

SHEARMAN & STERLING

# FCPA DIGEST

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

JANUARY 2020

*Shearman*

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## INTRODUCTION: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT

In 2019, the overall number of corporate enforcement actions was slightly higher than in 2018, with twenty-five actions brought, compared to twenty-four in 2018. The number of individuals charged, using our parameters, increased markedly, with forty individuals charged or indictments unsealed in 2019 and two major jury verdicts in trials in long-running cases, *United States v. Hoskins* and *United States v. Lambert*. The cases in 2019 tended to be highly concentrated, with thirteen corporations accounting for all of the corporate enforcement actions, and individual enforcement actions concentrated in the PetroEcuador, Corpoelec, and PdVSA bribery schemes. Total corporate penalties this year nearly equaled the previous year—totaling \$2.904 billion in 2019 and \$2.908 billion in 2018. Over \$1 billion of the 2019 penalties are related to the late-year enforcement action against Telefonaktiebolaget LM Ericsson, which represents one of the largest FCPA enforcement actions in history. Prior to this announcement, the sole outlier in 2019 had been MTS at \$850 million. While over half of the year's penalties were thus attributed to outliers, the average excluding outliers remained fairly high compared to recent years, indicating that the remaining penalties were relatively evenly distributed amongst the other enforcement actions.

As we explain in this year-end *Trends & Patterns*, among the highlights from 2019 were:

- Twenty-five corporate enforcement actions, with total sanctions of approximately \$2.9 billion, make 2019 a fairly typical year, ever-so slightly above 2018 in terms of number of FCPA enforcement actions and just slightly below 2018 for total corporate penalties. The year's enforcement actions were highly concentrated and the penalties were more evenly spread amongst defendants;
- Like recent years, two outlier enforcement actions (*MTS*, *Ericsson*) in 2019 had a significant effect on the average corporate sanction. Including the \$850 million sanction against MTS and the \$1.06 billion in penalties against Ericsson, the average corporate sanction in 2019 was over \$207 million. Excluding MTS and Ericsson, the average drops to just under \$82.8 million, a difference of about \$124 million. The difference between the true average and average excluding outliers continues a pattern we have observed since 2016: in 2018, the true average was \$171 million while the average excluding outliers was \$18 million, in 2017 the true average was \$151.2 million while the average excluding outliers was \$83.3 million, and in 2016 the true average was \$223.4 million while the average excluding outliers was \$13.2 million;
- The median sanction of \$25.2 million is up from 2018, when it was notably lower (\$9.2 million) compared to recent years. 2019's median is more in line with the typical medians since 2015 (\$29.2 million in 2017, \$14.4 million in 2016, and \$13.4 million in 2015);
- The SEC's nearly exclusive reliance on administrative proceedings, outside of the civil courts, to pursue enforcement actions against corporations and individuals, potentially in connection to recent and pending court decisions impacting the SEC's ability to obtain disgorgement;
- A trend towards confluence between economic sanctions and foreign corruption, with the Office of Foreign Assets Control designating numerous individuals based on alleged corruption, including involvement in bribery schemes in recent FCPA enforcement actions;
- The DOJ continued its recent trend of updating various enforcement policies, announcing: (i) minor revisions to the Corporate Enforcement Policy; (ii) a formalization of the Evaluation of Corporate Compliance Programs guidance; and (iii) guidelines on assessing inability to pay. However, the effect of the FCPA Corporate Prosecution Policy, announced late in 2017, was less apparent in 2019 than 2018, with only one formal declination issued by the DOJ, compared to three in 2018; and
- In the U.K., the Serious Fraud Office also issued updates to its guidance on corporate cooperation, with the SFO's director, Lisa Osofsky, emphasizing the importance and value of cooperation.

# ENFORCEMENT ACTIONS & STRATEGIES

STATISTICS

GEOGRAPHY & INDUSTRIES

TYPES OF SETTLEMENTS

ELEMENTS OF SETTLEMENTS

CASE DEVELOPMENTS



## ENFORCEMENT ACTIONS AND STRATEGIES

### STATISTICS

In 2019, the DOJ and SEC resolved twenty-five corporate enforcement actions. Consistent with the trends and patterns over the past years, the DOJ apparently deferred to the SEC to bring administrative enforcement cases in the less egregious matters, which has resulted in the SEC bringing six enforcement actions without parallel DOJ actions and typically with lower penalty amounts. On seven occasions, the DOJ and SEC brought parallel enforcement actions against corporations and one or more of their subsidiaries (*Cognizant, MTS, Fresenius, Walmart, Technip, Microsoft, and Ericsson*). In keeping with the trend from recent years, a vast majority of the financial sanctions in 2019 resulted from these joint enforcement actions – \$2.7 billion out of a total of \$2.9 billion. As we discuss in more detail below, these parallel enforcement actions involved wide-spread allegations of bribery and controls failures, often spanning multiple countries and prolonged periods of time.

Regarding FCPA enforcement actions against individuals in 2019, the DOJ charged or unsealed charges against twenty-six individuals, while the SEC brought cases against only five individuals, including three who were also charged by the DOJ.

We discuss the 2019 corporate enforcement actions, followed by the individual enforcement actions, in greater detail below.

### CORPORATE ENFORCEMENT ACTIONS

Until shortly before the end of 2019, the matter relating to MTS remained the largest combined penalty against a corporation in 2019. However, in early December, the DOJ and SEC announced enforcement actions against Ericsson, resulting in one of the largest penalties in FCPA history—topping out at \$1.06 billion. With increasingly complex settlements, often involving a mix of inter-agency credits and global settlements, there seems to be a lot of debate and inconsistency in how to calculate the “largest enforcement action of all time.” We take a “money out the door approach”—netting the payments for credits between the DOJ and SEC but counting payments made to foreign authorities. By this count, Ericsson comes in second behind Petrobras (\$1.7 billion). The *Ericsson* settlement’s action’s arguably record-breaking size appears to be attributable to the breadth of the allegations, which spanned five countries and sixteen years, and Ericsson’s failure to obtain full cooperation or remediation credit, discussed in further detail below.

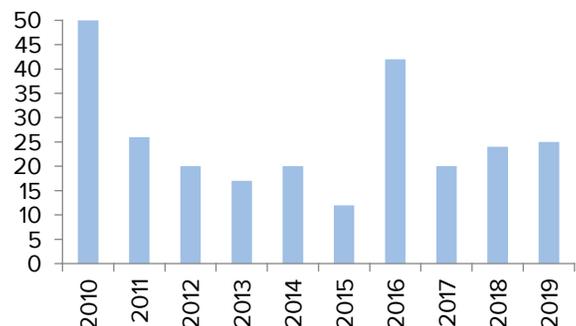
In the Statement of Facts, to which Ericsson admitted in the DPA, the DOJ described the following bribery schemes:

- Djibouti. From 2010 to 2014, Ericsson agreed to pay approximately \$2.1 million in bribes to Djibouti officials to win a contract to provide services to a state-owned telecommunications company, worth approximately €20.3 million. To disguise the payment, Ericsson made it to a

consulting company owned by the spouse of a foreign official and then drafted a due diligence report that did not include the relationship between the consulting company and the official.

- China. From 2000 to 2016, Ericsson engaged in a bribery scheme in China in which it paid about \$31.5 million to various third parties, some of which the DOJ states was used to “provide things of value, including leisure travel and entertainment, to foreign officials.” The bribery scheme also involved “sham contracts” with these third parties pursuant to which Ericsson made payments for work that was never performed. These payments were also made in contravention of Ericsson’s policies, which prohibited the use of third-party agents, except in limited circumstances, since 2011.
- Vietnam. In Vietnam, all of Ericsson’s customers were government-owned, making it a high-risk jurisdiction. The DOJ noted that Ericsson paid approximately \$4.8 million to a consulting company, which it put into an off-the-books account for a sales agent. The sales agent then passed these funds to other third parties, including agents of Ericsson’s government-owned customers.
- Indonesia. Similar to the conduct in Vietnam, from 2012 to 2015, Ericsson paid about \$45 million to a consulting company, which created an off-the-books fund. However, the government did not specifically allege involvement of government officials in this scheme.
- Kuwait. The DOJ claimed that Ericsson paid approximately \$450,000 to an official of a state-owned telecommunications company to win a tender, including by obtaining inside information about the tender. Ericsson won the tender, worth about \$182 million. In connection with the scheme, the DOJ detailed a communication by an Ericsson employee who was “asked to sort out the mess we got into in Kuwait” and was upset about having to “clean[] it up.”

**Total Aggregate Corporate Cases:  
2010-2019**



## ENFORCEMENT ACTIONS AND STRATEGIES

In accordance with these charges, the DOJ charged Ericsson with two counts of conspiracy—one for violations of the anti-bribery provisions and one for books-and-records and internal control violations. Ericsson’s Egyptian subsidiary pleaded guilty to one count of conspiracy to violate the FCPA’s anti-bribery provisions. In total, they agreed to pay a total criminal penalty of \$520,650,432. Ericsson also entered into a settlement agreement with the SEC pursuant to which it agreed to pay disgorgement and prejudgment interest totaling \$539,920,000.

All said and done, Ericsson’s payment will tip just over the \$1 billion mark, at \$1.06 billion, putting it in a lonely club with Petrobras and Odebrecht/Braskem. Unlike in the Petrobras and Odebrecht/Braskem matters where the penalties were divvied up between the U.S. and foreign authorities, the entirety of this penalty will go to the U.S. Treasury. In this way, Ericsson could lay claim to the largest FCPA enforcement action in which all penalties only went to U.S. authorities. Also, based on media reports, the Swiss authorities are investigating Ericsson for corruption-related offenses, which could result in even larger penalties against the company.

The *Ericsson* matter certainly has some of the hallmarks expected in a large enforcement action—multiple, long-running violations and controls failure, involvement of several “high-level executive[s]” of LM Ericsson and Ericsson AB, and fairly high dollar values in both the bribes paid and business obtained. However, the matter would not have cracked the \$1 billion level if Ericsson had obtained full remediation and cooperation credit, which in most cases accounts for a 25% discount.

According to the DOJ, Ericsson “did not disclose allegations of corruption with respect to two relevant matters, produced certain relevant materials in an untimely manner, and did not timely and fully remediate, including by failing to take adequate disciplinary measures with respect to certain executives and other employees involved in the misconduct.” This seems like a pretty serious “what-not-to-do list” for companies trying to earn the cooperation and remediation credit, and perhaps Ericsson was lucky to have obtained even a 15% discount off the sentencing guidelines.

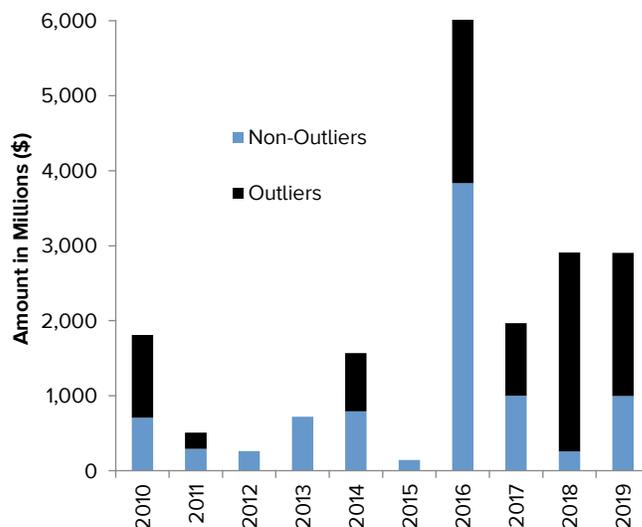
In second place and still representing a considerably large settlement not to be overshadowed by late-comers, the *MTS* enforcement actions, brought by the DOJ and the SEC against Mobile TeleSystems, a Russian telecommunication services provider, its Uzbekistan subsidiary, Kolorit Dizayn Inc., and two related individuals stemmed from an alleged bribery scheme in the Uzbekistani telecommunications market. *MTS* represents the third FCPA enforcement action involving bribery schemes centered in Uzbekistan around the telecommunications market, after *VimpelCom* in 2016 and *Telia* in 2018. According to the DOJ and SEC, *MTS* made at least \$20 million in illicit payments to an Uzbekistani government official from 2004 to 2012 to obtain and

retain business. *MTS* allegedly obtained more than \$2.4 billion in revenues from the scheme—which might explain why corporations are willing to engage in bribery to secure access to the lucrative Uzbekistani telecommunications market.

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.

Notwithstanding the fact that it made admissions in the DOJ matter, *MTS* resolved the charges made against it by the SEC without admitting or denying the allegations. It agreed to pay a civil penalty of \$100 million and retain an independent compliance monitor for at least three years. *MTS* also entered into a deferred prosecution agreement with the DOJ in which it admitted the facts alleged against it and agreed to a fine and restitution totaling \$850 million. Consistent with the DOJ’s policy

**Total Criminal and Civil Fines Imposed on Corporations: 2010-2019**



## ENFORCEMENT ACTIONS AND STRATEGIES

on coordination of corporate enforcement actions, MTS's \$100 million civil penalty paid to the SEC was credited by the DOJ towards its settlement. MTS's subsidiary, Kolorit, pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery and books-and-records provisions. It was ordered to pay a \$500,000 criminal fine and \$40,000,000 in criminal forfeiture (both of which were to be deducted from MTS's total penalty). Notably, the DOJ denied MTS the usual remediation and cooperation credit, giving it no discount from the U.S. Sentencing Guidelines and assigning it a penalty squarely within the range.

In another parallel enforcement action, the DOJ and SEC brought a total of three cases against Walmart Inc. and its Brazilian subsidiary, thereby bringing a conclusion of one of the longest running bribery investigations by U.S. authorities. The DOJ and SEC brought allegations of FCPA violations against Walmart and its subsidiaries, alleging misconduct in Brazil, China, India, and Mexico. Pursuant to the settlement agreements, 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 anticorruption 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.

Walmart's NPA with the DOJ provided the following additional details:

- **Mexico.** A former attorney for Walmart's local subsidiary reported to Walmart in 2005 that he had overseen a scheme for several years in which third-party intermediaries had made improper payments to government officials to obtain permits and licenses for the subsidiary. The former attorney further claimed that executives at the subsidiary were aware of and approved 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. Senior attorneys at Walmart were allegedly aware of the scheme and conducted a "limited" review of the scheme, which it closed in 2006. Notably, in April 2012, the New York Times reported on the alleged corruption at Walmart's Mexican subsidiary, noting that, in December 2011, Walmart had reportedly made a voluntary disclosure of the 2005 scheme to the U.S. authorities. While the NPA with the DOJ and the SEC avoid a statute of limitations issue by alleging certain conduct relating

to improper donations as late as April 2011, the clear focus of the action as it relates to Mexico is on the 2005 scheme.

- **India.** 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."
- **Brazil.** 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.
- **China.** 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 pleaded guilty to settle the charges the DOJ brought against it, 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 slightly 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

## ENFORCEMENT ACTIONS AND STRATEGIES

to the SEC. In total, Walmart agreed to pay approximately \$282.6 million in penalties to U.S. authorities.

Even though the \$282.6 million that Walmart agreed to pay to U.S. authorities is substantial on its own, it pales in comparison to the over \$900 million that the company reportedly 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.

The DOJ and SEC also brought a total of three enforcement actions against TechnipFMC, a global oil and gas services company, and its U.S. subsidiary. In *TechnipFMC*, the DOJ alleged that the predecessor entities of TechnipFMC plc—Technip S.A. and FMC Technologies, Inc.—engaged in two independent conspiracies to violate the FCPA, one in Brazil and one in Iraq. As we reported in the July 2019 *Trends & Patterns*, this matter involved charges against a company formed in a recent merger in which both companies entering into the merger are alleged to have separately engaged in corrupt conduct—which is perhaps unique amongst FCPA cases.

First, on the Technip side, TechnipFMC 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 were ultimately paid to employees at Petrobras, the Brazilian state-owned oil company. In December 2017, Keppel Offshore paid penalties of approximately \$422 million to resolve similar charges by U.S., Brazilian, and Singaporean authorities.

From the FMC side, the conspiracy to violate the FCPA was 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 U.K.’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 this year. In contrast to the trend in recent years, this was the only case this year involving a global resolution in which a company received credit for payments to foreign authorities. Further, with its settlement with the DOJ, TechnipFMC joins the growing list of FCPA recidivists. 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.

In the *Microsoft* matter, the SEC brought an enforcement action against Microsoft Corporation for alleged FCPA violations in Hungary, Saudi Arabia, Turkey, and Thailand. In Hungary, the SEC alleged that Microsoft’s Hungarian subsidiary used a system of unnecessary discounts and a third-party provider to win a tender to provide software to the Hungarian government. It allegedly used the third-party provider to direct the difference between the discount and the actual price of the software to influence government officials to launch the tender in the first place. The DOJ separately brought charges against Microsoft’s Hungarian subsidiary. In Turkey, the SEC’s allegations against Microsoft’s Turkish subsidiary also focused on a similar scheme in which the subsidiary allegedly documented discounts that were not actually passed on to the government agency to win a tender. In Saudi Arabia and Thailand, the SEC alleged that Microsoft’s subsidiaries based in these countries provided gifts, travel, and other things of value to government employees, which were not properly documented.

Again, notwithstanding the DOJ matter, Microsoft settled the charges made against it by the SEC without admitting or denying any of the findings, even as to the facts encompassed by its subsidiary’s plea. Pursuant to the settlement, Microsoft agreed to pay disgorgement and prejudgment interest totaling approximately \$5 million. Separately, Microsoft’s subsidiary entered into a non-prosecution agreement with the DOJ in which it agreed to pay a monetary penalty of approximately \$8.75 million. The SEC acknowledged this penalty imposed by the DOJ and agreed to not impose a civil fine against Microsoft in accordance therewith.

Another major joint effort between the DOJ and the SEC focused on Cognizant Technology Solutions Corporation, a New Jersey-based technology company. In the *Cognizant* matter, the SEC alleged that Cognizant violated the anti-bribery, books-and-records, and internal controls provisions of the FCPA in relation to a 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 change order requests for the project. On that same videoconference, the former chief legal officer allegedly approved of this proposal. The SEC order also made allegations related to alleged bribes paid by the company’s Indian

## ENFORCEMENT ACTIONS AND STRATEGIES

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. This remains the DOJ's only formal declination under the Policy in 2019.

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. As we reported in the July 2019 *Trends & Patterns*, the DOJ's decision to formally decline criminal charges against the company, combined with the enforcement actions against the two company executives, lends weight to the DOJ's stance in placing a premium on companies providing actionable information against individuals. As outlined in the FCPA Corporate Enforcement Policy, to qualify for declination, the company must self-disclose "all relevant facts about all individuals substantially involved in or responsible for the violation of law." In the *Cognizant* matter, the company self-disclosed the alleged conduct to the DOJ only two weeks after the board learned about it, including presumably providing evidence demonstrating the key role of the two executives, who were essentially in charge of the company, in allegedly devising and authorizing the alleged bribery scheme. According to the DOJ, Cognizant also engaged in substantial cooperation with the investigation and remediation. Given Cognizant's actions during the investigation, and the disgorgement it agreed to pursuant to the SEC order, it fell squarely within the DOJ Policy's criteria for a declination.

In *Fresenius*, the SEC and DOJ each brought enforcement actions alleging 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. In keeping with the other parallel DOJ-SEC matters in 2019, the *Fresenius* matter involved conduct that was widespread across jurisdictions for a protracted period of time. For example, according to the DOJ's Statement of Facts, which Fresenius admitted was "true and accurate," Fresenius subsidiaries entered into joint business ventures with government officials and doctors in Angola and provided them equity in the venture, false consultant contracts, and false

storage contracts to sell Fresenius's 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 provide funds to doctors employed in public hospitals and, through the same third-party agent, entered into false consultant contracts with doctors to gain win tenders with the hospital that employed the doctors. Fresenius also provided these doctors with gifts, donations to charities with which they were affiliated, and funds for travel to win a tender at affiliated hospitals. Fresenius engaged in similar behavior in Morocco, Spain, Turkey, and West Africa by paying officials and government-employed 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 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 the *Barclays* matter, the SEC brought an enforcement action against Barclays for alleged books-and-records and internal controls violations related to conduct at unspecified subsidiaries and affiliates of Barclays in the Asia-Pacific region. According to the SEC, Barclays's affiliates engaged in "referral hiring," including allegedly hiring the underqualified or unqualified children and relatives of potential or future customers to obtain or retain business. In some instances, the SEC claimed that the hires were related to government officials. Interestingly, the SEC did not bring any anti-bribery charges against Barclays, despite the government's apparent position that providing jobs and internships constitutes a "thing of value" under the FCPA. Barclays paid approximately \$6.3 million in disgorgement, prejudgment interest, and civil penalties to resolve the allegations, with the SEC recognizing Barclays's self-reporting, cooperation during the investigation, and remediation.

## ENFORCEMENT ACTIONS AND STRATEGIES

Similarly, in the *Deutsche Bank* matter, the SEC brought an enforcement action against Deutsche Bank for alleged FCPA violations related to its hiring practices. According to the SEC, Deutsche Bank engaged in a client referral hiring program in its Asia-Pacific and Russian offices. The hiring process allegedly “bypassed” Deutsche Bank’s standard competitive hiring process, and was instead aimed at generating business for the bank. The SEC claimed that some of the hires were related to foreign government officials from whom Deutsche Bank allegedly hoped to obtain or retain business. Similarly to the *Barclays* matter, the SEC did not charge Deutsche Bank with violations of the FCPA’s anti-bribery provisions—only books-and-records and internal controls violations. The SEC only acknowledged Deutsche Bank’s remedial efforts, and Deutsche Bank agreed to pay disgorgement and prejudgment interest of about \$13.7 million, as well as a civil penalty of \$3 million.

The remaining enforcement actions were smaller:

- In *Telefonica Brasilia*, 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 Men’s World Cup. According to the SEC, Telefonica Brasil sponsored a hospitality program in 2013 and 2014 for the 2013 Confederations Cup and 2014 Men’s 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.
- In *Juniper*, the SEC alleged that Juniper Networks’s Russian subsidiary used third-party channel distributors that claimed to offer customers discounts but then redirected them, in part, to pay for trips and expenses for government officials. The SEC claimed that employees at Juniper’s Chinese subsidiary falsified expense reports and trip agendas to circumvent Juniper’s policies on travel, entertainment, and gifts. Juniper agreed to pay \$11.45 million in disgorgement, prejudgment interest, and civil penalties to settle the SEC’s claims that it violated the books-and-records and internal control provisions of the FCPA.
- In *Westport Fuels*, the SEC claimed that Westport entered into a bribery scheme with a Chinese government official. According to the SEC, Westport arranged for shares in its Chinese JV to be transferred to a Chinese government official and to a private equity fund in which the official owned an

interest, purportedly in anticipation of an IPO that never occurred. After transferring the shares to the government official, allegedly below value, the JV (i) entered into a framework supply agreement with Westport worth approximately \$500,000 in sales and (ii) authorized a dividend distribution to all shareholders, including \$3.5 million to Westport. Westport paid \$4 million in disgorgement, prejudgment interest, and civil penalties to settle the SEC’s allegations that it violated the anti-bribery, books-and-records, and internal control provisions of the FCPA. It also agreed to report to the SEC for two years.

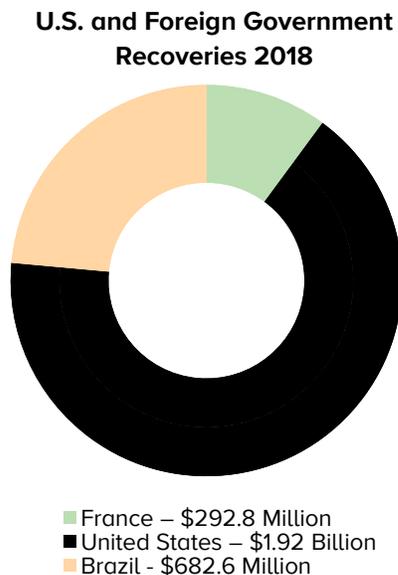
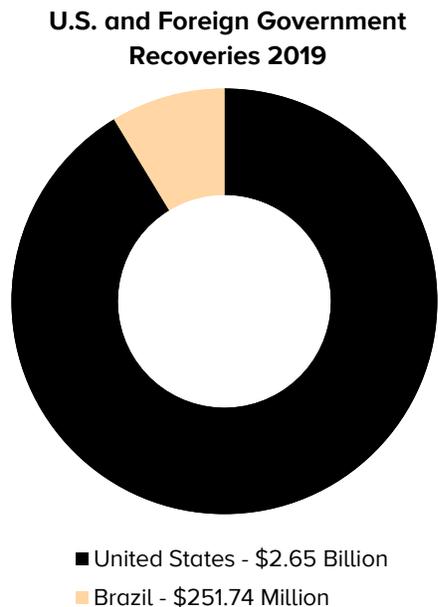
- In *Quad/Graphics*, the SEC alleged that Quad/Graphics’s subsidiaries engaged in bribery schemes in Peru and China. According to the SEC, in Peru, Quad/Graphics’s subsidiary made improper payments to government officials, including through false invoices to sham companies, to obtain business and to influence judges in a tax dispute. The SEC also alleged that Quad/Graphics’s Peruvian subsidiary knowingly violated U.S. sanctions laws by engaging in transactions with a Cuban telecommunications company. Quad/Graphics paid nearly \$10 million in disgorgement, prejudgment interest, and civil penalties to settle the SEC’s allegations that it violated the anti-bribery, books-and-records, and internal control provisions of the FCPA.
- In *Samsung*, according to the DOJ, from 2007 to 2013, Samsung Heavy Industries corruptly paid Brazilian foreign officials to retain business in Brazil. Allegedly, SHI made bribes to executives at Petrobras, the Brazilian state-owned oil corporation, to obtain a shipbuilding contract with a Houston-based Chartering Company that sought to charter the ship to Petrobras. Specifically, in 2007, SHI and the Chartering Company entered into an option agreement which gave the Chartering Company the right to purchase SHI’s new offshore oil drillship. The DOJ alleged that “Samsung Heavy Industries understood that Chartering Company would only exercise its option to purchase the Option Drillship [from SHI] if Chartering Company secured a contract with Petrobras to charter the Option Drillship to Petrobras.” To ensure that outcome, SHI allegedly made bribes to officials at Petrobras through two intermediary companies. SHI entered into a DPA pursuant to which it agreed to pay a criminal penalty of about \$75 million.

### UPSHOT

2019 included one of the largest FCPA enforcement actions in history – *Ericsson* – especially if we exclude penalties paid to foreign authorities. *Ericsson* and the other outlier of 2019, *MTS*, represented about half of the penalties in 2019. The remaining enforcement actions of the year were actually fairly evenly spread. The average excluding outliers was \$82.8 million, which is an outlier itself. Only 2017 (\$83 million) and 2014 (\$51 million) had averages (excluding outliers) above \$50 million. Ultimately,

## ENFORCEMENT ACTIONS AND STRATEGIES

we continue to view the median as a more accurate measure of the “average” corporate enforcement penalty. That figure for the 2019 corporate enforcement actions was \$25.2 million, which is slightly higher but generally in line with that measure from recent years.



Another notable point in 2019 is the lack of global enforcement resolutions. In previous years, we have reported the trend of increasing international coordination with a significant portion of the penalties paid to foreign governments. However, in 2019, only *Samsung* and *Technip* involved penalties that were split with foreign authorities. In *Samsung*, the DOJ agreed to credit up to half of the \$75 million penalty for amounts that Samsung would pay to the Controladoria-Geral da União (CGU), Advogado-Geral da União (AGU), and Ministério Público Federal (MPF). Similarly, in *Technip*, the DOJ agreed to credit Technip for \$214 million for penalties it paid to the same Brazilian authorities.

### INDIVIDUAL ENFORCEMENT ACTIONS

2019 arguably marked a record year for FCPA enforcement against individuals, in terms of charges and convictions. The DOJ brought or unsealed enforcement actions involving FCPA charges against thirty-five individuals this year, which is slightly more than 2018, which had thirty. The SEC kept pace with recent years, bringing charges against five individuals, which is one more than 2018 and two more than in 2017. Assistant Attorney General Brian A. Benczkowski announced the DOJ’s banner individual enforcement year, citing the number of individuals charged in 2019 by the Criminal Division’s FCPA Unit as the highest of “any year in history.” If one ignores most of the twenty-two individuals charged in 2009 in the “shot-show” investigation (which we posit would be acceptable given that most of the charges were dismissed), then 2019 is indeed a banner year for charges in FCPA-related cases against individuals.

Putting aside quibbles over whether or not 2019 represented a record year for the number of individuals charged, the overall trend towards increasing individual enforcement certainly continued in 2019. Indeed, from 2010 to 2015, the DOJ charged an average of ten individuals per year, whereas from 2016 to 2019, the average increased to over twenty-six. It is worth noting that the DOJ’s FCPA Corporate Enforcement Policy (formally incorporating some of the policies in the 2015 Yates Memorandum on Individual Accountability for Corporate Wrongdoing) incentivizes corporations to provide the DOJ with “all relevant facts about all individuals substantially involved in or responsible for the violation of law,” which may be a contributing factor to these increased numbers.

The year also saw a high number of plea agreements and jury convictions. Indeed, Benczkowski emphasized the DOJ’s “continued dedication to holding individual wrongdoers accountable across the board” in reference to the number of convictions this year. The most notable story in FCPA enforcement this year might well be the four trials and jury convictions—*Lambert*, *Hoskins*, *Boncy*, and *Baptiste*. We feel it is only equitable to mention here the acquittal of Jean Boustani, who was charged with money laundering offenses in connection with a \$200 million bribery scheme in Mozambique in which

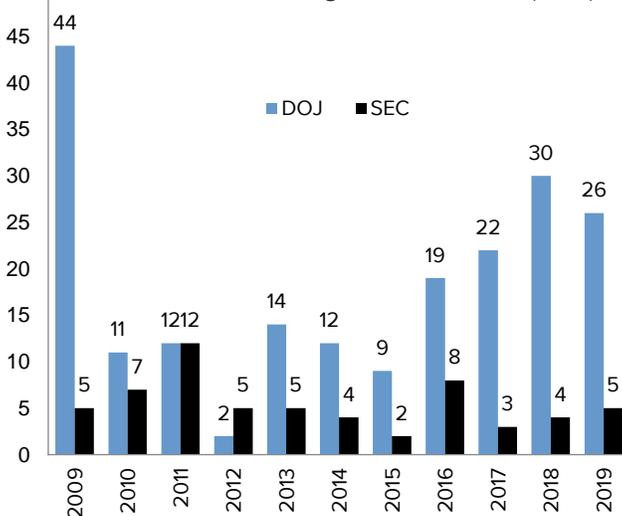
## ENFORCEMENT ACTIONS AND STRATEGIES

seven other defendants have been charged with FCPA and related offenses. In an area of law where little case law exists, four trials and the resulting opinions offer what feels like a feast of jurisprudence. We discuss these in greater detail below.

As a whole, the DOJ’s thirty-five charges against individuals involved thirteen bribery schemes: (i) *Pearse, Singh, Subeva, Boustani, Chang, de Rosario, Allam, and Nhangumele*; (ii) *Coburn and Schwartz*; (iii) *Lyon and Halbert*; (iv) *Pinto-Franceschi, Muller-Huber, Bleuler, Ochoa, and Casaqueiro Murta*; (v) *Motta Dominguez, Lugo Gomez, Ramon Veroes, and Chacin Haddad*; (vi) *Skornicki*; (vii) *Tasker and Innes*; (viii) *Cevallos Diaz and Cisneros Alarcon*; (ix) *Longoria*; (x) *Ahsani, Ahsani, and Hunter*; (xi) *Li and Yang*; (xii) *Grubisich*; and (xiii) *Akhmedov and Karimova*.

Although the DOJ’s actions can be fairly tightly grouped by bribery scheme, less than half stemmed from schemes in which a corporate defendant was criminally charged. Specifically, the cases of *Coburn* and *Schwartz* were executives at *Cognizant*; *Tasker and Innes* were involved with *ICBL*; *Skornicki* was a consultant to *TechnipFMC*; *Pearse, Singh, Subeva, Boustani, Chang, de Rosario, Allam, and Nhangumele* were related to a 2018 enforcement action against a European financial institution; *Karimova* and *Akhmedov* were allegedly part of the *MTS* matter; and, in a throw-back to 2016, *Grubisich* was the former CEO of *Braskem*.

**Individuals Charged: 2009-2019 (YTD)**



The true trend of individual enforcement in 2019 was charging individuals connected to bribery schemes with foreign state-owned energy companies in Latin America. As usual, the DOJ added more defendants to the PdVSA cases, with 2019’s five additions (*Pinto-Franceschi, Muller-Huber, Bleuler, Ochoa, and Casaqueiro Murta*) bringing the total up to thirty-two individuals charged in the case (including those who were not charged with FCPA offenses). This year also involved charges against two additional individuals in the cases involving Ecuador’s state-owned energy company, *Petroecudor*. Finally, in a new (but not so new) scheme for 2019, the DOJ charged four individuals (*Motta Dominguez, Lugo Gomez, Ramon Veroes, and Chacin Haddad*) in connection with allegations of bribery related to *Corpelec*, a state-owned power company in Venezuela.

The SEC brought four enforcement actions this year. Three were against individuals who had also been charged by the DOJ—*Coburn* and *Schwartz*. These charges were unusual not only because the SEC is doubling up on defendants the DOJ also charged, but also because two of them represent the only cases the SEC brought in court this year, rather than resolving by administrative proceeding. It is not clear, but it is possible that this number is related to the SEC’s apparent unwillingness to litigate in civil court and to choose efficiency over litigation. It is particularly interesting that individuals could have settled their cases without admitting or denying the charges. The SEC also brought enforcement actions against two individuals in conjunction with actions against corporations—*Nancy Gougarty (Westport)* and *Sridhar Thiruvengadam (Cognizant)*.

In the July 2019 *Trends & Patterns*, we noted that most of the enforcement actions against individuals had been brought against lower-level employees. The charges in the latter half of 2019 resulted in a more even distribution between high-level executives, foreign officials, agents and middle-men, and the lower-level employees.

### EXECUTIVES

The most notable individual charges this year remain the cases involving former executives of *Cognizant*. First, the DOJ and SEC both brought cases in federal court against two former senior executives of *Cognizant Technology Solutions*, *Gordon Coburn*, then-president of *Cognizant*, and *Steven Schwartz*, then-chief legal officer of *Cognizant*. In February, the DOJ filed a twelve-count indictment alleging a scheme to bribe Indian government officials in the District of New Jersey. On the next day, in an unusual move both in terms of taking action in conjunction with the DOJ and the mode of enforcement action, the SEC filed a civil complaint against *Schwartz* and *Coburn*. These cases are still pending. Then, in September, the SEC issued a cease-and-desist order against *Sridhar Thiruvengadam*, the former chief operating officer of *Cognizant*. Pursuant to the order, *Thiruvengadam* agreed to pay a civil money penalty of \$50,000 to settle

## ENFORCEMENT ACTIONS AND STRATEGIES

allegations that he violated the books-and-records and internal controls provisions of the FCPA.

As we discussed above, Cognizant entered into settlement agreements with the SEC and DOJ this year, receiving a declination from the DOJ pursuant to the Corporate Enforcement Policy. It would require little speculation to surmise the connection between the declination and the number of enforcement actions brought against former C-suite executives at Cognizant.

A similar conjecture could be made in the case of Insurance Corporation of Barbados Limited (“ICBL”), which also received a declination from the DOJ in 2018. The DOJ initially charged Donville Inniss, a U.S. permanent resident and former government official in Barbados. In 2019, the DOJ unsealed charges against two additional defendants—Ingrid Innes and Alex Tasker. Innes was the former CEO of ICBL, and Tasker was a “senior Vice President.” They allegedly paid bribes to Inniss to obtain two government contracts.

The DOJ snagged another indictment against a former CEO in 2019, bringing charges against Jose Carlos Grubisich, the former CEO of Braskem who also held positions in Odebrecht. For those who need a refresher on the 2016 enforcement action, Odebrecht, a Brazilian private holding company, and its partially owned subsidiary, Braskem, settled enforcement actions brought by the DOJ and the SEC, which alleged the two companies engaged in a sprawling bribery scheme. Odebrecht and Braskem settled the charges with the U.S. authorities, as well as Swiss and Brazilian authorities, resulting in a \$1.05 billion global settlement. According to the DOJ, Grubisich played his part “in a massive and sophisticated international bribery and money laundering scheme” by directing nearly \$250 million into slush funds that Braskem used to pay government officials. As the CEO, Grubisich allegedly made false representations to U.S. regulators in Braskem’s certifications, including fraud disclosures. The case remains pending.

Two other C-suite executives facing FCPA enforcement actions in 2019 are brothers Cyrus and Saman Ahsani, who were the chief executive officer and chief operations officer, respectively, of Unaoil, the Monaco-based oil consulting company. The company’s former business development director also is facing charges. Unaoil has been at the center of a multi-jurisdictional bribery scheme investigation that is still unfolding after nearly three years and has been central to other enforcement actions, including against Rolls-Royce and TechnipFMC. The U.K.’s Serious Fraud Office announced in July 2019 that it would not pursue charges against the Ahsani brothers after arresting them in Monaco in 2016. Then, in October 2019, the DOJ announced that it had filed charges against the Ahsanis and Hunter, and that the three had each pleaded guilty to one count of conspiracy to violate the FCPA.

Kicking off the new PdVSA charges, this year the DOJ charged Franz H. Muller-Huber with one count of conspiracy to violate the FCPA and wire fraud and money laundering-related offenses in connection with the sprawling bribery scheme. Muller-Huber was the president of a company that allegedly paid bribes to PdVSA officials to obtain contracts. Muller-Huber also allegedly received kickbacks himself from the scheme. Other PdVSA-related charges from 2019 are discussed below.

The SEC also brought charges against an executive in connection with the enforcement action against Westport. Specifically, the SEC alleged that Nancy Gougarty, the former CEO and board member of Westport, violated the FCPA’s anti-bribery, books-and-records, and internal controls provisions as part of a scheme to bribe a Chinese government official. In one of the few actions of 2019 to focus on one payment scheme, rather than a large swath of various different payments, officials, and methods, the SEC focused on Gougarty’s intentional skirting of Westport’s internal controls to effectuate the payment. Gougarty agreed to pay a civil penalty of \$120,000 to settle the charges.

Other executives charged this year include: Frank James Lyon, who was the owner of a consulting company in Hawaii that paid bribes to a Micronesian official and was sentenced to thirty months in prison after pleading guilty to one count of conspiracy to violate the FCPA; and Yanliang Li and Hongwei who were formerly executives at a Chinese subsidiary of a multi-level marketing company and were both charged with conspiracy to violate the FCPA.

### CORPORATE MANAGERS

In 2019, the DOJ unsealed charges against three former employees of a European bank, who were allegedly involved in a bribery scheme in Mozambique. According to the DOJ, the individuals worked with employees at a United Arab Emirates-based shipbuilding company, Prinvest Group, to arrange bribes for themselves and Mozambique government officials. The scheme allegedly involved \$2 billion in loans that were made from two banks to various companies owned by the Mozambique government, purportedly for maritime projects. However, the three former bank employees, two Prinvest Group employees, and at least three Mozambique government officials allegedly diverted portions of the loans to themselves, totaling over \$200 million. The Prinvest employees, Jean Boustani and Najib Allam, were also charged with money laundering and wire fraud-related offenses in the same indictment. Boustani, who was not charged with FCPA offenses, was acquitted by a jury this year.

In another case against a corporate manager announced this year, a manager at a U.S.-based adoption agency, Robin Longoria pleaded guilty to one count of conspiracy to violate the FCPA, to commit wire fraud, and to commit visa fraud. Longoria allegedly engaged in a scheme to bribe Ugandan officials to

## ENFORCEMENT ACTIONS AND STRATEGIES

make decisions in favor of her U.S. clients who were attempting to adopt Ugandan children, including granting guardianship rights. Two aspects of this case are rather unique. First, Longoria represents the only individual enforcement action this year not connected to another individual or corporate enforcement action (although the charging documents do refer to co-conspirators, so perhaps more actions are forthcoming). Second, intercountry adoptions fall somewhat outside the industries we typically track for the *Digest*, although the opportunity for official corruption and bribery is certainly present, and the human impacts are high.

Finally, in late December, the SEC announced that it had settled its case against Tim Leissner, a former managing director at a large multi-national bank. In 2018, the DOJ also charged Leissner with FCPA violations, to which he entered a guilty plea. The SEC's order permanently bans Leissner from working in the securities industry.

### MIDDLEMEN/FIXERS

Among the twenty-six individual defendants charged in connection with an FCPA enforcement action, several served as middlemen or middlewomen who funneled bribes from one individual/entity to a foreign official.

Two new indictments in the PdVSA matter were brought against Daisy Teresa Rafoi Bleuler and Paulo Jorge Da Costa Casaqueiro, who were partners at a Swiss company that allegedly funneled bribes destined for PdVSA. Both individuals were charged with conspiracy to violate the FCPA and various money laundering-related charges. Similarly, the DOJ also charged Rafael E. Pinto-Franceschi with one count of conspiracy to violate the FCPA, one count of conspiracy to commit wire fraud, two counts of wire fraud, and one count of conspiracy to launder money. Pinto-Franceschi was a sales representative who allegedly worked to facilitate bribes to PdVSA officials.

Similar to the PdVSA case, the DOJ has also pursued individual charges related to an alleged scheme to bribe officials at Empresa Publica de Hidrocarburos del Ecuador ("PetroEcuador"), the state-owned oil company of Ecuador. According to the allegations in the indictments, the alleged conspirators made corrupt payments to PetroEcuador from 2013 through 2015. In 2018, the DOJ charged four individuals, all of whom have pleaded guilty. In 2019, the DOJ also charged Armengol Alfonso Cevallos Diaz and Jose Melquiades Cisneros Alarcon. Cisneros Alarcon and Cevallos Diaz were directors of various companies based in Southern Florida that allegedly facilitated or received bribes on behalf of PetroEcuador officials, including Marcelo Reyes Lopez, who was sentenced to fifty-three months in prison.

Finally, Zwi Skornicki, who was a consultant for TechnipFMC and pleaded guilty to one count of conspiracy to violate the FCPA.

### FOREIGN OFFICIALS

Under the Fifth Circuit's decision in *United States v. Castle*, foreign officials cannot be prosecuted for conspiracy to violate the FCPA.<sup>1</sup> As a result, foreign officials are typically charged with crimes that often go part and parcel with corruption schemes. In keeping with recent trends, in 2019, a number of foreign officials were charged with money laundering offenses related to their receipt of corrupt payments.

As part of the Mozambique bribery scandal involving two European banks and Prinvest, the DOJ also charged three former government officials from Mozambique with money laundering related charges. The cases are still pending and, given Boustani's acquittal in the matter, it would not be surprising if these officials challenged the charges, as well.

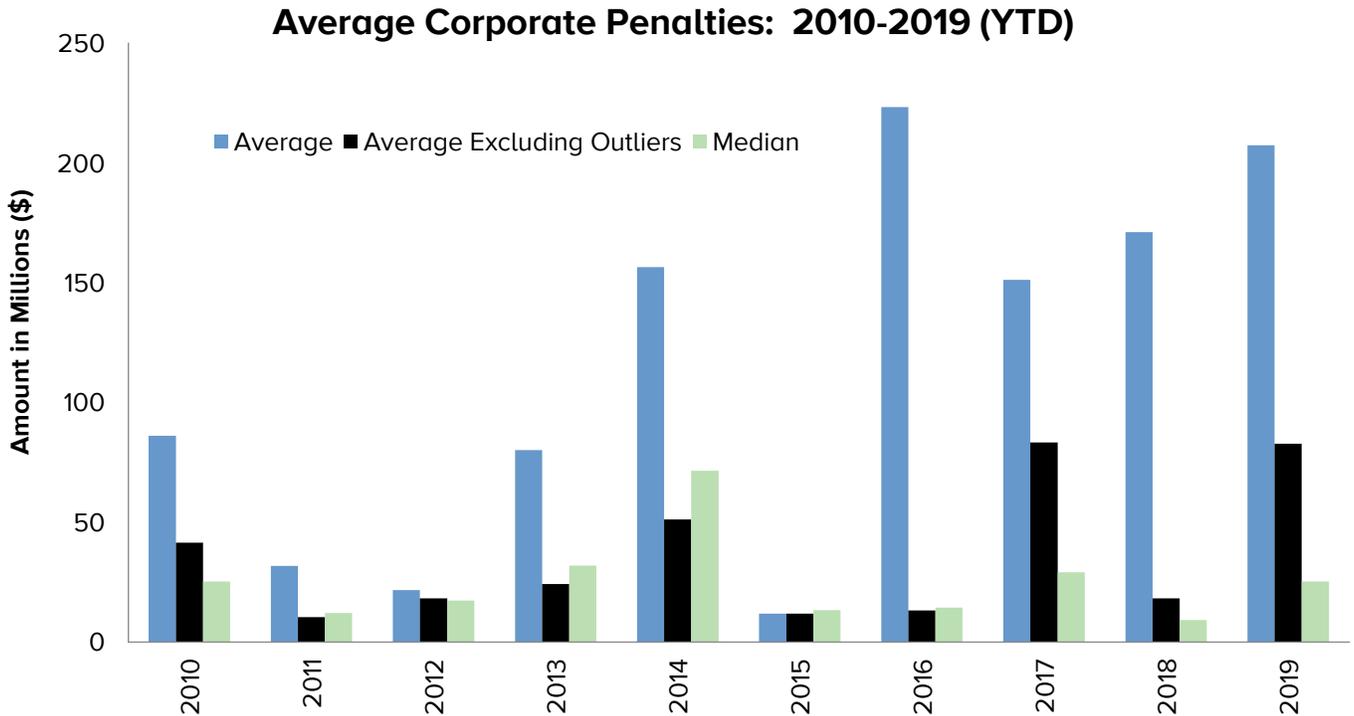
In conjunction with Frank James Lyon, the DOJ brought charges against a Micronesian government official, Master Halbert, for conspiracy to commit money laundering. Halbert pleaded guilty and was sentenced to eighteen months in prison. The DOJ also issued new charges against a Venezuelan government official as part of the PdVSA investigation. Javier Alvarado Ochoa, the former president of Barvien, a PdVSA subsidiary, was charged with money laundering-related offenses for allegedly receiving bribes and laundering the proceeds through shell companies.

As we reported in the July 2019 *Trends & Patterns*, the DOJ charged an Uzbek government official, Gulnara Karimova, and an Uzbek telecommunications executive, Bekhzod Akhmedov, in a four-count indictment in the SDNY alleging their involvement in the *MTS*, *Telia*, and *VimpelCom* bribery schemes. 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.

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<sup>1</sup> 925 F. 2d 831 (5th Cir. 1991).

ENFORCEMENT ACTIONS AND STRATEGIES



Finally, in June 2019 the DOJ brought charges against four individuals 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 (again, avoiding any charges of substantive FCPA violations). The same day, the U.S. Department of the Treasury designated Motta and Lugo pursuant to the Venezuelan sanctions programs, which we discuss in further detail below as part of a pattern of deploying sanctions on corruption targets outside the FCPA’s jurisdictional reach. The DOJ also announced that two businessmen had pleaded 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.

**UPSHOT**

The total number of individuals charged in FCPA enforcement actions in 2019 increased from 2018 (forty from thirty) and is generally in line with trends seen in recent years. From 2010 to 2015, the DOJ and SEC have charged an average of about sixteen individuals per year. From 2016 to 2019, this average number of individuals charged per year nearly doubled to thirty-one. Besides the overall trend towards more individuals charged, a few other points are worth noting.

First, in 2019, nineteen of the individual enforcement actions involved executives (counting the DOJ and SEC cases against Coburn and Schwartz separately). This number would be even higher if we included some of the middlemen and women who were the owners or presidents of the fairly small companies they used to funnel and launder bribes, but we exclude those individuals to focus on the individuals who might traditionally be perceived as off-limits—CEOs, presidents, and C-suite executives of large corporations. Notably, seven cases against these types of executives (two each for Coburn and Schwartz, Thiruvengadam, Tasker, and Innes) stemmed from cases in which the corporation received a formal declination under the FCPA

## ENFORCEMENT ACTIONS AND STRATEGIES

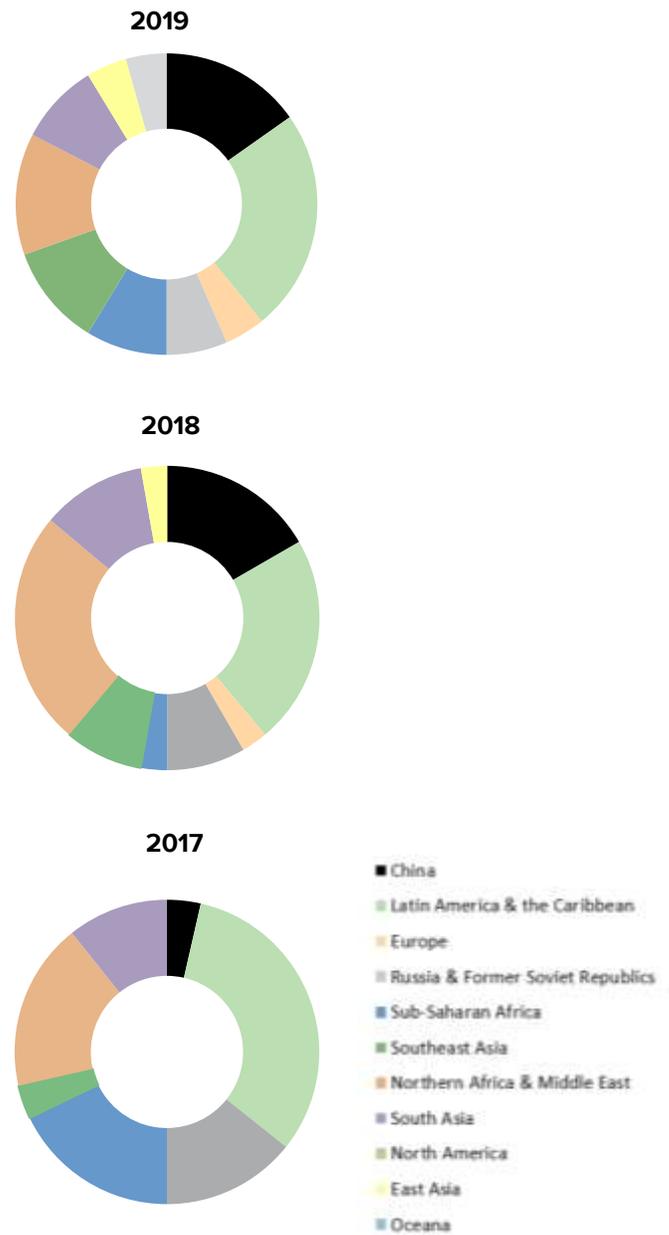
Corporate Enforcement Policy (*Cognizant, ICBL*). However, not to overstate the role of corporations desperate to avoid or minimize an enforcement action, seven of the executives charged were not connected to any corporate enforcement action. Therefore, the U.S. authorities can and do pursue high-powered individuals on their own, but they are providing corporations with a lot of incentive to serve executives up on a nice, neat platter.

*Second*, like in previous years, we have seen fairly substantial grouping of individual enforcement actions in 2019. Only one case (*Longoria*) truly stands alone. Every other individual charged this year was connected to another individual or corporate enforcement action (and in many cases, both). Several matters have over five defendants (including the corporate defendants, where applicable): Mozambique, PdVSA, Corpoelec, MTS, and PetroEcuador. Ultimately, the twenty-five corporate enforcement actions and forty individual actions in 2019 (65 actions in total) can be distilled into just twenty-five schemes. Of course, the concentration of actions makes sense from a time and resources perspective, but this year’s concentration was particularly notable.

### GEOGRAPHY & INDUSTRIES

Similar to 2018, there was no particular focus on any geographic region in 2019, in contrast to the heavy emphasis on China in 2016 and in Latin America in 2017. Overall, no region accounted for more than 25% of the total actions. The enforcement actions this year were even more evenly spread in 2018, and we added a new region—Oceania—to our tracker to more accurately account for matters in that region.

Of the total twenty-five enforcement actions,<sup>2</sup> eleven involved alleged acts of bribery in Latin America & the Caribbean (*Fresenius, Telefonica Brasil, Walmart, PdVSA* individuals, *Technip/Skornicki, Quad/Graphics, Samsung, Corpoelec* individuals, *Innes/Tasker, PetroEcuador* individuals, and *Grubisich*). If we did not aggregate the cases for the purposes of our statistical analysis, Latin America would be 2019’s clear winner. However, as we have mentioned, the DOJ and SEC have a tendency to cluster charges in certain schemes, so counting the number of individual enforcement actions in a geographic region, as opposed to the schemes as a whole, is less informative of enforcement trends. China also had a marginally higher count this year than the other regions, with seven matters (*Fresenius, Walmart, Juniper, Quad/Graphics, Westport/Gougarty, Ericsson, and Li/Yang*).



<sup>2</sup> 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.

## ENFORCEMENT ACTIONS AND STRATEGIES

Northern Africa & the Middle East had six actions in 2019 (*Fresenius*, *Technip/Skornicki*, *Microsoft*, *Ericsson*, *Leissner*, and *Ahsani/Ahsani/Hunter*), which represents a return to its average after an unusually high year in 2018, with nine matters. Sub-Saharan Africa and South Asia both had four matters (*Fresenius*, Mozambique individuals, *Ericsson*, and *Longoria* in Sub-Saharan Africa and *Cognizant/Coburn/Schwartz*, *Walmart*, *Deutsche Bank*, and *Barclays* in South Asia). Southeast Asia had five (*Microsoft*, *Deutsche Bank*, *Barclays*, *Leissner*, and *Ericsson*). Russia and the former Soviet Republics had three (*MTS/Karimova/Akhmedov*, *Deutsche Bank*, and *Juniper*); East Asia had two (*Deutsche Bank* and *Barclays*); Europe also had two (*Fresenius* and *Microsoft*); and finally our new region, Oceania, also had two (*Barclays* and *Lon/Halbert*).

In terms of industries, the 2019 FCPA corporate enforcement actions focused heavily on the energy sector, particularly oil and gas companies. Seven of the twenty-four actions were related to the energy industry (*Technip/Skornicki*, PdVSA individuals, *Westport/Gougarty*, *Corpoelec* individuals, *PetroEcuador* individuals, *Ahsani/Ahsani/Hunter*, and *Grubisich*). There was also a concentration in telecommunications (*MTS/Karimova/Akhmedov*, *Telefonica Brasil*, and *Ericsson*); information technology (*Cognizant/Coburn/Schwartz*, *Microsoft*, *Juniper*, and *Samsung*); and banking (*Barclays*, Mozambique individuals, *Leissner*, and *Deutsche Bank*). A few matters this year, however, involved industries that are less frequently in the FCPA sphere—namely, retail (*Walmart*), marketing (*Quad/Graphics*), aviation (*Lyon/Halbert*), and intercountry adoptions (*Longoria*).

### TYPES OF SETTLEMENTS

In 2019, the DOJ and SEC resolved matters using the typical variety of settlement structures. We continue to discern a general relationship between the choice of structure and the seriousness of the conduct or the level of disclosure and cooperation, but the pattern is far from clear. We discuss the SEC's and DOJ's settlement devices below.

#### SEC

As was the case in 2017 and 2018, the SEC in 2019 relied exclusively on administrative proceedings to resolve all thirteen of its corporate FCPA enforcement actions. As in recent years, none of these were contested enforcement actions.

#### DOJ

Of the twelve corporate enforcement actions the DOJ resolved in 2019, it managed to utilize all of the standard settlement mechanisms. This year involved four plea agreements for subsidiaries that were paired with DPAs for the corporate parents, as well as a lone declination with disgorgement. 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* (Mobile TeleSystems's subsidiary), *WMT Brasilia* (Walmart's subsidiary), *Technip USA* (Technip's subsidiary), *Ericsson Egypt Ltd.* (Ericsson's subsidiary)
- Deferred Prosecution Agreements – *MTS*, *TechnipFMC*, *Samsung Heavy Industries*, *Ericsson*
- Non-Prosecution Agreements – *Fresenius*, *Walmart*, *Microsoft*
- Public Declinations with Disgorgement – *Cognizant*

### ELEMENTS OF SETTLEMENTS

#### WITHIN GUIDELINES SANCTIONS

In five out of the six corporate enforcement actions brought by the DOJ in 2019 that have involved penalties based on the U.S. Sentencing Guidelines, the settling company received a sentencing discount. However, in a somewhat unusual case, *MTS* received no discounting credit whatsoever, although the DOJ acknowledged it “ultimately” cooperated with the investigation. Accordingly, *MTS* received a sentence squarely within the range of the Sentencing Guidelines. The *Ericsson* matter was similarly interesting because it only received partial credit for both its cooperation and remediation (15%). The DOJ explained that *Ericsson* “did not disclose allegations of corruption with respect to two relevant matters; it produced certain materials in an untimely manner; and it did not fully remediate, including by failing to take adequate disciplinary measures with respect to certain employees involved in the misconduct.” The rest of the companies received between 20% and 40%.

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

Unlike in 2018, the DOJ did appear to award full credit for voluntary disclosure in 2019. The DOJ recognized *Fresenius* for voluntarily disclosing, but denied it a declination and full cooperation and remediation credit because its responses to the DOJ were not timely or fulsome, and its remediation was not complete. Despite these apparent failings, *Fresenius* still received a 40% discount. In keeping with the DOJ's focus on individual accountability, the DOJ's explanations for its decision to not afford *Ericsson* and *MTS* full remediation credit emphasized their respective refusals to adequately discipline responsible employees. Although determining an exact weight behind the DOJ's awarding of discounts based on self-disclosure, cooperation, and remediation credit would be impossible, we could venture some speculation that there is an emphasis on companies disclosing the conduct and holding those individuals responsible.

## ENFORCEMENT ACTIONS AND STRATEGIES

### MONITORS

In 2018, we reported a decline in the frequency with which the DOJ imposed corporate monitors as part of FCPA settlements, but 2018 appears to have been somewhat of an anomaly. This year, the DOJ imposed a monitor on five corporate entities as part of their FCPA settlements. If we include the enforcement actions against subsidiaries and the related SEC actions, corporate monitors could ostensibly be said to cover eleven out of the twenty-five total corporate enforcement actions.

We therefore retract our speculation that 2018's low number of corporate monitors represented the start of a downward trend. However, we stand by our supposition that the DOJ might shift away from using monitors where the conduct occurred further in the past and the company has implemented a robust compliance program. Of the companies with the top five highest penalties in 2019, only Technip avoided a corporate monitor. In that case, the conduct was alleged to have occurred from 2003 to 2013—hardly current news. It also received full remediation credit. While it would be impossible to conclude with any certainty that less recent misconduct and fulsome remediation are factors considered by DOJ when imposing monitors, it would seem logical, since monitoring a company where most of the bad actors have likely departed and where solid compliance programs are already in place is not exactly the most productive use of time and money.

### RECIDIVISM

Technip joined the list of recidivists in 2019, having already entered into agreements with the DOJ and SEC in 2010 to settle allegations of FCPA violations. Although Technip's case in 2019 did involve a violation it inherited through its merger with FMC, there were violations on the Technip side, as well. However, despite this recidivism, the DOJ did not implement a corporate monitor.

### CASE DEVELOPMENTS – THE TRIALS

"Trials" is certainly *the* FCPA buzzword for 2019. Not only is this year's number of trials involving FCPA charges unprecedented in one year, but they resolved some long-running cases and resulted in (another 2019 FCPA hot topic) "case law." We discuss the cases in more detail below.

### HOSKINS

One of the most dynamic and impactful cases in FCPA history reached another milestone this year, with a jury convicting Lawrence Hoskins of six counts of violating FCPA, three counts of money laundering, and two counts of conspiracy. The case was remanded for trial after the Second Circuit held in 2018 that the government could not charge Hoskins, a British citizen and executive at a French multinational company, Alstom S.A., who

never entered the United States, with conspiracy to violate the FCPA unless it could show that he acted "while in the United States." The Second Circuit explained that "the FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—unless that person commits a crime within the territory of the United States." This aspect of the decision has had a significant impact on FCPA jurisprudence, closing a loophole that would have permitted the government to extend the FCPA's extraterritorial jurisdiction.

The Second Circuit's decision left open the possibility that Hoskins could be convicted of FCPA violations as an agent of a U.S. person—which is the theory of liability the government focused on during trial. The question at-issue became whether Hoskins acted as the agent of Alstom's U.S. subsidiary.

After the jury conviction, Assistant Attorney General Brian A. Benczkowski delivered remarks on the topic of agency liability and its application in *Hoskins*. We discuss his comments on agency liability in general below, but regarding Hoskins, Benczkowski argued that Hoskins "participated in this bribery scheme to secure the contract for Alstom's U.S. subsidiary, Alstom Power, Inc., as well as another partner on the project." He further noted that "the jury was called upon to evaluate Hoskins' conduct to look for proof of an agency relationship and control by the principal"—that is, the U.S. subsidiary.

The jury apparently agreed with Benczkowski and found the agency relationship and control between Hoskins and the U.S. subsidiary. The third superseding indictment from April 2015 merely claims that Hoskins's "responsibilities at Alstom included oversight of the hiring of consultants in connection with Alstom's and Alstom's subsidiaries' efforts to obtain contracts with new customers" and thus he was an agent of Alstom's U.S. subsidiary. While the DOJ surely supplemented this theory at trial and Hoskins's effort to challenge the charges failed, in some cases it might be beneficial to push back against the DOJ's attempts to assign agency where it does not belong. Hoskins's sentencing is expected in January 2020. If he does not appeal, this will mark the end of a case that has been ongoing since 2013.

### LAMBERT

Mark Lambert, a U.S. citizen and the former president of Transportation Logistics Inc., was convicted by a jury in November 2019 of four counts of violating the FCPA, two counts of wire fraud, and one count of conspiracy to violate the FCPA and to commit wire fraud.

Unlike some of the other trials in 2019, *Lambert* lacks any major jurisdictional issues, and the facts appear to be fairly straightforward. According to the DOJ, Lambert and others at TLI, a Maryland-based company which provides services for transporting nuclear material, engaged in a scheme to bribe an

## ENFORCEMENT ACTIONS AND STRATEGIES

official at the Russian state-owned nuclear company, JSC Technobexport (“TENEX”), to obtain contracts with the company. The evidence that Lambert and others at TLI offered kickbacks to the Russian official include discussions of “lucky figures” for the Russian official, a 10% “Remuneration”, and false invoices. According to the DOJ’s indictment, TLI made the payments after being contacted by the Russian official to beat out two other competitors for TENEX’s contracts.

Given that Lambert was a U.S. citizen, and therefore a domestic concern, and the president of a U.S. company, agent of a domestic concern, there is no argument that Lambert fell within the FCPA’s jurisdictional scope. Further, the emails and wire transfers presented in the indictment appear to provide strong support demonstrating that Lambert offered and paid the Russian official to obtain contracts, thus covering the factual predicates necessary for an anti-bribery conviction.

Based on the fact that this appears to be all but a slam dunk case, it remains unclear what Lambert hoped to gain from going to trial. The high number of charges the jury convicted him of also confirms the high risks associated with going to trial. One of Lambert’s co-conspirators, Daren Condrey, pleaded guilty to only one charge of conspiracy to violate the FCPA and commit wire fraud.

### **BONCY & BAPTISTE**

In June 2019, a jury convicted Roger Richard Boncy and Joseph Baptiste, who were board members of a Delaware-based investment firm, of one count of conspiracy to violate the FCPA and the Travel Act and, in Baptiste’s case, one count of violating the Travel Act and one count of conspiracy to commit money laundering. As with *Lambert*, there was very little FCPA-specific issues associated with this case. Both were U.S. citizens and were board members at a U.S.-based investment company, and the indictment alleged fairly clear acts.

In August 2019, Baptiste filed a motion for a new trial in August 2019 based on ineffective assistance of counsel, in which he argued that the prosecution “could not cogently explain exactly what Dr. Baptiste allegedly conspired to offer, to whom, and in exchange for what specific actions by public officials in Haiti.” Despite Baptiste’s claims, the indictment provides evidence that Boncy and Baptiste solicited undercover FBI agents for money to bribe Haitian officials in connection with a project developing a port in Haiti.

# PERENNIAL STATUTORY ISSUES

JURISDICTION

PARENT-SUBSIDIARY LIABILITY

FOREIGN OFFICIALS

THING OF VALUE

MODES OF PAYMENT



## PERENNIAL STATUTORY ISSUES

The enforcement actions in 2019, like the year before it, largely failed to generate any new or surprising issues related to the FCPA's statutory regime. Instead, we mostly observed a continuation of past issues, with the DOJ and SEC buckling themselves as they pushed the boundaries of the FCPA's definitions and scopes.

### JURISDICTION

The application of the FCPA's territorial jurisdiction provision to foreign persons and the contours of how to define "while in the United States" under § 78dd-3 have been areas in which the DOJ and SEC have been creatively pushing the boundaries. As we noted in the July 2019 *Trends & Patterns*, in the *Fresenius* matter, the DOJ and SEC based their jurisdictional hook solely on the use of internet-based email accounts hosted by service providers in the United States. Neither agency alleges that any of the actors involved in the misconduct had any presence in the United States while they acted in furtherance of the corrupt scheme, nor any other connection to the United States. Instead, the actors' emails and communications by which they engaged in the misconduct represented the only "presence" in the United States. While latching a \$231 million USD enforcement action on electronic signals passing through a server might seem tenuous, it is in keeping with other criminal statutes, such as the federal wire fraud statute, that use the location of electronic signals as a basis for jurisdiction.

Similarly, as in past years, in *MTS and Samsung Heavy Industries*, the agencies continued to highlight correspondent bank transactions between two foreign banks that merely passed through the U.S., although no case relied solely on these transactions for jurisdiction.

### PARENT-SUBSIDIARY LIABILITY

Last year, we commented on the SEC's tendency to charge parent issuers for violations under the FCPA's anti-bribery provisions for misconduct by their subsidiaries without establishing the parent's liability through traditional concepts of corporate liability. Essentially, the SEC applied a theory of strict liability of the parent for its subsidiary's conduct, in that it did not specifically establish that the parent authorized, directed, or controlled the subsidiary's relevant conduct.

This year, the DOJ, perhaps in reaction to this criticism of its peer FCPA enforcer and certainly in reaction to "concerns that have been voiced" on the issue, commented on corporate-subsidary liability and agency theory. Specifically, Assistant Attorney General Brian A. Benczkowski provided a synopsis of FCPA enforcement in 2019 to the American Conference Institute's International Conference on the Foreign Corrupt Practices Act, and gave commentary on the DOJ's interpretation of agency theory under the FCPA. Benczkowski expressed that he

"wholeheartedly" agrees that the FCPA explicitly provides for agency theories of liability, but he acknowledged concerns about the "bounds of agency principles." Benczkowski clarified that "the Criminal Division will not suddenly be taking the position that every subsidiary, joint venture, or affiliate is an 'agent' of the parent company simply by virtue of ownership status." Of course, Benczkowski does not speak for his counterparties over at the SEC on this point, so we cannot expect any such consideration from the civil side. Benczkowski explained that, ultimately, "the law requires more" than a mere parent-subsidary relationship. However, the exact contours of what "more" the law requires to establish agency liability remains somewhat unclear in the FCPA context, given the dearth of caselaw on this topic. Benczkowski cited the case against Lawrence Hoskins, which, as we discussed above, resulted in a jury conviction. Hoskins has been at the center of a jurisdictional battle, with the Second Circuit finding in 2018 that Hoskins, having never set foot in the United States, could not be held liable for conspiracy to violate the FCPA's anti-bribery provisions. However, it left open the possibility that he could be liable under agency theory, even if he never entered the U.S. Hoskins was ultimately convicted under this theory of liability in 2019, an event which Benczkowski highlighted in his speech. Benczkowski also touted the DOJ's commitment to "provid[ing] a window into the Department's thinking and approach to cases"—an objective that was not achieved in the rest of the speech in terms of providing specific elements or factors the DOJ would consider as part of its parent-subsidary relationship analysis. So we are left with needing "something more" and prosecutorial discretion.

Benczkowski's comments on agency theory might have been motivated by more than just the DOJ's efforts to provide insight into cases, generally. A few days later, the DOJ announced the \$1.06 billion enforcement action against *Ericsson*, in which it relied heavily on agency theory to hold Ericsson, the parent company, liable for the misconduct largely carried out by its subsidiaries. First, the DOJ's Statement of Facts starts to lay the groundwork early on—stating that Ericsson's subsidiaries "acted as divisions of the parent, rather than separate and independent entities." Then, in connection with the Djibouti scheme, the DOJ identified several individuals who were employees of Ericsson's direct and indirect subsidiaries, including Ericsson Egypt, and who "acted as an agent of Ericsson." However, besides the comment at the beginning of the Statement of Facts regarding subsidiaries acting like divisions, the Statement of Facts does not explain how the individuals were acting as Ericsson's agents. These individuals almost assuredly were acting as agents of the Ericsson subsidiaries for whom they worked, but the DOJ fails to explain the "something more" between Ericsson and the employees of its subsidiaries.

A generous interpretation would cite to Ericsson's scheme in China and Indonesia, where the DOJ more closely connected the

## PERENNIAL STATUTORY ISSUES

subsidiary's misconduct with authorization, direction, and control by LM Ericsson—citing an Ericsson employee who instructed subsidiary employees to enter into sham contracts and retain sales agents (which were generally prohibited by LM Ericsson's policies) to facilitate corrupt payments as part of the schemes. While this still does not represent the strongest example of agency liability, it does fall within the “authorizes, controls, and directs” principle.

With that scheme's corporate parent liability more clearly established, perhaps the DOJ considered its agency liability case resolved and neglected to obtain or convey information supporting agency liability in the (completely separate) Djibouti scheme. If we are being more realistic, the DOJ's stance on agency in *Ericsson* appear to contradict, in part, Benczkowski's promise to require “something more” than the parent-subsidiary relationship to impose liability on the parent for actions taken by the subsidiary.

### FOREIGN OFFICIALS

This year's enforcement actions have further underscored the fact that a corporation may be subject to liability under the FCPA, even if it did not bribe a foreign official. Indeed, a corporation may be subject to books-and-records and internal accounting controls liability if it simply makes a payment to a third party and fails to document that the payment is legitimate.

For example, in *Telefonica Brasil*, the SEC brought an action against the Brazilian telecommunications company for failing to devise and maintain sufficient internal accounting controls over a hospitality program hosted in connection with the 2014 Men's FIFA World Cup and 2013 Men's Confederations Cup. For the internal controls violation, the SEC alleges that the company failed to “detect and prevent” improper payments to foreign officials, a standard that is not explicitly required by the statute. The internal controls provision says only that the controls must be “sufficient to provide reasonable assurances that transactions are executed in accordance with management's general or specific authorization.” However, if we assume that senior management did not authorize bribes, then there is an implicit requirement of detecting and preventing.

This year's case against *Walmart* provided a look at the various degrees of separation a matter can have from actual involvement of a foreign official in the scheme. The DOJ's case against *Walmart* spans the spectrum for how concrete or hypothetical the evidence of connection to foreign officials can be. Specifically, the internal controls failures in Mexico, India, and Brazil resulted in improper payments that were traced to foreign officials, including in Mexico, where the invoices for improper payments to government officials had specific codes. However, in China, it was merely alleged that the internal controls weaknesses were flagged by its internal audit team but never addressed. Like

*Ericsson*, where the support for agency liability varied between various schemes, *Walmart* is interesting because the contrast between the solid and well-documented and the more suppositional is particularly high.

### THING OF VALUE

In 2015, the SEC caused a bit of a ruckus when it charged BNY Mellon with FCPA violations for offering jobs to the unqualified relatives of foreign officials. While a job and the related salary are undeniably “things of value,” the idea that referral hiring constituted a form of bribery under the FCPA upset traditionally held views about the scope of the statute, since it was providing the benefit to an official's *relative*. This year's actions against *Barclays* and *Deutsche Bank* involved alleged bribery through similar hiring schemes—indicating that this basis for liability is here to stay. As with *BNY Mellon* and *JPMorgan*, both *Barclays* and *Deutsche Bank* asserted that the individuals hired were underqualified for the positions or were merely holding sham positions without contributing. However, assuming the “thing of value” is the employment of an official's relative, and there is some sort of *quid pro quo* with a foreign official, the emphasis on the fact that the individual was unqualified seems somewhat superfluous.

### MODES OF PAYMENT

As the DOJ and SEC become more sophisticated in their investigation of corrupt payments, corrupt actors similarly attempted to become more creative in their methods for conveying corrupt payments, making it increasingly important for corporations to have broad and constantly adapting policies and controls in place.

For example, in *Quad/Graphics*, the payments were made through a third-party law firm. According to the SEC, *Quad/Graphics*'s Peruvian subsidiary “retained a local Peruvian law firm to serve as outside counsel on [a Peruvian tax authority] litigation” and paid it every month in amounts ranging from \$1,000 to \$1,200 per month. However, after the case moved against *Quad Peru*, it decided to arrange for the law firm to make improper payments to the Peruvian judges on the matter to try to influence their decisions. Suddenly, the payments to the law firm increased significantly, with a total of \$209,752 in payments from *Quad Peru* to the law firm, which the SEC alleged were for the purpose of paying bribes. This case is instructive in part because it highlights the long-held compliance adage that significant increases in the amount of payments to third parties are a red flag for potential bribery. It is also demonstrative of the fact that law firms may not be any better at covering up bribes than the more traditional third-party bribery scheme actors.

Indeed, this rest of the enforcement cases this year involved common third-party intermediary suspects. For example, in

## PERENNIAL STATUTORY ISSUES

Fresenius, they used third-party agents in West Africa, Morocco, Serbia, and Mexico to make corrupt payments to officials. They used the typical hide-the-bribe techniques, ranging from charging sham “service fees” to *Fresenius* and then passing them onto government hospital administrators to false consulting contracts.

In *Cognizant*, Cognizant’s subsidiary in India authorized an engineering and construction firm to pay an Indian government official to obtain various licenses and permits.

Also, Juniper’s subsidiary in Russia used third-party channel partners to divert extra funds from discounts that were not passed on to customers into off-book accounts referred to as “common funds.” These “common funds” were then used to pay

for trips, which included government officials and had no business or educational purpose.

In one twist to the usual narrative, some of the improper payments allegedly made in *MTS* involved \$1.1 million in payments to charities connected to an Uzbek government official. There were no allegations that the charities were connected to the official in any way—other than that she requested the contributions. Therefore, the benefit to the official from these donations is not clearly stated by the DOJ or the SEC. Instead, the issue appeared to be that *MTS*’s Uzbekistani subsidiary authorized the payments in violation of *MTS*’s policies and they were not properly recorded in the books and records.

# COMPLIANCE GUIDANCE

FCPA CORPORATE ENFORCEMENT POLICY

MINOR REVISIONS TO CORPORATE ENFORCEMENT POLICY

UPDATED GUIDANCE FROM DOJ ON THE EVALUATION OF COMPLIANCE PROGRAMS

DOJ ISSUES GUIDELINES ON INABILITY TO PAY

FOREIGN EXTORTION PREVENTION ACT



## COMPLIANCE GUIDANCE

### FCPA CORPORATE ENFORCEMENT POLICY

Since the DOJ's announcement in 2017 of its incorporation of the FCPA Pilot Program into the U.S. Attorneys' Manual (now the Justice Manual), which guides the DOJ's enforcement policies and practices, the DOJ has continued to release and formalize enforcement guidance.

In 2018, we reported on the DOJ's issuance of the Policy on Coordination of Corporate Resolutions, which provides a guide to DOJ attorneys when coordinating enforcement actions with multiple agencies and jurisdictions to avoid "piling on" corporations while still "achiev[ing] justice and protect[ing] the public." In 2018, the DOJ also produced formal guidance relating to conditions for awarding cooperation credit and considerations when engaging compliance monitors.

The trend continued in 2019, with the DOJ issuing new guidance on enforcement policies relating to assessing inability to pay, due diligence during mergers and acquisitions, software communication retention, and the evaluation of corporate compliance programs.

### MINOR REVISIONS TO CORPORATE ENFORCEMENT POLICY

Less than a year after issuing the FCPA Corporate Enforcement Policy in May 2018, the DOJ released revisions in March 2019. These revisions amounted to little more than tweaks and clarifications, although with potentially far-reaching impacts in practice.

First, the DOJ provided additional guidance on the ability of companies to obtain a declination under the Policy if they discover a violation during pre- or ("in appropriate instances") post-acquisition due diligence. This assuaged some concerns in an area of the Policy that had been a little unclear as originally issued, but still left considerable room for interpretation, particularly with respect to what the "appropriate instances" would be for the DOJ to award a declination for a post-acquisition discovery. Such a possibility appears to recognize the practical reality that even thorough pre-acquisition due diligence might not uncover violations lurking in the far-flung subsidiaries and JVs of large multi-national companies. Further, it would not be illogical to suppose that the DOJ might be inclined to look more kindly upon companies that acquire FCPA violations through mergers or acquisitions, since these companies are forces for improving compliance, but the DOJ did not express any such inclination in this announcement. Either some of the DOJ's enforcement policies remain unspoken or declinations in the M&A context operate identically to those outside it.

Second, the DOJ's announcement regarding changes to its approach to the retention requirements for communications,

while small, avoided a potentially major hurdle facing companies hoping to qualify for a declination or for remediation credit under the Policy. 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 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, the DOJ had any basis for defining a company to be uncooperative when, before there was an investigation in which to cooperate, it chose, as part of its document retention policy, could, for any number of legitimate reasons, not to retain 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." 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 Criminal Division released an updated version of its guidance on "Evaluation of Corporate Compliance Programs." This replaces the first version of this guidance, which was issued in February 2017 by the Fraud Section. 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

## COMPLIANCE GUIDANCE

explanations for what prosecutors expect effective compliance programs to entail.

The Guidance focuses on three general aspects of a compliance program: the program's design, its implementation, and its effectiveness. For each of these areas, the Guidance provides the "critical factors" to consider and questions prosecutors may ask during their evaluations. However, the DOJ stresses that the Guidance does not purport to function as a checklist or concrete formula, giving the DOJ, as always, a little wiggle room in its approach. In keeping with the objectives and foci the DOJ has expressed recently, the Guidance hits several hot topics in FCPA enforcement, including the establishment of "disincentives for non-compliance" and disciplinary measures and emphasis on the tone at the top.

### DOJ ISSUES GUIDELINES ON INABILITY TO PAY

In October 2019, the DOJ issued guidance on what is probably its least favorite topic—evaluating a company's inability to pay criminal fines or penalties. In a speech announcing the Guidelines, Assistant Attorney General Brian A. Benczkowski explained that "where a company is in fact unable to pay the appropriate fine or penalty, Criminal Division attorneys should recommend an adjustment to that amount." However, the DOJ will conduct the evaluation only "where legitimate questions exist regarding the company's ability to pay" and that the fine and penalty would only be adjusted to the point at which the company's viability and ability to pay restitution would be preserved.

Of course, the government has always been required to consider these factors when imposing a criminal penalty, pursuant to 18 U.S.C. § 3572 and the U.S. Sentencing Guidelines. The Guidance certainly adds a minor amount of color and some clarity to the factors considered regarding if and how much a company can pay, but overall it does not provide any concrete or bright-line rules or formulas. Instead, it merely provides the factors the

government should consider at a high level, without explaining what would influence the outcome of the evaluation or how it impacts the ability to pay calculation. The only piece of guidance that could be considered formulaic is in a footnote that explains that, in assessing ability to pay, "Criminal Division attorneys may find it helpful to consult the accounting standards amendment promulgated by the Financial Accounting Standards Board ("FASB") in August 2014 regarding 'Disclosure of Uncertainties about an Entity's Ability to Continue as a Going Concern.'" These accounting standards provide a bit more specificity and context to the financial condition in which a company must find itself to qualify for a reduction in the penalty.

### FOREIGN EXTORTION PREVENTION ACT

In August 2019, the Foreign Extortion Prevention Act was introduced into the U.S. House of Representatives. The bill would cover a gap in the FCPA by allowing prosecution of foreign officials that accept or request bribes. The bill is still in committee, so it is too early to speculate as to its chances of passing. Its current form appears to be based on a perceived gap in the FCPA, which punishes the "supply" side—those who give bribes—and not the "demand" side—the corrupt officials whose demands may have been the root cause of the bribe. However, in the context of foreign government officials, it is not clear on its odds of becoming law or the specific elements of any final legislation. However, the bill's introduction recognizes a key failure of the FCPA—that is, it only punishes those who offer or provide bribes while failing to deter the demand-side of the transaction. Further, foreign officials can be (and often are) charged with FCPA-related offenses such as money laundering or wire fraud, but these are decidedly side-show charges that lack teeth. We will continue to watch the progress of the Foreign Extortion Prevention Act.

# UNUSUAL DEVELOPMENTS

INTERNATIONAL CONVERGENCE (AND SOME) DIVERGENCE

(MOSTLY) INCREASED ENFORCEMENT IN EMERGING MARKETS

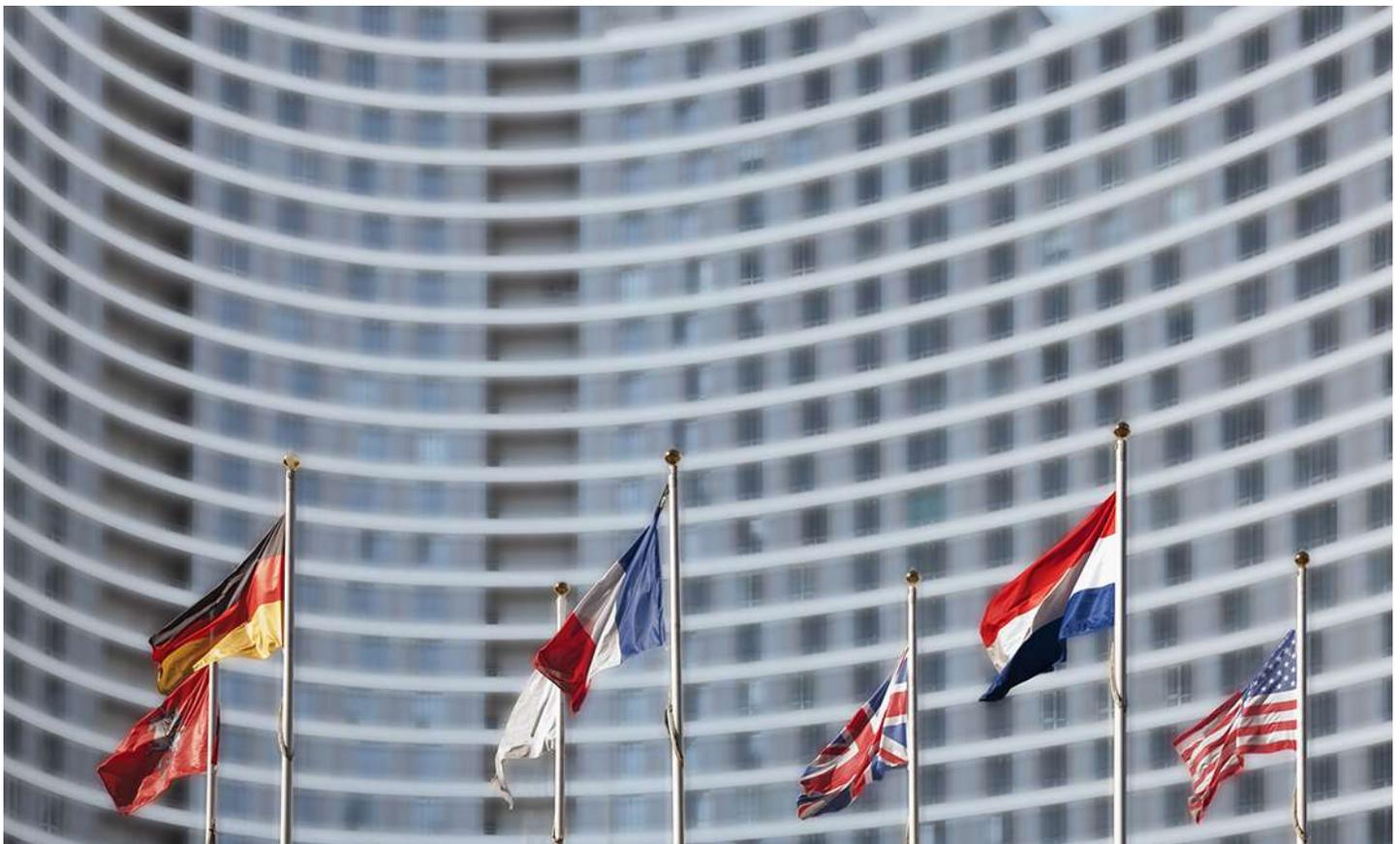
CONVERGENCE OF ANTI-CORRUPTION AND SANCTIONS ENFORCEMENT

SHELL NIGERIA – CASE DEVELOPMENTS

FEDERAL COURT RULES FORMER SHAREHOLDERS ARE “VICTIMS” OF OCH-ZIFF’S BRIBERY

PETROECUADOR MAKES CASE FOR RESTITUTION

UK – US BILATERAL DATA ACCESS AGREEMENT



## UNUSUAL DEVELOPMENTS

### INTERNATIONAL CONVERGENCE (AND SOME) DIVERGENCE

#### CANADA

As we reported in the July *Trends & Patterns*, SNC-Lavalin, a Montreal-based construction company, was charged with attempting to bribe Libyan government officials with almost \$48 million in relation to construction projects in Libya. The *SNL-Lavalin* case gained widespread attention after news outlets reported that the office of Prime Minister Justin Trudeau pressured then-Attorney General Jody Wilson-Raybould to negotiate a remediation agreement with the company. In December, a jury in Montreal found Sami Bebawi, a former vice president at SNC-Lavalin, guilty of fraud, corruption, money laundering, and possession of proceeds of a crime. Bebawi's former subordinate, Riadh Ben Aissa, testified as a witness during trial. In 2014, Aissa pleaded guilty to similar charges in relation to SNC-Lavalin's conduct in Libya and was sentenced to three years in prison by a Swiss court. The trial against the company is expected to go forward in early 2020, although, as we previously reported, Attorney General David Lametti can still intervene and offer an agreement. If SNL-Lavalin is currently engaged in negotiations with prosecutors, it is unclear how Bebawi's recent conviction will impact an agreement. SNC-Lavalin was scheduled to appear in court on December 18, but on that day, it pleaded guilty to a one-count fraud charge. Pursuant to the plea, SNC-Lavalin will pay a fine of \$280 million CAD (\$213 million USD). Bebawi is scheduled to be sentenced on January 10, 2020.

#### FRANCE

France's Anticorruption Agency's ("AFA") Sanctions Committee's first decision in a corruption case resulted in a dismissal of all charges against Sonepar, a French distributor of electrical products and related services. In 2017, the company was accused of breaching five obligations under Article 17 of Sapin II, including having a deficient code of conduct, improper third-party due diligence procedures, improper accounting controls, improper implementation of audit processes, and improper implementation of the risk mapping document. The company rebutted the allegations, stating that it had implemented a code of conduct and compliance guide, third-party assessment procedures, an accounting control manual, a two-level control system, and a risk mapping document with input from a compliance expert. After reviewing Sonepar's measures, the committee ruled that the company had implemented a system of detection and prevention that complied with Article 17 of Sapin II and dismissed the case. The committee noted that the AFA's recommendations were intended to be a frame of reference. As such, defendants accused of violating Article 17 of Sapin II can show they have complied with the law using their own methodology. We will be sure to follow future decisions to see

how the committee interprets breaches of Article 17 of Sapin II and the types of sanctions the committee imposes on defendants.

Sapin II also allows prosecutors in France to offer the Public Interest Judicial Agreement ("CJIP"), a settlement agreement closely resembling the deferred prosecution agreements offered by enforcement authorities in the U.S. With the CJIP, companies can pay a fine and avoid going to trial or pleading guilty. In December, France's Parquet National Financier ("PNF") settled with Egis Avia, a French engineering company, for €2.6 million over corruption allegations under the CJIP. According to the PNF, Egis Avia bribed foreign government officials in Algeria in relation to an airport terminal project. The CJIP has only been used five times since it was introduced in 2016.

#### ITALY

In October, the Italian National Anti-Corruption Authority ("ANAC") imposed its first penalty for retaliation against a whistleblower since enacting whistleblower legislation in 2017. ANAC imposed a €5,000 (\$6,200 USD) penalty against a municipal disciplinary committee after it suspended a manager following the submission of a whistleblower report. The manager filed a report with the judicial authority claiming that members of the disciplinary committee were negligent and abusing public office. The manager was then suspended, without pay, for twenty-two days. The ANAC found that there was a conflict of interest created between the whistleblower and the other members of the disciplinary committee because the members cited in the report did not abstain from the whistleblower's disciplinary proceedings. Under the whistleblower legislation, a public employee cannot be retaliated against for reporting misconduct in the interest of protecting the integrity of public administration. Italy's whistleblower protections not only align with those of the U.S., but seem to follow the EU's Whistleblower Protection Directive of 2019 which guarantees protection against all forms of retaliation against whistleblowers and their supporters. The EU directive goes one step beyond protections in the U.S. by providing whistleblowers with access to legal, financial, and psychological support, and requiring that government officials be trained on how to handle whistleblowing.

#### ISRAEL

In November, Israeli Prime Minister Benjamin Netanyahu was indicted on charges of bribery, fraud, and breach of trust, marking the first time a sitting prime minister has been indicted in Israel. There are three cases against Netanyahu. In the first case, Netanyahu has been charged with bribery and is alleged to have provided regulatory benefits to Bezeq, the parent company of Walla News, an Israeli news company, in exchange for favorable news coverage of himself and his family and negative coverage of his adversaries. The ease in regulations is estimated to have saved Bezeq 1.8 billion shekels (\$500 million USD). In the second case, Netanyahu is charged with fraud and breach of trust for

## UNUSUAL DEVELOPMENTS

assisting Arnon Milchan, a film mogul, with a visa application, a merger, and tax breaks in exchange for expensive gifts, such as cigars and bottles of champagne, worth 700,000 shekels (about \$200,000). In the third case, Netanyahu is charged with fraud and breach of trust for discussing limiting the free circulation of a newspaper, *Israel Hayom*, to help a competing newspaper, *Yediot Ahronot*, corner more of the media market. In exchange for limiting *Israel Hayom's* circulation, the owner of *Yediot Ahronot*, Arnon Mozes, offered to increase positive coverage of Netanyahu in the newspaper. Netanyahu did not accept or refuse the bribe but continued discussions with Mozes and received positive election coverage. While Netanyahu's alleged conduct does not constitute *foreign* bribery, it indicates that prosecutors in Israel remain committed to prosecuting bribery offenses.

### SWITZERLAND

In October, Switzerland's Office of the Attorney General ordered energy trader Gunvor Group Ltd. to pay 94 million Swiss francs (\$94.8 million) for failing to prevent its employees from bribing officials in the Republic of Congo and the Ivory Coast to secure oil contracts. According to Swiss prosecutors, from 2009 to 2011, consultants hired by Gunvor paid a large portion of their consulting fees to high-ranking foreign government officials in exchange for awarding Gunvor oil contracts worth hundreds of millions of dollars. Specifically, the company secured an oil supply contract from government-owned oil firm SNPC in the Congo. Gunvor also made deals for prepayments for oil cargoes with SNPC and oil cargoes from the Ivory Coast. Swiss prosecutors stated that the company had "serious deficiencies" in its internal controls, including a lack of compliance and internal guidance on preventing corruption and no compliance or audit personnel. The company also ignored warning signs, such as the backdating of supporting letters to banks. The settlement includes 4 million Swiss francs in fines and 90 million Swiss francs in disgorgement of profits derived from the contracts. Swiss prosecutors noted that since 2012, Gunvor has taken steps to improve its compliance program and reduced its use of third-party intermediaries.

## (MOSTLY) INCREASED ENFORCEMENT IN EMERGING MARKETS

In the July 2019 *Trends & Patterns*, we reported on increasing corruption legislation and enforcement in foreign jurisdictions, including in Russia, Mexico, Brazil, Peru, India, and China. Since then, there have been several further developments regarding anti-corruption laws and enforcement abroad.

### BRAZIL

In July, the OECD Working Group on Bribery issued a statement regarding a proposed anti-corruption bill that had been adopted

by the Brazilian Senate. According to the Working Group, the bill includes "some positive developments in tackling corruption," but uses an overly broad definition of abuse of discretion by judges and prosecutors. As such, the bill could provide corrupt individuals with a method to "unfairly attack justice-seeking prosecutors and judges for appropriately doing their jobs," which would result in a "significant chilling effect on anti-corruption prosecutions and investigation in Brazil and beyond." Further, the broad definition of abuse of discretion may prevent Brazil from meeting its obligations under the OECD Anti-Bribery Convention, which calls for independent investigations and prosecutions. The Working Group acknowledged the progress made thus far on the bill, namely the full or partial implementation of 31 of its 39 recommendations, but urged Brazil to consider addressing the remaining eight recommendations.

In October, despite the continued warnings from the Working Group that the ability of law enforcement to investigate and prosecute bribery must be protected, Brazil adopted the bill and it will enter into force in 2020. The Working Group raised additional concerns about recent developments in Brazil, including the Supreme Court halting investigations and criminal proceedings and restrictions on tax authorities to detect, report, and investigate bribery and money laundering. We will continue monitoring anti-corruption developments in Brazil as the law goes into effect.

### COSTA RICA

Costa Rica enacted anti-corruption new legislation, Statute 9699, that imposes corporate criminal liability, adds accounting fraud as an offense in the criminal code, and lays out the basic requirements of a compliance program. Under the new law, corporate criminal liability extends to directors, shareholders, employees, third parties acting on behalf of the company, and any individuals within the company with decision-making power. Sanctions for violating Statute 9699 can be imposed on both Costa Rican companies and foreign companies doing business in Costa Rica. Sanctions for companies include an \$8 million fine or ten percent of the amount obtained by the bribe, and a prohibition on contracting with the government, receiving tax incentives, obtaining licenses and permits, and maintaining commercial properties, while individuals charged under Statute 9699 can face up to twelve years in prison. Similar to the guidance on compliance programs provided by the DOJ, minimum requirements for a compliance program under Statute 9699 include conducting risk assessments, implementing a code of conduct, maintaining adequate financial controls, providing anti-corruption training, and establishing procurement procedures, among other requirements. If the Costa Rican Attorney General's Office finds that a company has met certain disclosure and cooperation requirements in addition to the compliance program requirements, the company may qualify for

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a 40 percent reduction in fines. Prosecutors directly notified construction companies of the new law in July. It is yet to be seen if construction companies that fail to meet the requirements after the direct alert will be among the first to be criminally charged.

### GREECE

In July, Greece implemented a new criminal code and code of criminal procedure. In addition to removing obsolete offenses, the new code introduced a number of new bribery-related offenses. Specifically, there are provisions concerning bribery of foreign and domestic politicians and state officers, bribery of judges and arbitrators, bribery of public employees, bribery of individuals in the private sector, and trading of influence. The most severe punishment is reserved for bribes received by politicians or judges—a felony punishable by up to ten years in prison. If the receiver of a bribe is a lower-level public employee, however, the offense is a misdemeanor carrying sentences of three to five years in prison. Similarly, trading in influence and bribery in the private sector are misdemeanors carrying sentences of five years or less. The OECD Working Group on Bribery has criticized the new code, claiming that the penalties for the misdemeanors is too lenient. Drafters of the new code claim the criticism is unwarranted as the penalties are “proportional and dissuasive” as required by the UN Convention on Corruption, the OECD Convention on Bribery of Foreign Officials, and the Council of Europe Criminal Law Convention on Corruption. Further, the new penalties are similar to penalties for bribery offenses in other European countries. It remains to be seen if the OECD’s criticism is enough to influence Greece to amend the new criminal code.

### MEXICO

As we reported in July *Trends & Patterns*, Mexico has increasingly focused on combating corruption. Most recently, Mexico strengthened its asset forfeiture law, the National Property Forfeiture Law, to make it easier for the government to seize property used for corrupt activities. The new law expanded the conduct that will trigger asset forfeiture to include corruption offenses committed by government officials, corporations, and individuals. The asset forfeiture law applies to all tangible and intangible assets that are considered private property of a company or an individual. Importantly, the new law does not have a statute of limitations and can be applied retroactively. Mexico’s Human Rights Commission has challenged the new law on the grounds that it fails to adequately protect property rights and due process rights. For instance, the Commission stated that the new law allows property to be seized that was rented to a tenant to commit crimes without the owner’s knowledge. It will be interesting to see whether the retroactive application of the law will result in additional legal challenges as it allows the

government to seize assets from the time when the corrupt act was carried out.

### GUATEMALA

Representing one of the few jurisdictions in which anti-corruption enforcement is backsliding, rather than increasing, Guatemala took a few steps backwards in 2019. The backwards slide started in January 2019 when the Guatemalan President, Jimmy Morales, announced that Guatemala would withdraw from the United Nation’s anti-corruption commission, known as CICIG. He also demanded the staff members leave the country within twenty-four hours. CICIG had been investigating Morales, his family, and a group of Russians residing in the country (with whom Morales is closely associated) for various crimes, including corruption. CICIG has racked up an impressive 310 convictions over the eleven years it has been working in the country. Apparently, the body was too successful, based on the timing of Morales’s ejection of CICIG in the midst of their investigation of Morales and his associates (unless one believes Morales’s claim that CICIG overstepped its boundaries and threatened Guatemala’s sovereignty).

In a region rife with corruption and strong-men dictators, Morales’s actions in Guatemala dismantling an institution that has been effective at rooting out corruption and other criminal activity represents a particular disappointment.

## CONVERGENCE OF ANTI-CORRUPTION AND SANCTIONS ENFORCEMENT

In past editions of the *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. We also noted that there remain concerns that sanctions will be applied arbitrarily or with political motivations to individuals without due process, even in cases in which the government might not have prevailed at trial even if the individual came within U.S. jurisdiction.

The sanctions regime against Venezuela aligns with the Global Magnitsky Act’s policy of punishing extraterritorial corruption occurring outside the broad jurisdictional requirements of the FCPA because it effectuates punishment on designated individuals, entities, and their affiliates that have potentially greater consequences than any FCPA-based enforcement action by freezing all U.S.-based assets associated with the Maduro government and prohibiting travel to the U.S. by any non-

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exempted Venezuelan government official. What becomes clear from the sanctions regime against Venezuela is that the U.S. uses sanctions to reach purportedly corrupt actors overseas without bringing charges—effectively a form of extra-jurisdictional enforcement. In the case of Venezuela in particular, sanctions are used to promote U.S.-backed political actors in the country and punish the Maduro political regime.

In August 2019, the U.S., by executive order, ramped up its sanctions program that targets the regime of Maduro, which the U.S. Department of the Treasury's Office of Foreign Assets Control determined has engaged in significant corruption and fraud to the detriment of the people of Venezuela. The executive order blocked all U.S.-based property interests of the Maduro regime and PdVSA from transfer, payment, export, or withdrawal. On the same day, OFAC issued a guidance document authorizing transactions with Interim President of Venezuela Juan Gerardo Guaidó Marquez and anyone appointed by him for the purpose of providing humanitarian assistance. The result of this guidance is that U.S. persons are generally prohibited from dealing with Venezuelan government officials apart from members of Guaidó's administration and the Venezuela National Assembly, and all property and interests in property of officials associated with the Maduro regime or PdVSA that are in the United States or in the possession or control of U.S. persons are blocked.

Apart from the sanctions against Venezuela, other recent sanctions cases illustrate this tendency of the U.S. to leverage sanctions as a means of reaching allegedly corrupt actors outside U.S. jurisdiction without bringing charges. For instance, on December 9, 2019 OFAC announced that it had sanctioned a Latvian business mogul, Aivars Lembergs, and his related businesses, due to concerns about corruption by placing Lembergs on its Magnitsky list of purportedly corrupt foreign officials. OFAC stated that Lembergs, a former mayor of the port city of Ventspils—a hub of Russian crude oil exports in the 1990s—had leveraged and corrupted law enforcement officials to protect his interests and subvert political opponents. The issuance of sanctions work in tandem with Latvia's attempt to rebuild its reputation with NATO and the European Union after experiencing a slew of money laundering scandals and the trial of its central bank governor for bribery. Accordingly, the newly issued sanctions—which is the first instance of sanctions being used against a Latvian government official—is indicative of a U.S. effort to curb corruption in Latvia for the purpose of bringing the country under tighter NATO control.

Another recent example of the broader jurisdictional reach enabled by the use of sanctions as opposed to FCPA enforcement is the case of Uladi Basikolo Mussa, Special Advisor on Parliamentary Affairs and former Malawian Minister of Home Affairs. In July 2019, the U.S. Secretary of State publicly designated Mussa based on his involvement in significant

corruption related to his official duties while Minister of Home Affairs. The effect of the designation was to impose a visa ban on Mussa and his spouse, Cecillia Mussa, prohibiting them from traveling to the U.S.

The overlap of FCPA enforcement actions and sanctions also enable enforcement agencies to roll in violations of sanctions as evidence of corrupt practices. For example, in September 2019, the SEC brought charges against Quad/Graphics Inc., a Wisconsin-based digital and print marketing firm, over its role in repeatedly paying bribes to Peruvian government officials to win sales contracts and avoid penalties and creating false records to conceal transactions with a state-controlled Cuban telecommunications company, which were subject to OFAC's sanctions and U.S. export controls laws. Without admitting or denying the SEC's findings, Quad/Graphics consented to a cease-and-desist order and a \$10 million penalty.

## SHELL NIGERIA – CASE DEVELOPMENTS

Royal Dutch Shell is currently facing prosecution in the Netherlands and litigation in Italy related to alleged corruption over a \$1.3 billion oil deal in Nigeria. In 2011, Shell and Eni SpA, an Italian company, paid \$1.3 billion to the Nigerian government to settle disputes over offshore drilling rights, referred to as OPL 245. Italian prosecutors have charged that a large sum of the money went to middlemen, and the Milan court ruled that Shell investors were “victims” of the company's alleged bribes paid to the government officials in Nigeria. This year, we have seen this line of argument—that is, the investors in a company that caused the corrupt payments to government officials can be considered victims of that very same bribery—have success in U.S. federal court, with the EDNY's ruling in the Och-Ziff case (see analysis below). With these successes on the books, we predict an increase in investors filing similar claims for restitution against FCPA offenders in 2020 and beyond. On the other hand, the DOJ attempted to establish jurisdiction over Boustani, a Lebanese national who had never traveled to the U.S., by alleging, in part, that his fraudulent actions had impacts on U.S. investors and they were thus the victims of his bribery scheme. This argument failed to persuade a jury in the EDNY and resulted in Boustani's acquittal this year. Therefore, the “investor as victim” angle, while having some support, remains somewhat tenuous in the U.S.

In a separate matter in the Netherlands, a judge ruled in October 2019 that prosecutors there could access documents involving Shell's internal counsel because they had not registered in the Netherlands. This opened up the pathway for Dutch prosecutors to file criminal charges against Shell, which Shell announced were forthcoming back in March 2019. The Netherlands has been a fairly major player in anti-corruption enforcement in recent years, with it receiving large settlements from ING Group

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(EUR 775 million) and Telia (\$274 million USD). The judicial ruling against Shell permitting prosecutors to access documents involving a company's internal counsel that would generally be considered privileged (although not without exception) may serve as a catalyst to increasing numbers of enforcement actions, including related to anti-corruption.

On the U.S. side of enforcement, the DOJ reportedly closed its investigation into Shell's involvement in the 2011 oil deal in October 2019 "based on the facts available to the DOJ, including ongoing legal proceedings in Europe." Shell maintains that the 2011 transactions were fully legal and both companies maintain that they had paid the funds to the Nigerian government, as required, and were not responsible for its ultimate disbursement.

### **FEDERAL COURT RULES FORMER SHAREHOLDERS ARE "VICTIMS" OF OCH-ZIFF'S BRIBERY**

On August 29, 2019, Judge Garaufis of the Eastern District of New York ruled that former shareholders of Africo Resources, Ltd. were "victims" entitled to restitution under the Mandatory Victims Restitution Act for losses incurred as a result of OZ Africa Management GP, LLC's ("Och-Ziff's") alleged bribery of government officials in the Democratic Republic of Congo.

The ruling springs out of the DOJ's enforcement action against Och-Ziff. By way of background since this matter now spans more than a decade, in 2006, Africo held a majority in the Kalukundi Mine, a copper and cobalt mine in the DRC. A former employee sued Africo for wrongful termination and sold off Africo's interest in the mine—without Africo's knowledge—to satisfy the default judgment. Seizing the opportunity, Och-Ziff allegedly conspired with Dan Gertler, an Israeli billionaire, to purchase the interest in the mine and a majority stake in Africo. As part of their scheme, Gertler and Och-Ziff allegedly made improper payments to DRC officials to ensure that the DRC court would uphold the default judgment in the wrongful termination action. Unaware of the bribery, Africo's former shareholders agreed to sell a majority of the now defunct company to an entity controlled by Gertler. After the DOJ conducted its investigation and brought charges, on September 29, 2016, Och-Ziff pleaded guilty to conspiracy to bribe DRC officials in violation of the FCPA. Och-Ziff agreed to pay \$213 million pursuant to the plea agreement.

To the surprise of the DOJ and Och-Ziff, the company was not done paying for the FCPA violation. The MVRA requires defendants convicted of certain federal offenses, or pleading guilty to those offenses, to compensate the victims with restitution. Here, the government and Och-Ziff argued against awarding restitution to the former shareholders of Africo. Judge Garaufis disagreed, finding that the former shareholders' interest in the Kalukundi Mine constituted "property" and that the former

shareholders were "victims" even if there is no private right of action under the FCPA's provision. In this case, Och-Ziff's bribery cost the former Africo shareholders an opportunity to reject the sale of Africo. Reasoning that the theft of the mining rights was a direct and proximate cause of the lost opportunity, Judge Garaufis concluded that the former shareholders should receive restitution but reserved judgment on the amount.

The Och-Ziff case demonstrates the breadth of the fallout that may result from FCPA enforcement. Notably, Judge Garaufis rejected Och-Ziff's defense that it had already pleaded guilty because the court had not yet accepted the plea agreement. Businesses pleading to FCPA counts would be well-advised to prepare for potential restitution suits following the entry of guilty pleas but before the acceptance of any plea agreements.

### **PETROECUADOR MAKES CASE FOR RESTITUTION**

In a perhaps more questionable claim of victimhood status, PetroEcuador filed a motion for restitution under the MVRA in December 2018. The DOJ objected to PetroEcuador's petition—claiming that PetroEcuador was complicit in the violations, since the bribery scheme was widespread and pervasive within the company. Therefore, according to the DOJ, PetroEcuador itself was complicit in the bribery, rather than a victim entitled to restitution.

As we reported above, several individuals have been charged with FCPA violations relating to the bribery scheme involving PetroEcuador, but so far no foreign officials have been charged. The case is ongoing, and there may be jurisdictional limits that can explain the lack of foreign officials charged in the case. It remains to be seen whether the PetroEcuador scheme is limited to just a few actors, or if it bears more similarities to the sprawling PdVSA scheme, but it is certainly worth watching.

### **UK-US BILATERAL DATA ACCESS AGREEMENT**

On October 3, 2019, the U.S. Department of Justice, in conjunction with the U.K. Home Office, announced an innovative agreement under the auspices of the 2018 CLOUD Act in the U.S. and the Crime (Overseas Production Orders) Act in the U.K., designed to facilitate investigations by allowing duly authorized law enforcement authorities to obtain electronic data directly from companies who hold it in instances of serious crime. The agreement was presented as a means of combatting crimes such as terrorism, cybercrime, and child sexual abuse—offences where timely access to data allows investigations to proceed at a more efficient pace.

The agreement includes terms which lift restrictions on a variety of investigations, though both parties have agreed to seek permission from the other in cases that implicate an essential interest, death penalty cases in the U.S. and free speech cases in

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the U.K. The agreement does not cover investigations targeting residents of the other country.

The current process, the Mutual Legal Assistance process, can take many months, and sometimes even years, due to the need to secure approval from various agencies and the central government. By allowing law enforcement to bring their data requests directly to the companies who hold the data, investigators hope to dramatically reduce this time investment. Both countries will supply judicial oversight to the process.

While the agreement is designed to increase the efficiency of investigations, the governments insist that the disclosures will be

compatible with data protection laws. The agreement does allow companies to continue using encryption techniques.

The typical FCPA case might not fall into the category of “serious crime” as it is used here—although at least one FCPA case in 2019 involved alleged child trafficking—the Act represents the increasing access to data and coordination between the U.S. and U.K. enforcement authorities.

# ENFORCEMENT IN THE UNITED KINGDOM

SERIOUS FRAUD OFFICE  
OTHER MATTERS OF INTEREST



## ENFORCEMENT IN THE UNITED KINGDOM

### SERIOUS FRAUD OFFICE

The latter half of 2019 continued to be a busy time for the SFO, with several prosecutions reaching a conclusion and a number of new investigations announced. In keeping with the focus of this publication, this section will focus on the SFO's efforts to tackle bribery and corruption. Full details of the U.K.'s efforts to tackle white collar crime will be available in another Shearman & Sterling publication, coming soon.

As we highlighted in our July 2019 *Trends & Patterns*, “cooperation” is the buzzword at the SFO. Lisa Osofsky, the SFO's Director, used her speech at the Cambridge Symposium in September 2019 to stress again the importance of cooperation between law enforcement bodies both in the U.K. and overseas. She also used her speech to emphasize the importance of the private sector “cooperating” in preventing crime, and specifically bribery, from occurring in the first place. However, it is the SFO's updated guidance on corporate cooperation and Ms. Osofsky's comments concerning the cooperation of individuals believed to have engaged in criminality that has attracted the most attention in recent months.

### CORPORATE COOPERATION

In August 2019, the SFO updated its guidance on corporate cooperation by publishing the relevant section of its Operational Handbook. Although the Handbook is for “internal guidance only,” it is commonly made available (either in full or with redactions) “in the interests of transparency.” It is intended to supplement the Guidance on Corporate Prosecutions and the Deferred Prosecution Agreements Code of Practice.

Unsurprisingly, the guidance highlights the benefits of organizations cooperating with the SFO to allow it to “more quickly and reliably to understand the facts, obtain admissible evidence, and progress an investigation to the stage where the prosecutor can apply the law to the facts.”

Cooperation is defined as “providing assistance to the SFO that goes above and beyond what the law requires.” The SFO asserts that “many legal advisers well understand the type of conduct that constitutes true cooperation” and observes that “this will be reflected in the nature and tone of the interaction between a genuinely co-operative organisation, its legal advisers and the SFO.”

In short, the SFO believes everyone will be able to recognize cooperation when they see it. However, in an effort to assist, the SFO sets out a non-exhaustive list of eleven “good general practices.” Many of the practices identified are to be expected, but it is the SFO's approach to material over which legal professional privilege is asserted that is raising a few eyebrows in London and beyond.

First, if documents are withheld, the SFO expects to be promptly provided with a schedule of such documents, including the basis for asserting privilege. In addition, if an organization claims privilege, “it will be expected to provide certification by independent counsel that the material in question is privileged.” Later in the guidance, the SFO states that “if an organisation decides to assert legal privilege over relevant material (such as first accounts, internal investigation interviews or other documents), the SFO may challenge that assertion where it considers it necessary or appropriate to do so.”

Therefore, in this area at least, the guidance is relatively clear—without certification from independent counsel, the SFO is unlikely to accept any assertions as to privilege made by an organization and, even then, the SFO may seek to challenge any assertion. Such a stance can only have been adopted for two reasons. First, because the SFO is of the view that the legal principles relating to privilege are being routinely misapplied by organizations or, second, because it believes organizations are using privilege as a device to hide behind.

The stance adopted by the SFO is interesting because, under section 2 of the Criminal Justice Act 1987—the legislative provision from which the SFO derives its principal powers of investigation—it is precluded from requiring the disclosure or production of any document over which legal professional privilege can properly be asserted. It is therefore not unreasonable to conclude that the SFO's assessment of the level of cooperation provided may depend, at least in part, on an organization's willingness to provide the SFO with access to material that it would otherwise be unable to obtain. Perhaps this is what the SFO means by going “above and beyond what the law requires.”

In contrast, the Principles of Federal Prosecution of Business Organizations issued by the U.S. DOJ state:

*Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.*

The thinking behind the approach taken by the DOJ is a sensible one—it expects to be provided with the relevant facts regardless of the professions of those used to gather information during the

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course of a fact-finding exercise or internal investigation. Such an approach ensures that no corporation is at an advantage or disadvantage by using lawyers to gather information when it comes to assessing eligibility for cooperation credit.

Of course, you can hardly blame the SFO for trying to encourage organization to waive privilege at an early stage, given the difficulties it has encountered in relation to such matters in recent years (see *SFO v ENRC* [2018] EWCA Civ 2006, for example). In the absence of cooperation from an organization, the thorny issue of privilege will often cause significant delay to the progress of an investigation and is almost certain to require the deployment of costly resources. As was demonstrated in *Regina (on the application of AL) v SFO* [2018] EWHC 856 (Admin), an organization's withholding of documents on grounds of privilege may also complicate the prosecution of individuals connected with that organization in later proceedings. In that matter, the application was dismissed for proper handling in the Crown Court, but, notwithstanding this conclusion, the court admonished the SFO for failing to challenge the organization's assertion of privilege to obtain the interview notes from an internal investigation of the company's executives, who were allegedly involved in the bribery scheme at-issue.

The SFO concludes its guidance by stating that "an organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code but will not be penalised by the SFO." The latter may be strictly true, but if an organization that refuses to waive privilege is likely to find it far more difficult to achieve eligibility for a DPA, it is going to feel an awful lot like it is being punished for asserting its legal rights. Surely an approach more in line with that adopted by the DOJ is more appropriate in the circumstances. After all, if an organization is willing to provide the SFO with all relevant facts and goes out of its way to do so, why should that not amount to "true cooperation" merely because it wishes to maintain a genuine claim of privilege over some material?

What remains to be seen is whether an organization must adhere to all eleven "good general practices" to be eligible for a DPA. We envisage that adherence to most of the practices will prove to be sufficient in most cases, as long as any departure from them can be justified in the circumstances.

### COOPERATING SUSPECTS

In April 2019, Ms. Osofsky hit the headlines following comments made during an interview with the Evening Standard in which she stated that she planned to tell offenders: "you can spend 20 years in jail for what you did or wear a wire and work with us."

In October 2019, during an address at the American Bar Association's Eighth Annual White Collar Crime Institute in London, she again turned to the topic. Ms. Osofsky said:

*Even if I don't have all the powers to wire someone up, we do work with partners who actually may have those abilities to do something similar... We can work with either [National Crime Agency] partners or policing partners or others if we've got an investigation that seems to merit that sort of approach.*

The SFO regularly works with the NCA, police forces, and others during investigations, so while the SFO may lack the operational expertise and experience to "wire up" a cooperating suspect, there is no legal or practical impediment to the organization pursuing such a course. However, Ms. Osofsky may have failed to fully appreciate three key differences between the U.S. and U.K. legal systems.

First, even those convicted after trial for white collar offences rarely receive prison sentences in excess of ten years. In addition, offenders will usually serve less than half of any sentence imposed and the vast majority of that time will be spent in a low-security or "open" prison. In those circumstances, the incentives for suspects to cooperate may be low, while the long-term risks to their safety and security remain high.

Second, in the U.K., it is very unusual for a cooperating suspect to be rewarded with immunity from prosecution, even though the Attorney General is able to authorize such a course. In most cases, a cooperating suspect or defendant will receive additional credit towards any sentence imposed. As the starting point for any sentence following a plea is already likely to be relatively low, any additional credit is unlikely to make any significant difference.

Third, anecdotal evidence appears to suggest that both judges and juries view the evidence of cooperating suspects and defendants with a significant degree of skepticism, and the use of such witnesses does not appear to significantly increase the chances of securing a conviction. As a result, investigators and prosecutors tend to embark on such a course only when evidence cannot be gathered by alternative methods or when pursuing those methods would lead to significant delay. Further, theoretically a cooperating suspect could obtain more direct (and convincing) evidence through the use of wires and recording devices. However, in most white collar cases, these methods of evidence gathering are impractical, because the crime is usually only discovered after-the-fact, and are therefore rarely utilized by the U.K. authorities. We are aware of corruption investigations in the U.S. where the use of a wire by an informant has been successful (e.g. the PdVSA matter), but we have not seen similar tactics in the U.K. Therefore, unless there is a shift in approach, we still expect cooperating suspects to be of relatively low value in bribery and corruption cases.

### OUTCOMES

In June 2019, FH Bertling Ltd, a freight forwarding company, was fined £850,000 for implementing a "planned and systematic"

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bribery scheme designed to secure \$20 million USD-worth of shipping contracts in connection with an oil project in Angola. At the time the company was sentenced, several employees had already received suspended terms of imprisonment for their involvement in the scheme or another that centered on oil exploration in the North Sea.

Also in June, Carole Ann Hodson was sentenced to two years' imprisonment for her part in a scheme that saw almost £300,000 paid in bribes in order to allow ALCA Fasteners Ltd, a company she owned at the time, to win contracts worth around £12 million. A confiscation order in the sum of £4,494,541 was made against her, and she was ordered to pay costs of £478,351 to the SFO. Ms. Hodson was also disqualified from acting as a company director for seven years.

In July 2019, three former executives of Sarclad Limited, a Sheffield-based steel components company, were acquitted following a trial. As we detailed in our July 2019 *Trends & Patterns*, the SFO alleged that Michael Sorby, Adrian Leek, and David Justice struck twenty-seven corrupt agreements to secure contracts that the company would not otherwise have obtained. The case was another example of the SFO concluding a DPA against a company, but being unable to secure convictions against individuals for their alleged roles in the criminal activity. [2016] 7 WLUK 220.

Also in July, Basil Al Jarah pleaded guilty to charges arising from the SFO's investigation into the activities of Unaoil, its employees, and its agents in Iraq. He will be sentenced following the conclusion of the trial against three other individuals, Ziad Akle, Paul Bond and Stephen Whiteley, which is scheduled to begin at Southwark Crown Court in January 2020. Relatedly, as we noted in the July 2019 *Trends & Patterns*, the SFO announced that it had dropped the investigation into three other Unaoil executives, who were subsequently charged and pleaded guilty in the U.S.

In November 2019, the long-running criminal proceedings against two Alstom subsidiaries and several individuals concluded with Alstom Network UK Ltd being fined £15 million and ordered to pay £1.4 million in costs. This strand of the investigation centered upon contracts to supply trams in Tunisia. While the SFO's investigation led to convictions against two Alstom subsidiaries and three individuals, the prosecutions brought also resulted in a number of acquittals. In the U.K., a number of commentators are questioning whether the outcomes merited the time and resources expended on this investigation.

Also in November, the European Bank for Reconstruction and Development (EBRD) imposed a six-year term of debarment on GE Power Sweden AB following an investigation in collaboration with the SFO. The investigation found that, from as early as 2002, representatives of Alstom Power Sweden AB, a predecessor company to GE Power Sweden, had conspired with another Alstom entity to manipulate the technical specifications for works

carried out at a Lithuanian power plant by making payments to Lithuanian government officials. The project was financed by donor funds administered by the EBRD. The debarment, which began on November 27, 2019, is the longest to have been imposed by the Bank. EBRD's Office of the Chief Compliance Officer stated it will also submit debarment of GE Power Sweden AB to the World Bank, the African Development Bank, the Asian Development Bank, and the Inter-American Development Bank.

In December 2019, following the acquittal of Cansun Güralp, Andrew Bell, and Natalie Pearce after a trial, the SFO announced that it had concluded a DPA with Güralp Systems Ltd in October 2019. The company, which produces equipment and data systems for seismological research and similar applications, accepted that the charges of conspiracy to make corrupt payments and failing to prevent bribery by its employees between 2002 and 2015 were made out, and agreed to pay a total of £2,069,861 by way of disgorgement of profits. The DPA also requires the company to cooperate fully and truthfully with the SFO, and to review and maintain its existing internal controls, policies, and procedures regarding compliance with the Bribery Act 2010. In its press release, the SFO highlighted the fact that the company appointed a new Executive Chairman in 2014, who identified the wrongdoing and ordered an internal investigation, which led to the company reporting matters to the SFO and the DOJ in 2015.

As we set out in our July 2019 *Trends & Patterns*, in May 2019, the SFO commenced criminal proceedings against Anna Machkevitch, a director of London-based ALM Services UK and the Machkevitch Foundation, for failing to produce documents to the SFO as part of its ongoing investigation against ENRC. Ms. Machkevitch, who is not a suspect in that investigation, will stand trial at Hendon Magistrates' Court in January 2020.

In November 2019, Ms. Machkevitch failed in her attempts to halt the prosecution by bringing an application for judicial review of the SFO's decision to commence the prosecution against her. In refusing her application, Mr. Justice Supperstone stated that the decision was neither disproportionate, unreasonable or "wholly out of the ordinary."

### INVESTIGATION DEVELOPMENTS

In July 2019, the SFO confirmed that it had opened an investigation into the activities of the De La Rue group and its associated persons in relation to suspected corruption in South Sudan.

The SFO's long-running investigation against ENRC and its acquisition of mineral assets in Africa continues to grab the headlines. Although the investigation began in 2013, no charges have been brought against the company, its employees, or agents to date. In November 2019, the SFO confirmed that ENRC had failed in its attempt to seek a judicial review designed to

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force the body to reinstate an independent examination of the case. In November 2018, the SFO had appointed retired High Court judge, Sir David Calvert-Smith, to carry out an independent review following demands made by ENRC. However, the review was suspended in March 2019 when ENRC filed a separate civil claim seeking more than \$90 million USD from the SFO for alleged wrongful conduct by inducing the company's former lawyers to act in breach of contract.

In December 2019, following an announcement by Glencore PLC, the commodity trading and mining company, the SFO confirmed that it is investigating suspected bribery in the conduct of business by the Glencore group of companies, its officials, employees, agents, and associated persons.

### OTHER MATTERS OF INTEREST

In December 2019, the High Court refused an application by Tesco PLC to withdraw an admission made in its defence as part of the ongoing civil proceedings brought by investors who argue that they have suffered a loss as a result of false and misleading trading statements issued by the company. In refusing

the application, Mr. Justice Supperstone relied, at least in part, on the fact that when entering into the DPA with the SFO and agreeing the terms of the Final Notice with the Financial Conduct Authority, Tesco PLC made similar admissions. The case serves as a timely reminder that reaching a settlement in one set of proceedings may well have consequences in others.

Finally, in recent editions of the *Trends & Patterns*, we have been following Zamira Hajiyeva's attempts to challenge the Unexplained Wealth Order (UWO) made against her in 2018, which requires her to explain how she funded the purchase of two London properties worth an estimated £22 million. For those unfamiliar with the case, she is the wife of the convicted former Chairman of the International Bank of Azerbaijan, who is currently serving a fifteen-year sentence for fraud and embezzlement. To date, Mrs. Hajiyeva's attempts to set aside the UWO have proved unsuccessful. However, we await the Court of Appeal's judgment following the hearing of her appeal in January 2020.

## CONTACTS

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

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