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Foreign Corrupt Practices Act Alert

Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019

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I. 2018 ENFORCEMENT TRENDS AND PRIORITIES

A. Introduction

Despite predictions of a slow-down in enforcement under the Trump administration—and indications that enforcement in some areas has decreased in the past year[1]—2018 was yet again an active year for FCPA enforcement. The year demonstrated that US and international governments continue to have their sights set on combating corruption and encouraging compliance at global companies. Below are five key takeaways regarding FCPA enforcement in 2018:

1. Blockbuster resolutions are here to stay.

2. International cooperation and coordinated resolutions continue to occur with regularity and show no sign of abating.

3. Multiple DOJ policy changes in 2018 appear corporation friendly on their face, but time will tell how much practical effect they have.

4. The judiciary handed the enforcement agencies some losses that resulted in a narrowing of the agencies' jurisdictional and charging theories.

5. After a few off years, prosecutions of individuals are at near-record levels and, as large resolutions and global scandals proliferate and the DOJ continues to prioritize punishing individual wrongdoers, they are likely to continue.

B. 2018 Enforcement Trends and Priorities

1. 2018 Enforcement Metrics

By almost all metrics, the level of FCPA enforcement increased in 2018. Indeed, US agencies seemed even more active than in 2017—a year that itself defied skeptics who predicted that the then-incoming administration might temper FCPA enforcement. The number of enforcement actions[2] in 2018 rose significantly from 32 to 50 (a 56% increase), and monetary penalties imposed on corporations for FCPA-related conduct also increased, going from approximately $1.9 billion in 2017 to a staggering $2.9 billion in 2018 (a 52% increase).[3] Much of the 2018 penalty amounts will be offset by payments made to foreign agencies or other parties. US authorities realistically stand to collect only an estimated $1 billion, or about one third of the total penalties from their 2018 settlements. (In comparison, in 2017 US authorities collected an estimated $1.1 billion, or almost 60% of the total penalties from that year's FCPA

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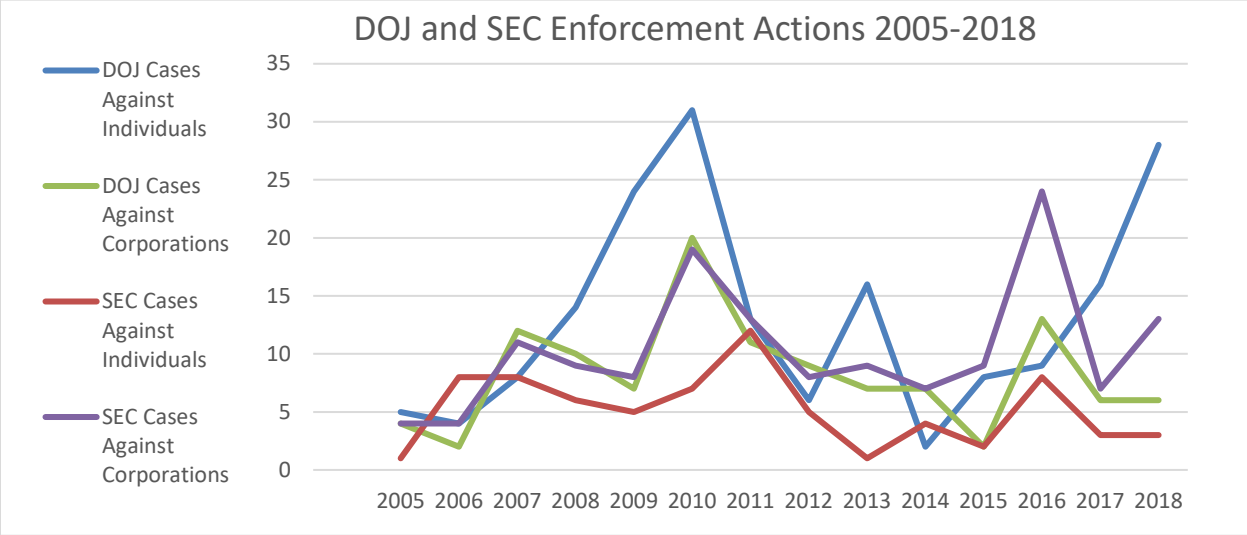
[1] *See, e.g.*, Ben Protess, Robert Gebeloff, & Danielle Ivory, *Trump Administration Spares Corporate Wrongdoers Billions in Penalties*, N.Y. TIMES (Nov. 3, 2018), https://www.nytimes.com/2018/11/03/us/trump-sec-doj-corporate-penalties.html.

[2] In determining the number of actions for the year, we have counted enforcement actions brought by the SEC and DOJ separately (*e.g.*, parallel settlements by the SEC and DOJ with the same entity count as two actions). Actions brought by a single agency against related corporate entities (*e.g.*, a parent and subsidiary) for the same core conduct, however, count as only one action. Declinations and case closures are not considered "actions" for purposes of this metric.

[3] To calculate the amount of total monetary penalties imposed in FCPA-related actions, we counted the penalty amounts set out in resolution papers that a settling party could be liable to pay to US enforcement agencies, even if those penalties were ultimately offset by payments to other entities (*e.g.*, foreign prosecuting authorities). We believe that the total penalty number, irrespective of offsets, most accurately represents the scope of FCPA liability because in each case US authorities retained the right to and theoretically could collect those amounts for FCPA violations. Furthermore, even if in some cases, settling parties agreed to larger penalties based on the understanding that there would be an offset, payments made to non-US government agencies can still to some degree be traced back to FCPA-related conduct; in other words, without FCPA liability and US enforcement activity, it is unlikely that the same amount would have been paid to foreign authorities. It is of course impossible to determine how much of a global resolution would have occurred without FCPA enforcement. But because at least some of those payments are attributable to some degree to FCPA enforcement, we have included them to provide a more accurate picture of overall FCPA-related liability.

settlements.) Nonetheless, the $2.9 billion number indicates how seriously the DOJ and SEC continue to take FCPA violations—and how high the cost of such violations can be to corporations.

Two significant 2018 trends contributed to the size of the 2018 enforcement numbers. First, the increase in overall resolutions is largely due to a sharp jump in DOJ actions against individuals; as can be seen in the graph below, DOJ actions against individuals rose from 16 in 2017 to 28 in 2018. Most of this increase can be attributed to DOJ actions against individuals connected to the sprawling corruption scandal at **PDVSA**, Venezuela's national oil company. As we discuss below at page 42, the conduct at PDVSA has now resulted in the largest number of FCPA actions in history at 31, 14 of which were added in the past year.[4] Without the PDVSA actions, DOJ enforcement—and, with it, the overall resolutions number—falls back toward 2017 levels. Second, large resolutions against companies continued to account for a high percentage of total penalties. The $2.9 billion penalty number noted above can be attributed mostly to a single blockbuster resolution—the $1.8 billion **Petrobras** settlement—one of the largest settlements in FCPA history and one that constituted 62% of the total monetary penalties for 2018.[5] This continues a pattern from 2017, in which the $800 million Rolls-Royce settlement and the $965 million Telia settlement together comprised 63% of total penalties. We discuss the PDVSA and Petrobras actions in further detail below at pages 6 and 7.



Another metric that remained steady between 2017 and 2018 was the number of investigations newly disclosed by companies throughout the course of the year, with 15 disclosures in 2017 and 15 in 2018. Of the various metrics used to gauge FCPA enforcement, this one is significant in that it may track the current activity level of enforcement authorities more closely than the announcement of settlements, the timing of which can be driven by a wide variety of factors (recognizing, of course, that the timing of corporate public disclosures—and more fundamentally, whether investigations are publicly disclosed at all—is also driven by numerous factors that prevent such figures from painting a fully representative picture). The steady rate of public disclosures does, however, provide us at a minimum with a window into

[4] Sealed Indictment, *United States v. Juan Carlos Castillo Rincon*, No. 18-cr-00200 (S.D. Tex. Apr. 11, 2018) (Indictment unsealed on Sep. 13, 2018); Criminal Complaint, *United States v. Francisco Convit Guruceaga, et al.*, No. 18-MJ-03119, ¶¶ 6-13 (S.D. Fla. Jul. 23, 2018); Criminal Complaint, *United States v. Jose Manuel Gonzalez Testino*, No. 18-MJ-03171-LFL (S.D. Tex. Jul. 27, 2018); Information, *United States v. Ivan Alexis Guedez*, No. 18-cr-00611 (S.D. Tex. Oct. 12, 2018).

[5] Non-Prosecution Agreement between US Department of Justice and Petróleo Brasileiro S.A - Petrobras, at 6 (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Petróleo Brasileiro S.A – Petrobras*, Rel. No. 84295, File No. 3-18843, at 9-10 (Sept. 27, 2018), https://www.sec.gov/litigation/admin/2018/33-10561.pdf.

the government's enforcement pipeline and may also indicate an increased sensitivity by public companies to market perceptions of an FCPA investigation.

2. Developments in DOJ and SEC Policy

a. Policy Changes in 2018

Enforcement in 2018 was also shaped by continuing policy developments at the DOJ and SEC. For its part, the DOJ made three enforcement policy announcements in 2018.

- The no "piling on" policy, announced on May 9, provides guidelines aimed at preventing the imposition of duplicative fines on companies under investigation by multiple government agencies;[6]

- The monitorship policy, announced on October 12, sets out guidelines and processes regarding when and to what extent prosecutors should impose monitorships, including requiring prosecutors to consider the cost, burden, and efficacy of monitors;[7] and

- Changes to the policy on corporate disclosure of information regarding culpable individuals (aka the "Yates Memorandum"), announced on November 29, reduce the amount of information companies seeking cooperation credit must provide about employees who were involved in the alleged conduct.[8]

All three announcements appear, on their face, to be corporation-friendly. The policy against "piling on" should theoretically work to reduce the total fines corporations face, and the DOJ's signaling around the monitorship policy indicates it will reduce and narrow the occurrence and scope of monitorships and result in more deference to companies' selection of monitors. The changes to the former Yates Memorandum may also reduce the burden and length of corporate investigations while making it easier for companies to earn cooperation credit. We discuss the new policy announcements in more detail below beginning at page 15.

These policy announcements, of course, came on the heels of the late 2017 announcement of the Corporate Enforcement Policy, which formalized the benefits corporations could obtain from self-disclosure, cooperation, and remediation. Collectively, these policies could be read to suggest that the Department is taking a more tempered approach to enforcement against corporations, as some predicted at the outset of the current administration. The impact of these DOJ policies remains to be seen, however. Each has its own caveats and defined terms that create uncertainties for companies determining whether to voluntarily disclose and/or the scope of cooperation in a given case.

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[6] Rod J. Rosenstein, Deputy Attorney General, DOJ, Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes; DOJ, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings, JUSTICE MANUAL § 1-12.000', https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings?utm_medium=email&utm_source=govdelivery#1-12.000.

[7] Brian A. Benczkowski, Assistant Attorney General, DOJ, 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; Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.

[8] Rod J. Rosenstein, Deputy Attorney General, DOJ, 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; DOJ, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-28.700, 'https://www.justice.gov/criminal-fraud/file/838416/download.

On the SEC front, the Commission did not announce any new policies in 2018, but continued to signal its move away from the "broken windows" approach of the prior Commission leadership. SEC Co-Director of Enforcement Steve Peikin stated last year that the SEC was no longer employing the "broken windows" approach and suggested that going forward the Commission would "be selective and bring a few cases to send a broader message rather than sweep the field."[9] Commissioner Hester Peirce reiterated that approach in 2018. At a conference in Denver, Peirce criticized prior years' mentality of viewing raw enforcement numbers "as the measure of success."[10] The SEC's current approach, Peirce stated, was to be selective in its enforcement cases and "bring only meaningful enforcement actions."[11]

b. Measuring the Impact of the DOJ Corporate Enforcement Policy

The DOJ publicly announced just four declinations under its Corporate Enforcement Policy in 2018.[12] This follows on the two declinations in 2017 and six declinations in 2016 under the Pilot Program, which was the predecessor to the Policy.[13]

Despite the low numbers (or perhaps because of them), the DOJ emphasized its 2018 declinations repeatedly throughout the year as a means of encouraging self-disclosure. In multiple speeches, DOJ officials highlighted the declinations, noting that the DOJ had declined even in cases with aggravating circumstances and urging defense counsel to advise clients to "work more closely" with the DOJ.[14] The DOJ also encouraged corporations to recognize "that it is in their interest to promptly and voluntarily self-disclose, cooperate, and engage in meaningful remedial actions."[15]

The DOJ has cited some statistics suggesting an uptick in voluntary disclosures since the enactment of the Pilot Policy,[16] it is unclear whether the Corporate Enforcement Policy has had any appreciable impact on voluntary disclosure given the low declination numbers (and low numbers of other resolutions where credit has been awarded under the Policy) to date. On the one hand, it is possible that companies are disclosing misconduct at higher rate, but the effects of disclosure have yet to be seen due to the length of the typical FCPA investigation. On the other hand, it may be that the incentives offered in the Corporate Enforcement Policy are simply insufficient to induce companies to self-report wrongdoing.

For example, companies are certainly aware that the incentives of the Corporate Enforcement Policy do not include immunization from monetary penalties. In all four 2018 public declinations, the

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[9] Dave Michaels, *SEC Signals Pullback From Prosecutorial Approach to Enforcement*, WALL ST. J. (Oct. 26, 2017), https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200?mod=searchresults&page=1&pos=12.

[10] Hester M. Peirce, Commissioner, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118.

[11] Hester M. Peirce, Commissioner, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118.

[12] US Department of Justice, Declinations (updated Dec. 26, 2018), https://www.justice.gov/criminal-fraud/pilot-program/declinations.

[13] US Department of Justice, Declinations (updated Dec. 26, 2018), https://www.justice.gov/criminal-fraud/pilot-program/declinations.

[14] Rod J. Rosenstein, Deputy Attorney General, DOJ, Remarks at American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes; John P. Cronan, Principal Deputy Assistant Attorney General, DOJ, Remarks at the 3rd Annual GIR Live DC Fall Event (Oct. 25, 2018), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-1; Matthew S. Miner, Deputy Assistant Attorney General, DOJ, Remarks at 5th Annual GIR New York Live Event (Sept. 27, 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.

[15] John P. Cronan, Principal Deputy Assistant Attorney General, DOJ, Remarks at the 3rd Annual GIR Live DC Fall Event (Oct. 25, 2018), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-1.

[16] Rod J. Rosenstein, Deputy Attorney General, DOJ, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

companies were still subject to fines or disgorgement.[17] To companies that study these declinations closely, the possibility of voluntarily submitting to government scrutiny, a lengthy investigation, and the expense of attorneys' fees—only to pay a substantial penalty at the close of the investigation—may tip the calculus back toward not disclosing potential violations. And, moreover, uncertainty about whether the DOJ might conclude that "aggravating circumstances" are present that overcome the presumption of a declination and lead ultimately to a criminal resolution may further incentivize companies to think carefully before making a voluntary disclosure.

In cases where declinations were not awarded, the DOJ's 2018 resolutions under the Corporate Enforcement Policy showed a range of credit for cooperation and remediation, with some companies receiving "full" cooperation credit (a 25% reduction of the monetary penalty), and others receiving "partial" credit (with penalty reductions ranging from 15% to 20%). Given the size of corporate settlements in 2018, the difference between a few percentage points equated to millions of dollars lost or saved by companies. Determining what amount of cooperation and remediation will be viewed as "full" in the eyes of the DOJ can be challenging and creates added uncertainties for companies deciding whether to disclose and how to investigate and remediate potentially problematic conduct. No company received 50% credit in 2018, which the Policy reserves for companies that voluntarily disclose, fully cooperate, and full remediate but have aggravating circumstances such that a declination is not warranted. As noted above, the DOJ stated that it chose to decline prosecution in the past year in the cases that involved voluntary disclosures, even where aggravating circumstances existed. The DOJ has not explained why declinations were appropriate in these instances, however, making it difficult for companies to predict when declinations might be granted despite aggravating circumstances going forward.

3. Blockbuster Resolution: Petrobras

One of the headlines of 2018 was the Petrobras resolution, one of the largest settlements in FCPA history. On September 27, Petróleo Brasileiro S.A ("Petrobras"), the Brazilian state-owned energy company, entered into agreements with US and Brazilian authorities relating to a sprawling scheme involving millions of dollars in illicit payments made to Brazilian politicians and political parties over the course of almost a decade.[18] The resolution—in which Petrobras agreed to pay $1.78 billion in total penalties and disgorgement—is one of the major actions to date coming out of Brazil's Operation Lava Jato (or Operation Car Wash), a long-running investigation that has resulted in the arrest and prosecution of politicians and corporate executives in Brazil and across Latin America.[19]

This mammoth settlement illustrates two trends we have seen in FCPA enforcement in the past few years. First, both the SEC and DOJ have recently highlighted their intentions to prioritize more significant cases, with the SEC moving away from a "broken windows" approach and the DOJ expressing

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[17] US Securities and Exchange Commission Press Release No. 3-18446: SEC Charges Dun & Bradstreet With FCPA Violations (Apr. 23, 2018), https://www.sec.gov/enforce/34-83088-s; Letter from Daniel Kahn, DOJ, to Matthew Reinhard, regarding Guralp Systems Limited (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/page/file/1088621/download; Letter from Richard P. Donoghue and Sandra L. Moser to Adam B. Siegel (Aug. 23, 2018), https://www.justice.gov/criminal-fraud/page/file/1089626/download.

[18] US Department of Justice Press Release No. 18-1258: Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018).

[19] US Department of Justice Press Release No. 18-1258: Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018); US Securities and Exchange Commission Press Release No. 2018-215: Petrobras Reaches Settlement With SEC for Misleading Investors (Sept. 27, 2018). This resolution represents the second major-FCPA settlement connected to Operation Car Wash; in December 2016, Odebrecht, a global construction company based in Brazil, and a related affiliate Braskem, a petrochemical company based in Brazil, settled with the authorities in the United States, Brazil and Switzerland and agreed to pay a total of $3.5 billion. US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).

a desire to resolve "lower priority" cases more quickly.[20] The last few years have seen a series of huge settlements. Indeed, seven out of the top ten FCPA settlements have occurred within the last three years, with Petrobras as the recent example of this enforcement prioritization. Separately, the Petrobras settlement also demonstrates the continued strength of US cross-border cooperation, and particularly the United States relationship with Brazil. An anticipated 80% of the Petrobras' $853.2 million criminal penalty will be paid to Brazil. In a speech delivered the same day the Petrobras resolution was publicly announced, Deputy Assistant Attorney General Matthew Miner also highlighted the settlement as the latest example of the "significant rise in global enforcement and cooperation with foreign authorities."[21]

In other ways, however, the Petrobras settlement is unusual. US authorities settled with a state-owned enterprise ("SOE") for only the second time ever,[22] and the DOJ acknowledged that, unlike the typical FCPA defendant, Petrobras was itself victimized by the corrupt scheme on which its settlement was based.[23] Petrobras's unusual role may explain why, despite the scope and magnitude of the corrupt conduct, the DOJ did not actually charge the company with criminal violations but elected to settle with a non-prosecution agreement ("NPA"). Potential arguments by Petrobras that, as a government instrumentality, it has sovereign immunity from prosecution also may have contributed to the more lenient treatment.[24]

The Petrobras settlement is also unique in that the SEC agreed to offset up to the full amount of its $934 million disgorgement requirement by any payments Petrobras made to investors in a related securities class action suit.[25] While this approach seems sensible—disgorgement is intended to recoup ill-gotten gains and logically should be offset where those gains have already been paid back to victims—it is atypical in FCPA enforcement actions. The SEC has indicated that the offset is specific to the facts of Petrobras, where the SEC also brought securities fraud claims against the company.[26] The related

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[20] Dave Michaels, *SEC Signals Pullback From Prosecutorial Approach to Enforcement*, WALL ST. J., Oct. 26, 2017; Adam Dobrik, *DOJ: We Are Speeding Up Cases*, GLOBAL INVESTIGATIONS REVIEW (Mar. 2, 2018), https://globalinvestigationsreview.com/article/jac/1166279/doj-we-are-speeding-up-cases.

[21] Matthew S. Miner, Deputy Assistant Attorney General, DOJ, Remarks at 5th Annual GIR New York Live Event (Sept. 27, 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.

[22] The previous instance of an SOE settling FCPA charges with US authorities was the 2006 Statoil settlement. Statoil, a Norwegian state-owned entity, entered into a deferred prosecution agreement with the US Department of Justice. US Department of Justice Press Release No. 06-700: US Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2018); *see also* Clara Hudson, *Petrobras Sovereign Claim Fostered Leniency, Lawyers Say*, GLOBAL INVESTIGATIONS REVIEW (Oct. 11, 2018) (noting that the Petrobras settlement represents only the second instance of an SOE settling FCPA charges), https://globalinvestigationsreview.com/article/jac/1175544/petrobras-sovereign-immunity-claim-fostered-leniency-lawyers-say. Additionally, after the Petrobras settlement in September 2018, the US authorities reached a third SOE settlement with the SEC settling books and records charges against Eletrobras, another Brazilian SOE, on December 26, 2018. US Securities and Exchange Commission Press Release No. 3-18962: SEC Charges Eletrobras with Violating Books and Records and Internal Accounting Controls Provisions of the FCPA (Dec. 26, 2018). That represents the third instance of an SOE settling FCPA charges with US authorities.

[23] Non-Prosecution Agreement between US Department of Justice and Petróleo Brasileiro S.A – Petrobras, at 3 (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download.

[24] *See* Non-Prosecution Agreement between US Department of Justice and Petróleo Brasileiro S.A – Petrobras, at 8-9 (Sept. 26, 2018) (noting that Petrobras, in making this agreement, does not "prospectively waive" a sovereign immunity argument and "reserves the right to assert this argument" in any future action), https://www.justice.gov/opa/press-release/file/1096706/download; *see also* Clara Hudson, *Petrobras Sovereign Claim Fostered Leniency, Lawyers Say*, GLOBAL INVESTIGATIONS REVIEW (Oct. 11, 2018), https://globalinvestigationsreview.com/article/jac/1175544/petrobras-sovereign-immunity-claim-fostered-leniency-lawyers-say.

[25] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Petróleo Brasileiro S.A – Petrobras*, Rel. No. 84295, File No. 3-18843, at 9 (Sept. 27, 2018).

[26] Clara Hudson, *SEC Official: No More "Cookie-Cutter" Monitorships*, GLOBAL INVESTIGATIONS REVIEW, Nov. 1, 2018 (indicating that Charles Cain, chief of the SEC FCPA unit, stated that the securities fraud claims and class action offset "made sense" for Petrobras).

securities class action presumably sought recovery for the same fraud, so the SEC may have thought it logical to credit payments made by Petrobras in that lawsuit. [27]

4. Ongoing Investigation into PDVSA

Throughout 2018, the DOJ continued to prosecute individuals as part of its ongoing investigation into the sprawling bribery scheme at Petróleos de Venezuela, S.A. ("PDVSA"), Venezuela's state-owned oil and natural gas company. To date, misconduct at PDVSA has led to more prosecutions than any other corrupt scheme in the history of the FCPA with 30 individuals charged, 18 of whom have pleaded guilty.[28] PDVSA has not been charged with FCPA violations as a corporate entity.

The DOJ's papers describe conduct dating back to 2014 (although media reports indicate that corruption has been ongoing at PDVSA for decades) and allege a corrupt scheme involving an elaborate web of PDVSA officials, international third-party money launderers, and members of the Venezuelan elite (known as "boliburgués").[29] Apart from paying bribes in exchange for business from PDVSA, conspirators also exploited Venezuela's highly favorable government currency exchange rate.[30] Ill-gotten gains and bribe payments were allegedly laundered through complex international arrangements, including real estate investments and transfers using shell companies.

In 2018, the DOJ brought 13 new actions[31] and unsealed 7 actions filed in 2017[32] against individuals connected to PDVSA. Individuals charged in the new actions included former officials from PDVSA and other Venezuelan government agencies; US-based owners of businesses that were awarded PDVSA contracts; and alleged "professional money launderers" from the US, Venezuela, and other parts of Latin America who helped transfer and conceal the proceeds of the PDVSA embezzlement scheme.[33] The unsealed actions included indictments filed against several former Venezuelan officials, including a

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[27] *See* James Tyler Kirk, *Deranged Disgorgement*, 8 J. Bus. Entrepreneurship & L. 131, 144-145 (2015) (noting the appropriateness of offsetting disgorgement in SEC enforcement actions where the "same colorable claim or securities law violation has been alleged" in a private action).

[28] US Department of Justice Press Release No. 18-1420: Texas Businessman Pleads Guilty to Money Laundering Charges in Connection with Venezuela Bribery Scheme (Oct. 30, 2018), https://www.justice.gov/opa/pr/texas-businessman-pleads-guilty-money-laundering-charges-connection-venezuela-bribery-scheme.

[29] US Department of Justice Press Release No. 18-980: Two Members of Billion-Dollar Venezuelan Money Laundering Scheme Arrested (July 25, 2018), https://www.justice.gov/opa/pr/two-members-billion-dollar-venezuelan-money-laundering-scheme-arrested.

[30] US Department of Justice Press Release No. 18-980: Two Members of Billion-Dollar Venezuelan Money Laundering Scheme Arrested (July 25, 2018), https://www.justice.gov/opa/pr/two-members-billion-dollar-venezuelan-money-laundering-scheme-arrested US.

[31] Sealed Indictment, *United States v. Juan Carlos Castillo Rincon*, No. 18-CR-00200 (S.D. Tex. Apr. 11, 2018) (Indictment unsealed on Sep. 13, 2018); Criminal Complaint, *United States v. Francisco Convit Guruceaga, et al.*, No. 18-MJ-03119, ¶¶ 6-13 (S.D. Fla. Jul. 23, 2018); Criminal Complaint, *United States v. Jose Manuel Gonzalez Testino*, No. 18-MJ-03171 (S.D. Tex. Jul. 27, 2018); Information, *United States v. Ivan Alexis Guedez*, No. 18-cr-00611 (S.D. Tex. Oct. 12, 2018).

[32] Sealed Indictment, *United States v. Jose Orlando Camacho*, No. 17-cr-00394 (S.D.Tex. Jul. 5, 2017) (Indictment unsealed Sep. 13, 2018); Sealed Indictment, *United States v. Luis Carlos de Leon-Perez, Nervis Gerardo Villalobos-Cardenas, Cesar David Rincon-Godoy, Alejandro Isturiz-Chiesa, and Rafael Ernesto Reiter-Munoz*, No. 17-CR-00514 (S.D. Tex. Aug. 29, 2017) (Indictment unsealed Feb. 12, 2018).

[33] US Department of Justice Press Release No. 18-1188: Business Executive Pleads Guilty to Foreign Bribery Charge in Connection With Venezuelan Bribery Scheme (Sept. 13, 2018), https://www.justice.gov/opa/pr/business-executive-pleads-guilty-foreign-bribery-charge-connection-venezuelan-bribery-scheme; US Department of Justice Press Release No. 18-1420: Texas Businessman Pleads Guilty to Money Laundering Charges in Connection with Venezuela Bribery Scheme (Oct. 30, 2018), https://www.justice.gov/opa/pr/texas-businessman-pleads-guilty-money-laundering-charges-connection-venezuela-bribery-scheme; US Department of Justice Press Release No. 18-1527: Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 20, 2018), https://www.justice.gov/opa/pr/venezuelan-billionaire-news-network-owner-former-venezuelan-national-treasurer-and-former; US Department of Justice Press Release No. 18-980: Two Members of Billion-Dollar Venezuelan Money Laundering Scheme Arrested (July 25, 2018), https://www.justice.gov/opa/pr/two-members-billion-dollar-venezuelan-money-laundering-scheme-arrested.

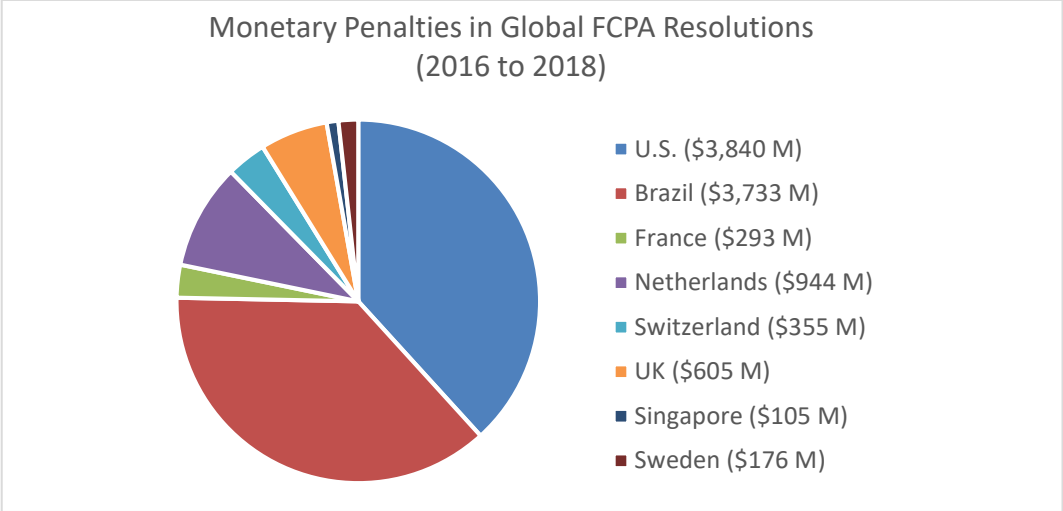
former PDVSA procurement official; a former general manager of Bariven, a PDVSA subsidiary; the former PDVSA head of security; and the former Venezuelan national treasurer.[34]

We discuss the 2018 PDVSA actions in more detail at page 44.

5. Continued Rise in Global Enforcement and Cooperation

a. Coordinated Resolutions

The SEC and DOJ continued in 2018 to cooperate with foreign counterparts to reach globally coordinated resolutions, a practice that has increased in recent years and has now become a consistent feature of the FCPA landscape. This past year US agencies continued strong relationships with Brazilian authorities in the Petrobras matter, and the DOJ reached its first coordinated resolution with French authorities in the **Société Général S.A**. ("SocGen") matter. To date, five of the top ten FCPA settlements in history (Odebrecht,[35] Telia,[36] Keppel,[37] SocGen,[38] and Petrobras[39]) are globally coordinated resolutions, and all occurred within the past three years.



i. Cooperation with French Authorities

While US regulators have over the past few years developed strong partnerships with regulators in the United Kingdom, the Netherlands, and Brazil—obtaining coordinated resolutions with these

[34] US Department of Justice Press Release No. 18-169: Five Former Venezuelan Government Officials Charged in Money Laundering Scheme Involving Foreign Bribery (Feb. 12, 2018), https://www.justice.gov/opa/pr/five-former-venezuelan-government-officials-charged-money-laundering-scheme-involving-forei-0; US Department of Justice Press Release No. 18-1527: Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 20, 2018), https://www.justice.gov/opa/pr/venezuelan-billionaire-news-network-owner-former-venezuelan-national-treasurer-and-former.

[35] Plea Agreement, *United States v. Odebrecht S.A.*, No. 16-643 (RJD) (E.D.N.Y. Dec. 21, 2016); Plea Agreement, *United States v. Braskem S.A.*, No. 16-644 (RJD) (E.D.N.Y. Dec. 21, 2016).

[36] Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581-GBD (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 3898, File No. 3-18195 (Sept. 21, 2017).

[37] Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (KAM) (E.D.N.Y. Dec. 22, 2017).

[38] Deferred Prosecution Agreement, *United States v. Société Général S.A.*, No. 18-CR-253 (E.D.N.Y. June 5, 2018).

[39] Non-Prosecution Agreement between US Department of Justice and Petróleo Brasileiro S.A., (Sept. 26, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Petróleo Brasileiro S.A. - Petrobras*, Rel. No. 10561, File No. 3-18843 (Sept. 27, 2018).

countries in 2017 against Rolls-Royce,[40] Telia,[41] SBM Offshore,[42] and Keppel[43]—the DOJ's resolution with SocGen in June 2018 represents the first US-French coordinated resolution in a foreign bribery case.[44] This is notable given that the DOJ has resolved FCPA actions against French companies in the past (*e.g.*, Alstom S.A. in 2014 and Alcatel-Lucent S.A. in 2010) without the participation of French authorities.[45]

SocGen agreed to pay $585 million to settle criminal proceedings brought by the DOJ and French prosecuting office Parquet National Financier ("PNF"), with half of the penalty being paid to the DOJ and half to the PNF.[46] As has become its practice in recent coordinated resolutions, the DOJ included the $585 million number in its resolution papers, but offset the portion of the penalty—$293 million—paid to the PNF.[47]

As a further sign of strengthening relations with French authorities, the DOJ is also currently involved in an ongoing bribery investigation led by UK and French authorities into potential bribes paid in parts of Asia by Netherlands-based aircraft manufacturer Airbus.[48] Notably, the investigation appears largely driven by foreign prosecutors—media reports indicate that the DOJ joined the matter in a supervisory capacity in 2017, overseeing investigations by the UK SFO and the PNF; only recently have reports emerged that the DOJ is itself actively investigating the alleged bribery.[49]

ii. Cooperation with Brazilian Authorities

As discussed above at page 6, US regulators continued to cooperate closely with Brazilian authorities on foreign bribery cases related to Brazil's national oil company, **Petrobras**, in 2018, with both enforcement agencies reaching record-setting settlements with Petrobras.[50]

As set forth in Petrobras' NPA with the DOJ, Petrobras agreed to pay 10 percent of the $853 million criminal penalty to the DOJ and, in an unusual move, another 10 percent to the SEC (a total of $170 million); Petrobras agreed to pay the remaining 80 percent of the criminal penalty to the MPF, the Brazilian Federal Prosecutor.[51] By way of administrative order, the SEC also agreed to credit against the disgorgement amount Petrobras' payment of more than $933.4 million in a related U.S. securities class

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[40] Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-00247 (S.D. Ohio Dec. 20, 2016).
[41] Deferred Prosecution Agreement, *United States v. Telia Co. AB*, No. 17-CR-581-GBD (S.D.N.Y. Sept. 21, 2017); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telia Co. AB*, Rel. No. 3898, File No. 3-18195 (Sept. 21, 2017).
[42] Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686 (S.D. Tex. Nov. 30, 2017).
[43] Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (KAM) (E.D.N.Y. Dec. 22, 2017).
[44] US Department of Justice Press Release No. 18-722: Société Général S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018).
[45] US Department of Justice Press Release No. 14-1448: Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014); US Department of Justice Press Release No. 10-1481: Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010).
[46] Deferred Prosecution Agreement, *United States v. Société Général S.A.*, No. 18-CR-253 (E.D.N.Y. June 5, 2018).
[47] Deferred Prosecution Agreement, *United States v. Société Général S.A.*, No. 18-CR-253 (E.D.N.Y. June 5, 2018).
[48] Michael Griffiths, *Airbus Hires US Law Firm in Bribery Probe*, GLOBAL INVESTIGATIONS REVIEW (Oct. 26, 2018), https://globalinvestigationsreview.com/article/jac/1176003/airbus-hires-us-law-firm-in-bribery-probe.
[49] Michael Griffiths, *Airbus Hires US Law Firm in Bribery Probe*, GLOBAL INVESTIGATIONS REVIEW (Oct. 26, 2018), https://globalinvestigationsreview.com/article/jac/1176003/airbus-hires-us-law-firm-in-bribery-probe.
[50] Richard L. Cassin, *Petrobras Reaches $1.78 Billion FCPA Resolution*, THE FCPA BLOG (Sept. 27, 2018), http://www.fcpablog.com/blog/2018/9/27/petrobras-reaches-178-billion-fcpa-resolution.html.
[51] Non-Prosecution Agreement between US Department of Justice and Petróleo Brasileiro S.A., (Sept. 26, 2018).

action settlement, effectively eliminating any further disgorgement payment to the SEC.[52] The DOJ and SEC thus collected a combined total of roughly $170.6 million from the resolution.[53]

In a separate instance of US-Brazilian cooperation, Dutch oil services company **SBM Offshore** ("SBM") wrapped up resolutions with US, Dutch, and Brazilian authorities in July 2018 when it reached a settlement agreement with Brazilian authorities. SBM had faced charges in the US, the Netherlands, and Brazil for allegedly bribing Petrobras officials in exchange for contract awards between 1996 and 2012.[54] The company settled charges with Dutch authorities in 2014 and then the DOJ in 2017 (we discussed these settlements in last year's Global Anti-Bribery Year-in-Review at page 26).[55] In resolving the last of three enforcement actions with Brazilian authorities, SBM agreed to pay $189 million in fines and compensation damages, and entered into a leniency agreement valued at $300 million.[56]

b. Global Enforcement Continues to Rise

As exemplified by the Airbus investigation referenced above, foreign authorities have also assumed the lead in recent enforcement actions where the US authorities have taken a more limited role.[57] A similar dynamic occurred in the Rolls-Royce case, where the UK SFO opened and led the investigation that the DOJ later joined.[58]

Foreign authorities have also independently initiated and pursued corruption charges in 2018, opening several significant investigations. Although a number of these investigations are based on conduct previously investigated or currently under investigation by the SEC or DOJ, foreign agencies are pursuing charges under their own authority and without formal involvement from the US, signaling increasingly robust anti-corruption enforcement worldwide. For example, Singaporean authorities are investigating individuals previously employed by Keppel Offshore & Marine, which settled FCPA charges with US, Brazilian, and Singaporean authorities in 2017, and Israeli authorities are investigating Teva Pharmaceuticals Ltd. in connection with FCPA-related conduct that the company settled with US authorities in 2016.[59] Investigations into the alleged billion-dollar embezzlement and bribery scheme

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[52] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Petróleo Brasileiro S.A. - Petrobras*, Rel. No. 10561, File No. 3-18843, at 9 (Sept. 27, 2018).
[53] Richard L. Cassin, *Petrobras Reaches $1.78 Billion FCPA Resolution*, THE FCPA BLOG (Sept. 27, 2018), http://www.fcpablog.com/blog/2018/9/27/petrobras-reaches-178-billion-fcpa-resolution.html.
[54] Emily Casswell, *SBM Reaches "Milestone" Settlement with Brazilian Authorities*, GLOBAL INVESTIGATIONS REVIEW (July 27, 2018), https://globalinvestigationsreview.com/article/1172369/sbm-reaches-%E2%80%9Cmilestone%E2%80%9D-settlement-with-brazilian-authorities; Bart Meijer, SBM Offshore Reaches Settlement in Brazil Corruption Probe, REUTERS (July 27, 2018), https://www.reuters.com/article/us-sbm-offshore-corruption/sbm-offshore-reaches-settlement-in-brazil-corruption-probe-idUSKBN1KH0Q0.
[55] Emily Casswell, *SBM Reaches "Milestone" Settlement with Brazilian Authorities*, GLOBAL INVESTIGATIONS REVIEW (July 27, 2018), https://globalinvestigationsreview.com/article/1172369/sbm-reaches-%E2%80%9Cmilestone%E2%80%9D-settlement-with-brazilian-authorities; Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-686 (S. D. Tex. Nov. 29, 2017).
[56] Emily Casswell, *SBM Reaches "Milestone" Settlement with Brazilian Authorities*, GLOBAL INVESTIGATIONS REVIEW (July 27, 2018), https://globalinvestigationsreview.com/article/1172369/sbm-reaches-%E2%80%9Cmilestone%E2%80%9D-settlement-with-brazilian-authorities; Bart Meijer, *SBM Offshore Reaches Settlement in Brazil Corruption Probe*, REUTERS (July 27, 2018), https://www.reuters.com/article/us-sbm-offshore-corruption/sbm-offshore-reaches-settlement-in-brazil-corruption-probe-idUSKBN1KH0Q0.
[57] Michael Griffiths, *Airbus Hires US Law Firm in Bribery Probe*, GLOBAL INVESTIGATIONS REVIEW (Oct. 26, 2018), https://globalinvestigationsreview.com/article/jac/1176003/airbus-hires-us-law-firm-in-bribery-probe.
[58] US Department of Justice Press Release No. 17-074: Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017); Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-CR-00247 (S.D. Ohio Dec. 20, 2016); Simon Zekaria & Ed Ballard, *Rolls-Royce Holdings Says U.K. Opens Probe Into Corruption Allegations*, WALL. ST. J., Dec. 23, 2013.
[59] Grace Leong, *Former Key Keppel Execs Arrested in Corruption Probe*, THE STRAITS TIMES (Feb. 2, 2018), https://www.straitstimes.com/singapore/former-key-keppel-execs-arrested-in-corruption-probe; Chaim Gelfand, Teva Pharmaceuticals Resolves Bribery Case with Israel Authorities, THE FCPA BLOG (Jan. 15, 2018), http://www.fcpablog.com/blog/2018/1/15/teva-pharmaceuticals-resolves-bribery-case-with-israel-autho.html.

perpetrated at 1Malaysia Development Berhad (1MDB) have also been separately initiated by US, Malaysian, Swiss, and other foreign authorities without formal coordination between countries.[60] Finally, in at least one case, a foreign authority has launched an investigation without any apparent historic or parallel investigation by the US, with Chinese police investigating potentially FCPA-related conduct at a Chinese subsidiary of Clear Channel Outdoor.

c. Deference to Foreign Investigations

Finally, in another sign of the strength of international anti-corruption enforcement and consistent with the DOJ's newly announced policy against "piling on," the DOJ closed two investigations in 2018 in deference to foreign authorities conducting parallel investigations. The first involved **Guralp** Systems Limited ("Guralp"), a UK engineering firm under investigation for possible FCPA and money-laundering violations. Guralp received a declination from the DOJ in part because the conduct at issue was the subject of ongoing investigation by the UK Serious Fraud Office.[61] The second case closure related to Netherlands-based **ING Group NV** ("ING"). The DOJ closed its investigation into the company in September 2018 following ING's $900 million settlement with Dutch authorities relating to the failure to implement sufficient controls to prevent money laundering and other corrupt practices.[62]

d. DOJ's China Initiative

In contrast to cooperation with certain foreign regulators described above, the DOJ announced a specific "China Initiative" in 2018 that may result in targeting of Chinese companies for FCPA-related offenses. Then-Attorney General Jeff Sessions introduced the Initiative on November 1, 2018 and described it as an effort aimed at countering Chinese national security threats and trade secret theft through a wide range of legal strategies.[63] The China Initiative will be led by Assistant Attorney General for National Security John Demers, Assistant Attorney General Brian Benczkowski, FBI Director Christopher Wray, and five US Attorneys from around the country.[64] One of the ten goals of the Initiative is to "Identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses."[65]

This announcement comes as legal practitioners have observed a decline across East Asia in companies self-reporting potential bribery to US regulators.[66] Rather than self-report, defense attorneys

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[60] Michael Griffiths, *1MDB Case Could Breed a "Hydra" of Investigations*, GLOBAL INVESTIGATIONS REVIEW (Oct. 30, 2018), https://globalinvestigationsreview.com/article/1176142/1mbd-case-could-breed-a-%E2%80%9Chydra%E2%80%9D-of-investigations. The degree to which global authorities are cooperating in the investigation of 1MDB remains unclear. On the one hand, in August 2018 Malaysian authorities seized a yacht that the DOJ had been attempting to seize since 2017—Malaysian authorities currently plan to auction off the yacht at a starting price of $345 million. On the other hand, in a cooperative gesture, Malaysian authorities did issue a provisional arrest warrant for Goldman Sachs banker Roger Ng at the DOJ's request in connection with the DOJ's investigation into 1MDB. The DOJ also noted the assistance of several foreign agencies—Malaysia, Singapore, Switzerland and Luxembourg—in its press release about Ng's indictment. US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018).

[61] Letter from Daniel Kahn, DOJ, to Matthew Reinhard, regarding Guralp Systems Limited (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/page/file/1088621/download.

[62] Harry Cassin, *ING Wins SEC Declination After $900 Million Dutch Penalty*, THE FCPA BLOG (Sept. 5, 2018), http://www.fcpablog.com/blog/2018/9/5/ing-wins-sec-declination-after-900-million-dutch-penalty.html.

[63] Jeff Sessions, Attorney General, Announcement of New Initiative to Combat Chinese Economic Espionage (Nov. 1, 2018), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage.

[64] US Department of Justice Press Release No. 18-1436: Attorney General Jeff Session's China Initiative Fact Sheet (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download.

[65] US Department of Justice Press Release No. 18-1436: Attorney General Jeff Session's China Initiative Fact Sheet (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download.

[66] Michael Griffiths, *FCPA in Asia: "We're Not Even Getting Called in for Investigations"*, GLOBAL INVESTIGATIONS REVIEW (Nov. 20, 2018), https://globalinvestigationsreview.com/article/jac/1177092/fcpa-in-asia-"we're-not-even-getting-called-in-for-investigations".

report that many corporate clients opt to cooperate with an investigation once underway.[67] Looking ahead, this trend may be further exacerbated by the implementation of China's new International Criminal Judicial Assistance Law (ICJA). Similar to so-called "blocking statutes" in countries like France and Switzerland, the ICJA may prevent China-based subsidiaries of multi-national companies from providing evidence or testimony in criminal proceedings outside of China without government approval, making it illegal to voluntarily self-report or provide certain evidence to US authorities.[68] Legal observers should watch whether the China Initiative—with its focus on criminal bribery—reinvigorates self-reporting or whether ICJA's implementing regulations further disincentivize Chinese companies.

Separately, the China Initiative may also violate provisions of the OECD Convention Against Bribery, which specifies that countries should not take into account "considerations of national economic interest" when pursuing foreign bribery offenses.[69] Practitioners have also criticized the Initiative as a form of selective prosecution generally inconsistent with the rule of law.[70] In response to questions regarding whether the Initiative represented a "weaponizing of the FCPA," the chief of the DOJ's FCPA Unit, Daniel Kahn, insisted that, as prosecutors, DOJ attorneys "follow [the] evidence" and that "the evidence has led [the DOJ] in a number of instances . . . [to] China."[71] Nonetheless, given the nature of the Initiative, the US may face backlash from other OECD signatories.

6. Legal Developments Regarding Theories of Enforcement

2018 was also an active year for FCPA-related litigation. Most notably, US enforcement agencies faced both a significant judicial narrowing of a common enforcement theory in *United States v. Hoskins* and experienced continued fallout from last year's *Kokesh v. SEC* decision.

First, in August 2018, the Second Circuit affirmed a limitation on the jurisdictional reach of the FCPA in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). The Court concluded that (1) Congress intended to exclude foreign nationals (individuals and entities) from the reach of the FCPA if such individuals and entities did not act in furtherance of a bribery violation while within the territory United States and did not act as an agent of a domestic concern in connection with any potential bribery violation, and (2) the government could not use a conspiracy charge to reach such persons as doing so would violate the presumption against extraterritoriality in the face of Congress' clear territorial limitations on the reach of the FCPA in the statute. If not applicable to every defendant in every FCPA matter, *Hoskins* (currently on appeal to the Supreme Court) has staked out one marker for what could be the outer bounds of FCPA liability for individuals and employees located abroad who were never present or never acted within the United States. The decision will affect government prosecutions of foreign companies—and their employees and agents—who were involved in bribery schemes abroad. We discuss *Hoskins* in greater detail below at page 50.

Second, in July 2018, a decision from the E.D.N.Y. in *SEC v. Cohen* dismissed an SEC action against two individuals with the conclusion that the conduct was time-barred under *Kokesh* in part because the SEC sought disgorgement beyond the five-year limitation period. The court also expanded *Kokesh* to cover injunctions directing defendants to refrain from any future violations of securities law (so-

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[67] Michael Griffiths, *FCPA in Asia: "We're Not Even Getting Called in for Investigations"*, GLOBAL INVESTIGATIONS REVIEW (Nov. 20, 2018), https://globalinvestigationsreview.com/article/jac/1177092/fcpa-in-asia-"we're-not-even-getting-called-in-for-investigations".
[68] Eric Carlson, *Practice Alert: China Asserts 'Judicial Sovereignty' with new Blocking Statute*, THE FCPA BLOG (Dec. 10, 2018), http://www.fcpablog.com/blog/2018/12/10/practice-alert-china-asserts-judicial-sovereignty-with-new-b.html.
[69] OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 9, http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.
[70] Clara Hudson, *DOJ Focus on China: "Is This a Weaponising of the FCPA?,"* GLOBAL INVESTIGATIONS REVIEW (Dec. 20, 2018), https://globalinvestigationsreview.com/article/jac/1178387/doj-focus-on-china-%E2%80%9Cis-this-a-weaponising-of-the-fcpa-%E2%80%9D.
[71] Clara Hudson, *DOJ Focus on China: "Is This a Weaponising of the FCPA?,"* GLOBAL INVESTIGATIONS REVIEW (Dec. 20, 2018), https://globalinvestigationsreview.com/article/jac/1178387/doj-focus-on-china-%E2%80%9Cis-this-a-weaponising-of-the-fcpa-%E2%80%9D.

called "obey-the-law" injunctions), reasoning that injunctive relief operated in part as a penalty and was thus also subject to the five-year statute of limitations. In addition, the *Cohen* ruling further circumscribed the SEC's time to bring an action by narrowly interpreting the language in the tolling agreements between the SEC and the defendants to apply only to the original investigation referenced in the agreement, not to subsequent investigations that arose later out of that investigation. Separately, the SEC estimated that *Kokesh* would cause it to forego collection of an estimated $900 million that it could have otherwise collected from cases currently pending.[72] It is possible that some of this amount could be collected by the DOJ instead, though—in an unusual settlement at the end of 2018, the DOJ imposed disgorgement on **Polycom, Inc.** in addition to the company's disgorgement to the SEC, possibly to account for years of corrupt conduct that the SEC was time-barred from reaching.[73] We discuss the impact of *Kokesh* in more detail below at page 55.

2018 judicial decisions did not uniformly go against the government, however, as an S.D.N.Y decision on a motion to dismiss in *United States v. Chi Ping Patrick Ho* affirmed the government's flexibility in using alternate charging theories to prosecute bribery, including ratification of money laundering charges premised on US dollar-denominated clearing activity. First, as we detail further on page 52 below, Judge Loretta Preska held that under certain circumstances, the domestic concern and territorial provisions of the FCPA were not mutually exclusive and could be charged as alternative theories against a single defendant. Second, Judge Preska also held that correspondent banking transactions cleared through the US were clearly transfers to a place in the United States and from the United States and were thus sufficient to form a US nexus for purposes of the US money laundering statute. And as described further below at page 40, Ho was ultimately convicted in December 2018 on seven of the eight counts he faced.

7. Increasing size of SEC Whistleblower awards

Both the number of whistleblower tips and size of payouts to whistleblowers increased in 2018, although no payouts were reported in FCPA cases.[74] First, according to recent reports, the SEC received 5,282 whistleblower tips during fiscal year 2018, an 18% increase from 2017.[75] (Of these, 202 were FCPA-related.[76]) Second, on March 19, 2018, the SEC announced its highest-ever Dodd Frank whistleblower awards, with two whistleblowers sharing close to $50 million, and a third whistleblower receiving more than $33 million.[77] These were followed in September with additional awards in a single case of $39 million to one whistleblower, and $15 million to another.[78]

Accordingly, the Dodd-Frank whistleblower award program seemingly continues to be an active source of new cases for the SEC (and indirectly for the DOJ). The program is well-publicized, and unlikely

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[72] US Securities and Exchange Commission, Annual Report, Division of Enforcement (2018), at 12, *available at*, https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

[73] *See* US Department of Justice Letter from Sandra Mosser to Cas Hashemi re: Polycom, Inc. (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Polycom, Inc.*, Rel. No. 84978, File No. 3-18964 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84978.pdf.

[74] The whistleblower program was created by Congress in 2010 in Section 922 of the Dodd-Frank Act. Office of the Whistleblower, US SEC. & EXCH. COMM'N, https://www.sec.gov/whistleblower/resources; *see* 15 USC. § 78u-6. As part of the program, the SEC can provide monetary awards to eligible individuals who provide valuable original information that leads to an SEC enforcement action for more than $1 million in sanctions. 15 USC. § 78u-6(a-b). The SEC can award between 10% and 30% of the money collected. 15 USC. § 78u-6(b).

[75] Mengqi Sun, *SEC Whistleblower Program Has Record-Breaking Year*, WALL ST. J., Nov. 16, 2018.

[76] Richard L. Cassin, *SEC Receives 202 FCPA Whistleblower Tips FY2018*, THE FCPA BLOG (Nov. 21, 2018, 7:38 AM), http://www.fcpablog.com/blog/2018/11/21/sec-receives-202-fcpa-whistleblower-tips-fy2018.html.

[77] To protect the confidentiality of the whistleblowers, the SEC did not disclose information on the nature of the case. US Securities and Exchange Commission Press Release No. 2018-44: SEC Announces Its Largest-Ever Whistleblower Awards (Mar. 19, 2018).

[78] To protect the confidentiality of the whistleblowers, the SEC did not disclose information on the nature of the case. US Securities and Exchange Commission Press Release No. 2018-179: SEC Awards More than $54 Million to Two Whistleblowers (Sept. 6, 2018).

to be cut back anytime soon. These increasing numbers demonstrate the possibility that an employee may make a direct report of wrongdoing to the government and illustrate why corporations must continue to strengthen their own compliance programs to increase the likelihood that they will learn about, and be able to remediate, wrongdoing before a federal agency does.

II. RECENT POLICY ANNOUNCEMENTS

As previewed above, the DOJ made three potentially significant FCPA-related policy announcements in 2018.

A. No "Piling On" Policy

As noted above, in May 2018, the DOJ announced a Policy on Coordination of Corporate Resolution Penalties ("the No 'Piling On' Policy").[79] The policy was introduced by Deputy Attorney General Rod Rosenstein at a white-collar conference in New York City and applies to all corporate resolutions, not just FCPA-related actions.[80]

The goal of the policy is to limit duplicative penalties imposed on corporations for the same conduct by different law enforcement agencies by coordinating resolutions among the agencies, both domestically and abroad.[81] The policy contains four guiding principles:

1. DOJ attorneys should not use criminal authority to impose additional civil or administrative fines;

2. DOJ attorneys should coordinate with one another to avoid duplicative fines;

3. DOJ attorneys should coordinate with non-DOJ enforcement agencies, including foreign enforcement authorities; and

4. DOJ should ensure that coordination does not prevent full vindication of the interests of justice.[82]

While the first three factors work to reduce the total amount of fines imposed on corporations, the fourth factor allows DOJ discretion to impose potentially large fines, even in addition to fines levied by other government agencies, when it deems such fines necessary. The policy sets out several factors for DOJ attorneys to consider in such instances, including the egregiousness of a company's misconduct, any mandated penalties or forfeiture, the risk of delay, the adequacy and timeliness of a company's disclosures, and cooperation.[83]

It is difficult to predict what the practical impact of the policy will be. To date, the policy appears to have largely codified existing practice rather than marked a significant change in the DOJ's approach to calculating penalty amounts. With respect to globally coordinated resolutions in particular, the DOJ has

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[79] Rod J. Rosenstein, Deputy Attorney General, DOJ, 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; Rod J. Rosenstein, Deputy Attorney General, DOJ, Letter to the Heads of Department Components, US Attorneys, Policy on Coordination of Corporate Resolution Penalties (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download.
[80] Rod J. Rosenstein, Deputy Attorney General, DOJ, 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.
[81] Rod J. Rosenstein, Deputy Attorney General, DOJ, Letter to the Heads of Department Components, US Attorneys, Policy on Coordination of Corporate Resolution Penalties (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download.
[82] *See* DOJ, Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct, JUSTICE MANUAL § 1-12.100 (2018).
[83] *See* DOJ, Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct, JUSTICE MANUAL § 1-12.100 (2018).

been practicing a form of "no piling" for some years. The DOJ consistently considers and credits monies corporations pay to foreign authorities against the penalty amount imposed by the DOJ; at times it also coordinates with foreign counterparts by dividing up the problematic conduct, with each agency investigating a particular geography or aspect of a corrupt scheme.[84] The SocGen and Petrobras resolutions in 2018 followed the same pattern with the DOJ crediting penalties paid to French and Brazilian authorities, respectively. Speaking at a conference in July, Deputy Assistant Attorney General Matthew S. Miner called the SocGen settlement a "perfect example" of the No "Piling On" Policy.[85] Going forward, a company trying to manage a significant multi-jurisdiction FCPA matter would do well to remind the DOJ of the No "Piling On" Policy, and urge that prosecutors either coordinate as much as possible with foreign authorities on final resolution amounts or even, in some instances, defer to foreign authorities with a greater interest in prosecuting the alleged misconduct. As we note above at pages 11 and 12, in two cases in 2018 (Guralp and ING), the DOJ deferred entirely to enforcement agencies located in the companies' home jurisdictions.

The policy also does not appear to signal a change with respect to US-only settlements. Domestically, the DOJ and SEC have long sought parallel settlements from companies for the same core conduct in FCPA matters, a practice that many practitioners might have thought to be an obvious form of "piling on."[86] While the SEC has in recent years declined to impose a civil penalty where the DOJ imposed a criminal penalty—and even specifically noted that it was doing so in deference to the DOJ[87]—both agencies still require companies to enter into multiple settlements relating to the same wrongdoing. The DOJ and SEC continued to enter into joint resolutions throughout 2018, and practitioners can likely conclude that that practice will continue under the policy.[88]

Ultimately, whether the policy will affect penalty calculations in domestic or global resolutions will be difficult for companies to tell. The final decision about the "right" total resolution is essentially made by government agencies behind closed doors, and it is not clear whether, for example, the DOJ would in fact extract higher penalties in the absence of simultaneous foreign settlements or if in "crediting" monies paid to foreign agencies, it is deducting amounts from its penalty that the Department would not have sought to collect anyway.

B. Monitorship Memorandum

In another potentially significant shift in DOJ policy, in October 2018, Assistant Attorney General for the US Department of Justice Criminal Division Brian A. Benczkowski announced revised guidance

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[84] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Petróleo Brasileiro S.A. – Petrobras*, Rel. No. 10561, File No. 3-18843, at 9-10 (Sept. 27, 2018); Non-Prosecution Agreement between US Department of Justice and Petróleo Brasileiro S.A. – Petrobras, 3, 6 (Sept. 26, 2018), https://www.justice.gov/criminal-fraud/file/1097256/download; Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253-DLI, 14 (June 5, 2018); Plea Agreement, *United States of America v. ZAO Hewlett-Packard A.O.*, No. CR-14-201-DLJ, 16 (N.D. Cal. Apr. 9, 2014); Plea Agreement, *United States of America v. Innospec Inc.*, No. 10-CR-00061-ESH, 4 (Mar. 5, 2010).

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

[86] *See* Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 514-17, 520 (2015) (recommending coordination and avoidance of duplicative actions, which is consistent with the No "Piling On" Policy).

[87] In two of the four 2018 joint cases, the SEC explicitly stated that it was not imposing a civil penalty because of the DOJ's criminal penalty. *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 83593, File No. 3-18571, ¶ 62 (July 5, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Legg Mason, Inc.*, Rel. No. 83948, File No. 3-18684, ¶ 37 (Aug. 27, 2018).

[88] Representatives from the US Commodities Futures Trading Commission, US Attorney's Office for the S.D.N.Y., and the SEC also stated throughout the year that the policy did not impose a new practice. Kelly Swanson, *Threatening Authorities with Piling On Memo is "Not a Good Strategy", Says Enforcement Chief,* GLOBAL INVESTIGATIONS REVIEW, Nov. 9, 2018.

regarding the imposition and selection of monitors in corporate resolutions.[89] The 2018 guidance memorandum "Selection of Monitors in Criminal Division Matters" ("2018 Monitor Memorandum") incorporates certain principles from prior DOJ guidance and makes explicit numerous additional considerations for assessing the need for, and potential scope of, a corporate monitor.[90] And, importantly, unlike prior guidance that applied only to DPAs and NPAs, the new policy also extends to guilty pleas.[91]

In connection with the 2018 Monitor Memorandum, Benczkowski also announced a significant change in the Department's approach to assessing corporate compliance programs, which had previously been done by a dedicated DOJ Compliance Consultant who advised prosecutors on compliance issues. The DOJ has formally abandoned that model, Benczkowski stated, explaining that the DOJ deemed the model to be "shortsighted from a management perspective," and suggesting that a single person was not capable of effectively evaluating compliance programs across different industries and companies.[92] Benczkowski also asserted that trial attorneys and supervisors working on a corporate case were in the best position to evaluate the adequacy of a company's compliance program and had the expertise to do so effectively.[93]

It is unclear what triggered the DOJ's decision to move away from the compliance consultant model. Since the departure of the first (and only) consultant to hold the position—Hui Chen—that position had remained unfilled despite two separate postings for the job.[94] Chen had served as a compliance consultant for the DOJ since late 2015 and possessed a depth of compliance experience, including previous stints as an in-house compliance officer in the technology, banking, and pharmaceutical industries. It remains to be seen how line prosecutors will evaluate corporate compliance programs in the absence of a dedicated compliance expert.

With regard to the imposition of monitors, the 2018 Monitor Memorandum elaborates on factors prosecutors should weigh when considering imposing a compliance monitor and determining the scope of the monitorship.

First, the new policy emphasizes correct scoping. Specifically, the policy states that "the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."[95] Benczkowski further noted in his speech announcing the new policy that that tailored scoping must be maintained throughout the life of a monitorship. He stated that DOJ attorneys have responsibility to continually evaluate and ensure that "monitors are acting within the appropriate scope of their mandate."[96] He also encouraged companies to raise with the DOJ "any legitimate

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[89] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.

[90] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), at 1 & n.1, https://www.justice.gov/criminal-fraud/file/1100366/download.

[91] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters(Oct. 11, 2018), at 1 n.3, https://www.justice.gov/criminal-fraud/file/1100366/download.

[92] Brian A. Benczkowski, Assistant Attorney General, DOJ, 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.

[93] Brian A. Benczkowski, Assistant Attorney General, DOJ, 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. AAG Benczkowski predicted that a DOJ compliance consultant would "quickly feel a strong pull to the private sector," due to the demand of his or her expertise, and leave the department, depriving it of a long-term inhabitant in the role and the benefits therefrom. *Ibid.*

[94] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018* (Jan. 12, 2018) at 6-7, https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.

[95] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters, (Oct. 11, 2018), at 2, https://www.justice.gov/criminal-fraud/file/1100366/download.

[96] Brian A. Benczkowski, Assistant Attorney General, DOJ, 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.

concerns regarding the authorized scope of the monitorship, cost or team size."[97] This emphasis on appropriately scoped monitorships will undoubtedly be well received by both companies and defense counsel alike amid frequent criticism that monitorships can quickly spiral beyond the conduct at issue.

Next, in addition to two "broad considerations" included in prior DOJ guidance from 2008, (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," the 2018 Memorandum specifically directs prosecutors to also consider whether the misconduct:

- involved the manipulation of books and records;
- involved the exploitation of an inadequate compliance program or internal controls; and
- was pervasive across the organization or approved or facilitated by senior management.[98]

Changes that a company has undergone since the misconduct are also relevant. The memo instructs prosecutors to consider whether:

- misconduct occurred under different leadership or in a compliance environment that no longer exists;
- the corporation has made significant investments in, and improvements to, its compliance and controls systems; and
- any remedial improvements have been tested to demonstrate that they would prevent or detect future similar misconduct.

The new policy prioritizes minimizing burdens on businesses and takes into account business realities. It requires prosecutors to consider the projected monetary costs of a monitor, as well as whether the proposed scope of the monitor's role is tailored to avoid unnecessary burdens to business operations. The new policy states that monitors should be imposed only where there is a demonstrated need and clear benefit to doing so, but where a compliance program and controls are effective at the time of resolution, a monitor will likely not be necessary. AAG Benczkowski emphasized that monitors should be the exception, not the rule, and noted that only one-third of DOJ's corporate resolutions in the past five years have involved the imposition of a monitor.[99]

It is thus clear that the DOJ now has a more detailed playbook for determining whether to impose a compliance monitor in connection with a corporate resolution and assessing the appropriate scope of the monitorship. It appears that the Criminal Division intends to give companies greater opportunity to demonstrate during the resolution process that a monitor is not warranted, whether by overhauling a compliance program in tandem with an investigation, taking strong remedial action, or simply arguing successfully that the misconduct was the result of a few rogue actors and was not pervasive. (Remarks offered by United States Attorney for the Southern District of New York Geoffrey Berman at the same conference at which Benczkowski announced the new policy reiterate this view; Berman "suggest[ed] the steps an entity should consider taking if it wanted to improve its chances of avoiding the appointment of a

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[97] Brian A. Benczkowski, Assistant Attorney General, DOJ, 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.

[98] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), at 2, https://www.justice.gov/criminal-fraud/file/1100366/download.

[99] Brian A. Benczkowski, Assistant Attorney General, DOJ, 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 (noting that the "overwhelming majority" do not involve a monitor).

monitor," and noted that if a company makes certain changes or enhancements "before the conclusion of the government's investigation, there will be a strong record from which to argue that the company is capable of full remediation on its own and a monitor is unnecessary.") All in all, these new principles may reduce the number of corporate compliance monitors and their reach within corporations undergoing a monitorship.

With respect to the selection of corporate compliance monitors, there is little substantive difference between the newly announced procedures and those set forth in prior DOJ guidance on this topic. There is, however, one change that could prove noteworthy to companies undergoing the selection process: in submitting the names of proposed candidates, a company must now provide a statement identifying which of the three candidates is the company's first choice to serve as the monitor (there was previously no requirement to make such an identification).

The Chair of the SEC's foreign bribery unit, Charles Cain, has indicated that the SEC is supportive of the DOJ's approach. In remarks in November 2018, Cain said that the era of "cookie-cutter" monitorships is over, and that authorities have adopted a more restrained attitude toward monitors.[100] One example of this more tailored approach to the scope of monitors' purview may be seen in the September 28, 2018 settlement reached between the SEC and **Stryker Corp**. for violations of the FCPA's internal accounting controls and books and records provision.[101] The monitorship detailed in the settlement is tailored to reviewing Stryker's internal controls, policies, and procedures relating to the use of and transactions by third parties; this narrow scope directly ties the monitor's responsibility with the underlying charges against Stryker, which involved improper payments made by third parties.

The World Bank also reevaluated its selection of monitors in 2018. In March 2018, the World Bank indicated that they will no longer informally disqualify monitor candidates working at law firms that had faced the Bank's anti-corruption unit, the Integrity Vice Presidency, as adversaries in sanctions proceedings as long as the candidates are not currently advising on those cases.[102] This decision will widen the options of available candidates.

Of the six DOJ corporate resolutions in 2018, only one has included a monitor and this imposition of a monitor predated the new guidance issued in October.[103] As with other DOJ policy changes in 2018, the 2018 Monitor Memo reflects a more business-friendly attitude.[104] Companies will likely have a more receptive audience when it comes to articulating the expense and disruption that a monitor would impose, and the ensuing harm to business and profitability. They may also face better odds at avoiding a monitor altogether if they improve compliance and internal controls quickly and can demonstrate their effectiveness.

C. Changes to "Yates Memorandum"

While reiterating its commitment to prosecuting culpable individuals in 2018, the DOJ also softened its requirements relating to what information corporations must provide on individual bad actors in order to qualify for cooperation credit. Pursuant to a 2015 memo entitled Individual Accountability for Corporate Wrongdoing (known as the "Yates Memorandum"), the DOJ had previously employed an "all or

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[100] Clara Hudson, *SEC Official: No More "Cookie-Cutter" Monitorships*, GLOBAL INVESTIGATIONS REVIEW (Nov. 1, 2018), https://globalinvestigationsreview.com/article/jac/1176432/sec-official-no-more-"cookie-cutter"-monitorships.
[101] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853 (Sept. 28, 2018).
[102] Dylan Tokar & Adam Dobrik, *World Bank Revisits Stance on Who Can Serve as a Monitor*, GLOBAL INVESTIGATIONS REVIEW (Mar. 7, 2018), https://globalinvestigationsreview.com/article/jac/1166392/world-bank-revisits-stance-on-who-can-serve-as-a-monitor.
[103] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118 (D.D.C. Apr. 30, 2018).
[104] See also Rod J. Rosenstein, Deputy Attorney General, DOJ, Remarks at Compliance Week's 2018 Annual Conference for Compliance and Risk Professionals (May 21, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-compliance-week-s-2018-annual ("Improving the business environment is a top priority of the Trump Administration.").

nothing" approach in all investigations, including FCPA-related cases, that barred corporations from any cooperation credit if they failed to provide information on all employees who were involved in criminal conduct. But on November 29, 2018, Deputy AG Rosenstein announced that going forward the DOJ would require corporations to disclose information only on employees who were "substantially involved in or responsible for the misconduct at issue." The new policy does not define "substantially involved in or responsible for," so corporations must still be careful to not scope investigations more narrowly than the DOJ would expect and to communicate effectively with the DOJ about its expectations. At the same time, the policy change should work to reduce the overall scope and burden of corporate investigations. According to Rosenstein, the change was intended to make DOJ policy workable given the real-world realities of limited investigation resources. The change also dovetails well with the DOJ's stated intention to resolve investigations more quickly and prioritize more important cases. For example, Rosenstein noted in his speech announcing the policy change that there had been "concerns" about "the inefficiency of requiring companies to identify every employee involved regardless of relative culpability," and clarified that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted."

III. KEY INVESTIGATION-RELATED DEVELOPMENTS

A. Declinations and Case Closures

As noted above, in 2018, the DOJ issued four public declinations in FCPA-related matters, a slight increase from the two declinations issued in the year prior. Apart from declinations, both the DOJ and SEC continued to close cases throughout the year where presumably they determined that the facts did not support bringing charges.

1. 2018 FCPA Corporate Enforcement Policy Declinations

The DOJ issued declinations under the FCPA Corporate Enforcement Policy in 2018 to **Dun & Bradstreet**, **Guralp Systems Limited** ("Guralp"), **Insurance Corporation of Barbados Limited** ("ICBL"), and **Polycom Inc.**[105] Each company received a formal declination letter stating that, despite the DOJ's conclusion that FCPA violations occurred, the DOJ would not bring charges. Consistent with the terms of the Corporate Enforcement Policy, companies were deemed by the DOJ to have, among other things: (1) timely and voluntarily disclosed the misconduct, (2) cooperated fully with the DOJ, and (3) undertaken comprehensive remediation.

Notably, despite not being subject to criminal charges, each of the four companies that received declinations still faced actual or anticipated financial penalties from either the DOJ or other agencies. In the case of Dun & Bradstreet, the company paid approximately $9 million in a parallel resolution with the SEC. In the case of ICBL, the company paid approximately $94,000 in disgorgement to the DOJ itself (continuing a practice the DOJ started in 2016 in cases with no parallel SEC resolution). In the case of Guralp, while no financial penalty has yet been levied, the company is currently negotiating a settlement with the UK SFO that will likely include a penalty. And, finally, in the case of Polycom, as part of the DOJ declination, the company was required to disgorge a combined $31 million in penalties to the SEC, the United States Treasury Department, and the United States Postal Inspection Service Consumer Fraud Fund.

In the case of Gurlap and ICBL, the DOJ also asserted that the cases involved aggravating circumstances—specifically, the involvement of executive management—but that the Department nevertheless chose not to bring enforcement actions.[106] Under the Corporate Enforcement Policy,

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[105] US Department of Justice, Declinations (updated Dec. 26, 2018), https://www.justice.gov/criminal-fraud/pilot-program/declinations.

[106] Matthew S. Miner, Deputy Assistant Attorney General, DOJ, Remarks at 5th Annual GIR New York Live Event (Sept. 27, 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.

companies that voluntarily disclose but have aggravating circumstances do not receive a "presumption" of declination. Importantly, the DOJ made clear in 2018 that even without a presumption such companies can still receive declinations and that aggravating circumstances "by no means preclude a declination."[107]

- The **Dun & Bradstreet** declination, announced April 23, 2018, was issued in conjunction with the US Attorney's Office for the District of New Jersey. This was the first declination issued under the Corporate Enforcement Policy.[108] According to settlement papers from a parallel resolution with the SEC, the conduct at issue involved improper payments made by two Chinese Dun & Bradstreet subsidiaries to Chinese government officials in exchange for information and data important to the company's business of providing market reports, industry reports, and other commercial information.[109]

- The **Guralp** declination, announced August 20, 2018, was issued in conjunction with the US Attorney's Office for the Central District of California. According to the declination letter, the conduct at issue involved improper payments to the director of a government-funded geosciences research center in Korea. The DOJ's declination letter specifically noted that Guralp "assisted the Department with the prosecution of [the research center director] for violating the US money laundering statute." The letter further attributed DOJ's decision to decline prosecution to the fact that Guralp was "a UK company with its principal place of business in the UK" and was "subject [to] an ongoing parallel investigation by the UK'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." The UK SFO investigation is still ongoing.

- The **ICBL** declination, announced August 23, 2018, was issued in conjunction with the US Attorney's Office for the Eastern District of New York. According to the declination letter, the conduct at issue involved "high-level employees" at ICBL making improper payments in 2015 and 2016 to the Barbados Minister of Industry, Donville Inniss, in exchange for government insurance contracts that ultimately earned ICBL nearly $94,000 in net profits. The declination letter attributed the declination in part to "the fact that the Department has been able to identify and charge the culpable individuals." This presumably refers to Inniss, whom the DOJ charged with money laundering violations in March 2018. The declination letter also noted that ICBL had agreed to disgorge to the DOJ the approximately $94,000 in net profits earned from the contracts obtained through Inniss.

- The **Polycom** declination was announced December 20, 2018.[110] According to the declination letter, the conduct at issue involved bribe payments made by employees of Polycom's Chinese subsidiaries and the subsidiaries knowingly and willfully causing Polycom's books and records to be false.[111] A parallel resolution with the SEC describes how employees, including the Vice President of a Chinese subsidiary, provided discounts to Polycom's distributors and resellers, knowing that those discounts would be used to make payments to Chinese officials in exchange for assistance in obtaining orders for Polycom products.[112] In addition to the company's voluntary

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[107] https://www.lexology.com/library/detail.aspx?g=8b1b5a2f-48f5-4fd6-9925-832eaebc9eda.
[108] US Department of Justice Letter from Sandra Moser to Peter Spivack re: The Dun & Bradstreet Corp., at 1 (Apr. 23, 2018), https://www.justice.gov/criminal-fraud/file/1055401/download.
[109] US Securities and Exchange Commission Press Release No. 3-18446: SEC Charges Dun & Bradstreet With FCPA Violations (Apr. 23, 2018), https://www.sec.gov/enforce/34-83088-s. As part of the settlement, which charged Dun & Bradstreet with violations of the internal controls and books and records provision of the FCPA, the company agreed to pay the SEC more than $9 million in financial penalties, including $6.07 in disgorgement, $1.14 million in prejudgment interest, and a $2 million civil penalty.
[110] US Department of Justice Letter from Sandra Moser to Caz Hashemi re: Polycom, Inc. (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download.
[111] US Department of Justice Letter from Sandra Moser to Caz Hashemi re: Polycom, Inc., at 1 (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download.
[112] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Polycom, Inc.,* Rel. No. 84978, File No. 3-18964 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84978.pdf.

self-disclosure, cooperation, and remediation, the DOJ also credited the declination in part to Polycom's reporting of "unrelated misconduct . . . for investigation and potential prosecution."[113] At the same time, the DOJ also imposed disgorgement of $31 million, the highest disgorgement to date for a declination and a greater amount that the disgorgement imposed by the SEC. We discuss the Polycom disgorgement in more detail below at page 37.

2. Cases Closed by the DOJ and SEC

Public declinations reflect only a portion of the investigations closed by the DOJ and SEC in a given year. Case closures also occur when the DOJ and SEC end an investigation without bringing an enforcement action or issuing a public declination letter. The DOJ and SEC typically communicate decisions to close a case to the companies under investigation; those companies then decide whether to report the closures publicly, often choosing to do so only when the existence of the investigation has been previously disclosed. In 2018, public reports of investigations closed by the DOJ and SEC occurred at a slightly higher rate than the prior year, with 17 publicly reported closures in 2018 compared to 15 in 2017.[114] In each year, of course, it is not known how many companies received notifications of a case closure and chose not to publicly disclose it.

Because the DOJ and SEC do not comment publicly on closures, it is unclear why government agencies elect not to bring an action or issue a formal declination in any given case. Public announcements of case closures rarely detail any explanation provided by the DOJ and/or SEC to the company, though companies often highlight their own voluntary disclosure, cooperation, and/or remedial efforts, suggesting that good corporate behavior was the basis for the closure. One company in 2018—Ensco—indicated that the DOJ itself explicitly acknowledged the company's full cooperation when notifying the company of the closure.

There are other potential reasons that the DOJ and SEC may close a case, however. The most obvious is that these are cases in which the government concludes that charges are not supported, whether because of insufficient evidence, jurisdictional limits, or other issues. In fact, in 2018, one company—Transocean— specifically noted that the company's internal investigation found no evidence to support the allegations of wrongdoing and that the company had met with the SEC and DOJ to share this fact.[115] The fact that many case closures may represent instances where the government could not make a case tends to be obscured by the constant focus on good corporate behavior, however. Practitioners and the public would be better served if, like Transocean, companies indicated when they believed that there was no FCPA liability. Similarly, it would be preferable if the DOJ and SEC informed individuals and entities under investigation where evidence, jurisdiction, or other factors were insufficient to sustain a case under the FCPA, rather than the repeatedly promote self-disclosure, cooperation, and remediation—three factors that support a declination under the Corporate Enforcement Policy where charges could have been brought, but that have no bearing on cases where the government cannot sustain charges to begin with.

Seven companies publicly announced closures of joint (*i.e.*, DOJ and SEC) FCPA-related investigations in 2018.[116] The investigations involved a broad range of conduct—including gifts and travel

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[113] US Department of Justice Letter from Sandra Moser to Caz Hashemi re: Polycom, Inc. ., at 1 (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download.

[114] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018,* at 10 (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.

[115] Transocean Ltd., Quarterly Report (Form 10-Q) (May 1, 2018).

[116] The seven companies that publicly announced closure by both the DOJ and SEC were: **Teradata** (February 2018); **Exterran Corporation** (February 2018); **Archrock Corporation** (May 2018); **Transocean** (May 2018); **Sinovac Biotech** (August 2018); **Ensco** (September 2018); and **Laureate Education** (November 2018). As discussed more below, two other companies—**Cobalt International Energy** and **Core Laboratories N.V.**—had investigations closed by the SEC in 2018 following the closure of DOJ investigations in 2017.

expenses paid for government officials and payments made to government officials for contract awards—across multiple regions, including high-risk regions like Turkey, the Middle East, China, and Brazil. The investigations had also been ongoing for varying periods of time, including some as long as four or five years.

Notably, two companies whose investigations were closed by both the DOJ and SEC were tied to Brazilian national oil company Petrobras. Investigations into one of those companies, Transocean, were closed by the DOJ and SEC in March and April 2018, respectively. The Transocean investigations arose from allegations by a former Petrobras employee that a Transocean agent paid the employee to secure a drilling services contract from Petrobras.[117] The second case closure involved Ensco, a UK oil drilling company, which announced the investigation closures in September 2018.[118] According to Ensco, the DOJ and SEC had investigated a 2008 drilling services agreement between Petrobras and Pride International, an offshore drilling company that Ensco acquired in 2011.[119] Ensco stated that it voluntarily reported the potential misconduct in 2015 and fully cooperated with the government investigations.[120]

Seven other companies publicly announced that the DOJ had closed investigations into the companies.[121] As with the joint closures, the DOJ-specific closures involved a broad range of conduct in many of the same jurisdictions as the joint closures. Most of the investigations had been in progress for four to five years. In six of these cases—Sanofi, Kinross Gold Corporation, United Technologies Corporation, Juniper Networks, Centrais Eléctricas Brasileiras SA ("**Eletrobras**"), and Ciena Corporation—the company has or likely will settle parallel actions with the SEC. Notably, **Kinross Gold Corporation** publicly reported the DOJ's closure in March 2018, although the company indicated that DOJ had alerted the company of the closure in November 2017. Kinross made the March 2018 disclosure at the same time it announced its settlement with the SEC.[122]

In the seventh DOJ closure of 2018, telecommunications company **Millicom** announced in an April 2018 press release that the DOJ had officially closed its investigation related to improper payments made by the company's joint venture in Guatemala.[123] Millicom's release stated that it had self-reported the allegations in October 2015 to both the DOJ and to Swedish authorities. The company reported that

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[117] Transocean Ltd., Quarterly Report (Form 10-Q) (May 1, 2018). *See also* Kelly Swanson, *DOJ and SEC Close Another FCPA Probe Without Charges*, GLOBAL INVESTIGATIONS REVIEW, May 2, 2018, *available at* https://globalinvestigationsreview.com/article/jac/1168920/doj-and-sec-close-another-fcpa-probe-without-charges. In 2010, Transocean settled a separate FCPA investigation involving allegations that it approved approximately $90,000 in bribe payments to Nigerian officials. Transocean entered into a deferred prosecution agreement with the DOJ and agreed to pay a criminal penalty of $13.4 million. Transocean was also ordered to pay $7.3 million in disgorgement and prejudgment interest in a civil settlement with the SEC. *See* Complaint, *SEC v. Transocean Inc*, No. 1:10-cv-01891 (D.D.C. Nov. 4, 2010); Deferred Prosecution Agreement, *United States v. Transocean, Inc.* (S.D. Tx. Oct. 21, 2010).

[118] Ensco plc, Current Report (Form 8-K) (Sep. 4, 2018), *available at* https://www.sec.gov/Archives/edgar/data/314808/000031480818000122/form8k_item801brazilmatter.htm.

[119] Ensco plc, Current Report (Form 8-K) (Sep. 4, 2018), *available at* https://www.sec.gov/Archives/edgar/data/314808/000031480818000122/form8k_item801brazilmatter.htm. Pride was charged in 2010 with bribing government officials in Venezuela, India and Mexico, and had entered into a DPA with the DOJ in 2010. *See* Deferred Prosecution Agreement, *United States v. Pride International Inc.,* No. 10-cr-766, (S.D. Tx. Nov. 4, 2010).

[120] Ensco plc, Current Report (Form 8-K) (Sept. 4, 2018), *available at* https://www.sec.gov/Archives/edgar/data/314808/000031480818000122/form8k_item801brazilmatter.htm. *See also* Clara Hudson, *Ensco Avoids Enforcement Action After FCPA Probe*, GLOBAL INVESTIGATIONS REVIEW (Sept. 4, 2018), https://globalinvestigationsreview.com/article/jac/1173752/ensco-avoids-enforcement-action-after-fcpa-probe.

[121] The companies are Sanofi (February 2018); Juniper Networks (February 2018); Kinross Gold Corporation (March 2018); United Technologies Corporation ("UTC") (April 2018); Millicom (April 2018); Centrais Eléctricas Brasileiras SA ("Eletrobras") (August 2018); and Ciena Corporation (December 2018).

[122] Kinross Gold Corporation, Report of Foreign Private Issuer (Form 6-K) at Exhibit 99-1 (Mar. 26, 2018), https://www.sec.gov/Archives/edgar/data/701818/000114420418016843/tv489527_6k.htm.

[123] Millicom Press Release: DOJ Closes Its Investigation Into Millicom (Apr. 24, 2018), *available at* http://mb.cision.com/Main/950/2504006/828249.pdf; Adam Dobrik, *DOJ Drops FCPA Investigation Into Telecoms Company*, GLOBAL INVESTIGATIONS REVIEW (Apr. 24, 2018), https://globalinvestigationsreview.com/article/jac/1168322/doj-drops-fcpa-investigation-into-telecoms-company

Swedish authorities dropped their investigation in 2016.[124] Millicom is not listed in the United States, and thus there presumably was no investigation by the SEC.

Although there is less detail available as compared to the DOJ closures, three companies publicly announced the closure of SEC investigations in 2018.[125] In each of these cases, the SEC's closure followed a closure or settlement by the company with the DOJ or a foreign regulator.

B. Notable Features of Corporate Resolutions

1. Speeding Up Resolutions

Both the DOJ and the SEC emphasized as a priority shortening the length of investigations in 2018. In March, Daniel Kahn, Chief of the DOJ FCPA Unit, remarked that in 2018, companies would "continue to see an effort to close out cases much more quickly."[126] Kahn cited as examples two major settlements—Odebrecht (settled in 2016) and Keppel Offshore & Marine (settled in 2017)—that were resolved in under 18 months. Kahn added that the DOJ would focus on speeding up resolutions with "lower priority" cases.[127] This message echoes statements made last year by acting Principal Deputy Assistant Attorney General Trevor McFadden, who stated that FCPA investigations should be "measured in months, not years." [128]

On the SEC front, during a securities conference in May, SEC Commissioner Hester Peirce stated that one of the issues she is focused on "is the length of SEC investigations." [129] She explained the reasoning behind this goal as twofold: to reduce the burden on companies under investigation and to address certain challenges associated with investigating older conduct.[130] Peirce explained that while there are circumstances beyond the SEC's control that affect the length of investigations, the SEC "is making great strides at shortening the enforcement timeline."[131] Nevertheless, she added that "there is more progress to be made."[132]

Review of 2018 resolutions indicates that there is indeed room for progress to be made. Many of the investigations closed in 2018 had been pending for years. This coincides with the observation made by Kara Brockmeyer, former Chief of the SEC Enforcement Division's FCPA unit, that "[w]hat you're seeing in any given year is the result of what agencies were already doing three to five years earlier."[133] For example, **Beam Suntory Inc.** disclosed in November 2012 that it was investigating possible FCPA

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[124] Millicom Press Release: DOJ Closes Its Investigation Into Millicom (Apr. 24, 2018), http://mb.cision.com/Main/950/2504006/828249.pdf; Adam Dobrik, *DOJ Drops FCPA Investigation Into Telecoms Company*, GLOBAL INVESTIGATIONS REVIEW, Apr. 24, 2018, https://globalinvestigationsreview.com/article/jac/1168322/doj-drops-fcpa-investigation-into-telecoms-company.

[125] **Cobalt International Energy** (January 2018); **Core Laboratories N.V.** (January 2018); and **ING Group N.V.** (September 2018).

[126] Adam Dobrik, *DOJ: We Are Speeding Up Cases*, GLOBAL INVESTIGATIONS REVIEW (Mar. 2, 2018), https://globalinvestigationsreview.com/article/jac/1166279/doj-we-are-speeding-up-cases.

[127] Adam Dobrik, *DOJ: We Are Speeding Up Cases*, GLOBAL INVESTIGATIONS REVIEW (Mar. 2, 2018), https://globalinvestigationsreview.com/article/jac/1166279/doj-we-are-speeding-up-cases.

[128] Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, DOJ, Remarks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti.

[129] Hester M. Peirce, Commissioner, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118.

[130] *See* Hester M. Peirce, Commissioner, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118.

[131] Hester M. Peirce, Commissioner, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118.

[132] Hester M. Peirce, Commissioner, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118.

[133] Adam Dobrik, *Companies Would Be "Short-Sighted and Foolish" To Cut FCPA Compliance Resources, Says Former DOJ Unit Chief*, GLOBAL INVESTIGATIONS REVIEW (Nov. 13, 2018), https://globalinvestigationsreview.com/article/jac/1176873/companies-would-be-%E2%80%9Cshort-sighted-and-foolish%E2%80%9D-to-cut-fcpa-compliance-resources-says-former-doj-unit-chief.

violations and had notified the DOJ and SEC of its investigation.[134] However, it was not until July 2018—after almost six years—that it settled with the SEC.[135] The Dun & Bradstreet investigation also lasted six years before a settlement with the SEC was reached and a declination from the DOJ was obtained.[136] Therefore, it remains to be seen whether the agencies will be able to deliver on their stated goals of shorter investigations in 2019.

2. Repeat Offenders

US authorities resolved another FCPA action against a repeat offender in 2018, following on multiple repeat offender settlements in 2017.[137] This persistent government focus on companies with historical FCPA settlements suggests that, rather than immunizing corporations from future enforcement, settling an FCPA case may lead to continuing or increased risk of additional charges. There are several possible reasons for this. First, a company might be subject to ongoing disclosure obligations under the terms of its first settlement with the government and thus be required provide enforcement agencies with evidence of violations that it later discovers. Alternatively, a company may be required to strengthen its FCPA compliance program under its first settlement, and in the course of doing so identify additional potential violations. It is also possible that whistleblowers may feel emboldened to raise potential violations where a company has already resolved FCPA charges, leading to additional charges.

In 2018**,** Stryker Corp. ("Stryker"), which settled FCPA charges with the SEC in 2013, resolved charges with the SEC again on September 28, 2018 for violations of the books and records and internal accounting controls provisions of the FCPA.[138] According to the settlement papers, Stryker's internal accounting controls were insufficient to detect the risk of improper payments by third parties in multiple regions, including India, China, and Kuwait; the SEC also alleged that Stryker's India subsidiary failed to maintain accurate books and records.[139]

The conduct at issue, as discussed above, did not give rise to any allegations of a specific improper payment and in fact appears to have been fairly low-level. Multiple allegations related to technical violations of Stryker's own internal policies, such as the failure to fully document transactions or to conduct due diligence on sub-distributors.[140] The alleged conduct also at times did not appear to directly benefit Stryker—in one instance, the SEC alleged that Stryker's dealers improperly inflated invoices for private hospitals, which enabled the *hospitals* to profit by overbilling patients.[141] Indeed, the order did not allege that Stryker earned any amount of illicit profits from the conduct.

Nonetheless, Stryker agreed to a $7.8 million penalty and, continuing a trend from 2017 for repeat offenders, was required to retain an independent monitor, which will review and evaluate the company's internal controls, practices, and procedures relating to the use of third parties who sell on

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[134] Beam Inc., Quarterly Report (Form 10-Q) at 18 (Nov. 8, 2012).
[135] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Beam, Inc.*, Rel. No. 83575, File No. 3-18568 (July 2, 2018).
[136] The Dun & Bradstreet Corp., Current Report (Form 8-K) at 1 (Mar. 18, 2012) (announcing investigation and voluntary report to the DOJ and SEC); Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Dun & Bradstreet Corp.*, Rel. No. 83088, File No. 3-18446 (Apr. 23, 2018); US Department of Justice Letter from Sandra Moser to Peter Spivack re: The Dun & Bradstreet Corporation (Apr. 23, 2018), https://www.justice.gov/criminal-fraud/file/1055401/download.
[137] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 11 (January 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.
[138] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853 (Sept. 28, 2018).
[139] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, ¶¶ 24-28 (Sept. 28, 2018).
[140] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, ¶¶ 6, 7, 18 (Sept. 28, 2018).
[141] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, ¶ 17 (Sept. 28, 2018).

behalf of the Stryker.[142] Stryker previously settled charges with the SEC in 2013 for violations of the books and records and accounting controls provisions of the Exchange Act, which may explain why, despite the relative insignificance of the conduct at issue, the SEC nonetheless elected to bring an action. The 2013 charges against Stryker related to alleged bribes paid by Stryker's subsidiaries in Argentina, Greece, Mexico, Poland, and Romania to government-employed doctors and health care professionals.[143] In that settlement, Stryker agreed to a total monetary penalty of $13.3 million.[144]

GlaxoSmithKline ("GSK"), which settled an FCPA matter with the SEC in 2016, announced in 2018 that it was subject to another government investigation for potential FCPA violations. On February 7, 2018, the company reported that it had informed the SEC and the DOJ about an inquiry by the UK Serious Fraud Office into third-party advisers GSK hired in China, and that both US agencies had requested further information.[145] GSK's prior SEC settlement, entered into on a neither-admit-nor-deny basis, was for violations of the internal controls and recordkeeping provisions of the FCPA and related to allegations that its China-based subsidiaries provided improper benefits to local healthcare providers in exchange for increased prescriptions and purchases of GSK products.[146] No charges have been announced stemming from the February 2018 disclosure.

3. SEC Continues to Bring Accounting Charges Without Direct Evidence of Bribery

The SEC brought two actions in 2018 based on internal controls and books and records violations without citing direct evidence of bribery: Stryker and **Elbit Imaging Ltd.** ("Elbit"). The SEC thus continued—as it had indicated it would[147]—its practice of insisting on FCPA resolutions even when it is unable to garner compelling evidence of a bribe being paid to obtain business. These actions follow two similar actions in 2017, which we noted in our 2017 Year-in-Review as particularly aggressive uses of the FCPA internal controls provision.[148] Each of these two 2018 actions settled for relatively small monetary penalties, with repeat offender Stryker receiving the largest penalty.

In the case of Elbit, Elbit and its indirect subsidiary, Plaza Centers NV ("Plaza"), allegedly retained third-party service providers in connection with projects in Romania and the US and paid the third parties a total of approximately $27 million.[149] While the SEC noted that Elbit and Plaza mischaracterized the payments as legitimate business expenses, it alleged only that "some or all of the funds *may have* been used to make corrupt payments to Romanian government officials or were embezzled."[150] Elbit paid the SEC a $500,000 civil penalty to settle the matter.

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[142] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, at 8-12 (Sept. 28, 2018).
[143] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 70751, File No. 3-15587, ¶ 1 (Oct. 24, 2013).
[144] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 70751, File No. 3-15587, at 8 (Oct. 24, 2013).
[145] Dylan Tokar, *After Resolving FCPA Violations in 2016, GSK Reports New Problem to US*, GLOBAL INVESTIGATIONS REVIEW (Feb. 8, 2018), https://globalinvestigationsreview.com/article/jac/1153488/after-resolving-fcpa-violations-in-2016-gsk-reports-new-problem-to-us.
[146] Order Instituting Cease-and-Desist Proceedings, *In the Matter of GlaxoSmithKline plc*, Rel. No. 79005, File No. 3-17606, § III, ¶¶ B, Q (Sept. 30, 2016).
[147] Kelly Swanson, *Amid criticism, SEC official says commission will continue to bring FCPA accounting charges*, GLOBAL INVESTIGATIONS REVIEW (Apr. 24, 2018), https://globalinvestigationsreview.com/article/jac/1168349/amid-criticism-sec-official-says-commission-will-continue-to-bring-fcpa-accounting-charges (describing statements by Paul Block from SEC's Boston Office).
[148] *See* WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018, at 38-39* (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.
[149] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, Rel. No. 82849, File No. 3-18397, ¶¶ 4-17 (Mar. 9, 2018).
[150] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, Rel. No. 82849, File No. 3-18397, ¶ 20 (Mar. 9, 2018) (emphasis added).

In the case of Stryker, the SEC alleged various failings in Stryker's operations in India, China, and Kuwait, including the failure to investigate problematic billing practices, to sufficiently document transactions, to train and monitor distributors and sub-distributors, and to prevent duplicative payments to healthcare providers.[151] While noting that some of these deficiencies "increased the risk of bribery and other improper payments," the SEC did not allege that any specific improper payments had been made.[152] Stryker paid $7.8 million in civil penalties and will retain an independent compliance consultant.[153] Stryker previously settled similar charges with the SEC in 2013, and the fact that Stryker was a repeat offender may have contributed to the SEC's more aggressive use of accounting charges in its case. In fact, the SEC specifically noted that the failures described in the 2018 order were "unacceptable, especially as this is not the first time the company has been charged for these types of violations." [154]

Notably, although the DOJ did bring a criminal case based exclusively on controls violations in 2017, it did not do so in 2018.

4. Resolution of An Additional Hiring Case

The DOJ and the SEC continue to investigate the hiring of relatives of foreign officials by other investment banks. In July, Swiss financial services company Credit Suisse Group AG ("Credit Suisse") and its Hong Kong subsidiary entered into resolutions with the SEC and the DOJ pursuant to which they agreed to pay $29.8 million in disgorgement and a $47 million criminal penalty in order to resolve allegations that the company bribed foreign officials in the Asia-Pacific region by hiring their relatives.[155] Other banks have reportedly also received queries from the SEC and DOJ concerning hiring practices in Asia.[156]

Like the banks that have previously settled these types of matters, the company was alleged to have engaged in a practice of hiring "referred" candidates, who were in many instances connected with government officials, even when those candidates lacked the requisite qualifications for participation in its internship program, or placement as a full-time employee.[157] According to the government's papers, some candidates were hired before being interviewed or having their qualifications vetted, based solely on their connected status.[158] The company admitted that employees also took steps to "give the appearance that normal hiring processes were being followed" for the referred candidates, even though they were not.[159] For example, on one occasion, a manager instructed a subordinate to draft a resume

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[151] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, ¶¶ 15-23 (Sept. 28, 2018).
[152] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, ¶ 22 (Sept. 28, 2018).
[153] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, at 8-12 (Sept. 28, 2018).
[154] US Securities and Exchange Commission Press Release No. 2018-222: SEC Charges Stryker A Second Time for FCPA Violations (Sept. 28, 2018).
[155] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 83593, File No. 3-18571, at 15 (July 5, 2018); Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, at 5 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.
[156] *See* Sophia Yan, *SEC Probes HSBC Hiring in Asia*, CNNMONEY (Feb. 22, 2016), https://money.cnn.com/2016/02/22/news/companies/hsbc-sec-investigation-hiring/index.html; *US SEC expands probe into top banks' hiring in Asia: WSJ*, REUTERS (May 6, 2014), https://www.reuters.com/article/us-sec-usbanks/u-s-sec-expands-probe-into-top-banks-hiring-in-asia-wsj-idUSBREA4601Y20140507 (citing a related *WSJ* article).
[157] Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, Attachment A ¶ 18 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.
[158] Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, Attachment A ¶ 14 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.
[159] Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, Attachment A ¶ 15 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.

for a referred internship candidate.[160] In addition, the company maintained spreadsheets that linked the referred candidates with the business "contribution[s]" made by their foreign official relatives.[161] In total, during a six-year period between 2007 and 2013, the company hired more than 100 candidates who were connected to foreign government officials.[162]

The Credit Suisse resolution, along with public disclosures by other banks, signals that the DOJ and SEC investigations into bank hiring practices have not abated under the current administration.

5. Effect of Voluntary Disclosure and Cooperation on Penalties

Voluntary disclosure and cooperation remained in sharp focus for the DOJ and SEC in 2018 and continued to have a discernible impact in calculating the level of monetary penalties for corporate offenders.

a. DOJ

As announced late last year, the DOJ's Corporate Enforcement Policy rewards companies that timely and voluntarily self-disclose potential misconduct, fully cooperate, and remediate wrongdoing by providing for a "presumption" of a declination.[163] Where a company fulfills these requirements, but aggravating circumstances are present—such as involvement by company executive management, significant profit from the misconduct, pervasive misconduct at the company, or criminal recidivism—the company cannot qualify for a declination, but can still receive other significant benefits, such as a penalty reduction of up to 50% off the low end of US Sentencing Guidelines range.[164] And for companies that demonstrate the sufficiency of their compliance programs, the Policy further provides that no independent monitor should be imposed.[165] Companies that do not voluntarily self-disclose misconduct, but that fully cooperate with the DOJ and engaged in appropriate and timely remediate may receive a reduction of up to 25% off of the low end of the US Sentencing Guidelines range.[166] Conversely, the DOJ has emphasized that a company's failure to voluntarily disclose FCPA violations, or to cooperate with the government, may result in stiffer penalties.[167]

Many of 2018's corporate resolutions reflect the DOJ's adherence to this policy in penalty discounts extended to corporate offenders.

- For example, in the case of **Petrobras**, which did not voluntarily disclose the misconduct, the DOJ awarded full cooperation credit and a discount of 25% off the bottom of the US Sentencing Guidelines fine range due to the company's extensive cooperation and remediation.[168] The DOJ noted that Petrobras had conducted a thorough internal investigation, shared facts discovered

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[160] Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, Attachment A ¶ 15 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.
[161] Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, Attachment A ¶ 17 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.
[162] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 83593, File No. 3-18571, ¶ 3 (July 5, 2018).
[163] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 3-4 (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018; DOJ, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120 (2018).
[164] DOJ, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120 (2018).
[165] DOJ, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120 (2018).
[166] DOJ, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120 (2018).
[167] Rod J. Rosenstein, Deputy Attorney General, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign (noting that where violations of the FCPA come to DOJ's attention through some means other than voluntary reporting, "the Department will take appropriate action consistent with the facts, the law, and the Principles of Federal Prosecution of Business Organizations").
[168] Non-Prosecution Agreement between the US Department of Justice and Petróleo Brasileiro S.A. – Petrobras, at 1, 3 (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download.

during the investigation in real time, and facilitated the DOJ's obtaining interviews from foreign witnesses.[169] The resolution papers also observed that Petrobras separated employees involved in the misconduct and implemented extensive remedial measures, including revamping its compliance program.[170] This 25% discount for full cooperation credit amounted to approximately $284 million in savings.

- By contrast, the **SocGen** resolution papers note that while SocGen received "substantial credit" from the DOJ for its cooperation with the DOJ's investigation, it did not receive "full credit" due to unspecified "issues that resulted in a delay during the early stages of the investigation" that caused the DOJ to independently develop evidence of the alleged misconduct.[171] SocGen received "substantial credit" from the DOJ for helping in: (i) conducting a thorough internal investigation; (ii) collecting and producing evidence located abroad; and (iii) providing frequent and regular updates to the DOJ as to its investigation.[172] Weighing these factors, the DOJ found that SocGen was entitled to an aggregate discount of 20% off the bottom of the US Sentencing Guidelines fine range.[173] For the FCPA-related fines alone, this discount amounted to approximately $146 million in savings. However, if SocGen had received the "full" cooperation credit (*i.e.*, a 25% discount), it could have saved approximately $36 million more.

- Likewise, in the **Credit Suisse** resolution, the DOJ awarded the company "partial credit" for its cooperation, noting that the company had taken significant steps to cooperate, such as conducting an internal investigation, making factual presentations, voluntarily making foreign-based employees available for interviews, and providing translations of key documents.[174] However, because the DOJ deemed the company's cooperation to be "reactive, instead of proactive," and because the company was deemed not to have sufficiently disciplined employees who allegedly engaged in the misconduct, Credit Suisse did not receive full cooperation credit.[175] Therefore, it received a 15% discount off the bottom of the US Sentencing Guidelines fine range.[176] This discount amounted to approximately $8 million in savings. However, if the company had received the "full" cooperation credit (*i.e.*, a 25% discount), it could have saved another approximately $5.5 million in fines.

- In the **Panasonic** resolution as well, the DOJ awarded only partial cooperation credit. However, the DOJ awarded cooperation credit for Panasonic's and its subsidiary's efforts to conduct a thorough internal investigation, provide facts and evidence obtained during the investigation, help with foreign witness interviews in the US, proactively alert the DOJ to material information relevant to the investigation, and disclose conduct in the Middle East of which the DOJ was previously unaware.[177] As a result, Panasonic and its subsidiary received a 20% discount off the bottom of the US Sentencing Guidelines fine range.[178] The discount amounted to approximately $34 million in savings.

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[169] Non-Prosecution Agreement between the US Department of Justice and Petróleo Brasileiro S.A. – Petrobras, at 1-2 (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download.
[170] Non-Prosecution Agreement between the US Department of Justice and Petróleo Brasileiro S.A. – Petrobras, at 2 (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download.
[171] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI) (E.D.N.Y. June 5, 2018), ¶ 4.
[172] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI) (E.D.N.Y. June 5, 2018), ¶ 4.
[173] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI) (E.D.N.Y. June 5, 2018), ¶ 4.
[174] Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, at 1 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.
[175] Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, at 1 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.
[176] Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited, at 2 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download.
[177] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, ¶ 4 (D.D.C. Apr. 30, 2018).
[178] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, ¶ 4 (D.D.C. Apr. 30, 2018).

Reductions in discounts for differing views between the DOJ and companies and their counsel will likely continue to be a source of frustration and disagreement. As a practice tip, regular and open communication between cooperating companies and the government is likely the best way to ensure that full cooperation credit is obtained, but there will no doubt continue to be situations where good faith company decisions relating to timing and scope of investigative steps and productions do not match DOJ expectations.

Apart from penalty discounts under the Corporate Enforcement Policy, the DOJ also limited criminal penalties based on a company's inability to pay in 2018. In particular, **Transportation Logistics International Inc.** ("TLI") received a penalty of only $2 million due to the company's inability (verified by the DOJ) to pay a greater amount.[179] According to its deferred prosecution agreement with the DOJ, TLI's sentencing range originally recommended a minimum fine of $28.5 million.[180] The DOJ granted TLI a 25% discount for full cooperation and remediation, which reduced the fine to approximately $21.4 million, and the DOJ then dramatically cut the fine amount to account for the company's poor financial condition.[181] The $2 million penalty represents a further reduction of 68% on top of the cooperation credit. The DOJ took similar actions in last year's settlement with SBM, cutting a projected fine of $3.4 billion to less than $1 billion in total global payout.[182]

Separately, in 2018 DOJ officials continued to clarify language in the Corporate Enforcement Policy that requires businesses to prohibit the use of "software that generates but does not appropriately retain business records or communications" in order to earn full remediation credit.[183]

In a March 2018 speech, David Johnson, an Assistant Chief in the FCPA Unit at the DOJ, stated that companies should consider whether to allow their employees to use certain messaging services that automatically delete messages, such as WhatsApp, noting that "it's something the Department of Justice is going to be looking at."[184] He further suggested that companies should proactively contemplate "whether there need to be prophylactic measures or workarounds put in place" in order to avoid "having to deal with it in hindsight when records do not exist [when] you're trying to make a pitch to the Department of Justice, or SEC or a foreign authority" about the reasonableness of records not having been retained.[185] The DOJ's FCPA Unit Chief Daniel Kahn echoed these sentiments in remarks on May 8. Kahn stated that companies must prevent "employees from using a software where everything disappears" to be considered by DOJ to have fully remediated.[186] Kahn further noted that "[a] company should not expect full credit if they don't have any records of the misconduct."[187] At the same time, he acknowledged the possibility that a company could have valid reasons for risk-based use of ephemeral messaging and, if so, the DOJ would not "deduct a company from having done something thoughtful."[188]

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[179] Deferred Prosecution Agreement, *United States v. Transport Logistics International, Inc.*, No. 18-CR-00011-TDC, ¶¶ 5, 9 (D. Md. Mar. 12, 2018).
[180] Deferred Prosecution Agreement, *United States v. Transport Logistics International, Inc.*, No. 18-CR-00011-TDC, ¶ 8 (D. Md. Mar. 12, 2018).
[181] Deferred Prosecution Agreement, *United States v. Transport Logistics International, Inc.*, No. 18-CR-00011-TDC, ¶ 8 (D. Md. Mar. 12, 2018).
[182] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 27 (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.
[183] DOJ, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120(3) (2018).
[184] Adam Dobrik, *FCPA Prosecutor Urges Companies To Rethink Messaging Services*, GLOBAL INVESTIGATIONS REVIEW (Mar. 8, 2018), https://globalinvestigationsreview.com/article/jac/1166454/fcpa-prosecutor-urges-companies-to-rethink-messaging-services.
[185] Adam Dobrik, *FCPA Prosecutor Urges Companies To Rethink Messaging Services*, GLOBAL INVESTIGATIONS REVIEW (Mar. 8, 2018), https://globalinvestigationsreview.com/article/jac/1166454/fcpa-prosecutor-urges-companies-to-rethink-messaging-services.
[186] Nicole Di Schino, *Making Sense of the DOJ's New Statements on Disappearing Messaging Apps*, THE ANTI-CORRUPTION REP. (May 30, 2018), https://www.anti-corruption.com/article/2785.
[187] Nicole Di Schino, *Making Sense of the DOJ's New Statements on Disappearing Messaging Apps*, THE ANTI-CORRUPTION REP. (May 30, 2018), https://www.anti-corruption.com/article/2785.
[188] Victoria Graham, *WhatsApp, Wickr Seen by Justice Dept. as Tools to Erase* Evidence, BLOOMBERG LAW, May 15, 2018, https://biglawbusiness.com/whatsapp-wickr-seen-by-justice-dept-as-tools-to-erase-evidence/.

Kahn and Johnson both acknowledged the rapidly changing nature of technology in their remarks, but expressed expectations that companies evolve their compliance practices to keep up with the risks certain technologies present.[189] Moreover, they indicated that cost alone would not excuse a company's failure to maintain the necessary records.[190]

b. SEC

While the 2017 Corporate Enforcement Policy only applies to the DOJ, the SEC also has an older, and more informal, policy of rewarding cooperation. The agency's 2001 "Seaboard Report" states that in deciding "whether and how to take enforcement action," the SEC will consider a company's voluntary reporting of the misconduct and its cooperation and remediation.[191] 2018's corporate resolutions indicate the SEC's continued adherence to this approach.

For example, in September 2018, **Sanofi**, a French pharmaceutical company, settled with the SEC for alleged violations of the FCPA's books and records and internal controls provisions related to alleged bribes made to foreign officials in the health care industry in Kazakhstan, the Levant region (including Jordan, Lebanon, Syria, and Palestine), and the Gulf region (including Bahrain, Kuwait, Qatar, Yemen, Oman, and UAE).[192] The SEC noted in its administrative order that, despite the serious nature of the violations, it was reducing Sanofi's fine due to the company's voluntary disclosure of the conduct and the "remedial acts promptly undertaken by [Sanofi] and cooperation afforded the Commission staff."[193] Sanofi's cooperation and remediation efforts included enhancing the company's FCPA compliance program and policies, providing regular factual briefings to the government, and disciplining or terminating culpable employees.[194] Based on this, the SEC determined that it would not impose a civil penalty in excess of $5 million.[195] This appears to be a meaningful cooperation and remediation discount, given the scope and size of the corruption across a number of Sanofi's operations. According to the SEC's order, Sanofi derived more than $17.5 million in profits from the conduct covered by the order: $11.5 million in Kazakhstan, $4.2 million in the Levant, and $1.7 million in the Gulf.[196] Ultimately, Sanofi agreed to pay a $5 million civil penalty and disgorgement and prejudgment interest in the amount of $20.2 million.[197] It also agreed to provide periodic reporting to the SEC for two years on the status of its remediation efforts.[198]

At the time of settlement, Sanofi highlighted its cooperation and the SEC's acknowledgement. Sanofi's CEO Olivier Brandicourt explained: "We have worked diligently to strengthen our compliance programme worldwide and we are pleased the Department of Justice and SEC recognised these efforts

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[189] Nicole Di Schino, *Making Sense of the DOJ's New Statements on Disappearing Messaging Apps*, THE ANTI-CORRUPTION REP. (May 30, 2018), https://www.anti-corruption.com/article/2785.
[190] Nicole Di Schino, *Making Sense of the DOJ's New Statements on Disappearing Messaging Apps*, THE ANTI-CORRUPTION REP. (May 30, 2018), https://www.anti-corruption.com/article/2785.
[191] US Securities and Exchange Commission Press Release No. 2001-117: SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation in Exercising Prosecutorial Discretion (Oct. 23, 2001).
[192] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶¶ A-B (Sept. 4, 2018).
[193] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶ X (Sept. 4, 2018).
[194] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶ X (Sept. 4, 2018).
[195] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § IV, ¶ D (Sept. 4, 2018).
[196] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶¶ L, Q, V (Sept. 4, 2018).
[197] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § IV, ¶ B (Sept. 4, 2018).
[198] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶ Z (Sept. 4, 2018).

and our close cooperation."[199] (The DOJ closed its investigation without bringing an enforcement action against Sanofi in February 2018).[200]

Other 2018 SEC resolutions similarly recognized and rewarded voluntary disclosure and cooperation. For example, the SEC limited a civil penalty against **United Technologies Corporation** ("UTC") to only $4 million, citing the company's "cooperation in [an SEC] investigation and related enforcement action."[201] This also appears to be a meaningful cooperation discount because, according to the SEC's order, UTC obtained a benefit of over $9 million from the misconduct at issue.[202]

And, like the DOJ resolution in TLI, the SEC's resolution in **Vantage Drilling** acknowledged that the SEC had taken into account the company's financial circumstances and inability to pay when setting out its resolution terms.[203] The Vantage Drilling resolution notes that the SEC did not impose financial penalties upon Vantage beyond disgorgement because of Vantage's current poor financial condition.[204]

6. Continued Importance of Due Diligence and Active Monitoring of Third Parties

The SEC's and the DOJ's actions in 2018 once again highlighted the necessity of conducting thorough due diligence on and actively monitoring third parties as potential conduits of improper payments, as the vast majority of enforcement actions involved the use of third parties. In several cases, the government determined that failures in internal controls and/or accounting were to blame for FCPA violations.

For example, in April 2018, **Panasonic Corporation** ("Panasonic") and a US subsidiary **Panasonic Avionics Corporation** ("PAC"), paid a combined $280 million to the DOJ and SEC to resolve allegations that PAC had violated the FCPA's books and records provisions.[205] Panasonic also agreed to retain a corporate compliance monitor for two years in its DPA with the DOJ.[206]

According to the DOJ and SEC resolution papers, PAC hired third party "consultants" for "improper purposes other than for providing actual consulting services.".[207] According to the government's charging documents, PAC retained as a consultant an individual who was employed by a state-owned airline and involved in negotiating a contract amendment between the airline and PAC.[208] The government alleged that PAC paid him a total of $875,000.[209] PAC also allegedly retained as a

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[199] *Sanofi agrees on monetary settlement for bribery charges*, PHARMACEUTICAL TECH., Sept. 5, 2018, https://www.pharmaceutical-technology.com/news/sanofi-bribery-charges/.
[200] Richard L. Cassin, *Sanofi discloses DOJ declination in FCPA investigation*, THE FCPA BLOG (Mar. 8, 2018, 8:22 AM), http://www.fcpablog.com/blog/2018/3/8/sanofi-discloses-doj-declination-in-fcpa-investigation.html.
[201] Order Instituting Cease-and-Desist Proceedings, *In the Matter of United Technologies Corp.*, Rel. No. 84087, File No. 3-18745, at 12 (Sept. 12, 2018).
[202] Order Instituting Cease-and-Desist Proceedings, *In the Matter of United Technologies Corp.*, Rel. No. 84087, File No. 3-18745, ¶ 2 (Sept. 12, 2018).
[203] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vantage Drilling Int'l*, Rel. No. 84617, File No. 3-18899, ¶ 28 (Nov. 19, 2018).
[204] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vantage Drilling Int'l*, Rel. No. 84617, File No. 3-18899, ¶ 28 (Nov. 19, 2018).
[205] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, ¶ 4(i) (D.D.C. Apr. 30, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Panasonic Corp.*, Rel. No. 83128, File No. 3-18459, at 12 (Apr. 30, 2018).
[206] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, ¶¶ 11-14 (D.D.C. Apr. 30, 2018).
[207] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, Attachment A ¶¶ 17-18 (D.D.C. Apr. 30, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Panasonic Corp.*, Rel. No. 83128, File No. 3-18459, ¶ 2 (Apr. 30, 2018).
[208] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, Attachment A ¶¶ 17, 35 (D.D.C. Apr. 30, 2018).
[209] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, Attachment A ¶ 17 (D.D.C. Apr. 30, 2018).

consultant an individual who was simultaneously employed as a consultant for a customer airline.[210] These expenses were ultimately accounted for in Panasonic's books and records as legitimate consulting expenses.[211]

Allegations of other third-party related misconduct in 2018 resolutions included the below:

- **Sanofi** employees in Kazakhstan used local distributors to pay bribes to government officials in exchange for awarding tenders to Sanofi.[212] The employees granted significant discounts of 20%-30% to distributors, which used funds saved from the discounts to make the improper payments.[213] The payments were tracked in internal spreadsheets where they were coded as "marzipans."[214]

- A **Dun & Bradstreet** subsidiary in China made payments to Chinese government officials through third-party agents in exchange for information and data important to the company's business.[215] The SEC order states that the subsidiary "used third-party agents to unlawfully obtain the financial statement data under the mistaken belief that using third parties would shield the company from any legal liability."[216]

- A wholly-owned subsidiary of **United Technologies** made payments to Azerbaijani officials through subcontractors and other third-party intermediaries.[217] The same subsidiary also used a distributor to make payments to an official of a state-owned bank in China.[218] Separately, a joint venture of United Technologies retained and made unsupported payments to a sales agent in China, disregarding the "high probability" that at least some of the money would be used to make unlawful payments to a Chinese official to obtain confidential information from an official at a state-owned airline.[219]

- A subsidiary of **Beam Suntory** in India used third parties to make improper payments to various government employees via false or inflated invoices.[220] The invoices were recorded in Beam's books and records as legitimate commissions, discounts, and other expenses.[221]

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[210] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, Attachment A ¶ 17 (D.D.C. Apr. 30, 2018).
[211] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, Attachment A ¶ 17 (D.D.C. Apr. 30, 2018).
[212] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶ J (Sept. 4, 2018).
[213] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶ K (Sept 4, 2018).
[214] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶ K (Sept. 4, 2018).
[215] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Dun & Bradstreet Corp.*, Rel. No. 83088, File No. 3-18446, ¶¶ 14-18, 22-25 (Apr. 23, 2018).
[216] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Dun & Bradstreet Corp.*, Rel. No. 83088, File No. 3-18446, ¶ 14 (Apr. 23, 2018).
[217] Order Instituting Cease-and-Desist Proceedings, *In the Matter of United Technologies Corp.,* Rel. No. 84087, File No. 3-18745, ¶¶ 8-12 (Sept. 12, 2018).
[218] Order Instituting Cease-and-Desist Proceedings, *In the Matter of United Technologies Corp.,* Rel. No. 84087, File No. 3-18745, ¶¶ 36-38 (Sept. 12, 2018).
[219] Order Instituting Cease-and-Desist Proceedings, *In the Matter of United Technologies Corp.,* Rel. No. 84087, File No. 3-18745, ¶ 2 (Sept. 12, 2018).
[220] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Beam, Inc.*, Rel. No. 83575, File No. 3-18568, ¶ 2 (July 2, 2018).
[221] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Beam, Inc.*, Rel. No. 83575, File No. 3-18568, ¶¶ 13, 25 (July 2, 2018).

- **SocGen** retained a Libyan intermediary to bribe Libyan officials working for dictator Muammar Gaddafi in exchange for business from Libyan financial institutions.[222] The Libyan intermediary received commissions of 1.5% to 3% of the investment amounts, which were disguised as payments for "introductory" services.[223] When one of the financial institutions began to scrutinize the intermediary, SocGen attempted to set up a joint venture with the intermediary to conceal the payments.[224] **Legg Mason** subsidiary Permal was aware of the scheme and the use of the Libyan intermediary, which helped obtain investments for Permal-managed funds.[225]

- **Stryker's** wholly-owned subsidiary in India used third-party dealers to sell medical products to hospitals.[226] At the request of the hospitals, the dealers inflated invoices to hospitals, despite the fact that the hospitals ultimately paid lower prices that had been negotiated with Stryker.[227] Separately, Stryker's primary distributor in Kuwait made at least $32,000 in duplicative per diem payments to Kuwaiti health care providers.[228]

- **Kinross Gold** paid a third-party consultant approximately $12,000 in petty cash in connection with a halted mining permit, and the permit was approved within a month of the payment.[229] There was no evidence that the consultant provided legitimate services.[230] Kinross Gold also engaged with two contractors that had connections to Mauritanian officials, without following its internal accounting controls and requirements for due diligence.[231]

- **Elbit Imaging** and an indirect subsidiary paid third parties $27 million in connection with a project in Romania and the sale of assets in the United States, despite having no evidence that the third parties provided the services for which they had contracted.[232] $14 million was paid to two consultants in connection with the project in Romania, and $13 million was paid to a sales agent to assist in selling a real estate portfolio in the United States.[233] These payments were mischaracterized as legitimate business expenses, although some or all of the funds may have

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[222] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), Attachment A ¶ 20 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-274-DLI, Attachment A ¶ 20 (E.D.N.Y. June 5, 2018).
[223] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), Attachment A ¶¶ 20, 29, 32, 33 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-00274-DLI, Attachment A ¶¶ 20, 29, 32, 33 (E.D.N.Y. June 5, 2018).
[224] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), Attachment A ¶¶ 26, 93 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-00274 (DLI), Attachment A ¶¶ 26, 93 (E.D.N.Y. June 5, 2018).
[225] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Legg Mason, Inc.*, Rel. No. 83948, File No. 3-18684, ¶¶ 1-3, 12 (Aug. 27, 2018).
[226] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, ¶¶ 3-4 (Sept. 28, 2018).
[227] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, ¶ 5 (Sept. 28, 2018).
[228] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853, ¶ 7 (Sept. 28, 2018).
[229] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Kinross Gold Corp.*, Rel. No. 82946, File No. 3-18407, ¶ 12 (Mar. 26, 2018).
[230] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Kinross Gold Corp.*, Rel. No. 82946, File No. 3-18407, ¶ 12 (Mar. 26, 2018).
[231] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Kinross Gold Corp.*, Rel. No. 82946, File No. 3-18407, ¶¶ 14-20 (Mar. 26, 2018).
[232] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, Rel. No. 82849, File No. 3-18397, ¶ 18 (Mar. 9, 2018).
[233] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, Rel. No. 82849, File No. 3-18397, ¶¶ 10, 17 (Mar. 9, 2018).

been used to make corrupt payments to Romanian government officials or were embezzled.[234] Elbit Imaging and the subsidiary conducted no due diligence on the third parties.[235]

- **Polycom**'s China subsidiary provided significant discounts to third-party distributors and/or resellers in a scheme to provide payments to government officials in China who had influence over purchasing decisions.[236] Polycom generated profits of $10.7 million from the discount scheme.[237] Notably, Polycom ignored a red flag in a 2013 when a due diligence procedure uncovered allegations that one of its Chinese distributors was making improper payments to a Chinese government official. Polycom failed to finish the due diligence review of the distributor and continued to work with the entity.[238]

- The predecessor entity of **Vantage Drilling International** retained a Brazilian third-party agent to market products and services to Petrobras but did not conduct any due diligence on the agent and did not follow its own internal guidelines regarding the need to implement safeguards against improper payments.[239] The agent then collaborated with a director of the company to provide the improper payments to Petrobras officials and Brazilian politicians in exchange for Petrobras entering into a $1.8 billion contract with the company.[240]

These cases underscore the perennial importance of actively and diligently monitoring third parties as they continue to represent elevated risk under the FCPA.

7. Focus on Foreign Companies

As we predicted in last year's Year-In-Review,[241] US authorities continue to show an interest in investigating and prosecuting non-US companies, apparently following through on earlier promises to level the playing field to protect US corporations from dishonest competitors worldwide.[242] Four of the six DOJ and eight of the thirteen SEC FCPA corporate enforcement actions in 2018 involved non-US

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[234] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, Rel. No. 82849, File No. 3-18397, ¶ 20 (Mar. 9, 2018).
[235] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, Rel. No. 82849, File No. 3-18397, ¶¶ 6, 8, 12 (Mar. 9, 2018).
[236] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Polycom, Inc.*, Rel. No. 84978, File No. 3-18964, ¶¶ 1, 8 (Dec. 26, 2018).
[237] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Polycom, Inc.*, Rel. No. 84978, File No. 3-18964, ¶ 14 (Dec. 26, 2018).
[238] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Polycom, Inc.*, Rel. No. 84978, File No. 3-18964, ¶ 13 (Dec. 26, 2018).
[239] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vantage Drilling Int'l*, Rel. No. 84617, File No. 3-18899, ¶ 9 (Nov. 19, 2018).
[240] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vantage Drilling Int'l*, Rel. No. 84617, File No. 3-18899, ¶¶ 10-14 (Nov. 19, 2018).
[241] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 1 (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.
[242] *See, e.g.*, Jeff Sessions, US Attorney General, Remarks at the Ethics & Compliance Initiative ("ECI") Annual Conference (Apr. 24, 2017), https://www.c-span.org/video/?427358-1/attorney-general-jeff-sessions-delivers-remarks-ethics-compliance-initiatives-confernece&start=563.

companies.[243] And with the resolutions with Petrobras and SocGen, nine of the top ten FCPA corporate resolutions now involve non-US parent companies.[244]

Of the eleven non-US corporations that resolved FCPA charges with either the DOJ or the SEC in 2018, all but two (the SocGen parent and subsidiary) involved foreign issuers.[245] In other words, although not incorporated in the United States, these companies were subject to liability under the FCPA because they issue securities in the United States and are therefore obligated to file periodic reports with the SEC (or had to at the time of the conduct).[246]

SocGen and its subsidiary—neither of which are issuers under the FCPA—were charged only by the DOJ, and were each charged with conspiracy to violate the anti-bribery provisions of the FCPA.[247] The SocGen resolution papers alleged that the parent corporation was a "person" acting within the United States under 15 U.S.C. § 78dd-3(a) and (f)(1).[248] This appears to have been based on the fact that SocGen operates a New York branch[249] and cleared certain payments used for bribes through that branch,[250] as well as the fact that a SocGen employee traveled to the United States on at least two

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[243] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI) (E.D.N.Y. June 5, 2018); Plea Agreement, *United States v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-00274 (DLI) (E.D.N.Y. June 5, 2018); Non-Prosecution Agreement between US Department of Justice and Credit Suisse (Hong Kong) Limited (May 30, 2018), https://www.justice.gov/opa/press-release/file/1077881/download?utm_medium=email&utm_source=govdelivery; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 83593, File No. 3-18571 (July 5, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, Rel. No. 82849, File No. 3-18397 (Mar. 9, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Kinross Gold Corp.*, Rel. No. 82946, File No. 3-18407 (Mar. 26, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Panasonic Corp.*, Rel. No. 83128, File No. 3-18459 (Apr. 30, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708 (Sept. 4, 2018); Non-Prosecution Agreement between US Department of Justice and Petróleo Brasileiro S.A. – Petrobras (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Petróleo Brasileiro S.A. - Petrobras*, Rel. No. 10561, File No. 3-18843 (Sept. 27, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vantage Drilling Int'l*, Rel. No. 84617, File No. 3-18899 (Nov. 19, 2018).

[244] *See* Part I.B.5.a above.

[245] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Elbit Imaging Ltd.*, Rel. No. 82849, File No. 3-18397, ¶ 1 (Mar. 9, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Kinross Gold Corp.*, Rel. No. 82946, File No. 3-18407, ¶ 3 (Mar. 26, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Panasonic Corp.*, Rel. No. 83128, File No. 3-18459, ¶ 5 (Apr. 30, 2018); Non-Prosecution Agreement between US Department of Justice and Credit Suisse (Hong Kong) Limited, Attachment A ¶ 2 (May 30, 2018), https://www.justice.gov/opa/press-release/file/1077881/download?utm_medium=email&utm_source=govdelivery; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 83593, File No. 3-18571, ¶ 5 (July 5, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sanofi*, Rel. No. 84017, File No. 3-18708, § III, ¶ E (Sept. 4, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Petróleo Brasileiro S.A. - Petrobras*, Rel. No. 10561, File No. 3-18843, ¶ 6 (Sept. 27, 2018); Non-Prosecution Agreement between US Department of Justice and Petróleo Brasileiro S.A. – Petrobras, Attachment A ¶¶ 1-2 (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Vantage Drilling Int'l*, Rel. No. 84617, File No. 3-18899, ¶ 3 (Nov. 19, 2018). One foreign company, Credit Suisse (Hong Kong) Limited, was charged as the "agent" of an issuer. *See* Non-Prosecution Agreement between US Department of Justice and Credit Suisse (Hong Kong) Limited, Attachment A ¶ 3 (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download?utm_medium=email&utm_source=govdelivery.

[246] *See, e.g.*, Order Instituting Cease-and-Desist Proceedings, *In the Matter of Panasonic Corp.*, Rel. No. 83128, File No. 3-18459, ¶ 5 (Apr. 30, 2018) (American Depositary Shares ("ADSs") traded on NYSE); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 83593, File No. 3-18571, ¶ 5 (July 5, 2018) (ADSs traded on NYSE).

[247] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), ¶ 1 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States of America v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-274 (DLI), ¶ 1 (E.D.N.Y. June 5, 2018).

[248] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), Attachment A ¶ 1 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States of America v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-274 (DLI), Attachment A ¶ 1 (E.D.N.Y. June 5, 2018).

[249] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), Attachment A ¶ 1 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States of America v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-274 (DLI), Attachment A ¶ 1 (E.D.N.Y. June 5, 2018).

[250] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), Attachment A ¶ 27 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States of America v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-274 (DLI), Attachment A ¶ 27 (E.D.N.Y. June 5, 2018).

occasions, and, while there, allegedly participated in actions in furtherance of the bribery scheme.[251] The DOJ also alleged that SocGen and its subsidiary participated in a conspiracy in partnership with a US domestic concern (Legg Mason), and committed overt actions in the United States in furtherance of that conspiracy.[252]

C. Notable Features of Individual Resolutions

The DOJ continued to prioritize the prosecution of individuals in 2018, bringing 28 new actions for FCPA-related conduct. Deputy Attorney General Rod Rosenstein emphasized the importance of individual prosecutions in a speech on May 9, 2018, stating that even when the DOJ penalized corporations, the "primary question" was still, "Who made the decision to set the company on a course of criminal conduct?" "Our investigations should focus on those individuals," Rosenstein continued, "Our goal in every case should be to make the next violation less likely to occur by punishing individual wrongdoers."[253] Principal Deputy Assistant Attorney General John Cronan echoed these sentiments in a speech on October 25, 2018, noting that "[a] company only acts through its employees and agents" and "[i]t therefore makes sense to focus our investigative efforts on the culpable individuals – both to secure appropriate punishment for the bad actors, and to have the greatest impact on preventing and deterring corruption."[254] He further noted that corporate cooperation with investigations into individuals is a key consideration for declination decisions under the DOJ's FCPA Corporate Enforcement Policy.

In contrast, the SEC has not brought many actions against individuals in the last few years and brought only three in 2018, notwithstanding its stated goal of focusing on individual accountability.[255]

Notably, there were multiple prosecutions in 2018 of individuals who are not covered by the jurisdictional provisions of the FCPA, but were nevertheless charged with other criminal violations arising from bribery-related conduct. For example, several PDVSA defendants, such as Gabriel Arturo Jimenez Aray and Matthias Krull, were charged only with money laundering offenses, despite their involvement in conspiracies with defendants who were charged with FCPA violations. The Second Circuit's limitation in Hoskins (*see* below at page 50) foreclosing the use of conspiracy and accessory charges to reach individuals not directly covered by the FCPA could mean that DOJ will rely on money laundering charges with greater frequency where it cannot otherwise assert jurisdiction under the FCPA.[256]

In years past, the DOJ has charged individuals outside of these three groups—for example, foreign employees of non-issuers who collaborated with US companies to carry out bribery schemes abroad—with either conspiracy to violate the FCPA or accessory violations. Where accessory or conspiracy charges were also unavailable, the DOJ has historically relied on money laundering charges,

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[251] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), Attachment A ¶¶ 8, 27 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States of America v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-274 (DLI), Attachment A ¶¶ 8, 27 (E.D.N.Y. June 5, 2018).

[252] Deferred Prosecution Agreement, *United States v. Société Générale S.A.*, No. 18-CR-253 (DLI), Attachment A ¶¶ 10, 20-27 (E.D.N.Y. June 5, 2018); Plea Agreement, *United States of America v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-274 (DLI), Attachment A ¶¶ 10, 20-27 (E.D.N.Y. June 5, 2018).

[253] Rod J. Rosenstein, Deputy Attorney General, DOJ, Remarks at 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.

[254] John P. Cronan, Principal Deputy Assistant Attorney General, DOJ, Remarks at the 3rd Annual GIR Live DC Fall Event (Oct. 25, 2018), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-1.

[255] U.S. Securities and Exchange Commission Press Release No. 2018-250: SEC Enforcement Division Issues Report on FY 2018 Results (Nov. 2, 2018). The first of the SEC's three individual resolutions, against is discussed below at page 42. The other two SEC individual defendants were former employees of PAC, Tyrone Uonaga and Paul Margis. Only Margis's settlement involved FCPA-related misconduct, which is similar to the misconduct described in Panasonic's and PAC's resolutions with the SEC and DOJ. Order Instituting Public Administrative and Cease-and-Desist Proceedings', *In the Matter of Takeshi "Tyrone" Uonaga*, Rel. No. 84850, File No. 3-18939, ¶¶ 1, 9-21 (Dec. 18, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Paul A. Margis*, Rel. No. 84849, File No. 3-18938, ¶ 1 (Dec. 18, 2018).

[256] *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

basing the charges on defendants' efforts to conceal or transmit bribe monies. Going forward, at least in the Second Circuit, the August 2018 *Hoskins* decision has limited the use of conspiracy and accessory charges to reach individuals not directly covered by the FCPA, suggesting that the incidence of money laundering charges in FCPA actions will be even greater in the future.[257]

1. DOJ trial victory

On December 5, 2018, former Hong Kong Home Secretary and NGO director **Chi Ping Patrick Ho** was convicted in connection with his role in bribing government officials in two African nations.[258] After only a morning of deliberations, a federal jury found Ho guilty of seven counts—one count of conspiring to violate the FCPA, four counts of violating the FCPA, one count of conspiring to commit international money laundering, and one count of committing international money laundering.[259] Ho was acquitted on one money-laundering count.[260] He had denied all of the charges against him.[261]

The government alleged that Ho, along with co-conspirator Cheikh Gadio, offered to pay $2 million to the president of Chad and paid $500,000 to the Ugandan Minister of Foreign Affairs for the benefit of the Chinese oil and gas conglomerate CEFC China Energy ("CEFC").[262] At trial, the DOJ presented evidence that Ho funneled bribes through an American-based NGO he managed that was financed in part by CEFC.[263] In one scheme, Ho offered a cash bribe, concealed within gift boxes, to the President of Chad in order to obtain oil rights from the Chadian government.[264] In the second scheme, Ho conspired to funnel a bribe to the Ugandan minister to steer potential business advantages to CEFC.[265] The DOJ had dropped its charges against Gadio after he executed a non-prosecution agreement and agreed to provide testimony against Ho.[266]

Ho had been in federal custody since November 2017, when Judge Loretta Preska denied his offer to post $10 million bail, deeming him a high flight risk.[267] He faces up to five years in prison for each FCPA-related count and twenty years in prison for each money-laundering count.[268] He is scheduled to be sentenced on March 14, 2019.[269]

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[257] *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).
[258] US Department of Justice Press Release No. 18-426: Patrick Ho, Former Head Of Organization Backed By Chinese Energy Conglomerate, Convicted Of International Bribery, Money Laundering Offenses (Dec. 5, 2018).
[259] Kelly Swanson, *DOJ Nets FCPA Conviction After Jury Debates Jurisdiction*, GLOBAL INVESTIGATIONS REVIEW (Dec. 5, 2018), https://globalinvestigationsreview.com/article/jac/1177614/doj-nets-fcpa-conviction-after-jury-debates-jurisdiction.
[260] Kelly Swanson, *DOJ Nets FCPA Conviction After Jury Debates Jurisdiction*, GLOBAL INVESTIGATIONS REVIEW (Dec. 5, 2018), https://globalinvestigationsreview.com/article/jac/1177614/doj-nets-fcpa-conviction-after-jury-debates-jurisdiction.
[261] Richard L. Cassin, *Jury Convicts Ex-Hong Kong Official of FCPA Offenses, Money Laundering*, THE FCPA BLOG (Dec. 5, 2018), http://www.fcpablog.com/blog/2018/12/5/jury-convicts-ex-hong-kong-official-of-fcpa-offenses-money-l.html.
[262] US Department of Justice Press Release No. 18-426: Patrick Ho, Former Head Of Organization Backed By Chinese Energy Conglomerate, Convicted Of International Bribery, Money Laundering Offenses (Dec. 5, 2018).
[263] Richard L. Cassin, *Jury convicts ex-Hong Kong official of FCPA offenses, money laundering*, THE FCPA BLOG (Dec. 5, 2018), http://www.fcpablog.com/blog/2018/12/5/jury-convicts-ex-hong-kong-official-of-fcpa-offenses-money-l.html.
[264] US Department of Justice Press Release No. 18-426: Patrick Ho, Former Head Of Organization Backed By Chinese Energy Conglomerate, Convicted Of International Bribery, Money Laundering Offenses (Dec. 5, 2018).
[265] US Department of Justice Press Release No. 18-426: Patrick Ho, Former Head Of Organization Backed By Chinese Energy Conglomerate, Convicted Of International Bribery, Money Laundering Offenses (Dec. 5, 2018).
[266] Matthew Goldstein, *US Drops Charges Against Ex-Senegal Official in Chinese Energy Bribery Case*, N. Y. TIMES (Sept. 15, 2018), https://www.nytimes.com/2018/09/15/business/cheikh-gadio-china-bribery-case.html.
[267] Richard L. Cassin, *Jury Convicts Ex-Hong Kong Official of FCPA Offenses, Money Laundering*, THE FCPA BLOG (Dec. 5, 2018), http://www.fcpablog.com/blog/2018/12/5/jury-convicts-ex-hong-kong-official-of-fcpa-offenses-money-l.html.
[268] Richard L. Cassin, *Jury Convicts Ex-Hong Kong Official of FCPA Offenses, Money Laundering*, THE FCPA BLOG (Dec. 5, 2018), http://www.fcpablog.com/blog/2018/12/5/jury-convicts-ex-hong-kong-official-of-fcpa-offenses-money-l.html.
[269] Kelly Swanson, *DOJ Nets FCPA Conviction After Jury Debates Jurisdiction*, GLOBAL INVESTIGATIONS REVIEW (Dec. 5, 2018), https://globalinvestigationsreview.com/article/jac/1177614/doj-nets-fcpa-conviction-after-jury-debates-jurisdiction.

Ho has not yet announced whether he will appeal the conviction.[270]

As discussed below at page 55, the Ho prosecution is also notable for Judge Preska's rulings on jurisdictional issues raised by the FCPA and the money laundering statute. First, Judge Preska rejected Ho's argument that it was improper for the DOJ to charge him with violations of Section dd-2 of the FCPA, which applies to agents of domestic concerns, and Section dd-3 of the FCPA, which applies broadly to acts that take place in the United States, for the same conduct.[271] As to money laundering, Judge Preska held that transfers originating outside the United States that traveled through correspondent banks in the United States and terminated in destination banks outside the United States constituted separate transactions to and from the United States and thus amounted to violations of the money laundering statute.[272] Taken together, these holdings give the DOJ more leeway in how they obtain jurisdiction over FCPA and money laundering defendants and are particularly significant in light of the low number of litigated FCPA cases.[273]

2. Charging trends

a. Individuals continue to be charged years after corporate resolution

As has historically been the case, some individuals charged in 2018 were tied to corporate misconduct resolved in past years.

In May 2018, the DOJ charged two individuals, Azat Martirossian and Vitaly Leshkov, with money laundering violations in connection with FCPA-related conduct at **Rolls-Royce**.[274] These charges came seventeen months after Rolls-Royce entered into a DPA with the Department of Justice for the conduct at issue and more than six months after four other individuals were charged and pleaded guilty on similar charges.[275]

Similarly, in September 2018, the SEC resolved one of its three 2018 actions against individuals when it reached a settlement in an administrative proceeding against Patricio Contesse González, the former CEO of **Sociedad Química y Minera de Chile, S.A.** ("SQM"), relating to improper payments Gonzalez made from a discretionary fund.[276] SQM settled the related misconduct with the SEC and DOJ in January 2017.[277]

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[270] Kelly Swanson, *DOJ Nets FCPA Conviction After Jury Debates Jurisdiction*, GLOBAL INVESTIGATIONS REVIEW (Dec. 5, 2018), https://globalinvestigationsreview.com/article/jac/1177614/doj-nets-fcpa-conviction-after-jury-debates-jurisdiction.
[271] Tr., *United States v. Ho*, No. 17-CR-00779 LAP, 15-19 (S.D.N.Y. July 19, 2018).
[272] Tr., *United States v. Ho*, No. 17-CR-00779 LAP, 31-36 (S.D.N.Y. July 19, 2018).
[273] Timothy D. Belevetz, *Federal Court: DOJ free to pursue alternate theories for FCPA jurisdiction*, THE FCPA BLOG (July 24, 2018), http://www.fcpablog.com/blog/2018/7/24/federal-court-doj-free-to-pursue-alternate-theories-for-fcpa.html.
[274] US Department of Justice Press Release No. 18-693: Former Armenian Ambassador and a Russian National Charged in Foreign Bribery and Money Laundering Scheme (May 24, 2018). Martirossian and Leshkov were allegedly part of a scheme to pay foreign officials in Kazakhstan in exchange for directing business to Rolls-Royce Energy Systems Inc. US Department of Justice Press Release No. 18-693: Former Armenian Ambassador and a Russian National Charged in Foreign Bribery and Money Laundering Scheme (May 24, 2018).
[275] US Department of Justice Press Release No. 18-693: Former Armenian Ambassador and a Russian National Charged in Foreign Bribery and Money Laundering Scheme (May 24, 2018).
[276] US Securities and Exchange Commission Press Release No. 2018-212: SEC Charges Former CEO of Chilean-Based Chemical and Mining Company with FCPA violations (Sept. 25, 2018). The alleged bribery scheme lasted at least seven years, from 2008 to 2015, and caused SQM to make $14.75 million in payments. Order Instituting Cease-and-Desist Proceedings, *In the Matter of Patricio Contesse Gonzalez,* Rel. No. 84280, File No. 3-18839, ¶ 10 (Sept. 25, 2018).
[277] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Quimica y Minera de Chile, S.A.,* Rel. No. 79795, File No. 3-17774, ¶ 1 (Jan. 13, 2017); US Department of Justice Press Release No. 17-065: US Department of Justice Press Release No. 17-065: Chilean Chemicals and Mining Company Agrees to Pay More Than $15 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 13, 2017).

b. Widespread Global Scandals Result in Numerous Charges

The DOJ continued its investigations into three massive scandals in 2018, all with international reach and each tied to estimated losses of billions of dollars: PDVSA, PetroEcuador, and 1MDB. The DOJ's investigations into conduct surrounding each of these entities have been long-running and expansive, reaching former government officials, company employees, vendors, bankers, and others.

i. PDVSA

In 2018, the DOJ charged 14 additional individuals and announced nine guilty pleas in connection with its ongoing investigation into a widespread bribery scheme at Petróleos de Venezuela S.A. ("PDVSA"), Venezuela's state-owned oil and gas company. Since 2015, the DOJ has charged more than 30 individuals tied to PDVSA, including former PDVSA officials, vendors, bankers, and other individuals. Former PDVSA officials have often faced money laundering charges while vendors and other non-officials have been charged with both money laundering and FCPA violations. We discuss the unusual size of the DOJ's PDVSA investigation above at page 7.

The majority of the 2018 PDVSA actions were brought in July, when the DOJ announced charges against nine individuals for allegedly participating in a billion-dollar money laundering scheme designed to transfer and hide funds embezzled from PDVSA.[278] Among the defendants are "professional money launderers," PDVSA executives, and prominent Venezuelan citizens.[279] Two of the defendants—a Swiss banker, Matthias Krull, and a PDVSA official—have already pleaded guilty.[280]

In October, the DOJ announced that a former PDVSA procurement officer pleaded guilty to a one-count information for conspiracy to launder money filed earlier that month.[281] As part of his plea, the officer admitted that he conspired with other PDVSA officials and employees of a Miami-based PDVSA supplier to pay bribes to PDVSA officials in exchange for directing PDVSA business to the supplier.[282] The officer accepted bribes and the supplier's employees received kickbacks.[283]

In November, the DOJ unsealed the indictment of Raul Gorrin Belisario, and announced the guilty pleas of Alejandro Andrade Cedeno and Gabriel Arturo Jimenez Aray.[284] Gorrin allegedly paid millions of dollars in bribes to Andrade and another Venezuelan official to obtain the right to conduct foreign

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[278] US Department of Justice Press Release No. 18-980: Two Members of Billion-Dollar Venezuelan Money Laundering Scheme Arrested (July 25, 2018); Affidavit in Support of Criminal Complaint, *United States v. Guruceaga*, No. 18-cr-20685-KMW, ¶¶ 6-13 (S.D. Fla. July 23, 2018); Affidavit in Support of Criminal Complaint and Arrest Warrant, *United States v. Gonzalez Testino*, No. 18-MJ-03171-LFL, ¶¶ 15-20 (S.D. Fla. Aug. 1, 2018). Although the complaint was docketed in the Southern District of Florida on August 1, it was originally filed in the Southern District of Texas on July 27, 2018. Criminal Complaint, *United States v. Gonzalez Testino*, No. 18-MJ-03171-LFL (S.D. Fla. Aug. 1, 2018).

[279] US Department of Justice Press Release No. 18-980: Two Members of Billion-Dollar Venezuelan Money Laundering Scheme Arrested (July 25, 2018).

[280] US Department of Justice Press Release No. 18-1427: Former Executive Director at Venezuelan State-Owned Oil Company, Petroleos De Venezuela, S.A., Pleads Guilty to Role in Billion-Dollar Money Laundering Conspiracy (Oct. 31, 2018); US Department of Justice Press Release No. 18-1089: Former Swiss Bank Executive Pleads Guilty to Role in Billion-Dollar International Money Laundering Scheme Involving Funds Embezzled from Venezuelan State-Owned Oil Company (Aug. 22, 2018).

[281] US Department of Justice Press Release No. 18-1420: Texas Businessman Pleads Guilty to Money Laundering Charge in Connection with Venezuela Bribery Scheme (Oct. 30, 2018); Information, *United States v. Guedez*, No. 18-CR-00611 (S.D. Tex. October 12, 2018).

[282] US Department of Justice Press Release No. 18-1420: Texas Businessman Pleads Guilty to Money Laundering Charge in Connection with Venezuela Bribery Scheme (Oct. 30, 2018).

[283] US Department of Justice Press Release No. 18-1420: Texas Businessman Pleads Guilty to Money Laundering Charge in Connection with Venezuela Bribery Scheme (Oct. 30, 2018).

[284] US Department of Justice Press Release No. 18-1527: Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 20, 2018).

exchange transactions at favorable rates for the Venezuelan government.[285] Jimenez and Gorrin together acquired a bank to launder the bribes and the scheme's proceeds.[286] Although none of these defendants have clear ties to PDVSA, Krull was Gorrin's banker.[287]

Multiple PDVSA defendants whose prosecutions were initiated in previous years pleaded guilty in 2018. In July 2018, Luis Carlos De Leon-Perez, a former PDVSA official who still had influence at the company, pleaded guilty to money laundering and FCPA violations for soliciting and directing bribes from PDVSA vendors to PDVSA officials in exchange for assisting those vendors obtain business with PDVSA.[288] And in September, the DOJ announced that Juan Carlos Castillo Rincon, an American business executive, pleaded guilty to conspiracy to violate the FCPA for his role in a scheme to bribe a PDVSA official in exchange for the official's assistance with his company's business with PDVSA.[289] The DOJ simultaneously announced the unsealing of the 2017 guilty plea of Jose Orlando Camacho, the PDVSA official who had received bribes from Castillo Rincon.[290] Camacho pleaded guilty to one count of conspiracy to commit money laundering.[291] And, in December, Alfonso Eliezer Gravina Munoz, a former PDVSA procurement officer, pleaded guilty to one count of conspiracy to obstruct justice.[292] In 2015, Gravina had pleaded guilty to one count of making false statements on a tax return and one count of conspiracy to launder money and, in connection with his plea, agreed to cooperate with the government.[293] However, despite this agreement, Gravina concealed facts about the payment of bribes by one of his PDVSA co-conspirators, leading to the obstruction charge.[294]

ii. PetroEcuador

In 2018, the DOJ furthered its investigation into a sprawling bribery and money laundering scheme at Empresa Publica de Hidrocarburos de Ecuador ("PetroEcuador"), Ecuador's state-owned oil company. The DOJ announced charges against four individuals tied to PetroEcuador in the last year.[295] While details about the specific allegations are sparse, over several years the individuals allegedly facilitated approximately $3.2 million in bribes to PetroEcuador officials in order to secure approximately $27.8 million of business for GalileoEnergy SA, an Ecuadorian company that provides services in the oil and gas industry.[296] According to the indictments, the individuals concealed the bribes by using

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[285] US Department of Justice Press Release No. 18-1527: Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 20, 2018).
[286] US Department of Justice Press Release No. 18-1527: Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 20, 2018).
[287] Clara Hudson, *Guilty Pleas Unveiled in Billion-Dollar Venezuelan Bribery Scheme*, GLOBAL INVESTIGATIONS REVIEW, Nov. 20, 2018.
[288] US Department of Justice Press Release No. 18-932: Former Venezuelan Official Pleads Guilty to Money Laundering Charge in Connection with Bribery Scheme (July 16, 2018).
[289] US Department of Justice Press Release No. 18-1188: Business Executive Pleads Guilty to Foreign Bribery Charge in Connection with Venezuelan Bribery Scheme (Sept. 13, 2018).
[290] US Department of Justice Press Release No. 18-1188: Business Executive Pleads Guilty to Foreign Bribery Charge in Connection with Venezuelan Bribery Scheme (Sept. 13, 2018).
[291] US Department of Justice Press Release No. 18-1188: Business Executive Pleads Guilty to Foreign Bribery Charge in Connection with Venezuelan Bribery Scheme (Sept. 13, 2018).
[292] US Department of Justice Press Release No. 18-1622: Texas Businessman Pleads Guilty to Conspiracy to Obstruct Justice in Connection with Venezuela Bribery Scheme (Dec. 10. 2018).
[293] US Department of Justice Press Release No. 18-1622: Texas Businessman Pleads Guilty to Conspiracy to Obstruct Justice in Connection with Venezuela Bribery Scheme (Dec. 10. 2018).
[294] US Department of Justice Press Release No. 18-1622: Texas Businessman Pleads Guilty to Conspiracy to Obstruct Justice in Connection with Venezuela Bribery Scheme (Dec. 10. 2018).
[295] US Department of Justice Press Release No. 18-1173: Financial Advisor Pleads Guilty to Money Laundering Charge in Connection with Bribery Scheme Involving Ecuadorian Officials (Sept. 11, 2018). Indictment, *United States v. Chatburn Ripalda and Larrea*, No. 18-20312, 9-10 (S.D. Fla. Apr. 19, 2018); Information, *United States v Escobar Dominguez*, No. 18-20108 (S.D. Fla. Feb. 20, 2018); Information, *United States v. Baquerizo Escobar*, No. 18-20596 (S.D. Fla. July 11, 2018).
[296] Indictment, *United States v. Chatburn Ripalda and Larrea*, No. 18-20312, 5-6 (S.D. Fla. Apr. 19, 2018).

intermediaries and offshore shell companies.[297] The individuals then opened up bank accounts in the names of those shell companies and transferred the improper payments from shell company accounts to bank accounts controlled by PetroEcuador officials.[298] In a superseding indictment filed against PetroEcuador contractor Frank Roberto Chatburn Ripalda in December, the DOJ further alleged that, in addition to the GalileoEnergy bribes, Chatburn Ripalda also facilitated the payment of bribes from Brazilian holding company Odebrecht to a PetroEcuador executive.[299]

Arturo Escobar Dominguez, a former PetroEcuador employee, was charged on February 20, 2018.[300] Chatburn Ripalda and Jose Larrea, a financial advisor, were indicted on April 19, 2018.[301] Juan Andre Baquerizo Escobar, a contractor, was charged on July 11, 2018.[302] Three of the individuals have already entered guilty pleas. Chatburn Ripalda, the only individual to plead not guilty, is expected to go to trial early next year.[303]

In 2018, Marcelo Reyes Lopez, an attorney at PetroEcuador, pleaded guilty to one count of conspiracy to commit money laundering as part of the same scheme.[304] He was sentenced to 53 months in prison.[305]

iii. 1MDB

The DOJ also continued its investigation into embezzlement at Malaysia's investment development fund ("1MDB"), with the DOJ seeking civil forfeiture of approximately $1.7 billion in complaints filed in 2016 and 2017.[306] The participants allegedly bribed foreign officials to obtain business from 1MDB, diverted billions of dollars from 1MDB over several years, and laundered ill-gotten funds through the US financial system, among other places.[307] Some of the embezzled funds were allegedly used to support the lavish lifestyle of the Malaysian financier Low Taek Jho, (popularly known as Jho Low), whose relationships with foreign officials were instrumental to the conspiracy.[308] Low's purchases

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[297] Indictment, *United States v. Chatburn Ripalda and Larrea*, No. 18-20312, 9-10 (S.D. Fla. Apr. 19, 2018).
[298] Indictment, *United States v. Chatburn Ripalda and Larrea*, No. 18-20312, 9-10 (S.D. Fla. Apr. 19, 2018).
[299] Superseding Indictment, *United States v. Chatburn Ripalda*, No. 18-20312, 2, 10 (S.D. Fla. Dec. 13, 2018); Kelly Swanson, *Charges say Miami Businessman Facilitated Bribes for Odebrecht in Ecuador*, GLOBAL INVESTIGATIONS REVIEW (Dec. 17, 2018), https://globalinvestigationsreview.com/article/jac/1178222/charges-say-miami-businessman-facilitated-bribes-for-odebrecht-in-ecuador. Odebrecht S.A. previously settled with US and international authorities to resolve charges that it engaged in a 15-year, $788 million bribery and bid-rigging scheme around the world. Michael Griffiths, *The Odebrecht Fact Sheet*, GLOBAL INVESTIGATIONS REVIEW (Feb. 13, 2018), https://globalinvestigationsreview.com/article/1158724/the-odebrecht-fact-sheet.
[300] Information, *United States v Escobar Dominguez*, No. 18-20108 (S.D. Fla. Feb. 20, 2018).
[301] Indictment, *United States v. Chatburn Ripalda and Larrea*, No. 18-20312 (S.D. Fla. Apr. 19, 2018).
[302] Information, *United States v. Baquerizo Escobar*, No. 18-20596 (S.D. Fla. July 11, 2018).
[303] Order Continuing Jury Trial and Calendar Call, *United States v. Chatburn Ripalda*, No. 18-20312 (S.D. Fla. Sept. 18, 2018).
[304] Clara Hudson & Adam Dobrik, *Ex-PetroEcuador Lawyer Sentenced to Over Four Years for Laundering Bribes*, GLOBAL INVESTIGATIONS REVIEW (July 23, 2018), https://globalinvestigationsreview.com/article/jac/1172201/ex-petroecuador-lawyer-sentenced-to-over-four-years-for-laundering-bribes.
[305] Clara Hudson & Adam Dobrik, *Ex-PetroEcuador lawyer sentenced to over four years for laundering bribes*, GLOBAL INVESTIGATIONS REVIEW (July 23, 2018), https://globalinvestigationsreview.com/article/jac/1172201/ex-petroecuador-lawyer-sentenced-to-over-four-years-for-laundering-bribes.
[306] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 62-63 (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018; WilmerHale, *Global Anti-Bribery Year-in-Review: 2016 Developments and Predictions for 2017,* at 37 (Feb. 7, 2017), https://www.wilmerhale.com/en/insights/client-alerts/2017-02-07-global-anti-bribery-year-in-review-2016-developments-and-predictions-for-2017.
[307] US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018).
[308] US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018).

reportedly included luxury US real estate, a private jet, a yacht, a Picasso (which he gave to Leonardo DiCaprio), and a birthday party featuring performances from several pop stars.[309]

2018 brought the first individual charges arising from the investigation. In October, the DOJ unsealed a criminal indictment charging Low and a Malaysian investment banker employed at a global investment bank with conspiring to launder money and conspiracy to violate the FCPA.[310] The DOJ simultaneously unsealed the guilty plea of a second banker at the same investment bank in connection with the same scheme. The banker, who was alleged to have provided misleading information to the compliance department of his employer regarding the true nature of the transactions and the participants, had pleaded guilty to one count of conspiracy to launder money and one count of conspiracy to violate the FCPA.[311] In November, the DOJ announced the guilty plea of a former DOJ employee who pleaded guilty to one count of conspiracy to make false statements to a bank.[312] The employee admitted to lying to cover up the source and purpose of funds that were wired into the United States to fund a lobbying campaign aimed at encouraging the resolution of the 1MDB investigation.[313]

The investigation into misconduct related to 1MDB is ongoing and at least six countries are currently involved, with subsidiaries of the investment bank, the former Malaysian prime minister, and several other individual defendants facing charges in Malaysia.[314]

c. Charges brought and dropped against foreign officials

The DOJ brought actions against six foreign officials in 2018, compared with nine in 2017.[315] All of the 2018 defendants were charged with money laundering offenses and none with FCPA offenses. Unlike other bribery statutes, the FCPA does not prohibit the acceptance of bribes, and thus foreign

[309] Hannah Ellis-Petersen, *1MDB Scandal Explained: A Tale of Malaysia's Missing Billions*, THE GUARDIAN (Oct. 25, 2018), https://www.theguardian.com/world/2018/oct/25/1mdb-scandal-explained-a-tale-of-malaysias-missing-billions.
[310] US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018).
[311] US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018).
[312] US Department of Justice Press Release No. 18-1586: Former Justice Department Employee Pleads Guilty to Conspiracy to Deceive US Banks about Millions of Dollars in Foreign Lobbying Funds (Nov. 30, 2018).
[313] US Department of Justice Press Release No. 18-1586: Former Justice Department Employee Pleads Guilty to Conspiracy to Deceive US Banks about Millions of Dollars in Foreign Lobbying Funds (Nov. 30, 2018).
[314] *Goldman Sachs Bankers 'Cheated' Malaysia over 1MDB: PM Mahathir*, REUTERS (Nov. 12, 2018), https://www.reuters.com/article/us-malaysia-politics-1mdb-goldman/goldman-sachs-bankers-cheated-malaysia-over-1mdb-pm-mahathir-idUSKCN1NI0D1; Austin Ramzy, *Najib Razak, Former Malaysian Prime Minister, to Face More Charges*, N. Y. TIMES (Sept. 19, 2018), https://www.nytimes.com/2018/09/19/world/asia/malaysia-najib-razak.html; Alexandra Stevenson & Sharon Tan, *Malaysia Files Criminal Charges Against Goldman Sachs Over 1MDB Scandal,* N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/business/goldman-sachs-malaysia-criminal-charges-1mdb.html.
[315] None of the officials—Carmelo Urdaneta Aqui, Abraham Eduardo Ortega, Egbert Yvan Ferdinand Koolman, Arturo Escobar Dominguez, Donville Inniss and Ivan Alexis Guedez—appear to have been officials at the time they were charged. This total does not include individual defendants, such as Luis Carlos De Leon Perez, who were officials at one time in their careers but not during their involvement in FCPA-related conspiracies.

officials who allegedly accepted bribes are often charged under other statutes, such as money laundering or wire fraud.

Among the foreign officials charged in 2018 were three former PDVSA officials,[316] an Aruban telecommunications official,[317] the former Barbados Minister of Industry,[318] and a former PetroEcuador official.[319]

In September 2018, the DOJ also announced that it was dropping charges against Cheikh Gadio, a former Senegalese foreign minister whom the DOJ charged in 2017 with FCPA and money laundering violations.[320] The charges were dropped as part of a non-prosecution agreement, pursuant to which Gadio testified at the jury trial of his co-conspirator, Chi Ping Patrick Ho.[321]

d. Sentencing trends

Eighteen defendants were sentenced in FCPA-related cases in 2018.[322] Most of the defendants received sentences of between three to four years' imprisonment, which represents an increase from 2017 when six of the seven defendants sentenced received prison terms of two years or less.[323] The 2018 defendants were a mixture of government officials convicted primarily of money laundering charges and business people convicted primarily of FCPA bribery charges. There appeared to be no significant difference in how the two groups of defendants were sentenced.

Defendants also faced monetary consequences in the form of fines, restitution, and/or forfeiture. Fines imposed ranged from $0 to $1 million, while orders of forfeiture and/or restitution ranged from $173,935 to more than $1 billion.

Representative sentences in 2018 include:

- **Egbert Yvan Ferdinand Koolman**, an Aruban official who was sentenced to 36 months' imprisonment and ordered to pay $1.3 million in restitution after pleading guilty to one count of conspiracy to commit money laundering.[324] Koolman admitted to accepting and laundering more than $1.3 million in bribe payments while an official for the Aruban state-owned telecommunications corporation in exchange for his agreement to influence the corporation's award of contracts.[325] The conspiracy lasted from 2005 to 2016.[326]

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[316] See above at pages 44-46.
[317] *See infra* note 323.
[318] Department of Justice Press Release No. 18-1021: Former Member of Barbados Parliament and Minister of Industry Charged with Laundering Bribes from Barbadian Insurance Company (Aug. 6, 2018).
[319] See section III.C.2.b.ii above.
[320] Matthew Goldstein, *US Drops Charges Against Ex-Senegal Official in Chinese Energy Bribery Case*, N. Y. TIMES (Sept. 15, 2018), https://www.nytimes.com/2018/09/15/business/cheikh-gadio-china-bribery-case.html; Sealed Complaint, *United States v. Ho and Gadio*, No. 17-8611, ¶¶ 1-12 (S.D.N.Y. Nov. 16, 2017).
[321] Richard L. Cassin, *Jury convicts ex-Hong Kong official of FCPA offenses, money laundering*, THE FCPA BLOG (Dec. 5, 2018), http://www.fcpablog.com/blog/2018/12/5/jury-convicts-ex-hong-kong-official-of-fcpa-offenses-money-l.html.
[322] Two defendants were scheduled to be sentenced in 2018, but the relevant docket entries are sealed. They are not included in this total.
[323] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 51 (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.
[324] US Department of Justice Press Release No. 18-859: Aruban Telecommunications Purchasing Official Sentenced to Prison in Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act (June 27, 2018).
[325] US Department of Justice Press Release No. 18-859: Aruban Telecommunications Purchasing Official Sentenced to Prison in Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act (June 27, 2018).
[326] US Department of Justice Press Release No. 18-859: Aruban Telecommunications Purchasing Official Sentenced to Prison in Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act (June 27, 2018).

- **Anthony Mace**, a businessman who was sentenced to 36 months' imprisonment and a $150,000 fine in connection with a multi-year scheme to bribe foreign government officials in Brazil, Angola, and Equatorial Guinea.[327] Mace admitted to authorizing over $16 million in bribe payments to individuals despite being aware of a high risk that they were Equatorial Guinean officials; Mace further deliberately avoided learning that the recipients of certain additional payments were Petrobras officials. Mace pleaded guilty to one count of conspiracy to violate the FCPA.

There were several notable outliers to the above sentencing trend. **Joo Hyun Bahn**, a Manhattan real estate broker, received a sentence of only 6 months' imprisonment.[328] Bahn pleaded guilty to one count of violating the FCPA and one count of conspiracy to violate the FCPA.[329] Judge Edgardo Ramos of the Southern District of New York indicated the lenient sentence was given in part because Bahn, who unsuccessfully attempted to pay bribes to a foreign official to close a real estate deal in Vietnam, "acted in part to try to help his father overcome financial difficulties."[330]

Similarly, **Colin Steven**, a former Embraer executive who pleaded guilty in late 2017 to several counts, including an FCPA violation, wire fraud, and money laundering, was sentenced to time served and a $25,000 fine.[331] The comparatively lenient sentence may be due to Steven's cooperation, letters describing Steven's good character, and what Judge Nathan of the Southern District of New York described as "comparably culpable co-conspirators who have not been charged" and who declined to cooperate with the investigation.[332]

On the other end of the spectrum, three defendants received substantially longer sentences of 9 to 10 years' imprisonment. First, **Matthias Krull**, a former Swiss banker, was sentenced to 10 years' imprisonment after pleading guilty to one count of conspiracy to commit money laundering.[333] Krull admitted to participating in a conspiracy that began in 2014 and, over the next few years, laundered a total of $1.2 billion in funds embezzled from PDVSA.[334] Krull himself joined the conspiracy in 2016 and participated in laundering approximately $60 million.[335] The size of the overall conspiracy and amount of funds at issue likely contributed to the length of Krull's sentence. Krull is cooperating with prosecutors and may qualify for a reduced sentence based on his assistance.[336]

Second, like Krull, **Alejandro Andrade** was sentenced to 10 years' imprisonment after pleading guilty to one count of conspiracy to commit money laundering.[337] Andrade admitted to accepting over $1

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[327] US Department of Justice Press Release No. 18-1273: Oil Services CEO and Executive Sentenced to Prison for Roles in Foreign Bribery Scheme (Sept. 28, 2018).
[328] Harry Cassin, *Former Colliers Broker Jailed Six Months for FCPA Offenses*, THE FCPA BLOG, Sept. 6, 2018.
[329] US Department of Justice Press Release No. 18-11: New Jersey Real Estate Broker Pleads Guilty to Role in Foreign Bribery Scheme Involving $800 Million International Real Estate Deal (Jan. 5, 2018).
[330] Harry Cassin, *Former Colliers Broker Jailed Six Months for FCPA Offenses*, FCPA BLOG, Sept. 6, 2018; US Department of Justice Press Release No. 18-11: New Jersey Real Estate Broker Pleads Guilty to Role in Foreign Bribery Scheme Involving $800 Million International Real Estate Deal (Jan. 5, 2018).
[331] Kelly Swanson, *There Are Uncharged, Culpable Individuals in Embraer Case, US Prosecutor Concedes*, GLOBAL INVESTIGATIONS REVIEW (Dec. 12, 2018), https://globalinvestigationsreview.com/article/jac/1177954/there-are-uncharged-culpable-individuals-in-embraer-case-us-prosecutor-concedes.
[332] Kelly Swanson, *There Are Uncharged, Culpable Individuals in Embraer Case, US Prosecutor Concedes*, GLOBAL INVESTIGATIONS REVIEW (Dec. 12, 2018), https://globalinvestigationsreview.com/article/jac/1177954/there-are-uncharged-culpable-individuals-in-embraer-case-us-prosecutor-concedes.
[333] US Department of Justice Press Release No. 18-1409: Former Swiss Bank Executive Sentenced to Prison for Role in Billion-Dollar International Money Laundering Scheme Involving Funds Embezzled from Venezuelan State-Owned Oil Company (Oct. 29, 2018).
[334] US Department of Justice Press Release No. 18-1409: Former Swiss Bank Executive Sentenced to Prison for Role in Billion-Dollar International Money Laundering Scheme Involving Funds Embezzled from Venezuelan State-Owned Oil Company (Oct. 29, 2018).
[335] David Voreacos, *Former Julius Baer Banker Gets 10 Years for Venezuelan Plot*, BLOOMBERG, Oct. 29, 2018.
[336] David Voreacos, *Former Julius Baer Banker Gets 10 Years for Venezuelan Plot*, BLOOMBERG, Oct. 29, 2018.
[337] US Department of Justice Press Release No. 18-1549: Former Venezuelan National Treasurer Sentenced to 10 Years in Prison for Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 27, 2018).

billion in bribes in exchange for using his position as Venezuelan national treasurer to select certain individuals to perform currency exchange transactions.[338] Andrade agreed to forfeit over $1 billion as well as assets connected to the scheme, including yachts, cars, homes, and champion horses.[339] Third, former FIFA official **Juan Angel Napout** was sentenced to 9 years' imprisonment after being convicted by a jury of one count of racketeering conspiracy and two counts of wire fraud conspiracy.[340] Napout was also ordered to forfeit $3.4 million, pay a $1 million fine, and provide $2.5 million in restitution.[341] The charges arose from Napout's corruption of FIFA by accepting or agreeing to accept millions of dollars in bribes in exchange for the media and marketing rights to various soccer tournaments[342]

e. Cooperation by individuals

At least one FCPA defendant obtained a reduced sentence in 2018 based on cooperation with the DOJ.

On December 28, 2017, **Lawrence W. Parker, Jr.** pleaded guilty to conspiracy to violate the FCPA and to commit wire fraud in connection with a scheme to pay bribes to Aruban official Egbert Yvan Ferdinand Koolman, discussed above.[343] As part of his plea agreement, Parker agreed to fully cooperate with the DOJ's investigation of Koolman, and the DOJ reserved the right to evaluate Parker's cooperation and make its views known to the court at Parker's sentencing.[344]

In March 2018, after the DOJ had initiated criminal proceedings against Koolman, the DOJ filed a motion for downward departure on Parker's behalf, stating that Parker had "cooperated with the government's investigation since he was first approached by the [FBI]" and had "provided substantial assistance to the government in the prosecution of other members of the conspiracy."[345] Under the Sentencing Guidelines, Parker's sentencing range was 57-71 months (though it was subject to a statutory maximum of 60 months).[346] The DOJ recommended that his sentence be reduced by 33 percent from the low end of the range.[347] In April 2018, the court granted the government's motion for downward departure and sentenced Parker to 35 months in prison.[348]

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[338] US Department of Justice Press Release No. 18-1549: Former Venezuelan National Treasurer Sentenced to 10 Years in Prison for Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 27, 2018).
[339] US Department of Justice Press Release No. 18-1549: Former Venezuelan National Treasurer Sentenced to 10 Years in Prison for Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 27, 2018).
[340] Judgment, *United States v. Napout*, 15-CR-00252-PKC-RML, 3 (E.D.N.Y. Sept. 4, 2018); US Department of Justice Press Release: Former FIFA Executive, President of CONMEBOL and Paraguayan Soccer Official Sentenced to Nine Years in Prison for Racketeering and Corruption Offenses (Aug. 29, 2018).
[341] Restitution Order, *United States v. Napout*, 15-CR-00252-PKC-RML, 30 (E.D.N.Y. Nov. 20, 2018); US Department of Justice Press Release: Former FIFA Executive, President of CONMEBOL and Paraguayan Soccer Official Sentenced to Nine Years in Prison for Racketeering and Corruption Offenses (Aug. 29, 2018).
[342] US Department of Justice Press Release: High-Ranking Soccer Officials Convicted in Multi-Million Dollar Bribery Schemes (Dec. 26, 2017).
[343] US Department of Justice Press Release No. 18-477: Aruban Telecommunications Purchasing Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act (Apr. 13, 2018).
[344] Plea Agreement, *United States v. Parker*, No. 17-CR-20914-CMA, ¶¶ 6, 8-9 (S.D. Fla. Dec. 28, 2017).
[345] Motion for Downward Departure Pursuant to U.S.S.G. § 5K1.1, *United States v. Parker*, No. 17-CR-20914-CMA, ¶¶ 2-3 (S.D. Fla. Apr. 12, 2018).
[346] Motion for Downward Departure Pursuant to U.S.S.G. § 5K1.1, *United States v. Parker*, No. 17-CR-20914-CMA, ¶ 4 (S.D. Fla. Apr. 12, 2018).
[347] Motion for Downward Departure Pursuant to U.S.S.G. § 5K1.1, *United States v. Parker*, No. 17-CR-20914-CMA, ¶ 5 (S.D. Fla. Apr. 12, 2018).
[348] Order, *United States v. Parker*, No. 17-CR-20914-CMA, (S.D. Fla. Apr. 30, 2018); Judgment, *United States v. Parker*, No. 17-CR-20914-CMA, 2 (S.D. Fla. Apr. 30, 2018).

IV. KEY LEGAL DEVELOPMENTS

A. *United States v. Hoskins* limits reach of DOJ in FCPA conspiracy charges

In our 2017 Global Anti-Bribery Year-in-Review, we noted the potential impact of a decision in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), which was then pending before the Second Circuit. On August 24, 2018, the Second Circuit issued what is indeed likely to be a significant ruling with regard to government FCPA enforcement strategy. The court held that a foreign national who was not an employee or agent of a US company and whose alleged conduct occurred entirely outside of the United States—and as a result could not be charged with a substantive FCPA violation—also could not be charged with conspiracy to violate the FCPA under federal conspiracy statutes, or any other accessory liability theory.

In *Hoskins*, the DOJ charged Lawrence Hoskins, a British national working for a British subsidiary of French power company Alstom SA, with conspiracy to violate Section 78dd-2 of the FCPA, which prohibits violations by American companies and their employees and agents, and Section 78dd-3, which prohibits violations by wholly foreign entities and individuals based on acts taken while in the United States, as well as substantive FCPA violations under Section 78dd-2.[349] Notably, Hoskins was not alleged to have taken any actions within the United States, which would have provided the DOJ with territoriality jurisdiction for substantive violations under Section 78dd-3.[350] Rather, the DOJ argued that Hoskins was liable for participating in the conspiracy because, although based outside the United States, he authorized payments to certain consultants for the purpose of paying bribes to Indonesian officials on behalf of Alstom's American subsidiary, Alstom Power Inc, and therefore took an overt act in furtherance of a corrupt scheme.[351] Hoskins successfully moved to dismiss the conspiracy count in part at the district court on the grounds that the DOJ could not charge him with conspiracy to violate the FCPA when he otherwise fell into a class of individuals whom Congress intended to exclude from liability.[352]

On appeal, the Second Circuit affirmed the dismissal in part, concluding that Congress intended to exclude foreign nationals from the reach of the FCPA if they did not act within territory of the United States and did not act as an agent of a domestic concern.[353] The Second Circuit also concluded the government could not use the conspiracy charge to reach such persons—doing so would violate the presumption against extraterritoriality because Congress had already provided clear territorial limitations on the reach of the FCPA in the statute.[354] The panel did, however, permit the government to continue to pursue a conspiracy charge based on a theory that, assuming the government could prove that Hoskins acted as an agent of a domestic concern and was thus substantively liable under Section 78dd-2, the conspiracy charge was not subject to the limitation described above.[355]

The *Hoskins* decision demarcates one outer limit of FCPA liability, *i.e.*, foreign national defendants who are not substantively liable under the FCPA cannot be reached via accessory charges. As expected, individual defendants have begun invoking *Hoskins* to contest prosecution. In one case pending before the Northern District of Illinois, the DOJ has alleged that two foreign national defendants, Dmitry Firtash and Andras Knopp, orchestrated a bribery conspiracy from abroad using emails, phone calls, and correspondent banking transactions that passed through the United States.[356] However, while arguing against dismissal of conspiracy count under *Hoskins*, the DOJ conceded in recent briefing that at

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[349] *United States v. Hoskins*, 902 F.3d 69, 72-73 (2d Cir. 2018).
[350] *See United States v. Hoskins*, 902 F.3d 69, 72 (2d Cir. 2018).
[351] *United States v. Hoskins*, 902 F.3d 69, 72 (2d Cir. 2018).
[352] *United States v. Hoskins*, 902 F.3d 69, 73 (2d Cir. 2018).
[353] *United States v. Hoskins*, 902 F.3d 69, 84-95 (2d Cir. 2018).
[354] *United States v. Hoskins*, 902 F.3d 69, 95-97 (2d Cir. 2018).
[355] *United States v. Hoskins*, 902 F.3d 69, 97-98 (2d Cir. 2018).
[356] Government's Second Supplemental Response to Defendant Firstash's and Knopp's Motions to Dismiss Indictment, at 2, *United States v. Firtash*, No. 13-Cr-515 (N.D. Ill. Sept. 22, 2018). The DOJ has also alleged one of the defendants, Knopp, committed certain acts while in the United States. *Id.*

least one defendant, Firtash, did not act within the United States, and that it would not present evidence that either defendant falls within the scope of Section 78dd-2's application to agents or officers of a domestic concern.[357] Accordingly, the defendants contended that *Hoskins*' reasoning applies equally to them given their status as foreign nationals and the DOJ's concessions about the minimal US nexus and that the conspiracy count should be dismissed.[358]

While the government has previously maintained that a violation of a substantive FCPA count is not required to pursue a conspiracy or aiding and abetting charge,[359] the *Hoskins* decision calls these prosecutorial views into question. It also suggests that physical presence may become increasingly contentious in Section 78dd-3 cases where the jurisdictional nexus is at issue. While Hoskins had emailed and made phone calls to the United States, the government conceded (and the panel emphasized) that he was never physically present in the United States.[360] The panel's statements on this conform with other case law in this area, which has held that the territorial requirement of Section 78dd-3 is understood to be more stringent than the interstate commerce requirement in Sections 78dd-1 and 78dd-2 and requires an act undertaken while physically present in the United States, as opposed, for example, to routing a transaction through a US bank.[361] The *Hoskins* decision adds further support for the argument that physical presence in the United States is required for liability under Section 78dd-3 of the FCPA.

Moreover, while the Second Circuit's decision may limit prosecutorial reach with respect to FCPA violations, the government has argued in a court filing in a different case that these jurisdictional limitations do not apply to money laundering charges, which were pending against Hoskins but not at issue in the appeal to the Second Circuit.[362] In fact, 2018 saw a significant number of individuals charged with money laundering in addition to FCPA violations.[363] In one string of recent prosecutions, numerous individuals were charged with money laundering in addition to FCPA violations for their role in a large scale bid-rigging scheme involving PDVSA, the state-owned Venezuelan oil company (*see* bove at page 44).

B. ***United States v. Chi Ping Patrick Ho*** **affirms alternative jurisdictional theories under the FCPA and use of correspondent banking transactions as jurisdictional basis for money laundering offenses**

Other 2018 legal developments, however, reaffirmed the government's flexibility in pursuing FCPA violations and related conduct, including the use of alternate charging theories and the addition of money laundering charges based solely on US dollar-denominated clearing activity. As discussed above at page 40, in *United States v. Chi Ping Patrick Ho*, No. 17-cr-00779 (S.D.N.Y. filed Dec. 18, 2017), the

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[357] Government's Second Supplemental Response to Defendant Firstash's and Knopp's Motions to Dismiss Indictment, at 2-3, *United States v. Firtash*, No. 13-Cr-515 (N.D. Ill. Sept. 22, 2018).
[358] Dmitry Firtash and Andras Knopp's Reply Brief in Support of Their Motion for Leave to File Supplemental Authority, *United States v. Firtash*, No. 13-Cr-515 (N.D. Ill. Oct. 9, 2018).
[359] DOJ & SEC, *A Resource Guide to the US. Foreign Corrupt Practices Act* 34 (2012).
[360] *United States v. Hoskins*, 902 F.3d 69, 74 (2d Cir. 2018).
[361] *See United States v. Hoskins*, 123 F. Supp. 3d 316, 326 n.11 (D. Conn. 2015), *aff'd in part, rev'd in part*, 902 F.3d 69 (2d. 2018); Trial Tr., Day 15, 9-12, June 6, 2011, *United States v. Patel*, No. 09-CR-335 (D.D.C. June 6, 2011); *see also* WilmerHale, *Second Circuit Limits Government's Ability to Prosecute Foreign Persons and Companies for Conspiracy to Violate the FCPA* (Aug. 28, 2018), https://www.wilmerhale.com/en/insights/client-alerts/20180828-second-circuit-limits-governments-ability-to-prosecute-foreign-persons-and-companies-for-conspiracy-to-violate-the-fcpa.
[362] Government's Response to Defendant's Notice of Supplemental Authority in Support of Motion to Dismiss Superseding Indictment, *United States v. Azat Martirossian*, No. 2:17-cr-00233-EAS (S.D. Ohio Oct. 1, 2018).
[363] *See United States v. Dimitry Firtash*, No. 13-CR-515 (N.D Ill.); *United States v. Petro Contoguris*, No. 2:17-cr-00233 (S.D. Ohio); *United States of America v. Luis Carlos de Leon-Perez*, No. 17-cr-514 (S.D. Tex.); *United States v. Rafael Ernesto Reiter-Munoz*, No. 17-CR-00514 (S.D. Tex.); *United States v. Cesar David Rincon Godoy*, No. 17-CR-00514 (S.D. Tex.); *United States v. Alejandro Isturiz Chiesa*, No. 17-CR-00514 (S.D. Tex.); *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC (S.D. Fla.); *United States v. Jose Larrea*, No. 18-cr-2012-MGC (S.D. Fla.), *United States v. Egbert Yvan Ferdinand Koolman*, No. 18-cr-20276-FAM (S.D. Fla.); *United States v. Carlos Alberto Zelaya Rojas*, No. 2:18-cr-00086 (E.D. La.).

government charged Ho, a Chinese national and the head of an anti-corruption NGO, with participation in two bribery schemes.

In a motion to dismiss filed in April 2018, Ho challenged multiple aspects of the indictment, including the government's simultaneous charging of both the domestic concern and territorial provisions of the FCPA as well as the government's reliance on correspondent banking transfers to establish the money laundering charges.

In a ruling from the bench, Judge Loretta Preska held that under certain circumstances, the FCPA's domestic concern provision (Section 78dd-2) and territorial provisions (Section 78dd-3) were not mutually exclusive and could be charged together or in the alternative.[364] Judge Preska observed that while employees or agents of a domestic concern can be charged under Section 78dd-2, it could also be the case that a foreign national employee or agent of a domestic concern is subject to jurisdiction under the Section 78dd-3 territorial provisions if she acted while present in the United States. Judge Preska concluded that because Ho was an agent of a domestic concern as well as a foreign national, he was fairly charged under Section 78dd-2 based on allegations that he acted as an officer and agent of a domestic concern, and under 78dd-3 by acting within the United States. As a result, he fell within the scope of both provisions for charging purposes, and any factual findings would be left to the jury.[365]

In addition to challenging the government's charging of two alternative jurisdictional provisions under the FCPA, Ho also challenged the jurisdictional basis for the money laundering counts. Ho argued that the allegedly laundered funds, which traveled through correspondent banks in New York without any other US nexus, did not travel "to" or "from" the United States as required under the money laundering statute, 18 U.S.C. § 1956(a)(2)(A); according to Ho, these were a single transaction that did not touch the United States.[366] Judge Preska rejected this argument on two grounds. First, she held that the indictment sufficiently alleged the elements of the offense, *i.e.*, that the defendant caused funds to be transmitted from China and to or through the United States to foreign countries, in turn furthering the unlawful scheme. Second, with respect to the adequacy of evidence needed to demonstrate transactions "to" and "from" the United States, Judge Preska held that the correspondent banking transaction from an account in Hong Kong to the same bank in New York and then to Dubai was sufficient. Relying on the Second Circuit's decision in *United States v. Daccarett*,[367] Judge Preska agreed that correspondent banking transactions were clearly transfers to a place in the United States and from the United States, and they were not properly considered a single transaction insufficient to form a nexus with the United States.[368]

Notably, while Judge Preska found *Daccarett* to be controlling in its explanation of the US jurisdictional hook provided by correspondent banking transactions, questions have been raised in other cases about the sufficiency of US jurisdiction based solely on dollar-denominated clearance activity. For example, in *Jesner v. Arab Bank, plc*,[369] the Supreme Court observed that correspondent banking clearing activity "is an entirely mechanical function" that occurs "without human intervention in the proverbial 'blink of an eye,'"[370] such that US jurisdiction may not always be assumed simply because a correspondent banking transaction has occurred. Accordingly, despite *Ho*, questions may continue to be raised as to whether clearing activity is itself sufficient to serve as a jurisdictional hook for potential money laundering violations involving transactions otherwise occurring entirely outside of the United States.

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[364] Tr., *United States v. Ho*, No. 17-cr-00779, 15-18 (S.D.N.Y. July 19, 2018).
[365] Tr., *United States v. Ho*, No. 17-cr-00779, 18 (S.D.N.Y. July 19, 2018).
[366] Tr., *United States v. Ho*, No. 17-cr-00779, 19-21 (S.D.N.Y. July 19, 2018).
[367] *United States v. Daccarett,* 6 F.3d 37, 54 (2d Cir. 1993).
[368] Tr., *United States v. Ho*, No. 17-cr-00779, 31-35 (S.D.N.Y. July 19, 2018).
[369] 138 S. Ct. 1386 (2018).
[370] 138 S. Ct. 1386, 1395 (2018) (citation omitted).

C. *Digital Realty Trust, Inc. v. Somers* limits anti-retaliation provisions for internal whistleblowers

In February 2018, in *Digital Realty Trust, Inc. v. Somers* ("Digital Realty"), the Supreme Court issued a 9-0 decision limiting the ability of certain whistleblowers to seek protection under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") when it addressed whether the anti-retaliation provision of Dodd-Frank extends to an individual who did not report a violation to the SEC and therefore fell outside the statute's definition of "whistleblower." As relevant to *Digital Realty*, Dodd-Frank specifies that whistleblowers are protected from retaliation when they (1) provide information to the SEC; (2) assist or testify in an SEC investigation; or (3) make a disclosure protected under Sarbanes-Oxley or other laws or rules governed by the SEC.[371] Importantly, the statute defined a whistleblower as "any individual who provides ... information relating to a violation of the securities laws to the Commission."[372] The SEC's implementing regulations, however, defined "whistleblower" two different ways: one required a potential whistleblower to disclose information to the SEC itself, but another—the definition applicable to the anti-retaliation provisions—did not require a disclosure to the SEC but covered disclosures to company management and/or other agencies.[373]

In *Digital Realty*, the respondent employee reported suspected securities laws violations to senior management and was allegedly terminated as a result of that report. The respondent did not report the suspected violation to the SEC but instead filed suit in federal court several months later alleging retaliation under Dodd-Frank. The Court unanimously agreed that the textual definition of "whistleblower" in Dodd-Frank requires a potential whistleblower to report a violation to the SEC in order to receive an award or protection under the statute; a potential whistleblower who does not report a violation to the SEC and/or only internally reports a violation therefore is not entitled to the protections of Dodd-Frank's anti-retaliation provisions.[374]

While the *Digital Realty* decision does not directly implicate the FCPA, it will likely affect the actions of potential whistleblowers when deciding whether to report concerns internally or to the SEC itself. Notably, as discussed above at page15, the SEC whistleblower program nonetheless has had a banner year. According to recent reports, the SEC received 5,282 whistleblower tips during fiscal year 2018, an 18% increase from 2017, and an increase in the number of tips after the Court's decision in *Digital Realty Trust*.[375]

In order to address the Supreme Court's decision, the SEC voted to propose amendments to the whistleblower program in June 2018. The proposed rule amendments clarify the definition of a "whistleblower" by applying uniform definition to the term across all three aspects of the SEC whistleblower program: the award program, the heightened confidentiality requirements, and the employment anti-retaliation protections.[376] Under the current rules, the SEC applies a broader definition of the term to apply to those seeking employment anti-retaliation protection.[377] To comport with the Supreme Court's decision, the proposed rules clarify that the more narrow statutory definition of a

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[371] 15 U.S.C. §78u–6(h)(1)(A).
[372] *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 774 (2018) (emphasis omitted) (citing 15 U.S.C. § 78u–6(a)(6)).
[373] *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 775 (2018).
[374] *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018).
[375] Mengqi Sun, *SEC Whistleblower Program Has Record-Breaking Year*, WALL ST. J., Nov. 16, 2018.
[376] US Securities and Exchange Commission Press Release No. 2018-120: SEC Proposes Whistleblower Rule Amendments (June 28, 2018).
[377] Whistleblower Program Rules, 83 Fed. Reg. 34702, 34718 (proposed July 20, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-07-20/pdf/2018-14411.pdf.

whistleblower will apply in that context.[378] Additionally, the proposed rules would require whistleblowers to report information to the SEC in writing in order to receive anti-retaliation protections.[379]

If approved, the recently proposed amendments would also give the SEC greater flexibility and discretion to reward whistleblowers as well as streamline the whistleblower claims review process. For example, under one proposed amendment, the SEC would be allowed to award whistleblowers for information resulting in deferred prosecution agreements, non-prosecution agreements, and settlements outside a judicial or administrative proceeding.[380] The current rules do not address whether whistleblower awards are permitted in such circumstances.

Over 60 percent of the awards historically paid out under the SEC whistleblower program have been less than $2 million. Under the current rules, the Commission may only consider certain criteria in determining the size of an award.[381] With the goal of incentivizing whistleblowers who might be deterred by the low dollar amount of a potential award, the proposed rules would give the Commission the discretion to increase the dollar amount of those smaller awards up to an amount of $2 million.[382] And in an effort to spread the wealth, the proposed rules provide the SEC with discretion to reduce the size of the largest awards and eliminate double recovery (*i.e.*, situations where whistleblowers recover from the SEC and another agency).[383] The proposed rules would also promote efficiency in the claims review process by allowing the SEC to summarily deny frivolous claims and by barring individuals who repeatedly make frivolous claims.[384]

Upon publishing these proposed rules on July 20, 2018, the SEC held a 60-day public comment period.[385] The SEC is now presumably reviewing those comments prior to moving forward with final rules. If the rules become final, it is safe to assume that they will increase the incentives for potential whistleblowers to come forward with information regarding corporate wrongdoing.

D. Continuing impact of *Kokesh v. SEC*

The impact of the Supreme Court's unanimous decision last year in *Kokesh v. SEC,* in which the Court held that disgorgement in SEC enforcement actions is subject to a five-year statute of limitations under 28 U.S.C. § 2462, continued to be felt in 2018. As we discussed in last year's Global Anti-Bribery Year-in-Review,[386] the Court in *Kokesh* concluded that because disgorgement in SEC cases operates as punishment for violations of public laws rather than compensation for private wrongs, it "bears all the hallmarks of a penalty" and is therefore subject to the five-year limitation set forth in the statute.[387] The SEC has estimated that *Kokesh* will cause it to forgo $900 million in disgorgement that it could have

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[378] Whistleblower Program Rules, 83 Fed. Reg. 34702, 34718 (proposed July 20, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-07-20/pdf/2018-14411.pdf.
[379] US Securities and Exchange Commission Press Release No. 2018-120: SEC Proposes Whistleblower Rule Amendments (June 28, 2018).
[380] US Securities and Exchange Commission Press Release No. 2018-120: SEC Proposes Whistleblower Rule Amendments (June 28, 2018).
[381] *See* 17 C.F.R. § 240.21F-6 (2018).
[382] US Securities and Exchange Commission Press Release No. 2018-120: SEC Proposes Whistleblower Rule Amendments (June 28, 2018).
[383] US Securities and Exchange Commission Press Release No. 2018-120: SEC Proposes Whistleblower Rule Amendments (June 28, 2018).
[384] US Securities and Exchange Commission Press Release No. 2018-120: SEC Proposes Whistleblower Rule Amendments (June 28, 2018).
[385] Whistleblower Program Rules, 83 Fed. Reg. 34702, 34718 (proposed July 20, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-07-20/pdf/2018-14411.pdf.
[386] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 53-56, (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.
[387] *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017).

otherwise collected from cases pending as of early November 2018;[388] it is thus unsurprising that the SEC has begun advocating for potential legislative action to address the limitations imposed by the ruling.[389]

Kokesh has also affected ongoing cases. In July 2018, in *SEC v. Cohen*, Judge Nicholas Garaufis of the E.D.N.Y. dismissed an SEC suit alleging a bribery scheme in Africa involving two former employees of fund manager Och-Ziff Capital Management Group, finding that the conduct was time-barred under *Kokesh* in part because the SEC sought disgorgement beyond the five-year limitation period.[390] Significantly, the court also expanded *Kokesh* to cover injunctions directing defendants to refrain from any future violations of securities law (so-called "obey-the-law" injunctions).[391] The court reasoned that the injunctive relief sought by the SEC in *Cohen* "operate[d] at least partly as a penalty" by "mark[ing] [the] Defendants as lawbreakers".[392] As a result, the court found that the injunction was similarly subject to the five-year statute of limitations.[393] In doing so, Judge Garaufis rejected the SEC's argument that additional discovery should be conducted before determining the timeliness of the injunction; the court stated that "[a]llowing discovery to proceed with respect to claims that appear to be time-barred on the face of a plaintiff's complaint would constitute 'entertain[ing]' those claims, which § 2462 clearly prohibits."[394]

The *Cohen* ruling also further circumscribed the SEC's time to bring an action by giving a narrow interpretation to the SEC's tolling agreements. The court found that the tolling agreements between the SEC and the defendants, interpreted via "general principles of contract law," applied only to the original investigation referenced in the agreement, not to subsequent investigations that arose later out of that investigation.[395] In explaining its rationale, the court noted that the subsequent investigation in *Cohen* was distinct enough that it was conducted under a separate formal order of investigation.[396] And the tolling agreements used by the SEC, the court found, did not "use the sort of broad, open-ended language that might have evinced the parties' mutual intent to extend the statute of limitations applicable to any claims the SEC might bring."[397]

In addition, *Cohen* also appears to refine the point at which the statute of limitations starts to run on a claim involving a disgorgement remedy, suggesting that the clock is triggered when the course of

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[388] US Securities and Exchange Commission, Annual Report, Division of Enforcement (2018), at 12, *available at* https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

[389] *See* Stephanie Avakian & Steven Peikin, Co-Directors Division of Enforcement, Testimony on "Oversight of the SEC's Division of Enforcement" before the US House of Representatives Committee on Financial Services, Subcommittee on Capital Markets, Securities, and Investment (May 16, 2018), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-savakianspeikin-20180516.pdf; Clara Hudson, *SEC Commissioner: Our Penalty Calculations Are "'Puzzling,'"* GLOBAL INVESTIGATIONS REVIEW (Nov. 2, 2018), https://globalinvestigationsreview.com/article/jac/1176459/sec-commissioner-our-penalty-calculations-are-"puzzling".

[390] *'SEC v. Cohen*, 332 F. Supp. 3d 575 (E.D.N.Y. 2018).

[391] In conflict with *Cohen*, the Sixth, Eighth and Eleventh Circuits have permitted "obey-the-law" injunctions as a remedy for conduct occurring outside of the five-year statute of limitations period. *See SEC v. Quinlan*, 373 F. App'x. 581, 586-88 (6th Cir. 2010); *SEC v. Collyard*, 861 F.3d 760, 764 (8th Cir. 2017); *SEC v. Graham*, 823 F.3d 1357, 1360-62 (11th Cir. 2016). Of the three circuits, only the Eight Circuit decision in *Collyard* was decided after the *Kokesh* ruling. To the extent that that the *Collyard* court suggested that a remedy is not subject to § 2462's five-year statute of limitations "if the remedy's penal effect is only incidental to its remedial effect[,]" the *Cohen* court respectfully found that inconsistent with *Kokesh*. *'SEC v. Cohen*, 332 F. Supp. 3d 575, 593-95 (E.D.N.Y. 2018).

[392] Mem. & Order Granting Mot. to Dismiss, *SEC v. Cohen*, No. 17-cv-430, at 30 (E.D.N.Y. July 12, 2018), ECF No. 68.

[393] Although the court stated that it was limiting its decision to the specific injunction in this case, the court's reasoning that the injunction would "'stigmatize'" Defendants and "do nothing to recompense past victims of Defendants' alleged misconduct" would appear to extend to all of the SEC's "obey-the-law" injunctions. *See* Mem. & Order Granting Mot. to Dismiss, *SEC v. Cohen*, No. 17-cv-430, at 30 (E.D.N.Y. July 12, 2018), ECF No. 68.

[394] *'SEC v. Cohen*, 332 F. Supp. 3d 575, 587 (E.D.N.Y. 2018) (alterations in original).

[395] *'SEC v. Cohen*, 332 F. Supp. 3d 575, 589-90 (E.D.N.Y. 2018).

[396] *'SEC v. Cohen*, 332 F. Supp. 3d 575, 589-91 (E.D.N.Y. 2018).

[397] *'SEC v. Cohen*, 332 F. Supp. 3d 575, 590-91 (E.D.N.Y. 2018).

conduct first begins and not when the ill-gotten gains are received.[398] The SEC argued in *Cohen* that "its 'disgorgement claims' accrued only when (and apparently each time) Defendants received ill-gotten gains as a result of the allegedly corrupt transactions"— thereby resetting the five-year limitation period each time the defendants received payment.[399] The court rejected this argument, explaining that "the statute of limitations runs from when Defendants allegedly engaged in the misconduct, not when they received compensation in connection with that misconduct."[400] In another discussion related to the time of accrual, in rejecting the SEC's argument that further discovery might reveal whether the violations at issue were timely, the court noted in a footnote, "the 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action'" and that "[e]vidence of subsequent misconduct would not change the date at which the SEC had a complete and present cause of action."[401] While this statement could conceivably be read to circumscribe charges related to long-running misconduct, it is unlikely to support statute-of-limitations arguments asserting that the claim on such long-running conduct accrued as soon as the first cause of action was complete; the court appeared to limit its claim accrual comment to the violations at issue in the *Cohen* case, which were based on the nine specific transactions for which the related claims had already accrued.

The SEC will likely attempt to mitigate to the *Cohen* ruling in several ways—for example, by proposing draft tolling agreements with broad language and injunctions prohibiting specific conduct—while also continuing to push back against the *Kokesh* decision. The SEC has already made statements criticizing *Kokesh* and advocating for legislative action. In May 2018, Stephanie Avakian and Steven Peikin, co-directors of the SEC's Division of Enforcement, testified before a subcommittee of the US House of Representatives Committee on Financial Services regarding how *Kokesh* hinders the SEC's ability to bring charges against bad actors and recover funds to compensate harmed investors.[402] The testimony stated that because many securities frauds are complex and can take significant time to uncover and investigate, *Kokesh* can result in an outcome where some investors "shoulder additional losses – and the fraudulent actor is able to keep those ill-gotten gains – because those investors were tricked early in a scheme rather than later."[403] Their testimony signals potential increased efforts to promote a legislative fix. Additionally, during a "Q&A" at the Securities Enforcement Forum in November 2018 in Washington, D.C., SEC commissioner Robert Jackson stated that *Kokesh* is "tragic" with "troubling implications" and "has to be fixed."[404] While Jackson did not think that Congress realistically had the political bandwidth to pass a legislative fix for *Kokesh*, such legislation would be his top priority.[405]

Although the SEC remains limited by *Kokesh*, the DOJ does not face a similar restriction and it is possible that that the DOJ may require disgorgement from companies that the SEC is time-barred from reaching. In December 2018, **Polycom, Inc.** resolved FCPA charges with the SEC and DOJ that involved for the first time in a joint DOJ-SEC resolution a larger disgorgement payment to the DOJ than to the SEC. The alleged corrupt scheme at Polycom lasted for approximately eight years, from 2006 to at least 2014. The SEC was time-barred from imposing disgorgement for all but the last two years of that period,

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[398] *'SEC v. Cohen*, 332 F. Supp. 3d 575, 591 (E.D.N.Y. 2018).
[399] *'SEC v. Cohen*, 332 F. Supp. 3d 575, 591 (E.D.N.Y. 2018).
[400] *'SEC v. Cohen*, 332 F. Supp. 3d 575, 591 (E.D.N.Y. 2018). The court also rejected the SEC's argument because the SEC did not allege that defendants received any ill-gotten gains in its complaint in *Cohen*. *Id*.
[401] *'SEC v. Cohen*, 332 F. Supp. 3d 575, 588 n. 6 (E.D.N.Y. 2018).
[402] Stephanie Avakian & Steven Peikin, Co-Directors, Division of Enforcement, Testimony on "Oversight of the SEC's Division of Enforcement" before the US House of Representatives Committee on Financial Services, Subcommittee on Capital Markets, Securities, and Investment (May 16, 2018), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-savakianspeikin-20180516.pdf.
[403] Stephanie Avakian and Steven Peikin, Co-Directors, Division of Enforcement, Testimony on "Oversight of the SEC's Division of Enforcement" before the US House of Representatives Committee on Financial Services, Subcommittee on Capital Markets, Securities, and Investment (May 16, 2018), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-savakianspeikin-20180516.pdf.
[404] Clara Hudson, *SEC Commissioner: Our Penalty Calculations Are "Puzzling,"* GLOBAL INVESTIGATIONS REVIEW (Nov. 2, 2018), ''https://globalinvestigationsreview.com/article/jac/1176459/sec-commissioner-our-penalty-calculations-are-"puzzling".
[405] Clara Hudson, *SEC Commissioner: Our Penalty Calculations Are "Puzzling,"* GLOBAL INVESTIGATIONS REVIEW (Nov. 2, 2018), ''https://globalinvestigationsreview.com/article/jac/1176459/sec-commissioner-our-penalty-calculations-are-"puzzling".

however, and ultimately required the company to pay a $3.8 million penalty and $12.5 million in disgorgement and prejudgment interest.[406] At the same time, despite issuing a declination to Polycom, the DOJ imposed disgorgement of $31 million.[407] While not explicitly stated in either the DOJ or SEC settlement papers, it appears that the DOJ disgorgement amount may have been intended to capture profits from the first six years of conduct that the SEC could not reach.[408]

E. March 2018 D.D.C. ruling requires disclosure of certain information regarding candidates for monitorships

In March 2018, a federal district court in Washington, D.C. ruled that the DOJ must release the names of unsuccessful candidates for FCPA monitorships.[409] The information was sought under a 2015 Freedom of Information Act ("FOIA") request by a journalist at news and research service *Global Investigations Review*. *Global Investigations Review* sought the names of unsuccessful monitor candidates and their associated law firms for 15 foreign bribery settlements from 2010 to 2014. The DOJ opposed the request, arguing that the information fell under FOIA exemptions protecting privacy interests and that revealing the names of the rejected monitor candidates without additional context would not alone lead to a greater public understanding of the monitor selection process.[410] Judge Rudolph Contreras of the D.D.C. acknowledged that candidates had expectations of some privacy but decided that *Global Investigations Review* "sufficiently demonstrated that the public interest [would] be significantly served by the release of these names," and that "the public interest in disclosure of the information outweigh[ed] the weak privacy interests at issue."[411] Following a May 2018 court order, the DOJ released to *Global Investigations Review* the names of the monitor candidates put forth by companies resolving FCPA offenses during a five-year period from 2009 to 2015.[412] Analysis by *Global Investigations Review* found that the 29 US-based monitor candidates did not include any women, and most of the candidates, 19 total, were former government officials.[413]

The request for and release of the monitor candidate names is significant because this effort to seek more transparency in the monitor process may encourage both companies and regulators to broaden their pool of potential monitors from both a diversity and experiential perspective.

V. COLLATERAL ACTIONS

Throughout the year, companies undergoing or resolving FCPA investigations also found themselves subject to related private litigation, most commonly shareholder suits claiming that companies' failures to disclose allegedly corrupt conduct damaged investors. Below we describe representative instances of private litigation from the year.

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[406] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Polycom, Inc.*, Rel. No. 84978, File No. 3-18964, at 6 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84978.pdf.
[407] *See* US Department of Justice Letter from Sandra Mosser to Cas Hashemi re: Polycom, Inc. (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Polycom, Inc.*, Rel. No. 84978, File No. 3-18964 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84978.pdf.
[408] *See* US Department of Justice Letter from Sandra Mosser to Cas Hashemi re: Polycom, Inc. (Dec. 20, 2018), *available at* https://www.justice.gov/criminal-fraud/file/1122966/download.
[409] *Tokar v. 'DOJ*, 304 F. Supp. 3d 81, 102 (D.D.C. 2018).
[410] *Tokar v. 'DOJ*, 304 F. Supp. 3d 81, 96-97 (D.D.C. 2018).
[411] *Tokar v. 'DOJ*, 304 F. Supp. 3d 81, 100 (D.D.C. 2018); *see also* Adam Dobrik & Mary Jacoby, *Court Orders DOJ to Release Monitor Candidate Names*, GLOBAL INVESTIGATIONS REVIEW (Mar. 30, 2018), https://globalinvestigationsreview.com/article/jac/1167412/court-orders-doj-to-release-monitor-candidate-names.
[412] FCPA Counsel Tracker, *FCPA Monitorships: The Candidates*, GLOBAL INVESTIGATIONS REVIEW (July 2, 2018), https://globalinvestigationsreview.com/benchmarking/fcpa-counsel-tracker/1171193/the-fcpa-monitor-candidates.
[413] Dylan Tokar, *DOJ Records Offer Window into Lucrative World of FCPA Monitorships*, GLOBAL INVESTIGATIONS REVIEW (Jul. 2, 2018), https://globalinvestigationsreview.com/article/jac/1171163/doj-records-offer-window-into-lucrative-world-of-fcpa-monitorship.

A. Shareholder Lawsuits

1. In re Petrobras Securities Litigation

On January 3, 2018, **Petrobras** agreed to settle an investor class action suit for $2.95 billion. The consolidated class action proceeding in the Southern District of New York alleged that Petrobras violated Section 10(b), Rule 10b-5, and Section 20(a) of the Exchange Act, Section 11, 12, and 15 of the Securities Act, and various Brazilian laws by misrepresenting material facts and failing to disclose a multi-year, multibillion-dollar money-laundering and bribery scheme in which Petrobras executives received $800 million in bribes from construction and engineering firms.[414]

On June 22, 2018, the court approved the $2.95 billion settlement.[415] Judge Rakoff reduced the requested attorney fees from $285 million to $186.5 million, observing that any higher amount of fees would be a windfall to lawyers who benefitted from the various government investigations.[416]

As noted above at page 6, in an unusual move, the SEC credited this settlement against the amounts due from Petrobras to the SEC in settling its FCPA action.

2. In re General Cable Corp. Securities Litigation

In January 2018, a consolidated complaint was filed in the Eastern District of Kentucky against General Cable Corporation ("GCC") and two of its executives, Gregory Kenny and Brian Robinson.[417] The original complaint was filed on January 5, 2017, just one week after Kentucky-based wire and cable manufacturer General Cable Corporation ("GCC") agreed to pay more than $74 million to resolve SEC and DOJ investigations.[418] In its December 2016 Non-Prosecution Agreement with the DOJ and settlement with the SEC, GCC admitted to making improper payments through its subsidiaries to foreign government officials in Angola, Bangladesh, China, Egypt, Indonesia, and Thailand, resulting in profits of more than $50 million.[419]

Referring to these admissions, plaintiffs allege that GCC, Kenny, and Robinson made material misrepresentations or omissions relating to millions of dollars GCC paid in bribes.[420] The case is still pending, with a hearing on GCC's motion to dismiss scheduled in March 2019.

3. Embraer Shareholder Litigation

Shareholders filed suit against Embraer S.A. ("Embraer"), a Brazilian aerospace manufacturer, in the Southern District of New York in March 2018, alleging that Embraer failed to disclose and/or made false or misleading statements about FCPA violations while the company was being investigated by the

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[414] Consolidated Second Amended Complaint, *In re Petrobras Sec. Litig.*, No. 14-cv-09662 (S.D.N.Y. July 16, 2015).
[415] *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858 (S.D.N.Y. 2018).
[416] *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 876 (S.D.N.Y. 2018).
[417] Consolidated Complaint, *In re General Cable Corp. Sec. Litig.*, No. 2:17-cv-00025 (E.D. Ky. Jan. 19, 2018).
[418] US Securities and Exchange Commission Press Release No. 2016-283: Wire and Cable Manufacturer Settles FCPA and Account Charges (Dec. 29, 2016); US Department of Justice Press Release No. 16-1536: General Cable Corporation Agrees to Pay $20 Million Penalty for Foreign Bribery Schemes in Asia and Africa (Dec. 29, 2016).
[419] Non-Prosecution Agreement between US Department of Justice and General Cable Corporation, Attachment A (Dec. 22, 2016), https://www.justice.gov/criminal-fraud/file/921801/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of General Cable Corp.*, Rel. No. 79703, File No. 3-17755 (Dec. 29, 2016).
[420] Consolidated Complaint, *In re General Cable Corp. Sec. Litig.*, No. 2:17-cv-00025, ¶¶ 12, 84-89, 121-145, (E.D. Ky. Jan. 19, 2018).

DOJ and the SEC.[421] The complaint came after Embraer settled FCPA violations with government agencies for $205 million.[422]

On March 30, 2018, the court granted Embraer's motion to dismiss all claims. The court stated that "disclosure is not a rite of confession, and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing."[423] Moreover, Embraer did publicly disclose in 2011 that it was under investigation by the DOJ and SEC for FCPA violations, and publicly warned on more than one occasion that it could be required to pay fines or be subject to sanctions as a result of such investigations; the court found that these statements satisfied Embraer's disclosure obligations.[424]

The shareholder-plaintiffs also argued that Embraer's statements or omissions concerning its adherence to the company's code of ethics and anti-corruption policy were actionable because of the importance that investors placed on them with the knowledge that Embraer faced an investigation.[425] The court, however, found that such statements about codes of ethics and anti-corruption policies are immaterial as a matter of law.[426] Moreover, "[b]ecause Embraer's code of ethics is inherently aspirational, it cannot be that every time a violation of that code occurs, Embraer will be liable under federal laws."[427]

4. Och-Ziff Shareholder Litigation

In October 2018, investors reached a settlement agreement with financial services company Och-Ziff Capital Management Group LLC, its chief executive officer Daniel S. Och, and its former chief financial officer Joel M. Frank ("Och-Ziff") totaling $28.75 million.[428] The settlement came less than one month after the court granted the plaintiffs' motion for class certification.[429]

Investors filed the suit in 2014, alleging that the company violated federal securities laws by failing to disclose that it was being investigated by the DOJ and SEC for FCPA violations.[430] Plaintiffs claimed that the company's stock price was artificially inflated due to the defendants' failure to disclose the government investigations into FCPA violations, and that stock prices fell after the *Wall Street Journal*

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[421] Decision & Order, *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-cv-06277, at 2 (S.D.N.Y. Mar. 30, 2018).
[422] Decision & Order, *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-cv-06277, at 3-4 (S.D.N.Y. Mar. 30, 2018).
[423] Decision & Order, *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-cv-06277, at 10 (S.D.N.Y. Mar. 30, 2018) (quoting *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014)).
[424] Decision & Order, *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-cv-06277, at 11-13 (S.D.N.Y. Mar. 30, 2018).
[425] Decision & Order, *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-cv-06277, at 7-8 (S.D.N.Y. Mar. 30, 2018).
[426] Decision & Order, *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-cv-06277, at 16 (S.D.N.Y. Mar. 30, 2018).
[427] Decision & Order, *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-cv-06277, at 17 (S.D.N.Y. Mar. 30, 2018) (citing *In re Braskem S.A. Sec. Litig.*, 246 F. Supp. 3d 731, 755-56 (S.D.N.Y. 2017)).
[428] Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement, *Menaldi v. Och-Ziff Capital Management Group LLC*, No. 14-cv-3251, at 1 (S.D.N.Y. Oct. 2, 2018).
[429] Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement, *Menaldi v. Och-Ziff Capital Management Group LLC*, No. 14-cv-3251, at 4 (S.D.N.Y. Oct. 2, 2018).
[430] Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement, *Menaldi v. Och-Ziff Capital Management Group LLC*, No. 14-cv-3251, at 2-3 (S.D.N.Y. Oct. 2, 2018); Kelly Swanson, *Och-Ziff to Pay $29 Million to Settle Class Action*, GLOBAL INVESTIGATIONS REV. (Oct. 2, 2018), *available at* https://globalinvestigationsreview.com/article/jac/1175196/och-ziff-to-pay-usd29-million-to-settle-class-action.

published an article in 2014 detailing the investigations, resulting in damages, according to the plaintiffs, of $166 million.[431]

B. RICO suits

1. Keppel Offshore & Marine Ltd.

On February 6, 2018, funds managed by EIG Global Energy Partners filed a $660 million Racketeer Influenced and Corrupt Organizations Act ("RICO") suit against Keppel Offshore & Marine Ltd. ("Keppel") in the Southern District of New York.[432] The complaint relies heavily on Keppel's 2017 settlement with the DOJ for FCPA violations.[433] Plaintiffs alleged a RICO conspiracy among Keppel, Petrobras, a Brazilian political party, and Sete Brasil Participacoes, S.A. (an entity created by Petrobras). The predicate acts for the RICO conspiracy were alleged violations of the Travel Act, money laundering, and wire fraud as described in the DOJ deferred prosecution agreement.[434] Specifically, Keppel allegedly aided Petrobras and Sete in fraudulently raising capital from third parties in order to purportedly fund the cost of construction, but in actuality was used to pay bribes and kickbacks.[435] Keppel met several times with the EIG funds regarding Sete but never informed the funds that Keppel planned to and did pay millions of dollars in bribes and kickbacks to obtain Sete contracts.[436] The funds invested over $221 million in Sete, which allegedly were used to fund improper payments to obtain drillship contracts.[437] The case is currently pending.

2. Government of Bermuda v. Lahey Clinic, Inc. et al.

On February 14, 2017, the Government of Bermuda filed a suit against healthcare providers Lahey Clinic, Inc. and Lahey Clinic Hospital, Inc., asserting RICO violations and several other claims relating to unfair business practices and fraud.[438] According to the complaint, for almost two decades, defendants bribed the former premier of Bermuda, Dr. Ewart Brown, to obtain lucrative healthcare contracts.[439] The allegedly improper payments were disguised as "consulting fees" and donations to Brown's political party.[440]

On March 8, 2018, Judge Indira Talwani of the District of Massachusetts dismissed the complaint in its entirety, holding that RICO only applied to extraterritorial conduct where an injury was suffered in the United States and refusing to exercise supplemental jurisdiction over the related state law claims.[441] In this case, the Government of Bermuda failed to allege any domestic injury.[442]

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[431] Consolidated Second Amended Class Action Complaint, *Menaldi v. Och-Ziff Capital Management Group LLC et al.*, No. 14-cv-3251, at ¶¶ 2-10 (S.D.N.Y. Nov. 18, 2016); Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement, *Menaldi v. Och-Ziff Capital Management Group LLC et al.*, No. 14-cv-3251, at 2 (S.D.N.Y. Oct. 2, 2018); Kelly Swanson, *Och-Ziff to Pay $29 Million to Settle Class Action*, GLOBAL INVESTIGATIONS REVIEW (Oct. 2, 2018), https://globalinvestigationsreview.com/article/jac/1175196/och-ziff-to-pay-usd29-million-to-settle-class-action.

[432] Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-cv-01047 (S.D.N.Y. Feb. 6, 2018).

[433] Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-00697 (KAM), at Attachment A (E.D.N.Y. Dec. 22, 2017).

[434] Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-cv-01047, ¶ 1, (S.D.N.Y. Feb. 6, 2018).

[435] Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-cv-01047, ¶ 5, (S.D.N.Y. Feb. 6, 2018).

[436] Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-cv-01047, ¶ 6, (S.D.N.Y. Feb. 6, 2018).

[437] Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-cv-01047, ¶ 7, (S.D.N.Y. Feb. 6, 2018).

[438] Complaint, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 17-cv-10242, ¶ 4 (D. Mass. Feb. 14, 2017).

[439] Complaint, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 17-cv-10242, ¶ 1 (D. Mass. Feb. 14, 2017).

[440] Complaint, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 17-cv-10242, ¶¶ 1, 45 (D. Mass. Feb. 14, 2017).

[441] Mem. & Order, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 17-cv-10242 (D. Mass. Mar. 8, 2018).

[442] Mem. & Order, *Government of Bermuda v. Lahey Clinic, Inc.*, No. 17-cv-10242, at 10, 12, 14-15 (D. Mass. Mar. 8, 2018).

3. GolTV, Inc. et al. v. Fox Sports Latin America Ltd. et al.

On October 20, 2016, GolTV filed suit against Fox Sports Latin America, T&T Sports Marketing (T&T), Pan American Sports Enterprises Co., and several of their subsidiaries and executives asserting violations of RICO, Sections 1 and 2 of the Sherman Act, and Florida's Deceptive and Unfair Trade Practices Act.[443] The RICO allegations mirror the allegations in the criminal indictments against T&T and several individuals regarding bribes paid to South American FIFA officials in exchange for television broadcast rights to soccer matches. [444]

On March 9, 2018, the court granted defendants' motion to certify the case for interlocutory appeal on two questions: (1) whether the indirect purchaser standing doctrine applies to civil RICO claims and (2) whether a plaintiff who resides in a foreign country may claim a domestic RICO injury for an inability to license broadcast rights for a US territory.[445] The appeal is currently pending.

On June 15, 2018, the magistrate judge sustained objections from the government to the plaintiffs' request for the production of "any presentation shown to or provided to the DOJ." The plaintiffs sought, among other things, presentations and documents provided to the DOJ by companies cooperating with the DOJ's criminal investigation. The court denied plaintiffs' request on the grounds that the discovery sought was not proportional to the needs of the case under Rule 26(b)(1) because the government's interest in keeping its investigation confidential outweighed the plaintiffs' need for the documents. [446]

Then, on August 2, 2018, despite denying previous motions to stay by the government, the court granted the defendants' motion to stay the case. The court agreed that the government's ongoing investigation hindered the defendants' ability to receive fulsome responses to their discovery requests and also cited to the pending interlocutory appeal in its ruling.[447]

C. Restitution Claims

1. United States v. OZ Africa Management GP, LLC

In February 2018, investors in Africo Resources Ltd., a company that allegedly held mining rights that were taken as a result of Och-Ziff's conduct, interceded in the company's criminal sentencing, claiming that that they were victims of its bribery and entitled to restitution.[448] The claimants alleged that Africo Resources was harmed by Och-Ziff's bribery scheme when Africo lost control over a mine in the Democratic Republic of Congo to Och-Ziff as a result of bribes Och-Ziff allegedly paid to local judges.[449] From there, Africo claims, Och-Ziff and its co-conspirators bribed judges to continue ruling against Africo as it sought to void the earlier court decision.[450] Simultaneously, Och-Ziff's co-conspirators approached Africo with a low-ball offer for their rights to the mine, allegedly hoping that the adverse court rulings would pressure Africo to accept the offer. Given what they call "a Hobson's choice" between the low offer

[443] Complaint, *GolTV, Inc., et al. v. Fox Sports Latin Am. Ltd., et al.*, No. 16-cv-24431, ¶ 7 (S.D. Fla. Oct. 20, 2016).
[444] Complaint, *GolTV, Inc., et al. v. Fox Sports Latin Am. Ltd., et al.*, No. 16-cv-24431, ¶¶ 1-4 (S.D. Fla. Oct. 20, 2016).
[445] Order, *GolTV, Inc., et al. v. Fox Sports Latin Am. Ltd., et al.*, No. 16-cv-24431, 1-2 (S.D. Fla. Mar. 9, 2018).
[446] Order, *GolTV, Inc., et al. v. Fox Sports Latin Am. Ltd., et al.*, No. 16-cv-24431 (S.D. Fla. June 15, 2018).
[447] Order, *GolTV, Inc., et al. v. Fox Sports Latin Am. Ltd., et al.*, No. 16-cv-24431, 2 (S.D. Fla. Aug. 2, 2018).
[448] Letter for Africo Resources Ltd. Equity Holders, *United States v. OZ Africa Management GP, LLC*, No. 1:16-cr-00515-NGG (E.D.N.Y. Feb. 16, 2018).
[449] Letter for Africo Resources Ltd. Equity Holders, *United States v. OZ Africa Management GP, LLC*, No. 1:16-cr-00515-NGG, at 3-4 (E.D.N.Y. Feb. 16, 2018).
[450] Letter for Africo Resources Ltd. Equity Holders, *United States v. OZ Africa Management GP, LLC*, No. 1:16-cr-00515-NGG, at 3-4 (E.D.N.Y. Feb. 16, 2018).

and the risk that the courts would continue to rule against them, Africo shareholders accepted the undervalued offer.[451]

Africo owners claimed that the DOJ had previously agreed with Africo that Africo had been harmed by the allegedly improper conduct and was entitled to restitution, but that the government later changed its position when Och-Ziff asserted that, if required to pay restitution to Africo on top of the previously-negotiated criminal penalty, Och-Ziff would seek to withdraw its guilty plea.[452] The Africo claimants argued that DOJ changed its mind regarding Africo's victim status because it wanted to avoid the embarrassment of having failed to provide for restitution in the plea agreement and incorrectly representing to the court that Och-Ziff's fine was sitting in an escrow account pending sentencing rather than the General Treasury where it was deposited.[453] The court has yet to render a final decision on Africo's claims.

D. Lawsuits Leading to Investigations

1. AstraZeneca Private Lawsuit and DOJ Investigation

In July 2018, AstraZeneca disclosed in an SEC filing that the DOJ had opened an "inquiry . . . in connection with an anti-corruption investigation" related to a 2017 lawsuit in which AstraZeneca is a defendant.[454] In 2017, a group of private plaintiffs sued a group of pharmaceutical companies for their conduct in Iraq, claiming violations of the Anti-Terrorism Act and raising potential FCPA concerns.[455]

In the SEC filing, AstraZeneca only stated that the DOJ inquiry was an "anti-corruption investigation" related to "interactions with the Iraqi government and certain of the same matters alleged in [the private lawsuit]." According to the 2017 complaint, AstraZeneca and the other defendants provided bribes or kickbacks to officials at the Iraqi Ministry of Health (MOH).[456] This began under the regime of Saddam Hussein but continued after the fall of that regime, when MOH became controlled by members of a Shi'ite terrorist organization, Jaysh al-Mahdi.[457] These bribes, which included cash and surplus pharmaceutical supplies, allegedly trickled down to Shi'ite terrorist fighters throughout Iraq.[458] The exact nature and scope of DOJ's investigation into AstraZeneca has not been disclosed, but the suit demonstrates the role private litigation can play in alerting the government to possible FCPA concerns.

E. Arbitration

1. Petrobras-Vantage Arbitration

In July 2018, an arbitration panel awarded **Vantage Drilling Co.** $622 million in damages for breach of contract claims against Petrobras. The dispute, initiated in 2015, related to allegations that Vantage had improperly obtained a large contract from Petrobras in 2009 by paying bribes to Jorge Zelada, the head of Petrobras's international division; Petrobras sought to cancel the contract and Vantage initiated the arbitration for breach. In finding for Vantage, the arbitration panel ruled that bribery did not void the contract because Petrobras ratified the contract by continuing to perform after it learned

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[451] Letter for Africo Resources Ltd. Equity Holders, *United States v. OZ Africa Management GP, LLC*, No. 1:16-cr-00515-NGG, at 4 (E.D.N.Y. Feb. 16, 2018).
[452] Letter for Africo Resources Ltd. Equity Holders, *United States v. OZ Africa Management GP, LLC*, No. 1:16-c-00515-NGG, at 7 (E.D.N.Y. Feb. 16, 2018).
[453] Letter for Africo Resources Ltd. Equity Holders, *United States v. OZ Africa Management GP, LLC*, No. 1:16-c-00515-NGG, at 8 (E.D.N.Y. Feb. 16, 2018).
[454] AstraZeneca PLC, US Securities and Exchange Commission Form 6-K, AstraZeneca PLC, July 26, 2018.
[455] Complaint, *Atchley v. AstraZeneca UK Ltd.*, No. 1:17-cv-02136, (D.D.C. Oct. 17, 2017).
[456] *See, e.g.*, Complaint, *Atchley v. AstraZeneca UK Ltd.*, No. 1:17-cv-02136, at 18, 37 (D.D.C. Oct. 17, 2017).
[457] Complaint, *Atchley v. AstraZeneca UK Ltd.*, No. 1:17-cv-02136, at 18, 37 (D.D.C. Oct. 17, 2017).
[458] Complaint, *Atchley v. AstraZeneca UK Ltd.*, No. 1:17-cv-02136, at 4-6 (D.D.C. Oct. 17, 2017).

of the bribery.[459] One arbitrator, however, dissented from the panel's opinion, refusing to sign the award and stating that Petrobras was denied "fundamental fairness and due process protections."[460] Further complicating the picture was the fact that, while the arbitration was ongoing, Zelada was convicted of money laundering and corruption in Brazil,[461] and after the panel ruled for Vantage, Vantage's former CEO was also criminally charged in Brazil for bribing Petrobras officials.[462]

Petrobras has filed a motion in the District Court for the Southern District of Texas to vacate the award, arguing bias on the part of one of the arbitrators, failure by the panel to consider key evidence, and failure by the panel to sufficiently explain its reasoning.[463] The motion is pending.

VI. INTERNATIONAL DEVELOPMENTS

A. United Kingdom

1. Investigation and Enforcement Trends

The year 2018 was a year of change for the UK's Serious Fraud Office ("SFO"). Last year, we concluded that the SFO was becoming increasingly confident in its investigation tactics.[464] While this remains true, there was limited progress on many investigations in 2018 due to a change in leadership and significant senior staff turnover. On April 20, 2018, Sir David Green CB QC ended his six-year tenure as Director of the SFO. After a long period of transition and an interim placement, Lisa Osofsky was announced as the new Director on June 4, 2018.[465] Ms. Osofsky, hailing from the US and with a background in US law enforcement (during her time at the FBI) and in private sector compliance, began a five-year term on August 28, 2018.[466] This change at the top was followed by a churn in senior management with the announced departures of General Counsel Alun Milford[467] and senior case controller John Gibson.[468]

Although she has yet to announce any significant casework decisions, Ms. Osofsky appears to have a wide-ranging vision for the future of the SFO, including increased and improved cooperation with local, national and international law enforcement agencies, and enhanced collaboration with other regulatory bodies and the private sector.[469] Ms. Osofsky envisions enhanced use of artificial intelligence tools, which the SFO already has employed on the Rolls-Royce investigation, and her US background,

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[459] Respondents' Motion to Vacate the Majority Award, *Vantage Deepwater Company v. Petrobras America Inc.*, No. 4:18-cv-2246, at 14-15 (S.D. Tex. Sept. 27, 2018).
[460] Respondents' Motion to Vacate the Majority Award, *Vantage Deepwater Company v. Petrobras America Inc.*, No. 4:18-cv-2246, at 15 (S.D. Tex. Sept. 27, 2018).
[461] *See* Caroline Simson, *Petrobras Says $622M Drilling Award Must Be Nixed*, LAW360 (Sept. 28, 2018), https://www.law360.com/articles/1087170/petrobras-says-622m-drilling-award-must-be-nixed; *Brazil Petrobras former director Jorge Zelada jailed*, BBC NEWS, Feb. 1, 2016.
[462] *Brazil Files Charges Against Former Executive of US Company*, ASSOCIATED PRESS (July 13, 2018), https://www.apnews.com/635813860125495faf7a4a3abcc29d15.
[463] Respondents' Motion to Vacate the Majority Award, *Vantage Deepwater Company v. Petrobras America Inc.*, No. 4:18-cv-2246, at 16-38 (S.D. Tex. Sept. 27, 2018).
[464] WilmerHale Foreign Corrupt Practices Act Alert, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, page 79 (Jan. 12, 2018) https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018.
[465] SFO News Release, *Lisa Osofsky named next Director of the SFO*, (June 4, 2018) https://www.sfo.gov.uk/2018/06/04/lisa-osofsky-named-next-director-of-the-sfo/.
[466] SFO News Release*, Lisa Osofsky begins tenure as SFO Director* (Aug. 28,2018), https://www.sfo.gov.uk/2018/08/28/lisa-osofsky-begins-tenure-as-sfo-director/.
[467] SFO News Release, *SFO General Counsel, Alun Milford, to join Kingsley Napley* (Sept. 24, 2018), https://www.sfo.gov.uk/2018/09/24/sfo-general-counsel-alun-milford-to-join-kingsley-napley/.
[468] Catherine Lafferty, *Ex-SFO Prosecutor Joins Cohen & Gresser's London Office*, Law360 (Sept. 21, 2018) https://www.law360.com/articles/1084629/ex-sfo-prosecutor-joins-cohen-gresser-s-london-office
[469] Lisa Osofsky, Director of the SFO, Remarks at the Cambridge International Symposium on Economic Crime (Sept. 3, 2018), https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/.

and consequent familiarity with DPAs may mean that concluding cases with DPAs will be an added priority. She has also made no secret of her desire to pursue the most challenging cases and appears willing to take her time untangling the most complex of crimes.[470]

Ms. Osofsky's arrival coincided with an increase in the SFO's core funding from £34.3m to £52.7m for the year 2018/2019.[471] However, funding for investigations with annual costs of more than £2.5 million will still require an application for "blockbuster funding."

2. Significant Cases

The year 2017 was the year of the DPA, with agreements being concluded between the SFO and both Rolls-Royce Plc and Tesco Stores Plc.[472] The year 2018, by contrast, did not see the resolution of any DPAs but instead the first contested prosecution of a company for failure to prevent bribery under section 7 of the United Kingdom Bribery Act ("UKBA"). Skansen Interiors Limited ("Skansen"), a company based in London with only 30 employees, discovered misconduct following a change in management and made a self-report to the Crown Prosecution Service ("CPS"), the UK prosecutor that handles the majority of police-investigated matters. Given the small size and relative simplicity of the investigation and prosecution, the matter was handled solely by the CPS with no involvement by the SFO. Despite Skansen having made a self-report, the CPS chose to proceed with a prosecution. Skansen put forward the statutory "adequate procedures" defense, arguing that its compliance procedures, although skeletal in nature, were appropriate for its small size and narrow geographical reach. The jury rejected this defense; Skansen was convicted but was not sanctioned as the Court issued an absolute discharge.[473] The treatment of Skansen indicates that a self-report will not, at least where the CPS is concerned, necessarily be sufficient for a company to obtain a DPA.

On January 18, 2018, the SFO announced that it had launched a formal investigation into Chemring Group Plc ("Chemring"), a UK-based defense company, and its UK subsidiary, Chemring Technology Solutions Limited ("CTSL").[474] The SFO is investigating bribery, corruption, and money laundering concerns involving intermediaries that had previously represented CTSL and its predecessor companies. The investigation was prompted by a self-report made by CTSL to the SFO relating to two historic contracts.

The SFO's investigation into Unaoil, which commenced in 2016, continued to progress, with numerous charging decisions made in 2018. The SFO announced in May that it had charged two individuals in relation to allegedly corrupt payments made to secure the award of a contract worth $733 million to Leighton Contracts Singapore PTE Ltd for a project to build two pipelines in Southern Iraq.[475] In December, a further charge of conspiracy to make corrupt payments was brought against another individual in relation to an oil pipeline project in Iraq. [476] All three of these individuals already faced

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[470] Franz Wild, *Mueller Protégé wants to Take 'Hard Cases' at U.K. Fraud Office*, BLOOMBERG (Nov. 29, 2018), https://www.bloomberg.com/news/articles/2018-11-29/mueller-protege-wants-to-take-hard-cases-at-u-k-fraud-office.
[471] SFO News Release, *Changes to SFO funding arrangements* (Apr. 19, 2018), https://www.sfo.gov.uk/2018/04/19/changes-to-sfo-funding-arrangements/.
[472] *SFO v Rolls Royce* (Unreported, Jan. 17, 2017); SFO News Release, *SFO agrees Deferred Prosecution Agreement with Tesco* (Apr. 11, 2017), https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/.
[473] Although Skansen was found guilty, the sentence of an absolute discharge means that no further action was taken.
[474] SFO News Release, *Chemring Group PLC and Chemring Technology Solutions Ltd* (Jan. 18, 2018), https://www.sfo.gov.uk/2018/01/18/chemring-group-plc-and-chemring-technology-solutions-ltd/; Chemring Press Release, *SFO Investigation* (Jan. 18, 2018), http://www.chemring.co.uk/media/press-releases/2018/18-01-2018a.aspx.
[475] SFO News Release, *New Charges in SFO's Unaoil Investigation in Relation to US$733 Million Contract* (May 22, 2018), https://www.sfo.gov.uk/2018/05/22/new-charges-in-sfos-unaoil-investigation-in-relation-to-us733-million-contract/.
[476] SFO News Release, *Further Charge Against Individual in SFO's Unaoil Investigation* (Dec. 21, 2018), https://www.sfo.gov.uk/2018/12/21/further-charge-against-individual-in-sfos-unaoil-investigation/.

charges in the Unaoil investigation, brought in November 2017, in relation to an alleged conspiracy to pay bribes to secure the award of contracts in Iraq to SBM Offshore, a client of Unaoil.[477]

Relatedly, in June 2018, both Unaoil Ltd and Unaoil Monaco SAM were indicted by the SFO as part of the ongoing investigation and summonsed to appear in court in July.[478] Unaoil Ltd faces two offenses of conspiracy to give corrupt payments contrary to section 1 of the Criminal Law Act 1977 and section 1 of the Prevention of Corruption Act 1906. These charges relate to alleged corrupt payments made to secure the above-mentioned award of a contract to Leighton Contractors Singapore PTE Ltd. Meanwhile, Unaoil Monaco SAM was summonsed with two counts of the same offenses, relating to the alleged corrupt payments made to secure the award of contracts in Iraq to SBM Offshore.

Charges also were brought in 2018 against two former employees of Güralp Systems Limited ("Güralp"), an engineering company specializing in the production of seismic testing equipment in July 2018. Although Güralp had been under investigation by the SFO since December 2015, the investigation was not announced until these charges were brought. The founder of Güralp and the former Managing Director were both charged with conspiracy to make corrupt payments to a public official and employee of the Korea Institute of Geoscience and Mineral Resources.[479] A further charge of the same offense was brought against another individual in September 2018.[480] We discuss Guralp above at page 22.

On November 27, 2018, a London jury acquitted three individuals and convicted one other in the SFO's investigation into FH Bertling relating to a bribery scheme to obtain freight forwarding contracts.[481] Three individuals were acquitted of charges of conspiracy to make or accept corrupt payments, while a fourth individual was found guilty of conspiring in a bribery scheme involving overcharging. On the same day, the SFO announced that three further individuals had pleaded guilty to charges of conspiracy to make corrupt payments before the trial. This brought the SFO's total number of convicted individuals in this investigation to nine.

The first instance of proceeds of corruption being returned overseas in a civil recovery case occurred in 2018. Griffiths Energy, an oil and gas company based in Canada, paid bribes to Chadian diplomats in the form of discounted shares deals and "consultancy fees" using a front company in return for securing exclusive contracts. Griffiths self-reported this conduct and pleaded guilty in 2013 to charges brought by Canadian authorities, paying a CAD $10.35 million fine to settle the case. Griffiths Energy was later acquired by a UK corporation, resulting in the corrupt proceeds falling, for the first time, within the SFO's jurisdiction. In 2014, with the wife of a former Chadian official standing to profit from the sale of the shares purchased at a steep discount, the SFO obtained a Property Freezing Order for the proceeds of the sale. Following a trial, the High Court granted the SFO's order for recovery of £4.4m. The recovered money was transferred for investment in projects to benefit the poorest in Chad.[482]

The SFO's long-running investigation into Eurasian Natural Resources Corporation ("ENRC") was dogged by issues throughout 2018. In September, the SFO suffered a significant defeat in the Court of

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[477] SFO News Release, *Two charged in SFO's Unaoil investigation* (Nov. 16, 2017), https://www.sfo.gov.uk/2017/11/16/two-charged-sfos-unaoil-investigation/; SFO News Release, *Two Further Individuals Charged in SFO's Unaoil Investigation* (Nov. 30, 2017) *https://www.sfo.gov.uk/2017/11/30/two-individuals-charged-sfos-unaoil-investigation/.*

[478] SFO News Release, *Unaoil Group Companies Summonsed as part of SFO's Ongoing Corruption Investigation* (June 26, 2018), https://www.sfo.gov.uk/2018/06/26/unaoil-group-companies-summonsed-as-part-of-sfos-ongoing-corruption-investigation/.

[479] SFO News Release, *Güralp Systems Founder and Former Managing Director Charged with Corruption over South Korea Contracts* (Aug. 17, 2018), https://www.sfo.gov.uk/2018/08/17/guralp-systems-founder-and-former-managing-director-charged-with-corruption-over-south-korea-contracts/.

[480] SFO News Release, *Further Charges Against Former Güralp Systems Employees in South Korean Bribery and Corruption Case* (Sept. 28, 2018), https://www.sfo.gov.uk/2018/09/28/further-charges-against-former-guralp-systems-employees-in-south-korean-bribery-and-corruption-case/.

[481] SFO News Release, 9 *Convicted in £16m and $21m FH Bertling Bribery Cases* (Nov. 27, 2018), https://www.sfo.gov.uk/2018/11/27/9-convicted-in-16m-and-21m-fh-bertling-bribery-cases/.

[482] SFO News Release, *SFO Recovers £4.4m from Corrupt Diplomats in 'Chad Oil' Share Deal* (Mar. 22, 2018), https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/.

Appeal in a battle for disclosure of documents over which ENRC claimed privilege. The SFO subsequently confirmed that it will not seek to appeal the matter to the Supreme Court.[483] The SFO also had to make a U-turn on its pursuit of Benedikt Sobotka, chief executive of ENRC's parent company Eurasian Resources Group. An arrest warrant was issued for Mr. Sobotka in July of 2018 after the SFO claimed he had failed to attend a compelled witness interview.[484] However, after withdrawing the warrant in August,[485] the SFO subsequently concluded in November that there was not a realistic prospect of his conviction.[486] Allegations then came to light of serious wrongdoing by the SFO in the ENRC investigation, including allegations of destruction of evidence, deliberate leaks to the media and unauthorized, secret meetings between the SFO and ENRC's former counsel.[487] A retired judge will be appointed to oversee an investigation into these allegations, which is expected to last into 2019.

The SFO's bribery case against various Alstom companies and executives concluded in 2018.[488] On the whole, it was a mixed result for the SFO. The prosecution was split across three trials and covered multiple jurisdictions. In the first trial, Alstom and two senior executives were accused of several counts of conspiracy to commit bribery. Both executives were acquitted; Alstom was convicted on one count (and is appealing this conviction). The second trial saw a clean sweep of acquittals for the company and three senior executives. By the time the third and final case came to trial, the Alstom corporate entity (which has subsequently been acquired) had already pleaded guilty, along with two individual defendants. The final defendant was convicted on December 19, 2018. These trials demonstrated the challenge the SFO still faces in securing corporate convictions in cases brought under the legislation in force prior to the UKBA. In order to establish liability against a company in cases such as these, the prosecution must prove the guilt of the company's 'directing mind and will' (normally a senior executive). Of all the defendants that did not plead, the SFO only managed to establish the guilt of one senior executive before a jury, thereby demonstrating the difficulty of establishing a guilty directing mind and securing a corporate conviction at trial. With a raft of pre-Bribery Act SFO investigations still ongoing, we expect this issue to be relevant in 2019 and beyond.

3. Legislative Developments

The year 2018 was a year of scrutiny for the UKBA. The House of Lords appointed a Select Committee in May 2018 to perform a review of the implementation and enforcement of the UKBA, with a full report due in March of 2019.[489] Current figures indicate that enforcement of the UKBA has, so far, been insufficient; in the seven years since the UKBA went into force, prosecutors have proceeded against 22 individuals under section 1 (bribing another person) and 13 individuals under section 2 (receiving

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[483] Kirstin Ridley, *UK Fraud Office Backs Down in ENRC Privilege Battle,* REUTERS (Oct. 2, 2018), https://uk.reuters.com/article/uk-britain-enrc-sfo/uk-fraud-office-backs-down-in-enrc-privilege-battle-idUKKCN1MC1N0.

[484] Arathy S. Nair, *UK's SFO Issues Arrest Warrant for CEO of Kazakh Miner Eurasian Resources,* REUTERS (July 13, 2018), https://uk.reuters.com/article/us-eurasianresources-sfo-ceo/uks-sfo-issues-arrest-warrant-for-ceo-of-kazakh-miner-eurasian-resources-idUKKBN1K325F.

[485] Dasha Afansieva, *UK court withdraws arrest warrant for Kazakh miner Eurasian Resources CEO,* REUTERS (Aug. 17, 2018), https://uk.reuters.com/article/uk-eurasianresources-ceo-sfo/uk-court-withdraws-arrest-warrant-for-kazakh-miner-eurasian-resources-ceo-idUKKBN1L214O.

[486] Max Walters, *SFO Drops Case Against Mining Chief*, THE LAW SOCIETY GAZETTE (Nov. 6, 2018), https://www.lawgazette.co.uk/law/sfo-drops-case-against-mining-chief/5068210.article.

[487] Max Walters, *ENRC Demands Judicial Review of SFO Probe,* THE LAW SOCIETY GAZETTE (Oct. 4, 2018) https://www.lawgazette.co.uk/law/enrc-demands-judicial-review-of-sfo-probe/5067798.article.

[488] SFO News Release, *Five Convictions in SFO's Alstom Investigation into Bribery & Corruption to Secure €325 Million of Contracts* (Dec. 19, 2018) https://www.sfo.gov.uk/2018/12/19/five-convictions-in-sfos-alstom-investigation-into-bribery-and-corruption-to-secure-e325-million-of-contracts/.

[489] UK Parliament press release, "Lords select committee appointed to examine Bribery Act 2010" https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notices/house-of-lords-media-notices---2018/may-2018/lords-select-committee-appointed-to-examine-bribery-act-2010/.

bribes), while no prosecutions under section 6 (bribery of a foreign public official) yet have been commenced.[490]

The issue of corporate criminal liability continued to plague prosecuting authorities, particularly the SFO. For many offenses, English law still requires that for acts to be attributable to a corporation they must be undertaken by those that represent the directing mind and will of that organization. The Ministry of Justice's consultation on reform of economic crime, and the proposed expansion of the "failure to prevent" model used in the UKBA, seems to have ground to a halt. Although the consultation was launched and concluded in 2017, there has been little mention of this issue since, which likely has taken a back seat to the UK's preparations for exiting the EU. However, the solicitor general, Robert Buckland, said in March 2018 that there was strong rationale for a new corporate offense of 'failing to prevent economic crime', and that the offense should be set it in statute.[491] The year 2019 may be when this idea finally gathers momentum.

4. Concluding Thoughts

Sir David Green's time as Director of the SFO ended on a confident note, with the SFO actively pursuing a number of investigations and taking an assertive stance on many issues. Although in some areas there has been a decrease in activity from last year, most notably in the lack of DPAs negotiated, this can be fairly attributed to the change of leadership and attendant upheaval within the SFO. Now that the new Director is firmly in post, expectations are high that activity will ramp up again in the early part of next year.

B. Germany

1. Enforcement Efforts

Germany saw one major settlement with authorities and several notable new criminal investigations related to bribery allegations in 2018.

In February 2018, in a settlement with the Munich Public Prosecutor's Office, aviation company Airbus SE agreed to pay an €81 million fine to end a five-year bribery investigation. Several employees of Airbus allegedly had paid bribes to foreign public officials in order to secure a deal to sell Eurofighter jets to the Austrian military in 2003. Munich prosecutors said that they had found no evidence of bribery but that Airbus had been unable to account for and explain the exact reasons for money transfers to third parties in an amount of €90-100 million. While this settlement ends the Munich investigation, Airbus and some former high-ranking employees face ongoing investigations by Austrian authorities.[492]

In May 2018, the Public Prosecutor's Office of Stuttgart launched an investigation against employees of German arms manufacturer Heckler & Koch. Allegedly, company employees paid bribes to Mexican public officials to enable the sale of assault rifles worth €4.1 million to the Mexican government. Many of the rifles allegedly were sold without export permits. The case is politically sensitive as some of the assault rifles may have been used to commit human rights violations in Mexico. For instance, rifles

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[490] UK Ministry of Justice, Bribery Act 2010: Post Legislative Scrutiny Memorandum (June 4, 2018), *accessible at* https://www.gov.uk/government/publications/bribery-act-2010-post-legislative-scrutiny-memorandum?utm_source=08bfac73-670d-49a2-a4d7-48c22cc15110&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate.

[491] Joe Watts, *Minister Says Time Has Come for New Corporate Offence of 'Failing to Prevent Economic Crime'*, THE INDEPENDENT (Mar. 18, 2018) https://www.independent.co.uk/news/uk/politics/failing-to-prevent-economic-crime-robert-buckland-solicitor-general-consultation-a8262396.html.

[492] Tim Hepher, *Airbus Ordered To Pay $99 Million Fine in Eurofighter Case*, REUTERS (Feb. 9, 2018), https://www.reuters.com/article/us-airbus-nl-court/airbus-ordered-to-pay-99-million-fine-in-eurofighter-case-idUSKBN1FT2GB; Klaus Ott, *Airbus zahlt 81 Millionen Euro Bußgeld*, SUEDDEUTSCHE ZEITUNG (Feb. 9, 2018), https://www.sueddeutsche.de/wirtschaft/eurofighter-affaere-airbus-zahlt-millionen-euro-bussgeld-1.3862166 (last visited Nov. 30, 2018).

sold between 2006 and 2009 were linked to the 2014 shooting of protesting students by the Mexican police force.[493]

In the same month, the Public Prosecutor's Office of Frankfurt am Main opened investigations into several top-level managers of the German Football Association. The investigations related to bribes allegedly paid in 2005 by the Association to members of the FIFA executive committee in order to secure the award of the 2006 World Cup for Germany. €6.7 million were transferred by the Association, supposedly as payment for a FIFA gala event, but that event never took place. However, these bribery investigations were soon terminated because prosecutors found that prosecution would be time-barred.[494]

In August 2018, the Public Prosecutor's Office of Braunschweig initiated investigations into an unidentified company from Göttingen that specialized in the production and sale of laboratory equipment. The investigation relates to allegations that employees of the company had for years paid bribes to government officials in the Democratic Republic of Congo, Nigeria, and Kazakhstan in exchange for the officials tailoring tender specifications to exactly match the company's products, ensuring that the company would win the tenders. Law enforcement authorities searched the company premises and private spaces with 120 police officers, seizing documents and computers, after being tipped off by a former employee of the company.[495]

2. Legislative Developments

In 2018, an OECD Working Group was tasked with evaluating the implementation of the OECD Convention on Combating Bribery of Foreign Public Officials of 1997 in Germany. The OECD team expressed concerns regarding the effectiveness of Germany's efforts to prosecute companies. According to the OECD report, only one company out of four was held liable by German authorities in cases of foreign corruption. The recommendations of the OECD team included the development of transparent guidelines for self-denunciation, better protections for whistleblowers, and the establishment of corporate criminal liability in Germany; currently, corporations may only be fined under the Administrative Offenses Act.[496]

Following the German parliamentary election in September 2017, three parties (the Christian Democratic Union, Christian Social Union, and the Social-Democratic Party) approved a coalition agreement in March 2018. The coalition agreement provides that the government will examine and, if necessary, take appropriate legislative action to reform corporate liability so as to effectively combat corporate crime.[497] Some of the measures under consideration include:

- Stronger sanctioning of companies that profit from their employees' misconduct; introduction of an obligation for the prosecution to hold companies accountable and impose sanctions (which is currently at the prosecution's discretion);

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[493] Deutscher Bundestag, Drucksache 19/3904, *Kleine Anfrage - G36-Sturmgewehr: Exporte von Heckler & Koch nach Mexiko*, Aug. 21, 2018.
[494] Johannes Aumüller & Thomas Kistner, *Stimmenkauf? – „Sicher"*, SUEDDEUTSCHE ZEITUNG, March 23, 2018, https://www.sueddeutsche.de/sport/dfb-affaere-um-wm-stimmenkauf-sicher-1.3918651 (last visited Nov. 30, 2018); Michael Ashelm, *DFB droht hohe Strafe*, FRANKFURTER ALLGEMEINE (June 1, 2018), http://www.faz.net/aktuell/sport/fussball/staatsanwaltschaft-dfb-droht-geldstrafe-in-wm-2006-affaere-15617612.html (last visited Nov. 30, 2018).
[495] Lars Ohlenburg, *Zahlte Göttinger Firma Schmiergelder?*, NRD.1 NIEDERSACHSEN (Nov. 15, 2018), https://www.ndr.de/nachrichten/niedersachsen/braunschweig_harz_goettingen/Zahlte-Goettinger-Firma-Schmiergelder,schmiergeld104.html (last visited Nov. 30, 2018).
[496] Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Germany, 2018.
[497] Coalition agreement between CDU, CSU and SPD for the 19. Legislative session, *Ein neuer Aufbruch für Europa, eine neue Dynamik für Deutschland, ein neuer Zusammenhalt für unser Land*, March 2018, page 126.

- Creation of clear rules of procedure, especially concerning the discontinuance of investigations without the imposition of a penalty;

- Connecting the amount of the penalty imposed to the economic importance of the company (with 10 percent of annual revenue the upper limit); public announcement of penalties;

- Incentives for companies to cooperate with authorities through internal investigations, including the introduction of new procedural rules concerning the search of company premises, the seizure of documents, and the scope of the attorney-client privilege.

In October 2018, the German parliament considered two draft bills related to the protection of business and trade secrets; both bills would provide further protect internal whistleblowers against civil lawsuits and criminal prosecution.[498]

C. France

1. Legislative Developments

The implementation of the watershed Sapin II anti-corruption law, adopted in 2017,has proceeded at a fast pace in 2018.

In January 2018, the Minister of Justice issued administrative guidelines laying out the details of the implementation of the Convention judiciaire d'intérêt public ("CJIP"), the French equivalent of a DPA and one of the main enforcement tools provided by Sapin II.[499] Since the enactment of Sapin II, the French Public Prosecutor's Office has used CJIPs on several occasions, in connection with proceedings involving companies such as Kaefer Wanner, SET Environnement, and Société Générale, for example.[500] The number of CJIPs is expected to rise over the next few years.

Companies subject to a CJIP are ordered to pay a fine and to implement certain anti-corruption measures. The implementation of these measures is monitored by the French anti-corruption authority, Agence française anti-corruption ("AFA"). Since its creation in 2017, AFA has inspected several companies and cooperated with foreign enforcement authorities. AFA has announced that the frequency of its inspections will increase.[501]

2. Enforcement Efforts

In March 2018, the French Supreme Court rendered a judgment in the French Oil-for-Food proceedings that provides guidance on various legal questions related to matters of foreign corruption. The Oil-for-Food program was implemented by the UN in 1996 and permitted Iraq, despite an embargo, to sell its oil on the world market in exchange for food. However, beginning in 2000, Iraqi officials

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[498] Deutscher Bundestag, Drucksache 19/4724, *Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2016/943 zum Schutz von Geschäftsgeheimnissen vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung*, Oct 4, 2018; Deutscher Bundestag, Drucksache 19/4558, *Entwurf eines Gesetzes zur Förderung von Transparenz und zum Diskriminierungsschutz von Hinweisgeberinnen und Hinweisgebern (Whistleblower-Schutzgesetz)*, Sep 26, 2018.

[499] Minister of Justice of the French Republic, *Circulaire relative à la présentation et la mise en œuvre des dispositions pénales prévues par la loi n°2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique* (Jan. 31, 2018), http://www.justice.gouv.fr/bo/2018/20180228/JUSD1802971C.pdf (last visited Dec. 14, 2018).

[500] See Legal publications of the French Anti-Corruption Authority (AFA), https://www.economie.gouv.fr/afa/publications-legales (last visited Dec. 15, 2018).

[501] *France - Premières conventions judiciaires dans des affaires de corruption*, REUTERS (Mar. 7, 2018), https://fr.reuters.com/article/topNews/idFRKBN1OD21V-OFRTP (last visited Dec. 14, 2018); L. Verbouw & S. Thonnerieux, *Lutte anti-corruption (loi Sapin 2) : l'AFA et les magistrats sur le pied de guerre!*, Mar. 2018, https://www.acte-international.com/web/aw_13770/fr/lutte-anti-corruption-loi-sapin-2-l-afa-et-les-magistrats-sur-le-pied-de-guerre (last visited Dec. 17, 2018).

demanded illegal "bonus payments" of approximately 10% per barrel. Employees of French energy companies Total and Vitol allegedly agreed to pay these bonuses. Criminal proceedings were instituted in both the United States and France against several employees and the companies themselves. Some of the employees pleaded guilty to the offense in the United States and then attempted to assert a double jeopardy defense in the French proceedings, which was rejected by the French Supreme Court, which held that international human rights protections against double jeopardy do not apply to convictions in two foreign states. The French Supreme Court also held senior company managers liable, finding that their choice to refrain from taking action to stop foreign corruption justified the imposition of criminal sanctions. Moreover, the Supreme Court considered that such significant decisions could have only been made at a senior corporate level and therefore imposed criminal liability on the company itself.[502]

As discussed above at page 9, in June 2018, the French bank Société Générale agreed to a settlement with US and French authorities to end investigations into the bank's business in Libya. Allegations against the bank included that Société Générale had paid bribes to Libyan government officials to secure investments worth approximately $3.66 billion from various Libyan state institutions and that the bank had manipulated the Libor rate. The total fine imposed on the bank was $1.3 billion.[503]

D. European Union

In January 2018, the Bulgarian parliament passed an anti-corruption law and overturned a presidential veto of the bill, clearing the way for the creation of a special anti-corruption unit responsible for tackling corruption on a senior government level.[504] The legislation was a response to persistent pressure from the EU for Bulgaria to strengthen its anti-corruption measures. In addition to continuous monitoring, reports, recommendations and warnings from the EU, the European Commission in 2008 froze EU subsidies for Bulgaria over charges of high-level corruption and improper administration of European funds.[505] Bulgaria is the lowest-ranking EU Member State on Transparency International's Corruption Perceptions Index.[506]

As a result of the alleged misconduct discovered through the "Luxleaks" and "Panama Papers" incidents, the European Commission in April 2018 proposed a directive aimed at improving the protection of whistleblowers who report breaches of EU law. The draft directive is intended to harmonize current laws and set new EU-wide standards. In addition to protecting whistleblowers from retaliation by their

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[502] Cour de Cassation criminelle, chambre criminelle, 16-82.117 (Mar. 14, 2018), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036741972&fastReqId=1379183482&fastPos=1 (last visited Dec. 14, 2018); Julie Gallois, *Pétrole contre nourriture : précisions en matière de corruption d'agents publics étrangers et d'abus de biens sociaux* (Apr. 4, 2018), https://www.dalloz-actualite.fr/flash/petrole-contre-nourriture-precisions-en-matiere-de-corruption-d-agents-publics-etrangers-et-d-#.XBO9jExFyUn (last visited Dec. 14, 2018).

[503] US Department of Justice Press Release No. 18-722, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018), https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan; Delphine Cuny, *Libye et Libor: Société Générale règle ses deux litiges pour 1,3 milliard de dollars*, LA TRIBUNE (June 4, 2018), https://www.latribune.fr/entreprises-finance/banques-finance/libye-et-libor-societe-generale-regle-ses-deux-litiges-pour-1-milliard-780570.html (last visited Dec. 14, 2018).

[504] *Bulgaria Parliament Overturns Presidential veto on Anti-Corruption bill*, BBC NEWS (Jan. 12, 2018), https://www.bbc.com/news/world-europe-42661461.

[505] Georgi Gotev, *Commission Lauds Bulgaria, Castigates Romania on Judicial Reform*, EURACTIV (Nov. 15, 2018), https://www.euractiv.com/section/justice-home-affairs/news/commission-lauds-bulgaria-castigates-romania-on-judicial-reform/ (last visited Dec. 17, 2018); Helen Pidd, *EU Keeps Watch as Authorities Drag their Feet over Trial of Alleged Gangsters*, THE GUARDIAN (Sept. 18, 2008), https://www.theguardian.com/world/2008/sep/19/eu; *European Commission Freezes Subsidies to Romania and Bulgaria over Charges of Corruption*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Sept. 1, 2008), https://www.iisd.org/gsi/news-events/european-commission-freezes-subsidies-romania-and-bulgaria-over-charges-corruption (last visited Dec. 17, 2018).

[506] *Bulgaria's battle with corruption*, EURONEWS, Jan. 12, 2018, https://www.euronews.com/2018/01/12/bulgarias-battle-with-corruption (last visited Dec. 14, 2018).

employers, the directive requires companies in certain sectors to implement clear internal and external reporting channels and to enable anonymous reporting.[507]

In August 2018, the European Commission confirmed the Netherlands and Malta as the 21st and 22nd EU Member States to join the European Public Prosecutor's Office ("EPPO"). The EPPO was founded in late 2017 and will serve as an independent and decentralized prosecution office of the EU, with jurisdiction to investigate and prosecute offenses against the EU's financial interests, such as fraud, corruption, and serious cross-border VAT fraud. The EPPO is scheduled to become operational in 2020.[508]

After allegations in 2017 that members of the Parliamentary Assembly of the Council of Europe had been accepting bribes from Azerbaijan ("Caviargate"), the Parliamentary Assembly established a committee to investigate these allegations. In April 2018, the investigation committee published a report, according to which several current and former members of the Parliamentary Assembly are suspected of having accepted luxury gifts – such as caviar, carpets, and paid trips – from Azerbaijan in return for favorable votes. Among others, they are alleged to have voted against a report in January 2013 damning the situation of political prisoners in Azerbaijan. Several national law enforcement authorities have initiated their own investigations of these Parliamentary Assembly members.[509]

E. China

1. Enforcement Efforts

China's anti-corruption campaign continued to broaden in 2018. In December 2018, President Xi Jinping announced at a meeting of the Communist Party's Politburo that the anti-corruption fight had now obtained an "overwhelming victory," and vowed that the campaign to weed out deep-seated corruption will continue. He further pledged to wage war on graft until corruption of all kinds has been expunged at all levels of the Communist Party of China ("CPC"), from high-level "tigers" to low-level "flies." In the first nine months of 2018, 464,000 cases involving corruption were filed, with 406,000 people disciplined and penalized[510] (among which 342,000 were disciplined by Party rules), including 39 government officials at the ministerial, provincial, or higher level, more than 80,500 at the sub-provincial, county, and village level, as well as thousands of other Party members and other individuals.[511]

Enforcement actions against senior government officials continued in 2018. The National Supervision Commission ("NSC") announced in October 2018 that Meng Hongwei, vice minister of the Ministry of Public Security, had been placed under investigation for suspected violation of law. A subsequent statement from the Ministry of Public Security made clear that Meng was being investigated

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[507] European Commission Press Release, *Whistleblower protection: Commission sets new, EU-wide rules*, Apr. 23, 2018, http://europa.eu/rapid/press-release_IP-18-3441_en.htm.
[508] *European Public Prosecutor's Office*, European Commission Update, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en (last visited Dec. 14, 2018).
[509] Jennifer Rankin, *Council of Europe Members Suspected of Corruption, Inquiry Reveals*, THE GUARDIAN (Apr. 22, 2018), https://www.theguardian.com/law/2018/apr/22/council-of-europe-members-suspected-of-corruption-inquiry-reveals; *'Strong Suspicion' of Corruption in 'Caviargate' at Council of Europe*, FRANCE24 (Apr. 23, 2018), https://www.france24.com/en/20180423-suspicion-corruption-caviargate-council-europe-azerbaijan.
[510] Christian Shepherd, *China's Xi Jinping Declares 'Overwhelming Victory' over Graft*, CHANNEL NEWSASIA (Dec. 15, 2018), https://www.channelnewsasia.com/news/asia/china-xi-jinping-fight-against-corruption-overwhelming-victory-11034806.
[511] *406,000 disciplined by discipline inspection and supervisory authorities nationwide during the first nine months in 2018* (2018年前三季度全国纪检监察机关处分40.6万人 包括39名省部级及以上干部) XINHUA NEWS AGENCY (Oct. 20, 2018), http://www.gov.cn/xinwen/2018-10/20/content_5332999.htm.

for taking bribes.[512] Meng also resigned as president of the France-based International Criminal Police Organization ("Interpol").

Chinese authorities reported on October 15, 2018 that Lai Xiaomin, former Chairman of China Huarong Asset Management Co. Ltd., one of the largest state-owned asset management corporations in China, had been expelled from the Party and dismissed from public office for multiple violations, including corruption.[513] Lai was found to have violated the central government's rules and policies on the conduct of financial personnel, to have taken advantage of his position to pursue illegal gains, to have engaged in suspicious activities, and to have refused to cooperate in the investigation. Lai Xiaomin was formally arrested in November 2018.[514]

Several senior officials who were investigated in 2017 were formally indicted in 2018. Lu Wei, the Vice Minister of the Publicity Department of the CPC Central Committee stood trial in October 2018 and then pleaded guilty to charges of accepting bribes of more than RMB 32 million.[515] In particular, Lu was accused of taking advantage of his various positions with state-run news agencies and government public relations departments to seek significant illegal gains for himself and other persons. The court has yet to impose a final sentence on Lu.

Lastly, Chinese police are investigating several employees of Clear Media Limited, a subsidiary of the outdoor advertising giant Clear Channel Outdoor, for misappropriation of funds in China—potentially implicating the books and records, internal controls, and anti-bribery provisions of the FCPA.[516]

2. Legislative Developments

China recently amended its Criminal Procedure Law ("CPL") to encourage cooperation with government investigations, align with the new national supervision system, and introduce "trials in absentia" for certain crimes, including bribery and corruption. The most recent CPL Amendments are closely aligned with the Party's and the government's ongoing anti-corruption campaign and will further strengthen domestic anti-corruption enforcement. Key changes related to corruption and bribery-related violations include:

a. Formalization of relevant leniency rules in criminal guilty pleas

Pursuant to the CPL Amendments, leniency may be offered when suspects (either individuals or entities) plead guilty and accept punishment. In such circumstances, the People's Procuratorate, the principal agency that prosecutes crimes in China, may suggest leniency in its filings, which will likely be accepted by the People's Court. The CPL Amendments do not detail the terms of leniency that may be offered, instead leaving those to prosecutorial discretion. The new leniency rules will exert additional pressure on individuals and organizations to cooperate with government investigations.

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[512] *The Ministry of Public Security held an emergency meeting in early morning to reveal the key information of Meng Hongwei's illegal activities* (**公安部凌晨召开**紧急会议 **透露孟宏**伟违法关键信息), BEIJING YOUTH (Oct. 8, 2018), http://news.sina.com.cn/c/2018-10-08/doc-ifxeuwws2115081.shtml.

[513] *Former chairman of China Huarong Lai Xiaomin expelled from the Party and the public office; unusual terse language used in CCDI's statement* (**中国**华融原董事长赖小民被双开 **中**纪委公告用词罕见严厉), GUANCHA (Oct. 16, 2018), https://www.guancha.cn/politics/2018_10_16_475623.shtml.

[514] *Latest Development in Lai Xiaomin's Case: Lai has been Arrested; PBOC and CBRC Held Meetings to Take Precautions* (赖小民案件最新进展：目前已被逮捕 **一行一会相**继召开警示教育大会), National Business Daily (Nov. 8, 2018), http://www.nbd.com.cn/articles/2018-11-08/1270519.html.

[515] *Former vice publicity chief went on trial for bribery* (**中宣部原副部**长鲁炜受贿案一审开庭 **受**贿3200**余万**), CHINA NEWS SERVICE (Oct. 19, 2018), http://news.xmnn.cn/xmnn/2018/10/19/100442320.shtml.

[516] Clear Channel Outdoor Holdings Kinc. Reports Results for 2017 Fourth Quarter and Full Year (Apr. 30, 2018), https://www.sec.gov/Archives/edgar/data/1334978/000119312518143419/d578476dex991.htm.

i. Revised procedures for investigating corruptions of government officials

In March 2018, the NSC (i.e., National Supervision Commission) was established to consolidate anti-corruption enforcement and supervision powers from three agencies (the People's Procuratorate, the Ministry of Supervision, and the National Bureau of Corruption Prevention). Prior to the establishment of the NSC, the People's Procuratorate was responsible for investigating and prosecuting most crimes involving government officials. Now, the NSC will be responsible for investigating crimes, particularly corruption and malfeasance, involving government officials (including officials of state-owned entities and public institutions), but the Procuratorate will continue to prosecute such cases. Criminal cases against private companies and individuals who pay bribes to government officials will continue to be investigated by the Public Security Bureau and prosecuted by the People's Procuratorate. The recent CPL Amendments modified existing laws to clarify these changes.

ii. Trial in absentia

The CPL Amendments added a new chapter addressing trial in absentia, which applies to three types of crimes: corruption/bribery, national security, and terrorism. Whenever a corruption or bribery case is transferred from the NSC or the Public Security Bureau to the People's Procuratorate for prosecution, the People's Procuratorate may still prosecute the case at the People's Court even if the suspect is physically located outside Mainland China. Trial in absentia is a further effort to hold individuals accountable for corruption, building on China's efforts to confiscate illegal proceeds located overseas, after allegedly corrupt officials flee China. Individuals convicted in absentia can be extradited pursuant to the United Nations Convention against Corruption, to which China is a party.

F. India

In July 2018, after several prior failed attempts, India passed a comprehensive amendment to its Prevention of Corruption Act (1988) ("PCA"). The Prevention of Corruption (Amendment) Act, 2018 ("Amendment Act") came into effect on July 26 and brings Indian law into greater alignment with the principles of the United Nations Convention against Corruption, of which India is a signatory.[517] The Amendment Act aims to crack down on bribery by creating a substantive offense of bribery, expanding the definition of bribery, and providing incentives for corporate compliance.

The Amendment Act establishes a substantive offense of bribery by commercial organizations that give or promise to give an undue advantage to a public servant to "obtain or retain" business or an advantage in the conduct of business.[518] Commercial organizations are defined to include companies either incorporated or conducting business in India.[519] The Amendment Act provides for corporate criminal liability and individual liability.[520] Any company convicted of an offense under the PCA will be subject to fines.[521] Individuals can be sentenced to imprisonment for three to seven years.[522] The establishment of the bribery offense is a significant development, as previously only public servants who accepted bribes—and not the bribe-payers themselves—could be prosecuted.

The new PCA enforcement scheme also expands prior bribery laws. Commercial organizations now can be liable if the alleged misconduct was undertaken indirectly, by a third party, and bribes are now more broadly defined to encompass gifts, lavish corporate hospitality, or anything else of value, in

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[517] David Simon & Sherbir Penang, *How to Customize Your Compliance Program in Response to India's Updated Anti-Corruption Legislation,* THE ANTI-CORRUPTION REPORT, Vol 7, No. 23, (Nov. 14, 2018).
[518] The Prevention of Corruption (Amendment) Act, 2018 (July 26, 2018), Section 9(1).
[519] The Prevention of Corruption (Amendment) Act, 2018 (July 26, 2018), Section 9(3).
[520] The Prevention of Corruption (Amendment) Act, 2018 (July 26, 2018), Section 9, 10.
[521] The Prevention of Corruption (Amendment) Act, 2018 (July 26, 2018), Section 9.
[522] The Prevention of Corruption (Amendment) Act, 2018 (July 26, 2018), Section 10.

addition to money.[523] Furthermore, in an effort to encourage compliance, the Amendment Act provides a prosecution exemption for companies that promptly report any bribes paid to public officials to law enforcement.[524]

Critics of the Amendment Act point to shortfalls in the new law. Prosecutors must now receive an official "sanction" prior to investigating or prosecuting public officials.[525] While the purpose of this requirement ostensibly is to provide additional protections for honest public servants, obtaining the required permissions apparently has been challenging for prosecutors—especially if senior public officials are implicated—and has resulted in delays in trials.[526]

G. Russia

In August 2018, new amendments to the Russian Code on Administrative Offenses came into effect that exempt legal entities from liability for bribery if they assist authorities in the discovery or investigation of bribery.[527] To ensure the payment of fines by entities under investigation, the amendments also authorize courts to impose an asset freeze of an amount no greater than the maximum possible fine.[528] Commentators note that application of the exemption may turn on prosecutors' subjective assessments and that companies will therefore need to engage in case-by-case determinations about whether to self-report bribery.[529] Particularly where potential fines are significant, the possibility of an asset freeze may be relevant to such determinations.[530]

Russia's General Prosecutor's Office created a public register of companies convicted of making improper payments on behalf of, or in the interests of, legal entities since 2014.[531] The information indicates that Russian enforcement efforts focus on small to mid-size Russian companies, rather than large or foreign companies.[532]

While the new register of bribery convictions assists companies conducting due diligence on Russian business partners, other developments complicate due diligence efforts.[533] Pursuant to decrees issued by the Republican Government between September and November of 2018 certain categories of entities – banks, insurance companies and their depositories, non-governmental pension funds and their managing companies, and managing companies of investment funds – are exempt from the obligation to

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[523] David Simon & Sherbir Penang, *How to Customize Your Compliance Program in Response to India's Updated Anti-Corruption Legislation,* THE ANTI-CORRUPTION REPORT, Vol 7, No. 23, (Nov. 14, 2018).
[524] The Prevention of Corruption (Amendment) Act, 2018 (July 26, 2018), Section 9.
[525] The Prevention of Corruption (Amendment) Act, 2018 (July 26, 2018); David Simon and Shabir Penang, *How to Customize Your Compliance Program in Response to India's Updated Anti-Corruption Legislation,* THE ANTI-CORRUPTION REPORT, Vol 7, No. 23, (Nov. 14, 2018).
[526] David Simon & Sherbir Penang, *How to Customize Your Compliance Program in Response to India's Updated Anti-Corruption Legislation,* THE ANTI-CORRUPTION REPORT, Vol 7, No. 23, (Nov. 14, 2018).
[527] Maryna Kavaleuskaya, *In Russia, New Rules Exempt Companies from Bribery Liability*, THE FCPA BLOG (Nov. 1, 2018), http://www.fcpablog.com/blog/2018/11/1/in-russia-new-rules-exempt-companies-from-bribery-liability.html.
[528] *Id.*
[529] Tom Firestone & Roman Butenko, *Firestone and Butenko: A Russian 'Pilot Program'?*, THE FCPA BLOG (Apr. 24, 2018), http://www.fcpablog.com/blog/2018/4/24/firestone-and-butenko-a-russian-pilot-program.html
[530] Tom Firestone & Roman Butenko, *Firestone and Butenko: A Russian 'Pilot Program'?*, THE FCPA BLOG (Apr. 24, 2018), http://www.fcpablog.com/blog/2018/4/24/firestone-and-butenko-a-russian-pilot-program.html.
[531] Tom Firestone & Roman Butenko, *Due Diligence in Russia: A Public Register of Bribe Payers*, THE FCPA BLOG (Nov. 30, 2018), http://www.fcpablog.com/blog/2018/11/30/due-diligence-in-russia-a-public-register-of-bribe-payers.html.
[532] Hannes Lubitzsch, *Anti-Corruption and Bribery in Russia*, LEXOLOGY (Nov. 13, 2018), https://www.lexology.com/library/detail.aspx?g=f338c734-6ffd-4c4b-8eff-44451680d41c.
[533] Tom Firestone & Roman Butenko, *Due Diligence in Russia: A Public Register of Bribe Payers*, THE FCPA BLOG (Nov. 30, 2018), http://www.fcpablog.com/blog/2018/11/30/due-diligence-in-russia-a-public-register-of-bribe-payers.html.

publicly report information about shareholders, controlling individuals, and certain other individuals subject to foreign sanctions.[534]

According to the General Prosecutor's Office, the number of corruption-related crimes in the first seven months of 2018 was up 12.5% compared to the same period in 2017.[535] Alexander Drymanov, the former head of Investigative Committee of Russia for Moscow, is currently detained on allegations that he accepted a bribe in exchange for releasing a member of a criminal syndicate from jail.[536] The Russian Republic of Dagestan has become the subject of a major anti-corruption investigation, which spans 19 ministries and departments and five municipalities.[537] Prosecutors claim to have identified more than 350 violations of anti-corruption legislation in the region, including political appointments based on kinship and the failure of government employees to report their connections to commercial organizations.[538] Dagestan's former acting prime minister, his deputies, and the former education minister all have been charged with embezzling public funds.[539]

H. Brazil

Operation Lava Jato ("Car Wash"), which was launched in 2014 by Brazilian federal prosecutors, continues to rack up convictions related to a vast corruption scheme that exploited contracts with Brazil's state-owned oil company, Petrobras, as discussed above.[540] Indeed, as part of this widespread investigation, Brazilian prosecutors recently levied corruption and money laundering charges against Paul Bragg, the former Chief Executive Officer of US oil services company **Vantage Drilling** ("Vantage"), in connection with Vantage's 2009 contract with Petrobras.[541] The contract has been the subject of an ongoing legal dispute between Vantage and Petrobras, with Petrobras arguing that the contract was won through bribery of Petrobras officials and is therefore void. Arbitrators found in Vantage's favor in 2017, finding no evidence that Vantage had bribed Petrobras for the contract; Petrobras has now challenged the award in federal court.[542] In July 2018, Brazilian authorities charged Mr. Bragg in connection with these same bribery allegations, claiming to have evidence that Mr. Bragg knew about corrupt payments Vantage made to Petrobras officials.[543]

By October 2018, according to Brazil's Federal Public Ministry, Operation Car Wash had resulted in more than 200 convictions for crimes including corruption, abuse of the international financial system,

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[534] Tom Firestone & Roman Butenko, *Due Diligence in Russia: A Public Register of Bribe Payers*, THE FCPA BLOG (Nov. 30, 2018), http://www.fcpablog.com/blog/2018/11/30/due-diligence-in-russia-a-public-register-of-bribe-payers.html.
[535] Russian Legal Information Agency, Number of Corruption Crimes in Russia Rises by 12.5% in 7 Months – Prosecutor's Office, RAPSI (Jan. 5, 2019), http://www.rapsinews.com/judicial_news/20180830/286912373.html.
[536] *Russia Detains Powerful Investigator for Alleged Links to Mafia*, NEWSMAX (Jul. 17, 2018), https://www.newsmax.com/newsfront/russia-politics-corruption-alexander-drymanov/2018/07/17/id/872105/.
[537] Timur Isaev, *Vasiliev Called New Priorities of Dagestan*, CAUCASIAN KNOT (Feb. 10, 2018), https://www.kavkaz-uzel.eu/articles/316380/.
[538] Timur Isaev, *Vasiliev Called New Priorities of Dagestan*, CAUCASIAN KNOT (Feb. 10, 2018), https://www.kavkaz-uzel.eu/articles/316380/.
[539] Liz Fuller, *Daghestan's Acting PM, Deputies Axed in Corruption Crackdown*, RADIOFREEEUROPE (Feb. 15, 2018), https://www.rferl.org/a/caucasus-report-gamidov-arrested-/29041830.html.
[540] Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN RELATIONS, Nov. 7, 2018.
[541] Clara Hudson, *American CEO's Knowledge of Bribery Scrutinized in Petrobras Dispute*, GLOBAL INVESTIGATIONS REVIEW (Oct. 31, 2018), https://globalinvestigationsreview.com/article/jac/1176147/american-ceo%E2%80%99s-knowledge-of-bribery-scrutinised-in-petrobras-dispute.
[542] Clara Hudson, *American CEO's Knowledge of Bribery Scrutinized in Petrobras Dispute*, GLOBAL INVESTIGATIONS REVIEW (Oct. 31, 2018), https://globalinvestigationsreview.com/article/jac/1176147/american-ceo%E2%80%99s-knowledge-of-bribery-scrutinised-in-petrobras-dispute.
[543] Clara Hudson, *American CEO's Knowledge of Bribery Scrutinized in Petrobras Dispute*, GLOBAL INVESTIGATIONS REVIEW (Oct. 31, 2018), https://globalinvestigationsreview.com/article/jac/1176147/american-ceo%E2%80%99s-knowledge-of-bribery-scrutinised-in-petrobras-dispute.

drug trafficking, and money laundering; nearly 350 individuals have been charged.[544] Numerous other corporations and multiple foreign leaders have also been implicated in the sprawling investigation, including the former presidents of Brazil, Peru, and Colombia, and Venezuelan President Nicolas Maduro.[545]

Operation Car Wash continues to have broad political implications in Brazil. After Brazil's top electoral court ruled in August 2018 that former President Lula de Silva—who is serving a 12-year sentence for corruption as part of Operation Car Wash—cannot run for a third term, right-wing candidate Jair Bolsonaro won Brazil's October presidential elections.[546] Bolsonaro's rise in popularity was due in part to his pledge to aggressively combat corruption through comprehensive anti-corruption legislation and tougher criminal sentences, and in November 2018, President-elect Bolsonaro appointed anti-graft Judge Sergio Moro, who had launched Operation Car Wash be to become his justice minister[547]

Meanwhile, Brazilian prosecutors also have expanded Operation Carne Fraca ("Weak Meat"), which was launched in 2017 and entered its third investigative phase in March 2018.[548] Operation Weak Meat is investigating the alleged bribery of food-sanitation inspectors by the world's top beef and poultry exporters, namely BRF and JBS,[549] and the third phase is focused on fraudulent lab results and fake data submitted to the Brazilian Ministry of Agriculture.[550] In October 2018, the Brazilian Federal Police indicted 43 individuals, including the former BRF Board President and the former BRF CEO, for crimes against public health, grand larceny, misrepresentation, and criminal organization.[551] Shortly thereafter, in November 2018, former JBS CEO Joesley Batista was arrested alongside two former agriculture ministers and other JBS executives for bribing agriculture ministry officials through political intermediaries.[552] Along with his brother Wesley, Batista previously confessed to involvement in a bribery scheme and struck a plea bargain in return for testifying about the bribes they paid to politicians, and their testimonies spurred a probe into Brazilian President Michel Temer (in office until January 2019).[553] Although prosecutors revoked Joesley Batista's plea deal for withholding information, the brothers had been released from prison earlier in 2018.[554] With Judge Moro at the helm of Brazil's justice ministry, Operation Weak Meat is expected to intensify in 2019.

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[544] Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN RELATIONS, Nov. 7, 2018; MINISTERIO PÚBLICO FEDERAL, *A Lava Jato em números no Paraná*, *accessible at* www.mpf.mp.br/para-o-cidadao/caso-lava-jato/atuacao-na-1a-instancia/parana/resultado.

[545] Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN RELATIONS, Nov. 7, 2018.

[546] Shasta Darlington & Manuela Andreoni, *Brazilian Court Rules That 'Lula' Cannot Run for President*, N.Y. TIMES, Aug. 31, 2018.

[547] Rodrigo Viga Gaier, *Brazil's Bolsonaro Names Judge Who Jailed His Rival as Justice Minister*, REUTERS (Nov. 1, 2018), https://www.reuters.com/article/us-brazil-politics/brazils-bolsonaro-names-judge-who-jailed-his-rival-as-justice-minister-idUSKCN1N65CE*'*.

[548] Ministry of Agriculture, Livestock and Food Supply of Brazil: Note of Clarification About the Third Phase of "Operation Weak Flesh" (Mar. 7, 2018).

[549] *'Operation Weak Flesh' Takes Bite out of Brazil's Meat Exports*, REUTERS Mar. 24, 2017.

[550] Arthur Cagliari & Joana Cunha, *Brazilian Federal Police Indicts Abilio Diniz During New Phase of Operation Weak Flesh*, FOLHA DE S. PAULO, Oct. 16, 2018; Beatriz Miranda, *BRF Executives Ordered to Disclose Data in 'Weak Flesh' Operation*, THE RIO TIMES, Mar. 6, 2018.

[551] Arthur Cagliari & Joana Cunha, *Brazilian Federal Police Indicts Abilio Diniz During New Phase of Operation Weak Flesh*, FOLHA DE S. PAULO, Oct. 16, 2018.

[552] *Brazil Meatpacking Magnate Arrested in Corruption Probe*, SUNDAY TIMES, Nov. 9, 2018; Julia Leite & Gerson Freitas Jr., *JBS Owner Joesley Batista Arrested Again in Corruption Probe*, BLOOMBERG, Nov. 9, 2018.

[553] *Brazil Meatpacking Magnate Arrested in Corruption Probe*, SUNDAY TIMES, Nov. 9, 2018; Julia Leite & Gerson Freitas Jr., *JBS Owner Joesley Batista Arrested Again in Corruption Probe*, BLOOMBERG, Nov. 9, 2018; Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN RELATIONS, Nov. 7, 2018; *Brazil Police Arrest Ex-Meatpacking Executive in Graft*, APNEWS, Nov. 9, 2018.

[554] *Brazil Police Arrest Ex-Meatpacking Executive in Graft*, APNEWS, Nov. 9, 2018; *Brazil Meatpacking Magnate Arrested in Corruption Probe*, SUNDAY TIMES, Nov. 9, 2018; Julia Leite & Gerson Freitas Jr., *JBS Owner Joesley Batista Arrested Again in Corruption Probe*, BLOOMBERG, Nov. 9, 2018.

I. Mexico

New regulations issued in Mexico in 2018 aim to ensure that companies contracting with Petróleos Mexicanos ("PEMEX"), the Mexican state-owned oil company, have adequate compliance programs in place.[555] On May 18, 2018, PEMEX published new General Procurement Rules and Standards for Pemex and Subsidiaries in Mexico's Federal Register.[556] Article 43 states that service providers, suppliers, contractors, subcontractors and other third parties must have a compliance program applicable to their respective operations, activities or services in place in order to execute or maintain existing contracts with PEMEX or its subsidiaries.[557] This new compliance mandate is just one in a series of initiatives PEMEX is undertaking to root out potential misconduct in the contracting process. PEMEX adopted a new Code of Ethics and Code of Conduct in 2017, which added a section on bribery and corruption that includes a prohibition on accepting things of value in exchange for a business advantage and encourages employees to report any suspicious conduct.[558] And while previously PEMEX employees were permitted to receive gifts of less than 700 pesos (approximately USD $36.00), as of Fall 2018, PEMEX employees now may not accept gifts of any value.[559]

Additionally, Mexico's attorney general's office is independently investigating Mexican officials in connection with a massive bribery scheme involving the Brazil-based construction conglomerate Odebrecht S.A. ("Odebrecht"), previously the subject of investigation by authorities in the US, Brazil, and Switzerland.[560] Odebrecht and its subsidiary, Braskem S.A., pleaded guilty to FCPA-related charges in 2016 and paid upwards of $3.5 billion in total penalties to global authorities to resolve charges related to a decades-long bribery and bid-rigging scheme to secure government contracts in dozens of countries—many within Latin America.[561]

J. Canada

On September 19, 2018, Canada amended the its Criminal Code to include new processes for "remediation agreements" that will function as DPAs. The Canadian model follows the UK's system in that the courts will perform a gatekeeping function, determining whether the terms of a remediation agreement are reasonable, proportionate, and serve the interests of justice, before the agreement can be executed.[562]

The new Canadian legislation provides that each remediation agreement must explain how each of several stated policy objectives for the remediation agreements—such as encouraging voluntary disclosure of wrongdoing and encouraging compliance through corrective measures—is met. The law also requires that before prosecutors can enter into negotiations for a remediation agreement with an investigation target, the prosecutor must find that there is a reasonable prospect of conviction, that the underlying offense did not cause serious injury or death, or threaten national security, and that the remedial agreement is in the public interest. In addition, the Attorney General must consent to the agreement before prosecutors seek court approval. While prosecutors are compelled to consider a range

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[555] General Procurement Rules and Standards for Pemex and Subsidiaries, Federal Register of Mexico (May 18, 2018); Luis Dantón Martínez Corres, PEMEX requires compliance programs for contractors, THE FCPA BLOG (May 22, 2018), http://www.fcpablog.com/blog/2018/5/22/pemex-requires-compliance-programs-for-contractors.html.
[556] General Procurement Rules and Standards for Pemex and Subsidiaries, Federal Register of Mexico (May 18, 2018).
[557] General Procurement Rules and Standards for Pemex and Subsidiaries, Federal Register of Mexico (May 18, 2018).
[558] Normia García, Pemex Busca Sacurdirse Escándalos de Corrupción, LA SILLA ROTA (Aug. 29, 2017), https://lasillarota.com/nacion/pemex-busca-sacudirse-escandalos-de-corrupcion/173140/.
[559] Teresa Macias, *Implementa PEMEX Códigos De Ética Con Proveedores,* EXPERSO (Apr. 13, 2018), https://expreso.press/2018/04/13/implementa-pemex-codigos-de-etica-con-proveedores/.
[560] Azam Ahmed, *Mexico Could Press Bribery Charges. It Just Hasn't*., N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/world/americas/mexico-odebrecht-investigation.html.
[561] Plea Agreement, *United States v. Odebrecht S.A.*, No. 16-643 (RJD) (E.D.N.Y. Dec. 21, 2016); Plea Agreement, *United States v. Braskem S.A*., No. 16-644 (RJD) (E.D.N.Y. Dec. 21, 2016).
[562] Budget Implementation Act, 2018 No. 1 (S.C. 2018, c. 12) (Can.).

of factors in determining whether a remediation agreement would be appropriate, the new legislation interestingly prohibits consideration of the national economic interest, or "the potential effect on relations with a state other than Canada or the identity of the organization or individual involved."[563]

The scope and impact of Canada's new DPA regime is already being tested in a closely watched case involving illegal payments made by SNC-Lavalin executives to Saadi Gaddafi, former Libyan leader Muammar Gaddafi's son, in exchange for construction contracts.[564] Canadian authorities began investigating the alleged bribes in 2011, when Riadh Ben Aissa, the company's former head of construction, described how the company made nearly CAD $48 million in illegal payments to Libyan officials, and defrauded Libyan entities of approximately CAD $130 million as a result.[565] Ben Aissa was arrested in Switzerland and has already served 29 months in Swiss prison, reportedly forfeiting approximately CHF $40 million in penalties from Swiss bank accounts.[566]

Canadian prosecutors delayed hearings against SNC-Lavalin as the DPA provision came into effect,[567] but in October 2018 declined to negotiate a DPA with the company, and moved ahead with a preliminary hearing seeking a full trial.[568] SNC-Lavalin has publicly fought back against the government's refusal to negotiate a DPA, emphasizing the corrective measures the company has taken since the scandal broke, including an overhaul of the company's ethics and compliance programs, and pointing out the negative consequences a conviction would have on the company's 52,000 employees who had no role in the Libya scandal.[569] If convicted at trial, the company may be excluded from winning any Canadian government contracts for up to ten years.

K. Argentina

Commentators are speculating that the Cuadernos ("Notebook") Scandal, which began in 2018 in Argentina, may become the next Operation Car Wash.[570] The investigation into bribes made to obtain contracts for public work projects began when an Argentinian newspaper obtained notebooks maintained by the chauffeur of a former official in the Ministry of Federal Planning.[571] By recording details about the trips the driver made to collect and distribute bags of money for over a decade, the notebooks reveal an extensive scheme to obtain public works contracts involving former President Christina Fernández de Kirchner, the former Minister of Federal Planning, and other public officials along with major construction

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[563] Budget Implementation Act, 2018 No. 1 (S.C. 2018, c. 12) (Can.).
[564] In parallel to the investigation into payments in Libya, Canadian authorities are also investigating corruption charges against SNC-Lavalin arising from the company's activity in Bangladesh. Nicole Morgant, *SNC-Lavalin ex-CEO Arrested in Widening Scandal*, REUTERS (Nov. 28, 2012), https://www.reuters.com/article/us-snclavalin-arrest-idUSBRE8AR0XU20121128.
[565] *SNC-Lavalin Writes Letter in Bid to Rally Public Support Over Criminal Charges*, THE GUARDIAN (Oct. 24, 2018), https://www.theguardian.pe.ca/business/snc-lavalin-writes-letter-in-bid-to-rally-public-support-over-criminal-charges-251754/; Dylan Tokar, *Canada Brings Foreign Bribery Charges Against SNC-Lavalin*, GLOBAL INVESTIGATIONS REVIEW (Feb. 19, 2015), https://globalinvestigationsreview.com/article/jac/1023575/canada-brings-foreign-bribery-charges-against-snc-lavalin.
[566] Richard L. Cassin, *Canada: Feds Won't Negotiate Plea Deal with SNC-Lavalin*, THE FCPA BLOG (Oct 12, 2018), http://www.fcpablog.com/blog/2018/10/12/canada-feds-wont-negotiate-plea-deal-with-snc-lavalin.html; James V. Girmaldi & Margaret Coker, *Canadian Firm Recoups Cash in Bribery Case*, WALL ST. J., Dec. 11 2014.
[567] Christopher Reynolds, *SNC-Lavalin Hearing Pushed Back Until Criminal Code Changes Take Effect*, FINANCIAL POST (Sept. 10, 2018), https://business.financialpost.com/pmn/business-pmn/snc-lavalin-hearing-pushed-back-until-after-criminal-code-changes-take-effect.
[568] *SNC Asks for Review of Federal Decision Excluding it From Remediation Regime*, DAILY COMMERCIAL NEWS (Nov. 2, 2018), https://canada.constructconnect.com/dcn/news/government/2018/11/snc-asks-review-federal-decision-excluding-remediation-regime; *The Short Cut*, GLOBAL INVESTIGATIONS REVIEW (Oct. 11, 2018), https://globalinvestigationsreview.com/short-cut/2018/october/11#1175524.
[569] SNC-Lavalin, *Thank You For Considering Our Position* (Oct. 26, 2018), *available at* http://www.snclavalin.com/en/files/documents/publications/snc-lavalin-open-letter-october-26-2018_en.pdf.
[570] Waithera Junghae, *Argentina Notebook Probe Could Be The Next Operation Carwash*, GLOBAL INVESTIGATIONS REVIEW, Oct. 24, 2018; Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.
[571] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.

companies, entities such as the Argentine Chamber of Construction, and various high-profile Argentine businesspeople.[572]

The Notebook Scandal is similar to Operation Car Wash not only because of its rapid expansion and potential cross-border scope but also because of how plea bargains are being used to gather information regarding additional corruption.[573] Under a plea bargain law Argentina enacted two years ago, individuals may obtain a sentence reduction by admitting wrongdoing and cooperating with an investigation.[574] As of November, 24 prominent business leaders and former government officials confessed to bribery and negotiated plea deals.[575] Portions of the plea deals that have been made public indicate that former Presidents Nestor Kirchner and Christina Fernandez de Kirchner led the efforts to obtain payments in exchange for public works contracts.[576]

The ongoing investigation by Argentine authorities of this misconduct, which spanned from 2003 to 2015, will likely continue to yield only prosecutions of individuals and not corporate entities for corruption.[577] Argentine law did not impose criminal liability on corporations for corruption until Argentina's Corporate Criminal Liability Act took effect in March 2018, and principles of Argentine criminal law prevent retroactive application of that law.[578] Accordingly, corporate entities are unlikely to be prosecuted for corruption as part of the Notebook Scandal.[579] However, if the investigation reveals that corporate books and records were falsified to pay bribes, corporations could be prosecuted for money laundering or tax evasion.[580]

L. Other International Developments

1. Israel

The Office of Israel's Tax and Economic Prosecutor announced in January 2018 a conditional agreement with Teva Pharmaceuticals Industries Ltd. ("Teva"), Israel's largest company by market value and the world's largest manufacturer of generic pharmaceutical products.[581] The conduct at issue involved allegedly corrupt payments made to public officials in Russia, Mexico, and Ukraine throughout the 2000s.[582] These payments were allegedly made to influence regulatory and formulary approvals,

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[572] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018; Waithera Junghae, *Argentina Notebook Probe Could Be The Next Operation Carwash*, GLOBAL INVESTIGATIONS REVIEW, Oct. 24, 2018; *Los Cuadernos De Las Coimas: Uno Por Uno, Todos Los Registros Del Chofer Oscar Centeno*, LA NACION, Aug. 5, 2018.

[573] Waithera Junghae, *Argentina Notebook Probe Could Be The Next Operation Carwash*, GLOBAL INVESTIGATIONS REVIEW, Oct. 24, 2018.

[574] Waithera Junghae, *Argentina Notebook Probe Could Be The Next Operation Carwash*, GLOBAL INVESTIGATIONS REVIEW, Oct. 24, 2018.

[575] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.

[576] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.

[577] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.

[578] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.

[579] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.

[580] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.

[581] *See Embattled pharmaceutical company fined for foreign bribes*, ISRAEL NAT'L NEWS (Jan. 15, 2018).

[582] US Securities and Exchange Commission Press Release No. 2016-277: Teva Pharmaceutical Paying $519 Million to Settle FCPA Charges (Dec. 22, 2016); Ari Rabinovitch, *Teva Says Israel Probing Same Issues as US Bribery Case*, REUTERS (Feb. 7, 2017), https://www.reuters.com/article/us-teva-pharm-ind-israel-corruption-idUSKBN15M231.

drug purchase decisions, prescription decisions, and to increase Teva's market share.[583] As part of the Israeli agreement, Teva was required to admit all charges and pay a fine of approximately $22 million, but would escape criminal liability.[584]

The Israeli settlement was an outgrowth of allegations investigated by the US DOJ and SEC and followed Teva's agreement with those agencies to pay more than $519 million to resolve FCPA charges—the largest fine ever paid by a pharmaceutical company for FCPA violations.[585] Israeli authorities stated that the decision to enter into a Conditional Agreement with Teva was based on several factors, including the substantial penalty already paid by the company to US authorities, Teva's cooperation with the investigations, the company's newly strengthened compliance program, and the company's recent financial hardships.[586] Indeed, the agreement was reached a month after Teva announced plans to lay off 14,000 employees and close numerous manufacturing plants.[587]

Notably, this enforcement action was only the second to be brought under Israel's foreign bribery statute, which was enacted in 2008. That statute makes it a crime to offer, provide, or facilitate bribery to or with a foreign public official for the purpose of promoting business activities or to obtain an advantage relating to such activities. Importantly, this settlement also represents the first time an Israeli bribery case has been resolved through a Conditional Agreement, which is an adjudication method typically used by Israeli authorities for smaller-scale crimes. Israel's use of a Conditional Agreement with Teva may signal a willingness to use such agreements to resolve other large-scale bribery investigations. That practice would align Israel with other countries that have passed legislation allowing them to resolve bribery cases using DPAs.

2. Malaysia

Enacted in April and published in May, the Malaysian Anti-Corruption Commission (Amendment) Act 2018 imposes liability on commercial organizations and their directors and managers for acts of bribery committed by employees and associated persons for the organization's benefit.[588] Modeled after the UK Bribery Act, an organization may establish a defense under the act only by proving that it had adequate procedures to prevent the unlawful conduct from occurring.[589] If an organization commits an offense, any director or manager is deemed liable unless she proves that she did not consent to the commission of the act and exercised appropriate due diligence to prevent it.[590] In 2017, Malaysia's highest court upheld a similar "deeming provision," reasoning that it did not unconstitutionally shift the burden of proof because the prosecutor still had to prove the commission of an offense by the organization before any individual could be deemed liable.[591] Under the new amendment, the financial penalty for bribery is the higher of RM1 million (approximately $240,000) or not less than ten times the

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[583] US Securities and Exchange Commission Press Release No. 2016-277: Teva Pharmaceutical Paying $519 Million to Settle FCPA Charges (Dec. 22, 2016).
[584] *See Embattled pharmaceutical company fined for foreign bribes*, ISRAEL NAT'L NEWS (Jan. 15, 2018).
[585] US Department of Justice Press Release No. 16-1522: Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016); US Securities and Exchange Commission Press Release No. 2016-277: Teva Pharmaceutical Paying $519 Million to Settle FCPA Charges (Dec. 22, 2016); Ari Rabinovitch, *Teva Says Israel Probing Same Issues as US Bribery Case*, REUTERS (Feb. 7, 2017), https://www.reuters.com/article/us-teva-pharm-ind-israel-corruption-idUSKBN15M231.
[586] *Embattled pharmaceutical company fined for foreign bribes*, ISRAEL NAT'L NEWS (Jan. 15, 2018).
[587] David Segal & Isabeal Kershenr, '*Nobody Thought It Would Come to This': Drug Maker Teva Faces a Crisis*, N.Y. TIMES, Dec. 27, 2017; *see also* Gareth Macdonald, *Teva timeline: CEO says 20-25 manufacturing Plants to Close in the Next two Years,* IN-PHARMATECHNOLOGIST.COM (Jan. 11, 2018, 1:58 PM), https://www.in-pharmatechnologist.com/Article/2018/01/11/Teva-timeline-CEO-says-20-25-manufacturing-plants-to-close-in-next-two-years.
[588] The Malaysian Anti-Corruption Commission (Amendment) Act 2018, section 4.
[589] The Malaysian Anti-Corruption Commission (Amendment) Act 2018, section 4; Peter Viksnins, *Malaysia Imposes Corporate and Personal Liability for Organizational Bribery*, THE FCPA BLOG (Oct. 17, 2018), http://www.fcpablog.com/blog/2018/10/17/malaysia-imposes-corporate-and-personal-liability-for-organi.html.
[590] The Malaysian Anti-Corruption Commission (Amendment) Act 2018, section 4.
[591] *Public Prosecutor v. Gan Boon Aun* [2017] 3 M.L.J. 12.

value of the bribe.[592] Along with, or in alternative to these fines, individuals may be sentenced to up to 20 years in prison.[593]

Furthermore, authorities from around the world are conducting investigations into the billions of dollars allegedly stolen from 1Malaysia Development Berhad ("1MDB"), a Malaysian sovereign wealth fund created to promote economic development.[594] Malaysian authorities opened an investigation into 1MDB in 2015, as did the Office of the Attorney General of Switzerland ("OAG"), following reports that billions of dollars had been embezzled from the fund.[595] The DOJ also began an investigation around the same time, filing *in rem* civil forfeiture complaints in 2016 as part of its Kleptocracy Asset Recovery Initiative, and additional civil forfeiture complaints in 2017 aimed at recovering approximately $640 million in assets.[596] Although several countries have ongoing investigations relating to funds embezzled from 1MDB and transferred around the world, it is unclear to what degree these authorities are cooperating. On the one hand, in August 2018, Malaysian authorities seized a yacht that Indonesian police had originally seized on behalf of the US and that the US was planning to transfer to American territory, suggesting that US and Malaysian authorities have not coordinated on forfeiture issues.[597] At the same time, Malaysian authorities recently provided assistance to the DOJ by issuing a provisional arrest warrant in late 2018 for an investment banker indicted in the US for ties to the 1MBD scheme. [598]

3. Singapore

In Singapore, the Corrupt Practices Investigation Bureau ("CPIB") is investigating several individuals employed by Keppel Offshore & Marine Ltd. ("Keppel") in connection with a decade-long bribery scheme involving Brazilian politicians and officials at Petrobras.[599] Keppel settled FCPA charges relating to the conduct last year in a coordinated resolution with US, Brazilian, and Singapore authorities involving $422 million in penalties.[600] Among those now under investigation by the CPIB is Tay Kim

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[592] Peter Viksnins, *Malaysia Imposes Corporate and Personal Liability for Organizational Bribery*, THE FCPA BLOG (Oct. 17, 2018), http://www.fcpablog.com/blog/2018/10/17/malaysia-imposes-corporate-and-personal-liability-for-organi.html.
[593] The Malaysian Anti-Corruption Commission (Amendment) Act 2018, section 4; Peter Viksnins, *Malaysia Imposes Corporate and Personal Liability for Organizational Bribery*, THE FCPA BLOG (Oct. 17, 2018), http://www.fcpablog.com/blog/2018/10/17/malaysia-imposes-corporate-and-personal-liability-for-organi.html.
[594] Michael Griffiths, *1MDB Case Could Breed a "Hydra" of Investigations*, GLOBAL INVESTIGATIONS REVIEW (Oct. 30, 2018), https://globalinvestigationsreview.com/article/1176142/1mbd-case-could-breed-a-%E2%80%9Chydra%E2%80%9D-of-investigations.
[595] Michael Griffiths, *1MDB Case Could Breed a "Hydra" of Investigations*, GLOBAL INVESTIGATIONS REVIEW (Oct. 30, 2018), https://globalinvestigationsreview.com/article/1176142/1mbd-case-could-breed-a-%E2%80%9Chydra%E2%80%9D-of-investigations; Office of the Attorney General of Switzerland Press Release: Attorney General of Switzerland Pays Official Visit to Malaysia (July 10, 2018), https://www.bundesanwaltschaft.ch/mpc/en/home/medien/archiv-medienmitteilungen/news-seite.msg-id-71536.html.
[596] US Department of Justice Press Release No. 16-839: United States Seeks to Recover More Than $1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund (July 20, 2016); US Department of Justice Press Release No. 17-655: US Seeks to Recover Approximately $540 Million Obtained from Corruption Involving Malaysian Sovereign Wealth Fund (June 15, 2017).
[597]Leslie Lopez, *US Denies Role in Transfer of Jho Low's 1MDB-linked Equanimity Yacht to Malaysia*, THE STRAITS TIMES (Aug. 18, 2018), https://www.straitstimes.com/asia/se-asia/us-denies-role-in-transfer-of-jho-lows-1mdb-linked-equanimity-yacht-to-malaysia.
[598] US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018).
[599] Grace Leong, *Former Key Keppel Execs Arrested in Corruption Probe*, THE STRAITS TIMES (Feb. 2, 2018), https://www.straitstimes.com/singapore/former-key-keppel-execs-arrested-in-corruption-probe.
[600] Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (KAM) (E.D.N.Y. Dec. 22, 2017).

Hock, the former president and Chief Executive Officer of Keppel's Brazil unit.[601] Mr. Hock and numerous other individuals were arrested by CPIB in February 2018.[602]

The Keppel Investigation highlighted a gap in the enforcement of Singapore's anti-corruption regime. While Singapore benefited from the DPA reached between the DOJ and KOM—in which the company agreed to pay $422 million total, including $105 million to Singapore—had the charges been brought under Singapore's domestic regulatory regime, only a penalty of $75,000 for each charge could have been imposed.[603] Following the KOM resolution, Singapore enacted the Criminal Justice Reform Act ("CJRA") in March 2018.

The CJRA's DPA regime applies to specific crimes of corruption, money laundering, and receipt of stolen property. In addition, the CJRA only applies to agreements between prosecutors and entities such as corporations, partnerships, or unincorporated associations—individual targets cannot enter a DPA under the new statute. Like Canada's new remediation agreement framework, Singapore's new system generally resembles the UK model.[604] For example, any DPA must be approved by the Singaporean High Court, and only if the judge determines the DPA is fair, reasonable, proportionate, and in the interest of justice. Court proceedings approving of prospective DPAs will be conducted privately *in camera*.[605] The CJRA also allows for the revision of any executed DPAs by agreement between the parties, but the High Court has supervisory power over any such amendments.[606] As in other jurisdictions, statements of facts included in DPAs under Singaporean law may be used as evidence in subsequent proceedings.

4. Australia, Switzerland, and Poland

Australia, Poland, and Switzerland have also begun the process of enacting new DPA regimes in the past year. In March 2017, the Australia Attorney General's Office released a proposed DPA scheme, about which the government invited feedback from civil society.[607] The proposed Australian model borrows significant features from the UK model, but contains some notable differences. For example, whereas the UK model involves continuous judicial oversight of proposed and executed DPAs, through successive court hearings, the Australian proposal envisions the courts stepping back from the DPA once its initial terms are approved by a judge.[608] Key provisions of the regime, including the procedure for appointing an independent monitor to oversee the implementation of DPAs, remain to be finalized.[609]

The OECD has long urged the Polish government to enact meaningful anti-corruption reforms, and the country is now taking action to do so, introducing a new draft corporate criminal liability bill in May

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[601] Grace Leong, *Former Key Keppel Execs Arrested in Corruption Probe*, THE STRAITS TIMES (Feb. 2, 2018), https://www.straitstimes.com/singapore/former-key-keppel-execs-arrested-in-corruption-probe.
[602] Grace Leong, *Former Key Keppel Execs Arrested in Corruption Probe*, THE STRAITS TIMES (Feb. 2, 2018), https://www.straitstimes.com/singapore/former-key-keppel-execs-arrested-in-corruption-probe.
[603] Plea Agreement, *United States v. Keppel Offshore & Marine USA, Inc.* Cr. No. 17-698 (KAM) (E.D.N.Y. Dec. 22, 2017); Richard L. Cassin, *Singapore's Keppel Pays $422 Million to Resolve Brazil Bribery Offenses, Lawyer Pleads Guilty*, THE FCPA BLOG (Dec. 22, 2017), http://www.fcpablog.com/blog/2017/12/22/singapores-keppel-pays-422-million-to-resolve-brazil-bribery.html.
[604] Zachary S. Brez et al., *Singapore Introduces Deferred Prosecution Agreements*, COMPLIANCE & ENFORCEMENT (Apr. 4, 2018), https://wp.nyu.edu/compliance_enforcement/2018/04/04/singapore-introduces-deferred-prosecution-agreements/.
[605] Criminal Justice Reform Bill (Bill No. 14/2018) (Singapore), https://www.parliament.gov.sg/docs/default-source/default-document-library/criminal-justice-reform-bill-14-2018.pdf.
[606] Richard J. Gibbon & Kristen Bender, *DPA Regime a Landmark to Singaporean Law*, NAT. L. REVIEW (Aug. 20, 2018), https://www.natlawreview.com/article/dpa-regime-landmark-change-to-singaporean-law.
[607] Proposed Model for a Deferred Prosecution Agreement Scheme in Australia, Attorney-General's Department (May 1, 2017), https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx.
[608] Parliament of Australia, *Encouraging Self-Reporting by Corporations—A Deferred Prosecution Agreement Scheme*, *accessible at* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Report/c05.
[609] Parliament of Australia, *Encouraging Self-Reporting by Corporations—A Deferred Prosecution Agreement Scheme*, *accessible at* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Report/c05.

2018.[610] Although Poland has cracked down on corrupt corporate behavior in the past, including a years-long investigation of GlaxoSmithKline,[611] Polish prosecutors have been frustrated by the limitations of Poland's existing criminal laws. For example, Polish law currently requires that before a corporate entity can be prosecuted, an individual associated with that entity must be convicted of specific wrongdoing; the draft corporate criminal liability bill eliminates that requirement. The law also adds whistleblower protections, untethers financial penalties from corporate income, and encourages voluntary admissions through automatic penalty deductions.[612] Under the proposed amendments, corporations will also be able to avoid prosecution altogether if they voluntarily disclose wrongdoing and attest to corrective actions.[613]

Finally, in March, Swiss officials introduced a draft DPA bill after the Attorney General recommended the country institute reforms to streamline enforcement processes and provide increased clarity to potential targets of investigations.[614] While the Geneva Attorney General's Office has used Article 53 of the Swiss Criminal Code to close investigations after targets admit wrongdoing and taken remedial measures, most notably in a 2015 investigation into HSBC, federal prosecutors outside of Geneva have declined to use this enforcement tool.[615] The bill is currently pending review in Swiss parliament. If passed, the proposed DPA law will give prosecutors and investigative targets wide latitude to set the terms of their agreements, with judicial oversight limited to the question of whether a proposed DPA is fair, reasonable, and proportionate.[616]

M. International Organizations

1. World Bank

2018 saw an increase in enforcement efforts by the World Bank. In fiscal year 2018, the World Bank debarred 78 firms and individuals (up from 58 in 2017), opened 68 new investigations into allegations of misconduct in bank-funded projects (up from 51 in 2017), and recognized 73 cross-debarments from other multilateral development banks.[617] Furthermore, whistleblower complaints have increased over the past three years, reaching 1,426 reports for fiscal year 2018. World Bank officials believe this rise is due to an increase in awareness of corruption, whistleblower protections offered by the bank, and World Bank trainings programs.[618]

2. OECD

The OECD continued its "Phase 4" anti-bribery monitoring efforts, which included scheduled visits by the OECD's Working Group on Bribery to some of the 43 countries that are signatories to the OECD's

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[610] Poland Must Make Urgent Legislative Reforms to Combat Foreign Bribery, OECD (March 22, 2018). http://www.oecd.org/investment/anti-bribery/poland-must-make-urgent-legislative-reforms-to-combat-foreign-bribery.htm.
[611] Rupert Neate, *GlaxoSmithKline Accused of Bribing Doctors in Poland*, THE GUARDIAN (Apr. 14, 2014), https://www.theguardian.com/business/2014/apr/14/gsk-accused-bribing-doctors-poland.
[612] *Poland: New Rules for Criminal Liability of Corporate Entities*, CMS-LAW NOW (June 28, 2018), http://www.cms-lawnow.com/ealerts/2018/06/poland-new-rules-for-criminal-liability-of-corporate-entities.
[613] Waithera Junghae, *IBA Krakow: Poland May Introduce DPAs*, GLOBAL INVESTIGATIONS REVIEW (May 18, 2018), https://globalinvestigationsreview.com/article/1169758/iba-krakow-poland-may%C2%A0introduce-dpas.
[614] Emily Casswell, *Switzerland Favours US-style DPAs*, GLOBAL INVESTIGATIONS REVIEW (May 25, 2018), https://globalinvestigationsreview.com/article/1169927/switzerland-favours-us-style-dpas.
[615] Michael Griffiths, *Controversial Settlement Tool Under Review in Switzerland*, GLOBAL INVESTIGATIONS REVIEW (Oct. 4, 2017), https://globalinvestigationsreview.com/article/1148538/controversial-settlement-tool-under-review-in-switzerland.
[616] Emily Casswell, *Switzerland Favours US-style DPAs*, GLOBAL INVESTIGATIONS REVIEW (May 25, 2018), https://globalinvestigationsreview.com/article/1169927/switzerland-favours-us-style-dpas.
[617] World Bank Press Release No. 2019/050/INT, World Bank Group Debarred 78 Firms and Individuals during Fiscal Year 2018 (Oct. 23, 2013), https://www.worldbank.org/en/news/press-release/2018/10/03/world-bank-group-debarred-78-firms-and-individuals-during-fiscal-year-2018.
[618] Michael Griffiths, *World Bank Sees Spike in Whistleblower Complaints*, GLOBAL INVESTIGATIONS REVIEW (Oct. 18, 2018), https://globalinvestigationsreview.com/article/1175742/world-bank-sees-spike-in-whistleblower-complaints.

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[619] In 2018, the OECD's Working Group visited Switzerland, Germany, Norway, Mexico, Sweden, Korea and Chile.[620] Next year, the group is slated to conduct "Phase 1" evaluations on Ireland, Peru, and Argentina; "Phase 3" evaluations on Colombia and Latvia; and "Phase 4" monitoring on Hungary, Japan, Sweden and the USA.[621]

The OECD also published a report in 2018 that found public officials accepting bribes from OECD-based companies face minimal risk of being punished.[622] The report looked at outcomes for public officials in 55 concluded foreign bribery cases between 2008 and 2013. Formal sanctions were imposed on public officials only in one fifth of the cases.[623] In other instances, an investigation was launched but no sanctions resulted.[624]

VII. CONCLUSION AND PREDICTIONS FOR 2019

Moving into 2019, FCPA enforcement will likely continue to be a priority for both the DOJ and SEC and many trends from 2018 will play out into 2019. First, companies should expect continued global coordination between US and foreign regulators. In 2018, the DOJ very much touted its first-ever coordinated resolution with France, and much of the movement atop the FCPA "top ten" list has been the result of globally-coordinated resolutions within the past three years. It is thus safe to assume that US enforcement authorities are likely to share information with foreign regulators and vice versa as investigations continue into or are commenced in 2019.

Relatedly, we may see in 2019 US authorities ceding more frequently to foreign regulators when the facts and conduct at issue suggest that enforcement is more appropriate in foreign jurisdictions despite jurisdiction existing for US enforcement. We could see more declinations along the lines of the Guralp and ING Group NV declinations from 2018 in which the US authorities step back on the basis of ongoing foreign investigations and/or resolutions with foreign governments.

Likewise, 2019 may see a rise in other declinations. It remains to be seen whether these "declinations" will be formal declinations or just an increase in case closures, but regardless the number of investigations that end without action taken by enforcement authorities may increase. First, as noted above, the Corporate Enforcement Policy promises more lenient treatment to companies that self-disclose, cooperate, and remediate, making declinations more likely. Second, and similarly, the fact that two of the four 2018 DOJ declinations involved aggravating circumstances but the Department nonetheless chose not to bring enforcement actions may suggest that even without a "presumption" of a declination under the Corporate Enforcement Policy, the DOJ is willing to grant a declination in appropriate circumstances. Finally, while it is arguable whether a "declination plus disgorgement" is

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[619] OECD, Phase 4 Country Monitoring of the OECD Anti-Bribery Convention, http://www.oecd.org/corruption/oecd-anti-bribery-convention-phase-4.htm. The OECD has issued reports for the following countries: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

[620] OECD, Working Group on Bribery in International Business Transactions, Monitoring Schedule December 2016 – June 2024, http://www.oecd.org/daf/anti-bribery/Phase-4-Evaluation-Calendar-2016-2024.pdf.

[621] OECD, Working Group on Bribery in International Business Transactions, Monitoring Schedule December 2016 – June 2024, http://www.oecd.org/daf/anti-bribery/Phase-4-Evaluation-Calendar-2016-2024.pdf.

[622] OECD, Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End? (Dec. 11, 2018), http://www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm.

[623] OECD, Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End? (Dec. 11, 2018), http://www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm.

[624] OECD, Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End? (Dec. 11, 2018), http://www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm.

properly termed a declination, the availability of declinations that still carry a financial consequence (under the Corporate Enforcement Policy) could make declinations more palatable to the enforcement agencies.

Large fines are likely to continue to dominate the FCPA landscape in 2019 due to both US authorities' announced intentions to prioritize more significant cases and the proliferation of global scandals that tend to sweep in a number of companies and give rise to large resolutions.

Finally, the continued focus on individual prosecutions will continue in 2019. First, changes to the Yates Memorandum and public remarks made by enforcement authorities throughout the year demonstrate that holding culpable individuals accountable is very much a priority for the DOJ. Second, as demonstrated by charges brought in 2018, the DOJ is increasingly using statutes other than the FCPA to charge corrupt conduct—for example, money laundering or wire fraud charges. And as noted above, the *Hoskins* decision's foreclosure of the use of conspiracy and accessory charges to reach individuals not directly covered by the FCPA, will likely result in even more non-FCPA charges.

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