FCPA Update

A Global Anti-Corruption Newsletter

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Anti-Corruption Enforcement in 2017: A Return to Normalcy

I. Major Trends and Developments in Global Anti-Bribery Enforcement

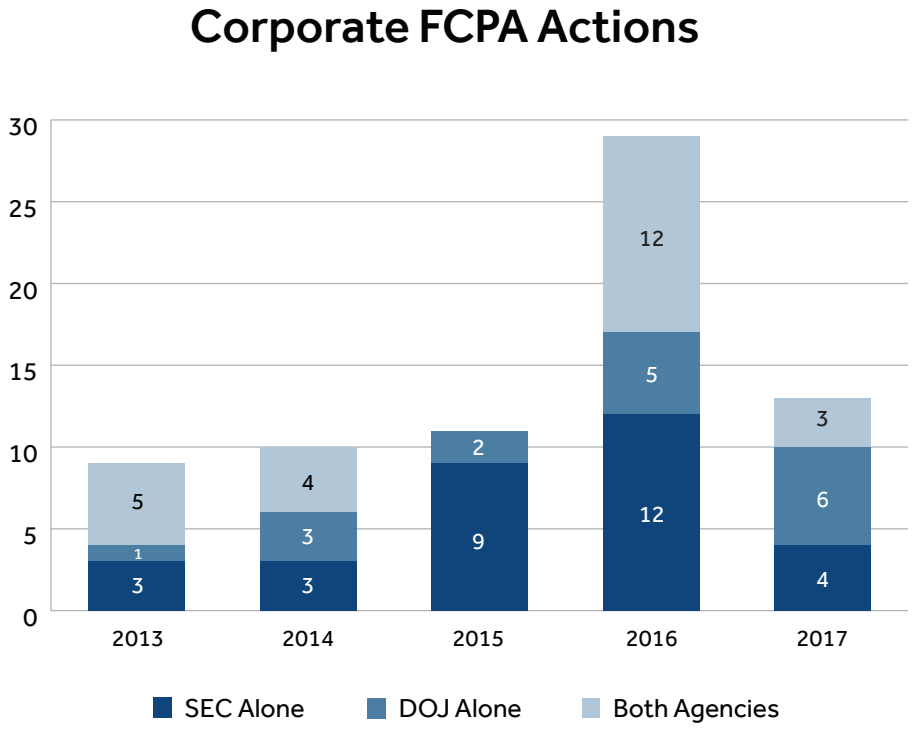
Despite questions raised at the outset of the Trump administration, 2017 enforcement of the U.S. Foreign Corrupt Practices Act ("FCPA") largely tracked historical averages. 2016's record-breaking FCPA enforcement activity by the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") appears to have been due, at least in part, to a desire to resolve cases before large-scale personnel changes that often occur at the end of a presidential administration. 2017 saw a return to the normal pace in terms of number of enforcement actions, while continuing the increased levels of coordination and cooperation between U.S. enforcement agencies and foreign counterparts to reach global settlements. 2017 was also the year of the recidivist, with three companies that previously settled FCPA charges again finding themselves in trouble.

Continued on page 2

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 1

For context, the chart below summarizes the number of corporate FCPA actions over the past five years:



Although FCPA actions may have lagged mid-year, the agencies ended the year in a flurry of activity, including the announcement of a new DOJ Corporate Enforcement Policy, which was formalized into the United States Attorneys' Manual.[1] The new policy largely tracked the 2016 Pilot Program,[2] albeit with a few significant changes discussed below. While one year's statistics cannot establish a pattern, 2017 was also a year in which DOJ's long-stated objective of bringing actions against individuals appears to have gained some traction, with DOJ charging more individuals in the FCPA space in a calendar year than ever before.[3]

Continued on page 3

1. United States Department of Justice, "United States Attorneys' Manual," §9-47.120, https://www.justice.gov/criminal-fraud/file/838416/download [hereinafter "United States Attorneys' Manual"]; *see also* Kara Brockmeyer et al., "U.S. Department of Justice Announces a Revised FCPA Corporate Enforcement Policy," FCPA Update, Vol. 9, No. 5 (Dec. 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/12/fcpa_update_dec_2017.pdf [hereinafter "FCPA Update Dec. 2017"].
2. United States Department of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download [hereinafter "Pilot Program"].
3. The individual actions were covered in-depth in the November 2017 FCPA Update. *See* Kara Brockmeyer et al., "U.S. Department of Justice Announces Flurry of FCPA Cases Against Individual Defendants," FCPA Update, Vol. 9, No. 4 (Nov. 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/11/fcpa_update_november_2017_v9no4.pdf [hereinafter "FCPA Update Nov. 2017"].

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 2

Anti-corruption laws and their enforcement around the world continue to proliferate, with Latin America serving as a crucible for both FCPA and local law enforcement. In addition to increased enforcement by non-U.S. anti-corruption authorities, 2017 included substantial cooperation on an international level: both active sharing of evidence and several notable multilateral resolutions, including Telia, SBM Offshore, Rolls-Royce, and Keppel Offshore & Marine ("KOM").

"2017 saw a return to the normal pace in terms of number of enforcement actions, while continuing the increased levels of coordination and cooperation between U.S. enforcement agencies and foreign counterparts to reach global settlements."

I. FCPA Enforcement Trends, Lessons, and Things to Watch

A. Enforcement Statistics

1. Number of Cases and Quantum of Penalties

After a record-breaking year in 2016, 2017 saw a return to historical averages. Without double-counting parallel actions, DOJ and the SEC resolved a total of 13 corporate enforcement actions,[4] collecting approximately $1.14 billion — a sum that jumps to $3.36 billion if settlement payments to other countries are counted. Three of the actions were with repeat-players, the largest number of recidivist cases in a calendar year.

As demonstrated below, though recovery amounts in 2017 were lower than 2016 – both global and U.S. recovery – the percentage paid to the U.S. held consistent at a little over one-third each year.

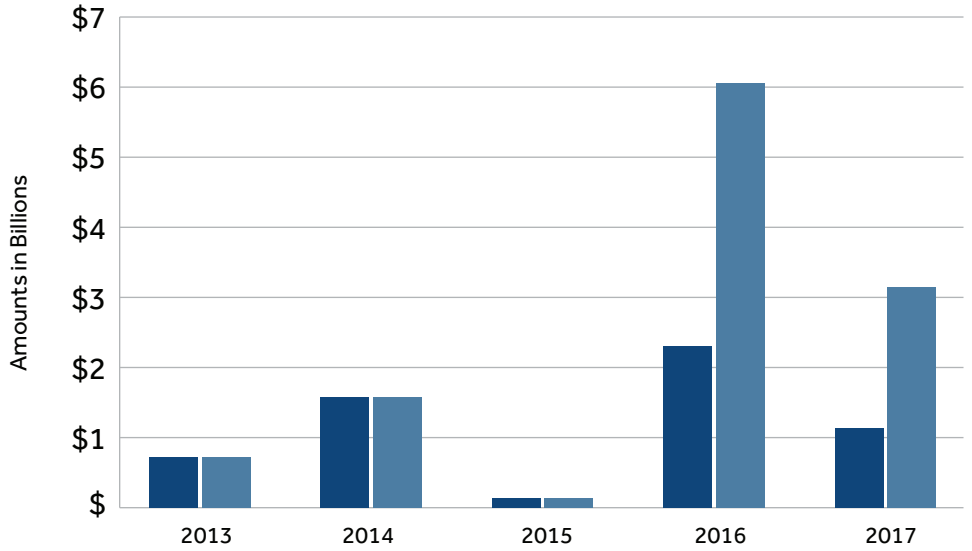
Continued on page 4

4. Although the Rolls-Royce agreement and supporting papers are dated December 20, 2016, the settlement was not announced publicly until January 17, 2017. Therefore, it is included in this issue of *FCPA Update* and our 2017 statistics.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 3

Penalties Received



Total US Recovery	$720,669,702	$1,566,098,941	$138,937,524	$2,310,291,491	$1,141,121,930
Total Global Recovery	$722,008,089	$1,566,099,341	$138,937,524	$6,054,623,028	$3,150,672,227
US Share	99.8%*	100%	100%	38%	36%

* German law enforcement authorities reached a $1,338,387 resolution following a parallel investigation into an ADM subsidiary.United States Department of Justice, Press Release No. 13-1356, "ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act," (Dec. 20, 2013), https://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act.

a) DOJ

In 2017, DOJ announced the resolution of 9 corporate enforcement actions:

- 6 deferred prosecution agreements (4 of which included guilty pleas by subsidiaries);
- 1 non-prosecution agreement; and
- 2 declinations with disgorgement.

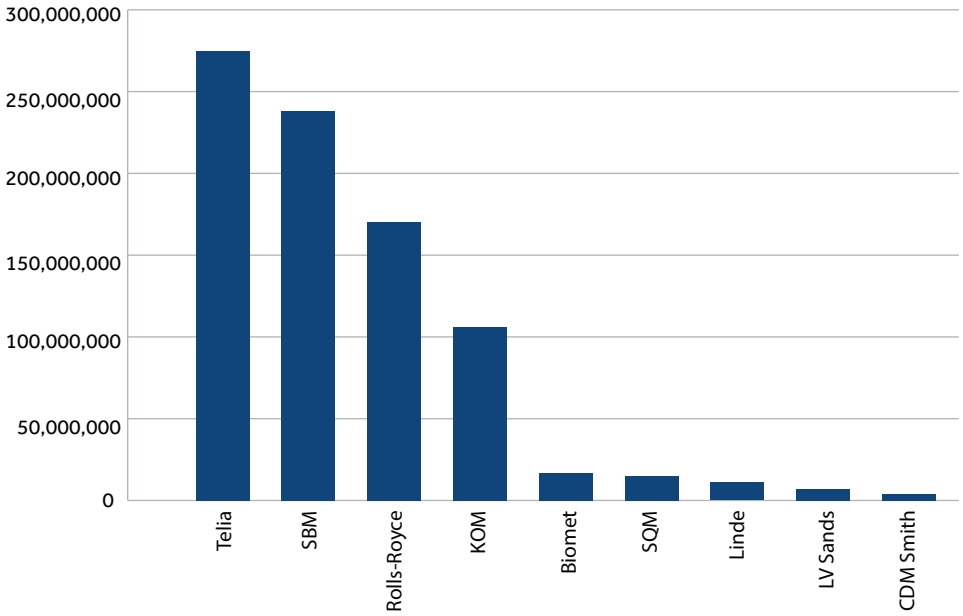
There were no stand-alone guilty pleas in 2017 and none taken by a parent company.

As in prior years, DOJ's corporate enforcement actions contained a mix of large cases (involving more than $100 million in disgorgement or penalties) and smaller actions. DOJ's 9 enforcement actions netted $843.3 million in penalties and disgorgement to the U.S. Treasury, most of which is attributable to four resolutions: Telia ($275 million), SBM Offshore ($238 million), Rolls-Royce ($170 million), and KOM ($105.6 million).

Continued on page 5

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 4



The amount of fines and penalties (again mostly attributable to the same four resolutions) exceeds $3.1 billion when settlement payments to other countries are included.

Deferred Prosecution Agreements

The following cases were resolved with a deferred prosecution agreement ("DPA"):

- Biomet, Inc. (now Zimmer Biomet), a recidivist, and its subsidiary JERDS Luxembourg Holding S.ar.l paid over $30 million to settle alleged violations of the accounting provisions of the FCPA with DOJ and the SEC. In its DPA with DOJ, Biomet admitted to continuing to use a third-party distributor in Brazil that was known – in light of Biomet's 2012 FCPA enforcement action – to have bribed government officials on Biomet's behalf. JERDS Luxembourg pled guilty to violating the books and records provisions of the FCPA through the actions of its wholly-owned subsidiary, 3i Mexico. Biomet also settled a cease-and-desist order with the SEC based on the same underlying conduct.[5] In addition to paying more than $30 million in fines and disgorgement, Biomet ended up with a monitor, despite the fact that the company had been acquired by Zimmer.

Continued on page 6

5. *United States v. Zimmer Biomet Holdings, Inc.*, Deferred Prosecution Agreement, No. 12-CR-00080 RBW (D.D.C. Jan. 13, 2017), https://www.justice.gov/criminal-fraud/case/file/925831/download [hereinafter "Zimmer Biomet DPA"]; *United States v. JERDS Luxembourg Holdings S.AR.L.*, Plea Agreement, No. 17-CR-00007 (D.D.C. Jan. 12, 2017), https://www.justice.gov/criminal-fraud/file/928251/download [hereinafter "JERDS Plea Agreement"]; *In the Matter of Biomet, Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 79780, Accounting and Auditing Enforcement Rel No. 3843, Administrative Proceeding File No. 3-17771 (Jan. 12, 2017), https://www.sec.gov/litigation/admin/2017/34-79780.pdf [hereinafter "Biomet Order"].

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 5

- Sociedad Quimica Y Minira de Chile, S.A. ("SQM") paid over $30.4 million to settle with DOJ[6] and the SEC[7] regarding alleged violations of the FCPA's accounting provisions. In its DPA with DOJ, SQM admitted that from 2008 to 2015 it donated to foundations closely-tied to Chilean politicians with influence over that country's mining sector, a key segment of SQM's business. SQM additionally admitted to paying approximately $15 million to vendors associated with politicians without any evidence that such payments were tied to goods or services. SQM also settled a cease-and-desist order with the SEC based on the same underlying conduct.
- Rolls-Royce PLC entered into a DPA with DOJ and agreed to pay over $800 million with 76% going to the U.K., 21% going to the U.S., and approximately 3% going to Brazil. DOJ alleged that between 2000 and 2013 Rolls-Royce PLC and its subsidiary Rolls-Royce Energy Systems, Inc. used third parties to make $35 million in improper payments to government officials in Angola, Azerbaijan, Brazil, Iraq, Kazakhstan, and Thailand, in order to access confidential information and win business.[8]
- In the second resolution arising from the Uzbek telecommunications industry, Telia Company AB and its Uzbek subsidiary, Coscom LLC, agreed to pay a total of $965 million to regulators in the U.S., Sweden, and the Netherlands. DOJ charged the company with conspiracy to violate the anti-bribery provisions of the FCPA.[9] Telia entered into a DPA with DOJ and its Uzbek subsidiary, and pled guilty to the same conspiracy allegation. Separately, Telia settled a cease-and-desist order with the SEC, which found that Telia had violated the FCPA's anti-bribery and internal controls provisions. The underlying allegations against Telia involved payments totaling $331 million made between 2007 and 2010 as part of a "corrupt partnership" with Gulnara Karimova, the daughter of the Uzbek President. DOJ found that, as a result of these payments, Telia realized a gain of $457 million from its Uzbek operations.

Continued on page 7

6. *United States v. Sociedad Quimica Y Minera de Chile, S.A.,* Deferred Prosecution Agreement, No. 17-CR-00013 (D.D.C. Jan. 13, 2017), https://www.justice.gov/criminal-fraud/file/930786/download [hereinafter "SQM DPA"].
7. *In the Matter of Sociedad Quimica Y Minera de Chile, S.A.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 79795, Administrative Proceeding File No. 3-17774 (Jan. 13, 2017), https://www.sec.gov/litigation/admin/2017/34-79795.pdf [hereinafter "SQM Order"].
8. *United States v. Rolls-Royce PLC,* Deferred Prosecution Agreement, No. 16-CR-247 (S.D. Ohio. Dec. 20, 2016), https://www.justice.gov/criminal-fraud/file/929126/download [hereinafter "Rolls-Royce DPA"].
9. Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to David M. Stuart, Esq. et al, Re: *United States v. Telia Company AB* Deferred Prosecution Agreement 17-CR-581 (Sept. 21, 2017), https://www.justice.gov/criminal-fraud/file/998601/download [hereinafter "Telia DPA"]; Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to David M. Stuart, Esq. et al, Re: *United States v. Coscom LLC* 17-CR-581 (Sept. 21, 2017), https://www.justice.gov/criminal-fraud/file/998596/download [hereinafter "Coscom Plea Agreement"].

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 6

- SBM Offshore N.V. (SBM) entered into a DPA with DOJ, while its subsidiary SBM Offshore USA (SBM USA) pled guilty to conspiracy to violate the anti-bribery provisions of the FCPA based on allegations that from approximately 1996 until 2012, SBM paid over $180 million in commissions to intermediaries, knowing that some of that amount would be paid to influence foreign officials in Angola, Brazil, Equatorial Guinea, Iraq, and Kazakhstan. Three years earlier, the DOJ had closed its investigation into SBM with a declination, just as the company paid Dutch authorities $240 million to resolve the same conduct. DOJ reopened its investigation in 2016 after establishing a jurisdictional hook based on a previously-unknown fact that a U.S.-based executive was involved in the underlying misconduct.[10] The company paid a combined total of $818 million, with $340 million going to Brazil, $238 million paid to the United States (and the original $240 million to the Netherlands).[11] As part of the settlement, SBM acknowledged that it gained at least $2.8 billion from projects obtained from state-owned oil companies in these countries.

"As in prior years, DOJ's corporate enforcement actions contained a mix of large cases (involving more than $100 million in disgorgement or penalties) and smaller actions. DOJ's 9 enforcement actions netted $843.3 million in penalties and disgorgement to the U.S. Treasury, most of which is attributable to four resolutions . . . ."

- In connection with the Petrobras scandal in Brazil, Keppel Offshore & Marine Ltd. ("KOM") entered into a DPA with DOJ, and its subsidiary Keppel Offshore & Marine USA ("KOM USA") pled guilty to conspiracy to violate the FCPA's anti-bribery provisions and agreed to pay a criminal penalty of approximately $422 million, with 50% going to Brazil, 25% to the United States, and 25% to Singapore.[12] DOJ alleged that, from approximately 2001 to 2014, KOM conspired to violate the FCPA by making $55 million in improper payments to officials

Continued on page 8

10. *United States v. SBM Offshore N.V.,* Deferred Prosecution Agreement, No. CR 17-686 (S.D. Tex. Nov. 29, 2017), https://www.justice.gov/criminal-fraud/file/1017346/download [hereinafter "SBM DPA"].
11. U.S. Department of Justice, Press Release No. 17-1348, "SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries," (Nov. 29, 2017), https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case.
12. *United States v. Keppel Offshore & Marine Ltd.,* Deferred Prosecution Agreement, No. 17-CR-697 KAM (E.D.N.Y. Dec. 22, 2017), https://www.justice.gov/criminal-fraud/file/1021786/download [hereinafter "KOM DPA"]; *United States v. Keppel Offshore & Marine USA, Inc.,* Plea Agreement, No. 17-CR-698 KAM (E.D.N.Y. Dec. 22, 2017), https://www.justice.gov/criminal-fraud/file/1021796/download [hereinafter "KOM USA Plea Agreement"].

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 7

at the Brazilian state-owned oil company Petrobras and to the then-governing political party in Brazil, in order to win 13 contracts with Petrobras and another Brazilian entity. In order to conceal the payments, KOM paid outsized commissions to an intermediary, under the guise of legitimate consulting agreements, who then made payments for the benefit of the Brazilian officials and the Brazilian political party.

Non-Prosecution Agreement

DOJ entered into one corporate non-prosecution agreement ("NPA") last year, in a companion case to an action brought by the SEC in 2016. On January 17, 2017, Las Vegas Sands Corp. entered into an NPA with DOJ and agreed to pay $6.9 million in penalties based on allegations that, from 2006 to 2009, its subsidiaries failed to maintain appropriate internal controls and paid $5.8 million to a business consultant in China and Macao without any discernible business purpose.[13]

Declinations with Disgorgement

DOJ also continued the use of "declinations with disgorgement," a type of resolution introduced in 2016 by the Pilot Program.[14] DOJ's policy announcements in 2017 indicated that the remedy of a declination with disgorgement remedy is here to stay.[15]

2017's two declinations with disgorgement were *In re Linde* and *In re CDM Smith*:

- In the first enforcement action of the Trump Administration, DOJ released a "declination" letter involving Linde North America, Inc. and Linde Gas North American LLC. This related to payments made between 2006 and 2009 by Spectra Gases Inc – a company that Linde North America had acquired in 2006 and dissolved in 2010.[16] The declination letter alleged that, in order to obtain business in the Republic of Georgia, executives of Spectra agreed to share approximately three-quarters of its profits with high-level government officials

Continued on page 9

13. Letter from the U.S. Dep't of Justice, Criminal Division to Laurence Urgenson, Esq., Re: Las Vegas Sands Corp., Non-Prosecution Agreement (Jan. 17, 2017), https://www.justice.gov/criminal-fraud/file/1022231/download [hereinafter "Las Vegas Sands NPA"]. Las Vegas Sands Corp. previously settled a cease-and-desist order with the SEC in 2016 for the same allegations, paying $9,000,000 to the United States. *See In the Matter of Las Vegas Sands Corp.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 77555, Administrative Proceeding File No. 3-17204 (Apr. 7, 2016), https://www.sec.gov/litigation/admin/2016/34-77555.pdf [hereinafter "Las Vegas Sands Order"].

14. *See* Paul R. Berger et al., "U.S. Department of Justice Issues New FCPA Guidance and Launches Pilot Enforcement Program," FCPA Update, Vol. 7, No. 9 (Apr. 2016), https://www.debevoise.com/~/media/files/insights/publications/2016/04/fcpa_update_april_2016.pdf [hereinafter "FCPA Update Apr. 2016"].

15. *See* Bruce E. Yannett et al., "The Difficulty of Defining a Declination: An Update on the DOJ's Pilot Program," FCPA Update, Vol. 8, No. 3 (Oct. 2016), https://www.debevoise.com/~/media/files/insights/publications/2016/10/fcpa_update_october_2016.pdf.

16. Letter from the U.S. Dep't of Justice, Criminal Division , Fraud Section to Lucinda Low, Esq. et al, Re: *Linde North America Inc., Linde Gas North America LLC,* Declination (June 16, 2017), https://www.justice.gov/criminal-fraud/file/974516/download [hereinafter "Linde Declination"].

Continued from page 8

in that country. In connection with the declination, Linde North America paid the US $11.2 million – comprised of $7.82 million in disgorgement and a $3.4 million forfeiture (the amount Linde North America withheld from government officials once it discovered the improper arrangement). The declination letter credited Linde North America's timely self disclosure, "thorough, comprehensive and proactive" investigation, and full cooperation and remediation.

- DOJ's second "declination" letter was to CDM Smith, Inc., which alleged that CDM Smith and its Indian subsidiary made approximately $1.18 million in improper payments to Indian officials to win business in that country. To offset the alleged $4 million in profits obtained from this business, CDM Smith disgorged that amount in connection with the declination. As in *Linde*, DOJ credited CDM Smith's timely and voluntary self-disclosure, as well as its investigation, cooperation, and remediation.[17]

b) SEC

In 2017, the SEC resolved 7 corporate enforcement actions, representing a decrease from the SEC's record-setting 2016, in which it announced 24 corporate resolutions. In addition to contemporaneous resolutions with DOJ for Telia,[18] SQM,[19] and Biomet,[20] the SEC entered into settled actions with Alere, Halliburton, Orthofix, and Mondelez. All of these settlements were in the form of cease-and-desist orders:

- Alere, Inc. settled a cease-and-desist order with the SEC and, without admitting or denying the underlying facts, agreed to pay $13 million to settle accounting violations, including books and records and internal controls violations under the FCPA.[21] The SEC found that Alere's subsidiaries in India and Colombia used distributors and consultants to make improper payments to government officials in those countries.

Continued on page 10

17. Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to Nathaniel B. Edmonds, Esq., Re: *CDM Smith,* Declination (June 21, 2017), https://www.justice.gov/criminal-fraud/page/file/976976/download [hereinafter "CDM Smith Declination"].

18. *In the Matter of Telia Company AB,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 81669, Accounting and Auditing Enforcement Rel. No. 3898, Administrative Proceeding File No. 3-18195 (Sept. 21, 2017), https://www.sec.gov/litigation/admin/2017/34-81669.pdf [hereinafter "Telia Order"].

19. *See* SQM Order, *supra* n.7.

20. *See* Biomet Order, *supra* n.5.

21. I*n the Matter of Alere Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, Securities Act of 1933 Rel. No. 10417, Securities Exchange Act of 1934 Rel. No. 81742, Administrative Proceeding File No. 3-18228 (Sept. 28, 2017), https://www.sec.gov/litigation/admin/2017/33-10417.pdf [hereinafter "Alere Order"].

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 9

- Halliburton Company settled a cease-and-desist order with the SEC and agreed to pay $29.2 million to settle allegations that it violated the FCPA's books and records and internal controls provisions.[22] The SEC found that, between 2009 and 2011, Halliburton violated the accounting provisions in connection with payments to a local Angolan company in connection with Halliburton's tendering for work from Sonangol, the Angolan state oil company. Specifically, the SEC found that a senior executive knowingly circumvented the company's internal controls and caused Halliburton to make $3.7 million in improper payments in Angola through the use of a local partner.

"In total, the SEC collected approximately $297.9 million in disgorgement, civil penalties, and prejudgment interest in 2017, significantly less than DOJ. Of course, this is likely due to the fact that of the four large corporate actions brought by DOJ in 2017, only Telia was a U.S. securities issuer and therefore subject to SEC jurisdiction."

- Orthofix International N.V. settled a cease-and-desist order with the SEC and agreed to pay $6.1 million to settle alleged violations of the books and records and internal controls provisions of the FCPA.[23] The SEC found that, between 2011 and 2013, senior personnel at Orthofix Brazil used third-party commercial representatives and distributors to make over $2.9 million in improper payments to doctors employed by government-owned hospitals in order to increase sales of Orthofix products.
- Finally, Mondelez International, Inc. paid $13 million, without admitting or denying the underlying facts, to settle a cease-and-desist order with the SEC alleging violations of the accounting provisions of the FCPA. The SEC found that Cadbury India – acquired by Mondelez in February 2010 – failed to record accurately the services rendered by an agent it retained in that country and to whom it paid over $90,000. The SEC further found that Cadbury India failed to

Continued on page 11

22. *In the Matter of Halliburton Company and Jeannot Lorenz,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 81222, Accounting and Auditing Enforcement Rel. No. 3884, Administrative Proceeding File No. 3-18080 (July. 27, 2017), https://www.sec.gov/litigation/admin/2017/34-81222.pdf [hereinafter "Halliburton Order"].
23. *In the Matter of Orthofix International N.V.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79828, Accounting and Auditing Enforcement Rel. No. 3851, Admin. Proc. File No. 3-17800, ¶¶ 6–12, 19–20 (Jan. 18, 2017), https://www.sec.gov/litigation/admin/2017/34-79828.pdf [hereinafter "Orthofix Order"].

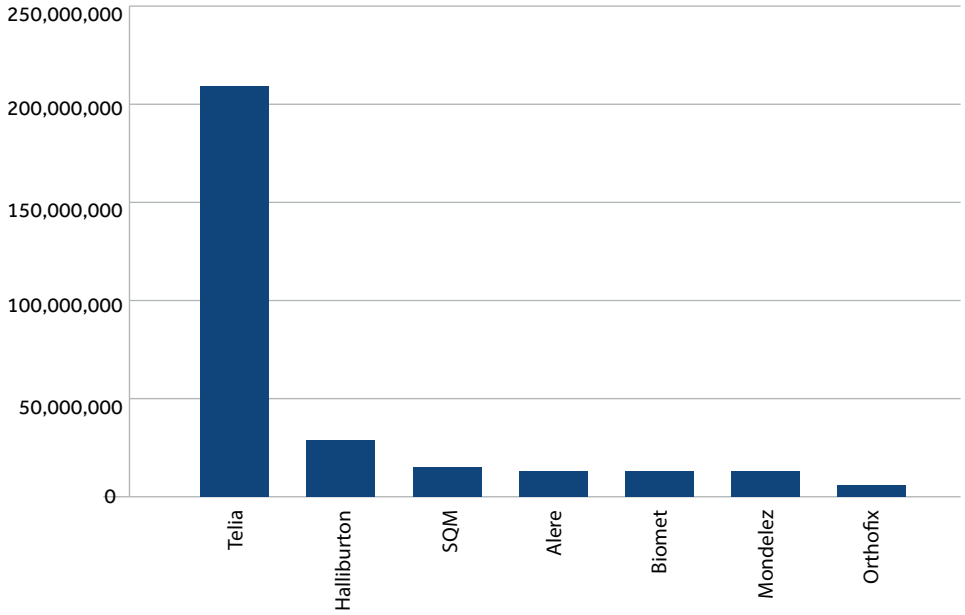
Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 10

conduct adequate due diligence on the agent and failed to monitor the agent's activities, which created a risk that funds paid to the agent may have been used for improper purposes.[24]

The SEC also filed litigated actions against two former Och-Ziff executives in the Eastern District of New York.[25] The firm and 2 senior executives settled charges in October 2016. In taking action against individuals, the SEC continues a trend, evident in 2016,[26] of pursuing individuals, both concurrent with and after corporate resolutions.

In total, the SEC collected approximately $297.9 million in disgorgement, civil penalties, and prejudgment interest in 2017, significantly less than DOJ. Of course, this is likely due to the fact that of the four large corporate actions brought by DOJ in 2017, only Telia was a U.S. securities issuer and therefore subject to SEC jurisdiction.



Continued on page 12

24. *In the Matter of Cadbury Ltd. and Mondelez Int'l, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 79753, Accounting and Auditing Enforcement Rel. No. 3841, Administrative Proceeding File No. 3-17759 (Jan. 6, 2017), https://www.sec.gov/litigation/admin/2017/34-79753.pdf [hereinafter "Cadbury/Mondelez Order"].

25. *SEC v. Cohen,* Complaint, No. 17-CV-00430-PKC-LB (E.D.N.Y. Jan. 26, 2017), https://www.sec.gov/litigation/complaints/2017/comp-pr2017-34.pdf [hereinafter "Cohen and Baros Complaint"].

26. *See* Paul R. Berger et al., "The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions," FCPA Update, Vol. 8, No. 6 at 18 (Jan. 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/01/fcpa_update_january_2017.pdf.

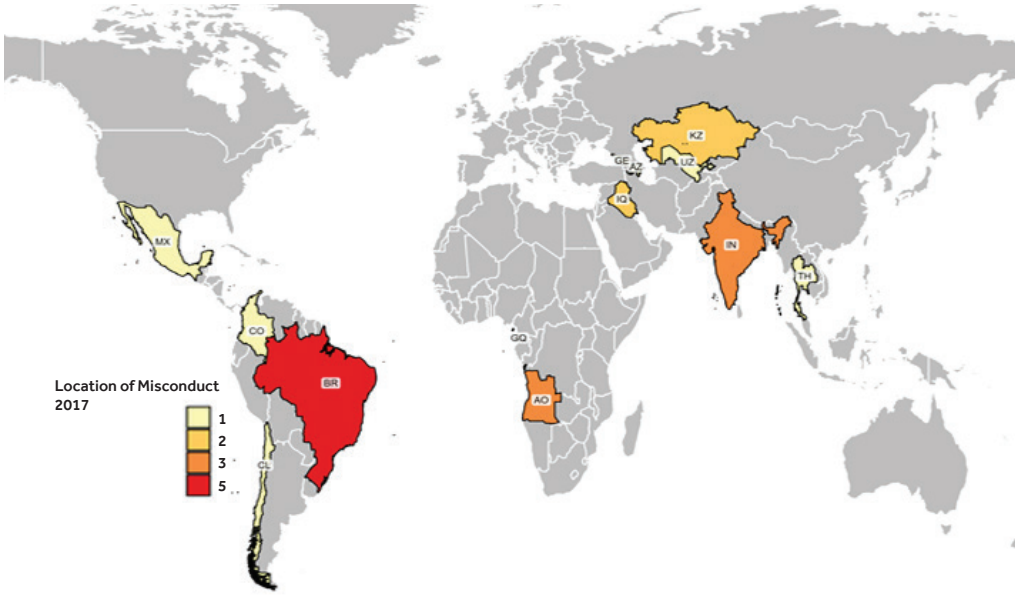
Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 11

It is worth noting that three-quarters of SEC's total recovery in 2017 came in the form of disgorgement. Given last summer's Supreme Court decision in *Kokesh v. SEC,* which held that a 5-year statute of limitations applies to disgorgement as well as penalties, it remains to be seen whether SEC disgorgement will decrease.[27]

2. Fewer Cases in China

This year, for the first time in 13 years, there were no FCPA cases involving conduct in China:[28]



The 13 corporate enforcement actions of 2017 involved activities in Brazil (5 actions),[29] Angola (3 actions),[30] India (3 actions),[31] Iraq (2),[32] Kazakhstan (2),[33]

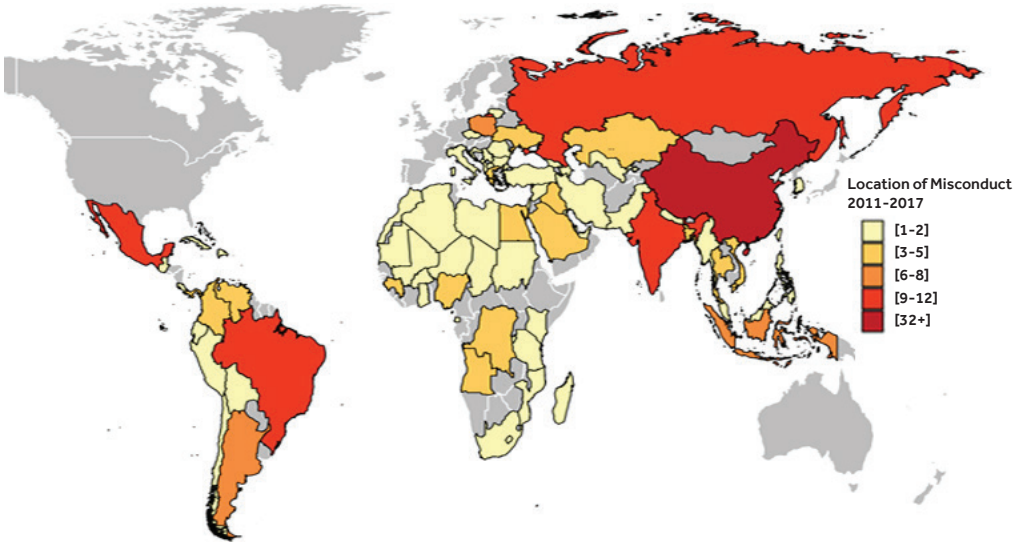
Continued on page 13

27. *See infra* Section I.F.1; *Kokesh v. SEC,* 137 S. Ct. 1635, 1639 (2017) (holding that SEC enforcement actions seeking disgorgement of ill-gotten gains must be commenced within five years of the date the claim accrues); *see also* Debevoise Client Update, "U.S. Supreme Court Holds SEC Disgorgement is a Penalty Subject to a Five-Year Statute of Limitations," (June 7, 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/06/20170607_us_supreme_court_holds_sec_disgorgement_is_a_penalty_subject_to_a_five_year_satute_of_limitations.pdf [hereinafter "*Kokesh* Client Alert"].
28. We are not counting Las Vegas Sands' 2017 NPA with DOJ, which was a delayed enforcement action following SEC's 2016 action. *See* Las Vegas Sands NPA and Las Vegas Sands Order, *supra* n.13.
29. *See* Zimmer Biomet DPA, *supra* n.5; Rolls-Royce DPA, *supra* n.8; SBM DPA, *supra* n.10; KOM DPA, *supra* n.12; Orthofix Order, *supra* n.23.
30. *See* Rolls-Royce DPA, *supra* n.8; SBM DPA, *supra* n.10; Halliburton Order, *supra* n.22.
31. *See* CDM Smith Declination, *supra* n.17; Alere Order, *supra* n.21; Cadbury/Mondelez Order, *supra* n.24.
32. *See* Rolls-Royce DPA, *supra* n.8; SBM DPA, *supra* n.10.
33. *See* Rolls-Royce DPA, *supra* n.8; SBM DPA, *supra* n.10.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 12

Azerbaijan,[34] Chile,[35] Colombia,[36] Equatorial Guinea,[37] Georgia,[38] Mexico,[39] Thailand,[40] and Uzbekistan.[41] Whether China's absence from 2017's enforcement geography represents a fluke of the FCPA case pipeline (as is likely) or a decision by the enforcement agencies to focus elsewhere, its virtual absence from enforcement actions is one of the more surprising facts of 2017. We suspect that it was due to a combination of factors: fewer pharmaceutical/medical device cases, which in recent years centered almost exclusively on China; an uptick in Latin America cases, as fallout from *Lavo Jato* continues; and a statistical anomaly that likely will not last.



Continued on page 14

34. *See* Rolls-Royce DPA, *supra* n.8.
35. *See* SQM DPA, *supra* n.6.
36. Alere Order, *supra* n.21
37. *See* SBM DPA, *supra* n.10.
38. *See* Linde Declination, *supra* n.16.
39. *See* Biomet Order, *supra* n.5.
40. *See* Rolls-Royce DPA, *supra* n.8.
41. *See* Telia DPA, *supra* n.9.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 13

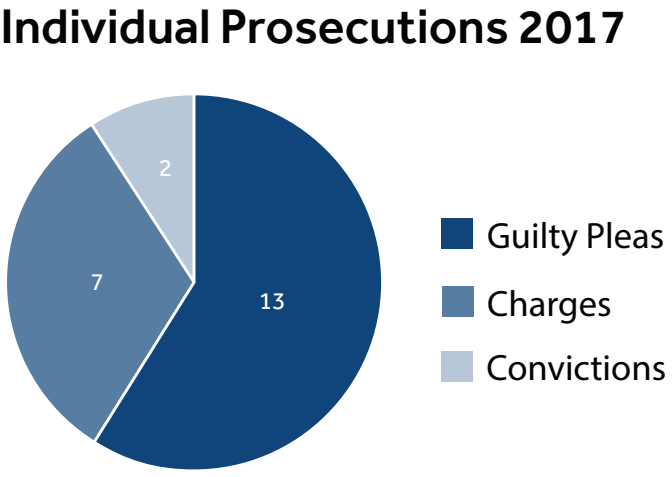
B. Individual Prosecutions

1. DOJ

2017 saw the highest number of individuals charged by DOJ in the FCPA space in a calendar year:[42]

- 20 actions initiated;[43]
- 3 cases went to trial with DOJ obtaining convictions in all of them;[44] and
- A third of the corporate resolutions had associated individual prosecutions.[45]

"While one year's statistics cannot establish a pattern, 2017 was also a year in which DOJ's long-stated objective of bringing actions against individuals appears to have gained some traction, with DOJ charging more individuals in the FCPA space in a calendar year than ever before."



Continued on page 15

42. The individual actions were covered in-depth in the November 2017 FCPA Update. *See* FCPA Update Nov. 2017, *supra* n.3, at 1.

43. This number includes Michael Cohen, whose October 2017 indictment was unsealed in January 2018, and Mahmoud Thiam, who was convicted in May 2017 of transacting in criminally derived property and money laundering. *See* SEC Press Release No. 2017-34, "SEC Charges Two Former Och-Ziff Executives with FCPA Violations," (Jan. 26, 2017), https://www.sec.gov/news/pressrelease/2017-34.html; *United States v. Thiam,* Jury Verdict, No. 17 CR 047 (S.D.N.Y. May 3, 2017).

44. *United States v. Ng,* Verdict Form, No. 15 CR 706 (S.D.N.Y. July 27, 2017); *United States v. Chi,* Jury Verdict, No. 16 CR 824 (C.D. Cal. July 17, 2017); *United States v. Thiam,* Jury Verdict, No. 17 CR 047 (S.D.N.Y. May 3, 2017).

45. U.S. Department of Justice, Press Release No. 17-1253, "Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary," (Nov. 7, 2017), https://www.justice.gov/opa/pr/five individuals-charged-foreign-bribery-scheme-involvingrolls-royce-plc-and-its-us; U.S. Department of Justice, Press Release No. 17-1275, "Two Executives Plead Guilty to Role in Foreign Bribery Scheme," (Nov. 9, 2017), https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme; U.S. Department of Justice, Press Release No. 17-1476, "Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case," (Dec. 22, 2017), https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties; *see also* Richard L. Cassin, "Details Emerge About Keppel Lawyer in FCPA Guilty Plea," FCPA Blog (Dec. 28, 2017), http://www.fcpablog.com/blog/2017/12/28/details-emerge-about-keppel-lawyer-in-fcpa-guilty-plea.html

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 14

As is often the case, many individual actions followed an associated corporation resolution, sometimes by months or even years. For example, in December 2017, DOJ charged Colin Steven, a former sales executive of Embraer S.A.,[46] over one year after the case against the company had been resolved.[47]

Similarly, Michael Cohen was indicted in October 2017,[48] a year after the underlying corporate action involving Och-Ziff[49] and ten months after the SEC charged him.[50] And in September, Eberhard Reichert, a former Siemens Business Services executive, was arrested in Croatia and agreed to be extradited to the United States to stand trial based on a 2011 indictment,[51] arising out of the 2008 corporate resolution with Siemens A.G.[52] Thus, the old adage "it's not over until it's over" certainly applies to individual prosecutions in the FCPA area.

Occasionally, individual prosecutions under the FCPA precede related corporate resolutions, typically when the individual is a cooperating witness. For instance, in July 2017, Jeffrey Chow pleaded guilty to conspiring to violate the anti-bribery provisions of the FCPA in connection with his former role as a senior member of KOM's legal department. That plea was unsealed in December, after DOJ announced its corporate resolution with KOM.[53]

Another clear trend was the way that a lion's share of the individual prosecutions stemmed from just a few cases. For example, five unsealed individual actions related to the Rolls-Royce settlement and two more related to the SBM Offshore matter.

Continued on page 16

46. Steven was charged with executing and conspiring to execute bribery and kickback schemes, laundering and conspiring to launder the proceeds of those schemes, and lying to U.S. law enforcement about such conduct. *United States v. Steven,* Information, No. 17-CR-00788 (S.D.N.Y. Dec.21, 2017), https://www.justice.gov/criminal-fraud/file/1021856/download [hereinafter "Steven Information"]. Steven pled guilty that same day. *United States v. Steven,* Arraignment, No. 17-CR-00788 (S.D.N.Y. Dec. 21, 2017) (entering guilty plea before J. Nathan) [hereinafter "Steven Plea"]; *see also* U.S. Department of Justice, Press Release No. 17-1466, "Former Embraer Sales Executive Pleads Guilty to Foreign Bribery Related Charges," (Dec. 21, 2017), https://www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges.

47. *United States v. Embraer S.A.,* Deferred Prosecution Agreement, No. 16-CR-60294 (S.D. Fla., Oct. 24, 2016), https://www.justice.gov/criminal-fraud/file/904636/download [hereinafter "Embraer DPA"].

48. *United States v. Cohen,* Indictment, No. 17-CR-544 (E.D.N.Y. Oct. 5, 2017) [hereinafter "Cohen Indictment"]. Cohen's indictment was not unsealed until January 2018. *United States v. Cohen*, Order to Unseal Indictment, No. 17-CR-544 (E.D.N.Y. Jan. 3, 2018).

49. *United States v. Och-Ziff Capital Management Group LLC,* Deferred Prosecution Agreement, No. 16-516 (NGG) (E.D.N.Y. Sept. 29, 2016), https://www.justice.gov/opa/file/899306/download.

50. *Securities and Exchange Commission v. Michael L. Cohen and Vanja Barros,* Complaint, No. 17-CV-00430 (E.D.N.Y. Jan. 26, 2017), https://www.sec.gov/litigation/complaints/2017/comp-pr2017-34.pdf.

51. *United States v. Sharef et al.,* Indictment, No. 11-cr-01056 (DLC) (S.D.N.Y. Dec. 12, 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/12/16/2011-12-12-siemens-ndictment.pdf.

52. *See* Brendan Pierson, "German pleads not guilty to U.S. charges in Siemens' Argentine bribe case," Reuters (Dec. 23, 2017), https://www.reuters.com/article/us-siemens-corruption/german-pleads-not-guilty-to-u-s-charges-in-siemens-argentine-bribe-case-idUSKBN1EG2D1.

53. *United States v. John Doe,* Unsealing Order, No. 17 CR 466 (E.D.N.Y. Dec. 26, 2017) (order "revealing that 'John Doe' is the defendant Jeffery Chow" and ordering that waiver of indictment, information and transcript of guilty plea be unsealed).

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 15

Stand-Alone Indictments

Three individual actions related to two scandals that between them produced 19 individual actions over the years, but no associated corporate enforcement actions.[54]

- Haiti Telco: On July 19, 2017, DOJ announced that Amadeus Richers, a Brazilian citizen and former general manager of a Miami-based telecommunications company, pleaded guilty to conspiracy to violate the FCPA, becoming the ninth person to have pleaded guilty or been convicted in connection with bribes paid to Haiti Telco.[55]
- PDVSA: On January 10, 2017, DOJ announced that Juan Jose Hernandez Comerma and Charles Quintard Beech III each pleaded. On October 11, 2017, DOJ announced that Fernando Ardila Rueda had pleaded guilty. According to DOJ's press release, Ardila Rueda became the tenth person charged in the PDVSA case.[56]

DOJ also brought several stand-alone individual indictments in 2017:

- On January 10, 2017, DOJ announced charges against Joo Hyun (Dennis) Bahn, his father Ban Ki Sang, and Malcolm Harris, in connection with an alleged scheme to bribe a foreign official in the Middle East in order to facilitate the sale of a commercial building in Vietnam.[57]
  - Malcom Harris pleaded guilty on July 21, 2017 to wire fraud and money laundering charges.[58]
  - Bahn recently pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA.[59]
- DOJ separately charged San Woo, who allegedly helped obtain the money used for the first bribe payment, with one count of conspiracy to violate the FCPA.[60]

Continued on page 17

54. Though no corporate enforcement actions have been brought, the US government does have sanctions targeted toward US dealings with PDVSA based, at least in part, on "rampant public corruption" within the country. Exec. Order No. 13808 Imposing Additional Sanctions With Respect to the Situation in Venezuela (Aug. 24, 2017).
55. *United States v. Amadeus Richers,* Plea Agreement, No. 09-CR-21010 JEM (S.D. Fla. Jul. 19, 2017), https://www.justice.gov/criminal-fraud/file/984611/download [hereinafter "Richers Plea Agreement"].
56. United States Department of Justice, Press Release No. 17-1138, "Florida Businessman Pleads Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme," (Oct. 11, 2017), https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-foreignbribery-charges-connection-venezuela-bribery-scheme.
57. *United States v. Joo Hyun Bahn et al.,* Sealed Indictment, 16-CR-831 (Dec. 15, 2016 S.D.N.Y.), https://www.justice.gov/criminal-fraud/case/file/942226/download.
58. Letter from the United States Department of Justice, Criminal Division, Fraud Section to Mark S. DeMarco, Esq., Re: *United States v. Malcolm Harris,* Plea Agreement, 16 Cr. 831(ER) (June 21, 2017), https://www.justice.gov/criminal-fraud/file/1011511/download.
59. Letter from the United States Department of Justice, Criminal Division, Fraud Section to Julia Gatto, Esq., Re: *United States v. Joo Hyun Bahn, a/k/a "Dennis Bahn",* Plea Agreement, 16 Cr. 831 (ER) (Jan. 5, 2018), https://www.justice.gov/criminal-fraud/file/1022676/download.
60. *United States of America v. Sang Woo a/k/a "John Woo,"* Sealed Complaint, 17-139 (S.D.N.Y. Jan. 10, 2017).

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 16

- On October 4, 2017, DOJ indicted Joseph Baptiste for conspiracy to violate the FCPA as well as Travel Act and money laundering offenses, alleging that he solicited bribes from undercover FBI agents intending them to pay Haitian officials.[61]
- On November 20, 2017, DOJ arrested Patrick Ho, a Hong Kong resident and head of an NGO funded by a "Chinese oil and gas conglomerate," in connection with an alleged multi-year scheme to bribe officials in Chad and Uganda on behalf of the Chinese company. Cheikh Gadio, the former foreign minister of Senegal, also was arrested in connection with the allegations relating to Chad.[62]

"There has also been what the government has termed a 'dramatic and exponential increase' in international coordination, as other countries implement and enforce anti-bribery regimes of their own."

DOJ also continued aggressively using the conspiracy statute in FCPA cases.[63] As we noted in our November 2017 Update, this was particularly prevalent against foreign defendants. As discussed below, the viability of such a charge has been under consideration by the Second Circuit Court of Appeals in the *Hoskins* case since 2016. DOJ's ongoing use of the charge suggests it will continue aggressively pushing the boundaries of jurisdiction while that issue is pending in the courts.

DOJ Trials

In addition to announcing guilty pleas, indictments, and arrests, DOJ and U.S. Attorneys' offices also took three cases to trial in 2017 and obtained convictions in all:

- On May 4, 2017, Mahmoud Thiam, a former Guinean Minister of Mines and Geology, was convicted after a seven-day trial in connection with a scheme to

Continued on page 18

61. *United States v. John Baptiste,* Indictment, 17-cr-10305-ADB (D. Mass. Oct. 4, 2017), https://www.justice.gov/criminal-fraud/file/1001651/download.
62. *United States v. Chi Ping Patrick Ho and Cheikh Gadio,* Sealed Complaint, 17-MAG-8611 (S.D.N.Y. Nov. 16, 2017), https://www.justice.gov/usao-sdny/press-release/file/1012511/download.
63. *United States v. Mace,* Plea Agreement, No. 17-cr-00618 (S.D. Tex. Nov. 9, 2017) https://www.justice.gov/criminal-fraud/file/1017331/download; *United States v. Kohler,* Information, No. 17-cr-00113-EAS (S.D. Ohio June 6, 2017) https://www.justice.gov/opa/press-release/file/1009246/download; *United States v. Zuurhout,* Information, No. 2:17-cr-00122-EAS (S.D. Ohio June 9, 2017) https://www.justice.gov/opa/press-release/file/1009251/download; Richers Plea Agreement, *supra* n. 55.

Continued from page 17

launder bribes paid by executives of China Sonangol International and China International Fund through the U.S.[64] The conviction is being appealed.[65]

- On July 18, 2017, DOJ announced the conviction, after a four-day trial, of Heon-Cheol Chi, the Director of South Korea's Earthquake Research Center at the Korea Institute of Geoscience and Mineral Resources, in connection with his role laundering bribes received from two seismological companies.[66] The conviction is being appealed.[67]
- On July 27, 2017, Ng Lap Seng, a Chinese billionaire, was found guilty after a four-week trial on six counts in connection with a scheme to pay over $1.3 million in bribes to the former President of the UN General Assembly, John Ashe, and former Deputy Ambassador the Dominican Republic, Francis Lorenzo.[68] On September 26, 2017, Ng moved for a new trial; that motion is still pending.[69]

2. SEC

The SEC was significantly less active on the individual front than DOJ, announcing actions against three individuals in 2017, all of which had an associated corporate settlement:

- On January 26, 2017, the SEC announced charges against Michael L. Cohen and Vanja Baros, two former executives at Och-Ziff Capital Management Group for causing tens of millions of dollars in bribe payments to high-level foreign officials in Chad, Niger, Guinea, and the Democratic Republic of the Congo.[70] As noted above, DOJ's indictment of Cohen was unsealed in January 2018.
- On July 27, 2017, the SEC announced that Jeannot Lorenz, Halliburton's former vice president, had agreed to pay a $75,000 civil penalty in connection with his role in causing Halliburton's violations through his efforts to retain a local

Continued on page 19

64. United States Department of Justice, Press Release No. 17-493, "Former Guinean Minister of Mines Convicted of Receiving and Laundering $8.5 Million in Bribes from China International Fund and China Sonangol," (May 4, 2017), https://www.justice.gov/opa/pr/former-guinean-minister-mines-convicted-receiving-and-laundering-85-million-bribes-china.
65. *United States v. Thiam,* No. 17-047 (S.D.N.Y. Aug. 28, 2017), *appeal docketed,* No. 17-2765 (2d Cir. Sept. 5, 2017).
66. United States Department of Justice, Press Release No. 17-792, "Director of South Korea's Earthquake Research Center Convicted of Money Laundering in Million Dollar Bribe Case," (July 18, 2017), https://www.justice.gov/opa/pr/director-south-koreas-earthquake-research-center-convicted-money-laundering-million-dollar.
67. *United States v. Chi,* No. 16-824 (C.D. Cal. Oct. 3, 2017), *appeal docketed,* No. 17-50358 (9th Cir. Oct. 13, 2017).
68. United States Department of Justice, Press Release No. 17-237, "Chairman Of Macau-Based Real Estate Development Company Convicted At Trial On All Counts In In Connection With United Nations Bribery Scheme," (July 27, 2017), https://www.justice.gov/usao-sdny/pr/chairman-macau-based-real-estate-development-company-convicted-trial-all-counts.
69. *United States v. Ng Lap Seng, et al.,* No. 15-706 (S.D.N.Y. Sept. 26, 2017) (notice of motion for a new trial).
70. Cohen and Baros Complaint, *supra* n. 25.

Continued from page 18

Angolan company owned by a former Halliburton employee who was a friend and neighbor of a foreign official, circumventing internal accounting controls, and falsifying books and records.[71] This case was brought at the same time as the corporate settlement.

C. International Cooperation & Coordination

For many years, the United States has cooperated with other countries in civil and criminal FCPA matters, either through multinational legal assistance treaties ("MLATs") or more informal mechanisms. In recent years, this has grown exponentially. Indeed, in 2017, the SEC and DOJ publicly thanked 22 countries in their press releases for their assistance.

There has also been what the government has termed a "dramatic and exponential increase" in international coordination,[72] as other countries implement and enforce anti-bribery regimes of their own. There are now forty-three signatories to the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Communication between regulators from various of these jurisdictions takes place regularly through both formal and informal channels.[73] The increase in informal communication channels between prosecutors on a global level is a significant development, because it allows prosecutors to share and compare evidence and theories before having to coordinate through official channels.[74]

2017 continued a trend begun in 2016 of large-scale global settlements involving countries that had not previously brought a foreign corruption action in conjunction with the United States (or in some cases, at all). 2016 saw Vimpelcom (first case done jointly by the United States and the Netherlands),[75] Embraer (first case done

Continued on page 20

71. Halliburton Order, *supra* n. 22.

72. Daniel Kahn, DOJ FCPA Unit Chief, *40 Years of FCPA: An Update from the DOJ,* LAW 360 (Dec. 14, 2017), https://www.law360.com/articles/986563/40-years-of-fcpa-an-update-from-the-doj.

73. *See, e.g.,* Clara Hudson, *GIR Live: Brazilian prosecutor Says WhatsApp Chat Group Drove Investigation Forward,* Global Investigations Review (Oct. 27, 2017), https://globalinvestigationsreview.com/article/1149463/gir-live-brazilian-prosecutor-says-whatsapp-chat-group-drove-investigation-forward [hereinafter "Hudson"].

74. In July, Acting Assistant Attorney General Ken Blanco noted the "tremendous cooperation" between the US and Brazil stating that "[g]iven the close relationship between the Department and the Brazilian prosecutors, we don't need to rely solely on formal processes such as mutual legal assistance treaties, which often take significant time and resources to draft, translate, formally transmit, and respond to." Kenneth A. Blanco, Acting Assistant Attorney General, U.S. Department of Justice, Speaks at the Atlantic Council Inter-American Dialogue Event on Lessons From Brazil: Crisis, Corruption and Global Cooperation, Washington, DC (July 19, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-atlantic-council-inter-american-1. Indeed, in some jurisdictions, the use of non traditional informal communications goes even further. *See, e.g.,* Hudson, *supra n.* 73 (discussing the use of WhatsApp between Brazilian and French investigators in the Rio Olympics corruption investigation).

75. Letter from the United States Department of Justice, Criminal Division, Fraud Section to Mark Rochon, Esq., Re: *United States v. VimpelCom,* Deferred Prosecution Agreement, 16-cr-137 (ER) (Feb. 22, 2016), https://www.justice.gov/criminal-fraud/file/828301/download.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 19

jointly by the United States and Brazil),[76] and Odebrecht (United States, Brazil, and Switzerland).[77] In 2017, the Rolls-Royce (United States, United Kingdom, and Brazil),[78] Telia (United States, Sweden, and Netherlands),[79] and KOM (United States, Singapore, and Brazil)[80] resolutions were resolved in a coordinated fashion.

Not every action was coordinated, however: The United States resolved an action against SBM, years after the Dutch already had brought an action for some of the same conduct.[81]

Prosecutors in multi-jurisdictional settlements, particularly involving EU countries, need to be cognizant of double jeopardy protections for companies and individuals. French prosecutors ran into this problem in June 2017 when the Paris Court of Appeals ruled that a French prosecution of Jeffrey Tesler was precluded by a prior U.S. guilty plea on international double jeopardy grounds.[82]

It still remains to be seen under what circumstances U.S. authorities will decide to take no action at all where foreign counterparts have brought their own actions. We need only look to the recent SBM Offshore resolution for an example of case where DOJ opened an investigation, closed it, and subsequently returned.[83] Examples where the United States received less than half of the total recovery (see Rolls-Royce, Telia, and KOM) represent steps in the right direction.

D. DOJ's New Corporate Enforcement Policy

A significant development during 2017 was DOJ's announcement on November 29 of its new "Policy on Corporate Enforcement of the FCPA" (the "Policy").[84] This Policy now makes permanent the twelve-month experiment initiated by the Pilot Program in April 2016, which sought to incentivize corporate self-reporting of wrongdoing to enforcement agencies, cooperation with the agencies, and remediation of underlying issues.[85]

Continued on page 21

76. Embraer DPA, *supra* n. 47.
77. *United States v. Odebrecht S.A.*, Plea Agreement, No: 16 Cr. 643 (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/criminal-fraud/file/920101/download.
78. Rolls-Royce DPA, *supra* n. 8.
79. Telia DPA, *supra* n. 9.
80. KOM DPA, *supra* n. 12.
81. SBM DPA, *supra* n. 10.
82. *See* discussion *infra* at 48-50.
83. *See* SBM Offshore Press Release, "SBM Offshore achieves settlement with Dutch Public Prosecutor's Office over alleged improper payments. United States Department of Justice closes out the matter," (Nov. 12, 2014), https://www.sbmoffshore.com/?press-release=sbm-offshore-achieves-settlement-dutch-public-prosecutors-office-alleged-improper-payments-united-states-department-justice-closes-matter; *see, also* SBM DPA, *supra* n. 10.
84. *See generally* FCPA Update Dec. 2017, *supra* n. 1.
85. *See* Pilot Program, *supra* n. 2.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 20

Under the Policy, companies that self-disclose, fully cooperate, and timely and appropriately remediate underlying issues are presumed to receive a "declination" (albeit with mandatory disgorgement) rather than a DPA or NPA.[86] According to the Policy, a company can be eligible for a declination rather than a criminal resolution in the form of a DPA, NPA, or guilty plea where the company has met the following four criteria: (1) voluntary disclosure, (2) full cooperation, (3) remediation and (4) payment of disgorgement, forfeiture and/or restitution.[87] Unlike the Pilot Program, the Yates Memo on individual liability, or many other DOJ memos, the Policy is formalized in the U.S. Attorneys' Manual.[88]

"A significant development during 2017 was DOJ's announcement on November 29 of its new 'Policy on Corporate Enforcement of the FCPA' . . . . This Policy now makes permanent the twelve-month experiment initiated by the Pilot Program in April 2016, which sought to incentivize corporate self-reporting of wrongdoing to enforcement agencies, cooperation with the agencies, and remediation of underlying issues."

According to the Policy, a declination will be presumed to be appropriate for companies that meet those three criteria, absent certain aggravating circumstances. These include involvement by executive management in the misconduct, a significant profit obtained from the misconduct, or pervasiveness of the misconduct within the company. Of course, given this exception for "aggravating circumstances," DOJ retains considerable discretion in making charging decisions. It therefore will be critical to track closely how DOJ applies this aspect of the Policy. Additionally, recidivists are ineligible for such a declination.

The Policy likely improves predictability of outcome when reporting smaller matters to DOJ (although it remains to be seen how the aggravating circumstances will be applied in practice), but – without more – does not materially change the self-reporting calculus as to more significant matters.[89] For issuers of U.S. securities, for example, the likelihood of a parallel SEC persists. Moreover, due to enhanced anti-corruption enforcement worldwide, companies must consider how self-reporting to U.S. authorities may trigger or influence anti-corruption investigations abroad, especially given the extent of international coordination and cooperation, discussed above.

Continued on page 22

86. FCPA Update Dec. 2017, *supra* n. 1, at 1.
87. United States Attorneys' Manual § 9-47.120.
88. *Id.*
89. FCPA Update Dec. 2017, *supra* n. 1, at 1-2.

Continued from page 21

1. Self-Disclosure Incentives

Under the Policy, even where a presumed declination is not warranted or a declination is not otherwise appropriate (for example, due to the presence of aggravating circumstances), DOJ will still recommend a reduction of 50% off the low end of the U.S. Sentencing Guidelines' fine range for companies that voluntarily self-disclose, fully cooperate, and remediate. The new Policy provides slightly more predictability given that 2016's Pilot Program gave DOJ staff more discretion by providing for *"up to"* a 50% reduction.[90]

The new Policy, like the Pilot Program, provides that DOJ will generally not require appointment of a monitor where a company has self-disclosed and cooperated, as long as the company, at the time of resolution, has implemented an effective compliance program, which is a typical remediation component.[91] The Policy makes clear that the 50% discount will not be available to criminal recidivists.

Consistent with DOJ's prior positions, it is not enough for a company merely to inform DOJ of misconduct to obtain self-reporting credit. Rather, for companies to receive credit, self-disclosure has to be voluntary and must: (1) occur "prior to an imminent threat of disclosure or government investigation;" (2) be made "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and (3) involve disclosure of "all relevant facts," including about all individuals involved in the potential violation.[92]

While the Policy provides some additional incentives for self-disclosure, the question of whether to self-disclose is still a challenging one, dependent on the facts and circumstances of the case. In considering whether to self-report, it is worth remembering the following:

First, a declination with disgorgement is not a traditional declination, but a form of enforcement action. Although it avoids the continuing jeopardy and sometimes onerous ongoing monitoring or reporting obligations of a DPA or NPA, a declination with disgorgement does involve: (i) significant expense both in terms of disgorgement and the cost of responding to a government investigation; (ii) negative publicity; and (iii) has the effect of making a report company a recidivist in the event of any future FCPA issues.

Continued on page 23

90. FCPA Update Dec. 2017, *supra* n. 1, at 2.

91. United States Attorneys' Manual § 9-47.120(1).

92. *Id.* at § 9-47.120(3)(a); *see also* FCPA Update Dec. 2017, *supra* n. 1, at 2.

Continued from page 22

Second, with the rise of international enforcement, self-reporting to one entity usually means self-reporting to others (or waiting for them to come calling, which may be an even worse option), potentially prompting multiple cross-border investigations.

Finally, it is worth noting that obtaining full credit for self-reporting is often difficult to achieve. While it is sometimes the case that a company is aware of a possible violation and decides not to self-report, often a company learns of wrongdoing around the same time or after DOJ does. As demonstrated by 2017 resolutions that did not qualify for self-reporting credit, a company that learns of wrongdoing from the press,[93] or a foreign investigation,[94] or as part of an investigation of a competitor (as was likely the case with the Telia DPA as a result of the Vimpelcom investigation) is simply not eligible for self-reporting credit, regardless of how proactive it is vis-à-vis DOJ.[95] This is true, even if, as normally happens in the course of cooperation, a company voluntarily provides new information to DOJ.

2. DOJ Addresses the Issue of Self-Destructing Apps and Services

Unlike the Pilot Program, the new DOJ Policy addresses the issue of self-destructing applications for the first time, stating that to receive full credit for timely and appropriate remediation, a company must "prohibit the improper destruction or deletion" of business records.[96] The Policy explicitly specifies that this includes "prohibiting employees from using software that generates but does not appropriately retain business records or communications" in an apparent effort to ensure that company employees are not using internal or external messaging or email apps and platforms that offer self-deleting capabilities (*e.g.*, Snapchat, Telegram, or Whatsapp) to discuss company-related business.[97] Such apps and services can thwart evidence-retention by either fully encrypting data (*i.e.*, making it inaccessible to the government) or by not storing the data at all (*i.e.*, allowing it to self-destruct).

Although this is the first time that DOJ has explicitly addressed the issue of self-destructing apps in the FCPA arena, the prohibition is consistent with DOJ's stepped up efforts to address more broadly the difficulties posed by self-destructing

Continued on page 24

93. *See* Rolls-Royce DPA, *supra* n. 8, at ¶ 4(a); KOM DPA, *supra* n. 12 at ¶ 4(a).
94. *See* Rolls Royce DPA, *supra* n. 8, at ¶ 4(a).
95. However, a company can qualify for full cooperation credit.
96. United States Attorneys' Manual § 9-47.120(3)(c); *see also* FCPA Update Dec. 2017, *supra* n. 1, at 4.
97. United States Attorneys' Manual § 9-47.120(3)(c).

Continued from page 23

software and encryption. Deputy Attorney General Rod J. Rosenstein recently commented on the "serious problem" created by "'warrant-proof' encryption."[98]

Many companies have been slow to address their employees' use of text messaging and similar apps. The use of such applications often is not contemplated or addressed by companies' compliance or document retention policies.[99] Given DOJ's new policy statement, companies should consider proactively addressing the issue in their compliance policies and employee training.

3. De-Confliction

To receive credit for full cooperation under the Policy, a company must, upon request, step aside to allow DOJ to proceed first with witness interviews and other internal investigative steps.[100] Under "de-confliction," DOJ asks a company to

"While the Policy provides some additional incentives for self-disclosure, the question of whether to self-disclose is still a challenging one, dependent on the facts and circumstances of the case."

defer taking certain investigative steps to allow DOJ to act first (*e.g.*, be the first to interview a witness). The insistence upon de-confliction further emphasizes DOJ's targeting of culpable individuals within corporations. In unveiling the new Policy, in fact, Rosenstein noted that "[i]t makes sense to treat corporations differently than individuals, because corporate liability is vicarious; it is only derivative of individual liability."[101]

This is not new. The Pilot Program first raised the issue of de-confliction, but did not provide much guidance as to what it means or entails, stating only that

Continued on page 25

98. Deputy Attorney General Rod J. Rosenstein, Remarks on Encryption at the United States Naval Academy, (Oct. 10, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-encryption-united-states-naval.

99. *See* FCPA Update Dec. 2017, *supra* n.1, at 4.

100. United States Attorneys' Manual § 9-47.120(3)(b); *see also* Dec. 2017 FCPA Update at 5.

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

Continued from page 24

one requirement for a company to receive full credit for cooperation was "[w]here requested, de-confliction of an internal investigation with the government investigation."[102] The revised Policy expands on the issue and clarifies that DOJ's de-confliction requests will be:

> made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose (*e.g.*, to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.[103]

Full cooperation credit under the Policy, as under the Pilot Program, requires a company conducting an internal investigation concurrently with a government investigation to not only, where requested, make company officers and employees available for DOJ interviews, but to give the first opportunity to interview these individuals to DOJ, where DOJ has requested such deference.[104]

As discussed in our December update, the United States is not alone in requiring that companies refrain from taking certain investigative steps on their own; indeed, it is still the norm in some countries for all or part of an internal investigation to be suspended or delayed once the authorities become involved.[105]

E. The Year of the Recidivist

2017 also saw three FCPA resolutions with recidivist offenders: Zimmer Biomet Holdings, Inc., Orthofix International N.V, and Halliburton. Given the extensive corporate liability standards in the United States, corporate "recidivisim" is somewhat of a misnomer, as the individuals within the corporation who engaged in the illicit behavior are rarely the same (with one exception being the Biomet case, as discussed below). However, U.S. authorities would view any company under investigation as a potential recidivist if previously charged with an FCPA violation, even if the country, employees, and type of conduct are different.

Continued on page 26

102. Pilot Program, *supra* n.2, at 5.

103. United States Attorneys' Manual § 9-47.120(4).

104. *Id.* at § 9-47.120(3)(b); Pilot Program, *supra* n.2, at 5.

105. For example, in France, contact between a potential witness and a lawyer is seen as an attempt to improperly influence the witness's testimony. *See* FCPA Update Dec. 2017, *supra* n.1, at 7.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 25

The facts underlying each of these matters shed some light on how the U.S. government treats recidivist companies. As discussed below, in each instance, a monitor of some type was imposed, and the company paid a significant penalty or fine that equaled or exceeded the relevant profits.

1. Biomet

The clearest case of corporate recidivism, and the only such company with actions brought by both DOJ and the SEC, was Zimmer Biomet.[106] The misconduct underlying its January 12, 2017 settlement involved the same jurisdiction (Brazil) and the same distributor as the conduct that formed the basis of its prior 2012 settlement.[107] To resolve the 2017 actions, Zimmer Biomet entered into a cease-and-desist order with the SEC[108] and a DPA with DOJ,[109] and its Luxemburg subsidiary pled guilty to one count of causing Zimmer Biomet to violate the FCPA's books and records provisions.[110] In addition to the $22.8 million in fines Biomet paid to DOJ and the SEC in 2012,[111] Zimmer Biomet paid $30.4 million in 2017, including approximately $17.4 million to DOJ[112] and $13 million to the SEC.[113] The company also agreed to retain a compliance monitor for three years, even though acquired by Zimmer and subject to Zimmer's compliance program.[114]

2. Orthofix

Within a week of Zimmer Biomet's 2017 settlement, the SEC announced that it had settled claims with another recidivist: Orthofix International, a Texas-based medical device company.[115] Treating Orthofix as a recidivist is less clear-cut as, unlike

Continued on page 27

106. *See* Bruce E. Yannett et al., "Corporate Recidivism in the FCPA Context," FCPA Update, Vol. 8, No. 9 (Apr. 2017), https://www.debevoise.com/insights/publications/2017/04/fcpa-update-_-april-2017.

107. Zimmer Biomet DPA, *supra* n.5, at ¶ 19. ("Despite being aware of red flags and prior corruption-related misconduct at Biomet's subsidiaries in Mexico and Brazil, and despite entering into a 2012 DPA both in connection with corruption in Brazil and other countries relating to Biomet's distributors, and as a consequence of its failure to implement internal accounting controls, Biomet knowingly failed to implement and maintain an adequate system of internal accounting controls[.]").

108. *In the Matter of Biomet, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79780, Accounting and Auditing Enforcement Rel. No. 3843, Admin. Proc. File No. 3-17771 (Jan. 12, 2017) [hereinafter "Biomet Order"].

109. Zimmer Biomet DPA, *supra* n. 5.

110. *United States v. Jerds Luxembourg Holding S.A.R.L.,* Plea Agreement, Docket No. 1:17-CR-00007-RBW ¶ 1 (filed Jan. 12, 2017).

111. Zimmer Biomet DPA, *supra* n. 5; *SEC Charges Medical Device Company Biomet with Foreign Bribery* (Mar. 26, 2012), https://www.sec.gov.news/press-release/2012-2012-50htm.

112. Zimmer Biomet DPA, *supra* n. 109, at ¶ 7.

113. Biomet Order, *supra* n. 108, at ¶ 42.

114. Zimmer Biomet DPA, *supra* n. 5, at ¶ 4(h); Biomet Order, *supra* n. 108, at ¶¶ 38-39.

115. *Medical Device Company Charged with Accounting Failures and FCPA Violations,* SEC Press Release (January 17, 2017), https://www.sec.gov/news/pressrelease/2017-18.html.

Continued from page 26

Zimmer Biomet, the conduct underlying the new action occurred in a different jurisdiction (Brazil) than Orthofix's 2012 settlement, which involved conduct in Mexico. In its 2017 resolution with the company, the SEC noted that Orthofix's remediation began too long after the prior actions were settled, stating that "[a]lthough the Company took remedial steps following the resolution of the [Mexican] allegations in 2012, Orthofix did not start fully implementing sufficient remedial steps until after the discovery of the Brazilian conduct in late 2013."[116] By bringing an action against Orthofix, the SEC appears to be signaling the importance it places on quick remediation.

To resolve the 2017 action, Orthofix entered into a cease-and-desist order with the SEC[117] and agreed to pay disgorgement of $2.9 million, prejudgment interest of $264,000, and a civil monetary penalty of $2.9 million, bringing its total payment to $6.1 million.[118] Orthofix was further required to retain an independent FCPA consultant for one year to review and evaluate Orthofix's FCPA-related policies and procedures (as actually implemented) and make recommendations to be reviewed by the SEC and adopted by Orthofix.[119]

3. Halliburton

Finally, in July 2017, the SEC brought an action against Halliburton, a Houston-based oilfield services corporation that had been charged some 8 years earlier for participating in one of the largest bribe schemes of all time.[120] In this more recent case, which involved the conduct of a local services partner in Angola, the SEC found that senior level executives at the company evaded the internal controls instituted by the company as a result of the prior settlement, very shortly after that settlement had been entered into,[121] a scenario quite likely to draw the ire of the U.S. enforcement agencies.

Indicating the seriousness with which the SEC views such behavior, Halliburton paid a civil monetary penalty of $14 million, an amount equal to the disgorgement, as well as $1.2 million prejudgment interest, for a total payment of $29.2 million.[122]

Continued on page 28

116. Orthofix Order, *supra* n. 23, at ¶ 18.

117. *Id.*

118. *Id.* at 7.

119. *Id.* at 8-11.

120. *In the Matter of Halliburton Company and Jeannot Lorenz,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act Rel. No. 81222, Accounting and Auditing Enforcement Rel. No. 3884, Admin. Proc. File No. 3-18080 (July 27, 2017), https://www.sec.gov/litigation/admin/2017/34-81222.pdf [hereinafter "Halliburton Order"]; Kara Brockmeyer et al., "Summer Enforcement Actions (and Non-Actions): Halliburton, Guilty Verdicts, and Declinations," FCPA Update, Vol. 9, No. 1 (Aug. 2017), https://www.debevoise.com/insights/publications/2017/08/fcpa-update-august-2017.

121. Halliburton Order, *supra* n. 120, at ¶ 25.

122. *Id.* at ¶ IV.C.

Continued from page 27

Halliburton also agreed to retain an independent consultant to review its policies and procedures, including those relating to local content requirements and the use of single-source justifications in Africa, make recommendations, and submit reports to the SEC.[123]

F. Limitations on the Government: *Kokesh* and Other Significant Case Developments

Given companies' preference to avoid litigating FCPA cases, case law that squarely tackles the FCPA is rare. That said, in 2017, several courts, including the U.S. Supreme Court, ruled on or had under consideration issues that may impact FCPA enforcement.

"In June 2017, the U.S. Supreme Court ruled that a five-year statute of limitations applies to claims for disgorgement. . . . It remains to be seen to what extent SEC enforcement of the FCPA in cases dating back more than five years will be substantially impacted."

1. *Kokesh v. SEC*

In June 2017, the U.S. Supreme Court ruled that a five-year statute of limitations applies to claims for disgorgement.[124] 28 U.S.C § 2462 creates a five-year statute of limitations for "the enforcement of any civil fine, penalty, or forfeiture" (unless a different period is specified by Congress). Together with the Court's 2013 decision in *Gabelli v. SEC,*[125] which held that the limitations period under § 2462 applies whenever the SEC seeks monetary penalties, the *Kokesh* decision means that all monetary remedies available to the SEC are subject to a five year statute of limitations.

In *Kokesh,* the Court rejected the SEC's argument that disgorgement is not a "civil fine, penalty, or forfeiture," because it merely disgorges ill-gotten gains and restores the status quo. Instead, the Court ruled that disgorgement is a "penalty" and thus subject to the five-year statute of limitations period contained in § 2462. The Court reasoned that disgorgement goes beyond mere compensation, is punitive in nature,

Continued on page 29

123. *Id.* at ¶ IV.G.

124. *Kokesh v. SEC,* 137 S. Ct. 1635, 1639 (2017).

125. 568 U.S. 442, 454 (2013).

Continued from page 28

and is imposed for violations of public laws (furthering the SEC's public policy missions of protecting investors and safeguarding market integrity).[126]

As a result of *Kokesh* and *Gabelli,* any SEC actions (including non-FCPA matters) seeking monetary damages – whether disgorgement or penalties or both – must be commenced within five years of the date the claim accrues or risk a fatal time-bar defense. That said, the fraudulent concealment and continuing violations doctrines and strategic use of tolling agreements still may provide the SEC weapons with which to arrest the statue of limitations.

And with respect to individuals in the FCPA context, § 2462 remains tolled and does not begin to run until the violator sets foot in the U.S.[127] Moreover, in order to raise a statute of limitations defense, a company would be required to let the SEC initiate a civil action in court rather than settle, something companies have traditionally been loathe to do. It remains to be seen to what extent SEC enforcement of the FCPA in cases dating back more than five years will be substantially impacted.

2. *United States v. Hoskins*

As we reported last year,[128] in August 2015, the United States District Court for the District of Connecticut granted a partial motion to dismiss in the *Hoskins*[129] prosecution related to the Alstom resolution. The ruling limited the scope of conspiracy and aiding and abetting charges in FCPA matters when the defendant is a non-resident foreign national.[130] DOJ moved for reconsideration, which was denied in March 2016.[131] DOJ then appealed to the Second Circuit, which heard oral argument in March 2017.[132]

As of the date of publication, no ruling has been issued in this case. If the Court of Appeals upholds the district court's ruling, this could significantly curtail the ability of U.S. prosecutors to assert jurisdiction over foreign nationals. As discussed earlier, DOJ has not let the pending appeal dampen its enthusiasm for the charge, using conspiracy charges in at least four cases involving foreign defendants this year.[133]

Continued on page 30

126. *Kokesh,* 137 S.Ct. at 1638-39, 1644-45; *see also* Debevoise Client Update, "U.S. Supreme Court Holds SEC Disgorgement Is a Penalty Subject to a Five-Year Statute of Limitations," (June 7, 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/06/20170607_us_supreme_court_holds_sec_disgorgement_is_a_penalty_subject_to_a_five_year_satute_of_limitations.pdf.

127. *See, e.g., SEC v. Straub,* 921 F. Supp. 2d 244 (S.D.N.Y. 2013).

128. Paul R. Berger at al., "The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions," FCPA Update, Vol. 8, No. 6 (Jan. 2017), https://www.debevoise.com/insights/publications/2017/01/fcpa-update-january-2017.

129. *United States v. Hoskins,* 123 F. Supp. 3d 316 (D. Conn. 2015) [hereinafter "*Hoskins*"].

130. *Id.*

131. *Hoskins,* Ruling Denying Government's Motion for Reconsideration (D. Conn. Mar. 16, 2016).

132. *United States v. Pierucci (Hoskins),* No. 16-1010cr, Notice of Hearing Date (2d Cir. Jan. 13, 2017).

133. See 2017 DOJ Actions on Foreign Individuals for FCPA Conspiracy Charges, *supra* n. 63.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 29

3. Developments in Domestic Anti-Bribery Law

Although not directly touching on the FCPA, continuing developments in U.S. domestic corruption law are worth noting. In 2016, the U.S. Supreme Court ruled 8-0 in *McDonnell v. United States* that although "distasteful" and "tawdry," loans and gifts to Robert McDonnell, the then-governor of Virginia and his family, did not constitute bribery under the domestic bribery statute. The court held that these gifts – which included flights on a private jet, rounds of golf, designer clothes, a Rolex, a loaned Ferrari, a $50,000 loan, a $10,000 wedding gift for the governor's daughter, and other items that often appeared in FCPA cases – did not violate the domestic bribery statute when they were not tied to "an official act" – specific governmental action within the power of the official.[134]

In 2017, the U.S. Court of Appeals for the Second Circuit relied on *McDonnell* to overturn the convictions of former New York State Assembly Speaker Sheldon Silver, who had been accused of receiving bribes and kickbacks in the form of referral fees from law firms[135] and former New York State Senate Majority Leader, Dean Skelos,[136] who had been accused of accepting consulting services contracts and a no-show job for his son from companies with interests before the state legislature.[137] *McDonnell* also led to a mistrial in the case of New Jersey Senator Robert Menendez, who was accused of accepting gifts including a luxury hotel stay and private jet flights from a longtime friend and doctor allegedly in exchange for assistance with obtaining visas and intervening in a billing dispute between the doctor and Medicaid.[138] The government initially announced its intention to retry Menendez.[139] However, after the district court judge acquitted Menendez on seven of the charges, holding that the government had failed to demonstrate an explicit quid pro quo agreement, the DOJ moved to dismiss the remaining corruption charges.[140]

Continued on page 31

134. *McDonnell v. United States,* 136 S. Ct. 2355, 2375 (2016); *see also* Colby A. Smith, Bruce E. Yannett, and Simon Leen, "Should the Supreme Court's Ruling in *McDonnell* Influence SEC and DOJ Enforcement Under the FCPA?" FCPA Update, Vol. 7, No. 12 (July 2016), https://www.debevoise.com/insights/publications/2016/07/fcpa-update-july-2016.

135. *United States v. Silver,* 864 F.3d 102, 106 (2d Cir. 2017).

136. *United States v. Skelos,* Nos. 16-1618-cr, 16-1697-cr, 2017 WL 4250021 (2d Cir. Sept. 26, 2017).

137. *Id.*

138. *See* Devlin Barrett & Alan Maimon , *After mistrial, Menendez speaks of 'resurrection,' but joy may be short-lived,* THE WASHINGTON POST (Nov. 16, 2017), https://www.washingtonpost.com/world/national-security/menendez-jury-says-again-that-it-is-deadlocked/2017/11/16/c6ae9096-c951-11e7-aa96-54417592cf72_story.html?utm_term=.fa168fab5e10.

139. *See* Devlin Barrett & Ed O'Keefe, *Justice Dept. says it will retry Sen. Robert Menendez following mistrial on bribery charges,* THE WASHINGTON POST (Jan. 19, 2018), https://www.washingtonpost.com/world/national-security/justice-department-says-it-will-re-try-sen-robert-menendez-following-mistrial-on-bribery-charges/2018/01/19/240fce5c-fd51-11e7-a46b-a3614530bd87_story.html?utm_term=.a4bee22ac4ff.

140. *United States v. Menendez,* Opinion at 25-43, No. 15-CR-155 WHW (D.N.J. Jan. 24, 2018); United States' Motion to Dismiss Superseding Indictment, No. 15-CR-155 WHW (D.N.J. Jan. 31, 2018).

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 30

There are several important things to note about *McDonnell* and its progeny. ***First,*** the FCPA does not use the same "official act" language that the *McDonnell* decision relied upon and instead contains arguably broader prohibitions.[141] The issue of how courts should construe an "official act" in connection with foreign bribery has been raised (in connection with interpretation of Guinean anti-corruption law) in the money laundering appeal of Mahmoud Thiam, a former Guinean Minister of Mines and Geology.[142] It also was raised unsuccessfully in a pre-trial motion by Ng Lap Seng, who was convicted of conspiracy to violate the FCPA in 2017.[143]

"*McDonnell* and subsequent domestic bribery decisions are notable given the discrepancy between the [Supreme] Court's insistence on interpreting the domestic bribery statute narrowly, and the broad construction of each element of the FCPA, as interpreted and applied by courts of appeals and the SEC and DOJ."

Second, beyond the specific statutory question of what is "an official act," *McDonnell* and subsequent domestic bribery decisions are notable given the discrepancy between the Court's insistence on interpreting the domestic bribery statute narrowly,[144] and the broad construction of each element of the FCPA, as interpreted and applied by courts of appeals[145] and the SEC and DOJ.[146] While this discrepancy is particularly glaring in gift, meal, hospitality, and travel cases with superficial similarity to facts in *McDonnell*,[147] the preference for a narrow reading

Continued on page 32

141. In particular, the FCPA includes 15 U.S.C. § 78dd-1(a)(1)(B) which does not have an analogue in the domestic bribery statute and would arguably cover the activity at issue in *McDonnell*. *See* Colby A. Smith, Bruce E. Yannett, & Simon Leen, "Should the Supreme Court's Ruling in *McDonnell* Influence SEC and DOJ Enforcement Under the FCPA?" FCPA Update, Vol. 7, No. 12 (July 2016),

142. That appeal is currently pending. Brief and Special Appendix for Defendant-Appellant, *United States v. Mahmoud Thiam,* No. 17-2765-cr (2d Cir. Jan. 15, 2018), ECF No. 31.

143. Reply Memorandum of Law in Support of Defendant's Motion to Dismiss the Indictment or in the Alternative for a Bill of Particular at 20-22, *United States v. Ng Lap Seng,* No. 15-CR-00706-VSB (S.D.N.Y. Dec. 23, 2016), ECF No. 354.

144. *See McDonnell,* 136 S. Ct. at 2373 ("'[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.'") (quoting *United States v. Sun–Diamond Growers of Cal.,* 526 U.S. 408, 412 (1999).

145. *See, e.g., United States v. Esquenazi,* 752 F.3d 912, 924-25 (11th Cir. 2014) (rejecting narrow interpretation of "instrumentality"); *United States v. Kay,* 359 F.3d 738, 756-61 (5th Cir. 2004) (broadly defining business nexus element of FCPA).

146. *See* U.S. Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act,* Nov. 14, 2012, at 12, , http://www.justice.gov/criminal/fraud/fcpa/guidance ("obtain or retain business" is "broadly interpreted"); *id.* at 14 ("anything of value" applies to "a broad range of unfair benefits"); *id.* at 20 ("... the FCPA broadly applies to corrupt payments to 'any' officer or employee of a foreign government"); *id.* ("the term 'instrumentality' is broad").

147. *See e.g.,* U.S. Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act,* Nov. 14, 2012, at 16, http://www.justice.gov/criminal/fraud/fcpa/guidance.

Continued from page 31

of public bribery statutes could be applied to other elements of the FCPA and has been raised by *amicus curiae* in connection with the jurisdictional questions in the *Hoskins* appeal.[148]

II. Developments Outside the United States

A. United Kingdom

The year 2017 will likely be viewed as a very successful year for the U.K. Serious Fraud Office ("SFO"), with the conclusion of two high-profile DPAs involving blue-chip U.K. corporations. It was also the final full year of David Green QC's tenure as Director of the SFO. Green has expressed a hope that the next director will maintain his approach to enforcement, emphasizing the SFO's role as a prosecutor and not a dealmaker or advisor, which itself represented a decisive break from the approach adopted by Green's predecessor, Richard Alderman. In any event, for the time being, the SFO's existence appears to be secure, following speculation in the run-up to the June 2017 election that it might be folded into the UK National Crime Agency.

In 2017, the U.K. government also further expanded strict liability "corporate offences" with the introduction of a corporate offence of failure to prevent the facilitation of tax evasion. As a consequence, businesses have been undertaking risk assessments and implementing policies to address the risk that their "associated persons" facilitate third parties' evasion of UK or foreign tax. Corporate offences for failure to prevent fraud and money laundering appear to be under consideration, but there has been little movement on those in 2017.

There were also several important court decisions, one of which brought uncertainty to the law on privilege (a Court of Appeal decision on that issue is expected in 2018) and another will lead to the revision of the criminal test for dishonesty, a concept that underpins UK fraud legislation.

1. 2017 DPAs

Rolls-Royce DPA

On January 17, 2017, the SFO secured UK's third bribery-related DPA with Rolls-Royce plc, the British engineering company. The UK DPA followed was the centerpiece of a global settlement that also involved a DPA with the U.S. DOJ and a Leniency Agreement with the Brazilian *Ministério Público Federal* ("MPF").[149]

Continued on page 33

148. Brief for the New York Council of Defense Lawyers as Amicus Curiae in Support of Defendant-Appellee and Affirmance at *20-25, *United States v. Hoskins*, No. 16-1010, 2016 WL 7367580 (2d Cir. Dec. 16, 2016).

149. Debevoise was engaged by Rolls-Royce in early 2012 to assist with certain enquiries from the SFO and to lead the subsequent internal investigations. The firm then advised Rolls-Royce on the investigations by the SFO and the DOJ, and the subsequent coordinated resolution with the SFO, DOJ and the Brazilian *Ministério Público Federal.*

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 32

The DPA was scrutinized and ultimately approved by Sir Brian Leveson QC, President of the Queen's Bench Division; Sir Brian has approved all four UK DPAs concluded to date. Rolls-Royce agreed to pay £497.25 million (plus the SFO's costs and interest) to the SFO, in addition to $170 million and $25 million to the DOJ and the MPF, respectively, pursuant to coordinated resolutions with those authorities.

The indictment covered by the DPA contained twelve counts, of which eleven were of bribery and corruption (including failure to prevent bribery under Section 7 of the Bribery Act 2010) and one of false accounting. The underlying conduct related to the operations of Rolls-Royce Civil and Defence Aerospace and Energy businesses in Indonesia, China, Malaysia, India, Thailand, Russia and Nigeria, with some conduct dating back to the late 1980s.

The Rolls-Royce case demonstrates that a DPA with the SFO might be possible even when serious misconduct is alleged and where the company is not deemed to have voluntarily self-reported the conduct to the SFO. That is particularly notable given that SFO's prior DPAs with Standard Bank and XYZ Ltd emphasized the importance of the companies' self-reporting. In fact, the SFO has maintained that the Rolls-Royce case was exceptional in this respect, and that a strong presumption that a DPA requires self-reporting will persist.

The Rolls-Royce DPA suggests that a company may overcome the "deficit" following its failure to self-report in case where it displays "extraordinary cooperation" with the SFO. In this context, Sir Brian engaged in a qualitative assessment of the company's cooperative stance and noted that "[it] could not have done more to expose its own misconduct,"[150] exhibiting a level of cooperation with the SFO that allowed him (and the SFO) to conclude that the case should not be distinguished from one where a company was deemed to have self-reported. This cooperation involved, among other things, (i) voluntarily providing materials responsive to the SFO's requests; (ii) making witnesses available to the SFO; (iii) deferring internal interviews until after the SFO had carried out its own; (iv) disclosing interview, subject to a limited privilege waiver; and (v) consulting the SFO in respect of matters relating to media coverage.

In approving the DPA, Sir Brian also emphasized the compliance and corporate culture improvements undertaken by Rolls-Royce. He found that "Rolls-Royce is no longer the company that once it was," pointing in particular to its new board and executive team as well as new compliance policies, practices, and procedures.

Continued on page 34

150. Serious Fraud Office v Rolls-Royce plc and another, 17 January 2017, para 38.

Continued from page 33

Sir Brian placed great significance on the fact that the individuals allegedly involved in the corrupt practices were no longer in the company management. He concluded that, because of the work undertaken by Rolls-Royce to improve its compliance culture and its willingness to cooperate and expose its own wrongdoing, the DPA served the interests of justice.

Tesco DPA

Three months after the conclusion of the Rolls-Royce DPA, on April 17, 2017, the Crown Court approved the SFO's fourth DPA with Tesco Stores Limited ("Tesco"). The first DPA that did not relate to bribery offences, it concerns accounting irregularities that resulted in Tesco's overstatement of its profits by £326 million in 2014.

Reporting restrictions have been imposed on the judgment approving the DPA, the DPA itself, and the accompanying statement of facts due to the ongoing criminal prosecution of three former Tesco executives. From the little information that is available, it is known that Tesco received a financial penalty of £129 million and was required to pay the SFO's costs. Tesco emphasised that it had cooperated fully with the investigation and had undertaken an extensive programme of change, which the SFO had recognised in offering the DPA.

The SFO appears to have coordinated the conclusion of the Tesco DPA with the UK Financial Conduct Authority ("FCA"). On the day when the agreement between the SFO and Tesco to enter into the DPA was made public, the FCA issued a final notice to Tesco plc and Tesco, finding that they had engaged in civil market abuse in relation to substantially the same conduct.

2. Introduction of a Corporate Tax Offense

The Criminal Finances Act 2017 (the "Act"), adopted on April 27, 2017, introduced a new strict liability corporate offence of failure to prevent the facilitation of the evasion of UK or foreign tax, which came into force on September 30, 2017. The extraterritorial reach of the offence is very wide and similar to that of the corporate bribery offence in the Bribery Act 2010. Also like the corporate bribery offence, the corporate tax offence is a strict liability one, subject to a defense of having had procedures in place to prevent the facilitation of criminal tax evasion.

The Act posits a defense of "reasonable procedures," different from the "adequate procedures" defense in the Bribery Act. Her Majesty's Revenue & Customs has explained that they took on board responses to the public consultation to the effect that, linguistically, perfectly tailored and proportionate preventative procedures are unlikely to have been "adequate" if an offence were subsequently committed.

Continued on page 35

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 34

The formulation is meant to emphasize that the Act should not be read as creating a "zero failure" regime; to mitigate its risk of facilitating tax evasion, a company must implement procedures that are proportionate to the risk it faces. In practice, however, it is unlikely this approach will differ to that applicable in the context of the corporate bribery offence.

The unavoidable evidential difficulties associated with pursuing a company for facilitating foreign tax evasion cast some doubt on the practical enforceability of this aspect of the new law. Not only will a prosecutor need to prove both overseas tax evasion and facilitation to the criminal standard, but it will also have to prove dual criminality in respect of both sets of conduct. This will not be easy given the varying and complex nature of criminal tax legislation, and will require expert evidence on foreign tax regimes.

"The year 2017 will likely be viewed as a very successful year for the U.K. Serious Fraud Office . . . , with the conclusion of two high-profile DPAs involving blue-chip U.K. corporations."

3. Privilege Uncertainty

On May 8, 2017, the English High Court handed down judgment in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd,*[151] holding that documents prepared by lawyers and forensic accountants instructed by lawyers during an internal investigation into bribery and corruption allegations were not covered by privilege.

After commencing an internal investigation in 2010, as a result of a whistleblower allegation, Eurasian Natural Resources Corporation Ltd ("ENRC"), on advice of counsel, contemplated preparations for a dawn raid by the UK authorities. Following an approach from the SFO in August 2011, ENRC notified the SFO of the internal investigation and engaged in dialogue with the SFO, including at a meeting in November 2011.

The SFO opened a formal criminal investigation into ENRC in April 2013. Using its statutory powers, the SFO issued notices compelling ENRC and related third parties to produce certain documents created between August 2011 and April 2013,

Continued on page 36

151. [2017] EWHC 1017 (QB).

Continued from page 35

including memoranda of interviews drafted by ENRC's former lawyers and materials generated by ENRC's forensic accountants. ENRC withheld production of some of these documents on the basis that they were privileged. The SFO rejected ENRC's position and brought a claim in the civil courts for a declaration that the documents being withheld were not privileged.

The English High Court held that ENRC could not claim that litigation was reasonably in contemplation – the trigger criterion for litigation privilege to arise – solely because it self-reported certain facts to the SFO. Rather, the court ruled, litigation privilege will only arise with respect to the materials produced in the course of an internal investigation if the company discovers evidence supporting the allegations at issue, at which point a prosecution would be "reasonably in prospect." Further, even when a prosecution is reasonably contemplated, the company must demonstrate that the materials at issue were created for the dominant purpose of defending against that future criminal prosecution, and not merely as part of a fact-finding exercise. The party asserting litigation privilege bears the burden of proving the above.

The ENRC case illustrates that English courts take a very fact-specific approach to privilege issues, which to a certain extent limits its broader applicability. Nevertheless, the decision raises important considerations for companies and their legal and other advisers when conducting internal investigations, and particularly witness interviews. Communications between the company's counsel and the small number of individuals within the company deemed to be the "client" for privilege purposes are arguably covered by the legal advice privilege. Aside from those, however, it cannot be assumed that any materials from an internal investigation, including interview notes, would be deemed privileged simply because an internal investigation into allegations of corporate wrongdoing has been commenced or because an SFO investigation is expected, or even has commenced, in relation to such allegations.

ENRC has appealed the High Court's judgment, and the Court of Appeal case is due to be heard in 2018.

4. Supreme Court Undermines Criminal Test for Dishonesty

On October 25, 2017, the Supreme Court handed down a judgment in *Ivey v Genting Casinos (UK) Ltd,*[152] which casts doubt on the validity of the well-established criminal test for "dishonesty" set out in *R v Ghosh*.[153] "Dishonesty" is an element of all English fraud-based offences.

Continued on page 37

152. [2017] UKSC 67.

153. [1982] QB 1053.

Continued from page 36

R v Ghosh established that, in a criminal context, "dishonesty" was established only if (i) complained-of conduct is dishonest by the ordinary standards of reasonable and honest people (objective standard); and (ii) the defendant realised that his/her conduct was dishonest by the objective standard (subjective standard). By contract, the civil test for dishonesty applies only the objective standard.[154]

In the 2017 *Ivey* decision, the Supreme Court repudiated the *R v Ghosh* test for criminal dishonesty and held that it should be aligned with the civil test by dropping the subjective standard. Central to the court's reasoning was the fact that, under *Ghosh*, a defendant would not be "dishonest" if he did not believe his behaviour to be dishonest by the ordinary standards of reasonable and honest people. In addition to highlighting the difficulty for juries in applying that test, the court noted that under *Ghosh*, perversely, "the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour." Although *Ivey* was a civil case and might not be a binding precedent on criminal matters, the Supreme Court could not have been clearer on how it would rule in the criminal context. It is generally expected that criminal courts will now align themselves with the *Ivey* test when considering criminal dishonesty.

5. Enforcement and Regulatory Activity

SFO

In September 2017, the SFO brought charges against the ex-CEO and CEO of former FTSE 250 oil and gas exploration company Afren Plc. Both men stand accused of having received payments via secret companies they controlled in connection with over $400 million in Nigerian business deals. In November 2017, the SFO charged four individuals in connection with the ongoing Unaoil investigation. Paul Bond, Stephen Whiteley, Ziad Akle, and Basil Al Jarah allegedly oversaw payments of bribes between June 2005 and August 2011, made to win certain contracts in Iraq for Unaoil's client, SBM Offshore. In April 2017, two former Barclays traders were acquitted in their retrial on charges that they plotted to manipulate LIBOR, the benchmark interest rate. The SFO's five-year investigation has so far resulted in five high-profile convictions and eight acquittals.

In May 2017, the SFO charged logistics and freight company F.H. Bertling Ltd, the UK subsidiary of the German Bertling Group, and four related individuals with one count of conspiracy to give or accept corrupt payments. The alleged bribes were paid between January 2010 and May 2013 in exchange for Bertling being awarded or

Continued on page 38

154. *Barlow Clowes International Ltd v Eurotrust International Ltd,* [2006] 1 WLR 1476.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 37

retaining contracts for the supply of freight forwarding services for a North Sea oil exploration project. In September, Bertling Ltd and six employees were convicted of conspiracy to make corrupt payments to an agent of the Angolan state oil company, Sonangol, in connection with a contract worth approximately $20 million.

In June 2017, the SFO charged Barclays Plc and four related individuals, including the former CEO, with conspiracy to commit fraud and unlawful provision of financial assistance in connection with Barclays' capital raisings in June and October 2008. After a five-year investigation, the SFO raised specific concerns with respect to Barclays' Advisory Services Agreements ("ASAs"). Pursuant to the ASAs, Barclays paid £322 million to Qatari investors over five years, ostensibly for advice that Barclays received. The SFO claimed that the payments were in fact made to secure the Qataris' participation in the capital raisings. The charge of unlawful provision of financial assistance relates to a $3 billion loan facility made available to Qatar around the same time.

"In 2017, the U.K. government also further expanded strict liability 'corporate offences' with the introduction of a corporate offence of failure to prevent the facilitation of tax evasion. As a consequence, businesses have been undertaking risk assessments and implementing policies to address the risk that their 'associated persons' facilitate third parties' evasion of UK or foreign tax."

FCA

In 2017, the FCA imposed financial penalties on 11 firms and individuals, totalling approximately £230 million. By far the largest penalty (approximately £163 million) was imposed on Deutsche Bank AG ("DB") for failings in its anti-money laundering ("AML") controls following an investigation into concerns that Russian customers of DB Moscow had used securities transactions (so-called "mirror trades") to transfer Roubles from Russia, convert those funds to US Dollars through DB London, and then transfer them to bank accounts in other countries. Over 2,400 mirror trades were made between 2012 and 2014, involving over $6 billion.

The FCA identified a number of deficiencies in DB's AML control framework, including in relation to customer due diligence, management oversight and supervision, policies and procedures, trade monitoring, risk assessment, resourcing, and IT infrastructure. The FCA found that these resulted in DB's inability to detect and prevent suspicious transactions.

Continued on page 39

Continued from page 38

As part of its continuing drive to promote individual responsibility in the financial services industry, the FCA consulted on extending its Senior Managers and Certification Regime ("SMCR") from banks, building societies, and credit unions to almost all of UK's 50,000 regulated financial services companies and their employees. It is expected that insurers will have to implement the SMCR by late 2018, with other regulated firms to follow by mid- to late 2019.

B. Germany

1. Legislative Developments: New Law on Confiscation in Criminal Proceedings

Starting July 1, 2017, a new law on the confiscation of ill-gotten gains replaced and simplified the former rules of the German Criminal Code (*Strafgesetzbuch, StGB*).[155] The law implements EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, which is meant to simplify the recovery of profits derived from serious or organized crime. Confiscation, as a sanction, is no longer limited only to certain enumerated crimes, but can be ordered with respect to any object or money that was acquired from or used for the purpose of committing a criminal act. The Act clarifies that gross proceeds remain the prime basis for calculating the amount to be confiscated, but expenses not related to the commission of the crime may be deducted.

2. Judicial Decisions

Search and Seizure of Law Firm Files

In March 2017, the Munich public prosecutor raided the Munich office of U.S.-headquartered law firm Jones Day, searching for materials obtained through the firm's internal investigation of the Volkswagen diesel emissions scandal on the car-maker's behalf. The raid was launched in the course of a public prosecutor investigation of individuals employed by Audi AG, a subsidiary of Volkswagen.

The raid raised questions about the extent to which attorney-client privilege protects evidence obtained in an internal investigation within a group of companies, when such evidence is in the possession of a lawyer. The German privilege pertains only to a particular attorney-client relationship and communications resulting from this relationship, including work product that outside lawyers generate for the purposes of rendering proper legal advice. Therefore, evidence seized in the search of a German law office is admissible if the seized evidence is not covered by legal privilege for the relevant persons, but rather pertains to other third persons or does not qualify as protected attorney-client communications or attorney work product.

Continued on page 40

155. Criminal Code (in the version promulgated on November 13, 1998), Federal Law Gazette I at 3322.

Continued from page 39

The Munich courts approved the seizure of the documents. Following a challenge to the constitutionality of the search warrant, the German Federal Constitutional Court prohibited, as a preliminary measure, Munich prosecutors from examining the seized documents for six months while considering the challenge. Following an extension for another six months in January, a final decision is expected in mid-2018.[156] The key issues are whether the privilege or its consequences are constitutionally protected and whether such protection also applies to foreign law firms or at least to their German practitioners.

As a practical matter, possible seizures of evidence collected in an internal investigation can be curbed by establishing a clearly defined client relationship and making sure that the evidence falls under that privilege. In addition, substantial cooperation with the prosecutor, where appropriate, may also reduce the authority's appetite to search the offices of a law firm conducting internal investigations in Germany.

Effective Compliance Programs and Mitigation of Fines

Under German law, there is no corporate criminal liability, but rather only an administrative misdemeanor liability of companies. Such liability attaches for actions of leading personnel in connection with business operations that are either crimes or administrative offenses and that violate corporation duties or are intended to enrich the company. Liability also attaches if senior management has failed to properly supervise the conduct of the business, which includes failure to instruct personnel about proper business requirements and compliance. Sanctions under the Administrative Offences Act are monetary fines and disgorgement of profits, or the forfeiture of the proceeds of crime in lieu of the disgorgement.

Until last year, it has been disputed by certain prosecuting authorities whether the establishment of a compliance management system ("CMS") could be a factor in the assessment of penalties under the misdemeanor act. In 2017, Germany's highest criminal court suggested in an unprecedented ruling that a court should also take into account in the assessment of the fines whether the corporation established an efficient CMS to prevent wrongdoing, in accordance with its statutory duty.[157] In addition, the Court found that the enhancement of an already existing CMS commencing after a crime or offense had been committed could be considered a mitigating factor if the CMS is designed to prevent or significantly impede the commission of similar violations in the future.

Continued on page 41

156. The decisions are available in German at http://www.bverfg.de/e/rk20180109_2bvr128717.html.

157. *See* German Federal Court, 1 StR 265/16 (May 9, 2017), at marginal number 118.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 40

C. France

1. Legislative Developments

a) The Sapin II Law

It has now been a year since France passed the "Law Regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life,"[158] known as the Sapin II Law. This new law provides for significant changes in French anti-corruption legal and regulatory procedures.

The principal measures of the Sapin II Law are: (i) introducing obligatory compliance programs for medium and large companies and certain public entities; (ii) establishing a new French Anti-corruption Agency (the "AFA") whose role is mainly to ensure that companies required to adopt compliance programs under the new law have done so; (iii) expanding the extraterritorial application of French law in relation to certain corruption-related offenses; (iv) adopting a DPA-type procedure which allows corporate entities to negotiate an outcome that avoids criminal conviction; and (v) enhancing the status and protection of whistleblowers in accordance with international standards. We have discussed these measures in greater detail in prior issues.[159] As those publications note, the Sapin II Law is already having an impact on criminal investigations in France, and resulted in the first-ever "French DPA" in 2017; but the extent of that impact, and in particular whether the Sapin II Law will achieve its desired effect of "repatriating" prosecutions of French corporations so that they are primarily investigated in France rather than the U.S., remains to be seen.

b) The French Data Protection Agency: Updated Documentation

On July 2017, the French Data Protection Agency (the "CNIL") updated its authorization provisions relating to whistleblowing systems in order to facilitate companies' efforts to comply with the whistleblowing provisions of the Sapin II Law.[160] This means that companies implementing whistleblowing systems under the Sapin II Law will benefit from simplified procedures in dealing with the CNIL, provided they comply with the authorization framework. Since the CNIL has wide-ranging authority to review data retention schemes, these new provisions may be important.

Continued on page 42

158. Law No. 2016-1691 of December 9, 2016.

159. *See* "The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions," FCPA Update, Vol. 8, No. 6 (Jan. 2017) at 42-44; Frederick T. Davis, Andrew M. Levine, and Charlotte Gunka, "France's New Anti-Corruption Framework: Potential Impact for Businesses in a Multijurisdictional World", FCPA Update, Vol. 8, No. 4 (Nov. 2016), http://www.debevoise.com/~/media/files/insights/publications/2016/11/fcpa_update_november_2016.pdf; Frederick T. Davis, Sean Hecker, and Charlotte Gunka, "France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?", FCPA Update, Vol. 7, No. 10 (May 2016), www.debevoise.com/insights/publications/2016/05/fcpa-update-may-2016.

160. CNIL Authorization No. AU-004, www.cnil.fr/fr/alertes-professionnelles-modification-de-lautorisation-unique-ndegau-004.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 41

c) AFA Guidelines

Since June 1, 2017, pursuant to Article 17 of the Sapin II Law, medium and large companies[161] and certain public entities are required to have compliance programs that meet certain specifications, including the adoption of (i) a code of conduct on corruption and influence-peddling; (ii) an internal whistleblowing system; (iii) a risk mapping program; (iv) due diligence processes for clients, first-tier providers and intermediaries; (v) accounting controls; (vi) training programs for managers and employees most exposed to corruption and influence-peddling risks; (vii) disciplinary sanctions to be applied against employees in case of breach of the code of conduct; and (viii) an internal control and evaluation mechanism.

"It has now been a year since France passed the 'Law Regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life,' known as the Sapin II Law. This new law provides for significant changes in French anti-corruption legal and regulatory procedures."

On December 22, 2017, the AFA published guidelines aimed at helping companies and public entities comply with their requirements under the Sapin II Law.[162] These guidelines are not legally binding and do not create additional obligations for companies. They are, however, the best indicator of what the AFA will look for when evaluating compliance programs; and since the AFA is tasked with supervising compliance programs, and can impose administrative penalties for failure to comply, its guidelines are important.

These guidelines are fairly detailed regarding several aspects of compliance program requirements such as risk mapping and third party due diligence. They urge companies to "take ownership" of their compliance obligations and to adopt procedures that respond to the specific needs of their structure and their

Continued on page 43

161. Companies (i) with at least 500 employees, or belonging to a group of companies whose parent company has its registered office in France and which employs at least 500 employees, and (ii) whose turnover or consolidated turnover exceeds €100 million. Article 17 therefore applies to companies that do not have their registered office in France and that do not meet the conditions relating to the number of employees and turnover provided that (i) the parent company located in France generates a consolidated turnover in excess of €100 million and (ii) the group to which it belongs employs more than 500 employees. Article 17 does not apply to companies of a non-French group, unless the company itself hires at least 500 employees and generates a turnover in excess €100 million.

162. "Recommandations de l'Agence française anticorruption destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d'influence, de concussion, de prise illégale d'intérêt, de détournement de fonds publics et de favoritisme", www.economie.gouv.fr/files/files/directions_services/afa/2017_-_Recommandations_AFA.pdf.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 42

industry, rather than simply adopting one-size-fits-all practices. They include the following items:

- **Tone at the top.** AFA's first recommendation is to have top management responsible for the company's anti-corruption program. Interestingly, this item was not included in Article 17 of the Sapin II Law. The AFA was likely inspired by the guidelines issued in the U.K.[163] and in the U.S.[164] that emphasize the importance of top-level commitment to foster an anti-corruption culture. According to the AFA, the management should inspire a culture of compliance by: (i) adopting a zero tolerance policy towards corruption; (ii) integrating anti-corruption measures in all procedures and policies, in particular in human resources procedures, whistleblowing schemes and any policy or procedure related to a process identified through risk mapping; (iii) ensuring appropriate execution of the prevention and detection program, in particular by naming a compliance officer; and (iv) implementing specific internal and external communication policies.
- **Code of conduct.** Article 17-II-1° of Sapin II Law provides that entities must put in place a code of conduct defining the types of behavior that are likely to constitute acts of corruption or influence-peddling and thus are prohibited. The AFA indicates that this code must: (i) provide information about the types of relevant conduct that employees may encounter or experience; (ii) describe situations and conduct to proscribe; (iii) formulate detailed and strict prohibitions covering gifts, travel, hospitality, facilitation payments, conflicts of interest, sponsorships, and lobbying; (iv) provide for disciplinary consequences of prohibited conduct – in accordance with Article 17-II-7° of the Sapin II Law – and, more generally, of conduct that is not in line with the organization's commitments and principles regarding the prevention and detection of corruption. The AFA mentions that the code of conduct shall be applicable to all employees of the company, but not – as it was contemplated in a draft version of these guidelines – to occasional external agents. It shall also be applicable wherever the entity carries on business, including abroad, notwithstanding the application of more stringent local anti-corruption rules.

Continued on page 44

163. *See* "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing" issued by the UK Ministry of Justice, principle 2, http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

164. *See Resource Guide*, *supra* n. 146.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 43

- **Internal whistleblowing program.** Article 17-II-2° of Sapin II Law provides that entities must put in place an internal whistleblowing program for employees to report behaviors or situations contrary to the company's code of conduct. The AFA seems to narrow this requirement to the reporting of behavior or situations that are contrary to the company's code of conduct and likely to constitute acts of corruption. The reason may be that French law offers legal protection to "whistleblowers" defined as any "natural person who discloses or reports, in a selfless and bona fide manner, a crime or offense, a serious and clear violation of an international convention duly ratified or approved by France, a unilateral decision of an international organization made on the basis of such a convention, of law or regulation, or a serious threat or harm to the public interest of which he has been personally aware."[165] Where the whistleblower's legal protection applies, the AFA stresses that care must be taken to ensure his or her rights and in particular the strict confidentiality of his or her identity, the facts reported, and the persons to whom the report refers. It also mentions the possibility to put in place only one technical collection system for all the different types of whistle-blowing/reporting mechanisms provided for by French law.
- **Risk mapping**. Risk mapping is the cornerstone of the Sapin II Law compliance framework since its objective is to identify all corruption risks faced by the company (Article 17-II-3°). According to the AFA, the risk mapping function has two sets of objectives: (i) first, to identify, assess, prioritize, and manage the risks of corruption to ensure an effective anti-corruption compliance program adapted to the economic circumstances of the entity; and (ii) second, to inform the management and to give the persons in charge of compliance the necessary visibility for the implementation of prevention and detection measures. The AFA describes a six-step methodology: (i) clarify roles and responsibilities in the elaboration, implementation, and updating of the risk mapping; (ii) identify inherent risks for the company's activities; (iii) evaluate exposure to corruption risks; (iv) evaluate adequacy and efficiency of the means to control risks; (v) hierarchize and manage risks; and (vi) formalize and update the mapping. This mapping should take the form of written documentation available to be presented to AFA agents in case of review.
- **Third party due diligence.** Article 17-II-4° of Sapin II Law provides that entities must put in place procedures for evaluating the situations of customers, first-tier suppliers, and intermediaries on the basis of the risk mapping process. The AFA widens the scope of application to include all third parties with which

Continued on page 45

165. Sapin II Law, Art. 6.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 44

the company has relationships or enters into relationships, prioritizing those identified by risk mapping. The AFA provides a detailed list of factors to take into account for the evaluation of third parties, including geographical location, activity, expertise, reputation, compliance, cooperation, and interaction with public officials and politically exposed persons and payments. It also suggests the following measures to prevent the risk of corruption: (i) inform the third party of the existence of its anti-corruption program by communicating, for example, the code of conduct; (ii) train or alert the third party to the risk of corruption; (iii) require from the third party a written anti-corruption commitment (in this respect, anti-corruption clauses may be included in the contracts considered to be at risk, with such clauses making it possible to terminate the contractual relationship in the event of a breach); and (iv) require the third party to verify the integrity of its subcontractors in order to secure the contractual chain.

"On November 14, 2017, the President of the Paris criminal court approved the first-ever Judicial Convention of Public Interest . . . – *i.e.*, the new French-style DPA procedure included in the Sapin II Law."

- **Accounting controls.** According to Article 17-II-5° of the Sapin II Law, entities must establish accounting controls to ensure that their books and accounts are not concealing violations such as corruption or influence-peddling. The AFA indicates that the goal is to ensure that books are kept that do not hide acts of corruption, but clarifies that it does not require developing new accounting procedures.
- **Training.** According to Article 17-II-6° of the Sapin II Law, entities must organize trainings targeting the managers and employees most exposed to corruption and influence-peddling risks. Although the AFA acknowledges these persons should be trained as a priority, it recommends that entities develop and implement a more comprehensive training / awareness plan so that everyone in the organization, regardless of their exposure to risk, is progressively trained to the prevention and detection of corruption. The content of trainings shall be adapted to nature of the risk, the employee's position and geographical location.

Continued on page 46

Continued from page 45

It shall be updated in parallel with the risk mapping exercise. E-learning trainings are acceptable, but in-person trainings are preferred for management and employees exposed to higher risks. Management must make sure that their teams attend all trainings.

- **Internal controls and evaluations.** According to Article 17-II-8° of the Sapin II Law, entities must set up internal controls to evaluate and monitor the effectiveness of their compliance program. According to the AFA, the internal control and evaluation process is intended to assess the efficiency of prevention and detection measures, to identify and investigate breaches, to define improvements and, if need be, to detect corrupt activities. It recommends three levels of control. First level controls are intended to ensure that entities' operations are carried out in accordance with the procedures laid down by the organization. Second level controls are intended to ensure the proper performance of first level controls and the proper functioning of the prevention and detection measures as a whole. Third level controls are internal audits aimed at ensuring that the mechanism for preventing and detecting corruption is compliant with the requirements of the organization, effectively implemented, and kept up to date.

Although the AFA has no criminal investigative or enforcement power, it can investigate and review the implementation of compliance programs within companies and impose significant regulatory fines for violations. In October 2017, the AFA announced that its first six controls had been launched with regard to large corporations.[166] In case of breach, the AFA may issue a warning to the company's representatives. It may also refer the case to the AFA's Sanction Committee which may (i) order the company to adapt its internal compliance program within a time limit not exceeding three years; (ii) impose a financial penalty, the amount of which may not exceed €200,000 for natural persons and €1 million for legal persons; and (iii) order the publication of these measures.

2. Enforcement Activity

a) First French DPA

On November 14, 2017, the President of the Paris criminal court approved the first-ever Judicial Convention of Public Interest ("CJIP") – *i.e.*, the new French-style DPA procedure included in the Sapin II Law.[167] The CJIP was the result of an agreement

Continued on page 47

166. "L'Agence française anticorruption mise sur la prévention", Le Point, Nov. 7, 2017, www.lepoint.fr/politique/l-agence-francaise-anticorruption-mise-sur-la-prevention-07-11-2017-2170581_20.php.

167. https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_HSBC.pdf

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 46

between the National Financial Prosecutor's office and HSBC Private Bank Swiss ("HSBC"), whereby HSBC agreed to pay €300 million to settle criminal charges relating to laundering the proceeds of tax fraud, with neither an admission of guilt nor a conviction.[168]

In November 2014, HSBC and its parent company, HSBC Holdings PLC, were formally put under criminal investigation for offenses including aggravated laundering of the proceeds of tax fraud. This investigation was begun because, in 2009, a former employee had leaked documents revealing HSBC's role in offering wealthy and well-connected French individuals ways to hide their assets from the French tax authority. This also led to a highly publicized investigation of several individuals.

In the CJIP, HSBC agreed to pay a €158 million fine, which was the maximum provided for by the law (*i.e.*, 30% of the bank's average annual turnover over the previous three years). This fine is comprised of (i) €86.4 million relating to illegal profits made by the HSBC, and (ii) €71.6 million "additional penalties" due to the exceptional nature of the facts, their recurrent nature over several years, and the fact that HSBC did not cooperate fully with French authorities during the investigation. HSBC also agreed to pay €142 million to the French tax authority as compensation for the laundering of the proceeds of tax fraud.

Because the CJIP was agreed upon at a relatively late stage of the proceedings, there was a statutory requirement that HSBC admit certain facts that had given rise to prosecution – which did not amount to an admission of guilt.

The CJIP only resolved the potential criminal liability of HSBC. The National Financial Prosecutor sent two former HSBC directors to trial (the new DPA procedure is only available to corporations, not individuals) and dismissed the charges against HSBC Holdings PLC.

This first CJIP demonstrates that French authorities are in fact serious about using the new procedure introduced by the Sapin II Law, but leaves some important questions outstanding. In particular:

- Does the size of the negotiated outcome suggest a sufficient "discount" to appeal to future targets of investigations? Even assuming it does, will companies be ready to negotiate with the French prosecutor when doing so means giving up

Continued on page 48

168. *See* Antoine Kirry, Frederick T. Davis, and Alexandre Bisch, "France Announces its First DPA with HSBC Private Bank Swiss", FCPA Update, Vol. 9, No. 5 (Dec. 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/12/fcpa_update_dec_2017.pdf; Antoine Kirry, Frederick T. Davis, and Alexandre Bisch, "France Announces First-Ever Deferred Prosecution Agreement" (Dec. 11, 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/12/20171211%20france_announces_firstever_deferred_prosecution_agreement.pdf.

Continued from page 47

a potential defense of lack of corporate criminal responsibility,[169] and without assurances that U.S. authorities will not pursue a "me too" investigation seeking further penalties?[170]

- The CJIP includes a statement that HSBC did not fully cooperate because it did not self-report the facts to the French authorities. This raises the question of whether companies should consider self-reporting to French authority in order to work out a better deal. The incentive of doing so remains however unclear in the absence of regulation or official guidelines encouraging it, unlike in the U.S. and the U.K.[171]
- As HSBC directors have been sent to trial, the decision also raises the question on how a company's admission of facts in a CJIP may impact investigations targeting individuals for the same matter.

b) International Double Jeopardy

As we have noted in a prior update, France has developed some interesting – and still unsettled – jurisprudence regarding what may be considered "international double jeopardy," that is, the determination of whether a criminal outcome in one country should have preclusive effect in another.[172] This jurisprudence continued to evolve in 2017.

In 2015, a French criminal trial court ruled that the negotiation of DPAs or Non-Prosecution Agreements with the U.S. Department of Justice to resolve U.S. FCPA claims barred prosecution in France under Article 14(7) of the International Covenant on Civil and Political Rights ("ICCPR").[173] Subsequently, in a related but different case decided in 2016, the Paris criminal court of appeal refused to bar a French corruption prosecution of a company that had previously pleaded guilty in New York to state charges of grand larceny, noting that because the "offense" of grand larceny was not the same as overseas bribery, it did not qualify for protection under the ICCPR.[174] Taken together, these decisions would seem to

Continued on page 49

169. *See* Frederick T. Davis, "Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws," https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/#more-6926.

170. *See* Frederick T. Davis, "The US Needs To Show More Respect For Foreign Prosecution", The Global Anticorruption Blog (Nov. 3, 2016), https://globalanticorruptionblog.com/2016/11/03/guest-post-the-us-needs-to-show-more-respect-for-foreign-prosecutions/.

171. *See* Kara Brockmeyer, Matthew E. Fishbein, Andrew J. Ceresney, and Sean Hecker, "DOJ Announces a Revised FCPA Corporate Enforcement Policy" (Nov. 30, 2017), https://www.debevoise.com/~/media/files/insights/publications/2017/11/20171130%20doj_announces_revised_fcpa_policy.pdf.

172. *See* Antoine Kirry and Frederick T. Davis, "A Recent Decision in France Applies "International Double Jeopardy" Principles to DPAs," FCPA Update, Vol. 7, No. 2 (Sept. 2015).

173. *Id.*

174. For more details on these decisions, *see* Frederick T. Davis, "International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe," 31 Am. Int'l L. Rev. 57 (2016).

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 48

provide that a U.S. negotiated outcome precludes prosecution in France if both the underlying acts and the qualification of the "offense" are the same. Both decisions are subject to further review (by the court of appeals and the French Supreme Court, respectively) that may shed light on the underlying principles, but no decisions were announced in 2017.

In 2017, a decision from the Paris criminal court of appeal dated September 21, 2016 became public for the first time, and sheds some further light on the underlying problem of multi-jurisdictional investigations and the deference countries must or should give to outcomes elsewhere.

"France has developed some interesting – and still unsettled – jurisprudence regarding what may be considered 'international double jeopardy,' that is, the determination of whether a criminal outcome in one country should have preclusive effect in another. This jurisprudence continued to evolve in 2017."

The case involved a British subject who was prosecuted and pleaded guilty to FCPA charges in federal court in Texas. He was subsequently prosecuted in France for what appears to be the same acts and legal theory. On motion by the defense, the trial court dismissed the French charges and the Paris criminal court of appeal upheld the decision. The court of appeal's reasoning was, first, that the defendant's guilty plea in Texas was not freely negotiated because he had been "faced with American judicial authorities armed with such powers and capable of proceeding against him to obtain particularly lengthy sentences (several decades) if he refused to plead guilty."[175] The court of appeal then went on to conclude that because U.S. criminal procedures were viewed as barring a defendant who had entered a guilty plea from contradicting his plea elsewhere, the U.S. plea had "depriv[ed] him of his ability to insist on his innocence without abandoning his right against self-incrimination or his right of self-defense."[176] The prosecutor has sought review of this decision in the French Supreme Court.

Taken together, these decisions may suggest an asymmetrical imbalance between criminal procedures in the U.S. and France (and possibly other countries that follow its interpretation of the ICCPR): because authorities in the U.S. do not regard the

Continued on page 50

175. For more details on this decision, *see* Frederick T. Davis, "Paris Court Rules that a US FCPA Guilty Plea Precludes Subsequent Prosecution in France," https://globalanticorruptionblog.com/2017/07/05/guest-post-paris-court-rules-that-a-us-fcpa-guilty-plea-precludes-subsequent-prosecution-in-france/#more-9529 (Jul. 2017).

176. *Id.*

Continued from page 49

ICCPR as creating individual rights, and give no legal preclusive weight to criminal outcomes in other countries, individuals and companies subject to prosecution in both countries may have an incentive to negotiate with U.S. authorities and thereby hope to gain protection against prosecution in countries that follow the French interpretation of the ICCPR.[177]

Appellate review in 2018 of the decisions noted here may clarify this currently unsettled situation.

c) The Obiang Case

In June 2017, the trial of Teodoro (known as Teodorin) Obiang was held before the Paris criminal court, on charges including corruption and money laundering.[178] Teodorin Obiang is the son of Teodoro Obiang Nguema Mbasogo, the President of Equatorial Guinea, and is Vice President of the country.

The case had been referred to a French court as a result of the efforts of several NGOs, including the French anti-corruption group Sherpa and the French chapter of Transparency International. The NGOs, joined by some affected citizens, used a French procedure known as *constitution de partie civile* in order to obtain that an investigating judge (*juge d'instruction*) start a criminal investigation. The senior investigating judge of the Paris court declared that "if the fight against corruption is also part of the general interests of the society, the reparation of which must be ensured by the Public Prosecutor's Office, this cannot deprive an association created specifically for the fight against corruption the right to bring an action if this association justifies, as in the present case, personal injury falling directly within its statutory object."[179] After a lengthy procedural struggle, Teodorin Obiang was finally bound over for trial.[180]

Although the full decision has not been published yet, it was announced on October 27, 2017 that Teodorin Obiang was sentenced to a three-year conditional sentence and a conditional €30 million fine for money laundering, misappropriation of funds, breach of trust and corruption. The Paris court also ordered the

Continued on page 51

177. For a discussion of this possibility, see Frederick T. Davis, "Where We Are Today in the International Fight Against Overseas Corruption: An Historical Perspective and Two Problems Going Forward," 32 ILSA J. of Int'l and Comp. L 1 (2017).

178. *See* Transparency International, On Trial for Corruption: Teodoro Obiang, Son of the President of Equatorial Guinea, https://www.transparency.org/news/feature/on_trial_for_corruption_teodoro_obiang_son_of_the_president_of_equatorial_g.

179. *See* Chantal Cutajar, *"L'affaire des "biens mal acquis" ou le droit pour la société civile de contribuer judiciairement à la lutte contre la corruption"*, La Semaine Juridique Edition Générale No. 22, May 27, 2009, act. 277, https://asso-sherpa.org/sherpa-content/docs/programmes/FFID/BMA/Doctrine/Affaire_des_biens_mal_acquis_ou_le_dro.rtf.

180. *See* Frederick T. Davis, "The Obiang Trial Suggests Innovative Approaches to Fighting International Corruption", FCPA Update Vol. 9, No. 1 (Aug. 2017).

Continued from page 50

confiscation of all seized assets, including his Parisian mansion.[181] The French public prosecutor had sought three years in prison and €30 million in fines as well as and the confiscation of his seized Paris assets.

This case was a singular one firstly for the importance of the offences and the international character of the money laundering, and secondly because it demonstrated the willingness of French courts to take an important step toward a more participatory form of international criminal justice, one that would include the involvement of victims and civil society.

It was reported that the Paris criminal court noted that the sentence did not take into account the interests of the victims since confiscated assets, as they cannot be restituted to them in Equatorial Guinea, are attributed to the French State. This is why the court reportedly called for possible revision of the French confiscation regime, so that it would be better suited to the restitution of illicit assets.[182]

D. Russia

In 2017, Russian law enforcement authorities generally kept up their recent trend of investigating bribery. For the period from January through November 2017,[183] the number of corruption crimes slightly decreased by 0.6% compared to the same period of 2016, while the number of criminal cases involving bribery of state officials increased by 4.6% in comparison with the corresponding eleven months of 2016. In addition, there was a significant decrease (32.2%) in the number of commercial bribery cases. The statistics of completed cases worsened a bit: the number of successfully completed corruption cases decreased by 3.5% and completed bribery cases by 5.4%. The majority of cases involved bribe-taking rather than bribe-giving, thereby continuing the trend of 2016.

2017 was notable for the commencement of several publicized cases against high-ranking state officials, as well as for the completion of some of 2016's high-profile court proceedings. The most prominent examples include:

- In March 2017, criminal proceedings were initiated against the ex-Governor of the Chelyabinsk Region. According to the case files, he regularly received bribes from the Minister of Health of the region for general protection. Later, another episode was discovered: according to investigators, the former official received bribes from local entrepreneurs amounting to at least RUB

Continued on page 52

181. *See* "Obiang Verdict: Transparency International welcomes the corruption conviction and seizure of assets", https://www.transparency.org/news/pressrelease/obiang_verdict_transparency_international_welcomes_the_corruption_convictio.

182. *See* Dorothée Goetz, "Teodoro Obiang condamné, une première dans l'affaire des 'bien mal acquis'", Dalloz actualité, Oct. 31, 2017.

183. This is the most recent period for which statistics are available . *See* Russian Ministry of Internal Affairs, "Status of Criminality in Russia for January-November 2017", https://media.mvd.ru/files/application/1207078.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 51

3.4 billion (approximately $60 million) for patronage on his part. He was put under custody by the court *in absentia*.[184]

- In April 2017, the ex-Governor of the Mari El Republic was arrested on suspicion of receiving a bribe of RUB 235 million (approximately $4.2 million) from a poultry factory owner for patronage and assistance with state support for the development of an agricultural complex.[185]
- In April 2017, the Governor of the Udmurt Republic was arrested for allegedly receiving large-scale bribes in the total amount of RUB 139 million (approximately $2.5 million) from companies involved in construction of bridges in the Udmurt Republic and a share in a company worth RUB 2.7 million (approximately $48,000). In August 2017, he was put under home detention.[186]

"However, the end of 2017 was marked by a legislative development [in Russia] that could threaten effective international anti-corruption cooperation and enforcement. On December 31, 2017, a new anti-sanctions law became effective allowing the Russian Government to determine cases when disclosure of information regarding the activity of certain legal entities and individuals may be restricted or precluded."

- In September 2017, the head of the technical support division of the food supply management department of the Ministry of Defense of Russia was arrested for allegedly receiving RUB 368 million (approximately $6.4 million) in bribes in exchange for support of contracts on the delivery of kitchens, bakeries, cisterns and other special equipment to the Ministry. This is a record amount for a bribe taken by an official of the Ministry of Defense of Russia.[187]
- In September 2017, the head of the Cadastral Chamber of the Leningrad Region and his deputy were detained over a criminal case of bribe-taking in the form of land plots and apartments amounting to RUB 56 million (approximately $968,000). In exchange for the bribes, the officials helped entrepreneurs to register land plots with the cadastral chamber.[188]

Continued on page 53

184. *See* "Eks-gubernator Chelyabinskoi oblasti podozrevaetsya v poluchenii vzyatki v 3.4 mlrd rublei," *TASS* (May 29, 2017), http://tass.ru/proisshestviya/4292014.

185. *See* "Byvshego glavu Marii-El zaderzhali po agrarnomu voprosu," *Kommersant* (Apr. 13, 2017), https://www.kommersant.ru/doc/3269624.

186. *See* "Head of Russia's Udmurt Republic arrested in corruption case," *RAPSI* (Apr. 4, 2017), http://www.rapsinews.com/news/20170404/278158910.html; "Glavu Udmurtii zapodozrili v poluchenii vzyatki v $2.5 mln," *BBC Russia* (Apr. 4, 2017), http://www.bbc.com/russian/news-39487892.

187. *See* "Polkovnik proyavil tylovuy khvatku," *Kommersant* (Sep. 26, 2017), https://www.kommersant.ru/doc/3421487.

188. *See* "Chinovniki ustanovili tsenu statusu zemelnykh uchastkov." *Kommersant* (Sep. 18, 2017), https://www.kommersant.ru/doc/3414877.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 52

- In December 2017, the former Minister of Economic Development of Russia was sentenced to 8 years of imprisonment, following a year of investigation and trial for the charges of extorting and accepting a $2 million bribe in exchange for green-lighting the participation of a Russian state-controlled oil company in a bid for another oil company. In addition, he was fined RUB 130 million (approximately $2.2 million) and deprived of the right to hold public office.[189]
- In December 2017, the mayor of Tuapse was arrested for allegedly extorting and receiving a bribe in the amount of RUB 2 million (approximately $35,100) in the guise of a birthday present. According to the investigation authorities, this amount was part of RUB 7 million (approximately $123,800) payment the official wanted in return for allowing demolition of one of the city buildings.[190]

Continuing the efforts to increase the effectiveness of anti-corruption legislation, in December 2017, the Russian State Duma adopted in the first reading a bill that would provide state protection to certain persons who inform their employers or state authorities of corruption-related matters.[191]

However, the end of 2017 was marked by a legislative development that could threaten effective international anti-corruption cooperation and enforcement. On December 31, 2017, a new anti-sanctions law became effective allowing the Russian Government to determine cases when disclosure of information regarding the activity of certain legal entities and individuals may be restricted or precluded. This provision refers to Russian companies in terms of disclosure of consolidated financial statements and information on major and interested party transactions, as well as disclosure of certain information about companies on the internet. The law also concerns issuers of securities, state customers, and the like. This development has the potential to limit the sources of information that may be used in investigations of corrupt conduct committed in Russia by foreign state authorities (if it falls within the scope of their responsibility) and by internal investigators.

Continued on page 54

189. *See* "Russian ex-minister Ulyukayev gets 8 years in prison for extorting $2 mln bribe," *RAPSI* (Dec. 15, 2017), http://www.rapsinews.com/judicial_news/20171215/281335814.html (for more details about the case, see FCPA Update, Vol. 8, No. 6 (Jan. 2017)).

190. *See* "Mera Tuapse zaderzhali pri poluchenii vzyatki," *Kommersant* (Dec. 8, 2017), https://www.kommersant.ru/doc/3492640; "Mera Tuapse zaderzhali s "podarkom ko dnyu rozhdeniya"," *Lenta.ru* (Dec. 8, 2017), https://lenta.ru/news/2017/12/08/podarok/.

191. For more information on the proposed bill and the contemplated state protection measures, *see* FCPA Update, Vol. 9, No. 3 (Oct. 2017).

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 53

E. China

China's anti-corruption drive continued apace in 2017. In total, 58 provincial or more senior government officials and cadres were punished for corruption-related violations, while the total number of people receiving disciplinary sanctions reached 527,000, according to the Central Commission on Discipline and Inspection ("CDI"), the responsible body for anti-corruption in the Communist Party.[192] In addition, the person responsible for leading the anti-corruption campaign over the past five years, Wang Qishan, reached mandatory retirement age and retired from the CDI.[193] He was replaced by Zhao Leji, formerly the Party's personnel chief, in October 2017.[194] The impact of this personnel change on the anti-corruption campaign of the PRC is unclear.

China also solicited public opinions on the Supervision Law (Draft) of the PRC (the "SLD"),[195] which is expected to be enacted into law in March 2018.[196] The SLD will create a new supervisory committee at each administrative level, which will exercise oversight of public officials.[197] Public officials are broadly defined under the SLD, and include government officials, managers of state-owned enterprises, and personnel engaged in management in public entities.[198] Practically speaking, this means that the anti-corruption campaign, which up to now has focused on members of the Communist Party, will be expanded to include all civil servants and state-owned enterprises. One of the major functions of the supervisory committee is to conduct anti-corruption work, including supervision, investigation, and disposition.[199] The SLD also creates a system for detention of suspects during investigations.[200] When a violation of law is found, the supervisory committee

Continued on page 55

192. *Notification by the Central Commission for Discipline Inspection on 2017 National Discipline Review,* The Central Commission for Discipline Inspection & The Administration of Supervision of the People's Republic of China (Jan. 11, 2018), http://www.ccdi.gov.cn/toutiao/201801/t20180110_161529.html.

193. Wang Xiang Wei, "Despite retirement, Xi's right hand man Wang Qishan is still within arm's reach," South China Morning Post, December 2, 2017, http://www.scmp.com/week-asia/opinion/article/2122250/despite-retirement-xis-right-hand-man-wang-qishan-still-within.

194. Chow Chung Yan, "China's new leadership team unveiled: Zhao Leji named as anti-graft chief while Xi Jinping elevates trusted deputy to top military role," South China Morning Post, October 25, 2017, http://www.scmp.com/news/china/policies-politics/article/2116838/what-xi-jinpings-choices-his-new-leadership-team-show.

195. Request for Comments on the Supervision Law (Draft) of the People's Republic of China, released on Nov.7, 2017, unofficial translation available at PKU law, http://en.pkulaw.cn/display.aspx?id=9b322d6cadb1245318c1fe0a279380dabdfb&lib=law&SearchKeyword=&SearchCKeyword=%bc%e0%b2%ec%b7%a8.

196. "China to set up national supervision commission next year," China Daily, October 30, 2017, http://www.chinadaily.com.cn/china/2017-10/30/content_33885232.htm.

197. SLD Art. 5.

198. *Id.* Art. 12.

199. *Id.* Art. 15.

200. *Id.* Art. 24; "China Focus: Draft supervision law clarifies norms for new detention system," Xinhuanet, December 22, 2017, http://www.xinhuanet.com/english/2017-12/22/c_136845777.htm.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 54

can dispose of the case by imposing disciplinary punishments (for example demotions, suspensions, or termination of employment or Party membership), providing suggestions for future supervision, or transferring investigation results to procuratorial authorities to initiate a prosecution.[201]

In addition to the SLD, on November 4, 2017, China adopted significant amendments to the Anti-Unfair Competition Law, effective January 1, 2018 (the "2018 AUCL").[202] The Anti-Unfair Competition Law governs (among other things) the administrative prohibition against commercial bribery in China. As most cases of bribery of employees of state-owned enterprises are treated as commercial bribery in China, multinational companies should treat investigations or fines under the AUCL as red flags for FCPA purposes.[203] The 2018 AUCL makes four major changes to the previous version of the AUCL (the "1993 AUCL").[204]

(i) The 2018 AUCL formally expands the scope of commercial bribery governed by the law. Under the text of 1993 AUCL, only commercial bribery for the purpose of selling or purchasing commodities was prohibited,[205] although in practice the prohibition applied to a broader set of commercial transactions.[206] Under the 2018 AUCL, the definition was expanded to include "commercial bribery for the purpose of seeking for transaction opportunities or competitive advantages."[207]

Continued on page 56

201. *Id.* Art. 18.

202. Anti-Unfair Competition Law of the People's Republic of China (effective Jan. 1, 2018), unofficial translation available at Westlaw China, http://app.westlawchina.com/maf/china/app/document?&docguid=i000000000000015f8f53025031a9a48c&hitguid=i000000000000015f8f53025031a9a48c&srguid=i0ad6a473000001610dbd27cfaa74826a&spos=1&epos=1&td=53&crumb-action=append&context=37&lang=en.

203. *See, e.g., Securities and Exchange Comm'n v. Diebold, Inc.,* Complaint ¶ 28 (D.D.C. Oct. 22. 2013) (company executives "on notice" of potential FCPA violation due to investigation under AUCL), https://www.sec.gov/news/press-release/2013-225.

204. Law of People's Republic of China Against Unfair Competition (effective Dec. 1, 1993), unofficial translation available at Westlaw China, http://app.westlawchina.com/maf/china/app/document?&docguid=i0adf589b0000011e6d83e8fed238abf3&hitguid=i0adf589b0000011e6d83e8fed238abf3&srguid=i0ad62833000001610dbb5140c2242227&spos=1&epos=1&td=2&crumb-action=append&context=27&lang=en.

205. Art. 8, the 1993 AUCL.

206. *See* Notice of the Supreme People's Court on Bringing into Full Play the Functional Role of Adjudication and Properly Handling the Special Work for Combating Commercial Bribery (effective Apr. 5, 2006) ("The courts shall punish in accordance with the law the criminal behaviors of commercial bribery ... in the fields such as project construction, land grant, property right transactions, pharmaceutical purchase and sale, government procurement as well as resources development and sale, as well as the criminal behaviors of seeking illegal interests and of demanding and accepting briberies committed by State functionaries by making use of their powers to participate in the business activities of enterprises and public institutions"), unofficial translation available at Westlaw China, http://app.westlawchina.com/maf/china/app/document?&docguid=i3cf76ad30000013046664e6d9b521806&hitguid=i3cf76ad30000013046664e6d9b521806&srguid=i0ad82b44000001611bca4bea91773e86&spos=1&epos=1&td=1&crumb-action=append&context=107&lang=en.

207. Art. 7, the 2018 AUCL.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 55

(ii) The 2018 AUCL defines objects of commercial bribery that will be governed by it: (1) staff members of transaction counterparties; (2) entities or individuals entrusted by transaction counterparties with relevant affairs; and (3) other entities or individuals who take advantage of their authority or influence to impact transactions.[208] The 1993 AUCL identifies only the transaction counterparty as the object of commercial bribery.[209]

(iii) The 2018 AUCL adds a provision in Article7, which provides that commercial bribery committed by a staff member of a business operator is presumptively committed by the business operator itself.[210] It is notable that the opinion from legislators released in January 2018 states, in regard to Article 7, that a business operator's possession of anti-corruption internal controls or training in this area should *not* serve as a defense to the operator's liability for commercial bribery conducted by its employee.[211] This rejection of a "compliance defense" puts a premium on successful (rather than paper) anti-corruption internal controls.

"China's anti-corruption drive continued apace in 2017. In total, 58 provincial or more senior government officials and cadres were punished for corruption-related violations . . . ."

(iv) The 2018 AUCL increases the amount of the fine that will be imposed on a business operator that violates the law, and also adds two administrative punishments. Under the 2018 AUCL, a business operator found to be in violation will be fined not less than RMB 100,000 (approximately $15,625), but not more than RMB 3,000,000 (approximately 468,750),[212] while under the 1993 AUCL, the range of fines is between RMB 10,000 (approximately $1,562.50) and RMB 200,000 (approximately $31,250).[213] Additionally, the 2018 AUCL provides for the possibility of the revocation of business

Continued on page 57

208. *Id.*

209. Art. 8, The 1993 AUCL.

210. Art. 7, The 2018 AUCL.

211. *See* Wang Ruihe, et al., 中华人民共和国反不正当竞争法释义, "Explanation on the Anti-Unfair Competition Law of the People's Republic of China," at 19-20. 法律出版社, Law Press·China (2018).

212. Art. 19, the 2018 AUCL.

213. Art. 22, The 1993 AUCL.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 56

licenses in "serious" cases.[214] In order to "name-and-shame" violators, any administrative punishments received by a business operator under the 2018 AUCL will be recorded in the business operator's credit records and made public.[215]

F. Latin America

2017 was another eventful year for anti-corruption in Latin America. Brazilian enforcement has continued at a feverish pace, while the relevant legal landscape has continued to evolve. Meanwhile, new anti-corruption laws and regulations in Argentina, Mexico, and Peru offer the possibility of greater Latin American anti-corruption enforcement, beyond Brazil. Of course, only time will tell how vigorously the authorities enforce these new laws.

1. Argentina

On November 8, 2017, the Argentine Congress passed the Law on Criminal Liability of Legal Entities (the "Argentine Law"), which imposes criminal liability on corporations for corruption-related offenses.[216] President Mauricio Macri, together with Chief of Cabinet Marcos Peña and Minister of Justice Germán Garavano, signed the bill through Decree 986/2017, published on December 1, 2017.[217] The Argentine Law takes effective on March 2, 2018.[218]

Most significantly, the new law establishes corporate criminal liability for corruption and related offenses in Argentina, following an "anti-corruption package" sent to Congress in December 2015 including a related proposal.[219] The scope of punishable conduct for now includes transnational bribery committed by legal entities, not just individuals.[220] More broadly, criminal liability for corporate entities now encompasses: (1) bribery; (2) national and transnational influence-trafficking; (3) negotiations incompatible with the exercise of public duties; (4) illegal levies; (5) unlawful enrichment of public officers and employees; and (6) false accounting and reporting.[221]

Continued on page 58

214. Art. 19, The 2018 AUCL.

215. *Id.* Art. 26.

216. *See* Ministerio de Justicia y Derechos Humanos Presidencia de la Nación, Diputados convirtió en ley el proyecto de responsabilidad penal empresaria [The House of Representatives Turned Bill on Corporate Criminal Liability into Law] (Nov. 8, 2017), https://www.justicia2020.gob.ar/diputados-convirtio-ley-proyecto-responsabilidad-penal-empresaria.

217. *See* Decree 986/2017, Infoleg (Dec. 1, 2017), http://servicios.infoleg.gob.ar/infolegInternet/anexos/295000-299999/296847/norma.htm.

218. *See* Ley de Régimen de Responsabilidad Penal aplicable a las Personas Jurídicas Privadas [Law on Legal Entities' Criminal Liability], Infoleg (Dec. 1, 2017), http://servicios.infoleg.gob.ar/infolegInternet/anexos/295000-299999/296846/norma.htm.

219. *See* Andrew M. Levine, et al., "Argentine Government Considers New Anti-Corruption Legislation," FCPA Update, Vol. 8, No. 3 (Oct. 2016), https://www.debevoise.com/insights/publications/2016/10/fcpa-update-october-2016.

220. *See* Diputados convirtió en ley el proyecto de responsabilidad penal empresaria, supra note 1.

221. *Id.*

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 57

A company implicated under the Argentine Law can settle with prosecutors by entering into a so-called Effective Collaboration Agreement ("Acuerdo de Colaboración Eficaz").[222] Under such an agreement:

- A company commits to cooperate and provide verifiable, useful, and accurate information sufficient to allow authorities to understand the facts, identify the wrongdoers and accomplices, and recover the profits from an offense.[223]
- As a pre-requisite, a company must pay a fine, disgorge ill-gotten profits, and transfer to the state all assets that would be seized if the company were convicted.[224]
- Additional pre-conditions may include repairing the damage caused by the company's misconduct, providing community service, disciplining executives and employees involved in the misconduct, and implementing or improving its compliance program.[225]

To become effective, a judge must approve such a collaboration agreement.[226]

Looking ahead to what 2018 may bring, it will be imperative to monitor developments under the Argentine Law, especially any early indications that local authorities intend to enforce aggressively the new law, similar to recent efforts in Brazil. The Argentine Law also provides yet another reason for companies operating in Argentina to adopt and maintain effective anti-corruption compliance programs, to the extent not already in place. Among other reasons, the Argentine Law excludes companies lacking such compliance programs from bidding for public contracts.[227]

Continued on page 59

222. *See* Lucha contra la corrupción: una ley indispensable [The Fight Against Corruption: An Essential Law], La Nación (Sept. 21, 2016), http://www.lanacion.com.ar/1939777-lucha-contra-la-corrupcion-una-ley-indispensable; Mariano Casal, Empresas: delitos de corrupción prescribirán a los seis años [Corporations: Corruption Crimes' Statute of Limitation Will Run After Six Years], Ámbito (Sept. 21, 2017), http://www.ambito.com/897883-empresas-delitos-de-corrupcion-prescribiran-a-los-seis-anos.

223. *See* Gimena Fuertes, Responsabilidad Penal Empresaria, media sanción sin artículo 37 [Corporate Criminal Liability, Half Approval Without Article 37], Tiempoar (July 5, 2017), https://www.tiempoar.com.ar/articulo/view/68782/responsabilidad-penal-empresaria-media-sancia-n-sin-arta-culo-37.

224. *See* Senado debate el proyecto de Responsabilidad Penal Empresaria [The Senate Debates the Bill on Corporate Criminal Liability], El Cronista (Sept. 27, 2017), https://www.cronista.com/economiapolitica/VIVO-Senado-debate-el-proyecto-de-Responsabilidad-Penal-Empresaria-20170927-0103.html.

225. *See* Law on Legal Entities' Criminal Liability, supra note 3, at art. 18.

226. *See id.* at art. 19.

227. *See* Corrupción: ya es ley la responsabilidad penal de la empresa [Corruption: Corporate Criminal Liability Is Already Law], La Nación (Nov. 12, 2017), http://www.lanacion.com.ar/2081433-corrupcion-ya-es-ley-la-responsabilidad-penal-de-la-empresa.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 58

2. Brazil

Now in its fourth year, Operation *Lava Jato* (Operation Car Wash) – which began as a corruption investigation involving Petrobras – is now one of the largest anti-corruption investigations ever and continues unfolding at a steady pace. As of December 2017, according to Brazil's Federal Prosecutor's Office (known as "MPF"), *Lava Jato's* task force in Curitiba had conducted over 881 police raids, arrested more than 215 individuals, and filed criminal charges against 289 individuals, with 113 individuals convicted totaling more than 1,750 years' imprisonment.[228] The task force also has submitted or received at least 340 requests for international cooperation from over 40 countries, and 10 companies and 163 individuals have entered into resolutions with the task force.[229]

"2017 was another eventful year for anti-corruption in Latin America. Brazilian enforcement has continued at a feverish pace, while the relevant legal landscape has continued to evolve. Meanwhile, new anti-corruption laws and regulations in Argentina, Mexico, and Peru offer the possibility of greater Latin American anti-corruption enforcement, beyond Brazil."

Among those convicted and sentenced last year was Luis Inacio Lula da Silva ("Lula"), Brazil's former President, who was found guilty of accepting bribes in the form of improvements to a beach house by a construction company that contracted with Petrobras.[230] Lula, who is facing additional charges in other proceedings, was sentenced to 9.5 years in prison in July 2017 by Judge Sergio Moro, who has presided over various matters related to *Lava Jato*. Just recently, on January 24, 2017, an appellate court upheld Lula's conviction, barring him from running in Brazil's upcoming presidential elections due to the country's "clean record law," which prohibits politicians with convictions upheld on appeal from running for office.[231]

Continued on page 60

228. *See* A Lava Jato em números no Paraná [Operation Car Wash in Paraná in numbers] (Dec. 22, 2017), http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato/atuacao-na-1a-instancia/parana/resultado.

229. *Id.*

230. *See* Nathan Lopes, Lula é condenado por Moro em primeiro processo na Lava Jato [Lula is convicted by Moro in first case in Lava Jato], UOL (Jul. 12, 2017), http://noticias.uol.com.br/politica/ultimas-noticias/2017/07/12/lula-e-condenado-por-moro-em-primeiro-processo-na-lava-jato.htm.

231. *See* Anna Jean Kaiser and Anthony Faiola, Brazilian court upholds corruption conviction of former president Lula, potentially ending his political career, The Washington Post (Jan. 24, 2018), https://www.washingtonpost.com/world/brazil-on-edge-as-appeals-decision-nears-in-ex-president-lula-corruption-case/2018/01/24/e34ecccc-ff9b-11e7-86b9-8908743c79dd_story.html?utm_term=.fd2cb678a8e7.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 59

Brazilian authorities also have made significant progress in Operation *Zelotes*, which concerns an alleged multi-billion dollar scheme to bribe or otherwise influence members of Brazil's tax appellate council, CARF, in exchange for reducing or dismissing tax claims.[232] During 2017, various businessmen and politicians – including Lula, former Minister of Finance Guido Mantega, and sitting Senator Romero Juca – were indicted or otherwise charged for corruption and related offenses in connection with Operation *Zelotes*.[233]

2017 also witnessed dramatic events relating to JBS S.A., the world's largest meat-processing company. In mid-2017, J&F, JBS's holding company, entered into a R$10.3 billion resolution with MPF in connection with Operations *Greenfield, Sépsis, Cui Bono, Bullish,* and *Weak Flesh,* corruption investigations in industries and sectors such as pension funds, meat-packaging, and bank loans from BNDES.[234] In parallel, certain executives, including controlling shareholders Joesley and Wesley Batista, entered into cooperation agreements.[235]

Shortly thereafter, MPF charged sitting President Michel Temer and other high profile politicians based on evidence provided by JBS cooperators, including a recording of an allegedly compromising conversation with Temer, giving rise to extreme political turmoil.[236] A few months later, in a remarkable turn of events, MPF obtained an audio recording of an earlier conversation between cooperators Joesley Batista and Ricardo Saud, JBS's former director of institutional relations, which suggested that they had omitted relevant facts from their earlier testimony.[237] MPF also discovered that the two cooperators had omitted that a former prosecutor,

Continued on page 61

232. *See* Brazil charges 14 in local Mitsubishi carmaker tax avoidance case, Reuters (Feb. 9, 2017), https://www.reuters.com/article/brazil-corruption-mitsubishi/brazil-charges-14-in-local-mitsubishi-carmaker-tax-avoidance-case-idUSL1N1FU2B4.

233. *See* Luisa Martins, MPF denuncia Lula por corrupcao no ámbito da Operacao Zelotes [MPF charges Lula with corruption in Operation Zelotes], Valor Económico (Sept. 11, 2017), http://www.valor.com.br/politica/5114596/mpf-denuncia-lula-por-corrupcao-no-ambito-da-operacao-zelotes, http://politica.estadao.com.br/blogs/fausto-macedo/zelotes-denuncia-mantega-e-outros-13/, https://g1.globo.com/politica/noticia/operacao-zelotes-mpf-denuncia-ex-ministro-guido-mantega-por-corrupcao-e-lavagem-de-dinheiro.ghtml, https://g1.globo.com/distrito-federal/noticia/mpf-denuncia-executivos-da-gerdau-na-zelotes-por-corrupcao-e-lavagem-de-dinheiro.ghtml, https://g1.globo.com/politica/noticia/juiz-aceita-denuncia-na-zelotes-e-torna-reus-ex-diretor-do-bank-boston-e-outros-10.ghtml.

234. *See* Ricardo Brio and Tatiana Bautzer, Brazil's J&F agrees to pay record $3.2 billion fine in leniency deal, Reuters (May 31, 2017), https://www.reuters.com/article/us-brazil-corruption-jbs/brazils-jf-agrees-to-pay-record-3-2-billion-fine-in-leniency-deal-idUSKBN18R1HE.

235. *See* Assessoria de Comunicacao Estrategica do PGR, PGR rescinde acordo de colaboração de Joesley Batista e Ricardo Saud [PGR rescinds collaboration agreement with Joesley Batista e Ricardo Saud], MPF (Sept. 14, 2017), http://www.mpf.mp.br/pgr/noticias-pgr/pgr-rescinde-acordo-de-colaboracao-de-joesley-batista-e-ricardo-saud.

236. *See* Shasta Darlington, President Temer of Brazil faces new corruption charges, New York Times (Sept. 14, 2017), https://www.nytimes.com/2017/09/14/world/americas/brazil-temer-corruption-janot.html.

237. *See* Assessoria de Comunicacao Estrategica do PGR, *supra* note 20.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 60

who had become JBS's counsel, advised the company while still a government official.[238] As a result, the cooperation agreements of Joesley Batista and Saud, and the criminal effects of the J&F leniency agreement, were suspended on a provisional basis.[239]

Although the lower House of Congress has shielded Temer from standing trial,[240] the Batista brothers and Saud are currently imprisoned in Brazil. Joesley Batista and Saud are detained on the ground that they could interfere with the government's investigations,[241] while Wesley Batista is imprisoned on the allegation that he and his brother used privileged information about JBS's impending leniency agreement to engage in profitable transactions in the stock and exchange markets.[242]

In another corruption scandal, the head of the Brazilian Olympic Committee, Carlos Arthur Nuzman, was arrested in October for allegedly facilitating bribes by former Rio de Janeiro Governor Sergio Cabral and businessman Arthur César de Menezes Soares Filho to secure Rio de Janeiro's bid to host the 2016 Olympic Games.[243] This is part of an investigation dubbed Operation *Unfair Play,* in which Brazilian and French authorities are working together to unearth an alleged scheme to buy and sell votes for rights to host the 2016 and 2020 Olympic Games.[244] Former Governor Cabral has been in jail since June, following a corruption conviction in connection with *Lava Jato,*[245] and he recently was convicted again of embezzling over 60 million reais from construction contracts.[246]

Continued on page 62

238. *Id.*

239. *See* Patrick Camporez, Joesley e preso por decisao de Fachin. Delacao da JBS e suspensa [Joesley is sent to jail by Fachin. JBS's leniency agreement is suspended], Epoca (Oct. 9, 2017), http://epoca.globo.com/politica/noticia/2017/09/fachin-decreta-prisao-de-joesley-batista-e-ricardo-saud.html.; Ricardo Brito, Justiça do DF suspende parte de efeitos de acordo de leniência da J&F até decisão do STF, Reuters (Sept. 11, 2017), https://br.reuters.com/article/businessNews/idBRKCN1BM2T2-OBRBS.

240. *See* Ernesto Londoño, President Temer of Brazil Dodges Corruption Prosecution, Again, New York Times (Oct. 25, 2017), https://www.nytimes.com/2017/10/25/world/americas/brazil-michel-temer-corruption.html.

241. *See* Luciana Amaral, Joesley e transferido para SP e Saud ficara preso na Papuda [Joesley is transferred to SP and Saud remains jailed in Papuda], UOL (Sept. 15, 2017), http://noticias.uol.com.br/politica/ultimas-noticias/2017/09/15/joesley-deixa-brasilia-rumo-a-sp-e-saud-vai-para-a-papuda-diz-advogado.htm.

242. *See* Walace Lara, Justica Federal aceita denuncia, e Joesley e Wesley Batista viram reus [Federal Courts accept charges and Joesley and Wesley Batista become defendants], G1 (Oct. 16, 2017), https://g1.globo.com/sao-paulo/noticia/justica-federal-aceita-denuncia-e-joesley-e-wesley-batista-viram-reus.ghtml.

243. *See* Ben Rumsby, Rio 2016 Olympic chief arrested over bribery allegations 'deposited 16 gold bars in Switzerland, The Telegraph (Oct. 5, 2017), http://www.telegraph.co.uk/olympics/2017/10/05/rio-2016-olympic-chief-arrested-amid-bribery-allegations/; Carlos Nuzman: Brazilian Olympics chief arrested in Rio, BBC (Oct. 5, 2017), http://www.bbc.com/news/world-latin-america-41510651.

244. *See* Bem Rumsby, *supra* note 28; Police raid home of Brazilian Olympic Committee president in bribery probe (Sept. 5, 2017), http://www.latimes.com/sports/olympics/la-sp-brazil-olympic-bribery-raid-20170905-story.html.

245. *See* Carlos Nuzman: Brazilian Olympics chief arrested in Rio, supra note 28.

246. *Id.*

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 61

The past year also saw further developments in Brazil's anti-corruption landscape. In a significant judicial decision in August – with important consequences for MPF's work in *Lava Jato* – a Brazilian federal court of appeals ruled that Odebrecht's leniency agreement with MPF was defective because it was executed with MPF alone. The court refused to declare the agreement null and void as a matter of legal certainty and in view of the company's legitimate expectations, but ruled that the company's assets must remain frozen until the agreement is "ratified or re-ratified" by the other concerned agencies. This includes the Ministry of Transparency ("CGU"), which the court deemed the competent authority under the Clean Company Act to execute leniency agreements within the executive branch.[247] The court further explained that the "participation of all concerned agencies" – in this case, MPF, CGU, the Federal Attorney's Office ("AGU"), and the Federal Court of Accounts ("TCU") – "is necessary for the allocation of liability to be unique and integral."[248]

Also in August, MPF issued a non-binding resolution containing guidelines for prosecutors regarding leniency agreements. These guidelines explain that negotiations must be kept confidential and that any leniency agreement from joint negotiations with other entities – such as CGU, AGU, TCU, or Brazil's Administrative Council for Economic Defense ("CADE") – must be formalized in separate instruments.[249] MPF's resolution also provides that the party seeking leniency must be the first to report on facts unknown to the investigation and provide "concrete elements that may serve as evidence," which "must also be able to reveal and dismantle the criminal organization."[250]

In June, Brazil's President enacted a provisional decree expanding the powers of Brazil's Central Bank and Securities and Exchange Commission (known as "CVM") to investigate, sanction, and resolve administrative infractions of banking and capital markets laws and regulations.[251] The decree significantly increased the fines that the Central Bank and CVM can impose, empowered both to resolve potential infractions through leniency agreements, and allowed the Central Bank to resort to settlement

Continued on page 63

247. *See* Andrew M. Levine, et al., "New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil," FCPA Update, Vol. 9, No. 2 (Sept. 2017), https://www.debevoise.com/insights/publications/2017/09/copy-of-fcpa-update-september-2017, at 18-19. Interlocutory Appeal (Agravo de Instrumento) No. 5023972-66.2017.4.04.0000/PR, available at https://www2.trf4.jus.br/trf4.

248. *Id.*

249. *See* "New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil," *supra* note 28, at 20-21. The Portuguese version of Instruction No. 7 is available at www.mpf.mp.br/pgr/documentos/ORIENTAO7_2017.pdf.

250. *Id.*

251. *See* "New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil," *supra* note 28, at 22.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 62

agreements (which already were available to CVM).[252] The Brazilian Congress is currently discussing the final wording of the provisional decree.

A few months later, in August, the Central Bank issued a resolution requiring all financial institutions authorized to operate in the country "to implement and maintain compliance policies compatible with their nature, size, complexity, structure, risk profile and business plan, in order to ensure the effective management of their compliance risks."[253] The resolution also establishes minimum requirements for compliance policies, which must be approved by the company's board of directors, and the responsibilities of compliance departments.[254]

"2018 will be a year to watch for important developments, including court decisions or practical arrangements among [Brazilian] agencies regarding their competence to enter into leniency agreements, and the potential intensification of investigations in connection with pension funds, banks, and pharmaceutical companies."

2018 will be a year to watch for important developments, including court decisions or practical arrangements among MPF, CGU, and other agencies regarding their competence to enter into leniency agreements, and the potential intensification of investigations in connection with pension funds, banks, and pharmaceutical companies. It also will be interesting to see the extent of the impact of the various ongoing anti-corruption investigations on the upcoming presidential election, and how the heads of agencies involved in those investigations will act in the last year of their terms.

3. Mexico

In June 2017, Mexico's Supreme Court affirmed the constitutionality of the far-reaching anti-corruption legislation Mexico had enacted the prior year.[255] That legislation increased transparency and disclosure requirements for public servants, mandated penalties for corruption-related offenses, incentivized corporate compliance programs and cooperation with authorities, and established

Continued on page 64

252. *Id.*

253. *Id.* at 25-27. The Resolution is available in Portuguese at http://www.bcb.gov.br/pre/normativos/busca/normativo.asp?numero=4595&tipo=Resolu%C3%A7%C3%A3o&data=28/8/2017.

254. *Id.*

255. *See* SCJN Valida Articulos de la Ley 3de3, televisa.NEWS (June 13, 2017), http://noticieros.televisa.com/ultimas-noticias/nacional/2017-06-13/scjn-valida-articulos-ley-3-3.

Anti-Corruption Enforcement in 2017: A Return to Normalcy

Continued from page 63

coordination among anti-corruption authorities at the federal, state, and local levels.[256] On July 19, 2017, the remaining section of this anti-corruption package, the General Law of Administrative Liabilities (the "Mexican General Law"), went into effect.[257]

The Mexican General Law defines the anti-corruption obligations of public officials and private parties.[258] It replaces pre-existing statutes related to corruption of public and private individuals and creates a code of ethics and standards to which public officials must adhere.[259] The Law defines "non-serious[260]" and "serious" administrative offenses by public servants.[261] Non-serious administrative offenses include failing to fulfill entrusted functions and commissions in accordance with the public servant's ethics code (*e.g.*, not timely and properly submitting statements of assets and conflicts of interest).[262] Serious administrative offenses include bribery, embezzlement, and other corruption-related offenses.[263]

Both private parties and public servants who violate the Mexican General Law face severe sanctions. Public officials risk the suspension or termination of their employment, fines, and a ban on participation in government procurement opportunities.[264] Private individuals face fines up to double the value of acquired benefits, and, if no tangible benefit from the corrupt activity, the equivalent of nearly a half-million U.S. dollars.[265] Legal entities face sanctions up to double the received benefit and, if none, the equivalent of up to six million U.S. dollars.[266]

Continued on page 65

256. For a detailed overview of Mexico's newly-adopted anti-corruption regime, see Sean Hecker, et al., "Mexico Adopts New Anti-Corruption Legislation," FCPA Update, Vol. 8, No. 2 (Sept. 2016), https://www.debevoise.com/insights/publications/2016/09/fcpa-update-september-2016.

257. The other three anti-corruption laws – the General Law of the National Anti-Corruption System, the Organic Law of the Administrative Justice Federal Court, and the Federal Accounting and Accountability Law – went into effect on July 19, 2016. See Sean Hecker et al., supra at 39.

258. Ley General de Responsabilidades Administrativas [LGRA] [Gen. L. of Admin. Liabilities], Diario Oficial de la Federación [DOF] July 18, 2016 (Mex.).

259. Ley Federal de Responsabilidades Administrativas de los Servidores Públicos [LFRAS] [Fed. L. of Admin. Liabilities of Pub. Servants], DOF Mar. 13, 2002 (Mex.); Ley Federal Anticorrupción en Contrataciones Públicas [LFACP] [Fed. Anti-Corruption L. on Pub. Procurement], DOF June 11, 2012 (Mex.).

260. *Id.*, arts. 49-50.

261. *Id.*, arts. 51-63.

262. Id., arts. 16, 49.

263. *Id.*, arts. 65-72.

264. *Id.*, art. 75.

265. *Id.*, art. 81.I.

266. *Id.*, art. 81.II.

Continued from page 64

Under the administrative process, culpability must be established beyond a reasonable doubt.[267] The statute of limitations for serious offenses is seven years from the date of the infraction or from the time when misconduct ceased.[268] The Mexican General Law does credit adequate compliance programs, self-reporting, or cooperation with authorities as mitigating factors when determining the appropriate punishment.[269]

The Mexican General Law and related steps have the potential to bring far-reaching changes to Mexico's anti-corruption landscape. These include establishment of Mexico's first National Anticorruption System (SNA),[270] a body comprised of citizens and investigators to detect and fight acts of corruption, and implementation of Mexico's first independent special prosecutor for corruption crimes.[271] However, some supporters of Mexico's new anti-corruption initiatives have become disillusioned.[272] The Government reportedly has failed to appoint judges to oversee anti-corruption cases, failed to appoint the prosecutor who would independently pursue investigations, and failed to act transparently with respect to the initiative.[273] Many civil society leaders have observed that the government has "fallen prey to a familiar trick" of "creat[ing] a panel to address a major issue, only to starve it of resources, inhibit its progress or ignore it."[274]

4. Peru

Peru recently introduced potentially far-reaching changes to its corporate corruption liability framework. On January 7, 2017, Peru's official gazette *El Peruano,* Peru's official publication newspaper, published Legislative Decree No. 1352, amending Law No. 30424 (2016) – the "Law Regulating Administrative Liability of Legal Entities for the Commission of Active Transnational Bribery."[275]

Continued on page 66

267. *Id.*, art. 135.

268. *Id.*, art. 74.

269. LGRA, arts. 25, 81, 88-89.

270. Mexico's National Anti-corruption System - Statement from OECD Secretary-General Angel Gurría, OECD (Jan. 8, 2017), http://www.oecd.org/newsroom/mexico-national-anti-corruption-system-statement-from-oecd-secretary-general.htm.

271. CPF, "Transitorios – Primero," July 18, 2016; LOPGR, "Transitorios – Primero," July 18, 2016.

272. Azam Ahmed, Mexico's Government is Blocking its Own Anti-Corruption Drive, Commissioners Say, New York Times (Dec. 2, 2017), https://www.nytimes.com/2017/12/02/world/americas/mexico-corruption-commission.html.

273. *Id.*

274. *Id.*

275. *See* Ley N° 30424, El Peruano, http://busquedas.elperuano.com.pe/normaslegales/ley-que-regula-la-responsabilidad-administrativa-de-las-pers-ley-n-30424-1370638-.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 65

This change addresses the autonomous liability of legal entities for acts of corruptions[276] and amplifies several provisions related to a legal entity's liability for acts of corruption.[277]

Following enactment of the Decree, legal entities may be investigated, prosecuted, and penalized for money laundering and bribery of public officials, regardless of whether an individual involved in the crime is prosecuted.[278] The amended law came into effect on January 1, 2018,[279] and establishes liability of legal entities for crimes in three categories: (1) corruption, including offering, providing, or promising a gift or advantage to a Peruvian public official, a foreign official, or a public international organization; (2) money laundering; and (3) terrorism funding.[280]

"The continuing vitality of enforcement actions brought and handled by foreign regulatory and enforcement counterparts signals an increasing emphasis on combatting global corruption."

This new law, which does not apply extraterritorially,[281] includes the following possible sanctions for a company: fines of two to six times the benefit obtained by the crime; a perpetual ban from entering into agreements with the government; and the company's dissolution.[282] Before initiating a case against a company, the new law requires the Securities Market Administration to assess the company's compliance program; if the authorities conclude that the compliance program is adequate, the public attorney cannot proceed with the case. The law also creates a Public Registry of Sanctioned Corporations to share the information with the general public and to inform the different entities of the sanctions imposed on the companies.[283]

Continued on page 67

276. *Id.*

277. Walter J. Palomino Ramirez, Análisis del decreto legislativo n. 1352 que amplió el alcance de la responsabilidad (¿penal?) de la persona jurídica, Derecho Penal Económico y DDHH (Jan. 25, 2017), http://blog.pucp.edu.pe/blog/dpenaleconomicoyddhh16/2017/01/25/analisis-del-decreto-legislativo-n-1352-que-amplio-el-alcance-de-la-responsabilidad-penal-de-la-persona-juridic.

278. *See*, Decreto Legislativo N° 1352, El Peruano, http://busquedas.elperuano.com.pe/normaslegales/decreto-legislativo-que-amplia-la-responsabilidad-administra-decreto-legislativo-n-1352-1471551-.

279. *Id.*

280. Nuevo régimen de responsabilidad de personas jurídicas por prácticas de corrupción y lavado de activos, Rodrigo Elias & Medrano Abogados, http://www.estudiorodrigo.com/nuevo-regimen-de-responsabilidad-de-personas-juridicas-por-practicas-de-corrupcion-y-lavado-de-activo.

281. Ley de Responsabilidad de Personas Jurídicas por Corrupción, Rodrigo Elias & Medrano Abogados, http://www.estudiorodrigo.com/boletin-ley-de-responsabilidad-de-personas-juridicas-por-corrupcion.

282. Ley que regula la responsabilidad administrativa de las personas jurídicas por el delito de cohecho activo transnacional [Congreso de la Republica] [Ley N° 30424] (Peru); Código Procesal Penal [C. Pro. P. [Penal Procedural Code] [Ley N° 957] (Peru).

283. Iván Martínez López, Legislative Decree 1352 in Peru, Intedya (Jan. 9, 2017) http://www.intedya.com/internacional/1303/noticia-decreto-legislativo-n-1352-en-peru-.html#googtrans(es|en).

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 66

The new law also provides companies with several potential defenses to liability, including:

- Effective implementation of a compliance program related to criminal matters;
- Demonstration that the individual(s) who violated the law did so using fraudulent means to circumvent controls of a properly implemented prevention model; and
- Proof that the individual violator committed the offense exclusively for his or her own benefit or for the benefit of a third party other than the legal entity.[284]

Executives and employees who evade compliance programs and commit criminal acts will still face charges, but criminal liability will not extend to the company itself.[285]

In relatively short order, Peruvian authorities already have put this law into action, raiding the offices of three construction companies as part of a large corruption investigation.[286] Raids conducted on January 12, 2018 targeted 42 properties and resulted in the arrest of a former advisor to the Peruvian Transportation Ministry.[287]

The Peruvian government also has made further efforts to develop a more robust anti-corruption regime by means of the Urgency Decree No. 003-2017. This Decree and its Guidelines established restrictions for transferring abroad funds generated from investments in the country or dividends obtained from its investments, and it implemented a government authorization system for the sale of assets of companies involved in bribery, money laundering, or other corrupt acts.[288]

This recent reform to Peru's anti-corruption regime has occurred while the country has been in the midst of turmoil generated by corruption scandals. Two former presidents have been accused of corruption – with one already in jail and the other a fugitive – and current President Pedro Kuczynski was nearly removed from office for being "morally handicapped" to serve as President.[289] Corruption scandals

Continued on page 68

284. Walter J. Palomino Ramirez, Análisis del decreto legislativo n. 1352 que amplió el alcance de la responsabilidad (¿penal?) de la persona jurídica, Derecho Penal Económico y DDHH (Jan. 25, 2017), http://blog.pucp.edu.pe/blog/dpenaleconomicoyddhh16/2017/01/25/analisis-del-decreto-legislativo-n-1352-que-amplio-el-alcance-de-la-responsabilidad-penal-de-la-persona-juridica.

285. Decreto Legislativo N° 1352, *supra* 59.

286. See Peru Prosecutors Raid Offices of Major Builders in Graft Probe, Reuters (Jan. 12, 2018), https://www.reuters.com/article/us-peru-corruption/peru-prosecutors-raid-offices-of-major-builders-in-graft-probe-idUSKBN1F12LY.

287. *Id.*

288. Urgency Decree No. 003-2017, El Peruano (Feb. 13, 2017), http://busquedas.elperuano.pe/download/url/decreto-de-urgencia-que-asegura-la-continuidad-de-proyectos-decreto-de-urgencia-n-003-2017-1485019-1.

289. Andrea Zarate and Nicholas Casey, Peru's President Faces Possible Ouster in Corruption Scandal, New York Times (Dec. 15, 2017), https://www.nytimes.com/2017/12/15/world/americas/peru-president-odebrecht.html.

Anti-Corruption Enforcement in 2017: A Return to Normalcy
Continued from page 67

also have reached other Peruvian government officials, as well as top executives of large companies operating in Peru, resulting in disruptions across the government and society.

III. Conclusion

2017 marks a year of relatively modest corporate enforcement statistics. But as we've warned in the past – following 2015's modest statistics and 2016's record settlements – a single year does not a trend make.

The continuing vitality of enforcement actions brought and handled by foreign regulatory and enforcement counterparts signals an increasing emphasis on combatting global corruption. And DOJ's new Policy's endorsement rather than abandonment of its 2016 Pilot Program's efforts reflects an increasing effort to incentivize corporate self-reporting and prosecution of culpable individual defendants. These developments suggest that anti-corruption enforcement will remain a focus for global business and for regulators in the United States and abroad. We look forward to examining and reporting on anti-corruption enforcement and related legal developments throughout 2018.

The Editors

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