FCPA Update

A Global Anti-Corruption Newsletter

In this issue:

2 United States

30 United Kingdom

44 France

52 Germany

57 Asia

65 Latin America

Click here for an index of all FCPA Update articles

If there are additional individuals within your organization who would like to receive *FCPA Update*, please email prohlik@debevoise.com, eogrosz@debevoise.com, or pferenz@debevoise.com

The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement

During 2018, anti-corruption enforcement remained vigorous. The United States continued enforcing aggressively the FCPA. And a growing number of other countries enacted their own anti-corruption laws, pursued high-profile investigations and enforcement actions, and partnered with other authorities in multi-jurisdictional inquiries. In this issue, we survey the past year's most significant anti-corruption developments in the United States, the United Kingdom, France, Germany, Asia, and Latin America.

Continued on page 2

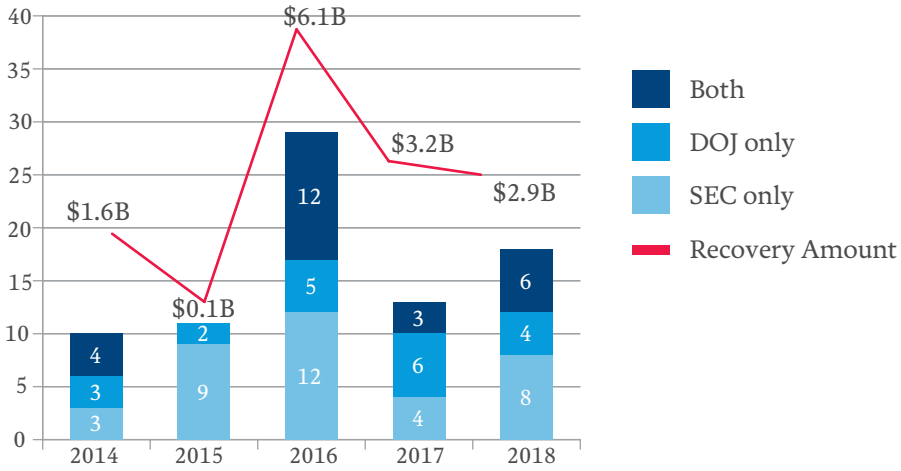
United States

A. Overview

Overall, there were eighteen corporate enforcement actions – the third most corporate actions in FCPA history – which included four declinations under DOJ's Corporate Enforcement Policy. In relation to these 18 matters:

- The United States collected over $1 billion in penalties, or more than $1.9 billion including the disgorgement that the SEC credited from Petrobras's class action settlement.
- When adding settlement payments to other countries that the U.S. authorities credited, total penalties exceeded $2.9 billion, representing the third largest sanction amount in the FCPA's 40-year history.
- These corporate actions spanned multiple industries, including financial services (Credit Suisse, Legg Mason, Société Générale), life sciences (Sanofi, Stryker), liquor (Beam Suntory), mining (Kinross Gold), and oil and gas (Vantage Drilling, Petrobras).
- In at least three cases (Elbit Imaging, Vantage Drilling, and Transport Logistics), the settling companies paid less in penalties than they otherwise would have, given considerations of inability to pay.
- Significantly, only three of these eighteen cases involved associated individual prosecutions in the United States, though some, such as Petrobras, involved associated individual prosecutions in other countries.

The chart below summarizes the number of corporate FCPA actions over the past five years, including the related recovery amounts:



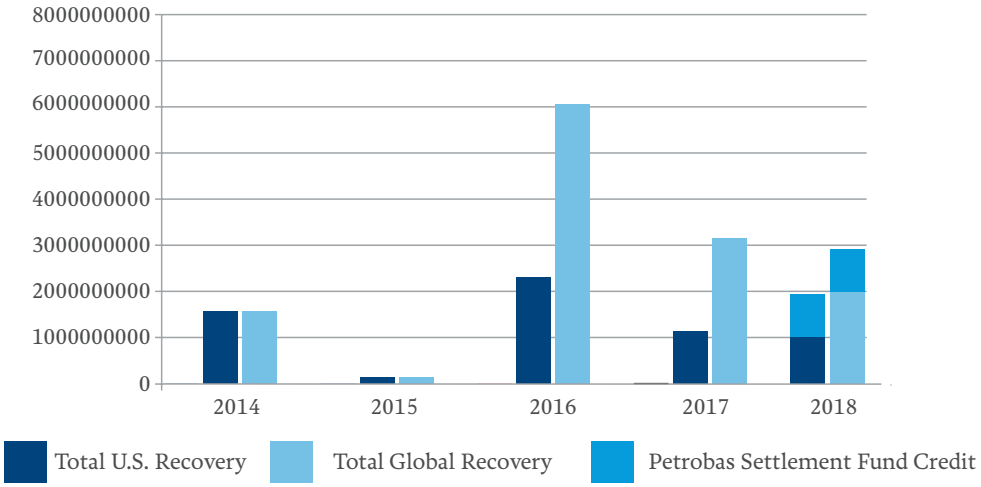
Continued on page 3

United States

Continued from page 2

Continuing on developments in recent years, the globalization of anti-corruption enforcement has persisted. Cooperation among various anti-corruption enforcers has continued, along with high-profile coordinated resolutions. The United States reached its sixth such settlement with Brazil[1] and, notably, its first with France. Impressively, U.S. authorities credited regulators from more than 13 countries for their assistance in enforcing the FCPA.

U.S. Share of Global Recovery



This year also saw a historic number of FCPA enforcement actions against individuals. DOJ filed charges or obtained guilty pleas against at least 31 individuals, including a number of senior executives in business and former senior bankers in the finance sector:

- Interestingly, only about 13% of these cases had an associated corporate action, though corporate actions likely will follow in at least some of these cases.
- The SEC charged four individuals, including a former CEO and CFO of the U.S. subsidiary of a major Japanese company.
- Three of the SEC's four individual actions had an associated corporate action, and one followed more than a year after DOJ had charged the individual (and eight months after the individual pled guilty).

Continued on page 4

1. The others were: Embraer (Deferred Prosecution Agreement, *U.S. v. Embraer S.A.*, Case No. 16-cr-06294-JIC (S.D. Fla. Oct. 24, 2016), https://www.justice.gov/criminal-fraud/file/904636/download); Rolls-Royce (Deferred Prosecution Agreement, *U.S. v. Rolls-Royce PLC*, Case No. 16-cr-247 (S.D. Fla. Oct. 24, 2016), https://www.justice.gov/opa/press-release/file/927221/download); Odebrecht (Plea Agreement, *U.S. v. Odebrecht S.A.*, No: 16 Cr. 643 (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/criminal-fraud/file/920101/ download); Braskem (Plea Agreement, *U.S. v. Braskem S.A.*, No. 16-CR-644 (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/criminal-fraud/fcpa/cases/braskem-sa); Keppel (Deferred Prosecution Agreement, *U.S. v. Keppel Offshore & Marine Ltd.*, Case No. 17-cr-697 (E.D.N.Y. Dec. 22, 2017), https://www.justice.gov/criminal-fraud/file/1021786/download); Petrobras (*see* Petrobras Order, *infra* n.6).

United States

Continued from page 3

B. Corporate Enforcement Trends

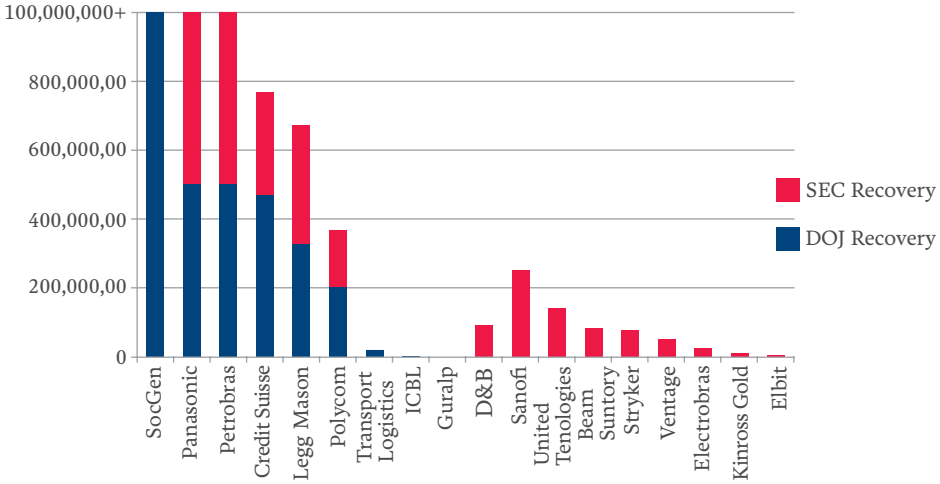
Three large cases drove this year's U.S. corporate enforcement statistics: Panasonic, Société Générale (and the related Legg Mason case), and Petrobras. In addition, each agency brought a set of smaller cases, and DOJ issued four declinations under the Corporate Enforcement Policy. Each is discussed in turn below.

DOJ assessed over $617.5 million in penalties, with three companies receiving a 25%-discount off the lower end of the U.S. Sentencing Guidelines ranges (Petrobras, Legg Mason, and Transport Logistics) and two companies receiving slightly smaller discounts (Panasonic (20%) and Credit Suisse (15%)).

"Continuing on developments in recent years, the globalization of anti-corruption enforcement has persisted. Cooperation among various anti-corruption enforcers has continued, along with high-profile coordinated resolutions."

The SEC brought fourteen corporate enforcement actions in 2018, six of which (including the largest) also involved DOJ enforcement actions. The SEC ordered a total of $1.3 billion in penalties, dropping to $382 million if excluding the amount credited from Petrobras's class action settlement. Of that $382 million, disgorgement and pre-judgment interest constituted seventy percent.

Amounts Recovered by the United States



Continued on page 5

United States

Continued from page 4

This year, only three cases involved sanctions over $100 million, each of which had a meaningful international element:

- In April, as we wrote about previously,[2] DOJ and the SEC jointly announced a $280 million settlement with Panasonic, the Japanese-headquartered multinational company, and its U.S.-based subsidiary, Panasonic Avionics. In addition to allegations of a long-running bribe scheme in an unnamed "Middle Eastern country," the SEC (but not DOJ) charged the company with accounting fraud in connection with an unrelated revenue recognition scheme at the U.S. subsidiary. Although no charges against individuals were announced at that time, the SEC in December charged the former CEO and CFO of the U.S. subsidiary with aiding and abetting and causing the company's books and records and internal controls violations in connection with the bribery (for the CEO)[3] and improperly recognized revenue (for the CFO) violations.[4] Although there was no parallel Japanese action (or any indication the Japanese were investigating), the SEC did publicly thank the Japanese for their assistance in the matter, something we have not seen in prior cases involving Japanese companies.[5]

Panasonic settlement snapshot:

- *SEC cease-and-desist order settled with parent company finding violations of both the accounting provisions and anti-bribery provisions*
- *DPA with subsidiary relating to violations of the accounting provisions*
- *Same underlying allegations that employees and senior executives at wholly-owned subsidiary, Panasonic Avionics Corporation, headquartered in California, engaged in schemes to retain consultants for improper purposes, compensating them from a discretionary account, controlled by senior executives, which lacked meaningful oversight*

Continued on page 6

2. *See* Kara Brockmeyer, Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, Jil Simon & Andreas Glimenakis, "U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic," FCPA Update, Vol. 9, No. 10 (May 2018), https://www.debevoise.com/insights/publications/2018/05/fcpa-may-2018.
3. *See* Order, *In re Margis*, Securities Exchange Act Rel. No. 84849 (Dec. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84849.pdf [hereinafter "Margis Order"].
4. *See* Order, *In re Uonaga*, Securities Exchange Act Rel. No. 84850 (Dec. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84850.pdf [hereinafter "Uonaga Order"].
5. Order, *In re Panasonic Corp.*, Securities and Exchange Act Rel. No. 83128 (Apr. 30, 2018), https://www.sec.gov/litigation/admin/2018/34-83128.pdf ["Panasonic Order"] with "SEC Press Release No. 2018-73, *Panasonic Charged With FCPA and Accounting Fraud Violations* (Apr. 30, 2018), https://www.sec.gov/news/press-release/2018-73.

United States
Continued from page 5

- In June, DOJ charged Société Générale S.A. ("SocGen"), a non-issuer, and its U.S. subsidiary with making payments through a Libyan intermediary to Gaddafi-era government officials to obtain investments from Libyan state-owned financial institutions. The company agreed to pay over $585 million in penalties to settle the FCPA action, with the money going in equal parts to the United States and France. This was the first time that the U.S. and French authorities brought a coordinated action. Additionally, the United States agreed to forego a monitor because the company would be monitored by the new French anti-corruption agency, the AFA. Shortly after the SocGen resolution, DOJ and the SEC announced a related case against Legg Mason's Permal unit, which we detailed previously.[6] Legg Mason paid a $32.6 million penalty to DOJ, as well as $331.6 million in disgorgement in a companion SEC case.

SocGen settlement snapshot:

- *Parent DPA alleged conspiracy to violate the anti-bribery provisions of the FCPA and transmitting false commodities reports*
- *SocGen subsidiary, SGA Société Générale Acceptance N.V., pled guilty to one count of conspiracy to violate the FCPA in the Eastern District of New York*
- *Based on payments made between 2004 and 2009 through Libyan and Panamanian intermediaries to Gaddafi-era Libyan officials at Libyan financial institutions*
- *Related settlement by **Legg Mason, Inc**.*
  - *$67 million paid to DOJ and the SEC*
  - *NPA with DOJ*
  - *Settled by cease & desist order with SEC for same underlying conduct*

- Finally, in September, DOJ and the SEC took long-awaited action against Petrobras, the Brazilian state-owned oil company at the center of the sprawling Operation *Lavo Jato* in Brazil and its many spin-offs in the United States and elsewhere. We covered this settlement in the October FCPA Update.[7] To date, six companies have been charged by U.S. authorities for paying bribes to Petrobras officials. In this case, Petrobras – itself a U.S. issuer – was charged with violating the books and records and internal controls provisions of the FCPA. The SEC also brought non-scienter fraud charges under Section 17(a)(2) and (3)

Continued on page 7

6. *See* Andrew M. Levine, Philip Rohlik & Jil Simon, "DOJ Applies Expansive Theory of Agency in Legg Mason Enforcement Action," FCPA Update, Vol. 9, No. 11 (June 2018), https://www.debevoise.com/insights/publications/2018/06/fcpa-june-2018.

7. *See* Kara Brockmeyer, Andrew M. Levine, Erich O. Grosz & Ivona Josipovic, "Petrobras Reaches Major Corruption-Related Settlements with U.S. and Brazilian Authorities," FCPA Update, Vol. 10, No. 5 (Oct. 2018), https://www.debevoise.com/insights/publications/2018/10/fcpa-update-october-2018.

United States

Continued from page 6

of the Securities Act against the company for the same conduct. The U.S. authorities alleged that Petrobras executives facilitated and directed millions of dollars in corrupt payments and kickbacks to themselves and to politicians and political parties in Brazil. The company was assessed a total of $1.8 billion in disgorgement and penalties to the United States and Brazil. Similar to other Petrobras-related cases with Brazilian companies – Odebrecht (91%), Braskem (70%) – 80% of the $853.2 million penalty was paid to Brazil, and only 20% went to the United States. In addition to its share of the penalty amount, the SEC ordered the company to pay $933 million in disgorgement, but offset that amount in full against the amount Petrobras paid in a class action lawsuit filed in the United States, in which Petrobras paid nearly $3 billion.[8] This was the first time that the United States charged a state-owned entity for effectively *taking* bribes and thereby misstating its financial statements.[9]

Petrobras settlement snapshot:

- *Majority-held by Brazilian government*
- *Parent company NPA; 25% cooperation discount*
- *Settled by cease & desist order with SEC that alleged misleading U.S. investors by filing false financial statements that concealed bribery and bid-rigging scheme in Brazil*

  – The SEC used a similar theory in December to charge Brazilian state-owned power company Eletrobras – a U.S. issuer – with violations of the FCPA's accounting provisions. According to the SEC's order, executives at an Eletrobras subsidiary engaged in an illicit bid-rigging and bribery scheme involving the construction of a new nuclear power plant. The executives received kickbacks of $9 million in exchange for, among other things, inflating the cost of the construction project.

DOJ and the SEC also reached settlements with a number of other companies, several aspects of which are noteworthy:

- Credit Suisse became the third investment bank to settle a hiring practices case. This case is discussed below in the "Focus on Financial Services" section and in our previous article.[10]

Continued on page 8

8. Order, *In re PETRÓLEO BRASILEIRO S.A. – PETROBRAS*, Securities Act of 1933 Rel. No. 10561, Securities Exchange Act of 1934 Rel. No. 84295 (Sept. 27, 2018), https://www.sec.gov/litigation/admin/2018/33-10561.pdf [hereinafter "Petrobras Order"].
9. The United States charged Statoil, a state-owned entity, in 2006, but that case was a more traditional bribe case in which the company was charged with *paying* bribes to Iran. Petrobras is the first FCPA resolution in which U.S. enforcement agencies acknowledged state ownership of the sanctioned company, which was not mentioned in Statoil.
10. *See* Andrew M. Levine, Jane Shvets, Colby A. Smith, Philip Rohlik & Olivia Cheng, "FCPA Settlements Reached with Beam Suntory and Credit Suisse," FCPA Update, Vol. 9, No. 12 (July 2018), https://www.debevoise.com/insights/publications/2018/07/fcpa-update-july-2018.

United States
Continued from page 7

- Three companies – Transport Logistics International Inc., Vantage Drilling, and Elbit Imaging Ltd. – received a reduction in penalties and/or disgorgement due to their inability to pay. Transport Logistics, a Maryland-based provider of logistical support services for the transport of nuclear materials, entered into a DPA with DOJ for alleged misconduct in Russia. Although the DPA called for a penalty exceeding $21.5 million after a 25% cooperation discount, the DPA imposed an "appropriate criminal penalty" of $2 million in light of the company's limited ability to pay.[11] Similarly, with respect to Vantage Drilling, the SEC ordered the company to pay $5 million in disgorgement and no further penalty, specifically stating in the order that it had considered the company's inability to pay in determining the disgorgement amount and deciding not to impose a penalty.[12] Finally, the SEC charged Elbit Imaging, an Israeli-based company, with paying millions of dollars to third parties while lacking evidence that the third parties actually had provided services. The company, which was in the process of winding down, paid a $500,000 civil penalty.

"During 2018, the SEC continued its aggressive use of the FCPA's accounting provisions, especially the internal controls provisions that impose virtually strict liability."

- Polycom, Inc., a California-based telecommunications company, paid over $36.6 million to DOJ and the SEC to settle allegations that its Chinese subsidiary obtained business by using local distributors and resellers to make improper payments to government officials. The Polycom resolution provides a window into how the agencies may address the challenges created by the U.S. Supreme Court's decision in *Kokesh* applying a five-year statute of limitations to the SEC's disgorgement claims. The SEC was limited by the statute of limitations to only the last two years of profits in the multiyear scheme. DOJ gave the company a public declination under the Corporate Enforcement Policy, but required the company to pay another $22 million in disgorgement on top of the $10.6 million

Continued on page 9

11. *See* Kara Brockmeyer, Jane Shvets & Andreas Glimenakis, "Transport Logistics and DOJ Settle First Corporate FCPA Enforcement Action of 2018," FCPA Update, Vol.9, No. 9 (Apr. 2018), https://www.debevoise.com/insights/publications/2018/04/fcpa-update-april-2018.
12. Order, *In re Vantage Drilling Int'l*, Securities Exchange Act Rel. No. 84617 (Nov. 19, 2018), https://www.sec.gov/litigation/admin/2018/34-84617.pdf.

United States

Continued from page 8

ordered by the SEC, explicitly referencing the SEC's statute of limitations.[13] Going forward, it will be interesting to see whether DOJ continues to order additional disgorgement where the SEC is time-barred or whether this was a one-off situation.

- United Technologies Corporation paid the SEC just under $14 million to resolve charges that its subsidiary Otis Elevator Co. and operating division Pratt & Whitney made unlawful payments to government officials in Azerbaijan and China, and provided trips and gifts to officials in Asia and the Middle East to obtain business. This was one of the few cases focused on gifts, entertainment, or travel brought during 2018.
- Finally, as we discussed in our December issue,[14] several cases brought in 2018 highlighted the risks of failing to properly integrate acquisitions:
  - In the Kinross Gold case, the company paid the SEC $950,000 to settle books and records and internal controls violations related to alleged misconduct by two African subsidiaries. The SEC focused on the company's failure to integrate the subsidiaries into its internal controls and compliance program over three years, despite multiple internal audits that flagged widespread deficiencies.
  - In the Beam Suntory case, the company agreed to pay more than $8 million to resolve claims that its Indian subsidiary used third-party sales promoters and distributors to make improper payments to government employees.
  - In the Dun & Bradstreet case, two Chinese subsidiaries used third-party agents to make payments to obtain personal data and other information on Chinese entities and individuals. The SEC noted that "[d]espite concerns raised during pre-acquisition due diligence," Dun & Bradstreet failed to take action to stop the payments post-acquisition.[15]

  These cases underscore the importance of good internal controls, prompt integration after an acquisition, and proper documentation of how any red flags identified through pre-acquisition due diligence have been appropriately addressed and mitigated.

Continued on page 10

13. Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to Caz Hashemi, et al, Re: Polycom, Inc., Declination (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download [hereinafter "Polycom Declination"].
14. *See* Andrew M. Levine, Philip Rohlik & Kamya B. Mehta, "Mitigating Anti-Corruption Risk in M&A Transactions: Successor Liability and Beyond" at 11-12, FCPA Update, Vol. 10, No. 5 (Dec. 2018), https://www.debevoise.com/insights/publications/2018/12/fcpa-update-december-2018.
15. *See* Brockmeyer et al, *supra* n.2.

United States

Continued from page 9

DOJ also issued four declinations under its Corporate Enforcement Policy. In addition to declinations in the Dun & Bradstreet and Polycom cases discussed above, there were two others:

- In the Guralp Systems ("GSL") declination, we see what may be a promising indication of deferring to another jurisdiction's ongoing investigation in connection with DOJ's application of its Coordination Policy.[16] DOJ did not require disgorgement based on GSL's voluntary disclosure, cooperation, remediation, and the fact that GSL, a U.K. company with its principal place of business in the U.K., is the subject of an ongoing parallel investigation by the U.K.'s Serious Fraud Office for allegations of the same underlying conduct and has committed to accepting responsibility for that conduct with the SFO.
- Insurance Corporation of Barbados Limited ("ICBL"), an insurance company headquartered in Barbados, received a declination from DOJ in connection with improper payments to a Barbadian official in exchange for insurance contracts. DOJ credited the company's self-disclosure, cooperation, and remediation in issuing the declination, and the company paid $93,000 in disgorgement to offset its profits from the misconduct. Given the small size of the alleged bribes (in comparison to other FCPA resolutions) and the fact that the government official at the heart of the scheme was charged (*see infra* Section I.C), it seems unlikely that DOJ would have taken any action in this case, but for the availability of the declination-with-disgorgement resolution vehicle.

During 2018, the SEC continued its aggressive use of the FCPA's accounting provisions, especially the internal controls provisions that impose virtually strict liability. Relevant cases include those involving Beam Suntory and Kinross Gold, underscoring the importance of internal controls and proper documentation of transactions involving "red flags." As previously discussed in this publication,[17] the resolution with Elbit Imaging went even further, continuing the trend – dating back at least to the 2012 enforcement action against Oracle – of charging violations of the accounting provisions without any specific findings of bribery or, alternatively, "illicit" or "improper" payments.

Continued on page 11

16. *See* Coordination Policy, *infra* n. 51; *see also* Andrew J. Ceresney et al., "DOJ's New Policy on Coordination of Corporate Resolutions Aims to Reduce 'Piling On'," Debevoise Update (May, 11, 2018), https://www.debevoise.com/insights/search/?PracticeAreas=454013a8-edef-4502-95d5-0bc99ffdf3ee&keyword=coordination.

17. *See* Paul R. Berger, Jonathan R. Tuttle, Bruce E. Yannett, Philip Rohlik & Jil Simon, "Beyond 'Virtual Strict Liability': SEC Brings First FCPA Enforcement Action of 2018," FCPA Update, Vol. No. 8 (Mar. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/03/fcpa_update_march_2018.pdf.

United States

Continued from page 10

Heat Mapping by Geography

After noticeably being absent in 2017, China-based cases were back on top, with five corporate actions arising in whole or in part from the actions of subsidiaries in China, including Hong Kong SAR. In fact, half of the 18 corporate actions involved misconduct, either in whole or in part, somewhere in Asia, including India (Stryker and Beam Suntory), South Korea (Guralp Systems), and Panasonic (unnamed Asian countries).

The rest of the world was also well-represented in FCPA enforcement in 2018:

- Latin America continues to be the source of a significant number of FCPA cases. The Petrobras, Eletrobras, and Vantage Drilling enforcement actions all involved Brazil and were related to Operation *Lava Jato*. The bulk of individual actions brought in 2018, as discussed below, stemmed from Venezuela, including the ongoing procurement and currency exchange schemes relating to Petroleos de Venezuela S.A. ("PDVSA"). Additionally, there were alleged schemes involving PetroEcuador contracts, Haitian port projects, Aruban telecom contracts, and the Honduran Institute of Social Security.

"Like 2017, 2018 was a record-breaking year for individual actions. DOJ or the SEC charged more than 31 individuals with FCPA or FCPA-related offenses (e.g., anti-money laundering, and mail and wire fraud). While a handful of the cases were tied to corporate resolutions, the majority appear to have been stand-alone actions."

- Just as the *Lava Jato* investigations provide a steady stream of Latin American cases for the FCPA docket, the 2011 industry sweep arising out of dealings with sovereign wealth funds and other government entities in Libya under the rule of Colonel Gaddafi[18] continued to produce enforcement actions in 2018. This included SocGen and Legg Mason, in addition to a criminal indictment against Michael Leslie Cohen, a former managing director of Och-Ziff and the subject of a DOJ corporate enforcement action in 2016.

Continued on page 12

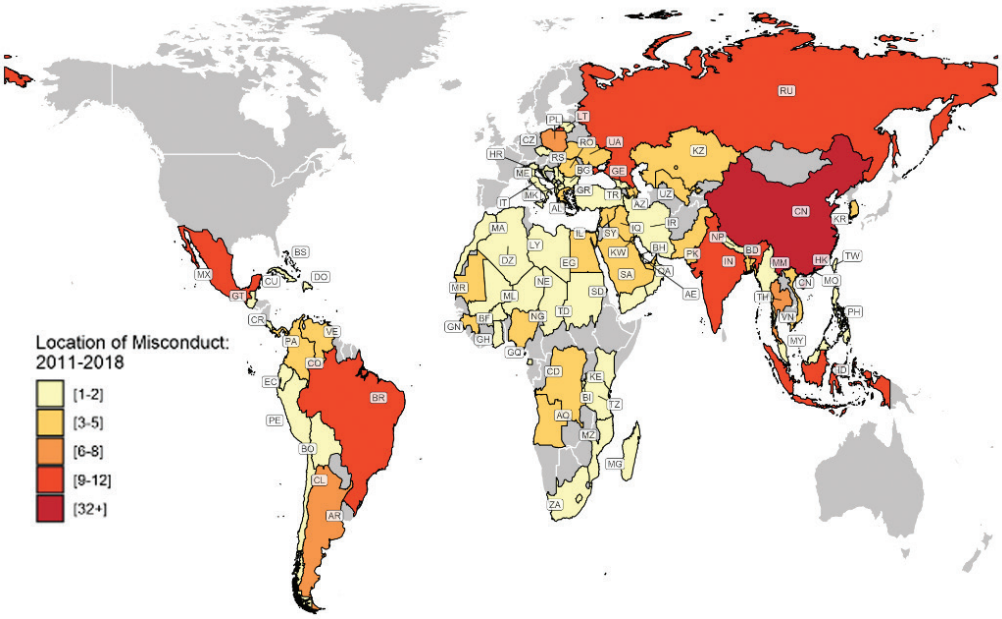
18. *See, e.g.*, Margaret Coker, *Libya's Sovereign Fund Seeks Investment Probe*, WSJ (Sept. 23, 2011), https://www.wsj.com/articles/SB10001424053111904563904576587041911379606.

United States

Continued from page 11

- Elsewhere in the Middle East and Central Asia, the Stryker case involved activities in Kuwait, an individual DOJ prosecution and SEC action against Joo Hyun (Dennis) Bahn involved an official from an unnamed Middle Eastern country, the United Technologies case involved activities in Azerbaijan, and the Sanofi case involved activities in Bahrain and Jordan.
- While often well represented in enforcement actions, Russia and Eastern Europe were the source of only two corporate enforcement cases, the Transport Logistics resolution (which involved payments to an "instrumentality" of Russia that was headquartered in Maryland) and the Elbit Imaging resolution (an SEC action based on payments related to a real estate deal in Romania).
- Sub-Saharan Africa also was the locus of enforcement activity in the Kinross Gold case, in which the company was fined by the SEC for failing to integrate quickly acquisitions in Ghana and Mauritania.

Corporate Resolutions: 2011-2018 Heat Map



Continued on page 13

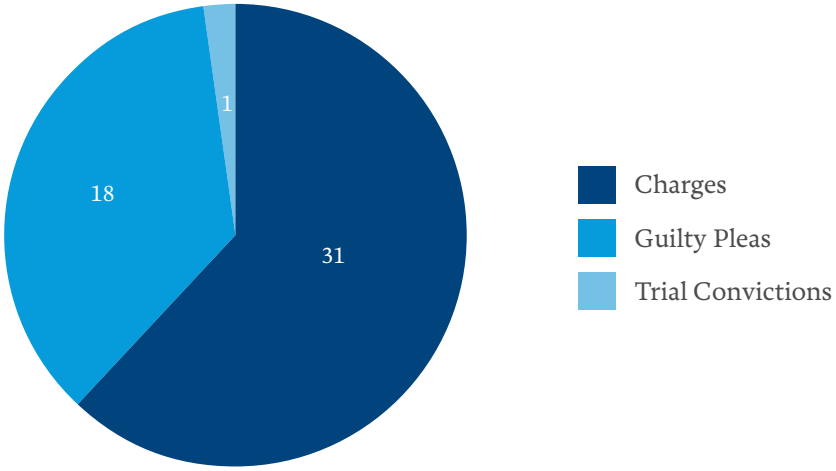
United States

Continued from page 12

C. FCPA Enforcement Against Individuals

Like 2017, 2018 was a record-breaking year for individual actions. DOJ or the SEC charged more than 31 individuals with FCPA or FCPA-related offenses (*e.g.*, anti-money laundering, and mail and wire fraud). While a handful of the cases were tied to corporate resolutions, the majority appear to have been stand-alone actions.

DOJ Individuals



- DOJ announced or unsealed charges against 31 people this year, including at least 10 of whom already have entered guilty pleas and an additional 8 who had previous indictments unsealed (the majority of which were PDVSA-related).
- DOJ also resolved a number of previously filed actions, including at least 6 guilty pleas by individuals indicted in previous years and one conviction at trial.

Stand-Alone Charges

As we have seen in prior years, a handful of large alleged bribe schemes have produced the majority of the individual cases.

- **1MDB**
  - 2018 saw the first indictments in the long-running 1MBD scandal.
  - In November, DOJ unsealed indictments against Malaysian financier Jho Low and former Goldman Sachs managing director Roger Ng, charging them with conspiring to launder billions of dollars embezzled from Malaysia's sovereign wealth fund, 1MDB.

Continued on page 14

United States
Continued from page 13

- At the same time, DOJ unsealed the guilty plea of former senior Goldman banker Tim Leissner on two charges of conspiring to launder money and violate the FCPA.[19]

• **PDVSA**

- Over the past several years, the United States has aggressively targeted U.S. and foreign nationals, including former government officials, in connection with several corruption schemes involving the state-owned Venezuelan oil company PDVSA.
- In connection with a sprawling public procurement corruption scheme, there were 3 new indictments and 5 guilty pleas in 2018, from both U.S.-based PDVSA suppliers[20] and officials.[21] To date, DOJ has charged nearly 20 individuals and obtained 15 guilty pleas in connection with this scheme.
- DOJ also announced a spate of indictments and guilty pleas resulting from a multi-year undercover operation dubbed "Operation Money Flight." In the second half of 2018, DOJ charged a series of individuals, including a German banker, several Venezuelan businessmen, and two former senior Venezuelan government officials with money laundering and related charges relating to the embezzlement of more than $1.2 billion from PDVSA through bribery and fraud from 2014 to 2016.[22]

Continued on page 15

19. *See* DOJ Press Release, *Malaysian Financier Low Taek Jho, AKA "Jho Low," and Former Banker Ng Chong Hwa, AKA "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes in Connection with 1MDB Fund* (Nov. 1, 2018), https://www.justice.gov/usao-edny/pr/malaysian-financier-low-taek-jho-aka-jho-low-and-former-banker-ng-chong-hwa-aka-roger [hereinafter "1MDB Press Release"].
20. Former business executive Juan Carlos Castillo Rincon pleaded guilty to charges filed in April, and business executive Jose Manuel Gonzalez Testino was charged in July. *See* DOJ Press Release No. 18-1188, *Business Executive Pleads Guilty to Foreign Bribery Charge in Connection With Venezuelan Bribery Scheme* (Sept. 13, 2018), https://www.justice.gov/opa/pr/business-executive-pleads-guilty-foreign-bribery-charge-connection-venezuelan-bribery-scheme; *see also* DOJ Press Release No. 18-1006, B*usiness Executive Arrested on Foreign Bribery Charges in Connection With Venezuela Bribery Scheme* (Aug. 1, 2018), https://www.justice.gov/opa/pr/business-executive-arrested-foreign-bribery-charges-connection-venezuela-bribery-scheme.
21. Former PDVSA procurement officers, Alfonso Eliezer Gravina Munoz (conspiracy to obstruct the investigation), Ivan Alexis Guedez (money laundering conspiracy), Luis Carlos De Leon Perez (FCPA and money laundering conspiracy), and Cesar David Rincon Godoy (money laundering conspiracy) pleaded guilty in 2018. *See* DOJ Press Release No. 18-1420, *Texas Businessman Pleads Guilty to Money Laundering Charges in Connection with Venezuela Bribery Scheme* (Oct. 30, 2018), https://www.justice.gov/opa/pr/texas-businessman-pleads-guilty-money-laundering-charges-connection-venezuela-bribery-scheme; DOJ Press Release No. 18-506, *Former Venezuelan Official Pleads Guilty to Money Laundering Charge in Connection with Bribery Scheme* (Apr. 19, 2018), https://www.justice.gov/opa/pr/former-venezuelan-official-pleads-guilty-money-laundering-charge-connection-bribery-scheme.
22. DOJ Press Release No. 18-1089, *Former Swiss Bank Executive Pleads Guilty to Role in Billion-Dollar International Money Laundering Scheme Involving Funds Embezzled from Venezuelan State-Owned Oil Company* (Aug. 22, 2018), https://www.justice.gov/opa/pr/former-swiss-bank-executive-pleads-guilty-role-billion-dollar-international-money-laundering.

United States
Continued from page 14

In addition to the 1MDB and PDVSA cases, other high-profile individual actions this year, included:

- The indictment of Roger Richard Boncy in connection with alleged bribes to Haitian officials in order to win a planned $84 million port development project (this was in addition to the superseding indictment of Joseph Baptiste, who was indicted last year).[23]
- Three more guilty pleas in connection with allegations of bribes paid to PetroEcuador officials (businessmen Jose Larrea and Juan Andres Baquerizo Escobar and PetroEcuador official Arturo Escobar Dominguez), together with an upcoming trial (Frank Roberto Chatburn Ripalda) on related allegations.[24]

"Over the past several years, the United States has aggressively targeted U.S. and foreign nationals, including former government officials, in connection with several corruption schemes involving the state-owned Venezuelan oil company PDVSA."

- One guilty plea stemming from a money laundering conspiracy to arrange and receive corrupt payments in exchange for mobile phone and accessory contracts in Aruba (Egbert Yvan Ferdinand Koolman, an official of an Aruban state-owned telecommunications company).[25]
- The indictment of the billionaire owner of Globovision news network, Raul Gorrin Belisario[26] on charges of paying over $1 billion in bribes to two Venezuelan national treasurers to win rights to conduct foreign exchange

Continued on page 16

23. DOJ Press Release No. 18-1419, *Businessman Indicted for Conspiring to Bribe Senior Government Officials of the Republic of Haiti* (Oct. 30, 2018), https://www.justice.gov/opa/pr/businessman-indicted-conspiring-bribe-senior-government-officials-republic-haiti.
24. *See* DOJ Press Release No. 18-1173, *Financial Advisor Pleads Guilty to Money Laundering Charge in Connection With Bribery Scheme Involving Ecuadorian Officials* (Sept. 11, 2018), https://www.justice.gov/opa/pr/financial-advisor-pleads-guilty-money-laundering-charge-connection-bribery-scheme-involving; Plea Agreement, *United States v. Dominguez*, No. 18-CR-20108-CMA (S.D. Fla. Mar. 28, 2018), https://www.justice.gov/criminal-fraud/file/1060946/download; Factual Proffer in Support of Guilty Plea, *United States v. Baquerizo Escobar*, No. 18-CR-20596 (S.D. Fla. Sept. 14, 2018), ECF. No. 19.
25. DOJ Press Release No. 18-477, *Aruban Telecommunications Purchasing Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act* (Apr. 13, 2018), https://www.justice.gov/opa/pr/aruban-telecommunications-purchasing-official-pleads-guilty-money-laundering-conspiracy. Another related guilty plea – Lawrence W. Parker, Jr. – was unsealed in 2018.
26. *United States v. Belisario*, Indictment, No. 18-80160 (S.D. Fla. Aug. 16, 2018), https://www.justice.gov/opa/press-release/file/1112816/download.

United States

Continued from page 15

transactions at favorable rates.[27] Two additional defendants, including a former Treasurer of Venezuala, pleaded guilty to related charges.[28]

- A guilty plea by the former Executive Director of Honduras's Institute of Social Security (Carlos Zelaya) relating to his role in laundering more than $1.3 million in bribe payments.[29]
- Indictments against three former Credit Suisse bankers, a former Mozambique Finance Minister, and a Middle Eastern salesman[30] relating to alleged fraud and bribery in connection with Mozambican debt issuances.

Individuals with Related Corporate Resolutions

Several of the cases against individuals stemmed from corporate settlements reached in 2018 or earlier. These were: Mark Lambert (Transport Logistics);[31] Donville Innis, the former Minister of Industry of Barbados (ICBL);[32] Azat Martirossian, Vitaly Leshkov, and Petros Contoguris (Rolls-Royce);[33] and Eberhard Reichert (Siemens).[34]

Continued on page 17

27. DOJ Press Release No. 18-1527, *Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving Over $1 Billion in Bribes* (Nov. 20, 2018), https://www.justice.gov/opa/pr/venezuelan-billionaire-news-network-owner-former-venezuelan-national-treasurer-and-former.
28. *United States v. Jimenez Aray*, Plea Agreement, No. 18-CR-80054 (S.D. Fla. Mar. 23, 2018), https://www.justice.gov/opa/press-release/file/1112821/download; *United States v. Andrade Cedeno*, Plea Agreement, No. 17-CR-80242 (S.D. Fla. Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1112826/download; DOJ Press Release No. 18-1549, *Former Venezuelan National Treasurer Sentenced to 10 Years in Prison for Money Laundering Conspiracy Involving Over $1 Billion in Bribes* (Nov. 27, 2018), https://www.justice.gov/opa/pr/former-venezuelan-national-treasurer-sentenced-10-years-prison-money-laundering-conspiracy.
29. DOJ Press Release No. 18-1288, *Honduran Man Sentenced to More Than Three Years in Prison for Conspiring to Launder Over $1 Million in Bribes and Funds Misappropriated from the Honduran Social Security* (Oct. 3, 2018), https://www.justice.gov/opa/pr/honduran-man-sentenced-more-three-years-prison-conspiring-launder-over-1-million-bribes-and.
30. *United States v. Boustani*, Indictment, No. 18-CR-00681-WFK (E.D.N.Y. Dec. 19, 2018).
31. DOJ Press Release No. 18-34, F*ormer President of Maryland-Based Transportation Company Indicted on 11 Counts Related to Foreign Bribery, Fraud and Money Laundering Scheme* (Jan. 12, 2018), https://www.justice.gov/opa/pr/former-president-maryland-based-transportation-company-indicted-11-counts-related-foreign.
32. DOJ Press Release No. 18-1021, *Former Member of Barbados Parliament and Minister of Industry Charged with Laundering Bribes from Barbadian Insurance Company* (Aug. 6, 2018), https://www.justice.gov/opa/pr/former-member-barbados-parliament-and-minister-industry-charged-laundering-bribes-barbadian.
33. DOJ Press Release No. 18-693, *Former Armenian Ambassador and a Russian National Charged in Foreign Bribery and Money Laundering Scheme* (May 24, 2018), https://www.justice.gov/opa/pr/former-armenian-ambassador-and-russian-national-charged-foreign-bribery-and-money-laundering.
34. DOJ Press Release No. 18-319, *Former Siemens Executive Pleads Guilty to Role in $100 Million Foreign Bribery Scheme* (Mar. 15, 2018), https://www.justice.gov/opa/pr/former-siemens-executive-pleads-guilty-role-100-million-foreign-bribery-scheme.

United States
Continued from page 16

DOJ Trial Conviction

In addition to announcing indictments, arrests, and guilty pleas, DOJ also secured one trial conviction in 2018. In December 2018, a jury convicted Chi Ping Patrick Ho (former member of the Hong Kong Executive Council) of FCPA and international money laundering violations related to his involvement in a scheme to bribe foreign leaders in Chad and Uganda to secure business advantages for CEFC China Energy Company Limited, a Shanghai-based energy conglomerate.[35] Ho's trial included testimony regarding the offer of gift boxes containing $2 million in cash to the President of Chad.[36]

SEC Individual Enforcement

As has become typical, the SEC brought fewer individual actions than DOJ, announcing settlements with 4 individuals in 2018, 3 of whom had an associated corporate settlement:

- Panasonic: In December 2018, SEC announced settlements with two former Panasonic Avionics senior executives – former CEO Paul A. Margis, who was charged in connection with the FCPA charges, and former CFO Takeshi "Tyrone" Uonaga, who was charged in connection with the improper revenue recognition scheme.[37]
- SQM: In September 2018, SEC announced a settlement with the former CEO of Chile-based chemical and mining company Sociedad Química y Minera de Chile, S.A. ("SQM") – Patricio Contesse González.[38] The SEC seized the opportunity to reiterate that "when misconduct is directed by the highest level of management it is critical that they are held accountable for their conduct."[39] Last year, SQM paid $30 million to settle with the SEC and DOJ.

Continued on page 18

35. Ye Yanming, the chairman of CEFC, was detained by Chinese authorities in March and has not been publicly heard from since that time. It is assumed (but cannot be confirmed) that his detention is at least partly related to the charges against Ho. *See* Eric Ng and Xie Yu, "China detains CEFC's founder Ye Jianming, wiping out U.S.$153 million in value off stocks," South China Morning Post (March 1, 2018), https://www.scmp.com/business/companies/article/2135238/china-detain-cefc-founder-ye-jianming-stocks.
36. DOJ Press Release No. 18-426, *Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Convicted of International Bribery, Money Laundering Offenses* (Dec. 5, 2018), https://www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-convicted.
37. *See* Margis Order; Uonaga Order.
38. Order, *In re González*, Securities Exchange Act Rel. No. 84280 (Sept. 25, 2018), https://www.sec.gov/litigation/admin/2018/34-84280.pdf; SEC Press Release No. 2018-212, *SEC Charges Former CEO of Chilean-Based Chemical and Mining Company With FCPA Violations* (Sept. 25, 2018), https://www.sec.gov/news/press-release/2018-212 [hereinafter "González Press Release"].
39. González Press Release, *supra* n.38.

United States
Continued from page 17

- And finally, Joo Hyun (Dennis) Bahn settled with SEC in September in connection with a scheme through which he and his father (Ban Ki Sang) attempted to bribe a foreign official in the Middle East to secure a sale of the Landmark 72 skyscraper in Vietnam to a sovereign wealth fund. Bahn agreed to pay $225,000 in disgorgement, which was deemed satisfied by the forfeiture and restitution ordered in connection with his January 2018 guilty plea to conspiracy and substantive FCPA charges brought earlier by DOJ.[40]

"[T]he SEC . . . announc[ed] settlements with four individuals in 2018, three of whom had an associated corporate settlement."

D. FCPA Case Law and Enforcement Policies

Developments in Case Law

We continue tracking closely developments in FCPA case law and related impacts on anti-corruption enforcement. Although relatively rare, 2018 saw some major developments in this regard. The Second Circuit issued its jurisdiction-clarifying decision in *Hoskins*, setting limits on FCPA jurisdiction. The Supreme Court's 2017 remedy-limiting decision in *Kokesh* already has had an observable impact on SEC enforcement. Additionally, the Supreme Court's 2018 decision in *Digital Realty* has narrowed meaningfully the federal protections afforded to whistleblowers.

Hoskins

As previously reported,[41] the Second Circuit's long-awaited 2018 decision in *United States v. Hoskins*[42] held that the government may not use allegations of conspiracy to expand the extraterritorial reach of the FCPA over foreign nationals. In *Hoskins*, the Second Circuit held that a non-resident foreign national who is not an officer, director, shareholder, employee, or agent of a U.S. issuer or domestic concern, and who has not acted within the territory of the United States, cannot be held liable for violating the FCPA under a conspiracy theory.

Continued on page 19

40. *See* Order, *In re Bahn*, Securities Exchange Act Rel. No. 84054 (Sept. 6, 2018), https://www.sec.gov/litigation/admin/2018/34-84054.pdf.
41. *See* Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett, Philip Rohlik, Jil Simon & Anne M. Croslow, "Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery," FCPA Update, Vol. 10, No. 1 (Aug. 2018), https://www.debevoise.com/insights/publications/2018/08/20180830-fcpa-update-august-2018.
42. 902 F.3d 69 (2d Cir. 2018).

United States
Continued from page 18

While the ruling is undoubtedly an important curb on some potential sources of liability for foreign nationals, the continued availability of conspiracy theories for agents may limit the practical implications. The most significant impact may be on foreign companies that enter into joint ventures with U.S. issuers or domestic concerns, unless there are facts establishing that the foreign national acted as an agent of the U.S. company.

With the government having declined to appeal the *Hoskins* ruling, it remains to be seen whether the government will seek further litigation in other circuits. Further clarity is necessary on the meaning of "agency" under the FCPA before we can assess the full effect of *Hoskins*. However, in what may be the first indication of that impact, DOJ voluntarily dismissed the first prong of each of the three bribery-related charges it brought against Barbados government minister Donville Inniss.[43]

Kokesh

In *SEC v. Kokesh*, a unanimous Supreme Court held in 2017 that any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued.[44] *Kokesh* already has had a significant impact on the SEC, both in the FCPA context and generally, including:

- In July, the district court for the Southern District of New York dismissed charges against Michael Cohen and Vanja Baros, two former Och Ziff employees, holding that the charges were time-barred under *Kokesh*.[45]
- In December, DOJ disclosed a declination with disgorgement with respect to Polycom, obtaining $20 million in disgorgement that the SEC was time-barred from recovering.[46]
- Finally, in its Annual Enforcement Report in November, the SEC Enforcement Division projected that, as a result of *Kokesh*, it had foregone at least $900 million in disgorgement just in cases already filed.[47]

Continued on page 20

43. Motion to Dismiss, *United States v. Inniss*, No. 18-cr-00134-KAM (E.D.N.Y. Dec. 12, 2018), ECF. No. 25.
44. *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).
45. Samuel Rubenfeld, "Judge Dismisses SEC Suit Against Former Och-Ziff Executives" (WSJ, July 13, 2018), *available at* https://www.wsj.com/articles/judge-dismisses-sec-suit-against-former-och-ziff-executives-1531512230.
46. *See* Polycom Declination, *supra* n.13
47. *See* Debevoise Update at 3, "SEC's Division of Enforcement Issues 2018 Annual Report," (Nov. 5, 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/11/20181105_secs_division_of_enforcement_issues_2018_annual_report.pdf.

United States
Continued from page 19

Digital Realty

On February 21, 2018, the Supreme Court ruled that the Dodd-Frank Act's anti-retaliation provision applies only to individuals who report violations of the federal securities laws to the SEC, and does not extend to individuals who only report misconduct internally to their employers.[48]

As discussed in a prior Client Update,[49] the *Digital Realty* decision may impact broader whistleblowing trends:

- ***First***, fewer individuals will receive anti-retaliation protection because only those who report to the SEC will be protected under Dodd-Frank.
- ***Second***, because individuals are not retroactively afforded protection, employees are now incentivized to report alleged wrongdoing concurrently to the SEC and through internal reporting mechanisms.
- ***Third***, the ruling likely will decrease the number of frivolous retaliation suits brought against employers.

Nonetheless, in light of protections afforded to internal whistleblowers under Sarbanes-Oxley and enforcement actions brought by the SEC against companies for retaliation and interference with whistleblowing activity, companies should ensure that their policies and procedures are designed to encourage reporting and that effective responses to potential whistleblowing are in place.[50]

Enforcement Policy Developments

DOJ announced several new policies this year and further expanded the use of its Corporate Enforcement Policy to non-FPCA cases.

Coordination

In May, Deputy Attorney General Rod Rosenstein announced a new Policy on the Coordination of Corporate Resolution Penalties ("Coordination Policy"). This policy nobly seeks to address "piling on" – where different enforcement authorities penalize a company for the same underlying conduct. This has become a serious concern, including given the rise in global enforcement, which has increased the risk that

Continued on page 21

48. *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 772–73 (2018); *see also* Debevoise Client Update, "Supreme Court Clarifies Scope of Dodd-Frank's Whistleblower Protections," (Feb. 22, 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/02/20180222%20supreme_court_clarifies_whistleblower_protections [hereinafter "Digital Realty Update"].
49. *Digital Realty* Update, *supra* n.48.
50. *Id.*

United States

Continued from page 20

competing, sometimes uncoordinated enforcement actions will result in duplicative penalties and overlapping compliance commitments for the same conduct.[51]

Largely memorializing recent DOJ efforts already in place, the Coordination Policy expressly provides that DOJ should consider, "as appropriate," penalties imposed by other enforcement authorities. Specifically, the policy:

- Affirms that the government should not use its criminal enforcement authority unfairly to extract larger fines in civil cases;
- Requires coordination among different DOJ divisions to avoid duplicative penalties;
- Encourages coordination with other federal, state, local, and foreign enforcement authorities; and
- Sets out factors for determining whether multiple penalties are appropriate, including:
  - egregiousness of the misconduct,
  - statutory mandates regarding penalties,
  - risk of delay in reaching a resolution, and
  - adequacy and timeliness of a company's disclosure and cooperation.[52]

M&A

In speeches given by senior DOJ officials in 2018, DOJ addressed how the Corporate Enforcement Policy applies to M&A activity.[53] While reiterating the importance of acquirers applying strong compliance practices to their acquisitions, DOJ acknowledged the "many benefits when law-abiding companies with robust compliance programs are the ones to enter high-risk markets . . . or take over otherwise problematic companies."[54]

Continued on page 22

51. *See* U.S. Dep't of Justice, "Policy on Coordination of Corporate Resolution Penalties," (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download [hereinafter "Coordination Policy"]; Debevoise Update, "DOJ's New Policy on Coordination of Corporate Resolutions Aims to Reduce 'Piling On,'" (May 11, 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/05/20180511_dojs_new_policy_on_coordination_of_corporate_resolutons_aims_to_reduce_piling_on.pdf.
52. Coordination Policy, *supra* n.51, at 2.
53. DOJ Press Release No. 18-975, *Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets* (July 25, 2018), https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th [hereinafter "Miner ACI Remarks"]; *see also* Andrew M. Levine, Philip Rohlik & Kamya B. Mehta, "Mitigating Anti-Corruption Risk in M&A Transactions: Successor Liability and Beyond," FCPA Update, Vol. 10, No. 5 (Dec. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/12/201812_fcpa_update_december_2018.pdf [hereinafter "Dec. 2018 FCPA Update"].
54. Miner ACI Remarks, *supra* n.53.

United States

Continued from page 21

It will be interesting to see how DOJ attempts to deal with the challenge between maintaining a credible threat of FCPA enforcement without discouraging investment in difficult markets by companies trying in good faith to do the right thing. Acquirers can take some comfort that DOJ expressly is not looking to deter companies from acquiring others with past corruption issues. However it is unclear whether DOJ speeches will amount to much more than a formalization of pre-existing practice, with the added wrinkle that DOJ now expects to obtain disgorgement when it declines under the Corporate Enforcement Policy.[55]

"It will be interesting to see how DOJ attempts to deal with the challenge between maintaining a credible threat of FCPA enforcement without discouraging investment in difficult markets by companies trying in good faith to do the right thing."

Monitorships

Perhaps the most onerous non-monetary obligation resulting from an FCPA settlement is the appointment of a corporate monitor. In October, DOJ announced new guidance on monitorships, stating that DOJ would impose a monitor "only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens."[56] The memo provided that prosecutors evaluating potential benefits of a monitor should consider whether:

- the misconduct involved manipulation of books and records or exploited an inadequate compliance program or internal controls;
- the misconduct was pervasive or facilitated by senior management;
- the company made significant investments and improvements to its compliance program and internal controls; and
- remedial improvements have been tested to demonstrate that they would detect similar misconduct in the future.[57]

Continued on page 23

55. *See* Dec. 2018 FCPA Update, *supra* n.53, at 9.
56. *See* U.S. Dep't of Justice, "Selection of Monitors in Criminal Division Matters," (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download, at 2.
57. *Id.*

United States
Continued from page 22

Companies should take note that a monitor likely will not be necessary where a company's "compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution,"[58] which provides an opportunity for a company facing an enforcement action to make significant improvements during the course of an investigation and avoid a monitor at the end.

Revisions to Individual Liability Under the Yates Memo

In November 2018, Deputy Attorney General Rod Rosenstein announced changes to the 2015 Yates Memo's policies concerning individual accountability in corporate cases, including as previously incorporated in the Corporate Enforcement Policy. These changes afford prosecutors greater flexibility in assessing cooperation credit in corporate investigations.[59]

While continuing to emphasize that the "most effective deterrent to corporate criminal misconduct is identifying and punishing" culpable individuals, the policy announcement reflected a more practical approach. It no longer requires companies to identify *all* culpable individuals and provide *all* relevant factual information about their misconduct, regardless of their position at the company. For purposes of warranting cooperation credit, DOJ now requires that companies identify only those individuals who were "substantially involved in or responsible for" the misconduct.

Although "substantial involvement" is not defined, Rosenstein emphasized that DOJ is most interested in knowing "who authorized the misconduct, and what they knew about it." Companies should thus be aware that DOJ may now scrutinize high-ranking individuals even more carefully. This also raises the welcome prospect that DOJ will not insist on investigating every last employee's low-level conduct, instead allowing the company to focus on identifying the main "bad actors."

E. FCPA Enforcement in 2018 – Focus on Financial Sector

2018 was a particularly active year for cases involving the financial services sector. Although a target of significant interest for white-collar prosecutors in other areas, the financial services industry (broadly defined) historically has not been a particular focus of FCPA enforcement actions.

Continued on page 24

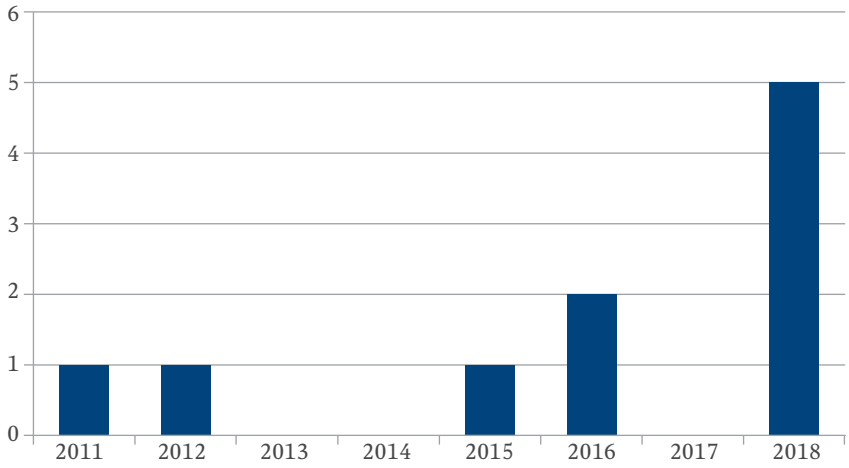
58. *Id.*

59. U.S. Dep't of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0; *see also* Kara Brockmeyer, Andrew M. Levine, Sarah Wolf & Javier Alvarez-Oviedo, "DOJ Revises Yates Memo to Provide More Flexibility in Corporate Investigations," FCPA Update, Vol. 10, No. 5 (Dec. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/12/201812_fcpa_update_december_2018.pdf.

United States

Continued from page 23

Number of Financial Services Corporate Actions



Between 2011 and 2017, there were very few financial services-related cases, with most years seeing none or only one:

- One corporate action in 2011: SEC Order and DOJ NPA against Aon[60] (the SEC action being largely based on travel and entertainment allegations);[61]
- One corporate action in 2012: SEC order against Allianz SE;[62]
- One corporate action in 2015: SEC Order against Bank of New York Mellon in the first of the hiring practices cases;[63]
- Two corporate actions in 2016: SEC Order and DOJ DPA with Och-Ziff[64] and the SEC Order and DOJ NPA with JPMorgan (Asia Pacific) hiring practices case;[65]

Continued on page 25

60. DOJ Press Release No. 11-1678, *Aon Corporation Agrees to Pay a $1.76 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act* (Dec. 20, 2011), https://www.justice.gov/opa/pr/aon-corporation-agrees-pay-176-million-criminal-penalty-resolve-violations-foreign-corrupt; SEC Litigation Release No. 22203, *SEC Files Settled FCPA Charges Against Aon Corporation* (Dec. 20, 1011), https://www.sec.gov/litigation/litreleases/2011/lr22203.htm [hereinafter "Aon Press Release"].

61. *See* Aon Press Release, *supra* n.60.

62. SEC Press Release No. 2012-266, *SEC Charges Germany-Based Allianz SE with FCPA Violations* (Dec. 17, 2012), https://www.sec.gov/news/press-release/2012-2012-266htm.

63. *See* Sean Hecker, Bruce E. Yannett, Philip Rohlik & David Sarratt, "The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials," FCPA Update, Vol. 7, No. 1 (Aug. 2015), https://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015.

64. *See* Paul R. Berger, Colby A. Smith, Rushmi Bhaskaran & Kayla Bensing, "In First Major FCPA Enforcement Action Against a Hedge Fund, U.S. Settles with Och-Ziff Capital Management," FCPA Update Vol. 8, No. 3 (Oct. 2016), https://www.debevoise.com/insights/publications/2016/10/fcpa-update-october-2016.

65. *See* Bruce E. Yannett, Andrew M. Levine & Philip Rohlik, "Beyond 'Sons and Daughters': JPMorgan Resolves Hiring Practices Probe," FCPA Update, Vol. 8, No. 4 (Nov. 2016), https://www.debevoise.com/insights/publications/2016/11/fcpa-update-november-2016.

United States
Continued from page 24

In contrast, 2018 included five corporate cases related to the financial sector (or financial sector activities): Dun and Bradstreet, Credit Suisse, Société Générale, Legg Mason, and Insurance Company of Barbados. There also were several individual indictments announced in connection with the 1MDB, Mozambique bonds, and Venezuelan currency exchange-related schemes.

The improper conduct underlying the 2018 FCPA enforcement actions involving financial services or financial services-related activities, included a wide range of common factual scenarios.

- **Kickbacks and other payments given to broadly defined "foreign officials"** made by employees of a foreign subsidiary behaving according to local (illegal) practice in the Dun & Bradstreet matter.

"Between 2011 and 2017, there were very few financial services-related cases, with most years seeing none or only one."

- **Benefits from hiring practices** in the Credit Suisse case.

The Credit Suisse resolution[66] is the third hiring practices case involving a bank (following Bank of New York Mellon and JPMorgan (Asia Pacific) Securities). Like JPMorgan, the DOJ NPA involved Credit Suisse's Hong Kong subsidiary, Credit Suisse (Hong Kong) Limited.[67] As with JPMorgan, the Credit Suisse NPA and Order allege that Credit Suisse (Hong Kong) hired over 100 candidates referred by "foreign officials." From this universe of 100 hires, four are described at length in the resolution documents. And like JPMorgan, the referral hires allegedly were tracked on a spreadsheet, with the resolution documents quoting copious internal communications and emails with SOE officials, intended to demonstrate that hires

Continued on page 26

66. *See* Non-Prosecution Agreement Letter from the U.S. Dep't of Justice, Criminal Division to Herbert S. Washer, Esq., Re: *Credit Suisse (Hong Kong) Limited Criminal Investigation*, (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download; Order, *In re Credit Suisse Group AG*, Securities Exchange Act Rel. No. 83593 (July 5, 2018), https://www.sec.gov/litigation/admin/2018/34-83593.pdf.

67. *See* Order, *In re JPMorgan Chase & Co.*, Securities Exchange Act Rel. No. 79335 (Nov. 17, 2016), https://www.sec.gov/litigation/admin/2016/34-79335.pdf (the JPMorgan Order also included a finding of a violation of the books and records provisions).

United States

Continued from page 25

were allegedly made as "*quid pro quo*" transactions.[68] Unlike the JPMorgan (and Bank of New York Mellon) enforcement actions, which largely involved internships, the examples in the Credit Suisse matter pertain mostly to full-time positions, for which some of the referred candidates received significant remuneration and bonuses (none of which is alleged to have been paid to the foreign officials).[69]

A number of other Hong Kong-based subsidiaries of major banks have announced that they are cooperating with hiring-practices related investigations, so 2019 and beyond likely will see other hiring practices resolutions. Financial services firms in Asia and elsewhere should ensure that they have rigorous controls around hiring of politically connected candidates.

- **Payments through third parties to unidentified (but presumably senior) foreign officials** in the SocGen and Legg Mason matters.

After the fall of Colonel Gaddafi, aided by documents made available by the change in the Libyan government, the SEC began a probe into dealings with Libya's sovereign wealth fund and other Libyan financial institutions. In 2016, Och-Ziff became the first U.S. financial services company to become the subject of an enforcement action related to the Libya inquiry.[70] In 2018, Société Générale and Legg Mason[71] settled related actions relating to dealings with Libyan banks. While additional cases involving Libya are possible, the Libyan cases arise from rather unique circumstances, namely a greenfield market (because of sanctions) in a country with a low CPI score, the government of which was subsequently overthrown, resulting in evidence of corruption coming to light.

- **Payments to identified or identifiable senior political leaders of a foreign country**, which are less commonly seen in FCPA enforcement actions.[72]

Continued on page 27

68. Non-Prosecution Agreement Letter from the U.S. Dep't of Justice, Criminal Division to Herbert S. Washer, Esq., Re: *Credit Suisse (Hong Kong) Limited Criminal Investigation*, (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download [hereinafter "Credit Suisse NPA"]; Order ¶ 12, In re Credit Suisse Grp AG, Securities Exchange Act Rel. No. 83593 (July 5, 2018), https://www.sec.gov/litigation/admin/2018/34-83593.pdf.

69. Credit Suisse NPA ¶¶ 32, 38, 41, 48, 50, 54.

70. *See* Berger et al, *supra* n.64.

71. *See* Levine et al, *supra* n.6.

72. Other recent cases involving large payments to identifiable high-ranking government officials include the Uzbekistan telecom cases and the Teva Pharmaceuticals case. *See, e.g.*, DOJ Press Release No. 16-194, *VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme* (Feb. 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million ("a close relative of a high-ranking government official"); DOJ Press Release No. 17-1035, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan* (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965 (same); DOJ Press Rel. No. 16-1522, *Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges* (Dec. 22, 2016), https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt ("high ranking Russian government official").

United States

Continued from page 26

Perhaps the most interesting financial services cases brought in 2018 involve former employees of investment banks and others alleged to have participated in and benefitted from what are alleged to be massive frauds in connection with debt issuances for sovereign financing vehicles. The two unrelated cases involve:

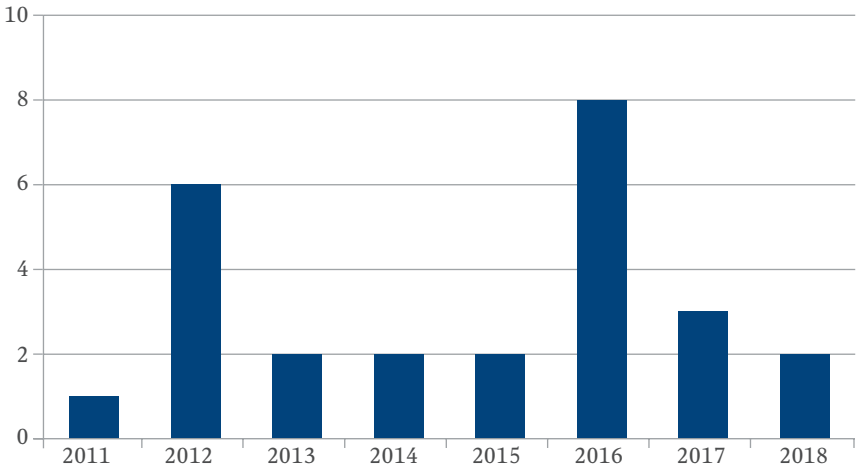
- $6.5 billion in bond issuances for the Malaysian sovereign wealth fund 1MDB.[73]
- $2 billion in syndicated loans issued to develop Mozambique's maritime resources.[74]

Both sets of indictments are noteworthy in that they involve what are alleged to be complex frauds, through which the conspirators evaded the internal controls of investment banks, enriched themselves, and paid significant amounts to identified or identifiable high-ranking foreign officials.

F. Focus on Healthcare

2018's Sanofi and Stryker settlements, discussed above, mark the twenty-fifth and twenty-sixth times the SEC and/or DOJ have announced an FCPA action against a pharmaceutical or medical device company since the beginning of 2011. While 2018's two settlements represent a decline from the three life sciences settlements in 2017 and the eight from 2016, 2018's numbers represent a return to a relatively normal two-per-year rate. And 2018's settlements – and the language accompanying those settlements – do not indicate any reason to believe that government scrutiny will ease.

Healthcare / Med Device Settlements



Continued on page 28

73. *See* 1MDB Press Release, *supra* n.19.

74. *See United States v. Boustani*, Indictment, No. 18-CR-00681-WFK (E.D.N.Y. Dec. 19, 2018).

United States
Continued from page 27

In the press release announcing the Sanofi settlement, the chief of the SEC's FCPA Unit warned that "[b]ribery in connection with pharmaceutical sales remains as a significant problem despite numerous prior enforcement actions involving the industry." And the Stryker settlement announced later that month highlights that past involvement in those prior enforcement actions offers little respite.

Life sciences companies are faced with unique risks because they operate in highly-regulated environments with many government touchpoints, often needing licenses and approvals from government officials and relying on third parties to help obtain those approvals and distribute products. Because the U.S. government views individual doctors and health care providers ("HCPs") employed at state-owned hospitals or medical centers (and often woefully underpaid) as foreign officials, there are numerous opportunities for companies to run into trouble.

For additional lessons learned and items to keep in mind, refer to our life sciences round-up.[75]

F. The "China Initiative"

On November 1, 2018, DOJ issued a press release announcing what then-Attorney General Jeff Sessions called DOJ's "China Initiative."[76] While the majority of the initiative addresses cybersecurity, theft of trade secrets, and economic espionage, one component is to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses." The inclusion of FCPA enforcement in an initiative aimed at "countering Chinese national security threats" is unusual. It prompted many to ask whether the Trump administration was seeking to weaponize the FCPA in aid of broader disputes with China.

While criticism of aggressive enforcement of the FCPA's extraterritorial aspects has been common, robust enforcement of the FCPA has contributed to stigmatizing corrupt behavior by corporations and leveling the playing field in international commerce. The same is true of the multilateral efforts such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and various legal reforms abroad. Such targeted enforcement also has provided a riposte to occasional complaints from highly-placed personalities that the FCPA puts U.S. companies at a disadvantage.[77]

Continued on page 29

75. *See* Kara Brockmeyer, Andrew M. Levine, Paul D. Rubin, Philip Rohlik & Andreas A. Glimenakis, "Sanofi Settlement Highlights Risk in the Life Sciences Industries," FCPA Update, Vol. 10, No. 2 (Sept. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/09/20180928_fcpa_update_september_2018_v2.pdf.

76. DOJ Press Release No. 18-1436, *Attorney General Jeff Session's China Initiative Fact Sheet* (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download.

77. *See, e.g.*, Jeremy Berke, *After Trump Took Office, He Told Tillerson That American Businesses Were Being Unfairly Penalized by Laws Prohibiting Them From Bribing Foreign Officials*, Business Insider (Oct. 6, 2017), https://www.businessinsider.com/trump-tillersonamerican-businesses-bribing-foreign-officials-2017-10.

United States

Continued from page 28

Given the active participation of Chinese companies in the industrial sectors and jurisdictions with high corruption risk, one might expect an even greater number of FCPA enforcement involving Chinese companies. On the other hand, there is little law enforcement cooperation between the United States and China, and Chinese companies are significantly less integrated into the U.S. economy than others, sometimes depriving regulators of a jurisdictional nexus. Given the Second Circuit's ruling in *Hoskins*,[78] the potential jurisdictional difficulties in pursuing Chinese companies have only increased.

While the threat of FCPA enforcement is a tool that can be (and already is) used to encourage companies to adopt international best practices regarding corruption, singling out a particular nation's companies for FCPA enforcement, including tying it "national security," seems unwise and counterproductive. Doing so opens FCPA enforcement up to further charges of overreach and politicization. Leveling the international playing field involves encouraging foreign companies to adopt ethical business practices, both to mitigate enforcement exposures and to join the growing community of companies that have embraced anti-corruption compliance. Singling out a particular country's companies may suggest unhelpfully that they are unwelcome in the anti-corruption club and encourage those companies to dismiss inquiries from U.S. regulators as politically motivated. It also seems likely to discourage cooperation by the country involved.[79] The FCPA has served the United States and its companies well through aggressive unbiased enforcement. The suggestion of politicization or bias could provide a convenient excuse for countries (especially non-OECD countries) to dismiss corruption matters as a foreign policy concern of already powerful states.

Continued on page 30

78. 902 F.3d 69 (2d Cir. 2018); *see supra* Section I.D.

79. The absence of U.S.-China cooperation is evidenced by the SEC's continuing difficulties in accessing audit work papers of Chinese companies listed in the United States. *See* SEC Public Statement, *Statement on the Vital Role of Audit Quality and Regulatory Access to Audit and Other Information Internationally – Discussion of Current Information Access Challenges with Respect to U.S.-listed Companies with Significant Operations in China* (Dec. 7, 2018), https://www.sec.gov/news/public-statement/statement-vital-role-audit-quality-and-regulatory-access-audit-and-other.

United Kingdom

I. Introduction

The absence of significant corporate anti-bribery resolutions in the UK in 2018 should not obscure important institutional and legal developments relevant to the companies and their advisers. In August, Lisa Osofsky took up her post as director of the Serious Fraud Office ("SFO"), the main authority responsible for investigating and prosecuting bribery offenses. With prosecutions of individuals in bribery cases resulting in predictably mixed outcomes, significant setbacks in high-profile (non-bribery) prosecutions, and an apparent stalling of progress in ongoing corporate investigations, the industry is waiting to see whether a change in director will lead to broader changes in the SFO's approach.

There were also important legal developments in 2018. The Court of Appeal reversed the contentious High Court ruling in *SFO v. ENRC*, giving comfort to companies that records of interviews as well as other documents created in the course of internal investigations can attract privilege. However, in another case the High Court ruled that a company that has concluded a DPA may be obliged to produce any material relevant to follow-on prosecutions, in particular records of interviews, even if privileged. And we would be remiss if we did not engage in some Brexit speculation.

II. Institutional Developments

A. SFO

On August 28, 2018, Lisa Osofsky, took up her position as the SFO's new director. A former Deputy General Counsel and Ethics Officer at the U.S. Federal Bureau of Investigation, Osofsky replaced David Green QC, who served as SFO Director for six years.

A number of senior prosecutors also left the SFO to take up roles in private practice, including former General Counsel Alun Milford and John Gibson, the case controller in charge of the SFO's investigation into ENRC.

In September 2018, Osofsky pledged to be a different kind of director, bringing both a private and public sector view, work ethic, and commitment to her role. So what can we expect to see from the SFO under Osofsky's leadership in 2019?

Continued on page 31

United Kingdom

Continued from page 30

Streamlining investigations: At the end of 2018, Osofsky announced that she was personally reviewing over 70 SFO case files to assess why it was taking so long to conclude investigations and reach charging decisions. Under her direction, the SFO appears committed to progressing cases more quickly, in particular at the investigative stage.

Cooperation with overseas regulators: In her keynote address at the ACI FCPA conference in Washington in November 2018, Osofsky stated: "If there is only one thing that you take away from this conference, take this away: Prosecutors, regulators and law enforcement around the world are working more closely together than we ever have before." To this end, Osofsky has already met with numerous regulators around the world. She appears determined to maintain these relationships, particularly in light of the risk represented by Brexit to the UK's relationship with bodies such as Europol and Eurojust, as well as its likely exclusion from instruments of procedural cooperation such as the European Arrest Warrant and European Investigation Order. In September 2018, the SFO hosted a secondee from the U.S. DOJ in a move to further strengthen that relationship.

Deployment of U.S.-style investigative methods: Having brought in members of the FBI and the U.S. DOJ (as well as a U.S.-qualified law firm partner on secondment) to advise SFO staff, Osofsky also wants to make greater use of a tactic widely used by U.S. prosecutors, namely the "flipping" of insiders to cooperate with investigators and assist in the identification of key documents.[1]

Corporate cooperation: Osofsky has emphasised the importance of full cooperation from those who have committed corporate offenses to ease the path to a settlement. In her view, this does not mean only responding to requests to which a company may in any event be obliged to accede. Rather, it means, "tell me something I don't know. Help the prosecutor find the truth. Don't obstruct, or mislead, or delay."[2] Osofsky has made it clear that, if a company wants to resolve an investigation through a DPA, it must cooperate from the start.

Use of artificial intelligence: Continuing her predecessor's efforts, Osofsky has highlighted the promise of artificial intelligence. Before leaving the SFO, Green had praised his teams' use of AI in the review of significant volumes of documents secured in investigations. It is understood that the focus of the SFO's investments in technology will be: (i) mastering the plethora of electronic means of communication; (ii) targeting document searches; and (iii) facilitating the discharging of disclosure obligations.

Continued on page 32

1. House of Commons, Justice Committee, Oral evidence: Serious Fraud Office, HC 1653 (Dec. 18, 2018), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/serious-fraud-office/oral/94785.html.
2. Serious Fraud Office, "Keynote address at the FCPA Conference, Washington DC" (Dec. 4, 2018), https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc.

United Kingdom
Continued from page 31

Ongoing discussion of corporate criminal liability: The SFO has long called for the introduction of a general offense of "failure to prevent economic crime", modelled on the so-called "corporate offense" in the Bribery Act. In November 2018, Osofsky expressed her support for the introduction of such an offense. It is envisaged that it would cover economic crimes committed on a company's behalf by employees or other company representatives, and would circumvent the high evidential hurdle to successfully prosecuting companies under English law.

"With prosecutions of individuals in bribery cases resulting in predictably mixed outcomes, significant setbacks in high-profile (non-bribery) prosecutions, and an apparent stalling of progress in ongoing corporate investigations, the industry is waiting to see whether a change in director will lead to broader changes in the SFO's approach."

B. CPS

2018 saw a changing of the guard also at the Crown Prosecution Service ("CPS"), the UK's principal public prosecuting agency responsible for all criminal enforcement activity not covered by specialist authorities, principally the SFO and the Financial Conduct Authority. On July 24, 2018 it was announced that Max Hill QC would replace Alison Saunders as Director of Public Prosecutions. Hill took up his new functions on 1 November 2018.

2018 saw the CPS come under fire for serious disclosure failings leading to innocent people being pursued through the courts. The CPS has struggled in recent times, suffering from an endemic shortage of funding following budget cuts of 25 percent which have seriously impacted its ability to allocate resources efficiently and effectively. As a result, legal bodies have called for the government to increase CPS funding, with the Home Affairs Committee of the House of Commons warning of "*dire consequences for the public safety and criminal justice*" if funding is not increased.

In July 2018, in the wake of a series of collapsed trials under the watch of then Director of Public Prosecutions Alison Saunders, the Justice Select Committee of the House of Commons issued a report which found major flaws in the way in which disclosure was handled. Commenting at the time the report was released, Saunders merely noted that disclosure improvements were underway, saying that "*disclosure has been a systemic issue for quite some years*". Shortly before leaving her post in October 2018, however, Saunders stated that the criminal justice system was "*creaking*" and unable to cope with the huge amounts of data being generated.

Continued on page 33

United Kingdom
Continued from page 32

In November 2018, the Government published its own review of the efficiency and effectiveness of disclosure in the criminal justice system. In launching the review, Attorney General Geoffrey Cox made evident his intention to hold the leaders of the criminal justice system to account for delivering on the recommendations set out in the report.

C. National Economic Crime Centre

On October 31, 2018, as part of the Government's revised Anti-Corruption Strategy, the National Economic Crime Centre ("NECC") began to operate as the national authority for coordinating the UK's operational response to economic crime. The Anti-Corruption Strategy, which was published in December 2017, sets out the Government's plans for tackling both domestic and international corruption. As part of this initiative, the NECC works with different law enforcement agencies, the Government as well as the private sector with the aim of improving the UK's ability to fight economic crime, with a particular focus on money laundering and corruption.

Concerns have been raised as to whether the NECC will actually be an effective resource in the fight against economic crime; inter-agency cooperation is nothing new, and many of the powers conferred on the NECC are already held by the UK's National Crime Agency ("NCA") sparking concerns of inefficiencies and overlap. In addition, the NECC's power (as a governmental authority) to direct the SFO (an independent prosecuting authority) to carry out investigations can be seen as a risk to the SFO's prosecutorial independence.

D. Economic Crime Strategic Board

The Home Secretary and Chancellor have recently launched a government taskforce comprised of senior figures from the UK financial sector in order to fight economic crime.

The Economic Crime Strategic Board, which will meet twice a year, will set priorities, direct resources and assess performance against the threats of economic crime. The board includes senior executives from banks, representatives from the NCA and the Solicitors Regulation Authority.

E. New Fraud Court in the City of London

In July 2018, plans were announced to build a new flagship court in the City of London, specially designed to handle trials concerning fraud, economic crime and cybercrime. The new court building, planned to be made up of 18 courtrooms, is intended to help shore up London's reputation as a global centre for international business. It will be built on the site of Fleetbank House and has a scheduled opening date of 2025.

Continued on page 34

United Kingdom
Continued from page 33

III. Legal Developments

A. Privilege

In hindsight, 2018 may well be seen as the year when the English law of privilege reverted to orthodoxy, at least as far as the defense bar is concerned.

At the end of 2017, the English law position on litigation privilege, which attaches to communications in the context of actual or contemplated litigation, was in a state of uncertainty. In May 2017, the English High Court held in *SFO v ENRC*[3] that documents, including records of interviews, prepared by lawyers and forensic accountants during an internal investigation before the SFO had formally opened a criminal investigation were not covered by litigation privilege. The judgment gave rise to the risk that companies conducting internal investigations could generate potentially damaging, non-privileged documents accessible to government authorities investigating them or to adversaries pursuing ancillary litigation.

1. *Bilta v Royal Bank of Scotland*

Companies received some respite in February 2018 in *Bilta (UK) Ltd v Royal Bank of Scotland pcl*[4]. The English High Court confirmed that documents generated during an internal investigation could be protected by litigation privilege when their disclosure is sought in separate proceedings. The judge in *Bilta* did not view *ENRC* as establishing a general legal principle on the issue of litigation privilege, but rather that it turned on its own facts.[5]

Significantly, the interview notes for which disclosure was sought in *Bilta* related to interviews carried out after HM Revenue and Customs ("HMRC") had sent a letter to RBS asserting it had sufficient grounds to deny an RBS tax reclaim. The judge accepted that this letter by HMRC represented a "watershed moment," and the beginning of a tax dispute, in anticipation of which RBS expended significant funds and conducted the interviews in question.

2. ENRC Appeal

On September 5, 2018, the English Court of Appeal overturned the High Court's judgment in *ENRC*.[6] First and foremost, the Court of Appeal reset the point at which litigation privilege applies. It held that criminal proceedings were reasonably contemplated when the company commenced its internal investigation, following

Continued on page 35

3. *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).
4. [2017] EWHC 3535 (Ch).
5. *See* Debevoise & Plimpton LLP, "Litigation Privilege in UK Internal Investigations Revived?" (Feb. 13, 2018), https://www.debevoise.com/insights/publications/2018/02/litigation-privilege-internal-investigations.
6. *Eurasian Natural Resources Corporation Limited v The Director of the Serious Fraud Office* [2018] EWCA Civ 2006.

United Kingdom
Continued from page 34

whistleblower allegations and adverse media reports. This was "certainly" the case by the time the company received a letter from the SFO referencing the allegations against it and indicating the clear prospect of prosecution in the absence of a self-report. The Court of Appeal clarified that while not "every SFO manifestation of concern" would necessarily satisfy the test, here the SFO had specifically made the prospect of prosecution clear to the company, which had engaged lawyers to deal with that situation.

Helpfully, the Court of Appeal set out that determining the level of knowledge and certainty of prosecution required to invoke litigation privilege, did not require a company to know the full details of what may become known or be certain that prosecution is likely. The Court of Appeal recognized that, unlike an individual suspect, a company will often need to investigate allegations before it can meaningfully asses the likelihood of a prosecution and that such investigation should not need to be made outside the cloak of privilege.

The Court of Appeal also held that a company that is self-reporting to the SFO may rely on litigation privilege in circumstances where prosecution is likely if that self-reporting process does not result in a civil settlement (or a deferred prosecution agreement).

Lastly, in another substantial departure from the first instance judgment, the Court of Appeal held that lawyers' interview notes and forensic accountants' work may fall within "the zone where the dominant purpose may be to prevent or deal with litigation." It is difficult to discern the broader principles emerging from the judgment on this point, but it clearly recognizes that fact-finding investigations and compliance and remediation reviews can in certain contexts be characterized as being for the dominant purpose of avoiding or defending future criminal proceedings, particularly where the company is contemplating prosecution at the time of that work.[7]

In October 2018, the SFO announced that it would not appeal the Court of Appeal's ruling to the Supreme Court. This left open certain issues relating to legal advice privilege, which applies to confidential communications between lawyer and client seeking or providing legal advice. The Court of Appeal accepted that it could not broaden the definition of the "client" as applied to corporate clients.[8] That means that the narrow definition of "client" under English law, which severely restricts the range of individuals at a company who can engage in privileged communications with the company's lawyers, will persist absent statutory reform or Supreme Court intervention.

Continued on page 36

7. *See* Debevoise & Plimpton LLP, "Putting Privilege Back into UK Investigations: the ENRC Appeal" (Sept. 6, 2018), https://www.debevoise.com/insights/publications/2018/09/putting-privilege-back-into-uk-investigations.

8. *See Three Rivers District Council v Governor and Company of the Bank of England (No. 5)* [2003] QB 1556.

United Kingdom
Continued from page 35

B. Disclosure and Duties of Cooperation Following DPAs

Interview records were also the subject of litigation following the 2017 "*XYZ Ltd*" DPA. An individual defendant known as *AL* challenged the refusal of the SFO to obtain and disclose full records of interviews relevant to his defense from the company.[9]

In April 2018, the High Court made it clear that the SFO could not take the company's assertion of privilege at face value, but had to use all means at its disposal, including litigation, to obtain arguably non-privileged material. The High Court went so far as to state that the SFO should have considered whether to require XYZ Ltd to waive privilege over the interview notes as part of its ongoing duty of cooperation under its DPA, and to consider using the threat of a referral to the Crown Court for breach of the DPA.

"[T]he High Court ruled that a company that has concluded a DPA may be obliged to produce any material relevant to follow-on prosecutions, in particular records of interviews, even if privileged."

C. Confirmation of the Extraterritorial Reach of Section 2 Notices

The SFO obtained a favourable judgment in a judicial review brought by the U.S. incorporated professional services company, KBR Inc.,[10] concerning the extraterritorial scope of its investigative powers.

KBR had challenged the lawfulness of a section 2(3) Notice requiring the production of documents held outside the UK issued by the SFO under the Criminal Justice Act 1987 ("CJA 1987"). The Notice was issued as part of the SFO's investigation into Kellogg, Brown & Root Ltd., KBR Inc.'s UK subsidiary, which arises out of the SFO's Unaoil investigation. KBR Inc. challenged the SFO's jurisdiction to request material held outside the United Kingdom by a foreign company by means of a section 2 Notice.

Continued on page 37

9. R (AL) v Serious Fraud Office [2018] EWHC 856.

10. *R (On the Application of KBR Inc.) v The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin), available at http://www.bailii.org/ew/cases/EWHC/Admin/2018/2368.html.

United Kingdom
Continued from page 36

The High Court ruled that the SFO's compulsory document production powers under section 2(3) CJA 1987 have extraterritorial application. The High Court held that as long as the SFO could establish that a foreign company has "sufficient connection" to the UK in the context of the conduct investigated, it can compel that company to produce documents held overseas through a section 2 Notice.

IV. SFO Activity

2018 was a mixed year for the SFO's enforcement efforts. There were no new corporate settlements or DPAs, but the SFO obtained some results in prosecutions following on from prior corporate enforcement actions and announced potentially significant new investigations. At the same time, the SFO suffered significant reversals in high-profile and high-stakes prosecutions which have cast its case preparation and management into doubt.

A. Bribery and Corruption Enforcement: Trial Results and Charges Brought

The SFO's investigation into Alstom Power Ltd and Alstom Network UK Ltd was opened in 2009. Last year, the SFO secured convictions against a corporate entity and two individuals. Alstom Network UK Ltd was convicted of making corrupt payments of €2.4 million to win a €85 million tram and infrastructure contract in Tunisia. Göran Wikström, former Regional Sales Director of Alstom Power Sweden AB, and Nicholas Reynolds, former Global Sales Director, Alstom Power Ltd, were found guilty of falsifying company records to avoid bribery-related checks. Wikström and Reynolds were found to have enabled the Alstom companies to pay more than €5 million in bribes to Lithuanian officials and politicians to win two contracts worth €240 million. Reynolds was sentenced to four years and six months in prison, and ordered to pay £50,000 in costs, and Wikström was sentenced to 31 months in prison and ordered to pay £40,000 in costs. In related proceedings concerning corruption in Hungary, Alstom Network UK Ltd and three individuals were found not guilty. Two individuals were also acquitted of charges of corruption in relation to securing contracts in India and Poland.

Following on from the convictions against logistics and freight company F.H. Bertling Ltd, as well as individuals associated with it, in 2017, the SFO secured convictions against four further individuals in 2018. They were convicted of conspiracy to make corrupt payments to secure contracts in the North Sea and Angola, with sentences that included imprisonment and fines handed down on January 11, 2019. Three other individuals were acquitted in November 2018.

Continued on page 38

United Kingdom

Continued from page 37

On October 24, 2018, the former CEO and COO of the now-bankrupt oil and gas exploration company Afren plc were convicted of fraud by abuse of position and money laundering. The CEO and the COO, Osman Shahenshah and Shahid Ullah, secretly received payments made by Afren to its Nigerian oil field partner through shell companies controlled by them. Shahenshah and Ullah were sentenced to six and five years' imprisonment, respectively, for one count of fraud by abuse of position, six and five years' imprisonment, respectively, for one count of receiving the proceeds of crime contrary to section 329 Proceeds of Crime Act 2002 ("POCA"), and four years' imprisonment each for one count of entering into a money laundering arrangement contrary to section 328 POCA, all sentences to run concurrently.

On June 26, 2018, the SFO brought criminal charges against Unaoil Monaco SAM and Unaoil Ltd. Unaoil Ltd allegedly made improper payments to help secure a contract worth $733 million to build two oil pipelines in southern Iraq for Leighton Contractors Singapore Pte Ltd. Unaoil Monaco SAM allegedly made corrupt payments to win contracts in Iraq for its client SBM Offshore. In May 2018, the SFO brought charges against to individuals: Unaoil's Iraq partner and its Iraq territory manager, in connection with securing the $733 million contract in Iraq. In December 2018, a former vice-president of SBM Offshore was charged with conspiracy to make corrupt payments in relation to the same project. They await trial.

In addition to corporate and individual convictions, the SFO secured notable civil recoveries. In March 2018, the SFO recovered £4.4 million through a civil recovery order against Ikram Saleh, the wife of a former Chadian official. The amount represents the proceeds of a share sale held by Saleh in a UK bank account, which had been subject to a freezing order since 2014. According to the SFO, Saleh acquired the shares at a discount from Canadian oil and gas company, Griffiths Energy International Inc, as part of a corrupt scheme to secure contracts in Chad, which she later sold for a large profit.

On October 3, 2018, the SFO issued an application for civil recovery in the High Court in respect of assets held by Gulnara Karimova, the daughter of the now-deceased President of Uzbekistan. Karimova allegedly obtained the assets through bribes received from telecommunications companies to influence deals in Uzbekistan. The SFO's claim is pending.

Continued on page 39

United Kingdom
Continued from page 38

B. High Profile Setbacks: Charges Dismissed in Barclays and Tesco

The SFO faced unfavourable decisions in relation to two of its highest profile cases in 2018. These put an end to the SFO's long-running pursuit of Barclays for alleged offenses in relation to its 2008 capital raising, as well as the prosecution of individuals following on from the 2017 DPA with Tesco plc for accounting irregularities.

On February 12, 2018, the SFO charged Barclays Bank plc with unlawful financial assistance in connection with Barclays' capital raisings in Qatar in 2008. The SFO had previously charged Barclays plc with the same offense following a five-year investigation. The charge against Barclays Bank plc was widely viewed as aggressive because it threatened the bank's continuing operations.

"In February 2018, the UK courts granted the first unexplained wealth order ('UWO'). Introduced in 2017 as an investigative tool, UWOs require individuals who are suspected to have been involved in serious crime or who are Politically Exposed Persons … from outside the European Economic Area to explain how they obtained property which appears to be disproportionate to their known income."

On May 21, 2018, the Crown Court dismissed the charges against both entities before they even had to enter pleas. The SFO applied for a so-called "voluntary bill of indictment" from the High Court, a little-used procedure, to seek to reinstate the charges. This application was turned down for reasons that remain unknown; the judgment is embargoed because the SFO's prosecution of four very senior Barclay's executives, including former CEO John Varley, proceeds.[11] Under the identification doctrine governing corporate liability in English criminal proceedings, the acts of the CEO would normally qualify to engage the company. The High Court ruling is therefore awaited with some interest because it may include an interesting discussion on the interaction between the liability of senior management and that of the company they represent.

The SFO suffered another dismissal of its charges in a prosecution related to its investigation against Tesco plc. Following its 2017 DPA with the company, the SFO brought charges against three senior executives for false accounting. A first trial was aborted in February 2018 due to one defendant, former UK Finance Director Carl Rogberg, suffering a heart attack late in the trial. On October 1, 2018, the trial

Continued on page 40

11. The trial started on January 7, 2019.

United Kingdom
Continued from page 39

restarted against two of three remaining defendants: Christopher Bush, the former Tesco UK managing director; and John Scouler, its former commercial food director. At the end of the prosecution case, the Crown Court found that the defendants had no case to answer and ordered their acquittal. The SFO unsuccessfully appealed the ruling, the Court of Appeal upholding the lower court's decision that the SFO had presented insufficient evidence against the individuals to put before a jury.

On January 23, 2019, the SFO dropped its charges against Rogberg, bringing the whole Tesco matter to an end. Lawyers for the three cleared executives have criticised the process leading to the conclusion of the original DPA which was based on the alleged criminal conduct of their clients, the evidence for which the courts found insufficient even to leave to a jury.

These setbacks have led to significant criticism of the SFO from practitioners and the media. The Tesco prosecutions, for example, reportedly cost the SFO £10 million. With the agency unable to secure convictions of individuals in these cases and not yet having made individual charging decisions in other long-standing matters, such as Rolls-Royce[12], there has been renewed speculation about the SFO's ability effectively discharge its statutory mission of tackling complex economic crime.

C. New Investigations

On August 17, 2018, the SFO announced that it has been conducting a criminal investigation into Güralp Systems Ltd, an engineering company specialising in the production of seismic testing equipment, since December 3, 2015. The investigation focuses on alleged corrupt contracts in South Korea. Güralp had also been subject to a criminal investigation in the U.S. concerning possible FCPA violations arising from payments made to a director of Korea Institute of Geoscience and Mineral Resources ("KIGAM"). On August 22, 2018, the DOJ announced that it was closing its investigation for reasons including the SFO's ongoing parallel investigation.

In connection with the investigation, the SFO charged Dr. Cansun Güralp, Güralp's founder, Andrew Bell, its former managing director, and Natalie Pearce, a former employee, for conspiring to make corrupt payments to a KIGAM employee and public official between 2002 and September 2015. These charges are pending.

The SFO has also opened investigations into Chemring Group plc and its subsidiary Chemring Technology Solutions Limited (after the subsidiary self-reported), Ultra Electronic Holdings plc's business conduct in Algeria, and Patisserie Holdings plc's finance director.

Continued on page 41

12. On January 7, 2019, the SFO formally announced that it had dropped its investigation of some individuals associated with the Rolls-Royce investigation.

United Kingdom
Continued from page 40

V. CPS Activity – First Trial for the "Adequate Procedures" Defense

With the SFO's remit to handle all serious or complex corruption investigations, the Crown Prosecution Service's ("CPS") residual jurisdiction is sometimes overlooked. However, dealing with cases of lower value and primarily domestic corruption cases, the CPS plays a non-negligible role in the development of Bribery Act enforcement.

In 2018, the CPS secured the first ever contested conviction for a failure to prevent bribery under section 7 of the Bribery Act. On February 21, 2018, in *R v Skansen Interior Limited*, a jury at Southwark Crown Court found the small London-based interior design company Skansen Interior Limited ("SIL") guilty of failing to prevent bribery.

The CPS alleged that SIL's former managing director had paid sums of around £10,000 in two payments to the then project manager of DTZ Debenham Tie Leung to secure £6 million of contracts to refurbish offices. It argued that SIL failed to implement an adequate anti-bribery and corruption programme after the Bribery Act came into force in July 2011. SIL sought to rely on the "adequate procedures" defense, arguing that its policies and procedures to prevent bribery in place at the time of the conduct had been adequate, given the company's size and nature of operations. The jury, however, was not persuaded.

Despite self-reporting to the SFO, SIL was unable to secure a DPA, in part because the company did not hold sufficient assets; it has been dormant since 2014. SIL's conviction highlights the importance of having a dedicated, proportionate and up-to-date anti-bribery and corruption framework for companies large and small, and the high hurdle involved in relying on the adequate procedures defense to a charge of failing to prevent bribery.

VI. FCA Activity

In 2018, the Financial Conduct Authority ("FCA") imposed financial penalties on 15 firms and individuals, totalling approximately £60 million. This figure represents a marked reduction from the 2017 total of £230 million (although that involved only 11 firms and individuals). The number of open enforcement investigations continues to rise – 504 as at March 31, 2018, up from 410 a year earlier. This reflects the FCA's stated intention to open more enforcement investigations and use them as diagnostic tools, resulting in the vast majority of cases being discontinued without enforcement action. No FCA penalties involved corrupt conduct or deficient anti-corruption controls.

Continued on page 42

United Kingdom
Continued from page 41

In May 2018, the FCA proceeded with the first, and so far only, enforcement action under the FCA's recently-introduced Senior Managers Certification Regime ("SMCR") which makes it easier to hold senior managers personally responsible for failures within their areas of responsibility. Among the areas covered by SMCR is responsibility for a regulated firm's financial crime prevention programme. In this instance, the chief executive of Barclays, James Staley, was fined £320,000 for attempting to identify an anonymous whistleblower.

VII. AML Developments

A. The First Unexplained Wealth Order

In February 2018, the UK courts granted the first unexplained wealth order ("UWO"). Introduced in 2017 as an investigative tool, UWOs require individuals who are suspected to have been involved in serious crime or who are Politically Exposed Persons ("PEPs") from outside the European Economic Area to explain how they obtained property which appears to be disproportionate to their known income. A failure to respond to a UWO or to provide a satisfactory explanation will create a presumption that the property is criminal and therefore subject to recovery under the Proceeds of Crime Act 2002.

The first UWO was granted in respect of Zamira Hajiyeva, an Azerbaijani national living in London and wife of the former chairman of the International Bank of Azerbaijan. Jahangir Hajiyev had been convicted in Azerbaijan of various offenses relating to his role at the bank. Hajiyeva unsuccessfully challenged the UWO in the High Court which led to a ruling that provides useful first guidance on the application of UWOs and the definition of PEPs in the context of "state-owned enterprises".

B. Consultation on Reforming Suspicious Activity Reports

In July, the UK Law Commission published a wide-ranging consultation paper outlining provisional reform proposals to the UK's Suspicious Activity Report ("SAR") regime for reporting suspected money laundering to the authorities.[13] Proposals include modifications to the test of suspicion required for filing a SAR, allowing banks to handle mixed criminal and legitimate funds in some circumstances, and the potential introduction of a corporate criminal offense of failure to ensure the reporting of suspected money laundering.

Some of the proposed reforms to the SAR regime should reduce the compliance burdens on banks and other financial institutions that routinely file SARs. However, it is not obvious that the changes will address the fundamental difficulties associated

Continued on page 43

13. *See* Karolos Seeger, Andrew Lee, and Natasha McCarthy, "UK Law Commission Proposes Reforms to Suspicious Activity Reports for Money Laundering" (Aug. 28, 2018), https://www.debevoise.com/insights/publications/2018/08/uk-law-commission-considers-reforms-to-suspicious.

United Kingdom
Continued from page 42

with the high number of SARs that are currently submitted. Over 460,000 SARs were filed between April 2017 and March 2018 (a 9.6% increase on the previous year), a number widely seen as too high for the NCA to be able to process effectively.

VIII. Brexit

During 2018, the Government negotiated a Withdrawal Agreement (the "Agreement") with the 27 remaining EU member states which provided for a transition period where the UK remains a member of the EU framework, intended to allow for the negotiation of an agreement to govern future UK/EU relations, including in the field of criminal justice cooperation.

The Agreement envisions that up to December 31, 2020, the UK would have access to the EU's Justice and Home Affairs information databases, participate in the European Police Office ("Europol") and Eurojust and continue to benefit from mutual recognition instruments such as the European Arrest Warrant which governs the expeditious return of suspects and convicts to stand trial or serve sentences between EU member states, and the European Investigation Order which greatly facilitates the obtaining of real evidence across the EU.

However, the U.K. Parliament has recently rejected the Agreement by a historical margin and no alternative agreement or plan has yet been presented. This means the likelihood of the UK ceasing to be a member of the EU, including its extensive criminal justice cooperation measures, on March 29, 2019 has increased. As of March 30, 2019, the UK would immediately become a third country, falling outside the legislative and organisational framework of the EU.

The fallback for the UK's continued cooperation with EU member states on criminal matters would appear to be mainly through Council of Europe conventions. Such conventions cover mutual legal assistance, extradition and mutual recognition of financial penalties and confiscation orders. However, such cooperation will be far less effective and efficient than the EU framework and leave much more scope for discretion in whether to accede to requests.

2018 is likely to be the last year for the UK within the EU, but it is very difficult to say whether it provides any steer on the likely framework for U.K./E.U. cross-border investigations in the future.

Continued on page 44

France

In 2018, France fine-tuned its recent sweeping changes to its anti-corruption legal framework and continued to enforce it. The French anti-corruption agency ("AFA") carried out an increased number of administrative inspections. And high-profile white-collar criminal cases led to important DPA-style resolutions and court decisions.

I. Legislative Developments

A. New Law Extends CJIP to Tax Fraud Cases

On December 9, 2016, France passed a landmark law on corruption and other white-collar crimes, commonly known as the *Sapin II law*.[1] Among the key provisions of this law was the creation of the so-called *convention judiciaire d'intérêt public* ("CJIP"), a French equivalent to a U.S.-style deferred prosecution agreement or DPA.

The CJIP mechanism offers corporate entities the possibility to negotiate an outcome without an admission of guilt or a criminal conviction. The defendant corporation, however, has to agree to the payment of a fine proportionate to the benefit secured through the illicit activity (up to 30% of the corporation's average annual turnover over the previous three years) and also may have to agree to implementing an enhanced compliance program for a maximum period of three years. A CJIP may be finalized only following approval by a judge at a public hearing. At such a proceeding, the judge is asked to review the validity and regularity of the procedure, as well as the conformity of the amount of the fine to the statutory limit and the proportionality of the agreed measures relative to benefits resulting from the breaches. The judge's decision cannot be appealed.

The CJIP initially was available only in cases relating to corruption, influence peddling, and the laundering of the proceeds of tax fraud. But on October 23, 2018, France passed a law addressing tax, customs, and social security frauds.[2] The law has been particularly innovative in changing key procedural aspects of tax fraud enforcement and is expected to result in an increased number of tax fraud criminal prosecutions.[3] In order to help French prosecutors manage this likely inflow of tax fraud cases, the new law extended the scope of the French pretrial guilty plea and the CJIP to such cases. Although the CJIP mechanism applying to tax fraud is similar to the one applying to corruption and influence peddling, it remains unclear whether the imposition of enhanced compliance programs will form part of CJIPs entered into in cases of tax fraud and laundering of the proceeds of tax fraud.

Continued on page 45

1. Law No. 2016-1691 (Dec. 9, 2016), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id.
2. Law No. 2018-898 (Oct. 23, 2018), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037518803&categorieLien=id.
3. *See* Debevoise & Plimpton LLP, "France Boosts Tax Fraud Prosecution" (Oct. 30, 2018), https://www.debevoise.com/insights/publications/2018/10/france-boosts-tax-fraud-prosecution.

France
Continued from page 44

B. Ministry of Justice Issues a Circular About the CJIP

On January 31, 2018, the French Ministry of Justice communicated to French public prosecutors a ministerial circular (the "Circular") relating to the implementation of the criminal provisions contained in the *Sapin II* law.[4]

The Circular includes recommendations for public prosecutors regarding the factors they should take into consideration for offering a CJIP to a corporate entity. These factors are: (i) the criminal antecedents of the corporation; (ii) whether it voluntarily disclosed the relevant facts; and (iii) the degree of cooperation of the corporate entity. The Circular also makes clear that the abandonment of charges against a legal person does not hinder criminal proceedings against natural persons acting on behalf of that legal entity.

As mentioned above, the *Sapin II* law provides that the CJIP fine must be proportionate to the benefit derived from the alleged misconduct, up to a limit of 30% of the entity's average annual turnover during the previous three years. The Circular indicates that the turnover to be taken into consideration is the worldwide revenue of the specific targeted legal entity. The Circular also recommends first (i) to calculate the direct and indirect improper benefit secured by the corporation, and then (ii) to apply aggravating or mitigating factors. The Circular mentions that aggravating factors should result in a multiplier of at least two after taking into account the gravity of the misconduct and the corporation's past conduct. Mitigating factors should apply when the facts are old, when the corporation self-reported the facts, cooperated with the authorities during the proceedings and took remediation actions.

Despite providing welcome, although non-binding, recommendations to the prosecutors on using the CJIP, French law still fails to address matters of greatest concern to corporations facing corruption and tax fraud issues in France: the lack of statutory criteria used by authorities about whether to offer a CJIP resolution or not, and the lack of statutory incentives for self-reporting and cooperation with the French authorities.

C. AFA's Questionnaire and Support Charter

The main role of the AFA is to ensure that companies required to adopt compliance programs under the *Sapin II* law have done so. The AFA can investigate and review the implementation of compliance programs within companies. In case of breach, the AFA's director may refer the case to the AFA's Sanction Committee, which may impose administrative fines. Although the AFA has no criminal investigative or

Continued on page 46

4. French Ministry of Justice Circular (CRIM/2018-01/G3-31.01.2018) (Jan. 31, 2018), http://circulaire.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=43109.

France

Continued from page 45

enforcement powers, it must inform the public prosecutor of any facts discovered during the course of its investigations that may amount to criminal wrongdoing, including corruption.

On December 22, 2017, the AFA published official guidelines aimed at helping companies and public entities comply with their requirements under the *Sapin II* law.[5] 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. These guidelines are fairly detailed regarding several aspects of compliance program requirements, such as risk assessments and third party due diligence.[6]

"The main role of the [French anti-corruption agency ('AFA')] is to ensure that companies required to adopt compliance programs under the Sapin II law have done so. The AFA can investigate and review the implementation of compliance programs within companies. … In February 2018, the AFA published a list of questions and required documents that would form part of a standard AFA inspection."

In February 2018, the AFA published a list of questions and required documents that would form part of a standard AFA inspection.[7] This has been done in order to give companies a better idea of the scope and depth of the AFA's investigations. The 163 questions revolve around: (i) resources allocated by companies to implement and organize an effective compliance program; (ii) top management involvement in implementing compliance programs, especially in allocating sufficient resources to such programs; (iii) the eight requirements of the *Sapin II* law relating to compliance programs, including the adoption of a code of conduct, an internal whistleblowing system, a risk assessment program, due diligence processes, accounting controls, training programs, and disciplinary sanctions.

Continued on page 47

5. "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", https://www.economie.gouv.fr/files/files/directions_services/afa/2017_-_Recommandations_AFA.pdf.
6. *See* "Anti-Corruption Enforcement in 2017: A Return to Normalcy," FCPA Update, Vol. 9, No. 6, at 42-46 (Jan. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/01/fcpa_update_january_2018_v9no6.pdf.
7. "Contrôles des entités assujetties à l'article 17 de la loi n°2016-1691 du 9 décembre 2016, questionnaire et pièces à fournir", https://www.economie.gouv.fr/files/files/directions_services/afa/Questionnaire_et_pieces_a_fournir.pdf.

France
Continued from page 46

On October 2, 2018, the AFA published a Charter outlining the support provided by the agency to help companies prevent and detect corruption.[8] The Charter sets forth three levels of support: (i) generic support available to all companies consisting of elaborating, updating, and disseminating the French anticorruption frame of reference, meaning all of the relevant standards to prevent and detect corrupt practices (e.g. AFA's guidelines); (ii) specific support consisting of providing expertise on issues raised by a specific group of companies; (iii) and individual support consisting of providing answers to questions raised by a specific company.

II. Enforcement Activity

A. AFA's Inspections

As mentioned above, the AFA conducts inspections to ensure that companies required to adopt compliance programs under the *Sapin II* law have done so. In case of breach, the AFA's Sanction Committee may impose administrative fines. The AFA began conducting inspections in October 2017. On October 15, 2018, the AFA's director announced that 45 inspections had been carried out so far; 30 of them involved private entities and 15 involved public entities. The AFA had issued warnings to four of these entities, but so far has not referred any cases to the AFA's Sanction Committee.[9]

In September 2018, media reported that the AFA had referred to public prosecutors potential criminal wrongdoing uncovered during its inspection of some large French companies.[10] That reporting triggered the opening of formal criminal investigations of those companies for possible wrongdoing, including corruption, laundering of the proceeds of tax fraud, and misuse of company assets.

B. CJIPs

In November 2017, the first-ever CJIP was approved, whereby HSBC Private Bank Swiss agreed to pay €300 million to settle criminal charges relating to laundering of the proceeds of tax fraud. The following four new CJIPs were approved in 2018:

- ***Kaefer*, *Set*, and *Poujeaud*.** In February and May 2018, the President of the High Court of Nanterre approved three CJIPs between public prosecutors and three medium-sized French sub-contractors to French state-owned utility EDF.[11]

Continued on page 48

8. "Charte de l'appui aux acteurs économiques", https://www.economie.gouv.fr/files/files/directions_services/afa/2018-09_-_Charte_dappui_aux_acteurs_eco.pdf.
9. *See* "Au Havre, les greffiers des tribunaux de commerce ont «le vent en poupe", Editions Législatives (Oct. 15, 2018), https://www.editions-legislatives.fr/actualite/au-havre-les-greffiers-des-tribunaux-de-commerce-ont-%C2%ABle-vent-en-poupe%C2%BB.
10. *See* "Un raid judiciaire vise les quatre géants français du matériel électrique", Médiapart (Sept. 6, 2018), https://www.mediapart.fr/journal/economie/060918/un-raid-judiciaire-vise-les-quatre-geants-francais-du-materiel-electrique?onglet=full.
11. These three CJIPs and their approval orders are available in French at https://www.economie.gouv.fr/afa/publications-legales.

France
Continued from page 47

The CJIPs indicate that the three companies had been charged with bribing an EDF procurement manager in exchange for the attribution or continuation of certain concessions. As part of the CJIPs, the three companies admitted the facts and their legal qualification – which did not amount to a formal admission of guilt or a criminal conviction – and agreed to pay financial penalties between €420,000 and €2.7 million, plus compensation to EDF of €30,000 each. In addition, they agreed to submit to the implementation of a compliance program, monitored by the AFA. These CJIPs are the first to be concluded in respect of alleged domestic corruption offences. Helpfully, they provide some details on the financial incentive for entering into a CJIP for companies with potential exposure for corruption-related offences in France, and represent the first examples of AFA monitoring of compliance program implementation imposed as part of a CJIP.[12]

- ***Société Générale***. In May 2018, Société Générale SA entered into both a CJIP with the PNF and a DPA with the U.S. authorities to settle charges of alleged corruption of foreign public officials, as discussed above. The President of the High Court of Paris approved the CJIP in June 2018.[13] The bank agreed to pay €250.15 million ($292.8 million) to the French authorities and $292.8 million to the U.S. authorities. In addition, the bank agreed to the review of its compliance program, to be monitored by the AFA for a 24-month period. This CJIP is a key milestone of enforcement of the *Sapin II* law, constituting the first coordinated resolution between French and U.S. authorities in a foreign bribery case where the two countries shared (in this case, equally) the fines imposed on the company.

C. Criminal Trials

During the past year, several noteworthy trials and appellate rulings also took place:

- ***Tesler* Case**. This criminal case involved a British citizen who entered into an agreement with DOJ in which he pleaded guilty to FCPA charges for acts of corruption relating to foreign public officers, committed between 2000 and 2004 in Nigeria and France. He served a significant prison sentence and paid a large fine, but was later brought to trial in France on charges of corruption based on the same facts. In September 2016, the Paris Court of Appeals approved the Paris Criminal Court's initial decision to dismiss the case against the defendant, reasoning that the U.S. guilty plea had deprived him of his right to self-defense

Continued on page 49

12. *See* Debevoise & Plimpton LLP, "First French DPAs for Corruption Offences" (Mar 12, 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/03/20180309_first_french_dpas_for_corruption_offences_concluded_.pdf.
13. This CJIP is available in French at https://www.economie.gouv.fr/files/files/directions_services/afa/24.05.18_-_CJIP.pdf.

France

Continued from page 48

in France.[14] On January 17, 2018, the French Court of Cassation reversed this decision.[15] The Court ruled that the defendant had not been deprived of his right to a fair trial because his appearance in French courts was not governed by the provisions of the agreement concluded with DOJ. The Court then ruled that because some of the corruption acts had been committed in France, the U.S. decision did not preclude prosecution in France.

- ***Oil-For-Food* Case**. This criminal case involved several companies and individuals prosecuted before the Paris Criminal Court for corruption-related offenses taking place between 2000 and 2003 in the context of the Oil-for-Food Program in Iraq. In February 2016, the Paris Court of Appeals found all the defendants guilty.[16] On March 14, 2018, the Court of Cassation confirmed most of the convictions, and the outcome now stands as one of the rare convictions of companies prosecuted for corruption before French courts.[17]

  As part of its defense, one company noted that it already had been prosecuted in a New York State court based on the same facts, entered a guilty plea for "grand larceny" under New York criminal law, and paid a very substantial fine. It argued that, in application of the *non bis in idem* rule provided for by the International Covenant on Civil and Political Rights ("ICCPR"), it should not be prosecuted in France. Pursuant to Article 14(7) of the ICCPR: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." The trial court and the Paris Court of Appeals ruled that this provision of the ICCPR precluded a subsequent prosecution in France, initially raising hopes of an "international double jeopardy regime" that might limit multiple prosecutions.[18] On March 14, 2018, the French Court of Cassation ruled that Article 14(7) of the ICCPR "prevent[s] double jeopardy for the same facts, [and] appl[ies] only in cases where both proceedings were initiated in the territory of the same State." Because the two proceedings had not been initiated in the territory of the same State, the Court found this provision inapplicable.

Continued on page 50

14. *See* Frederick T. Davis, "Paris Court Rules That a U.S. FCPA Guilty Plea Precludes Subsequent Prosecution in France", Global Investigations Blog (July 5, 2017), https://globalanticorruptionblog.com/2017/07/05/guest-post-paris-court-rules-that-a-us-fcpa-guilty-plea-precludes-subsequent-prosecution-in-france/#more-9529.
15. Cassation Court, Criminal Chamber (Jan. 17, 2018), n° 16-86.491, *available at* https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036584463&fastReqId=1596888297&fastPos=1.
16. Paris Court of Appeals (Feb. 26, 2016), n°13/09208.
17. Cassation Court, Criminal Chamber (Mar. 14, 2018), n° 16-82.117, *available at* https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036741972&fastReqId=1379183482&fastPos=1.
18. *See* Frederick T. Davis, "International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe," 31 Am. U. Int'l L. Rev. 57 (2016).

France

Continued from page 49

This ruling thus appears to put an end to protection against double jeopardy in France for the same conduct when the first proceedings were initiated in the U.S. and the subsequent French prosecution is said to be "territorial" (*i.e.*, when at least part of the alleged wrongdoing took place in France).

- ***UBS* Case**. In October and November 2018, UBS Group AG, UBS France SA, and several individuals were tried before the Paris Criminal Court for alleged illicit solicitation of clients on the French territory and laundering the proceeds of tax fraud. One landmark of this six-week trial was the public prosecutor's call for a €3.7 billion fine against UBS AG, on the basis of an aggressive calculation of the statutory maximum fine applicable to these types of offenses.[19] If ultimately imposed by the Court, this would be the highest fine ever to be imposed in France, and it would send a strong message to companies weighing the pros and cons of a CJIP versus a criminal trial. In this same case, back in 2017, press articles reported that UBS Group AG declined a €1 billion CJIP deal.[20] The Paris Criminal Court verdict is expected on February 20, 2019.

"Despite providing welcome, although non-binding, recommendations to the prosecutors on using the CJIP [deferred prosecution procedure], French law still fails to address matters of greatest concern to corporations facing corruption and tax fraud issues in France: the lack of statutory criteria used by authorities about whether to offer a CJIP resolution or not, and the lack of statutory incentives for self-reporting and cooperation with the French authorities."

- ***Total/Iran* Case**. In September 2018, the trial of French energy giant Total SA was held before the Paris Criminal Court. The company was charged with the alleged payment of $30 million in bribes to high-ranking Iranian officials between 2000 and 2004, in exchange for gas field concessions. Although the full decision has not been published yet, it was announced on December 21, 2018 that the Paris Criminal Court found Total guilty of corruption of foreign public officials.[21]

Continued on page 51

19. *See* "Fraude fiscale : le parquet demande 3,7 milliards à UBS", Les Echos (Nov. 8, 2018), https://www.lesechos.fr/finance-marches/banque-assurances/0600112550766-fraude-fiscale-le-parquet-demande-37-milliards-a-ubs-2220274.php.
20. *See* "Vers un procès UBS pour blanchiment de fraude fiscale", Reuters (Mar. 17, 2017), https://fr.reuters.com/article/businessNews/idFRKBN16Q0E7-OFRBS.
21. *See* "Total condamné à 500 000 euros d'amende pour corruption en Iran", Le Monde (Dec. 21, 2018), https://www.lemonde.fr/international/article/2018/12/21/total-condamne-a-500-000-euros-d-amende-pour-corruption-en-iran_5401005_3210.html.

France

Continued from page 50

The trial was initially set to last several days, but was cut short because of a DPA settlement struck in May 2013 with the U.S. DOJ, prohibiting Total from making any public statement, in litigation or otherwise, contradicting the acceptance responsibility or the facts described in that DPA.[22] Much like the above-mentioned *Tesler* case, this circumstance did not stop the Paris Criminal Court in sentencing Total for the same facts. The prosecutors called for a €750,000[23] fine and a €250 million confiscation corresponding to the alleged amount of the proceeds of the corruption. The Court eventually imposed a €500,000 fine, but did not order confiscation. In recent years, French criminal courts usually have tended to order confiscation as a way to impose significant consequences in addition to the criminal fine.[24] Once available, the judgment of the Paris Criminal Court may provide information as to why the court denied confiscation in this case and may therefore provide useful guidance to corporate defendants assessing the merits and flaws of a CJIP as compared to a criminal trial.

Continued on page 52

22. The DPA between the DOJ and Total is available at https://www.justice.gov/iso/opa/resources/939201352910374699852 4.pdf.
23. This was the maximum applicable fine for corruption charges at the time of the offenses. Under the most recent French criminal law provisions, corporations convicted of corruption would now face a maximum fine up to €5 million, which can be increased to ten times the proceeds of the offence.
24. *See* Antoine Kirry & Robin Lööf, "French DPAs Lack Crucial Disgorgement Tool," Global Investigations Review (Feb. 27, 2018), https://globalinvestigationsreview.com/article/1166127/french-dpas-lack-crucial-disgorgement-tool.

Germany

I. Legislative Developments

A. Corporate Liability

German criminal law addresses primarily the liability of individuals, not companies. Administrative liability under the Administrative Offences Act may attach to a company for crimes or administrative offenses of its senior management, including corruption of public officials, provided such activity violated the company's duties or enriched or was intended to enrich the company. Administrative liability attaches also to the company's top management if it fails to prevent actual misconduct through culpable lack of oversight that would have prevented or materially impeded misconduct. The personal administrative liability of the leading personnel for a failure of oversight thereby may trigger administrative liability of the company itself. The sanctions under the Administrative Offences Act are fines of up to EUR 10 million and disgorgement of profits, or, alternatively, the forfeiture of proceeds of crime. These sanctions have teeth: Volkswagen and Audi accepted in Germany in 2018 as part of the settlement of the diesel emission scandal administrative fines of EUR 5 million, respectively, for negligent failure of oversight. The Braunschweig public prosecutor also ordered a disgorgement of EUR 995 million Volkswagen profits and the Munich public prosecutor a disgorgement of EUR 795 million Audi profits.

In their 2018 coalition agreement, Germany's leading political parties agreed to upgrade the Administrative Offences Act from a misdemeanor law to a full criminal law and to address certain shortcomings of the current regime.[1] Mandatory prosecution shall replace the discretion of the prosecutor whether to prosecute or close a case. Given that internal investigations currently appear to be unprotected from prosecutor access, as explained below, the coalition parties agreed to improve legal certainty with respect to the search and seizure of documentation from internal investigations, and to incentivize the disclosure of findings. The new law is also likely to address cooperation and its benefits, though not as extensively as in the United States. Criminal sanctions shall take into account the revenues of the corporation, and companies generating revenue exceeding EUR 100 million annually may face a fine of up to 10% of such revenue.

B. Impact of Data Protection on Internal Investigations

Starting in May 2018, the European General Data Protection Regulation (GDPR), which is the uniform data protection law across the EU member states, provided for

Continued on page 53

1. Koalitionsvertrag 2018, marginal numbers 5895 et seq., https://www.bundesregierung.de/breg-de/themen/koalitionsvertrag-zwischen-cdu-csu-und-spd-195906.

Germany

Continued from page 52

a new set of rules for data processing in the context of investigations.[2] Protected personal data is any information relating to an identified or identifiable individual, irrespective of its citizenship. The GDPR covers any use of personal data in an investigation, including the collection, search, review, and transfer of personal data.

German corporates are generally required to appoint a data protection officer tasked with the monitoring of data protection compliance and the liaising with the data protection supervisory authority. The officer should be involved in the discussion of data protection compliance from the outset of an investigation, in particular in case the company decides to conduct a GDPR data protection impact assessment. The GDPR permits the company to enter into a shop agreement on data protection with the works council in anticipation of an investigation and in order to accelerate the process.

The GDPR has no uniform law for the employment context, and the new German Federal Data Protection Act fills the gap by replicating in essence the former strict national German data protection regime. The German legislature clarified that, if personal data of employees are processed on the basis of consent, then the employees' level of dependence in the employment relationship and the circumstances under which consent was given shall be taken into account in assessing whether such consent was freely given. In practice, consent remains a relatively weak legal basis for employee data processing because an employee can withdraw his or her voluntary consent any time and thus prevent any further processing. In the absence of consent, an employee's personal data may be processed to detect crimes only if: (i) there is a documented reason to believe that the employee has committed a crime while employed; (ii) the processing of such data is necessary to investigate the crime and is not outweighed by the data subject's legitimate interest in not processing the data; and (iii) in particular, the type and extent of data processing are not disproportionate to the underlying reason.

Internal investigations may involve the sharing of personal data with non-EU group companies, advisers, or authorities. The GDPR, like the previous data protection regime, generally prohibits data transfers to non-EU countries, unless based on a European Commission adequacy decision, Standard Contractual Clauses, Binding Corporate Rules, or exceptions. In particular, the GDPR abolishes any additional local law requirements for data transfers to non-EU countries. If a company responds to a non-EU authority request, it can rely on the exception that permits transfers necessary for the establishment, exercise, or defense of legal claims. Data protection authorities are expected to interpret the exception narrowly,

Continued on page 54

2. Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation); *see also* [German] Federal Data Protection Act of June 30, 2017 (Federal Law Gazette I p. 2097).

Germany
Continued from page 53

though, and have indicated that the mere interest of such authorities or possible "good will" to be obtained from the authority will not, as such, be sufficient to qualify as "necessary."

In case of a violation, data protection authorities and courts may prohibit the collection, review, and transfer of personal data. Failures to comply with the GDPR requirements may result in administrative fines of up to EUR 20 million or up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher. The first fine issued by a German Data Protection Authority in a data breach case, was moderate – only 20,000 Euro – as it rewarded the cooperation and remediation efforts of the breaching company. A company also may be civilly liable for material and non-material damages, and the burden of proof rests with the company.

C. Whistleblower Protection

In Germany, there is no comprehensive whistleblower protection, but rather fragmented and primarily EU-driven legislation covering the reporting of specific types of wrongdoing, in particular in the financial sector. The upcoming German Trade Secrets Act implements the EU Trade Secrets Directive (2016/943) and is expected to protect whistleblowers disclosing trade secrets if the disclosure serves the public interest, insofar as directly relevant misconduct, wrongdoing, or illegal activity is revealed.[3]

"Professional secrecy in Germany may not necessarily extend to documents prepared by the attorney during an attorney-led investigation, unless prepared as part of the communication in the defense of a specifically existing or imminent prosecution."

The situation in Germany may change as a consequence of a 2018 EU initiative to harmonize the uneven whistleblower protections across the Union in a Directive. The draft instrument is designed to protect whistleblowers who report breaches of EU law by setting new, EU-wide standards. The contemplated new law will establish safe channels for reporting, both within an organization and to public authorities. It will also protect whistleblowers against dismissal, demotion, and other forms of retaliation, and will require national authorities to inform citizens and provide training for public authorities on how to deal with whistleblowers.

Continued on page 55

3. Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2016/943 zum Schutz von Geschäftsgeheimnissen vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung, Deutscher Bundestag, Drucksache 19/4724, dated Oct. 4, 2018, http://dipbt.bundestag.de/extrakt/ba/WP19/2385/238528.html, http://dipbt.bundestag.de/dip21/btd/19/047/1904724.pdf.

Germany
Continued from page 54

II. Judicial Decisions

In 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 an 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. Volkswagen, Jones Day, and certain of Jones Day's German lawyers challenged the constitutionality of the search warrant before the German Federal Constitutional Court.

In considering the constitutional rights of Volkswagen, the Court upheld the interference as justified, given the strong public interest in efficient prosecution.[4] Jones Day, as a foreign entity, was held not to enjoy standing under German constitutional law. The constitutional complaint of the lawyers of Jones Day therefore was considered inadmissible, because they did not have any apparent standing to lodge a complaint.

Consequently, the framework for conducting internal investigations in Germany for remains unchanged. The risk of confiscation of documents for internal investigations, even in (local or international) law firms, was already understood on the basis of previous criminal court decisions. Professional secrecy in Germany may not necessarily extend to documents prepared by the attorney during an attorney-led internal investigation, unless prepared as part of the communication in the defense of a specifically existing or imminent prosecution. In the absence of a criminal prosecution and related defense communication, written conclusions or other work product rendered by a law firm in the course of a client-initiated internal investigation are not safe from disclosure or seizure. This holds true in particular if the material has been sourced from a third party.

As a result, companies should determine at the outset who is the client in the corporate group environment, treating each affiliate as an independent entity for the purposes of investigation and privilege. It also should be determined if and when the investigation is undertaken for defense purposes, as documents are only privileged to the extent they form part of legal advice in an actual or imminent defense communication.

Continued on page 56

4. *See* Kara Brockmeyer, Thomas Schürrle, and Erich O. Grosz, "German Constitutional Court Permits the Seizure of Documents in Possession of Third Party's Lawyers (July 26, 2018), https://www.debevoise.com/insights/publications/2018/07/german-constit-court-permits-the-seizure-of-docs.

Germany

Continued from page 55

Privileged communications residing with a German lawyer should be marked as privileged. Non-protected third-party documentation should be kept separate from privileged information to avoid privileged and non-privileged material from being seized together by a prosecutor.

A company's vulnerability to forced disclosure of sensitive information originating from internal investigations may be mitigated if the company pursues cooperative measures with the relevant authorities and implements adequate practices regarding the communication of sensitive information and the protection of individuals involved.

Continued on page 57

Asia

2018 was an active year for anti-corruption enforcement in Asia:

- China continued its anti-corruption crackdown and enacted several new laws, including one on international cooperation containing what could be a blocking statute.
- In Malaysia, a historic election ended the sixty-one-year rule of the Barisan Nasional coalition, facilitating a number of local investigations related to the 1MDB scandal and others.
- India passed amendments to its anti-corruption law, including the establishment of a corporate offense for failure to prevent bribery.
- Vietnam continued with its own crackdown on corruption.
- And Singapore announced the adoption of deferred prosecution agreements in corruption cases.

A. China

1. Enforcement

China's anti-corruption campaign, which began in 2013, remained active during 2018. On December 13, 2018, the Political Bureau of the Communist Party of China (the "CPC" or "Party") Central Committee claimed a "sweeping victory" in the campaign.[1] The Central Commission for Discipline Inspection (the "CCDI") of the CPC disclosed that in 2018, 372 senior officials had been investigated for corruption-related activities, and 206 such officials had received disciplinary punishment or were prosecuted.[2]

Among the higher-ranking officials prosecuted was Lu Wei, the former director of the Office of the Central Cyberspace Affairs Commission, who was investigated for corruption and later prosecuted for accepting bribes of RMB 32 million (approximately USD 4.7 million).[3] Also notable was a Vice-Governor of Guizhou Province, who was arrested for (among other things) receiving so many bottles of Chinese Moutai liquor in the course of his duties that he and his family members opened four liquor stores to resell them.[4]

Continued on page 58

1. "反腐败斗争取得压倒性胜利" Xinhua Daily Telegraph (Dec. 14, 2018), http://www.xinhuanet.com//mrdx/2018-12/14/c_137674713.htm.
2. *See* http://www.ccdi.gov.cn/.
3. "中央宣传部原副部长、中央网信办原主任鲁炜，山东省政府原党组成员、副省长季缃绮严重违纪 被开除党籍和公职" CCDI (Feb. 13, 2018), http://www.ccdi.gov.cn/toutiao/201802/t20180213_164223.html.
4. William Zheng, "China's corruption watchdog takes down self-styled Mao-tai liquor mogul who went into business for himself," South China Morning Post (Dec. 17, 2018), https://www.scmp.com/news/china/politics/article/2178346/chinas-corruption-watchdog-takes-down-self-styled-mao-tai-mogul.

Asia
Continued from page 57

In addition, China's most notorious fugitive, Xu Chaofan, a former bank manager who embezzled USD 485 million in 2001, was repatriated in July 2018. In 2008, Xu had been convicted in United States federal court of racketeering and money laundering.[5] Xu's (apparently voluntary) repatriation is a rare case of cooperation between Chinese and U.S. authorities.[6] During 2018, more than 600,000 lower-level public officials were investigated and/or punished, an increase from earlier years in the crackdown.[7]

Despite the declaration of "victory," 2018 was a continuation rather than a completion of the anti-corruption efforts that have characterized Xi Jinping's presidency. Those efforts are expected to continue into 2019 and beyond. Such future activity will take place under new laws enacted in 2018, described below, which fundamentally changed China's anti-corruption enforcement framework.

2. Legislation

On January 1, 2018, amendments to China's Anti-Unfair Competition Law (the "2018 AUCL") took effect, including significant changes to provisions governing commercial bribery. The 2018 AUCL expanded the definition of commercial bribery to include bribes paid in order to obtain "transaction opportunities or competitive advantages." It also introduced the presumption of corporate vicarious liability for commercial bribery by employees.[8]

On March 20, 2018, the Supervision Law of China established a new state organ – the Supervisory Commission – to carry out oversight and investigation of wrongdoing committed by "public officials," a broadly defined term that covers all persons exercising public power, when performing their duties.[9] The Supervisory Commission is responsible for either determining non-criminal disciplinary punishment for the infraction, or transferring the case to the People's Procuratorate for prosecution.[10] While the Supervisory Commission has the power to investigate violations of discipline unrelated to corruption, to date all publicly announced investigations have related to corruption.

Continued on page 59

5. DOJ Press Release No. 09-446, "Former Bank of China Managers and Their Wives Sentenced for Stealing More Than $485 Million, Laundering Money Through Las Vegas Casinos" (May 6, 2009), https://www.justice.gov/opa/pr/former-bank-china-managers-and-their-wives-sentenced-stealing-more-485-million-laundering.
6. "历时17年 追逃从未停歇——许超凡被强制遣返背后" Xinhua Net (July 11, 2018), http://www.xinhuanet.com/legal/2018-07/11/c_1123111841.htm.
7. *See* "2018年反腐：有何新情况？" infzm.com (Jan. 10, 2019), http://www.infzm.com/content/143813.
8. 《中华人民共和国反不正当竞争法》(hereinafter the 2018 AUCL), effective on Jan. 1, 2018, unofficial translation available at PKU Law, http://en.pkulaw.cn/display.aspx?cgid=401d47f76b65500dbdfb&lib=law. For more details, *see also* "Anti-Corruption Enforcement in 2017: A Return to Normalcy," FCPA Update, Vol. 9, No. 6 (Jan. 2018),
9. https://www.debevoise.com/~/media/files/insights/publications/2018/01/fcpa_update_january_2018_v9no6.pdf.
10. Article. 45 of the Supervision Law. For more details, *see also* Kara Brockmeyer, Andrew M. Levine, Philip Rohlik, and De Zha, "China Creates New Anti-Corruption Regulator," FCPA Update, Vol. 9, No. 8 (Mar. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/03/fcpa_update_march_2018.pdf.

Asia

Continued from page 58

The Supervisory Law also replaced the previous form of extra-judicial detention in disciplinary matters (known as *shuanggui*) with new procedures (now known as *liuzhi*).[11] *Shuanggui* was an order requiring a subject to appear in a designated place at a designated time and provided a basis for (often lengthy) detention and questioning without recourse to China's criminal law system. *Shuanggui* had been informally criticized in Chinese legal circles. In the Supervision Law, the Chinese legislature formerly established a new form of extrajudicial detention in law, renaming it *Liuzhi*. In appropriate circumstances, the Supervision Law grants the Supervisory Commission the right to hold and interrogate a suspect for up to three months, subject to an additional three-month extension. The Supervision Law is silent as to a suspect's rights, such as the right to an attorney, during *Liuzhi*, suggesting such rights do not attach.[12]

"On January 1, 2018, amendments to China's Anti-Unfair Competition Law … introduced the presumption of corporate vicarious liability for commercial bribery by employees."

On October 26, 2018, China amended its Criminal Procedure Law (the "2018 CPL"). The amendment aligned the investigation procedures under the Supervision Law with the procedures used by the People's Procuratorate for prosecution.[13] The amendment also created a procedure for trials *in absentia* to further China's ability to prosecute crimes committed by suspects abroad, likely targeting the large number of former officials who have fled China with the fruits of alleged corruption. Indeed, crimes related to bribery and corruption are one of only three types of crimes subject to trials *in absentia* and the only crimes subject to such trials without verification by the Supreme People's Procuratorate.[14]

Continued on page 60

11. *See* "Full text of Xi Jinping's report at 19th CPC National Congress," Xinhua Net (Nov.3, 2017), http://www.xinhuanet.com/english/special/2017-11/03/c_136725942.htm.
12. *See* Nectar Gan, "China's National Supervisory Commission: fresh, bigger fears over reach of new anti-corruption super agency," South China Morning Post (July19, 2018), https://www.scmp.com/news/china/policies-politics/article/2155888/fresh-bigger-fears-over-reach-chinas-new-anti-graft.
13. 《中华人民共和国刑事诉讼法》（2018修正）(hereinafter the 2018 CPL), effective on Oct. 26, 2018, unofficial translation available at PKU Law, http://en.pkulaw.cn/display.aspx?cgid=5a06769be1274052bdfb&lib=law. For more details, *see also* Jane Shvets, Bruce E. Yannett, Philip Rohlik, and De Zha, "Anti-Corruption Enforcement Update: China, Vietnam, and Malaysia," FCPA Update, Vol. 10, No. 4 (Nov. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/11/20181130_fcpa_update_november_2018_v2.pdf.
14. *Id.*

Asia
Continued from page 59

On the same day, China also enacted its International Criminal Judicial Assistance Law.[15] The law sets forth procedures for requesting judicial assistance from a foreign country or for responding to such requests from a foreign country. Such procedures remain subject to existing judicial assistance treaties or, in the absence of such a treaty, "consultation under the principles of equality and reciprocity,"[16] thereby permitting *ad hoc* (but reciprocal) judicial assistance in the absence of a formal treaty. The Criminal Judicial Assistance Law provides procedures for requesting the transfer of evidence, testimony, and witnesses as well as the seizure of property or illegal income, and the transfer of prisoners abroad.[17]

With regard to requests from China, the law grants the Ministry of Foreign Affairs the power to make binding commitments to foreign states regarding prosecution or punishment of suspects,[18] a provision likely to increase cooperation with foreign countries concerned about the death penalty or other aspects of the Chinese judicial system. Most significantly for FCPA practitioners, Article 4 of the Criminal Judicial Assistance Law could be read as a blocking statute, in that it prohibits foreign institutions, organizations, and individuals from conducting criminal proceedings or providing evidence or assistance to foreign jurisdictions except as set forth in the law. As there is no penalty provision in the law, the implications and scope of this prohibition remain unclear.

3. Trends

In a communique issued on January 13, 2019, the CCDI identified several priorities for the coming year. First, and consistent with the Criminal Judicial Assistance Law, is the intention to undertake a "deep involvement" in international anti-corruption practice.[19] This focus relates to "Operation Skynet," launched in 2015, which is aimed at identifying corruption suspects who have fled the country and repatriating them for trial. As of November 2018, 4,833 suspects allegedly have been located and either voluntarily returned to China or transferred to China with the cooperation of foreign governments. Of these suspects, 995 are former public officials.[20] Second, the CCDI expressly stated that the financial sector will be a priority for anti-corruption enforcement in 2019.[21]

Continued on page 61

15. 《中华人民共和国国际刑事司法协助法》(hereinafter the Criminal Judicial Assistance Law), effective on Oct. 26, 2018, unofficial translation available at PKU Law, http://en.pkulaw.cn/display.aspx?cgid=b1575aa60196ebe4bdfb&lib=law.
16. *See*, e.g., the Criminal Judicial Assistance Law, Art. 8.
17. *Id.*, Art. 2.
18. *Id.*, Art. 11.
19. *See* "CCDI adopts communique at plenary session," China Daily (Jan. 13, 2019), http://www.chinadaily.com.cn/a/201901/13/WS5c3b1b31a3106c65c34e41c3.html.
20. *See* "China's anti-corruption campaign recovers $519 million in a year," NBC News (Jan. 11, 2019), https://www.nbcnews.com/news/world/china-s-anti-corruption-campaign-recovers-519-million-year-n957491.
21. China Daily, *supra* n.18.

Asia
Continued from page 60

Enforcement of the commercial bribery provisions in the AUCL is expected to continue to focus on the healthcare sector. Commercial bribery authorities announced a concentration on that sector from May 2018 to October 2018,[22] and national and provincial health and medical regulators have signaled their intention to focus on anti-corruption in the future.[23]

B. Malaysia

On May 9, 2018, the opposition Pakatan Harapan coalition under former Prime Minister Mahatir Mohamad won a surprise victory against the Barisan Nasional coalition, which had ruled the country since independence.[24] One factor in the victory was public anger regarding the 1MDB scandal.

Following the election, Malaysian anti-corruption authorities made numerous arrests in connection with the 1MDB probe, starting with associates of former Prime Minister Najib Razak in June,[25] the former Prime Minister himself in September,[26] followed shortly thereafter by Razak's former lawyer[27] and his wife Rosmah Mansor in October.[28] Arrest warrants for certain former 1MDB executives (including its former General Counsel) were issued in July,[29] and against others in December, including Jho Low, Tim Leissner, and Roger Ng (who were also indicted in the United States).[30]

The Malaysian Anti-Corruption Commission ("MACC") also has been busy investigating a number of corruption cases not directly related to 1MDB. Notably, former Sabah Governor Musa Aman was arrested – and has pleaded not guilty –

Continued on page 62

22. 《市场监管总局关于开展反不正当竞争执法重点行动的公告》(Announcement of the State Administration for Market Regulation on Conducting the Key Action of Law Enforcement in Anti-Unfair Competition), effective on May 14, 2018, unofficial translation available at PKU Law, http://en.pkulaw.cn/display.aspx?cgid=c7a82cb33ccae738bdfb&lib=law.
23. *See* XiaoMi, "北京、上海、安徽、江苏大整顿，2019医药反腐风暴已来！" Sailing Health (Dec. 29, 2018), http://www.sohu.com/a/285546931_564023.
24. *See* Sebastian Dettman, "The Malaysian election results were a surprise. Here are 4 things to know," Washington Post (May 15, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/15/the-malaysian-election-results-were-a-surprise-here-are-4-things-to-know/?noredirect=on&utm_term=.879cb823c84a.
25. *See* "Malaysia arrests Najib ex-aide in 1MDB probe: media," Reuters (Jun. 25, 2018), https://www.reuters.com/article/us-malaysia-politics-1mdb-arrests/malaysia-arrests-najib-ex-aide-in-1mdb-probe-media-idUSKBN1JL0C7.
26. "Malaysia's ex-PM Najib arrested in massive 1MDB corruption case," France 24 (Sept. 9, 2018), https://www.france24.com/en/20180919-malaysia-ex-pm-najib-arrested-1mdb-corruption-case.
27. Anisah Shukry, "Malaysia Charges Ex-Premier Najib's Lawyer in 1MDB Case," Bloomberg News (Sept. 13, 2018), https://www.bloomberg.com/news/articles/2018-09-13/malaysia-to-charge-ex-premier-najib-s-lawyer-in-1mdb-linked-case.
28. Nile Bowie, "Malaysia's 1MDB scandal ensnares Najib's wife," Asia Times (Oct. 4, 2018), http://www.atimes.com/article/malaysias-1mdb-scandal-ensnares-najibs-wife/.
29. Stefania Palma, "Malaysia issues 1MDB arrest warrants as graft probe intensifies," Financial Times (Jul. 19, 2018), https://www.ft.com/content/2910c3d8-8b32-11e8-bf9e-8771d5404543.
30. Nadirah H. Rodzi, "KL court issues warrants of arrests against Jho Low, four others linked to 1MDB issue," The Straits Times (Dec. 4, 2018).

Asia
Continued from page 61

in connection with allegations of bribery related to timber concessions dating from the mid-2000s.[31]

Going forward, the MACC and other Malaysian authorities will have significantly expanded legal powers thanks to an amendment to the Malaysian Anti-Corruption Commission Act passed by Parliament shortly before the election in May.[32] Similar to the UK Bribery Act, the amendment creates a corporate offense for failure to prevent bribery. But unlike the UK Bribery Act, it adds a presumption of criminal liability for managers ("director[s], controller[s], officer[s] or partner[s]") in such cases. It is likewise an affirmative defense for an entity to have adopted "adequate procedures" to prevent bribery. In order to rebut the presumption of guilt, a manager must prove that the offense was committed without his or her consent or connivance or that he or she exercised due diligence to prevent the commission of the offense.[33]

International companies doing business in Malaysia will want to review their anti-corruption procedures in order to take into consideration both the new law and the post-election crackdown on corruption.

C. India

In July 2018, amendments to India's Prevention of Corruption Act received presidential assent and became law:[34]

- Section 8 of the Prevention of Corruption Act was amended to formally criminalize bribing a public servant (bribe payers previously had been prosecuted for aiding and abetting a public servant's crime of accepting a bribe).
- Section 9 was amended to add a corporate offense of failure to prevent bribery by any person associated with a commercial organization, with an affirmative defense of adequate procedures (similar to the UK Bribery Act).
- Section 10 was amended to add criminal liability for corporate officers when the corporate offense is committed with the "consent or connivance" of those officers.[35]

Continued on page 63

31. "Musa Aman pleads not guilty to 35 graft charges (updated)," The Star (Malaysia) (Nov. 5, 2018), https://www.thestar.com.my/news/nation/2018/11/05/musa-aman-pleads-not-guilty-to-35-graft-charges/.
32. *See* Kara Brockmeyer, Karolos Seeger, Philip Rohlik, and Saqib Alam, "Malaysia Strengthens its Anti-Corruption Law," FCPA Update, Vol. 9, No. 10 at 12 (May 2018), https://www.debevoise.com/insights/publications/2018/05/fcpa-may-2018.
33. *Id.*
34. Act No. 16 of 2018 (Jul. 26, 2018), www.egazette.nic.in/writereaddata/2018/187644.pdf.
35. *Id.*

Asia
Continued from page 62

D. Vietnam

On November 20, 2018, the same day that Vietnam ratified the CPTPP Trade Agreement, the National Assembly of Vietnam passed amendments to Vietnam's anti-corruption law. The amendments included a chapter expanding the anti-corruption law to the private sector.[36]

Vietnam is also in the middle of an anti-corruption crackdown, with several significant arrests during 2018.[37] As with China, the opaque nature of the Vietnamese political and legal systems makes it difficult to discern the progress of such a crackdown, beyond selective reporting of arrests and trials. That said, due to trade frictions between China and the United States, as well as changes in China's economy, Vietnam (despite being ranked poorly on Transparency International's Corruption Perceptions Index) is increasingly a destination for foreign direct investment, especially in manufacturing.

As Vietnam's economy develops and as it becomes an increasingly prominent location for foreign businesses, we can expect to see more corruption cases, both international and domestic, involving the country.

"Malaysian authorities will have significantly expanded legal powers thanks to an amendment to the Malaysia Anti-Corruption Commission Act…. Similar to the UK Bribery Act, the amendment creates a corporate offense for failure to prevent bribery. But unlike the UK Bribery Act, it adds a presumption of criminal liability for managers … in such cases."

E. Singapore

On March 19, 2018, Singapore passed the Criminal Justice Reform Act of 2018 (the "Act").[38] The Act amended the Criminal Procedure Code (Cap. 68) and, among other changes, established deferred prosecution procedures in Singapore. Section 121 of the Act lists eight types of offenses for which DPAs are available, including offenses under the Prevention of Corruption Act (Cap. 289).

Continued on page 64

36. "Important legislation passed as National Assembly concludes," Viet Nam News (Nov. 21, 2018), https://vietnamnews.vn/politics-laws/480487/important-legislation-passed-as-national-assembly-concludes.html#w7bgHydszxJVbHj4.97.

37. *See generally* Jane Shvets, Bruce E. Yannett, Philip Rohlik, and De Zha, "Anti-Corruption Enforcement Update: China, Vietnam, and Malaysia," FCPA Update, Vol. 10, No. 4 at 9 (Nov. 2018), https://www.debevoise.com/insights/publications/2018/11/fcpa-update-november-2018.

38. Law No. 19 of 2018.

Asia

Continued from page 63

The Act also specifies the procedures to be used for DPAs. DPAs may be entered into any time before the commencement of trial for an alleged offense[39] and are available only to legal persons, not individuals.[40] A DPA must contain a draft charge and a statement of facts, which are deemed admissions,[41] and must describe any requirements imposed by the DPA, which can include penalties, restitution, disgorgement, compliance program undertakings, and monitors.[42] As in the UK, a DPA must be approved by a court (in Singapore, the High Court), initially in camera, upon the declaration by a prosecutor that the DPA is in the interests of justice and that the terms are fair, reasonable, and proportionate.[43] Should the High Court refuse to approve the DPA, the prosecutor may submit a revised DPA or appeal the ruling.[44] An alleged breach of the DPA also must be brought to the High Court, with the prosecutor bearing the burden of proof and with the outcome appealable by either party.[45]

Continued on page 65

39. *Id.* § 35 (new section 149B).
40. *Id.* (new section 149D).
41. *Id.* (new section 149K).
42. *Id.* (new section 149E).
43. *Id.* (new section 149F).
44. *Id.* (new section 149M).
45. *Id.* (new section 149G).

Latin America

Anti-corruption enforcement in Latin America continues to proliferate. 2018 featured significant developments in the region's legal terrain, as well as increased attention by both companies and individuals to the risks of non-compliance. Not surprisingly, the anti-corruption journey of each country differs, not least of which among Argentina, Brazil, Chile, and Mexico:

- A few months after Argentina's new anti-corruption law took effect in 2018, the "Cuadernos" or "Notebooks" scandal erupted, taking center stage.
- Brazil has provided additional guidance on its 2013 anti-corruption law, while Operation *Lava Jato* has continued to expand – now under a newly-elected government that pledged to invigorate the country's anti-corruption initiatives.
- Chile passed broad anti-corruption legislation in 2018, creating a stronger statutory basis for potential anti-corruption enforcement.
- While Mexico's new anti-corruption law has been in effect since 2016, many expect that the recent change in administration may bring more transparency in prosecuting anti-corruption cases and the continuation of investigations without intervention.

Although actual enforcement efforts differ by country, the trend in the region continues to be one of greater focus on anti-corruption issues and the implementation of statutory frameworks that provide for aggressive prosecution of bribery and corruption offenses.

A. Argentina

2018 included numerous Argentine corruption prosecutions of politicians and business executives. During this time, Argentina also passed legal decrees and clarifying resolutions that elaborated on its anti-corruption laws and set forth additional guidelines for compliance and enforcement.

In April 2018, the executive branch published Decree 277/18, which authorized the Argentine Anti-Corruption Office to design guidelines for compliance programs related to the Law on Criminal Liability of Legal Entities ("Criminal Liability Law").[1]

Continued on page 66

1. Decree 277/2018, Infoleg (May 4, 2018), http://servicios.infoleg.gob.ar/infolegInternet/anexos/305000-309999/308488/norma.htm; *see also* "El Gobierno reglamentó la ley de responsabilidad penal de las empresas" [The Government regulated the law on criminal liability of companies], El Cronista (Apr. 6, 2018), https://www.cronista.com/economiapolitica/El-Gobierno-reglamento-la-ley-de-responsabilidad-penal-de-las-empresas-20180406-0074.html.

Latin America
Continued from page 65

That law, which imposes criminal liability on corporations for corruption-related offense, was passed in 2017 and has been in force since March 2018.[2]

Following this decree, Argentina's Anti-Corruption Office passed Resolution 27/2018 on October 1, 2018, establishing guidelines for corporate compliance programs.[3] These guidelines are particularly important because the Criminal Liability Law – in addition to providing for a broad scope of punishable conduct and allowing settlement by means of Prosecution Agreements – mandates that companies adopt and maintain effective anti-corruption compliance programs in order to conduct business in the public sector.[4] Resolution 27/2018 therefore provides a roadmap for augmenting internal controls and appropriately mitigating anti-corruption risk, as required by the Criminal Liability Law.[5]

A number of high-profile prosecutions also occurred this year in Argentina:

- The headline-grabbing "Cuadernos" or "Notebooks" scandal was triggered by the disclosure of several notebooks maintained by the driver for a close advisor of Julio De Vido (the former Minister of Planning and Public Investment), allegedly containing records of bribes from 2005 to 2015.[6] In August 2018, this resulted in arrests of two dozen former government officials and senior executives.[7] Additionally, implicated companies also are being investigated by the Anti-Corruption Office[8] and the judiciary.[9]

Continued on page 67

2. *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.; Decree 986/2017, Infoleg (Dec. 1, 2017), http://servicios.infoleg.gob.ar/infolegInternet/anexos/295000-299999/296847/norma.htm.
3. Resolution 27/2018, Argentina.gob (Oct. 4, 2018), https://www.argentina.gob.ar/normativa/nacional/resoluci%C3%B3n-27-2018-314938/texto; *see also* Fernanda Goldaracena et al., "Argentina: Guidelines for the Implementation of Compliance programs issued by the Anti-corruption Office," Global Compliance News (Nov. 9, 2018), https://globalcompliancenews.com/argentina-guidelines-for-the-implementation-of-compliance-programs-issued-by-the-anti-corruption-office/.
4. *See* Ley de Régimen de Responsabilidad Penal aplicable a las Personas Jurídicas Privadas [Law on Legal Entities' Criminal Liability], *supra* note 2; s*ee also* Decree 986/2017, Infoleg (Dec. 1, 2017), http://servicios.infoleg.gob.ar/infolegInternet/anexos/295000-299999/296847/norma.htm.
5. *See* Resolution 27/2018, *supra* note 3.
6. Bonadio rechazó excarcelar a Campillo y ordenó 80 allanamientos a empresas [Bonadio rejected the excarcelation of Campillo and ordered 80 raids to companies] Ambito (Jan. 17, 2019), https://www.ambito.com/bonadio-rechazo-excarcelar-campillo-y-ordeno-80-allanamientos-empresas-n5011171.
7. "Los Cuadernos de las Coimas: uno por uno, todos los registros del chofer Oscar Centeno" [The Bribe Notebooks: One By One, All the Records of the Driver Oscar Centeno], La Nación (Aug. 5 2018), https://www.lanacion.com.ar/2159363-cuadernos; Federico Molina, "Ocho cuadernos manuscritos por un chófer destapan una presunta red kirchnerista de sobornos" [Eight Notebooks By a Driver Unveil an Alleged Kirchner Bribery Web], El País (Aug. 1, 2018), https://elpais.com/internacional/2018/08/01/argentina/1533137235_141165.html.
8. La causa de los cuadernos: Más de 20 empresas son las que investiga la Justicia [The Cuadernos matter: More than 20 companies are being investigated by the Government.] Clarin (Aug. 11, 2018), https://www.clarin.com/politica/20-empresas-investiga-justicia_0_S1xxxk6rm.html.
9. Bonadio rechazó excarcelar a Campillo y ordenó 80 allanamientos a empresas [Bonadio rejected the excarcelation of Campillo and ordered 80 raids to companies] Ambito (Jan. 17, 2019), https://www.ambito.com/bonadio-rechazo-excarcelar-campillo-y-ordeno-80-allanamientos-empresas-n5011171.

Latin America
Continued from page 66

- In September 2018, Cristina Fernandez de Kirchner, ex-president and current senator, was indicted on corruption grounds.[10] As a result, Kirchner's apartments were raided and millions of dollars' worth of assets seized.[11]
- Finally, in December 2018, Amando Boudou, the former vice president, was found guilty of passive bribery and of engaging in negotiations incompatible with his public function.[12] He was sentenced to almost six years of prison, though the case is currently on appeal.[13]

"Argentina's Anti-Corruption Office passed Resolution 27/2018 on October 1, 2018, establishing guidelines for corporate compliance programs. These guidelines are particularly important because the Criminal Liability Law … mandates that companies adopt and maintain effective anti-corruption compliance programs in order to conduct business in the public sector."

B. Brazil

Amidst the electorally contentious climate of 2018, the Brazilian Federal Prosecutor's Office ("MPF") continued securing significant convictions, expanding ongoing investigations, and bringing new ones to light, with targets including high-profile politicians and foreign investors. Brazilian entities and individuals likewise featured prominently in relevant U.S. developments.

According to MPF figures, by October 15, 2018, Operation *Lava Jato* had yielded 82 criminal charges against 347 individuals, as well as nine administrative improbity actions against 52 individuals, 16 companies, and one political party. The investigation also had led to 176 individual plea bargain agreements, 11 leniency agreements, and 140 individuals sentenced to a combined 2,036 years of prison time. Meanwhile, the MPF has submitted or received 548 requests for investigative cooperation with dozens of countries.[14]

Continued on page 68

10. Ryan Dube, "Argentine Police Raid Homes of Ex-President Cristina Kirchner in Graft Probe," Wall Street Journal (Aug. 23, 2018), https://www.wsj.com/articles/argentine-police-raid-homes-of-ex-president-cristina-kirchner-in-graft-probe-1535062032.
11. *Id.*
12. Ignacio Sanchez, "Boudou salió de prisión y pidió la libertad de los 'presos políticos'" [Boudou Left Prison and Asked for the Release of "Political Prisoners"], La Nación (Dec. 18 2018), https://www.lanacion.com.ar/2201951-boudou-salio-de-prision-y-pidio-la-libertad-de-los-presos-politicos; "Boudou libre: pagó $1 millón y se fue a su casa con tobillera electronica" [Boudou Free: Paid $ 1 Million and Went Home with an Ankle Monitor], El Cronista (Dec. 12, 2018), https://www.cronista.com/economiapolitica/Boudou-libre-el-exvicepresidente-va-camino-a-su-casa-tras-la-orden-de-excarcelacion-20181212-0072.html.
13. *Id.*
14. *See* "A Lava Jato em Números no Paraná" [Operation Car Wash in Parana in Numbers], MPF (Oct. 15, 2018), http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato/atuacao-na-1a-instancia/parana/resultado.

Latin America
Continued from page 67

1. Lava Jato Convictions, Charges, and Resolutions

Several corruption-related cases against individuals made headlines during 2018:

- In January 2018, Brazil's Court of Appeals for the Fourth Region unanimously upheld former President Luis Inacio Lula da Silva's conviction for bribery and money laundering, increasing his prison sentence from nine to 12 years.[15]
- In July 2018, former mining billionaire Eike Batista was sentenced to 30 years of imprisonment for wrongdoing involving Rio de Janeiro's former governor, Sergio Cabral.[16]
- That same month, the MPF indicted the former CEO of U.S. oil services company Vantage Drilling for corruption and money laundering related to dealings with Petrobras.[17]
- On the corporate resolutions front, following a 2015 leniency agreement with the MPF, advertising agencies MullenLowe Brasil and FCB Publicidade e Comunicacao settled *Lava Jato*-related charges with the Federal Attorney's Office ("AGU") and the Ministry of Transparency and Comptroller-General's Office ("CGU"), with the blessing of the Federal Court of Accounts ("TCU"), thus becoming the first Brazilian companies to settle with *all* key Brazilian anti-corruption enforcement agencies.[18]
- Construction conglomerates Odebrecht and Andrade Gutierrez, which previously had entered into leniency agreements with the MPF, followed suit, agreeing to pay R$2.7 billion and R$1.49 billion, respectively, to settle with the CGU and the AGU.[19]

Continued on page 69

15. *See* "Operação Lava Jato: TRF4 Confirma Condenação do Ex-Presidente Luiz Inácio Lula" [Operation Car Wash: TRF4 Confirms Conviction of Former President Luiz Inacio Lula da Silva], Federal Court of Appeals for the 4th Region (Jan. 24, 2018), https://www.trf4.jus.br/trf4/controlador.php?acao=noticia_visualizar&id_noticia=13418.
16. *See* Brad Brooks, "Ex-Brazil Tycoon Batista Handed 30-year Sentence for Corruption," Reuters (July 3, 2018), https://www.reuters.com/article/us-brazil-corruption-batista/ex-brazil-tycoon-batista-handed-30-year-sentence-for-corruption-idUSKBN1JT29R.
17. *See* "FT Lava Jato Denuncia Executivo de Empresa Americana por Corrupção e Lavagem de Dinheiro em Contratação pela Petrobras" [Operation Car Wash Task Force Indicts Executive of American Company for Corruption and Money Laundering in Petrobras Contracting], MPF (July 12, 2018), http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/forca-tarefa-lava-jato-denuncia-executivo-de-empresa-americana-por-corrupcao-e-lavagem-de-dinheiro-na-contratacao-de-sonda-pela-petrobras.
18. *See* "CGU e AGU Assinam Acordo de Leniência com as Agências MullenLowe e FCB Brasil" [CGU and AGU Sign Leniency Agreement with the Agencies MullenLowe and FCB Brasil], CGU (Apr. 16, 2018), http://www.cgu.gov.br/noticias/2018/04/cgu-e-agu-assinam-acordo-de-leniencia-com-as-agencias-mullenlowe-e-fcb-brasil.
19. *See* "Acordo de Leniência com a Odebrecht Prevê Ressarcimento de 2,7 bilhões" [Leniency Agreement with Odebrecht Provides for R$2.7 Billion Payment], CGU (July 9, 2018), http://www.cgu.gov.br/noticias/2018/07/acordo-de-leniencia-com-a-odebrecht-preve-ressarcimento-de-2-7-bilhoes; "CGU e AGU Assinam Acordo de Leniência de R$ 1,49 Bilhão com a Andrade Gutierrez" [CGU and AGU Sign R$1.49 Billion Leniency Agreement with Andrade Gutierrez], CGU (Dec. 18, 2018), http://www.cgu.gov.br/noticias/2018/12/cgu-e-agu-assinam-acordo-de-leniencia-de-r-1-49-bilhao-com-a-andrade-gutierrez.

Latin America
Continued from page 68

- Dutch oil and gas company SBM Offshore also resolved *Lava Jato*-related claims in 2018. In July, SBM Offshore entered into an agreement with the CGU, AGU, and Petrobras, under which it must pay to and otherwise forego future payments from Petrobras totaling R$1.22 billion.[20] Two months later, it also settled with the MPF, agreeing to pay an additional R$200 million to Petrobras.[21] That same month, a U.S. federal court in Texas fined and sentenced the company's former CEO and another executive to jail time after they pleaded guilty to FCPA charges related to bribing officials in Brazil and Africa.[22]

2. New Anti-Corruption Investigations in Brazil

2018 also saw new investigations come to public light, including spinoffs of *Lava Jato*:

- In June, Brazilian authorities charged 62 individuals, including former Governor Sergio Cabral, in connection with Operation *Exchange Switch Off*, which targets an alleged criminal enterprise responsible for a reported U.S.$1.6 billion money laundering and tax evasion scheme.[23]
- Shortly thereafter, Operation *Resonance* was launched, resulting in various charges against and arrests of individuals allegedly involved in wrongdoing relating to public healthcare contract bids.[24]
- Then, in December 2018, local authorities launched Operation *No Limits* into potential wrongdoing involving major global trading companies alleged to have bribed Petrobras officials in Brazil and the United States to secure improper advantages.[25]

Continued on page 70

20. *See* "Acordo de Leniência com a SBM Offshore Ressarcirá R$ 1,22 Bilhão à Petrobras" [Leniency Agreement with SBM Offshore Will Pay R$1.22 Billion to Petrobras], CGU (July 26, 2018), http://www.cgu.gov.br/noticias/2018/07/acordo-de-leniencia-com-a-sbm-offshore-ressarcira-r-1-22-bilhao-a-petrobras.
21. *See* "MPF Firma Novo Acordo de Leniência com a SBM Offshore" [MPF Signs New Leniency Agreement with SBM Offshore], MPF (Sept. 5, 2018), http://www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/mpf-firma-novo-acordo-de-leniencia-com-a-sbm-offshore.
22. *See* U.S. Dep't of Justice, "Oil Services CEO and Executive Sentenced to Prison for Roles in Foreign Bribery Scheme" (Sept. 28, 2018), https://www.justice.gov/opa/pr/oil-services-ceo-and-executive-sentenced-prison-roles-foreign-bribery-scheme.
23. *See* "Câmbio, Desligo: MPF Denuncia 62 Pessoas por Esquema de Lavagem e Evasão" [Operation Exchange Switch Off: MPF Charges 62 People for Money Laundering and Tax Evasion Scheme], MPF (June 7, 2018), http://www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/cambio-desligo-mpf-denuncia-62-pessoas-por-esquema-de-lavagem-e-evasao.
24. *See* "MPF Denuncia 24 Pessoas por Fraude em Contratos do Into, no RJ" [MPF Charges 24 People for Fraud in INTO Contracts in Rio de Janeiro], MPF (Aug. 8, 2018), http://www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/mpf-denuncia-24-pessoas-por-fraude-em-contratos-do-into.
25. *See* "Lava Jato: 57ª Fase Investiga Corrupção de Gigantes do Mercado Internacional do Petróleo" [Operation Car Wash: 57th Phase Investigates Corruption by the International Oil Market Giants], MPF (Dec. 5, 2018), http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/lava-jato-57a-fase-investiga-corrupcao-de-gigantes-do-mercado-internacional-do-petroleo.

Latin America
Continued from page 69

3. Changes to Brazil's Legal Framework

The past year also saw further developments in Brazil's anti-corruption legal framework:

- In May 2018, the CGU issued a normative ruling regarding the calculation of fines under the Brazilian Anti-Corruption Law in the context of leniency agreements with the agency.[26] That same month, the MPF issued a guideline setting out factors for the approval of plea bargains, based on MPF's prior best practices in approving such agreements.[27]
- In February and June 2018, respectively, the Federal District (where Brasilia is located) and the Ministry of Agriculture, Livestock, and Food Supply ("MAPA") each issued rules requiring bidders to public contracts to have compliance programs in place,[28] which the State of Rio de Janeiro has required since late 2017.[29] Going a step further, Rio de Janeiro enacted its state-level version of Brazil's Clean Company Act (the Federal anti-corruption law) in July 2018, following the lead of various other Brazilian states.[30]
- That same month, the CGU and the General Inspector of Administrative Discipline ("CRG") issued a manual providing definitions, legal background, and explanations for the various steps in implementing administrative discipline, including for calculating fines under the Clean Company Act and for the use of leniency agreements.[31]
- Lastly, in September 2018, the CGU and CRG jointly issued a manual providing guidance for evaluating the compliance programs of companies under investigation by Brazilian authorities, including the possibility of obtaining a reduction in fines under the Clean Company Act.[32] A few days later, the CGU announced it had hired a former DOJ compliance expert to serve as its first-ever foreign consultant.[33]

Continued on page 71

26. *See* CGU Normative Ruling No. 2/2018 (May 21, 2018), http://www.cgu.gov.br/noticias/2018/05/cgu-publica-metodologia-de-calculo-da-multa-aplicada-nos-acordos-de-leniencia.
27. *See* "MPF Consolida Documento de Orientação para Assinatura de Acordos de Colaboração Premiada" [MPF Establishes Document for Orientation in Signing Plea Bargains], MPF (May 28, 2018), http://www.mpf.mp.br/pgr/noticias-pgr/mpf-consolida-documento-de-orientacao-para-assinatura-de-acordos-de-colaboracao-premiada.
28. *See* Federal District Law No. 6.112/18 (Feb. 6, 2018); "MAPA Exige que Prestadores de Serviços Instituam Programas de Integridade" [MAPA Requires Service Providers to Implement Compliance Program], MAPA (June 8, 2018), http://www.agricultura.gov.br/noticias/mapa-exige-que-prestadores-de-servicos-instituam-programas-de-integridade.
29. *See* State of Rio de Janeiro Law No. 7.753/17 (Oct. 17, 2017).
30. *See* State of Rio de Janeiro Decree No. 46.366/18 (July 20, 2018).
31. *See* "Manuais Orientam Servidores Sobre Processo de Responsabilização de Pessoas Jurídicas" [Manuals Provide Guidance to Servers on Process for Administrative Discipline of Legal Entities], CGU (July 19, 2018), http://www.cgu.gov.br/noticias/2018/07/manuais-orientam-servidores-sobre-processo-de-responsabilizacao-de-pessoas-juridicas.
32. *See* "Manual Orienta Sobre Avaliação de Programas de Integridade de Empresas Investigadas" [Manual Provides Guidance over Evaluation of Compliance Programs of Companies under Investigation], CGU (Sep. 14, 2018), http://www.cgu.gov.br/noticias/2018/09/manual-orienta-sobre-avaliacao-de-programas-de-integridade-de-empresas-investigadas.
33. *See* Contract 18/2018 (Sep. 27, 2018), http://www.cgu.gov.br/sobre/licitacoes-e-contratos/contratos/contrato-18-2018.

Latin America
Continued from page 70

4. Brazil-related U.S. Developments

Last year, Brazil also featured prominently in anti-corruption developments in the United States:

- In what was said to be the largest U.S. class action settlement by a foreign entity, Petrobras agreed, in January 2018, to pay U.S.$2.95 billion to investors who had brought a class action in New York over *Lava Jato*-related wrongdoing.[34] As detailed above, Petrobras subsequently agreed to pay U.S.$853 million to settle investigations by DOJ, the SEC, and the MPF into its role in facilitating bribes to politicians and political parties in Brazil, with the majority of that settlement amount being directed to Brazilian authorities.[35]

"Brazil has provided additional guidance on its 2013 anti-corruption law, while Operation Lava Jato has continued to expand – now under a newly-elected government that pledged to invigorate the country's anti-corruption initiatives."

- In March 2018, a New York federal court dismissed a class action against Embraer over alleged securities-law violations in a matter relating to disclosures surrounding its 2016 FCPA-related settlement with the SEC, DOJ, and Brazilian authorities.[36]
- As also mentioned earlier, Eletrobras in late 2018 agreed to pay U.S.$2.5 million in a settlement with the SEC over books-and-records and internal controls charges related to a bid-rigging and bribery scheme involving the construction of a nuclear power plant.[37] Eletrobras previously had avoided prosecution by DOJ.[38] Relatedly, Eletrobras agreed to pay U.S.$14.75 million to settle with shareholders over losses resulting in part from the alleged wrongdoing.[39]

Continued on page 72

34. *See* Petrobras Press Release, "Petrobras Signs Agreement in Principle to Settle Class Action in the U.S." (Jan. 3, 2018), http://www.petrobras.com.br/en/news/petrobras-signs-agreement-in-principle-to-settle-class-action-in-the-u-s.htm.
35. *See* U.S. Dep't of Justice, "Petrobras Agrees to Pay More than $850 Million for FCPA Violations" (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations.
36. *See* Dustan Prial, "Embraer Wins Dismissal in FCPA-Related Class Action Case," Law360 (Apr. 2, 2018), https://www.law360.com/articles/1029058/embraer-wins-dismissal-in-fcpa-related-class-action-case.
37. *See* U.S. Sec. & Exch. Comm., "SEC Charges Eletrobras with Violating Books and Records and Internal Accounting Controls Provisions of the FCPA" (Dec. 26, 2018), https://www.sec.gov/enforce/34-84973-s.
38. *See* U.S. Sec. & Exch. Comm., Eletrobras' Form 6-K (Aug. 13, 2018), https://www.sec.gov/Archives/edgar/data/1439124/000129281418002807/ebr20180813_6k.htm.
39. *See* Gram Slattery and Jason Neely, "U.S. Court Approves Settlement between Brazil's Eletrobras, Shareholders," Reuters (Dec. 13, 2018), https://www.reuters.com/article/us-eletrobras-classaction/u-s-court-approves-settlement-between-brazils-eletrobras-shareholders-idUSKBN1OC18Y.

Latin America
Continued from page 71

5. Political Developments in Brazil

Beyond the enforcement front, the Brazilian political arena was extremely active in 2018:

- On October 28, 2018, Jair Bolsonaro was elected President after having taken a forceful anti-corruption stance during the campaign.
- Shortly thereafter, President Bolsonaro appointed federal judge Sergio Moro to become Minister of Justice. Moro resigned as a judge and accepted the invitation, expressing plans to implement a strong anti-corruption and anti-organized-crime agenda.
- Since the new government's arrival in early 2019, the powers of the Ministry of Justice have been expanded. This has included incorporating the Council for Control of Financial Activities ("Coaf") – Brazil's anti-money laundering body – under its umbrella, as well as expanding the Ministry's staffing.
- Notably, several *Lava Jato* law enforcement officials have joined the Ministry, including former police and tax investigators.
- Minister Moro is also expected to submit new legislation covering criminal enforcement issues to Congress in the coming weeks.

Much of what will change under the new administration remains to be seen. But in light of public expectations and Minister Moro's history as a strict *Lava Jato* judge, 2019 certainly will be a year to watch for developments in the Brazilian anti-corruption landscape.

C. Chile

Last year, Chile passed a new anti-corruption law (Law. No. 21121), which entered into force on November 20, 2018.[40] The new law revised and strengthened existing anti-corruption laws, making penalties more stringent and widening the scope of criminalized conduct. The new law also addressed commercial negotiations and has implications for companies' internal compliance programs.[41]

Of particular note:

- Law No. 21121 expanded the crimes of domestic bribery and bribery of foreign officials. While bribery used to apply only to financial or economic benefits, the new statute encompasses benefits of any nature.[42] Similarly, under the former

Continued on page 73

40. Law No. 21121, Modifica el código penal y otras normas legales para la prevención, detección y persecución de la corrupción [Modifications to the Penal Code and other Legal Norms for the Prevention, Detainment and Prosectuion of Corruption] (Nov. 20, 2018), https://www.leychile.cl/Navegar?idNorma=1125600&buscar=21121 (hereinafter "Law No. 21121").
41. Gustavo Balmaceda H., "Lucha Contra la Corrupción: Nueva Ley" [Fight Against Corruption: New Law], Diaria Constitucional (Nov. 26, 2018), http://www.diarioconstitucional.cl/cartas-al-director/2018/11/26/lucha-contra-la-corrupcion-nueva-ley/.
42. *See, e.g.*, Law No. 21121, art. 1(10) (amending art. 248 of the Criminal Code).

Latin America
Continued from page 72

legal regime, bribery of foreign officials could be charged only if the act took place in relation to an international transaction. Now, bribery of foreign officials may be charged in relation to any type of economic activity performed abroad.[43]

- The law also created two new offenses: corruption between private parties[44] and disloyal administration.[45] Corruption between private parties criminalizes giving or receiving (or offering or agreeing to give or receive) benefits of any nature in order to favor one party over another in the execution of a private contract, extending the crime of corruption to situations not involving public officials.[46] Prosecutors previously attempted to shoehorn this kind of conduct into the crimes of fraud or misappropriation, which rendered conviction less likely.[47]
- Last, the Chilean law increased the potential criminal penalties for corruption offenses, including by providing for longer terms of imprisonment[48] and significantly increasing fines and disgorgement.[49] It introduced the new penalty of a bar on various kinds of employment by companies (i) that contract with the state, (ii) are state-owned entities, or (iii) in which the government holds a majority stake.[50] The law also authorized the dissolution of a legal entity for crimes and misdemeanors when aggravating circumstances are present.[51]

Although it remains unclear how this change in the law will impact enforcement priorities, companies should take note of the broadened definitions and increased penalties.

Continued on page 74

43. Law No. 21121, art. 1(16) (amending art. 251 bis of the Criminal Code).
44. Law No. 21121, art. 1(19) (adding arts. 287 bis and 287 ter to the Criminal Code).
45. Law No. 21121, art. 1(20) (adding paragraph 11 to art. 470 of the Criminal Code).
46. Criminal Code, arts. 287 bis & 287 ter (Nov. 20, 2018).
47. Francisco Ibanez, "Cuáles son las implicancias de la nueva ley anticorrupción" [What are the Implications of the New Anticorruption Law], Pauta (Nov. 30, 2018), http://www.pauta.cl/negocios/bloomberg/cuales-son-las-implicancias-de-la-nueva-ley-anticorrupcion.
48. *See, e.g.*, Law No. 21121, art. 1(10) (amending art. 248 of the Criminal Code).
49. For example, the maximum penalty fee for legal entities for crimes (as opposed to misdemeanors) increased to 300,000 Monthly Tax Units, roughly equivalent to USD $21.5 million. Law No. 21121, art. 2(5) (amending art. 12 of Law No. 20.393 on the Criminal Liability of Legal Entities). Historically, such fines rarely exceeded USD $1 million. *See* Paula Valenzuela, "Ley Anticorrupcion: Um Cambio Necessário" [Anticorruption Law], Diario Financiero (Nov. 28, 2018), https://www.df.cl/noticias/opinion/columnistas/ley-anticorrupcion-un-cambio-necesario/2018-11-27/191455.html.
50. Law No. 21121, art. 1(1)–(2) (modifying art. 21 of the Criminal Code).
51. Law No. 21121, art. 2(9) (amending art. 16 of Law 20393).

Latin America
Continued from page 73

D. Mexico

Mexico's new anti-corruption laws are robust on paper,[52] but remain a work in progress regarding implementation. Execution of various prosecutorial aspects of the laws remains incomplete, such as appointments to newly-created positions and the earnest enforcement of newly criminalized conduct.

In October 2018, the OECD's Working Group on Bribery in International Business Transactions ("WGB") issued its fourth evaluation of Mexico's efforts to comply with the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.[53] The WGB expressed particular concern over Mexico's failure to prosecute a single case of foreign bribery since 1999 and the fact that Mexico has four ongoing investigations themselves deemed "at high risk for corruption."[54]

"While Mexico's new anti-corruption law has been in effect since 2016, many expect that the recent change in administration may bring more transparency in prosecuting anti-corruption cases and the continuation of investigations without intervention."

The WGB did commend Mexico on its progress since the prior report, encompassing the passage of the General Law of Administrative Responsibilities (GLAR), the creation of an "anti-corruption prosecutorial body . . . known as the Special Prosecutor's Office for Corruption-Related Offences (FEMDHC)"; and a National Anti-Corruption System (NACS).[55] The WGB added that Mexico must now take steps toward effectuating the law by nominating a Special Anti-Corruption Prosecutor; establishing an "Administrative Liability Regime for Corruption Crimes and a Special Administrative Court; and implement[ing] the new Anti-Bribery Protocol."[56]

Continued on page 75

52. *See* Andrew Levine et al.,"Anti-Corruption Enforcement in 2017: A Return to Normalcy" FCPA Update, Vol. 9, No.6 (Jan. 2018), https://www.debevoise.com/insights/publications/2018/01/fcpa-update-jan-2018-vol-9-no-6 (discussing the passage of the final provisions to the Mexican General Law on July 19,2017, and its objective to promote anti-corruption measures in both the public and private sphere, along with the establishment of a National Anti-Corruption System). *See also* Sean Hecker, Andrew M. Levine, Eileen Zelek, "Mexico Adopts New Anti-Corruption Legislation," FCPA Update, Vol. 8, No. 2 (Sept. 2016). https://www.debevoise.com/~/media/files/insights/publications/2016/09/fcpa_update_september_2016.pdf.
53. Implementing the OECD Anti-Bribery Convention- Mexico Phase 4 Report, Organisation for Economic Co-operation and Development, http://www.oecd.org/corruption/anti-bribery/OECD-Mexico-Phase-4-Report-ENG.pdf.
54. *Id*. at 12.
55. *Id*. at 29.
56. *Id*. at 58.

Latin America
Continued from page 74

Although Mexican authorities have lagged behind in bribery enforcement, American prosecutors have persisted in prosecuting cases involving suspicious financial activity from Mexico and, in some cases, corruption:

- In February 2018, Rabobank N.A. agreed to pay $368 million for processing funds likely tied to drug trafficking and other illicit activity.[57] The company also pleaded guilty to a felony conspiracy charge for impairing, impeding, and obstructing its primary regulator, the Department of the Treasury's Office of the Comptroller of the Currency ("OCC") by concealing deficiencies in its anti-money laundering program and for obstructing the OCC's examination of Rabobank.[58] According to regulators, the bank looked the other way when untraceable cash from Mexico was deposited in California and then transferred such funds without adequate monitoring.[59]
- In August 2018, Citigroup agreed to pay a $4.75 million penalty to settle charges involving fraudulently induced loans made by a Mexican subsidiary.[60] The subsidiary, Grupo Financiero Banamex S.A. de C.V., loaned approximately $3.3 billion to Oceanografia,S.A.("OSA") based on work estimates for services that OSA provided to Petróleos Mexicanos ("Pemex"). Many of these estimates were fraudulent and did not reflect the correct amounts that Pemex owed OSA. The SEC found that Banamex and Citigroup "lacked the controls necessary to verify the invoices before making loans to OSA."[61]

It bears noting that Mexico's status as a signatory to the trilateral trade pact known as the United States-Mexico-Canada Agreement (the "USMCA") may also augment enforcement in the coming years, if the USMCA is ratified and takes effect. That agreement encompasses a multinational commitment to anti-corruption and compliance, including provisions regarding increased international cooperation in enforcement.[62]

Continued on page 76

57. U.S. Dep't of Justice, "Rabobank NA Pleads Guilty, Agrees to Pay Over $360 Million" (Feb. 7, 2018), https://www.justice.gov/opa/pr/rabobank-na-pleads-guilty-agrees-pay-over-360-million. See also Andrew Levine and Bruce Yannett, "Anti-Corruption," Latin Lawyer (Nov. 8, 2018), https://latinlawyer.com/reference/1175577/introduction.
58. *Id.*
59. *Id.*
60. U.S. Sec. & Exch. Comm., "Citigroup to Pay More Than $10 Million for Books and Records Violations and Inadequate Controls" (Aug. 16, 2018), https://www.sec.gov/news/press-release/2018-155-0. *See also* Andrew Levine and Bruce Yannett, "Anti-Corruption," Latin Lawyer (Nov. 8, 2018), https://latinlawyer.com/reference/1175577/introduction.
61. *Id.*
62. See Kara Brockmeyer *et al.*, "NAFTA Replacement Adds Anti-Corruption Provisions," FCPA Update, Vol. 10, No. 4 (Nov. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/11/20181130_fcpa_update_november_2018_v2.pdf.

Continued from page 75

This month's issue of FCPA Update was prepared by partners Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, David A. O'Neil, Thomas Schürrle, Karolos Seeger, Jane Shvets, and Bruce E. Yannett, of counsel Frederick T. Davis, counsel Erich O. Grosz, international counsel Alexandre Bisch, Robin Lööf, and Philip Rohlik, associates Fabricio M. Archanjo, Daniel Aun, Ceri Chave, Sol Czerwonko, Andreas A. Glimenakis, Emily Rebecca Hush, Thomas Jenkins, Constantin Klein, Carolina Kupferman, Andrew Lee, Ramsay McCulloch, Friedrich Popp, Elena Rodriguez, Katherine R. Seifert, Ayushi Sharma, Jil Simon, Marisa R. Taney, Rebecca M. Urquiola, and Kate Walsh, and consultant De Zha. Their biographies and contact information are available at www.debevoise.com.

FCPA Update

FCPA Update is a publication of
Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Andreas A. Glimenakis
Associate Editor
+1 202 383 8138
aaglimen@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Jil Simon
Associate Editor
+1 202 383 8227
jsimon@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

Please note:
The URLs in *FCPA Update* are provided with hyperlinks so as to enable readers to gain easy access to cited materials.