Steptoe

FCPA/Anti-Corruption Developments: 2018 Year in Review

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FCPA/Anti-Corruption Developments: 2018 Year in Review[1]

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

Introduction

US government enforcement of the Foreign Corrupt Practices Act (FCPA) in 2018 remained robust. While the 33 combined individual and corporate FCPA enforcement actions concluded by the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) in 2018 did not match the record of 61 enforcement actions concluded in 2016, the level of enforcement was largely consistent with the average number of enforcement actions brought over the last seven years. The US $2.91 billion in monetary sanctions levied in corporate FCPA enforcement matters in 2018 reached a record high, although the chart-topping $1.78 billion penalty imposed as part of the Petrobras settlement accounts for more than half of this amount.

Notably, enforcement priorities of the DOJ and SEC appear to be increasingly diverging. The DOJ settled fewer corporate enforcement actions during the year but substantially increased the number of foreign corruption-related individual prosecutions. Only two of the six corporate enforcement actions settled by the DOJ in 2018 were not brought in conjunction with the SEC. Additionally, the DOJ issued four public declinations pursuant to the new FCPA Corporate Enforcement Policy, all but one of which included disgorgement. Consistent with requirements for eligibility under the program, all of the declinations cited the companies' cooperation, voluntary self-disclosures, and remediation, and the DOJ appeared in at least one case to use a criminal declination to obtain disgorgement of proceeds that could not be reached by the SEC in parallel civil proceedings due to the five-year statute of limitations imposed on the SEC's disgorgement penalty.

The number of individual prosecutions brought by the DOJ for FCPA anti-bribery violations actually fell from 2017 to 2018. The decrease belies the number of individuals prosecuted for other crimes in connection with corrupt schemes, particularly money laundering and conspiracy to commit money laundering. The DOJ appears to have aggressively increased the use of money laundering offenses to prosecute corrupt government officials responsible for the "demand" side of transnational bribery. In 2018, cases against officials were concentrated in the Caribbean and South America, with the DOJ bringing multiple cases against former officials at Petróleos de Venezuela S.A., PetroEcuador, and a state-owned entity

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[2] Other contributors to Steptoe's 2018 FCPA/Anti-Corruption Year in Review include Brigida Benitez, William L. Drake, Alexandra Melia, Fernando Q. Merino, Richard K. Wagner, Simon Hirsbrunner, and Alexandra Baj (Eds.); John C. London, Rachel B. Peck, Ronak D. Desai, and Jessica Piquet Megaw (Associate Eds.); and Evan T. Abrams, Yasmin Almeida, Elizabeth Arkell, Katherine M. Dubyak, Melissa Freeman, Chris Han, Peter Ibrahim, Tom Jackson, Jessica D. Maneval, Jillian Norton, Alexandrea Rahill, Troy Shephard, A. Cherie Tremaine, Stefan Tsakanakis, Lin Yang, and Bo Yue.

in Aruba as well as individual prosecutions against the former Minister of Industry of Barbados, the former National Director of Anti-Corruption in Colombia, and the former National Treasurer of Venezuela.

In contrast, the SEC brought only four individual enforcement actions related to the FCPA while increasing the number of corporate settlements from nine in 2017 to 17 in 2018. Consistent with the SEC's position that an effective anti-corruption compliance program is a critical element of an issuer's internal accounting controls, all of the SEC's enforcement actions in 2018 included internal control charges. Only three SEC cases (*Credit Suisse*, *Panasonic*, and *United Technologies*) included a violation of the anti-bribery provisions, and only one of those cases was not brought in parallel with the DOJ (*United Technologies*). Often cases charging violations of the accounting provisions included an alleged failure to sufficiently investigate red flags that arose during company internal audits and third-party due diligence, including in settlements with Beam Suntory, Kinross, Polycom, Vantage and Stryker. The SEC also continues to cite instances of deliberate circumvention of internal controls as evidence that such controls are inadequate, as in its settlement with Polycom.

Notably, the SEC cited commercial dealings with private parties in a number of settlements in 2018 related to the accounting provisions. Specifically, the SEC cited overcharging schemes involving private hospitals (*Stryker*), benefits provided to private health care professionals without sufficient documentation (*Sanofi*), and payments to private customers to "drum up business" (*Dun & Bradstreet*). Those cases are a tangible reminder that the accounting provisions extend beyond the substantive scope of the FCPA's anti-bribery provisions, which are limited to foreign public officials, to all transactions of an issuer.

Despite the divergence in enforcement priorities, the DOJ and SEC brought four parallel cases to resolve the most serious misconduct, including schemes involving the bribery of senior government officials in exchange for high-value contracts (so-called "grand corruption" cases). Cases settled jointly by the DOJ and SEC resulted in the highest fines in 2018 and included all cases involving settlements that included non-US enforcement agencies.

The trend of increasing international multilateral cooperation and multijurisdictional enforcement continued in 2018. The DOJ and SEC concluded two multijurisdictional settlements in 2018 that involved longstanding multilateral investigations. Notably, the $1.78 billion settlement with Petrobras, with penalties split 80% Brazil and 20% DOJ/SEC, imposed the highest penalty for a violation of the FCPA in history and now serves as the capstone of the investigations arising out of Operation Car Wash in Brazil.

A number of countries continue to substantially enhance the legal and regulatory structure for international anti-corruption enforcement. Argentina, Australia, India, and Peru all passed or considered anti-corruption legislation in 2018 establishing corporate liability for certain types of bribery offenses, and Argentina will issue guidance and potential requirements for corporate compliance programs in the forthcoming standards for company Integrity Programs in Argentina. Moreover,

Australia, Canada, and Japan passed or considered legislation authorizing corporate settlements with prosecutors in certain cases where full prosecution is not warranted, and the UK, Brazil, and France continued to use prosecutorial agreements to settle cases and refined guidance for their application in those countries.

We anticipate that the level of US and foreign anti-corruption enforcement will remain stable or increase throughout 2019, and that individual enforcement by the DOJ, leveraging corporate cooperation, will continue. Companies will be expected to continue to enhance their anti-corruption compliance programs and controls to meet the evolving expectations of enforcement authorities, including to address both public and private sector bribery. Multinational companies also should continue monitoring anti-corruption developments in the jurisdictions in which they do business, as they increasingly face the risks of multijurisdictional investigations and enforcement. Companies engaged in projects financed by multilateral development banks also need to be alert to the increasing consequences of sanctions from those institutions; compliance strategies to mitigate risks in that area can also pay dividends.

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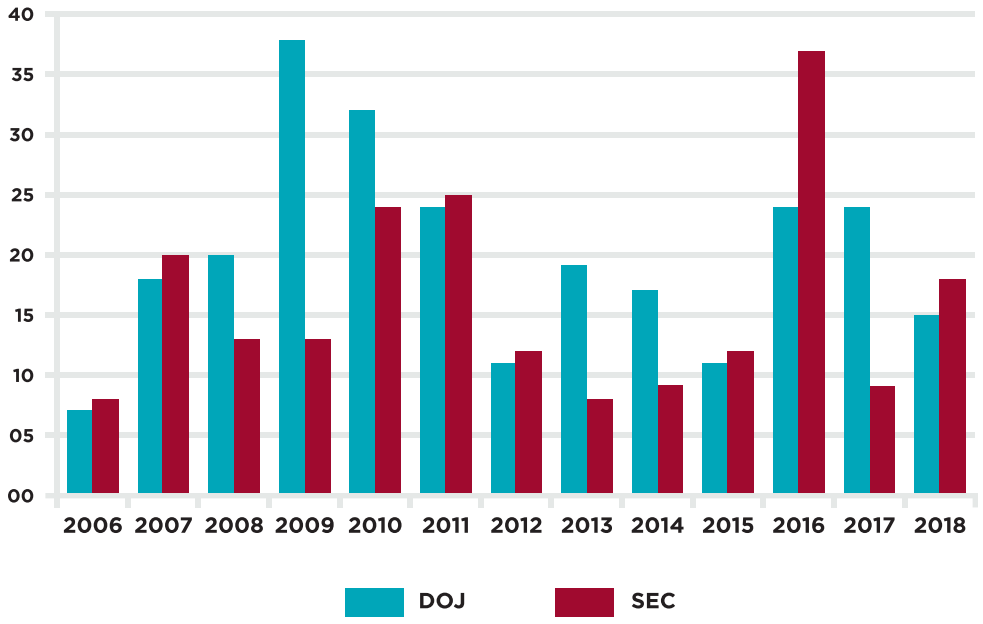
I. Enforcement Statistics and Trends

A. Number of Enforcement Actions

With 33 reported FCPA-related prosecutions[3] against corporations and individuals in 2018, the DOJ and SEC registered the same number of enforcement actions as in 2017.[4] This is despite significantly fewer enforcement actions brought by the DOJ than in previous years – the DOJ brought only 15 new FCPA enforcement actions in 2018 compared to 24 in both 2016 and 2017. The SEC, on the other hand, increased its enforcement actions in 2018, from nine in 2017 to 18 in 2018, although this is still a sharp decline from its peak of 37 enforcement actions in 2016.[5]

Number of Reported FCPA Corporate and Individual Prosecutions (2006–2018)



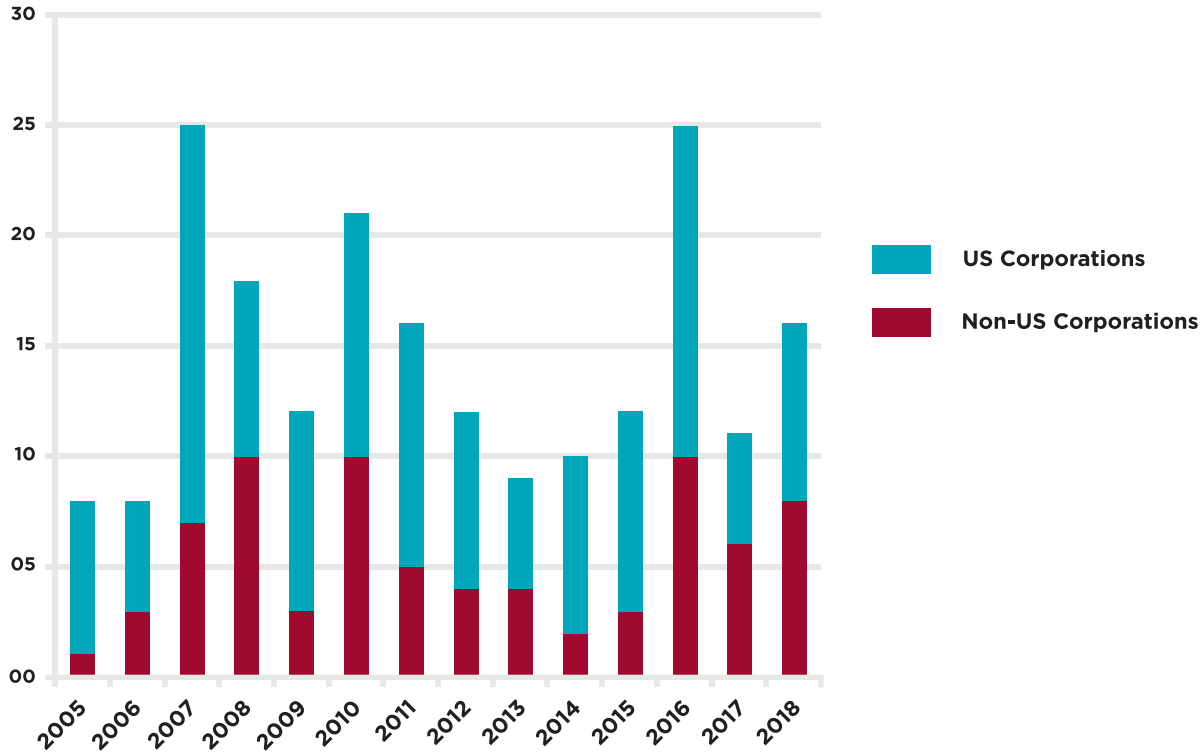
[3] Steptoe did not include the SEC's settlement with Maxwell Technologies in its 2018 enforcement statistics because the co nduct alleged by the SEC dealt primarily with improper revenue recognition. Despite the nature of the alleged violations, Maxwell was required to report to the SEC FCPA Unit, and Maxwell was ordered to cease and desist from violations of the FCPA accounting provisions.

[4] Steptoe's methodology accounts for charges brought in 2018 or unreported prior to 2018. As a result, individual prosecutions by the DOJ of Ingrid Innes and Alex Tasker were not included in the 2018 statistics because they were announced in 2019. With respect to charges brought against individuals, the methodology accounts for charges involving violations of the FCPA and for conspiracy to violate the FCPA. The count provided does not include charges against individuals related to money laundering or other non-FCPA violations.

[5] The DOJ and SEC brought a total of 20 corporate FCPA enforcement actions (counting actions against more than one member of the same corporate family as a single action) against 16 different companies. The 20 corporate enforcement actions include four parallel enforcement actions by the DOJ and SEC against the same companies, two separate actions by the DOJ (excluding declinations under the DOJ FCPA Corporate Enforcement Policy), and another ten separate actions by the SEC. In addition, the DOJ brought FCPA charges against nine individuals, while the SEC brought four such actions; none were done in parallel against the same individuals. See below for further discussion.

Sixteen separate companies faced charges from either the SEC or DOJ (or both) in 2018. This is a significant increase from 2017, in which only 11 separate companies faced charges. These companies represented a diverse range of industry sectors, including mining, oil and gas, pharmaceuticals and medical devices, financial services, energy, transportation, real estate development, asset management, and spirits (among others). The DOJ and SEC brought four parallel corporate enforcement actions in 2018, compared to three in 2017 and 10 in 2016. Eight of the 16 companies facing charges in 2018 were US-based corporations.[6]

FCPA Focus on Foreign Corporations (2005–2018)

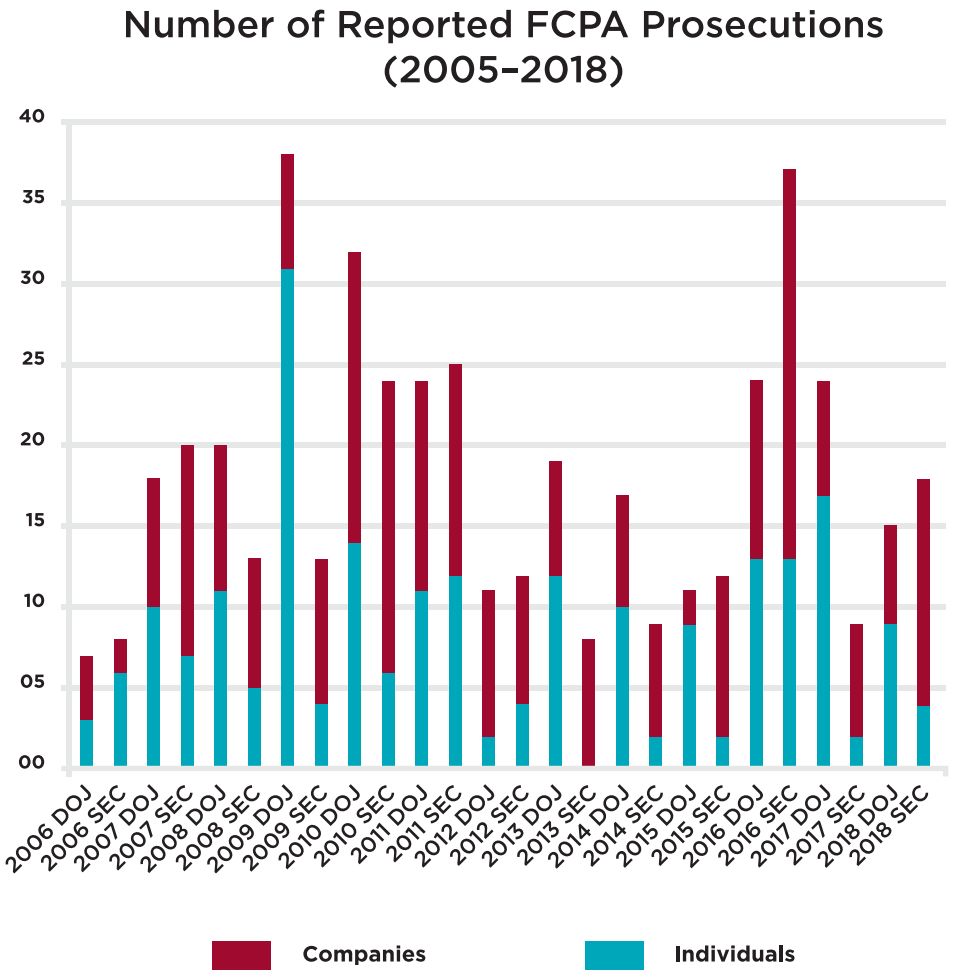


US authorities brought charges against 13 individuals under the FCPA in 2018 – nine by the DOJ and four by the SEC. The prosecution of individuals has been pronounced a priority in past years, including in the September 2015 *Yates Memo* and in an April 2017 speech by former Attorney General Jeff Sessions.[7] At this time, it does not appear that the decrease in individual prosecutions from 19 in 2017 to 13 in 2018 is indicative of a shift in priorities, but rather is likely explained by the DOJ's focus in

[6] Panasonic was counted as a US company because the enforcement action targeted its US subsidiary.

[7] 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 Jan. 7, 2019). This policy was reiterated in remarks made by Deputy Attorney General Rod Rosenstein at this year's American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (FCPA) and associated revisions to the DOJ's Justice Manual (formerly the US Attorney's Manual). *See* Transcript, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act*, Oxon Hill, MD (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 (last accessed Jan. 8, 2019).

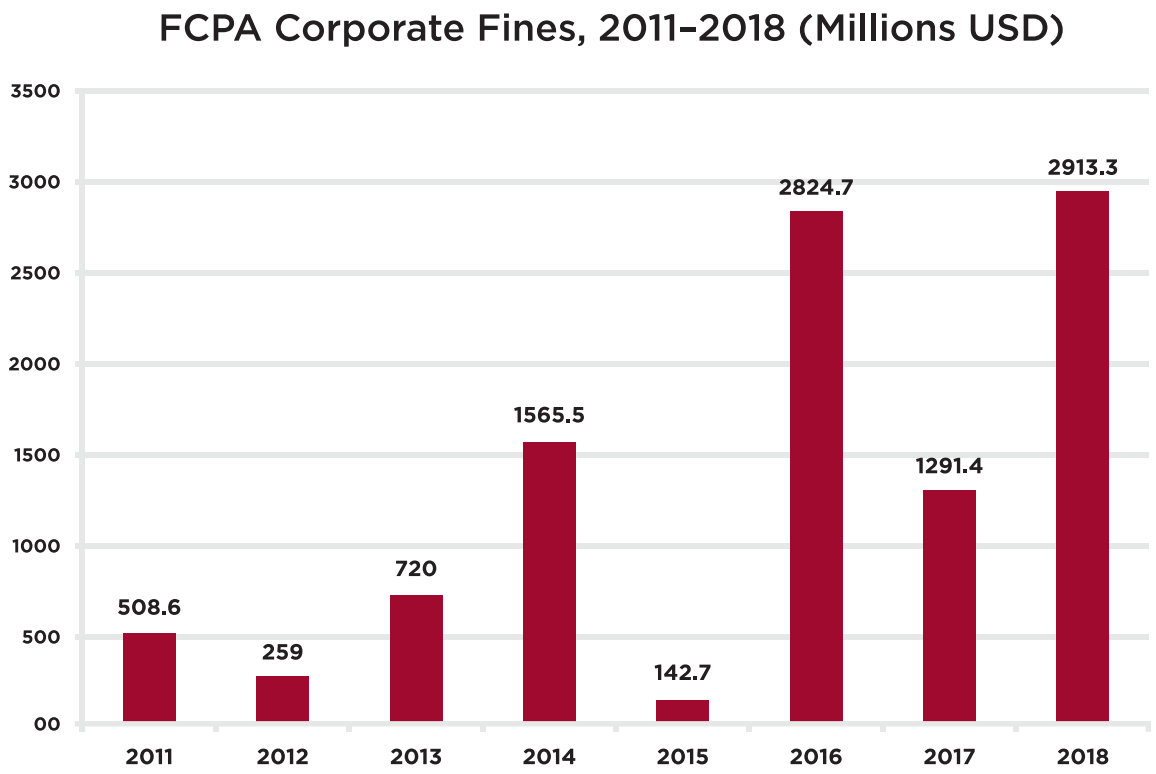
2018 on prosecuting individuals involved in the Petróleos de Venezuela S.A. (*PDVSA*) bribery and money laundering scheme.[8]



In addition to the corporate enforcement actions noted above, the DOJ issued four formal declinations in 2018 under its FCPA Corporate Enforcement Policy, two of which included disgorgement (*Polycom* and *Insurance Corporation of Barbados Limited*) and another of which referred to disgorgement paid to the SEC (*Dun & Bradstreet*). Two companies receiving declinations were charged by the SEC for FCPA violations (*Polycom* and *Dun & Bradstreet*), and the disgorgement imposed as part of the DOJ declination letter in *Polycom* appeared to reach beyond the five-year statute of limitations imposed on the SEC's disgorgement remedy by the Supreme Court in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). A declination was also provided to Guralp Systems Limited (*Guralp*), in part due to an ongoing parallel investigation by the UK's Serious Fraud Office (SFO) relating to the same conduct. No disgorgement was ordered in that declination, although Guralp committed to accept responsibility for its conduct before the SFO.

[8] The majority of charges brought against those individuals by the DOJ were not included in this count because the charges were limited to money laundering.

B. Monetary Sanctions[9]



The aggregate dollar value of monetary sanctions imposed by US enforcement authorities in 2018 was approximately $2.91 billion, with about $1.95 billion payable to the US Treasury.[10] The number, a new high, was reached largely due to the record-breaking $1.78 billion settlement with Petróleo Brasileiro S.A. (*Petrobras*), which involved both the DOJ and SEC. As reported in prior years, the Brazil-based *Petrobras* case relates to a massive scheme spanning at least eight years and involving payments to an extensive number of Brazilian politicians and political parties, and many different Petrobras contractors. Approximately $1.1 billion – 80% of the settlement – will go to Brazilian authorities.

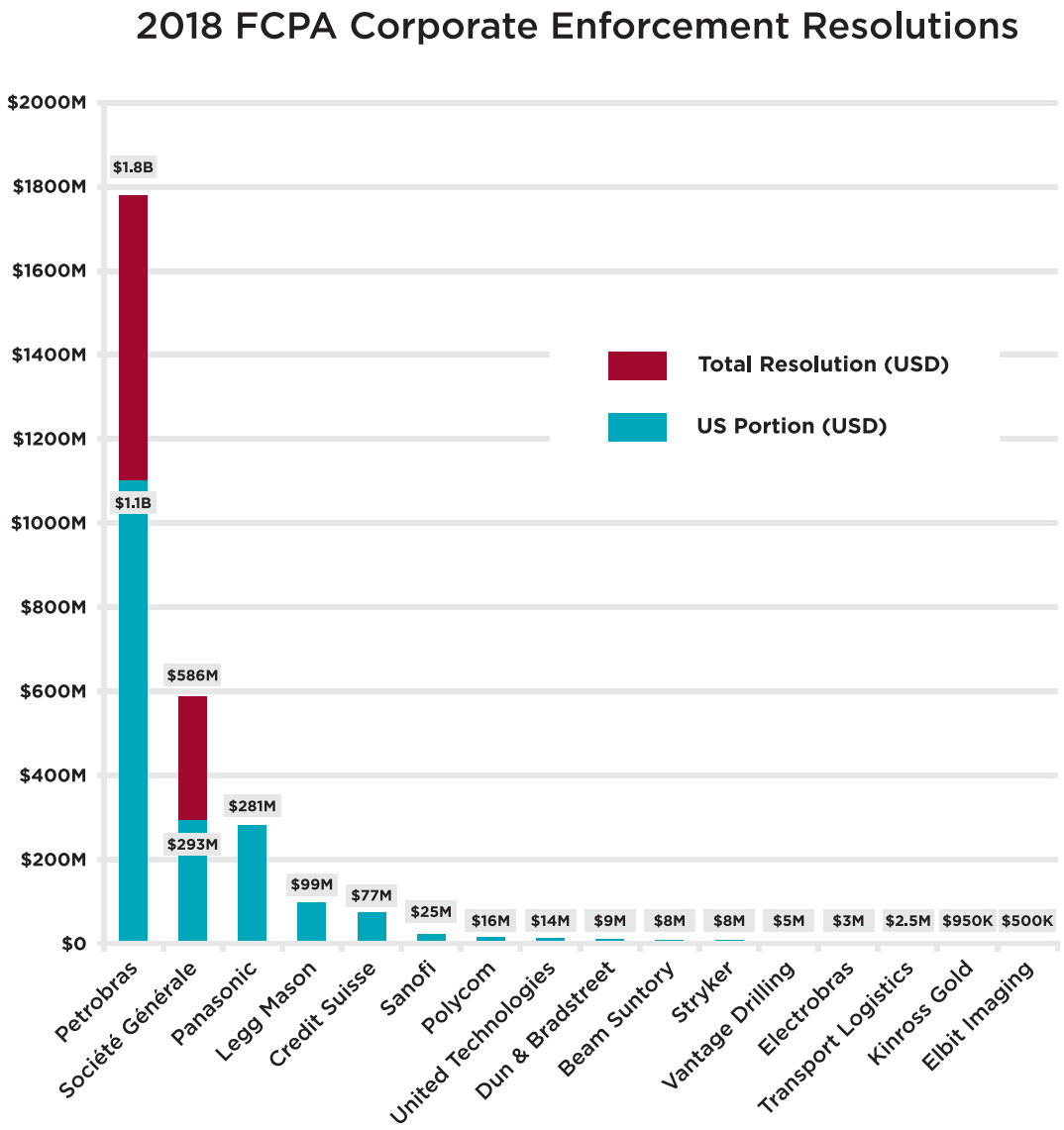
Outside the *Petrobras* settlement, 2018 also featured one other chart-topping settlement. Under the second largest settlement of the year, Société Générale S.A. (*Société Générale*) agreed with the DOJ to pay approximately $586 million (to be split between US and French authorities). The FCPA violations underlying the charges involved bribes to officials in Libya to obtain investments from Libyan state-owned financial institutions. Investment management firm Legg Mason Inc. (*Legg Mason*) also agreed to pay almost $100 million for its role in relation to the same bribery scheme.

The year also included a number of relatively minor penalties, including two under $1 million against Kinross Gold Corporation (*Kinross*) and Elbit Imaging Ltd. (*Elbit Imaging*). These companies agreed with the SEC to pay a total of $950,000 and

9 All values reported in US Dollars unless otherwise specified.

10 The totals include penalties, disgorgement and interest. They do not include disgorgement amounts from companies who received declinations by the DOJ. The difference between fines imposed and paid to the US Treasury reflects credits to payments to other authorities and the crediting of the Petrobras class action settlement payment.

$500,000, respectively, for violating the FCPA's books and records and internal control provisions.

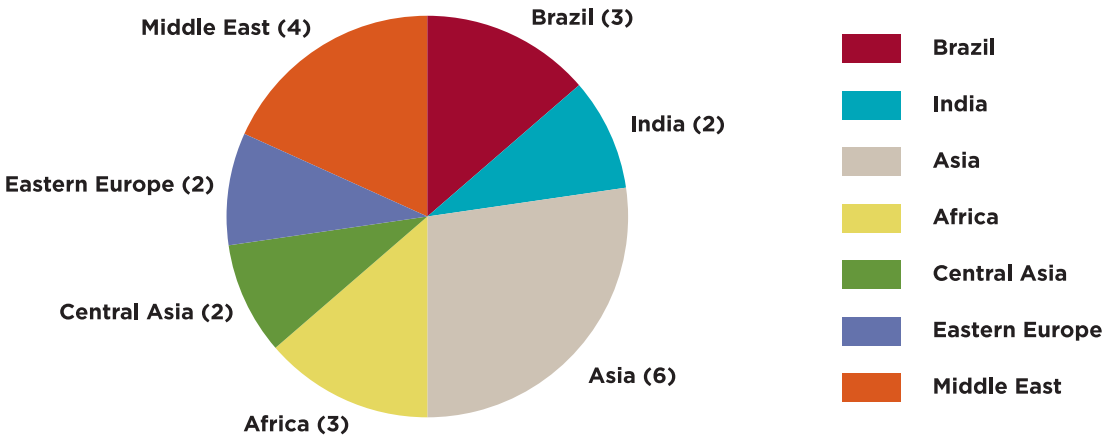


The two largest settlements in 2018 involved multijurisdictional enforcement actions – *Petrobras* and *Société Générale*. Even more common than these multijurisdictional cases was international cooperation in FCPA matters. Foreign authorities continue to provide evidence and other assistance to US authorities in FCPA matters, even if those authorities do not independently initiate enforcement actions or participate in settlement agreements. For example, although Brazilian authorities did not receive a portion of the penalty against Centrais Elétricas Brasileiras S.A. (*Electrobras*), the SEC acknowledged assistance from Brazilian authorities in the matter. The SEC also acknowledged the assistance of French authorities relating to its investigation into Paris-based pharmaceutical company, Sanofi, as well as the authorities of a number of countries in connection with its charges against Panasonic Corp. (*Panasonic*) (including authorities located in Switzerland, Canada, the United Arab Emirates, Japan, Singapore, Malaysia, Australia, and Pakistan).

C. Geography of Conduct[11]

FCPA corporate enforcement activity in 2018 was based on misconduct that occurred in diverse jurisdictions. India, Brazil, China, and Kuwait were the most common venues for misconduct. Conduct in Eastern Europe, including Romania and Russia, was not a subject of FCPA enforcement actions in 2017, but surfaced in 2018. The two countries in Central Asia featured in this year's enforcement actions were Kazakhstan and Azerbaijan. The misconduct based in Africa took place in Libya in two cases, and in another took place in Ghana and Mauritania. South American countries other than Brazil were notably absent in 2018 from corporate enforcement matters.

2018 Locus of Corrupt Conduct Cited in Corporate Cases



D. Monitors

The DOJ imposed one monitorship in 2018, and the SEC imposed one "independent compliance consultant," down from seven in 2016 and four in 2017. Panasonic Avionics Corporation (PAC), a US subsidiary of Japan-based Panasonic, agreed to retain an independent compliance monitor for two years, followed by a year of self-reporting to the DOJ, because the company had not yet fully implemented or tested an enhanced compliance program.

Stryker Corp. (*Stryker*), a recidivist which had settled charges of FCPA violations in 2013, agreed with the SEC to retain an independent compliance consultant for eighteen months to review and evaluate its internal controls, record-keeping, and anti-corruption policies and procedures relating to use of dealers, agents, distributors, sub-distributors, and other such third parties that sell on behalf of Stryker.

[11] Several enforcement actions are listed as occurring in more than one region due to the global nature of the underlying conduct. For example, conduct alleged in Panasonic (Middle East and Asia), Sanofi (Central Asia and Middle East), Stryker (Middle East and Asia), and United Technologies (Middle East, Central Asia, and Asia) all crossed regional boundaries.

The decrease in monitors may reflect priorities noted in last year's FCPA Corporate Enforcement Policy[12] and this year's memorandum on Selection of Monitors in Criminal Division Matters,[13] both of which indicate that a monitor will likely not be necessary in cases in which a company has implemented an effective compliance program at the time of resolution. In several cases, the DOJ stated that it found an independent compliance monitor unnecessary. For example, the DOJ declined to require Transportation Logistics International to obtain a monitor due to the company's remedial efforts. Regarding its decision not to impose a monitorship on Petrobras, the DOJ cited the company's remediation and the state of its compliance program, in addition to ongoing oversight by Brazilian authorities.

E. Nature of the Conduct

The six cases settled by the DOJ, of which four were joint settlements with the SEC, shared a number of similar features. Except for *Petrobras*, the DOJ's corporate cases all dealt with situations in which the company acquired business directly from a foreign government, either through bidding and procurement processes or through purchases from a state-owned enterprise. The types of government purchases were diverse, ranging from financial services (*Credit Suisse, Societe Generale, Legg Mason*), and large-scale energy infrastructure (*Petrobras*) to logistics support (*Transportation Logistics International*) and in-flight entertainment on state-owned airlines (*Panasonic Avionics*). The *Petrobras* case involved a majority-state owned enterprise that was at once both victim and perpetrator, whose officials diverted money from its *own* corporate procurement processes to their own pockets and, through contractors, to a cabal of government officials and political parties.

Five of the six corporate cases brought by the DOJ involved the payment of money to government officials, either in the form of direct payments disguised in the companies' books and records or kickbacks and payments from company bid rigging. Those benefits were provided to officials both directly – concealed, for example, through the use of falsified invoices – and indirectly through the use of agents, sub-agents, and brokers. The only outlier was the settlement against Credit Suisse (Hong Kong) Limited, which like a series of earlier cases involving financial services firms, was based on hiring and promotion of individuals referred by government officials.

Corporate cases brought by the SEC alone encompassed a wider range of conduct, relied principally on its accounting authority, and generally resulted in smaller penalties. As noted above, all of the SEC enforcement actions alleged violations of the accounting provisions. Specifically, all alleged violations of the internal accounting controls provision, and all but three of the cases alleged violations of the books and records provisions (*Vantage Drilling*, *Legg Mason*, and *Credit Suisse*). Only three of the SEC's 14 corporate enforcement actions alleged violations of the FCPA's anti-bribery provisions (*Credit Suisse*, *Panasonic*, and *United Technologies*), and only one of those cases was not brought in parallel with the DOJ (*United Technologies*).

[12] For a discussion of the FCPA Corporate Enforcement Policy, see our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview

[13] Memorandum from Brian Benczkowski, Assistant Attorney General, US Dep't of Justice, *Selection of Monitors in Criminal Division Matters* 2 (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.

A number of the SEC's corporate settlements highlighted that issuers can be held liable for failing to take action in the face of red flags that arise during company internal audits and due diligence. Every case but one that was brought exclusively by the SEC involved the use of an intermediary of some kind, including third-party promoters and marketing companies, sales agents, joint venture partners, distributors, and sub-distributors. Notably, the SEC settled three cases (*Polycom*, *Sanofi*, and *Stryker*) in which it alleged that distributors and sub-distributors used excessive margins or discounts to create slush funds that were used to provide benefits to government officials. The SEC cited an alleged lack of compliance with corporate discount policies or the lack of such policies as evidence of inadequate internal controls.

SEC cases also included a wider range of benefits passed to government officials. Although most cases involved the alleged transfer of money to government officials through third parties, the SEC also alleged that some companies provided benefits directly to government officials by hiring vendors with connections to government officials (*Kinross*); issuing improper per diems after covering the direct costs of travel (*Stryker*); providing improper travel and gifts (*United Technologies*); and improper sponsorships, gifts, donations, product samples, clinical trials, and grants (*Sanofi*). There were no standalone cases centered on gifts, meals, entertainment, and travel, but these activities came up in conjunction with other conduct that was the focus of the enforcement actions (*e.g.*, *United Technologies* and *Sanofi*).

There was also greater diversity in the business advantage received by the settling companies in SEC cases. One case involved obtaining non-public information concerning a government tender (*United Technologies*). One involved payments to obtain non-public commercial information for use in the company's products (*Dun & Bradstreet*). Three cases (*Beam Suntory*, *Elbit Imaging*, and *Kinross*) involved, at least in part, receiving timely inspections, regulatory permits, customs clearance, or other licensing benefits. Most cases, however, alleged that the benefit passed to government officials related to, among other things, purchases by the government itself or by state-owned enterprises and hospitals (*e.g.*, *Beam Suntory*, *Polycom*, *Sanofi*, *United Technologies*, *Vantage Drilling*).

Finally, the SEC cited commercial bribery or overbilling of private parties in a number of settlements in 2018 involving violations of the FCPA's accounting provisions. Specifically, the SEC alleged that companies engaged in overbilling of private hospitals (*Stryker*), provided benefits to private health care professionals without proper documentation of the services provided (*Sanofi*), and paid "rebates" to private customers through a third party to "drum up business" (*Dun & Bradstreet*). Those cases serve as a reminder that violations of the FCPA's accounting provisions are not limited to payments involving foreign bribery.

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II. FCPA Legal and Policy Developments

A. Significant Litigation

2018 featured a number of important policy and legal developments. In addition to the Supreme Court's clarification of the Dodd-Frank whistleblower anti-retaliation provision discussed below, significant litigation included *Hoskins* (rejecting DOJ efforts to expand the jurisdictional reach of the FCPA over foreign nationals) and *General Cable* (for which a 2017 ruling calls into question how companies should make disclosures to US authorities while preserving privilege). In addition, the DOJ announced several new policies, including its policies against "piling on," on reduced roles for monitors, and a revised corporate enforcement policy. Meanwhile, the SEC is managing an apparent lack of resources by prioritizing cases against those in "gatekeeper" roles. Financial institutions will also be affected by FinCEN's new Customer Due Diligence Requirements, which came into effect in May, 2018. Finally, in 2018 the SEC proposed amendments to whistleblower program rules that would provide it with more flexibility in issuing awards.

1. Whistleblower Protection: Digital Realty v. Somers

As reported in our 2017 FCPA Year in Review and 2018 Q1 Preview, 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.[14] 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.[15] 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 had held that SEC reporting was not required for whistleblower protection, and the Fifth Circuit on the other, which had ruled that SEC reporting was required.[16]

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

[14] 138 S. Ct. 767 (2018).

[15] *Id.*

[16] *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).

whistleblower as "any individual who provides . . . information relating to a violation of the securities laws to the commission."[17] 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.[18] 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*."[19]

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.

2. Hoskins

On August 24, 2018, the US Court of Appeals for the Second Circuit rejected an effort by the DOJ to expand the jurisdictional reach of the FCPA over foreign nationals.[20] The defendant, Lawrence Hoskins, is a British citizen who worked as an executive for the UK subsidiary of the French multinational corporation, Alstom SA. He was not employed by Alstom's American subsidiary, nor did he travel to the United States during the period of Alstom's alleged bribery scheme. The district court granted Hoskins' motion to dismiss the FCPA conspiracy charge in *United States v. Hoskins* on the basis that a non-resident foreign national cannot be charged with conspiracy to violate the FCPA, or with aiding and abetting a violation of the statute, unless he falls within a category of persons covered by the substantive provisions of the Act.[21] On interlocutory appeal, the Second Circuit affirmed the district court's ruling.[22]

In reaching its decision, the Second Circuit first emphasized that the text of the FCPA clearly establishes three categories of persons liable under the FCPA.[23] The court recognized the general principle that liability for conspiracy and aiding and abetting may be established even in cases where the accused cannot be held liable for the underlying substantive offense. The court agreed, however, that narrow exceptions to this general rule exist, specifically where the legislative scheme "evinces an affirmative legislative policy to leave the category of defendants omitted from the statutory framework unpunished."[24]

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17 *Id.*
18 *Id.*
19 *Digital Realty,* 138 S. Ct. at 773 (emphasis in original).
20 *United States v. Hoskins*, No. 16-cr-1010, 2018 WL 4038192 (2d Cir. Aug. 24, 2018).
21 *See United States v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. 2015); *United States v. Hoskins*, No. 12-cr-238, 2016 WL 1069645 (D. Conn. Mar. 16, 2016). For a discussion of the earlier decisions, see our 2016 FCPA Year in Review.
22 *See United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).
23 The court cited: (1) "issuers" of US securities or any officer, director, employee, or agent of an issuer, or a stockholder acting on the issuer's behalf using interstate commerce in connection with the payment of bribes; (2) US companies and persons using interstate commerce in connection with the payment of bribes; and (3) foreign persons or businesses engaged in acts to further corrupt schemes, including causing the payment of bribes, while present in the United States. *Id.* at 71 (These formulations are the court's and do not, in our view, fully capture the reach of the statute.).
24 *Id.* at 83-84, 91.

Based on the text, structure, and legislative history of the FCPA, the court concluded that Congress had affirmatively limited the class of covered person with "surgical precision" to exclude the "class of persons under discussions." It went on to note that the law "excluded only non-resident foreign nationals outside American territory without an agency relationship with a US person, and who are not officers, directors, employees, or stockholders of American companies."[25]

The Second Circuit's order, however, was not a total victory for Hoskins. The court allowed the government to proceed with its efforts to prove that Hoskins acted as an agent of a domestic concern and thus could be held directly liable for substantive violations of the anti-bribery provisions.[26]

The ruling is sufficiently narrow in scope, moreover, that it is unlikely to meaningfully affect the number or types of investigations that the DOJ will pursue. For a more in-depth analysis, see our International Law Advisory.

3. General Cable

In *SEC v. Herrera*, a magistrate judge in the Southern District of Florida determined that a law firm had waived work product protection when it made oral disclosures to the SEC related to the firm's investigation of General Cable Corporation.[27] In 2012, General Cable hired the law firm to conduct an internal investigation after the company announced that it had identified accounting errors related to its business in Brazil. As part of this investigation, attorneys interviewed dozens of witnesses and prepared notes about the interviews and other aspects of the investigation. After the SEC launched its own investigation into the company's accounting practices, the firm voluntarily provided the agency with information related to its investigative findings, including oral summaries of its interviews and notes.

In August of 2017, two General Cable executives under investigation filed a motion to compel the oral disclosures that the law firm made to the SEC, as well as other investigation-related materials such as the attorneys' notes.[28] In response to the motion, the firm acknowledged that "[i]nformation regarding specific witness interviews was provided to the SEC through oral discussions" and that certain information was also provided to Deloitte & Touche, General Cable's auditor.[29] However, the firm argued, in relevant part, that the disclosures did not constitute a waiver of work product protections because: the information at issue was "classic attorney work product" and reflected only facts rather than attorney mental processes; the information did not create an "unfair advantage" for the SEC; the disclosure to an external auditor did not constitute a waiver; and the defendants did not demonstrate a substantial need for the materials.[30]

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25 *Id.* at 84.
26 *Id.* at 97-98.
27 *See SEC v. Herrera*, No. 17-cv-20301, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017). For a discussion of the corporate enforcement action against General Cable Corporation, see our 2016 FCPA Year in Review.
28 Defendants' Motion to Compel the Law Firm of Morgan Lewis & Bockius, LLP, to Produce Documents, *SEC v. Herrera*, No. 17-cv-20301, 2017 WL 6041750 (S.D. Fla. Oct. 31, 2017).
29 Morgan Lewis' Response to Defendants' Motion to Compel Work Product-Protected Materials, *SEC v. Herrera*, No. 17-cv-20301, 2017 WL 6041750 (S.D. Fla. Nov. 10, 2017).
30 *Id.*

In ruling on the motion to compel, the magistrate judge determined that the law firm had waived work product protection with respect to the oral disclosures. Specifically, the court found that the oral disclosures were the "functional equivalent" of actual notes and memoranda and that the firm had waived work product protection by turning them over to an adversarial party. However, based upon the same reasoning, the court denied the executives' request to compel information that the firm had provided to Deloitte & Touche. The court determined that the auditor was not General Cable's adversary, and therefore the firm had not waived work product protection.

In 2018, the parties in *SEC v. Herrera* reached a non-public agreement regarding the production of information related to oral disclosures to enforcement authorities. Although the parties ultimately resolved the underlying matter, the court's ruling heightens the risks associated with the widespread practice of oral downloads to law enforcement and presents challenges for companies seeking to cooperate with US authorities under current cooperation standards while at the same time preserving work product protection.

4. Lucia

As of February 2018, the SEC had brought more than 80% of its enforcement proceedings since passage of the Dodd-Frank Act of 2010 through in-house administrative tribunals, where it has won 90% of the time.[31] Prior to litigating *Lucia*, the SEC Commissioners of the SEC did not appoint Administrative Law Judges (ALJs) in accordance with the Appointments Clause; rather, ALJs were selected by the staff of the SEC from a list of candidates provided by the Office of Personnel Management.[32] On November 30, 2017, in response to a change of position by the Solicitor General, the SEC issued an order stating that the Commission "in its capacity as head of a department – hereby ratifies the agency's prior appointment" of its ALJs.[33]

On June 21, 2018, the Supreme Court held that SEC ALJs were "officers of the United States" subject to the Appointments Clause.[34] As noted in our 2017 FCPA/ Anti-Corruption Year in Review & 2018 Q1 Preview, the most notable issue related to remedy. Although the decision will have little impact on new proceedings due to the Commissioners' subsequent appointment of ALJs, the Court held that litigants who made timely challenges under the Appointments Clause were entitled to a new hearing before a different, properly appointed ALJ.[35]

On June 21, 2018, after the decision, the SEC announced that it would stay any pending proceeding before an ALJ.[36] The SEC lifted the stay on August 22, 2018 and announced that it would rehear over 120 cases currently pending before an ALJ

[31] *See* Br. for Pet'rs, *Lucia v. Sec. & Exch. Comm'n* , No. 17-130, at *3 (U.S. Feb. 21, 2018).
[32] See Br. for Resp't, *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, at *2 (U.S. Nov. 29, 2017).
[33] *See In re Pending Administrative Proceedings*, Sec. Exch. Act Release No. 82,178 (Nov. 30, 2017), https://www.sec.gov/litigation/opinions/2017/33-10440.pdf.
[34] *See Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044 (2018).
[35] *See Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2055 (2018).
[36] *See In re Administrative Proceedings*, Exch. Act Release No. 83,495 (June 21, 2018).

that were stayed as a result of the *Lucia* decision. The SEC vacated all decisions and deadlines in the prior matters unless the parties agreed to alternative procedures.[37]

B. Enforcement Agency Policies

1. DOJ Revised Corporate Enforcement Guidance

As noted in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, the DOJ announced its new FCPA Corporate Enforcement Policy in November 2017, building upon aspects of the FCPA Pilot Program to create a presumption that companies that meet all standards relating to "voluntary self-disclosure, full cooperation, and timely and appropriate remediation" will have cases resolved through a declination absent "aggravating circumstances." In March 2018, then-Acting Assistant Attorney General John Cronan announced that the Criminal Division would consider the FCPA Corporate Enforcement policy as "nonbinding guidance" in all Criminal Division corporate criminal cases, not just those involving violations of the FCPA.[38]

On July 25, 2018, at a speech during the American Conference Institute's 9th Global Forum on Anti-Corruption Compliance in High Risk Markets, Deputy Assistant Attorney General Matthew S. Miner clarified guidance from the 2012 DOJ and SEC FCPA Resource Guide that the DOJ will give "meaningful credit" and "*may* consequently decline to bring enforcement actions" against companies that undertake due diligence and implement effective controls after an acquisition. Miner stated that the DOJ did not want enforcement actions to discourage companies with strong compliance programs from entering high-risk markets. As a result, when "an acquiring company conducts robust due diligence…and engages in remedial measures, including extending already robust compliance to the acquired company," the DOJ would apply "the principles contained in the FCPA Corporate Enforcement Policy to successor companies that uncover wrongdoing in connection with mergers and acquisitions and thereafter disclose that wrongdoing and provide cooperation, consistent with the terms of the policy." Miner further noted that acquiring companies that become aware of corruption during due diligence can continue to take advantage of the DOJ's Opinion Procedure Release procedure.[39]

On September 27, 2018, at a speech during the 5th Annual GIR New York Live Event, Miner further clarified that the DOJ would apply the Corporate Enforcement Policy in the context of mergers and acquisitions that uncover wrongdoing beyond violations of the FCPA.[40]

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[37] *See In re Administrative Proceedings*, Exch. Act Release No. 83,907 (Aug. 22, 2018), https://www.sec.gov/litigation/opinions/2018/33-10536.pdf.

[38] *See* Transcript, *Deputy Assistant Attorney General Matthew S. Miner of the Justice Department's Criminal Division Delivers Remarks at the 5th Annual GIR New York Live Event*, Dept. of Justice (Sept. 27, 2018). https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.

[39] *See* Transcript, *Deputy Assistant Attorney General Mark S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption in High Risk Markets*, Dept. of Justice (July 25, 2018), https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th.

[40] *See* Transcript, *Deputy Assistant Attorney General Matthew S. Miner of the Justice Department's Criminal Division Delivers Remarks at the 5th Annual GIR New York Live Event*, Dept. of Justice (Sept. 27, 2018). https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.

Finally, in a speech delivered on November 29, 2018 at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, Deputy Attorney General Rod Rosenstein announced revisions to the DOJ's Justice Manual (JM) (formerly the US Attorneys' Manual) clarifying the Department's position on corporate cooperation and enforcement.[41] The changes, reflected in JM §§ 1-12.000, 4-3.100, 9.28.210, 9.28.300, and 9-28.700 reiterate the Department's focus on individual prosecution, including by providing corporations additional flexibility to identify individuals who were "substantially" involved in misconduct (as opposed to earlier guidance from the DOJ in the Yates memorandum that required identification of all individuals involved to obtain cooperation credit). The revisions also provide additional flexibility in civil cases, walking back the Department's "all or nothing" cooperation policy and acknowledging that civil attorneys will have discretion to offer some cooperation credit where "a company honestly did meaningfully assist the government's investigation." Civil attorneys will also have discretion to consider an individual's ability to pay in determining whether to pursue a civil judgment.

2. Reduced Roles for Monitors

On October 11, 2018, the Department of Justice published new guidance related to the use of corporate monitors in Criminal Division matters.[42] The guidance, unveiled in a speech by Assistant Attorney General Brian Benczkowski, is intended to "further refine the factors that go into the determination of whether a monitor is needed, as well as [to] clarify and refine the monitor selection process."[43]

Under the new guidance, "the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens."[44] In evaluating the "potential benefits" of a monitor, prosecutors should consider: (a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future."[45] In cases "[w]here a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be

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41 *See* Transcript, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act*, Oxon Hill, MD (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

42 Brian Benczkowski, *Selection of Monitors in Criminal Division Matters* 2 (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.

43 *See* Transcript, *Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance,* New York, NY (Oct. 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

44 Memorandum from Brian Benczkowski, Assistant Attorney General, US Dep't of Justice, *Selection of Monitors in Criminal Division Matters* 2 (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.

45 *Id.*

necessary."[46] Further, even where a monitor is appropriate, the monitor's role should be tailored to minimize burdens.[47]

This guidance reflects continued refinement and limiting of the circumstances in which the DOJ will require an independent external monitor, as opposed to self-reporting no post-settlement reporting obligations. Specifically, as Deputy Attorney General Rod Rosenstein articulated, the Department no longer intends to "employ the hammer of criminal enforcement to extract unfair settlements."[48] Additionally, the Department intends to select "prosecutors and supervisors [who] have a strong foundational understanding of what constitutes an effective approach to compliance" in lieu of a single compliance expert for monitoring purposes.[49] As noted in Section I.D, above, this shift may account for the low number of DOJ-imposed monitors in 2018.

3. Policy Against "Piling On"

In May 2018, the DOJ implemented a new policy intended to avoid the assessment of duplicative fines and penalties – or "piling on"– against companies that are subject to joint or parallel enforcement for the same misconduct involving multiple authorities and/or jurisdictions.[50] The policy, which we discussed in an earlier International Law Advisory, is officially titled the Policy on Coordination of Corporate Resolution Penalties and/or Joint Investigations and Proceedings Arising from the Same Misconduct, and is incorporated into the JM. It contains four main elements. First, it reminds DOJ attorneys "not to use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments." [51] Second, it states that DOJ components should coordinate amongst themselves, where multiple DOJ components are investigating the same misconduct, in order to achieve an "equitable" result.[52] Third, it states DOJ should, "as appropriate," coordinate with other federal, state, local, or foreign enforcement authorities seeking

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46 *Id.*

47 *Id.* (stating that, "[i]n weighing the benefit of a contemplated monitorship against the potential costs, Criminal Division attorneys should consider not only the projected monetary costs to the business organization, but also whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the business's operations").

48 Transcript, *Deputy Attorney General Rosenstein Delivers Remarks at the 32nd Annual ABA National Institute on White Collar Crime*, San Diego, CA (Mar. 2, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-32nd-annual-aba-national-institute.

49 *See* Transcript, *Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance,* New York, NY (Oct. 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

50 Memorandum from Rod J. Rosenstein, Deputy Att'y Gen., US Dep't of Justice, *Policy on Coordination of Corporate Resolution* (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download (last accessed Jan. 6, 2019); *see also* Transcript, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act,* New York, NY (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes (last accessed Jan. 6, 2019); Transcript, *Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute,* New York, NY (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar (last accessed Jan. 6, 2019).

51 Justice Manual, Sec. 1-12.100 - Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct, https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings (last accessed Jan. 6, 2019).

52 *Id.*

to resolve a case with a company for the same misconduct.[53] Fourth, the policy requires DOJ attorneys to consider "all relevant factors" in determining whether multiple penalties serve the interests of justice in a particular case.[54] To that end, it provides a non-exhaustive list of the relevant factors, including: the egregiousness of a company's wrongdoing, statutory mandates regarding penalties, the risk of unwarranted delay in reaching a final resolution, and the adequacy and timeliness of a company's disclosures to and cooperation with the DOJ.[55]

By offering greater certainty of a "full and final settlement," the anti-piling on policy aims to further incentivize corporate self-reporting and cooperation by easing companies' concerns about opening themselves up to investigations and potentially duplicative punishments by multiple authorities and/or in multiple jurisdictions.[56] It does not offer concrete assurance, however, against duplicative penalties.

The SEC's decision in September 2018 to close its investigation against ING Groep, N.V. – following ING's announcement that it agreed to pay €775 million ($900 million) to the Dutch Public Prosecution Services for deficiencies in its customer due diligence policies – is likely an example of this policy at work.[57] The *Petrobras* resolution, in which the Brazilian state-owned oil company entered into agreements with US and Brazilian authorities in connection with Petrobras's role in bribing politicians and political parties in Brazil, and the *Société Générale S.A.* case, in which that company entered into agreements with the DOJ and French authorities to resolve charges related to a bribery scheme in Libya, were also likely influenced by this new policy. In those cases, large penalties were issued ($1.78 billion and $585 million, respectively), but US authorities agreed to credit penalties paid to other jurisdictions as a percentage of the penalties otherwise due to them.[58]

Although the anti-piling on policy was only announced in 2018, it builds upon a longer-standing trend of increased coordination and cooperation in the resolution of large, multijurisdictional cases. The 2017 Telia Company AB case, which resulted in $965 million fine, to be allocated among US, Dutch, and Swedish authorities for

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53 *Id.*

54 *Id.*

55 *Id.*

56 Transcript, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act,* New York, NY (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes (last accessed Jan. 6, 2019).

57 ING Groep N.V., Form 6-K, EX-99.1, (Sept. 4, 2018), https://www.sec.gov/Archives/edgar/data/1039765/000119312518266031/d602410dex991.htm (last accessed Jan. 6, 2019) (announcing agreement with Dutch authorities); ING Groep N.V., Form 6-K, EX-99.1, (Sept. 5, 2018) https://www.sec.gov/Archives/edgar/data/1039765/000119312518266748/d619065dex991.htm (last accessed Jan. 6, 2019) (announcing the SEC closed its investigation against ING).

58 *See* Non-Prosecution Agreement, *Petroleo Brasileiro S.A. – Petrobras* at 6 (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download (last accessed Jan. 6, 2019) (stating that aside from the penalty amount credited for a US class action settlement fund, the DOJ and SEC would each receive 10% of the remaining penalty, while the Brazil authorities would receive 80%); DOJ Press Release, *Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate* (June 4, 2018), https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan (last accessed Jan. 6, 2019) (stating that the DOJ would credit the portion of the penalties paid to French authorities as "equal to 50 percent of the total criminal penalty otherwise payable to the United States").

charges related to a scheme to pay bribes in Uzbekistan, exemplified this trend.[59] In that case, the DOJ and SEC acknowledged assistance from 16 countries, most of which were not party to the settlement.[60] Also in 2017, US, Swiss, and Brazilian authorities split the fines and penalties ultimately imposed in the Odebrecht S.A. and Braskem S.A. cases.[61]

4. SEC Focus on "Gatekeeper" Cases

In remarks made at a Practising Law Institute event on December 17, 2018, the SEC's Associate Regional Director for Enforcement in New York, Lara Shalov Mehraban, reportedly acknowledged a change in the SEC's enforcement priorities to accommodate more limited resources available to the regulator.[62] In her remarks, Mehraban noted that "[p]icking and chosing, for example, gatekeeper cases, becomes extremely important in a tight resources environment because gatekeepers are the ones who can prevent wrongdoing among any number of actors." Such gatekeepers may include lawyers, compliance personnel, finance and accounting personnel, and auditors.

C. FinCEN Due Diligence Regulations

On May 11, 2018, the Financial Crimes Enforcement Network (FinCEN)'s "Customer Due Diligence Requirements for Financial Institutions," first published in 2016, became effective.[63] This rule, which amends Bank Secrecy Act regulations, is intended "to improve financial transparency and prevent criminals and terrorists from misusing companies to disguise their illicit activities and launder their ill-gotten gains."[64] In doing so, the rule clarifies and strengthens existing customer due diligence requirements and adds a new requirement for covered financial institutions

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[59] *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* (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 Jan. 6, 2019).

[60] Other than the Netherlands and Sweden, the countries/territories included: Austria, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Cyprus, France, Hong Kong, Ireland, the Isle of Man, Latvia, Luxembourg, Norway, Spain, 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* (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 Jan. 6, 2019); SEC Press Release 2017-171, *Telecommunications Company Paying $965 Million For FCPA Violations* (Sept. 21, 2017), https://www.sec.gov/news/press-release/2017-171 (last accessed Jan. 6, 2019).

[61] *See* Sentencing Memorandum, *United States v. Odebrecht S.A.*, No. 16-cr-643, Dkt. 15 at *4 (E.D.N.Y. Apr. 11, 2017); DOJ Plea Agreement, *United States v. Braskem S.A.*, Cr. No. 16-644 (RJD) Dkt. 8, at 19 (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/opa/press-release/file/919906/download (last accessed Jan. 6, 2019).

[62] *See* Clara Hudson, *SEC to focus on "gatekeeper" cases, official says*, Global Investigations Rev.: Just Anti-Corruption (Dec. 18, 2018), https://globalinvestigationsreview.com/article/jac/1178304/sec-to-focus-on-%E2%80%9C-gatekeeper%E2%80%9D-cases-official-says?gator_td=iWV8FNnS0Di1TM3HnNGSk2x1%2bMbuDDejN7raY-5i4yxN76KQb%2brc5R1AVILfQBMEIhBSaiIsrbB0IBG8ULBylasj5mHtjCAaSATFtcyLffZ%2fPmQozUGAOmMI4Pm-8m6Xj%2bak0%2fqqHhgkD4cK%2bhVntxh2o0m8ZFYmtIRKayP%2fs2Zazxkujcc5dgzSPAcod43IqAfk1tTG0lbc-CCTTtpEj8TJVYRVVIrdWOTieIYSqQbXKjZ3to6%2fQTsRG9gWc7hu0KZjhY2hWOfYDZLehljbzdf9Q%3d%3d.

[63] *Customer Due Diligence Requirements for Financial Institutions*, 81 Fed. Reg. 91 (May 11, 2016) (codified at 31 C.F.R. § 1010).

[64] FinCEN Press Release, *FinCEN Reminds Financial Institutions that the CDD Rule Becomes Effective Today* (May 11, 2018), https://www.fincen.gov/news/news-releases/fincen-reminds-financial-institutions-cdd-rule-becomes-effective-today.

(an industry frequently subject to FCPA scrutiny)[65] regarding the identification and verification of beneficial owners.[66]

Regarding the new requirement to obtain beneficial ownership information, financial institutions are required to identify and verify the identity of the beneficial owners of all legal entity customers at the time that a new account is opened. Beneficial owners include: (i) each individual, if any, who owns, directly or indirectly, 25 percent or more of the equity interests of the legal entity customer; and (ii) any individual with significant responsibility for managing the legal entity customer (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).[67] In determining whether an individual meets this definition, the financial institution may rely on the beneficial ownership information supplied by the customer, provided that the institution has no knowledge of facts that would reasonably call into question the reliability of the information. FinCEN has also published "Frequently Asked Questions" intended to assist financial institutions in complying with the new requirement.[68]

D. Whistleblower Reward Update

In fiscal year 2018, the SEC awarded $168 million in whistleblower awards to 13 individuals.[69] Notable milestones include the SEC's highest award to date, comprised of a $33 million award to a single whistleblower and a $50 million joint award to two individuals. The SEC ended the fiscal year with its second-highest award to date, at $54 million split between two whistleblowers.[70]

In addition, the SEC proposed amendments to whistleblower program rules that would provide it with more flexibility in issuing awards and take into account a wider range of enforcement vehicles when calculating total sanctions.[71]

1. Adjustments to Whistleblower Award Amounts

On June 28, 2018, the SEC voted to propose an amendment to section 21F of the Exchange Act, which requires the SEC to provide an award to whistleblowers who provide the SEC with original information about a violation of the securities laws that leads to successful enforcement by the SEC in a covered judicial, administrative, or related action.[72] Under the proposed rule, the award amounts would take into

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65 A "covered financial institution" for the purposes of the rule refers to: banks, federally insured credit unions, savings associations, corporations organized for international or foreign banking or financial operations, trust banks or trust companies that are federally regulated and subject to an anti-money laundering program requirement, mutual funds, brokers or dealers in securities, futures commission merchants, and introducing brokers in commodities.

66 *See* Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 91 (May 11, 2016) (codified at 31 C.F.R. § 1010).

67 *Customer Due Diligence Requirements for Financial Institutions, Correction*, 82 Fed. Reg. 187 (Sept. 28, 2017), https://www.fincen.gov/sites/default/files/federal_register_notices/2017-09-29/CDD_Technical_Amendement_17-20777.pdf.

68 FinCEN, *Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions* (Apr. 3, 2018), https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.

69 *2018 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, SEC (Nov. 2018), https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf.

70 *Id.*

71 SEC Press Rel. No. 2018-120, *SEC Proposed Whistleblower Rule Amendments* (June 28, 2018), https://www.sec.gov/news/press-release/2018-120.

72 *Id.*

account deferred and non-prosecution agreements entered into by the DOJ and state attorneys general to calculate whistleblower awards, potentially expanding the scale of awards significantly.[73]

Subject to certain eligibility requirements, current SEC rules provide for whistleblower awards when the SEC or a related agency completes a successful enforcement action with a sanction of over $1 million, and SEC rules provide that the award for all whistleblowers be between 10 and 30 percent of the total monetary sanctions that the "Commission and the other authorities are able to collect."[74] The proposed rule would allow the SEC to adjust award amounts upward from $2 million (subject to a 30% statutory maximum) for low penalty cases and downward (subject to a 10% statutory minimum) to no less than $30 million for exceedingly high penalty cases.[75] The comment period for the proposed rule closed on September 18, 2018, although the SEC posted public comments through at least January 4, 2019.[76]

2. 2018 Fiscal Year Report

In fiscal year 2018, the SEC received more than 5,200 tips, up from more than 4,400 the previous year. Of those, just 202 (less than four percent) were FCPA-related, a decline from the 210 FCPA-related tips received in the previous fiscal year.[77] Fiscal year 2018 was marked by a shattering of previous records in SEC award amounts. On March 19, 2018, the SEC issued its highest-ever whistleblower award.[78] Thirty-three million dollars went to a single whistleblower and another $50 million was split between two additional whistleblowers for a total distribution of $83 million.[79]

The March awards stemmed from a 2016 settlement with the brokerage unit of Bank of America's Corp's Merrill Lynch in which it admitted to the misuse of customer funds.[80] The SEC had alleged that between 2009 and 2012, Merrill Lynch engaged in a series of options trades that artificially reduced the level of funds required to be held on reserve, which it subsequently used to further its own trading activities.[81] Similarly, between 2009 and 2015, Merrill Lynch was alleged to have held up to $58 billion per day in a clearing account rather than on reserve. On June 23, 2016, Merrill Lynch settled the matter for $415 million.[82]

In April of 2018, the SEC issued two separate whistleblower awards totaling $4.3 million. First, on April 5, 2018, the SEC announced the first whistleblower award

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73 *See* Whistleblower Program Rules, 83 Fed. Reg. 34,702 (proposed July 20, 2018), https://www.govinfo.gov/content/pkg/FR-2018-07-20/pdf/2018-14411.pdf..

74 17 C.F.R. §§ 240.21F-3; 240.21F-5 (2018).

75 *Id.*

76 *See* Sec. Exch. Comm'n, *Comments on Proposed Rule: Amendments to the Commission's Whistleblower Program Rules*, https://www.sec.gov/comments/s7-16-18/s71618.htm (last visited Feb. 25, 2019).

77 *Id.*

78 SEC Press Rel. No. 2018-44, *SEC Announces Its Largest-Ever Whistleblower Awards* (Mar. 19, 2018), https://www.sec.gov/news/press-release/2018-44.

79 *Id.*

80 Pete Schroeder, *U.S. SEC Awards Merrill Lynch Whistleblowers a Record $83 Million*, Reuters (Mar. 19, 2018) https://www.reuters.com/article/us-usa-sec-whistleblower/u-s-sec-awards-merrill-lynch-whistleblowers-a-record-83-million-idUSKBN1GV2MT.

81 SEC Press Rel. No. 2016-128, *Merrill Lynch to Pay $415 Million for Misusing Customer Cash and Putting Customer Securities at Risk* (June 23, 2016), https://www.sec.gov/news/pressrelease/2016-128.html.

82 *See* Order Instituting Cease-and-Desist Proceedings, *In re Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corp*, Sec. Exch. Act of 1934 Release No. 78,141 (June 23, 2016), https://www.sec.gov/litigation/admin/2016/34-78141.pdf.

issued under the "safe harbor" of Exchange Act Rule 21F-4(b)(7), which makes whistleblowers who submit information to the SEC within 120 days of submitting it to another federal agency eligible for awards as though the information had been submitted at the same time.[83] In announcing an award of $2.2 million, the SEC noted that the whistleblower "provided substantial cooperation in the investigation."[84] The following week, the SEC announced a second award of $2.1 million to a "former company insider whose information led to multiple successful enforcement actions."[85]

On September 6, 2018, the SEC issued a joint award of $54 million, with $39 million to one and $15 million to another whistleblower.[86] This most recent award marks the second-largest in the history of the SEC's whistleblower program – second only to its early March Merrill Lynch award.[87] Also in September 2018, the SEC awarded nearly $4 million to an overseas whistleblower.[88]

Since the Program's creation in 2012, the SEC has issued over $326 million in awards to 59 different individuals. As a result of actionable information received from these individuals, more than $1.7 billion in monetary sanctions has been imposed over the same period.[89]

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83 SEC Press Rel. No. 2018-58, *SEC Awards More Than $2.2 Million to Whistleblower Who First Reported Information to Another Federal Agency Before SEC* (Apr. 5, 2018), https://www.sec.gov/news/press-release/2018-58.

84 *Id.*

85 SEC Press Rel. No. 2018-64, *SEC Awards Whistleblower More Than $2.1 Million* (Apr. 12, 2018), https://www.sec.gov/news/press-release/2018-64.

86 SEC Press Rel. No. 2018-179, *SEC Awards More Than $54 Million to Two Whistleblowers* (Sept. 6, 2018), https://www.sec.gov/news/press-release/2018-179.

87 *Id.*

88 SEC Press Rel. No. 2018-209, *SEC Awards Almost $4 Million to Overseas Whistleblower* (Sept. 24, 2018), https://www.sec.gov/news/press-release/2018-209.

89 *Id.*

Steptoe

III. 2018 FCPA Corporate Settlements

FCPA corporate enforcement remained robust in 2018 and was largely consistent with enforcement over the last seven years in both the number of total enforcement actions and average penalties imposed. However, the enforcement priorities of the DOJ and SEC appear to be increasingly diverging. The DOJ continues to focus largely on criminal prosecution of grand corruption and other violations of the FCPA's anti-bribery provisions and increasingly on individual prosecutions that leverage corporate cooperation. The SEC is largely focused on civil violations of the FCPA's accounting provisions, asserting civil violations of the FCPA's anti-bribery provisions in only three of 14 matters. Despite that divergence, the DOJ and SEC brought four parallel corporate enforcement actions, which resulted in a substantial portion of the total penalties imposed in 2018.

A. DOJ Corporate Enforcement Policy Declinations

1. Dun & Bradstreet Corporation

On April 23, 2018, the DOJ issued a declination letter to Dun & Bradstreet (D&B) under the FCPA Corporate Enforcement Policy in connection with an investigation of conduct relating to D&B's Chinese subsidiaries.[90] Despite asserting that company employees had engaged in bribery, the DOJ declined to prosecute the company based on a number of factors, including D&B's detection, voluntary self-disclosure, and investigation of the misconduct; full cooperation with the DOJ (including identifying individuals responsible and making current and former employees available for interview); and remediation (including terminations, disciplinary actions, and reductions of salaries and bonuses).

The DOJ recognized D&B's disgorgement to the SEC in a related matter to settle books and records and internal controls allegations (discussed in more detail in section IV.D.2).

2. Guralp Systems

On August 20, 2018, the DOJ issued a declination to Guralp Systems Limited (GSL) under the FCPA Corporate Enforcement Policy, relating to possible violations of the FCPA and US money laundering statutes.[91] Although the DOJ indicated it had evidence of FCPA violations relating to payments made to Heon-Cheol Chi (a South Korean citizen sentenced in 2017),[92] it declined to prosecute GSL and did not require disgorgement based on GSL's "voluntary disclosure of the misconduct to [DOJ], significant remedial efforts undertaken by GSL, GSL's substantial cooperation with

[90] DOJ Declination Letter, *The Dun & Bradstreet Corporation* (Apr. 23, 2018), https://www.justice.gov/criminal-fraud/file/1055401/download.

[91] DOJ Declination Letter, *Guralp Systems Limited* (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/file/1055401/download.

[92] For more information, see our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview.

[DOJ's] investigation, and the fact that GSL, a U.K. company with its principal place of business in the U.K., is the subject of an ongoing parallel investigation by the [SFO] . . . ." In particular, the DOJ noted GSL's cooperation and assistance with its prosecution of Chi relating to a money laundering scheme.

3. Insurance Corporation of Barbados

On August 23, 2018, the DOJ issued a declination to Insurance Corporation of Barbados Limited (ICBL) under the FCPA Corporate Enforcement Policy in connection with an investigation of bribery of Barbadian government officials and money laundering.[93] This was the first declination issued under the FCPA Corporate Enforcement Policy that included a disgorgement component.[94] According to the letter, ICBL paid $36,000 in bribes to the Minister of Industry, International Business, Commerce, and Small Business Development in exchange for just under $687,000 in contracts, resulting in approximately $93,940.19 in profits. As part of the scheme, bribes were paid through a US bank account to a dental company owned by the Minister's friend. Although there was "high-level involvement of corporate officers," the DOJ declined prosecution based on ICBL's self-disclosure, investigation, cooperation, disgorgement of profits ($93,940.19), compliance program enhancements and other remediation, and identification of culpable individuals (who were charged by the DOJ).

4. Polycom, Inc.

On December 20, 2018, the DOJ issued a declination to Polycom, Inc. (Polycom) under the FCPA Corporate Enforcement Policy, for violations of the anti-bribery and books and records provisions by Polycom's Chinese subsidiary (for a discussion of the SEC's parallel action in this matter, see Section IV.D.6).[95] The decision to issue a declination was based on Polycom's identification, self-disclosure, and investigation of the misconduct, full cooperation, and remediation (including improvements to its compliance program, termination and discipline of individuals involved, and termination of a third party relationship). Polycom agreed to disgorge nearly $31 million in profits (including approximately $10.7 million in disgorgement to the SEC, $10.1 million to the US Treasury Department, and $10.2 million to the US Postal Inspection Service Consumer Fraud Fund). Amounts disgorged under the DOJ declination presumably reflect profits over the life of the scheme while disgorgement to the SEC was limited by the Supreme Court's *Kokesh* decision.

B. DOJ Corporate Enforcement

1. Transportation Logistics International, Inc.

As reported in our 2017 FCPA Year in Review and 2018 Q1 Preview, 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

[93] *See* DOJ Declination Letter, *Insurance Corporation of Barbados Limited* (Aug. 23, 2018), https://www.justice.gov/criminal-fraud/page/file/1089626/download.

[94] Of course, declinations under the FCPA Pilot Program, on which the FCPA Corporate Enforcement Policy was based, included a disgorgement component. For a discussion of the requirements of the DOJ FCPA Corporate Enforcement Policy, please see our *2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview*.

[95] DOJ Declination Letter, *Polycom, Inc.* (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download.

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.[96] 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.[97] Around 2009, two other executives of TLI, Daren Condrey and Mark Lambert, learned of and joined the corrupt scheme.[98] 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.[99] 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.[100]

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 $21.4 million, which represented a 25% discount off the bottom of the applicable USSG range.[101] 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.[102] 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."[103]

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 described below in Section V.A.15, charges against Lambert were filed in January 2018.

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96 *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).

97 *See id.* Attach. A ¶¶ 12–14.

98 *See id.* Attach. A ¶¶ 14–15.

99 *See id.* Attach. A ¶¶ 9–11, 16–17.

100 *See id.* Attach. A ¶¶ 12.

101 *See id.* ¶ 8.

102 *See id.* ¶ 4(l).

103 *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-thecompany-%E2%80%9D-judge-asks-fcpaprosecutor?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 Dec. 28, 2018).

2. Société Générale

On June 4, 2018, Société Générale S.A. (Société Générale) and its wholly-owned subsidiary SGA Société Générale Acceptance N.V. (SGA) settled charges with enforcement authorities in the United States and in France in connection with a multi-year bribery scheme involving Libyan public officials and violations arising from manipulation of the London InterBank Offered Rate (LIBOR).[104] To resolve the charges, Société Générale agreed to pay a combined $860 million criminal penalty to US and French criminal authorities, as well as $475 million in regulatory penalties and disgorgement to the Commodity Futures Trading Commission (CFTC).

Société Générale, a global financial institution headquartered in Paris, France with a subsidiary and branch located in New York, entered a three-year DPA with the DOJ, and SGA, a wholly-owned subsidiary incorporated under the laws of Curaçao, entered a plea agreement to resolve charges of conspiracy to violate the FCPA's anti-bribery provisions. In addition, Société Générale's DPA settled charges that it conspired to transmit false, misleading and knowingly inaccurate commodities reports.

As part of the DPA, Société Générale admitted to paying bribes between 2005 and 2009 to Libyan public officials through a local "broker" to secure financial investments, which were falsely categorized as payments for "introduction" services. Société Générale sold Libyan state agencies 13 structured notes (9 of which were issued in partnership with SGA[105]) and one restructuring worth approximately $3.66 billion, and for each transaction, it paid the local broker a 1.5 to 3 percent commission on the nominal amount of the investment made, for a total of approximately $90.74 million. Société Générale earned approximately $523 million from these deals.[106]

The DOJ asserted territorial jurisdiction over the bribery scheme on the basis of meetings in New York at which Société Générale employees planned and discussed the bribery scheme with a Libyan official, and during which the company provided expensive hotel stays, meals, entertainment, and gifts the Libyan official. In addition, commission payments to the intermediary cleared through Société Générale's New York branch.

In relation to the LIBOR scheme, Société Générale admitted to submitting false and misleading USD LIBOR rates to the British Bankers' Association (BBA) to give the appearance to the public that the company could borrow money at a lower interest

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[104] *See* DOJ Press Release, *Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate*, Office of Pub. Affairs (Jun. 4, 2018), https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan; Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, Case 18-cr-253-DLI, https://www.justice.gov/opa/press-release/file/1068521/download; Plea Agreement, *U.S. v. SGA Société Générale Acceptance, N.V.*, No. 18-cr-274-DLI, https://www.justice.gov/opa/press-release/file/1068526/download; Information, *United States v. Société Générale S.A.*, No. 18-cr-253-DLI, https://www.justice.gov/opa/press-release/file/1068596/download.

[105] Information, *U.S. v. SGA Société Générale Acceptance, N.V.*, No. 18-cr-274-DLI, ¶ 12, https://www.justice.gov/opa/press-release/file/1068621/download.

[106] Information, *U.S. v. Société Générale S.A.*, No. 18-cr-253-DLI, ¶ 15, https://www.justice.gov/opa/press-release/file/1068596/download.

rate than it could in reality. The purpose of the scheme was to avoid reputational harm that it expected would result from submitting its actual borrowing rates.[107]

As part of the resolution with the DOJ, Société Générale agreed to pay a $585 million criminal penalty in relation to the bribery scheme and a $275 million criminal penalty in relation to the LIBOR manipulation. This amount is in addition to the $475 million in regulatory penalties and disgorgement that Société Générale agreed to pay to the CFTC for violations in connection with the LIBOR scheme. The DOJ agreed to credit up to $292,776,444 of the bribery-related criminal penalty for payments made to French authorities in relation to the same conduct.[108]

These penalty amounts reflect a 20% discount off the bottom of the US Sentencing Guidelines fine range in relation to the anti-bribery charges and a 15% discount in relation to the LIBOR charges. The company did not receive voluntary disclosure credit and, while it received "substantial" cooperation credit in relation to the anti-bribery charges and partial cooperation credit in relation to the LIBOR charges, it did not receive full cooperation credit due to delays and incomplete cooperation early in the investigation.[109] The DOJ acknowledged remedial measures undertaken by Société Générale, including terminating employees involved in or knowledgeable of misconduct, creating new anti-bribery policies and procedures addressing the use of intermediaries, and enhancing its anti-bribery training. As a result of these measures and the company's agreement to self-report annually to the DOJ concerning further enhancements to its compliance program, the DOJ did not require appointment of an independent compliance monitor.

C. Parallel DOJ/SEC Enforcement Actions

1. Credit Suisse

On July 5, 2018 Credit Suisse (Hong Kong) Limited (CSHK) entered into an NPA with the DOJ to resolve allegations that it hired and promoted relatives and other individuals referred by Chinese officials to obtain banking business from state-owned entities.[110] CSHK is a Hong Kong-based subsidiary of Credit Suisse Group AG (CSAG), a Swiss-based financial services firm listed on the New York Stock Exchange (NYSE). To assert FCPA jurisdiction over CSHK, the DOJ alleged that CSHK acted as an agent of issuer CSAG. In related proceedings, the SEC issued a cease and desist order against CSAG on the same day, alleging violations of the anti-bribery and internal control provisions of the FCPA in connection with the same conduct.[111]

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[107] *See id.* ¶ 16.

[108] *See* Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, Case 18-cr-253-DLI, ¶ 7, https://www.justice.gov/opa/press-release/file/1068521/download; Plea Agreement, *United States v. SGA Société Générale Acceptance, N.V.*, No. 18-cr-274-DLI, ¶ 19, https://www.justice.gov/opa/press-release/file/1068526/download.

[109] *See* DOJ Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-cr-253 (DLI), ¶ 4, https://www.justice.gov/criminal-fraud/file/1072451/download.

[110] DOJ Press Release, *Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA* (Jul. 5, 2018), https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt.

[111] *See* SEC Press Release, *SEC Charges Credit Suisse With FCPA Violations* (Jul 5, 2018), https://www.sec.gov/news/press-release/2018-128.

As part of the DOJ NPA, CSHK agreed to pay a monetary penalty in the amount of $47,029,916, which reflects a discount of 15 percent off the bottom of the US Sentencing Guidelines fine range.[112] Under the SEC cease and desist order, CSAG agreed to pay disgorgement of $24,989,843 dollars and prejudgment interest of $4,833,961, totaling $29,823,804.[113]

2. Legg Mason

On June 4, 2018, Legg Mason Inc. (Legg Mason), a Maryland-based investment management company, entered into an NPA with the DOJ to resolve an FCPA investigation into the company's participation in bribery of Libyan officials.[114] At the time of the conduct at issue, Legg Mason was listed in the (NYSE).

As part of the NPA, Legg Mason admitted that, through its subsidiary Permal Group Ltd. (Permal), it benefited from seven transactions that Société Générale secured on its behalf by paying bribes to Libyan public officials through a local "broker." Between 2005 and 2008, seven structured notes of a total value of approximately $950 million, linked to funds managed in whole, or in part, by Permal, were sold by Société Générale to Libyan State Agencies. For each transaction, Société Générale paid the local broker between 1.5 and 3 percent commission on the nominal amount of the investment for supposed "introductory" services. These payments totaled approximately $26.25 million.[115] Société Générale engaged in six other transactions that did not involve Permal (see description of Société Générale's DPA).

Legg Mason agreed to pay $64.2 million to resolve the criminal charges, including a $32,652,000 criminal penalty and $31,517,891.90 in disgorgement of profits. Legg Mason also enhanced its compliance program and agreed to report to the DOJ on continued enhancements to the program during the NPA's three-year term. While Legg Mason received no voluntary disclosure credit, it received full cooperation credit. The criminal penalty reflected a 25% discount off the bottom of the US Sentencing Guidelines fine range in light of this cooperation and a number of mitigating circumstances, including the fact that only two lower-level employees were involved and Legg Mason only earned one-tenth the profits of its co-conspirator Société Générale.

On August 27, 2018, Legg Mason agreed to the entry of a cease and desist order to resolve SEC charges that it violated the FCPA's internal control provisions in relation to the same conduct. Pursuant to the order, Legg Mason agreed to pay $27.6 million in disgorgement and $6.9 million in prejudgment interest. The SEC declined to impose a civil penalty in light of the criminal penalty Legg Mason agreed to pay to resolve the DOJ's charges.

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[112] *See* DOJ Non-Prosecution Agreement, *Credit Suisse (Hong Kong) Limited Criminal Investigation*, at A4-A5, (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.

[113] *See also* SEC Cease-and-Desist Order, *Credit Suisse Group AG* (July 5, 2018), § IV(B), https://www.sec.gov/litigation/admin/2018/34-83593.pdf.

[114] *See* DOJ Press Release, *Legg Mason Inc. Agrees to Pay $64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials* (Jun. 4, 2018) https://www.justice.gov/opa/pr/legg-mason-inc-agrees-pay-64-million-criminal-penalties-and-disgorgement-resolve-fcpa-charges.

[115] DOJ Non-Prosecution Agreement, *Re: Legg Mason, Inc. Criminal Investigation* (Jun. 4, 2018), ¶ 19, https://www.justice.gov/opa/press-release/file/1068036/download.

3. Panasonic and Panasonic Avionics Corp.

On April 30, 2018, the SEC and DOJ announced a settlement with Panasonic Corporation (Panasonic), a Japan-based company, and its subsidiary, Panasonic Avionics Corporation (PAC), the Company's in-flight entertainment unit based in Lake Forest, California. In connection with a Deferred Prosecution Agreement (DPA), PAC agreed to pay approximately $137.4 million in criminal penalties to the DOJ for violations of the FCPA's accounting provisions for knowingly and willfully causing Panasonic to falsify its books and records, while Panasonic agreed under a cease and desist order to pay approximately $143 million in disgorgement and pre-judgment interest to the SEC relating to anti-bribery, anti-fraud, books and records, and internal accounting control violations.[116]

Between 2007 and 2013, PAC contracted with third-party agents in the Middle East and Asia regions for the purpose of obtaining contracts with multiple airlines, including state-owned airlines. These agents were paid for out of a PAC executive's discretionary budget without meaningful oversight by Panasonic. In one instance, a PAC executive negotiated to provide a Middle Eastern foreign official a consulting position while the official was involved in negotiating a lucrative contract with PAC on behalf of a state-owned airline. According to the DOJ, PAC made $875,000 in payments to the same official over a six-year period, although the official did little to no work for the company. In another instance, PAC hired a consultant to an airline as a PAC consultant in order to obtain the airline's confidential non-public business information. Furthermore, PAC employees continued to covertly use agents in the Asia region that did not pass PAC's internal diligence requirements by hiring them as sub-agents of an approved agent. Executives and compliance personnel failed to address concerns despite apparent red flags, including risks identified by PAC's Internal Audit Department, and caused Panasonic to falsify its books and records through these activities.[117]

According to the SEC, as a result of PAC's actions, Panasonic failed to keep accurate books and records with respect to PAC's consultant and sales agent scheme (Panasonic was held accountable for anti-bribery violations based on the same scheme), lacked sufficient internal accounting controls (including over the PAC executive's discretionary budget and relating to the retention of consultants and agents), and made material fraudulent representations with respect to its net income based on a back-dated PAC agreement and misleading information provided to PAC's auditor (thus prematurely recognizing revenue).[118]

Under the terms of the DPA, PAC did not receive voluntary disclosure credit from the DOJ because disclosure occurred only after Panasonic was notified of the SEC

[116] *See* DOJ Press Release, *Panasonic Avionics Corporation Agrees to Pay $137 Million to Resolve Foreign Corrupt Practices Act Charges* (Apr.30, 2018), https://www.justice.gov/opa/pr/panasonic-avionics-corporation-agrees-pay-137-million-resolve-foreign-corrupt-practices-act; SEC Press Release 2018-73, *Panasonic Charged With FCPA and Accounting Fraud Violations* (April 30, 2018), https://www.sec.gov/news/press-release/2018-73.

[117] *See* Information, *United States of America v. Panasonic Avionics Corporation*, Case 1:18-cr-00118-RBW (Apr. 30, 2018), https://www.justice.gov/opa/press-release/file/1058471/download; Deferred Prosecution Agreement *United States of America v. Panasonics Avionics Corporation*, Case 1:18-cr-00118-RBW (Apr. 30, 2018), https://www.justice.gov/opa/press-release/file/1058466/download.

[118] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Panasonic Corporation*, Sec. Exch. Act of 1934 Release No. 83,128 (U.S. SEC Apr. 30, 2018), https://www.sec.gov/litigation/admin/2018/34-83128.pdf.

investigation, despite Panasonic becoming aware of the allegations through an internal investigation spurred by a prior whistleblower complaint and civil lawsuit. The DOJ, however, conferred a twenty percent discount off the low end of the applicable Guidelines due to PAC's cooperation and for undertaking significant remedial measures, such as the separation of several senior executives from PAC and PAC's agreement to retain an independent compliance monitor for two years followed by a year of self-reporting to the DOJ.[119] The SEC took into consideration Panasonic's efforts to replace PAC executives involved in the violations, to establish an Office of Compliance and Ethics (including the instatement of a new Chief Compliance Officer), and to improve accounting procedures and internal controls.[120]

4. Petrobras

On September 27, 2018, Petróleo Brasileiro S.A. (Petrobras) entered into a non-prosecution agreement with the DOJ.[121] At the same time, the SEC issued a cease and desist order against Petrobras[122] related to violations of the books and records and internal controls provisions of the FCPA in connection with the involvement of its executives and managers in facilitating payments to politicians and political parties in Brazil.[123] In a parallel settlement, Petrobras also reached agreement with Brazilian authorities in a concurrent investigation.

Petrobras, a Brazilian government-controlled oil and gas company with shares traded on the New York Stock Exchange, was at the center of "Operation Car Wash" (*Operação Lava Jato*), a large-scale investigation of public-sector corruption in Brazil that started as an investigation by the Brazilian Federal Police and Brazilian Prosecutor's Office into an alleged bid-rigging scheme in which proceeds were diverted to a number of political parties in then-President Rousseff's coalition. For additional information regarding the progress of Operation Car Wash, please see our 2014, 2015, 2016 and 2017 FCPA Year in Reviews.

Operation Car Wash has expanded over time to include a number of Petrobras contractors and politicians. The Petrobras settlement follows earlier settlements of other companies implicated in the investigation, including the construction firm Odebrecht SA (Odebrecht) and its majority-owned subsidiary Braskem SA (Braskem) for paying hundreds of millions of dollars in bribes to secure projects

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119 *See* Deferred Prosecution Agreement *United States of America v. Panasonics Avionics Corporation*, Case 1:18-cr-00118-RBW (Apr. 30, 2018), https://www.justice.gov/opa/press-release/file/1058466/download.

120 *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Panasonic Corporation*, Sec. Exch. Act of 1934 Release No. 83,128 (U.S. SEC Apr. 30, 2018), https://www.sec.gov/litigation/admin/2018/34-83128.pdf.

121 *See* DOJ Press Release, *Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations* (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations; Non-Prosecution Agreement, *In re Petroleo Brasileiro S.A.* (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download.

122 *See* SEC Press Release, *Petrobras Reaches Settlement with SEC for Misleading Investors* (Sept. 27, 2018), https://www.sec.gov/news/press-release/2018-215; Order Instituting Cease-and-Desist Proceedings, *In re Petroleo Brasileiro S.A.—Petrobras*, Sec. Exch. Act Release No. 84,295 (Sept. 27, 2018), https://www.sec.gov/litigation/admin/2018/33-10561.pdf.

123 *See* Non-Prosecution Agreement, *In re Petroleo Brasileiro S.A.*, Attachment A, ¶52 (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download.

around the world, including with Petrobras.[124] For further information regarding those settlements, please see our 2016 FCPA Year in Review.

Pursuant to its settlement with the DOJ, Petrobras admitted that its executives, a number of whom were political appointees, facilitated bid-rigging and kickback schemes in which contractors paid bribes in exchange for contracts with Petrobras.[125] Corrupt payments usually amounted to one to three percent of the contract value and were split among Petrobras executives, Brazilian politicians and political parties, and other individuals involved in facilitating these schemes.[126] The DOJ estimated that the total bribes paid between 2004 and 2012 in connection with the scheme amounted to more than $2 billion dollars, of which approximately $1 billion was directed to Brazilian politicians and political parties.[127]

The SEC found that the corrupt scheme spanned at least eight years, reflected a failure to implement internal controls, and resulted in material misstatements and omissions by Petrobras in its securities filings.[128] In particular, the SEC found that overinflated costs of infrastructure contracts falsely inflated the value of certain of the Company's assets in its financial statements, including its property, plant and equipment.[129] Petrobras agreed to pay a total penalty of $853,200,000 dollars, reflecting a 25% discount off the bottom of the sentencing guidelines for full cooperation and remediation. Eighty percent of that penalty ($682,560,000) was satisfied by payments to Brazilian authorities pursuant to the parallel resolution of the investigation in Brazil, with the remaining 20% paid in equal amounts to the DOJ and SEC ($85,320,000 to each agency). The amounts earmarked for Brazil will be paid into a special fund for social and educational programs to promote transparency and compliance in Brazil's public sector.

In addition to the penalty, Petrobras agreed to pay the SEC disgorgement of $711,000,000 and prejudgment interest of $222,473,797 dollars. The SEC determined that the disgorgement amount could be reduced and deemed satisfied by a payment up to the amount of the obligation in the class action Settlement Fund for *In re Petrobras Securities Litigation*, No. 14-cv-9662 (S.D.N.Y.), which is associated collateral litigation arising from the same conduct.[130] Petrobras noted that the disgorgement amount was paid already pursuant to a previous settlement in that securities litigation and that no payment would be made to the SEC beyond its share of the penalty.[131]

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124 *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.

125 *See* Non-Prosecution Agreement, *In re Petroleo Brasileiro S.A.*, Attach. A ¶¶ 14, 21, 28 (Sep. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download.

126 *See id.* ¶ 15.

127 *See id.* ¶ 17.

128 *See* Order Instituting Cease-and-Desist Proceedings, *In re Petroleo Brasileiro S.A.—Petrobras*, Sec. Exch. Act Release No. 84,295 ¶ 5 (Sep. 27, 2018), https://www.sec.gov/litigation/admin/2018/33-10561.pdf.

129 *See id.* ¶ 2.

130 *See id.* § IV (B)-(D).

131 *See* Petrobras, *Petrobras Reaches Coordinated Resolutions with Authorities in the United States and Agreement to Remit Bulk of Associated Payments to Brazil*, Investor Relations (Sept. 27, 2018), http://www.investidorpetrobras.com.br/en/press-releases/petrobras-reaches-coordinated-resolutions-authorities-united-states-and-agreement-remit-bulk.

The settlement has a number of highly unusual features, including use of an NPA to settle such a massive, long-term bribery scheme, treatment of Petrobras as much as a victim as a perpetrator, and crediting of a private civil settlement to satisfy a disgorgement obligation.

D. SEC Enforcement Actions

1. Beam Suntory

On July 2, 2018, the SEC issued a cease and desist order against Beam Suntory Inc. (Beam) alleging books and records and internal controls violations related to conduct by Beam's subsidiary in India, Beam Global Spirits & Wine (India) Private Limited (Beam India), between 2006 and 2012.[132] Beam is a Chicago-based producer of distilled beverages previously listed on the New York Stock Exchange (NYSE) through April 2014, when it was acquired by Japanese corporation Suntory Holdings Limited and subsequently delisted.

According to the SEC order, Beam India violated the books and records provision of the FCPA by falsely characterizing illicit payments to government officials as legitimate business expenses.[133] In particular, the order alleged that Beam India made improper payments through third-party promoters to officials at government-controlled retail stores and depots to secure and promote sales of its products, and falsely reported these expenses both at the subsidiary level, and as consolidated expenses in Beam's books and records under the label of "selling and distribution expenses."[134] In addition, the order alleged that Beam India made improper payments to excise officials to secure timely inspections of its manufacturing facility, and to secure and expedite label registrations for its products and warehouse licenses, disguising these payments including by reimbursing false invoices submitted by a third party agent.[135] The SEC noted that payments to excise officials included both payments to lower-level employees to ensure routine administrative processes (which would appear to be permissible under the FCPA's facilitating payments exception) and payments to senior-level officials who had discretion to issue or renew registrations and licenses necessary to distribute and sell Beam's products in India.[136]

The SEC order also found that Beam violated the internal controls provision of the FCPA by failing to devise and maintain a sufficient system of internal accounting controls.[137] The order alleged that Beam failed to timely respond to deficiencies identified in the course of a 2010 compliance review of Beam India by a global accounting firm and in further reviews conducted by an Indian law firm and a US law firm.[138] In the course of the review, the US law firm forwarded to Beam a July 2011 SEC enforcement action alleging FCPA violations by Diageo plc in India, a

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[132] *See* Order Instituting Cease-and-Desist Proceedings, *In re Beam Inc., n/k/a Beam Suntory Inc.*, SEC Exch. Act Release No. 83,575 (Jul. 2, 2018), https://www.sec.gov/litigation/admin/2018/34-83575.pdf.
[133] *See id.* ¶ 25.
[134] *See id.* ¶¶ 10-13.
[135] *See id.* ¶ 14, 16.
[136] *See id.* ¶ 14.
[137] *See id.* ¶ 27.
[138] *See id.* ¶¶ 18-21.

direct competitor of Beam's in India, arising from similar conduct identified at Beam.[139] Beam failed to conduct certain transactional testing and third-party due diligence recommended by its advisors.[140] Following complaints raised by former Beam employees, Beam conducted follow-on compliance review that led to an internal investigation that uncovered the "schemes conducted by Beam India management."[141]

Beam did not admit or deny the allegations contained in the SEC order,[142] but agreed to pay $8,181,838 dollars in disgorgement ($5,264,340), prejudgment interest ($917,498), and a civil monetary penalty ($2,000,000) to resolve the charges.[143] The SEC took into account Beam's self-disclosure, cooperation and remedial efforts in the cease and desist order.[144] Remedial efforts included, among others, ceasing business operations at Beam India until Beam determined it could operate Beam India compliantly; terminating certain employees and third-party sales promoters; and enhancing the company's compliance program.[145]

2. Dun & Bradstreet

On April 23, 2018, the SEC issued a cease and desist order against Dun & Bradstreet Corporation (D&B) relating to books and records and internal controls violations.[146] D&B is a Delaware corporation with a class of securities on the NYSE. D&B provides its users with access to business information, including credit reporting, through a global database. According to the Order, two D&B Chinese subsidiaries (HDBC, a joint venture, and Roadway) obtained access to commercial data through direct and indirect improper payments made to government officials, including employees of state-owned enterprises.

HDBC, a joint venture between D&B and Huaxia International Credit Consulting Co. Limited (Huaxia), was developed in an effort to grow D&B's China business. According to the Order, Huaxia was chosen as D&B's partner in part due to its government connections.[147] Although D&B's due diligence procedures noted that Huaxia used these government connections to receive access to highly-regulated and restricted commercial information (as opposed to using publicly available information), D&B "failed to address the information in the report" other than by providing a brief FCPA training and requiring certification for Huaxia executives.[148] The Order alleges that, because D&B was aware of the impropriety of paying officials to receive this information, "HDBC management used third-party agents to unlawfully obtain the [data] under the mistaken belief that using third parties would shield the company from any legal liability."[149] Despite awareness from D&B

[139] *See id.* ¶ 19.
[140] *See id.* ¶ 20.
[141] *See id.* ¶ 22.
[142] *See id.* § II.
[143] *See id.* § IV(B).
[144] *See id.* ¶¶ 28-29.
[145] *See id.*
[146] *See* Order Instituting Cease-and-Desist Proceedings, *In re Dun & Bradstreet Corporation*, SEC Exch. Act Release No. 83,088 (Apr. 23, 2018), https://www.sec.gov/litigation/admin/2018/34-83088.pdf.
[147] *See id.* ¶ 10.
[148] *See id.* ¶ 11.
[149] *See id.* ¶ 14.

management, HDBC was permitted to continue using third party agents to make improper payments from 2006 through mid-2012.[150]

Under a similar scheme, D&B's Roadway subsidiary, a provider of direct marketing services in China, improperly obtained information on Chinese citizens in violation of Chinese law and provided such information to businesses for use in marketing. Pre-acquisition due diligence identified this risk, but post-acquisition internal audit reviews failed to detect payments made to improperly acquire data. Although agents provided certifications that consumer data was obtained legally, D&B did not audit the agents or review their data sources to verify the accuracy of those certifications.[151] In addition, although D&B was made aware through its pre-acquisition due diligence process that sales representatives might share commissions in the form of "rebates" with "decision-maker[s]" to "drum up" business, D&B performed no further due diligence to determine whether improper payments were in fact being made to employees of private and state-owned customers.[152] Improper payments, recorded in D&B's records as "Pin Tui" (promotional expenses) continued to be paid by Roadway employees and third party agents from July 2009 through March 2012.[153]

D&B self-disclosed to both the SEC and the DOJ following a local raid of Roadway. As noted above in section IV.A.1, the DOJ issued a declination pursuant to the Corporate Enforcement Policy. The order acknowledged D&B's self-disclosure, cooperation, and remedial efforts in the investigation (including ceasing Roadway's operations, terminating employees involved in the misconduct, doubling the size of its internal audit and compliance teams, and enhancing the company's compliance program).[154] D&B neither admitted nor denied the SEC's findings, and agreed to pay just over $9.2 million to settle the charges (consisting of a $2 million civil money penalty, $6,077,820 in disgorgement, and $1,143,664 in pre-judgment interest).

3. Elbit Imaging

As reported in our 2017 FCPA Year in Review and 2018 Q1 Preview, 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.[155] 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

[150] *See id.* ¶ 18.
[151] *See id.* ¶ 22.
[152] *See id.* ¶ 21.
[153] *See id.* ¶ 25.
[154] *See id.* ¶¶ 31-33.
[155] *See* Order Instituting Cease-and-Desist Proceedings, *In re 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 Apr. 4, 2018).

documentation supporting the payments or identifying services actually rendered.[156] According to the SEC, "some or all of the funds may have been used to make payments to Romanian government officials or were embezzled."[157]

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 detail to reflect the transactions appropriately).[158] 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.[159] The SEC also alleged that Elbit and Plaza mischaracterized the payments as legitimate expenses.[160]

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.[161]

4. Eletrobras

On December 26, 2018, the SEC issued a cease and desist order against Centrais Eléctricas Brasileiras S.A. – Eletrobras (Eletrobras), a Brazilian power company that is majority owned by the Brazilian federal government and has shares traded on the New York Stock Exchange. Pursuant to the Order, Eletrobras agreed to pay a $2.5 million civil penalty, without admitting or denying liability, to settle charges that it violated the books and records and internal controls provisions of the FCPA due to activities of its majority-owned nuclear power subsidiary Eletronuclear. [162]

The SEC alleged that Eletrobras failed to devise and maintain sufficient internal controls, which allowed Eletronuclear to engage in an illicit bid-rigging and bribery scheme related to the construction of a nuclear power plant that inflated the costs of the infrastructure project.[163] Eletronuclear began renegotiation of a $4.6 billion civil construction contract for a nuclear power plant in 2009. The SEC alleged that several Brazilian government officials, including the former Eletronuclear president, other Eletronuclear officers, and at least two Brazilian political parties, received bribes from Brazilian construction companies related to the contract until suspension of construction activities in 2015. In exchange for bribes, Eletronuclear officers used their positions to authorize unnecessary contractors, inflate the costs of the

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156 *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.* ¶¶ 14, 17.

157 *See id.* ¶ 10.

158 *See id.* ¶¶ 18-19.

159 *See id.* ¶ 19.

160 *See id.* ¶ 20.

161 *See id.* ¶ 27.

162 *See* Order Instituting Cease-and-Desist Proceedings, *In re Centrais Elétricas Brasileiras S.A.*, SEC Exch. Act Release No. 84,973 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84973.pdf.

163 *See id.* ¶¶ 2-4.

project, and issue sham invoices that were used to make the improper payments.[164] The inflated contract prices and sham invoices were inaccurately recorded in Electronuclear's books and records as legitimate expenses for goods and services, and were consolidated into Electrobras's financial statements, violating the FCPA's books and records requirements.

The SEC noted that Eletrobras maintained ethical principles governing the hiring of suppliers based on legal, technical, quality, cost and timeliness criteria. However, the SEC noted that Eletrobras disclosed material weaknesses in its ability to maintain an effective control environment from 2009 to 2015, and the SEC alleged that requirements that payments be proportional to work performed were circumvented or ignored.[165]

When determining whether to accept the settlement, the SEC considered Eletrobras's cooperation and remediation, including disciplining employees involved in the misconduct and enhancing its internal accounting controls through, among other things, adopting new anti-corruption policies and procedures and addressing material weaknesses identified in annual reports to the SEC.[166]

5. Kinross Gold

As reported in our 2017 FCPA Year in Review and 2018 Q1 Preview, on March 26, 2018, the SEC announced that Kinross Gold Corporation (Kinross), a Canada-based gold-mining company and "issuer" under the FCPA, would pay a $950,000 civil penalty to settle alleged violations of the FCPA's books and records and internal controls provisions.[167]

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."[168] 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.[169] 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

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164 *See id.* ¶¶ 10, 12, 17.
165 *See id.* ¶¶ 13–15.
166 *See id.* at 5.
167 *See* 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 Apr. 4, 2018).
168 *See* Order Instituting Cease-and-Desist Proceedings, *In re 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 Apr. 4, 2018).
169 *See id.* ¶¶ 1, 2, 6-12.

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.[170] In addition, the order alleges that in 2014, after implementing enhanced internal 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.[171] Kinross also failed to adequately train key employees to recognize corruption risks.[172] 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.[173] 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.[174]

6. Polycom

On December 26, 2018, the SEC instituted cease and desist proceedings against Polycom, Inc. (Polycom) (a California-headquartered communications solutions company with common stock quoted on the Nasdaq Global Select Market) based on violations of the FCPA's books and records and internal accounting controls provisions between 2006 and 2014.[175]

According to the SEC's cease and desist order, Polycom's wholly-owned China Subsidiary, Polycom Communications Solutions (Beijing) Co., Ltd. (China) (Polycom China) inaccurately recorded discounts provided to Chinese distributors, which Polycom China management knew were used to make improper payments to Chinese officials. These payments were consolidated and reported by Polycom in its books and records. Polycom China circumvented Polycom's centralized customer relations management (CRM) database by requesting discounts through a "non-Polycom sales management system," recording information about the reason for the discount. Polycom China managers routinely approved the payments, knowing their improper purpose, and re-logged the information into Polycom's centralized CRM

[170] *See id.* ¶ 12.
[171] *See id.* ¶¶ 14-20.
[172] *See id.* ¶ 21.
[173] *See id.* ¶ 22.
[174] *See* 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 Dec. 28, 2018).
[175] *See* Order Instituting Cease-and-Desist Proceedings, *In rePolycom, Inc.*, Sec. Exch. Act Release No. 84,978 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84978.pdf.

database with inaccurate descriptions that attributed the discounts to legitimate reasons. Despite Polycom China's circumvention of Polycom's controls and lack of evidence that anyone outside Polycom China was aware of the payments, the SEC found that "Polycom failed to devise and maintain controls" sufficient to prevent and detect these issues. The SEC also cited other Polycom compliance failures, including that anti-corruption training materials had not been translated into Mandarin and that Polycom failed to follow up when Polycom China personnel attended such training. Furthermore, although Polycom became aware of possible concerns relating to a Chinese distributor as part of a due diligence review, it failed to complete this review and allowed Polycom China to continue using the distributor.

The SEC credited Polycom's self-disclosure, cooperation, and remedial efforts, although the SEC noted that Polycom was the subject of a 2015 cease and desist order arising from the failure to disclose to investors a number of substantial personal perks paid to the Polycom's former CEO.[176] Polycom was ordered to pay a civil penalty of $3.8 million, in addition to approximately $12.5 million in disgorgement and prejudgment interest. Notably, although the conduct occurred between 2006, and 2014, disgorgement amounts covered only profits earned within the past five years (in accordance with the Supreme Court's 2017 *Kokesh* ruling and pursuant to 28 U.S.C. § 2462).[177] Additional profits (in the amount of $20.3 million) were disgorged to the US Treasury and US Postal Inspection Service as part of DOJ's declination (discussed under Section IV.A.4).

7. Sanofi

On September 4, 2018, Sanofi, a French pharmaceutical company with securities traded on the New York Stock Exchange, resolved SEC allegations related to violations of the FCPA's accounting provisions associated with its Kazakhstan and Middle East subsidiaries. Sanofi agreed to pay $25.2 million in penalties to resolve the charges.

The SEC's Order alleged that Sanofi bribed public officials to influence the award of tenders at public institutions and boost sales of its products through increased prescriptions. To cover the bribes, Sanofi allegedly submitted false travel and entertainment reimbursement claims and engaged health care professionals as "consultants" without providing documentation of services provided. [178]

Between 2007 and 2012, Sanofi's Kazakh affiliate provided credit notes and discounts of 20-30 percent of product value to distributors who submitted bids in public tenders, and an agreed portion of that value was kicked back to Sanofi employees and distributed to Kazakh officials. The kickbacks were tracked in internal spreadsheets and referred to as "marzipans."[179] During the relevant period, tender sales in Kazakhstan increased by more than 200 percent. Sanofi had no standardized

[176] *See* Order Instituting Cease-and-Desist Proceedings, *In re Polycom Inc.*, Sec. Exch. Act Release No. 74,613 (Mar. 31, 2015), https://www.sec.gov/litigation/admin/2015/34-74613.pdf.

[177] For more information, see our 2017 FCPA Mid-Year Review.

[178] *See* Order Instituting Cease-and-Desist Proceedings, *In re Sanofi*, Sec. Exch. Act Release No. 84017, Accounting and Auditing Enforcement, at 2 (Sept. 4, 2018), https://www.sec.gov/litigation/admin/2018/34-84017.pdf.

[179] *See id.* at 3.

commercial policy for distributor discounts and did not review discounts approved by local management.[180]

Sanofi's subsidiary in the Levant region provided "sponsorships, gifts, donations, product samples, consulting agreements, peer-to-peer meetings, clinical studies, and grants" to health care providers of public institutions to increase prescriptions of Sanofi products from 2011 to 2013. In addition, the subsidiary also made payments to influential health care providers in the private sector for training programs and speaking events. Sanofi failed to obtain sufficient documentation of the receipt of services by the public or private sector health care providers.[181]

From 2012 to 2015, sales managers and sales representatives of Sanofi's subsidiary in the Gulf region engaged in a scheme to submit false travel and entertainment reimbursement claims and to pool the resulting funds in a slush fund that was used to pay private sector health care providers to increase prescriptions of Sanofi products. The false reimbursement claims were based on "fake round table meetings" with health care providers that did not occur, supported by doctored receipts from "collusive vendors" that facilitated the scheme. Sanofi failed to conduct a fall audit of the subsidiary's activities from 2007 to 2015, when an internal audit identified issues with both distributor- and Sanofi-sponsored round table events, including use of cash and lack of adequate supporting documentation to support payments.[182]

Based on these alleged control failures and the inaccurate booking of payments as legitimate sales and marketing expenses, which were consolidated in Sanofi's books and records, the SEC alleged violations of the FCPA's books and records and internal accounting control provisions.[183] Despite allegations that payments were made to win public tenders and increase prescriptions, including by public sector health care providers, the SEC did not allege a violation of the FCPA's anti-bribery provisions, and did not cite any use of interstate commerce or conduct in US territory that would have supported such a charge. To resolve the matter, Sanofi agreed to pay $17.5 million in disgorgement, $2.7 in interest, and a $5 million civil penalty. Sanofi was also subject to a two-year self-reporting period on the status of its compliance remediation efforts.[184]

The SEC considered the remedial acts promptly taken by Sanofi, including termination and discipline of employees, and its cooperation throughout the investigation, in reaching this resolution.[185] The SEC also took into consideration Sanofi's efforts to independently enhance its compliance program and internal controls prior to the SEC's investigation, including by increasing its centralized and local compliance staff and enhancing its policies, procedures, training, and audits.[186]

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180 *See id.* at 4.
181 *See id.* at 4-5.
182 *See id.* at 5-6.
183 *See id.* at 9.
184 *See id.* at 2, 7, 9.
185 *See id.* at 6.
186 *See id.*

The DOJ investigated these allegations as well, but Sanofi indicated the DOJ closed its investigation in early 2018.[187]

8. Stryker Corp.

On September 28, 2018, Stryker Corporation (Stryker), a Michigan company that manufactures and distributes medical devices, agreed to appoint an independent compliance consultant and to pay the SEC a civil monetary penalty of $7,800,000 to settle charges that it violated the internal controls and books and records provisions of the FCPA. The alleged violations arose out of Stryker's use of distributors and sub-distributors in India, China, and Kuwait.[188]

The SEC alleged a violation of the FCPA's internal controls provision arising out of Stryker's (and its dealers') dealings with private hospitals in India. Specifically, Stryker used distributors to sell orthopedic products to dealers in India at negotiated profit margins based on prices Stryker had agreed directly with the private hospital end users. The SEC found that the dealers then issued "inflated invoices" at the request of "private hospitals," reflecting amounts higher than the hospitals negotiated with Stryker or paid the dealers, and that the hospitals passed on the higher prices to patients and insurance companies. This overbilling practice allegedly violated Stryker's policy prohibiting "improper payments to government or non-government officials, employees, or entities." The SEC noted that, despite complaints about overbilling and a 2012 Stryker internal audit that uncovered the practice at one of Stryker's distributors, Stryker "did not act to determine the scope of dealer-inflated invoices" until it conducted additional dealer audits in 2015. The SEC found a violation of the internal controls provision based on Stryker's failure to adopt controls to "detect, address, and prevent this widespread practice at the dealer level."[189] In addition, the SEC alleged that Stryker violated the FCPA's books and records provisions as a result of Stryker India failing to maintain any documentation for 27 percent of sampled "high-risk and compliance-sensitive accounts and payments" during the period 2010 to 2015, such as consulting fees, travel, and other benefits provided to Indian health care professionals, and inadequate supporting documentation for other compliance-sensitive transactions.[190]

The SEC also found internal controls violations arose in China from Stryker's "failure to vet, approve, train, and monitor its distributors and sub-distributors in China in accordance with the company's policies." While the SEC did not cite any evidence of actual bribery, it alleged that these compliance failures "increased the risk of improper payments in connection with the sale of Stryker products."

In Kuwait, Stryker used a distributor to sell orthopedic products to the Kuwait Ministry of Health, and the SEC found that the distributor made over $32,000 in

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[187] *See* Sanofi, Annual Report (Form 20-F) (Mar. 9, 2018) https://www.sec.gov/Archives/edgar/data/1121404/000119312518073307/d466787d20f.htm (last accessed Oct. 30, 2018).

[188] *See* Order Instituting Cease-and-Desist Proceedings, *In re Stryker Corp.*, Sec. Exch. Act Release No. 84,308 (Sept. 28, 2018), https://www.sec.gov/litigation/admin/2018/34-84308.pdf; *see also* SEC Press Release, *SEC Charges Stryker A Second Time for FCPA Violations* (Sept. 28, 2018), https://www.sec.gov/news/press-release/2018-222 (last accessed Nov. 18, 2018).

[189] *See id.* ¶¶ 4–5, 8.

[190] *See id.* ¶¶ 3, 8.

"improper" per diem payments to Kuwaiti health care providers to attend Stryker events "when Stryker had directly paid the costs for lodging, meals, and local transportation for these individuals." In addition to the per diems, the SEC found a violation of the internal controls provisions arising from the failure "to sufficiently implement policies to test or otherwise assess whether the Kuwait Distributor would allow the company to exercise its audit right to review records."[191]

The SEC's pursuit of charges in this matter and its imposition of a compliance consultant may have been driven in part by Stryker's status as a recidivist. In October 2013, Stryker paid the SEC $13.3 million to settle charges that it violated the FCPA's books and records and internal controls provisions by making and incorrectly describing unlawful payments from 2003 to 2008 to government employees, including public health care professionals, in Mexico, Poland, Romania, Argentina, and Greece.[192] In agreeing to the 2013 settlement, the SEC considered Stryker's implementation of a "company-wide anti-corruption compliance program" that included, among other things, specific documentation requirements for high-risk transactions, compliance monitoring and auditing, and enhanced financial controls and governance.[193]

9. United Technologies

On September 12, 2018, United Technologies Corporation (UTC) agreed to pay to the SEC, pursuant to a cease and desist order and without admitting or denying liability, $9,067,142 in disgorgement, $919,392 in pre-judgment interest, and a $4 million civil penalty to settle alleged violations of the anti-bribery, books and records, and internal controls provisions of the FCPA.[194] UTC is a public company headquartered in Connecticut that designs, manufactures, and markets high-technology products and services to the building systems and aerospace industries.

The SEC alleged that a UTC subsidiary used sham subcontractors and intermediaries to disguise payments to government officials in Azerbaijan in exchange for contracts worth over $14 million to install elevators in public housing units.[195] Among other things, the SEC cited the lack of due diligence on the third parties, the high value of the payments (or of the discount for re-sellers) relative to the total contract, and the lack of documentation of services when determining that the payments were for an improper purpose.[196] The SEC noted that management and Legal personnel at the UTC subsidiary ignored red flags related to the intermediaries, including one instance when local Legal and Finance personnel approved a distributorship agreement directly with the government agency responsible for the contracts.[197] The SEC also found that the Chinese branch of the same UTC subsidiary, through majority-owned joint ventures, used a distributor to participate in a kickback scheme that passed

191 *See id.* ¶¶ 6-8, 20-21.
192 *See id.* ¶ 10.
193 *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, SEC Exch. Act Release No. 70,751, ¶ 39 (Oct. 24, 2013); https://www.sec.gov/litigation/admin/2013/34-70751.pdf (last accessed Nov. 18, 2018).
194 *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of United Technologies Corporation*, SEC Exch. Act Release No. 84,087 (Sept. 12, 2018), https://www.sec.gov/litigation/admin/2018/34-84087.pdf (last accessed Nov. 19, 2018).
195 *See id.* ¶¶ 2, 8, 23, 36.
196 *See id.* ¶¶ 9, 10.
197 *See id.* ¶ 14, 16–21.

$98,000 to an employee and an official at a Chinese state-owned bank in exchange for a contract to install elevators at the bank.

Moreover, the SEC alleged that International Aero Engines, a majority-owned joint venture of a UTC division, made payments to a Chinese agent from 2009 to 2013 while disregarding a "substantial risk" that the agent used the money to pay Chinese officials at a state-owned airline for confidential information related to ongoing public tenders for aircraft engines.[198] The agent procured information from Chinese government officials marked proprietary and confidential, and UTC officials failed to inform the Legal department despite a UTC policy requiring consultation when an employee received proprietary information from outside the company.[199] The SEC noted the agent's lack of qualifications and experience, the lack of due diligence, success fee commission, and the payment of large cash advances without documentation for an "office expansion" and "sponsorship" of golf and other activities as factors tending to show a high risk that the payments would be diverted to government officials.[200] Some of the golf sponsorship funds were used to purchase gifts, such as iPads and luggage, for Chinese airline executives. The Chinese official responsible for providing the information was thereafter arrested for corruption, and UTC halted payments to the agent after Chinese media reported that the sales agent made improper payments to the official.[201]

In addition to the alleged conduct in Azerbaijan and China, the SEC found that UTC businesses improperly provided trips and gifts to foreign officials from China, Kuwait, South Korea, Pakistan, Thailand, and Indonesia.[202] These gifts and trips allegedly were provided in an effort to retain business in these countries and improperly recorded as legitimate business expenses. Trips that ostensibly were organized for officials to inspect equipment and facilities at times consisted purely or disproportionately of leisure time and entertainment. The SEC found that UTC employees frequently circumvented UTC controls requiring the Legal Department to review and approve travel and entertainment to foreign officials by excluding the leisure component of travel from the request for approval or by including travel as a cost component of a contract that was not submitted for approval.[203]

In its Order, the SEC credited UTC for its self-disclosure, cooperation with the enforcement authorities, and remedial efforts.[204]

10. Vantage Drilling International

On November 19, 2018, the SEC announced a settlement with Houston-based Vantage Drilling International (Vantage) for alleged internal accounting control violations by its predecessor Vantage Drilling Company (VDC).[205] The SEC alleged that VDC failed to implement adequate controls with regard to transactions with

[198] *See id.* ¶ 25-28, 30.
[199] *See id.* ¶ 27.
[200] *See id.* ¶¶ 24, 26.
[201] *See id.* ¶ 30.
[202] *See id.* ¶ 2.
[203] *See id.* ¶ 39.
[204] *See id.* at 10.
[205] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vantage Drilling International*, Sec. Exch. Act Release No. 84,617 (Nov. 19, 2018), https://www.sec.gov/litigation/admin/2018/34-84617.pdf.

an individual who was VDC's "former outside director, largest shareholder, and only supplier of drilling assets" (the Director) and with regard to an agent. The Director and agent agreed to make payments to Petrobras officials to obtain drilling contracts for VDC. VDC allegedly failed to conduct appropriate due diligence in light of heightened bribery risks in the oil and gas sector in Brazil, and failed to respond to red flags surrounding both individuals and the transactions. The investigation arose out of information obtained from targets of Brazil's "Operation Car Wash" investigation, through which VDC's agent and Director were charged for their role in a bribery scheme involving Petrobras officials.[206]

As a result of Operation Car Wash, Petrobras cancelled the contract with VDC, which had realized profits of $106 million at that time. As a result of the loss of the Petrobras revenue, Vantage (which held VDC's debt following a restructuring agreement) commenced bankruptcy proceedings.[207]

Vantage neither admitted nor denied the allegations, but agreed to disgorge $5,000,000 to the SEC to settle the matter (the disgorgement amount and the SEC's decision not to impose a penalty were based on "Vantage's current financial condition and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities."). [208] The SEC also took into consideration Vantage's cooperation and remedial efforts, including corporate restructuring and replacement of its management and compliance team, termination of the contract with the agent, reviewing its anti-corruption policy and procedures (as well as its relationships with third parties), and committing additional resources to its compliance and internal audit functions.

[206] *See id.* ¶¶20-21.
[207] *See id.* ¶ 23.
[208] *See id.* ¶ 28.

IV. 2018 Individual Enforcement Actions

A. DOJ Enforcement Actions

1. 1MDB

In October 2018, financiers Jho Low and Roger Ng were indicted for conspiring to violate the FCPA by paying bribes to various Malaysian and Abu Dhabi officials, as well as conspiring to launder billions of dollars embezzled from Malaysia's state-owned investment development fund, 1Malaysia Development Berhad (1MDB).[209] Ng was also charged with conspiring to violate the FCPA by circumventing the internal accounting controls of Goldman Sachs, which underwrote more than $6 billion in 1MDB bonds in 2012 and 2013 while Ng was employed there. Ng was arrested in Malaysia at the request of the United States, but Low remains at large.[210]

Separately, in August 2018, Tim Leissner, the former Southeast Asia Chairman of Goldman Sachs, pleaded guilty to a two-count criminal information charging him with conspiring to launder money and conspiring to violate the FCPA by bribing various Malaysian and Abu Dhabi officials and circumventing Goldman Sachs' internal accounting controls.[211] Leissner has been ordered to forfeit $43.7 million as a result of his crimes.[212] He is scheduled to be sentenced on June 28, 2019.[213]

According to court documents, Low, Ng, Leissner, and others conspired to bribe government officials to obtain and retain lucrative business deals for Goldman Sachs, and to launder the proceeds of this criminal conduct through the US financial system by purchasing real estate and artwork, and funding major Hollywood films.[214] The conspiracy was achieved by leveraging Low's relationships with government officials, including a high-ranking Malaysian official with authority to approve 1MDB's business decisions, as well as the payment of hundreds of millions in bribes to steer business toward Goldman Sachs.[215] In total, more than $2.7 billion was misappropriated from 1MDB.[216] The high-ranking 1MDB official was identified by news reports as Malaysia's

[209] Indictment, *United States v. Low Taek Jho and Ng Chong Hwa*, No. 18-cr-00538 (MKB) (E.D.N.Y. Oct. 3, 2018), https://www.justice.gov/opa/press-release/file/1106931/download.

[210] DOJ Press Release, *Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes* (Nov. 1, 2018), https://www.justice.gov/opa/pr/malaysian-financier-low-taek-jho-also-known-jho-low-and-former-banker-ng-chong-hwa-also-known.

[211] Information, *United States v. Leissner*, No. 18-cr-00439 (MKB) (E.D.N.Y. Aug. 28, 2018), https://www.justice.gov/opa/press-release/file/1106936/download.

[212] DOJ Press Release, *Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes* (Nov. 1, 2018), https://www.justice.gov/opa/pr/malaysian-financier-low-taek-jho-also-known-jho-low-and-former-banker-ng-chong-hwa-also-known.

[213] Scheduling Order, *United States v. Leissner*, No. 18-cr-00439 (MKB) (E.D.N.Y. Jan. 14, 2019).

[214] Indictment, *United States v. Low Taek Jho and Ng Chong Hwa*, No. 18-cr-00538 (MKB) (E.D.N.Y. Oct. 3, 2018).

[215] *Id.*

[216] *Id.*

former Prime Minister and head of 1MDB, Najib Razak.[217] Razak has been charged with a variety of corruption and money laundering charges in Malaysia, but no trial date has been set and he has not yet been charged in the United States.[218]

2. Donville Inniss

On August 3, 2018, the former Minister of Industry of Barbados, Donville Inniss, was arrested and charged in the Eastern District of New York with laundering bribes allegedly received from a Barbadian insurance company, Insurance Corporation of Barbados Ltd. (ICBL), in exchange for official action taken on behalf of the company.[219] The indictment alleges that Inniss, who is a US legal permanent resident, accepted the bribes in exchange for using his position as a member of the Barbadian Parliament to secure two government contracts for the insurance company.[220] It further alleges that Inniss laundered approximately $36,000 in illicit bribes through a US bank in the name of a dental company located in New York in violation of the Barbados Prevention of Corruption Act and US anti-money laundering statute. The case is set to go to trial in October 2019.[221] To date, no pre-trial motions have been filed.

In August 2018, two former executives of ICBL were also charged with money laundering and conspiracy in connection with the unlawful scheme – Ingrid Innes (the former CEO of ICBL) and Alex Tasker (the former Senior Vice President of ICBL).[222] The indictment, which was unsealed in January 2019, alleges that Innes, a Canadian citizen, and Tasker, a Barbadian citizen, laundered approximately $36,000 in bribes that they paid to Inniss.[223]

3. Chi Ping Patrick Ho

As reported in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, in November 2017, Patrick Ho (Hong Kong's former home secretary) and Cheikh Gadio (the former foreign minister of Senegal) were both charged with FCPA violations, money laundering, and conspiracy in connection with two separate schemes to bribe high-level African officials.[224] The complaint alleged that Ho and Gadio conspired to bribe high-level officials in Chad and Uganda in exchange for business advantages for a Chinese oil and gas company.[225] At the time, Ho was the head of an energy non-governmental organization based in Hong Kong and Virginia, which was funded by the Chinese oil and gas company.[226] In April 2018, Ho filed a motion

[217] The Guardian, *US justice department charges former Goldman bankers in 1MDB scandal* (Nov. 1, 2018), https://www.theguardian.com/world/2018/nov/01/malaysia-1mdb-scandal-us-justice-department-charges-former-goldman-bankers.
[218] *Id.*
[219] Indictment, *United States v. Donville Inniss*, No. 18-cr-00134-KAM (E.D.N.Y. Mar. 15, 2018), https://www.justice.gov/opa/press-release/file/1085546/download.
[220] *Id.*
[221] Order Granting Motion to Continue, *United States v. Donville Inniss*, No. 18-cr-00134-KAM (E.D.N.Y. Feb. 12, 2019).
[222] DOJ Press Release, *Former Chief Executive Officer and Senior Vice President of Barbadian Insurance Company Charged with Laundering Bribes to Former Minister of Industry of Barbados* (Jan. 29, 2019), https://www.justice.gov/opa/pr/former-chief-executive-officer-and-senior-vice-president-barbadian-insurance-company-charged.
[223] Superseding Indictment, *United States v. Inniss et al.*, No. 18-00134 (E.D.N.Y. Aug. 22, 2018).
[224] 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.
[225] *Id.*
[226] *Id.*

to dismiss certain FCPA counts, arguing that he was improperly charged under both the domestic concern and territorial jurisdiction provisions of the FCPA for the same conduct.[227] The judge rejected this argument, finding that although the FCPA's territorial jurisdiction provision (prohibiting bribery within US territory) excludes issuers or domestic concerns (which are covered by the issuer and domestic concern provisions), it does not exclude the officers, directors, and agents of a domestic concern, and therefore the government could charge Ho under both jurisdictional theories.[228] In December 2018, a jury convicted Ho on all counts except for one money laundering count.[229] He is set to be sentenced on March 14, 2019.[230] Gadio, who acted as an intermediary between Ho and the African officials, testified against Ho pursuant to a non-prosecution agreement in exchange for dismissal of the case against him.[231]

4. Colombian Anti-corruption Agency

On August 14, 2018, Luis Gustavo Moreno Rivera, the former National Director of Anti-Corruption in Colombia, and Leonardo Luis Pinilla Gomez, a Colombian attorney, pleaded guilty in the Southern District of Florida to conspiracy to launder money with the intent to promote foreign bribery.[232] In November 2016, Moreno and Pinilla approached an unnamed cooperator, the Governor of the Cordoba region in Colombia, and offered to obstruct the corruption investigation against him in exchange for a bribe payment.[233]

In June 2017, Moreno and Pinilla traveled to Miami, Florida to meet with the cooperator, who under the direction of DEA agents, provided Moreno and Pinilla with a $10,000 deposit of bribe money.[234] Moreno claimed that he could control an investigation into the cooperator by inundating his prosecutors with work so they would be unable to focus on the cooperator.[235] Moreno and Pinilla requested a total payment of 400 million Colombian pesos (the equivalent of approximately $132,000) with an additional $30,000 to be paid prior to Moreno's departure from the United States.[236] Both Moreno and Pinilla were arrested in Colombia pursuant to an Interpol Red Notice and extradited back to the United States. [237] On January 2, 2019, Moreno and Pinilla were sentenced to four and two years in prison, respectively.[238]

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[227] Defendant's Memorandum of Law in Support of His Motion to Dismiss Count 1 and Counts 4 through 8 of the Indictment, *United States v. Ho*, Nos. 17-cr-779 (KBF) (S.D.N.Y. Apr. 16, 2016).

[228] *See* Hearing Tr., *United States v. Ho*, Nos. 17-cr-779 (KBF) (S.D.N.Y. July 24, 2018), at 15-19, ECF No. 108.

[229] *See* DOJ Press Release, *Patrick Ho, Former Head Of Organization Backed By Chinese Energy Conglomerate, Convicted Of International Bribery, Money Laundering Offenses* (Dec. 5, 2018), https://www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-convicted.

[230] *Id.*

[231] Complaint/Removal Dismissal, *United States v. Ho*, No. 17-mj-08611-UA-2 (S.D.N.Y. Sept. 14, 2016);Matthew Goldstein, *Ex-Hong Kong Official Convicted in Bribe Case Involving Chinese Oil Company,* New York Times (Dec. 5, 2018), https://www.nytimes.com/2018/12/05/business/cefc-china-patrick-ho.html.

[232] DOJ Press Release, *Colombia's Former National Director of Anti-Corruption and a Foreign Attorney Plead Guilty to Participating in a Conspiracy to Launder Money in Order to Promote Foreign Bribery* (Aug. 14, 2018), https://www.justice.gov/usao-sdfl/pr/colombia-s-former-national-director-anti-corruption-and-foreign-attorney-plead-guilty.

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] DOJ Press Release, *Colombia's Former National Director of Anti-Corruption and a Foreign Attorney Sentenced to Prison for Participating in a Conspiracy to Launder Money in Order to Promote Foreign Bribery* (Jan. 2, 2019), https://www.justice.gov/usao-sdfl/pr/colombia-s-former-national-director-anti-corruption-and-foreign-attorney-sentenced.

5. Harder – ERBD Matter

As reported in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, Dmitrij Harder, a Russian national and former owner and President of the Chestnut Consulting Group, was sentenced to five years in prison after pleading guilty to two counts of violating the FCPA. Harder admitted to paying $3.5 million in bribes to an official with the European Bank for Reconstruction and Development (EBRD) in return for the bank's approvals of financing applications submitted by Harder's clients.[239] Following his arrest, Harder cooperated with prosecutors as they pursued corruption charges against his former clients. According to reports, counsel for Harder expressed outrage at the sentence in light of his cooperation with investigators, despite the sentence being on the lower end of the US Sentencing Guidelines range of 57 to 71 months.[240] On November 8, 2018, the US Court of Appeals for the Third Circuit affirmed the 60-month sentence.[241] The panel found that the district court had given meaningful consideration to Harder's mitigation argument and thus affirmed the decision below. In response to the panel's judgment, Harder filed a petition for rehearing.[242] On January 25, 2019, the Third Circuit again affirmed Harder's 60-month sentence.[243]

6. Haiti Port Development

In Steptoe's 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, we reported on a case involving retired US Army Colonel Joseph Baptiste, who was indicted for conspiracy to violate the FCPA and the Travel Act, violating the Travel Act, and conspiracy to commit money laundering.[244] On October 30, 2018, DOJ filed a superseding indictment charging Roger Richard Boncy with the same crimes and adding him as a co-conspirator to the case.[245] According to the DOJ, Baptiste and Boncy solicited bribes from undercover FBI agents in connection with a proposed project to develop a port in Haiti. As part of the scheme, the men told agents that they would funnel payments to Haitian officials through a non-profit controlled by Baptiste in order to secure government approval of the project. Baptiste and Boncy are alleged to have received $50,000 from undercover agents to pay bribes to Haitian officials and reportedly intended to seek additional money to use for future bribe payments in connection with the port project.[246] Both men have pleaded not guilty, and are scheduled to begin trial on June 3, 2019.

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239 Matt Fair, *3rd Circ. OKs 60-Month FCPA Sentence In $3.5M Bribery Case*, LAW360 (Nov. 9, 2018), https://www.law360.com/articles/1100585/3rd-circ-oks-60-month-fcpa-sentence-in-3-5m-bribery-case (last accessed Jan. 16, 2019).

240 *Id.*

241 Opinion, *United States v. Harder*, No. 17-2698 (3d Cir. Nov. 8, 2018), http://www2.ca3.uscourts.gov/opinarch/172698np.pdf (last accessed Jan. 16, 2019).

242 Appellant Harder's Petition for Panel Rehearing, *U.S. v. Harder*, No. 17-2698 (On appeal from judgment of conviction and sentence in No. 2:15-cr-001-01 (E.D.Pa.), https://globalinvestigationsreview.com/digital_assets/7cc52539-a1e9-4800-8fdc-f6bc323e5904/E.C.F.-3rd-Cir.-17-02698-dckt-_000-filed-2018-11-20.pdf (last accessed Jan. 16, 2019).

243 Order of US Court of Appeals, *United States v. Dimitrij Harder*, No. 17-2698 (On appeal from judgment of conviction and sentence in No. 2:15-cr-001-01 (E.D.Pa.), ECF No. 198.

244 Indictment, *United States v. Baptiste*, 17-cr-10305-ADB (D. Mass. Oct. 4, 2017).

245 DOJ Press Release, *Businessman Indicted for Conspiring to Bribe Senior Government Officials of the Republic of Haiti* (Oct. 30, 2018), https://www.justice.gov/opa/pr/businessman-indicted-conspiring-bribe-senior-government-officials-republic-haiti (last accessed Jan. 16, 2019).

246 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 Jan. 16, 2019).

7. Honduran Institute of Social Security

On October 3, 2018, Carlos Alberto Zelaya Rojas, a Honduran citizen residing in the New Orleans area, was sentenced to 46 months in federal prison for conspiring to launder bribe payments and Honduran public funds into the United States.[247] According to the DOJ, Carlos Zelaya conspired with his brother, Mario Zelaya, the former Executive Director of the Honduran Institute of Social Security, who in 2014 was charged in Honduras on bribery and money-laundering charges, to launder over $1.3 million in bribes. These bribes were paid by two Honduran businessmen for the benefit of Mario Zelaya.[248] Funds were laundered into the United States through international wire transfers and were used to purchase real estate, including commercial property, in the New Orleans area. In an effort to conceal the illicit source of the funds and Mario Zelaya's involvement, certain properties were titled in the names of companies nominally controlled by Carlos Zelaya.

Moreover, as part of the conspiracy, Carlos Zelaya used his brother's high-ranking official position to profit from lucrative Honduran government contracts and then laundered the misappropriated funds. Under the terms of the plea agreement, Carlos Zelaya agreed to forfeit the real estate and pleaded guilty to one count of conspiracy to commit money laundering.[249]

8. Macau Conference Center

Our 2016 FCPA Year in Review and 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview reported on the indictment of Macau real estate developer Ng Lap Seng for his alleged bribery of former President of the UN General Assembly John W. Ashe, and former deputy UN ambassador from the Dominican Republic, Francis Lorenzo. In November 2016, Seng was indicted for FCPA violations stemming from his 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. On July 27, 2017, Seng was convicted on all counts, including two counts of violating the FCPA's anti-bribery provisions, one count of paying bribes and gratuities, one count of money laundering, and two counts of conspiracy.[250] On May 11, 2018, Seng was sentenced to 48 months in prison for his role in the bribery scheme.[251]

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247 DOJ Press Release, *Honduran Man Pleads Guilty to Conspiring to Launder Over $1 Million in Bribes and Funds Misappropriated From the Honduran Social Security Agency*, (June 28, 2018), https://www.justice.gov/opa/pr/honduran-man-pleads-guilty-conspiring-launder-over-1-million-bribes-and-funds-misappropriated (last accessed Jan. 16, 2019); Judgment, *United States v. Carlos Alberto Zelaya Rojas*, No. 2:18-cr-00086 (E.D. La. October 3, 2018) (ECF No. 45).

248 *Id.*; Indictment, *United States v. Carlos Alberto Zelaya Rojas*, No. 2:18-cr-00086 (E.D. La. April 27, 2018) (ECF No. 1).

249 DOJ Press Release, *Honduran Man Sentenced to More Than Three Years in Prison for Conspiring to Launder Over $1 Million in Bribes and Funds Misappropriated from the Honduran Social Security Agency* (Oct. 3, 2018), https://www.justice.gov/opa/pr/honduran-man-sentenced-more-three-years-prison-conspiring-launder-over-1-million-bribes-and (last accessed Jan. 16, 2019).

250 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-sentenced-prison-role-scheme-bribe-united (last accessed Jan. 19, 2019); Verdict Form, *United States v. Ashe et al.*, 1:15-CR-00706 (S.D.N.Y. July 27, 2017) (ECF No. 572).

251 DOJ Press Release, *Chairman of Macau Real Estate Development Company Sentenced to Prison for Role in Scheme to Bribe United Nations Ambassadors to Build A Multi-Billion Dollar Conference Center* (May 11, 2018), https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-sentenced-prison-role-scheme-bribe-united (last accessed Jan. 19, 2019).

On April 4, 2018, Julia Vivi Wang pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions, a substantive FCPA offense, and submitting fraudulent income tax returns.[252] Prosecutors alleged that Wang had wired Ashe $500,000 in exchange for Antiguan diplomatic positions for her or her late husband. Wang was formerly an executive of South-South News, a media group that promoted UN development goals. Wang is scheduled to be sentenced on March 6, 2019.[253]

In Steptoe's 2016 FCPA Year in Review and 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, we reported on developments in a 2015 case filed against 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.[254] Charges against Ashe were dismissed following his passing in 2016.[255]

Our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview also noted Francis Lorenzo's conviction for bribery and money laundering, among other charges.[256] Lorenzo admitted to violations of the FCPA and ultimately became a key government witness against Seng.[257] On April 27, 2017, Lorenzo withdrew his earlier guilty plea and pleaded guilty to additional counts of FCPA violations in a new superseding indictment filed by prosecutors.[258] He is scheduled to be sentenced on June 14, 2019.[259]

Shiwei Yan and Jeff C. Yin are the only defendants involved in the bribery scheme that have been sentenced. Yin – an accountant who worked with Seng – pleaded guilty to conspiracy to defraud the United States, and was sentenced to seven months in prison. On August 4, 2016, Yan, a Chinese national who worked with Lorenzo to arrange the bribes, was sentenced to 20 months in prison. Yan pleaded guilty to one count of bribery based on allegations that she, and another co-defendant Heidi Hong Piao, provided payments totaling more than $800,000 to Ashe. Piao also pleaded guilty to, among other things, non FCPA-related bribery

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[252] 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 Jan. 16, 2019).

[253] Order Resetting Sentencings as to Julia Vivi Wang, *United States v. Wang*, 1:16-cr-00495 (S.D.N.Y. Dec. 4, 2018) (ECF No. 63).

[254] DOJ Press Release, *Former UN General Assembly President and Five Others Charged in $1.3 Million Bribery Scheme* (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 Jan. 19, 2019).

[255] 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 Jan. 16, 2019).

[256] 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 Jan. 16, 2019).

[257] Transcript of Proceedings, *United States 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); *see also* 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-fromdeveloper (last accessed Jan. 16, 2019).

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

[259] Order Granting Motion to Reschedule Sentencing as to Francis Lorenzo, *United States v. Ashe et al.*, 1:15-CR-00706 (S.D.N.Y. Feb. 6, 2019) (ECF No. 895).

charges and money laundering. Piao is currently scheduled for sentencing on May 24, 2019.[260]

9. PDVSA

In our 2016 FCPA Year in Review and 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, we reported on ongoing developments in the investigation of an alleged bribery scheme to obtain and extend contracts from Venezuelan state-owned oil company Petróleos de Venezuela S.A. (PDVSA). The DOJ has continued charging individuals in connection with this investigation, and has also unsealed several charges filed against individuals in past years. As of February 26, 2019, the DOJ has publically disclosed charges against thirty-three individuals, at least nineteen of whom have pleaded guilty.[261] The case of Alfonso Eliezer Gravina-Muñoz, a former PDVSA procurement officer, is noteworthy. Gravina agreed to cooperate with the United States in his 2015 guilty plea, but pleaded guilty again on December 10, 2018, this time for concealing information in his interviews and passing on information regarding the investigation to a co-conspirator.[262]

Matthias Krull was sentenced in October 2018 to ten years in prison after pleading guilty to conspiracy to commit money laundering.[263] In November 2018, two additional individuals were sentenced: Alejandro Andrade Cedeño, the former national treasurer for Venezuela, and Gabriel Arturo Jiménez Aray, the former owner of Banco Peravia. Both had pleaded guilty to conspiracy to commit money laundering. Alejandro Andrade Cedeño was sentenced to 10 years in prison, while

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[260] Order Granting Motion to Reschedule Sentencing as to Heidi Hong Piao, *United States v. Ashe et al.*, 1:15-CR-00706 (S.D.N.Y. Jan. 25, 2019) (ECF No. 893).

[261] Docket, *United States v. Rincon-Fernandez et al*, No. 4:15-cr-00654 (S.D. Tex.) (Roberto Enrique Rincon-Fernandez & Abraham Jose Shiera-Bastidas); Docket, *United States v. Millan Escobar*, No. 4:16-CR-00009 (S.D. Tex.) (Moises Abraham Millan-Escobar); Docket, *United States v. Ramos-Castillo*, No. 4:15-CR-00636 (S.D. Tex.) (Jose Luis Ramos-Castillo); Docket, *United States v. Maldonado-Barillas*, No. 4:15-CR-00635 (S.D. Tex.) (Christian Javier Maldonado-Barillas); *United States v. Gravina-Munoz*, No. 4:15-CR-00637 (S.D. Tex.) (Alfonzo Eliezer Gravina-Munoz); Docket, *United States v. Hernandez-Comerma*, No. 4:17-cr-00005 (S.D. Tex.) (Juan Jose Hernandez-Comerma); Docket, *United States v. Beech*, No. 4:17-CR-00006 (S.D. Tex.) (Charles Quintard Beech III); Docket, *United States v. Ardila-Rueda*, No. 4:17-cr-00515 (S.D. Tex.) (Fernando Ardila-Rueda); Docket, *United States v. De Leon-Perez et al.*, No. 4:17-cr-00514 (S.D. Tex.) (Luis Carlos de Leon-Perez, Nervis Gerardo Villalobos-Cardenas, Cesar David Rincon-Godoy, Alejandro Isturiz-Chiesa & Rafael Ernesto Reiter-Munoz); *United States v. Rincon*, No. 4:18-CR-00200 (S.D. Tex.) (Juan Carlos Castillo-Rincon); Docket, *United States v. Camacho*, No. 4:17-CR-00394 (Jose Orlando Camacho) (S.D. Tex.); DOJ Press Release, *Texas Businessman Pleads Guilty to Money Laundering Charges in Connection with Venezuela Bribery Scheme*, Office of Pub. Affairs (Oct. 30, 3018), https://www.justice.gov/opa/pr/texas-businessman-pleads-guilty-money-laundering-charges-connection-venezuela-bribery-scheme (Ivan Alexis Guedez); Docket, *United States v. Nunez-Arias*, No. 4:16-CR-00436 (S.D. Tex.) (Karina del Carmen Nunez-Arias); Docket, *United States v. Gonzalez Testino*, No. 1:18-MJ-03171 (S.D. Fla.) (Jose Manuel Gonzalez-Testino); Docket, *Unites States v. Guruceaga et al*, No. 1:18-CR-20685 (S.D. Fla.) (Francisco Convit Guruceaga, Jose Vincente Amparan-Croquer, Carmelo Antonio Urdaneta-Aqui, Abraham Edgardo Ortega, Gustavo Adolfo Hernandez-Frieri, Hugo Andre Ramalho-Gois, Marcelo Federico Gutierrez Acosta Y Lara & Mario Enrique Bonilla-Vallera); *United States v. Krull*, 1:18-CR-20682 (S.D. Fla.) (Matthias Krull); Docket, *Unites States v. Belisario*, No. 9:18-cr-80160 (S.D. Fla.); Docket, *United States v. Cedeno*, No. 9:17-cr-80242-RLR (S.D. Fla.) (Alejandro Andrade Cedeno); Docket, *United States v. Jimenez Aray*, No. 9:18-cr-80054-RLR (S.D. Fla.) (Gabriel Arturo Jimenez-Aray); Indictment, *United States v. Pinto-Francheschi and Muller-Huber*, 1:19-mj-02252-JG (S.D. Fla. Feb. 26, 2019) (Rafael Enrique Pinto-Franceschi & Franz Herman Muller-Huber).

[262] DOJ Press Release, *Texas Businessman Pleads Guilty to Conspiracy to Obstruct Justice in Connection with Venezuela Bribery Scheme*, Office of Pub. Affairs (Dec. 10, 2018), https://www.justice.gov/opa/pr/texas-businessman-pleads-guilty-conspiracy-obstruct-justice-connection-venezuela-bribery (last accessed Jan. 16, 2019).

[263] Judgment, *United States v. Krull*, 1:18-CR-20682 (S.D. Fla. Oct. 29, 2018).

Arturo Jiménez Aray was sentenced to 3 years.[264] Sentencing hearings for many defendants in this matter have been scheduled for April, May, or July 2019.[265]

The probe appears to be ongoing. The most recent charges were filed against Rafael Enrique Pinto-Franceschi and Franz Herman Muller-Huber on February 26, 2019.[266] Additionally, several defendants appear to remain at large as of January 2019: Francisco Convit Guruceaga, Jose Vincente Amparan-Croquer, Carmelo Antonio Urdaneta-Aqui, Hugo Andre Ramalho-Gois, Marcelo Federico Gutierrez Acosta y Lara, Mario Enrique Bonilla-Vallera, Alejandro Isturiz-Chiesa, and Raul Gorrin Belisario.[267]

10. PetroEcuador

Six individuals have been charged in connection with the (ongoing) investigation of a scheme to bribe officials of PetroEcuador, Ecuador's state-owned oil company, in exchange for contracts.[268] These individuals are: Ramiro Andres Luque-Flores, Marcelo Reyes Lopez, Arturo Escobar Dominguez, Jose Larrea, Juan Andres

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[264] Docket, *United States v. Cedeno*, No. 9:17-cr-80242-RLR (S.D. Fla.); Docket, *United States v. Jimenez Aray*, No. 9:18-cr-80054-RLR (S.D. Fla.); Clara Hudson, *Guilty pleas unveiled in billion-dollar Venezuelan bribery scheme*, Global Investigations Rev. (Nov. 20, 2018), https://globalinvestigationsreview.com/article/jac/1177097/guilty-pleas-unveiled-in-billion-dollar-venezuelan-bribery-scheme (last accessed Jan. 16, 2019); Kelly Swanson, *Judge hears details of "staggering" billion-dollar Venezuela bribery scheme*, Global Investigations Rev. (Dec. 17, 2018), https://globalinvestigationsreview.com/article/jac/1178077/judge-hears-details-of-%E2%80%9Cstaggering%E2%80%9D-billion-dollar-venezuela-bribery-scheme (last accessed Jan. 16, 2019).

[265] The sentencing hearing for Cesar David Rincon-Godoy has been set for April 1, 2019. *United States v. De Leon-Perez et al.*, No. 4:17-cr-00514 (S.D. Tex. Oct. 19, 2018). The sentencing hearing for Abraham Edgardo Ortega has been set for April 10, 2019. Docket, *United States v. Guruceaga et al.*, No. 1:18-CR-20685 (S.D. Fla.). Sentencing hearings have been set for May 9, 2019 for Christian Javier Maldonado-Barillas, Karina del Carmen Nunez-Arias, Juan Jose Hernandez-Comerma, and Fernando Ardila-Rueda. Order, *United States* v. Maldonado-Barillas, No. 4:15-CR-00635 (S.D. Tex. Feb. 5, 2019). Sentencing hearings have been set for July 30, 2019 for Moises Abraham Millan-Escobar, Jose Luis Ramos-Castillo, Charles Quintard Beech III, Jose Orlando Camacho, Juan Carlos Castillo-Rincon, and Ivan Alex Guedez. Order, *United States v. Millan Escobar*, No. 4:16-CR-00009 (S.D. Tex. Feb. 5, 2019); Order, *United States v. Rincon*, No. 4:18-CR-00200 (S.D. Tex. Feb. 15, 2019). Sentencing hearings have been set for July 31, 2019 for Abraham Jose Shiera-Bastidas, Roberto Enrique Rincon-Fernandez, and Alfonzo Eliezer Gravina-Munoz. Order, *United States v. Rincon-Fernandez et al.*, No. 4:15-cr-00654 (S.D. Tex. Feb. 6, 2019). Sentencing for Luis Carlos De Leon-Perez was originally set for September 24, 2018, but there is a sealed event on September 20, 2018, no docket item for September 24, 2018, and apparently no subsequent sentencing hearing scheduled. Docket, *United States v. De Leon-Perez et al.*, No. 4:17-cr-00514 (S.D. Tex.) (last accessed Feb. 26, 2019).

[266] Indictment, *United States v. Pinto-Francheschi and Muller-Huber*, 1:19-mj-02252-JG (S.D. Fla. Feb. 26, 2019).

[267] *See* Order, *United States v. Guruceaga et al*, No. 1:18-CR-20685 (S.D. Fla. Sept. 26, 2018) (placing multiple defendants in fugitive status); Motion, *United States v. De Leon-Perez et al.*, No. 4:17-cr-00514 at 9 (S.D. Tex. Mar. 14, 2018) (acknowledging that Alejandro Isturiz-Chiesa remains at large); Order, *United States v. Belisario*, No. 9:18-cr-80160 (S.D. Fla.) (placing Belisario in fugitive status); *see, e.g.*, Dan McCue, *Two Charged in Alleged Billion-Dollar Money-Laundering Scheme*, Courthouse News Serv. (July 25, 2018), https://www.courthousenews.com/two-charged-in-alleged-billion-dollar-venezuelan-money-laundering-scheme/ (last accessed Feb. 25, 2019).
It is unclear whether Nervis Gerardo Villalobos-Cardenas and Rafael Ernesto Reiter-Munoz have been extradited to the US. *See Spanish Government extradites two former Venezuelan oil bosses to US*, Diplomat in Spain (Feb. 10, 2018), https://thediplomatinspain.com/en/2018/02/spanish-government-extradites-two-former-venezuelan-oil-bosses-to-us/ (saying Spain had approved the extradition of these individuals as of February *2018*); Docket, *United States v. De Leon-Perez et al.*, No. 4:17-cr-00514 (S.D. Tex.) (last accessed Feb. 25, 2019) (no reference to motions filed by these defendants, but also a sealed event on September 20, 2018).

[268] DOJ Press Release, *Financial Advisor Pleads Guilty to Money Laundering Charge in Connection With Bribery Scheme Involving Ecuadorian Official* (Sept. 11, 2018), https://www.justice.gov/opa/pr/financial-advisor-pleads-guilty-money-laundering-charge-connection-bribery-scheme-involving (last accessed Jan. 15, 2019); Clara Hudson, *FCPA Docket: DOJ evaluating Bilfinger's compliance with DPA*, Global Investigations Review (Jan. 14, 2019).

Baquerizo-Escobar, and Frank Roberto Chatburn-Ripalda.[269] Only Ramiro Andres Luque-Flores and Marcelo Reyes Lopez had cases filed against them in 2017; the rest were charged or otherwise had cases filed against them in 2018.[270] Chatburn Ripalda is set to go to trial in September 2019, while the remaining five defendants have pleaded guilty. Please see our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview for additional background regarding this investigation.

In 2017, Argentinian contractor Ramiro Andres Luque-Flores pleaded guilty to conspiracy to defraud the United States.[271] Sentencing has not been scheduled.[272] In 2018, several individuals pleaded guilty to laundering bribe money: former PetroEcuador official Arturo Escobar Dominguez,[273] former PetroEcuador official Marcelo Reyes Lopez,[274] US-based financial advisor Jose Larrea,[275] and the owner of an oil services company Juan Andres Baquerizo-Escobar[276]. Arturo Escobar Dominguez was sentenced to 48 months in prison,[277] Marcelo Reyes Lopez to 53 months,[278] Jose Larrea to 27 months,[279] and Juan Andres Baquerizo-Escobar to 36 months.[280]

In December 2018, the DOJ filed a superseding indictment alleging that Frank Roberto Chatburn-Ripalda participated in a conspiracy to bribe PetroEcuador officials to win contracts for Ecuadorian company GalileoEnergy S.A., and charged

[269] Information, *United States v. Luque-Flores*, No. 1:17-cr-00537-CBA (E.D.N.Y. Oct. 6, 2017); Indictment, *United States v. Marcelo Reyes Lopez*, No. 1:17-cr-20747-KMW (S.D. Fla. Oct. 25, 2017); Information, *United States v. Arturo Escobar Dominguez*, No. 1:18-cr-20108-CMA (S.D. Fla. Feb. 20, 2018); Indictment, *United States v. Chatburn Ripalda et al*, No. 1:18-cr-20312-MGC (S.D. Fla. Apr. 20, 2018) (Jose Larrea); Information, *United States v. Baquerizo Escobar*, No. 1:18-CR-20596 (S.D. Fla. July 11, 2018); Superseding Indictment, *United States v. Chatburn Ripalda et al*, No. 1:18-cr-20312-MGC (S.D. Fla. Dec. 13, 2018) (Frank Roberto Chatburn-Ripalda).

[270] *Id.*

[271] Kelly Swanson & Adam Dobrik, *PetroEcuador bribery case widens*, Global Investigations Rev. (July 20, 2018), https://globalinvestigationsreview.com/article/jac/1172167/petroecuador-bribery-case-widens (last accessed Jan. 15, 2019); *see* Information, *United States v. Luque-Flores*, No. 1:17-cr-00537-CBA (E.D.N.Y. Oct. 6, 2017) (Doc 2); Criminal Cause for Pleading, *United States v. Luque-Flores*, No. 1:17-cr-00537-CBA (Oct. 6, 2017) (Doc 6). The relevant docket was partially unsealed in 2018, but portions of the docket, including possibly the sentence, remain hidden to the public as of January 15, 2019. *See* Docket, *Unites States v. Luque-Flores*, No. 1:17-cr-00537-CBA (E.D.N.Y.).

[272] Docket, *United States v. Luque-Flores*, No. 1:17-cr-00537-CBA (E.D.N.Y.) (last accessed Feb. 26, 2019).

[273] *See* Information at 1-2, *United States v. Arturo Escobar Dominguez*, No. 1:18-cr-20108-CMA (S.D. Fla. Feb. 20, 2018) (Doc 1); Plea Agreement ¶1, *United States v. Arturo Escobar Dominguez*, No. 1:18-cr-20108-CMA (S.D. Fla. Mar. 28, 2018) (Doc 17); 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 Jan. 15, 2019).

[274] *See* Plea Agreement ¶1, *United States v. Marcelo Reyes Lopez*, No. 1:17-cr-20747-KMW (S.D. Fla. Apr. 11, 2018) (Doc 48); 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 Jan. 15, 2019); Kelly Swanson, *DOJ charges former Ecuador official with money laundering*, Global Investigations Review (Nov. 7, 2017), https://globalinvestigationsreview.com/article/jac/1149847/doj-charges-former-ecuador-official-with-money-laundering (last accessed Jan. 15, 2019).

[275] *See* Indictment, *United States v. Jose Larrea*, No. 1:18-cr-20312-MGC (S.D. Fla. Apr. 20, 2018) (Doc 3); Plea Agreement ¶1, *United States v. Jose Larrea*, No. 1:18-cr-20312-MGC (S.D. Fla. Sept. 14, 2018) (Doc 80); DOJ Press Release, *Financial Advisor Pleads Guilty to Money Laundering Charge in Connection With Bribery Scheme Involving Ecuadorian Official* (Sept. 11, 2018), https://www.justice.gov/opa/pr/financial-advisor-pleads-guilty-money-laundering-charge-connection-bribery-scheme-involving (last accessed Jan. 15, 2019).

[276] *See* Information, *United States v. Baquerizo Escobar*, No. 1:18-CR-20596 (S.D. Fla. July 11, 2018) (Doc 1); Plea Agreement, *United States v. Baquerizo Escobar*, No. 1:18-CR-20596 (S.D. Fla. Sept. 14, 2018) (Doc 18); Kelly Swanson, *In PetroEcuador bribery scheme, DOJ notches another guilty plea*, Global Investigations Review (Sept. 25, 2018), https://globalinvestigationsreview.com/article/jac/1174756/in-petroecuador-bribery-scheme-doj-notches-another-guilty-plea (last accessed Jan. 15, 2019).

[277] Judgment, *United States v. Arturo Escobar Dominguez*, No. 1:18-cr-20108-CMA (S.D. Fla. June 7, 2018) (Doc 36).

[278] Judgment, *United States v. Marcelo Reyes Lopez*, No. 1:17-cr-20747-KMW (S.D. Fla. July 24, 2018) (Doc 79).

[279] Judgment, *United States v. Jose Larrea*, No. 1:18-cr-20312-MGC (S.D. Fla. Nov. 28, 2018) (Doc 99).

[280] Judgement, *United States v. Baquerizo Escobar*, No. 1:18-CR-20596-DPG (S.D. Fla. Jan. 18, 2019) (Doc 46).

him with violations of the FCPA and money laundering.[281] Chatburn pleaded not guilty.[282] A jury trial has been set for September 2019.[283]

11. SBM Offshore

As discussed in Steptoe's 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, in November 2017 two former executives of Dutch oil services company SBM Offshore N.V. (SBM) pleaded guilty to conspiring to violate the FCPA; their charges arose out of their role in bribing foreign government officials in Brazil, Angola, and Equatorial Guinea to obtain drilling contracts. Both were sentenced on September 28, 2018.[284] Anthony "Tony" Mace, of the United Kingdom, the former CEO of SBM, was sentenced to thirty-six months in prison and a $150,000 fine. The DOJ sought a five-year sentence for Mace, but the court sentenced him to three years in response to defense mitigation arguments.[285] Robert Zubiate, of California, a former executive, was sentenced to 30 months in prison and a $50,000 fine.[286]

12. Siemens

On March 15, 2018, Eberhard Reicher, of Germany, a former senior executive at Siemens Aktiengesellschaft, pleaded guilty to conspiring to bribe Argentinian officials in order to win and retain a project worth more than $1 billion to Siemens.[287] Reichert is one of eight Siemens employees charged in a 2011 indictment regarding this conspiracy.[288] Only two of the eight Siemens employees listed in that indictment – Reichert and Andres Truppel – have appeared before the court.[289] As of January 2019, the rest appear to remain at large and it is unclear whether the US has sought to extradite them.[290] As part of Reichert's plea deal, Reichert has agreed to cooperate with investigators,[291] and as such no sentencing date has been set as of the date of

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281 Superseding Indictment, *United States v. Chatburn Ripalda et al*, No. 1:18-cr-20312-MGC (S.D. Fla. Dec. 13, 2018).

282 DOJ Press Release, *Financial Advisor Pleads Guilty to Money Laundering Charge in Connection With Bribery Scheme Involving Ecuadorian Official* (Sept. 11, 2018), https://www.justice.gov/opa/pr/financial-advisor-pleads-guilty-money-laundering-charge-connection-bribery-scheme-involving (last accessed Jan. 15, 2019).

283 Docket, *United States v. Chatburn Ripalda et al*, No. 1:18-cr-20312-MGC (S.D. Fla.) (last accessed Feb. 26, 2019).

284 DOJ Press Release, *Oil Services CEO and Executive Sentenced to Prison for Roles in Foreign Bribery Scheme*, Office of Office of Pub. Affairs (Sept. 28, 2018), https://www.justice.gov/opa/pr/oil-services-ceo-and-executive-sentenced-prison-roles-foreign-bribery-scheme (last accessed Jan. 18, 2019); Docket, *U.S. v. Mace*, 4:17-CR-00618 (S.D. Tex.); Docket, *United States v. Zubiate*, 4:17-CR-00591 (S.D. Tex.).

285 Plea Agreement, *United States v. Mace*, 4:17-CR-00618 (S.D. Tex. Nov. 9, 2017) (Doc 18); Adam Dobrik, *Federal judge sentences SBM CEO to three years for turning blind eye to bribery*, Global Investigations Review (Sept. 28, 2018), https://globalinvestigationsreview.com/article/jac/1175029/federal-judge-sentences-sbm-ceo-to-three-years-for-turning-blind-eye-to-bribery (last accessed Jan. 18, 2019).

286 Judgment, *United States v. Mace*, 4:17-CR-00618 (S.D. Tex. Oct. 12, 2018) (Doc 46); Judgment, *United States v. Zubiate*, 4:17-CR-00591 (S.D. Tex. Oct. 10, 2018) (Doc 44).

287 DOJ Press Release, *Former Siemens Executive Pleads Guilty To Role in $100 Million Foreign Bribery Scheme*, Office of Pub. Affairs (Mar. 15, 2018), https://www.justice.gov/opa/pr/former-siemens-executive-pleads-guilty-role-100-million-foreign-bribery-scheme (last accessed Jan. 18, 2019).

288 *Id.*; Indictment ¶ 19, *United States v. Sharef et al*, No. 1:11-CR-01056-DLC (S.D.N.Y. Dec. 12, 2011) (Doc 1).

289 *See* Docket, *United States v. Sharef et al*, No. 1:11-CR-01056 (S.D.N.Y.); Dylan Tokar, *After six years a fugitive, former 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 Jan. 17, 2019).

290 *See* Docket, *United States v. Sharef et al*, No. 1:11-CR-01056 (S.D.N.Y.) (last accessed Feb. 26, 2019) (lack of filings by remaining six defendants); Erik Larson, *Ex-Siemens Official Pleads Guilty in U.S. to Bribery Scheme*, Bloomberg (Mar. 15, 2018), https://www.bloomberg.com/news/articles/2018-03-15/ex-siemens-executive-says-he-will-plead-guilty-in-bribery-case (last accessed Feb. 26, 2019) (noting that the defendants live outside the US).

291 Tr. at 15:10-20, *United States v. Sharef et al*, No. 1:11-cr-01056-DLC (Apr. 5, 2018) (Doc 48).

the publication of this report.[292] Reichert's case is discussed at greater length in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview. Truppel, the former chief financial officer of Siemens Argentina, who pleaded guilty in September 2015, is discussed in our 2015 FCPA Year in Review. Truppel's sentencing has not been scheduled.[293]

13. Setar

On April 13, 2018, a former Aruban government official residing in Florida pleaded guilty in the Southern District of Florida to money laundering in connection with a scheme to facilitate and receive corrupt payments to influence the award of contracts by an Aruban state-owned telecommunications company, Servicio di Telecommunicacion di Aruba N.V. (Setar).[294] According to admissions made as part of his plea agreement, between 2005 and 2016, Egbert Yvan Ferdinand Koolman used his position as Setar's product manager to award lucrative cellular and accessory contracts in exchange for bribes from individuals and companies located in the United States and abroad, including Florida businessman Lawrence Parker Jr., an unidentified co-conspirator residing in Florida, and five unidentified Floridian phone companies, in violation of the FCPA.[295] Koolman admitted that he received more than $1.3 million in illicit payments made via wire transfers from banks located in the United States, cash payments in the United States and Aruba, and through withdrawals in Aruba of money from a US-based bank account.[296] On June 27, 2018, Koolman was sentenced to 36 months in prison and ordered to pay over $1.3 million in restitution.[297]

In connection with the scheme, Lawrence Parker Jr. also pleaded guilty in December 2017 to one count of conspiracy to violate the FCPA and to commit wire fraud.[298] Parker admitted that he conspired with Koolman and others to transmit funds from Florida and elsewhere in the United States to Aruba and Panama with the intent to promote a corrupt scheme that violated the FCPA.[299] He was sentenced on April 30, 2018 to serve 35 months in prison and ordered to pay $701,750 in restitution.[300]

14. Rolls-Royce

As reported in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, five individuals were previously charged for allegedly participating in a scheme to pay

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[292] *See* Docket, *United States v. Sharef et al*, No. 1:11-CR-01056 (S.D.N.Y.) (last accessed Feb. 26, 2019).
[293] Docket, *United States v. Sharef et al*, No. 1:11-CR-01056 (S.D.N.Y.) (last accessed Feb. 26, 2019).
[294] DOJ Press Release, *Aruban Telecommunications Purchasing Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act* (Apr. 13, 2018), https://www.justice.gov/opa/pr/aruban-telecommunications-purchasing-official-pleads-guilty-money-laundering-conspiracy.
[295] *Id.*
[296] *Id.*
[297] DOJ Press Release, *Aruban Telecommunications Purchasing Official Sentenced to Prison in Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act* (June 27, 2018), https://www.justice.gov/opa/pr/aruban-telecommunications-purchasing-official-sentenced-prison-money-laundering-conspiracy.
[298] DOJ Press Release, *Aruban Telecommunications Purchasing Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act* (Apr. 13, 2018), https://www.justice.gov/opa/pr/aruban-telecommunications-purchasing-official-pleads-guilty-money-laundering-conspiracy.
[299] *Id.*
[300] DOJ Press Release, *Aruban Telecommunications Purchasing Official Sentenced to Prison in Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act* (June 27, 2018), https://www.justice.gov/opa/pr/aruban-telecommunications-purchasing-official-sentenced-prison-money-laundering-conspiracy.

bribes to foreign officials in exchange for directing business to US-based Rolls-Royce Energy Systems Inc. (RRESI), an indirect subsidiary of UK-based RollsRoyce Plc. 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).[301]

On November 7, 2017, the cases were unsealed.[302] Zuurhout's case has been continued until April 26, 2019.[303] Finley's case has been continued until April 23, 2019.[304] Barnett's case has been continued until May 22, 2019.[305] The court granted Kohler an extension to file a Final Presentence Investigation Report until March 9, 2019.[306]

On May 24, 2018, Azat Martirossian (Armenia) and Vitaly Leshkov (Russia), two employees of Technical Advisor, an international engineering consulting firm, were charged by superseding indictment in the Southern District of Ohio for their alleged participation in this scheme. Technical Advisor was retained by Asia Gas Pipeline, LLP (AGP), a state-owned entity that was created to build a gas pipeline between Kazakhstan and China, to evaluate and award bids in connection with this venture. Martirossian and Leshkov were each charged with one count of conspiracy to launder money and 10 counts of money laundering. Petros Contoguris was also charged on these counts, in addition to seven counts of violating the FCPA and one count of conspiracy to violate the FCPA.[307] Prosecutors allege that Contoguris was retained by RRESI to pay bribes to various individuals in order to help Rolls-Royce and RRESI obtain contracts with AGP.[308] Prosecutors further allege that Contoguris received payments from RRESI for his services, which he in turn shared with Martirossian and Leshkov with the understanding that a portion of that money would be shared with a Kazakh foreign official[309] On June 22, 2018, Martirossian filed a motion to dismiss the indictment as it pertains to him, because it does not support the charges made against him.[310] The court granted the prosecution's request to hold the motion to dismiss in abeyance until or unless Martirossian submits to the jurisdiction of the court pursuant to the fugitive disentitlement doctrine.[311]

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[301] 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 Jan. 14, 2019).

[302] Order to Unseal Case, *United States v. Zuurhout*, No. 2:17-cr-122 (S.D. Ohio Nov. 7, 2017).

[303] Order on Motion to Continue, *United States v. Zuurhout*, No. 2:17-cr-122 (S.D. Ohio Sept. 6, 2018).

[304] Order on Motion to Continue, *United States v. Finley*, No. 2:17-cr-00160 (S.D. Ohio Aug. 30, 2018).

[305] Order on Motion to Continue, *United States v. Barnett*, No. 2:16-cr-00248 (S.D. Ohio Oct. 25, 2018).

[306] Order on Motion to File, *United States v. Kohler*, No. 2:17-cr-00113 (S.D. Ohio Aug. 10, 2018).

[307] DOJ Press Release, *Former Armenian Ambassador and a Russian National Charged in Foreign Bribery and Money Laundering Scheme* (May 24, 2018), https://www.justice.gov/opa/pr/former-armenian-ambassador-and-russian-national-charged-foreign-bribery-and-money-laundering.

[308] Indictment, *United States v. Contoguris*, No. 2:17-cr-00233 (S.D. Ohio May 24, 2018).

[309] *Id.*

[310] Memorandum of Law in Support of Motion to Dismiss the Superseding Indictment as to Mr. Azat Martirossian, *United States v. Contoguris*, No. 2:17-cr-00233 (S.D. Ohio June 22, 2018).

[311] Opinion and Order, *United States v. Contoguris*, No. 2:17-cr-00233 (S.D. Ohio Oct. 9, 2018).

15. Transport Logistics International

As reported in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, Mark Lambert, the former co-president of Transport Logistics International (TLI), was indicted on 11 counts, 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, 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.[312] In 2016, the Government offered Lambert a pre-indictment plea, which he rejected. In October 2018, the Government offered Lambert a second plea deal, which he also rejected.[313] The parties do not anticipate another plea deal and are, as of the publication of this report, scheduled for trial on April 20, 2019.

16. Venezuelan Foreign Exchange

On August 16, 2018, Raul Gorrin Belisario (Gorrin), a Venezuelan citizen who owns Globovision news network, was charged in the Southern District of Florida with one count of conspiracy to violate the FCPA, one count of conspiracy to commit money laundering, and nine counts of money laundering for his role in a currency exchange and money laundering scheme.[314] On December 22, 2017, Alejandro Andrade Cedeno (Andrade), a former Venezuelan national treasurer, pleaded guilty under seal to one count of conspiracy to commit money laundering for his role in the scheme.[315] Gabriel Arturo Jimenez Aray (Jimenez), the former owner of Banco Peravia bank in the Dominican Republic, pleaded guilty under seal on March 20, 2018 to one count of conspiracy to commit money laundering for his role in the scheme.[316]

The indictment alleges that Gorrin bribed Andrade and another Venezuelan official in order for Globovision to secure the rights to conduct foreign currency exchanges for the Venezuelan government at favorable rates.[317] Gorrin made payments through multiple shell companies in order to conceal the payments. Gorrin allegedly partnered with Jimenez to acquire Banco Peravia in order to use the bank to pay bribes to Venezuelan government officials and to launder the money obtained from the bribery scheme.[318]

Andrade admitted as part of his guilty plea that he received over $1 billion in bribes from Gorrin and others in exchange for choosing them to conduct currency exchange transactions for the Venezuelan government.[319] Andrade agreed to a forfeiture money judgment of $1 billion and forfeiture of all assets involved in the scheme. On

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312 Indictment, *United States v. Lambert*, No. 8:18-CR-00012 (D. Md. Jan. 10, 2018).
313 Joint Status Report, *United States v. Lambert*, No. 8:18-CR-00012 (D. Md. Nov. 11, 2018).
314 DOJ Press Release, *Former Owner of Dominican Republic Bank Sentenced to Three Years in Prison for Money Laundering Conspiracy* (Nov. 20, 2018), https://www.justice.gov/opa/pr/venezuelan-billionaire-news-network-owner-former-venezuelan-national-treasurer-and-former.
315 *Id.*
316 *Id.*
317 Indictment, *United States v. Belisario*, No. 9:18-cr-80160 (S.D. Fla. Aug. 16, 2018).
318 Factual Proffer, *United States v. Jimenez*, 18-CR-80054-RLR (S.D. Fla. Mar. 23, 2018).
319 Plea Agreement, *United States v. Andrade*, No. 9:17-cr-80242 (S.D. Fla. Jan. 4, 2018).

November 27, 2018, Andrade was sentenced to 10 years in prison for his role in the scheme.[320]

Jimenez admitted as part of his guilty plea that he conspired with Gorrin to acquire Banco Peravia in order to launder bribe money and proceeds from the scheme.[321] Jimenez admitted to having facilitated illegal transactions and bribe payments to foreign officials through Banco Peravia. On November 29, 2018, Jimenez was sentenced to three years in prison.[322]

17. Bahn, Woo, Ban, and Harris

As noted in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, Ban Ki Sang, a national and resident of South Korea, Joo Hyun Bahn a national of South Korea and lawful permanent resident of the United States, and Malcolm Harris, a United States citizen, 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.[323] A fourth individual, Sang Woo, a national of South Korea and lawful permanent resident of the United States, was charged in a December 2016 criminal complaint alleging conspiracy to violate the FCPA.[324] In October 2017, Harris pleaded guilty and was sentenced to 42 months imprisonment, three years of supervised release and ordered to pay $760,148.57 in restitution.[325] On January 5, 2018, Bahn pleaded guilty to conspiracy to violate the FCPA and violations of the FCPA. On June 29, 2018, he was sentenced to 6 months imprisonment and ordered to pay a fine of $225,000 and $500,000 in restitution.[326] Woo was arrested on January 10, 2017. On April 12, 2017, the case was continued so that the parties could continue discussions regarding a possible disposition of the case and remains stayed as of the publication of this report.[327] All court filings from 2018 relating to the case against Ban Ki Sang have been filed under seal.

B. SEC Enforcement Actions

1. SQM

On September 25, 2018, the SEC issued a cease and desist order against Patricio Contesse Gonzalez, the Chief Executive Officer of Sociedad Quimica y Minera de Chile, S.A., (SQM), a Chilean mining and chemical company, for alleged violations of the books and record and internal controls provisions of the FCPA. Between 2008 and 2015, Contesse caused SQM to pay out more than $14.7 million in bribes to Chilean politicians, political candidates, and their associates (collectively,

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320 DOJ Press Release, *Former Venezuelan National Treasurer Sentenced to 10 Years in Prison for Money Laundering Conspiracy Involving Over $1 Billion in Bribes* (Nov. 27, 2018), https://www.justice.gov/opa/pr/former-venezuelan-national-treasurer-sentenced-10-years-prison-money-laundering-conspiracy.

321 Plea Agreement, *United States v. Jimenez*, No. 9:18-cr-80054 (S.D. Fla. Mar. 23, 2018).

322 DOJ Press Release, *Former Owner of Dominican Republic Bank Sentenced to Three Years in Prison for Money Laundering Conspiracy* (Nov. 29, 2018), https://www.justice.gov/opa/pr/former-owner-dominican-republic-bank-sentenced-three-years-prison-money-laundering-conspiracy.

323 *See* Sealed Indictment, *United States v. Bahn*, No. 16-cr-00831 (S.D.N.Y. Dec. 15, 2016) (ECF No. 2).

324 *See* Complaint, *United States v. Woo*, No. 17-mj-00139-UA (S.D.N.Y. Jan. 10, 2017).

325 J. as to Malcolm Harris, *United States v. Bahn*, No. 1:16-CR-00831-ER (S.D.N.Y. Oct. 13, 2017) (ECF No. 44).

326 J. as to Joo Hyun Bahn, *United States v. Bahn*, No. 1:16-CR-00831-ER (S.D.N.Y. Oct. 13, 2017).

327 Order of Continuance, *United States v. Woo*, No. 17-mj-00139-UA (S.D.N.Y. Apr. 12, 2017).

"politically exposed persons" or PEPs).[328] According to the SEC, Contesse personally directed and authorized these improper bribe payments through a discretionary CEO account. Under Contesse's direction, SQM received and approved falsified invoices from third-party vendors associated with PEPs.[329] Supported by the sham documentation, SQM made payments to the PEP-associated vendors for services that were never actually rendered.[330]

Under the terms of the SEC's order Contesse agreed – without admitting or denying the SEC's allegations – to pay $125,000 to resolve the charges.[331] In a related proceeding on January 13, 2017, the SEC ordered SQM to pay a civil monetary penalty of $15 million.[332] On the same day, SQM entered into a Deferred Prosecution Agreement with the Justice Department for a term of three years. Under the terms of the agreement, SQM admitted responsibility for the misconduct and agreed to pay a criminal fine of more than $15 million.[333] To date, SQM has paid more than $30 million to settle civil and criminal FCPA charges stemming from Contesse's tenure as CEO. For additional discussion of the FCPA enforcement actions against SQM, please see our2016 FCPA Year in Review and 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview.

2. Och-Ziff

In our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, we reported on ongoing developments in a 2017 case filed by the SEC against former London-based Och-Ziff management executives, Michael Cohen and Vanja Baros, charging them with violating the FCPA and the Investment Advisers Act.[334] In July 2018, the court dismissed all claims as time-barred.[335] Applying the Supreme Court case *Kokesh v. Sec. & Exch. Comm'n*, the court held that the disgorgement sought by the SEC was a penalty, and therefore that the federal five-year statute of limitation under 28 U.S.C. § 2462 applied.[336] The court also extended the reasoning of *Kokesh* to the "obey-the-law" injunction sought by the SEC, categorizing the injunction as a time-barred penalty. In *Kokesh*, the Supreme Court's determination of whether the remedy was punitive, as opposed to solely remedial, turned in part on whether the sanction sought "'went beyond compensation, [and is] intended to punish and label

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328 *In the Matter of Patricio Contesse Gonzalez, Respondent.*, Release No. 84280 (Sept. 25, 2018), https://www.sec.gov/litigation/admin/2018/34-84280.pdf (last accessed Jan. 16, 2019).

329 *Id.*

330 Dean Seal, *Ex-CEO of Chilean Chemical Co. Settles FCPA Claims*, LAW360 (Sept. 25, 2018), https://www.law360.com/articles/1086255/ex-ceo-of-chilean-chemical-co-settles-fcpa-claims (last accessed Jan. 16, 2019).

331 *In the Matter of Patricio Contesse Gonzalez, Respondent.*, Release No. 84280 (Sept. 25, 2018), https://www.sec.gov/litigation/admin/2018/34-84280.pdf (last accessed Jan. 16, 2019).

332 SEC Press Release, *Chemical and Mining Company in Chile Paying $30 Million to Resolve FCPA Cases* (Jan. 13, 2017), https://www.sec.gov/news/pressrelease/2017-13.html (last accessed Jan. 16, 2019); Order Instituting Cease-and-Desist Proceedings, *In re Sociedad Quimica y Minera de Chile, S.A.*, Exchange Act Release No. 79795, at 8 (Jan. 13, 2017), https://www.sec.gov/litigation/admin/2017/34-79795.pdf.

333 *Id.*; Deferred Prosecution Agreement, *United States v. Sociedad Quimica y Minera de Chile, S.A.*, No. 1:17-cr-00013-TSC (D.D.C. Jan. 13, 2017), https://www.justice.gov/criminal-fraud/file/930786/download.

334 Complaint, *Sec. & Exch. Comm'n v. Cohen*, No. 1:17-cv-00430-NGG-LB (E.D.N.Y. Jan. 12, 2017); 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 January 18, 2019).

335 Memorandum & Order, *Sec. & Exch. Comm'n v. Cohen*, No. 1:17-cv-00430-NGG-LB (E.D.N.Y. July 12, 2018).

336 *Id.* at 17-18 (citing *Kokesh v. Sec. & Exch. Comm'n*, No. 16-529, 137 S. Ct. 1635, 1640-41, 1644-45 (2017)). For additional discussion on *Kokesh*, see our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview and Steptoe's International Law Advisory on *Kokesh*.

defendants wrongdoers[] as a consequence of violating public laws."[337] Applying this reasoning to the injunction sought by the SEC, the court reasoned that the injunction imposed no duty beyond the already existing duty to obey the law, and that the effect of the injunction would be to stigmatize Cohen and Baros by marking them as lawbreakers in the public's eyes. Additionally, past victims would not be recompensed by the injunction. As the injunction was not purely remedial, it was a penalty.[338] For additional discussion of the FCPA enforcement actions against Och Ziff and its executives, please see our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview and our 2016 FCPA Year in Review.

3. Panasonic

On December 18, 2018, the SEC issued cease-and-desist orders against Paul A. Margis, President and Chief Executive Officer of Panasonic Aviation Corporation (PAC), and Takeshi "Tyrone" Uonaga, Chief Financial Officer of PAC, for violations of, among other things, the FCPA accounting provisions and regulations prohibiting securities fraud.[339] The SEC alleged that Margis used an unrelated third party to pay over $1 million to consultants, including government officials, who did little or no work in order to obtain contracts from state-owned airlines. The SEC further alleged that Margis circumvented company controls and made materially false or misleading statements to auditors regarding PAC's internal controls with respect to those contracts.[340] The SEC alleged that Uonaga caused Panasonic Corp., PAC's parent company with stock traded on the New York Stock Exchange, to improperly record $82 million in revenue based on a backdated contract and that Uonaga made false and misleading statements to PAC's auditors.[341]

Margis and Uonaga neither admitted nor denied the findings in the SEC's orders. The SEC ordered Margis and Uonaga to pay $75,000 and $50,000, respectively, in civil penalties, and the SEC suspended Uonaga from appearing or practicing before the SEC as an accountant.[342] As noted above in Section IV.C.3, Panasonic separately settled parallel enforcement actions brought by the SEC and DOJ in April 2018.

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337 *Id.* at 28 (quotation marks omitted) (first alteration in original).

338 *Id.* at 29-31.

339 *See* Order Instituting Cease-and-Desist Proceedings, *In re Paul A. Margis*, Sec. Exch. Act Release No. 84,849 (Dec. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84849.pdf; Order Instituting Cease-and-Desist Proceedings, *In re Takeshi "Tyrone" Uonaga*, Sec. Exch. Act Release No. 84,850 (Dec. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84850.pdf.

340 *See* Order Instituting Cease-and-Desist Proceedings, *In re Paul A. Margis*, Sec. Exch. Act Release No. 84,849, at ¶ 1 (Dec. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84849.pdf.

341 *See* Order Instituting Cease-and-Desist Proceedings, *In re Takeshi "Tyrone" Uonaga*, Sec. Exch. Act Release No. 84,850, at ¶¶ 1–2, 4 (Dec. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84850.pdf.

342 *See* Order Instituting Cease-and-Desist Proceedings, *In re Paul A. Margis*, Sec. Exch. Act Release No. 84,849, at 1, 8 (Dec. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84849.pdf; Order Instituting Cease-and-Desist Proceedings, *In re Takeshi "Tyrone" Uonaga*, Sec. Exch. Act Release No. 84,850, at 1, 8 (Dec. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84850.pdf.

V. 2019 Enforcement Actions to Date

On February 15, 2019, New Jersey-based Cognizant Technology Solutions Corporation entered into a $25 million settlement with the SEC to resolve allegations that it violated the anti-bribery and accounting provisions of the FCPA arising out of, among other things, the construction of a campus in Chennai, India.[343] The DOJ issued a declination letter to Cognizant's attorneys two days earlier[344] but filed criminal charges against two former executives for paying a $2 million bribe to a government official in the Indian state of Tamil Nadu.[345]

A. SEC Enforcement

The SEC alleged that Cognizant, through its largest subsidiary, Cognizant India, violated the FCPA's anti-bribery, books and records, and internal control provisions because Cognizant executives in both the US and India "authorized contractors to pay on the company's behalf and reimbursed them for a total of approximately $3.6 million in bribes to Indian government officials to obtain government construction-related permits and operating licenses in connection with the construction and operation of commercial office buildings" across India between 2014 and 2016.[346]

Specifically, Congizant India engaged a "multinational engineering and construction firm based in India" to complete a 2.7 million square foot campus for Cognizant India in Chennai, India. The SEC alleged that Cognizant India employees became aware that an Indian official had demanded that the contractor pay a $2 million bribe in exchange for necessary regulatory approvals for the project. Cognizant India employees allegedly discussed the demand with Gordon J. Coburn, the former president of Cognizant, and Steven E. Schwartz, the former Chief Legal Officer of Cognizant, both of whom were based in the United States. The SEC alleged that Coburn and Schwartz approved a scheme to reimburse the contractor using a series of sham change orders by retroactively accepting previously rejected requests and adjusting amounts to reimburse the contractor an additional $2 million for the bribe and a $500,000 commission.[347] Moreover, Coburn allegedly directed his subordinates to withhold payments to the contractor if it refused to pay the bribe on Cognizant's behalf.[348] The SEC further alleged that the real estate officer at Cognizant India falsified invoices and supporting Excel spreadsheets that were approved by the operations officer at Cognizant India and Coburn.[349]

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[343] *See* Order Instituting Cease-and-Desist Proceedings, *In re Cognizant Technology Solutions Corporation*, Sec. Exch. Act Release No. 85,149 (Feb. 15, 2019), https://www.sec.gov/litigation/admin/2019/34-85149.pdf.

[344] https://www.justice.gov/criminal-fraud/file/1132666/download.

[345] https://www.justice.gov/opa/press-release/file/1132691/download.

[346] *See* Order Instituting Cease-and-Desist Proceedings, *In re Cognizant Technology Solutions Corporation*, Sec. Exch. Act Release No. 85,149 ¶ 2 (Feb. 15, 2019), https://www.sec.gov/litigation/admin/2019/34-85149.pdf.

[347] *See id.* ¶¶ 12, 14.

[348] *See id.* ¶ 13.

[349] *See id.* ¶ 14.

In addition, the SEC alleged that Cognizant used the same contractor to pay bribes to other Indian officials. For example, the SEC alleged that Cognizant issued sham change orders to pay the contractor $770,000 to bribe an Indian official in Pune, Maharashtra to issue an environmental clearance.[350]

Without admitting or denying liability, Cognizant agreed to pay approximately $25 million (disgorgement of $16,394,351, prejudgment interest of $2,773,017 and a civil monetary penalty of $6 million) to resolve the charges. The SEC considered several factors in its decision to enter into the settlement, including Cognizant's voluntary disclosure, cooperation, and remedial efforts.[351]

The SEC concurrently filed a civil complaint in federal court against Coburn and Schwartz alleging violations of the FCPA anti-bribery and accounting provisions based on their knowledge and approval of a fraudulent scheme to make the $2.5 million payment to Cognizant India's contractor to bribe an Indian government official to issue approvals and permits for the construction of Cognizant India's campus in Chennai.[352] The SEC sought civil monetary penalties; an injunction against Coburn and Schwartz prohibiting further actions in violation of, among other things, the anti-bribery and accounting provisions of the FCPA; and an order prohibiting Coburn and Schwartz from acting as an officer or director of any issuer.[353]

B. DOJ Enforcement

In a letter dated February 13, 2019 but publicly released two days later, the DOJ issued a declination letter to Cognizant pursuant to the FCPA Corporate Enforcement Program. The declination letter listed ten different factors it considered under the Corporate Enforcement Policy in its decision, including Cognizant's "voluntary self-disclosure of matters described above within two of weeks of the Board learning of the criminal conduct," "thorough and comprehensive investigation," "full and proactive cooperation," "lack of prior criminal history," and "full remediation, including but not limited to terminating the employment of, and disciplining, employees and contractors involved in the misconduct."[354] Cognizant agreed to disgorge $19.4 million, representing the "profits fairly attributable to the bribery conduct, as determined through a cost avoidance calculation." Although the DOJ credited the disgorgement amount payable to the SEC against the disgorgement amount imposed as part of the DOJ's declination letter, the DOJ's disgorgement calculation was almost $3 million higher than the SEC's calculation.[355]

On February 14, 2019, the DOJ filed a 12-count indictment against Coburn and Schwartz in the District of New Jersey alleging, among other things, criminal violations of the anti-bribery and accounting provisions of the FCPA arising out of

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350 *See id.* ¶ 15.
351 *Id.*
352 *See* Complaint, *Secs. & Exch. Comm'n v. Coburn*, No. 19-cv-5820 (D.N.J. Feb. 15, 2019), https://www.sec.gov/litigation/complaints/2019/comp-pr2019-12.pdf.
353 *See id.* at 18.
354 DOJ Declination Letter, *Cognizant Technology Solutions Corporation* (Feb. 13, 2019).https://www.justice.gov/criminal-fraud/file/1132666/download.
355 *See id.*

the same conduct outlined in the SEC's cease-and-desist order against Cognizant.[356] Pursuant to its declination, Cognizant agreed to continue to fully cooperate in the ongoing investigation and prosecutions, presumably including the prosecutions against Coburn and Schwartz.[357] Both Coburn and Schwartz have denied any wrongdoing.

On January 18, 2019, the DOJ announced indictments against Ingrid Innes and Alex Tasker, executives of Insurance Corporation of Barbados Limited. Those indictments are described above in Section V.A.2.

[356] *See* Indictment, *United States v. Coburn*, No. 19-cr-120, (D.N.J. Feb. 14, 2019), https://www.justice.gov/opa/press-release/file/1132691/download.

[357] DOJ Declination Letter, *Cognizant Technology Solutions Corporation* (Feb. 13, 2019). https://www.justice.gov/criminal-fraud/file/1132666/download.

Steptoe

VI. New FCPA Investigations

Overall, 10 new FCPA investigations were disclosed in 2018. While the number of new, publicly disclosed investigations was less than in 2017 (when 20 new investigations were disclosed), they continued to cover a wide range of industries and a variety of alleged conduct. Targeted sectors included energy and extractives, healthcare, technology, and others.

A. Energy and Extractives

The energy and extractives industries historically have been a frequent target for enforcement action. In 2017, three new investigations were announced in these industries. That number ticked down slightly to one new investigation in 2018. Specifically, on July 3, 2018 Glencore PLC announced it had received a subpoena from the DOJ requesting documents and records related to the company's compliance with the FCPA and money laundering laws for its business units in Nigeria, the Democratic Republic of Congo, and Venezuela.[358]

B. Healthcare

The number of new investigations in the healthcare sector was also down slightly from 2017 with just one new investigation reported in 2018. On February 7, 2018 GlaxoSmithKline filed a Form 6-K stating the company had informed the DOJ and SEC of a matter concerning third party advisers used by the company in China.[359] The company had previously disclosed the matter to the SFO in the UK. This continues a trend of China being a focal point for FCPA-related investigations in the pharmaceutical industry.

On February 20, 2019, Fresenius Medical Care AG announced an agreement in principle with the SEC and DOJ related to conduct that might violate the FCPA. Fresenius recorded charges of €277 million encompassing estimates for the government's claims for disgorgement, penalties, legal expenses, and other related costs or impairments arising from the investigation and settlement.[360]

C. Technology

While new investigations in the technology sector were down from 2017, the sector continued to be a focus of FCPA-related activity with four new investigations reported in 2018, the most of any sector. On August 23, it was reported that the DOJ and SEC were investigating Microsoft Corp. for potential bribery and corruption

[358] Glencore PLC Press Release, *Subpoena from United States Department of Justice* (Jul. 3, 2017), https://www.glencore.com/en/media-and-insights/news/Subpoena-from-United-States-Department-of-Justice (last accessed Jan. 7, 2019).

[359] GlaxoSmithKline Plc., Form 6-K (Feb. 7, 2018), https://www.sec.gov/Archives/edgar/data/1131399/000165495418001174/a2006e.htm (last accessed Jan. 7, 2019).

[360] *See* Fresenius Medical Care AG & Co. KGaA, Annual Report of a Foreign Issuer (Form 20-F) (Feb. 20, 2019).

related to software sales in Hungary.[361] On February 1, 2018 OSI Systems Inc. filed a Form 8-K stating that the SEC and DOJ had requested information regarding the company's FCPA compliance following a report by a short seller.[362] Plantronics Inc. reported in its Form 10-Q on August 7, 2018 that the DOJ and SEC were investigating possible FCPA violations by a recently acquired subsidiary of the company.[363] Finally, on November 20, 2018 Mobile TeleSystems PJSC announced in its Form 6-K that it was being investigated by the SEC and DOJ in relation to its former operations in Uzbekistan.[364]

D. Other Industries

A number of other industries saw new investigations reported in 2018 including agriculture,[365] chemicals,[366] and life sciences.[367] Each of these industries had only one new investigation announced, but such announcements demonstrate that FCPA-related investigations continue to cover a wide range of industries.

[361] Drew Hinshaw and Jay Greene, *Microsoft Hit With U.S. Bribery Probe Over Deals in Hungary*, Wall Street J., Aug. 23, 2018, https://www.wsj.com/articles/microsoft-hit-with-u-s-bribery-probe-over-deals-in-hungary-1535055576 (last accessed Jan. 7, 2019).

[362] OSI Systems Inc., Form 8-K (Feb. 1, 2018), https://www.sec.gov/Archives/edgar/data/1039065/000110465918005849/a18-5160_18k.htm (last accessed Jan. 7, 2019).

[363] Plantronics Inc., Form 10-Q (Aug. 7, 2018), https://www.sec.gov/Archives/edgar/data/914025/000091402518000048/q11910-q.htm (last accessed Jan. 7, 2019). A Plantronics subsidiary, Polycom, Inc., subsequently reached a settlement with the DOJ and SEC, discussed further in the corporate settlements section.

[364] Mobile Telesystems PJSC, Form 6-K (Nov. 20, 2018), https://www.sec.gov/Archives/edgar/data/1115837/000110465918069294/a18-40501_16k.htm (last accessed Jan. 7, 2019).

[365] CHS Inc., Form 10-K (Dec. 3, 2018), https://www.sec.gov/Archives/edgar/data/823277/000082327718000065/chscp10k83118.htm (last accessed Jan. 7, 2019) (noting a voluntarily disclosure was made to the DOJ and SEC related to potential FCPA violations arising from payments to Mexican customs agents).

[366] Albemarle Corporation, Form 10-K (Feb. 28, 2018), https://www.sec.gov/Archives/edgar/data/915913/000091591318000005/a1231201710-kdocument.htm (last accessed Jan. 7, 2018) (noting the company disclosed potential FCPA violations to the DOJ and SEC concerning the company's use of third party sales representatives in its refining solutions business).

[367] Bruker Corporation, Form 10-Q (Aug. 9, 2018), https://www.sec.gov/Archives/edgar/data/1109354/000110465918050960/a18-14084_110q.htm (last accessed Jan. 7, 2018) (noting the company had disclosed potential FCPA violations related to certain business partners in China to the DOJ and SEC).

VII. Significant Civil Collateral Litigation

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

A. Derivative Litigation

Civil litigants continued to file derivative suits in 2018 related to FCPA-related misconduct. Many of these took the form of class actions that were filed after the announcement of FCPA investigations or settlements with regulatory authorities and, not surprisingly in light of the corruption scandals in Brazil in the last year, many of these involved Brazilian companies. A number of these cases were resolved with substantial settlements. Examples of suits involving significant court decisions or resolutions in 2018 include:

- Cobalt International Energy, Inc. (Cobalt): In February 2019, the US District for the Southern District of Texas, Houston Division, approved a consolidated class action settlement of at least $173.8 million between a group of defendants including Cobalt underwriters and debtors, and purchasers of Cobalt securities.[368] The plaintiffs alleged that Cobalt, an oil exploration and production company headquartered in Houston, Texas, misled investors by concealing partnerships with senior Angolan government officials and misrepresenting the value of its wells in Angola.[369] All settling defendants denied any wrongdoing.[370]

- Centrais Eléctricas Brasileiras S.A. (Eletrobras): In December 2018, the US District for the Southern District of New York approved a $14.75 million settlement between Eletrobras, a Brazilian government-controlled electricity company, and purchasers of Eletrobras American Depositary Receipts.[371] The plaintiffs alleged that Eletrobras misled shareholders about its financials and internal controls to conceal its involvement in a bid-rigging scheme in Brazil. Eletrobras made no admission of wrongdoing or misconduct, and stated that it entered into the agreement for the best interests of its shareholders.

- Embraer S.A.: In March 2018, the US District Court for the Southern District of New York dismissed a proposed securities fraud class action against Brazilian

[368] Order Awarding Attorney's Fees and Reimbursement of Litigation Expenses, *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. 4:14-cv-3428 (S.D.Tex. Feb. 13, 2019).

[369] Second Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws, *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. 4:14-cv-3428 (S.D.Tex. Mar. 15, 2017).

[370] Stipulation and Agreement of Settlement with the Sponsor Defendants, the Sponsor Designee Defendants and Goldman Sachs & Co., LLC, *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. 4:14-cv-3428 (S.D.Tex. Oct. 9, 2018); Stipulation and Agreement of Settlement Among the Plaintiffs, Cobalt Individual Defendants, and Nader Tavakoli, Solely Acting as Plan Administrator on Behalf of the Cobalt Debtors, *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. 4:14-cv-3428 (S.D.Tex. Oct. 11, 2018); Stipulation and Agreement of Settlement Between Plaintiffs and Underwriter Defendants Other Than Goldman Sachs & Co. LLC, *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. 4:14-cv-3428 (S.D.Tex. Nov. 28, 2018).

[371] Order, *In re Eletrobras Sec. Litig.*, No. 15-cv-5754 (S.D.N.Y. Dec. 12, 2018).

aerospace conglomerate Embraer.[372] The plaintiffs alleged that Embraer made false or misleading statements in its public filings in connection with a government investigation into potential FCPA violations. The Court found that Embraer "complied with its disclosure obligations" because, among other things, it disclosed that it might have to pay fines or incur sanctions as a result of the investigation. The court reasoned that "disclosure is not a rite of confession and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing."

- Petróleo Brasileiro S.A. (Petrobras): In June 2018, the US District Court for the Southern District of New York approved a $3 billion class action settlement between Brazil's state oil company Petrobras and purchasers of Petrobras securities in the United States.[373] As reported in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, the lawsuit involved claims that Petrobras made materially false and misleading statements to its investors as part of a corruption scheme in Brazil. In the settlement, Petrobras denied any wrongdoing or misconduct related to the plaintiffs' claims.[374]

- Och-Ziff Capital Management Group LLC (Och-Ziff): In October 2018, the Southern District of New York granted preliminary approval of a class action settlement between Och-Ziff and shareholders who alleged that the company misled investors about SEC and DOJ investigations into alleged corruption in African investment deals.[375] As part of the settlement, Och-Ziff agreed to pay investors $29 million without admitting any wrongdoing.[376] A final settlement conference was scheduled for January 16, 2019, and the court issued a revised final order and judgment approving the settlement on January 24, 2019.[377]

B. Civil Fraud/RICO Litigation

Several civil fraud/RICO cases related to FCPA allegations were filed or resolved in 2018. Noteworthy cases from 2018 include:

- GlaxoSmithKline (GSK): As reported in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, 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.[378] The District Court found that the plaintiffs did not suffer any domestic injury from the alleged RICO violations, and therefore, lacked standing to assert civil RICO claims. The plaintiffs appealed the dismissal to the Third Circuit. On September 26, 2018, the Third Circuit affirmed the lower court's decision, finding that all of

[372] Decision & Order, *Emp'rs Ret. Sys. of Providence, et al. v Embraer S.A.*, No. 16-CIV-6277, 2018 WL 1725574 (S.D.N.Y. Mar. 30, 2018).
[373] Opinion and Order, *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858 (S.D.N.Y. 2018).
[374] Stipulation of Settlement, *In re Petrobras Sec. Litig*, No. 14-cv-9662 (S.D.N.Y. Feb. 1, 2018).
[375] Preliminary Approval Order, *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, No. 14 Civ. 3251 (S.D.N.Y. Oct. 3, 2018).
[376] Stipulation of Settlement, *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, No. 14 Civ. 3251 (S.D.N.Y. Oct. 3, 2018).
[377] Revised Final Order and Judgment, *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, No. 14 Civ. 3251 (S.D.N.Y. Jan. 24, 2019).
[378] Opinion, *Humphrey v. GlaxoSmithKlein, PLC.*, No. 16-cv-05924, 2017 WL 4347587 (E.D. Pa. Sep. 29, 2017).

the alleged injuries indeed occurred abroad.[379] The Third Circuit further held that the plaintiffs' allegation that their reputations in the United States were damaged was insufficient to give rise to domestic injury in the United States for purposes of a civil RICO claim.

- Lahey Clinic, Inc (Lahey): In February 2017, the Government of Bermuda filed a RICO claim against Lahey in federal court, alleging that Lahey paid bribes and gave discounts on medical equipment to a public official in Bermuda in exchange for preferential treatment on bids for healthcare contracts and other undue benefits from the Bermudian government.[380] On March 8, 2018, the US District Court for the District of Massachusetts granted Lahey's motion to dismiss, finding that Bermuda failed to allege an injury in the United States as a result of the alleged schemes, as is required to bring a private RICO action. The judge also dismissed the pendent state law claims without prejudice.

- Petróleo Brasileiro S.A. (Petrobras): In February 2016, EIG Global Energy Partners and various other investment funds filed a civil fraud lawsuit against Petrobras, alleging that Petrobras's involvement in the Operation Car Wash corruption scandal caused the funds to lose their investments in one of Petrobras's offshore drilling projects.[381] Petrobras moved to dismiss under, *inter alia*, the Foreign Sovereign Immunities Act (FSIA). In March 2017, a D.C. federal judge largely denied Petrobras's motion to dismiss. The court found that Petrobras's alleged activity fell within the "commercial activity exception" to the FSIA because it allegedly targeted and fraudulently induced US-based entities to invest in the project, thereby having a "direct effect" on the United States.

- Petrobras filed an interlocutory appeal of the FSIA ruling. On July 3, 2018, the D.C. Circuit affirmed the judgment in a 2-1 opinion.[382] The Court held that Petrobras's commercial activity, as alleged in the complaint, caused a "direct effect" in the United States because "Petrobras specifically targeted US investors . . . ." Petrobras filed a Petition for Certiorari with the Supreme Court on December 3, 2018.

C. Breach of Contract Litigation

A notable breach of contract arbitration decision was issued in 2018:

- Petróleo Brasileiro S.A. (Petrobras): On July 2, 2018, Vantage Drilling International (Vantage) announced that an international arbitration tribunal issued an award in its favor in its breach of contract arbitration against Petrobras.[383] According to Vantage's press release, the tribunal awarded Vantage damages of $622

[379] Opinion, *Humphrey v. GlaxoSmithKlein, PLC.*, 905 F. 3d 964 (3d. Cir. 2018).
[380] Opinion and Order, *Gov't of Bermuda v. Lahey Clinic, Inc.*, No. 17-CV-10242-IT, 2018 WL 1243954 (D. Mass. Mar. 8, 2018).
[381] Opinion and Order, *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro S.A.*, 246 F. Supp. 3d 52 (D.D.C. 2017), *aff'd*, 894 F.3d 339 (D.C. Cir. 2018).
[382] Opinion, *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339 (D.C. Cir. 2018).
[383] Because the arbitration filings and award are not publicly available, we have relied on and cited media reports and public statements made by the companies.

million.[384] Vantage filed the arbitration after Petrobras notified Vantage in 2015 that it was terminating its contract with Vantage because Vantage had breached the terms.[385] According to media reports, the contract was terminated amid reports of a corruption probe in Brazil into potential bribery in the procurement of the 2009 contract between Vantage and Petrobras.[386] Vantage has moved to enforce the award in the Netherlands, and Petrobras has stated publicly that "it intends to adopt all available legal remedies" to challenge the award.[387]

D. Evidentiary Issues Related to the FCPA

A notable evidentiary ruling involving FCPA issues was issued in 2018 by the Fifth Circuit:

- DePuy Orthopedics, Inc. (DePuy) / Johnson & Johnson (J&J): In April 2018, the Fifth Circuit threw out a $502 million jury verdict and ordered a new trial in the Pinnacle Hip Implant Production Liability Litigation against DePuy and its parent company J&J due to plaintiffs' misuse of evidence at trial.[388] The Fifth Circuit said the "most problematic evidence" involved references to an unrelated 2011 deferred prosecution agreement (DPA) J&J entered into to resolve an FCPA investigation of bribes paid by J&J affiliates to Saddam Hussein's "henchmen." After defendants elicited testimony about J&J's positive internal culture, the trial judge allowed plaintiffs to use the DPA as rebuttal evidence, ruling that defendants had "opened the door." Plaintiffs' counsel referenced the DPA several times at trial, including in closing arguments, when he told the jury that they should consider the DPA "as a proxy for J&J's liability." The Fifth Circuit found this improper under the Federal Rules of Evidence and said "[t]hat alone provides grounds for a new trial."

[384] Vantage Press Release, *International Arbitration Tribunal Awards Vantage Drilling $622 million in Breach of Drilling Contract Claim against Petrobras*, Global News Wire, July 2, 2018, https://globenewswire.com/news-release/2018/07/02/1532605/0/en/International-Arbitration-Tribunal-Awards-Vantage-Drilling-622-million-in-Breach-of-Drilling-Contract-Claim-against-Petrobras.html.

[385] Jonathan Randles, *Vantage Protects Interests in Pursuit of $622 Million Petrobras Award*, Wall Street J., August 27, 2018, https://www.wsj.com/articles/vantage-protects-interests-in-pursuit-of-622-million-petrobras-award-1535397713?mod=article_inline.

[386] *Id.*

[387] *Id.*

[388] Order and Opinion, *In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753 (5th Cir. 2018).

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VIII. International Developments

A. United Kingdom

The Serious Fraud Office (SFO) experienced mixed fortunes during 2018. While a replacement for the outgoing director, David Green, was appointed, the agency experienced a number of setbacks throughout the year. The latter half of 2018 saw the collapse of the trial of two former Tesco executives and a decision upheld to dismiss the prosecution of Barclays Bank before trial. A number of key decisions also remain outstanding in several high profile cases, including potential charges against the Kazakh mining group Eurasian Natural Resources Corporation Ltd (ENRC) and the defense contractor (and subsidiary of Airbus) GPT. The SFO also lost an appeal brought by ENRC regarding the privilege attaching to documentation sought by the SFO.

On June 4, 2018, the Attorney General's Office announced that Lisa Osofsky had been appointed as the new director of the SFO, replacing Sir David Mark John Green QB QC, who stepped down in April 2018. Ms. Osofsky previously worked in both the public and private sectors, prosecuting over 100 cases on behalf of the US Government and also working at the FBI, Goldman Sachs International and Control Risks. She began a five-year term on August 28, 2018.

Since taking over as director Ms. Osofsky has indicated in her public speeches a possible change of direction for the SFO. While her predecessor refrained from explaining what constituted cooperation with the SFO, Ms. Osofsky, in a keynote speech at the Trace European Forum in London on November 8, 2018, said that the SFO was examining whether it would give a little more guidance to corporates and financial institutions on the level and nature of cooperation necessary to be considered for a deferred prosecution agreement (DPA).[389] The provision of firm guidance would be welcomed by compliance practitioners.

Additionally, Ms. Osofsky has indicated that SFO investigators and prosecutors will need to have an understanding of compliance to assess whether, in accordance with section 7 of the UK Bribery Act (UKBA), companies have adequate procedures in place such that they can avail themselves of a defence to any bribery charge. Ms. Osofsky described an approach similar to that of the US Department of Justice in which future prosecutors will be required to understand company compliance programs, thereby allowing assessment of the adequacy of a company's procedures and remediation efforts.

As noted in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, the SFO previously charged Ziad Akle, Basil Al Jarah, Paul Bond and Stephen Whiteley

[389] *Lisa Osofsky, Tell us something we don't know,* Global Investigations Rev. (Nov. 8, 2018), https://globalinvestigationsreview.com/article/1176629/lisa-osofsky-%E2%80%9Ctell-us-something-we-don%E2%80%99t-know%E2%80%9D (last accessed Jan. 4, 2019).

with conspiracy to make corrupt payments to secure the award of contracts in Iraq to Unaoil's client, SBM Offshore. In May 2018, the SFO brought further charges against Mr. Akle and Mr. Al Jarah, alleging conspiracy to make corrupt payments to secure the award of a contract to Leighton Contractors Singapore PTE Ltd to build two oil pipelines in southern Iraq.[390] All four individuals appeared before Southwark Crown Court on July 25, 2018. A pre-trial directions hearing is scheduled for April 23, 2019.

In June 2018, the SFO commenced criminal proceedings against two Unaoil Group companies, Unaoil Monaco SAM and Unaoil Ltd. The two entities were charged with two offences of conspiracy to give corrupt payments. The charges against Unaoil Monaco SAM relate to the aforementioned payments in Iraq and the charges against Unaoil Ltd relate to the contract awarded to Leighton Contractors.

As noted in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, ENRC was granted permission to appeal the decision of the High Court in *Serious Fraud Office v. Eurasian Natural Resources Corporation* in October 2017.[391] The judge at first instance, Geraldine Andrews J, agreed with the SFO's contention that the majority of materials created by ENRC during an internal investigation were not privileged and were required to be disclosed. Andrews J found that the materials were not covered by legal advice privilege due to a previous decision of the Court of Appeal in *Three Rivers No. 5* that communications or documents prepared by employees of a company who were not authorized to seek and receive legal advice on behalf of the company were not protected by the legal advice privilege.[392]

Andrews J also held that the other key form of privilege, litigation privilege, did not protect the materials created. In her view, notwithstanding the fact that the SFO had commenced an investigation, litigation was not reasonably contemplated when ENRC arranged for the carrying out of interviews and other forensic work. Andrews J further held that criminal prosecution would reasonably be contemplated only once ENRC had sufficient knowledge of the facts to form a view as to the likelihood of a conviction.

In the aftermath of the High Court's decision, concern was expressed that a narrow interpretation of privilege might discourage companies from self-reporting suspected wrongdoing.[393]

ENRC's appeal was heard by the Court of Appeal in July 2018, and in September 2018 the court ruled in favour of ENRC.[394] The Court of Appeal almost entirely overturned the decision of the High Court, concluding that ENRC did indeed reasonably contemplate criminal proceedings at the point at which it commenced its internal investigation, noting that "the whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting

[390] SFO press release, *New charges in SFO's Unaoil investigation in relation to US$733 million contract* (May 22, 2018), https://www.sfo.gov.uk/2018/05/22/new-charges-in-sfos-unaoil-investigation-in-relation-to-us733-million-contract/ (last accessed January 3, 2019).

[391] Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB)

[392] Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5) [2003] QB 1556.

[393] Law Society Gazette, *Legal Privilege Battle Heads to Court of Appeal* (Oct. 11, 2017),https://www.lawgazette.co.uk/law/legal-privilege-battle-heads-to-court-of-appeal/5063169.article (last accessed Jan. 14, 2019).

[394] Serious Fraud Office v Eurasian Natural Resources Corporation [2018] EWCA Civ 2006.

process did not result in a civil settlement."[395] The court found that documents created during the investigation had been created for the dominant purpose of resisting and defending contemplated legal proceedings and not for compliance and governance. It also found that there should be no distinction between the contemplation of civil or criminal proceedings when considering the applicability of litigation privilege. Accordingly, litigation privilege applied to all such documents.

While the Court of Appeal's view was that the case focused primarily on litigation privilege, it also considered legal advice privilege and, in particular, the decision in *Three Rivers No. 5* that communications and documents prepared by a company's employees who are not authorized to seek and receive legal advice on behalf of the company will not typically be covered by the legal advice privilege. While the Court of Appeal is unable to overrule its past judgments, the court made clear that it disagreed with the decision in *Three Rivers No. 5*, believing the position to be out of step with many common law jurisdictions and founded upon an outdated view of the nature of clients.

The Court of Appeal judgment has been welcomed in many quarters as representing a sensible and commercial approach to legal professional privilege. The Law Society, which intervened in the appeal, stated that "if the High Court ruling had been upheld, any organisation facing a prosecution – not just multinationals, but charities, newspapers, small businesses or local authorities – could have to turn over private communications with their lawyers. The rule of law depends on all parties being able to seek confidential legal advice without fear of disclosure."[396]

While clarity in respect of litigation privilege has been welcomed, any changes to the scope of legal advice privilege must be made by the Supreme Court in a future case as the SFO has confirmed that it will not appeal the Court of Appeal judgment.[397]

After the abandonment of a previous trial due to one of the defendants suffering a heart attack, on October 1, 2018 a retrial began of Christopher Bush and John Scouler, two of three former Tesco Plc senior managers who were charged over allegations of fraud and false accounting. On November 26, 2018 a judgment of no case to answer was handed down. On December 5, 2018 the Court of Appeal upheld the original decision that there was insufficient evidence for a jury to consider in respect of the two defendants, which resulted in the acquittal of Mr. Bush and Mr. Scouler.

The last of the three Tesco senior managers, Carl Rogberg, was severed from the trial following his heart attack. The SFO subsequently decided not to try Mr. Rogberg on his own and at a hearing on January 23, 2019 offered no evidence against him, resulting in a not guilty verdict being delivered.[398]

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[395] *Ibid.*, para. 93.

[396] *Landmark privilege win: appeal court rules against SFO in ENRC case*, Law Soc'y Gazette (Sept. 5, 2018), https://www.lawgazette.co.uk/law/landmark-privilege-win-appeal-court-rules-against-sfo-in-enrc-case-/5067427.article (last accessed Jan. 4, 2019)

[397] Law Society Gazette, *SFO will not appeal ENRC privilege ruling*, Law Soc'y Gazette (Oct. 2, 2018), https://www.lawgazette.co.uk/law/sfo-will-not-appeal-enrc-privilege-ruling/5067780.article (last accessed Jan. 3, 2019)

[398] SFO Case Information , *Tesco PLC* (Jan. 2, 2019), https://www.sfo.gov.uk/cases/tesco-plc/ (last accessed Jan. 3, 2019)

In addition to representing a setback for the SFO in a high-profile case, this verdict was labelled by some commentators as striking a serious blow to the SFO's two-pronged strategy of pursuing deferred prosecution agreements with companies and criminal prosecutions of individuals.[399] The case represented the SFO's first attempt at securing criminal prosecutions following a DPA. The outcome has led to debate concerning whether Tesco should have agreed to its DPA in the first place and raises the prospect that other companies facing similar allegations may elect to resist future deals. Despite Barclays Plc and Barclays Bank Plc facing allegations of unlawful financial assistance (and, in the case of the former, conspiracy to commit fraud) over the 2008 Qatar fund raising, the bank did not agree to a DPA with the SFO because of its refusal to accept any criminality had taken place. The SFO's subsequent efforts to bring corporate prosecutions against both companies were dismissed by both the Crown Court and the High Court.[400]

Following these developments in the cases against Barclays and the Tesco executives, Ms. Osofsky said she would look to make greater use of a US tactic of persuading insiders to cooperate with investigators to speed up criminal investigations.[401] A number of cases appear to have stalled recently, with no decisions yet made to charge the Kazakh mining group ENRC or the Airbus subsidiary, GPT.

Moreover, on February 22, 2019, the SFO announced the closure of the Rolls-Royce and GlaxoSmithKline (GSK) cases, citing "insufficient evidence to provide realistic prospect of conviction" and the "public interest" as the reasons behind its decision. The SFO noted that its investigation into Rolls-Royce had resulted in a DPA while the GSK investigation focused on "commercial practices by the company." It did concede, however, that "a detailed review of the available evidence and an assessment of the public interest" led the SFO to conclude that "there will be no prosecution in this case."[402] The SFO also confirmed that no individuals at Rolls-Royce would face prosecution.[403]

While the SFO faced a number of challenges during 2018, it obtained some welcome news in the judgment of the High Court in *R (on the application of KBR, Inc.) v Director of the Serious Fraud Office [2018] EWHC 2368 (Admin)*.[404] The case concerned the SFO's powers to obtain evidence for the purposes of investigation without requiring a court order under section 2 of the Criminal Justice Act 1987 (CJA). The SFO used these powers to require KBR, Inc. (KBR) to produce various documents held outside the UK, prompting KBR to contend that the SFO's powers under section 2 CJA had no extraterritorial jurisdiction and that mutual legal assistance should instead have been sought. The High Court held that a jurisdictional bar would risk frustrating the purpose of the power and that extraterritoriality

[399] FT Opinion, *Tesco fraud case crumbles as SFO tries to have cake and eat it* (Dec. 6, 2018), https://www.ft.com/content/c03e9304-f949-11e8-af46-2022a0b02a6c (last accessed January 3, 2019).
[400] SFO press release, *Barclays Plc and Barclays Bank Plc* (Oct. 26, 2018), https://www.sfo.gov.uk/2018/10/26/barclays-plc-and-barclays-bank-plc/ (last accessed Jan. 4, 2019).
[401] *SFO plans to flip insiders to speed up criminal probes*, FT News, Dec. 18, 2018, https://www.ft.com/content/5faeaaaa-02d2-11e9-99df-6183d3002ee1 (last accessed Jan. 3, 2019).
[402] https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/.
[403] https://www.bbc.com/news/business-47330580.
[404] R (on the application of KBR Inc) v Director of the Serious Fraud Office [2018] EWHC 2368 (Admin) (6 Sept. 2018) (Gross LJ and Ouseley J).

was extended to foreign companies in respect of documents held abroad when a sufficient connection existed between the company and the UK. On the facts of the case, the High Court found that a sufficient connection existed between KBR and the UK because payments central to the SFO's investigation of KBR Ltd. required the approval of, and were paid by, KBR. Consequently, KBR's application was refused.

The SFO also secured a number of convictions during 2018. As noted in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, the SFO previously secured convictions against F.H. Bertling Ltd and six of its current and former employees in respect of a $250,000 corrupt payment made to an agent of Sonangol in Angola. In November 2018, two further individuals pleaded guilty to a separate corruption scheme on behalf of F.H. Bertling in respect of payments connected to a ConocoPhillips freight forwarding contract.[405]

On December 19, 2018 another conviction was secured in the SFO's ongoing Alstom investigation. This means that four individuals have now been convicted of conspiracy to bribe senior Lithuanian politicians and various senior individuals in the energy sector to secure two contracts worth €240 million.[406]

In November 2018, the President of the Queen's Bench Division and Ms. Osofsky appeared before a House of Lords Committee on the UKBA and advocated for the expansion of "failure to prevent" offences to cover all areas of economic crime. Ms. Osofsky expressed a desire that the UKBA be "*mirrored elsewhere other than just in the facilitation of tax offences*", believing an extension to other fraud offences would be in the public interest. Prosecutors have long complained that, absent failure to prevent offences, reliance on the identification principle to establish corporate liability for economic crime has been problematic in the UK.

The hearing followed a 2017 Ministry of Justice call for evidence to examine different proposals addressing the issue of corporate liability for economic crime. The findings of this call for evidence have not yet been published but will be eagerly anticipated following the push for wider failure to prevent offences.

As we noted in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, unexplained wealth orders (UWOs) came into force on January 31, 2018 pursuant to the Criminal Finances Act 2017. An UWO requires a person reasonably suspected of involvement in, or being connected to a person involved in, serious crime to explain the nature and extent of his interest in particular property and how it was obtained when reasonable grounds exist to suspect that the subject of the UWO's lawfully obtained income would be insufficient to allow him to obtain the property in question.[407]

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[405] SFO press release, *9 convicted in £16m and $21m FH Bertling bribery cases* (Nov. 27, 2018), https://www.sfo.gov.uk/2018/11/27/9-convicted-in-16m-and-21m-fh-bertling-bribery-cases/ (last accessed January 4, 2019).

[406] SFO press release, *Five convictions in SFO's Alstom investigation into bribery and corruption to secure €325 million of contracts* (Dec. 19, 2018), https://www.sfo.gov.uk/2018/12/19/five-convictions-in-sfos-alstom-investigation-into-bribery-and-corruption-to-secure-e325-million-of-contracts/ (last accessed Jan. 4, 2019).

[407] Home Office correspondence, *Circular 003/2018: unexplained wealth orders* (February 1, 2018) https://www.gov.uk/government/publications/circular-0032018-criminal-finances-act-unexplained-wealth-orders/circular-0032018-unexplained-wealth-orders (last accessed Jan. 14, 2019).

On February 28, 2018, the National Crime Agency (NCA) secured the first UWOs, to investigate two properties totaling £22 million in value that were believed to be owned by a politically exposed person. The granting of these UWOs was challenged in the High Court.[408]

On October 3, 2018, the High Court reached a decision in *National Crime Agency v. Mrs A* [2018] EWHC 2534 (Admin).[409] The court upheld its previous decision to grant the NCA's application for the UWOs. The application to discharge the UWOs was made on eight grounds, including a contention that the individual in question was not a politically exposed person and the UWOs offended both the privilege against self-incrimination and spousal privilege. In upholding its previous decision, the court laid to rest some doubts surrounding the ability of the UWO regime to tackle criminal activity and money laundering.

B. Canada

On September 19, 2018, Canada amended its Criminal Code to establish a Deferred Prosecution Agreement (DPA) regime for corporate wrongdoing, including fraud and bribery offences. This followed the Canadian Government's previous consultation on the possibility of adopting legislation to create a DPA regime, as detailed in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview. The results of that consultation, which were published on February 22, 2018, revealed that participants supported "fair, proportional and transparent measures that enable the Government to take action against corporate wrongdoing and to hold companies accountable for such misconduct."[410] Canada's decision to implement a DPA regime follows similar steps taken in the United Kingdom in February 2014, France in November 2016, and Australia in December 2017.

Under the Canadian DPA scheme, Canadian Prosecutors may enter into negotiations for a DPA – which the relevant legislation labels as a "remediation agreement" – with a private organization provided: (i) there is a reasonable prospect of conviction; (ii) the relevant misconduct did not cause serious bodily injury, death, or harm to national defense or national security, and did not involve or benefit a criminal organization or terrorist group; (iii) negotiations for a remediation agreement are in the public interest; and (iv) the negotiations have been consented to by the Attorney General. Moreover, all remediation agreements must be approved by a judge, who must be satisfied that the remediation agreement is in the public interest and contains terms that are "fair, reasonable and proportionate."[411]

In an early test of Canadian prosecutors' willingness to use their new powers under the remediation agreement regime, SNC-Lavalin Group Inc. announced on October 10, 2018 that the Public Prosecution Service of Canada had declined to invite it

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[408] Transparency International UK, *First UWOs Challenged In Court* (July 25, 2018) https://www.transparency.org.uk/first-uwos-challenged-in-court/ (last accessed Jan. 14, 2019).

[409] *Nat'l Crime Agency v. Mrs A*[2018] EWHC 2534 (Admin).

[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 Jan. 3, 2018).

[411] Department of Justice Canada, *Remediation Agreements and Orders to Address Corporate Crime*, https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html (last accessed Jan. 4, 2018).

to negotiate a remediation agreement in connection with charges of bribery and fraud filed against it in 2015. As detailed in our 2016 FCPA Year in Review, SNC faces accusations of bribery in Bangladesh and Libya, as well as in relation to a contract to build the McGill University hospital in Montreal. On October 30, 2018, SNC requested judicial review of Canadian prosecutors' decision to exclude it from the remediation agreement regime. SNC alleged that the prosecutor had failed to explain its decision, leaving SNC "in the dark as to how they failed to meet the requirement of 'appropriateness,' or why the public interest requirement, though met, has apparently been ignored."[412]

The Canadian authorities also continue to prosecute individuals in connection with the SNC case. In December 2018, a former hospital executive was sentenced to 39 months in prison for accepting a $10 million bribe to favor SNC's bid to construct the McGill University Health Centre Hospital in Montreal.[413] The executive pleaded guilty to a variety of charges involving bribery, influence peddling, breach of trust and money laundering. The prosecution of individuals in connection with the SNC case has continued into 2019 – Pierre Duhaime, formerly SNC's chief executive officer, pled guilty on February 1, 2019 to a charge of helping a public servant commit breach of trust.[414]

C. Australia

During the past year, Australia remained active in passing legislation to combat bribery and other forms of corruption. In December 2018, the Australian Senate approved the *Treasury Laws Amendment (Enhanced Whistleblower Protections) Bill 2018*. As we detailed in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, a previous version of this Bill was tabled in late 2017. In addition to the provisions proposed by the 2017 Bill, the 2018 Bill further strengthens the protections and rights of whistleblowers, namely by granting a whistleblower the right to seek compensation when a company fails to take reasonable steps to prevent a third party from engaging in conduct prejudicial to the whistleblower. Following its approval by the Senate, the Bill must now pass scrutiny by the House of Representatives and is anticipated to become law no earlier than July 2019.

The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* also remains before the Australian Parliament.[415] This new legislation, introduced in December 2017 and discussed in our 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, would, among other things, introduce a new corporate offence of failing to prevent bribery and an associated "adequate procedures" defense (broadly equivalent to Section 7 of the UK Bribery Act 2010) and institute a DPA scheme for certain serious corporate crimes. On April 20, 2018, the Senate Legal

[412] SNC-Lavalin requests court review of federal decision to exclude it from remediation regime, GLOBE AND MAIL, Oct. 30, 2018, https://www.theglobeandmail.com/business/article-snc-lavalin-requests-court-review-of-federal-decision-to-exclude-it/ (last accessed Jan. 4, 2019).

[413] *Former hospital manager who took $10 million bribe to favour SNC Lavalin bid sentenced to 39 months in prison* FIN. POST, Dec. 17, 2018, https://business.financialpost.com/news/fp-street/ex-manager-sentenced-to-39-months-prison-in-hospital-corruption-fraud (last accessed Jan. 4, 2019).

[414] *Former SNC-Lavalin CEO pleads guilty in superhospital fraud case*, CBC NEWS, Feb. 1, 2019, https://www.cbc.ca/news/canada/montreal/snc-lavalin-ceo-guilty-fraud-pierre-duhaime-1.5001839 (last accessed 27 Feb. 2019).

[415] Parliament of Australia, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1108 (last accessed Jan. 4, 2019).

and Constitutional Affairs Committee released its report on the Bill,[416] which recommended that Parliament pass the Bill as currently drafted.

The Attorney-General's Department released on June 8, 2018 a draft DPA Scheme Code of Practice, which provides further insights into the DPA scheme proposed by the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*.[417] Among other things, the Code of Practice provides that DPA negotiations will only be entered into if it is in the public interest and there is a reasonable prospect of the parties agreeing to a DPA. It also makes clear that, although self-reporting will not be a pre-requisite to successfully obtaining a DPA, it nonetheless will be an important factor in determining whether DPA negotiations are appropriate. As noted, the Bill currently is being considered by the Australian Parliament, so it remains to be seen whether Australia approves the Bill and makes the proposed broad changes to its anti-corruption legislative regime in 2019.

In December 2018, the Australian Government announced the establishment of a Commonwealth Integrity Commission to identify, investigate and prosecute corruption in the federal public sector.[418] The proposed Commission will be led by a Commissioner and two Deputy Commissioners, and will have jurisdiction over a broad range of Government departments. The Government most recently conducted a public consultation on the issue, which closed on February 1, 2019. The Australian Government now will consider responses to the consultation and work with a panel of experts to establish the Commission.[419]

D. Continental Europe

1. France

As discussed in our 2016 FCPA Year in Review and 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, France has stepped up its anti-corruption efforts in recent years. This has included adoption of a new anti-corruption law, nicknamed Sapin II, in December 2016, which entered into force in June 2017; publication by the French Anti-Corruption Agency (*Agence Française Anticorruption*, AFA) in December 2017 of compliance program guidance; and the conclusion of the first French DPAs or *Convention Judiciaire d'Intérêt Public* (CJIP) in 2017.

On May 24, 2018, the French bank Société Générale reached coordinated settlements with US and French authorities in relation to alleged bribery of officials of the Libyan Investment Authority. Société Générale entered a DPA with the DOJ, discussed at Section IV.B.2 above, and a CJIP with the French Parquet National Financier (PNF).

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[416] *See Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, Senate Legal & Constitutional Affairs Legislation Comm. (Apr. 2018), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CombattingCrime/Reporthttps://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CombattingCrime/Report (last accessed Jan. 4, 2019).

[417] *Australian Government Attorney-General's Department, Deferred Prosecution Agreement Scheme of Practice* (May 2018), https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme-code-of-practice/Deferred-prosecution-agreement-scheme-draft-code-of-practice.pdf (last accessed Jan. 4, 2019).

[418] *See Media Release*, Prime Minister, and Attorney General of Australia (Dec. 13, 2018), https://www.pm.gov.au/media/commonwealth-government-establish-new-integrity-commission (last accessed Jan. 4, 2019).

[419] *See Media Release*, Attorney General for Australia (Dec. 18, 2018), https://www.attorneygeneral.gov.au/Media/Pages/Commonwealth-Integrity-Commission-Review-Panel-Announced-18-Dec-2018.aspx (last accessed Jan. 4, 2019).

Penalties were split between US and French authorities, with the CJIP requiring Société Générale to pay €250 million penalty to French authorities and submit to two years of monitoring by the AFA.[420]

In addition, three domestic corruption-related CJIPs were approved by the Paris High Court in 2018. Three sub-contractors to the partially state-owned utility company *Electricité de France* (EDF) -- Kaefer Wanner (KW), SET Environnement (SE), and Poujaud -- admitted to having bribed an EDF procurement manager in exchange for the allocation of public contracts. In the CJIPs, KW[421], SE[422], and Poujaud[423] agreed to pay fines of €2,710,000, €800,000, and €420,000, respectively, as well as €30,000 each as compensation to EDF. Each of the companies also agreed to being monitored by the AFA. KW will be subject to the AFA monitorship for 18 months, and SE and Poujaud will be subject to the AFA monitorship for 24 months.

In a case concerning payments totaling $30 million allegedly made to secure a deal for the South Pars natural gas field located in the Persian Gulf, a French court fined Total €500,000 in December 2018. French prosecutors had sought a €750,000 penalty and €250 million in disgorgement. The alleged facts occurred between 2000 and 2004.[424] Total reached a $398 million FCPA settlement with US authorities in 2013 in relation to the same conduct.[425]

French prosecutors are also targeting current and former high-level politicians in France in connection with their anti-corruption efforts. The PNF announced that they have opened a preliminary inquiry into allegations that the French President's chief of staff, Alexis Kohler, violated conflict of interest rules while serving at the Ministry of the Economy and Finance.[426] Furthermore, the investigation into the allegations of illegal financial support from the Libyan government for Nicolas Sarkozy's 2007 election campaign is ongoing. In March 2018, the former French President was

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420 CJIP PNF 15 254 000 424 (May 24, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/24.05.18_-_CJIP.pdf (last accessed Jan. 4, 2019); ordinance of validation of the CJIP, Cour d'appel de Paris, P 15 254 000 424, (June 4, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/Ordonnance_de_validation_CJIP.pdf (last accessed Jan. 4, 2019).

421 CJIP RCS Nanterre 312 668 601 (Feb. 15, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_KW.pdf (last accessed Feb. 15, 2019); ordinance of validation of the CJIP, Cour d'appel de Versailles, 11245045572 (Feb. 23, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/Ordonnance_validation_CJIP_SAS_KAEFER_WANNER.pdf (last accessed Feb. 15, 2019).

422 CJIP RCS d'Evry 338 594 250 (Feb. 14, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_PR_Nanterre_-_SAS_SET_ENVIRONNEMENT_-_14-02-2018_signe.pdf (last accessed Feb. 15, 2019); ordinance of validation of the CJIP, Cour d'appel de Versailles, 11245045572 (Feb. 23, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/Ordonnance_validation_CJIP_SAS_SET_ENVIRONNEMENT.pdf (last accessed Feb. 15, 2019).

423 CJIP RCS Aix en Provence 410 379 119 (May 7, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_Poujaud.pdf (last accessed Feb. 15, 2018); ordinance of validation of the CJIP, Cour d'appel de Versailles, 11245045572 (May 25, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/Ordonnance_validation_CJIP_Poujaud.pdf (last accessed Feb. 15, 2018).

424 *Total condamné à 500 000 euros d'amende pour corruption en Iran*, Le Monde, Dec. 21, 2018, https://www.lemonde.fr/international/article/2018/12/21/total-condamne-a-500-000-euros-d-amende-pour-corruption-en-iran_5401005_3210.html (last accessed Jan. 5, 2019).

425 Deferred Prosecution Agreement, *Total S.A.*, No. 1:13-cr-239 (E.D.V.A. May 29, 2013), https://www.justice.gov/iso/opa/resources/939201352910374699852 4.pdf (last accessed Feb. 15, 2019); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Total S.A.*, Exchange Act Release No. 69654 (May 29, 2013), https://www.sec.gov/litigation/admin/2013/34-69654.pdf (last accessed Feb. 15, 2019).

426 Caroline Piquet, *Le secrétaire general de l'Élysée visé par une enquête du parquet national financier*, Le Figaro (June 4, 2018), http://www.lefigaro.fr/actualite-france/2018/06/04/01016-20180604ARTFIG00134-le-secretaire-general-de-l-elysee-vise-par-une-enquete-du-parquet-national-financier.php (last accessed Jan. 4, 2019).

charged with corruption, illegal campaign financing and misappropriation of Libyan public funds.[427]

Lafarge SA, the predecessor company of the world's largest building materials and solutions company LafargeHolcim, was placed under formal investigation in June 2018 over allegations that it financed ISIS and other terrorist groups and aided and abetted crimes against humanity in order to keep its Syrian cement plant running. Moreover, the company was charged with violating an EU embargo on oil purchases.[428]

The Court of Cassation (the French Supreme Court) issued two important judgments in which it limited the application of the *ne bis in idem* principle as a defense to criminal prosecution. According to French law, a complete criminal conviction in another jurisdiction will bar prosecution in France – but only if no act took place in France. The Oil-for-Food-1 case concerned Swiss oil trader Vitol, which allegedly bribed the government of Iraq to obtain oil under the UN's Oil-for-Food program that ran from 1996 to 2003. Under that program, Iraq could sell oil on the open market to purchase humanitarian supplies for its citizens. The Court of Cassation held that Vitol could be prosecuted in France, despite having entered into a plea agreement in the United States based on the same facts. Although the International Covenant on Civil and Political Rights prevents double jeopardy on similar charges for unique facts, the Court of Cassation held that it only applies if both proceedings were initiated in the same jurisdiction.[429]

The Oil-for-Food 1 judgment resembled another 2018 ruling, in which the Court of Cassation overturned the lower court's decision not to hear the case against British-Israeli lawyer Jeffrey Tesler, who pleaded guilty in the United States in 2011 to FCPA charges arising from bribery of Nigerian public officials. The Court of Cassation noted that Tesler had not been deprived of his right to a fair trial because his appearance in French courts was not governed by the provisions of the plea agreement concluded with the DOJ. Moreover, the US plea deal did not preclude French prosecution given that some of the corrupt acts had been committed in France.[430] The new case law of the Court of Cassation appears to put an end to protection against double jeopardy in France conduct prosecuted abroad if at least part of the alleged violations took place in France. These two decisions and in particular the March 2018 decision on the Oil-for-Food 1 case are likely to have an impact on ongoing and future cases, such as the Oil-for-Food 2 case currently pending before the Paris Court of Appeals.

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427 *Soupçons de financement libyen : Nicolas Sarkozy mis en examen,* Le Figaro, Mar. 21, 2018, http://www.lefigaro.fr/politique/le-scan/2018/03/20/25001-20180320ARTFIG00055-soupcons-de-financement-libyen-de-la-campagne-de-2007-nicolas-sarkozy-en-garde-a-vue.php (last accessed Jan. 4, 2019).

428 Liz Alderman, *French Cement Giant Lafarge Indicted on Terror Financing Charge in Syria*, N.Y. Times, June 28, 2018, https://www.nytimes.com/2018/06/28/business/lafarge-holcim-syria-terrorist-financing.html (last accessed Jan. 8, 2019).

429 Decision of the Court of Cassation No. 16-82.117 (Mar. 14, 2018), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036741972&fastReqId=1379183482&fastPos=1 (last accessed Jan. 8, 2019).

430 Decision of the Court of Cassation No. 16-86.491 (Jan. 17, 2018), https://www.doctrine.fr/d/CASS/2018/JURITEXT000036584463 (last accessed Jan. 8, 2019).

2. Germany

2018 was quiet year for German anti-corruption enforcement. Most notably, the German Federal Constitutional Court published three rulings on the lawfulness of the seizure of documents and data obtained during a dawn raid of the Munich office of Jones Day, which was conducting an internal investigation on behalf of Volkswagen (VW). During the raid, Munich prosecutors seized documents and data related to the VW investigation for use in the Audi investigation. The Court held that VW's fundamental rights were not violated and that the seizure was proportionate, noting that it was not Jones Day's client, VW, which was being investigated by the Munich prosecutors but rather Audi. The court further held that search and seizure of documents at a law firm is unlawful if the firm's client is a suspect in the respective criminal investigation or is subject to proceedings that could lead to an administrative fine or a confiscation of property. Consequently, the documents must not be used in the investigation of VW, which is conducted by Braunschweig prosecutors.[431]

3. Italy

Anti-corruption efforts remained strong in Italy this year, both in terms of legislative and enforcement developments. The Italian parliament approved a package of measures to fight corruption in the public sector and to improve the efficiency of the justice system. The new legislation bans persons definitively convicted of corruption from participating in public tenders and increases sentences for offering or receiving bribes. It also allows the police to use undercover operations in order to pursue corruption, which was previously only allowed for organized crime and terrorism. Moreover, it contains provisions to encourage public sector whistleblowers.[432] The so-called "bribe destroyer" (spazzacorotti) bill was approved in the Chamber of Deputies by a nearly 3-1 margin following months of deliberations.

A case on alleged corruption in Nigeria, revolving around the 2011 purchase by oil and gas companies Eni and Shell of Nigeria's OPL-245 offshore oilfield, is ongoing. Several current and former executives or contractors, including the CEO of Eni Claudio Descalzi, have been accused of paying bribes to obtain the license to explore the oilfield. In a first ruling, a Milan judge sentenced two men to four years in prison and ordered the seizure of more than $115 million.[433] In another matter, concerning alleged corruption in Algeria, a Milan court acquitted Eni, its former CEO Paolo Scaroni, and its current upstream head Antonio Vella. In the same ruling, it fined Saipem (a former subsidiary of Eni) €400,000, seized €198 million euros

[431] German Federal Constitutional Court Press Release, *Verfassungsbeschwerden anlässlich der Durchsuchung einer Anwaltskanzlei im Zuge des "Diesel-Skandals" erfolglos* (July 6, 2018), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-057.html (last accessed July 6, 2018).

[432] Gavin Jones, *Italy parliament approves corruption crackdown in win for 5-star*, Reuters, Dec. 18, 2018, https://www.reuters.com/article/us-italy-corruption-law/italy-parliament-approves-corruption-crackdown-in-win-for-5-star-idUSKBN1OH25B (last accessed Jan. 8, 2018).

[433] Luca de Vito, *Eni, prime condanne per le tangenti in Nigeria*, la Repubblica, Sept. 20, 2018, https://www.repubblica.it/economia/finanza/2018/09/20/news/eni_prime_condanne_per_le_tangenti_in_nigeria-206931236/?refresh_ce (last accessed Jan. 6, 2019).

and sentenced several individuals, including Saipem's former CEO Pietro Tali, to sentences between 4 years and a month and 5 years and 5 months.[434]

4. The Netherlands

On September 4, 2018, ING reached a settlement with the Dutch Public Prosecution Service concerning an investigation relating to client on-boarding and prevention of money laundering and corrupt practices. ING agreed to pay a fine of €675 million and €100 million in disgorgement. The alleged deficiencies included missing and incomplete client due diligence files, assignment of incorrect risk classifications, failure to conduct periodic client due diligence reviews, failure to exit business relationships in a timely manner, insufficient post-transaction monitoring, classifying clients in the wrong segments and insufficient availability of human resources.[435] On September 5, 2018, ING announced that the SEC closed its investigation after the company reached a settlement with Dutch prosecutors.[436]

E. Ukraine

On June 7, 2018, Ukraine's parliament passed a law to establish an anti-corruption court which is expected to go into effect in March 2019. Following the launch of the National Anti-Corruption Bureau of Ukraine, the Specialized Anti-Corruption Prosecutor's Office and the National Agency on Corruption Prevention, the anti-corruption court became the fourth anti-corruption institution in the country. The court has jurisdiction in corruption and anti-corruption related matters, both at trial as well as at appellate level, and is tasked with controlling pre-trial investigation and the criminal procedure of such matters. However, regular courts retain jurisdiction over ongoing corruption cases and any resulting appeals will also be heard in courts of general jurisdiction. The National Agency on Corruption Prevention voiced concerns that this will allow numerous corrupt officials to avoid sentencing.[437] The new legislation creates mechanisms to ensure the impartiality of the new anti-corruption court's judges. In particular, candidates for appointment are vetted and interviewed by a panel of six international experts.[438]

F. Russia

Russia continued to enforce and advance its anti-corruption framework through prosecutions, investigations, and legislative changes in 2018. During the first nine

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[434] *Eni-Saipem, assolto Scaroni per le tangenti in Algeria*, La Repubblica, Sept. 19, 2018, https://www.repubblica.it/economia/finanza/2018/09/19/news/eni_assolto_scaroni_per_le_tangenti_in_algeria-206864041/?refresh_ce (last accessed Jan. 7, 2019).

[435] *ING reaches settlement agreement with Dutch authorities on regulatory issues in the ING Netherlands business*, (Sept. 4, 2018), https://www.ing.com/Newsroom/All-news/Press-releases/ING-reaches-settlement-agreement-with-Dutch-authorities-on-regulatory-issues-in-the-ING-Netherlands-business.htm (last accessed Jan. 7, 2019).

[436] ING Groep N.V., Report of Foreign Private Issuer (Form 6-K), (Sept. 5, 2018), https://www.sec.gov/Archives/edgar/data/1039765/000119312518266748/d619065d6k.htm.

[437] *Sentences in the NABU cases made by the courts of general jurisdiction should be appealed to the Appeals Chambers of the High Anti-Corruption Court*, Nat'l Anti-Corruption Bureau of Ukraine (June 13, 2018), https://nabu.gov.ua/en/novyny/sentences-nabu-cases-made-courts-general-jurisdiction-should-be-appealed-appeals-chamber-high (last accessed Jan. 7, 2019).

[438] Oleg Sukhov, *Commission selects foreign expert panel to create anti-corruption court*, Kyiv Post, Nov. 6, 2018, https://www.kyivpost.com/ukraine-politics/commission-selects-foreign-expert-panel-to-create-anti-corruption-court.html (last accessed Jan. 7, 2019).

months of 2018, Russian law enforcement registered over 25,000 corruption crimes, a small increase (0.6%) over the first nine months of 2017.[439] During the same period, 7,800 convictions were issued in criminal corruption cases in connection with 8,500 people, including law enforcement officers, as well as regional, municipal, local, and other government officials.[440] Criminal investigations were completed of former regional officials, a former governor, a former mayor, a former Ministry of Internal Affairs official, and two former judges.[441]

Legislative changes in the past year include a law that President Putin signed in August aimed at strengthening anti-corruption enforcement and refining the application of liability. Broadly speaking, Federal Law 298, "On amendments to the Code of the Russian Federation regarding administrative offenses", exempts certain legal entities from liability under article 19.28 of the Code (which deals with illegal remuneration on behalf of a legal entity) for administrative offenses, if the entity took action such as contributing to discovering the offense or conducting an administrative investigation.[442] Legal entities may also be exempt if they were extorted.[443] Federal Law 298 also allows for the seizure of property in order to enforce administrative penalties.[444] Other notable legislation signed by President Putin in 2018 includes Federal Law 307, "On amendments to certain legislative acts of the Russia Federation to improve monitoring of compliance with Russian Federation laws on anti-corruption",[445] signed in August 2018, and Federal Law 570, "On amendments to article 19.28 of the Code of the Russian Federation regarding administrative offenses", signed in December 2018.[446]

G. China

Efforts to promote internal stability and government control over officialdom defined Chinese anti-corruption policy and legislation in 2018. With the establishment of the National Supervision Commission (中国监督委员会), greater direct supervision has been set up for party and government agencies. According to reports, the National Supervision Commission has already dispatched forty-seven supervision teams to conduct onsite supervision of central party and government personnel.[447] It is

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[439] The Investigative Committee of Russia, *В СК России проанализирована работа по расследованию преступлений коррупционной направленности* (The Investigative Committee of Russia analyzes investigations of corruption-related crimes) (Dec. 9, 2018) https://sledcom.ru/news/item/1279428 (last accessed Jan. 15, 2019).

[440] The Prosecutor General's Office of the Russian Federation, *Предлагаем вашему вниманию интервью Генерального прокурора Российской Федерации Юрия Чайки газете «Коммерсантъ»* (Interview with Prosecutor general of the Russian Federation Yurii Chaika in the newspaper "Kommersant") (Dec. 12, 2018). https://genproc.gov.ru/smi/news/archive/news-1514212/ (last accessed Jan. 18, 2019).

[441] *Supra*, fn. 1.

[442] *Федеральный Закон № 298-ФЗ, 3 августа 2018, О внесении изменений в Кодекс Российской Федерации об административных правонарушениях* (Federal Law No. 298-FZ, Aug. 3, 2018), http://publication.pravo.gov.ru/Document/View/0001201808030084 (last accessed Jan. 18, 2019).

[443] *Id.*

[444] *Id.*

[445] *Федеральный Закон № 307-ФЗ, 3 августа 2018, О внесении изменений в отдельные законодательные акты Российской Федерации в целях совершенствования контроля за соблюдением законодательства Российской Федерации о противодействии коррупции* (Federal Law No. 307-FZ, Aug. 3, 2018), http://publication.pravo.gov.ru/Document/View/0001201808030089 (last accessed Jan. 18, 2019).

[446] *Федеральный Закон № 570-ФЗ, 27 декабря 2018, О внесении изменения в статью 19.28 Кодекса Российской Федерации об административных правонарушениях* (Federal Law No. 570-FZ, Dec. 27, 2018), http://publication.pravo.gov.ru/Document/View/0001201812280033 (last accessed Jan. 18, 2019).

[447] *CCDI and the National Supervision Commission Jointly Set up Dispatch Agencies*, Xinhua, published on Jun. 20, 2018, http://www.xinhuanet.com/politics/2018-06/20/c_1123011925.htm.

presumed that even greater scrutiny of officials is being conducted online through monitoring social media and other electronic communications.[448] These efforts are designed to promote greater accountability and solidarity within the party and the government. It remains to be seen how these changes will impact foreign businesses operating in China, already constrained somewhat and viewed with suspicion in the current political environment between the US and China.

1. Repatriating Fugitive Officials

Utilizing the Belt and Road Initiative, China continued to leverage financial assistance and infrastructure projects to promote judicial assistance and cooperation in anti-corruption cases, with an eye towards having fugitive officials accused of anti-corruption crimes repatriated to China.

China promulgated the *PRC Law on International Criminal Justice Assistance*, laying out rules and procedures for judicial assistance (including service of documents; evidence collection; witness testimony and seizure and confiscation of assets) in criminal cases.[449] Certain countries have reached mutual judicial assistance treaties or agreements with China,[450] but for those who have not done so, this law is designed to serve as a gap-filler. In the new law, China emphasized Chinese judicial sovereignty, expressly requiring all requests for judicial assistance or evidence collection to uphold the principles of Chinese sovereignty, security and public interests.[451] There are also provisions that look to impact criminal litigation in the anti-corruption sphere. For example, Article 4 provides that without the approval of relevant Chinese government authorities, foreign organizations or individuals are not permitted to engage in criminal litigation activities within PRC territory.[452] It is unclear what that provision will mean in practice and whether there will be any impact on anti-corruption investigations conducted in China.

In addition, it is worth noting that we are now in the fourth year of the "Sky Net" Campaign (天网行动), which was launched by China in 2015 to capture fugitive officials. Fugitive government officials are accused of causing significant financial and reputational impact to the PRC, and the Chinese government endeavors to have them repatriated. According to reports, as of November 2018, the "Sky Net" Campaign has led to the capture of 1,005 fugitive government officials, fifty-six of whom are on China's list of 100 most wanted corrupt officials.[453]

Apart from efforts at repatriation, China also enacted legislation so as to be able to try anti-corruption crimes *in absentia*. Through amendments to the Criminal Procedure Law, the Chinese government added absentee provisions for criminal

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[448] *See the Communist Party of China Integrity Discipline Provisions*, revised on Oct. 1, 2018, http://www.ccdi.gov.cn/fgk/law_display/6343.

[449] *PRC Law on International Criminal Justice Assistance*, Standing Committee of National People's Congress, promulgated on Oct. 26, 2018, http://www.npc.gov.cn/npc/xinwen/2018-10/26/content_2064576.htm ("*International Criminal Judicial Assistance Law*").

[450] A list of judicial assistance agreements/treaties is available at the Supreme People's Court's website: http://www.court.gov.cn/shenpan-gengduo-73.html.

[451] Article 4, International Criminal Judicial Assistance Law.

[452] *Id.*

[453] *One Minute Nutshell: What is New about "Fox Hunt" in 2018*, Central Commission for Discipline Inspection, published on Jan. 9, 2019, http://www.ccdi.gov.cn/toutiao/201901/t20190109_186614.html.

cases related to bribery and corruption by fugitive government officials.[454] The new absentee provisions allow convictions of fugitive government officials and the confiscation of their property even when they do not participate in the criminal proceedings.[455] The basic procedure for this mechanism is covered in a new subsection of the Criminal Procedure Law, in total seven provisions.[456] Under these provisions, prosecutors can bring charges against the fugitive officials if they find the facts and evidence are sufficient.[457] If a defendant does not appear after service of indictment documents,[458] the court may proceed with trial and ultimately enter a default judgment, and dispose of the defendant's adjudged illegally-gained property and any other assets involved in the case.[459]

2. Compliance Concerns for Chinese Companies Operating Overseas

With the current political backdrop to the US- China relationship and issues of trade compliance routinely in the news, China is taking further steps to focus its companies on compliance in their overseas investments, issuing a *Notice on Guideline of Compliance Management in Enterprises' Overseas Operation* intended to help Chinese companies operating overseas with their compliance.[460] This guidance was prepared jointly by several government departments, including the National Development and Reform Commission (NDRC) and the Ministry of Commerce, to provide basic instructions and guidance to Chinese companies and their overseas subsidiaries in building up a proper compliance system and putting such system into effective operation.[461] The guidance calls for establishing independent compliance departments, due diligence reviews on third party partners, and compliance training and audit.[462] Chinese state-owned enterprises, which are under direct supervision of the NDRC, are expected to be the first followers to implement this guidance. Foreign companies dealing with Chinese companies overseas may start seeing an increased focus on compliance issues by these companies.

H. South Korea

Corruption continued to afflict the highest levels of the South Korean government in 2018. Last year witnessed two former presidents receiving extensive prison terms following their convictions on corruption charges related to different scandals. As noted in Steptoe's 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, 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

[454] *See* PRC Criminal Procedure Law, Standing Committee of the National People's Congress, amended on Oct. 26, 2018, http://www.gov.cn/xinwen/2018-10/27/content_5334920.htm#1.
[455] *Id.*
[456] Articles 291-297, PRC Criminal Procedure Law.
[457] Article 291, PRC Criminal Procedure Law.
[458] Article 292, PRC Criminal Procedure Law.
[459] *Id.*
[460] *Notice on Guideline of Compliance Management in Enterprises' Overseas Operation*, Fa Gai Wai Zi (2018) No. 1916, issued jointly by National Development and Reform Commission, Ministry of Foreign Affairs, Ministry of Commerce, People's Bank of China, State-Owned Assets Supervision and Administration Commission, State Administration of Foreign Exchange, All-China Federation of Industry and Commerce Federation, http://www.ndrc.gov.cn/gzdt/201812/t20181229_924456.html.
[461] *Guideline of Compliance Management in Enterprises' Overseas Operation*, http://www.ndrc.gov.cn/gzdt/201812/W020181229559496208820.pdf.
[462] *See generally Guideline of Compliance Management in Enterprises' Overseas Operation.*

aide, removed from office on March 10, 2017, and indicted a month later on several criminal corruption charges. On April 6, 2018, Park was sentenced to 24 years in prison and was also ordered to pay a $16.9 million fine.

Less than six months later on October 5, 2018, former South Korean president Lee Myung-bak was sentenced to 15 years in prison on corruption charges in addition to being ordered to pay an $11.5 million fine.[463] A former Hyundai executive and mayor of Seoul, Lee served as President of South Korea from 2008-2013, during which he allegedly engaged in a slate of corruption-related crimes.

Prosecutors accused Lee of taking bribes from Samsung totaling nearly $6 million in exchange for a presidential pardon for Samsung Chairman Lee Kun-hee who had been imprisoned for tax evasion and stock fraud. It was alleged that the former president was also involved in a massive embezzlement scheme with a portion of the funds Samsung allegedly provided to him used to pay legal fees for DAS, a car-parts manufacturing firm owned by Lee's brother.[464] Lee was also accused of embezzling $700k of government money that was initially earmarked for the country's intelligence agency. Lee's corruption conviction highlights the close and ongoing nexus between South Korea's government and major corporate houses.[465]

I. India

Combatting corruption continued to be a priority for the world's largest democracy in 2018, particularly with national elections looming in May 2019. Prime Minister Modi swept into power in an election landslide in 2014 largely on a platform to eradicate graft that had become ubiquitous during the predecessor Indian government. The Modi government's anti-corruption credentials were tarnished in 2018, however, when one of the country's wealthiest citizens fled the country after being implicated in a massive bank fraud.[466] The Indian government's efforts to extradite the so-called "jeweler to the stars" have so far been unsuccessful.

A murky multibillion dollar defense deal involving Prime Minister Modi, French fighter jets and another Indian billionaire, Anil Ambani, has also raised questions about the Indian government's commitment to combatting corruption. Although the Indian Supreme Court has cleared the prime minister and his governing party of any wrongdoing, India's political opposition party has used the episode, known as the Rafael-scandal, as a political cudgel against Modi ahead of national elections.[467]

Mr. Modi has also invited criticism from certain sectors for having so far failed to appoint a national anti-corruption watchdog, or Lokpal. As noted in Steptoe's 2017

[463] *South Korea Jails Former President Lee for 15 years on Corruption Charges*, Reuters, Oct. 5, 2018, https://www.reuters.com/article/us-southkorea-politics-corruption/south-korea-jails-former-president-lee-for-15-years-on-corruption-charges-idUSKCN1MF0J1.

[464] *Ex-South Korean President Questioned in Corruption Probe*, VOANews, Mar. 14, 2018, https://www.voanews.com/a/lee-myung-bak-corruption-case/4297915.html.

[465] *Id.*

[466] Maria Abi-Habib, *Jeweler to the Stars Flees as India Seethes Over Bank Fraud*, N.Y.Times, Apr. 3, 2018, https://www.nytimes.com/2018/04/03/world/asia/nirav-modi-india-banks.html.

[467] *Supreme Court Gives Clean Chit to Modi Gov't in Rafale Dea*, Hindu Business Line, Dec. 14, 2018, https://www.thehindubusinessline.com/news/supreme-court-gives-clean-chit-to-modi-govt-in-rafale-deal/article25740731.ece.

Year in Review & 2018 Q1 Preview, the prime minister was scheduled to appoint one sometime last year consistent with prevailing statutory requirements.

On the legislative front, India's Lower House of Parliament passed the Prevention of Corruption (Amendment) Bill, 2018 on July 24, 2018, setting the stage for far-reaching amendments to India's primary anti-corruption law, the Prevention of Corruption Act, 1988 (POCA). Under the current statute, bribe recipients, not offerors, are the principal targets of the law. The new proposed amendments would render offering or providing bribes a principal offense, helping align the POCA with other international anti-corruption laws, including the FCPA. The new amendments also would establish liability for commercial organizations for offering or providing any undue advantage to a public servant intending to obtain an advantage in the conduct of business.

J. Japan

On July 20, 2018, the Tokyo District Public Prosecutors Office indicted three former executives of Mitsubishi Hitachi Power Systems (MHPS) for bribery of foreign public officials in violation of the Unfair Competition Prevention Act. MHPS used a logistic company in Thailand who did not have the appropriate license to use the local port facility. As a result, the company's goods were held at the port, and three MHPS officials allegedly acceded to a demand by local port officials for a payment of THB 20 million (approximately USD 630,000) to release the goods. After learning about the payment, MHPS engaged outside counsel to conduct an internal investigation and disclosed findings to the Tokyo District Public Prosecutors Office. As a result of its cooperation, MHPS resolved the investigation under a newly adopted plea agreement system that became effective in Japan on June 1, 2018 under the Code of Criminal Procedure.[468]

K. Other Developments in Asia

In April 2018, Malaysia amended its anti-corruption law to introduce a new corporate liability provision, as Section 17A of the Malaysian Anti-Corruption Commission Act, which will come into force on June 1, 2020.[469] The new Section 17A provides that a commercial organization will be found liable for an employee's bribery if the bribery is intended to obtain or retain business or an advantage for the commercial organization.[470]

L. Brazil

Brazil's unprecedented investigation into large-scale corruption and money laundering schemes involving Petrobras and other government agencies, known as "Operation Car Wash" (*Lava Jato* in Portuguese), continued to unfold in 2018. In spite of the July 2017 decision to disband the Federal Police task force leading Operation Car Wash, 2018 saw new charges, arrests and convictions. Its modus

[468] Press Release, MHPS (July 20, 2018), https://www.mhps.com/news/20180720.html.
[469] Press Release, Prime Minister's Office (Dec. 10, 2018), http://www.pmo.gov.my/home.php?menu=newslist&page=1731&news_id=762&news_cat=13.
[470] Laws of Malaysia, Act A1567, Malaysian Anti-Corruption Commission (Amendment) Act 2018 (May 4, 2018), http://www.federalgazette.agc.gov.my/outputaktap/20180504_A1567_BI_Act%20A1567.pdf.

operandi outgrew its state of origin, Paraná, and has been implemented by state and federal prosecutors throughout the country. Since its inception in 2014, the investigation has unveiled an exceptional scope of corrupt practices, resulting in arrests and indictments of business executives, financial operatives and high-ranking politicians, including former President Luiz Inácio Lula da Silva and former Governor of Rio de Janeiro Sérgio Cabral, both of whom had their convictions upheld in 2018 by the Federal Regional Tribunal for the Fourth Region (TFR4), Brazil's appeals court, in January and May, respectively. In addition, in 2018 the investigation expanded its scope by targeting kickback schemes involving toll-road companies operating highway concessions, and international commodity trading companies, including Glencore, Vitol and Trafigura.

As the number of enforcement actions under Brazil's 2014 Clean Company Act continued to increase in 2018, jurisdictional issues between federal agencies remained. In particular, in 2018, companies that had previously entered into leniency agreements with the Federal Prosecutor's Office (MPF) signed new leniency agreements with Brazil's Office of the Attorney General (AGU) and Ministry of Transparency (CGU), the latter a federal agency with jurisdiction over acts harmful to the Public Administration. In the context of Operation Car Wash, these companies included Andrade Gutierrez, which agreed to pay approximately $382 million ($1.49 billion BRL) over 16 years, and Odebrecht, which agreed to pay $697 million ($ 2.72 billion BRL) over 22 years. Both agreements took into account the leniency agreements previously signed with MPF, and will credit the amount already paid under the latter. In addition, these jurisdictional issues also add uncertainty to multilateral settlements negotiated by international companies with authorities across different countries. For instance, although Rolls-Royce entered a leniency agreement with MPF in January 2017 as part of a global resolution with US, UK and Brazilian authorities (see 2017 FCPA Year in Review), the CGU reportedly opened a formal investigation into the company in January 2018.

The *rapprochement* among authorities represented a welcome development for companies and individuals under investigation in Operation Car Wash, and an indication that the various agencies may be finally reaching a common approach to negotiating leniency agreements with corporate entities. On the other hand, a Supreme Court (STF) ruling confirming the federal police's authority to enter into collaboration agreements with individuals at the police inquiry stage, a decision criticized by prosecutors as opening alternative routes for collaboration by individuals, added to the legal uncertainty around Operation Car Wash.

On the policy front, President Jair Bolsonaro appointed Sérgio Moro, the lead judge overseeing Operation Car Wash, as Minister of Justice under his government. While it is too early to know the implications of this appointment for Operation Car Wash and for the country's anti-corruption efforts going forward, Moro indicated his intention to promote legal reforms to further strengthen Brazil's anti-corruption framework, and anti-corruption reforms feature in the Anti-Crime bill sent to Congress for approval in February 2019.[471] Moro has also indicated his intention to place a greater

[471] Among other reforms, the bill proposes to reform criminal procedures to enhance criminal prosecution and confiscation, and criminalize the use of "slush funds" (known as "caixa 2") for political campaign contributions.

focus on the fight against money laundering, including by targeting offshore accounts and funds and by strengthening Brazil's financial intelligence unit (Coaf).

M. Argentina

On March 1, 2018, Argentina's first anti-corruption law, Law 27.401, creating corporate liability for corrupt activity, became effective. Specifically, the law establishes a civil and administrative legal framework applicable to both national and foreign companies for the following crimes: (1) national and transnational bribery and influence peddling; (2) improper business activity by public officials; (3) extortion (as described in Argentina's penal code); (4) illicit enrichment of public officials and employees; and (5) false balance sheets and reports.[472]

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. Similar to the FCPA, the law holds companies accountable for the acts of their agents, whenever the agent's act provides a benefit to the company, and also provides for NPAs and DPAs. Argentine prosecutors also have the discretion to seek reparations for victims, community service, disciplinary actions and compliance measures.

Similar to the US and international guidelines, Law 27.401 encourages companies to design adequate compliance programs, called Integrity Programs, to prevent, detect and report activity prohibited under the law. The Integrity Programs are mandatory for companies that contract with the government, and will be taken into account when companies are seeking to obtain a reduction or exemption from potential penalties. On April 6, 2018, Decree 277/2018 delegated to the Argentine Anti-Corruption Office (the OA) the task of developing guidelines for compliance with Articles 22 and 23 of the law, which establish the standards for company Integrity Programs.[473] A preliminary draft of the guidelines was released to the public for comments in August 2018, and an amended final version was released on October 4, 2018 by Resolution 27/2018.[474] According to the guidelines, Integrity Programs are expected to be tailored to each company and should be designed to prevent the commission of crimes, exercise supervision and control over employees, and promote a culture of integrity within the company. Integrity Programs should also facilitate the investigation of activities, the adoption of sanctions, and corrective measures. To determine the adequacy of an Integrity Program, Argentine authorities will consider a company's exposure to risk, size, and economic capacity.

Implementation of the new law overlaps with the eruption of a new corruption scandal in Argentina that has led to the indictment of former President Cristina Fernández. Known as the "notebooks" (*cuadernos)* scandal, it was sparked by the publishing of notebooks by a chauffeur of Fernández's former planning minister, which catalogued bags of cash allegedly delivered to government officials. In

[472] *See* Law 27.401, http://servicios.infoleg.gob.ar/infolegInternet/anexos/295000-299999/296846/norma.htm.
[473] *See* Decree 277/2018 (April 6, 2018) https://www.argentina.gob.ar/normativa/nacional/decreto-277-2018-308488/texto.
[474] *See* Resolution 27/2018 (Oct. 4, 2018) https://www.argentina.gob.ar/normativa/nacional/resoluci%C3%B3n-27-2018-314938/texto.

addition to Fernández, the scandal also implicated dozens of other former officials and business owners in the construction sector and has resulted in a number of indictments.[475]

N. Other Latin American Countries

The Odebrecht scandal continues to reverberate throughout Latin America, giving impetus not only to enforcement activity but also to reforms of legal systems. Nowhere is this more evident than in Peru.

Peru's anti-corruption landscape changed dramatically in 2018, with new President Martín Vizcarra leading an anti-corruption reform agenda widely supported by Peruvian voters. Vizcarra's rise from Vice President to President followed the resignation of former President Pedro Pablo Kuczynski on March 21, 2018, amid allegations that his allies offered financial incentives for support on the impending congressional vote on his impeachment. The vote on his impeachment was initially prompted by allegations that he had received payments from Odebrecht. In August 2018, Vizcarra proposed a referendum to reform Peru's political and judicial systems, including measures to reform private financing of political parties, reform the panel that appoints judges and prosecutors, ban the immediate re-election of legislators, and create a second legislative chamber.[476] The December 9, 2018 referendum resulted in Peruvian voters overwhelmingly supporting the proposals, with the exception of the creation of a second legislative chamber (Vizcarra withdrew support for this proposal after a number of changes to the proposal by Congress).[477]

Further evidence of coming changes in Peru can be seen in the prosecution of opposition leader and powerful Peruvian politician, Keiko Fujimori. She was arrested in October 2018, in the midst of an investigation into whether she accepted illegal campaign contributions from Odebrecht during her 2011 and 2016 presidential campaigns.[478] On January 31, 2018, Peru's then Attorney General Pedro Chavarry dismissed two prosecutors leading the Odebrecht anti-corruption probe in Peru, sparking protests and leading to Chavarry's resignation a few days later. Chavarry was replaced by Zoraida Avalos, who has publicly announced her commitment to addressing corruption in Peru.[479]

These developments will be bolstered by two previously passed anti-corruption laws in Peru that 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 prior law to include bribery of domestic public

[475] *See* Uki Goni, *Argentina: ex-president Cristina Fernández charged in bribery scandal*, Guardian, Sep. 17, 2018, https://www.theguardian.com/world/2018/sep/17/cristina-fernandez-indicted-argentina-president-corruption.

[476] Simeon Tegal, *Corruption scandals have ensnared 3 Peruvian presidents. Now the whole political system could change*, Wash. Post, Aug. 12, 2018, https://www.washingtonpost.com/world/the_americas/corruption-scandals-have-ensnared-3-peruvian-presidents-now-the-whole-political-system-could-change/2018/08/11/0cd43ab0-9a82-11e8-a8d8-9b4c13286d6b_story.html?noredirect=on&utm_term=.27be2a2b3651.

[477] John Quigley, *Peru Anti-Graft Referendum Boosts Vizcarra And Punishes Congress*, Bloomberg (Dec. 10, 2018), https://www.bloomberg.com/news/articles/2018-12-10/peru-anti-graft-referendum-boosts-vizcarra-and-punishes-congress.

[478] Nicholas Casey and Andrea Zarate, *Peru Opposition Leader Keiko Fujimori Is Arrested in Corruption Inquiry*, N.Y. Times, Oct. 10, 2018, https://www.nytimes.com/2018/10/10/world/americas/peru-keiko-fujimori.html.

[479] The Associated Press, *Peru's attorney general resigns over corruption probe*, Seattle Times, Jan. 8, 2019, https://www.seattletimes.com/nation-world/world/perus-attorney-general-resigns-over-corruption-probe/.

officials or servants. Companies found guilty of violations can face a fine of up to six times the benefit obtained through the illicit activity, suspension from contracting with the state for up to five years, and the cancellation of licenses, concessions or other authorizations. Notably, the statutes provide standing for private parties 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. The laws, however, do not provide for settlement agreements, DPAs, or other such arrangements.

In Colombia, the Supreme Court selected a special prosecutor in December 2018 to investigate bribes to politicians and others by Odebrecht related to projects in Colombia, including a highway construction project worth more than $1 billion. The attorney general's office has stated that Odebrecht's bribes in Colombia totaled about $30 million. Attorney General Nestor Humberto Martinez recused himself from the investigation because he served as a legal advisor to one of Odebrecht's partners, Grupo Aval. Protests in Colombia in early 2019 have called for Martinez to resign. The Vice Attorney General, Maria Paulina Riveros, asked the Supreme Court to appoint a special prosecutor after a civil society group requested that she also recuse herself.[480] The special prosecutor is Sergio Arboleda University Law Dean Leonardo Espinosa, who was presented in a shortlist of candidates by President Ivan Duque.[481]

The investigation in Colombia has been further complicated by the death of a key witness. Jorge Enrique Pizano, an auditor for Aval Group who had been assisting prosecutors, died on November 8, 2018. Although forensic reports attribute his death to a heart attack, the death of his son three days later after drinking from a water bottle on Pizano's desk has raised suspicion of poisoning.[482]

Finally, Mexico's public administration ministry banned federal and state agencies from working with Odebrecht until 2021 and fined Odebrecht $60 million based on allegations it made corrupt payments to officials of Mexico's state-run oil company, Petróleos Mexicanos (Pemex). Mexico reportedly rejected an offer by Odebrecht to pay $18 million and provide information in exchange for the Mexican administration lifting the fines and sanctions and agreeing not to prosecute.[483] According to prosecutors, an investigation is underway and there have been interviews of current and former Pemex officials as well as Odebrecht executives.[484] Although Mexico reportedly refused to agree to the terms offered by Brazilian prosecutors

[480] *Colombia court to appoint special prosecutor in Odebrecht case*, Reuters, Nov. 29, 2018, https://www.reuters.com/article/odebrecht-colombia/colombia-court-to-appoint-special-prosecutor-in-odebrecht-case-idUSL2N1Y42DG.

[481] Adriaan Alsema,*Colombia's Supreme Court elects least inconvenient special prosecutor to investigate Odebrecht bribery*, Colombia Reports, Dec. 15, 2018, https://colombiareports.com/colombias-supreme-court-elects-least-inconvenient-special-prosecutor-to-investigate-odebrecht-bribery/.

[482] *Colombian coroner says Odebrecht whistleblower died of heart attack*, Reuters, Nov. 16, 2018, https://www.reuters.com/article/us-odebrecht-colombia/colombian-coroner-says-odebrecht-whistleblower-died-of-heart-attack-idUSKCN1NL2PE.

[483] Diego Oré and Lizbeth Diaz, *Odebrecht offered Mexico $18 million to resolve graft cases: document*, Reuters, Oct. 24, 2018, https://www.reuters.com/article/us-mexico-odebrecht/odebrecht-offered-mexico-18-million-to-resolve-graft-cases-document-idUSKCN1MY2JD

[484] Beatrice Christofaro and Maria Verza, *Brazil: Mexico dragging feet on Odebrecht corruption scandal*, AP News, Oct. 10, 2018, https://www.apnews.com/829969cee5a14aa8962f247a15bd774c.

as a requirement for an exchange of information,[485] in February 2019 the Attorney General's office announced that it has been receiving information from Switzerland and continues to investigate.[486]

[485] *Id.*

[486] *Mexico to Deepen Investigation on Odebrecht Corruption Case*, Anti-Corruption Digest (Feb. 25, 2019), https://anticorruptiondigest.com/anti-corruption-news/2019/02/25/mexico-to-deepen-investigation-on-odebrecht-corruption-case-2/#axzz5gZFq95HE.

IX. World Bank and Other International Financial Institutions

A. The World Bank

Enforcement of anti-corruption and other standards of conduct in World Bank-financed project continued to be active in 2018. The Bank's Integrity Vice Presidency (INT), the unit that investigates and prosecutes cases, initiated a total of 68 new investigations (up from 51 new cases in FY 2017), with 28 originating in Africa and 14 in Eastern Europe and Central Asia.[487] As in prior years, the overwhelming majority of cases opened in FY 2018 (69%) involved allegations of fraud, as compared to 39% involving allegations of corruption and 31% involving allegations of collusion.[488] INT submitted 28 cases to OSD in FY 2018, and entered into 23 settlements, suggesting that while referral of cases through the sanctions process remains high, the trend toward settlement noted in recent years is continuing.[489] Of the 28 cases submitted to OSD, 27 were reviewed by OSD; of these, 12 were returned to INT for revisions (finding insufficient evidence to support one or more allegations), and two cases were "rejected in their entirety"[490] – a slightly higher percentage than has been reported in years past.

INT's resolution of cases via settlement continued, including, in particular, settlements resulting in the debarment of three companies related to one project and four settlements based on a sanction of conditional non-debarment – a sanction which enables a company to continue participating in Bank-financed projects).[491] INT also has enhanced its efforts at implementing procedures for so-called "fast-track cases," which allow resources to be used for more complex cases.[492]

The Sanctions Board continues to play an active and important role in the overall sanctions system, issuing sixteen decisions in FY 2018 (doubling its output of eight in FY 2017).[493] In FY 2018, 37% of firms and individuals contested their case to the Sanctions Board and it is not difficult to see why – from FY 2014 through FY 2018, the Sanctions Board applied a lesser period of debarment than that recommended by OSD in 60% of cases, and issued no sanction in 16% of cases.[494]

Perhaps unsurprisingly, given the recent trend towards settlement (which typically includes conditions to reinstatement), the Bank's Integrity Compliance Officer (ICO)

[487] *See* World Bank Group, Sanctions System Annual Report FY18 (2018), http://pubdocs.worldbank.org/en/227911538495181415/WBG-SanctionsSystemARFY18-final-for-web.pdf (last accessed Dec. 18, 2018). This is the first year that INT, the Office of Suspension and Debarment (OSD), and the Sanctions Board have issued a joint annual report of the Bank's Sanctions System for the fiscal year. The report focuses on a broad range of activities undertaken by the investigative, adjudicative, and compliance arms of the sanctions system, as well as preventative support efforts undertaken by INT.

[488] *Id.* at 18 (note that one case may involve multiple allegations of misconduct).

[489] *Id.* at 21-22. OSD reviewed 26 settlements in FY 2018. *Id.* at 37.

[490] *Id.*

[491] *Id.* at 12, 19.

[492] *Id.* at 12.

[493] *Id.* at 50.

[494] *Id.* at 48.

has also been active in FY 2018. Of the 80 parties that engaged with the ICO in FY 2018, 59 were newly sanctioned parties, 39 had their sanctions continued for failure to meet conditions for release, and only 15 were released from their sanctions.[495] These statistics demonstrate that a release from sanction is far from automatic; to the contrary, our experience is that it requires a sustained commitment of resources and effort to secure.

The trend towards settlement with conditions appears to be continuing into FY 2019, as demonstrated by the Bank's recent settlement with Constructora Norberto Odebrecht S.A. and other Odebrecht affiliates for fraudulent and collusive practices in connection with the Río Bogotá Environmental Recuperation and Flood Control Project in Colombia.[496] Under the terms of the settlement agreement, the Odebrecht subsidiary acknowledged its responsibility for the conduct and was debarred for a period of three years. In order to be released from sanction, the company will be required to demonstrate its development and implementation of an integrity compliance program consistent with the Bank's Integrity Compliance Guidelines, and to continue cooperating fully with INT.

B. Other International Financial Institutions

Other IFIs, including the Asian Development Bank (ADB), European Bank of Reconstruction and Development (EBRD), Inter-American Development Bank (IDB), and African Development Bank (AfDB), continued enforcement efforts in 2018. The ADB sanctioned firms and individuals in 33 cases, the majority of which involved allegations of fraudulent practices.[497] As of the date of this publication, the remaining banks have yet to report on enforcement activity for the year. Nonetheless, there were some developments that are worth noting. The IDB, for example, issued its first debarment arising from a Negotiated Resolution Agreement in 2018.[498] The AfDB also issued three sanctions decisions in 2018, up from two decisions in each year from 2015 to 2017.[499]

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[495] *Id.* at 26.

[496] World Bank Group Press Release, *World Bank Group Announces Settlement with Brazilian Subsidiary of Odebrecht* (Jan. 29, 2019), https://www.worldbank.org/en/news/press-release/2019/01/29/world-bank-group-announces-settlement-with-brazilian-subsidiary-of-odebrecht (last accessed Feb. 26, 2019).

[497] *See* Asian Development Bank, Office of Anticorruption and Integrity Case Summaries, https://www.adb.org/site/integrity/case-summaries (last accessed Dec. 19, 2018).

[498] *See* Inter-American Development Bank, *IDB Announces Settlement in Connection with Prohibited Practices* (Aug. 21, 2018), https://www.iadb.org/en/news/idb-announces-settlement-connection-prohibited-practices (last accessed Dec. 19, 2018).

[499] African Development Bank, Summaries of Sanctions Decisions, https://www.afdb.org/en/topics-and-sectors/topics/sanctions-system/first-tier-sanctions-office/summaries-of-sanctions-decisions/ (last accessed Dec.19, 2018).

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X. Conclusion

We anticipate that the level of US and foreign anti-corruption enforcement will remain stable or increase throughout 2019, as the DOJ and SEC concluded the same number of individual and corporate enforcement actions as 2017 while setting records for the amount of monetary sanctions leveled. Notwithstanding the uniformity in enforcement levels, the priorities of the DOJ and SEC appear to be increasingly diverging. Consistent with the DOJ's Corporate Enforcement Policy, the DOJ settled fewer corporate enforcement actions during the year, focusing primarily on individual prosecutions and corporate enforcement involving the bribery of senior government officials in exchange for high-value contracts (so-called "grand corruption" cases). In contrast, the SEC brought only four individual enforcement actions in 2018 and concluded 14 corporate settlements that, while primarily charging violations of the FCPA's accounting provisions, generally encompassed a wider range of corrupt schemes, intermediaries, and benefits passed to government officials. Notably, the SEC alleged improper recording or controls surrounding private commercial transactions in a number of settlements under the FCPA's accounting provisions. Despite the divergence in enforcement priorities, the DOJ and SEC brought four parallel cases, which resulted in the highest fines in 2018.

The trend of increasing multilateral cooperation and multijurisdictional enforcement continued in 2018. The DOJ and SEC concluded two multijurisdictional settlements in 2018 that involved longstanding multilateral investigations. Significantly, the $1.78 billion settlement with Petrobras, split between the United States and Brazil, imposed the highest penalty for a violation of the FCPA in history and now serves as the capstone of the investigations arising out of Operation Car Wash in Brazil. A number of countries continue to substantially enhance their legal and regulatory frameworks for international anti-corruption enforcement, including adopting legislation authorizing prosecutors to reach negotiated resolutions with corporate defendants in certain cases where full prosecution is not warranted. Finally, the multilateral development banks, led by the World Bank, continue to actively investigate potential misconduct and pursue sanctions in bank-financed projects.

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