforcement actions to see seven foreign companies and conclude that the facts are now different from when Clayton penned that paper.<sup>230</sup> Clayton's confirmation hearings were uneventful and, subsequent to his confirmation in May of 2017, the industry focused more on their agenda of creating a uniform standard for fiduciary obligations, revisiting standards on investment advisors put in place by the Obama administration.<sup>231</sup> Research reveals no mention of FCPA coming to light.

The renegade Republican faction that tried to gut the independent Office of Congressional Ethics received a rare rebuke from Trump, the public, and other legislators.<sup>232</sup> Ultimately, they were unsuccessful. Trump's response may have been more about their poor timing, which may have jeopardized his legislative priorities including repeal of the Affordable Care Act, rather than his disagreement with their position. Accordingly, this incident does not necessarily add any insight into the new administration's approach to the FCPA.

We also note that generally shared assumptions about ethics and transparency are of concern given that Trump still has not released his tax returns. Finally, we must underline that questions surrounding the ethics of "donations for favors" are percolating in this administration's view of this business practice. A book recently getting more attention explored Donald

<sup>229</sup> NEW YORK CITY BAR, *supra* note 229, at 3 (emphasis added).

<sup>230</sup> Cassin, *supra* note 21.

<sup>231</sup> Mark Schoeff, Jr., *After His Confirmation as SEC Chairman, Jay Clayton is Urged to Tackle Fiduciary Standard*, INVESTMENT NEWS (May 2, 2017, 5:48 PM), <http://www.investmentnews.com/article/20170502/FREE/170509974/after-his-confirmation-as-sec-chairman-jay-clayton-is-urged-to>; Bourree Lam, *Trump Picks Jay Clayton to Head the SEC*, ATLANTIC (Jan. 4, 2017), <https://www.theatlantic.com/business/archive/2017/01/jay-clayton-sec/512171>.

<sup>232</sup> *Republican Congressmen Retreat From an Attempt to Gut the Office of Congressional Ethics*, ECONOMIST (Jan. 5, 2017), <http://www.economist.com/news/united-states/21713848-or-how-lose-votes-and-irritate-people-republican-congressmen-retreat-attempt>.

Trump's son-in-law's alleged family donation to Harvard to secure his acceptance,<sup>233</sup> a notion that Jamie Dimon discussed in the context of business hiring.<sup>234</sup> This may augur a similar interpretation of acceptability for hiring of foreign officials' offspring under certain circumstances in the future.

#### V. CONCLUSION: LESSONS GOING FORWARD FROM THE PRINCELINGS SETTLEMENTS

In considering lessons going forward, we note with interest the very recent and unanimous Supreme Court decisions regarding insider trading and public corruption examined above. These seem to offer the “benefit of the doubt” approach to criminal liability, focusing on a close nexus in the former and an emphasis on the letter rather than the spirit of the law in the latter.

Obviously, there is no such judicial guidance except through the untested settlements with respect to the “innovative” but problematic employment arrangements developed by JPMorgan Chase and other banks. Further, our research reveals little governmental appetite to actually enforce the threat of individual prosecution promised by the Yates memo. With respect to JPMorgan Chase and other institutions struggling to succeed in a peculiarly narrow environment, one must recognize and address the obvious: relatives of an elite business class are often those with access to the best education and experience opportunities. Accordingly, particularly robust and appropriate hiring procedures are required to avoid the expense and distraction of the investigations considered here.

A compliance checklist such as the one developed by JPMorgan Chase is a worthy tool if properly employed. Any candidate for hire must include the normal scrutiny of qualifications, comparison to cohorts, disclosure of ties and conflicts, etc. Indeed, in particularly sensitive situations, monitoring of conflicts should be on-going.

We will have to review the information provided by JPMorgan in their filings during the requisite time period. We assume they have been remediating the situation before the settlement announcement and that their internal efforts continue.

It is surprising that technologically sophisticated companies do not have

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<sup>233</sup> See DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* (2006); see also Daniel Golden, *The Story Behind Jared Kushner's Curious Acceptance into Harvard*, PROPUBLICA (Nov. 18, 2016, 2:00 PM), <https://www.propublica.org/article/the-story-behind-jared-kushners-curious-acceptance-into-harvard>.

<sup>234</sup> See *supra* note 54 and accompanying text.

better email review. Computer programs currently on the market effectively red-flag language in emails.<sup>235</sup> Although the spreadsheet was a significant “smoking gun,” it seems obvious that without the offending emails, the DOJ’s investigation of JPMorgan may have concluded with a much smaller penalty. In view of the more restrictive stance on public corruption liability discussed above, we wonder whether there may be legal ways to help foreign officials’ children? A number of possibilities that would be far less obvious and legally problematic than the *quid pro quo* evident in the JPMorgan Chase facts come to mind. For example, well-placed bank executives might become resources for college admission guidance, including offering strong recommendations. Perhaps bank executives could employ those same children as nannies or personal assistants in the home, thereby garnering favor without the official participation of the bank. The new environment of “logrolling” has us thinking of other examples.

It is difficult to make many more concrete conclusions regarding lessons in this new age of America in the Trump Era.” Recent research suggests that in the first six months of the Trump administration, fines across the board are down and there is a more “[B]usiness friendly stance....”<sup>236</sup> This does not bode well for continued vigorous enforcement of the FCPA, but it is a little early to draw definitive conclusions. Given the current environment of the Trump Administration, a particular focus on the FCPA seems unlikely unless it is used to advance “America First” to the detriment of foreign business.

Administrative remedies may continue to be used more aggressively without all the baggage of criminal prosecutions.<sup>237</sup> Sometimes criminal prosecution, as in *Samson*, ends up with no significant penalties and serve minimal deterrence. President Trump criticized President Obama for saying funding priorities would leave many illegal immigrants in the U.S.<sup>238</sup> The reality is that resources are finite, and each administration makes allocation decisions according to its own priorities. Nonetheless, it is possible that restricted resources may simply defund or contract FCPA enforcement. However, more optimistically, perhaps the continuing research connecting

<sup>235</sup> See *supra* note 141.

<sup>236</sup> Jean Eaglesham, Dave Michaels & Danny Dougherty, *Wall Street Fines Tumble*, WALL ST. J., Aug. 7, 2017, at p. 1.

<sup>237</sup> Stephen Zimmerman, *The Importance of Administrative Remedies in the Fight Against Corruption*, FCPA BLOG (June 8, 2017, 7:28 AM), <http://www.fcablog.com/blog/2017/6/8/stephen-zimmermann-the-importance-of-administrative-remedies.html> (Zimmermann points out that criminal penalties don’t always achieve the desired results in the context of combatting corruption).

<sup>238</sup> Cf. Nolan Rappaport, *On Illegal Immigration, Trump Ends Obama’s ‘Home Free Magnet,’* HILL (May 5, 2017, 2:20 PM), <http://thehill.com/blogs/pundits-blog/immigration/332110-on-illegal-immigration-trump-puts-an-end-to-obamas-home-free>.

bribery to corruption, destabilization of democracy and governments, and its potential links to terrorism, as well as the growing international pressure in this era of cooperative international enforcement will provide the necessary persuasion for the U.S. to stay the course of FCPA enforcement.