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FCPA Update

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In this issue:

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The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement

For those who predicted the demise of the FCPA under the Trump Administration, 2019 again proved them wrong. This year included record-breaking corporate resolutions and significant activity against individuals, including four criminal convictions at trial. U.S. monetary sanctions reached an all-time high of $2.65 billion, including the two largest corporate resolutions in FCPA history. Also, DOJ and the SEC reported receiving assistance from enforcement counterparts in more than 24 jurisdictions around the world.

Elsewhere, the level of anti-corruption enforcement activity was more mixed. The United Kingdom seemingly was preoccupied by the politics of Brexit, and some jurisdictions in Asia and Latin America assumed less aggressive postures than recently, though China continued its domestic anti-corruption campaign. At the same time, various countries continued developing and refining their anti-corruption regimes.

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The UK Serious Fraud Office issued important guidance for cooperation in corporate investigations, France released guidelines regarding its unique form for deferred prosecution agreements, and Germany considered adopting corporate criminal liability.

In this first issue of 2020, we survey the past year's most significant anti-corruption developments in the United States, the United Kingdom, France, Germany, Asia, and Latin America.

United States

In 2019, U.S. authorities announced the resolution of 14 corporate enforcement actions that accounted for the largest total recovery by U.S. authorities under the FCPA in a single year. Before taking a closer look at the more noteworthy corporate and individual resolutions, case law, and policy announcements, below are a few highlights from this past year:

- Ericsson's $1.06 billion resolution with U.S. authorities in December became the largest-ever FCPA settlement, surpassing the $850 million record set eight months earlier by fellow foreign telecom company MTS. In total, five corporate settlements announced in 2019 each exceeded $200 million in penalties.
- DOJ secured four trial convictions in 2019, the highest in any given year, and also notched an appellate win regarding a narrow definition of bribery confined to "official acts." The Second Circuit Court of Appeals held that the Supreme Court's "official act" requirement in *McDonnell* does not apply to the FCPA. DOJ also had a high-profile loss at trial, when Jean Boustani, the Lebanese shipbuilding salesman allegedly involved in the Mozambique "Tuna Bonds" scandal, was acquitted in December.
- FCPA enforcement fell disproportionately on foreign companies: only five of the 14 companies charged this year were based in the United States. Foreign companies also paid the vast majority of the fines, driven primarily by the record-setting Ericsson and MTS settlements, which together accounted for $1.91 billion of the total $2.65 billion (nearly 72%).
- Interestingly, despite DOJ's perennial attempts to increase self-reporting (see page 30, *infra*), only three companies received credit for self-reporting. Two of these companies obtained declinations from DOJ pursuant to its FCPA Corporate Enforcement Policy ("Enforcement Policy"),[1] though the SEC still brought charges and required disgorgement.

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1. *See* U.S. Dep't of Justice, Criminal Division, 9-47.120–FCPA Corporate Enforcement Policy (updated Nov. 2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977 [hereinafter "Enforcement Policy"].

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- DOJ issued updated guidance to assist prosecutors with evaluating corporate compliance programs and companies' inability-to-pay claims and announced several updates to its Enforcement Policy, including clarifying expectations concerning voluntary self-disclosure, the use of ephemeral messaging applications, and de-confliction.

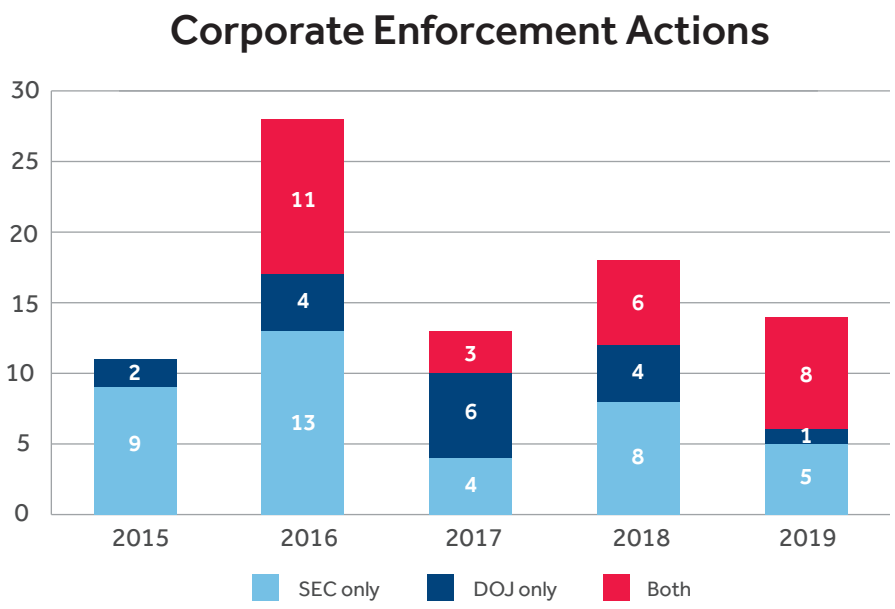
I. Corporate Enforcement Trends

A. Enforcement Actions

Led by Ericsson's $1.06 billion settlement and Russian telecom company MTS's $850 million resolution, five corporate FCPA resolutions each resulted in more than $200 million in penalties, as noted above. Like in prior years, large-dollar resolutions were supplemented by a number of smaller cases, including declinations by DOJ pursuant to its Enforcement Policy.

"In 2019, U.S. authorities announced the resolution of 14 corporate enforcement actions that accounted for the largest total recovery by U.S. authorities under the FCPA in a single year."

As this chart shows, more than half of the corporate resolutions involved settlements with both DOJ and the SEC:



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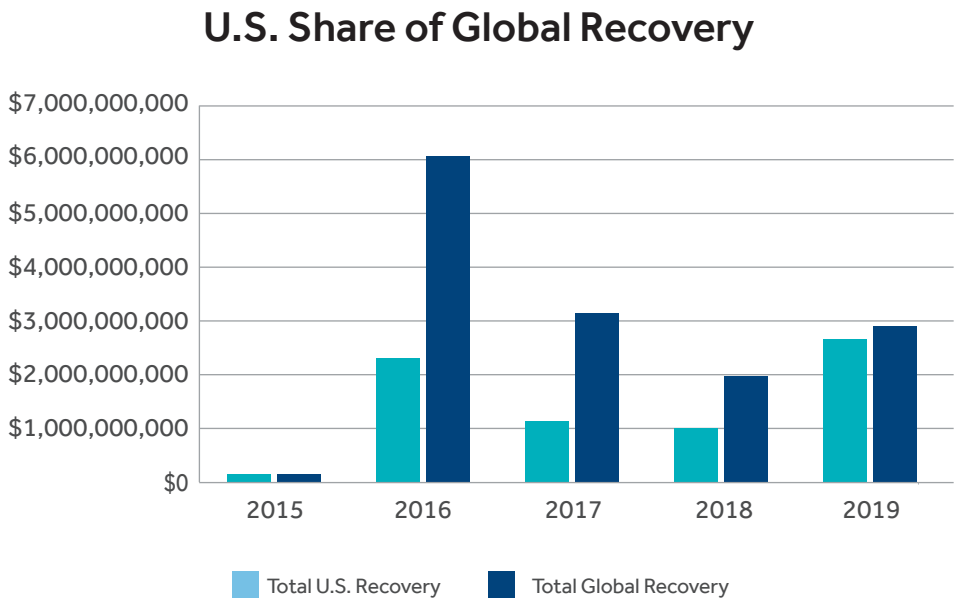
Of the 14 corporate resolutions, eight were joint settlements with the SEC and DOJ, five were with the SEC alone, and one (a foreign non-issuer charged in a relatively rare invocation of solely dd-3 jurisdiction) was with DOJ alone. Four corporate resolutions imposed independent compliance monitors: Ericsson, Fresenius, MTS, and Walmart. Each case is discussed in more detail below.

Unlike in prior years, only two U.S. settlements last year involved coordinated resolutions with non-U.S. authorities: TechnipFMC and Samsung Heavy Industries, both relatively small and both with Brazil. Consequently, most of the year's FCPA settlement proceeds went to the U.S. Treasury, in contrast to several prior years where credits from payments to non-U.S. authorities and other recipients constituted the majority of FCPA penalties imposed by U.S. enforcement agencies.

As reflected in the chart below, the United States imposed over $2.65 billion in disgorgement and penalties from corporate resolutions, the largest sum in a single year by U.S. authorities in the history of the FCPA:



- The corporate actions spanned multiple industries, including telecom (MTS, Telefônica, Ericsson), technology services (Cognizant, Microsoft, Juniper Networks), financial services (Deutsche Bank, Barclays), consumer products (Walmart, Westport Fuels Systems), medical devices (Fresenius), marketing (Quad/Graphics), engineering (Samsung Heavy Industries), and oil and gas (TechnipFMC).

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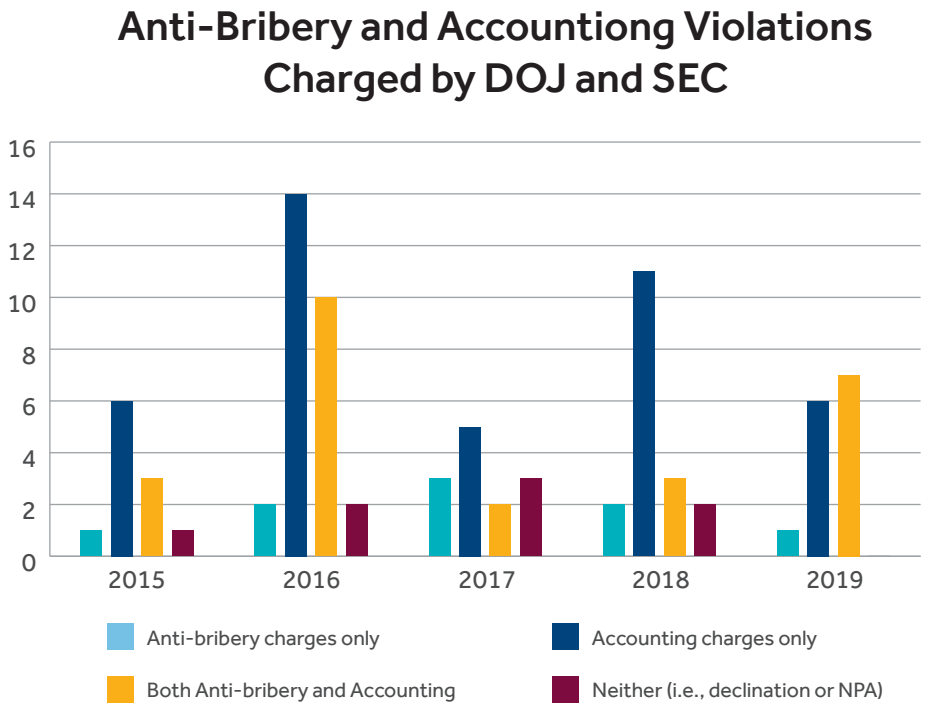
- Of the 14 total corporate resolutions, one involved only anti-bribery charges, six involved only the accounting provisions, and seven involved either conspiracy or substantive violations of both the FCPA's anti-bribery and accounting provisions. This marks a significant increase in the proportion of corporate actions charging anti-bribery violations:



The key corporate enforcement developments in 2019 include:

- *Largest settlement in an FCPA case.* In December 2019, **Telefonaktiebolaget LM Ericsson**, a Swedish multinational telecom company, agreed to pay more than $1.06 billion to settle DOJ and SEC charges that it violated the FCPA's anti-bribery and accounting provisions, resulting from the use of sham contracts and off-book funds in connection with business with state-owned telecom companies in China, Djibouti, Indonesia, Kuwait, Saudi Arabia, and Vietnam.[2]

  Ericsson entered into a DPA with DOJ and agreed to pay a $540 million penalty (a 15% discount off the low end of the Sentencing Guidelines range) and to retain an independent compliance monitor for the DPA's three-year term.[3]

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2. *See* Kara Brockmeyer, Andrew M. Levine, & Suzanne Zakaria, "U.S. Authorities Reach Record-Breaking Settlement with Swedish Telecom Company," FCPA Update, Vol. 11, No. 5 (Dec. 2019), https://www.debevoise.com/insights/publications/2019/12/fcpa-update-december-2019. This is also the second-largest global anti-corruption settlement after Petrobras's $1.78 billion settlement in 2018.
3. Deferred Prosecution Agreement ¶ 4(j), *United States v. Telefonaktiebolaget LM Ericsson* (Nov. 26, 2019), https://www.justice.gov/usao-sdny/press-release/file/1224261/download.

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Ericsson's Egyptian subsidiary pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions.[4] Ericsson settled the SEC's complaint by agreeing to pay approximately $540 million in disgorgement and pre-judgment interest and to consent to an injunction from further FCPA violations.[5] While Swedish enforcement authorities were publicly thanked for significant cooperation in DOJ's investigation, there was no coordinated resolution between U.S. and Swedish authorities. However, Swedish authorities reportedly opened an investigation into the company after the U.S. settlements were announced.[6]

- *Third Karimova-related case brings total penalties globally to $2.6 billion.* Following on settlements with Vimpelcom (2016) and Telia (2017), in March 2019, Russia's largest telecom company, **Mobile TeleSystems PJSC ("MTS")**, agreed to pay $850 million to settle DOJ and SEC charges that it violated the FCPA's anti-bribery and accounting provisions.[7] Similar to the prior actions against Vimpelcom and Telia, U.S. authorities alleged that MTS profited by making approximately $420 million in improper payments through shell companies, charities, and sponsorships between 2004 and 2012 to Gulnara Karimova, the daughter of the late Uzbek president, which allowed it to enter and continue to operate in the Uzbek telecom market. MTS entered into a DPA with DOJ and consented to an SEC cease-and-desist order, agreeing to pay $750 million to DOJ and $100 million to the SEC. The company was also required to retain an independent compliance monitor for three years. With the more than $965 million in monetary sanctions imposed against Telia and another $795 million against Vimpelcom, the global sum assessed in the Karimova-related matters reaches more than $2.6 billion.[8]
- *More M&A liability, more coordination with Brazil, and more recidivists.* UK-based oil and gas company **TechnipFMC plc ("TechnipFMC")** agreed to pay more than $301 million in a coordinated enforcement action between the United States and Brazil to resolve DOJ and SEC charges that it violated the FCPA's anti-bribery and accounting provisions in connection with improper payments made by its corporate predecessor, Technip S.A., through a third-party

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4. *See* Brockmeyer et al., Dec. 2019 FCPA Update, *supra* note 2, at 2.
5. *SEC v. Telefonaktiebolaget LM Ericsson*, Complaint ¶ 34–54, No. 19-CV-11214 (Dec. 6, 2019), https://www.sec.gov/litigation/complaints/2019/comp-pr2019-254.pdf.
6. *See* Simon Johnson, "Sweden Opens Ericsson Bribery Probe After U.S. Settlement: Paper," Reuters (Dec. 12, 2019), https://www.reuters.com/article/ususa-ericsson-sweden/sweden-opens-ericsson-bribery-probe-after-u-s-settlement-paper-idUSKBN1YG248.
7. *See* Andrew M. Levine, Andreas A. Glimenakis & Alma M. Mozetič, "Individual Accountability and the First FCPA Corporate Enforcement Actions of 2019," FCPA Update, Vol. 10, No. 8 (March 2019), https://www.debevoise.com/insights/publications/2019/03/fcpa-update-march-2019 [hereinafter "Levin et al., March 2019 FCPA Update – First FCPA Corporate Enforcement Actions of 2019"].
8. *See* "Telia Company AB Reaches $965 Million Corruption Settlement Arising from Telephone Operations in Uzbekistan," FCPA Update, Vol. 9, No. 2 (Sept. 2017), https://www.debevoise.com/insights/publications/2017/09/copy-of-fcpa-update-september-2017.

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consultant to Brazilian officials to secure Petrobras contracts between 2003 and 2014.[9] The settlement also included charges that another corporate predecessor, FMC, made improper payments to Iraqi officials through Unaoil to secure business with state-owned oil companies between 2008 and 2013. Both schemes occurred independently prior to the merger of Technip S.A. and FMC in 2017. It was also Technip's second FCPA resolution, granting it a place among the small but growing group of FCPA recidivists.[10]

"[Walmart] was charged with violating the FCPA's accounting provisions mainly by failing to institute proper anti-corruption controls despite knowledge (based on its own history) of increased FCPA risks in emerging markets."

As we've previously noted, this case is a relatively rare example of two merger parties bringing historical FCPA liabilities to a new merged entity.[11] It also provides insight into how DOJ will treat FCPA recidivism as an aggravating factor. Despite the fact that TechnipFMC received both cooperation and remediation credit, its 25% discount was taken from near the middle of the Sentencing Guidelines range rather than off the bottom, as is typical.[12]

- *Matching internal controls to high-risk markets*. In June 2019, U.S.-based multinational retailer **Walmart, Inc.** agreed to pay more than $282 million to settle long-running DOJ and SEC investigations.[13] The company was charged with violating the FCPA's accounting provisions mainly by failing to institute proper anti-corruption controls despite knowledge (based on its own history) of increased FCPA risks in emerging markets.

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9. *See* Kara Brockmeyer, David A. O'Neil, Philip Rohlik, & Jil Simon, "Skeletons in the Closet: TechnipFMC Settles FCPA Allegations Involving Both of its Predecessor Companies," FCPA Update, Vol. 10 No. 12 (July 2019), https://www.debevoise.com/insights/publications/2019/07/fcpa-update-july-2019. TechnipFMC entered into a DPA with DOJ and agreed to pay a penalty of approximately $296 million, more than $214 million of which was paid to Brazilian authorities. That split, with 73% of the total penalty being credited to Brazil, is similar to other Petrobras-related cases with Brazilian companies – Petrobras (80%), Odebrecht (91%), and Braskem (70%).
10. Technip had a 2010 FCPA DPA and paid $240 million in penalties over bribes paid in Nigeria. *See* Paul R. Berger & Aaron Tidman, "Technip S.A. and Snamprogetti Settlements Highlight the Importance of Due Diligence When Selecting Joint Venture Partners," FCPA Update, Vol. 1, No. 12 (July 2010), https://www.debevoise.com/insights/publications/2010/07/fcpa-update.
11. *See, e.g.*, Bruce E. Yannett, Andrew M. Levine, Philip Rohlik, & Maxwell K. Weiss, "Corporate Recidivism in the FCPA Context," FCPA Update, Vol. 8, No. 9 (April 2017), https://www.debevoise.com/insights/publications/2017/04/fcpa-update-_-april-2017.
12. Deferred Prosecution Agreement ¶ 4k., *United States v. TechnipFMC*, No. 19-CR-278 (E.D.N.Y. June 25,2019), https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve.
13. *See* Andrew M. Levine, Philip Rohlik, & Jil Simon, "Walmart and U.S. Authorities Reach Long-Awaited FCPA Settlements," FCPA Update, Vol. 10, No. 11 (June 2019), https://www.debevoise.com/insights/publications/2019/06/fcpa-update-june-2019.

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- *Self-reporting sprawling activity: second largest life sciences resolution.* In March 2019, German medical device and services provider **Fresenius Medical Care AG & Co KGaA ("Fresenius")** agreed to pay more than $231 million – the second-largest FCPA settlement brought in the life sciences area – to settle DOJ and SEC charges that the company and its subsidiaries made almost $30 million in improper payments to government officials and public healthcare professionals between 2007 and 2016.[14] The payments were made in at least 17 countries (eight West African countries along with Angola, Bosnia, China, Mexico, Morocco, Saudi Arabia, Serbia, Spain, and Turkey), and were made in cash and through gifts, travel, charitable donations, and JV shares through a variety of schemes.

DOJ and the SEC also reached settlements with a number of other companies, several aspects of which are noteworthy:

- *More hiring practices cases.* Deutsche Bank and Barclays became the fourth and fifth investment banks to settle hiring practices cases. In August, Germany-based multinational financial services company **Deutsche Bank AG** agreed to pay more than $16 million to resolve SEC charges.[15] Those included that between 2006 and 2014 the bank violated the FCPA's accounting provisions by hiring relatives of government officials in China and Russia at their request – including through its China-based JV to evade internal controls – to improperly influence them to assist the bank in obtaining or retaining investment banking business. One month later, in September, UK-based multinational financial services company **Barclays PLC** agreed to pay more that $6.3 million to resolve SEC charges that it violated the FCPA's accounting provisions by hiring relatives and friends of government officials and private clients in China, South Korea, and APAC generally to secure investment banking business.[16] DOJ declined to prosecute both companies, likely due to the smaller size of the cases. It is also worth noting that unlike the three prior cases (Bank of New York Mellon in

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14. *See* Jane Shvets, Philip Rohlik, Jil Simon, Andreas A. Glimenakis, & Katherine L. Nelson, "Fresenius Settlement Demonstrates Continued Regulatory Interest in Life Sciences Industry," FCPA Update, Vol. 10, No. 9 (April 2019), https://www.debevoise.com/insights/publications/2019/04/fcpa-update-april-2019.
15. Order, *In re Deutsche Bank AG*, Securities Exchange Act Release No. 86740 (Aug. 22, 2019), https://www.sec.gov/litigation/admin/2019/34-86740.pdf.
16. Order, *In re Barclays PLC*, Securities Exchange Act Release No. 87132 (Sept. 27, 2019), https://www.sec.gov/litigation/admin/2019/34-87132.pdf.

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2015,[17] JPMorgan in 2016,[18] and Credit Suisse in 2017[19]), neither Deutsche Bank nor Barclays was charged with violating the FCPA's anti-bribery provisions.

- *High risks in the technology sector*. In July, **Microsoft Corporation** agreed to pay more than $25 million to settle SEC and DOJ charges that it violated the FCPA's books and records and internal controls provisions when its subsidiaries used off-book funds to make improper payments and provide gifts and travel to officials in Hungary, Saudi Arabia, Thailand, and Turkey between 2012 and 2015.[20] According to the settlements, the subsidiaries generated the slush funds by issuing discounts to third-party channel partners that were not passed on to end customers.

  In August, California-based networking and cybersecurity company **Juniper Networks** agreed to pay more than $11.7 million to settle SEC charges.[21] Those included that it violated the FCPA's accounting provisions when sales employees of its Russian subsidiary used third-party channel partners to create off-books accounts to fund trips lacking legitimate business justifications for government customers, and marketing employees at its Shanghai and Hong Kong subsidiaries falsified trip and meeting agendas for customer events (including for foreign officials) to understate the amount of entertainment provided. Legal department staff regularly made after-the-fact approvals for events despite company policy requiring pre-approval.

  These resolutions highlight the need for companies to police carefully discounts when third parties are involved. Additionally, the alleged conduct in Thailand in Microsoft's case was commercial bribery, which provides an important reminder to issuers that the FCPA's accounting provisions also can apply to private sector bribery.[22]

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17. *See* Sean Hecker, Bruce E. Yannett, Philip Rohlik, & David Sarratt, "The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials," FCPA Update, Vol. 7, No. 1 (Aug. 2015), https://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015.
18. *See* Bruce E. Yannett, Andrew M. Levine, & Philip Rohlik, "Beyond 'Sons and Daughters': JPMorgan Resolves Hiring Practices Probe," FCPA Update, Vol. 8, No. 4 (Nov. 2016), https://www.debevoise.com/insights/publications/2016/11/fcpa-update-november-2016.
19. *See* Andrew M. Levine, Jane Shvets, Colby A. Smith, Philip Rohlik, & Olivia Cheng, "FCPA Settlements Reached with Beam Suntory and Credit Suisse," FCPA Update, Vol. 9, No. 12 (July 2018), https://www.debevoise.com/insights/publications/2018/07/fcpa-update-july-2018.
20. *See* Kara Brockmeyer, Andrew M. Levine, Philip Rohlik, & Jil Simon, "Recent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability," FCPA Update, Vol. 11, No. 2 (Sept. 2019), https://www.debevoise.com/insights/publications/2019/09/fcpa-update-september-2019 [hereinafter "Brockmeyer et al., Sept. 2019 FCPA Update"].
21. *Id.* at 4-7.
22. *Id.*

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- *Telefônica highlights corporate hospitality but brings little clarity.* In May, Brazilian telecom company **Telefônica Brasil S.A. ("Telefônica")** agreed to pay a $4.125 million penalty to settle SEC cease-and-desist proceedings charging violations of the FCPA's books and records and internal controls provisions related to the company's giving of tickets and corporate hospitality to nearly 130 government officials leading up to the 2014 World Cup and 2013 Confederations Cup.[23] The SEC alleged that payments for the tickets given to government officials with influence over legislative actions and regulatory approvals related to Telefônica's business interests were not accurately reflected in the company's books and records, and that the company's anti-corruption policy was inadequately enforced.

"Microsoft's case . . . provides an important reminder to issuers that the FCPA's accounting provisions also can apply to private sector bribery."

While relationship-building is under most facts a legitimate business interest, the SEC has made clear its suspicions of corporate hospitality offered to government officials at marquis sporting and other entertainment events. Such hospitality should be undertaken with caution, including with appropriate pre-approval thresholds, procedures to identify government official invitees, and restrictions regarding a guest's guests.[24]

- *More Coordination with Brazil.* In November, South Korea-based engineering company **Samsung Heavy Industries Company Limited ("Samsung Heavy Industries")** agreed to pay more than $75 million (half to Brazilian authorities if payment is made by November 2020) as part of another coordinated enforcement action involving the United States and Brazil to resolve DOJ charges of conspiracy to violate the FCPA's anti-bribery provisions.[25] Samsung Heavy Industries admitted that, from 2007 until 2013, the company paid approximately $20 million

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23. *See* Kara Brockmeyer, Andrew M. Levine, Jonathan R. Tuttle, Philip Rohlik, & Jil Simon, "Corporate Hospitality Loses When the SEC is the Referee: Telefônica Agrees to $4M Penalty Involving Hospitality at Marquee Soccer Events," FCPA Update Vol. 10, No. 10 (May 2019), https://www.debevoise.com/insights/publications/2019/05/fcpa-update-may-2019.

24. *Id.* at 8-9

25. Deferred Prosecution Agreement, *United States v. Samsung Heavy Industries Co. Ltd.*, No. 19-CR-00328-TSE (E.D. Va. Nov. 22, 2019), https://www.justice.gov/opa/press-release/file/1219891/download; *see also* DOJ Press Release No. 19-1301, *Samsung Heavy Industries Company Ltd Agrees to Pay $75 Million in Global Penalties to Resolve Foreign Bribery Case* (Nov. 22, 2019), https://www.justice.gov/opa/pr/samsung-heavy-industries-company-ltd-agrees-pay-75-million-global-penalties-resolve-foreign [hereinafter "DOJ Samsung Heavy Industries Press Release"].

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in improper commission payments through an intermediary to officials at state-owned Petrobras in order to obtain a shipbuilding contract.[26] The action was interestingly brought against the foreign non-issuer under 15 U.S.C. § 78dd-3 – the jurisdictional provision that captures acts taken in the territory of the United States – alleging that the company took actions in furtherance of the bribery conspiracy from its Houston branch office.[27]

DOJ also issued two declination letters pursuant to its Corporate Enforcement Policy in 2019, both issued despite the involvement of senior managers:

- In September, Wisconsin-based digital and print marketing provider **Quad/Graphics, Inc.** agreed to pay more than $9.8 million and accept a one-year reporting obligation to settle SEC charges that it violated the FCPA's anti-bribery and accounting provisions in connection with its operations in China, Cuba, and Peru.[28] The company's China-based subsidiary was alleged to have made improper payments to employees of private and government customers through commissions to sham sales agents to induce the purchase of its printing systems, and its Peruvian subsidiary was alleged to have made improper payments to secure printing contracts with government customers. The Peruvian subsidiary was also alleged to have attempted to bribe judges to influence the judicial outcome of a Peruvian tax dispute and to have created false records to conceal its transactions with a U.S. sanctioned, state-controlled Cuban telecom company. Despite the alleged awareness and involvement of senior managers at Quad's Peruvian subsidiary, DOJ issued a declination letter pursuant to its Corporate Enforcement Policy, noting the company's voluntary self-disclosure, full cooperation, and remediation.[29] DOJ's declination did not include any disgorgement, as the company disgorged the full amount of its ill-gotten gains (from 2010 to 2016) to the SEC, waiving statute of limitations arguments under *U.S. v. Kokesh* in doing so.[30] There have not been any publicly-announced related actions against individuals.

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26. DOJ Samsung Heavy Industries Press Release.
27. *Id.*
28. Order, *In re Quad/Graphics, Inc.*, Securities Exchange Act Rel. No. 87128 (Sept. 26, 2019), https://www.sec.gov/litigation/admin/2019/34-87128.pdf ["Quad/Graphics Order"].
29. Declination Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to David W. Simon, et al, Re: *Quad/Graphics Inc.*, Declination (Sept. 19, 2019), https://www.justice.gov/criminal-fraud/file/1205341/download.
30. Quad/Graphics Order at 16 ("Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.").

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- In February, New Jersey-based technology services company **Cognizant Technology Solutions Corporation ("Cognizant")** agreed to pay more than $28 million to settle SEC charges and a DOJ investigation into alleged violations of the FCPA's anti-bribery and accounting provisions in connection with securing construction permits and licenses in India.[31] Senior managers allegedly authorized more than $2 million in bribes in 2014 and 2015 to Indian government officials to secure statutorily required planning permits and licenses to develop and operate company facilities, agreeing to reimburse the contractor for the bribe payment. DOJ issued a declination letter pursuant to its Corporate Enforcement Policy. Despite the involvement of multiple senior managers in directing the criminal conduct, the company received a declination due to the company's timely voluntary disclosure, full and proactive cooperation, settlement with the SEC, agreement to disgorge the full amount of its cost savings, and assistance in identifying culpable individuals within the company.[32] In addition to the more than $25 million paid to the SEC (roughly $19 million in disgorgement and prejudgment interest plus a $6 million penalty), DOJ imposed disgorgement of an additional nearly $3 million that was not recovered by the SEC. It is unclear whether the $3 million in additional disgorgement resulted from a difference between the profit calculations by DOJ and the SEC, or corresponds to amounts not paid to the SEC due to statute of limitations defenses. Relatedly, Cognizant's former president and former Chief Legal Officer were criminally charged and made defendants in SEC civil actions in 2019.[33] The company's former Chief Operating Officer agreed to the entry of a cease-and-desist order by the SEC, paying a $50,000 penalty.[34]

B. Heat Mapping by Geography

China-based cases were again on top in 2019, with eight corporate actions arising in whole or in part from the actions of subsidiaries operating therein. While China (8) and Brazil (4) figure most prominently, the rest of the world was also well-represented in FCPA enforcement in 2019:

- *Asia & Asia-Pacific*. Ten of the 13 corporate actions involved misconduct, either in whole or in part, in Asia, including China (Fresenius, Walmart, Deutsche Bank, Juniper Networks, Quad/Graphics, Westport Fuels, Barclays, and Ericsson), India (Cognizant and Walmart), Indonesia (Ericsson), South Korea (Barclays),

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31. *See* Levine et al., March 2019 FCPA Update – First FCPA Corporate Enforcement Actions of 2019, *supra* note 7, at 2.
32. *Id*. at 2-4.
33. *Id*. at 2.
34. *See* Brockmeyer et al., Sept. 2019 FCPA Update, *supra* note 20, at 8.

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Thailand (Microsoft), and Vietnam (Ericsson). Furthermore, several individual actions in the APAC region involved charges against former executives at Herbalife's Chinese subsidiary for improper payments to avoid regulatory scrutiny[35] and a scheme involving improper payments by Westport Fuel Systems to Chinese officials through transfers of JV shares to a private equity fund.[36] Lastly, in a rare matter involving Oceania, a handful of individual actions targeted corrupt payments to secure engineering and project management contracts from the government of Micronesia.[37]

- *Latin America*. Another continued source of a significant number of FCPA cases, six of the 13 corporate actions involved misconduct occurring in whole or in part in Latin America, including in Brazil (Samsung Heavy Industries, TechnipFMC, Telefônica, and Walmart), Cuba (Quad/Graphics), Mexico (Fresenius and Walmart), and Peru (Quad/Graphics). Since 2015, a significant number of individual actions, as discussed below, stemmed from a small number of ongoing investigations involving Venezuela relating to Venezuela's state-owned and controlled energy company PDVSA and its state-owned and controlled electricity company Corpoelec.[38] Furthermore, DOJ announced additional individual charges involving the bribery and money laundering schemes to obtain business from PetroEcudaor[39] and in the ICBL scheme to bribe the Barbados Minister of Industry to obtain insurance contracts from the government of Barbados.[40]
- *Russia, Southern/Eastern Europe and Central Asia*. Five of the corporate actions involved conduct in Russia (Deutsche Bank and Juniper Networks), Bosnia and Serbia (Fresenius), Hungary (Microsoft), and Uzbekistan (MTS). Charges were also brought against two individuals in Uzbekistan, including against Gulnara Karimova – the government official at the center of Vimpelcom's 2016 and

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35. *See* Philip Rohlik, "Individual Accountability and Extraterritorial Jurisdiction: DOJ and SEC Charge Employees of Chinese Subsidiary of U.S. Issuer," FCPA Update, Vol. 11, No. 4 (Nov. 2019), https://www.debevoise.com/insights/publications/2019/11/fcpa-update-november-2019 [hereinafter "Rohlik, Nov. 2019 FCPA Update"].
36. Order, *In re Westport Fuel Systems, Inc. and Nancy Gougarty*, Securities Exchange Act Rel. No 87138 (Sept. 27, 2019), https://www.sec.gov/litigation/admin/2019/34-87138.pdf.
37. DOJ Press Release No. 19-107, *Micronesian Government Official Arrested in Money Laundering Scheme Involving Foreign Bribery* (Feb. 12, 2019), https://www.justice.gov/opa/pr/micronesian-government-official-arrested-money-laundering-scheme-involving-foreign-bribery.
38. DOJ Press Release No. 19-723, *Two Former Venezuelan Officials Charged and Two Businessmen Plead Guilty in Connection with Venezuela Bribery Scheme* (June 27, 2019), https://www.justice.gov/opa/pr/two-former-venezuelan-officials-charged-and-two-businessmen-plead-guilty-connection-venezuela.
39. *See, e.g.*, Indictment, *United States v. Diaz*, No. 19-CR-20284-RS (S.D. Fla. May 10, 2019).
40. *See, e.g.*, DOJ Press Release No. 19-31, *Former Chief Executive Officer and Senior Vice President of Barbadian Insurance Company Charged with Laundering Bribes to Former Minister of Industry of Barbados* (Jan. 28, 2019), https://www.justice.gov/opa/pr/former-chief-executive-officer-and-senior-vice-president-barbadian-insurance-company-charged.

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Telia's 2017 FCPA settlements and the alleged recipient of the largest sum total of bribe payments by multiple companies ever received by an individual defendant in an FCPA case (more than $865 million).[41]

- *Middle East*. Four of the corporate actions involved conduct occurring at least partly in the Middle East. The Ericsson case involved improper payments to state-owned telecom companies in Kuwait and Saudi Arabia; TechnipFMC involved improper payments to secure contracts from Iraqi state-owned oil companies; and Microsoft allegedly approved excessive discounts through unauthorized third parties in connection with government tenders in Turkey and provided improper travel and hospitality to Saudi government officials from slush funds maintained by third-party vendors and resellers. Fresenius entered into JVs with government-employed doctors in Turkey to obtain improperly business from their public employers.[42]

"While China (8) and Brazil (4) figure most prominently, the rest of the world was also well-represented in FCPA enforcement in 2019."

- *Africa*. Fresenius also involved misconduct in multiple African countries, including JV shares to government officials at Angola's state-owned military hospital; bribes through sham commissions to Moroccan officials; and improper payments to government-employed health officials and doctors in eight West African countries (Benin, Burkina Faso, Cameroon, Chad, Gabon, Ivory Coast, Niger, and Senegal). Ericsson involved contracts with Djibouti's state-owned telecom company. There was also one action against an individual alleged to have been involved with a scheme to bribe Ugandan officials to facilitate adoptions of Ugandan children in the United States.[43]

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41. DOJ Press Release No.19-067, *Former Uzbek Government Official And Uzbek Telecommunications Executive Charged In Bribery And Money Laundering Scheme Involving The Payment Of Nearly $1 Billion In Bribes* (Mar. 7, 2019), https://www.justice.gov/usao-sdny/pr/former-uzbek-government-official-and-uzbek-telecommunications-executive-charged-bribery.

42. Order, *In re Fresenius Medical Care AG & Co. KGaA*, Securities Exchange Act Rel. No. 85468 (Mar. 29, 2019), https://www.sec.gov/litigation/admin/2019/34-85468.pdf.

43. *See* Brockmeyer et al., Sept. 2019 FCPA Update, *supra* note 20, at 8; *see also* DOJ Press Release No. 19-921, *Texas Woman Pleads Guilty to Conspiracy to Facilitate Adoptions From Uganda Through Bribery and Fraud* (Aug. 29, 2019), https://www.justice.gov/opa/pr/texas-woman-pleads-guilty-conspiracy-facilitate-adoptions-uganda-through-bribery-and-fraud.

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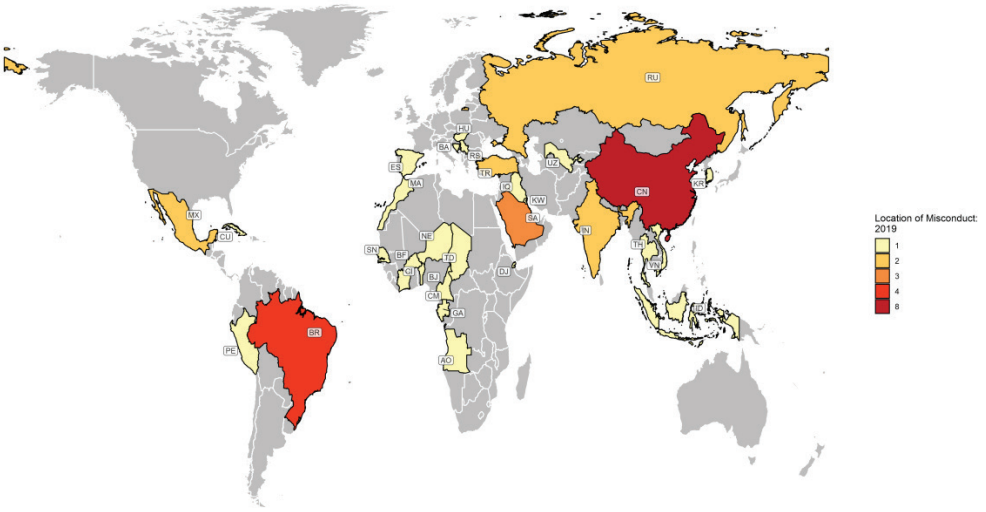
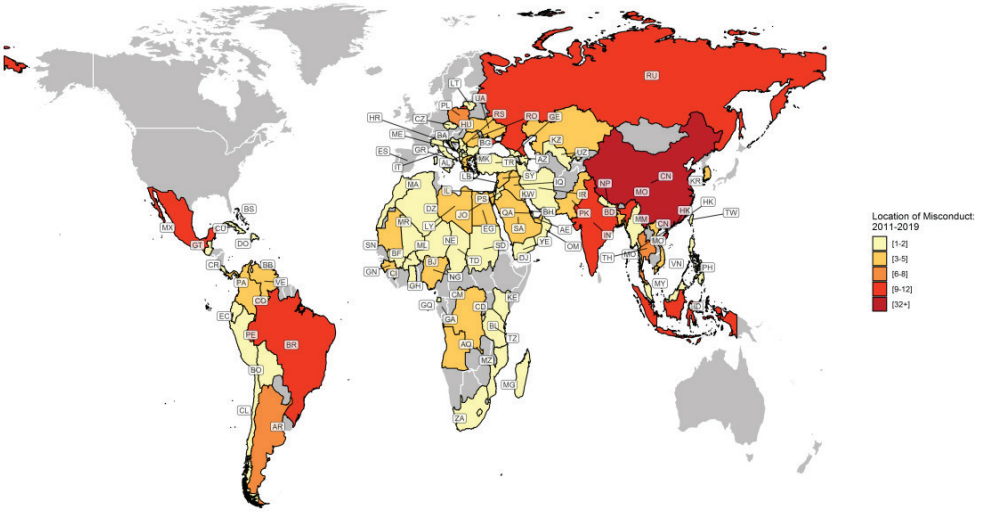
Corporate Resolutions: 2019 Heat Map



Corporate Resolutions: 2011-2019 Heat Map



II. FCPA Enforcement Against Individuals

A. Enforcement Actions

2019 exceeded all previous years with respect to FCPA-related resolutions with individuals – not only for the announcements of charges and guilty pleas, but also for trial convictions. Continuing a trend from the past several years, most of these were clustered in a small number of cases (including as noted above the sprawling PDVSA and PetroEcuador cases).

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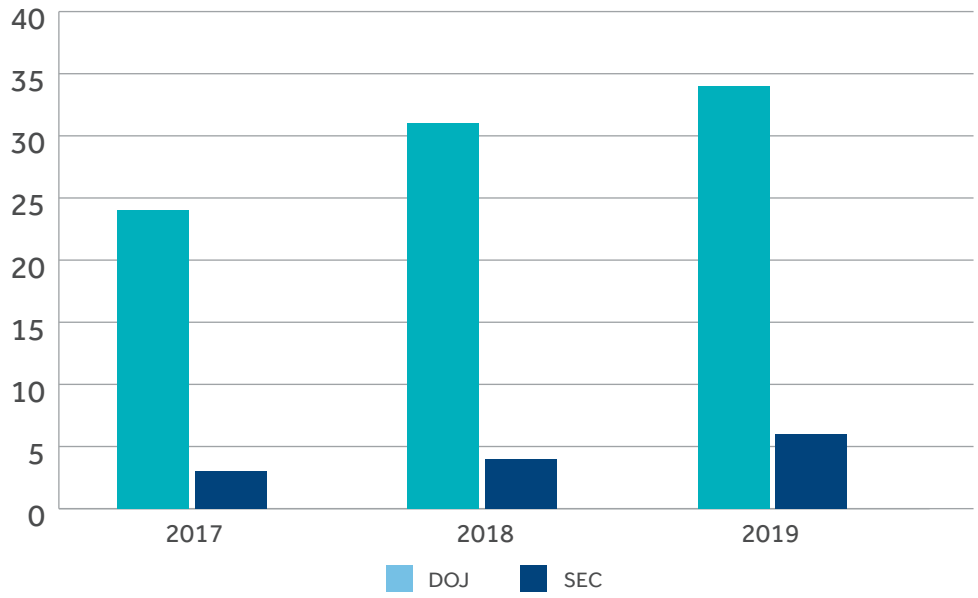
DOJ publicly announced or unsealed charges against at least 34 people this year and announced at least 30 guilty pleas in FCPA-related cases.[44] DOJ also secured four trial convictions. Only about 20% of these cases had an associated corporate action, though corporate enforcement actions could follow the 1MDB-related or Mozambique "Tuna Bond" indictments/guilty pleas, as well as the indictments of former senior managers of Herbalife's operations in China.

The SEC announced charges against or settlements with six individuals in 2019, four of whom had an associated corporate settlement (*e.g.*, related to Cognizant's former president, CLO, and COO; and Westport Fuels' former CEO), and corporate settlements with the other two (Goldman Sachs and Herbalife) may follow. Four of the six individuals charged by the SEC were also charged by DOJ: Gordon Coburn and Steven Schwartz (Cognizant), Tim Leissner (Goldman Sachs), and Yanliang Li (Herbalife).

A sampling of these individual actions are discussed in greater detail below.

Charges Announced Against Individuals in FCPA-related Actions



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44. U.S. Dep't of Justice, *Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act* (Dec. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference.

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As we have seen in prior years, a handful of large alleged bribery schemes have produced many individual cases for DOJ. For example:

- *Mozambique Tuna Bonds Scandal*. Eight individuals were charged (including former Mozambican government officials, former Credit Suisse bankers and business executives) at the close of 2018. In 2019, three pleaded guilty, and one was acquitted at trial in connection with an alleged scheme to direct loan proceeds away from funding maritime projects for state tuna fisheries towards bribes and kickbacks to Mozambican officials and investment bankers.[45]
- *PDVSA*. DOJ announced charges against six more individuals (including another former Venezuelan official) and guilty pleas entered by four more in connection with the sprawling public procurement corruption scheme in Venezuela.[46] Since 2015, DOJ has publicly announced charges against some 25 individuals and obtained 19 guilty pleas in connection with this scheme, in which U.S.-based PDVSA vendors bribed foreign officials to obtain PDVSA contracts and to secure payment on overdue invoices.

"2019 exceeded all previous years with respect to FCPA-related resolutions with individuals – not only for the announcements of charges and guilty pleas, but also for trial convictions."

- *PetroEcuador*. Five individuals pleaded guilty in 2019 (raising the number to 10 total), including former Ecuadorian officials, oil services contractors, and financial advisors, in connection with a scheme to pay bribes to obtain and retain oil services contracts with PetroEcuador.[47]
- *Corpoelec*. Four individuals were charged (including Venezuela's minister of electrical energy and Corpoelec's procurement director), and two guilty pleas

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45. DOJ Press Release, *Three Former Mozambican Government Officials and Five Business Executives Indicted in Alleged $2 Billion Fraud and Money Laundering Scheme That Victimized U.S. Investors* (Mar. 7, 2019), https://www.justice.gov/usao-edny/pr/three-former-mozambican-government-officials-and-five-business-executives-indicted.
46. *See, e.g.*, DOJ Press Release No. 19-593, *Business Executive Pleads Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme* (May 29, 2019), https://www.justice.gov/opa/pr/business-executive-pleads-guilty-foreign-bribery-charges-connection-venezuela-bribery-scheme.
47. DOJ Press Release No. 20-75, *Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials* (Oct. 11, 2019), https://www.justice.gov/opa/pr/miami-based-businessman-pleads-guilty-fcpa-and-money-laundering-violations-scheme-involving.

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were secured in connection with a bribery and money laundering scheme by Florida-based companies to obtain contracts with Corpoelec, Venezuela's state-owned and controlled electricity company.[48]

B. SEC and DOJ Individual Actions with Related Corporate Resolutions

This year, only about 30% of the corporate actions had associated individual actions. Those cases are listed below.

- The SEC and DOJ both charged Cognizant's former president, Gordon Coburn, and its former chief legal officer, Steven Schwartz, with violating the FCPA's anti-bribery and accounting provisions by authorizing bribe payments to foreign officials in connection with construction projects in India.[49] The SEC also charged former COO Sridhar Thiruvengadam, who agreed to pay a $50,000 penalty for his role in falsifying books and records and circumventing internal controls related to the scheme.[50]
- The daughter of the former Uzbek president, Gulnara Karimova, and her close associate, Bekhzod Akhmedov, were charged by DOJ for their roles in soliciting payments from telecom companies using Karimova's political influence over access to the Uzbek telecom market in connection with the settlements of MTS, Telia, and Vimpelcom.[51]
- A former Technip consultant, Zwi Skornicki, was charged and pleaded guilty to DOJ charges in connection with his role in making improper payments to Brazilian politicians and Petrobras employees in connection with TechnipFMC's DOJ and SEC settlements related to pre-merger conduct in Brazil and Iraq.[52]
- Westport Fuels' former CEO, Nancy Gougarty, paid a $120,000 civil penalty to resolve SEC charges that she caused certain of Westport's violations by circumventing internal controls and signing false certifications in connection with transferring shares in Westport's Chinese joint venture to a Chinese private equity fund in which a government official held a financial interest.[53]

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48. DOJ Press Release No. 19-723, *Two Former Venezuelan Officials Charged and Two Businessmen Plead Guilty in Connection with Venezuela Bribery Scheme* (June 27, 2019), https://www.justice.gov/opa/pr/two-former-venezuelan-officials-charged-and-two-businessmen-plead-guilty-connection-venezuela.
49. *See* Levine et al., March 2019 FCPA Update – First FCPA Corporate Enforcement Actions of 2019, *supra* note 7, at 2-3.
50. *See* Brockmeyer et al., Sept. 2019 FCPA Update, *supra* note 20, at 8.
51. *See* Levine et al., March 2019 FCPA Update, *supra* note 7, at 5-8.
52. DOJ Press Release, *TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case* (June 25, 2019), https://www.justice.gov/usao-edny/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-criminal-fines.
53. Order, *In re Westport Fuel Systems, Inc. and Nancy Gougarty*, Securities Exchange Act Rel. No. 87138 (Sept. 27, 2019), https://www.sec.gov/litigation/admin/2019/34-87138.pdf.

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In 2019, we also continued to see actions against individuals that were tied to previous corporate resolutions, including:

- The former CEO and SVP of Barbados-based insurance company Insurance Corporation of Barbados Limited (ICBL) were charged with laundering bribes to the former Minister of Industry of Barbados for assistance in securing government contracts for ICBL.[54] ICBL received a DOJ declination pursuant to the Corporate Enforcement Policy in 2018, and the former Minister of Industry (Donville Innis) was just convicted of laundering bribes in the first FCPA-related trial of 2020.[55]
- In November, DOJ also announced charges against Jose Carlos Grubisich, the former CEO of Braskem S.A. – the Brazilian petrochemical company that resolved FCPA cases with DOJ and the SEC in 2016 – for his role in the bribery and money laundering scheme involving Odebrecht S.A., which had diverted hundreds of millions of dollars into a slush fund used to bribe Brazilian government officials and political parties to obtain business from Petrobras.[56]

C. SEC and DOJ Individual Stand-Alone Actions

In addition to the charges relating to these larger schemes and those associated with corporate resolutions, 2019 saw a handful of stand-alone actions against individuals, including:

- Two individuals were charged in connection with a scheme to bribe government officials at Venezuela's government revenue service, currency exchange commission, and National Guard to approve fraudulent import documents in order to take advantage of Venezuela's government-controlled exchange rate.[57]
- Two individuals – the former head of Herbalife Nutrition Ltd.'s China-based subsidiary, Yanliang Li, and the former head of the external affairs department, Hongwei Yang – were charged for their roles in a scheme to violate the FCPA's anti-bribery and internal controls provisions by bribing Chinese officials (at the local, provincial, and national levels) to obtain sales permits, to influence

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54. DOJ Press Release No. 19-31, *Former Chief Executive Officer and Senior Vice President of Barbadian Insurance Company Charged with Laundering Bribes to Former Minister of Industry of Barbados* (Jan. 28, 2019), https://www.justice.gov/opa/pr/former-chief-executive-officer-and-senior-vice-president-barbadian-insurance-company-charged.
55. Dylan Tokar, *Former Barbadian Official Found Guilty of Laundering Bribes*, The Wall Street Journal (Jan. 17, 2020), https://www.wsj.com/articles/former-barbadian-official-found-guilty-of-laundering-bribes-11579221651.
56. DOJ Press Release No. 19-1,278, *Former Chief Executive Officer of a Brazilian Petrochemical Company Charged for His Role in a Scheme to Pay Bribes to Brazilian Officials and to Falsify Company Books and Records* (Nov. 20, 2019), https://www.justice.gov/opa/pr/former-chief-executive-officer-brazilian-petrochemical-company-charged-his-role-scheme-pay.
57. DOJ Press Release No. 19-810, *Two Colombian Businessmen Charged With Money Laundering in Connection With Venezuela Bribery Scheme* (July 25, 2019), https://www.justice.gov/opa/pr/two-colombian-businessmen-charged-money-laundering-connection-venezuela-bribery-scheme.

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government investigations into the company's compliance with Chinese laws, and to suppress negative news reports about the company.[58] Li was also charged by the SEC, and then by DOJ for lying to SEC staff during investigative testimony.[59]

- The former CEO and COO of Monaco-based oil intermediary company Unaoil pleaded guilty for their roles in a scheme to facilitate millions of dollars of bribe payments to government officials in nine countries – Algeria, Angola, Azerbaijan, the Democratic Republic of Congo, Iran, Iraq, Kazakhstan, Libya, and Syria – to help secure oil and gas contracts over 17 years.[60] The company's former business development director was also charged for his role in facilitating bribe payments in Libya. Sentencing is scheduled for the spring of 2020.
- The owner of Hawaii-based engineering and consulting company Lyon Associates Inc. (Frank James Lyon) pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions and to commit federal program fraud for paying bribes to a former Department of Transportation, Communications, and Infrastructure official for the Federated States of Micronesia for his assistance in securing over $8 million in government contracts between 2006 and 2016, and for paying bribes to Hawaii state officials.[61] The Micronesian government official, Master Halbert, was charged with and pleaded guilty to conspiracy to commit money laundering for his role in the bribery scheme. Lyon and Halbert have been sentenced to 30 months and 18 months in prison, respectively.[62]
- After pleading guilty to DOJ's FCPA charges in 2018,[63] former Goldman Sachs Managing Director Tim Leissner in December settled with the SEC.[64] In particular, he agreed to be barred permanently from the securities industry and to disgorge $43.7 million (offset by amounts paid to DOJ). The SEC's charges included that Leissner violated the FCPA's anti-bribery and accounting provisions for his role in a scheme to bribe government officials in Malaysia and

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58. *See* Rohlik, Nov. 2019 FCPA Update, *supra* note 35.
59. *Id.*
60. DOJ Press Release No. 19-172, *Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials* (Oct. 30, 2019), https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials; *see also* Dylan Tokar, *Former Unaoil Chiefs Plead Guilty to U.S. Bribery Charges*, The Wall Street Journal (Oct. 30, 2019), https://www.wsj.com/articles/former-unaoil-chiefs-plead-guilty-to-u-s-bribery-charges-11572478122.
61. DOJ Press Release No. 19-821, *Micronesian Government Official Sentenced to Prison for Role in Money Laundering Scheme Involving FCPA Violations* (July 30, 2019), https://www.justice.gov/opa/pr/micronesian-government-official-sentenced-prison-role-money-laundering-scheme-involving-fcpa.
62. *Id.*
63. *United States v. Leissner*, Information, No. 18-cr-00439-MKB (E.D.N.Y. Aug. 28, 2018), https://www.justice.gov/opa/press-release/file/1106936/download.
64. Order, *In re Leissner*, Securities Exchange Act Rel. No. 87750 (Dec. 16, 2019), https://www.sec.gov/litigation/admin/2019/34-87750.pdf; *SEC Press Release No. 2019-260, SEC Charges Former Goldman Sachs Executive With FCPA Violations* (Dec. 16, 2019), https://www.sec.gov/news/press-release/2019-260.

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the Emirate of Abu Dhabi to secure lucrative business underwriting $6.5 billion in bond offerings for Goldman from 1MDB, Malaysia's sovereign wealth fund.

Relatedly, DOJ announced in October the settlement of civil forfeiture cases to recover more than $700 million in assets allegedly misappropriated from 1MDB by the Malaysian financier Low Taek Jho ("Jho Low") at the center of the 1MDB scandal and his family.[65] The settlement brings the total assets recovered by or with the help of U.S. authorities in forfeiture actions related to the alleged bribery and money laundering schemes involving 1MDB to more than $1 billion, the largest civil forfeiture ever secured by DOJ.

"In addition to the announcements of several arrests, indictments, and guilty pleas, this year saw DOJ try five FCPA-related defendants and secure four trial convictions."

D. DOJ Trial Convictions

In addition to the announcements of several arrests, indictments, and guilty pleas, this year saw DOJ try five FCPA-related defendants and secure four trial convictions:

- *Roger Boncy & Joseph Baptiste*. In June, Roger Boncy (the chairman and CEO of an investment firm) and Joseph Baptiste (firm president and board member) were found guilty of conspiracy to violate the FCPA and Travel Act, securing for DOJ its first two convictions of 2019.[66] The duo solicited bribes from undercover FBI agents who were posing as potential investors to influence improperly Haitian officials and obtain authorization for a port development project. At a recorded meeting, Baptiste and Boncy told the agents they would funnel the money through a Maryland-based non-profit controlled by Baptiste. Baptiste and Boncy were charged initially in October 2017 and 2018, respectively, and were convicted after a two-week trial in Massachusetts.

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65. *See* David A. O'Neil & Andreas A. Glimenakis, "1MDB Continued: DOJ Secures Largest Ever Civil Forfeiture While Criminal Actions Remain Pending," FCPA Update, Vol. 11, No. 4 (Nov. 2019), https://www.debevoise.com/insights/publications/2019/11/fcpa-update-november-2019.

66. DOJ Press Release No. 19-697, *Two Businessmen Convicted of International Bribery Offenses* (June 20, 2019), https://www.justice.gov/opa/pr/two-businessmen-convicted-international-bribery-offenses-0.

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- *Lawrence Hoskins*. In November, Lawrence Hoskins, former senior vice president at French-based Alstom, was convicted of violating the FCPA and of money laundering and related conspiracy charges after a nearly two-week trial.[67] Hoskins, a UK national, allegedly engaged in a conspiracy to bribe Indonesian officials in exchange for assistance in securing a contract from Indonesia's state-owned and controlled electricity company. In a highly anticipated trial, the jury found that Hoskins acted as an agent for Alstom's U.S.-based subsidiary, at least for the purposes of helping arrange the improper payments. To conceal the bribes, Hoskins retained two consultants purportedly to provide legitimate consulting services on behalf of Alstom. Alstom had pleaded guilty and agreed to pay more than $772 million to resolve FCPA charges in December 2014.[68]
- *Mark Lambert*. Also in November, Mark Lambert, the former president of Maryland-based Transportation Logistics Inc. ("TLI"), was found guilty of FCPA violations, wire fraud, and related conspiracy charges.[69] Lambert was convicted for his role in arranging kickbacks for Vadim Mikerin, a Russian official at JSC Techsnabexport (TENEX) – a subsidiary of Russia's State Atomic Energy Corporation – in order to secure contracts for TLI. Lambert was found guilty after a three-week trial in the District of Maryland. TLI had entered into a DPA with DOJ to resolve FCPA charges in March 2018.[70]
- *Jean Boustani*. DOJ did suffer one defeat at trial this year, when a jury in the Eastern District of New York acquitted Jean Boustani, a lead salesman at Privinvest Group, a United Arab Emirates-based shipbuilding company.[71] While not a true FCPA acquittal – Boustani ultimately was tried for alleged securities fraud and money laundering – he was acquitted of all charges brought against him alleging participation in a scheme to direct more than $2 billion in loans marketed to U.S. investors away from funding maritime projects for which Privinvest would provide the equipment and services. Instead, more than $200 million in loan proceeds went to bribe payments to Mozambican

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67. DOJ Press Release No. 19-1219 *Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy* (Nov. 8, 2019), https://www.justice.gov/opa/pr/former-senior-alstom-executive-convicted-trial-violating-foreign-corrupt-practices-act-money.
68. *See* Sean Hecker, Andrew M. Levine, Karolos Seeger, Bruce E. Yannett, Frederick T. Davis & Steven S. Michaels, "Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement," FCPA Update, Vol. 6, No. 5 (Dec. 2014), https://www.debevoise.com/insights/publications/2014/12/fcpa-update-december-2014.
69. DOJ Press Release No. 19-1296, *Former President of Transportation Company Found Guilty of Violating the Foreign Corrupt Practices Act and Other Crimes* (Nov. 22, 2019), https://www.justice.gov/opa/pr/former-president-transportation-company-found-guilty-violating-foreign-corrupt-practices-act.
70. Kara Brockmeyer, Jane Shvets & Andreas A. Glimenakis "Transport Logistics and DOJ Settle First Corporate FCPA Enforcement Action of 2018," FCPA Update, Vol. 9, No. 9 (Apr. 2018), https://www.debevoise.com/insights/publications/2018/04/fcpa-update-april-2018.
71. Judgment of Acquittal, *United States v. Boustani*, No. 18-cr-00681-WFK-ST (E.D.N.Y. Dec. 2, 2019).

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government officials and kickbacks to investment bankers.[72] Boustani never denied making the payments to the officials, but claimed he played no part in packaging the loans for the investors.[73] Although Boustani was charged with money laundering and securities fraud, the decision raises interesting questions about the requisite nexus to U.S. interests to convince a jury to convict. It remains to be seen whether DOJ's appetite to pursue a case against Credit Suisse will be dampened by the guilty pleas of three former Credit Suisse bankers (two of whom testified at Boustani's trial), coupled with Boustani's acquittal.

In the midst of four trial convictions, the significance of Boustani's acquittal should not be overstated, particularly in light of Hoskins' conviction. Hoskins was initially indicted in 2013 but challenged the FCPA's application to him, a Briton working in France and accused of bribing government officials in Indonesia. The Second Circuit had affirmed the district court's holding that a non-U.S. citizen or resident could not be held criminally liable for conspiring to violate the FCPA if the individual could not be held criminally liable for conspiring to violate the FCPA if the individual could not be charged with violating the law itself. However, the Court of Appeals held that Hoskins could still be charged with substantive FCPA offenses if DOJ could show he had acted as an agent of a "domestic concern." DOJ proceeded to try Hoskins, resulting in his conviction on 11 of 12 counts, including six FCPA violations.

Federal agencies often seem inclined to construe the reach of FCPA jurisdiction as broadly as possible. The Second Circuit's decision in *Hoskins* places some limit on liability, including that individuals cannot be charged with conspiracy and aiding and abetting an FCPA violation if they cannot be charged with the FCPA violation itself. Nevertheless, Hoskins's conviction means that criminal liability arising when one acts as an agent of a "domestic concern" remains a viable and expansive basis for FCPA jurisdiction.

III. FCPA Case Law and Enforcement Policies

A. Developments in Case Law

There were some significant legal developments this year that will impact FCPA enforcement, including the first appellate court to decide whether the "official act" requirement of the Supreme Court's decision in *McDonnell v. United States* applies to the FCPA, and a decision out of the Southern District of New York that may impact how DOJ relies on company counsel to conduct internal investigations. Meanwhile,

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72. DOJ Press Release No. 19-201, *Mozambique's Former Finance Minister Indicted Alongside Other Former Mozambican Officials, Business Executives, and Investment Bankers in Alleged $2 Billion Fraud and Money Laundering Scheme that Victimized U.S. Investors* (Mar. 7, 2019), https://www.justice.gov/opa/pr/mozambique-s-former-finance-minister-indicted-alongside-other-former-mozambican-officials.

73. *See* Brendan Pierson, "Lebanese salesman acquitted in case over $2 bln Mozambique loans," Reuters (Dec. 2, 2009), https://www.reuters.com/article/mozambique-usa-trial/lebanese-salesman-acquitted-in-case-over-2-bln-mozambique-loans-idUSL2N2821LZ.

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the Supreme Court's 2017 remedy-limiting decision in *Kokesh* continues to have an observable impact on SEC enforcement, and eyes are on what the Supreme Court will do next with respect to disgorgement remedies.

1. Second Circuit Decision in *Ng Lap Seng* Case

In August, the Second Circuit upheld Chinese real estate developer **Ng Lap Seng's** trial conviction and held that the Supreme Court's decision in *McDonnell* does not apply to FCPA cases.[74] Ng was convicted on FCPA charges in 2017 in connection with a scheme to bribe United Nations officials to obtain support to build a conference center in Macau.[75]

"[T]he Supreme Court's 2017 remedy-limiting decision in Kokesh continues to have an observable impact on SEC enforcement, and eyes are on what the Supreme Court will do next with respect to disgorgement remedies."

Ng argued on appeal that *McDonnell*, which requires the government to show that a bribe to U.S. officials was paid in exchange for an "official act,"[76] applied to his case such that his trial should be set aside. The Second Circuit, however, held that the concerns reflected in *McDonnell* do not pertain to the FCPA, which does not contain a specific requirement that bribes be paid for "official acts."[77] That is, in *McDonnell*, the Court was concerned that the domestic bribery law, 18 U.S.C. § 201, could chill the relationship between elected U.S. officials and their constituents while the FCPA, on the other hand, has an entirely different legislative aim and specifically prohibits bribery of foreign government officials (including officials of public international organizations like the United Nations).

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74. *United States v. Ng Lap Seng*, 934 F.3d 110, 134 (2d Cir. 2019); Bruce E. Yannett, Kara Brockmeyer, Philip Rohlik, Jil Simon & Leonie M. Stoute, "Second Circuit Rules that *McDonnell*'s 'Official Act' Requirement Does Not Apply to the FCPA," FCPA Update, Vol. 11, No. 1 (Aug. 2019), https://www.debevoise.com/insights/publications/2019/08/fcpa-update-august-2019 [hereinafter "Yannett et al., Aug. 2019 FCPA Update"].

75. DOJ Press Release No. 18-621, *Chairman of Macau Real Estate Development Company Sentenced to Prison for Role in Scheme to Bribe United Nations Ambassadors to Build A Multi-Billion Dollar Conference Center* (May 11, 2018), https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-sentenced-prison-role-scheme-bribe-united.

76. *McDonnell v. United States*, 136 S. Ct. 2355, 2370-72 (2016).

77. *See* Yannett et al., Aug. 2019 FCPA Update, supra note 74.

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2. United States v. Connolly

In an opinion issued in May 2019, the Chief Judge of the Southern District of New York criticized DOJ and the CFTC for outsourcing their probes by relying on Deutsche Bank and its outside counsel to carry out their investigations of LIBOR manipulation.[78] The court deemed it a demand rather than a request when the CFTC sent a letter to the bank outlining the CFTC's expectations that the bank would cooperate and may receive credit for doing so by reporting on an ongoing basis with investigative developments. Further, DOJ monitored outside counsel's interviews and waited more than three years for a white paper summarizing the bank's findings before taking its own investigative steps. Importantly, the court held that the government impermissibly *directed* the bank's internal investigation by telling the bank whom to interview, and when and how to interview them.[79] Because the government outsourced its investigation, the court found that a bank employee's statements to outside counsel during the internal investigation were compelled in violation of his Fifth Amendment right against self-incrimination.

To walk the line between cooperation and direction, it is important to keep clear boundaries between the government entity's action and the company's internal investigation.

Until resolution of any appellate challenges brings more clarity, we anticipate that prosecutors and regulators will exercise even more care in how they approach interactions with company counsel during investigations in order to avoid any accusations or findings that heavy-handed government direction converted company investigative counsel into state actors.[80] Prosecutors and regulators also may be less transparent about their views of the evidence, expectations, and independent investigative efforts.

3. Monitoring Kokesh and Awaiting Liu

In 2017, a unanimous Supreme Court held that claims for disgorgement in SEC enforcement actions act as penalties and must be commenced within five years of the date the claim accrues.[81] That decision continues to have a significant impact on the SEC, both in the FCPA context and more generally. In its 2019 Annual Report, the SEC's Enforcement Division estimated that it has forgone at least $1.1 billion

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78. *United States v. Connolly*, No. 16 Cr. 0370, 2019 WL 2120523, at *5-*10 (S.D.N.Y. May 2, 2019); *see also* Debevoise & Plimpton LLP, "District Court Opinion Criticizes Government 'Outsourcing' of Investigations" (May 6, 2019), https://www.debevoise.com/insights/publications/2019/05/district-court-opinion-criticizes-government [hereinafter "Debevoise Update – May 2019"].

79. *Connolly*, *supra* note 78, at *3.

80. *See* Debevoise Update – May 2019, *supra* note 78, at 4.

81. *Kokesh v. SEC*, 137 S. Ct. 1635, 1638 (2017); *see* Debevoise Client Update, "U.S. Supreme Court Holds SEC Disgorgement Is a Penalty Subject to a Five-Year Statute of Limitations," (June 7, 2017), https://www.debevoise.com/insights/publications/2017/06/us-supreme-court-holds-sec-disgorgement.

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in disgorgement in filed cases. It is still unclear, however, precisely how much of an impact the *Kokesh* decision has had on FCPA enforcement, particularly given the agency's extensive use of tolling agreements. As noted earlier, the SEC ordered disgorgement of more than $750 million in 2019 – including $458 million from Ericsson alone, where the SEC's complaint described activity stretching beyond the five-year limitations period and back to 2011, perhaps indicating the presence of a tolling agreement.

As noted above, there was one case in particular in 2019 that did appear to be impacted by *Kokesh*. In the action against Cognizant, in addition to the roughly $16 million in disgorgement and prejudgment interest (and $6 million civil penalty) paid to the SEC, DOJ disgorged an additional nearly $3 million. This additional disgorgement may correspond to amounts not paid to the SEC due to statute of limitations defenses. As we have noted before, DOJ operates under a different statutory framework and can have up to eight years to bring an action, if it is seeking information from overseas.[82]

In March 2020, the Supreme Court is scheduled to hear oral arguments in *Liu v. SEC*, which could potentially impact the SEC's ability to obtain disgorgement in district court actions.[83]

In Liu, the SEC sued Charles Liu and his wife for allegedly defrauding immigrant investors, using the EB-5 Immigrant Investor Program, which offers foreign entrepreneurs the opportunity to obtain green cards in exchange for investing in the U.S. commercial enterprises.[84] Liu and Wang raised almost $27 million, transferred more than $8 million to their personal bank accounts, and funneled about $13 million to oversees marketers.[85]

In April 2017, a federal district court found that Liu and Wang violated Section 17(a) of the Securities Act and granted summary judgment for the SEC[86] and disgorgement of $26.7 million.[87] Liu and Wang appealed the decision to the Ninth Circuit, which held in favor of disgorgement and the disgorgement amount, pointing out that *Kokesh* does not explicitly negate the Court's ability to order disgorgement.[88]

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82. Where DOJ makes an official request to a foreign law enforcement counterpart for evidence outside the Unites States, a federal court may toll the five-year limitations clock for three more years, stretching the total limitations period to eight years. *See* 18 U.S.C. § 3292.
83. *Liu v. SEC*, 205 L.Ed.2d 265 (U.S. 2019).
84. *SEC v. Liu*, 262 F. Supp.3d 957, 961-64 (C.D. Cal. 2017); *see also* EB-5 Immigrant Investor Program, U.S. Citizenship and Immigration Services, 1, https://www.uscis.gov/eb-5.
85. *Liu*, *supra* note 84, at 962-64.
86. *Id.* at 976.
87. *Id.* at 975-76.
88. *SEC v. Liu*, 754 F. App'x 505, 509 (9th Cir. 2018).

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Even if Liu and his wife prevail, the impact of the decision could be quite limited, because the SEC already has the statutory authority to seek disgorgement in administrative cease-and-desist proceedings, through which the SEC settles the majority of its FCPA actions.[89] In addition, the U.S. House of Representatives introduced legislation in November that would amend the Securities Exchange Act to authorize expressly the SEC to obtain disgorgement in federal court actions.[90]

B. Enforcement Policy Developments

This past year, DOJ issued new guidance to assist prosecutors with evaluating corporate compliance programs and companies' inability-to-pay claims and announced several updates to its Enforcement Policy,[91] including clarifying expectations concerning voluntary self-disclosure, the use of ephemeral messaging applications, and de-confliction.

1. Guidance for Evaluating Corporate Compliance Programs

In April, DOJ released additional guidance to assist prosecutors in evaluating corporate compliance programs.[92] The updated guidance is the most complete discussion of the government's expectations regarding corporate compliance programs to date and can serve as a valuable resource for those grappling with how best to design, implement, and monitor an effective corporate compliance program.[93] Invoking a more streamlined and holistic approach, the updated guidance focuses on three fundamental questions: whether the compliance program is (1) well-designed; (2) implemented effectively; and (3) working in practice.[94] More specifically:

- *Is the compliance program well designed?* This step begins with reviewing a company's risk assessment; followed by reviewing its policies and procedures; training and communication; confidential reporting structure and investigation process; third-party management; and handling of mergers and acquisitions.

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89. *See* 15 U.S.C. § 78u-3(e).

90. H.R. 4344, 116th Cong. (2019) (available at https://www.congress.gov/bill/116th-congress/house-bill/4344/text/rfs).

91. *See* Bruce Yannett, Jane Shvets, Sandy Tomasik & Farhana Choudhury, "DOJ Revises Corporate Enforcement Policy and Eases Stance on Messaging Apps," at 9-12, FCPA Update, Vol 10, No. 8 (Mar. 2019), https://www.debevoise.com/insights/publications/2019/03/fcpa-update-march-2019 [hereinafter "Yannett et al., March 2019 FCPA Update – DOJ Revises Corporate Enforcement Policy"].

92. U.S. Dep't of Justice, Criminal Division, Evaluation of Corporate Compliance Programs Guidance Document at 2 (updated Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download [hereinafter "DOJ Compliance Program Guidance"].

93. *See* Debevoise & Plimpton LLP, "DOJ Updates Guidance on Evaluating Corporate Compliance Programs" (May 3, 2019), https://www.debevoise.com/insights/publications/2019/05/doj-updates-guidance [hereinafter "May 2019 Debevoise Update"].

94. *Id.* at 2.

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- *Is the program being implemented effectively?* This includes evaluating the commitment by senior and middle management; the autonomy and resources of the compliance program; and the incentives for compliance and disciplinary measures for noncompliance.
- *Does the compliance program work in practice?* The elements of a properly functioning program include continuous improvement; periodic testing and review (including the role of internal audit); adequate investigation of misconduct; and thoughtful analysis and remediation of underlying misconduct. Importantly, the guidance reiterates that the existence of misconduct "does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense."

"This past year, DOJ issued new guidance to assist prosecutors with evaluating corporate compliance programs and companies' inability-to-pay claims and announced several updates to its [Corporate] Enforcement Policy…."

Because there is no one-size-fits-all compliance program, designing an effective one begins with conducting an appropriate risk assessment and periodically refreshing that work. In conducting this assessment, companies should consider the location of operations; the industry sector; the competitiveness of the business; the regulatory landscape; potential clients and business partners; transactions with foreign governments; payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; and charitable and political donations.[95]

By emphasizing the importance of a risk-based approach, the updated guidance encourages companies to focus their compliance efforts on preventing and detecting misconduct in light of the actual risks faced. The guidance likewise acknowledges that a program may still be credited if it appropriately focuses attention and resources on high-risk transactions, even if it fails to prevent an infraction in a lower-risk area.[96]

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95. *Id.*
96. *Id.* at 3-4.

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2. Guidance for Evaluating Inability-to-Pay Claims

After at least three cases in 2018 involved settling companies that paid less in penalties than they otherwise would have in light of their inability to pay, DOJ released new guidance in October to assist prosecutors in evaluating companies' inability-to-pay claims.

DOJ has identified four primary factors for prosecutors to consider if a company asserts it is unable to pay a criminal fine: (1) the background of the company's current financial condition; (2) the company's ability to raise capital and otherwise obtain alternative sources of capital; (3) significant adverse collateral consequences that would result from a criminal fine; and, (4) whether a criminal fine would impair the company's ability to pay restitution to victims.[97]

3. New Changes to DOJ's Corporate Enforcement Policy

DOJ also updated its 2017 Corporate Enforcement Policy in several key areas, including clarifying its expectations with respect to ephemeral messaging apps and "de-confliction" procedures, and modifying policy language surrounding the disclosure of evidence, reflecting a more realistic understanding of how companies learn and are able to communicate information.

- *Ephemeral messaging*. In March, DOJ clarified its stance on the use of ephemeral messaging apps, addressing an area that is evolving and one that DOJ and the business community continue to grapple with.[98] While initially instructing companies in December 2017 to prohibit the use of "ephemeral messaging platforms" such as WhatsApp, Signal, and WeChat in order to receive full cooperation credit in any resolutions – reasoning that the platforms generated but did not appropriately retain business records and communications – DOJ now expects companies to prohibit improper deletion and implement "appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications."[99]

  Companies should have a retention policy for ephemeral messages in place and should be thinking critically about related issues, including how long such data should be retained; why that particular retention period was selected; how to

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97. Letter from Brian A. Benczkowski, Assistant Attorney General, to All Criminal Division Personnel, Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty at 3 (Oct. 8. 2019), https://www.justice.gov/opa/speech/file/1207576/download.

98. *See* Yannett et al., March 2019 FCPA Update – DOJ Revises Corporate Enforcement Policy, *supra* note 91.

99. U.S. Dep't of Justice, Criminal Division, 9-47.120–FCPA Corporate Enforcement Policy (updated Mar. 2019), https://www.justice.gov/criminal-fraud/file/838416/download [hereinafter "DOJ March 2019 CEP Updates"]

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train employees on these matters; whether personal phones are permitted and how they are handled; and generally how to be innovative in this area.

- *De-confliction expectations*. While the revised Policy still states that a company, where requested and appropriate, must de-conflict witness interviews and other investigative steps it intends to take with the steps that DOJ intends to take as part of its investigation,[100] DOJ clarified in March that the "de-confliction" of witness interviews should not interfere with a company's internal investigation and that DOJ will not take any steps to direct affirmatively a company's internal investigation.
- *Policy applies in the M&A context*. DOJ also updated the Policy to apply expressly in the M&A context, underscoring the value of anti-corruption due diligence. In particular, there will be a presumption of a declination if an acquiring company: (1) discovers and voluntarily and timely self-discloses misconduct uncovered at a target, such as through pre-acquisition due diligence or post-acquisition audits and compliance integration efforts; (2) fully cooperates with DOJ; and (3) works to remediate effectively, including by implementing an effective compliance program at the merged or acquired entity. [101]
- *Voluntary self-disclosure*. Finally, while the Policy previously required companies to disclose "all relevant facts known to it, including all relevant facts about all individuals substantially involved in or responsible for the violation of law,"[102] DOJ modified this language in November to reflect an understanding that a company that discloses possible violations soon after learning about them would not be expected to have a full understanding of the facts. DOJ now requires companies to disclose relevant facts known "at the time of the disclosure" and to provide information regarding any – as opposed to all – "individuals substantially involved in or responsible for the misconduct at issue."[103]

  The Policy also previously required companies to inform DOJ of "opportunities for the Department to obtain relevant evidence not in the company's possession or otherwise known to the Department."[104] This was simplified to read:

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100. *See* Enforcement Policy (updated Nov. 2019), *supra* note 1 ("'De-confliction' is one factor that the Department may consider in appropriate cases in evaluating whether and how much credit that a company will receive for cooperation. When the Department does make a request to a company to defer investigative steps, such as the interview of company employees or third parties, such a request will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.").
101. *See* Yannett et al., March 2019 FCPA Update – DOJ Revises Corporate Enforcement Policy, *supra* note 91, at 10.
102. *See* DOJ March 2019 CEP Updates, *supra* note 99, at 2.
103. *See* Enforcement Policy (updated Nov. 2019), *supra* note 1.
104. *See* DOJ March 2019 CEP Updates, *supra* note 99, at 2.

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"[W]here the company is aware of relevant evidence not in the company's possession, it must identify that evidence to the Department."[105]

C. Post-*Hoskins* Agency Liability

As discussed above, UK national Lawrence Hoskins – a senior executive at the France-based power and transportation company Alstom – was indicted in 2013 in connection with allegations that Alstom bribed foreign officials to secure power contracts in Indonesia. The Second Circuit last year foreclosed the possibility of charging Hoskins with conspiracy or aiding and abetting FCPA violations if he himself could not be charged with the substantive offense. Hoskins's trial therefore hinged on whether DOJ could prove that Hoskins was an agent of the Alstom Connecticut subsidiary implicated in the alleged bribery.[106] (Relatedly, earlier this year, a federal judge within the Seventh Circuit refused to follow this approach absent binding precedent, noting that Seventh Circuit case law – which calls for inferring congressional intent from the statutory text rather than legislative history – does not impose the *Hoskins* requirement that foreign persons must meet the jurisdictional requirements for primary liability to be charged with conspiracy.)[107]

"*Hoskins* therefore serves as a timely reminder to U.S. parent companies that they retain an obligation to ensure that the conduct of their subsidiaries conforms to the FCPA's requirements."

Hoskins's defense counsel relied on organizational charts to show that Hoskins worked for the parent company, which controlled the subsidiary rather than acting as an agent for it. Conversely, DOJ emphasized that Hoskins's role involved assisting its regional businesses, including by approving consultants in cases where final approval rested with the subsidiaries.[108] Agreeing with DOJ's argument that Hoskins, at least in certain cases, acted as an agent in connection with the alleged wrongdoing, the jury found Hoskins guilty of various counts of FCPA and money laundering and conspiracy charges.

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105. Enforcement Policy (updated Nov. 2019), *supra* note 1.

106. *See, e.g.*, Dylan Tokar, "Jury Finds Former Alstom Executive Guilty of Foreign Bribery," The Wall Street Journal (Nov. 8, 2019), https://www.wsj.com/articles/jury-finds-former-alstom-executive-guilty-of-foreign-bribery-11573234651.

107. Memorandum Order and Opinion 20-26, *United States v. Firtash*, 13-CR-00515 (N.D. Ill. June 21, 2019).

108. *See* Tokar, *supra* note 106.

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After DOJ's victory in the *Hoskins* trial on an agency theory, it appears that the ease with which a person or an entity can be deemed an agent has the potential to (1) neutralize any limitations the Second Circuit placed on DOJ jurisdiction under the FCPA,[109] and (2) potentially expand the scope of criminal liability for U.S. corporate parents, given that principals are presumptively liable for the acts of their agents.

In remarks delivered in December responding to these concerns, Assistant Attorney General Benczkowski clarified that, despite the Hoskins conviction, DOJ would not begin to argue "that every subsidiary, joint venture, or affiliate is an 'agent' of the parent company simply by virtue of ownership status" nor that "every parent company should automatically be held liable for the acts of its subsidiaries, joint ventures, or affiliates based on an agency theory."[110] According to AAG Benczkowski, a person may "be an agent for some business purposes and not for others," and this will remain a fact-based determination that looks for a principal's control over an agent.[111]

Taken together, the *Hoskins* verdict and Benczkowski's subsequent comments offer some potential insights on three key issues:

- *Individual liability*. Hoskins previously would have been charged under a theory of conspiracy or aiding and abetting alleged FCPA violations. But the Second Circuit foreclosed these theories in its 2018 decision. Now, employees of foreign subsidiaries or affiliates who previously would have been charged under conspiracy or aiding and abetting theories instead may be charged under a theory of agency – one that is fact-dependent and unfixed by the dictates of corporate organizational charts. The Hoskins and Li charges (discussed above) provide examples of this more aggressive approach.
- *Corporate liability*. Corporate liability for foreign subsidiaries, sister companies, or consortium partners – previously charged under conspiracy or aiding and abetting theories, as was the case in the Bonny Island Nigeria cases[112] – may also see an uptick in efforts by the enforcement agencies to rely on agency theories of liability.

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109. *See United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018); see also Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett, Philip Rohlik, Jil Simon & Anne M. Croslow, "Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery," FCPA Update, Vol. 10, No. 1 (Aug. 2018), https://www.debevoise.com/insights/publications/2018/08/20180830-fcpa-update-august-2018.

110. U.S. Dep't of Justice, *Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act* (Dec. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference.

111. *Id.*

112. *See, e.g.*, Paul Berger & Aaron Tidman, "Technip S.A. and Snamprogetti Settlements Highlight the Importance of Due Diligence When Selecting Joint Venture Partners," FCPA Update Vol. 1, No. 12 (July 2010), https://www.debevoise.com/insights/publications/2010/07/fcpa-update.

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- *Vicarious liability*. Finally, the *Hoskins* verdict reinforces that U.S. parent companies are vicariously liable for the acts of their subsidiaries, since a principal is presumptively liable for the acts of its agents under traditional agency principles. Benczkowski also noted that DOJ would "strongly favor prosecution" where there is evidence that corporate structures were used to shield a parent from criminal liability or where agents were used to shield a high-level individual executive from accountability.[113] *Hoskins* therefore serves as a timely reminder to U.S. parent companies that they retain an obligation to ensure that the conduct of their subsidiaries conforms to the FCPA's requirements.

We will closely follow and continue reporting on any appeals that shed further light on the breadth and scope of the future of agency liability.

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113. AAG Benczkowski Dec. 2019 Remarks, *supra* note 110.

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2019 can only be described as a slow year in the field of white collar crime enforcement in the United Kingdom. The SFO entered into DPAs with Serco Geografix Limited and Güralp Systems Ltd., the latter in respect of foreign corruption, but continued to struggle in follow-on prosecutions of individuals. Last year saw prosecutions of individuals brought in conjunction with the DPAs with Sarclad Ltd and Güralp end in acquittals. Although the publication of guidelines for corporate cooperation provided additional clarity for corporates considering whether to self-report to the SFO and / or engage with an SFO investigation, the SFO's continuing difficulties in securing trial convictions may well affect corporates' calculations whether it would be in their interest to do so.

While calls to reform the principles of corporate criminal liability continue to grow louder, Brexit claimed virtually the entirety of the parliamentary bandwidth in 2019. The only legislative development of note is a law to facilitate the obtaining of electronic data abroad, applicable initially only in relation to the United States. Nevertheless, the December 12 elections at least meant that some of the Brexit-uncertainty has been dispelled.

I. Legal Developments

2019 was a quiet year for white collar matters in the appellate courts, and an almost total legislative preoccupation with Brexit meant that little legislation of note was passed. However, the SFO released much-anticipated guidance on corporate cooperation, and an agreement with the United States has the potential to revolutionise the cross-border treatment of electronic data. Last year also saw the publication of parliamentary committee reviews and proposed reform of the Bribery Act 2010 ("UKBA"), as well as proposals to revise corporate liability for economic crime.

A. SFO Corporate Cooperation Guidance[1]

On August 6, 2019, the SFO published long-anticipated guidance[2] on how it assesses cooperation by corporate entities when making charging decisions and determining whether to enter into DPAs. Defining cooperation as "providing assistance to the SFO above and beyond what the law requires," the Guidance emphasizes that no amount of cooperation guarantees a particular outcome. Rather, it provides a set of expectations of good practice that a corporate should comply with in order to be eligible for a deferred prosecution agreement.

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1. Karolos Seeger, et al., "U.K. Serious Fraud Office Issues Corporate Cooperation Guidance," FCPA Update, Vol. 11, Nov. 1 (Aug. 2019), https://www.debevoise.com/insights/publications/2019/08/fcpa-update-august-2019.
2. SFO Operational Handbook, Corporate Co-operation Guidance (Aug. 2019), https://www.sfo.gov.uk/download/corporate-co-operation-guidance/ (the "Guidance").

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1. Cooperative Investigation Management

The SFO provides a list of steps (already widely applied in practice) indicating that a corporate has been cooperative in preserving evidence and providing it to the SFO. The guidance states that cooperative corporates will:

- consult with the SFO before interviewing witnesses or suspects, and make employees and agents available for interview by the SFO;
- provide the SFO with a privilege log which records all documents withheld on the basis of privilege, including the basis for asserting privilege;
- ensure good record-keeping for both digital and physical materials; and
- maintain an effective audit trail of data collections and productions.

2. Formalizing Witness-Handling and Privilege Claims

In this respect, the Guidance makes three key points.

First, the Guidance reaffirms the SFO's position that cooperative corporates should identify relevant witnesses, and disclose their accounts and documents shown to them. In a potential shift to a stricter approach, the Guidance states that cooperative corporates "should additionally provide any recording, notes and/or transcripts of the interview," as well as "identify a witness competent to speak to the contents of each interview."

Second, a cooperating corporate that claims privilege over such materials needs to provide "certification by independent counsel that the material in question is privileged."

Third, while waiving privilege will be considered for the purpose of assessing a corporate's degree of cooperation, the Guidance states that the decision by a corporate not to waive privilege over privileged witness accounts will not be penalized.

B. Facilitating Access to Extra-Territorial Digital Evidence[3]

On October 9, 2019, the Crime (Overseas Production Orders) Act 2019 ("COPOA"), which attempts to simplify and accelerate the process by which criminal investigators can obtain electronic data located abroad, came into force.[4] COPOA provides for a court-issued Overseas Production Order ("OPO") to compel persons located overseas directly, particularly Communication Services Providers, to produce or grant access to electronic data. In order to be subject to an OPO, a person must

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3. For more information, please see the April 2019 and October 2019 issues of FCPA Update, available at https://www.debevoise.com/insights/publications/2019/04/fcpa-update-april-2019 and https://www.debevoise.com/insights/publications/2019/10/fcpa-update-october-2019.

4. The Act came into force in England, Scotland, and Wales. It received Royal Assent on February 12, 2019.

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(i) operate or be based outside the U.K., and (ii) in a country that is party to a "designated international cooperation arrangement."[5]

On October 3, 2019, the United Kingdom entered into its first "designated international cooperation arrangement" with the United States,[6] which is expected to enter into effect in early April 2020. The scope of the arrangement is wide; it covers fraud, cyberattacks, corruption, and other serious offenses, and applies to individuals and corporates.

"Although the publication of guidelines for corporate cooperation provided additional clarity for corporates considering whether to self-report to the SFO …, the SFO's continuing difficulties in securing trial convictions may well affect corporates' calculations whether it would be in their interest to do so."

The enactment of COPOA and the U.S./U.K. data sharing arrangement is reflective of a wider movement towards speeding up the gathering of evidence in international criminal investigations, and a desire to improve on the current framework of Mutual Legal Assistance treaties. With its strict time limits, OPOs should in theory enable U.K. law enforcement to obtain vital evidence within weeks, and improve its ability to gather electronic material from uncooperative targets or witnesses. However, OPOs do not address the challenges faced by investigation authorities due to the increasingly prevalent use of encryption.

C. Legislative Reform Proposals[7]

1. Post-Legislative Review of the Bribery Act 2010

On March 14, 2019, the House of Lords Select Committee on the Bribery Act 2010 (the "Lords Committee") published its review.[8] While the Lords Committee concluded that the UKBA has been a positive piece of legislation, it made a number of recommendations.

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5. Section 4(2) COPOA.
6. The text of the Agreement is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836969/CS_USA_6.2019_Agreement_between_the_United_Kingdom_and_the_USA_on_Access_to_Electronic_Data_for_the_Purpose_of_Countering_Serious_Crime.pdf (PDF: 268 KB). For the relevant press releases, *see* https://www.gov.uk/government/news/uk-and-us-sign-landmark-data-access-agreement (U.K.) and https://www.justice.gov/opa/pr/us-and-uk-sign-landmark-cross-border-data-access-agreement-combat-criminals-and-terrorists (U.S.).
7. Karolos Seeger, Jane Shvets, Robin Lööf, & Alma M. Mozetič, "U.K. Considers Reforms to Enforcement Involving Economic Crime," FCPA Update, Vol. 10, No. 10 (May 2019), https://www.debevoise.com/insights/publications/2019/05/fcpa-update-may-2019.
8. House of Lords Select Committee on the Bribery Act 2010, Report of Session 2017-19, The Bribery Act 2010: Post-Legislative Scrutiny (Mar. 14, 2019), https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf.

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First, in relation to the UKBA's adequate procedures defence, the Lords Committee recommended that additional guidance be provided on the definition of "adequate". In its response of May 13, 2019,[9] the government confirmed that adequate procedures are likely to be ones that are "reasonable in all the circumstances."

Second, the Lords Committee recommended the government provide more examples of procedures that are likely to constitute a good defence under UKBA. Responding, the government instead urged businesses to consult with legal and compliance professionals.

Third, the Lords Committee recommended that the government provide clearer examples of acceptable corporate hospitality. The government responded by suggesting that businesses should consult previously published guidance.

Fourth, the Lords Committee recommended that companies who self-report breaches should receive a greater penalty discount. The government noted this recommendation, but did not propose to take specific action.

2. Calls for Reform of Corporate Liability for Economic Crime

In a report published on March 8, 2019, the House of Commons Treasury Committee (the "Commons Committee") urged legislative reform on corporate liability for economic crime.[10] English law of corporate liability for white collar offenses is, with a few notable exceptions, based on the so-called "identification principle," under which it is notoriously difficult to prosecute, in particular, large companies. The Commons Committee's recommendation followed the SFO's suggestion last year that a new offense of "failing to prevent economic crime"[11] should be created. There was also a letter by the All-Party Parliamentary Group on Fair Business Banking to the then-U.K. Prime Minister, Theresa May, which noted that fraud costs the U.K. economy £100 billion annually and urged reform to enable adequate prosecution of large corporate economic crimes.[12] In response, Prime Minister May acknowledged the urgency of the matter and promised to publish a response "*soon*" to its Call for Evidence on Corporate Criminal Liability for Economic Crime – a public consultation issued by the Ministry of Justice that

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9. Ministry of Justice, Government Response to the House of Lords Select Committee on the Bribery Act 2010 (May 13, 2019), https://www.parliament.uk/documents/lords-committees/Bribery-Act-2010/govt-response-hol-select-committee-bribery-act-2010.pdf.
10. House of Commons Treasury Committee, Twenty-Seventh Report of Session 2017-19, Economic Crime – Anti-money laundering supervision and sanctions implementation (Mar. 5, 2019), https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2010/2010.pdf.
11. Letter from Mark Thompson of the Serious Fraud Office to the Chair of the Treasury Select Committee (July 16, 2018), https://www.parliament.uk/documents/commons-committees/treasury/Written_Evidence/sfo-corporate-liability-160718.pdf.
12. Letter from Kevin Hollinrake MP and The Rt Hon Norman Lamb MP, Co-Chairs of the All-Party Parliamentary Group on Fair Business Banking, to the Prime Minister (Mar. 6, 2019), http://www.appgbanking.org.uk/wp-content/uploads/2019/03/060319-Prime-Minister-Corporate-Liability-Regime-APPG-Fair-Business-Ba....pdf.

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closed in March 2017.[13] It remains to be seen whether the new Prime Minister, in office following the December 12, 2019 general election, will follow through on his predecessor's promise.

II. SFO Activity

2019 was undoubtedly a difficult year for the SFO, following on from the high-profile dismissal of charges in both the Barclays and Tesco cases in 2018. All individuals charged in connection with the DPAs entered into with both Sarclad and Güralp Systems were acquitted by juries, and the decision was announced to drop the investigations into individuals in the Rolls-Royce and GlaxoSmithKline investigations, the former having led to the United Kingdom's still largest DPA in early 2017. These outcomes have not allayed already existing concerns regarding the SFO's ability to secure convictions and hold individuals to account. 2019 also saw the SFO announce a number of new investigations, and close some without charges.

A. Trial Results, Charges Brought, and Guilty Pleas

The SFO also announced its fifth and sixth DPAs, with Serco Geografix Limited ("SGL") and Güralp Systems Ltd ("GSL") respectively. On July 4, 2019, it announced that a three-year DPA with SGL, a wholly-owned subsidiary of Serco Group, had been approved. In entering the DPA, SGL has taken responsibility for three offenses of fraud and two of false accounting arising from a scheme dishonestly to mislead the Ministry of Justice in relation to the profits made from a government electronic tagging contract between 2010 and 2013 by SGL's parent company, Serco Limited. SGL will pay a financial penalty of £19.2 million and the full cost of the SFO's investigation of £3.7 million. On October 22, the SFO announced its DPA with GSL, under which GSL accepted the charges of conspiracy to make corrupt payments and failure to prevent bribery in connection with the sale of seismographic equipment to South Korea, agreeing to pay a total of £2,069,861.

In July 2019, the SFO announced that Basil al Jarah, the Iraqi partner of Unaoil, had pleaded guilty to five offenses of conspiracy to give corrupt payments. The SFO opened an investigation into Unaoil in July 2016 in relation to suspected offenses of bribery, corruption, and money laundering to secure the award of contracts in Iraq for Unaoil's client SBM Offshore. In June 2018, Unaoil Monaco SAM and Unaoil Ltd were both summonsed for conspiracy to give corrupt payments. Three other individuals were also charged with conspiracy to make corrupt payments. The trial of Ziad Akle, Paul Bond, and Stephen Whiteley began at Southwark Crown Court on January 20, 2020.

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13. Letter from the Prime Minister to Kevin Hollinrake MP (Apr. 8, 2019), http://www.appgbanking.org.uk/wp-content/uploads/2019/04/080419-Prime-Minister-Corporate-Liability-Regime-for-Economic-Crime.pdf.

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The SFO could in 2019 finally close its investigation into EURIBOR, which it had opened in 2015, following the conviction after trial of another two traders of conspiracy to defraud. In relation to the SFO's high-profile investigation into Barclays' capital raising arrangements with Qatar Holding LLC and Challenger Universal Ltd during the financial crisis, the retrial of the remaining three defendants (former senior executives) is, as this issue goes to press, coming to an end.

B. High Profile Setbacks: Charges Dismissed and Cases Closed

2019 saw the SFO fail to secure trial convictions of individuals in two cases where it had agreed to DPAs with companies who had accepted wrongdoing on the basis of the actions of those individuals. Additionally, the SFO announced that it was closing two major investigations into alleged foreign corruption without charging any individuals.

The SFO's prosecutions of the individuals allegedly at the heart of the conduct which led to the DPA with the so-called "XYZ Ltd" concluded in 2019. XYZ, now known to be Sarclad Ltd, a steel industry product design and manufacturing company, had accepted charges of corruption and failure to prevent bribery in relation to the systematic use of bribes by three senior representatives to secure contracts for the company between June 2004 and June 2012. However, the three individuals were acquitted by a jury.

Similarly, as the SFO announced the DPA with Güralp Systems Ltd, it also announced the acquittal by a jury of the three individuals accused of the conduct for which the company had taken responsibility.

Finally, the announcement on February 22, 2019 that the SFO was closing investigations into the GlaxoSmithKline plc case and Rolls-Royce plc individuals was controversial. Lisa Osofsky, the Director of the SFO, said that the SFO had concluded that "there is either insufficient evidence to provide a realistic prospect of conviction or it is not in the public interest to bring a prosecution in these cases." The SFO's investigation of Rolls-Royce led in early 2017 to the largest UK DPA by far, costing the flagship engineering company some £500m in fines and disgorgement. The long-running investigation into GSK, started in May 2014, had focused on commercial practices by the company, its subsidiaries and associated persons, mainly in China.

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C. New Investigations and Charges Brought

2019 saw the SFO opening a number of new investigations into suspected fraud in connection with property developments, the sale of mini-bonds and ISA bonds, the sale of investments into Brazilian teak plantations, as well as aspects of biodiesel trading in tandem with the Dutch authorities.

In addition, the SFO announced two investigations into suspected foreign corruption in 2019: The activities of De La Rue plc, a paper and security printed products company, in South Sudan are under SFO scrutiny, and following an announcement by Glencore plc, the SFO confirmed on December 5 that it is investigating suspicions of bribery in the course of business by the mining giant.

"The enactment of COPOA and the U.S./U.K. data sharing arrangement is reflective of a wider movement towards speeding up the gathering of evidence in international criminal investigations, and a desire to improve on the current framework of Mutual Legal Assistance treaties."

III. CPS Activity – Weak White Collar Enforcement

2019 saw the CPS largely leave white collar investigation and prosecution to the Serious Fraud Office. The only noteworthy example of a CPS bribery prosecution in 2019 was the Barnsley FC case in which a former assistant head coach and two corrupt football agents (Tommy Wright, Dax Price, and Giuseppe Pagliara) were found guilty of, respectively, accepting or soliciting a bribe, and paying and facilitating a bribe, under sections 1 and 2 of the Bribery Act 2010. Material obtained by undercover journalists from the Daily and relied upon at trial included audio recordings demonstrating that Wright accepted a £5,000 bribe to leak information about Barnsley football players, and Pagliara and Price broke football regulations by acting as "third-party" owners in a bid to profit when players were sold on to other clubs. On January 17, 2020, the three were sentenced to 12, 18, and 24 months' suspended prison sentences.

This case indicates that the CPS continues to enforce the Bribery Act in domestic and lower value cases. However, the CPS was criticized by a parliamentary committee for prosecuting bribery offenses sparingly, and, when it does, too slowly.[14]

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14. House of Lords Select Committee on the Bribery Act 2010, Report of Session 2017-19 (Mar. 14, 2019), https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf. Similarly, Richard Atkins QC, chair of Bar Council, recently criticized the UK criminal justice system for allowing fraud to go "virtually unpunished." *See* Jemma Sligo, "State of criminal justice 'far worse' than new figures show, says Bar Council," The Law Society Gazette (Aug. 16, 2019), https://www.lawgazette.co.uk/news/state-of-criminal-justice-far-worse-than-new-figures-show-says-bar-council/5101171.article.

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IV. FCA Activity

In 2019, the Financial Conduct Authority ("FCA") imposed financial penalties on 21 firms and individuals, totalling almost £400 million. This figure represents a marked increase on the last few years (£60 million in 2018 and £230 million in 2017), although it is still well below the peak levels of 2014 and 2015. The number of open enforcement investigations continues to rise significantly, as it has every year since 2016: 630 as at December 2, 2019, compared to approximately 500 in April 2018 and 400 in April 2017. Only 15 of the individuals being investigated were "senior managers" under the FCA's Senior Managers and Certification Regime. The SMCR applies to senior managers responsible for AML and compliance.

The FCA's enforcement actions in 2019 reflected the increasingly varied nature of its active market supervision, although none involved allegations of corruption. Notably, the FCA used its competition law powers dating from 2015 for the first time, bringing actions against two asset management firms and an individual in that sector. While the FCA continues to focus on financial crime, market abuse, and issues affecting retail customers, it is also prioritizing investigations into firms' culture and governance, operational resilience failings, and cybersecurity incidents.

V. AML Developments

As of April 2019, the FCA had over 60 ongoing investigations into AML issues. The FCA now frequently opens "dual track" cases that are investigated on both a civil and criminal basis, and only decides which avenue it wishes to pursue once it has sufficiently investigated the facts. The FCA's Director of Enforcement has made it clear in recent public statements that the FCA is keen to bring criminal prosecutions under the Money Laundering Regulations where these are warranted. However, to date there have been no criminal prosecutions for AML issues.

The most significant AML case in 2019 was the FCA's imposition of a £102 million civil penalty against Standard Chartered Bank for failings in its UK wholesale correspondent banking business and its UAE branches from 2009 to 2014. The FCA found that (in breach of the old Money Laundering Regulations 2007), the bank failed to establish and maintain adequate AML policies and procedures, and failed to require its UAE branches to apply UK-equivalent AML standards in relation to customer due diligence and ongoing monitoring. The FCA also found shortcomings in the bank's approach to identifying and mitigating material AML risks, its escalation of AML risks, and its internal checks on its AML controls. The FCA concluded that these issues exposed the bank to the risk of breaching sanctions and increased the risk of it receiving and handling the proceeds of crime.

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In 2019, the UK courts also granted some further unexplained wealth orders ("UWOs") at the application of the National Crime Agency, following the first UWO in 2018. These included a UWO for three London properties worth £80 million belonging to a politically exposed person believed to be involved in serious crime, and a UWO for properties worth £10 million belonging to a businessman believed to be connected to drug and firearms trafficking.

VI. Brexit

At the December 12, 2019 general elections, Prime Minister Boris Johnson secured a comfortable House of Commons majority for the governing Conservative party. This new majority wasted no time approving the Withdrawal Agreement between the United Kingdom and the European Union ("WA"), rejected by the previous Parliament. The United Kingdom will therefore formally leave the EU on January 31, 2020.

After the reigning uncertainty of the past three and half years, what we now know is the following: For the duration of the "implementation period" in the WA, i.e., until the end of 2020, everything stays the same. From January 1, 2021, the United Kingdom will cease to be a part of the framework of intra-EU cooperation that has been built up over, essentially, the past two decades. From then, therefore, UK law enforcement will in principle have to deal with its counterparts in the EU on the basis of, essentially, the Council of Europe Conventions on Extradition and Mutual Assistance in Criminal Matters from, respectively, 1957 and 1959.

SFO Director Osofsky has continued to emphasise the "transnational nature of serious economic crime"[15] and the SFO has reported that in the financial year 2018-19 compared to the previous, the number of requests received for Mutual Legal Assistance and European Investigations Orders (EIOs) increased from 31 to 41, whilst the number of Letters of Requests and EIOs issued by the SFO increased from 66 to 104. So for UK prosecutors who have, for example, relatively recently started benefiting from EU-wide enforcement of European Investigation Orders,[16] the almost inevitable sudden slowing down and increased bureaucracy of international cooperation may be a bit of a shock. At a recent conference attended by a large number of prosecutors,[17] a significant majority deemed that Brexit "will have a highly negative impact on law enforcement as a whole."

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15. SFO Director Lisa Osofsky, "Fighting fraud and corruption in a shrinking world," Speech at the Royal United Services Institute (Apr. 3, 2019), https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/.
16. This has been available to UK authorities since July 31, 2017.
17. The Criminal Law Review Conference 2019, London, Dec. 5, 2019.

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Criminal justice cooperation will undoubtedly eventually be the subject of UK-EU agreements improving on the half-century old Council of Europe conventions. However, with no way of knowing when such agreements are likely, or what their eventual scope and depth will be, it is likely that cross-border cooperation will soon enter into a period of complication and uncertainty for UK law enforcement.

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France

In 2019, France refined its recent sweeping changes to its anti-corruption legal framework and continued to be active in enforcement. French authorities issued detailed guidelines for the use of DPA-style resolutions. A landmark parliamentary report pointed out the lack of effective legal tools available to French companies faced with extraterritorial proceedings and made several recommendations. Additionally, vigorous enforcement of corruption and tax fraud-related statutes led to high-profile settlement resolutions and criminal court decisions.

I. Legislative Developments

A. The First CJIP Guidelines

On June 26, 2019, the French Financial National Prosecutor ("PNF") published its first guidelines[1] on the use of the French-style deferred prosecution agreement (known as the "CJIP").[2]

The CJIP was created by the Sapin II Law of December 9, 2016,[3] which significantly changed white-collar criminal enforcement in France. In cases relating to corruption, influence peddling, tax fraud, and the laundering of the proceeds of tax fraud, the CJIP mechanism offers corporate entities the possibility to negotiate an outcome without an admission of guilt or a criminal conviction. The defendant corporation, however, must agree to pay a fine proportionate to the benefit secured through the illicit activity (up to 30% of the corporation's average annual turnover over the previous three years) and also may have to agree to an enhanced compliance program for a maximum period of three years. A CJIP may be finalized only after approval by a judge following a public hearing.

The stated purpose of these guidelines is to encourage cooperation by corporate wrongdoers, by providing clearer and more reliable procedures to develop the facts and circumstances relevant to the PNF as it considers whether to enter into a CJIP and, if so, on what terms. The PNF and other prosecutors' offices have discretion to propose resolving a case through a CJIP. The guidelines list factors that will be considered by the PNF before deciding to do so, including:

- *Self-reporting*. Self-reporting within a reasonable time following the discovery of misconduct is a positive but not necessary factor. The PNF accepts the view that

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1. "Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public" (June 26, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf.
2. *See* Debevoise & Plimpton LLP, "French DPAs—First CJIP Guidelines Published" (July 9, 2019), https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines.
3. Law No. 2016-1691 (Dec. 9, 2016), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id.

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it is proper for a company to conduct an internal investigation to evaluate the relevant facts and form a view on whether self-reporting is warranted (all within a reasonable time following discovery).

- *Cooperation*. The degree of cooperation with prosecution authorities is a key factor for any CJIP resolution. In this context, cooperation primarily means conducting a thorough internal investigation, resulting in a report that is made available to the PNF along with all relevant documents and testimony.

  The guidelines provide that any internal investigation conducted before the involvement of authorities must ensure the preservation of evidence and the integrity of witness testimony. Internal investigations conducted in parallel with a prosecutor's own investigation should be coordinated with the prosecutor. Importantly, the CJIP procedure is not available for individuals, and the guidelines make it clear that any internal investigation should help establish the responsibility of relevant individuals.

  The guidelines also indicate that, if a company wishes to assert the French attorney-client privilege (*secret professionnel*) as a basis to refuse to share any material with the PNF, the PNF will assess whether this refusal appears justified. In the event that it considers the assertion unjustified, the PNF will consider the extent to which any continued refusal should affect negatively the company's cooperation credit. The guidelines state, however, that prosecutors will consider whether sharing the materials covered by the French attorney-client privilege may create a risk of waivers in other jurisdictions.

- *Corporation's past history*. A prior penalty imposed by French or foreign authorities against the company, one of its subsidiaries, or even one of its executives for facts demonstrating a lack of probity usually will prevent any CJIP resolution. The same ordinarily will be true if the company already reached a settlement with a foreign authority. However, the PNF nevertheless may be willing to consider a CJIP if the company's past resolution dates back a significant number of years or relates to a different scope of activities.

- *Compliance program and corrective measures*. The lack of an effective anti-corruption compliance program, which Sapin II requires all medium and large companies to implement, will be viewed negatively by the PNF when deciding whether to offer a CJIP. However, the voluntary implementation of such a program by companies outside the scope of Sapin II, as well as the implementation of remedial measures upon discovery of the facts, will be viewed positively.

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The statute provides that the fine agreed to in a CJIP must be proportionate to the benefit derived through the misconduct, up to 30% of the corporation's average annual turnover over the previous three years. The guidelines now further indicate that the PNF will first calculate the direct and indirect improper benefit secured by the entity, then apply a multiplier based on relevant aggravating and mitigating factors:

- *Aggravating factors*: conduct involving corruption of a public official; a duty to implement an anti-corruption compliance program under Sapin II, but the failure to do so; failure to implement a sufficiently robust anti-corruption compliance program; history of corruption-related offenses in France or abroad; use of corporate resources to conceal the alleged corruption; and alleged corrupt conduct that was repeated or systemic.
- *Mitigating factors*: self-reporting in a timely fashion; excellent cooperation; full and effective internal investigation; effective anti-corruption compliance program; implementation of remedial measures and changes in the organization; and voluntary implementation of a compliance program by entities having no statutory obligation to do so.

"The stated purpose of [the] guidelines is to encourage cooperation by corporate wrongdoers, by providing clearer and more reliable procedures to develop the facts and circumstances relevant to the [French Financial National Prosecutor] as it considers whether to enter into a CJIP and, if so, on what terms."

The guidelines in essence amount to an invitation to French (and other) corporations and their attorneys to engage in discussions that would lead to a negotiated outcome in France, as has been the norm in the United States for years. While these first guidelines represent a welcome clarification, it remains to be seen whether French corporations and their attorneys will find the CJIP procedure to be sufficiently attractive to cause a real change in corporate defensive strategy. Another variable is whether a French CJIP will be considered sufficiently "adequate" by prosecutors in other countries, notably the United States, as to forestall parallel or successive prosecutions.

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B. The Gauvain Report

On June 26, 2019, French MP Raphaël Gauvain published a 102-page report entitled "Restoring French and European Sovereignty and protecting our companies from extraterritorial laws and measures."[4] That well-publicized report pointed out the lack of effective legal tools available to French companies faced with extraterritorial proceedings and made several recommendations, including:

- *Updating the French Blocking Statute*. The French Blocking Statute of 1968 prohibits French citizens and residents of France from disclosing information that would harm the sovereignty, security, or essential economic interests of France or contravene public policy; and from requesting, searching, or disclosing commercial information for use in foreign judicial or administrative proceedings, unless accomplished under an existing treaty (such as the U.S.-France Mutual Legal Assistance Treaty). A breach of such prohibitions is punishable by up to six months' imprisonment and/or a fine of €18,000 (€90,000 for legal entities).

  The Blocking Statute, however, has almost never been enforced. Because of this lack of enforcement history, foreign authorities may not see it as a valid reason not to comply with domestic subpoenas or discovery without recourse to burdensome MLA channels. As a result, the Blocking Statute creates a host of difficulties for French companies, requiring them to balance the immediate risk of noncompliance, such as with their U.S. obligations, with the often theoretical risk of violating the Blocking Statute. Perhaps unsurprisingly, French companies tend to take their chances and comply with foreign requirements. As a consequence, French authorities appear to be concerned that they are losing their grip on the flow of potentially sensitive information transmitted by French corporations.

  The Gauvain report thus recommends strengthening the Blocking Statute, notably by increasing the penalties for violations to a maximum of €2 million (€10 million for legal entities) and two years' imprisonment. The report further proposes to strengthen the already-existing but unenforceable obligation to report requests for documents by foreign authorities or opposing parties, designating an already-existing government body (the Economic Strategic Information and Security Department, or "SISSE", of the Ministry of Economy and Finance) to receive such reports. In addition, the report suggests introducing a criminal offense punishable by up to six months' imprisonment and/or a €50,000 fine (€250,000 for legal entities) for failing to report a request to the SISSE.

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4. Parliamentary Report, "Restoring French and European Sovereignty and protecting our companies from extraterritorial laws and measures" (June 26, 2019), https://www.vie-publique.fr/sites/default/files/rapport/pdf/194000532.pdf.

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- *Introducing In-House Privilege*. According to the report, France is the only G7 country that does not recognize advice from in-house counsel as privileged. The report argues that this places French companies at a disadvantage compared to their main competitors in the context of, in particular, U.S. enforcement action.

  The Gauvain report thus recommends protecting all internal communications of in-house counsel amounting to legal advice, "including legal consultations concerning the preparation or conduct of the company's defense in legal proceedings." In-house counsel would be enrolled at the Bar on an *ad hoc* list and thus would be subject to specific ethical obligations, though they would not enjoy rights of audience before courts. As is already the case for external counsel, legal advice provided with the intent to commit or enable an offense would not be protected. The report also argues that in-house privilege would likely be respected by U.S. authorities, as it mirrors the protection available under U.S. law and because French in-house counsel would be members of the Bar.

- *Other Recommendations*. The Gauvain report provides several other recommendations, including protecting companies' data against the U.S. Cloud Act; extending the scope of the CJIP to the misuse of corporate assets and money laundering; regulating internal investigations; turning to the International Court of Justice and the OECD to clarify international law on the issue of the extraterritoriality, particularly in relation to unilateral sanction regimes; upgrading the EU Blocking Regulation No 2271-96[5] to make it as protective as the proposed reforms of the French Blocking Statute; and loosening France's corporate criminal liability regime to facilitate prosecution of legal entities.

The Gauvain report is currently under close review by the French government. To date, however, no substantive legislation arising from the report's recommendations has been submitted.

II. Enforcement Activity

A. CJIPs

The following three new CJIPs were approved in 2019:

- *Carmignac Gestion*. On June 20, 2019, the French asset-manager Carmignac Gestion agreed to pay a €30 million fine to settle charges of alleged tax fraud.[6] This CJIP is the first to be concluded with respect to tax fraud offenses since

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5. Council Regulation (EC) No 2271/96 (Nov. 22, 1996) (protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1533849072786&uri=CELEX:01996R2271-20140220.

6. The CJIPs and their approval orders are available in French at https://www.economie.gouv.fr/afa/publications-legales.

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the mechanism was extended to such crimes in 2018.[7] In addition to the actual amount of evaded taxes (€11 million over four years), the PNF also took into account several aggravating factors, including the level of complexity of the tax arrangement and the duration of the alleged misconduct.

- *Google*. On September 3, 2019, Google Ireland Limited and its French subsidiary Google France agreed to pay a total €500 million to settle charges of alleged tax fraud. The PNF investigations, which started in 2015, were brought to light following a well-publicized PNF raid of Google France's premises after months of offline investigations. The PNF took into account the cooperation of the defendants and the fact that Google France settled its tax debt as mitigating factors. The large amount of evaded taxes and the duration of the alleged misconduct were taken into account as aggravating factors.
- *Egis Avia*. On November 28, 2019, the medium-sized French company Egis Avia agreed to pay a €1.6 million fine to settle charges of alleged corruption of foreign public officials in Algeria. The PNF considered the limited scope (only one contract) and timing (10 years ago) of the alleged misconduct, as well as the active cooperation of the company's new management, as mitigating factors. However, the PNF considered the gravity of the alleged misconduct and the late cooperation of the company as aggravating factors.

B. First Decision of the AFA's Enforcement Committee

The role of the French Anti-Corruption Agency ("AFA") is not to prosecute corruption or other crimes, but rather to ensure that entities required to adopt anti-corruption compliance programs under Sapin II actually have done so, as well as to supervise the implementation of anti-corruption compliance programs imposed by a CJIP. In case of a breach, the AFA's director may refer the case to the AFA's Enforcement Committee, which may impose administrative fines.

On June 25, 2019, the AFA's Enforcement Committee held its first-ever hearing in a case involving a French family-owned company, Sonepar. According to the AFA's director, the company had allegedly failed to implement five of the eight requirements of an effective anti-corruption compliance required under Sapin II: (i) a risk assessment program, (ii) a code of conduct, (iii) a third-party assessment program, (iv) accounting control processes, and (v) an internal controls procedure.[8]

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7. *See* Debevoise & Plimpton LLP, "France Boosts Tax Fraud Prosecution" (Oct. 30, 2018), https://www.debevoise.com/insights/publications/2018/10/france-boosts-tax-fraud-prosecution.
8. AFA, Enforcement Committee, sanction n°19-01 (July 4, 2019), https://www.agence-francaise-anticorruption.gouv.fr/files/files/DECISION%2019-01%20COMMISSION%20DES%20SANCTIONS%20ANONYMISEE.pdf.

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On July 4, 2019, the AFA's Enforcement Committee eventually dismissed all these charges, mostly because Sonepar had taken the necessary steps to address the alleged breaches before the Enforcement Committee hearing. Regarding the risk assessment program, the Enforcement Committee highlighted that companies do not necessarily have to follow the methodology provided for in the AFA's guidelines of December 22, 2017,[9] which should be considered guidance rather than mandates.

C. Criminal Trial of UBS

On February 20, 2019, the Paris Criminal Court convicted and fined UBS AG €3.7 billion for illegal solicitation of financial services and aggravated laundering of the proceeds of tax fraud. This is by far the largest fine ever imposed by a French criminal court. UBS AG's French subsidiary was also convicted and fined €15 million for complicity. Five individual defendants were also found guilty and sentenced to suspended jail terms and fines of up to €300,000. The two banks and three of the individuals also will have to pay a total of €800 million to the French State in compensation for lost tax revenues. The retrial before the Paris Court of Appeals is expected to take place in June 2020.

Interestingly, it was publicly reported that CJIP discussions between UBS AG and the PNF took place before trial but eventually failed, reportedly because French authorities refused to accept a financial penalty below €1.1 billion, and both sides took the view they would be able to achieve better results at trial. Pending appeal, the €3.7 billion fine imposed on UBS AG therefore sends a clear signal to companies weighing the pros and cons of entering into a CJIP or risking a criminal trial and may affect the strategy of corporate defendants in a French criminal investigation.

On September 11, 2019, in a separate case, the French Cassation Court handed down a key decision regarding the calculation of fines imposed by criminal courts for "laundering of the proceeds of tax fraud." According to that decision, fines must be calculated based on the amount of evaded "taxes." Because the €3.7 million fine imposed on UBS AG was based instead on the amount of evaded "assets," that decision may well impact UBS AG's retrial before the Paris Court of Appeals.

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9. AFA, "Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and Favouritism" (Dec. 22, 2017). An English version is available at https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/French_Anticorruption_Agency_Guidelines.pdf.

Germany

I. Legislative Developments Regarding Corporate Liability[1]

In 2019, Germany advanced what could become a significant change regarding corporate criminal liability. Although German criminal law does not currently provide for such liability, corporate misconduct may lead to administrative liability under the Administrative Offences Act. Following the government's Coalition Treaty in 2018 that promised related reform, in August 2019, the German Federal Ministry of Justice and Consumer Protection issued its first unofficial draft of a Corporate Sanctions Act for intra-governmental discussion purposes (the "Draft Act"). The Act, if adopted by the German Parliament, would replace the current regime of administrative corporate liability two years after promulgation.

Under the Draft Act, corporate criminal liability attaches if top management commits a corporate crime, which is defined as a criminal deed that violates the duties of the corporation or is intended to enrich the corporation illegally. Corporate crimes committed by lower-ranking employees trigger liability if management could have prevented or considerably impeded the crime from occurring, for example by implementing and enforcing adequate compliance measures. For corporations domiciled in Germany, the Act also would extend to corporate crimes committed abroad, if the relevant conduct is punishable both in Germany and the foreign jurisdiction.

The Draft Act also provides for mandatory prosecution of corporate crimes, thus ending the discretion of the prosecutors' offices regarding whether to prosecute a case against a corporation. Additional grounds to decline or end the proceedings, for example in the case of an expected foreign sanction for the same crime, counterbalance the new duty to prosecute.

The Draft Act replaces the single sanction of a fine of up to €10 million with a more nuanced set of sanctions:[2]

i A fine of up to €10 million, or, in case the global revenue of the responsible "economic unit," as defined in German competition law and including all controlled affiliates, exceeds €100 million per year, up to 10% of the revenues.

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1. *See* Thomas Schürrle & Friedrich Popp, "Germany Begins Reform of Corporate Criminal Liability," FCPA Update, Vol. 11, No. 5 (Dec. 2019), https://www.debevoise.com/insights/publications/2019/12/fcpa-update-december-2019.

2. *See* secs. 8 et seq., Draft Act.

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ii A formal warning coupled with a contingent fine operating for a period of up to five years if the court finds that a fine is not appropriate. Amongst other impositions on the company, this sanction may come with the direction to implement certain measures to prevent future crime from occurring and to show evidence of implementation to an expert, thus resembling the U.S. concept of a monitorship.

iii Dissolution of the corporation in egregious cases.

Ill-gotten profits can still be disgorged, in addition to imposition of a fine.

The Draft Act further provides for guidance on the factors that a court must consider when imposing sanctions, including the severity of the crime and the efforts necessary to detect and compensate any injured persons.

Effective internal investigations can mitigate fines by up to 50% and may serve as a basis for the prosecutor to defer (but not decline) an investigation. To obtain such a benefit, the investigation must:

i. Contribute materially to the discovery of the corporate crime;

ii. if conducted by outside counsel, be led by counsel other than the company's defense counsel; and

iii. provide full and continuous cooperation, in particular by sharing the findings (including all relevant documentary evidence and final reports) with the prosecution; while

iv. observing certain essential fair trial standards (including, in all interviews conducted with employees, informing the interviewee of (a) the possibility that the testimony may be used in a criminal prosecution; (b) the right to have a lawyer or a member of the works council present; and (c) the right to refuse testimony if such testimony would expose the interviewee to criminal prosecution).

Such investigation also generally must comply with relevant laws, in particular data protection and employment relations laws.

Another recurring issue in internal investigations under German law is the attorney-client privilege. German law respects the need for a client to disclose all facts to his or her attorney, particularly defense counsel, and protects the confidentiality of attorney–client communications (as well as all types of documents pertaining to said communications) from compelled disclosure. In internal investigations the privilege may serve as a tool to control the reporting of findings

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and, if need be, to encourage employees to disclose their wrongdoing as part of the company's effort to determine the root cause of the compliance issues. The German law privilege is based on professional secrecy and already limited in scope in comparison to the broader U.S. attorney-client privilege and attorney work product doctrine or the U.K. legal advice or litigation privileges.

Regarding documents, the German privilege protects against seizure only with respect to communications between the defending corporation and its defense counsel. Compared to the United States, for example, the Draft Act treats differently internal investigations in Germany. To qualify for the cooperation benefit under the Draft Act, the company must fully communicate the results of an internal investigation, including interview records, to the prosecution. In this case the company does not have the option of producing only certain information or shielding certain witnesses from providing information or testimony.

"Under [Germany's] Draft Act, corporate criminal liability attaches if top management commits a corporate crime, which is defined as a criminal deed that violates the duties of the corporation or is intended to enrich the corporation illegally."

As a consequence, the corporation would have to decide in every instance whether to accept the new rules for internal investigations and thereby risk incomplete fact-finding by in-house counsel or non-defense outside counsel, or have the investigation conducted by defense counsel, retaining the benefits of privilege and potentially obtaining more information (including information that may be needed to remedy any compliance deficiencies), but risk foregoing a reduction in penalties.

As of now, it is unclear whether the Coalition actually will bring the Draft Act forward to the German Parliament.

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II. Judicial Decisions Regarding Confidentiality of Compliance Investigations and GDPR Access Rights[3]

Since May 2018, the EU General Data Protection Regulation ("GDPR"), the uniform data protection law across the EU Member States, has governed the processing of personal data of individuals ("data subjects") in the Union. Personal data is any information relating to an identifiable person, including information gathered in the context of internal investigations or whistleblower systems. In particular, any use of personal data, including the search, collection, review, transfer, and sharing with affiliates, outside advisors, and authorities within or outside the EU, is covered by the new rules. Failure to comply with GDPR may result in civil, administrative, or criminal liability and may render evidence inadmissible in court. In addition, data protection supervisory authorities may prohibit data processing, including transfers to third-country authorities.

Data subjects have certain rights to obtain information about the use of their data, and to obtain access to their data within certain short timeframes. These rights are not absolute, and GDPR provides certain defenses against their exercise. Member States can further shape defenses in accordance with the nature of the data processing at issue.

The Landesarbeitsgericht Baden-Württemberg, a German State Appellate Court, recently confirmed that data protection rights may extend to personal information gathered in internal investigations or similar proceedings on a private level. A German company had implemented a whistleblower system providing for confidential reporting and collection of information in a designated office that handled compliance investigations. In the context of employment litigation, the plaintiff employee requested on the basis of the GDPR access to, and a copy of, personal information in a whistleblower report revealing alleged compliance violations. The defending company denied the access with a general reference to the confidential nature of the whistleblower information, but gave no further reasoning.

The Court granted the employee access to the investigation files because the company failed to specify the defenses under GDPR and the German Federal Data Protection Act. A successful defense would have required showing that the company had an overriding interest in the confidentiality of the whistleblowing system, except in cases of false allegations made deliberately or with gross negligence.

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3. *See* Thomas Schürrle & Friedrich Popp, "German Court Finds That GDPR Access Rights May Trump Confidentiality of Internal Investigations," FCPA Update, Vol. 10, No. 11 (June 2019), https://www.debevoise.com/insights/publications/2019/06/fcpa-update-june-2019.

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There is a risk that data custodians will try to use their GDPR access rights in internal investigations to better understand the scope and status of investigations and to adjust their cooperation accordingly. The court's decision serves as a reminder that investigating companies should prepare to provide a timely response to such requests and should consider potential defenses from the outset.

Data protection remains on the radar of German corporations, as German supervisory authorities have published uniform guidelines for calculating administrative fines under the GDPR.[4] The first fine calculated under the new method amounts to €14.5 million, was issued by the Berlin supervisory authority, and relates to the over-retention of personal data by a German real estate company.[5]

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4. *See* Konzept der unabhängigen Datenschutzaufsichtsbehörden des Bundes und der Länder zur Bußgeldzumessung in Verfahren gegen Unternehmen (Oct. 14, 2019), https://www.datenschutzkonferenz-online.de/media/ah/20191016_bu%C3%9Fgeldkonzept.pdf.

5. The press release issued by the Berlin Commissioner for Data Protection may be viewed at https://www.datenschutz-berlin.de/fileadmin/user_upload/pdf/pressemitteilungen/2019/20191105-PR-Translation-Fine_DW.pdf.

Asia

After several years of active anti-corruption legislative efforts and headline grabbing campaigns in the Asia Pacific region, 2019 was not a particularly active year in local anti-corruption developments. South Korea created a new anti-corruption body, and India appointed its first anti-corruption ombudsperson (*Lokpal*), almost six years after the relevant legislation's passage. Following the lead of India and Malaysia in 2018, Australia's Senate began debating a UK Bribery Act-style corporate offense. Meanwhile, anti-corruption campaigns continued in China and Vietnam. Potentially bucking the regional and global trend of strengthening anti-corruption laws, Indonesia passed legislation that could reduce the independence of its Corruption Eradication Commission.

I. Australia

In November 2019, the Australian government tabled the Crimes Legislation Amendment (Combatting Corporate Crime) Bill in the Senate.[1] This bill seeks to amend existing law to define more broadly what constitutes an "advantage" and creates a corporate offense for the failure to prevent bribery of foreign public officials, punishable by a fine of up to three times the value of the benefit received or up to 10% of a company's annual turnover.

The Attorney General's department in November released draft guidance on adequate procedures and is accepting comments on the draft through the end of February 2020. The guidance is generally consistent with the 2011 UK Ministry of Justice Guidance for the UK Bribery Act and contains a useful summary of Australia's foreign bribery law.[2]

II. People's Republic of China

Following major updates to its anti-corruption legislation and disciplinary procedures in 2018,[3] China's continuing anti-corruption campaign generated fewer headlines in 2019. No new anti-corruption laws or amendments were passed. However, the Communist Party of China ("CPC") promulgated several internal

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1. *See* Attorney General for Australia and Minister for Industrial Relations, Press Release, "New laws to help stamp out foreign bribery offences" (Nov. 28, 2019), https://www.attorneygeneral.gov.au/media/media-releases/new-laws-help-stamp-out-foreign-bribery-offences-28-november-2019. The text of the bill is available at https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1246_first-senate/toc_pdf/1922120.pdf;fileType=application%2Fpdf.
2. *See* Australian Government, Attorney-General's Department, "Draft guidance on adequate procedures to prevent the commission of foreign bribery," https://www.ag.gov.au/Consultations/Pages/adequate-procedures.aspx.
3. For more details, see Kara Brockmeyer, Andrew M. Levine, Philip Rohlik, & De Zha, "The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement," FCPA Update, Vol. 10, No. 6 (Jan. 2019), https://www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019.

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disciplinary rules and opinions in 2019. These rules govern party members, who comprise most public officials and senior executives at state-owned enterprises.

In particular, the CPC Rules regarding Accountability ("Accountability Rules") seek to strengthen the supervision of cadres and reduce corruption.[4] Among other things, the Accountability Rules require that cadres uphold the CPC's anti-corruption campaign. Failure to do so will be grounds for a request for self-criticism, a warning letter, a demotion, or a disciplinary action under the CPC's Regulations on Disciplinary Actions.

Through November 2019, China's disciplinary inspection and supervisory organs have investigated and filed 555,000 cases (often corruption-related), with 485,000 people subject to CPC or governmental disciplinary measures and a further 19,000 being referred to People's Procuratorates for criminal investigation.[5] According to the data released on the website of the Central Commission for Discipline Inspection ("CCDI"), 490 cadres at the central and provincial level were subjected to disciplinary actions in 2019, an increase from 392 and 248 in 2018 and 2017, respectively.[6] Sixty-two cadres of state organs, state-owned enterprises ("SOE"), and financial institutions at the central (as opposed to provincial or municipal) level were disciplined in 2019, representing a dramatic increase from to 2018 (15 cadres) and 2017 (9 cadres).

Many of these cadres investigated were employed by SOEs and financial institutions, including banks, insurance companies, asset management companies, and financial regulatory bodies. For example, Jiang Xiyun, the former chairman of Hengfeng Bank, was convicted of embezzling US$108 million and accepting US$8.6 million in bribes and sentenced to death, commuted to life imprisonment.[7] Another example is Liu Shiyu, the former chief of China Securities Regulatory Commission ("CSRC"), who was accused of "failing to uphold his political position, lacking partisanship, failing to implement the CPC's material policies, making improper speeches, arranging jobs and promotions illegally, and accepting gifts and funds." However, unlike most other cadres accused of corruption, who usually would face criminal charges and be expelled from the CPC, Liu Shiyu was not referred to prosecutors and will not lose his CPC membership despite "wrongdoings" during his work.[8]

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4. *See* https://baijiahao.baidu.com/s?id=1654663242261151801&wfr=spider&for=pc.
5. "China consolidates sweeping victory against corruption in 2019," Xinhua Net (Dec. 30, 2019), http://www.xinhuanet.com/english/2019-12/30/c_138667313.htm.
6. *See* https://baijiahao.baidu.com/s?id=1654663242261151801&wfr=spider&for=pc.
7. "Chinese banker who embezzled US$108 million handed suspended death sentence," South China Morning Post (Dec. 27, 2019), https://www.scmp.com/economy/china-economy/article/3043714/death-sentence-corrupt-banker-china-gets-tough-lending-risks.
8. "The curious corruption case of China's former securities chief Liu Shiyu and his lenient treatment," South China Morning Post (Oct. 21, 2019), https://www.scmp.com/news/china/politics/article/3033774/curious-corruption-case-chinas-former-securities-chief-liu.

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This focus on the financial sector is not surprising, as it was announced in a communiqué issued by the third convention of the 19th CCDI on January 13, 2019.[9] The emphasis on the financial sector follows a similar focus on the medical sector in 2018. It is likely that other important industries, such as transportation, energy, and infrastructure, will attract the attention of disciplinary officials in the coming years.

In addition to domestic actions, China continued to seek international cooperation in connection with its attempts to repatriate corruption-related suspects from overseas. From January to November 2019, 1,841 suspects were repatriated (among whom 816 were party members and state officials) and over 4 billion renminbi in allegedly illicit funds were returned.[10]

"South Korea created a new anti-corruption body, and India appointed its first anti-corruption ombudsperson (*Lokpal*), almost six years after the relevant legislation's passage."

III. Hong Kong

While Hong Kong spent the second half of 2019 dealing with widespread public protests and increasingly divided public opinion, the Hong Kong Independent Commission Against Corruption ("ICAC") (along with the judiciary) retains broad public support.

In 2019, the ICAC handled over 2,000 corruption-related complaints, approximately two-thirds of which related to private sector bribery.[11] The most prominent ICAC case of 2019 involved non-bribery fraud charges against a stockbroker and several executives of Convoy Global Holdings, in connection with fraud relating to a bond offering.[12]

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9. "CCDI adopts communique at plenary session," China Daily (Jan. 13, 2019), http://www.chinadaily.com.cn/a/201901/13/WS5c3b1b31a3106c65c34e41c3.html.
10. *See* http://www.ccdi.gov.cn/toutiao/202001/t20200106_207213.html.
11. Independent Commission Against Corruption, "ICAC remains committed to anti-graft duties with staunch public support" (Jan. 14, 2020), https://www.icac.org.hk/en/press/index_id_880.html.
12. Independent Commission Against Corruption, "Four Charged with Conspiracy to Defraud over Bonds Placement of Listed Company" (July 22, 2019), https://www.icac.org.hk/en/press/index_id_766.html; Enoch Yiu, "ICAC lays charges against five more people in Convoy case," South China Morning Post (July 22, 2019), https://www.scmp.com/business/companies/article/3019659/icac-lays-charges-against-five-more-people-convoy-case.

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IV. India

Although India introduced a corporate offense as part of its 2018 amendments to the Prevention of Corruption Act, the new offense has yet to be tested in court. In March, nearly six years after the passage of the act establishing the position, former Supreme Court Justice PC Ghose was appointed as the first anti-corruption ombudsperson, or Lokpal, heading an eight-member anti-corruption watchdog charged with overseeing investigations of public servants.[13]

In November 2019, Transparency International India and a local NGO, Local Circles, released a survey of 190,000 individuals across India in which 51% of respondents admitted to paying a bribe in the previous 12 months. The survey also listed the least and most corrupt Indian states.[14]

V. Indonesia

With a score of 40 in the 2019 Transparency International Corruption Perceptions Index, Indonesia is among the higher-risk countries in the region. In September 2019, Indonesia's Parliament passed the Revision of Corruption Eradication Commission Law (Law 19/2019), establishing a supervision board to oversee the country's independent anti-corruption agency, the Corruption Eradication Commission ("KPK").[15] The new supervision board and other aspects of the law are seen by many, including Transparency International, as weakening the KPK's independence.[16]

VI. Japan

On June 27, 2019, the OECD Working Group on Bribery released its Phase 4 Report on Japan's implementation of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention").[17] The report faulted Japan on its low rate of prosecution of foreign bribery offenses, while recognizing recent legislative changes, such as the adoption

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13. "Justice Pinaki Chandra Ghose appointed first Lokpal of India," India Today (Mar. 19, 2019), https://www.indiatoday.in/india/story/justice-pinaki-chandra-ghose-first-lokpal-india-1482072-2019-03-19.
14. Local Circles and Transparency International India, "India Corruption Survey 2019: Bribery In India reduced by 10% over the last 1 year; 51% citizens admit to paying a bribe in the last 12 months," http://transparencyindia.org/wp-content/uploads/2019/11/India-Corruption-Survey-2019.-Press-Release.pdf.
15. Hotman Siregar and Nur Yasmin, "KPK Takes its Time to Implement Law Revisions," Jakarta Globe (Sept. 19, 2019), https://jakartaglobe.id/news/kpk-takes-its-time-to-implement-law-revisions/; "Indonesia approves controversial revisions to law governing anti-corruption agency KPK," South China Morning Post (Sept. 17, 2019), https://www.scmp.com/news/asia/southeast-asia/article/3027626/indonesian-parliament-passes-controversial-revisions-law.
16. "President of Indonesia Urged to Reject Revision of Corruption Eradication Commission Law," Transparency International Secretariat (Sept. 10, 2019), https://www.transparency.org/news/pressrelease/president_of_indonesia_urged_to_reject_revision_of_anti_corruption_laws.
17. Organization on Economic Cooperation and Development, "Implementing the OECD Anti-Bribery Convention – Phase 4 Report: Japan" (June 27, 2019), https://www.oecd.org/corruption/OECD-Japan-Phase-4-Report-ENG.pdf.

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of the "Agreement Procedure" in 2018, providing for leniency for cooperating persons and entities in connection with bribery and other specified crimes.[18]

Japanese companies were not among those that settled enforcement actions with U.S authorities in 2019, but the country's Olympic Committee was the subject of an international anti-corruption investigation originating in France. The President of Japan's Olympic Committee, Tsunekazu Takeda, was indicted in France on corruption charges in late 2018 regarding the bidding process that led to the award of the 2020 Summer Games to Tokyo.[19] As a result, Takeda announced his resignation in March.[20]

In terms of domestic enforcement, ruling-party lawmaker Tsukasa Akimoto was arrested in December on charges of taking JPY 3 million (approximately US$27,000) and an all-expenses-paid vacation from Chinese gambling firm 500.com.[21] Several other politicians have been named in connection with the scandal, but not arrested or charged.[22] Finally, two LDP cabinet members resigned in October 2019 after being accused of providing small gifts to voters.[23]

VII. Malaysia

Malaysia continues to grapple with fallout from the 1MDB scandal. Former Prime Minister Najib Razak was charged in three separate (still ongoing) trials relating to the 1MDB-related charges in 2019.[24] Negotiations between Malaysia and Goldman Sachs have been reported widely in the press, with Malaysia seeking significant reparations.

In 2018, Malaysia enacted sweeping amendments to its anti-corruption law, adding a corporate offense similar to that included in the UK Bribery Act, as well as

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18. *Id.* at ¶¶ 224-227.
19. Tariq Panja and Hiroko Tabuchi, "Japan's Olympics Chief Faces Corruption Charges in France," New York Times (Jan. 11, 2019), https://www.nytimes.com/2019/01/11/world/europe/japan-olympics-corruption-tsunekazu-takeda.html.
20. Ben Dooley, "Japan's Olympic Chief to Step Down Amid Corruption Investigation," New York Times (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/business/japan-olympics-bribery-corruption.html?.
21. Naomi Tajitsu and David Dolan, "Explainer: Bribery scandal casts shadow on Japan's big casino gamble," Reuters (Dec. 26, 2019), https://www.reuters.com/article/us-japan-casino-corruption-explainer/explainer-bribery-scandal-casts-shadow-on-japans-big-casino-gamble-idUSKBN1YU0C8; "Chinese exec in Japan casino scandal asked his head office for bribe money, sources say," Japan Times (Dec. 30, 2019), https://www.japantimes.co.jp/news/2019/12/30/national/crime-legal/chinese-exec-japan-casino-scandal-asked-head-office-bribe-money-sources-say/#.XiEEUFIUn-g.
22. Mina Pollman, "Foreign Bribery Scandal Muddies Japan's Casino Legalization Gamble," The Diplomat (Jan. 10, 2020), https://thediplomat.com/2020/01/foreign-bribery-scandal-muddies-japans-casino-legalization-gamble/.
23. Motoko Rich, "2 Cabinet Ministers Resigned in Japan. Their Downfall? Melons and Potatoes," New York Times (Nov. 1, 2019), https://www.nytimes.com/2019/11/01/world/asia/japan-political-gifts.html.
24. Danial Dzulkifly, "From 'Bossku' to 'sumpah laknat': The ups and downs of Najib Razak in 2019," Malay Mail (Dec. 27, 2019), https://www.malaymail.com/news/malaysia/2019/12/27/from-bossku-to-sumpah-laknat-the-ups-and-downs-of-najib-razak-in-2019-video/1822457.

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a presumption of criminal liability for officers and directors of a company convicted of the corporate offense, subject to a due diligence defense.[25] In connection with the implementation of that law, the Bursa Malaysia (the Malaysian stock exchange) amended its listing rules in December 2019. The new rules, to become effective in June 2020, require all companies listed on Malaysian exchanges to take particular measures in order to benefit from the adequate procedures defense in the Malaysian Anti-Corruption Commission Act. These include: (i) adopting anti-corruption and whistle-blower policies; (ii) periodically reviewing those policies (at least once every three years); (iii) including corruption risk in annual risk assessments; and (iv) publishing anti-corruption and whistleblower policies and procedures on company websites.[26]

VIII. South Korea

In December 2019, South Korea's parliament passed a bill to establish a dedicated Anti-Corruption Agency to probe high-ranking governmental officials, granting the unit the power to both investigate and indict such officials.[27]

IX. Vietnam

Although it has garnered less press than Xi Jinping's long-running anti-corruption drive in China, Vietnam has engaged in its own high-profile anti-corruption drive, aimed primarily at senior officials and connected local businessmen. 2019 saw 279 corruption prosecutions,[28] including the conviction and life sentence of former Minister of Information and Communications Son Bac Nguyen for receiving bribes in connection with the long-running MobiFone scandal (a case in which prosecutors had sought the death penalty).[29] Vietnam also passed a new decree (No. 59/2019/ND-CP) requiring officials to report all gifts, eliminating a pre-existing threshold of VND 500,000 (approximately US$22) below which such gifts did not need to be reported.[30]

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25. *See* Kara Brockmeyer, Karolos Seeger, Philip Rohlik, & Saqib Alam, "Malaysia Strengthens its Anti-Corruption Law, FCPA Update, Vol. 9, No. 10 (May 2018), https://www.debevoise.com/insights/publications/2018/05/fcpa-may-2018.
26. Bursa Malaysia, "Bursa Malaysia Amends Main and ACE Market Listing Requirements in Relation to Anti-Corruption Measures" (Dec. 28, 2019), https://www.bursamalaysia.com/about_bursa/media_centre/bursa-malaysia-amends-main-and-ace-market-listing-requirements-in-relation-to-anti-corruption-measures.
27. "Parliament passes corruption probe unit bill amid opposition lawmakers' protest," Korea Herald (Dec. 30, 2019), http://www.koreaherald.com/view.php?ud=20191230000785.
28. "Court sector tries 279 corruption cases in 2019," Vietnamplus (Jan. 6, 2020), https://en.vietnamplus.vn/court-sector-tries-279-corruption-cases-in-2019/166794.vnp.
29. "Former Vietnamese Government Minister Draws Life Term in Corruption Case," Radio Free Asia (Dec. 30, 2019), https://www.rfa.org/english/news/vietnam/corruption-12302019162604.html; Pham Du, Bao Ha, "Death sought for ex-minister for taking bribes in TV firm acquisition case," VNExpress (Dec. 20, 2019), https://e.vnexpress.net/news/news/death-sought-for-ex-minister-for-taking-bribes-in-tv-firm-acquisition-case-4030187.html.
30. Ha Nguyen, "Vietnam Enacts Rules Against Graft Ahead of Party Meeting," Voice of America (Oct. 1, 2019), https://www.voanews.com/east-asia-pacific/vietnam-enacts-rules-against-graft-ahead-party-meeting.

Latin America

Latin America's anti-corruption landscape continues to evolve, reflecting a mixture of momentum and confusion. As discussed below, Argentina, Brazil, and Mexico have reformed their anti-corruption laws in recent years and have engaged in varying degrees of related enforcement.

Within the region last year, other countries similarly advanced in their anti-corruption journeys. For example, Peru experienced a constitutional crisis when President Martín Vizcarra dissolved the Peruvian congress on September 30, 2019, accusing the opposition of stonewalling attempts to curb widespread corruption.[1] Following this cascade of events, Peruvians offered their own split judgment in an inconclusive special election on January 26, 2020.[2] In Bolivia, popular uprisings for many reasons, including allegations of corruption, have led to a new interim government that announced it will launch corruption-related investigations against nearly 600 former officials of the prior administration.[3]

In short, *Lava Javo* has reverberated far beyond Brazil's borders, and anti-corruption matters continue generating daily headlines in the region, including popular uprisings focused on combatting corruption. Nevertheless, significant obstacles remain, and the precise contours of future anti-corruption enforcement across Latin America are unclear.

I. Argentina

Argentina witnessed a flurry of anti-corruption-related activity during 2019, including prosecutions of politicians and business executives. Nevertheless, the country's outlook in this area has become murkier since the election of Alberto Fernández as president and Cristina Fernández de Kirchner as vice president.

A. Legislative and Policy Developments

As described in previous issues, former President Mauricio Macri's government seemed increasingly committed to combating corruption:[4]

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1. Franklin Briceno & Christine Armario, "Peru president dissolves congress amid anti-corruption push," Associated Press (Sept. 30, 2019), https://apnews.com/82d3dd0d76054d5ba6744825c448d973.
2. Marcelo Rochabrun & Marco Aquino, "Peru Elects Deeply Split Congress with Right-of-Center Tilt," Reuters (Jan. 26, 2020), https://www.reuters.com/article/us-peru-election/peru-elects-deeply-split-congress-with-right-of-center-tilt-idUSKBN1ZP0S4.
3. "Bolivia opens probe into 600 former Morales officials," France 24 (Jan. 8, 2020), https://www.france24.com/en/20200108-bolivia-opens-probe-into-600-former-morales-officials.
4. Bruce E. Yannett, Andrew M. Levine, et al., "Argentina Adopts Anti-Corruption Law Imposing Corporate Criminal Liability" FCPA Update, Vol. 9, No. 4 (Nov. 2017), https://www.debevoise.com/insights/publications/2017/11/fcpa-update-novem-2017-vol-9-no-5.

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- In November 2017, the Argentine Congress passed the Law on Criminal Liability of Legal Entities (the "Law"), which imposed criminal liability on corporations for corruption-related offenses and has been in force since March 2018.[5] Under the Law, a corporation is liable for offenses committed directly or indirectly on its behalf. The Law also provides for a form of potential resolution entitled an Effective Collaboration Agreement ("Acuerdo de Colaboración Eficaz"). If entering into such an agreement, the corporation must commit to cooperate and disclose information sufficient to understand the facts, identify the offenders and accomplices, and recover the profits from committing the offense.[6]
- In April 2018, the executive branch published Decree 277/18, authorizing the Argentine Anti-Corruption Office to establish guidelines for corporate compliance programs recommended by the Law. The Anti-Corruption Office then passed Resolution 27/2018 in October 2018, providing such guidelines.[7]
- In 2019, that same Office issued Resolution 36/2019, which included additional guidance for compliance programs, specifically directed to entrepreneurs and small and medium-sized enterprises (also known as "PYMEs").[8] This Resolution sought to assist PYMEs, which constitute approximately 95% of Argentine companies, in designing and implementing compliance programs, referenced as "integrity programs."[9] More specifically, the Resolution addressed important elements of an effective compliance program, including an initial evaluation of corruption risks, the creation of an action plan to address such risks, and, following the plan's implementation, the assessment of the results. The Resolution also contains annexes that provide practical tools, such as a template for recording corporate hospitality (Annex X).[10]
- On April 11, 2019, the government approved a five-year "National Anti-Corruption Plan" by Decree No. 258/2019.[11] This strategic plan focuses on combatting corruption and strengthening the country's transparency, integrity, and public accountability. Relatedly, the government has prepared

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5. Kara Brockmeyer, Andrew J. Ceresney, et al., "The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement", FCPA Update, Vol. 10, No. 6 (Jan. 2019) [hereinafter "The Year 2018 in Review"], https://www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019.
6. Bruce E. Yannett, Andrew M. Levine, et al., "Argentina Adopts Anti-Corruption Law Imposing Corporate Criminal Liability" FCPA Update, Vol. 9, No. 4 (Nov. 2017), https://www.debevoise.com/insights/publications/2017/11/fcpa-update-novem-2017-vol-9-no-5.
7. The Year 2018 in Review.
8. Resolution 36/2019, Argentina.gob (Nov 12, 2019), https://www.argentina.gob.ar/normativa/nacional/resoluci%C3%B3n-36-2019-331634/texto.
9. *Id.*
10. *Id.*
11. Decree 258/2019, Argentina.gob (Apr 11, 2019), https://www.argentina.gob.ar/normativa/nacional/decreto-258-2019-322013/texto.

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more than 250 initiatives to be implemented between 2019 and 2023. Each initiative is assigned to a particular government entity and includes a deadline for completion. For instance, the second initiative involves implementing an electronic system for use in certain stages of public bids and requires making public certain information regarding such process. This initiative, which seeks to enhance transparency in public bids, has been assigned to the National Procurement Office and the Anti-Corruption Office and must be completed between 2019 and 2021.

"Although Argentina has taken meaningful strides with these initiatives, it remains to be seen how the new government will address anti-corruption matters going forward…. [T]he change in government potentially could undermine Argentina's recent anti-corruption enforcement efforts."

More recently, the new government published Decree 54/2019, which regulates the Anti-Corruption Office and establishes in particular that the Office will become a "non-concentrated" entity within the executive branch, meaning it will have more independence. The Decree further states that the Office has "technical independence" and will fulfill its functions without receiving instructions from the President or any other superior authority within the executive branch.[12]

Although Argentina has taken meaningful strides with these initiatives, it remains to be seen how the new government will address anti-corruption matters going forward. Along the lines expressed by the former head of the Anti-Corruption Office, Laura Alonso, the change in government potentially could undermine Argentina's recent anti-corruption enforcement efforts.[13]

B. Anti-Corruption Enforcement

Argentina continues to prosecute both government officials and business executives. The investigation of the "Cuadernos" or "Notebooks" scandal, which erupted in 2018, continued to advance during 2019. As discussed previously, this first arose following the disclosure of several notebooks – belonging to the driver of a close

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12. See Decree 54/2019, Argentine Gob. (Dec. 20, 2019), https://www.boletinoficial.gob.ar/detalleAviso/primera/224051/20191221.
13. "La Argentina Tiene un Serio Problema de Corrupcion en el Sector Publico y Privado" [Argentina Has a Serious Corruption Problem both in the Private and Public Sector] La Nacion (Sept. 13, 2019), https://www.lanacion.com.ar/economia/laura-alonso-la-argentina-tiene-serio-problema-nid2287226.

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advisor of Julio De Vido, the former Minister of Planning and Public Investment – allegedly containing records of bribes from 2005 to 2015.[14] This operation has included the indictment of 172 people, of which 136 were executives, 22 former public officials, and 14 figureheads (known as "testaferros").[15] Of these, the Federal Court of Appeals has confirmed 71 cases that now are ready to go to trial.[16]

The judge leading the Notebooks case also has ordered requests for documentation, and even raids in some instances, involving more than 70 companies.[17] These companies have attracted attention given their participation in public works contracts between 2003 and 2015, during the Kirchners' government. Among other things, the judge requested corporate minutes and other corporate and administrative information, and issued orders that the National Companies Registry (known as "IGJ") provide a list of all the relevant authorities of more than 70 companies who participated in public tenders during the same timeframe.[18] Directors of some of the companies involved – including Decavial, Supercemento, Luis Losi, Panedile Argentina, Coarco, and Equimac – have admitted to bribing public authorities.[19] Some of these individuals have been indicted, and others await judicial decisions on procedural matters.[20]

Meanwhile, the criminal cases against Fernández de Kirchner, the former president and current vice-president, also advanced in 2019:

- These include a proceeding ancillary to the Notebooks matter, namely for allegedly accepting bribes in connection with a railway subsidy scheme. On November 28, 2019, Fernández de Kirchner appeared before the Federal Court of Criminal Cassation seeking to overturn the decision of the lower court judge to prosecute her on such counts. The decision of the federal court remains pending.[21]

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14. The Year 2018 in Review.
15. "En la causa de los Cuadernos, hubo 49 presos y ahora sólo quedan 2: Jaime y Schiavi" [In the Cuadernos matter, there were originally 49 people in prison but now there are only two remaining: Jaime and Schiavi] Clarin (Dec. 28, 2019), https://www.clarin.com/politica/causa-cuadernos-49-presos-ahora-solo-quedan-2-jaime-schiavi_0_4IEKM_wg.html.
16. *Id.*
17. "Cuadernos: realizan 80 operativos en todo el país para buscar nuevas pistas de las coimas" [The Notebooks: 80 police operations have been carried out in search of new evidence of bribes], Clarín (Jan. 17, 2019), https://www.clarin.com/politica/cuadernos-realizan-80-operativos-pais-buscar-nuevas-pistas-coimas_0_pFtAUvwqi.html; "Por una derivación de la causa de los cuadernos realizaron mas de 80 procedimientos en empresas privadas" [In an ancillary proceeding to the Notebooks, more than 80 police operations have been carried out in private companies] Infobae (Jan. 17, 2019), https://www.infobae.com/politica/2019/01/17/el-juez-claudio-bonadio-ordeno-una-serie-de-procedimientos-por-una-causa-anexa-a-la-de-los-cuadernos-de-las-coimas-k/.
18. *Id.*
19. *Id.*
20. *Id.*
21. "El Panorama Judicial de Cristina Kirchner: Cuantos Pedidos de Prisión preventiva en su contra están vigentes?" [Cristina Kirchner's Judicial Status: How Many Remand Orders Against her are Still in Force?] Infobae (Nov. 13, 2019), https://www.infobae.com/politica/2019/11/13/el-panorama-judicial-de-cristina-kirchner-cuantos-pedidos-de-prision-preventiva-en-su-contra-estan-vigentes/.

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- Fernández de Kirchner also is the subject of an additional investigation, known as "Liquefied Gas," in which she is accused of having been part of a criminal conspiracy and fraudulent scheme related to price overcharges on liquefied gas. The Federal Court of Appeals overruled the lower court's prosecution order due to a lack of evidence. This ruling also discharged the remand order against Fernández de Kirchner and the lien order regarding her assets.[22]
- Together with Carlos Zannini, former head of the Presidential Legal and Technical Secretary, Fernández de Kirchner remains involved in the "Memorandum" case, involving a memorandum between Argentina and Iran regarding a 1994 terrorist attack on the Argentine Israelite Mutual Association, from which 85 people died. The former case arose out of a criminal investigation initiated by Alberto Nisman, an Argentine prosecutor found dead of a gunshot wound in his home in February 2015.[23] Fernández de Kirchner has been prosecuted for treason for having consented to this memorandum. During 2019, the remand order against her remained in force, but was not enforced due to her parliamentary immunity as a senator. As vice president, Fernández de Kirchner retains immunity, subject to removal by means of an impeachment proceeding.[24]
- Additionally, both Fernández de Kirchner and her daughter and son are implicated in two judicial proceedings relating to Hotesur and Los Sauces, both involving alleged money laundering through hotel companies.[25] Fernández de Kirchner's daughter has moved at least temporarily to Cuba, which some claim she did for health reasons and others, including some local newspapers, suggest she did given the lack of an extradition treaty between Cuba and Argentina.[26]

This past year, Fernández de Kirchner's former vice president, Amado Boudou, also was involved in judicial proceedings, having been found guilty of passive bribery and of engaging in conduct incompatible with his public function.[27] In July 2019, the

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22. "Dictaron la Falta de Merito para Cristina Kirchner en la Causa por el Gas Licuado" [In the Criminal Investigation relating to the Liquefied Gas, Cristina Kirchner has been Acquitted due to Lack of Evidence] Infobae (Oct. 29, 2019), https://www.infobae.com/politica/2019/10/29/dictaron-la-falta-de-merito-para-cristina-kirchner-en-la-causa-por-el-gas-licuado/.
23. "The Mysterious Death of Alberto Nisman," New York Times (Feb 20, 2015), https://www.nytimes.com/interactive/2015/02/07/world/americas/argentina-alberto-nisman-case.html.
24. "Un Tribunal Revocó la Presión Preventiva de Cristina Kirchner en la Causa por el Memorándum Con Irán" [In the Iran-Memorandum Case, a Federal Tribunal Overruled a Remand Order Against Cristina Kirchner"] Infobae (Dec 23, 2019), https://www.infobae.com/politica/2019/12/23/un-tribunal-revoco-la-prision-preventiva-de-cristina-kirchner-en-la-causa-por-el-memorandum-con-iran/.
25. "Un caso complejo: que le pasa a Florencia Kirchner? Las razones del nuevo y sorpresivo viaje de Cristina Kirchner a Cuba" [A Complex Case: What is happening to Florencia Kirchner? The Reasons behind Cristina Kirchner's New and Surprising Trip to Cuba] Clarín (Sept. 27, 2019), https://www.clarin.com/politica/-pasa-florencia-kirchner-razones-nuevo-sorpresivo-viaje-cristina-kirchner-cuba_0_G6E6TRbV.html.
26. "Florencia Kirchner: 6 meses en cuba y una situación personal muy delicada" [Florencia Kirchner: 6 months in Cuba and a very delicate personal situation], Perfil (Sept. 28, 2019), https://www.perfil.com/noticias/politica/florencia-kirchner-6-meses-en-cuba-y-una-situacion-personal-muy-delicada.phtml.
27. The Year 2018 in Review.

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Court of Appeals confirmed the lower court's decision sentencing Boudou to almost six years' imprisonment.[28]

Last, in June 2019, José López, the Secretary of Public Works under Fernández de Kirchner, was sentenced to six years' imprisonment for unlawful enrichment.[29] López had been caught *in fraganti* in 2016, leaving a convent with approximately $9 million in various foreign currencies, wrapped in plastic bags, together with various luxury watches and a rifle.[30] The tribunal imposed on López a perpetual prohibition from holding public office, a fine of 60% of the value of the unlawful enrichment, and an instruction to donate the money to hospitals. The tribunal, however, acquitted Inés Aparicio, the nun who helped López conceal the cash in the convent.

II. Brazil

The first year of President Jair Bolsonaro's administration included challenges and changes to Brazil's anti-corruption enforcement landscape.

Following reports by *The Intercept* and other media outlets, prosecutors from the *Lava Jato* taskforce in Curitiba came under attack for alleged political partisanship and improper dealings with then judge – now Minister of Justice – Sergio Moro involving certain prosecutions. This year also witnessed a decrease in criminal anti-corruption prosecutions by the Public Prosecutors' Office ("MPF") and related setbacks before the Brazilian Supreme Court. At the same time, the Comptroller-General's Office ("CGU") and Attorney General's Office ("AGU") have enforced more prominently the administrative and civil components of Brazil's anti-corruption laws, including through a coordinated settlement with the MPF and U.S. DOJ.

Looking ahead at anti-corruption enforcement in Brazil, significant variables for 2020 include the balancing of power and related coordination among enforcement authorities, the Supreme Court's stance on anti-corruption matters, and the enforcement of the recently passed "Anti-Crime Package" advocated for by Minister Moro.

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28. "Caso Ciccone: Casación confirmó la ejecución de la pena a Amado Boudou" [Ciccone Case: The Federal Court of Criminal Cassation has Confirmed the Execution of the Sentence against Amado Boudou] La Nación (Nov. 1, 2019), https://www.lanacion.com.ar/politica/la-casacion-confirmo-ejecucion-pena-boudou-ciccone-nid2302759.

29. "José López fue condenado a 6 años de prisión por el caso de los bolsos con USD 9 millones" [Jose Lopez has been convicted and sentenced to 6 years imprisonment in the case of the bags containing USD 9 million] Infobae (Jun. 12, 2019) https://www.infobae.com/sociedad/policiales/2019/06/12/jose-lopez-fue-condenado-a-6-anos-de-prision-por-el-caso-de-los-bolsos-con-dolares; "Condenan a José López a seis años de prisión por el caso de los bolsos" [Jose Lopez is Sentenced to Six Year Imprisonment on the bags-related case] Perfil (Jun. 12, 2019), https://www.perfil.com/noticias/politica/jose-lopez-conoce-veredicto-caso-enriquecimiento-ilicito.phtml.

30. "It was for the nuns, said Argentine politician caught with millions in cash outside convent" Washington Post (Jun. 15, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/15/it-was-for-the-nuns-said-argentine-politician-caught-with-millions-in-cash-outside-convent/.

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A. The Intercept Leaks

In June 2019, the *Lava Jato* taskforce in Curitiba experienced a reputational blow after *The Intercept* and other media outlets published leaked private text messages between prosecutors and then Judge Moro containing discussions about targets and investigations. The leaks led to allegations that the prosecutors and Moro potentially breached ethical and legal rules, and cast doubt on the outcome of certain specific cases, including those of former president Lula, and the legacy of *Lava Jato* more broadly.[31]

"Following reports by *The Intercept* and other media outlets, prosecutors from the *Lava Jato* taskforce in Curitiba came under attack for alleged political partisanship and improper dealings with then judge – now Minister of Justice – Sergio Moro involving certain prosecutions."

As of now, it remains unclear whether prior convictions may be impacted by these leaks. Outstanding questions include how the underlying communications were obtained. In any event, the pace of MPF's criminal prosecutions has slowed ever since then, at least temporarily.

B. Expanded Roles of CGU and AGU

In parallel, this past year saw related CGU and AGU activities increase, including in cross-border matters. This is best illustrated by the coordinated resolution in June 2019 by TechnipFMC plc. The parent company entered into a DPA with U.S. DOJ, pursuant to which it agreed to pay over $296 million in fines and to abide by a three-year compliance reporting obligation, and its U.S. subsidiary pleaded guilty to conspiring to violate the FCPA.[32] Concurrently, related entities Technip Brasil and Flexibras settled with the CGU, AGU, and MPF.[33] Of particular significance, this was

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31. *See* Glenn Greenwald, et al., Secret Archive Brazil, The Intercept (June 9 - Oct. 4, 2019), https://theintercept.com/2019/06/09/brazil-archive-operation-car-wash; Ricardo Balthazar and Paula Bianchi, "Mensagens Apontam que Moro Interferiu em Negociações de Delações" [Messages Indicate that Moro Interfered in Plea Negotiations], Folha (July 18, 2019), https://www1.folha.uol.com.br/poder/2019/07/mensagens-apontam-que-moro-interferiu-em-negociacao-de-delacoes.shtml.

32. *See* U.S. Department of Justice, "TechnipFMC PLC and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Criminal Fines to Resolve Foreign Bribery Case" (June 25, 2019), https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve.

33. *See* Kara Brockmeyer, David A. O'Neil, Philip Rohlik & Jil Simon, "Skeletons in the Closet: TechnipFMC Settles FCPA Allegations Involving Both of its Predecessor Companies," FCPA Update, Vol. 10, No. 12 (July 2019), https://www.debevoise.com/insights/publications/2019/07/fcpa-update-july-2019; "CGU, AGU, MPF e DOJ Firmam Primeiro Acordo de Leniência Global no Âmbito da Lava Jato" [CGU, AGU, MPF, and DOJ Sign First Global Leniency Agreement in Context of Lava Jato], CGU (June 25, 2019), http://www.cgu.gov.br/noticias/2019/06/cgu-agu-mpf-e-doj-firmam-primeiro-acordo-de-leniencia-global-no-ambito-da-lava-jato.

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the first coordinated settlement involving all three key Brazilian anti-corruption agencies and DOJ.[34]

Notwithstanding discussions about the potential for greater coordination among these Brazilian agencies, including expectations generated by this settlement, it remains to be seen whether the TechnipFMC resolution represents an exception or a turning point. As a general matter, companies remain eager for more definitive answers to key open questions, including the treatment that agencies will afford agreements with other agencies and the order in companies should approach the various agencies when seeking to self-report and cooperate.

C. Notable STF Decisions on Federal Criminal Procedure

In 2019, the Brazilian Supreme Court also was particularly active, issuing decisions that sparked some controversy and much debate in the country:

- In March, the Court ruled that matters involving the commission of connected "common" (*e.g.*, corruption) and electoral crimes (*e.g.*, illegal campaign funding through bribe payments) fall under the jurisdiction of electoral courts.[35]
- A few months later, in August, the Court annulled on procedural grounds the conviction of Petrobras's former president, Aldemir Bendine.[36]
- In November, the Court overturned its prior decision that defendants can be imprisoned after their conviction is confirmed by a court of appeals.[37] Pursuant to the Court's ruling, defendants generally may not be imprisoned in ordinary circumstances until all potential appeals are exhausted.[38] Following this ruling, former President Lula was among several convicted defendants released from prison.[39]

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34. *See* Kara Brockmeyer, David A. O'Neil, Philip Rohlik & Jil Simon, "Skeletons in the Closet: TechnipFMC Settles FCPA Allegations Involving Both of its Predecessor Companies," FCPA Update, Vol. 10, No. 12 (July 2019), https://www.debevoise.com/insights/publications/2019/07/fcpa-update-july-2019.
35. *See* "Plenário do STF Reafirma Competência da Justiça Eleitoral para Julgar Crimes Comuns Conexos a Delitos Eleitorais" [Plenary Session of STF Confirms Jurisdiction of the Electoral Justice System to Try Common Crimes Related to Electoral Crimes], STF (Mar. 14, 2019), http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo= 405834.
36. See "2ª Turma Reconhece Cerceamento de Defesa e Anula Condenação de Ex-Presidente da Petrobras" [STF's Second Panel Recognizes Defense Restriction and Annuls Conviction of Petrobras' Former President], STF (Aug. 27, 2019), https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=421829.
37. *See* "STF Decide que Cumprimento da Pena Deve Começar Após Esgotamento de Recursos" [STF Decides that Sentences Begin Being Served After Appeals are Exhausted], STF (Nov. 7, 2019), http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=429359.
38. *Id.*
39. *See* Eduardo Simoes & Ricardo Brito, "Brazil Judge Orders Ex-President Lula Released from Prison," Reuters (Nov. 8, 2019), https://www.reuters.com/article/us-brazil-corruption-court-lula/brazil-judge-orders-ex-president-lula-released-from-prison-idUSKBN1XI2A6.

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- Finally, in December, the Court reversed[40] a prior ruling requiring judicial authorization for financial intelligence agencies to share tax and banking data with law enforcement for criminal prosecutions by the MPF.[41]

D. Other Changes to Brazil's Anti-Corruption Legal Framework

2019 also included significant developments regarding Brazil's anti-corruption legal framework:

- In June 2019, the Brazilian Securities and Exchange Commission (known in Brazil as "CVM") issued a set of rules reforming its administrative sanctioning procedures, including addressing prior legislative changes that expanded the Commission's powers, such as the ability to sanction companies and enter into "supervision agreements."[42]
- In August 2019, the CGU and AGU issued Joint Ordinance No. 4/2019, which defines the procedures for negotiating, executing, and monitoring leniency agreements executed by these agencies, reflecting their increasing collaboration and alignment.[43] Shortly thereafter, the CGU published Normative Instruction No. 13/19 establishing new procedures for assessing corporate administrative labilities under Brazil's Clean Company Act.[44]
- Also in August, Provisional Measure No. 893/2019 restructured the Council for the Control of Financial Activities (known in Brazil as "COAF"), transferring it from the Ministry of the Treasury to the Central Bank.[45] The provisional measure was converted into Law No. 13,974/2020 in January 2020.[46]

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40. *See* "Plenário Define Tese Sobre Compartilhamento de Dados Financeiros Sem Autorização Judicial" [Plenary Session Sets Thesis on the Sharing of Financial Data Without Judicial Authorization], STF (Dec. 4, 2019), http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=431690&caixaBusca=N.
41. *See* "Plenário define tese sobre compartilhamento de dados financeiros sem autorização judicial" [Full court defines its position on the sharing of financial information without judicial authorization], STF (Dec. 4, 2019), http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=431690&caixaBusca=N.
42. *See* CVM Instructions No. 607 (June 17, 2019) and No. 608 (June 25, 2019), http://www.cvm.gov.br/legislacao/instrucoes/inst607.html and http://www.cvm.gov.br/legislacao/instrucoes/inst608.html, and CVM Resolution No. 819 (June 25, 2019), http://www.cvm.gov.br/legislacao/deliberacoes/deli0800/deli819.html.
43. *See* "CGU e AGU reestruturam regulamento dos acordos de leniência" [CGU and AGU restructure rules on leniency agreements], CGU (Aug. 9, 2019), https://www.cgu.gov.br/noticias/2019/08/cgu-e-agu-reestruturam-regulamento-dos-acordos-de-leniencia-1. *See also* Joint Ordinance No. 4/2019, Federal Official Gazette (Aug. 9, 2019), http://www.in.gov.br/en/web/dou/-/portaria-conjunta-n-4-de-9-de-agosto-de-2019-210276111.
44. *See* "CGU atualiza regras para apuração e responsabilização de empresas" [CGU updates rules to assess liability and hold companies accountable], CGU (Aug. 15, 2019), https://www.cgu.gov.br/noticias/2019/08/cgu-atualiza-regras-para-apuracao-e-responsabilizacao-de-empresas. *See also* Normative Instruction No. 13/19, Federal Official Gazette (Aug. 8, 2019), http://www.in.gov.br/web/dou/-/instrucao-normativa-n-13-de-8-de-agosto-de-2019-210039570.
45. *See* "CGU atualiza regras para apuração e responsabilização de empresas" [CGU updates rules to assess liability and hold companies accountable], CGU (Aug. 15, 2019), https://www.cgu.gov.br/noticias/2019/08/cgu-atualiza-regras-para-apuracao-e-responsabilizacao-de-empresas. *See also* Normative Instruction No. 13/19, Federal Official Gazette (Aug. 8, 2019), http://www.in.gov.br/web/dou/-/instrucao-normativa-n-13-de-8-de-agosto-de-2019-210039570.
46. *See* Law No. 13,974/2020, Official Gazette, http://www.in.gov.br/en/web/dou/-/lei-n-13.974-de-7-de-janeiro-de-2020-236986816.

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- In December, Presidential Decree No. 10.153/2019 established Brazil's first set of rules on protecting whistleblowers of crimes involving the federal government.[47]
- The following day, CVM issued Instruction No. 617 defining new parameters for preventing money laundering activity and terrorism financing crimes in the capital markets.[48]

And last and (arguably most notably), in the last few days of 2019, President Bolsonaro executed Law No. 13,964/2019, the so-called "Anti-Crime Package," for which Minister Moro advocated with the goal of further combatting corruption and organized crime.[49] This "package" altered several provisions of the Brazilian Penal Code, Code of Criminal Procedure, Administrative Improbity Act, and Money Laundering Act. Among other changes, different judges now will be responsible for overseeing criminal investigations, on the one hand, and trial and sentencing, on the other hand. In addition, local authorities expressly may now enter into civil non-prosecution agreements under the Administrative Improbity Act, as well as into criminal non-prosecution agreements. Other changes include regulations as to the government's use of undercover agents in money laundering investigations and amendments to the Criminal Organization Act regarding collaboration agreements with individuals.[50]

"Looking ahead at anti-corruption enforcement in Brazil, significant variables for 2020 include the balancing of power and related coordination among enforcement authorities, the Supreme Court's stance on anti-corruption matters, and the enforcement of the recently passed 'Anti-Crime Package'…"

III. Mexico

In mid-2016, Mexico adopted its new National Anti-Corruption System, a regime that many hoped would foster an era of enhanced anti-corruption enforcement.[51] That long-awaited change has been slow to follow. Critical vacancies within the

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47. *See* Decree No. 10.153/2019, Office of the Presidency of Brazil (Dec. 3, 2019), http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D10153.htm.
48. *See* Instruction No. 617, CVM (Dec. 5, 2019), http://www.cvm.gov.br/legislacao/instrucoes/inst617.html.
49. *See* Law No. 13,964, Office of the Presidency of Brazil (Dec. 24, 2019), http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13964.htm.
50. *Id.*
51. *See* Sean Hecker, Andrew M. Levine, & Eileen Zelek, "Mexico Adopts New Anti-Corruption Legislation," FCPA Update, Vol. 8, No. 2 (Sept. 2016), https://www.debevoise.com/insights/publications/2016/09/fcpa-update-september-2016.

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system remained vacant, and a lack of meaningful action by the government hindered efforts to bolster anti-corruption enforcement.

This past year, however, key developments in Mexico reflect an increasing focus by regulators on battling corruption. In his first year after taking office, President Andrés Manuel López Obrador filled key vacancies within the National Anti-Corruption System, and several high-profile corruption investigations publically advanced. The Mexican government also expanded its use of certain ancillary regimes, such as asset forfeiture, to assist in investigating and prosecuting suspected misconduct. Mexico (and the United States) also signed the United States-Mexico-Canada Agreement ("USMCA") – a trilateral trade agreement that, once ratified, will replace the North Atlantic Free Trade Agreement – which contains several anti-corruption provisions.[52] Although it remains to be seen whether this represents a turning point for Mexican anti-corruption enforcement, these initial steps may foretell a larger shift that will impact how companies conduct business in Mexico.

A. Government Action

After years of vacant posts and the absence of a real push to implement Mexico's National Anti-Corruption System, President López Obrador ran a presidential campaign premised in large part on a platform of targeting and eliminating corruption.[53] When he took office in December 2018, questions persisted about how prominently these issues would figure in his new government, and how, if at all, President López Obrador would approach anti-corruption enforcement.

In June 2019, the president took a significant step towards effectuating the new statutory regime by nominating three individuals for the newly independent position of Attorney General. The Senate selected Alejandro Gertz Manero, who in turn appointed María de la Luz Mijangos Borja as the first-ever Special Anti-Corruption Prosecutor. In that role, Borja is focused on investigating and prosecuting corruption-related misconduct in Mexico.[54] Her department reportedly has received reports of more than 570 allegations of corruption – roughly two-thirds

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52. *See* USMCA art. 27.3; Kara Brockmeyer, Andrew M. Levine, Daniel Aun, Marisa R. Taney, & Victoria L. Recalde, "NAFTA Replacement Adds Anti-Corruption Provisions," FCPA Update, Vol. 10, No. 4 (Nov. 2018) [hereinafter "NAFTA Replacement – FCPA Update Nov. 2018"], https://www.debevoise.com/insights/publications/2018/11/fcpa-update-november-2018.

53. *See* Sonia Corona, "López Obrador ofrece perdón a los casos de corrupción previos a su Gobierno," *El País* (Nov. 21, 2018), https://elpais.com/internacional/2018/11/21/mexico/1542769379_267800.html.

54. Elías Camhaji, "Alejandro Gertz Manero: el fiscal que supo esperar," El País (Jan. 19, 2019), https://elpais.com/internacional/2019/01/18/mexico/1547826190_621298.html; Juan Arvizu, "Nombran a los fiscales electoral y anticorrupción," El Universal (Feb. 9, 2019), https://www.eluniversal.com.mx/nacion/politica/nombran-los-fiscales-electoral-y-anticorrupcion.

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from other governmental authorities and one-third from private individuals – and is prosecuting about 70% of these claims.[55]

In July 2019, the Secretary of Public Administration launched a federal whistle-blower platform that extends legal protections to whistleblowers and enables citizens to report anonymously corruption allegations.[56] A month later, in August 2019, the Secretary of Public Administration created the Integrity Business Registry, which recognizes companies that exceed legal minimums in preventing proactively corruption within their companies and supply chains.[57]

The government is also using asset forfeiture as a key enforcement tool. In the first half of 2019 alone, the Financial Intelligence Unit froze nearly $250 million in assets and blocked the accounts of more than 1,000 people, compared to only $1.4 million and 25 people in the same period in 2018.[58]

However, not all new anti-corruption plans are moving forward as steadily. The Federal Court of Administrative Justice is still pending the appointments of 18 federal anti-corruption judges.[59] Meanwhile, the Mexican Supreme Court unanimously held that the local anti-corruption system in Mexico City was unconstitutional and invalidated the Act.[60] The local legislature will continue working to pass a city-wide anti-corruption bill, but this may take another year, at least.[61]

Although local anti-corruption laws at the city level have not advanced at the same pace, the national focus on anti-corruption enforcement is altering not only the legal risks of conducting business improperly, but also seemingly changing the public's opinion of the government's ability to combat corruption. According to

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55. *See* A.N., S.H., "Revisaremos y contrastaremos declaraciones patrimoniales de Bartlett, promete Fiscalía anticorrupción," Aristegui (Sept. 11, 2019), https://aristeguinoticias.com/1109/mexico/es-necesaria-una-vision-integral-del-combate-a-la-corrupcion-titular-de-la-fiscalia-especializada/; Laura Mallene, "Mexican Corruption Prosecutor Opens 680 Investigations," Organized Crime and Corruption Reporting Project (Dec. 20, 2019), https://www.occrp.org/en/daily/11348-mexican-corruption-prosecutor-opens-680-investigations.
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Transparency International, 61% of Mexicans in 2019 believed that the government was doing a good job of combating corruption, up from only 24% in 2017.[62]

B. Enforcement

In the first six months of his term as president, President López Obrador was slow to move forward with his promised anti-corruption enforcement priorities. There also were questions about his willingness to prosecute corrupt acts predating his inauguration, including investigations ongoing from the previous administration.[63] But on May 28, 2019, the Fiscalía General de la República Mexicana issued an arrest warrant for Emilio Lozoya,[64] the former director of Pemex.

This warrant was based on allegations that Lozoya received improper payments in connection with Pemex's 2014 acquisition of the fertilizer plant Agronitrogenados from Altos Hornos de Mexico ("AHMSA").[65] The suspicious transaction included links to Odebrecht, the Brazilian construction firm that featured in the *Lava Jato* scandal in Brazil.[66] The owner of AHMSA, Alonso Ancira Elizondo, was arrested in Spain by Spanish police, pursuant to a Mexican warrant, in connection with charges stemming from the same transaction.[67] Elizondo remains under house arrest in Spain,[68] though he is now able to access nine bank accounts (after the initial freezing of his assets).[69]

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Lozoya was charged with a litany of offenses, including bribery, fraud, and money laundering, and his assets were frozen.[70] Lozoya has been at large since May, causing INTERPOL to issue a red notice for his arrest in any of the 190 countries member countries.[71] Meanwhile, the Mexican government continues to expand its case against Lozoya and has brought multiple set of charges against him.[72] The authorities also have issued arrest warrants for Lozoya's wife, mother, and sister.[73] Lozoya is currently believed to be living in St. Petersburg, Russia under the protection of the mafia, and authorities are having trouble with the extradition process.[74]

"The USMCA sets forth guidelines for regulating both public and private actors and, in some cases, imposes an affirmative duty on each of the three signatory countries to enforce or enact legislation in support of specific anti-corruption measures."

Corruption-related investigations by other organs of the federal government, however, have not been as well-received. The national comptroller's office, for example, launched a probe into Manuel Bartlett, the head of the state-owned electricity company in Mexico (the CFE), after a news story broke in August about Bartlett allegedly acquiring improperly luxury properties and failing to report those assets.[75] The investigation ultimately "cleared" Bartlett of any wrongdoing, but was strongly criticized in Mexico for its limited in scope. It covered only Bartlett's conduct since becoming head of the CFE last year – notwithstanding many years of

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holding public positions before that appointment – and exempted from review any assets owned by his partner or children.[76]

In contrast with the public view of recent investigations by the Attorney General's office, many in the country felt that the investigation of Bartlett – who was publicly supported by President López Obrador[77] – was aimed at justifying the misconduct of a key public official rather than exposing it. Some commentators compared the review to those conducted by President López Obrador's predecessor, former President Pena Nieto.

C. The USMCA

In November 2018, Mexico signed the USMCA, a trade agreement that contains potentially significant anti-corruption provisions. The USMCA sets forth guidelines for regulating both public and private actors and, in some cases, imposes an affirmative duty on each of the three signatory countries to enforce or enact legislation in support of specific anti-corruption measures.[78] It does not encompass commercial bribery, but does address the demand side of public corruption by requiring the parties to adopt and enforce criminal liability of government officials who receive bribes or embezzle public funds.[79] The agreement also requires the three countries to establish legal protections for whistleblowers and strongly emphasizes the need for international cooperation among anti-corruption law enforcement agencies.[80]

On January 16, 2020, the U.S. Congress passed the USMCA.[81] President Trump signed it into law on January 29, 2020.[82]

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76. *Id.*
77. "Mexican President Backs Official Accused of Suspect Real Estate Purchases," Reuters (Aug. 30, 2019), https://www.reuters.com/article/us-mexico-bartlett/mexican-president-backs-official-accused-of-suspect-real-estate-purchases-idUSKCN1VK2IO.
78. *See* United States-Mexico-Canada Agreement ("U.S.M.C.A.") art. 27.3; NAFTA Replacement – FCPA Update Nov. 2018.
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