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January 19, 2018

## **FCPA ENFORCEMENT AND ANTI-CORRUPTION DEVELOPMENTS: 2017 YEAR IN REVIEW**

Despite significant FCPA enforcement activity in 2017, the Trump administration's approach to enforcement remains elusive and not readily characterized.

Looking at 2017 as a whole, the number of corporate enforcement actions resolved by the DOJ and the SEC was within the range of fluctuations in such numbers in recent years, though down from 2016's record-breaking total. Looking at the year more closely, we find that eight of the fourteen corporate resolutions by the DOJ and the SEC in 2017 were announced in January during the final weeks of the Obama administration, followed by a six-month quiet period during the beginning of the Trump administration, and culminating in six corporate resolutions in the closing months of the year. The majority of corporate resolutions announced during the Trump administration involved foreign companies, but whether the Trump administration is pursuing an "America First" policy in enforcing the FCPA remains an open question. The new administration does appear to have been more aggressive in pursuing prosecutions against individuals, with 17 of the 20 prosecutions of individuals in 2017 brought by the Trump administration. However, given the duration of FCPA investigations, most, if not all, of the corporate and individual enforcement actions announced during the Trump administration almost certainly originated from investigations that pre-dated the administration, suggesting it is too early to draw definitive conclusions.

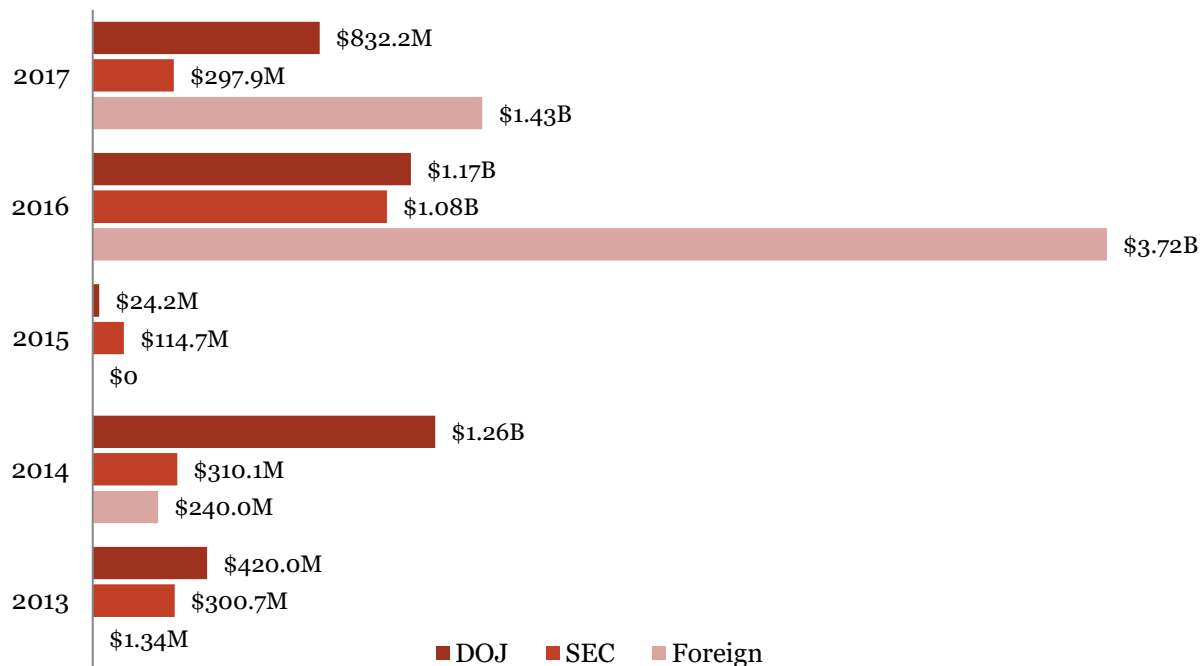
While it may be too soon to evaluate trends, the administration has made efforts to signal its priorities to companies clearly. The DOJ announced, and incorporated into the United States Attorney's Manual, a new corporate enforcement policy that reinforces the policy objectives that drove the FCPA Pilot Program announced during the Obama administration, continuing the emphasis on corporate self-reporting of wrongdoing. The new policy is noteworthy in seeking to incentivize cooperation further by dangling the prospect of a declination for companies that self-report and meet the rigorous criteria.

Crossing borders, cooperation between the U.S. and foreign enforcement authorities remained a key feature of FCPA enforcement in 2017.

Our reflections on the year's most significant developments in anti-corruption and FCPA enforcement and policy are below.

### A Decline in Corporate Resolutions from the Highs in 2016

In 2017, the DOJ and the SEC resolved a combined 14 enforcement actions against business entities resulting in \$1.1 billion in fines, penalties, disgorgement and pre-judgment interest, of which \$832 million was assessed by the DOJ and \$298 million by the SEC.<sup>1</sup> Though significant, the \$1.1 billion assessed in 2017 is considerably less than the record-breaking amount of more than \$2 billion assessed last year.<sup>2</sup> Foreign authorities assessed another \$1.4 billion in penalties in connection with U.S. enforcement actions, collectively assessing more than the DOJ and the SEC combined for the second year in a row. Four of the settlements in 2017 (Telia, SBM Offshore N.V. (“SBM”), Rolls-Royce and Keppel Offshore & Marine Ltd. (“KOM”)) resulted in global resolutions with total penalties topping the \$400 million mark. Telia’s \$965 million global settlement was one of the largest FCPA settlements ever.

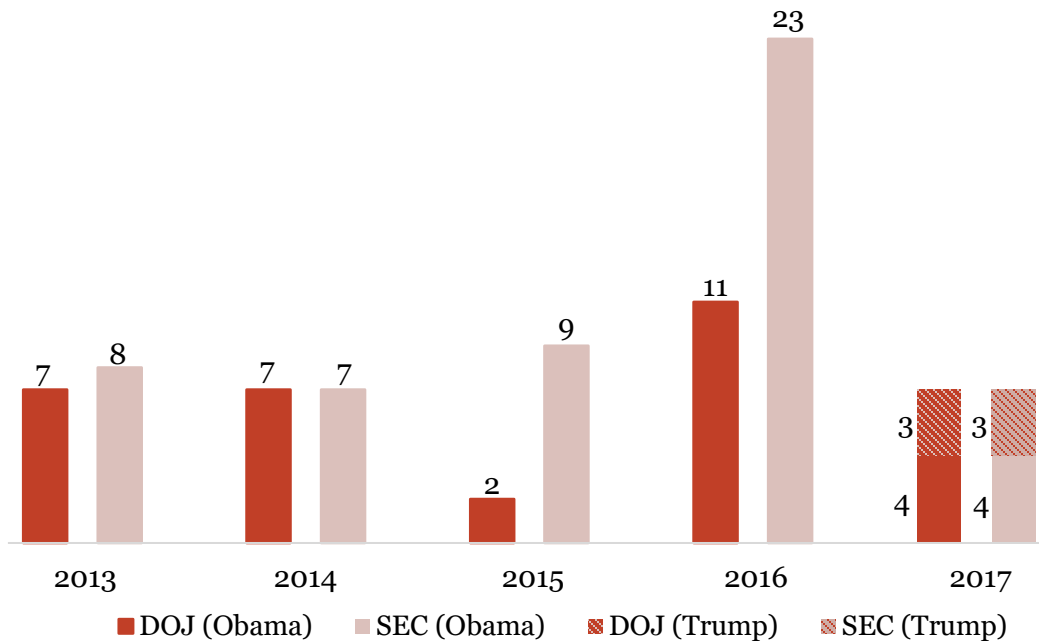


**CORPORATE FCPA ENFORCEMENT ACTION PENALTIES**  
2013-2017

<sup>1</sup> Penalty amounts account for offsets between the DOJ and the SEC, and between U.S. and foreign authorities.

<sup>2</sup> See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2016 Year In Review (Jan. 20, 2017), [https://www.paulweiss.com/media/3897243/19jan17\\_fcpa\\_year\\_end.pdf](https://www.paulweiss.com/media/3897243/19jan17_fcpa_year_end.pdf). The 2016 penalty amounts have been revised from those reported last year, including to take into account additional information released regarding the penalties assessed in the Odebrecht case.

The DOJ and the SEC each resolved seven corporate enforcement actions in 2017.<sup>3</sup> Although these totals were significantly lower than last year's, they are comparable with the number of resolutions in earlier years.

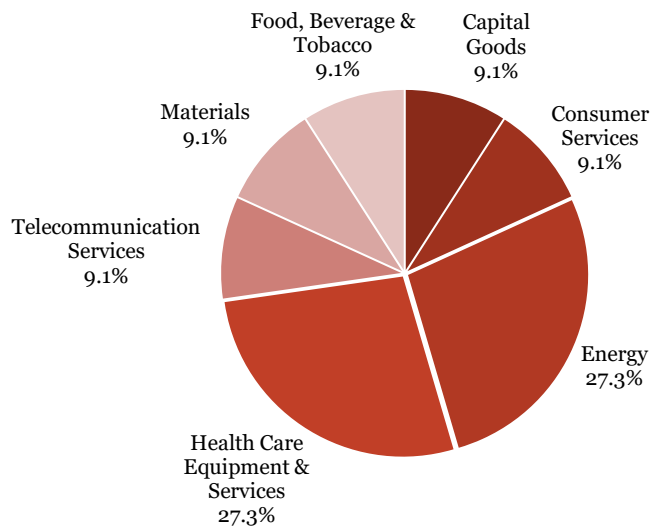


CORPORATE FCPA ENFORCEMENT ACTION  
RESOLUTIONS  
2013 – 2017

<sup>3</sup> Enforcement actions were counted based on the year they were announced. See <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>; <https://www.justice.gov/criminal-fraud/related-enforcement-actions>. Resolutions announced on the same day by the same enforcement agency against corporate affiliates were counted as one resolution (e.g., SBM Offshore N.V. and SBM Offshore USA Inc.), a change in methodology from last year.

### Enforcement Across Industries and Regions

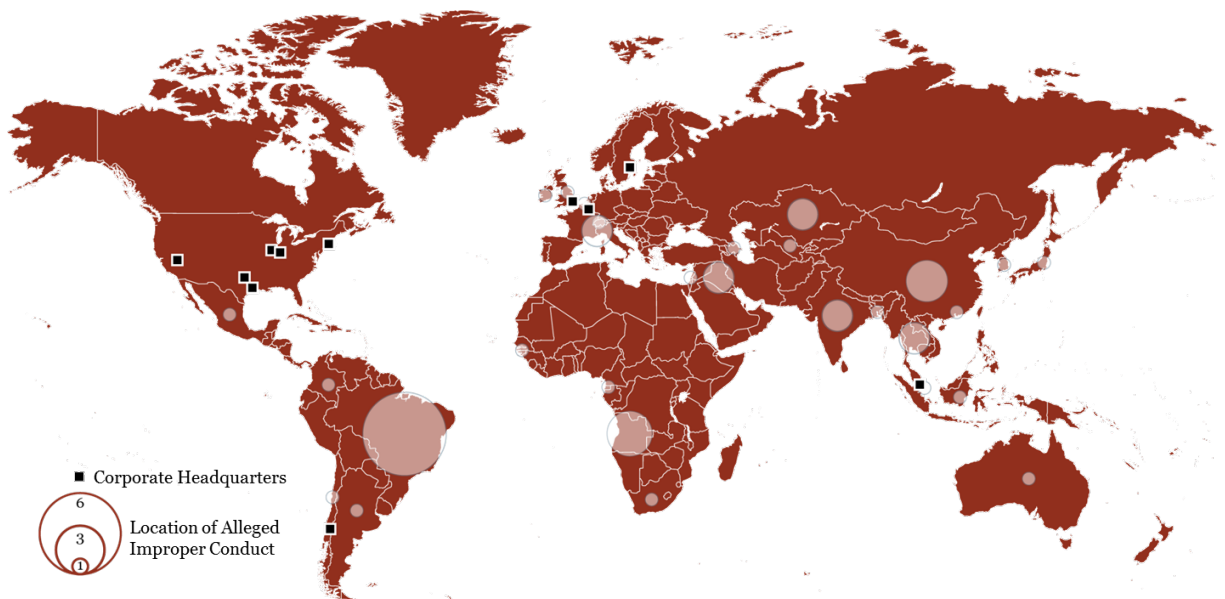
The DOJ and the SEC entered into corporate resolutions in 2017 with companies across a variety of industries and throughout the world. U.S. authorities were most active in the healthcare and energy industries, resolving actions against Zimmer Biomet/JERDS, Orthofix and Alere in the healthcare industry and Halliburton, KOM and SBM in the energy industry.<sup>4</sup>



2017 FCPA CORPORATE RESOLUTIONS BY INDUSTRY

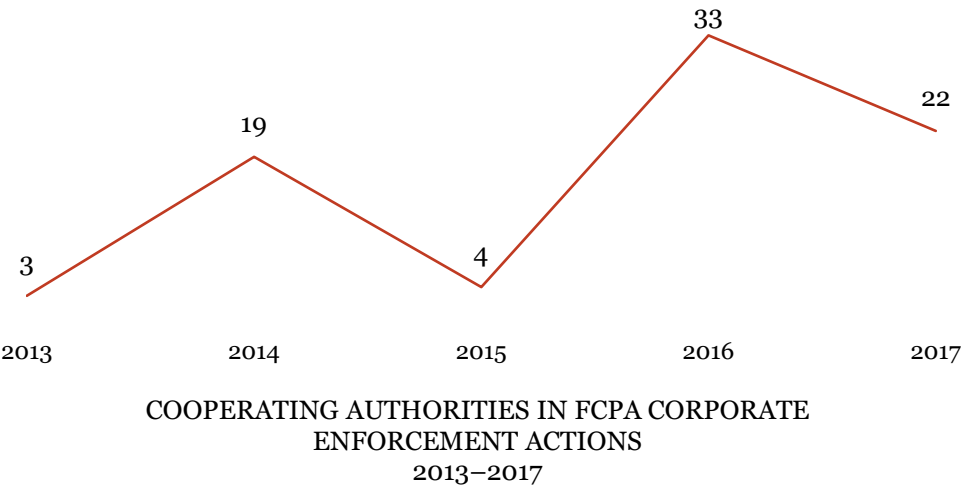
The map below demonstrates the global span of FCPA cases by showing the locations of the corporate headquarters of all companies that resolved FCPA actions in 2017 and the countries in which improper conduct allegedly occurred.

<sup>4</sup> Industries were defined according to the industry group classifications set by S&P Global Market Intelligence, pursuant to the Global Industry Classification Standard. See <http://www.sn1.com>.



2017 FCPA CORPORATE ENFORCEMENT ACTIONS BY LOCATION

Over the past five years, the number of foreign authorities cooperating with U.S. authorities’ FCPA corporate enforcement efforts appears to have increased, with 2015 an apparent outlier.<sup>5</sup> We caution, though, that limited conclusions can be drawn from this data, as it is difficult to assess the depth of the substantive cooperation provided by a foreign authority.



<sup>5</sup> The number of cooperating countries and territories was counted based on the countries and territories thanked in DOJ and SEC press releases announcing corporate resolutions.

### **DOJ Corporate Resolutions**

Four of the seven corporate resolutions announced by the DOJ in 2017 (Zimmer Biomet/JERDS, Sociedad Química y Minera Chile (“SQM”), Rolls-Royce and Las Vegas Sands) were announced during the final weeks of the Obama administration. Following an eight-month period during which the DOJ did not announce any corporate resolutions, in the last few months of 2017, the DOJ announced three such resolutions (Telia/Coscom, SBM and KOM). All three resolutions involved foreign companies and their U.S. subsidiaries.

Pursuant to the FCPA Pilot Program, the DOJ also issued two public declination letters in 2017. Both declinations were issued in June to privately-held companies (Linde Group and CDM Smith) and required the companies to disgorge all ill-gotten gains. Since the start of the FCPA Pilot Program, the DOJ has issued seven public declination letters, each of which required the company to disgorge ill-gotten gains to the DOJ or credited the company’s disgorgement of ill-gotten gains to the SEC as part of parallel settlements.

In addition to the two public declinations under the Pilot Program, in 2017, the DOJ also apparently declined to prosecute at least eleven companies that had been under investigation for potential corruption offenses (Cobalt, Core Laboratories, Halliburton, IBM, Innodata, MTS, Net 1 UEPS Technologies, Newmont, Platform, Vantage Drilling and Varian), based on their public announcements. Whether such announcements indicate something more than that the DOJ lacked any basis—jurisdictional or otherwise—to prosecute such companies, remains to be seen.

### **FCPA Corporate Enforcement Policy**

On November 29, 2017, Deputy Attorney General Rod J. Rosenstein announced the FCPA Corporate Enforcement Policy.<sup>6</sup> The policy, which has been incorporated into the U.S. Attorneys’ Manual, is intended to improve upon and make permanent aspects of the FCPA Pilot Program, to enable the DOJ to identify and punish criminal conduct efficiently and to provide greater certainty for companies considering whether to disclose a potential FCPA violation to the DOJ voluntarily.<sup>7</sup> The new Corporate Enforcement Policy applies only to DOJ criminal prosecutions and affects neither declinations in cases in which there is no basis for prosecution nor SEC investigations. Under the policy, when a company voluntarily self-discloses misconduct, fully cooperates and timely and appropriately remediates, there will be a presumption that the company will receive a declination unless there are aggravating circumstances. To qualify for benefits under the policy, a company must also pay all disgorgement, forfeiture and restitution resulting from the misconduct. In an effort to provide greater transparency, the policy addresses in detail these eligibility

<sup>6</sup> See Rod J. Rosenstein, Deputy Attorney General, Dep’t of Just., Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

<sup>7</sup> See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ Issues New FCPA Corporate Enforcement Policy (Nov. 30, 2017), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/doj-issues-new-fcpa-corporate-enforcement-policy?id=25619>; see also United States Attorneys’ Manual 9-47.120.

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criteria, as well as the aggravating factors that can prevent a company from receiving the full benefit of the policy.

Even if the DOJ determines that a criminal resolution is warranted because of the presence of an aggravating factor, a company nonetheless may be eligible for a 50-percent reduction off of the low end of the U.S. Sentencing Guidelines fine range unless the company is a repeat offender. A company that does not voluntarily self-disclose, but otherwise meets all of the requirements of the new policy, may receive up to a 25-percent reduction off of the low end of the Guidelines fine range.

The DOJ, like the SEC, has consistently sought to incentivize companies to disclose FCPA violations and provide robust cooperation in subsequent investigations. The Corporate Enforcement Policy appears on its face to represent a step forward from the Pilot Program in encouraging voluntary self-disclosure by dangling the carrot of a declination, or possibly a penalty reduction, but there are substantial questions regarding how the policy will be implemented, including how the DOJ will interpret the eligibility criteria for consideration under the policy, as well as the aggravating factors. In addition, even if a company does not self-report, the policy may motivate it to endeavor to meet the other eligibility criteria in order to maintain eligibility for the 25-percent reduction.

In announcing the Corporate Enforcement Policy, DAG Rosenstein stated that the number of self-reported FCPA matters increased to 30 over the 18 months that the Pilot Program was in effect, compared to 18 reports during the prior 18 months. Given the increased incentives for self-reporting, it is possible that this uptick in self-disclosure will continue, at least in certain types of cases. However, to further incentivize self-reporting, the DOJ could be more transparent about how it treats companies that self-report, by making public—without identifying the companies by name—whether it has declined to prosecute these companies or is continuing to investigate and/or prosecute them. Because the DOJ has issued only seven public declinations under the Pilot Program, the outcomes for the other companies that self-reported are not clear.

The Corporate Enforcement Policy also emphasizes corporate cooperation in holding individuals accountable. The policy builds on the Yates Memo, which requires that companies provide the DOJ with all relevant facts about individuals involved in corporate misconduct to receive cooperation credit. The Corporate Enforcement Policy goes further, requiring that, to receive full cooperation credit, companies must disclose all facts relating to involvement in the criminal activity by the company's officers, employees or agents, as well as facts relating to potential criminal conduct by third parties and their officers, employees and agents. In announcing the policy, DAG Rosenstein stated that "[e]ffective deterrence of corporate corruption requires prosecuting individuals." He argued that the new policy will increase corporate voluntary self-disclosure, which will in turn enhance the DOJ's ability to identify and punish individuals. Consistent with the stated emphasis on prosecuting individuals, the DOJ has prosecuted fourteen individuals for FCPA offenses since President Trump's inauguration. In explaining why the DOJ was continuing to emphasize the prosecution of individuals over corporations, Rosenstein explained his view that "[i]t makes sense to treat corporations differently because corporate liability is vicarious; it is only derivative of individual liability." Companies should expect that, to earn the full benefits of cooperation

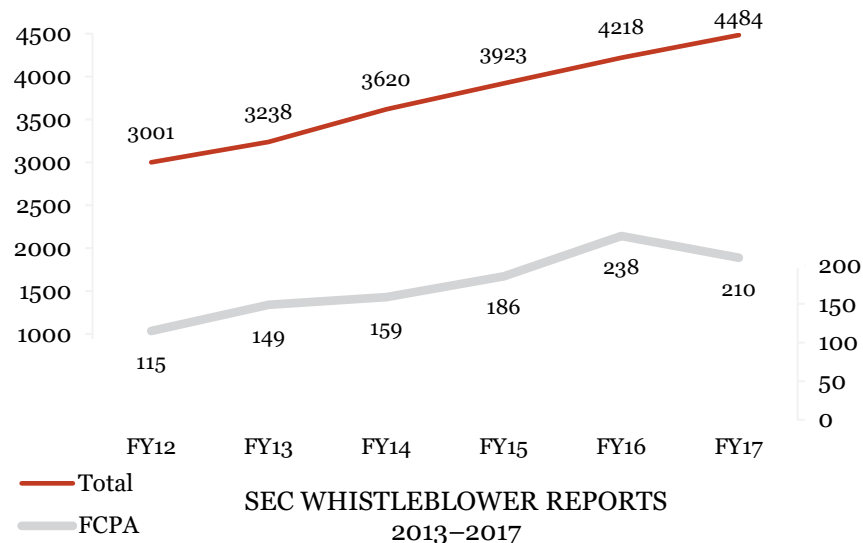
under the Corporate Enforcement Policy, their actions will need to reflect this focus on individual liability through cooperation in investigations of individuals.

### SEC Corporate Resolutions

In 2017, the SEC resolved seven corporate enforcement actions and assessed \$298 million in penalties and related remedies, which was 16 fewer resolutions and almost \$800 million less than in 2016. Setting aside 2016's record-breaking numbers, the number of corporate enforcement actions and penalties assessed in 2017 was consistent with recent prior years. Only three of the seven corporate resolutions (Halliburton, Telia and Alere) were announced during the Trump administration.

### SEC Whistleblower Program

In 2017, with respect to FCPA-related tips, the SEC's whistleblower program also saw declines from highs in 2016. The SEC issued awards totaling more than \$42 million to 13 whistleblowers, which was considerably less than the \$80 million total awarded to 15 whistleblowers in 2016.<sup>8</sup> Although the SEC received more whistleblower tips in 2017 than in any previous year, the number of FCPA-related tips declined to 210 in 2017, from 238 in 2016, ending a long trend of increased reporting of potential FCPA violations.<sup>9</sup>

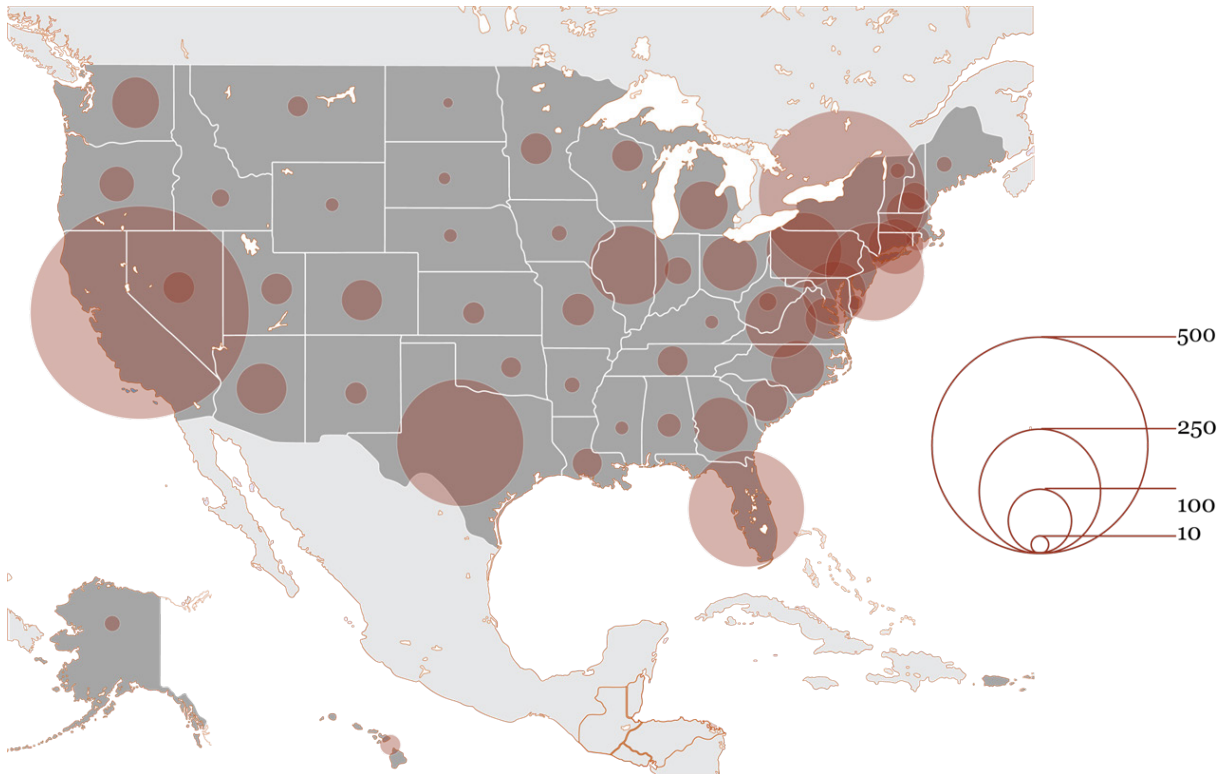


<sup>8</sup> One of the whistleblower awards did not specify the amount, which will be a percentage of monetary sanctions collected or to be collected.

<sup>9</sup> See U.S. SEC. & EXCH. COMM'N, 2017 ANNUAL REPORT TO CONGRESS ON DODD-FRANK WHISTLEBLOWER PROGRAM (Nov. 15, 2017), <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>. As stated in the SEC's report, statistics regarding whistleblower tips are current through the end of its fiscal year on September 30, 2017.

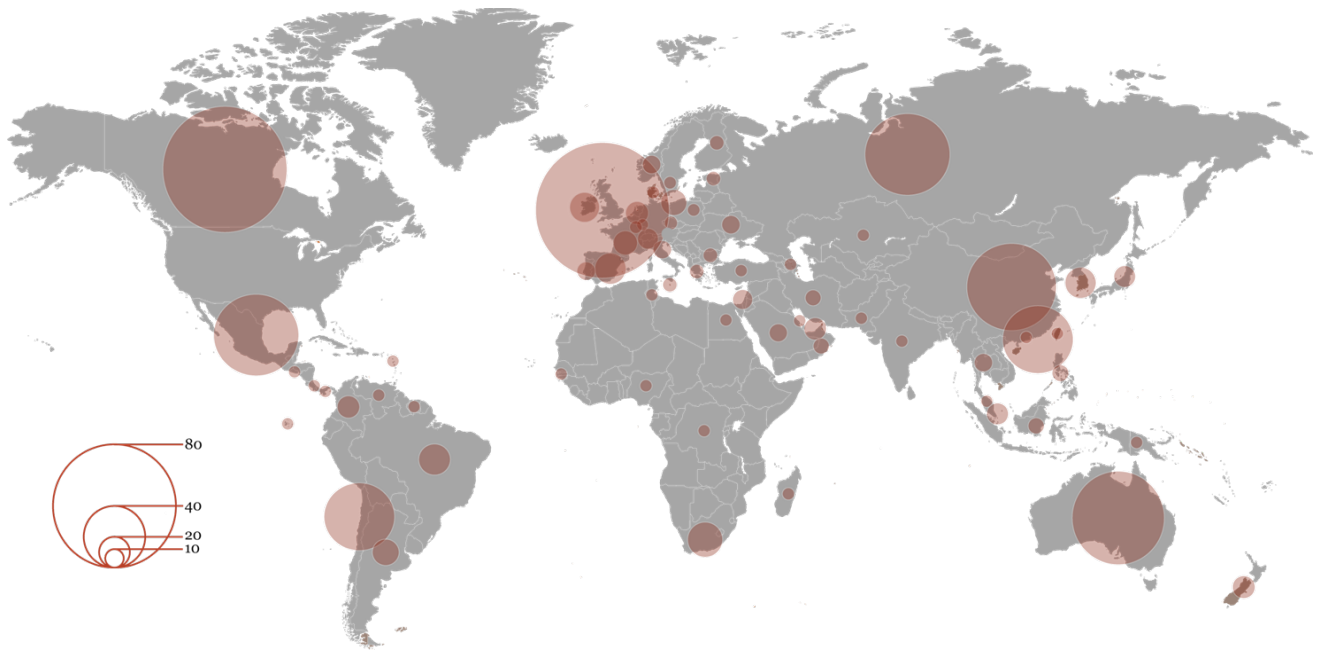


The maps below show the geographic distribution of whistleblower tips in 2017, both within the United States and internationally. Domestically, the greatest number of tips were in California, New York and Texas.



2017 FCPA SEC WHISTLEBLOWER TIPS U.S. AND ITS TERRITORIES

The SEC received tips from 73 countries, with the largest number of tips coming from the United States, the United Kingdom and Canada. The large number of countries from which tips emanated continues to suggest, as it did last year, that norms discouraging whistleblowing may be receding in many foreign jurisdictions.



2017 FCPA SEC WHISTLEBLOWER TIPS WORLDWIDE

The SEC also continued to warn companies in 2017 against impeding potential whistleblowers. The SEC brought enforcement actions against three companies (BlackRock, HomeStreet and Lux Financial Services/LWLVAAC) for violations of Exchange Act Rule 21F-17, which prohibits impeding any individual from communicating with the Commission about potential securities law violations.<sup>10</sup> Only one of these actions was brought during the Trump administration.

### Review of Trump Administration Corporate Resolutions

After not announcing any corporate resolutions during the first six months of the Trump administration, beginning in late July, the DOJ and the SEC announced a total of six corporate resolutions against five companies (Halliburton, Telia/Coscom, Alere, SBM and KOM). These resolutions are summarized below.

#### **Halliburton**

On July 27, 2017, the Halliburton Company, an oilfield services provider, consented to a cease-and-desist order with the SEC to settle charges that it violated the FCPA's internal accounting controls and books and records provisions in connection with its operations in Angola.<sup>11</sup> Halliburton agreed to pay more than \$29.2

<sup>10</sup> These enforcement actions were identified based upon SEC press releases.

<sup>11</sup> See *In re Halliburton Co. and Jeannot Lorenz*, Release No. 81222 (July 27, 2017), <https://www.sec.gov/litigation/admin/2017/34-81222.pdf>; Press Release, Sec. & Exch. Comm'n, Halliburton Paying \$29.2 Million to Settle FCPA Violations (July 27, 2017), <https://www.sec.gov/news/press-release/2017-133>.

million—a \$14 million penalty, \$14 million in disgorgement and \$1.2 million in prejudgment interest—and to retain an independent compliance consultant for eighteen months. Halliburton’s former vice president, Jeannot Lorenz, also agreed to pay the SEC a \$75,000 civil penalty for his alleged role in causing the company’s FCPA violations.

According to the SEC, officials at Angola’s state oil company, Sonangol, advised Halliburton that it was required to partner with more local Angolan-owned businesses to satisfy local content regulations for foreign firms operating in Angola. Halliburton then retained a local Angolan company owned by a former Halliburton employee with connections to an influential Sonangol official who ultimately approved the award of lucrative subcontracts to Halliburton. The local Angolan company did not perform the work described in the pretextual contracts. The SEC further alleged that Lorenz negotiated and entered into these contracts while knowingly circumventing Halliburton’s internal accounting controls and that he falsified books and records by knowingly providing inaccurate scopes of work and other information.

In July, Halliburton disclosed that the DOJ advised that it has closed its investigation into the alleged misconduct.<sup>12</sup>

Although not referenced in the SEC’s order, in 2009, Halliburton reached a settlement with the SEC to resolve charges that it and its former subsidiary, KBR Inc., violated the FCPA by participating in a decade-long scheme to bribe Nigerian government officials.<sup>13</sup> Halliburton and KBR jointly agreed to pay \$177 million in disgorgement. In addition, KBR has disclosed that the DOJ, SEC and the U.K.’s Serious Fraud Office (“SFO”) are conducting investigations into KBR’s interactions with energy company Unaoil—which the SFO is investigating for suspected bribery and corruption—in relation to international projects involving several global companies.<sup>14</sup>

### ***Telia and Coscom***

On September 21, 2017, the DOJ and the SEC, together with the Public Prosecution Service of the Netherlands (“OM”), entered into a \$965 million global settlement—one of the largest combined FCPA settlements ever—with Telia Company AB, a Sweden-based international telecommunications company, and Coscom LLC, Telia’s Uzbek subsidiary.<sup>15</sup> This was the second corporate resolution resulting from an

<sup>12</sup> See Press Release, Halliburton, Halliburton Resolves Investigations Regarding Angola and Iraq Operations (July 27, 2017), [http://www.halliburton.com/public/news/pubsdata/press\\_release/2017/halliburton-resolves-investigations-regarding-angola-iraq-operations.html](http://www.halliburton.com/public/news/pubsdata/press_release/2017/halliburton-resolves-investigations-regarding-angola-iraq-operations.html).

<sup>13</sup> See Litigation Release No. 20897, *SEC v. Halliburton Co. and KBR, Inc.*, No. 4:09-cv-399 (S.D. Tex. Feb. 11, 2009).

<sup>14</sup> See Press Release, KBR Statement on SFO Investigation (April 28, 2017), <https://kbr.com/about/newsroom/press-releases/2017/04/28/kbr-statement-on-sfo-investigation>.

<sup>15</sup> See Deferred Prosecution Agreement, *U.S. v. Telia Co. AB*, No. 1:17-cr-00581 (S.D.N.Y. Sept. 21, 2017); Plea Agreement, *U.S. v. Coscom LLC*, No. 1:17-cr-00581 (S.D.N.Y. Sept. 21, 2017); Press Release, Dep’t of Justice, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than \$965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965>; see also *In re Telia Co. AB*, Exchange Act Release No. 81669 (Sept. 21, 2017), <https://www.sec.gov/litigation/admin/2017/34-81669.pdf>; Press Release, Sec. & Exch. Comm’n, Telecommunications Company Paying \$965 Million For FCPA Violations (Sept. 21, 2017), <https://www.sec.gov/news/press-release/2017-171>.

ongoing investigation into alleged corruption in the Uzbek telecommunications market. In February 2016, Amsterdam-based telecommunications provider VimpelCom Limited and its Uzbek subsidiary, Unitel LLC, entered into a \$795 million global settlement, also with the DOJ, the SEC and the OM, to resolve allegations that they funneled over \$114 million in bribery payments to an Uzbek government official.<sup>16</sup>

According to resolution documents, Telia and Coscom admitted that, from 2007 until at least 2010, they paid over \$330 million in bribes to a shell company, under the guise of payments for lobbying and consulting services that were never performed, in order to enter the Uzbek telecommunications market. The shell company was controlled by the Uzbek government official implicated in the VimpelCom scheme, who was a family member of the president of Uzbekistan with influence over the Uzbek governmental body that regulated the telecom industry. In connection with the bribery scheme, millions of dollars were laundered through the U.S. financial system.

Telia entered into a deferred prosecution agreement with the DOJ to resolve charges of conspiracy to violate the FCPA's anti-bribery provisions and consented to a cease-and-desist order with the SEC to settle charges that it violated the FCPA's anti-bribery and internal accounting controls provisions, and Coscom pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions. Telia agreed to pay a \$274.6 million criminal penalty (including a \$500,000 criminal fine and \$40 million criminal forfeiture on Coscom's behalf) to the DOJ, \$457 million in disgorgement and prejudgment interest to the SEC and a \$274 million criminal penalty to the OM. The SEC has agreed to credit any disgorged profits that Telia pays to Swedish or Dutch authorities, who are also investigating, up to half of the total \$457 million owed. With respect to the criminal penalty, Telia received a 25-percent reduction off of the bottom of the U.S. Sentencing Guidelines fine range but did not receive more significant mitigation credit because it did not voluntarily self-disclose the misconduct to the DOJ.

In announcing the resolution, then-Acting U.S. Attorney Joon H. Kim of the Southern District of New York stated that it was "one of the largest criminal corporate bribery and corruption resolutions ever."

### ***Alere***

On September 28, 2017, Alere Inc., a Massachusetts-based medical manufacturer, consented to a cease-and-desist order with the SEC to resolve charges that Alere's foreign subsidiaries committed accounting fraud, used third parties to make improper payments to government officials, failed to maintain adequate internal controls and inaccurately recorded the improper payments.<sup>17</sup> Alere agreed to pay more than \$13 million, including a \$9.2 million civil penalty, \$3.3 million in disgorgement and almost \$500,000 in prejudgment interest.

<sup>16</sup> See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2016 Year In Review, at 16 (Jan. 20, 2017), [https://www.paulweiss.com/media/3897243/19jan17\\_fcpa\\_year\\_end.pdf](https://www.paulweiss.com/media/3897243/19jan17_fcpa_year_end.pdf).

<sup>17</sup> See *In re Alere Inc.*, Litigation Release No. 10417 (Sept. 28, 2017), <https://www.sec.gov/litigation/admin/2017/33-10417.pdf>; Press Release, Medical Manufacturer Settles Accounting Fraud Charges (Sept. 28, 2017), <https://www.sec.gov/news/press-release/2017-178>.

According to the SEC's order, from 2011 to 2016, Alere misstated its reported revenue due to its South Korean unit's intentionally recording sales prematurely and to various foreign subsidiaries' engaging in other improper revenue recognition practices. The SEC also alleged that, between 2011 and 2013, Alere's Colombian subsidiary made improper payments to a management-level employee at a private health insurance entity that served as an instrumentality of the Colombian government, such that its employees were Colombian government officials. The Colombian subsidiary allegedly made the payments, disguised as payments for purported consulting services, to obtain and retain business from the health insurance entity. The SEC further alleged that, in 2012, Alere's Indian distributor paid local government officials a commission so they would increase orders under the distributor's contract for malaria testing kits. In addition, the SEC alleged that Alere failed to maintain adequate internal accounting controls to prevent the improper payments and inaccurately recorded the payments in its books and records.

### **SBM**

On November 29, 2017, SBM, a Netherlands-based oil services company, and its U.S. subsidiary, SBM USA, agreed to pay the DOJ \$238 million to resolve charges that they conspired to bribe foreign officials to secure business advantages.<sup>18</sup> According to settlement documents and the companies' admissions, over a more than fifteen-year period, SBM paid more than \$180 million in commissions to intermediaries, knowing that a portion of the commissions would be used to bribe government officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq. SBM made these payments to secure improper business advantages with state-owned oil companies in those countries and gained at least \$2.8 billion from projects obtained from the oil companies.

SBM entered into a deferred prosecution agreement with the DOJ, pursuant to which the company agreed to pay the DOJ a criminal penalty of \$238 million, including a \$500,000 criminal fine and \$13.2 million in criminal forfeiture that SBM agreed to pay on behalf of SBM USA. The DOJ considered a number of factors in reaching this resolution, including that SBM self-reported the misconduct but did not provide a complete disclosure for approximately one year, and found that SBM was entitled to a 25-percent reduction off of the bottom of the U.S. Sentencing Guidelines range. In calculating its fine, the DOJ also credited SBM's payment of penalties to the OM and penalties likely to be paid to the Brazilian Ministério Público Federal. As part of the settlement, SBM USA pleaded guilty to conspiring to violate the FCPA's anti-bribery provision.

SBM has paid a combined worldwide total in criminal penalties in excess of \$478 million to resolve charges over related conduct. In addition, in November, two former SBM executives pleaded guilty in the Southern District of Texas to conspiracy to violate the FCPA.

<sup>18</sup> See Deferred Prosecution Agreement, *U.S. v. SBM Offshore N.V.*, No. 17-686 (S.D. Tex. Nov. 29, 2017); Plea Agreement, *U.S. v. SBM Offshore USA, Inc.*, No. 17-685 (S.D. Tex. Nov. 29, 2017); Press Release, Dep't of Justice, SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017), <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>.

**KOM**

On December 22, 2017, KOM, a Singapore-based company that operates shipyards and repairs ships, and its wholly-owned U.S. subsidiary, KOM USA, agreed to pay a combined total penalty of more than \$422 million to resolve charges brought by authorities in the U.S., Brazil and Singapore that the companies conspired to pay millions of dollars in bribes to officials in Brazil.<sup>19</sup> According to settlement documents and the companies' admissions, for more than a decade, KOM—and, for part of that time, KOM USA—paid approximately \$55 million in bribes to officials at Petróleo Brasileiro SA (“Petrobras”), Brazil’s state-run oil company, and to the then-governing political party in Brazil, to secure contracts with Petrobras and another Brazilian entity. KOM paid the bribes, under the guise of legitimate consulting agreements, through commissions to an intermediary, who then made payments for the benefit of the officials at Petrobras and the Brazilian political party.

KOM entered into a deferred prosecution agreement with the DOJ to resolve charges that it violated the FCPA’s anti-bribery provisions. Pursuant to the agreement, KOM will pay a \$105.6 million criminal penalty to the U.S., including a \$4.7 million criminal fine paid by KOM USA. KOM also will pay \$211 million to Brazil and \$105.6 million to Singapore; the DOJ will credit these payments. KOM USA pleaded guilty in the Eastern District of New York to conspiracy to violate the FCPA’s anti-bribery provisions. In addition, a former senior member of KOM’s legal department pleaded guilty to conspiring to violate the FCPA based upon related conduct.

Singapore’s Corrupt Practice Investigation Bureau is continuing to investigate certain employees of KOM.<sup>20</sup>

**Significant Legal Developments Affected Enforcement Tools**

In 2017, significant legal developments affected the SEC’s and the DOJ’s tools for enforcing the FCPA and resolving cases. First, in *Kokesh v. SEC*, a decision with potentially far reaching consequences for FCPA enforcement, the Supreme Court held that disgorgement is a penalty subject to a five-year statute of limitations. Second, the Supreme Court has agreed to hear an appeal of a decision holding that SEC administrative law judges (“ALJs”) are not constitutional officers who must be appointed under the Appointments Clause, thereby leaving open questions about SEC enforcement actions brought as administrative proceedings. These legal developments and their potential implications are discussed below.

<sup>19</sup> See Deferred Prosecution Agreement, *U.S. v. Keppel Offshore & Marine Ltd.*, No. 17-697 (E.D.N.Y. Dec. 22, 2017); Press Release, Dep’t of Justice, Keppel Offshore & Marine Ltd. And U.S.-Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017), <https://www.justice.gov/usao-edny/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global>.

<sup>20</sup> See Angela Teng, *Keppel Scandal: Govt ‘Extremely Disappointed,’ Warns Spore Firms to Uphold Integrity*, TODAY (Jan. 8, 2018), <http://www.todayonline.com/singapore/keppel-bribery-scandal-govt-extremely-disappointed-warns-spore-firms-uphold-integrity>.



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***Limits on U.S. Authorities' Abilities to Seek Disgorgement***

In *Kokesh v. SEC*, the Supreme Court unanimously held that disgorgement sought in SEC enforcement actions, although not expressly enumerated as a “civil fine, penalty, or forfeiture” under 28 U.S.C. § 2462, constitutes a penalty under that provision and therefore is subject to its five-year statute of limitations.<sup>21</sup> In a footnote, the Court noted that its decision did not address whether courts possess authority to order disgorgement in SEC enforcement proceedings, which was an issue not squarely raised by the parties.

The consequences of *Kokesh* for FCPA enforcement are potentially far-reaching, particularly given the long time it often takes to discover and investigate foreign corruption. Under *Kokesh*, SEC disgorgement claims are barred five years from the date on which the defendant’s allegedly wrongful conduct occurred. Consequently, parties previously ordered to pay disgorgement outside the five-year window may seek to have those rulings—and even settlements—set aside. Indeed, at least one party in a non-FCPA case has already sought to do so.<sup>22</sup> Also, going forward, the SEC may endeavor to prosecute cases more quickly, although, more realistically, it likely will make more requests for companies to enter into tolling agreements in which they agree to extend the five-year statute of limitations. In addressing whether, in light of *Kokesh*, the SEC will seek tolling agreements as a matter of routine, Charles Cain, Chief of the SEC’s FCPA Unit, stated that the SEC will not automatically ask for such agreements, but will ask for them as deemed appropriate.<sup>23</sup>

*Kokesh* also raises questions about the DOJ’s authority to seek disgorgement in cases where it declines prosecution. The DOJ has statutory authority, pursuant to the alternative fines provision of 18 U.S.C. § 3571, to seek disgorgement against convicted defendants, but neither that nor any other federal statute indicates that this alternative fines provision may be applied against a company that the DOJ declines to prosecute.<sup>24</sup> Notably, the FCPA Corporate Enforcement Policy explicitly restricts declinations to cases that would have been prosecuted criminally but for the company’s voluntary disclosure, full cooperation, remediation and payment of disgorgement, forfeiture and/or restitution. By requiring disgorgement as a condition for a company to receive a declination and avoid a criminal enforcement action, the FCPA Corporate Enforcement Policy may be carefully worded to avoid characterizing this sort of disgorgement as a penalty in an effort to protect declinations with disgorgement against potential *Kokesh* challenges.

It is also worth noting that the Internal Revenue Service issued guidance that section 162(a) of the Internal Revenue Code prohibits deductions for disgorgement paid in connection with a breach of federal securities

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<sup>21</sup> 137 S. Ct. 1635 (2017).

<sup>22</sup> See *Jalbert v. SEC*, No. 17-cv-12103 (D. Mass. Oct. 26, 2017).

<sup>23</sup> See Megan Zwiebel, *Top FCPA Officials Discuss How International Cooperation and Individual Prosecutions Are Reshaping Anti-Corruption Enforcement, the Defense Bar Responds*, ANTI-CORRUPTION REPORT (Dec. 13, 2017), <https://www.anti-corruption.com/article/2679>.

<sup>24</sup> See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, *Kokesh* Raises Questions About Declinations with Disgorgement Under the FCPA Pilot Program (June 29, 2017), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/kokesh-raises-questions-about-declinations-with-disgorgement-under-the-fcpa-pilot-program?id=24498>.

law, referencing *Kokesh*'s holding that disgorgement is a penalty.<sup>25</sup> Prior to *Kokesh*, the IRS had issued guidance that the Code prohibits a deduction for disgorgement paid for violating the FCPA.<sup>26</sup> The new tax law signed by President Trump on December 22, 2017 precludes, with limited exceptions, deductions for amounts paid at the government's direction in connection with the violation of any law or the investigation into the potential violation of any law.<sup>27</sup>

### ***Constitutional Challenges to SEC Administrative Proceedings***

On June 26, 2017, the D.C. Circuit, sitting *en banc*, denied a petition for review of its decision holding that SEC ALJs are not constitutional officers who must be appointed under the Appointments Clause (*i.e.*, by the president, a court or a department head), thus affirming that their appointments are constitutional.<sup>28</sup> The Tenth Circuit, in contrast, had previously held that SEC ALJs are constitutional officers subject to the requirements of the Appointments Clause and thus that the appointments of these ALJs were unconstitutional because they were not appointed by the President, a court or the head of a department.<sup>29</sup> In light of this decision, the SEC stayed certain administrative proceedings in the Tenth Circuit involving ALJs.<sup>30</sup>

On November 30, 2017, to resolve potential claims that administrative proceedings before SEC ALJs violate the Appointments Clause, the SEC—in its capacity as a “department head” thereby authorized to make appointments under the Appointments Clause—ratified the prior appointments of all of the SEC ALJs.<sup>31</sup> The SEC also directed ALJs to review their actions in all open administrative proceedings to determine whether to ratify those actions. In addition, the SEC lifted its stay on administrative proceedings in the Tenth Circuit.

On January 12, 2018, the Supreme Court granted a writ of certiorari in the D.C. Circuit case, agreeing to hear an appeal of the D.C. Circuit's decision. The DOJ had urged the Supreme Court to hear the appeal, taking the position that SEC ALJs are constitutional officers subject to the requirements of the Appointments Clause.<sup>32</sup> How the Supreme Court decides this case could have far-reaching consequences for SEC enforcement actions brought as administrative proceedings, as well as challenges to such actions.

<sup>25</sup> See Internal Revenue Serv., Office of Chief Counsel, Section 162(f) and Disgorgement for Violating a Federal Securities Law (Dec. 1, 2017), <https://www.irs.gov/pub/irs-wd/201748008.pdf>.

<sup>26</sup> See Internal Revenue Serv., Office of Chief Counsel, Section 162(f) and Disgorgement to the SEC (May 6, 2016), <https://www.irs.gov/pub/irs-wd/201619008.pdf>.

<sup>27</sup> See Act of Dec. 22, 2017, Pub. L. No. 115-97.

<sup>28</sup> See *Lucia v. S.E.C.*, 832 F.3d 277, 283 (D.C. Cir. 2016), *cert. granted*, No. 17-130, 2018 WL 386565 (U.S. Jan. 12, 2018).

<sup>29</sup> See *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *reh'g denied*, 855 F.3d 1128 (10th Cir. 2017), *petition for cert. pending*, No. 17-475 (U.S. 2017).

<sup>30</sup> See *In re Pending Admin. Proceedings*, SEC Release No. 10365 (May 22, 2017).

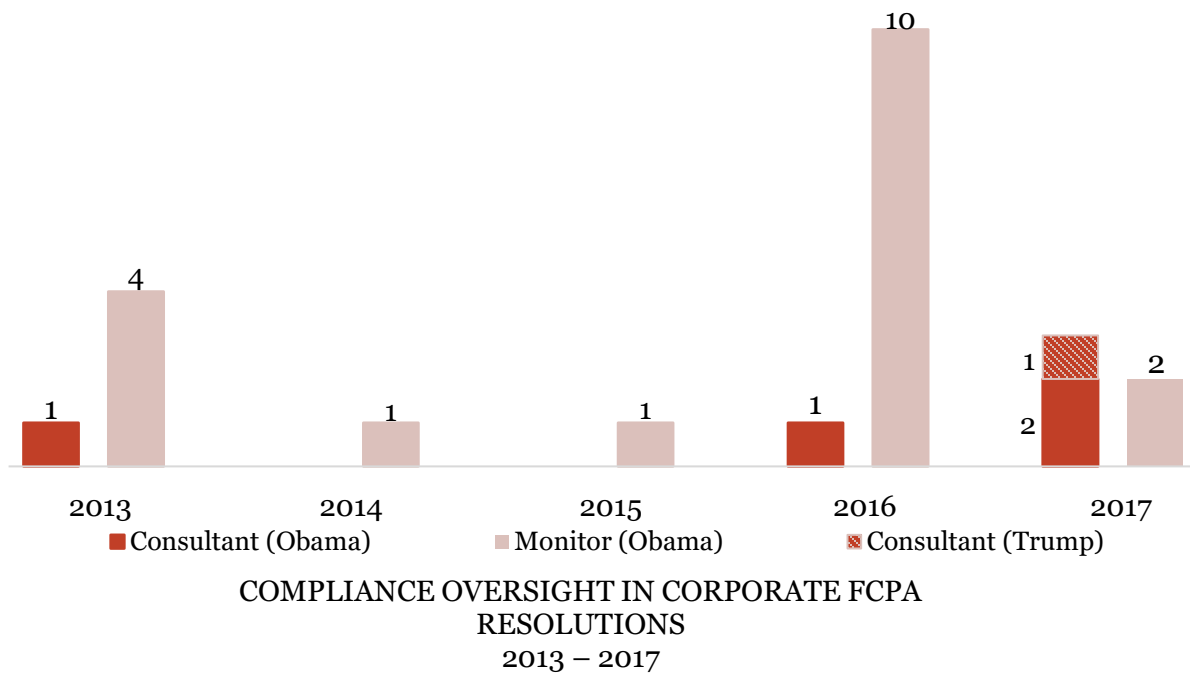
<sup>31</sup> See *In re Pending Admin. Proceedings*, SEC Release No. 10440 (Nov 30, 2017).

<sup>32</sup> See Brief of Respondent, *Lucia v. SEC*, No. 17-130, at 4 (U.S. Nov. 29, 2017).



### Corporate Compliance

The Trump administration has emphasized the importance of robust corporate compliance programs. It is not yet clear, however, how the administration will use compliance monitors and consultants in corporate resolutions.



In 2017, corporate resolutions required that companies retain a total of two corporate monitors (Zimmer Biomet and SQM) and three independent compliance consultants (Orthofix, Las Vegas Sands and Halliburton).<sup>33</sup> Since the start of the Trump administration, neither the DOJ nor the SEC has required a monitor as a condition of a corporate resolution, and only one resolution (Halliburton) required retention of an independent compliance consultant. The new FCPA Corporate Enforcement Policy provides that when a criminal resolution is warranted, the Fraud Section generally will not require the appointment of a monitor if a company has implemented an effective compliance program at the time of the resolution.<sup>34</sup>

On February 8, 2017, the DOJ issued the “Evaluation of Corporate Compliance Programs,” a guidance document that sets forth a list of common questions that the Fraud Section may ask in evaluating corporate

<sup>33</sup> Where multiple monitors or consultants were imposed in the same resolution, such as when both the parent company and its subsidiary received monitors, those monitors and consultants are counted separately.

<sup>34</sup> United States Attorneys’ Manual 9-47.120.

compliance programs during a criminal investigation.<sup>35</sup> The questions emphasize the importance of maintaining a risk-based compliance program that focuses appropriate resources on areas where misconduct is most likely to occur. Although these questions provide helpful insights into the Fraud Section's views about effective compliance programs, it is worth noting that the guidance was promulgated at the direction of Andrew Weissmann, former Chief of the Fraud Section, and may be subject to revision. It is also worth noting that Hui Chen, former DOJ Compliance Counsel, left that position in June 2017.<sup>36</sup> A replacement has not yet been named, though the position is being filled temporarily by Andrew Gentin of the FCPA unit.<sup>37</sup>

The FCPA Corporate Enforcement Policy also highlights the DOJ's focus on corporate compliance by requiring that, where appropriate, a company must implement an effective compliance and ethics program to receive full credit for timely and appropriate remediation.<sup>38</sup> Under the Corporate Enforcement Policy, the DOJ's criteria for evaluating the effectiveness of the company's compliance and ethics program may vary based on the size and resources of the organization, but may include considerations such as the company's culture of compliance, resources the company has dedicated to compliance and auditing of the compliance program to ensure its effectiveness. For a company to receive full credit for timely and appropriate remediation, the policy also requires the appropriate retention of business records, including prohibiting employees from using software that does not appropriately retain records or communications, as well as the implementation of measures to reduce the risk of repetition of misconduct, including measures to identify future risks. The criteria outlined in the policy mirror the principles of the "Evaluation of Corporate Compliance Programs" guidance and expand upon considerations in other DOJ guidance documents.<sup>39</sup>

### FCPA Actions Against Individuals Were Consistent with Past Years

Based on publicly filed charging instruments, in 2017, the DOJ brought FCPA charges against seventeen individuals and the SEC brought charges against three individuals.<sup>40</sup> The number of prosecutions brought

<sup>35</sup> See U.S. Dep't of Just., Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs (Feb. 8, 2017), <https://www.justice.gov/criminal-fraud/page/file/937501/download>; see also Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New DOJ Guidance for Evaluating Corporate Compliance Programs (Mar. 20, 2017), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/new-doj-guidance-for-evaluating-corporate-compliance-programs?id=24054>.

<sup>36</sup> See Sue Reisinger, *DOJ Advertises for New Compliance Counsel to Succeed Hui Chen*, NAT'L L.J. (June 7, 2017), <https://www.law.com/nationallawjournal/almID/120278884701>.

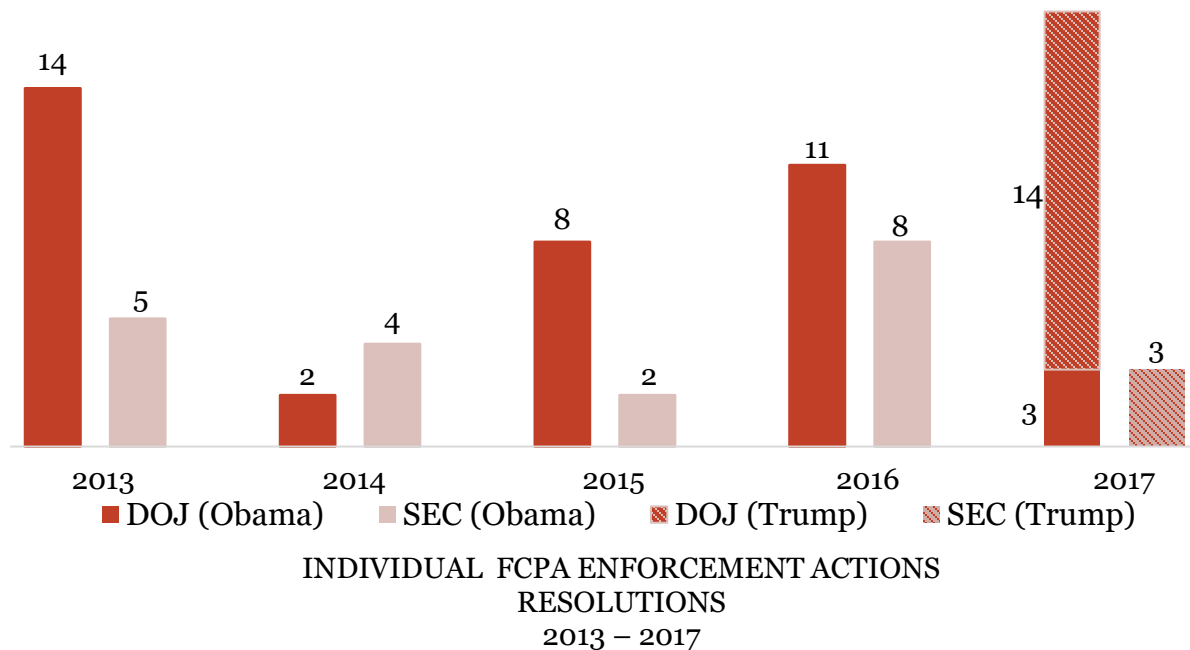
<sup>37</sup> See Andrew Ramonas, *Meet the Foreign Corrupt Practices Act Unit Prosecutors: Andrew Gentin*, GLOBAL INVESTIGATIONS REV. (Apr. 2, 2012), <https://globalinvestigationsreview.com/benchmarking/meet-the-foreign-corrupt-practices-act-unit-prosecutors/1024282/andrew-gentin>.

<sup>38</sup> See United States Attorneys' Manual 9-47.120.

<sup>39</sup> See, e.g., U.S. Dep't of Just. & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 57-60 (2012) (outlining the hallmarks of an effective compliance program).

<sup>40</sup> Included in these totals are individual prosecutions and enforcement actions for FCPA charges, but not for other charges, such as money laundering or racketeering. Actions are listed in the year of the initial filing of FCPA charges, even if unsealed in a later year.

by the DOJ in 2017 was the highest in recent years, but overall both the DOJ and the SEC numbers are in line with fluctuations in individual prosecutions over the past five years.



As in most recent years, in 2017, the DOJ was more active than the SEC in bringing FCPA cases against individuals. As noted in last year's report, compared with the DOJ, the SEC seemingly has not made FCPA actions against individuals a focus, perhaps because of its other regulatory role with respect to issuers. In 2017, the DOJ affirmed its commitment to prioritizing prosecutions of individuals and announced the FCPA Corporate Enforcement Policy. The SEC has not announced an equivalent policy focusing on enforcement against individuals.

Of the seventeen prosecutions brought by the DOJ against individuals in 2017, fourteen were brought during the Trump administration. Two of the three individuals charged during the final weeks of the Obama administration and eight of the individuals charged during the Trump administration have pleaded guilty. All three of the actions brought by the SEC were brought during the Trump administration, of which only one has been resolved.

Most of these individual enforcement actions were ancillary to corporate resolutions. This is not surprising given the evidentiary requirements and the demands imposed on companies to cooperate with DOJ and SEC investigations, as reflected in both the Yates Memo and the FCPA Corporate Enforcement Policy.

Also in 2017, for the first time since 2011, a jury convicted an individual on FCPA charges. On July 27, following a four-week trial, a jury in the Southern District of New York convicted Ng Lap Seng of, among other charges, conspiracy to violate the FCPA and violating the FCPA, in connection with a multi-year scheme to pay more than \$1.3 million in bribes to ambassadors of the United Nations.<sup>41</sup> Ng, chairman of the Sun Kian Ip Group, a Macau real estate development company, conspired with and paid bribes to UN officials—including John Ashe, former president of the UN General Assembly—with the principal objective of obtaining the UN’s formal support for a facility that Ng hoped to build in Macau that would serve as a location for various events associated with the UN.

The significant number of DOJ actions brought against individuals in 2017 is consistent with the Trump administration’s statements that it will prioritize individual enforcement. Given the length of FCPA investigations, though, most of these actions likely originated from investigations that pre-dated the administration.

### Multi-Jurisdictional Coordination

U.S. authorities continued in 2017 to achieve significant successes in the fight against global corruption by coordinating with and leveraging the resources of their foreign counterparts, as demonstrated by the global resolutions with Rolls-Royce, Telia and SBM. These successes continue to reflect both the U.S. government’s commitment to international cooperation and the more aggressive stances foreign governments are taking through legislation and enforcement to address international corruption.

Senior DOJ and SEC officials in the Trump administration have publicly confirmed the agencies’ commitments to coordinating with foreign authorities and signaled that such coordination is increasing. For example, DAG Rosenstein stated in November that, by “[w]orking together with international partners,” the DOJ was “making headway in combatting corruption,” and that he could not “emphasize enough [the DOJ’s] commitment to international cooperation.”<sup>42</sup> Steven R. Peikin, co-director of the SEC’s Division of Enforcement, in November similarly highlighted the need for multi-jurisdictional cooperation, stating: “[I]n an increasingly international enforcement environment, the U.S. authorities cannot—and should not—go it alone in fighting corruption. As global markets become more interconnected and complex, no one country or agency can effectively fight bribery and corruption by itself.”<sup>43</sup>

Several of the corporate enforcement actions resolved during the Trump administration are consistent with statements by administration officials signaling the importance of multi-jurisdictional cooperation. These

<sup>41</sup> See Press Release, Dep’t of Justice, Chairman of Macau-Based Real Estate Development Company Convicted at Trial on All Counts in Connection with United Nations Bribery Scheme (July 27, 2017), <https://www.justice.gov/usao-sdny/pr/chairman-macau-based-real-estate-development-company-convicted-trial-all-counts>.

<sup>42</sup> Rod J. Rosenstein, Deputy Attorney General, Dep’t of Justice, Remarks at the 34<sup>th</sup> International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

<sup>43</sup> Steven R. Peikin, Co-Director, SEC Enforcement Division, Reflections on the Past, Present, and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act, Speech at New York University School of Law (Nov. 9, 2017), <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

include the Telia/Coscom, SBM and KOM resolutions described above. U.S. authorities' investigation of international soccer corruption also demonstrates the extent of the international cooperation undertaken by the DOJ.

### ***International Soccer Corruption***

U.S. authorities have continued to cooperate with international authorities, particularly Swiss law enforcement, to root out corruption in international soccer. Since May 2015, U.S. authorities have charged 44 individuals and entities with racketeering, wire fraud, money laundering and other offenses—though no FCPA charges—in connection with what in some instances were decades-long schemes to enrich themselves by awarding lucrative marketing contracts in exchange for bribes.<sup>44</sup> In 2017, two additional individuals were charged and pleaded guilty, two individuals who had been charged in a previous year pleaded guilty and were sentenced to terms of imprisonment and, as described below, two individuals were convicted following a jury trial.<sup>45</sup>

In December, a jury in the Eastern District of New York convicted two former South American soccer officials of racketeering and other charges.<sup>46</sup> José Maria Marin, the former president of Brazil's soccer federation, and Juan Ángel Napout, the former president of Paraguay's soccer federation and of the South American soccer confederation, were each convicted of racketeering conspiracy and wire fraud conspiracy, and Marin was also convicted on money laundering conspiracy charges. Marin and Napout have not yet been sentenced. A third defendant, Manuel Burga, the former president of the Peruvian soccer federation, was acquitted of racketeering conspiracy, the sole charge he faced. The superseding indictment against Burga also charged him with wire fraud and money laundering conspiracies, but, pursuant to the rule of specialty, he was not tried on those charges because he was extradited to the United States from Peru only on the racketeering conspiracy charge. Following his acquittal, the DOJ advised the court that it does not intend to dismiss the open wire fraud and money laundering conspiracy charges.

<sup>44</sup> Because no FCPA charges were brought in these actions, they are not included in the individual prosecution and enforcement action totals provided above.

<sup>45</sup> See, e.g., Press Release, Dep't of Just., Former Guatemalan Soccer Official Sentenced to 8 Months' Imprisonment For Pocketing Bribes and Kickbacks (Oct. 25, 2017), <https://www.justice.gov/usao-edny/pr/former-guatemalan-soccer-official-sentenced-8-months-imprisonment-pocketing-bribes-and>; Press Release, Dep't of Just., Former Soccer Official Costas Takkas Sentenced to 15 Months In Prison for Laundering Millions Of Dollars in Bribes (Oct. 31, 2017), <https://www.justice.gov/usao-edny/pr/former-soccer-official-costas-takkas-sentenced-15-months-prison-laundering-millions>; Press Release, Dep't of Just., Former Managing Director At Swiss Bank Pleads Guilty To Money Laundering Charge In Connection With Soccer Bribery Scheme (June 15, 2017), <https://www.justice.gov/usao-edny/pr/former-managing-director-swiss-bank-pleads-guilty-money-laundering-charge-connection>; Press Release, Dep't of Just., FIFA Audit and Compliance Committee Member Pleads Guilty To Corruption Charges (Apr. 27, 2017), <https://www.justice.gov/usao-edny/pr/fifa-audit-and-compliance-committee-member-pleads-guilty-corruption-charges>.

<sup>46</sup> See Press Release, Dep't of Just., High-Ranking Soccer Officials Convicted in Multi-Million Dollar Bribery Schemes (Dec. 26, 2017), <https://www.justice.gov/usao-edny/pr/high-ranking-soccer-officials-convicted-multi-million-dollar-bribery-schemes>.

## Foreign Jurisdictions Investigating and Prosecuting Corruption

In addition to U.S.-led enforcement, other jurisdictions have taken strides to investigate and prosecute corrupt actors. In the past year, authorities in Brazil, Saudi Arabia, South Korea and the United Kingdom took significant steps to enforce their anti-corruption laws.

### Brazil

In 2017, Brazilian authorities continued Operation Lava Jato (“Carwash”), the sweeping investigation of money laundering and corruption associated with Petrobras, which has implicated officials at the highest levels of government, including two former presidents, and major Brazilian companies and their executives.<sup>47</sup> The Brazilian authorities’ investigation has now expanded to several other industries, uncovering evidence of corruption in the construction, meatpacking and banking industries. The scope of the investigation appears to reflect a new era in the Brazilian government’s efforts to fight corruption.

In the construction industry, billions of dollars of bribes have been revealed.<sup>48</sup> In the meatpacking industry, J&F Investimentos, parent company of Brazil’s meatpacking giant JBS SA, admitted in 2017 to paying approximately \$150 million in improper payments to hundreds of Brazilian politicians and agreed to pay \$3.2 billion to the Brazilian Federal Prosecutor’s Office over a 25-year period.<sup>49</sup> In the banking industry, in May 2017, Brazil’s federal police launched an investigation into the National Bank for Economic Social Development (“BNDES”)—the largest source of long-term corporate credit in Brazil and one of the world’s largest development banks—based on allegations that the bank loaned over \$37 billion to various companies entangled in the Lava Jato probe.<sup>50</sup>

In connection with the various investigations, more than 200 individuals have been charged with criminal offenses, resulting in sentences totaling more than 1,300 years of jail time.<sup>51</sup> Among those convicted in 2017 were former president Luiz Inacio Lula da Silva and former House speaker Eduardo Cunha, who were convicted of money laundering and corruption and sentenced, respectively, to 9.5 and 15 years in prison.<sup>52</sup> Brazil’s current president, Michel Temer, has also been implicated in the corruption scandal. Brazilian

<sup>47</sup> See Ernesto Londoño, *A Judge’s Bid to Clean Up Brazil From the Bench*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/world/americas/judge-sergio-moro-brazil-anti-corruption.html>.

<sup>48</sup> See Marcelo Odebrecht Diz Que Propina Foi de Até R\$2 Bilhões ao Ano, VEJA (Apr. 14, 2017), <https://veja.abril.com.br/brasil/marcelo-odebrecht-diz-que-propina-foi-de-ate-r-2-bilhoes-ao-ano/>.

<sup>49</sup> See Luciana Magalhaes and Paul Kiernan, *JBS Parent to Pay \$3.2 Billion to Settle Corruption Investigations in Brazil*, WALL ST. J. (May 31, 2017), <https://www.wsj.com/articles/jbs-parent-to-pay-3-16-billion-to-settle-corruption-charges-in-brazil-1496232139>.

<sup>50</sup> See *Brazil’s Bank BNDES invested billions to finance the corruption*, BRAZIL MONITOR (Apr. 29, 2017), <http://www.brazilmonitor.com/index.php/2017/04/29/brazils-bank-bndes-invested-billions-to-finance-the-corruption>.

<sup>51</sup> See Ian Bremmer, *The Silver Lining to Brazil’s Never-Ending Corruption Scandal*, TIME (May 24, 2017), <http://time.com/4792665/brazil-michael-temer-corruption-scandal-lava-jato>; Lise Alves, *Lava Jato Corruption Investigation Completes 3 Years in Brazil*, RIO TIMES (March 17, 2017), <http://riotimesonline.com/brazil-news/rio-politics/brazils-lava-jato-investigation-completes-three-years>.

<sup>52</sup> See Ernesto Londoño, *Ex-President of Brazil Sentenced to Nearly 10 Years in Prison for Corruption*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/world/americas/brazil-lula-da-silva-corruption.html?mcubz=3>.



authorities charged him in June with bribery, then in September with effectively operating the Brazilian government like a criminal organization and with obstruction of justice. The legislative votes needed to suspend him so he could face trial fell short both times.<sup>53</sup> President Temer has denied wrongdoing.

Although impossible to quantify precisely, the corruption scandal has had a devastating impact on Brazil's economy. Brazil's GDP for 2015 and 2016 shrunk approximately 3.8 percent and 3.6 percent, respectively, and it is estimated that the Lava Jato probe accounted for a significant portion of the decline each year.<sup>54</sup> The slump in Brazil's GDP was caused, at least in part, by freezing various planned infrastructure projects, which was a direct byproduct of the investigation. Further demonstrating the impact of the corruption allegations, millions of employees in the affected industries have lost their jobs or been displaced.<sup>55</sup>

The expanding nature of the Lava Jato investigation and Brazilian authorities' aggressive prosecution of corruption are important developments for U.S. companies. American companies contemplating conducting business in Brazil should exercise caution in partnering with local companies and should conduct enhanced due diligence on potential business partners. U.S. companies that are already conducting business in Brazil should consider reviewing their business partnerships and the anti-corruption controls of their local operations. And U.S. companies that are caught up in the widespread investigation may want to consider seeking incentives for cooperating with Brazilian authorities. Brazil's Clean Company Act, which establishes civil and administrative penalties for companies engaging in corrupt conduct, permits companies that cooperate with authorities in an investigation to receive up to a two-thirds reduction in any penalties that are assessed.

### **Saudi Arabia**

The Supreme Anti-Corruption Committee, formed in November by Saudi Arabian Crown Prince Mohammed bin Salman, has been conducting a widespread investigation into alleged corruption that has roiled the Kingdom's elite. The Committee was vested with powers to take any measures deemed necessary to seize companies, funds and other assets, and, within hours of its formation, reports emerged concerning the detention of hundreds of senior officials, princes and businessmen.<sup>56</sup> Reportedly, 320 individuals have

<sup>53</sup> See Samantha Pearson & Paulo Trevisani, *Brazil President Michel Temer Beats Back Corruption Charges*, WALL ST. J. (Aug. 2, 2017), <https://www.wsj.com/articles/brazil-president-michel-temer-beats-back-corruption-charges-1501716625>; Anna Jean Kaiser, *Brazil's President Temer Avoids a New Corruption Trial*, WALL ST. J. (Oct. 25, 2017), [https://www.washingtonpost.com/world/the\\_americas/brazils-president-temer-appears-set-to-avoid-a-new-corruption-trial/2017/10/25/6ae8aa24-b832-11e7-9b93-b97043e57a22\\_story.html?utm\\_term=.aa8f0ffa1fe2](https://www.washingtonpost.com/world/the_americas/brazils-president-temer-appears-set-to-avoid-a-new-corruption-trial/2017/10/25/6ae8aa24-b832-11e7-9b93-b97043e57a22_story.html?utm_term=.aa8f0ffa1fe2).

<sup>54</sup> See Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN RELATIONS (Jan. 11, 2018), <https://www.cfr.org/backgrounder/brazils-corruption-fallout>; Pedro Jardim, *Is Corruption Worth Investigating? How Brazil Became Consumed by Operation Car Wash*, CHARGED AFFAIRS (June 12, 2017), <https://chargedaffairs.org/operation-lava-jato>.

<sup>55</sup> Daniel Giovanz, *Belluzzo: Lava Jato Produziu 7 Milhões de Desempregados* (July 19, 2017), Brasil 247, <https://www.brasil247.com/pt/247/parana247/307270/Belluzzo-Lava-Jato-produziu-7-milh%C3%B5es-de-desempregados.htm>.

<sup>56</sup> *New Saudi Committee to Investigate Public Corruption Opens 'New Era of Transparency'*, NATIONAL (Nov. 5, 2017), <https://www.thenational.ae/world/gcc/new-saudi-committee-to-investigate-public-corruption-opens-new-era-of-transparency-1.673068>.

been subpoenaed and 2,000 bank accounts frozen.<sup>57</sup> The far-reaching investigation is said to be consistent with the crown prince's "Saudi Vision 2030" reform program, which seeks to modernize Saudi Arabia's economy and make it more attractive to foreign investors.<sup>58</sup>

In December, Attorney General Sheikh Saud Al-Mujib announced that most of the detainees facing corruption allegations had accepted settlements to avoid prosecution.<sup>59</sup> Although the size of the settlements and the identity of the individuals detained are largely confidential, according to news reports, Senior Prince Miteb bin Abdullah, a member of the House of Saud who previously served as the Kingdom's Minister of the National Guard, agreed to pay over \$1 billion for his release.<sup>60</sup> News reports also indicate that Saudi authorities are demanding \$6 billion to release Prince Al-Waleed bin Talal, an influential international businessman and one of the world's wealthiest individuals, who reportedly has been detained since November. The Public Prosecutor's Office estimates that between \$50 and \$100 billion ultimately will be recovered.<sup>61</sup>

Based upon news reports, the corruption investigation does not appear to be focused on foreign companies doing business in Saudi Arabia. Rather, consistent with the Saudi Vision 2030 program, the investigation seems focused on eradicating corruption inside Saudi Arabia in order to increase foreign investment. Nevertheless, U.S. companies doing business in the Kingdom, or considering doing so, should monitor developments carefully, given the suddenness with which the Supreme Anti-Corruption Committee acted.

### **South Korea**

In 2017, the South Korean news was dominated by the legal travails of former President Park Geun-hye, who has been accused of conspiring with her close confidante, Choi Soon-sil, to pressure numerous business groups—including Samsung, Lotte, POSCO, SK, CJ, Hyundai, LG, Hanwha, Hanjin and GS—to donate approximately \$70 million to two non-profit organizations controlled by Choi, in exchange for various favors.<sup>62</sup> Based on investigation findings by Korean prosecutors, in December 2016, the Korean National

<sup>57</sup> Margherita Stancati & Summer Said, *Saudi Arabia Pursues Cash Settlements as Crackdown Expands*, WALL ST. J. (Nov. 17, 2017), <https://www.wsj.com/articles/saudi-crackdown-escalates-with-arrests-of-top-military-officials-1510950402>; Saud Al-Mujib, Attorney Gen. of Saudi Arabia, Statement on the Proceedings of Supreme Anti-Corruption Committee (Dec. 5, 2017), <http://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1695090#1695090>.

<sup>58</sup> Majid Al Qasabi, Opinion, *Riyadh Is Delivering on Vision 2030*, WALL ST. J. (Nov. 12, 2017), <https://www.wsj.com/articles/riyadh-is-delivering-on-vision-2030-1510521284>.

<sup>59</sup> See al-Mujib, *supra* note 57.

<sup>60</sup> See Margherita Stancati, Summer Said & Benoit Faucon, *The Price of Freedom for Saudi Arabia's Richest Man: \$6 Billion*, WALL ST. J. (Dec. 23, 2017), <https://www.wsj.com/articles/the-price-of-freedom-for-saudi-arabias-richest-man-6-billion-1513981887>.

<sup>61</sup> See Riad Hamade & Alaa Shahine, *Saudi Official Says Graft Settlements Could Recover \$100 Billion*, BLOOMBERG (Nov. 20, 2017), <https://www.bloomberg.com/news/articles/2017-11-18/saudi-graft-settlements-could-recover-billions-official-says>.

<sup>62</sup> See, e.g., Jennifer Williams, *The Bizarre Political Scandal That Just Led to the Impeachment of South Korea's President*, VOX (Mar. 9, 2017), <https://www.vox.com/world/2016/11/30/13775920/south-korea-president-park-geun-hye-impeached>; Jung Suk-ye, *Korean Conglomerates' Heads Deny Bribery Allegations Involving President's Confidante*, BUSINESS KOREA (Dec. 7, 2016), <http://businesskorea.co.kr/english/news/national/16690-business-tycoons%E2%80%99-denials-korean-conglomerates%E2%80%99-heads-deny-bribery-allegations>.



Assembly impeached then-President Park and, on March 10, 2017, the Constitutional Court upheld the impeachment decision, ending her presidency. Park was subsequently arrested and indicted, and has been on trial since May. If convicted of bribery involving more than KRW100 million (approximately \$94,000), Park faces a prison term of more than ten years, and up to life imprisonment.<sup>63</sup>

In February 2017, in connection with the allegations against former President Park, Korean prosecutors also indicted five Samsung executives—including Samsung’s de facto head, Jay Y. Lee—based on allegations that, between 2015 and 2016, they made improper payments to Choi in exchange for business-related benefits.<sup>64</sup> Lee was charged, tried and convicted for allegedly authorizing a payment to Choi in order to obtain government support of a merger between Samsung affiliates. Lee was sentenced to five years in prison, and has appealed.<sup>65</sup> The four other charged executives were also convicted on related corruption charges, with two sentenced to four years in prison and two receiving suspended prison terms. In addition, in December, the Chairman of Lotte was convicted on related corruption charges, and received a suspended prison sentence.<sup>66</sup>

The effects of these prosecutions on South Korea’s economy may be far reaching. The country’s economic growth slowed in 2016 in conjunction with a drop in consumer confidence following announcements of Park’s impeachment. In November 2016, amid political unrest and large protests, Korea’s consumer sentiment index fell to its lowest level in seven years.<sup>67</sup> Since Lee’s detention, however, Samsung’s stock price has risen, which may be a positive sign for future economic growth, as the company generates almost one-fifth of the country’s GDP.<sup>68</sup>

Neither the DOJ nor the SEC has brought enforcement actions against the companies implicated in the corruption scandal, but it remains to be seen whether such cases will be brought.

In addition, as reported last year, South Korea’s anti-corruption legislation, commonly referred to as the “Kim Young-ran Act,” took effect in September 2016, significantly expanding the set of conduct and individuals that could be subject to bribery offenses.<sup>69</sup> In December 2017, the Anti-Corruption and Civil

<sup>63</sup> See Tong-Hyung Kim, *Ousted South Korean President’s Graft Trial Begins Tuesday*, ASSOCIATED PRESS (May 22, 2017), <https://www.apnews.com/056a79aee90a4ffeb57b46bd1c478320>.

<sup>64</sup> See Anna Fifield, *Samsung Group’s Heir Lee Jae-Young Sentenced to Five Years in Corruption Case*, WASH. POST. (Aug. 25, 2017), [https://www.washingtonpost.com/world/samsungs-heir-apparent-found-guilty-of-corruption-sentenced-to-five-years-in-jail/2017/08/25/03a71976-894e-11e7-9ce7-9e175d8953fa\\_story.html?utm\\_term=.72b6d13275cb](https://www.washingtonpost.com/world/samsungs-heir-apparent-found-guilty-of-corruption-sentenced-to-five-years-in-jail/2017/08/25/03a71976-894e-11e7-9ce7-9e175d8953fa_story.html?utm_term=.72b6d13275cb).

<sup>65</sup> See Joyce Lee, *Samsung Scion Lee Appeals Against Five-Year Jail Term for Bribery*, REUTERS (Aug. 27, 2017), <https://www.reuters.com/article/us-samsung-lee-appeal/samsung-scion-lee-appeals-against-five-year-jail-term-for-bribery-idUSKCN1B8o5U>.

<sup>66</sup> See Raymond Zhong, *Chairman of Lotte Group Is Convicted of Graft in South Korea, but Avoids Jail*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/business/korea-lotte-corruption-conviction.html>.

<sup>67</sup> See John Manning, *The Economic Impact of South Korea’s Presidential Impeachment*, INT’L BANKER (Jan. 23, 2017), <https://internationalbanker.com/finance/economic-impact-south-koreas-presidential-impeachment/>.

<sup>68</sup> See Julian Ryall & Fabian Kretschmer, *Will Samsung Survive Heir Lee Jae-Yong Jail Sentence?*, DEUTSCHE WELLE (Aug. 25, 2017), <http://www.dw.com/en/will-samsung-survive-heir-lee-jae-yong-jail-sentence/a-40238037>.

<sup>69</sup> See Client Memorandum, Yulchon LLC, Proposed Changes to the Anti-Graft Law (Dec. 21, 2017), <https://www.lexology.com/library/detail.aspx?g=52ca2c2f-952b-4357-a6ed-20b0fc90b5be>.

Rights Commission agreed to a proposed amendment to the Act, modifying the monetary limits on specific types of benefits that public officials may receive. Under the proposed amendment, the current KRW30,000 (approximately \$28) maximum for meals and drinks would remain the same. The KRW50,000 (approximately \$47) maximum for presents would be doubled, to KRW100,000, provided that the gifts are agricultural products or processed goods with more than 50% agricultural content. The KRW100,000 limit for congratulatory and condolence payments would be reduced to KRW50,000, but would not change for wreaths and condolence flowers. The proposed amendment resulted in part from campaigning by the agricultural industry, which has seen significant decreases in sales since the Act was passed. Critics of the proposed amendment have expressed concern that permitting an exception for agricultural gifts could set a precedent for further changes to the Act, undermining it. The proposed amendment requires final endorsement by the Cabinet.

### **United Kingdom**

2017 was a significant year for anti-corruption enforcement in the United Kingdom. In January, Rolls-Royce entered into a deferred prosecution agreement with the SFO, pursuant to which Rolls-Royce admitted to paying bribes in seven countries and agreed to pay the largest penalty ever assessed in the United Kingdom, totaling £497.25 million.<sup>70</sup> In September, the SFO announced the conviction of F.H. Bertling, a U.K.-based subsidiary of the German-headquartered Bertling Group, for conspiring to make corrupt payments to an agent of the Angolan state oil company, Sonangol.<sup>71</sup> In addition, four employees pleaded guilty to the same charges in March, three of whom were subsequently given suspended prison sentences and fined.<sup>72</sup> One employee was acquitted in September. Two others had pleaded guilty in 2016.

In connection with the international investigations into SBM and arising out of an ongoing criminal investigation into suspected bribery, corruption and money laundering at Unaoil, in November 2017, the SFO announced charges against two SBM executives and two Unaoil employees for conspiracy to make corrupt payments.<sup>73</sup> The individuals allegedly made corrupt payments to secure contracts in Iraq for SBM, Unaoil's client, between June 2005 and August 2011. Another Unaoil employee is subject to an extradition request to Monaco on related charges.

<sup>70</sup> See Press Release, Serious Fraud Office, SFO Completes £497.25M Deferred Prosecution Agreement with Rolls-Royce PLC (Jan. 17, 2017), <https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/>.

<sup>71</sup> See Press Release, Serious Fraud Office, SFO Secures Seven Convictions in \$20M F.H. Bertling Corruption Case (Sept. 26, 2017), <https://www.sfo.gov.uk/2017/09/26/sfo-secures-7-convictions-20m-f-h-bertling-corruption-case/>.

<sup>72</sup> See *id.*; Press Release, Serious Fraud Office, Three Men Sentenced in \$20M Angolan Oil Corruption Case (Oct. 20, 2017), <https://www.sfo.gov.uk/2017/10/20/three-men-sentenced-20m-angolan-oil-corruption-case/>.

<sup>73</sup> See Press Release, Serious Fraud Office, Two Further Individuals Charged in SFO's Unaoil Investigation (Nov. 30, 2017), <https://www.sfo.gov.uk/2017/11/30/two-individuals-charged-sfos-unaoil-investigation/>; Press Release, Serious Fraud Office, Two Charged in SFO's Unaoil Investigation (Nov. 16, 2017), <https://www.sfo.gov.uk/2017/11/16/two-charged-sfos-unaoil-investigation/>.

Also in 2017, the SFO commenced bribery and corruption investigations into several other prominent companies, including Rio Tinto, AMEC Foster Wheeler, British American Tobacco p.l.c., and ABB Ltd.<sup>74</sup>

In 2017, the United States and the United Kingdom took steps to institutionalize their relationship, further strengthening their high level of cooperation in addressing cross-border bribery and corruption. For example, in May, the DOJ announced that it plans to send an anti-corruption prosecutor to work in the United Kingdom as part of the DOJ's efforts to collaborate with international partners in the fight against corruption and financial fraud.<sup>75</sup> This will be the first time that a DOJ prosecutor has worked in a foreign regulatory agency on white collar crime issues. In light of the cooperation between the United States and the United Kingdom, U.S. companies conducting business in the United Kingdom should be cognizant that these authorities likely will work together to enforce the anti-corruption laws in both jurisdictions.

Notably, there has been concern that the Brexit vote might undermine the United Kingdom's efforts to combat corruption and bribery, including with respect to its international cooperation.<sup>76</sup> In response to such concerns, David Green, the outgoing head of the SFO, stated in December that he "think[s] everyone recognises on both sides that cooperation in relation to criminal investigation and prosecution and the return of suspected offenders is in everybody's interest," while acknowledging that the SFO might need to find alternative mechanisms to carry out such international cooperation.<sup>77</sup>

## Foreign Jurisdictions Enhancing Their Anti-Corruption Laws

### Canada

In 2017, Canada implemented legislation making facilitation payments—payments made to foreign government officials to facilitate routine transactions, such as permits—unlawful.<sup>78</sup> An exception for facilitation payments in the Corruption of Foreign Public Officials Act, which excluded facilitation payments

<sup>74</sup> See, e.g., Press Release, Serious Fraud Office, SFO Investigating British American Tobacco p.l.c. (Aug 1, 2017), <https://www.sfo.gov.uk/2017/08/01/sfo-investigating-british-american-tobacco-plc/>; Press Release, Serious Fraud Office, SFO Opens Investigation Into the Rio Tinto Group (July 24, 2017), <https://www.sfo.gov.uk/2017/07/24/sfo-opens-investigation-into-the-rio-tinto-group/>; Press Release, Serious Fraud Office, SFO Confirms Investigation into Amec Foster Wheeler (July 11, 2017), <https://www.sfo.gov.uk/2017/07/11/sfo-confirms-investigation-amec-foster-wheeler/>; Press Release, Serious Fraud Office, SFO Opens Investigation into ABB Ltd (Feb. 10, 2017), <https://www.sfo.gov.uk/2017/02/10/sfo-opens-investigation-abb-ltd/>.

<sup>75</sup> See Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, Dep't of Just., Remarks at American Conference Institute's 7<sup>th</sup> Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

<sup>76</sup> See ORG. FOR ECON. CO-OPERATION & DEV., IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION, PHASE 4 REPORT: UNITED KINGDOM at 10, 42, 73–74 (Mar. 2017), <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>.

<sup>77</sup> See Kirstin Ridley, *SFO Head Sees Cross-Border Cooperation Surviving Brexit*, REUTERS (Dec. 13, 2017), <https://www.reuters.com/article/uk-britain-eu-sfo/sfo-head-sees-cross-border-cooperation-surviving-brexit-idUSKBN1E725L>.

<sup>78</sup> See *Strengthening Canada's Fight Against Foreign Bribery*, GLOB. AFFAIRS CANADA (Oct. 30, 2017), [http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption\\_questions-answers-reponses.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption_questions-answers-reponses.aspx?lang=eng).

from the Act's bribery offense, was repealed in 2013 as part of the Canadian government's efforts to combat corruption and bribery. Implementation of the repeal was delayed to provide businesses with adequate time to amend their practices and procedures. On October 30, 2017, the Canadian government announced that the repeal of the exception for facilitation payments would become effective the next day.<sup>79</sup>

## China

In November, the Standing Committee of the National People's Congress adopted amendments to China's Anti-Unfair-Competition Law, a civil and administrative statute that regulates, among other things, domestic commercial bribery.<sup>80</sup> The amendments modify the scope of prohibited bribery, by specifying the range of prohibited recipients of bribes and expanding the definition of prohibited bribery to include bribery for the purpose of obtaining transaction opportunities or competitive advantages. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees. In addition, the law provides for increased penalties. These amendments, which came into effect on January 1, 2018, represent the most significant changes to the law since its adoption in 1993. It is an open question how the Chinese government will interpret these statutory changes and whether and to what extent the government will modify its enforcement approach under the amended law.

Also in 2017, the Communist Party continued its broad criminal anti-corruption campaign under General Secretary Xi Jinping, detaining and imprisoning several prominent Chinese business leaders and government officials.<sup>81</sup> In his address to the National Congress in October, General Secretary Xi described corruption as the "greatest threat" facing the party and promised to work toward the adoption of a national anti-corruption law and the creation of a "corruption reporting platform."<sup>82</sup> Xi subsequently proposed the creation of a National Supervision Commission, a new anti-corruption agency with broad powers over China's public sector.<sup>83</sup> We expect significant developments in this area in 2018.

In addition, an official with the Communist Party's Central Commission for Discipline Inspection, which is tasked with fighting corruption, stated in December that China wants to work with the international community to "establish new orders in [the] global anti-corruption fight."<sup>84</sup> The agency also stated that it

<sup>79</sup> See Press Release, Glob. Affairs Canada, Canada Repeals Facilitation Payments Exception in Corruption of Foreign Public Officials Act (Oct. 30, 2017), [https://www.canada.ca/en/global-affairs/news/2017/10/canada\\_repeals\\_facilitationpaymentsexceptionincorruptionofforeign.html](https://www.canada.ca/en/global-affairs/news/2017/10/canada_repeals_facilitationpaymentsexceptionincorruptionofforeign.html).

<sup>80</sup> See Emily Feng, *China SOEs Move to Set Up First Institutional Compliance Systems*, FINANCIAL TIMES (Jan. 1, 2018), <https://www.ft.com/content/0833413a-db2f-11e7-a039-c64b1c09b482>.

<sup>81</sup> See e.g., Sui-Lee Wee, *Chinese General Being Investigated for Bribery Kills Himself*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/world/asia/china-army-general-suicide.html>; Chris Buckley & Paul Mozur, *China's Flashy Ex-Internet Censor Faces Corruption Investigation*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/world/asia/china-internet-censorship-lu-wei-corruption.html>.

<sup>82</sup> See Xi Pledges "Sweeping Victory" in Anti-Corruption, XINHUA NEWS (Oct. 18, 2017), [http://news.xinhuanet.com/english/2017-10/18/c\\_136688762.htm](http://news.xinhuanet.com/english/2017-10/18/c_136688762.htm).

<sup>83</sup> See China Aims to Set Up State Anti-Corruption Unit Next Year, REUTERS (Oct. 29, 2017), <https://af.reuters.com/article/worldNews/idAFKBN1CYODK>.

<sup>84</sup> See China Looks for More Int'l Cooperation in Anti-Graft Fight, XINHUA (Dec. 6, 2017), [http://news.xinhuanet.com/english/2017-12/06/c\\_136806240.htm](http://news.xinhuanet.com/english/2017-12/06/c_136806240.htm).

will “punish both those who take bribes and those who offer them.” The Communist Party has not, however, actively prosecuted bribery by Chinese companies overseas.

### **Mexico**

Effective July 2017, under Mexico’s General Law of Administrative Responsibilities (“GLAR”), individuals and corporations that have bribed government officials, rigged procurement processes or misused public resources are subject to penalties and may be required to establish enhanced compliance programs.<sup>85</sup> GLAR was one of a series of laws passed to implement a 2015 amendment to the Federal Constitution to create a National Anti-Corruption System. This system is tasked with coordinating the anti-corruption activity of all government and state agencies responsible for the prevention, detection and prosecution of corruption.<sup>86</sup>

In June, the Secretary of Public Administration published its “Model Program for Corporation Integrity,” which provides interpretations of certain provisions of the GLAR.<sup>87</sup> The Model Program provides detailed requirements for companies’ “integrity programs,” including the creation and maintenance of an organizational manual describing the company’s leadership structure and reporting chains, employee code of conduct, compliance and audit systems, self-reporting systems, disciplinary procedures and training-in-integrity measures.

Another significant anti-corruption development in Mexico was the December arrest of Alejandro Gutiérrez, a former high-ranking official of President Enrique Peña Nieto’s Institutional Revolutionary Party (“PRI”).<sup>88</sup> Gutiérrez was arrested on allegations that he orchestrated a financing scheme to illegally funnel public money to support PRI’s political campaigns. Several other former officials have been arrested on political corruption charges as part of a widening inquiry into seemingly large-scale corruption in Mexican politics. Corruption is expected to be a key issue in Mexico’s 2018 presidential election.

Mexico’s increasing anti-corruption efforts may impact future FCPA enforcement. In recent years, several companies (such as Teva, Key Energy and Zimmer Biomet) have paid significant settlement amounts to the DOJ and the SEC to settle charges involving alleged wrongdoing in Mexico, but have not paid related penalties to Mexican authorities.<sup>89</sup> This trend may change, as multinational and U.S.-based companies

<sup>85</sup> Ley General de Responsabilidades Administrativas (July 18, 2016), <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGRA.pdf>.

<sup>86</sup> See ORG. FOR ECON. CO-OPERATION & DEV., OECD INTEGRITY REVIEW OF MEXICO: TAKING A STRONGER STANCE AGAINST CORRUPTION at 30–33 (Mar. 2017), <http://dx.doi.org/10.1787/9789264273207-en>.

<sup>87</sup> See Modelo de Programa de Integridad Empresarial (June 12, 2017), [https://www.gob.mx/cms/uploads/attachment/file/272749/Modelo\\_de\\_Programa\\_de\\_Integridad\\_Empresarial.pdf](https://www.gob.mx/cms/uploads/attachment/file/272749/Modelo_de_Programa_de_Integridad_Empresarial.pdf).

<sup>88</sup> Azam Ahmed & J. Jesus Esquivel, *Mexico Graft Inquiry Deepens With Arrest of a Presidential Ally*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/world/americas/mexico-corruption-pri.html>.

<sup>89</sup> See Deferred Prosecution Agreement, *U.S. v. Zimmer Biomet Holdings, Inc.*, No. 12-o8o (D.D.C. Jan. 12, 2017); Press Release, Dep’t of Justice, Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017), <https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act>; Plea Agreement, *U.S. v. Teva, LLC*, No. 16-20967 (S.D. Fl. Dec. 22, 2016); Press Release, Dep’t of Justice, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than \$283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign>.



operating in Mexico must comply with the GLAR, which potentially exposes them to broader enforcement risk. In addition, Mexico's enforcement of anti-corruption laws may lead to increased cooperation and collaboration with U.S. authorities.

The January 19, 2017 extradition of narcotics kingpin Joaquín Guzmán Loera ("El Chapo") from Mexico to the United States may reflect such cooperation. His trial, scheduled for September 2018 in the Eastern District of New York, threatens to reveal further salacious details regarding corruption in Mexico, given the reach of his alleged criminal enterprise.<sup>90</sup>

### Multilateral Development Bank Debarments

In 2017, as in prior years, the World Bank Group debarred considerably more individuals and entities than did the other multilateral development banks ("MDBs"). The World Bank Group imposed 288 debarments, whereas the Inter-American Development Bank imposed 27, the Asian Development Bank and the European Bank for Reconstruction and Development each imposed six and the African Development Bank imposed five.<sup>91</sup> More than half of the World Bank Group debarments (180 debarments) and almost half of the African Development Bank debarments (2 debarments) were based, at least in part, on corrupt practices. The other MDBs do not appear to have imposed any debarments based on corrupt practices.

The longest debarments based at least in part on corrupt practices were the World Bank's debarments of Consia Consultants ApS and Dutchmed B.V., each of which was debarred for fourteen years. The World Bank debarred Consia, a Denmark-based consultancy company, for allegedly making improper payments to officials in connection with various projects in Indonesia and Vietnam, while Dutchmed, a Dutch medical products firm, was debarred for allegedly paying improper commissions to an official for the Romanian health ministry.<sup>92</sup> In debarring these entities, the World Bank Sanctions Board emphasized each entity's lack of cooperation with the World Bank's investigation and inadequate compliance measures.

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corrupt; *In re Key Energy Serv., Inc.*, Litigation Release No. 78558 (Aug. 11, 2016), <https://www.sec.gov/litigation/admin/2016/34-78558.pdf>.

<sup>90</sup> See Alan Feuer, *Prosecutors Poised to Tell an Epic Tale at El Chapo Trial*, N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/nyregion/el-chapo-trial-postponed.html>.

<sup>91</sup> Debarments were counted based on the data reported by each MDB, using each bank's own reporting criteria. See <https://www.afdb.org/en/projects-and-operations/procurement/debarment-and-sanctions-procedures/>; <http://lnadbg4.adb.org/oga0009p.nsf/sancALLPublic?OpenView&count=999>; <http://www.ebrd.com/ineligible-entities.html> (including debarments based upon third party findings); <http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/sanctioned-firms-and-individuals.1293.html>; <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>. The World Bank Group appears to report only current debarments; the debarment totals are based upon the data reported as of January 16, 2018. The African Development Bank does not specify the grounds for its debarments; those grounds were counted based upon information reported by the Asian Development Bank and an African Development Bank press release.

<sup>92</sup> See Press Release, World Bank, World Bank Debars Consia Consultants ApS for 14 Years (Apr. 6, 2017), <http://www.worldbank.org/en/news/press-release/2017/04/05/world-bank-debars-consia-consultants-aps-for-14-years>; Mark Bocchetti, *Sanctions Board Rejects Link of World Bank Probe to Prosecutions*, MLEX (June 7, 2017),

Unfortunately, limited conclusions about MDB corruption enforcement can be drawn from this data. Debarments of affiliates of the same company generally are reported as separate debarments, such that the debarment statistics do not reflect the number of standalone entities that have been debarred.

### **Anti-Money Laundering and the Kleptocracy Initiative**

The DOJ continued to seek the forfeiture and recovery of assets through significant actions brought under its Kleptocracy Asset Recovery Initiative, which is led by the International Unit of the DOJ Criminal Division's Money Laundering and Asset Recovery Section.

As reported last year, the DOJ announced in 2016 that it was seeking the forfeiture of more than \$1 billion of assets in connection with investigations of corruption at 1Malaysia Development Berhad ("1MDB"), a Malaysian sovereign wealth fund. On June 15, 2017, the DOJ announced that it was seeking the forfeiture and recovery of an additional \$540 million in assets.<sup>93</sup> The 1MDB case is the largest asset forfeiture action under the Kleptocracy Initiative. Assets now subject to forfeiture total nearly \$1.7 billion.

On July 14, 2017, the DOJ announced that it was seeking the forfeiture and recovery of approximately \$144 million in assets alleged to be the laundered proceeds of foreign corruption in connection with the Nigerian oil industry.<sup>94</sup> Two Nigerian businessmen allegedly paid bribes to Nigeria's former minister for petroleum resources in return for access to lucrative oil contracts, with the proceeds laundered in and through the United States. Related assets subject to seizure and forfeiture include a \$50 million condominium in Manhattan and an \$80 million yacht.

### **Looking Forward Into 2018**

Statements by senior Trump administration officials, policies implemented by the DOJ and recent corporate and individual enforcement trends suggest that, as Attorney General Jeff Sessions has promised, U.S. authorities will continue to "strongly enforce the FCPA and other anti-corruption laws."<sup>95</sup>

It appears that, going forward, U.S. authorities will continue to focus on themes that were prevalent during the later years of the Obama administration, including individual accountability, providing companies with incentives for self-disclosure and cooperation, transparency, international cooperation and corporate

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<https://mlexmarketinsight.com/insights-center/editors-picks/anti-bribery-and-corruption/cross-jurisdiction/sanctions-board-rejects-link-of-world-bank-probe-to-prosecutions>.

<sup>93</sup> See Press Release, Dep't of Just., U.S. Seeks to Recover Approximately \$540 Million Obtained From Corruption Involving Malaysian Sovereign Wealth Fund (June 15, 2017), <https://www.justice.gov/opa/pr/us-seeks-recover-approximately-540-million-obtained-corruption-involving-malaysian-sovereign>.

<sup>94</sup> See Press Release, Dep't of Just., Department of Justice Seeks to Recover Over \$100 Million Obtained From Corruption in the Nigerian Oil Industry (July 14, 2017), <https://www.justice.gov/opa/pr/departments-justice-seeks-recover-over-100-million-obtained-corruption-nigerian-oil-industry>.

<sup>95</sup> Jeff Sessions, Attorney General, U.S. Dep't of Just., Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>.

compliance. Attorney General Sessions highlighted these themes in an April speech, declaring that “[c]ompanies should succeed because they provide superior products and services, not because they have paid off the right people.”<sup>96</sup> He also stated that the DOJ “will continue to emphasize the importance of holding individuals accountable for corporate misconduct” and that the DOJ “will work closely with our law enforcement partners, both here and abroad, to bring these persons to justice.” Sessions further stated that, when the DOJ makes charging decisions, it “will continue to take into account whether companies have good compliance programs; whether they cooperate and self-disclose their wrongdoing; and whether they take suitable steps to remediate problems.” SEC Division of Enforcement Co-Director Peikin emphasized similar themes, stating in November that the “FCPA has been and remains an increasingly important tool in the ongoing fight against corruption worldwide,” and noting the SEC’s continued focus on FCPA enforcement.<sup>97</sup>

That said, it is still too early to draw conclusions about how the Trump administration will enforce the FCPA, primarily because FCPA investigations and prosecutions generally take longer than one year to resolve. While the high number of individual prosecutions is consistent with the administration’s stated intent to focus on individual misconduct, it remains to be seen whether this trend continues in 2018.

A test of the administration’s approach to FCPA enforcement likely will occur in the coming year, when settlements of significant investigations—including at least one involving a U.S. company—are expected. The manner in which these investigations are resolved may help illuminate the administration’s approach to corporate enforcement, including whether it will be more lenient toward U.S. companies than U.S. authorities were under the Obama administration.

Notably, the most significant corporate enforcement actions resolved during the Trump administration involved coordination with foreign authorities and large penalties paid to those authorities. Moreover, a large percentage of the penalties obtained in these actions were shared with foreign authorities as part of joint resolutions. Such resolutions portend that in 2018, as in 2017, U.S. authorities will continue to cooperate with their international counterparts and that foreign jurisdictions will continue to implement and enforce anti-corruption laws. Should U.S. authorities’ enforcement of the FCPA wane in 2018, foreign jurisdictions may continue to investigate and prosecute on their own.

We will watch these developments with interest and look forward to providing you with further updates in 2018.

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<sup>96</sup> *Id.*

<sup>97</sup> Peikin, *supra* note 43.



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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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