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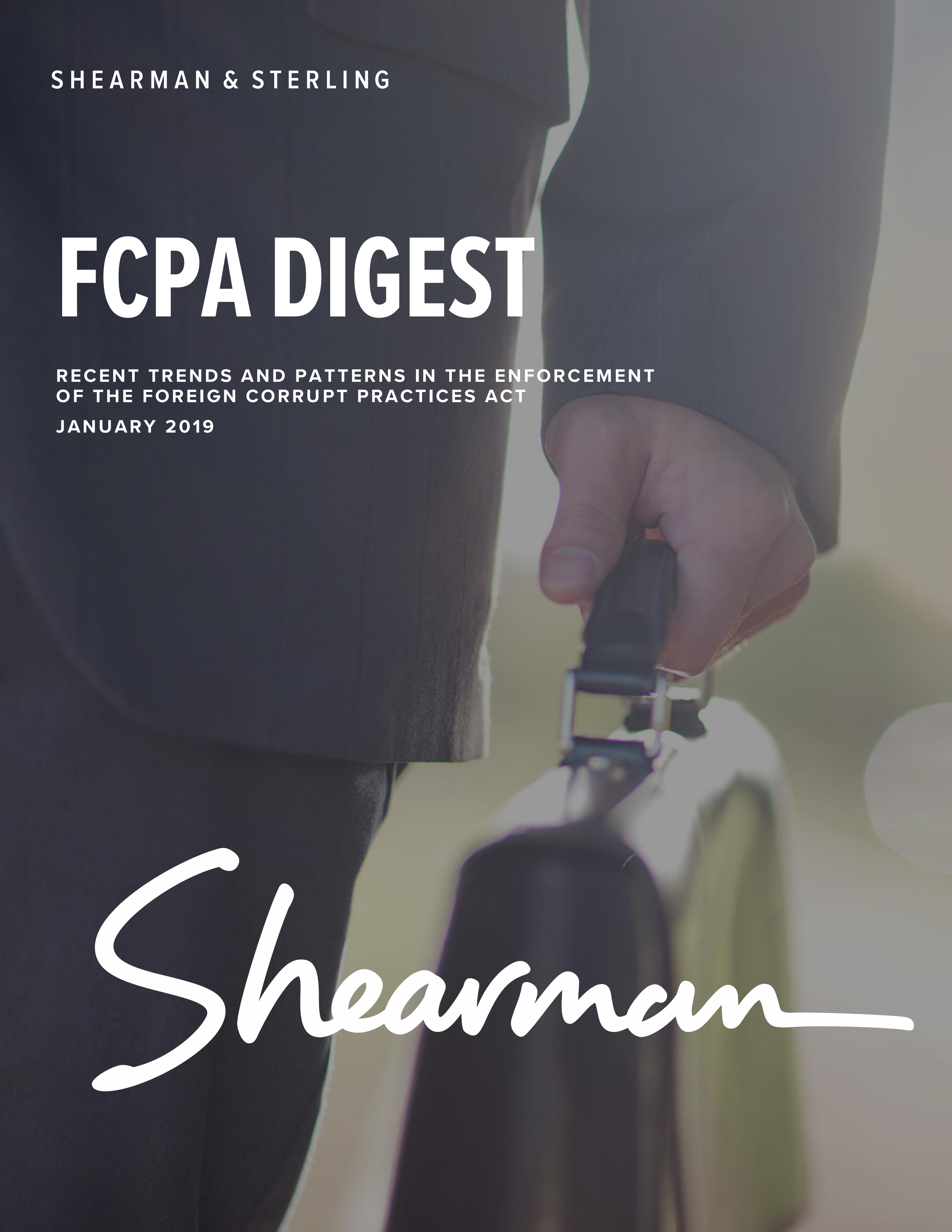

FCPA DIGEST

RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

JANUARY 2019

Shearman

CONTENTS

INTRODUCTION: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT

Although FCPA enforcement across the 2018 calendar year seemed to ebb and flow, in retrospect the enforcement agencies brought a typical number of enforcement actions, which in the aggregate resulted in the second-highest penalty total in one year. That being said, the vast majority of FCPA enforcement actions brought in 2018 were small, and the SEC was significantly more active than the DOJ. Indeed, other than a very active summer, the DOJ only brought one corporate enforcement action during the rest of the calendar year. Still, several of the DOJ's handful of enforcement actions were notable, including the largest penalty imposed as part of an FCPA enforcement action.

As we explain in this year-end *Trends & Patterns*, among the highlights from 2018 were:

- Seventeen corporate enforcement actions, with total sanctions of approximately $2.9 billion, make 2018 a fairly typical year in terms of level of FCPA enforcement activity. Although only four more enforcement actions were brought in 2018 than in 2017, the total assessed sanctions were nearly $900 million higher than in 2017, making the penalties assessed in 2018 the second-highest of any year;
- As in recent years, three outlier enforcement actions (*Petrobras*, *Société Générale*, and *PAC*) greatly distort the picture, raising the average corporate sanction for 2018 to $171.1 million, whereas the true average, with outliers excluded, is significantly less than this figure ($18.3 million). This type of difference between the true average and average excluding outliers is typical: in 2017 the true average was $151.2 million while the average excluding outliers was $83.3 million, and in 2016 the true average was $223.4 million while the average excluding outliers was $13.2 million;
- The median sanction of $9.2 million is down from recent years ($29.2 million in 2017, $14.4 million in 2016, and $13.4 million in 2015);
- The Second Circuit's decision in *Hoskins* has the potential to alter the scope of FCPA prosecutions and alter the investigation process by limiting the number of defendants that are within the jurisdictional grasp of the enforcement authorities;
- The DOJ entered into its first coordinated resolution with French authorities in a foreign bribery case, possibly heralding the emergence of France as an important global anti-corruption authority;
- The DOJ continued its recent trend of updating various enforcement policies, announcing: (i) a new policy addressing situations where enforcement actions involve "piling on" of fines and penalties in matters involving multiple enforcement authorities; (ii) an updated policy on corporate monitors; and (iii) updates to the policy on cooperation credit originally set forth in the Yates Memo. In addition, the effect of the FCPA Corporate Prosecution Policy, announced late in the previous year, was also apparent in 2018's DOJ matters.

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STATISTICS

In 2018, the DOJ and SEC resolved seventeen corporate enforcement actions. Consistent with the trends and patterns over the past years, the DOJ apparently deferred to the SEC to bring civil enforcement cases in the less egregious matters, which has resulted in the SEC bringing eight enforcement actions without parallel DOJ actions and typically with lower penalty amounts. Although the DOJ increased its activity dramatically in the middle of the year, bringing four major enforcement actions in the span of approximately two months, it proceeded to only bring one significant enforcement action—*Petrobras*—during the second half of the year.

Of the FCPA enforcement actions against individuals, 2018 has seen twenty-one individuals charged by the DOJ (or had charges unsealed), while the SEC brought cases against only four individuals.

We discuss the 2018 corporate enforcement actions, followed by the individual enforcement actions, in greater detail below.

CORPORATE ENFORCEMENT ACTIONS

The largest case resolved in 2018 was the long-running and high-profile investigation of Brazilian state-owned oil company Petrobras. As far as we can tell, this is the first FCPA enforcement action brought against a foreign state-owned and controlled entity. This unusual posture is highlighted by the fact that a number of recent enforcement actions, such as *Odebrecht/Braskem* and this year's enforcement action against *Vantage Drilling*, have involved bribery payments to government officials at Petrobras.

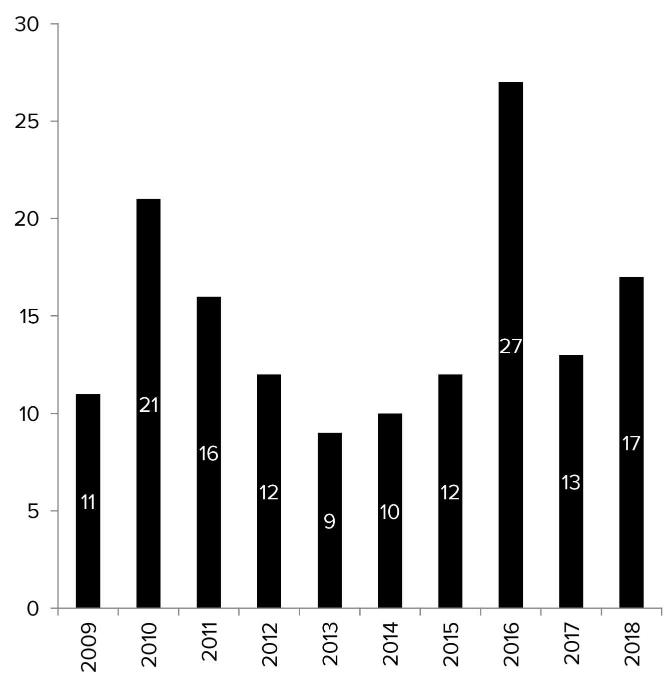
The *Petrobras* case involves one of the largest of the many bribery cases to have engulfed Brazil in recent years. According to the company's admissions, members of the Petrobras Executive Board helped facilitate millions of dollars in corrupt payments to politicians and political parties in Brazil, and members of Petrobras's Board of Directors were also involved in facilitating bribes that a major Petrobras contractor was paying to Brazilian politicians. Examples provided in the statement of facts accompanying the company's settlement agreement demonstrate just how far Petrobras's reach extended into the Brazilian government. For example, a Petrobras executive reportedly directed the payment of illicit funds to stop a parliamentary inquiry into Petrobras contracts, and the executive is also said to have directed millions of dollars in payments received from Petrobras contractors to be corruptly paid to the campaign of a Brazilian politician who was supervising the building location of one of Petrobras's refineries.

On September 27, 2018, the DOJ announced that it had entered into a non-prosecution agreement with Petrobras, which was part of a global settlement between the company and U.S. and Brazilian authorities. Petrobras agreed to pay a total criminal fine of $853.2 million, after the government agreed to a 25% discount off the recommended minimum sentence under the U.S. Sentencing Guidelines to recognize the company's cooperation and remediation. However, only a small portion of this penalty will reach the coffers of the U.S. Treasury. Instead, 10% (approximately $85.3 million) of the criminal penalty was allocated to the DOJ, 10% was allocated to the SEC, and the remaining 80% (approximately $682.6 million) is to be paid to the Ministerio Publico Federal in Brazil.

The same day, the SEC announced a settled enforcement action against Petrobras. The company agreed to pay approximately $933 million in disgorgement and prejudgment interest The Commission's order, however, stated that this obligation shall be reduced and deemed satisfied by the amount of any settlement payment agreed to by Petrobras in the securities litigation that was filed against the company in 2014. Because the company agreed earlier in 2018 to settle that case for $3 billion, which was approved by the court handling the case, it will not be required to pay any of its SEC settlement amount to the U.S. Treasury.

The Petrobras investigation also spawned the SEC's enforcement action against Vantage Drilling. In November 2018, the SEC announced a settled enforcement action against Vantage Drilling, a Houston-based offshore drilling company. According to the SEC's order, Vantage's predecessor entity, Vantage Drilling Company, lacked sufficient internal accounting controls, given the increased risks associated with the oil and gas industry

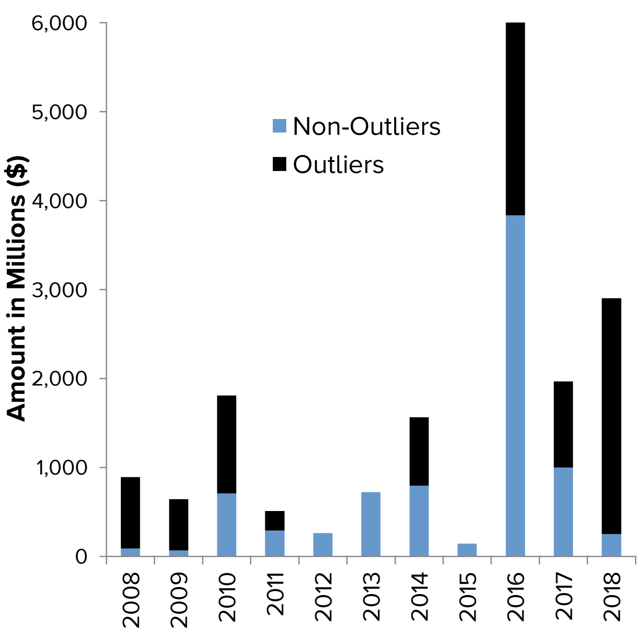
Total Aggregate Corporate Cases: 2009-2018



in Brazil. As a result, Vantage Drilling made substantial payments to a former director, and these payments were subsequently allegedly used to make improper payments to Petrobras. Vantage Drilling agreed to pay $5 million in disgorgement to settle the enforcement action.

In the *Société Générale* matter, the DOJ alleged that between 2004 and 2009, Société Générale paid bribes through a Libyan "broker" related to fourteen investments made by Libyan state-owned financial institutions. According to the DOJ, Société Générale sold over a dozen investments and one restructuring to the Libyan state institutions worth a total of approximately $3.66 billion, from which it earned profits of approximately $523 million. In June 2018, the DOJ announced that the bank had entered into a deferred prosecution agreement to resolve both the FCPA conduct described above and unrelated allegations involving LIBOR. As part of the DPA, Société Générale agreed to pay a criminal penalty of $585 million to resolve the FCPA charges. In related proceedings, Société Générale reached a settlement with the Parquet National Financier (PNF) in Paris relating to the alleged Libya corruption scheme, and the DOJ agreed to credit Société Générale for the $292.8 million payment it would make to the PNF. This is the first coordinated resolution with French authorities in a foreign bribery case and represents the latest example of the DOJ entering into coordinated global settlements whereby a large portion of the criminal penalty is paid to another country's government.

Total Criminal and Civil Fines Imposed on Corporations: 2008-2018



In a related enforcement action, the DOJ and SEC both brought enforcement actions against Legg Mason Inc., a Maryland-based investment management firm, to resolve allegations of the company's participation in the same Libyan bribery scheme. Specifically, according to Legg Mason's admissions, a Legg Mason subsidiary partnered with Société Générale to seek business from Libyan state-owned financial institutions. As described above, Société Générale paid commissions to a Libyan broker, which benefitted Legg Mason through its relevant subsidiary, which managed funds invested by the Libyan state institutions. The company's NPA included approximately $32.6 million in criminal penalties and approximately $31.6 million in disgorgement, the latter of which will be credited against any disgorgement paid to other law enforcement authorities in the first year of the agreement. The SEC subsequently required the company to disgorge approximately $34.5 million, including prejudgment interest, bringing the total penalty to approximately $67.1 million.

In *PAC*, the DOJ alleged that Panasonic Avionics Corporation ("PAC"), a subsidiary of multinational electronics company Panasonic Corporation, improperly recorded payments to an executive of a state-owned airline in an unspecified Middle East country in violation of the books-and-records provision of the FCPA. Specifically, the DOJ alleged that during the course of negotiating a valuable contract with the relevant airline, PAC executives agreed to retain the relevant government official as a consultant, for which he received $875,000 for "little work," although the subsidiary recorded the payments as legitimate consulting expenses. More broadly, the DOJ also alleged that Panasonic Avionics disguised payments to sales agents in Asia who had not passed its compliance due diligence by channeling them through another sales agent. To resolve the charges, Panasonic Avionics agreed to pay $137.4 million pursuant to a deferred prosecution agreement with the DOJ, while Panasonic Corporation agreed to pay $143.2 million in disgorgement and pre-judgment interest to the SEC.

In *Dun & Bradstreet*, the SEC alleged that two Dun & Bradstreet partners in China made payments to third-party agents, including payments to government officials, to illegally obtain customer data. Without admitting or denying the alleged conduct, Dun & Bradstreet agreed to pay approximately $9.2 million to settle the SEC charges. The same day that the SEC enforcement action was announced, the DOJ issued a letter stating that it declined prosecution consistent with the FCPA Corporate Enforcement Policy. The DOJ's letter specifically listed the company's prompt voluntary self-disclosure, full cooperation, remediation and compliance enhancements, and disgorgement to the SEC. This declination represents the first under the DOJ's Corporate Enforcement Policy, and makes clear that the disgorgement requirement contained in the Policy can be satisfied by such a payment to the SEC, not just to the DOJ.

The facts of the *Dun & Bradstreet* enforcement are also somewhat unusual: FCPA enforcement actions typically arise out of situations where companies pay bribes to foreign government officials to obtain contracts or favorable regulatory decisions. Here, however, the relevant Chinese joint venture and subsidiary allegedly paid money to government officials and others to obtain data and information about individuals and entities. This unusual factual backdrop highlights the broad range of interactions with government officials that can spawn FCPA enforcement actions and highlights some of the unique risks that service industry companies can face when engaging in business in foreign countries.

In *UTC*, the SEC alleged that various subsidiaries of United Technologies Corporation ("UTC") made illicit payments to government officials in a number of countries. For example, UTC subsidiary Otis Elevator Company allegedly made improper payments to Azerbaijani officials to obtain sales of elevator equipment for public housing in Baku and in China. UTC also allegedly, through a joint venture, made payments without proper documentation to a Chinese sales agent in an attempt to obtain confidential information from a Chinese official that would help the company sell engines to a Chinese state-owned airline. Finally, the SEC's order also alleged that United Technologies improperly provided trips and gifts to foreign officials in China, Kuwait, South Korea, Pakistan, Thailand, and Indonesia through its Pratt & Whitney division and Otis subsidiary. In September 2018, UTC agreed to pay approximately $13.9 million to settle the charges.

In *Stryker*, the SEC alleged that Stryker Corporation, a global manufacturer and distributor of medical devices and products, failed to maintain internal controls that were sufficient to detect the risk of improper payments in sales of the company's products in India, China, and Kuwait, and that the company's subsidiary in India failed to maintain complete and accurate books and records. In September 2018, Stryker agreed to pay a civil penalty of $7.8 million to settle the SEC charges, making it the most recent member of the short, but growing, list of FCPA corporate recidivists—in October 2013, the company agreed to settle charges by the SEC that the company had violated the internal controls and books-and-records provisions of the FCPA based on unrelated conduct.

In *Sanofi*, the SEC alleged that French pharmaceutical company Sanofi engaged in schemes in a number of countries to induce increased purchases of the company's products. Without admitting or denying the allegations, in September 2018, the company consented to the issuance of a cease-and-desist order for violations of the books-and-records and internal controls provisions of the FCPA. Pursuant to the order, Sanofi agreed to pay approximately $20.2 million in disgorgement and prejudgment interest, as well as a $5 million civil penalty.

In *Polycom*, the SEC alleged that employees of Polycom's China subsidiary provided significant discounts to distributors and resellers, with the knowledge and intention that these intermediaries would make payments with the discounts to Chinese officials at government agencies and government-owned enterprises to obtain orders of Polycom products. Without admitting or denying the allegations, the company agreed to settle the SEC charges in December 2018, and on the same day the DOJ issued a declination with disgorgement pursuant to the FCPA Corporate Enforcement Policy. As part of the resolution, Polycom agreed to disgorge approximately $31 million, with this amount roughly split between the SEC, the U.S. Treasury, and the United States Postal Inspection Service Consumer Fraud Fund. As part of its settlement with the SEC, Polycom also agreed to pay a civil money penalty of $3.8 million. This enforcement action represents the latest example of the government alleging that discounts offered by a technology company served as a conduit for illicit payments, and with the ongoing investigation of Microsoft's sales practices in Hungary, this seems likely to continue to be an area of risk for technology companies.

The remaining enforcement actions were smaller:

- In *TLI*, the DOJ alleged that Maryland-based Transport Logistics International, Inc., which provides services for the transportation of nuclear materials, participated in a scheme that involved the bribery of an official at a subsidiary of Russia's State Atomic Energy Corporation. The company entered into a DPA with the DOJ to resolve the criminal charges and agreed to pay $2 million.
- In *Elbit Imaging*, the SEC alleged that Elbit Imaging Ltd. and its indirect subsidiary Plaza Centers NV, a real estate developer in Europe, paid approximately $27 million to consultants and sales agents for services related to a real estate development project in Bucharest, Romania. According to the cease-and-desist order, the company made the payments despite the lack of any evidence that the consultants and sales agents actually provided the services they were retained to provide. Furthermore, Elbit and Plaza described the payments in their books and records as legitimate business expenses, even though they may have ultimately been used to make illicit payments to Romanian government officials in connection with a real estate development project in Bucharest. In March 2018, without admitting or denying the facts stated in the cease-and-desist order, Elbit agreed to pay a civil fine of $500,000 to resolve violations of the FCPA's books-and-records and internal controls provisions.
- The enforcement action against Kinross Gold is the latest example of liability that can arise from mergers and acquisitions. According to the SEC, in 2010, while conducting due diligence prior to acquiring two African companies, Kinross Gold Corporation determined that the previous owner lacked an anti-corruption compliance program and associated internal accounting controls. Nevertheless, it proceeded with the transaction without addressing the deficiencies in a timely manner. Subsequent internal audit reports over several years

found that internal controls continued to be inadequate, but Kinross management took no action. As a result, according to the SEC's order, between the acquisition of the subsidiaries in 2010 and at least 2014, Kinross made payments to certain third parties, frequently in connection with government dealings, without reasonable assurances that transactions were conducted in accordance with their represented purpose or were not improper. As part of a cease-and-desist order, the company agreed to pay a civil penalty of $950,000, and to report to the SEC for a term of one year on the status of the implementation of the company's improved anti-corruption compliance procedures and internal controls.

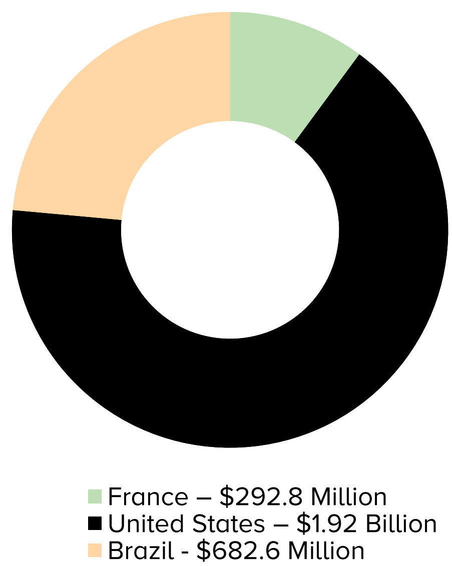
- In *Beam Suntory*, the SEC alleged that an Indian subsidiary of the global beverage company used third-party sales promoters and distributors to make illicit payments to government officials from 2006 through 2012. According to the SEC's order, the relevant Indian subsidiary utilized false invoices to reimburse the third parties, thereby creating false entries in the subsidiary's books and records, which were subsequently incorporated into Beam's books and records. In July 2018, without admitting or denying the facts stated in the cease-and-desist order, Beam agreed to pay total penalties of approximately $8.2 million to resolve the SEC's allegations.
- In *Eletrobras*, the SEC alleged that former officers at a nuclear power generation subsidiary of Centrais Elétricas Brasileiras S.A. ("Eletrobras") engaged in a bid-rigging and bribery scheme related to construction of a nuclear power plant from approximately 2009 until 2015. According to the SEC, the former officials received approximately $9 million in illicit payments from various construction companies involved in the alleged scheme. Without admitting or denying the alleged conduct, Eletrobras agreed to pay $2.5 million to settle the SEC charges.

UPSHOT

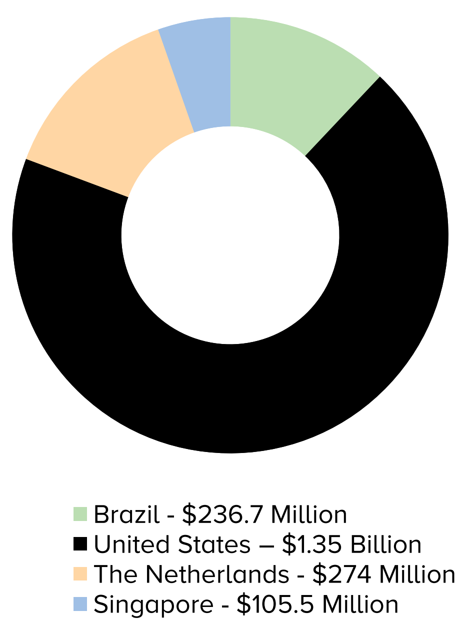
2018 saw some of the largest FCPA enforcement actions in history: *Petrobras* yielded arguably the largest FCPA penalty of all time (although much less will actually be paid into the U.S. Treasury), and *Société Générale* similarly yielded one of the top ten largest FCPA criminal penalties. Although *PAC* similarly involved large penalties, the majority of the remaining 2018 FCPA enforcement actions resulted in small corporate penalties. In fact, the *Petrobras*, *Société Générale*, and *PAC* enforcement actions accounted for approximately 91.2% of the total 2018 corporate enforcement penalties.

Setting aside these three enforcement actions, the corporate sanctions imposed in 2018 were relatively modest—ranging from $93,900 to $76.8 million. As a result, while the pure average corporate penalty from 2018 was $171.1 million, when we exclude the *Petrobras*, *Société Générale*, and *Panasonic* outliers,

U.S. and Foreign Government Recoveries 2018



U.S. and Foreign Government Recoveries 2017



the average corporate penalty is approximately $18.3 million.[1] This number is significantly lower than the average excluding outliers of $83.4 million from 2017, but generally in line with the $13.2 million average excluding outliers from 2016.

Regardless, we continue to view the median as a more accurate measure of the "average" corporate enforcement penalty. That figure for the 2018 corporate enforcement actions was $9.2 million, which is slightly lower but generally in line with that measure from recent years. As we have noted in previous editions of this publication, it is a general trend that FCPA enforcement actions typically range between $10 million and $30 million (excluding the median from 2014, which is an outlier given the low number of enforcement actions in that year).

Finally, as has been the case for the past several years, a substantial portion of the $2.9 billion in sanctions will not be paid to the U.S. Treasury. Continuing the recent trend of increased international coordination, a significant portion of the 2018 penalties will be paid to foreign governments. As part of Société Générale's settlement with the DOJ, the Department agreed to credit the company for the $292.8 million payment it would make to the Parquet National Financier (PNF) pursuant to a separate settlement agreement with that regulator. Additionally, the DOJ agreed to credit the approximately $682.6 million that Petrobras paid to Brazil as part of its settlement agreement with that country's Ministerio Publico Federal. Finally, in a more unusual situation, although Petrobras agreed to pay the SEC a total of $933 million in disgorgement and prejudgment interest, the Commission's order stated that this obligation shall be reduced and deemed satisfied by the amount of any settlement payment agreed to by Petrobras in the securities litigation that was filed against the company in 2014. Because the company agreed to settle that case for $3 billion, which was approved by the court handling the case, it will not be required to pay any of its SEC settlement amount to the U.S. Treasury.

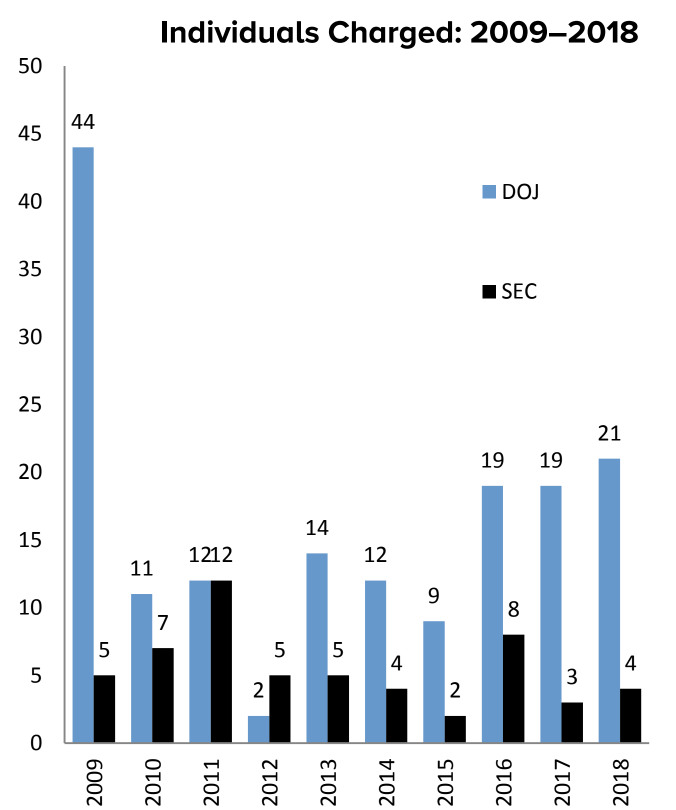
INDIVIDUAL ENFORCEMENT ACTIONS

On the individual side of the 2018 FCPA enforcement year, the DOJ and SEC have cumulatively brought charges against a similar level of individuals as in recent years. Of the twenty-five different defendants, the DOJ brought charges against twenty-one as part of eight separate enforcement actions: (i) *Cohen*; (ii) *Lambert*; (iii) *Perez*, *Cardenas*, *Rincon*, *Isturiz*, *Reiter*, *Gonzalez-Testino*, and *Guedez*; (iv) *Parker* and *Koolman*; (v) *Dominguez*, *Lopez*, *Ripalda*, and *Larrea*; (vi) *Martirossian* and *Leshkov*; (vii) *Leissner*, *Low*, and *Ng*; and (viii) *Inniss*. The SEC separately brought charges against four individual defendants in three cases: (i) *Bahn*; (ii) *Contesse*; and (iii) *Margis* and *Uonaga*. As discussed below, these cases include a mix of executives, corporate managers, and middlemen/fixers.

The charges against individuals brought by the DOJ arose from both enforcement actions from recent years and from new bribery schemes for which no corporate defendant has yet been charged. In the former category, the DOJ brought charges against individuals involved in the recent enforcement actions against Och-Ziff (Michael Cohen), Rolls-Royce (Martirossian and Leshkov), and the PDVSA corruption scheme (Perez, Cardenas, Rincon, Isturiz, Reiter, Gonzalez-Testino, and Guedez). In the latter category, several enforcement actions related to corporate enforcement actions newly brought in 2018 or related to a new bribery scheme for which no companies nor individuals had previously been charged: SETAR (Parker and Koolman), PetroEcuador (Dominguez, Lopez, Ripalda, and Larrea), ICBL (Inniss), and the 1MDB investigation (Tim Leissner, Jho Low, and Roger Ng).

EXECUTIVES

On January 3, 2018, the DOJ unsealed criminal charges against Michael Leslie Cohen, a former executive at Och-Ziff, which had originally been filed in October 2017. The ten count indictment in the Eastern District of New York included counts for conspiracy to commit investment adviser fraud, investment adviser fraud, conspiracy to commit wire fraud, wire fraud, conspiracy to



[1] For purposes of our statistics, the "average excluding outliers" refers to the pure average sanction excluding any outliers as calculated using the Tukey Fences model, which utilizes interquartile ranges.

obstruct justice, obstruction of justice, and making false statements. As we discussed in our January 2018 *Trends & Patterns*, these charges come on the heels of civil charges filed by the SEC against Cohen in January 2017.

In *Lambert*, the DOJ obtained an eleven count indictment in the District of Maryland against Mark Lambert, who was a co-owner and executive of TLI (discussed above). The charges against Lambert mark the latest enforcement related to this alleged bribery scheme: in June 2015, Daren Condrey—co-owner and co-president of TLI with Lambert—pleaded guilty to conspiracy to violate the FCPA and to commit wire fraud. Then, in August 2015, the foreign official involved in the bribery scheme, Vadiim Mikerin, pleaded guilty to conspiracy to commit money laundering as part of the bribery scheme. Finally, as discussed above, the company involved in the bribery scheme (TLI) entered into a DPA in January 2018 to resolve a charge of conspiracy to violate the anti-bribery provisions of the FCPA. Lambert has pleaded not guilty to the charges, and as of the date of publication the charges against Lambert are moving forward, with a jury trial scheduled for April 2019.

In *Contesse*, the former CEO of Chilean chemical and mining company Sociedad Química y Minera de Chile, S.A. ("SQM") agreed in September 2018 to pay $125,000 to resolve allegations that he violated the FCPA. According to the SEC's order, Contesse caused SQM to make approximately $15 million in improper payments to Chilean political figures and connected entities and individuals. As discussed in last year's *Trends & Patterns*, SQM agreed in 2017 to pay approximately $30.5 million to settle FCPA allegations with the DOJ and SEC.

Finally, in December 2018, the SEC charged two former senior executives of Panasonic Avionics Corporation with violations of the books-and-records and internal controls provisions of the FCPA. Paul Margis, then-CEO and president of PAC, allegedly used a third party to pay over $1.76 million to several consultants, including a government official who was offered a valuable consulting position to help Panasonic Avionics obtain and retain business from a state-owned airline. Takeshi Uonaga, then-CFO of PAC, allegedly caused Panasonic Corporation to improperly record $82 million in revenue based on a backdated contract and made false representations to PAC's auditor regarding financial statements, internal accounting controls, and books and records. To settle the charges, Margis and Uonaga agreed to pay penalties of $75,000 and $50,000, respectively.

CORPORATE MANAGERS

Charges brought against three individuals in 2018 relate to the ongoing investigation into 1MDB, the Malaysian sovereign wealth fund, taking place in a number of countries, including the United States, the U.K., Singapore, and Malaysia. According to a lawsuit filed by the DOJ in June 2015, at least $3.5 billion was stolen from 1MDB in recent years. In November 2018, the DOJ announced that former Goldman Sachs banker Tim Leissner had pleaded guilty to conspiring to violate the FCPA and launder money in conduct relating to the 1MDB scandal. According to the DOJ, Leissner made illegal payments to Malaysian and Abu Dhabi government officials to obtain business for Goldman Sachs. According to the criminal information filed by the DOJ, bond offerings and related transactions ultimately earned Goldman Sachs approximately $600 million in fees. Leissner has not yet been sentenced, but was ordered to forfeit $43.7 million as part of his plea deal.

The same day that Leissner's guilty plea was announced, the DOJ announced that former Goldman Sachs managing director Ng Chong Hwa, also known as Roger Ng, had also been charged with conspiring to violate the FCPA and launder money. Interestingly, although the U.S. has not charged Goldman Sachs itself, the Malaysian authorities did bring such charges in December 2018, alleging largely the same facts as in the U.S. cases against the individuals.

In *Castillo*, a manager at a Houston-based logistics and freight forwarding company pleaded guilty in September 2018 to one count of conspiracy to violate the FCPA. The charges were one of the many brought as part of the ongoing investigation into the PDVSA bribery scandal.

In *Parker*, the owner, controlling member of, or participant in the operation of five unnamed Florida phone companies was charged with engaging in a conspiracy to make payments to a product manager at Servicio di Telecomunicacion di Aruba N.V. ("Setar"), a state-owned telecommunications provider in Aruba, to obtain contracts with the company. In April 2018, the DOJ announced that Parker had pleaded guilty in December 2017 to one count of conspiracy to violate the anti-bribery provisions of the FCPA and to commit wire fraud. That same month, Parker was sentenced to thirty-five months in prison to be followed by three years of supervised release. Parker was further ordered to pay restitution of $701,750.

MIDDLEMEN/FIXERS

Among the twenty-five individual defendants charged in connection with an FCPA enforcement action, several served as middlemen who funneled bribes from one individual/entity to a foreign official.

In *Low*, Malaysian financier Low Taek Jho, also known as "Jho Low," was charged with conspiring to violate the FCPA and launder money as part of the 1MDB scheme discussed above. According to the DOJ, Low's close relationships with high-ranking government officials in both Malaysia and Abu Dhabi were an important component of the alleged scheme. Low remains at large as a fugitive.

Similar to the PDVSA case, the DOJ has also pursued individual charges related to an alleged scheme to bribe officials at Empresa Publica de Hidrocarburos del Ecuador ("PetroEcuador"), the state-owned oil company of Ecuador. According to the

ENFORCEMENT ACTIONS AND STRATEGIES

allegations in the indictments, from 2013 through 2015, the alleged conspirators made corrupt payments to PetroEcuador to obtain and retain contracts for GalileoEnergy S.A., an Ecuadorian company that provided services in the oil and gas industry. The bribes were allegedly made through a Panamanian shell company and an unnamed intermediary company organized in the British Virgin Islands. According to the indictment, the scheme resulted in bribes of over $3 million being paid to secure contracts worth over $27 million.

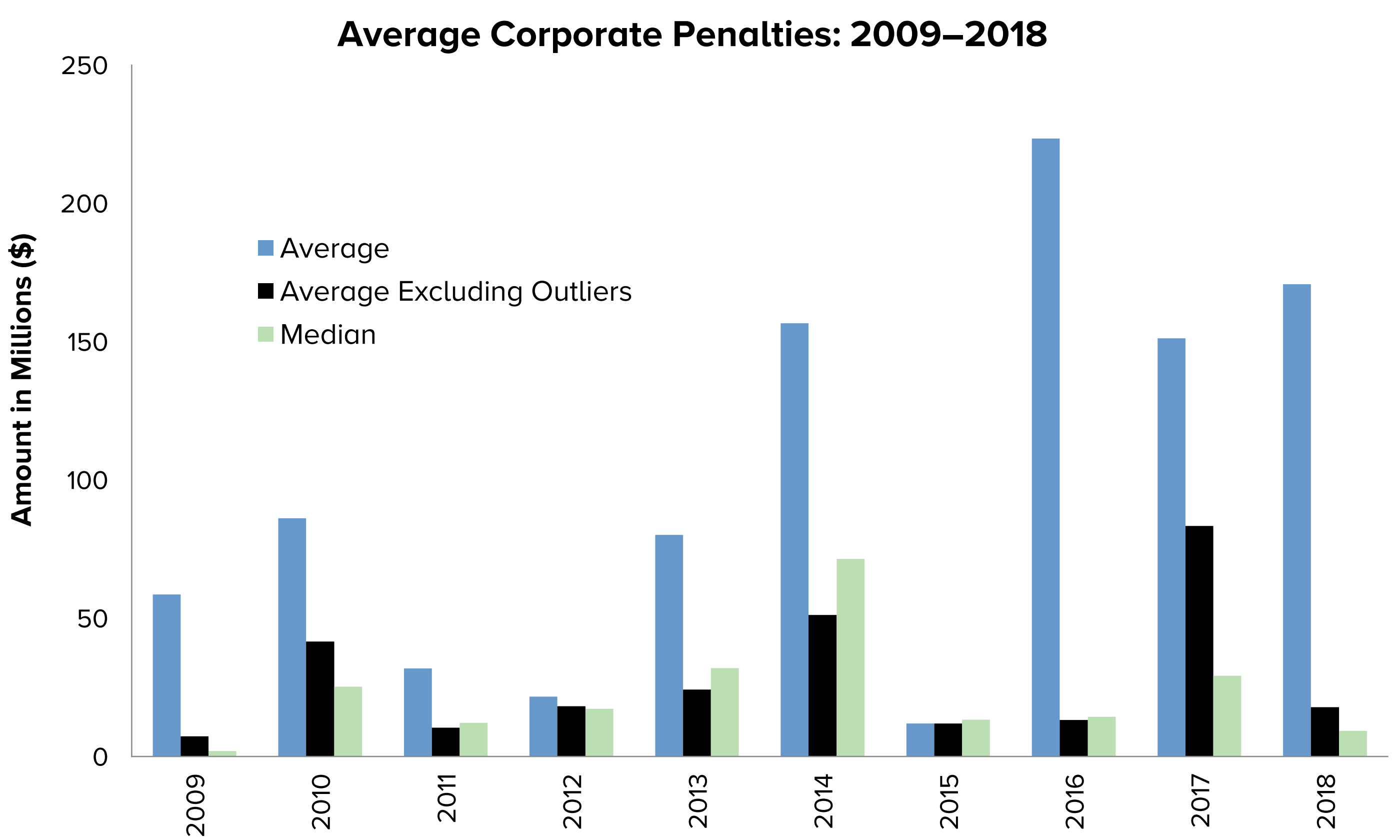
Four individuals have now been charged as part of this alleged scheme, two of which were middlemen. In April 2018, the DOJ obtained an indictment against Frank Roberto Chatburn Ripalda and Jose Larrea, charging Ripalda with conspiracy to violate the anti-bribery provisions of the FCPA, conspiracy to commit money laundering, violating the anti-bribery provisions of the FCPA, and money laundering, while charging Larrea with conspiracy to commit money laundering.

The remaining cases brought against middlemen originated from FCPA enforcement actions from recent years.

In May 2018, the DOJ brought charges against two additional individuals—Azat Martirossian and Vitaly Leshkov—allegedly involved in the far-reaching Rolls-Royce bribery scheme. According to the indictment, Petros Contoguris—who was charged in 2017—and an international engineering consulting firm (referred to as the "Technical Advisor" in the *Rolls-Royce* papers) instituted a scheme with Rolls-Royce executives and employees, in which Rolls-Royce paid kickbacks to the Technical Advisor employees and bribes to at least one foreign official in Kazakhstan, and then improperly document these payments as commissions to Contoguris's company, Gravitas, in exchange for helping Rolls-Royce obtain contracts with a company building a gas pipeline from Kazakhstan to China. Martirossian, a citizen of Armenia, and Vitaly Leshkov, a citizen of Russia, were both employees of the Technical Advisor, and were both charged with one count of conspiracy to launder money and ten counts of money laundering.

The cases of *Gonzalez-Testino* and *Guedez* arose from the sprawling corruption scandal involving PDVSA with U.S. businessmen Abraham Jose Shiera Bastidas and Roberto Enrique Rincon Fernandez at the center. In total, the DOJ has now charged eighteen individuals—fourteen of whom have pleaded guilty—for alleged involvement in the bribery scheme.

Finally, in *Bahn*, the SEC announced in September 2018 that Joo Hyun Bahn, also known as Dennis Bahn, had agreed to disgorge $225,000 to settle civil FCPA violations. As we reported in our January 2018 *Trends & Patterns*, Bahn was charged in December 2017 with conspiracy to violate the FCPA and substantive violation of the FCPA, and agreed to plead guilty to one count of each in January 2018.



FOREIGN OFFICIALS

Under the Fifth Circuit's decision in *United States v. Castle*, foreign officials cannot be prosecuted for conspiracy to violate the FCPA.[2] As a result, foreign officials are typically charged with crimes that often go part and parcel with corruption schemes. 2018 saw a number of foreign officials charged with money laundering offenses related to their receipt of corrupt payments.

In February 2018, the DOJ brought charges against an additional five individuals allegedly involved in the PDVSA enforcement actions. With the unsealing of these most recent charges, the DOJ has to-date charged eighteen individuals, five of whom were former officials of PDVSA and its subsidiaries or former officials of other Venezuelan government agencies or instrumentalities, and together were known as the "management team." This group allegedly wielded significant influence within PDVSA and allegedly conspired with each other and others to solicit several PDVSA vendors, including U.S.-based vendors, for bribes and kickbacks in exchange for providing assistance to those vendors in connection with their PDVSA business. The indictment further alleges that the co-conspirators then laundered the proceeds of the bribery scheme through various international financial transactions, including to, from, or through bank accounts in the United States, and, in some instances, laundered the bribe proceeds using real estate transactions and other U.S. investments. Specifically, charges were brought against the following individuals:

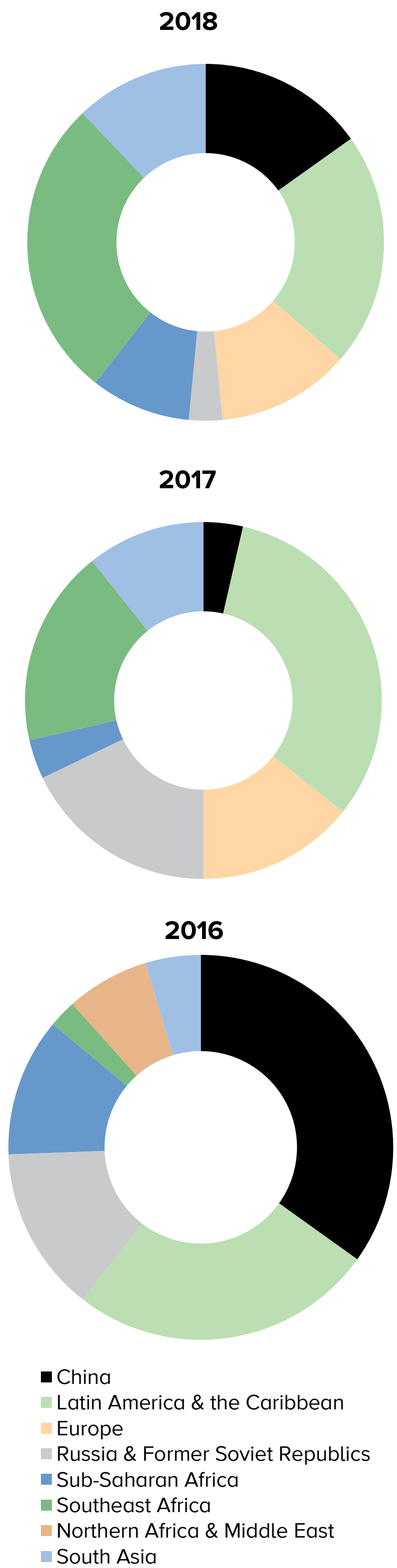
- Luis Carlos De Leon Perez, a dual citizen of the U.S. and Venezuela who, according to the indictment, was previously employed by instrumentalities of the Venezuelan government, was charged with one count of conspiracy to commit money laundering, four counts of money laundering, and one count of conspiracy to violate the FCPA.
- Nervis Gerardo Villalobos Cardenas, a Venezuelan citizen who according to the indictment was previously employed by instrumentalities of the Venezuelan government, was charged with one count of conspiracy to commit money laundering, one count of money laundering, and one count of conspiracy to violate the FCPA.
- Cesar David Rincon Godoy, a Venezuelan citizen who was allegedly employed by PDVSA and its subsidiaries, was charged with two counts of conspiracy to commit money laundering and four counts of money laundering. According to the indictment, Cesar Rincon is alleged to be a "foreign official" as that term is defined in the FCPA. In April 2018, Cesar Rincon pleaded guilty to one count of conspiracy to commit money laundering, and on the same day the district court ordered a forfeiture of approximately $7 million. Sentencing is scheduled for December 2018.
- Alejandro Isturiz Chiesa, a Venezuelan citizen who was allegedly employed by a PDVSA subsidiary and is alleged to be a "foreign official," was charged with one count of conspiracy to commit money laundering and five counts of money laundering.
- Rafael Ernesto Reiter Munoz, a Venezuelan citizen who was employed by PDVSA and is alleged to be a "foreign official," was charged with one count of conspiracy to commit money laundering and four counts of money laundering.

The DOJ also unsealed charges against two employees of PetroEcuador for their involvement in the alleged bribery scheme relating to that entity:

- In October 2017, Marcelo Reyes Lopez was charged with conspiracy to commit money laundering based on violations of the FCPA. In April 2018, Lopez agreed to plead guilty to the one-count indictment.
- In February 2018, Arturo Escobar Dominguez was charged with conspiracy to commit money laundering based on violations of the FCPA. In March 2018, Dominguez agreed to plead guilty to the one-count indictment.

In *Koolman*, the DOJ announced that an agent of Setar alleged to have been involved in the bribery scheme had pleaded guilty to one count of conspiracy to commit money laundering. Egbert Yvan Ferdinand Koolman, a Dutch citizen residing in Miami, was a product manager with Setar during the relevant time period. According to admissions made as part of his plea agreement, between 2005 and 2016, Koolman operated a money laundering conspiracy from his position as Setar's product manager. This money laundering conspiracy was intended to promote a wire fraud scheme and an improper payment scheme that violated the FCPA. Specifically, Koolman was promised and received bribes from individuals and companies in the United States and abroad in exchange for using his position at Setar to award valuable mobile phone and accessory contracts. Koolman pleaded guilty to the charges in April 2018, and in June 2018 was sentenced to 36 months in prison and was ordered to pay approximately $1.3 million in restitution.

[2] 925 F. 2d 831 (5th Cir. 1991).



Finally, in March 2018, a foreign official allegedly involved in the conduct underpinning the *ICBL* enforcement action was charged with one count of conspiracy to launder money and two counts of money laundering. According to the indictment, Donville Inniss allegedly received the bribes from ICBL and used his influence to direct the contracts to ICBL. Inniss allegedly hid the bribes by directing them to the account of a U.S.-based dental company owned by a friend. As of December 2018, Inniss's trial is scheduled to commence in June 2019.

UPSHOT

The total number of individuals charged in FCPA enforcement actions in 2018 went slightly up from 2017 (twenty-five from twenty-two) and is generally in line with trends seen in recent years. With a few outliers (2009, 2012, 2015, and 2016), the DOJ and SEC have brought charges against fifteen to twenty-five individuals in connection with an FCPA enforcement action on an annual basis since 2007. That said, there are still a few points worth highlighting.

First, although a number of the individuals charged in 2018 were executives, the year's enforcement actions lacked the large number of C-suite executives that we saw in 2016. Furthermore, most of the C-suite executives who were charged in 2018 were charged by the SEC, rather than the DOJ, and paid relatively paltry fines (all under $125,000). When the enforcement agencies talk about holding high-level executives to account for corporate misconduct, we are not sure this is the type of stick that the enforcement agencies are hoping for.

Second, a number of the charges against individuals stem from larger cases filed prior to 2018. Specifically, the seven individuals charged for involvement in the PDVSA scheme add to the growing list of individuals charged as part of that scheme, the Cohen case arises out of the Och-Ziff corporate enforcement action from 2016, the *Martirossian* and *Leshkov* cases arise out of the Rolls-Royce corporate enforcement action from 2017, the *Contesse* enforcement action arises from the SQM corporate enforcement action from 2017, and the penalty levied against Dennis Bahn by the SEC follows on the criminal charges filed against him in 2017 by the DOJ. As a result, only twelve of the twenty-five FCPA enforcement actions against individuals in 2018 arose from truly new matters.

GEOGRAPHY & INDUSTRIES

In our January 2018 *Trends & Patterns*, we discussed the striking focus of 2017's FCPA enforcement actions on one geographic region: Latin America. This followed on a heavy focus in the 2016 FCPA enforcement actions on China. The FCPA enforcement actions from 2018, on the other hand, were generally spread across regions that have consistently been the focus of enforcement activity in recent years.

Of the total twenty-five enforcement actions,[3] nine involved alleged acts of bribery in Northern Africa or the Middle East (*Kinross Gold*, *PAC*, *Société Générale*, *Legg Mason*, *Sanofi*, *UTC*, *Stryker*, *Cohen*, and *Bahn*). Although the region has been a consistent source of FCPA enforcement actions, the 2018 total represents a significant jump in enforcement activity in the region by the U.S. enforcement agencies.

After North Africa and the Middle East, the 2018 FCPA enforcement actions were fairly evenly distributed across regions that have generally the focus of such actions. Eight of the 2018 FCPA enforcement actions involved officials from Latin America or the Caribbean (*Petrobras*, *Vantage Drilling*, *Eletrobras*, *ICBL*, PetroEcuador individuals, PDVSA individuals, *Parker/Koolman*, and *Contesse*); six enforcement actions involved officials from China (*Dun & Bradstreet*, *Credit Suisse*, *Sanofi*, *UTC*, *Stryker*, and *Polycom*); four have involved alleged bribery schemes in South Asia (*Beam Suntory*, *Sanofi*, *UTC*, and *Stryker*); three have involved improper conduct in Russia and the former Soviet republics (*TLI/Lambert*, *UTC*, and *Martirossian/Leshkov*) or Southeast Asia (*Sanofi*, *UTC*, and the 1MDB individuals); and one involved payments to government officials in Sub-Sarahan Africa (*Cohen*), East Asia (*UTC*), or Europe (*Elbit Imaging*).

With regard to industries, the 2018 FCPA corporate enforcement actions arise from a diverse set of industries. As with past years, a number of enforcement actions involved the oil & gas industry (*Petrobras* and *Vantage Drilling*) and healthcare & life sciences industry (*Sanofi* and *Stryker*). Unusually, the largest source of FCPA enforcement actions in 2018 was the financial services industry. The remaining enforcement actions involved a variety of other industries, each of which has seen FCPA enforcement activity in recent years: aerospace (*PAC* and *UTC*), mining (*Kinross*), transportation (*TLI*), real estate (*Elbit Imaging*), and food & beverage (*Beam Suntory*).

TYPES OF SETTLEMENTS

In 2018, the enforcement agencies continued prior practices of resolving matters using a variety of settlement structures, with the choice of structure apparently related—but not always in a clear or consistent manner—to the seriousness of the conduct or the timing and degree of disclosure and cooperation. We discuss the SEC's and DOJ's settlement devices below.

SEC

As was the case in 2017, the SEC in 2018 relied exclusively on administrative proceedings to resolve all eleven of its corporate FCPA enforcement actions. As in recent years, none of these were contested enforcement actions.

DOJ

The DOJ in 2018 used a range of settlement devices in each of its eight enforcement actions. Further, 2018 saw the DOJ utilize declinations with disgorgement with a twist, with disgorgement paid to the SEC qualifying as the disgorgement required under the DOJ's FCPA Corporate Enforcement Policy—an approach suggested in the original Pilot Program and consistent with this year's "no piling on" policy. The list below sets out the various settlement devices the DOJ used thus far in its 2018 FCPA enforcement actions against corporate entities:

- Plea Agreements – *SGA Société Générale Acceptance N.V.* (Société Générale's subsidiary)
- Deferred Prosecution Agreements – *Société Générale*, *Panasonic*, *TLI*
- Non-Prosecution Agreements – *Credit Suisse*, *Legg Mason, Petrobras*
- Public Declinations with Disgorgement – *Dun & Bradstreet*, *ICBL*, *Polycom*

ELEMENTS OF SETTLEMENTS

WITHIN GUIDELINES SANCTIONS

In all six corporate enforcement actions brought by the DOJ in 2018 that have involved penalties based on the U.S. Sentencing Guidelines, the settling company received a sentencing discount. Nonetheless, it is notable that two of the 2018 enforcement actions—*Société Générale* and *Panasonic*—involved sentencing discounts of 20%, which is slightly less than the "up to 25%" discount provided for in the Pilot Program and now the FCPA Corporate Prosecutions Policy for companies that cooperate but had not made a voluntary disclosure. In the settlement documents for both of these enforcement actions, the DOJ made clear its view that each company did not completely cooperate. Similarly, another company that settled through a NPA received a discount of 15%, with the DOJ contending that the company only provided cooperation in a reactive, rather than proactive, manner, and, further, denying it full remediation credit purportedly because it failed to sufficiently discipline employees who were involved in the misconduct.

SELF-DISCLOSURE, COOPERATION, AND REMEDIATION

The DOJ did not award full credit for voluntary disclosure in any of its 2018 enforcement matters, but it did grant at least partial cooperation credit in all of them. As in recent years, the DOJ has highlighted the fact that the companies disciplined and

[3] For the purpose of this geographic analysis, we treat corporate enforcement actions and charges against individuals that arise out of the same bribery scheme(s) as one enforcement action. Similarly, we treat groups of related cases against individuals that are not, as of yet, connected to a corporate enforcement action as a single matter for this purpose. Finally, to the extent that charges are brought in multiple years against different corporations or individuals relating to the same bribery scheme, the relevant countries are included in the count for each year where any corporation or individual is charged.

terminated the individuals responsible for the misconduct, and it has been trending towards emphasizing terminations as part of its remedial requirements. It is therefore noteworthy that, as noted above, a company which failed to self-disclose, failed to fully cooperate, and failed to fully remediate nonetheless received a 15% sentencing discount. As we have discussed in past editions of this publication and below in the Compliance Guidance section, the DOJ has enacted a number of policy changes over the past few years that are designed to incentivize self-disclosure of potential violations and subsequent cooperation and remediation. While these carrots might seem enticing, companies are unlikely to consistently take the bait when they simultaneously see that companies do not seem to be penalized for failing to self-disclose, fully cooperate, and fully remediate.

MONITORS

As we have previously reported, in recent years the DOJ has increased the frequency with which it imposed a corporate monitor as part of FCPA settlements. However, in a departure from that trend, only one of the eight enforcement actions brought by the DOJ in 2018 required a monitor. In what may be the beginning of a new trend, in one case, involving a foreign financial institution, the DOJ noted that it was not imposing a monitor in part because of the continued and ongoing monitoring that will be conducted by French authorities. This represents the latest facet of international cooperation by U.S. enforcement authorities, and is an implicit recognition by the DOJ that it views the French anti-bribery agency as a credible anti-corruption authority.

Furthermore, as discussed in more detail below, the DOJ's announcement in October 2018 of an updated corporate monitor policy may signal at least a mild shift away from the use of monitors by the DOJ, at least in cases involving historical conduct where companies have made meaningful efforts to remediate and invest in corporate compliance programs.

FINANCIAL HARDSHIP

The DOJ's enforcement action against TLI provides another recent example of consideration of whether a criminal fine would substantially jeopardize the continued viability of the company. The DPA entered into by TLI prescribed a minimum fine of $28.5 million, and the DOJ and TLI agreed that the appropriate penalty was approximately $21.4 million, which represents a 25% discount off the bottom of the Sentencing Guidelines fine range. Nonetheless, based on representations made by the company, the DOJ ultimately agreed that a criminal fine of only $2 million was appropriate based on TLI's ability to pay.

Similarly, the SEC appears to have taken into account the financial health of Vantage Drilling in determining the proper financial penalty to impose against the company. Specifically, the SEC's order notes that "in determining the disgorgement amount and not to impose a penalty, the Commission has considered Vantage's current financial condition and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities."

RECIDIVISM

In 2017, we saw Biomet and Orthofix added to the small group of recidivist FCPA violators. In 2018, Stryker became the latest company to be added to this list. Unlike the Orthofix and Biomet enforcement actions, Stryker's second FCPA settlement did not result from a breach of an earlier DPA. Perhaps unsurprisingly, Stryker was required by the SEC to retain an independent compliance consultant for a period of eighteen months to review and evaluate the company's internal controls and anti-corruption policies.

DISGORGEMENT

Much like the DOJ's *Biomet* enforcement action from 2017, the DOJ required Legg Mason to disgorge the $31.6 in million profits it allegedly obtained from the bribery scheme it entered into with Société Générale. As we noted in our January 2018 *Trends & Patterns*, it is unusual for the DOJ to require companies to disgorge profits, as this remedy is typically left to the SEC, with the DOJ instead typically obtaining a similar remedial penalty through forfeiture.

CASE DEVELOPMENTS

BILFINGER

In our January 2018 *Trends & Patterns*, we reported that in April 2017, Bilfinger announced that it had extended its 2013 DPA with the DOJ. In December 2018, the company's DPA expired after the monitor certified its compliance program.

REICHERT

In March 2018, former Siemens AG executive Eberhardt Reichert pleaded guilty to one count of conspiring to violate the FCPA's anti-bribery, internal controls, and books-and-records provisions and to commit wire fraud. As we discussed in prior years' *Trends & Patterns*, Reichert was one of eight former Siemens employees charged by the DOJ more than six years ago for their roles in the company's extensive bribery scheme in Latin America. Only one other individual Siemens defendant—Andres Truppel, who pleaded guilty in September 2015—has made an appearance in U.S. court, with the others remaining abroad (and thus, at least according to the U.S. government, fugitives). In September 2017, Reichert was arrested in Croatia and agreed to be extradited to the United States to face trial, becoming the second Siemens defendant to appear in U.S. courts. As of the date of publication, a sentencing hearing has not yet been scheduled.

BAHN

In January 2018, Joo Hyun Bahn aka Dennis Bahn pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA. As we have previously reported, Bahn was involved in a bribery scheme that involved paying a Qatari official to finance the sale of a high-rise building complex in Vietnam. In September 2018, Bahn was sentenced to six months in prison. At about the same time, Bahn agreed to disgorge $225,000 to the SEC to settle civil FCPA violations based on the same facts.

WANG

In April 2018, Julia Vivi Wang pleaded guilty to charges of conspiracy to violate the anti-bribery provisions of the FCPA, violations of the anti-bribery provisions of the FCPA, and filing false income tax returns. Wang is scheduled to be sentenced in March 2019.

NG

In May 2018, Ng Lap Seng was sentenced to 48 months in prison. In addition, Ng was ordered to pay a $1 million fine, $302,977 in restitution to the United Nations, and a forfeiture money judgment of $1.5 million. Ng had previously been convicted in July 2017 of one count of conspiracy to violate the FCPA and two substantive counts of violating the FCPA—in addition to conspiracy to commit money laundering, money laundering, conspiracy to defraud the United States, bribery, and obstruction of justice.

Ng has appealed his conviction, and in June 2018, the Second Circuit denied Ng's motion for bail pending appeal, ruling that he had failed to show that he was not a flight risk.

MACE

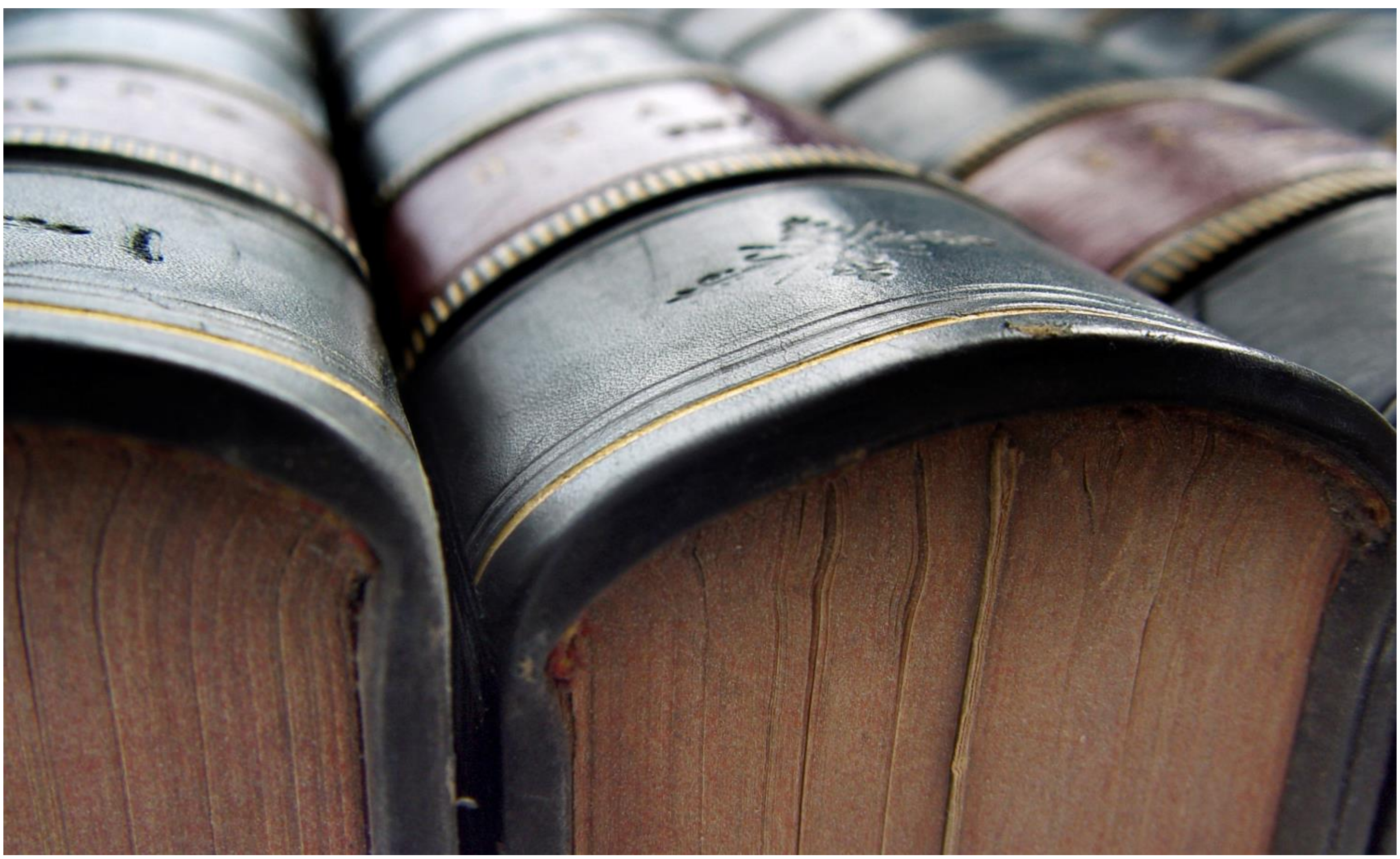
In September 2018, Anthony Mace, the former chief executive of Dutch oil-services firm SBM Offshore, was sentenced to thirty-six months in prison and fined $150,000. He had pleaded guilty in November 2017 to one count of conspiracy to violate the FCPA involving bribes to officials in Brazil, Angola, and Equatorial Guinea.

ZUBIATE

In September 2018, Robert Zubiate, a former SBM Offshore sales executive, was sentenced to 30 months in prison and fined $50,000. He had previously pleaded guilty in November 2017 to one count of conspiracy to violate the FCPA involving bribes to officials in Brazil, Angola, and Equatorial Guinea.

PERENNIAL STATUTORY ISSUES

JURISDICTIONS
PARENT-SUBSIDIARY LIABILITY
FOREIGN OFFICIALS
SUCCESSOR LIABILITY
OBTAIN OR RETAIN BUSINESS



For the most part, the 2018 corporate enforcement actions have not presented very many substantive statutory-related issues within the FCPA-specific context. However, there have been a few landmark cases this year that, while not directly related to the FCPA, will likely influence FCPA enforcement. As discussed in further detail below, we have seen significant convergence between FCPA enforcement and other disciplines, providing even stronger evidence that these non-FCPA cases may be generally applicable to FCPA enforcement issues.

JURISDICTION

As we noted in previous editions of *Trends & Patterns*, the DOJ and SEC have historically interpreted the FCPA's jurisdictional requirements extremely broadly, claiming that slight touches on U.S. territory such as a transaction between two foreign banks that cleared through U.S. banks or, even more tenuously, an email between two foreign persons outside the U.S. that transited through a U.S. server, were sufficient. Two appellate decisions issued in 2018 have the potential to result in a narrowing—if only slightly—of the jurisdictional scope of the FCPA.

Hoskins: On August 27, 2018, the Second Circuit issued an opinion in the *United States v. Hoskins* appeal. The panel largely upheld a decision by the United States District Court for the District of Connecticut, which concluded that the government could not evade the statute's requirement that a foreign person had to act "while in the United States" by charging a retired British executive of a French multinational company with conspiring with persons in the United States to violate the FCPA. The Court noted, however, that the government could still proceed on an alternative theory that the foreign person acted as an agent of those U.S. persons.

In its indictment, the government pursued alternative theories of liability in both the conspiracy and substantive FCPA counts. Thus, it charged Hoskins both under 15 U.S.C. § 78dd-2, which prohibits American companies and persons *and their agents* from using interstate commerce in connection with payment of bribes, and 15 U.S.C. § 78dd-3, which prohibits foreign persons or businesses from taking acts to further certain corrupt schemes, including the payment of bribes, *while present in the U.S*. The District Court rejected the government's approach with respect to § 78dd-3, holding that the government could not evade the requirement that foreign persons must have acted "while in the United States" by charging that Hoskins had conspired with persons in the United States. The court, however, held that the government could proceed and attempt to prove that Hoskins had conspired and substantively violated 15 U.S.C. § 78dd-2 by acting as an agent of an American company.

On interlocutory appeal, the Second Circuit held that, despite the general rule that a defendant can be liable for conspiracy or as an accomplice for crimes he did not or could not physically commit, a clear affirmative decision by Congress can exclude certain classes of persons from liability under particular statutes. The Court further concluded that the text, structure, and legislative history of the FCPA demonstrate a clear affirmative decision to exclude foreign nationals who are not residing in the U.S., are acting outside of American territory, lack an agency relationship with a U.S. person, and are not directors, stockholders, employees, or officers of American companies. Thus, "the FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—*unless* that person commits a crime within the territory of the United States, [and] . . . [t]he government may not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes."[4] Consequently, the retired British executive, as a foreign national residing in France working for a French company, could not violate the FCPA unless he came into the United States or acted abroad as an agent of an American company. The Second Circuit thus left undisturbed the District Court's decision that the executive could be charged as a member of the conspiracy under 15 U.S.C. § 78dd-2 through an agency theory.

Intriguingly, the Court came to a different conclusion with respect to whether Hoskins could be convicted of conspiring *with foreign persons* who committed acts in the United States. Thus, if the government can prove that Hoskins was acting as an agent of an American person, a jury could reasonably conclude that, "as an agent, [he] committed the first object by conspiring with employees and other agents of [the American company] and committed the second object by conspiring with foreign nationals who conducted relevant acts while in the United States."[5] Judge Lynch, though he joined the panel in full, wrote separately to emphasize the narrow scope of the clear Congressional intent exception to the general principle that conspirators can be liable even when they could not be liable as principals.

This case adds some much-needed clarity to the extraterritorial reach of the FCPA in cases against individuals. Given the paucity of reported decisions in the FCPA area, this decision will be especially helpful precedent for foreign individuals facing FCPA-related investigations.

Jesner v. Arab Bank: An opinion issued by the Supreme Court in 2018, although not relating to the FCPA, could nonetheless have implications with respect to the government's view that the FCPA's territorial jurisdiction over foreign persons (the "while in the United States" prong of § 78dd-3) may be satisfied by somewhat "acts" such as the clearing of U.S. dollar transactions through U.S. banks. In *Jesner v. Arab Bank*,[6] the Court's opinion included *dicta* that pushed back on this expansive jurisdictional scope.

[4] *United States v. Hoskins*, 902 F.3d 69, 96-97 (2d Cir. 2018).

[5] *Id.* at 98.

[6] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

Jesner involved a suit under the Alien Tort Statute ("ATS") against Arab Bank, a Jordanian bank with a branch in New York, which the plaintiffs claimed provided financing to Hamas and other terrorist groups resulting in terrorist attacks on plaintiffs and their families. The main U.S.-based conduct alleged by the plaintiffs was Arab Bank's use of the Clearing House Interbank Payments System ("CHIPS") for transactions that allegedly benefitted terrorists. CHIPS utilizes U.S. dollars, both directly and to facilitate exchanges between other foreign currencies, and operates in the United States and abroad. The Court noted that "it could be argued" that a corporation whose only connection to the United States is the use of CHIPS has "insufficient connections to the United States to subject it to jurisdiction under the ATS."[7] However, it declined to answer the question of whether these contacts were sufficient, reaching its decision in *Jesner* on other, unrelated grounds specific to the ATS.

We might be trying to read into the smoke here, but in an area bereft of judicial guidance, we have to take what we can get. The Supreme Court's treatment of the question of the sufficiency of U.S. dollar clearing operations to sustain jurisdiction on a foreign corporation was too brief and inconclusive to provide a firm precedential basis for this argument, and, of course, there may be relevant distinctions between evaluating minimum contacts sufficient for civil *in personam* jurisdiction and the factual question of whether a defendant in a criminal case acted "while in the United States." However, the mere hint that this type of activity is not sufficient to warrant jurisdiction may provide support to future challenges or may dissuade the U.S. authorities from relying on it too heavily. This could, in time, have a significant effect on the DOJ's and SEC's ability to bring bribery charges against foreign corporations and individuals, as the main or only jurisdictional hook in several recent cases, including *VimpleCom*, *Teva*, and *Telia*, has been the use of U.S. dollars. *Jesner* provides some support for the notion that such connections might just be "insufficient."

PARENT-SUBSIDIARY LIABILITY

The SEC's habit of charging parent issuers with violations of the anti-bribery provisions of the FCPA for the acts of a subsidiary without establishing that the parent authorized, directed, or controlled the subsidiary's corrupt conduct continues to be a problem. Instead of applying traditional concepts of corporate liability, the SEC often applies a theory of strict liability, taking the position that a subsidiary was *ipso facto* an agent of its parent. Therefore, applying the test for liability applicable to an employee's or agent's actions, any illegal act committed within the scope of the employee's or agent's duties and at least in part for the benefit of the corporation results in corporate criminal liability. The latest example of this practice seems to be the *UTC* enforcement action.

UTC involved allegations of corrupt payments in a number of countries—Azerbaijan, China, Kuwait, South Korea, Pakistan, Thailand, and Indonesia. The SEC's order was clear, however, that only the alleged payment of bribes to government officials in Azerbaijan by UTC subsidiary Otis Russia violated the anti-bribery provisions of the FCPA. According to the SEC, the remainder of the conduct alleged in the SEC's order violated only the internal controls and books-and-records provisions of the FCPA.

Notably absent from the allegations contained in the SEC's order, however, is any indication that United Technologies authorized, directed, or controlled the conduct at Otis Russia. Instead, it seems that the best link the SEC could draw between UTC and Otis Russia was that "UTC failed to detect the conduct and first learned of it in April 2017"—nearly five years after the alleged conduct had commenced. If this is truly the only basis for holding UTC liable for the conduct at Otis Russia, then it is the latest example of disregard for established limits on corporate criminal liability.

FOREIGN OFFICIALS

Continuing a trend we highlighted in last year's *Trends & Patterns*, 2018 brought yet another case in which a corporation was held liable under the FCPA's accounting provisions without alleging that the company had bribed a foreign official. In *Elbit Imaging*, the SEC charged the company with violations of the FCPA's books-and-records and internal controls provisions in connection with sales through third-party consultants and sales agents that lacked proper documentation. The SEC's order alleges that Elbit Imaging and its subsidiary engaged these agents and consultants to assist in projects involving government officials, but it tellingly never explicitly connects the sums paid to the consultants or sales agents to payments to a foreign official. Further, it does not even attempt to *infer* that any payment to a government official was made in exchange for obtaining or retaining business.

With no *quid pro quo* and no payment to a government official, we are essentially looking at a case of falsification of documentation and failure to implement reasonable internal controls. These accounting failures in turn resulted in a situation in which "some or all of the funds *may* have been used to make corrupt payments to Romanian government officials or were embezzled" (emphasis added)—but the SEC can't really say. This case thus demonstrates the additional risk to issuers under the FCPA—mere suspicion of bad conduct, coupled with internal controls failures related to payments to third parties, is sufficient to establish a violation of the FCPA's accounting provisions, even where there is insufficient (or no) evidence of bribery.

SUCCESSOR LIABILITY

As discussed above, *Kinross Gold* provides another warning of the risks of successor liability in M&A transactions. In this case, Kinross was allegedly aware of inadequate internal controls at its

[7] *Id.* at 1398.

two newly acquired subsidiaries even before it closed the acquisition and was on warning through internal audits that these issues continued post-closing. During this time, the subsidiaries continued to make improper payments to local vendors without confirming that the vendors provided the services, including after Kinross finally attempted to implement policies and adequate procedures at these companies. Kinross purportedly knew that the companies it had acquired "lacked an anti-corruption compliance program and associated internal accounting controls" and required "extensive remediation" but it failed to make the necessary remediation and the improper behavior continued and Kinross was held responsible.

Kinross serves as a cautionary tale for acquiring companies, but realistically it's a pretty clear case. Based on the SEC's order, the compliance risks appear to have been clearly known by Kinross, but the company did virtually nothing for at least three or four years after the acquisition to address the problems. We should let that serve as a fairly obvious lesson—if there are known risks in an acquisition, waiting four years to address them is far too long.

OBTAIN OR RETAIN BUSINESS

The statutory language of the FCPA prohibits making payments to foreign officials *to assist in obtaining or retaining business*. In the majority of cases, the "obtain or retain business" requirement involves payments designed to win government contracts or other business directly with the government. Several enforcement actions in 2018, however, involved schemes where companies sought to obtain confidential information or documents from a foreign government, rather than the more traditional scheme designed to directly win business.

In *UTC*, the SEC alleged that a foreign affiliate/joint venture in China made payments in that country despite the high probability that at least a portion of the funds would be used to make unlawful payments to a Chinese official "to obtain confidential information to sell engines to a Chinese state-owned airline." This type of customer information can be utilized to obtain an advantage in contract bidding or negotiations, and therefore would seem to satisfy the requirement that a payment be made to "obtain or retain business."

Similarly, in *PAC*, the SEC alleged that the company retained a consultant who ultimately made payments to foreign officials to obtain confidential non-public business information about a state-owned airline customer, including information about the airline's negotiations with PAC's competitors.

Finally, as discussed above, in *Dun & Bradstreet*, the relevant Chinese joint venture and subsidiary allegedly paid money to government officials and others to obtain data and information about individuals and entities. This unusual factual backdrop highlights the broad range of interactions with government officials that can spawn FCPA enforcement actions and highlights some of the unique risks that service industry companies can face when engaging in business in foreign countries.

COMPLIANCE GUIDANCE

FCPA CORPORATE ENFORCEMENT POLICY

In November 2017, the DOJ announced the incorporation of the FCPA Pilot Program into the U.S. Attorneys' Manual, which guides the DOJ's enforcement policies and practices. As discussed in last year's *Trends & Patterns*, the model presented by the DOJ provides a pathway for companies to secure a less onerous penalty in the face of FCPA violations—the so-called "declination with disgorgement"—through voluntary self-disclosure, cooperation, and remediation.

Dun & Bradstreet represents the first DOJ "declination" issued after the Policy's official formalization and remains the quintessential example of how the Policy operates. In April 2018, the DOJ declined to prosecute Dun & Bradstreet despite its conclusion that the company's subsidiary in China had paid bribes. The DOJ justified its decision not to bring more serious forms of enforcement actions by referring to Dun & Bradstreet's "prompt voluntary self-disclosure; the thorough investigation undertaken by the Company; its full cooperation in this matter, including identifying all individuals involved in or responsible for the misconduct, providing the Department all facts relating to that misconduct, making current and former employees available for interviews, and translating foreign language documents to English; the steps that the Company has taken to enhance its compliance program and its internal accounting controls; [and] the Company's full remediation, including terminating the employment of 11 individuals involved in the China misconduct." In other words, Dun & Bradstreet strictly adhered to the requirements as laid out by the FCPA Corporate Enforcement Policy, word-for-word. Dun & Bradstreet, however, did not escape the last requirement of the Policy, as the letter from DOJ to Dun & Bradstreet indicates that it "will be disgorging to the SEC the full amount of disgorgement." The enforcement action against IBSL, also resulting in a declination with disgorgement, followed a nearly identical pattern.

In addition to the declination-with-disgorgement enforcement actions expressly contemplated under the Corporate Enforcement Policy, 2018 has involved several other subtle variations of declinations, likely a result of the Corporate Enforcement Policy and other DOJ enforcement initiatives. In some cases, these have been true declinations in which the DOJ drops the investigation without disgorgement, accusations of wrongdoing, or further admonishment. There have been at least thirteen true declinations in 2018 as of the time of this publication—two SEC-only (Cobalt International Energy, Teradata Corporation); five DOJ-only (Juniper Networks, Inc., Sanofi, Kinross Gold Corporation, Eletrobras, UTC); and six DOJ and SEC declinations (Exterran Corporation, Core Laboratories N.V., Sinovac Biotech Ltd., Ensco plc, Transocean Ltd., Archrock, Inc.).

Other cases, discussed in detail below, have involved declinations with no disgorgement to the DOJ, but only because the company has received credit for penalties paid pursuant to a foreign enforcement action.

POLICY ON COORDINATION OF CORPORATE RESOLUTIONS

Following hot in the footsteps of the FCPA Corporate Enforcement Policy, in May 2018, the DOJ released the "Policy on Coordination of Corporate Resolution Penalties," which will be similarly incorporated into the U.S. Attorneys' Manual. Deputy Attorney General Rod J. Rosenstein, in announcing the Policy, stated that its purpose was to instruct DOJ attorneys "to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company for the same conduct."[8] According to Mr. Rosenstein, the DOJ's Policy against "piling on" enforcement actions recognizes that companies may be subject to numerous regulatory authorities—both in the U.S. and abroad—which may result in disproportionate penalties.

The Policy has four core features:

> (1) "[re]affirm[ing] that the federal government's criminal enforcement authority should not be used against a company for purposes unrelated to the investigation and prosecution of a possible crime," *e.g.*, Department attorneys "should not employ the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case";
>
> (2) "direct[ing] Department components to coordinate with one another, and achieve an overall equitable result . . . includ[ing] crediting and apportionment of financial penalties, fines, and forfeitures";
>
> (3) "encourag[ing] Department attorneys, when possible, to coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct"; and
>
> (4) "set[ting] forth some factors that Department attorneys may evaluate in determining whether multiple penalties serve the interests of justice in a particular case . . . includ[ing] the egregiousness of the wrongdoing; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation with the Department."

Mr. Rosenstein emphasized that the goal of this Policy is to "achieve an overall equitable result," but he also cautioned that DOJ would continue to expect full cooperation from companies, even if other authorities are involved in an investigation, and it may still impose multiple penalties where they "really are essential to achieve justice and protect the public."

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[8] DOJ Press Release, Deputy Attorney General Rod J. Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

As with the FCPA Corporate Enforcement Policy, this Policy does not appear to represent any dramatic change in DOJ practices but instead largely reflects the policies and approaches already taken by the DOJ, especially the Fraud Section. However, the formalization and addition to the DOJ's Attorneys' Manual may lead to more frequent and consistent applications of the Policy. In particular, it is possible we will see the DOJ engaging in earlier and more pro-active coordination with non-U.S. enforcement authorities, which have become more involved in recent years, as exemplified, for example, in the global investigation and $2.6 billion USD resolution concerning the Brazilian conglomerate Odebrecht. Companies undergoing similarly wide-spread investigations may endeavor to use this Policy as leverage to reduce or streamline the investigations or penalties, but companies should not expect to get off with significantly lighter penalties. Ultimately, as stated by Mr. Rosenstein, "the Department will act without hesitation to fully vindicate the interests of the United States."

A few cases from 2018 show how the Policy could play out in practice and also suggest that the SEC may rely on the Policy's principles in its own enforcement actions. In a seemingly extreme example, in September 2018, the SEC appeared to embrace the essence of the DOJ's Policy when it issued a formal declination to ING Group one day after the bank settled charges brought against it by the Netherlands Public Prosecution Service for EUR 775 million (approximately $900 million). Given the severity and duration of the conduct alleged in the Dutch settlement, the SEC likely could have brought charges against ING notwithstanding the Dutch settlement.

In another interesting development, in one case this year, the DOJ's Policy on Coordination of Corporate Resolutions combined with the Corporate Enforcement Policy to result in yet another slightly less onerous penalty—the declination with disgorgement credited to foreign authorities. In August 2018, Guralp Systems Limited received a formal declination letter from the DOJ "notwithstanding evidence of violations of the FCPA arising from GSL's payments" to a South Korean official.[9] The enumerated reasons for doing so were two-fold and clearly encompassed both the Corporate Enforcement Policy—*i.e.*, "GSL's voluntary disclosure . . . , significant remedial efforts undertaken by GSL, [and] GSL's substantial cooperation"—and the Policy on Coordination of Corporate Resolutions—*i.e.*, noting that DOJ reached its conclusion based on the fact that GSL is a U.K. company and "is the subject of an ongoing parallel investigation by the U.K.'s Serious Fraud Office for violations of law relating to the same conduct and has committed to accepting responsibility for that conduct with the SFO." To some extent, this approach might be a reflection of comity and accomodation between the two enforcement agencies, since the U.K.'s version of double jeopardy would prevent the SFO from proceeding if the company was charged in the U.S. (assuming a Corporate Enforcement Policy declination would so qualify). Nevertheless, applying only the Corporate Enforcement Policy, GSL likely would have had to agree to disgorgement, since the DOJ publicly accused it of violative conduct. However, the pending enforcement action (and accompanying penalty) in the U.K. most likely rescued it from that aspect of punishment.

GSL and other companies facing these types of declinations with disgorgement credited to a foreign authority obviously benefit from obtaining potentially lower penalty amounts, but they still fall short of true declinations since reputational penalties apply and monetary penalties, albeit reduced, remain inevitable.

DOJ REVISES YATES MEMORANDUM POLICY TO PROVIDE FLEXIBILITY IN AWARDING COOPERATION CREDIT

On November 29, 2018, Deputy Attorney General Rod J. Rosenstein announced that the Department of Justice planned to modify policies in the DOJ Attorneys' Manual relating to individual accountability and corporate investigations.[10] The announcement conveyed two broad themes—first, DOJ remains focused on punishing individuals, and second, that DOJ would make yet another adjustment to its policies to increase corporate cooperation, in this case, as it relates to identifying culpable individuals.

First, Mr. Rosenstein emphasized DOJ's continued emphasis on prosecuting individuals responsible for FCPA violations, noting that "[t]he most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes." To this end, DOJ would revise its policy to significantly limit the number of corporate resolutions that include provisions that effectively protect individuals from facing criminal liability.

Second, Mr. Rosenstein clarified an aspect of current DOJ policy relating to cooperation credit that has recurrently confused and frustrated prosecutors and defenders alike. Specifically, DOJ's current policy, which was released in a memorandum in 2015 issued by then-Deputy Attorney General Sally Yates, on its face, required corporations to identify "*all* relevant facts about the individuals involved in corporate misconduct" to qualify for "*any* cooperation credit" (emphasis added).[11] In practice, of course,

[9] *In re Guralp Systems Ltd.*, Letter to Matthew Reinhard from Daniel S. Kahn, Deputy Chief, Fraud Section, DOJ (Aug. 20, 2018).

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

[11] Memorandum from Sally Q. Yates, Deputy Attorney General re: Individual Accountability for Corporate Wrongdoing (Sept. 9,

DOJ prosecutors exercised their discretion in a less rigid manner, awarding partial cooperation credit even where corporate handovers of individual wrongdoers have been less-than-fulsome. Nevertheless, Mr. Rosenstein acknowledged that this all-or-nothing language can have the unintended effect of incentivizing prosecutors and corporations to expend inordinate amounts of time and resources to ensure this criterion is met. To promote efficiency, Mr. Rosenstein noted that the policy would be revised to "focus on the individuals who play significant roles in setting a company on a course of criminal conduct," rather than "every person involved in the alleged misconduct in any way." It would also more clearly allow partial cooperation credit, instead of the full-credit or no credit approach.

The revised policy, as described by Mr. Rosenstein, will also grant some measure of discretion to civil attorneys to avoid unnecessary investigation into individual accountability when no criminal conduct is at-issue. Rather than forcing corporations through a pointless bureaucratic exercise to point the finger at individuals even where the DOJ has no reason to believe there was any prosecutable criminal conduct, under the revised policy, the DOJ may accept a settlement granting cooperation credit to the corporation, even without extensive investigation into individuals, and move on.

That being said, the policy shift may not impact the scope of internal investigations conducted by companies in response to government investigations, as there are still ample incentives for the company to understand the full breadth and scope of alleged misconduct. Indeed, a full understanding of the scope and facts underpinning potential misconduct will likely be necessary to effectively determine which individuals were "substantially" involved and which individuals were not. However, the revised policy may provide some measure of relief to companies that have conducted a thorough investigation, but may not be able to provide *all* information on individuals with *any* involvement in the misconduct—*e.g.* because at some point the involvement becomes too attenuated to be relevant or because data protection laws confine the information the company can provide to U.S. authorities. This policy likely will not have a substantial effect on the size and scope of FCPA investigations, which are often among the most sprawling and expensive of white collar investigations, but it may serve to smooth some of the barbs around the edges.

DOJ UPDATES POLICY ON CORPORATE MONITORS

On October 11, 2018, the DOJ released an updated policy regarding the selection of corporate monitors.[12] The policy—entitled "Selection of Monitors in Criminal Division Matters"—is designed to guide the DOJ's decision-making on whether to require a monitor as part of corporate criminal resolutions. In announcing the policy, Assistant Attorney General Brian A. Benczkowski explained that while the DOJ continues to adhere to the view that "every case will at some stage require a deep look into the sufficiency and proper functioning of the subject company's compliance program," the policy nonetheless recognizes that "the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."[13] Thus, the revised policy appears to signal at least a mild shift away from the use of monitors by the DOJ, at least in cases involving historical conduct where companies have made meaningful efforts to remediate and invest in corporate compliance programs.

The policy builds on the principles set out in a DOJ memorandum from March 2008 known as the "Morford Memo," which set forth the two broad considerations to guide prosecutors in assessing whether to require a monitor as part of corporate criminal resolutions: "(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation." Elaborating on this cost-benefit analysis, the policy advises that a corporate monitor should be imposed only where there is "a demonstrated need for, and clear benefit to be derived from," a monitor when compared to the costs and burdens to the corporation. Factors that the DOJ will now consider when determining the "potential benefits" of requiring a monitor include:

(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

2015), https://www.justice.gov/archives/dag/file/769036/download.

[12] Memorandum from Brian A. Benczkowski, Assist. Attorney General re: Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.

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

(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.

Building off this list of factors, the policy states that a monitor "will likely not be necessary" if a corporation's compliance program is "demonstrated to be effective and appropriately resourced at the time of resolution." Thus, in cases where a corporation has remediated any compliance failures by the time of resolution, the corporation should now have a particularly strong argument that no monitor would be appropriate—an argument that defense firms routinely make but which, in the past, has often fallen on somewhat deaf ears. The new policy also mandates that, where a monitorship is imposed, its scope should be "appropriately tailored to address the specific issues and concerns that created the need for the monitor." To comply with this requirement, Criminal Division settlement agreements must now include an explanation of the scope of the monitorship, along with a description of the process for replacing a monitor, if necessary. Furthermore, Mr. Benczkowski emphasized that prosecutors have an ongoing obligation to ensure that monitors are acting properly and effectively by "operating within the appropriate scope of their mandate."

In the same speech, Mr. Benczkowski also announced that the Criminal Division will eliminate the position of compliance counsel. In eliminating the position, Mr. Benczkowski cited a number of institutional limitations of relying on a single person as the repository of compliance expertise. For instance, "[e]ven when fully briefed on a matter, a single compliance professional who has not been involved in a case throughout an investigation is not likely to have the same depth of factual knowledge as the attorneys who make up the case team. Nor can any one person be a true compliance expert in every industry [that the DOJ] encounter[s]." Nonetheless, Mr. Benczkowski made clear that assessing the compliance function will continue to be a key consideration in every corporate enforcement matter. Accordingly, rather than hiring a new compliance counsel, the Criminal Division will develop a hiring and training program designed to create "a workforce better steeped in compliance issues across the board."

CONVERGENCE AND DIVERGENCE OF FCPA ENFORCEMENT ACROSS BORDERS AND DISCIPLINES

Until recently, the U.S. was virtually the only country with an effective enforcement regime with respect to transnational bribery. In the absence of significant judicial interpretation of the FCPA's terms, the DOJ was able to develop an unwritten code of sentence reductions, settlements of varying levels of severity, and wide but unchallenged interpretations of the statutory limits. It was one-of-a-kind, and not everyone was a fan.

However, as FCPA compliance has become an accepted reality of doing business with companies with U.S. ties, other countries and disciplines have started adopting their own approaches and practices. In some cases, they follow the model of the DOJ, while others choose different paths.

The clearest trend has been the adoption and enforcement of anti-corruption laws across the globe, including in countries where kickbacks and bribes are a deeply engrained part of business. Moreover, in addition to adopting anti-corruption laws, we have also seen other countries embracing U.S. enforcement techniques. In 2018, both Canada and France introduced deferred prosecution agreements, a hallmark of U.S. corporate criminal enforcement, particularly in the FCPA context. The first French DPA cited the company's lack of self-disclosure and cooperation as factors in assessing a higher fine—concepts that had previously been entirely unfamiliar in French law but which strongly echo U.S. enforcement mechanisms. Canada's DPA also seeks to encourage companies to voluntarily disclose violations, which has never been part of its enforcement landscape before. More time will tell if Canadian and French companies take to DPAs as a means of avoiding convictions and higher fines, as the companies in these jurisdictions may or may not become comfortable with the risk of stepping forward and cooperating with authorities.

Further, in July 2018, India passed amendments to its anti-bribery laws that brought them into closer alignment with the U.S. model. That is, like the FCPA, India's law criminalizes the act of making or offering to make a bribe, whereas it previously only criminalized the acceptance of the bribe and only permitted punishment of the bribe-maker in the *quid pro quo* as an accomplice. Much like the U.S., India's newly amended law focuses on corporate management and has a specific provision making corporate executives liable for any bribery committed by the corporation if they consented or were otherwise involved in the misconduct. This step towards greater alignment between India's anti-bribery laws and the FCPA may increase the ability of the two countries to cooperate on investigations and enforcement actions.

Alternatively, some countries are opting to depart from the U.S. model of enforcement, thus raising the possibility of diametrically opposed incentives and consequences in different jurisdictions, which may be problematic for multi-national companies subject to multiple authorities. The U.K.-U.S. enforcement dynamic could become particularly tough to negotiate based on different approaches taken by the DOJ and SEC versus the SFO. In recent years, the SFO has repeatedly expressed its interest in taking over investigations once a company has self-reported. The SFO's self-reporting guidance emphasizes "the SFO's primary role as an investigator and prosecutor of serious and/or complex fraud, including corruption"[14]—in marked contrast to U.S.

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[14] *Bribery Act Guidance*, Serious Fraud Office, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/.

authorities which often prefer for companies to shoulder the burden of the investigation after they self-report and consider it an important factor in support of the cooperation credit. Companies under investigation by authorities in the U.S. and the U.K. thus face an impossible choice—continue their own investigation while stepping on the toes of the SFO or back down to the chagrin of the U.S. authorities expecting continued investigative efforts and cooperation from the company. The damned-if-you-do and damned-if-you-don't situation may be considered in a company's decision to self-report or not or may weigh on the side of delaying a self-report until the internal investigation has progressed further.

The U.S. and the U.K. authorities have worked together in several successful enforcement actions in recent years, and in the last *Trends & Patterns*, we wrote about the unprecedented level of global cooperation in anti-bribery investigation. But we have to wonder if the two biggest players will start to clash more frequently as the U.K. grows stronger in its own approach to investigation and enforcement.

While cross-border anti-bribery enforcement across the globe has seen a mix of convergence and divergence, cross-discipline enforcement in the U.S. has experienced uncommon alignment in 2018. The FCPA used to exist in a separate bubble within domestic white collar and fraud, but in 2018 we have seen unexpected levels of migration towards traditionally FCPA-exclusive enforcement policies and practices. The incorporation of the FCPA Corporate Enforcement Policy and the Policy on Coordination of Corporate Resolutions into the U.S. Attorneys' Manual, which applies to all DOJ attorneys, indicates that other types of investigations may start to look a lot like FCPA actions. DOJ's settlement with Barclays marked the first implementation of the FCPA Corporate Enforcement Policy after its official incorporation to the Attorneys' Manual, and it involved alleged currency trading front-running—*i.e.*, nothing to do with the FCPA. DOJ officials have referred to the Barclays case as a blueprint for companies seeking to avoid criminal charges and the declination letter explicitly laid out all four elements of self-reporting, cooperation, de-confliction, and remediation from the FCPA Corporate Enforcement Policy. The Barclays settlement thus clearly represented that DOJ, at least DOJ's Fraud Section, plans on applying the tenets of the FCPA Corporate Enforcement Policy to other types of cases. We have not seen it outside the fraud section's purview yet, and there are some limitations in the potential application to areas such as antitrust enforcement that already have defined leniency programs. Otherwise, the potential scope of the FCPA Corporate Enforcement Policy and the Coordination of Corporate Resolutions Policy beyond the realm of the FCPA appears to be pretty wide.

DOJ'S CHINA INITIATIVE

On November 1, 2018, Attorney General Jeff Sessions announced a new DOJ-wide initiative, termed the China Initiative, focusing on identifying and prosecuting "Chinese economic espionage" in the U.S.[15] According to the DOJ's press release, the China Initiative will be led by a combination of DOJ officials, United States Attorneys, and FBI officials. As announced by Mr. Sessions, the China Initiative will focus mostly on trade and intellectual property, but one of the goals is to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses."

Those familiar with FCPA enforcement activity over the past few years will know that doing business in China has always presented a significant FCPA risk and, indeed, in past years, a substantial portion of FCPA enforcement actions have related, at least in part, to corrupt payments to Chinese officials. The vast majority of these cases, however, have been brought against subsidiaries, affiliates, or joint ventures of non-Chinese based companies, rather than domestic Chinese companies. Indeed, we are not familiar with any publicly settled FCPA enforcement action involving conduct by a China-based company outside of China.

In the past, the U.S. authorities have not been shy about bringing cases against foreign companies, sometimes with only the slimmest of jurisdictional hooks. In some cases, it appeared that the government was reaching to bring such cases, even at the risk of distorting the statute's language, to drive home a point to its OECD partners that if they were not willing or capable of prosecuting their own companies for foreign corruption the U.S. would fill the gap. This is a message that has, at least in some instances, appeared to have been received, and we have indeed seen more enforcement activity from some OECD signatories.

The China Initiative, however, seems a bit different. For many years, the media has reported that Chinese companies, including state-owned entities, engaged in corruption and collusion and other unfair competitive conduct, sometimes as part of the Chinese government's Belt and Road Initiative. Bringing cases against such Chinese companies would fall within the previous practice of the U.S. acting when the company's home country won't. (In this respect, it may be relevant that the OECD is reportedly attempting to persuade China to sign on to the OECD Convention.) However, in the context of the Trump Administration's policies toward China and its legitimate concerns relating to China's commitment to fair competition in and outside of China, the DOJ's China Initiative almost seems to be weaponizing the FCPA, making it, for the first time, a tool of the United States' foreign and international trade policies. If so, this would raise troubling questions concerning political intervention in FCPA enforcement, akin to the President's intervention in the ZTE sanctions matter (and, based on the President's recent tweets, also potentially the Huawei matter).

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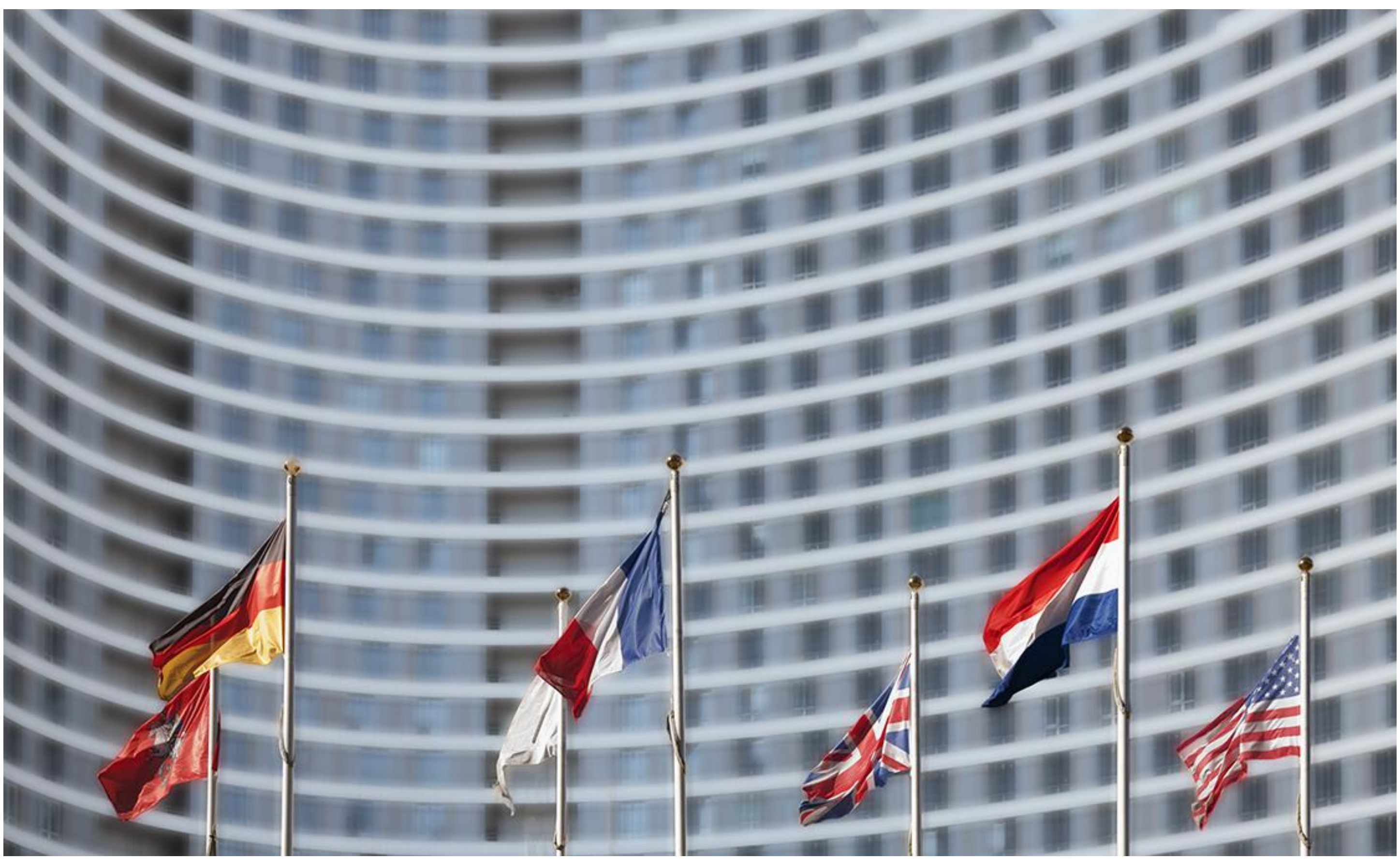
[15] *Attorney General Jeff Session's [sic] China Initiative Fact Sheet*, DOJ Press Release (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download.

UNUSUAL DEVELOPMENTS

POST-KOKESH DEVELOPMENTS: LIMITS ON SEC'S PURSUIT OF DISGORGEMENT

COMPLIANCE MONITORS

SHELL AND ENI – CASE DEVELOPMENTS



POST-KOKESH DEVELOPMENTS: LIMITS ON SEC'S PURSUIT OF DISGORGEMENT

In *Kokesh v. SEC*,[16] the Supreme Court held that SEC disgorgement sanctions for violating federal securities laws were subject to the five-year statute of limitations that applied for any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." In doing so, it rejected the SEC's argument that the statute of limitations applied only in cases where it sought to impose a fine but not to equitable remedies such as injunctions or disgorgement of illicit gains. Instead, the Court found that disgorgement was indeed a "penalty" within the meaning of the statute, which the SEC must seek within five years of the relevant conduct taking place. Unsurprisingly, the decision has unleashed a series of challenges and conflicting lower-court interpretations.

In perhaps the most impactful of the post-*Kokesh* developments, in July 2018, in *SEC v. Cohen & Baros*,[17] the U.S. District Court for the Eastern District of New York dismissed as time-barred the SEC's FCPA charges against two former executives of a hedge-fund management firm. These charges arose out of alleged multiple schemes to make improper payments to various officials in Libya, the Democratic Republic of the Congo, South Africa, and the Republic of Congo. Of these schemes, none took place within five years of the SEC's filing of a complaint. While a tolling agreement existed to extend the statute of limitations relating to the alleged scheme in Libya, the tolling agreement had expired and did not cover the conduct specific to that investigation. Further, the court found that the Libya scheme was factually distinct and held that the remaining schemes, which had conduct that would have been covered by the tolling agreement, fell outside the limitations period and also dismissed those aspects of the SEC's complaint.

The court's decision was most notable because it held that the five-year statute of limitations period applied, in this case, not only to the disgorgement remedy that was the subject of *Kokesh* but also to the injunctive relief sought by the SEC. Here the court found that the SEC's "obey-the-law" injunction was a penalty on its face because it sought to "redress a wrong to the public," which *Kokesh* cited as a hallmark of a penalty. However, the court explicitly refused to draw a bright line in determining whether all injunctive relief was a penalty and thus subject to the statute of limitations, but it is hard to see how its reasoning could result in a different conclusion in another case.

The Eastern District of New York's decision in holding that injunctive relief *could* constitute a penalty subject to the five-year limitation period, *but is not inherently so*, is consistent with several other rulings by other courts at both the trial and appellate levels. This approach, however, necessarily means that some of those courts have concluded that the injunction in a particular case was *not* a penalty and thus not subject to the limitations period. For example, in *SEC v. Collyard*,[18] the Eighth Circuit, after considering the nature of the injunction and how it affected the defendant, concluded the injunction was not a penalty. On the other side of the coin, however, the Eleventh Circuit, in *SEC v. Graham*,[19] has taken a completely different path, holding that injunctions are never penalties because they relate to future conduct, instead of past conduct like penalties.

Notably, the SEC publicly declined to appeal the EDNY's decision in *Cohen & Baros,* perhaps to avoid an adverse and influential decision by the Second Circuit. In the meantime, however, with a relatively clear split amongst the circuits—a factor that may ultimately bring this issue back to the Supreme Court—a mishmash of these approaches and interpretations will thus continue to impact future litigation by the SEC in unpredictable ways.

COMPLIANCE MONITORS

In last year's mid-year update to the *Trends & Patterns*, we reported on several challenges to attorney-client privilege in the context of internal investigations and regarding representations made through counsel to the federal government. The heart of these challenges lies in distinguishing the communications with attorneys as purely factual in nature.

This year, another challenge has surfaced from yet another angle—in this case, from the independent compliance monitor appointed as part of Volkswagen's settlement with the DOJ for alleged fraud in manipulating emissions tests. In one of his compliance reports, the independent monitor accused Volkswagen executives of not cooperating with the monitorship by improperly redacting and withholding documents on the basis of attorney-client privilege and work product protection. The monitor asserted that he "disagreed with some of the VW Defendants' assertions" of privilege and expounded on the need for greater transparency to meet the cooperation provisions of the settlement.[20]

Any reluctance on Volkswagen's part to provide potentially privileged documents to an independent compliance monitor may be valid, given multiple challenges to the confidentiality of the monitor's reports. However, the two most prominent cases—

[16] 137 S. Ct. 635 (2017).

[17] No. 1:17-CV-00430 (E.D.N.Y. 2018).

[18] 861 F.3d 760, 764 (8th Cir. 2017).

[19] 823 F.3d 1357, 1361 (11th Cir. 2016).

[20] Larry D. Thompson, LLC, First Annual Report by the Independent Compliance Auditor for the VW Defendants (Aug. 17, 2018), https://www.vwcourtsettlement.com/wp-content/uploads/2018/08/ICAR-Aug2018-English.pdf.

discussed below—were resolved in favor of protecting the confidentiality and preventing public access in the context of these reports.

First, in *United States v. HSBC Bank*[21] in 2017, the Second Circuit dismissed a motion to compel the unsealing of a corporate monitor's report filed with the district court pursuant to a deferred prosecution agreement. It clarified that—contrary to the district court's assertions—the DOJ is not automatically required to file the reports and other documents pertaining to the compliance with DPAs in district court and that the district court has no "freestanding supervisory power to monitor the implementation of the DPA." Therefore, compliance monitor reports and other such documents are not required to be filed with the court, except in the rare situation in which they are necessary for the court to deny the government's dismissal motion when the DPA ends. Accordingly, avoiding required submissions of the monitor reports to district court provides some level of assurance that the reports and compliance information will not become public.

Second, in *100Reporters LLC v. DOJ*, the District Court for the District of Columbia partially granted the DOJ's motion to dismiss a Freedom of Information Act request seeking to obtain access to corporate compliance monitor reports and related documentation and correspondence.[22] In March 2017, the court recognized that the compliance monitor's reports were largely exempt from FOIA disclosure as confidential commercial information (Exemption 4).[23] However, the court found that the DOJ could not assert these Exemptions to all of the information in the documents in their entirety, finding the DOJ's claim that none of the material therein is segregable to be implausible. It thus granted 100Reporters' request for DOJ to submit "certain representative documents for *in camera* review" so that the court could determine if the DOJ has produced all segregable factual information. The court also held that, because compliance monitors fall within the "consultant corollary" definition, communications between monitors and the agencies to which they report could be exempt under Exemption 5, which covers certain inter-agency or intra-agency communications, including the deliberative process privilege. The DOJ also asserted Exemption 5 to withhold the monitor's annual reports, work plans, and presentations to the DOJ and SEC, as well as related correspondence. However, the court held that DOJ failed to meet its burden to support the application of the Exemption, as its reasoning was too vague and requested additional information.

In the June 2018 order, the court again recognized the DOJ's claims that documents related to the corporate monitor's reports were exempt from disclosure under FOIA as confidential commercial information and deliberative process, but it drew some limitations to the scope of these exemptions.[24] First, it held that the DOJ must segregate purely factual material in the monitor's reports, work plans, and related materials, as it was not confidential commercial information. Second, it also held that the deliberative process privilege applied to the monitor's drafts, feedback, presentations, and other preliminary materials related to the Work Plans" are deliberative, but the final Work Plans must be disclosed (subject, of course, to the application of other applicable exemptions). The court also held that the monitor's annual reports and related correspondence were mostly subject to this exemption and expressly cited the chilling effect disclosure could have on deliberations between the monitor and the DOJ and SEC "relating to whether Siemens was complying with the plea agreement." Certain parts of the report, such as the "General Principles and Good Practices" section, which merely summarizes industry best practices and FCPA guidance, cannot be withheld, even though the rest of the report is exempt. The court thus required the DOJ to use a much finer toothed comb to parse out exempt and non-exempt information, but the core information contained in the compliance monitor's reports and related communications continue to be protected as confidential by courts.

SHELL AND ENI – CASE DEVELOPMENTS

A recent development in the Italian bribery case against Royal Dutch Shell and Eni S.p.A. has exposed the two companies to a potentially massive increase in compensation claims and, at the same time, effected a shift in international discourse on bribery. The case arises out of claims that Shell and Eni paid approximately USD 1 billion in bribes to Nigerian officials to win a lucrative oil concession. In November 2018, the court in Milan ruled that the government of Nigeria could join the suit as a victim, since the concession as awarded generated significantly less revenue than expected at market rates.[25] Nigeria's admittance to the suit as a victim could open the door for Nigeria to file compensation claims against RDS and Eni, in addition to the criminal sanctions they potentially face.

It is inarguable that the government of Nigeria certainly would have lost money if the deal was, in fact, subject to such massive levels of bribery, self-dealing, and corruption. However, casting governments as victims of their own leaders' corruption challenges the prevailing international approach which generally aims to condemn and, if possible, punish the officials and their governments for enabling or ignoring corruption in their ranks. On the one hand, this approach appeals from a fairness

[21] 863 F.3d 125 (2d Cir. 2017).

[22] 316 F. Supp. 3d 124 (D.D.C. 2018).

[23] *100Reporters LLC v. DOJ*, 248 F. Supp. 3d 115 (D.D.C. 2017).

[24] 316 F. Supp. 3d at 135.

[25] *Nigeria 'lost billions' on oil deal with Shell and Eni*, FINANCIAL TIMES (Nov. 26, 2018), https://www.ft.com/content/f0713292-f16b-11e8-ae55-df4bf40f9d0d.

perspective in that corrupt governments can't have their cake (or corrupt handouts) and eat it too (in the form of compensation claims against the companies paying the bribes). On the other hand, perhaps companies will be less inclined to offer bribes to government officials if they know the very same governments may one day be able to point the finger back at them and demand even more money, this time as victims rather than co-conspirators.

In the U.S., foreign sovereigns seeking to enter the mix in bribery- and corruption-related enforcement actions based on conduct occurring in their territorial jurisdiction have met varied results.

In 2012, a state-owned telecommunications company from Costa Rica, the Instituto Costarricense de Electricidad ("ICE"), sought to intervene in the settlement of FCPA charges between the DOJ and Alcatel-Lucent under the Crime Victims' Rights Act. The district court denied ICE's request, in part because ICE was not a victim under the CVRA since there was pervasive illegal activity at all levels of ICE. The district court subsequently accepted the DPA with Alcatel-Lucent, which contained no restitution award for ICE. On appeal, the Eleventh Circuit also held that ICE was not a victim under the CVRA since it "actually functioned as the offenders' coconspirator" and again cited the pervasiveness of the misconduct, including on ICE's board and management.[26]

However, several countries have petitioned for and been granted restitution in criminal corruption cases. In 2010, the court awarded restitution to Haiti in connection with the FCPA enforcement action against Juan Diaz for a bribery scheme involving Telecommunications D'Haiti, in which the court referred to the government of Haiti as a victim.[27] Similarly, after the investigation and enforcement actions surrounding the UN Oil-for-Food Programme, the defendants, including several American companies, paid the penalties to the Development Fund for Iraq, in recognition of the harm caused to the country by the extensive bribery scheme that redirected critical aid and resources.[28] Finally, in 2007, the U.S., Switzerland, and Kazakhstan agreed to direct $84 million in funds forfeited by Mercator as part of its FCPA settlement to a non-profit organization in Kazakhstan.[29] It is critical to note, however, that the latter two initiatives to compensate the local victims of bribery and corruption were conducted through non-governmental organizations, rather than through the foreign governments themselves. Therefore, the U.S., like Italy in the case of *Eni*, recognizes the harm caused by bribery in the locations of the bribery, but it is rarely willing to accept the governments themselves as the victims, especially where the governmental entity seeking restitution or recognition of legal rights is rife with the very corruption which engendered the prosecution in the first place. With the continued progress of cross-border cooperation and legal convergence and divergence, the approach in the U.S. and abroad to restitution for the location of foreign bribery will certainly continue to develop and shift in the future.

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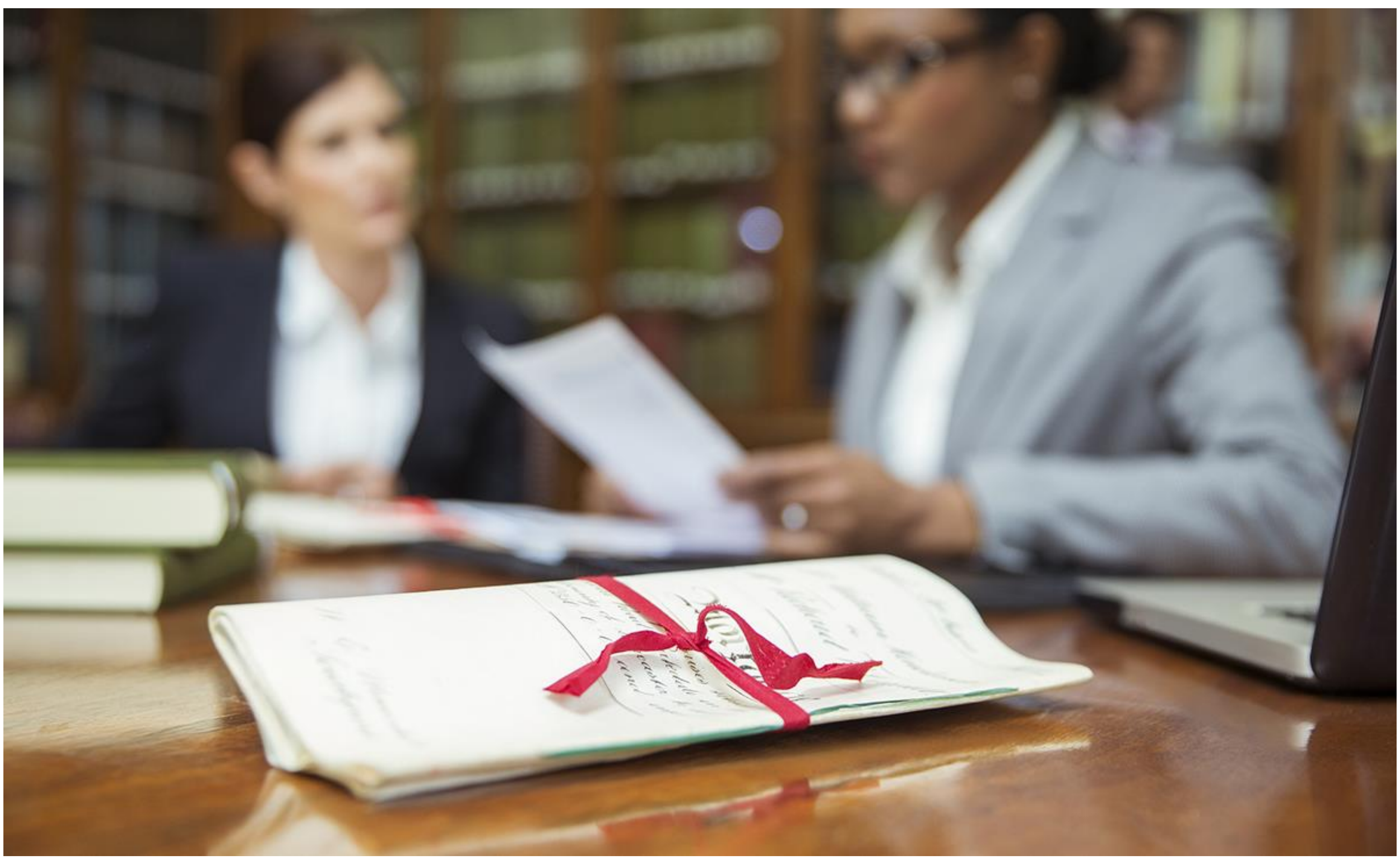
[26] *United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1302-04 (11th Cir. 2012).

[27] Jacinta Anyango Oduor, et al., LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY 92 (2014), https://star.worldbank.org/sites/star/files/9781464800863.pdf.

[28] *Id.* at 92-93.

[29] *Id.* at 95-96.

PRIVATE LITIGATION



SCOPE AND NATURE OF DISCLOSURE IN EMBRAER

Embraer S.A., the Brazilian aircraft manufacturer which is also an issuer in the U.S., first disclosed in November 2011 that it was under investigation by the DOJ and the SEC. Over the ensuing five years, the company periodically repeated its disclosure until in July 2016 it disclosed that its negotiations with the DOJ and the SEC had progressed to a point that it was recognizing a $200 million loss contingency. Three months later it entered into a DPA with the DOJ and a consent order with the SEC and agreed to pay $190 million in fines and disgorged profits with respect to violations of the FCPA's anti-bribery and books-and-records provisions.

As often happens, the announcement of the settlement was shortly followed by a class action complaint against Embraer and several of its officers alleging securities fraud under Sections 10(b) and 20(a) of Securities Exchange Act of 1934 and Rule 10b-5 based on the company allegedly having made false or misleading statements about or failing to disclose violations of the FCPA. On March 30, 2018, the U.S. District Court for the Southern District of New York dismissed the complaint with prejudice, finding that Embraer did not have a duty to disclose uncharged, unadjudicated wrongdoing and that the company's disclosures about the government investigation adequately addressed the risks that could result from a finding of unlawful conduct.[30] The court noted that the company repeatedly disclosed that it was under investigation for alleged FCPA violations and that it may be required to pay substantial fines or incur other sanctions. The court ruled that under Second Circuit law these statements satisfied the Company's disclosure obligations.

Interestingly, the court also rejected the plaintiff's argument that Embraer's financial statements were false and misleading because it failed to disclose that some of its revenue was derived from an illicit bribery scheme. This is, of course, the very theory of the government's prosecution under the FCPA's books and records provisions. Here, however, in the disclosure context, the court ruled that a company that accurately reports historical financial data, even if it did not disclose that some portion of its underlying books and records were not accurate because they did not reflect that the sales or income was related to corrupt conduct, is not in violation of the securities fraud laws and regulations.

SETTLEMENT IN PETROBRAS SECURITIES CLASS ACTION

In January 2018, Petrobras announced that it has agreed to pay $2.95 billion to resolve a securities class action pending in the Southern District of New York regarding the company's significant corruption scandal in Brazil. The class action claimed that investors were harmed by alleged corruption when contractors overcharged Petrobras and kicked back some of the overcharges through bribes to Petrobras officials. Judge Rakoff subsequently granted preliminary approval of the proposed settlement in February 2018, and granted final approval in June 2018, under which Petrobras did not admit to any wrongdoing or misconduct and continued to advocate its position that the company itself was a victim of the acts revealed in Operation Lavo Jato in Brazil.[31] (This position, of course, is somewhat inconsistent with its admissions in its subsequent settlement of FCPA and corruption charges with the U.S. and Brazilian authorities discussed above.)

ATTEMPTED RECOVERY AGAINST FOREIGN OFFICIALS INVOLVED IN BRIBERY SCHEMES

In an interesting case filed in 2018, Harvest Natural Resources ("Harvest"), a Houston-based energy corporation that formally dissolved in May 2017, and HNR Energia B.V., a foreign subsidiary of Harvest, filed suit against two former presidents of PDVSA and other individuals who worked for these two presidents, alleging civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as federal and state antitrust statutes.[32] According to allegations contained in the complaint, the Venezuelan government twice refused to allow Harvest to sell energy assets co-owned with PDVSA because Harvest refused to pay bribes requested by the defendants. The complaint alleges that these denials forced the company to sell the same assets at a loss of $470 million.

[30] *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-CV-06277 (S.D.N.Y. 2018).

[31] *In re Petrobras Securities Lit.*, No. 14-CV-9662 (S.D.N.Y. 2018).

[32] *Harvest Natural Resources, Inc. et al., v. Garcia et al.*, No. 18-CV-00483, ECF No. 1 (S.D. Tex. Feb. 16, 2018).

ENFORCEMENT IN THE UNITED KINGDOM

SFO – NEW INVESTIGATIONS, CHARGES, AND CONVICTIONS

CPS – FIRST CONVICTION FOR FAILURE TO PREVENT BRIBERY

SFO – LEGAL PROFESSIONAL PRIVILEGE DEVELOPMENTS

SFO – CHALLENGES TO THE TERRITORIAL SCOPE OF THE POWER TO COMPEL THE PRODUCTION OF DOCUMENTS

SFO – DEVELOPMENTS AND UPDATES

SFO – NEW INVESTIGATIONS, CHARGES, AND CONVICTIONS

In 2018, the U.K.'s Serious Fraud Office ("SFO") opened two new corruption bribery and investigations, brought charges in relation to three major ongoing investigations, and secured six new convictions against individuals, with £4.4 million collected by way of civil recovery.

NEW INVESTIGATIONS

In January 2018, the SFO announced that it had opened an investigation into Chemring Group PLC, the ammunitions and military equipment manufacturer, and its subsidiary, Chemring Technology Solutions Limited, which specializes in bomb disposal equipment, following the subsidiary self-reporting. The SFO has confirmed that this is a criminal investigation into bribery, corruption, and money laundering. The investigation is ongoing and is expected to conclude at some point during 2019.

In April 2018, the SFO confirmed that it had opened a criminal investigation into Ultra Electronic Holdings PLC, which manufactures military electronics, as well as its subsidiaries, employees, and associated persons following a self-report by the company. The investigation is into suspected corruption in the conduct of the company's business in Algeria. The investigation is still ongoing.

These two new investigations follow other investigations by the SFO into British companies operating in the defense sector including Rolls-Royce and BAE Systems.

CHARGES

In February 2018, the SFO announced that it had charged a European bank with unlawful financial assistance contrary to section 151 of the Companies Act 1985.

In May 2018, however, the Crown Court dismissed all charges brought against the bank regarding matters arising in the context of its capital raisings in 2008. The SFO applied to the High Court to reinstate the charges but the High Court ruled against the SFO's application. The charges against the bank's former chief executive and other senior managers remain in place. A trial is expected to commence on January 9, 2019.

Also in May 2018, the SFO brought further charges against two individuals, Basil Al Jarrah and Ziad Akle, in the investigation of Unaoil. Both individuals have been charged with conspiracy to provide corrupt payments in relation to securing the award of a contract worth $733 million to Leighton Contractors Singapore PTE Ltd to build two oil pipelines in southern Iraq. The SFO publicly thanked the Australian Federal Police for the assistance it provided in connection with its investigation, demonstrating the increasing reliance on the cooperation of foreign authorities in international investigations.

In June 2018, the SFO also announced that it had commenced criminal proceedings against Unaoil Ltd and Unaoil Monaco SAM as part of its ongoing corruption prosecution. Both entities have been summonsed with two offences of conspiracy to give corrupt payments. These offences relate to securing the award of a contract to Leighton Contractors Singapore PTE Ltd, as described above, as well as securing the award of contracts in Iraq to Unaoil's client SBM Offshore. This follows the SFO's previous decision in November 2017 to prosecute four executives with conspiring to make corrupt payments to secure Iraqi contracts, as reported in our January 2018 edition of *Trends & Patterns*. The SFO initiated its investigation into Unaoil in March 2016 and received special blockbuster funding from the Treasury for this purpose. Recently, in late December 2018, the SFO announced that it had further charged Stephen Whiteley with conspiracy to make corrupt payments. The SFO allege that he assisted Unaoil Ltd to be engaged as a subcontractor in relation to the oil pipeline projects in Iraq.

In September 2018, the SFO brought charges against former Guralp Systems employees in a South Korean bribery and corruption case. Natalie Pearce was charged by requisition with conspiracy to make corrupt payments. These charges follow those already made against Dr. Cansun Guralp and Andrew Bell who appeared before Westminster Magistrates' Court in August 2018. The SFO alleges that the three individuals conspired together to corruptly make payments to a public official and employee of the Korean Institute of Geoscience and Mineral Resources.

CONVICTIONS AND CIVIL RECOVERY

On March 22, 2018, the Court granted a civil recovery order for the SFO to the value of £4.4 million in relation to a corruption case where Griffiths Energy bribed Chadian diplomats in the United States and Canada. Griffiths Energy used a sham company known as "Chad Oil" to bribe Chadian diplomats with discounted share deals and "consultancy fees" to secure exclusive contracts. The company later self-reported these payments as bribes and pleaded guilty to corruption charges brought by the Canadian authorities.

Following the takeover of Griffiths Energy by a U.K. corporate and share sale via a U.K. broker, the corrupt proceeds entered the U.K.'s jurisdiction and the SFO began civil recovery proceedings, culminating in the civil recovery order. The recovered funds will be held on trust by the SFO and transferred to the Department for International Development who will identify key projects in which to invest to benefit Chad. This recovery order follows two previous SFO cases in which funds recovered from bribery and corruption were returned and reinvested in the relevant country. The Deferred Prosecution Agreement ("DPA") with Standard Bank in 2015 involved a payment of $7 million to the Government of Tanzania, while the SFO's confiscation order following the conviction of senior executives at Smith & Ouzman for foreign bribery in 2016 paid for seven new ambulances in Kenya.

On October 3, 2018, the Serious Fraud Office issued a claim for civil recovery in the High Court under Part 5 of the Proceeds of Crime Act 2002 ("POCA"). The claim concerned a number of assets, including three U.K. properties, which the SFO alleges were obtained using the proceeds of corrupt deals in Uzbekistan involving Gulnara Karimova and Rustam Madumarov. Karimova is suspected of accepting at least $300 million in bribes from Sweden's Telia Company AB and Amsterdam-based VimpelCom. No date has yet been set for a hearing.

In November 2018, the SFO announced that four further individuals had been convicted in relation to the investigation into FH Bertling for bribery of freight contracts. Stephen Emler, FH Bertling's former CFO, and Giuseppe Morreale, a senior executive, pleaded guilty for their role in FH Bertling paying over £350,000 in bribes and facilitation payments. FH Berling executives made corrupt payments to ensure their bid for the ConocoPhillips "Jasmine" shipping contract was successful and separately to obtain assurance that inflated prices it charged for additional services were waived by ConocoPhillips staff. Christopher Lane, former head of logistics at ConocoPhillips, pleaded guilty to conspiracy for his role in the overcharging and Colin Bagwell, the former managing director and CCO at FH Bertling, was convicted by the jury for conspiracy with Mr. Lane.

Finally, in December 2018, Nicholas Reynolds, a U.K. national and former global sales director for Alstom Power Ltd, was found guilty of conspiracy to corrupt in relation to more than €5 million in bribes paid to officials in a Lithuanian power station and senior Lithuanian politicians in order to win two contracts for the company. He was sentenced to four years and six months imprisonment. In relation to the same investigation, former Business Development Manager at Alstom Power Ltd John Venskus had pleaded guilty on October 2, 2017, and former Regional Sales Director at Alstom Power Sweden AB Göran Wikström pleaded guilty on June 22, 2018, to the same charge. They were sentenced to three years and six months imprisonment and two years and seven months imprisonment respectively.

CPS – FIRST CONVICTION FOR FAILURE TO PREVENT BRIBERY

In February 2018, Skansen Interiors Ltd became the first company to be convicted of the corporate offence of failing to prevent bribery under section 7 of the Bribery Act 2010, following a contested trial in which the company unsuccessfully argued that it had adequate procedures in place to prevent bribery (the statutory defense). Although the case is unreported, the submissions of the prosecution provide an insight into what will likely need to be shown to successfully raise a defense of adequate procedures. In addition, the case has attracted criticism for the Crown Prosecution Service's ("CPS") approach in choosing to prosecute rather than pursue a DPA, and the corresponding impact this will have on whether companies choose to self-report in similar circumstances.

DO YOU HAVE ADEQUATE PROCEDURES IN PLACE?

Skansen was an office interior design company based in London. In 2013 it won two office refurbishment contracts worth £6 million. However, when a new CEO was appointed in January 2014 he became suspicious of certain payments that had been made by the managing director to the project manager of the company that provided the contracts. The new CEO initiated an internal investigation and put in place specific anti-bribery and corruption policies, which had been previously lacking. Following the internal investigation, the company blocked an additional payment and summarily dismissed the managing director and commercial director. The CEO then submitted a suspicious activity report to the National Crime Agency ("NCA") and also reported the matter to the City of London Police, following which the company fully cooperated with the police investigation, including handing over confidential company documents and legally privileged material pertaining to the internal investigation. In spite of this, the government charged the company with having violated section 7 of the Bribery Act by failing to prevent bribery, while the former managing director and project manager were charged with individual bribery offences. Both of the individuals pleaded guilty but the company did not.

At trial, the jury was unconvinced that the controls the company had in place at the time of the payments (*i.e.*, before the new CEO implemented remedial controls) were sufficient to establish that there were adequate procedures to afford a defense. In particular, the prosecution drew attention to several matters, including: the lack of contemporaneous records of the company's attempts to introduce a compliance culture; the absence of any new policies being introduced when the Bribery Act came into force in July 2011; the lack of any evidence of the company having ensured that its staff had actually read the anti-bribery policy or undertaken any training on the subject; and the failure to designate any specific individual in the company with a compliance role or responsibility for ensuring that the anti-bribery policies were implemented and complied with.

In the light of this finding, we advise that companies seeking to prove they have adequate procedures in place to prevent bribery should bear in mind several key factors: (i) ensuring that compliance implementation is recorded, including creating and maintaining records of compliance-related initiatives, activities and decisions, which may be especially important in smaller companies where only face-to-face discussions take place; (ii) actively communicating anti-bribery policies to staff, including providing training on such policies, which should be updated in line with changes in the law; and (iii) appointing a dedicated compliance officer or someone at a senior level who has responsibility for ensuring that anti-bribery controls are implemented and followed (the latter may be more appropriate for smaller companies).

TO SELF-REPORT OR NOT TO SELF-REPORT?

Another major issue in the case was the fact that the CPS decided to prosecute Skansen rather than pursue a DPA. According to the CEO of Skansen, the CPS were originally planning to offer the company a DPA in view of the company having self-reported, cooperated with the authorities, dismissed those involved, and made remedial changes. However, once the company became dormant in 2014, the CPS apparently decided that a DPA would be a nullity as a dormant company with no assets would not be able to comply with any terms imposed by the DPA.

It is peculiar that the CPS maintained this stance even though the company's parent offered to take on the DPA, an arrangement which, in contrast, was accepted by the SFO and entered into by the company known as XYZ in 2016. Under the terms of the XYZ DPA, XYZ's parent company agreed to pay the majority of the fine. With Skansen, however, the CPS pursued the section 7 offence on the basis that it would send a message to the industry about the importance of establishing anti-bribery procedures. This message, however, may well have been lost given that the court concluded it could not impose any meaningful punishment on a dormant company without any assets and therefore ordered an absolute discharge.

Rather than sending the message that the CPS intended, there is a substantial risk that the prosecution will instead have a chilling effect on companies considering whether to self-report in similar circumstances. This is especially so where the company in question does not have sufficient controls in place at the time of the alleged wrongdoing to establish an adequate procedures defense. The very act of reporting puts the company at the mercy of the CPS or SFO, which have the power to exercise discretion to seek a DPA or bring charges, a decision that, given the Skansen matter, has become even more unpredictable.

Indeed, the U.K. authorities are, frankly sending very mixed messages concerning their exercise of discretion in these matters. The SFO has advised that companies should self-report and cooperate to increase their chances of receiving a DPA, and most understood that there was no chance of obtaining a DPA in the absence of voluntary disclosure. Notably however, Rolls-Royce did not self-report and yet still entered into a DPA with the SFO, purportedly due to its exceptional cooperation with the authorities.

The CPS' prosecution of Skansen now muddies the waters even further, with no DPA being offered even after the company both self-reported and provided extensive cooperation. Moreover, this appetite for prosecuting alleged failure to prevent offences does not seem to be an isolated incident. On June 20, 2018, Judge David Tomlinson informed Rapid Engineering Supplies that it faced a criminal trial in March 2019 for alleged failure to prevent offences. At this stage there are few details known other than that Rapid Engineering Supplies has been charged with failing to put in place adequate procedures to prevent bribery between December 2011 and March 2013, under section 7 of the Bribery Act. It is now unclear what approach the U.K. authorities will take even where a company self-reports and cooperates. It will be interesting to see how the Rapid Engineering Supplies case progresses and whether a DPA is offered, which may hopefully provide greater clarity to companies on the expected consequences of self-reporting.

THE LANDSCAPE POST-SKANSEN

There has been little by way of clarification as to what approach will be taken from the U.K. authorities themselves following the *Skansen* case. In May 2018, the House of Lords appointed a Select Committee to consider and report on the Bribery Act 2010, which included consideration of the "adequate procedures" defence relevant to the *Skansen* case, as discussed below. As part of gathering evidence for the Committee to consider, the Law Society of England and Wales, the City of London Law Society, and the Fraud Lawyers Association selected various partners of law firms working in bribery and corruption to provide their views on the Bribery Act. As part of their submissions of July 31, 2018, they commented that "DPAs are likely to be more easily applied to larger businesses. Smaller enterprises, such as Skansen, are less likely to have the resources or longer-term enterprise value to be able to cooperate with authorities and/or to change their leadership to the same extent."

In November 2018, the Bribery Act 2010 Committee made some interesting comments regarding the Section 7 defence of "adequate procedures" at issue in the *Skansen* matter. Neil Swift, partner at Peters & Peters and a witness called by the Committee, expressed confusion as to what the precise difference is between "adequate" used in Section 7 of the Bribery Act 2010 and "reasonable" used in the Criminal Finances Act. It is confusing for companies to have to develop procedures which are "adequate" on the one hand and "reasonable" on the other. Mr. Swift expressed a preference for the term "reasonable" given that it would be unjust to criminalize a company if it acted reasonably in devising procedures.

Lord Grabiner, a member of the Committee, suggested that "reasonableness" as a test from the defence perspective is much more attractive, because it is highly facts-sensitive and would enable the defence to explain in great detail what mechanisms were in place and then leave it to the jury to decide whether they were reasonable. Following extensive debate regarding the use of the term "adequate" compared to "reasonable", Max Hill QC, the new head of the CPS appointed on November 1, 2018, stated that the CPS are content with where the law currently sits. In saying so he highlighted that the *Skansen* case proceeded to trial and a conviction was returned, with no difficulty as to what the test was at the jury or judicial level.

NCA – UNEXPLAINED WEALTH ORDERS

The new Unexplained Wealth Order ("UWO") regime came into force in the U.K. on January 31, 2018. A UWO is an order made by the High Court which compels a person holding property worth more than £50,000 to provide information as to how they came to obtain the property. It is an investigative tool designed to help law enforcement tackle assets paid for through the suspected proceeds of corruption. A UWO can be made against a politically exposed person ("PEP") from outside the European Economic Area ("EEA"), or a person reasonably suspected of involvement in serious crime (anywhere in the world) or of someone being connected to such a person. Only enforcement agencies, such as the NCA can apply for a UWO. They then must show that there is reasonable cause to suspect that the individual's known sources of lawfully obtained income were insufficient to allow them to acquire the property.

FIRST UWO AND DISMISSAL OF FIRST CHALLENGE TO THE UWO

In February 2018, the NCA secured the first ever UWOs in relation to two high value properties in the South East of England worth a total of £22 million. It was believed that these properties ultimately belonged to a PEP who had been the chairman of a leading bank in a non-EEA country of which the government of the relevant foreign country had a controlling stake. In 2016 the individual was convicted of fraud offences with regard to his time at the bank and received a prison sentence. The wife of the individual, known as "Mrs. A" in proceedings due to reporting restrictions, was subject to the UWOs compelling her to reveal the source of her wealth. Under the UWO regime, failure to comply with any UWO requirement creates a rebuttable presumption that the relevant property is recoverable through civil forfeiture proceedings. Providing false information in response is a criminal offense. In this case the NCA obtained interim freezing orders which meant that the relevant properties could not be sold or transferred.

In July 2018, Mrs. A brought a High Court challenge to the UWO. Among various grounds she argued that she was not a PEP as this was reliant on her husband being a PEP, which was in turn reliant on her husband working for a state-owned enterprise. She also challenged whether there was reasonable suspicion that her known sources of lawfully obtained wealth were insufficient to allow her to obtain the property. The challenge was dismissed by the High Court in October 2018. On these two specific grounds, the High Court held that the evidence of the relevant government having a majority shareholding in the bank meant that it constituted a state-owned enterprise, while the evidence that the husband was a state employee between 1993 to 2015 meant it was very unlikely that his lawful income would have been sufficient to purchase the property when it was bought for £11.5 million. The dismissal of this challenge will likely spur on the NCA with its pursuit of UWOs, as per the comments from Donald Toon, NCA Director for Economic Crime when the challenge was dismissed: "We are determined to use the powers available to us to their fullest extent where we have concerns that we cannot determine legitimate sources of wealth."

SFO – LEGAL PROFESSIONAL PRIVILEGE DEVELOPMENTS

In our January 2018 *Trends & Patterns* we discussed the decision of the High Court in *Serious Fraud Office v Eurasian Natural Resources Corporation*[33] and the impact it had for companies claiming litigation privilege over documents created as part of internal investigations. In that case the SFO successfully challenged an assertion of litigation privilege over certain documents, including notes of interviews with employees created as part of an internal investigation into alleged corruption. In addition, the SFO also challenged an assertion of legal advice privilege over the documents, on the basis that the narrow interpretation of this type of privilege meant that only documents or communications between a lawyer and an employee who was specifically authorised to seek or receive legal advice (*e.g.* the general counsel of a company) could be protected.

This SFO's position in this case demonstrated its increasing appetite at the time to challenge claims to legal professional privilege where a company creates documents in the context of an investigation. Since then, the Court of Appeal has partially rolled back the High Court's controversial decision, restoring the protection of litigation privilege to at least some of the materials created during the course of an internal investigation.

THE HIGH COURT'S DECISION: A NARROW VIEW OF "LITIGATION" LIMITS THE SCOPE OF THE PRIVILEGE

In the first decision, the High Court held that several classes of documents, which ENRC had created in the course of an internal investigation, did not attract litigation privilege and so were not protected from disclosure. Under English law, litigation privilege will only arise where documents are created: (i) when either litigation is in progress or is reasonably contemplated, *i.e.*, where litigation is a real prospect, and (ii) for the dominant purpose of that litigation. Breaking new ground, the Court held that prosecution—*i.e.*, litigation—"only becomes a real prospect once it is discovered that there is some truth in the accusations, or at the very least that there is some material to support the allegations of corrupt practices." Consequently, the Court held that documents created during the course of an internal investigation will only attract litigation privilege once there is a real prospect of a prosecution—*i.e.*, when "the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met."

The Court also rejected ENRC's contention that the SFO's criminal investigation into its conduct should be treated as adversarial litigation for the purposes of attracting litigation

[33] [2017] EWHC 1017 (QB).

privilege. Instead, the Court considered that an SFO investigation is "a preliminary step taken, and generally completed, before any decision to prosecute is taken . . . . Such an investigation is not adversarial litigation."

The High Court's decision created an untenable dilemma for companies: it could not investigate potential wrongdoing, which itself might be viewed as demonstrating that it did not have adequate procedures, but if, to the contrary, it did conduct an internal investigation into alleged wrongdoing, it could potentially aggravate matters by creating materials that could be disclosable in future civil or criminal proceedings.

In October 2017, ENRC was granted leave to appeal the High Court's decision, which was heard in the Court of Appeal on 3 July 2018. The Law Society intervened in the appeal, arguing that the legal profession urgently needs authoritative and correct guidance on this issue.

THE COURT OF APPEAL'S DECISION: LITIGATION PRIVILEGE RESTORED

In September 2018, the Court of Appeal partially overturned the controversial High Court decision,[34] concluding that the High Court had erred both in law and in its interpretation of the facts of the case. The Court of Appeal concluded that criminal proceedings were reasonably contemplated from the time at which ENRC engaged lawyers to conduct an internal investigation, which was before the SFO commenced its own investigation. It held that the same threshold for "reasonable contemplation" should apply to both civil and criminal proceedings. The Court of Appeal also held that the documents had been created for the dominant purpose of resisting or avoiding such proceedings. Litigation privilege therefore applied to them. The judgment did, however, make clear that the decision turned on the specific facts of the case. As such, we would caution against blanket assumptions that litigation privilege will apply to all materials created in the context of internal investigations.

The High Court decision was only partially overturned by the Court of Appeal as the latter held it was unable to change the current narrow interpretation of legal advice privilege. This interpretation, as previously established by the Court of Appeal in the *Three Rivers* decision in 2003[35], provides a narrow definition of the "client" as it applies to legal advice privilege—the English law privilege doctrine which protects confidential communications between a lawyer and a client for the purpose of seeking or receiving legal advice. Where the client is a company, legal advice privilege will not extend to every employee of that company. Instead, it will only cover those employees specifically authorised to seek or receive legal advice. Interestingly, the Court of Appeal in the recent ENRC decision noted that English law in this respect was out of step with the international common law on this issue. It even went so far as to say that it would have been in favour of changing the law in this area. However, given the previous binding decision of the Court of Appeal in the *Three Rivers* case, the Court stated that this is a matter that will have to be considered by the Supreme Court in an appropriate future case.

LITIGATION PRIVILEGE FINDINGS FOLLOWING *SFO V ENRC*

The ENRC decision brought a welcome and clear statement that litigation privilege may, in appropriate circumstances, apply to documents created in the course of an investigation. However, issues remain concerning *when* those circumstances exist. Although not in the context of an internal investigation, the recent decision on November 30, 2018 of the *West Ham v E20*[36] case offers some insight as to how the court should evaluate claims of privilege and what a company may do to strengthen its claim to litigation privilege.

The claim concerned a dispute between the soccer club West Ham United and the owners of their stadium, E20. West Ham wished for the match-day capacity of the stadium to be increased and contended that it had a contractual right that E20 must act in good faith in deciding whether to make an application for permission for the increased capacity. E20 disputed this obligation but argued in the alternative that it had, in any event, acted in good faith as it had decided not to increase the stadium's capacity due to legitimate safety concerns. E20 had asserted litigation privilege over documents evidencing its decision-making process, stating that those documents were created with the dominant purpose of discussing a commercial settlement of the dispute between the parties at a time when litigation was in reasonable contemplation. West Ham requested that the judge inspect the documents to ascertain whether the assertion of privilege was correct.

At first instance, Norris J refused West Ham's application in connection with the documents. The judge relied on the Court of Appeal decision in *ENRC v Serious Fraud Office* that litigation privilege was not limited to documents concerned with obtaining information or advice for use in the litigation but also included any document prepared for the purpose of settling or avoiding a claim. Relying on the guidance outlined in *West London Pipeline*[37], Norris J held that he could only inspect the documents if he was reasonably certain that the test for privilege had been wrongly applied by E20's solicitors.

[34] [2018] EWCA Civ 2006.

[35] [2003] EWCA Civ 474.

[36] [2018] EWCA Civ 2652.

[37] [2008] 2 CLC 258.

However, the Court of Appeal unanimously allowed West Ham's appeal of the first instance decision. The Court held that its earlier decision in *ENRC* did not expand the scope of litigation privilege to encompass documents which neither seek advice nor information for the purpose of conducting litigation. It held that *ENRC* only clarified that settling litigation formed part of conducting litigation. The requirement that the documents must be concerned with obtaining information or advice remains. It rejected E20's argument that "conducting litigation" encompassed documents which merely comprised discussions as to a commercial settlement of that litigation. It also rejected its suggestion that internal communications within a company which are made for the dominant purpose of conducting litigation are, without more, necessarily subject to privilege, and overruled the much earlier decision of *Mayor and Corporation of Bristol v Cox*[38].

The Court also examined the circumstances in which a judge should inspect a document to test a challenged assertion of privilege. It considered that the formulation set out in the leading textbooks, taken from *West London Pipeline*, was too narrow. The power to inspect is not limited to cases in which, without sight of the documents in question, the court is "reasonably certain" that the test for litigation privilege has been misapplied. Instead, the court has a broader discretion to inspect, though the power should be exercised cautiously. In exercising its discretion, the court should take into account the nature of the privilege claimed, the number of documents involved and their potential relevance to the issues.

In the light of these decisions, it is clear that the ability successfully to claim litigation privilege is heavily dependent on the specific circumstances of each case. To assist in any future claim to litigation privilege with the SFO, we recommend that companies: (i) maintain a record—and, if appropriate, an analysis—of all communications with, and actions taken by, an investigating or enforcement authority such as the SFO (this will be of use if and when subsequently there is a need to determine when adversarial proceedings came into prospect); and (ii) maintain a record or otherwise document the purpose for which particular documents are produced (this will assist in asserting that a document or class of documents were created for the dominant purpose of the litigation).

CRITICISM OF THE SFO FOR NOT CHALLENGING PRIVILEGE

From the other side of the coin, the SFO, which has in the past been criticized for being overly aggressive in demanding documents generated in the course of an internal investigation, has recently come under fire for not having done so, allegedly to the detriment of individuals charged in the same matter.

In *R (on the application of AL) v Serious Fraud Office,*[39] the Administrative Court took the SFO to task for its approach to challenging privilege in the XYZ matter. An XYZ employee, who had been separately charged with conspiracy offences, demanded to see the full interview notes that had been produced by XYZ's lawyers as part of the company's cooperation that ultimately resulted in a DPA. The SFO had previously requested these full interview notes as part of its own investigation, but the company asserted privilege over them and refused to hand them over. Instead the company only provided "oral proffers," whereby one of the company's lawyers read aloud a short summary of the interview notes which an employee of the SFO then transcribed.

After the DPA was entered into, the employee repeatedly asked the SFO to obtain the full interview notes from the company, and indeed the terms of the DPA required the company's full cooperation with the SFO. When, however, the SFO did not challenge the company's continuing assertion of privilege over the notes, the employee brought a judicial review action against the SFO for failing to compel the company to provide the full interview notes. Although the judicial review failed on a procedural point, the Administrative Court strongly criticized the approach that the SFO had taken on this issue. In particular, the Court criticized the SFO's acceptance of "oral proffers" and its failure to challenge the company's assertion of privilege over the notes, especially in the light of the original High Court decision in *SFO v ENRC* limiting the scope of privilege in this context.

In the light of the Administrative Court's comments it is now unlikely that the SFO will be content with "oral proffers" and will instead demand to see a company's full interview notes, actively challenging any resistance from the company regarding disclosure. Indeed, at a recent panel discussion the SFO case controller in the XYZ case commented that from now on the SFO will expect all factual records of an investigation, including interview notes. However, given the Court of Appeal decision in *SFO v ENRC* upholding the assertion of privilege in that case, the SFO may well feel vindicated in their approach with XYZ not to challenge privilege, and will likely only challenge privilege going forward where there is some indication that the privilege has been wrongly claimed.

SFO – CHALLENGES TO THE TERRITORIAL SCOPE OF THE POWER TO COMPEL THE PRODUCTION OF DOCUMENTS

In a separate judicial review action, KBR Inc challenged the territorial scope of the SFO's powers to compel the production of documents, calling into question whether the SFO will be able to rely on these powers to obtain documents held overseas. Under section 2 of the Criminal Justice Act 1987, the SFO can serve a so-called "section 2 notice" on any individual or entity and

[38] (1884) 26 Ch D 678.

[39] [2018] EWHC 856 (Admin).

require them to produce documents or provide information relevant to the subject matter of an SFO investigation. The SFO often uses these notices to compel the production of documents held in foreign countries; however the territorial scope of these powers had not yet been decided by an English Court.

To provide context to the judicial review action, a U.K. subsidiary of KBR Inc has been the subject of an on-going investigation by the SFO in relation to the company's connection with Unaoil. The SFO served a section 2 notice on one of KBR Inc's representatives when she was in the U.K. and sought to compel production of data that was previously held by the U.K. subsidiary but was now held on U.S. servers. The company refused to comply and challenged the SFO's use of section 2 notices to compel the production of data held outside of the U.K.

In its judgment[40], the Administrative Court concluded that section 2(3) did permit the SFO to request foreign companies which have a "sufficient connection" to the U.K. to produce data in the course of investigations. Gross LJ and Ouseley J concluded that to satisfy the "sufficient connection" test there must be a functional connection between the U.K. and the foreign company. This test would not be met by a foreign company simply being a parent company of a subsidiary in the U.K. Similarly, a foreign company could not be said to have sufficient connection to the U.K. simply by the SFO requiring its officers to come within the jurisdiction.

The KBR decision is at odds with the very different approach adopted by the Supreme Court to an attempt to extend beyond the U.K. the ambit of information notices under section 357 of the Proceeds of Crime Act 2002 in *Perry v Serious Organised Crime Agency*.[41] In that case the Supreme Court held that information notices under POCA were limited to those within the jurisdiction. Lord Philips explained that section 357 authorises orders for requests for information with which the recipient is obliged to comply, subject to penal sanction. In his reasoning, Lord Philips stated that subject to limited exceptions, it is contrary to international law for country A to purport to make conduct criminal in country B if committed by persons who are not citizens of country A. Lord Philips held that the same principle should apply given the penal sanctions for information notices under POCA. Accordingly, he held that to confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law, and therefore information notices under POCA should be limited only to those within the jurisdiction.

This Supreme Court decision was considered by the Administrative Court in its judicial review decision. However, the Administrative Court held that the situations could be distinguished based on the fact that: the two cases were addressing different pieces of legislation; the information notices issued in the *Perry* case were against persons entirely unconnected with the U.K.; and the context of section 2(3) meant that it must have had some extraterritorial application whereas POCA did not. In the light of these decisions, the current position under English law is therefore that information notices under POCA cannot extend beyond the U.K. while section 2(3) notices can. However, given the similarity between these two mechanisms for gathering information/documents and the very different conclusions reached in each case, there may be further judicial actions in the future seeking to challenge the extraterritorial application of section 2(3) notices.

SFO – GENERAL DEVELOPMENTS AND UPDATES

More generally, 2018 has proven to be a busy time for the SFO, with key developments including an increase in funding and the appointment of a new director.

INCREASE IN FUNDING

In April 2018, the SFO announced changes to its funding arrangements which included an increase of over 50% to its core budget as well as changes to the "blockbuster" funding used to investigate large cases. The SFO's core budget for the 2018-19 fiscal year has now been increased from £34.3 million to £52.7 million, raising it to a level that has not been seen for a decade. In addition, there is now a different approach to funding for "blockbuster" cases. For the last six years, the SFO would secure extra funding from the Government Treasury where any case was forecast to cost more than five percent of the core budget (at least two investigations were funded in this way). This method was criticized for creating a perceived conflict of interest given that the SFO had to call on the Government to provide funds, as well as more general criticism that it was inefficient and relied on expensive temporary staff hired when funding was secured. According to the new arrangements, the SFO will be able to call on the Government Treasury for blockbuster funding where costs on a single case are expected to be more than £2.5 million in a year. However, it is expected that this will be needed less given the increase in the core budget. These new funding arrangements represent a strong vote of confidence in the SFO and are sure to be welcomed by its new Director, as discussed below.

NEW DIRECTOR OF THE SFO AND AREAS OF FOCUS

On June 4, 2018, the Attorney General's Office announced that Lisa Osofsky had been appointed as the new Director of the SFO. This follows the appointment of Mark Thompson as the interim Director on 10 April 2018 (the previous Chief Operating Officer at the SFO) who worked in his post until Ms. Osofsky joined on August 28, 2018. The career history of Ms. Osofsky marks an interesting departure from the experience of previous Directors. Beginning her career as a U.S. federal prosecutor, Ms. Osofsky

[40] *R. (on the application of KBR Inc) v the Director of the SFO* [2018] EWHC 2368 (Admin).

[41] [2012] UKSC 35.

prosecuted over 100 cases in the U.S. before joining Exiger, a global company providing services in regulatory compliance, risk, and financial crime, where she was a Managing Director, Regional Leader, and Head of Investigations for Europe, the Middle East, and Africa.

Ms. Osofsky has given several speeches since her appointment highlighting her intended approach and areas of focus. In particular, she has emphasized the importance of international cooperation, with law enforcement and regulation counterparts cultivating ways to keep in touch regarding shared areas of strategic significance. There must also be cooperation across different disciplines with prosecutors, investigators, police and accountants working side by side throughout the life of a case, something she has been used to in the U.S. but is relatively new to the U.K. The importance of facilitating technological development, to combat increasingly sophisticated criminals, has also been emphasized. In addition, she has commented that she wants an independent SFO and "didn't take this job to report to the NCA", putting to rest speculation that she may have supported the previously mooted proposal to bring the SFO under the NCA.

She has also made clear that the SFO expects full cooperation from corporates under investigation. At a recent keynote address at the FCPA International Conference in Washington D.C. on November 28, 2018, she made some choice remarks regarding what full cooperation really means and what she expects from corporates: "At its simplest, it's not so hard: Tell me something I don't know. Help the prosecutor find the truth. Don't obstruct, or mislead, or delay. Don't hold things back. Here's what cooperation is not: it is not simply responding to requests that you are obligated to respond to. It is certainly not burying bad news or protecting certain executives. It is not slow-rolling us. It is not playing one prosecutor off another." Beyond corporate cooperation, Ms. Osofsky reiterated that corporate rehabilitation for offenders requires a strong ongoing compliance function and "window dressing will not suffice". As part of this she warned that the SFO "are not in the habit—nor will we ever be—of recommending DPAs for recidivists."

Ms. Osofsky's appointment reflects an interesting addition to what some call the Americanization of enforcement in the U.K, following the entry of the U.K. Bribery Act and the U.K.'s Deferred Prosecution Agreement regime. Ms. Osofsky's experience differs from the previous Director, Sir David Green QC, who practiced as a barrister and served as the CPS's Director of the Central Fraud Group. Accordingly, it will be interesting to see in due course the impact that Ms. Osofsky's background and areas of focus will have on the SFO's approach during her (renewable) term of five years.

CONCLUSION

Although the pace of enforcement, particularly in the U.S., was uneven across the 2018 calendar year, it is clear that enforcement of the FCPA and of similar statutes in other countries remains active and is even expanding. Although the majority of the cases brought by the U.S. enforcement agencies in 2018 were relatively small, there have continued to be significant cases, many of which involved cooperation with enforcement authorities who had previously not been active in this area. For many years, the U.S. went it alone, even after the implementation of the OECD Convention, assuming, whether it wanted to or not, the role of a global policeman in the absence of effective enforcement regimes in some of its largest trading partners (and competitors). This, however, resulted in some criticism (including in our previous *Trends & Patterns*) of overreaching by the DOJ and the SEC. Now the question will be whether, with a more active international enforcement community, the DOJ in particular, with its new "no more piling on" policy, will stand down when there is an effective and credible investigation or enforcement action by its peers in other countries.

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IF YOU WISH TO RECEIVE MORE INFORMATION ON THE TOPICS COVERED IN THIS PUBLICATION, YOU MAY CONTACT YOUR REGULAR SHEARMAN & STERLING CONTACT OR ANY OF THE FOLLOWING PEOPLE.

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