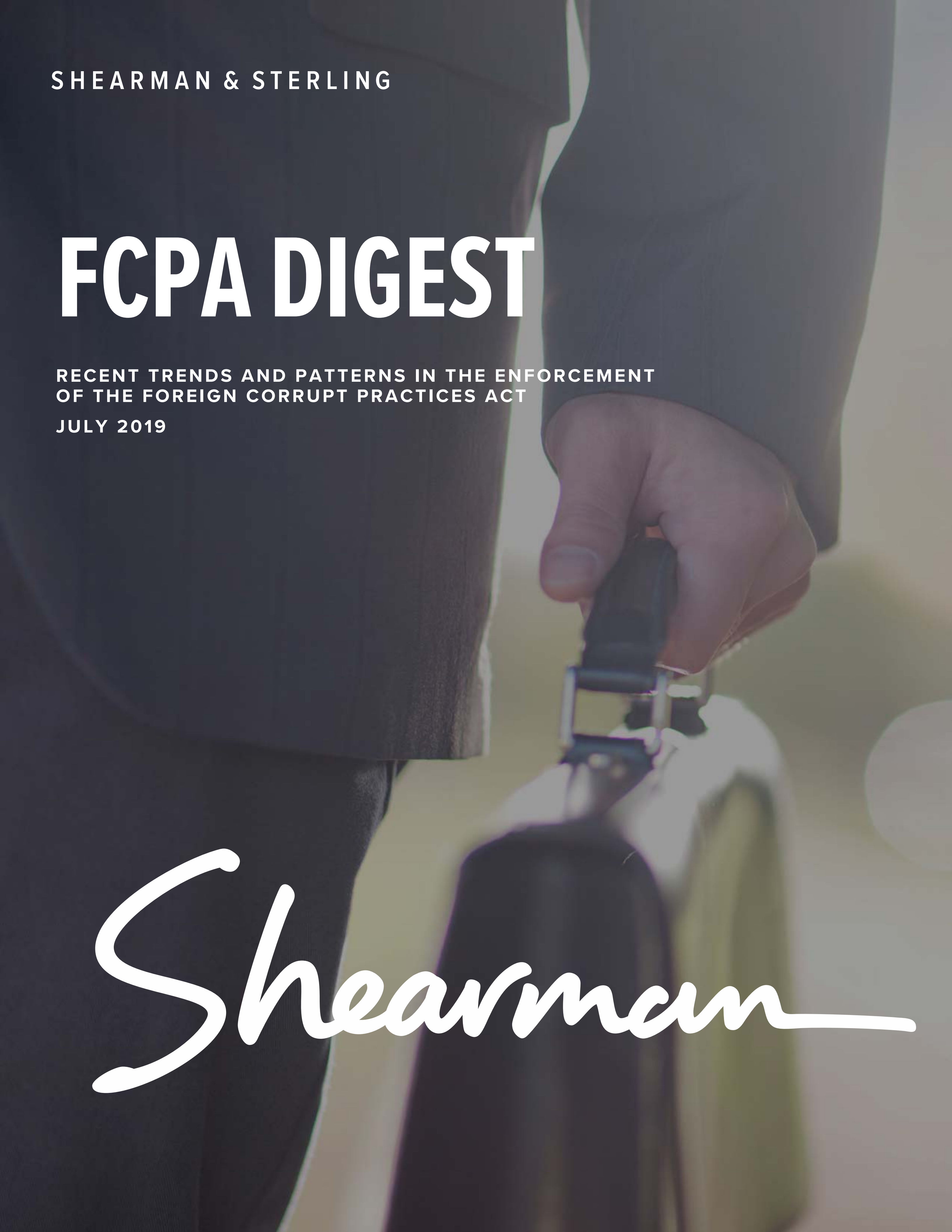
SHEARMAN & STERLING

FCPA DIGEST

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

JULY 2019



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INTRODUCTION: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT

Although the DOJ and SEC brought a relatively low number of FCPA enforcement actions in the first half of 2019, an unusually large portion of those enforcement actions resulted in penalties over $100 million. In the past, we have repeatedly noted that although the large FCPA enforcement actions grab the headlines, the bulk of enforcement actions are actually relatively small (often under $30 million in penalties). The first half of 2019 has been an exception, resulting in some of the highest penalty statistics of any half year of FCPA enforcement.

As we explain in this mid-year *Trends & Patterns*, among the highlights from the first half of 2019 were:

- Six corporate enforcement actions, with total sanctions of approximately $1.69 billion, make the first half of 2019 a fairly typical year in terms of number of enforcement actions, but significantly above-average in terms of total assessed sanctions;
- One of the longest-running and most expensive FCPA investigations finally came to a close when Walmart agreed to pay nearly $300 million to settle charges that it violated the FCPA, this after spending over $900 million on the multi-year investigation;
- As in recent years, one outlier enforcement action (*MTS*) and three other large enforcement actions distort the picture, raising the average corporate sanction thus far in 2019 to $282.1 million, whereas the true average, with the *MTS* outlier excluded, is significantly less than this figure ($168.5 million). Even the average excluding the outlier, however, is unusually high, and is indicative of the lack of small enforcement actions thus far in 2019;
- The DOJ brought charges against (or charges were unsealed against) twenty individuals, while the SEC brought claims against two individuals, making the first half of 2019 very active in terms of FCPA-related cases brought against individuals; and
- The DOJ continued its recent practice of providing guidance to companies by revising its FCPA Corporate Enforcement Policy and providing guidance on the evaluation of compliance programs.

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ENFORCEMENT ACTIONS & STRATEGIES

STATISTICS

Thus far in 2019, the DOJ and SEC have resolved six corporate enforcement actions: *Cognizant*, *MTS*, *Fresenius*, *Telefonica Brasil*, *Walmart*, and *TechnipFMC*.

Although a small sample size, four of the six enforcement actions thus far in 2019 involved parallel DOJ and SEC enforcement actions. In recent years, on the other hand, the DOJ has typically deferred to the SEC to bring civil enforcement cases in the less egregious matters, which typically results in the SEC bringing a larger number of enforcement actions than the DOJ.

Of the FCPA enforcement actions against individuals, 2019 has seen twenty individuals charged by the DOJ (or had charges unsealed), while the SEC has brought cases against two individuals.

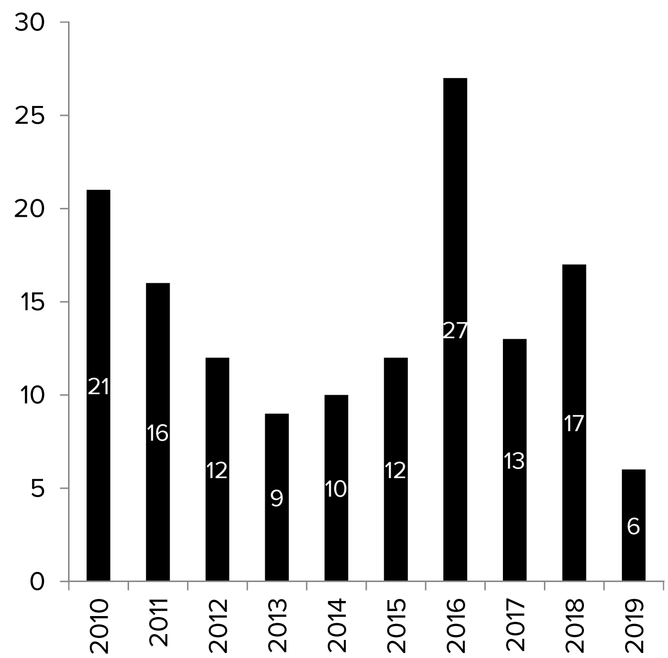
We discuss the corporate enforcement actions from the first half of 2019 followed by the individual enforcement actions in greater detail below.

In *Cognizant*, the SEC alleged that Cognizant Technology Solutions Corp., a New Jersey-based technology company, violated the anti-bribery, books-and-records, and internal controls provisions of the FCPA by engaging in certain conduct in India in connection with the construction of facilities. Specifically, the SEC's allegations against Cognizant arose from the company's project involving the construction of a corporate campus in Chennai, India, for which the company engaged a contracting firm to obtain permits and construct the facility. According to the SEC's order, a senior government official in India allegedly demanded a $2 million payment from the contracting firm as a condition for issuing a necessary permit. This demand was allegedly escalated to the company's executives for guidance, and two executives allegedly participated in a videoconference in which the former president both authorized the payment of the demanded bribes and suggested that the payments be disguised as payments on change order requests designed to look like cost overruns on the project. On that same videoconference, the former chief legal officer allegedly approved of this proposal. The SEC order also contained allegations related to alleged bribes paid by the company's Indian subsidiary (through the same contracting firm) to obtain permits required for unrelated projects. In total, the SEC alleged that the company authorized the payment of approximately $3.6 million in bribes to various Indian government officials.

Without admitting or denying the allegations, Cognizant agreed to pay disgorgement and prejudgment interest of approximately $19 million and a civil monetary penalty of $6 million to the SEC to resolve the agency's claims. The same day, the DOJ issued a letter announcing that it had declined to prosecute the company pursuant to the Department's FCPA Corporate Enforcement Policy. Finally, as discussed below, the DOJ announced indictments of the company's former president and chief legal officer, and the SEC filed a civil complaint against the same two executives, both in the United States District Court for the District of New Jersey.

The enforcement actions resulting from this alleged bribery scheme are significant for several reasons. Despite the existence of aggravating circumstances (*i.e.*, the involvement of executives in the conduct at issue), the DOJ's decision to decline to bring criminal charges pursuant to its FCPA Corporate Enforcement Policy is noteworthy, though not particularly surprising. Indeed, the DOJ has made it clear in recent years that it placed a premium on companies providing actionable information against individuals, and, in this case, the company self-disclosed the alleged conduct to the DOJ only two weeks after the board learned about it and subsequently engaged in extensive cooperation and remediation, including presumably providing evidence demonstrating the central role of the two executives, who were essentially in charge of the company, in allegedly devising and authorizing the alleged bribery scheme. Thus, given that the company had self-disclosed, cooperated, and remediated, it fell squarely within the DOJ Policy's criteria for a declination, and, also consistent with the Policy, the fact that its settlement with the SEC included disgorgement resulted in the DOJ not seeking disgorgement itself as part of that declination. The charges filed by the SEC against the executives are also noteworthy because in recent years the Commission has brought

Total Aggregate Corporate Cases: 2010-2019 (YTD)

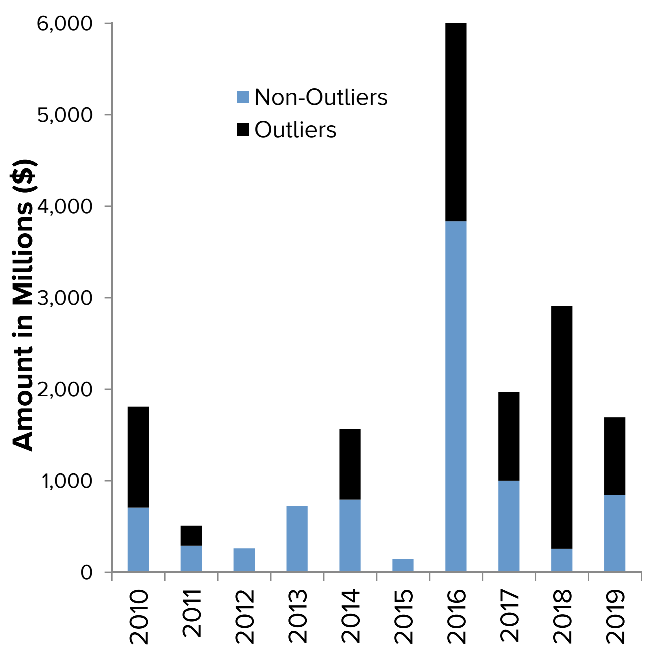


charges against a very small number of individuals for alleged FCPA violations, and there have been a very small number of instances where the DOJ and SEC both brought charges against executives. The decision by both the DOJ and SEC to bring cases against the two former executives allegedly involved in the conduct may simply reflect the perceived egregiousness of the facts and the strength of the evidence, and, for the SEC, the seniority of those executives in an issuer, but it may also reflect the start of a shift to try to bring more such cases.

The *MTS* matter is the third FCPA enforcement action in recent years (following *VimpelCom* in 2016 and *Telia* in 2018) to involve the Uzbek telecommunications market. According to allegations made by the DOJ and SEC, MTS made at least $20 million in illicit payments to an Uzbek government official from 2004 to 20012 to obtain and retain business, which generated more than $2.4 billion in revenues. Specifically, MTS allegedly (i) paid an Uzbek company owned by a government official $12 million, $4 million of which went to the government official, to obtain the rights to telecommunications frequencies that would otherwise be unavailable to MTS under Uzbek law; (ii) amended options pertaining to an MTS subsidiary in a manner that benefited a company partially owned by the same government official before buying the company out; (iii) paid a company beneficially owned by the government official $30 million in exchange for its rights to 800 MHz frequencies; (iv) purchased an Uzbek subsidiary from the government official for the inflated price of $40 million after the company had been valued at $23 million; and (v) contributed more than $1 million to charities controlled by the government official, mischaracterizing them in MTS's books and records as advertising and non-operating expenses. As a result of these alleged acts, the SEC alleged MTS violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. The DOJ similarly alleged violations of all three provisions of the FCPA.

Without admitting or denying the SEC's allegations, MTS agreed to pay a civil penalty of $100 million to the SEC and retain an independent compliance monitor for at least three years. MTS also agreed to enter into a deferred prosecution agreement (DPA) with the DOJ to settle charges, pursuant to which it admitted the facts and agreed to a fine and restitution totaling $850 million. The DOJ agreed to credit MTS's $100 million civil penalty to the SEC, consistent with its new policy on coordination of corporate resolution penalties.

Total Criminal and Civil Fines Imposed on Corporations: 2010-2019 (YTD)



In *Fresenius*, the government alleged that, from at least 2009 through 2016, Fresenius Medical Care AG & Co. KGaA, a German-based provider of medical products and services, paid millions of dollars in bribes to public officials and doctors to win contracts at hospitals in various jurisdictions, including in China, Spain, Bosnia, Mexico, Saudi Arabia, Angola, Morocco, and Turkey. For example, according to the DOJ's Statement of Facts, which Fresenius admitted was "true and accurate," Fresenius subsidiaries were involved in entering into joint business ventures with government officials and doctors in Angola and provided them shares in the venture, false consultant contracts, and false storage contracts to sell Fresenius' products at the public clinics and hospitals with which the doctors were associated. Similarly, in Saudi Arabia, Fresenius entered into a check-cashing scheme with a third party to direct funds to doctors working in public hospitals and, through the same third party agent, entered into sham consultant contracts with doctors in order to gain an advantage in tenders with the hospital with which the doctors were affiliated. Fresenius also provided these doctors with gifts, made donations to their charities, and funded their travel in order to win a tender at affiliated hospitals. Fresenius engaged in similar behavior in Morocco, Spain, Turkey, and West Africa by paying officials and doctors bribes in the form of sham commissions and bonuses for services that were not rendered, sham consultant contracts, paying for their travel (in Spain), and entering into joint ventures that benefitted the doctors (in Turkey).

The government contended that the company ignored "numerous red flags of corruption" in its operations since the early 2000s and that its employees used sham consulting contracts, falsified documents, third party intermediaries, and other mechanisms to funnel bribes to local government officials in exchange for business and influence in official decision-making. The government further alleged that senior company management "actively thwarted" compliance efforts, personally engaging in corruption schemes and directing employees to destroy records of the misconduct.

To settle the charges, Fresenius agreed to enter into a three-year non-prosecution agreement (NPA) with the DOJ, in which the company admitted to earning more than $140 million in profits from its corrupt schemes. As part of its NPA, Fresenius agreed to pay approximately a $84.7 million penalty and $147 million in disgorgement and prejudgment interest. The company also agreed to pay $135 million in disgorgement and $12 million prejudgment interest to the SEC, which the DOJ credited. In total, Fresenius agreed to pay approximately $231.7 million in penalties.

In *Telefonica Brasil*, the SEC alleged that Telefonica Brasil S.A., a Brazilian subsidiary of Spanish telecommunications company Telefonica S.A., violated the books-and-records and internal controls provisions of the FCPA by improperly recording the purchase of tickets to the 2014 World Cup. According to the SEC, Telefonica Brasil sponsored a hospitality program in 2013 and 2014 in connection with the 2013 Confederations Cup and 2014 World Cup soccer tournaments. Telefonica Brasil allegedly offered and provided tickets and hospitality to thirty-four government officials for the Confederations Cup and to approximately 93 officials for the World Cup, but failed to accurately reflect payments for these tickets in the company's books and records. Specifically, the company allegedly booked the ticket purchases as "Publicity Institutional Events" and booked the hospitality provided as "Advertising & Publicity." The company agreed to pay a civil penalty of $4.125 million to settle the SEC's claims.

The first half of 2019 finally saw the conclusion of one of the longest running bribery investigations by U.S. authorities, with Walmart reaching agreement with the DOJ and SEC to settle allegations of FCPA violations in Brazil, China, India, and Mexico. In entering into the settlements, Walmart admitted that between 2000 and 2011, "certain employees who had responsibility for implementing and maintaining internal accounting controls related to anticorruption with respect to Walmart's subsidiaries in Brazil, China, India, and Mexico had knowledge that the anti-corruption related internal accounting controls in those subsidiaries were not adequate and willfully failed to implement and maintain them." These deficiencies allowed Walmart and its subsidiaries to use third-party intermediaries to make improper payments to government officials to assist with obtaining store permits and licenses.

The NPA provided additional detail as to the specific failures in each of the four jurisdictions noted above:

- <u>Mexico.</u> A former attorney for Walmart's local subsidiary reported to Walmart in 2005 that he had overseen a scheme for several years prior in which third-party intermediaries had made improper payments to government officials to obtain permits and licenses for the subsidiary and that several executives at the subsidiary knew of and approved of the scheme. According to the DOJ, most of the relevant invoices included a code specifying why the subsidiary had made the improper payment, including: (1) avoiding a requirement; (2) influence, control or knowledge of privileged information known by the government official; and (3) payments to eliminate fines.
- <u>India.</u> From 2009 until 2011, Walmart's operations in India were able to retain third party intermediaries that made improper payments to government officials to obtain store operating permits and licenses. These improper payments were then falsely recorded in Walmart's joint venture's books and records with vague descriptions like "misc fees," "miscellaneous," "professional fees," "incidental," and "government fee."
- <u>Brazil.</u> According to the DOJ, Walmart Brazil ignored numerous findings in internal audit reports that controls were lacking, and continued to retain and renew contracts with third party intermediaries without conducting the required due diligence. Some of these third parties made improper payments, including a construction company that made improper payments to government officials in connection with the construction of two Walmart Brazil stores in 2009. The NPA noted, however, that these payments were made without the knowledge of Walmart Brazil. Another third party allegedly made improper payments to government inspectors in 2009 in connection with the construction of a Walmart Brazil store, but the NPA stated that these payments were also made without the knowledge of Walmart Brazil.
- <u>China.</u> Walmart's local subsidiary's internal audit team flagged numerous weaknesses in internal controls related to anti-corruption at the subsidiary between 2003 and 2011, sometimes repeatedly, but many of these weaknesses were not addressed. In fact, from 2007 until early 2010, Walmart and the subsidiary failed to address nearly all of the anti-corruption-related internal controls audit findings. Neither agency made any allegation that the subsidiary actually made any improper payments.

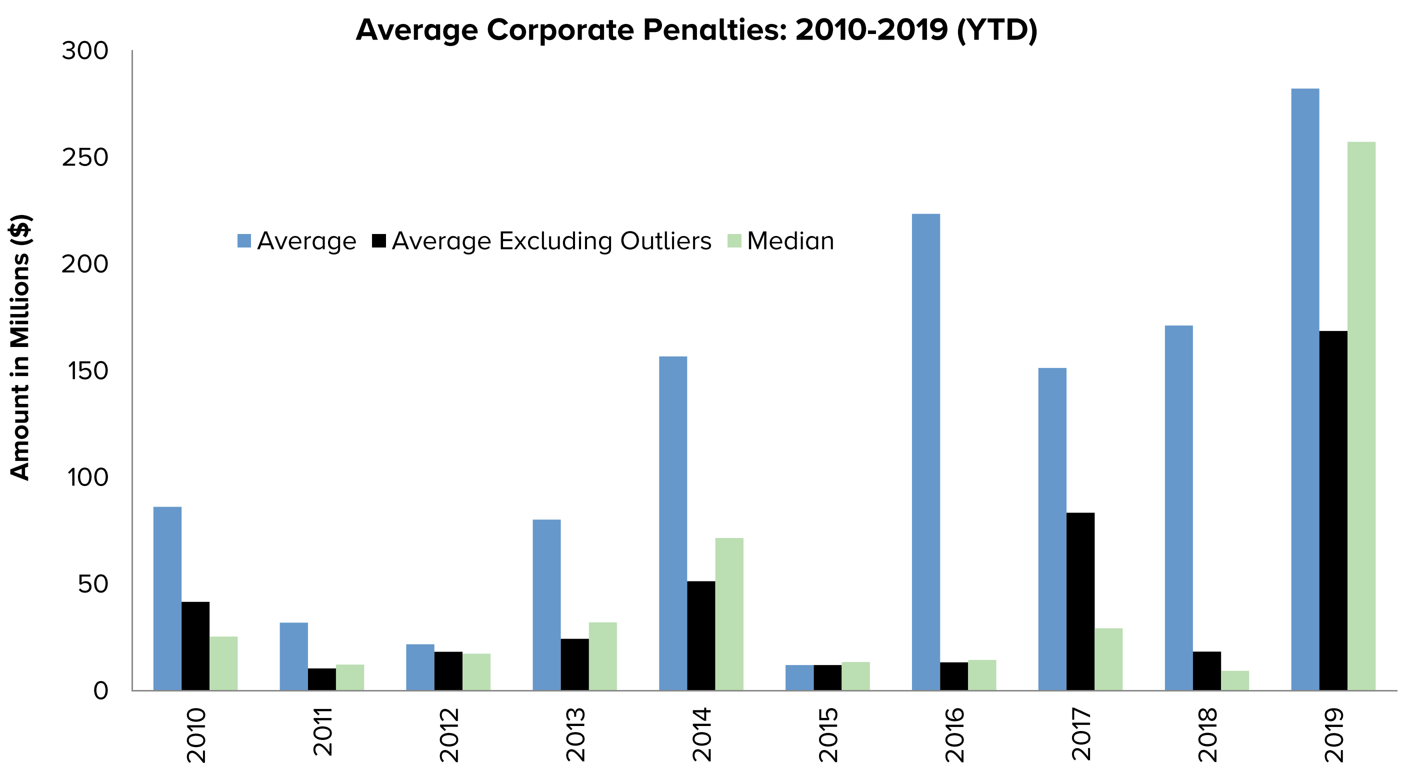
Walmart entered into a three-year non-prosecution agreement, pursuant to which it agreed to pay a criminal penalty of approximately $138 million. Walmart's Brazilian subsidiary, WMT Brasilia, also agreed to enter into a guilty plea with the DOJ which required forfeiture of $3.6 million and a fine of $724,898; these payments were included as part of the $138 million penalty paid by the Walmart parent company. As part of the NPA, Walmart also agreed to retain an independent corporate compliance monitor for two years. The $138 million penalty reflects a 20 percent reduction off the bottom of the applicable U.S. Sentencing Guidelines fine range for the portion of the penalty applicable to conduct in Mexico and 25 percent for the portion applicable to the conduct in Brazil, China, and India. The company received a lower discount on the Mexico fine range because, in relation to that component of the investigation, it did not timely provide documents and information to the government and did not de-conflict with the government's request to interview one witness before Walmart interviewed that witness. Walmart also agreed to pay approximately $119.6 million in disgorgement and $25 million in prejudgment interest to the SEC. In total, Walmart agreed to pay approximately $282.6 million in penalties to U.S. authorities.

Though a large amount on its own, the $282.6 million that Walmart agreed to pay to U.S. authorities pales in comparison to the over $900 million that the company spent on its investigation. Interestingly, even though the conduct alleged by the DOJ and SEC involved repeated failures of compliance at the company, including by in-house legal counsel, over the course of the nearly eight years of the investigation, neither the DOJ nor the SEC have brought cases against any individuals in connection with the Walmart investigation.

Finally, in *TechnipFMC*, the DOJ alleged that both predecessor entities of TechnipFMC plc, a global oil and gas services company which was formed in 2017 by the merger of Technip S.A. and FMC Technologies, Inc., engaged in two independent conspiracies to violate the FCPA, one in Brazil and one in Iraq. Perhaps uniquely in FCPA cases, this matter involved charges against a company formed in a recent merger in which *both* companies are alleged to have separately engaged in corrupt conduct. Specifically, the company admitted that, from 2003 until at least 2013, Technip conspired with Keppel Offshore & Marine Ltd. and a former consultant of Keppel Offshore to pay nearly $70 million in bribes in Brazil. Some of these payments made by Technip were ultimately paid to employees at Petrobras, the Brazilian state-owned oil company. As discussed in more detail in the January 2018 edition of *Trends & Patterns*, Keppel Offshore previously paid penalties of approximately $422 million in December 2017 to resolve similar charges by U.S., Brazil, and Singapore authorities.

The second conspiracy to violate the FCPA related to the ongoing Unaoil bribery scandal. According to the DOJ, from 2008 until at least 2013, FMC bribed at least seven government officials in Iraq "through a Monaco-based intermediary company." Based on similar allegations made by the UK's SFO against Unaoil individuals, this intermediary appears to be Unaoil.

To settle the charges, TechnipFMC admitted the facts and entered into a DPA with the DOJ in which it agreed to pay a criminal penalty of approximately $296 million. Only $81.9 million of this penalty, however, will actually be paid to the U.S. Treasury. The remaining $214 million will be paid to Brazilian authorities, with whom the company also entered into settlement agreements. With its settlement with the DOJ, TechnipFMC joins the growing list of FCPA recidivists, which has continued to grow in recent years. Specifically, Technip S.A. entered into settlements with the DOJ and SEC in 2010, pursuant to which it agreed to pay a total of $338 million in penalties to settle



charges of an alleged conspiracy to violate the FCPA.

Although it is a small sample size, the FCPA enforcement actions thus far in 2019 have consisted of an unusually high percentage of large settlements. A typical year of FCPA enforcement has a handful of large settlements (with one or two very large settlements), with the remaining matters being relatively small (under $30 million in penalties) enforcement actions often brought by the SEC. The first half of 2019, on the other hand, saw only two relatively small enforcement actions (*Telefonica Brasil* at $4.125 million and *Cognizant* at $28.1 million), with each of the remaining enforcement actions involving penalties of over $230 million, and the *MTS* enforcement action involving a significantly larger $850 million penalty.

As a result, the pure average corporate penalty from 2019 thus far is $282.1 million, which would be the highest average in any year of the FCPA's existence. When we exclude the *MTS* outlier, the average corporate penalty drops only to $168.5 million.[1] Although this number is significantly lower than the true average, it is still significantly higher than the average excluding outliers seen in recent years: $18.3 million in 2018, $83.4 million in 2017, and $73 million in 2016. In fact, the average excluding outliers for the first half of 2019 would be far and away the highest in the history of the FCPA's existence.

Unlike the relatively typical number of corporate enforcement actions brought in the first half of 2019, the DOJ has been particularly active in bringing FCPA-related charges against individuals. Specifically, the DOJ has brought charges against (or had charges against unsealed) twenty individuals allegedly involved in schemes that violated the FCPA. If this pace continues, 2019 will have the highest level of charges against individuals since 2009. Nonetheless, with the notable exception of the charges against two Cognizant executives and against a high-level Uzbek official, a large number of these charges have been brought against lower-level employees.

In January 2019, the DOJ partially unsealed criminal charges against eight individuals allegedly involved in the same bribery scheme as formed the basis for the settlement with a European bank last year. Specifically, the DOJ charged two executives of Privinvest Group, a United Arab Emirates-based shipbuilding company, three former employees of the bank, and three former government officials of Mozambique. In the complaint, the DOJ alleged that the individuals arranged for two banks to loan more than $2 billion to companies owned by the Mozambique government. The purpose of the loans was allegedly to fund maritime projects in Mozambique. According to the DOJ, Privinest Group received the loans directly because the company purported to provide the equipment and services for the projects. The DOJ alleged that the eight individuals diverted portions of the loans amongst themselves as kickbacks, including over $150 million to the Mozambique government officials and over $50 million to the former employees of the bank. The indictment alleges that the charged bank employees then sold the loans to investors in the United States and around the world. As of the date of publication, the DOJ cases against all eight of the defendants remain ongoing.

As noted above, in February 2019, the DOJ charged two former senior executives of Cognizant Technology Solutions in a twelve-count indictment alleging a bribery scheme with Indian government officials. The indictment filed in the District of New Jersey included counts for conspiracy to violate the FCPA and violations of the FCPA, including the books-and-records and internal controls provisions. Gordon Coburn, then-president of Cognizant, and Steven Schwartz, then-chief legal officer of Cognizant, allegedly authorized a payment for $2 million to secure a building permit necessary for the construction of a Cognizant facility in India. The day after the DOJ announcement, the SEC filed a civil complaint against Coburn and Schwartz arising from the same conduct. As of the date of publication the DOJ and SEC actions against Coburn and Schwartz are ongoing.

In March 2019, the DOJ unsealed charges brought against two individuals in connection with an alleged scheme to bribe government officials of the Federated States of Micronesia. To date, two individuals have been charged in connection with the alleged conspiracy. In January 2019, Frank Lyon, the owner of an American engineering and consulting company, Lyon Associates, Inc., was charged with one count of conspiracy to violate the anti-bribery provisions of the FCPA. According to the DOJ information, Lyon arranged for payments over $240,000 to officials from the Federated States of Micronesia to secure approximately $7.8 million in contracts for his company. Lyon pleaded guilty to the charge in January 2019, and in May 2019 was sentenced to thirty months in prison.

The DOJ also brought charges against a government official for the Federated States of Micronesia relating to his involvement in the alleged bribery scheme. Specifically, Master Halbert was charged with conspiracy to commit money laundering based on having allegedly accepted bribes and thereafter engaged in financial transactions involving the proceeds of violations of the FCPA. In April 2019, Halbert agreed to plead guilty to the one-count indictment. Sentencing is currently scheduled for July 2019.

The DOJ continued to bring charges in relation to PDVSA, the Venezuelan state-owned and state-operated oil company. In February 2019, the DOJ charged two more individuals over their alleged involvement in the wide-ranging bribery scandal, bringing the total number of charged individuals to twenty-nine. The latest indictment, brought in the Southern District of Texas,

[1] 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.

charged the president of an American-based supplier of industrial equipment, Franz Herman Muller Huber, and a sales representative for the company, Rafael Enrique Pinto-Franceschi, with conspiracy to violate the anti-bribery provisions of the FCPA, conspiracy to commit wire fraud, substantive wire fraud violations, and conspiracy to commit money laundering. According to the DOJ, between 2009 and 2013, Muller allegedly arranged for a portion of the PDVSA payments made to his company to be split amongst himself, Pinto, and three PDVSA officials as part of a scheme to obtain business from PDVSA. As of the date of publication, the DOJ actions against Muller and Pinto are ongoing. Trial is currently scheduled for September 2019.

In *Karimova* and *Akhmedov*, the DOJ charged an Uzbek government official and an Uzbek telecommunications executive in a four-count indictment in the Southern District of New York alleging their involvement in the MTS, Telia, and VimpelCom bribery schemes discussed above. Gunara Karimova, an Uzbek government official and daughter of the then-president of Uzbekistan, allegedly received a total of $866 million in bribes from three private telecommunications companies that were trying to enter into the Uzbek telecommunications market (VimpelCom, Telia, and MTS). Uzbek law does not permit private companies to operate in the telecommunications market. Karimova's alleged agent, Bekhzod Akhmedov, worked for one of the telecommunications companies and allegedly arranged the payments to be made to Karimova. Karimova was charged with one count of conspiracy to commit money laundering, while Akhmedov was charged with one count of conspiracy to violate the FCPA, two substantive counts of violating the FCPA, and one count of conspiracy to commit money laundering. As of the date of publication, the DOJ actions against Karimova and Akhmedov are ongoing.

Finally, in June 2019 the DOJ announced that four individuals had been charged in connection with an alleged bribery scheme involving Corporación Eléctrica Nacional, S.A. ("Corpoelec") in Venezuela. Specifically, two Venezuelan officials—Luis Alfredo Motta Dominguez and Eustiquio Jose Lugo Gomez—were charged in an eight-count indictment with one count of conspiracy to commit money laundering and seven counts of money laundering. The same day, the U.S. Department of the Treasury designated Motta and Lugo pursuant to the Venezuelan sanctions programs. The DOJ also announced that two businessmen had agreed to plead guilty in connection with the alleged bribery scheme. Specifically, Jesus Ramon Veroes, a Venezuelan citizen, and Luis Alberto Chacin Haddad, a resident of Miami, each pleaded guilty to one count of conspiracy to violate various provisions of the FCPA. Under the terms of their plea agreements, Veroes and Chacin will each be required to forfeit at least $5.5 million and certain real property in the Miami area.

GEOGRAPHY & INDUSTRIES

Although representing a much smaller sample size than in past years, the enforcement actions brought thus far in 2019 have been spread out across a number of geographic regions that have historically been the focus of significant FCPA enforcement activity. Of the total eight enforcement actions[2]: six involved alleged acts of bribery in Latin America (*Fresenius*, *Telefonica Brasil*, *Walmart*, *TechnipFMC*, PDVSA individuals, and Corpoelec individuals); two have involved improper conduct in China (*Fresenius* and *Walmart*), Sub-Saharan Africa (*Fresenius* and European bank individuals), India (*Cognizant* and *Walmart*), or Northern Africa/the Middle East (*Fresenius* and *TechnipFMC*); and one involved payments to government officials in Russia and the former Soviet republics (*MTS*), Europe (*Fresenius*), or Pacific Islands (Micronesia individuals).

With regard to industries, the FCPA corporate enforcement actions thus far in 2019 arise from a diverse set of industries. Several of these enforcement actions come from industries that are familiar targets of enforcement actions: telecommunications (*MTS* and *Telefonica Brasil*), medical equipment (*Fresenius*), and oil & gas (*TechnipFMC*). The remaining enforcement actions involved technology services (*Cognizant*) and retail sales (*Walmart*).

TYPES OF SETTLEMENTS

Thus far in 2019, the enforcement agencies 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 has been the case since 2016, thus far in 2019 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. The SEC did, on the other hand, file contested civil cases against the

[2] For the purpose of this geographic analysis, we treat corporate enforcement actions and charges against individuals that arise out of the same bribery scheme(s) as one enforcement action. Similarly, we treat groups of related cases against individuals that are not, as of yet, connected to a corporate enforcement action as a single matter for this purpose. Finally, to the extent that charges are brought in multiple years against different corporations or individuals relating to the same bribery scheme, the relevant countries are included in the count for each year where any corporation or individual is charged.

two Cognizant executives that allegedly masterminded the company's bribery scheme in India.

DOJ

The DOJ thus far in 2019 has used a range of settlement devices in each of its five corporate enforcement actions. The list below sets out the various settlement devices the DOJ used thus far in its 2019 FCPA enforcement actions against corporate entities:

- Plea Agreements – *Kolorit Dizayn Ink LLC* (subsidiary of MTS). WMT Brasilia S.a.r.l. (subsidiary of Walmart), *Technip USA, Inc.* (subsidiary of TechnipFMC)
- Deferred Prosecution Agreements – *MTS*, *TechnipFMC*
- Non-Prosecution Agreements – *Fresenius*, *Walmart*
- Public Declinations with Disgorgement – *Cognizant*

ELEMENTS OF SETTLEMENTS

WITHIN GUIDELINES SANCTIONS

In all four corporate enforcement actions brought by the DOJ thus far in 2019 that have involved penalties based on the U.S. Sentencing Guidelines (*Fresenius*, *MTS*, *Walmart*, and *TechnipFMC*), the settling company received a sentencing discount. Three of these enforcement actions are nonetheless worth noting.

First, it is particularly notable that MTS received a 25 percent discount, considering that the company did not receive cooperation credit and failed to voluntarily self-disclose.

Second, although TechnipFMC received a 25 percent discount, because its predecessor entity Technip S.A. is an FCPA recidivist, the base fine that the 25 percent discount was deducted from was near the midpoint of the applicable U.S. Sentencing Guidelines fine range, rather than the bottom of that range, as is more typically the case.

Third, Walmart received a 25 percent discount for the portion applicable to the conduct in Brazil, China, and India but only received a 20 percent reduction off the bottom of the applicable U.S. Sentencing Guidelines fine range for the portion of the penalty applicable to conduct in Mexico. In the NPA, the DOJ noted that Walmart had cooperated with the investigation in Mexico, but did not timely provide documents and information and did not de-conflict with the government's request to interview one witness before Walmart interviewed that witness. In addition, Walmart did not voluntarily disclose the conduct in Mexico and only disclosed the conduct in Brazil, China, and India after the government had already begun investigating the Mexico conduct.

SELF-DISCLOSURE, COOPERATION, AND REMEDIATION

The DOJ awarded full credit for voluntary self-disclosure to Fresenius and Cognizant, but did not award self-disclosure credit to MTS, Walmart, or TechnipFMC. All five companies that entered into settlements with the DOJ received some form of cooperation credit. Fresenius, however, only received partial cooperation credit because, according to its NPA, the company "did not timely respond to requests by the Department and, at times, did not provide fulsome responses to requests for information." Finally, all five companies received remediation credit.

MONITORS

Although 2018 saw a sharp decrease in the frequency with which the DOJ imposed a corporate monitor as part of FCPA settlements, three of the five FCPA enforcement actions brought by the DOJ thus far in 2019 have involved a corporate monitor requirement. Although the DOJ's announcement in October 2018 of an updated corporate monitor policy suggested a potential shift away from the use of monitors by the DOJ, it is probably too early to draw any conclusions from the enforcement actions brought thus far in 2019. Indeed, this high percentage of corporate monitors imposed in the 2019 enforcement actions could simply be a product of the unusually large number of high-penalty enforcement actions during the first half of the year.

Perhaps most surprising is that TechnipFMC was able to avoid the imposition of a corporate monitor. After all, one of its predecessor companies (Technip S.A.) paid $338 million in 2010 to resolve FCPA offenses relating to conduct in Nigeria. Although in some previous FCPA cases involving M&A activity, the DOJ had not appointed a monitor—or appointed only a monitor with a limited term and mandate—on the assumption that the untainted acquiring company would effectively clean house and implement a "day one" compliance integration plan, here the other merger partner—FMC—was also implicated in separate FCPA violations, making the decision not to appoint a monitor all the more surprising.

CASE DEVELOPMENTS

FIRTASH

As we have discussed in previous editions of *Trends & Patterns*, in 2014, U.S. prosecutors charged Dmytro Firtash, the politically-connected Ukrainian oligarch and former owner of the gas company RosUkrEnergo, with violating the FCPA, RICO, and the federal money laundering statute after he allegedly paid $18.5 million to Indian officials in exchange for valuable mining rights. Although a lower Austrian court initially denied the U.S. extradition request, finding it was "politically motivated," an Austrian court of appeals cleared the way on February 22, 2017 for Firtash to be extradited to the United States. Firtash subsequently filed, before any potential extradition, a motion to dismiss the charges pending against him in the Northern District of Illinois.

On June 21, 2019, Judge Rebecca Pallmeyer denied Firtash's motion to dismiss, rejecting Firtash's arguments (1) that the court lacked venue, (2) that the indictment failed to state an offense, and (3) that prosecution would violate the defendant's rights under the Fifth Amendment's Due Process Clause. Judge Pallmeyer's decision will be discussed in more detail in the Unusual Developments section below. A few days later, the Austrian Supreme Court ruled that Firtash can be extradited to the United States. However, as of the date of publication, Firtash has not yet been extradited to the United States.

HO

In March 2019, Ho was sentenced to three years imprisonment and was ordered to pay a $400,000 criminal fine. Ho had previously been found guilty by jury trial in December 2018 on seven counts: one count of conspiring to violate the FCPA, four counts of violating the FCPA, one count of conspiring to commit international money laundering, and one count of committing international money laundering. Following his sentencing, Ho notified the court that he would be appealing his conviction to the Second Circuit. That appeal is ongoing.

BAPTISTE/BONCY

In June 2019, a federal jury found Joseph Baptiste and Roger Boncy guilty of conspiracy to violate the FCPA and the Travel Act. The DOJ had alleged that Baptiste and Boncy solicited bribes from undercover FBI agents who were posing as potential investors in a project to develop a port in Haiti. As of the date of publication, Baptiste and Boncy are awaiting sentencing.

GONZALEZ

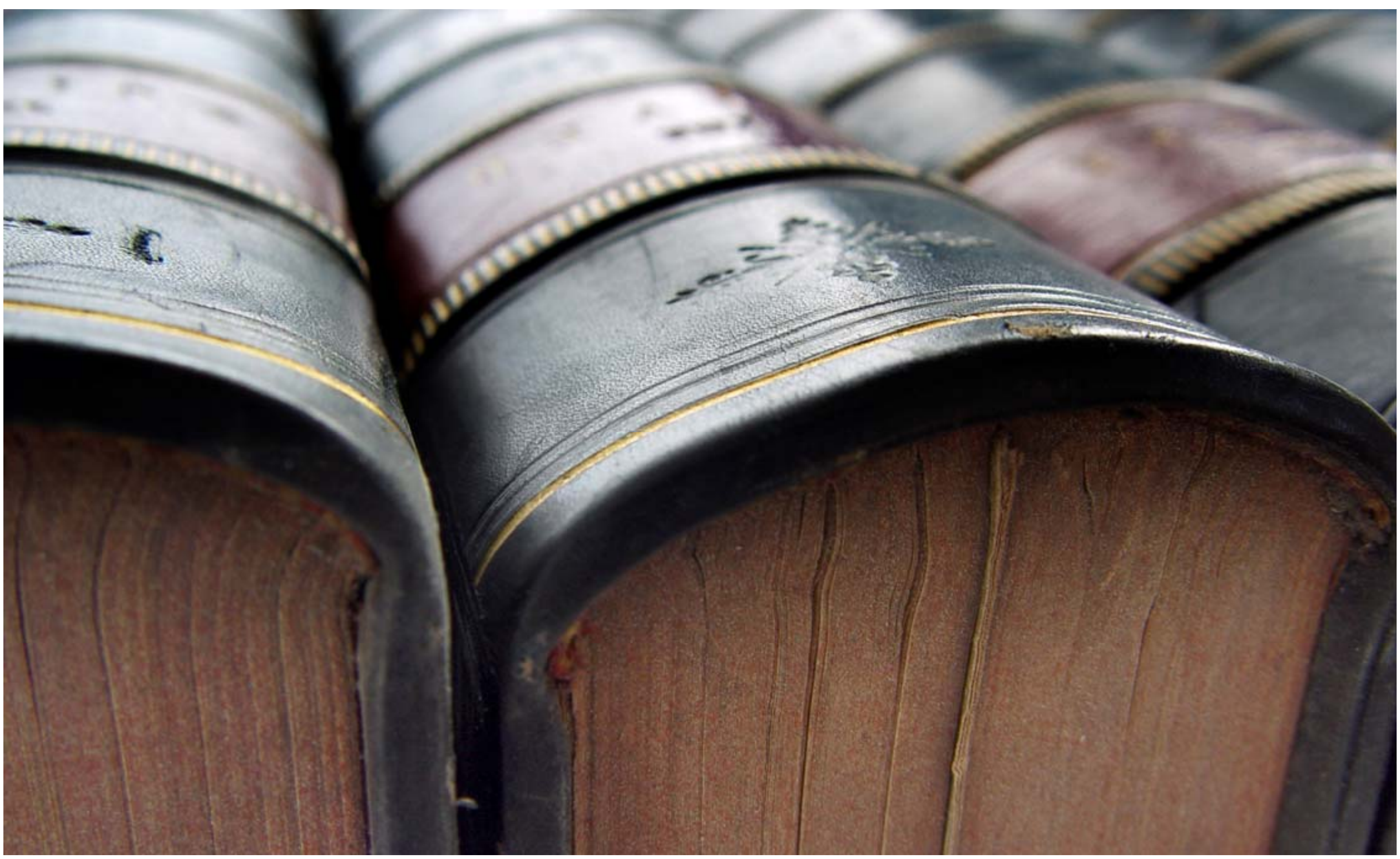
On July 27, 2018, the DOJ filed a criminal complaint in the Southern District of Texas against Gonzalez alleging conspiracy to violate the anti-bribery provisions of the FCPA as well as direct violations of the anti-bribery provisions of the FCPA. On May 14, 2019, the DOJ filed an information in the case, realleging the FCPA violations and adding an allegation of failure to file a foreign bank account report. On May 29, 2019, Gonzalez entered into a plea agreement with the DOJ, but as of the date of publication, the agreement remains under seal. Gonzalez is scheduled to be sentenced on August 28, 2019.

WANG

On June 26, 2019, Julie Vivi Wang was sentenced to imprisonment for a total term of time served, and will be subject to supervised release for a term of three years. Wang was also ordered to pay $629,295 in restitution. Wang had previously agreed to plead guilty to conspiracy to violate the anti-bribery provisions of the FCPA, substantive violations of the anti-bribery provisions of the FCPA, and filing false income tax returns.

PERENNIAL STATUTORY ISSUES

JURISDICTION
FOREIGN OFFICIALS
STATUTE OF LIMITATIONS
MODES OF PAYMENT



PERENNIAL STATUTORY ISSUES

For the most part, the corporate enforcement actions thus far in 2019 have not presented very many substantive statutory-related issues within the FCPA-specific context.

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 United States that transited through a U.S. server, were sufficient.

Last year, however, the government suffered a setback when the Second Circuit affirmed a district court's decision in *Hoskins* significantly curtailing some of these expansive theories. However, more recently, a district court in the Seventh Circuit has expressed its disagreement with the Second Circuit. In *United States v. Firtash*,[3] Judge Pallmeyer denied the defendant's motion to dismiss, and in the process, rejected the Second Circuit's holding in *Hoskins*. Judge Pallmeyer held that Congress did not clearly intend by "affirmative legislative policy" to limit the prosecution of foreign nationals to "agents, employees, officers, directors, or shareholders of an American issuer or domestic concern." The court reasoned that the FCPA's text and structure alone did not show a congressional intent to include "an additional element to be alleged in any indictment for conspiracy or complicity where the substantive offense is (or would have been) an FCPA violation: that the defendant is the agent of a domestic concern or a qualified foreign national." The denial of the motion to dismiss in *Firtash* shows that the law concerning the FCPA's jurisdictional reach is still unsettled and that we can expect the government to attempt to limit the scope of the *Hoskins* decision to the Second Circuit, setting up a potential conflict amongst the circuits that could reach to the Supreme Court.

Although the DOJ and SEC were rebuked in last year's *Hoskins* decision for overly broad theories of jurisdiction, they have not retreated from their aggressive position. The expansive reach of the DOJ and SEC was fully on display in the DOJ and SEC's enforcement actions against Fresenius Medical Care AG & Co. KGaA. To establish jurisdiction, the DOJ and SEC alleged that Fresenius used "internet-based email accounts hosted by numerous service providers located in the United States" to make improper payments to publicly-employed health and government officials in Angola and Saudi Arabia. The reliance of the DOJ and SEC on email accounts transited through U.S. servers remains a much criticized theory of territorial jurisdiction.

[3] No. 1:13-cr-00515 (N.D. Ill. June 22, 2019).

FOREIGN OFFICIALS

Continuing a trend we highlighted in previous editions of *Trends & Patterns*, 2019 brought yet another case in which a corporation was held liable under the FCPA when there was no evidence that the case involved providing corrupt benefits to a foreign official. By definition, every FCPA bribery case must involve an act of furtherance towards the payment of a bribe to a "foreign official." The SEC's enforcement action against Telefonica Brasil, however, once again demonstrates that the books-and-records and internal controls provisions are much broader than the FCPA's anti-bribery provision, and the government can charge companies with violating those accounting provisions whenever it can show the falsification of company records.

In Telefonica Brasil, the SEC charged a subsidiary of a Spanish multinational broadband and telecommunications provider without alleging the bribery of any foreign official. According to the SEC's order, Telefonica Brasil gave 194 World Cup tickets and related hospitality to Brazilian government officials. The value of the World Cup tickets and the hospitality expenses totaled $621,576. The SEC also alleges that the company gave Confederations Cup tickets to thirty-four government officials. The value of the tickets and related hospitality totaled $117,230. The only U.S. connection mentioned in the SEC's order is the fact that Telefonica Brasil's American Depositary Receipts are registered with the SEC and traded on the New York Stock Exchange. With respect to issuers, the FCPA's far-reaching books-and-records provision allowed the SEC to charge Telefonica Brasil for incorrectly characterizing and recording the tickets and hospitality as general advertising and publicity expenses without having to prove a territorial act. Furthermore, the SEC alleged that Telefonica Brasil failed to devise and maintain sufficient internal accounting controls to detect and prevent the making of improper payments to foreign officials. Telefonica Brasil is the latest example showing how expansive the SEC's reach is when it comes to these statutory provisions.

STATUTE OF LIMITATIONS

In recent years, most of the focus in terms of the application of the statutes of limitations has been on the SEC's efforts to obtain disgorgement and injunctive relief for allegedly improper conduct that occurred well outside its statute of limitations for civil penalties. In this year, the Walmart settlement raises interesting questions as to how the DOJ approaches such issues, given that some of the payments, particularly in Mexico, apparently ended in August 2004, six and a half years before Walmart disclosed any of that conduct to the DOJ in December 2011 and almost fifteen years before the ultimate resolution of the investigation.

According to investigative reporting by the *New York Times* that was first reported in April 2012, Walmart first learned of the payments in Mexico in approximately 2005, but it did not report the conduct to the DOJ until December 2011, after the *Times* made inquiries and it was clear that the matter would soon become public. According to the DOJ's NPA, the company thereafter discovered and reported issues in other countries, including Brazil, China, and India. According to the NPA's statement of facts, the company made payments in India through 2011, which were obviously within the statute of limitations at the time of Walmart's disclosure to the authorities and thus presumably covered by any tolling agreement Walmart executed early in the investigation. Similarly, the alleged failure to implement controls to prevent improper payments and knowledge of red flags presumably viewed as sufficient to establish willful blindness continued through 2009, also bringing those payments also within the limitations period. With respect to China, however, there are no allegations of specific payments, and only barebones allegations that might be intended to establish red flags as to the possibility of payments, all of which continued to 2010. All of this, however, is supposition, as the only references to the statute of limitations are the standard clauses concerning tolling of the statute with respect to conduct within the limitations period at the time of the resolution (presumably including tolling periods) and of conduct that takes period during the NPA term, together with an explicit statement that the NPA does not "revise a statute of limitations that expired prior to the time that this Agreement was executed."

The DOJ's apparent solution for this issue was to make this case essentially a criminal internal controls case (and, to some extent, also a criminal books and records case), alleging that Walmart, the parent issuer, had failed to implement adequate internal financial controls in all four countries, even in the face of red flags concerning possible payments in Brazil, China, and India and actual knowledge of the historical payments in Mexico (although DOJ tries to close the gap there by alleging that Walmart's controls did not provide assurances until 2011 that donations "were not being converted to personal use" and that the Mexican subsidiary "did not make improper payments." Indeed, in the NPA, in the clause in which Walmart admits to the facts in the statement of facts, it explicitly acknowledges that responsible executives "had knowledge that the anti-corruption related internal accounting controls were not adequate and willfully failed to implement and maintain them." Similarly, in DOJ's press release, although various officials at the DOJ, the U.S. Attorney's Offices, and the investigating agencies refer broadly to "violations of the FCPA," the release itself fairly clearly identifies the violations as those of the internal controls provisions.

There is nothing wrong with making a criminal internal controls case where the evidence supports it, and Walmart apparently had some significant issues that continued up to and past its disclosures to the DOJ and the SEC. However, whether in the absence of the pre-statutory payments (and failure to properly investigate such payments), the flaws identified in the statement of facts would be worthy of a *criminal* prosecution is something one could discuss at length. The real lesson, however, to be drawn here is that historical payments, even outside of the statute of limitations, may have a very lengthy shelf life for issuers (but not for other domestic concerns or foreign non-issuers) given the government's ability to allege that the company's response to and remediation of controls failures was inadequate through into limitations, and, and, frankly, its ability to pick a date when such remediation was complete and effective (which in Walmart was generally sometime between 2010 and 2012, although the government may still have concerns given its requirement that the company retain a two-year monitor).

Finally, it does not help that neither the DOJ or the SEC were particularly transparent about which conduct resulted in financial penalties or, for that matter, how those penalties were calculated, something that would seem relevant both in calculating the purported Sentencing Guidelines penalty range referred to only in passing by the DOJ in the NPA without showing the actual Guidelines calculation and the SEC's calculation of disgorgement in light of recent Supreme Court penalty. Even in the WMT Brasilia plea agreement, the sentencing guidelines calculations, which of course had to be justified to and accepted by the court, account for only a small portion of the parent's penalties and, moreover, are apparently based on payments made within a limited period of 2009 to 2010. Thus, neither the basis for the government's penalties nor the impact of the statute of limitations is at all apparent from the government's own pleadings. That should give some pause to companies relying on the repose granted to such limitations periods.

MODES OF PAYMENT

The FCPA enforcement actions in 2019 generally alleged schemes similar to those seen in the past. As with most alleged bribery schemes, the issues concerning the modes of payment are (i) how the defendant acquired the funds to be used as bribes and (ii) how the defendant funneled those bribes to a foreign official.

- *Third-Party Intermediaries*. *Fresenius* illustrates the use of third-party intermediaries to transmit payments to foreign officials. In Saudi Arabia, Fresenius avoided or reduced its customs fees by using a third-party freight and logistics company to funnel payments to Saudi officials. From 2007 to at least 2016, Fresenius also used third-party agents throughout West Africa to transmit payments to officials and doctors in public hospitals to obtain product sales, particularly the sale of dialysis kits. The West African supplier funneled sham "service fees" to public doctors and hospital administrators. Fresenius's corruption scheme in West Africa resulted in a benefit of $40 million. As discussed above, third-party intermediaries were also a central component of the charges underpinning the enforcement action against Walmart.
- *Fake Invoices*. In *Cognizant*, senior executives paid $2.5 million to bribe an Indian government official in exchange for a planning permit for the construction of its Chennai campus. Cognizant falsified invoices and Excel spreadsheets as

contract order changes to hide the transmission of the funds. Cognizant similarly used contract order changes to hide its bribes, totaling $867,000 to government officials to obtain a planning permit, a power permit, an environmental clearance, and several operating licenses.
- *Charity Donations*. *MTS* demonstrates how bribes can be disguised as charitable donations. Among the modes of payments to carry out its corruption scheme, MTS's subsidiary Uzdunrobita paid approximately $1.1 million for purported charitable purposes and sponsorships. These funds actually reached entities associated with the foreign official so that MTS would be able to enter the Uzbekistan market and acquire licenses to a range of telecommunications frequencies.

COMPLIANCE GUIDANCE

CFTC PROSECUTION OF FOREIGN CORRUPT PRACTICES

On March 6, 2019, the U.S. Commodity Futures Trading Commission ("CFTC") issued an enforcement advisory announcing that it intended to pursue enforcement actions against companies that engage in foreign corrupt practices that affect the commodities or derivatives markets. The advisory also reinforced the CFTC's policy of encouraging self-reporting of potential violations and cooperation during investigations. On the same day, CFTC Director of Enforcement James M. McDonald provided remarks on the advisory.

The announcement was met with some bemusement by practitioners and even some government officials, particularly given the fact that the FCPA does not confer any enforcement powers to the CFTC. Upon closer study and explanation by Mr. McDonald at other conferences, it appears that the CFTC's position did not represent any jurisdictional expansion of the FCPA or new practice of the CFTC, but rather served to emphasize the relationship between foreign corrupt practices and the CFTC's regulatory jurisdiction to prosecute manipulative trading in commodities futures and derivatives. In discussing the types of foreign corrupt practices it would target, Director McDonald referenced the Libor manipulation scandal, which involved extensive international acts of fraud and manipulation to achieve corrupt benefits and has so far resulted in nearly $9 billion in penalties against numerous financial institutions levied by foreign and U.S. regulators, including the CFTC.[4]

The CFTC has also recognized that certain types of foreign corruption it investigated in the context of commodities and derivatives would necessarily implicate the FCPA, such as "[b]ribes [that] might be employed, for example, to secure business in connection with regulated activities like trading, advising, or dealing in swaps or derivatives" or "[p]rices that are the product of corruption might be falsely reported to benchmarks."[5] In the cases in which its investigations might overlap with the jurisdiction of the SEC, DOJ, and other foreign and domestic regulators, the CFTC would cooperate in the investigation and "will ensure that [its] penalty appropriately accounts for any imposed by any other enforcement body" including a "dollar-for-dollar credit for disgorgement or restitution payments."[6] As we have discussed in previous *Trends & Patterns*, the DOJ also formalized a similar "anti-piling on" policy in May 2018 in which it commits to coordinating penalties with other authorities. The CFTC's announcement in March of this year continues this trend of formally documenting a long-practiced but unwritten approach of coordinating penalties with other authorities.

Director McDonald remarked that the CFTC currently has open investigations involving foreign corrupt practices, and indeed, Glencore plc announced on April 25, 2019 that the CFTC "is investigating whether Glencore and its subsidiaries may have violated certain provisions of the Commodity Exchange Act and/or CFTC Regulations through corrupt practices in connection with commodities."[7] Glencore is also under investigation for similar conduct by the DOJ.

While the CFTC's announcement does not carry any new enforcement guidance, it does provide a signal to companies operating in the commodities and derivatives markets that they can expect the CFTC to potentially increase its international focus and pursue investigations that in the past might have been handled exclusively by the DOJ or the SEC. We can't predict whether this shift in emphasis by the CFTC will uncover any Libor-sized schemes, but it certainly wouldn't come as a surprise if it did.

REVISION OF FCPA CORPORATE ENFORCEMENT POLICY

On March 8, 2019, the DOJ released a revised version of its FCPA Corporate Enforcement Policy ("the Policy"), which provides enforcement and practice guidance to DOJ prosecutors and was formally incorporated into the Justice Manual in November 2017 after a year and a half experiment as the FCPA Pilot Program.[8] Assistant Attorney General Brian A. Benczkowski announced the revisions to the Policy in a speech at the American Bar Association's National White Collar Crime Institute in which he highlighted the DOJ's commitment to transparency and the need to ensure its "ongoing process of refinement and reassessment."[9] The changes to the Policy include clarifications concerning disclosures made in the context of mergers and acquisitions, as well as providing more nuance concerning the DOJ's approach to a cooperating company's obligation with respect to messaging software that does not retain "ephemeral" communications.

[4] James McBride, *Understanding the Libor Scandal*, Council on Foreign Relations (Oct. 12, 2016), https://www.cfr.org/backgrounder/understanding-libor-scandal.

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

[6] *Id.*

[7] Glencore, *Announcement re the Commodity Futures Trading Commission* (Apr. 25, 2019), https://www.glencore.com/media-and-insights/news/announcement-re-the-commodity-futures-trading-commission

[8] *Justice Manual*, FCPA Corporate Enforcement Policy Section 9-47.120 (as of Mar. 15, 2019).

[9] DOJ Press Release, *Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference* (Mar. 8, 2019).

First, the DOJ provided additional details about potential FCPA violations discovered in due diligence prior to a merger or acquisition. The Policy notes that an acquiring company can obtain the Policy's presumption of a declination or other credits if it timely voluntarily discloses misconduct discovered during due diligence and adheres to the Policy's other requirements of cooperation and remediation. Most notably, the Policy update clarifies that the Policy applies to potential violations discovered during pre-acquisition due diligence and, "in appropriate instances, through **post-acquisition** audits or compliance integration efforts" (emphasis added).

The DOJ's express allowance for post-acquisition violations to qualify under the Policy for declinations or other benefits should provide some comfort to acquiring companies, which might have become preoccupied or chilled from completing an acquisition for fear of getting stuck with a pre-acquisition violation discovered only after finalization of the deal. The DOJ's Policy update encourages companies with more effective compliance programs, which otherwise might be dissuaded from taking a chance on a company with compliance risks, to make these acquisitions and implement their more robust programs to the acquired company. Indeed, the updated guidance on compliance programs released by the DOJ's Criminal Division in April 2019, which we discuss in further detail below, emphasizes the importance of due diligence and compliance integration in the M&A context and provides companies considering these deals with a clearer outline of the DOJ's expectations. Hopefully, the overall effect of the new guidance will be to increase companies' confidence in making solid risk-based, compliance-oriented decisions about acquisitions.

Second, the Policy update clarifies a key practical question regarding communications policies that has boggled companies since the Policy was first formalized in November 2017. Specifically, the plain language of the original Policy suggested that companies could not qualify for a presumption of declination or remediation credit if their policies did not completely bar employees from using personal communication devices or ephemeral messaging platforms. This strict black-or-white language left companies wondering if they needed to make drastic, potentially burdensome changes to policies, even in the absence of any allegation or investigation, and if their use of these commonly-used and previously non-controversial technologies at the time of a potential violation might preclude them from obtaining a declination or remediation credit. Indeed, many questioned whether the DOJ had stepped out of its lane by defining cooperation to exclude pre-investigative use of messaging software even when the company's adoption of or acceptance of such communication software was done without any intent to obstruct a non-existent investigation and instead was based on the utility and effectiveness of the software (or, for that matter, a company, as part of its document retention policy, could, for any number of legitimate reasons, choose not to retain or preserve records of communications including emails, voicemails, while-you-were-out pink pads, or any other types of records once there was no business need for them). The Policy, as updated in March 2019, now states that companies must have "*[a]ppropriate* retention of business records, and prohibiting the *improper* destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to *appropriately* retain business records or communications or otherwise *comply with the company's document retention policies or legal obligations*" (emphasis added). This softer language ameliorates potential confusion by eliminating the flat prohibition of these communication methods that was in the original Policy. The result is much more practicable guidance for companies, especially given the realities of current communication habits and needs.

UPDATED GUIDANCE FROM DOJ ON THE EVALUATION OF COMPLIANCE PROGRAMS

On April 30, 2019, the DOJ's Criminal Division released an updated version of its guidance on "Evaluation of Corporate Compliance Programs."[10] This replaces the first version of this guidance, which was issued in February 2017 by the Fraud Section and the even earlier "Hallmarks of Effective Compliance Programs" in the FCPA Resource Guide published by the Criminal Division and the SEC's Enforcement Division in 2012. In keeping with the prior version, the latest update still contains a list of general questions for prosecutors to ask when assessing a company's ethics and compliance program rather than a formal rubric or checklist for compliance. The newly released version, however, goes further by providing more detail and concrete explanations of what prosecutors should expect effective compliance programs to entail.

For example, in the context of assessing how well the compliance program is designed, the new guidance lists several specific factors to consider:

- Whether there is an effective risk assessment process to "detect the particular types of misconduct most likely to occur in a particular corporation's line of business";
- Whether policies and procedures "give both content and effect to ethical norms and . . . address and aim to reduce risks identified by the company as part of its risk assessment process";
- Whether training and communication of the program are "appropriately tailored" and properly disseminated to employees;

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[10] U.S. Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs* (April 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

- Whether there is "an efficient and trusted" means by which employees can report potential breaches of the compliance policies and a "timely" and "appropriate" process for handling allegations and investigations of misconduct;
- Whether the company applies "risk-based due diligence to its third-party relationships" and has proper third-party controls in place; and
- Whether there is a "comprehensive due diligence" process for acquisitions and mergers and procedures for timely integrating acquisitions into the company's compliance program.

The guidance also provides markers for observing whether the compliance program is effectively implemented. Factors to be considered include the commitment by upper and middle management, the autonomy and resources provided by the company to its compliance team, and the incentives and disciplinary procedures in place.

Finally, the guidance lists factors to consider in determining the overall effectiveness of the compliance program, in practice. According to the guidance, the program will be evaluated at the time of the alleged violation and at the present time. One key factor to consider is the ability of the program to continuously improve and adapt—which necessarily requires a comparison between the present program and its past iterations. The existence of "a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents" is also considered an important part of an effective program. Further, a robust compliance program should enable the company to use the information obtained in the investigation to determine the cause and apply proper remedies.

Overall, this guidance is hardly new information and merely elaborates on previous DOJ guidance and commonly known best practices. The additional details and examples may prove useful for companies; essentially, however, the Guidance represents another example in the ongoing effort by DOJ, especially the Fraud Section, to document, formalize, and clearly convey its intentions and expectations to companies.

INTERNAL INVESTIGATION DOCUMENTS – ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGE REMAINS STRONG

On April 11, 2019, the U.S. District Court for the Eastern District of New York issued an opinion in the much-anticipated *Cicel (Beijing) Science & Technology Co. v. Misonix, Inc.*[11] case, where the privileged status of documents related to an internal FCPA investigation conducted by external counsel was at risk of discovery disclosure. We wrote about this case in the July 2018 *Trends & Patterns*, predicting chaos should the court order disclosure of the internal investigation documents. However, the case that had the potential to unseat a long-standing assumption of white collar practice and unnerve companies and law firms everywhere came to an anticlimactic, status quo-sustaining end when the court found that the documents were protected under attorney-client and attorney work product privileges.

The case arose when a Chinese medical device distributor, Cicel, sued Misonix, a U.S. medical device manufacturer, for terminating a distributor agreement after allegedly "uncovering evidence that Cicel's business practices were inconsistent with Misonix's policies and raised concerns under the Foreign Corrupt Practices Act."[12] Misonix hired a U.S. law firm to "provide legal advice regarding issues surrounding [Cicel], for which government investigations and civil litigation was anticipated."[13] The U.S. law firm conducted interviews of Cicel and Misonix employees and conducted a full investigation, the results of which it reportedly provided to the DOJ and SEC. Cicel sued Misonix for breach of contract and other claims, and it filed a motion to compel production of documents related to the FCPA investigation conducted by outside counsel. In the alternative, Cicel moved for the documents to be reviewed *in camera* or exclude any investigation documents from the lawsuit.

The court denied Cicel's motion to compel, rejecting its argument that the internal investigation was a "fact-finding mission" and thus did not constitute "legal advice." The court found that the internal investigation "was conducted as part of the company's request for legal advice regarding issues pertaining to government investigations and anticipated civil litigations."[14] Therefore, the primary purpose of the documents sought was to obtain legal advice, in which case they are clearly protected by attorney-client privilege. The court cited several pieces of evidence from the retention documents and interviews in support of this conclusion.

Further, the court held that the threat of litigation was sufficient to sustain attorney work product privilege, even where Misonix mainly used the information for regulatory purposes in the context of filing its Form 10-K and 10-Q statements. It also concluded that all of the investigation documents were protected by the attorney work product doctrine. This decision was based, in part, on the fact that "the notes taken by [external counsel] attorneys during those interviews 'reflect the questions counsel chose to ask and mental impressions and opinions of the attorneys who took the notes.'"[15] The decision notes that materials protected by work product privilege can be created in

[11] No. 17-cv-1642 (E.D.N.Y. Apr. 11, 2019).

[12] *Id.* at *2-3.

[13] *Id.* at *3.

[14] *Id.* at *19.

[15] *Id.* at *24.

anticipation of litigation that has not yet developed, not just litigation that has begun or is inevitable.

The court did, however, require Misonix to submit any emails on its privilege log that do not involve lawyers for *in camera* review and to add all the documents from the internal investigation to its privilege log. As of the time of publication, we do not know whether any of these documents will be compelled by the court for disclosure, but finding a few non-privileged documents would be par for the course in a civil litigation of this type and would not likely upend general practice in the way a full granting of the motion would have done.

Overall, the court recognized characterizations of the documents from the internal investigation as legal advice or in anticipation of litigation—even where it admitted that they had other secondary, non-privileged purposes, including regulatory requirements and fact-finding. These findings emphasize important practice points to consider when conducting and documenting internal investigations using external counsel—notes from interviews should contain attorney thoughts and impressions, as mere verbatim notes could be vulnerable to disclosure. Further, the anticipated litigation pursuant to which the investigation is being conducted should be frequently and thoroughly documented, especially where no actual litigation exists.

INTERNAL INVESTIGATIONS – CONSEQUENCES OF GOVERNMENT OUTSOURCING

On May 2, 2019, Chief Judge Colleen McMahon of the Southern District of New York announced a decision that, in contrast to the *Cicel* decision, has the potential to significantly impact the typical practice for conducting internal investigations, including in the FCPA context. Specifically, in *United States v. Connolly*, Chief Judge McMahon found that an internal investigation of a major financial institution's LIBOR reporting practices conducted by an external law firm was "fairly attributable" to the government, which it claimed has essentially "outsourced" its work by relying on the institution's "internal" investigation.[16] While Chief Judge McMahon's opinion did not result in vacatur or a new trial in Connolly's case for fact-specific reasons, it still has key implications for how the DOJ and regulators may conduct investigations of financial institutions and corporations.

In *Connolly*, the defendant argued that the evidence against him was inadmissible under the Supreme Court's holding in *Garrity v. New Jersey*,[17] in which it held that a government employee's statements to his government employer were inadmissible if they were made under threat of termination. The court agreed with Connolly's argument that he "was compelled, upon pain of losing his job" to submit to multiple interviews with the bank's external counsel during the internal investigation. Further, the court pointed to the DOJ's "micromanaging" of the investigation—from identifying which employees should be interviewed and how often to what line-of-approach should be taken in the interviews—to conclude that the investigation was "fairly attributable" to the government and thus raised an issue under *Garrity*. The court also noted that in addition to controlling the internal investigation conducted by the external law firm, the record contained "very little evidence about the Government's own independent investigative efforts" and found that "rather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to [the financial institution]—the original target of that investigation—and then built its own 'investigation' into specific employees, such as [the defendant], on a very firm foundation constructed for it by the Bank and its lawyers."[18]

Therefore, the court held that these facts combined to raise an issue under *Garrity*, but the court ultimately upheld Connolly's conviction because of the "overwhelming" independent evidence DOJ had amassed. In other cases, however, it is possible that a court could declare material evidence inadmissible and even grant a new trial. Because of these high stakes, this case may have key implications for how the government, the corporate institutions they target, and external law firms engage in investigations.

On its side, the government will likely attempt to avoid the appearance that it directed or instructed a target on how to conduct its investigation—keeping specific instructions to targets about the process of the investigation to a minimum. Practitioners can also expect for the government to develop and maintain a record of the independent investigative steps it conducted in connection with such matters—Chief Judge McMahon's opinion, for example, placed considerable emphasis on the DOJ's inability to point to its own, substantive investigative steps, as opposed to those that the institution took itself. This could include, for example, relying less upon counsel's proffers or summaries of employee interviews, and increasingly requesting access to employees earlier on in the process to avoid any suggestion of outsourcing.

On the other hand, corporations and the external counsel advising them on such investigations should also bear this opinion in mind. While Chief Judge McMahon faulted neither the institution nor counsel for this "outsourcing," it will be good practice for corporations and their outside counsel to maintain the independence of the corporation's investigation, while at the same time cooperating with DOJ and regulators. Of course, the opinion in no way suggests that it is improper or poor practice for targets to engage with DOJ and regulators in the course of

[16] *United States v. Connolly*, No. 16-CR-0370 (S.D.N.Y. May 2, 2019).

[17] 385 U.S. 493 (1967).

[18] *Id.* at *23-24.

government investigation; such dialogues help ensure that the investigation is focused and that targets understand the nature and scope of what DOJ and regulators are probing. At the same time, the *Connolly* decision will give corporations and outside counsel stronger grounds to resist "micromanaging" of an investigation by DOJ and regulators.

UNUSUAL DEVELOPMENTS

POST-KOKESH DEVELOPMENTS: NEW LEGISLATION
BIO-RAD: CASE DEVELOPMENTS
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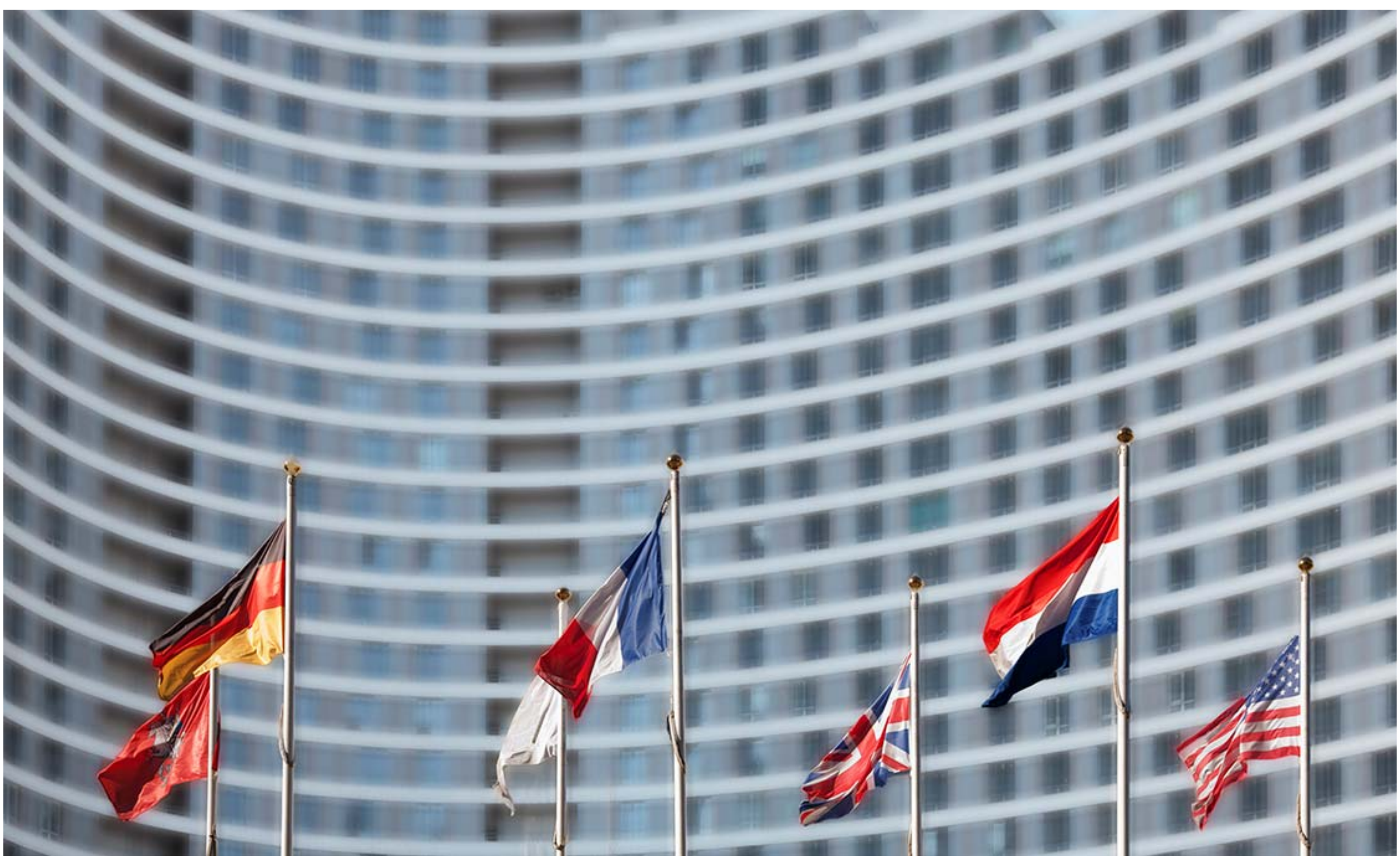

POST-KOKESH DEVELOPMENTS: NEW LEGISLATION

Following the Supreme Court's decision in *Kokesh v. SEC*, the Securities Fraud Enforcement and Investor Compensation Act,[19] a bipartisan bill establishing a ten-year limitation on restitution claims, was introduced in March 2019. As we have previously reported, in *Kokesh*, the 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."[20] Prior to the *Kokesh* decision, disgorgement was not subject to any statute of limitations, allowing the SEC to order disgorgement years after the conduct took place. The new bill would keep the disgorgement limitation in place, but allow the SEC to pursue fraud claims for up to ten years. The senators behind the bill, Senators Mark Warner (D-Va.) and John Kennedy (R-La.), have stated that the bill is intended to provide the SEC with additional time to recover money investors lost due to a corrupt scheme or investment scam.

The Whistleblower Protection Reform Act of 2019[21] would protect whistleblowers who internally report potential violations under the anti-retaliation provisions of Dodd-Frank, overturning the Supreme Court's 2018 decision in *Digital Realty Trust, Inc. v. Somers*.[22] In *Somers*, the Court held that Dodd-Frank's anti-retaliation provision applied exclusively to those who report violations of the securities laws to the SEC rather than report internally, preventing whistleblowers who use a company's reporting mechanism to report misconduct from receiving protection. In practice, the SEC has shown strong support for individuals who raise misconduct internally before reporting it to the SEC. In May 2019, the SEC awarded $4.5 million to a whistleblower who anonymously provided a tip about a kickback scheme in Brazil through the reporting mechanism at his company, Biomet.[23] Within 120 days of reporting the tip, the whistleblower reported the scheme to the SEC, qualifying him for a reward. After receiving the anonymous tip, Biomet launched an internal investigation and self-reported to the SEC. Similarly, in June 2019, in a redacted order, the SEC announced that it rewarded two whistleblowers for reporting misconduct internally as well as to the SEC.[24] In this case, however, another law enforcement authority had already submitted requests for information to the company that required responses from the two whistleblowers. Even though the report was not considered "voluntary" due to the request from the other authority, the whistleblowers received the reward because they did not learn about the request until after they had already reported to the SEC. The SEC's recent whistleblower rewards indicate that the agency is trying to incentivize employees to report both internally and directly to the SEC.

BIO-RAD: CASE DEVELOPMENTS

On February 26, 2019, the Ninth Circuit affirmed $8 million of an $11 million award that Bio-Rad's general counsel, Sanford Wadler, won at trial in a whistleblower retaliation suit in 2017.[25] Wadler was fired in 2015 after reporting to Bio-Rad's audit committee that the corporation may have engaged in bribery in China. Wadler filed suit against the corporation under the Sarbanes-Oxley Act ("SOX"), the Dodd-Frank Wall Street Reform and Consumer Protection Act, and California's wrongful termination laws. At trial, the jury found Bio-Rad liable for Wadler's termination and awarded him $11 million.[26] Bio-Rad appealed to the Ninth Circuit, arguing that the jury relied on a Dodd-Frank whistleblower provision that did not apply to internal reporting. The Ninth Circuit held that the jury's verdict on the California claims should stand because employees cannot be terminated for complying with the reporting provisions in the FCPA and SOX under California law. In a previous California Supreme Court case, *Tameny v. Atlantic Richfield Co*., the court held that it was unlawful for a company to terminate an employee for reasons that violate public policy.[27] The Ninth Circuit vacated the Dodd-Frank verdict, relying on *Somers*,[28] which held that Dodd-Frank's whistleblower provision only protected employees who reported to the SEC, not those who reported internally. The court found that companies cannot be punished under SOX for retaliating against employees who report FCPA violations because a violation of the FCPA, without more, is not covered by SOX's whistleblower provision. However, the court remanded the SOX claim to district court for a potential retrial, acknowledging that Wadler may have a claim under the SEC's books-and-records provisions. The court also stated that while the jury instructions did not distinguish between the FCPA as law and the SEC regulations as rules, there was enough evidence for a jury to find in Wadler's favor if they were given new instructions. The court's ruling on the Dodd-Frank claim and remand of the SOX claim

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[19] S. 799, 116th Cong. (2019).

[20] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

[21] H.R. 2515, 116th Cong. (2019).

[22] 138 S. Ct. 767 (2018).

[23] In the Matter of the Claim for Award in connection with [Redacted] Notice of Covered Action [Redacted], Release No. 85936 (May 24, 2019).

[24] In the Matter of the Claim for Award in connection with Notice of Covered Action [Redacted], Release No. 86010 (June 3, 2019).

[25] *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176 (9th Cir. 2019); *Wadler v. Bio-Rad Labs., Inc.*, 754 F. App'x 661 (9th Cir. 2019).

[26] *Wadler v. Bio-Rad Labs., Inc.*, No. 15-CV-02356-JCS, 2017 WL 1910057 (N.D. Cal. May 10, 2017).

[27] 27 Cal. 3d 167 (1980).

[28] 138 S. Ct. 767 (2018).

sheds some light on whistleblower retaliation post-*Somers*, but it remains to be seen how other circuits will treat damages under whistleblower retaliation claims.

SIEMENS: COMPLIANCE MONITOR UPDATE

As we have previously reported, in March 2017, the District Court for the District of Columbia granted 100Reporters' request that the DOJ be required to submit "certain representative documents for *in camera* review" so that the court could determine if the DOJ has produced all segregable factual information.[29] The court also held that, because compliance monitors fall within the "consultant corollary" definition, communications between monitors and the agencies to which they report could be exempt under Exemption 5, which covers certain inter-agency or intra-agency communications, including the deliberative process privilege. However, the court stated that the DOJ failed to meet its burden to support application of Exemption 5 to withhold the monitor's reports, work plans, presentations, and related materials because the DOJ's reasoning was too vague. The court requested additional information from the DOJ.

As we reported earlier this year, in a June 2018 order, the court partially granted the DOJ's motion to dismiss 100Reporters' request seeking to obtain access to the monitor's reports and related materials. The court recognized the DOJ's claims that documents related to the corporate monitor's reports were exempt from disclosure under FOIA as confidential commercial information and deliberative process, but stated that the scope of the exemptions were limited.[30] The court held that the DOJ must segregate purely factual material in the monitor's reports, work plans, and related materials, as it was not confidential commercial information, and held that the deliberative process privilege applied to the monitor's drafts, feedback, presentations, and other preliminary materials related to the Work Plans, but the final Work Plans must be disclosed (subject, of course, to the application of other applicable exemptions). In short, the core information in the monitor's reports and related materials are subject to this exemption and remain protected as confidential while more general information (*e.g.*, the "General Principles and Good Practices" section summarizing industry best practices and FCPA guidance) must be disclosed.

On May 7, 2019, the court ordered that the compliance monitor's report and attending exhibits be released by June 10, 2019 and remaining miscellaneous materials be produced by August 11, 2019.

GOLDMAN SACHS: EQUITY-BASED PAY

In its February 2019 Form 8-K filing, Goldman Sachs stated that the equity-based pay awards it paid in 2018 to current Chairman and CEO David Solomon, and former Chairman and CEO Lloyd Blankfein, may be subject to reduction pending the outcome of investigations related to the 1Malaysia Development Berhad (1MDB) scandal. As we have previously reported, the DOJ alleges that from 2009 to 2014, $4.5 billion raised by 1MDB, Malaysia's state-owned and controlled investment development company, was misappropriated by financier Low Taek Jho and former Goldman banking executives Tim Leissner and Ng Chong Hwa through shell companies and complex transactions. Solomon and Blankfein received $28 million and $20.5 million, respectively, in equity-based pay awards last year. Goldman Sachs stated that the Board of Directors approved a new forfeiture provision allowing the size of an award to be reduced prior to payment. The provision would apply if the outcome of the 1MDB investigations would have impacted the Board's compensation decision for Solomon or Blankfein.

INTERSECTION OF SANCTIONS AND FCPA POLICIES

As discussed above, in June 2019, the DOJ brought charges against two Venezuelan officials—Luis Alfredo Motta Dominguez and Eustiquio Jose Lugo Gomez—over their roles in an alleged bribery scheme involving Corporación Eléctrica Nacional, S.A. ("Corpoelec"). That same day, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") designated Motta and Lugo pursuant to the U.S. sanctions program that targets Maduro regime officials whom OFAC determines have engages in significant corruption and fraud to the detriment of the people of Venezuela. The result of this designation is that U.S. persons are generally prohibited from dealing with the two officials, and all property and interests in property of the officials that are in the United States or in the possession or control of U.S. persons are blocked.

In past editions of *Trends & Patterns*, we have discussed a possible increase in overlap between sanctions and FCPA policy in the context of the Global Magnitsky Act, which notably expanded the United States' ability to punish extraterritorial corruption that occurs outside even the exceptionally broad jurisdictional requirements of the FCPA. In the January 2018 edition of this article, we noted that several key players in large bribery scandals had escaped U.S. charges, but were nonetheless punished by sanctions pursuant to the Global Magnitsky Act. Motta and Lugo, on the other hand, will both face criminal charges in the United States and be the subject of U.S. sanctions, thus providing them with an assurance of due process in the U.S. courts should they choose to appear and defend themselves against the charges.

[29] *100Reporters LLC v. DOJ*, 248 F. Supp. 3d 115 (D.D.C. 2017).

[30] 316 F. Supp. 3d 124, 135 (D.D.C. 2018).

INTERNATIONAL ENFORCEMENT: CONVERGENCE

BRAZIL

In February 2019, an anti-crime bill that included anti-corruption enforcement as part of a broader anti-crime package was proposed and signed by President Jair Bolsonaro before being sent to Congress for approval. In general, the bill would introduce a number of changes that would reform crimes and expand definitions as well as impact investigations, trial procedure, and federal sentencing. Specifically, the bill would criminalize slush funds, set conditions for negotiating non-prosecution agreements, require all public entities to establish reporting lines for reporting misconduct, and establish rules for protecting whistleblowers from retaliation. As of May 2019, Brazil's Justice Minister, Sergio Moro, was still having trouble getting Congress to pass the bill. At the same time Moro was introducing the anti-crime bill, the Financial Activities Control Council (COAF) was granted greater power to analyze suspicious transactions, and oversee obligations to prevent money laundering and terrorist financing. Two new regulatory bodies were created under the umbrella of the COAF: (1) the Financial Intelligence boards, responsible for analyzing reports of suspicious transactions by entities required to submit reports, and (2) the Supervision boards, responsible for overseeing obligations to prevent money laundering and terrorist financing. The COAF was also granted permission to share information with foreign regulators, including the SEC.

CANADA

Robert Barra and Shailesh Govindia, nationals from the U.S. and U.K., respectively, were convicted under the Corruption of Foreign Public Officials Act (CFPOA) in January 2019 for agreeing to bribe Indian government officials in order to secure a contract with Air India. Barra was convicted of agreeing to pay a bribe to Praful Patel, the Indian Minister of Civil Aviation, and agreeing to pay a bribe to Patel through an intermediary, Govindia. Govindia was convicted of agreeing to pay a bribe to Patel on Barra's behalf. Both men were convicted despite there being no evidence that a bribe was actually paid to Patel or another foreign official. The court held that bribery is a specific intent offense requiring defendants to have the requisite *mens rea* to agree to provide a bribe to a foreign public official. Under the FCPA, however, a defendant need only know that he or she is committing the act constituting the violation. While the court's specific intent finding conflicts with FCPA case law, the court's ruling on knowledge of the status of a foreign public official is consistent with U.S. case law, specifically *United States v. Carson*.[31] The judge in *Carson* gave jury instructions stating that a defendant's bribe must be given to a person the defendant knew or believed was a foreign official. The court went on to state that a belief that a person was a foreign official who is later found out to not be a foreign official would not satisfy the element. Similarly, in *R. v. Barra and Govindia*,[32] the court stated that a defendant's knowledge that the person being bribed is a foreign official is an "essential element of the bribery." *Barra and Govindia* indicates that it may be more difficult for prosecutors to bring charges against defendants in cases where it is unclear whether the individual being bribed is a private or public official.

In December 2018, the Ontario Securities Commission ("OSC") approved a civil settlement with Katanga, a Canadian mining company, for $30 million under the CFPOA. The OSC claimed that Katanga failed to disclose the risk that hiring intermediaries to represent it while doing business with the Democratic Republic of Congo ("DRC") posed. The CFPOA, unlike the FCPA, had previously only been enforced criminally, requiring prosecutors to meet a higher burden of proof when bringing CFPOA charges. The settlement with Katanga signals a move toward civil enforcement of the CFPOA that will likely mirror the SEC's enforcement of the FCPA. One difference, however, will be that the OSC has the ability to sanction entities for conduct contrary to public interest in addition to investigating false statements in books and records and lack of adequate internal controls. It remains to be seen whether the OSC will bring more civil enforcement actions and whether entities that would have previously escaped criminal liability for corrupt conduct will be sanctioned.

In late 2018, Canada introduced its own version of a deferred prosecution agreement called a remediation agreement. The remediation agreement is a voluntary agreement between a prosecutor and a private entity that requires the entity to meet certain obligations by a particular date in order to avoid criminal prosecution for corruption, fraud, or bribery. In contrast to the relatively rubber-stamp role of the court in U.S. DPAs, under Canada's law (like that of the U.K.), before a judge can approve the agreement, it must be reviewed for reasonableness, fairness, and proportionality. If the entity successfully complies with the agreement's terms, the criminal charges will be stayed, but if the entity does not comply, the entity can be prosecuted. In 2015, SNC-Lavalin, a construction company based in Montreal, was charged with attempting to bribe Libyan government officials with almost $48 million in relation to construction projects in Libya. After the passage of the new law, the company sought to negotiate a remediation agreement to avoid a ten-year ban on bidding on government contracts. However, in October 2018, prosecutors determined that SNC-Lavalin had failed to meet the criteria to be eligible for an agreement. Not satisfied, it appears that the company sought to leverage political connections to force the prosecutors to reconsider and, in February 2019, media

[31] Order re Select Jury Instructions, *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal.).

[32] *R v Barra and Govindia*, 2018 ONSC 57.

outlets reported that the office of Prime Minister Justin Trudeau had pressured the former Attorney General, Jody Wilson-Raybould, to convince the prosecutor to negotiate with SNC-Lavalin, but she refused. Trudeau admitted that he asked Wilson-Raybould whether she would be open to revisiting the decision to prosecute the company, but denied that anyone from his office directed her to intervene. An investigation has been opened by the Ethics Commission into whether Trudeau's office violated the Conflict of Interest Act by attempting to influence Wilson-Raybould's decision in furtherance of a private interest in helping SNC-Lavalin. On May 29, 2019, a judge in Quebec ruled that SNC-Lavalin would face trial on fraud and bribery charges. However, the new Attorney General, David Lametti, signaled that he may intervene and offer an agreement.

COLOMBIA

In January 2019, Luis Gustavo Moreno Rivera, the former Colombian National Director of Anti-Corruption, was sentenced to four years in prison by a U.S. District Judge for soliciting a bribe from Alejandro Lyons Muskus, a former Colombian governor, in Miami. Moreno was caught soliciting a $132,000 bribe from Lyons in exchange for agreeing to discredit a witness in a case Lyons had pending before the Internal Revenue Service. Unbeknownst to Moreno, Lyons was a cooperating witness with the DEA and his meeting with Lyons was part of a DEA sting operation. Lyons was wearing a wire when he met Moreno in a shopping mall in Miami to give him the money. Morena was recorded stating that he would "inundate the prosecutors" with work to distract them from the Lyons investigation. Moreno pleaded guilty to conspiring to launder money in furtherance of foreign bribery.

INDIA

India made several key amendments to its main anti-corruption legislation, the Prevention of Corruption Act ("PCA"), in late 2018 that further align India's anti-corruption regime with those of the U.S. and U.K. Most notably, a new section, Section 9, has been added to the PCA concerning offenses committed by commercial organizations that are either incorporated in India (or associated with such an organization) or conduct business, or part of a business, in India. Under Section 9, liability may be imposed on commercial organizations for unlawful acts of bribery or corruption committed by individuals associated with the organization, including third parties and intermediaries. Borrowing from the FCPA, a separate amendment broadens corporate liability, allowing directors, managers, secretaries, and other officers of an offending commercial organization to be held liable for the organization's unlawful acts. Such individuals may be subject to fines and imprisonment up to seven years. Following the UK Bribery Act's adequate procedures provision, another amendment to the PCA recognizes proof of implementation of adequate procedures to prevent corrupt conduct as a defense available to commercial organizations. As of June 2019, however, the Central Government has yet to release guidelines on adequate procedures. Other amendments include broadening the scope of abetment, redefining terms such as "undue advantage" and "gratification," and setting the timeline for completion of trial to four years. Unlike the FCPA, the PCA does not recognize facilitation payments, does not provide for disgorgement of profits obtained from corrupt conduct, and does not provide a program allowing commercial organizations to avoid trial (*e.g.*, deferred prosecution agreements).

ITALY

Italy adopted new measures in late 2018 to combat corruption in the public sector and increase transparency of corporate contributions to political parties and organizations. The "bribe destroyer" bill, which went into effect in early 2019, includes amendments to the criminal code that extend statutes of limitations, prohibit individuals convicted of corruption from ever seeking a public contract or holding political office, increase penalties for bribery and embezzlement, and broaden the definition of "foreign public official," among others. On the civil side, entities that collaborate with law enforcement authorities during investigations will face a maximum of two years of restraining sanctions. Entities are expected to collaborate by providing evidence, identifying other offenders, turning over the proceeds of the corrupt activity, and implementing a compliance and ethics program. Interestingly, while the bill aims to increase entities' collaboration with authorities, it also aims to deter unethical leadership. One of the civil amendments increases restraining measures for managers who commit wrongdoing to a maximum of seven years. Additionally, the bill requires individuals, organizations, foreign companies subject to Italy's tax laws, political officials, and political organizations to fully disclose political donations and prohibits politicians from accepting donations from companies outside of Italy. It remains to be seen how the new measures will impact the compliance climate in Italy, and how companies will adapt to the changes.

ISRAEL

Anti-corruption enforcement in Israel has recently increased. Media outlets have covered investigations into corruption and bribery, and efforts by prosecutors to hold both high-level Israeli political officials and large private companies accountable. For instance, in February 2019, Israel's Attorney General, Avichai Mandelblit, announced his intent to prosecute Prime Minister Benjamin Netanyahu for bribery, fraud, and breach of trust pending a hearing. While the timing of the announcement has stirred controversy—one month before elections—those who support the decision point out that an investigation has been ongoing for two years and the police have previously recommended that Netanyahu be prosecuted. The allegations include receiving expensive gifts in exchange for favors, colluding with a newspaper to hurt competing newspapers in exchange for favorable news coverage, and offering incentives to a telecommunications company in exchange for positive news coverage on a website owned by the company's owner. The preindictment hearing was set for July 10, 2019, but according to media reports, Netanyahu's legal team is trying to delay the process long enough to put an immunity law in place that will allow him to avoid going to trial. It is unclear if, and for long, the hearing will be postponed. In addition to the pending Netanyahu indictment, Israel has demonstrated a commitment to addressing corruption by investigating and prosecuting a high-profile Israeli company, and individuals associated with the company, alleged to have paid bribes to government officials in exchange for contracts in Kenya.

MEXICO

The Federal Economic Competition Commission ("COFECE"), Mexico's independent antitrust regulator responsible for competition enforcement, is increasingly focusing on bid rigging in public procurement and the use of privileged information in exchange for bribes. While COFECE has not been tasked with handling anti-corruption enforcement, regulators recognize that both anti-competitive activity and corrupt activity are triggered by public tenders. Corrupt behavior, such as government officials favoring a particular entity or providing privileged information in exchange for bribes, can enable collusion. Further, a contract gained through corrupt means may unfairly increase an entity's market power, which may impact prices. The new focus on anti-corruption enforcement is one of many developments in the antitrust regime in Mexico over the past twelve years. For instance, COFECE has a leniency program, the power to conduct unannounced raids, and the ability to impose maximum fines. In addition to proposing regulations aimed at placing conditions on public tenders, COFECE has played an active role in investigating high-profile bid rigging cases and assisting companies in developing compliance programs.

RUSSIA

According to media reports, at the end of 2018, Russian Prosecutor General Yuri Chaika reported a total of 7,800 convictions for corruption offenses. The defendants included law enforcement officers, government employees, and politicians. In early 2019, Russia continued its efforts to build its anti-corruption regime, announcing two major developments in ongoing investigations and prosecutions. First, prosecutors announced that their investigation of Aleksandr Shestun, the former head of the Serpukhov District in the Moscow Region, found that Shestun had been auctioning government land to himself through corrupt means. It is estimated that Shestun's properties are worth $150 million. Shestun was charged with embezzlement, money laundering, and "illegal entrepreneurship" in addition to being ordered to forfeit the properties. Second, France extradited Aleksei Kuznetsov, the Moscow Region's former Finance Minister. Kuznetsov had been charged with fraud, misuse of funds, and money laundering. Prosecutors estimate that Kuznetsov is responsible for more than $211 million in losses to the regional government.

The media has also reported that the Russian government has made changes in the areas of anti-corruption legislation and public outreach on anti-corruption compliance. After President Vladimir Putin signed a decree in 2018 to amend Russia's corruption laws, the Ministry of Justice, along with other government agencies, began working on amendments to current laws. The Russian government also expanded the scope of its corporate liability for bribery to include bribes made in the interest of *any* entity affiliated with a company.

However, in January 2019, the Ministry of Justice announced a proposal that would make certain corrupt acts "due to *force majeure*" exempt from prosecution. Under the new rule, which would diverge from established anti-corruption legislation in other countries, government officials who find corruption to be unavoidable will not be punished. According to media reports, the Ministry of Justice has stated that compliance with anti-corruption laws, including disclosing a conflict of interest, may be impossible in "single-industry or closed cities, the Far North, or other remote and sparsely populated places" or due to "long-term serious illness." In late December 2018, the government hired a private company to lead discussions on anti-corruption compliance around the country. The company will hold round-table discussions, give lectures and seminars, and present at conferences in addition to conduct polling and interviews on anti-corruption matters. It is unclear whether the government is aiming to increase awareness of anti-corruption compliance generally due to the recent changes to corruption laws, or if specific individuals or entities will be targeted. It also remains to be seen whether Russia will continue prosecuting individuals at high rates, or if prosecutors will turn their attention to entities.

RWANDA

Rwanda has demonstrated a renewed commitment to strengthening its anti-corruption regime by establishing laws targeting corruption, money laundering, terrorist financing, whistleblower protection, and asset recovery. The Office of the Ombudsman has the power to investigate and prosecute corruption matters. In late 2018, Rwanda enacted an anti-corruption law that expanded the definition of corruption, encouraged reporting, and discouraged giving and receiving bribes. Corruption offenses now include bribery, sexual corruption, embezzlement, decision-making based on favoritism, influence peddling, illicit enrichment, the use of public property for unintended purposes, abuse of power, and the demand or receipt of excessive amounts of money. Further, corruption offenses are not subject to a statute of limitations. The Office of the Ombudsman also has specialized courts for handling criminal corruption cases. If a defendant is found guilty, the court is required to order that any property or proceeds resulting from the corrupt activity be confiscated. In addition to prosecuting criminal offenses, the Office of the Ombudsman can impose administrative fines on entities for failing to implement proper anti-corruption controls.

INTERNATIONAL ENFORCEMENT: DIVERGENCE

MEXICO

In early 2019, Mexico created an autonomous National Prosecutor's Office and Special Anti-Corruption Prosecutor's Office, but key positions in the office remain vacant, including that of the special prosecutor. The new prosecutor's office was granted the authority to independently investigate and prosecute corruption; however, it has been reported that cases are automatically referred from the Attorney General's Office. It remains to be seen whether the new prosecutor's office will become fully operational as other anti-corruption units established in the past few years have yet to be fully staffed. For instance, in 2016, Mexico created the National Anti-Corruption System ("NAS"), a governmental body tasked with handling anti-corruption efforts nationwide. But as of June 2019, the NAS still lacked a dedicated anti-corruption prosecutor and eight of the twenty-four seats of its governing body have yet to be filled.

GUATEMALA

On January 7, 2019, Guatemala's Foreign Minister, Sandra Jovel, announced that the government was going to withdraw from an agreement with the United Nations that established the International Commission Against Impunity in Guatemala ("CICIG"), an anti-corruption panel that has been working with prosecutors to investigate and co-prosecute corruption for the past eleven years. Jovel stated that CICIG's lawyers had one day to leave Guatemala. CICIG has brought cases implicating as many as 600 individuals, secured 310 convictions, and broken up 60 criminal networks over the years. The President of Guatemala, Jimmy Morales, had previously promised to work with CICIG, but became hostile toward the panel after CICIG claimed that Morales had accepted almost $1 million in illegal campaign funds and the Attorney General's office accused Morales' brother and son of being involved in a fraud scheme.

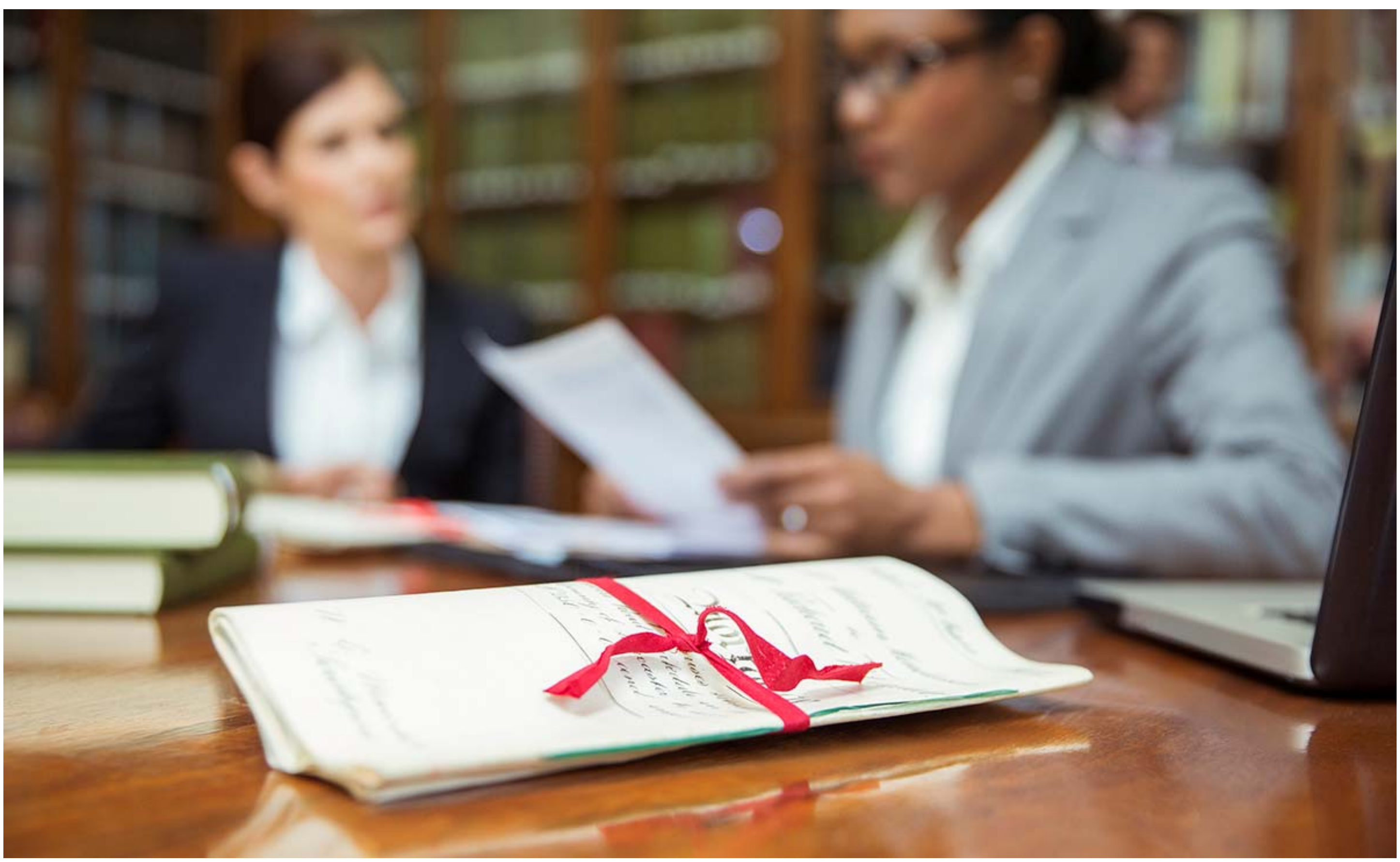
PERU

The two lead prosecutors investigating the Odebrecht case in Peru were removed and reinstated days before they were set to travel to Brazil to interview former Odebrecht executives about payments to former Peruvian government officials. The prosecutors had been investigating Peru's former presidents, politicians, and businesspeople in connection with the Odebrecht investigation. The move was widely seen as an attempt to halt progress in the investigation and citizens began protesting in the streets of major cities after the announcement, calling for Attorney General Pedro Chavarry's resignation. In January 2019, Chavarry resigned. Chavarry, who was already under investigation by the prosecutor in the Odebrecht investigation for being involved in a judicial corruption ring, is being investigated for removing the prosecutors. As we have previously reported, Odebrecht, a private Brazilian holding company, sought to influence foreign officials with bribes, primarily to secure public works contracts or other contracts with state-owned enterprises.

CHINA

China's new National Supervisory Commission ("NSC"), established in March 2018, consolidates and expands the enforcement arms of its anti-corruption agencies. Like other anti-corruption bodies, the NSC can investigate and prosecute public officials allegedly involved in corruption. However, unlike other anti-corruption bodies, the NSC outranks both the Supreme People's Court and the highest prosecutor's office. Additionally, NSC has immense investigatory power as it is not subject to China's Criminal Procedure Law. One of the most controversial powers held by the NSC, according to media reports, is the ability to detain individuals for up to six months without access to legal counsel while an investigation is ongoing. Media outlets have reported that law enforcement authorities have detained individuals claiming they are involved in corrupt activities, when in reality, they are being detained for unrelated reasons. The NSC now has reach over all public employees—including public hospital workers and village officials—in addition to public officials. The NSC has also launched a campaign targeting specific sectors—pharmaceutical, medical devices, education—in its anti-corruption efforts.

PRIVATE LITIGATION



PRIVATE LITIGATION

PETROBRAS PAYS VANTAGE DRILLING TO SATISFY ARBITRATION AWARD AND SUBSEQUENT U.S. JUDGMENT

In June 2019, Petrobras agreed to pay Vantage Drilling approximately $700 million to satisfy an arbitration award and subsequent confirmation of that award by a U.S. district court.

The dispute arose out of the termination of a drilling contract between Petrobras and Vantage Drilling. On August 31, 2015, subsidiaries of Petrobras allegedly notified Vantage Drilling of the termination of an agreement for drilling services to be provided by the *Titanium Explorer* dated February 4, 2009 between a Petrobras subsidiary and a Vantage Drilling subsidiary. Shortly thereafter, the Vantage Drilling parties filed an international arbitration claim against Petrobras and its relevant subsidiaries, claiming wrongful termination of the drilling contract.

In July 2018, an international arbitration tribunal issued an award in favor of the Vantage Drilling parties, finding that the relevant Petrobras subsidiaries had breached the contract. The Tribunal found that PAI and PVIS breached the Drilling Contract. The Tribunal awarded $622 million in damages plus interest against the Petrobras parties, and dismissed the Petrobras entities' counterclaims against the Vantage parties with prejudice.

In May 2019, U.S. District Court Judge Alfred H. Bennett of the Southern District of Texas granted the Vantage Drilling parties' petition to confirm the international arbitration award against the Petrobras parties. The court also denied the Petrobras entities' motion to vacate the arbitration award, and ultimately issued a judgment of approximately $733.9 million. As noted above, the parties reached an agreement in June 2019 to settle the matter, with the Petrobras parties agreeing to pay approximately $700 million to satisfy both the arbitration award and the subsequent U.S. judgment confirming that award.

ENFORCEMENT IN THE UNITED KINGDOM

SFO – NEW INVESTIGATIONS, CHARGES, AND CONVICTIONS

CPS – FIRST CONVICTION FOR FAILURE TO PREVENT BRIBERY

NCA – UNEXPLAINED WEALTH ORDERS

DEFERRED PROSECUTION AGREEMENTS

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

SFO – GENERAL DEVELOPMENTS AND UPDATES

SFO – NEW INVESTIGATIONS, CHARGES, AND CONVICTIONS

The first half of 2019 has continued to prove a busy time for the SFO with several new investigations being commenced, charges brought, and convictions made.

INVESTIGATION DEVELOPMENTS

In February 2019, the SFO announced the conclusion of its long running case against Rolls-Royce which resulted in a Deferred Prosecution Agreement with the company and one of its subsidiaries in respect of bribery and corruption to win business in Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia, for which it was fined a total of £497.25 million. The SFO has not charged any individuals in connection with the investigation.

The SFO also announced the closure of its long running investigation into GlaxoSmithKline ("GSK"), which focused on commercial practices by the company, its subsidiaries and associated persons. The SFO has not charged GSK or any individuals in connection with the case.

In May 2019, the SFO opened a joint investigation with its Dutch counterpart in relation to biodiesel trading at Greenergy (a U.K.-based distributor of petrol and diesel for motor vehicles) and certain connected third parties. In opening its investigation, the SFO conducted searches at five sites across the U.K. and additional sites in the Netherlands and Belgium. To date, four individuals have been arrested and released without charge. The investigation continues.

Finally, in June 2019 the SFO announced the closure of its investigation into Unaoil in relation to claims that the firm's former chairman had been involved in bribes in relation to land contracts in the oil and gas industry. The SFO has not brought charges against Unaoil itself but in 2018 the SFO charged four Unaoil employees with conspiracy to make corrupt payments to secure contracts in Iraq. The trial against the employees is scheduled to begin in January 2020.

CHARGES

In May 2019, the trial of three former executives of the Sheffield-based steel-components company Sarclad began, in connection with bribery by company agents in China, India, and Taiwan to secure contracts.

The SFO alleges that Sarclad's founder, Michael Sorby, and former senior sales executives Adrian Leek and David Justice struck twenty-seven corrupt agreements. By way of example, the court heard that the executives discussed paying €14,000 in travel costs for a client to travel to China and the U.K. from Korea as part of a deal to secure a contract, where the company was told it would otherwise have been beaten by competitors on pricing. The SFO is prosecuting under the conspiracy offences, conspiring to corrupt and conspiring to bribe under the U.K.'s old bribery legislation, the 1906 Corruption Act as well as under the U.K.'s Bribery Act 2010.

The trial is expected to last up to 10 weeks. A number of Sarclad employees have been called to give evidence.

In our January 2019 *Trends & Patterns* we discussed the recent Court of Appeal decision relating to litigation privilege in the case of *SFO v ENRC* which held that certain internal documents created as part of an internal investigation were covered by litigation privilege (overturning the High Court decision on this point). Within the same context of the SFO's ongoing investigation into ENRC, in May 2019, Anna Machkevitch, director of the London-based ALM Services UK Ltd and the daughter of the former director of ENRC, was charged with failing to supply documents required by the SFO as part of its corruption investigation into ENRC. A notice had been served on Ms. Machkevitch in December 2018 with which she failed to comply. Such a failure is a criminal offence under the U.K.'s Criminal Justice Act 1987 and is punishable by up to six months in prison and a fine. Although Ms. Machkevitch's lawyer labelled the move by the SFO as "very aggressive and unjustified," the SFO have said in a statement: "The SFO's investigation into ENRC is ongoing and focused on allegations of serious fraud, bribery and corruption in relation to the acquisition and retention of substantial mineral assets."

CONVICTIONS AND CIVIL RECOVERY

The SFO's ongoing investigation into Petrofac Limited and its subsidiaries continues. In connection with that investigation, on February 6, 2019, David Lufkin, a British national, and previously Global Head of Sales for Petrofac International Limited, pleaded guilty at Westminster Magistrates' Court to eleven counts of bribery, contrary to sections 1(1) and 1(2) of the Bribery Act 2010. These offences relate to the making of corrupt offers to influence (ultimately unsuccessfully) the award of contracts to Petrofac worth in excess of USD $730 million in Iraq and in excess of USD $3.5 billion in Saudi Arabia. Sentencing is to follow.

The SFO has secured the forfeiture of over £1.5 million from convicted fraudster Nisar Afzal of Birmingham. This is one of the largest seizures of its kind in the U.K. and is the SFO's first use of its forfeiture enforcement tool, brought in under new powers from the 2017 Criminal Finances Act. The forfeited money came from the sale of two properties in Birmingham, which Afzal originally bought with the funds from a series of long-term frauds. Afzal, who fled Britain for Pakistan in the mid-2000s, was also implicated in a series of mortgage frauds, for which his brother, Saghir Afzal, was convicted and jailed in 2011 for 13 years.

CPS – FIRST CONVICTION FOR FAILURE TO PREVENT BRIBERY

In our January 2019 *Trends & Patterns* we discussed in detail the conviction of Skansen Interiors Ltd under section 7 of the Bribery

Act 2010 for the corporate offence of failing to prevent bribery. The conviction came as a surprise to many, Skansen having reported itself to the National Crime Agency and the City of London police in relation to suspicious payments that had been made by the managing director. The case attracted criticism for the CPS's approach in choosing to prosecute rather than pursue a DPA, and the impact this could have on whether companies choose to self-report in the future.

There has been little by way of clarification as to what approach will be taken from the U.K. authorities themselves following the Skansen case. In May 2018, the House of Lords appointed a Select Committee to consider and report on the Bribery Act 2010, which included consideration of the "adequate procedures" defence relevant to the Skansen case, as discussed below. As part of gathering evidence for the Committee to consider, the Law Society of England and Wales, the City of London Law Society, and the Fraud Lawyers Association selected various partners of law firms working in bribery and corruption to provide their views on the Bribery Act. As part of their submissions of July 31, 2018, they commented that "DPAs are likely to be more easily applied to larger businesses. Smaller enterprises, such as Skansen, are less likely to have the resources or longer-term enterprise value to be able to cooperate with authorities and/or to change their leadership to the same extent."

In November 2018, the Bribery Act 2010 Committee made some interesting comments regarding the section 7 defence of "adequate procedures" at issue in the Skansen matter. Neil Swift, partner at Peters & Peters and a witness called by the Committee, expressed confusion as to what the precise difference is between "adequate" used in section 7 of the Bribery Act 2010 and "reasonable" used in the Criminal Finances Act. It is confusing for companies to have to develop procedures which are "adequate" on the one hand and "reasonable" on the other. Mr. Swift expressed a preference for the term "reasonable" given that it would be unjust to criminalize a company if it acted reasonably in devising procedures.

Lord Grabiner, a member of the Committee, suggested that "reasonableness" as a test from the defence perspective is much more attractive, because it is highly facts-sensitive and would enable the defence to explain in great detail what mechanisms were in place and then leave it to the jury to decide whether they were reasonable.

In the report published by the Select Committee on March 14, 2019, the Committee did not go so far as recommending that the test and wording of section 7 of the Act be changed. Instead, it recommended that the statutory guidance provided on the Bribery Act 2010 be amended to make clear that "adequate" does not mean, and is not intended to mean, anything more stringent than "reasonable in all the circumstances." However, in its response to the report published on 13 May 2019, the Government have rejected the need for the guidance to be amended, citing the Select Committee's own conclusion that it was in fact unlikely that "adequate" would be interpreted so strictly that a company would be unable to rely on the section 7 defence in circumstances where it did have reasonable anti-bribery procedures in place but which did not in fact prevent bribery from taking place. The Government did, however, express a willingness to examine the issue again should there be a reported problem with the interpretation of section 7 of the Act. It therefore remains up to the courts in any individual case to exercise their own discretion in deciding whether a section 7 defence is available to a company in circumstances where some form of anti-bribery procedure has been put in place, and whether such procedures are deemed adequate or not.

It is worth also highlighting that in relation to the Skansen decision itself, the report of the Select Committee commented that the case was far from typical. While it was accepted that the case drew attention to the need for even small companies to have in place adequate anti-bribery procedures, the Committee noted suspicion still lingers that Skansen was not treated fairly by the CPS. While giving no more away on their views of the case, the Committee opted to follow the opinion of John Bray, Director of Control Risks, a specialist risk consultancy, who believed the main lesson to learn from Skansen was the need to have something in place, rather than nothing at all. In the meantime, we must therefore await the next prosecution to see if Skansen truly is an outlier, or is in fact a sign of things to come.

NCA – UNEXPLAINED WEALTH ORDERS

The new Unexplained Wealth Order ("UWO") regime came into force in the U.K. on January 31, 2018. It was introduced by the Criminal Finances Act 2017. A UWO is an order made by the High Court which compels a person holding property worth more than £50,000 to provide information as to how they came to obtain the property. It is an investigative tool designed to help law enforcement tackle assets paid for through the suspected proceeds of corruption. A UWO can be made against a politically exposed person ("PEP") from outside the European Economic Area ("EEA"), or a person reasonably suspected of involvement in serious crime (anywhere in the world) or of someone being connected to such a person. Only enforcement agencies, such as the NCA, can apply for a UWO. They then must show that there is reasonable cause to suspect that the individual's known sources of lawfully obtained income were insufficient to allow them to acquire the property.

FIRST UWO AND DISMISSAL OF FIRST CHALLENGE TO THE UWO

In our January 2019 *Trends & Patterns* we discussed the first ever UWO to be ordered in relation to two high value properties in the South East of England worth a total of £22 million. At the time, all that had been publically disclosed was that the UWO had been granted in relation to the wife of an individual who had been the chairman of a leading bank in a non-EEA country of which the government of the relevant foreign country had a controlling stake, and who had been convicted of fraud offences with regard to his time at the bank.

In July 2018, the wife, "Mrs A," brought a High Court challenge to the UWO. Among various grounds she argued that she was not a PEP as this was reliant on her husband being a PEP, which was in turn reliant on her husband working for a state-owned enterprise. She also challenged whether there was reasonable suspicion that her known sources of lawfully obtained wealth were insufficient to allow her to obtain the property. The challenge was dismissed by the High Court in October 2018. On these two specific grounds, the High Court held that the evidence of the relevant government having a majority shareholding in the bank meant that it constituted a state-owned enterprise, while the evidence that the husband was a state employee between 1993 to 2015 meant it was very unlikely that his lawful income would have been sufficient to purchase the property when it was bought for £11.5 million. An appeal of the decision to the Court of Appeal is currently outstanding.

Following a court order in May 2019, High Court documents were released to the media with the identity of "Mrs A" being revealed as Zamira Hajiyeva, wife of convicted Azerbaijani banker Jahangir Hajiyev, the former chairman of the state-controlled International Bank of Azerbaijan. He has now been sentenced in his native country to 15 years imprisonment for fraud and embezzlement. Much to the interest of the press, the released court documents included details on the spending habits of Mrs Hajiyeva which included a total expenditure of £16 million at Harrods in London. The documents also revealed that the NCA had seized a diamond ring worth in excess of £1 million and other items of jewellery totalling around £400,000 from Mrs Hajiyeva. These seizures took place under the Criminal Finance Act's listed asset provisions which extend existing cash seizure powers under the Proceeds of Crime Act 2002 to seizures of high value personal or moveable property. The provisions allow items to be detained for up to 48 hours, and with the court's permission, for up to two years where there are reasonable grounds that the property is the proceeds of crime.

The primary reason why Mrs Hajiyeva's case is now in the public domain is ultimately because she chose to challenge her UWO, rather than comply with it, with her arguments against the UWO being heard in open court. This may prove to be a factor in the minds of future recipients of a UWO in deciding how to respond to one. However, crucially, a response is required. A UWO cannot simply be ignored. A failure to respond triggers a presumption that the property is recoverable, *i.e.*, that it has been purchased with the proceeds of crime. Further, as occurred in the case of Mrs Hajiyeva, a UWO can come with a penal notice resulting in the recipient being fined or given a prison sentence if a response is not forthcoming. While some might view such measures as draconian, it demonstrates the hard hitting nature of UWO's and the commitment of the British government to make the U.K. more hostile to illicit finance.

SECOND UWO

This commitment is also revealed by the issuance of the second UWO in May 2019 against a currently unnamed "politically exposed person" in relation to three properties said to have been originally purchased for over £80 million and currently held by offshore companies. As stated by Andy Lewis, Head of Asset Denial at the NCA, UWOs "are a powerful tool in being able to investigate illicit finance flowing into the U.K. and discourage it happening in the first place." These comments make it clear UWOs are a tool that the NCA intends to continue using into the future, and as Mr Lewis confirmed: "The NCA will not shy away from complex and detailed investigations against high profile individuals and professional enablers."

DEFERRED PROSECUTION AGREEMENTS

Deferred Prosecution Agreements ("DPAs") have been a common source of comment in our *Trend & Patterns*. Our January 2018 edition discussed the approval of the U.K.'s fourth DPA between the SFO and Tesco Stores Limited ("Tesco") which arose, not out of bribery offences, but out of Tesco's alleged false accounting practices.

Since then, the SFO has failed to secure convictions in any of its highly publicized trials of the Tesco executives connected with the supermarket's 2014 £250 million accounting scandal. The trial of former Tesco U.K. finance director Carl Rogberg collapsed after the SFO offered no evidence in his case. The result means that all three executives named and accused of wrongdoing in the £129m DPA agreed in 2017 have now been acquitted. The Tesco DPA had been under an embargo from publication, until the conclusion of the criminal trials. The SFO's failure to prosecute successfully any of the individuals has thrown into doubt the basis upon which Tesco entered into the DPA, now that those identified in the DPA as the 'directing minds' of the company have all been acquitted. This may also not be the end of the matter for the SFO—there is precedent in individuals suffering as a result of an SFO investigation seeking damages, where there have been systematic failures in the case against them. It remains to be seen whether this is such a case (and it may ultimately be a matter for a civil court to determine, should any of the individuals elect to bring claims against the SFO).

The Tesco matter shows the difficulty for the SFO in acting efficiently and judiciously to strike a DPA early on in a case (thereby saving the public purse the expense of a lengthy corporate prosecution) and the difficult balancing act of choosing to name the responsible individuals at the company in that DPA in circumstances where the decision whether to bring charges against the individuals concerned and whether there is a reasonable prospect of securing convictions, may not at that stage be capable of being made.

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 U.K. 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 U.K. and sought to compel production of data that was previously held by the U.K. subsidiary but was now held on U.S. 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 U.K.

In its judgment, the Administrative Court concluded that section 2(3) did permit the SFO to request foreign companies which have a "sufficient connection" to the U.K. to produce data in the course of investigations. Gross LJ and Ouseley J concluded that to satisfy the "sufficient connection" test there must be a functional connection between the U.K. and the foreign company. This test would not be met by a foreign company simply being a parent company of a subsidiary in the U.K. Similarly, a foreign company could not be said to have sufficient connection to the U.K. simply by the SFO requiring its officers to come within the jurisdiction.

The KBR decision is at odds with the very different approach adopted by the Supreme Court to an attempt to extend beyond the U.K. the ambit of information notices under section 357 of the Proceeds of Crime Act 2002 in *Perry v Serious Organised Crime Agency*. In that case the Supreme Court held that information notices under POCA were limited to those within the jurisdiction. Lord Philips explained that section 357 authorizes orders for requests for information with which the recipient is obliged to comply, subject to penal sanction. In his reasoning, Lord Philips stated that subject to limited exceptions, it is contrary to international law for country A to purport to make conduct criminal in country B if committed by persons who are not citizens of country A. Lord Philips held that the same principle should apply given the penal sanctions for information notices under POCA. Accordingly, he held that to confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law, and therefore information notices under POCA should be limited only to those within the jurisdiction.

This Supreme Court decision was considered by the Administrative Court in its judicial review decision. However, the Administrative Court held that the situations could be distinguished based on the fact that the two cases were addressing different pieces of legislation; the information notices issued in the Perry case were against persons entirely unconnected with the U.K.; and the context of section 2(3) meant that it must have had some extraterritorial application whereas POCA did not.

The approach of the Administrative Court has recently been followed by the Court of Appeal in relation to a judicial review claim against Her Majesty's Revenue and Customs ("HMRC") who had sent an information notice to a taxpayer resident out of the jurisdiction under the Finance Act 2008. The taxpayer argued this was beyond the powers set out in that Act. However, the Court of Appeal disagreed. In discussing both the Administrative Court decision and the *Perry* case, the Court of Appeal considered there was greater similarity to the decision of the Administrative Court, there being a sufficient connection with the U.K. jurisdiction so as to hold the powers in question could be exercised extraterritorially.

In the light of these decisions, the current position under English law is therefore where there is sufficient connection to this jurisdiction, powers such as the ability to make section 2(3) notices can extend beyond the U.K. However, until another ruling by the Supreme Court distinguishes or overturns *Perry*, there may be further judicial actions in the future seeking to challenge the extraterritorial application of section 2(3) notices.

SFO – GENERAL DEVELOPMENTS AND UPDATES

More generally, the first half of 2019 has seen Lisa Osofsky, appointed as the new Director of the SFO on June 4, 2018, consolidate her position with new appointments on her team and a reinforcement of the SFO's areas of focus.

NEW APPOINTMENTS

In January 2019, John Kielty was appointed as Chief Intelligence Officer, a new role introduced by the SFO. Mr Kielty first joined the SFO in 2015 as a Case Controller, but before that, had a distinguished police career in which he, amongst other roles, headed London Metropolitan Police's Serious and Organised Crime Command. In his new role at the SFO, Mr Kielty is responsible for leading the intelligence unit, focusing on strengthening the SFO's relationships with partner agencies and creating more sophisticated strategies to assist with tacking economic crime.

In May 2019, Sarah Lawson QC was appointed as the SFO's new General Counsel. Previously practicing as a barrister specializing in prosecuting government, criminal and regulatory cases, Ms. Lawson is suitably experienced to provide oversight, advice and quality control to SFO cases and its preparation for trials.

In June 2019, Emir Feisal and Martin Spencer joined the SFO as Non-Executive Directors. With backgrounds as a chartered accountant, fraud examiner and associated managing editor of the Sunday Times, and as Senior Vice President at NTT DATA, a global IT services business, respectively, both bring a broad range of experience. As Ms Osofsky stated: "Constructive challenge is as important for our organisation, corporately, as it is for testing our investigative and legal strategy in our individual cases, and it is where our non-executive directors add so much value."

AREA OF FOCUS

As we set out in our January 2019 *Trends & Patterns*, since joining the SFO as Director, Ms. Osofsky has emphasized the importance of international cooperation with law enforcement and regulation counterparts, as well as across different disciplines with prosecutors, investigators, police and accountants working side by side throughout the life of a case. This is certainly something that is reflected in the new appointments to the SFO.

It has also been re-asserted in a more recent speech given by Ms. Osofsky to the Royal United Services Institute in London in April 2019 in which Ms. Osofsky set out the increasingly transnational nature of serious economic crime in what she dubbed our "shrinking world." In giving her opinion on what the future of fighting corruption holds, Ms. Osofsky stated there were essentially three fundamental components at work. First, "the old-school method of interdisciplinary teams," which Ms. Osofsky stated was how she learned her trade back in Chicago. This, she said, allowed teams to bring their different skills to "ferret out and punish those who defraud, bribe, and cheat." Second, harnessing new technology, and effectively keeping up with the criminals. And third, participating in meaningful and mutually beneficial cooperation.

It is this last word, "cooperation," which is the theme that pervades the SFO's new area of focus. It will be interesting to see how this call for cooperation is taken up by different departments and different jurisdictions and the impact this may have on the practice of tackling economic crime.

CONCLUSION

Although the DOJ and SEC brought a relatively low number of FCPA enforcement actions in the first half of 2019, an unusually large portion of those enforcement actions resulted in penalties over $100 million. In the past, we have repeatedly noted that although the large FCPA enforcement actions grab the headlines, the bulk of enforcement actions are actually relatively small (often under $30 million in penalties). The first half of 2019 has been an exception, resulting in some of the highest penalty statistics of any half year of FCPA enforcement. Meanwhile, the DOJ has brought a relatively large number of cases against individuals, and is on pace to charge the most individuals in a single year since 2009.

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