2019 Year in Review: Top Anti-Corruption Enforcement Trends and Developments
2019年回顾：主要反腐败执法趋势和动态

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It has been another strong year in anti-corruption enforcement, with 2019 meeting or beating the high-water mark for enforcement across a number of measurements.
过去一年仍然是反腐败执法行动活跃的一年，从若干项指标来衡量，2019年达到或超越了过往最严厉的执法水平。

In 2019, the U.S. Department of Justice ("DOJ" or the "Department") recovered approximately $1.6 billion through eight resolved corporate FCPA cases – seven through criminal resolutions, and one through declination with disgorgement. The U.S. Securities and Exchange Commission (the "SEC") collected over $1 billion more in FCPA actions against 13 corporate entities. Together, the approximately $2.6 billion in 2019 FCPA recoveries is the highest on record for corporate FCPA enforcement.
2019年，美国司法部（下称"司法部"）通过八个企业FCPA和解案件（其中七项通过刑事和解，一项拒绝起诉协议并缴纳非法所得）追回约16亿美元。美国证券交易委员会（下称"证交会"）在针对13个公司实体的FCPA行动中追回了超过10亿美元。2019年的FCPA执法行动总计追回26亿美元的款项，创下企业FCPA执法行动的最高记录。

DOJ's FCPA Unit also had a banner year in announcing FCPA and foreign corruption-related charges against and guilty pleas by individuals – more than any single year in history – and it obtained a number of convictions, including in three of the four FCPA trials that DOJ pursued this year, matching DOJ's previous high-water mark for guilty verdicts in a year. For its part, the SEC also reached resolutions with several individuals in enforcement actions in 2019.
司法部的FCPA部门在2019年也硕果累累，其针对个人的FCPA和外国腐败相关指控及个人认罪答辩数量比历史上任何一年都多，并获得了若干项有罪判决，包括司法部在过去一年中起诉的四个FCPA案件中的三个，达到了司法部之前的年度有罪判决的最高水平。证交会方面也在2019年的执法行动中与几名个人达成和解。

2019 also saw two record-setting resolutions, with Ericsson and MTS entering the FCPA all-time top 10 resolutions list, and reports suggest that more record-setting corruption-related settlements may be on the horizon. Notwithstanding this vigorous enforcement, companies can weather even a prolonged FCPA investigation. Our team secured five FCPA declinations within the past three months alone for publicly traded multinational clients in the technology, financial services, and life sciences industries. We achieved these results even in investigations that were active for many years and in circumstances where our clients had not made voluntary disclosures. These favorable outcomes turned on our clients' cooperation, remediation, and empowerment of our team to engage in measured but tenacious

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advocacy regarding the facts and applicable law.
2019年也见证了两项创记录的和解案。爱立信和MTS案进入史上10大FCPA和解案榜单，并有报告指出，不久的将来可能出现更多创记录的腐败相关和解案。尽管面临如此强大的执法力度，公司仍能应对长期的FCPA调查。仅在过去的三个月内，我们的团队就为科技、金融服务和生命科学行业的跨国上市公司客户取得了五项FCPA拒绝起诉协议，其中有些调查甚至持续了多年，以及客户并未于事前向政府主动披露。这些有利的结果让我们的客户愿意合作、补救，并授权我们的团队就事实和适用法律进行慎重而坚定的辩护。

We cover below the top five enforcement trends and developments from 2019, and the linked chart summarizes 2019's corporate FCPA enforcement actions. While anti-corruption enforcement in 2019 generally followed similar themes to those we have observed in recent years, it has also provided new evidence that FCPA enforcement remains a top priority for U.S. enforcers. International enforcement also continues to be on the rise, with ever more countries becoming active in the enforcement space, leading to a more complex landscape for companies to navigate. More than ever, the key takeaway from looking back over a year of enforcement activity is clear: Companies must develop and maintain a robust and tailored anti-corruption compliance program to meet regulators' ever-evolving expectations, and they must be able to demonstrate its effectiveness through objective, data-driven testing.
我们在下文阐述了2019年的五大执法趋势和动态，链接的图表概述了2019年的企业FCPA执法行动。虽然2019年的反腐败执法总体来说延续了我们在近年来观察到的类似主题，但也有新证据表明，FCPA执法仍是美国执法机构的工作重点。国际执法也继续在增加，越来越多的国家开始积极执法，令企业面临更为复杂的局面。回顾过去一年执法行动的主要收获比以往任何时候都更加明确：为满足监管机构不断变化的预期，企业必须制定和维持健全和有针对性的反腐败合规体系，且必须能够通过客观、数据驱动的测试来证明该体系的有效性。

1 DOJ continues to create and clarify policies to incentivize voluntary disclosure and compliance investments, but companies still face substantial uncertainty.

司法部继续制定和明确激励主动披露和合规投入的政策，但企业仍然面临很大的不确定性。

In 2019, DOJ released two new policy pronouncements – its 2019 Evaluation of Corporate Compliance Programs guidance (the "2019 guidance"), and Assistant Attorney General Brian Benczkowski's memo on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty. It also twice tweaked its FCPA Corporate Enforcement Policy (the "Policy"). With each new policy pronouncement or revision, DOJ has encouraged companies voluntarily to self-disclose misconduct – extolling the benefits that accompany self-disclosure – in addition to cooperating and remediating. To support those aims, DOJ has said that it seeks to provide transparency around what conduct will be credited or penalized in connection with its FCPA corporate enforcement program. While the Department's efforts in these regards are helpful and instructive for companies, it is unclear whether DOJ's new and updated policies provide significant additional predictability of outcomes, even if they do increase transparency around corporate enforcement practices. We expect that companies will continue to face difficult decisions related to voluntary self-disclosure notwithstanding these policy revisions.

2019年，司法部发布了两项新的政策声明——其2019年《企业合规体系评估指引》（下称"2019年指引"）和助理司法部长Brian Benczkowski关于《评估商业组织无力支付刑事罚金或刑事罚款处罚的情形》的备忘录。司法部还两度对其《FCPA企业执法政策》（下称"政策"）进行了微调。通过每项新政策的宣布或修订，司法部鼓励企业主动自行披露不当行为（强调自行披露带来的益处），以及进行合作和补救。为支持这些目标的实现，司法部称其会努力澄清，就其企业FCPA执法计划而言，哪些行为将获得奖励，哪些行为将受到处罚。尽管司法部在这些方面的努力对企业而言是有用和有益的，但是，即使司法部的新政策和政策修订增加了企业执法行动的透明度，这些政策是否能提供显著的额外结果的可预计性仍然不明确。我们预计，虽然有这些政策修订，企业仍将面临与主动自行披露有关的艰难抉择。

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Evaluation of Corporate Compliance Programs and Monitorships
企业合规体系和监察制度评估

Although styled as an "update" to the Fraud Section's 2017 compliance program guidance, the 2019 guidance overhauls the organization of the 2017 guidance, raises new questions, identifies refined points of emphasis in comparison to past guidance, and extends the guidance to apply to all Criminal Division investigations and enforcement actions involving business organizations. As we covered in our commentary on the 2019 guidance, it is organized around three "fundamental questions" that prosecutors should ask when evaluating the effectiveness of corporate compliance programs: (1) "Is the corporation's compliance program well designed?"; (2) "Is the program being applied earnestly and in good faith?"; and (3) "Does the corporation's compliance program work in practice?" While these three questions may not break new ground, the 2019 guidance reflects the exacting approach that DOJ now takes when evaluating corporate compliance programs. Gone are the days when the mere existence of a compliance program addressing various risks suffices. Today, DOJ expects thoughtful, risk-based analyses to underlie the design and implementation of a compliance program, and objective data to prove that it is working.

尽管被称为欺诈司2017年合规体系指引的"更新"，2019年指引对2017年指引的结构进行了大幅调整，

提出了新的问题，确定了相对以往指引更加细化的重点，将该指引扩大适用于涉及商业组织的所有刑事分部的调查和执法行动。正如我们在关于2019年指引的评述中所提到的，其内容围绕检察官在评估企业合规体系有效性时应当提出的三个“基本问题”：(1)“企业的合规体系是否妥善制订？”(2)“该体系是否被认真善意地贯彻落实？”和(3)“在实践中，企业的合规体系是否发生作用？”虽然这三个问题可能并无新意，但2019年指引反映了司法部目前在评估企业合规体系时采取的严格方法。只要存在应对各种风险的合规体系就足够的时代一去不复返了。现在，司法部要求在制订和执行合规体系时进行周详、基于风险的分析，以及提供证明该体系有效的客观数据。

The 2019 guidance should be a foundational resource for compliance professionals charged with developing, refining, and testing their compliance programs. And any multinational facing an enforcement action that has not performed a thorough compliance program assessment, benchmarked against peer companies, will likely face a skeptical audience when evaluated against the 2019 guidance. Based on our recent experience, we expect that in every Criminal Division (and SEC) investigation, business organizations should expect to be asked – and will need to answer – highly detailed and nuanced questions about the design, implementation, and effectiveness of their compliance programs.
2019年指引应当成为负责制订、细化和测试合规体系的合规专业人士的基本参考资料。任何面临执法行动却未曾对比同行公司进行全面合规体系评估的跨国公司很可能在接受根据2019年指引进行的评估时遭到质疑。基于我们近期的经验，我们预计，在每项刑事分部（及证交会）的调查中，商业组织应当预期被问及（且需要回答）关于其合规体系的制订、执行和有效性的细致入微的问题。

Instructive as the 2019 guidance is, however, DOJ’s constellation of policies vests considerable discretion in its prosecutors, and DOJ’s enforcement actions in 2019, and in particular its monitor decisions, leave substantial uncertainty of outcomes. With one exception, every DOJ resolution in 2019 awarded at least some credit under the Policy for cooperation and remediation, though several companies failed to receive full credit due to deficiencies in cooperation, and one received less than full credit due to delayed remediation. And while DOJ never explicitly stated that a company’s remedial efforts were deficient, four companies that resolved with DOJ in 2019 were required to retain independent compliance monitors. For instance, Walmart, which reportedly spent upwards of $900 million over seven years on professional investigative and remediation costs, received a two-year monitorship to ensure effectiveness and “adequate test[ing]” against settlement requirements. In contrast, no monitor was imposed on TechnipFMC due to the company’s “remediation and the state of its compliance program,” among other things.
尽管2019年指引十分清晰，但是司法部的一系列政策对其检察官赋予了相当大的裁量权，并且，司法部在2019年的执法行动，尤其是其涉及监察员的决定，留下了很大的结果不确定性。只有一个例外，2019年司法部达成的每项和解均给予了政策下的至少某些合作和补救的宽大考量，尽管有几家公司因为合作不足未获得充分宽大考量，而一家公司由于未及时补救而未能获得充分宽大考量。并且，尽管司法部从未明确说过哪家公司的补救努力不足，2019年与司法部达成和解的四家公司均被要求聘请独立合规监察员。例如，据报道，沃尔玛在七年里在专业调查和补救方面花费超过9亿美元，实行了为期两年的监察员制度，以确保有效性和对照和解要求进行“充分测试”。对比之下，TechnipFMC公司因为“其补救措施和其合规体系的状况”等而未被要求执行监察员制度。

There is little in the public record to discern the specific factors that led to the divergence between these two outcomes. To fully realize the stated goal of encouraging voluntary self-disclosure, DOJ should go beyond providing transparency in evaluation criteria; it must also provide transparency with respect to key factors that lead to differing outcomes. What gaps in effectiveness and testing did Walmart fail to meet when evaluated under DOJ’s policies, and in particular its monitor guidance? And what did Technip, an FCPA recidivist, successfully demonstrate in order to avoid a monitor the second time around? Despite DOJ’s many efforts to encourage voluntary disclosure, on the basis of these two cases and the underlying settlement documents, a company considering disclosure is left with little data

to evaluate whether it falls on the Walmart or the Technip side of the monitor decision. Accordingly, companies still face substantial uncertainty in the enforcement context, leaving more work for DOJ to do to clarify its policies and provide greater transparency in negotiated resolution outcomes. What is clear, though, is that DOJ is serious about compliance, and remains willing to impose monitors. Companies have been provided a roadmap for building out – and, more importantly, testing the effectiveness of – their compliance programs. The key takeaway is: After you have your compliance house in order, make sure that you can demonstrate to regulators that your program is effective.
在公开记录中很难发现导致这两个结果之间差异的具体因素。为了充分实现鼓励主动自行披露的既定目标，司法部不能仅满足于明确评估标准，还必须明确导致不同结果的关键因素。在根据司法部政策（尤其是其关于监察员制度的指引）接受评估时，沃尔玛在有效性和测试方面存在哪些差距？而过去有FCPA违法记录的Technip成功证明了什么以避免监察员要求？尽管司法部为鼓励主动披露作了许多努力，但基于这两个案例和相关的和解文件，权衡是否进行披露的公司依旧缺乏足够的数据评估其将得到沃尔玛还是Technip的结果。因此，在执法情境下，企业仍然面临很大的不确定性，这就需要司法部做更多的工作来澄清其政策，在协商的和解结果中提供更大的透明度。但可以肯定的是，司法部对于合规的态度是严肃的，且仍然愿意施加监察员制度。企业已经得到了建立其合规体系（以及，更重要的，测试其有效性）的指导方针。关键的经验是：在你建立了合规体系后，确保你能向监管机构证明你的体系是有效的。

FCPA Corporate Enforcement Policy and Cooperation

FCPA企业执法政策和合作

DOJ twice this year amended its FCPA Corporate Enforcement Policy, which outlines the parameters under which DOJ will provide credit for voluntary self-disclosure, cooperation, and remediation in the resolution of corporate FCPA investigations. We analyzed the first round of revisions, focused on ephemeral messaging and M&A transactions, in our April 2019 commentary. More recently, in November 2019, DOJ introduced subtle changes to the Policy. Most importantly, while companies were previously required to "disclose all relevant facts known to [them]" to qualify for voluntary self-disclosure credit, the Policy now requires disclosure of "all relevant facts known *at the time of the disclosure*." (Emphasis added.) DOJ added a footnote to the Policy to explain the change: DOJ "recognizes that a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure." This change appears intended to encourage voluntary disclosure at the earliest possible time, even where companies do not yet know all relevant facts.
司法部今年两度修订其FCPA企业执法政策，该政策略述了司法部在企业FCPA调查的和解中为主动自行披露、合作和补救提供宽大考量所依据的参数。我们在2019年4月的一篇评述中分析了第一轮修订，主要内容是关于即时消息和并购交易。之后，在2019年11月，司法部对政策进行了一些微调。最重要的是，虽然之前企业被要求在"披露[其]知悉的所有相关事实"之后才有资格获得主动自行披露的宽大考量，但政策现在要求披露"**在披露之时**知悉的所有相关事实。"（加粗着重后加）。司法部在政策中加入一个脚注解释了这一变更：司法部"理解一家公司在主动自行披露时可能无法知悉所有相关事实。"该项变更似乎旨在鼓励尽早的主动披露，即使在企业尚未知悉所有相关事实的情况下。

Other elements of the Policy beyond self-disclosure would benefit from similar clarification in light of certain enforcement outcomes last year. In particular, in 2019 DOJ appears to have taken a stringent approach to cooperation credit. In four enforcement actions in 2019, DOJ did not award full cooperation credit to companies where it deemed the companies' cooperation incomplete or inadequate, but it did not provide much guidance for how other companies can avoid that outcome. In these cases, DOJ noted that a resolving company, among other things, did not timely respond to requests, did not de-conflict with respect to one witness, failed to meet reasonable deadlines, or delayed the resolution of a matter. These broad criticisms of cooperation, however, leave companies uncertain about what is

required to obtain full cooperation credit, which in turn can influence how companies evaluate the costs and benefits of self-disclosure. How many requests were not timely met? What types of requests were they? What delay resulted, and for how long? How reasonable were the deadlines? What led to the delayed resolution – negotiation over the terms, or something else? Compliance professionals know well that FCPA investigations often last years. At times, a company may choose to engage in a dialogue about particular requests; at other times, a company may resist requests altogether for legitimate reasons. If the Policy is intended to promote transparency and encourage cooperation, DOJ's decisions about awarding credit must be transparent as well.
鉴于去年的某些执法结果，政策中除自行披露之外的其他要素亦需要类似的澄清。具体而言，2019年，司法部似乎对合作宽大考量采取了严格的态度。在2019年的四项执法行动中，司法部认为相关公司的合作不完整或不充分，因而未给予这些公司充分的合作宽大考量，但其对于其他公司如何能避免这一结果未给予多少指引。在这些执法行动中，司法部指出，有一家和解的公司未能及时答复请求、未能解决与一名证人有关的冲突、未能满足合理的时限要求，或延迟了某个事项的解决等等。但是，这些关于合作的泛泛批评令企业无法确定取得充分的宽大考量需要满足什么条件，从而会影响企业评估自行披露成本效益的方式。有多少请求未及时满足？是哪些类型的请求？导致了什么延迟，延迟了多久？时限是否合理？是什么导致了和解延迟（条款谈判还是别的）？合规专业人士清楚地知道，FCPA调查往往会持续多年。有时，一家公司可能会选择就特定要求进行对话；有时，一家公司可能以正当理由拒绝要求。如果政策旨在增加透明度和鼓励合作，司法部关于授予宽大考量的决定也必须透明化。

Looking ahead, we would not be surprised if DOJ continues to tweak its policies and guidance in the next 12-24 months. DOJ is intent to encourage voluntary disclosure, cooperation, and remediation, and the stated benefits to companies under existing guidance have never been greater. DOJ retains considerable discretion and flexibility under its policies and guidance, however, and uncertainty of outcomes leaves companies to wrestle with the pros and cons of voluntary disclosure. As the data set of cases that resolve under DOJ's new and updated policies grows over the coming year, we will be watching to see whether new policy tweaks provide greater predictability of resolution outcomes that may influence companies considering voluntary disclosure.
如果司法部在未来的12-24个月里继续微调其政策和指引，我们不会感到惊讶。司法部希望鼓励主动披露、合作和补救，且现行指引下给予企业的好处前所未有地好。不过，司法部在其政策和指引下保留了相当大的裁量权和灵活度，结果的不确定性会让企业纠结于主动披露的利弊。随着根据司法部新政策和修订政策达成和解的案件数据集在来年的积累，对于新政策调整是否会带来更大的（可影响考虑主动披露的企业的）和解结果可预测性，我们将拭目以待。

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2 The SEC's disgorgement authority is at risk, but the SEC continues to collect.
证交会收缴非法所得的权限面临风险，但证交会仍在收缴。

We covered the Supreme Court's decision in *Kokesh v. SEC* in our Winter 2018 Year in Review. In that case, the Supreme Court unanimously held that disgorgement is a penalty subject to a five-year statute of limitations. In November 2019, the Supreme Court granted certiorari to review a question that it raised but explicitly declined to address in *Kokesh*: Whether the SEC has the authority to seek disgorgement at all in court proceedings. The decision could have wide-ranging implications not only for the SEC, but also for other regulatory agencies that routinely seek disgorgement. The case at issue, *Liu v. SEC*, focuses on disgorgement ordered to be paid by the petitioners in connection with an EB-5 Immigrant Investor Program, but the implications are broader. The petitioners asked the Court to

address: "Whether the Securities and Exchange Commission may seek and obtain disgorgement from a court as 'equitable relief' for a securities law violation even though this Court has determined that such disgorgement is a penalty."
我们在2018冬撰写的年度评论中介绍了最高法院在"Kokesh诉证交会"一案中的裁决。在该案中，最高法院一致认为，收缴非法所得是一项具有五年追诉时效的处罚。2019年11月，最高法院授予调卷令，以审核其提出但在Kokesh一案中明确拒绝处理的一个问题：证交会是否有权限在法庭程序中试图收缴非法所得。该裁决对于证交会以及其他经常试图收缴非法所得的监管机构均可能有深远的影响。相关的案件，即"Liu诉证交会案"，主要围绕上诉人被命令缴纳涉及一项EB-5移民投资者计划的非法所得，但其影响更为广泛。上诉人请求法院裁定："证券交易委员会是否可向法院申请收缴非法所得作为违反证券法的'衡平法救济'，即使贵院已认定上述非法所得的收缴是一项处罚。"

The outcome of *Liu* has the potential to significantly undermine the SEC's enforcement power by stripping it of one of its most potent enforcement tools. For years, disgorgement obtained by the SEC has exceeded civil monetary penalties. For example, in 2018, the SEC obtained orders imposing over $2.5 billion of disgorgement in FCPA and other cases, compared to less than $1.5 billion in civil monetary penalties. While the impact of *Liu* could be significant, legislation pending in both the House and the Senate could overturn *Kokesh* and render *Liu* moot. We will be keeping an eye on the *Liu* case and the pending legislation in 2020.
Liu案的结果有可能会使证交会失去其最强有力的执法工具之一，从而削弱证交会的执法权力。多年来，证交会收缴的非法所得已超过民事罚金。例如，2018年，证交会依据法庭命令在FCPA及其他案件中收缴了超过25亿美元的非法所得，而收缴的民事罚金不到15亿美元。虽然Liu案的影响可能很大，参众两院未决的立法可能会撤销Kokesh案的判决，使Liu案变得无实际意义。我们将持续关注Liu案进展及2020年的立法动态。

In the meantime, *Kokesh* did not appear to have a significant impact on the SEC's 2019 FCPA resolutions, at least from the perspective of its ability to obtain disgorgement. In 2019, the SEC obtained most of the monetary sanctions in its corporate FCPA resolutions based on disgorgement – over $750 million in total. There were only two settled matters in which the SEC did not obtain disgorgement (MTS and Telefonica Brasil). In contrast, several matters in which the SEC obtained disgorgement cite to conduct pre-dating a strict application of the five-year statute of limitations on disgorgement mandated by *Kokesh*, and two appear to focus exclusively on conduct that would be outside of the limitations period.
就目前而言，Kokesh案似乎对证交会的2019年FCPA和解并无太大影响，至少从其收缴非法所得的能力来看是如此。2019年，证交会在企业FCPA和解中的金钱处罚大多来自于收缴的非法所得，总计超过7.5亿美元。证交会只在两项和解中未收缴非法所得（MTS和巴西电信）。对比之下，证交会收缴非法所得的几个案件提及发生在（Kokesh案裁定严格适合用于收缴非法而所得的）五年追诉期限之外的行为，其中的两个案件似乎完全围绕追诉期限之外的行为。

Drawing conclusions on the basis of publicly available information about these resolutions is difficult: Tolling agreements may have been in place, or companies may have yielded on statute of limitations defenses for strategic reasons around the settlement table. As time moves on and the SEC begins to resolve cases that began while *Kokesh* was pending or after it was resolved, we will watch to see whether the timeframes subject to disgorgement in SEC actions will become more closely aligned with the five-year statute of limitations. And in the year ahead, it bears watching whether companies will be emboldened to resist tolling agreements regarding dated conduct, and whether they will take a harder line on statute of limitations defenses during settlement discussions. With the cloud of uncertainty over disgorgement remedies, we think that companies increasingly may hold the line in settlement discussions in the absence of a tolling agreement, or may push for reigned in disgorgement calculations reflecting the uncertainty in this area.

基于有关这些和解的公开可获得信息很难做出结论：可能存在中止追诉期限协议，或公司出于策略原因在和解谈判桌上已就追诉期限辩护作出了让步。随着时间推移，以及证交会开始解决在Kokesh案审理期间或解决之后开始的案件，我们将密切关注在证交会行动中非法所得收缴的追诉期限是否会变得更接近于五年的追诉期限。在未来的一年中，值得关注的是，企业是否会有勇气拒绝与过往行为有关的中止追诉期限协议，以及是否会在和解讨论期间就追诉期限采取更强硬的立场。鉴于围绕非法所得救济的不确定性，我们认为，在没有中止追诉期限协议的情况下，企业越来越有可能在和解讨论中采取强硬立场，或者力求限制反映该领域不确定性的非法所得计算。

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3 Litigated cases in 2019 tested the boundaries of important FCPA and bribery concepts, and the outcomes are unlikely to reign in enforcement.

2019年的诉讼案件检验了重要的FCPA和贿赂概念的界线，结果不太可能限制执法。

In 2019, courts weighed in on the bounds of the "agency" theory of liability and addressed a lingering question of dissonance between a domestic public official bribery statute and the FCPA. On balance, we expect that the outcomes of the cases will embolden the regulators' expansive view of FCPA enforcement.
2019年，法院就法律责任的"代理"理论发表了看法，解答了一个国内政府官员贿赂法规与FCPA之间不一致的遗留问题。总的来说，我们预计这些案件的结果将鼓励监管机构对FCPA执法持扩大化立场。

United States v. Hoskins and "Agency" Liability
"美国政府诉Hoskins案"和"代理"责任

United States v. Hoskins proceeded to trial in 2019. Those who followed the *Hoskins* case will recall – as we covered in our alert – that in 2018 the Second Circuit rejected DOJ's expansive interpretation of jurisdiction, holding that the government may not employ conspiracy or accomplice liability theories to bring charges against foreign defendants that do not fall within the FCPA's explicit categories of covered persons. In reaching this result, the Second Circuit rejected DOJ's argument that a person can be "guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal." Setting aside a potentially brewing Circuit split (a Northern District of Illinois decision in *United States v. Firtash* declined to follow the Second Circuit's decision in *Hoskins*), the central issue in *Hoskins* became whether Lawrence Hoskins qualified as an "agent" for purposes of establishing jurisdiction under the FCPA.
"美国政府诉Hoskins案"的审理在2019年继续进行。一直关注此案的人会记得（正如我们在客户期刊中提到的那样），在2018年，第二巡回法院拒绝了司法部对管辖权的扩大化解释，认为，政府不得运用阴谋或共谋责任理论对FCPA没有明确覆盖的主体类别的外国被告人提起指控。在做出这项裁定时，第二巡回法院拒绝了司法部的下列论点："如果一个人不能作为主谋犯下一项FCPA罪行，则其可作为该项罪行的共谋或同谋被认定有罪。"抛开一个可能正在酝酿的巡回法院分歧（在"美国政府诉Firtash"一案中，一项伊利诺伊州北区联邦地区法院的裁定拒绝遵循第二巡回法院在Hoskins案中的裁决）不谈，Hoskins案中的核心问题变成，就确定FCPA管辖权而言，Lawrence Hoskins是否具备"代理人"的资格？

As the *Hoskins* case proceeded to trial in 2019, the parties briefed the trial court on the instructions to be provided to the jury on who qualifies as an "agent" – a term not defined by the FCPA. Naturally,

Hoskins sought a narrower definition, while DOJ pushed for a broader one. At trial, the court adopted a broader, government-friendly definition. It instructed the jury that an agent must meet three requirements: (1) There must be a "manifestation by the principal that the agent will act for it"; (2) the agent must accept the undertaking, meaning that the agent will perform acts or services for the principal; and (3) there must be an understanding that the principal is in control of the undertaking. The court also instructed that "[o]ne may be an agent for some business purposes and not others" – requiring the government to prove that Hoskins was an agent in connection with the project at issue.
随着Hoskins案在2019年的继续审理，各当事方向审理法院报告了拟提供给陪审团的关于谁具有“代理人”（一个FCPA未定义的术语）资格的指示。自然，Hoskins想得到较狭义的定义，而司法部却力求较广义的定义。在审理期间，法院采用了较广义、对政府较为有利的定义。法院指示陪审团，代理人必须满足三个要求：(1)必须有一份“委托人出具的关于代理人将为其行事的声明”；(2)代理人必须接受该委托，即代理人将为委托人从事行为或服务；和(3)必须有一项认知，即由委托人控制该委托。法院还指示，“一个人可能因某些业务目的而非其他目的而担任代理人”，要求政府证明Hoskins就相关项目而言是代理人。

The jury determined that Hoskins was in fact an agent for purposes of that project, paving the way to his conviction on six counts of violating the FCPA and other statutes. Commenting on *Hoskins*, Assistant Attorney General Brian Benczkowski stated that "the Department is not looking to stretch the bounds of agency principles beyond recognition," and that DOJ will continue to apply traditional agency principles. But the breadth of the jury instruction in *Hoskins* may embolden Fraud Section prosecutors (and SEC attorneys) in future matters. In the future, will a foreign subsidiary that observes corporate formalities nonetheless be deemed an "agent" of the U.S. parent in the eyes of DOJ and the SEC? How about a minority-owned joint venture? DOJ and the SEC have not been shy about advancing aggressive theories of agency in settlement negotiations. The *Hoskins* jury instructions and the case's outcome may encourage even more aggressive stances towards seeking jurisdiction through agency over foreign companies and individuals. Practitioners should not be surprised when regulators set a low bar for claiming jurisdiction through agency at the settlement table.
陪审团认定，Hoskins就该项目而言事实上是代理人，最终导致其被判犯有六项违反FCPA及其他法律的罪行。助理司法部长Brian Benczkowski表示，“司法部不打算将代理原则的界线扩大到认可范围之外，”司法部将继续适用传统的代理原则。但Hoskins案中陪审团指示的广度可能会在未来事项中鼓励欺诈司检察官（和证交会检察官）。在将来，一家遵循公司形式的外国子公司是否仍会被司法部和证交会视为美国母公司的“代理人”？少数持股的合资公司呢？司法部和证交会从未畏缩在和解谈判中谋求积极的代理理论。Hoskins案的陪审团指示和该案的结果可能会鼓励（监管机构）采取更积极的姿态基于代理关系寻求对外国公司和个人的管辖权。如果监管机构在和解谈判桌上基于代理关系主张管辖权，业界人士不应当感到惊讶。

We do not consider this issue settled, and we predict that this will be a continuing topic of litigation in the FCPA space, particularly in cases against individual defendants. Hoskins' counsel has already signaled that an appeal is likely, and others may take up the mantle in future cases.
我们不认为此问题已得到解决，并且预计这将成为FCPA领域的一个持久的诉讼主题，在针对个人被告人的案件中尤为如此。Hoskins的律师已表明有可能提起上诉，在将来的案件中还会有其他人遇到这个问题。

***United States v. Ng Lap Seng* and "Official Act"**
“美国政府诉吴立胜”案和“职务行为”

Ng Lap Seng was convicted by a federal jury in July 2017 on FCPA, money laundering, conspiracy, and other bribery charges. On appeal to the Second Circuit, Lap Seng challenged his FCPA conviction on the ground that FCPA bribery requires proof of an "official act" satisfying the standard announced by the U.S. Supreme Court in *United States v. McDonnell*. In *McDonnell*, the Supreme Court unanimously

held that the federal domestic bribery statute, 18 U.S.C. §201, required a nexus between accepting something of value and an official act, which the Court said must be specific and focused, and pending or capable of being brought before a public official for formal exercise of government power.
2017年7月，一个联邦陪审团裁定吴立胜违反FCPA、洗钱、密谋和其他贿赂罪名成立。在向第二巡回法院上诉时，吴立胜对其违反FCPA的裁决提出质疑，理由是，FCPA贿赂指控要求证明有满足美国最高法院在“美国政府诉McDonnell”一案中宣布的标准中的“职务行为”。在McDonnell一案中，最高法院一致认为，联邦国内贿赂法规（美国法典第18编第201条）要求在接受有价之物和职务行为之间有关联。最高法院称，该职务行为必须具体而单一，待由或可提交一名政府官员正式行使政府权力。

The Second Circuit rejected Lap Seng's argument. The court observed that section 201's "definition of 'official act,' which informs the *McDonnell* standard, does not delimit the *quid pro quo* elements of . . . FCPA bribery." Focusing on various "manifestations of bribery under the federal criminal law," the court reasoned that "not all federal bribery statutes identify 'official act,' much less official act as defined in §201[], as the necessary *quo* for bribery." Turning to the text of the FCPA, the court concluded that FCPA liability does not hinge on section 201's statutorily defined "official act" standard, confirming that the standard for domestic bribery and an FCPA violation are not the same.
第二巡回法院拒绝了吴立胜的论点。该法院指出，201条的“‘职务行为’的定义（其提供了McDonnell案依据的标准）没有限定FCPA贿赂……的回报要素。”法院关注的是“联邦刑事法律下的各种贿赂迹象，”因此推论，“并非所有联邦贿赂法规将‘职务行为’（更别提201条中定义的职务行为）认定为贿赂必需的回报。”提到FCPA文本时，法院认为，FCPA责任不取决于201条定义的“职务行为”标准，确认国内贿赂的标准与FCPA违法行为的标准并不相同。

The *Lap Seng* decision supports a position often taken by the government when facing arguments seeking to contrast differing standards under domestic and foreign bribery laws: Namely, that each statute will be evaluated and applied on its own terms, even if that creates inconsistencies. As a consequence, we are left with a statutory regime in which a company could be convicted under the FCPA of paying bribes to a foreign legislator, even if the same conduct would not qualify as domestic bribery if the payment was made to a member of the U.S. Congress.
吴立胜案的裁定支持在面对试图对比国内和外国贿赂法律下不同标准的论点时政府往往采取的一个立场，即，每部法规将根据其本身的条款得到评估和适用，即使这会造成不一致。因此，在我们的法规体系下，一家公司可能会按FCPA被判犯有向外国立法机构成员支付贿赂的罪行，即使相同的行为但支付对象为美国国会议员的情况下不会构成国内贿赂。

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4 The number of domestic regulators and their basket of tools to target foreign corruption have never been larger.
针对外国腐败的国内监管机构及其掌握的工具的数量从未如此之多。

In 2019, domestic enforcers have increasingly turned to tools beyond the FCPA to combat foreign bribery, and the foreign-corruption-enforcer alphabet soup gained more letters. The expanded use of the myriad tools available, and an increase in the number of regulators that can be deployed in foreign corruption matters, makes for an increasingly complex domestic playing field for companies facing potential enforcement actions.
2019年，国内执法机构日益借助FCPA领域之外的工具打击外国贿赂，外国贿赂执法机构的缩略语大杂烩更加丰富了。众多可用工具的扩大使用以及可部署到外国腐败事务中的监管机构数量的增加为面临潜在

执法行动的企业带来了日益复杂的国内环境。

In perhaps the splashiest development in 2019, the Commodity Futures Trading Commission (the "CFTC") announced in an Enforcement Advisory its entry into the "foreign corrupt practices" space, under the guise of providing cooperation credit guidelines for companies and individuals not registered (or required to be registered) with the CFTC that voluntarily disclose violations of the Commodity Exchange Act involving foreign corrupt practices. As we discussed at the time of the CFTC's announcement, the advisory leaves unanswered the million-dollar question: What are "violations involving foreign corrupt practices" that are subject to CFTC enforcement?
2019年最为引人注目的动态也许是，美国商品期货交易管理委员会（下称"CFTC"），借着对未向CFTC登记（或须向CFTC登记）的公司或个人——该等公司或个人主动披露违反《商品交易法》的行为且违法行为涉及外国腐败——提供合作宽大考量指导的名义，在一份执法报告中宣布该机构进入"外国腐败行为"领域。正如我们在CFTC公告时讨论的那样，该报告并未解答一个最重要的问题：什么是CFTC执法行动针对的"涉及外国腐败行为的违法行为"？

On the conference circuit, CFTC Director of Enforcement James McDonald has elaborated on the CFTC's mission in the foreign corruption space: To pursue foreign corrupt practices that produce negative effects on the integrity of the U.S. commodities and derivatives markets. McDonald rejected suggestions of an overcrowded enforcement field, arguing that there is room for a civil regulator to police the activities of non-issuers in the commodities space. Early public indications suggest that DOJ and SEC officials have welcomed the CFTC into the foreign corruption enforcer's club as a collaborator. Much ink has been spilled speculating about the types of foreign bribery cases that may be pursued by the CFTC, but that key question remained unanswered as we closed out 2019. Going forward, we expect that some companies will face added complexity in making decisions regarding self-disclosure and other considerations surrounding corruption-related matters now that a new regulator has entered the fray. The CFTC reportedly is actively pursuing its corner of the foreign bribery enforcement market, having launched multiple investigations in 2019. We expect to see more investigations by the agency in 2020. Companies subject to CFTC jurisdiction must remain mindful that there is now expanded risk that foreign bribery can create exposure under yet another statute, and with a new regulator.
在巡回会议上，CFTC执法主任James McDonald阐述了CFTC在外国腐败执法领域的使命：打击对美国商品和衍生品市场的完整性产生负面影响的外国腐败行为。McDonald否认了执法领域机构过多的暗示，辩称民事监管机构应当有权监管商品领域中非发行人的活动。早期公开迹象表明，司法部和证交会官员已对CFTC作为合作方加入外国腐败执法机构俱乐部表示欢迎。对于CFTC可能处理的外国贿赂案件类型，媒体有很多猜测，但直到2019年结束这个关键问题仍然没有得到解答。将来，我们预计有些公司在做出有关自行披露以及腐败相关事务的其他考虑时将面临更复杂的局面，因为一家新的监管机构加入了进来。据报道，CFTC拟积极巩固其在外国贿赂执法市场上的地位，已在2019年启动多项调查。我们预计在2020年会看到该机构更多的执法行动。受CFTC管辖的公司务必要注意，在另一部法规以及新监管机构加入的情况下，外国贿赂会带来更大的风险。

DOJ also has continued to utilize tools other than the FCPA to pursue conduct amounting to foreign corruption, particularly in cases against individuals. As noted above, in 2019, DOJ's FCPA Unit announced more foreign bribery-related charges against and guilty pleas by individuals than in any previous year. In many of those cases, FCPA charges were nowhere to be found, with DOJ instead relying on the anti-money laundering ("AML") statutes and fraud-based charges. We expect that the Department will continue to rely on these and other statutes, such as the Travel Act, to prosecute bribe-payors and bribe-takers who may lie beyond the FCPA's jurisdictional reach. We also expect the Department's Money Laundering and Asset Recovery ("MLARS") Section to continue to play a leading role in supporting enforcement related to foreign bribery. In the coming year, we will be watching to see whether the Department seeks to deploy AML statutes more broadly in the context of foreign bribery enforcement, including employing the statutes' forfeiture remedies against companies.

司法部也继续运用FCPA之外的工具追究外国腐败的行为，在针对个人的案件中尤其如此。如上所述，在2019年，司法部的FCPA部门宣布了比过去任何一年都多的针对个人的外国贿赂相关指控及个人认罪，其中很多案件并未包含FCPA指控，司法部转而运用反洗钱法规和基于欺诈的指控。我们预计，司法部将继续运用这些及其他法规（如旅行法）起诉可能不在FCPA管辖范围内的行贿和受贿者。我们还预计，司法部的反洗钱和资产追偿部（下称“MLARS”）将继续在支持外国贿赂相关执法方面发挥主要作用。在新的一年，我们将密切关注，司法部是否会试图在外国贿赂执法领域更广泛地部署反洗钱法规，包括对企业适用这些法规的没收救济。

On the domestic front, we expect to see continued coordination and collaboration across agencies, with DOJ and the SEC routinely crediting in enforcement actions the assistance of other domestic agencies. While domestic coordination and collaboration among regulatory and enforcement agencies is not new, sophisticated coordination will remain the norm. And the emphasis has never been greater on encouraging voluntary disclosure across different areas of enforcement. This raises the question whether we may begin to see in the coming years more coordinated actions across DOJ: Between, for example, the Antitrust Division and the Fraud Section stemming from disclosures under the former's leniency program or the latter's FCPA Corporate Enforcement Policy; or in connection with the National Security Division's new policy encouraging disclosures in the export control and sanctions space, which we recently covered. The trend is clear – companies will need to continue to strategize along multiple fronts domestically.
在美国国内，我们预计看到各机构之间继续协调和合作，司法部和证交会仍会如往常一样在执法行动中认可其他国内机构的协助。尽管国内监管和执法机构之间的协调和合作并非新闻，复杂的协调仍将是常态。在不同执法领域鼓励主动披露得到前所未有的强调。令人不禁想知道，我们在未来一些年里是否会看到司法部内部更多的协调行动：例如，反垄断分部和欺诈司就源自前者的从宽处罚计划或后者的FCPA企业执法政策下的披露进行的协调行动；或与我们最近讨论过的国家安全分部鼓励出口管制和制裁领域披露的新政策有关的协调行动。趋势是明显的——企业仍需就国内不同领域制订策略。

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5 The risk of parallel enforcement in foreign jurisdictions continues to increase. 外国司法辖区平行执法的风险仍在增加。

Around the world in 2019, various jurisdictions stepped up both the tools that they may use to combat corruption, as well as enforcement efforts. We have seen proposed laws or guidance or newly-launched corruption initiatives and task forces in Italy, Malaysia, Brazil, India, Ukraine, Argentina, the UK, France, Germany, Poland, Russia, Spain, Greece, Hong Kong, Mexico, Sweden, Vietnam, Australia, Indonesia, the Philippines, Myanmar, and China, among other places. The frameworks in place internationally to combat corruption are multiplying. While SEC Chairman Jay Clayton has criticized the pace of international cooperation and enforcement in foreign jurisdictions, there is no question that enforcement capabilities are building in many international jurisdictions.
2019年，世界各地各司法辖区在可用于打击腐败的工具以及执法努力方面均有加强。我们注意到下列国家和地区出台了法律或指引草案或建立了新的反腐败计划和特别工作组：意大利、马来西亚、巴西、印度、乌克兰、阿根廷、英国、法国、德国、波兰、俄罗斯、西班牙、希腊、香港、墨西哥、瑞典、越南、澳大利亚、印度尼西亚、菲律宾、缅甸和中国等。国际上实施的打击腐败框架正在大幅增加。虽然

证交会主席Jay Clayton批评了外国司法辖区国际合作和执法的进展，但在许多国际司法辖区中执法能力正在逐渐提高是无庸置疑的。

More than ever, the global patchwork of overlapping laws and guidance makes it difficult for multinational companies to navigate anti-corruption investigations. For instance, while certain jurisdictions provide credit for voluntary self-disclosure, cooperation, and remediation, others do not. It is difficult to predict the consequences in one jurisdiction of voluntary disclosure in another – particularly if the jurisdiction where disclosure is made does not have a robust and transparent body of historic enforcement activity. And, notwithstanding DOJ's policy to mitigate "piling on," DOJ retains significant discretion under its policy, and the policy does not constrain other regulators, whether foreign or domestic. For instance, while Ericsson recently settled with U.S. regulators to the tune of over $1 billion, Sweden has reportedly opened a bribery probe after the U.S. settlement. Myriad other potential complications from overlapping anti-corruption regimes and enforcers exist as well, and companies will need to carefully consider and navigate the ever-evolving landscape.
全球错综复杂的法律和指引体系使跨国公司在应对反腐败调查时面临前所未有的困难。例如，某些司法辖区鼓励主动自行披露、合作和补救，而其他则并不鼓励。在一个司法辖区难以预测在另一司法辖区进行主动披露的后果，在进行披露的司法辖区没有健全和透明的历史执法活动机构的情况下尤其如此。而且，尽管司法部有缓解"叠加"的政策，但其在该政策下保留了很大的裁量权，该政策并不限制其他美国国内或外国监管机构。例如，虽然爱立信近期与美国监管机构达成总计10亿美元的和解，但据报道瑞典在美国和解后仍然启动了一项贿赂调查。因交叉的反腐败体系和执法机构带来的许多其他潜在问题仍然存在，企业需要仔细地考虑和应对不断变化的局面。

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