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WHITE PAPER

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FCPA 2019 Year in Review

In the third year of the Trump Administration, the biggest Foreign Corrupt Practices Act ("FCPA") headlines were record corporate fines and penalties and a banner year of individual FCPA enforcement highlighted by three DOJ trial victories. The DOJ clarified aspects of its FCPA corporate enforcement policy and provided additional guidance regarding effective corporate ethics and compliance programs. Abroad, the DOJ and SEC continued to coordinate with foreign authorities, publicly acknowledging cooperation from 26 countries and territories.

This past year demonstrated that the DOJ's and SEC's FCPA corporate and individual enforcement is not waning and is instead reaching new heights, in close coordination with anticorruption authorities around the globe. This White Paper examines the key enforcement highlights of 2019.

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KEY HIGHLIGHTS

There were five key highlights from 2019 Foreign Corrupt Practices Act ("FCPA") enforcement.

1. It was a record year for corporate FCPA settlements. In 2019, the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") resolved 14 corporate FCPA cases and collected—after accounting for various credits or deductions for related foreign enforcement actions—a record $2.65 billion in fines, penalties, disgorgement, and interest. Meanwhile, the DOJ continued to issue corporate declinations under the 2017 FCPA Corporate Enforcement Policy, which incentivizes companies to self-disclose, cooperate, remediate, and pay any applicable disgorgement by offering the possibility of a declination.
2. The DOJ also had a record year of individual FCPA enforcement. In cases against individuals, the DOJ announced a total of 25 FCPA-related indictments and pleas (up from 19 in 2018), and obtained convictions in three out of four FCPA trials. Overall, individual enforcement under the Trump Administration continues to be higher than under the Obama Administration, demonstrating the DOJ's renewed focus on prosecuting individuals.
3. Following the DOJ's recent pattern of increasing transparency so that the business community can better understand the government's enforcement expectations, the DOJ provided additional guidance on the FCPA Corporate Enforcement Policy, expectations for effective corporate ethics and compliance programs, and requirements for "inability to pay" claims.
4. Meanwhile, the SEC's corporate and individual FCPA enforcement likewise increased.
5. 2019 saw an uptick in international cooperation and coordination among the DOJ and SEC and their counterparts in other countries. Specifically, recent developments in Brazil—including continued cooperation with the DOJ and SEC on three significant FCPA resolutions in 2019, new political leadership, and changes in local anticorruption enforcement—are noteworthy for multinational companies with operations in the country.

RECORD YEAR OF CORPORATE FCPA SETTLEMENTS

DOJ and SEC Collected a Record of $2.65 Billion in Corporate FCPA Fines and Penalties

The biggest FCPA story of 2019 was a new record of corporate fines and penalties. The dollar value of FCPA settlements soared to $2.65 billion, more than two-and-a-half times the $1.03 billion collected in 2018, and surpassed the previous record of $2.43 billion set in 2016, the last full year of the Obama Administration. To date, the Trump Administration's DOJ and SEC have entered into 35 corporate FCPA resolutions and collected more than $4.5 billion in fines and penalties.

Two resolutions, with Telefonaktiebolaget LM Ericsson ("Ericsson") and Mobile TeleSystems PJSC ("MTS"), comprised approximately 70% of the total amount, and respectively rank as the first and second largest FCPA resolutions in history. This is similar to prior years, where two corporate resolutions comprised more than a majority of the total resolution amount.

Chart 1: Amount of DOJ and SEC FCPA Corporate Fines and Penalties and Number of DOJ and SEC FCPA Corporate Resolutions, 2010–2019

Year	Total Corporate FCPA Fines and Penalties	Total Corporate FCPA Resolutions
2010	$1.80B	21
2011	$0.51B	16
2012	$0.26B	12
2013	$0.72B	9
2014	$1.57B	10
2015	$0.14B	12
2016	$2.43B	25
2017	$1.13B ($0.86B under the Trump Administration)	11 (5 under the Trump Administration)
2018	$1.03B	16
2019	$2.65B	14

Chart 2: DOJ and SEC Corporate FCPA Resolutions, 2016–2019

Corporate FCPA Actions	2016		2017		2018		2019	
	#	$	#	$	#	$	#	$
DOJ	11	$1.33B	9	$820.6M	6	$629.7M	7	$1.62B
SEC	24	$1.10B	8	$304.7M	14	$404.6M	13	$1.03B
Total[1]	**25**	**$2.43B**	**11**	**$1.13B**	**16**	**$1.03B**	**14**	**$2.65B**

Ericsson Entered into the Largest FCPA Settlement in History

In the largest corporate FCPA settlement in history, Sweden-based telecommunications company Ericsson agreed to pay $1.06 billion in combined penalties, disgorgement, and interest to resolve the DOJ's and SEC's investigations into Ericsson's conduct in six countries around the world.[1] As part of the settlement, Ericsson entered into a deferred prosecution agreement ("DPA"), and its wholly-owned subsidiary, Ericsson Egypt Ltd, pleaded guilty to one count of violating the FCPA's books and records provisions.[2] The SEC's complaint alleged that Ericsson violated the FCPA's antibribery, internal controls, and books and records provisions.[3] Ericsson agreed to retain an independent monitor for a period of three years.[4]

According to admissions from its DPA, Ericsson used third-party agents and consultants to make millions of dollars in improper payments to government officials and to manage off-the-books funds in China, Djibouti, Indonesia, Kuwait, and Vietnam between 2000 and 2016.[5] These agents were often engaged through sham contracts and paid pursuant to false invoices.[6] The payments to such agents were improperly accounted for in Ericsson's books and records.[7] The SEC's complaint alleged that between 2011 and 2017, Ericsson paid $62 million in bribes through third parties to government officials in Djibouti, Saudi Arabia, and China and realized approximately $427 million in profits.[8] To date, no individuals have been charged in connection with this conduct.

Of note, the DOJ credited Ericsson for only partial cooperation and remediation because—among other reasons—it did not self-report the misconduct and did not fully remediate.[9] The DOJ credited the company for "conducting a thorough internal investigation," making foreign employees available to the DOJ, and disclosing additional conduct.[10]

Unlike Sweden-based Telia's FCPA resolution with the DOJ and SEC in 2017, there was no concurrent resolution with Swedish authorities. However, a week after Ericsson reached its resolution with the DOJ and SEC, Sweden's National Anti-Corruption Unit announced that it had begun investigating Ericsson for possible bribery in April.[11] The DOJ acknowledged the assistance of Swedish authorities in its resolution.[12]

MTS Entered into the Second Largest FCPA Resolution

Russia's largest mobile telecommunications company, MTS, agreed to pay $850 million in penalties to the DOJ and SEC following a bribery scheme related to the Uzbek telecommunications industry.[13] MTS's settlement did not include disgorgement because the company did not profit from its misconduct.[14] MTS also agreed to the imposition of a compliance monitor for three years.[15] In announcing this resolution, the DOJ and SEC acknowledged cooperation from 16 countries and territories around the world.[16]

MTS entered into a DPA with the DOJ, and Kolorit Dizayn Ink LLC ("Kolorit," MTS's wholly-owned Uzbek subsidiary) pleaded guilty to violating the FCPA's antibribery and books and records provisions.[17] According to admissions in the DPA, MTS and Kolorit paid more than $420 million in bribes to Gulnara Karimova—a former Uzbek government official and daughter of a former president of Uzbekistan—to gain traction in the Uzbek telecommunications market.[18] Among other misconduct referenced in the DPA, MTS and Kolorit knowingly directed the corrupt payments to shell companies owned by Karimova, and she, in turn, laundered the money using U.S. banks.[19]

In March, the DOJ unsealed charges it filed against Karimova and Bekhzod Akhmedov, a former Uzbek telecommunications executive.[20] The DOJ charged Karimova with money laundering violations and Akhmedov with one count of conspiracy to violate the FCPA and two counts of violating the FCPA.[21] According to the indictment, Akhmedov allegedly helped MTS, Telia, and VimpelCom pay Karimova more than $865 million in bribes—nearly 2% of Uzbekistan's gross domestic product—to enter the Uzbek telecommunications market.[22] Karimova was arrested by Ukrainian authorities in March for violating the terms of her house arrest for fraud and money laundering.[23] Uzbek prosecutors said they aim to seize more than $1.5 billion in foreign assets held by Karimova, including luxury properties.[24]

MTS did not receive voluntary self-disclosure credit or full credit for cooperation and remediation.[25] Among other factors militating against full credit, MTS "significantly delayed production of certain relevant materials," declined to "support interviews with current employees during certain periods

of the investigation," and meted out inadequate discipline to culpable employees.[26] The DPA further noted that MTS "had inadequate anticorruption controls" and compliance programs during the relevant period, but it also stated that the company had committed to strengthening its compliance program and auditing procedures.[27]

This matter is the third enforcement action against international telecoms based on bribery schemes related to the Uzbek telecommunications market, all involving Karimova. The DOJ and SEC previously entered resolutions with Netherlands-based VimpelCom (now VEON) and Sweden-based Telia, respectively the seventh and tenth largest FCPA resolutions in history. The three resolutions resulted in a total of $2.65 billion in global fines and disgorgement, half of which went to the DOJ and SEC.

Chart 3: FCPA Corporate Enforcement Actions, 2019

	Company	Date	DOJ ($M)	SEC ($M)	Total ($M)
1.	Cognizant Technology Solutions Corp. (Technology: U.S.)	Feb. 15	Declination[28]	$25.2	$25.2[29]
2.	Mobile TeleSystems PJSC (Telecom: Russia)	Mar. 6	$750.0	$100.0	$850.0
3.	Fresenius Medical Care AG & Co. (Healthcare: Germany)	Mar. 29	$84.7	$147.0	$231.7
4.	Telefônica Brasil SA (Telecom: Brazil)	May 9	-	$4.1	$4.1
5.	Walmart Inc. (Retail: U.S.)	June 20	$138.0	$144.7	$282.7
6.	TechnipFMC plc (Oil and Gas: Brazil)	June 25	$81.9	$5.1	$87.0[30]
7.	Microsoft Corp. (Software: U.S.)	July 22	$8.8	$16.5	$25.3
8.	Deutsche Bank AG (Financial Services: Germany)	Aug. 22	-	$16.2	$16.2
9.	Juniper Networks, Inc. (Technology: U.S.)	Aug. 29	Closed Without Taking Action[31]	$11.7	$11.7
10.	Quad/Graphics, Inc. (Technology: U.S.)	Sept. 26	Declination	$9.9	$9.9
11.	Westport Fuels Systems, Inc. (Energy: Canada)	Sept. 27	-	$4.0	$4.0
12.	Barclays PLC (Financial Services: U.K.)	Sept. 27	-	$6.3	$6.3
13.	Samsung Heavy Industries Company Ltd. (Engineering: South Korea)	Nov. 22	$37.7	-	$37.7[32]
14.	Ericsson (Telecom: Sweden)	Dec. 6	$520.7	$539.9	$1,060.6
	TOTAL		**$1,621.8**	**$1,030.6**	**$2,652.4**

DOJ Continued to Issue Declinations

The DOJ publicly issued two corporate declinations pursuant to its 2017 FCPA Corporate Enforcement Policy ("Policy"). It incentivizes companies to self-disclose, cooperate, remediate, and pay any applicable disgorgement in exchange for a presumption of a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.[33] While there are no guarantees on the outcome of a DOJ investigation, the DOJ has touted the Policy as creating a strong incentive for companies to consider self-disclosure of conduct that may violate the FCPA.[34]

In February, Cognizant Technology Solutions Corp. ("Cognizant") received a declination notwithstanding the DOJ's allegation that senior management was involved in the alleged misconduct.[35] In March, the Assistant Attorney General for the Criminal Division explained that "aggravating factors like high-level executive involvement in the misconduct" will not necessarily preclude a declination if the company's actions are "otherwise exemplary."[36] He noted that despite the fact that Cognizant's misconduct allegedly involved senior management, the company voluntarily self-disclosed the conduct within weeks of when the company's board learned of it, conducted a thorough internal investigation, fully cooperated, had an effective preexisting compliance program, fully remediated other control weaknesses, and disgorged its ill-gotten gains.[37] The DOJ filed FCPA charges against two former Cognizant senior executives for their alleged involvement in the misconduct.[38]

In September, the DOJ issued a declination letter to Quad/Graphics, Inc. ("Quad") pursuant to the Policy.[39] The DOJ found evidence of bribery committed by third-parties engaged by the company's subsidiary in Peru and employees of the company's subsidiary in China.[40] Notwithstanding this conduct, the DOJ declined to prosecute Quad based on the company's voluntary self-disclosure, thorough investigation, proactive cooperation, lack of criminal history, full remediation, and disgorgement of ill-gotten gains to the SEC, as well as the overall nature and seriousness of the offense.[41] The company's remediation steps included enhancing its compliance program and terminating relationships with the individuals and entities involved in the misconduct.[42] Quad agreed to pay to the SEC disgorgement of approximately $6.9 million plus pre-judgment interest of nearly $1 million and a civil penalty of $2 million.[43] The company also agreed to self-report to the SEC on its compliance program for a year.[44]

Chart 4: DOJ Declinations Issued Pursuant to FCPA Corporate Enforcement Policy, 2019

	Company	Date	Factors	Aggravating Circumstances?	Related SEC Enforcement Action
1.	Cognizant Tech. Solutions Corp. (Technology: U.S.)	Feb. 13	• Voluntary self-disclosure, which led to investigations into individuals • Thorough investigation • Full and proactive cooperation • Nature and seriousness of offense • Lack of prior criminal history • Full remediation • Payment of penalty and disgorgement to the SEC[45]	Yes: DOJ indicted two Cognizant senior executives in connection with the alleged misconduct.	Admin. Order, $25M settlement (penalty, disgorgement and interest), charged same two senior executives as the DOJ; and entered into a resolution with a third individual.
2.	Quad/Graphics Inc. (Technology: U.S.)	Sept. 19	• Voluntary self-disclosure • Thorough investigation • Full and proactive cooperation • Nature and seriousness of offense • Lack of prior criminal history • Full remediation • Disgorgement to the SEC	None identified.	Admin. Order, $10M settlement (penalty, disgorgement, and interest).

BANNER YEAR OF DOJ INDIVIDUAL ENFORCEMENT

2019 was the DOJ's busiest year of individual FCPA enforcement. With respect to cases against individuals, the DOJ announced a total of 25 indictments with, and guilty pleas to, FCPA charges (up from 19 in 2018) and won three out of four FCPA trials. The DOJ's actions against individuals focused on long running bribery investigations in Brazil, China, Venezuela, and Ecuador. The DOJ also announced several money laundering-related actions against foreign government officials arising out of ongoing FCPA investigations.

The Assistant Attorney General of the Criminal Division noted that this trend is part of the DOJ's "continued dedication to holding individual wrongdoers accountable across the board."[46]

Chart 5: DOJ Individual FCPA Enforcement Actions, 2016–2019

Type of Action	2016	2017	2018	2019
Indictments	2	4	13	16
Pleas	7	11	6	9
Total	**9**	**15**	**19**	**25**

DOJ Won Three Out of Four FCPA Trials

The DOJ had its most successful and busiest year of FCPA trials. Four individuals who were prosecuted in three trials received guilty verdicts, and one individual was acquitted. This trial activity was a significant uptick from recent years. There were no FCPA trials between 2013 and 2016 and only one trial each in 2017 and 2018. Below are two highlights from the last year.

U.S. v. Boncy and Baptiste: In June, Roger Richard Boncy and Joseph Baptiste were found guilty of FCPA, Travel Act, and money laundering violations after a two-week jury trial in Boston.[47] Boncy, the chairman and CEO of an investment firm, and Baptiste, a member of the investment firm's board, were convicted of conspiring to pay millions of dollars to senior Haitian government officials in bribes, including a scheme to secure approval for an $84 million port project.[48] According to the evidence introduced at trial, Boncy and Baptiste solicited corrupt payments from undercover FBI agents posing as potential investors in connection with a proposed project to develop a port in Haiti.[49] Boncy and Baptiste have filed motions for new trials and sentencing is pending the result of those motions.[50]

***U.S. v. Boustani*:** In December, a jury acquitted a Lebanese businessman and executive of a Middle East shipbuilding company for alleged FCPA and other violations.[51] Prosecutors alleged that he and others diverted Mozambican government-backed loans for bribes to bankers and government officials. Of particular importance, the jurors who spoke to reporters after the hearing said their verdict came down to a lack of nexus to the Eastern District of New York.[52] The defendant, a Lebanese citizen working for a Middle East ship building company, had not set foot in the United States before he was arrested.[53]

DOJ Prosecuted Foreign Government Officials Pursuant to Related Statutes

Foreign officials who received corrupt payments cannot be charged under the FCPA. In several FCPA individual prosecutions last year, the DOJ concurrently charged foreign officials who received the corrupt payments through a money laundering action or violation of another statute, such as wire fraud. In MTS, for example (discussed on pages 3–4 above), the DOJ charged a former Uzbek government official with money laundering charges and a former Uzbek telecommunications executive with FCPA violations. These money laundering actions are often co-enforced with the DOJ's Money Laundering and Asset Recovery Section ("MLARS").

Proposed Legislation in Congress to Criminalize Extortion by Foreign Officials

As the non-FCPA cases against foreign officials may suggest, one perceived gap in the FCPA is that it does not allow the U.S. government to prosecute foreign officials who solicit and accept bribes. In August, a bipartisan group of U.S. representatives introduced the Foreign Extortion Prevention Act ("FEPA"), as a proposed amendment to the federal bribery statute. This amendment, if enacted, would enable the DOJ to prosecute foreign government officials for "demanding bribes to fulfill, neglect, or violate their official duties."[54] The proposed amendment does not contain a U.S. nexus requirement, which would make it broader than the FCPA.

If enacted, FEPA would bring the United States in line with other countries, such as France, Switzerland, the Netherlands, and the United Kingdom, which have similar laws in place.[55]

DOJ REFINED ITS FCPA AND RELATED ENFORCEMENT GUIDANCE

DOJ Clarified Certain Aspects of the FCPA Corporate Enforcement Policy

In March and November, the DOJ adopted six updates to the Policy in response to feedback from the business community on practical challenges of following the original Policy.[56] As explained in Chart 6 below, these updates refine the DOJ's expectations for voluntary self-disclosures, address corporate policies and controls regarding the use of ephemeral messaging platforms (such as Snapchat, WhatsApp, and WeChat), formally extend the Policy to disclosures made in connection with mergers or acquisitions, and refine requirements for DOJ requests to de-conflict investigation interviews.

While the updates to the Policy provide more clarity, companies still face much of the same uncertainty that they did previously when deciding whether to self-disclose FCPA violations to the DOJ, including, for example, potential subsequent investigations by the SEC or foreign regulators and other collateral consequences, such as civil litigation, administrative sanctions, and reputational harm.

Chart 6: Summary of 2019 DOJ Updates to FCPA Corporate Enforcement Policy

	Issue	Original Policy	Revisions to the Policy	Analysis
1.	**Disclosure Regarding Relevant Facts for Full Self-Disclosure Credit**	One of the requirements for full self-disclosure credit required a company to disclose "all relevant facts known to it" to the DOJ.	Now, a company must disclose only "all relevant facts known to it **at the time of disclosure**" to the DOJ.[57]	Emphasizes the DOJ's desire for prompt disclosure while allowing the company to follow up with additional facts after an internal investigation is completed.
2.	**Disclosure Regarding Responsible Individuals for Full Self-Disclosure Credit**	Another requirement for full self-disclosure credit is that a company must disclose "all relevant facts about all individuals involved in or responsible for the violation of law."	Now, a company must only disclose all relevant facts about all "individuals **substantially** involved in or responsible for the **misconduct at issue**."	Now, credit is conditioned on information about individuals who were "substantially" involved (not just involved). Replaces "violation of law" with "misconduct at issue." Updates track changes to the DOJ's Individual Accountability for Corporate Wrongdoing Memo announced by the DOJ in 2018.[58]
3.	**Disclosures Regarding Relevant Evidence for Full Cooperation Credit**	One of the requirements for full cooperation credit is that a company must disclose where it "is **or should be aware of** opportunities for the DOJ to obtain relevant evidence not in the company's possession and not otherwise known to [the] DOJ."	Revised Policy eliminates "should be aware of" requirement.	Softens prior requirement. Now, companies must only inform the DOJ of evidence of the misconduct when it becomes aware of it.
4.	**Guidelines for DOJ Requests to De-Conflict Witness Interviews For Full Cooperation Credit**	Company must agree to DOJ requests to de-conflict witness interviews to qualify for full cooperation credit.	Revised Policy now contains requirement that DOJ de-confliction requests must be "made for a limited period of time and be narrowly tailored to a legitimate investigative purpose." Also adds that the DOJ "will not take any steps to affirmatively direct a company's internal investigation efforts."	Adds conditions to narrowly tailor any DOJ de-confliction request. Statement that DOJ "will not direct a company's investigation efforts" follows a Southern District of New York District Judge ruling in May that rebuked DOJ's alleged reliance on and direction of outside counsel's investigation in a LIBOR matter.[59]
5.	**Guidance and Controls on Use of Ephemeral Messaging for Full Remediation Credit**	Required companies to prohibit employees from using ephemeral messaging software (e.g., Snapchat, WhatsApp, and WeChat) in order to receive full cooperation credit.	No longer requires a company to prohibit use of ephemeral messaging platforms. Now, requires a company to implement appropriate guidance and controls on the use of these applications.	This change is significant for companies that do business in markets where communications platforms are routinely used for business purposes.
6.	**Applicability of the Policy to Mergers and Acquisitions**	Not explicitly addressed.	Clearly extends presumption of declination to conduct that a company self-discloses in connection with a merger or acquisition, if company conducts appropriate due diligence, promptly self-discloses, and otherwise complies with the Policy.	This revision was foreshadowed by the Criminal Division Deputy Assistant Attorney General ("DAAG") in a July 2018 speech.[60]

Certain Declinations Issued Pursuant to the Policy May Not Be Publicized

Declinations issued pursuant to the Policy are supposed to be made public by the DOJ.[61] However, in June, the DAAG stated that the DOJ has not disclosed some declinations issued pursuant to the Policy in response to company requests.[62] As an example, the DAAG stated that if a company self-disclosed misconduct that was discovered in the context of an acquisition, and the DOJ determined that the conduct and financial impact was *de minimis*, it may agree to a company's request that the DOJ not disclose the declination.[63] This is another example of the evolving nature of the Policy.

DOJ Published Additional Guidance on Effective Corporate Compliance Programs

Under the Policy, a company is not eligible for the presumption of a declination if it has not implemented an effective ethics and compliance program.[64] In April, the DOJ released guidance titled "Evaluation of Corporate Compliance Programs" ("Guidance") in an effort to provide more detail around the DOJ's approach to analyzing compliance programs for purposes of determining an appropriate resolution.[65] The Guidance clarified and reorganized a prior iteration of compliance program guidance that the DOJ Fraud Section published in February 2017.

While it does not contain any new requirements, the Guidance emphasizes the importance of a risk-based approach to compliance and continuous improvement of corporate compliance programs. The Guidance is structured around three "fundamental questions" that prosecutors should consider when evaluating the effectiveness of a corporate compliance program at the time of misconduct, a charging decision, and a resolution: (i) Is the program well-designed?; (ii) Is the program effectively implemented?; and (iii) Does the compliance program actually work in practice?

Chart 7: Summary of DOJ Evaluation of Corporate Compliance Programs Guidance, 2019

I. Is the corporation's compliance program well designed?	II. Is the program being implemented effectively?	III. Does the corporation's compliance program work in practice?
A. Risk Assessment B. Policies and Procedures C. Training and Communications D. Confidential Reporting Structure and Investigation Process E. Third-Party Management F. Mergers & Acquisitions	A. Commitment by Senior and Middle Management B. Autonomy and Resources C. Incentives and Disciplinary Measures	A. Continuous Improvement, Periodic Testing, and Review B. Investigation of Misconduct C. Analysis and Remediation of Any Underlying Misconduct

The Guidance is another step in the DOJ's effort to clarify its expectations for corporate compliance programs and is useful for companies in determining the DOJ's expectations for compliance programs and best practices.

In connection with the Guidance, the DOJ conducted a compliance training session for its prosecutors in April 2019.[66] At this training, the DOJ sought to provide prosecutors with additional understanding of an effective ethics and compliance program design and the challenges to implementation.[67] As further evidence of the DOJ's coordination with other regulators, the DOJ also invited some enforcement partners in the United States and abroad to attend the training.[68]

DOJ Issued Direction on "Inability-to-Pay" Claims

In October, the DOJ Criminal Division published new criteria for prosecutors to consider when evaluating inability-to-pay claims from corporate defendants based on its financial condition.[69] It includes an Inability-to-Pay Questionnaire and information requests to provide objective data to the DOJ.[70]

Before the DOJ will consider a company's inability-to-pay claim, the parties must first agree to (1) the form of the criminal resolution and (2) the appropriate monetary penalty based on the law and facts, irrespective of the company's financial condition.[71] Prosecutors are then directed to consider factors such as the reasons for the company's financial condition, whether the company has alternative sources of capital, the collateral consequences of a criminal fine or penalty, and whether the fine or penalty will impair the company's ability to make restitution to any victims.[72] These factors are to be applied in conjunction with the statutory sentencing and fine factors in 18 U.S.C. § 3572 and U.S. Sentencing Guidelines §§ 8C2.2 and 8C3.3.[73]

If a corporate defendant is unable to pay after evaluating the four factors above, DOJ prosecutors are then directed to recommend an adjustment "to the extent necessary to avoid (1) threatening the continued viability of the organization and/or (2) impairing the organization's ability to make restitution to victims."[74] A prosecutor may also make an adjustment "based on the existence of a significant adverse collateral consequence" that "may not necessarily threaten the continued viability" of the company.[75] Relevant collateral consequences include the ability to fund pension obligations, layoffs, product shortages, or significantly disrupting competition in a market.[76]

Adjustments may consist of a reduction in the fine or penalty or the implementation of an installment schedule to facilitate payment over a reasonable period of time.[77]

The criteria provides prosecutors with additional flexibility when analyzing inability-to-pay claims. In two recent FCPA resolutions where the DOJ cited the company's inability to pay a particular fine, the DOJ apparently employed a higher standard than the recent guidance. In 2018, for example, the DOJ agreed to reduce Transport Logistics International's $21 million fine to $2 million because a penalty higher than $2 million would "substantially jeopardize the continued viability of the company."[78] The new guidance provides prosecutors with more flexibility to assess such claims in the future, including the ability to take into consideration a broader range of adverse collateral consequences.

New and Permanent Enforcement Leadership at DOJ

There were several noteworthy changes in enforcement leadership at DOJ. Robert Zink was appointed permanent Chief of the DOJ's Fraud Section in July.[79] Zink previously served as Acting Fraud Section Chief and Deputy Chief.[80]

There were also significant leadership changes in the 34-lawyer DOJ FCPA Unit, housed within the DOJ's Fraud Section. Dan Kahn, the former FCPA Unit Chief, was promoted to Senior Deputy Chief, Fraud Section. In this role, he is still expected to be involved with the FCPA Unit in a supervisory capacity.

Chris Cestaro was appointed to Acting Chief of the FCPA Unit in July and Permanent Chief of the Unit in December.[81] Separately, David Last was promoted to the role of the FCPA Unit's Acting Principal Assistant Deputy Chief, a new position.[82] Both formerly served as Assistant Chiefs in the Unit and have significant experience prosecuting FCPA matters.[83]

Additionally, Vanessa Sisti and David Fuhr were both promoted to Assistant Chiefs of the FCPA Unit from their previous roles as DOJ trial lawyers.[84]

FBI Established New International Corruption Squad

In 2015, the FBI established international corruption squads in New York, Los Angeles, and Washington, D.C., to investigate foreign bribery, kleptocracy, and international antitrust matters.[85] In March, the FBI announced a new dedicated international corruption squad in Miami.[86] Modeled on the existing

three units, the new Miami team will partner with foreign law enforcement and FBI legal attaché offices as a "force multiplier" to combat international corruption matters with a focus on issues in Latin America.[87]

SEC FCPA ENFORCEMENT ACTIVITY INCREASED

Overall, SEC corporate FCPA enforcement activity increased from 2018. While the SEC brought 13 corporate FCPA cases compared to the 14 corporate cases in 2018, the amount of fines, penalties, disgorgement, and interest collected by SEC more than doubled from $405 million in 2018 to $1.03 billion in 2019.

The number of SEC individual FCPA enforcement actions also increased. SEC filed six actions against individuals in 2019, up from four in 2018. Four of the six individual actions in 2019 were against individuals in a related SEC corporate enforcement action.

SEC Continues to Aggressively Enforce FCPA Accounting Provisions

The SEC continued to aggressively enforce the FCPA's internal controls and books and records provisions (collectively, the accounting provisions) without a corresponding antibribery charge. For example, the SEC charged São Paulo-based telecom Telefônica Brasil for violating the internal controls and books and records provisions of the FCPA in connection with hosting Brazilian government officials at Brazilian soccer matches.[88] The SEC Order found Telefônica spent more than $6 million on soccer tickets and related hospitality for individuals, including Brazilian officials.[89] There were no antibribery allegations or charges. Rather, the SEC alleged Telefônica "inaccurately" recorded the costs as "Publicity Institutional Events" and "Advertising & Publicity," and it lacked adequate internal controls over its gifts and entertainment program.[90]

The head of the SEC's FCPA Unit addressed the SEC's use of the accounting provisions without a corresponding antibribery charge. He stated that the SEC does not enforce the FCPA's accounting provisions without a corresponding antibribery charge only in cases when it cannot prove a violation of the antibribery provisions.[91] Instead, he explained that when just the FCPA's accounting provisions are enforced, it could be because the SEC was unable to establish jurisdiction over the bribery itself.[92]

In 2019, half of the SEC's FCPA corporate enforcement actions involved antibribery charges. This is double the levels from 2017 and 2018, when 25% and 21% of the SEC's corporate enforcement actions included antibribery charges, respectively. Time will tell if 2019 represents an overall increase in enforcement of the FCPA's antibribery provisions by the SEC.

Supreme Court to Review SEC's Disgorgement Authority

The Supreme Court agreed to hear *Liu v. SEC*—a case challenging the SEC's ability to seek disgorgement as a form of equitable relief.[93] While no statute expressly authorizes the SEC to collect disgorgement, the SEC has pursued disgorgement of ill-gotten gains as one of the primary enforcement mechanisms of the FCPA and other securities statutes. Courts have generally accepted that the SEC is authorized to seek disgorgement under the Securities Exchange Act of 1934 as a form of equitable relief.[94] However, in *Kokesh v. SEC*, the Court found that disgorgement was a "penalty" for the purposes of the statute of limitations, thus imposing a five-year limitations period for the SEC to collect disgorgement.[95] The Court noted in a footnote the open question of whether or not courts have the authority to issue disgorgement in SEC enforcement proceedings as a form of equitable relief.[96]

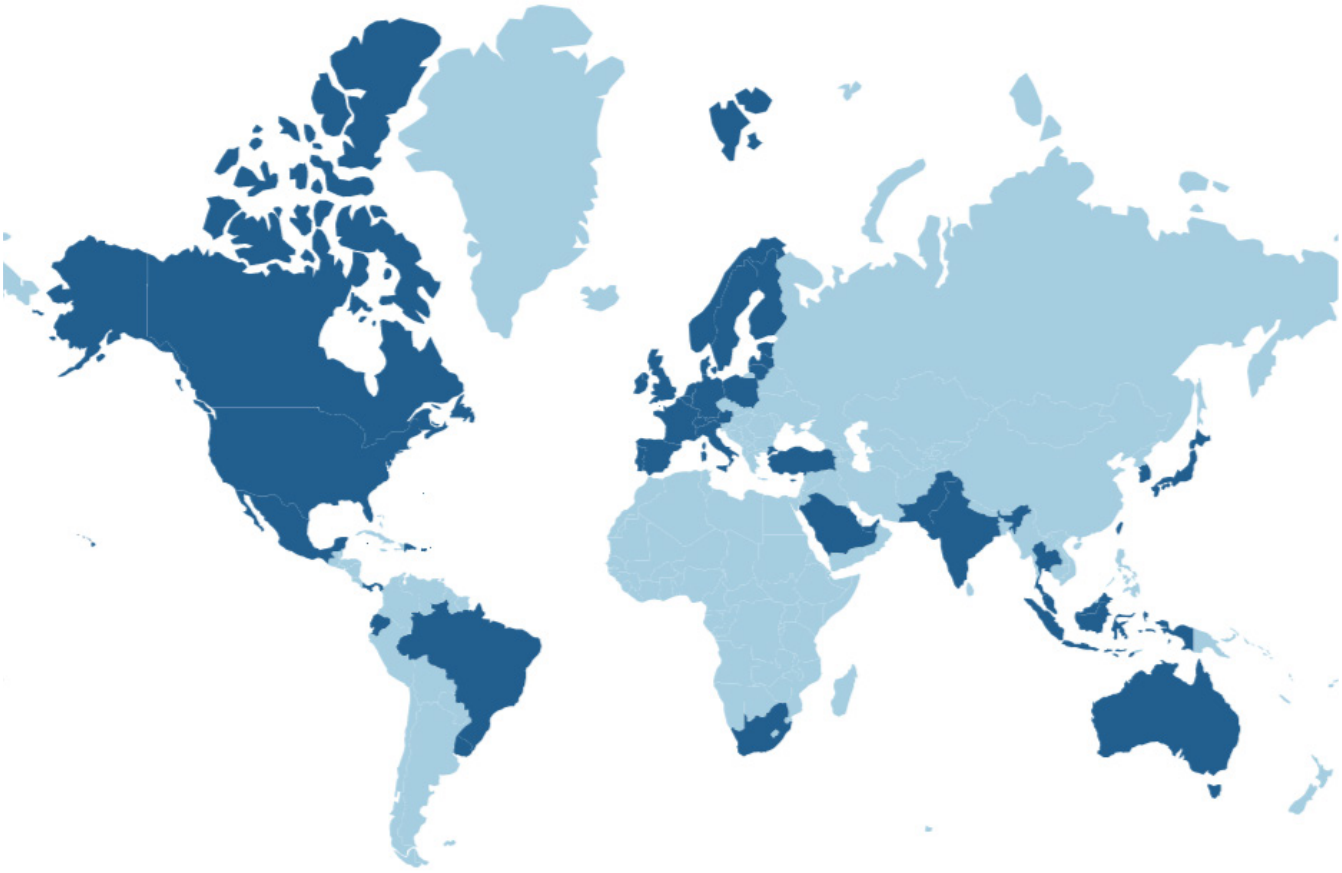
As *Liu* heads to argument, two bills pending in Congress—including one that has already been passed by the House—seek to address some of the issues raised by *Liu* and *Kokesh*. Specifically, those bills would codify the SEC's ability to pursue disgorgement, and define the limitations period for such enforcement actions.[97]

A decision in *Liu* by the Court is expected by June 2020.[98] Barring a change in the law, the decision could curb the SEC's ability to seek disgorgement and have implications for other agencies' enforcement powers.

CONTINUED COOPERATION IN CROSS-BORDER ANTICORRUPTION ENFORCEMENT

While the United States continues to lead the world in anticorruption enforcement, other nations, such as Brazil, are taking on a greater role in enforcing their own anticorruption laws and coordinating with the DOJ and SEC. Indeed, as shown in Chart 8, over the past five years, the DOJ and SEC have publicly acknowledged the assistance of regulators from more than 55 countries and territories around the world. Last year alone, the DOJ and SEC noted assistance from 26 countries and territories in 10 corporate FCPA enforcement actions. For companies facing global corruption investigations, this pattern of greater international collaboration underscores the importance of preparation for investigations by numerous agencies acting in coordination with one another and could result in potential resolutions in multiple sovereign jurisdictions.

Chart 8: Countries From Which the DOJ and SEC Have Acknowledged Cooperation in Corporate FCPA Resolutions, 2015–2019



From 2015–2019, the DOJ and SEC publicly acknowledged the assistance of foreign authorities from those countries shaded in dark blue above.

List of Countries Shaded in Dark Blue in Chart 8

Americas	Europe		Asia / Africa / Middle East
Bermuda	Austria	Latvia	Australia
Brazil	Belgium	Liechtenstein	Hong Kong
British Virgin Islands	Cyprus	Lithuania	India
Canada	Denmark	Luxembourg	Indonesia
Cayman Islands	Estonia	Malta	Japan
Dominican Republic	Finland	Monaco	Malaysia
Ecuador	France	Norway	Marshall Islands
Mexico	Germany	Poland	Pakistan
Panama	Gibraltar	Portugal	Saudi Arabia
Uruguay	Guernsey	Spain	Singapore
USA	Ireland	Sweden	South Africa
	Isle of Man	Switzerland	South Korea
	Italy	The Netherlands	Taiwan
	Jersey	Turkey	Thailand
		United Kingdom	UAE

Focus on Brazil

Brazil continues to be a focus of anticorruption enforcement. The DOJ, SEC, and Brazilian authorities, including the Brazilian Federal Prosecutor's Office ("MPF"), the Attorney General ("AGU"), and the Offices of the Comptroller General ("CGU"), have cooperated formally and informally to investigate several major corruption cases related to the Operação Lava Jato ("Operation Car Wash") investigation, which began in 2014. Since then, several multinational companies have entered into significant resolutions with these authorities. Six of the top ten largest global anticorruption resolutions in history—including the largest global anticorruption resolution—have involved coordination between U.S. and Brazilian authorities.

In particular, U.S. and Brazil enforcement related to conduct involving Petróleo Brasileiro S.A. ("Petrobras"), Brazil's state-owned oil and gas company, continues. With the resolutions with TechnipFMC and Samsung Heavy Industries in 2019, the United States, Brazil, and other foreign regulators have now entered into resolutions with seven companies related to conduct involving Petrobras, resulting in a global total of $7.7 billion in fines and penalties. Additionally, last year, the DOJ indicted the former CEO of Brazilian oil and gas company, Braskem, for alleged conspiracy to violate the FCPA and money laundering statutes related to Petrobras conduct.[99]

Chart 9: FCPA Resolutions Related to Brazil's Petrobras, 2014–2019

	Company	Year	U.S. Total	Global Total	Resolving Authorities
1.	Odebrecht S.A. and Braskem S.A. (Construction: Brazil)	2016	$253M	$3.3B	U.S. Brazil
2.	Petróleo Brasileiro S.A. (Oil and Gas: Brazil)	2018	$171M	$1.7B	U.S. Brazil
3.	SBM Offshore N.V. (Oil and Gas: Netherlands)	2014–2017	$238M	$820M	U.S. (2017) Brazil (2016) Netherlands (2014)
4.	Keppel Offshore & Marine Ltd (Conglomerate: Singapore)	2017	$106M	$422M	U.S. Brazil Switzerland
5.	Technip USA and TechnipFMC plc (Oil and Gas: UK)	2019	$87.2M	$296M	U.S. Brazil
6.	Samsung Heavy Industries Company Ltd. (Engineering: South Korea)	2019	$37.8M	$75.6M	U.S. Brazil

Cooperation between the United States and Brazil is expected to continue. Indeed, in late 2019, the FBI said it requested additional funds for extra resources to handle requests for information from Brazilian authorities, and, last spring, Brazilian prosecutors confirmed an investigation into more than 20 medical devices companies and noted that they were working closely with the DOJ, FBI, and SEC in connection with the investigation.[100]

Brazil's local anticorruption priorities are shifting under the new administration of President Jair Bolsonaro, who began a four-year term last January.[101] Bolsorano campaigned as someone who would combat the corruption of the country's political class.[102] Last year, he appointed Sérgio Moro, the federal judge who oversaw the Operation Car Wash investigation, as his minister of justice and public security.[103] Moro received criticism last year about whether he was impartial in some of Operation Car Wash's most high-profile trials.[104]

Some of the Bolsonaro Administration's initial anticorruption proposals, however, have received criticism from the OECD Working Group on Bribery.[105]

- In July, the President of the Brazilian Federal Supreme Court enjoined all the investigations and court proceedings with detailed private banking reports from the Financial Intelligence Unit (Unidade de Inteligência Financeira ("UIF")) and the Internal Revenue Service.[106]
- In August, Bolsonaro transferred oversight of the Council for Financial Activities Control ("COAF"), now renamed as UIF, from Moro to the Brazilian Central Bank, diminishing Moro's influence over the government's anticorruption efforts.[107]
- Brazil's Supreme Court overturned the conviction of the former president of Petrobras, because he did not have an opportunity to present a closing argument.[108] This verdict has spurred appeals from others convicted in the Operation Car Wash probe.[109]

Notwithstanding these developments, Brazil is expected to remain at the forefront of international anticorruption enforcement. Anticorruption enforcement changes in Brazil are noteworthy for multinational companies with operations in the area, as corruption investigations that begin in Brazil continue to lead to investigations by the DOJ and SEC.

Impact of DOJ's 2018 No "Piling On" Policy

Last year, the DOJ highlighted the impact of its 2018 so-called No "Piling On" Policy, which seeks to avoid the unnecessary imposition of duplicative fines, penalties, and forfeitures in connection with actions by other federal, state, local, and foreign enforcement authorities that want to resolve potential claims arising from the same misconduct.[110] In June, the

Criminal Division DAAG stressed that the DOJ and SEC are coordinating resolutions and affording credit for penalties paid to other foreign authorities "where appropriate."[111] The DOJ highlighted this policy in connection with three resolutions. In TechnipFMC and Samsung, the DOJ agreed to credit approximately $214 million and $37.5 million in penalties respectively paid to Brazilian authorities.[112] Also, in MTS, the DOJ agreed to credit MTS's $100 million penalty paid to the SEC.[113] As these and other resolutions from the year indicate, the policy has led to even more coordination and cooperation among foreign authorities.

One authority has lobbied for a global "no piling on" standard. In December, the chair of the Organisation for Economic Cooperation and Development ("OECD"), unsatisfied with the level of cooperation among foreign authorities, released guidelines to encourage coordination that could bolster international cooperation.[114] Citing the DOJ's No "Piling On" Policy as a model, the chair stated that he would like to see other countries adopt similar policies.[115] The chair acknowledged that while double jeopardy is permitted under the OECD antibribery convention, the OECD Working Group on Bribery would try and develop guidelines to further enhance the level of cooperation among its member states.[116]

SEC Chairman Criticized Perceived Lack of International Anticorruption Enforcement

Notwithstanding continued anticorruption enforcement abroad, in September, SEC Chairman Jay Clayton delivered a speech in which he called for increased international cooperation in anticorruption enforcement around the world.[117] He stated that in many areas of the world, the United States' anticorruption efforts are not having the desired effect of curbing corruption abroad, and are in fact disadvantaging United States companies while benefiting companies from countries that do not enforce offshore anticorruption laws.[118] Indeed, he noted that as of 2017, 21 of the 44 countries that are party to the OECD antibribery convention had never enforced their foreign bribery laws.[119] While insisting that he does not intend to change the FCPA enforcement posture of the SEC, Chairman Clayton stated that the United States should recognize that it is "acting largely alone" and that other countries are incentivized to play strategies that take advantage of the United States' "laudable efforts."[120]

CONCLUSION

2019 was a banner year for FCPA enforcement. The DOJ and SEC resolved a total of 14 corporate enforcement actions and collected a record amount of corporate fines and penalties. The DOJ continued to issue declinations pursuant to the FCPA Corporate Enforcement Policy, which it clarified in 2019. Meanwhile, the DOJ and SEC increased FCPA enforcement against individuals, with the DOJ winning three of its four trials. Abroad, the DOJ and SEC continued to cooperate with their foreign counterparts, particularly in Brazil. 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.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/. To learn more about Jones Day's experience in counseling companies and individuals that have received an allegation of corruption or have become the subject of government investigation, please visit our website.

AUTHORS

Hank Bond Walther
Washington
+1.202.879.3432
hwalther@jonesday.com

Theodore T. Chung
Chicago
+1.312.269.4234
ttchung@jonesday.com

Karen P. Hewitt
San Diego
+1.858.314.1119
kphewitt@jonesday.com

Samir Kaushik
Dallas
+1.214.969.5092
skaushik@jonesday.com

Henry Klehm III
New York
+1.212.326.3706
hklehm@jonesday.com

Joan E. McKown
Washington
+1.202.879.3647
jemckown@jonesday.com

Eric Snyder
São Paulo / New York
+55.11.3018.3939 / +1.212.326.3435
esnyder@jonesday.com

ADDITIONAL LAWYER CONTACTS

UNITED STATES

Bethany K. Biesenthal
Chicago
+1.312.269.4303
bbiesenthal@jonesday.com

David P. Bergers
Boston
+1.617.449.6870
dbergers@jonesday.com

Stephen Cowen
Detroit
+1.313.230.7954
scowen@jonesday.com

Roman E. Darmer
Irvine
+1.949.553.7581
rdarmer@jonesday.com

Richard H. Deane, Jr.
Atlanta
+1.404.581.8502
rhdeane@jonesday.com

Ryan M. DiSantis
Boston
+1. 617.449.6911
rdisantis@jonesday.com

James C. Dunlop
Chicago
+1.312.269.4069
jcdunlop@jonesday.com

Louis P. Gabel
Detroit
+1.313.230.7955
lpgabel@jonesday.com

Randy S. Grossman
San Diego
+1.858.314.1157
rsgrossman@jonesday.com

Fahad A. Habib
San Francisco
+1.415.875.5761
fahabib@jonesday.com

Jamila M. Hall
Atlanta
+1.404.581.8465
jhall@jonesday.com

Adam Hollingsworth
Cleveland
+1.216.586.7235
ahollingsworth@jonesday.com

Additonal lawyer contacts continued on next page

James T. Kitchen
Pittsburgh
+1.412.394.7272
jkitchen@jonesday.com

Weston C. Loegering
Dallas
+1.214.969.5264
wcloegering@jonesday.com

James P. Loonam
New York
+1.212.326.3808
jloonam@jonesday.com

Andrew M. Luger
Minneapolis
+1.612.217.8862
aluger@jonesday.com

Shireen Matthews
San Diego
+1.858.314.1184
shireenmatthews@jonesday.com

Cheryl O'Connor
Irvine
+1.949.553.7505
coconnor@jonesday.com

Mary Ellen Powers
Washington
+1.202.879.3870
mepowers@jonesday.com

Peter J. Romatowski
Washington
+1.202.879.7625
pjromatowski@jonesday.com

Joshua S. Roseman
Dallas
+1.214.969.4898
jsroseman@jonesday.com

Rasha Gerges Shields
Los Angeles
+1.213.243.2719
rgergesshields@jonesday.com

Ronald W. Sharpe
Washington
+1.202.879.3618
rsharpe@jonesday.com

Shamoil T. Shipchandler
Dallas
+1.214.969.3684
sshipchandler@jonesday.com

Evan P. Singer
Dallas
+1.214.969.5021
epsinger@jonesday.com

Stephen G. Sozio
Cleveland
+1.216.586.7201
sgsozio@jonesday.com

Neal J. Stephens
Silicon Valley
+1.650.687.4135
nstephens@jonesday.com

Brian A. Sun
Los Angeles
+1.213.243.2858
basun@jonesday.com

Jason S. Varnado
Houston
+1.832.239.3694
jvarnado@jonesday.com

David Woodcock
Dallas
+1.214.969.3681
dwoodcock@jonesday.com

James R. Wooley
Cleveland
+1.216.586.7345
jrwooley@jonesday.com

MIDDLE EAST / ASIA

Sean Thomas Boyce
Dubai
+971.4.709.8416
sboyce@jonesday.com

Stephen J. DeCosse
Tokyo
+81.3.6800.1819
sdecosse@jonesday.com

Steven W. Fleming
Sydney
+61.2.8272.0538
sfleming@jonesday.com

Jerry C. Ling
San Francisco / Shanghai
+1.415.875.5890 / +86.21.2201.8000
jling@jonesday.com

Christopher K. Pelham
Shanghai / Los Angeles
+86.21.2201.8000
+1.213.243.2686
cpelham@jonesday.com

Sheila L. Shadmand
Dubai
+971.4.709.8408
slshadmand@jonesday.com

Matthew J. Skinner
Singapore
+65.6233.5502
mskinner@jonesday.com

Peter J. Wang
Hong Kong / Shanghai
+852.3189.7211 / +86.21.2201.8040
pjwang@jonesday.com

Additonal lawyer contacts continued on next page

EUROPE

José Bonilla
Madrid
+34.91.520.3907
jbonilla@jonesday.com

Adam R. Brown
London
+44.20.7039.5292
abrown@jonesday.com

Sébastien Champagne
Brussels
+32.2.645.15.20
schampagne@jonesday.com

Bénédicte Graulle
Paris
+33.1.56.59.46.75
bgraulle@jonesday.com

Karin Holloch
Düsseldorf
+49.211.5406.5500
kholloch@jonesday.com

Glyn Powell
London
+44.20.7039.5212
gpowell@jonesday.com

Dr. Thomas Preute
Düsseldorf
+ 49.211.5406.5569
tpreute@jonesday.com

Sion Richards
London
+44.20.7039.5139
srichards@jonesday.com

Rick van 't Hullenaar
Amsterdam
+31.20.305.4223
rvanthullenaar@jonesday.com

LATIN AMERICA

Guillermo E. Larrea
Mexico City
+52.55.3000.4064
glarrea@jonesday.com

Fernando F. Pastore
São Paulo
+55.11.3018.3939
fpastore@jonesday.com

Cristina Pérez Soto
Miami
+1.305.714.9733
cperezsoto@jonesday.com

Emmanuel E. Ubiñas
Dallas
+1.214.969.3670
eeubinas@jonesday.com

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ENDNOTES

1 A concurrent DOJ and SEC corporate FCPA resolution is counted as one total corporate FCPA enforcement action.

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31 In February 2018, Juniper Networks publicly disclosed that the DOJ had closed its FCPA investigation "without taking any action against the Company." Form 8-K, Juniper Networks, Inc. (Feb. 9, 2018). Juniper stated that the DOJ acknowledged the Company's cooperation in the investigation. *Id.* At the time of the disclosure, the SEC's investigation was ongoing. *Id.*

32 DPA, Samsung Heavy Industries Company (Nov. 22, 2019).

33 U.S. Attorneys Manual ("USAM") § 9-47.120 (updated Nov. 2019). Two DOJ declinations pursuant to the Policy were made public in 2019, though the DOJ stated it may have issued additional declinations pursuant to the Policy that were not made public. *See* pages 5–6 and 10 *supra* for additional discussion on this issue.

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57 In addition, a new footnote to the Policy states: "The [DOJ] recognizes that a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible. In such circumstances, a company should make clear that it is making its disclosure based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at that time." *Id.* at Section 3 n.1.

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71 *Id.*

72 *Id.*

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95 *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

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97 *See* H.R. 4344, 116 Cong. § 1 (2019). The Senate bill was originally introduced as Senate bill 799, but a revised version was added into a separate bill, ILLICIT CASH Act, on September 26, 2019. *See* ILLICIT CASH Act, S. 2563, 116 Cong. § 502 (2019); *see also* Andrew Kragie, "House Oks SEC Disgorgement Power Up to 14 Years," Law360 (Nov. 19, 2019).

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