

WEBINAR

*Updates and New Developments
in Foreign Corrupt Practices Act
Enforcement*

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Attorney Advertising



WEBINAR

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Agenda

- I. Enforcement Trends
- II. Recently Resolved Matters
- III. Case Closures
- IV. Recent Policy Updates
- V. Legal Developments
- VI. International Developments

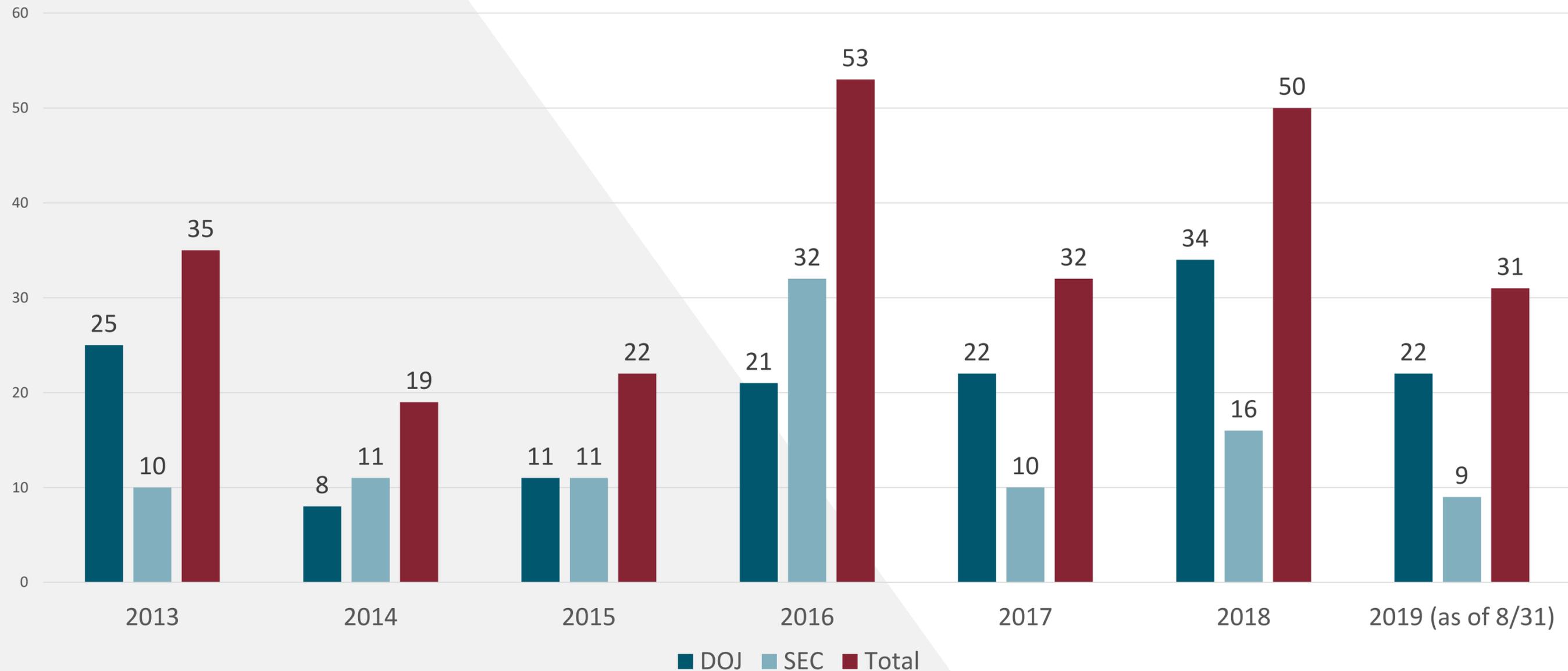


I. Enforcement Trends



Enforcement Trend Line

FCPA Enforcement Actions (2013-2019)





2019 FCPA Statistics

2019 FCPA Enforcement Statistics (Year to Date)

	DOJ	SEC
No. Companies	5	6
No. Individuals	17	3

2019 FCPA Announced Declination Statistics (Year to Date)

	DOJ	SEC
No. Companies	5	5



Anti-Corruption Enforcement Trends

- ✓ Continued focus on large cases with high-dollar resolutions
 - By August 2019, FCPA enforcement 3rd highest ever in terms of settlement amounts
- ✓ Ongoing and robust coordination/cooperation with foreign authorities
- ✓ Abiding commitment to pursuing cases against individuals
- ✓ Continued use of accounting charges to resolve matters with no/little evidence of bribery
- ✓ Use of (hybrid) monitorships to oversee compliance after resolution
- ✓ Continued efforts by DOJ to provide more policy guidance



II. Recently Resolved Matters

Corporate Resolutions



Cognizant Technology Solutions Corp.



- Cognizant is a global provider of IT and business process services
- Government alleged, between 2014 and 2016, Cognizant authorized contractors to pay \$3.6 million in bribes to Indian government officials to obtain permits and licenses
- Bribes were authorized by senior executives at U.S. headquarters
- In February 2019, Cognizant agreed to pay \$25 million to SEC (\$16 million disgorgement, \$3 million prejudgment interest, \$6 million civil penalty)
 - SEC considered self-disclosure, cooperation, and remedial efforts
 - DOJ issued a declination based on voluntary self-disclosure, full cooperation, lack of criminal history, full remediation, adequacy of SEC civil penalty and disgorgement, and DOJ's ability to identify culpable individuals, among other things
- Cognizant's former president and former chief legal officer were also indicted for these violations



Mobile Telesystems PJSC (MTS)



- MTS is a Russian telecommunications services provider and a U.S. issuer
- Government alleged that from 2004 to 2012, MTS paid at least \$420 million in bribes to government officials in Uzbekistan, generating more than \$2.4 billion in revenue
- In March 2019, MTS agreed to pay SEC \$100 million civil penalty and engage an independent compliance monitor for 36 months
- Entered into deferred prosecution agreement with DOJ, with MTS paying \$850 million, with the civil fine paid to the SEC treated as an offset
- A former MTS executive has also been indicted for his part in the scheme, as has the government official (and daughter of the former president of Uzbekistan) who was implicated
- Vimpelcom and Telia resolved similar matters in 2016 and 2018



Fresenius Medical Care AG



**FRESENIUS
MEDICAL CARE**

- Fresenius is a world-wide provider of dialysis equipment and services
- Government alleged, from 2009 to 2016, Fresenius paid bribes and did not accurately record payments in operations across Africa, the Middle East, and Europe, with senior management thwarting compliance, engaging in corruption, and directing employees to destroy records of misconduct
- Conduct covered multiple countries, with different fact patterns in each
- In March 2019, Fresenius entered into a non-prosecution agreement with DOJ and agreed to pay an \$84.7 million criminal penalty
- Fresenius received credit for its voluntary disclosure, but only partial credit for cooperation because the DOJ concluded that it did not timely respond to requests and did not provide comprehensive responses
- Agreed to pay \$147 million to SEC (\$135 million disgorgement, \$12 million prejudgment interest)
- Fresenius must retain an independent compliance monitor for two years, and self-report for an additional year



Walmart



- Government alleged that, between 2000 and 2011, Walmart subsidiaries in Brazil, China, India, and Mexico operated without sufficient anti-corruption related internal accounting controls and maintained inaccurate books and records
- Walmart made payments to third-party intermediaries without reasonable assurances they were consistent with stated purpose and were not improper payments to government officials
- Walmart also failed to act when various “anti-corruption” red flags were raised
- In June 2019, Walmart agreed to pay SEC \$145 million (\$120 million disgorgement, \$25 million prejudgment interest)
- Walmart entered into three-year non-prosecution agreement with DOJ, which required payment of \$138 million penalty, and appointment of independent monitor for two years
- Notably, neither the SEC nor the DOJ brought bribery charges against the company
- SEC considered Walmart’s self-disclosure, cooperation, and remedial measures; DOJ did not give credit for voluntary disclosure
- Public reports indicate that Walmart spent over \$900 million investigating and remediating



Telefonica Brasil

Telefonica

- Telefonica Brasil is a subsidiary of Telefonica S.A. and is the largest telecommunications company in Brazil
- Government alleged that Telefonica failed to devise and maintain sufficient accounting controls with respect to a program where it offered World Cup tickets and hospitality to government officials
- Telefonica had an internal policy prohibiting this conduct but allegedly did not have accounting controls sufficient to implement the policy
- In May 2019, Telefonica agreed to pay SEC a \$4.1 million civil penalty in a neither-admit-nor-deny settlement involving no disgorgement
- The SEC considered Telefonica's remedial acts and cooperation



Technip FMC PLC



- DOJ alleged two criminal counts relating to bribery in Brazil and Iraq; Technip made payments to consultants, knowing that they would be passed on to Brazilian government officials, as well as to a Brazilian political party and political candidates
- In June 2019, Technip entered into a three-year deferred prosecution agreement with DOJ and paid a \$296 million criminal penalty (with most going to Brazilian authorities, who separately prosecuted the company); Technip received a 25% reduction to its fine for substantial cooperation and remediation
- A Technip U.S. subsidiary entered a guilty plea
- DOJ noted that Technip did not voluntarily disclose but received full credit for cooperation and remediation; based on that remediation, DOJ said an independent compliance monitor was unnecessary
- Technip says the SEC has also agreed to a deal in principle but it has not been finalized; Technip said its combined settlement will total approximately \$301 million
- DOJ credited governments of Australia, Brazil, France, Germany, Italy, Monaco, and the UK



Microsoft



- Government alleged that from 2012 to 2015, employees at a Microsoft subsidiary in Hungary requested increased discounts for third parties in connection with licenses for government end-users
 - Rather than passing along the discounts to customers, the third parties used the resulting funds for payments to government officials
 - Microsoft's Hungary subsidiary also paid numerous third-party contractors even though there was no evidence the contractors provided any services
- The SEC also alleged that Microsoft subsidiaries in Turkey, Saudi Arabia, and Thailand provided payments, gifts, and improper discounts to government officials
- In July 2019, Microsoft's subsidiary in Hungary entered into a non-prosecution agreement with DOJ and paid an \$8.8 million criminal penalty; Microsoft received a 25% reduction from the low end of the sentencing guidelines for cooperation and remediation
- Microsoft also agreed to pay \$16.6 million to settle books and records and internal controls violations with the SEC (\$13.8 million disgorgement, \$2.8 million prejudgment interest)



Juniper Networks



- Juniper designs, manufactures, and sells networking equipment products and services
- Government alleged that from 2008 to 2013, employees in Russia secretly agreed to increase discounts for channel partners; Instead of passing the discounts on to customers, partners held the proceeds in off-book accounts to fund trips for customers, including foreign officials
 - Senior management learned about this in 2009, but the practices continued through 2013
- Government also alleged that from 2009 to 2013, employees in China paid for excessive entertainment/travel for customers, including government officials, contrary to company policy
- Juniper did not voluntarily disclose but timely disclosed facts from internal investigation
- In 2018, Juniper announced that DOJ closed investigation with no action, and had acknowledged the company's cooperation with the investigation
- In August 2019, Juniper agreed to resolve internal accounting controls and recordkeeping charges and pay \$11.7 million to SEC, including \$4 million disgorgement, \$1.2 million prejudgment interest, and \$6.5 million civil penalty



Deutsche Bank



Deutsche Bank

- Government alleged that between 2006 and 2014, Deutsche Bank provided employment to relatives of foreign government officials to improperly influence the officials to assist the bank
 - Deutsche Bank had various policies intended to prevent such hiring, but the policies were not followed and employees created false records to conceal the hiring
- SEC alleged that Deutsche Bank received business in China and Russia as a result of these business practices, resulting in \$10.8 million in unjust enrichment
- In August 2019, Deutsche Bank agreed to pay approximately \$16 million to the SEC (\$10.8 million disgorgement, \$2.4 million prejudgment interest, \$3 million civil penalty) to resolve books and records and internal controls violations; there was no anti-bribery charge
- Deutsche Bank also agreed to enhance its internal control systems, including requiring that its anti-corruption office review and approve each client referred by a client, potential client, or government official

Individual Resolutions



Frank James Lyon

- Government alleged that Lyon's Hawaii-based engineering and consulting company paid \$440,000 in bribes to government officials of Hawaii and of the Federated States of Micronesia to obtain government contracts
- In January 2019, Lyon pleaded guilty to conspiracy to violate anti-bribery provisions of FCPA and to commit federal program fraud
- Lyon was sentenced to 30 months in prison in May 2019

Jose Manual Gonzalez Testino

- In May 2019, Gonzalez Testino pleaded guilty to violating anti-bribery provisions of the FCPA, conspiracy to violate the FCPA, and failure to report foreign bank accounts
- According to admissions made as part of his guilty plea, Gonzalez Testino paid bribes to officials with Petroleos de Venezuela S.A., Venezuela's state-owned energy company, in exchange for contracts for several companies that he controlled
- In total, DOJ has charged 21 individuals relating to bribery at Petroleos de Venezuela



Roger Richard Boncy & Joseph Baptiste

- In 2017 and 2018, Boncy and Baptiste were charged with conspiracy to violate the anti-bribery provision of the FCPA and the Travel Act; Baptiste was also charged with violating the Travel Act and money laundering
- According to evidence presented at trial, Boncy and Baptiste solicited bribes from undercover FBI agents posing as potential investors for a development project in Haiti
- In June 2019, after a two-week jury trial in the District of Massachusetts, Boncy and Baptiste were found guilty of all counts
- Boncy and Baptiste are expected to be sentenced on September 12, 2019

Luis Alberto Chacin Haddad & Jesus Ramon Veroes

- In June 2019, Haddad and Veroes pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA, admitting they made payments to officials at Corpoelec SA, Venezuela's state-owned power company in exchange for contracts
- Two former Venezuelan officials have also been charged with money laundering and conspiracy to commit money laundering
- Haddad and Veroes are to be sentenced on September 30, 2019



Andrew Pearse, Surjan Singh, & Detelina Subeva

- In January 2019, an indictment against three former bankers at a global financial institution was unsealed, charging them with conspiracy to (1) commit wire fraud, (2) commit securities fraud, (3) violate the FCPA anti-bribery and internal controls provisions, and (4) commit money laundering
- Government alleged defendants were involved in a scheme to provide \$2 billion in loans for maritime projects in Mozambique, while diverting \$200 million for bribes and kickbacks; a number of foreign officials also were charged
- In June 2019, Subeva pleaded guilty to money laundering conspiracy
- In July 2019, Pearse pleaded guilty to wire fraud conspiracy
- On September 11, 2019, Singh pleaded guilty to money laundering conspiracy



Robin Longoria

- In August 2019, Longoria pleaded guilty to conspiracy to (1) violate the anti-bribery provision of the FCPA, (2) commit wire fraud, and (3) commit visa fraud
- Longoria worked for an Ohio adoption agency and admitted to bribing Ugandan officials to facilitate adoptions of Ugandan children by her American clients
- The adoption agency she worked for had previously been debarred by the U.S. State Department and eventually shut down after being sued by the Ohio Attorney General for failing to deliver services and making misrepresentations to clients
- In 2014, DOJ brought charges of accreditation fraud and conspiracy to defraud the United States against employees of another adoption agency relating to adoptions of children from Ethiopia and Kazakhstan; in 2017, one of those employees was sentenced to 18 months imprisonment, a second to 12 months, and a third to probation



III. Case Closures



Noble Corporation



- Noble is an offshore drilling contractor
- In 2015, Noble opened an investigation of a commercial agent in Brazil in connection with drilling contracts with Petroleo Brasileiro S.A., who had pleaded guilty in Brazil in connection with the award of a drilling contract to a competitor
- In a February 2019 SEC filing, Noble stated that the SEC and DOJ had informed the company that they would not take enforcement action



PAR Technology



- PAR Technology provides software, systems, and service solutions to restaurants and retail stores
- In 2016, PAR notified the SEC and DOJ of an internal investigation relating to whether conduct in its China and Singapore offices was in violation of the FCPA
- In a May 2019 SEC filing, PAR stated that the SEC and DOJ had notified the company that they would not take enforcement action
- Investigations by authorities in China and Singapore are ongoing



OSI Systems



- OSI designs and manufactures electronic systems and components
- In February 2018, OSI disclosed that the SEC and DOJ were investigating its compliance with the FCPA after receiving a report by a short seller
- At that time, OSI also said it had taken action with respect to a senior-level employee
- In June 2019, OSI announced that DOJ and the SEC had informed the company that they would be closing their respective FCPA investigations



Misonix



- Misonix designs, manufactures, and markets ultrasonic medical devices
- In September 2016, Misonix contacted DOJ and the SEC to disclose conduct by an independent Chinese entity that had distributed Misonix's products in China, relating to FCPA compliance
- In June 2019, Misonix stated that the SEC had informed the company that it would not be pursuing an enforcement action
- In August 2019, Misonix stated that DOJ had also informed the company that it had closed its inquiry without taking any actions



Veolia



- Veolia is a resource management company, covering water, waste, and energy management
- In 2015, the SEC and DOJ opened investigations into potential bribery of government officials in Romania resulting in Veolia obtaining significant increases in water prices
- In a financial statement, Veolia announced that on July 8, 2019, the SEC informed the company that it had concluded its investigation and would not be recommending enforcement action
- Veolia has not commented on the status of the DOJ investigation



IV. Recent Policy Updates



DOJ Revises FCPA Corporate Enforcement Policy

- On March 8, 2019, DOJ released a revised Corporate Enforcement Policy
- Provides presumption of declination in M&A context, where acquiring entity self-discloses, fully cooperates, and timely and appropriately remediates violations of acquired or merged entity, unless there are certain aggravating circumstances
- Clarifies that companies need only disclose relevant facts about individuals substantially involved in or responsible for legal violations
- Removes prohibition on use of ephemeral messaging systems and instead asks companies seeking credit to implement appropriate guidance and controls to ensure that business records are appropriately maintained
- Clarifies that “de-confliction” is only required where requested and appropriate



DOJ Updates Guidance on Evaluation of Corporate Compliance Programs

- In April 2019, DOJ released an update to its 2017 Guidance on the evaluation of corporate compliance programs
- 2019 Guidance covers many of the same topics as the 2017 Guidance, but it provides more concrete direction
- 2019 Guidance is framed around three questions:
 1. Is the corporation's compliance program well designed?
 2. Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?
 3. Does the corporation's compliance program work in practice?



DOJ Updates Guidance on Evaluation of Corporate Compliance Programs

1. Is the corporation's compliance program well designed?
 - Allows prosecutors to “credit” a risk-based compliance program that is focused on areas of highest risk, even if that program fails to prevent misconduct in low-risk areas
 - Suggests companies test employees on what they learn in compliance trainings and respond with remedial measures if an employee fails tests
 - States DOJ will examine whether reporting mechanisms are publicized to employees and how a company determines which red flags warrant further investigation
 - States DOJ will scrutinize practices surrounding third parties



DOJ Updates Guidance on Evaluation of Corporate Compliance Programs

2. Is the corporation's compliance program being implemented effectively?
 - Elevates responsibility of middle management in reinforcing ethical standards
 - Focus on independent compliance functions that are adequately staffed and resourced

3. Does the corporation's compliance program work in practice?
 - States that identification of misconduct is "strong indicator" compliance is working
 - Introduces measure of "culture of compliance"
 - Indicates DOJ will inquire as to employee discipline for misconduct



CFTC's New Enforcement Advisory

- In March 2019, the CFTC announced an Enforcement Advisory on self-reporting and cooperation for violations of the Commodity Exchange Act involving foreign corrupt practices
- This was the first time the CFTC had announced a commitment to investigating cases involving foreign corrupt practices
- Where companies and individuals voluntarily disclose violations of the CEA involving foreign corrupt practices, and fully cooperate and appropriately remediate, CFTC will apply presumption of no civil penalty, provided there are no aggravating circumstances





V. Legal Developments



Wadler v. Bio-Rad Laboratories, Inc.

- Wadler (then general counsel of Bio-Rad) reported potential FCPA violations to the CEO and was rebuffed; he then reported directly to the Audit Committee, and was later fired
 - Sued claiming termination violated Sarbanes-Oxley, which prohibits retaliation against employees who report conduct they reasonably believe to be a violation of “any rule or regulation of” the SEC or any federal law relating to fraud against shareholders
- Jury found in Wadler’s favor after judge instructed them that a violation of the FCPA was a violation of rules or regulations of the SEC
- In February 2019, the Ninth Circuit reversed in part and remanded, holding FCPA (as a statute enacted by Congress) is not a “rule or regulation” of the SEC
 - Noted that the FCPA’s books and records provisions are identical to certain SEC regulations and remanded to the district court to determine whether a new trial was warranted
 - Noted that Wadler may be able to argue that FCPA violations also constituted “fraud against shareholders”



United States v. Ng Lap Seng

- Ng Lap Seng paid two UN ambassadors \$1 million to secure commitment that UN would use his Macau real estate development for a UN conference
- Jury found him guilty of various bribery and money laundering charges, including under the FCPA and 18 U.S.C. § 666 (bribery involving programs receiving federal funds)
 - Ng appealed, arguing (1) UN was not an “organization” under 18 U.S.C. § 666, (2) jury was improperly instructed in light of *McDonnell v. United States*, and (3) evidence was insufficient
- In August 2019, Second Circuit affirmed, holding that (1) UN was an “organization”, (2) *McDonnell* standard does not apply to Section 666 or the FCPA because those statutes do not require the provision of an “official act”, and (3) evidence was sufficient



United States v. Hoskins

- Hoskins is a British national and former Paris-based executive of Alstom UK
- Hoskins was indicted on 12 counts, including conspiracy to violate the FCPA, violations of the FCPA, and money laundering relating to an Indonesian bribery scheme
- Hoskins argued that he could not be charged with conspiracy to violate the FCPA since he did not fall within the categories of the statute allowing for extraterritorial application
- Second Circuit agreed that person cannot “be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal,” but allowed government to argue that Hoskins was an agent of a domestic concern under common law agency principles
- Jury selection for Hoskins’ trial is scheduled to start in October



Och-Ziff and Restitution



- On August 29, 2019, Judge Garaufis of the Eastern District of New York ruled that hedge fund Och-Ziff Capital Management should compensate certain victims of its foreign bribery scheme
- In February 2018, shareholders of the Canadian Mining company, Africo Resources Limited, filed for restitution to recover losses incurred as a result of Och-Ziff's scheme to bribe officials in the Democratic Republic of Congo
 - Och-Ziff entered a \$412 million settlement with the DOJ and SEC in 2016 for bribes related to the acquisition of mining interests in several African countries
 - Its subsidiary, OZ Africa Management, pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA
- Shareholders intervened prior to sentencing, and August 2019 Garaufis ruling finds that they are victims under the Mandatory Victims Restitution Act, opening the door to restitution claims

Congress Considers Foreign Extortion Prevention Act

- In August 2019, members of the House of Representatives introduced legislation that would criminalize extortion by foreign officials
- If passed, this legislation would allow prosecution of foreign officials receiving bribes, in addition to current enforcement powers against those who pay bribes
 - In a press release announcing the bill, Representative John Curtis wrote, “Currently, a business being extorted for a bribe can only say ‘**I can’t pay you a bribe because it is illegal and I might get arrested.**’ This long-overdue bill would enable them to add, ‘and so will you.’”
- If enacted, it would bring U.S. law in line with a number of other countries, including the UK, France, the Netherlands, and Switzerland



*VI. International
Developments*

Enforcement Actions Against Government Officials

- China – Former Provincial Vice-Governor sentenced to 20 years in jail and fined \$26 million for bribery, embezzlement, and insider trading (April 2019)
- France – Ex-President Sarkozy to stand trial for corruption, influence-peddling (June 2019)
- Israel – Attorney General announced plan to try Prime Minister Netanyahu for bribery and fraud (February 2019)
- Peru – Former President arrested as part of Odebrecht bribery scandal (July 2019); another Former President committed suicide to avoid arrest (April 2019)
- Romania – Former Chief of Anticorruption Agency indicted on bribery, abuse of office, and false testimony charges (March 2019)

Recall that FCPA charges cannot be brought against foreign government officials, but they can be charged under foreign statutes

Enforcement Actions Relating to Payment of Bribes

- Canada – Quebec court finds sufficient evidence against SNC-Lavalin for trial on fraud and bribery charges (May 2019)
 - Parliament of Canada’s Ethics Commissioner concluded that Prime Minister Trudeau improperly pressured the Attorney General to offer SNC-Lavalin a deferred prosecution agreement
- UK – FH Bertling Ltd was fined £850,000 for bribery scheme to secure contracts in Angola (June 2019)



International Policy Developments

- Italy – Enacts “Bribe Destroyer” Law (January 2019)
 - Relaxes statute of limitations, prevents certain people convicted of corruption charges from holding public office or seeking state contracts, and increases corruption-related penalties
- Brazil – Supreme Court holds that corruption cases involving illegal campaign donations should be handled by electoral courts, not criminal courts (March 2019)
- Ukraine – Launches anti-corruption court with funds from IMF (April 2019)
- UK – Serious Fraud Office releases Corporate Cooperation Guidance (August 2019)
 - Defines cooperation as “providing assistance to the SFO that goes above and beyond what the law requires,” including identifying suspected wrongdoing and those responsible, reporting to SFO within reasonable time, and preserving available evidence and providing it promptly
 - If organization asserts privilege, requires certification by independent counsel that material is privileged



Questions

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