COVINGTON

2018 Year in Review: Top Anti-Corruption Enforcement Trends and Developments

Winter 2019

Anti-Corruption

It was business as usual for FCPA enforcement in 2018. The U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") collected a total of $1 billion from seventeen corporate defendants, including through their share of two high-value, multi-jurisdictional enforcement actions. DOJ also announced thirteen new FCPA prosecutions against individuals and used the money laundering and wire fraud statutes to pursue cases against foreign officials and others implicated in cross-border corruption schemes. The SEC, for its part, commenced FCPA enforcement actions against three individuals. Though the year did not see a meaningful change in the level of enforcement activity, DOJ announced several refinements to its FCPA enforcement policies, which seem unlikely to result in a substantial shift in practice, but helped to clarify the Department's position on various issues. As for the SEC, the agency continued to aggressively pursue actions under the books and records and internal accounting controls provisions, including against foreign state-owned companies that were themselves the victims of corruption schemes.

Meanwhile, anti-corruption enforcement efforts continued to expand and mature across Europe, Africa, Asia, and Latin America, underscoring the continued importance of developing and maintaining a robust and tailored anti-corruption compliance program to meet the expectations of regulators around the world.

1. A year of refinement to DOJ's FCPA enforcement policies.

Over the course of 2018, DOJ announced a number of changes to its enforcement policies and practices. As discussed in more detail below, those changes included extending the Corporate Enforcement Policy to acquiring companies that uncover wrongdoing in connection with mergers and acquisitions; formalizing the Department's practice of coordinating with other U.S. and foreign enforcement authorities to avoid the "piling on" of penalties; issuing updated guidance on corporate monitors; and revising the Department's policy on cooperation in investigations of corporate wrongdoing.

Rather than signaling a dramatic shift in Department philosophy or practice, most of these policy refinements reflect a codification of what we have seen in practice in recent years and may reflect a desire to take into account the experience of the Department's prosecutors and realities of FCPA investigations, feedback from the defense bar, and an intention by the Department to ensure that its resources are being deployed in a manner consistent with broader Department

priorities. As such, we do not expect that these refinements will result in a dramatic shift in enforcement priorities or practice, but this is an area we will continue to watch.

Clarifications regarding the application of the Corporate Enforcement Policy

As we have noted in past publications, the Corporate Enforcement Policy, which was adopted by DOJ and incorporated into the United States Attorneys' Manual (now known as the "Justice Manual") in 2017, establishes the presumption that, absent "aggravating circumstances," a company will be eligible for a declination where it voluntarily discloses misconduct, fully cooperates with DOJ, timely and appropriately remediates, and agrees to pay disgorgement, forfeiture, or restitution. The policy also commits DOJ to recommending a 50% reduction off the low end of the U.S. Sentencing Guidelines fine range in those cases (except cases involving recidivists) in which a company does not qualify for a declination but otherwise voluntarily discloses the conduct, fully cooperates, and remediates. The policy also makes clear that, in cases where a company qualifies for a 50% reduction, DOJ "generally will not require appointment of a monitor" if the company has implemented an effective compliance program at the time of the resolution.

DOJ did not make any significant revisions to the Corporate Enforcement Policy in 2018, but DOJ did expand the scope of its application in several respects. In March 2018, DOJ officials announced that the Criminal Division would use the policy as guidance outside the FCPA context. In July 2018, Deputy Assistant Attorney General Matthew Miner also announced that DOJ intends to apply the policy to acquiring companies that uncover wrongdoing in connection with mergers and acquisitions so that "law-abiding companies with robust compliance programs" are not discouraged from acquiring non-compliant companies. While not game-changing, the announcement clarified that acquiring entities may receive the benefit of disclosure even in situations where the selling or acquired company was aware of the improper conduct prior to the transaction. DOJ further clarified in September 2018 that these principles will apply in the merger and acquisition context when other types of wrongdoing—not just FCPA violations—are uncovered.

DOJ officials have explained that the purpose of the Corporate Enforcement Policy is to "foster[] a climate in which companies are fairly and predictably treated when they report misconduct" in order to "increase self-reporting and individual accountability." As we noted last year, however, the additional clarity and predictability that the policy is intended to achieve is offset in part by the fact that prosecutors retain considerable discretion in the application of the policy. In 2018, we began to see the policy applied in practice, but questions remain, fueled in part by the discretion embodied in the policy's voluntary self-disclosure and remediation standards, as well as the "aggravating circumstances" exception, which allows prosecutors to depart from the presumption of a declination and resolve matters through a non-prosecution agreement ("NPA"), deferred prosecution agreement ("DPA"), guilty plea, or even an indictment.

For example, under the Corporate Enforcement Policy, a voluntary self-disclosure must occur "prior to an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense" in order to qualify for a declination. DOJ officials have noted that this means "companies should make their initial disclosures sooner rather than later," but exactly what these standards mean in practice will likely vary in each investigation. For example, The Dun & Bradstreet Corporation ("D&B") received a declination under the policy last year, even though according to the company's settlement with the SEC, D&B self-reported to DOJ and the SEC after police in China conducted a raid on D&B's subsidiary.

As another example, to receive credit for "appropriate remediation," the policy requires "prohibiting the improper destruction or deletion of business records, including *prohibiting employees from using software that generates but does not appropriately retain business records or communications*" (emphasis added), such as ubiquitous messaging platforms like WhatsApp and WeChat. Although DOJ has not formally expounded on its expectations in this regard, DOJ officials have indicated that, despite the strict language of the policy, DOJ does not necessarily expect companies to impose outright prohibitions on the use of such messaging applications. Instead, companies should take a "risk-based approach" and be able to explain to DOJ what steps they have taken with respect to use of messaging applications, and why. Whether this risk-based approach is accepted by DOJ in practice remains to be seen.

Finally, regarding the "aggravating circumstances" exception, two of 2018's enforcement actions suggest that the exception may be applied with flexibility. For example, the declination issued to Insurance Corporation of Barbados Limited suggests that a declination may be available to companies under the Corporate Enforcement Policy despite the "high-level involvement of corporate officers" if DOJ is "able to identify and charge the culpable individuals." Another declination issued last year included disgorgement to DOJ and the SEC in excess of $30 million, suggesting that declinations may be possible even where there may have been significant profit from the underlying conduct at issue.

Policy on Coordination of Corporate Resolution Penalties

In May 2018, DOJ issued a policy, titled "Coordination of Corporate Resolution Penalties" (the "Anti-Piling On Policy"), which requires DOJ attorneys to be mindful of their ethical obligation not to unfairly extract additional penalties in parallel or joint investigations involving other U.S. or foreign enforcement authorities, and requires DOJ attorneys to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other U.S. or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct. Given the increasing number of coordinated, multi-jurisdictional enforcement actions we have seen in recent years, we do not see this policy as a significant shift in practice for FCPA settlements. But having DOJ's position in writing when negotiating parallel resolutions will be helpful to practitioners.

After the Anti-Piling On Policy was issued, DOJ announced two coordinated, multi-jurisdictional enforcement actions involving Petróleo Brasileiro S.A. ("Petrobras") and Société Générale S.A., the latter being the first coordinated anti-corruption resolution between U.S. and French authorities. In both matters, U.S. authorities offset the penalties they imposed against penalties paid to local enforcement authorities, with U.S. authorities collecting just 20% of the overall penalties in the Petrobras matter and 50% of the overall penalties in the Société Générale matter. In both cases, DOJ stated that it did not impose a monitor because, among other factors, each company would be subject to oversight by enforcement authorities in their home country.

As in prior years, multi-jurisdictional coordination also was evidenced in acknowledgments by DOJ and the SEC in various enforcement actions of assistance from non-U.S. law enforcement authorities and police, including authorities in Switzerland, Spain, the UK, Brazil, Singapore, Malaysia, and several other countries. In 2018, the SEC and the FCPA Unit within DOJ also hosted a training for foreign law enforcement officials from 34 countries, suggesting continued cross-border collaboration and strengthening of law enforcement relationships.

Updated DOJ guidance on corporate monitors

In October 2018, Assistant Attorney General Brian Benczkowski issued updated guidance on the selection of corporate monitors in criminal matters (the "Benczkowski Memo"). The Benczkowski Memo emphasizes the core principles from prior DOJ guidance that a monitor should be a remedial measure and not punitive, and that prosecutors should weigh the potential benefits as well as the cost and impact of a monitor on a company's operation. The Benczkowski Memo elaborates on these considerations, formalizing principles and procedural steps for the imposition and selection of corporate monitors, many of which have already been reflected in recent resolution papers. Notably, the Benczkowski Memo does not otherwise reference the criteria in last year's DPA with Panasonic Avionics Corp. ("PAC") that "[m]onitor selections shall be made in keeping with the Department's commitment to diversity and inclusion," although a footnote in the Memo indicates that "[a]ny submission or selection of a monitor candidate by either the Company or the Criminal Division should be made without unlawful discrimination against any person or class of persons."

To evaluate the potential benefits of a monitorship, the Benczkowski Memo instructs prosecutors to consider the adequacy of a company's compliance program and internal controls, whether remedial improvements to those controls have been tested, and the pervasiveness or involvement by senior management in the misconduct. In this sense the Benczkowski Memo does not break any new ground, as these factors have typically been part of any discussion regarding the imposition of a monitor, and recent enforcement actions have expressly referenced some of these factors. For example, in the April 2018 PAC settlement—the only case from 2018 where a monitor was imposed—the DPA noted that the imposition of a monitor for two years was "necessary to prevent the reoccurrence of misconduct" because the company "to date has not fully implemented or tested its enhanced compliance program." In contrast, in the September 2018 Petrobras settlement, DOJ pointed to the extensive remedial measures taken by Petrobras as one of the factors considered in not imposing a monitor, in addition to the fact that Petrobras would be subject to post-resolution supervision by Brazilian authorities.

While we view DOJ's approach on *whether* to impose a monitorship as consistent with existing practice, the Benczkowski Memo's commentary on the *scope* of monitorships is potentially significant. The memo instructs that the scope of a monitorship "should be appropriately tailored to address the specific issues and concerns that created the need for the monitor," and requires that the monitorship's scope be explicitly addressed in the resolution papers. Although we have not yet seen how these scope instructions will be applied in practice, the Benczkowski Memo may support arguments to limit a monitorship to particular geographies, business units, operational areas, or compliance risks. Recent monitorships have tended not to include such explicit scope limitations, but we will be watching to see whether such limitations become more common in the wake of the Benczkowski Memo.

DOJ confirms the elimination of compliance counsel position

In October 2018, Assistant Attorney General Benczkowski announced that DOJ will no longer have a single, designated compliance counsel. Instead of "[r]elying on a single person as the repository of all of [DOJ's] compliance expertise," DOJ will focus on (a) hiring attorneys who have experience developing and testing corporate compliance programs, and (b) developing targeted compliance training programs for its prosecutors.

In his announcement, Benczkowski emphasized that prosecutors will continue to assess and take into account corporate compliance programs at the time of the conduct and at the time of

resolution, which would be consistent with the focus on remediation and compliance in the Corporate Enforcement Policy and the Benczkowski Memo. However, by eliminating the compliance counsel position and shifting the compliance program assessment role fully to line prosecutors conducting the investigation, the Department may lose, in the short term at least, some of its ability to benchmark corporate compliance programs, and some of the perspectives that come from having a dedicated compliance counsel with extensive experience in the private sector. In any event, we do not expect this change in approach to result in DOJ's assessment of compliance programs being any less rigorous.

Revisions to DOJ policy on cooperation in investigations of corporate wrongdoing

In November 2018, DOJ announced changes to its policy on cooperation in investigations of corporate wrongdoing. As with other policy changes from 2018, these changes do not represent a significant shift in policy or practice with respect to corporate criminal investigations, but they do help clarify in writing the scope of DOJ's expectations regarding cooperation. For example, under the previously applicable Yates Memo from 2015, companies were required to "identify *all individuals* involved in or responsible for the misconduct" (emphasis added) in order to receive cooperation credit. Under the new policy, companies only are required to identify individuals "*substantially* involved in or responsible for the misconduct" (emphasis added). Deputy Attorney General Rod Rosenstein explained that this change was made in response to concerns about the inefficiencies and delays associated with requiring companies to identify all employees involved in wrongdoing and was intended to clarify DOJ's view that companies should focus on individuals who played significant roles and authorized the misconduct. Although the exact scope of who is considered an individual "substantially involved in or responsible for the misconduct" remains to be seen (and likely will be very fact-specific), DOJ officials have suggested that "substantially involved" would include not only the obvious categories, such as senior leadership involved and other employees responsible for the misconduct, but also lower-level employees involved in carrying out a scheme.

We do not view this more limited focus on individuals who were "substantially involved in or responsible for" as stepping away from the Department's recent emphasis on individual accountability, nor do we see it as likely to materially change how companies will need to approach internal investigations to obtain cooperation credit.

What to watch for in 2019:

- *Will DOJ provide greater clarity on what is considered a timely voluntary self-disclosure under the Corporate Enforcement Policy?*
- *Will DOJ revise the Corporate Enforcement Policy's express requirement that companies "prohibit[] employees from using software that generates but does not appropriately retain business records or communications"? If not, will we see cases where companies receive full credit under the policy despite not implementing a prohibition on messaging applications?*
- *Will DOJ limit the scope of corporate monitorships under the Benczkowski Memo, and if so, in what ways?*
- *Will DOJ continue to defer to foreign authorities in the monitoring of companies in their jurisdictions?*
- *Will corporate investigations be resolved more expeditiously with DOJ's more targeted focus on individuals substantially involved in or responsible for the misconduct?*

2. The SEC continues aggressive enforcement under the FCPA's accounting provisions.

In 2018, eleven of the fourteen corporate enforcement actions pursued by the SEC were based on alleged books and records or internal accounting controls violations, with no corresponding anti-bribery charges. This absence of anti-bribery charges is not particularly remarkable given enforcement statistics from prior years and the jurisdictional nexus required for anti-bribery charges, but this statistic does underscore a continuing trend of the SEC's aggressive use of the internal accounting controls or books and records provisions.

Failure to timely implement compliance controls in acquired entities and joint ventures

In 2018, the SEC pursued accounting provision charges against three companies for allegedly failing to stop improper conduct by not implementing adequate internal accounting controls after an acquisition or joint venture formation, emphasizing the importance of pre-acquisition due diligence and post-acquisition integration.

- Kinross Gold Corporation: In its March 2018 order, the SEC alleged that Kinross Gold Corporation ("Kinross"), a Canadian mining company, failed to timely implement sufficient internal accounting controls and remediate known anti-corruption issues at two companies acquired in Mauritania and Ghana in 2010. The SEC alleged that although Kinross conducted due diligence on the two companies and learned that they lacked anti-corruption compliance programs and associated internal accounting controls, Kinross did not take steps to enhance the companies' internal accounting controls until approximately three years after the acquisition. The SEC also criticized Kinross for allegedly failing to take more swift action (i.e., within a year) after internal audit reports identified potential issues and recommended remediation steps. Kinross agreed to a no-admit/no-deny cease-and-desist order and a civil penalty of $950,000, with an obligation to report to the SEC for a one-year period on the status of its remediation efforts and implementation of compliance measures in its Africa operations.
- D&B: In its April 2018 order, the SEC alleged that D&B failed to implement sufficient internal accounting controls after forming a joint venture and acquiring a new company in China, despite knowledge (at least at the regional level) that these entities had been acquiring data through improper payments. Regarding the joint venture, the SEC alleged that instead of stopping the practice of improper payments altogether, regional management implemented a practice of using third-party agents to obtain the data. Regarding the newly acquired company, the SEC alleged that D&B failed to conduct further diligence post acquisition to determine whether improper payments were in fact being made. D&B did not admit or deny the SEC's allegations, but agreed to a cease-and-desist order and payment of over $7 million in disgorgement and prejudgment interest, as well as a $2 million civil penalty.
- Beam Suntory Inc.: In July 2018, the SEC alleged that after Beam Suntory Inc. ("Beam") acquired a subsidiary in India in 2006, the company "provided [the subsidiary's] management with its Code of Conduct manuals and additional compliance training," but did not conduct internal audits until two years after the acquisition. Additionally, Beam kept existing management in place after it acquired the company, and that management was aware of and had orchestrated improper payments to government officials that allegedly continued after the acquisition. The SEC also alleged that from 2010 to 2011, Beam engaged an accounting firm and a U.S. law firm to review the subsidiary's operations in India; however, Beam failed to conduct the additional transaction testing or due diligence

recommended by those firms. Beam did not admit or deny the SEC's allegations, but agreed to a cease-and-desist order and payment of over $6 million in disgorgement and prejudgment interest, as well as a $2 million penalty.

Continued application of internal accounting controls provision to enforcement of internal hiring and due diligence policies

The 2018 SEC enforcement actions also illustrate the SEC's broad view that a failure to enforce or implement controls in anti-corruption-related policies, such as hiring and due diligence policies, is sufficient to establish a failure to implement adequate internal *accounting controls*. In a settlement with Credit Suisse Group AG ("Credit Suisse"), for example, the SEC alleged that the company failed to maintain an adequate system of internal accounting controls because it failed to meaningfully enforce or implement in practice policies that "prohibited the hiring of candidates referred by or related to officials from SOEs [state-owned enterprises] or government ministries in order to obtain or retain business." As a result, the company's Hong Kong subsidiary allegedly offered jobs or internships to numerous individuals referred by officials from Chinese SOEs to obtain business or other favorable treatment. The SEC charged Credit Suisse with violating both the anti-bribery and internal accounting controls provisions. Credit Suisse agreed to a cease-and-desist order with the SEC, including payment of nearly $30 million in disgorgement and prejudgment interest. Credit Suisse also entered into an NPA with DOJ for the same underlying conduct and agreed to pay a $47 million criminal penalty.

Other enforcement actions from 2018 focused on the implementation of due diligence policies and controls. In an action against Vantage Drilling, the SEC alleged that the company "failed to properly implement internal accounting controls related to its use of third-party marketing agents." The company's policies "required due diligence and prudent safeguards against improper payments to be in place" for agents interacting with foreign governments on behalf of the company; however, the company allegedly failed to conduct due diligence and implement enhanced payment controls with respect to an agent engaged to help it secure contracts from Petrobras. As a result, the SEC alleged that the company violated the FCPA's internal accounting controls provision. Vantage Drilling agreed to a no-admit/no-deny cease-and-desist order as well as the payment of $5 million in disgorgement. No penalty was imposed in light of the company's financial condition.

Similarly, in an enforcement action against a medical device company, the SEC alleged that the company failed to maintain an adequate system of internal accounting controls because, among other things, one of its subsidiaries failed to conduct due diligence on or train sub-distributors as required by company policy, and the company "failed to implement its internal accounting controls to detect and prevent the use of" those unauthorized sub-distributors. The SEC charged the company with violations of the FCPA's internal accounting controls provision as well as the books and records provision (based on other alleged conduct). The company agreed to a no-admit/no-deny cease-and-desist order and a payment of a civil penalty of $7.8 million.

We see these cases as part of a continuing trend of SEC actions addressing control deficiencies in areas that are not traditionally viewed as accounting controls, such as controls over procurement, hiring, and third-party due diligence. Whether or not these areas were intended to be within the reach of the FCPA's internal accounting controls provision, issuers are well-served to consider the SEC's expansive view in the design, implementation, and maintenance of their internal controls frameworks and anti-corruption compliance programs.

Applying the books and records and internal controls provisions to embezzlement with no connection to bribery risks

Another 2018 enforcement action that underscores the broad scope of the FCPA's accounting provisions is the SEC's cease-and-desist order against Elbit Imaging Ltd. ("Elbit"). In Elbit, the SEC alleged that the company violated the FCPA's books and records and internal accounting controls provisions based on purported sales agent or consulting agreements in connection with three transactions. Although the SEC's allegations regarding two of those transactions indicate that there was a risk that some or all of the funds paid to the consultants may have been used to make corrupt payments to Romanian government officials or were embezzled, the SEC's allegations regarding the third transaction allege simply that sales agents were paid for purported services in connection with the sale of a portfolio of real estate assets in the U.S. as part of an embezzlement scheme by Elbit's then-CEO. The SEC alleged that the internal accounting controls of Elbit and its then-subsidiary were insufficient because they failed to detect the approximately $27 million in payments made to the consultants and sales agents despite no evidence of these third parties providing any of the contracted services. The SEC also alleged that Elbit and its then-subsidiary improperly recorded the third-party payments as legitimate expenses. Although the civil penalty that Elbit paid to resolve the SEC's allegations was relatively low ($500,000), the enforcement action underscores the importance of issuers ensuring that their third-party controls are sufficiently adequate to detect not only potential corrupt payments but also embezzlement.

Enforcement against state-owned entities for in-country conduct

As we have highlighted before, the SEC (and DOJ) also used the FCPA's books and records and internal accounting controls provisions in enforcement actions against Brazilian parastatals Petrobras and Eletrobras, both of which were victims of employee kickback schemes that benefitted not only company employees (themselves considered "foreign officials" by U.S. authorities under the FCPA) but also Brazilian politicians. In both cases, the government alleged that inflated contracts and invoices served as a vehicle to generate funds used to pay kickbacks to Petrobras and Eletrobras employees, as well as Brazilian politicians and political parties.

Petrobras resolved charges through coordinated agreements with DOJ, the SEC, and Brazilian authorities; the Eletrobras settlement was limited to the SEC, with DOJ declining prosecution. Neither company was charged with violating the FCPA's anti-bribery provisions, even though in the case of Petrobras, the NPA noted that the bribes paid to Brazilian politicians "caused Petrobras to remain in [their] favor" and "to stop a Parliamentary Inquiry into Petrobras contracts." Likely a significant factor in DOJ's decision not to pursue anti-bribery charges was DOJ's view that the company and its shareholders were victims in the corruption scheme. The NPA also noted that, by entering into the agreement, Petrobras was not waiving any sovereign immunity arguments it might have. The SEC cease-and-desist order against Petrobras did not contain allegations suggesting that Petrobras may have benefitted from the scheme, but the order did allege that the corruption scheme resulted in material misstatements and omissions by Petrobras. The SEC order also alleged that Petrobras failed to maintain an adequate system of internal accounting controls because, among other things, Petrobras did not require employees to complete anti-corruption, anti-fraud, or compliance training and the company did not have a formal process for vetting individuals nominated to senior management positions. Petrobras reached a global resolution of $1.78 billion under which it agreed to pay approximately $85.3 million each to the SEC and DOJ. The amounts to be collected by U.S. authorities took into account $682.5 million to be paid to Brazilian authorities and $933.4 million to be paid to shareholders in a pending securities class action.

In the Eletrobras matter, the SEC alleged that the scheme ultimately benefitted certain construction companies, at least two Brazilian political parties and government officials, and several former officers at an Eletrobras subsidiary. Although there were no allegations that the bribes paid to Brazilian politicians benefitted the company, the SEC alleged that Eletrobras violated the books and records and internal accounting controls provisions because of inflated contracts and sham invoices used in the scheme, and because the company failed to address "significant material weaknesses" in its internal controls over financial reporting, among other issues. Eletrobras agreed to a no-admit/no-deny cease-and-desist order with the SEC and the payment of a $2.5 million civil penalty.

Use of traditional accounting and disclosure charges coupled with FCPA charges

The Panasonic Corporation ("Panasonic") and Petrobras enforcement actions also illustrate that the SEC will not shy away from bringing traditional accounting and disclosure charges along with FCPA charges. This is not the first time that we have seen this pairing. For example, in 2016, General Cable settled FCPA charges relating to a corruption scheme in parallel with a separate SEC enforcement action relating to improper inventory accounting.

In the case of Panasonic, the SEC alleged that the company violated the FCPA's anti-bribery, books and records, and internal accounting controls provisions because its U.S. subsidiary PAC provided a post-retirement consultancy position to an official at a state-owned airline (with whom PAC was negotiating certain agreements worth more than $700 million); paid the official $875,000 for little to no work; and failed to follow its third-party due diligence protocols in Asia. In addition to the FCPA charges, the SEC also alleged that Panasonic fraudulently overstated pre-tax and net income by prematurely recognizing more than $82 million in revenue for a fiscal quarter in 2012. The premature revenue recognition was allegedly accomplished by backdating an agreement with the state-owned airline and providing misleading information to the company's auditor. In connection with the revenue recognition issues, the SEC charged Panasonic with violating Sections 10(b) and 13(a) of the Exchange Act, as well as Rule 10b-5.

In the case of Petrobras, the SEC alleged that the company erroneously recorded kickback payments to its executives as expenses for the purposes of acquiring and improving assets, resulting in an estimated $2.5 billion overstatement of assets. According to the SEC, Petrobras's SEC filings misrepresented the company's assets and infrastructure projects, the integrity of its management, and the nature of its relationships with its majority shareholder, the Brazilian government. Based on this overstatement of assets, the SEC alleged that Petrobras violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, which prohibit sellers of securities from obtaining money by means of fraud, deceit, untrue statements or omission of material facts. The SEC alleged that Petrobras's filings included materially false and misleading statements to U.S. investors in a $10 billion stock offering completed in 2010.

Both the Petrobras and Panasonic actions serve as helpful reminders that the SEC remains focused on protecting investors, and will seek to hold issuers accountable under all securities laws, not just the FCPA.

Expansive view of agency in anti-bribery charge

The SEC brought three corporate enforcement actions in 2018 that included anti-bribery charges against Credit Suisse, Panasonic, and United Technologies Corporation. Two of these enforcement actions included allegations that employees of the parent company were involved in the improper conduct. In the case of Credit Suisse, the SEC alleged that certain managers in the

U.S. were aware of the allegedly improper hiring practices and approved some of the hires in question. In the case of Panasonic, the SEC alleged that one of the subsidiary executives involved in the corruption scheme also served as a director in one of the issuer parent company's business units. However, in the case of United Technologies, the SEC did not allege any knowledge or involvement by the parent company in the conduct underlying the anti-bribery charge, and instead simply alleged, without elaboration, that the parent company acted "through" its subsidiaries and "failed to detect the conduct." This is a notable case given that parent-level anti-bribery charges typically involve misconduct by employees at the parent company or specific allegations to support a theory under which a subsidiary or subsidiary employees are acting as agents of the parent. While the failure of a parent company to detect and prevent misconduct at a subsidiary might provide a basis for an internal controls charge, the FCPA's anti-bribery provisions require, among other things, corrupt intent. This aggressive charging theory provides further reason for issuers to ensure that they implement effective compliance programs in all controlled subsidiaries.

Could SEC Commission composition affect enforcement activity?

As we enter 2019, we will be looking to see whether the current SEC commissioner make-up affects the agency's enforcement activity. For most of 2018, the SEC was led by five commissioners. However, due to term limitations, the SEC is starting 2019 with only four. Although it is not unusual for the SEC to have fewer than five commissioners at any given time because of the typically lengthy appointment process, this year the absence of a fifth commissioner may lead to stalemates in the approval of certain enforcement actions. At least one current commissioner (Commissioner Hester Peirce) has pointed to concerns that civil monetary penalties can have the effect of doubly penalizing shareholders as a reason for voting against certain corporate enforcement actions. Commissioner Peirce also has openly criticized the SEC's pursuit of what may be viewed as relatively minor securities law violations (which some have described as a "broken windows" approach to enforcement), and indicated that she will vote against enforcement actions on which she believes the SEC should not have spent its time. Looking at the SEC's Commission vote records, since her appointment in January 2018, Commissioner Peirce has voted against the approval of five FCPA enforcement actions and voted to approve except as to penalties six FCPA enforcement actions. Commissioner Peirce has approved only three FCPA enforcement actions in their entirety. Whether the commissioner make-up ultimately has an effect on FCPA enforcement actions will likely depend on the length of the approval process for a fifth commissioner and whether any other Commissioners begin to follow Commissioner Peirce's position on penalties.

What to watch for in 2019:

- *Will the SEC continue to apply the internal accounting controls provisions to enforcement of policies in areas not traditionally viewed as accounting controls?*
- *Will the SEC pursue traditional accounting and disclosure charges in more FCPA cases?*
- *With the SEC down to four commissioners for the near future, will the SEC impose lower or fewer penalties in FCPA cases, and will fewer investigations lead to enforcement actions?*

3. Individual FCPA prosecutions remain a priority for DOJ, as well as the SEC.

As reflected in the 2018 enforcement statistics, we expect individual prosecutions to remain a priority for DOJ, as well as the SEC, in 2019:

- In 2018, DOJ announced thirteen individual prosecutions for alleged FCPA violations (not counting the various non-FCPA charges against foreign officials and others, discussed in more detail in section 5 below); and the SEC commenced FCPA enforcement actions against three individuals.
- DOJ also secured an FCPA trial victory for the second year in a row when a jury convicted former Hong Kong government official Chi Ping Patrick Ho in connection with a multi-year, multimillion-dollar scheme to bribe high-level government officials in Chad and Uganda in exchange for business advantages for CEFC China, a Chinese oil and gas conglomerate.

Of particular note over the past year were the indictments unsealed against several former bankers at multiple global financial institutions for their alleged participation in conspiracies to violate the FCPA by paying bribes to public officials and laundering billions of dollars in connection with investment banking transactions in emerging markets. These charges are reflective of DOJ's emphasis on pursuing individual wrongdoing, particularly where individuals may have knowingly and willfully circumvented corporate controls and concealed their conduct from others, including by misleading personnel in control functions.

As in 2017, the overall number of individual prosecutions remained lower than we might have expected given DOJ's expressed goal of increasing individual accountability in cases involving corporate wrongdoing. Of the eight corporate enforcement actions brought by DOJ in 2018, so far only two (those against Transportation Logistics and the Insurance Corporation of Barbados Limited) have involved corresponding prosecutions of individuals, although charges arising out of the six other corporate actions could certainly be announced in the coming months and years. But, as we noted last year, we would not expect DOJ to bring charges against all individual wrongdoers subject to FCPA jurisdiction, particularly in cases involving non-U.S. citizens whose conduct principally occurred outside the U.S. We expect that there will continue to be cases where DOJ will defer to non-U.S. enforcers in jurisdictions with proven track records of enforcement. For example, in the case of Petrobras, given the number of arrests and individual prosecutions pursued by Brazilian authorities, we would not expect DOJ to pursue the same individuals who have been or will be the subject of prosecutions in Brazil.

The emphasis on individuals extends beyond DOJ to the SEC, which in 2018 brought FCPA charges against three individuals, including: a New Jersey real estate broker who allegedly attempted to bribe a foreign official from the Middle East as part of an effort to broker a property sale in Vietnam; the former CEO of a mining company that had previously resolved FCPA enforcement actions with DOJ and the SEC; and the former CEO and president of PAC, based on the same conduct that led to the DOJ and SEC corporate enforcement actions against PAC and its parent. The SEC also brought accounting charges against the former CFO of PAC based on the revenue recognition issue described above. Although three individual FCPA enforcement actions may not appear significant when compared to the fourteen total SEC corporate enforcement actions from this past year, these actions do underscore that where senior executives cause their employers to violate securities laws, there is a significant risk of personal exposure in an SEC action. As Antonia Chion, Associate Director of the SEC's Enforcement Division noted in the press release regarding the enforcement actions against the former PAC executives, "[h]olding individuals accountable, particularly senior executives, is critical.

Compliance starts at the top and senior executives who fail in their duty to comply with the federal securities laws will be held responsible."

4. FCPA-related court decisions from 2018 create potential enforcement limits for DOJ and the SEC.

In 2018, we saw two important court decisions that have the potential to limit DOJ's and the SEC's FCPA enforcement capabilities: *United States v. Hoskins* and *SEC v. Cohen*.

DOJ has long taken the position in FCPA cases that the "United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States." This expansive interpretation of the FCPA's jurisdictional reach was rejected in *United States v. Hoskins*, as we previously discussed. Whether *Hoskins* will have a significant effect on prosecutors' charging decisions is unclear. In litigation outside the Second Circuit, DOJ has already taken the position that *Hoskins* is not binding, arguing that the Second Circuit's interpretation of the statute was incorrect. Moreover, the *Hoskins* opinion is decidedly narrow. Foreign defendants who commit corrupt acts abroad may still be prosecuted if they fall within one of the FCPA's many categories of covered persons, including "agents" of U.S. issuers or domestic concerns, and they may be within the reach of U.S. anti-money laundering laws. One area where *Hoskins* has the potential to make a lasting and significant impact are cases involving foreign, non-controlled joint ventures of issuers and domestic concerns, and foreign joint-venture partners, where DOJ may struggle to prove that an agency relationship existed due to the absence of control over the foreign joint venture or joint-venture partner—a critical factor in any agency inquiry.

As we discussed in a previous client alert, in *SEC v. Cohen*, a federal district court dismissed an SEC enforcement action, in its entirety, on statute-of-limitations grounds. Most notably, citing the Supreme Court's 2017 *Kokesh* decision, the court held that the injunction sought by the SEC in the case "would function at least partly to punish Defendants and is therefore a penalty" for purposes of the five-year statute of limitations applicable to all federal government actions seeking a civil fine, penalty, or forfeiture. The court held that the requested injunction fell within the ambit of *Kokesh*'s reasoning because the SEC sought the injunction to benefit the public, rather than an aggrieved individual, and because the injunction would label the defendants as wrongdoers—a form of punishment. Although the court stated that its decision was limited to the specific injunction sought in that case, the court's reasoning would appear to extend to all obey-the-law injunctions sought by the SEC.

Although not directly related to the SEC's enforcement authority under the FCPA, another significant decision from 2018 was the Supreme Court's decision in *Digital Realty Trust Inc. v. Somers*, which held that the Dodd-Frank Act prohibits retaliation against whistleblowers only if they report suspected wrongdoing *directly to the SEC*. As we have noted in a prior client alert, the primary significance of *Digital Realty* is its impact on the process available to employees with whistleblower retaliation claims. Because employees who report internally, but not to the SEC, are now excluded from Dodd-Frank's anti-retaliation remedies, their recourse for retaliation is limited to state-law claims or private actions under Sarbanes-Oxley. Even with this exclusion from protection under Dodd-Frank, however, the critical message for companies is that it remains illegal to retaliate against whistleblowers.

5. U.S. and UK authorities continued to leverage anti-money laundering statutes to target foreign government officials involved in corruption schemes, while the U.S. government also leveraged new sanctions regimes.

Anti-money laundering developments

In 2018, DOJ continued to leverage U.S. anti-money laundering statutes to bring charges against foreign officials as well as other individuals involved in bribery schemes. These individual prosecutions targeted, among others: former officials of Petróleos de Venezuela S.A. ("PDVSA"), Venezuela's state-owned energy company; a former Venezuelan national treasurer; two former executives of Ecuador's state-owned Empresa Pública de Hidrocarburos del Ecuador ("PetroEcuador"), and two U.S. citizens involved in the alleged PetroEcuador bribery scheme; an official of Aruba's national telecommunication provider; and two individuals whom the government alleged were foreign officials because they worked for a consulting firm hired on behalf of the state-owned joint venture between Kazakhstan's KazMunayGas and the China National Petroleum Corporation.

Notably, in addition to money laundering charges based on transfers of corrupt payments or proceeds involving the U.S. financial system, two of the schemes that led to charges against former Venezuelan officials last year also involved currency exchange schemes. In one case, PDVSA officials and foreign companies allegedly leveraged the country's fixed U.S. dollar exchange rate and a PDVSA loan program to generate funds for bribes that were paid in exchange for favoring the foreign companies. In another case, the former Venezuelan national treasurer, a Venezuelan billionaire and other unnamed conspirators allegedly generated funds for bribes by leveraging a bond sales program created by the Venezuelan National Treasury that used a higher exchange rate than the country's fixed exchange rate. These cases are a reminder that currency exchange controls and foreign exchange remittance processes present considerable corruption risk in a number of jurisdictions, and should be an area of focus in many companies' anti-corruption compliance programs.

Another notable development in the ongoing prosecution of individuals in connection with the alleged PetroEcuador money laundering and bribery scheme is the intervention by PetroEcuador in recent months in the criminal proceedings seeking restitution for the losses allegedly suffered by the company as a result of the bribery scheme. PetroEcuador has intervened or is expected to intervene in three cases involving individuals accused of paying or laundering bribes to PetroEcuador officials. PetroEcuador did not file a similar motion in the cases against the two former PetroEcuador officials who pleaded guilty and were sentenced for laundering the proceeds of bribes.

In the UK, where money laundering laws have long been used to target corruption, the Serious Fraud Office ("SFO") secured a Proceeds of Crime Act ("POCA") victory in the long-running Chad Oil matter in March 2018, recovering £4.4 million that will be invested in development programs to benefit the people of Chad. The underlying bribery scheme had included the transfer of company shares to the wife of a Chadian official, and the SFO asserted jurisdiction over the shares when the company was taken over and put up for sale by a UK broker. The SFO also commenced a civil recovery action in October 2018 to recover assets, including three UK properties, alleged to represent the proceeds of corrupt telecommunications deals in Uzbekistan.

The UK's anti-money laundering enforcement arsenal also was strengthened in 2018 by various reforms introduced through the Criminal Finances Act, including the introduction of the Unexplained Wealth Order ("UWO"). A UWO is a court order that requires a politically exposed

person or a person suspected of involvement in serious crime to explain how they obtained property where there are reasonable grounds to suspect that the person would not have been able to obtain the property with lawfully-obtained income. A failure to provide a response to a UWO may give rise to a presumption that the property is recoverable in a subsequent civil recovery action, and making a false statement in response to a UWO is a criminal offense. The UK's first UWO required the wife of a former Azerbaijani official (who was convicted of fraud and embezzlement in 2016) to explain how she was able to afford £22 million in real estate, in addition to having spent £16 million at the high-end London department store Harrods over the course of a decade. The High Court dismissed an application to discharge the order in October 2018.

Use of sanctions regimes to target corrupt actors

The U.S. government also has been employing sanctions to target foreign officials and other individuals believed to be involved in corruption. For example, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") imposed a number of sanctions pursuant to Executive Order 13818, which implements the Global Magnitsky Human Rights Accountability Act and authorizes the blocking of property of parties involved in serious human rights abuses or corruption. The Executive Order defines corruption broadly, and sanctions may be imposed on a range of parties—including government officials, or persons acting on their behalf, who directly or indirectly engage in corruption, or the transfer of the proceeds of corruption, as well as other parties who provide support to such persons or in respect of such activities. Since the Executive Order was signed in December 2017, Global Magnitsky Sanctions have been imposed on a number of individuals and entities believed to be engaged in corruption.

The President also issued executive orders in November 2018 focused on Venezuela (E.O. 13850) and Nicaragua (E.O. 13851), which give OFAC the authority to sanction parties involved in transactions involving deceptive practices or corruption related to the governments of Venezuela or Nicaragua. A number of individuals and entities have already been sanctioned pursuant to the Venezuela Order.

Sanctions are a flexible tool that the government can use to take action against corrupt actors in cases where an enforcement action under the FCPA or anti-money laundering laws may not be viable—there is no need to undergo judicial review prior to imposing sanctions, and they can be imposed regardless of whether the conduct at issue has any nexus to the U.S. Though sanctions are not criminal in nature, they give rise to significant reputational, practical, and commercial consequences, including, for example, loss of access to the U.S. market and, for individuals, denial of entry to the U.S.

6. In Europe, recent developments suggest that the UK, France, and Ireland will step up enforcement.

Relatively few bribery cases were resolved by the SFO in 2018, but a new director may mean more activity in 2019

In June 2018, British-American lawyer Lisa Osofsky—who has experience on both sides of the Atlantic, having worked at DOJ and the FBI before moving to the UK, where she has held roles in-house and with leading compliance consulting firms—was named the new director of the SFO. Comments delivered by Osofsky and other senior SFO officials over the course of 2018 provide insight into the SFO's priorities for the coming year and the direction the agency may take under its new leadership.

Osofsky has emphasized a desire to progress cases more quickly. In December 2018, she told a House of Commons Justice Committee that the slow pace of SFO investigations was the most significant criticism she had heard since taking on the role of Director, and that she was personally reviewing the evidence in over 70 cases to understand why they had gone on so long and the strategy for resolving them. Given Osofsky's background, the coming year may see the SFO adopt aggressive investigative tactics similar to those used in the U.S. For example, Osofsky has indicated that she hopes to speed cases up by using proactive investigative techniques such as persuading corporate insiders to cooperate in investigations, focusing on cooperation with international counterparts to ensure that key intelligence is shared, and harnessing technology to identify key documents quickly. Osofsky also has appointed a new Head of Intelligence to ensure that sufficient focus is given to proactive intelligence development.

Though relatively few corruption cases were resolved by the SFO in 2018, we may see more activity in 2019, given the current drive to speed up cases and the fact that a number of long-running investigations remain open. Notable resolutions in 2018 included the convictions of a UK Alstom subsidiary and three Alstom executives (resulting from an investigation initiated by the SFO in 2009, and following a $772 million settlement between Alstom S.A. and U.S. authorities in 2014), and convictions of three former executives of the FH Bertling Group and one former ConocoPhillips employee in connection with a commercial bribery scheme involving payments made by FH Bertling employees to win a contract from ConocoPhillips and obtain assurance that inflated prices would be approved. The Alstom and FH Bertling actions both delivered mixed results for the SFO; the convictions came alongside several acquittals, and the defendants in the FH Bertling matter were spared prison when their sentences were suspended in January 2019.

As in the U.S., a company seeking a favorable resolution in an SFO matter is expected to cooperate with the SFO's investigation. The SFO's expectations with respect to cooperation are broadly similar to those of the U.S. authorities—Osofsky defined cooperation in a recent address as "making the path to admissible evidence easier" through making documents, financial records, and witnesses available, pointing prosecutors to key evidence, and not creating proof issues or procedural barriers. However, companies should be alert to certain key differences between the cooperation expectations of the U.S. authorities and those of the SFO. For example, a company in a cooperative posture with the SFO may be asked to waive privilege over documents created in the course of a privileged investigation (in contrast to the U.S., where the Justice Manual expressly provides that "prosecutors should not ask for [privilege] waivers and are directed not to do so."). In a recent speech, the SFO's joint head of bribery and corruption, Matthew Wagstaff, stated that the SFO may ask companies to waive privilege over factual accounts created during investigations, and that "the refusal to do so may well be incompatible with an assertion of a desire to cooperate." Those comments echo a passage in the recent *SFO v. ENRC* decision, where the Court of Appeal commented (in *obiter dicta*) that in determining whether to approve a DPA, a court "will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations."

We also expect that the SFO's scrutiny of compliance programs will likely increase under Osofsky's leadership. Osofsky brings a wealth of compliance expertise to the agency, and she has made clear that companies seeking DPAs must be able to demonstrate that their compliance programs are effective in practice. In a keynote address delivered at an FCPA conference in November 2018, Osofsky said that favorable dispositions will not be available to corporations unless they have compliance systems that are effective, including by embedding controls and compliance processes into the corporate structure "so that they cannot simply be undone when

no longer convenient." She stressed that "window dressing will not suffice" and that companies seeking DPAs should be prepared for the SFO to "ask tough questions on this subject."

Enforcement activity ramped up in France

The past year saw the first wave of anti-corruption enforcement in France since the December 2016 passage of *Loi Sapin II*, which introduced a number of changes to the French anti-corruption framework, including by introducing a DPA-styled settlement mechanism known as a *Convention judiciaire d'intérêt public* ("CJIP").

France secured four CJIPs in corruption cases in 2018, including three relating to bribes paid by employees of French companies to a public utility company in France (with fines ranging from €420,000 to €2,710,000) and a settlement with Société Générale relating to historical conduct in Libya, which included the imposition of a €250,755 fine by the French authorities (in addition to penalties imposed in a parallel settlement with DOJ). Each of the four CJIPs included a requirement to submit to a compliance program monitorship by France's new anti-corruption agency, the *Agence française anticorruption* ("AFA"), with the monitorships ranging from 18 months to two years in length.

The AFA also commenced its statutorily mandated compliance program audits in 2018. As a reminder, *Loi Sapin II* established mandatory compliance program requirements for certain large French companies and created penalties for failure to implement those elements, regardless of whether any corruption offence has occurred. The law also tasked the AFA with conducting audits to assess compliance with the requirements. To help companies prepare for audits, the AFA has published detailed compliance program guidelines and the 163-item questionnaire it uses to commence the audit process, which make clear that companies subject to the *Loi Sapin II* requirements will need to be prepared to demonstrate that their compliance programs go well beyond written policies and procedures and are effective in practice.

New anti-corruption law in Ireland came into force

In July 2018, a new anti-corruption law came into force in Ireland. The Criminal Justice (Corruption Offences) Act 2018 ("CJCOA") creates a variety of offenses, including active and passive corruption and trading in influence, and a strict liability corporate offense where a person associated with a company (including an employee, agent, or subsidiary, among other parties) commits an offense with the intention of obtaining or retaining a benefit for the company. A defense is available where the company is able to "prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence." The CJCOA notably contains clauses that reverse the burden of proof in certain circumstances and create a presumption of corrupt intent, including where a gift or other advantage has been given to an official tasked with carrying out a function in which the donor had an interest (such as granting a tender or license), or in certain circumstances involving political donations. The CJCOA has extra-territorial effect where a party subject to Irish jurisdiction (e.g., an Irish company or citizen) has committed an act that constitutes an offense under the CJCOA and under the law of the place where the act occurred. In tandem with the passage of the new law, Ireland's national police force established a new anti-corruption unit in 2017.

7. Developments in China and other countries in Asia include reforms to anti-corruption laws and increased enforcement in certain countries.

Developments in Chinese law

In 2018, the Chinese government undertook the largest reorganization in a generation. Among the changes was the creation of a "super" enforcement agency, the National Supervision Commission ("NSC"), which targets public-sector officials, including those affiliated with state-owned enterprises. While the NSC does not have direct enforcement jurisdiction over private citizens, we have seen indirect impacts as it seeks evidence from those companies, including through its powers to interrogate, detain, and seize or freeze assets.

Amendments to the Anti-Unfair Competition Law also came into effect. The amendments expanded the scope of commercial bribery-related offenses, increased penalties, clarified vicarious liability rules, provided specific monetary penalties for obstructing an investigation, and enhanced the investigative powers of the enforcement agency, the State Administration of Market Regulation. China also amended its Criminal Procedure Law to codify rules encouraging cooperation with government investigations, align with the new national supervision system, and introduce trials in absentia for certain crimes, including bribery and corruption.

Finally, China enacted an International Criminal Judicial Assistance Law that blocks China-based individuals and entities, including the China-based subsidiaries of non-Chinese companies, from disclosing evidence in China to criminal enforcement authorities outside of China in connection with a criminal matter, absent approval from the Chinese government.

U.S. enforcement developments related to China

In 2018, a significant percentage of corporate FCPA resolutions (six of seventeen, or 35%) involved allegations of improper conduct related to China. This is consistent with recent trends from 2011 to 2018, as 31% of all corporate FCPA cases from 2011 to the present have involved improper conduct in part or in full in China.

In November 2018, DOJ announced a China Initiative comprised of ten goals, one of which is to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses." Further details were not provided.

Other developments in Asia

- **Malaysia** elected a new government that promised to take a firmer stance against corruption—on January 29, 2019, the Prime Minister announced a five-year plan to curb corruption in the country. The Malaysia Anti-Corruption Commission also became more active, announcing new investigations in a range of industries, including several related to the 1MDB scandal. In addition, Malaysia released guidelines for commercial organizations to show that they have "adequate procedures" as a defense against corporate liability for failure to prevent corruption, which will take effect in 2020.
- **Korea** continued its aggressive enforcement of anti-corruption laws, marked by several high-profile enforcement actions and the implementation of an expansive new anti-corruption law. In 2018, two former South Korea presidents were sentenced to jail for corruption, and senior members of Korean companies were sentenced to prison time for improper payments. Pharmaceutical companies have been a particular target of enforcement efforts, with an increasing number of corporate investigations (both internal and government-driven) having been prompted by whistleblower reports.

- **India** passed notable amendments to its Prevention of Corruption Act. Specifically, while the Prevention of Corruption Act had previously only included offenses related to the *receipt* of bribes by government officials (and it was only possible to prosecute the giver of a bribe as an abettor of such an offense), amendments passed in July 2018 made it an offense for an individual or company to pay a bribe to a government official. A company may now be found guilty of bribery if an associated person is found to have bribed a public official in return for business or any other commercial advantage. Similar to the UK Bribery Act, a defense is available where the company is able to establish that it had "adequate procedures" in place to prevent associated persons from engaging in bribery. The Indian government is expected to issue compliance program guidelines in due course. India also cracked down on hidden beneficial ownership transactions ("*benami*") in which illicit funds are invested in property in another's name.
- **Indonesia's** Corruption Eradication Commission ("KPK") continued aggressive enforcement, primarily against government officials believed to have taken bribes. As part of the country's efforts to increase transparency of beneficial ownership, legal entities in Indonesia must declare the identity of, and provide information regarding, beneficial owners.
- In **Japan**, a new plea bargaining system took effect, and Japanese prosecutors filed charges against a Japanese company and its employees for bribes paid in Thailand. Probes into corruption in the education ministry also are ongoing.
- In **Vietnam**, amendments to the Penal Code that criminalize commercial bribery above VND 2 million (approximately USD $85) and bribery of non-Vietnamese public officials came into effect in 2018. However, the Penal Code remains applicable only to individuals, not corporate entities.

8. Signs point to increasing international and domestic scrutiny of conduct in Africa.

International investigations and enforcement actions

As in past years, several U.S. and UK investigations related to alleged misconduct in Africa are ongoing, and certain resolved matters involved conduct in Africa, including the SEC's settlement with Kinross (which involved issues in Mauritania and Ghana) and the recent conviction of Patrick Ho (which involved payments on behalf of a Chinese energy company in Chad and Uganda). Notable recent activity focused on Africa includes FCPA, money laundering, and wire fraud charges filed in January 2019 against the former Finance Minister of Mozambique and three former Credit Suisse employees in connection with an alleged bribery and kickback scheme related to government-guaranteed loans to fund maritime projects. In addition, in July 2018, DOJ issued a subpoena to a subsidiary of Swiss-headquartered commodity trading and mining firm Glencore regarding its business in Nigeria, the Democratic Republic of the Congo ("DRC"), and Venezuela. The subpoena followed Glencore's decision to settle a royalty dispute with Dan Gertler, who was recently sanctioned under the Global Magnitsky Sanctions program in connection with corruption allegations related to his business activities in the DRC.

Recent comments from the U.S. government suggest that the FCPA and other enforcement tools may be used strategically to bring actions against foreign companies and state-owned enterprises operating in Africa—particularly those with ties to China and Russia. As noted above, one of the goals cited in DOJ's China Initiative was to identify FCPA cases involving Chinese companies that compete with American businesses. Further, in December 2018, National Security Advisor Ambassador John Bolton delivered comments describing the Trump administration's Africa

Strategy, in which he referenced "predatory practices" by China and Russia in Africa, including "deliberately and aggressively targeting their investments in the region to gain a competitive advantage over the United States." Bolton accused both countries of engaging in corrupt practices, stating that China's "investment ventures are riddled with corruption" and that Russia "advances its political and economic relationships with little regard for the rule of law or accountable and transparent governance." Though establishing FCPA jurisdiction over Chinese and Russian companies operating in Africa may prove challenging, the government might also seek to use other tools discussed above (i.e., anti-money laundering laws or sanctions) to target corrupt practices on the continent.

Increased enforcement activity in countries that have not historically been active enforcers of anti-corruption laws is also likely to lead to heightened scrutiny in Africa. France's arrival on the international enforcement scene is likely to be notable in that regard, given the large number of French companies operating in Francophone Africa. As we have previously described, one of the first high-profile corruption investigations by the French authorities following the December 2016 passage of *Loi Sapin II* targeted French logistics firm Groupe Bolloré in connection with alleged misconduct in Guinea and Togo. In an unrelated matter, the Guinean Minister of Agriculture and several senior executives of the agro-industrial firm Socfin, in which Groupe Bolloré holds a 38.8% interest, were found guilty of corruption by a Belgian court. Canada is another country to watch—particularly in the extractives sector. In December 2018, the Ontario Securities Commission entered into a CAD $30 million settlement with Glencore subsidiary Katanga Mining Limited (and related settlements with eight of its directors and officers), including on the basis that Katanga failed to disclose to investors the elevated corruption risks in the DRC and the nature and extent of the company's reliance on individuals and entities associated with Dan Gertler.

Multilateral development bank enforcement

As we have previously discussed, we expect that the multilateral development banks will continue to play an important enforcement role in Africa. The World Bank, which has aggressively enforced its sanctions and debarment procedures for several years, initiated 28 investigations in Africa in its 2018 financial year alone, representing 41% of all new investigations. Notable World Bank settlements in 2018 included a settlement with Slovenian firm Flycom, in which an 18-month debarment was imposed in connection with allegations of corrupt practices on a power project in the DRC, and a settlement with Africa Railways Logistics Limited (and related entities) in which a 2-year debarment was imposed based on an employee's attempt to improperly influence customs and port clearance processes in Kenya. The African Development Bank has also become increasingly active in pursuing its own sanctions and debarment proceedings, in addition to cross-debarring parties debarred by the World Bank and other multilateral development banks.

Domestic efforts to address corruption

Finally, there has been a proliferation of anti-corruption efforts across the African continent, with a number of current African leaders—including, for example, the presidents of Nigeria, Tanzania, South Africa, Angola, Zimbabwe, and Ghana—having put pledges to fight corruption at the center of their political campaigns and policies. Though such campaigns are often viewed cynically as consisting of ineffective rhetoric (or being used as a tool to attack members of political opposition parties), a number of concrete steps have been taken to identify and address corruption issues. For example:

- The African Union dubbed 2018 the "African Anti-Corruption Year" and made anti-corruption efforts a focal point for the year, including in its mid-year summit and through a

training delivered to the heads of several anti-corruption agencies in December on how to conduct corruption risk assessments in the public sector.

- Governments in **Nigeria**, **Tanzania**, and elsewhere in Africa have been at the forefront of adopting new technologies such as blockchain to curb corruption and fraud in the public sector.
- In **South Africa**, the "State Capture" investigation, which is focused on allegations of widespread corruption and conflicts of interest in the government of former president Jacob Zuma, by a Judicial Commission of Inquiry continues, with reports indicating that U.S. and UK authorities have opened related investigations into assets and individuals associated with the Gupta family.
- In **Nigeria**, "Special Courts" were designated to try corruption and financial crime cases. In June 2018, the National Judicial Council announced that in six months, those courts had delivered 324 judgments, struck out 12 cases, and reserved 62 cases for judgment.
- In **Angola**, President João Lourenço's anti-corruption drive has targeted family members and close associates of former president José Eduardo dos Santos, including his daughter, who was dismissed from her position as the head of the state-owned oil company, Sonangol, and his son, who formerly headed Angola's sovereign wealth fund and was arrested in September on money laundering, corruption, and other charges.
- A number of arrests were made in **Kenya**, including of officials of the China Road and Bridge Corporation in connection with allegations that they attempted to bribe fraud investigators to influence an ongoing investigation.
- In **Rwanda**, a new anti-corruption law was introduced, which aims at preventing and punishing corruption in public bodies, private entities, and international organizations operating in Rwanda. The new law also created protections from criminal liability for whistleblowers who inform the authorities of illegal benefits they have given or received.
- A new anti-corruption unit was established in **Uganda**.

9. U.S. and regional enforcement coupled with ongoing political transitions and legislative changes make Latin America a region to watch in 2019.

U.S. enforcement developments in Latin America

In 2018 U.S. authorities continued to investigate and prosecute companies and individuals based on alleged improper conduct in Latin America. Three of the seventeen corporate enforcement actions announced in 2018 (those against Petrobras, Eletrobras, Vantage Drilling) involved conduct in the region, specifically in Brazil. The Petrobras global resolution is the largest anti-corruption settlement in history even if the amounts to be paid to U.S. authorities only amount to about USD $170 million. In addition, over half of the FCPA enforcement actions against individuals in 2018 were related to conduct in Latin America. Based on public reporting, there are at least ten ongoing FCPA investigations involving conduct in Latin America, some of which likely will be resolved in 2019. In addition to the existing close relationship with Brazil, which has resulted in a large number of joint, multi-jurisdictional resolutions, cooperation between U.S. authorities and their counterparts in the region continues to strengthen, particularly with Colombia, Peru, and Argentina.

Domestic efforts to address corruption

Last year was momentous for Latin America, as the fight against corruption continued to drive political and legislative reform, as well as enforcement priorities in several countries. Elections in 2018 in the two largest economies in the region (Mexico and Brazil) brought new administrations to power that gained popular support in large part due to their promise to tackle corruption. In 2019, we expect Brazil to continue to vigorously investigate allegations deriving from Operation Car Wash (*Operação Lava Jato*). In the rest of the region, we can expect further efforts to untangle the web of corruption and graft uncovered by the 2016 Odebrecht settlement and to investigate other corruption schemes as the new anti-corruption laws that have recently mushroomed in the region continue to mature.

- In **Argentina**, Law 27.401 entered into force in March 2018. As we explained last year, Law 27.401 establishes the legal framework for criminal and administrative corporate liability for corruption offenses. The law provides that corporations can avoid or benefit from reduced penalties if they have, among other things, adequate anti-corruption controls in place, including a corporate integrity program. The law also makes this corporate integrity program a requirement for all companies with state contracts above a certain threshold. Guidelines for the establishment, implementation, and evaluation of corporate integrity programs were subsequently published by the government in October 2018. Last year also brought the so-called "notebooks" scandal in Argentina, which began when the chauffeur of a former Argentine public works official shared with a local newspaper eight notebooks containing details of alleged bribes paid by construction and energy companies to Argentine officials. Former President Cristina Fernández de Kirchner (now a senator) and other former Argentine government officials and high-profile individuals have been indicted in relation to this scandal. The "notebooks" investigation is likely to lead to investigations in the U.S. as cooperation between the two countries in anti-corruption enforcement matters strengthens.
- In **Brazil**, Operation Car Wash continued in full force and led to a number of new investigations and charges, including, among others, an investigation into possible bribes paid by construction firms in connection with federal highway concessions (*Operação Integração* I and II); an investigation into possible bribes paid by construction companies in connection with the bid for the construction of the Belo Monte Hydroelectric plant (*Operação Buona Fortuna*); an investigation into possible bribes paid by healthcare companies as part of a corruption and bid-rigging scheme for the sales of medical equipment to the state of Rio de Janeiro (*Operação Ressonância/Fatura Exposta*); an investigation into possible bribes paid to Petrobras employees and other officials in connection with the construction of Petrobras's new headquarters (*Operação Sem Fundos*); and an investigation into possible bribes paid by oil trading companies to Petrobras employees in exchange for favorable oil prices (*Operação Sem Limites*). On the political front, far-right Jair Bolsonaro was elected president after running on an anti-corruption campaign platform. Since taking office in January of this year, President Bolsonaro appointed Sérgio Moro, one of the head judges who presided over Operation Car Wash, as the new Minister of Justice and Public Security. Moro has since promoted an anti-crime bill that he plans to submit to the National Congress that proposes amendments to more than a dozen criminal statutes in Brazil in an effort to crack down on organized crime and corruption.
- **Colombia** has been trying to gain traction in pursuing Odebrecht-related investigations against a number of companies and individuals. In a web of strange events, two key

witnesses in the Odebrecht bribery scheme were found dead late last year. Allegations involved Grupo Aval, the country's largest financial conglomerate, in connection with a highway construction project in which its subsidiary joined Odebrecht in the Ruta del Sol 2 consortium. Grupo Aval disclosed in a securities filing in December that it had received an inquiry from DOJ involving this project. Also in December 2018, a regional court in Colombia imposed a fine of approximately USD $250 million on the consortium and banned its members from participating in Colombian state contracts for ten years. Colombia also saw enforcement developments unrelated to Odebrecht. In April 2018, Colombia's *Superintendencia de Sociedades* (the Superintendent for Corporate Entities, known as "*Supersociedades*") reported that seventeen transnational bribery investigations were underway. And in July 2018, *Supersociedades* fined a company for the first time for bribes paid to foreign officials. The fine totaled approximately USD $1.7 million and was based on the company's alleged bribes to officials in Ecuador in exchange for securing public contracts. In March 2018, *Supersociedades* also for the first time fined a company approximately USD $55,000 for obstructing a bribery investigation when it refused to produce electronic data.

- In **Mexico**, leftist Andrés Manuel López Obrador, known as "AMLO," became president on December 1, 2018, after having run a successful campaign on a strong anti-corruption platform. AMLO and his party will oversee the country's long-awaited transition to a new, independent Attorney General's Office (*Fiscalía General de la República*), which will include a specialized anti-corruption prosecutor's office. The anti-corruption prosecutor is expected to be appointed this year. Another important development in 2018 was the signing of the United-States-Mexico-Canada Agreement ("USMCA"), which includes a chapter dedicated solely to anti-corruption in which the countries agreed to cooperate on anti-corruption matters and work to effectively enforce their respective anti-corruption laws. However, the USMCA has yet to be approved by lawmakers in the U.S., Mexico, and Canada.
- In **Peru**, Law 30424 entered into force in January 2018, creating corporate liability for criminal offenses such as transnational bribery of foreign officials, money laundering, and terrorist financing. Corporations now face both fines and disqualification penalties ranging from suspension to dissolution. The law also requires companies to develop and implement a compliance program to prevent the commission of the various crimes covered by the law. Companies that do not develop this required compliance program could face criminal liability. Peruvian authorities also continued to pursue Odebrecht-related investigations, with the strong support of the public, including against a number of high-profile politicians. Former President Pedro Pablo Kuczynski was forced to resign amid a corruption scandal revealing his links to Odebrecht, and in January of this year, the attorney general of Peru was forced to resign over public outrage over his interference with the ongoing Odebrecht investigations.
- In **Ecuador**, the Criminal Code (Article 280) was amended in February 2018 to incorporate a provision that subjects corporations to fines, dissolution, and liquidation if convicted of public bribery or influence peddling. These penalties have significant implications for companies with public concessions in Ecuador, as dissolution of a company would require any concession to revert back to the state. Additionally, in September 2018, a new law was proposed in Ecuador to combat corruption, which would, among other things, simplify the recovery of illicit proceeds from corrupt individuals and protect whistleblowers.
- Anti-corruption bodies in **Guatemala** and **Honduras** also continued to pursue investigations, though not without significant roadblocks. In September 2018, after the

announcement of an investigation against the President of Guatemala, the President banned the head of the United Nations-backed International Commission Against Impunity in Guatemala ("CICIG") from entering the country and declined to renew CICIG's mandate past its September 2019 expiration date. In December 2018, Guatemala's Foreign Ministry also revoked visas and immunity for eleven CICIG investigators and two of their relatives. Likewise, in Honduras, shortly after the Organization of American State's Mission to Support the Fight Against Corruption and Impunity in Honduras ("MACCIH") announced that numerous legislators were under investigation for an alleged embezzlement scheme, the Congress in Honduras passed a law blocking the investigation until a fiscal tribunal completed an audit of funds received by members of congress. Then in May 2018, the Honduran Supreme Court issued a ruling that could undermine the work of the special investigative unit within the Honduran Public Ministry that works with MACCIH.

* * *

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Global Anti-Corruption practice:

Stephen Anthony	+1 202 662 5105	santhony@cov.com
Bruce Baird	+1 202 662 5122	bbaird@cov.com
Lanny Breuer	+1 202 662 5674	lbreuer@cov.com
Eric Carlson	+86 21 6036 2503	ecarlson@cov.com
Michelle Coquelin	+1 424 332 4783	mcoquelin@cov.com
Sarah Crowder	+44 20 7067 2393	scrowder@cov.com
Jason Criss	+1 212 841 1076	jcriss@cov.com
Christopher Denig	+1 202 662 5325	cdenig@cov.com
Arlo Devlin-Brown	+1 212 841 1046	adevlin-brown@cov.com
Steven Fagell	+1 202 662 5293	sfagell@cov.com
James Garland	+1 202 662 5337	jgarland@cov.com
Ben Haley	++27 (0) 11 944 6914	bhaley@cov.com
Ian Hargreaves	+44 20 7067 2128	ihargreaves@cov.com
Gerald Hodgkins	+1 202 662 5263	ghodgkins@cov.com
Barbara Hoffman	+1 212 841 1143	bhoffman@cov.com
Eric Holder	+1 202 662 6000	
Robert Kelner	+1 202 662 5503	rkelner@cov.com
Nancy Kestenbaum	+1 212 841 1125	nkestenbaum@cov.com
Aaron Lewis	+1 424 332 4754	alewis@cov.com
David Lorello	+44 20 7067 2012	dlorello@cov.com
Mona Patel	+1 202 662 5797	mpatel@cov.com
Mythili Raman	+1 202 662 5929	mraman@cov.com
Don Ridings (Chair)	+1 202 662 5357	dridings@cov.com
Jennifer Saperstein (Vice Chair)	+1 202 662 5682	jsaperstein@cov.com
Jennifer Saulino	+1 202 662 5305	jsaulino@cov.com
Daniel Shallman (Vice Chair)	+1 424 332 4752	dshallman@cov.com
Ashley Sprague	+1 202 662 5604	asprague@cov.com
Daniel Suleiman	+1 202 662 5811	dsuleiman@cov.com
Alan Vinegrad	+1 212 841 1022	avinegrad@cov.com
Veronica Yepez	+1 202 662 5165	vyepez@cov.com