



# FCPA Enforcement and Anti-Corruption Developments

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2018 YEAR IN REVIEW

January 17, 2019

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## Introduction

FCPA enforcement activity remained robust in 2018. The DOJ and the SEC assessed a combined total of almost \$1 billion in corporate penalties in FCPA cases, and foreign authorities assessed another nearly \$1 billion in those cases. While the number of corporate FCPA enforcement actions resolved this year by the DOJ remained consistent with the number of resolutions in 2017, the number of actions resolved by the SEC doubled from that in 2017. The number of declinations issued by the DOJ and the SEC during the year remained comparable with the number announced last year.

Similarly, the number of individual prosecutions announced by the DOJ and the SEC was consistent with recent years, though the DOJ announced significantly fewer prosecutions under the FCPA than it did in 2017, which was an unusually active year for such prosecutions. Notably, the DOJ also brought a number of non-FCPA charges against individuals—including both officials and facilitators—in international corruption cases.

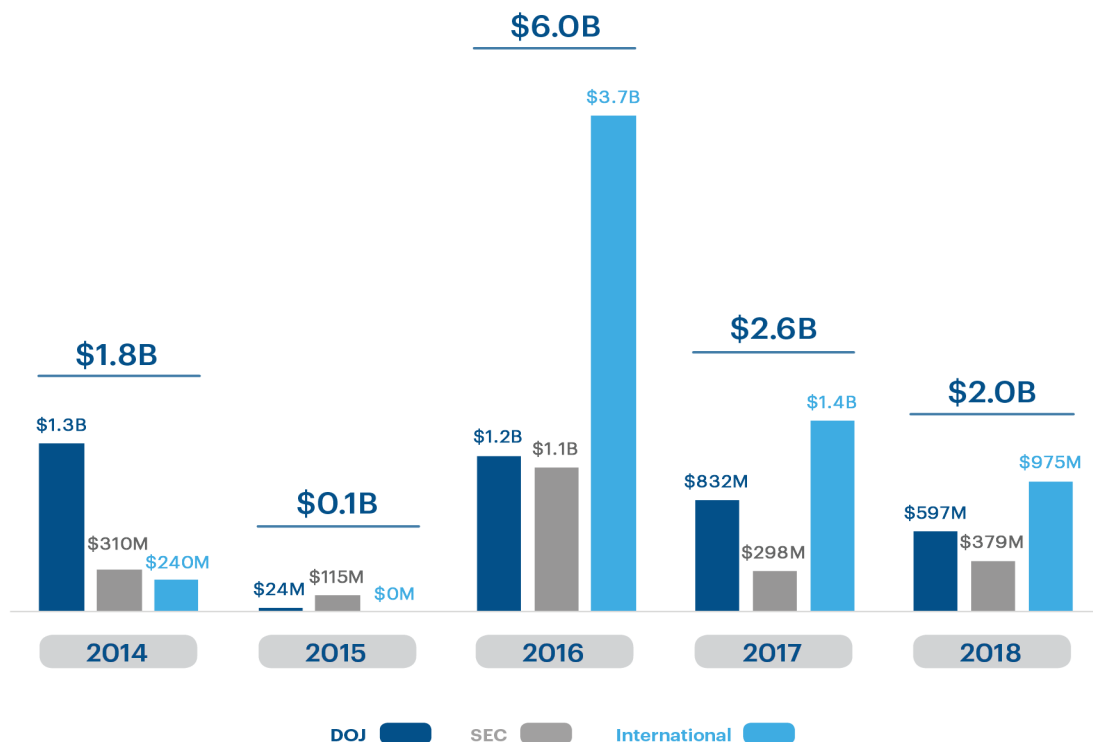
The DOJ also announced this year several new policies that outlined the Trump administration's enforcement priorities, some of which appear intended to rein in the more aggressive policies of prior administrations. These new policies, for the most part, seem consistent with the Trump administration's deregulatory and business-friendly agenda, though it is too early to evaluate the effect of these policies on FCPA enforcement.

As in 2017, cooperation between the U.S. and foreign enforcement authorities remained a key feature of FCPA enforcement. Foreign authorities also aggressively prosecuted high-level officials within their own borders, and several foreign jurisdictions enhanced their anti-corruption laws.

Our reflections on the year's most significant developments in anti-corruption and FCPA enforcement and policy are below.

## Corporate Enforcement Overview

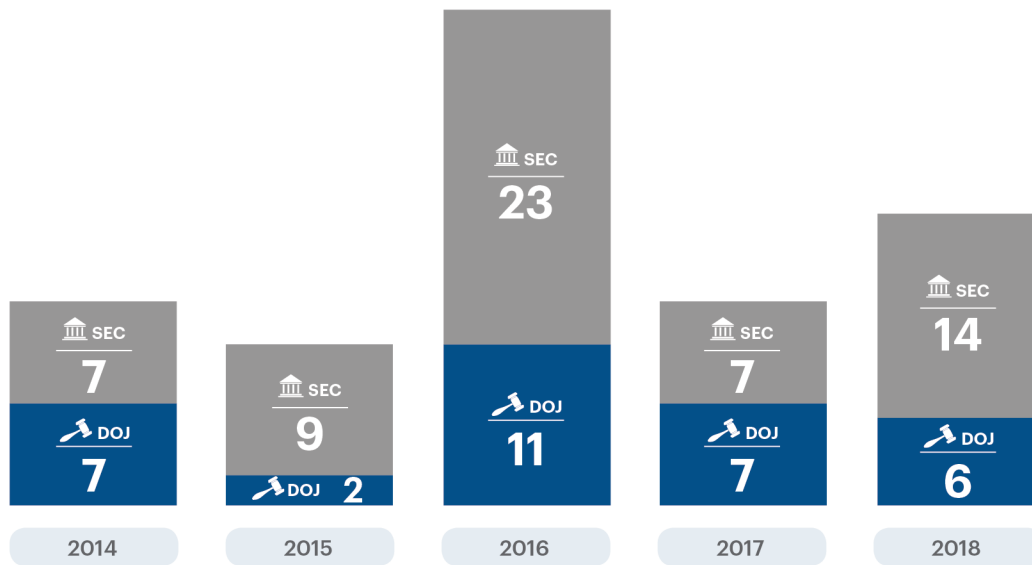
In 2018, the DOJ and the SEC resolved a combined 20 enforcement actions against business entities, resulting in almost \$1 billion in fines, penalties, disgorgement and pre-judgment interest, of which \$597.2 million was assessed by the DOJ and \$378.7 million by the SEC.<sup>1</sup> Foreign authorities assessed another \$975.3 million in penalties in connection with U.S. enforcement actions. The three largest settlements were with foreign companies.



FCPA CORPORATE ENFORCEMENT ACTION PENALTIES 2014-2018

<sup>1</sup> Penalty amounts account for offsets between the DOJ and the SEC, and between U.S. and foreign authorities.

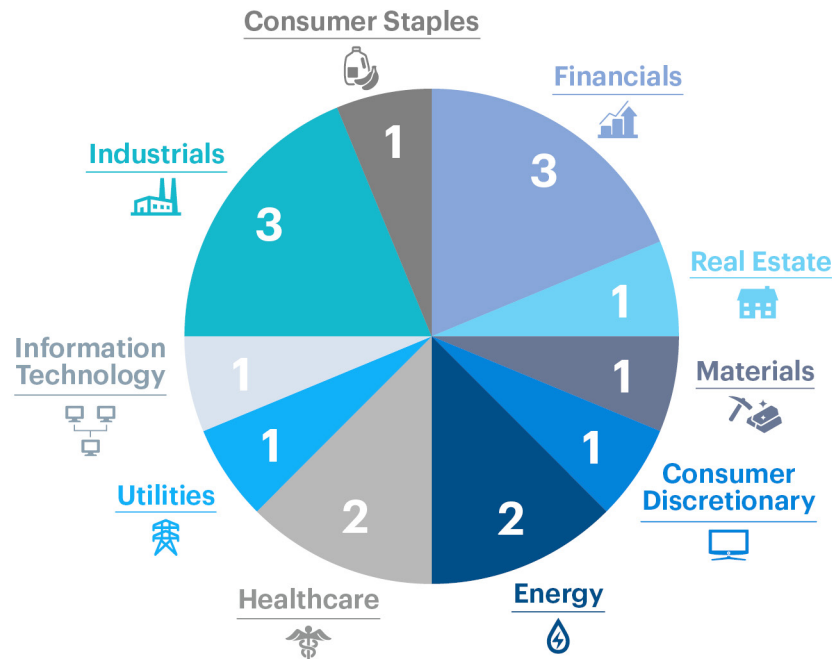
The DOJ resolved six and the SEC resolved 14 corporate enforcement actions in 2018.<sup>2</sup> The DOJ total is generally consistent with recent years, setting aside the high of 2016. There was a significant uptick in the SEC total, with twice as many resolutions as last year, although still trailing the large number of resolutions in 2016.



FCPA CORPORATE ENFORCEMENT ACTION RESOLUTIONS 2014-2018

<sup>2</sup> Enforcement actions were counted based on the year they were announced. See *Related Enforcement Actions*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/criminal-fraud/related-enforcement-actions>; *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>. Resolutions announced on the same day by the same enforcement agency against corporate affiliates were counted as one resolution (e.g., Société Générale S.A. ("Société Générale") and SGA Société Générale Acceptance N.V. ("SGA N.V.")).

The DOJ and the SEC entered into corporate resolutions with companies across a variety of industries. U.S. authorities were most active in the financials and industrials sectors.<sup>3</sup>



2018 FCPA CORPORATE ENFORCEMENT ACTION RESOLUTIONS BY INDUSTRY

<sup>3</sup> Industries were defined according to the sector classifications set by S&P Global Market Intelligence, pursuant to the Global Industry Classification Standard. See *Companies, Assets and Profiles*, S&P GLOBAL (2019), <https://platform.mi.spglobal.com/web/client?auth=inherit#dashboard>; S&P GLOBAL, GLOBAL INDUSTRY CLASSIFICATION STANDARD (2018), [https://www.spglobal.com/marketintelligence/en/documents/112727-gics-mapbook\\_2018\\_v3\\_letter\\_digitalspreads.pdf](https://www.spglobal.com/marketintelligence/en/documents/112727-gics-mapbook_2018_v3_letter_digitalspreads.pdf). Resolutions announced on the same day against corporate affiliates were counted as one resolution, irrespective of the enforcement agency (e.g., Credit Suisse Group AG and Credit Suisse Hong Kong Ltd.).

A world map with a light gray background. The map highlights specific regions in light blue. Overlaid on the map are 21 blue location pins, each containing a white number. The numbers represent the count of alleged misconduct incidents at each location. The highest count is 5, located in East Asia. Other counts include 3 in South America and 3 in South Asia. Most other locations have counts of 1 or 2. A legend at the bottom center shows a blue pin icon followed by the text 'Location of the Alleged Misconduct'.

Region	Count
East Asia	5
South America	3
South Asia	3
Europe (various locations)	2
North America	1
Africa (various locations)	1
Asia (various locations)	1
Oceania	1

## DOJ Corporate Enforcement

Pursuant to the FCPA Corporate Enforcement Policy,<sup>4</sup> the DOJ issued four public declination letters in 2018. Three of these letters specified that the companies receiving the declinations (Dun & Bradstreet Corp., Insurance Corporation of Barbados Ltd., Polycom, Inc.) were required to disgorge all ill-gotten gains, whereas the letter to the fourth company (Güralp Systems Ltd.) did not address disgorgement.<sup>5</sup> Güralp, a

<sup>5</sup> See Letter from Craig Carpentino, U.S. Att’y for D.N.J., and Sandra Moser, Acting Chief, U.S. Dep’t of Justice Crim. Div. Fraud Sec., to Peter Spivack (Apr. 23, 2018), <https://www.justice.gov/criminal-fraud/file/1055401/download> (Dun & Bradstreet Corp.); Letter from Richard Donoghue, U.S. Att’y for E.D.N.Y., and Sandra Moser to Adam Siegel (Aug. 23, 2018),

U.K. company with its principal place of business in the United Kingdom, may have received a declination without disgorgement, at least in part, because the DOJ faced jurisdictional obstacles under the FCPA and because Güralp committed to accepting responsibility with the U.K.'s Serious Fraud Office, which was conducting a parallel investigation of the same conduct. All seven of the public declination letters previously issued pursuant to the 2016 FCPA Pilot Program, the predecessor to the FCPA Corporate Enforcement Policy, had stated that the companies were required to disgorge ill-gotten gains to the DOJ or that the DOJ had credited the company's disgorgement of ill-gotten gains to the SEC as part of parallel settlements.<sup>6</sup>

The DOJ also apparently closed its investigations, without issuing public declination letters, into at least nine companies that had been under investigation for potential corruption offenses (Juniper Networks, Teradata, Exterran, Sanofi, United Technologies Corp., Transocean Ltd., Archrock, Inc., Sinovac Biotech Ltd., Ensco plc), based on the companies' public announcements.<sup>7</sup> The bases for these decisions are not known.

### *New DOJ Policies Affecting Corporate Enforcement*

In 2018, the DOJ announced a number of policies affecting FCPA corporate enforcement, including a new policy to coordinate the imposition of corporate penalties to avoid "piling on" penalties, changes to the DOJ's existing policies for granting companies credit for cooperating with criminal investigations, new guidance for prosecutors in determining whether to impose independent compliance monitors, and a new initiative to counter perceived national security threats from China. Although it is too early to evaluate the effect of these policies on FCPA enforcement, these policies appear consistent with the Trump administration's deregulatory and business-friendly agenda. These policies seem intended to lessen the severity and costs of corporate investigations and to rein in some of the more aggressive aspects of policies announced by prior administrations, such as certain of the stringent requirements imposed on companies to qualify for cooperation credit under the Yates Memo.

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<https://www.justice.gov/criminal-fraud/page/file/1089626/download> (Ins. Corp. of Barbados Ltd.); Letter from Sandra Moser to Caz Hashemi and Rohan Virginkar (Dec. 20, 2018), <https://www.justice.gov/criminal-fraud/file/1122966/download> (Polycom, Inc.); Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice Crim. Div. FCPA Unit, to Matthew Reinhard (Aug. 20, 2018), <https://www.justice.gov/criminal-fraud/page/file/1088621/download> (Güralp Sys. Ltd.).

<sup>6</sup> See *Declinations*, U.S. DEP'T OF JUSTICE (last updated Dec. 26, 2018), <https://www.justice.gov/criminal-fraud/pilot-program/declinations>.

<sup>7</sup> Closures of investigations were counted based on the year in which the U.S. authority appears to have closed the investigation, irrespective of the year in which the company made its disclosure, a change in methodology from our Q1 2018 report.



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*Policy to Coordinate Corporate Penalties to Avoid “Piling On”*

On May 9, Deputy Attorney General Rod J. Rosenstein announced a new policy to coordinate the imposition of corporate penalties in cases where more than one regulator or law enforcement authority is investigating the same conduct.<sup>8</sup>

In a speech announcing the new policy, DAG Rosenstein referred to the “piling on” of fines and penalties by multiple regulators and law enforcement agencies “in relation to investigations of the same misconduct.”<sup>9</sup> DAG Rosenstein noted that the “aim” of the new policy “is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties.” Specifically, the new policy requires DOJ attorneys to “coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture against [a] company,” and further instructs DOJ personnel to “endeavor, as appropriate, to . . . consider the amount of fines, penalties and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.”<sup>10</sup>

In his speech, DAG Rosenstein identified four key components of the new policy:

- The reaffirmation of the principle that “the federal government’s criminal enforcement authority should not be used against . . . compan[ies] for purposes unrelated to the investigation and prosecution of a possible crime,” including using “the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case”;
- An explicit direction to different components of the DOJ to coordinate with one another when seeking to resolve cases involving the same misconduct in order to achieve an “equitable” result;
- An invitation to DOJ attorneys that, when possible, they coordinate with other federal, state, local, and foreign enforcement authorities in resolving cases involving the same misconduct; and
- The identification of relevant factors (including the egregiousness of a company’s misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company’s disclosures and cooperation) for DOJ attorneys to consider when evaluating whether multiple penalties serve the interests of justice.<sup>11</sup>

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<sup>8</sup> See Rod J. Rosenstein, U.S. Deputy Att’y Gen., Dep’t of Justice, Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018) (hereinafter, “Rosenstein ‘Piling On’ Remarks”), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>; Memorandum from Rod J. Rosenstein, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Att’ys, (May 9, 2018) (hereinafter, “DOJ ‘Piling On’ Policy”), <https://www.justice.gov/opa/speech/file/1061186/download>; see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ Issues New Policy on Coordination of Corporate Penalties to Address “Piling On” (May 10, 2018), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/doj-issues-new-policy-on-coordination-of-corporate-penalties-to-address-piling-on?id=26402>.

<sup>9</sup> Rosenstein “Piling On” Remarks, *supra*.

<sup>10</sup> DOJ “Piling On” Policy, *supra*.

<sup>11</sup> Rosenstein “Piling On” Remarks, *supra*.

How this new policy will affect the size of FCPA corporate penalties remains to be seen. Although the policy requires that DOJ attorneys coordinate with each other and with other regulators, and “evaluate” certain factors, it does not set forth any concrete guidance on the extent of “credit” to be given for fines paid to other regulators in other jurisdictions. The policy also allows for consideration of subjective criteria, such as the “egregiousness of a company’s misconduct,” which could have an impact on its practical application.

Though the DOJ appears to have resolved the Société Générale, Legg Mason, and Petróleo Brasileiro S.A. – Petrobras (“Petrobras”) investigations under this new policy,<sup>12</sup> the DOJ has not detailed how those investigations were impacted by the policy. Nevertheless, these resolutions suggest that, at least in large cases, the DOJ may narrowly construe the policy to require partial offsetting of penalties assessed by other authorities, but not to require the DOJ to forego assessing or collecting such penalties altogether.

### *Standards for Corporate Cooperation*

On November 29, DAG Rosenstein announced significant changes to the DOJ’s policies for granting companies credit for cooperating with criminal investigations.<sup>13</sup> The policy changes allow companies to receive cooperation credit when they identify “every individual who was substantially involved in or responsible for the criminal misconduct” at issue,<sup>14</sup> whereas prior DOJ policy, set forth in the Yates Memo, had stated that companies could receive credit only by both “identify[ing] all individuals” involved in the misconduct and by “completely disclos[ing]” to the DOJ “all relevant facts about individual misconduct.”<sup>15</sup>

According to DAG Rosenstein, the changes under the new policy were made so investigations will “not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted.”<sup>16</sup> DAG Rosenstein emphasized, however, that a company “must identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it wants to earn any credit for cooperat[ion].”

<sup>12</sup> But see Henry Engler, *SocGen’s \$1.3 Billion U.S. Settlement Challenges DOJ Vow to Avoid ‘Piling On’*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/bc-finreg-socgen-doj-piling-on/socgens-13-billion-us-settlement-challenges-doj-vow-to-avoid-piling-on-idUSKBN1O52E7>.

<sup>13</sup> See Rod J. Rosenstein, Deputy Att’y Gen., U.S. Dep’t of Justice, Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018) (hereinafter, “Rosenstein Cooperation Remarks”), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-o>; U.S. Dep’t of Justice, Justice Manual, § 9-28.700 (revised Nov. 2018) (hereinafter, “Justice Manual”), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>; see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ Announces New Standards for Corporate Cooperation (Dec. 5, 2018), <https://www.paulweiss.com/practices/litigation/white-collar-regulatory-defense/publications/doj-announces-new-standards-for-corporate-cooperation?id=27914>.

<sup>14</sup> Rosenstein Cooperation Remarks, *supra*.

<sup>15</sup> See Memorandum from Sally Q. Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & All U.S. Attorneys (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

<sup>16</sup> Rosenstein Cooperation Remarks, *supra*.

The new policy also provides that a company may be eligible for cooperation credit if it is unable to identify all individuals or provide complete factual information despite good faith efforts to do so.<sup>17</sup> For example, the new policy recognizes that “there may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government.” When such circumstances exist, the company “will bear the burden of explaining the restrictions it is facing to the prosecutor.” In addition, the new policy encourages prosecutors to ensure that companies and their counsel do not “exaggerate, or otherwise misrepresent the behavior or role of any individual or group of individuals.”

### *Guidance for Imposing Compliance Monitors*

On October 12, Brian A. Benczkowski, the Assistant Attorney General for the Criminal Division, announced new guidance (the “Benczkowski Memorandum”) setting forth a “pragmatic approach to monitorships,” highlighting factors that prosecutors should consider in determining whether to impose an independent compliance monitor to oversee corporate remediation efforts as part of a resolution with the Criminal Division.<sup>18</sup> Benczkowski also announced that the Criminal Division will no longer rely on a single compliance counsel attached to the Fraud Section for compliance expertise, but instead will develop targeted training programs for prosecutors in the Criminal Division and will hire attorneys with experience developing and testing corporate compliance programs, in order to create “a workforce better steeped in compliance issues across the board.”

The Benczkowski Memorandum elaborates on specific factors to be weighed by the Criminal Division in assessing whether to appoint a monitor. In particular, the Benczkowski Memorandum underscores the possibility that a company’s remediation efforts—including enhanced compliance policies and programs—may obviate the need to impose an independent monitor under certain circumstances. The new guidance also requires prosecutors to weigh the benefits of appointing a monitor against the potential costs. This includes, among other things, considering the projected monetary costs to the business organization and whether the proposed scope of a monitor’s role is appropriately tailored to avoid unnecessary burdens to the business’s operations. The new guidance states that the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens.

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<sup>17</sup> Justice Manual, § 9-28.700.

<sup>18</sup> See Brian A. Benczkowski, Assistant Att’y Gen., U.S. Dep’t of Justice Crim. Div., Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018) (hereinafter, “Benczkowski Remarks”), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program>; Memorandum from Brian A. Benczkowski, Assistant Att’y Gen., U.S. Dep’t of Justice Crim. Div., to All Criminal Division Personnel (Oct. 11, 2018) (hereinafter, “Benczkowski Memorandum”), <https://www.justice.gov/criminal-fraud/file/1100366/download>; see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ Announces New Guidance for Imposing Compliance Monitors in Criminal Division Matters (Oct. 17, 2018), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/doj-announces-new-guidance-for-imposing-compliance-monitors-in-criminal-division-matters?id=27647>.

By emphasizing the limited circumstances in which the appointment of a monitor is appropriate, this guidance provides a framework for companies and their counsel to advocate against the appointment of a compliance monitor in Criminal Division and potentially other DOJ cases.

### *China Initiative*

On November 1, then-Attorney General Jeff Sessions announced a new “China Initiative,” to counter perceived national security threats to the United States from China.<sup>19</sup> The China Initiative specifies ten goals, including identifying FCPA cases involving Chinese companies that compete with American businesses. The Initiative will be led by Assistant Attorney General for National Security John C. Demers and a team composed of a senior FBI executive, five U.S. Attorneys, and other DOJ leaders and officials, including Assistant Attorney General Benczkowski. The Initiative appears to be the first overt effort to employ FCPA enforcement as a tool to achieve political goals with respect to a particular country and on its face represents a sharp diversion from the DOJ’s historically apolitical approach.

In announcing the Initiative, then-Attorney General Sessions stated that China “must decide whether it wants to be a trusted partner on the world stage—or whether it wants to be known around the world as a dishonest regime running a corrupt economy.”<sup>20</sup> Assistant Attorney General Benczkowski explained: “We know that Chinese companies and individuals also have bribed government officials in other countries in order to win contracts. The Criminal Division is committed to fully enforcing the Foreign Corrupt Practices Act. Bringing these offenders to justice will help create a level playing field for American companies in foreign markets.”<sup>21</sup>

### **SEC Corporate Enforcement**

In 2018, the SEC resolved 14 corporate enforcement actions and assessed \$378.7 million in penalties. As noted above, the number of SEC resolutions was higher than in any other year during the past five years, with the exception of 2016. Steven Peikin, co-director of the Division of Enforcement, has affirmed that “[v]igorous enforcement of the FCPA remains a high priority for the SEC.”<sup>22</sup>

In addition, the SEC apparently closed its investigations into at least nine companies that had been under investigation for potential corruption offenses (Cobalt International Energy, Core Laboratories, Teradata,

<sup>19</sup> See Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, Remarks Announcing New Initiative to Combat Chinese Economic Espionage (Nov. 1, 2018) (hereinafter, “Sessions Remarks”), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage>; Attorney General Jeff Session[s]’s China Initiative Fact Sheet, U.S. Dep’t of Justice (Nov. 1, 2018), <https://www.justice.gov/opa/speech/file/1107256/download>.

<sup>20</sup> Sessions Remarks, *supra*.

<sup>21</sup> See Brian A. Benczkowski, Assistant Att’y Gen., U.S. Dep’t of Justice, Remarks Regarding Chinese Economic Espionage (Nov. 1, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-criminal-division-delivers-remarks-regarding>.

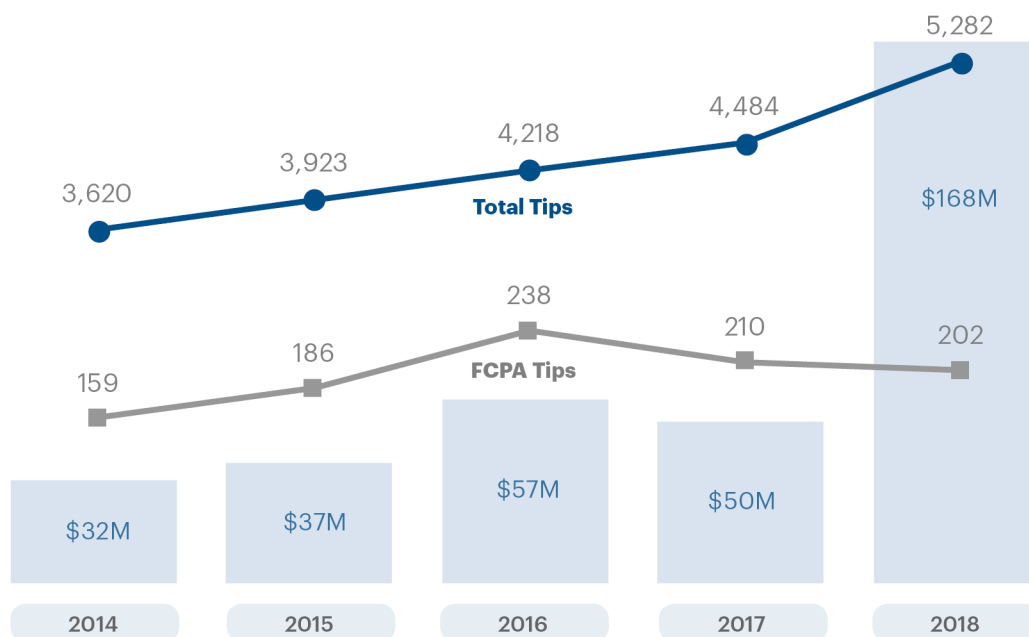
<sup>22</sup> Steven Peikin, Co-Director, U.S. Sec. & Exch. Comm’n Enft Div., Remarks at the IOSCO/PIFS-Harvard Law School Global Certificate Program for Regulators of Securities Markets (Dec. 3, 2018) (hereinafter, “Peikin Remarks”), <https://www.sec.gov/news/speech/speech-peikin-120318>.

Exterran, Transocean Ltd., Archrock, Inc., Sinovac Biotech Ltd., Ensco plc, ING Groep NV), based on the companies' public announcements. As with the DOJ's decisions to close various investigations, it is difficult to draw conclusions from these decisions, including whether there was conduct sufficient to support an SEC action.

### **SEC Whistleblower Program**

In fiscal year 2018, the SEC received the highest number of whistleblower tips and paid the highest amount in awards since the start of the whistleblower program in 2011.<sup>23</sup> The SEC received 5,282 tips, 798 more than in 2017, which represents the highest year-over-year increase since the start of the program. The SEC issued awards totaling more than \$168 million to 13 whistleblowers. This high total reflects that two of the SEC's largest awards occurred in 2018, including an award to three individuals totaling \$83 million and another award to two individuals totaling nearly \$54 million. Neither of these awards were in FCPA cases.

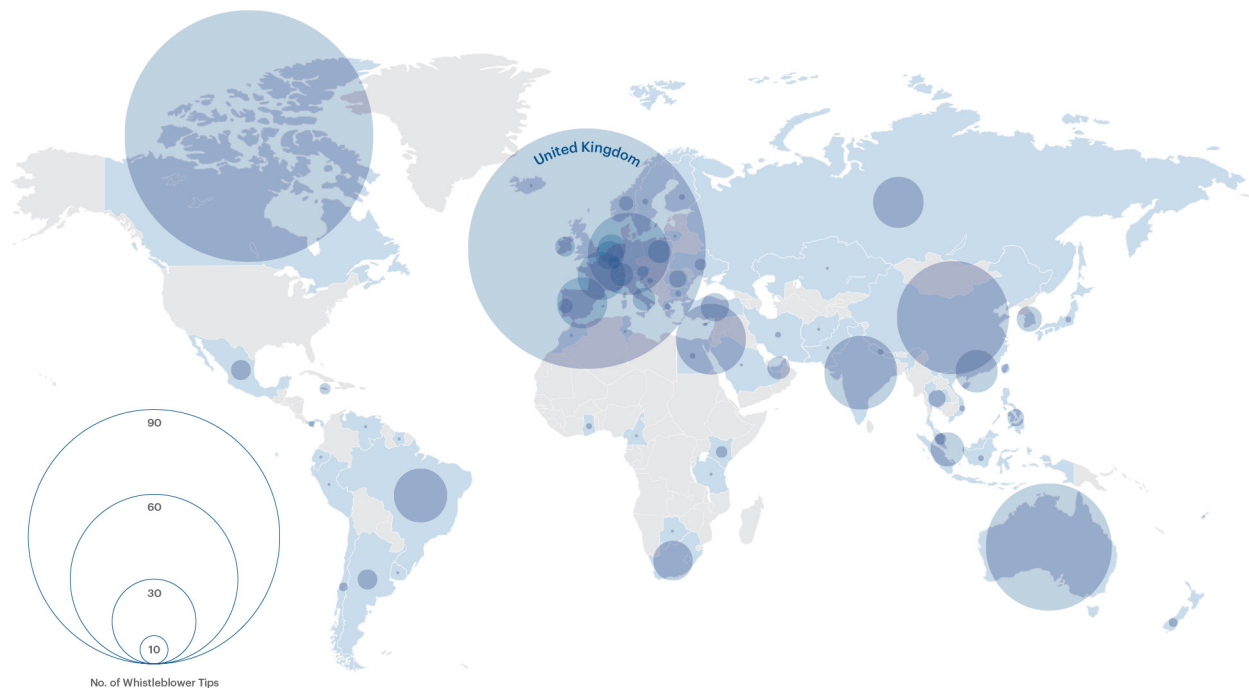
Although the SEC received more whistleblower tips in 2018 than in any previous year, the number of FCPA-related tips declined to 202, from 210 in 2017. This was the second year in a row that FCPA-related tips declined.



SEC WHISTLEBLOWER TIPS AND TOTAL WHISTLEBLOWER AWARDS 2014-2018

<sup>23</sup> See U.S. SEC. & EXCH. COMM'N, 2018 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM (Nov. 15, 2018), <https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf>. As stated in the SEC's report, statistics regarding whistleblower tips are current through the end of its fiscal year on September 30, 2018.

The map below shows the geographic distribution of whistleblower tips from foreign countries in 2018.<sup>24</sup> The SEC received tips from 73 countries. The largest number of tips came from the United States, Canada, the United Kingdom, and Australia. The large number of countries from which tips emanated continues to suggest, as it has in recent years, that contacting the SEC's Whistleblower Program has become a more well-known and accepted practice internationally.

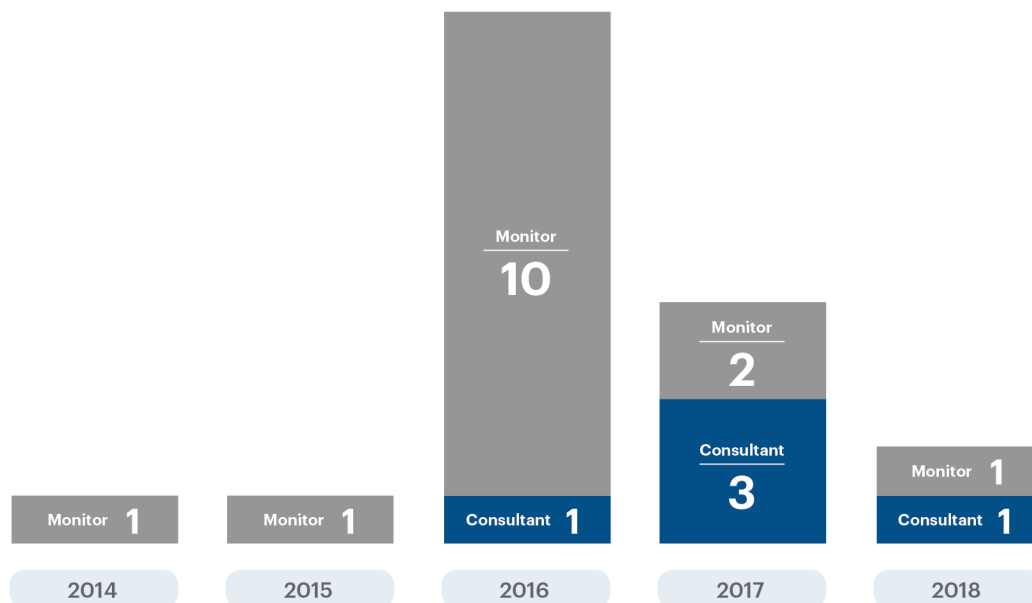


2018 FCPA SEC WHISTLEBLOWER TIPS — WORLDWIDE

<sup>24</sup> This map does not depict the 3,306 tips from the United States and its territories.

## Corporate Compliance

U.S. authorities imposed only one compliance monitor and one compliance consultant in FCPA cases during the past year, as reflected in the chart below.<sup>25</sup> The DOJ imposed one monitor (Panasonic Avionics Corp. (“PAC”)) as part of a deferred prosecution agreement and no consultants, while the SEC imposed one consultant (Stryker Corp.) and no monitors. In declining to impose monitors and consultants, U.S. authorities noted in multiple resolutions that the companies at issue (*e.g.*, Société Générale, Petrobras) were subject to monitoring by foreign authorities, a rationale which appears to be an offshoot of the DOJ’s “piling on” policy.<sup>26</sup>



COMPLIANCE OVERSIGHT IN FCPA CORPORATE ENFORCEMENT RESOLUTIONS 2014-2018

As in prior years, the DOJ has emphasized the importance of strong corporate compliance measures. For example, DAG Rosenstein in March explained that the DOJ “want[s] to reward companies that invest in

<sup>25</sup> Monitors and consultants imposed in corporate resolutions are counted based on a variety of considerations. Where the resolution involves both a parent and a subsidiary and/or both the DOJ and the SEC, whether more than one monitor/consultant is counted depends upon whether one individual appears to be serving in multiple capacities or multiple individuals appear to be serving in different capacities. This analysis is based upon the corporate resolution documents and, if necessary, third-party resources.

<sup>26</sup> See, *e.g.*, John P. Cronan, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice Crim. Div., Remarks at the 3rd Annual GIR Live DC Fall Event (Oct. 25, 2018), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-1>.



strong compliance measures.”<sup>27</sup> The DOJ’s limited use of compliance monitors and consultants in corporate resolutions during the two years of the Trump administration is consistent with such statements, as well as with both the FCPA Corporate Enforcement Policy, which provides that the Fraud Section generally will not require the appointment of a monitor if a company has implemented an effective compliance program at the time of the resolution, and the Benczkowski Memorandum, which emphasizes that a company’s remediation efforts may obviate the need to impose an independent monitor under certain circumstances.

## Review of Select Corporate Resolutions

In 2018, the DOJ and the SEC resolved a combined 20 corporate enforcement actions. We summarize below select resolutions from the past year.

### *PAC and Panasonic*

On April 29, the DOJ entered into a deferred prosecution agreement with California-based PAC, a wholly-owned subsidiary of Panasonic Corporation (“Panasonic”), in connection with a one-count criminal information charging PAC with violations of the internal accounting controls and books-and-records provisions of the FCPA.<sup>28</sup> To resolve the matter, PAC, which manufactures in-flight entertainment systems, agreed to pay a criminal penalty of approximately \$137 million and accepted the imposition of an independent compliance monitor for two years. In a related proceeding concerning the same conduct, Panasonic consented to a cease-and-desist order with the SEC and agreed to pay approximately \$143 million in disgorgement, including prejudgment interest, to settle allegations of violations of the anti-bribery, books-and-records, and internal accounting controls provisions of the FCPA and the anti-fraud provisions of the securities laws.<sup>29</sup> The combined amount of U.S. criminal and regulatory penalties to be paid exceeds \$280 million.

PAC admitted that, between 2007 and 2013, employees, including senior executives, retained as a consultant a foreign official, who was involved in negotiating a lucrative contract amendment with PAC on behalf of a state-owned Middle Eastern airline, and a consultant for a domestic airline, who obtained confidential, non-public business information for PAC. Payments to these individuals were falsely recorded

<sup>27</sup> Rod J. Rosenstein, Deputy Att’y Gen., U.S. Dep’t of Justice, 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>.

<sup>28</sup> See Deferred Prosecution Agreement, *U.S. v. Panasonic Avionics Corp.*, No. 18-CR-00118 (D.D.C. Apr. 30, 2018); Press Release, U.S. Dep’t of Justice, Panasonic Avionics Corporation Agrees to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Charges (Apr. 30, 2018), <https://www.justice.gov/opa/pr/panasonic-avionics-corporation-agrees-pay-137-million-resolve-foreign-corrupt-practices-act>; see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Panasonic Reaches Global Settlement with DOJ and SEC Over FCPA Violations (May 8, 2018), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/panasonic-reaches-global-settlement-with-doj-and-sec-over-fcpa-violations?id=26393>.

<sup>29</sup> See In the Matter of Panasonic Corp., Exchange Act Release No. 83128 (Apr. 30, 2018), <https://www.sec.gov/litigation/admin/2018/34-83128.pdf>.



as legitimate consulting services in Panasonic's books and records. PAC also used sales agents that did not meet the company's diligence requirements and recognized revenue prematurely.

According to the charging documents, PAC's internal accounting controls were not reasonably designed to ensure that funds paid to purported consultants were used in accordance with the law and were properly recorded in PAC's, and ultimately Panasonic's, books and records.<sup>30</sup> Between 2007 and 2013, PAC paid a former employee now working as a consultant to one of its largest American airline customers \$825,000 in exchange for non-public information regarding the American airline. The former employee also evaluated bids submitted by PAC and other vendors for contracts to be awarded by the airline customer. Between 2008 and 2013, PAC earned over \$22 million in profits attributable to business from the American airline customer on three different programs in which the former employee had some involvement.

### *Société Générale/SGA N.V. and Legg Mason*

On June 4, the DOJ announced a pair of FCPA resolutions, one involving Paris-based Société Générale and its wholly-owned subsidiary, SGA N.V., and the other involving Maryland-based Legg Mason, Inc.<sup>31</sup> In August, Legg Mason entered into a separate resolution with the SEC.<sup>32</sup> The various resolutions related to the same scheme to bribe Libyan government officials, and the Société Générale resolution also covered other charges.

Société Générale and SGA N.V. agreed to pay over \$860 million in penalties to resolve criminal charges in the United States and France in connection with charges of bribery and interest rate manipulation. Of the penalties assessed, \$585 million related to the bribery charges—with the DOJ crediting half the amount (over \$292 million) to Société Générale for payments the company will make to the Parquet National Financier (the "PNF"), the French financial prosecutorial authority—and \$275 million related to the interest rate manipulation charges.<sup>33</sup> Société Générale agreed to enter into a three-year deferred prosecution agreement with the DOJ to resolve charges of conspiracy to violate the anti-bribery provisions of the FCPA and transmission of false commodities reports. Despite the large penalty, the DOJ did not require Société Générale to retain an independent monitor, reportedly because of Société Générale's substantial

<sup>30</sup> See Deferred Prosecution Agreement at A-8, *U.S. v. Panasonic Avionics Corp.*, No. 18-CR-00118 (D.D.C. Apr. 30, 2018).

<sup>31</sup> See Deferred Prosecution Agreement, *U.S. v. Société Générale S.A.*, No. 18-CR-253 (E.D.N.Y. June 5, 2018); Press Release, U.S. Dep't of Justice, Société Générale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018); Plea Agreement, *U.S. v. SGA Société Générale Acceptance, N.V.*, No. 18-CR-274 (E.D.N.Y. June 5, 2018); Press Release, U.S. Dep't of Justice, Legg Mason Inc. Agrees to Pay \$64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials (June 4, 2018); see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Société Générale and Legg Mason to Pay Nearly \$650 Million to Resolve DOJ Investigation of Libyan Bribery Scheme (June 7, 2018).

<sup>32</sup> See In the Matter of Legg Mason, Inc., Exchange Act Release No. 83948 (Aug. 27, 2018), <https://www.sec.gov/litigation/admin/2018/34-83948.pdf>.

<sup>33</sup> In addition to the criminal penalties, Société Générale will pay \$475 million in regulatory penalties and disgorgement to the U.S. Commodity Futures Trading Commission ("CFTC") in connection with the interest rate manipulation charges.

cooperation with the DOJ, its remediation efforts, and the fact that it is subject to ongoing monitoring by France's anti-corruption authority.

SGA N.V. entered a guilty plea on June 5 to the charge of conspiracy to violate the FCPA's anti-bribery provisions.

Investment management firm Legg Mason entered into a three-year non-prosecution agreement with the DOJ and agreed to pay \$64.2 million to resolve the DOJ's investigation into FCPA violations in connection with Legg Mason's participation in the same Libyan bribery scheme. The \$64.2 million payment includes a penalty of \$32.6 million and disgorgement of \$31.6 million, which will be credited against disgorgement paid to other law enforcement authorities—seemingly including the SEC<sup>34</sup>—within the first year of the agreement. Legg Mason also agreed to pay a \$34 million fine to the SEC.

The DOJ enforcement action is notable not only for the size of the penalty, but also because it is the first coordinated action between French authorities and the DOJ in a foreign corruption case. The resolution seemingly also illustrates the DOJ's new policy against "piling on" multiple penalties by different enforcement agencies for the same conduct. DOJ spokesman Mark Pettit said that, "[i]n reaching the criminal resolution, the [DOJ] was careful to adhere to the ['piling on'] policy," noting that the policy "requires coordination with other federal and state enforcement authorities and consideration of the amount of penalties paid by the company to those authorities in order to avoid unnecessary or duplicative penalties" and "is intended to ensure that the [DOJ] only pursues sanctions that are proportionate to the defendants' conduct and the legitimate goals of law enforcement."<sup>35</sup>

### ***Petrobras***

On September 27, the DOJ and the SEC announced coordinated enforcement resolutions with Petrobras, the Brazilian state-owned energy company, in connection with numerous schemes to bribe Brazilian public officials.<sup>36</sup> Specifically, the DOJ and the SEC alleged that, between 2003 and 2012, senior Petrobras executives, many of whom served as company board members, worked with the company's largest contractors to inflate the cost of its infrastructure projects by billions of dollars in exchange for billions of dollars in kickbacks, which were paid to the Petrobras executives and to politicians and political parties responsible for appointing those executives to their positions.

<sup>34</sup> See Press Release, U.S. Sec. & Exch. Comm'n, Legg Mason Charged With Violating the FCPA (Aug. 27, 2018), <https://www.sec.gov/news/press-release/2018-168>.

<sup>35</sup> See Engler, *supra*.

<sup>36</sup> See Press Release, U.S. Dep't of Justice, *Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than \$850 Million for FCPA Violations* (Sept. 27, 2018), <https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>; In the Matter of *Petróleo Brasileiro S.A. – Petrobras*, Exchange Act Release No. 84295 (Sept. 27, 2018), <https://www.sec.gov/litigation/admin/2018/33-10561.pdf>; see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, *Behind Petrobras \$1.8 Billion FCPA Settlement, An Interesting Accounting* (Oct. 2, 2018), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/behind-petrobras-18-billion-fcpa-settlement-an-interesting-accounting?id=27511>.

The DOJ entered into a non-prosecution agreement with Petrobras, and the company agreed to pay a criminal penalty of \$853.2 million to resolve the matter. Separately, to resolve the SEC investigation, Petrobras agreed to the entry of a cease-and-desist order, and to pay \$933.5 million in disgorgement and prejudgment interest, for a total of nearly \$1.8 billion between the two resolutions. Neither the DOJ nor the SEC imposed an independent compliance monitor, citing the understanding that Petrobras will enter into a separate resolution with Brazilian authorities and will be subject to unspecified oversight.

An unusual feature of these settlements is that U.S. authorities will recover only a relatively small portion of the total penalties assessed. Petrobras will pay to U.S. authorities only 20 percent, or \$170.6 million, of the penalty assessed in the non-prosecution agreement, and the remaining 80 percent (\$682.6 million) to Brazilian authorities to be placed in a special fund for social and educational programs to promote transparency and compliance in Brazil's public sector.<sup>37</sup> In addition, the \$933 million settlement with the SEC may be offset completely by payments Petrobras makes in a related securities class action, which settled in September for nearly \$3 billion,<sup>38</sup> effectively wiping out the entire SEC settlement amount.

The extraordinary leniency reflected in the resolutions seemingly is attributable at least in part to the DOJ's new "piling on" policy. As Principal Deputy Assistant General John P. Cronan explained, the policy "meant crediting amounts being paid to the [SEC] and Brazilian authorities, with Brazil receiving 80 percent, or about \$682 million, and the [DOJ] and the SEC each receiving 10 percent, or about \$85 million."<sup>39</sup> He further stated that "in agreeing to a non-prosecution agreement with Petrobras, rather than pursuing a harsher resolution, the [DOJ] took into account that Brazil was entering into a resolution with Petrobras and that Brazilian authorities would be maintaining oversight of Petrobras as a state-owned entity." Other factors contributing to this exceptional treatment of Petrobras might also include the perception that Petrobras is in some ways a victim of this massive corruption scheme<sup>40</sup> and the fact that Petrobras is not only a state-owned enterprise but also is closely associated with the Brazilian state.<sup>41</sup>

<sup>37</sup> See Press Release, Petrobras, Petrobras Reaches Coordinated Resolutions with Authorities in the United States and Agreement to Remit Bulk of Associated Payments to Brazil (Sept. 27, 2018), <http://www.petrobras.com.br/en/news/petrobras-reaches-coordinated-resolutions-with-authorities-in-the-united-states-and-agreement-to-remit-bulk-of-associated-payments-to-brazil.htm>.

<sup>38</sup> In the Matter of Petróleo Brasileiro S.A. – Petrobras, Exchange Act Release No. 84295, at 9 (Sept. 27, 2018), <https://www.sec.gov/litigation/admin/2018/33-10561.pdf>.

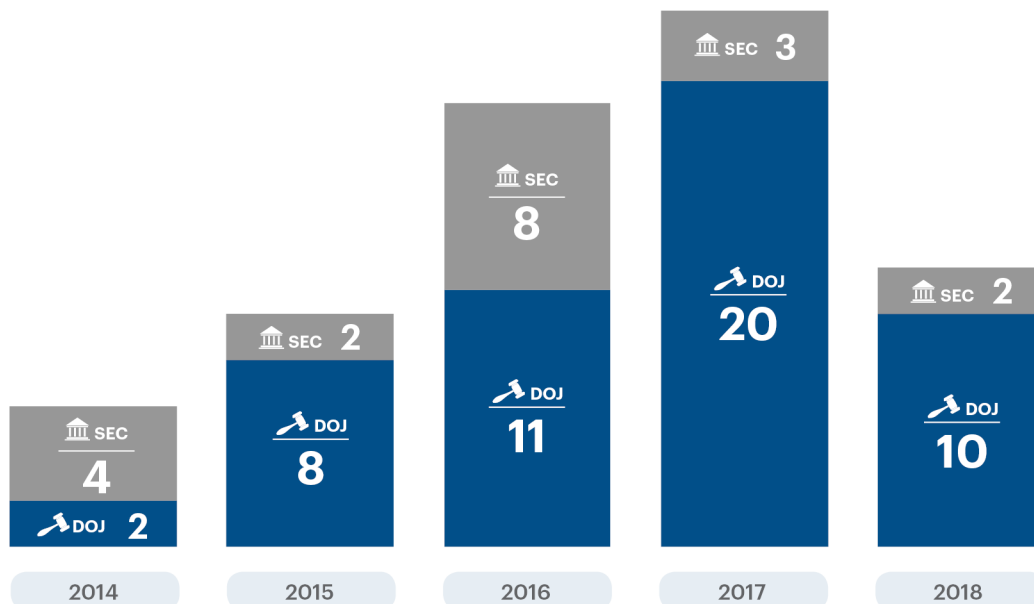
<sup>39</sup> John P. Cronan, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice Crim. Div., Remarks at the Latin Lawyer/Global Investigations Review Anti-Corruption and Investigations Conference (Oct. 18, 2018), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-o>.

<sup>40</sup> See Aruna Viswanatha, et al., *Petrobras to Pay \$853.2 Million to Settle Corruption Probes in U.S., Brazil*, WALL ST. J. (Sept. 27, 2018), <https://www.wsj.com/articles/petrobras-to-pay-853-2-million-to-settle-corruption-investigations-in-u-s-brazil-1538051052>.

<sup>41</sup> See Lise Alves, *Brazil's Interim Government Replaces Petrobras President*, RIO TIMES (May 20, 2016), <https://riotimesonline.com/brazil-news/rio-business/brazils-government-replaces-petrobras-president/>.

## Enforcement Actions Against Individuals

Based on publicly filed charging instruments, in 2018, the DOJ brought FCPA charges against ten individuals and the SEC brought charges against two individuals.<sup>42</sup> The number of individual prosecutions brought by the DOJ under the FCPA is down from the highs of last year, but overall both the DOJ and the SEC numbers are in line with fluctuations in recent years. Unlike last year, when most of the individual enforcement actions were ancillary to corporate resolutions, that was true of only one individual enforcement action this year.



FCPA INDIVIDUAL ENFORCEMENT ACTION RESOLUTIONS 2014-2018

As in most recent years, in 2018, the DOJ was more active than the SEC in bringing FCPA actions against individuals. As compared with the DOJ, the SEC seemingly has not made FCPA actions against individuals a priority. In 2018, the DOJ reaffirmed its commitment to prioritizing prosecutions of individuals. For example, in November, DAG Rosenstein emphasized that “[f]ocusing on individual wrongdoers is an important aspect of the Department’s FCPA program” and that “pursuing individuals responsible for

<sup>42</sup> Included in these totals are individual prosecutions and enforcement actions for FCPA charges, but not for other charges, such as money laundering or racketeering. Actions are listed in the year of the initial filing of FCPA charges, even if unsealed in a later year, which may result in changes to the totals for past years, as indictments from past years are unsealed.

wrongdoing will be a top priority in every corporate investigation.”<sup>43</sup> The co-directors of the SEC’s Division of Enforcement also have stated that individual accountability remains a priority.<sup>44</sup>

One individual was convicted of FCPA and money laundering violations following a jury trial in the Southern District of New York. Patrick Ho, the former head of the China Energy Fund Committee, a non-governmental organization based in Hong Kong and Arlington, Virginia, paid millions of dollars in bribes to top officials of Chad and Uganda in exchange for business advantages for a multi-billion dollar Chinese conglomerate that operates internationally in multiple sectors, including oil, gas, and banking.<sup>45</sup>

Six individuals—five of whom were charged in prior years—also pleaded guilty to FCPA charges. Among these individuals was Joo Hyun (“Dennis”) Bahn, a real-estate broker, who pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA.<sup>46</sup> Bahn pleaded guilty in connection with his role in a scheme to bribe a foreign official in the Middle East to secure a real-estate deal for a South Korean construction company. Bahn also settled FCPA charges with the SEC relating to the same conduct.<sup>47</sup> No charges have been brought by the DOJ or the SEC against Bahn’s employer, Colliers International, which was largely a victim of the bribery scheme and which did not profit from the never-completed real estate transaction.

The DOJ—with the assistance of its Organized Crime Drug Enforcement Task Force (“OCDETF”)—was particularly active in prosecuting individuals involved in an international bribery and money laundering scheme to pay billions of dollars to high-level officials in Venezuela, including Venezuela’s former treasurer and officials of Venezuela’s state-owned energy company, Petroleos de Venezuela S.A. (“PDVSA”).<sup>48</sup> Two of the three individuals whose FCPA charges from prior years were unsealed in 2018 were former Venezuelan government officials, who each were charged with conspiracy to violate the FCPA and conspiracy to commit money laundering for their alleged participation in the scheme.<sup>49</sup> Also, two of the six

<sup>43</sup> See Rosenstein Cooperation Remarks, *supra*.

<sup>44</sup> See Stephanie Avakian and Steven Peikin, Co-Directors, U.S. Sec. & Exch. Comm’n Enft Div., Statement Before the U.S. House of Representatives Committee on Financial Services (May 16, 2018), <https://www.sec.gov/news/testimony/testimony-oversight-secs-division-enforcement>.

<sup>45</sup> See Press Release, U.S. Dep’t of Justice, Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Convicted of International Bribery, Money Laundering Offenses (Dec. 5, 2018), <https://www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-convicted>.

<sup>46</sup> See Press Release, U.S. Dep’t of Justice, 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>.

<sup>47</sup> See In the Matter of Joohyun Bahn, a/k/a Dennis Bahn, Exchange Act Release No. 84054 (Sept. 6, 2018), <https://www.sec.gov/litigation/admin/2018/34-84054.pdf>.

<sup>48</sup> See U.S. DEP’T OF JUSTICE CRIM. DIV. FRAUD SECTION, FRAUD SECTION YEAR IN REVIEW 2018 7-8 (Jan. 2019) (hereinafter, “Fraud Section Year in Review”), <https://www.justice.gov/criminal-fraud/file/1123566/download>.

<sup>49</sup> See Press Release, U.S. Dep’t of Justice, 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>.

individuals who pleaded guilty to FCPA charges in 2018 did so in connection with this scheme.<sup>50</sup> Relatedly, in cases not involving FCPA charges, in 2018 the DOJ announced eight guilty pleas and numerous charges against individuals involved in this scheme.<sup>51</sup> According to the DOJ, the alleged conspirators include former Venezuelan officials, professional third-party money launderers, members of the Venezuelan elite, and business owners.

As in past years, the DOJ also brought non-FCPA criminal charges against other individuals—including both corrupt officials and the facilitators of corruption—under the money laundering, wire fraud, and Travel Act statutes. For example, the DOJ’s investigation into Transport Logistics International Inc. (“TLI”), in connection with a scheme that involved the bribery of an official at a subsidiary of Russia’s State Atomic Energy Corporation, resulted in both FCPA and non-FCPA charges.<sup>52</sup> The DOJ brought and resolved charges against TLI in 2018 for conspiracy to violate the FCPA, and also brought FCPA, wire fraud, and money laundering charges against TLI’s co-president. The DOJ previously, in 2015, brought FCPA and money laundering charges against a Russian government official, and FCPA and wire fraud charges against another TLI co-president; both individuals previously pleaded guilty.

Looking forward, FCPA trials against four individuals are scheduled to commence in 2019.<sup>53</sup>

## Legal Developments Affecting Enforcement Tools

In 2018, significant legal developments affected the DOJ’s and the SEC’s tools for enforcing the FCPA and resolving cases. *First*, in *Digital Realty Trust Inc. v. Somers*, the U.S. Supreme Court 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. *Second*, in *United States v. Hoskins*, the U.S. Court of Appeals for the Second Circuit held that a foreign national who does not otherwise fall within the specific categories of defendants enumerated in the FCPA cannot be held liable for violating the FCPA under accomplice liability theories. These legal developments and their potential implications are discussed below.

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<sup>50</sup> See Press Release, U.S. Dep’t of Justice, Business Executive Pleads Guilty to Foreign Bribery Charge in Connection with Venezuelan Bribery Scheme (Sept. 13, 2018), <https://www.justice.gov/opa/pr/business-executive-pleads-guilty-foreign-bribery-charge-connection-venezuelan-bribery-scheme>; Press Release, U.S. Dep’t of Justice, Former Venezuelan Official Pleads Guilty to Money Laundering Charge in Connection with Bribery Scheme (July 16, 2018), <https://www.justice.gov/opa/pr/former-venezuelan-official-pleads-guilty-money-laundering-charge-connection-bribery-scheme-o>.

<sup>51</sup> See Fraud Section Year in Review, *supra*.

<sup>52</sup> See Press Release, U.S. Dep’t of Justice, Transport Logistics International Inc. Agrees to Pay \$2 Million Penalty to Resolve Foreign Bribery Case (Mar. 13, 2018), <https://www.justice.gov/opa/pr/transport-logistics-international-inc-agrees-pay-2-million-penalty-resolve-foreign-bribery>.

<sup>53</sup> See *U.S. v. Lambert*, No. 8:18-CR-00012 TDC (D. Md. 2018); *U.S. v. Chatburn Ripalda*, No. 1:18-CR-20312 MGC (S.D. Fla. 2018); *U.S. v. Baptiste and Boncy*, No. 1:17-CR-10305 ADB (D. Mass. 2018).



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***Digital Realty Trust Inc. v. Somers***

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).<sup>54</sup> 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.<sup>55</sup> 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* thus may 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.

***United States v. Hoskins***

On August 24, the Court of Appeals for the Second Circuit held in *United States v. Hoskins* that a foreign national who does not otherwise fall within the specific categories of defendants enumerated in the FCPA cannot be held liable for violating the FCPA under an accomplice liability theory.<sup>56</sup> Stating that the FCPA does not "purport[] to rule the world," the Second Circuit held that the DOJ cannot skirt the FCPA's

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<sup>54</sup> *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-narrowsscope-of-whistleblower-anti-retaliation-protections?id=26011>.

<sup>55</sup> See U.S. SEC. & EXCH. COMM'N, 2017 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 17 (Nov. 15, 2017), <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>.

<sup>56</sup> *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018); see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, The Second Circuit Rejects FCPA Liability for Foreign Persons Under Accessory Liability Theories (Aug. 27, 2018), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/the-second-circuit-rejects-fcpa-liability-for-foreign-persons-under-accessory-liability-theories?id=26965>.

“carefully-drawn limitations” by relying on conspiracy and aiding and abetting theories of liability<sup>57</sup> to assert jurisdiction over foreign nationals who are solely acting abroad and otherwise fall outside the categories of persons liable under the FCPA. The Second Circuit reaffirmed, however, that a foreign national acting as an agent of a U.S. issuer or domestic concern—which is a specific category of defendants set out in the FCPA—may be liable even without engaging in criminal activity in the territory of the United States. Although *Hoskins* involved an individual foreign defendant, the Second Circuit’s decision has implications for foreign companies, which may also be covered by the FCPA.<sup>58</sup>

The Second Circuit’s opinion, which is among the few appellate decisions construing the FCPA, limits the DOJ’s ability to prosecute foreign persons—either individuals or companies—for FCPA violations based solely on conspiracy or aiding and abetting theories of liability unless they travel to or engage in proscribed conduct in the territory of the United States. The opinion flatly contradicts the DOJ and SEC’s FCPA Resource Guide, issued in 2012, which sets forth the government’s view that a foreign national or company also may be liable under the FCPA based on conspiring with or aiding and abetting an issuer or domestic concern.<sup>59</sup> However, the opinion leaves open the possibility that, where supported by the facts, the government still may prosecute foreign nationals as agents of U.S. issuers and domestic concerns. Whether the DOJ actually proceeds against *Hoskins* on this theory, and, if so, how it seeks to establish agency, will be instructive.

It also remains to be seen whether this decision undercuts the DOJ’s ability to bring charges against foreign persons based on a theory that such persons directed or arranged U.S.-dollar payments that flow through the U.S. banking system, but without any physical presence of those foreign persons in the United States. The Second Circuit’s decision does not address this point directly, but includes discussion of the FCPA’s language and legislative history that suggests that the Circuit may be of the view that such circumstances are not sufficient to give rise to jurisdiction. This part of the Second Circuit’s opinion, however, is not necessary to its holding, and we expect the DOJ to defend vigorously its ability to prosecute foreign persons engaging in criminal activity in the territory of the United States, including by causing U.S.-dollar payments to transit through the U.S. financial system.

*Hoskins* also may have important implications for foreign companies, particularly those that conduct international business through joint ventures, consortia, and other teaming arrangements that involve U.S. companies (“domestic concerns”) and/or U.S.-listed companies (U.S. or foreign “issuers”). In light of

<sup>57</sup> The conspiracy statute, 18 U.S.C. § 371, and aiding and abetting statute, 18 U.S.C. § 2, generally apply across the United States Code to impose accomplice liability on persons who conspire with or aid and abet in the commission of any “offense against the United States.”

<sup>58</sup> See 15 U.S.C. § 78c(a)(9) (“The term ‘person’ means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.”).

<sup>59</sup> See U.S. DEP’T OF JUSTICE CRIM. DIV. & U.S. SEC. & EXCH. COMM’N ENF’T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 12 (Nov. 14, 2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> (“A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.”).



*Hoskins's* rejection of the conspiracy and aiding and abetting theories—which have served as the jurisdictional basis for multiple settled FCPA actions in which the DOJ charged non-U.S. companies that were neither domestic concerns nor issuers<sup>60</sup>—foreign companies subject to DOJ or SEC investigations solely because of their business association with a domestic concern or issuer now may have stronger jurisdictional defenses.

## Multi-Jurisdictional Coordination

U.S. authorities in 2018 continued to achieve significant successes in the fight against global corruption by coordinating with and leveraging the resources of their foreign counterparts, as demonstrated by the resolutions with Petrobras, Société Générale, SGA N.V., and Legg Mason, described above. These successes continue to reflect both the U.S. government's commitment to international cooperation and the more aggressive stances foreign governments are taking to address international corruption.

Senior DOJ and SEC officials in the Trump administration continue to affirm publicly the agencies' commitments to coordinating with foreign authorities and have said that such coordination is increasing. For example, DAG Rosenstein explained that the DOJ “work[s] every day with partners around the globe to root out and punish misconduct that distorts markets and corrupts political systems” and that “[a]nyone who considers committing fraud with the hope of hiding their misconduct in foreign jurisdictions, should know that the arm of American law enforcement is long.”<sup>61</sup> SEC Division of Enforcement Co-Director Peikin in December similarly stated that “[c]ollaboration with international regulators and law enforcement is critical to the SEC's civil law enforcement success” and observed that “the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory, particularly in matters involving corruption.”<sup>62</sup>

For example, there have been numerous developments in the worldwide investigation into the alleged misappropriation of more than \$4.5 billion in funds by senior government officials from 1Malaysia Development Berhad (“1MDB”), the state-owned strategic development company. Malaysian authorities arrested and charged former Malaysian Prime Minister Najib Razak with money laundering and various other offenses, to which he subsequently pleaded not guilty.<sup>63</sup> Ahmad Zahid Hamidi, former deputy prime minister to Prime Minister Razak, also was charged by Malaysian authorities with corruption offenses and pleaded not guilty. Malaysian authorities additionally arrested eight former officers of the Malaysian External Intelligence Organization, including its former chief, in connection with allegations that they

<sup>60</sup> See Deferred Prosecution Agreement ¶¶ 1, 6, 12, *United States v. Marubeni Corp.*, No. 4:12-cr-00022 (S.D. Tex. Jan. 17, 2012); Deferred Prosecution Agreement ¶¶ 1, 6, 11, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011); Deferred Prosecution Agreement ¶¶ 1, 6, 10, *United States v. Snamprogetti Netherlands B.V.*, No. 4:10-cr-00460 (S.D. Tex. July 7, 2010).

<sup>61</sup> Rosenstein Cooperation Remarks, *supra*.

<sup>62</sup> Peikin Remarks, *supra*.

<sup>63</sup> See Ronzanna Latiff, *Former Malaysian PM Najib, 1MDB Ex-CEO Face Fresh Corruption Charges*, REUTERS (Dec. 11, 2018), <https://www.reuters.com/article/us-malaysia-politics-najib/former-malaysian-pm-najib-1mdb-ex-ceo-face-fresh-corruption-charges-idUSKBN1OBoCM>.

misappropriated government funds.<sup>64</sup> Separately, the DOJ brought FCPA charges against three individuals in connection with the 1MDB investigation, including a Malaysian financier, Low Taek Jho, and two former bankers.<sup>65</sup> In response to a request from the DOJ, Indonesia impounded in Bali and agreed to convey to Malaysia a \$250 million luxury yacht belonging to Low.<sup>66</sup>

Authorities in the United States and Mexico have coordinated in the ongoing trial of drug cartel kingpin Joaquín (“El Chapo”) Guzmán Loera in the Eastern District of New York.<sup>67</sup> Guzmán is being tried on a 17-count indictment that includes charges of drug trafficking, murder conspiracy, and money laundering.<sup>68</sup> During his trial, a witness testified that Guzmán paid vast sums in bribes to top Mexican officials, including a \$100 million bribe to former Mexican president Enrique Peña Nieto<sup>69</sup>; this bribery has not been charged as a separate offense.

The new anti-bribery and anti-corruption provisions in the United States-Mexico-Canada Agreement (“USMCA”), which is scheduled to replace the North American Free Trade Agreement (“NAFTA”) on January 1, 2020, further reflect multi-jurisdictional coordination. The USMCA requires its signatories to adopt and enforce measures to combat corruption, promote integrity among public officials, and encourage the private sector to help combat corruption.<sup>70</sup>

## Foreign Jurisdictions Investigating and Prosecuting Corruption

In addition to U.S.-led enforcement, other jurisdictions took significant strides to investigate and prosecute corrupt actors. Authorities in many countries announced investigations and prosecutions of allegedly corrupt officials, and a startling number of current and former government officials, including former heads of state, were convicted and sentenced in connection with corruption charges. Foreign authorities in certain

<sup>64</sup> See Joseph Sipalan, *Eight Malaysian Former Spies Under Probe for Graft*, REUTERS (Aug. 30, 2018), <https://www.reuters.com/article/us-malaysia-corruption/eight-malaysian-former-spies-under-probe-for-graft-idUSKCN1LFoM8>.

<sup>65</sup> See Press Release, U.S. Dep’t of Justice, *Malaysian Financier Low Taek Jho, Also Known as “Jho Low,” and Former Banker Ng Chong Hwa, Also Known as “Roger Ng,” Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes* (Nov. 1, 2018), <https://www.justice.gov/opa/pr/malaysian-financier-low-taek-jho-also-known-jho-low-and-former-banker-ng-chong-hwa-also-known>.

<sup>66</sup> See A. Ananthalakshmi, *Indonesia to Hand Over Yacht Linked to 1MDB to Malaysia*, REUTERS (Aug. 4, 2018), <https://www.reuters.com/article/us-malaysia-scandal-1mdb-equanimity/indonesia-to-hand-over-yacht-linked-to-1mdb-to-malaysia-idUSKBN1KP07J>.

<sup>67</sup> See Alan Feuer, *El Chapo Trial Shows That Mexico’s Corruption Is Even Worse Than You Think*, N.Y. TIMES (Dec. 28, 2018), <https://nyti.ms/2RjQRFm>; Alan Feuer, *El Chapo Jury Hears About Bribes to Mexico’s Public Security Secretary*, N.Y. TIMES (Nov. 20, 2018), <https://nyti.ms/2zlOUoZ>.

<sup>68</sup> See Dareh Gregorian, *El Chapo Trial: The Accused Drug Lord’s History Looming Large in New York Court*, NBC NEWS (Nov. 12, 2018), <https://www.nbcnews.com/news/crime-courts/el-chapo-trial-accused-drug-lord-s-history-looming-large-n931791>.

<sup>69</sup> See Alan Feuer, *El Chapo Trial: Former Mexican President Peña Nieto Took \$100 Million Bribe, Witness Says*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/nyregion/el-chapo-trial.html>.

<sup>70</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA, ch. 27 (Nov. 30, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

jurisdictions also continued to pursue corporate enforcement. In addition, a number of foreign jurisdictions took a variety of measures to enhance their anti-corruption laws. Several countries implemented laws imposing criminal liability on domestic and foreign companies, and a significant legislative trend was the introduction of alternative forms of corporate resolutions short of criminal convictions.

### Asia

In **China**, Lu Wei, China's former Internet regulator, pleaded guilty to committing bribery.<sup>71</sup> Sun Zhengcai, former Chongqing Party secretary and member of the Politburo, pleaded guilty to taking bribes of more than \$26.7 million and was sentenced to life in prison.<sup>72</sup>

The Standing Committee of the National People's Congress adopted amendments, which took effect in January 2018, to the country's Anti-Unfair Competition Law, which specify the range of prohibited recipients of bribes and expand the definition of prohibited bribery to include bribery for the purpose of obtaining a competitive advantage.<sup>73</sup> The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees, and provide for increased penalties. China also amended its Criminal Procedure Law to codify rules encouraging cooperation in government investigations and to introduce trials *in absentia*, including for bribery and corruption.<sup>74</sup>

In addition, China adopted the PRC Supervision Law, which creates commissions with broad authority to supervise public functionaries who exercise public power, including by investigating occupation-related wrongdoings and criminal activities.<sup>75</sup> The commissions have "retention in custody" authority to detain suspects for prolonged periods while investigating serious corruption cases. Amnesty International has criticized the Supervision Law, and particularly the retention in custody provisions, as a threat to human rights in China.<sup>76</sup>

China also adopted—prior to the announcement of the China Initiative—the Law on International Criminal Judicial Assistance, which prohibits individuals and entities in China from providing foreign countries with

<sup>71</sup> See Chun Han Wong, *Former Chinese Internet Czar Pleads Guilty to Corruption*, WALL ST. J. (Oct. 19, 2018), <https://www.wsj.com/articles/former-chinese-internet-czar-pleads-guilty-to-corruption-1539941189>.

<sup>72</sup> See Sun Zhengcai: *Former Top Chinese Official Jailed for Life*, BBC (May 8, 2018), <https://www.bbc.com/news/world-asia-china-44036175>.

<sup>73</sup> See Law on Anti-Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong.) (Nov. 4, 2017), art. 7, [http://www.npc.gov.cn/npc/xinwen/2017-11/04/content\\_2031432.htm](http://www.npc.gov.cn/npc/xinwen/2017-11/04/content_2031432.htm).

<sup>74</sup> See Law on Criminal Procedure (promulgated by the Standing Comm. Nat'l People's Cong.) (Oct. 26, 2018), arts. 15 & 291, [http://www.npc.gov.cn/npc/xinwen/2018-10/26/content\\_2064435.htm](http://www.npc.gov.cn/npc/xinwen/2018-10/26/content_2064435.htm).

<sup>75</sup> See *China: Supervision Law Enacted Establishing a New State Supervisory Organ*, U.S. LIB. OF CONG. (July 9, 2018), <http://www.loc.gov/law/foreign-news/article/china-supervision-law-enacted-establishing-a-new-state-supervisory-organ/>.

<sup>76</sup> See *China: New Supervision Law a Systemic Threat to Human Rights*, AMNESTY INT'L (Mar. 20, 2018), <https://www.amnesty.org/en/latest/news/2018/03/china-new-supervision-law-threat-to-human-rights/>.

evidence or assistance in criminal investigations, absent authorization from Chinese authorities.<sup>77</sup> The legislation purportedly is intended to strengthen international cooperation without harming China's sovereignty, security, and social interests, or violating China's laws.

**India** passed the Prevention of Corruption (Amendment) Act, which criminalizes giving an "undue advantage" to a public official, establishes criminal liability for companies, and creates a specific offense penalizing corporate management.<sup>78</sup>

In **Japan**, the government introduced a plea bargaining system.<sup>79</sup> The first plea bargain was entered in July 2018 between the Tokyo District Public Prosecutors Office and Mitsubishi Hitachi Power Systems, relating to the company's allegedly illegal payment to a Thai official to avoid delay in unloading cargo in Thailand.<sup>80</sup> The new plea bargaining system allows individuals and companies to negotiate reduced criminal sentences in exchange for providing information regarding third parties suspected of or charged with particular offenses, including crimes of corruption.

**Singapore** passed legislation introducing a legal mechanism akin to U.S. deferred prosecution agreements, which is available to companies accused of offenses including corruption and money laundering.<sup>81</sup>

In **South Korea**, following an almost year-long trial, former president Park Geun-hye was convicted in April of multiple criminal charges, including bribery, for conspiring with her confidante, Choi Soon-sil, to pressure numerous business groups to donate approximately \$72 million to two non-profit organizations controlled by Choi in exchange for various favors.<sup>82</sup> President Park was sentenced to 25 years in prison and a nearly \$18 million fine was imposed, after an appellate court increased her sentence, having found she

<sup>77</sup> See *China Adopts Law to Facilitate Int'l Judicial Cooperation*, NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REP. OF CHINA (Oct. 29, 2018), [http://www.npc.gov.cn/englishnpc/news/Legislation/2018-10/29/content\\_2064964.htm](http://www.npc.gov.cn/englishnpc/news/Legislation/2018-10/29/content_2064964.htm).

<sup>78</sup> See *The Prevention of Corruption (Amendment) Act, 2018, No. 16, Acts of Parliament, 2018 (India)*, <http://www.egazette.nic.in/WriteReadData/2018/187644.pdf>.

<sup>79</sup> See Robin Harding, *Japan Targets Corporate Chiefs With Plea Bargain System*, FINANCIAL TIMES (May 31, 2018), <https://www.ft.com/content/4ea087ae-64a5-11e8-90c2-9563a0613e56>.

<sup>80</sup> See *Bribes Approved by the Ex-Director? (贈賄、元取締役が承認か)*, NIKKEI NEWSPAPER (July 16, 2018), <https://www.nikkei.com/article/DGKKZO33024160V10C18A7CC1000/>; *The First Plea Bargain, the Corporation Indemnified (初の司法取引 企業免責)*, NIKKEI NEWSPAPER (July 15, 2018), <https://www.nikkei.com/article/DGKKZO33018790U8A710C1EA2000/>; *The First Plea Bargain, the Corporation Not Prosecuted, Three Individuals Prosecuted by Foreign Bribery Without Arrest (初の司法取引、法人不起訴、海外贈賄で3人在宅起訴)*, NIKKEI NEWSPAPER (July 21, 2018), <https://www.nikkei.com/article/DGKKZO33202390Q8A720C1MM8000/>; *Notice Regarding Charges Filed Against Former Officers and Employee for Violation of the Unfair Competition Prevention Act*, MITSUBISHI HITACHI POWER SYS. (July 20, 2018), <https://www.mhps.com/news/20180720.html>.

<sup>81</sup> See Tan Tam Mei, *Deferred Prosecution Agreements Proposed to Take Companies to Task: Shanmugam*, STRAITS TIMES (Jan. 15, 2018), <http://www.straitstimes.com/singapore/deferred-prosecution-agreements-proposed-to-take-companies-to-task-shanmugam>; Selina Lum, *Amnesty for Firms: Ensuring Transparency*, STRAITS TIMES (Mar. 20, 2018), <http://www.straitstimes.com/singapore/amnesty-for-firms-ensuring-transparency>.

<sup>82</sup> See Choe Sang-Hun, *Park Geun-hye, South Korea's Ousted President, Gets 24 Years in Prison*, N.Y. TIMES (Apr. 6, 2018), <https://nyti.ms/2Heh68v>.

accepted more in bribes than previously believed.<sup>83</sup> Choi, who was convicted of receiving bribes from South Korean companies, was sentenced to 20 years' imprisonment.<sup>84</sup> 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, but his sentence subsequently was suspended and he was released.<sup>85</sup>

Jay Y. Lee, the de facto head of Samsung, was released from prison, after serving approximately one year, when an appellate court reduced his sentence to two-and-a-half years and suspended it.<sup>86</sup> Lee was convicted of allegedly authorizing a payment to Choi to obtain government support for a merger between Samsung affiliates.<sup>87</sup>

Lee Myung-bak, South Korea's president from 2008 to 2013, was imprisoned for 15 years on charges of bribery, embezzlement, and tax evasion.<sup>88</sup> President Lee allegedly received approximately \$10 million in bribes from various sources and embezzled \$22 million. President Lee also is accused of using his presidential power to help settle a legal case.

### *Europe and the Middle East*

In March, a court in **France** ordered former President Nicolas Sarkozy to stand trial on various corruption charges, and in October he lost his first appeal of that decision.<sup>89</sup> Whether he ultimately stands trial will depend upon the outcome of a second appeal. French authorities also are investigating him in connection with allegations that his 2007 election campaign received illegal financing from Muammar Gaddafi of Libya.<sup>90</sup>

<sup>83</sup> See Choe Sang-Hun, *Park Geun-hye, Ex-South Korean Leader, Gets 25 Years in Prison*, N.Y. TIMES (Aug. 24, 2018), <https://nyti.ms/2059wnT>.

<sup>84</sup> See South Korea Jails Choi Soon-sil, *Friend to Park Geun-hye, for Corruption*, BBC (Feb. 13, 2018), <https://www.bbc.com/news/world-asia-43042862>.

<sup>85</sup> See Lotte Chairman Shin Dong-bin Freed as Court Suspends Corruption Sentence, STRAITS TIMES (Oct. 5, 2018), <https://www.straitstimes.com/asia/east-asia/south-koreas-appeals-court-suspends-lotte-group-chiefs-jail-sentence-yonhap>.

<sup>86</sup> 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>.

<sup>87</sup> See Sam Kim, *Samsung's Jay Y. Lee Set Free in Unexpected Court Reversal*, BLOOMBERG (Feb. 5, 2018), <https://www.bloomberg.com/news/articles/2018-02-05/samsung-heir-jay-y-lee-goes-free-after-court-suspends-jail-term>.

<sup>88</sup> See Joyce Lee, *South Korea Jails Former President Lee for 15 Years on Corruption Charges*, REUTERS (Oct. 5, 2018), <https://www.reuters.com/article/us-southkorea-politics-corruption/south-korea-jails-former-president-lee-for-15-years-on-corruption-charges-idUSKCN1MF0J1>; Choe Sang-Hun, *In South Korea, Another Former President Lands in Jail*, N.Y. TIMES (Mar. 22, 2018), <https://nyti.ms/2GcvT5H>.

<sup>89</sup> See Aurelien Breeden, *Sarkozy to Face Trial in Influence-Peddling Case in France*, N.Y. TIMES (Mar. 29, 2018), <https://nyti.ms/2GixzeJ>; Julie Carriat & John Irish, *France's Sarkozy Loses First Appeal Over Corruption Trial*, REUTERS (Oct. 8, 2018), <https://www.reuters.com/article/us-france-sarkozy/frances-sarkozy-loses-first-appeal-over-corruption-trial-idUSKCN1MI1AU>.

<sup>90</sup> See Breeden, *supra*.

French authorities entered into the country's first deferred prosecution agreements relating to corruption charges.<sup>91</sup> These deferred prosecution agreements were with two companies (Kaefer Wanner and Set Environnement), which were alleged to have paid bribes to retain their maintenance contracts for thermal power stations. 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, 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.<sup>92</sup> The court found that the relevant provision of the treaty did not apply to investigations and convictions by foreign sovereigns.

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.<sup>93</sup> They denied the allegations.

### *Latin America*

In **Argentina**, in the so-called "Notebooks Scandal," handwritten notebooks—kept by a driver for a Ministry of Planning official with significant political ties—allegedly detailed hundreds of millions of dollars of bribes paid to government officials in the energy and construction sectors, in exchange for public works contracts.<sup>94</sup> More than a dozen former government officials and 30 businessmen reportedly have been implicated in the scandal.<sup>95</sup> Cristina Kirchner, former president and current senator, has been charged with related corruption offenses, and a federal appeals court ruled that she should face trial on these charges.<sup>96</sup>

<sup>91</sup> See Convention judiciaire d'intérêt public, le Procureur de la République et la SAS Kaefer Wanner (Feb. 15, 2018), [https://www.economie.gouv.fr/files/files/directions\\_services/afa/CJIP\\_KW.pdf](https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_KW.pdf); Convention judiciaire d'intérêt public, le Procureur de la République et la SAS Set Environnement (Feb. 14, 2018), [https://www.economie.gouv.fr/files/files/directions\\_services/afa/CJIP\\_PR\\_Nanterre\\_-\\_SAS\\_SET\\_ENVIRONNEMENT\\_-\\_14-02-2018\\_signe.pdf](https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_PR_Nanterre_-_SAS_SET_ENVIRONNEMENT_-_14-02-2018_signe.pdf).

<sup>92</sup> See Stéphane Bonifassi, *Double Jeopardy Not a Defense in France*, ETHIC INTELLIGENCE (Apr. 17, 2018), <https://www.ethic-intelligence.com/en/experts-corner/international-experts/420-double-jeopardy-not-a-defense-in-france.html>.

<sup>93</sup> See Niki Kitsantonis, *Greece Approves Bribery Investigation Involving Political Elite*, N.Y. TIMES (Feb. 22, 2018), <https://nyti.ms/2BJevCX>; Nektaria Stamouli & Noemie Bisserbe, *Novartis Faces Investigation for Alleged Bribery in Greece*, WALL ST. J. (Feb. 9, 2018), <https://www.wsj.com/articles/novartis-faces-investigation-for-alleged-bribery-in-greece-1518220328>.

<sup>94</sup> See Agustino Fontevicchia, *Of Betrayal, Notebooks and Dollars*, BUENOS AIRES TIMES (Aug. 4, 2018), <http://www.batimes.com.ar/news/opinion-and-analysis/of-betrayal-notebooks.phtml>.

<sup>95</sup> See *Ex-President Kirchner Charged in Argentina Corruption Scandal*, TIMES OF ISRAEL (Sept. 18, 2018), <https://www.timesofisrael.com/ex-president-kirchner-charged-in-argentina-corruption-scandal/>.

<sup>96</sup> See *Court Confirms Fernández de Kirchner to Stand Trial for Graft in 'Notebooks' Case*, BUENOS AIRES TIMES (Dec. 22, 2018), <http://www.batimes.com.ar/news/argentina/court-confirms-fernandez-de-kirchner-to-stand-trial-for-graft-in-notebooks-case.phtml>.



Argentina also introduced deferred and non-prosecution agreements, which may be granted to companies that cooperate with prosecuting authorities.<sup>97</sup>

Additionally, Argentina's Law 27.401, which was enacted in December 2017 and 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.<sup>98</sup>

In **Brazil**, an appellate court upheld the conviction of former president Luiz Inácio Lula da Silva on corruption and money laundering charges, and extended his sentence from ten to 12 years in prison.<sup>99</sup> Brazil's Supreme Court subsequently ruled that he must begin serving his sentence while appealing his conviction.<sup>100</sup>

Authorities in **Colombia** are investigating Odebrecht S.A., the Brazilian construction conglomerate, and Grupo Aval, Colombia's largest financial group, in connection with a \$1.6 billion contract to build a highway linking the capital region and the Caribbean coast.<sup>101</sup> Documents and recordings allegedly reflect more than \$30 million in payments by Odebrecht and Grupo Aval for non-existent consultancies, some of which may have been used to bribe politicians. Odebrecht admitted to the DOJ, as part of its 2016 settlement, that it paid \$11 million in bribes in connection with this contract, whereas Grupo Aval publicly has denied knowledge of the payments.

In **Guatemala**, in connection with a different highway contract, Odebrecht reached an agreement with the Guatemala Attorney General's Office to pay \$17.9 million to compensate for a bribe of the same amount that company executives paid a government official in 2012 in exchange for the \$300 million contract.<sup>102</sup>

Former Guatemalan president Álvaro 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.<sup>103</sup> In addition, former Guatemalan presidential candidate

<sup>97</sup> 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>.

<sup>98</sup> See Jaclyn 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#.XDt3t\\_IKiU](https://www.complianceweek.com/news/news-article/argentina-passes-tough-new-anti-corruption-law#.XDt3t_IKiU).

<sup>99</sup> See Ernesto Londoño, *Upending Brazil's Presidential Race, Court Upholds Ex-Leader's Conviction*, N.Y. TIMES (Jan. 24, 2018), <https://nyti.ms/2FaPA9A>.

<sup>100</sup> See Manuela Andreoni et al., *Ex-President 'Lula' of Brazil Surrenders to Serve 12-Year Jail Term*, N.Y. TIMES (Apr. 7, 2018), <https://nyti.ms/2GFzAlf>.

<sup>101</sup> See *Colombia's Biggest Corruption Scandal Gets More Complicated*, ECONOMIST (Nov. 17, 2018), <https://www.economist.com/the-americas/2018/11/17/colombias-biggest-corruption-scandal-gets-more-complicated>.

<sup>102</sup> 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>.

<sup>103</sup> See Elisabeth Malkin, *Guatemala Arrests Ex-President and His Finance Minister in Corruption Case*, N.Y. TIMES (Feb. 13, 2018), <https://nyti.ms/2Bvo2gy>.

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.<sup>104</sup>

In **Peru**, President Pedro Pablo Kuczynski resigned in March after being implicated in the ongoing investigation into Odebrecht.<sup>105</sup> He denies wrongdoing.

Peru also passed a law, which became effective January 1, 2018, which imposes independent criminal liability on legal entities for local and foreign bribery, with violations punishable by fine, debarment from government contracting, and dissolution.<sup>106</sup> 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 addition, Odebrecht's Peruvian unit reached a deal with Peruvian authorities to pay a fine of between \$180 and \$200 million, in addition to providing evidence about the officials it bribed, which will allow it to continue to operate in the country.<sup>107</sup>

### *North America*

**Canada** created a legal regime for "remediation agreements," similar to U.S. deferred prosecution agreements, to resolve corporate offenses under the Criminal Code and the Corruption of Foreign Public Officials Act.<sup>108</sup> The legislation directs prosecutors to consider a number of factors in deciding whether to negotiate a remediation agreement, such as whether the organization has previous convictions, sanctions, or settlements for similar offenses. Remediation agreements also are subject to judicial approval, requiring a judicial finding that the agreement is in the public interest and its terms are fair, reasonable, and proportionate.

<sup>104</sup> 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>.

<sup>105</sup> 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](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); Pedro Pablo Kuczynski: *Under Fire Peru President Resigns*, BBC (Mar. 22, 2018), <https://www.bbc.com/news/world-latin-america-43492421>.

<sup>106</sup> 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://globalcompliancencews.com/anti-corruption/anti-corruption-in-peru/>.

<sup>107</sup> See Marco Aquino, *Odebrecht Peru Agrees to Plea Deal with Peruvian Authorities Over Bribery Scandal*, REUTERS (Dec. 8, 2018), <https://www.reuters.com/article/us-peru-odebrecht-exclusive/exclusive-odebrecht-peru-agrees-to-plea-deal-with-peruvian-authorities-over-bribery-scandal-sources-idUSKBN1O70U4>.

<sup>108</sup> See GOV'T OF CANADA, REMEDIATION AGREEMENTS AND ORDERS TO ADDRESS CORPORATE CRIME (Sept. 11, 2018), <https://www.canada.ca/en/departement-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html>.



Notably, in October, Canadian prosecutors declined to enter into a remediation agreement with SNC-Lavalin Group Inc., Canada's largest engineering and construction company, in connection with charges from 2015 of attempted bribery and fraud.<sup>109</sup> According to the public prosecutor's office, the criteria for remediation agreements were not satisfied.

## Multilateral Development Bank Sanctions

In 2018, as in prior years, the World Bank Group debarred or otherwise sanctioned considerably more individuals and entities than other multilateral development banks ("MDBs"). The World Bank Group imposed 177 debarments, whereas the Inter-American Development Bank imposed 48, the Asian Development Bank imposed seven, the European Bank for Reconstruction and Development imposed three, and the African Development Bank imposed eight.<sup>110</sup> Thirty-three of the debarments imposed by the World Bank and eight of the debarments imposed by the Inter-American Development Bank were based, at least in part, on corrupt practices. The other MDBs do not appear to have imposed any debarments based on corrupt practices.

The longest debarments based in part on corrupt practices were by the Inter-American Development Bank, which debarred Guatemalan Julio Enrique Reyna Arreaga, Ecuadorian Leonardo Iván Noblecilla Sotomayor, and Ecuadorian company Nobsa Construcciones S.A. each for 12 years.<sup>111</sup>

Unfortunately, limited conclusions about MDB corruption enforcement can be drawn from this data. Debarments of affiliates of the same company generally are reported as separate debarments, such that debarment statistics do not reflect the number of distinct investigations that have resulted in debarments.

## Looking Forward Into 2019

As we predicted last year, it appears that U.S. authorities have continued to focus on themes such as individual accountability, providing companies with incentives for self-disclosure and cooperation, corporate compliance, transparency, multi-jurisdictional coordination, and international cooperation.

<sup>109</sup> See Frederic Tomesco, *SNC Sinks as Canada Rules Out Negotiations on Graft Charges*, BLOOMBERG (Oct. 10, 2018), <https://www.bloomberg.com/news/articles/2018-10-10/snc-plunges-as-canada-rules-out-negotiated-deal-on-graft-charges>.

<sup>110</sup> Debarments were counted based on the data reported by each MDB, using each bank's own reporting criteria. See *Debarment and Sanctions Procedures*, AFRICAN DEV. BANK GRP., <https://www.afdb.org/en/projects-and-operations/procurement/debarment-and-sanctions-procedures/>; *Published List*, ASIAN DEV. BANK, <http://lnadbg4.adb.org/oga0009p.nsf/sancALLPublic?OpenView&count=999>; *Ineligible Entities*, EUROPEAN BANK FOR RECONSTRUCT. AND DEV., <http://www.ebrd.com/ineligible-entities.html> (including debarments based upon third-party findings); *Sanctioned Firms and Individuals*, INTER-AMERICAN DEV. BANK, <http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/sanctioned-firms-and-individuals,1293.html>; *World Bank Listing of Ineligible Firms & Individuals*, WORLD BANK, <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>. The World Bank Group appears to report only current debarments; the debarment totals are based upon the data reported as of January 11, 2019. The African Development Bank does not specify the grounds for its debarments; those grounds were counted based upon information reported by the Asian Development Bank and African Development Bank press releases.

<sup>111</sup> See *Sanctioned Firms and Individuals*, *supra*.

Brazil, Venezuela, and the entire Latin American region are areas of significant investigative activity, and such activity appears likely to continue for some time. Statements by senior Trump administration officials, policies implemented by the DOJ, and recent corporate and individual enforcement trends reflect these ongoing themes.

We expect the focus on these themes to continue in 2019, and we note that, if confirmed as Attorney General, William Barr is unlikely to shift the DOJ's priorities. In his first term as Attorney General in the George H. W. Bush administration, Barr demonstrated a business-friendly approach to FCPA enforcement. In 1992, the DOJ, under Barr's leadership, published a final rule enabling issuers and domestic concerns to obtain an opinion of the Attorney General regarding whether, under the DOJ's existing enforcement policy, a proposed transaction would violate the FCPA's anti-bribery provisions and lead the DOJ to take enforcement action.<sup>112</sup> Notably, that Opinion Procedure has fallen into disuse, with the last such opinion issued in 2014.<sup>113</sup>

We look forward to providing you with further updates on these and other developments in 2019.

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<sup>112</sup> See 57 Fed. Reg. 39,597, 39,598–39,601 (Sept. 1, 1992) (to be codified at 28 C.F.R. pts. 50 & 80).

<sup>113</sup> See *Opinion Procedure Releases*, U.S. Dep't of Justice (June 17, 2015), <https://www.justice.gov/criminal-fraud/opinion-procedure-releases>; Opinion Procedure Release 14-02, U.S. Dep't of Justice Crim. Div. (Nov. 7, 2014), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/14/14-02.pdf>.

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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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