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NEWS

2018 YEAR IN REVIEW

2018 marked another significant year for Foreign Corrupt Practices Act (FCPA) enforcement. Seventeen corporate enforcement actions by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) resulted in over $2 billion in corporate penalties, which exceeds the 2017 total despite excluding penalties paid to foreign anti-corruption regulators in connection with the same conduct. While the vast majority of the penalties paid to U.S. regulators were the result of three large resolutions in 2018, the other 14 resolutions averaged just under $20 million in penalties, indicating that U.S. regulators are pursuing corruption on all scales. Additionally, the DOJ announced an increased number of declinations in 2018 compared with 2017, including four declinations under the Corporate Enforcement Policy, in which three companies agreed to disgorge illicit profits, prejudgment interest and penalties totaling nearly $50 million.

With respect to the corporate resolutions in 2018, in September, the DOJ and the SEC announced the largest global anti-corruption settlement to date in an anti-corruption enforcement action, totaling $1.78 billion, including $853.2 million in criminal penalties and $933.5 million in disgorgement plus interest, involving Petroleo Brasileiro S.A. (Petrobras), a Brazilian state-owned energy company. The case involved high-ranking Petrobras executives facilitating illicit payments to Brazilian politicians and political parties. The other two largest enforcement actions in 2018 involved Société Générale S.A., a Paris-based global financial services institution, which agreed on June 4 to pay $585 million in criminal penalties to the DOJ to resolve the FCPA investigation into the company's participation in a Libyan bribery scheme, and Japan-based Panasonic Corporation, which agreed to pay more than $280 million in total to resolve FCPA charges brought by the DOJ and the SEC for falsifying records and improperly retaining consultants in connection with sales of its in-flight entertainment units in the Middle East and Asia.

Significantly, with respect to corporate resolutions, only one resolution in 2018 involved the imposition of a corporate compliance monitor, which may be the result of corporations under investigation becoming more adept at early and thorough remediation. It may, however, also be due to a change in the DOJ policy regarding monitorships. In October, the DOJ issued a new memorandum providing guidance to prosecutors on the imposition of compliance monitors in corporate resolutions, which outlines the

factors that prosecutors must consider before imposing a monitorship, including the cost of the monitorship, whether the scope of the monitorship can be narrowed to "avoid unnecessary burdens" to the corporation's operations, the pervasiveness and nature of the misconduct, and the corporation's subsequent development of a new compliance program.

The DOJ and the SEC also continued to focus on individual prosecutions with over 50 individuals charged, entering guilty pleas or convicted at trial in 2018. The prosecution of individuals highlighted a continued focus on enforcement in Latin America, with the DOJ announcing 10 guilty pleas and numerous charges against individuals involved in a corruption scheme in Venezuela, and the Operation Car Wash corruption scandal in Brazil continued to bear fruit, including, most notably, with the record-setting Petrobras corporate resolution.

In addition to the number of corporate resolutions, corporate penalties and individual prosecutions, both the DOJ and the SEC have generally maintained the level of resources devoted to FCPA enforcement, and their FCPA units continue to be headed by experienced prosecutors who have worked in the government for multiple administrations. All in all, FCPA enforcement continues to be robust two years into the Trump administration.

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Importantly, 2018 also marked the continuing cooperation between U.S. regulators and prosecutors and law enforcement officials from around the globe on anti-corruption enforcement actions, which the top three corporate resolutions make clear. In the Petrobras case, U.S. and Brazilian authorities worked together and, as part of its nonprosecution agreement with U.S. authorities, Petrobras agreed to pay 10 percent of the criminal penalty to the DOJ, 10 percent to the SEC and 80 percent to the Ministerio Publico Federal in Brazil. Similarly, in the Société Générale matter, U.S. authorities worked with France's Parquet National Financier (PNF) and credited nearly $300 million in penalties that Société Générale paid to the PNF. Finally, the SEC's press release announcing the Panasonic resolution acknowledged the assistance of authorities in Switzerland, Canada, United Arab Emirates, Japan, Singapore, Malaysia, Australia and Pakistan. This cooperation is in addition to a growing number of foreign authorities independently pursuing anti-corruption enforcement actions against corporations and individuals.

In 2018, the DOJ also made three noteworthy announcements regarding its policies with respect to FCPA enforcement.

In 2018, the DOJ also made three noteworthy announcements regarding its policies with respect to FCPA enforcement. On November 29, Deputy Attorney General Rod Rosenstein announced a change to the DOJ's policy that corporations must provide "all relevant facts" regarding all the individuals involved in the alleged corporate misconduct to receive any cooperation credit in criminal investigations. Under the revised policy, to qualify for "any cooperation credit" in criminal cases, companies now have to work "in good faith to identify only individuals who were substantially involved in, or responsible for, wrongdoing" and disclose that information to the DOJ.

The second announcement came on May 9, when Deputy Attorney General Rosenstein announced a new policy that could have important consequences for corporate enforcement actions where penalties are imposed by more than one regulator or law enforcement authority. The new policy encourages coordination of corporate resolution penalties in such cases, with a goal of reducing duplicative fines and penalties amidst the growing number of cross-border and cross-agency enforcement efforts, which Rosenstein referred to as "piling on."

A third policy announcement occurred on July 25, when Deputy Assistant Attorney General Matthew Miner announced the extension of the FCPA Corporate Enforcement Policy to mergers and acquisitions. Miner stated that successor companies that discover wrongdoing in connection with merger and acquisition (M&A) transactions will receive a strong presumption that the DOJ will decline to bring charges provided those companies self-disclose potential FCPA violations, fully cooperate with the DOJ in any ensuing investigation and remediate potential violations. Miner also encouraged acquiring companies to seek

guidance from the DOJ through its FCPA Opinion Procedures before finalizing a deal when they discover possible corruption concerns in the due diligence process.

Finally, 2018 saw two significant court cases limiting the reach of the FCPA and one notable case in the UK affecting the scope of the attorney-client privilege.

Finally, 2018 saw two significant court cases limiting the reach of the FCPA and one notable case in the UK affecting the scope of the attorney-client privilege. In *United States v. Hoskins*, a rare federal court of appeals decision interpreting the FCPA, the U.S. Court of Appeals for the Second Circuit rejected an expansive view of the FCPA's jurisdiction, holding that an individual cannot be guilty as a co-conspirator or accomplice if he or she is incapable of committing the crime as a principal. In *SEC v. Cohen*, a New York federal district court judge dismissed an SEC lawsuit accusing two former executives of paying bribes because the applicable statute of limitations had lapsed despite a tolling agreement being in place. And in *Bilta v. RBS*, the UK High Court addressed the scope of litigation privilege protection over internal investigation materials, a particularly important topic to companies and their legal counsel since a High Court opinion in 2017 appeared to significantly narrow such protection.

These trends, updates and insights are discussed in more detail below.

CHANGES IN DOJ AND SEC POLICIES

DOJ Announces Important Changes to Yates Memo

In a speech delivered on November 29, Deputy Attorney General Rosenstein announced important limitations to the policies regarding individual accountability for corporate wrongdoing set forth in the 2015 Yates Memo. Under the policy announced in that memo, summarized here, the DOJ limited the ability of its lawyers to offer any cooperation credit in criminal investigations to those corporations that provided "all relevant facts" regarding all the individuals involved in the alleged corporate misconduct. Companies and counsel that have been engaged in the DOJ investigations have experienced the challenges in complying with this standard, and it was far from clear that the DOJ itself did, or even could, adhere to the standard. In his speech, Rosenstein acknowledged the challenges and that "the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources." In light of those realities and a recognition that the DOJ's "policies need to work in the real world of limited investigative resources," Rosenstein announced a revised policy that "return[s] discretion to Department attorneys."

Under the revised policy, to qualify for "any cooperation credit" in criminal cases, companies now have to work "in good faith to identify individuals who were substantially involved in, or responsible for, wrongdoing" and disclose that information to the DOJ.

As a preliminary matter, what is not changing is the DOJ's pursuit of individuals involved in corporate fraud, including violations of the FCPA. "Under [the] revised policy, pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation," which has been the DOJ's policy for many years. However, the DOJ knows that collecting information about the conduct of every individual involved in a course of corporate conduct is, if not impossible, the source of significant delay in many criminal cases. Thus, the revised policy acknowledges that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted." Instead, the DOJ will focus "on the individuals who play significant roles in setting a company on a course of criminal conduct." In particular, the DOJ "want[s] to know who authorized the misconduct, and what they knew about it." Under the revised policy, to qualify for "any cooperation credit" in criminal cases, companies now have to work "in good faith to identify individuals who were substantially involved in, or responsible for, wrongdoing" and disclose that information to the DOJ.

In light of this change, it is important that companies work closely with their outside counsel in ongoing FCPA investigations to ensure, where advisable, that they provide full information on individuals who play a key role in criminal misconduct so that the company can receive full cooperation credit in any corporate resolution.

New DOJ Policy on Coordination of Corporate Penalties

On May 9, in a second significant policy announcement of 2018, Deputy Attorney General Rosenstein announced a new policy that could have important consequences for corporate enforcement actions where penalties are imposed by more than one regulator or law enforcement authority.

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The new policy encourages coordination of corporate resolution penalties in such cases, with a goal of reducing duplicative fines and penalties, which Rosenstein referred to as "piling on." Rosenstein announced the policy at the New York City Bar White Collar Crime Institute, and it has been added to the U.S. Attorneys' Manual (USAM) at Section 1-12.100.

In announcing the policy, Rosenstein emphasized the DOJ's commitment to fairness and concern that, amidst growing cross-border and cross-agency enforcement efforts, companies are facing redundant and sometimes "disproportionate" penalties imposed by multiple authorities. By encouraging greater cooperation in this area, Rosenstein noted, authorities will be able to "achieve reasonable and proportionate outcomes in major corporate investigations."

Rosenstein underscored the importance and strength of the DOJ's working relationships with law enforcement agencies and regulators in the U.S. and abroad, which have allowed for better detection and punishment of wrongdoing. He emphasized that the new policy was designed to enhance those relationships and cooperation in the penalty phase.

The new policy has four key features:

- It reaffirms the principle that "the federal government's criminal enforcement authority should not be used…for purposes unrelated to the investigation and prosecution of a possible crime." This includes using "the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case." Rosenstein noted that this is not a policy change but rather "a reminder of, and commitment to, principles of fairness and the rule of law."
- In cases where attorneys from different parts of the DOJ may be seeking to resolve a corporate case based on the same misconduct, it directs them to coordinate to "achieve an overall equitable result." This may include "crediting and apportionment of financial penalties, fines and forfeitures."
- It encourages DOJ attorneys, "when possible, to coordinate with other federal, state, local and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct."
- Finally, it sets forth certain factors that DOJ attorneys "may evaluate in determining whether multiple penalties serve the interests of justice in a particular case."

While emphasizing the need for cooperation and the importance of fairness, however, Rosenstein also made clear that there are times when duplicative penalties "really are essential to achieve justice and protect the public," and that in those cases the DOJ "will not hesitate to pursue complete remedies and to assist our law enforcement partners in doing the same." Rosenstein also noted that cooperating with a foreign government "is not a substitute for cooperating with the Department of Justice" and cautioned companies against coming to the DOJ "only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments." The written policy itself allows DOJ attorneys to "[consider] additional remedies in appropriate circumstances." Thus, while the new policy is meant to promote fairness and cooperation, it should not be read as a move toward greater leniency.

As part of this effort, Rosenstein also announced the creation of a Working Group on Corporate Enforcement and Accountability within the DOJ, which includes DOJ leaders and senior officials from the Federal Bureau of Investigation, the Criminal Division, the Civil Division, other litigating divisions involved in significant corporate investigations and the U.S. Attorney's Offices. Rosenstein explained that the Group "will make internal recommendations about white collar crime, corporate compliance and related issues."

As with any new DOJ guidance, the policy's ultimate impact will depend on how it is applied. The policy itself, as set forth in the USAM, provides only high-level guidance. It is also nonbinding. The policy's effectiveness will further depend on cooperation from other U.S. and foreign authorities. If well implemented, however, it could lead to fairer and more reasonable outcomes for companies facing multiple parallel criminal and/or regulatory enforcement actions. And the policy certainly provides companies with a basis to argue for them.

New DOJ FCPA Policy for M&A Transactions

...successor companies that discover wrongdoing in connection with M&A transactions will receive a strong presumption that the DOJ will decline to bring charges, provided those companies self-disclose potential FCPA violations, fully cooperate with the DOJ in any ensuing investigation and remediate potential violations.

At an American Conference Institute event on July 25, the Deputy Assistant Attorney General of the DOJ, Matthew Miner, announced a third significant policy change of 2018: the extension of the FCPA Corporate Enforcement Policy (the Policy) to mergers and acquisitions (M&A). Miner stated that successor companies that discover wrongdoing in connection with M&A transactions will receive a strong presumption that the DOJ will decline to bring charges, provided those companies self-disclose potential FCPA violations, fully cooperate with the DOJ in any ensuing investigation and remediate potential violations. Miner hoped that this announcement would provide greater clarity to companies on how to approach wrongdoing discovered in the M&A context.

Miner noted that the DOJ recognizes that "there are many benefits when law-abiding companies with robust compliance programs are the ones to enter high-risk markets or, in appropriate cases, take over otherwise problematic companies." He emphasized that the DOJ "want[s] to encourage this sort of activity" and "want[s] to encourage [a company's] leadership to take the steps outlined in the FCPA Policy and, when they do, [the DOJ wants] to reward them accordingly for stepping up, being transparent and reporting and remediating the problems they inherited." The DOJ implemented the Policy last November. To read the November 30, 2017 Sidley Update on the original announcement of the Policy before it applied in the M&A context, click here.

Miner also encouraged acquiring companies to seek guidance from the DOJ through its FCPA Opinion Procedures before finalizing a deal when they discover possible corruption concerns in the due diligence process. While this process has been available, it is not one that has been used frequently or recently, with the last use occurring in 2014. It is yet to be seen how helpful this process will be in the fast-paced M&A environment. In that regard, however, Miner also stated that "[a]lthough it may take a little more time—and we can, to a degree, expedite our analysis based on timing needs—it sometimes makes sense to slow down to assess risks."

Despite Miner's attempt to provide certainty and not discourage M&A transactions, companies should consult with legal counsel about the implications (including potential disclosure) of both potential FCPA risks identified during due diligence and wrongdoing discovered subsequent to the closing of a deal.

MAJOR CORPORATE ANTI-CORRUPTION ENFORCEMENT ACTIONS

DOJ and SEC Announce Largest Global Anti-Corruption Settlement at $1.78 Billion

...the DOJ and the SEC announced the largest global anti-corruption settlement to date in an anti-corruption enforcement action, totaling $1.78 billion, against Petroleo Brasileiro S.A. (Petrobras), a Brazilian state-owned energy company.

On September 26, 2018, the DOJ and the SEC announced the largest global anti-corruption settlement to date in an anti-corruption enforcement action, totaling $1.78 billion, including $853.2 million in criminal penalties and $933.5 million in disgorgement plus interest, against Petroleo Brasileiro S.A. (Petrobras), a Brazilian state-owned energy company.

The DOJ and the SEC alleged that high-ranking Petrobras executives facilitated illicit payments of "hundreds of millions of dollars" to Brazilian politicians and political parties. These bribes were used to prevent the Brazilian parliament's inquiry into Petrobras' contracts and to contribute to "the campaign of a Brazilian politician who had oversight over the location where one of Petrobras' refineries was being built."

Petrobras admitted that it failed to keep accurate books and records and that its executives were aware that other company executives were paying bribes to government officials. As part of its non-prosecution agreement with U.S. authorities, Petrobras agreed to pay 10 percent of the criminal penalty to the DOJ, 10 percent to the SEC and 80 percent to the Ministerio Publico Federal in Brazil.

Investment Firms Legg Mason and Société Générale S.A. Pay a Total of Over $600 Million for Libyan Bribes

Maryland-based investment management firm Legg Mason Inc. and Société Générale S.A., a Paris-based global financial services institution, agreed to pay millions in criminal penalties to the DOJ to resolve the FCPA investigation into the companies' participation in a Libyan bribery scheme.

Maryland-based investment management firm Legg Mason Inc. and Société Générale S.A., a Paris-based global financial services institution, agreed on June 4, 2018 to pay millions in criminal penalties to the DOJ to resolve the FCPA investigation into the companies' participation in a Libyan bribery scheme.

The DOJ alleged that, between 2004 and 2010, Legg Mason subsidiary Permal Group Ltd. partnered with Société Générale to solicit business from state-owned financial institutions in Libya through a Libyan "broker." Over this period, Société Générale paid the broker more than $90 million in connection with 14 investments from Libyan institutions. The broker apparently paid a portion of that amount to high-level Libyan officials to secure the investments and then received a commission based on the Libyan institutions' investments. As a result of the bribery, Legg Mason, through Permal, managed seven Libyan investments and earned approximately $31.6 million in profits. Société Générale obtained 13 investments and collected approximately $523 million in profits.

Legg Mason entered into a non-prosecution agreement with the DOJ and agreed to pay a criminal fine of approximately $32.6 million and to disgorge approximately $31.6 million. As part of the agreement, it also agreed to cooperate with ongoing DOJ investigations and to enhance its compliance program.

Société Générale entered into a deferred prosecution agreement with the DOJ, agreeing to continue to cooperate with the DOJ's investigation and to implement new, enhanced compliance procedures. Société Générale also agreed to pay a criminal penalty of $585 million to the DOJ. Société Générale's subsidiary, SGA Société Générale Acceptance N.V., pleaded guilty in New York federal court on June 5.

Panasonic Agrees to Pay $280 Million to Settle FCPA Charges With the DOJ and the SEC

Japan-based Panasonic Corporation (Panasonic) agreed to pay more than $280 million in total to resolve FCPA charges brought by the DOJ and the SEC for falsifying records and improperly retaining consultants in connection with sales of its in-flight entertainment units in the Middle East and Asia.

In April 2018, Japan-based Panasonic Corporation (Panasonic) agreed to pay more than $280 million in total to resolve FCPA charges brought by the DOJ and the SEC for falsifying records and improperly retaining consultants in connection with sales of its in-flight entertainment units in the Middle East and Asia. Panasonic admitted in court documents that U.S.-based subsidiary Panasonic Avionics Corporation (PAC), a designer and distributor

of airline entertainment systems and global communication services for airlines, "knowingly and willfully caused Panasonic to falsify its books and records" by mischaracterizing pay to "consultants" who aided Panasonic interests without providing any actual consultant work for the company. For example, in one instance, Panasonic paid one "consultant"—an employee at a state-owned airline—$875,000 over six years after that employee helped negotiate a lucrative contract amendment between Panasonic and the airline. PAC also concealed its use of sales agents who did not pass the company's internal diligence requirements. PAC admitted to making more than $7 million in payments to these sales agents.

Panasonic agreed to pay $143 million in disgorgement to the SEC, and PAC agreed to pay $137 million in criminal penalties to the DOJ. PAC also entered into a deferred prosecution agreement for knowingly and willingly falsifying Panasonic's books, agreeing to cooperate with further investigations and retain a compliance monitor for a minimum of two years.

NOTEWORTHY INDIVIDUAL ANTI-CORRUPTION ENFORCEMENT ACTIONS

Total Guilty Pleas Rise to 15 in Connection With a Bribery Scheme Involving Venezuela's State Energy Company

…the DOJ continued its investigation and prosecution of former employees and vendors for Petróleos de Venezuela, S.A. (PDVSA), who were involved in a series of bribes for contracts with Venezuela's state energy company.

Throughout 2018, the DOJ continued its investigation and prosecution of former employees and vendors for Petróleos de Venezuela, S.A. (PDVSA), who were involved in a series of bribes for contracts with Venezuela's state energy company.

On February 13, the DOJ charged five former PDVSA employees with money laundering in connection with allegedly accepting at least $27 million in bribes. Two of the employees were also charged with conspiring to violate the FCPA. The government wrote in a press release that the five defendants were known as the "management team" and wielded significant influence within PDVSA. The group solicited bribes and kickbacks from U.S.-based vendors in exchange for providing assistance to those vendors in connection with their PDVSA business. One of those employees, Luis Carlos De Leon-Perez, pleaded guilty in federal court on July 16 to one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering.

Juan Carlos Castillo Rincon, a former manager of a Houston-based logistics and forwarding company, was also accused of conspiring with others to bribe PDVSA officials. The DOJ alleged that Castillo bribed a PDVSA official in order to obtain PDVSA contracts, extensions of contracts and favorable contract terms. He pleaded guilty to a count of conspiracy to violate the FCPA on September 18. A federal judge also unsealed the 2017 guilty plea of Jose Orlando Camacho, the PDVSA official whom Castillo bribed.

In total, 15 individuals have pleaded guilty in connection to the PDVSA bribery and corruption cases.

Chairman of Macau Real Estate Development Company Receives Four-Year Prison Sentence and $1 Million Fine for UN Bribery Scheme

On May 11, 2018, a U.S. District Judge in the Southern District of New York sentenced Ng Lap Seng (a.k.a. David Ng) to 48 months in prison, fined him $1 million and ordered him to pay $302,977 in restitution to the UN for his role in a bribery scheme. Ng, the chairman of Macau real estate development company Sun Kian Ip Group, paid bribes to Francis Lorenzo, a former UN Ambassador from the Dominican Republic, and John Ashe, the former Permanent Representative of Antigua and Barbuda to the UN. Ng intended to obtain the UN's formal support for a multibillion-dollar conference center to serve as the permanent home of the UN's Global South-South Development Expo. Ng was convicted in July 2017 of violating the FCPA, paying bribes, money laundering and conspiracy.

Former Dutch Oil Company Executives Sentenced to Several Years in Prison for International Bribery Scheme

On September 28, 2018, the former CEO and a former executive for SBM Offshore, a Dutch oil company, were sentenced in federal court for their roles in an international bribery scheme. According to a press release issued by the DOJ, Anthony Mace, the former SBM CEO, and Robert Zubiate, a former sales and marketing executive, played key roles in facilitating a massive bribery scheme that involved providing millions in illicit payments to officials at state-owned oil companies in Brazil, Angola and Equatorial Guinea in exchange for lucrative oil-services contracts. Mace was sentenced to 36 months in prison and was ordered to pay a $150,000 fine. Zubiate was sentenced to 30 months in prison and was ordered to pay a $50,000 fine. In November 2017, both executives pleaded guilty to conspiring to violate the FCPA. SBM Offshore also agreed to pay a $238 million criminal penalty to resolve related FCPA charges in 2017.

New Jersey Real Estate Broker Sentenced to Six Months in Prison for Role in Qatar Bribery Scheme

In January 2018, Joo Hyun Bahn (a.k.a. Dennis Bahn), a New Jersey-based real estate broker and nephew of former UN Secretary General Ban Ki-moon, pleaded guilty to one count of violating the FCPA and one count of conspiracy to violate the FCPA. In September 2018, a New York federal judge sentenced him to six months in prison.

Bahn was charged in December 2016 in connection with a scheme from 2013 to 2015 to bribe a Qatari official to help secure the $800 million sale of an office building complex to Qatar's sovereign wealth fund. Bahn gave $500,000 to Malcolm Harris, who claimed to be an agent of the Qatari official, but Harris stole the money and never passed it along to the official. Harris was also charged in connection with the plot and has already been sentenced to 42 months in prison. In a press release, the DOJ said that the fact that Harris thwarted Bahn's scheme did not change the fact that Bahn attempted to make a corrupt payment.

Bahn reached a separate settlement agreement with the SEC for violations of the FCPA, and Bahn agreed to disgorge $225,000 to the SEC.

OTHER DEVELOPMENTS

Second Circuit Rejects DOJ's Use of Conspiracy and Accomplice Liability to Prosecute Foreign Nationals for FCPA Violations

...in a rare federal court of appeals decision interpreting the FCPA, the U.S. Court of Appeals for the Second Circuit rejected that expansive view of the FCPA's jurisdiction, holding that an individual cannot be guilty as a co-conspirator or accomplice if he or she is incapable of committing the crime as a principal.

For years, the DOJ has taken the position that theories of conspiracy and aiding and abetting allow it to prosecute foreign nationals for FCPA violations even if those individuals otherwise would not be subject to liability under the FCPA. In August 2018, in a rare federal court of appeals decision interpreting the FCPA, the U.S. Court of Appeals for the Second Circuit rejected that expansive view of the FCPA's jurisdiction, holding that an individual cannot be guilty as a co-conspirator or accomplice if he or she is incapable of committing the crime as a principal. *United States v. Hoskins* (No. 16-1010, 2018 WL 4038192 (2d Cir. Aug. 24, 2018)).

The DOJ brought charges against Lawrence Hoskins in connection with the DOJ's prosecution of Alstom S.A., a French power and transportation company, which resulted in a $770 million corporate settlement. Hoskins, a former British citizen based in France, never worked for Alstom's American subsidiary in a direct capacity but was alleged to have approved the selection of, and authorized payments to, consultants knowing that a portion of the money was intended to influence Indonesian officials.

Hoskins did not clearly fall within the three categories of persons that the FCPA prohibits from offering bribes to foreign officials: "issuers," "domestic concerns" and persons who act within the territory of the United States. "Issuers" are defined as companies registered on a U.S. stock exchange or with certain reporting obligations to the SEC. "Domestic concerns" include U.S. citizens, nationals, residents and businesses with their principal place of business in the United States. Agents of "issuers" or "domestic concerns" are also included in these categories. The FCPA applies to nonresident foreign nationals—like Hoskins—only when such persons are agents or commit an act within the United States in furtherance of an improper payment.

The DOJ charged Hoskins with conspiring to violate the FCPA based on its longstanding theory that if the DOJ has jurisdiction over one conspirator, it has jurisdiction over all co-conspirators. As the DOJ advised in the November 2012 FCPA Resource Guide, foreign nationals and companies "may…be liable for conspiring to violate the FCPA…even if they are not, or could not be, independently charged with a substantive FCPA violation."

In August 2015, however, the trial court in Hoskins' case held that for an individual to be convicted of conspiring to violate the FCPA, the individual must also fall within a category of persons directly liable under the FCPA. On that basis, the court dismissed the conspiracy charge against Hoskins.

On appeal, the Second Circuit, analyzing the text and legislative history of the FCPA, held that because the statute omits jurisdiction over foreign nationals who act outside of the United States and are not an officer, director, employee, agent or stockholder of an issuer or domestic concern, Hoskins cannot instead be charged as a co-conspirator or accomplice to an FCPA violation. The court went on, however, to state that if prosecutors are able to show that Hoskins acted as an agent of Alstom's American subsidiary (a domestic concern), then there would not be improper extraterritorial application of the FCPA to his conduct. This decision is a significant blow to the DOJ's expansive view of the jurisdictional reach of the FCPA and a crucial judicial check on the DOJ's prosecutorial practices with respect to the FCPA. Significantly, it also offers guidance to foreign nationals in future DOJ prosecutions and emphasizes the importance of judicial opinions in checking the DOJ's broad interpretations of the FCPA.

New York District Court FCPA Case Highlights the Importance of a 2017 Supreme Court Decision and Language in Tolling Agreements

On July 13, 2018, a New York federal district court judge dismissed an SEC lawsuit in *SEC v. Cohen* accusing two former executives of Och-Ziff Capital Management Group LLC (OZCM) of paying bribes because the applicable statute of limitations had lapsed. The case highlights both the impact of a recent Supreme Court case on the period of time for which defendants can be held liable for an FCPA violation and the importance of language in tolling agreements.

In its complaint filed in 2017, the SEC alleged that, from May 2007 through April 2011, defendants diverted money from funds managed by OZCM that would be used to pay bribes to high-ranking officials in various African countries in violation of the FCPA and the Investment Advisers Act of 1940 (Advisers Act). The officials allegedly awarded OZCM "preferential access to mining rights and other natural resources investments and, on one occasion, made a substantial investment in OZCM-managed funds." The SEC sought civil penalties (under both the Advisers Act and the Securities Exchange Act of 1934), disgorgement of allegedly ill-gotten gains and a permanent injunction barring defendants from violating these provisions. The defendants moved to dismiss, arguing, *inter alia*, that all of the SEC's claims were time-barred. Of note, one of the defendants had entered into three different tolling agreements.

The applicable statute of limitations as set forth in 28 U.S.C. § 2462 was five years for actions to enforce fines, penalties and forfeitures. The court concluded that the SEC's claims were time-barred under § 2462, finding that the SEC sought relief that was at least partly penal and not solely remedial and that the claims had all accrued more than five years before the SEC filed suit. The court's reasoning in *Cohen* highlights new limitations that the SEC may face in pursuing enforcement actions in the wake of the Supreme Court's ruling in *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017), which held that disgorgement of ill-gotten gains constituted a penalty. The court did note, however, that it was not deciding whether all similar injunctions were always penalties.

Significantly, the court rejected the SEC's argument that its claims against one defendant were timely based on three tolling agreements, which expressly tolled the statute of limitations for claims "arising out of" the SEC's investigation into two transactions involving Libya from 2007 to 2008. The defendant, however, argued that he had not agreed to toll the statute of limitations as it pertained to the other transactions alleged in the SEC's complaint, which he claimed arose out of separate investigations by the SEC. The SEC responded that the tolling agreements covered claims related to all of the transactions because the SEC's broader investigations into OZCM's dealings in Africa "arose out of" the Libya investigation.

Applying general principles of contract law, the court concluded that the tolling agreements applied only to the SEC claims based on the two transactions at issue in the Libya investigation and not to the transactions targeted in subsequent SEC investigations. The court noted that the tolling agreements lacked "the sort of broad, open-ended language that might have evinced the parties' mutual intent to extend the statute of limitations applicable to any claims the SEC might bring." Instead, by their plain terms, the agreements covered actions "arising out of" the Libya investigation and "not actions arising out of investigations that themselves arose out of the [Libya] investigation." The court concluded that because claims related to the Libya transactions were time-barred despite falling under the tolling agreements, and the claims arising out of subsequent investigations were not covered by the tolling agreements, all of the claims concerning the transactions in the amended complaint were time-barred.

Cohen has important implications for parties entering into tolling agreements with the SEC. First, the case underscores the importance of paying careful attention to the language in tolling agreements to ensure a clear understanding of what is covered. To the extent an agreement is ambiguous or overly broad, a court could construe the agreement to apply to any claims and limit a party's statute-of-limitations defenses, leaving defendants unexpectedly exposed to claims based on old conduct or arising out of other investigations.

Second, the *Cohen* case further shows that SEC enforcement actions may face new hurdles as a result of the *Kokesh* decision. Although *Kokesh* identified SEC disgorgement (and not injunctive relief) as penal for purposes of § 2462, *Cohen* has increased the likelihood that other courts may find that SEC claims seeking disgorgement, penalties and injunctions are time-barred even when tolling agreements have been signed.

English High Court Opinion Provides Guidance, but not Complete Clarity, on UK Legal Privilege Law Protection of Internal Investigation Materials

...Bilta held that the privilege applies to documents created as part of an internal investigation, as long as the documents were created for the dominant purpose of conducting litigation.

A UK High Court decision in *Bilta v. RBS* addressed the scope of litigation privilege protection over internal investigation materials, a particularly important topic to companies and their legal counsel since a High Court opinion in 2017 appeared to significantly narrow such protection. The court in *Bilta* held that the privilege applies to documents created as part of an internal investigation, as long as the documents were created for the dominant purpose of conducting litigation. Though the reasoning in *Bilta* is very fact-specific, and thus does not offer complete clarity on the issue, it does offer some guidance on protecting the legal privilege for companies under investigation by foreign regulators.

Critically, though, *Bilta* also serves as another important reminder that the legal privilege in various jurisdictions has its limitations. The legal privilege dispute in *Bilta* arose in connection with a tax fraud investigation by the UK government involving the failure of Bilta (UK Ltd.) and other companies (collectively, Bilta) to pay value-added tax to Her Majesty's Revenue and Customs (HMRC) in connection with executing certain financial transactions. In early February 2010, HMRC informed the Royal Bank of Scotland (RBS) of its interest in investigating some 2009 transactions for possible fraudulent activity. On March 29, 2012, HMRC wrote a letter to RBS informing RBS that HMRC had sufficient grounds to deny RBS's request for 90 million pounds of input tax from HMRC "on the basis that [RBS] knew or should have known that their transactions were connected to fraud." Shortly after receiving HMRC's letter, RBS hired external lawyers to conduct an internal investigation into the 2009 transactions. The investigation concluded with RBS's production of a report to HMRC.

After learning of a significant potential tax liability owed to HMRC, Bilta sought internal investigation documents from RBS, including witness interview transcripts, created during the RBS investigation. RBS argued that those documents were protected by the litigation privilege, which applies under UK law if three requirements are satisfied: (a) Litigation must be in progress or in contemplation, (b) the applicable document(s) must have been created for the sole or dominant purpose of conducting that litigation and (c) the litigation must be adversarial, not investigative or inquisitorial.

Bilta conceded that the documents were created in contemplation of litigation and that such litigation was adversarial, leaving the sole issue in dispute of whether the documents were created for the sole or dominant purpose of conducting litigation.

The English High Court accepted RBS's argument that the documents created as part of its internal investigation were created for the dominant purpose of conducting litigation and, thus, were covered by the litigation privilege. In determining the dominant purpose of the documents, the court stated that it must take a "realistic, indeed commercial, view of the facts." In particular, the court said that RBS's receipt of HMRC's March 2012 letter was a "watershed moment" that was "similar in nature…to a letter before claim" in an ordinary commercial litigation and that RBS's report provided to HMRC was similar to a response to a claim letter in ordinary litigation. The court further found that HMRC's letter served as an indication that it was highly likely that HMRC would issue an adverse assessment against RBS, which could only be contested by litigation, and that RBS's report was "just part of the continuum that formed the road to the litigation."

The *Bilta* decision is important in light of the UK High Court 2017 decision in *SFO v. ENRC*, which, although overturned on appeal, limited a company's ability to assert privilege under UK law in the context of a criminal investigation but not a criminal prosecution. (That case was analyzed in our 2017 Q2 Anti-Corruption Quarterly newsletter.) The court's reasoning in *SFO v. ENRC* centered on the fact that adversarial litigation was not reasonably contemplated because a criminal investigation by the UK Serious Fraud Office (SFO) (as opposed to a criminal prosecution) was not adversarial litigation. The court also reasoned that even if adversarial litigation had been reasonably contemplated, the documents at issue in *SFO v. ENRC* were not created for the dominant purpose of being used in such litigation.

...Bilta offers some guidance for companies regarding whether internal investigation materials will be protected by the privilege.

Despite the court's fact-specific reasoning, *Bilta* offers some guidance for companies regarding whether internal investigation materials will be protected by the privilege. In particular, before creating documents as part of an investigation, companies and their legal counsel should specifically analyze whether the documents would be for the dominant purpose of litigation. In considering this question, the specific facts of the investigation will be crucial. If a company concludes that a document may not be considered privileged at a later time, the company and its legal counsel should consider, on balance, if it is worth preparing a potentially discoverable document. *Bilta* is also another important reminder that companies under investigation by foreign regulators must keep in mind that the legal privilege in various jurisdictions has limitations. Accordingly, it is important for companies to work with their lawyers from the onset of any investigation to fully understand the types of documents and information that may not be protected by the privilege and to develop strong arguments for establishing privilege over otherwise appropriate materials.

IN THE INTERIM

10/11/2018: Brian Benczkowski, the Assistant Attorney General for the Criminal Division of the DOJ, issued a new memorandum providing guidance to prosecutors on the imposition of compliance monitors in corporate resolutions. The memorandum extends the guidance from a 2009 DOJ memorandum, which only addressed monitor selection for non-prosecution agreements and deferred prosecution agreements, to plea agreements. It also outlines the factors that prosecutors must consider before imposing a monitorship, including the cost of the monitorship, whether the scope of the monitorship can be narrowed to "avoid unnecessary burdens" to the corporation's operations, the pervasiveness and nature of the misconduct, and the corporation's subsequent development of a new compliance program.

https://www.justice.gov/opa/speech/file/1100531/download

10/26/2018: Walmart proposed a $160 million settlement in Arkansas federal court to end litigation with its shareholders, who claimed that the company acted fraudulently in a bribery scandal. Walmart is under investigation by the DOJ and the SEC for alleged FCPA violations in Mexico, India, Brazil and China. In November 2017, Walmart set aside $283 million for potential settlements with the DOJ and the SEC. Walmart stated that the shareholder settlement was not an admission of fault for any of the conduct under investigation.

10/31/2018: Abraham Edgardo Ortega, the former executive director of financial planning at PDVSA, Venezuela's state-owned oil company, pleaded guilty in U.S. federal court to one count of conspiracy to commit money laundering. Ortega participated in a scheme that embezzled $1.2 billion from PDVSA. As part of his plea agreement, Ortega admitted to taking $5 million in bribes to give priority loan status to a French company and a Russian bank that were minority shareholders in joint ventures with PDVSA. Ortega laundered the bribe payments through a "sophisticated false-investment scheme that received money from a payment made to look like an investment into a fund, but, in fact, the payment was actually laundered out of the fund."

https://www.justice.gov/opa/pr/former-executive-director-venezuelan-state-owned-oil-company-petroleos-de-venezuela-sa-pleads

11/19/2018: Vantage Drilling International, a Houston-based oil and gas company, agreed to disgorge $5 million to resolve an SEC investigation into the company's compliance failures. According to the SEC's internal administrative order, Vantage "failed to devise a system of internal accounting controls." Because of these compliance failures, the company provided funds to a company director who bribed officials at Brazil's state-owned energy company, Petróleo Brasileiro (a.k.a. Petrobras). An unnamed director paid $31 million in bribes to win a $1.8 billion drilling service contract for Vantage in 2009.

https://www.sec.gov/litigation/admin/2018/34-84617.pdf

11/19/2018: Raúl Gorrín, the owner of the Venezuelan Globovisión network, was charged with 11 counts of violating the FCPA and money laundering. According to the DOJ's unsealed indictment, Gorrín paid approximately $160 million in bribes to two Venezuela National Treasury officials in return for their assistance in embezzling state funds and avoiding currency controls. Gorrín then laundered the embezzled money through U.S. banks and real estate. According to a plea agreement with another individual that was unsealed in November 2018, one of the treasury officials Gorrín bribed—Alejandro Andrade—pleaded guilty in December 2017 to the money laundering conspiracy, forfeiting $1 billion in personal assets, and was sentenced on November 27, 2018 to 10 years in prison.

Raúl Gorrín: https://www.justice.gov/opa/press-release/file/1112816/download?utm_medium=email&utm_source=govdelivery

Alejandro Andrade: https://www.justice.gov/opa/pr/former-venezuelan-national-treasurer-sentenced-10-years-prison-money-laundering-conspiracy

11/20/2018: Mobile TeleSystems PJSC, Russia's biggest mobile phone company, announced that it is reserving approximately $840 million to resolve FCPA investigations by the DOJ and the SEC, which are investigating the company in connection with corrupt payments that may have occurred through the company's former operations in Uzbekistan.

11/27/2018: The UK SFO announced that two former senior executives of the Germany-based FH Bertling Group pleaded guilty for their roles in a bribery scheme to obtain a freight forwarding contract from ConocoPhillips. According to the SFO press release, FH Bertling executives paid approximately $445,000 in bribes to obtain the contract and to ensure that FH Bertling's "inflated prices" were "waved through by ConocoPhillips staff." The SFO has charged 13 individuals in the FH Bertling corruption case and has obtained convictions or guilty pleas for nine individuals.

https://www.sfo.gov.uk/2018/11/27/9-convicted-in-16m-and-21m-fh-bertling-bribery-cases/

12/3/2018: CHS Inc., a Minnesota-based agricultural company, stated in a 10-K filing that it has voluntarily disclosed potential FCPA violations to the DOJ and the SEC. According to CHS's SEC filing, the company made a "small number of reimbursements" to Mexican customs officials from 2014 to 2015 in connection to Mexico's inspection of grain crossing the U.S.-Mexican border. CHS stated it is "cooperating fully" with the government.

https://www.chsinc.com/~/media/chs%20inc/files/financials/2018/chscp%2010k%2083118%20final%20as%20filed.ashx?la=en

12/5/2018: Chi Ping Patrick Ho, Hong Kong's former secretary of home affairs, was convicted in New York federal court of eight counts of violating the FCPA, money laundering and conspiracy. While a Hong Kong Cabinet member from 2002 to 2007, Ho allegedly offered bribes to the president of Chad and the foreign minister of Uganda to secure business advantages for CEFC China Energy. Ho's conviction is significant as it was for conduct that largely occurred outside the United States and despite Ho's limited ties to the country. Ho's sentencing is scheduled for March 14.

https://www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-convicted

12/10/2018: Alfonso Eliezer Gravina, a former Houston-based procurement officer for Venezuela's state-owned energy company PDVSA, pleaded guilty in federal court to one count of conspiracy to obstruct an official proceeding. Gravina had agreed as part of a 2015 plea deal to cooperate with the DOJ and provide information about corruption at the PDVSA. But, in early 2018, Gravina concealed information regarding an unnamed co-conspirator's bribes to PDVSA officials. Gravina also provided information about the DOJ's investigation to the unnamed co-conspirator. Gravina's sentencing is scheduled for February 19.

https://www.justice.gov/opa/pr/texas-businessman-pleads-guilty-conspiracy-obstruct-justice-connection-venezuela-bribery

12/14/2018: Colin Steven, a former sales executive for Brazil-based aircraft manufacturer Embraer SA, was sentenced to time served and fined $25,000 for charges connected with bribe payments to an official in Saudi Arabia. According to the DOJ, Steven paid approximately $1.5 million in bribes to a Saudi official in exchange for the official guaranteeing that Embraer would win a $93 million contract in 2010 for a new aircraft with Saudi Arabia's national oil company. Steven received a $130,000 kickback from the bribe. Steven pleaded guilty to several counts of violating the FCPA, money laundering and wire fraud in New York federal court in December 2017.

https://www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges

12/18/2018: The SEC settled FCPA books and records and internal controls charges against two former senior executives for U.S.-based Panasonic Avionics Corporation. According to the SEC's administrative orders, beginning in 2007, Paul A. Margis, the former chief executive for Panasonic Avionics, offered "a lucrative consulting position" to a state official in exchange for his help negotiating contracts with state-owned airlines. Margis knowingly falsified the company's books and circumvented the company's internal controls to provide hundreds of thousands of dollars in payments to this "consultant." In 2012, Takeshi "Tyrone" Uonaga, the corporation's former chief financial officer, allegedly falsely certified that the corporation's financial statements met prevailing audit standards despite knowing that the corporation had impermissibly backdated a contract to recognize an extra $82 million in revenue for that quarter. Without admitting to any wrongdoing, Margis paid a $75,000 penalty to resolve the charges, while Uonago paid a $50,000 penalty and was barred for five years from practicing before the SEC as an accountant. Earlier this year, Panasonic Avionics and its Japan-based parent corporation, Panasonic Corporation, paid $280 million to resolve related FCPA charges with the SEC.

Paul A. Margis: https://www.sec.gov/litigation/admin/2018/34-84849.pdf

Takeshi "Tyrone" Uonaga: https://www.sec.gov/litigation/admin/2018/34-84850.pdf

12/26/2018: Centrais Elétricas Brasileiras S.A. (Electrobras), Brazil's state-owned electric utilities company, agreed to pay the SEC a $2.5 million penalty to resolve alleged violations of the SEC's books and records and the internal accounting controls provisions. According to the SEC's administrative order, from 2009 to 2015, officials at Electrobras participated in a bid-rigging and bribery scheme for the construction of a nuclear power plant. Officials also inflated costs associated with the plant construction and authorized payments for unnecessary contractors. Electrobras paid invoices for these contracts because, the SEC alleged, Electrobras "had failed to devise and maintain a sufficient system of internal accounting controls." In August 2018, the DOJ declined to prosecute Electrobras for violations of the FCPA.

https://www.sec.gov/litigation/admin/2018/34-84973.pdf

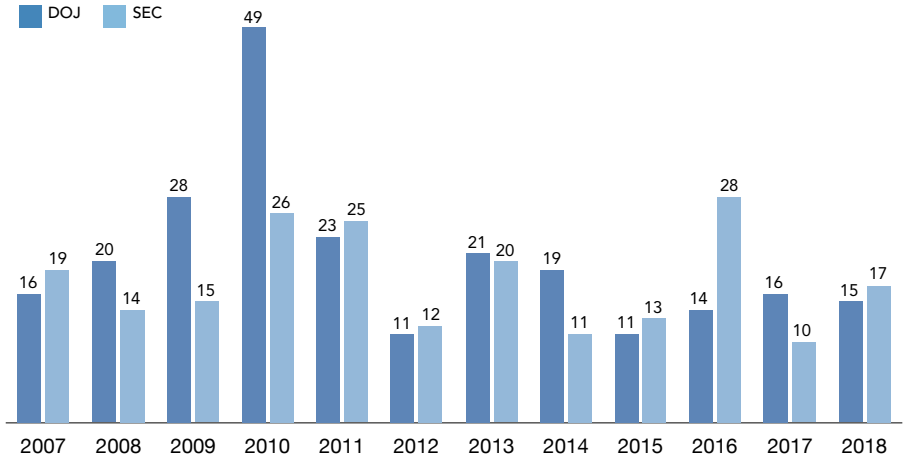
12/26/2018: The DOJ and the SEC reached a resolution with the California-based communications technology company Polycom, Inc. to settle allegations that the company violated FCPA books and records and internal accounting controls provisions. According to the SEC, from 2006 through 2014, Polycom's Chinese subsidiary provided "significant discounts" to the company's distributors so the distributors could make illicit payments to government officials in exchange for ordering Polycom products. Employees at the subsidiary hid these discounts using "a parallel deal-tracking and email system" that was "outside of Polycom's company-approved systems." The SEC alleged that Polycom "failed to devise and maintain a sufficient system of internal accounting controls and lacked an effective anti-corruption compliance program with regard to its Chinese sales operations." Citing Polycom's voluntary self-disclosure, thorough investigation, full cooperation and remediation, the DOJ announced a declination of prosecution in its investigation with Polycom, agreeing to disgorge $10.67 million plus prejudgment interest of $1.8 million to the SEC, $10.15 million to the U.S. Treasury Department and $10.15 million to the U.S. Postal Inspection Service Consumer Fraud Fund.

SEC settlement: https://www.sec.gov/litigation/admin/2018/34-84978.pdf

DOJ declination: https://www.justice.gov/criminal-fraud/file/1122966/download

FCPA GOVERNMENT INVESTIGATIONS AND CORPORATE SETTLEMENTS

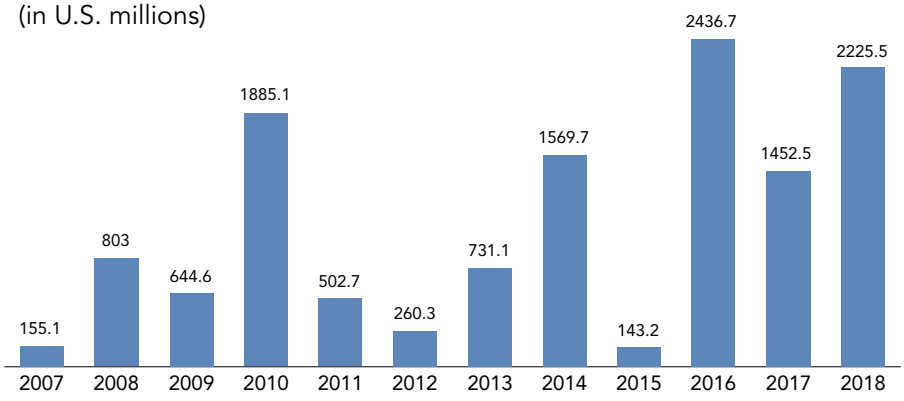
FCPA-Related Cases*



* New criminal or civil cases (settled or contested) instituted by year

Corporate FCPA-Related Penalties*

(in U.S. millions)



* Includes disgorgement; does not include non-U.S. fines

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