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FCPA ENFORCEMENT AND ANTI-CORRUPTION DEVELOPMENTS: Q1 2018

The first quarter of 2018 saw a flurry of declinations of FCPA prosecutions by the DOJ and the SEC, and only one FCPA corporate enforcement resolution by the DOJ and two resolutions by the SEC. This activity—or lack thereof—appears consistent with senior DOJ officials’ statements that, absent corporate misconduct that is “serious or pervasive enough” to warrant an entity-level criminal resolution, the DOJ wants “to avoid imposing penalties that disproportionately punish innocent employees, shareholders, customers, and other stakeholders” and “to reward companies that invest in strong compliance measures.”¹

Based on publicly available records, FCPA charges were brought against only one individual in the first quarter, and charges were unsealed for two individuals who were charged in August 2017. In addition, two individuals pleaded guilty to FCPA charges.

The U.S. enforcement activity level last quarter contrasted sharply with stepped-up anti-corruption efforts abroad, as foreign jurisdictions continued to implement and enforce anti-corruption laws.

Our thoughts on the most significant developments in anti-corruption and FCPA enforcement and policy during the first quarter are below.

Corporate Resolutions

Overview

In the first quarter of 2018, the DOJ and the SEC resolved a total of three corporate FCPA enforcement actions, resulting in a modest \$3.45 million in combined fines, penalties, disgorgement and pre-judgment interest, of which \$2 million was assessed by the DOJ and \$1.45 million by the SEC. These resolutions are summarized below.

In contrast, there were a number of declinations disclosed by companies in the last quarter, as at least four U.S. companies (Cobalt International Energy, Exterran, Teradata, Juniper Networks) and three

¹ Rod J. Rosenstein, Deputy Attorney General, Dep’t of Just., Deputy Attorney General Rosenstein Delivers Remarks at the 32nd Annual ABA National Institute on White Collar Crime (Mar. 2, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-32nd-annual-aba-national-institute>.

foreign companies (Core Laboratories, Sanofi, Kinross) disclosed that the DOJ and/or the SEC had declined prosecution in previously announced FCPA investigations.²

Notably, none of the DOJ declinations appear to be “declinations with disgorgement,” several of which had followed the announcement of the FCPA Pilot Program in 2016.³ It seems somewhat unlikely that this signals any intentional shift away from utilizing declinations with disgorgement, given that this form of resolution is included in the relatively new DOJ FCPA Corporate Enforcement Policy.⁴ It more likely reflects that the declinations announced in the most recent quarter related to cases that were reported prior to the Pilot Program and/or involved cases with jurisdictional, evidentiary or statute of limitations concerns, or that otherwise did not warrant a disgorgement condition.

The apparent decline in the number of enforcement actions and the total settlement amounts from recent years, along with the relatively high number of declinations, appears consistent with recent statements by Deputy Attorney General Rod J. Rosenstein suggesting that the DOJ will place less emphasis on corporate prosecutions and greater emphasis on companies’ compliance programs, along with individual prosecutions.

The SEC also has expressed continued interest in rewarding companies for their cooperation, recently endeavoring to provide clearer guidance about when it will grant cooperation credit and what the credit will be.⁵ According to Anthony Kelly, Co-Chief of the SEC’s Asset Management Unit, to obtain cooperation credit from the SEC as a general matter, parties should demonstrate conduct that allows the SEC to reach a resolution in a shorter period of time than it otherwise would have been able to do, or that allows a resolution to be reached using fewer resources than otherwise would have been required.

² Three companies announced declinations by the DOJ (Juniper Networks, Sanofi, Kinross), two companies announced declinations by the SEC (Cobalt International Energy, Core Laboratories), and two companies announced declinations by both the DOJ and the SEC (Exterran, Teradata).

³ Since the start of the FCPA Pilot Program, the DOJ has announced seven declinations with disgorgement, meaning that the company was required to disgorge ill-gotten gains to the DOJ or was credited for disgorging ill-gotten gains to the SEC as part of parallel settlements. See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2017 Year in Review (Jan. 19, 2018), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/fcpa-enforcement-and-anti-corruption-developments-2017-year-in-review?id=25839>. The DOJ’s most recent public declination letters were issued in June 2017, to Linde Group and CDM Smith.

⁴ See U.S. Attorneys’ Manual § 9-47.120.

⁵ See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Leaders of SEC Enforcement Division Discuss Priorities and Recent Developments (Feb. 28, 2018), <https://www.paulweiss.com/practices/litigation/securities-litigation/publications/leaders-of-sec-enforcement-division-discuss-priorities-and-recent-developments?id=26034>.

It is also worth noting that both of the SEC's corporate FCPA resolutions in the first quarter reflect the SEC's long-standing practice of charging companies under the accounting provisions of the FCPA even if the evidence might not sustain a charge under the FCPA's anti-bribery provisions.

Summary of 2018 Corporate Resolutions

TLI

On January 12, 2018, Transport Logistics International, Inc. ("TLI"), a Maryland-based company that provides transportation management services to the nuclear power industry, entered into a deferred prosecution agreement with the DOJ to resolve allegations that it conspired to violate the FCPA's anti-bribery provisions.⁶ TLI agreed to pay a \$2 million criminal fine.

Beginning in at least 2004 and continuing until at least 2014, TLI conspired to bribe an official at JSC Technabexport ("TENEX"), a subsidiary of Russia's State Atomic Energy Corporation. The bribes were intended to help TLI secure business advantages and contracts with TENEX.

The DOJ calculated a fine range of between \$28.5 million and \$57 million. TLI received a 25-percent reduction off the bottom of the applicable U.S. Sentencing Guidelines fine range for full cooperation, though it did not voluntarily and timely disclose the alleged conduct to the DOJ. However, TLI represented that it was unable to pay a penalty higher than \$2 million. An independent analysis conducted by the DOJ's Fraud Section and the U.S. Attorney's Office for the District of Maryland, with the assistance of a forensic accounting expert, verified the accuracy of TLI's representations, resulting in a reduction of the fine to that amount.

In approving the terms of the agreement, Judge Theodore D. Chuang of the District of Maryland cautioned that deferred prosecution agreements "should be reserved for companies that have engaged in extraordinary cooperation and have entirely rid themselves of all remnants of the prior criminal activity."⁷ He noted that TLI did not self-report and that there remained board members who were on the board during the period of the fraud. Judge Chuang warned that under the circumstances—where a high percentage of TLI's business was the same type of business that was secured through fraudulent means, and the agreement required TLI to pay a criminal penalty of less than ten percent of the amount contemplated by the U.S. Sentencing Guidelines—there was a risk that the deferred prosecution agreement "will provide insufficient deterrence to companies which otherwise would permit fraud, or fail

⁶ See Deferred Prosecution Agreement, *U.S. v. Transp. Logistics Int'l, Inc.*, No. TDC-18-0011 (D. Md. Mar. 12, 2018), <https://www.justice.gov/opa/press-release/file/1043221/download>.

⁷ Order at 2, *U.S. v. Transp. Logistics Int'l, Inc.*, No. TDC-18-0011 (D. Md. Apr. 2, 2018).

to prevent fraud, by [their] senior officials.” He nevertheless approved the agreement, finding that the court’s authority to take action other than approval of the agreement was limited.

In January, a TLI co-president was charged with, among other things, multiple counts of conspiracy to violate the FCPA and violations of the FCPA. These charges remain pending. Previously, in 2015, another TLI co-president and the Russian official pleaded guilty to related charges.

Elbit and Plaza

On March 9, 2018, Elbit Imaging Ltd., an Israeli company, and its majority-owned indirect subsidiary, Plaza Centers N.V., consented to a cease-and-desist order with the SEC to resolve allegations that they violated the FCPA’s internal accounting controls and books-and-records provisions.⁸ Without admitting or denying the SEC’s allegations, Elbit agreed to pay a \$500,000 civil penalty.

According to the SEC, in 2006 and 2011, at the direction of an unnamed senior executive at Elbit, Plaza engaged two off-shore, third-party consultants to assist in obtaining approval from the Romanian government to participate in a real estate development project in Romania. In connection with this real estate project, the SEC alleged that, between 2007 and 2012, Plaza paid the consultants approximately \$14 million. The SEC alleged that Plaza did not conduct any due diligence on either consultant and that there was no evidence that the consultants provided services relating to the transactions. The SEC highlighted the consultants’ failure to attend any meetings and inability to provide any evidence of their consulting work.

The SEC also alleged that in 2011, in connection with the sale of a portfolio of 47 real estate assets in the United States, Elbit and Plaza—at the direction of the same Elbit executive—retained a third-party agent, again without conducting any due diligence, and paid that agent approximately \$13 million in commissions after obtaining \$1.428 billion from the portfolio sale.

Kinross

On March 26, 2018, Kinross Gold Corporation, a dual-listed senior Canadian gold mining company, consented to a cease-and-desist order with the SEC to resolve allegations that it violated the FCPA’s books-and-records and internal accounting controls provisions.⁹ Without admitting or denying the SEC’s

⁸ See *In re Elbit Imaging Ltd.*, Exchange Act Release No. 82849 (Mar. 9, 2018), <https://www.sec.gov/litigation/admin/2018/34-82849.pdf>; see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Elbit Imaging Settles with SEC in First FCPA Resolution of 2018 (Mar. 15, 2018), https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/elbit-imaging-settles-with-sec-in-first-fcpa-resolution-of-2018?id=26116#_ftnref1.

⁹ See *In re Kinross Gold Corp.*, Exchange Act Release No. 82946 (Mar. 26, 2018), <https://www.sec.gov/litigation/admin/2018/34-82946.pdf>.

allegations, Kinross agreed to pay a civil penalty of \$950,000 and to report to the SEC for one year on its remediation and implementation of compliance measures.

According to the SEC, Kinross acquired two West African subsidiaries in 2010, understanding that the subsidiaries lacked anti-corruption compliance programs and internal accounting controls. It allegedly took Kinross almost three years to implement adequate controls, and, after eventually implementing such controls, Kinross failed to maintain them. Among other things, Kinross allegedly awarded a lucrative contract to a company preferred by Mauritanian government officials in contravention of Kinross's procedures, contracted with a politically-connected consultant without conducting the required due diligence, and paid vendors and consultants without ensuring the payments were consistent with policies prohibiting improper payments.

Kinross disclosed that the DOJ closed its investigation into this same conduct in November 2017.¹⁰

DOJ Compliance Developments

Under the DOJ's FCPA Corporate Enforcement Policy, when a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that the company will receive a declination unless there are aggravating circumstances.¹¹ For a company to receive full remediation credit, it must appropriately retain business records, which includes prohibiting the improper destruction of those records and "prohibiting employees from using software that generates but does not appropriately retain business records or communications."

David Johnson, Assistant Chief in the Criminal Division's Fraud Section, recently indicated that the DOJ is focusing on companies' record retention for instant messaging services—such as WhatsApp and WeChat—to which companies might not have access.¹² He urged companies to address record retention for instant messaging services now rather than waiting until an issue arises, at which point the company might need to convince the DOJ, the SEC, and possibly foreign authorities that it is not unreasonable that such records were not retained. Johnson also stated that companies should consider whether employees

¹⁰ See News Release, Kinross Gold Corp., Kinross Announces End of Regulatory Investigation of West Africa Operations (Mar. 26, 2018), <http://www.kinross.com/news-and-investors/news-releases/press-release-details/2018/Kinross-announces-end-of-regulatory-investigation-of-West-Africa-operations/default.aspx>.

¹¹ See U.S. Attorneys' Manual § 9-47.120(1), (3); see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ Issues New FCPA Corporate Enforcement Policy (Nov. 30, 2017), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/doj-issues-new-fcpa-corporate-enforcement-policy?id=25619>.

¹² See Adam Dobrik, *FCPA Prosecutor Urges Companies to Rethink Messaging Services*, GLOB. INVESTIGATIONS REV. (Mar. 8, 2018), <https://globalinvestigationsreview.com/article/jac/1166454/fcpa-prosecutor-urges-companies-to-rethink-messaging-services>.

should be permitted to use messaging services at all and, if so, under what circumstances and whether prophylactic measures are necessary.

In light of the DOJ's focus, companies may want to consider adopting explicit policies that set forth acceptable uses of these messaging services for business purposes, if any, and otherwise prohibit employees from using such instant messaging services for work purposes. Such policies can be incorporated into broader information technology and data use policies and included in employee trainings.

SEC Whistleblower Program Developments

In *Digital Realty Trust, Inc. v. Somers*, the Supreme Court unanimously held that individuals who report alleged misconduct internally, but not to the SEC, are not covered by the anti-retaliation provisions of the Dodd-Frank Act, 15 U.S.C. § 78u-6(h).¹³ This reporting requirement distinguishes the Dodd-Frank Act from the Sarbanes-Oxley Act, which provides certain protections for individuals who report alleged securities violations internally.

Prior to this decision, whistleblowers overwhelmingly reported their concerns internally before reporting them to the SEC. According to the SEC's 2017 Annual Report to Congress, approximately 83 percent of whistleblowers who received monetary awards under Dodd-Frank raised their concerns internally before reporting to the SEC. Employees who only report internally now may still seek relief under the anti-retaliation provisions of Sarbanes-Oxley, but they must meet the shorter statute of limitations and exhaust administrative remedies before seeking relief in federal court.

Digital Realty may thus discourage employee use of internal reporting systems and encourage immediate reporting to the SEC, including with respect to FCPA-related issues. By discouraging employees from utilizing internal reporting systems, *Digital Realty* may also weaken the role of corporate compliance programs, which generally encourage internal reporting as an early warning system to protect against fraud and other securities violations.

The decision does not appear to affect whistleblowers' abilities to collect awards under the SEC's Whistleblower Program.

Digital Realty serves as a reminder that, irrespective of the current level of white collar enforcement activity, companies must remain vigilant on compliance matters.

¹³ See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018); see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, U.S. Supreme Court Narrows Scope of Whistleblower Anti-Retaliation Protections (Feb. 22, 2018), <https://www.paulweiss.com/practices/litigation/white-collar-regulatory-defense/publications/us-supreme-court-narrows-scope-of-whistleblower-anti-retaliation-protections?id=26011>.

Individual Prosecutions

Based on publicly available records, FCPA charges were brought against only one individual in the first quarter, the TLI co-president charged with multiple counts of conspiracy to violate the FCPA and violations of the FCPA, as described above.

Charges also were unsealed for two individuals who were charged in August 2017.¹⁴ Both individuals, former Venezuelan officials, were charged with conspiracy to violate the FCPA in connection with allegations that they conspired to solicit bribes from vendors in order to secure business with Petroleos de Venezuela S.A. (“PdVSA”), the Venezuelan state-owned energy company.

In addition, two individuals pleaded guilty to FCPA charges brought in 2011 and 2016, respectively.¹⁵

Foreign Jurisdictions’ Anti-Corruption Enforcement Activity

Significant activity occurred abroad this quarter, as numerous foreign jurisdictions investigated and prosecuted perceived corruption.

Investigations and Prosecutions of Officials

In the first quarter of 2018, authorities in many countries throughout the world announced investigations and prosecutions of allegedly corrupt officials, and current and former government officials were convicted and sentenced in connection with corruption charges. Noteworthy examples are provided below.

Asia

In South Korea, following an almost year-long trial, in April former President Geun-hye was convicted of multiple criminal charges, including bribery, for conspiring with her confidante, Choi Soon-sil, to pressure numerous business groups to donate approximately \$70 million to two non-profit organizations

¹⁴ See Press Release, Dep’t of Just., Five Former Venezuelan Government Officials Charged in Money Laundering Scheme Involving Foreign Bribery (Feb. 12, 2018), <https://www.justice.gov/opa/pr/five-former-venezuelan-government-officials-charged-money-laundering-scheme-involving-forei-o>.

¹⁵ See Press Release, Dep’t of Just., Former Siemens Executive Pleads Guilty To Role in \$100 Million Foreign Bribery Scheme (Mar. 15, 2018), <https://www.justice.gov/opa/pr/former-siemens-executive-pleads-guilty-role-100-million-foreign-bribery-scheme>; Press Release, Dep’t of Just., New Jersey Real Estate Broker Pleads Guilty to Role in Foreign Bribery Scheme Involving \$800 Million International Real Estate Deal (Jan. 5, 2018), <https://www.justice.gov/opa/pr/new-jersey-real-estate-broker-pleads-guilty-role-foreign-bribery-scheme-involving-800-million>.

controlled by Choi, in exchange for various favors.¹⁶ President Park was sentenced to 24 years in prison and a \$17 million fine was imposed. Choi, who was convicted of receiving bribes from South Korean companies, was sentenced to 20 years' imprisonment. Shin Dong-bin, chairman of the Lotte Group, who was convicted on related corruption charges, was sentenced to two-and-a-half years in prison.¹⁷

Separately, Lee Myung-bak, the country's president from 2008 to 2013, was arrested for bribery, embezzlement and tax evasion.¹⁸ Lee allegedly received more than \$10 million in bribes from various sources and embezzled \$32 million. Lee also is accused of using his presidential power to help settle a legal case. In addition, prosecutors raided the homes and offices of two of Lee's aides, who are suspected of illegally raising campaign funds from the private sector in connection with the 2008 presidential election in which Lee was elected.

Jay Y. Lee, the de facto head of Samsung, was released from prison, after serving approximately one year, when a South Korean appellate court suspended his sentence and reduced it to two-and-a-half years.¹⁹ Lee was convicted of allegedly authorizing a payment to Choi to obtain government support for a merger between Samsung affiliates. Prosecutors are appealing to the country's highest court the decision to release Lee early.

In China, the Communist Party's Central Commission for Discipline Inspection, the party's anti-corruption watchdog, announced that Lu Wei, China's former Internet regulator, would be prosecuted for bribery.²⁰ The Party did not provide further information. Chinese prosecutors also charged Sun Zhengcai, former Chongqing Party Secretary and member of the Politburo, with bribery for accepting significant amounts of money and property during the span of his career.

¹⁶ See Choe Sang-Hun, *Park Heun-hye, South Korea's Ousted President, Gets 24 Years in Prison*, N.Y. TIMES (Apr. 6, 2018), <https://nyti.ms/2Hch68v>.

¹⁷ See Joyce Lee, *Lotte Chief and Ex-President's Friend Jailed in South Korea Scandal*, REUTERS (Feb. 13, 2018), <https://www.reuters.com/article/us-southkorea-politics/lotte-chief-and-ex-presidents-friend-jailed-in-south-korea-scandal-idUSKBN1FXoP2>.

¹⁸ See Choe Sang-Hun, *In South Korea, Another Former President Lands in Jail*, N.Y. TIMES (Mar. 22, 2018), <https://nyti.ms/2G4IdSl>.

¹⁹ See Choe Sang-Hun & Raymond Zhong, *Samsung Heir Freed, to Dismay of South Korea's Anti-Corruption Campaigners*, N.Y. TIMES (Feb. 5, 2018), <https://nyti.ms/2GOzfJA>.

²⁰ See James T. Areddy, *Former China Internet Regulator Accused of Corruption*, WALL ST. J. (Feb. 13, 2018), <https://www.wsj.com/articles/former-china-internet-regulator-accused-of-corruption-1518528434>.

Europe and the Middle East

Following a year-long investigation, in February, Israeli police recommended that Prime Minister Benjamin Netanyahu face prosecution in two corruption cases: one involving gifts for favors and another involving backroom dealings to ensure more favorable media coverage.²¹ In March, Netanyahu was questioned in a third corruption case, involving allegations that, while serving as communications minister, he provided regulatory and financial benefits to a telecommunications tycoon in exchange for positive media coverage.

In Saudi Arabia, in the wake of the purported corruption purge instigated by Crown Prince Mohammed bin Salman in 2017, witnesses reported being subjected to coercion and physical abuse.²² Allegedly, at least 17 detainees were hospitalized and one later died in custody. The Saudi government has denied the allegations of abuse. Prince Al-Waleed bin Talal, who is among the Kingdom's most influential and wealthiest businessmen, was released after more than 80 days in detention.²³ It is widely presumed that he paid an immense sum to the government to secure his release, and that others who have been released did the same.

French authorities are investigating former President Nicolas Sarkozy in connection with allegations that his 2007 election campaign received illegal financing from Muammar Gaddafi.²⁴

In Greece, eight former ministers and two former prime ministers were named in an investigation into pharmaceutical company Novartis A.G. regarding alleged payments to public officials to increase subscriptions to their products at public hospitals.²⁵

²¹ See Rory Jones, *Israeli Police Recommend Charging Netanyahu With Bribery, Fraud*, WALL ST. J. (Feb. 14, 2018), <https://www.wsj.com/articles/israeli-police-recommend-charging-netanyahu-for-bribery-fraud-1518550185>; Isabel Kershner, *Benjamin Netanyahu is Questioned in 3rd Corruption Case in Israel*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/world/middleeast/israel-benjamin-netanyahu-corruption.html>.

²² See Ben Hubbard et al., *Saudis Said to Use Coercion and Abuse to Seize Billions*, N.Y. TIMES (Mar. 11, 2018), <https://nyti.ms/2tBExpG>.

²³ See Ben Hubbard, *Billionaire Saudi Prince, Alwaleed bin Talal, Is Freed From Detention*, N.Y. TIMES (Jan. 27, 2018), <https://nyti.ms/2FktUIj>.

²⁴ See Aurelien Breeden, *Nicolas Sarkozy, Ex-President of France, Faces Corruption Charges Over Libyan Cash*, N.Y. TIMES (Mar. 21, 2018), <https://nyti.ms/2FTqQI6>.

²⁵ See Niki Kitsantonis, *Greece Approves Bribery Investigation Involving Political Elite*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/world/europe/greece-bribery-novartis-investigation.html>.

Latin America

Politicians in Latin America continue to be implicated in the fallout from the investigations into alleged corruption in the construction and oil industries.

In Brazil, an appellate court upheld the conviction of former President Luiz Inácio Lula da Silva for corruption and money laundering and extended his sentence from 10 to 12 years in prison.²⁶ Brazil's Supreme Court subsequently ruled that he must begin serving his sentence while appealing his conviction.²⁷ On April 7, Lula surrendered to authorities, likely ending his bid for a third term as president.

On March 21, Pedro Pablo Kuczynski, Peru's president, announced his resignation after being implicated in the ongoing investigation into Brazilian construction conglomerate Odebrecht S.A.²⁸ He denies wrongdoing.

In Guatemala, former President Alvaro Colom and nine former members of his cabinet (including Juan Alberto Fuentes Knight, a former Guatemalan finance minister and chairman of Oxfam International) were arrested in an ongoing corruption investigation.²⁹ In addition, former Guatemalan presidential candidate Manuel Baldizon, who is wanted in Guatemala on bribery and money laundering charges relating to the Odebrecht investigation, sought asylum in the United States after he was arrested while trying to enter the country.³⁰

²⁶ See Ernesto Londoño, *Upending Brazil's Presidential Race, Court Upholds Ex-Leader's Conviction*, N.Y. TIMES (Jan. 24, 2018), <https://nyti.ms/2FaPA9A>.

²⁷ See Manuela Andreoni et al., *Ex-President 'Lula' of Brazil Surrenders to Serve 12-Year Jail Term*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/world/americas/brazil-lula-surrenders-luiz-inacio-lula-da-silva.html>.

²⁸ See Simeon Tegel, *The Corruption Scandal That's Ensnared Not One, But Three Peruvian Presidents*, WASH. POST (Mar. 22, 2018), https://www.washingtonpost.com/world/the_americas/the-corruption-scandal-thats-ensnared-not-one-but-three-peruvian-presidents/2018/03/22/7d15a75a-2c50-11e8-8dc9-3b51e028b845_story.html?noredirect=on&utm_term=.a91a542e454c.

²⁹ See Elisabeth Malkin, *Guatemala Arrests Ex-President and His Finance Minister in Corruption Case*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/world/americas/guatemala-corruption-colom-oxfam.html>.

³⁰ See Sofia Menchu, *Guatemala Businessman, Wanted on Graft Charges, Seeks U.S. Asylum*, REUTERS (Jan. 21, 2018), <https://www.reuters.com/article/us-guatemala-corruption/guatemala-businessman-wanted-on-graft-charges-seeks-u-s-asylum-idUSKBN1FAoT2>.

Corporate Enforcement Developments

The first quarter of 2018 also saw developments in foreign jurisdictions' corporate anti-corruption enforcement.

For example, Odebrecht reached an agreement with the Guatemala Attorney General's Office to pay \$17.9 million to compensate for bribes that company executives paid a government official in 2012 in exchange for a \$300 million highway contract.³¹ The government official allegedly was paid \$17.9 million, the same amount Odebrecht will pay as compensation.

Teva Pharmaceutical Industries, an Israeli pharmaceutical company, agreed to pay a fine to Israeli authorities of approximately \$22 million.³² Teva admitted to making corrupt payments to public employees in Russia and Ukraine and improper payments in Mexico that generated more than \$200 million in profits. In 2016, Teva reached settlements with U.S. authorities in connection with the same misconduct, agreeing to pay a \$283 million criminal penalty to the DOJ and \$236 million in disgorgement to the SEC.

In February, French authorities entered into the country's first deferred prosecution agreements relating to corruption charges. These deferred prosecution agreements were with two companies (Kaeffer Wanner and Set Environnement), which had been alleged to have engaged in "passive" corruption for allegedly paying bribes. Compliance monitoring by the French Anticorruption Agency was imposed on both companies, they were required to disgorge ill-gotten profits, and one was required to pay an additional penalty.

In addition, in March, France's Supreme Court held that double jeopardy under the International Covenant on Civil and Political Rights did not prevent authorities from prosecuting a French company that entered into a plea agreement on related charges in the United States. The court found that the relevant provision of the treaty did not apply to investigations and convictions by foreign sovereigns.

³¹ See Sofia Menchu, *Guatemala Says Odebrecht Agrees to Pay \$17.9 Million Over Bribes*, REUTERS (Jan. 24, 2018), <https://www.reuters.com/article/us-guatemala-corruption/guatemala-says-odebrecht-agrees-to-pay-17-9-million-over-bribes-idUSKBN1FE09N>.

³² See Chen Ma'anit, *Teva Settles Graft Case with Israeli Authorities*, GLOBES (Jan. 15, 2018), <http://www.globes.co.il/en/article-teva-settles-graft-case-with-israeli-authorities-1001210547>; see also Joel Schectman & Natalie Grover, *Teva to Pay U.S. Government \$519 Million Over Foreign Bribery Charges*, REUTERS (Dec. 22, 2016), <https://www.reuters.com/article/us-teva-pharm-ind-probe/teva-to-pay-u-s-government-519-million-over-foreign-bribery-charges-idUSKBN14B1QL>.

Foreign Jurisdictions Enhancing Their Anti-Corruption Laws

In Argentina and Peru, new laws came into force that establish criminal liability for foreign and domestic companies. Law 27.401, which Argentina enacted in December 2017 and which came into effect in March 2018, imposes strict liability for various offenses, including active domestic bribery, transnational bribery, and participating in the offense of illicit enrichment of public officials, whether committed directly or indirectly.³³ The law also introduces deferred and non-prosecution agreements, which may be granted to companies that cooperate with the prosecuting authorities. Peru's new law, effective January 1, imposes independent criminal liability on legal persons for local and foreign bribery, with violations punishable by fine, debarment from government contracting, and dissolution.³⁴ Under the new law, corporate entities may face criminal liability for the illegal conduct of their agents or employees, provided those individuals are acting within the scope of their agency or employment and the illegal conduct is intended to provide a benefit to the corporate entity.

In March, Singapore passed legislation introducing a legal mechanism akin to U.S. deferred prosecution agreements.³⁵ The agreements are available to corporations accused of corruption, money laundering, or receipt of stolen property, and are intended to encourage companies voluntarily to disclose potential violations and to cooperate with authorities in their investigations.

Multilateral Development Bank Debarments

In the first quarter, the World Bank Group imposed 94 debarments. The World Bank Group continued to debar considerably more individuals and entities than did the other multilateral development banks. The Inter-American Development Bank imposed 21 debarments, the Asian Development Bank imposed two, and neither the European Bank for Reconstruction and Development nor the African Development Bank

³³ See Caroline Stauffer & Maximilian Heath, *Argentina Congress Passes Law to Fight Corporate Corruption*, REUTERS (Nov. 8, 2017), <https://www.reuters.com/article/us-argentina-corruption/argentina-congress-passes-law-to-fight-corporate-corruption-idUSKBN1D83AX>; Jaelyn Jaeger, *Argentina Passes Tough New Anti-Corruption Law*, COMPLIANCE WEEK (Jan. 30, 2018), <https://www.complianceweek.com/news/news-article/argentina-passes-tough-new-anti-corruption-law#.WtA5bnrvZjU>.

³⁴ See Waithera Junghae, *New Criminal Liability Law Gives Peru's Prosecutors the Tools to Tackle Corruption*, GLOB. INVESTIGATIONS REV. (Jan. 15, 2018), <https://globalinvestigationsreview.com/article/1152744/new-criminal-liability-law-gives-perus-prosecutors-the-tools-to-tackle-corruption>; Teresa Tovar, *Anti-Corruption in Peru*, GLOB. COMPLIANCE NEWS, <https://globalcompliancenews.com/anti-corruption/anti-corruption-in-peru/>.

³⁵ See Tan Tam Mei, *Deferred Prosecution Agreements Proposed to Take Companies to Task*, STRAIT TIMES (Jan. 15, 2018), <http://www.straittimes.com/singapore/deferred-prosecution-agreements-proposed-to-take-companies-to-task-shanmugam>; Selina Lum, *Amnesty for Firms: Ensuring Transparency*, STRAIT TIMES (Mar. 20, 2018), <http://www.straittimes.com/singapore/amnesty-for-firms-ensuring-transparency>.

imposed any. Only 12 of the debarments by the World Bank Group and none of the debarments by the other MDBs were based, in part or in whole, on corrupt practices.

Conclusion

While the enforcement activity of the DOJ and the SEC in the first quarter of 2018 may substantiate senior Trump administration officials' statements that they intend to move away from corporate prosecutions so as not to unfairly penalize innocent employees, stakeholders, and customers, the data sample is too small as of now to reach that conclusion with certainty.

We will watch these developments with interest and look forward to providing you with further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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