2019 Year in Review:

Top Anti-Corruption Enforcement Trends and Developments

Winter 2020

Anti-corruption/FCPA

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.

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.

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.

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 advocacy regarding the facts and applicable law.

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.

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

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.

Evaluation of Corporate Compliance Programs and Monitorships

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.

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.

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.

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.

FCPA Corporate Enforcement Policy and Cooperation

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.

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.

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.

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2 The SEC's disgorgement authority is at risk, but the SEC continues to collect.

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."

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.

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.

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.

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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.

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.

***United States v. Hoskins* and "Agency" Liability**

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.

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.

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.

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.

***United States v. Lap Seng* and "Official Act"**

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.

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.

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.

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4 The number of domestic regulators and their basket of tools to target foreign corruption have never been larger.

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.

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?

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.

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.

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.

5 The risk of parallel enforcement in foreign jurisdictions continues to increase.

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.

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.

The following Covington lawyers assisted in preparing this client update: Steven Fagell, Mythili Raman, Don Ridings, Daniel Shallman, Jennifer Saperstein, Ben Haley, Adam Studner, Ashley Sprague, Brian Fitzpatrick, Leah Saris, Michelle Coquelin, and Ben Kramer.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Anti-corruption/FCPA 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
Jason Criss	+1 212 841 1076	jcriss@cov.com
Sarah Crowder	+44 20 7067 2393	scrowder@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	
Helen Hwang	+86 21 6036 2520	hhwang@cov.com

Mitchell Kamin	+1 424 332 4759	mkamin@cov.com
Robert Kelner	+1 202 662 5503	rkelner@cov.com
Nancy Kestenbaum	+1 212 841 1125	nkestenbaum@cov.com
Adem Koyuncu	+32 2 549 52 40	akoyuncu@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	+1 202 662 5682	jsaperstein@cov.com
Jennifer Saulino	+1 202 662 5305	jsaulino@cov.com
Daniel Shallman	+1 424 332 4752	dshallman@cov.com
Doug Sprague	+1 415 591 7097	dsprague@cov.com
Adam Studner	+1 202 662 5583	astudner@cov.com
Addison Thompson	+1 415 591 7046	athompson@cov.com
Veronica Yepez	+1 202 662 5165	vyepez@cov.com