

# FCPA/Anti-Corruption Developments: 2018 Year in Review

February 28, 2019

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## Overview

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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 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 multi-jurisdictional enforcement continued in 2018. The DOJ and SEC concluded two multi-jurisdictional settlements in 2018 that involved long-standing 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. Multi-national companies also should continue monitoring anti-corruption developments in the jurisdictions in which they do business, as they increasingly face the risks of multi-jurisdictional 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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*A publication of Steptoe's FCPA/Anti-Corruption Practice, in collaboration with Steptoe's White-Collar and Securities Enforcement Group*

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