

A satellite with solar panels is shown in space, orbiting Earth. The satellite is gold and white, with large blue solar panels. The Earth below is covered in white clouds and blue oceans. The background is a clear blue sky.

ADG Insights

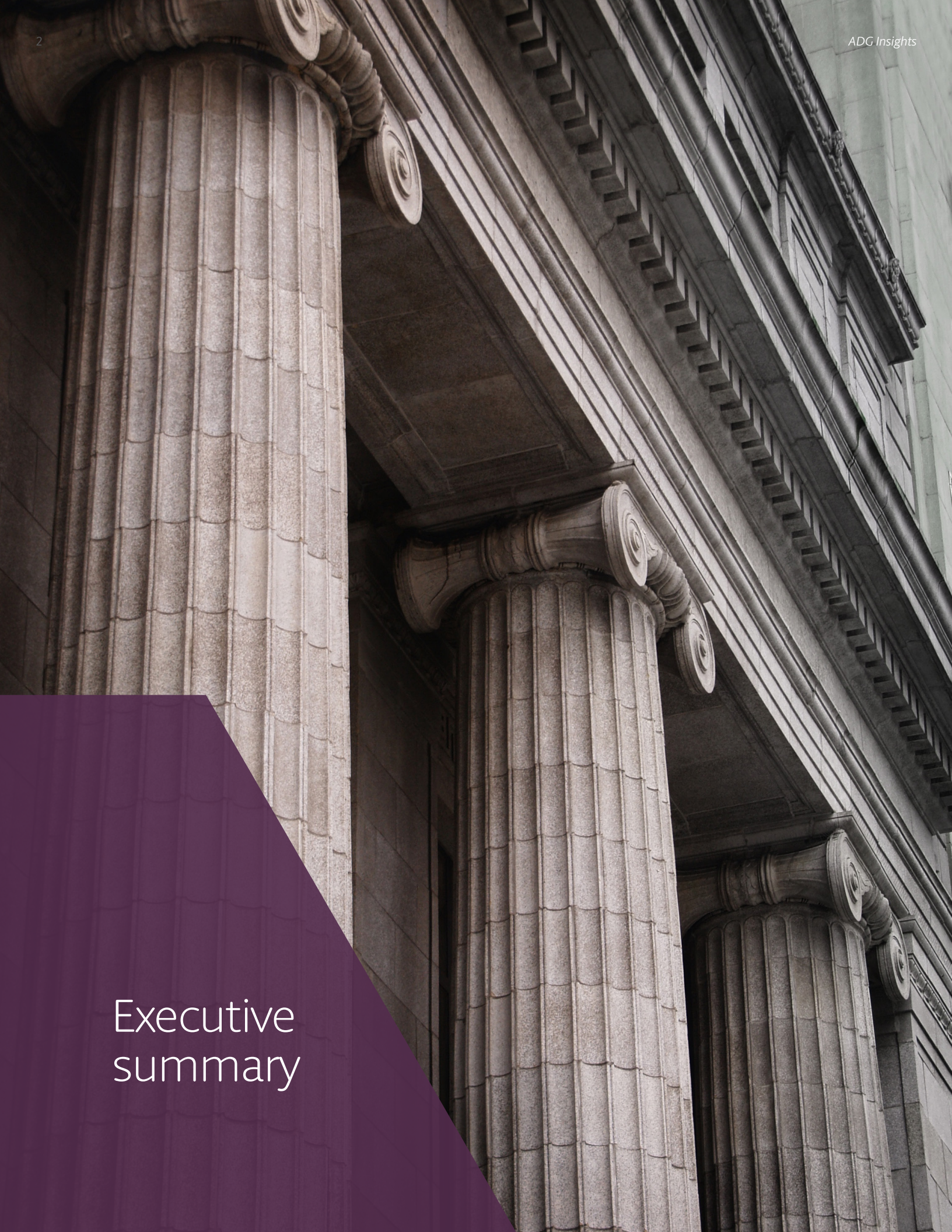
Top Bribery and Corruption
Developments of ADG
Companies in 2018

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Executive summary



Although many have expected the Trump Administration to be more business–friendly and less aggressive in prosecuting corruption related to business transactions, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) appear to be largely holding the course set by the prior administration. And, U.S. enforcement agencies are not the only cops on the corruption beat. The UK’s Serious Fraud Office (SFO) continues to aggressively enforce anti-bribery and corruption laws and to cooperate with U.S. enforcement agencies in doing so. In fact, DOJ recently assigned an Assistant Chief in the DOJ FCPA Unit to serve a two-year detail at the SFO and the UK’s Financial Conduct Authority in order to further strengthen the DOJ’s partnership with the UK enforcement agencies. In addition, enforcement authorities from a growing number of other countries are actively enforcing their own anti-corruption laws. This past year alone, enforcement agencies from Brazil, France, Sweden and Germany resolved – sometimes in cooperation with UK or U.S. agencies – corruption matters that targeted companies operating in the aerospace, defense, and government services (ADG) industries.

It's too early to say how the change in administration will shape enforcement trends, but ADG companies still face significant bribery and corruption risk.

Prior to his election, President Trump expressed contempt for the Foreign Corrupt Practices Act (FCPA). He called it a “horrible law” that “should be changed” and suggested that efforts to stop global corruption amounted to the United States acting as the “policemen for the world,” which he characterized as “ridiculous.”¹ But, public remarks from current Trump enforcement officials have not reflected similar hostility to FCPA enforcement.

Both in his nomination hearing² and in subsequent public remarks³, Attorney General Jeff Sessions declared that DOJ will continue to enforce the FCPA and the International Anti-Bribery Act, and will “continue to emphasize the importance of holding individuals accountable for corporate misconduct.”⁴ When deciding whether to bring charges against companies, Sessions stressed that DOJ will take into account “whether companies have good compliance programs; whether they cooperate and self-disclose their wrongdoing; and whether they take suitable steps to remediate problems.”⁵

Because many of the FCPA investigations resolved last year began under the prior administration, it’s too early to draw a conclusion about how the change in administrations will shape enforcement trends. It is clear, however, that companies operating in the ADG industries continue to face significant bribery and corruption risk.

Herein, we review some of the most significant enforcement actions resolved in the ADG industries in 2017. We also examine the impact of DOJ’s newly published FCPA Enforcement Policy and other global developments that should inform your thinking about corruption and bribery risk for the coming year.

ADG bribery and corruption matters resolved in 2017 highlight the dangers of working through a middleman or intermediary

In January 2017, an ADG company agreed to pay \$800 million in a global settlement with U.K., Brazilian, and U.S. authorities to resolve allegations that the company paid bribes to foreign officials in various countries through third parties in order to secure confidential information or government contracts. A second ADG company reportedly is under investigation for its use of middlemen. The SFO reportedly opened an investigation in August 2016 after the company self-disclosed that it had made inaccurate declarations to Britain's export credit finance agency about payments to sales agents. France's Parquet National Financier (PNF) fraud police have also opened an investigation, and some have suggested that their involvement may slow the investigation because this is the first time the UK and French agencies have cooperated in tackling corruption.

On June 1, 2017 German prosecutors announced that a marine technology company would pay Germany about €48 million (US\$54 million) — the amount the company earned under contracts to supply Greece and Peru with submarine sonar systems — resolving allegations that employees paid a Greek middleman more than €13 million to win the contracts.

On August 18, 2017, Swedish prosecutors charged a Russian citizen and employee of another ADG company with bribing an Azerbaijani official in order to secure a contract to provide train signals worth around US\$350 million. Prosecutors alleged that the company sold equipment to a UK-based intermediary, which then sold the equipment to the company in Azerbaijan at an inflated price, channeling the revenue from the inflated price to Azerbaijani officials to influence the award of the contract. The individual defendant was acquitted in October 2017, but the investigation is reportedly ongoing.

Other noteworthy ADG enforcement actions resolved in 2017 include:

- A July 2017 SEC settlement entered into by an energy services company through which the company will pay more than US\$29.2 million to resolve allegations that it violated the books and records and internal accounting control provisions of the FCPA. The alleged violations relate to the selection of a particular local supplier in Angola, the owner of which was a friend and neighbor of an official at Angola's national oil company, Sonangol. The same official ultimately approved the award of a lucrative

A woman with dark hair pulled back, wearing a light blue blazer over a pink shirt, is seated at a wooden desk. She is looking down at an open book. A large, modern desk lamp with a black shade and a warm white glow is positioned above her, casting light on the book and her face. The background is a blurred office setting with wooden paneling and windows.

oil services contract to the multinational company. The SEC alleged that the company circumvented its own anti-corruption policies and accounting controls when it entered a supply contract with the Angolan company.

- On September 26, 2017, the SFO secured guilty pleas from a UK-based subsidiary of a German shipping and logistics company and six current and former employees in relation to a conspiracy to make corrupt payments to an agent of Sonangol, Angola’s national oil company, in connection with a contract worth approximately US\$20 million.

DOJ FCPA Enforcement Policy affirms and refines incentives to self-disclose, fully cooperate and remediate

The new FCPA Corporate Enforcement Policy, released by DOJ on November 29, 2017 as an insert for the U.S. Attorneys' Manual, adopts many of the components of the FCPA Pilot Program.⁶ The Policy, like the FCPA Pilot Program, attempts to provide guidance and clarity about how companies will benefit if they voluntarily self-disclose potential FCPA violations, fully cooperate with investigators, and execute timely and appropriate remediation. The Policy provides that when a company has done all three of these things, "there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender."⁷ In contrast, the FCPA Pilot program provided only that DOJ would "consider" a declination of prosecution under these circumstances⁸ The Policy then explains that "[a]ggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism."⁹

When DOJ determines that such aggravating circumstances exist and a criminal resolution is

warranted, the company will still earn leniency if the company voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated. Specifically, the Fraud Section:

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines fine range, except in the case of a criminal recidivist; and
- generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.¹⁰

DOJ's move away from requiring a compliance monitor was reflected in the largest FCPA settlement of 2017 with Sweden-based international telecommunications company, Telia Company. Telia agreed to pay a staggering total of \$965 million to resolve a global investigation in which DOJ cooperated with the Public Prosecution Service of the Netherlands and Swedish authorities. DOJ found that a compliance monitor was not necessary despite the far-reaching nature of the corruption allegations.¹¹ Telia made an extensive effort to ensure that the company implemented a program that not only complied with DOJ guidance, but was also

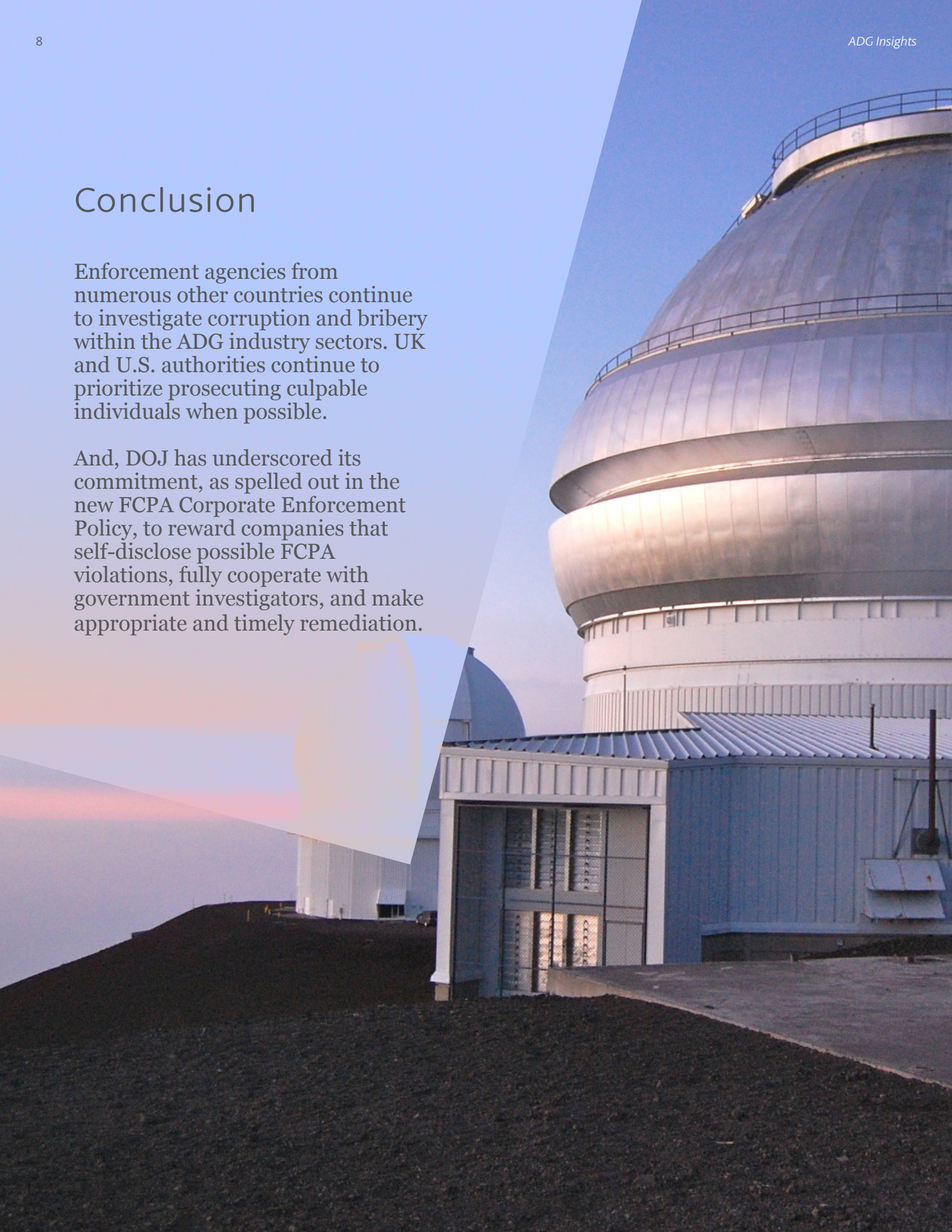
innovative and easily accessible to employees.¹² The company's former head of anti-corruption reportedly traveled to Washington, D.C. on three separate occasions to discuss Telia's compliance program with prosecutors from DOJ and the SEC before the terms of the settlement, which did not include a compliance monitor, were finalized.¹³ Companies seeking to avoid a compliance monitor in future criminal FCPA resolutions may be wise to take similar steps when developing their own compliance enhancements.

To qualify for leniency under the FCPA Corporate Enforcement Policy, companies must "pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue."¹⁴ This requirement may be satisfied by a parallel SEC resolution. However, in instances in which the defendant is not an issuer and therefore not subject to an SEC action, we expect DOJ to continue to issue "declinations with disgorgement," which require disgorgement at the same time they announce a declination, despite the fact that some have suggested that DOJ lacks statutory authority to do so.¹⁵ DOJ issued two such "declinations with disgorgement" in 2017 – to Linde North America Inc./Linde Gas North America LLC and CDM Smith – prior to issuing the new Corporate Enforcement Policy.¹⁶

Conclusion

Enforcement agencies from numerous other countries continue to investigate corruption and bribery within the ADG industry sectors. UK and U.S. authorities continue to prioritize prosecuting culpable individuals when possible.

And, DOJ has underscored its commitment, as spelled out in the new FCPA Corporate Enforcement Policy, to reward companies that self-disclose possible FCPA violations, fully cooperate with government investigators, and make appropriate and timely remediation.





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Endnotes

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2. Nomination of Jeff Sessions to be Attorney General of the United States, Senator Whitehouse: Questions for the Record, page 6, Question 13, January 17, 2017. See <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Whitehouse%20QFRs.pdf>
3. Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference, Washington, D.C., April 24, 2017. See <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>
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5. *Id.*
6. U.S. Dep't of Justice, Corporate Enforcement Policy (9-47.120), <https://www.justice.gov/criminal-fraud/file/838416/download> (last visited Feb. 27, 2018).
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13. *Id.*
14. See Corporate Enforcement Policy, *supra* n6
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16. Declination re: CDM Smith Inc., U.S. Department of Justice, Criminal Division (June 21, 2017). See <https://www.justice.gov/criminal-fraud/page/file/976976/download> (last accessed Feb. 27, 2018); Declination re: Linde North America Inc., Linde Gas North America LLC, U.S. Department of Justice, Criminal Division (June 16, 2017). See <https://www.justice.gov/criminal-fraud/file/974516/download> (last accessed Feb. 27, 2018)



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We can help you anticipate and deal with the risks before they become problems.

The aerospace, defense, and government services (ADG) industry is changing significantly. Global spending on defense and weapon system platforms is increasing. Governments are procuring analysis and engineering services to address escalating terrorism threats, cybersecurity concerns, and an ever-increasing demand for big data analytics. Commercial space and unmanned vehicle advances have invigorated key sections of the industry. Brexit and the administration change in the U.S. are creating challenges and opportunities across the globe. And, technological advances such as 3-D printing are creating unique opportunities for innovative products, decreased time-to-market schedules, and agile maintenance and repair services.

Our clients demand experience. They need comprehensive and cost-effective support from lawyers who know their business and understand the demands of their industry.

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Our clients are also some of the most innovative in the world. They build manned and unmanned aircraft, supply parts, and materials to the aerospace industry, and develop and deliver the technologies essential to defense and national security. Our clients make and provide launch vehicle and satellite services and provide the services and innovations required for homeland security and critical governmental operations.

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