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Foreign Corrupt Practices Act Alert

Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020

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A. Introduction

Enforcement activity reached new heights in 2019. The year saw the two largest corporate resolutions in the history of the FCPA, corporate penalties paid to US enforcement agencies topped last year's record levels, and individuals were charged at a pace matching last year's near-record level. The enforcement agencies also issued a number of policy announcements that may significantly impact prospective enforcement activity. Below are five key takeaways regarding FCPA enforcement in 2019:

1. As we predicted last year, blockbuster resolutions with large penalties continued in 2019, including most notably, the record-setting Telefonaktiebolaget LM Ericsson (Ericsson) and Mobile Telesystems PJSC (MTS) actions.

2. DOJ continues to issue revised policies and other guidance documents that appear business-friendly on their face, though corporate enforcement remains robust.

3. Although the Second Circuit's 2018 *Hoskins* decision may limit the enforcement authorities' ability to prosecute foreign actors in some circumstances, the DOJ's conviction of Hoskins in Fall 2019 and the authorities' reliance on agency principles in the Ericsson resolution demonstrate the FCPA's continued strength and reach.

4. The DOJ FCPA unit took four cases (five individuals) to trial in 2019, matching a record for the unit.

5. US enforcement agencies continue to target foreign companies for enforcement activity. Among the top 10 FCPA enforcement actions in history, only one was brought against a US-based company.

B. 2019 Enforcement Trends and Priorities

1. Enforcement Metrics

FCPA enforcement activity remained high in 2019 with the number of enforcement actions[1] remaining at nearly the same level with 50 in 2018 and 52 in 2019 and monetary penalties imposed on corporations for FCPA-related conduct equaling the record-setting $2.9 billion in 2018.[2] Unlike in recent years, however, the majority of these penalties were paid to US authorities, rather than their overseas counterparts. Thus, although the total amount of penalties imposed was essentially the same in 2019 and 2018, the US government will likely end up collecting significantly more of those penalties than it did for 2018 enforcement actions.

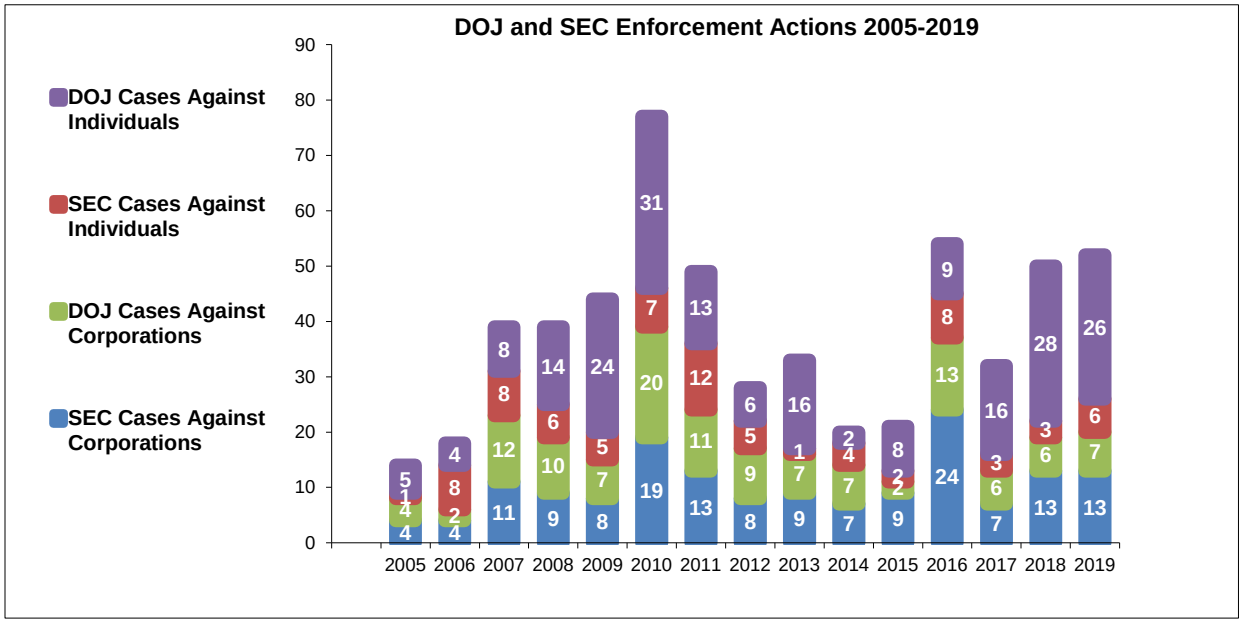
Two significant trends contributed to the 2019 enforcement numbers. First, the DOJ continued its recent focus on bringing charges against individuals, charging 26 individuals, only two fewer than charged by the Department in 2018. Although the jump in individuals prosecuted by the DOJ in 2018 (as compared to 2017) was largely the result of an additional 14 individuals being charged for their alleged involvement in the sprawling corruption scandal at Petróleos de Venezuela, S.A. (PDVSA), Venezuela's national oil company, the charges against individuals in 2019 involved a wide array of bribery schemes. Indeed, only five individuals were charged in 2019 in connection with the PDVSA scandal, with the remaining individuals charged in connection with a variety of other

[1] We recognize that other commentators may arrive at slightly different numbers depending on their methodology. 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.

[2] 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 complete picture of overall FCPA-related liability.

matters, including the Mozambique bond case, the PetroEcuador case, and various Unaoil-linked cases. This continued focus on charging individuals is in line with comments made by DOJ leadership concerning their enforcement priorities. In his March 2019 Keynote Address on FCPA Enforcement Developments, then-Deputy Attorney General (DAG) Rod Rosenstein discussed the importance of individual prosecutions in deterring FCPA violations.

Second, large resolutions against companies continued to account for a high percentage of 2019 total penalties. The $2.9 billion penalty number noted above primarily can be attributed to two blockbuster resolutions—the $1.06 billion Ericsson settlement and the $850 million MTS settlement—which together constituted 66% of the total monetary penalties for 2019. The top five resolutions accounted for almost 94% of the total monetary penalties.[3] This continues a pattern from recent years—a handful of blockbuster resolutions driving notable top-line enforcement metrics. In 2018, the $1.8 billion Petrobras settlement constituted 62% of the total monetary penalties for the year, while in 2017, the $800 million Rolls-Royce settlement and the $965 million Telia settlement together constituted 63% of total monetary penalties.



2. Developments in DOJ Policy

Enforcement in 2019 was also shaped by continuing policy developments at the DOJ. The DOJ made several enforcement policy announcements in 2019 which, while not changing the landscape considerably, may suggest that the DOJ will be more sympathetic to business concerns in the context of FCPA matters. Of course, there

[3] Deferred Prosecution Agreement, *United States v. Mobile Telesystems PJSC*, No. 19-CR-___-00167 (S.D.N.Y. Feb. 22, 2019); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mobile TeleSystems PJSC*, Rel. No. 85261, File No. 3-19022 (Mar. 6, 2019), https://www.sec.gov/litigation/admin/2019/34-85261.pdf; Non-Prosecution Agreement between US Department of Justice and Fresenius Medical Care AG & Co. KGaA (Feb. 25, 2019), https://www.justice.gov/opa/press-release/file/1148951/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Fresenius Medical Care AG & Co. KGaA*, Rel. No. 85468, File No. 3-19126 (Mar. 29, 2019);Non-Prosecution Agreement between US Department of Justice and Walmart Inc. (June 20, 2019), https://www.justice.gov/opa/press-release/file/1175791/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Walmart Inc.*, Rel. No. 86159, File No. 3-19207 (June 20, 2019); US Department of Justice Press Release No. 19-714: TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019); US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019). We discuss each of these actions in further detail below in Section III.A.

are limitations to the effect of non-binding, informal guidance promulgated by the Department,[4] but in our view, the interpretations and policy preferences that the DOJ's leadership expresses through its guidance remain critical for predicting how the government is likely to respond to a given set of facts and for marshaling the best advocacy possible.

As discussed further in Section II.B, in March 2019, the DOJ issued a revised Corporate Enforcement Policy, which made several tweaks to the original policy issued in November 2017.[5] The revised policy: (1) extends, in certain circumstances, the presumption of declination to the mergers and acquisitions context; (2) clarifies that companies need only disclose relevant facts about individuals "substantially involved in or responsible for" legal violations in order to receive cooperation credit (as opposed to the Yates Memorandum that required disclosing all facts relating to any individual involved in the misconduct); (3) clarifies expectations regarding the use of ephemeral messaging systems, asking companies seeking credit to implement appropriate guidance and controls to ensure that business records are appropriately maintained; and (4) clarifies that "de-confliction" is only required where requested and appropriate. In November 2019, the DOJ made an additional round of minor tweaks to the policy to add clarity around what companies need to disclose to the DOJ during an investigation (and when) to obtain leniency.[6]

In April 2019, the DOJ also issued updated guidance on the factors it considers when evaluating corporate compliance programs.[7] The updated guidance frames the DOJ's examination of corporate compliance programs in the context of three fundamental questions: (1) whether the corporation's compliance program is well-designed; (2) whether the program is being applied earnestly and in good faith; and (3) whether the corporation's compliance program works in practice.[8] While much of the content may not be new to seasoned compliance professionals, the new guidance is the DOJ's most expansive effort to date to publicize and explain its views on effective compliance programs.

In October 2019, the DOJ Criminal Division also issued a memorandum concerning claims of inability to pay by companies settling corporate criminal matters. The new policy provides considerably more detail than existing guidance on evaluating such claims.[9] Overall, the memorandum suggests that the DOJ will take into consideration factors to ensure that DOJ enforcement actions generally do not put companies out of business, but companies backed by deep-pocketed investors will not be insulated from fines or penalties even when the company itself lacks considerable assets and corporate formalities are followed.

3. DOJ Has Active Year of Trials

As discussed further in Section III.B.5. the Department's FCPA unit went to trial with five individuals in four trials over the course of 2019, an unusually high number. The DOJ secured convictions against four of those individuals, most notably in the hard-fought case against Lawrence Hoskins, who was convicted in November 2019. This conviction came after the Second Circuit held in August 2018, that Hoskins could not be charged with conspiring to violate the FCPA since he was a foreign person not within a category of persons directly covered by the statute's anti-bribery provisions. The DOJ pushed forward with the Hoskins prosecution based on a theory that he acted as an

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[4] In a May 2019 speech, for instance, Principal Deputy Associate Attorney General Claire McCusker Murray reminded us that guidance published by the DOJ outside of typical rulemaking processes is not law and thus, to the extent such subregulatory guidance goes beyond statutory and formal regulatory language, it does not legally bind companies (or the Department) and decisions on whether to follow the guidance, or to take another lawful approach, require a good faith risk calculation. Claire McCusker Murray, Principal Deputy Associate Attorney General, DOJ, Remarks at the Compliance Week Annual Conference (May 20, 2019), https://www.justice.gov/opa/speech/remarks-principal-deputy-associate-attorney-general-claire-mccusker-murray-compliance.

[5] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national; DOJ, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47-120, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

[6] FCPA Corporate Enforcement Policy (Nov. 2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

[7] Brian A. Benczkowski, Assistant Attorney General, DOJ, Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and; US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

[8] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

[9] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the Global Investigations Review Live New York (Oct. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations.

agent of an FCPA-covered domestic concern, Alstom's US subsidiary, notwithstanding that he was employed by a different, foreign subsidiary. While the Second Circuit's conspiracy decision in *Hoskins* may not have changed the outcome in his case, it might limit US authorities' ability to prosecute or obtain cooperation from non-resident foreign nationals in future cases. The case of Jean Boustani, detailed in Section III.B, illustrates the challenges the DOJ now faces without the ability to proceed against foreign persons on a theory of aiding and abetting or conspiracy liability.

4. A New FCPA #1 and #2: Ericsson and Mobile Telesystems

FCPA resolutions in 2019 reinforced US enforcement authorities' focus on large cases with high-dollar outcomes and, in fact, yielded the first and second highest combined payments to US authorities in connection with FCPA resolutions in history.[10] The SEC and DOJ reached settlements in December totaling over $1 billion with the Swedish telecommunications corporation Ericsson for violations of the FCPA's anti-bribery, books and records, and internal accounting controls provisions in connection with, among other things, its creation of slush funds used to bribe officials in multiple countries.[11] Ericsson will pay approximately $540 million in disgorgement and interest to the SEC and over $520 million in criminal penalties to the DOJ, and will be subject to an independent compliance monitor.[12]

The SEC and DOJ also reached resolutions in March 2019 with MTS, a Russian telecommunications service provider, for a total of $850 million.[13] Between 2004 and 2012, MTS paid at least $420 million in bribes to government officials in Uzbekistan in order to develop its business in the country's telecommunications market, which generated more than $2.4 billion in revenue.[14] MTS entered into a deferred prosecution agreement with the DOJ, which required MTS to pay $850 million to settle claims related to violations of the FCPA's anti-bribery, books and records, and internal accounting controls provisions, subject to a credit for the $100 million civil penalty paid to the SEC for parallel charges.[15] The government also required MTS to engage a compliance monitor for a three-year period.[16] These resolutions are discussed in greater detail in Section III.A below.

Globally, the Ericsson and MTS resolutions are surpassed only by the Petrobras settlement in September 2018, which involved $1.78 billion in penalties and disgorgement,[17] the 2017 Telia settlement, which led to $965 million in penalties and fines, and the 2016 Odebrecht settlement, which resulted in $2.6 billion in global penalties (subsequently reduced due to the company's inability to pay).[18] However, those three resolutions included money paid to foreign authorities in coordinated settlements, in contrast to the Ericsson and MTS resolutions that did not mandate payments to foreign authorities.

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[10] *See* Jaclyn Jaeger, *Compliance Lessons from Recent Nine-Figure FCPA Settlements*, COMPLIANCE WEEK, Oct. 24, 2019 (observing that 2019 FCPA enforcement included an "unusually large quantity of cases—four—that resulted in nine-figure penalties, each case involving widespread bribery schemes that spanned multiple countries over a period of several years"), https://www.complianceweek.com/anti-corruption/compliance-lessons-from-recent-nine-figure-fcpa-settlements/27940.article.

[11] US Securities and Exchange Commission Press Release No. 2019-254: SEC Charges Multinational Telecommunications Company with FCPA Violations (Dec. 6, 2019); US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019).

[12] US Securities and Exchange Commission Press Release No. 2019-254: SEC Charges Multinational Telecommunications Company with FCPA Violations (Dec. 6, 2019); US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019).

[13] US Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019).

[14] Deferred Prosecution Agreement between US Department of Justice and *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, at A-4 (S.D.N.Y. Feb. 22, 2019); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mobile TeleSystems PJSC*, Rel. No. 85261, File No. 3-19022, at 2 (Mar. 6, 2019); US Securities and Exchange Commission Press Release No. 2019-27: Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019).

[15] Deferred Prosecution Agreement between US Department of Justice and *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, at 10 (S.D.N.Y. Feb. 22, 2019); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mobile TeleSystems PJSC*, Rel. No. 85261, File No. 3-19022, at 16 (Mar. 6, 2019).

[16] US Securities and Exchange Commission Press Release No. 2019-27: Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019).

[17] *See* 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), https://www.sec.gov/news/press-release/2018-215.

[18] US Securities and Exchange Commission Press Release No. 2017-171: Telecommunications Company Paying $965 Million for FCPA Violations (Sept. 21, 2017).

Notably, these large settlements extend a trend in which some of the most notable cases in recent years have come from companies in the telecommunications industry. In 2016, Vimpelcom reached a nearly $800 million resolution with US and Dutch authorities.[19] In 2017, Telia agreed to a $965 million global settlement, with US, Dutch, and Swedish authorities.[20] And last year, Polycom settled FCPA charges with the SEC, received a declination from the DOJ, and agreed to pay approximately $36 million.[21] In sum, FCPA enforcement actions against telecommunications companies—perhaps unsurprisingly given that it is a highly regulated, multinational industry—have resulted in $3.1 billion in settlements since 2010.[22]

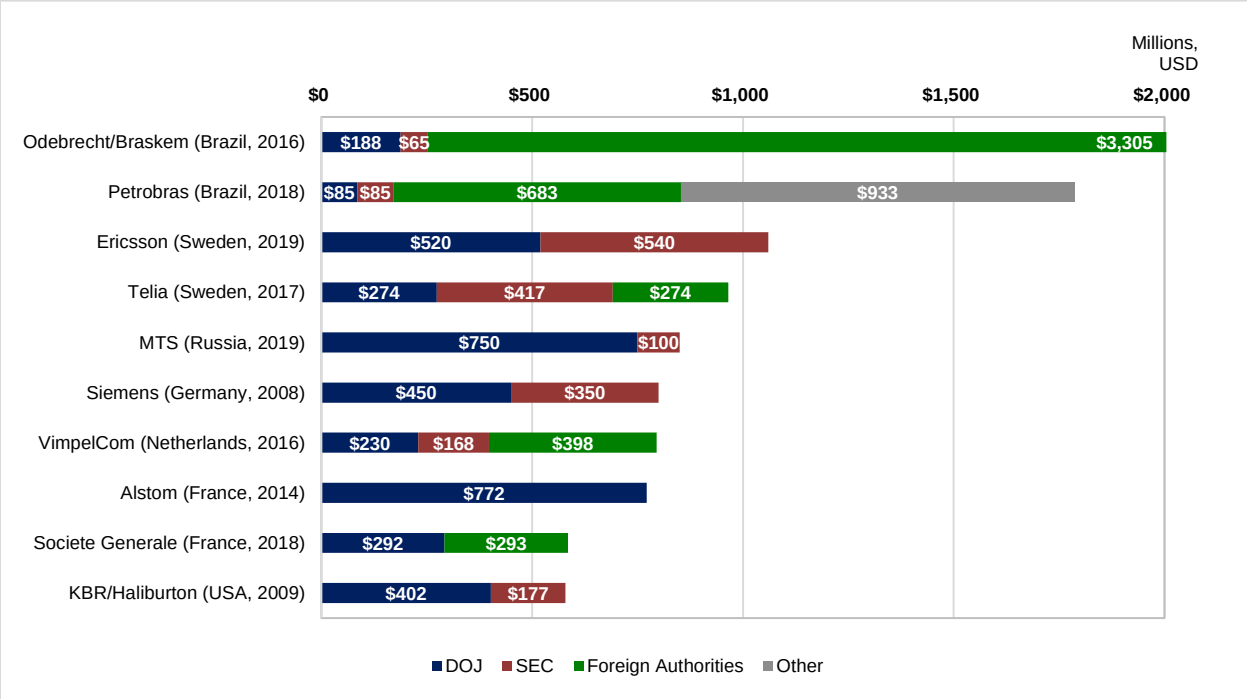
Given that enforcement authorities touted the Petrobras and Telia resolutions as indications that foreign authorities were finally playing an active role in anti-corruption enforcement in coordination with US law enforcement, the US agencies' apparent go-it-alone approach with respect to Ericsson and MTS raises the question whether foreign authorities are tempering their enthusiasm for cooperation. On the other hand, Swedish authorities publicly confirmed that they have opened their own preliminary investigation into Ericsson in the wake of Ericsson's settlement with the DOJ and SEC.[23] The prospects for foreign cooperation may always be country-specific: Russia, where MTS is headquartered, and Uzbekistan, where its subsidiary corporation is based, have never been at the vanguard of anti-corruption efforts. It is also possible that this example of an arguable lack of cooperation and coordination supports a view that the United States continues to play an outsized role in the enforcement landscape.

5. US Authorities Continue to Target Foreign Companies

The Ericsson and MTS settlements also highlight the continued pattern of US authorities pursuing cases and securing some of the largest settlements against companies that are not domestic corporations. Of the top ten largest global monetary settlements, only Kellogg Brown & Root, which agreed to pay $579 million in penalties to the DOJ and SEC in 2009, is a US company.[24] The other companies in the current top ten are based in Brazil, Sweden, Russia, Germany, the Netherlands, and France.

[19] US Securities and Exchange Commission Press Release No. 2016-34: VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016).
[20] US Securities and Exchange Commission Press Release No. 2017-171: Telecommunications Company Paying $965 Million for FCPA Violations (Sept. 21, 2017).
[21] Samuel Rubenfeld, *Plantronics Unit Agrees to Pay $36 Million in FCPA Settlement*, WALL ST. J. (Dec. 26, 2018), https://www.wsj.com/articles/plantronics-unit-agrees-to-pay-36-million-in-fcpa-settlement-11545868903.
[22] *Disconnected—The Many FCPA Enforcement Actions Against Telecom Companies*, FCPA PROFESSOR (Dec. 23, 2019), http://fcpaprofessor.com/disconnected-many-fcpa-enforcement-actions-telecom-companies/.
[23] Will Barbieri and Sam Fry, *Sweden Investigates Ericsson Over Bribery*, GLOBAL INVESTIGATIONS REVIEW, Dec. 13, 2019, https://globalinvestigationsreview.com/article/1212130/sweden-investigates-ericsson-over-bribery.
[24] US Department of Justice Press Release No. 09-112: Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009).

Top Monetary Settlements[25]



While foreign corporations have clearly become a more prominent focus of FCPA enforcement and have recently received some of the largest penalties, the cause of this trend is difficult to identify with certainty. It may be that US enforcement authorities are more motivated to pursue cases against foreign entities. It is also possible that companies based abroad are less likely to have robust compliance programs that prevent corruption in the first place. These less sophisticated programs may also make it more likely that US authorities will insist on a resolution, as opposed to a declination, based on a pattern of wrongdoing. It could also simply be that foreign companies inherently engage in more business outside of the United States and are, therefore, more exposed to foreign corruption risks addressed by the FCPA. Regardless of the underlying cause, the recent trend of FCPA settlements makes clear that foreign corporations with connections to the United States must pay particular attention to corruption risks.

6. Continued Use of Accounting Charges to Resolve Matters

The DOJ and SEC continue to use the FCPA's internal accounting and recordkeeping provisions to counter international corruption, including in situations where the government authorities suggested that there may have been improper payments made or things of value provided to government officials, but for one reason or another, it

[25] US Department of Justice Press Release No. 18-1258: Petroleo Brasileiro S.A. – Petrobras Agrees to Pay More than $850 Million for FCPA Violations (Sept. 27, 2018); US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019); US Department of Justice Press Release No. 17-1035: Telia Company AB and its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017); US Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019); US Department of Justice Press Release No. 08-1105: Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008); US Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016); 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. 18-722: Societe Generale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating Libor Rate (June 4, 2018); US Department of Justice Press Release No. 09-112: Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009); US Department of Justice Press Release No. 16-1522: Judgment, *United States v. Odebrecht S.A.*, No. 16-cr-00643-RJD (E.D.N.Y. Apr. 17, 2017); Judgment, *United States v. Braskem S.A.*, No. 16:cr-00644-RJD (E.D.N.Y. Jan. 26, 2017); Consent, *United States v. Braskem S.A.*, No. 16-cv-02488-JDB (D.D.C. Dec. 21, 2016).

appears they were unable to bring charges under the bribery prong of the statute. In 2019, the DOJ and SEC reached six settlements under the accounting and recordkeeping provisions in cases where bribery was not charged, an increase compared to the two it brought in 2018.[26] The settlements ranged from $4 million to $282 million. As detailed in Section III.A.1. below, numerous non-bribery SEC settlements included disgorgement of alleged ill-gotten gains, suggesting that, although it did not bring a bribery charge, perhaps because of the inability to prove another element of the offense, such as jurisdiction or corrupt intent, the government believed that the companies benefited financially from their loose controls environments.

7. Continued Instances of International Cooperation and Continued Touting of International Cooperation—with One Dissent

a. DOJ Officials Continued to Promote the Importance of International Cooperation and Highlight Cases that Benefited from It

The SEC and DOJ continued in 2019 to coordinate frequently with their foreign counterparts on investigations and global resolutions. The DOJ also repeatedly emphasized the importance of international cooperation in enforcing the FCPA. During his Keynote Address on FCPA Enforcement Developments in March 2019, then DAG Rosenstein stated that "international cooperation is essential to prohibit corruption by multinational corporations."[27] Specifically, Rosenstein praised Cayman and Swiss authorities for their assistance in an investigation that led to charges against more than 30 individuals for a kickback scheme in Venezuela. In the same speech, Rosenstein reiterated the Department's policy against "Piling On." He said that DOJ attorneys should coordinate their investigations to avoid duplicative penalties, and he encouraged Department attorneys to coordinate with other federal, state, local, *and foreign* enforcement authorities to resolve claims arising from the same misconduct.[28]

In a June 2019 speech, Deputy Assistant Attorney General Matthew Miner also emphasized that "[w]orking cooperatively and efficiently with our foreign counterparts is an absolute necessity for effective law enforcement."[29] Deputy AAG Miner pointed to two specific initiatives that highlight the Department's cooperation with foreign counterparts: the Organisation for Economic Cooperation and Development's (OECD) Working Group on Bribery and the DOJ's secondment program with the UK's Financial Conduct Authority (FCA) and Serious Fraud Office (SFO).[30]

Deputy AAG Miner further singled out two corporate resolutions that demonstrate the importance of international assistance with DOJ investigations. The first was with Moscow-based mobile telecommunications company MTS, discussed above. Miner noted that DOJ received assistance from enforcement authorities in over a dozen countries in the MTS matter. The second was a deferred prosecution agreement with oil and gas company TechnipFMC (Technip) relating to bribery schemes in Brazil and Iraq.[31] Technip's subsidiary, Technip USA, pleaded guilty to a single charge of conspiracy to violate the anti-bribery provisions of the FCPA.[32] Pursuant to its agreement with the DOJ, Technip agreed to pay a criminal fine of over $296 million.[33] The Department credited Technip,

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[26] *See* WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-In-Review: 2018 Developments and Predictions for 2019,* at 28-29 (Jan. 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.

[27] Rod J. Rosenstein, Deputy Attorney General, DOJ, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.

[28] Rod J. Rosenstein, Deputy Attorney General, DOJ, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.

[29] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at the American Bar Association, Criminal Justice Section Third Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.

[30] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at the American Bar Association, Criminal Justice Section Third Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.

[31] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at the American Bar Association, Criminal Justice Section Third Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.

[32] US Department of Justice Press Release No. 19-714: TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019).

[33] US Department of Justice Press Release No. 19-714: TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019).

however, for the approximately $214 million it had already agreed to pay to settle concurrent investigations in Brazil.[34] Though the SEC elected not to impose a civil penalty based on the resolution with the DOJ, the SEC ordered disgorgement and prejudgment interest totaling just over $5 million.[35]

According to admissions and court documents, Technip conspired to violate the FCPA by making more than $69 million in corrupt payments, including "commission" payments to a former consultant.[36] The consultant then passed on portions of those payments as bribes to Brazilian officials at state-owned oil company Petrobras in order to secure business advantages.[37] Also in furtherance of that scheme, Technip made over $6 million in corrupt payments to a Brazilian political party and party officials.[38] The admissions and court documents also establish that, in addition to Brazil, Technip paid bribes to at least seven Iraqi government officials through a Monaco-based intermediary, Unaoil, to secure improper business advantages.[39] In announcing the Technip resolution, Miner credited the governments of Brazil, the UK, Monaco, Italy, Australia, France, and Switzerland as providing significant assistance to the DOJ's investigation.[40]

Similarly, according to public reports, the US and Brazilian authorities are investigating medical equipment sales associated with companies like Johnson & Johnson, Siemens AG, and Philips.[41] Brazilian authorities have alleged that the companies, along with many others, paid bribes and charged the government inflated prices for medical equipment.[42] The DOJ and SEC have each opened investigations into the schemes.[43] Brazilian federal prosecutor Marisa Ferrari stated that Brazilian authorities are "constantly sharing information" with the FBI relating to this case, including sending documents to US authorities.[44] Twenty-four people have already been charged in connection with the alleged bribery schemes, and the investigation is ongoing.[45]

In some circumstances, the involvement of foreign counterparts has caused the DOJ to decline prosecuting a case at all. In 2018, the DOJ declined prosecuting potential FCPA violations by Güralp Systems Limited in part because Güralp was the subject of a parallel investigation by the UK's SFO.[46] Along the same lines, and as discussed in Section III.C.2. below, in 2019 the DOJ closed investigations into Italian energy company Eni and Anglo-Dutch oil company Shell over alleged bribes to acquire an oil license in Nigeria.[47] The DOJ cited the fact that Italian

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[34] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at the American Bar Association, Criminal Justice Section Third Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.

[35] Order Instituting Cease-and-Desist Proceedings, *In the Matter of TechnipFMC plc.*, Rel. No. 87055, File No. 3-19493, at 13 (Sept. 23, 2019).

[36] US Department of Justice Press Release No. 19-714: TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019).

[37] US Department of Justice Press Release No. 19-714: TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019).

[38] US Department of Justice Press Release No. 19-714: TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019).

[39] US Department of Justice Press Release No. 19-714: TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019).

[40] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at the American Bar Association, Criminal Justice Section Third Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.

[41] Brad Brooks, *Exclusive: Philips, Under Investigation in U.S. and Brazil, Fired Whistleblower Who Warned of Graft*, REUTERS, Aug. 21, 2019, https://www.reuters.com/article/us-brazil-corruption-healthcare-exclusiv/exclusive-philips-under-investigation-in-u-s-and-brazil-fired-whistleblower-who-warned-of-graft-idUSKCN1VB0BJ.

[42] Brad Brooks, *Exclusive: Philips, Under Investigation in U.S. and Brazil, Fired Whistleblower Who Warned of Graft*, REUTERS, Aug. 21, 2019, https://www.reuters.com/article/us-brazil-corruption-healthcare-exclusiv/exclusive-philips-under-investigation-in-u-s-and-brazil-fired-whistleblower-who-warned-of-graft-idUSKCN1VB0BJ.

[43] Brad Brooks, *Exclusive: Philips, Under Investigation in U.S. and Brazil, Fired Whistleblower Who Warned of Graft*, REUTERS, Aug. 21, 2019, https://www.reuters.com/article/us-brazil-corruption-healthcare-exclusiv/exclusive-philips-under-investigation-in-u-s-and-brazil-fired-whistleblower-who-warned-of-graft-idUSKCN1VB0BJ.

[44] John R. Fischer, *FBI opens probe into alleged kickbacks by healthcare OEMs in Brazil*, HEALTHCARE BUSINESS NEWS, May 21, 2019, https://www.dotmed.com/news/story/47332.

[45] Brad Brooks, *Exclusive: Philips, Under Investigation in U.S. and Brazil, Fired Whistleblower Who Warned of Graft*, REUTERS, Aug. 21, 2019, https://www.reuters.com/article/us-brazil-corruption-healthcare-exclusiv/exclusive-philips-under-investigation-in-u-s-and-brazil-fired-whistleblower-who-warned-of-graft-idUSKCN1VB0BJ.

[46] US Department of Justice, Re: Güralp Systems Limited (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/page/file/1088621/download (DOJ Declination Letter to Güralp).

[47] Michael Griffiths, *Shell Announces End to DOJ Bribery Probe*, GLOBAL INVESTIGATIONS REVIEW, Oct. 3, 2019, https://globalinvestigationsreview.com/article/jac/1209197/shell-announces-end-to-doj-bribery-probe.

authorities in Milan were prosecuting the Eni case as its reason for closing its probe.[48] Shell also faces potential charges in the Netherlands.[49]

b. SEC Chair Clayton, However, Criticized Foreign Authorities and Suggested the United States Acts "Alone"

But even as DOJ officials extol the virtues of foreign assistance and praise their foreign counterparts, SEC Chairman Jay Clayton noted in September 2019 that, in some areas of the world, the United States' FCPA work was not having its desired effect.[50] According to Clayton, other countries are incentivized to "play strategies" that take advantage of the United States' enforcement efforts[51] and that the United States is "acting largely alone" as the driver of global enforcement.[52] Clayton also noted that globally oriented laws like the FCPA, without consistent means of enforcement, may create "individually unfair and collectively suboptimal results."[53]

While stressing the importance of the FCPA in prosecuting corruption, Chairman Clayton noted that other countries often fail to enforce anti-corruption laws, giving offshore competitors an unfair advantage over US companies.[54] As he explained, "if your company is the only one who is 'cheating'—your company 'wins' the lucrative offshore business with no competition."[55] Chairman Clayton concluded that his statements should not be understood as advocating for a change in the SEC's FCPA enforcement posture, but rather that "this reality is at the front of [his] mind" when engaging with international counterparts and he will continue to strive for cooperative enforcement strategies.[56]

Chairman Clayton's comments echo the conclusions of a New York City Bar Association's International Business Transaction Committee report from 2011, which he co-authored while he was in private practice.[57] That report laid out the Committee's view of the "disproportionate burdens" placed on US companies, which harm their competitiveness against offshore companies not bound by strict anti-bribery and anti-corruption laws.[58]

8. CFTC Begins Foreign Corruption Enforcement

In March 2019, the Commodity Futures Trading Commission (CFTC) announced it was entering the foreign corruption space. The CFTC issued a new Enforcement Advisory for companies and individuals that "timely and voluntarily disclose . . . violations of the Commodity Exchange Act (CEA) involving foreign corrupt practices . . ."[59]

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[48] US Department of Justice, Re: Eni S.p.A. (Sep. 27, 2019), https://globalinvestigationsreview.com/digital_assets/0620ff71-1f8c-4aeb-82c9-b031f021828b/Eni-letter-9.27.2019.pdf (DOJ Letter to Eni).
[49] Michael Griffiths, *Shell Announces End to DOJ Bribery Probe*, GLOBAL INVESTIGATIONS REVIEW, Oct. 3, 2019, https://globalinvestigationsreview.com/article/jac/1209197/shell-announces-end-to-doj-bribery-probe.
[50] Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.
[51] Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.
[52] Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.
[53] Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.
[54] Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.
[55] Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.
[56] Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.
[57] Committee on International Business Transactions, *The FCPA and its Impact on International Business Transactions—Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?*, NEW YORK CITY BAR ASS'N., (Dec. 2011), https://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf.
[58] Committee on International Business Transactions, *The FCPA and its Impact on International Business Transactions—Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?*, NEW YORK CITY BAR ASS'N., (Dec. 2011), https://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf.
[59] US Commodity Futures Trading Commission, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.

The disclosure must also be followed by "full cooperation and appropriate remediation."[60] When those criteria are met, the CFTC Division of Enforcement "will apply a presumption that it will recommend . . . a resolution with no civil monetary penalty, absent aggravating circumstances . . ."[61] The Advisory extends to companies and individuals not registered (and not required to be registered) with the CFTC.[62] Registrants were already obligated to report foreign corrupt practices that violate the CEA but remain eligible to receive reduced penalties through self-reporting.[63] This Advisory works in tandem with two previous CFTC advisories that outlined what constitutes sufficient cooperation and disclosures.[64]

In announcing the Advisory, CFTC Enforcement Director James McDonald stated that the CFTC is looking to fill enforcement gaps related to foreign corruption and provided several examples of foreign corrupt practices that would violate the CEA, including paying bribes to secure business in trading or other regulated activities, or using a corrupt practice to manipulate benchmarks for derivative contracts or prices.[65] The CFTC's approach seems to be to treat such conduct as an independent fraud or manipulation that violates the CEA and to bring its own action based on the CEA violation (either in addition to a potential FCPA violation that would be charged by the DOJ or SEC or, perhaps, where the conduct does not satisfy all the elements of an FCPA violation).

This strategy, of course, raises the same sort of redundancy and efficiency concerns that motivate the DOJ's policy against "Piling On," announced in May 2018. McDonald acknowledged this issue and stated that the CFTC will "work closely" to coordinate its investigations with its enforcement partners and would seek to "avoid duplicative investigative steps."[66]

To date, the CFTC has publicly announced investigations into three companies: Glencore plc, Vitol, and Trafigura. None of these corruption-related CFTC investigations have reached any sort of resolution as of yet. Therefore, the extent and impact of the CFTC's deployment of the CEA to address foreign corruption remains to be seen.

9. Major Investigations Continue to Generate Individual Enforcement Actions

A trio of massive DOJ investigations that have been generating indictments and guilty pleas for years continued to do so in 2019. The bribery investigation of PDVSA resulted in enforcement activity in several different cases in 2019. In February, the DOJ charged the president and a former sales representative of a Miami-based company stemming from allegations that they conspired to bribe PDVSA officials.[67] And in September, a superseding indictment was unsealed charging two wealth managers from Switzerland with conspiracy to violate the FCPA's anti-bribery provisions and other offenses relating to allegations of PDVSA officials soliciting bribes from contractors in exchange for government contracts.[68] In June 2019, the DOJ served Citgo Petroleum Corporation, the US subsidiary

[60] US Commodity Futures Trading Commission, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.
[61] US Commodity Futures Trading Commission, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.
[62] US Commodity Futures Trading Commission, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.
[63] US Commodity Futures Trading Commission, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.
[64] US Commodity Futures Trading Commission, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.
[65] James M. McDonald, Director of Enforcement, CFTC, Remarks at the American Bar Association's National Institute on White Collar Crime (Mar. 6, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2.
[66] James M. McDonald, Director of Enforcement, CFTC, Remarks at the American Bar Association's National Institute on White Collar Crime (Mar. 6, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2.
[67] US Department of Justice Press Release No. 19-167: Two Businessmen charged with Foreign Bribery in Connection with Venezuela Bribery Scheme (Feb. 26, 2019), https://www.justice.gov/opa/pr/two-businessmen-charged-foreign-bribery-connection-venezuela-bribery-scheme.
[68] Superseding Indictment*, United States v. Nervis G. Villalobos-Cardenas, et al*., No. H-17-514-S (S.D. Tex. Apr. 24, 2019).

of PDVSA, with a subpoena. Citgo is now conducting roughly 20 internal investigations, but whether the DOJ will charge anyone at Citgo is yet to be seen.[69]

The DOJ also furthered its investigations into sprawling bribery and money laundering schemes at Empresa Publica de Hidrocarburos de Ecuador (PetroEcuador), Ecuador's state-owned oil company. Federal prosecutors charged two more individuals with conspiracy to violate the FCPA and to commit money laundering.[70]

Finally, the DOJ brought a significant action against the former executives of energy services company Unaoil. The company had been the subject of investigations by the UK's SFO since 2016, when it began investigating millions of dollars in alleged bribe payments to government officials in Algeria, Angola, Azerbaijan, the Democratic Republic of Congo, Iran, Iraq, Kazakhstan, Libya, and Syria.[71] The SFO had brought charges against numerous individuals in 2018 and a number of companies had announced that they were under investigation in the United States and UK in connection with their work with Unaoil. In March 2019, the former Unaoil CEO and COO pleaded guilty in the United States to arranging millions in bribes to officials in at least ten countries.[72] These pleas were unsealed and made public in October 2019.[73] The circumstances of these pleas suggest that the former Unaoil CEO and COO are cooperating with US authorities, and the charging papers indicated that there are nearly two dozen ongoing investigations against unidentified persons or entities.

II. RECENT POLICY ANNOUNCEMENTS

A. Introduction

2019 saw FCPA enforcement authorities make several significant new announcements and clarifications of existing policies that, on the whole generally, favor defendants and demonstrate the Department's continued efforts to increase transparency in its decision-making processes. Among the higher-profile announcements, the DOJ announced revisions to its Corporate Enforcement Policy, clarifications to its recent memorandum on monitorships, and updated guidance on how it evaluates corporate compliance programs, while the SEC announced a new approach in which settlement offers and requests for waivers from collateral consequences can be considered simultaneously.

As noted above, 2019 also saw a new actor—the Commodity Futures Trading Commission—enter the foreign bribery enforcement scene. The CFTC announced an expansive view of its jurisdiction under the CEA that would encompass foreign corrupt practices that affect commodity-related activity and made clear that it intended to investigate such conduct. Indeed, it has already entered into the anti-corruption enforcement landscape with new investigations in 2019.

B. Revised FCPA Corporate Enforcement Policy

On March 8, 2019, at the 33rd Annual ABA National Institute on White Collar Crime Conference, Assistant Attorney General (AAG) Brian A. Benczkowski announced the DOJ was in the process of revising its FCPA Corporate Enforcement Policy (the Policy) "to bring it in line with current practice."[74] The previous policy, introduced in 2017, contained provisions that established a presumption of declination for companies that met certain requirements.[75] The DOJ issued the most recent revisions to the Policy on the same day as AAG Benczkowski's

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[69] David Wethe and Lucia Kassai, *Citgo Gets U.S. Subpoena Related to Venezuela Bribery Probe*, BLOOMBERG (June 3, 2019), https://www.bloomberg.com/news/articles/2019-06-03/citgo-gets-u-s-subpoena-related-to-venezuela-bribery-probe.
[70] Indictment, *United States v. Armengol Alfonso Cevallos Diaz and Alarcon*, No. 19-20284-RS (S.D. Fla. May 9, 2019).
[71] US Department of Justice Press Release No. 19-1172: Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials (Oct. 30, 2019), https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials.
[72] *See* US Department of Justice Press Release No. 19-1172: Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials (Oct. 30, 2019), https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials.
[73] US Department of Justice Press Release No. 19-1172: Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials (Oct. 30, 2019), https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials.
[74] Brian A. Benczkowski, Assistant Attorney, DOJ, Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national.
[75] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018* (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.

remarks. The revisions to the Policy were aimed at ensuring greater transparency and predictability in enforcement and included, among other provisions, several key changes: (1) adding a presumption of declination in the mergers and acquisitions context; (2) relaxing the standard relating to information companies must disclose about individuals in order to receive cooperation credit; (3) modifying the language on the use of ephemeral messaging platforms; and (4) clarifying the standard for "de-confliction." [76]

The DOJ issued a further update to the Policy in November, clarifying both what information a company must disclose in order to receive "voluntary disclosure" and cooperation credit and when a company must alert DOJ of relevant evidence not in its possession.[77] Both of the changes in the November Policy update reflect the DOJ's ongoing initiative to provide greater transparency and predictability for companies that are considering whether and how to voluntarily disclosure possible FCPA violations.

The major 2019 revisions to the Policy are explained below:

1. M&A Context

The revised Policy makes clear that the DOJ's existing principles for evaluating whether a company receives a declination, including whether a company has voluntarily self-disclosed, applies equally to the mergers and acquisitions context. The DOJ adopts a presumption of declination in situations where a company uncovers misconduct at a target company in the course of a merger or acquisition "through thorough and timely due diligence[,]" voluntarily self-discloses the misconduct and otherwise takes action in accordance with the Policy.[78] A footnote in the Policy adds that a declination may still be appropriate even where there were "aggravating circumstances" such as pervasive misconduct or executive management involved in the misconduct, at the acquired entity.[79] The updated Policy reflects DOJ's continued efforts to reward companies with strong compliance practices, encourage others to adopt such practices, and not let potential FCPA enforcement stand in the way of responsible corporate actors engaging in M&A activity. As AAG Benczkowski explained, DOJ "[doesn't] want the good corporate actors to cede the field to higher-risk entities that may only perpetuate illegal conduct."[80]

2. Sharing Information on Individuals *Substantially Involved in* Misconduct

The revised Policy formally implements a policy change previewed by DAG Rosenstein in November 2018 related to the DOJ's assessment of a company's obligation to share information against individuals in order to receive cooperation credit. At that time, even though under the policy then in effect, companies were required to turn over information on *all* individuals involved to receive any cooperation credit,[81] DAG Rosenstein stated that the DOJ recognized that "it [was] not practical to require a company to identify every employee who played any role in the conduct" and that the Department "now ma[d]e clear that investigations should not be delayed merely to collect information about individuals whose involvement was not substantial."[82]

Pursuant to the revised Policy, it is now clear that to receive cooperation credit, companies need only share information on individuals "substantially involved" in misconduct.[83] The March 2019 Policy requires that a company must report "all relevant facts known to it, *including* all relevant facts about all individuals substantially involved in or

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[76] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national; FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download.

[77] FCPA Corporate Enforcement Policy (Nov. 2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

[78] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download.

[79] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download.

[80] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national.

[81] Kelly Swanson, *Addresses Apparent Inconsistencies in DOJ Policies*, GLOBAL INVESTIGATIONS REVIEW, Mar. 8, 2019, https://globalinvestigationsreview.com/article/jac/1181317/fraud-section-daag-addresses-apparent-inconsistencies-in-doj-policies.

[82] 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, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

[83] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download.

responsible for the violation of law."[84] In November 2019, the DOJ revised this language to require disclosure related to those "substantially involved in or responsible for the *misconduct at issue*" rather than "for the violation of law," to eliminate complications surrounding corporate determinations that a violation of law did or did not occur.[85]

3. Ephemeral Messaging Systems[86]

The prior version of the Policy contained language, in the remediation section of the Policy, suggesting that a company must prohibit its employees from using ephemeral messaging systems in order to receive credit. The language had caused significant confusion in the corporate community. Under the revised Policy, companies must "implement[] appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms" that interfere with the company's ability to retain proper business records.[87] Modifying the prior language reflects DOJ's acknowledgment that these methods of communication are a fact of life in many modern businesses, while still requiring that companies carry the burden of implementing responsible record retention practices in order to receive credit under the Policy.

4. Clarification on "De-confliction"

The DOJ also clarified the "de-confliction" factor for evaluating a company's cooperation. De-confliction refers to a company's deferral of internal investigative steps, such as an employee interview, at the government's request.[88] As in the original Policy, the revised Policy states that when DOJ makes a request to a company regarding investigative steps, "such a request will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose[.]"[89] However, the revised Policy includes a footnote stating DOJ "will not take any steps to affirmatively direct a company's internal investigation efforts."[90] This addition acknowledges that while DOJ may occasionally have a compelling reason to make requests of a company in handling its internal investigation, prosecutors should not be running a company's investigation.

This DOJ clarification of "de-confliction" is generally consistent with the message in a recent case in the Southern District of New York. In *United States v. Connolly*, discussed further below in Section IV.C., the court held that the government "outsourced its investigation," which made the company's and its outside counsel's internal investigation "fairly attributable to the government," and afforded witnesses in the investigation constitutional protections normally limited to governmental investigative action.[91] As noted in WilmerHale's May 10, 2019 Investigations Alert, the *Connolly* decision "challenge[d] the government's aggressive leveraging of companies' eagerness to cooperate."[92]

5. November 2019 Updates

The DOJ's revised November 2019 Policy included two additional substantive updates. First, the DOJ clarified that a company's voluntary self-disclosure of facts was limited to "all relevant facts known to it *at the time of the disclosure*" (emphasis added).[93] Previously, the Policy stated a company must disclose "all relevant facts known

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[84] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download (emphasis added).
[85] FCPA Corporate Enforcement Policy (Nov. 2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[86] Ephemeral messaging systems are communication platforms on which data is intentionally short-lived, meaning the application automatically or the user manually deletes the messages. Due to the encryption of these messages, once deleted, they are nearly impossible to recover forensically. *See* Thomas J. Kelly & Jason R. Baron, *The Rise of Ephemeral Messaging Apps in the Business World*, THE NATIONAL LAW REVIEW, Apr. 23, 2019, https://www.natlawreview.com/article/rise-ephemeral-messaging-apps-business-world.
[87] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download.
[88] WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018* (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.
[89] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download.
[90] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download.
[91] *United States v. Connolly*, No. 16 Cr. 0370 (CM), 2019 WL 2120523, at *10 (S.D.N.Y. May 2, 2019).
[92] WilmerHale, *Investigations Alert: Connolly Ruling Creates Complications for Prosecutors, Companies Seeking to Cooperate* (May 10, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190510-investigations-alert-connolly-ruling-creates-complications-for-prosecutors-companies-seeking-to-cooperate.
[93] FCPA Corporate Enforcement Policy (Nov. 2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

to it." [94] In explaining the change, the DOJ indicated that it recognized a self-disclosing company may not have full knowledge of all relevant facts at the time of disclosure and indicated a company in that situation should include a caveat when an investigation is in preliminary stages.[95] Second, under the November revisions, to receive full cooperation credit, a company must alert DOJ of relevant evidence only when it is actually aware of such evidence.[96] Previously, the Policy required "where the company is *or should be* aware of" relevant evidence.[97]

C. DOJ Updated Guidance on Evaluation of Corporate Compliance Programs[98]

In April 2019, the DOJ announced an update to its 2017 guidance document entitled Evaluation of Corporate Compliance Programs (the "Compliance Guidance"). The DOJ's 2019 Compliance Guidance is its most expansive effort to date to publicize and explain its assessment of effective compliance programs. The 2019 Compliance Guidance instructs prosecutors assessing the effectiveness of a program to engage in a "particularized evaluation" of the program, focusing on whether the company has taken a risk-based approach to building and implementing its program, rather than applying a "rigid formula."[99] Deputy AAG Miner reiterated this aspect of the guidance in June 2019, stating that "compliance is not and cannot be 'one-size-fits-all.'"[100] He indicated that DOJ understood that each company is influenced by its own risks (including "geographically differentiated risk[s]") and regulatory requirements, and no two corporate compliance programs will be exactly alike.[101] A company can—and should—follow the fundamental principles in the Compliance Guidance in a manner tailored to its unique risk profile.

In announcing the update, AAG Benczkowski noted his view that compliance programs are a significant factor in the early detection and ultimate prevention of misconduct.[102] Once the investigation is underway, DOJ's assessment of a company's compliance program impacts the outcome of the Department's decisions with regard to: (1) charging, including whether a company receives a declination; (2) financial penalties; and (3) compliance obligations contained in a corporate criminal resolution, including whether an independent monitor will be appointed.[103]

The 2019 Compliance Guidance identifies three "fundamental questions" that should drive evaluations of a company's compliance program: (1) "Is the corporation's compliance program well designed?" (2) "[I]s the program being implemented effectively?" and (3) "Does the corporation's compliance program work in practice?"[104]

With regard to the first question—whether the program is well-designed—prosecutors need to "understand the company's business from a commercial perspective," especially the risk factors specific to it in order to determine whether the compliance program is designed to detect those issues, including by utilizing a risk-based assessment of

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[94] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download.
[95] FCPA Corporate Enforcement Policy (Nov. 2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[96] FCPA Corporate Enforcement Policy (Nov. 2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[97] FCPA Corporate Enforcement Policy (Mar. 8, 2019), https://www.justice.gov/criminal-fraud/file/838416/download (emphasis added).
[98] The updated guidance is summarized below and is covered in detail in a prior WilmerHale client alert. *See* WilmerHale, *DOJ Issues Updated Guidance on Evaluation of Corporate Compliance Programs* (May 9, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190509-doj-issues-updated-guidance-on-evaluation-of-corporate-compliance-programs.
[99] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[100] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at The American Bar Association Criminal Justice Section Third Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.
[101] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at The American Bar Association Criminal Justice Section Third Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.
[102] Brian A. Benczkowski, Assistant Attorney General, DOJ, Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and.
[103] Brian A. Benczkowski, Assistant Attorney General, DOJ, Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and.
[104] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 2 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

its third-party partners.[105] Prosecutors are directed to look at the "comprehensiveness of the compliance program" and determine whether the program is "well-integrated into the company's operations and workforce," including by ensuring that company policies not only relay applicable laws to employees but communicate a broader culture of compliance within the business, and providing periodic reminders to employees of those principles through regular trainings tailored to each employee's function as well as testing of employees' compliance knowledge following such trainings.[106]

The next key question is whether the program is being implemented earnestly and in good faith. Prior guidance focused almost exclusively on senior managers' roles in setting the compliance "tone at the top" for a company and ensuring the compliance infrastructure was well-supported and compliance culture encouraged. The 2019 Compliance Guidance also sets out the critical role of middle managers in reinforcing a company's ethical standards, encouraging employees to commit to compliance, and modeling proper behavior for junior employees.[107] While those principles should apply throughout the company, when looking at the compliance function itself, DOJ prosecutors will be assessing the seniority of the staff, the stature and autonomy of the group within the organization (e.g., direct access to the board or audit committee), and whether the compliance function is adequately funded and staffed by dedicated compliance personnel. As part of the compliance function's ongoing role in monitoring and continually adapting and applying the program, the DOJ will be looking at whether companies incentivize compliance and discourage non-compliance, ensuring that such incentives and disciplinary actions are applied fairly and consistently.[108] The Compliance Guidance suggests that the DOJ may not provide full remediation credit if it believes that an insufficient number or inappropriate selection of employees have been disciplined.[109]

The final guiding question for Department attorneys is whether the compliance program works in practice. The DOJ views a program's ability to identify misconduct (and, in accordance with the Corporate Enforcement Policy, allow the company to self-report any issues) to be a "strong indicator" that a compliance program is working. Speaking at the ACI conference in December, AAG Benczkowski underscored this point, encouraging companies to invest in their compliance systems to better detect misconduct, despite what may be perceived as an increased risk of finding that misconduct: "This sense of increased risk may then create resistance to the project from within the company. An important compliance program improvement is then never undertaken, and certain misconduct then goes unchecked, unless and until the Department happens upon it. That is not the outcome [the Department] want[s]."[110]

If and when misconduct is detected, an important feature of any effective compliance program is "a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct."[111] Investigations should be "properly scoped, . . . independent, objective, appropriately conducted, and properly documented," and they should "identify root causes, system vulnerabilities, and accountability lapses" at all levels within the company.[112]

D. Additional Comments on Monitorship Memorandum

As noted above, the Department's assessment of a company's compliance program impacts the decision of whether to impose a monitor as part of a resolution. In October 2018, as discussed in last year's Year-in-Review, AAG Benczkowski announced revised guidance concerning the considerations underlying the DOJ's decision-making on when to impose monitors in corporate resolutions, how to select the monitors, and how to determine the scope of

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[105] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 2 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[106] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 2 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[107] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 9 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[108] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 12 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[109] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 16 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[110] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference.
[111] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 15 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[112] US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 15 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

monitorships.[113] At the time, Benczkowski remarked that the DOJ's "practice of imposing corporate monitors [was] the exception, not the rule" and that the scope of any monitorship should be "appropriately tailored."[114] In his March 2019 remarks at the ABA National Institute on White Collar Crime Conference, Benczkowski clarified that the policy was not a "Shakespearean policy . . . [meant to] kill all the monitors," but rather it was meant to "provide greater clarity both to companies but also to [Department] prosecutors to ensure that when they do recommend the appointment of a monitor that they are doing so for the right reasons and with the right scope."[115] Indeed, as discussed further in Section III.A.3. ("Continued Use of Monitors"), more monitors were imposed in 2019 than in 2018, though it remains to be seen whether this is a trend that will continue in future years.

E. CFTC Enforcement Advisory on Foreign Corrupt Practices and McDonald Remarks

As noted above, in March, CFTC announced, for the first time, its intent to investigate violations of the CEA involving foreign corrupt practices. In a March 6, 2019 Enforcement Advisory and contemporaneous remarks by the CFTC's Director of Enforcement, the CFTC signaled that it viewed foreign bribery as within the Commission's investigatory mandate when such improper payments involve or impact commodity or commodity-related contracts (e.g., swaps, options, or futures contracts). On the same day the CFTC issued the Advisory, the Commission's Director of Enforcement, James McDonald explained that the new focus was tied to increasing incidents of "fraud, manipulation, false reporting, [and] other types of violations" under the CEA that, "left unchecked, can distort prices and undermine the integrity of [CFTC-regulated] markets."[116]

The Advisory, which applies to both individuals and companies, regardless of whether they are required to register with the CFTC, expanded on previous CFTC guidance concerning self-reporting and cooperation and focused specifically on the disclosure of conduct involving foreign corrupt practices.[117] If an individual or company voluntarily discloses a violation of the CEA "involving foreign corrupt practices," where the disclosure "is followed by full cooperation and appropriate remediation" in accordance with previous CFTC guidance, then the Enforcement Division "will apply a presumption that it will recommend to the Commission a resolution with no civil monetary penalty, absent aggravating circumstances."[118] Consideration of aggravating circumstances will include an evaluation of, among other things, whether "executive or senior level management of the company was involved; the misconduct was pervasive within the company; or the company or individual has previously engaged in similar misconduct."[119]

The CFTC's March 2019 Advisory closely parallels the DOJ's Corporate Enforcement Policy for FCPA matters, which provides a presumption that a company will receive a declination when that company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates according to the policy's guidelines and in the absence of aggravating circumstances.[120] However, unlike the DOJ's Policy, the CFTC's Advisory does not provide limited credit for companies that fail to voluntarily self-disclose misconduct but nonetheless cooperate fully and remediate in a timely and appropriate fashion.

The March 2019 Advisory makes clear that a recommendation to resolve an inquiry without a civil monetary penalty would not preclude the payment of "disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue" for companies or individuals making voluntary disclosures.[121] The Advisory also states that the Enforcement

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[113] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019* (Jan. 7, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.

[114] 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.

[115] Adam Dobrik, *Criminal Division Chief Plays Down Talk of Monitorship Demise*, GLOBAL INVESTIGATIONS REVIEW, Mar. 8, 2019, https://globalinvestigationsreview.com/article/jac/1181316/criminal-division-chief-plays-down-talk-of-monitorship-demise.

[116] James M. McDonald, Director of Enforcement, CFTC, Remarks at the American Bar Association's National Institute on White Collar Crime (Mar. 6, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2.

[117] US Commodity Futures Trading Commission, Advisory On Self Reporting And Cooperation For CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.

[118] US Commodity Futures Trading Commission, Advisory On Self Reporting And Cooperation For CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.

[119] US Commodity Futures Trading Commission, Advisory On Self Reporting And Cooperation For CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.

[120] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-28.700, https://www.justice.gov/criminal-fraud/file/838416/download.

[121] US Commodity Futures Trading Commission, Advisory On Self Reporting And Cooperation For CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.

Division "will seek all available remedies—including, where appropriate, substantial civil monetary penalties" in situations where individuals or companies have not made a voluntary disclosure.[122]

Since the Advisory, several CFTC foreign corruption investigations have been announced. On April 25, 2019, Glencore Plc disclosed that it was under investigation by the CFTC for alleged bribery of foreign officials in violation of the CEA.[123] Glencore had previously disclosed an FCPA probe by the DOJ for similar conduct and subsequently disclosed an investigation by the SFO.[124] In addition to Glencore, the CFTC is investigating commodity companies Vitol and Trafigura for potential violations related to foreign corruption.[125] Both Vitol and Trafigura are also reportedly under investigation by the FBI, as well as Swiss and Brazilian authorities.[126]

Since the CFTC's initiative is new, it will take some time to determine whether the Commission's statements about the confines of its interest and activities will be borne out in practice. Nonetheless, companies and individuals that have identified conduct involving potential corrupt payments abroad should evaluate whether such conduct may have had any effect on activities regulated by the CFTC and consider whether to take advantage of the benefits of voluntary self-disclosure outlined in the March 2019 Advisory.

F. Benczkowski Memorandum on Corporate Claims of Inability to Pay

In October 2019, AAG Benczkowski released guidance regarding how the DOJ will evaluate corporate claims of inability to pay an otherwise appropriate criminal fine or monetary penalty.[127] This guidance was designed to standardize prosecutors' approach to these claims and will provide additional transparency for companies facing criminal penalties.[128] Notably, the factors detailed in the October 2019 memo indicate that companies with access to additional capital through investors may not be protected from monetary penalties even if the company has very few assets. Accompanying the guidance was a questionnaire for Criminal Division attorneys to use to solicit information from companies claiming an inability to pay, which includes requests for information about the company's recent cash flow projections and operating budgets, as well as acquisition or divestiture plans and encumbered assets.[129] Financial penalty adjustments can take the form of a reduction in the proposed penalty or the use of an installment schedule for payment over a reasonable amount of time.[130] When the proposed reduction exceeds 25 percent of the otherwise-agreed-upon penalty, it requires approval from the Assistant Attorney General for the Criminal Division.[131]

Under the US Sentencing Guidelines, courts are required to consider several factors pertaining to a defendant's financial situation in determining whether a criminal fine would be appropriate, and in what amount.[132] AAG Benczkowski's memorandum provides analogous guidance for Criminal Division prosecutors. Emphasizing that penalty adjustments should be used only as necessary to avoid threatening the continued viability of the organization and/or impairing the organization's ability to make restitution to victims, Benczkowski instructed Criminal Division

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[122] US Commodity Futures Trading Commission, Advisory On Self Reporting And Cooperation For CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.
[123] Adam Dobrik, *CFTC Eyes More Trading Companies in Corruption Probe*, GLOBAL INVESTIGATIONS REVIEW, May 1, 2019, https://globalinvestigationsreview.com/article/jac/1190716/cftc-eyes-more-trading-companies-in-corruption-probe.
[124] Adam Dobrik, *CFTC Eyes More Trading Companies in Corruption Probe*, GLOBAL INVESTIGATIONS REVIEW, May 1, 2019, https://globalinvestigationsreview.com/article/jac/1190716/cftc-eyes-more-trading-companies-in-corruption-probe.
[125] Adam Dobrik, *CFTC Eyes More Trading Companies in Corruption Probe*, GLOBAL INVESTIGATIONS REVIEW, May 1, 2019, https://globalinvestigationsreview.com/article/jac/1190716/cftc-eyes-more-trading-companies-in-corruption-probe.
[126] Gram Slattery & Marta Nogueria, *Swiss Prosecutors Search Vitol, Trafigura Offices Amid Sweeping Graft Probe*, REUTERS, Nov. 21, 2019, https://www.reuters.com/article/us-brazil-corruption-oil-traders/swiss-prosecutors-search-vitol-trafigura-offices-amid-sweeping-graft-probe-idUSKBN1XV22I.
[127] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Policy (Oct. 8, 2019), https://www.justice.gov/opa/speech/file/1207576/download.
[128] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the Global Investigations Review Live New York (Oct. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations.
[129] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the Global Investigations Review Live New York (Oct. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations.
[130] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Policy (Oct. 8, 2019), https://www.justice.gov/opa/speech/file/1207576/download.
[131] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Policy (Oct. 8, 2019), https://www.justice.gov/opa/speech/file/1207576/download.
[132] Among the factors courts must evaluate are: (i) the defendant's income, earning capacity, and financial resources; (ii) the burden that the fine will impose on the defendant and those dependent on the defendant; (iii) any restitution ordered or made; (iv) the expected costs to the government; (v) whether the defendant can pass on the cost of the fine; and (vi) any measures taken by the organization to mitigate the situation. 18 USC § 3572(a).

attorneys crafting resolutions to evaluate a company's current assets, liabilities, and anticipated cash flows compared to working capital needs, as well as four potential additional factors: (i) background on current financial condition; (ii) alternative sources of capital; (iii) collateral consequences, including impact on the entity's ability to fund pension obligations or meet operational standards required by law; and (iv) victim restitution considerations, including whether the proposed fine will impair an organization's ability to pay restitution.

While this guidance regarding claims of inability to pay applies to DOJ Criminal Division enforcement actions generally and is not specific to FCPA cases, corporate claims of inability to pay have featured in prior FCPA cases. For example, in 2018 alone, the DOJ reduced penalties in three settlements based on the defendant company's inability to pay: (i) Transport Logistics International, Inc. (DOJ reduced the $21 million criminal penalty appropriate under the Sentencing Guidelines to $2 million after finding that a penalty greater than $2 million "would substantially jeopardize the continued viability of the company")[133]; (ii) SBM Offshore (DOJ reduced penalties by 25% from the lowest recommended penalties under the Sentencing Guidelines upon finding that payment of the full fine would lead to "significant collateral consequences" and substantial jeopardy as to "the continued viability" of the company)[134]; and (iii) Odebrecht (DOJ reduced $260 million to be paid to the United States to $93 million due to the company's "inability to pay a total criminal penalty in excess of $2,600,000,000 . . . .").[135]

G. Clayton Statement Regarding Offers of Settlement

In July 2019, SEC Chairman, Jay Clayton issued a Statement detailing a new approach the SEC will take in considering settlement offers, namely considering contemporaneously with settlement discussions requests for waivers from automatic statutory disqualifications and other collateral consequences.[136] The SEC can grant a waiver exempting entities from the "significant collateral consequences" that accompany certain types of resolutions and often does so in conjunction with settlement offers. However, SEC consideration of a potential settlement has historically been conducted separately from consideration of any waiver requests. As Chairman Clayton explained in the Statement, this bifurcated approach can be unduly complex and lead to inconsistencies undermining appropriate settlements.[137] To address these negative effects of the current process, under the new Statement, a settling entity will now be able to request that the SEC consider an offer of settlement that simultaneously addresses both the enforcement action and related collateral disqualifications.[138]

The Statement also emphasized the importance to both the SEC and the settling entity of reaching an "appropriately-crafted settlement," and described multiple factors that drive decision-making around settlements. These include: (1) the cost of litigation; (2) the SEC's willingness to "litigate zealously" in the absence of a timely and reasonable offer of settlement; (3) the importance of promptly remedying harm to investors, as "[i]nvestor protection is at the core of the Commission's mission"; and (4) a desire for certainty.[139]

This change constitutes a procedural improvement that should create a more predictable enforcement environment and allow settling entities to better assess the outcome of a proposed settlement and make an informed decision about whether and when to enter into a settlement with the SEC.

H. SEC Proposed Rules to Require Mandatory Disclosures by Resource Extraction Companies

Section 13(q) of the Securities Exchange Act, added by Dodd-Frank, instructed the SEC to adopt rules mandating the disclosure of certain payments by issuers in the extractive resource industries.[140] Two initial attempts to implement Section 13(q) were invalidated—once by the courts and once by Congress.[141]

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[133] US Department of Justice Press Release No. 18-305: Transport Logistics International Inc. Agrees to Pay $2 Million Penalty to Resolve Foreign Bribery Case (Mar. 13, 2018).
[134] Plea Agreement, *United States of America v. SBM Offshore USA*, No. 17-685 (S.D. Tex. Nov. 29, 2017); Deferred Prosecution Agreement, *United States of America v. SBM Offshore N.V.*, No. 17-686 (S.D. Tex. Nov. 29, 2017).
[135] Richard L. Cassin, DOJ Reduces Odebrecht Penalties, We Revise the Top Ten List, FCPA BLOG (Apr. 14, 2017 11:28 AM), https://fcpablog.com/2017/4/14/doj-reduces-odebrecht-penalties-we-revise-the-top-ten-list/; Sentencing Memo, *United States v. Odebrecht S.A.*, No. 16-643 (RJD) (S.D.N.Y. Apr. 11, 2017).
[136] Jay Clayton, Chairman, SEC, Public Statement: Statement Regarding Offers of Settlement (July 3, 2019).
[137] Jay Clayton, Chairman, SEC, Public Statement: Statement Regarding Offers of Settlement (July 3, 2019).
[138] Jay Clayton, Chairman, SEC, Public Statement: Statement Regarding Offers of Settlement (July 3, 2019).
[139] Jay Clayton, Chairman, SEC, Public Statement: Statement Regarding Offers of Settlement (July 3, 2019).
[140] 15 U.S.C. 78m(q)(2)(A).
[141] *See API v. SEC*, 953 F. Supp. 2d 5 (D.D.C. July 2, 2013); H.R.J. Res. 41, 115th Cong. (2017) (enacted).

On December 18, 2019, the Commission embarked on its third attempt, proposing rules that, if adopted, would require domestic or foreign issuers (including their subsidiaries and entities under their control) that are required to file annual reports to the Commission to disclose payments to the US government or any foreign government made in connection with the commercial development of extractive resources (e.g., oil, natural gas, or minerals).[142] If adopted, the proposed rules would require disclosure of payments meeting two thresholds: first, the individual payment must meet a threshold of $150,000; and second, the payment must be related to projects meeting a threshold value of $750,000.[143] Exemptions are contemplated for situations in which disclosure is prohibited by foreign law or an already-existing contract or for smaller or emerging-growth companies.[144]

The proposed rules and the mandate for their implementation highlight regulatory and legislative avenues—beyond and besides FCPA enforcement—that can be used to expose and combat corruption.

III. KEY INVESTIGATION-RELATED DEVELOPMENTS

A. Notable Features of Corporate Resolutions

1. Continued Reliance on Accounting Provisions

In 2019, as in recent years, the SEC and the DOJ brought several FCPA actions against companies where the charges were based solely on violations of the internal accounting controls and books and records provisions of the FCPA, without bribery charges. There were six such cases in 2019, as compared to two in 2018[145] and three in 2017.[146] As SEC FCPA Unit head, Charles Cain, noted at a conference in September, the SEC may pursue accounting and recordkeeping charges when it cannot establish *jurisdiction* over substantive bribery.[147] And whether or not the government found that bribes were paid, these cases demonstrate that the accounting provisions continue to be a critical tool for the FCPA enforcement authorities and will be used even where the government cannot, or chooses not to, bring a case under the anti-bribery provisions.[148]

For example, in a June resolution with Walmart, the SEC and the DOJ charged only internal controls and bookkeeping violations where, according to the government, Walmart's internal controls relating to anti-corruption were allegedly deficient from 2000 to 2011. The government alleged that during that time, Walmart subsidiaries in Brazil, China, India, and Mexico were allowed to hire third-party intermediaries in order to obtain various permits or licenses without reasonable assurances that these transactions complied with their stated purposes and the prohibition on improper payments.[149] Both the SEC and the DOJ alleged that Walmart ignored red flags as to these controls.[150]

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[142] Disclosure of Payments by Resource Extraction Issuers, 17 C.F.R. pts. 240, 249 (proposed Dec. 18, 2019).
[143] Disclosure of Payments by Resource Extraction Issuers, 17 C.F.R. pts. 240, 249 (proposed Dec. 18, 2019).
[144] Disclosure of Payments by Resource Extraction Issuers, 17 C.F.R. pts. 240, 249 (proposed Dec. 18, 2019).
[145] WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 28-29 (Jan. 17, 2019).
[146] WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 38-39 (Jan. 12, 2018).
[147] Clara Hudson, *"They're Just Scaring People": SEC Chief Responds to Defence Bar's Criticisms*, GLOBAL INVESTIGATIONS REVIEW Sept. 25, 2019, https://globalinvestigationsreview.com/article/jac/1198076/%E2%80%9Cthey%E2%80%99re-just-scaring-people%E2%80%9D-sec-chief-responds-to-defence-bar%E2%80%99s-criticisms.
[148] Clara Hudson, *"They're just scaring people": SEC chief responds to Defence Bar's Criticisms*, GLOBAL INVESTIGATIONS REVIEW, Sep. 25, 2019. Charles Cain, head of the SEC's FCPA unit explained, in part, at a September 25 white-collar crime conference: "The idea that we bring accounting cases when we can't prove a bribe is just simply not the case. It's often just because of the fact that maybe interstate commerce wasn't used in connection with the bribe scheme; maybe we're not able to establish agency over the subsidiary where the conduct took place so you can't charge the substantive charge itself. We recognize that people are going to do bad things and you can't prevent every Tom, Dick and Harry from doing something wrong in your organization. But was it somebody high in the organization? Did it go on for a really long time? Was there a robust control environment? Was there a real commitment to compliance? Those are the questions we're going to be looking at."
[149] Non-Prosecution Agreement between US Department of Justice and Walmart Inc., Attachment A ¶ 20 (June 20, 2019), https://www.justice.gov/opa/press-release/file/1175791/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Walmart Inc.*, Rel. No. 86159, File No. 3-19207, ¶ 1 (June 20, 2019).
[150] Non-Prosecution Agreement between US Department of Justice and Walmart Inc., Attachment A ¶¶ 20, 61 (June 20, 2019), https://www.justice.gov/opa/press-release/file/1175791/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Walmart Inc.*, Rel. No. 86159, File No. 3-19207, ¶ 1 (June 20, 2019).

Both the SEC and the DOJ acknowledged Walmart's significant remedial measures, including its hiring of a Global Chief Ethics & Compliance Officer as well as a dedicated Global Anti-Corruption Officer, monthly and quarterly anti-corruption monitoring across markets, and enhanced global controls addressing the use of third-party intermediaries.[151] That the eventual resolution was not based on an anti-bribery violation suggests that the government was unable to establish all of the elements of such a charge or that there was not sufficient jurisdiction to charge under those provisions. Some commentators also believe that the highly publicized $900 million Walmart paid in legal costs and enhancements to its compliance program over the course of its internal and government investigations contributed to leniency in the settlements.

Similarly, in July, Microsoft settled with the SEC and the DOJ in connection with internal controls and recordkeeping violations in a number of jurisdictions.[152] The alleged violations spanned 2012 to 2015, and, according to the government's papers, at varying times involved using intermediaries in connection with government projects and business development and making payments for gifts and travel for government officials and employees of non-government customers, without having a sufficient system of internal controls to prevent improper payments.[153] The SEC alleged that, at least in certain of the transactions, Microsoft won government tenders as a result of the conduct.[154] In the SEC settlement, Microsoft agreed to pay disgorgement plus interest of more than $16 million, which reflected the approximately $13.7 million in business that Microsoft allegedly won through "improper payments."[155] And for its part, the DOJ entered into a three-year Non-Prosecution Agreement (NPA) with the Microsoft subsidiary in Hungary, called Microsoft Magyarorszag Kft, which agreed to a criminal penalty of $8.75 million.[156]

In a case with no corresponding DOJ resolution, in September, Juniper Networks settled SEC charges, which detailed that from 2009 to 2013, employees of a Chinese subsidiary falsified trip and meeting agendas for government officials in order to understate the value of entertainment.[157] In addition, according to the SEC's Order, from 2008 to 2013, sales employees at a Russian subsidiary, called JNN Development Corp., secretly agreed with third-party partners to increase discounts on sales made to customers and diverted these discounts into "common funds" that were used by the third-party partners for travel and marketing expenses, including for expenses that were "predominately leisure in nature" and for government officials; these funds were directed in part by JNN sales representatives.[158] Despite alleging that practices such as "inflat[ing] and divert[ing] discounts into off-book accounts also created a risk that these funds could be embezzled or applied to other improper uses," the SEC did not contend any specific improper payments occurred.[159] Juniper agreed to pay approximately $4 million in disgorgement (plus pre-judgment interest) and a civil penalty of $6.5 million. As we noted in a previous alert, this high civil penalty was unusual, particularly because Juniper was credited for cooperating with the Commission's investigation.[160] This perhaps reflects the seriousness with which the SEC viewed Juniper's conduct, even if it was unable to identify additional profits derived from the conduct.[161] Indeed, the SEC's Order did not allege that the conduct in China or in

[151] Non-Prosecution Agreement between US Department of Justice and Walmart Inc., Attachment A ¶ 20 (June 20, 2019), https://www.justice.gov/opa/press-release/file/1175791/download; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Walmart Inc.*, Rel. No. 86159, File No. 3-19207, ¶ 1 (June 20, 2019).
[152] US Department of Justice Press Release No. 19-791: Hungary Subsidiary of Microsoft Corporation Agrees to Pay $8.7 Million in Criminal Penalties to Resolve Foreign Bribery Case (July 22, 2019).
[153] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Microsoft Corp.*, Rel. No. 86421, File No. 3-19260 (July 22, 2019).
[154] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Microsoft Corp.*, Rel. No. 86421, File No. 3-19260 (July 22, 2019).
[155] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Microsoft Corp.*, Rel. No. 86421, File No. 3-19260, ¶ IV(B) (July 22, 2019).
[156] US Department of Justice Press Release No. 19-791: Hungary Subsidiary of Microsoft Corporation Agrees to Pay $8.7 Million in Criminal Penalties to Resolve Foreign Bribery Case (July 22, 2019).
[157] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Juniper Networks, Inc.*, Rel. No. 86812, File No. 3-19397, ¶ 3 (Aug. 29, 2019).
[158] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Juniper Networks*, *Inc.*, Rel. No. 86812, File No. 3-19397, ¶¶ 2-3, 11, 14 (Aug. 29, 2019).
[159] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Juniper Networks*, *Inc.,* Rel. No. 86812, File No. 3-19397, ¶ 10 (Aug. 29, 2019).
[160] WilmerHale, *Juniper FCPA Settlement Provides Useful Compliance Reminders* (Sept. 4, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190904-juniper-fcpa-settlement-provides-useful-compliance-reminders.
[161] WilmerHale, *Juniper FCPA Settlement Provides Useful Compliance Reminders* (Sept. 4, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190904-juniper-fcpa-settlement-provides-useful-compliance-reminders.

Russia was connected to any specific business, nor that the conduct in China was undertaken with the intent of obtaining business or favorable treatment.[162]

Similarly, the SEC's May settlement with Telefônica Brasil S.A., a Brazilian telecommunications company, involved an application of the internal controls and bookkeeping provisions in a context where there was limited or no evidence of corrupt conduct and where there was only a tenuous connection to the United States.[163] The SEC's Order set forth that the company provided dozens of government officials with tickets and related hospitality for soccer matches during the 2013 Confederations Cup and the 2014 World Cup worth more than $730,000, and that the officials were directly involved with, or were in a position to influence legislative actions, regulatory approvals, and business dealings.[164] The SEC charged that Telefônica failed to properly characterize the hospitality spending, improperly recording the tickets in the company's books as "Publicity Institutional Events" and "Advertising & Publicity" as opposed to gifts to government officials, and lacked internal accounting controls sufficient to enforce its general code of ethics.[165]

The SEC did not allege any direct connection between the gifts and any specific improper advantages. It did, however, cite to internal emails in which Telefônica employees associated the officials with issues for which their support was needed.[166] In support of its charges, the SEC alleged that while Telefônica did have high-level policies prohibiting the offer of gifts and hospitality for improper purposes, it lacked sufficiently robust controls to prevent the gifts at issue.[167] Notably, the SEC imposed penalties of $4.125 million (with no disgorgement), which was more than five times the value of the gifts given to the government officials.[168]

The SEC's reliance on the FCPA's accounting provisions also extended to its resolutions of relationship hiring cases in 2019. Deutsche Bank and Barclays became the fourth and fifth banks to settle matters relating to foreign hiring practices.[169] The cases also involved only the SEC, even though public disclosures and statements indicate the DOJ also had been involved in the investigations. This is in contrast to two prior hiring cases in which the DOJ also reached resolutions with the banks and the SEC found that the banks had violated the FCPA's Section 30A anti-bribery provisions.[170]

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[162] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Juniper Networks, Inc.*, Rel. No. 86812, File No. 3-19397, ¶ 3 (Aug. 29, 2019); WilmerHale, *Juniper FCPA Settlement Provides Useful Compliance Reminders* (Sept. 4, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190904-juniper-fcpa-settlement-provides-useful-compliance-reminders.

[163] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telefônica Brasil S.A.*, Rel. No. 85819, File No. 3-19162, ¶ 2 (May 9, 2019).

[164] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telefônica Brasil S.A.*, Rel. No. 85819, File No. 3-19162, ¶¶ 2, 8, 12 (May 9, 2019).

[165] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telefônica Brasil S.A.*, Rel. No. 85819, File No. 3-19162, ¶ 16 (May 9, 2019).

[166] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telefônica Brasil S.A.*, Rel. No. 85819, File No. 3-19162, ¶ 9 (May 9, 2019).

[167] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telefônica Brasil S.A.*, Rel. No. 85819, File No. 3-19162, ¶¶ 13-15 (May 9, 2019).

[168] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telefônica Brasil S.A.*, Rel. No. 85819, File No. 3-19162, ¶¶ 7, 11, 20(B) (May 9, 2019). This large fine is reminiscent of the SEC's 2015 order against BHP Billiton. There, BHP Billiton agreed to pay the SEC $25 million to settle books and records and internal controls violations, where the SEC alleged that the company offered gifts and entertainment to approximately 176 government officials and their guests during the 2008 Summer Olympic Games in Beijing. The SEC noted that 60 government officials accepted the invitation—including 24 who came with spouses or guests—some of whom flew business class to the events. The SEC did not suggest the approximate value of the gifts and entertainment provided to these officials, but, like in the Telefônica Brasil settlement, it was likely much less than the penalty that BHP incurred. See Order Instituting Cease-and-Desist Proceedings, *In the Matter of BHP Billiton Ltd. and BHP Billiton Plc*, Rel. No. 74998, File No. 3-16546, ¶¶ 1-3, 15, IV(B) (May 20, 2015).

[169] US Securities and Exchange Commission Press Release No. 2015-170: SEC Charges BNY Mellon With FCPA Violations (Aug. 18, 2015); US Department of Justice Press Release No. 16-1343: JPMorgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016); US Department of Justice Press Release No. 18-888: Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (July 5, 2018); US Securities and Exchange Commission Press Release No. 3-19373: SEC Charges Deutsche Bank with FCPA Violations Related to Its Hiring Practices (Aug. 22, 2019); US Securities and Exchange Commission Press Release No. 3-19537: SEC Charges Barclays with FCPA Violations Related to Its Hiring Practices (Sept. 27, 2019).

[170] US Department of Justice Press Release No. 16-1343: JPMorgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016); US Department of Justice Press Release No. 18-888: Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (July 5, 2018)

With the DOJ absent from 2019's resolutions, and the fact that years have now passed since the investigations were first publicly reported,[171] it may be that US authorities are winding down their bank hiring investigations, and have declined to bring charges against many or all of the remaining banks that have publicly disclosed that they were under investigation. While the book may be almost closed on the bank matters, there is little doubt that hiring practices will continue to be a live theory of liability for US authorities, likely to feature in future corporate resolutions.

2. Self-Disclosure and Cooperation

The DOJ and SEC remained keenly focused on voluntary disclosure and cooperation in 2019, issuing several policy announcements on the subject (*see* Section II above) and continuing to weigh them heavily when calculating penalties for corporate offenders.

For over two years now, the DOJ's Corporate Enforcement Policy has rewarded companies that voluntarily self-disclose potential misconduct, fully cooperate, and timely and appropriately remediate wrongdoing with a "presumption" that the company will receive a declination.[172] While the presence of aggravating circumstances—such as involvement by company executive management, significant profit from the misconduct, pervasive misconduct at the company, or criminal recidivism—may warrant a criminal resolution, companies with such characteristics that self-disclose and cooperate may still receive other significant benefits, such as penalty reductions of 50% off of the low end of the US Sentencing Guidelines range.[173] Moreover, if a company has, at the time of resolution, implemented an effective compliance program, an independent monitor will "generally" not be imposed.[174] Even companies that do not voluntarily self-disclose misconduct but do fully cooperate with the Department and engage in timely and appropriate remediation may receive a reduction of up to 25% off of the low end of the Guidelines range.[175] Such was the case with Walmart, which did not receive voluntary disclosure credit, but nonetheless received a discount given its subsequent cooperation with the government's investigation.[176]

While the Corporate Enforcement Policy only applies to the DOJ, the SEC takes a similar, though less elucidated, approach. The agency's 2011 "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.[177]

Corporate resolutions in 2019 reflect both the DOJ's and the SEC's adherence to these principles and their mutual interest in further increasing disclosure and cooperation. In particular, Cognizant Technology Solutions (Cognizant) and Quad/Graphics Inc. (Quad) received declinations from the DOJ pursuant to the Corporate Enforcement Policy.

The case of Cognizant is especially illustrative of the potential benefits of self-disclosure and full cooperation for both companies and individuals. Cognizant was alleged to have paid a $2 million bribe to government officials in India in exchange for securing a permit for the development of an office park, along with two additional bribes totaling $1.6 million.[178] The government specifically alleged that the bribes were authorized by Cognizant's president and chief legal officer, an aggravating factor that eliminates the presumption of a declination under the Policy, yet Cognizant apparently overcame the loss of the presumption and emerged with a DOJ declination and a reasonable SEC settlement.

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[171] *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; Anannya Pramanick & Aman Shah, *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).
[172] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120 (2019).
[173] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120 (2019).
[174] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120 (2019).
[175] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120 (2019).
[176] Non-Prosecution Agreement between US Department of Justice and Walmart Inc., (June 20, 2019), https://www.justice.gov/opa/press-release/file/1175791/download.
[177] 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).
[178] US Securities and Exchange Commission Press Release No. 2019-12: SEC Charges Cognizant and Two Former Executives With FCPA Violations (Feb. 15, 2019).

Without admitting or denying the allegations, Cognizant settled with the SEC by agreeing to pay $19 million in disgorgement and prejudgment interest as well as a civil penalty of $6 million.[179] In its declination papers, the DOJ highlighted, in particular, how the company disclosed the conduct within two weeks of its Board learning about it.[180] The DOJ stated that this very rapid disclosure was supplemented by the company's lack of prior criminal history, its "full remediation" (including, but not limited to, terminating the employment of, and disciplining, employees and contractors involved in misconduct), the presence of an effective compliance program, and a willingness to disgorge its entire cost savings (in the SEC settlement).[181] Confirming that individuals likewise stand to benefit from cooperating with the government, the SEC credited Cognizant's former chief operating officer with full cooperation and imposed only a $50,000 fine, despite his senior position and role in the scheme.[182] Cognizant's former president and chief legal officer have taken a different approach, however, fighting the criminal and civil charges against them.[183] While both men have filed motions to dismiss the criminal charges, a jury trial is scheduled for September 2020.[184] The SEC's civil case has been stayed pending the criminal charges.[185]

The Quad matter was resolved in a similar fashion. Quad consented to a cease-and-desist order and agreed to pay the SEC $10 million to resolve charges stemming from the payment of bribes to secure printing contracts in Peru and China.[186] Quad employees allegedly made $1 million in improper payments over the course of five years to government officials in China and Peru to secure printing contracts, minimize penalty payments, and improperly influence the judicial outcome of a dispute with the Peruvian tax authority.[187] The DOJ declined to prosecute in light of the company's (1) prompt, voluntary self-disclosure; (2) thorough and comprehensive investigation; (3) full and proactive cooperation; (4) lack of prior criminal history; and (5) full remediation, including taking steps to enhance its compliance program, terminating the employment of individuals involved in misconduct, and discontinuing relationships with contractors and third parties involved in misconduct.[188]

While there may have been other considerations motivating the closure (without penalty) of three additional cases in 2019—they did not receive Corporate Enforcement Policy Declinations—they nonetheless also reflect the Department's and the SEC's interest in promoting disclosure and cooperation.

- Misonix, Inc., a medical device manufacturer based in New York, announced in June 2019 that the SEC closed its investigation into alleged bribery by the company in China and disclosed in August 2019 that it had received a declination letter from the DOJ in connection with the alleged misconduct.[189] The government's investigations stemmed from allegations by a former company executive that Misonix was making improper payments to doctors in China through its former distributor, Cicel Science & Technology.[190] Misonix conducted an internal investigation into Cicel, self-reported the bribery allegations to the US authorities in 2016, and fully cooperated with the ensuing government inquiry.[191]

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[179] US Securities and Exchange Commission Press Release No. 2019-12: SEC Charges Cognizant and Two Former Executives With FCPA Violations (Feb. 15, 2019).
[180] Non-Prosecution Agreement between US Department of Justice and Cognizant Technology Solutions Corporation, at 1-2 (Feb. 13, 2019), https://www.justice.gov/criminal-fraud/file/1132666/download.
[181] Non-Prosecution Agreement between US Department of Justice and Cognizant Technology Solutions Corporation, at 1-2 (Feb. 13, 2019), https://www.justice.gov/criminal-fraud/file/1132666/download.
[182] US Securities and Exchange Commission Press Release No. 3-19446: SEC Settles FCPA Charges Against Former Chief Operating Office of Cognizant (Sep. 13, 2019).
[183] Samuel Rubenfeld and Dave Michaels, *Two Former Cognizant Executives Charged in Bribery Probe*, WALL ST. J., Feb. 15, 2019.
[184] *USA v. Coburn et al.*, 2:19-cr-00120 (D.N.J.).
[185] *SEC v. Coburn et al.*, 2:19-cv-05820 (D.N.J.).
[186] US Securities and Exchange Commission Press Release No. 2019-193: SEC Charges Marketing and Printing Services Provider with FCPA Violations (Sept. 26, 2019), https://www.sec.gov/news/press-release/2019-193.
[187] Non-Prosecution Agreement between US Department of Justice and Quad/Graphics Inc., at 1-2 (Sep. 19, 2019), https://www.justice.gov/criminal-fraud/file/1205341/download.
[188] Non-Prosecution Agreement between US Department of Justice and Quad/Graphics Inc., at 1-2 (Sep. 19, 2019), https://www.justice.gov/criminal-fraud/file/1205341/download.
[189] Misonix, Inc., SEC Investigation of Misonix, Inc. Ends With No Action (June 20, 2019), https://misonix.gcs-web.com/news-releases/news-release-details/sec-investigation-misonix-inc-ends-no-action; Clara Hudson, *DOJ Closes Misonix Investigation*, GLOBAL INVESTIGATIONS REVIEW, Aug. 19, 2019, https://globalinvestigationsreview.com/article/jac/1196496/doj-closes-misonix-investigation; Misonix, Inc., Current Report (SEC Form 8-K) (Aug. 16, 2019), *available at* https://www.sec.gov/Archives/edgar/data/880432/000121390019016137/f8k081519_misonixinc.htm.
[190] Clara Hudson, *DOJ Closes Misonix Investigation*, GLOBAL INVESTIGATIONS REVIEW, Aug. 19, 2019, https://globalinvestigationsreview.com/article/jac/1196496/doj-closes-misonix-investigation.
[191] Misonix, Inc., Current Report (SEC Form 8-K) (Aug. 16, 2019), *available at* https://www.sec.gov/Archives/edgar/data/880432/000121390019016137/f8k081519_misonixinc.htm.

While neither the SEC nor the DOJ commented on the bases for the investigation closures, Misonix appears to view its voluntary investigation, disclosure, and cooperation with both agencies as contributing factors.[192] A press release issued by Misonix suggests that the company is no longer using the distributor whose conduct was at issue and that the internal controls issues identified during the investigation have been remedied.[193]

- On September 9, 2019, the SEC announced that it closed its investigation into Ciena Corporation's payments to an employee of one of its customers in Southeast Asia.[194] This announcement comes about a year after the December 2018 announcement that the DOJ closed its investigation into the matter and about two years after the company voluntarily disclosed to the SEC and the DOJ the results of its internal investigation into the payments at issue.[195] In its December 2018 announcement, Ciena did not provide an explanation as to why the DOJ had closed its investigation.[196]

While these resolutions suggest that voluntary disclosure and cooperation may have factored into the government's analysis, it is worth noting that under the Corporate Enforcement Policy, discretionary declinations are accompanied by public statements describing the conduct, as well as disgorgement. The lack of these features suggests that these matters were simply closed for lack of evidence or other factors.

Other 2019 resolutions exemplify how companies can receive some credit even if they do not both voluntarily disclose *and* fully cooperate. For example, TechnipFMC was alleged to have made payments to consultants that it knew would be passed on to Brazilian officials and politicians. The company did not voluntarily disclose, but it did receive full credit for cooperation and remediation.[197] As a result, in its deferred prosecution agreement with the DOJ, Technip's fine was reduced by 25%. The company also was not required to have an independent monitor, with the DOJ signaling its satisfaction with the company's remediation efforts and compliance program, including its agreement to voluntarily report other issues for the duration of the deferred prosecution agreement.[198] Technip ultimately paid an approximately $300 million penalty, with the majority of it going to Brazilian authorities who separately prosecuted the company.[199]

The SEC's resolution with Westport Fuel Systems was similar to the DOJ's treatment of Technip. According to the SEC, the company engaged in a scheme to bribe a Chinese government official so as to obtain business and a cash dividend payment.[200] Even though there is no indication of self-disclosure, the Commission credited Westport for its cooperation and a number of specific remedial efforts.[201] In particular, the SEC noted how the company enhanced its policies and training programs by establishing specific controls for transactions involving foreign

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[192] *See* Misonix, Inc., Current Report (SEC Form 8-K) (Aug. 16, 2019), *available at* https://www.sec.gov/Archives/edgar/data/880432/000121390019016137/f8k081519_misonixinc.htm.
[193] Misonix, Inc., SEC Investigation of Misonix, Inc. Ends With No Action (June 20, 2019), https://misonix.gcs-web.com/news-releases/news-release-details/sec-investigation-misonix-inc-ends-no-action.
[194] Clara Hudson, *SEC Closes Ciena Investigation*, GLOBAL INVESTIGATIONS REVIEW, Sept. 13, 2019, https://globalinvestigationsreview.com/article/jac/1197541/sec-closes-ciena-investigation.
[195] Kelly Swanson, *US Prosecutors Drop Investigation into Network Services Company*, GLOBAL INVESTIGATIONS REVIEW, Jan. 3, 2019, https://globalinvestigationsreview.com/article/jac/1178583/us-prosecutors-drop-investigation-into-network-services-company.
[196] Ciena Corporation, Annual Report (SEC Form 10-K) (Dec. 21, 2019), *available at* https://www.sec.gov/Archives/edgar/data/936395/000093639518000048/a20181031financials.htm.
[197] Deferred Prosecution Agreement, *United States v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. June 25, 2019); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Technip FMC plc.*, Rel. No. 87055, File No. 3-19493, ¶ 37-38 (Sep. 23, 2019).
[198] Deferred Prosecution Agreement, *United States v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. June 25, 2019); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Technip FMC plc.*, Rel. No. 87055, File No. 3-19493, ¶ 37-38 (Sep. 23, 2019).
[198] Deferred Prosecution Agreement, *United States v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. June 25, 2019); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Technip FMC plc.*, Rel. No. 87055, File No. 3-19493, ¶ 37-38 (Sep. 23, 2019).
[199] Deferred Prosecution Agreement, *United States v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. June 25, 2019).
[200] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Westport Fuel Systems, Inc.*, Rel. No. 87138, File No. 3-19543 (Sept. 27, 2019).
[201] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Westport Fuel Systems, Inc.*, Rel. No. 87138, File No. 3-19543 (Sept. 27, 2019).

government officials and requiring its business partners to agree to abide by anti-bribery laws.[202] The SEC also noted the company's production of foreign witnesses for testimony in the United States.[203]

Lastly, the Samsung Heavy Industries resolution provides a useful reminder that timeliness plays a role not only in self-disclosure, but also in cooperation. The government charged that Samsung Heavy Industries provided a Brazilian intermediary with $20 million in commission payments while knowing that a portion of the money would be paid as bribes to Brazilian officials in order to win business.[204] In a deferred prosecution agreement, the DOJ explained that the company ordinarily would have received full credit for its cooperation, given its thorough internal investigation and production of foreign-based employees and documents.[205] Samsung Heavy Industries did *not* receive the full credit, however, because, according to the DOJ, of its "failure to meet reasonable deadlines . . . and delays it caused in reaching a resolution."[206] The DOJ did not expand upon the "reasonable deadlines" or the duration of the delays, leaving practitioners with little guidance as to the Department's expectations on "reasonableness" in responding to requests. In any event, the DOJ's conclusion regarding the company's cooperation cost Samsung nearly $5 million, as its fine was discounted by only 20%, (a reduction of $18,870,400 from $94,352,000 to $75,481,600), instead of the 25% discount (which would have been $23,588,000) it would otherwise have received for full cooperation.

3. Continued Use of Monitors

a. Reflections on the Benczkowski Memorandum and Overall Trends

Independent compliance monitors continue to be an important part of both DOJ and SEC resolutions in the wake of AAG Benczkowski's 2018 Memorandum (the "Benczkowski Memo"), which we analyzed in full in the 2018 Year-in-Review.[207] As a brief refresher, the Benczkowski Memo reiterated the important role monitors play in reducing a company's risk of recurring misconduct but focused on weighing the costs of monitorship against its potential benefits.[208] The memo provided four specific factors a Criminal Division attorney should consider in determining whether to impose a monitor. The first two factors went to the nature of the misconduct (whether it involved manipulation of books and records or exploited controls weaknesses, and whether it was pervasive and involved senior managers) and the second two factors went to remediation (whether the corporation had made significant improvements to its controls, and whether the improvements had been tested to demonstrate that they would prevent similar misconduct in the future). The memo also advised that Department attorneys should examine overall changes in corporate leadership and culture.[209]

The Benczkowski Memo asserted that a monitor "will not be necessary in many corporate criminal resolutions."[210] This, in conjunction with the factors identified, led us to predict last year that companies would have a more receptive audience at the DOJ to arguments pointing to the disruptive and costly nature of monitorships and that companies might face better odds at avoiding monitors altogether if quick remedial measures are taken.[211] Indeed, even more recently in remarks delivered to the American Conference Institute's Conference on the FCPA,

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[202] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Westport Fuel Systems, Inc.*, Rel. No. 87138, File No. 3-19543, ¶ 28-29 (Sep. 27, 2019).
[203] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Westport Fuel Systems, Inc.*, Rel. No. 87138, File No. 3-19543, ¶ 30 (Sept. 27, 2019).
[204] US Department of Justice Press Release No. 1301: Samsung Heavy Industries Company Ltd Agrees to Pay $75 Million in Global Penalties to Resolve Foreign Bribery Case (Nov. 22, 2019).
[205] Deferred Prosecution Agreement, *United States v. Samsung Heavy Industries Co. Ltd.*, No. 1:19-CR-328 (E.D.V.A. Nov. 22, 2019).
[206] Deferred Prosecution Agreement, *United States v. Samsung Heavy Industries Co. Ltd.*, No. 1:19-CR-328 (E.D.V.A. Nov. 22, 2019).
[207] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 18-20 (Jan. 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[208] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters, at 1-2 (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.
[209] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters, at 2 (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.
[210] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters, at 2 (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.
[211] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 20 (Jan. 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.

AAG Benczkowski stressed that companies' "strong remedial investments in their compliance programs after misconduct is discovered" will "weigh against the imposition of a monitor."[212]

However, the DOJ's actions may speak louder than its words. Although the appointment of independent compliance monitors is off from the high-point seen in 2016,[213] there were more monitorships imposed in 2019, following the release of the Benczkowski Memo, than there were in 2018. The DOJ imposed only one monitorship in 2018.[214] That number quadrupled in 2019, as the DOJ required independent monitorships as part of its resolutions with MTS,[215] Fresenius Medical Care,[216] Walmart,[217] and Ericsson.[218] The SEC metrics are consistent with those of the DOJ. In 2019, the SEC jointly imposed three monitorships with the DOJ (Fresenius Medical Care, MTS, and Ericsson) whereas it had only imposed one in 2018 (Stryker Corp.)[219] While a small sample, this modest upward trend may evince the DOJ's intent to impose monitorships, even against first-time offenders who have undertaken remedial efforts. On the other hand, the DOJ does appear to be heeding its own guidance that Department attorneys should "appropriately tailor[]" the monitorships to "address the specific issues and concerns that created the need for the monitor."[220]

The MTS, Fresenius, and other resolutions demonstrate that the DOJ and SEC will continue to use monitors in instances of perceived serious internal controls failures or gaps. But, in line with AAG Benczkowski's memorandum, those monitorships should be more refined, targeted to the particular issues identified in the government's investigation, and sensitive to a corporation's business operations. We highlight one caveat: many of these resolutions were likely being negotiated during or before the Benczkowski Memo was issued, and thus may not be entirely illustrative of the memo's implementation. The next few years will better demonstrate how closely the enforcement authorities will heed the new guidance. We briefly discuss each of 2019's monitorships below.

b. Mobile TeleSystems PJSC

The DOJ and SEC resolutions in March 2019 with Moscow-based MTS and its wholly owned Uzbek subsidiary, Kolorit Dizayn Ink LLC,[221] demonstrate enforcement authorities' continued willingness to use broad monitorships to remedy what they view as pervasive misconduct combined with lack of remediation and cooperation. Both authorities imposed requirements that the company engage an independent compliance monitor for a three-year

[212] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference.
[213] *FCPA Monitorships: Data Analysis*, GLOBAL INVESTIGATIONS REVIEW, https://globalinvestigationsreview.com/benchmarking/fcpa-counsel-tracker/1068506/fcpa-monitorships-data-analysis (Dec. 11, 2019).
https://globalinvestigationsreview.com/article/jac/1171163/doj-records-offer-window-into-lucrative-world-of-fcpa-monitorship.
[214] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118, ¶ 4(e), Attachment D (D.D.C. Apr. 30, 2018).
[215] US Department of Justice Press Release No. 19-200: Mobile Telesystems PJSC and Its Uzbek Subsidiary Enter into Resolutions off $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019).
[216] US Department of Justice Press Release No. 19-290: Fresenius Medical Care Agrees to Pay $231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (Mar. 29, 2019).
[217] US Department of Justice Press Release No. 19-691: Walmart Inc. and Brazil-Based Subsidiary Agree to Pay $137 Million to Resolve Foreign Corrupt Practices Act Case (June 20, 2019)
[218] US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019).
[219] US Securities and Exchange Commission Press Release No. 2019-48: SEC Charges Medical Device Company With FCPA Violations (Mar. 29, 2019); US Securities and Exchange Commission Press Release No. 2019-27: Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019).
[220] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters, at 2 (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.
[221] US Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions off $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019); US Securities and Exchange Commission Press Release No. 2019-27: Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019).

term.[222] The agreements resolve conduct the agencies described as "egregious"[223] and of such "level and reach [to] poison[]"[224] the global marketplace.

In response to that level of misconduct, the DOJ and SEC required that the monitor have broad oversight to ensure future compliance. Notably, the description of the monitor's mandate in the resolution papers contains no limiting language, allowing the monitor to evaluate all internal controls and reporting policies and procedures as they relate to complying with the FCPA and other anti-corruption laws.[225] The monitor must also assess the Board of Directors', senior management's, and the company's implementation and commitment to the agreed upon compliance program.[226] Although the monitor should use a risk-based approach and need not review all aspects of the business's compliance comprehensively,[227] the DOJ's and SEC's language encompasses all risk areas associated with the FCPA, including current and future business opportunities in all operating countries; current and potential third parties and joint ventures; gifts, travel, and entertainment; and involvement with foreign officials.[228]

The breadth of the monitorship was likely a response to MTS's apparent lack of cooperation and its failure to quickly and effectively remediate, in the view of the DOJ and SEC. The DOJ cited MTS for not voluntarily self-disclosing, for delaying production of materials, for refusing to support employee interviews, and for insufficiently remediating by failing to discipline relevant employees and executives.[229] While MTS was not a repeat offender,[230] that evidently did not outweigh the DOJ's belief that an independent monitor would be beneficial under the circumstances.

c. Fresenius Medical Care AG & Co. KGaA

In contrast to MTS, the resolution with Fresenius Medical Care demonstrates that the DOJ and SEC may still require a monitor, even when a company voluntarily self-discloses and cooperates, where circumstances support taking such a step. Fresenius reached resolutions with the DOJ and SEC that included the imposition of a monitor for two years, with a year of self-reporting to follow.[231] The DOJ alleged that Fresenius paid bribes to "publicly-employed health and/or government officials" to gain business benefits and failed to implement reasonable internal accounting

[222] Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, (S.D.N.Y. Feb. 22, 2019).
[223] US Securities and Exchange Commission Press Release No. 2019-27: Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019); *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mobile TeleSystems PJSC*, Rel. No. 85261, File No. 3-19022, at 2 ¶¶ B–C (Mar. 6, 2019).
[224] US Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions off $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019).
[225] Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, Attachment D-1 ¶ 2 (S.D.N.Y. Feb. 22, 2019). The SEC's mandate mirrors the DOJ's. *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Mobile TeleSystems PJSC*, Rel. No. 85261, File No. 3-19022, at 10 ¶ VV (Mar. 6, 2019).
[226] Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, Attachment D-1–D-2 ¶ 2 (S.D.N.Y. Feb. 22, 2019).
[227] Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, Attachment D-3 ¶ 8 (S.D.N.Y. Feb. 22, 2019) ("The Monitor's reviews should use a risk-based approach, and thus, the Monitor is not expected to conduct a comprehensive review of all business lines, all business activities, or all markets.").
[228] Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, Attachment D-3–D-4 ¶ 8 (S.D.N.Y. Feb. 22, 2019).
[229] Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, at 4 ¶ 4 (S.D.N.Y. Feb. 22, 2019).
[230] Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, at 5 ¶ 4(g) (S.D.N.Y. Feb. 22, 2019).
[231] US Department of Justice Press Release No. 19-290: Fresenius Medical Care Agrees to Pay $231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (Mar. 29, 2019); US Securities and Exchange Commission Press Release No. 2019-48: SEC Charges Medical Device Company With FCPA Violations (Mar. 29, 2019); *see also* Non-Prosecution Agreement between US Department of Justice and Fresenius Medical Care AG & Co. KGaA, at 2 ¶ (f) (Feb. 25, 2019), https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve; Corrected Order Instituting Cease-and-Desist Proceedings, *In the Matter of Fresenius Medical Care AG & Co. KGaA*, Rel. No. 85468, File No. 3-19126, at 15 ¶ 65 (Mar. 29, 2019).

controls.[232] Fresenius engaged in the alleged conduct in Angola, Saudi Arabia, Morocco, Spain, Turkey, and West Africa.[233]

Fresenius received credit from the DOJ for disclosure and remediation. The DOJ noted that Fresenius voluntarily self-disclosed its conduct; cooperated by conducting a thorough investigation, quickly providing documents, making regular presentations, and providing witnesses for interviews; and engaged in certain remedial measures.[234] The DOJ concluded that a monitor was necessary notwithstanding these steps because, among other things, Fresenius had "not yet had the opportunity to test the effectiveness of its compliance enhancements."[235] This conclusion is consistent with AAG Benczkowski's 2018 memorandum, which stated that the DOJ likely would not seek to impose a monitor where a "corporation's compliance program and controls are demonstrated to be effective and appropriately resourced."[236] The SEC resolution also required the imposition of a monitor.[237]

d. Walmart Inc.

As part of the resolution, the DOJ required Walmart to engage a monitor for a term of two years, with no further self-reporting obligation. Consistent with the Department's statements acknowledging the company's substantial remediation and the findings of misconduct limited to particular jurisdictions, the scope of the monitor's work is limited to a review of the company's operations in four markets as well as its home office in Arkansas.[238] The Walmart case is perhaps the best example of the DOJ reaching the view that a monitor was necessary, but working with the company to tailor the scope of the monitorship to specific control areas rather than requiring a broader and more expensive exercise. The SEC, while not imposing a monitor, nonetheless required the company to self-report for a two-year period on the status of its remediation and implementation of anti-corruption-related compliance measures.[239]

e. Diversity of Monitors

It is worth noting that the monitors selected in 2019 were more diverse than in years past. This follows a 2018 ruling by a federal district court in Washington DC, ordering the DOJ to release the names of unsuccessful candidates for FCPA monitorships in response to a FOIA request.[240] We predicted that the ruling "may encourage both companies and enforcement authorities to broaden their pool of potential monitors from both a diversity and experiential perspective."[241] A *Global Investigations Review* report found that US-based monitor candidates did not include any women from 2009 to 2015, and that the majority of candidates were former government officials.[242]

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[232] Non-Prosecution Agreement between US Department of Justice and Fresenius Medical Care AG & Co. KGaA, at A-2 (Feb. 25, 2019), https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve.
[233] Non-Prosecution Agreement between US Department of Justice and Fresenius Medical Care AG & Co. KGaA, at A-2 (Feb. 25, 2019), https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve.
[234] Non-Prosecution Agreement between US Department of Justice and Fresenius Medical Care AG & Co. KGaA, at 1–2 (Feb. 25, 2019), https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve. Those remedial measures included: removing at least ten employees involved in the misconduct; enhancing compliance programs; terminating business relationships with inappropriate third parties; adopting more stringent controls on use of third parties; and withdrawing from consideration of certain pending public contracts.
[235] US Department of Justice Press Release No. 19-290: Fresenius Medical Care Agrees to Pay $231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (Mar. 29, 2019).
[236] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters, at 2 (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.
[237] US Securities and Exchange Commission Press Release No. 2019-48: SEC Charges Medical Device Company With FCPA Violations (Mar. 29, 2019); *see also* Corrected Order Instituting Cease-and-Desist Proceedings, *In the Matter of Resenius Medical care AG & Co. KGaA*, Rel. No. 85468, File No. 3-19126, at 15 ¶ 64 (Mar. 29, 2019).
[238] Non-Prosecution Agreement between US Department of Justice and Walmart Inc., at A-1 (June 20, 2019), https://www.justice.gov/opa/press-release/file/1175791/download.
[239] Order Instituting Cease-and-Desist Proceedings, In the Matter of Walmart Inc., Rel. No. 86159, File No. 3-19207 (June 20, 2019).
[240] *Tokar v. DOJ*, 304 F. Supp. 3d 81, 102 (D.D.C. 2018).
[241] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 56 (Jan. 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[242] Dylan Tokar, *DOJ Records Offer Window into Lucrative World of FCPA Monitorships*, GLOBAL INVESTIGATIONS REVIEW, July 2, 2018, https://globalinvestigationsreview.com/article/jac/1171163/doj-records-offer-window-into-lucrative-world-of-fcpa-monitorship.

Indeed, since 2004, monitorships have been awarded to forty white men, three white women, and three non-white men.[243]

Consistent with the ruling, the DOJ included language in its 2018 resolution with Panasonic Avionics Corporation that "[m]onitor selections shall be made in keeping with the Department's commitment to diversity and inclusion."[244] This language had been added to the Department's standard template agreements in 2017 but became public for the first time with the Panasonic resolution the following year.[245]

Since 2018, there have been five DOJ monitorships imposed, with one woman and two men of color named as monitors.[246] WilmerHale's Erin Sloane was appointed by US authorities to monitor Fresenius Medical Care.[247] She is only the fourth woman ever appointed as an FCPA monitor.[248] Kwame Manley was selected in October 2018 as the independent monitor for Panasonic Avionics,[249] and World Bank's Leonard McCarthy was chosen as monitor for MTS.[250] The diversity and inclusion provision appears in the resolutions of all three instances above.[251]

The diversity and inclusion language was not, however, included in the two most recent resolutions requiring monitors—Walmart and Ericsson. These resolutions instead included the requirement to appoint a monitor, the selection of which "should be made without unlawful discrimination against any person or class of persons."[252] This language echoes that in a Benczkowski Memo footnote requiring that "[a]ny submission or selection of a monitor candidate by either the Company or the Criminal Division should be made without unlawful discrimination against any person or class of persons."[253]

4. Blockbuster Resolution: Ericsson

The largest resolution of the year—and the largest FCPA payment to US authorities ever—illustrates a number of the enforcement trends addressed in this section. In December, the Swedish telecommunications giant Ericsson agreed to pay $1.06 billion to resolve FCPA charges brought by the DOJ and SEC.[254] The DOJ charged Ericsson in a two-count Information, alleging a conspiracy to violate the anti-bribery and accounting provisions of the FCPA.[255] Ericsson resolved the charges through a DPA and agreed to pay a $520.6 million criminal penalty.[256] An Ericsson subsidiary, Ericsson Egypt, pleaded guilty to conspiring to violate the anti-bribery provision.[257] Notably, as

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[243] Clara Hudson, *Lawyers Laud Criminal Division's Diversity Provision for Monitors*, GLOBAL INVESTIGATIONS REVIEW, May 3, 2018, https://globalinvestigationsreview.com/article/jac/1168991/lawyers-laud-criminal-divisions-diversity-provision-for-monitors.
[244] Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118, ¶ 12 (D.D.C. Apr. 30, 2018).
[245] Clara Hudson, *Lawyers Laud Criminal Division's Diversity Provision for Monitors*, GLOBAL INVESTIGATIONS REVIEW, May 3, 2018, https://globalinvestigationsreview.com/article/jac/1168991/lawyers-laud-criminal-divisions-diversity-provision-for-monitors
[246] Adam Dobrik, *Fresenius Monitor Selection Adds to Evidence of Changing Attitudes*, GLOBAL INVESTIGATIONS REVIEW, Oct. 31, 2019, https://globalinvestigationsreview.com/article/jac/1210335/fresenius-monitor-selection-adds-to-evidence-of-changing-attitudes.
[247] Adam Dobrik, *Fresenius Monitor Selection Adds to Evidence of Changing Attitudes*, GLOBAL INVESTIGATIONS REVIEW, Oct. 31, 2019, https://globalinvestigationsreview.com/article/jac/1210335/fresenius-monitor-selection-adds-to-evidence-of-changing-attitudes.
[248] Adam Dobrik, *Fresenius Monitor Selection Adds to Evidence of Changing Attitudes*, GLOBAL INVESTIGATIONS REVIEW, Oct. 31, 2019, https://globalinvestigationsreview.com/article/jac/1210335/fresenius-monitor-selection-adds-to-evidence-of-changing-attitudes.
[249] Kelly Swanson, *DOJ Appoints Compliance Monitor to Oversee Panasonic DPA*, GLOBAL INVESTIGATIONS REVIEW, Oct. 3, 2018, https://globalinvestigationsreview.com/article/jac/1175251/doj-appoints-compliance-monitor-to-oversee-panasonic-dpa.
[250] Adam Dobrik, *World Bank Veteran Picked for MTS Monitorship*, GLOBAL INVESTIGATIONS REVIEW, Aug. 20, 2019, https://globalinvestigationsreview.com/article/jac/1196531/world-bank-veteran-picked-for-mts-monitorship.
[251] *See, e.g.*, Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18-CR-00118, ¶ 12 (D.D.C. Apr. 30, 2018); Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, ¶ 11 (S.D.N.Y. Feb. 22, 2019); Non-Prosecution Agreement between US Department of Justice and Fresenius Medical Care AG & Co. KGaA, at 5 (Feb. 25, 2019), https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve.
[252] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶ 1 (S.D.N.Y. Nov. 26, 2019).
[253] Brian A. Benczkowski, Assistant Attorney General, DOJ, Memorandum on Selection of Monitors in Criminal Division Matters, at 4 n.8 (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.
[254] US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019).
[255] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶ 1 (S.D.N.Y. Nov. 26, 2019).
[256] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶ 4j (S.D.N.Y. Nov. 26, 2019).
[257] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶ 4j (S.D.N.Y. Nov. 26, 2019).

part of the Ericsson resolution, the DOJ did not allege that the issuer, Ericsson, was itself involved in any of the alleged misconduct. Instead, the DOJ alleged that employees of the foreign subsidiary that engaged in bribery were agents of the parent company that was subject to US jurisdiction. The DOJ's papers did not, however, allege that any foreign subsidiary was an agent of the issuer. The SEC, in its Complaint, also charged violations of the anti-bribery and accounting provisions, and Ericsson agreed to pay approximately $540 million in disgorgement and prejudgment interest to resolve the charges.[258]

The resolution relates to conduct spanning over 15 years and across six countries—Djibouti, China, Vietnam, Indonesia, Kuwait, and Saudi Arabia.[259] The papers allege a widespread scheme to pay and improperly book millions of dollars in payments to third-party agents and consultants for the purpose of winning lucrative telecommunications contracts.[260] Despite the breadth of the conduct and the size of the criminal penalty, the DOJ only included the Djibouti conduct in its recitation of the anti-bribery violation; the other countries were all folded into the accounting provision charges.[261]

While there were likely multiple factors at play, the papers suggest that, for the conduct in those other five countries, the DOJ either could not prove that the agent payments made their way to government officials or could not tie the payments directly to business won by Ericsson. The China portion of the Information illustrates both those factors. The DOJ describes two categories of alleged misconduct: (1) $30 million in payments to third-party agents through the use of sham invoices; and (2) approximately $20 million in payments to agents to cover gift, travel, and entertainment expenses for officials at state-owned entities (SOE).[262] For the first category of misconduct, the DOJ presented no evidence that the payments were funneled through the agents to government officials. And for the second category, the DOJ does not tie the travel and entertainment expenditures for SOE officials to business won by Ericsson.

Despite the inclusion of only a single country in the bribery charge, the DOJ described "significant books and records and internal controls violations." [263] Under the terms of the DPA, Ericsson is required to engage a monitor for a term of three years and the scope of the monitorship continues to align with Department guidance. [264] Much like it did for Fresenius, DOJ acknowledges the company's improved compliance program, but noted that a monitor is necessary because Ericsson's enhanced compliance program is untested.[265]

The scope of the monitor's oversight is as broad as in the MTS resolutions. Although the DPA noted that that the monitor is "not expected to conduct a comprehensive review of all business lines, all business activities, or all markets[,] the monitor is directed to pursue a risk-based approach that takes into account risks in five broad categories: (1) all of the countries and industries in which the business operates; (2) current and future business opportunities and transactions; (3) current and future business partners, including whether legitimate business purposes exist for new joint ventures and third parties; (4) gifts, travel, and entertainment interactions with foreign officials; and (5) licensing, permitting, and immigration and customs issues related to foreign governments.[266] The first point is significant because the DOJ and SEC did not explicitly limit the monitorship to the six countries where they alleged misconduct and presumably concluded that controls weaknesses were present more generally throughout the company. The breadth of this monitorship may reflect the government's view that Ericsson's updated

[258] Complaint, *SEC v. Telefonaktiebolaget LM Ericsson*, No. 19-CV-11214, (Dec. 6, 2019); US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019).
[259] Unlike the SEC, DOJ does not reference Saudi Arabia conduct in its charging papers. Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884 (S.D.N.Y. (Nov. 26, 2019).
[260] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884 (S.D.N.Y. Nov. 26, 2019); Complaint, *SEC v. Telefonaktiebolaget LM Ericsson*, 19-CV-11214, (Dec. 6, 2019).
[261] Information, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶¶ 121-125 (S.D.N.Y. Nov. 26, 2019). Notably, the SEC also includes (in addition to Djibouti) the conduct in China and Saudi Arabia—a country that does not feature in the DOJ papers—in its anti-bribery provision violation. Complaint, *SEC v. Telefonaktiebolaget LM Ericsson*, No. 19-CV-11214, ¶ 7 (Dec. 6, 2019). This may be a reflection of the loosened standard for civil enforcement actions compared to criminal charges.
[262] Information, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶¶ 65-81 (S.D.N.Y. Nov. 26, 2019).
[263] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶ 4f (S.D.N.Y. Nov. 26, 2019).
[264] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR(-00884, ¶¶ 11-14, Attachment D-1 ¶¶ 1-2 (S.D.N.Y. Nov. 26, 2019); Complaint, *SEC v. Telefonaktiebolaget LM Ericsson*, No. 19-CV-11214, (Dec. 6, 2019).
[265] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶ 4e (S.D.N.Y. Nov. 26, 2019).
[266] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶ 4e, Attachment D-4 ¶ 8 (S.D.N.Y. Nov. 26, 2019).

compliance program is yet untested and that Ericsson had not sufficiently remediated the controls issues by the time of the resolution.

The Ericsson resolution also highlights the importance of prompt disclosure and full remediation. Unlike many of the resolutions described in this section, Ericsson received only partial cooperation and remediation credit, which amounted to a 15% discount off its criminal penalty.[267] The DOJ explained that Ericsson did not receive full credit "because it did not disclose allegations of corruption with respect to two relevant matters; it produced certain relevant materials in an untimely manner; and it did not fully remediate, including [like MTS] by failing to take adequate disciplinary measures with respect to certain executives and other employees involved in the misconduct."[268] Thus, while Ericsson is certainly notable for the sheer size and scope of the relief, the issues that seem to have animated the government's case are generally consistent with the other cases brought over the course of the past year.

Finally, the Ericsson resolution also implicates global coordination of enforcement activity. Following the DOJ and SEC resolutions, Swedish authorities publicly confirmed that they had opened their own investigation into Ericsson in April 2019 based on conduct that was uncovered during the US investigations, and that their investigation is ongoing.[269] The DOJ recognized assistance from the Swedish authorities in connection with the US resolution.

B. Notable Features of Individual Resolutions

1. A Continued Focus on Prosecution of Individuals

Leading DOJ officials have continued to emphasize that individual prosecutions remain a priority. Then-Deputy Attorney General Rod J. Rosenstein highlighted the DOJ's continued FCPA enforcement efforts against individuals in a keynote address delivered on March 7, 2019.[270] DAG Rosenstein said that in its continuing efforts to identify individual wrongdoers, the DOJ would focus on identifying individuals "who play significant roles in setting a company on a course of criminal conduct" in an effort to identify those individuals "who devised and authorized criminal schemes."[271]

In explaining the reasons for the DOJ's focus on prosecutions of individuals, DAG Rosenstein noted that while corporate enforcement allows the DOJ "to recover fraudulent proceeds, reimburse victims, and deter future wrongdoing," corporate prosecutions deter individual wrongdoing less effectively than do individual prosecutions given "a minimal risk of punishing" individual actors.[272]

Notwithstanding DAG Rosenstein's comments, it remains the case that many of DOJ corporate prosecutions do not result in related individual prosecutions. For example, for eight of the twelve DOJ corporate prosecutions brought in 2015 and 2016 following the announcement of the Yates Memorandum, the DOJ has still not charged any connected individuals. While individual prosecutions often lag behind corporate enforcement actions, making comparisons in a particular year difficult or misleading, given the time that has passed since the corporate prosecutions brought in 2015 and 2016, it seems unlikely that additional individuals will be charged in connection with these matters.

In an unusual development, the DOJ took four FCPA cases to trial in 2019, against five individual defendants, obtaining four convictions.

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[267] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶¶ 4e, 4j (S.D.N.Y. Nov. 26, 2019).
[268] Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, ¶ 4c (S.D.N.Y. Nov. 26, 2019).
[269] Will Barbieri and Sam Fry, *Sweden Investigates Ericsson Over Bribery*, GLOBAL INVESTIGATIONS REVIEW, Dec. 13, 2019, https://globalinvestigationsreview.com/article/1212130/sweden-investigates-ericsson-over-bribery.
[270] Rod J. Rosenstein, Deputy Attorney General, DOJ, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.
[271] Rod J. Rosenstein, Deputy Attorney General, DOJ, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.
[272] Rod J. Rosenstein, Deputy Attorney General, DOJ, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.

2. Individual Cases in Long-Running Investigations

As in 2018, individuals continue to be charged years after investigations are opened into corporations, and in some instances even years after those corporate inquiries are resolved, when the individuals and corporations are involved in the same core misconduct. Notably, in the cases of long-running, cross-jurisdictional investigations into PDVSA and 1Malaysia Development Berhad, (1MDB), a Malaysian state-owned and controlled investment fund, resolutions with individuals have occurred while investigations against their related entities are still reportedly ongoing, demonstrating US authorities' commitment to prosecuting the individuals most culpable for broader corporate misconduct.

a. PDVSA and PetroEcuador

PDVSA and PetroEcuador, large, state-owned oil companies in South America (Venezuela and Ecuador, respectively) have been subject to sprawling investigations in recent years into kickbacks paid to government officials in exchange for favorable contracts.[273] These investigations are being conducted by the DOJ and enforcement authorities in Venezuela and Ecuador.[274] Despite the fact that the investigations are several years old, both resulted in a number of new indictments and guilty pleas by individuals in 2019.

In 2019, the PDVSA investigation resulted in three new guilty pleas and FCPA-related money laundering charges against two individuals. In May 2019, Jose Manuel Gonzalez Testino, a dual US-Venezuelan citizen who controlled a number of companies that provided goods and services to PDVSA and its American subsidiary Citgo, pleaded guilty to two FCPA-related charges.[275] Soon thereafter, Rafael Enrique Pinto Franceschi and Franz Muller Huber, both Venezuelan nationals[276] who worked for the same Miami-based supplier to PDVSA, pleaded guilty to violating the anti-bribery provisions of the FCPA.[277] Finally, in September, a federal court in Houston unsealed a superseding indictment charging Swiss citizen Daisy Teresa Rafoi Bleuler and dual Swiss-Portuguese national Paulo Jorge Da Costa Casqueiro Murta with laundering money destined for PDVSA employees.[278] All told, 18 of the 21 individuals who have been charged so far for conduct relating to the PDVSA scandal have pleaded guilty.[279]

The PetroEcuador investigation has led to a similarly large number of individual guilty pleas. Over the life of the case, 10 individuals have pleaded guilty to crimes related to bribery and money laundering schemes involving PetroEcuador.[280] The most recent is Frank Roberto Chatburn Ripalda (Chatburn), a financial advisor of dual US and Ecuadorian citizenship who, in December 2018, was charged with conspiring to violate the FCPA and conspiring to launder money, as well as substantive money laundering and FCPA violations.[281] The government alleged that Chatburn and his co-conspirators schemed to bribe officials at PetroEcuador to obtain and retain lucrative contracts for his client, an Ecuadorian oil and gas services provider.[282] Chatburn agreed to use shell companies and bank accounts in the United States and abroad to funnel bribe payments to then-PetroEcuador officials.[283]

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[273] WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019* (Jan. 17. 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.

[274] WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019* (Jan. 17. 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.

[275] US Department of Justice Press Release No. 19-593: Business Executive Pleads Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme (May 29, 2019).

[276] *US v. Rafael E. Pinto Franceschi and Franz H. Muller Huber*, No. 4:19-CR-00135 (S.D. Tex. Feb. 21, 2019).

[277] Clara Hudson, *US Sales President Pleads Guilty Over PDVSA Bribery*, GLOBAL INVESTIGATIONS REVIEW, Aug. 22, 2019.

[278] *US v. Nervis G. Villalobos-Cardenas, Alejandro Isturiz-Chiesa, Rafael E. Reiter-Munoz, Javier Alvarado-Ochoa, Daisy T. Rafoi-Bleuler, and Paulo J.D.C. Casqueiro-Murta*, No. 4:17-cr-00514 (S.D. Tex. Apr. 24, 2019).

[279] Clara Hudson, *US Sales President Pleads Guilty Over PDVSA Bribery*, GLOBAL INVESTIGATIONS REVIEW, Aug. 22, 2019.

[280] US Department of Justice Press Release No. 19-1096: Miami-Based Financial Advisor Pleads Guilty for Conspiring to Launder Money Relating to FCPA and Ecuadorian Bribery Law Violations (Oct. 11, 2019).

[281] Superseding Indictment, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC (S.D. Fla. Dec. 14, 2018).

[282] Factual Proffer in Support of Guilty Plea, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC, at 1-2 (S.D. Fla. Oct. 11, 2019).; Superseding Indictment, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC (S.D. Fla. Dec. 14, 2018); US Department of Justice Press Release No. 19-1096: Miami-Based Financial Advisor Pleads Guilty for Conspiring to Launder Money Relating to FCPA and Ecuadorian Bribery Law Violations (Oct. 11, 2019).

[283] Factual Proffer in Support of Guilty Plea, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC, at 2 (S.D. Fla. Oct. 11, 2019).

Chatburn also admitted to conspiring with Ecuadorian government officials to hide bribe payments to Odebrecht SA, a Brazilian construction company.[284] To hide these payments, Chatburn conducted transactions through shell companies and bank accounts in the United States, Antigua, and the Cayman Islands, among other jurisdictions.[285]

On the eve of trial in October, Chatburn pleaded guilty to conspiring to pay nearly $3 million in bribes to Ecuadorian government officials.[286] Chatburn also pleaded guilty to one count of conspiracy to commit money laundering.[287] On December 18, Judge Marcia Cooke sentenced Chatburn to 42 months in prison followed by three years supervised release.[288] She also ordered that Chatburn pay a $40,000 fine.[289] On February 5, 2020, the court will hear a motion for restitution.[290]

The individual cases that grew out of the PDVSA and PetroEcuador investigations demonstrate the DOJ's willingness to aggressively pursue financial professionals who facilitate crimes, as well as the principal actors in the bribery schemes. This new focus comports with then-DAG Rosenstein's stated focus on deterring individual wrongdoing through "identifying the people who commit crimes and sending them to prison."[291]

b. Odebrecht and Braskem

In 2016, Odebrecht S.A., a Brazilian conglomerate, and its subsidiary Braskem S.A. pleaded guilty to FCPA-related charges and settled with global authorities, resolving charges for a decades-long bribery and bid-rigging scheme.[292]

In a February 2019 indictment, unsealed in November, DOJ charged Jose Carlos Grubisich, the former CEO of Brazilian petrochemical company Braskem and member of the Braskem Board of Directors, with two FCPA-related charges and one count of conspiracy to commit money laundering for his role in organizing hundreds of millions of dollars' worth of bribes on behalf of Braskem's part owner, Odebrecht.[293] The alleged scheme occurred between 2002 and 2014, during which approximately $250 million of Braskem's funds were diverted to pay bribes to Brazilian officials to obtain and retain business.[294] Grubisich allegedly participated in creating the slush funds used to pay the bribes, negotiated and approved the bribes, falsified Braskem's books and records, and submitted false certifications to the SEC.[295] The case is ongoing.

c. Leadership at Unaoil Plead Guilty

In October, the Department of Justice announced that Cyrus Ahsani, CEO of Unaoil, a Monaco-based intermediary in the oil and gas industry, and Saman Ahsani, former COO of Unaoil, pleaded guilty in March to one count of conspiracy to violate the FCPA, with a five-year maximum sentence, for their roles in facilitating millions of dollars in bribes on behalf of their clients, including US issuers, to obtain oil and gas contracts in several foreign countries.[296] Steven Hunter, Unaoil's former business development director, pleaded guilty to one count of conspiracy

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[284] Factual Proffer in Support of Guilty Plea, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC, at 3-4 (S.D. Fla. Oct. 11, 2019).
[285] Factual Proffer in Support of Guilty Plea, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC, at 4 (S.D. Fla. Oct. 11, 2019).
[286] US Department of Justice Press Release No. 19-1096: Miami-Based Financial Advisor Pleads Guilty for Conspiring to Launder Money Relating to FCPA and Ecuadorian Bribery Law Violations (Oct. 11, 2019).
[287] US Department of Justice Press Release No. 19-1096: Miami-Based Financial Advisor Pleads Guilty for Conspiring to Launder Money Relating to FCPA and Ecuadorian Bribery Law Violations (Oct. 11, 2019).
[288] Judgment, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC, at 2 (S.D. Fla. Dec. 19, 2019).
[289] Judgment, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC, at 5 (S.D. Fla. Dec. 19, 2019).
[290] Judgment, *United States v. Frank Roberto Chatburn Ripalda*, No. 1:18-cr-20312-MGC, at 5 (S.D. Fla. Dec. 19, 2019).
[291] Rod Rosenstein, Deputy Attorney General, DOJ, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.
[292] Plea Agreement, *United States v. Odebrecht S.A.*, No. 16-CR-643-RJD (E.D.N.Y. Dec. 21, 2016); Plea Agreement, *United States v. Braskem S.A.*, No. 16-CR-644-RJD (E.D.N.Y. Dec. 21, 2016).
[293] Indictment, *United States v. Jose Carlos Grubisich*, No. 19-CR-102-RJD (E.D.N.Y. Feb. 27, 2019); US Attorney's Office for the Eastern District of New York Press Release: Former CEO of Braskem Indicted for His Role in Bribery Scheme (Nov. 20, 2019).
[294] Indictment, *United States v. Jose Carlos Grubisich*, No. 19-CR-102-RJD, at 5 (E.D.N.Y. Feb. 27, 2019).
[295] US Attorney's Office for the Eastern District of New York Press Release: Former CEO of Braskem Indicted for His Role in Bribery Scheme (Nov. 20, 2019).
[296] US Department of Justice Press Release No. 19-1172: Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials (Oct. 30, 2019).

to violate the FCPA in August 2018.[297] According to the charging papers, between 1999 and 2016, Unaoil made millions of dollars in bribe payments to officials in Algeria, Angola, Azerbaijan, the Democratic Republic of Congo, Iran, Iraq, Kazakhstan, Libya, and Syria to obtain contracts on behalf of its clients.[298] The Ahsani brothers laundered the proceeds of the bribery scheme and obstructed US and foreign investigations by destroying evidence.[299]

The information against the Ahsanis identifies Rolls-Royce plc, SBM Offshore N.V., and twenty-five other unnamed companies that dealt with Unaoil.[300] Given their plea agreements, and the lag between agreeing those pleas and their public announcements, it is likely that Hunter and the Ahsanis are cooperating with the government, suggesting that we may see other charges against companies and individuals involved in the schemes in the future.

d. 1MDB

On December 16, 2019, the SEC reached a civil settlement with Tim Leissner in connection with the investigations into 1MDB.[301] According to the SEC Order, Leissner authorized kickbacks to government officials in Malaysia and the Emirate of Abu Dhabi in order to secure business for his former employer. [302] The civil settlement follows Leissner's 2018 guilty plea for conspiring to violate the FCPA and conspiracy to commit money laundering, consequent to which he forfeited $43.7 million.[303] In recognition of his guilty plea as well as a parallel civil settlement with the Board of Governors of the Federal Reserve System, the SEC did not impose a civil money penalty. Leissner is, however, barred from associating with the US securities industry.[304]

3. Foreign Officials Continue to Face non-FCPA Charges in FCPA Enforcement Actions

The DOJ brought actions against seven former foreign officials in 2019, compared with six in 2018. None of the 2019 defendants were charged with FCPA offenses because, unlike other bribery statutes, the FCPA does not prohibit the acceptance of bribes. Thus, foreign officials who allegedly accepted bribes are often charged under other statutes, such as money laundering or wire fraud.

a. Venezuela

Two Venezuelan officials at Corpoelec, a Venezuelan state-controlled electricity company, were indicted in June for laundering the proceeds of bribes they received in exchange for awarding Corpoelec contracts. Luis Alfredo Motta Dominguez (Motta), the former Venezuelan Minister of Electrical Energy and head of Corpoelec, and Eustiquio Jose Lugo Gomez (Lugo), the procurement director of Corpoelec, were charged in an eight-count indictment in Florida for conspiracy to commit money laundering and money laundering.[305] Between July 2016 and December 2018, Motta and Lugo allegedly awarded more than $60 million in contracts with Corpoelec to three Florida-based companies from which Motta and Lugo each received kickbacks totaling approximately $700,000.[306] On June 27, the Department of the Treasury's Office of Foreign Assets Control sanctioned Motta and Lugo, adding them to OFAC's Specially Designated Nationals list.[307] The two businessmen who bribed Motta and Lugo, Luis Alberto Chacin

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[297] US Department of Justice Press Release No. 19-1172: Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials (Oct. 30, 2019).
[298] US Department of Justice Press Release No. 19-1172: Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials (Oct. 30, 2019).
[299] US Department of Justice Press Release No. 19-1172: Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials (Oct. 30, 2019).
[300] Information, *United States v. Cyrus Allen Ahsani and Saman Ahsani*, No. 4:19-CR-147 (S.D. Tex. Mar 4, 2019).
[301] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Tim Leissner*, Rel. No. 87750, File No. 3-19619 (Dec. 16, 2019), https://www.sec.gov/litigation/admin/2019/34-87750.pdf.
[302] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Tim Leissner*, Rel. No. 87750, File No. 3-19619 (Dec. 16, 2019), https://www.sec.gov/litigation/admin/2019/34-87750.pdf.
[303]
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[305] US Department of Justice Press Release No. 19-723: Two Former Venezuelan Officials Charged and Two Businessmen Plead Guilty in Connection with Venezuela Bribery Scheme (June 27, 2019).
[306] US Department of Justice Press Release No. 19-723: Two Former Venezuelan Officials Charged and Two Businessmen Plead Guilty in Connection with Venezuela Bribery Scheme (June 27, 2019); Indictment, *United States v. Luis Alfredo Motta Dominguez and Eustoquio Jose Lugo Gomez*, No. 19-20388-CR-MARTINEZ/OTAZO-REYES, at 8-9 (S.D. Fla. June 28, 2019).
[307] Notice of OFAC Sanctions Actions, 84 Fed. Reg. 32,011, 32,012 (June 27, 2019).

Haddad and Jesus Ramon Veroes, pleaded guilty to conspiracy to violate the FCPA on June 24 and were both sentenced to 51 months in federal prison.[308]

b. Federated States of Micronesia

In February, charges were unsealed against Master Halbert, an official in the Federated States of Micronesia's Department of Transportation, Communications, and Infrastructure alleging conspiracy to commit money laundering.[309] The DOJ alleged that Halbert accepted bribes between 2006 and 2016 from a Hawaiian engineering and consulting company owned by Frank James Lyon to obtain and retain $8 million in contracts with the FSM government.[310] Halbert pleaded guilty in the District of Hawaii in April[311] and was sentenced to 18 months in prison followed by three years of supervised release.[312] On January 22, 2019, Lyon pleaded guilty to conspiracy to violate the FCPA and bribing an agent of an organization receiving federal funds.[313] Lyon was sentenced on May 13 to 30 months in federal prison followed by three years of supervised release.[314]

c. Mozambique

In March, an indictment was unsealed against three former Mozambican officials and five other individuals for their roles in an alleged $2 billion fraud and money laundering scheme.[315] The officials were: Manuel Chang, Mozambique's former Minister of Finance; Antonio do Rosario, a former official in Mozambique's governmental state intelligence and security service and head of three Mozambican-owned entities; and Teofilo Nhangumele, a former official acting on behalf of the Office of the President of Mozambique. The indictment included both FCPA and non-FCPA charges against five other foreign nationals for their roles in arranging the financing for the scheme: Jean Boustani (whose trial is discussed further below in Section III.B.5.), Najib Allam, Andrew Pearse, Surjan Singh, and Detelina Subeva. According to the indictment, between 2013 and 2016, companies owned by the Mozambican government, which were run by Rosario, borrowed in excess of $2 billion through loans guaranteed by the Mozambican government for three maritime projects.[316] The loans were arranged by investment banks and sold to investors throughout the world.[317] However, at least $200 million of the loans allegedly were used for bribes and kickbacks instead of the maritime projects for which they were sold to investors.[318]

Chang and Rosario were indicted on charges of conspiracy to commit wire fraud, securities fraud, and money laundering.[319] Nhangumele was charged with conspiracy to commit wire fraud and money laundering. At the request of the US government, Chang was arrested by South African authorities and the US government is seeking his extradition. Rosario and Nhangumele are not in custody.

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[308] US Department of Justice Press Release No. 19-723: Two Former Venezuelan Officials Charged and Two Businessmen Plead Guilty in Connection with Venezuela Bribery Scheme (June 27, 2019); Judgment, *United States v. Haddad*, Case No. 19-CR-20351-CMA (S.D. Fla. Sept. 26, 2019); Judgment, *United States v. Veroes*, No. 19-CR-20351-CMA-2 (S.D. Fla. Oct. 29, 2019).
[309] US Department of Justice Press Release No. 19-107: Micronesian Government Official Arrested in Money Laundering Scheme Involving Foreign Bribery (Feb. 12, 2019).
[310] US Department of Justice Press Release No. 19-107: Micronesian Government Official Arrested in Money Laundering Scheme Involving Foreign Bribery (Feb. 12, 2019).
[311] US Department of Justice Press Release No. 19-309: Micronesian Government Official Pleads Guilty to Money Laundering Scheme Involving FCPA Violations (Apr. 3, 2019).
[312] US Department of Justice Press Release No. 19-821: Micronesian Government Official Sentenced to Prison for Role in Money Laundering Scheme Involving FCPA Violations (July 30, 2019).
[313] Plea Agreement, *United States v. Frank James Lyon*, No. 19-CR-00008-SOM, at 2 (D. Haw. Jan. 22, 2019).
[314] Judgment, *United States v. Frank James Lyon*, No. 19-CR-00008-SOM (D. Haw. May 14, 2019).
[315] US Department of Justice Press Release No. 19-201: Mozambique's Former Finance Minister Indicted Alongside Other Former Mozambican Officials, Business Executives, and Investment Bankers in Alleged $2 Billion Fraud and Money Laundering Scheme that Victimized US Investors (Mar. 7, 2019).
[316] Indictment, *United States v. Jean Boustani, Najib Allam, Manuel Chang, Antonio Do Rosario, Teofilo Nhangumele, Andrew Pearse, Surjan Singh, and Detelina Subeva*, No. 18-CR-00681-WFK, at 6 (E.D.N.Y. Dec. 19, 2018).
[317] Indictment, *United States v. Jean Boustani, Najib Allam, Manuel Chang, Antonio Do Rosario, Teofilo Nhangumele, Andrew Pearse, Surjan Singh, and Detelina Subeva*, No. 18-CR-00681-WFK, at 6 (E.D.N.Y. Dec. 19, 2018).
[318] Indictment, *United States v. Jean Boustani, Najib Allam, Manuel Chang, Antonio Do Rosario, Teofilo Nhangumele, Andrew Pearse, Surjan Singh, and Detelina Subeva*, No. 18-CR-00681-WFK, at 7 (E.D.N.Y. Dec. 19, 2018).
[319] US Department of Justice Press Release No. 19-201: Mozambique's Former Finance Minister Indicted Alongside Other Former Mozambican Officials, Business Executives, and Investment Bankers in Alleged $2 Billion Fraud and Money Laundering Scheme that Victimized US Investors (Mar. 7, 2019).

d. Barbados

In August, the Department of Justice unsealed a second superseding indictment against Donville Inniss, Ingrid Innes, and Alex Tasker for conspiracy to commit money laundering and money laundering.[320] Donville Inniss was a member of the Parliament of Barbados and the Minister of Industry, International Business, Commerce, and Small Business Development of Barbados.[321] Ingrid Innes, a Canadian citizen, was CEO of Insurance Corporation of Barbados Ltd. (ICBL). Alex Tasker, a Barbadian citizen, was a Senior Vice President of ICBL. According to the indictment, between August 2015 and April 2016, Innis allegedly accepted $36,000 in bribes from ICBL and laundered the money through the United States.[322] After receiving the bribes, Inniss allegedly caused the Barbados Investment and Development Corporation to renew an insurance contract with ICBL, which had a $330,734.65 premium. The indictment followed a declination letter under the FCPA Corporate Enforcement Policy issued to ICBL, in which ICBL agreed to $93,940.19 in disgorgement.[323]

4. DOJ Pursues Adoption Agency Case

Entities operating internationally, even if attempting to pursue social good, can still be caught up in FCPA cases. Robin Longoria, an adoption agency employee, pleaded guilty to conspiracy to violate the FCPA and to commit wire and visa fraud in connection with bribing Ugandan officials to facilitate adoptions by American clients.[324] Longoria admitted that she and her co-conspirators agreed to and did cause payments, disguised as fees, to be made to a Ugandan agent, knowing that the payments would be used to bribe court registrars to assign cases to "adoption-friendly" judges and to bribe Ugandan High Court judges to grant rights over Ugandan children to the US clients of the adoption agency.[325]

The DOJ charged employees of another adoption agency in 2014 with accreditation fraud and conspiracy to defraud the United States related to adoptions of children in Ethiopia and Kazakhstan.[326] In that case, three employees were sentenced in 2017: one to 18 months' imprisonment; another to 12 months' imprisonment; and a third to probation.

5. The latter half of 2019 saw an unusually large number of trials

In the second half of 2019, five individuals went to trial on FCPA or FCPA-related charges. The government secured four convictions, matching an annual record for the FCPA Unit.[327]

a. Roger Richard Boncy and Joseph Baptiste

On June 20, 2009, Roger Richard Boncy, chairman and CEO of an investment firm and Joseph Baptiste, a member of the firm's board of directors, were found guilty of one count of conspiracy to violate the FCPA and the Travel Act.[328] Baptiste was also convicted of one count of violating the Travel Act and one count of conspiracy to

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[320] Second Superseding Indictment, *United States v. Donville Inniss, Ingrid Innes, and Alex Tasker*, No. 18-CR-00134-KAM, at 5-7 (E.D.N.Y. Aug. 1, 2019).
[321] Second Superseding Indictment, *United States v. Donville Inniss, Ingrid Innes, and Alex Tasker*, No. 18-CR-00134-KAM, at 1 (E.D.N.Y. Aug. 1, 2019).
[322] Second Superseding Indictment, *United States v. Donville Inniss, Ingrid Innes, and Alex Tasker*, No. 18-CR-00134-KAM, at 2-3 (E.D.N.Y. Aug. 1, 2019).
[323] US Department of Justice Press Release No. 19-31: Former Chief Executive Officer and Senior Vice President of Barbadian Insurance Company Charged with Laundering Bribes to Former Minister of Industry of Barbados (Jan. 28, 2019).
[324] US Department of Justice Press Release No. 19-921: Texas Woman Pleads Guilty to Conspiracy to Facilitate Adoptions from Uganda through Bribery and Fraud (Aug. 29, 2019). *See also* Information, *United States v. Robin Longoria*, No. 1:19-CR-00482-CAB, at 5 (N.D. Ohio Aug. 12, 2019).
[325] US Department of Justice Press Release No. 19-921: Texas Woman Pleads Guilty to Conspiracy to Facilitate Adoptions from Uganda through Bribery and Fraud (Aug. 29, 2019).
[326] WilmerHale, *Updates and New Developments in Foreign Corrupt Practices Act Enforcement* (Sept. 12, 2019), https://www.wilmerhale.com/-/media/ef0f44d5c31e411eb7d21ac35ea44596.pdf.
[327] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference.
[328] Verdict Form, *United States v. Joseph Baptiste and Roger Richard Boncy*, No. 17-CR-10305-ADB, at 2-3 (D. Mass. June 20, 2019).

commit money laundering.[329] The jury found Boncy not guilty of either violating the Travel Act or conspiring to launder money.[330]

At trial, the DOJ presented evidence that Boncy and Baptiste solicited bribes from individuals whom they believed might become investors in a proposed port development project.[331] Boncy and Baptiste told the investors—who were actually undercover FBI agents—that they would pass along bribe payments to Haitian government officials in order to secure project approval and would do so by making the bribe payments through a non-profit entity controlled by Baptiste.[332] The government played recorded phone calls where Boncy and Baptiste discussed bribing an aide to a high-level elected official in Haiti.[333] In exchange, the aide would help obtain the elected official's authorization for the project.[334] Boncy and Baptiste also described separate plans to conceal bribes to officials at all levels of the Haitian government.[335] This separate plan entailed hiding bribe payments as money falsely earmarked for social programs.[336] The sentencings, originally scheduled for December 16, 2019, were rescheduled for some time in 2020.[337]

b. Lawrence Hoskins

While French power and transportation company Alstom SA (Alstom) pleaded guilty to violating the FCPA in 2014,[338] the case against former Alstom vice president Lawrence Hoskins was only resolved (at the trial level) in November 2019.[339] Hoskins was originally charged with both conspiracy to violate the FCPA and substantive FCPA violations in 2013.[340] Hoskins moved to dismiss the case, arguing that as a foreign national with no ties to the United States his conduct fell outside the bounds of the FCPA.[341] The District of Connecticut agreed and the government appealed. The Second Circuit found that while Congress did not intend to expose foreign nationals with no US ties, who could not otherwise be charged with a substantive violation, to conspiracy liability,[342] they could be charged with both substantive and accessory violations if the government can prove that they are "an agent of a domestic concern" that itself has engaged in violative conduct that was sufficiently connected to the United States.[343]

On remand to the District of Connecticut the DOJ secured a conviction following trial in late 2019. The jury convicted Hoskins, a former senior executive at Alstom for participating in a scheme to bribe Indonesian officials.[344] The DOJ alleged that Hoskins participated in a multi-year, multimillion-dollar foreign bribery and money laundering scheme as a senior vice president at Alstom.[345] At trial, DOJ argued that Hoskins, acting as an agent of one of Alstom's US subsidiaries, conspired with Alstom employees and other agents and conspired with foreign nationals

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[329] Verdict Form, *United States v. Joseph Baptiste and Roger Richard Boncy*, No. 17-CR-10305-ADB, at 4-5 (D. Mass. June 20, 2019).
[330] Verdict Form, *United States v. Joseph Baptiste and Roger Richard Boncy*, No. 17-CR-10305-ADB, at 4-5 (D. Mass. June 20, 2019).
[331] US Department of Justice Press Release No. 19-697: Two Businessmen Convicted of International Bribery Offenses (June 20, 2019).
[332] US Department of Justice Press Release No. 19-697: Two Businessmen Convicted of International Bribery Offenses (June 20, 2019).
[333] US Department of Justice Press Release No. 19-697: Two Businessmen Convicted of International Bribery Offenses (June 20, 2019).
[334] US Department of Justice Press Release No. 19-697: Two Businessmen Convicted of International Bribery Offenses (June 20, 2019).
[335] US Department of Justice Press Release No. 19-697: Two Businessmen Convicted of International Bribery Offenses (June 20, 2019).
[336] US Department of Justice Press Release No. 19-697: Two Businessmen Convicted of International Bribery Offenses (June 20, 2019).
[337] Electronic Notice, *United States v. Joseph Baptiste and Roger Richard Boncy*, No. 17-CR-10305-ADB (D. Mass. Dec. 10, 2019).
[338] *United States v. Alstom S.A.*, No. 3:14-CR-00246-JBA (D. Conn. Dec. 22, 2014).
[339] *United States v. Lawrence Hoskins,* No. 3:12-CR-00238-JBA (D. Conn. Nov. 8, 2019).
[340] *United States v. Lawrence Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. July 30, 2013).
[341] *United States v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. 2015).
[342] WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019* (Jan. 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[343] *United States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018).
[344] Dylan Tokar, *Jury Finds Former Alstom Executive Guilty of Foreign Bribery*, WALL ST. J., Nov. 8, 2019. *See generally* Verdict Form, *United States v. Lawrence Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Nov. 8, 2019).
[345] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).

who conducted relevant acts while in the United States.[346] We discuss below in Section IV.A. the implications of DOJ validating the agency theory of FCPA liability for extraterritorial misconduct through Hoskins's conviction.

At trial, the DOJ presented evidence that Hoskins conspired to bribe Indonesian officials in exchange for assistance securing a $118 million contract for Alstom and a partner company to provide power-related services within the country.[347] Hoskins and his co-conspirators concealed the bribes by retaining two consultants to purportedly provide legitimate consulting services on Alstom's behalf in connection with the project.[348] Emails admitted at trial showed that Hoskins and his co-conspirators discussed using one consultant to direct bribe payments to a member of parliament who could exert influence over the project.[349] The consultant received hundreds of thousands of dollars in an American bank account and then transferred the bribe money to an Indonesian bank account for the official's benefit.[350] After determining that the first consultant failed to effectively make bribe payments to key officials, Hoskins and his co-conspirators retained a second consultant whom they paid to bribe Indonesian officials.[351] Alstom ultimately secured the project.[352]

After a two-week trial, jurors in the District of Connecticut deliberated for only one day before finding Hoskins guilty on November 8, 2019.[353] Hoskins was convicted of one count of conspiracy to violate the FCPA, six counts of violating the FCPA, three counts of money laundering, and one count of conspiracy to launder money.[354] He was acquitted of a single money laundering count.[355] This count related to an $80,000 transfer that a consultant allegedly made from an American bank account to an Indonesian bank count for the purpose of paying a bribe to an official in Indonesia.[356] Sentencing is scheduled for January 31, 2020.[357]

Hoskins's conviction at trial demonstrates that even in the wake of the earlier Second Circuit decision, foreign nationals continue to face potential FCPA exposure.

c. Mark Lambert

The DOJ's FCPA unit secured a third trial victory for 2019 on November 22 in the District of Maryland.[358] After a three-week trial, jurors found Mark Lambert, a former co-president of a Maryland-based transportation company, TLI, guilty of bribing a Russian official in exchange for contracts with TENEX, a subsidiary of Russia's State Atomic Energy Corporation, to deliver nuclear materials to customers in the United States and abroad.[359]

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[346] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[347] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[348] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[349] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[350] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[351] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[352] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[353] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[354] Verdict Form, *United States v. Lawrence Hoskins*, No. 3:12-CR-00238-JBA, at 1-3 (D. Conn. Nov. 8, 2019).
[355] Verdict Form, *United States v. Lawrence Hoskins*, No. 3:12-CR-00238-JBA, at 3 (D. Conn. Nov. 8, 2019).
[356] Third Superseding Indictment, *United States v. Lawrence Hoskins*, No. 3:12-CR-00238-JBA, at 32 (D. Conn. Apr. 15, 2015).
[357] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[358] Verdict Form, *United States v. Mark Lambert*, No. 8:18-CR-00012-TDC (D. Md. Nov. 22, 2019); Ines Kagubare, *DOJ Secures Another Trial Victory With Lambert Conviction*, GLOBAL INVESTIGATIONS REVIEW (Nov. 22, 2019), https://globalinvestigationsreview.com/article/jac/1211230/doj-secures-another-trial-victory-with-lambert-conviction.
[359] Richard L. Cassin, *Jury Convicts Mark Lambert on FCPA and related charges*, FCPA BLOG (Nov. 25, 2019, 8:22 AM).

The jury deliberated for one week before reaching a verdict.[360] Lambert was convicted of one count of conspiracy to violate the FCPA and to commit wire fraud, four counts of violating the FCPA, and two counts of wire fraud.[361] He was acquitted of one money laundering count and three other counts alleging FCPA violations.[362]

The DOJ presented evidence that Lambert and his co-conspirators concealed bribe payments to Vadim Mikerin by causing the preparation of false invoices.[363] The invoices described services that were never rendered from TENEX to TLI.[364] Lambert and others then caused TLI to wire payments to shell companies in Switzerland, Cyprus, and Latvia for services described on the false invoices.[365] The DOJ also presented evidence that Lambert caused TLI to overbill TENEX by adding the corrupt payments to its invoices.[366] At trial, the DOJ presented email correspondence between Lambert, his former co-president Daren Condrey, and Mikerin, wherein they referred to the bribes by code words.[367] A juror told reporters after the verdict that the email correspondence led them to convict Lambert.[368]

d. Jean Boustani

In December 2019, a jury in the Eastern District of New York acquitted Jean Boustani, a Lebanese shipbuilding executive at Privinvest Group, on charges related to an alleged scheme involving loans backed by the Mozambican government.[369] We discuss the broader case in Section III.B.3. above.

The DOJ had alleged that Boustani conspired to commit wire fraud, securities fraud, and money laundering in connection with bribe and kickback payments to Mozambican officials and UK-based investment bankers.[370] According to the DOJ, Boustani and co-conspirators arranged for two European banks to issue $2 billion in loans to companies owned and controlled by the Mozambican government, purportedly to fund three maritime projects in which Privinvest, a shipbuilder, would provide equipment and services.[371] Federal prosecutors alleged that the co-conspirators diverted more than $200 million from Mozambican government-backed loan funds for bribes and kickbacks to some of the bankers and Mozambican government officials.[372]

Boustani testified in his own defense at trial and admitted to making payments to Mozambican officials.[373] However, he denied defrauding any investors.[374]

The Second Circuit's decision in *United States v. Hoskins* may have influenced prosecutors' charging decisions. As discussed above, the Second Circuit ruled in *Hoskins* that foreign nationals cannot be charged with

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[360] Ines Kagubare, *DOJ Secures Another Trial Victory With Lambert Conviction*, GLOBAL INVESTIGATIONS REVIEW (Nov. 22, 2019), https://globalinvestigationsreview.com/article/jac/1211230/doj-secures-another-trial-victory-with-lambert-conviction.
[361] Verdict Form, *United States v. Mark Lambert*, No. 8:18-CR-00012-TDC, at 2-3 (D. Md. Nov. 22, 2019).
[362] Verdict Form, *United States v. Mark Lambert*, No. 8:18-CR-00012-TDC, at 2-3 (D. Md. Nov. 22, 2019).
[363] US Department of Justice Press Release No. 18-34: Former President of Maryland-Based Transportation Company Indicted on 11 Counts Related to Foreign Bribery, Fraud and Money Laundering Scheme (Jan. 12, 2018).
[364] US Department of Justice Press Release No. 18-34: Former President of Maryland-Based Transportation Company Indicted on 11 Counts Related to Foreign Bribery, Fraud and Money Laundering Scheme (Jan. 12, 2018).
[365] US Department of Justice Press Release No. 18-34: Former President of Maryland-Based Transportation Company Indicted on 11 Counts Related to Foreign Bribery, Fraud and Money Laundering Scheme (Jan. 12, 2018).
[366] US Department of Justice Press Release No. 18-34: Former President of Maryland-Based Transportation Company Indicted on 11 Counts Related to Foreign Bribery, Fraud and Money Laundering Scheme (Jan. 12, 2018).
[367] Ines Kagubare, *DOJ Secures Another Trial Victory With Lambert Conviction*, GLOBAL INVESTIGATIONS REVIEW (Nov. 22, 2019), https://globalinvestigationsreview.com/article/jac/1211230/doj-secures-another-trial-victory-with-lambert-conviction.
[368] Ines Kagubare, *DOJ Secures Another Trial Victory With Lambert Conviction*, GLOBAL INVESTIGATIONS REVIEW (Nov. 22, 2019), https://globalinvestigationsreview.com/article/jac/1211230/doj-secures-another-trial-victory-with-lambert-conviction.
[369] Matt Wirz, *Shipbuilding Executive Found Not Guilty in Mozambique Debt Fraud Trial*, WALL ST. J. (Dec. 2, 2019), https://www.wsj.com/articles/shipbuilding-executive-found-not-guilty-in-mozambique-debt-fraud-trial-11575310415.
[370] Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WFK, at 6 (E.D.N.Y. Dec. 19, 2018).
[371] Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WFK, at 6 (E.D.N.Y. Dec. 19, 2018); US Department of Justice Press Release No. 19-201: Mozambique's Former Finance Minister Indicted Alongside Other Former Mozambican Officials, Business Executives, and Investment Bankers in Alleged $2 Billion Fraud and Money Laundering Scheme that Victimized US Investors (Mar. 7, 2019).
[372] Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WFK, at 6 (E.D.N.Y. Dec. 19, 2018).
[373] Stewart Bishop, *BREAKING: Boustani Acquitted in $2B Mozambique Loan Fraud Case*, LAW360 (Dec. 2, 2019), https://www.law360.com/articles/1221333.
[374] Stewart Bishop, *BREAKING: Boustani Acquitted in $2B Mozambique Loan Fraud Case*, LAW360 (Dec. 2, 2019), https://www.law360.com/articles/1221333.

conspiring to violate the FCPA for crimes occurring abroad absent sufficient ties to the United States[375] The DOJ did not charge Boustani, a foreign national, with directly violating the FCPA.[376] Instead, the DOJ focused on claims that Boustani defrauded investors and charged Boustani with conspiring to commit wire fraud, conspiring to commit securities fraud, and conspiring to launder money to promote the carrying out of an FCPA violation.[377] Prosecutors relied on the use of US correspondent banks to facilitate payments in order to link Boustani's conduct to the United States.[378]

Jurors told reporters that their acquittal hinged on the lack of a connection between Boustani's conduct and the United States.[379] Boustani had never set foot in the United States before his arrest.[380] Authorities in the Dominican Republic had detained Boustani and his wife while on vacation and sent him to Brooklyn, where he was tried.[381]

Two former bankers who have pleaded guilty, Andrew Pearse and Surjan Singh, testified against Boustani at trial that they accepted millions of dollars in kickbacks in exchange for facilitating the Mozambican loans.[382] A third banker, Detelina Subeva, pleaded guilty to a charge of conspiracy to launder money.[383] None of the three bankers have been sentenced.[384]

Mozambique's former Finance Minister, Manuel Chang, and Privinvest's CFO, Najib Allam, have been charged.[385] Neither Chang nor Allam has made a US court appearance, though Chang has been detained in South Africa and may be extradited to the United States.[386] Antonio do Rosario, an official in Mozambique's governmental state intelligence and security service, and Teofilo Nhangumele, who acted on behalf of the Mozambican president, also have been charged but have not appeared in US courts.[387]

6. Sentencing

Seventeen individual defendants were sentenced in FCPA-related cases in 2019. Most of the defendants received two to three years' imprisonment, a slight decrease from 2018, when most defendants received sentences of between three to four years' imprisonment. Defendants also faced monetary consequences in the form of fines, restitution, and/or forfeiture. Fines imposed ranged from $15,000 to $500,000, while orders of forfeiture and/or restitution ranged from $500,000 to $1.7 million. Of those seventeen individuals sentenced, eleven were in connection with large-scale, multi-year investigations into Rolls-Royce (five) PDVSA (four), and PetroEcuador (two, including Chatburn Ripalda, discussed in more detail above in Section III.B.1).

Focusing on one of the PDVSA individuals, the sentencing of Christian Javier Maldonado-Barillas, a former PDVSA official, again highlights the importance of cooperation. Maldonado-Barillas pleaded guilty to one count of

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[375] *United States v. Hoskins*, 902 F.3d 69, 96 (2d Cir. 2018).
[376] Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WFK, at 42 (E.D.N.Y. Dec. 19, 2018). The DOJ also charged three bankers with conspiring to violate the FCPA's anti-bribery and internal controls provisions. *Id.* at 37.
[377] Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WFK, at 42 (E.D.N.Y. Dec. 19, 2018).
[378] Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WFK, at 42 (E.D.N.Y. Dec. 19, 2018).
[379] Stewart Bishop, *Boustani Acquitted in $2B Mozambique Loan Fraud Case*, LAW360 (Dec. 2, 2019), https://www.law360.com/articles/1221333/boustani-acquitted-in-2b-mozambique-loan-fraud-case.
[380] Stewart Bishop, *Boustani Acquitted in $2B Mozambique Loan Fraud Case*, LAW360 (Dec. 2, 2019), https://www.law360.com/articles/1221333/boustani-acquitted-in-2b-mozambique-loan-fraud-case.
[381] Matt Wirz, *Shipbuilding Executive Found Not Guilty in Mozambique Debt Fraud Trial*, WALL ST. J. (Dec. 2, 2019), https://www.wsj.com/articles/shipbuilding-executive-found-not-guilty-in-mozambique-debt-fraud-trial-11575310415.
[382] Stewart Bishop, *BREAKING: Boustani Acquitted in $2B Mozambique Loan Fraud Case*, LAW360 (Dec. 2, 2019), https://www.law360.com/articles/1221333.
[383] Joseph Cotterill and Caroline Binham, *Former Credit Suisse banker pleads guilty on Mozambique bribes*, FINANCIAL TIMES (May 21, 2019), https://www.ft.com/content/a4de6e06-7ba6-11e9-81d2-f785092ab560.
[384] *See* Minutes of Plea Hearing, *United States v. Surjan Singh*, No. 18-CR-861-WFK (E.D.N.Y. Sept. 6, 2019) (directing probation office to prepare and file presentence report by March 6, 2020 for defendant Surjan Singh and indicating that sentencing will be set by the Probation Office); Minutes of Plea Hearing, *United States v. Jean Boustani et al.*, No. 18-CR-681-WFK (E.D.N.Y. July 19, 2019) (indicating that defendant Andrew Pearse's sentencing will be set by the probation office); Minutes of Plea Haering, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WFK (E.D.N.Y. May 20, 2019) (directing the probation office to prepare and file a presentence report by November 20, 2019 but omitting to schedule sentencing for defendant Detelina Subeva).
[385] Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WFK (E.D.N.Y. Dec. 19, 2018).
[386] Stewart Bishop, *BREAKING: Boustani Acquitted in $2B Mozambique Loan Fraud Case*, LAW360 (Dec. 2, 2019), https://www.law360.com/articles/1221333.
[387] Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681-WK (E.D.N.Y. Dec. 19, 2018).

conspiracy to commit money laundering and was sentenced to two years of probation in May 2019.[388] Maldonado-Barillas admitted taking bribes from a co-defendant in exchange for placing the co-defendant's oilfield supply company on bidding lists and providing inside information about the bidding process, but was credited for providing "substantial assistance" to the investigation, including being willing to testify and making many recordings "at great risk to his personal safety."[389] Four other individuals who pleaded guilty in connection with PDVSA are scheduled to be sentenced in February 2020.

Perhaps signaling the end of the Rolls-Royce cases, the five individuals—Andreas Kohler, James Finley, Aloysius Johannes Josef Zuurhout, Keith Barnett, and Vitaly Leskov—received relatively lenient sentences. In addition to fines, two were sentenced to probation and the three who were sentenced to imprisonment were sentenced to one year or less.[390]

2019 also saw the sentencing of Patrick Ho, the secretary general of an NGO funded by CEFC China, a privately owned Chinese conglomerate, convicted in 2018 of orchestrating two schemes to bribe government officials in Chad and Uganda to secure advantages for CEFC China.[391] Ho led CEFC China executives on a trip to Chad via a corporate jet with $2 million in cash hidden in gift boxes and presented the cash to the president of Chad in an effort to obtain lucrative oil rights for CEFC China.[392] Ho also tried to influence Ugandan officials to use their official power to direct business advantages to CEFC China by paying high-level officials in exchange for event invitations and business meetings.[393]

As detailed in our 2018 Year-in-Review, the case yielded two important holdings: first, that in certain circumstances, the government could charge the FCPA's domestic concern provision (Section 78dd-2) and the territorial provisions (Section 78dd-3) together or in the alternative, and second, that the funds transferred through a correspondent bank in the United States was sufficient to charge money laundering under 18 U.S.C. § 1956(a)(2)(A).[394] A jury convicted Ho for FCPA violations, money laundering, and related conspiracy charges after a one-week trial in December 2018.[395] On March 25, 2019, Ho received a three-year prison sentence and was fined $400,000.[396]

C. Declinations and Case Closures

As noted above, the DOJ issued two public declinations in 2019—Cognizant and Quad/Graphics—pursuant to the FCPA Corporate Enforcement Policy, representing a decrease from the four public Enforcement Policy declinations issued in 2018.

While the DOJ continues to highlight the important transparency function of public declinations, Deputy AAG Miner also stated that the Department is "open" to issuing non-public declinations, and that it has indeed "done so."[397]

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[388] Judgment, *United States v. Christian Javier Maldonado-Barillas*, No. 4:15-cr-00635-1, at 1 (S.D. Tex. May 29, 2019).
[389] Michelle Casady, *2 Ex-Venezuelan Oil Co. Officials Sentenced in Bribery Ploy*, LAW360 (May 23, 2019), https://www.law360.com/articles/1162585/2-ex-venezuelan-oil-co-officials-sentenced-in-bribery-ploy; Transcript of Sentencing, *United States v. Christian Javier Maldonado-Barillas*, No. 4:15-cr-00635-1, at 12 (S.D. Tex. May 23, 2019).
[390] Judgment at 2, *United States v. Andreas Kohler*, No. 2:17-cr-113 (S.D. Ohio July 22, 2019); Judgment at 2, *United States v. James Finley*, No. 2:17-cr-00160 (S.D. Ohio July 22, 2019); Judgment at 2, *United States v. Aloysius Johannes Jozef Zuurhout*, No. 2:17-cr-122 (S.D. Ohio July 25, 2019); Judgment at 2, *United States v. Keith Barnett*, No. 2:16-cr-00248 (S.D. Ohio July 24, 2019); Judgment at 2, *United States v. Vitaly Leshkov*, No. 2:17-cr-00233 (S.D. Ohio July 30, 2019).
[391] US Department of Justice Press Release No. 19-097: Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Sentenced to 3 Years in Prison for International Bribery and Money Laundering Offenses (Mar. 25, 2019).
[392] US Department of Justice Press Release No. 19-097: Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Sentenced to 3 Years in Prison for International Bribery and Money Laundering Offenses (Mar. 25, 2019).
[393] US Department of Justice Press Release No. 19-097: Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Sentenced to 3 Years in Prison for International Bribery and Money Laundering Offenses (Mar. 25, 2019).
[394] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019* (Jan. 17, 2019), at 50-51, https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[395] US Department of Justice Press Release No. 19-097: Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Sentenced to 3 Years in Prison for International Bribery and Money Laundering Offenses (Mar. 25, 2019).
[396] US Department of Justice Press Release No. 19-097: Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Sentenced to 3 Years in Prison for International Bribery and Money Laundering Offenses (Mar. 25, 2019).
[397] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at The American Bar Association Criminal Justice Section 3rd Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.

In an apparent effort to encourage self-disclosure by companies weighing the potentially adverse collateral impact of a public declination, the DOJ asserted that public declinations may not be warranted or necessary in instances where a company voluntarily self-discloses misconduct.[398] For example, Miner explained that the DOJ might—at its discretion and subject to discussion with the self-disclosing company—decide against publicly disclosing a declination where the financial impact of the misconduct is determined to be *de minimis*.[399]

1. 2019 FCPA Corporate Enforcement Policy Declinations

In 2019, the DOJ issued public declinations under the FCPA Corporate Enforcement Policy to Cognizant and Quad, both discussed in detail above in Section III.A.2.[400] Both Cognizant and Quad received declination letters explaining that the DOJ would not bring charges, despite the Department's conclusion that each company engaged in misconduct that violated the FCPA. The DOJ attributed these declinations to, among other things, the companies': (1) timely and voluntary disclosure, (2) thorough internal investigations, (3) comprehensive remediation, and (4) full cooperation with the DOJ. The SEC issued Cease-and-Desist Orders against each company which assessed disgorgement.[401]

While neither Cognizant nor Quad was subject to criminal charges, both still faced financial penalties. Cognizant provided an important reminder of one of the key facets of the DOJ's Corporate Enforcement Policy: companies that receive a DOJ declination are still required to pay all disgorgement, forfeiture and/or restitution stemming from the misconduct. The Cognizant declination letter stated that the company agreed to disgorge approximately $19 million, which the Department would credit against the amount paid to the SEC. In addition to the disgorgement, Cognizant agreed to pay prejudgment interest and a civil penalty to the SEC.[402] Similarly, Quad agreed to pay approximately $10 million in disgorgement, prejudgment interest, and civil penalties to the SEC.[403]

2. Cases Possibly Closed under the DOJ's "No Piling On" Policy

In 2019, there were significantly fewer public reports of investigation closures than the prior year, with nine publicly reported closures in 2019 compared to 17 in 2018.[404] As the DOJ and SEC do not comment publicly on investigation closures and company-prepared announcements of investigation closures often do not provide details of any explanation provided by the DOJ and/or SEC, it is difficult to discern the precise reasons that drove the government's decisions. However, as many as five of the nine investigations were closed under circumstances consistent with application of the DOJ's 2018 "no piling on" policy, which instructs Department attorneys to appropriately coordinate with one another and with other enforcement agencies, including foreign governments, in imposing multiple penalties on a company stemming from the same misconduct.[405] In 2019, DOJ officials continued

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[398] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at The American Bar Association Criminal Justice Section 3rd Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.

[399] Matthew Miner, Deputy Assistant Attorney General, DOJ, Remarks at The American Bar Association Criminal Justice Section 3rd Global White Collar Crime Institute Conference (June 27, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-delivers-remarks-american-bar-association.

[400] US Department of Justice, Declinations (updated Sept. 26, 2019), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations.

[401] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cognizant Technology Solutions Corporation*, Rel. No. 85149, File No. 3-19000 (Feb. 19, 2019), https://www.sec.gov/news/press-release/2019-12; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Quad/Graphics, Inc.*, Rel. No. 87128, File No. 3-19531 (Sept. 26, 2019), https://www.sec.gov/litigation/admin/2019/34-87128.pdf.

[402] US Securities and Exchange Commission Press Release No. 2019-12: SEC Charges Cognizant and Two Former Executives With FCPA Violations (Feb. 15, 2019), https://www.sec.gov/news/press-release/2019-12.

[403] US Securities and Exchange Commission Press Release No. 2019-193: SEC Charges Marketing and Printing Services Provider with FCPA Violations (Sept. 26, 2019), https://www.sec.gov/news/press-release/2019-193.

[404] WilmerHale, Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2018, at 10 (Jan. 12, 2018),

[405] Rod Rosenstein, Deputy Attorney General, DOJ, Prepared Remarks at 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.

to highlight the import of the policy to "ensure that corporate resolutions resulting from parallel or joint investigations are reasonable and proportionate," and to insulate companies from "multiple penalties from multiple regulators."[406]

Although the DOJ did not explicitly cite to the "no piling on" policy in closing the five cases described below, the presence of an ongoing investigation by one or more foreign governments may have weighed in favor of case closure. It is worth noting that the SEC does not have a no-piling-on policy.

- Noble Corporation, a London-based offshore drilling contractor, announced in February 2019 that the SEC and DOJ had, in December 2018, closed investigations into the company's connections to the Petrobras bribery scandal in Brazil (Operation Car Wash).[407] Noble opened an internal investigation in 2015 after one of the company's agents pleaded guilty to helping multiple companies corruptly obtain drilling contracts with Brazilian state-controlled oil company Petrobras.[408] In a 2019 SEC filing, Noble stated that neither the agent nor the government authorities investigating the matter had alleged that the agent or Noble acted inappropriately in regard to Noble's contracts with Petrobras.[409] Although the SEC and DOJ elected to close their investigations into Noble, the company is continuing to cooperate with the Brazilian federal prosecutor's office regarding these matters.[410] The US government's closure of the investigations into Noble is comparable to the 2018 closures of Operation Car Wash investigations into Transocean Ltd. and Ensco.[411] Both Transocean and Ensco had opened internal investigations after learning of alleged misconduct between their employees and Petrobras, and like Noble, found no evidence to support the allegations.[412]
- Global software and service provider, PAR Technology Corporation (PAR), announced in May 2019 that the SEC and DOJ had recently closed investigations into potential FCPA violations in the company's Asian offices.[413] PAR conducted an internal investigation and determined that certain members of upper management in its China and Singapore offices "knew or should have known" of "questionable conduct" in the company's import/export and sales documentation activities but failed to prevent or correct the conduct.[414] PAR further found that employees made "questionable" payments to customs officials in China without appropriate documentation and failed to properly document items for import and export into various non-US countries.[415] PAR voluntarily disclosed these findings to the SEC and DOJ, who both later notified PAR that they did not intend to proceed with enforcement action against the company.[416] PAR, however, is continuing its cooperation with enforcement authorities in China and Singapore regarding these matters.[417]
- In a report dated June 30, 2019, French water management company Veolia Environment S.A. (Veolia) announced that the SEC had closed its investigation into allegations of improper payments from

[406] Rod Rosenstein, Deputy Attorney General, DOJ, Keynote Address on FCPA Enforcement Developments (March 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement; Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the 20th Annual Pharmaceutical and Medical Device Compliance Congress (Nov. 6, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-20th-annual-pharmaceutical.

[407] Kelly Swanson, US Shuts Investigation into Noble Corporation, GLOBAL INVESTIGATIONS REVIEW (Feb. 22, 2019), https://globalinvestigationsreview.com/article/jac/1180651/us-shuts-investigation-into-noble-corporation.

[408] Noble Corporation, Annual Report (Form 10-K) (Feb. 22, 2019), *available at:* https://noblecorp.gcs-web.com/node/21551/html.

[409] Noble Corporation, Annual Report (Form 10-K) (Feb. 22, 2019), *available at:* https://noblecorp.gcs-web.com/node/21551/html.

[410] Kelly Swanson, US Shuts Investigation into Noble Corporation, GLOBAL INVESTIGATIONS REVIEW (Feb. 22, 2019), https://globalinvestigationsreview.com/article/jac/1180651/us-shuts-investigation-into-noble-corporation.

[411] Transocean Ltd., Annual Report (Form 10-Q) (Mar. 31, 2018), *available at:* https://transocean.gcs-web.com/node/18081/html; *see also* Ensco plc, Current Report (Form 8-K) (Sept. 4, 2018), *available at:* https://www.sec.gov/Archives/edgar/data/314808/000031480818000122/form8k_item801brazilmatter.htm.

[412] Transocean Ltd., Annual Report (Form 10-Q) (Mar. 31, 2018), *available at:* https://transocean.gcs-web.com/node/18081/html; *see also* Ensco plc, Current Report (Form 8-K) (Sept. 4, 2018), *available at:* https://www.sec.gov/Archives/edgar/data/314808/000031480818000122/form8k_item801brazilmatter.htm.

[413] PAR Technology Corporation, Quarterly Report (Form 10-Q) (May 7, 2019), *available at:* https://www.partech.com/wp-content/uploads/2019/07/PAR-3.31.2019-10Q-r107.pdf.

[414] PAR Technology Corporation, Annual Report (Form 10-K) (Apr. 17, 2017), *available at:* https://www.partech.com/wp-content/uploads/2017/04/PAR_Technology_10K_2017_r4.pdf.

[415] PAR Technology Corporation, Annual Report (Form 10-K) (Apr. 17, 2017), *available at:* https://www.partech.com/wp-content/uploads/2017/04/PAR_Technology_10K_2017_r4.pdf.

[416] PAR Technology Corporation, Quarterly Report (Form 10-Q) (May 7, 2019), *available at:* https://www.partech.com/wp-content/uploads/2019/07/PAR-3.31.2019-10Q-r107.pdf.

[417] PAR Technology Corporation, Quarterly Report (Form 10-Q) (May 7, 2019), *available at:* https://www.partech.com/wp-content/uploads/2019/07/PAR-3.31.2019-10Q-r107.pdf.

Veolia's subsidiary to Romanian government officials.[418] Veolia did not provide an update as to the progress of a parallel DOJ investigation, which appears to be ongoing.[419] While the SEC has not commented on the closure of its investigation, it may have taken into consideration the fact that Romanian and French authorities are conducting parallel investigations into the alleged misconduct. Veolia stressed in its June 30, 2019 report that it "is fully cooperating with the investigating authorities and, in particular, providing all requested information, in accordance with applicable laws."[420]

- In separate announcements dated October 2 and October 4, 2019, respectively, Italian oil company Eni SpA (Eni) and Anglo-Dutch oil and gas company Royal Dutch Shell PLC (Shell) reported that the DOJ had closed its investigations into the companies' respective involvement in a 2011 deal for a Nigerian offshore oil block.[421] Shell reported that part of the reason for the case closure was the existence of parallel investigatory proceedings in Europe.[422] In those proceedings, Italian prosecutors allege that executives at Shell knew that proceeds from a $1.3 billion deal between Shell, Eni, and the Nigerian government were to be used as bribes. In response to an announcement by Eni that the DOJ closed the investigation due to lack of evidence, the DOJ instead stated that it closed the probe because Italian prosecutors were pursuing the case.[423] Shell also reportedly faces potential charges from authorities in the Netherlands.[424]
- Eni also announced that the DOJ closed its separate investigation into the company's contract awards in Algeria, highlighting that Italian authorities had separately found "no instances of any wrongdoing or illegal activity" in relation to the company's Algerian contracts.[425] Eni earlier disclosed in an April 2019 SEC filing that it had investigated these allegations and voluntarily disclosed them to the DOJ and SEC in 2012 (after which both entities commenced investigations).[426] Eni's internal investigations confirmed that the alleged misconduct was attributable to Saipem, a former Eni subsidiary which at the time of the conduct in question was autonomous from the company.[427] In 2017, Eni was tried and acquitted in Italian court, while Saipem was convicted of international corruption in the same proceedings.[428] Eni has not provided an update on the SEC investigation.

IV. KEY LEGAL DEVELOPMENTS

A. Conspiracy/International Reach of FCPA

In our 2018 Global Anti-Bribery Year-in-Review, we reported on the August 2018 Second Circuit decision in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), which held that a foreign national who could not be charged with a substantive FCPA violation for jurisdictional reasons also could not be charged with conspiracy to violate the FCPA under federal conspiracy statutes, or with any other accessory liability theory. In *Hoskins*, the Second Circuit

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[418] Veolia, Condensed Interim Financial Statements for the Half-Year Ended June 30, 2019 (June 30, 2019), https://www.veolia.com/sites/g/files/dvc2491/files/document/2019/08/Finance-Veolia-Notes-Annexes-2019-UK.pdf; *see also* GIR, FCPA Docket: Uber, Veolia and Hoskins, GLOBAL INVESTIGATIONS REVIEW (Aug. 5, 2019), https://globalinvestigationsreview.com/article/jac/1195921/fcpa-docket-uber-veolia-and-hoskins.

[419] Veolia, Condensed Interim Financial Statements for the Half-Year Ended June 30, 2019 (June 30, 2019), https://www.veolia.com/sites/g/files/dvc2491/files/document/2019/08/Finance-Veolia-Notes-Annexes-2019-UK.pdf.

[420] Veolia, Condensed Interim Financial Statements for the Half-Year Ended June 30, 2019 (June 30, 2019), https://www.veolia.com/sites/g/files/dvc2491/files/document/2019/08/Finance-Veolia-Notes-Annexes-2019-UK.pdf.

[421] Olivia Bugault and Dylan Tokar, *Justice Department Closes Investigation Over Eni's Nigerian, Algerian Activities*, WALL ST. J., Oct. 2, 2019; Dylan Tokar, *Shell Discloses End of U.S. Bribery Probe Into Nigerian Oil Deal*, WALL ST. J., Oct. 4, 2019.

[422] Dylan Tokar, *Shell Discloses End of U.S. Bribery Probe Into Nigerian Oil Deal*, WALL ST. J., Oct. 4, 2019.

[423] Jaclyn Jaeger, *DOJ contests Eni's statement concerning corruption case*, COMPLIANCE WEEK (Oct. 3, 2019), https://www.complianceweek.com/anti-corruption/doj-contests-enis-statement-concerning-corruption-case/27828.article.

[424] Michael Griffiths, *Shell Announces End to DOJ Bribery Probe*, GLOBAL INVESTIGATIONS REVIEW (Oct. 3, 2019), https://globalinvestigationsreview.com/article/jac/1209197/shell-announces-end-to-doj-bribery-probe.

[425] Adam Dobrik, *DOJ Closes Bribery Investigation into Eni*, GLOBAL INVESTIGATIONS REVIEW, (Oct. 1, 2019), https://globalinvestigationsreview.com/article/jac/1208952/doj-closes-bribery-investigation-into-eni; Olivia Bugault and Dylan Tokar, *Justice Department Closes Investigation Over Eni's Nigerian, Algerian Activities*, WALL ST. J., Oct. 2, 2019; Eni SpA Press Release: US Department of Justice Closes Investigation into Eni's Nigerian and Algerian Activities (Oct. 1, 2019), https://www.eni.com/docs/en_IT/enicom/media/press-release/2019/10/PR_ing_newUSDoJ.pdf.

[426] Eni SpA, Form 20-F (Apr. 5, 2019), *available at:* https://www.sec.gov/Archives/edgar/data/1002242/000117494719000533/tv509650-20f.htm#tI16H.

[427] Eni SpA, Form 20-F (Apr. 5, 2019), *available at:* https://www.sec.gov/Archives/edgar/data/1002242/000117494719000533/tv509650-20f.htm#tI16H.

[428] Eni SpA, Form 20-F (Apr. 5, 2019), *available at:* https://www.sec.gov/Archives/edgar/data/1002242/000117494719000533/tv509650-20f.htm#tI16H.

held that Congress intended to exclude foreign nationals from the reach of the FCPA unless they acted within the territory of the United States or as an agent of a domestic concern and that prosecutors could not evade that limitation simply by charging such persons with a conspiracy with individuals acting in the United States to violate the FCPA.[429] Accordingly, the Court affirmed-in-part the dismissal of FCPA charges brought against Lawrence Hoskins, a British national working for a British subsidiary of French power company Alstom SA, who was not alleged to have taken any actions within the United States in connection with bribery conduct undertaken by a US subsidiary of Alstom. The Court, however, reversed the dismissal of charges brought against Hoskins on the theory that he acted as the agent of the US subsidiary/domestic concern, setting the stage for continued proceedings in 2019.[430]

The DOJ continued to pursue the charges against Hoskins on the agency theory, and the case went to trial beginning on October 28, 2019, in a federal district court in Connecticut, poised to serve as a significant marker in establishing the outer boundaries of FCPA jurisdiction and secondary liability. Unsurprisingly, at trial, the question of who may be considered an agent and how the government could prove such agency took center stage. Hoskins and the government agreed that the term "agent" as used in the FCPA should be defined based on common law agency principles but disputed how those principals should be applied to Hoskins's case.[431] In particular, the parties disagreed over the degree of control that a domestic concern would need to have to establish an agency relationship.

Hoskins argued that he could not have acted as an agent of the US subsidiary because under the formal corporate structure it did not control his actions.[432] The defense presented evidence showing that Hoskins did not formally report to anyone at the US subsidiary and that he held a headquarters role such that the US subsidiary had to get Hoskins's approval before hiring agents according to Alstom procedures, not the other way around.[433] In contrast, the government argued that whatever the formal reporting lines might indicate, the evidence showed that in practice, Hoskins was responsible for negotiating with the agents on behalf of the US subsidiary and that the US subsidiary controlled Hoskins's actions with respect to the project at issue.[434] The government pointed to emails and witness testimony suggesting that the US subsidiary had the final decision-making authority on the selection, engagement, and compensation of agents and that Hoskins acted on the subsidiary's behalf in connection with the subsidiary's efforts to hire the agents who paid bribes.[435]

Following conclusion of the evidence, Hoskins sought an instruction that to establish agency, the domestic concern must have "controlled, or had the right to control, Mr. Hoskins's day-to-day work for the duration of the agency relationship" and that "[a]n agent of one corporation is not necessarily also an agent of an affiliated corporation unless a separate agency relationship with that affiliated corporation is established."[436] In contrast, the government requested a more permissive instruction that required only that the principal must "control . . . the undertaking" and that "control need not be present at every moment, its exercise may be attenuated, and it may even be ineffective."[437]

The final jury instructions hewed more closely to the government's broader definition of agency, requiring an understanding that "the principal will be in control of the undertaking." Moreover, the instructions did not require a formal agency relationship and provided instead that the jury could infer an agency relationship "circumstantially from

[429] *United States v. Hoskins*, 902 F.3d 69, 84-97 (2d Cir. 2018).
[430] *United States v. Hoskins*, 902 F.3d 69, 72-73, 97-98 (2d Cir. 2018). Hoskins also faced money laundering charges which were not at issue in the Second Circuit appeal. *Id.* at 73 n.3.
[431] Ruling on Defendant's Motion for Agency Instruction at 1, *United States v. Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Aug. 23, 2019).
[432] Transcript of Defendant's Closing Argument at 1373-98, *United States v. Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Nov. 6, 2019).
[433] Transcript of Defendant's Closing Argument at 1373-98, *United States v. Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Nov. 6, 2019).
[434] Transcript of Government's Closing Argument at 1339-45, *United States v. Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Nov. 6, 2019).
[435] Transcript of Government's Closing Argument at 1339-45, *United States v. Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Nov. 6, 2019).
[436] Ruling on Defendant's Motion for Agency Instruction at 2, *United States v. Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Aug. 23, 2019) (quoting Hoskins' proposed jury instruction).
[437] Ruling on Defendant's Motion for Agency Instruction at 2, *United States v. Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Aug. 23, 2019) (quoting the government's proposed jury instruction).

the words and actions of the parties involved," that "[o]ne may be an agent for some business purposes and not others." This portion of the instructions read:

> An agent is a person who agrees to perform acts or services for another person or company. To create an agency relationship, there must be, one, a manifestation by the principal that the agent will act for it; two, acceptance by the agent of the undertaking; and, three, an understanding between the agent and the principal that the principal will be in control of the undertaking.
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> . . .
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> Such control need not be present at every moment, its exercise may be attenuated, and it may even be ineffective. Proof of agency may not – need not be in the form of a formal agreement between agent and principal. Rather, it may be inferred circumstantially from the words and actions of the parties involved. One may be an agent for some business purposes and not others. Here the government must prove that the defendant was an agent of a domestic concern in connection with the specific events related to the [project for which bribes were paid].[438]

On November 8, 2019, after just one day of deliberations, the jury convicted Hoskins of six counts of violating the FCPA, three counts of money laundering, and two counts of conspiracy.[439] Although the Second Circuit's 2018 decision set an important outer limit of FCPA liability, i.e., foreign national defendants who are not substantively liable under the FCPA cannot be reached via accessory charges, Hoskins' ultimate conviction reaffirms the broad international reach of the FCPA and suggests that the government has not lost its ability to prosecute foreign nationals under an agency theory. That said, as noted above, the case of Jean Boustani, detailed in Section III.B.5., illustrates the challenges the DOJ may face in some circumstances, without the ability to proceed on a theory of aiding and abetting or conspiracy liability.

On December 4, 2019, Assistant Attorney General Brian Benczkowski delivered remarks touching on the *Hoskins* trial, during which he assured the audience of FCPA practitioners that the DOJ would not try to "stretch the bounds of agency principles beyond recognition, or even push the FCPA statute towards its outer edges."[440] Rather, he indicated that the *Hoskins* jury instructions were, in fact, instructive for future cases, which he said the DOJ would evaluate individually based on the facts that prosecutors could prove. He explained that "[w]here the evidence supports a finding of agency between a parent and a subsidiary, or for an individual, we will assess whether it is appropriate to exercise our discretion to apply the principle in that case."[441]

Issues of agency will likely continue to be a central focus of future FCPA prosecutions. In a current case in the US District Court for the Northern District of Illinois, defendants Dmitry Firtash and Andras Korpas relied heavily on *Hoskins* in their attempt to dismiss the criminal charges against them when they argued that, as foreign nationals who never visited the United States in connection with the alleged misconduct and were not alleged to be agents of a domestic concern, they could not be held liable for conspiring to violate the FCPA under federal conspiracy and aiding and abetting statutes.[442] However, the district court held that controlling Seventh Circuit case law on secondary liability, which rejected the legislative history analysis used by the *Hoskins* court, precluded application of the agency requirement adopted in *Hoskins*.[443] Although the district court recognized that the presumption against extraterritoriality could undermine that Seventh Circuit precedent, the Court was "unwilling to disregard" the Seventh

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[438] Transcript of Jury Instructions at 1246-48, *United States v. Hoskins*, No. 3:12-CR-00238-JBA (D. Conn. Nov. 6, 2019).
[439] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).
[440] Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act, https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference (Dec. 4, 2019).
[441] Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act, https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference (Dec. 4, 2019).
[442] *United States v. Firtash*, 392 F. Supp. 3d 872, 877, 888-90 (N.D. Ill. 2019) (defendants had been charged with conspiring to obtain mining licenses in India by bribing two Indian public officials).
[443] *United States v. Firtash*, 392 F. Supp. 3d 872, 889, 892 (N.D. Ill. 2019) (citing *United States v. Pino-Perez*, 870 F. 2d 1230, 1234 (7th Cir. 1989) ("It would introduce great uncertainty into federal criminal law if the liability of a conceded aider and abettor depended on the results of an inquiry into Congress's intent concerning such liability in creating the offense that the defendant aided and abetted.")).

Circuit's "clear guidance" about secondary liability and denied the defendants' motion to dismiss.[444] Defendant Firtash is currently awaiting extradition to the United States and an eventual trial, but no matter the outcome, the *Firtash* court's disagreement with the Second Circuit decision in *Hoskins* shows how the outer limits of FCPA liability remain uncertain and will likely be litigated in the years to come. Moreover, if the Seventh Circuit concurs with the district court's analysis of its prior precedent and reaffirms that analysis, it would establish a circuit split that might warrant Supreme Court review.

B. Supreme Court to Hear Challenge to SEC's Disgorgement Authority in *Liu v. SEC* (U.S. 18-1501)

The US Supreme Court recently agreed to hear a case that, at first glance, would appear to have far-reaching implications for one of the SEC's most important enforcement tools if the Commission were to lose. In *Liu v. SEC*, the Supreme Court will consider "[w]hether the Securities and Exchange Commission may seek and obtain disgorgement from a court as 'equitable relief' for a securities law violation even though th[e Supreme] Court has determined that such disgorgement is a penalty."[445]

The issue presented in *Liu* was raised by five Justices during the 2017 oral argument for *United States v. Kokesh*.[446] During that argument, Chief Justice Roberts noted: "One reason we have this problem is that the SEC devised this remedy or relied on this remedy without any support from Congress."[447] Similarly, Justice Kennedy asked whether there is "specific statutory authority that makes it clear that [a] district court can entertain [the] remedy" of disgorgement.[448] In the end, the Supreme Court's *Kokesh* decision expressly left open the issue of whether the SEC may ever seek disgorgement from a court at all.[449] That unanswered question is now presented squarely in *Liu*.

The case arises from a 2017 decision by a federal district court in California granting the SEC's request for disgorgement of all the funds that defendants Charles Liu and Xin Wang raised by defrauding investors who sought to take advantage of a visa program for non-citizens who make large investments in the United States. Liu and Wang appealed, contending that Congress only expressly authorized the SEC to seek injunctions, civil monetary penalties, and equitable relief as remedies in judicial enforcement proceedings, and that after *Kokesh*, it is now clear that disgorgement does not fall into the category of equitable relief because the Supreme Court has determined disgorgement is, instead, a type of penalty.[450] In response, the SEC argues that disgorgement is indeed a form of equitable relief, except for in the context of statutes of limitation (the issue presented in *Kokesh*).[451] The agency highlights that "[t]he Court cautioned that "[n]othing in [the *Kokesh*] opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement."[452]

Like *Kokesh* before it, the *Liu* decision could have a detrimental impact on the SEC's ability to seek disgorgement, which has become one of, if not the most, significant enforcement tool in the Commission's arsenal. Indeed, in Fiscal Year 2019 alone, the SEC secured disgorgement orders totaling $3.248 billion.[453] In contrast, the

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[444] *United States v. Firtash*, 392 F. Supp. 3d 872, 892 (N.D. Ill. 2019).
[445] Petition for Writ of Certiorari, *Liu v. SEC*, No. U.S. 18-1501, at i (May. 31, 2019).
[446] *Kokesh v. SEC*, Tr. of Oral Argument at 7-8 (Kennedy, J.), 9 (Sotomayor, J.), 13 (Alito, J.), 31 (Roberts, C.J.), 52 (Gorsuch, J.), 137 S. Ct. 1635 (2017).
[447] *Kokesh v. SEC*, Tr. of Oral Argument at 31:16-21, 137 S. Ct. 1635 (2017).
[448] *Kokesh v. SEC*, Tr. of Oral Argument at 7:20-8:2, 137 S. Ct. 1635 (2017).
[449] *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017). In *Kokesh*, the Court held that that disgorgement in SEC enforcement actions is subject to a five-year statute of limitations under 28 U.S.C. § 2462. 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. *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017). For additional discussion on *Kokesh* and its implications, see 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-andpredictions-for-2018; WilmerHale, Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019, at 53-56 (Jan. 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[450] Petition for Writ of Certiorari, *Liu v. SEC*, No. U.S. 18-1501, at 10-11 (May 31, 2019).
[451] Brief for Respondent in Opposition, *Liu v. SEC*, No. U.S. 18-1501, at 5-7 (Sept. 4, 2019).
[452] Brief for Respondent in Opposition, *Liu v. SEC*, No. U.S. 18-1501, at 5-7 (Sept. 4, 2019) (citing *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017)).
[453] Securities and Exchange Commission, Division of Enforcement: 2019 Annual Report, at 16 (Nov. 6, 2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

total funds the agency obtained through all other types of monetary penalties amounted to only $1.101 billion.[454] Furthermore, the Supreme Court's decision in this case could call into question the SEC's authority to seek other types of equitable relief that it regularly employs, such as cease and desist orders and the imposition of independent monitors.

However, a loss by the SEC at the Supreme Court would not have the impact that might initially seem to be the case, as the SEC enjoys separate, explicit statutory authority to seek disgorgement in cases that the Commission brings through administrative proceedings rather than in federal court.[455] Notably, during the three most recent fiscal years, a substantial majority of the FCPA matters in which the defendant paid disgorgement resulted from cases the Commission brought through administrative proceedings rather than in federal court. However, there are notable exceptions to that trend—such as more than $200 million in disgorgement by Teva Pharmaceuticals and, in the most recent corporate settlement, more than $539 million in Ericsson—where the SEC in fact filed a complaint in federal court.[456] Thus, one possible result of an SEC loss in *Liu* could be to shift SEC enforcement even more heavily toward administrative proceedings in order to maintain the Commission's ability to seek disgorgement.

A decision adverse to the SEC might also prompt congressional consideration of a bill granting the SEC the express statutory authority to seek disgorgement, discussed further in Section IV.F.2.

The Supreme Court is scheduled to hold oral argument on March 3, 2020 and issue its decision in *Liu* by June 2020.

C. Collateral Consequences of Cooperation

A May 2019 ruling in the Southern District of New York imposed significant new collateral consequences on cooperating with government investigations that, if adopted by other courts, will complicate internal investigations going forward. In *United States v. Connolly*, No. 16 CR. 0370 (CM), 2019 WL 2120523 (S.D.N.Y. May 2, 2019), Chief Judge Colleen McMahon ruled that because the government had "outsourced" its investigation of Deutsche Bank (DB) to the Bank itself, actions undertaken by DB's outside counsel were "fairly attributable" to the government and statements made by a DB employee to outside counsel during an internal investigation were subject to certain constitutional protections as if made to government investigators.[457] This decision raises significant questions about how the government, law firms, and corporations will approach internal investigations and cooperation efforts in the future as the actions taken by DB's counsel that were at issue in *Connolly* are standard practice for companies seeking cooperation credit from the government.

Gavin Black, a former DB employee, was convicted of wire fraud and conspiracy in October 2018 in connection with alleged LIBOR interest rate manipulation.[458] Relying on *Garrity v. New Jersey*, 385 U.S. 493 (1966), Black moved to vacate his conviction on the basis that statements he made to the bank's outside counsel during the course of the internal investigation were attributable to, and compelled by, the government and improperly used against him at trial.[459] In *Garrity*, the Supreme Court held that statements made by defendant police officers under threat of termination by their employer were involuntary and could not be used against them in a criminal trial.[460] In the Second Circuit, the *Garrity* rule applies to statements made to private employers as well when the actions of the private employer are "fairly attributable to the government."[461] Black argued that the actions of DB's external lawyers who had interviewed him were attributable to the government because of the degree to which the government had coordinated with and relied upon the bank's internal investigation. Black also contended that his statements to

[454] Securities and Exchange Commission, Division of Enforcement: 2019 Annual Report, at 16 (Nov. 6, 2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf.
[455] 15 U.S.C. § 78u-2(e).
[456] Complaint, *SEC v. Teva Pharmaceutical Industries Ltd.,* No. 16-CV-25298 (S.D. Fl. Dec. 22, 2016); Complaint, *SEC v. Telefonaktiebolaget LM Ericsson*, No. 19-CV-11214, (S.D.N.Y. Dec. 6, 2019).
[457] *United States v. Connolly*, No. 16-CR-0370-CM, 2019 WL 2120523, at *10, *14 (S.D.N.Y. May 2, 2019).
[458] US Department of Justice Press Release No. 18-1354: Two Former Deutsche Bank Traders Convicted for Role in Scheme to Manipulate a Critical Global Benchmark Interest Rate (Oct. 17, 2018).
[459] *United States v. Connolly*, No. 16-CR-0370-CM, 2019 WL 2120523, at *1 (S.D.N.Y. May 2, 2019).
[460] *Garrity v. New Jersey*, 385 U.S. 493, 500 (1966).
[461] *United States v. Stein*, 541 F.3d 130, 152 n.11 (2d Cir. 2008).

outside counsel were effectively compelled by the government because he understood that he would be terminated if he refused to be interviewed.

Judge McMahon agreed on both points, finding that the bank's actions and those of its outside counsel were "fairly attributable" to the government because the government had "directed Deutsche Bank to investigate Gavin Black on its behalf" and because there appeared to be no evidence that the government had conducted its own, independent, investigation into Black.[462] Instead, Judge McMahon noted that the government chose to "simply give direction to Deutsche Bank . . . take the results of their labor (which appears to have been fully disclosed to government lawyers), and save itself the trouble of doing its own work."[463] In making these determinations, Judge McMahon cited a number of actions taken by the government and company counsel that will be familiar to any experienced internal investigation practitioner. For example, the government requested that the company interview particular individuals and provided specific guidance as to how to conduct those interviews.[464] In addition, the bank's counsel sought permission from the government before interviewing Black a final time and "digested the vast information it collected, highlighted the most important nuggets, and shared a blueprint for what prosecutors should expect when they finally interviewed Black on their own."[465] The bank's counsel also submitted a white paper detailing the extent of the bank's cooperation which stated that "much (if not most) of the information that will ultimately be used in making charging decisions . . . will have come from the Bank's identification of notable communications and its having brought those communications to the DOJ's attention."[466]

Although the court ultimately found that the statements Black had made to DB's counsel had not been used against him at trial and denied Black's motion to vacate on that basis,[467] the decision raises important questions about how the government, law firms, and their clients should approach cooperation efforts in the future. For example, government attorneys may be wary of providing detailed instructions about investigative priorities and could request that companies delay witness interviews to allow the government to conduct its own investigation in order to avoid being seen as "outsourcing" its investigation. Attorneys for individual defendants, on the other hand, may seek to develop a record showing that interviews their clients give while employees of a company were compelled, and both individuals and companies may even begin arguing that other evidence in the case was derived from the statements made in the course of internal investigations and is therefore inadmissible.

D. Ninth Circuit Ruling Limits Sarbanes-Oxley Anti-Retaliation Protections for Employees Reporting Possible FCPA Violations

In a noteworthy whistleblower retaliation case, the Ninth Circuit ruled that the anti-bribery and books-and-records provisions of the FCPA do not constitute "rules and regulations" of the SEC and, therefore, an employee reporting violations of the FCPA itself has not engaged in protected activity under Section 806 of the Sarbanes-Oxley Act (SOX).[468] In 2015, Sanford Wadler, Bio-Rad's former general counsel, sued the company after it terminated his employment.[469] Wadler asserted whistleblower retaliation claims against Bio-Rad under Dodd Frank and SOX, alleging that the company discharged him for reporting potential FCPA violations to the company's audit committee.[470] For both claims, the district court judge instructed the jury that Wadler had to prove he engaged in protected activity under SOX and that statutory provisions of the FCPA constituted "rules or regulations of the SEC" under Section 806 of SOX for purposes of determining whether Wadler engaged in protected activity.[471] Bio-Rad had objected to this instruction, arguing that as statutory text, the FCPA provisions did not qualify as SEC "rules or regulations" under SOX.[472] The district court disagreed, and the jury subsequently found in Wadler's favor on all claims and awarded him a verdict totaling $10.92 million dollars plus interest.[473] The court denied Bio-Rad's subsequent motions for judgment as a matter of law and for a new trial on the same basis.[474] Bio-Rad challenged the

[462] *United States v. Connolly*, No. 16-CR-0370-CM, 2019 WL 2120523, at *10, *14 (S.D.N.Y. May 2, 2019).
[463] *United States v. Connolly*, No. 16-CR-0370-CM, 2019 WL 2120523, at *9 (S.D.N.Y. May 2, 2019).
[464] *United States v. Connolly*, No. 16-CR-0370-CM, 2019 WL 2120523, at *11-12 (S.D.N.Y. May 2, 2019). Specifically, the government directed a lawyer from Deutsche Bank's outside counsel to approach an employee interview "as if he were a prosecutor." *Id.* at *4.
[465] *United States v. Connolly*, No. 16-CR-0370-CM, 2019 WL 2120523, at *12 (S.D.N.Y. May 2, 2019).
[466] *United States v. Connolly*, No. 16-CR-0370-CM, 2019 WL 2120523, at *7 (S.D.N.Y. May 2, 2019).
[467] *United States v. Connolly*, No. 16-CR-0370-CM, 2019 WL 2120523, at *21-22 (S.D.N.Y. May 2, 2019).
[468] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1187 (9th Cir. 2019).
[469] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1181 (9th Cir. 2019).
[470] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1181-83 (9th Cir. 2019).
[471] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1184 (9th Cir. 2019).
[472] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1184 (9th Cir. 2019).
[473] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1184 (9th Cir. 2019).
[474] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1184-85 (9th Cir. 2019).

award and appealed to the Ninth Circuit.[475] On appeal, the Ninth Circuit vacated the verdict as to the one SOX retaliation claim and remanded for consideration of a possible new trial on the grounds that statutory provisions are not "rules and regulations" of the SEC.[476]

While the court's ruling that an employee who reports violations of the FCPA has not engaged in protected activity under SOX might seem like a victory for Bio-Rad, retaliating against an FCPA whistleblower can still result in significant liability. Bio-Rad's appellate victory is likely to ultimately prove hollow due to two observations made by the Ninth Circuit for the trial court to consider on remand: 1) the court noted that the FCPA's books-and-records provisions are identical to certain SEC regulations and that a reasonable jury could have concluded that Wadler's report to the audit committee demonstrated his belief that these SEC regulations had been violated or at least warranted investigation; [477] and 2) the court also noted that a new trial might allow for Wadler to proceed with a "fraud against shareholders" theory as well.[478] Thus, even after the Ninth Circuit's decision in *Wadler*, companies should remain vigilant that their compliance programs do not allow for retaliation against those employees who report possible bribery issues in the company's foreign operations.

In a separate, unpublished memorandum opinion, however, the panel of judges vacated the verdict on Wadler's whistleblower claim under the Dodd-Frank Act, with instructions to enter judgment in favor of Bio-Rad.[479] During the pendency of Bio-Rad's appeal, the Supreme Court decided *Digital Realty Trust, Inc. v. Somers*, which held that the Dodd-Frank Act's whistleblower provisions did not apply to purely internal reports.[480] Therefore, per *Digital Realty*, because Wadler reported violations internally and did not report them to the SEC prior to his firing, the panel held that he did not qualify as a whistleblower under Dodd-Frank.[481] This ruling resulted in a reduction of Wadler's verdict by almost three million dollars plus interest.[482] Since the Ninth Circuit's decision in February, the court rejected Bio-Rad's request for a rehearing *en banc*. The parties also appear to have reached a private settlement of the case for an unknown amount, and on September 25, 2019, the district court approved their joint stipulation that all remaining claims be dismissed.

E. Federal Circuit Courts Decline to Apply the Supreme Court's *McDonnell* Decision to the FCPA and Other Anti-Bribery Laws

In 2016, in *McDonnell v. United States*, a high-profile public corruption case involving the former governor of Virginia, Robert McDonnell, the Supreme Court unanimously rejected the government's expansive reading of the term "official act" in 18 U.S.C. § 201, also known as the general bribery statute. Instead, the Court adopted a two-part test requiring that to prove bribery under Section 201, the government must: 1) "identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official"; and 2) "prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so."[483] The Supreme Court held that to qualify as an "official act," the "question, matter, cause, suit, proceeding or controversy" needed to be "a formal exercise of governmental power," and the public official must have made a decision, agreed to take action, or taken action on that "question, matter, cause, suit, proceeding or controversy."[484] In contrast, the Court held conduct such as "setting up a meeting, talking to another official, or organizing an event," without more, would not qualify as an "official act."[485]

The Supreme Court's narrow reading of "official act" in *McDonnell* led many legal observers to believe that the ruling would severely harm the government's ability to fight corruption. However, since 2016, a growing number of federal circuit courts have been reluctant to import the "official act" standard from the Supreme Court's *McDonnell* decision into cases involving defendants charged with violations of the FCPA or other federal anti-bribery statutes. In addition to several 2019 cases outlined below, the Third, Fifth, and Sixth Circuits have previously ruled that the *McDonnell* standard is limited to the narrower text of the general bribery statute.[486] Under these cases, the Supreme

[475] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1185 (9th Cir. 2019).
[476] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1187, 1189 (9th Cir. 2019).
[477] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1187 (9th Cir. 2019).
[478] *Wadler v. Bio-Rad Lab., Inc.*, 916 F.3d 1176, 1187 (9th Cir. 2019).
[479] *Wadler v. Bio-Rad Lab., Inc.*, 754 Fed. Appx. 661, 662 (9th Cir. Feb. 26, 2019).
[480] *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018).
[481] *Wadler v. Bio-Rad Lab., Inc.*, 754 Fed. Appx. 661, 662 (9th Cir. Feb. 26, 2019).
[482] *Wadler v. Bio-Rad Lab., Inc.*, 754 Fed. Appx. 661, 662 (9th Cir. Feb. 26, 2019).
[483] *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (quoting 18 U.S.C. § 201 (a)(3)).
[484] *McDonnell v. United States*, 136 S. Ct. 2355, 2371-72 (2016).
[485] *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016).
[486] *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018); *United States v. Reed*, 908 F.3d 102, 111-13 (5th Cir. 2018); *United States v. Ferriero*, 886 F.3d 107, 127-38 (3d Cir. 2017).

Court's pro-defendant ruling in *McDonnell* would effectively remain the governing law in those criminal cases charged pursuant to 18 U.S.C. § 201, the general bribery statute specifically at issue in *McDonnell*, while providing no basis for defendants to challenge their convictions pursuant to the FCPA or other statutes.

1. The Second Circuit: *US v. Thiam and US v. Ng Lap Seng*

In two notable cases this past year, the Second Circuit has held that the *McDonnell* standard does not delimit bribery statutes outside of Section 201.

On August 5, 2019, the Second Circuit refused to import the *McDonnell* standard to another anti-bribery statute when it ruled that the "official act" definition under Section 201 was inapplicable in a case involving violations of foreign laws.[487] In *United States v. Thiam*, the DOJ charged a US citizen and Minister of Mines and Geology of the Republic of Guinea, Mahmoud Thiam, with violating 18 U.S.C. §§ 1956 and 1957 after he received an $8.5 million bribe from a Chinese entity in return for supporting a Chinese joint venture with Guinea.[488] Both US statutes prohibit monetary transactions involving proceeds of "specified unlawful activities" and define "specified unlawful activity" as "an offense against a foreign nation involving . . . bribery of a public official," in violation of that foreign nation's laws.[489] The government proved violations of Articles 192 and 194 of Guinea's Penal Code as the predicate "offense[s] against a foreign nation involving . . . bribery of a public official," as required by Sections 1956 and 1957, and a jury convicted Thiam.[490] Thiam challenged his conviction, citing *McDonnell* and arguing that the district court's jury instructions were erroneous because the judge failed to instruct jurors of the "official act" definition for a bribery conviction.[491]

The Second Circuit rejected Thiam's argument and ruled that the "official act" standard as defined in *McDonnell* was inapplicable primarily due to principles of international comity.[492] Thiam argued that the court was required to incorporate *McDonnell*'s "official act" standard because the texts of Articles 192 and 194 of Guinea's Penal Code were sufficiently similar to 18 U.S.C. § 201's text.[493] The court disagreed and held that any commonalities the statutes shared were unremarkable given that they all related to bribery, and that regardless of any alleged likeness, applying *McDonnell* to the Guinean Penal Code would impermissibly require the court to interpret foreign law.[494] The court abided by international comity and declined to limit the conduct that Guinea had chosen to criminalize in its penal code.[495] The Supreme Court denied Thiam's petition for certiorari to appeal his conviction on December 9, 2019.

In another notable case arising in the Second Circuit, a jury in the Southern District of New York found a Chinese real estate developer, Ng Lap Seng, guilty of paying and conspiring to pay bribes in violation of the FCPA and 18 U.S.C. § 666, which prohibits theft or bribery in connection with programs receiving federal funds.[496] The government alleged that Ng Lap Seng bribed two United Nations (UN) officials as part of an effort to have the UN formally designate a property he owned as the permanent site for one of the UN's annual events.[497] Ng Lap Seng challenged his convictions under Section 666 and the FCPA, contending, among other grounds, that *McDonnell* required the government to prove the occurrence of an "official act."[498]

On appeal, the Second Circuit rejected that argument, concluding that the *McDonnell* "official act" standard applicable to 18 U.S.C. § 201 does not extend to the potential scope of liability under 18 U.S.C. § 666 nor the FCPA anti-bribery provisions, ruling that the scope of each bribery statute varied based upon its text.[499]

Specifically, the court concluded that the language in Section 666 was more expansive than that of Section 201, noting that while bribery under Section 201 pertained only to "official acts" that were "limited to acts on pending

[487] *United States v. Thiam*, 934 F.3d 89, 93-94 (2d Cir. 2019).
[488] *United States v. Thiam*, 934 F.3d 89, 93 (2d Cir. 2019).
[489] 18 U.S.C. § 1956(c)(7)(B)(iv); 18 U.S.C. § 1957(f)(3).
[490] *United States v. Thiam*, 934 F.3d 89, 93 (2d Cir. 2019).
[491] *United States v. Thiam*, 934 F.3d 89, 93 (2d Cir. 2019).
[492] *United States v. Thiam*, 934 F.3d 89, 94 (2d Cir. 2019).
[493] *United States v. Thiam*, 934 F.3d 89, 94 (2d Cir. 2019).
[494] *United States v. Thiam*, 934 F.3d 89, 94-95 (2d Cir. 2019).
[495] *United States v. Thiam*, 934 F.3d 89, 94 (2d Cir. 2019).
[496] *United States v. Ng Lap Seng*, 934 F.3d 110, 121 (2d Cir. 2019).
[497] *United States v. Ng Lap Seng*, 934 F.3d 110, 117 (2d Cir. 2019).
[498] *United States v. Ng Lap Seng*, 934 F.3d 110, 129 (2d Cir. 2019).
[499] *United States v. Ng Lap Seng*, 934 F.3d 110, 131-33 (2d Cir. 2019).

questions, matters, causes, suits, proceedings, or controversies," Section 666 forbid bribery "in connection with any business, transaction, or series of transactions of an organization, government, or agency."[500] The court ruled that Section 666's silence on "official acts" further differentiated it from Section 201.[501] *Ng Lap Seng* further held that the FCPA was also distinguishable from Section 201 because it "does not cabin 'official capacity' acts or decisions to a definitional list akin to that for official acts in § 201(a)(3)."[502] The court held that these distinctions suggested that the bribery prohibitions codified in neither the FCPA nor Section 666 were textually limited to the "official acts" as proscribed in the general bribery statute at issue in *McDonnell*.

There are several other pending cases in the Second Circuit in which defendants have challenged corruption convictions on the basis that *McDonnell* applies to other bribery statutes.[503] As a result, *Thiam* and *Ng Lap Seng* are unlikely to be the last word on the impact of *McDonnell*.

2. The Ninth Circuit: *United States v. Chi*

In *United States v. Chi*, the Ninth Circuit ruled that the scope of the federal criminal statute involving "bribery of a foreign official" was not limited to bribery as defined in 18 U.S.C. § 201, which was at issue in *McDonnell*.[504] Heon-Cheol Chi, a South Korean citizen employed as a researcher and director of a government-funded geological research institute in South Korea, solicited and received payments from two seismometer manufacturers in exchange for his assurance that he would give the companies inside information about their competitors.[505] The DOJ charged Chi with six counts of engaging in unlawful monetary transactions derived from a "specified unlawful activity," in violation of 18 U.S.C. § 1957.[506] The government defined "specified unlawful activity" per 18 U.S.C. § 1956(c)(7)(B) as "an offense against a foreign nation involving . . . bribery of a public official."[507] The DOJ further alleged that Chi's violation of Article 129 of the South Korean Criminal Code, which prohibits public officials from accepting bribes, amounted to a "specified unlawful activity" in violation of Section 1957.[508] Chi appealed his conviction, arguing that the bribery of public officials described in Article 129 must also fall within the bounds of crimes described within 18 U.S.C. § 201.

The Ninth Circuit upheld Chi's conviction and ruled that bribery as defined in 18 U.S.C. § 201 did not limit the scope of liability under 18 U.S.C. § 1957.[509] The court held that to define "specified unlawful activity" within Section 1957, it needed to look to its sister statute, 18 U.S.C. § 1956, which defines a "specified unlawful act" as "an offense against a foreign nation involving . . . bribery of a public official."[510] The court held that to define the categorical boundaries of "briberies of public officials," it would interpret the words "as taking their ordinary, contemporary, common meaning."[511] The Ninth Circuit rejected Chi's argument that Section 201 therefore dictated the meaning of bribery under Sections 1956 and 1957, ruling that had Congress intended to criminalize the laundering of bribery proceeds only where the acts fell within the ambit of crimes described under Section 201's purview, it would have clearly indicated such intentions.[512] The Ninth Circuit noted that although 18 U.S.C. § 201 is referred to as the "federal bribery statute," it is just one of various anti-bribery statutes that aims to curb government corruption and would thus not necessarily dictate the scope of liability for all bribery laws.[513]

F. Legislative Developments

Members of the US Congress have recently proposed legislation in both the House of Representatives and the Senate that could strengthen enforcement tools available to prosecute anti-bribery enforcement cases. Three bills in particular—the Foreign Extortion Prevention Act (H.R. 4140), the Investor Protection and Capital Markets Fairness

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[500] *United States v. Ng Lap Seng*, 934 F.3d 110, 133 (2d Cir. 2019).
[501] *United States v. Ng Lap Seng*, 934 F.3d 110, 133 (2d Cir. 2019).
[502] *United States v. Ng Lap Seng*, 934 F.3d 110, 134 (2d Cir. 2019).
[503] *See, e.g., United States v. Percoco*, No. 18-2990(L) (2d Cir.).
[504] *United States v. Chi*, 936 F.3d 888, 896-97 (9th Cir. 2019).
[505] *United States v. Chi*, 936 F.3d 888, 890 (9th Cir. 2019).
[506] *United States v. Chi*, 936 F.3d 888, 892 (9th Cir. 2019).
[507] *United States v. Chi*, 936 F.3d 888, 892 (9th Cir. 2019).
[508] *United States v. Chi*, 936 F.3d 888, 892 (9th Cir. 2019).
[509] *United States v. Chi*, 936 F.3d 888, 896-97 (9th Cir. 2019).
[510] *United States v. Chi*, 936 F.3d 888, 893 (9th Cir. 2019).
[511] *United States v. Chi*, 936 F.3d 888, 894 (9th Cir. 2019) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).
[512] *United States v. Chi*, 936 F.3d 888, 896 (9th Cir. 2019).
[513] *United States v. Chi*, 936 F.3d 888, 896 (9th Cir. 2019).

Act (H.R. 4344), and the Securities Fraud Enforcement and Investor Compensation Act (S. 799)—could change the landscape of FCPA enforcement, if enacted.

1. The Foreign Extortion Prevention Act (H.R. 4140)

Historically, including in 2019, foreign government officials have been charged with non-bribery crimes when implicated in FCPA cases because federal law does not criminalize corrupt acts by foreign officials. To close this gap in US anti-bribery law, Representatives Sheila Jackson Lee (D-TX), John Curtis (R-UT), Tom Malinowski (D-NJ), and Richard Hudson (R-NC) introduced the bipartisan Foreign Extortion Prevention Act (FEPA) in August 2019.[514] This bill would amend 18 U.S.C. § 201, the general federal anti-bribery statute (rather the FCPA itself), to prohibit foreign officials from taking or demanding bribes in order to assist others in obtaining or retaining business.[515]

Such a prohibition would add to the Department of Justice's arsenal of tools available to prosecute foreign officials who are involved in FCPA violations. For example, the amended statute would allow the DOJ to more directly bring bribery charges against government officials rather than relying on other tools to prosecute their corrupt conduct such as charging conspiracy to commit money laundering in relation to FCPA violations. However, this bill's impact may be limited by the fact that it proposes to amend 18 U.S.C. § 201 rather than the FCPA anti-bribery provision. While FEPA's definition of foreign official matches that of the FCPA's, any prosecutions brought pursuant to FEPA would need to reach the higher burden for proving an "official act" that the Supreme Court placed on 18 U.S.C. § 201 with their decision in *McDonnell*.[516]

2. The Investor Protection and Capital Markets Fairness Act (H.R. 4344)

In the US House of Representatives, Rep. Ben McAdams (D-UT) and Rep. Bill Huizenga (R-MI) introduced bipartisan legislation in September 2019 that would address the SEC's previous loss in the *United States v. Kokesh* case and a potential loss in the *Liu v. SEC* case currently before the Supreme Court. Both decisions were discussed above. The "Investor Protection and Capital Markets Fairness Act" would grant express statutory authority for the SEC to seek disgorgement, and it would also expand the statute of limitations for disgorgement to 14 years after the alleged violation. The bill passed the House overwhelmingly by a vote of 314-95 in November 2019, with almost half of the voting Republicans joining with all Democrats in favor of the legislation.

3. The Securities Fraud Enforcement and Investor Compensation Act (S. 799)

On the Senate side of Capitol Hill, where building bipartisan agreement is typically more important to legislative success, the proposed legislation regarding SEC authority appears to be moving more slowly. Senators John Kennedy (R-LA) and Mark Warner (D-VA) introduced bipartisan legislation in March 2019—the "Securities Fraud Enforcement and Investor Compensation Act" — that would provide the SEC with express statutory authority to seek disgorgement and restitution, as well as extend the statute of limitations for the SEC's disgorgement authority and restitution authority as discussed further below.[517]

By granting the SEC the express statutory authority to seek disgorgement, this bill addresses the exact issue that will be before the Supreme Court in *Liu v. SEC*, discussed above.[518] If the Court were to rule in favor of the SEC in *Liu* and hold that the agency already has the legal authority to seek disgorgement, the disgorgement provision of this bill would be rendered superfluous. If the Supreme Court were to rule against the SEC, however, and hold that the agency currently lacks the legal authority to seek disgorgement, this provision would reverse that outcome and restore the authority that the Commission has been relying on for many years. Accordingly, the Supreme Court's decision in *Liu* may serve as the catalyst for Congress to act more quickly in considering this legislation, including the additional reforms discussed below.

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[514] Foreign Extortion Prevention Act, H.R. 4140, 116th Cong. § 1 (2019).
[515] Foreign Extortion Prevention Act, H.R. 4140, 116th Cong. § 1 (2019).
[516] *See supra* Section IV.E.1.
[517] Securities Fraud Enforcement and Investor Compensation Act, S. 799, § 2(a)(3)(2019) (amending the Securities Exchange Act of 1934 to include: "In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement of any unjust enrichment that a person obtained as a result of a violation of that provision. . . . The Commission may seek a claim for any equitable remedy, including for restitution under paragraph (8), an injunction, or a bar, suspension, or cease and desist order, not later than 10 years after the latest date on which a violation that gives rise to the claim occurs.").
[518] *See supra* Section IV.B.

The bill would also relax the statute of limitations period for SEC disgorgement authority beyond the current five years imposed by the Supreme Court's 2017 decision in *United States v. Kokesh*.[519] Currently, following *Kokesh*, the five-year limitations period runs from the date of the unlawful conduct that caused the claim to originally accrue. The act would allow the SEC to take action within "5 years after the date on which the person against which the claim is brought receives any unjust enrichment as a result of the violation that gives rise to the action or proceeding in which the Commission seeks the claim."[520] In many cases, this could provide the SEC additional time to seek disgorgement, as ill-gotten gains are often received after (sometimes long after) the unlawful conduct. With respect to restitution, the bill would extend the statute of limitations to ten years rather than the current five-year period. These time periods in the Senate bill are less generous than the 14 year statute of limitations contained in the bill that passed in the House. Thus, if the Senate bill eventually passes in its current form, a Conference Committee between the two chambers of Congress may have to negotiate a compromise regarding the statute of limitations.

V. COLLATERAL ACTIONS

Throughout the year, companies undergoing FCPA investigations also found themselves subject to collateral actions including restitution claims, shareholder lawsuits, and civil forfeiture actions.

A. Restitution Claims

1. United States v. OZ Africa Management LLC

In February 2018, former shareholders in Africo Resources Ltd. (Africo), a company that allegedly held mining rights that were taken through the acts detailed in Och-Ziff's resolution with the DOJ, interceded in Och-Ziff's sentencing, claiming that they were victims and entitled to restitution.[521] On August 28, 2019, in an unprecedented ruling in the context of corporate criminal FCPA resolutions, Judge Nicholas Garaufis of the Eastern District of New York found that the former shareholders of Africo were entitled to restitution as victims.

The former Africo shareholders alleged that as a result of Och-Ziff's misconduct, Africo lost control over a mine in the Democratic Republic of Congo. Specifically, the shareholders alleged that Och-Ziff engaged in a multi-pronged conspiracy concerning a third party's efforts to obtain the mining rights that included Och-Ziff making a low offer to acquire Africo in June 2008, which the Africo shareholders ultimately accepted.[522]

The court held that the former Africo shareholders were "victims" under the Mandatory Victims Restitution Act (MVRA), because the act defines "victim" broadly, does not contain a "carve-out for holders of intangible property rights," and because when the former Africo shareholders endorsed the Och-Ziff takeover, they did so "under duress . . . ."[523] In so holding, the court rejected Och-Ziff's arguments that the former shareholders' interest in the mining rights did not constitute "property" under the MVRA, and that the theft of the mining rights was not the direct and proximate cause of the Africo takeover.[524]

Notably, the court also held that because Och-Ziff "pleaded guilty to a single conspiracy, spanning from 2005 to 2015,"[525] it was liable for restitution for harm caused before it joined the conspiracy (which the US government argued occurred in December 2007), because it knew or should have known of its co-conspirators' prior acts in furtherance of the conspiracy at the time it joined.[526]

On September 6, 2019, Och-Ziff filed a motion for reconsideration of the Court's Order, arguing that it was "premised on a mistake of fact" in that Africo is not a defunct company and thus could not be a victim under the MVRA.[527] The motion has been fully briefed but has not been acted on. In the meantime, because the parties' initial briefing did not fully address the calculation of the amount owed in restitution to the former Africo shareholders, Judge

[519] *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017).
[520] Securities Fraud Enforcement and Investor Compensation Act, S. 799, § 2(a)(3).
[521] 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).
[522] *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-515-NGG, 2019 WL 419904, at *1-2 (E.D.N.Y. Aug. 29, 2019).
[523] *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-515-NGG, 2019 WL 419904, at *6 (E.D.N.Y. Aug. 29, 2019).
[524] *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-515-NGG, 2019 WL 419904, at *5 (E.D.N.Y. Aug. 29, 2019).
[525] *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-515-NGG, 2019 WL 419904, at *7 (E.D.N.Y. Aug. 29, 2019).
[526] *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-515-NGG, 2019 WL 419904, at *7 (E.D.N.Y. Aug. 29, 2019).
[527] Memorandum in Support of Def.'s Mot. for Reconsideration, *United States v. OZ Afr. Mgmt. GP, LLC*, 16-515, at 3 (E.D.N.Y. Sept. 6, 2019)

Garaufis asked for supplemental briefing on that issue.[528] That briefing and discovery motions related to the restitution claim remain ongoing.

On December 9, 2019, Och-Ziff filed a motion for discovery, asking the court to subpoena the investors' valuation expert and to identify the individual claimants so their alleged losses can be assessed on a case-by-case basis. Och-Ziff also seeks information about the valuation of Africo's securities in order to calculate the value of the mining rights between 2006 and the present, and information about any other problems with the mine's development.[529]

2. Government-as-Victim Cases

2019 has also seen instances where foreign governments have sought restitution as putative victims of FCPA violations. If such claims succeed, they could have a significant impact on FCPA enforcement, as they would likely embolden more governments to pursue restitution claims in FCPA cases. Below are representative examples of such actions.

a. United States v. Ortega (PDVSA)

On April 2, 2019, a third party purporting to represent the government of Venezuela (the "Maduro Government") moved to be recognized as a victim in this action and for restitution for Venezuela's alleged losses as a result of an alleged scheme whereby defendants embezzled funds from Venezuelan state-owned oil company, PDVSA, using Miami, Florida real estate and other false investment schemes.[530] In the underlying matter, the government alleged that Abraham Edgardo Ortega—who is a Venezuelan national and former executive director of finance at PDVSA—was one of the co-conspirators in the scheme.[531] Ortega pleaded guilty to one count of conspiracy to commit money laundering on October 31, 2018.[532] On September 23, 2019, the court ordered Ortega to forfeit $2 millions of dollars in assets.[533] Ortega is scheduled to be sentenced on March 12, 2020.[534]

In its motion, the Maduro Government asserted that nothing in the MVRA prevents a foreign government from being a victim entitled to restitution and that the PDVSA bribery scheme resulted in significant monetary losses to Venezuela.[535] The US government filed its opposition to the motion on May 17, 2019, on a single ground: that the United States does not recognize the Maduro Government as the legitimate government of Venezuela.[536] As a result, the US government argued, the Maduro Government does not have any authority to bring claims on Venezuela's behalf, and consideration by the court of the Maduro Government's motion would constitute recognition of a foreign power by the judiciary, a decision that is reserved for the executive branch.[537] The motion is still pending and a hearing has not yet been scheduled.

In another case, *PDVSA US Litigation Trust v. Lukoil Pan Americas LLC*, a US litigation trust brought similar claims on behalf of PDVSA itself, alleging that the defendants (including major oil companies and individual traders) conspired to bribe PDVSA officials and its affiliates, fix prices, and rig bids submitted to PDVSA.[538] On March 8, 2019 the Florida district court dismissed the claims due to the trust's failure to establish standing.[539]

b. United States v. Escobar (PetroEcuador)

On September 20, 2019, Magistrate Judge Alicia Otazo-Reyes of the Southern District of Florida recommended that the District Court deny PetroEcuador's request to be treated as a victim of, and to obtain

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[528] *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-515-NGG, 2019 WL 419904, at *1 (E.D.N.Y. Aug. 29, 2019).
[529] Memorandum of Law in Support of OZ Africa Management GP LLC's Motion for Discovery Under Federal Rule of Civil Procedure 17(c), *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-515-NGG (E.D.N.Y. Dec. 9, 2019).
[530] Mot. Victim Status & Restitution, *United States v. Ortega*, No. 18-CR-20685 (S.D. Fla. Apr. 2, 2019).
[531] Complaint, *United States v. Ortega*, No. 18-CR-20685 (S.D. Fla. July 24, 2018).
[532] 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. 18, 2019).
[533] Final Order on Restitution, *United States v. Ortega*, No. 18-CR-20685 (S.D. Fla. Sept. 23, 2019).
[534] *United States v. Guruceaga et. al.*, No. 18-CR-20685, Dkt. #139 (S.D. Fla. Sept. 10, 2019).
[535] Mot. Victim Status & Restitution, *United States v. Ortega*, No. 18-CR-20685, at 8–10 (S.D. Fla. Apr. 2, 2019).
[536] Opp'n Mot. Victim Status & Restitution, *United States v. Ortega*, No. 18-CR-20685, at 1–2 (S.D. Fla. May 17, 2019).
[537] Opp'n Mot. Victim Status & Restitution, *United States v. Ortega*, No. 18-CR-20685, at 4–6 (S.D. Fla. May 17, 2019).
[538] Compliant, *PDVSA US Litigation Trust v. Lukoil Pan Americas LLC*, No. 18-CV-20818 (S.D. Fla. Mar. 3, 2018).
[539] Order, *PDVSA US Litigation Trust v. Lukoil Pan Americas LLC*, No. 18-CV-20818 (S.D. Fla. Mar. 8, 2019).

restitution for, a bribery scheme carried out by its own employees.[540] In making this recommendation, the court noted that the US government's opposition did not contest PetroEcuador's potential victim status under the MVRA; instead, the government argued, and Magistrate Judge Otazo-Reyes agreed, that PetroEcuador "cannot be deemed a victim" because it was "complicit in the bribery and money laundering schemes that gave rise to . . . criminal prosecution[]."[541]

PetroEcuador contended that it was not itself prosecuted, and that only a small fraction of its employees had been prosecuted for corrupt acts that did not benefit the company.[542] However, Judge Otazo-Reyes found that high-level employees of PetroEcuador were involved in the bribery—all the way up to the company's board of directors—that a number of employees involved in corruption had not been prosecuted, and that the investigation was still ongoing in Ecuador.[543] Accordingly, Judge Otazo-Reyes concluded that "the level of 'pervasive, constant, and consistent illegal conduct' among EP PetroEcuador's principals was sufficient to preclude [it] from being recognized as a victim under the MVRA."[544] The District Court has not yet acted upon Judge Otazo-Reyes' Report and Recommendation.

B. Shareholder Lawsuits

Throughout the year, companies undergoing FCPA investigations were also subjected to shareholder lawsuits claiming that the companies' directors breached their fiduciary duties by failing to prevent bribery and by failing to disclose allegedly corrupt conduct that damaged investors. Below are illustrative instances of such suits.

1. Cobalt International Energy Inc. Shareholder Litigation

On February 13, 2019, a judge in the US District Court for the Southern District of Texas approved a combined $173.8 million settlement in a consolidated class action lawsuit against Cobalt International Energy Inc. stemming from alleged bribery in Angola.[545]

In the lawsuit, which was originally filed in November 2014 and was amended in May 2015 and May 2017, a class of investors alleged that Cobalt failed to disclose that it allegedly bribed Angolan officials to gain access to local oil wells in violation of the FCPA and federal securities laws, that Cobalt shares declined when the Company disclosed the DOJ and SEC investigations into that conduct, and that Cobalt had overstated the amount of oil in certain wells.[546]

Although the DOJ and SEC have since dropped their investigations, the investor litigation has continued since 2014. In late 2018, the investors finally reached settlements with three groups of defendants they claimed were involved in the alleged wrongdoing, with the court finally approving the following combined settlements on February 13, 2019: $146.9 million resolving allegations against a group of defendants, including Goldman Sachs Group Inc., that owned significant stakes in Cobalt;[547] $22.75 million resolving allegations against investment banks that underwrote stock and note offerings for Cobalt;[548] and $4.2 million resolving allegations with Cobalt and its debtor affiliates.[549]

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[540] Report & Recommendation, *United States v. Escobar*, No. 18-CR-20596, at 1 (S.D. Fla. Sept. 20, 2019).
[541] Report & Recommendation, *United States v. Escobar*, No. 18-CR-20596, at 19 (S.D. Fla. Sept. 20, 2019).
[542] Report & Recommendation, *United States v. Escobar*, No. 18-CR-20596, at 20 (S.D. Fla. Sept. 20, 2019).
[543] Report & Recommendation, *United States v. Escobar*, No. 18-CR-20596, at 20–21 (S.D. Fla. Sept. 20, 2019).
[544] Report & Recommendation, *United States v. Escobar*, No. 18-CR-20596, at 21 (S.D. Fla. Sept. 20, 2019) (quoting *In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G, 11-12708-G (11th Cir. June 17, 2011)).
[545] Order Approving Plan of Allocation of Net Settlement Fund, *In re Cobalt International Energy, Inc. Sec. Litig.*, No. 1:14-CV-3428 (S.D. Tex. Feb. 13, 2019).
[546] Second Consolidated Amended Class Action Complaint, *In re Cobalt International Energy, Inc. Sec. Litig.*, No. 1:14-CV-3428 (S.D. Tex. Mar. 15, 2017).
[547] Judgement Approving Class Action Settlement with the Sponsor Defendants, the Sponsor Designee Defendants, and Goldman Sachs & Co., *In re Cobalt International Energy, Inc. Sec. Litig.*, No. 1:14-CV-3428 (S.D. Tex. Feb. 13, 2019).
[548] Judgement Approving Class Action Settlement Between Plaintiffs and Underwriter Defendants Other than Goldman Sachs & Co. LLC, *In re Cobalt International Energy, Inc. Sec. Litig.*, No. 1:14-CV-3428 (S.D. Tex. Feb. 13, 2019).
[549] Judgement Approving Class Action Settlement Among the Plaintiffs, Cobalt Individual Defendants, and Nader Tavakoli, Solely Acting as Plan Administrator on Behalf of the Cobalt Debtors., *In re Cobalt International Energy, Inc. Sec. Litig.*, No. 1:14-CV-3428 (S.D. Tex. Feb. 13, 2019).

2. Mobile Telesystems PJSC Shareholder Litigation

In March 2019, immediately following settlements with both the SEC and DOJ that totaled penalties of $850 million,[550] shareholders of MTS filed a class action lawsuit in the Eastern District of New York alleging that the company, its officers, and directors failed to disclose an alleged bribery scheme in Uzbekistan, and failed to disclose that it would be forced to pay substantial fines to the US government after disclosing the DOJ and SEC investigations in 2014.[551]

Plaintiffs filed an Amended Complaint on November 12, 2019.[552] The case is pending, and no substantive motions have been filed at this time.

3. In re General Cable Corp. Securities Litigation

On May 1, 2019 a federal judge in Kentucky dismissed a lawsuit against General Cable Corporation, finding that the investors had not shown that the company knowingly lied about its compliance with anti-corruption laws.[553] The lawsuit, filed shortly after the company agreed to pay more than $74 million to resolve SEC and DOJ investigations, alleged that the company and two of its executives made material misrepresentations and omissions relating to bribes paid through subsidiaries to foreign government officials.[554]

Among other things, the court held that plaintiffs did not allege sufficient facts to support their claims that the company knew that its overseas operations risked relying on corrupt business practices and therefore that it could not have disclosed more information to investors.[555]

4. Cemex Shareholder Litigation

On July 12, 2019, a judge in the Southern District of New York dismissed a securities class action brought by investors against Cemex, S.A.B. de C.V. (Cemex) and two of its officers.[556] The lawsuit, which was originally filed in March 2018, followed the company's disclosures that the DOJ and SEC were investigating its operations in Colombia.[557] The investors alleged that Cemex concealed a "culture of corruption" at its Colombian branch in connection with the development of a new cement plant and that by not disclosing alleged bribery, the company made misleading statements and omissions in violation of federal securities laws.[558]

The court held that the majority of Cemex's statements were "classic puffery" and therefore not misleading.[559] And, although the court held that plaintiffs sufficiently alleged an omission with respect to the company's statements regarding ongoing litigation in Colombia related to bribery, plaintiffs failed to allege scienter.[560]

The court allowed plaintiffs leave to amend the complaint,[561] which they did on August 1, 2019.[562] Cemex filed a motion to dismiss on September 5, 2019. A hearing on the motion has not yet been scheduled. The SEC and DOJ investigations into Cemex are ongoing.

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[550] US Securities and Exchange Commission Press Release No. 2019-27: Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019); US Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019).
[551] Complaint, *Salim v. Mobile TeleSystems Pjsc et al.*, No. 1:2019-cv-01589 (E.D.N.Y. Mar. 19, 2019).
[552] Amended Complaint, *Salim v. Mobile TeleSystems Pjsc et al.*, No. 1:2019-cv-01589 (E.D.N.Y. Nov. 12, 2019).
[553] Order, *Doshi v. General Cable Corp, et al.*, No. 2:17-CV-25 (E.D. Ky. Apr. 30, 2019).
[554] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 57 (Jan. 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[555] Order, *Doshi v. General Cable Corp, et al.*, No. 2:17-CV-25, at 17-18 (E.D. Ky. Apr. 30, 2019).
[556] Order, *Schiro v. Cemex, S.A.B. de C.V.*, No. 18-CV-2352-VEC (S.D.N.Y. July 12, 2019).
[557] Christine Murray, *Mexico's Cemex says under U.S. DOJ investigation*, REUTERS, Mar. 14, 2018, https://www.reuters.com/article/us-cemex-investigation/mexicos-cemex-says-under-u-s-doj-investigation-idUSKCN1GQ1WZ.
[558] Complaint, *Schiro v. Cemex*, *S.A.B. de C.V.*, No. 18-CV-2352-VEC (S.D.N.Y. Mar. 16, 2018).
[559] Order, *Schiro v. Cemex, S.A.B. de C.V.*, No. 18-CV-2352-VEC, at 11, 18 (S.D.N.Y. July 12, 2019).
[560] Order, *Schiro v. Cemex, S.A.B. de C.V.*, No. 18-CV-2352-VEC, at 11, 14, 18 (S.D.N.Y. July 12, 2019).
[561] Order, *Schiro v. Cemex, S.A.B. de C.V.*, No. 18-CV-2352-VEC, at 16, 29 (S.D.N.Y. July 12, 2019).
[562] Complaint, *Schiro v. Cemex*, *S.A.B. de C.V.*, No. 18-CV-2352-VEC (S.D.N.Y. Aug. 1, 2019).

5. OSI Systems Shareholder Litigation

In February 2018, OSI Systems, Inc. (OSI) disclosed that the SEC and DOJ had opened investigations into allegations in a short-seller report that OSI and its subsidiaries were corruptly obtaining lucrative contracts in Albania.[563] Shareholders of OSI filed an amended class action in the US District Court for the Central District of California in June 2019, following dismissal of the initial class action on May 7, 2019.[564] The lawsuit alleges that OSI misled investors by concealing the dealings of its Albanian subsidiary. Most notably, plaintiffs allege that OSI concealed that the Company's Albanian turnkey contact was "subject to a secret and corrupt arrangement" whereby OSI covertly transferred 49% of its Albanian subsidiary to an Albanian holding company with ties to the outgoing Albanian government for a price of only $4.50 per share.[565]

OSI Systems filed a motion to dismiss on July 24, 2019. The motion is fully briefed and the parties are waiting for a decision.[566] While that action remains pending, OSI announced on June 5, 2019 that the government investigations were closed. [567] Neither the US authorities nor the company have commented on why the investigations were closed, but OSI reported in 2018 that it had "taken action with respect to a senior-level employee" implicated in the matter, highlighted the company's "high priority on compliance with its anti-corruption and securities trading polices," and expressed its commitment to cooperating with the SEC and DOJ investigations.[568]

6. Glencore Investor Lawsuit

Following the December 5, 2019 announcement that the UK'S Serious Fraud Office (SFO) is investigating Glencore Plc for bribery, institutional investors of Glencore announced a lawsuit alleging share price declines from that investigation, as well as similar investigations in the United States and Canada.[569] The investors said that they expect to file the lawsuit in the first quarter of 2020 for damages under the Financial Services and Markets Act 2000.[570] A US shareholder class action was previously filed in 2018 after the company disclosed an investigation by the DOJ in July 2018.[571]

C. Whistleblower Rewards

In 2019, the SEC used a provision in the whistleblower regulations for the first time to credit a whistleblower for reporting the allegations *to the company first* and then to the SEC. Rule 21F-4(c)(3) provides that if a whistleblower reports information through a company's compliance or legal program, before or at the same time that he or she reports the information to the SEC, and the company later provides the information to the SEC, the whistleblower may be eligible for an award.[572] By allowing whistleblowers to be compensated for internal reports of wrongdoing, the SEC seeks to encourage the use of internal compliance programs.[573]

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[563] Kelly Swanson, *US Probes Tech Company after Investment Firms' FCPA Allegations*, GLOBAL INVESTIGATIONS REVIEW, Feb. 13, 2018, https://globalinvestigationsreview.com/article/jac/1153341/us-probes-tech-company-after-investment-firm%E2%80%99s-fcpa-allegations; OSI Systems, Inc., Current Report (SEC Form 8-K) (Feb. 1, 2018), *available at:* https://investors.osi-systems.com/static-files/68e98b67-c594-48f2-9e31-ba99498c56fd.

[564] First Amended Consolidated Class Action Complaint, *Cory Longo v. OSI Systems, Inc. et al.,* No. 17-CV-08841-VAP-SKx (C.D. Cal. June 13, 2019).

[565] First Amended Consolidated Class Action Complaint, *Cory Longo v. OSI Systems, Inc. et al.,* No. 17-CV-08841-VAP-SKx, ¶¶ 11-12 (C.D. Cal. June 13, 2019).

[566] Docket Entry No. 99, *Cory Longo v. OSI Systems, Inc. et al.,* No. 17-cv-08841-VAP-SKx (C.D. Cal. Nov. 18, 2019).

[567] OSI Systems, Inc. Press Release: OSI Systems Notified That U.S. DOJ and SEC FCPA Inquiries Have Been Closed (June 5, 2019), https://investors.osi-systems.com/news-releases/news-release-details/osi-systems-notified-us-doj-and-sec-fcpa-inquiries-have-been.

[568] OSI Systems, Inc., Current Report (SEC Form 8-K) (Feb. 1, 2018), *available at:* https://investors.osi-systems.com/static-files/68e98b67-c594-48f2-9e31-ba99498c56fd.

[569] Glencore News Release: Investigation by the Serious Fraud Office (Dec. 5, 2019); SFO UK Serious Fraud Office News Release: SFO confirms investigation into suspected bribery at Glencore group of companies (Dec. 5, 2019); Franz Wild, *Glencore Investors to Sue for Billions Over Probes, Boies Says*, BLOOMBERG, Dec. 5, 2019, https://www.bloomberg.com/news/articles/2019-12-05/glencore-investors-to-sue-for-billions-over-probes-boies-says-k3tgyo42.

[570] Will Barbieri, *Glencore investors sue over investigations related share price drop*, GLOBAL INVESTIGATIONS REVIEW, Dec. 6, 2019, https://globalinvestigationsreview.com/article/1211815/glencore-investors-sue-over-investigations-related-share-price-drop.

[571] Class Action Complaint, *Church v. Glencore Plc, et al.*, No. 18-CV-11477 (D.N.J. July 9, 2018).

[572] Order Determining Whistleblower Award Claim, *In the Matter of the Claim for Award in connection with [Redacted]*, Rel. No. 85936, File No. 2019-6 (May 24, 2019), https://www.sec.gov/rules/other/2019/34-85936.pdf.

[573] Order Determining Whistleblower Award Claim, *In the Matter of the Claim for Award*

On May 24, 2019, the SEC announced a $4.5 million award to a Brazilian surgeon who sent an anonymous email to medical device company Zimmer Biomet, alerting the company to a kickback scheme in Brazil.[574] The surgeon's email prompted an internal investigation and, subsequently, a report of the company's findings to the SEC and DOJ. Zimmer Biomet self-reported the wrongdoing and ultimately settled with the SEC and the DOJ in January 2017 for over $30 million to resolve charges that it bribed Mexican officials and had internal controls failures in Mexico and Brazil.[575] Although Zimmer Biomet fully cooperated with the investigation, because at the time it was already being monitored pursuant to a prior FCPA settlement, the DOJ required the company to retain an independent compliance monitor for three years.[576]

SEC whistleblowers can be awarded between 10% and 30% of penalties over $1 million.[577] In this case, the SEC awarded the whistleblower 15% of the total 2017 fine due to the agency's "high enforcement interest" in this case, which the SEC attributed to the fact that: (1) the conduct occurred outside the United States; and (2) the case involved a company violating the terms of an earlier settlement.[578] With this award, the SEC has now awarded $381 million to 62 individuals since issuing its first whistleblower award in 2012.[579]

D. Civil Forfeiture

The DOJ's Kleptocracy Asset Recovery Initiative, administered through the Criminal Division's Money Laundering and Asset Recovery Section (MLARS), obtained its largest recovery to date, and the largest civil forfeiture ever, in 2019.[580]

On October 30, 2019, the DOJ reached an agreement to retrieve more than $700 million in assets from Malaysian financier Low Taek Jho (popularly known as Jho Low), for using funds misappropriated from 1MDB, Malaysia's investment development fund, for luxury US real estate, one-of-a-kind art, and gambling.[581] The terms of this settlement total over $1 billion in assets associated with the 1MDB scheme.[582] The DOJ's related criminal case against Low, who is charged with embezzlement and money laundering in the Eastern District of New York, remains outstanding.

E. International Arbitration

1. Petrobras Securities Litigation

On July 30, 2019, a judge in the Southern District of New York declined to order Petrobras to produce documents containing confidential information, previously filed under seal in a class action stemming from a bribery scheme, in a foreign arbitration.[583] The court held that it did not have authority to order Petrobras to turn over

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in connection with [Redacted], Rel. No. 85936, File No. 2019-6 (May 24, 2019), https://www.sec.gov/rules/other/2019/34-85936.pdf.

[574] Order Determining Whistleblower Award Claim, *In the Matter of the Claim for Award in connection with [Redacted]*, Rel. No. 85936, File No. 2019-6 (May 24, 2019), https://www.sec.gov/rules/other/2019/34-85936.pdf.

[575] US Securities and Exchange Commission Press Release No. 2017-8: Biomet Charged With Repeating FCPA Violations (Jan. 12, 2017); US Department of Justice Press Release No. 17-045: Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017).

[576] US Department of Justice Press Release No. 17-045: Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017).

[577] Order Determining Whistleblower Award Claim, *In the Matter of the Claim for Award in connection with [Redacted]*, Rel. No. 85936, File No. 2019-6 (May 24, 2019), https://www.sec.gov/rules/other/2019/34-85936.pdf.

[578] Order Determining Whistleblower Award Claim, *In the Matter of the Claim for Award in connection with [Redacted]*, Rel. No. 85936, File No. 2019-6 (May 24, 2019), https://www.sec.gov/rules/other/2019/34-85936.pdf.

[579] US Securities and Exchange Commission Press Release No. 2019-76: SEC Awards $4.5 Million to Whistleblower Whose Internal Reporting Led to Successful SEC Case and Related Action (May 24, 2019).

[580] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference.

[581] US Department of Justice Press Release No. 91-1176: United States Reaches Settlement to Recover More Than $700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund (Oct. 20, 2019).

[582] US Department of Justice Press Release No. 91-1176: United States Reaches Settlement to Recover More Than $700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund (Oct. 20, 2019); Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference.

[583] Order, *In re Petrobras Securities Litigation*, No. 1:14-CV-09662 (S.D.N.Y. July 30, 2019).

documents, which were sought by Cornell University, because the conduct at issue in the foreign arbitration arose from conduct entirely outside the forum, and because Brazil's privately established arbitration chamber is not a "foreign or international tribunal" under the statutory language of 28 U.S.C. § 1782(a), which would allow the court to order discovery.[584] However, the court held that certain documents filed in connection with a summary judgment motion could be unsealed because they were "judicial documents" subject to public disclosure.[585]

Although Cornell was a member of the class of Petrobras shareholders that initiated the underlying class action, which alleged that Petrobras misled shareholders by failing to disclose a bribery scheme in which executives inflated the value of projects in return for kickbacks, Cornell's claims were dismissed in 2015. Following the dismissal of its claims, Cornell initiated arbitration in Brazil.[586]

F. Other Collateral Actions

1. IMSS v. Stryker Corp.

On October 18, 2019, the Instituto Mexicano del Seguro Social (IMSS), an agency of the Mexican government, filed suit against Stryker Corporation in the Western District of Michigan to recover for Stryker's alleged corrupt conduct in contracting with IMSS between 2003 and 2015.[587] The lawsuit stems from the same corruption allegations that resulted in a $13.2 million settlement between Stryker and the SEC in 2013.[588] According to the complaint, Stryker engaged in a worldwide pattern of bribery to sell its medical devices to foreign governments between 2003 and 2015.[589] In Mexico, IMSS alleges that Stryker's Mexican subsidiary paid tens of thousands of dollars in bribes to individual IMSS officials in order to illicitly obtain IMSS contracts, netting Stryker over $2.1 million in profits.[590] Representing that it acted in reliance on Stryker's fraudulent representations and paid artificially inflated prices for its contracts with Stryker,[591] IMSS brings claims under US and Mexican law for breach of fiduciary duty and fraud, as well as a claim under Mexican law for violation of the law of acquisitions, leases, and services of the public sector.[592]

VI. INTERNATIONAL DEVELOPMENTS

A. United Kingdom

1. Investigation and Enforcement Trends

The year 2019 marks the first full year of Lisa Osofsky's tenure as Director of the Serious Fraud Office (SFO). Successful prosecutions have been few thus far, and Ms. Osofsky has spoken of the difficulties the SFO faces in gathering sufficient evidence to prosecute misconduct that may have taken place years previously and to clear the high bar required for successful conviction.[593] Accordingly, 2019 has fallen short of expectations in terms of positive results in the sphere of bribery and corruption.

No deferred prosecution agreements (DPAs) were reached in 2019 in relation to bribery offenses, and the SFO has continued to face difficulties in prosecuting individuals. As detailed below, the SFO has tried and failed to obtain convictions in the first and only prosecution brought against individuals for corruption offenses where their former employers had agreed to DPAs. It will be interesting to observe the extent to which individuals continue to be pursued by the SFO where their cases are linked to successfully concluded DPAs. A March 2019 House of Lords

[584] Order, *In re Petrobras Securities Litigation*, No. 1:14-CV-09662, at 3, 14, 20 (S.D.N.Y. July 30, 2019).
[585] Order, *In re Petrobras Securities Litigation*, No. 1:14-CV-09662, at 21 (S.D.N.Y. July 30, 2019).
[586] Order, *In re Petrobras Securities Litigation*, No. 1:14-CV-09662, at 1-2 (S.D.N.Y. July. 30, 2019).
[587] *See* Complaint, *Instituto Mexicano del Seguro Social v. Stryker Corp.*, No. 19-CV-857 (W.D. Mich. Oct. 18, 2019).
[588] *See* Complaint, *Instituto Mexicano del Seguro Social v. Stryker Corp.*, No. 19-CV-857, ¶ 2 (W.D. Mich. Oct. 18, 2019); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Striker Corp.*, Rel. No. 70751, File No. 3-15587 (Oct. 24, 2013).
[589] Complaint, *Instituto Mexicano del Seguro Social v. Stryker Corp.*, No. 19-cv-857, ¶¶ 16, 18, 20 (W.D. Mich. Oct. 18, 2019).
[590] Complaint, *Instituto Mexicano del Seguro Social v. Stryker Corp.*, No. 19-cv-857, ¶¶ 20–22, 32–34 (W.D. Mich. Oct. 18, 2019).
[591] Complaint, *Instituto Mexicano del Seguro Social v. Stryker Corp.*, No. 19-cv-857, ¶¶ 28–40 (W.D. Mich. Oct. 18, 2019).
[592] Complaint, *Instituto Mexicano del Seguro Social v. Stryker Corp.*, No. 19-cv-857, ¶¶ 42–57 (W.D. Mich. Oct. 18, 2019).
[593] Lisa Osofsky, Director, UK Serious Fraud Office, Remarks at the Cambridge Symposium on Economic Crime 2019 (Sept. 2, 2019), https://www.sfo.gov.uk/2019/09/02/cambridge-symposium-2019/.

report on the Bribery Act 2010 concluded that the DPA process should not be considered as an alternative to individual prosecutions but should in fact make it all the more important that culpable individuals are prosecuted.[594]

We expect the SFO to target lower-profile cases against individuals to improve its prosecution figures and we may also see a shift in tactics to a "plea bargain" approach whereby individual suspects may be offered greatly reduced sentences (i.e., in excess of 50-75%) in return for guilty pleas and full cooperation in the investigation of other individuals or companies.[595] It remains to be seen whether suspects will be willing to submit to the risks of bargaining with the SFO, including the admissibility of all statements made in interviews should the deal collapse.

2. Significant Cases

In February 2019, the SFO announced the closure of its long-running investigations into GlaxoSmithKline PLC and into individuals associated with Rolls-Royce PLC.[596] These simultaneous decisions came as a surprise to many, particularly in the wake of the DPA that was agreed between the SFO and Rolls-Royce in 2017. The SFO explained its decision by noting that these cases either lacked sufficient evidence or that there were public interest justifications for avoiding a trial, such as the age or ill health of some of the suspects. This statement by Osofsky appears to signal that her organization will be more discerning in its pursuit of convictions, focusing on those which the SFO believes it is most likely to win.

On June 3, 2019, FH Bertling Ltd (FH Bertling) was sentenced to an £850,000 (approximately $1.1 million) fine in connection with a bribery scheme intended to secure freight forwarding contracts worth approximately $20 million in Angola by paying bribes totaling $350,000.[597] The fine marks the end of the SFO's investigation into FH Bertling's Angola operations, which also saw three individuals convicted, and one individual acquitted, of conspiracy to make corrupt payments in 2017 and a further two individuals convicted in relation to the same scheme in late 2018. FH Bertling, now in liquidation, has been the focus of SFO probes into contracts in the North Sea and Angola for over five years.

On July 16, 2019, a London jury acquitted three individuals in the SFO's investigation into Sarclad Ltd (Sarclad), in relation to allegations of conspiracy to corrupt and conspiracy to bribe in relation to 27 overseas contracts.[598] Sarclad, formerly known only as XYZ Ltd due to reporting restrictions, was the subject of the UK's second-ever DPA, in 2016, under which the company accepted that it had failed to prevent corrupt payments over an eight-year period.[599] The acquittal in 2019 means that, despite the SFO concluding five DPAs – three of which relate to bribery offenses – since their introduction in 2014, it has failed to convict any individuals involved in the wrongdoing to which they relate.

On November 25, 2019, the SFO's sprawling investigation into French engineering company Alstom came to a close with a UK subsidiary of the company, Alstom Network UK Ltd, ordered to pay $21.2 million – consisting of a $19.4 million fine and $1.8 million in costs – for conspiracy to corrupt in connection with a contract to supply trams in Tunisia.[600] The penalty is the final chapter of the SFO's decade-long, multi-pronged probe into the company, which covered numerous jurisdictions and has seen three individuals and two companies convicted of conspiracy to corrupt. A further five individuals were acquitted of bribery-related charges in connection with the Alstom contracts in India, Poland, and Hungary.

In December 2019, three individuals associated with Güralp were acquitted of conspiring to make corrupt payments to a South Korean public official between 2002 and 2015.[601] Marking something of a trend, the acquittals

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[594] Parliament of the United Kingdom and Northern Ireland, *The Bribery Act 2010: post-legislative scrutiny* (Mar. 14, 2019), https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/30302.htm.
[595] This option is available to the SFO under section 73 of the Organised Crime and Police Act 2005.
[596] SFO News Release, *SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals* (Feb. 22, 2019), https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/.
[597] SFO News Release, FH Bertling sentenced for $20m Angolan bribery scheme (June 3, 2019), https://www.sfo.gov.uk/2019/06/03/fh-bertling-sentenced-for-20m-angolan-bribery-scheme/.
[598] SFO News Release, Three individuals acquitted as SFO confirms DPA with Sarclad (July 16, 2019), https://www.sfo.gov.uk/2019/07/16/three-individuals-acquitted-as-sfo-confirms-dpa-with-sarclad/.
[599] SFO News Release, SFO secures second DPA (July 8, 2016), https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/.
[600] SFO News Release, Court orders Alstom Network UK Ltd to pay £16.4 million (Nov. 25, 2019) https://www.sfo.gov.uk/2019/11/25/sfos-alstom-case-concludes-with-sentencing-of-alstom-network-uk-ltd/.
[601] SFO News Release, Three individuals acquitted as SFO confirms DPA with Güralp Systems Ltd. (Dec. 20, 2019), https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/

followed a DPA agreed between the SFO and Güralp in October 2019 in which the company accepted the charges of conspiracy to make corrupt payments and a failure to prevent bribery by employees. These results may give greater pause for thought to companies invited to enter into DPA negotiations, who will note the difficulty the SFO has encountered in actually securing corruption-related convictions.

And finally, as noted above, the SFO announced on December 5 that it had opened an investigation into Glencore in relation to "suspicions of bribery in the conduct of business by the Glencore group of companies, its officials, employees, agents and associated persons."[602]

3. Legislative Developments

February 2019 saw the enactment of the Crime (Overseas Production Orders) Act 2019 a new piece of legislation aimed at enabling authorities to quickly obtain relevant evidence held overseas.[603] The act provides a mechanism by which an application can be made to the Crown Court for an overseas production order, requiring a person based overseas to produce or give access to electronic data regardless of where it is stored. Given that previously the only sure-fire way to obtain such evidence would be through the time-consuming and cumbersome MLAT process, the act could, theoretically, have a significant impact on the speed with which investigations can be concluded. Practitioners will be on the lookout in 2020 to see how often, and in what situations, the SFO and other agencies deploy this new tool.

4. SFO Guidance

On August 6, 2019, the SFO published its long-awaited Corporate Co-operation Guidance (Guidance). The Guidance is designed to assist companies when considering whether to self-report corporate wrongdoing to the SFO and, if they choose to do so, how to secure as much co-operation credit as possible in order to maximize chances of avoiding prosecution or receiving the opportunity to negotiate a DPA.[604] Covering the SFO's position on key themes such as data gathering and production, dealing with witnesses to and subjects of investigations, and the assertion of legal professional privilege, the Guidance is designed, as its name suggests, to guide companies in the direction of effective co-operation. The Guidance provides practical assistance to companies hoping to navigate the complex co-operation process, possibly paving the way for an uptick in self-reporting and more successful DPA negotiations.

B. Germany

1. Enforcement Efforts

In October 2019, the Frankfurt public prosecutor confirmed that it has initiated investigations against several employees of Fresenius Medical Care, a German headquartered medical services company.[605] The investigation relates to the same conduct that was the subject of the company's 2019 DOJ and SEC settlement, alleging that between 2007 and 2016 physicians and hospital managers in 17 countries were bribed to obtain advantages in the establishment of dialysis clinics as well as the purchase of dialysis products.[606] See further information about the Fresenius case at Section III.A.3.

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[602] SFO News Release, SFO confirms investigation into suspected bribery at Glencore group of companies (Dec. 5, 2019), https://www.sfo.gov.uk/2019/12/05/sfo-confirms-investigation-into-suspected-bribery-at-glencore-group-of-companies/.
[603] The full text of the act can be found at: http://www.legislation.gov.uk/ukpga/2019/5/contents/enacted.
[604] A PDF download of the Corporate Co-operation Guidance can be found at: https://www.sfo.gov.uk/download/corporate-co-operation-guidance/; *See also* WilmerHale, *UK Serious Fraud Office Publishes Corporate Co-Operation Guidance* (Aug. 12, 2019) https://www.wilmerhale.com/en/insights/client-alerts/20190812-uk-serious-fraud-office-publishes-corporate-co-operation-guidance.
[605] SÜDDEUTSCHE ZEITUNG, *Korruption: Ermittlungen gegen Fresenius-Mitarbeiter*, Oct. 21, 2019, https://www.sueddeutsche.de/gesundheit/gesundheit-korruption-ermittlungen-gegen-fresenius-mitarbeiter-dpa.urn-newsml-dpa-com-20090101-191021-99-380819.
[606] SÜDDEUTSCHE ZEITUNG, *Korruption: Ermittlungen gegen Fresenius-Mitarbeiter*, Oct. 21, 2019, https://www.sueddeutsche.de/gesundheit/gesundheit-korruption-ermittlungen-gegen-fresenius-mitarbeiter-dpa.urn-newsml-dpa-com-20090101-191021-99-380819.

2. Legislative Developments

In 2018, the OECD Working Group on Bribery evaluated Germany's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[607] In its report on the evaluation, the OECD Working Group expressed concerns regarding the effectiveness of Germany's efforts to prosecute companies. It criticized the fact that that only one company out of four was held liable by German authorities in cases of foreign corruption.[608] The OECD Working Group report's recommendations included the development of transparent guidelines for self-reporting, better protections for whistleblowers, and removing the principle of prosecutorial discretion applicable to corporate liability in Germany.[609]

In their March 2018 coalition agreement, the current government parties agreed to reform the sanctions law for corporations to effectively combat corporate crime.[610] So far, the sanctioning of companies has been governed by the Act of Regulatory Offenses (*Ordnungswidrigkeitengesetz*), which gave the prosecuting authority discretion to hold a company accountable and prosecute for offenses committed by its employees.

In August 2019, the Federal Ministry of Justice and Consumer Protection presented the initial approach for the reform in a so-called Association Sanctions Act (*Verbandssanktionengesetz*) ("Draft Law"). The Draft Law has not been officially published as it is still undergoing inter-ministerial coordination.[611] The Draft Law includes significant changes regarding sanctioning of associations (which include corporations and partnerships), such as implementing potentially higher fines, but also refers to incentives to reduce such fines. Significantly, the Draft Law:

- Aims to widen the range for prosecutable corporate offenses by permitting the sanctioning of offenses conducted outside of Germany in certain circumstances.[612]
- Amends possible sanctions for corporate offenses and increases the possible penalties, including (1) through a corporate fine[613] of up to 10% of the annual group turnover;[614] (2) through a warning with a reservation to charge a corporate fine,[615] in which case the court may issue instructions in order to prevent offenses;[616] and (3) as a last resort, by the dissolution of the entity.[617] Additionally, the sanctioning may be announced publicly[618] and recorded in an administrative register.[619]
- Encourages compliance measures and internal investigations by the association, as these can be considered when determining the sanction and when calculating the amount of the corporate fine, as well as whether the offense is publicly announced.[620]
- Permits the seizure of documents before prosecutors open a case. Documents produced during an internal investigation and even documents from attorneys, which are not within the attorney-client

[607] *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Germany, 2018*, OECD, https://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf.
[608] *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Germany, 2018*, at 67, OECD, https://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf.
[609] *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Germany, 2018*, at 84 et seq., OECD, https://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf.
[610] 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*, at 126, Mar. 2018.
[611] Konstantin von Busekist, Bernd Federmann, Philipp Schiml, *Was auf Unternehmen zukommt*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 30, 2019, https://www.faz.net/einspruch/entwurf-zum-unternehmensstrafrecht-eine-uebersicht-16359829.html?GEPC=s3&premium=0xadf56df45582a11d0161c99b80143840.
[612] *See* Section 2 (2) of the Draft Law; *cf* at 75 of the reasoning to the Draft Law.
[613] *See* Section 8 No. 1 of the Draft Law.
[614] *See* Section 9 (2) No. 1 of the Draft Law; *cf* at 57 of the reasoning of the Draft Law.
[615] *See* Section 8 No. 2 of the Draft Law.
[616] *See* Section 13 (1) of the Draft Law.
[617] *See* Section 8 No. 3 of the Draft Law.
[618] *See* Section 15 of the Draft Law.
[619] *See* Section 55 of the Draft Law.
[620] *See* Section 10 (1) No. 2; Section 16 (2) Nos. 6 and 7 of the Draft Law; *cf* at 78 of the reasoning to the Draft Law; see Section 19 of the Draft Law.

relationship, may also be seized.[621] This lack of privilege raised criticism and is currently a focus of the inter-ministerial coordination process.[622]

In April 2019, the Trade Secrets Act (Gesetz zum Schutz von Geschäftsgeheimnissen—"GeschGehG") entered into force.[623] The act implements Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed knowledge and business information (trade secrets) against their unlawful acquisition, use, and disclosure.[624] In Germany, trade secrets were already protected by law before the GeschGehG came into force, but these regulations were enforced under various areas of law; the new GeschGehG consolidates prohibitions against the disclosure of trade secrets and criminal penalties for infringements into one law. The GeschGehG contains exemptions to protect whistleblowers, i.e., to detect an unlawful act, or professional, or other misconduct when the obtaining, use, or disclosure of the trade secret is likely to protect the general public interest.[625]

Additional protection for whistleblowers comes from the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report on breaches of Union law (Whistleblowing Directive).[626] A draft law has not yet been published on this subject in Germany.

C. France

1. Law Enforcement Guidance

The year 2019 has been an important year in marking the path forward for France's DPA regime, as French enforcement authorities issued new guidance on eligibility for DPAs. On June 27, the French National Financial Prosecutor's Office (PNF) and the French Anti-Corruption Agency (AFA) published their first-ever joint guidelines about application of France's DPA regime, which was implemented in 2016.[627] The guidelines set out the conditions under which the PNF will enter into a "*Convention Judiciare d'Intérêt Public*" (CJIP)—the French equivalent of a DPA—pursuant to the 2016 anti-corruption law known as "Sapin II."[628] Although the French Ministry of Justice issued some guidance on the application of Sapin II in January 2018, the 2019 PNF/AFA Guidelines (Guidelines) provide additional guidance on when companies should expect the PNF to pursue a CJIP in lieu of formal prosecution.[629]

The 2019 Guidelines cover three key areas of concern for companies that are seriously considering pursuing a CJIP with the PNF: (1) conditions under which the PNF will consider entering into a CJIP; (2) factors that the PNF will weigh in determining fines that will be imposed under the CJIP; and (3) the type of monitoring that companies can expect following a CJIP.[630] While the PNF retains complete discretion in deciding whether to enter into a CJIP, the Guidelines state that the following factors weigh in favor of pursuing a CJIP: (i) the PNF has been able to collect sufficient evidence of wrongdoing, such that it could pursue formal prosecution if a CJIP is unsuccessful; (ii) the company under investigation has not previously been convicted of acts of corruption or entered into a CJIP for the acts in question; (iii) the company under investigation fully cooperates with the PNF—which

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[621] *Cf* at 137 and 138 of the reasoning to the Draft Law.
[622] *See* James Thomas, *Lawyers disappointed by lack of privilege reforms in German draft law*, GLOBAL INVESTIGATIONS REVIEW, Nov. 12, 2019, https://globalinvestigationsreview.com/article/1210770/lawyers-disappointed-by-lack-of-privilege-reforms-in-german-draft-law.
[623] BGBl. I 2019, 466–472.
[624] BGBl. I 2019, 466.
[625] *See* Section 5 of the Draft Law (This section makes further exemptions for journalists and employees).
[626] Council Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report on breaches of Union law (OJ L. 305, 26.11.2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=EN.
[627] Lignes Directrices Sur La Mise En Oeuvre De La Convention Judiciare D'Interet Public, Le Procureur De La Republique Financier & Agence Française Anticorruption (June 26, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf.
[628] Cecile Terret & David Pere, *French Authorities Release New Guidelines for Settlement Agreements in Corporate Prosecutions*, FCPA PROFESSOR, July 29, 2019, http://fcpaprofessor.com/french-authorities-release-new-guidelines-settlement-agreements-corporate-prosecutions/.
[629] Nicolas Brooke, *French DPA Guidelines—Still a Work in Progress*, GLOBAL INVESTIGATIONS REVIEW, July 17, 2019, https://globalinvestigationsreview.com/article/1195198/french-dpa-guidelines-%E2%80%93-still-a-work-in-progress.
[630] Lignes Directrices Sur La Mise En Oeuvre De La Convention Judiciare D'Interet Public, Le Procureur De La Republique Financier & Agence Française Anticorruption (June 26, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf.

includes spontaneously sharing evidence with the PNF and conducting an independent internal investigation; and (iv) the company has made efforts to compensate victims of its wrongdoing.[631]

In determining the appropriate fine to impose on a company as part of a CJIP, the Guidelines state that the PNF will first consider the financial advantage gained by a company as part of its wrongdoing. Second, the PNF will determine whether to add a punitive fine in addition to illicit profits, which will be determined by considering specific aggravating and mitigating factors. Among the aggravating factors mentioned by the Guidelines are: (i) the illegal conduct involves a public official; (ii) the company was previously sanctioned in France or abroad for the illegal acts in question; (iii) the company used corporate resources to conceal its wrongdoing; and (iv) the acts under investigation are part of a trend of ongoing acts of corruption.[632] Mitigating factors include: (i) sharing information with the PNF about wrongdoing before a criminal investigation has been opened; (ii) exceptional cooperation with the PNF during the course of the investigation; (iii) making changes within the organization to eliminate wrongdoers; and (iv) implementation of a compliance program without prompting by the PNF.[633]

Finally, the Guidelines lay out a process for the monitoring that may occur after a company has entered into a CJIP. Under the terms of Sapin II, compliance programs established in the course of a CJIP can be subject to monitoring for up to three years following the settlement agreement.[634] According to the 2019 Guidelines, this monitoring will be carried out by the AFA and will proceed in five stages: (1) the AFA will conduct an internal audit of a company to evaluate the compliance program; (2) the company will establish an action plan in line with the AFA's recommendations; (3) the AFA will approve the proposed action plan; (4) the AFA will approve specific compliance measures within the company, conduct more targeted auditing, and prepare annual reports; and (5) the AFA will conduct a final audit and present its report to the PNF.[635]

While the 2019 Guidelines provide slightly more clarity on Frances's DPA regime than the Ministry of Justice's guidance in 2018, they still leave several questions unanswered for companies under investigation, including whether and for how long those companies should expect to remain under supervision by the AFA and PNF after entering into a CJIP. The Guidelines also do not assign any specific multipliers to punitive damages that the PNF may seek if it discovers certain aggravating factors. While the Guidelines are therefore helpful in enumerating mitigating and aggravating conduct at a high level, they do not provide companies with much information about what sorts of fines they should expect as a result of that conduct. The Guidelines do make clear that the PNF and AFA are dedicated to continuing to flesh out France's new DPA regime, however, and the number of CJIPs is expected to rise in the coming years. Indeed, on December 10, the PNF entered into a CJIP with French engineering company Egis Aviva over alleged bribery and forgery related to construction contracts in Algeria.[636] As part of the settlement agreement, Egis Aviva agreed to pay €2.6 million in fines. This CJIP marks the eighth CJIP signed in France and the fifth signed with the PNF since the passage of Sapin II in 2017. The remaining three settlement agreements were made with Nanterre's Public Prosecutor's Office.[637]

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[631] Lignes Directrices Sur La Mise En Oeuvre De La Convention Judiciare D'Interet Public, Le Procureur De La Republique Financier & Agence Française Anticorruption (June 26, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf.

[632] Lignes Directrices Sur La Mise En Oeuvre De La Convention Judiciare D'Interet Public, Le Procureur De La Republique Financier & Agence Française Anticorruption (June 26, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf.

[633] Lignes Directrices Sur La Mise En Oeuvre De La Convention Judiciare D'Interet Public, Le Procureur De La Republique Financier & Agence Française Anticorruption (June 26, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf.

[634] Roger Burlingame, et al., *How the New French Guidance on Deferred Prosecution Eligibility Affects Settlement Negotiations*, ANTI-CORRUPTION REPORT, Oct. 30, 2019, https://www.anti-corruption.com/4129851/how-the-new-french-guidance-on-deferred-prosecution-eligibility-affects-settlement-negotiations.thtml.

[635] Lignes Directrices Sur La Mise En Oeuvre De La Convention Judiciare D'Interet Public, Le Procureur De La Republique Financier & Agence Française Anticorruption (June 26, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf.

[636] James Thomas, *French Engineering Company Agrees Country's Eighth DPA*, GLOBAL INVESTIGATIONS REVIEW, Dec. 11, 2019, https://globalinvestigationsreview.com/article/1211996/french-engineering-company-agrees-countrys-eighth-dpa.

[637] James Thomas, *French Engineering Company Agrees Country's Eighth DPA*, GLOBAL INVESTIGATIONS REVIEW, Dec. 11, 2019, https://globalinvestigationsreview.com/article/1211996/french-engineering-company-agrees-countrys-eighth-dpa.

In addition to the CJIP Guidelines, on July 18, the AFA also published the first draft of its guide on gifts and invitations policies for corporations and non-profit organizations under Sapin II and French law.[638] In particular, the AFA guide recommends that companies set up a gift register that tracks all gifts, invitations, and other benefits given, received, or refused by company employees.[639] The AFA guide also states that companies should create a formal, well-articulated policy by which gifts are approved by managers.[640] While the AFA guide does not dictate any one policy for companies to implement, it discourages policies in which approval is simply based on "reasonableness," and instead recommends that companies require approval of all gifts over a certain amount or set hard limits on the value of gifts that can be given or received.[641] The AFA guide is still in its first draft, but, along with the CJIP Guidelines, it signals AFA's desire to give companies more concrete guidance as they attempt to comply with Sapin II and France's growing anti-corruption framework.

2. Enforcement Efforts

Beyond issuing guidance, the AFA stepped up its enforcement efforts by holding its first-ever public hearing to determine whether a French electric company should be sanctioned for failing to implement a sufficient compliance program under Sapin II.[642] The AFA sanctions proceeding was initiated because the respondent company did not have any proper compliance program in place when the AFA audited the company in 2017.[643] On July 4, the AFA Sanctions Committee issued a decision declining to impose sanctions.[644] In its decision, the Sanctions Commission emphasized that the respondent company had worked with the AFA to implement an effective compliance program between the date of the first audit and the hearing, and that these efforts were credited in determining not to impose sanctions.[645] In particular, the Sanctions Committee found that the company had implemented a risk-mapping system that helped management create action plans to reduce risks of corruption, and it had also issued a code of conduct that was distributed to the company's subsidiaries and translated into 19 languages.[646] While the AFA's decision not to pursue sanctions in its first proceeding may not send the strongest deterrent message, the Sanction Commission's opinion makes clear that it is willing to give credit to those companies that fully cooperate with the AFA in implementing a compliance program.

In the criminal sphere, in 2020, former President Nicolas Sarkozy may finally proceed to trial on campaign finance charges. In October, France's highest appeals court rejected Sarkozy's latest appeal, which opens the door to a full trial.[647] Sarkozy's trial has been delayed for over two years due to challenges filed by Sarkozy's legal team, but now French prosecutors will decide whether to move forward with a full trial in 2020.[648] The case centers on allegations that Sarkozy's party, formerly known as the UMP, worked with the public relations firm Bygmalion to hide

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[638] Guide Practique Sur Les Politiques Cadeaux Et Invitations En Enterprise: Ouverture De La Consultation, Agence Française Anticorruption (July 18, 2019), https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-ouvre-consultation-publique-sur-projet-guide-jusquau-30-septembre-2019.

[639] Guide Practique Sur Les Politiques Cadeaux Et Invitations En Enterprise: Ouverture De La Consultation, Agence Française Anticorruption (July 18, 2019), https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-ouvre-consultation-publique-sur-projet-guide-jusquau-30-septembre-2019.

[640] Guide Practique Sur Les Politiques Cadeaux Et Invitations En Enterprise: Ouverture De La Consultation, Agence Française Anticorruption (July 18, 2019), https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-ouvre-consultation-publique-sur-projet-guide-jusquau-30-septembre-2019.

[641] Guide Practique Sur Les Politiques Cadeaux Et Invitations En Enterprise: Ouverture De La Consultation, Agence Française Anticorruption (July 18, 2019), https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-ouvre-consultation-publique-sur-projet-guide-jusquau-30-septembre-2019.

[642] Nicolas Tollet & Marie-Agnès Nicolas, France: Anti-Corruption Agency's Sanctions Committee Holds Blockbuster Hearing, THE FCPA BLOG (July 8, 2019, 1:18 PM), https://fcpablog.com/2019/07/08/france-anti-corruption-agencys-sanctions-committee-holds-blo/.

[643] Nicolas Tollet & Marie-Agnès Nicolas, France: Anti-Corruption Agency's Sanctions Committee Holds Blockbuster Hearing, THE FCPA BLOG (July 8, 2019, 1:18 PM), https://fcpablog.com/2019/07/08/france-anti-corruption-agencys-sanctions-committee-holds-blo/.

[644] Décision n°19-01, Commission De Sanctions, Agence Française Anticorruption (July 4, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/DECISION%2019-01%20COMMISSION%20DES%20SANCTIONS%20ANONYMISEE.pdf.

[645] Emmanuel Breen, French Enforcement: No Sanctions in Landmark Sapin II Action, THE FCPA BLOG (Aug. 29, 2019, 12:28 PM), https://fcpablog.com/2019/08/29/french-enforcement-no-sanctions-in-landmark-sapin-ii-action/.

[646] Décision n°19-01, Commission De Sanctions, Agence Française Anticorruption (July 4, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/DECISION%2019-01%20COMMISSION%20DES%20SANCTIONS%20ANONYMISEE.pdf.

[647] Andrew Heavens, *Top French Court Rejects Bid by Sarkozy to Avoid Trial Over 2012 Campaign*, REUTERS, Oct. 1, 2019, https://www.reuters.com/article/us-france-sarkozy/top-french-court-rejects-bid-by-sarkozy-to-avoid-trial-over-2012-campaign-idUSKBN1WG3U7.

[648] Louise Guillot, *Court Orders Sarkozy to Face Trial Over Campaign Financing*, POLITICO, Oct. 1, 2019, https://www.politico.eu/article/court-orders-former-french-president-nicolas-sarkozy-to-face-trial-over-campaign-financing/.

the true cost of Sarkozy's 2012 re-election campaign.[649] If prosecutors press forward with a trial and Sarkozy is convicted, he could face a year in prison and a fine of €3,750.[650]

D. The European Union

1. Enforcement Efforts

The European Anti-Fraud Office (OLAF) is cooperating with the Romanian Anti-Corruption Directorate to investigate possible large-scale corruption and fraud involving EU funds. In April 2019, both authorities carried out searches of premises and interviews with suspects and witnesses in order to substantiate their suspicion of a kickback scheme amounting to over €2 million (approximately $2.2 million).[651]

2. Legislative Developments

a. Challenges from EU Privacy Laws

The EU's General Data Protection Regulation (GDPR) has caused turbulence in many areas of law, and corruption law has not been spared. In comments submitted by TRACE International (TRACE), as part of the public consultation regarding the law, TRACE asserted that many GDPR provisions are "in direct conflict with the essential elements of anti-bribery compliance programs."[652]

TRACE highlighted two areas of particular concern. First and more generally, it is unclear which legal basis under Art. 6 GDPR applies to the processing of personal data for anti-corruption purposes, especially in due diligence processes: consent will seldomly be appropriate, and while the fight against corruption certainly qualifies as legitimate interest, the requirements to the necessity of the measure remain uncertain.[653] Furthermore, Art. 88 GDPR authorizes Member States to individually regulate the processing of employees' personal data, possibly leading to diverging national legal bases in the employment context. Second, Art. 9 and 10 GDPR prohibit the processing of certain types of "sensitive" data, such as an individual's political opinion or criminal convictions and offenses. These types of data are often processed in anti-corruption due diligence processes, but both TRACE and the Swedish Anti-Corruption Institute point out that currently, the exceptions from both provisions, e.g., express consent or legitimizing national or EU laws, do not seem to apply to anti-bribery measures.[654] Consequently, virtually all stakeholders call for a clarification on the requirements to data processing in the context of anti-corruption measures, e.g., by best practice guidelines, and a revision of national data protection legislation with regard to efficient anti-corruption work.[655]

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[649] Andrew Heavens, *Top French Court Rejects Bid by Sarkozy to Avoid Trial Over 2012 Campaign*, REUTERS, Oct. 1, 2019, https://www.reuters.com/article/us-france-sarkozy/top-french-court-rejects-bid-by-sarkozy-to-avoid-trial-over-2012-campaign-idUSKBN1WG3U7.

[650] Louise Guillot, *Court Orders Sarkozy to Face Trial Over Campaign Financing*, POLITICO, Oct. 1, 2019, https://www.politico.eu/article/court-orders-former-french-president-nicolas-sarkozy-to-face-trial-over-campaign-financing/.

[651] OLAF, OLAF Partners With Romanian Anti-Corruption Directorate to Untangle EU Funds Scam, Press Release No. 02/2019 (Apr. 9, 2019), https://ec.europa.eu/anti-fraud/media-corner/news/09-04-2019/olaf-partners-romanian-anti-corruption-directorate-untangle-eu-funds_en; Romanian National Anticorruption Directorate, Press Release No. 310/VIII/3 (Apr. 8, 2019), https://ec.europa.eu/anti-fraud/sites/antifraud/files/09042019_olaf_partners_with_dna_ro_pr_en.pdf.

[652] TRACE, Submission to the OECD Working Group on Bribery Public Consultation on the Review of the 2009 OECD Anti-Bribery Recommendation, at 3 (Apr. 30, 2019), https://www.traceinternational.org/Uploads/PublicationFiles/TRACEConsultationSubmissiontoOECDWGB.pdf.

[653] TRACE, Submission to the OECD Working Group on Bribery Public Consultation on the Review of the 2009 OECD Anti-Bribery Recommendation, at 6-7 (Apr. 30, 2019). *See also* Ruta Mrazauskaite, Managing Anticorruption Compliance Under the EU's General Data Protection Regulation, GLOBAL ANTICORRUPTION BLOG (June 3, 2019), https://globalanticorruptionblog.com/2019/06/03/managing-anticorruption-compliance-under-the-eus-general-data-protection-regulation/.

[654] Swedish Anti-Corruption Institute, in: OECD Working Group on Bribery, Public Comments: Review of the 2009 Anti-Bribery Recommendation, at 78-80 (2019); TRACE, Submission to the OECD Working Group on Bribery Public Consultation on the Review of the 2009 OECD Anti-Bribery Recommendation, at 5-7 (Apr. 30, 2019).

[655] Ruta Mrazauskaite, Managing Anticorruption Compliance Under the EU's General Data Protection Regulation, GLOBAL ANTICORRUPTION BLOG (June 3, 2019), https://globalanticorruptionblog.com/2019/06/03/managing-anticorruption-compliance-under-the-eus-general-data-protection-regulation/; Swedish Anti-Corruption Institute, in: OECD Working Group on Bribery, Public Comments: Review of the 2009 Anti-Bribery Recommendation, at 80 (2019); TRACE, Submission to the OECD Working Group on Bribery Public Consultation on the Review of the 2009 OECD Anti-Bribery Recommendation, at 3 (Apr. 30, 2019).

Either way, the need to comply with GDPR provisions certainly entails higher expenses and complexity in due diligence processes and investigations, be it to assess the legality of data processing operations, to respect the data minimization principle, to notify the data subjects, or to implement retention practices.[656] Transfers of personal data to recipients outside the EU, including authorities, also remain a concern.[657]

b. Whistleblowing Directive

In October 2019, the EU enacted its Whistleblowing Directive.[658] The Directive obliges the Member States to guarantee whistleblowers adequate protection. The Directive is only applicable for reporting regarding certain breaches of EU law,[659] i.e., in the areas of public procurement; financial services and products; and EU competition and state aid law.[660] Nevertheless, Member States are likely to use the opportunity to adapt existing national laws to EU requirements or to broaden those laws. The Directive provides for the establishment of internal and external reporting channels, the prohibition of retaliation, and appropriate support measures.[661] The transposition period is four years for companies with 50 to 249 workers and two years for larger companies.[662]

c. Other Anti-Corruption Efforts

The EU strives to implement rule-of-law conditionality in its budgetary rules. In April 2019, the European Parliament approved the proposal for a regulation allowing the EU to suspend its funding for states that fail to tackle fraud and corruption. The proposal now awaits decision by the Council,[663] where it may face controversy since Poland and Hungary have already signaled their opposition.[664]

The European Investment Bank (EIB) reaffirmed its commitment to anti-corruption initiatives by adopting and publishing its Anti-Corruption Statement.[665] This step followed EIB's participation in the 2018 Anti-Corruption Conference in Copenhagen, where it had already endorsed the Joint Statement by the high-level segment.[666] In the Statement, the EIB reasserts its zero tolerance policy towards corruption, fraud, collusion, coercion, obstruction, money laundering, and financing of terrorism, and confirms the principles laid down in its existing legal framework, the EIB Anti-Fraud Policy, and EIB Group NCJ Policy.[667]

In September 2019, the European Parliament and the Council agreed to appoint Laura Codruta Kövesi as the first European Chief Prosecutor, another step in preparation for the European Public Prosecutor's Office

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[656] TRACE, Submission to the OECD Working Group on Bribery Public Consultation on the Review of the 2009 OECD Anti-Bribery Recommendation at 8 (Apr. 30, 2019).
[657] Stuart Alford/Serrin Turner/Gail Crawford/Mair Williams/Max Mazzelli, *Data Protection in Investigations*, at ¶¶ 40.3, 40.5, GLOBAL INVESTIGATIONS REVIEW, Jan. 15, 2019, https://globalinvestigationsreview.com/benchmarking/the-practitioner%E2%80%99s-guide-to-global-investigations-third-edition/1179191/data-protection-in-investigations; TRACE, Submission to the OECD Working Group on Bribery Public Consultation on the Review of the 2009 OECD Anti-Bribery Recommendation, at 8 (Apr. 30, 2019).
[658] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report on breaches of Union law, 2019 O.J. (L. 305/17), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=EN. *See also* Council of the EU Press Release, Better Protection of Whistle-Blowers: New EU-Wide Rules to Kick In in 2021 (Oct. 7, 2019), https://www.consilium.europa.eu/en/press/press-releases/2019/10/07/better-protection-of-whistle-blowers-new-eu-wide-rules-to-kick-in-in-2021/.
[659] Transparency International, Building on the EU Directive for Whistleblower Protection, Position Paper #1/2019, at 4 (Oct. 7, 2019) https://www.transparency.org/whatwedo/publication/building_on_the_eu_directive_for_whistleblower_protection.
[660] Art. 2 of Directive (EU) 2019/1937.
[661] Art. 8 and 11, 19, 20 of Directive (EU) 2019/1937 (Internal reporting channels need to be established by all companies with 50 or more workers).
[662] Art. 26 of Directive (EU) 2019/1937.
[663] Procedure file 2018/0136(COD), Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/0136(COD).
[664] Lily Bayer, *European Parliament Backs Plan to Link EU Funds to Rule of Law*, POLITICO, Jan. 17, 2019, https://www.politico.eu/article/budget-hungary-poland-rule-of-law-european-parliament-backs-plan-to-link-eu-funds/.
[665] European Investment Bank, Anti-Corruption Statement of the European Investment Bank, Apr. 2, 2019.
[666] 18th International Anti-Corruption Conference, Joint Statement by the High-Level Segment, Oct 22, 2018.
[667] European Investment Bank, Anti-Corruption Statement of the European Investment Bank, at ¶¶ 3-4, Apr. 2, 2019, with reference to European Investment Bank, Anti-Fraud Policy, Sept. 17, 2013, and EIB Group, Policy towards weakly regulated, non-transparent and non-cooperative jurisdictions and tax good governance, Mar. 25, 2019.

(EPPO)'s start of operation in 2020.[668] The European Chief Prosecutor, supported by two Deputies, will head the EPPO.[669]

E. China

1. Enforcement Efforts

China's anti-corruption campaign continued apace in 2019. In March 2019, the Chief Justice of the Supreme People's Court, in a presentation to the 13th National People's Congress, stated that the Supreme People's Court continues to focus on penalizing corruption and bribery related crimes,[670] underscoring the strong determination of the Party Central Committee to continue to crack down on corruption in China. In 2018, People's Courts at various levels concluded trials of about 28,000 cases relating to corruption, bribery, and work-related crimes/illegal conducts and penalized about 30,000 people (criminal, administrative penalties), including a large number of senior officials. In addition to the cases tried by the courts, there were many more corruption cases opened and investigated by China's Central Commission for Discipline and Inspection (CCDI) in 2018.[671]

All told, in the first nine months of 2019, a total of 452,000 corruption cases were investigated with 383,000 people disciplined and penalized,[672] including many senior government officials as well as sub-provincial, county, and lower-level party members/officials.

Among those, the most significant corruption prosecutions and investigations include:

A. In June, Meng Hongwei (孟宏伟), former vice minister of the Ministry of Public Security and former President of Interpol, pleaded guilty to the crime of bribery. Meng was charged with abuse of his power to promote others and other misconduct in exchange for bribes of RMB 14.46 million (approximately $2 million).[673]

B. In July, Nur Bekri (努尔·白克力), former vice commissioner of the National Development and Reform Commission ("NDRC") and head of the National Energy Administration, was tried on bribery charges. Nur was accused of abusing his power to help others to secure large projects and government preferential policies in exchange for bribes totaling RMB 79.1 million (approximately $11 million) between 1998 and 2018 when he served in senior government roles.[674]

C. Also in July, CCDI and the National Supervisory Commission ("NSC") announced that Hu Huaibang (胡怀邦), the former party secretary and chairman of China Development Bank ("CDB"), one of China's

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[668] European Commission, European Public Prosecutor's Office: Commission welcomes the agreement to appoint Ms Kövesi as the first European Chief Prosecutor (Sept. 25, 2019), https://ec.europa.eu/commission/presscorner/detail/en/statement_19_5769; European Commission, European Public Prosecutor's Office, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en#more-information.

[669] European Commission, European Public Prosecutor's Office, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en#more-information.

[670] Zhang Yanling, *Supreme People's Court Report: The Supreme People's Court has completed trials of corruption and bribery related cases that involved about 33,000 people with 18 senior officials at or above the minister level in 2018* (最高法:去年审结贪污贿赂等案件涉及3.3万人 省部级以上18人), CHINA NEWS NET, Mar. 12, 2019, http://news.sina.com.cn/o/2019-03-12/doc-ihsxncvh1815320.shtml.

[671] Zhu Jizhen, *The National Discipline Inspection and Supervision Agency Punished 621,000 People in 2018, including 51 Cadres at and Above the Provincial Level,* XINHUA NEWS AGENCY, Sept. 1, 2019, http://www.gov.cn/xinwen/2019-01/09/content_5356088.htm.

[672] Li Xia, *Disciplinary, Supervisory Authorities Punish 383,000 Officials in First 3 Quarters* (年前三季度全国纪检监察机关 处分包括31名省部级干部在内的38.3万人), XINHUA NEWS AGENCY, Oct. 27, 2019, http://www.xinhuanet.com/english/2019-10/27/c_138507516.htm, (About 383,000 officials and Party members were disciplined or penalized by discipline inspection and supervisory authorities during the first nine months in 2019).

[673] Meng Hongwei*, Former Vice Minister of Public Security Pleaded Guilty and Showed Repentance* (公安部原副部长孟宏伟认罪悔罪现场), BEIJING NEWS, June 20, 2019, http://www.bjnews.com.cn/feature/2019/06/20/593702.html.

[674] Shi Ge, *Former Deputy Director of the National Development Reform Commission and Former Director of the Energy Administration* (国家发改委原副主任、国家能源局原局长努尔·白克力受贿案一审开庭), XINHUA NEWS AGENCY, July 25, 2019, http://www.xinhuanet.com/2019-07/25/c_1124799047.htm, (First-instance bribery case of Nur Bekri, former vice commissioner of the National Development and Reform Commission and deputy head of the National Energy Administration heard).

leading policy banks, was under investigation. Based on China Central Television ("CCTV") and other media reports, potential allegations include accepting bribes and abuse of power. The investigation is ongoing.

D. In November, the Chengdu Intermediate People's Court in Sichuan Province ruled that Wu Zhen (吴浈), the former deputy head of China Food and Drug Administration ("CFDA"), was guilty of bribery. Wu was sentenced to 16 years in prison and fined RMB 1 million (approximately $142,000) for bribery and abuse of power. Wu accepted bribes totaling RMB 21.71 million (approximately $3.1 million) directly or indirectly through his relatives during 1996 to 2018 when he served multiple roles at CFDA, as well as helping others to facilitate drug approvals and to secure work positions. From 2017 to 2018, when Wu served as deputy director of CFDA and deputy director of the National Health and Family Planning Commission, he engaged in abuse of power and embezzlement.[675]

E. Li Xinghua (李新华), former deputy general manager of PetroChina, a leading State-owned oil and gas company, was under investigation by CCDI and NSC in March 2019 for alleged "serious violations of law and disciplines." The investigation was initiated six years after his retirement in 2013. Li's former colleagues, former PetroChina Chairman Jiang Jiemin and former Deputy General Manager Liao Yongyuan were sentenced to 16 years and 15 years in prison, respectively, for taking bribes.

2. Regulatory Developments

The Communist Party of China (CPC) Central Committee promulgated revised *Regulations on Party Accountability*[676] (the Regulations) in September with 14 new articles that further clarify roles and responsibilities of the party's discipline and inspection organizations and strengthen the regulation and administration of accountability for misconduct that applies to party members and senior government officials. Under the revised Regulations, relevant party organizations and their respective leading officials may be held accountable for poor leadership, failure to promote political, organizational and disciplinary work within the party organizations, failure to combat corruption and bribery and failure to take actions or abuse of power when dealing with more pressing issues that concern the general public, including education, health, environment, and social security. Officials who violate the Regulations will be held accountable regardless of whether they are subsequently transferred, promoted or retired.

On October 26, 2018, the China National People's Congress Standing Committee adopted the International Criminal Judicial Assistance Law (the ICJA Law).[677] The ICJA Law primarily regulates mutual "judicial assistance" between China and other countries in relation to international criminal proceedings.

This legislation may become China's first "blocking statute" by expressly requiring that no PRC institutions, organizations or individuals can provide evidence materials and judicial assistance to foreign countries absent pre-approval of Chinese governmental authorities.[678] Although the United States and China signed a Treaty on Mutual Legal Assistance in Criminal Matters (MLAT) in 2000, the cooperation between the two countries under the MLAT has been infrequent. We anticipate the ICJA Law will have a significant impact on cross-border collection of evidence and transmission of documents and materials in relation to FCPA or other criminal investigations involving entities or individuals in China. While the new ICJA Law sets out some general principles, no implementing regulations have been promulgated so far, and therefore there are no details on implementation at this point. The law applies to Chinese subsidiaries of multinationals, among other entities, and how much those Chinese subsidiaries can assist with a US FCPA investigation before obtaining the PRC government's pre-approval will be an important consideration in those investigations, especially given recent focus on China in FCPA enforcement actions.

While the ICJA Law only addresses judicial assistance relating to "criminal proceedings," in practice, it may be difficult to determine at the early stage of an FCPA investigation whether such investigation will eventually turn into a civil or criminal proceeding. Whether an FCPA investigation becomes a criminal proceeding often depends on the

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[675] Dan Danni & Zhang Sai, *Former Deputy Director of the State Food and Drug Administration Wu Xun Sentenced to 16 Years in First Trial* (原国家食药监总局副局长吴浈一审获刑16年), BEIJING AGENCY, Nov. 15, 2019, https://ie.bjd.com.cn/5b165687a010550e5ddc0e6a/contentApp/5b16573ae4b02a9fe2d558f9/AP5dce6b8ae4b0ab28c837bcfa.html?isshare=1.

[676] Liao Baojun, *Comparison of the "Accountability Regulations of the Communist Party of China" Before and After the Amendment* (中国共产党问责条例), LIAONING DAILY NEW MEDIA CENTER, http://www.sohu.com/a/338914800_349253.

[677] *See* The National People's Congress of the People's Republic of China, *Law of the People's Republic of China on International Criminal Judicial Assistance* (Adopted Oct. 26, 2018), http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-10/26/content_2064576.htm.

[678] Pursuant to Article 6 of the ICJAL, "Competent Authorities" for conducting international criminal judicial assistance are the State Supervision Commission, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of National Security, and other relevant departments.

underlying evidence, but relevant procedural requirements for cross-border collection and transmission of evidence will be different based on the question of whether such evidence pertains to a criminal or civil proceeding, which could make the consideration of the issue a circular one. The uncertainty will likely create challenges for multinationals conducting internal FCPA investigations and making decisions about voluntary disclosure to US enforcement agencies, as well as in subsequent investigation steps.

The new ICJA Law is only one aspect of a fast-evolving legal regime relating to information sharing. The Chinese government has been tightening scrutiny of cross-border information transmission in recent years. For instance, the Chinese government has promulgated a Cybersecurity Law in recent years, and relevant rules on cross-border information/data transmission and data security are forthcoming.

F. Brazil

1. Legislative Developments

January 2019 marked the beginning of President Jair Bolsonaro's new administration, and, as expected, Bolsonaro launched his presidency with the promise of stamping out corruption in Brazil. Together with his Minister of Justice Sergio Moro—the former judge who had overseen "Operation Car Wash"—Bolsonaro began his term by introducing a broad anti-crime package establishing "measures against corruption, organized crime and crimes committed with serious violence."[679] Among other changes, the anti-crime bill aims to establish greater protections and incentives for whistleblowers and enables the expanded use of DPAs, settlements, and conciliations.[680] The legislation has met strong political opposition, however, and it remains stalled in Congress.[681]

In line with his administration's public emphasis on combatting corruption, President Bolsonaro also consolidated control over Brazil's anti-money laundering intelligence unit.[682] In an August decree, Bolsonaro moved the Financial Activities Control Board (COAF) from the Ministry of Economy into a newly created Financial Intelligence Unit (FIU) under the purview of the central bank.[683] Bolsonaro issued the August decree after Congress initially blocked Bolsonaro's attempt to move COAF into the Ministry of Justice,[684] in a move designed to give Bolsonaro's administration tightened control over Brazil's anti-money laundering body.[685]

2. Enforcement Efforts: Operation Car Wash

Despite these attempts to fulfil anti-corruption campaign promises, the Bolsonaro administration has faced its own allegations of corruption in connection with Operation Car Wash. As we predicted last year,[686] Operation Car Wash continued in full force with Moro at the helm of the Ministry of Justice. In March, Operation Car Wash claimed yet another high-profile political figure when former President Michel Temer was arrested and charged with accepting

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[679] Lucas Zanoni, New Brazil Bill Seeks to Add NPAs and Whistleblower Rewards, THE FCPA BLOG (Feb. 15, 2019, 1:02 PM), https://fcpablog.com/2019/02/15/new-brazil-bill-seeks-to-add-npas-and-whistleblower-rewards/.
[680] Lucas Zanoni, New Brazil Bill Seeks to Add NPAs and Whistleblower Rewards, THE FCPA BLOG (Feb. 15, 2019, 1:02 PM), https://fcpablog.com/2019/02/15/new-brazil-bill-seeks-to-add-npas-and-whistleblower-rewards/.
[681] Ricardo Brito, *Brazil 'Car Wash' Corruption Probe Facing 'Worst Moment' as Establishment Fights Back*, REUTERS, Sept. 4, 2019, https://www.reuters.com/article/us-brazil-corruption-analysis/brazil-car-wash-corruption-probe-facing-worst-moment-as-establishment-fights-back-idUSKCN1VP2SR.
[682] Ana Mano, *Brazil Moves Money Laundering Intelligence Unit to Central Bank*, REUTERS, Aug. 20, 2019, https://www.reuters.com/article/us-brazil-financial-intelligence/brazil-moves-money-laundering-intelligence-unit-to-central-bank-idUSKCN1VA19O.
[683] Ana Mano, *Brazil Moves Money Laundering Intelligence Unit to Central Bank*, REUTERS, Aug. 20, 2019, https://www.reuters.com/article/us-brazil-financial-intelligence/brazil-moves-money-laundering-intelligence-unit-to-central-bank-idUSKCN1VA19O.
[684] James Thomas, *Brazilian Politicians Vote to Move Money Laundering Body Away from Moro*, GLOBAL INVESTIGATIONS REVIEW, May 10, 2019, https://globalinvestigationsreview.com/article/1192633/brazilian-politicians-vote-to-move-money-laundering-body-away-from-moro.
[685] Ana Mano, *Brazil Moves Money Laundering Intelligence Unit to Central Bank*, REUTERS, Aug. 20, 2019, https://www.reuters.com/article/us-brazil-financial-intelligence/brazil-moves-money-laundering-intelligence-unit-to-central-bank-idUSKCN1VA19O.
[686] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 75 (Jan. 17. 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.

bribes in connection with the construction of a nuclear facility.[687] On June 9, however, *The Intercept* published a bombshell report accusing Justice Minister Moro of abusing his power when he presided over Operation Car Wash.[688] The report, based on a leaked archive of secret documents, alleged that then-Judge Moro had colluded with federal prosecutors to use Operation Car Wash as a tool to target Bolsonaro's predecessor and political opponent, Lula da Silva, and help Bolsonaro win the 2018 election.[689] Following on the heels of these allegations against Moro, *The Intercept* published another report accusing the lead prosecutor behind Operation Car Wash, Deltan Dallagnol, of being paid for an off-the-record speaking engagement to a company under investigation in the probe.[690] In the wake of these reports, many called for Moro to resign as Minister of Justice.[691] While Moro has refused to step down, the allegations surrounding Moro have opened the door for da Silva to once again appeal his conviction on the grounds of bias—a challenge that is still under consideration by the Supreme Court.[692]

In addition to the allegations against Moro and Dallagnol, the Brazilian government has suffered several high-profile legal setbacks in 2019 in carrying out Operation Car Wash. In August, the Supreme Court overturned the conviction of Aldemir Bendine, a former president of Petrobras, on procedural grounds.[693] The Supreme Court held that Bendine was not properly given the opportunity to make a closing argument after hearing accusations against him from plea-bargain testimony.[694] This procedural annulment of Bendine's conviction is the first of its kind during the investigation, and if similar reasoning is applied to other defendants in the case, as many as 32 sentences involving 143 of the 162 people sentenced in the case could be overturned.[695] On top of these procedural concerns, the Supreme Court issued a landmark decision in November that abolished mandatory imprisonment of convicted criminals who lose their first appeal.[696] As a result of the Supreme Court's ruling, da Silva has been released from prison pending decision on his current appeals.[697] Da Silva has used his newfound freedom to launch a renewed attack against President Bolsonaro, perhaps building in preparation for challenging him in 2022.[698]

Despite these political and legal setbacks, Operation Car Wash continues to produce new indictments, settlements, and investigations across the globe. In November, the Brazilian Attorney General's Office (AGU) and Comptroller General of the Union (CGU) signed off on two $500 million settlements with construction companies

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[687] Anna Jean Kaiser, *Brazil's Former President Michel Temer Arrested in Corruption Investigation*, THE GUARDIAN, Mar. 21, 2019, https://www.theguardian.com/world/2019/mar/21/brazils-former-president-michel-temer-arrested-in-corruption-investigation.
[688] Glenn Greenwald & Victor Pougy, *Hidden Plot, Exclusive: Brazil's Top Prosecutors Who Indicted Lula Schemed in Secret Messages to Prevent His Party From Winning 2018 Election*, THE INTERCEPT, June 9, 2019, https://theintercept.com/2019/06/09/brazil-car-wash-prosecutors-workers-party-lula/.
[689] Andrew Fishman, Rafael Moro Martins, et al., *Breach of Ethics, Exclusive: Leaked Chats Between Brazilian Judge and Prosecutor Who Imprisoned Lula Reveal Prohibited Collaboration and Doubts Over Evidence*, THE INTERCEPT, June 9, 2019, https://theintercept.com/2019/06/09/brazil-lula-operation-car-wash-sergio-moro/.
[690] Andrew Fishman, Leandro Demori, et al., *"The Risk is Well Paid LOL": Brazilian Anti-Corruption Prosecutor Gave Secret Talk to Bankers and Took Money From a Company He Was Investigating*, THE INTERCEPT, July 26, 2019, https://theintercept.com/2019/07/26/brazil-car-wash-deltan-dallagnol-paid-speaking/.
[691] Tom Phillips, *Brazil: Calls Grow for Bolsonaro Ally to Quit After 'Devastating' Report on Leaks*, THE GUARDIAN, July 5, 2019, https://www.theguardian.com/world/2019/jul/05/brazil-sergio-moro-jair-bolsonaro-justice-minister.
[692] Ricardo Brito, *Back to Jail, or Run for President: The Legal Maze Facing Brazil's Lula*, REUTERS, Nov. 11, 2019, https://www.reuters.com/article/us-brazil-corruption-lula/back-to-jail-or-run-for-president-the-legal-maze-facing-brazils-lula-idUSKBN1XL2FO; *Brazil Ex-President, Out of Jail, Vows to Make 'Lives Hell'*, NEW YORK TIMES POST, Nov. 23, 2019, https://nytimespost.com/brazils-ex-president-vows-to-make-right-wing-leaders-lives-a-living-hell/.
[693] Ricardo Brito, *Brazil 'Car Wash' Corruption Probe Facing 'Worst Moment' as Establishment Fights Back*, REUTERS, Sept. 4, 2019, https://www.reuters.com/article/us-brazil-corruption-analysis/brazil-car-wash-corruption-probe-facing-worst-moment-as-establishment-fights-back-idUSKCN1VP2SR.
[694] Ricardo Brito, *Brazil 'Car Wash' Corruption Probe Facing 'Worst Moment' as Establishment Fights Back*, REUTERS, Sept. 4, 2019, https://www.reuters.com/article/us-brazil-corruption-analysis/brazil-car-wash-corruption-probe-facing-worst-moment-as-establishment-fights-back-idUSKCN1VP2SR.
[695] Ricardo Brito & Tatiana Bautzer, *Brazil's Supreme Court Approves Ruling that May Overturn Corruption* Convictions, REUTERS, Sept. 26, 2019, https://www.reuters.com/article/brazil-corruption-supreme-court/brazils-supreme-court-approves-ruling-that-may-overturn-corruption-convictions-idUSL2N26H2BG.
[696] Anthony Boadle & Ricardo Brito, *Top Brazil Court Ends Early Prison Rule, Decision Could Free Lula*, REUTERS, Nov. 7, 2019, https://uk.reuters.com/article/uk-brazil-corruption-court/top-brazil-court-ends-early-prison-rule-decision-could-free-lula-idUKKBN1XI03U.
[697] Terrence McCoy & Heloisa Traiano, *Former Brazilian President Luiz Inácio Lula da Silva Released from Prison*, WASHINGTON POST, Nov. 8, 2019, https://www.washingtonpost.com/world/the_americas/former-brazilian-president-luiz-inacio-lula-da-silva-to-be-released-from-prison/2019/11/08/31f9791c-0260-11ea-8341-cc3dce52e7de_story.html.
[698] Brazil *Ex-President, Out of Jail, Vows to Make 'Lives Hell'*, NEW YORK TIMES POST, Nov. 23, 2019, https://nytimespost.com/brazils-ex-president-vows-to-make-right-wing-leaders-lives-a-living-hell/.

Engevix Group and OAS to resolve bribery accusations tied to Operation Car Wash.[699] As of these recent settlements, the AGU and CGU have signed 11 such agreements, for a total of nearly $3 billion in fines under Operation Car Wash.[700] And on December 18, Brazilian Federal Police raided the offices of shipping company A.P. Moller-Maersk as part of the continued investigation into corruption at the state-run oil company Petrobras. Federal prosecutors stated that they are investigating Maersk and two ship brokers for allegedly paying bribes to receive privileged business information from Petrobras. The Operation Car Wash investigation into Maersk remains ongoing.[701]

Operation Car Wash also produced several high-profile arrests beyond Brazil's borders in 2019. In July, former Peruvian President Alejandro Toledo was arrested in the United States in connection to the Odebrecht bribery scandal.[702] In October, Swiss prosecutors filed their first charges against an unnamed suspect in connection with an investigation of Petrobras and Odebrecht.[703] And, as noted above, in November, José Carlos Grubisich, former CEO of Brazilian petrochemical company Braskem SA, was arrested in the United States for his alleged role in a scheme to divert $250 million in Braskem money to pay bribes to government officials.[704]

3. Other Legal Developments

Beyond Operation Car Wash, several high-profile decisions from Brazil's Supreme Court have drawn widespread criticism and made anti-corruption enforcement more difficult. In March, the Supreme Court held that cases involving illegal campaign donations could only be handled by electoral courts, not federal criminal courts.[705] Critics of the decision argued that Brazil's electoral courts, which are made up of rotating state and federal judges, are less prepared than federal criminal courts to examine the country's complex political bribery schemes that have been unearthed in the wake of Operation Car Wash.[706]

The Supreme Court issued an even more controversial decision in July, in which Presiding Justice José Antonia Dias Toffoli temporarily halted all cases built on evidence obtained from the COAF or FIU without judicial approval.[707] Justice Toffoli's ruling has radically impacted federal investigations into corruption, money laundering, and terrorism financing, and the Federal Prosecutor's Office (Ministério Público Federal, or "MPF") has reported that approximately 700 investigations and criminal proceedings have been halted pending further review by the Supreme Court.[708] Justice Toffoli's actions have also drawn criticism from the OECD, which issued a November press release urging Brazil "to preserve the full capacity and independence of law enforcement authorities to investigate and

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[699] James Thomas, *Brazil Signs Second Operation Car Wash Leniency Agreement in a Week*, GLOBAL INVESTIGATIONS REVIEW, Nov. 14, 2019, https://globalinvestigationsreview.com/article/1210918/brazil-signs-second-operation-car-wash-leniency-agreement-in-a-week.

[700] James Thomas, *Brazil Signs Second Operation Car Wash Leniency Agreement in a Week*, GLOBAL INVESTIGATIONS REVIEW, Nov. 14, 2019, https://globalinvestigationsreview.com/article/1210918/brazil-signs-second-operation-car-wash-leniency-agreement-in-a-week.

[701] Marcelo De Sousa & Jan M. Olsen, Brazil Police Search Maersk Offices in Corruption Probe, ASSOCIATED PRESS, Dec. 18, 2019, https://apnews.com/b4d78281dcb5fca9445feccfa8f0a946.

[702] Nicholas Casey & Andrea Zarate, *Former Peru President Arrested in U.S. as Part of Vast Bribery Scandal*, NEW YORK TIMES, July 16, 2019, https://www.nytimes.com/2019/07/16/world/americas/peru-toledo-arrested.html.

[703] Tassilo Hummel & John Miller, *Swiss File First Charges in Brazilian 'Car Wash' Corruption Probe*, REUTERS, Oct. 22, 2019, https://www.reuters.com/article/us-switzerland-odebrecht/swiss-file-first-charges-in-brazilian-car-wash-corruption-probe-idUSKBN1X10UE.

[704] Corinne Ramey & Paulo Trevisani, *Former CEO of Brazilian Petrochemical Giant Braskem Is Arrested*, WALL ST. J., Nov. 20, 2019, https://www.wsj.com/articles/former-ceo-of-brazilian-petrochemical-giant-braskem-is-arrested-11574286578.

[705] Brad Brooks, *Brazil Supreme Court Decision Seen as 'Blow' to Car Wash Probe*, REUTERS, Mar. 14, 2019, https://www.reuters.com/article/us-brazil-corruption/brazil-supreme-court-decision-seen-as-blow-to-car-wash-probe-idUSKCN1QV3C4.

[706] Brad Brooks, *Brazil Supreme Court Decision Seen as 'Blow' to Car Wash Probe*, REUTERS, Mar. 14, 2019, https://www.reuters.com/article/us-brazil-corruption/brazil-supreme-court-decision-seen-as-blow-to-car-wash-probe-idUSKCN1QV3C4.

[707] James Thomas, *Corruption Investigations Halted Across Brazil Following "Landmark" Ruling*, GLOBAL INVESTIGATIONS REVIEW, July 17, 2019, https://globalinvestigationsreview.com/article/1195259/corruption-investigations-halted-across-brazil-following-%E2%80%9Clandmark%E2%80%9D-ruling.

[708] Lachlan Williams, *Survey: 700 Investigations Stalled in Brazil After Justice Toffoli's COAF Decision*, THE RIO TIMES, Oct. 27, 2019, https://riotimesonline.com/brazil-news/brazil/there-are-700-investigations-stalled-in-brazil-following-toffolis-coaf-decision/.

prosecute foreign bribery and corruption."[709] The OECD's Working Group on Bribery sent an expedited high-level mission to Brazil in November.[710]

The year 2020 promises to be another eventful year in Brazil's anti-corruption drive, as many of the legal developments concerning Operation Car Wash remain unresolved going into the new year. With the release of President Bolsonaro's most fervent political opponent from prison, continuing allegations of corruption within the Car Wash investigation, and the stalling of Bolsonaro's anti-corruption bill in Congress, the Bolsonaro administration is likely to remain on the defensive in 2020. Yet, as evidenced by the new charges brought by US and Swiss authorities that emerged from Operation Car Wash, Brazil's largest ever anti-corruption investigation will continue to reverberate globally in the years to come.

G. Mexico

1. Enforcement Efforts

In December 2018, Mexico swore in a new president, Andrés Manuel López Obrador, who campaigned on an anti-corruption platform.[711] The first high-profile anti-bribery charges his administration filed relate to the national oil company Pemex (Petróleos Mexicanos).[712] In May, Mexican investigators filed charges with federal prosecutors against former Pemex CEO, Emilio Lozoya, alleging that he accepted $10 million in bribes from a Brazilian company in connection with Pemex's 2014 purchase of a fertilizer plant.[713] The following day, Spanish police arrested the chairman of the largest integrated steel producer in Mexico in connection with the same probe.[714] Pemex purchased the fertilizer plant for $273 million dollars, $92 million more than a Mexican government agency's assessment of its value at the time.[715] The government is also expected to file charges against Lozoya in connection with the purchase of a second fertilizer company, Grupo Fertinal.[716] Lozoya is currently in hiding while his legal defense team challenges his arrest warrant and engages in cooperation negotiations with prosecutors.[717]

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[709] *Brazil Must Immediately End Threats to Independence and Capacity of Law Enforcement to Fight Corruption*, OECD, Nov. 13, 2019, https://www.oecd.org/brazil/brazil-must-immediately-end-threats-to-independence-and-capacity-of-law-enforcement-to-fight-corruption.htm.

[710] *Brazil Must Immediately End Threats to Independence and Capacity of Law Enforcement to Fight Corruption*, OECD, Nov. 13, 2019, https://www.oecd.org/brazil/brazil-must-immediately-end-threats-to-independence-and-capacity-of-law-enforcement-to-fight-corruption.htm.

[711] Lizbeth Diaz & Diego Ore, *Mexico Leftist Open to International Help, Truth Commission*, REUTERS, May 8, 2019, https://www.reuters.com/article/us-mexico-election-violence/mexico-leftist-open-to-international-help-truth-commission-idUSKBN1I93JA; Juan Montes, *Mexico's New Leader Takes Office Vowing a Bigger State Role in the Economy*, WALL ST. J., last updated Dec. 1, 2018, https://www.wsj.com/articles/mexicos-new-leader-takes-office-facing-migrant-crisis-market-selloff-1543686085.

[712] *See generally* Robbie Whelan, *Secret Recordings Describe Extensive Bribery at Mexico's Pemex*, WALL ST. J., Oct. 11, 2019, https://www.wsj.com/articles/secret-recordings-describe-extensive-bribery-at-mexicos-pemex-11570804717; David Luhnow & Juan Montes; *Decrepit Factory Becomes Symbol of Mexican Corruption Battle*, WALL ST. J., June 4, 2019, https://www.wsj.com/articles/decrepit-factory-becomes-symbol-of-mexican-corruption-battle-11559657455.

[713] Anthony Harrup & Juan Montes, *Former Executive in Mexico Is Charged*, WALL ST. J., May 28, 2019; Mexico Issues Arrest Warrants for Ex-Pemex CEO Lozoya, Family Members, REUTERS, July 5, 2019, https://www.reuters.com/article/us-mexico-pemex/mexico-issues-arrest-warrants-for-ex-pemex-ceo-lozoya-family-members-idUSKCN1U01N0.

[714] David Luhnow & Juan Montes, *Steel Executive Seized in Spain in Mexican Corruption Case Tied to Pemex*, WALL ST. J., May 28, 2019, https://www.wsj.com/articles/steel-executive-seized-in-spain-in-mexican-corruption-case-tied-to-pemex-11559089071; AHMSA Press Release: Altos Hornos Updates on Operating and Financial Normalization Process (Sept. 20, 2019), https://www.globenewswire.com/news-release/2019/09/20/1918747/0/en/Altos-Hornos-Updates-on-Operating-and-Financial-Normalization-Process.html.

[715] David Luhnow & Juan Montes; *Decrepit Factory Becomes Symbol of Mexican Corruption Battle*, WALL ST. J., June 4, 2019, https://www.wsj.com/articles/decrepit-factory-becomes-symbol-of-mexican-corruption-battle-11559657455.

[716] Juan Montes; *Mexico Prepares New Charges Against Former Pemex Boss*, WALL ST. J., Aug. 20, 2019, http://www.wsj.com/articles/mexico-prepares-new-charges-against-former-pemex-boss-11566346498.

[717] Luis Dantón Martínez Corres, et al.; *Mexico: At a Turning Point in Anti-corruption Investigations and Enforcement*, GLOBAL INVESTIGATIONS REVIEW, Aug. 19, 2019, https://globalinvestigationsreview.com/benchmarking/americas-investigations-review-2020/1196469/mexico-at-a-turning-point-in-anti-corruption-investigations-and-enforcement.

2019 also saw the appointment of Mexico's first Chief Anticorruption Prosecutor.[718] In the nine months following her appointment to the role, Luz Mijangos Borja's office has initiated nearly 700 anticorruption investigations.[719] Mijiangos Borja is also a member of the coordinating committee for Mexico's National Anticorruption System, which was established in 2016.[720]

Criminal cases against entities identified in the corruption scandal known as "La Estafa Maestra" ("The Master Fraud") also begun to move forward in 2019.[721] The scandal involves the funneling of nearly $200 million worth of government funds through public universities and shell companies.[722] Although the first criminal case in La Estafa Maestra was filed four years ago,[723] the prosecutions had stalled under the previous administration.[724] And, as noted above in Section V.F.1., in October, the IMSS, a Mexican government agency, filed suit against medical technologies firm, Stryker, in US federal court.

2. Legislative Developments

Earlier in 2019, Mr. López Obrador pledged to create an entity called the Instituto para Devolverle al Pueblo lo Robado (IDPR), which translates to the Institute "for returning stolen goods to the people."[725] The IDPR's mandate would be to redistribute the proceeds of seized assets to fund social programs throughout the country.[726] Critics argue that there is little evidence the proceeds of such forfeitures would wind up earmarked as intended, rather than being absorbed into the general treasury where they would represent an insignificant percentage of the federal budget.[727] In October, the Mexican Chamber of Deputies voted to change the name of the Service of Administration and Disposal of Assets to the IDPR.[728] It is not yet clear whether this change will lead to any substantive changes in how the institute operates.

Mr. López Obrador's administration has also expanded the Mexican government's asset forfeiture powers. In March, Mexico amended its constitution to remove several impediments to asset forfeiture.[729] In August, Mexico's congress passed the Ley de Extincion de Dominio ("National Asset Forfeiture Law").[730] And in October, the federal Attorney General's office created a unit specializing in asset forfeiture.[731]

The Ley de Extincion de Dominio adds corruption, money laundering, and other conduct to the list of activities for which forfeiture proceedings are available.[732] Asset forfeiture proceedings are available under the law

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[718] Brandt Liebe, Grant Nichols, Luke Fields, *INSIGHT: Watching U.S. Anti-Corruption Efforts in Latin America*, BLOOMBERG LAW, Sept. 24, 2019, https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-watching-u-s-anti-corruption-efforts-in-latin-america.
[719] Luis Dantón Martínez Corres, *New Corruption Prosecutor Opens 680 Investigations*, THE FCPA BLOG, (Dec. 18, 2019, 7:48 AM), https://fcpablog.com/2019/12/18/new-corruption-prosecutor-opens-680-investigations/.
[720] Brandt Liebe, Grant Nichols, Luke Fields, *INSIGHT: Watching U.S. Anti-Corruption Efforts in Latin America*, BLOOMBERG LAW, Sept. 24, 2019, https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-watching-u-s-anti-corruption-efforts-in-latin-america.
[721] Gina Hinojosa, *What's Happening with Mexico's National Anti-Corruption System? Progress and Continued Challenges at the Federal and State Level*, WOLA, Oct. 28, 2019, https://www.wola.org/analysis/progress-challenges-corruption-mexico/.
[722] Gina Hinojosa, *What's Happening with Mexico's National Anti-Corruption System? Progress and Continued Challenges at the Federal and State Level*, WOLA, Oct. 28, 2019, https://www.wola.org/analysis/progress-challenges-corruption-mexico/.
[723] Gina Hinojosa, *What's Happening with Mexico's National Anti-Corruption System? Progress and Continued Challenges at the Federal and State Level*, WOLA, Oct. 28, 2019, https://www.wola.org/analysis/progress-challenges-corruption-mexico/.
[724] Gina Hinojosa, *What's Happening with Mexico's National Anti-Corruption System? Progress and Continued Challenges at the Federal and State Level*, WOLA, Oct. 28, 2019, https://www.wola.org/analysis/progress-challenges-corruption-mexico/.
[725] Patrick Corcoran, *Mexico's Criminal Asset Forfeiture Plan Faces Teething Problems*, INSIGHT CRIME, May 29, 2019, https://www.insightcrime.org/news/analysis/mexicos-criminal-asset-forfeiture-teething-problems/.
[726] Patrick Corcoran, *Mexico's Criminal Asset Forfeiture Plan Faces Teething Problems*, INSIGHT CRIME, May 29, 2019, https://www.insightcrime.org/news/analysis/mexicos-criminal-asset-forfeiture-teething-problems/.
[727] Patrick Corcoran, *Mexico's Criminal Asset Forfeiture Plan Faces Teething Problems*, INSIGHT CRIME, May 29, 2019, https://www.insightcrime.org/news/analysis/mexicos-criminal-asset-forfeiture-teething-problems/.
[728] Iván E. Saldaña & Ximena Mejía, *Rebautizan al ExSAE como Instituto para Devolver al Pueblo lo Robado*, EXCELSIOR, Oct. 15, 2019, https://www.excelsior.com.mx/nacional/rebautizan-al-exsae-como-instituto-para-devolver-al-pueblo-lo-robado/1342100.
[729] Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, Art. 22, últimas reformas DOF 14-03-2019 (Mex.); Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, Art. 73, últimas reformas DOF 15-05-2019 (Mex.).
[730] Decreto por el que se expide la Ley Nacional de Extinción de Dominio, Diario Oficial de la Federación [DOF] 09-08-2019 (Mex.).
[731] Acuerdo A/016/19 por el que se establece la organización y funcionamiento de la Unidad Especializada en materia de Extinción de Dominio de la Fiscalía General de la República, Diario Oficial de la Federación [DOF] 01-10-2019 (Mex.).
[732] Decreto por el que se expide la Ley Nacional de Extinción de Dominio, Diario Oficial de la Federación [DOF] 09-08-2019 (Mex.).

independent of whether parallel criminal proceedings exist.[733] Critics have charged that the new law goes too far, potentially allowing for the seizure of assets from an owner who had no knowledge that the assets were being used for illegal purposes.[734]

H. Canada

"Remediation agreement" became a household phrase in Canada in 2019, as Canada's new remediation agreement regime emerged as a hot-button topic during the 2019 election for Prime Minister. As we discussed in detail in last year's Year-in-Review,[735] on September 19, 2018, Canada amended its Criminal Code to include new processes for "remediation agreements," which function like DPAs.[736] As in the UK, under the new Canadian regime, the terms of remediation agreements must be approved by a court as reasonable, proportionate, and serving the interests of justice, before they can be executed.[737]

Despite the promise of a robust new remediation agreement regime following the 2018 legislation, Canadian authorities have not yet executed any remediation agreements. This is perhaps due in large part to political pushback following allegations that Prime Minister Justin Trudeau and his government improperly pressured the public prosecutor into negotiating a remediation agreement with SNC-Lavalin.[738]

On December 18, SNC-Lavalin Group, a Canadian company that focuses on engineering, procurement, and construction services, settled Canadian charges in connection with misconduct in Libya. The company's construction division pleaded guilty to a single count of fraud of over $5,000, agreeing to pay a $280 million penalty and to be subject to independent monitorship and a three-year probation period. The charges centered on allegations that SNC-Lavalin's construction division paid nearly $48 million in bribes to public officials to influence government decisions under the late dictator Muammar Gadhafi, along with other charges of fraud and corruption for allegedly defrauding various Libyan organizations of roughly $130 million.

In 2015, as reported in previous versions of the Year-in-Review, Montreal-based SNC-Lavalin was charged under Canada's Corruption of Foreign Public Officials Act (CFPOA), based on allegations that SNC-Lavalin executives made illegal payments to former Libyan leader Muammar Gaddafi's son in exchange for construction contracts.[739] Although Canadian prosecutors postponed hearings against SNC-Lavalin until the new remediation agreement regime came into effect,[740] they ultimately declined to negotiate a remediation agreement with the company in October 2018 and moved ahead with seeking a full trial.[741] SNC-Lavalin challenged the government's decision not to pursue a remediation agreement, arguing that the decision was unreasonable, particularly given that the company had completely remediated the misconduct, removing the executives in charge when the Libyan bribes allegedly occurred and completely overhauling the company's ethics and compliance systems, hiring the same compliance professional that led the Siemens remediation.[742] In March 2019, however, Canada's Federal Court rejected this argument, holding that the Attorney General had sole discretion whether to pursue a remediation

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[733] Decreto por el que se expide la Ley Nacional de Extinción de Dominio, Diario Oficial de la Federación [DOF] 09-08-2019 (Mex.).
[734] *Mexican Rights Agency Objects to Assets Seizure Law*, ASSOCIATED PRESS, Sept. 27, 2019, https://apnews.com/ae599f1b97fe4e439ff84d41466d204f.
[735] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 76-77 (Jan. 17. 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[736] Budget Implementation Act, 2018 No. 1 (S.C. 2018, c. 12) (Can.).
[737] Budget Implementation Act, 2018 No. 1 (S.C. 2018, c. 12) (Can.).
[738] Amini Khoungui, Canada's New DPA Regime Brings Internal Controls to the Forefront, THE FCPA BLOG (Aug. 22, 2019, 12:28 PM), https://fcpablog.com/2019/08/22/canadas-new-dpa-regime-brings-internal-controls-to-the-foref/.
[739] 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.
[740] 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.
[741] Richard L. Cassin, Canada: Feds Won't Negotiate Plea Deal with SNC-Lavalin, THE FCPA BLOG (Oct. 12, 2018, 1:28 PM), https://fcpablog.com/2018/10/12/canada-feds-wont-negotiate-plea-deal-with-snc-lavalin/.
[742] David Ljunggren & Julie Gordon, *Canada Court Dismisses Bid by SNC-Lavalin to Escape Corruption Trial*, REUTERS, Mar. 8, 2019), https://www.reuters.com/article/us-canada-politics-snc-lavalin/canada-court-dismisses-bid-by-snc-lavalin-to-escape-corruption-trial-idUSKCN1QP1W8.

agreement.[743] In May, a Quebec court judge held that there is sufficient evidence against SNC-Lavalin for the company to be tried on fraud and bribery charges.[744]

Separate from SNC-Lavalin's legal claims, the case took on political overtones when *The Globe and Mail* reported in February that Prime Minister Trudeau's office improperly pressured former Attorney General Jody Wilson-Raybould to seek a remediation agreement with SNC-Lavalin and avoid a trial.[745] According to the report, in the fall of 2018, Trudeau had urged Wilson-Raybould to intervene in the prosecution of SNC-Lavalin and override federal prosecutors' decision not to seek a remediation agreement.[746] Immediately following the report, Wilson-Raybould stepped down as Attorney General, but Trudeau continued to deny any improper involvement in the SNC-Lavalin case.[747] In August, however, the Office of the Conflict of Interest and Ethics Commissioner published a detailed report finding that Trudeau had violated the Conflict of Interest Act by using his authority to pressure Wilson-Raybould into procuring a remediation agreement for SNC-Lavalin.[748] The Ethics Commissioner's Report and SNC-Lavalin became a hot-button topic during the 2019 election, setting off a nationwide debate over whether remediation agreements were desirable as a matter of public policy. Throughout the election, Prime Minister Trudeau continually defended his decision to encourage a remediation agreement for SNC-Lavalin, explaining that his actions were motivated by a desire to protect both Canadian jobs and the public interest.[749] Trudeau won re-election in October.[750]

It remains to be seen whether the Canadian government will pursue other remediation agreements in the near future, or whether the political backlash surrounding remediation agreements has weakened the government's appetite for embracing Canada's new remediation agreement regime. Likewise, it remains to be seen whether the Canadian government's decision to prosecute SNC-Lavalin despite its extensive remediation efforts will have a chilling effect on companies' interest in pursuing remediation agreements and, potentially, on voluntary disclosure decisions.

I. Other International Developments

1. Argentina

After months of discussions, on June 19, 2010, Argentina ratified a landmark information-sharing agreement with Brazil, entered into by the Attorney General's Offices of both Brazil and Argentina, that allows Argentinian prosecutors to use evidence from their Brazilian counterparts in cases linked to the Odebrecht investigations.[751] This cooperation agreement was designed to help Argentinian prosecutors launch their own investigations into Odebrecht using evidence from collaboration agreements that Odebrecht's former employees signed with Brazilian prosecutors.[752] Weeks later, the Argentinian government commenced a trial against the former Minister of Public

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[743] David Ljunggren & Julie Gordon, *Canada Court Dismisses Bid by SNC-Lavalin to Escape Corruption Trial*, REUTERS, Mar. 8, 2019, https://www.reuters.com/article/us-canada-politics-snc-lavalin/canada-court-dismisses-bid-by-snc-lavalin-to-escape-corruption-trial-idUSKCN1QP1W8.

[744] Jonathan Montpetit, *SNC-Lavalin to Stand Trial on Corruption Charges, Quebec Judge Rules*, CBC NEWS, May 29, 2019, https://www.cbc.ca/news/canada/montreal/snc-lavalin-trial-corruption-bribery-1.5153429.

[745] Robert Fife, et al., *PMO Pressed Wilson-Raybould to Abandon Prosecution of SNC-Lavalin; Trudeau Denis His Office 'Directed' Her*, THE GLOBE AND MAIL, Feb. 7, 2019, https://www.theglobeandmail.com/politics/article-pmo-pressed-justice-minister-to-abandon-prosecution-of-snc-lavalin/.

[746] Robert Fife, et al., *PMO Pressed Wilson-Raybould to Abandon Prosecution of SNC-Lavalin; Trudeau Denis His Office 'Directed' Her*, THE GLOBE AND MAIL, Feb. 7, 2019, https://www.theglobeandmail.com/politics/article-pmo-pressed-justice-minister-to-abandon-prosecution-of-snc-lavalin/.

[747] Catharine Tunney & Peter Zimonjic, *Trudeau Pushes Back on SNC-Lavalin, Says He Was 'Surprised and Disappointed' by Wilson-Raybould's Resignation*, CBC NEWS, Feb. 12, 2019, https://www.cbc.ca/news/politics/wilson-rayboul-snc-lavalin-1.5015755.

[748] Office of the Conflict of Interest and Ethics Commissioner, Trudeau II Report (Aug. 14, 2019), https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf.

[749] Amanda Connolly & Beatrice Britneff, *Federal Leaders Trade Barbs on Immigration, SNC-Lavalin, Climate Change in Debate*, GLOBAL NEWS, Oct. 7, 2019, https://globalnews.ca/news/6002525/federal-election-debate-2019/.

[750] Paul Vieira & Kim Mackrael, *Trudeau Wins Re-Election but Fails to Secure Majority*, WALL STREET JOURNAL, Oct. 22, 2019, https://www.wsj.com/articles/canadian-prime-minister-trudeau-headed-to-election-win-11571711840.

[751] Emily Casswell, *Brazil-Argentina Odebrecht collaboration agreement gets green light*, GLOBAL INVESTIGATIONS REVIEW, June 26, 2019, https://globalinvestigationsreview.com/article/1194538/brazil-argentina-odebrecht-collaboration-agreement-gets-green-light.; Fabio Ferrer, *La fiscalía podrá usar pruebas del Lava Jato y Odebrecht en la causa por el soterramiento del Sarmiento*, INFOBAE, June 19, 2019, https://www.infobae.com/politica/2019/06/19/la-fiscalia-podra-usar-pruebas-del-lava-jato-y-odebrecht-en-la-causa-por-el-soterramiento-del-sarmiento.

[752] Fabio Ferrer, *La fiscalía podrá usar pruebas del Lava Jato y Odebrecht en la causa por el soterramiento del Sarmiento*, INFOBAE.

Works, Julio De Vido, over corruption charges related to an alleged $2.3 billion worth of contracts awarded to Odebrecht in 2006.[753]

Argentinian prosecutors also continue to investigate the Cuadernos ("Notebook") Scandal, an investigation into several bribes made for public works contracts which has been predicted to become "Argentina's Operation Car Wash."[754] In April, Argentinian prosecutors petitioned the judge in charge of the case to open a parallel investigation into alleged money laundering committed by the businesspersons involved in the contracts, after discovering the existence of multiple bank accounts in Argentina and other countries.[755] The president of Argentina's financial information unit, Mariano Federici, recently stated that the Notebook Scandal may also present an "unprecedented opportunity" for significant anti-corruption reforms in the country.[756]

2. Ukraine

Ukraine adopted several key legislative and policy changes in 2019. In February, Ukraine's constitutional court struck down a law that prevented the self-enrichment of government officials.[757] Ukraine's National Anti-Corruption Bureau (NABU) called this decision a "politically motivated" action that represented "a step back" for Ukraine's anti-corruption efforts.[758] In April, prosecutors from Ukraine's State Bureau of Investigation (SBI) raided NABU as part of an investigation into whether law enforcement agencies accepted bribes that encouraged them to close criminal cases tied to the alleged embezzlement of state funds in the defense sector.[759] Ukraine's High Anti-Corruption Court (HACC), which was established as a permanently functioning specialized court last year, was officially launched in September.[760]

In November, the Ukrainian Parliament introduced amendments to Ukraine's anti-corruption laws that will significantly enhance protections and incentives for whistleblowers (Whistleblower Amendments or Amendments).[761] These Whistleblower Amendments, which took effect January 1, 2020, require all government bodies, state-owned enterprises, and private companies that participate in public procurement for contracts worth approximately $825,000 or more to draft procedures for employees to raise concerns, implement internal reporting channels and provide guidance to employees on reporting concerns.[762] The Amendments extend the definition of "whistleblower" to apply to several areas of European law, bringing Ukraine's legislation on whistleblowers closer to the standards outlined by the EU Directive on the protection of whistleblowers,[763] and impose sanctions on companies that disclose a

[753] Nicolás Misculin, Hugh Bronstein, and Leslie Alder, *Odebrecht corruption case against ex Argentine minister heads to trial*, REUTERS, June 27, 2019, https://www.reuters.com/article/us-argentina-corruption-odebrecht/odebrecht-corruption-case-against-ex-argentine-minister-heads-to-trial-idUSKCN1TS371.
[754] Maximiliano N. D'Auro, Francisco Grosso, & Virginia Frangella, *Will the Notebooks Scandal Be Argentina's Operation Carwash?*, THE ANTI-CORRUPTION REPORT, Nov. 14, 2018.
[755] *La UIF - Querellante en la causa de los cuadernos*, GOBIERNO DE LA REPÚBLICA ARGENTINA, Apr. 12, 2019, https://www.argentina.gob.ar/noticias/la-uif-querellante-en-la-causa-de-los-cuadernos.
[756] Waithera Junghae, Notebook scandal gives Argentina "unprecedented opportunity" to tackle corruption, official says, GLOBAL INVESTIGATIONS REVIEW, May 17, 2019, https://globalinvestigationsreview.com/article/1193094/notebook-scandal-gives-argentina-%E2%80%9Cunprecedented-opportunity%E2%80%9D-to-tackle-corruption-official-says.
[757] *Ukrainian Court Strikes Down Anti-Corruption Law*, VOA NEWS, Feb. 27, 2019, https://www.voanews.com/europe/ukrainian-court-strikes-down-anti-corruption-law.
[758] *Poroshenko Proposes New Anti-Graft Bill after Court Annuls 2015 Law*, RADIO FREE EUROPE / RADIO LIBERTY, Feb. 28, 2019, https://www.rferl.org/a/ukraine-s-constitutional-court-annuls-legislation-on-illegal-enrichment/29795698.html.
[759] *Ukraine's State Bureau of Investigation conducting raid at NABU*, UKRAINIAN INDEPENDENT INFORMATION AGENCY OF NEWS (UNIAN), Apr. 23, 2019, https://www.unian.info/politics/10527894-ukraine-s-state-bureau-of-investigation-conducting-raid-at-nabu.html.
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[761] Will Neal, *Ukraine introduces new whistleblower protections*, GLOBAL INVESTIGATIONS REVIEW, Nov. 15, 2019, https://globalinvestigationsreview.com/article/1210967/ukraine-introduces-new-whistleblower-protections.
[762] Maryna Kavaleuskaya, Ukraine adds whistleblower awards (and protections) with new amendments, THE FCPA BLOG (Dec. 10, 2019, 7:38 AM), https://fcpablog.com/2019/12/10/ukraine-adds-whistleblower-awards-and-protections-with-new-amendments/.
[763] Oleksandr Kalitenko, *Protection of Whistleblowers: Legal Analysis of the Draft Law*, TRANSPARENCY INTERNATIONAL UKRAINE, Oct. 9, 2019, https://ti-ukraine.org/en/news/protection-of-whistleblowers-legal-analysis-of-the-draft-law/.

whistleblower's identity or terminate a whistleblower's employment.[764] The Amendments also introduce guidelines on remuneration for those who come forward with corruption allegations.[765]

3. Italy

The Italian so-called "bribe destroyer" bill was enacted in January 2019. The legislation updates the Italian Criminal Code to change the commencement of the statute of limitations to minimize the risk of a statute of limitations barring a case in the event of long-standing criminal proceedings, include increased penalties for bribery and embezzlement, and expand the definition of "foreign public official" to include individuals in public international organizations, members of international parliamentary assemblies, and members of international organizations.[766]

4. Switzerland

The Federal Assembly of Switzerland has amended article 53 of the Swiss Code of Criminal Procedure.[767] The pre-amendment criminal code allowed prosecutors to offer settlements to individuals charged with offenses carrying a term of custody of up to two years companies that made a reasonable effort to compensate victims.[768] The amendment limits prosecutors' authority to offer settlements to offenses against individuals carrying a term of custody of up to one year and companies that admit guilt.[769] The amendment will take effect on July 1, 2020.[770]

As for prosecutorial actions in 2019, Swiss authorities have indicted Israeli billionaire Beny Steinmetz and two of his associates for allegedly paying $10 million in bribes to the wife of former Guinean President Lansana Conte.[771] The prosecutor claims that Beny Steinmetz authorized the bribe to win mining rights for Beny Steinmetz Group Resources (BSGR) and is seeking two to ten years prison terms for each of the defendants.[772] Beny Steinmetz and BSGR categorically deny any wrongdoing.[773]

The Swiss indictment comes at a noteworthy time. Earlier in 2019, BSGR and Guinea entered into a settlement reportedly brokered by former French president Nicholas Sarkozy.[774] The terms of the agreement provide that both parties will withdraw all allegations of corruption against each other and that BSGR will relinquish mining rights to Simandou—the very region implicated in Beny Steinmetz' alleged $10 million bribe to Guinean authorities.[775]

The Swiss Office of the Attorney General (Swiss OAG) also commenced an investigation against unknown perpetrators suspected of bribing foreign officials.[776] The investigation comes after an NGO filed a complaint against

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[764] Maryna Kavaleuskaya, Ukraine adds whistleblower awards (and protections) with new amendments, THE FCPA BLOG (Dec. 10, 2019, 7:38 AM), https://fcpablog.com/2019/12/10/ukraine-adds-whistleblower-awards-and-protections-with-new-amendments/.
[765] Will Neal, *Ukraine introduces new whistleblower protections*, GLOBAL INVESTIGATIONS REVIEW, Nov. 15, 2019, https://globalinvestigationsreview.com/article/1210967/ukraine-introduces-new-whistleblower-protections.
[766] Gazzetta Ufficiale della Repubblica Italiana, https://www.gazzettaufficiale.it/eli/id/2019/01/16/18G00170/sg.
[767] James Thomas, *Swiss parliament amends controversial settlement tool*, GLOBAL INVESTIGATIONS REVIEW, June 20, 2019, https://globalinvestigationsreview.com/article/1194271/swiss-parliament-amends-controversial-settlement-tool.
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[771] Richard L. Cassin, Beny Steinmetz indicted in Switzerland for bribery, THE FCPA BLOG (Aug. 14, 2019, 12:18 PM), https://fcpablog.com/2019/8/14/beny-steinmetz-indicted-in-switzerland-for-bribery/.
[772] Richard L. Cassin, Beny Steinmetz indicted in Switzerland for bribery, THE FCPA BLOG (Aug. 14, 2019, 12:18 PM), https://fcpablog.com/2019/8/14/beny-steinmetz-indicted-in-switzerland-for-bribery/.
[773] Richard L. Cassin, Beny Steinmetz indicted in Switzerland for bribery, THE FCPA BLOG (Aug. 14, 2019, 12:18 PM), https://fcpablog.com/2019/8/14/beny-steinmetz-indicted-in-switzerland-for-bribery/.
[774] Franz Wild & Thomas Biesheuvel, *Mining Billionaire Ends Bitter Guinea Dispute After Months of Secret Negotiations*, BLOOMBERG, Feb. 24, 2019, https://www.bloomberg.com/news/articles/2019-02-25/steinmetz-stages-guinea-comeback-in-sarkozy-brokered-deal.
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[776] *The Short Cut: Swiss court rejects former FIFA executive's appeal against ban,* GLOBAL INVESTIGATIONS REVIEW, May 31, 2019, https://globalinvestigationsreview.com/short-cut/2019/may/31#1193575.

commodity trader Glencore in 2017.[777] However, the Swiss OAG said that the investigation is not focused on specific individuals or Glencore.[778]

Swiss prosecutors are also looking into soccer officials for various crimes. On December 2, 2019, the OAG questioned Nasser Al-Khelaifi, the president of the French soccer team Paris Saint-Germain, over allegations that he bribed former FIFA official Jerome Valcke to gain telecommunications contracts linked to the 2026 and 2030 World Cups.[779] Further, three German soccer officials and a former Swiss FIFA official have been indicted for misleading the German Football Association's board about the purpose of a payment of around $6.8 million.[780] The Swiss OAG has initiated a separate probe against Franz Beckenbauer linked to the same $6.8 million transaction.[781]

J. International Organizations

1. World Bank

In fiscal year 2019, the World Bank debarred 48 firms and individuals (down from 78 in 2018).[782] Most notably, Brazil-based engineering and construction company Construtora Norberto Odebrecht S.A. was debarred in early 2019 for engaging in fraudulent and collusive practices in Colombia.[783] The World Bank also debarred several Odebrecht subsidiaries based in Angola, Austria, Barbados, Cayman Islands, Chile, Colombia, Luxembourg, Panama, Peru, and the United States.[784] Nearly seven months later, the Inter-American Development Bank followed suit and debarred 20 Odebrecht subsidiaries for bribing public officials.[785]

The World Bank also opened 49 new investigations in 2019 (down from 68 in 2018) and recognized 33 cross-debarments from other multilateral development banks (down from 73 in 2018).[786] Furthermore, the Integrity Vice Presidency identified and mitigated integrity risks in 152 projects, safeguarding $28.9 billion in project commitments.[787]

2. OECD

In August, the Brazilian Congress approved a law on abuse of authority despite the OECD's warning that the law's overly broad definition of abuse of authority would have a significant chilling effect on anti-corruption

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[777] *The Short Cut: Swiss court rejects former FIFA executive's appeal against ban,* GLOBAL INVESTIGATIONS REVIEW, May 31, 2019, https://globalinvestigationsreview.com/short-cut/2019/may/31#1193575.
[778] *The Short Cut: Swiss court rejects former FIFA executive's appeal against ban,* GLOBAL INVESTIGATIONS REVIEW, May 31, 2019, https://globalinvestigationsreview.com/short-cut/2019/may/31#1193575.
[779] *The Short Cut: PSG president questioned in Swiss bribery case,* GLOBAL INVESTIGATIONS REVIEW, Dec. 3, 2019, https://globalinvestigationsreview.com/short-cut/2019/december/03#1211608.
[780] Office of the Attorney General of Switzerland Press Release: Football: Indictment filed in connection with German Football Association (DFB) (June 8, 2019), https://www.bundesanwaltschaft.ch/mpc/en/home/medien/archiv-medienmitteilungen/news-seite.msg-id-75991.html.
[781] Office of the Attorney General of Switzerland Press Release: Football: Indictment filed in connection with German Football Association (DFB) (June 8, 2019), https://www.bundesanwaltschaft.ch/mpc/en/home/medien/archiv-medienmitteilungen/news-seite.msg-id-75991.html.
[782] World Bank Press Release No. 2020/053/INT: World Bank Group Debarred 48 Firms and Individuals during Fiscal Year 2019 (Oct. 10, 2019), https://www.worldbank.org/en/news/press-release/2019/10/10/world-bank-group-debarred-48-firms-and-individuals-during-fiscal-year-2019.
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[784] Richard L. Cassin, World Bank debars Odebrecht construction units for fraud and collusion, THE FCPA BLOG (Jan. 29, 2019, 4:08 PM), https://fcpablog.com/2019/1/29/world-bank-debars-odebrecht-construction-units-for-fraud-and/.
[785] Richard L. Cassin, Inter-American Development Bank debars Odebrecht units for massive bribery, THE FCPA BLOG (Sept. 4, 2019, 3:58 PM), https://fcpablog.com/2019/9/4/inter-american-development-bank-debars-odebrecht-units-for-m/.
[786] World Bank Press Release No. 2020/053/INT: World Bank Group Debarred 48 Firms and Individuals during Fiscal Year 2019 (Oct. 10, 2019), https://www.worldbank.org/en/news/press-release/2019/10/10/world-bank-group-debarred-48-firms-and-individuals-during-fiscal-year-2019.
[787] World Bank Press Release No: 2020/053/INT: World Bank Group Debarred 48 Firms and Individuals during Fiscal Year 2019 (Oct. 10, 2019), https://www.worldbank.org/en/news/press-release/2019/10/10/world-bank-group-debarred-48-firms-and-individuals-during-fiscal-year-2019.

prosecutions.[788] The law entered into force in early in January 2020.[789] In response, the OECD Working Group on Bribery sent a high-level mission to Brazil in November to meet with senior officials to encourage them to preserve Brazil's capacity to prosecute foreign bribery.[790]

In addition to addressing these changes to Brazilian law, the OECD Anti-Bribery Convention launched a review of the 2009 Anti-Bribery Recommendation.[791] The recommendation contains policy directions on combating bribery, protecting whistleblowers, improving communication between law enforcement authorities and public officials, and good practices on internal compliance.[792] As part of this review, the OECD Working Group on Bribery held an online public consultation from March to May to address several issues pertaining to the implementation and enforcement of the OECD Anti-Bribery Convention.[793] The OECD Working Group on Bribery plans to complete the review early next year.[794]

The OECD also began surveying international businesses, large and small, anonymously to understand their anti-corruption compliance measures.[795] The OECD will present the survey results at the OECD Integrity Forum in March 2020 in hopes of informing policymakers how best to incentivize anti-corruption compliance.[796]

VII. CONCLUSIONS AND PREDICTIONS FOR 2020

As we look ahead to 2020, we predict that FCPA and foreign corruption enforcement more generally will continue to be a high priority for DOJ, the SEC, and, now, the CFTC, and that the level of enforcement activity will remain at the high levels we have seen in recent years.

We also anticipate that the CFTC will be eager to follow up on its foreign corruption Enforcement Advisory to put down a marker for its role in foreign corruption enforcement. Look for the CFTC to open significant new investigations, issue further policy guidance on the scope of foreign corruption activity that it views as within its jurisdiction, or, perhaps, even reach its first resolution.

Moreover, several trends that we have seen develop and evolve over the last few years look set to continue. For example, large, cross-border investigations appear likely to feature heavily in 2020 enforcement activity once again, as investigations linked to numerous such matters, including PDVSA, Petrobras, and Unaoil, remain ongoing. Similarly, DOJ leadership continues to emphasize the prioritization of individual prosecutions, suggesting that this will remain a focus for the Department's FCPA unit in 2020.

2019 also saw the opening of investigations in two areas that may result in enforcement activity in 2020 (and beyond). First, the FBI has opened an inquiry into "possible improper payments" in Johnson & Johnson's medical equipment business.[797] Following on the heels of the March 2019 Fresenius settlement, this inquiry marks an

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[788] *Law enforcement capacity in Brazil to investigate and prosecute foreign bribery seriously threatened, says OECD Working Group on Bribery*, OECD, Oct. 10, 2019, https://www.oecd.org/corruption/law-enforcement-capacity-in-brazil-to-investigate-and-prosecute-foreign-bribery-seriously-threatened-says-oecd-working-group-on-bribery.htm.

[789] *Law enforcement capacity in Brazil to investigate and prosecute foreign bribery seriously threatened, says OECD Working Group on Bribery*, OECD, Oct. 10, 2019, https://www.oecd.org/corruption/law-enforcement-capacity-in-brazil-to-investigate-and-prosecute-foreign-bribery-seriously-threatened-says-oecd-working-group-on-bribery.htm.

[790] *Brazil must immediately end threats to independence and capacity of law enforcement to fight corruption*, OECD, Nov. 13, 2019, https://www.oecd.org/corruption/brazil-must-immediately-end-threats-to-independence-and-capacity-of-law-enforcement-to-fight-corruption.htm.

[791] *Public Consultation: Review of the 2009 OECD Anti-Bribery Recommendation*, OECD, http://www.oecd.org/corruption/2019-review-oecd-anti-bribery-recommendation.htm.

[792] *Public Consultation: Review of the 2009 OECD Anti-Bribery Recommendation*, OECD, http://www.oecd.org/corruption/2019-review-oecd-anti-bribery-recommendation.htm.

[793] *Public Consultation: Review of the 2009 OECD Anti-Bribery Recommendation*, OECD, http://www.oecd.org/corruption/2019-review-oecd-anti-bribery-recommendation.htm.

[794] *Public Consultation: Review of the 2009 OECD Anti-Bribery Recommendation*, OECD, http://www.oecd.org/corruption/2019-review-oecd-anti-bribery-recommendation.htm.

[795] Melanie Reed, OECD Survey: What's in your compliance program?, THE FCPA BLOG (Nov. 13, 2019, 10:28 AM), https://fcpablog.com/2019/11/13/oecd-survey-whats-in-your-compliance-program/.

[796] Melanie Reed, OECD Survey: What's in your compliance program?, THE FCPA BLOG (Nov. 13, 2019, 10:28 AM), https://fcpablog.com/2019/11/13/oecd-survey-whats-in-your-compliance-program/.

[797] Brad Brooks, *FBI Targets Johnson & Johnson, Siemens, GE, Philips in Brazil Graft Case – Sources*, REUTERS (May 17, 2019) https://www.reuters.com/article/us-brazil-corruption-healthcare-exclusiv/exclusive-fbi-targets-johnson-johnson-siemens-ge-philips-in-brazil-graft-case-sources-idUSKCN1SN0ZZ.

additional investigation in the medical device industry. Whether or not there is a formal "sweep" of the industry ongoing, the investigation, paired with AAG Benczkowski's November 2019 remarks to the 20th Annual Pharmaceutical Medical Device Compliance Congress on the importance of the corporate compliance function, suggests a heightened government interest in FCPA compliance and enforcement in the industry.[798]

Second, in August 2019, Avianca Holdings (Avianca), Colombia's national airline, announced that it had voluntarily disclosed potential violations of the FCPA to the DOJ, the SEC, and Colombia's financial regulator, and that it was conducting an internal investigation.[799] Avianca's investigation focused on whether airline employees, potentially including senior management and directors, were providing free and discounted airline tickets and upgrades to government employees.[800] Avianca's disclosure represents at least the third major foreign bribery investigation into conduct by Latin American airlines over the past several years, in addition to a number of smaller aviation industry resolutions and ongoing investigations focused on Latin American operations.[801] On the domestic front, in May 2019, AAR Corporation, an Illinois-based aviation services company, alerted the DOJ, the SEC, and the UK Serious Fraud Office that the company was investigating possible violations of the FCPA related to the company's activities in Nepal and South Africa.[802]

[798] Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the 20th Annual Pharmaceutical and Medical Device Compliance Congress (Nov. 6, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-20th-annual-pharmaceutical.
[799] Avianca Holdings, Bi-Annual Report (Form 6-K, Exhibit 99.1) (Aug. 15, 2019), https://www.sec.gov/Archives/edgar/data/1575969/000119312519221753/d792613dex991.htm.
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[802] AAR Corp., Current Form (Form 8-K) (July 10, 2019), https://www.sec.gov/Archives/edgar/data/1750/000110465919039824/a19-12637_18k.htm.

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