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FCPA 2018 Year in Review

Under the second year of the Trump Administration, the biggest story was the increase of corporate declinations one year after the DOJ adopted a permanent FCPA policy incentivizing self-disclosure, cooperation, and remediation with the possibility of a declination.

Corporate FCPA enforcement normalized in the second year of the Trump Administration, after a low number of corporate resolutions in 2017. In 2018, the DOJ and SEC resolved 16 corporate FCPA cases—highlighted by three significant multijurisdictional anticorruption resolutions—and collected $1 billion in fines and penalties, and they continued their focus on individual enforcement actions. These trends are an indication that the DOJ and SEC continue to devote significant resources to FCPA corporate enforcement, and the continued enhanced collaboration between U.S. and foreign enforcement authorities demonstrates increasing international cooperation and coordination.

TABLE OF CONTENTS

KEY HIGHLIGHTS

There were six key highlights from 2018 Foreign Corrupt Practices Act ("FCPA") enforcement.

1. The trend of increasing corporate declinations continued one year after the Department of Justice ("DOJ") adopted a permanent FCPA enforcement policy that incentivizes companies to self-disclose, cooperate, remediate, and pay any applicable disgorgement by offering the possibility of a declination. In fact, in 2018, the DOJ's FCPA Unit Chief commented that in the year since the enforcement policy was adopted, all companies that voluntarily self-disclosed potential FCPA violations received declinations.
2. The second year of the Trump Administration saw an increase in corporate FCPA enforcement over the first year of the administration, resulting in enforcement rates that matched those in the Obama Administration. In 2018, the DOJ and the Securities and Exchange Commission ("SEC") resolved 16 corporate FCPA cases and, after accounting for various credits or deductions for related foreign enforcement actions, collected a total of $1 billion in fines, penalties, disgorgement, and interest.
3. The number of DOJ enforcement actions against individuals under the Trump Administration continues to be higher than under the Obama Administration, demonstrating the DOJ's renewed focus on prosecuting individuals. Meanwhile, the DOJ announced a revised approach to assessing corporate cooperation credit. Now credit is conditioned on identifying every individual who was *substantially* involved in or responsible for the criminal conduct, as opposed to the previous requirement to identify *all* individuals involved in or responsible for the conduct.
4. Three large multijurisdictional corporate resolutions, including the second largest global anticorruption settlement in history entered into with authorities in Brazil, highlight continued and increasing international cooperation and coordination among U.S. anticorruption regulators and their counterparts in other countries. Specifically, recent developments in Brazil, including anticorruption enforcement initiatives and new political leadership, signal that Brazilian authorities are likely to continue to ramp up their local anticorruption enforcement and their coordination with U.S. authorities.
5. Recognizing the trend toward multijurisdictional resolutions, the DOJ announced a new "no piling on" corporate enforcement penalties policy that directs DOJ prosecutors to coordinate with one another and consider penalties paid to other regulators to avoid the disproportionate effect of imposing overlapping penalties by multiple authorities for the same underlying misconduct.
6. The DOJ required only one monitor out of its six FCPA resolutions in 2018. This is a significant change from 2016, the last full year of the Obama Administration, when seven DOJ corporate FCPA resolutions required the company involved to engage an independent monitor. In late 2018, the DOJ announced a new policy that may result in the appointment of even fewer corporate monitors in connection with criminal resolutions.

CONTINUED INCREASE IN CORPORATE DECLINATIONS

New DOJ Policy Gives Rise to Increase In Corporate Declinations

The biggest FCPA story of 2018 was the continued increase in corporate FCPA declinations under the Trump Administration. In 2018, 21 companies publicly reported a DOJ and/or SEC declination, including four publicly released DOJ declination letters, which is up from the 12 companies that publicly reported such declinations in 2016.

Chart 1: Companies Who Publicly Reported a DOJ and/or SEC Declination, 2016–2018

Year	Total
2016	12
2017	19 (18 under the Trump Administration)
2018	21

The trend of increasing declinations under the Trump Administration is tied to the DOJ's new FCPA corporate enforcement policy. Following the DOJ's FCPA Pilot Program announced in April 2016, in November 2017, the DOJ made permanent a new corporate enforcement policy that sets out rules for "declinations" by the DOJ in potential FCPA cases.[1] The new corporate enforcement policy creates a presumption that, absent "aggravating circumstances," the DOJ will decline to take any enforcement action against companies that: (i) voluntarily self-disclose suspected FCPA violations; (ii) fully cooperate with the DOJ investigation; (iii) take timely and appropriate remediation steps; and (iv) pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.[2] Aggravating circumstances that may warrant a criminal resolution include, but are not limited to: (i) involvement by senior management of the company in the misconduct; (ii) a significant profit to the company from the misconduct; (iii) pervasiveness of the misconduct within the company; and (iv) criminal recidivism.[3] In November, the Head of the DOJ's FCPA Unit stated that since the policy has taken effect, all companies that voluntarily self-disclosed potential FCPA violations have received declinations.[4]

Chart 2: DOJ FCPA Corporate Enforcement Policy (Nov. 2017) vs. Prior DOJ Programs

	Policies Prior to Pilot Program	FCPA Pilot Program (Apr. 2016 – Nov. 2017)	FCPA Corporate Enforcement Policy (Nov. 2017 - Present)
Self-Report, Full Cooperation, and Remediation	Opaque Prosecutorial Discretion	Consideration of declination Up to 50% off the low end of the U.S.S.G. fine range, if fine sought Generally will not require a corporate monitor	Presumption of declination, assuming no "aggravating circumstances" 50% off the low end of the U.S.S.G. fine range in the event presumption of declination is overcome Generally will not require a corporate monitor
No Self-Report, Full Cooperation, and Remediation	Opaque Prosecutorial Discretion	Up to 25% off the low end of the U.S.S.G. fine range	Up to 25% off the low end of the U.S.S.G. fine range

DOJ Senior Official Explains FCPA Corporate Enforcement Policy May Apply Even Where "Aggravating Circumstances" Exist

On September 27, the Deputy Assistant Attorney General ("DAAG") stated in a speech that the presence of "aggravating circumstances" may not necessarily preclude a declination under the FCPA corporate enforcement policy.[5] The DAAG explained that in the three declinations issued between November 2017 and the date of his speech, two declinations were issued despite "aggravating circumstances," specifically the involvement of senior executives in the improper conduct.[6]

The DAAG noted in each of the two cases culpable individuals were prosecuted, which "demonstrate[s] [the DOJ's] clear commitment to holding individuals accountable for transnational corruption."[7]

Accordingly, the DAAG encouraged companies to consider these cases when deciding whether to voluntarily self-disclose wrongdoing "and recognize the significant benefits they can achieve through good corporate behavior under the Policy."[8]

Chart 3: Public DOJ Declination Letters, 2018

	Company	Date	Factors	Presence of Aggravating Circumstances	Related Enforcement Action(s)
1	Dun & Bradstreet Corp. (Business Services: US)	April 23	• Voluntary self-disclosure • Thorough investigation • Full cooperation • Full remediation • Disgorgement (through SEC resolution)	Yes: Terminated employment of an officer of D&B's China subsidiary and other senior employees of one subsidiary	• SEC (April 23): $9.2M settlement (incl. $6.1M in disgorgement)
2	Guralp Systems Ltd. (Electronics: UK)	August 20	• Voluntary self-disclosure • Thorough investigation • Substantial cooperation • Significant remediation		• DOJ (July 2017): DOJ convicted one of the recipients of the improper payments • UK Serious Fraud Office ("SFO") (August 17): SFO charged Guralp's founder and former managing director
3	Insurance Corp. of Barbados Ltd. (Insurance: Barbados)	August 23	• Voluntary self-disclosure • Thorough and comprehensive investigation • Substantial cooperation • Significant remediation • Disgorgement of $93.9K	Yes: High-level employees of ICBL took part in the scheme	
4	Polycom, Inc. (Technology: US)	December 26	• Voluntary self-disclosure • Thorough investigation • Full cooperation • Remediation • Disgorgement of $20.3M (which is in addition to SEC disgorgement of $10.15M)		• SEC (December 26): $16.0M settlement. (incl. $10.15M in disgorgement)

The policy provides a significant incentive for companies to consider when deciding whether to self-disclose conduct that may violate the FCPA, particularly when the conduct did not involve aggravating circumstances. While the new policy does not provide a company with complete assurance that it will receive a declination from the DOJ when the mitigating circumstances set forth in the policy are present, the policy, as suggested by the 2018 declinations, offers a higher degree of assurance compared to the pre-Pilot Program period as outlined in Chart 2. While the policy also provides an incentive for self-disclosure in cases involving more serious corrupt conduct, companies that learn of such conduct still face uncertainty as to whether the benefits of self-disclosing the conduct to the DOJ outweigh the risks of not doing so.

CORPORATE FCPA ENFORCEMENT NORMALIZED IN THE SECOND YEAR OF THE TRUMP ADMINISTRATION

DOJ and SEC Resolved 16 Corporate FCPA Cases and Collected $1 Billion in Fines and Penalties in 2018

The number of FCPA enforcement actions in 2018 returned to an historically normal level, after an abnormally low number of corporate resolutions by the Trump Administration in 2017. The DOJ and SEC resolved a total of 16 corporate FCPA cases in 2018 and collected a total of $1 billion in fines, penalties, disgorgement, and interest, after accounting for various credits or deductions tied to related foreign enforcement actions.[9] This is an increase from the five corporate FCPA cases resolved by the Trump Administration in the last 49 weeks of 2017 for a total of $868.3 million. The Trump Administration's overall corporate FCPA enforcement activity in 2018 was slightly higher than the Obama Administration's average annual corporate enforcement from 2009 to 2016.

Chart 4: DOJ and SEC Corporate FCPA Resolutions and Declinations, 2016–2018

	Obama Admin. (2016)		Obama Admin. (Jan. 1– Jan. 20, 2017)		Trump Admin. (Jan. 21– Dec. 31, 2017)		Trump Admin. (2018)	
	#	$	#	$	#	$	#	$
DOJ Corporate FCPA Enforcement Actions	11	$1.33B	6	$203.0M	3	$617.6M	6	$617.4M
SEC Corporate FCPA Enforcement Actions	24	$1.1B	5	$54.0M	3	$250.7M	14	$382.5M
Total	**25**	**$2.43B**	**6**	**$257.0M**	**5**	**$868.3M**	**16**	**$999.9M**

In total, the DOJ resolved six corporate FCPA cases in 2018 and collected $617.4 million. The number of corporate resolutions is an increase from the first 49 weeks of the Trump Administration in 2017, when only three corporate FCPA cases were resolved for a total of $617.6 million.

SEC corporate FCPA enforcement activity also increased in 2018. Last year, the SEC resolved 14 corporate FCPA cases for $382.5 million, compared to the three corporate cases for $304.7 million that the SEC resolved during the 49 weeks of the Trump Administration in 2017. All of the SEC's corporate FCPA resolutions in 2018 were administrative actions, which is an increase from 2016, when 71 percent of the SEC's corporate FCPA resolutions were administrative actions. Use of administrative proceedings to resolve FCPA actions provides the SEC with greater autonomy by allowing it to avoid judicial scrutiny of its settlements.

Chart 5: Number of DOJ and SEC FCPA Corporate Resolutions, 2009–2018

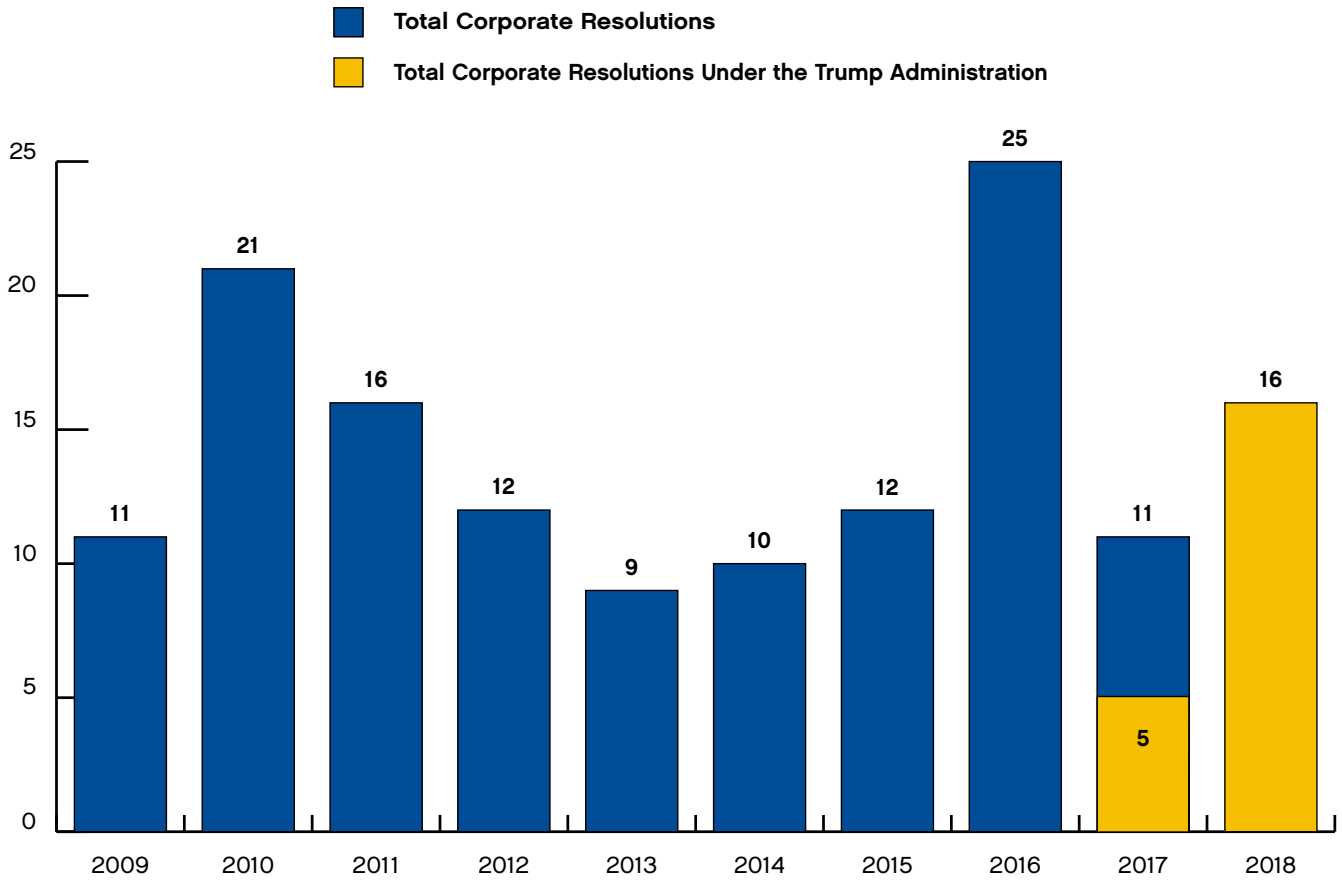
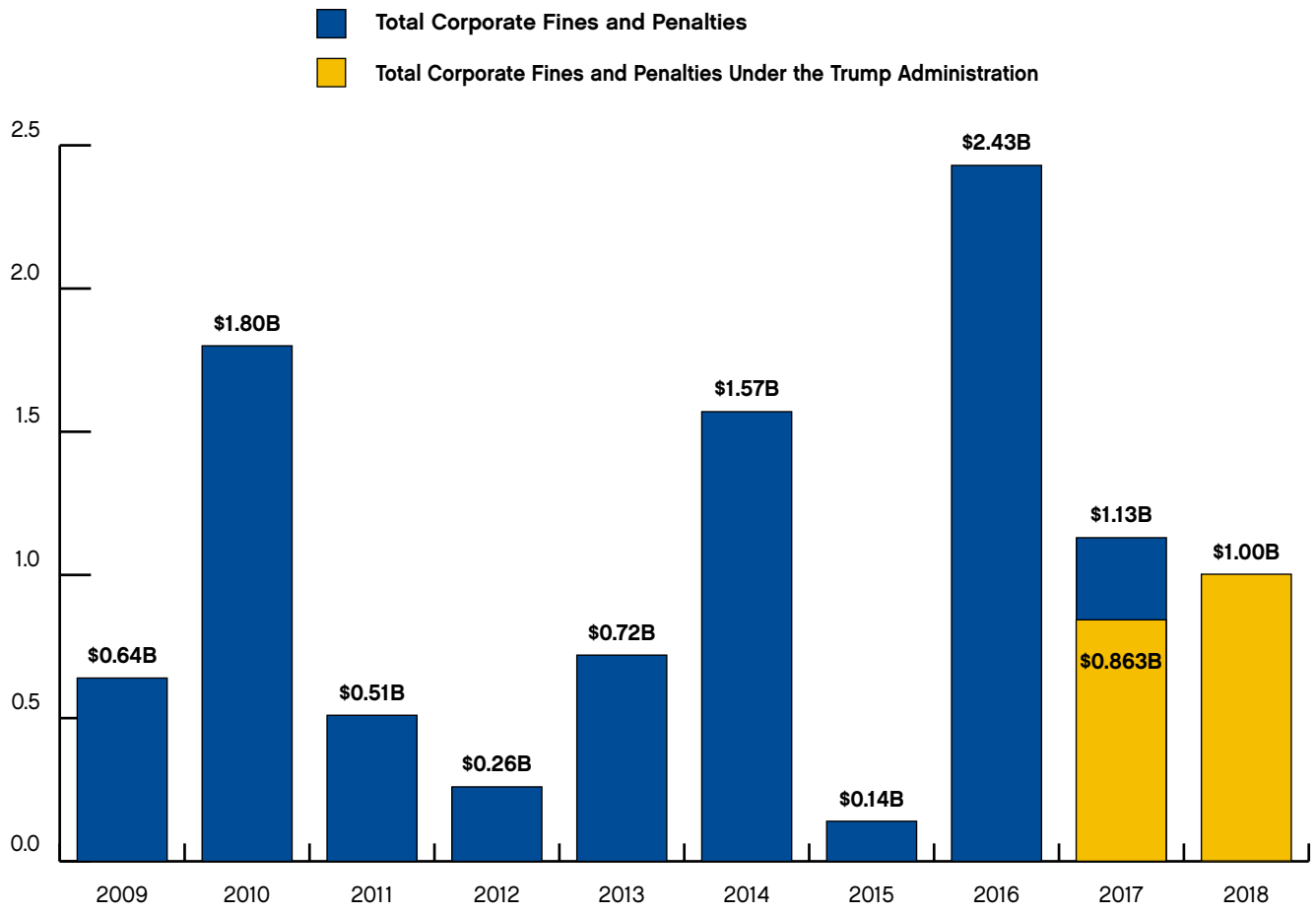


Chart 6: DOJ and SEC FCPA Corporate Fines and Penalties, 2009–2018



Permanent Assistant Attorney General for DOJ's Criminal Division Confirmed; Fraud Section Leadership Changes to Come in 2019

In July, Brian Benczkowski was confirmed to lead the DOJ's Criminal Division as Assistant Attorney General ("AAG").[10] Between January 2017 and July 2018, the Criminal Division was led by career prosecutors serving in an acting capacity until a permanent AAG could be confirmed. It is too early to say what impact the AAG will have on FCPA enforcement.

The DOJ Fraud Section, which houses the DOJ's FCPA Unit, continues to lack a permanent Chief. In December, it was reported that the prosecutor who was leading the Fraud Section in an acting capacity would leave the Fraud Section in January 2019.[11] No future permanent leader has been announced. Dan Kahn continues to lead the Fraud Section's 35-attorney FCPA Unit.

At the SEC, Stephanie Avakian and Steven Peikin completed their second year as co-heads of SEC enforcement.[12] Charles Cain completed his first full year as head of the SEC's 40-attorney FCPA Unit after serving in an acting role from April 2017 to November 2017.[13]

INDIVIDUAL ENFORCEMENT ACTIONS CONTINUE TO INCREASE UNDER THE TRUMP ADMINISTRATION

2018 saw a continued increase in DOJ and SEC FCPA enforcement actions against individuals. The DOJ filed 13 indictments and resolved five cases against individuals for a total of 18 individual actions. This is up from the 13 indictments and individual resolutions in the last 49 weeks of 2017 and two total individual FCPA actions announced by the Obama Administration's DOJ in 2016. The increased number of individual actions reflects the DOJ's heightened focus on individual enforcement.

In addition, the DOJ announced several money laundering and wire fraud individual actions arising out of FCPA investigations. A majority these actions were filed against foreign officials who allegedly received improper payments. Foreign officials cannot be charged under the FCPA but can be charged with money laundering and wire fraud, assuming other factors are met.

SEC actions against individuals increased as well, with four actions against individuals filed in 2018, up from one action filed in the last 49 weeks of 2017 but are down from the eight actions the SEC filed in 2016 and the six it filed during the end of the Obama Administration in 2017.

Chart 7: DOJ and SEC FCPA Actions Against Individuals, 2016–2018

	Obama Admin. (2016)	Obama Admin. (Jan. 1–Jan. 20, 2017)	Trump Admin. (Jan. 21–Dec. 31, 2017)	Trump Admin. (2018)
DOJ – Indictments	2	0	4	13
DOJ – Pleas	6	2	9	5
DOJ – Total	**8**	**2**	**13**	**18**
SEC	**8**	**6**	**1**	**4**
Total	**16**	**8**	**14**	**22**

Deputy Attorney General Modifies Directive from the 2015 Yates Memo, Makes It Easier for Companies to Receive Cooperation Credit for Naming Individuals

On November 29, the Deputy Attorney General ("DAG") announced a revised approach to assessing cooperation credit and individual liability in corporate investigations by modifying certain policies instituted by the former DAG in 2015.[14] With regard to criminal cases, the revised policy calls for companies seeking cooperation credit to "identify every individual who was *substantially* involved in or responsible for the criminal conduct" (emphasis added).[15] The September 2015 memorandum on "Individual Accountability for Corporate Wrongdoing" issued by then-DAG Sally Yates ("Yates Memo") had previously conditioned eligibility for cooperation credit on the company's identification of "*all* individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority."[16] This modification of the policy outlined in the Yates Memo indicates the DOJ's desire to focus on certain individuals who play significant roles in setting a company on a course of criminal conduct, rather than every employee involved in the wrongdoing.[17]

The DAG further reported that the "all or nothing" approach outlined in the Yates Memo had proven counterproductive in civil cases, and announced that the DOJ's civil attorneys will have more discretion in assessing the amount of credit a company should receive for cooperating in a civil case.[18] Still, a company "must identify all wrongdoing by senior officials, including members of senior management or the board of directors," to receive any civil cooperation credit.[19] And to receive maximum credit, the standard is the same as in criminal cases—a company "must identify every individual person who was substantially involved in or responsible for the misconduct."[20]

The Second Circuit Limits the Extraterritorial Application of the FCPA, Curbs DOJ's Ability to Use Conspiracy or Accomplice Theories of Liability

On August 24, in *United States v. Hoskins*, the Second Circuit limited the extraterritorial application of the FCPA. The Second Circuit ruled that the DOJ cannot use conspiracy or accomplice theories of liability to charge nonresident foreign citizens with antibribery violations of the FCPA if the foreign citizen could not be held directly liable under the statute.[21]

In reaching this holding, the court observed that Congress had carefully considered extraterritorial liability under the FCPA and limited it accordingly.[22]

The Second Circuit explained that there are three categories of persons subject to the FCPA: (i) issuers of securities on a U.S. stock exchange or any officer, director, employee, or agent of an issuer, or stockholder acting on the issuer's behalf; (ii) U.S. companies and persons using interstate commerce in connection with the payment of bribes; and (iii) foreign persons or businesses engaged in acts to further corrupt schemes, including causing the payment of bribes, while in the United States.[23] Although *Hoskins* will restrict the DOJ's ability to use conspiracy theories to charge overseas defendants who act outside the United States, it remains to be seen what future impact the ruling will have given that the DOJ may still charge overseas defendants as "agents" of domestic concerns and issuers.

THREE LARGE MULTIJURISDICTIONAL CORPORATE FCPA SETTLEMENTS HIGHLIGHT INCREASING INTERNATIONAL COOPERATION AND COORDINATION

In 2018, U.S. regulators entered into three major global anticorruption resolutions with Petrobras, Société Générale, and Panasonic, that acknowledged cooperation from foreign authorities in 11 different jurisdictions: Brazil, France, the United Kingdom, Switzerland, Canada, the United Arab Emirates, Japan, Singapore, Malaysia, Australia, and Pakistan. These settlements highlight continuing and increasing coordinated anticorruption enforcement among authorities in the United States and countries throughout the world.

Chart 8: DOJ and SEC Corporate FCPA Resolutions, 2018

	Company	Date	DOJ ($M)	SEC ($M)	Total ($M)
1	Elbit Imaging Ltd. (Holding Company: Israel)	March 9		$0.5	$0.5
2	Transport Logistics Int'l Inc. (Transportation: US)	March 13	$2.0		$2.0
3	Kinross Gold Corp. (Mining: Canada)	March 26		$1.0	$1.0
4	Dun & Bradstreet Corp. (Business Services: US)	April 23	*Declination*	$9.2	$9.2
5	Panasonic Avionics Corp. (DOJ) (Electronics: US) Panasonic Corp. (SEC) (Electronics: Japan)	April 30	$137.4	$143.2	$280.6
6	Société Générale S.A. (Financial Services: France)	June 4	$292.8		$292.8
7	Beam Suntory, Inc. (Beverages: US)	July 2		$8.2	$8.2
8	Credit Suisse Group AG (Financial Services: Switzerland)	July 5	$47.0	$29.8	$76.8
9	Legg Mason Inc. (Financial Services: US)	August 27	$32.6	$34.5	$67.1
10	Sanofi (Pharmaceuticals: France)	September 4	*Declination*	$25.2	$25.2
11	United Technologies Corp. (Conglomerate: US)	September 12	*Declination*	$14.0	$14.0
12	Petróleo Brasileiro S.A. (Petrobras) (Oil and Gas: Brazil)	September 27	$85.3	$85.3	$170.6
13	Stryker Corp. (Medical Devices: US)	September 28		$7.8	$7.8
14	Vantage Drilling Int'l (Oil and Gas: US)	November 20		$5.0	$5.0
15	Centrais Elétricas Brasileiras S.A. (Eletrobras) (Utilities: Brazil)	December 26		$2.5	$2.5
16	Polycom, Inc. (Technology: US)	December 26	*Declination* and disgorgement of $20.3M (which is in addition to SEC disgorgement of $10.15M)	$16.3	$36.6
	TOTAL		**$617.4**	**$382.5**	**$999.9**

Brazil's Petrobras Agreed to Pay $1.786 Billion to Resolve Corruption Investigations by U.S. and Brazilian Authorities, the Second Largest Global Corruption Settlement in History

In September, Brazilian state-owned energy company Petrobras agreed to pay penalties and disgorgement totaling $1.786 billion, making it the second largest global corruption settlement in history. Petrobras entered into a non-prosecution agreement ("NPA") with the DOJ, a cease and desist order with the SEC, and a consent agreement with the Brazilian Federal Prosecutor's Office, Ministério Público Federal ("MPF").[24]

According to the DOJ NPA, from 2004 to 2012, Petrobras executives—including members of its Executive Board and Board of Directors—inflated the cost of its infrastructure projects in exchange for one billion dollars in kickbacks which was used to pay Brazilian politicians responsible for appointing the executives to their positions.[25] Relatedly, according to the SEC's Administrative Order, Petrobras filed false and misleading financial statements that concealed this massive scheme to U.S. investors in a $10 billion stock offering completed in 2010.[26]

The $1.786 billion global resolution included a criminal penalty of $853.2 million, with the DOJ and SEC each receiving 10 percent of the penalty ($85.3 million each), and the MPF receiving the remaining 80 percent ($682.56 million).[27] Petrobras' settlement with the SEC included another $933.5 million in disgorgement and prejudgment interest, though the SEC reduced this payment to zero because of Petrobras' $2.5 billion payment to the *In re Petrobras Securities Litigation*, No. 14-cv-9662 (S.D.N.Y.), class action settlement fund.[28]

While Petrobras did not voluntarily self-disclose its conduct to the DOJ, the company received full credit for its cooperation, and implemented extensive remedial measures. The DOJ did not impose a compliance monitor, in part because Petrobras would be subject to ongoing oversight by Brazilian authorities.[29] Both the DOJ and SEC coordinated with Brazilian authorities throughout the investigation.

FCPA-related developments in Brazil bear particular attention. In particular it should be noted that the DOJ and SEC have increasingly cooperated with Brazilian authorities. Indeed, as Chart 9 demonstrates, five of the top nine global anticorruption resolutions—including the largest global anticorruption resolution in history—involved cooperation with the MPF. The DOJ's and SEC's cooperation with the MPF increased starting in 2014 at the beginning of the Operação Lava Jato ("Operation Car Wash") investigation.

For its part, Brazil continues to strengthen its anticorruption enforcement efforts, including most recently through the election of President Jair Bolsonaro, who focused his election campaign on anticorruption enforcement, and his appointment of Judge Sérgio Moro, the judge who oversaw the Operation Car Wash investigation, as Minister of Justice. In this role, he will not only oversee the Brazilian Federal Police (which has been responsible for conducting the most criminal investigations in Brazil) but also the Council of Control of Financial Activities (Conselho de Controle de Atividades Financeiras ("COAF")), which is responsible for monitoring, examining, and identifying illicit financial transactions. The Minister is expected to continue the focus in Brazil on anticorruption enforcement both locally and abroad through international cooperation efforts with the United States and other countries.

These developments are noteworthy for, and should be closely monitored by, U.S. and international companies operating in Brazil, as increasingly corruption investigations that begin in Brazil have triggered the DOJ and SEC to open their own investigations and because U.S. and Brazilian law enforcement authorities are increasingly conducting these investigations jointly.

France's Société Générale Paid $586 Million in Penalties to U.S. and French Authorities, the Fifth-Largest FCPA Settlement Ever and First Coordinated with France

In June 2018, Société Générale S.A. ("Société Générale"), a global financial services institution based in France, agreed to pay $585.6 million in penalties to the DOJ and France's Parquet National Financier to resolve foreign bribery charges, with each agency receiving $292.8 million.[30] Société Générale entered into a deferred prosecution agreement ("DPA") with the DOJ, and its wholly owned subsidiary, SGA Société Générale Acceptance N.V., entered a guilty plea in the Eastern District of New York.[31] According to the DOJ's charging documents, Société Générale paid more than $90 million to a Libyan intermediary who used a portion of those payments to bribe Libyan officials to secure investments from Libyan state agencies.[32]

While the DOJ did not impose a compliance monitor, noting Société Générale's "substantial, though not full, cooperation," Société Générale will be subject to "ongoing monitoring" by France's L'Agence Française Anticorruption.[33] The DOJ noted that the case involved "significant cooperation" between the DOJ and authorities in France, Switzerland, and the United Kingdom.[34]

Investment management firm Legg Mason, Inc. separately entered into an NPA with the DOJ that included paying a $32.6 million penalty and agreed to a $34.5 million settlement with the SEC.[35] According to the DOJ NPA, a number of Société Générale's Libyan investments were managed by a subsidiary of Legg Mason.[36]

Japan's Panasonic and Its U.S. Subsidiary Resolved DOJ and SEC FCPA Investigations for $281 Million

In April, California-based Panasonic Avionics Corp. ("PAC") and its Japanese-parent Panasonic Corp. entered into a resolution with the DOJ and SEC respectively for a combined $280 million resolution.

PAC, a wholly owned subsidiary of Panasonic Corp. that designs and distributes in-flight entertainment and communication systems for airlines, agreed to pay $137.4 million and entered into a DPA with the DOJ.[37] According to the DPA, PAC retained an official at a state-owned airline as a consultant while PAC was negotiating a several hundred million dollar agreement with the state-owned airline and hired agents in Asia without following its due diligence protocols.[38] PAC, who did not voluntarily self-disclose its conduct to the DOJ but cooperated and implemented remedial measures, agreed to retain an independent compliance monitor for at least two years followed by one year of self-reporting.[39]

Separately, Panasonic Corp. concurrently entered into a cease and desist order with the SEC for $143.2 million.[40] According to the SEC order, Panasonic Corp. lacked adequate controls in connection with soliciting business from state-owned airlines and other customers throughout the Middle East and Asia.[41] The SEC credited cooperation with authorities in Australia, Canada, Japan, Malaysia, Pakistan, Singapore, Switzerland, and the United Arab Emirates.[42]

INCREASED CLOSE COOPERATION BETWEEN U.S. AUTHORITIES AND FOREIGN REGULATORS

In 2018, the DOJ and SEC credited cooperation from anticorruption enforcement authorities in 13 countries, in particular Brazil, in connection with five global anticorruption resolutions. While the United States continues to lead the world in anticorruption enforcement, other nations are taking on a greater role. As the former Acting AAG noted in June, combatting international corruption will be met with a "global and coordinated law enforcement response."[43] As evidence of this trend, the Chief of the FCPA Unit recently remarked that foreign bribery cases that the DOJ previously pursued alone are now typically investigated by four or five countries cooperating with one another and acting in a coordinated fashion.[44]

For companies facing global corruption investigations, this pattern of greater international cooperation underscores the importance of preparation for investigations by multiple agencies and resolutions in numerous sovereign jurisdictions. As Chart 9 demonstrates, there has recently been a recent increase in coordinated anticorruption resolutions involving one or more foreign enforcement authorities.

Chart 9: Top Global Anticorruption Corporate Resolutions Involving DOJ and/or SEC

	Company	Year	US Total	Global Total	Resolving Authorities
1	Odebrecht S.A./Braskem S.A. (Construction: Brazil)	2016	$253M	$3.3B	U.S. Brazil Switzerland
2	Petrobras (Oil and Gas: Brazil)	2018	$171M	$1.7B	U.S. Brazil
3	Siemens AG (Manufacturing: Germany)	2008	$800M	$1.6B	U.S. Germany
4	Telia Company AB (Telecommunications: Sweden)	2017	$699M	$965M	U.S. Sweden Netherlands
5	SBM Offshore N.V. (Oil and Gas: Netherlands)	2014 - 2017	$238M	$820M	U.S. (2017) Brazil (2016) Netherlands (2014)
6	Rolls-Royce plc (Aviation: UK)	2017	$170M	$800M	U.S. UK Brazil
7	VimpelCom Ltd. (Oil and Gas: Netherlands)	2016	$398M	$795M	U.S. Netherlands
8	Société Générale S.A. (Financial Services: France)	2018	$293M	$585M	U.S. France
9	Keppel Offshore & Marine Ltd (Conglomerate: Singapore)	2017	$106M	$422M	U.S. Brazil Switzerland
		TOTAL	**$3.31B**	**$10.98B**	

DOJ Announced No "Piling On" Policy Discouraging Unnecessarily Duplicative Penalties Based on Same Misconduct

Recognizing the increasing trend of multijurisdictional enforcement actions against companies, the DOJ announced in early May a new policy aimed at discouraging "piling on" corporate penalties for the same misconduct.[45] The policy, now incorporated in the U.S. Attorneys Manual, encourages DOJ prosecutors to cooperate with other agencies investigating the same corporate conduct, including regulators outside the United States, to "avoid the unnecessary imposition" of duplicate or unfair penalties.[46] The goal is to "discourage disproportionate enforcement of laws by multiple authorities," including the DOJ, the SEC, and foreign regulators.[47]

As to foreign regulators, the policy encourages inter-agency cooperation by directing DOJ prosecutors to, "as appropriate," coordinate with other U.S. and foreign enforcement authorities and to consider "the amount of fines, penalties, and/or forfeiture paid" to those authorities by the company in connection with the same misconduct.[48] The overarching goal is to achieve an equitable resolution.

The policy, however, also lists factors the DOJ may consider in whether to impose duplicative penalties such as the:

- Egregiousness of the company's misconduct;
- Statutory mandates regarding penalties, fines, and/or forfeitures;

- Risk of an unwarranted delay in achieving a final resolution; and
- Adequacy and timeliness of a company's disclosures and cooperation with the DOJ, separate from any such disclosures and cooperation with other relevant enforcement authorities.[49]

Recognizing the new policy could be an invitation to forum shop, the DAG stated that the DOJ will "not look kindly on companies that come to [the DOJ] after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments" and that the policy "is not a substitute for cooperating with the DOJ."[50]

The practical application of this policy remains unclear. For example, the policy does not discuss how companies will receive "credit" for fines already paid to other regulators. Further, many of the relevant factors listed in the policy are based on subjective criteria which could cause inconsistent results. The policy does, however, imply that timely selfdisclosure and cooperation with the DOJ will result in more favorable treatment.

The new policy is only binding on the DOJ and cannot compel cooperation from other federal, state or foreign regulatory agencies. Other regulatory agencies will remain free to pursue their own remedies despite settlements with the DOJ. Thus, any significant impact on multijurisdictional FCPA resolutions depends on the cooperation of other enforcement agencies.

The DOJ has noted its application of the "no piling on" approach in connection with three FCPA resolutions since the policy was announced. First, in Société Générale, the DOJ agreed to credit the bank's payment to French authorities for 50 percent of the DOJ's criminal penalty.[51] Second, the DOJ stated it declined to prosecute Guralp Systems because of the company's resolution with the United Kingdom's SFO. Finally, in Petrobras, the DOJ agreed to credit Petrobras' payments to Brazilian authorities and the SEC for 90 percent of the DOJ's criminal penalty. Time will tell whether the new policy will lead to similar coordination.

Expectations for Future Anticorruption Investigations

Whether or not countries are cooperating or "piling on" to enforce anticorruption laws, the increased incidence of international anticorruption enforcement, particularly with authorities in Brazil, raises complex jurisdictional issues that can expose companies to complicated and lengthy investigations and higher penalties. This increase in international anticorruption enforcement means that now, more than ever, companies facing corruption investigations must be prepared to deal with enforcement agencies and the consequences of enforcement actions in multiple countries.

2018 SAW A CONTINUED DECLINE IN CORPORATE MONITORS UNDER THE TRUMP ADMINISTRATION, OPENING THE DOOR FOR SELF-MONITORSHIP FOLLOWING FCPA RESOLUTIONS

DOJ Required Only One Monitor in Its Six 2018 Corporate Resolutions

In 2018, the DOJ required a monitor in only one of its six corporate resolutions. In two of the five resolutions where no monitor was required, the DOJ stated its decision to not to impose a monitor was based, in part, on the resolving company's agreement to be subject to ongoing monitoring and oversight by a foreign regulator.

Under the 2017 FCPA corporate enforcement policy, the DOJ announced that it will generally not require a corporate monitor if a company: (i) voluntarily self-discloses criminal conduct to the DOJ; (ii) fully cooperates with the DOJ's investigation; and (iii) takes timely and appropriate remediation steps.[52] While the policy requires voluntary self-disclosure, the five corporations that did not end up with a monitor in 2018 also did not self-disclose their conduct, although they did cooperate with the DOJ and implement remedial measures.

The DOJ's willingness under the Trump Administration to allow companies to self-monitor their conduct after FCPA enforcement actions, even in cases where the company does not self-disclose, is a significant change from the prior administration. Under the Obama Administration, the DOJ required nine out of 17 resolving companies to hire an independent monitor, generally for a three-year term.

Recent Revisions to DOJ Monitor Policy Could Cause Even Further Decline in Imposition of Monitors

On October 11, the AAG in charge of the Criminal Division announced new guidance that formalizes the factors the DOJ must consider when deciding whether to require a corporate

monitor in Criminal Division matters.[53] The new guidance states that the imposition of a monitor should be "the exception, not the rule."[54]

Following the overarching principle that a monitor should never be imposed as punishment, the AAG's Memorandum directs Criminal Division attorneys to focus on a corporation's compliance program and controls, which will dictate whether the cost and other burdens of a monitorship outweigh the benefit of imposing a corporate monitor to prevent future misconduct.[55] The factors to consider include:

- Whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems;
- Whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;
- Whether the corporation has made significant investments in, and improvements to its corporate compliance program and internal control systems; and
- Whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.[56]

As the AAG explained, these factors recognize that "the imposition of a monitor will not be necessary in many corporate criminal resolutions," and that, when a monitor is appointed, "the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."[57] Looking ahead, this policy could further facilitate the downward trend in corporate monitorships that has occurred over the last few years.[58]

CONCLUSION

2018 was a noteworthy year for FCPA enforcement. With the Trump Administration in its second year and in the first year of the DOJ's FCPA enforcement policy, publicly announced corporate declinations continued to increase. In addition, corporate FCPA enforcement normalized after a slow start in the last 49 weeks of 2017. In 2018, the DOJ and SEC resolved a total of 16 corporate enforcement actions and collected $1 billion in fines and penalties. Meanwhile, 2018 saw the installation of a confirmed AAG overseeing the DOJ's Criminal Division, a continued increase in individual FCPA enforcement actions under the Trump Administration, new DOJ initiatives that could shape corporate and individual FCPA enforcement, and continued multijurisdictional corruption enforcement. With increased domestic and global anticorruption enforcement activity and cooperation, companies under investigation must be prepared to deal with enforcement agencies and the consequences of enforcement actions in multiple countries.

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