

SHEARMAN & STERLING

# FCPA DIGEST

RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT  
OF THE FOREIGN CORRUPT PRACTICES ACT

JULY 2018

*Shearman*

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## INTRODUCTION: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT

Although 2017 ended with two significant FCPA enforcement actions brought by the DOJ, the pace of FCPA enforcement activity over the first half of 2018 once again slowed to a relative crawl. Over the first 120 days of the year, neither the DOJ nor SEC brought any FCPA enforcement actions resulting in a penalty of over \$10 million. The past two months, however, saw a dramatic upshift in enforcement activity by the DOJ, which brought several significant enforcement actions, including the first resolution coordinated with French authorities. Although some may view the recent uptick of DOJ enforcement activity as a sign that a bottleneck has been eased at the agency, the rest of 2018 will be more indicative of whether FCPA enforcement will return to levels that we saw prior to the commencement of the Trump administration.

Among the highlights thus far from 2018 were:

- Nine corporate enforcement actions with total sanctions of approximately \$1.03 billion. Although only slightly more enforcement actions than the eight that had been brought at this time last year, the total sanctions thus far in 2018 are significant higher than the total sanctions of \$272 million at this point in time last year;
- After a significant period of time without bringing any enforcement actions, the DOJ brought four actions in a two-month span;
- The DOJ entered into its first coordinated resolution with French authorities in a foreign bribery case, possibly heralding the emergence of France as an important global anti-corruption authority;
- As in recent years, two outlier enforcement actions distort the picture, raising the average corporate sanction for 2018 to \$114.2 million, whereas the true average, with outliers excluded, is significantly less than this figure (\$23.1 million). The median sanction of \$9.2 million is broadly in line with those from recent years (\$29.2 million in 2017, \$14.4 million in 2016, and \$13.4 million in 2015); and
- The DOJ announced a new policy addressing situations where enforcement actions involve penalties imposed by more than one regulator or law enforcement authority that is designed to avoid the “piling on” of fines and penalties.

# ENFORCEMENT ACTIONS & STRATEGIES

STATISTICS

GEOGRAPHY & INDUSTRIES

TYPES OF SETTLEMENTS

ELEMENTS OF SETTLEMENTS

CASE DEVELOPMENTS



## ENFORCEMENT ACTIONS AND STRATEGIES

### STATISTICS

Thus far in 2018, the DOJ and SEC resolved nine corporate enforcement actions: *TLI, Elbit Imaging, Kinross Gold, Dun & Bradstreet, Panasonic, Société Générale, Legg Mason, Beam Suntory, and Credit Suisse*.

Consistent with the trends and patterns over the past years, the DOJ apparently deferred to the SEC to bring civil enforcement cases in the less egregious matters, which has resulted in the SEC bringing three enforcement actions in the first part of the year without parallel DOJ actions and typically with lower penalty amounts. From April 30 through the middle of the year, however, the DOJ increased its activity dramatically, bringing four major enforcement actions, only two of which involved a SEC parallel enforcement action.

Of the FCPA enforcement actions against individuals, 2018 has seen fifteen individuals charged by the DOJ (or had charges unsealed), while the SEC has not brought a case against a single individual.

We discuss the corporate enforcement actions from the first half of 2018 followed by the individual enforcement actions in greater detail below.

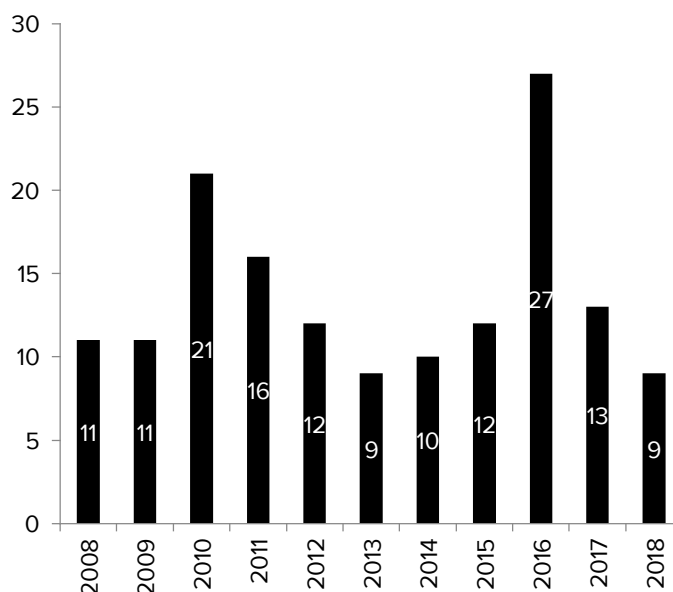
In the *Société Générale* matter, the DOJ alleged that between 2004 and 2009, Société Générale paid bribes through a Libyan “broker” in connection with fourteen investments made by Libyan state-owned financial institutions. According to the DOJ, Société Générale sold over a dozen investments and one restructuring to the Libyan state institutions worth a total of approximately \$3.66 billion, from which it earned profits of approximately \$523 million. In June 2018, the DOJ announced that the bank had entered into a deferred prosecution agreement to resolve both the FCPA conduct described above and unrelated allegations involving LIBOR. As part of the DPA, Société Générale agreed to pay a criminal penalty of \$585 million to resolve the FCPA charges. In related proceedings, Société Générale reached a settlement with the Parquet National Financier (PNF) in Paris relating to the alleged Libya corruption scheme, and the DOJ agreed to credit Société Générale for the \$292.8 million payment it would make to the PNF. This is the first coordinated resolution with French authorities in a foreign bribery case and represents the latest example of the DOJ entering into coordinated global settlements whereby a large portion of the criminal penalty is paid to another country’s government.

In a related enforcement action, the DOJ announced that Legg Mason Inc., a Maryland-based investment management firm, agreed to pay a total of \$64.2 million to resolve allegations of the company’s participation in the same Libyan bribery scheme. Specifically, according to Legg Mason’s admissions, a Legg Mason subsidiary partnered with Société Générale to solicit business from state-owned financial institutions in Libya. As described above, Société Générale paid commissions to a Libyan

broker, which benefitted Legg Mason through its relevant subsidiary, which managed funds invested by the Libyan state institutions. The total settlement amount included approximately \$32.6 million in criminal penalties and approximately \$31.6 million in disgorgement, the latter of which will be credited against any disgorgement paid to other law enforcement authorities in the first year of the agreement. As of the date of publication, the company has not entered into any other agreements with law enforcement authorities.

In *Panasonic*, the DOJ alleged that Panasonic Avionics Corporation, a subsidiary of multinational electronics company Panasonic Corporation, improperly recorded payments to an executive of a state-owned airline in an unspecified Middle East country in violation of the books-and-records provision of the FCPA. Specifically, the DOJ alleged that during the course of negotiating a lucrative contract with the relevant airline, Panasonic Avionics executives agreed to retain the relevant government official as a consultant, for which he received \$875,000 for “little work,” although the subsidiary recorded the payments as legitimate consulting expenses. More broadly, the DOJ also alleged that Panasonic Avionics disguised payments to sales agents in Asia who had not passed its compliance due diligence by channeling them through another sales agent. To resolve the charges, Panasonic Avionics agreed to pay \$137.4 million pursuant to a deferred prosecution agreement with the DOJ, while Panasonic Corporation agreed to pay \$143.2 million in disgorgement and pre-judgment interest to the SEC.

**Total Aggregate Corporate Cases:  
2008-2018 (YTD)**

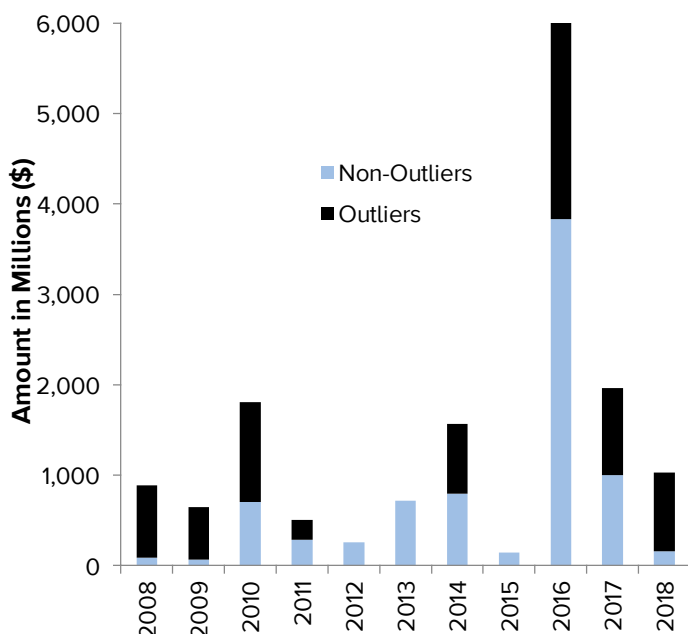


## ENFORCEMENT ACTIONS AND STRATEGIES

In *Dun & Bradstreet*, the SEC alleged that two Dun & Bradstreet partners in China made payments to third-party agents, including payments to government officials, to illegally obtain customer data. Without admitting or denying the alleged conduct, Dun & Bradstreet agreed to pay approximately \$9.2 million to settle the SEC charges. The same day that the SEC enforcement action was announced, the DOJ issued a letter stating that it declined prosecution consistent with the FCPA Corporate Enforcement Policy. The DOJ's letter specifically listed the company's prompt voluntary self-disclosure, full cooperation, remediation and compliance enhancements, and disgorgement to the SEC. This declination represents the first under the DOJ's Corporate Enforcement Policy, and makes clear that the disgorgement requirement contained in the Policy can be satisfied by such a payment to the SEC, not just to the DOJ.

The facts of the *Dun & Bradstreet* enforcement are also somewhat unusual: FCPA enforcement actions typically arise out of situations where companies pay bribes to foreign government officials to obtain contracts or favorable regulatory decisions. Here, however, the relevant Chinese joint venture and subsidiary allegedly paid money to government officials and others to obtain data and information about individuals and entities. This unusual factual backdrop highlights the broad range of interactions with government officials that can spawn FCPA enforcement actions and highlights some of the unique risks that service industry companies can face when engaging in business in foreign countries.

**Total Criminal and Civil Fines Imposed on Corporations: 2008-2018 (YTD)**



The remaining enforcement actions were smaller:

- In *TLI*, the DOJ alleged that Maryland-based Transport Logistics International, Inc. ("TLI"), which provides services for the transportation of nuclear materials, participated in a scheme that involved the bribery of an official at a subsidiary of Russia's State Atomic Energy Corporation. The company entered into a DPA with the DOJ to resolve the criminal charges and agreed to pay \$2 million.
- In *Elbit Imaging*, the SEC alleged that Elbit Imaging Ltd. and its indirect subsidiary Plaza Centers NV, a real estate developer in Europe, paid approximately \$27 million to consultants and sales agents for services related to a real estate development project in Bucharest, Romania. According to the cease-and-desist order, the company made the payments despite the lack of any evidence that the consultants and sales agents actually provided the services they were retained to provide. Furthermore, Elbit and Plaza described the payments in their books and records as legitimate business expenses, even though they may have ultimately been used to make illicit payments to Romanian government officials in connection with a real estate development project in Bucharest. In March 2018, without admitting or denying the facts stated in the cease-and-desist order, Elbit agreed to pay a civil fine of \$500,000 to resolve violations of the FCPA's books and records and internal controls provisions.
- The enforcement action against Kinross Gold is the latest example of liability that can arise from mergers and acquisitions. According to the SEC, in 2010, while conducting due diligence prior to acquiring two African companies, Kinross Gold Corporation determined that the previous owner lacked an anti-corruption compliance program and associated internal accounting controls. Nevertheless, it proceeded with the transaction without addressing the deficiencies in a timely manner. Subsequent internal audit reports over several years found that internal controls continued to be inadequate, but Kinross management took no action. As a result, according to the SEC's order, between the acquisition of the subsidiaries in 2010 and at least 2014, Kinross made payments to certain third parties, frequently in connection with government interactions, without reasonable assurances that transactions were consistent with their stated purpose or the prohibition against making improper payments to government officials. As part of a cease-and-desist order, the company agreed to pay a civil penalty of \$950,000, and to report to the SEC for a term of one year on the status of the implementation of the company's improved anti-corruption compliance procedures and internal controls.
- In *Beam Suntory*, the SEC alleged that an Indian subsidiary of the global beverage company used third-party sales promoters and distributors to make illicit payments to government officials from 2006 through 2012. According to the SEC's order, the relevant Indian subsidiary utilized false

## ENFORCEMENT ACTIONS AND STRATEGIES

invoices to reimburse the third parties, thereby creating false entries in the subsidiary’s books and records, which were subsequently incorporated into Beam’s books and records. In July 2018, without admitting or denying the facts stated in the cease-and-desist order, Beam agreed pay total penalties of approximately \$8.2 million to resolve the SEC’s allegations.

Although *Société Générale* yielded one of the largest FCPA criminal penalties and *Panasonic* similarly involved large penalties, the majority of the remaining 2018 FCPA enforcement actions have resulted in small corporate penalties. In fact, the *Société Générale* and *Panasonic* enforcement actions account for approximately 92% of the total 2018 corporate enforcement penalties to date.

Setting aside these two enforcement actions, the corporate sanctions thus far in 2018 have been relatively modest—ranging from \$500,000 to \$76.8 million. As a result, while the pure average corporate penalty from 2018 thus far is \$114.2 million, when we exclude the *Société Générale* and *Panasonic* outliers, the average corporate penalty is \$23.1 million.<sup>1</sup> This number is significantly lower than the average excluding outliers of \$83.4 million from 2017 and \$73 million from 2016.

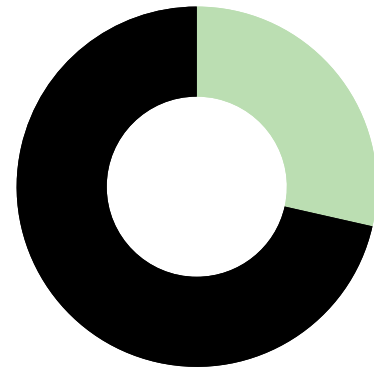
Regardless, we continue to view the median as a more accurate measure of the “average” corporate enforcement penalty. That figure for the 2018 corporate enforcement actions to date is \$9.2 million, which is slightly lower but generally in line with that measure from recent years. As we have noted in previous editions of this publication, it is a general trend that FCPA enforcement actions typically range between \$10 million and \$30 million (excluding the median from 2014, which is an outlier given the low number of enforcement actions in that year).

The 2018 FCPA enforcement activity against individuals has been significantly lower than in past years. The SEC has not brought a single enforcement action against an individual. The DOJ, on the other hand, has brought charges against (or had charges against unsealed) fifteen individuals allegedly involved in schemes that violated the FCPA, but the majority of these charges have been against low-level employees or foreign officials that were involved in enforcement actions brought in recent years (specifically, *Och-Ziff*, the PDVSA investigation, and *Rolls-Royce*).

On January 3, 2018, the DOJ unsealed criminal charges against Michael Leslie Cohen, a former executive at Och-Ziff, which had originally been filed in October 2017. The ten count indictment in the Eastern District of New York included counts for conspiracy to commit investment adviser fraud, investment adviser fraud,

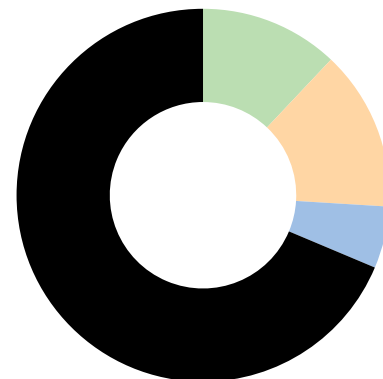
<sup>1</sup> For purposes of our statistics, the “average excluding outliers” refers to the pure average sanction excluding any outliers as calculated using the Tukey Fences model, which utilizes interquartile ranges.

**U.S. and Foreign Government Recoveries 2018 (YTD)**



■ France – \$292.8 Million  
 ■ United States – \$733.2 Million

**U.S. and Foreign Government Recoveries 2017**



■ Brazil – \$236.7 Million  
 ■ The Netherlands – \$274 Million  
 ■ Singapore – \$105.5 Million  
 ■ United States – \$1.35 Billion

conspiracy to commit wire fraud, wire fraud, conspiracy to obstruct justice, obstruction of justice, and making false statements. As we discussed in our January 2018 *Trends & Patterns*, these charges come on the heels of civil charges filed by the SEC against Cohen in January 2017.

In *Lambert*, the DOJ obtained an eleven count indictment in the District of Maryland against Mark Lambert, who was a co-owner and executive of TLI (discussed above), alleging a number of FCPA-related criminal violations: (1) one count of conspiracy to violate the anti-bribery provisions of the FCPA and conspiracy to commit wire fraud; (2) seven counts of violating the anti-bribery provisions of the FCPA; two counts of wire fraud; and one count

## ENFORCEMENT ACTIONS AND STRATEGIES

of money laundering. The charges against Lambert mark the latest enforcement related to this alleged bribery scheme: in June 2015, Daren Condrey—co-owner and co-president of TLI with Lambert—pleaded guilty to conspiracy to violate the FCPA and to commit wired fraud. Then, in August 2015, the foreign official involved in the bribery scheme, Vadiim Mikerin, pleaded guilty to conspiracy to commit money laundering as part of the bribery scheme. Finally, as discussed above, the company involved in the bribery scheme (TLI) entered into a DPA in January 2018 to resolve a charge of conspiracy to violate the anti-bribery provisions of the FCPA.

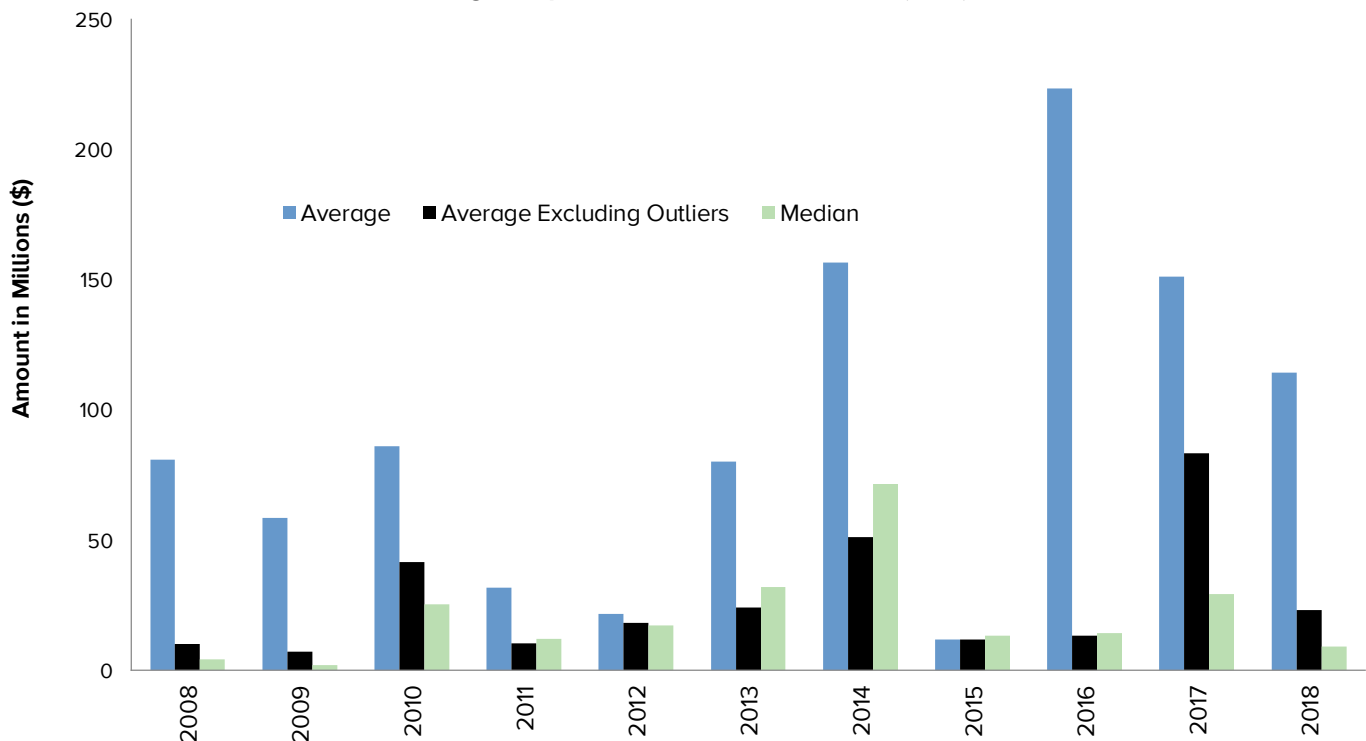
According to the allegations found in the indictment, Lambert and his co-conspirators allegedly agreed to make payments, and caused TLI to make payments, to Vadiim Mikerin, a Director of Techsnabexport (“TENEX”)—which supplied uranium and uranium enrichment services to nuclear power companies throughout the world on behalf of the Russian government—to obtain business with TENEX and one of its wholly-owned subsidiaries. According to documents filed in the case against Condrey, the conspirators obtained the money used to pay the bribes by inflating the prices that TLI charged TENEX for services. Lambert has pleaded not guilty to the charges, and as of the date of publication the charges against Lambert are moving forward, and a jury trial is scheduled for April 2019.

Meanwhile, in February 2018 the DOJ brought charges against an additional five individuals allegedly involved in the PDVSA

enforcement actions. With the unsealing of these most recent charges, the DOJ has to-date charged fifteen individuals—ten of whom have pleaded guilty—as part of its investigation into bribery at PDVSA. According to the indictment, the five individuals charged were former officials of PDVSA and its subsidiaries or former officials of other Venezuelan government agencies or instrumentalities, and together were known as the “management team.” This group allegedly wielded significant influence within PDVSA and allegedly conspired with each other and others to solicit several PDVSA vendors, including U.S.-based vendors, for bribes and kickbacks in exchange for providing assistance to those vendors in connection with their PDVSA business. The indictment further alleges that the co-conspirators then laundered the proceeds of the bribery scheme through a series of complex international financial transactions, including to, from, or through bank accounts in the United States, and, in some instances, laundered the bribe proceeds in the form of real estate transactions and other investments in the United States. Specifically, charges were brought against the following individuals:

- Luis Carlos De Leon Perez, a dual citizen of the U.S. and Venezuela who according to the indictment was previously employed by instrumentalities of the Venezuelan government, was charged with one count of conspiracy to commit money laundering, four counts of money laundering, and one count of conspiracy to violate the FCPA.

**Average Corporate Penalties: 2008-2018 (YTD)**





## ENFORCEMENT ACTIONS AND STRATEGIES

- Nervis Gerardo Villalobos Cardenas, a Venezuelan citizen who according to the indictment was previously employed by instrumentalities of the Venezuelan government, was charged with one count of conspiracy to commit money laundering, one count of money laundering, and one count of conspiracy to violate the FCPA.
- Cesar David Rincon Godoy, a Venezuelan citizen who was allegedly employed by PDVSA and its subsidiaries, was charged with two counts of conspiracy to commit money laundering and four counts of money laundering. According to the indictment, Cesar Rincon is alleged to be a “foreign official” as that term is defined in the FCPA. In April 2018, Cesar Rincon pleaded guilty to one count of conspiracy to commit money laundering, and on the same day the district court ordered a forfeiture of approximately \$7 million. Sentencing is scheduled for December 2018.
- Alejandro Isturiz Chiesa, a Venezuelan citizen who was allegedly employed by a PDVSA subsidiary and is alleged to be a “foreign official,” was charged with one count of conspiracy to commit money laundering and five counts of money laundering.
- Rafael Ernesto Reiter Munoz, a Venezuelan citizen who was employed by PDVSA and is alleged to be a “foreign official,” was charged with one count of conspiracy to commit money laundering and four counts of money laundering.

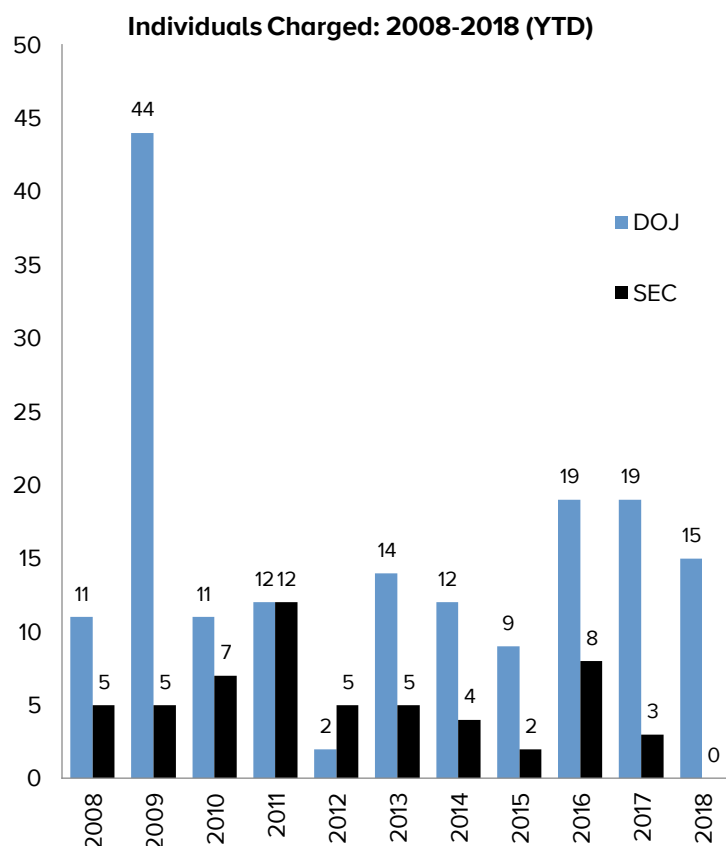
Similar to the PDVSA case, the DOJ has also pursued individual charges related to an alleged scheme to bribe officials at Empresa Publica de Hidrocarburos del Ecuador (“PetroEcuador”), the state-owned oil company of Ecuador. According to the allegations in the indictments, from 2013 through 2015, the alleged conspirators made corrupt payments to PetroEcuador to obtain and retain contracts for GalileoEnergy S.A., an Ecuadorian company that provided services in the oil and gas industry. The bribes were allegedly made through a Panamanian shell company and an unnamed intermediary company organized in the British Virgin Islands. According to the indictment, the scheme resulted in bribes of over \$3 million being paid to secure contracts worth over \$27 million.

Four individuals have now been charged as part of this alleged scheme:

- In October 2017, Marcelo Reyes Lopez was charged with conspiracy to commit money laundering based on violations of the FCPA. In April 2018, Lopez agreed to plead guilty to the one-count indictment.
- In February 2018, Arturo Escobar Dominguez was charged with conspiracy to commit money laundering based on violations of the FCPA. In March 2018, Dominguez agreed to plead guilty to the one-count indictment.
- In April 2018, the DOJ filed an indictment against Frank Roberto Chatburn Ripalda and Jose Larrea, charging Ripalda

with conspiracy to violate the anti-bribery provisions of the FCPA, conspiracy to commit money laundering, violating the anti-bribery provisions of the FCPA, and money laundering, while charging Larrea with conspiracy to commit money laundering.

Two FCPA enforcement actions brought against individuals thus far in 2018 involved an alleged scheme to bribe officials at Servicio di Telecomunicacion di Aruba N.V. (“Setar”), a state-owned telecommunications provider in Aruba. Although the information and plea agreement were entered in December 2017, in April 2018 the DOJ announced an enforcement action against Lawrence W. Parker, Jr., a U.S. citizen who resided in Miami, Florida. According to the Information, Parker was an owner, controlling member of, or participant in the operation of five unnamed phone companies headquartered and incorporated in Florida. Parker engaged in a conspiracy to make payments to a product manager at Seta to obtain contracts with the company, and the Information alleged that at least \$85,000 in bribes were paid in furtherance of the scheme. In December 2017, Parker pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of conspiracy to commit wire fraud, and in April 2018, Parker was sentenced to



## ENFORCEMENT ACTIONS AND STRATEGIES

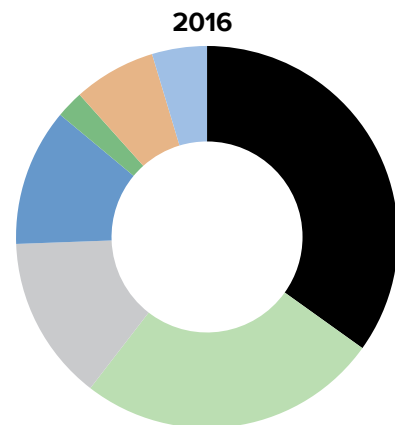
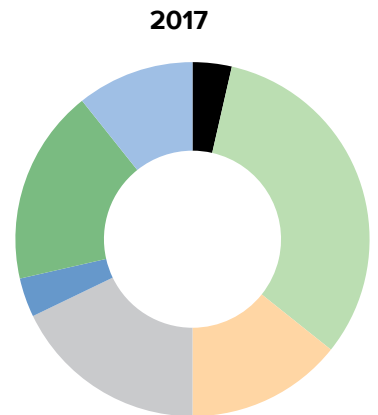
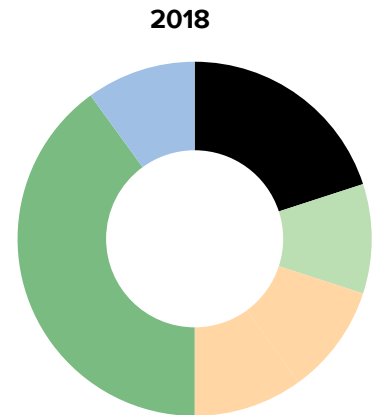
thirty-five months in prison to be followed by three years of supervised release. Parker was further ordered to pay restitution of \$701,750.

In the same press release, the DOJ announced that an agent of Setar alleged to have been involved in the bribery scheme had pleaded guilty to one count of conspiracy to commit money laundering. Egbert Yvan Ferdinand Koolman, a Dutch citizen residing in Miami, was a product manager with Setar during the relevant time period. According to admissions made as part of his plea agreement, between 2005 and 2016, Koolman operated a money laundering conspiracy from his position as Setar’s product manager. This money laundering conspiracy was intended to promote a wire fraud scheme and a corrupt scheme that violated the FCPA. Specifically, Koolman was promised and received bribes from individuals and companies located in the United States and abroad in exchange for using his position at Setar to award lucrative mobile phone and accessory contracts. Koolman pleaded guilty to the charges in April 2018, and in June 2018 was sentenced to 36 months in prison and was ordered to pay approximately \$1.3 million in restitution.

The final two FCPA enforcement actions brought against individuals thus far in 2018 relate to the *Rolls-Royce* corporate and individual enforcement actions brought in 2017. In May 2018, the DOJ brought charges against two additional individuals—Azat Martirosian and Vitalu Leshkov—allegedly involved in that far-reaching bribery scheme. According to the indictment, Petro Contoguris—who was charged in 2017 as part of the *Rolls-Royce* bribery scheme—and an international engineering consulting firm (referred to as the “Technical Advisor” in the *Rolls-Royce* papers) devised and executed a scheme with Rolls-Royce executives and employees, whereby Rolls-Royce would pay kickbacks to the Technical Advisor employees and bribes to at least one foreign official in Kazakhstan, and disguise these payments as commissions to Contoguris’s company, Gravitax, in exchange for helping Rolls-Royce win contracts with a company constructing a gas pipeline from Kazakhstan to China. Martirosian, a citizen of Armenia, and Vitaly Leshkov, a citizen of Russia, were charged with one count of conspiracy to launder money and ten counts of money laundering.

### GEOGRAPHY & INDUSTRIES

In our January 2018 *Trends & Patterns*, we discussed the striking focus of 2017’s FCPA enforcement actions on one geographic region: Latin America. This followed on a heavy focus in the 2016 FCPA enforcement actions on China. Although not as pronounced, and representing a much smaller sample size, the focus thus far in 2018 has been on Northern Africa and the Middle East, with four corporate enforcement actions involving alleged bribery schemes in that region (*Kinross Gold*, *Panasonic*, *Société Générale*, and *Legg Mason*). The charts to the right show the geographic breakdown of the FCPA enforcement actions from 2018, 2017, and 2016 (corporate and individual).



- China
- Latin America & the Caribbean
- Europe
- Russia & Former Soviet Republics
- Sub-Saharan Africa
- Southeast Africa
- Northern Africa & Middle East
- South Asia

## ENFORCEMENT ACTIONS AND STRATEGIES

After North Africa and the Middle East, the 2018 FCPA enforcement actions have generally involved alleged bribery schemes in the regions that have typically been the focus of such actions. Specifically, the 2018 FCPA enforcement actions have involved officials from China (*Credit Suisse* and *Dun & Bradstreet*), Latin America (PDVSA and PetroEcuador individuals), South Asia (*Beam Suntory*), and Russia (*TLI*). Finally, for the first time since 2015, one of the FCPA enforcement actions involved an alleged bribery scheme centered in a European country (*Elbit Imaging* in Romania).

With regard to industries, the 2018 FCPA corporate enforcement actions represent a more diverse set of industries than in past years. In particular, none of the corporate enforcement actions involve two industries that have historically been a source of a large number of FCPA enforcement actions: healthcare & life sciences and the oil & gas industries. Instead, the largest source of FCPA enforcement actions has been the financial services industry, with the *Société Générale*, *Legg Mason*, and *Credit Suisse* cases all involving companies in this space. The remaining enforcement actions have involved a variety of industries: aerospace (*Panasonic*), mining (*Kinross*), transportation (*TLI*), real estate (*Elbit Imaging*), and food & beverage (*Beam Suntory*).

### TYPES OF SETTLEMENTS

For the most part, the agencies have continued prior practices of resolving matters using a variety of settlement structures, with the choice of structure apparently related—but not always in a clear or consistent manner—to the seriousness of the conduct or the timing and degree of disclosure and cooperation. We discuss the SEC's and DOJ's settlement devices below.

#### SEC

As was the case in 2017, thus far in 2018 the SEC has relied exclusively on administrative proceedings to resolve all five of its corporate FCPA enforcement actions. As in recent years, none of these were contested enforcement actions.

#### DOJ

The DOJ thus far in 2018 has used a range of settlement devices in each of its six enforcement actions. Further, 2018 saw the DOJ utilize declinations with disgorgement with a twist, with disgorgement paid to the SEC qualifying as the disgorgement required under the DOJ's FCPA Corporate Enforcement Policy. The list below sets out the various settlement devices the DOJ used thus far in its 2018 FCPA enforcement actions against corporate entities:

- Plea Agreements – *SGA Société Générale Acceptance N.V.* (*Société Générale's* subsidiary)
- Deferred Prosecution Agreements – *Société Générale*, *Panasonic*, *TLI*

- Non-Prosecution Agreements – *Credit Suisse*, *Legg Mason*
- Public Declinations with Disgorgement – *Dun & Bradstreet*

### ELEMENTS OF SETTLEMENTS

#### WITHIN GUIDELINES SANCTIONS

In all five corporate enforcement actions brought by the DOJ thus far in 2018 that have involved penalties based on the U.S. Sentencing Guidelines, the company received a sentencing discount. Nonetheless, it is notable that two enforcement actions from the first half of 2018—*Société Générale* and *Panasonic*—involved sentencing discounts of 20%, which is slightly less than the “up to 25%” discount provided for in the Pilot Program and now the FCPA Corporate Prosecutions Policy for companies that cooperate but did not make a voluntary disclosure. In the settlement documents for both of these enforcement actions, the DOJ made clear that each company did not completely cooperate. Similarly, another company that settled through a NPA received a discount of 15%, with the DOJ contending that the company only provided cooperation in a reactive, rather than proactive, manner, and, further, denying it full remediation credit purportedly because it failed to sufficiently discipline employees who were involved in the misconduct.

#### SELF-DISCLOSURE, COOPERATION, AND REMEDIATION

The DOJ did not award full credit for voluntary disclosure in any of its enforcement matters thus far this year, but it did grant at least partial cooperation credit in all of them. As in recent years, the DOJ has highlighted the fact that the companies disciplined and terminated the individuals responsible for the misconduct, and has been trending towards emphasizing terminations as part of its remedial requirements.

#### MONITORS

As we have previously reported, in recent years the DOJ has increased the frequency with which it imposed a corporate monitor requirement as part of FCPA sanctions. However, only one of the six enforcement actions brought by the DOJ thus far in 2018 has required the imposition of a monitor. In the case of one foreign financial institution, the DOJ noted that it was not imposing a monitor in part because of the continued and ongoing monitoring that will be conducted by French authorities. This represents the latest facet of international cooperation by U.S. enforcement authorities, and is an implicit recognition by the DOJ that it views the French anti-bribery agency as a legitimate anti-corruption authority.

#### FINANCIAL HARDSHIP

The DOJ's enforcement action against TLI provides another recent example of consideration of whether a criminal fine would substantially jeopardize the continued viability of the company. The DPA entered into by TLI prescribed a minimum fine of \$28.5 million, and the DOJ and TLI agreed that the appropriate penalty

## ENFORCEMENT ACTIONS AND STRATEGIES

was approximately \$21.4 million, which represents a 25% discount off the bottom of the Sentencing Guidelines fine range. Nonetheless, based on representations made by the company, the DOJ ultimately agreed that a criminal fine of only \$2 million was appropriate based on TLI's ability to pay.

### DISGORGEMENT

Much like the DOJ's *Biomet* enforcement action from 2017, the DOJ once again required a company to disgorge the profits it allegedly obtained as a result of the bribery scheme. This time, it was Legg Mason that was required to disgorge \$31.6 million in profits it allegedly earned from the bribery scheme it entered into with Société Générale. As we noted in our January 2018 *Trends & Patterns*, it is unusual for the DOJ to require companies to disgorge profits, as this remedy is typically left to the SEC, with the DOJ instead typically obtaining a similar remedial penalty through forfeiture.

## CASE DEVELOPMENTS

### REICHERT

In March 2018, former Siemens AG executive Eberhardt Reichert pleaded guilty to one count of conspiring to violate the FCPA's anti-bribery, internal controls, and books and records provisions and to commit wire fraud. As we discussed in prior years' *Trends & Patterns*, Reichert was one of eight former Siemens employees charged by the DOJ more than six years ago with criminal conspiracy to violate the FCPA, launder money, and commit wire fraud for their roles in the company's extensive bribery scheme in Latin America. Only one other individual Siemens defendant—Andres Truppel, who pleaded guilty in September 2015 to conspiracy to violate the anti-bribery, internal controls and books and records provisions of the FCPA and to commit wire fraud—has made an appearance in U.S. court, with the others remaining abroad as fugitives. In September 2017, Reichert was arrested in Croatia and agreed to be extradited to the United States to face

trial, becoming the second Siemens defendant to appear in U.S. courts. As of the date of publication, a sentencing hearing has not yet been scheduled.

### BAHN

In January 2018, Joo Hyun Bahn aka Dennis Bahn pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA. As we have previously reported, Bahn was involved in a bribery scheme that involved paying a Qatari official to finance the sale of a high-rise building complex in Vietnam. Sentencing is scheduled for September 2018.

### WANG

In April 2018, Julia Vivi Wang pleaded guilty to charges of conspiracy to violate the anti-bribery provisions of the FCPA, violations of the anti-bribery provisions of the FCPA, and filing false income tax returns. Wang is scheduled to be sentenced in September 2018.

### NG

In May 2018, Ng Lap Seng was sentenced to 48 months in prison. In addition, Ng was ordered to pay a \$1 million fine, \$302,977 in restitution to the United Nations, and a forfeiture money judgment of \$1.5 million. Ng had previously been convicted in July 2017 of one count of conspiracy to violate the FCPA and two substantive counts of violating the FCPA—in addition to conspiracy to commit money laundering, money laundering, conspiracy to defraud the United States, bribery, and obstruction of justice.

Ng has appealed his conviction, and in June 2018, the Second Circuit denied Ng's motion for bail pending appeal, ruling that he had failed to show that he was not a flight risk.

# PERENNIAL STATUTORY ISSUES

JURISDICTIONS

FOREIGN OFFICIALS

SUCCESSOR LIABILITY



## PERENNIAL STATUTORY ISSUES

2018 has been a relatively slow year so far for corporate enforcement actions, so there have been fewer statutory-related issues within the FCPA-specific context. However, there have been a few landmark cases this year that, while not directly related to the FCPA, will likely influence FCPA enforcement. As discussed in further detail below, we have seen significant convergence between FCPA enforcement and other disciplines, providing even stronger evidence that these non-FCPA cases may be generally applicable to FCPA enforcement issues.

### JURISDICTION

As we noted in previous editions of *Trends & Patterns*, the DOJ and SEC have historically interpreted the FCPA's jurisdictional requirements extremely broadly, claiming that slight touches on U.S. territory such as a transaction between two foreign banks that cleared through U.S. banks or, even more tenuously, an email between two foreign persons outside the U.S. that transited through a U.S. server, were sufficient. This year in *Jesner v. Arab Bank*, the Supreme Court's opinion included *dicta* that pushed back on this expansive jurisdictional scope, at least in the context of clearing U.S. dollar transactions. 138 S. Ct. 1386 (2018).

*Jesner* involved a suit under the Alien Tort Statute ("ATS") against Arab Bank, a Jordanian bank with a branch in New York, which the plaintiffs claimed provided financing to Hamas and other terrorist groups resulting in terrorist attacks on plaintiffs and their families. The main U.S.-based conduct alleged by the plaintiffs was Arab Bank's use of the Clearing House Interbank Payments System ("CHIPS") for transactions that benefitted terrorists. CHIPS utilizes U.S. dollars, both directly and to facilitate exchanges between other foreign currencies, and operates in the United States and abroad. The Court noted that "it could be argued" that a corporation whose only connection to the United States is the use of CHIPS has "insufficient connections to the United States to subject it to jurisdiction under the ATS." *Id.* at 1398. However, it declined to answer the question of whether these contacts were sufficient, reaching its decision in *Jesner* on other, unrelated grounds specific to the ATS.

We might be trying to read into the smoke here, but in an area bereft of judicial guidance, we have to take what we can get. The Supreme Court's treatment of the question of the sufficiency of U.S. dollar clearing operations to sustain jurisdiction on a foreign corporation was too brief and inconclusive to provide a firm precedential basis for this argument. However, this mere hint that this type of activity is not sufficient to warrant jurisdiction may provide support to future challenges or may dissuade the U.S. authorities from relying on it too heavily. This could, in time, have a significant effect on the DOJ's and SEC's ability to bring bribery charges, as the main or only jurisdictional hook in several recent cases, including *VimbleCom*, *Teva*, and *Telia*, has been the use of U.S. dollars. *Jesner* provides some support for the notion that such connections might just be "insufficient."

### FOREIGN OFFICIALS

Continuing a trend we highlighted in last year's *Trends & Patterns*, 2018 brought yet another case in which a corporation was held liable under the FCPA when there was no evidence that the case involved the bribery of a foreign official. In the settlement with *Elbit Imaging*, the SEC charged Elbit with violations of the FCPA's books-and-records and internal controls provisions in connection with sales through third-party consultants and sales agents that lacked proper documentation. The SEC's Order alleges that Elbit and its subsidiary engaged these agents and consultants to assist in projects involving government officials, but it tellingly never explicitly connects the sums paid to the consultants or sales agents to payments to a foreign official. Further, it does not even attempt to *infer* that any payment to a government official was made in exchange for obtaining or retaining business.

With no *quid pro quo* and no payment to a government official, we are essentially looking at a case of falsification of documentation and failure to implement reasonable internal controls. These accounting failures in turn resulted in a situation in which "some or all of the funds *may* have been used to make corrupt payments to Romanian government officials or were embezzled" (emphasis added)—but the SEC can't really say. This case thus demonstrates the additional risk to issuers under the FCPA—mere suspicion of bad conduct, coupled with internal controls failures related to payments to third parties, is sufficient to establish a violation of the FCPA's accounting provisions, even where there is insufficient (or no) evidence of bribery.

### SUCCESSOR LIABILITY

As discussed above, *Kinross Gold* provides another warning of the risks of successor liability in M&A transactions. In this case, Kinross was allegedly aware of inadequate internal controls at its two newly acquired subsidiaries even before it closed the acquisition and was on warning through internal audits that these issues continued post-closing. During this time, the subsidiaries continued to make improper payments to local vendors without confirming that the vendors provided the services, including after Kinross finally attempted to implement policies and adequate procedures at these companies. Kinross purportedly knew that the companies it had acquired "lacked an anti-corruption compliance program and associated internal accounting controls" and required "extensive remediation" but it failed to make the necessary remediation and the improper behavior continued and Kinross was held responsible.

Kinross serves as a cautionary tale for acquiring companies, but realistically it's a pretty clear case. Based on the SEC's order, the compliance risks appear to have been clearly known by Kinross, but the company did virtually nothing for at least three or four years after the acquisition to address the problems. We should let that serve as a fairly obvious lesson—if there are known risks in an acquisition, waiting four years to address them is far too long.

# COMPLIANCE GUIDANCE

FCPA CORPORATE ENFORCEMENT POLICY

POLICY ON COORDINATION OF CORPORATE RESOLUTIONS

PRE-EMPTIVE REPORTING OF TOP EXECUTIVES

CONVERGENCE AND DIVERGENCE OF FCPA ENFORCEMENT ACROSS BORDERS AND DISCIPLINES

CHALLENGES TO ATTORNEY-CLIENT PRIVILEGE



### FCPA CORPORATE ENFORCEMENT POLICY

In November 2017, the DOJ announced the incorporation of the FCPA Pilot Program into the U.S. Attorneys' Manual, which guides the DOJ's enforcement policies and practices. As discussed in last year's *Trends & Patterns*, the model presented by the DOJ provides a pathway for companies to secure a less onerous penalty in the face of FCPA violations—the so-called “declination with disgorgement”—through voluntary self-disclosure, cooperation, and remediation. The Policy has been active for over half a year, but only one case so far has resulted in this lowest form of enforcement action - which may provide further insight into the demands and ramifications of this policy.

*Dun & Bradstreet* represents the first DOJ “declination” issued after the Policy's official formalization. In April 2018, the DOJ posted a declination letter indicating it had declined to prosecute Dun & Bradstreet despite its conclusion that the company's subsidiary in China had paid bribes. The DOJ justified its decision not to bring more serious forms of enforcement actions by referring to Dun & Bradstreet's “prompt voluntary self-disclosure; the thorough investigation undertaken by the Company; its full cooperation in this matter, including identifying all individuals involved in or responsible for the misconduct, providing the Department all facts relating to that misconduct, making current and former employees available for interviews, and translating foreign language documents to English; the steps that the Company has taken to enhance its compliance program and its internal accounting controls; [and] the Company's full remediation, including terminating the employment of 11 individuals involved in the China misconduct.” In other words, Dun & Bradstreet strictly adhered to the requirements as laid out by the FCPA Corporate Enforcement Policy, word-for-word. Dun & Bradstreet, however, did not escape the last requirement of the Policy, as the letter from DOJ to Dun & Bradstreet indicates that it “will be disgorging to the SEC the full amount of disgorgement.”

We have previously noted that disgorgement pursuant to the DOJ's Policy does not offer a true escape from enforcement so much as a slightly more gentle enforcement action. Thus, the required disgorgement and the express acknowledgement of bribery in Dun & Bradstreet's “declination” sounds as much in enforcement as it does in declinations. In a true declination, the DOJ truly decides to close its case without an enforcement action, there is no formal, published letter, no disgorgement, and no public accusation or “finding” of wrong-doing. For example, in 2018 both Sanofi and Juniper reported in their 20-F filings that the DOJ had formally closed its investigations into possible FCPA violations at the companies. These true declinations were issued under similar circumstances as the “declinations” under the Policy, since both companies self-reported and cooperated, at least according to their own disclosures. However, these declinations carry no disgorgement requirements and the DOJ made no public, formal comment regarding the existence of any FCPA violations. Instead, Sanofi and Juniper were able to quietly

report the end of the DOJ's investigation on their own terms while facing no monetary or reputational penalties.

When compared to true declinations, the declinations issued pursuant to the Policy have more in common with non-prosecution or deferred prosecution agreements. The Policy declinations may incentivize companies to follow its tenets in the hope of garnering a reduced penalty. However, results such as *Dun & Bradstreet* would seem to offer very different incentives and, contrary to the confident statements of DOJ officials, have the opposite impact from that intended.

### POLICY ON COORDINATION OF CORPORATE RESOLUTIONS

Following hot in the footsteps of the FCPA Corporate Enforcement Policy, in May 2018, the DOJ released the “Policy on Coordination of Corporate Resolution Penalties,” which will be similarly incorporated into the U.S. Attorney's Manual. Deputy Attorney General Rod J. Rosenstein, in announcing the Policy, stated that its purpose was to instruct DOJ attorneys “to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company for the same conduct.”<sup>2</sup> According to Mr. Rosenstein, the DOJ's Policy against “piling on” enforcement actions recognizes that companies may be subject to numerous regulatory authorities—both in the U.S. and abroad—which may result in disproportionate penalties.

The Policy has four core features:

- (1) “reaffirm[ing] that the federal government's criminal enforcement authority should not be used against a company for purposes unrelated to the investigation and prosecution of a possible crime,” e.g., Department attorneys “should not employ the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case;”
- (2) “direct[ing] Department components to coordinate with one another, and achieve an overall equitable result . . . includ[ing] crediting and apportionment of financial penalties, fines, and forfeitures;”
- (3) “encourag[ing] Department attorneys, when possible, to coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct;” and
- (4) “set[ting] forth some factors that Department attorneys may evaluate in determining whether multiple penalties

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<sup>2</sup> DOJ Press Release, Deputy Attorney General Rod J. Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.



## COMPLIANCE GUIDANCE

serve the interests of justice in a particular case . . . includ[ing] the egregiousness of the wrongdoing; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation with the Department."

Mr. Rosenstein emphasized that the goal of this Policy is to "achieve an overall equitable result," but he also cautioned that DOJ would continue to expect full cooperation from companies, even if other authorities are involved in an investigation, and it may still impose multiple penalties where they "really are essential to achieve justice and protect the public."

As with the DOJ's formalization of the FCPA Corporate Enforcement Policy, this Policy certainly does not represent any dramatic change for DOJ enforcement actions and largely reflects the policies and approaches already taken by the DOJ, especially the Fraud Section. However, the formalization and addition to the DOJ's Attorney's Manual may lead to more frequent and consistent applications of the Policy. In particular, it is possible we will see the DOJ engaging in earlier and more proactive coordination with non-U.S. enforcement authorities, which have become more involved in recent years, as exemplified, for example, in the global investigation and \$2.6 billion USD resolution concerning the Brazilian conglomerate Odebrecht. Companies undergoing similarly wide-spread investigations may endeavor to use this Policy as leverage to reduce or streamline the investigations or penalties, but companies should not expect to get off with significantly lighter penalties. Ultimately, as stated by Mr. Rosenstein, "the Department will act without hesitation to fully vindicate the interests of the United States."

### PRE-EMPTIVE REPORTING OF TOP EXECUTIVES

In a new trend potentially emerging in FCPA enforcement, possibly in reaction to the Yates Memo and related provisions in the FCPA Corporate Prosecution Policy, several recent cases have involved companies pre-emptively reporting misconduct by top executives.

In March 2018, Royal Dutch Shell filed with Dutch Authorities a criminal complaint against its former head of commercial operations in Africa, Peter Robinson, in connection with potential kickbacks in a sale of an oilfield in Nigeria. It also passed information about other transactions involving Robinson to the U.S. DOJ and SEC. Shell became aware of the potential bribery involving Robinson when authorities raided his home as part of an investigation into another matter. Shell then conducted its own investigation and ultimately filed the criminal complaint against Robinson.

Similarly, in the end of 2016, Rio Tinto suspended and reported the chief executive of its energy and minerals division to authorities in the U.S. and the U.K. after it discovered evidence that he approved \$10.5 million in suspicious payments to a consultant for an iron ore project in Guinea. The disclosure,

which was released on November 8, 2016, states that Rio Tinto became aware of the potential payment on August 29, 2016, giving it a mere two months to conduct the investigation.

We do not have insight into exactly what Shell and Rio Tinto knew when they outed their executives to the authorities, so we can only speculate that the investigations had not progressed too far beyond a preliminary point based on the timing and language in their public disclosures. Regardless, it is unusual to see companies coordinating with authorities and offering up high-level executives so early in the investigation, although that is, of course, exactly what the DOJ wants. Although these companies may have correctly calculated that throwing an executive under the bus will ultimately result in a more positive outcome for the company as a whole, doing so in the very preliminary stages of an investigation, based on inferences piled on suppositions based on incomplete evidence, may obviously be unfair to the executives and a disservice both to the company and the government.

### CONVERGENCE AND DIVERGENCE OF FCPA ENFORCEMENT ACROSS BORDERS AND DISCIPLINES

Until recently, the U.S. was virtually the only country with an effective enforcement regime with respect to transnational bribery. In the absence of significant judicial interpretation of the FCPA's terms, the DOJ was able to develop an unwritten code of sentence reductions, settlements of varying levels of severity, and wide but unchallenged interpretations of the statutory limits. It was one-of-a-kind, and not everyone was a fan.

However, as FCPA compliance has become an accepted reality of doing business with companies with U.S. ties, other countries and disciplines have started adopting their own approaches and practices. In some cases, they follow the model of the DOJ, while others choose different paths.

The clearest trend has been the adoption and enforcement of anti-corruption laws across the globe, including in countries where kickbacks and bribes are a deeply engrained part of business. Moreover, in addition to adopting anti-corruption laws, we have also seen other countries embracing U.S. enforcement techniques. In 2018 both Canada and France introduced deferred prosecution agreements, a hallmark of U.S. corporate criminal enforcement, particularly in the FCPA context. The first French DPA cited the company's lack of self-disclosure and cooperation as factors in assessing a higher fine—concepts that had previously been entirely unfamiliar in French law but which strongly echo U.S. enforcement mechanisms. Canada's DPA also seeks to encourage companies to voluntarily disclose violations, which has never been part of its enforcement landscape before. More time will tell if Canadian and French companies take to DPAs as a means of avoiding convictions and higher fines, as the companies in these jurisdictions may or may not become comfortable with the risk of stepping forward and cooperating with authorities.

## COMPLIANCE GUIDANCE

Alternatively, some countries are opting to depart from the U.S. model of enforcement, thus raising the possibility of diametrically opposed incentives and consequences in different jurisdictions, which may be problematic for multi-national companies subject to multiple authorities. The U.K.-U.S. enforcement dynamic could become particularly tough to negotiate based on different approaches taken by the DOJ and SEC versus the SFO. In recent years, the SFO has repeatedly expressed its interest in taking over investigations once a company has self-reported. The SFO's self-reporting guidance emphasizes "the SFO's primary role as an investigator and prosecutor of serious and/or complex fraud, including corruption"—in marked contrast to U.S. authorities which often prefer for companies to shoulder the burden of the investigation after they self-report and consider it an important factor in support of the cooperation credit. Companies under investigation by authorities in the U.S. and the U.K. thus face an impossible choice—continue their own investigation while stepping on the toes of the SFO or back down to the chagrin of the U.S. authorities expecting continued investigative efforts and cooperation from the company. The damned-if-you-do and damned-if-you-don't situation may be considered in a company's decision to self-report or not or may weigh on the side of delaying a self-report until the internal investigation has progressed further.

The U.S. and the U.K. authorities have worked together in several successful enforcement actions in recent years, and in the last *Trends & Patterns*, we wrote about the unprecedented level of global cooperation in anti-bribery investigation. But we have to wonder if the two biggest players will start to clash more frequently as the U.K. grows stronger in its own approach to investigation and enforcement.

While cross-border anti-bribery enforcement across the globe has seen a mix of convergence and divergence, cross-discipline enforcement in the U.S. has experienced uncommon alignment in 2018. While the FCPA used to exist in a separate bubble within domestic white collar and fraud, we have seen unexpected levels of migration towards traditionally FCPA-exclusive enforcement policies and practices. The incorporation of the FCPA Corporate Enforcement Policy and the Policy on Coordination of Corporate Resolutions into the U.S. Attorney's Manual, which applies to all DOJ attorneys, indicates that other types of investigations may start to look a lot like FCPA actions. DOJ's settlement with Barclays marked the first implementation of the FCPA Corporate Enforcement Policy after its official incorporation to the Attorney's Manual, and it involved a front-running scheme on Barclays' currency trading desk—i.e., nothing to do with the FCPA. DOJ officials have referred to the Barclays case as a blueprint for companies seeking to avoid criminal charges and the declination letter explicitly laid out all four elements of self-reporting, cooperation, de-confliction, and remediation from the FCPA Corporate Enforcement Policy. The Barclays' settlement thus clearly represented that DOJ, at least DOJ's Fraud Section, plans on applying the tenets of the FCPA Corporate Enforcement Policy

to other types of cases. We have not seen it outside the fraud section's purview yet, and there are some limitations in the potential application to areas such as antitrust enforcement that already have defined leniency programs. Otherwise, the potential scope of the FCPA Corporate Enforcement Policy and the Coordination of Corporate Resolutions Policy beyond the realm of the FCPA appears to be pretty wide.

### CHALLENGES TO ATTORNEY-CLIENT PRIVILEGE

The sacrosanct attorney-client privilege has taken a bit of a battering so far in 2018, with potentially significant ramifications on FCPA investigations. Typically, when companies hire external law firms to conduct internal investigations into potential corruption, they assume the attorney-client privilege will shield the majority of communications. However, a Chinese company, Cichel Science & Technology Co., has challenged this assumption in a contractual dispute in the Eastern District of New York. Cichel operated as a distributor for Misonix, a U.S.-based medical device manufacturer, until Misonix terminated the contract after conducting an internal investigation into potential corruption at Cichel. Misonix conducted the internal investigation with the help of law firms Morgan Lewis and Williams & Connolly, with Morgan Lewis conducting most of the fact-finding work. Cichel demanded discovery of Morgan Lewis' investigation documents, arguing that they are not protected by attorney-client privilege because they were solely factual in nature and thus not subject to protection. We saw a similar challenge to the attorney work product protection succeed in the Office of the Special Counsel's investigation into possible collusion between Russia and U.S. citizens, where the District court for the District of Columbia held that the protection did not apply to the factual, as opposed to opinion, portions of an attorney's notes.

However, Misonix argues that the factual information was critical to Morgan Lewis' legal advice, and thus should be covered by privilege. In an interesting twist, Cichel argues that Williams & Connolly, rather than Morgan Lewis, provided the ultimate legal advice to Misonix regarding the contract termination, leaving Morgan Lewis as the factual heavy lifters but with little role in the legal advice that generates the privilege.

Further, Cichel alleges that Misonix waived privilege in utilizing the investigation's findings as the basis for terminating the contract and defending its decision. Misonix rejects this claim, arguing that it only relied on documents that had already been produced to Cichel in its decision, and thus it had not waived the privilege on the investigation documents sought by Cichel.

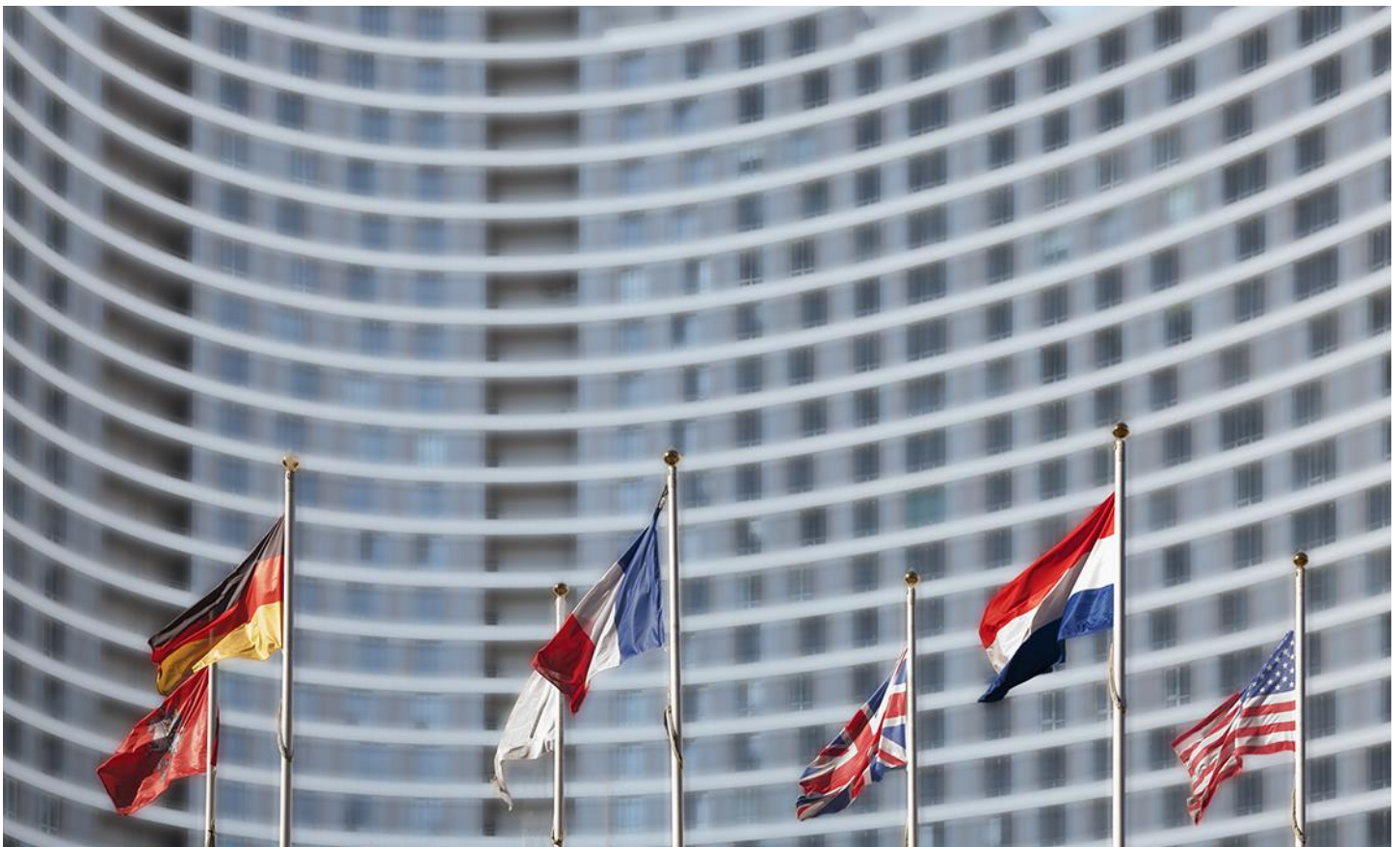
As of the time of this publication, no decision on this topic is publicly available. Regardless of the outcome, it the case should serve as a warning that internal investigations are not immune to discovery and companies and law firms engaging in such investigations should be conscientious of potential challenges to privilege and discovery risk.

# UNUSUAL DEVELOPMENTS

POST-KOKESH DEVELOPMENTS: LIMITS ON SEC'S PURSUIT OF DISGORGEMENT

DOJ'S EFFORTS TO INCREASE VOLUNTARY DISCLOSURES

NARROWING WHISTLEBLOWER PROTECTIONS



## UNUSUAL DEVELOPMENTS

### POST-KOKESH DEVELOPMENTS: LIMITS ON SEC'S PURSUIT OF DISGORGEMENT

In *Kokesh v. SEC*, the Supreme Court held that SEC disgorgement sanctions for violating federal securities laws were subject to the five-year statute of limitations that applied for any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture.” Overruling established precedent, which had been fortified by the SEC’s assertion that disgorgement constituted an equitable remedy, the Court found a disgorgement sanction was a “penalty” within the meaning of the statute. The decision has particular importance in FCPA actions even if it is relevant for all corporations and individuals facing the SEC’s vast investigatory power. The Department of Justice issued eight declination letters in the last two years to end FCPA investigations, relying largely on the fact that the company would be disgorging ill-found profits as a reason for stopping its prosecutorial pursuit of the company.

Following the *Kokesh* decision, there have been some developments in the law as securities litigators have tested the outer boundaries of the SEC’s sanction powers. From the ensuing court and agency decisions after *Kokesh*, several conclusions can be drawn: 1) attempts to extend *Kokesh* beyond disgorgement has been largely unsuccessful, 2) the underlying power to assess disgorgement sanctions remains firmly in the hands of the investigators, and 3) the retroactivity of the *Kokesh* decision to sanctions issued before the ruling has been confirmed.

Since *Kokesh*, the attempts to extend the ruling beyond disgorgement have failed to gain traction. When the Federal Communications Commission sought to recover sums improperly paid, it addressed and promptly dismissed the respondent’s claim that *Kokesh* governed the action. It found that *Kokesh* applied exclusively where the sanction had some retributive or deterrent purpose, rather than returning both parties to the status quo. It was, after all, an action to recover a windfall the respondent was not entitled to. Additionally, the *Kokesh* statute of limitations has not been extended to injunctive relief sought for violations of a federal securities law. The District Court in *SEC v. Ahmed* found that the injunction was designed to protect the public instead of punishing the defendant, and thus fell outside the scope of “penalty.”

Furthermore, the Supreme Court left the door ajar, if only slightly, to reassess the constitutionality of imposing disgorgement sanctions in the first place, but the lower courts have proved unwilling to entertain the question. Dubbed the “ominous footnote,” footnote 3 in *Kokesh* simply reads “[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context,” but that has not stopped defendants from raising it as a defense. The Supreme Court’s

deliberate avoidance has proven unhelpful thus far, but it is a development that warrants close future examination.

Finally, the relief afforded defendants from disgorgement sanctions for older claims has been extended even to sanctions assessed before the *Kokesh* decision was published. Before an SEC Administrative Proceeding on March 29, 2018, *In re Larry Grossman* vacated a disgorgement award from before *Kokesh*, affirming the retroactivity of the Supreme Court ruling. Additionally, the Eastern District of New York requested additional information on a defendant’s alleged activities—even before *Kokesh* was issued—to ensure the disgorgement sought fell within the 5-year time frame required by *Kokesh*. Thus, the decision can provide some relief for claims arising out of conduct pre-*Kokesh*.

### DOJ'S EFFORTS TO INCREASE VOLUNTARY DISCLOSURES

The revised DOJ FCPA Corporate Enforcement Policy, issued in November 2017, seeks to attract voluntary disclosures and further cooperation by companies suspected of violating the anti-bribery and bookkeeping provisions of the FCPA. Improving on the former Pilot Program that provided potential reductions in criminal fines for companies following the DOJ’s guidance, the new Policy introduces a presumption that, absent aggravating circumstances, a company will not be “prosecuted” if it voluntarily discloses and cooperates with the investigation. In May, Deputy Attorney General Rosenstein reaffirmed the Department’s willingness to give great consideration to companies that, in an effort to mitigate the corporate environment responsible for the FCPA violation, adopt serious compliance programs and timely report the misconduct to the appropriate investigators.

The DOJ has shown a willingness to calibrate sanctions based on a variety of different factors, weighing heavily the proactive efforts of the corporate entity to resolve the issue and assist the prosecutors before and during its FCPA investigation. For example, as discussed above, Panasonic Avionics Corporation (PAC), a subsidiary of Panasonic Corporation, entered into a DPA with the DOJ on April 30, 2018, agreeing to pay \$137 million to the DOJ and \$143 million in disgorgement to the SEC for violating the accounting provisions of the FCPA. In this case, PAC’s mischaracterization of money spent on consultants who did little or no actual consulting work caused Panasonic to falsify its books and records. Since PAC did not voluntarily self-disclose the misconduct, it was not eligible for the full penalty reduction afforded under the new Policy, but the DOJ recognized its extensive cooperation and compliance enhancements by agreeing to a twenty percent discount off the low end of the Sentencing Guidelines range. Even so, it is notable that PAC did not receive the full twenty-five percent available to cooperating and mitigation companies; unfortunately, the papers do not disclose why.

## UNUSUAL DEVELOPMENTS

Additionally, the Department issued its first corporate declination letter under the new Policy in the case of *Dun & Bradstreet*. Here the company voluntarily self-disclosed the conduct, cooperated, and mitigated the conduct by its Chinese subsidiary. In return, the DOJ declined prosecution but only after noting that the company would be the subject of an SEC enforcement action and be required in that case to disgorge \$9 million.

### **NARROWING WHISTLEBLOWER PROTECTIONS**

On February 21, 2018, the Supreme Court issued its ruling in *Digital Realty Trust v. Somers* to resolve a circuit split on the reach of the anti-retaliation whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Congress enacted the Dodd-Frank Act in response to the 2008 financial crash and extended retaliation protections to whistleblowers at companies subject to federal securities laws. In *Somers*' 9th Circuit case below, the Court of Appeals held that whistleblowers who reported internally could qualify for Dodd-Frank's anti-retaliation protections, which were more expansive and easier to demonstrate than the prior protections afforded under the Sarbanes-Oxley framework (which requires administrative exhaustion and has a 180-day administrative complaint-filing deadline). In reversing the lower court's decision, the Supreme Court held that the Dodd-Frank Act's anti-retaliation provision applied exclusively to those that report the securities-law violations to the SEC rather than internally. This means that

employees that notice compliance violations, including potential FCPA issues, are not protected if they report only through their employer's whistleblower channels but must instead report those issues to the Commission directly to receive the Dodd-Frank safeguards against retaliatory employment actions. In implementing the Dodd Frank Act, the SEC had sought to avoid weakening an issuer's ability to provide incentives and address compliance issues internally by expanding the Act's protections to internal reporting. The Court, however, applying a strict interpretation of the Act's language, rejected that approach, essentially inviting Congress, which is no friend to the Act in today's environment, to revise the statute if it intended such a result.

The *Somers* decision had an almost immediately effect in the FCPA world. At a trial prior to the decision, the jury had returned a verdict holding Bio-Rad Laboratories Inc. liable for \$11 million for firing its former general counsel in 2015 after he had reported to the corporation's audit committee that the company may have engaged in bribery in China. In light of the *Somers* decision, Bio-Rad has now appealed the judgment to the 9th Circuit Court of Appeals, arguing in part that the jury, in making its decision to award attorney's fees, relied on a Dodd-Frank whistleblower provision that was made inapplicable for cases of internal reporting. The case's outcome has not yet been determined, but it may shed some light into the extent of damages under whistleblower retaliation claims after the *Somers* decision.

# PRIVATE LITIGATION



## PRIVATE LITIGATION

The issue of when to disclose and how much was again at issue in a recent case involving Embraer S.A., which disclosed in November 2011 that it was under investigation by the DOJ and the SEC. Over the next almost five years, the company periodically repeated its disclosure until in July 2016 it disclosed that its negotiations with the DOJ and the SEC had progressed to a point that it was recognizing a \$200 million loss contingency. Three months later it entered into a DPA with the DOJ and a consent order with the SEC and agreed to pay \$190 million in fines and disgorged profits with respect to violations of the FCPA's anti-bribery and books and records provisions.

As often happens, the announcement of the settlement was shortly filed by a class action complaint against Embraer and several of its officers alleging securities fraud under Sections 10(b) and 20(a) of Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 based on the company allegedly having made false or misleading statements about or failed to disclose violations of the FCPA. On March 30, 2018, the U.S. District Court for the Southern District of New York dismissed the complaint with prejudice, finding that Embraer did not have a duty to disclose uncharged, unadjudicated wrongdoing and that the Company's disclosures about the government investigation adequately addressed the risks that could result from a finding of unlawful conduct. The court noted that the company repeatedly disclosed that it was under investigation for alleged FCPA violations and that it may be required to pay substantial fines or incur other sanctions. The court ruled that, under Second Circuit law, these statements satisfied the Company's disclosure obligations.

Interestingly, the court also rejected the plaintiff's argument that Embraer's financial statements were false and misleading because it failed to disclose that some of its revenue was derived from an illicit bribery scheme. This is, of course, the very theory of the government's prosecution under the FCPA's books and records provisions. Here, however, in the disclosure context, the court ruled that a company that accurately reports historical

financial data, even if it did not disclose that some portion of its underlying books and records were not accurate because they did not reflect that the sales or income was related to corrupt conduct, is not in violation of the securities fraud laws and regulations.

### **SETTLEMENT IN PETROBRAS SECURITIES CLASS ACTION**

In January 2018, Petrobras announced that it has agreed to pay \$2.95 billion to resolve the securities class action pending in the Southern District of New York regarding the company's significant corruption scandal in Brazil. The class action claimed that investors were harmed by alleged corruption when contractors overcharged Petrobras and kicked back some of the overcharges through bribes to Petrobras officials. Judge Rakoff subsequently granted preliminary approval of the proposed settlement in February 2018, and granted final approval in June 2018, under which Petrobras did not admit to any wrongdoing or misconduct and continued to advocate its position that the company itself was a victim of the acts revealed in Operation Lavo Jato in Brazil.

### **ATTEMPTED RECOVERY AGAINST FOREIGN OFFICIALS INVOLVED IN BRIBERY SCHEMES**

In an interesting case filed this year, Harvest Natural Resources and HNR Energia B.V., a Houston-based energy corporation that formally dissolved in May 2017, has filed suit against two former presidents of PDVSA and other individuals who worked for these two presidents, alleging civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as federal and state antitrust statutes. According to allegations contained in the complaint, the Venezuelan government twice refused to allow Harvest to sell energy assets co-owned with PDVSA because Harvest refused to pay bribes requested by the defendants. The complaint alleges that these denials forced the company to sell the same assets at a loss of \$470 million.

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## ENFORCEMENT IN THE UNITED KINGDOM

### **CPS – FIRST CONVICTION FOR FAILURE TO PREVENT BRIBERY**

In February 2018, Skansen Interiors Ltd became the first company to be convicted of the corporate offence of failing to prevent bribery under section 7 of the Bribery Act 2010, following a contested trial in which the company unsuccessfully argued that it had adequate procedures in place to prevent bribery (the statutory defense). Although the case is unreported, the submissions of the prosecution provide an insight into what will likely need to be shown to successfully raise a defense of adequate procedures. In addition, the case has attracted criticism for the Crown Prosecution Service's ("CPS") approach in choosing to prosecute rather than pursue a DPA, and the corresponding impact this will have on whether companies choose to self-report in similar circumstances.

#### **DO YOU HAVE ADEQUATE PROCEDURES IN PLACE?**

Skansen was an office interior design company based in London. In 2013 it won two office refurbishment contracts worth £6 million. However, when a new CEO was appointed in January 2014 he became suspicious of certain payments that had been made by the managing director to the project manager of the company that provided the contracts. The new CEO initiated an internal investigation and put in place specific anti-bribery and corruption policies, which had been previously lacking. Following the internal investigation, the company blocked an additional payment and summarily dismissed the managing director and its commercial director. The CEO then submitted a suspicious activity report to the National Crime Agency and also reported the matter to the City of London Police, following which the company fully cooperated with the police investigation, including handing over confidential company documents and legally privileged material pertaining to the internal investigation. In spite of this, the government charged the company with having violated section 7 of the Bribery Act by failing to prevent bribery, while the former managing director and project manager were charged with individual bribery offences. Both of the individuals pleaded guilty but the company did not.

At trial, the jury was unconvinced that the controls the company had in place at the time of the payments were sufficient to establish that there were adequate procedures to afford a defense. In particular, the prosecution drew attention to several matters, including: the lack of contemporaneous records of the company's attempts to introduce a compliance culture; the absence of any new policies being introduced when the Bribery Act came into force in July 2011; the lack of any evidence of the company having ensured that its staff had actually read the anti-bribery policy or undertaken any training on the subject; and the failure to designate any specific individual in the company with a compliance role or responsibility for ensuring that the anti-bribery policies were implemented and complied with.

In the light of this finding, we advise that companies seeking to prove they have adequate procedures in place to prevent bribery should bear in mind several key factors: (i) ensuring that compliance implementation is recorded, including creating and maintaining records of compliance-related initiatives, activities and decisions, which may be especially important in smaller companies where only face-to-face discussions take place; (ii) actively communicating anti-bribery policies to staff, including providing training on such policies, which should be updated in line with changes in the law; and (iii) appointing a dedicated compliance officer or someone at a senior level who has responsibility for ensuring that anti-bribery controls are implemented and followed (the latter may be more appropriate for smaller companies).

#### **TO SELF-REPORT OR NOT TO SELF-REPORT?**

Another major issue in the case was the fact that the CPS decided to prosecute Skansen rather than pursue a DPA. According to the CEO of Skansen, the CPS were originally planning to offer the company a DPA in view of the company having self-reported, cooperated with the authorities, dismissed those involved, and made remedial changes. However, once the company became dormant in 2014, the CPS apparently decided that a DPA would be a nullity as a dormant company with no assets would not be able to comply with any terms imposed by the DPA.

It is peculiar that the CPS maintained this stance even though the company's parent offered to take on the DPA, an arrangement which, in contrast, was accepted by the Serious Fraud Office ("SFO") and entered into by the company known as XYZ in 2016. Under the terms of the XYZ DPA, XYZ's parent company agreed to pay the majority of the fine. With Skansen, however, the CPS pursued the section 7 offence on the basis that it would send a message to the industry about the importance of establishing anti-bribery procedures. This message, however, may well have been lost given that the court concluded it could not impose any meaningful punishment on a dormant company without any assets and ordered an absolute discharge.

Rather than sending the message that the CPS intended, there is a substantial risk that the prosecution will instead have a chilling effect on companies considering whether to self-report in similar circumstances. This is especially so where the company in question does not have sufficient controls in place at the time of the alleged wrongdoing to establish an adequate procedures defense and the very act of reporting puts the company at the mercy of the CPS or SFO, which have the power to exercise discretion to seek a DPA or bring charges, a decision that, given the Skansen matter, has become even more unpredictable.

Indeed, the UK authorities are, frankly, sending very mixed messages concerning their exercise of discretion in these matters. The SFO has advised that companies should self-report and cooperate to increase their chances of receiving a DPA, and

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most understood that there was no chance of obtaining a DPA in the absence of voluntary disclosure. Notably, however, Rolls Royce did not self-report and yet still entered into a DPA with the SFO, purportedly due to its exceptional cooperation with the authorities.

The CPS's prosecution of Skansen now muddies the waters even further, with no DPA being offered even after the company both self-reported and provided extensive cooperation. Moreover, this appetite for prosecuting alleged failure to prevent offences does not seem to be an isolated incident. On 20 June 2018 Judge David Tomlinson informed Rapid Engineering Supplies that it faced a criminal trial in March 2019 for alleged failure to prevent offences, with further details yet to emerge. It is now unclear what approach the UK authorities will take even where a company self-reports and cooperates. It will be interesting to see how the Rapid Engineering Supplies case progresses and whether a DPA is offered, which may hopefully provide greater clarity to companies on the expected consequences of self-reporting.

### SFO – LEGAL PROFESSIONAL PRIVILEGE DEVELOPMENTS

#### LITIGATION PRIVILEGE IN THE CONTEXT OF INTERNAL INVESTIGATIONS

In our January 2018 *Trends & Patterns*, we discussed the decision of the High Court in *Serious Fraud Office v Eurasian Natural Resources Corporation*<sup>3</sup> and the impact it had for companies claiming litigation privilege over documents created as part of internal investigations. In that case, the SFO successfully challenged an assertion of litigation privilege over certain documents, including notes of interviews with employees created as part of an internal investigation into alleged corruption. This case demonstrated the SFO's increasing appetite to challenge claims to legal professional privilege where a company creates documents in the context of an investigation.

In particular, the Court held that several classes of documents, which ENRC had created in the course of an internal investigation, did not attract litigation privilege and so were not protected from disclosure. Under English law, litigation privilege will only arise where documents are created: (i) when either litigation is in progress or is reasonably contemplated, *i.e.*, where litigation is a real prospect, and (ii) for the dominant purpose of that litigation. Breaking new ground, the Court held that prosecution—*i.e.*, litigation—“only becomes a real prospect once it is discovered that there is some truth in the accusations, or at the very least that there is some material to support the allegations of corrupt practices.” Consequently, the Court held that documents created during the course of an internal investigation will only attract litigation privilege once there is a real prospect of a prosecution—*i.e.*, when “the prosecutor is

<sup>3</sup> [2017] EWHC 1017 (QB).

satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met.”

The Court also rejected ENRC's contention that the SFO's criminal investigation into its conduct should be treated as adversarial litigation for the purposes of attracting litigation privilege. Instead, the Court considered that an SFO investigation is “a preliminary step taken, and generally completed, before any decision to prosecute is taken . . . . Such an investigation is not adversarial litigation.”

In October 2017, ENRC was granted leave to appeal the High Court's decision, which was heard in the Court of Appeal on 3 July 2018. The Law Society intervened in the appeal, arguing that the legal profession urgently needs authoritative and correct guidance on this issue.

#### CONTRASTING LITIGATION PRIVILEGE FINDINGS FOLLOWING SFO V ENRC

Two recent High Court cases following *SFO v ENRC* have not helped companies looking for clarity on this issue, particularly as different conclusions were reached in each case. As discussed below, if any logic is to be drawn out of these decisions it is that, absent further clarification from the Court of Appeal, a successful claim to litigation privilege in this context will be heavily dependent on the facts of each case.

In the recent case of *Bilta (UK) Ltd (in Liquidation) & Ors v Royal Bank of Scotland plc and Mercuria Energy Europe Trading Limited*<sup>4</sup> the High Court declined to follow *SFO v ENRC* in the circumstances and upheld RBS's claim to litigation privilege over documents prepared as part of an internal investigation. This included transcripts of interviews with its employees. The bank's investigation occurred following the receipt of a letter from Her Majesty's Revenue & Customs (“HMRC”) stating that it considered that it had sufficient evidence to bring a successful tax claim against RBS but would wait to hear RBS's response before proceeding. Accordingly, in contrast to the facts of *SFO v ENRC*, the High Court considered that the HMRC's letter was a “watershed moment” which was “similar in nature . . . to a letter before claim.” In the circumstances, this showed that litigation was in reasonable contemplation and the documents were created for the dominant purpose of litigation, providing a sufficient basis to claim litigation privilege.

In contrast, in *R (for and on behalf of the Health and Safety Executive) v Paul Jukes*<sup>5</sup> the Criminal Division of the Court of Appeal followed *SFO v ENRC* and held that litigation privilege did

<sup>4</sup> [2017] EWCH 3535 (Ch). For a further discussion of this case, you may wish to refer to our prior client publication, Shearman & Sterling, [High Court Rules That Litigation Privilege Can Apply In Respect Of Internal Investigations](#).

<sup>5</sup> [2018] EWCA Crim 176.

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not apply to a statement made by an employee to his company's lawyers as part of the company's investigation into a death at work. Key to this finding was the fact that the Health and Safety Executive were investigating the matter when the employee made the statement but had not commenced any proceedings. Crucially, at the time the statement was made no evidence had been unearthed which would show that there was a real prospect that there would be a prosecution, similar to the circumstances in *SFO v ENRC*. Accordingly, the statement was not deemed to have been created in anticipation of adversarial proceedings or for the dominant purpose of such proceedings, and therefore litigation privilege could not apply.

In the light of these decisions, it is clear that the ability to successfully claim litigation privilege is heavily dependent on the specific circumstances of each case. Until the Court of Appeal clarifies the exact scope of privilege under English law in the context of investigations, companies should be wary of creating documents that may not be deemed privileged by the Court. To assist in any future claim to litigation privilege with the SFO, we recommend that companies: (i) maintain a record—and, if appropriate, an analysis—of all communications with, and actions taken by, an investigating or enforcement authority such as the SFO (this will be of use if and when subsequently there is a need to determine when adversarial proceedings came into prospect); and (ii) maintain a record or otherwise document the purpose for which particular documents are produced (this will assist in asserting that a document or class of documents were created for the dominant purpose of the litigation).

### CRITICISM OF THE SFO FOR NOT CHALLENGING PRIVILEGE

In addition to the developments concerning litigation privilege, the SFO has recently faced strong criticism from the Administrative Court in *R (on the application of AL) v Serious Fraud Office*<sup>6</sup> on its approach to challenging privilege in the XYZ matter. An XYZ employee, who had been separately charged with conspiracy offences, demanded to see the full interview notes that had been produced by XYZ's lawyers as part of the company's cooperation that ultimately resulted in a DPA. The SFO had previously requested these full interview notes as part of its own investigation, but the company asserted privilege over them and refused to hand them over. Instead the company only provided "oral proffers," whereby one of the company's lawyers read aloud a short summary of the interview notes which the SFO then transcribed.

After the DPA was entered into, the employee repeatedly asked the SFO to obtain the full interview notes from the company, and indeed the terms of the DPA required the company's full cooperation with the SFO. However, the SFO did not challenge

the company's renewed assertion of privilege over the notes, resulting in the employee bringing a judicial review action against the SFO for failing to compel the company to provide the full interview notes. Although the judicial review failed on a procedural point, the Administrative Court strongly criticized the approach that the SFO had taken on this issue. In particular, the Court criticized the SFO's acceptance of "oral proffers" and its failure to challenge the company's assertion of privilege over the notes, especially in the light of the recent High Court decisions limiting the scope of privilege in this context.

Although the judicial review action did not ultimately succeed, the Administrative Court's criticism will no doubt reinforce the SFO's drive to challenge claims to privilege over interview notes produced as part of internal investigations, particularly given the recent High Court decisions in its favor. Moreover, it is now unlikely that the SFO will be content with "oral proffers" and will instead demand to see a company's full interview notes, actively challenging any resistance from the company regarding disclosure. Indeed, at a recent panel discussion the SFO case controller in the XYZ case commented that from now on the SFO will expect all factual records of an investigation, including interview notes.

### SFO – CHALLENGES TO THE TERRITORIAL SCOPE OF THE POWER TO COMPEL THE PRODUCTION OF DOCUMENTS

In a separate judicial review action, KBR Inc challenged the territorial scope of the SFO's powers to compel the production of documents, calling into question whether the SFO will be able to rely on these powers to obtain documents held overseas. Under section 2 of the Criminal Justice Act 1987, the SFO can serve a so-called "section 2 notice" on any individual or entity and require them to produce documents or provide information relevant to the subject matter of an SFO investigation. The SFO often uses these notices to compel the production of documents held in foreign countries; however, the territorial scope of these powers has not yet been decided by an English Court.

To provide context to the judicial review action, a UK subsidiary of KBR Inc has been the subject of an on-going investigation by the SFO in relation to the company's connection with Unaoil. The SFO served a section 2 notice on one of KBR Inc's representatives when she was in the UK and sought to compel production of data that was previously held by the UK subsidiary but was now held on US servers. The company refused to comply and challenged the SFO's use of section 2 notices to compel the production of data held outside of the UK. Although a judgment has not yet been given, the Court has indicated that it will likely not accept an open-ended jurisdictional scope of such notices that simply relies on the brief presence of a company's representative in the UK. However, the Court has also indicated that documents held abroad but belonging to a UK subsidiary should be brought back within the jurisdiction if requested by the SFO.

<sup>6</sup> [2018] EWHC 856 (Admin).

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A date has not yet been set for the judgment, however it is unclear how data protection laws and restrictions on the export of data overseas will impact on the Court's decision, particularly in the light of the new European regime encompassed in the General Data Protection Regulation. This can be compared to the *United States v Microsoft* case before the US Supreme Court, which considered whether a US entity could be compelled to produce data held in Ireland. This case was dismissed without a judgment due to US legislative intervention through the introduction of the Clarifying Lawful Overseas Use of Data Act, known as the "Cloud Act." In the absence of specific legislation on this issue being passed in the UK, it will be for the English Court to decide the scope of the SFO's powers.

### SFO – DEVELOPMENTS AND UPDATES

More generally, the first half of 2018 has proven to be a busy time for the SFO, with several key developments including an increase in funding, the appointment of a new director, and progress on several cases.

#### INCREASE IN FUNDING

In April 2018, the SFO announced changes to its funding arrangements which included an increase of over 50% to its core budget as well as changes to the "blockbuster" funding used to investigate large cases. The SFO's core budget for the 2018-19 fiscal year has now been increased from £34.3 million to £52.7 million, raising it to a level that has not been seen for a decade. In addition, there is now a different approach to funding for "blockbuster" cases. For the last six years, the SFO would secure extra funding from the Government Treasury where any case was forecast to cost more than five percent of the core budget (the Barclays (Qatar) and Rolls Royce investigations were funded in this way). This method was criticized for creating a perceived conflict of interest given that the SFO had to call on the Government to provide funds, as well as more general criticism that it was inefficient and relied on expensive temporary staff hired when funding was secured. According to the new arrangements, the SFO will be able to call on the Government Treasury for blockbuster funding where costs on a single case are expected to be more than £2.5 million in a year. However, it is expected that this will be needed less given the increase in the core budget. These new funding arrangements represent a strong vote of confidence in the SFO and are sure to be welcomed by its new Director, as discussed below.

#### NEW DIRECTOR OF THE SFO

On 4 June 2018 the Attorney General's Office announced that Lisa Osofsky had been appointed as the new Director of the SFO. This follows the appointment of Mark Thompson as the interim Director on 10 April 2018 (the previous Chief Operating Officer at the SFO) who will continue in his post until Ms. Osofsky joins on 3 September 2018. The career history of Ms. Osofsky marks an interesting departure from the experience of previous Directors.

Beginning her career as a US federal prosecutor, Ms. Osofsky prosecuted over 100 cases in the US before joining Exiger, a global company providing services in regulatory compliance, risk, and financial crime, where she was a Managing Director, Regional Leader, and Head of Investigations for Europe, the Middle East, and Africa. This appointment reflects an interesting addition to what some call the Americanization of enforcement in the UK, following the entry of the UK Bribery Act and the UK's Deferred Prosecution Agreement regime. Ms. Osofsky's experience certainly differs from the previous Director, Sir David Green QC, who practiced as barrister and served as the CPS's Director of the Central Fraud Group. Accordingly, it will be interesting to see in due course if Ms. Osofsky's background will impact on the SFO's approach during her (renewable) term of five years.

#### NEW INVESTIGATIONS

In January 2018, the SFO announced that it had opened an investigation into Chemring Group PLC, the ammunitions and military equipment manufacturer, and its subsidiary, Chemring Technology Solutions Limited, which specializes in bomb disposal equipment, following the subsidiary self-reporting. The SFO has confirmed that this is a criminal investigation into bribery, corruption, and money laundering.

In April 2018, the SFO confirmed that it had opened a criminal investigation into Ultra Electronic Holdings PLC, which manufactures military electronics, as well as its subsidiaries, employees, and associated persons following a self-report by the company. The investigation is into suspected corruption in the conduct of the company's business in Algeria.

These two new investigations follow other investigations by the SFO into British companies operating in the defense sector including Rolls-Royce and BAE Systems.

#### CHARGES

In February 2018, the SFO announced that it had charged a major financial institution with unlawful financial assistance contrary to section 151 of the Companies Act 1985. This relates to financial assistance the financial institution provided to a Middle East sovereign wealth fund between 1 October and 30 November 2008 in the form of a \$3 billion loan to acquire shares in its own holding company. This follows previous charges brought against the financial institution and four individuals in June 2017.

In May 2018, however, the Crown Court dismissed all charges regarding matters arising in the context of the financial institution's capital raisings in 2008. This included charges of conspiring with former executives to commit fraud by false representations and providing unlawful financial assistance. The charges against the bank's former chief executive and other senior managers remain in place.

Also in May 2018, the SFO brought further charges against two individuals, Basil Al Jarrah and Ziad Akle, in the investigation of

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Unaoil. Both individuals have been charged with conspiracy to provide corrupt payments in relation to securing the award of a contract worth \$733 million to Leighton Contractors Singapore PTE Ltd to build two oil pipelines in southern Iraq. The SFO publicly thanked the Australian Federal Police for the assistance it provided in connection with its investigation, demonstrating the increasing reliance on the cooperation of foreign authorities in international investigations.

Finally, in June 2018, the SFO also announced that it had commenced criminal proceedings against Unaoil Ltd and Unaoil Monaco SAM as part of its ongoing corruption prosecution. Both entities have been summonsed with two offences of conspiracy to give corrupt payments. These offences relate to securing the award of a contract to Leighton Contractors Singapore PTE Ltd, as described above, as well as securing the award of contracts in Iraq to Unaoil's client SBM Offshore. This follows the SFO's previous decision in November 2017 to prosecute four executives with conspiring to make corrupt payments to secure Iraqi contracts, as reported in our January 2018 edition of *Trends & Patterns*. The SFO initiated its investigation into Unaoil in March 2016 and received special blockbuster funding from the Treasury for this purpose. The first appearance of the companies is to be held at Westminster Magistrates' Court on 18 July 2018.

### CIVIL RECOVERY

On 22 March 2018 the Court granted a civil recovery order for the SFO to the value of £4.4 million in relation to a corruption case where Griffiths Energy bribed Chadian diplomats in the United States and Canada. Griffiths Energy used a sham company known as "Chad Oil" to bribe Chadian diplomats with discounted share deals and "consultancy fees" to secure exclusive contracts. The company later self-reported these payments as bribes and pleaded guilty to corruption charges brought by the Canadian authorities.

Following the takeover of Griffiths Energy by a UK corporate and share sale via a UK broker, the corrupt proceeds entered the UK's jurisdiction and the SFO began civil recovery proceedings, culminating in the civil recovery order. The recovered funds will be held on trust by the SFO and transferred to the Department for International Development, which will identify key projects in which to invest to benefit Chad. This recovery order follows two previous SFO cases in which funds recovered from bribery and corruption were returned and reinvested in the relevant country. The DPA agreement with Standard Bank in 2015 involved a payment of \$7 million to the Government of Tanzania, while the SFO's confiscation order following the conviction of senior executives at Smith & Ouzman for foreign bribery in 2016 paid for seven new ambulances in Kenya.

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### CONCLUSION

Although the pace of enforcement, particularly in the U.S., has been uneven in the first six months of 2018, it is clear that enforcement of the FCPA and of similar statutes in other countries remains active and is even expanding. Although some of the cases are relatively small, there have been significant cases, many of which involved cooperation with enforcement authorities who had previously not been active in this area. For many years, the U.S. went it alone, even after the implementation of the OECD

Convention, assuming, whether it wanted to or not, the role of a global policeman in the absence of effective enforcement regimes in some of its largest trading partners (and competitors). This, however, resulted in some criticism (including in our previous *Trends & Patterns*) of overreaching by the DOJ and the SEC. Now the question will be whether, with a more active international enforcement community, the DOJ in particular, with its new “no more piling on” policy, will stand down when there is an effective and credible investigation or enforcement action by its peers in other countries.

## CONTACTS

**IF YOU WISH TO RECEIVE MORE INFORMATION ON THE TOPICS COVERED IN THIS PUBLICATION, YOU MAY CONTACT YOUR REGULAR SHEARMAN & STERLING CONTACT OR ANY OF THE FOLLOWING PEOPLE.**

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**PHILIP UROFSKY**

Washington, D.C.  
T: +1 202 508 8060  
[philip.urofsky@shearman.com](mailto:philip.urofsky@shearman.com)

**DANFORTH NEWCOMB**

New York  
T: +1 212 848 4184  
[dnewcomb@shearman.com](mailto:dnewcomb@shearman.com)

**STEPHEN FISHBEIN**

New York  
T: +1 212 848 4424  
[sfishbein@shearman.com](mailto:sfishbein@shearman.com)

**PATRICK D. ROBBINS**

San Francisco  
T: +1 415 616 1210  
[probbins@shearman.com](mailto:probbins@shearman.com)

**PAULA HOWELL ANDERSON**

New York  
T: +1 212 848 7727  
[paula.anderson@shearman.com](mailto:paula.anderson@shearman.com)

**MARK D. LANPHER**

Washington, D.C.  
T: +1 202 508 8120  
[mark.lanpher@shearman.com](mailto:mark.lanpher@shearman.com)

**JO RICKARD**

London  
T: +44 20 7655 5781  
[josanne.rickard@shearman.com](mailto:josanne.rickard@shearman.com)

**MASAHISA IKEDA**

Tokyo  
T: +03 5251 1601  
[mikeda@shearman.com](mailto:mikeda@shearman.com)

**BRIAN G. BURKE**

New York  
T: +1 212 848 7140  
[brian.burke@shearman.com](mailto:brian.burke@shearman.com)

**ROBERT ELLISON**

São Paulo  
T: +55 11 3702 2220  
[robert.ellison@shearman.com](mailto:robert.ellison@shearman.com)

**SUSANNA CHARLWOOD**

London  
T: +44 20 7655 5907  
[susanna.charlwood@shearman.com](mailto:susanna.charlwood@shearman.com)

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599 Lexington Avenue | New York | NY | 10022-6069 | [www.shearman.com](http://www.shearman.com)

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