SHEARMAN & STERLING

FCPA DIGEST

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

JULY 2020

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INTRODUCTION: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT

In the first half of 2020, the overall number of corporate enforcement actions dropped somewhat from recent years, with only six actions brought by the DOJ and SEC. The number of individual enforcement actions dropped as well, with only five individuals charged or indictments unsealed in the first half of 2020. As a benchmark, U.S. officials brought nineteen corporate enforcement actions in the last six months of 2019 and charged (or unsealed charges against) eighteen individuals. This year provides a significant departure from past enforcement trends, due of course to the novel coronavirus outbreak, which has commanded the nation's attention and disrupted business as usual.

Since the declaration of a national emergency in mid-March in response to the COVID-19 outbreak in the U.S. and the ensuing shuttering of normal governmental activity, the DOJ has only brought two corporate enforcement actions (*Novartis Hellas* and *Alcon Pte*) and no individual enforcement actions. In that same time period, the SEC only filed one complaint against an individual (*Asante Berko*) and charged two companies with FCPA violations (*Eni S.p.A.* and *Novartis AG*). Whether FCPA enforcement actions resume their normal frequency in the second half of 2020 remains to be seen; for the moment, a dearth of publicly announced FCPA cases may lead to a build-up of prepared indictments and charges.

Of note, even while the number of enforcement actions lags behind recent trends, the *Airbus* action, which proved to be the highlight of 2020 so far, with a combined penalty of nearly $4 billion allocated among the DOJ, the State Department, the French PNF, and the UK's SFO has already brought yearly aggregate corporate penalties to a new record high.

As we explain in this mid-year *Trends & Patterns*, among the highlights from 2020 were:

- COVID-19-related compliance challenges and the potential for increased corruption risks;
- six corporate enforcement actions, with total sanctions of approximately $4.35 billion, making the first half of 2020 a record year in terms of level of FCPA enforcement penalties—with six months still to come. Although the total penalties in the first half of 2020 were significantly higher than previous years ($2.908 billion in the whole year of 2018 and $2.904 billion in 2019), the penalties were unevenly spread across enforcement actions;
- a median corporate sanction of $24.5 million, which is in line with the median from last year of $20.6 million;
- two major judicial challenges to the DOJ's individual enforcement efforts, in *United States v. Baptiste & Boncy* and *United States v. Hoskins*, both leading to the reversal of FCPA-related jury convictions;
- several notable updates to private litigation claims arising in the aftermath of an FCPA investigation, including restitution claims, securities fraud claims, and RICO claims;
- as in recent years, the DOJ continued its trend of updating its enforcement policies, announcing updates to the Evaluation of Corporate Compliance Programs guidance; the SFO similarly issued guidance on how it will evaluate compliance programs moving forward;
- record rewards issued under the SEC's whistleblower program;
- a Supreme Court ruling permitting but limiting SEC's disgorgement powers; and
- new guidance by the French government on requirements for issuance of its *Convention Judiciaire d'Intérêt Public* settlement agreement.

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STATISTICS

In the first half of 2020, the DOJ and SEC resolved six corporate enforcement actions. Consistent with the trends and patterns over the past years, the DOJ apparently deferred to the SEC to bring civil enforcement cases in the less egregious matters, which has resulted in the SEC bringing two enforcement actions without parallel DOJ actions and typically with lower penalty amounts (*Cardinal Health* and *Eni S.p.A.*). The DOJ and SEC brought only one joint enforcement action in 2020 so far.

Regarding the FCPA enforcement actions against individuals in the first half of 2020, the DOJ charged or unsealed charges against five individuals, while the SEC brought a case against only one individual. Charges against three of the individuals stemmed from the investigation into alleged corrupt conduct by Alstom S.A. and Marubeni Corporation in Indonesia, which means only three unique cases have been filed or unsealed against individuals in 2020 so far.

We discuss the 2020 YTD corporate enforcement actions, followed by the individual enforcement actions, in greater detail below.

CORPORATE ENFORCEMENT ACTIONS

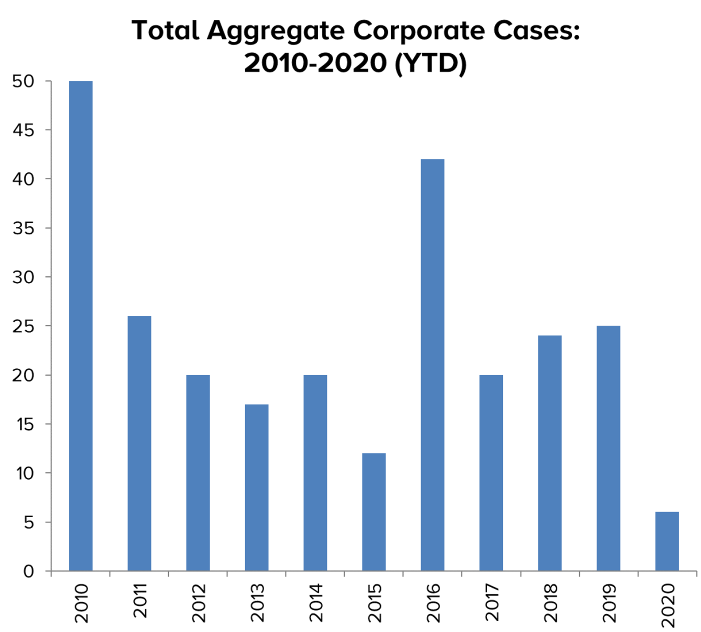
DOJ ACTIONS

The *Airbus* enforcement action, brought by the combined prosecutorial efforts of the DOJ, PNF, and the SFO, was announced on January 31, 2020. It immediately vaulted to the top of the largest combined penalty list, with a staggering global sanction of around $3.97 billion. The previous holder of the unenviable number one spot was Petróleo Brasileiro S.A., Petrobras, with a combined penalty of over $1.79 billion to be paid to U.S. and Brazilian authorities. The *Airbus* penalty is especially significant considering the company obtained at least partial self-disclosure, cooperation, and remediation credit in all three of the investigating jurisdictions. Given its import (and for lack of other significant enforcement actions to discuss), we dedicate an entire section below to the *Airbus* enforcement action and the significant growing cooperation between the DOJ, SFO, and PNF.

In the *Airbus* enforcement action, the DOJ investigated attempts by the company, which is headquartered in the Netherlands, to secure contracts with Chinese state-owned and state-controlled enterprises for the sale of its aircraft. The company had designated a business division as specifically responsible for third-party partnerships, and that business division directed bribes to Chinese officials and brought those officials, and occasionally their families, to attend all-expenses-paid events in China, Utah, and Hawaii. The DOJ also investigated the sale of Airbus aircraft to the Vietnamese Ministry of Defense and a failure to accurately record those sales, in violation of a separate statute, the International Traffic in Arms Regulations (ITAR).

To resolve allegations it violated the FCPA and ITAR, the company entered into a non-prosecution agreement with the DOJ in which it agreed to pay a monetary penalty of $587,224,475. This settlement includes a penalty of $294,488,085 for a violation of the FCPA in China and $287,736,390 for its ITAR violation. Airbus received a twenty-five percent discount off the recommended sentence for the company's full cooperation and remediation efforts. As the global bribery investigation was initiated by the SFO, Airbus did not receive any self-disclosure credit. However, Airbus received a discount of more than fifty percent for the ITAR-related penalty for, among other factors, its voluntary self-disclosure to the DOJ and its cooperation with respect to the inaccurate recording of aircraft sales in Vietnam.

While the DOJ focused only on FCPA-related conduct by Airbus in China, the scope of the investigations by SFO and PNF covered similar bribery schemes in Malaysia, Sri Lanka, Taiwan, Indonesia, and Ghana. As part of a global settlement, Airbus entered into a deferred prosecution agreement with the SFO to pay approximately $1.09 billion and settled with the PNF for approximately $2.29 billion in a *Convention Judiciaire d'Intérêt Public*, or Judicial Public Interest Agreement. Both the SFO and PNF settlements represent a fifty percent discount off the original penalties.



ENFORCEMENT ACTIONS AND STRATEGIES

The *Airbus* enforcement action remained the sole FCPA-related DOJ action in the first half of 2020 until the DOJ announced two related DPAs on June 25, 2020 against Novartis Hellas S.A.C.I. and Alcon Pte Ltd.

Novartis AG's subsidiary in Greece, Novartis Hellas S.A.C.I., and its former subsidiary, Alcon Pte Ltd, agreed to settle FCPA-related charges with the DOJ. Novartis AG is a Switzerland-based multinational pharmaceutical company, and it had sold Alcon Pte Ltd to Alcon Inc., a multinational eye care company, in April 2019, after the alleged misconduct occurred. According to the DOJ, Novartis Hellas bribed employees of state-owned hospitals in Greece and falsely recorded such improper payments, while Alcon Pte Ltd engaged in similar conduct in Vietnam. In settling these FCPA-related charges, Novartis Hellas S.A.C.I and Alcon Pte Ltd agreed to pay a criminal fine of $225 million and around $8.9 million, respectively. An investigation by Greek authorities into Novartis continues unabated, even in light of the U.S. settlement agreements.

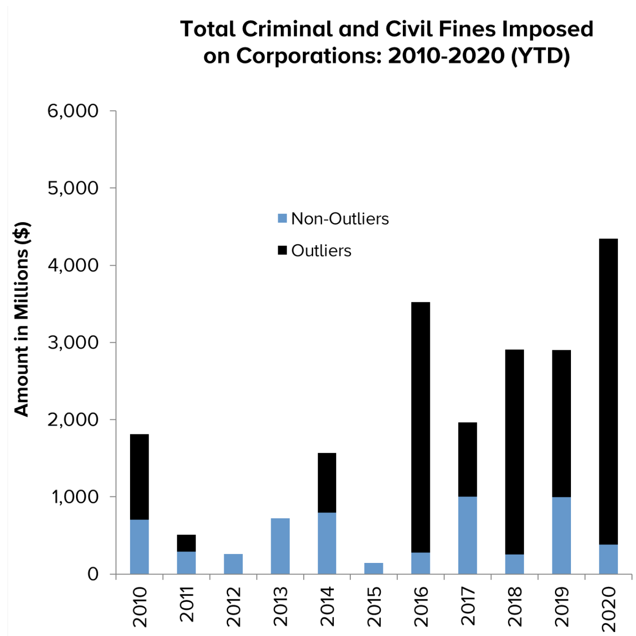
SEC ACTIONS[1]

The SEC settled its first case of the year on February 28, 2020, issuing a cease-and-desist order in its *Cardinal Health* investigation for alleged misconduct by the company's Chinese subsidiary, which it had acquired in 2010. At the core of the SEC's allegations, the subsidiary allegedly failed to disentangle its books and records from those of a European supplier of a product for which Cardinal Health was the sole distributor in China. The subsidiary also allegedly hired employees on behalf of the European supplier without providing adequate oversight, which proved problematic. According to the SEC, the employees made payments from marketing accounts without proper management authorization due to the subsidiary's insufficient controls. The SEC further alleged that the subsidiary failed to record accurately such marketing payments on its books and records.

According to the SEC, Cardinal Health violated the FCPA's internal accounting controls and recordkeeping provisions in relation to the subsidiary's marketing payments. The SEC settled its enforcement action against Cardinal Health, recognizing the company's remedial efforts, which included self-disclosure of an internal investigation, terminating employees involved in the scheme, and cooperating with the SEC, among other actions. Cardinal Health was required to pay $5.4 million in disgorgement, $916,887 in prejudgment interest, and a civil monetary penalty of $2,500,000, for a total of around $8.8 million.

The SEC finalized the government's first COVID-19 era case as it filed a cease-and-desist order against Eni S.p.A. on April 17, 2020. Eni S.p.A. is a global oil and gas company headquartered in Rome, Italy, and according to the SEC, it violated the FCPA's internal accounting controls and recordkeeping provisions because of a subsidiary's actions in Algeria. Management of Saipem S.p.A., the subsidiary controlled by Eni S.p.A., allegedly met with the Algerian Energy Minister in 2006, who told them that to obtain business in Algeria, Saipem would need to hire an intermediary and pay invoices for services that would not be rendered. According to the SEC, Eni received approximately $19,750,000 of unwarranted tax benefit as a result of Saipem misclassifying its bribes as legitimate business expenses.

Notably, this enforcement action makes Eni a repeat offender: it had previously settled with the SEC in 2010 to resolve similar allegations that it violated the books and records and internal accounting controls of the FCPA with respect to efforts by Snamprogetti Netherlands, B.V., its then wholly-owned subsidiary, to construct a natural gas facility in Nigeria.



The SEC settled this year's enforcement action against Eni by issuing a cease-and-desist letter, noting both the company's repeat-offender status and its positive remedial efforts and cooperation with the SEC. It ordered Eni to pay $19.75 million in disgorgement, as well as $4.75 million in prejudgment interest, for a total penalty of $24.5 million.

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[1] Before the publication date, but after the end of the Second Quarter, the SEC announced an enforcement action against Alexion Pharmaceuticals, in which the company agreed to pay $21.4 million to resolve FCPA charges. The Alexion enforcement action will be included in the year-end Trends and Patterns.

ENFORCEMENT ACTIONS AND STRATEGIES

On June 25, 2020, the SEC announced it had issued a cease-and-desist order against Novartis AG in parallel with the DOJ action discussed above. According to the SEC, Novartis engaged in various bribery schemes in South Korea, Vietnam, and Greece to obtain business with public and private healthcare providers. Of note, this action against Novartis AG makes the company a repeat offender; it had previously settled charges with the SEC in 2016 under a separate Administrative Proceeding.

Noting the company's cooperation and remedial efforts, the SEC ordered the Novartis to pay $92.3 million in disgorgement and $20.5 million in pre-judgment interest, for a total penalty of $112.8 million. This brings the total penalty in the Novartis-related actions to $346.7 million.

UPSHOT

The first half of 2020 saw *the* largest combined FCPA enforcement actions in history: Airbus's global settlement of around $3.97 billion. In fact, the *Airbus* enforcement actions accounted for approximately 91.2% of the total 2020 YTD corporate enforcement penalties. The total enforcement penalties for the year to date thus amounted to a staggering $4.35 billion—already surpassing aggregate penalties assessed in previous years, with six months to spare.

Setting aside the *Airbus* enforcement action, which is a clear outlier,[2] the corporate sanctions imposed in 2020 were relatively disparate—ranging from $8.8 to $346 million. While the pure average corporate penalty from 2020 was $1.08 billion, when we exclude the *Airbus* outlier, the average corporate penalty is approximately $126 million. That said, this number (which is heavily influenced by the *Novartis* action as a result of the limited number of enforcement actions) is also higher than the average excluding outliers of $82.8 million from 2019.

As we have noted in previous Trends and Patterns, we continue to view the median as a more accurate measure of the "average" corporate enforcement penalty. That figure for the 2020 YTD corporate enforcement actions was $24.5 million, which is slightly higher but generally in line with that measure from recent years. The median corporate sanction, for example, was $20.6 million in 2019. As we have noted in previous editions of this publication, it remains a general trend that FCPA enforcement actions typically range between $10 million and $30 million.

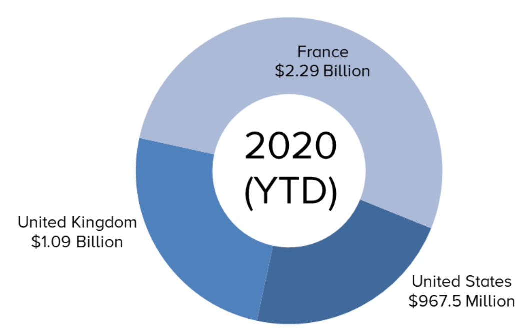
Finally, as has been the case for the past several years, a substantial portion of the $4.35 billion in sanctions will not be paid to the U.S. Treasury. Continuing the recent trend of increased international coordination, a significant portion of the 2020 YTD penalties will be paid to foreign governments—in this case, the United Kingdom and France, respectively.

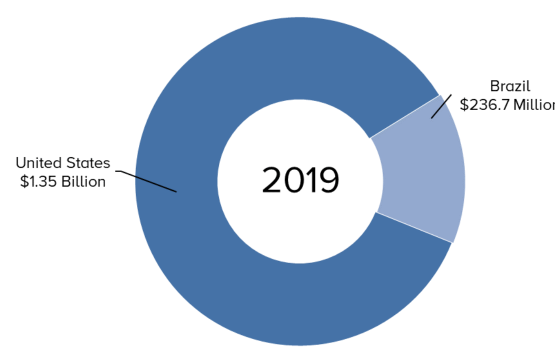
INDIVIDUAL ENFORCEMENT ACTIONS

On the individual side of the 2020 year-to-date FCPA enforcement, the DOJ and SEC have cumulatively brought charges against only five individuals, a significant decrease from recent years. Of the five different defendants, the DOJ brought charges against four as part of two separate enforcement actions: (i) *Kusunoki, Moenaf, and Sulianto, and* (ii) *Farias-Perez*. The SEC separately brought charges against one individual defendant: *Berko*. As discussed below, these cases include a mix of executives and corporate managers.

The charges against individuals brought by the DOJ arose from enforcement actions it had commenced in previous years, while the SEC charged *Berko* in connection with a previously undisclosed investigation into an unnamed U.S.-based publicly traded bank holding company. The DOJ brought charges against individuals involved in the recent enforcement actions

U.S. and Foreign Government Recoveries

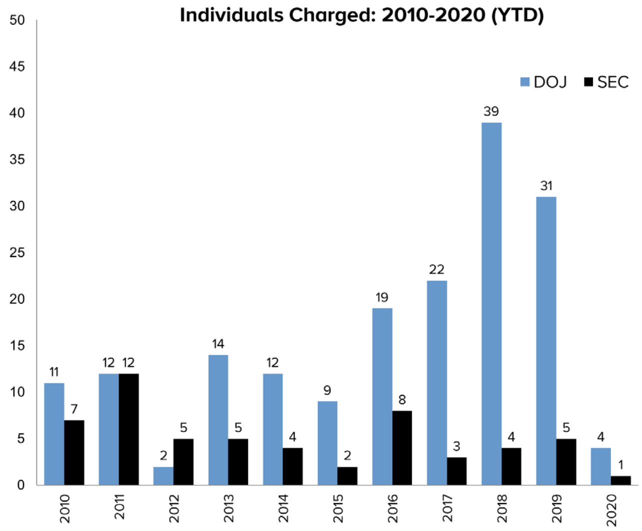




[2] For purposes of our statistics, the "average excluding outliers" refers to the pure average sanction, excluding any outliers as calculated using the Tukey Fences model, which utilizes interquartile ranges.

ENFORCEMENT ACTIONS AND STRATEGIES

against Marubeni and Alstom (*Kusunoki et al.*) and the PdVSA corruption scheme (*Farias-Perez*).



DOJ ACTIONS

On February 18, 2020, the DOJ unsealed a criminal indictment against Junji Kusunoki, Reza Moenaf, and Eko Sulianto, charging the co-defendants with a litany of counts, including counts for conspiracy to violate the FCPA, counts of violating the anti-bribery provisions of the FCPA, counts of conspiracy to commit money laundering, and counts of money laundering. The DOJ had filed an original indictment against Kusunoki on November 14, 2013 and subsequently filed a superseding indictment on February 26, 2015, which included charges against Moenaf and Sulianto.

As an important aside, the indictment covers conduct from 2002 to 2009. Several important considerations allows the DOJ to reach conduct from over eighteen years ago: (1) the five-year statute of limitations is generally tolled upon the filing of an indictment, (2) the statute of limitations generally remains tolled for a superseding indictment, as long as that new indictment does not substantially alter the original filing, (3) the statute of limitations remains tolled even if the indictment, immediately upon filing, is sealed, and (4) for conspiracy offenses, the DOJ need only prove that a single overt act in furtherance of the conspiracy occurred during the five-year statute of limitations period. Then, all parts of the conspiracy become punishable.

According to the DOJ, in 2002, Marubeni Corporation entered into a joint-venture partnership with Alstom S.A. to procure a power services contract in Indonesia, the Tarahan Project. The DOJ alleges that executives from Alstom S.A. hired two consultants with the intent to bribe members of the Indonesian parliament and the state-owned power company, Perusahaan Listrik Negara, in exchange for securing the contract for the Tarahan Project. The DOJ alleges that Kusunoki, Moenaf, and Sulianto coordinated with fellow co-conspirators to wire hundreds of thousands of dollars from bank accounts in New York to the consultants' bank accounts in Maryland and Singapore. In 2005, Marubeni and Alstom S.A. were awarded the contract for the Tarahan Project.

Two of the defendants worked in a mixed executive/corporate manager role, while the third worked exclusively as a corporate manager. Kusunoki was the General Manager of Marubeni Power Systems Corporation and former president of another Marubeni subsidiary. Moenaf was the president of PT Energy Systems Indonesia, a subsidiary of Alstom S.A. in Indonesia and Sulianto was the director of sales of the same Alstom subsidiary.

Partially in connection with Alstom S.A.'s actions in Indonesia, it was ordered to pay a $772.3 million fine in 2015, which at the time was the largest criminal FCPA fine ever—although the investigation included conduct in a number of other countries as well. Similarly, in 2014, Marubeni Corporation agreed to plead guilty one count of conspiracy to violate the FCPA and seven counts of violating the FCPA's anti-bribery provisions and was ordered to pay $88 million.

Charges against the three Alstom and Marubeni defendants are currently pending.

On February 7, 2020, the DOJ brought charges against an additional individual allegedly involved in the wide-ranging PdVSA bribery investigation, Tulio Anibal Farias-Perez. With the unsealing of this most recent indictment, to date the DOJ has charged thirty-three individuals, among whom were former officials of PdVSA and its subsidiaries or former officials of other Venezuelan government agencies or instrumentalities, in relation to this investigation. The indictment against Farias-Perez (not to be confused with Luis Carlos De Leon-Perez, who pleaded guilty in 2018 in connection with the same enforcement action) alleges that Farias-Perez and his co-conspirators sought to obtain lucrative equipment supply contracts with PdVSA and laundered the proceeds of a bribery scheme through various international financial transactions, including to, from, or through bank accounts in the United States. Farias-Perez was the owner and former executive of a number of closely held companies that attempted to secure contracts with PdVSA. He pleaded guilty on February 19, 2020 and is currently awaiting sentencing.

SEC ACTIONS

In the final individual enforcement action in an otherwise quiet half year, the SEC charged Asante Berko on April 13, 2020 with violations of the anti-bribery provision of the FCPA and aiding and abetting. Berko was an executive of a U.K. subsidiary of an unnamed U.S.-based publicly traded bank holding company and was charged with bribing government officials in Ghana to secure a contract to build and operate an electrical power plant for a client. The SEC also alleges that the client, a Turkish energy company, transferred at least $2.5 million to a Ghana-based intermediary, all or most of which was used to bribe government officials to secure the contract. Berko, according to the SEC, deliberately misled his employer's compliance personnel about the true nature of payments to the intermediary company. Berko's financial services company allegedly earned over $10 million in fees and, according to the SEC, Berko further expected to be independently compensated by the Turkish energy company.

The case against Berko is currently pending. As of the time of this publication, the SEC has not pursued charges against the bank for its "agent's" conduct (relatedly, we discuss the agency assertion in a separate section below). Significantly, in the *Berko* complaint, the SEC noted that the company's compliance efforts led it to independently conduct an internal investigation in 2016 and terminate its involvement with the energy project on its own accord.

UPSHOT

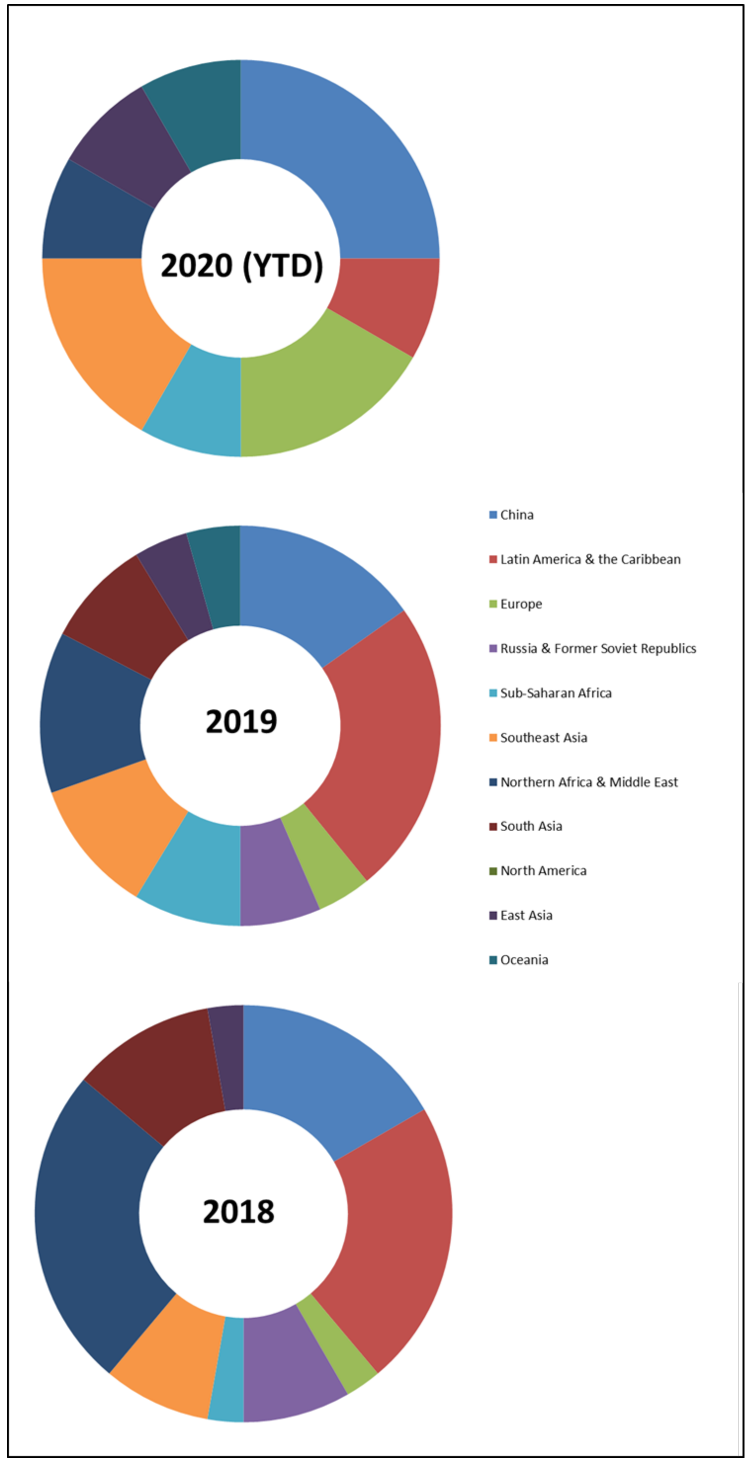
The total number of individuals charged in FCPA enforcement actions in the first half of 2020 dropped significantly (only five). With a few outliers (2012 and 2016), the DOJ and SEC have brought charges against fifteen to twenty-five individuals in connection with an FCPA enforcement action on an annual basis in the last decade. That said, the rest of 2020 may yet see an increase of enforcement so as to more closely align with recent enforcement trends. Additionally, there are a few points worth highlighting.

First, most of the individuals charged in 2020 were executives; unlike in previous years, neither the DOJ nor the SEC filed charges against middlemen/fixers or foreign officials in the first half of 2020.

Second, most of the charges against individuals stem from larger cases filed prior to 2020. Specifically, the individual charged for involvement in the PdVSA scheme adds to the growing list of individuals charged as part of that scheme, and the indictment against Marubeni and Alstom employees stemmed from corporate actions finalized in 2014 and 2015. As a result, only one of the five FCPA enforcement actions against individuals in the first half of 2020 arose from a truly new matter—and it remains to be seen whether any corporate enforcement actions result from the charges against Berko.

GEOGRAPHY & INDUSTRIES

In recent years, the geographic focus on FCPA enforcement actions has been relatively diverse. The FCPA enforcement action from 2020, however small in number, proved no different, with investigations into conduct that occurred in China, Northern



ENFORCEMENT ACTIONS AND STRATEGIES

Africa, Sub-Saharan Africa, Oceania, Europe, Southeast Asia, East Asia, and Latin America.

Of the nine total enforcement actions in the first half of 2020,[3] three involved alleged acts of bribery in China (*Airbus*, *Cardinal Health*, and *Novartis AG*). Business activity in China has been a consistent source of FCPA enforcement actions, with at least thirty-two separate enforcement actions addressing misconduct in the country arising in the last five years alone.

After taking account of actions related to conduct in China, the 2020 FCPA enforcement actions were fairly evenly distributed across other regions. One of the FCPA enforcement actions involved officials from Latin America or the Caribbean (*Farias-Perez*); one enforcement action involved officials from Oceania (*Kusunoki et al.*); one involved an alleged bribery scheme in Sub-Saharan Africa (*Berko*); one involved improper conduct in Northern Africa (*Eni S.p.A.*); two involved conduct in Southeast Asia (*Novartis AG* and *Alcon Pte Ltd*); one came partially from misconduct in East Asia (*Novartis AG*); and two resulted from activities in Europe (*Novartis AG* and *Novartis Hellas S.A.C.I.*).

With regard to industries, the 2020 FCPA corporate enforcement actions to date arise from a diverse set of industries. As with past years, a number of enforcement actions involved the oil & gas industry (*Farias-Perez* and *Eni S.p.A.*) and healthcare & life sciences industry (*Cardinal Health*, *Novartis Hellas S.A.C.I.*, *Novartis AG*, and *Alcon Pte Ltd*). As in 2018, when the largest source of FCPA enforcement actions was the financial services industry, the industry once again made it on the list this year (*Berko*). The remaining enforcement action involved the aerospace industry (*Airbus*), which has likewise seen FCPA enforcement activity in recent years.

TYPES OF SETTLEMENTS

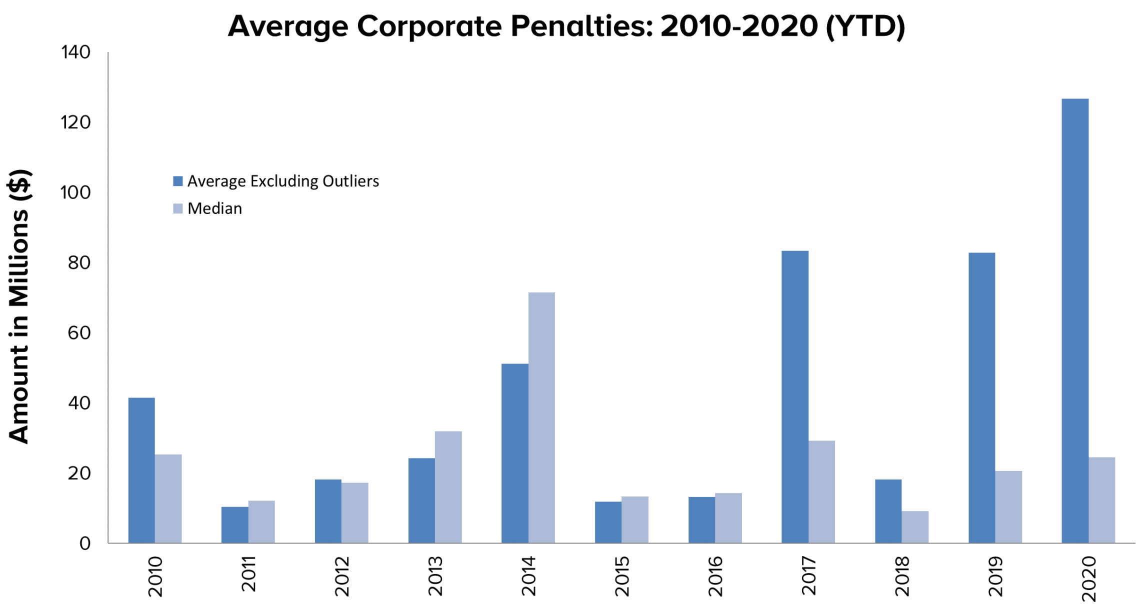
In 2020, the enforcement agencies continued prior practices of resolving matters using a variety of settlement structures, with the choice of structure apparently related—but not always in a clear or consistent manner—to the seriousness of the conduct or the timing and degree of disclosure and cooperation. We discuss the SEC's and DOJ's settlement devices below.

SEC

As was the case in recent years, the SEC in 2020 relied exclusively on administrative proceedings to resolve its corporate FCPA enforcement actions. Indeed, the SEC has not utilized a civil settlement since 2016.

DOJ

The DOJ, in 2020 thus far, has only settled with three companies, and it used DPAs in all actions. There is nothing to indicate that it



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

will cease using the range of settlement devices it has in previous years, including DPAs, NPAs, Plea Agreements, and FCPA Corporate Enforcement Policy "declinations." Further, 2020 saw the DOJ decline to pursue charges against CHS, a Minnesota-based farmers' cooperative, in response to self-disclosed potential violations of payments to Mexican customs agents. Similarly, Usana Health Sciences Inc., a Utah-based multilevel marketer of personal-care products, issued a statement in June 2020 that the SEC and DOJ were closing an FCPA-related investigation into the company's operations in China, based on the company's prompt disclosure of the matter, its thorough investigation, cooperation, and remediation. The DOJ did not issue an official declination pursuant to its FCPA Corporate Enforcement Policy for either company; rather, the DOJ's decision to not pursue further action was reported by the companies itself. The list below sets out the various settlement devices the DOJ has at its disposal, of which it has only used one thus far in its 2020 FCPA enforcement actions against corporate entities:

- Plea Agreements – *None*
- Deferred Prosecution Agreement(s) – *Airbus; Novartis Hellas S.A.C.I.; Alcon Pte Ltd*
- Non-Prosecution Agreements – *None*
- Public Declinations with Disgorgement –*None*

ELEMENTS OF SETTLEMENTS

WITHIN GUIDELINES SANCTIONS

In the three corporate enforcement actions brought by the DOJ in 2020 so far, the settling companies, all received a sentence based on the U.S. Sentencing Guidelines.

SELF-DISCLOSURE, COOPERATION, AND REMEDIATION

The DOJ did not award Airbus full credit for voluntary disclosure because the global bribery investigation was initiated by the SFO. That said, Airbus received both cooperation and remediation credit to the tune of twenty-five percent, which resulted in a reduction of its criminal fine for the FCPA-related conduct—down to $2.09 billion.

In the *Alcon* enforcement action, the company received a twenty-five percent discount off the bottom of the applicable Sentencing Guidelines range for its cooperation and remediation efforts. It was not credited for voluntarily disclosing the misconduct.

Interestingly, although Novartis Hellas received full credit for its cooperation with the DOJ and its remedial efforts, because Novartis AG—its parent company—was involved in similar conduct for which it reached a resolution with the SEC in 2016, the twenty-five percent reduction was not applied to the applicable fine range. As a result, the repeat-offender status of Novartis AG cost the company at least $45 million in settling the *Novartis Hellas* DPA.

MONITORS & REPORTING REQUIREMENTS

As we have previously reported, in recent years the DOJ has increased the frequency with which it imposed corporate monitors as part of FCPA settlements. However, in a departure from that trend, the DOJ has not imposed any monitoring requirements this year. It did, however, require that Airbus, Novartis Hellas, and Alcon report annually for a term of three years regarding their remediation efforts and the implementation of the compliance measures described in the DPAs.

SANCTIONS PAID ELSEWHERE

The DOJ's *Airbus* enforcement action provides another recent example of the agency taking into account whether a portion of the criminal fine will be paid to other authorities. The DPA entered into by Airbus allows for the offset of around $1.8 billion to be paid to authorities in France. This accounting of other sanctions allowed Airbus to reduce the amount of the U.S. monetary penalty for FCPA-related conduct from $2.09 billion to $294 million.

CASE DEVELOPMENTS

BONCY & BAPTISTE

In 2018, the DOJ charged Joseph Baptiste and Roger Richard Boncy with three counts for alleged misconduct in a project to develop a port in Haiti. At trial in 2019, the jury convicted Baptiste on all charges and found Boncy guilty of one count of conspiracy to violate the FCPA but acquitted him on money laundering and Travel Act charges. In August 2019, Baptiste filed a motion for a new trial on the basis of ineffective assistance of counsel and for a judgment of acquittal, and, relatedly, Boncy moved for the same in September 2019.

In March 2020, the court granted Baptiste's motion for a new trial based on the ineffective assistance of counsel. The court also granted Boncy's motion for a new trial based on the prejudice he experienced due to the ineffective assistance of his co-defendant's trial counsel. The status of the new trial is currently pending.

We discuss the case and its implications at length below.

CEVALLOS DIAZ & CISNEROS ALARCON

In January 2020, in connection with the *PetroEcuador* investigation, Armengol Alfonso Cevallos Diaz pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering. Sentencing is currently pending.

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In February 2020, Jose Melquiades Cisneros Alarcon, who had pled guilty to one count of conspiracy to commit money laundering in connection with the same *PetroEcuador* investigation, was sentenced to 20 months in prison and three years of supervised release.

HOSKINS

On November 8, 2019, a jury convicted Lawrence Hoskins of six counts of violating the FCPA, three counts of money laundering, and two counts of conspiracy in connection with the government's investigation into Alstom SA's conduct in Indonesia. The focus at trial was whether Hoskins acted as an agent for Alstom's U.S. subsidiary, which the jury determined was the case. Immediately following the conclusion of the jury trial, Hoskins filed post-trial motions for acquittal and a new trial. He argued that the government failed to provide sufficient evidence to the jury to prove he acted as an agent of the subsidiary.

In February 2020, the district judge in charge of the case granted, in part, Hoskins' post-trial motions for acquittal and a new trial with respect to all six FCPA counts and the conspiracy to violate the FCPA count. He remains convicted of the money laundering and the conspiracy to commit money laundering counts and was sentenced to fifteen months imprisonment. We discuss the case and its implications at length below.

TRUPPEL & REICHERT

In March 2020, Andres Truppel, a former consultant for Siemens AG who had pleaded guilty to one count of conspiracy to violate the FCPA, was sentenced to time served.

In April 2020, Eberhard Reichert, the technical head of Siemens' major projects subdivision, was also sentenced in time served in connection with a guilty plea for one count of conspiracy to violate the FCPA.

As we have previously reported, Truppel and Reichert were involved in a bribery scheme in Argentina to obtain a national identity card contract with the government there for their employer. Previous DOJ and SEC actions against Siemens and its subsidiaries were filed and settled in 2008. Six other defendants in the case remain fugitives.

HIGHLIGHT ON *AIRBUS*: PERSPECTIVES FROM THE UNITED STATES, THE UNITED KINGDOM, AND FRANCE

Given the limited number of enforcement actions in the start of 2020, even if we just considered the U.S. portion of the *Airbus* enforcement action, it still would be notable in terms of size, scope, and for lessons learned. Adding in the significant penalties and leadership roles assumed by the SFO and PNF, *Airbus* is somewhat unique amongst all anti-corruption enforcement actions.

First, Airbus' profits between 2011 and 2018 ranged from €1.5 billion to €5 billion, such that the combined global sanction of approximately $3.97 billion represents a hefty portion of its profits for the next several years. In 2018, the DOJ formalized its policy against "piling on" large penalties where entities might be subject to enforcement in multiple jurisdictions, but it seems that the DOJ took the stance that Airbus' conduct fit the bill for what Deputy Attorney General Rod Rosenstein described as necessitating "penalties that may appear duplicative really [but] are essential to achieve justice and protect the public." Rosenstein has also remarked on the need for enforcement to deter those who "calculate that the likely benefit of breaking the rule[s] outweighs the potential penalty." It certainly is possible that penalties like those in *Airbus* could shift that calculus, at least a little.

Second, *Airbus* represents a new variation in the burgeoning trend of large, coordinated global settlements in anti-corruption matters, since the French and UK authorities took charge. On January 31, 2017, a little less than six months after the SFO formally opened its investigation of Airbus, the SFO and PNF entered into a Joint Investigation Team. The JIT conducted a vast investigation into all of the business partners engaged by Airbus up to 2016, which covered more than 1,750 across the globe. The PNF and SFO then divided 110 specific relationships between themselves by country. Such high levels of coordination and division of labor resulted in an impressive enforcement effort for both authorities, including France's largest ever public interest fine. The CJIP with Airbus represented the tenth one since they were introduced under Sapin II, France's anti-corruption law, in December 2016. Like a deferred prosecution agreement, a CJIP may be offered where there is an investigation for offenses related to corruption but it is not in the public interest to initiate a criminal prosecution.

Third, while the DOJ's investigation of Airbus was more limited in scope and penalty compared to the enforcement actions in the UK and France, it still is worth diving into some key details. Most notably, the matter clarified an arguably ambiguous point in the DOJ's guidance regarding self-disclosure—namely, that companies do not qualify for voluntary disclosure credit if there is "an imminent threat of disclosure or government investigation" which includes a foreign investigation. The Airbus DPA expressly stated that Airbus did not receive voluntary disclosure credit for the FCPA-related offenses because of the ongoing SFO investigation. Therefore, after *Airbus*, to preserve voluntary disclosure credit, and the possibility of a declination, companies will need to decide whether to disclose to U.S. authorities conduct with no U.S. ties in case such ties are later discovered in the course of an ongoing investigation. Paired with the DOJ's emphasis on timely disclosure, this may prove to be particularly challenging in practice.

ENFORCEMENT ACTIONS AND STRATEGIES

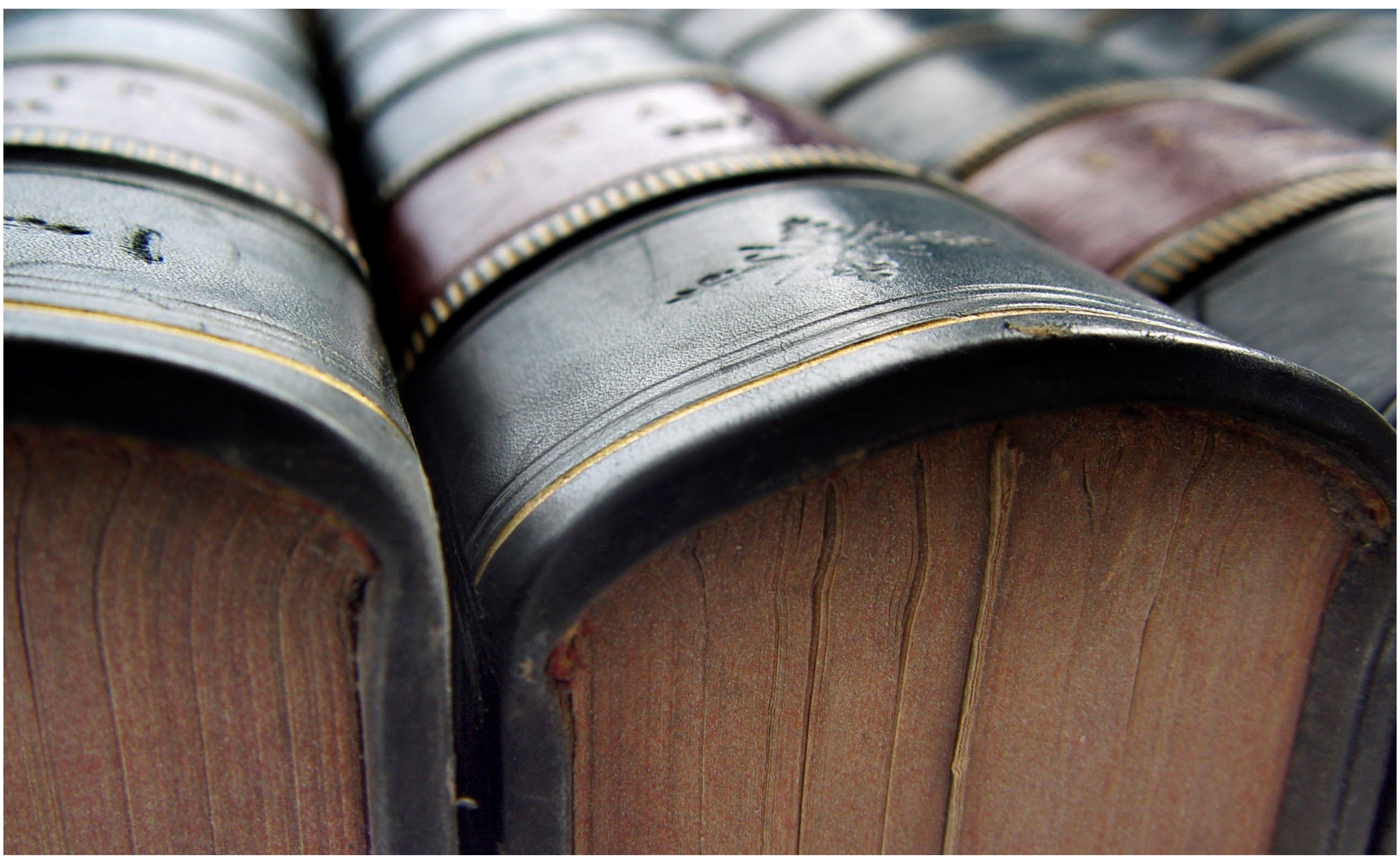
Another noteworthy aspect of the U.S. enforcement action is that the State Department joined the DOJ to resolve alleged violations of the Arms Export Control Act and its implementing regulations, the ITAR. The involvement of the State Department in an enforcement action against a foreign corporation for corruption-related offenses is quite rare, but as reported in previous *Trends & Patterns*, recently there has been an increasing overlap between the FCPA and the U.S. economic sanctions regime—including the Quad-Graphics enforcement action in 2019 and recent U.S. sanctions targeting individuals allegedly involved in corrupt activities. Given the broader extraterritorial reach of sanctions, such overlap may allow the U.S. to tackle corrupt conduct beyond the reach of the FCPA.

When *Airbus* initially was announced, we hypothesized that it represented the next major step for France progressing to being a major anti-corruption enforcer. At the time, we could not have predicted the virus outbreak that disrupted the globe a few months later, which undoubtedly affected enforcement efforts. France's recently issued guidance (described below) suggests that it intends to continue enforcing its anti-corruption laws, but we can only guess what will happen in a post-COVID world.

Overall, *Airbus* could represent a quintessential example of anti-corruption enforcement in 2020—large-scale investigations run by coordination between numerous authorities from multiple countries—but this year has been so unusual that we are hesitant to make any predictions about whether we will see another such example before 2021.

PERENNIAL STATUTORY ISSUES

JURISDICTION
FOREIGN OFFICIALS
THING OF VALUE
MODES OF PAYMENT



PERENNIAL STATUTORY ISSUES

The 2020 YTD enforcement actions have presented a few substantive statutory related issues within the FCPA-specific context. There were some notable assertions of statutory and jurisdictional reach by the DOJ this year that may have an impact on future FCPA enforcement.

JURISDICTION

IN RE AIRBUS

As part of its global settlement, Airbus consented to the DOJ's assertion of jurisdiction based on several minor territorial hooks. The *Airbus* Information asserts, "[i]n furtherance of the corrupt bribery scheme, Airbus employees and agents, among other things, *sent emails* while located in the United States and *traveled* to the United States."[4]

In addition to monetary bribes, as discussed above, Airbus allegedly paid for Chinese officials, and occasionally their families, to attend all-expenses-paid events in Utah and Hawaii. The Hawaiian events occurred over the course of six days in 2013. Furthermore, the DOJ alleges that two emails were sent by an Airbus executive while in the United States to change certain meeting minutes related to illicit consultant payments in an effort to conceal them. Additionally, the same executive sent another email while in the United States to express his approval of a leisure event in China aimed at top-level officials of Chinese airlines. In sum, the U.S.-based travel, which was allegedly intended to discuss business opportunities with government officials, and the three emails served as the sole basis for the assertion of territorial jurisdiction for DOJ enforcement.

While such territorial acts might be sufficient to form a basis for asserting jurisdiction over a discrete bribery act to which they may be directly related, these passing touches on the U.S. seems extenuated and a flimsy foundation on which to base a criminal penalty of $2.09 billion for a purported far-flung and varied bribery scheme that at best had very little to do with the U.S. Moreover, although some DOJ prosecutors appear to have held the view that it is both necessary and justified to stretch the jurisdictional reach of the statute to reach extraterritorial conduct by non-U.S. companies where there is an apparent lack of political will to bring cases against "national champions"—a view strongly held and applied with respect to a number of French companies in the past—such a view seems somewhat outdated with respect to this case and France's new-found willingness to bring significant transnational corruption prosecutions against its own companies. Nevertheless, that Airbus agreed to jurisdiction on these terms alone indicates the prosecutorial weight of the U.S. government and serves as a notice to other similarly placed companies facing a wide-spread DOJ investigation that jurisdictional arguments may offer little protection.

UNITED STATES V. COBURN & SCHWARTZ

Emails proved a common theme this year. A ruling in the case of *Coburn & Schwartz*, former executives of Cognizant Technology Solutions, found that emails could be considered separate "units of prosecution."[5] Coburn had moved to dismiss certain counts of the indictment against him, claiming some of the counts were impermissibly multiplicitous of other counts in the indictment. That is, he argued a single offense of bribery was dispersed among three separate counts stemming from three separate emails. On February 14, 2020, Judge Kevin McNulty found to the contrary. Looking at the nature of legislative intent in the drafting of the FCPA, Judge McNulty stated that the precise act which Coburn was charged with, "to make use of interstate commerce facilities, such as email," permitted the government to charge as separate offenses the sending of three emails in furtherance of the same bribery scheme. We have likely not seen the final say on whether individual emails are punishable as separate FCPA counts—but the ruling provides some initial insight, at least, into the permissible reach of DOJ jurisdiction here.

UNITED STATES V. NAPOUT

Beginning as early as the *Siemens* decision in 2008, the government has asserted jurisdiction over non-U.S. companies and individuals for conduct largely outside the United States based on, at best, tangential use of interstate instrumentalities, such as foreign-to-foreign wire transfers that pass through correspondent banking accounts (i.e., accounts belonging not to them but to their banks) or foreign-to-foreign emails that passed through U.S.-based servers. In the one case in which a court addressed the legitimacy of this position, *SEC v. Straub*, it held that the requirement of territorial act was merely a jurisdictional fact about which the defendant need not have any knowledge or intent.[6] Under *Straub*, the DOJ would not need to prove that the defendant knew it's emails would be routed through or stored in the United States. The recent case of *U.S. v. Napout*, although not a FCPA case, may, however, provide some additional arrows for the defense quiver.

Napout involved corruption charges against FIFA and CONCACAF officials based on alleged violations of honest services wire fraud.[7] The defendants—foreign nationals employed by foreign organizations who were bribed in connection with the award of foreign business contracts—argued that their conduct was extraterritorial and outside the scope of the wire fraud statute. The Second Circuit agreed that the wire fraud statute was indeed not extraterritorial, but it concluded that there were sufficient territorial acts—payments from and to bank

[4] *In re Airbus S.A.* (2020) (emphasis added).
[5] *United States v. Coburn*, No. 19-cr-00120-KM (D.N.J. Feb. 14, 2020).
[6] *SEC v. Straub*, No. 11-cv-9645 (S.D.N.Y. Dec. 29, 2011).
[7] *United States v. Napout*, No. 18-2750 (2d Cir. 2020).

accounts, access of U.S. bank accounts, etc.—to justify application of U.S. law to the defendants' conduct. Critically, however, the court noted, "for incidental domestic wire transactions not to haul essentially foreign allegedly fraudulent behavior into American courts, 'the use of the . . . wires *must be essential*, rather than merely incidental, to the scheme to defraud.' *This ensures that the domestic tail [does] not wag, as it were, the foreign dog*." In other words, in applying language almost identical to the territorial language of §78dd-3, the court required a two-step analysis: (i) whether the use of the wires in furtherance of the scheme occurred in the United States and (ii) whether the use of the wires was "essential, rather than merely incidental" to the offense.

It is, in our view, questionable whether each and every case in which the government has relied on tenuous "jurisdictional facts" in a FCPA case would survive this test. That is, however, a question for the next case.

FOREIGN OFFICIALS

In February 2020, the DOJ brought a case in which it extended its reach of who could be considered a "foreign official" to employees of a company based and registered in the United States. In the *Farias-Perez* case, the DOJ had alleged that improper payments to employees of Citgo Petroleum, a Houston-based corporation registered in Delaware, were violations of the FCPA's anti-bribery provisions. Significantly, such employees were considered foreign official by the DOJ because Citgo is a wholly-owned subsidiary of PdVSA, Venezuela's state-owned oil company.

THING OF VALUE

Consistent with previous DOJ positions, all-expenses-paid events and travel to China, Utah, and Hawaii for government officials and their families were considered a "thing of value" in the *Airbus* enforcement action.

MODES OF PAYMENT

As in previous years, the use of high-risk intermediaries continues to be an issue in FCPA enforcement actions. In the *Eni S.p.A.* enforcement action, for example, the company was pressured to hire a third-party intermediary by the Algeria Energy Minister in order to conduct business in the country. The company then paid the intermediary "brokerage fees" to the tune of €198 million. In the *Airbus* enforcement action, the company allegedly used third-party consultancy agreements to secure contracts with Chinese state-owned enterprises. In the *Marubeni* and *Alstom* investigation, under which Kusunoki and his co-defendants were charged, the defendants allegedly hired two consultants with the intent to bribe members of the Indonesian parliament and the state-owned power company. Whether the intermediaries nominally claim to be independent consultants (*Airbus* and *Kusunoki et al.*) or independent brokers (*Eni S.p.A.*), such third-party relationships have come under increased scrutiny by the DOJ and SEC and require close review by compliance personnel.

COMPLIANCE GUIDANCE

COMPLIANCE CHALLENGES IN A COVID-19 WORLD
DOJ REVISES CORPORATE COMPLIANCE PROGRAMS GUIDANCE
ARTIFICIAL INTELLIGENCE & COMPLIANCE PROGRAM REFORMS
MONEY LAUNDERING COMPLIANCE CONCERNS FOR FINANCIAL INSTITUTIONS

COMPLIANCE GUIDANCE

COMPLIANCE CHALLENGES IN A COVID-19 WORLD

It goes without saying that COVID-19 has placed the global economy under a significant strain, particularly in sectors tied to healthcare. In times of such economic stress, companies and their employees may find themselves tempted to skirt compliance laws or to de-prioritize compliance programs in favor of more "essential" business functions. This can be especially appealing when faced with exigent pandemic-response demands and foreign government officials who may seek to capitalize on the circumstances. Additionally, an increased flow of foreign aid to troubled areas provides opportunity for abuse, although based on litigation trends, COVID-related fraud is potentially rampant in the U.S. as well.

As companies respond to the crisis, there are many opportunities for compliance-related risks to manifest. For example, corrupt customs officials who know the importance of getting medical supplies across borders may feel more empowered to demand bribes from companies. This and other compliance-related problems can be compounded by the difficulty of monitoring employees who now work remotely. Increased demand can cause significant shifts in the supply chains that are available to companies. Companies may find themselves wanting to partner with entities they have not fully vetted out of a desire for expediency. The urgency of need for medical supplies places greater pressure on customs agents across globe, giving greater leverage to corrupt officials seeking to extract value from companies attempting to respond to global needs. Other priorities are whistleblowing and hiring decisions.

However, companies should guard against letting their compliance controls slip, even as they rise to meet the challenges presented by COVID-19. Both the DOJ and the SEC have announced that they will continue enforcement measures despite logistical hurdles, and they have singled-out COVID-19-related infractions as those of potential interest to authorities. Historically, crises of this magnitude (e.g., the Financial Crisis of 2008) tend to be followed by periods of heightened enforcement, which may already be materializing.

As we discuss below, DOJ has also recently published revised guidelines for how it evaluates compliance monitoring systems, emphasizing the reasoning behind the system's design, how well it is resourced, and the system's ability to evolve to meet new challenges.

One way of combatting the potential risk associated with this unusual time is to ensure that compliance programs assess and reassess the risk landscape as it shifts under the tremors of COVID-19's impact. By remaining vigilant, compliance programs will be better able to foresee, mitigate, and neutralize threats as they arise—and demonstrate a track record of responsive diligence to inquisitive enforcement authorities. Towards that end, compliance programs should consider conducting trainings specific to this context, take greater steps to monitor risks associated with remote work, add temporary layers of approval requirements for risk-heightened spending decisions, and regularly review and audit internal processes.

DOJ REVISES CORPORATE COMPLIANCE PROGRAMS GUIDANCE

On June 1, 2020, the DOJ released a revision of its guidance on the Evaluation of Corporate Compliance Programs, which provides companies with general principles and factors to consider when designing, implementing, and updating their compliance policies and procedures. It also provides a useful basis for companies seeking to avoid or mitigate prosecution pursuant to the DOJ's "Principles of Federal Prosecution of Business Organizations" and the U.S. Sentencing Guidelines, both of which require DOJ prosecutors to consider a company's compliance program as a factor in their decisions to initiate a case and in terms of punishment. While the revisions to the Compliance Program Guidance generally represent incremental changes, there are sufficient updates that companies may still want to take this opportunity to reevaluate existing compliance programs to ensure that they are keeping step with evolving best practices.

Indeed, the revisions to the text are so minor that a line-by-line comparison was needed to identify all the changes—but they still represent important changes, which we have broken down into several thematic categories.

First, and perhaps most critically, some of the DOJ's revisions to the Compliance Program Guidance have the effect of reducing some of the arguably bright-line, determinative aspects of the previous version by adding language confirming that the DOJ recognizes that compliance programs are not one-size-fits-all. For example, in the previous guidance, the question of whether a compliance program is "being implemented effectively" becomes whether it is "adequately resourced and empowered to function effectively" in the new version. This change reveals the DOJ's increasing focus on quality over mere quantity.

In terms of training, the DOJ makes it clear that longer is not always better, citing companies that use "shorter, more targeted" sessions as a positive example. The DOJ also adds that the "need for" due diligence of third parties—rather than just the degree of due diligence—"may vary based on size." Finally, the DOJ acknowledges that a company's compliance program outside the U.S. might be affected by local law, and it will consider the limitations and requirements of foreign law as part of its evaluation. On balance, we view all of these changes as positive, and they should make it easier for companies to engage in constructive dialogue regarding how their compliance programs should impact charging and sentencing decisions.

Second, there are a number of revisions that appear geared toward providing more detail and nuance about the factors that the DOJ considers as part of its program evaluation, without actually altering the substance of what the DOJ has long emphasized. For example, the previous Compliance Program Guidance stated that prosecutors should make an "individualized determination" of compliance programs. The revised version explicitly explains that these factors include "the company's size, industry, geographic footprint, regulatory landscape," and "other factors, both internal and external to the company's operations." Those factors, as a practical matter, were already being considered by line prosecutors, but now the guidance is in writing.

The revised guidance added several references to whether a company plans for and effectively implements post-acquisition or post-merger compliance program integration. These additions are by no means earth-shattering, but they provide clear, useful information and highlight minor changes that could improve a company's compliance program. Similarly, the revised guidance adds to previous guidance on how the DOJ evaluates the accessibility of a company's policies and procedures, stating explicitly that they should be published "in a searchable format."

Third, there are a number of revisions that appear to be geared towards evaluating whether a company itself evaluates and tracks its compliance program. These are, in our view, the most substantive and noteworthy changes that were made. For example, the revised Compliance Program Guidance indicates that the DOJ would consider whether a company:

- tracks or measures access to its compliance policies and procedures to understand what policies are attracting more attention from employees;
- engages in a "periodic review" of its risk assessment "based upon continuous access to operational data and information across functions" and whether the periodic review has led to updates in policies, procedures, and controls;
- employs "a process for tracking and incorporating" lessons learned from "prior issues" of the company and "other companies operating in the same industry and/or geographical region;"
- evaluates the impact of training on employee behavior;
- tests the compliance program, including the hotline, in terms of employees' knowledge and comfort in using it and in terms of "tracking a report from start to finish;" and
- monitors "investigations and resulting discipline to ensure consistency."

Put simply, these revisions further emphasize the DOJ's previously stated expectation that compliance programs must be dynamic and constantly improving based on informed self-assessment and feedback. Accordingly, complying with these directives to test, measure, and evaluate their compliance programs' efficacy will be critical to implementing the most effective program and to demonstrating this fact to the DOJ with credibility.

Companies would be wise to take this opportunity to reassess their compliance programs, or at least incorporate the new DOJ Compliance Program Guidance into their next periodic self-assessment. After all, while the overall message and impact of the Guidance largely stays the same, the revisions do provide helpful clarification. Being able to demonstrate that companies are trying to keep up with evolving best practices will serve them well if problems are later uncovered.

ARTIFICIAL INTELLIGENCE & COMPLIANCE PROGRAM REFORMS

Recently, global brewer Anheuser-Busch InBev SA (AB InBev) announced it has implemented a new system of internal compliance, for the first time employing machine learning to root out corrupt conduct in a corporation's global dealings. Three years in the making, AB InBev's new compliance program, which it calls BrewRight, seeks to cut compliance costs by taking charge of the expensive and time-consuming review of the company's millions of daily payment transactions. It seeks to proactively monitor legal developments in risk-prone business relationships and to prevent violations of the corporation's legal obligations, including anti-bribery provisions to which it is subject around the world.

AB InBev has faced some scrutiny in the past for its corporate misconduct with respect to its anti-bribery obligations, notably settling charges with the SEC in 2016 for its Indian subsidiary's violations of the books and records and internal controls provisions of the FCPA. That said, the settlement proved minor ($6 million) compared to that year's average FCPA settlement of $130.6 million (or $13.2 million excluding outliers).

Matt Galvin, the AB InBev executive in charge of the development of BrewRight, has stated his intention to empower other companies to work with the technology to better the analytic capabilities of the platform. Significantly, the DOJ's Evaluation of Corporate Compliance Programs (which we discuss at length above) notes the need for compliance programs to be "empowered to function effectively" and to adapt to changing circumstances. In line with these revisions, AB InBev's use of data-driven compliance strategies, and its promotion that other companies follow suit, could set a higher bar for international compliance monitoring—and raise expectations of the investigating authorities tasked with reviewing the adequacy of such programs.

MONEY LAUNDERING COMPLIANCE CONCERNS FOR FINANCIAL INSTITUTIONS

In recent years, there has been a significant convergence of anti-corruption and anti-money laundering efforts. As part of the DOJ's efforts to reach *both* the demand-side and supply-side of specific bribery schemes, it has increasingly used non-FCPA statutes to prosecute conduct beyond the reach of the FCPA. In 2018, the FCPA unit within the DOJ pursued more corruption cases under non-FCPA statutes—anti-money laundering statutes being chief among them—than under the FCPA itself. Although the numbers reversed in 2019, the FCPA unit still brought 19 criminal enforcement cases under non-FCPA statutes. We expect the trend of the DOJ using non-FCPA statutes to bolster its FCPA enforcement efforts to continue through 2020 and beyond.

The use of anti-money laundering statutes to prosecute corruption alongside and, increasingly, instead of the FCPA reflects an obvious and natural relationship between the conduct they proscribe—where there is a bribe, there is a need to launder that bribe. This relationship is evinced in the money laundering statutes, themselves. They criminalize nearly any kind of transaction involving the proceeds of certain "specified unlawful activities," including any activity that violates the FCPA.

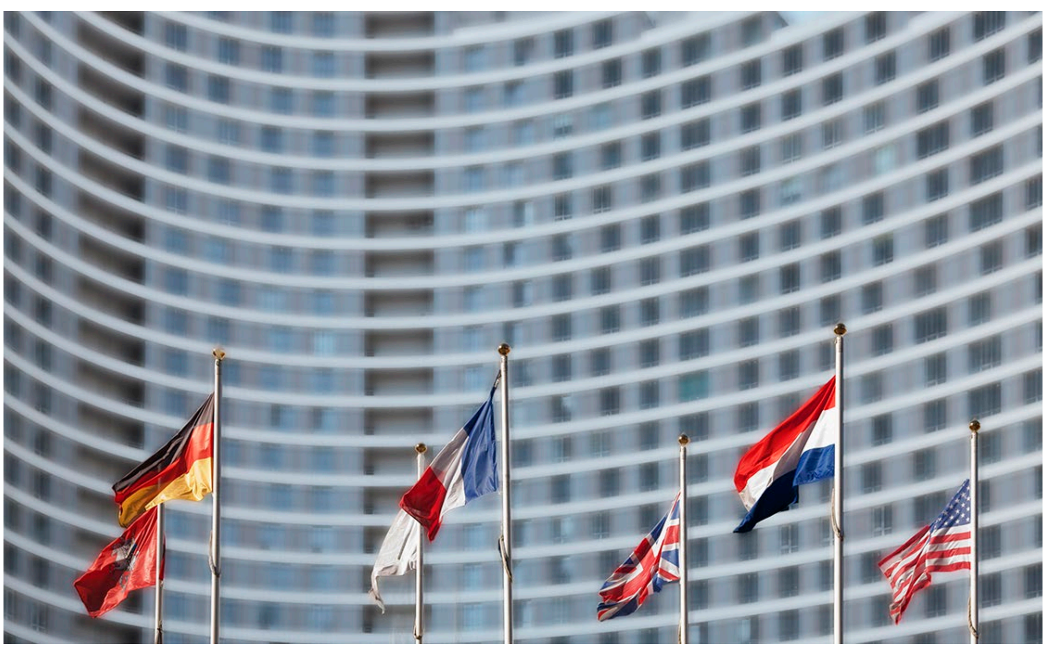
The use of anti-money laundering statutes to prosecute corruption is also attributable to their broader reach. The FCPA is widely interpreted as not applying to public officials, meaning that it is difficult to prosecute a foreign official for accepting a bribe. However, money laundering statutes enjoy extensive extraterritorial jurisdiction, generally bringing these foreign officials within reach of U.S. prosecutors. And the DOJ's increasing reliance on money laundering statutes underscores its aggressive approach to pursuing corruption cases.

Notably, this reliance on anti-money laundering statutes to prosecute international corruption creates a new and less understood FCPA risk for banks—prosecution under anti-money laundering statutes. A bank's exposure to FCPA risk is significant and wide-ranging. A bank is exposed to FCPA risk through its international operations and relationships with foreign governments and regulators; providing banking and brokerage services to foreign government officials, senior employees of state-owned enterprises, or sovereign wealth funds; underwriting offerings involving foreign issuers; and acting as a correspondent bank for foreign financial institutions.

Over the years, banks have adapted their business practices and compliance regimes to account for these risks. For example, banks perform FCPA due diligence, and any underwriting agreement contains representations and warranties certifying the issuer's compliance with the FCPA. Moreover, banks are certainly no strangers to money laundering statutes. Under the Bank Secrecy Act, they must maintain extensive and costly risk-based AML programs—the cornerstone of which is the same for the bank's ABC compliance: Know-Your-Customer programs.

Nevertheless, the use of anti-money laundering statutes in corruption cases heightens a bank's exposure to FCPA risk and will require further integration of AML and ABC compliance programs within banks. Regulators' expectations for integrated AML and ABC compliance will likely grow too, as, undoubtedly, the United States has a significant interest in ensuring that its financial system is not used to launder the proceeds of international corruption.

UNUSUAL DEVELOPMENTS



UNUSUAL DEVELOPMENTS

COVID-19 AND INCREASED BRIBERY RISKS

COVID-19 poses various risks and challenges to FCPA enforcement, including delays in enforcement activity due to court closures and a limited ability to conduct in-person investigations. More broadly, economic instability has increased the risk of bribery and fraud, especially in the healthcare industry. Significantly, U.S. enforcement agencies have indicated that FCPA enforcement activity has remained consistent and is expected to increase in coming months.

In May, Charles Cain, the SEC's FCPA Unit Chief, announced that the Unit is "still very much focused on FCPA violations." Daniel Kahn, Senior Deputy Chief of the DOJ's Fraud Section similarly expressed a commitment to continuing ongoing FCPA investigations and opening new investigations.

Enforcement officials highlighted specific challenges, including constraints on business supply chains, safety protocols, and data privacy in this environment. Certain industries face particular risk. As COVID-19 has led to shortages in hospital beds, ventilators, and other hospital equipment, officials have warned of the increasing risk of bribery. Before the pandemic in 2019, bribery rates in hospitals were reported at 14% in Africa and the Middle East and 10% in Latin America and the Caribbean.[8] U.S. officials expect the pandemic could increase willingness to participate in bribery schemes such as payments to customs officials to obtain personal protective equipment. As a reminder, bribes may not be monetary in nature, but include other transfers of value like insider knowledge. Additionally, corruption and price gouging practices may increase as governments spend more on treatment and vaccine research and providers seek to profit from limited supplies. These concerns point to a need for greater transparency on public and private spending, as well as procurement processes.

The DOJ and SEC have declared that they will continue to monitor businesses' compliance with internal controls and disclosure obligations, and expect internal investigations to continue, with the help of virtual platforms. Agencies will take into consideration cooperating businesses' explanations as to why they are unable to satisfy a DOJ request or pay claims. Enforcement officials have emphasized that businesses should continue as able with regular business activities while working with these new limitations.

PENDING LEGISLATION: THE COUNTERING RUSSIAN AND OTHER OVERSEAS KLEPTOCRACY (CROOK) ACT

On July 18, 2019, the Countering Russian and Other Overseas Kleptocracy (CROOK) Act was introduced in the U.S. House of Representatives to establish an anti-corruption fund designed to assist foreign countries in their anti-corruption efforts. The legislation contemplated funding such efforts through a charge of 5% on each civil and criminal penalty imposed on companies that have violated the Foreign Corrupt Practices Act (FCPA). The House bill provides a preference of disbursements to countries that "are undergoing historic opportunities for democratic transition," are "important to [the U.S.'s] national interests," and where "foreign assistance could significantly increase the chance of a successful [democratic] transition." On December 11, 2019, legislation was introduced in the Senate which proposed funding a similar anti-corruption fund by charging companies facing FCPA enforcement of over $50 million in related penalties an additional $5 million. The Senate bill provides a preference for distribution of funding to countries that meet the same requirements as those set forth in the House's bill.

Under the Senate's proposed bill, the limitation to enforcement actions with combined civil and criminal FCPA penalties over $50 million will result in more limited funding, whereas the House bill's application to all FCPA enforcement actions would affect a greater number of corporate actions across the board.

FCPA CONVICTIONS SUCCESSFULLY CHALLENGED IN COURT: BAPTISTE, BONCY, AND HOSKINS

Three defendants were offered a measure of reprieve this year as two district courts granted post-trial motions, overturning jury convictions of FCPA-related counts in the cases of *United States v. Hoskins* and *United States v. Baptiste & Boncy*.

Lawrence Hoskins, the former senior vice president for the Asia region at Alstom S.A., allegedly acted as an agent of Alstom Power Inc. in furtherance of the Indonesian power project bribery scheme discussed above in the *Kusunoki et al.* case. Alstom S.A. settled related charges with the DOJ for $772.3 million in 2015. In November 2019, as we discuss in our previous Trends and Patterns, a jury convicted Hoskins of six counts of violating the FCPA, three counts of money laundering, and two counts of conspiracy. The focus at trial was whether Hoskins acted as an agent for Alstom's U.S. subsidiary, which the jury determined was the case.

The Second Circuit had heard an interlocutory appeal by the DOJ in 2018 regarding the extent to which the government could assert jurisdiction over a foreign national. The court found that the FCPA could only reach foreign conduct by foreign nationals if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern. As Hoskins was a U.K. national employed at a European subsidiary of Alstom and never personally took any action related to the bribery scheme in the

[8] *Corruption and the Coronavirus*, TRANSPARENCY INT'L (Mar. 13, 2020), https://www.transparency.org/en/news/corruption-and-the-coronavirus.

UNUSUAL DEVELOPMENTS

United States, this left the government with the sole jurisdictional argument that Hoskins acted as an agent of an Alstom subsidiary based in the United States. The government's agency theory—which was praised extensively by former Assistant Attorney General Brian Benczkowski in December 2019 following Hoskins' conviction—rested on allegations that Hoskins acted subject to the subsidiary's control, but the defendant argued evidence at trial bore out the opposite conclusion: the U.S. Alstom subsidiary had no right to control his actions with respect to the Indonesian project in question.

In February 2020, after years of extensive litigation and nearly five years after his not-guilty plea, Hoskins successfully challenged the government's agency theory that had brought his conduct into the jurisdictional confines of the FCPA. The district court granted Hoskins' post-trial motions for acquittal and a new trial with respect to all six FCPA counts and one conspiracy to violate the FCPA count. He remains convicted of the money laundering and the conspiracy to commit money laundering counts and was sentenced to fifteen months imprisonment in March 2020.

In another blow to the DOJ's effort to obtain individual FCPA convictions, the court in *Baptiste & Boncy* overturned jury convictions of FCPA-related counts for both defendants. Unlike the *Hoskins* reversal, this post-trial motion had little to do with the DOJ's charging decisions or evidence and more to do with the opposing counsel: both defendants had filed a motion for a new trial on the basis of ineffective assistance of counsel and for a judgment of acquittal. At trial, the jury had convicted Baptiste of several counts: one count of conspiracy to commit offenses against the United States, including Travel Act and FCPA violations, one count of violating the Travel Act, and one count of conspiracy to commit money laundering. The same jury found Boncy guilty of one count of conspiracy to violate the FCPA but acquitted him on the money laundering and Travel Act charges.

Baptiste argued in his motion for a new trial that his counsel's representation fell below an objective standard of reasonableness. His counsel had no criminal experience, did not review the bulk of the material the government provided, including important recordings and trial exhibits, failed to subpoena witnesses, pursued a defense that was not available to the defendant, and allowed counsel for Boncy to cross examine the government's witnesses—despite the fact that Boncy's trial strategy was to portray Baptiste as the primary driver of the alleged conspiracy.

On March 11, 2020, the court issued a memorandum and order granting Baptiste's motion for a new trial based on the ineffective assistance of counsel. The court also granted Boncy's motion for a new trial based on the prejudice he experienced due to the trial counsel's ineffective assistance to his co-defendant. The status of the new trial is currently pending.

RECORD REWARDS ISSUED UNDER THE SEC WHISTLEBLOWER PROGRAM

In June 2020, the SEC announced a $50 million whistleblower award, its largest ever, to an individual who provided firsthand observations of misconduct which resulted in a successful enforcement action against a publicly-traded company. Under the confidentiality provisions of the SEC program, additional information was not provided. The second-largest award of $39 million was awarded to an individual in 2018, and since this program started in 2012, the SEC has awarded over $500 million to eighty-three individuals—including, in one widely reported example, related to the FCPA investigation of BHP Billiton in 2015.

The whistleblower awards are paid from an investor protection fund established by Congress that is financed solely through penalties paid to the SEC for violations of the securities laws. The awards can range from ten to thirty percent of the money the SEC collects when monetary penalties exceed $1 million.

Individuals may be eligible for a whistleblower award when they voluntarily provide the SEC with relevant, timely, and credible information that leads to a successful enforcement action. Under the Dodd-Frank Act, the identity of each whistleblower is protected—and the SEC protects that confidentiality. In this record order, the SEC said that a second individual in the case was denied an award because that individual did not meet the statutory definition of a whistleblower under the Dodd-Frank Wall Street Reform Act of 2010.

SEC BACKSLIDES ON AGENCY REQUIREMENTS

As discussed above, on April 13, 2020, the Securities and Exchange Commission (SEC) charged Asante Berko, the former executive of foreign-based subsidiary of a U.S.-based financial services company, for violating the Foreign Corrupt Practices Act (FCPA) by arranging a bribery scheme in the Republic of Ghana.

The case signals that the SEC is less willing than the DOJ to retreat from a more expansive view of agency liability. For years, the SEC and DOJ alike maintained that the liability of a parent company for the conduct of its subsidiary was premised on whether the parent exercised "authorization, direction, and control" of that subsidiary. The DOJ and SEC deviated from this decades-long standard by applying doctrine that defined when an employer/principal was responsible for the acts of its employees/agents. This new view was memorialized in the *FCPA Resource Guide* authored by the DOJ's Criminal Division and the SEC's Division of Enforcement, which enabled the SEC to charge parent issuers with their subsidiaries' violations of the FCPA's anti-bribery provisions without establishing the parent's liability through the traditional concepts of corporate liability. In essence, the DOJ and SEC applied a theory of strict liability for the misconduct of the subsidiary, in that it did not specifically establish that the parent authorized, directed, or controlled the subsidiary's relevant conduct.

The agency issue was brought to the forefront in the recent *Hoskins* case, as discussed above. The judge in that case found that Hoskin's conduct, while corrupt, did not fall under a very technical "restatement of law" definition of agency that emphasized the company's control over Hoskins and its role in his compensation. Interestingly, *Hoskins* reached only whether Hoskins was an agent of the subsidiary and had little to say on whether the parent was liable for the misconduct of the subsidiary.

Facing heavy criticism for its expansive view of parent-subsidiary liability, the DOJ seemingly acknowledged that the authorities had overreached. In 2019, former Assistant Attorney General Brian A. Benczkowski expressed his agreement that the FCPA explicitly provides for agency theories of liability but that "the Criminal Division [of the DOJ] will not suddenly be taking the position that every subsidiary, joint venture, or affiliate is an 'agent' of the parent company simply by virtue of ownership status." At least for the DOJ, his comments seemingly signaled a return to the "authorization, direction, and control" standard.

The SEC has not brought any corporate FCPA cases in the first half of 2020 that would directly shed light on the SEC's direction towards agency. The *Berko* case, however, strongly suggests that the SEC is not following the DOJ's approach. Berko was an employee of a foreign subsidiary, and the SEC alleged that "Berko acted as an employee and/or agent" of the U.S.-based financial institution. Like the DOJ in *Hoskins*, the SEC, when faced with a foreign person who was not an employee of the corporation over which it did have clear jurisdiction, adopted an agency theory to charge him under the FCPA's anti-bribery provisions. Notably, the SEC did not charge the financial institution, finding that Berko and the subsidiary had evaded the bank's otherwise effective internal controls, that it lacked knowledge, and that it took remedial actions once Berko's conduct was discovered.

It should be further noted that the SEC, assuming its allegations are true, did not strictly need to bring anti-bribery charges against Berko and the foreign subsidiary. According to the complaint, Berko and the foreign subsidiary had falsified books and records and evaded internal controls. Nevertheless, the SEC appears to have retained the broader view of agency liability to establish jurisdiction. Based on the *Berko* case, it appears to be a favorable bet that the SEC will maintain the more expansive view that parents are strictly liable for the misconduct of their subsidiaries.

IRS ISSUES GUIDANCE ON NON-DEDUCTIBILITY OF DISGORGEMENT AND FORFEITURE

On May 13, 2020, the Internal Revenue Service released a proposed rule, 85 Fed. Reg. 28, 524, which prohibits companies that paid disgorgement or forfeiture in connection with the violation of a law from deducting such amounts from their taxes, adding to the existing rule that fines, and penalties paid pursuant to a violation of law are non-deductible. The proposed rule, however, continues to permit companies the ability to deduct payments paid as remediation, restitution, or in relation to coming into "compliance with a law."

In so doing, such an approach by the IRS will likely lead to an even larger financial hit to companies facing FCPA enforcement and will be an additional factor for companies to consider in settlement negotiations with the SEC and DOJ. In particular, the proposed rule does not consider whether a company facing FCPA enforcement has already paid taxes on the amounts disgorged or forfeited and may be an additional consideration in settlement negotiations.

SUPREME COURT PERMITS & LIMITS SEC DISGORGEMENT[9]

On June 22, 2020, the Supreme Court, in an 8-1 decision in *Liu v. SEC*, permitted the SEC to seek disgorgement in civil actions as a form of "equitable relief" but permitted such disgorgement only to the extent directly related to the defendant's "net profits," and only if the funds are returned to the defendant's victims.[10] The much-anticipated clarification of the SEC's disgorgement power came more than three years after the inclusion of an (in)famous footnote in *Kokesh v. SEC* calling into question the SEC's ability to seek disgorgement as a form of equitable relief[11]—a footnote we have discussed extensively in previous Trends and Patterns.

Liu originated with an SEC enforcement action against a husband and wife in California for allegedly defrauding foreign investors of nearly $27 million with an EB-5 immigrant investor program. As a part of its enforcement action, the SEC issued a disgorgement order equal to the amount of the money raised from investors, less $234,899, which the defendants had left in the corporate accounts for the program. Significantly, the SEC did not make clear whether such disgorgement would be returned to the investors as recompense for damages suffered. On appeal, the petitioners argued that the SEC's disgorgement order constituted

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[9] See *Supreme Court in* Liu *Upholds SEC Ability to Seek Equitable Disgorgement of Net Profits for Return to Victims, but Indicates Limits on Broader Disgorgement Theories*, SHEARMAN & STERLING LLP (June 23, 2020), available at https://www.lit-wc.shearman.com/Supreme-Court-In-Liu-Upholds-SEC-Ability-To-Seek-Equitable-Disgorgement.

[10] *Liu v. SEC*, No. 18–1501, __ S.Ct. __ (June 22, 2020).

[11] *Kokesh v. SEC*, 581 U.S. __ (2017).

a "penalty" and not "equitable relief," and as only the latter is authorized by statute, argued the order was impermissibly issued. The Ninth Circuit affirmed the SEC's order based on extensive precedent permitting the SEC to seek disgorgement. The petitioners then focused their Supreme Court appeal on the broad question of whether *any* form of disgorgement could be ordered, arguing such orders were in effect a "penalty" in violation of the statutory framework.

At its core, the *Liu* decision permits the issuance of disgorgement orders as long as they are issued as equitable relief—which leads to the prohibition of orders where the SEC fails to return funds to victims or where the disgorgement amount is greater than the defendant's net profits from the crime. The Court remanded to the lower courts to determine whether the order against the petitioners could be upheld in accordance with the newly imposed restrictions.

In sum, the Supreme Court found that disgorgement must be "for the benefit of investors," and as such must be tied directly to a defendant's ill-gotten gains, or "net profits." This restriction prohibits most instances of joint-and-several liability for disgorgement orders, as it may extend liability beyond the defendant's own profits. The Court further noted that a calculation of "net profits" must account for legitimate business expenses, which are then generally deducted from the final disgorgement amount.

This, of course, leaves several open questions, particularly with respect to what constitutes a legitimate business expense, what mechanisms the SEC will utilize for redistributing disgorged funds to victims if deposited with the U.S. Treasury, and how the SEC's occasional use of a broad theory of market harm will affect the agency's ability to disgorge profits—if there are no easily identifiable victims. The clarification provided by the Supreme Court in *Liu,* however, provides a welcome end to the three years of relative uncertainty following the issuance of the Supreme Court's *Kokesh* opinion in 2017.

FOREIGN DEVELOPMENTS

Netanyahu Corruption Trial Begins in Israel

As we previously reported, Israeli Prime Minister Benjamin Netanyahu was indicted on charges of bribery, fraud, and breach of trust in three separate cases in November 2019. Netanyahu was charged with bribery for allegedly providing regulatory benefits to an Israeli news company, Bezeq, in exchange for favorable news coverage; fraud and breach of trust for assisting a film mogul with a visa application, a merger, and tax breaks in exchange for expensive gifts; and fraud and breach of trust for discussing limiting the free circulation of a newspaper, Israel Hayom, to help a competing newspaper, Yediot Ahronot, corner more of the media market.

On May 24, 2020, Netanyahu's trial, *State of Israel v. Benjamin Netanyahu*, officially commenced in East Jerusalem's District Court in front of a panel of three judges. Netanyahu did not enter a plea, but gave a speech before entering the courtroom in which he stated that he was innocent. The proceedings during the opening session were procedural in nature. Netanyahu's attorney, Micha Fetman, who recently joined the defense team, stated that he needed time to get up to speed, and prosecutors estimated that it could take Fetman up to three months to review the relevant material. It was also decided that Netanyahu, along with three other defendants—Shaul and Iris Elovitch, owners of Bezeq, and Arnon Mozes, publisher of Yediot Ahronot—would be excused from attending every procedural session in person. According to media reports, it could be a year before preliminary arguments are completed and witnesses begin to testify. As such, it may take several years to reach a verdict. Netanyahu will continue to serve as Prime Minister as he is not required by law to step down, and he has refused to resign. We will continue to monitor developments in this case.

France Issues CJIP Guidance

As we previously reported, under France's anti-corruption law, Sapin II, French prosecutors may offer defendants the Public Interest Judicial Agreement ("CJIP"), a settlement agreement closely resembling deferred prosecution agreements ("DPAs") offered by enforcement authorities in the U.S. With the CJIP, companies can pay a fine and avoid going to trial or pleading guilty.

On June 2, 2020, Justice Minister Nicole Belloubet of the French Ministry of Justice issued guidance on what companies must do to be offered the CJIP. While the guidance does not have the same binding effect as a law, French prosecutors are expected to follow the guidance. According to media reports, the guidance is considered particularly influential because it comes from the executive, rather than from an agency like the National Financial Prosecutor's Office ("PNF") or French Anti-Corruption Agency ("AFA").

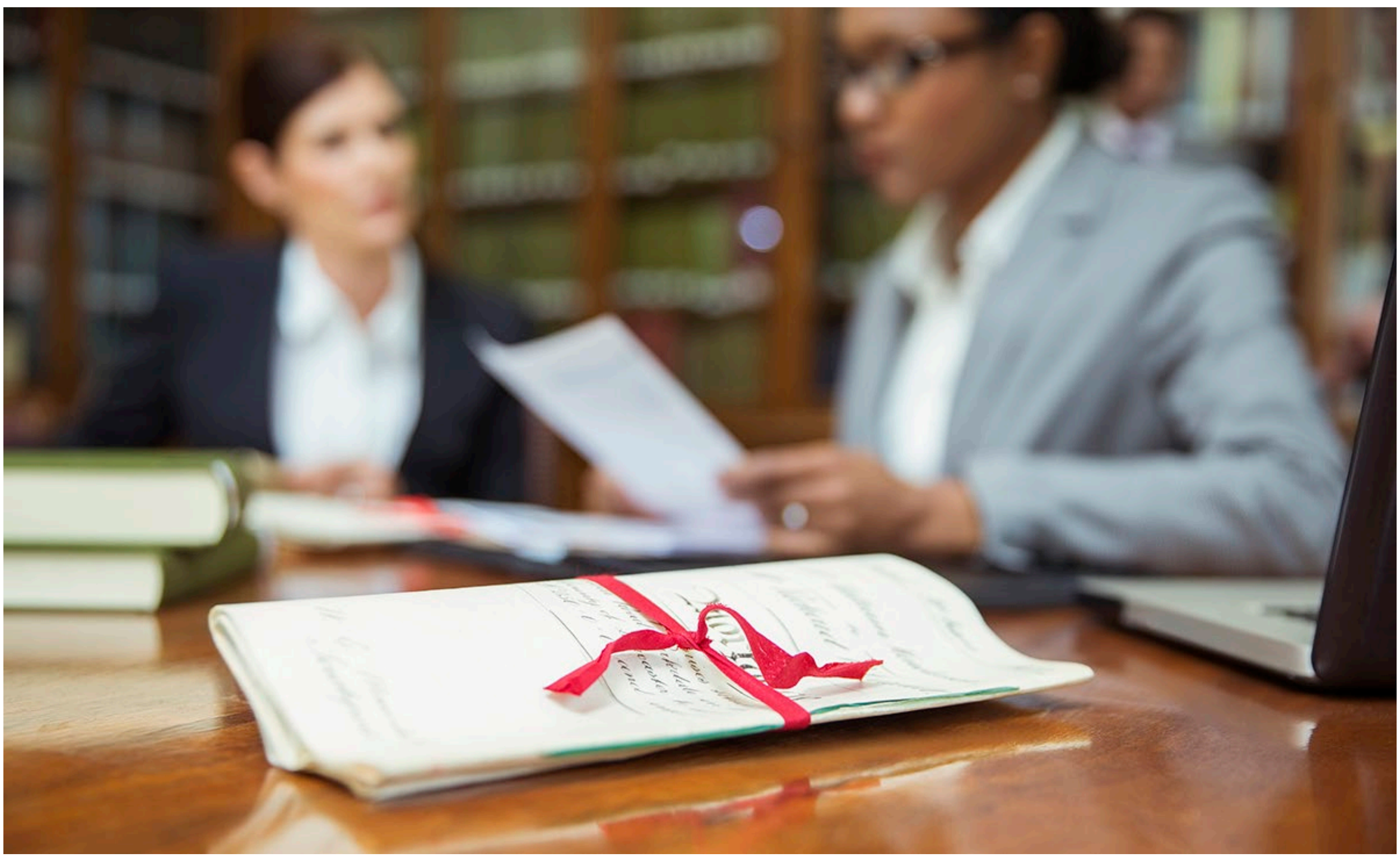
The guidance states that companies cannot have previous convictions and must voluntarily disclose misconduct to be eligible for the CJIP. The guidance also states that companies are expected to cooperate with prosecutors, including naming individuals involved in misconduct. The cooperation requirement in the guidance is seen as a significant step as there was previously no such requirement for the CJIP under Sapin II. Additionally, the guidance states that French authorities will work with some of France's largest unions to develop a framework to encourage companies to voluntarily self-disclose. In terms of prosecuting individuals, the guidance states that prosecutors should consider an individual's previous charges, involvement in the misconduct, and willingness to cooperate with prosecutors when offering a plea deal. Individuals cannot enter into the CJIP.

UNUSUAL DEVELOPMENTS

More broadly, the guidance attempts to streamline investigations by laying out how the PNF and regional prosecutor's offices should handle cases. Under the current decentralized system, prosecutors were able to begin investigating financial crimes without informing the PNF. Now, prosecutor's offices are advised to alert the PNF to any such investigations and allow the PNF to take the lead if it is determined the PNF is better situated to handle the investigation.

PRIVATE LITIGATION

RESTITUTION CLAIMS
SECURITIES FRAUD CLAIMS
RICO CLAIMS



PRIVATE LITIGATION

The first half of 2020 brought a number of updates to private litigation actions that followed the conclusion, or even commencement, of FCPA investigations. Particularly prevalent were restitution claims under the Mandatory Victim Restitution Act (MVRA), follow-on securities litigation, and civil RICO actions. Significantly, the threat of such civil litigation by private third parties in the aftermath of an FCPA investigation has extended the uncertainty and financial risk related to anti-bribery violations.

RESTITUTION CLAIMS[12]

State-Owned Oil Companies

In April 2020, Juan Guaidó, whose claim to the Venezuelan presidency remains contested at the time of writing, requested a court order for restitution under the MVRA in excess of $560 million against a former employee of the state-owned oil company, PdVSA.[13] The provisions of the MVRA require a court to issue restitution orders to victims who suffered damages at the hands of defendants found guilty by jury or by plea. The former PdVSA employee, Abraham Edgardo Ortego, pleaded guilty in October 2018 to one count of conspiracy to commit money laundering. As Ortego pleaded guilty, the most significant obstacle to recovery is a declaration by the court of PdVSA's "victim" status—which has held up past MVRA claims by similarly situated parties.

For example, in March 2020, PetroEcuador lost its bid in the Southern District of Florida to be recognized as a victim under the MVRA.[14] The court found that PetroEcuador's request to receive restitution from Jose Melquiades Cisneros Alarcón, who pleaded guilty in August 2019 to charges related to PetroEcudaor's bribery scheme, lacked merit due in part to pervasive illegal conduct by PetroEcuador's executives and that decision was affirmed by the Court of Appeals for the 11th Circuit in May 2020. A similar claim by PetroEcuador against Andrés Baquerizo Escobar, who was the owner of an Ecuadorian contracting company involved in bribing PetroEcuador officials, and who pleaded guilty to those bribes, was struck down by the same court and is currently under appeal in the 11th Circuit. At the center of these dismissals remain the oil company's own misconduct—which the courts found disqualified it from claiming to be a victim.

Similarly, Juan Guaidó's claim for restitution on behalf of PdVSA rests on its ability to receive victim status even as the company faces its own bribery allegations. The U.S. government has urged the district court to deny Guaidó's restitution claim, citing in part the 11th Circuit's *PetroEcuador* decision and the complicity of PdVSA in the bribery and money laundering schemes that are the subject of Ortego's prosecution. The claim is currently pending.

On note, PdVSA has pursued several avenues in its quest for restitution in the past, including claims by the Maduro government. In 2017, a subsidiary of PdVSA, Bariven S.A., unsuccessfully sought to receive victim status, which may offer some guidance as to the potential success of PdVSA's newest claim to victimhood and restitution.

Och-Ziff Capital Management Group

The *Och-Ziff* case offers another prominent example of the potential financial risks a restitution claim may bring in the aftermath of an anti-bribery investigation. A subsidiary of Och-Ziff Capital Management Group, Inc. pleaded guilty in 2016 to one FCPA count and now faces a significant restitution claim by shareholders of a Canadian mining company filed in 2019.[15] The shareholders sought more than $1.8 billion in damages for an investment in a mine that they claim would have been properly developed without the corruption—an amount that dwarfs the original combined FCPA settlement of $412 million agreed to in 2016. In August 2019, as we discuss in the previous Trends and Patterns, the district court ruled that the shareholders were, in fact, victims of the Och-Ziff bribery scheme—but requested further briefing regarding the actual damages suffered.

In May 2020, in response to objections by Och-Ziff regarding what the company viewed as the exaggerated value of the mine in question, the shareholders decreased the amount of their claim to $421 million. The claim is currently pending.

SECURITIES FRAUD CLAIMS

Cognizant Technology Solutions Corporation

In September 2016, shareholders of Cognizant Technology Solutions Corporation brought a securities fraud class action, alleging the company made false statement that concealed the fact that the company had made illegal payments to Indian officials—and that the company's senior management participated in the scheme.[16] As discussed in our 2019 Trends and Patterns, Cognizant settled charges with the SEC for approximately $25 million in connection with its attempts to obtain permits for a facility in India. It also received a declination from the DOJ for the same conduct. U.S. authorities brought

[12] *See* Philip Urofsky, et al., *Civil Litigation in the Aftermath of FCPA and U.K. Bribery Act Investigations*, ANTI-CORRUPTION REPORT (May 13, 2020).
[13] *United States v. Abraham Edgardo Ortega*, No. 18-cr-20685-KMW (S.D. Fl. 2018).
[14] *United States v. Jose Melquiades Cisneros Alarcón*, No. 19-cr-20284-KMW (S.D. Fl. 2019).
[15] *United States. v. OZ Africa Management GP, LLC*, No. 1:16-cr-00515 (E.D.N.Y. 2016).
[16] *Park v. Cognizant Tech. Solutions Corp., et al.*, No. 2:16-cv-06509 (D.N.J. 2016).

further enforcement actions against several former C-suite executives at the company in connection with the scheme.

As several former Cognizant executives were subsequently charged from conduct arising out of the bribery scheme, plaintiffs filed an amended complaint in 2019, including new allegations related to the indictments. Defendants moved to dismiss the complaint, noting the Private Securities Litigation Reform Act (PSLRA) imposes certain heightened pleading standards on securities plaintiffs. At issue in the motion to dismiss, specifically, were (1) whether statements by the company and its chief executive were materially false and misleading, and (2) whether the statements were made with the requisite *scienter*.

In June 2020, Judge Esther Salas denied the defendants' motion to dismiss the securities fraud claims. Judge Salas found the plaintiffs stated with particularity facts giving rise to a strong inference that the company acted with the required state of mind—that is, it acted with an intent to deceive, manipulate, or defraud, either knowingly or recklessly. She further found that the alleged financial misstatements were sufficiently material at the pleading stage to merit a denial of the motion to dismiss.

Later in June 2020, the DOJ wrote in a court filing that it intends to seek a stay of discovery in the securities case pending prosecution of Coburn and Schwartz, two of the executives charges over the alleged bribery scheme.

The case is currently pending, and further developments in the case should be followed closely by companies apprehensive of follow-up securities litigation in the aftermath of an anti-bribery investigation.

Mobile Telesystems PJSC

In another notable securities fraud case, investors sued Mobile Telesystems PJSC (MTS) in relation to the company's $850 million FCPA settlement in 2019.[17] The plaintiffs allege that MTS made misleading statements when it sought to assure investors that it would cooperate with the DOJ's investigation. The complaint states that if MTS had cooperated fully with the investigation, it would have received a 25% sentencing discount—reducing the eventual penalty by an additional $350 million. MTS moved to dismiss the complaint in May 2020, noting in part that it could not have predicted the outcome of the investigations; the motion is currently pending.

RICO CLAIMS

The first half of 2020 saw notable updates to several civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims arising out of FCPA enforcement actions. RICO opens the door to plaintiffs by offering a federal claim for damages related to racketeering activities. The Act is silent about its extraterritorial reach, and as a result, it is relatively rare for RICO cases to follow FCPA investigations because of the difficulty of establishing jurisdiction over conduct occurring in foreign countries (but not altogether impossible).

State-Owned Oil Companies

PdVSA continues to feature prominently in this section on private litigation. In May 2020, PdVSA's wholly owned subsidiary, Citgo Petroleum Company (which is discussed in the "Foreign Officials" section above), filed a complaint for damages under RICO against businessman Jose Manuel Gonzalez Testino and his company Petroleum Logistics Service Corp.[18] Testino had pled guilty to one count of conspiracy to violate the FCPA by paying bribes to PdVSA and Citgo employees in Texas (and thus obviating a question on the extraterritorial reach of RICO), and Citgo filed claims that it suffered damages as a result of Testino's conspiracy. The damage claims rest both in common law and under RICO. Under the RICO claims, Citgo seeks treble damages for all actual injuries caused by Testino and his company, as well as attorneys' fees—both of which are permitted by the RICO statute. Citgo's case against Testino and his company is currently pending.

Continuing the trend of national oil companies requesting damage awards in U.S. federal court for corruption schemes in which *their own* officials received bribes, Petrobras sued Samsung Heavy Industries in March 2019 under RICO.[19] Samsung had previously settled criminal charges with the DOJ related to the same conduct in November 2019, paying $75 million to the DOJ.

In June 2020, the court dismissed the RICO claims because it found the conduct was time-barred based on the Act's four-year statute of limitations, which begins when a plaintiff knew or should have known of the injury. Petrobras had issued several press releases back in 2014 regarding the specific official Samsung is alleged to have bribed, which indicates it knew or should have known of the bribery scheme that was the subject of the RICO claim.

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[17] *Salim v. Mobile TeleSystems PJSC et al.*, No. 1:19-cv-01589 (E.D.N.Y. 2019).

[18] *Citgo Petroleum Corporation v. Petroleum Logistics Service Corp.*, No. 20-cv-01820 (S.D. Tex. 2020)

[19] *Petrobras Am., Inc. v. Samsung Heavy Indus. Co.*, No. H-19-1410 (S.D. Tex. 2019).

UNUSUAL DEVELOPMENTS

Keppel Offshore & Marine

Of note, there is certain overlap between securities fraud claims and RICO claims, and federal legislators have sought to address that overlap in the PSLRA. PSLRA prohibits RICO claims alleging securities fraud, *except* where the RICO claims are brought against a person criminally convicted of the conduct in question.

This PSLRA bar to RICO actions proved too difficult to overcome for EIG Energy Fund, which sued Keppel Offshore & Marine in 2018 under RICO.[20] As we discussed in previous Trends and Patterns publications, Keppel entered into a DPA with the DOJ in 2017, in which it agreed to pay $422 million as part of a global settlement with authorities in the U.S., Singapore, and Brazil.

In May 2020, the district court dismissed EIG's RICO claims, noting that the DPA did not equate to a criminal conviction. As with restitution claims under the MVRA, which also require a criminal conviction, this bar to certain securities claims under RICO serves as further indication of the importance of NPAs and DPAs in FCPA enforcement actions.

[20] *EIG Energy Fund XIV, L.P. v. Keppel Offshore & Marine LTD*, No. 18-cv-01047 (S.D.N.Y. 2018).

ENFORCEMENT IN THE UNITED KINGDOM

SERIOUS FRAUD OFFICE
OTHER MATTERS OF INTEREST

ENFORCEMENT IN THE UNITED KINGDOM

SERIOUS FRAUD OFFICE

In keeping with the focus of this publication, this section will focus on the Serious Fraud Office's efforts to tackle bribery and corruption. Full details of the U.K.'s efforts to tackle white collar crime more generally are available in another Shearman & Sterling publication—UK Business Crime Review.

Without a doubt, the Deferred Prosecution Agreement (DPA) concluded with Airbus SE (Airbus) in January 2020 was the most significant outcome achieved by the Serious Fraud Office (SFO) in recent years and the highlight of a largely barren first half of the year. While the current pandemic will account, at least in part, for a lack of announcements on the bribery and corruption front, many long-standing and deep-seated issues that existed long before coronavirus continue to hamper the organization's ability to deliver the frequency of positive outcomes that many expect.

In February 2020, in response to a request made under the Freedom of Information Act 2000 (FOIA), the SFO revealed that it had opened just five investigations in 2019—five fewer than in 2018. In the same year, it closed ten investigations without bringing enforcement action against an individual or corporate entity—an increase of one on the previous year. Of course, one investigation is likely to feature multiple suspects, but it is important to bear in mind that these figures relate to <u>all</u> SFO investigations, including those concerning allegations of serious fraud and related offenses.

As the SFO was at pains to point out, "the number of cases opened fluctuates year-on-year" and it is understood to have more than 50 ongoing investigations and prosecutions at the current time—some of which may yield impressive outcomes. However, it has only opened less than ten investigations in one other calendar year in the last twelve years and it is a long way from the heights of 2008 when it opened twenty. Furthermore, as of July 2, 2020, the 'court calendar' published on the SFO's website showed that no individual or corporate entity was awaiting trial for bribery or related offenses, and it remains the case that the SFO is yet to secure a conviction for any offense against an individual following the conclusion of a DPA.

Recent outcomes also demonstrate that the SFO's woes are not limited to investigations and prosecutions concerning allegations of bribery and corruption. In February 2020, three former Barclays executives accused of funneling secret fees to Qatar in exchange for emergency funding at the height of the 2008 financial crisis were acquitted of conspiracy to commit fraud following a high-profile trial, and in June 2020, the SFO announced that it had closed its investigation into the manipulation of EURIBOR and withdrawn European Arrest Warrants for three German traders and a French citizen. While the investigation led to four senior ex-bankers being convicted for their part in the conspiracy and receiving sentences ranging from four to eight years' imprisonment, several individuals were acquitted or avoided extradition to the U.K.

Of course, no-one can sensibly argue that the SFO's task is an easy one. The majority of investigations the organization undertakes are complex and resource-intensive, and usually concern multiple suspects. They invariably require the assistance of overseas authorities and are increasingly conducted in conjunction with other agencies, both in the U.K. and abroad. Most acknowledge that such investigations will take time to resolve and will not always lead to DPAs, prosecutions, or convictions. However, like most other law enforcement and prosecution agencies in the U.K., the SFO is under ever-increasing political and public pressure to improve on its performance.

Against this backdrop, it is unsurprising that Lisa Osofsky, who joined the SFO as its Director in August 2018, continues to look for new ways to deliver an increased number of outcomes more quickly through the smarter use of the resources available to her. As we have highlighted in previous editions of *Trends & Patterns*, securing increased cooperation from individuals and corporate entities is one of the ways in which she believes the SFO can meet her aim. It was therefore to be expected that she would use the *Airbus* settlement to highlight the benefits of doing so, noting that the company had "admitted its culpability, cleaned its house and come forward to put [the] conduct to bed." In future editions of *Trends & Patterns*, we will be examining whether Ms. Osofsky's determination to use a broader range of tools to deliver results is bearing fruit.

COVID-19

Like all other U.K. regulators, prosecutors and law enforcement agencies, the work of the SFO has been impacted by the current pandemic. In a statement issued on May 7, 2020, the SFO said it "continues to investigate suspected fraud, bribery and corruption, adapting ways of working where necessary to adhere to Government guidance." It continued:

The office remains open for staff performing essential functions which cannot be done remotely, but all staff who are able to do so are working from home, utilising remote alternatives to tasks usually completed face-to-face and prioritising work which can be done remotely. In this way, we have been able to continue to follow active lines of inquiry in open investigations, as well as looking into allegations and referrals at the "pre-investigation" stage…

Investigations into suspected fraud, bribery and corruption continue, and we are working with our partners in HM Courts and Tribunals Service to ensure that court proceedings can go ahead as soon as practicable…

Case teams will contact you with relevant information relating to adapted ways of working. If you have any questions about the

ENFORCEMENT IN THE UNITED KINGDOM

particulars of your client's situation, you should contact the relevant case team directly.

Unlike other U.K. agencies, the SFO has been less forthcoming about how it has been impacted by recent events and the steps it is taking to overcome the operational challenges it is facing in the current environment. However, the extent of the disruption was revealed in a response to a recent FOIA request in which the SFO disclosed that it had not conducted any interviews under compulsion under section 2 of the Criminal Justice Act 1987 or under caution under the Police and Criminal Evidence Act 1984 between March 23 and April 30, 2020. In response to the same request, the SFO also stated that it had not applied for a search warrant or carried out a search during the same period. Given the circumstances, these revelations are unlikely to come as a surprise. However, the SFO also disclosed that in the almost six-week period, it had only issued sixteen notices compelling the provision of information. Given that the organization can issue anywhere up to 1,000 such notices in any given year, this figure highlights the very real challenges the SFO is facing in attempting to progress investigations.

On May 11, 2020, the *Financial Times* also reported that the SFO was struggling to process evidence having stopped handling "paper documents or seized devices to minimise the risk of transmitting the virus." The newspaper also reported that the move to home-working had meant that only electronic evidence in certain compatible formats could be uploaded to its IT platform.

Like many organizations, the SFO may have hoped that it could "put off" non-urgent activities until things returned to "normal," but as such a time appears to be a long way off, the agency will be under increasing pressure to find new and innovative solutions to progress investigations and prosecutions. Recent anecdotal evidence appears to suggest that the SFO is willing to take such steps and that it has overcome many of the challenges it initially faced. Investigations and prosecutions are being progressed, albeit even more slowly than before the current pandemic.

EVALUATING A COMPLIANCE PROGRAM

In January 2020, the SFO updated its guidance on evaluating compliance programs by publishing the relevant section of its Operational Handbook. Although the Handbook is for "internal guidance only," it is commonly made available (either in full or with redactions) "in the interests of transparency."

The guidance highlights that when investigating any organization, the SFO will need to assess the effectiveness of the organization's compliance program. Such an assessment will inform decisions as to:

- whether an organization may have an "adequate procedures" defense under section 7 of the Bribery Act 2010;
- whether a prosecution is in the public interest;
- whether an organization should be invited to enter into DPA negotiations and, if so, what conditions should be attached to any DPA; and
- the sentence to be imposed in the event of conviction.

The SFO stresses that the key feature of any program is that it needs to be effective and not simply "a paper exercise." It must work for the organization in question, taking into account the field in which that organization operates, and be proportionate, risk-based, and regularly reviewed.

As part of any assessment, the SFO will consider the compliance program in existence at the time of any alleged wrongdoing and at the time any assessment is being carried out. The SFO will also take into account any changes that may be made to a compliance program going forward. An organization who has adopted a genuinely proactive approach to implementing remedial actions is far more likely to avoid immediate prosecution and may, in some circumstances, even avoid being the subject of a DPA.

The SFO's guidance also draws on the six principles identified in the statutory guidance published by the Ministry of Justice in 2011, following the enactment of the Bribery Act 2010. The principles will be familiar to many readers. In short, they recommend that organizations seeking to put in place adequate procedures":

- adopt proportionate procedures;
- secure a "top level commitment" from senior management;
- carry out risk assessments;
- conduct due diligence;
- communicate policies and procedures, and provide appropriate training for staff; and
- monitor and review policies and procedures on a periodic basis.

As the SFO recognizes, the guidance relates to organizations of different sizes, operating in different sectors. It is, therefore, not designed to be prescriptive. However, it does provide organizations with a clear indication of the matters that the SFO will be taking into account in assessing the effectiveness of an organization's compliance program and, in turn, whether action ought to be taken as a result.

ENFORCEMENT IN THE UNITED KINGDOM

RESPONSES TO REPORTS BY HM CROWN PROSECUTION SERVICE INSPECTORATE

In 2019, HM Crown Prosecution Service Inspectorate (HMCPSI) published its findings following separate reviews of case progression, and leader and management at the SFO. In June 2020, the SFO provided its formal response to the observations and recommendations made by HMCPSI.

HMCPSI's review of case progression focused on systems and processes between case acceptance and charge. The Inspectorate noted that the SFO deals with very complex cases involving huge amounts of data and often extensive international cooperation. It found that the SFO had clear and well-documented internal casework processes and welcomed its engagement with partners and stakeholders; its greater commitment to victims and witnesses, in particular setting clearer expectations leading to improved communications; and the opportunities for training and development it offered.

However, it identified a number of areas that would benefit from improvement and made seven recommendations concerning the organization's allocation of resources, its use of independent counsel, the demands placed on its digital forensic unit, the development of core skills training to support case progression, and the monitoring of key milestones in the investigation and prosecution of cases. HMCPSI also identified two further issues to address—the use of a new electronic case management system by the Intelligence Division, and the improvement of performance data in order to identify and challenge delays in cases.

In responding to the findings, the SFO accepted all of the recommendations in full, save for one, which it accepted in part—refusing to accept that it should consider the reallocation of case controllers and case teams when cases are not being taken forward promptly. The SFO's response also contained a number of announcements designed to implement the recommendations, such as:

- the recruitment of a cadre of paralegals to reduce the number of temporary staff;
- the refreshing of its Counsel Panel List;
- a staff rotation policy in order to enable all staff to experience the breadth and depth of its work;
- the re-balancing of the allocation of resources across divisions;
- new training programs;
- revisions to its Business Plan;
- changes to the way in which MI is gathered and presented; and
- various other amendments to existing policies and procedures.

All of the announcements are to be welcomed. However, some readers may be left wondering whether HMCPSI's report and the subsequent measures to be introduced by the SFO really address the systemic issues that often delay case progression. Time will tell whether any of the measures announced by the SFO will have a meaningful impact.

HMCPSI's review of leadership and management was carried out at the request of the SFO's Chief Operating Officer (COO) following a drop in what had previously been higher than average staff engagement scores. HMCPSI recognized both the desire of the SFO's Director and its senior leadership team to foster improvements to the culture of the SFO, and the goodwill of its staff in support of those efforts to promote positive change, but found room for improvement. The Inspectorate did not make any formal recommendations, but the SFO accepted the findings in full.

In response, the SFO announced the introduction of a three-year Culture Change Programme and a new People Strategy. The Strategy has four key objectives:

- to implement effective organizational development to deliver the SFO's vision, ensuring staff feel valued and supported by having adequate resources and information available to get their jobs done;
- to create a balanced, effective workforce fairly reflecting the Roskill Model by recruiting and retaining the right people, at the right grades and disciplines to deliver high quality outputs;
- to improve and maintain learning and development opportunities for all to enhance staff careers and further develop their skills; and
- to support improvements in staff well-being to offer an excellent staff experience at work and become an employer of choice.

Days before publishing its response, the SFO announced the appointment of John Carroll as COO and Michelle Crotty as Chief Capability Officer. Mr. Carroll has been employed by the SFO for a number of years and has been acting COO since October 2019. Ms. Crotty joins the SFO from the National Crime Agency (NCA) where she was the Director of Strategy.

CORPORATE CRIMINAL LIABILITY

Lisa Osofsky used the announcement of the DPA against Airbus to call for an overhaul of the U.K.'s legal regime to make it easier to prosecute corporate entities. As many readers will be aware, this is not the first time that Ms. Osofsky has raised the issue. In 2018, she called for an extension of corporate criminal liability and the creation of an all-encompassing failure to prevent fraud offense, akin to the offenses under the Bribery Act 2010 and the Criminal Finances Act 2017.

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Back in 2014, the then-Attorney General, Jeremy Wright, mooted the creation of a failure to prevent serious economic crime offense. However, nothing came of his proposals.

As matters currently stand, there appears to be little appetite to reform the laws concerning corporate criminal liability generally, although there remains the possibility that further "failure to prevent" offenses will be introduced in an effort to combat particular types of criminal activity. It will be interesting to see whether Ms. Osofsky's ideas gain any greater traction this time.

OUTCOMES

As detailed above in our section on the *Airbus* global enforcement action, on January 31, 2020, Dame Victoria Sharp, the President of the Queen's Bench Division of the High Court, approved the Deferred Prosecution Agreement (DPA) between the SFO and Airbus. Under the agreement, Airbus was required to pay a financial penalty and costs amounting to almost €1 billion, as part of a €3.6 billion settlement reached with the U.K., French and U.S. authorities to avoid prosecution. It is the seventh DPA approved by the U.K. courts and the fifth relating to allegations of bribery and corruption. The record-breaking penalty is the largest ever imposed by a U.K. criminal court and dwarfs the £497 million settlement agreed with Rolls-Royce in January 2017. To put it into context, it is double the total of all fines paid in respect of all criminal conduct in England and Wales in the whole of 2018.

As reported in the last edition of *Trends and Patterns*, in May 2019, the SFO commenced criminal proceedings against Anna Machkevitch, a director of London-based ALM Services U.K. and the Machkevitch Foundation, for failing to produce documents to the SFO as part of its ongoing investigation against ENRC. In November 2019, Ms. Machkevitch failed in her attempts to halt the prosecution by bringing an application for judicial review of the SFO's decision to commence the prosecution against her. In refusing her application, Mr. Justice Supperstone stated that the decision was neither disproportionate, unreasonable, or "wholly out of the ordinary." Ms. Machkevitch stood trial at Hendon Magistrates' Court in January 2020 and was convicted. She was fined £800 and ordered to pay the SFO's costs in full. She is not a suspect in the SFO's investigation against ENRC.

In May 2020, the SFO announced the closure of its investigation into the U.K. subsidiaries of ABB Ltd—the Swiss incorporated engineering company—their officers, employees, and agents. The SFO stated that the case did not meet the relevant tests for prosecution. The investigation, which was announced in February 2017 following a self-report by representatives acting on behalf of the company, was linked to the SFO's Unaoil investigation.

In June 2020, the SFO announced the closure of its investigation into the activities of the De La Rue group and its associated persons in relation to suspected corruption in South Sudan. The SFO stated that "following extensive investigation and a thorough and detailed review of the available evidence," the case did not meet the relevant tests for prosecution.

SIGNIFICANT INVESTIGATION DEVELOPMENTS

There have been very few significant investigation developments in recent months. However, as foreshadowed in the last edition of *Trends & Patterns*, the trial of Ziad Akle, Paul Bond, and Stephen Whiteley—three individuals accused of bribery in connection with the activities of Unaoil in Iraq—began at Southwark Crown Court in January 2020. The trial was temporarily halted towards the end of March 2020 due to the current pandemic but resumed on May 13, 2020 at the Central Criminal Court. Proceedings were moved to allow social distancing measures to be implemented. The jury began deliberations on May 29, 2020. As of July 2, 2020, no verdicts have been announced.

As readers will recall, the fourth defendant, Basil Al Jarah, pleaded guilty in July 2019. He will be sentenced at the conclusion of the trial. The SFO has not brought any charges against the company. Other individuals have faced prosecution in the U.S.

OTHER MATTERS OF INTEREST

Dishonesty

In *Regina v. Barton & Booth* [2020] EWCA Crim 575, the Court of Appeal confirmed that the test for establishing dishonesty is that set out by the U.K. Supreme Court in *Ivey v. Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67. When dishonesty is in question, the fact-finding tribunal must first ascertain the actual state of the individual's knowledge or belief as to the facts. The question whether the conduct was honest or dishonest must then be determined by applying the objective standards of ordinary decent people to the facts as the individual knew or believed them to be.

This significant decision overturns the previous "two stage' test set out in *Regina v. Ghosh* [1982] Q.B. 1053 and is likely to make it easier for a party to prove dishonesty before any tribunal.

Unexplained Wealth Orders

In recent editions of *Trends & Patterns*, we have been following Zamira Hajiyeva's attempts to challenge the Unexplained Wealth Order (UWO) made against her in 2018, which requires her to explain how she funded the purchase of two London properties worth an estimated £22 million. For those unfamiliar with the case, she is the wife of the convicted former Chairman of the International Bank of Azerbaijan, who is currently serving a fifteen-year sentence for fraud and embezzlement. She attracted a significant degree of media attention last year when court documents revealed her spending habits, which included a total expenditure of £16 million at Harrods in London. The documents also revealed that the NCA had seized a diamond ring worth in excess of £1 million and other items of jewelry totaling around £400,000, suspecting them to have been acquired with the proceeds of crime.

The Court of Appeal heard Mrs. Hajiyeva's appeal in December 2019 and delivered its judgment on February 5, 2020 (*see Hajiyeva v. NCA* [2020] EWCA Civ 108). The Court upheld the High Court's decision and confirmed that Mrs. Hajiyeva was a Politically Exposed Person ("PEP") as a result of her husband's former employment. In that regard, the Court stated that a broad approach should be taken when assessing whether an entity is a "state-owned enterprise." The Court also confirmed that neither the privilege against self-incrimination nor spousal privilege applied to the UWO regime, and even if they did, the U.K. Parliament had clearly intended such privileges to be abrogated. Mrs. Hajiyeva must now comply with the UWO made against her and provide the NCA with a full account of the source of her wealth.

However, a few months later, the NCA was dealt a blow in the unconnected case of *NCA v. Baker & Others* [2020] EWHC 822 (Admin) when Mrs. Justice Lang set aside three UWOs. The UWOs had been secured during an *ex parte* hearing in which the NCA alleged that a number of properties held in the names of companies had been acquired as a means of laundering the proceeds of the unlawful conduct of Rakhat Aliyev, a senior official in the government of Kazakhstan, who died in prison in Austria in February 2015 while awaiting trial for murder.

Upon receipt of the UWOs, the Respondents asserted that Mr. Aliyev was not connected to the properties and that the factual basis for the NCA's application was incorrect. The NCA refused to withdraw the UWOs, and the Respondents sought the discharge of the UWOs.

In discharging the orders, the Court concluded that the NCA had failed adequately to investigate a number of matters before seeking the UWOs and described the NCA's assumption that Mr. Aliyev was the source of the funds to purchase the properties as "unreliable." Furthermore, the Court found that the evidence provided by the Respondents concerning ownership to be "cogent." In particular, the Court noted that too much emphasis had been placed on the fact that complex structures had been used to purchase the properties, highlighting that such structures are often used for perfectly legitimate purposes.

Following the judgment, the NCA, describing itself as "tenacious," stated that it would seek leave to appeal. However, on June 17, 2020, the Court of Appeal refused leave.

It would be easy to read too much into this recent decision. In truth, it is simply a timely reminder to all law enforcement agencies that they should do their homework before seeking an intrusive order during an *ex parte* hearing and carry out adequate investigations when presented with an explanation by the recipient of such an order. However, as the unsuccessful party is normally ordered to meet the costs of the successful party in such proceedings, it will be interesting to see whether this recent setback dents the NCA's enthusiasm for one of its new investigative tools.

Civil Claims

In the first half of 2020 we saw another example of the continuing trend of litigants bringing civil proceedings before the English High Court concerning allegations of bribery and corruption. However, in *Nigeria v. Royal Dutch Shell & Others* [2020] EWHC 1315 (Comm), the Court refused to entertain the claims brought against various companies within the Shell and Eni groups on the basis that "proceedings involving the same cause of action and between the same parties" were already underway in Italy.

In February 2017, the Public Prosecutor of Milan charged a number of individuals with the offence of bribery in relation to the acquisition of Nigerian oil rights. Those individuals included current or former officers or employees of companies in the Shell and Eni groups. Nigeria joined the Italian criminal proceedings as a civil claimant. Various Shell and Eni entities were joined to the proceedings as a result of Nigeria alleging that they are vicariously liable for the criminal conduct of the individuals in question. The trial began in March 2018 and is continuing.

In October 2019, the U.S. Department of Justice concluded its investigations against companies in the Shell and Eni groups in relation to the conduct that is the subject of the Italian trial without taking any action.

CONCLUSION

Although the DOJ and SEC brought a relatively low number of FCPA enforcement actions in the first half of 2020, *Airbus* brought the yearly aggregate corporate penalties to a record high—with six months to spare. The first half of 2020 has been an exception to recent enforcement trends due, largely, to the COVID-19 pandemic and unprecedented disruption of business as usual. It remains to be seen whether FCPA enforcement actions pick up in the second half of the year.

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