Steptoe

FCPA/Anti-Corruption Developments: 2017 Year in Review & Q1 2018 Preview

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Lucinda A. Low and Brittany Prelogar (eds.)[2]

INTRODUCTION

2017 was a year of transition for US enforcement of the Foreign Corrupt Practices Act (FCPA) and saw a significant increase in global anti-corruption enforcement. As noted in our 2017 FCPA Mid-Year Review, last year began with a flurry of FCPA enforcement at the end of the Obama Administration, followed by a prolonged lull as the Trump Administration reviewed enforcement policies and filled key positions at the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC). FCPA enforcement resumed in earnest in the third and fourth quarters of the year, putting 2017 well within the typical range of reported corporate and individual prosecutions for the last five years. Those enforcement trends continued in the first quarter of 2018, with both the DOJ and SEC inking corporate resolutions.

After the transition of administrations, the DOJ, under President Trump, avoided public changes to pre-existing enforcement policies. In November 2017, the DOJ formalized, with certain amendments, the FCPA Pilot Program by incorporating a new FCPA Corporate Enforcement Policy into the US Attorneys' Manual. The program creates a presumption, absent aggravating circumstances, that a company will receive a declination if it self-discloses, cooperates in the government's investigation, and remediates, but the payment of disgorgement and/or forfeiture remains a requirement of such a declination. Even where aggravating circumstances exist and declination is unavailable, companies meeting the disclosure, cooperation, and remediation expectations will be eligible to receive a 50% discount off the fines calculated under the US Sentencing Guidelines (USSG), consistent with the Pilot Program. Although the Yates Memorandum is currently under review, Deputy Attorney General Rosenstein has publicly asserted that the DOJ is committed to the "common themes" put forward in that Memorandum and remains committed to pursuing criminal resolutions against individuals.[3] The number and range of individual prosecutions in 2017 appears to confirm that approach, as does the settlement in Transportation Logistics International, Inc. in the first quarter of 2018, which justified a dramatically reduced penalty based on, among other reasons, the prosecution of the executives who allegedly directed the scheme.

The SEC under President Trump and Chairman Clayton also appears committed to enforcing the FCPA and holding individuals accountable for misconduct. Chairman Clayton and Steven Peikin, Co-Director of the Enforcement Division, have commented on the importance of

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[2] Other contributors to Steptoe's 2017 FCPA Year in Review include Brigida Benitez, Pablo Bentes, Jeffrey Cottle, Will Drake, Simon Hirsbrunner, Richard Wagner, Patrick Rappo, Alexandra Baj, Anthony Rapa, Rachel Peck, Ronak D. Desai, John London, Jessica Piquet Megaw, Evan Abrams, Helen Aldridge, Elizabeth Arkell, Sara Chouraqui, Melissa Freeman, Elizabeth Ginsburg, Keith Huffman, Peter Ibrahim, Galen Kast, Peter Jeydel, Bibek Pandey, William Simoneaux, Cherie Tremaine, Lin Yang, and Bo Yue.

[3] *See* Rod J. Rosenstein, Keynote Address, NYU Program on Corporate Compliance & Enforcement, at *4 (Oct. 6, 2017) (noting "any changes will reflect our resolve to hold individuals accountable for corporate wrongdoing"), http://www.law.nyu.edu/sites/default/files/upload_documents/Rosenstein%2C%20Rod%20J.%20Keynote%20Address_2017.10.6.pdf.

the SEC's anti-corruption enforcement,[4] and the SEC's enforcement record to date appears to corroborate these public comments. Settlements with Halliburton and Alere suggest the SEC will continue to pursue civil enforcement actions against issuers for violations of the FCPA's accounting provisions, and settlements with Mondelēz and Kinross show continued commitment to enforce violations of the FCPA arising from mergers and acquisitions (M&A). The SEC continues, however, to face headwinds in the courts. The Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), that disgorgement penalties are subject to the federal five-year statute of limitations, may hinder the SEC's ability to complete large multi-year investigations.

In perhaps the most important trend in anti-corruption enforcement, the recent trend of multilateral anti-corruption cooperation and enforcement between US FCPA enforcement authorities and their counterparts abroad further accelerated. 2017 began in an interlude between two landmark multilateral enforcement actions: Odebrecht (Brazil, US, and Switzerland) and Rolls-Royce (UK, US, and Brazil). The trend continued in the third and fourth quarters of 2017 with large, multi-jurisdictional settlements involving Telia (US, Sweden, and the Netherlands) and Keppel Offshore (US, Brazil, and Singapore). Penalties for these multilateral settlements were orders of magnitude larger than some settlements before only the DOJ or SEC, suggesting that the largest and most serious cases continue to garner attention from enforcement authorities across the globe. Also notable is that the largest portion of those penalties went not to the US Treasury, but to the coffers of non-US enforcement authorities.

Consistent with this growing global crackdown on corruption, the past year also saw a steady increase in anti-corruption legal and enforcement developments around the world, including investigation and prosecution of matters that had no FCPA enforcement component. In December 2017, the United Kingdom published its Anti-Corruption Strategy 2017−2022, calling for the establishment of a National Economic Crime Centre, and the French Anti-Corruption Agency published guidelines for compliance with the Law on Transparency, the Fight against Corruption and Modernization of Economic Life, nicknamed "Sapin II." In Latin America, Brazil continues to aggressively pursue anti-corruption enforcement, most notably through Operation Car Wash, and anti-corruption laws in both Argentina and Peru became effective in the first quarter of 2018. In Asia-Pacific, China, Korea, India, and Australia are all in the midst of legislative changes related to anti-corruption laws, and domestic enforcement of graft and corruption laws continues to rise. While the World Bank Sanctions Board issued several significant decisions, the number of negotiated resolutions reached by contractors and consultants with the Integrity Vice Presidency continues to rise, obviating the need for a sanctions referral.

While it is still too early to see the fruits of investigations initiated during the current administration, from what is publicly known about the current pipeline, we anticipate that these trends will continue in 2018.

[4] *See* Steven R. Peikin, *Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act*, N.Y.U. Sch. of Law (Nov. 9, 2017), https://www.sec.gov/news/speech/speech-peikin-2017-11-09.

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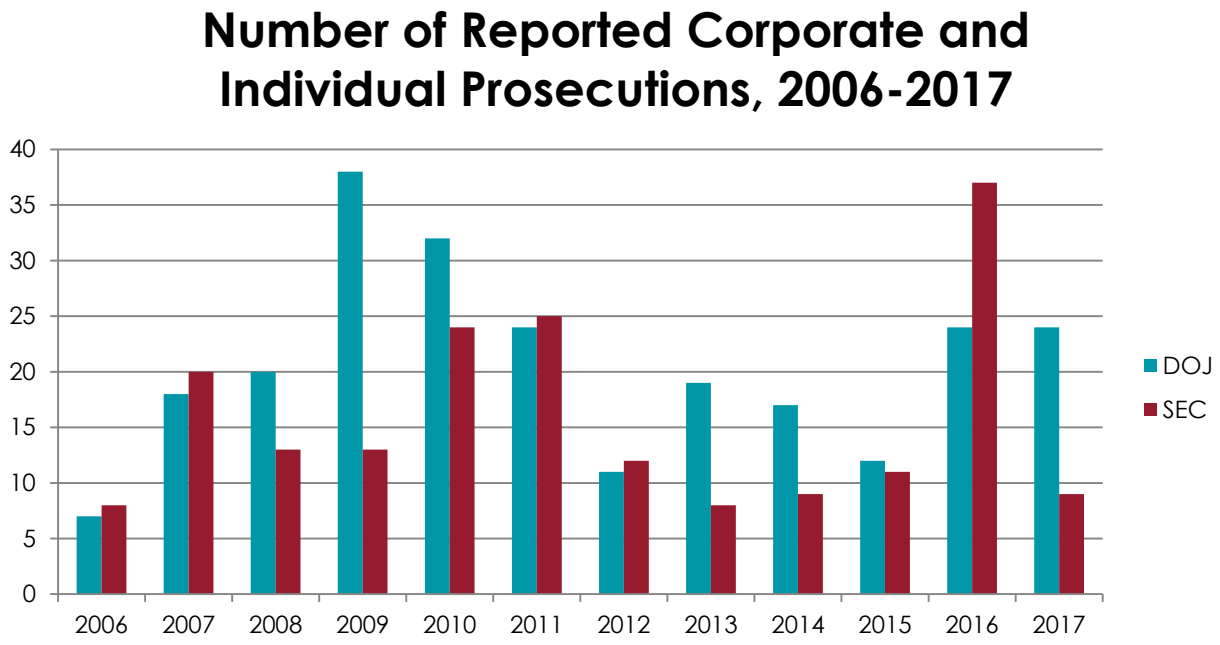
I. ENFORCEMENT STATISTICS

A. Number of Enforcement Actions

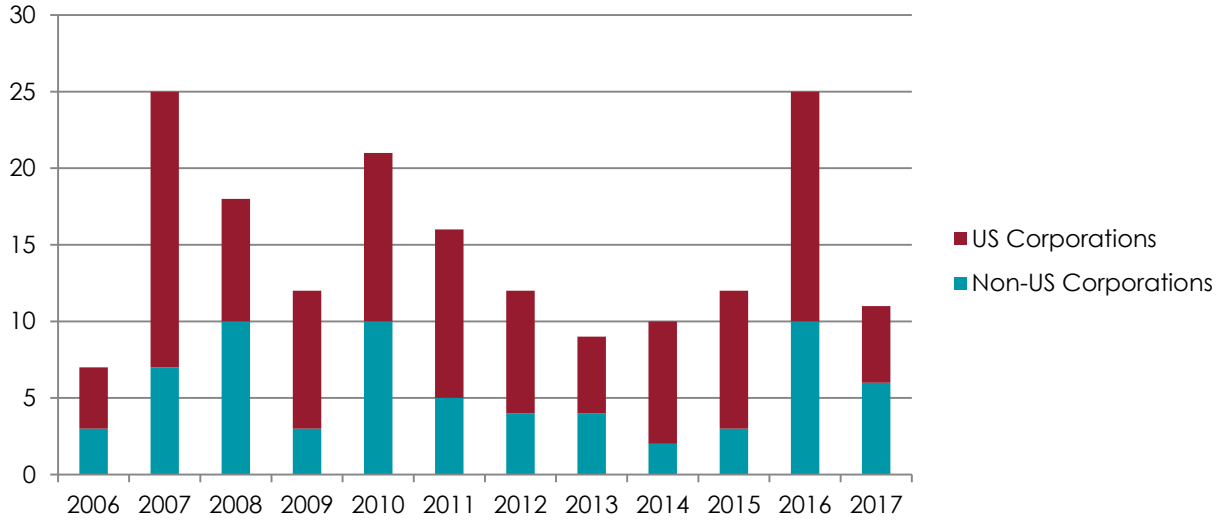
Although 2017 did not register as large a number of enforcement actions as last year, it still witnessed significant FCPA enforcement activity, including more than a billion dollars in cumulative fines imposed on both US and foreign companies by US enforcement authorities. The DOJ and SEC brought a total of 33 FCPA enforcement actions against companies and individuals in 2017: 24 by the DOJ and 9 by the SEC.[5] The total is less than half the number from the previous year (61) but notably higher than the number from 2015 (23). The statistics from 2017 reveal a year of robust activity and the continuation of recent trends, including several blockbuster, multijurisdictional anti-corruption enforcement actions involving some of the largest penalties in FCPA enforcement history.



Eleven separate companies faced charges from either the SEC or DOJ (or both) in 2017, a steep decline relative to the figure from last year, which saw 25 separate companies face charges. These companies represented a diverse range of industry sectors, including energy, mining, telecommunications, health care, food, gaming and lodging, and others. For the first time in nearly a decade, more enforcement actions were brought against foreign companies (6) than US companies (5). US authorities continue to rely on the FCPA's broad extraterritorial reach to target foreign companies, even while non-US authorities step up enforcement against their own corporates.

[5] The DOJ and SEC brought a total of 11 corporate FCPA enforcement actions (counting actions against more than one member of the same corporate family as a single action). This total includes three parallel enforcement actions by the DOJ and the SEC against the same companies, four separate actions by the DOJ, and another four separate actions by the SEC. In addition, the DOJ brought FCPA charges against 17 individuals, while the SEC brought two such actions; none were done in parallel against the same individuals. See below for further discussion.

Continued Focus on Foreign Corporations, 2006-2017



The SEC and DOJ brought three parallel corporate enforcement actions in 2017 (Telia, Sociedad Quimica y Minera de Chile, and Zimmer Biomet), a decrease from 10 last year.

US authorities continued their focus on prosecuting individuals under the FCPA – 17 by the DOJ, two by the SEC, and zero in parallel – a priority reiterated in the September 2015 *Yates Memo* and in multiple pronouncements from the DOJ and SEC since that time. These individuals include the brother of the former UN Secretary General as well as a retired US Army colonel. There is no indication the Trump Administration intends to change this policy. On the contrary, Attorney General Jeff Sessions emphasized in an April 2017 speech the importance "of holding individuals accountable for corporate misconduct…it is not merely companies, but specific individuals, who break the law" adding, "we will work closely with our law enforcement partners, both here and abroad, to bring these persons to justice."[6]

The first quarter of 2018 has already witnessed significant activity in the individual enforcement arena. In February alone, the government unsealed charges against five former Venezuelan government officials for their alleged participation in the PDVSA bribery scheme discussed below.[7] These most recent charges bring the total number of individuals charged in connection with this scheme to 15.[8]

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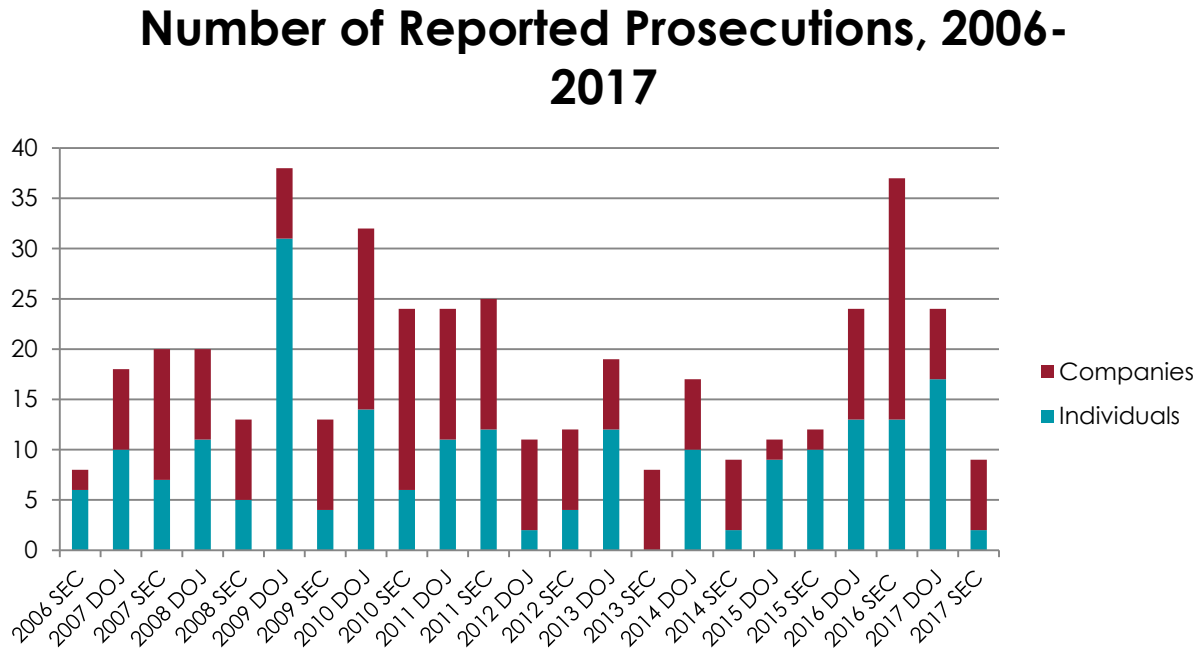
[6] Transcript, *Attorney General Jeff Sessions Delivers Remarks at the Ethics and Compliance Initiative Annual Conference*, Washington, D.C. (Apr. 24, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual (last accessed April 4, 2018).

[7] DOJ Press Release, *Five Former Venezuelan Government Officials Charged in Money Laundering Scheme Involving Bribery*, Office of Pub. Affairs (Feb. 12 2018), https://www.justice.gov/opa/pr/five-former-venezuelan-government-officials-charged-money-laundering-scheme-involving-forei-0 (last accessed April 4, 2018).

[8] *Id.*

Similarly, FCPA corporate enforcement has continued apace in 2018, with three corporate enforcement actions announced in the first quarter: Transport Logistics International Inc. (DOJ only), Elbit Imaging Ltd. (SEC only), and Kinross Gold Corporation (SEC only) (all discussed further below).



There were 17 reported declinations in 2017, including two declinations with disgorgement under the DOJ's Pilot Program. Certain companies within the Linde Group received a declination from the DOJ for FCPA offenses in the Republic of Georgia after paying $11.2 million[9] in disgorgement and forfeiture, while Boston-based CDM Smith Inc. paid $4 million for a declination with disgorgement to resolve FCPA violations in India.

B. Monetary Sanctions & Multijurisdictional Anti-corruption Resolutions

The aggregate dollar value of monetary sanctions imposed by US enforcement authorities and paid to the US Treasury topped more than $1.37 billion in 2017.[10] The aggregate figure is less than last year's total of $2.43 billion, but includes some of the highest penalty numbers imposed in individual corporate FCPA matters to date. Telia Company AB, for example, agreed with the DOJ and SEC to pay $965 million to US, Swedish, and Dutch authorities, while Keppel Offshore & Marine (KOM) will pay roughly $422 million for its violations. Along with the $170 million Rolls-Royce will pay to US authorities (as part of an $800 million overall settlement with US, UK, and Brazilian authorities), these amounts dwarfed other 2017 settlement figures by

[9] All values reported in US Dollars unless otherwise specified.

[10] The figure includes the maximum penalty potentially available to the US Treasury from Telia, which could ultimately end up paying more than $731 million under the DOJ and SEC's complex crediting and accounting system. The figure does not include disgorgement from and forfeiture claims asserted against companies who received DOJ Pilot Program declinations.

comparison, which included Zimmer Biomet Holdings ($30.46 million), Haliburton ($29.2 million), and Las Vegas Sands ($7.2 million). Overall, fines imposed this year ranged from roughly $6 million (Las Vegas Sands) to $965 million (Telia).

The Telia, Rolls-Royce, and KOM cases illustrate two other growing FCPA enforcement trends: 1) the rise of multijurisdictional enforcement actions in which the SEC and DOJ coordinate with their international counterparts to sanction anti-corruption violations falling within the enforcement jurisdiction of multiple countries; and 2) the DOJ and SEC's willingness to credit monetary sanctions paid to resolve matters with foreign authorities when determining amounts payable to the US Treasury, reducing penalties otherwise payable under the USSG and/or disgorgement amounts.

As we noted in our 2016 FCPA Year in Review, both the VimpelCom and Odebrecht cases seemed to signal that coordination and cooperation between US and foreign authorities were emerging as important trends in the FCPA enforcement realm. VimpelCom involved a $795 settlement between US and Dutch authorities, while US, Swiss, and Brazilian authorities split the fines and penalties ultimately imposed in the Odebrecht case.[11] Three additional coordinated anti-corruption settlements in 2017 appeared to confirm that such multijurisdictional resolutions – and the division of monetary sanctions among US authorities and their foreign counterparts – are not aberrations, but rather a new norm in FCPA enforcement.

The terms of the three multijurisdictional anti-corruption resolutions of 2017 – KOM, Rolls-Royce, and Telia – are revealing. Of the approximately $422 million to be paid by KOM, roughly $106 million went to the United States, while the remainder was split between Brazil and Singapore. Similarly, the United States received roughly $170 million of the approximately $800 million sanction levied on Rolls-Royce for engaging in a worldwide bribery scheme. The remainder was received by state treasuries in the United Kingdom and Brazil.

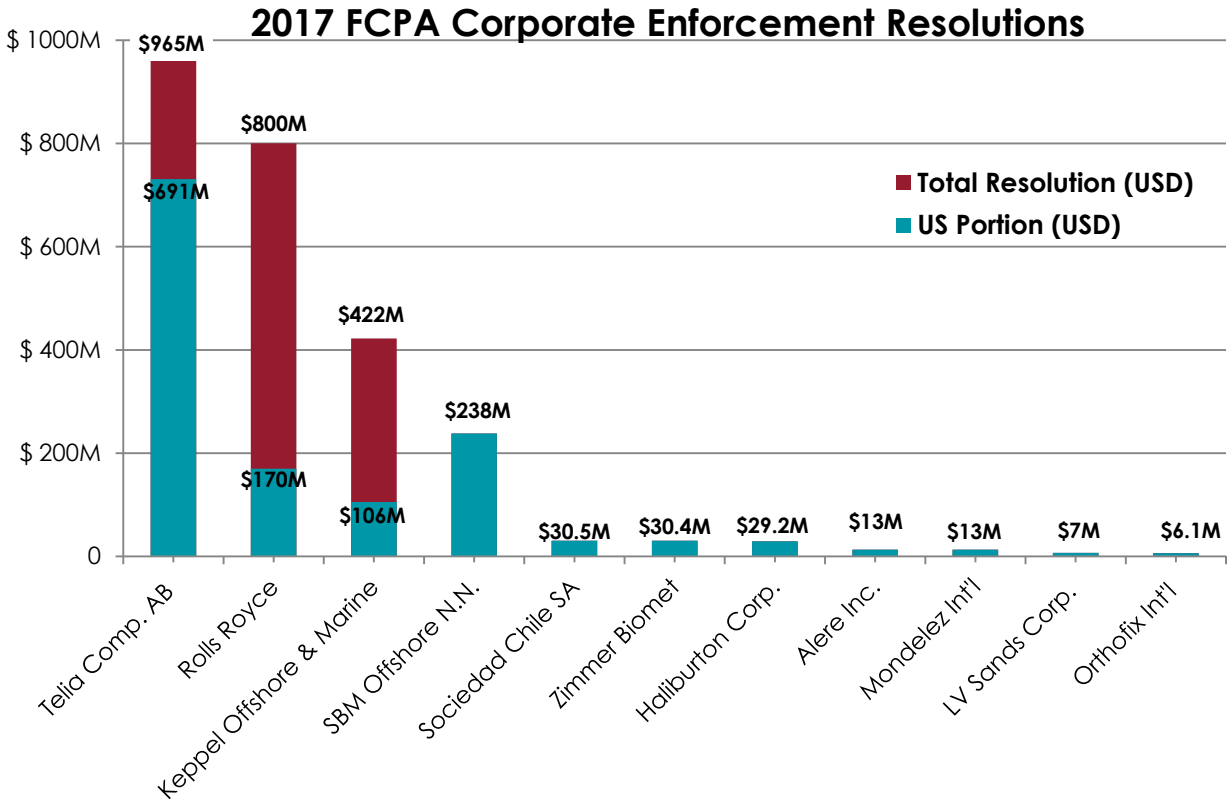
With Telia, the amount payable to the US Treasury will range from $483 million to $691 million depending on the amounts ultimately paid to Dutch and Swedish authorities. In each of these three matters, the majority of the fines, penalties, and disgorgement imposed were payable to non-US authorities. Taken cumulatively, total monetary sanctions payable to both US and foreign enforcement authorities in matters involving FCPA charges topped $2.55 billion in 2017.

International cooperation in FCPA matters resolved in 2017 was not limited to these three coordinated settlements. The trend of foreign authorities providing evidence and other assistance

[11] Odebrecht agreed that the appropriate criminal fine for the conduct was $4.5 billion, but the final penalty was subject to an inability to pay analysis conducted by DOJ and Brazilian authorities. Odebrecht represented that it could pay only $2.6 billion, of which the US government was entitled to ten percent. *See* DOJ Press Release, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve (last accessed April 4, 2018). In its April 11, 2017 Sentencing Memorandum, the US government noted that Odebrecht had the ability to pay only $2.6 billion in criminal penalties, and the US government further reduced the portion of the criminal penalty due to the US Treasury by June 2017 to $93 million, with an equivalent amount due at that time to Brazil. The time schedules for the remaining penalties were to be set by agreement with the government of each country. *See* Sentencing Memorandum, *U. S. v. Odebrecht S.A.*, No. 16-cr-643, Dkt 15 at *4 (E.D.N.Y. Apr. 11, 2017).

to US authorities in FCPA matters continues, even in matters in which those authorities do not themselves take enforcement action. In total, the DOJ and/or SEC acknowledged receiving assistance from at least 20 foreign authorities in connection with matters concluded in 2017.[12]

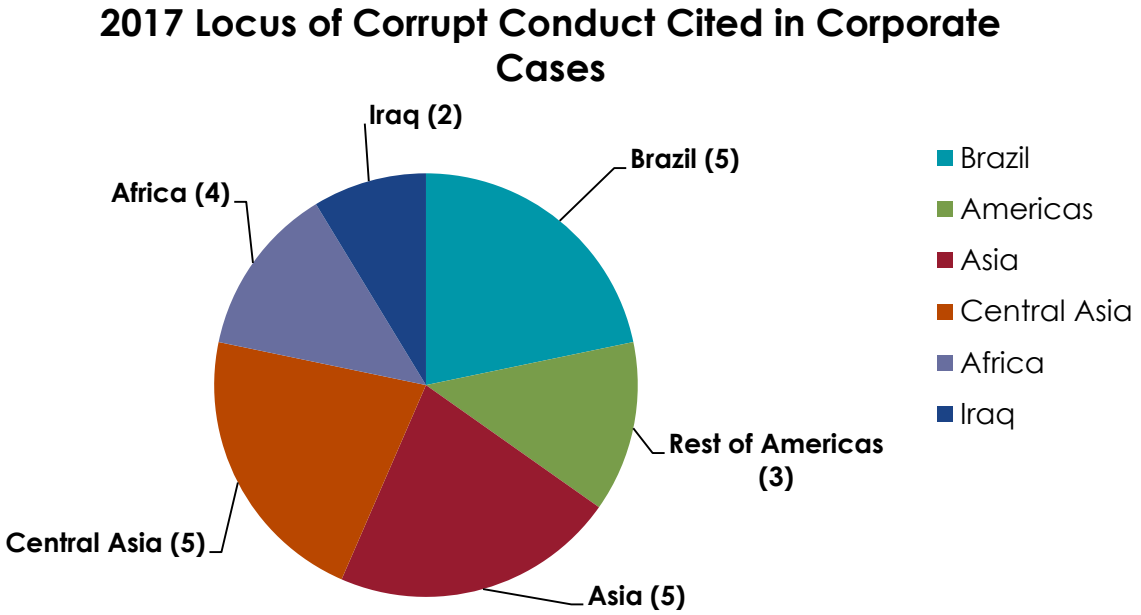
Together, the increase in coordinated, international anti-corruption actions, the cooperation provided by a growing number of non-US authorities in FCPA matters, and the steady increase in bribery-related investigations and prosecutions pursued by non-US authorities in matters involving no US enforcement component (as discussed in Part VI below), confirm that anti-corruption enforcement has truly gone global.



[12] In the Telia matter alone, the DOJ and SEC acknowledged assistance from 16 countries, most of which were not party to the $965 million settlement in that case. The countries included: Austria, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Cyprus, France, Hong Kong, Ireland, the Isle of Man, Latvia, Luxembourg, Norway, Switzerland, and the UK. *See* DOJ Press Release, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan*, Office of Pub. Affairs (Sept. 21, 2007), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965 (last accessed April 4, 2018); In the Rolls-Royce resolution, US enforcement authorities acknowledged significant assistance from enforcement colleagues in Austria, Germany, the Netherlands, and Turkey. *See* DOJ Press Release, *Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practice Act Case*, Office of Pub. Affairs (Jan. 17, 2017), https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act (last accessed April 9, 2018); In the SBM Offshore case, the DOJ expressed gratitude for the assistance provided by government authorities in Brazil, the Netherlands, and Switzerland. *See* DOJ Press Release, *SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries*, Office of Pub. Affairs (Nov. 29, 2017), https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case (last accessed April 9, 2018).

C. Geography of Conduct

The majority of 2017's corporate FCPA enforcement activity was focused on misconduct that occurred in a few concentrated jurisdictions globally. Brazil was the most frequent venue for conduct at the center of 2017 FCPA enforcement, displacing China for the first time. India was the situs of conduct underlying three FCPA actions, while three Central Asian countries were cited in five FCPA actions.[13] In total, FCPA charges in 2017 arose out of conduct in 14 different countries, with Rolls-Royce's "global conspiracy" to violate the FCPA accounting for six of the 14 countries alone. None of the prosecuted conduct in 2017 was in Europe or Russia.



D. Monitors

The DOJ and SEC imposed four monitorships in 2017, a slight drop from the seven it imposed the year before. An examination of the circumstances under which US authorities did – and did not – require monitors for FCPA violators is instructive.

Companies involved in the four largest FCPA settlements of 2017 – Telia, Rolls-Royce, SBM Offshore, and Keppel Offshore – all escaped a compliance monitor as part of their US resolutions. Although surprising on the surface given the magnitude of misconduct in all four cases, US authorities cited the host of remediation efforts the companies adopted to prevent future violations in each of their resolution announcements. Monitorships were conspicuously absent in all four cases.

By contrast, three of the four companies upon which monitors were imposed in 2017 were repeat offenders. Orthofix International, which agreed to a one-year monitorship in addition to a $6 million resolution with the SEC, had earlier resolved FCPA charges in 2012. Zimmer

[13] The three countries were Uzbekistan, Azerbaijan, and Kazakhstan.

Biomet Holdings paid $30 million in penalties and consented to a three-year monitorship; Biomet Inc. had been the subject of FCPA enforcement action in 2012 (before Zimmer bought Biomet in 2015). Halliburton, which accepted an 18-month monitorship and $29.2 million resolution in July 2017, had resolved FCPA charges in 2009. Accordingly, recidivism is, not surprisingly, an important factor in predicting the imposition of a monitorship by US authorities.

The only company to receive a monitorship in 2017 that was not a past offender was Sociedad Quimica y Minera de Chile (SQM) (discussed further below).[14] The Chilean company reached a $30 million settlement with the DOJ and SEC and agreed to a two-year monitorship. SQM had never faced FCPA charges in the past, nor was the misconduct at issue as pervasive as the corrupt practices in the Rolls-Royce, Telia, Keppel Offshore, or SBM cases. The distinguishing factor likely explaining the monitorship, however, appears to be that the company was still implementing its compliance program at the time of its resolution with DOJ. As a result, the efficacy of the compliance measures remained unclear, likely tilting the scales in favor of a monitorship.

E. Nature of Conduct

As discussed more extensively below, enforcement activity in 2017 focused heavily on cases involving grand corruption, with the magnitude of financial sanctions imposed on corporate violators reflecting the scope and breadth of corrupt practices at issue. At the same time, the SEC has continued bringing enforcement actions – in both 2017 and the first quarter of 2018 – focused on violations of the FCPA's books and records and internal control provisions. The FCPA's accounting provisions have allowed the government to pursue enforcement action against companies even in the absence of proof of bribery, as was the case with the Haliburton and Cadbury/Mondelēz International, cases examined further below. The three cases underscore the continuing trend of the SEC treating a robust anti-corruption compliance program as an integral part of an issuer's internal controls – a trend that is continuing into 2018 as demonstrated by the Elbit Imaging and Kinross Gold matters. The Cadbury/Mondelēz (2017) and Kinross Gold (2018) matters also serve as a reminder of the anti-corruption risks merger and acquisition (M&A) activity can pose to companies, the critical importance of anti-corruption due diligence prior to the consummation of a proposed deal, and the necessity of promptly integrating the target into the acquirer's anti-corruption compliance program.

Enforcement activity in 2017 also demonstrated the reality that even companies with anti-corruption compliance programs in place are still at risk for recidivist behavior and subsequent

[14] As noted in our 2016 Year in Review, Las Vegas Sands retained an independent compliance consultant in connection with the settled Administrative Proceeding filed by the SEC on April 7, 2016. As part of its January 17, 2017 NPA with the DOJ, Las Vegas Sands agreed to submit copies of all reports of the independent compliance consultant to the DOJ's FCPA Unit (Fraud Section) within three calendar days of the company's receipt of such reports until the successful completion of the independent compliance consultant's engagement. Should the independent compliance consultant's engagement be successfully completed prior to the end of the three-year Term of the Agreement between Las Vegas Sands and the Fraud Section, Las Vegas Sands will voluntarily submit periodic reports for the balance of the Agreement, at the same intervals as the reports prepared by the independent compliance consultant had been provided, with a final report provided no less than 30 days prior to the expiration of the Term of the Agreement between Las Vegas Sands and the Fraud Section. *See* DOJ letter to Laurence Urgenson, Esq., *Las Vegas Sands Non Prosecution Agreement*, (Jan. 17, 2017), https://www.justice.gov/opa/press-release/file/929836/download (last accessed April 4, 2018).

enforcement action by the SEC and DOJ. As noted above, the three repeat offenders of 2017 (Haliburton, Orthofix, and Zimmer Biomet) had all previously resolved FCPA violations. The reporting obligations imposed on Orthofix and Biomet Inc. as part of their original settlements in 2012 played a role in the identification of the corrupt practices leading to the second round of FCPA resolutions for Orthofix and Zimmer Biomet in 2017. These cases serve as a cautionary tale for companies about the importance of remaining vigilant following a FCPA resolution with enforcement authorities. Although companies often implement robust anti-corruption programs in the wake of FCPA enforcement, they are not immune from further enforcement if further misconduct occurs. In particular, they remain under close scrutiny during the period of any monitorship or self-reporting obligations agreed as part of a plea, deferred prosecution agreement (DPA), or non-prosecution agreement (NPA).

Finally, 2017 and the first quarter of 2018 did not register any actions centered on gifts, travel, and entertainment (though such conduct was sometimes cited in connection with matters focused on grand corruption, as in the Rolls-Royce, SBM, Keppel Offshore, Telia, and Transportation Logistics International cases). It is too early to tell if this reflects a trend by the DOJ and SEC to de-emphasize such conduct or, as seems more likely, a continued enforcement focus in matters in which particularly lavish or frequent gifts, travel, or entertainment clearly evince corrupt intent or significant deficiencies in controls.

II. FCPA CORPORATE SETTLEMENTS

As reported in our 2017 FCPA Mid-Year Review, the first half of 2017 included six corporate enforcement actions: two brought by the DOJ alone (Las Vegas Sands and Rolls-Royce); two brought by the SEC alone (Mondelēz and Orthofix); and two parallel enforcement actions (Sociedad Química y Minera de Chile and Zimmer Biomet).[15] In addition, Linde North America Inc. and Linde Gas North America LLC also received declinations with disgorgement under the DOJ's Pilot Program. The flurry of activity prior to January 20, 2017 and a relative lull until June 2017 raised questions as to whether the Trump Administration would actively pursue corporate enforcement under the FCPA.

Nonetheless, we continued to see enforcement in the second half of 2017, including a total of two enforcement actions brought by the DOJ alone (SBM Offshore, and Keppel Offshore), one parallel DOJ/SEC enforcement actions (Telia), and two enforcement actions brought by the SEC alone (Halliburton and Alere). The second half of 2017 also saw three coordinated, multijurisdictional resolutions (SBM, Keppel Offshore, and Telia), one of which (Telia) involves one of the highest FCPA penalties ever imposed. We discuss these actions in more detail below.

[15] This included Las Vegas Sands Corp. (a DOJ NPA); Rolls Royce (a DOJ DPA), Mondelēz International, Inc. (an SEC cease and desist order); Orthofix International N.V. (an SEC cease and desist order); Sociedad Química y Minera de Chile (SQM) (a DOJ DPA with a parallel SEC settlement); and Zimmer Biomet (a new DOJ DPA and related SEC settlement following findings that Zimmer Biomet breached Biomet's 2012 DPA).

A. DOJ Pilot Program Declinations

1. Linde

On June 16, 2017, the DOJ issued its first public FCPA declination under the Trump Administration in a case involving an entity acquired in 2006 by Linde North America Inc. and Linde Gas North America LLC whose businesses included an interest in a joint venture in the Republic of Georgia.[16] The DOJ issued the declination, "consistent with the Pilot Program," based on Linde's voluntary self-disclosure, comprehensive investigation, full cooperation, compliance program enhancements, and remediation. Linde agreed to disgorge profits of the acquired entity obtained through the Georgian conduct and forfeit proceeds owed to certain unrelated entities involved in the conduct (which Linde withheld upon discovery of the conduct) in the amount of $11 million. This matter is the first declination released by the DOJ addressing issues arising in the M&A context. It is also the first declination to involve an element of forfeiture as well as disgorgement, and will be of interest to any company involved in M&A activity.

2. CDM Smith

On June 21, 2017, the DOJ issued a public declination letter under the Pilot Program to CDM Smith, Inc. (CDM Smith), a Boston-based, privately held engineering and construction firm. The declination letter stated that CDM Smith, through its subsidiary in India (CDM India), paid approximately $1.18 million in bribes over a four-year period to government officials in India in exchange for highway construction supervision and design contracts and a water project contract resulting in approximately $4 million in net profits. The bribes generally were two to four percent of the contract price and paid through sham subcontractors, who provided no actual services and understood that payments were meant to solely benefit the officials. As a basis for jurisdiction under the FCPA's anti-bribery provisions, the declination letter cited involvement by both senior management and employees of CDM India, "act[ing] as employees and agents" of CDM Smith, and of CDM Smith's "division responsible for India" (which may have been based in the United States, though this is not specified). As part of the declination, CDM Smith disgorged $4,037,138.[17]

Supporting its decision to close the investigation, the DOJ cited CDM Smith's compliance with the Pilot Program's conditions, including the company's timely, voluntary disclosure; its thorough and comprehensive internal investigation; its full cooperation, including the provision of relevant facts concerning individuals involved; its agreement to disgorge profits illegally obtained from the contracts in India; the steps CDM Smith took to enhance its compliance program and internal controls; and CDM Smith's remediation efforts, including terminating the executives and employees involved in the misconduct.[18]

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[16] DOJ Declination Letter, *In re Linde N. Am. Inc. and Linde Gas N. Am. LLC* (June 16, 2017), https://www.justice.gov/criminal-fraud/file/974516/download (last accessed April 4, 2018). Steptoe represented the companies in this matter.

[17] DOJ Declination Letter, *CDM Smith Inc.* (June 21, 2017), https://www.justice.gov/criminal-fraud/page/file/976976/download (last accessed April 4, 2018).

[18] *Id.* On a related note, the World Bank also announced on June 30, 2017 that it had entered into a Non-Resolution Agreement with CDM Smith providing for a 15-month conditional non-debarment relating to Vietnam.

B. DOJ Enforcement Actions

1. Las Vegas Sands

On January 17, 2017, Las Vegas Sands Corporation (LVSC) entered into an NPA with the DOJ regarding substantially the same conduct as an April 7, 2016 settlement with the SEC involving books and records and internal control deficiencies surrounding payments made to a China-based consultant retained by a majority-owned LVSC affiliate.[19]

LVSC agreed to pay a $6.96 million criminal penalty and to disclose, for a term of three years, any conduct that would violate the FCPA if it occurred in the United States.[20] Although LVSC did not receive credit for voluntary disclosure, the company received a 25% reduction off the bottom of the USSG penalty range due to its cooperation and remediation.[21] The DOJ cited in particular the termination of the individuals implicated in the conduct; "revamping and expanding [LVSC's] compliance and audit function," including retaining new leaders in the legal, compliance, internal audit, and gatekeeping functions; and LVSC's commitment to continue enhancing the company's compliance program and internal controls.[22]

2. Rolls-Royce

On January 17, 2017, the DOJ unsealed a DPA entered into with Rolls-Royce plc (Rolls-Royce) on December 20, 2016. Rolls-Royce agreed to pay the DOJ almost $170 million as part of an $800 million coordinated global settlement with US, UK, and Brazilian authorities based on a decade-long scheme to use consultants and distributors as intermediaries to pay bribes to officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, Iraq, and elsewhere to obtain confidential information and win contracts to supply turbines, gas generators, and other equipment to state-owned and state-controlled oil and gas power generation projects in those countries.[23] The DOJ charged Rolls-Royce, a UK holding company, with one count of conspiring to violate the FCPA, basing jurisdiction on the involvement of Rolls-Royce Energy Systems, Inc. – an indirect, US-based subsidiary of Rolls-Royce – and various US citizen employees in the scheme, as well as the use of US bank accounts to transfer the bribe payments.[24]

The DOJ penalty reflects a 25% reduction from the bottom of the applicable USSG range.[25] Although the DOJ did not credit Rolls-Royce with a timely voluntary disclosure because the company disclosed violations only after media reports arose alleging corruption and after the

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[19] *See* DOJ Non-Prosecution Agreement, *Las Vegas Sands Corp.*, at 2 (Jan. 17, 2007), https://www.justice.gov/opa/press-release/file/929836/download (last accessed April 4, 2018).
[20] *See id.* at 4.
[21] *See id.* at 1–2.
[22] *See id.* at 2–3.
[23] *See* DOJ Press Release, *Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, Office of Pub. Affairs (Jan. 17, 2017), https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act (last accessed April 4, 2018).
[24] *See* Information, *U. S. v. Rolls-Royce plc*, No. 16-cr-247 ¶¶ 3, 19 (S.D. Ohio Dec. 20, 2016) Judge Sargus, https://www.justice.gov/opa/press-release/file/927226/download (last accessed April 4, 2018).
[25] *See* DOJ Press Release, *Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case* ¶ 12.

Serious Fraud Office (SFO) initiated an inquiry,[26] Rolls-Royce did receive full cooperation credit.[27] The DOJ also noted Rolls-Royce's significant remedial measures, including: terminating or accepting the resignation of employees implicated in the conduct; terminating business relationships with relevant intermediaries; enhancing compliance procedures used to review and approve third-party intermediaries, including limiting the use of such intermediaries; engaging an outside compliance advisor to monitor implementation of remedial procedures; and implementing new and enhanced internal controls.[28]

3. SBM Offshore

In November 2017, SBM Offshore N.V. (SBM), a Netherlands-based holding company with business operations specializing in the design, construction, and provision of offshore oil drilling equipment, entered into a three-year DPA with the DOJ charging SBM with conspiracy to violate the FCPA's anti-bribery provisions in connection with improper payments it made or attempted to make through intermediaries and shell companies, as well as gifts, travel, and other benefits provided directly by SBM sales and marketing staff, to officials of state-owned oil companies in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq, to obtain confidential information and business worth $2.8 billion. In addition, SBM's wholly owned US subsidiary, SBM Offshore USA Inc. (SBM USA), pleaded guilty to a one-count criminal information charging the company with conspiracy to violate the anti-bribery provisions of the FCPA in relation to the same conduct. In total, SBM agreed to pay a criminal penalty of $238 million to the United States, including a $500,000 criminal fine and $13,200,000 in criminal forfeiture that SBM agreed to pay on behalf of SBM USA.[29]

SBM admitted that between 1996 and 2012 it paid intermediaries $180 million in "commissions," knowing that a portion of those funds would be used to bribe officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq in order to maintain or retain business with state-owned companies. In addition, bribes to foreign officials took the form of jewelry, electronics, "thank you" money after successfully winning a project, travel to sporting events and cash "spending money," tuition and living expenses for foreign officials' relatives, and employment and overpayment of officials' relatives. Small bribes were permitted subject to SBM employees' discretion, while larger bribes required high-level approval.[30] SBM officials used code names, personal email accounts, and faxes to receive confidential information and communicate concerning bribes.[31] Initially the DOJ declined to investigate based on an apparent lack of jurisdiction, but in 2016, upon learning that a US-based executive managed significant

[26] *See* Deferred Prosecution Agreement, *U. S. v. Rolls-Royce plc*, No. 16-cr-247 ¶ 4.a (S.D. Ohio Dec. 20, 2016) Judge Sargus, https://www.justice.gov/opa/press-release/file/927221/download (last accessed April 4, 2018).
[27] *See id.* ¶ 4.b.
[28] *See id.* ¶ 4.d.
[29] Deferred Prosecution Agreement, *U. S. v. SBM Offshore N.V*, No. 4:17-cr-00686 (S.D. Tex Nov. 21, 2017), https://www.justice.gov/opa/press-release/file/1014801/download (last accessed April 4, 2018); Plea Agreement, *U.S. v. SBM Offshore USA, Inc.*, No. 17-685 (S.D. Tex Nov. 29, 2017), https://www.justice.gov/opa/press-release/file/1014846/download (last accessed April 4, 2018).
[30] *Id*.
[31] Deferred Prosecution Agreement, *SBM Offshore N.V*, No. 4:17-cr-00686 (S.D. Tex Nov. 21, 2017).

portions of the bribery scheme and engaged in conduct within US jurisdiction, the DOJ re-opened its investigation.[32]

SBM and SBM USA's DPA and plea followed guilty pleas by two former SBM executives, Anthony Mace and Robert Zubiate, discussed further below. The DPA also followed a settlement between the Dutch Public Prosecutor's Office (Openbaar Ministerie) in 2014 over related conduct, in which SBM paid the Netherlands $240 million in disgorged profits and fines. In addition, the Federal Prosecutor's Office (Ministério Público Federal – MPF) in Brazil has filed a damages claim against SBM with the Federal Court in Rio de Janeiro based on the Brazilian Improbity Act.[33]

The DOJ did not grant SBM voluntary disclosure credit because its disclosure was not timely, but did grant full cooperation and remediation credit once the US investigation was underway.[34] The DOJ also considered SBM's inability to pay a more substantial fine.[35] In calculating penalties, the DOJ credited SBM's payment of penalties to the Openbaar Ministerie and its expected payment of penalties to the Brazilian MPF.[36] While SBM must self-report to the DOJ annually concerning its compliance program, remediation, and controls during the term of the three-year DPA, no monitor was imposed. The DOJ acknowledged assistance from Brazilian, Dutch, and Swiss authorities.

4. Keppel Offshore

On December 22, 2017, Keppel Offshore & Marine Ltd. (KOM), a Singapore-based company that operates shipyards, builds offshore drilling rigs, and repairs and upgrades shipping vessels, and its wholly owned US subsidiary, Keppel Offshore & Marine USA, Inc. (KOM USA), agreed to pay a penalty of more than $422 million to authorities in the US, Brazil and Singapore to settle charges related to a bribery scheme in Brazil that took place between 2001 and 2014. The companies admitted to making approximately $55 million in improper payments to officials at Brazil's state-owned oil company, Petróleo Brasileiro SA (Petrobras), and the Worker's Party, the then-governing party in Brazil, in order to win 13 contracts with Petrobras and another with private company Sete Brazil, which commissioned rigs for Petrobras' use. The payments were disguised as large commissions to a third party agent under purported consulting agreements that KOM and KOM USA executed on behalf of KOM, and made to bank accounts in and outside of the United States, under the names of shell companies controlled by the consultant. The consultant then transferred the funds – sometimes referred to as "commitments" and "fees" – to the Petrobras officials and Worker's Party, who were referred to in emails as

[32] Deferred Prosecution Agreement, *SBM Offshore N.V*, No. 4:17-cr-00686 (S.D. Tex Nov. 21, 2017); Plea Agreement, *SBM Offshore N.V*, No. 17-685 (S.D. Tex Nov. 29, 2017).
[33] SBM Offshore N.V., *SBM OFFSHORE 2017 FULL YEAR EARNINGS*, NASDAQ GLOBAL NEWS WIRE (Feb. 8, 2018), https://globenewswire.com/news-release/2018/02/08/1335770/0/en/SBM-OFFSHORE-2017-FULL-YEAR-EARNINGS.html (last accessed April 4, 2018).
[34] Deferred Prosecution Agreement, *SBM Offshore N.V*, No. 4:17-cr-00686 (S.D. Tex Nov. 21, 2017); Plea Agreement, *SBM Offshore N.V*, No. 17-685 (S.D. Tex Nov. 29, 2017).
[35] *Id.*
[36] *Id.*

"friends," "Big Brother," and "partners." KOM earned approximately $350 million in profits from the contracts obtained through the scheme.[37]

KOM entered into a three-year DPA with the DOJ, while KOM US entered a guilty plea and plea agreement, to settle charges that they conspired to violate the FCPA's anti-bribery provisions applying to domestic concerns (78dd-2) and to persons acting within US territory (78dd-3). In addition to US dollar transfers made into and from US bank accounts, the conspiracy included conduct by KOM USA executives within the United States (such as signing an agreement and sending emails in furtherance of corruption).

This was the first coordinated FCPA resolution with Singapore and one of several actions coordinated with Brazil. The DOJ acknowledged assistance from the MPF in Brazil and the Attorney General's Chambers in Singapore, and the countries will receive 50% and 25% of the $422 million settlement, respectively.[38] KOM received a 25% reduction off the bottom of the applicable USSG fine range, reflecting the company's substantial cooperation and remediation. Such measures involved terminating and disciplining employees involved in the misconduct, including the imposition of approximately $8.9 million in financial sanctions on 12 former and current employees. The company also enhanced and committed to further enhancing its anti-corruption compliance program and controls, and agreed to self-report to the DOJ on the state of its compliance program over the term the DPA. Due to these efforts, it was determined that an independent compliance monitor was unnecessary. KOM did not receive voluntary disclosure credit because the DOJ was already aware of the publicly-reported allegations at the time the company self-reported.[39]

The DOJ also announced that Jeffery Chow, a former "senior member" of KOM's legal department, pleaded guilty to one count of conspiracy to violate the FCPA. He will be sentenced on May 2, 2018.[40]

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[37] Information, *U. S. v. Keppel Offshore & Marine Ltd.*, Cr. No. 17-697 (KAM) (E.D.N.Y. Dec. 22, 2017), https://www.justice.gov/opa/press-release/file/1020711/download (last accessed April 4, 2018).

[38] DOJ Press Release, *Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case*, Office of Pub. Affairs (Dec. 22, 2017), https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties (last accessed April 4, 2018).

[39] Deferred Prosecution Agreement, *U. S. v. Keppel Offshore & Marine Ltd.*, 17-CR-697 (KAM) (E.D.N.Y. Dec. 22, 2017), https://www.justice.gov/opa/press-release/file/1020706/download (last accessed April 4, 2018)

[40] DOJ Press Release, *Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties* ¶ 1 (Dec. 22, 2017), https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties.

C. Parallel DOJ/SEC Enforcement Actions

1. Sociedad Química y Minera de Chile

On January 13, 2017, Chilean chemical and mining company Sociedad Química y Minera de Chile (SQM), whose shares also trade on the NYSE, entered into a DPA with the DOJ to resolve criminal violations of the FCPA's internal control and books and records provisions surrounding use of a discretionary account for the office of SQM's CEO, and consented to entry of an SEC cease and desist order to resolve civil violations relating to the same conduct.[41]

Between 2008 and 2015, the CEO's discretionary account, which was designated for travel, publicity, and advisory services, allegedly was used to direct payments totaling approximately $14.75 million to Chilean politicians, political candidates, and other politically exposed persons via vendors and foundations that were connected to these recipients. This included, among other payments, approximately $630,000 paid to foundations controlled by an official who had influence over the Chilean government's plans for mining in Chile.[42] SQM failed to require appropriate due diligence, documentation, or oversight with respect to these payments. SQM reportedly used fictitious contracts and invoices to disguise the nature of the payments, which were falsely recorded as "financial services," "communications advice," and "consulting services" in SQM's books and records.[43] Payments continued for an additional six months after concerns were raised in an internal audit report and to SQM's board of directors.

SQM agreed to pay a criminal penalty of $15,487,500, cooperate with the DOJ's investigation, make improvements to its compliance program, and retain an independent corporate compliance monitor for a term of two years, with a third year of self-reporting thereafter.[44] Although SQM did not voluntarily self-disclose to the DOJ, it received a 25% reduction off the low end of the applicable Guidelines range in view of its full cooperation and substantial remediation.[45] SQM's parallel settlement with the SEC required payment of a $15 million civil monetary penalty.[46]

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[41] *See* DOJ Press Release, *Chilean Chemicals and Mining Company Agrees to Pay More Than $15 Million to Resolve Foreign Corrupt Practices Act Charges*, Office of Pub. Affairs (Jan. 13, 2017), https://www.justice.gov/opa/pr/chilean-chemicals-and-mining-company-agrees-pay-more-15-million-resolve-foreign-corrupt (last accessed April 4, 2018); Deferred Prosecution Agreement, *U. S. v. Sociedad Química y Minera de Chile, S.A.*, Case 17-cr-00013-TSC, at 2 (D.D.C.. Jan. 13, 2017), https://www.justice.gov/criminal-fraud/file/930786/download (last accessed April 4, 2018); Information, *U. S. v. Sociedad Química y Minera de Chile, S.A. ("SQM")*, No. 17-cr-00013, at 2–3 (D.D.C. Jan. 13, 2017) https://www.justice.gov/criminal-fraud/file/930781/download (last accessed April 4, 2018).

[42] *See* Information, *U.S. v. Sociedad Química y Minera de Chile, S.A.*, Case 17-cr-00013-TSC, at *4 (D.D.C. Jan. 13, 2017).

[43] *See id.* at 6.

[44] *See* DOJ Press Release, *Chilean Chemicals and Mining Company Agrees to Pay More Than $15 Million* (Jan. 13, 2017), https://www.justice.gov/opa/pr/chilean-chemicals-and-mining-company-agrees-pay-more-15-million-resolve-foreign-corrupt; *see also* Deferred Prosecution Agreement, *U.S. v. Sociedad Química y Minera de Chile, S.A.*, Case 17-cr-00013-TSC, at 2–12 (D.D.C. Jan. 13, 2017).

[45] *See* Deferred Prosecution Agreement, *U.S. v. Sociedad Química y Minera de Chile, S.A.*, Case 17-cr-00013-TSC, at 6 (D.D.C. Jan. 13, 2017).

[46] *See* Order Instituting Cease-and-Desist Proceedings, *In re Sociedad Química y Minera de Chile., S.A.*, Sec. Exch. Act of 1934 Release No. 79,795 (U.S. SEC Jan. 13, 2017), https://www.sec.gov/litigation/admin/2017/34-79795.pdf (last accessed April 4, 2018).

2. Zimmer Biomet

As noted in our 2016 FCPA Year in Review, after medical device manufacturer Biomet Inc. (Biomet) entered into a DPA with the DOJ in 2012 relating to payments to public doctors in Argentina, Brazil, and China, in 2015 the company was acquired by Zimmer Holdings, Inc. and Biomet's monitorship was extended to March 2016. The newly combined company Zimmer Biomet Holdings, Inc. (Zimmer Biomet) disclosed on March 25, 2016 that the DOJ and SEC continued to investigate alleged misconduct in Brazil and Mexico.[47] As a result of that investigation, the DOJ found that Zimmer Biomet breached the 2012 DPA, and, on January 12, 2017, Zimmer Biomet entered into a new three-year DPA in connection with a superseding criminal information that charged the company with failing to implement adequate internal controls in Brazil and Mexico. In particular, Biomet allowed a Brazilian distributor to sell, import, and market its products through a different distributor that Biomet previously had terminated due to prior FCPA violations. In addition, Biomet used an unlicensed customs broker, without appropriate due diligence or a written agreement, to pay bribes to Mexican customs officials to facilitate the importation of unregistered and mislabeled dental products into Mexico.

Pursuant to the new DPA, Zimmer Biomet agreed to pay a $17.4 million criminal penalty and retain an independent corporate monitor for an additional three years based on a finding of criminal internal control violations.[48] In addition, an indirect subsidiary of Zimmer Biomet agreed to plead guilty to charges of causing Zimmer Biomet to violate the FCPA's books and records provisions. Zimmer Biomet also settled civil anti-bribery, books and records, and internal control charges with the SEC related to the same conduct and agreed to pay a $6.5 million civil penalty and over $6 million in disgorgement and prejudgment interest.[49]

3. Telia

On September 21, 2017, Telia Company AB (Telia), a Swedish company whose shares were traded on the NASDAQ from 2002 to September 5, 2007, settled FCPA violations with the DOJ and the SEC as part of a multijurisdictional investigation related to Telia's payment of bribes from 2007 to 2010 to obtain licenses, frequencies, number blocks, and other assets necessary to provide telecommunications services in Uzbekistan.[50] Telia agreed to pay $965 million in a coordinated settlement with the United States, Sweden, and the Netherlands.[51]

The settled charges arose out of bribes Telia paid between 2007 and 2010 to an Uzbek government official (whose government position was not identified), who was also a relative of a

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[47] *See* Zimmer Biomet Holdings, Inc., Current Report (Form 8-K) (Mar. 25, 2016), https://www.sec.gov/Archives/edgar/data/1136869/000119312516518185/d318910d8k.htm (last accessed April 4, 2018).
[48] *See* DOJ Press Release, *Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million* (Jan. 12, 2017), https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act.
[49] *See* SEC Press Release, 2017-8, *Biomet Charged with Repeating FCPA Violations* (Jan. 12, 2017), https://www.sec.gov/news/pressrelease/2017-8.html (last accessed April 4, 2018).
[50] DOJ Press Release, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution* (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.
[51] *Id.*

high-ranking Uzbek government official (whom the SEC identified as the then-President of Uzbekistan) and who had influence over decisions made by the Uzbek Agency for Communications and Information (UzAKI).[52] The press has identified a bribe recipient as Gulnara Karimova, the daughter of former Uzbek President Islam Karimov.[53] Telia paid the bribes to Ms. Karimova through a front company, Takilant Ltd., which was beneficially owned and controlled by Ms. Karimova, in the form of sham consulting payments, equity shares in Telia's Uzbek operating entity (COSCOM), a valuable put option to re-sell those shares to Telia at a substantial profit, and repayment of certain debt of a Swiss company beneficially owned by Ms. Karimova. Telia funneled other bribes through a representative of Ms. Karimova, who also was the general manager of one of Telia's key competitors in Uzbekistan.[54] In exchange for these corrupt payments, Telia received 3G and 4G licenses, radio frequencies, telephone blocks, and other regulatory approvals from UzAKI, as well as the lease of a fiber optic network from an Uzbek state telecom operator. In total, Telia made approximately $331 million in corrupt payments and, as a result, earned approximately $457 million in profits through the Uzbek telecommunications market.[55]

Apparently because Telia understood at the time it entered Uzbekistan that bribes would be required to operate in the country and had agreed to at least portions of the specific corrupt arrangements as early as July 2007, prior to Telia's de-listing of shares in September 2007, the SEC charged Telia, who therefore was an "issuer" for three months of the relevant period, with violations of the FCPA's anti-bribery and internal controls provisions. The SEC's cease and desist order did not spell out the basis for apparently covering conduct that post-dated Telia's de-listing.[56] Notably, the order did not include books and records charges.[57]

The DOJ charged both Telia and COSCOM with conspiracy to violate the FCPA's anti-bribery provisions covering domestic concerns, issuers, and other persons engaging in acts in furtherance of bribery while in US territory.[58] As support for its assertion of jurisdiction, the DOJ noted Telia's use of US agents and US-based email accounts, that Telia made payments in US dollars routed through US correspondent bank accounts, and that at least one Telia executive sent emails in furtherance of the corrupt scheme while in US territory.

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[52] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Company AB*, SEC Exch. Act Release No. 3898, Accounting and Auditing Enforcement (Sept. 21, 2017), https://www.sec.gov/litigation/admin/2017/34-81669.pdf (last accessed April 4, 2018).

[53] *See* Tom Schoenberg & Chris Dolmetsch, *Telia Is Said to Pay at Least $965 Million Over Uzbek Bribes*, BLOOMBERG (Sept. 21, 2017), https://www.bloomberg.com/news/articles/2017-09-21/telia-to-seal-u-s-deferred-prosecuton-deal-over-uzbek-bribes (last accessed April 4, 2018) (noting that the investigation of Telia arises out of a wider investigation into a company linked to Karimova which has spawned investigations into telecommunication companies such as VimpelCom, ING Groep NV, and Mobile TeleSystems PJSC).

[54] *Id.*

[55] DOJ Press Release, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery* (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.

[56] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Company AB*, Exch. Act Release No. 3898.

[57] *Id.*

[58] DOJ Press Release, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution* (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.

As noted above, Telia agreed to pay $965 million in penalties and disgorgement to resolve this matter with US, Dutch, and Swedish authorities. Within this amount, Telia agreed to a $548 million "Total Criminal Penalty" (which included a fine and forfeiture) with the DOJ, half of which was payable to the US Treasury within ten days of sentencing and up to half of which would be offset by criminal penalties paid to Dutch authorities.[59] In addition, Telia agreed with the SEC to disgorge $457 million, of which $40 million would be satisfied by the forfeiture agreed with the DOJ, and another $209 million could be satisfied by any payments made to resolve the Swedish and Dutch matters within the next 540 or 550 days, respectively.[60]

Although Telia was not eligible for voluntary disclosure credit, it received a 25% discount off the bottom end of the applicable USSG penalty range based on its cooperation and remediation.[61] The DOJ noted Telia's extensive remediation, including the termination of "all individuals who had a supervisory role over those who engaged in the misconduct" (including board members involved in the decision to enter Uzbekistan "or [who] failed to detect the corrupt conduct"), and the creation of a "new and robust" compliance function and "comprehensive compliance program."[62] The SEC also credited Telia's remedial efforts, including replacing all relevant members of its board and senior management. As a result of these remedial efforts, no independent compliance monitor was required.

The DOJ's press release noted that it had filed civil complaints seeking the forfeiture of "more than $850 million held in bank accounts in Switzerland, Belgium, Luxembourg and Ireland, which constitute bribe payments made by VimpelCom, Telia and a third telecommunications company, or funds involved in the laundering of those corrupt payments, to the Uzbek official."[63]

D. SEC Enforcement Actions

1. Mondelēz International

On January 6, 2017, the SEC issued a cease and desist order against Cadbury Ltd. (Cadbury) and Mondelēz International, Inc. (Mondelēz) relating to books and records and internal controls violations surrounding conduct in India.[64] Mondelēz (formerly Kraft Foods Inc.) is a global food and beverage manufacturer that is based in the United States and trades shares on the NASDAQ. In February 2010, Mondelēz acquired Cadbury, a UK-based confectionary manufacturer whose shares at the time traded as American Depository Receipts on the NYSE, and its subsidiaries, including Cadbury India Limited.

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[59] *See* DOJ Letter to David M. Stuart, Esq. et al., *U. S. v. Telia Company AB Deferred Prosecution Agreement*, No. 17-cr-581, ¶ 1 (S.D.N.Y. Sept. 21, 2017), https://www.justice.gov/criminal-fraud/file/998601/download (last accessed April 4, 2018).
[60] *Id.*
[61] *Id.*
[62] *Id.* ¶ 4.d.
[63] DOJ Press Release, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery* (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.
[64] *See* Order Instituting Cease-and-Desist Proceedings, *In re Cadbury Ltd. & Mondeléz Int'l Inc.*, SEC Exch. Act Release No. 79,753 (Jan. 6, 2017), https://www.sec.gov/litigation/admin/2017/34-79753.pdf (last accessed April 4, 2018).

In the same month Mondelēz completed its acquisition of Cadbury, Cadbury India finalized its retention of a local tile and marble vendor as an agent to obtain certain government licenses and approvals needed to expand a Cadbury India chocolate factory. The SEC's cease and desist order did not find specifically that Cadbury or its subsidiary engaged in bribery. Rather, the SEC stated, in connection with the settled enforcement action, that Cadbury India failed to conduct proper due diligence on the agent and failed to obtain adequate documentary support regarding services provided by that agent.[65] While the tile and marble vendor provided invoices and copies of the permits obtained, the SEC noted the lack of a contract with the agent and that Cadbury India had itself prepared the permit applications, while descriptions on the agent's invoices suggested the agent had performed such services.[66] The SEC stated that Cadbury India's deficiencies in due diligence and monitoring "created the risk" that the agent could use funds paid to it for improper or unauthorized purposes and that Cadbury India's books and records did not "accurately and fairly" reflect the nature of the services rendered by the agent.[67]

According to the SEC order, due to the nature of Mondelēz's acquisition of Cadbury, Mondelēz could not conduct "complete" pre-acquisition due diligence.[68] Mondelēz also did not identify the relationship with the Indian agent during the "substantial, risk-based, post-acquisition compliance-related due diligence" it conducted beginning in April 2010.[69] In October 2010, however, Mondelēz initiated an internal investigation related to the Indian agent, required Cadbury India to terminate and cease payments to the agent, cooperated with the SEC, and undertook "extensive remedial actions" with respect to Cadbury.[70]

In addition to finding Cadbury responsible for books and records and internal controls violations, the SEC found Mondelēz responsible for Cadbury's violations as a result of its acquisition of Cadbury stock.[71] Mondelēz agreed to pay a civil penalty of $13 million to resolve the matter, without admitting or denying the SEC's findings.[72]

2. Orthofix

On January 17, 2017, the SEC announced that Orthofix International N.V. (Orthofix) agreed to admit wrongdoing and pay more than $6 million in civil penalties and disgorgement for improper payments made to government officials by a Brazilian subsidiary.[73] Senior officials at Orthofix's wholly-owned subsidiary, Orthofix do Brasil LTDA (Orthofix Brazil), collaborated with third-party commercial representatives and distributors to make improper payments to

[65] *See id.* ¶¶ 10, 12.
[66] *See id.* ¶ 11.
[67] *See id.* ¶ 21.
[68] *See id.* ¶ 14. The Order does not specify the applicable legal or other restriction that prevented the company from conducting robust pre-acquisition due diligence.
[69] *See id.* ¶ 14.
[70] *See id.* ¶¶ 15–16.
[71] *See id.* ¶ 21.
[72] *See id.* § IV.
[73] *See* SEC Press Release 2017-18, *Medical Device Company Charged with Accounting Failures and FCPA Violations* (Jan. 17, 2017), https://www.sec.gov/news/pressrelease/2017-18.html (last accessed April 4, 2018).

government-employed doctors.[74] In particular, payments to doctors were funded through high commissions Orthofix Brazil paid to commercial representatives that were supported by false invoices for "marketing" services, through high discounts for distributors, or through payments to distributors for services that were not rendered. These amounts were recorded improperly as commissions, discounts, consulting fees, administrative expenses, and other legitimate expenses. The payments to doctors secured additional sales of Orthofix products to Brazilian state-run hospitals, netting approximately $2.9 million in illegal profits.

In support of the internal control charges, the SEC found that Orthofix had deficient controls surrounding the setting, approval, payment, and monitoring of commissions and discounts. The SEC noted that Orthofix management pressured subsidiaries to meet internal sales targets and that the company's decentralized reporting structure complicated parent company oversight, compliance monitoring, and communication with US executives. In addition, the SEC noted that "a lack of centralized global accounting and payment controls allowed Orthofix to record the improper payments as legitimate business expenses."

This marked the second time in five years that the Texas-based medical device company had settled with the SEC to resolve FCPA books and records and internal controls charges. Orthofix disclosed the Brazil allegations in the course of ongoing self-reporting obligations undertaken as part of a 2012 settlement with the SEC related to FCPA violations by a Mexican subsidiary. Although the SEC noted that Orthofix had not fully implemented remedial steps following the 2012 matter until discovery of the Brazil conduct in late 2013, it also noted that these "significant" efforts had included terminating problematic third parties, adopting new policies, establishing an internal audit function and expanding its compliance department, conducting extensive third-party audits, and conducting revised and additional training.

On the same day, the SEC also announced settlements with Orthofix and four former executives concerning non-FCPA-related accounting violations.

3. Halliburton

On July 27, 2017, the SEC issued a cease and desist order alleging violations by Halliburton Company (Halliburton), a US issuer and domestic concern, of the FCPA's books and records and internal controls provisions.[75] Without admitting or denying liability, Halliburton agreed to pay a $14 million civil penalty, disgorge $14 million in profits derived from the company's oilfield services business in Angola, and pay $1.2 million in pre-judgment interest to resolve the matter.[76] In the same order, the SEC also settled charges with Jeannot Lorenz, a former Halliburton Vice-President and US permanent resident who led Halliburton's local content efforts in Angola during the relevant period, alleging that Lorenz knowingly

[74] *See* Order Instituting Cease-and-Desist Proceedings, *In re Orthofix International N.V.*, SEC Exch. Act Release No. 79,828, at 2 (Jan. 17, 2017), https://www.sec.gov/litigation/admin/2017/34-79828.pdf (last accessed April 4, 2018).
[75] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Haliburton Company and Jeannot Lorenz*, Exchange Act Release No. 3884 (July 27, 2017), https://www.sec.gov/litigation/admin/2017/34-81222.pdf) (last accessed April 4, 2018).
[76] SEC Press Release 2017-133, *Halliburton Paying $29.2 Million to Settle FCPA Violations*, (July 27, 2017), https://www.sec.gov/news/press-release/2017-133 (last accessed April, 4, 2018).

circumvented Halliburton's internal controls, knowingly falsified Halliburton's books and records, and caused Halliburton's violations of the FCPA's accounting provisions.[77]

In its cease and desist order, the SEC alleged that, in early 2008, Sonangol, an Angolan state-owned company that regulates international oil investments, considered vetoing further subcontract work for Halliburton in Angola's oilfield services industry because Halliburton allegedly was in violation of Angolan local-content regulations.[78] As a result, Lorenz and Halliburton considered several local content projects in 2008 and early 2009. In April 2009, Lorenz proposed outsourcing $15 million in unspecified services to a local Angolan company owned by a former Halliburton employee who was "a friend and neighbor of the Sonangol government official" with authority to approve the award of certain contracts to Halliburton.

Lorenz made two initial attempts to engage the local company – the first to appoint the local company as an agent on commission, and the second to outsource certain work to the local company on a sole source basis – which both were slowed by Halliburton's internal control processes surrounding such engagements.[79] As a result, in September 2009, Lorenz entered an interim consulting contract with the local partner before Halliburton began its local bidding process. The SEC alleged that Lorenz made false statements to secure approval for the consulting contract by implying that the Angolan company already provided and would continue to provide services. He also failed to comply with Halliburton's requirement that the contract be approved by a tender committee. In the meantime, Lorenz and a "Halliburton senior executive" assured the Sonangol official that they were working through Halliburton's procurement processes and asked for support in the award of an upcoming contract to Halliburton.[80]

After the local partner's bid failed to meet Halliburton's stated outsourcing requirements and exceeded the cost of competing bids, on February 23, 2010, Halliburton issued a letter of intent to enter into a real estate management agreement in which the local Angolan company instead would provide "real estate transaction management consulting services" and sublease commercial properties to Halliburton at a substantial markup. Roughly contemporaneously, Lorenz paid $405,000 under the consulting contract, although the SEC alleged that no work had been completed.[81]

Halliburton's finance and accounting department at both the regional and headquarters level raised concerns about the real estate management agreement, questioning the single source procurement, upfront payments, high costs, and rationale for entering into subleases rather than direct leases. The concerns were raised to senior corporate executives, who agreed that the commercial terms were onerous but thought that only the proposed agreement would satisfy Sonangol. On May 1, 2010, Lorenz signed the real estate management agreement, and Halliburton agreed to pay the local Angolan company $275,000 per month for four years. The documentation entered into Halliburton's management systems failed to reflect a basis for the

[77] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Haliburton Company and Jeannot Lorenz*, SEC Exch. Act Release No. 3884, Accounting and Auditing Enforcement (July 27, 2017), https://www.sec.gov/litigation/admin/2017/34-81222.pdf (last accessed April 4, 2018).
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* ¶ 15.

sole source award, which was noted by Halliburton's internal audit in late 2010.The SEC alleged that the local Angolan company provided no meaningful services under the agreement.

Halliburton terminated payments to the local Angolan company in April 2011 after receiving an anonymous email in December 2010 alleging possible misconduct with respect to the contracts. From April 2010 to April 2011, Halliburton paid the local Angolan company $3.705 million under the contracts and derived $14 million in profits from the award of seven Sonangol subcontracts.[82]

The SEC found that Halliburton had "clearly defined internal accounting controls governing, among other things, the selection and approval of vendors in high risk countries, commercial agents, and single source suppliers."[83] The SEC specifically noted that Halliburton required potential commercial agents to undergo a "lengthy due diligence and review process that included retaining outside US legal counsel experienced in FCPA compliance to conduct interviews." Moreover, the SEC noted that Halliburton established a supplier qualification process that "begin[s] with an assessment of the criticality or risk of a material or service," and Halliburton's internal controls required either a competitive bidding process or a single source justification that "typically occurs when a supplier is clearly preferred for quality, technical execution or other reasons."[84]

Despite those procedures and a finding that Lorenz "knowingly circumvented" certain internal controls, the SEC alleged that Halliburton violated the internal controls provisions of the FCPA by failing to follow the terms of its own internal controls.[85] The SEC further alleged that the conduct violated the books and records provisions of the FCPA because Halliburton's books and records did not reflect the true purpose of the contracts: to satisfy local content requirements rather than to perform the stated scope of work. The SEC alleged that Lorenz caused those violations by "providing inaccurate scopes of work and other information contained in the agreements."[86]

Potentially influenced by the fact Halliburton had settled past FCPA violations in 2009, the SEC required Halliburton to retain an independent consultant, approved by the SEC, for a term of 18 months. Among other things, the consultant will "review and evaluate" Halliburton's anti-corruption procedures and "consider whether the ethics and compliance function has sufficient resources, authority, and independence, and provides sufficient training and guidance to the business operations in Africa."

4. Alere

On September 28, 2017, Alere, Inc. (Alere), a Delaware corporation and "issuer" that manufactures and sells diagnostic testing equipment, consented to the entry of an SEC cease and desist order alleging violations of the FCPA's books and records and internal controls

[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

provisions.[87] The order arose out of, among other things, the alleged mischaracterization of payments made to a Colombian government official by Alere's Colombian subsidiary and the failure of Alere's Indian subsidiary to properly record certain payments made by a distributor.[88] The SEC further alleged that Alere improperly recognized revenue and made certain misstatements related to tax liabilities in violation of various provisions of the Securities Exchange Act, Securities Act, and corresponding SEC rules. Without admitting or denying the SEC's findings, Alere agreed to pay a civil monetary penalty of $9,200,000, disgorgement of $3,328,689, and prejudgment interest of $495,196.[89]

The SEC alleged that, in 2008, Alere purchased a private Colombian distributor previously known as BioSystems, S.A., whose customers included a set of Entidad Promotora de Salud (EPS) entities that provided health-insurance services.[90] EPSs are created by Colombian law, and BioSystems's EPS customers were both private and government controlled. From 2007 through 2012, Biosystems, at the direction of its general manager in Colombia, allegedly made improper payments to an EPS manager totaling $275,000 in order to obtain and retain business from the EPS, and the payments were disguised as payments for consulting services ostensibly received from the EPS manager's husband, sister-in-law, and friend.[91] The EPS in question was initially private, but was taken over by the government during the period in question. The SEC did not allege violations of the anti-bribery provisions of the FCPA.[92] Instead, the SEC alleged that the payments violated the books and records and internal controls provisions of the FCPA because they were improperly recorded as payments related to consulting services and because Alere failed to devise controls that would prevent payments in contravention of Alere's policies.[93]

In addition, in 2011, an Indian-based Alere subsidiary, working through an Indian distributor, received a contract to provide malaria testing kits to a local governmental entity.[94] In 2012, local government officials informed the distributor that they would be willing to increase their purchase of malaria testing kits from 200,000 to 1,000,000 if the officials were paid a four percent commission.[95] The SEC alleged that the distributor passed this message to Alere's subsidiary, who agreed to the arrangement. The Indian subsidiary then failed to record the additional commission in its books and records. Similar to the Colombian conduct, the SEC alleged that the conduct of Alere's Indian subsidiary violated the books and records and internal controls provisions of the FCPA by failing to record the additional commission in its books and records and failing to implement internal controls that would prevent the improper payment.[96] The SEC's order did not include anti-bribery charges.[97]

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[87] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alere Inc.*, SEC Exch. Act Release No. 81,742 (Sept. 28, 2017); https://www.sec.gov/litigation/admin/2017/33-10417.pdf (last accessed April 4, 2018).
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] As noted above, the Order included a number of non-FCPA-related charges. It also included alleged violations of the FCPA's books and records and internal controls provisions with respect to financial misstatements arising from

The settlement also underscores the importance of thorough anti-corruption due diligence prior to mergers and acquisitions. The SEC and DOJ conducted their investigations during the acquisition of Alere by Abbott Labs, Inc. (Abbott). Abbott originally agreed to purchase Alere in February 2016, but subsequently sought to terminate the deal after the full extent of the Alere investigations came to light. Abbott eventually agreed to proceed with the deal after reducing the original price by $500 million.

E. Corporate Enforcement in Q1 2018

After a relatively quiet few months, three corporate enforcement actions were announced in March 2018. While the first quarter of 2018 has not seen quite the flurry of activity we witnessed in the first quarter of 2017 (particularly in the first few weeks of 2017), we nonetheless continue to see activity from both the DOJ (Transportation Logistics International) and SEC (Elbit Imaging Ltd. and Kinross Gold).

1. Transportation Logistics International

On March 12, 2018, Transportation Logistics International, Inc. (TLI), a Maryland-based company, paid a $2 million penalty and entered into a three-year DPA with the DOJ. The DOJ charged TLI with one count of conspiracy to violate the anti-bribery provisions of the FCPA arising from TLI's contracts with JSC Techsnabexport (TENEX), a Russian state-owned company responsible for supplying uranium and uranium enrichment services to nuclear power companies on behalf of the Russian Federation.

TLI provides logistical support services for the transportation of nuclear materials to US and foreign customers.[98] As early as 2004, an unnamed owner and executive of TLI entered into a corrupt agreement with Vadim Mikerin, a Director of TENEX and President of TENEX's US subsidiary, whereby TLI provided Mikerin a kickback based on a percentage of contracts TENEX would award.[99] Around 2009, two other executives of TLI, Daren Condrey and Mark Lambert, learned of and joined the corrupt scheme.[100] To conceal the corrupt scheme from others at TLI, the co-conspirators used code words, such as "cake," "lucky numbers," "lucky figures," "remuneration," and "commission;" shell companies with accounts in Cyprus, Latvia, and Switzerland; and falsified invoices from TENEX for services that were never provided.[101] In total, TLI paid approximately $1.7 million for the benefit of Mikerin in exchange for contracts that resulted in approximately $11.6 million in profit.[102]

TLI received full credit for substantial cooperation but, not having self-reported, did not receive voluntary disclosure credit. As a result, the DOJ calculated a criminal penalty of almost

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tax errors from the divestiture of various subsidiaries and business segments and improper revenue recognition by Alere's subsidiaries, including subsidiaries in South Korea and the United States.

[98] *See* Deferred Prosecution Agreement, *U. S. v. Transp. Logistics Int'l, Inc.*, No. 18-cr-00011, Attach. A ¶ 2 (D. Md. Mar. 12, 2018) (ECF No. 6).

[99] *See id.* Attach. A ¶¶ 12-14.

[100] *See id.* Attach. A ¶¶ 14-15.

[101] *See id.* Attach. A ¶¶ 9-11, 16-17.

[102] *See id.* Attach. A ¶ 12.

$21.4 million, which represented a 25% discount off the bottom of the applicable USSG range.[103] Despite that finding, the DOJ imposed only a $2 million criminal penalty, citing an independent forensic analysis that showed a penalty greater than $2 million would "substantially jeopardize the continued viability of the company," the ability of the DOJ to prosecute the individual wrongdoers, and TLI's significant cooperation and remediation.[104] Based on TLI's remedial efforts, the DOJ did not impose a monitor, but the company is required to self-report to the DOJ concerning the status of its compliance program during the term of its three-year DPA. During sentencing, the judge approved the DPA, but only after criticizing the DOJ for "sav[ing] the company as opposed to render[ing] justice."[105]

As noted in our 2015 FCPA Year in Review, Mikerin, Condrey, and a related intermediary previously pleaded guilty in 2015 to criminal charges related to the core conduct in the case. As noted below, charges against Lambert were filed in January 2018.

2. Elbit Imaging Ltd.

On March 9, 2018, the SEC announced an order instituting a settled administrative proceeding against Elbit Imaging Ltd. (Elbit), an Israeli-incorporated "issuer" under the FCPA, and a Dutch subsidiary it controlled and consolidated, Plaza Centers NV (Plaza), in connection with violations of the FCPA's books and records and internal controls provisions. According to the order, between 2007 and 2012, Elbit and Plaza entered into agreements with consultants and sales agents in connection with a Romanian real estate development project and the unrelated sale of a portfolio of assets located in the United States.[106] Overall, Elbit and Plaza paid approximately $14 million to two consultants on the Romanian project, and $13 million to sales agents on the portfolio sale, without conducting due diligence on the consultants and without any documentation supporting the payments or identifying services actually rendered.[107] According to the SEC, "some or all of the funds may have been used to make payments to Romanian government officials or were embezzled."[108]

The SEC charged Elbit and Plaza with having deficient internal accounting controls for failing to identify the $27 million in unsupported payments (which were not kept in reasonable

[103] *See id.* ¶ 8.
[104] *See id.* ¶ 4(l).
[105] *See* Adam Dobrick, *"Why Is the Goal Always to Save the Company?" Judge Asks FCPA Prosecutor*, Global Investigations Rev.: Just Anti-Corruption (Mar. 26, 2018), https://globalinvestigationsreview.com/article/jac/1167181/%E2%80%9Cwhy-is-the-goal-always-to-save-the-company-%E2%80%9D-judge-asks-fcpa-prosecutor?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=9315116_JAC%20Headlines%2026%2F03%2F2018&dm_i=1KSF,5JNL8,MAGVYO,LIST4,1 (last accessed April 4, 2018).
[106] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, SEC Exch. Act Release No. 82,849, ¶¶ 4, 11 (Mar. 9, 2018), https://www.sec.gov/litigation/admin/2018/34-82849.pdf (last accessed April 4, 2018).
[107] *See id.* at ¶¶ 10, 17. Interestingly, in the case of the sales agents, one sales agent subcontracted work to a separate sales agent beneficially owned by Elbit's former CEO (who passed away in June, 2016). The sales agents were paid nearly double the amount paid separately to a Financial Advisor, who apparently provided the services contemplated to be provided by the sales agents. *See id.* at ¶¶ 14, 17.
[108] *Id.* at ¶ 10.

detail to reflect the transactions appropriately).[109] The deficiency of these controls was exacerbated by the limited involvement of the legal department over contracts entered into with third parties, and by Elbit's failure to have an adequate anti-corruption program in place.[110] The SEC also alleged that Elbit and Plaza mischaracterized the payments as legitimate expenses.[111]

Elbit did not admit or deny the order's findings, and paid a $500,000 civil penalty to the SEC. The penalty took into account Elbit's disclosure and investigation of the payments in connection with the Romanian project (which led to the discovery of facts pertaining to the portfolio sale) and other cooperation with the SEC, as well as the fact that Elbit was in the process of selling its assets and was not developing new business.[112]

3. Kinross

On March 26, 2018, the SEC announced a settled action with Kinross Gold Corporation (Kinross), a Canada-based gold-mining company and "issuer" under the FCPA, for alleged violations of the FCPA's books and records and internal controls provisions. The action, which is pending court approval, will result in a $950,000 civil penalty when approved.[113]

The SEC order instituting cease and desist proceedings alleges that, following Kinross' acquisition of two mining operations in Mauritania and Ghana, Kinross failed to address those operations' inadequate accounting controls "in a timely manner."[114] The SEC alleged that, in spite of multiple internal audits concluding the operations lacked an anti-corruption compliance program and sufficient internal controls (including audits undertaken as part of its pre-acquisition due diligence process) it took Kinross more than three years following its acquisition of these subsidiaries to implement adequate controls.[115] Once controls were put into place, Kinross allegedly failed to adequately maintain them.

The SEC further alleged that Kinross had inadequate controls to provide reasonable assurances that transactions were properly authorized or that payments to vendors were undertaken pursuant to their stated purpose and complied with Kinross' prohibition on making improper payments to government officials. Specifically, the order states that Kinross paid the expenses of a Ghanaian government customs officer for travelling to the mine site (even when it appeared he did not do so), regularly created purchase orders following the receipt of invoices, issued disbursements without retaining proper approvals, and did not accurately describe petty cash payments made to consultants working with government agencies in the company's books and records.[116] In addition, the order alleges that in 2014, after implementing enhanced internal

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[109] *See id.* at ¶¶ 18-19.
[110] *See id.* at ¶ 19.
[111] *See id.* at ¶ 20.
[112] *See id.* at ¶ 27.
[113] SEC Press Release 2018-047, *Kinross Gold Charged With FCPA Violations* (Mar. 26, 2018), https://www.sec.gov/news/press-release/2018-47 (last accessed April 4, 2018).
[114] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Kinross Gold Corporation*, SEC Exch. Act Release No. 82,946, ¶ 7 (Mar. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-82946.pdf (last accessed April 4, 2018).
[115] *See id.* at ¶¶ 1, 2, 6-12.
[116] *See id*. at ¶12.

accounting controls, Kinross awarded a three-year, $50 million logistics contract to a higher-cost, less-qualified company preferred by Mauritanian government officials without following the company's bidding and tendering procedures and hired a "well-connected" individual as a handsomely paid consultant working with Kinross' government-relations department without performing required due diligence.[117] Kinross also failed to adequately train key employees to recognize corruption risks.[118] Kinross neither admitted nor denied the allegations.

The order notes remedial efforts taken by Kinross, including conducting audits, implementing systems to better manage and track expenditures, implementing improved compliance training, replacing personnel, and increasing the number of compliance personnel.[119] Kinross also agreed to inform the SEC of any additional evidence of corrupt payments it finds and, for a one-year period, to undertake a follow-up review and submit reports describing and monitoring the compliance policies and procedures in place at its African operations.
The DOJ also initiated a related investigation, but in 2017 it notified Kinross that it had closed its investigation.[120]

III. INDIVIDUAL ENFORCEMENT ACTIONS

As noted in in our Enforcement Statistics section above, the SEC brought two individual enforcement actions in 2017 while the DOJ brought 17. Below, we address both new enforcement actions brought against individuals and significant developments in ongoing matters, including those noted in our 2017 FCPA Mid-Year Review.[121]

A. SEC Enforcement Actions[122]

1. Och-Ziff Management Individuals

On January 26, 2017, the SEC charged Michael Cohen and Vanja Baros, both former Och-Ziff Management (Och-Ziff) executives, with violating the FCPA and the Investment Advisers Act.[123] The pair also was charged with aiding and abetting Och-Ziff's violations. In its complaint, the SEC asked the court for civil penalties, disgorgement of ill-gotten gains, and an injunction preventing Cohen and Baros from engaging in future violations.[124] For background please see our 2017 FCPA Mid-Year Review and our 2016 FCPA Year in Review.

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[117] *See id*. at ¶14-20.
[118] *See id*. at ¶21.
[119] *See id*. at ¶ 22.
[120] Joel Schectman, *Kinross Gold Settles U.S. Charges Related to Bribe Prevention in Africa*, REUTERS (Mar. 26, 2018), https://ca.reuters.com/article/topNews/idCAKBN1H22DW-OCATP (last accessed April 4, 2018).
[121] For a discussion of the Magyar Telecom Defendants (Tamás Morvai, Elek Straub, and András Balogh) and Samuel Mebiame (an individual involved in the Och-Ziff matter), see our 2017 FCPA Mid-Year Review.
[122] As noted above in Part II, the SEC brought an enforcement actions against Jeannot Lorenz in conjunction with Halliburton, and the SEC brought an enforcement action against Jeffery Chow in conjunction with Keppel Offshore & Marine Ltd.
[123] SEC Press Release 2017-34, *SEC Charges Two Former Och-Ziff Executives with FCPA Violations* (Jan. 26, 2017), https://www.sec.gov/news/pressrelease/2017-34.html (last accessed April 4, 2018).
[124] Complaint, *Sec. & Exch. Comm'n v. Cohen*, No. 1:17-cv-00430-NGG-LB (E.D.N.Y. Jan. 26, 2017) (ECF No. 1); Amended Complaint, *Sec. & Exch. Comm'n v. Cohen*, No. 1:17-cv-00430-NGG-LB (E.D.N.Y. May 29, 2017) (ECF No. 27).

On August 18, 2017, Cohen and Baros filed motions to dismiss the amended complaint, arguing all of the SEC's claims were time-barred because the federal five-year statute of limitation under 28 U.S.C. § 2462 had expired.[125] They cited to the Supreme Court case *Kokesh v. Sec. & Exch. Comm'n*, which held that the statute of limitations under § 2462 applied not only to monetary penalties, but also to disgorgement.[126] Cohen and Baros argued that the reasoning in *Kokesh* likewise applied to injunctions, meaning that injunctions too were subject to the five-year statute of limitations. Accordingly, they argued that the SEC was barred from seeking penalties, disgorgement, or an injunction. The SEC opposed the motions to dismiss, arguing that its claims were timely, and that the reasoning in *Kokesh* did not apply to injunctions.[127]

On February 9, 2018, the United States filed a motion to stay the proceedings, due to a related criminal case that was underway against Cohen, alleging that he defrauded a UK-based charitable organization that was an Och-Ziff investor, and engaged in obstruction.[128] The United States sought a stay of the SEC's action until the conclusion of the criminal case. The court has yet to rule on the Cohen and Baros August 18 motions to dismiss the amended complaint, or on the government's February 9 motion to stay the proceedings.

B. DOJ Enforcement Actions

1. Ashe - United Nations Bribery Allegations[129]

In Steptoe's 2016 FCPA Year in Review, we reported on developments in a 2015 case filed against John W. Ashe and five other individuals involving more than $1.3 million in bribes paid to Ashe in his former roles as Ambassador for Antigua and Barbuda and President of the UN General Assembly.[130] Ashe passed away in 2016.[131] Only one of the remaining five defendants, Chinese national Shiwei Yan, has been sentenced in the case. In January 2017, Yan

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[125] Memorandum of Law in Support of Defendant Michael L. Cohen's Motion to Dismiss the Amended Complaint, *Sec. & Exch. Comm'n v. Cohen*, No. 1:17-cv-00430-NGG-LB (E.D.N.Y. Aug. 18, 2017) (ECF No. 47); Memorandum of Law of Vanja Baros in Support of His Motion to Dismiss the Amended Complaint, *Sec. & Exch. Comm'n v. Cohen*, No. 1:17-cv-00430-NGG-LB (E.D.N.Y. Aug. 18, 2017) (ECF No 43). According to 28 U.S.C. § 2462, "… an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon[]" (emphasis added).

[126] *Kokesh v. Sec. & Exch. Comm'n*, No. 16-529, 137 S.Ct. 1635, 1640-41, 1644-45 (U.S. Jun. 5, 2017). For additional discussion on *Kokesh*, see our 2017 FCPA Mid-Year Review and Steptoe's International Law Advisory on *Kokesh.*

[127] Plaintiff Securities and Exchange Commission's Opposition to Defendant Cohen's and Defendant Baros's Motions to Dismiss, *Sec. & Exch. Comm'n v. Cohen*, No. 1:17-cv-00430-NGG-LB (E.D.N.Y. Aug. 18, 2017) (ECF No. 43).

[128] SEC Memorandum of Law in Support of Applications to Intervene in and Stay Civil Proceedings, *Sec. & Exch. Comm'n v. Cohen*, No. 1:17-cv-00430-NGG-LB (E.D.N.Y. Feb. 9, 2018) (ECF No. 63). The criminal case is *U. S. v. Cohen*, No. 1:17-cr-00544-NGG-1 (E.D.N.Y. filed Oct. 5, 2017).

[129] Please see Part III.B.4 in FCPA Policy and Legal Develops for a discussion of defenses raised by Ng Lap Seng.

[130] DOJ Press Release, *Former UN General Assembly President and Five Others Charged in $1.3 Million Bribery Scheme* (S.D.N.Y. Oct. 6, 2016), https://www.justice.gov/usao-sdny/pr/former-un-general-assembly-president-and-five-others-charged-13-million-bribery-scheme (last accessed April 4, 2018).

[131] Melissa Daniels, Ex-UN Leader Dies 5 Days Before Hearing in Bribery Case, LAW360.COM (June 22, 2016), http://www.law360.com/articles/810158/ex-un-leader-dies-5-days-before-hearing-in-bribery-case (last accessed April 4, 2018).

pleaded guilty to one count of bribery based on allegations that she, and co-defendant Heidi Hong Piao, provided payments totaling more than $800,000 to Ashe.[132] Piao also pleaded guilty to, among other things, non FCPA-related bribery charges and money laundering,[133] and is currently scheduled for sentencing on April 25, 2018.[134]

Our 2016 FCPA Year in Review also noted the indictment of two of the other individuals involved in the scheme, Macau real estate developer Ng Lap Seng and his associate Jeff C. Lin, for their alleged bribery of Ashe and Francis Lorenzo, the former deputy UN ambassador from the Dominican Republic. Seng faces FCPA, money laundering and conspiracy charges for alleged payments in excess of $500,000 to Ashe and Lorenzo in exchange for their support for the construction of a UN Conference Center in Macau.

Following his 2016 guilty plea to bribery, money laundering, and other charges,[135] on April 27, 2017, Lorenzo, the final individual involved in the scheme, pleaded guilty to two additional counts in a new superseding information filed by the government,[136] admitting for the first time violations of the FCPA and thereby securing his agreement to testify against Seng.[137] Lorenzo ultimately became a key government witness and testified to having benefitted from Seng's bribes.[138] On April 7, 2017, Yin also pleaded guilty to conspiracy to defraud the United States,[139] and was sentenced to seven months imprisonment on February 28, 2018.[140] On July 27,

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[132] Minute Entry, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. Jan. 20, 2016). As described in our 2016 FCPA Year in Review, Yan was sentenced to 20 months in prison and two years of supervised release, fined US $12,500, and ordered to forfeit US $300,000. DOJ Press Release, *Former Head Of Foundation Sentenced To 20 Months In Prison For Bribing Then-Ambassador And President Of United Nations General Assembly* (S.D.N.Y. July 29, 2016), https://www.justice.gov/usao-sdny/pr/former-head-foundation-sentenced-20-months-prison-bribing-then-ambassador-and-president (last accessed April 4, 2018); *see also* J. as to Shiwei Yan, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. Aug. 4, 2016) (ECF No. 243); DOJ Press Release, *Former UN General Assembly President and Five Others Charged in $1.3 Million Bribery Scheme* (S.D.N.Y. Oct. 6, 2015), https://www.justice.gov/usao-sdny/pr/former-un-general-assembly-president-and-five-others-charged-13-million-bribery-scheme (last accessed April 4, 2018).

[133] Minute Entry, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. Jan. 14, 2016); Superseding Information, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. Jan. 14, 2016) (ECF No. 132).

[134] Memo Endorsement as to Heidi Hong Piao, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. Oct. 25, 2017) (ECF No. 676).

[135] DOJ Press Release, *Former Head Of Foundation Sentenced To 20 Months In Prison For Bribing Then-Ambassador And President Of United Nations General Assembly* (July 29, 2016), https://www.justice.gov/usao-sdny/pr/former-head-foundation-sentenced-20-months-prison-bribing-then-ambassador-and-president (last accessed April 4, 2018).

[136] Minute Entry, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. April 27, 2017); Superseding Information, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. April 27, 2017) (ECF No. 459).

[137] Tr. of Proceedings, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. May 9, 2017) (ECF No. 465) (transcript of Mr. Lorenzo guilty plea to new counts of FCPA violations); Larry Neumeister, Dominican Diplomat Pleads Guilty, Cooperating in UN Case, U.S. NEWS (April 27, 2017), https://www.usnews.com/news/best-states/new-york/articles/2017-04-27/dominican-diplomat-pleads-guilty-cooperating-in-un-case.

[138] Bob Van Voris, *Ex-Diplomat Tells Jurors He Got $1 Million Bribe From Developer*, BLOOMBERG (July 7, 2017), https://www.bloomberg.com/news/articles/2017-07-07/ex-diplomat-tells-jurors-he-got-1-million-bribe-from-developer (last accessed April 4, 2018).

[139] Minute Entry, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. April 7, 2017); Superseding Indictment at 24, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. Nov. 22, 2016) (ECF No. 322).

[140] Order, *U. S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. Mar. 6, 2018) (ECF No. 724); Order, *U. S. v. Ashe et al.*, 1:15-CR-00706 (S.D.N.Y. Feb. 26, 2018).

2017, Seng was convicted on all counts, including violating the FCPA, bribery, money laundering, and conspiracy.[141] Seng is scheduled for sentencing on May 11, 2018.

On April 4, 2018, one of the other defendants charged in the case, Julia Vivi Wang, pleaded guilty to conspiracy to violate the FCPA, a substantive FCPA offense, and submitting fraudulent income tax returns.[142] The government alleged that Wang had wired Ashe $500,000 as part of the scheme. Wang was formerly an executive of South-South News, a media group that promoted UN development goals. A sentencing date has not been set at the time of this writing.[143]

2. PDVSA Individuals

In our 2016 FCPA Year in Review and 2017 FCPA Mid-Year Review, we reported on ongoing developments in an alleged bribery scheme at Venezuelan state-owned oil company Petróleos de Venezuela S.A. (PDVSA) involving multiple defendants.[144] Although sentencing was previously scheduled for some individuals in July 2017, sentencing for all defendants is now scheduled for August 23, 2018.[145]

These defendants include Juan Jose Hernandez Comerma (Hernandez), a former general manager and partial owner of a Florida-based energy company, and Charles Quintard Beech III (Beech), owner of multiple Texas-based energy companies, both of whom pleaded guilty to FCPA charges for their role in a scheme to corruptly obtain contracts from PDVSA on January 10, 2017. Additionally, Fernando Ardila-Rueda (Ardila), a Florida resident and partial owner of

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[141] DOJ Press Release, *Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center*, (July 28, 2017) https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-role-scheme-bribe-united (last accessed April 4, 2018); Verdict Form, *U.S. v. Ashe et al*., 1:15-CR-00706 (S.D.N.Y. July 27, 2017) (ECF No. 572).

[142] Pete Brush, *Woman Who Helped Bribe Top Diplomat Cops To FCPA Counts*, LAW360 (Apr. 4, 2017), https://www.law360.com/articles/1029757/woman-who-helped-bribe-top-diplomat-cops-to-fcpa-counts (last accessed April 5, 2018).

[143] *Id.*

[144] DOJ Press Release, *Businessman Pleads Guilty to Foreign Bribery and Tax Charges in Connection with Venezuela Bribery Scheme* (June 16, 2016), https://www.justice.gov/opa/pr/businessman-pleads-guilty-foreign-bribery-and-tax-charges-connection-venezuela-bribery-scheme (last accessed April 4, 2018).

[145] Order Resetting Sentencings as to Roberto Enrique Rincon-Fernandez, Abraham Jose Shiera-Bastidas, *U. S. v. Rincon-Fernandez et al*., 4:15-CR-00654 (S.D. Tex. Jan. 29, 2018) (ECF No. 146); Order Resetting Sentencing as to Moises Abraham Millan Escobar, *U. S. v. Millan Escobar*, 4:16-CR-00009 (S.D. Tex. May 31, 2017) (ECF No. 40); Order Resetting Sentencing as to Christian Javier Maldonado-Barillas, *U. S. v. Maldonado-Barillas*, 4:15-CR-00635 (S.D. Tex. Jan. 29, 2018) (ECF No. 33); Order Resetting Sentencing as to Alfonzo Eliezer Gravina-Munoz, *U. S. v. Gravina-Munoz*, 4:15-CR-00637 (S.D. Tex. Jan. 29, 2018) (ECF No. 41); Order Resetting Sentencing as to Juan Jose Hernandez-Comerma, *U. S. v. Hernandez-Comerma*, 4:17-CR-00005 (S.D. Tex. Jan. 29, 2018) (ECF No. 25); Order Resetting Sentencing as to Charles Quintard Beech, III, *U. S. v. Beech*, 4:17-CR-00006 (S.D. Tex. Jan. 29, 2018) (ECF No. 15); Order Resetting Sentencing as to Karina Del Carmen Nunez-Arias, *U. S. v. Nunez-Arias*, 4:16-CR-00436 (S.D. Tex. Jan. 29, 2018) (ECF No. 21); Order Resetting Sentencing as to Fernando Ardila-Rueda, *U. S. v. Ardila-Rueda*, 4:17-CR-00515 (S.D. Tex. Jan 29, 2018) (ECF No. 14); Order Resetting Sentencing as to Jose Luis-Ramos-Castillo, *U. S. v. Ramos-Castillo*, 4:15-CR-00636 (S.D. Tex. May 31, 2017) (ECF No. 45).

US-based energy companies, pleaded guilty to FCPA charges for his role in paying bribes to PDVSA personnel in exchange for contracts on October 10, 2017.[146]

On February 12, 2018, the DOJ unsealed money laundering and conspiracy to commit money laundering charges against five former Venezuelan government officials for their alleged participation in the PDVSA bribery scheme.[147] Two of the five defendants were also charged with conspiracy to violate the FCPA.[148] Four of the defendants were arrested in Spain in October 2017 by Spanish authorities based on a 20-count indictment returned in the Southern District of Texas on August 23, 2017.[149] One of the defendants was extradited from Spain on February 9, 2018 while three remain in Spanish custody pending extradition.[150] A fifth defendant remains at large.[151] All five defendants are citizens of Venezuela while the government has alleged one is also a dual US citizen.[152]

With the unsealing of the indictment against these foreign officials, the DOJ has announced charges against 15 individuals, 10 of whom have pleaded guilty, as part of a larger, ongoing investigation by the US government into bribery at PDVSA.[153]

3. Mexican Aviation Defendants

As noted in our 2016 FCPA Year in Review, four individuals, Douglas Ray, Victor Hugo Valdez Pinon, Kamta Ramnarine, and Daniel Perez, pleaded guilty in the Southern District of Texas to, among other things, conspiracy to violate the FCPA arising from a scheme to bribe Mexican aviation officials to obtain aviation maintenance, repair, and overhaul contracts from Mexican government-owned customers.[154] In conjunction with the aforementioned plea agreements, two former foreign officials, Ernesto Hernandez Montemayor and Ramior Ascencio Nevarez, pleaded guilty to conspiracy to commit money laundering as part of an effort to conceal

[146] Ardila was a business partner of Abraham Jose Shiera Bastidas (Shiera), who owned United States-based energy companies that supplied PDVSA. Ardila was a minority owner of Shiera's companies, and served as sales director or manager for some. According to the criminal information, around late September 2011, Ardila "caused $40,000 to be transferred" from a company owned by Shiera into the United States bank account of a relative of a Venezuelan official employed by PDVSA, in exchange for that official helping direct PDVSA projects to Shiera's companies. Additionally, from around 2008 to 2014, Ardila conspired with Shiera, United States-based business person Roberto Enrique Rincon Fernandez (Rincon), and others, to pay bribes to PDVSA officials to obtain contracts.

[147] DOJ Press Release, *Five Former Venezuelan Government Officials Charged in Money Laundering Scheme Involving Bribery*, Office of Pub. Affairs (Feb. 12 2018), https://www.justice.gov/opa/pr/five-former-venezuelan-government-officials-charged-money-laundering-scheme-involving-forei-0 (last accessed April 4, 2018).

[148] Indictment, *U. S. v. De Leon Perez et al*, 17-cr-514 (S.D. Tex. Aug. 23, 2017), https://www.justice.gov/opa/press-release/file/1033901/download (last accessed April 4, 2018).

[149] DOJ Press Release, *Five Former Venezuelan Government Officials Charged in Money Laundering Scheme* (Feb. 12 2018), https://www.justice.gov/opa/pr/five-former-venezuelan-government-officials-charged-money-laundering-scheme-involving-forei-0.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] DOJ Press Release, *Four Businessmen and Two Foreign Officials Plead Guilty in Connection with Bribes Paid to Mexican Aviation Officials* (Dec. 27, 2016), https://www.justice.gov/opa/pr/four-businessmen-and-two-foreign-officials-plead-guilty-connection-bribes-paid-mexican (last accessed April 4, 2018).

the scheme's proceeds.[155] Although the FCPA itself does not reach the conduct of foreign officials, the DOJ continues to use the anti-money laundering laws to prosecute officials who bring the proceeds of bribery into the United States. Nevarez was eventually sentenced to 15 months in prison,[156] while the charges against Montemayor were dismissed, for reasons that remain under seal.[157] The remaining defendants were sentenced in 2017. Ray was sentenced to 18 months imprisonment, three years of supervised released, and ordered to pay $589,698.87 in restitution.[158] Pinon was sentenced to 12 months and one day imprisonment, two years of supervised release, and ordered to pay $90,783.50 in restitution.[159] Ramnarine and Perez were both sentenced on February 2, 2017, to three years of probation.[160]

4. Alstom SA Individuals

On September 25, 2017, Frederic Pierucci, the former vice president of global sales[161] of a Connecticut-based subsidiary of Alstom SA, a French power and transportation company, was sentenced to 30 months in prison and a $20,000 fine for his role in a seven-year scheme to violate the FCPA.[162] On July 29, 2013, Pierucci pleaded guilty to conspiring to violate and violating the FCPA in connection with a scheme to bribe Indonesian officials in exchange for assistance in securing a $118 million contract for the company to provide power services to the citizens of Indonesia.[163] According to the indictment, Pierucci and other executives of Alstom SA and the Connecticut-based subsidiary, Lawrence Hoskins and William Pomponi, concealed their bribes by retaining consultants for the purpose of paying bribes to the Indonesian officials.[164]

As noted below, Hoskins is litigating various important jurisdictional issues against the government in a case whose outcome will have important implications for the territorial reach of the FCPA. Pomponi pleaded guilty, but charges against him were dropped after he died last year.[165]

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[155] *Id.*.
[156] *Id.*
[157] Dismissal of Counts, *U. S. v. Hernandez-Montemayor*, 7:15-MJ-01937 (S.D. Tex. Jan. 4, 2016). Documentation regarding the rationale for the dismissal remains sealed.
[158] J. as to Douglas Ray, *U. S. v. Ray et al*., 4:16-CR-00409 (S.D. Tex. April 18, 2017) (ECF No. 77).
[159] J. as to Victor Hugo Valdez Pinon, *U. S. v. Ray et al*., 4:16-CR-00409 (S.D. Tex. March 2, 2017) (ECF No. 58).
[160] J. as to Daniel Perez, *U. S. v. Perez et al*., 7:16-CR-01164 (S.D. Tex. Feb. 13, 2017) (ECF No. 65); J. as to Kamta Ramnarine, *U. S. v. Perez et al.*, 7:16-CR-01164 (S.D. Tex. Feb. 13, 2017) (ECF No. 67).
[161] DOJ Press Release, *Foreign Bribery Charges Unsealed Against Current and Former Executives of French Power Company* (Apr. 16, 2013), https://www.justice.gov/opa/pr/foreign-bribery-charges-unsealed-against-current-and-former-executives-french-power-company (last accessed April 4, 2018).
[162] Jody Godoy, *Judge Sends 'Message' In Ex-Alstom Exec's Bribery Sentence*, LAW360 (Sept. 25, 2017) https://www.law360.com/articles/967275/judge-sends-message-in-ex-alstom-exec-s-bribery-sentence (last accessed April 4, 2018).
[163] DOJ Press Release, *Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme*, Office of Pub. Affairs (July 30, 2013) https://www.justice.gov/opa/pr/former-senior-executive-french-power-company-charged-connection-foreign-bribery-scheme (last accessed April 4, 2018).
[164] Second Superseding Indictment, *U. S. v. Hoskins*, et. al., 3:12-cr-00238-JBA (D. Conn. July 30, 2013) (ECF No. 209).
[165] Jody Godoy, *Judge Sends 'Message' In Ex-Alstom Exec's Bribery Sentence*, LAW360, (Sept. 25, 2017)

5. Harder – EBRD Matter

As reported in our 2016 FCPA Year in Review, Dmitrij Harder, former owner and President of the Chestnut Consulting Group, pleaded guilty on April 20, 2016, to bribing a European Bank for Reconstruction and Development (EBRD) official in return for referrals. Harder admitted to paying $3.5 million in bribes to the EBRD official (Andrej Ryjenko) and the official's sister (Tatjana Sanderson) in return for directing business to the Chestnut Consulting Group, resulting in approximately $8 million in "success fees" for Harder's firm. In June 2017, a UK jury found the EBRD official and his sister (through whom bribes had been channeled) guilty of related offenses. The official was sentenced to six years in prison.[166]

On July 18, 2017, Harder was sentenced to serve five years in prison after pleading guilty to two counts of violating the FCPA. Harder also agreed to pay forfeiture in the amount of $1.9 million.[167] According to reports, counsel for Harder expressed outrage at the sentence given Harder's cooperation with prosecutors, although the sentence Harder received was reportedly a reduction from the seven to nine years enumerated in the USSG.[168] Harder is currently seeking a review of his sentence in the Third Circuit.

6. Heon-Cheol Chi

On October 2, 2017, Heon-Cheol Chi (Chi), a South Korean citizen who was a principal researcher at a government-funded geoscience research institute in South Korea, the Korea Institute of Geoscience and Mineral Resources (KIGAM), was sentenced to 14 months in prison for using a US bank account to "launder bribes" he received from two earthquake detection equipment companies based in California and the United Kingdom.[169] Chi was also ordered to pay a $15,000 fine.[170] According to the superseding indictment, Chi "illegally used his official position at KIGAM to provide business advantages to private companies."[171]

The original indictment filed on December 14, 2016, contained two counts of engaging in monetary transactions in criminally derived property. The superseding indictment, filed on April 12, 2017, contained four additional counts of the same. Each count consists of an individual

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[166] *See* DOJ Press Release, *Former Owner of Bucks County Financial Consulting Firm Sentenced to Five Years in Prison for Bribing Foreign Official* (July 18, 2017), https://www.justice.gov/opa/pr/former-owner-bucks-county-financial-consulting-firm-sentenced-five-years-prison-bribing (last accessed April 4, 2018).

[167] *See* Government's Sentencing Memorandum, *U. S. v. Dmitrij Harder*, No. 2:15-cr-0001-PD (E.D.Pa. July 10, 2017) (ECF No. 167).

[168] *See* Adam Dorik, *'I'm sitting here in shock', defence says as judge sentences FCPA felon to five years,* GLOBAL INVESTIGATIONS REVIEW (July 18, 2017), https://globalinvestigationsreview.com/article/jac/1144696/%E2%80%98i%E2%80%99m-sitting-here-in-shock%E2%80%99-defence-says-as-judge-sentences-fcpa-felon-to-five-years (last accessed April 4, 2018).

[169] DOJ Press Release, *Director of South Korea's Earthquake Research Center Sentenced to 14 months in Federal Prison for Money Laundering Stemming from Million Dollar Bribe Scheme* (Oct. 2, 2017), https://www.justice.gov/usao-cdca/pr/director-south-korea-s-earthquake-research-center-sentenced-14-months-federal-prison (last accessed April 4, 2018); First Superseding Indictment, *U. S. v. Heon-Cheol Chi*, No. 2:16-cr-00824-JFW (C.D. Cal. Apr. 12, 2017) (ECF No. 55).

[170] Judgment and Probation/Commitment Order, *U.S. v. Heon-Cheol Chi*, No. 2:16-cr-00824-JFW (C.D. Cal. Oct. 2, 2017) (ECF No. 202).

[171] First Superseding Indictment, *U.S. v. Heon-Cheol Chi*, No. 2:16-cr-00824-JFW (C.D. Cal. Apr. 12, 2017) (ECF No.55).

transaction whereby Chi wrote a check ranging from $30,000 to $60,000 from a California bank account, which was deposited in a New York brokerage account.[172] Chi pleaded not guilty to all counts.[173]

After a four-day trial, on July 17, 2017, the jury found Chi guilty of one of the six counts in the superseding indictment.[174] On October 13, 2017, Chi appealed both his conviction and sentence.[175] As of this writing, the appeal is underway.[176]

7. Bahn, Ban, Woo, and Harris

As noted in our 2017 FCPA Mid-Year Review, three individuals, Ban Ki Sang, his son Joo Hyun Bahn, and Malcolm Harris were charged in a January 2017 indictment alleging conspiracy to violate the FCPA, violations of the FCPA, money laundering, wire fraud, and aggravated identity theft.[177] A fourth individual, Sang Woo, was charged in a December 2016 criminal complaint alleging conspiracy to violate the FCPA.[178] Both the January 2017 indictment and December 2016 complaint arose in connection with the planned sale of Vietnam's tallest building, Landmark 72.[179]

The January 2017 indictment and December 2016 complaint identified Sang, a national and resident of South Korea, Bahn, a national of South Korea and lawful permanent resident of the United States residing in New Jersey, and Woo, a national of South Korea and lawful permanent resident of the United States, as "domestic concerns" under the FCPA.[180] Harris is a national of the United States who previously resided in Manhattan and Brooklyn, New York. [181]

On June 21, 2017, Harris pleaded guilty to wire fraud and money laundering and two days later stipulated to a $500,000 money judgment.[182] On October 5, 2017, Harris was

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[172] Indictment, *U.S. v. Heon-Cheol Chi*, No. 2:16-cr-00824-JFW (C.D. Cal. Dec. 14, 2016) (ECF No. 6); Superseding Indictment, *U.S. v. Heon-Cheol Chi*, No. 2:16-cr-00824-JFW (C.D. Cal. Apr. 12, 2017) (ECF NJo. 55).
[173] Criminal Minutes – Post-Indictment Arraignment, *U.S. v. Heon-Cheol Chi*, No. 2:16-cr-00824 (C.D. Cal. Jan. 6, 2017) (ECF No. 20); Criminal Minutes - General, *U.S. v. Heon-Cheol Chi*, No. 2:16-cr-00824-JFW (C.D. Cal. Apr. 19, 2017) (ECF No. 60).
[174] DOJ Press Release, *Director of South Korea's Earthquake Research Center Convicted of Money Laundering in Million Dollar Bribe Scheme* (Jul. 18, 2017), https://www.justice.gov/opa/pr/director-south-koreas-earthquake-research-center-convicted-money-laundering-million-dollar; Criminal Minutes – Jury Trial, *U.S. v. Heon-Cheol Chi*, No. 2:16-cr-00824-JFW (C.D. Cal. Jul. 17, 2017) (ECF No. 162).
[175] Notice of Appeal, *U.S. v. Heon-Cheol Chi*, No. 2:16-cr-00824-JFW (C.D. Cal. Oct. 13, 2017) (ECF No. 207).
[176] Notification by Circuit Court, *U.S. v. Heon-Cheol Chi*, No. 17-50358 (9th Cir. filed Oct. 13, 2017) (ECF No. 208).
[177] *See* Sealed Indictment, *U.S. v. Bahn*, No. 16-cr-00831 (S.D.N.Y. Dec. 15, 2016) (ECF No. 2).
[178] *See* Compl., *U.S. v. Woo*, No. 17-mj-00139-UA (S.D.N.Y. Jan. 10, 2017).
[179] *See* Sealed Indictment, *U.S. v. Bahn*, No. 16-cr-00831-ER (S.D.N.Y. Dec. 15, 2016); Compl., *U.S. v. Woo*, No. 17-mj-00139 (S.D.N.Y. Jan. 10, 2017).
[180] *See* Sealed Indictment, *U.S. v. Bahn*, ¶¶ 5, 35 No. 16-cr-00831 (S.D.N.Y. Dec. 15, 2016); Compl., *U.S. v. Woo*, ¶¶ 10, No. 17-mj-00139 (S.D.N.Y. Jan. 10, 2017).
[181] *See* Sealed Indictment, *U. S.* v. Bahn, No. 16-cr-00831, at ¶ 7, (S.D.N.Y. Dec. 15, 2016).
[182] Minute Entry, *U.S. v. Bahn*, 1:16-CR-00831-ER (S.D.N.Y. June 21, 2017); J. as to Malcolm Harris, *U.S. v. Bahn*, 1:16-CR-00831 (S.D.N.Y. Oct. 13, 2017) (ECF No. 44); *see also* Tr. of Proceedings as to Malcolm Harris, *U.S. v. Bahn*, 1:16-CR-00831-ER (S.D.N.Y. August 1, 2017) (ECF No. 35); Consent Preliminary Order of Forfeiture/Money Judgment, *U.S. v. Bahn*, 1:16-CR-00831-ER (S.D.N.Y. June 23, 2017) (ECF No. 32) .

sentenced to 42 months imprisonment, three years of supervised release and ordered to pay $760,148.57 in restitution.[183] On January 1, 2018, Bahn pleaded guilty to conspiracy to violate the FCPA and violations of the FCPA, and is scheduled for sentencing on June 29, 2018.[184] Woo was arrested on January 10, 2017, but has not been indicted.[185]

8. Mahmoud Thiam

On May 3, 2017, Mahmoud Thiam, the former Minister of Mines and Geology of the Republic of Guinea, was convicted by a federal jury of one count of transacting in criminally derived property and one count of money laundering.[186] The money laundering scheme arose out of bribes paid to Thiam by executives of China Sonangol International Ltd. (China Sonangol) and China International Fund, SA (CIF).

According to evidence presented at trial, China Sonangol and CIF paid Thiam $8,500,000 to a bank account in Hong Kong in exchange for rights and interests in natural resources in Guinea, as well as exclusive rights to conduct a broad range of business operations in Guinea, including mining. Thiam transferred approximately $3,900,000 of this money to the United States, falsely claiming to banks in Hong Kong and the United States that the money was income earned before he became a government official.[187] On August 25, 2017, Thiam was sentenced to seven years in prison[188] and was ordered to forfeit the $8.5 million.[189]

9. Amadeus Richers - Haiti Teleco

On July 19, 2017, Amadeus Richers (a fugitive who was extradited from Panama in February) became the ninth defendant to plead guilty in the *Haiti Teleco* case – with the first of such pleas dating back to April 2009.[190] Richers, a former General Manager of Miami-based companies Cinergy and Uniplex, and his co-conspirators allegedly paid $3 million in bribes to Haiti Teleco officials between 2001 and 2004 to obtain contracts and receive favorable treatment. Payments were made through a shell company and through companies owned by the officials' relatives.

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[183] J. as to Malcolm Harris, *U.S. v. Bahn*, 1:16-CR-00831-ER (S.D.N.Y. Oct. 13, 2017) (ECF No. 44).
[184] Minute Entry, *U.S. v. Bahn*, 1:16-CR-00831-ER (S.D.N.Y. Jan. 5, 2018); Sealed Indictment, *U.S. v. Bahn*, No. 16-cr-00831-ER (S.D.N.Y. Dec. 15, 2016); *see also* Tr. of Proceedings as to Joo Hyun Bahn, *U.S. v. Bahn*, 1:16-CR-00831-ER (S.D.N.Y. Feb. 13, 2018) (ECF No. 59).
[185] *U.S. v. Woo*, No. 17-mj-00139-UA (S.D.N.Y. Jan. 10, 2017).
[186] Jury Verdict and Order, *U.S. v. Thiam*, 17-cr-00047-DLC (S.D.N.Y. May 3, 2017).
[187] DOJ Press Release, *Former Guinean Minister of Mines Convicted of Receiving and Laundering $8.5 Million in Bribes from China International Fund and China Sonangol*, (May 4, 2017), https://www.justice.gov/opa/pr/former-guinean-minister-mines-convicted-receiving-and-laundering-85-million-bribes-china (last accessed April 4, 2018)
[188] DOJ Press Release, *Former Guinean Minister of Mines Sentenced to Seven Years in Prison for Receiving and Laundering $8.5 Million in Bribes from China International Fund and China Sonangol*, (Aug. 25, 2017), https://www.justice.gov/opa/pr/former-guinean-minister-mines-sentenced-seven-years-prison-receiving-and-laundering-85 (last accessed April 4, 2018).
[189] Bob Van Voris, *Ex-Banker Gets 7 Years in Prison for Taking Bribes While African Minister*, Bloomberg (Aug. 25, 2017), https://www.bloomberg.com/news/articles/2017-08-25/former-banker-gets-7-years-for-corruption-as-african-minister (last accessed April 4, 2018).
[190] *See* Plea Agreement, *United States v. Richers*, No. 09-cr-21010-JEM (S.D. Fla. July 19, 2017) (ECF No. 976).

Richers was sentenced to time served (having been arrested in Panama in 2013 and serving 48 months in prison there before his extradition to the United States in February 2017)[191] for one count of conspiracy to violate the FCPA on September 27, 2017.[192] Richers will be on supervised release for three years and was ordered to pay $100.

10. Joseph Baptiste

On October 4, 2017, retired US Army colonel Joseph Baptiste was charged in an indictment with conspiracy to violate the FCPA and the Travel Act, violating the Travel Act, and conspiracy to commit money laundering.[193] The indictment alleges that Baptiste solicited bribes from undercover FBI agents in connection with a proposed project to develop a port in Haiti. As part of the scheme, Baptiste told agents that he would funnel payments to Haitian officials through a non-profit he controlled in order to secure government approval of the project. Baptiste is alleged to have received $50,000 from undercover agents to pay bribes to Haitian officials, which he ultimately used for personal purposes. He allegedly intended to seek additional money from agents to use for future bribe payments in connection with the port project.[194] The case is ongoing.

11. Rolls-Royce Individuals – Contoguris, Finley, Zuurhout, Kohler, Barnett

On November 7, 2017, the DOJ unsealed charges against five individuals for allegedly participating in a scheme to pay bribes to foreign officials in exchange for directing business to US-based Rolls-Royce Energy Systems Inc. (RRESI), an indirect subsidiary of UK-based Rolls-Royce Plc.[195] The individuals are former Rolls-Royce executives James Finley (United Kingdom) and Keith Barnett (United States); former Rolls-Royce employee Aloysius Johannes Jozef Zuurhout (Zuurhout) (Netherlands); former commercial agent for RRESI in Kazakhstan Petros Contoguris (Greece); and international engineering and consulting firm employee Andreas Kohler (Austria).[196] The government asserted jurisdiction over the individuals by alleging Contoguris and Finley were agents of a domestic concern as executives of RRESI, while asserting Zururhout and Kohler participated in a conspiracy that caused RRESI to make corrupt payments from the US subsidiary's bank accounts in Ohio. Barnett was a US citizen and RRESI executive.

Between December 2016 and October 2017, the DOJ filed an information for each individual and an indictment for Contoguris. The informations and indictment were unsealed in

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[191] *See* Stewart Bishop, Ex-Telecom Boss Gets Time Served in Haiti Teleco FCPA Case, LAW360 (Sept. 29, 2017), https://www.law360.com/articles/968727 (last accessed April 4, 2018).
[192] *See* Judgment, *U.S. v. Richers*, No. 1;09-cr-21010-JEM (S.D. Fla. Sept. 27, 2017).
[193] Indictment, *U.S. v. Baptiste*, 17-cr-10305-ADB (D. Mass. Oct, 4, 2017).
[194] DOJ Press Release, *Retired U.S. Army Colonel Indicted for Conspiring to Bribe Senior Government Officials of the Republic of Haiti*, (Oct. 4, 2017), https://www.justice.gov/opa/pr/retired-us-army-colonel-indicted-conspiring-bribe-senior-government-officials-republic-haiti (last accessed April 4, 2018).
[195] DOJ Press Release, *Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary* (Nov. 7, 2017), https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us (last accessed April 4, 2018).
[196] *Id*.

November 2017.[197] The government alleges that all of the individuals caused RRESI to make corrupt commission payments from its US bank accounts to a company headed by Contoguris, knowing that some of the funds would be used as bribes.[198] The DOJ charged Contoguris with one count of conspiracy to violate the FCPA, one count of conspiracy to launder money, seven counts of violating the FCPA, and ten counts of money laundering. The DOJ charged Finley with one count of conspiracy to violate the FCPA and one count of violating the FCPA. Barnett, Zuurhout, and Kohler were each charged with one count of conspiracy to violate the FCPA. All but Contoguris have pleaded guilty, to all of the charges in the informations. The pleas were entered between December 2016 and July 2017. All of the plea agreements remain sealed. Sentencing has not yet occurred. For additional discussion on Rolls-Royce, see our 2017 FCPA Mid-Year Review and our 2016 FCPA Year in Review.

12. SMB Offshore Individuals – Anthony Mace and Robert Zubiate

Two former executives of Dutch oil services company SBM Offshore N.V. (SBM) pleaded guilty in November in federal court in the Southern District of Texas to a single count each of conspiracy to violate the anti-bribery provisions of the FCPA in connection with their roles in bribing foreign government officials in Brazil, Angola, and Equatorial Guinea.[199] Anthony Mace, a UK citizen, former SBM CEO, and a board member of the company's US subsidiary (SBM USA), and Robert Zubiate, a former sales and marketing director of SBM USA, both admitted to entering into an agreement to pay bribes to secure lucrative drilling contracts with state-run oil companies abroad.[200] The DOJ asserted jurisdiction over the two individuals on the basis that Zubiate and Mace both served as executives of SBM USA in various capacities, and therefore both constituted agents of a domestic concern.[201]

Mace's plea agreement with the government is noteworthy because he admitted his involvement in the criminal conspiracy under a theory of willful blindness.[202] As the DOJ noted in its plea agreement, Mace conceded he "joined the conspiracy by continuing to make payments that furthered the bribery scheme and deliberately avoided learning that certain payments, including payments [he] authorized and approved, were in fact bribes paid to foreign officials."[203] Both Mace and Zubiate are scheduled to be sentenced on April 12, 2018.[204]

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[197] Order to Unseal Case, *U S. v. Keith Barnett*, No. 2:16-cr-00248 (S.D. Ohio Nov. 7, 2017) (ECF No. 23); Order to Unseal Case, *U.S. v. Petros Contoguris*, No. 2:17-cr-00233 (S.D. Ohio Nov. 7, 2017); Order to Unseal Case, *U.S. v. James Finley*, No. 2:17-cr-00160 (S.D. Ohio Nov. 7, 2017); Order to Unseal Case, *U.S. v. Andreas Kohler*, No. 2:17-cr-00113 (S.D. Ohio Nov. 7, 2017); Order to Unseal Case, *U.S. v. Aloysius Johannes Jozef Zuurhout*, No. 2:17-cr-00122 (S.D. Ohio Nov. 7, 2017) (ECF No. 28).

[198] Information, *U.S. v. Keith Barnett*, No. 2:16-cr-00248 (S.D. Ohio Dec. 20, 2016); Information, *U.S. v. Andreas Kohler*, No. 2:17-cr-00113 (S.D. Ohio Jun. 6, 2017); Information, *U.S. v. Aloysius Johannes Jozef Zuurhout*, No. 2:17-cr-00122 (S.D. Ohio Jun. 9, 2017); Information, *U.S. v. James Finley*, No. 2:17-cr-00160 (S.D. Ohio Jul. 21, 2017); Indictment, *U.S. v. Petros Contoguris*, No. 2:17-cr-00233 (S.D. Ohio Oct. 12, 2017).

[199] DOJ Press Release, *Two Executives Plead Guilty to Role in Foreign Bribery Scheme* (Nov. 9, 2017), https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme (last accessed April 4, 2018).

[200] Information, *United States v. SBM Offshore USA, Inc.*, No. 17-685 (S.D.T.X. Nov. 29, 2017), https://www.justice.gov/opa/press-release/file/1014866/download (last accessed April 4, 2018).

[201] *Id.*

[202] Plea Agreement, *United States v. Anthony Mace*, No. 17-618 (S.D.T.X Nov. 9, 2017), https://www.justice.gov/criminal-fraud/file/1017331/download (last accessed April 4, 2018).

[203] *Id.*

13. Chi Ping Patrick Ho and Cheikh Gadio

A criminal complaint unsealed by the DOJ in the Southern District of New York in November 2017 charged two former foreign government officials from Hong Kong and Senegal each with a single count of violating the FCPA, international money laundering, and conspiracy to commit those crimes.[205] The charges came in connection with two separate schemes to bribe high-level African officials to garner business advantages for a prominent Chinese energy company.[206] At the time of his arrest, Ho worked for a Hong Kong and US-based NGO, which was funded primarily by the Chinese energy company.[207] In its complaint against both men, the government alleged the NGO was a domestic concern, while Ho was alleged to be an officer, director, employee, and agent of the domestic concern.[208] The complaint also asserted jurisdiction over Ho, a foreign national, by alleging he had "furthered both schemes while present in New York, New York, and also caused wire transfers in furtherance of both schemes to pass through New York, New York."[209]

Gadio, the former foreign minister of Senegal, and a lawful permanent resident of the United States, allegedly acted as the intermediary between Ho and the African officials being bribed.

According to the DOJ complaint, Ho delivered a $2 million bribe to the President of Chad through Gadio, in exchange for oil rights in one scheme, while paying $500,000 to the Ugandan foreign minister for business favors in another. The second plan was allegedly "hatched in the halls of the United Nations in New York, when Uganda's current foreign minister served as the President of the UN General Assembly…."[210] Both Ho and Gadio were arrested the weekend before the complaint was unsealed.[211] On December 18, 2018, Ho was criminally indicted on the various charges enumerated in the DOJ's complaint.[212] On January 8, 2018, Ho pleaded not guilty to all the charges against him.[213] Gadio has not yet been criminally indicted and was freed on bail shortly after his arrest subject to certain monitoring conditions.[214]

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[204] Dave Simpson, *2 Ex-SBM Execs Cop to FCPA Charges in Petrobas Scheme*, LAW360, (Nov. 9. 2017), https://www.law360.com/articles/984143/2-ex-sbm-execs-cop-to-fcpa-charges-in-petrobras-scheme (last accessed April 4, 2018).
[205] Complaint, *United States v. Chi Ping Patrick Ho, a/k/a 'Patrick C.P. Ho,' and Cheikh Gadio*, No. 17-mj-08611 (S.D.N.Y. Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012531/download (last accessed April 4, 2018).
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] DOJ Press Release, *Head of Organization Backed by Chinese Conglomerate, and Former Foreign Minister of Senegal, Charged with Bribing High-Level African Officials*, (Nov. 20, 2017), https://www.justice.gov/usao-sdny/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister (last accessed April 4, 2018).
[211] *Id.*
[212] Indictment, *U.S. v. Chi Ping Patrick Ho, a/k/a 'Patrick C.P. Ho,' and Cheikh Gadio*, No.17-cr-00779 (S.D.N.Y. Dec. 18, 2017).
[213] Docket, *U.S. v. Chi Ping Patrick Ho, a/k/a 'Patrick C.P. Ho,' and Cheikh Gadio*, No.17-cr-00779 (S.D.N.Y).
[214] Docket, *U.S. v. Ho et al*, No. 1:17-MJ-08611 (S.D.N.Y.).

14. Colin Steven - Embraer

On December 21, 2017, a former Embraer SA sales and marketing executive, Colin Steven, pleaded guilty in federal court in the Southern District of New York to paying bribes to high-level foreign government officials in Saudi Arabia in exchange for assistance in securing a $93 million contract for the sale of three aircrafts to Saudi Arabia's national oil company.[215] Steven was charged with one count of violating the FCPA's anti-bribery provisions and one count of conspiracy to violate the FCPA.[216] He was also charged with one count of wire fraud, one count of money laundering, and one count each of conspiracy to commit these crimes.[217] The government also charged him with a single count of making a false statement to authorities.[218] To establish jurisdiction over Steven, a UK national, the government alleged Embraer was an issuer within the meaning of the FCPA, and that as an executive of the company, Steven was an agent and employee of the issuer.[219] By pleading guilty, Steven admitted to taking a portion of the bribe proceeds being made to Saudi officials as a kickback in the course of the conspiracy and then lying to US law enforcement about it when asked about the arrangement.[220]

15. Eberhard Reichert - Siemens

On March 15, 2018, Eberhard Reichert, a former senior executive at Siemens AG, pleaded guilty to FCPA charges filed against him in December 2011 by the DOJ for his role in a criminal conspiracy to bribe senior government officials in Argentina.[221] Based on Siemens' listing on the NYSE, the government alleged Siemens was an "issuer" under the FCPA and that all the named defendants, including Reichert, were agents of the issuer as former company executives.[222] Siemens AG pleaded guilty in 2008 to violating the FCPA and paid more than $1.3 billion to US and German authorities as part of its settlement agreement. Reichert's alleged conduct in Argentina fell within the scope of misconduct to which Siemens pleaded guilty.[223]

Dubbed the "Siemens-8," Reichert and his co-conspirators were charged by the DOJ more than six years ago with criminal conspiracy to violate the FCPA, launder money, and commit wire fraud for their roles in paying a $100 million bribe to high-level Argentine officials to secure a $1 billion contract to produce national identity cards for the Latin American

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[215] DOJ Press Release, *Former Embraer Sales Executive Pleads Guilty to Foreign Bribery and Related Charges*, (Dec. 21, 2017), https://www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges (last accessed April 4, 2018).
[216] Information, *U.S. v. Colin Steven*, No. 17-cr-00788, (S.D.N.Y, Dec. 21, 2017), https://www.justice.gov/opa/press-release/file/1020101/download (last accessed April 4, 2018).
[217] *Id*.
[218] *Id*.
[219] *Id*.
[220] *Id*.
[221] Indictment, *United States v. Sharef et al*, No.11-01056, (S.D.N.Y. Dec. 12, 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/12/16/2011-12-12-siemens-ndictment.pdf (last accessed April 4, 2018).
[222] *Id*.
[223] DOJ Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*, (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html (last accessed April 4, 2018).

country.[224] The group also faced civil charges brought by the SEC in connection with the bribery scheme.[225]

In September 2017, Reichert was arrested in Croatia and agreed to be extradited to the United States to face trial.[226] Reichert was released on a $500,000 bond after initially pleading not guilty and was scheduled to go to trial in July 2018.[227] Only one other member of the Siemens-8 has appeared in US court in addition to Reichert. As noted in our 2015 FCPA Year in Review, Andres Truppel, a former chief financial officer of Siemens Argentina, pleaded guilty to conspiracy in September 2015 in federal court in the Southern District of New York.[228]

16. Dmitry Firtash

In April 2014, federal prosecutors unsealed a criminal indictment against Ukrainian defendant Dmitry Firtash, charging him in the Northern District of Illinois with violating the FCPA, Racketeer Influenced and Corrupt Organizations Act (RICO), and federal money laundering laws in connection with alleged payments made to government officials in India totaling $18.5 million in exchange for mining rights in the Indian state of Andhra Pradesh.[229] The mining project was estimated to generate more than a half a billion dollars in profits annually from the sale of titanium products to companies around the world, including one based in Chicago.[230]

Firtash was arrested in Vienna on March 12, 2014, and the DOJ requested his extradition to the United States.[231] Although an Austrian trial court initially denied the US extradition request characterizing it as politically motivated, an appellate court reversed the trial court's decision on February 22, 2017, clearing the way for Firtash to be extradited.[232] Firtash, through his attorneys in the United States, filed a motion to dismiss the indictment and proceedings

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[224] *Id.*
[225] *U.S. Securities and Exchange Commission v. Uriel Sharef, et al*, No. 1:2011cv09073, (Dec. 19, 2011), https://www.sec.gov/litigation/complaints/2011/comp22190.pdf (last accessed April 4, 2018).
[226] Dylan Tokar, *After Six Years a Fugitive, Former Siemens Exec Extradited to US to Fight FCPA Charges*, Global Investigations Review, (Jan. 2, 2018), https://globalinvestigationsreview.com/article/jac/1152097/after-six-years-a-fugitive-former-siemens-exec-extradited-to-us-to-fight-fcpa-charges (last accessed April 4, 2018).
[227] DOJ Press Release, *Former Chief Financial Officer of Siemens Argentina Pleads Guilty to Role in Multimillion Dollar Foreign Bribery Scheme*, (Sept. 30, 2015), https://www.justice.gov/opa/pr/former-chief-financial-officer-siemens-argentina-pleads-guilty-role-multimillion-dollar (last accessed April 4, 2018).
[228] *Id.*
[229] DOJ Pres Release, *Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals*, (Apr. 2, 2014), https://www.justice.gov/opa/pr/six-defendants-indicted-alleged-conspiracy-bribe-government-officials-india-mine-titanium (last accessed April 4, 2018); *See also*, Indictment, *United States v. Firtash et al*, No. 13-cr-515 (N.D.I.L. June 20, 2014), /www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/04/03/df_indictment_final_stamped_6-20-13.pdf (last accessed April 4, 2018).
[230] *Id.*
[231] Michael Lipkin, *Ukrainian Gas Mogul Indicted Over Mine Bribery Scheme*, LAW360 (April 2, 2014), www.law360.com/articles/524578/ukrainian-gas-mogul-indicted-over-mine-bribery-scheme (last accessed April 4, 2018).
[232] Shadia Nasralla, *Austrian Court Backs Extradition of Ukraine Businessman Firtash to U.S.*, Reuters (Feb. 21, 2017), www.reuters.com/article/us-ukraine-firtash/austrian-court-backs-extradition-of-ukraine-businessman-firtash-to-u-s-idUSKBN1602OW (last accessed April 4, 2018).

against him in May 2017.[233] On December 20, 2017, Firtash's Chicago-based attorney sent a letter to the presiding judge in the Northern District of Illinois indicating that the Austrian Supreme Court had stayed Firtash's extradition two days earlier pending, *inter alia*, an opinion from the EU Court of Justice on the applicability of the EU Charter on Human Rights.[234] Firtash's counsel also wrote that it was unlikely that Firtash would be extradited to the United States in the immediate future.[235]

B. New Individual Charges Brought in Q1 2018

1. Lopez and Dominguez - Petroecuador Officials

Two Petroecuador officials have been charged with conspiracy to commit FCPA-related offenses in the Southern District of Florida, and some reports have speculated that the charges may be connected to Ecuador's ongoing investigation into bribes paid by Odebrecht.[236] On October 24, 2017, Marcelo Reyes Lopez was charged with conspiracy to commit money laundering based on violations of the FCPA and offenses against a foreign nation involving bribery of a public official in violation of foreign law (here, the Ecuadorian Penal Code).[237] He pleaded not guilty to the offenses. Arturo Escobar Dominguez was charged with the same offenses on February 20, 2018,[238] and pleaded guilty on March 28, 2018.[239] Both defendants face up to 20 years in prison.

2. Mark Lambert - Transportation Logistics International

On January 11, 2017, an 11-count indictment was unsealed against Mark Lambert, the co-president of Transportation Logistics International (TLI), including one count of conspiracy to violate the FCPA and to commit wire fraud, seven counts of violating the FCPA, two counts of wire fraud, and one count of international promotion of money laundering.[240]

The indictment related to a scheme involving the alleged bribery of an official at a subsidiary of a Russian state-owned company to secure transportation contracts for nuclear fuel. According to the indictment, Lambert conspired to make corrupt and fraudulent kickback payments to the Russian official as early as 2009 and continuing until October 2014. As part of

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[233] Docket, *U.S. v. Firtash et al*, No.1:13-cr-0515, (N.D. Ill. May 9, 2017).
[234] Letter from Dan Webb, counsel of record for Dmitry Firtash, to the Hon. Rebecca R. Pallmeyer, *Re: Updates on the Austrian Extradition Proceedings, U.S. v. Firtash, No. 13 CR 515*, 1:13-cr-0515, (N.D.I.L. Dec. 20, 2017).
[235] *Id.*
[236] Kelly Swanson, *Former PetroEcuador official pleads guilty in US bribery case*, GLOBAL INVESTIGATIONS REVIEW (Mar. 29, 2018), https://globalinvestigationsreview.com/article/jac/1167403/former-petroecuador-official-pleads-guilty-in-us-bribery-case (last accessed April 4, 2018).
[237] *See* Indictment, *U.S. v. Lopez*, 1:17-cr-20747-KMW (S.D. Fla. Oct. 25, 2017).
[238] *See* Information, *U.S. v. Dominguez*, 1:18-cr-20108-CMA (S.D. Fla. Feb. 20, 2018).
[239] Kelly Swanson, *Former PetroEcuador official pleads guilty in US bribery case*, GLOBAL INVESTIGATIONS REVIEW (Mar. 29, 2018), https://globalinvestigationsreview.com/article/jac/1167403/former-petroecuador-official-pleads-guilty-in-us-bribery-case (last accessed April 4, 2018).
[240] DOJ Press Release, *Transport Logistics International Inc. Agrees to Pay $2 Million Penalty to Resolve Foreign Bribery Case* (Mar. 13, 2018), https://www.justice.gov/opa/pr/former-president-maryland-based-transportation-company-indicted-11-counts-related-foreign?utm_medium=email&utm_source=govdelivery (last accessed April 4, 2018).

the scheme, Lambert allegedly caused TLI to create false invoices and used a series of shell companies to conceal the payments.[241]

As noted above, TLI entered into a three-year DPA on March 13, 2018 and agreed to pay a $2 million criminal penalty.[242] As noted in our 2015 FCPA Year in Review, the other co-president of TLI and the Russian official in question already pleaded guilty to charges related to the scheme.

IV. FCPA POLICY AND LEGAL DEVELOPMENTS

A number of important FCPA-related developments occurred in 2017. These included both policy developments (with DOJ issuing new compliance program guidance and the FCPA Corporate Enforcement Policy) and legal developments addressing important concepts such as FCPA jurisdictional issues affecting foreign defendants, the applicable statute of limitations in SEC disgorgement actions, and the validity of orders issued by SEC Administrative Law Judges. In addition, the US Congress and Office of Foreign Assets Control (OFAC) took significant steps to impose sanctions on individuals involved in corruption. Below, we summarize these key developments, and provide an overview of SEC whistleblower program activity and related litigation.

A. Policy Developments

1. DOJ Compliance Program Guidance

As detailed in our 2017 FCPA Mid-Year Review, the DOJ's Fraud Section posted its "Evaluation of Corporate Compliance Programs" (the Guidance) online on February 8, 2017.[243] The document sets out detailed questions which the DOJ now states it considers in the context of investigations when evaluating whether a company's compliance program is "effective." The DOJ's determination that a company's ethics and compliance program is effective can affect its decision-making as to whether to bring criminal charges against the company and which charges to bring, as well as potentially reduce applicable penalties calculated under the USSG. Although there was some speculation as to whether and how the DOJ would apply the Guidance following Compliance Consultant Hui Chen's departure from the DOJ and recent changes in the administration, the Guidance appears to remain in effect.

2. DOJ FCPA Corporate Enforcement Policy

In late November, the DOJ announced its new FCPA Corporate Enforcement Policy, incorporated in chapter 9-47 of the US Attorneys' Manual at section 120. The new policy builds upon aspects of the FCPA Enforcement Plan and Guidance (commonly referred as the FCPA "Pilot Program"), which had been in effect since April 5, 2016. A key aspect of the FCPA Corporate Enforcement Policy is that it creates a presumption that a company meeting all standards relating to "voluntary self-disclosure, full cooperation, and timely and appropriate

[241] *Id.*
[242] *Id.*
[243] Dept. of Justice, *Evaluation of Corporate Compliance Programs* (2017), https://www.justice.gov/criminal-fraud/page/file/937501/download (last accessed April 4, 2018).

remediation" (each of which is defined by the policy) will have its case resolved through a declination "absent aggravating circumstances involving the seriousness of the offense and the nature of the offender." Such "aggravating circumstances" could include (but are not limited to):

- Executive-level involvement in the misconduct;
- Significant profits to the company resulting from the misconduct;
- Pervasiveness of the misconduct; and
- Criminal recidivism

Even where such factors exist, however, the Fraud Section will reduce the recommended USSG fine range by 50% (for self-disclosure, full cooperation, and timely and appropriate remediation) or by up to 25% (for full cooperation and timely and appropriate remediation, in the absence of voluntary disclosure). To qualify under the FCPA Corporate Enforcement Policy, a company will still be required to pay disgorgement, forfeiture, and/or restitution; this requirement may be satisfied through parallel resolution with a relevant regulator (such as the SEC).

As we noted in our more detailed analysis of the DOJ's FCPA Corporate Enforcement Policy, it is difficult to tell how much of a game-changer the new policy will be in practice. No declinations have been announced under the FCPA Corporate Enforcement Policy to date. Unlike the DOJ Antitrust Division's Corporate Leniency Policy, it is not a leniency program. Nor does it provide a compliance defense. The FCPA Corporate Enforcement Policy also does not address the situation of corporate groups; it is not clear whether members of a corporate family implicated in misconduct (such as a parent and one or more subsidiaries) will receive the same benefits under the policy. Most significantly, the policy leaves substantial room for the DOJ to exercise prosecutorial discretion in determining whether any of the broadly-stated aggravating circumstances may apply to overcome the presumption of a declination. As a result, the decision whether to self-report an FCPA violation to US enforcement authorities likely will remain one that requires careful consideration.

B. Significant Legal Developments for FCPA Matters

1. Disgorgement in SEC Enforcement Actions

As discussed in our 2017 FCPA Mid-Year Review, on June 5, 2017, the Supreme Court unanimously held in *Kokesh v. Securities and Exchange Commission* that disgorgement in SEC enforcement actions operates as a penalty, and that the SEC's efforts to recover disgorgement were themselves subject to the federal five-year statute of limitations under 28 U.S.C. § 2462. For a more detailed analysis of the decision, see our International Law Advisory.

2. Status of SEC Administrative Law Judges

Since the Dodd-Frank Act of 2010 expanded the SEC's administrative enforcement authority, the SEC has brought more than 80% of its enforcement proceedings through in-house

administrative tribunals, where it has won 90% of the time.[244] In administrative proceedings before the SEC, the Commission may delegate its authority over the proceeding to an administrative law judge (ALJ) or a subset of the Commission.[245] The commissioners do not appoint ALJs. Rather, ALJs are selected by the staff of the SEC from a list of candidates provided by the Office of Personnel Management.[246]

In 2015, in the matter of the Raymond J. Lucia Cos. and Raymond J. Lucia Sr., the SEC reiterated a longstanding position that ALJs were employees of the SEC that were not subject to the Appointments Clause of the US Constitution.[247] The respondents argued that ALJs should be deemed "inferior officers" under the Appointments Clause, requiring their appointment by the President, the heads of departments, or courts of law.[248] In 2016, the DC Circuit rejected respondents' argument and affirmed the SEC position, concluding that ALJs did not require an appointment under the Appointments Clause because ALJ decisions are not final.[249]

On July 21, 2017, respondents in that case filed a petition for a writ of certiorari with the US Supreme Court as to the question of whether ALJs are subject to the Appointments Clause, noting a recent Circuit split between the DC and Tenth Circuits.[250] On November 29, 2017, in response to the petition, the government changed its long-held position and argued that SEC ALJs are officers of the United States subject to the provisions of the Appointments Clause.[251] Pursuant to that change in position, on November 30, 2017, the SEC issued an order ratifying the appointment of its five administrative law judges.[252] The Order also remands for reconsideration by the ALJs all matters in which the ALJs issued initial decisions prior to the SEC's ratification of their appointments, requiring the ALJs to determine whether to ratify or revise in any respect any prior actions taken.[253]

On January 12, 2018, the Supreme Court granted certiorari,[254] and on March 26, 2018, a court-appointed amicus brief was filed in support of the judgment of the DC Circuit below, which held that ALJs are not subject to the Appointments Clause.[255] A ruling in the case is pending and could have wide-reaching implications for SEC administrative enforcement actions

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[244] *See* Br. for Pet'rs, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, at *3 (U.S. Feb. 21, 2018).
[245] *See* Br. for Resp't, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, at *2 (U.S. Nov. 29, 2017).
[246] *See* Br. for Pet'rs, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, at *4 (U.S. Feb. 21, 2018).
[247] *See In re Raymond J. Lucia Cos. & Raymond J. Lucia, Sr.*, Exchange Act Release No. 31,806, 112 S.E.C. Docket 1,754, 2015 WL 5172953, at *21–23 (Sept. 3, 2015).
[248] *See id.* at *21.
[249] *See Lucia v. Sec. & Exch. Comm'n*, 832 F.3d 277, 285–87 (D.C. Cir. 2016), *reh'g en banc denied* 868 F.3d 1021, *cert. granted* 138 S. Ct. 736 (U.S. Jan. 12, 2018) (No. 17-130).
[250] *See* Pet. for a Writ of Cert., *Lucia v. Sec. & Exch. Comm'n*, No. 17-130 (U.S. July 21, 2017); *see also Bandimere v. Sec. & Exch. Comm'n*, 855 F.3d 1,128 (10th Cir. 2017).
[251] *See* Br. for Resp't, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, at *14–15 (U.S. July 21, 2017).
[252] *See* Order, *In re Pending Admin. Proceedings*, Exch. Act. Release No. 82,178 (Nov. 30, 2017); Press Release, S*EC Ratifies Appointment of Administrative Law Judges*, Sec. & Exch. Comm'n (Nov. 30, 2017), https://www.sec.gov/news/press-release/2017-215.
[253] *See* Order, *In re Pending Admin. Proceedings*, Exch. Act. Release No. 82,178 (Nov. 30, 2017).
[254] *See Lucia v. Sec. & Exch. Comm'n*, 868 F.3d 1021 (D.C. Cir. 2016), *cert. granted* 138 S. Ct. 736 (U.S. Jan. 12, 2018) (No. 17-130).
[255] *See* Br. for Ct.-Appointed *Amicus Curiae* in Supp. Of the J. Below, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130 (U.S. Mar. 26, 2018).

concluded before an ALJ. In the initial administrative action, petitioners claimed that the failure to appoint an ALJ required that the SEC order be vacated.[256] Before the Supreme Court, the petitioners argued that violations of the Appointments Clause required new proceedings only in cases in which a party raised constitutional challenges based on the Appointments Clause.[257] The government did not raise the issue of remedy before the Court, except to note that the executive branch should maintain the power to remove ALJs under the Appointments Clause,[258] and court-appointed *amicus curiae* chose not to brief the question of remedy because such arguments were not in support of the judgment below.[259]

3. Use of Testimony Compelled in Foreign Jurisdictions

On July 19, 2017, the Second Circuit Court of Appeals ruled in *United States v. Allen* that testimony from a criminal defendant that is compelled by law in a foreign jurisdiction cannot be used, either directly or indirectly, as evidence against him at trial.[260] As our December 2017 International Law Advisory on the ruling notes, "[t]he Second Circuit's decision has far-reaching consequences for defendants in criminal investigations with a multijurisdictional dimension in both the US and in countries where testimony can be compelled by law," including FCPA investigations and those involving civil enforcement agencies like the SEC and CFTC.

In *Allen*, two former employees of a British bank were convicted in the Southern District of New York of charges stemming from the alleged manipulation of the London Interbank Offered Rate.[261] The convictions were based in part on the testimony the two defendants, both British citizens, were legally compelled to provide to the UK's Financial Conduct Authority (FCA). In the course of the US government's investigation, another bank employee agreed to become a cooperating witness after reviewing the compelled FCA testimony of his former colleagues. The defendants' argued that the government's use of the cooperating witness's testimony at trial was tainted by his review of defendants' FCA testimony, and therefore violated the defendants' Fifth Amendment right against self-incrimination.[262] The district court rejected the argument.[263]

In July, the Second Circuit reversed the district court's decision, holding that because the defendants' testimony had been compelled by UK law, the government's use of it in securing an indictment and at trial violated their Fifth Amendment rights.[264] The court ruled that the Fifth Amendment prohibited the use of the compelled testimony because the United States was the "prosecuting sovereign" seeking to use it.[265] The court concluded the compelled testimony

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[256] *See In re Raymond J. Lucia Cos. & Raymond J. Lucia, Sr.*, Exchange Act Release No. 31,806, 112 S.E.C. Docket 1,754, 2015 WL 5172953, at *21–23 (Sept. 3, 2015).
[257] *See* Br. for Pet'rs, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, at *43–49 (U.S. Feb. 21, 2018).
[258] *See* Br. for Resp't Supporting Pet'rs, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, at *39 n.7 (U.S. Feb. 21, 2018).
[259] *See* Br. for Ct.-Appointed *Amicus Curiae* in Supp. Of the J. Below, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, at *21 (U.S. Mar. 26, 2018).
[260] Opinion, *U.S. v. Allen*, No. 16-898-cr (L) (2d Cir. July 19, 2017), https://cases.justia.com/federal/appellate-courts/ca2/16-898/16-898-2017-07-19.pdf?ts=1500471007 (last accessed April 4, 2018).
[261] *Id.*
[262] *United States v. Allen*, 160 F. Supp. 3d 684, 694-95 (S.D.N.Y. 2016).
[263] *Id.*
[264] *Allen*, *supra* notes 255-56.
[265] *Id.* at 45.

tainted both the cooperator's grand jury and trial testimony, and reversed the defendants' convictions and dismissed the indictment.[266]

4. Jurisdictional Reach of FCPA

Questions surrounding the precise jurisdictional reach of the FCPA with respect to foreign nationals were the focus of important litigation in 2017. As we noted in our 2017 FCPA Mid-Year Review, the US District Court for the District of Connecticut reaffirmed its 2015 ruling in *United States v. Hoskins* that a non-resident foreign national cannot be charged with conspiracy to violate the FCPA or with aiding and abetting a violation of the FCPA without first satisfying the FCPA's jurisdictional requirements.[267] The ruling thrust the DOJ's bribery prosecution of former Alstom SA executive, Lawrence Hoskins, into uncertainty and prompted the government to file an interlocutory appeal in the Second Circuit Court of Appeals. Hoskins is a British citizen who worked in France for a French company during the time of his alleged involvement in a bribery scheme in Indonesia. Thus, Hoskins was neither an issuer nor domestic concern under the FCPA (78dd-1 and -2), nor had the government identified acts by Hoskins in furtherance of bribery while in US territory (78dd-3). Instead, the government argued unsuccessfully that Hoskins could be charged with conspiracy absent himself taking an act in furtherance of bribery while in US territory and despite his lack of status as a domestic concern.[268]

The Second Circuit heard oral argument on the issue on March 2, 2017.[269] The argument focused heavily on the congressional intent behind the legislation and its 1998 amendments. Both sides cited different provisions of the statute's legislative history to support their respective and opposing interpretations of the law. The Second Circuit's pending decision carries with it the potential to dramatically expand or circumscribe the scope and reach of the FCPA over non-US persons.

5. *McDonnell* and the FCPA

On January 13, 2017, the DOJ took the position in prosecuting Ng Lap Seng that the June 2016 Supreme Court decision in *McDonnell*, which narrowed the definition of an "official act" required under the domestic bribery statute 18 U.S.C. § 201, does not apply to the FCPA.[270] In *McDonnell*, the Supreme Court held that "[s]etting up a meeting, talking to another official, or

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[266] *Id.* at 3.
[267] *United States v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. Aug 13, 2015); *see also U.S. v. Hoskins*, No. 3:12 Cr. 238 (JBA), 2016 WL 1069645 (D. Conn. Mar. 16, 2016).
[268] *Id.* Although the Government's initial indictment characterized Hoskins as an agent of a domestic concern, its Third Superseding Indictment altered its initial charging language and stated that Hoskins conspired to violate the FCPA by "acting 'together with'" a US domestic concern. *U.S. v. Hoskins*, 123 F. Supp. 3d. 316 (D. Conn. 2015)
[269] *United States v. Pierucci (Hoskins)*, No. 16-1010 (2d Cir. Mar 2, 2017). A full audio recording of the oral argument can be heard at: http://www.ca2.uscourts.gov/decisions/isysquery/9d573277-3d80-4a78-b9e3-8d31c1c0d677/671-680/list/ (last accessed April 4, 2018).
[270] *Sur-Reply Mem. of Law of the United States of America in Further Opp'n to Def. NG Lap Seng's Mot. to Dismiss the Indictment or for a Bill of Particulars ["Gov't Brief]*, No. 15-Cr-00706, 2017 WL 1292633 at *7−9 (S.D.N.Y. Jan. 13 2017).

organizing an event – without more – does not fit [the] definition of 'official act'" under that statute.[271]

In a motion to dismiss an indictment charging him with violations of the FCPA's anti-bribery provisions and money laundering offenses, defendant Ng Lap Seng argued that there must be a similar showing of an "official act" to establish an FCPA violation.[272] The Defendant relied on the constitutional concerns at issue in *McDonnell* and in FCPA cases and the FCPA's legislative history to argue that Congress modeled the FCPA after § 201, and that the DOJ Resource Guide looks to § 201 for guidance in interpreting the FCPA.[273] The Defendant also pointed to the superseding indictment which used the term "official action," thereby implicitly recognizing *McDonnell* applied.[274] In response, the DOJ cited several cases in support of its interpretation of the FCPA's legislative history to argue that Congress intended the statute to apply more broadly to payments intended to "secur[e] an improper advantage" that assists in "obtaining or retaining business" (as opposed to payments intended "to secure an improper advantage *through an official act of the bribe-recipient*," as was the case in *McDonnell*).[275] The DOJ also argued the plain language of subsection (iii) of the FCPA's anti-bribery provisions ("secur[e] any improper advantage") is far more expansive than the language used in § 201.[276] Further, if the FCPA only applied to official acts, then subsection (iii) would be "superfluous because subsection (i) already prohibits corrupt payments intended to influenc[e] any act or decision of such foreign official in his official capacity."[277]

Apart from the Defendant's arguments interpreting the FCPA's statutory language and legislative history, the Defendant argued that an expansive interpretation of the FCPA would chill foreign officials' interactions with the public, which was a concern for domestic officials in *McDonnell*.[278] In response, the DOJ argued *McDonnell* was concerned with the ability of elected public officials to respond to the needs of their constituents.[279] This would rarely apply in the FCPA context, the DOJ argued, because the bribe-payer is rarely a "constituent" of the bribed foreign official.[280] In *McDonnell*, the Supreme Court also raised significant federalism concerns that the DOJ argued would not apply to Congress' efforts to prevent the bribery of foreign officials.[281] Lastly, the DOJ cited case law and legislative history acknowledging the "broad" reach of the FCPA to counter the Defendant's contention that the FCPA brings greater fair notice

[271] *U.S. v. McDonnell*, 136 S. Ct. 2355, 2375 (2016).
[272] *Gov't Brief*, 2017 WL 1292633 at 7-9.
[273] *Reply Mem. of Law in Supp. of Def.'s Mot. to Dismiss the Indictment or in the Alternative for a Bill of Particulars [Def. Brief]*, No. 15-Cr-00706, 2016 WL 8678077 at *11−12 (S.D.N.Y. Dec. 23 2016) ("[I]t would surely be odd if the same conduct were legal in the domestic context but illegal, under federal law, when done abroad. If[*sic*] anything, Congress intended for domestic officials to be held to a higher standard than foreign officials.")
[274] *Id.* at 11 (The superseding indictment "alleg[es] the [D]efendant made payments to public officials in exchange for and to influence the taking of *official action* to benefit [the Defendant] and [his company].") (quotations omitted).
[275] *Gov't Brief*, 2017 WL 1292633 at 8-9; *e.g. U.S. v. Kay*, 359 F.3d 738, 755-56 (5th Cir. 2004).
[276] *Gov't Brief*, 2017 WL 1292633 at 8.
[277] *Id.* (noting the Supreme Court has expressed deep reluctance to interpret statutory provisions so as to render superfluous other provisions in the same enactment) (citations and quotations omitted).
[278] *Def. Brief*, 2016 WL 8678077 at 11.
[279] *Gov't Brief*, 2017 WL 1292633 at 9.
[280] *Id.*
[281] *Id.*

concerns than § 201.[282] The court ultimately denied the Defendant's motion to dismiss, finding the indictment was "legally sufficient" to support an FCPA charge.[283]

C. US Economic Sanctions Targeting Corruption

In 2017, US economic sanctions policy makers sharpened their focus on targeting issues related to government corruption, both by establishing new authorities and implementing existing authorities. Probably most significant in this area was the enactment of the Countering America's Adversaries Through Sanctions Act (CAATSA), which established several broad new authorities that create potentially significant economic sanctions risk for those doing business in Russia and with Russian persons and entities worldwide whenever any element of corruption may be present.[284] One section of CAATSA provides for the imposition of sanctions on persons involved in "significant corruption" in Russia, including officials of the government of Russia and their family members and associates, as well as persons providing material support for such activity. Under another section of that law, the Treasury Department published a list of Russian "oligarchs," which, while making no specific allegations of corruption or other wrongdoing against those listed, could in the future potentially give rise to legal risks for business involving them.[285] At the same time, the US government continued to build up its economic sanctions program on Venezuela, in part due to corruption concerns with the Maduro government.[286]

The much-watched Global Magnitsky Human Rights Accountability Act saw its first round of sanctions designations, including against Dan Gertler (who has been linked to reports of corruption in the Democratic Republic of the Congo and elsewhere), the daughter of the former President of Uzbekistan (who was at the center of the VimpelCom/Telia bribery scheme), an individual who was charged with corruption in the Dominican Republic for funneling bribes from Odebrecht to local officials there, and the son of Russia's Prosecutor General (who was accused of using prosecutors under his father's control to pressure business competitors unfairly).[287] OFAC also continued to designate Russian officials and their associates for their involvement in the tax fraud, theft, imprisonment, murder and cover-up involving attorney

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[282] *Id.*; *see Def. Brief*, 2016 WL 8678077 at 11 (arguing § 201 has greater fair notice issues due to varying international business practices and a "dearth of judicial guidance.")

[283] *U.S. v. NG Lap Seng, et al.*, No. 15-cr-00706, Dkt. 452, 9 (Apr. 26, 2017). The court order stated, "I will issue a decision detailing the basis for denying Defendant Ng's motion to dismiss prior to the beginning of trial." *Id.* However, the trial occurred in 2017, and no additional details on this decision have been released by the court.

[284] For more detail, see our prior advisories on this topic: *A Detailed Look at the Countering America's Adversaries Through Sanctions Act*, Steptoe & Johnson LLP (Aug. 10, 2017), https://www.steptoe.com/publications-12112.html; *New Guidance Points to Potentially Aggressive Application of Secondary Sanctions on Russia*, Steptoe & Johnson LLP (Jan. 11, 2018), https://www.steptoe.com/publications-12416.html (last accessed April 4, 2018).

[285] For a discussion of this issue, see the following blog post: *More Sanctions Ahead After Treasury's Reports to Congress on Russian Oligarchs, Defense/Intel Sanctions?* Steptoe International Compliance Blog (Jan. 30, 2018), https://www.steptoeinternationalcomplianceblog.com/2018/01/more-sanctions-ahead-after-treasurys-reports-to-congress-on-russian-oligarchs-defense-intel-sanctions/ (last accessed April 4, 2018).

[286] *U.S. Cuts off Venezuela from Most Dollar-Denominated Financing*, Steptoe International Compliance Blog (Aug. 26, 2017), https://www.steptoeinternationalcomplianceblog.com/2017/08/u-s-cuts-off-venezuela-from-most-dollar-denominated-financing/ (last accessed April 4, 2018).

[287] *United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe*, U.S. Dep't of the Treasury (Dec. 21, 2017), https://home.treasury.gov/news/press-releases/sm0243 (last accessed April 4, 2018).

Sergei Magnitsky, and for other corrupt activity and human rights abuses in Russia.[288] Canada,[289] the UK,[290] and other EU states have adopted similar legislation, while the EU itself continues to debate such a measure.[291] Corruption has long been one of many areas of rhetorical focus for economic sanctions policy, but 2017 was an unprecedented year of action in this respect.

D. Dodd-Frank Whistleblower Activity/Protection

Fiscal year 2017 was another busy year for the SEC's whistleblower program, with awards issued to 12 whistleblowers totaling nearly $50 million.[292] In the first quarter of 2018, the US Supreme Court issued a highly anticipated decision interpreting the scope of Dodd-Frank's anti-retaliation provisions.

1. SEC Whistleblower Report

Fiscal year 2017 saw more than a 10% rise in the tips received by the SEC compared to fiscal year 2016, according to the agency's annual whistleblower report.[293] In fiscal year 2017, the SEC received more than 4,400 tips, compared to the 3,923 tips it received the previous year.[294] Of the 4,400 tips received, 210, or less than five percent, were FCPA-related, a slight decline from the 238 FCPA-related tips received last year.[295]

Fiscal year 2017 also witnessed the SEC order three of the 10 largest awards granted since the inception of the whistleblower program back in August 2011. On November 14, 2016, the SEC awarded more than $20 million to an individual who provided a tip that allowed the agency to initiate a successful enforcement action against wrongdoers that led to a near total recovery of investors' funds.[296] The total constituted the third-largest award ever ordered by the SEC. On January 23, 2017, the SEC issued an award of more than $7 million to three individuals who assisted the agency in relation to a fraud investment scheme that affected hundreds of investors.[297] That same month, the Commission awarded more than $5.5 million to a company

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[288] *Treasury Targets Individuals Involved in the Sergei Magnitsky Case and Other Gross Violations of Human Rights in Russia*, U.S. Dep't of the Treasury (Dec. 20, 2017), https://home.treasury.gov/news/press-releases/sm0240 (last accessed April 4, 2018).
[289] *Russian and Venezuelan officials hit by Canada sanctions*, BBC News (Nov. 3, 2017), http://www.bbc.com/news/world-us-canada-41838832 (last accessed April 4, 2018).
[290] *Magnitsky bill turns UK into 'hostile environment' for kleptocrats*, BBC News (Feb. 21, 2017), http://www.bbc.com/news/uk-39047321 (last accessed April 4, 2018).
[291] *After Canada, it is time for the EU's Magnitsky Act*, American Enterprise Institute (Nov. 1, 2017), http://www.aei.org/publication/after-canada-it-is-time-for-the-eus-magnitsky-act/ (last accessed April 4, 2018).
[292] *2017 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, SEC (Nov. 2017), https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf (last accessed April 4, 2018).
[293] *Id.* The report also indicates that corporate/issuer disclosure violations (including FCPA, accounting, and other document violations) accounted for 22% of the primary securities violates for covered actions that resulted in awards.
[294] *Id.*
[295] *Id.* at 31.
[296] *Id.*at 10-11.
[297] *Id.*

insider whose tip resulted in the uncovering of "an ongoing scheme" and ultimately in a successful enforcement action.[298]

Since the program's creation almost seven years ago, the SEC has awarded nearly $160 million to 46 whistleblowers whose tips aided the Commission (or other enforcement agencies) in bringing successful enforcement actions. These actions have resulted in more than $975 million in total monetary sanctions, most of which have been (or will be) returned to defrauded investors.[299]

2. Digital Realty v. Somers

After hearing oral argument on November 28, 2017, the Supreme Court issued its much-anticipated decision in *Digital Realty Trust, Inc. v. Somers*, on February 21, 2018, on the question of who constitutes a whistleblower under the Dodd-Frank Act.[300] Ruling 9-0, the Court held that the anti-retaliation provision of the Act does not extend to an individual who has not reported a suspected violation to the SEC.[301] In other words, the Act prohibits retaliation against whistleblowers only if they reported the alleged misconduct directly to the SEC as opposed to internally to company management. The ruling resolved a Circuit split among the Second and Ninth Courts of Appeals on one side, which found that SEC reporting was not required for whistleblower protection, and the Fifth Circuit, on the other, which had ruled that SEC reporting was required.[302]

In *Somers*, Digital Realty Trust, Inc. (DLR) Vice President Paul Somers alleged he was impermissibly fired after reporting suspected securities law violations to senior management of the company. Somers brought suit in federal district court for wrongful termination and retaliation, which he argued was barred by Dodd-Frank's whistleblower protection provisions. DLR asserted that Somers was not a "whistleblower" as defined by Dodd-Frank because he had reported the allegations internally and not directly to the SEC. The Court sided with DLR, relying on the plain language of the Dodd-Frank Act's definition of a "whistleblower." Writing for the unanimous Court, Justice Ginsburg found that Dodd-Frank "unequivocally" defines a whistleblower as "any individual who provides … information relating to a violation of the securities laws to the commission."[303] Because the "definition of 'whistleblower' is clear and conclusive," the Court refused to "accord deference to the contrary view advanced by the SEC in its rule" promulgated under the statute.[304] The decision emphasized that the "core objective" of the Dodd-Frank whistleblower program is "to motivate people who know of securities law violations to *tell the SEC*."[305]

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[298] *Id.; See also* SEC Press Rel. No. 2017-1, "SEC Awards $5.5 Million to Whistleblower," (2017-1), https://www.sec.gov/news/pressrelease/2017-1.html (last accessed April 4, 2018).
[299] *Id.* at 1.
[300] 138 S. Ct. 767 (2018).
[301] *Id.*
[302] *See Asadi v. GE Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013) (finding SEC reporting required); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015) (finding SEC reporting not required); *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017) (finding SEC reporting not required).
[303] *Id.*
[304] *Id.*
[305] *Digital Realty*, supra note 18 at *9 (emphasis in original).

The significance of the Court's decision is far-reaching. It narrows the class of whistleblowers entitled to Dodd-Frank protections significantly, while incentivizing whistleblowers to report any possible violations directly to the SEC and not to company management. Whistleblowers who report possible misconduct internally are now limited to finding recourse through state-law claims and private actions under the Sarbanes-Oxley Act to the extent such recourse is available.

3. Bio-Rad

The Court's decision in *Digital Realty* is likely to affect the outcome of another important whistleblower case. On February 6, 2017, a federal jury in San Francisco awarded the former general counsel of Bio-Rad Laboratories, Inc. (Bio-Rad) nearly $11 million in an FCPA whistleblower-retaliation case.[306] The company's former general counsel, Sanford Wadler, sued his former employer under Sarbanes-Oxley, Dodd-Frank, and California state law after alleging he was impermissibly terminated by Bio-Rad after he reported possible FCPA violations to the company's auditor.[307] As we noted in our 2016 FCPA Year in Review, the US District Court for the Northern District of California found that federal common law and the Sarbanes-Oxley Act preempted state rules respecting attorney-client privilege, and that Wadler could use any privileged or confidential documents "reasonably necessary to any claim or defense in the case."[308]

The federal jury in San Francisco ruled in favor of Wadler, awarding him $2.96 in back pay and $5 million in punitive damages.[309] The back pay award was doubled under Dodd-Frank. But with the Supreme Court's recent ruling in *Digital Realty*, it appears Sandler no longer meets the definition of a whistleblower under Dodd-Frank and will therefore no longer be entitled to the back pay award being doubled.[310] Perhaps anticipating the Supreme Court's decision in *Digital Realty*, this is one of the arguments Bio-Rad advanced in its October 2017 brief to the Ninth Circuit appealing the jury verdict and accompanying multi-million dollar judgment.[311] Its appeal further alleges that the trial court should have directed the verdict in favor of Bio-Rad because it wrongly excluded certain impeachment testimony and included improper jury instructions on the application of the Sarbanes-Oxley Act.[312]

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[306] Matthew Solomon et al, *GC Whistleblowing and other Implications from Bio-Rad*, LAW360, (Feb. 28, 2017), https://www.law360.com/articles/896033/gc-whistleblowing-and-other-implications-from-bio-rad (last accessed April 4, 2018).
[307] Complaint , *Wadler v. Bio–Rad Labs. Inc.*, No. 15-cv-2356 (JCS) (N.D. Cal. May 27, 2015).
[308] *Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d 829, 849 (N.D. Cal. Dec. 20, 2016).
[309] Solomon, *supra* note 22.
[310] *Id.*
[311] *See* Brief for the Appellants, *Wadler v. Bio-Rad Laboratories, Inc.*, No. 3:15-cv-02356-JCS (9th Cir. Oct. 16, 2017).
[312] *Id.*

V. NEW FCPA INVESTIGATIONS

A number of new FCPA investigations were disclosed in 2017. These include investigations in a variety of sectors including energy and extractives, healthcare, financial services, technology, and others.[313]

A. Energy and Extractives

The energy and extractives industries have been a frequent target of past enforcement activity, and that trend continued in 2017 with a number of entities disclosing new investigations. On August 30, it was reported that China Petroleum & Chemical Corp. (Sinopec), was being investigated by US authorities for allegedly paying about $100 million in improper payments to Nigerian officials to resolve a business dispute.[314] On August 1, Archrock Inc. disclosed in its 10-Q filing that it was being investigated by the SEC in connection with "previously disclosed errors and possible irregularities" at one of its former international operations.[315] Amec Foster Wheeler PLC also disclosed in its 20-F, on April 28, that the company had received voluntary requests for information from both the SEC and DOJ regarding the company's use of certain agents, primarily in the Middle East.[316] In addition to these newly disclosed investigations, previously disclosed enforcement activity continues, including in connection with Operation Car Wash, the high-profile bribery probe regarding Brazilian state-owned oil company Petrobras.[317]

B. Health Care

As with last year, several new investigations involving the health care sector were announced in 2017. All of the newly disclosed health care investigations involve China-based operations, underscoring the risks for the sector in that country. On May 16, Sinovach Biotech Ltd. disclosed that it had received subpoenas from US authorities related to an alleged bribery scandal in China that was first brought to light by research from GeoInvesting LLC.[318] On February 7, Usana Health Sciences Inc. disclosed that the company was voluntarily conducting

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[313] According to the FCPA Tracker, six new investigations have been reported in 2018 across the defense technology, security and inspection systems, banking, engineering and construction, chemicals, and mining industries. *New FCPA investigations reported in 2018*, THE FCPA BLOG (Mar. 23, 2018), http://www.fcpablog.com/blog/2018/3/23/new-fcpa-investigations-reported-in-2018.html (last accessed April 4, 2018).

[314] Hugo Miller and Tom Schoenberg, *Chinese Oil Giant Sinopec Probed by the U.S. Over Nigeria Bribery Allegations*, BLOOMBERG (Aug. 31, 2017), https://www.bloomberg.com/news/articles/2017-08-30/sinopec-is-said-to-be-probed-by-u-s-over-nigeria-payments (last accessed April 4, 2018).

[315] Archrock Inc., Quarterly Report (Form 10-Q) (Aug. 1, 2017) https://www.sec.gov/Archives/edgar/data/1389050/000138905017000073/a2017q210qaroc.htm (last accessed April 4, 2018).

[316] Amec Foster Wheeler PLC, Annual Report (Form 20-F) (Apr. 28, 2017) https://www.sec.gov/Archives/edgar/data/1328798/000093041317001797/c88192_20-f.htm (last accessed April 4, 2018).

[317] *See, e.g.*, DOJ Press Release, *Two Executives Plead Guilty to Role in Foreign Bribery Scheme* (Nov. 9, 2017), https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme (last accessed April 4, 2018).

[318] Sinovac Biotech Ltd., Form 6-K (May 16, 2017) https://www.sec.gov/Archives/edgar/data/1084201/000114420417027949/v467162_ex99-1.htm (last accessed April 4, 2018).

an internal investigation of its China-based subsidiary BabyCare Ltd's reimbursement policies.[319] Additionally, on January 20, Herbalife Ltd. disclosed that the SEC had requested documents and other information related to the company's anti-corruption compliance in China.[320]

C. Financial Services

This was a relatively quiet year in the financial services sector, with just two new investigations announced. On June 14, World Acceptance Corp., a small-loan consumer finance business, announced that the company was conducting an internal investigation of its operations in Mexico related to the FCPA.[321] On March 20, ING Groep NV disclosed that it had received information requests from US authorities regarding possible corrupt practices.

D. Technology

This was a particularly active year for FCPA investigations in the technology sector with new investigations disclosed by a wide range of technology companies. The technology sector had more new investigations reported in 2017 than any other single sector. Given the continued growth of technology companies with international operations, including in jurisdictions with a high corruption risk, this is a trend that is likely to continue in coming years. In 2017, new investigations were reported for SAP SE,[322] Uber Technologies Inc.,[323] Teradata Corp.,[324] IBM Corp.,[325] PAR Technology Corp.,[326] Quad-Graphics Inc.,[327] Panasonic,[328] and ABB Ltd.[329]

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[319] Usana Health Sciences Inc., Form 8-K (Feb. 7, 2017) https://www.sec.gov/Archives/edgar/data/896264/000115752317000383/a51506012-ex991.htm (last accessed April 4, 2018).

[320] Austen Hufford, *SEC Questions Herbalife Over China Anti-Corruption Efforts*, WALL STREET JOURNAL (Jan. 20, 2017) https://www.wsj.com/articles/sec-questions-herbalife-over-china-anti-corruption-efforts-1484924135 (last accessed April 4, 2018).

[321] World Acceptance Corp. Form 12b-25 (June 14, 2017) https://www.sec.gov/Archives/edgar/data/108385/000010838517000019/wrld_6-15x17xform12bx25.htm (last accessed April 4, 2018).

[322] Gabriele Steinhauser, *SAP Reports Itself to U.S. Authorities Over Gupta Scandal*, WALL STREET JOURNAL (Oct. 26, 2017) https://www.wsj.com/articles/sap-reports-itself-to-u-s-authorities-over-gupta-scandal-1509008688 (last accessed April 4, 2018) (noting the company had self-reported to US authorities after making payments to the controversial Gupta family to secure contracts with state-owned entities in South Africa).

[323] Eric Newcomer, *Uber Faces Widespread Asia Bribery Allegations Amid U.S. Criminal Probe*, BLOOMBERG (Sep. 19, 2017) https://www.bloomberg.com/news/articles/2017-09-20/uber-is-said-to-review-asia-dealings-amid-u-s-criminal-probe (last accessed April 4, 2018) (noting that the investigation focused on Uber's conduct in China, India, Indonesia, Malaysia and South Korea).

[324] Teradata Corp., Quarterly Report (Form 10-Q) (Aug. 4, 2017) https://www.sec.gov/Archives/edgar/data/816761/000081676117000033/tdc-063017x10q.htm (last accessed April 4, 2018) (disclosing the discovery of questionable expenditures for travel, gifts, and other expenses at a Turkish subsidiary).

[325] International Business Machines Corp., Quarterly Report (Form 10-Q) (Jul. 25, 2017) https://www.sec.gov/Archives/edgar/data/51143/000110465917046808/a17-13367_110q.htm (last accessed April 4, 2018) (disclosing the company was cooperating with the SEC in reviewing possible improper conduct by an employee in Poland and was being investigated by the DOJ related to transactions in Argentina, Bangladesh, and Ukraine).

[326] PAR Technology Corp., Quarterly Report (Form 10-Q) (May 15, 2017) https://www.sec.gov/Archives/edgar/data/708821/000114036117020767/form10q.htm (last accessed April 4, 2018)

E. Other Industries

A number of other industries saw new investigations reported in 2017, including industrial services and engineered products,[330] waste disposal,[331] car rental,[332] airlines,[333] and food and agriculture.[334] None of these industries had a significant number of investigations, but the announcement of new investigations demonstrates that FCPA-related issues can emerge across a wide variety of industries, including those not typically associated with significant corruption problems.

F. Other Investigations

On November 5, a trove of 13.4 million documents, known as the Paradise Papers, was made public by the International Consortium of Investigative Journalists, in conjunction with the newspaper Süddeutsche Zeitung.[335] The documents belonged to Bermuda-based law firm Appleby and exposed the business and financial dealings of politicians, financiers, and business

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(disclosing the company was investigating import/export and other sales activities in China and Singapore and cooperating with US authorities).

[327] Quad-Graphics Inc., Annual Report (Form 10-K) (Feb. 22, 2017) https://www.sec.gov/Archives/edgar/data/1481792/000148179217000006/a12312016form10k.htm (last accessed April 4, 2018) (disclosing that the company had self-reported to the DOJ and SEC regarding transactions in Peru and China).

[328] Pavel Alpeyev, *U.S. Probes Panasonic Unit for Alleged Bribery Violations*, BLOOMBERG (Feb. 2, 2017) https://www.bloomberg.com/news/articles/2017-02-02/u-s-investigates-panasonic-unit-for-alleged-fcpa-violations (last accessed April 4, 2018) (noting the company was being investigated by the DOJ and SEC for possible FCPA violations).

[329] Samuel Rubenfeld, *ABB Discloses Unaoil-Linked Bribery Probe*, WALL STREET JOURNAL (Feb. 10, 2017) https://blogs.wsj.com/riskandcompliance/2017/02/10/abb-discloses-unaoil-linked-bribery-probe/ (last accessed April 4, 2018) (noting the company had made disclosures to US authorities regarding past dealings with Unaoil Group, including potentially improper payments to third parties).

[330] Harsco Corp., Quarterly Report (Form 10-Q) (Nov. 8, 2017) https://www.sec.gov/Archives/edgar/data/45876/000004587617000093/hsc-9302017_10q.htm (last accessed April 4, 2018) (disclosing the company had self-reported to the DOJ and SEC regarding potentially improper payments at a Chinese subsidiary).

[331] Stericycle Inc., Quarterly Report (Form 10-Q) (Aug. 9, 2017) https://www.sec.gov/Archives/edgar/data/861878/000156459017017033/srcl-10q_20170630.htm (last accessed April 4, 2018) (disclosing SEC and DOJ investigations into the company's conduct in Latin America).

[332] Herc Holdings Inc., Quarterly Report (Form 10-Q) (Aug. 8, 2017) https://www.sec.gov/Archives/edgar/data/1364479/000136447917000031/herc2017q2form10-q.htm (last accessed April 4, 2018) (disclosing the company had self-reported possible violations by a former vehicle rental operation in Brazil).

[333] Gol Intelligent Airlines Inc., Form 20-F (May 1, 2017) https://www.sec.gov/Archives/edgar/data/1291733/000129281417001139/golform20f_2016.htm (last accessed April 4, 2018) (disclosing the company had self-reported to the DOJ and SEC regarding payments to firms owned by politically exposed persons).

[334] Roger Hamilton-Martin, *DOJ and SEC alerted to possible bribery in Brazilian meat scandal*, GLOBAL INVESTIGATIONS REVIEW (May 4, 2017) https://globalinvestigationsreview.com/article/jac/1140883/doj-and-sec-alerted-to-possible-bribery-in-brazilian-meat-scandal (last accessed April 4, 2018) (noting BRF SA was cooperating with the SEC and DOJ regarding an investigation into potential bribes to government food inspectors).

[335] The International Consortium of Investigative Journalists, *Offshore Trove Exposes Trump-Russia Links And Piggy Banks Of The Wealthiest 1 Percent*, ICIJ (Nov. 5, 2017) https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/ (last accessed April 4, 2018).

leaders in countries around the world.[336] As with the Panama Papers, released in 2016, the Paradise Papers may lead to a variety of investigations and charges around the globe under a number of different legal regimes.

G. Q1 2018 Investigations

The first quarter of 2018 has continued to be active in terms of new FCPA-related investigations. Investigations were disclosed in a number of sectors including energy and extractives,[337] financial services,[338] technology,[339] healthcare,[340] and chemicals.[341] Thus far, the 2018 investigations have been spread evenly across the above industries.

VI. SIGNIFICANT CIVIL COLLATERAL LITIGATION

FCPA investigations again resulted in significant collateral litigation last year. These suits included shareholder derivative actions, civil fraud/RICO actions, breach of contract, and other civil claims.

A. Derivative Litigation

Civil litigants continued to file derivative suits in 2017 related to FCPA-related misconduct. Many of these took the form of class actions that were filed after the announcement of FCPA investigations or resolutions. Examples of suits involving significant court decision or resolution in 2017 include:

- PTC Inc. (PTC): As reported in our 2016 FCPA Year in Review, PTC, a Massachusetts-based software company, reached a settlement with the DOJ and SEC related to charges that it provided Chinese officials with improper travel. Soon thereafter, PTC investors filed a shareholder class action lawsuit in the US District Court for the District of Massachusetts

[336] *Id.*
[337] Exterran Corporation, Annual Report (Form-K) (Feb. 28, 2018) https://www.sec.gov/Archives/edgar/data/1635881/000163588118000012/extn-20171231x10k.htm (disclosing that the company had responded to an SEC subpoena and responded to a DOJ request for information related to FCPA compliance, but that both agencies have informed the company they do not plan to proceed with an FCPA-related enforcement action).
[338] Credit Suisse Group AG, Form 6-K (Feb. 14, 2018) https://www.sec.gov/Archives/edgar/data/1053092/000137036818000007/a180214q4-ex99_1.htm (disclosing that Credit Suisse has responded to information requests from the DOJ and SEC regarding its hiring practices in the Asia Pacific region).
[339] OSI Systems, Inc., Form 8-K (Feb. 1, 2018) https://www.sec.gov/Archives/edgar/data/1039065/000110465918005849/a18-5160_18k.htm (disclosing that the SEC commenced an investigation into the company's FCPA compliance and the DOJ has said it intends to request information regarding FCPA compliance matters).
[340] GlaxoSmithKline plc, Form 6-K (Feb. 7, 2018) https://www.sec.gov/Archives/edgar/data/1131399/000165495418001174/a2006e.htm (disclosing that the company had informed the SEC and DOJ of an ongoing and previously disclosed SFO investigation related to the company's operations in China).
[341] Albemarle Corporation, Annual Report (Form 10-K) (Feb. 28, 2018) https://www.sec.gov/Archives/edgar/data/915913/000091591318000005/a1231201710-kdocument.htm (disclosing that the company had voluntarily self-reported potential FCPA-related issues concerning the use of third party sales representatives to the DOJ and SEC).

alleging, among other, that PTC either failed to disclose and/or made false or misleading statements about the internal investigation and its lack of cooperation with the DOJ and the SEC pertaining to the matter.[342] On July 14, 2017, the Court approved a settlement to resolve all claims for $2.1 million.[343]

- Petróleo Brasileiro S.A. (Petrobras): On July 7, 2017, the Second Circuit decertified two investor class actions claiming that the Brazilian oil company Petrobras concealed billions of dollars in bribes and kickbacks.[344] The Second Circuit vacated the District Court's finding that the investors satisfied the predominance requirement of class certification because the District Court failed to consider the need for individualized inquiry for class membership as required by the US Supreme Court's *Morrison* ruling. But the Second Circuit also articulated a new ascertainability standard favourable to the investors and upheld the District Court's ruling that the class was entitled to a presumption of reliance on Petrobras' securities market prices.[345] On remand, the Southern District of New York granted preliminary approval for a staggering $3 billion settlement ($2.95 billion to be paid by Petrobras and $50 million to be paid by PricewaterhouseCoopers Auditores Independentes), with a final settlement hearing scheduled for June 4, 2018.[346]

- Braskem S.A. (Braskem) – Brazilian petrochemical company Braskem agreed to pay investors $10 million to settle a class action lawsuit claiming that Braskem misled investors regarding Braskem's involvement in the Operation Car Wash scandal.[347] As reported in our 2016 FCPA Year in Review, Braskem had pleaded guilty for conspiring to violate the FCPA's anti-bribery provisions. The United States District Court for the Southern District of New York approved the settlement.[348]

B. Civil Fraud/RICO Litigation

Several new civil fraud/RICO cases were filed in relation to FCPA allegations in 2017. Noteworthy cases filed in 2017 include:

- Associação Brasileira de Medicina de Grupo (Abramge): In 2016, Abramge, an association of Brazilian health insurers, filed civil fraud and conspiracy complaints against the following medical device companies in different US federal courts: 1) Boston Scientific Corp., Arthrex, Inc. and Zimmer Biomet Holdings, Inc. (District of Delaware), 2) Abbott Laboratories, Inc.

[342] Class Action Complaint for Violations of Federal Securities Laws, *Crandall v. PTC Inc. et al.*, No. 1:16-cv-10471-WGY (D. Mass. March 7, 2016).
[343] Amended Stipulation of Settlement, *Crandall v. PTC Inc. et al.*, No. 1:16-cv-10471-WGY (D. Mass. March 1, 2017); Order and Final Judgment, *Crandall v. PTC Inc. et al.*, No. 1:16-cv-10471-WGY (D. Mass. July 14, 2017).
[344] Opinion and Order, *In re Petrobras Securities*, No. 16-1914-cv (2d. Cir. July 7, 2017).
[345] Opinion and Order, *In re Petrobras Securities*, No. 14-cv-9662 (S.D.N.Y. Feb. 2, 2016).
[346] Memorandum of Law in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Settlement, *In re Petrobras Securities*, No. 14-cv-9662 (S.D.N.Y. Feb. 1, 2018); Order, *In re Petrobras Securities*, No. 14-cv-9662 (S.D.N.Y. Feb. 28, 2018); Order, *In re Petrobras Securities*, No. 14-cv-9662 (S.D.N.Y. March 1, 2018).
[347] Stipulation and Agreement of Settlement, *In Re Braskem, S.A., Securities Litigation*, No. 15-cv-5132-PAE (Sept. 14, 2017).
[348] Order and Final Judgment, *In Re Braskem, S.A., Securities Litigation*, No. 15-cv-5132-PAE (Feb. 22, 2018).

(Northern District of Illinois), and 3) Stryker Corp. (Western District of Michigan).[349] Abramge alleged that the defendants, labeled in Brazilian press as "the Prosthetic Mafia," engaged in corrupt practices that inflated prices for medical devices that were eventually paid by Brazilian health insurers. Abramge's motion to consolidate the actions was denied because they involved different defendants and there was no allegation that the defendants conspired or coordinated with one another.[350] The case against Stryker was dismissed on *forum non conveniens* grounds, with the court agreeing with Stryker that the case belonged in a Brazilian court.[351] Soon thereafter, Abramge voluntarily dismissed its case against Abbott Laboratories after Abbott consented to the Brazilian court's jurisdiction.[352] Abramge also voluntarily dismissed its case against Arthrex, whereas Boston Scientific and Biomet's motions to dismiss are pending.[353]

- GlaxoSmithKline (GSK): On September 29, 2017, the United States District Court for the Eastern District of Pennsylvania granted defendant GSK's motion to dismiss federal RICO claims and state law fraud and related claims filed by husband and wife private investigators Peter Humphrey and Yu Yingzeng.[354] Both Humphrey and Yingzeng had spent more than a year in Chinese prison after being convicted for illegally obtaining private information while they were investigating a corruption-related whistleblower claim on behalf of GSK.[355] The District Court found that the plaintiffs did not suffer any domestic injury from GSK's alleged RICO violations, and, therefore, lacked standing to assert civil RICO claims. The case is pending appeal before the Third Circuit.[356]

C. Breach of Contract Litigation

A notable breach of contract claim was filed in 2017 relating to alleged FCPA violations.

- Misonix: On March 23, Cicel (Beijing) Science & Technology Co. Ltd. (Cicel), a Beijing-based promoter and distributor of medical devices in China, filed breach of contract and related actions in the US District Court for the Eastern District of New York against Misonix,

[349] Complaint, *Associacao Brasileira De Medicina De Grupo d/b/a Abramge v. Boston Scientific, Arthrex, Inc. and Zimmer Biomet Holdings, Inc.*, No. 1:16-cv-01184-GMS (D. Del. Dec. 14, 2016); Complaint, *Associacao Brasileira De Medicina De Grupo d/b/a Abramge v. Abbott Laboratories, Inc.*, No. 1:16-cv-11326 (N.D. Ill. Dec. 13, 2016); Complaint, *Associacao Brasileira De Medicina De Grupo d/b/a Abramge v. Stryker Corp.*, No. 1:16-cv-1366 (W.D. Mich. Nov. 28, 2016).
[350] Order, *In Re: Brazilian Prosthetic Device Bribery Litigation*, No. ILN/1:16-cv-11326 (J.P.M.L. May 31, 2017).
[351] Order, *Associacao Brasileira De Medicina De Grupo d/b/a Abramge v. Stryker Corp.*, No. 1:16-cv-1366 (W.D. Mich. June 28, 2017). Abramge appealed the dismissal, which is pending. *See* Notice of Appeal, *Associacao Brasileira de Medic v. Stryker Corp.*, No. 17-1828 (6th. Cir. July 19, 2017).
[352] Amended Notice Regarding Consent to Jurisdiction in Brazil, *Associacao Brasileira De Medicina De Grupo d/b/a Abramge v. Abbott Laboratories, Inc.*, No. 1:16-cv-11326 (N.D. Ill. Aug. 7, 2017); Notice of Dismissal, *Associacao Brasileira De Medicina De Grupo d/b/a Abramge v. Abbott Laboratories, Inc.*, No. 1:16-cv-11326 (N.D. Ill. Aug. 29, 2017).
[353] Notice of Voluntary Dismissal, *Associacao Brasileira De Medicina De Grupo d/b/a Abramge v. Boston Scientific, Arthrex, Inc. and Zimmer Biomet Holdings, Inc.*, No. 1:16-cv-01184-GMS (D. Del. July 5, 2017).
[354] Order, *Humphrey et al. v. GlaxoSmithKlein, PLC., et al.*, No. 2:16-cv-05924-NIQA (E.D. Pa. Sep. 29, 2017).
[355] Peter Humphrey, *"I was locked inside a steel cage: Peter Humphrey on his life inside a Chinese prison"*, FINANCIAL TIMES (Feb. 15, 2018), https://www.ft.com/content/db8b9e36-1119-11e8-940e-08320fc2a277 (last accessed April 4, 2018).
[356] Notice of Appeal, *Humphrey et al. v. GlaxoSmithKlein, PLC., et al.*, No. 17-3285 (3d. Cir. Oct. 16, 2017).

Inc. (Misonix), a New York based manufacturer of medical devices, and several officers and directors of Misonix.[357] Cicel argued that Misonix terminated its contractual relationship with Cicel based on unsubstantiated allegations that Cicel violated the FCPA. On October 7, 2017, the Court denied the defendants' motion to dismiss the breach of contract claim, allowing the parties to proceed to discovery.[358]

VII. INTERNATIONAL DEVELOPMENTS

One of the most important anti-corruption trends in recent years, which accelerated in 2017, is the strengthening of anti-corruption legal and policy frameworks – as well as the active pursuit of bribery-related investigations and prosecutions – outside the United States. Significant developments in a sampling of these non-US jurisdictions are summarized below.

A. United Kingdom

The SFO has become an increasingly aggressive anti-corruption agency, having received "blockbuster" funding from the government to pursue global investigations involving several high-profile entities and having successfully secured convictions and fines amounting to hundreds of millions of British Pounds. Though David Green's replacement has not yet been announced, questions remain about the effectiveness and role of the SFO, in particular in light of Brexit and budgetary considerations. Nevertheless anti-corruption enforcement remains a priority in the United Kingdom, as evidenced by a new Anti-Corruption Strategy, legislation and regulation aimed at targeting corruption, tax evasion and money laundering, and unexplained wealth orders (UWOs).

The SFO announced a series of new investigations in 2017 and early 2018. For a discussion of developments during the first half of 2017, see our 2017 FCPA Mid-Year Review. On July 11, 2017, the SFO announced an investigation into allegations of bribery, corruption and related offences by Amec Foster Wheeler plc. On July 24, 2017, the SFO announced an investigation into suspicions of corruption in the conduct of business in the Republic of Guinea by the Rio Tinto group. On August 1, 2017, the SFO announced an investigation into suspicions of corruption in the conduct of business by British American Tobacco p.l.c. On January 18, 2018, the SFO announced a criminal investigation into bribery, corruption and money laundering arising from the conduct of business by Chemring Group plc and its subsidiary, Chemring Technology Solutions Limited (CTSL), following a self-report made by CTSL.

The SFO also has announced a number of new charges: On June 20, 2017, the SFO charged Barclays Plc, John Varley and Roger Jenkins with conspiracy to commit fraud (in relation to June and October 2008 capital raisings) and the provision of unlawful financial assistance contrary to the Companies Act 1985.[359] Thomas Kalaris and Richard Boath were charged with conspiracy to commit fraud in relation to the June 2008 capital raising. Further

[357] Complaint, *Cicel (Beijing) Science & Technology Co., Ltd. v. Misonix, Inc. et. al.*, No. 2:17-cv-01642-ADS-SIL (E.D.N.Y. March 23, 2017).
[358] Order, *Cicel (Beijing) Science & Technology Co., Ltd. v. Misonix, Inc. et. al.*, No. 2:17-cv-01642-ADS-SIL (E.D.N.Y. Oct. 7, 2017).
[359] SFO press release, *SFO charges in Barclays Qatar capital raising case* (June 20, 2017), https://www.sfo.gov.uk/2017/06/20/sfo-charges-in-barclays-qatar-capital-raising-case/ (last accessed April 4, 2018).

charges were announced, in February 2018, against Barclays Bank Plc for unlawful financial assistance contrary to s151(1) and (3) of the Companies Act 1985 in respect of Barclays' 2008 capital raising.[360]

On September 27, 2017, the SFO charged Osman Shahenshah and Shahid Ullah (the former CEO and COO of Afren PLC) with fraud and money laundering offences, in connection with the SFO's investigation into Afren concerning secret agreements with Afren's joint venture partners in Nigeria.[361]

In November 2017, the SFO charged Ziad Akle, Basil Al Jarah, Paul Bond and Stephen Whiteley with conspiracy to make corrupt payments to secure the award of contracts in Iraq to Unaoil's client SBM Offshore. The charges relate to alleged corrupt conduct within Unaoil, between June 2005 and August 2011.[362] The SFO is also seeking the extradition of Saman Ahsani, who resides in Monaco, for similar allegations.

As noted in our 2016 FCPA Year in Review, the SFO investigated F.H. Bertling Ltd. in respect of a $250,000 corrupt payment made to an agent of Sonangol in Angola. On September 26, 2017, the SFO secured convictions against F.H. Bertling and six of its current and former employees.[363] On October 20, 2017, Joerg Blumberg, Dirk Juergensen and Marc Schweiger each received a 20-month sentence (suspended for two years) and a £20,000 fine (payable within three months with a default sentence of one year for non-payment) and were disqualified from being company directors for five years.[364]

As noted during our 2017 FCPA Mid-Year Review, in May 2017 the High Court held in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* that the majority of materials created by Eurasian Natural Resources Corporation Ltd (ENRC) during an internal investigation were not privileged and were required to be disclosed.[365] ENRC's fear of a dawn raid and subsequent prosecution was deemed insufficient to establish that the company believed prosecution was a real likelihood and for litigation privilege to therefore apply.

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[360] SFO press release, *Further SFO charges in Barclays Qatar capital raising case* (Feb. 12, 2018), https://www.sfo.gov.uk/2018/02/12/further-sfo-charges-in-barclays-qatar-capital-raising-case/ (last accessed April 4, 2018).

[361] SFO press release, *Ex-CEO and COO of collapsed oil giant, Afren Plc, charged with Money Laundering and Fraud over $400m Nigerian business deals* (Sept. 26, 2017), https://www.sfo.gov.uk/2017/09/26/ex-ceo-and-coo-of-collapsed-oil-giant-afren-plc-charged-with-money-laundering-and-fraud-over-400m-nigerian-business-deals/ (last accessed April 4, 2018).

[362] SFO press releases, *Two charged in SFO's Unaoil investigation* (Nov. 16, 2017), https://www.sfo.gov.uk/2017/11/16/two-charged-sfos-unaoil-investigation/; *Two further individuals charged in SFO's Unaoil investigation* (Nov. 30, 2017), https://www.sfo.gov.uk/2017/11/30/two-individuals-charged-sfos-unaoil-investigation/ (last accessed April 4, 2018).

[363] SFO press release, *SFO secures seven convictions in $20m F.H. Bertling corruption case* (Sept. 26, 2017), https://www.sfo.gov.uk/2017/09/26/sfo-secures-7-convictions-20m-f-h-bertling-corruption-case/ (last accessed April 4, 2018).

[364] SFO press release, *Three men sentenced in $20m Angolan oil corruption case (*Oct. 20, 2017), https://www.sfo.gov.uk/2017/10/20/three-men-sentenced-20m-angolan-oil-corruption-case/ (last accessed April 4, 2018).

[365] *Serious Fraud Office v Eurasian Natural Res. Corp.* [2017] EWHC 1017.

In October 2017, ENRC was granted permission to appeal the ruling and the case will be heard by the Court of Appeal in July 2018. The original decision and its impact on claims to both legal advice privilege and litigation privilege have proven the subject of much debate and the Court of Appeal's decision will be highly anticipated. A continued narrow interpretation of privilege may discourage companies from self-reporting suspected wrongdoing, and this concern has led to the Law Society of England and Wales also seeking permission to intervene in the appeal.[366]

The decision in *ENRC* can be contrasted with the approach taken by Lord Justice Vos in the December 2017 case of *Bilta (UK) Ltd (in liquidation) and others v Royal Bank of Scotland and another*.[367] In *Bilta* the court took the view that documents created by the Royal Bank of Scotland during an internal investigation were covered by litigation privilege as they were created for the sole or dominant purpose of expected tax litigation with HM Revenue & Customs. Vos LJ took care not to draw a general principle from the approach taken in *ENRC* and instead emphasized the importance of taking a realistic and commercial view of the facts. Notwithstanding the care taken to distinguish *ENRC* on the facts, however, the two decisions appear in tension with one another. The forthcoming Court of Appeal judgment in *ENRC* thereby takes on yet further significance.

The UK's focus on anti-corruption and recovering the ill-gotten gains from corruption can be seen from a number of recent developments:

On December 11, 2017, the Department for International Development and the Home Office published the Anti-Corruption Strategy 2017-2022, which is designed to provide the framework for anti-corruption policies and actions, guided by four approaches to combat corruption: protect, prevent, pursue and reduce. The Strategy includes the following: the government will create a new Minister for Economic Crime in the Home Office; a National Economic Crime Centre will be established, based in the National Crime Agency (NCA), to task and coordinate law enforcement; the Crime and Courts Act will be amended to add the SFO to the list of organizations that can be directed by the NCA to investigate cases of economic crime; the findings from the Call of Evidence, which proposed extending corporate criminal liability to wider economic crimes will be considered and, if appropriate, the government will consult on how new offenses might be introduced; and the Suspicious Activity Reporting regime will be reformed to improve feedback between law enforcement and reporters. Finally, the new Anti-Corruption Champion is the Right Honourable John Penrose MP, who was appointed in December 2017.

In June 2017, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force. These regulations implement the European Union's Fourth Money Laundering Directive and are intended to ensure that the UK's anti-money laundering regime meets with the standards imposed by the Financial Action Task Force. Alongside the Proceeds of Crime Act 2002, this now forms the main body of UK anti-

[366] Law Society press release, *Law Society in bid to intervene in landmark privilege case* (Nov. 10, 2017), https://www.lawsociety.org.uk/news/press-releases/law-society-in-bid-to-intervene-in-landmark-privilege-case/ (last accessed April 4, 2018).
[367] (*Bilta (UK) Ltd (in liquidation) and others v Royal Bank of Scotland and another* [2017] EWHC 3535 (Ch)).

money laundering legislation, replacing the Money Laundering Regulations 2007. Among other changes, the regulations provide additional detail on the customer due diligence measures required to be taken by regulated entities, an expansion in the definition of politically exposed persons, and the creation of new criminal offences for prejudicing investigations into a breach of the regulations and/or making false or misleading statements pursuant to a requirement imposed under the regulations.

The Criminal Finances Act 2017 came into force on September 30, 2017. The statute creates new corporate offences in relation to failure to prevent the facilitation of tax evasion, whether in the UK or beyond. In similar fashion to the section 7 failure to prevent offence in the Bribery Act 2010 and its accompanying adequate procedures defense, organizations can benefit from a 'reasonable procedures' defense under the Criminal Finances Act. HM Revenue and Customs has published draft guidance intended to help organizations understand the steps needed to avail themselves of the defense and further guidance will doubtless follow as cases start to be considered by the courts.[368]

Sections 1 to 6 of the Criminal Finances Act 2017 introduced the new powers of UWOs and supporting interim freezing orders, which came into force on January 31, 2018. A UWO requires a person who is reasonably suspected of involvement in, or of being connected to a person involved in, serious crime to explain the nature and extent of their interest in particular property, and to explain how the property was obtained, where there are reasonable grounds to suspect that the respondent's known lawfully obtained income would be insufficient to allow the respondent to obtain the property. A UWO is an investigative tool which is granted to an "enforcement agency," which includes the SFO and NCA; it is not, in itself, a power to recover assets.

On February 28, 2018, the NCA secured two UWOs to investigate two properties (one in London and one in the South East of England) totaling £22 million, which are believed to ultimately be owned by a politically exposed person (according to online sources, the subject is a politician from Central Asia[369]).[370] These are the first UWOs to be granted and represent the first time the legislation will be tested in court. In addition to the UWOs, interim freezing orders were granted, meaning that the assets cannot be sold, transferred or dissipated while subject to the order.

[368] HM Revenue & Customs, *Corporate offences for failing to prevent criminal facilitation of tax evasion*, (Sept. 6, 2017), https://www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion (last accessed April 4, 2018).
[369] Financial Times, *Asian politician targeted in UK dirty money clampdown* (Feb. 28, 2018), https://www.ft.com/content/5887d604-1ca3-11e8-956a-43db76e69936 (last accessed April 4, 2018).
[370] NCA press release, *NCA secures first unexplained wealth orders* (Feb. 28, 2018), http://nationalcrimeagency.gov.uk/news/1297-nca-secures-first-unexplained-wealth-orders (last accessed April 4, 2018).

B. Other European Jurisdictions

1. France

France adopted its Law on Transparency, the Fight against Corruption and Modernization of Economic Life, nicknamed "Sapin II," in December 2016.[371] In less than eighteen months, Sapin II has resulted in several French DPAs or *Convention Judiciaire d'Intérêt Public* (CJIP). Additionally, on December 22, 2017, the Agency created by Sapin II, the French Anti-Corruption Agency (AFA), published important guidelines aimed at helping companies and public entities comply with the requirements under Sapin II.[372]

The AFA's guidelines are inspired by the "best international standards" and will be updated periodically.[373] They apply to both public and private sector organizations, including to French subsidiaries of groups established outside France, and regardless of the entity's size or business sector. Although not legally binding, the AFA guidelines indicate what the AFA will be looking for when evaluating compliance programs. The AFA encourages organizations to tailor their compliance programs to their own risks, business model and issues, but provides guidance with respect to each of the following elements of an appropriate prevention and detection program:

- Tone at the Top
- Code of Conduct
- Internal Whistleblowing Program
- Risk Mapping
- Third Party Due Diligence Procedures
- Accounting Controls
- Corruption Risk Training
- Internal Monitoring and Assessment System

In addition to the AFA issuing compliance program guidance, French authorities have stepped up their investigation and enforcement activity under Sapin II. On November 14, 2017, the first CJIP provided for in Sapin II was approved by the Paris High Court.[374] The CJIP was entered into by the French National Financial Prosecutor and HSBC Private Bank (Suisse) SA. In the CJIP, HSBC agreed to pay a €158 million fine, which was the maximum provided for by the law (30% of the bank's average annual turnover over the past three years). The settlement resolved allegations of unlawful banking, financial soliciting and aggravated money

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[371] Law No. 2016-1691 of 9 December 2016, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id (last accessed April 4, 2018).

[372] Agence Francaise Anticorruption, *Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism*, (Dec. 2017) https://www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion (last accessed April 4, 2018).

[373] *Id.*

[374] Richard L. Cassin, *France enforcement: HSBC pays €300 million for first DPA*, The FCPA Blog (Nov. 28, 2017), http://www.fcpablog.com/blog/2017/11/28/france-enforcement-hsbc-pays-300-million-for-first-dpa.html (last accessed April 4, 2018).

laundering.[375] The CJIP's statement of facts sets forth allegations describing how the bank and its employees assisted the bank's clients in concealing their assets and evading tax payments in France.[376] Although not a corruption-related case, this is the first application of the CJIP procedure as provided by Sapin II, which will also be available to resolve corruption-related matters.

In February 2018, two domestic corruption-related CJIP were approved by the Paris High Court. Two sub-contractors to the partially state-owned utility company *Electricité de France* (EDF), Kaefer Wanner (KW) and SET Environnement (SE) admitted to having bribed an EDF procurement manager in exchange for the allocation of public contracts. In the CJIP, KW and SE agreed to pay fines of €2,710,000 and €800,000 respectively as well as €30,000 each as compensation to EDF. Both companies also agreed to being monitored by the AFA. KW and SE will be subject to the AFA monitorship for 18 and 24 months, respectively.[377]

Another significant case in France has been that against Teodoro Obiang, the Vice-President of Equatorial Guinea and son of the President, on charges including corruption and money laundering in June 2017.[378] The case was brought to trial by the NGOs Transparency International France and Sherpa. In October 2017, Obiang was sentenced to a three-year conditional sentence and a conditional €30 million fine for money laundering, misappropriation of funds, breach of trust and corruption. The court also confiscated all his assets held in France.

French prosecutors are also pursuing a number of high-profile corruption investigations. As discussed in our 2017 FCPA Mid-Year Review, the investigation opened in March 2017 by the French National Financial Prosecutor into allegations of fraud, bribery and corruption within Airbus' civil aviation arm is ongoing.[379]

In May 2017, the press reported that the French National Financial Prosecutor opened an investigation into French naval supplier DCNF, focusing on bribery of a foreign public official. The investigation, which is ongoing, reportedly relates to a 2008 contract worth €6.7 billion between DCNS and Brazil for the sale of five submarines. DCNS is alleged to have paid €40 million to a Brazilian lobbyist who was involved with the 2008 contract.[380]

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[375] Michael Griffiths, *Allen & Overy ushers HSBC to France's first DPA*, GIR (Nov. 14, 2017), https://globalinvestigationsreview.com/article/1150378/allen-overy-ushers-hsbc-to-france%E2%80%99s-first-dpa (last accessed April 4, 2018).
[376] *Id.*
[377] Valerie Mahaut, *By paying heavy fines, two companies of the Hauts-de-Seine escape a trial for corruption,* LeParisien (Mar. 6, 2018), http://www.leparisien.fr/hauts-de-seine-92/en-payant-de-lourdes-amendes-deux-societes-des-hauts-de-seine-echappent-a-un-proces-pour-corruption-06-03-2018-7594041.php (last accessed April 4, 2018).
[378] Transparency Int'l, *ON TRIAL FOR CORRUPTION: TEODORO OBIANG, SON OF THE PRESIDENT OF EQUATORIAL GUINEA*, (July 5, 2017), https://www.transparency.org/news/feature/on_trial_for_corruption_teodoro_obiang_son_of_the_president_of_equatorial_g (last accessed April 4, 2018).
[379] Bruno Trevidic, *Corruption: Airbus faces a multi-billion euro fine*, LesEchos (Dec. 10, 2017) https://www.lesechos.fr/12/10/2017/lesechos.fr/030700782753_corruption---airbus-s-expose-a-une-amende-de-plusieurs-milliards-d-euros.htm
[380] Pierre Tran, *French officials probe bribery allegations in Brazil Scorpene sale*, Defense News (May 22, 2017), https://www.defensenews.com/naval/2017/05/22/french-officials-probe-bribery-allegations-in-brazil-scorpene-sale/ (last accessed April 4, 2018).

The press reported in November 2017 that Société Générale SA faced a fresh investigation in France into alleged bribery related to the bank's work with the Libyan Investment Authority.[381] Société Générale received two judicial requests for information in September and October as part of a preliminary probe opened by the French National Financial Prosecutor into possible violations of anti-corruption laws.[382] The investigation was disclosed in a filing updating the bank's annual report.

After two days of questioning in March 2018, former French President Nicolas Sarkozy faces charges of corruption, illegal campaign financing and misappropriation of Libyan public funds arising from an inquiry into whether his 2007 election campaign received illegal financial support from the Libyan government.[383]

2. Italy

Following the opening of an investigation into Royal Dutch Shell PLC's acquisition of a stake in an oilfield in Nigeria (with Eni as co-owner), Italian authorities brought corruption charges in February 2017 against both Royal Dutch Shell and Eni.[384] Eni chief executive Claudio Descalzi was also charged and will stand trial alongside Paulo Scaroni, former chief executive of Eni, and nine other individuals. In December 2017 a judge ruled that the case should proceed to trial. This was scheduled to commence in Milan on March 5, 2018 but was then delayed to May 14, 2018.[385] The transaction is also being investigated in Nigeria and the Netherlands.

In December 2016 the Italian Supreme Court of Cassation ordered a re-trial of Giuseppe Orsi and Bruno Spagnolini, the former chief executives of Finmeccanica and AgustaWestland, following a previous conviction for paying bribes to Indian government officials to win a contract for the sale of 12 helicopters. In January 2018 the pair was acquitted of the bribery charges by an Italian appeals court.[386]

A long-running case centered upon allegations that Saipem bribed Algerian officials to win work from Sonatrach, the Algerian state-owned oil company, is ongoing. Following the acquittal in 2015 of Eni in the same case, as well as Paolo Scaroni and Antonio Vella (former

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[381] Gaspard Sebag, *SocGen Faces Fresh Bribery Probe in France Over LIA Dealings*, BLOOMBERG (Nov. 7, 2017), https://www.bloomberg.com/news/articles/2017-11-07/socgen-faces-french-criminal-probe-into-suspected-libya-bribery-j9pfpeh9 (last accessed April 4, 2018).

[382] Dow Jones News, *Societe Generale Investigated in France for Possible Anti-Corruption Breach*, (July 11, 2017) https://uk.advfn.com/stock-market/EURONEXT/GLE/share-news/Societe-Generale-Investigated-in-France-for-Possib/76035019 (last accessed April 4, 2018).

[383] Challenges, *Nicolas Sarkozy indicted for Libyan financing of his 2007 campaign*, (Mar. 21, 2018) https://www.challenges.fr/france/nicolas-sarkozy-mis-en-examen-pour-le-financement-libyen-de-sa-campagne-2007_575286; *see also* Louis San, et al., *Financing of the 2007 campaign: indicted, Nicolas Sarkozy denies the facts*, (Mar. 21, 2018) https://www.francetvinfo.fr/politique/affaire/financement-de-la-campagne-de-sarkozy/direct-soupcons-de-financement-libyen-de-sa-campagne-nicolas-sarkozy-toujours-en-garde-a-vue_2667138.html

[384] James Politi, *Eni chief Claudio Descalzi charged with international corruption*, FT (Feb. 8, 2017), https://www.ft.com/content/87983836-ee13-11e6-930f-061b01e23655 (last accessed April 4, 2018).

[385] *Eni and Shell trial over Nigeria kickbacks postponed*, The Independent (March 6, 2018), https://www.independent.co.ug/eni-shell-trial-nigeria-kickbacks-postponed/ (last accessed April 4, 2018).

[386] EMILIO PARODI, *ITALIAN COURT CLEARS FORMER LEONARDO BOSSES IN INDIA CORRUPTION CASE*, REUTERS (JAN. 8, 2018), https://uk.reuters.com/article/uk-leonardo-india-corruption-trial/italian-court-clears-former-leonardo-bosses-in-india-corruption-case-idUKKBN1EX16M (last accessed April 4, 2018).

head of Eni's North African operations), an Italian appeals court overturned the ruling and in July 2016 a Milan court ordered that Eni, Saipem, Scaroni, Vella and other former executives stand trial over allegations of corruption and fraudulent tax returns. Whilst the case remains ongoing, in February 2018 an Italian prosecutor asked for Eni and Saipem to be fined €900,000 each and for Scaroni and Vella to be given jail sentences of six years and four months and five years and four months respectively.[387]

In March 2017, Italian prosecutors also stepped up an inquiry into corruption at Consip, a state-owned company that manages public procurement. The investigation swept up Tiziano Renzi, the father of former Italian premier Matteo Renzi, who allegedly sought to illicitly influence Consip decisions. Alfredo Romeo, an entrepreneur and political donor who had been bidding on a €2.7 billion contract relating to Consip, was also investigated on corruption allegations.[388] In September 2017, the first verdict in the Consip investigation was delivered as a judge ratified a plea bargain relating to Marco Gasparri, a former manager accused of receiving bribes from Romeo.[389]

3. The Nordics

In July 2017, the Swedish Prosecution Agency dropped a bribery investigation it had been pursuing into Anders Borg, a former Swedish finance minister, and Par Boman, the chairman of Handelsbanken.[390]

Following the March 2017 arrest by Swedish prosecutors of an employee of Bombardier Transportation, Evgeny Pavlov, on suspicion of bribing Azerbaijani officials in order to win a 2013 rail equipment procurement deal worth $340 million, Pavlov was acquitted of bribery in October 2017.[391] Swedish prosecutors appealed the decision the same month.[392]

In September 2017, Swedish telecom company Telia entered into a $965 million settlement with US, Dutch, and Swedish authorities to resolve allegations it paid at least $330 million in bribes to penetrate the Uzbek market.[393] This total settlement amount comprises two parts: a $548 million criminal penalty that will be split between the DOJ and the Dutch public

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[387] *Italy prosecutor seeks jail sentences for Eni manager, ex-CEO in Algeria case*, REUTERS (Feb. 26, 2018), https://www.reuters.com/article/eni-saipem-algeria-corruption/update-1-italy-prosecutor-seeks-jail-sentences-for-eni-manager-ex-ceo-in-algeria-case-idUSL8N1QG5D1 (last accessed April 4, 2018).
[388] James Politi, *Renzi's father questioned in Italian corruption inquiry*, FT (MAR. 3, 2017), https://www.ft.com/content/7abbe904-0002-11e7-96f8-3700c5664d30 (last accessed April 4, 2018).
[389] *First CONSIP case verdict arrives*, ANSA (Sept. 14, 2017), http://www.ansa.it/english/news/general_news/2017/09/14/first-consip-case-verdict-arrives_420b9d66-1937-4189-bb25-1849e17a13f9.html (last accessed April 4, 2018).
[390] GIR, *Sweden ends elk hunting bribery investigation*, (July 17, 2017) https://globalinvestigationsreview.com/short-cut/2017/july/12#1144299
[391] David Keyton, *Russian employee of Bombardier acquitted in bribery case*, THE STAR (Oct. 11, 2017), https://www.thestar.com/business/2017/10/11/russian-employee-of-bombardier-acquitted-in-bribery-case.html (last accessed April 4, 2018).
[392] GIR, *Deutsche Bank settles with US states for US$220 million in Libor case*, (Oct. 26 2017), https://globalinvestigationsreview.com/short-cut/2017/october/26#1149385 (last accessed April 4, 2018).
[393] Jonathan Stempel, *Telia settles U.S., European bribery probes for $965.8 million*, REUTERS (Sept. 21, 2017), https://www.reuters.com/article/us-telia-settlement/telia-settles-u-s-european-bribery-probes-for-965-8-million-idUSKCN1BW1XL?il=0 (last accessed April 4, 2018).

prosecutor's office, and $457 million in civil disgorgement to the SEC, $40 million of which was offset by a forfeiture to the DOJ. The SEC's order stated Telia's disgorgement obligation would be deemed satisfied in part by any confiscation or forfeiture payment of up to $208.5 million made by the company to Swedish or Dutch prosecutors. However, due to its corporate criminal liability laws, it is unclear whether Sweden will be able to accept its share of the funds without also succeeding in cases against former Telia executives. Any portion of Sweden's share of the disgorgement ($208.5 million) it is unable to accept reportedly will be offered to, and likely accepted by, the Dutch authorities.[394]

4. The Netherlands

Stockholm-based Telia Company AB, an international telecommunications company, agreed to pay the Public Prosecution Service of the Netherlands (Openbaar Ministrie, or OM) a criminal penalty of $274,000,000[395] as part of a global foreign bribery resolution entered to resolve charges arising out of a scheme to pay bribes in Uzbekistan.[396]

The Dutch's Prosecutor's Office investigation into ING Bank's role in corruption and money laundering in Uzbekistan, referred to in our 2017 FCPA Mid-Year Review,[397] is still ongoing. One aspect of the investigation relates to payments made by VimpelCom to the company of an Uzbek official[398].

5. Germany

On February 7, 2018, the new German coalition government published an inter-party agreement[399] outlining its legislative agenda. Chapter X of the agreement includes a proposal to

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[394] Michael Griffiths, *Sweden to prosecute individuals before accepting its cut of the Telia settlement*, GLOBAL INVESTIGATIONS REVIEW (Sept. 25, 2017), https://globalinvestigationsreview.com/article/1147658/sweden-to-prosecute-individuals-before-accepting-its-cut-of-the-telia-settlement (last accessed April 4, 2018).

[395] DOJ Press Release, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan*, (Sept. 21, 2017) https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965; *see also* DutchNews, *Dutch prosecutors reach $274m deal with Telia in Uzbek corruption case* (Sept. 22, 2017), http://www.dutchnews.nl/news/archives/2017/09/dutch-prosecutors-reach-274m-deal-with-telia-in-uzbek-corruption-case/ (last accessed April 4, 2018).

[396] DOJ Press Release, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan*, (Sept. 21, 2017) https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965 (last accessed April 4, 2018).

DutchNews, *Dutch prosecutors reach $274m deal with Telia in Uzbek corruption case*, (Sept. 22, 2017) http://www.dutchnews.nl/news/archives/2017/09/dutch-prosecutors-reach-274m-deal-with-telia-in-uzbek-corruption-case/ (last accessed April 4, 2018).

[397] Lucinda A. Low et al., *2017 FCPA Mid-Year Review*, Steptoe & Johnson LLP.

[398] Richard L. Cassin, *Dutch, U.S. investigate ING for corruption*, The FCPA Blog (Mar. 24, 2017), http://fcpablog.squarespace.com/blog/2017/3/24/dutch-us-investigate-ing-for-corruption.html (last accessed April 4, 2018) and

Dutch Prosecutor Investigating ING Over Possible Corruption In Uzbekistan RadioFreeEurope (Mar. 22, 2017), https://www.rferl.org/a/uzbekistan-dutch-ing-investigation/28384506.html (last accessed April 4, 2018).

[399] Koalitionsvertrag zwischen CDU, CSU und SPD, *Ein neuer Aufbruch für Europa Eine neue Dynamik für Deutschland Ein neuer Zusammenhalt für unser Land*, Berlin (Feb. 7, 2018) http://www.handelsblatt.com/downloads/20936422/4/koalitionsvertrag_final.pdf.

revise German law governing corporate sanctions "to ensure that white-collar crime is effectively prosecuted and adequately punished" and that companies benefitting from their employees' misconduct are more heavily sanctioned. Under current German law, companies are, in principle, exposed to the risk of administrative sanctions if one of their employees commits an offence, with prosecutorial discretion as to whether to initiate an investigation. Under the proposed revision, this prosecutorial discretion would be removed in favor of mandatory prosecution.

The government has also promised to improve the procedural framework to increase legal certainty for the companies concerned. In addition the government would like to clarify under which conditions investigations may be terminated. This is understood to mean that the government will propose specific rules or guidelines on settlements, similar to DPAs, NPAs, and monitorships. Although German prosecuting authorities and judges already are able to reduce penalties for companies deemed to have cooperated, this is not yet codified. It is not yet clear which government authority will promulgate these new rules.

In the agreement, the government also has proposed to increase the amount of corporate administrative fines (which currently allow for a maximum fine of €10 million). For companies with an annual revenue of more than €100 million, the maximum fine will be up to 10% of their annual turnover, if found guilty of white-collar offences such as bribery, corruption and money laundering. The government further promises to clarify the criteria for calculating fines.

Another notable proposal is to clarify the rules on inspections, in particular with regard to the seizure of documents. The government further suggests creating incentives for the conduct of "internal investigations" by companies.

The proposed reforms will gradually be implemented during the term of the new government.

Pending implementation of these proposed legal reforms, German prosecutors have continued to pursue bribery charges against German companies under existing German law. For example, on June 2, 2017, Atlas Elektronik agreed to pay €48 million to settle bribery allegations with the Bremen Prosecutors' Office, which alleged that an Atlas employee paid a Greek middleman €13 million to win a contract to supply submarine sonar systems and bribed a Peruvian middleman to win a contract to supply torpedoes to Peru's navy. Atlas Elektronik was given credit for cooperating with prosecutors, creating a new compliance program and undertaking an internal investigation.[400] In addition, on February 9, 2018, Airbus Defense and Space GmbH agreed to a €81.25 million fine to resolve a Munich Prosecutors' Office investigation – which began in 2012 – into bribes paid as part of a $2 billion sale, in 2003, of Eurofighter jets to the Austrian government.[401]

[400] Reuters Staff, *Thyssenkrupp's Atlas ordered to pay 48 mln euros in bribery case* (June 1, 2017), https://www.reuters.com/article/atlas-corruption/thyssenkrupps-atlas-ordered-to-pay-48-mln-euros-in-bribery-case-idUSL8N1IY3TY (last accessed April 4, 2018).
[401] München Prosecutors' Office press release, *Bußgeld über 81,25 Millionen Euro gegen die Airbus Defence and Space GmbH* (Feb. 9, 2018), https://www.justiz.bayern.de/gerichte-und-behoerden/staatsanwaltschaft/muenchen-1/presse/2018/02.php (last accessed April 4, 2018).

C. Latin America

1. Brazil

In July 2017, Brazil's Federal Police announced that the task force leading the unprecedented investigation known as "Operation Car Wash" would be absorbed into the organization's main anti-corruption division.[402] The investigation unveiled an unprecedented scope of corrupt practices relating to contracts with Petrobras and other government agencies, resulting in arrests and indictments of politicians, business executives and financial operatives. Among the individuals prosecuted for corruption, money laundering and racketeering based on schemes uncovered in the investigations are the former Governor of Rio de Janeiro Sergio Cabral Filho and two former State Secretaries. In January 2018, the list of government officials expanded to include a popular former President and potential contender for Brazil's 2018 elections, Luiz Inácio Lula da Silva. On January 24, 2018, an appeals court in Brazil unanimously upheld the conviction of the former president for taking bribes and money laundering.[403] On April 7, 2018, Mr. da Silva surrendered to Brazilian police to begin serving a 12-year jail term, ending his political campaign.[404] Mr. da Silva has vowed to continue his appeals to Brazil's highest courts.[405]

In 2017, Brazil's Supreme Court also ratified two high-profile plea bargains. Former CEO of Odebrecht, Marcel Odebrecht, along with 77 executives pleaded guilty to corruption, money laundering, and racketeering in exchange for reduced sentences. Testimony by Odebrecht executives led to the conviction of former high-ranking officials, including former Finance Minister Antonio Pallocci. A group of JBS Executives, including former CEO Joesley Batista, also pleaded guilty to the same charges after admitting to bribing more than 50 politicians. Batista's recording of conversations, in which President Michel Temer purportedly solicited bribes and conspired to obstruct justice, led to a vote in congress to authorize the initiation of criminal procedures against Temer, which was ultimately rejected.[406] In 2018, however, Brazil's Prosecutor General requested to include Temer in an investigation into an alleged payment by Odebrecht in 2014, which the Supreme Court granted on March 2, 2018. Under the Brazilian constitution, sitting presidents are barred for being charged for crimes committed before coming into power.[407]

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[402] Ernesto Londoño, *Brazil Shuts Down Successful Corruption-Fighting Task Force* (July 7, 2017), https://www.nytimes.com/2017/07/07/world/americas/brazil-corruption-lava-jato.html (last accessed April 4, 2018)
[403] Lisandra Paraguassu, *Lula's Brazil presidential run in doubt after conviction upheld* (Jan. 23, 2018), https://www.reuters.com/article/us-brazil-politics-lula/lulas-brazil-presidential-run-in-doubt-after-conviction-upheld-idUSKBN1FD0FU (last accessed April 4, 2018).
[404] Manuela Andreaoni et al, *Ex-President 'Lula' of Brazil Surrenders to Serve 12-Year Jail Term*, (Apr. 7, 2018), https://www.nytimes.com/2018/04/07/world/americas/brazil-lula-surrenders-luiz-inacio-lula-da-silva-.html.
[405] *Id.*
[406] Reuters Staff, *Brazil's Congress blocks corruption charges against President Temer* (Oct. 25, 2017), https://www.reuters.com/article/us-brazil-temer-vote/brazils-congress-blocks-corruption-charges-against-president-temer-idUSKBN1CU38S (last accessed April 4, 2018).
[407] Reuters Staff, *Brazil high court justice approves investigation of Temer: ruling* (March 2, 2018), https://www.reuters.com/article/us-brazil-corruption-temer/brazil-high-court-justice-approves-investigation-of-temer-ruling-idUSKCN1GE2P5 (last accessed April 4, 2018).

On January 3, 2018, Petrobras signed an agreement to settle a US securities class action lawsuit alleging that shareholders lost money because of corruption that was uncovered through Operation Car Wash. Under the proposed agreement, which is still subject to court approval, Petrobras would deny liability and pay $2.95 billion in three installments. The settlement would rank as the largest securities class action settlement in the US by a foreign entity.[408]

2. Argentina

On December 1, 2017, Argentina enacted law 27.401, an anti-corruption law creating corporate liability for corrupt activity. The law went into effect on March 1, 2018. Law 27.401 permits fines up to five times the amount companies are determined to have obtained through corrupt payments and companies can be banned from public contracts for up to 10 years. It also institutes mandatory anti-corruption compliance programs for some contracts with the national government, including contracts exceeding AR$100 million (approximately US$5 million). Similar to the FCPA, the law holds companies accountable for the acts of their agents, whenever the act provides a benefit to the company, and also provides for NPAs or DPAs. As additional enforcement tools, Argentine prosecutors have the discretion to require reparations to victims, community service, disciplinary actions to participants and compliance measures.

3. Peru

Two previously passed anti-corruption laws in Peru became effective on January 1, 2018. Law 30424, enacted in 2016, introduced corporate liability for transnational bribery and Legislative Decree 1352, enacted January 6, 2017, extended the first to include bribery of domestic public officials or servants. Companies found guilty of violations can face a fine of up to six times the benefit obtained through the illicit activity, the suspension from contracting with the state for up to five years, and the cancellation of license, concessions or other authorizations. Notably, the statutes provide standing for plaintiffs alleging damage from corrupt activity to sue individuals and companies in civil court for negligent or tortious actions. Possible mitigation of liability can be granted if the company admits to the crimes before an internal investigation has formalized and collaborates with authorities during the investigation. Peru, however, does not provide for settlement agreements, DPAs, or other such arrangements.

On March 21, 2017, Pedro Pablo Kuczynski resigned from the presidency of Peru, amid allegations that his allies offered financial incentives for support on the impending congressional vote on his impeachment. Peru's Congress had also voted on his impeachment in December 2017, in response to allegations that he had received payments from Odebrecht. The vote then failed by a slim margin.[409]

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[408][408] Brendan Pierson, *Petrobras to pay $2.95 billion to settle U.S. corruption lawsuit* (Jan. 3, 2018), https://www.reuters.com/article/us-petrobras-classaction/petrobras-to-pay-2-95-billion-to-settle-u-s-corruption-lawsuit-idUSKBN1ES0L2 (last accessed April 4, 2018).

[409] BBC News, *Pedro Pablo Kuczynski: Under fire Peru president resigns* (March 22, 2018), http://www.bbc.com/news/world-latin-america-43492421 (last accessed April 4, 2018)

D. Canada

Canada is moving closer to adopting a DPA regime. Between September 25 and December 8, 2017, the Government of Canada conducted a public consultation on the possibility of adopting DPAs as a tool to combat corporate crime. As part of this process the government met with over 370 participants and received 75 written submissions. In its report, the government said that participants generally were "supportive of fair, proportional and transparent measures that enable the Government to take action against corporate wrongdoing and to hold companies accountable for such misconduct."[410] This report comes on the heels of a Transparency International Canada report recommending that the Canada adopt legislation to create a DPA regime.[411] The government has said it will further review public feedback before determining whether to introduce a DPA regime.

Facilitation payments are no longer legal under Canadian law. Effective October 31, 2017, the exception allowing for facilitation payments in the Corruption of Foreign Public Officials Act (CFPOA) was repealed. As detailed in our 2013 FCPA Year in Review, Canada amended the CFPOA to comply with its obligations under the OECD Convention. This legislation provided for the removal of the facilitation payments exception but delayed the elimination of the exception to allow for Canadian companies to implement compliance programs.[412]

On July 6, 2017, the Court of Appeal for Ontario upheld Nazir Karigar's conviction for agreeing to bribe a foreign public official, the first individual prosecuted under the CFPOA.[413] As detailed in our 2014 FCPA Year in Review, Karigar was sentenced to three years in prison for arranging bribes to public officials at Air India on behalf of CryptoMetrics, Inc. The trial judge had held, *inter alia*, that "the offence of 'agreeing' to give or offer a benefit to a foreign public official in s. 3 of the Act includes an agreement among two or more people to offer a bribe to a foreign public official, and does not require the Crown to prove an agreement with or payment to a particular foreign official."[414] On appeal, Karigar argued that the word "agree" requires proof of an agreement between the accused and a foreign public official, not just agreements between any parties that offer a bribe. The Court of Appeal disagreed and concluded that "there is no basis to read in a limitation on who must be parties to an agreement."[415] The Supreme Court of Canada dismissed Karigar's application for leave to appeal the Court of Appeal decision on March 15, 2018.[416]

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[410] Gov't of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing, What we heard* (Feb. 22, 2018), http://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf (last accessed April 4, 2018).
[411] *See Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada* (July 2017), http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf (last accessed April 4, 2018).
[412] *See* Fighting Foreign Corruption Act, S.C. 2013, c.26 §§ 3(2), 5.
[413] *See R. v. Karigar*, 2017 ONCA 576, Dkt. C59321 (July 6, 2017), http://www.ontariocourts.ca/decisions/2017/2017ONCA0576.htm (last accessed April 4, 2018).
[414] *Id*.
[415] *Id*.
[416] *Nazir Karigar v. Her Majesty the Queen*, 2017 ONCA 576 (ONCA July 6, 2017), https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37784 (last accessed April 4, 2018).

E. Australia

Australia has been active legislatively to combat bribery. On December 7, 2017, the Australian Senate referred the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 to the Legal and Constitutional Affairs Legislation Committee for inquiry and report.[417] The new legislation would amend the Criminal Code Act of 1995 in several meaningful ways, including the creation of a strict liability corporate offense of failing to prevent foreign bribery and the introduction of a DPA scheme for certain serious corporate crimes. The legislation would apply both to Australian company employees as well as to their "associates," which includes third parties that are controlled by or performing services on behalf of an Australian company. The Senate report is due April 20, 2018.

On December 7, 2017, a revised whistleblower protections bill, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*, was introduced into the Australian Parliament.[418] The Bill would enhance whistleblower protections to the *Corporations Act 2001*. If enacted, the law would apply to disclosures made on or after July 1, 2018 but would apply to events that occurred before July 1, 2018. On March 28, 2018, the Australian Senate Economics References Committee issued a final report based on its inquiry into the measures governing the activities of Australian corporations, entities, organizations, individuals, government and related parties with respect to foreign bribery.[419] The report concluded that Australia's implementation of international foreign bribery obligations into domestic law is incomplete and that more can be done to combat foreign bribery, such as increased resources, increased regulations and changes to corporate culture. The report itself contains 22 specific recommendations to improve the effectiveness of Australia's anti-foreign bribery laws.

Nevertheless, Australia also stepped up enforcement of its anti-bribery legislation. As of August 29, 2017, the Australian Federal Police (AFP) had 19 active investigations, 13 allegations under evaluation by AFP's Fraud and Anti-Corruption Centre (FACC), and 20 allegations that had been finalized after evaluation or investigation and closed.[420] Australia recorded its first foreign bribery prosecution and conviction in 2017. On September 27, 2017, the Supreme Court of New South Wales found three individuals guilty of conspiring to bribe a foreign public official to obtain construction contracts.[421] All three individuals were sentenced to four years imprisonment and two individuals who happened to be brothers were fined an additional AU$250,000 each.

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[417] Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CombattingCrime (last accessed April 4, 2018).
[418] *See* Parliament of Australia, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*, No. 45, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1120.
[419] *See Foreign Bribery*, Australia Senate Economics References Committee Report (Mar. 28, 2018), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Report.
[420] *See* OECD, *Implementing the OECD Anti-Bribery Convention*,Phas 4 Report, Australia (Dec. 15, 2017) https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (last accessed April 4, 2018).
[421] *See R v Jousif; R v I Elomar; R v M Elomar* [2017] NSWSC 1299 (Sept. 27, 2017), http://classic.austlii.edu.au/au/cases/nsw/NSWSC/2017/1299.html.

F. China

Significant and foundational changes are underway in the People's Republic of China. After decades of modest political reform and a leadership succession model based on designated leadership generations – the "second generation (第二代)," "third generation (第三代)," "fourth generation (第四代)," etc. – the People's Republic, under the leadership of Xi Jinping, has decided to embark on a different path. On March 11, 2018, the National People's Congress approved amendments to the country's constitution that would allow for an indefinite or life term for Xi Jinping and his new vice president, Wang Qishan, the former head of China's Central Commission for Discipline Inspection (CCDI), a powerful anti-corruption body.[422] It remains to be seen how future leaders of China will be selected, but, for now, everything will be under the executive mandate of Xi Jinping.

The new approach was signalled at the 19th Communist Party Congress in November, 2017, but its administrative breadth was only recently unveiled during the annual "two meetings" (两会) that took place in March 2018. [423] China's government is being reformed and centralized under Xi Jinping. Anti-corruption and environmental protection are to be given core emphasis. Xi Jinping's "One-Belt One-Road" foreign policy also looks to be taking a central role, including in both court and law reform.[424] Cybersecurity will also continue to be a key priority for the central government.[425]

During the annual "two meetings," the National People's Congress (NPC) also passed a State Council organizational reform plan, which will significantly change the organization and power distribution among the various government ministries.[426] Pursuant to the new reforms, there will now be 26 ministries, with certain new ministries formed and some ministries reorganized.[427] For example, a new National Market Supervision Administration Bureau will carry out unified antitrust enforcement and pricing supervision.

On anti-corruption, a new National Supervision Commission has been created to lead anti-corruption efforts. The National Supervision Commission will be a state institution on par

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[422] The amendments to the PRC Constitutions, Xinhua News Agency (Mar. 12, 2018) are available at http://www.npc.gov.cn/npc/xinwen/2018-03/12/content_2046540.htm (last accessed April 4, 2018).
[423] The "two meetings" refers to the annual meetings of the National People's Congress and the Chinese People's Political Consultative Conference, both of which are typically held each year in March.
[424] The One-Belt One-Road (一带一路) concept was initially proposed by President Xi Jinping in 2013 to develop cooperation and strengthen business relations among those countries residing along the old silk roads, roughly along land routes through Central Asia and Mongolia, but also along southern maritime routes. China is engaged in innovative judicial reforms and liberalizations to better serve the development of the One-Belt One-Road, including proposing specialized international courts to resolve disputes and providing mechanisms to allow for the enforcement of foreign court judgements in Chinese courts.
[425] People's Daily, National People's Congress Press Conference on March 12, 2018, *There is no security of organization and personal information without network security*, http://lianghui.people.com.cn/2018npc/n1/2018/0312/c418459-29863149.html (last accessed April 4, 2018).
[426] *The State Council Institutional Reform Program*, Xinhua News Agency (Mar. 17, 2018), available at http://www.xinhuanet.com/politics/2018lh/2018-03/17/c_1122552185.htm (last accessed April 4, 2018).
[427] *Id.*

with the State Council, the Supreme People's Court, and the Supreme People's Procuratorate.[428] The National Supervision Commission is set to have a broad range of powers to supervise, investigate, and discipline personnel with public duties, including civil servants, personnel engaged in public affairs, among other officials.[429] The National Supervision Commission is to work in coordination with the CCDI. It is also expected to play an active role in international cooperation efforts for financial crimes, including in efforts to investigate and repatriate PRC officials suspected of having engaged in bribery, but residing abroad—e.g., "Operation Fox Hunt."

Following the decision to form the National Supervision Commission, the NPC also passed and promulgated a new Supervision Law, enumerating the powers of the National Supervision Commission and outlining certain procedures that are required to be followed in supervision work to ensure due process.[430]

As reported in our 2017 FCPA Mid-Year Review, another notable legislative development was the amendment to the *Unfair Competition Law*, which includes provisions relating to bribery. There are a number of points worth noting from the new amendment.[431] First, it clarified the categories of recipients of commercial bribes in a non-criminal context – employees of the counterparty to the bribe, agents of the counterparty, along with those who may have power over the transaction that the bribing party is seeking to influence.[432] Second, it imposed vicarious liability on the employer for the bribing acts of its employees.[433] Third, it increased maximum penalties for non-criminal commercial bribery from RMB200,000 (approximately $32,000) to RMB3 million (approximately $475,000).[434]

The current anti-corruption campaign entered its fifth year in 2017. According to PRC official reports, there have been 59,593 officials prosecuted for taking bribes, and 37,277 individuals prosecuted for offering bribes since the campaign began, representing a significant increase from past campaigns.[435] The PRC has also continued its efforts to repatriate suspected corrupt officials and other economic fugitives through "Operation Fox Hunt." According to PRC official reports, there have been over 3,000 officials who have been repatriated since the operation began.[436]

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[428] *Supervision Law of the People's Republic of China*, enacted by the National People's Congress on March 20, 2018 and effective as of the same day, Chapters II. The official version of the law is available at http://www.npc.gov.cn/npc/xinwen/2018-03/21/content_2052362.htm?from=timeline&isappinstalled=0 (last accessed April 4, 2018).
[429] *Id.*, Chapter III.
[430] *Id.*
[431] *Unfair Competition Law of the People's Republic of China*, amended by the Standing Committee of the National People's Congress on November 4, 2017 and effective as of January 1, 2018, http://www.npc.gov.cn/npc/xinwen/2017-11/04/content_2031432.htm (last accessed April 4, 2018).
[432] *Id.*, Article 7.
[433] *Id.*
[434] *Id.*, Article 19.
[435] *See* 2018 The Supreme People's Procuratorate of the People's Republic of China, *2018 Supreme Inspection Work Report* (Mar. 9, 2018), http://www.spp.gov.cn/spp/tt/201803/t20180309_369886.shtml (last accessed April 4, 2018).
[436] *See* People's Daily, *3,517 fugitives were arrested in the hunt fox operation* (Nov. 3, 2017), http://legal.people.com.cn/n1/2017/1103/c42510-29624238.html.

G. Korea

Anti-corruption efforts reached into the highest echelons of South Korea's government and corporate sector in 2017. South Korean President Park Geun-hye was impeached by the National Assembly on December 9, 2016 on corruption charges related to influence peddling by her chief aide, Choi Soon-sil, removed from office on March 10, 2017, and indicted a month later on a host of criminal corruption charges.[437] On April 6, 2018, Park was sentenced to 24 years in prison and was also ordered to pay a $16.9 million fine over the corruption scandal. Prosecutors had sought a 30 year sentence.[438]

On August 25, 2017, Lee Jae-yong, Samsung's acting chairman, was convicted of bribery, embezzlement, and other related charges for several multi-million dollar donations made to entities controlled by Park's aide, Soon-sil.[439] Lee was accused of seeking political favors and the approval of the merger of two Samsung affiliates in exchange for the donations. He was convicted and sentenced to five years in prison.[440] In a controversial decision issued in February 2018, however, an appeals court suspended Lee's sentence, allowing him to go free.[441]

More than a year after the enactment of country's Improper Solicitation and Graft Act in September 2016, [442] the law remains controversial. Although the South Korean criminal code already criminalizes bribery to and from public officials,[443] the new law jettisons the need to establish a *quid pro quo* in order to secure a conviction of a public official.[444] Instead, the law criminalizes the offer or provision to, or acceptance by, public officials of certain financial or other advantages exceeding specified values, subject to limited exceptions for meals, gifts, and

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[437] *South Korea Charges Ousted Leader Park and Lotte Chief with Bribery*, Reuters (Apr. 17, 2017), https://www.reuters.com/article/us-southkorea-politics-park/south-korea-charges-ousted-leader-park-and-lotte-chief-with-bribery-idUSKBN17J0I3 (last accessed April 4, 2018).

[438] Choe Sang-Hun, *Park Geun-hye, South Korea's Ousted President, Gets 24 Years in Prison*, N.Y. Times (Apr 6., 2018), https://www.nytimes.com/2018/04/06/world/asia/park-geun-hye-south-korea.html (last accessed April 6, 2018)

[439] Stewart Bishop, *Samsung Boss Gets 5 Years in Prison for Bribery*, LAW360, (Aug. 25, 2017), https://www.law360.com/articles/957756/samsung-boss-gets-5-years-in-prison-for-bribery (last accessed April 4, 2018).

[440] *Id.*

[441] Choe Sang-Hun and Raymond Zhong, *Samsung Heir Free, to Dismay of South Korea's Anti-Corruption Campaigners*, N.Y.Times, (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/business/samsung-lee-jae-yong-appeal.html (last accessed April 4, 2018).

[442] *See Improper Solicitation and Graft Act Took Effect on September 28*, (Sept. 28, 2016), http://www.acrc.go.kr/en/board.do?command=searchDetail&method=searchDetailViewInc&menuId=020501&boardNum=61628 (last accessed April 4, 2018).

[443] The South Korean criminal code criminalizes bribery in the public and the private sectors, as well as several other forms of corruption, including active and passive bribery, attempted corruption, facilitation payments (both at home and abroad), embezzlement, extortion, bribing a foreign official, money laundering and abuse of office. South Korea's Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption & Civil Rights Commission includes a Code of Conduct for government officials, regulates conflicts of interest, and requires high-ranking officials to disclose their assets and to report gifts received from foreign entities. *See Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption and Civil Rights Commission*, Act No. 9402 (Feb. 3, 2009), copy of full text of law available at https://www.oecd.org/site/adboecdanti-corruptioninitiative/46816508.pdf (last accessed April 4, 2018).

[444] The legislation also holds companies accountable for corruption committed by their employees, while broadening the definition of a public official.

congratulatory or condolence money when the values fall below defined monetary thresholds and when provided in connection with certain specified occasions.[445] The new law has garnered significant criticism in South Korea for its broad scope, with some characterizing it as going too far, and calling for it to be amended to more efficiently deter corruption.[446]

H. India

Fighting corruption remained a high priority for the Indian government in 2017. The government of Prime Minister Narendra Modi swept into power during national elections in May 2014 on platform pledging to combat graft and other related forms of misconduct. Last year witnessed officials in New Delhi implement two major anti-corruption initiatives toward this end: demonetization and the Goods and Service Tax (GST).

In November 2016, Prime Minister Modi unveiled an ambitious demonetization campaign that invalidated 86% of India's cash supply overnight. The plan's primary goal was to launch a "surgical strike" against "black money" or undeclared, untaxed cash coursing through the economy.[447] The government established a stringent deadline for the return of the canceled notes to prevent individuals holding large reserves of illicit cash from money laundering. An ordinance was also enacted criminalizing the possession of large caches of the cancelled notes effective March 31, 2017.[448] The magnitude of the intervention and the accompanying disruption it caused underline the government's focus on anti-corruption.

In April 2017, the Indian Parliament passed the Goods and Service Tax (GST) Act, and the law went into effect on July 1, 2017. The GST represents perhaps the most significant overhaul of the Indian tax system in the country's history. One of the primary objectives underlying the new tax regime was combatting tax evasion and money laundering, fighting low-level, pervasive graft, and promoting transparency.[449]

These new initiatives should be viewed against the backdrop of India's existing anti-corruption laws, including the Prevention of Corruption Act (POCA)[450] and the Companies

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[445] *See* Anticorruption and Civil Rights Commission, *Improper Solicitation and Graft Act took effect on September 28* (News Release) (Sept. 28, 2016), http://www.acrc.go.kr/en/board.do?command=searchDetail&method=searchDetailViewInc&menuId=020501&boardNum=61628 (last accessed April 4, 2018).

[446] *See e.g.*, Jason Strother, *A Year After South Korea Passed an Anti-Corruption Law, Some Businesses Say It Goes Too Far*, PRI, (Nov. 29, 2017), https://www.pri.org/stories/2017-11-29/year-after-south-korea-passed-anti-corruption-law-some-businesses-say-it-goes-too (last accessed April 4, 2018).

[447] Prime Minister Narendra Modi, Address to the Nation on Demonetization in New Delhi, *Historic moment against black money in India* (Nov. 8. 2017), full transcript available at https://economictimes.indiatimes.com/news/politics-and-nation/prime-minister-narendra-modis-speech-historic-moment-against-black-money-in-india/articleshow/55319137.cms (last accessed April 4, 2018).

[448] *Id.*

[449] ANI, *GST Will Promote Transparency , Corruption-Free Business Environment: Piyush Goyal*, Business Standard (Aug. 8, 2017), http://www.business-standard.com/article/news-ani/gst-will-promote-transparency-corruption-free-business-environment-piyush-goyal-117080800891_1.html (last accessed April 4, 2018).

[450] POCA is India's principal anti-corruption law and applies in India, to Indian citizens abroad, as well as to foreign citizens or foreign entities established within India. POCA prohibits receiving bribes, such as monetary or non-monetary payments to government officials, and penalizes bribe givers, recipients, and colluding parties. The term "public official" is interpreted broadly under the Act, and can include any individual performing a public function,

Act.[451] In March 2018, Prime Minister Modi held meetings with key government stakeholders to initiate the process of appointing the inaugural Lokpal, or national anti-corruption watchdog, as required by the Lokpal and Lokayuktas Bill enacted in 2013.[452]

On the enforcement side, the Indian government embarked on an aggressive campaign to crack down on shell companies to curb tax evasion, money laundering, and other illicit activities. The Prime Minister's Office formed a special task force comprising top law enforcement officials responsible for identifying and shutting down these sham companies. The government issued orders closing more than 200,000 of these firms, while the Securities and Exchange Board of India (SEBI) directed stock exchanges to suspend trading activities of any illicit shell companies.[453] Banks were also directed to restrict the operation of bank accounts of these firms. The Ministry of Corporate Affairs (MCA) disqualified over 100,000 company directors of these sham enterprises, precluding them from sitting on any corporate board for a five-year period.[454]

In sharp contrast to the preceding three and a half years, the first weeks of 2018 have been characterized by the eruption of a major corruption scandal in India. In February 2018, one of India's largest state-owned banks accused one of India's most prominent billionaires, Nirav Modi, of architecting an elaborate, multi-year scheme that defrauded the bank of $2 billion over the past seven years.[455] Modi and his entire family left the country just days before the scheme was uncovered. The scandal has ignited a firestorm of controversy across India and has once again thrust corruption onto the forefront of the national agenda. The scandal has prompted the

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including employees of private banks. Liability under POCA can also extend to businesses. Top executives can be held liable for corrupt practices conducted by any company employee under investigation. For US firms conducting business in India, it is important to note that facilitation payments, or grease payments, are not exempted under POCA as they are within the FCPA, and can result in criminal liability. *See India: Prevention of Corruption Act, 1988*, Sept. 9, 1988, full copy of text available at https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814376.pdf (last accessed April 4, 2018).

[451] The Act defines and penalizes corporate fraud, and mandates the maintenance of transparent accounts. *See The Companies Act, 2013*, Aug. 29, 2013, full text available at http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf (last accessed April 4, 2018).

[452] In December 2013, the Indian Parliament passed the Lokpal and Lokaytuas Bill following nationwide, public anti-corruption protests two years earlier. The legislation was intended to be the most significant anti-corruption law in Indian history. It sought to create a Lokpal, or anti-corruption watchdog, on both the national and state levels, with far-reaching powers to investigate and prosecute official corruption. *See The Lokpal and Lokayuktas Bill, 2013* (Dec. 16, 2014), *full copy of text available at* www.prsindia.org/uploads/media/Lok%20Pal%20Bill%202011/Lokpal_Bill_as_passed_by_both_Houses.pdf (last accessed April 4, 2018)*; see also* IANS, *Lokpal Selection Panel Chaired by PM Modi to Meet on March 1: Centre to SC*, India Today (Feb. 23, 2018), https://www.indiatoday.in/india/story/lokpal-selection-panel-chaired-by-pm-modi-to-meet-on-march-1-centre-to-sc-1176156-2018-02-23 (last accessed April 4, 2018).

[453] SS Rana & Co, India: *Disqualification of Shell Companies & Their Directors*, LEXOLOGY, (Oct. 10, 2017), https://www.lexology.com/library/detail.aspx?g=d7090d3f-b35b-4452-91d7-8500a673a12d (last accessed April 4, 2018).

[454] *Id.*

[455] Rich Archer, *US Biz of Indian Man Accused of $2B Bank Fraud Files Chp 11*, (Feb. 27, 2018), LAW360, https://www.law360.com/articles/1016433/us-biz-of-indian-man-accused-of-2b-bank-fraud-files-ch-11 (last accessed April 4, 2018). Nirav Modi is not related to Prime Minister Narendra Modi.

Modi government to begin drafting a new set of laws aimed at deterring similar large-scale corruption in the future.[456]

I. Russia

Russia continued its anti-bribery enforcement efforts in 2017 through prosecutorial efforts and legislative changes. Regional prosecutors continued to conduct inspections of organizations to assess their compliance with Article 13.3 of Russia's anti-corruption law, which requires organizations to take measures to prevent corruption, and lists six suggested measures, including the development and implementation of procedures for safeguarding organizational integrity.[457] Additionally, the Deputy Prosecutor General reported that more than 150 federal officials were charged with corruption-related crimes in 2017.[458] According to the Chief Justice of the Russian Supreme Court, in 2017 almost 10,000 people were convicted of corruption-related crimes.[459] Legislative changes included the adoption by the State Duma of a law creating a "registry of the corrupt" that will contain, for five years, information on individuals fired from government in connection with corruption offences.[460] Additionally, a bill that would provide protection for anti-corruption whistleblowers had its first reading in the Duma in December.[461]

VIII. The World Bank and Other International Financial Institutions

The World Bank and other International Financial Institutions (IFIs) continued to pursue enforcement against those violating internal enforcement regimes in 2017. Despite significant leadership changes at the World Bank, its Integrity Vice Presidency (INT) continues to focus on more complex cases (including those involving allegations of corruption and collusion) while demonstrating an increased appetite for Negotiated Resolution Agreements (NRAs). Meanwhile, the Asia Infrastructure Investment Bank (AIIB) continues to take steps to develop its investigative arm.

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[456] *See, e.g., Cabinet Okays Fugitive Economic Offenders Bill to Avoid a Nirav Modi Repeat*, The Econ. Times, (Mar. 2, 2018), https://economictimes.indiatimes.com/news/economy/policy/cabinet-okays-fugitive-economic-offenders-bill-to-avoid-a-nirav-modi-repeat/articleshow/63127140.cms (last accessed April 4, 2018).

[457] Федеральный Закон № 273-ФЗ, 19 декабря 2008,О противодействии коррупции (Federal Law No. 273-F3, Dec. 25, 2008, On counteracting corruption), http://pravo.gov.ru/proxy/ips/?docbody=&nd=102126657 (last accessed April 4, 2018). Article 13.3 entered into force in 2013. *See, e.g.*, The Prosecutor General's Office of the Russian Federation press release, *Прокуратурой выявлены нарушения законодательства о противодействии коррупции в деятельности ГОБУ 'Мурманский региональный инновационный бизнес-инкубатор'* (*Prosecutor's Office identified violations of the anti-corruption law in the activities of GOBY 'Murmansk regional innovative business incubator'*) (Nov. 3, 2017), https://genproc.gov.ru/smi/news/regionalnews/news-1277100/ (last accessed April 4, 2018).

[458] RIA Novosti, *Более 150 федеральных чиновников привлекли за коррупцию в 2017 году* (*More than 150 federal officials charged with corruption in 2017*) (Dec. 15, 2017), https://ria.ru/incidents/20171215/1511006234.html (last accessed April 4, 2018).

[459] TACC, *В 2017 году за коррупцию в России осуждено 9,9 тыс. человек* (*In 2017 9.9 thousand persons were convicted of corruption in Russia*) (Feb. 20, 2018), http://tass.ru/obschestvo/4973829 (last accessed April 4, 2018).

[460] INTERFAX.RU, *Госдума приняла закон о создании "реестра коррупционеров"* (*Duma adopted law to create "registry of the corrupt"*) (Dec. 21, 2017), http://www.interfax.ru/russia/592806 (last accessed April 4, 2018); RT, *Putin signs law establishing register of officials sacked over corruption* (Dec. 29, 2017), https://www.rt.com/politics/414522-putin-signs-law-ordering-unified/ (last accessed April 4, 2018).

[461] *Стенограммы обсуждения законопроекта № 286313-7* (Dec. 13, 2017) (*Transcript of the discussion of bill № 286313-7*) http://api.duma.gov.ru/api/transcript/286313-7 (last accessed April 4, 2018).

A. The World Bank

The World Bank's enforcement arm saw significant leadership changes in 2017, most notably with Pascale Hélène Dubois' appointment (effective July 2, 2017) as the Vice President for Integrity, replacing Leonard McCarthy.[462] Ms. Dubois previously served as the Chief Suspension and Debarment Officer, a position which is currently being filled by Acting Chief Suspension and Debarment Officer and Senior Counsel Jamieson Smith.

Although it remains too early to tell how new leadership will affect the direction that INT will take in coming years, we note that the World Bank had a somewhat atypical record this year in terms of enforcement activity. While the number of inquiries and new cases declined slightly, the number of sanctioned firms and individuals remained fairly steady as compared to the prior year. There was also an uptick in cases involving allegations of collusion in 2017, as well as several notable Sanctions Board decisions, discussed below.

According to INT's Annual Update for Fiscal Year 2017, the Bank's investigative arm opened fewer preliminary inquiries and new cases in FY 2017 than in preceding years. The number of preliminary inquiries opened has been steadily dropping since FY 2013 (which saw 449 inquiries), down to just 179 such inquiries in FY 2017.[463] Similarly, INT opened just 51 new cases in FY 2017 (down from FY 2015 and FY 2016 levels of 99 and 64 cases, respectively).[464] The primary region of focus for investigations in FY 2017 was the East Asia Pacific region, where 16 cases originated.[465] Despite these slightly lower numbers of new cases, however, 60 firms and individuals were sanctioned in fiscal year 2017 (holding fairly consistent to the number of sanctions imposed in 2016).[466]

Although INT has in the past noted a desire to pursue more corruption-related cases, statistics for FY 2017 indicate that only 31 investigations involved allegations of corruption, as compared to 47 allegations relating to fraudulent practices.[467] Notably, the number of investigations including allegations of collusion more than doubled that of investigations over the prior four years (22 allegations in FY 2017, as compared to 10 in FY 2013 and 2015, eight in FY 2016, and seven in FY 2014).[468] Finally, in keeping with a recent trend towards settlement, INT also reported an uptick in Negotiated Resolution Agreements (NRAs) – up to 26 in FY 2017, as compared to 18 in FY 2016.[469]

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[462] World Bank Group Press Release, *World Bank Group President Appoints Pascale Dubois as Vice President of Integrity* (Apr. 27, 2017), http://www.worldbank.org/en/news/press-release/2017/04/27/world-bank-group-president-appoints-pascale-dubois-as-vice-president-of-integrity (last accessed April 4, 2018). Ms. Dubois replaced Leonard McCarthy in the role.

[463] WORLD BANK GROUP, INTEGRITY VICE PRESIDENCY, ANNUAL UPDATE FISCAL YEAR 2017, 27 (2017), http://documents.worldbank.org/curated/en/129141508163808440/Integrity-Vice-Presidency-INT-fiscal-year-2017-annual-update (last accessed April 4, 2018).

[464] *Id.*

[465] *Id.* at 24.

[466] *Id.* at 28.

[467] *Id.* at 26.

[468] *Id.*

[469] *Id.* at 28. As of early 2018, the Bank has already entered into some notable NRAs. On March 19, 2018 the Bank announced the debarment of Manila-based Innogy Solutions Inc. and its president for five and a half years (potentially signaling a continued focus on individual culpability and lengthy debarment terms). *See* World Bank

The World Bank Sanctions Board issued 15 decisions this year. As reported in our 2017 FCPA Mid-Year Review the Sanctions Board appears to continue a focus on long debarment periods for egregious conduct;[470] in addition, 2017 saw, in contrast, a rare finding of insufficient evidence of misconduct in Sanctions Board Decision No. 96.[471] Sanctions Board Decision No. 104 is also of note for addressing an issue that frequently arises in World Bank INT investigations – the scope of INT's audit rights. In that case, the Respondent refused to allow INT to audit books and records relating to the bid, arguing that the audit was improper under local law, the related contracts did not define obstruction, bidding documents contained an "invalid" definition of obstruction, and the Respondent had not been awarded the contract. On advice of counsel, the Respondent provided some but not all documents to INT. In considering an obstruction charge, the Sanctions Board declined to accept the Respondent's argument that "zealous advocacy and protection of the Respondent's perceived rights cannot amount to a refusal," instead finding that the Respondent's actions "were intended to materially impede the exercise of the Bank's inspection and audit rights" and constituted an obstructive practice.[472] The Respondent was sanctioned for a period of one year. Finally, the Sanctions Board issued its first major decision on successor liability in M&A transactions, in Sanctions Board Decision No. 101.[473] In so doing, it found an abuse of discretion by the World Bank in holding that the Appellant was a successor of the Respondent.

B. Other International Financial Institutions

As reported in prior years, less up-to-date information is available regarding sanctions for other IFIs (including the Asian Development Bank (ADB), European Bank of Reconstruction and Development (EBRD), Inter-American Development Bank (IDB), African Development Bank (AfDB), and the Asia Infrastructure Investment Bank (AIIB)), which saw significantly less enforcement activity than the World Bank in 2017. The ADB sanctioned 17 firms and 14 individuals (all for fraudulent and/or obstructive practices).[474] Updated statistics were unavailable for the EBRD, the IDB, and the AfDB.

Furthermore, as we reported previously, the AIIB published its Policy on Prohibited Practices in December, 2016. In 2017, the bank announced the appointment of Hamid Sharif as the Compliance, Effectiveness and Integrity Unit's (CEIU) first Director General, and the CEIU

Group Press Release, *World Bank Group Announces Debarment of Innogy Solutions Inc.* (Mar. 19, 2018), http://www.worldbank.org/en/news/press-release/2018/03/19/world-bank-group-announces-debarment-of-innogy-solutions-inc (last accessed April 4, 2018).

[470] *See, e.g.*, Sanctions Board Decisions No. 92 (2017) (imposing 14-year debarments on respondent firms for allegations of fraudulent and corrupt practices across five projects in Indonesia and Vietnam); Sanctions Board Decision No. 93 (2017) (imposing a 14-year debarment on an entity for corrupt and obstructive practices across multiple contracts in the Republic of Romania); Sanctions Board Decision No. 97 (2017) (imposing sanctions of 10.5 years and 7.5 years on a Mumbai-based pharmaceutical company for multiple instances of fraudulent practices and corrupt practices.

[471] Sanctions Board Decision No. 96 (2017). Steptoe defended the Respondent company before the Sanctions Board.

[472] Sanctions Board Decision No. 104 (2017), para. 28.

[473] Sanctions Board Decision No. 101 (2017).

[474] *See* ASIAN DEVELOPMENT BANK, OFFICE OF ANTICORRUPTION AND INTEGRITY CASE SUMMARIES 1998-2017, https://www.adb.org/site/integrity/case-summaries (last accessed April 4, 2018).

began soliciting consultants to develop its Complaints Handling Mechanism (CHM). This could be an indication that the bank intends to ramp up investigative efforts in the coming years.

IX. CONCLUSION

Although 2017 began with widespread speculation as to the likely direction of FCPA enforcement under the Trump Administration, the SEC and DOJ generally have continued "business as usual." After a slow transition period following a flurry of activity as the Obama Administration came to a close, FCPA enforcement resumed to typical levels in the third and fourth quarters of 2017 and has continued through early 2018. Nonetheless, 2017 was a notable year in many respects. The DOJ formalized the FCPA Pilot Program into its new FCPA Corporate Enforcement Policy, while the SEC continues to focus on internal controls. The SEC's recovery of disgorgement was set back following the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). Meanwhile, the globalization of anti-corruption efforts accelerated. US authorities and their foreign law enforcement counterparts continued their cooperation in anti-corruption investigations and concluded several epic, multilateral anti-corruption enforcement actions against Rolls-Royce, Telia, and Keppel Offshore. Outside the United States, numerous countries have strengthened anti-corruption legislation and policies, and/or stepped up their anti-corruption investigations and enforcement activity. The World Bank also has continued to actively police fraud and corruption in Bank-financed projects. Based on developments in the first quarter of 2018 and what is publicly known about the pipeline of anti-corruption investigations, we anticipate that these trends will continue in the remainder of 2018.

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