

2019 Mid-Year Review: Anti-Corruption Trends and Other Corporate Enforcement Issues

CLE CREDIT AVAILABLE

July 25, 2019



Agenda

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Overview

- YTD Timeline
 - YTD Facts and Figures
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DOJ Developments

- Revisions to the Corporate Enforcement Policy
 - Updated Guidance on the Evaluation of Corporate Compliance Programs
 - Notable Enforcement Actions
 - Monitor Policy in Practice
-

3



SEC Developments

- Notable Enforcement Actions
-

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Other Developments

- CFTC Enforcement
-

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Areas to Watch

Presented by



Greg D. Andres



Angela T. Burgess



James W. Haldin



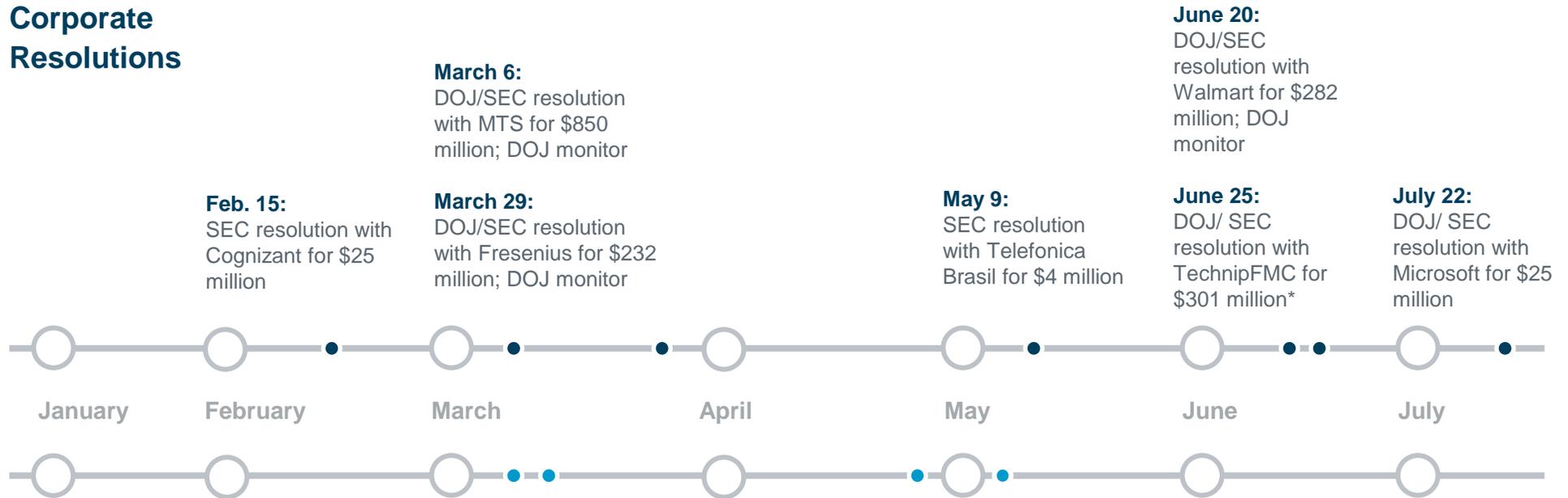
Patrick S. Sinclair



Linda Chatman Thomsen

YTD Timeline

Corporate Resolutions



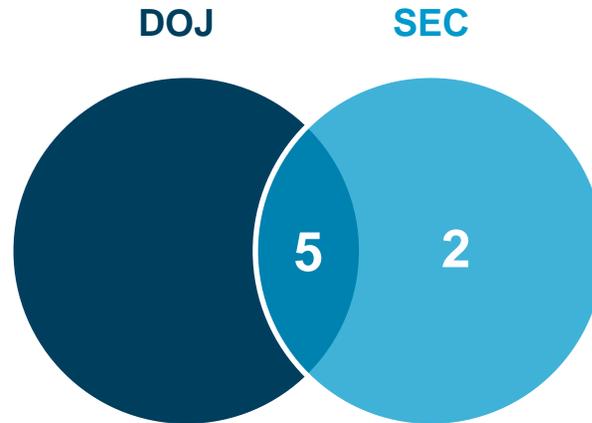
Other Events

- March 6:** CFTC announces enforcement of foreign corruption
- March 8:** DOJ announces revisions to Corporate Enforcement Policy
- April 30:** DOJ announces updated guidance on corporate compliance
- May 2:** Judge McMahon issues opinion in *United States v. Connolly*

* SEC Order not yet available

YTD Facts and Figures

CORPORATE ENFORCEMENT ACTIONS



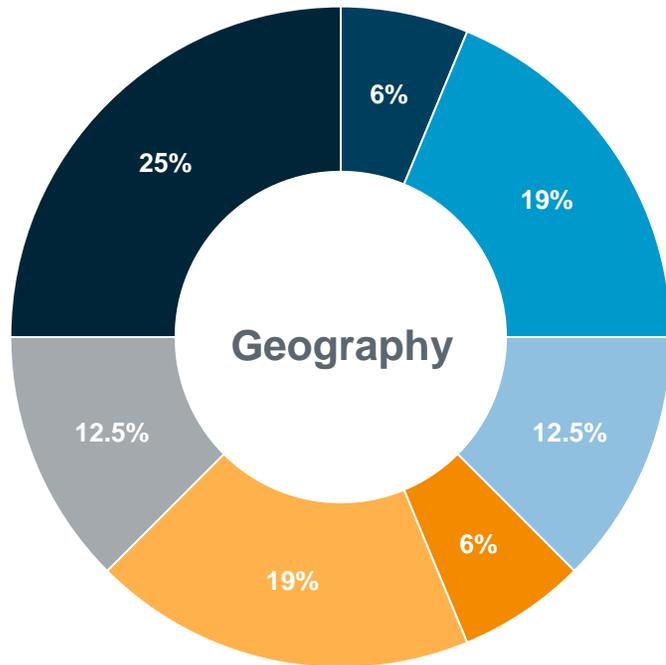
Cognizant

Telefonica

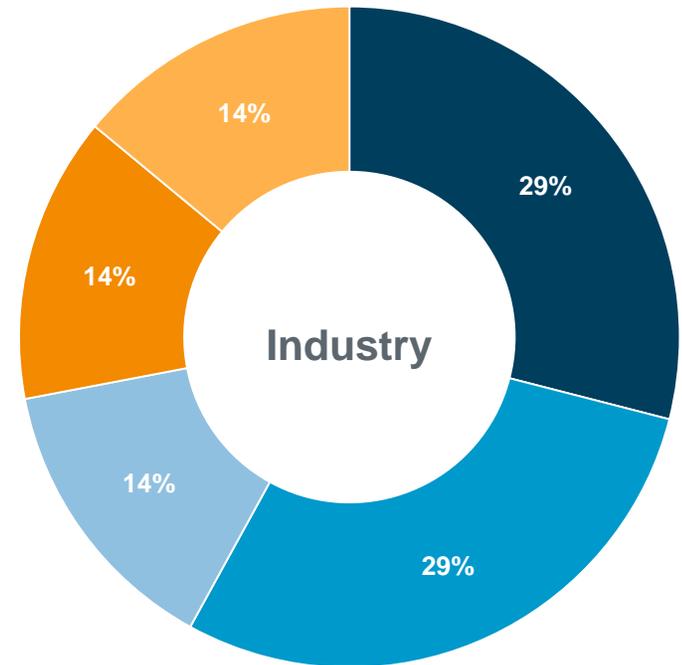


YTD Facts and Figures

CORPORATE ENFORCEMENT ACTIONS



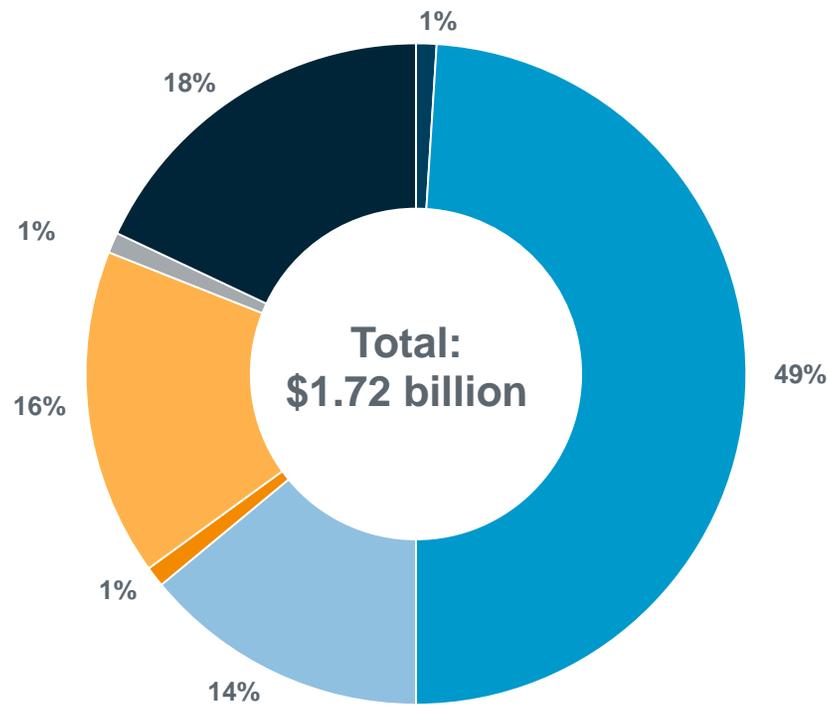
- Africa
- China & East Asia
- Europe
- Middle East
- Latin America & Caribbean
- India
- Russia & Central Asia



- Information Technology
- Telecommunications
- Healthcare
- Oil and Gas
- Retail

YTD Facts and Figures

CORPORATE ENFORCEMENT ACTIONS



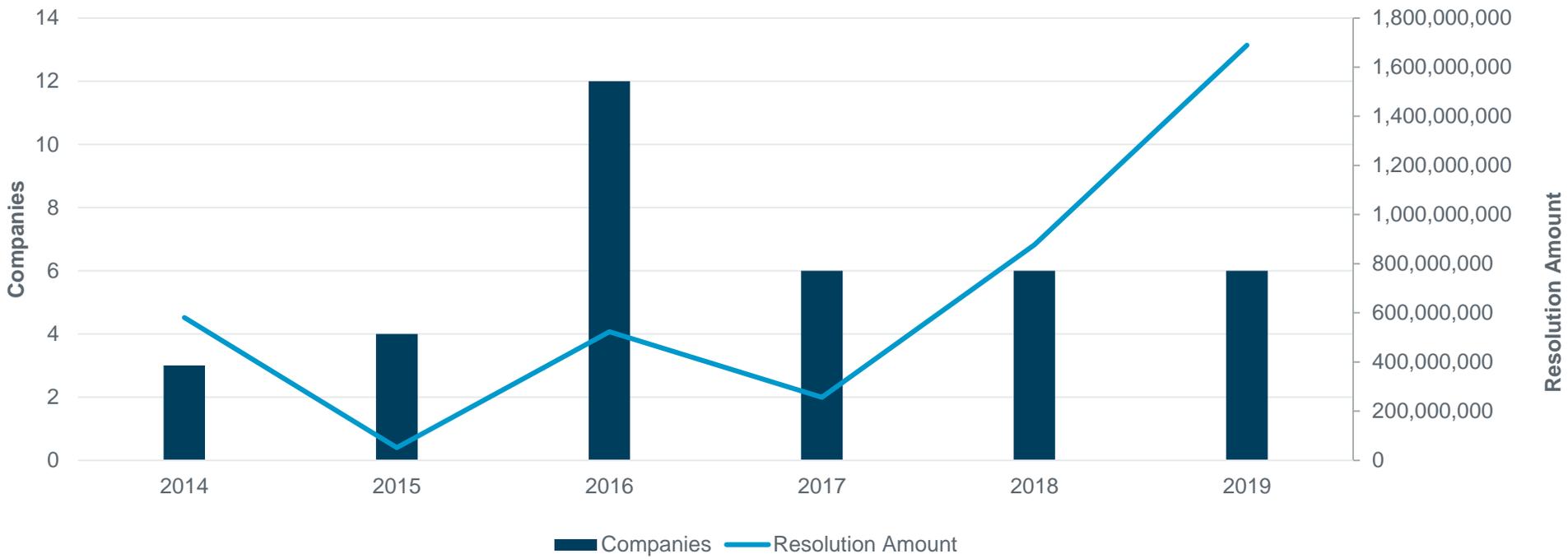
- Cognizant Technology Solutions (\$25.2 million)
- Fresenius Medical Care (\$231.7 million)
- Walmart (\$282.7 million)
- TechnipFMC (\$301.3 million)
- Mobile Telesystems (MTS) (\$850 million)
- Telefonica Brasil (\$4.1 million)
- Microsoft (\$25.3 million)

¹ Amount includes all penalties, fines, disgorgement, and prejudgment interest paid to U.S. and non-U.S. regulators.

YTD Facts and Figures

CORPORATE ENFORCEMENT ACTIONS

FCPA Corporate Enforcement Actions and Total Resolution Amounts Through Q2¹



¹ Resolutions involving subsidiaries are not counted separately from parent companies. Parallel enforcement actions brought by the SEC and DOJ are counted as one enforcement action.

DOJ Developments

FCPA CORPORATE ENFORCEMENT POLICY REVISIONS | MARCH 2019

Modified Voluntary Disclosure Requirement

Credit available to companies that disclose individuals “substantially involved in” or “responsible for” the violations (as opposed to all individuals)

Clarified De-Confliction Requirement

De-confliction of witness interviews (previously thought to apply to all interviews) only required where “requested” and “appropriate”

Modified Guidance on Ephemeral Communications

Credit available to companies that implement “appropriate guidance and controls” on the use of instant and ephemeral messaging services and platforms (as opposed to prohibiting them)



Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including ~~prohibiting employees from using software that generates but does not implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company’s ability to~~ appropriately retain business records or communications or otherwise comply with the company’s document retention policies or legal obligations; and→

DOJ Developments

FCPA CORPORATE ENFORCEMENT POLICY REVISIONS | MARCH 2019

Cooperation Credit in M&A Context

Credit available to acquiring companies who voluntarily disclose misconduct (as previously announced in July 2018)

No Waiver Required

Unequivocal language added to provision disclaiming any link between credit eligibility and waiver of attorney-client privilege or work product

As set forth in [USAM JM 9-28.720](#), eligibility for **full** cooperation [or voluntary self-disclosure](#) credit is not [in any way](#) predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver.

DOJ Developments

UPDATED GUIDANCE ON EVALUATION OF CORPORATE COMPLIANCE PROGRAMS | APRIL 2019



“Effective compliance programs play a critical role in preventing misconduct, facilitating investigations, and informing fair resolutions. Today’s guidance document is part of our broader efforts . . . [to] ensure that prosecutors evaluate the effectiveness of compliance in a rigorous and transparent manner.”

– *Assistant Attorney General for the Criminal Division Brian A. Benczkowski, April 30, 2019*



DOJ Developments

UPDATED GUIDANCE: FUNDAMENTAL QUESTIONS | APRIL 2019

1

Is the Program *well designed*?

- Risk Assessment
- Policies and Procedures
- Training and Communications
- Confidential Reporting Structure and Investigation Process
- Third-Party Management
- Mergers and Acquisitions

2

Is the Program implemented effectively?

- Commitment by Senior and Middle Management
- Compliance Autonomy and Resources
- Incentives and Disciplinary Measures

3

Does the Program work in practice?

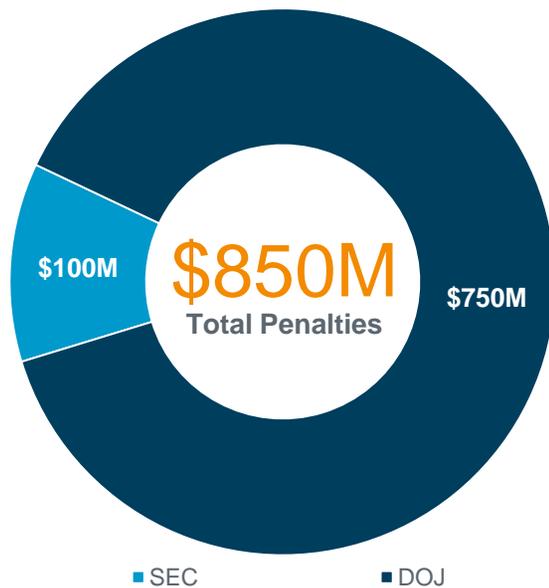
- Continuous Improvement, Periodic Testing, and Review
- Investigation of Misconduct
- Analysis and Remediation of Any Underlying Misconduct

DOJ Developments

NOTABLE ENFORCEMENT ACTIONS

MTS | March 6, 2019

DOJ and SEC Resolutions



This is the third installment in a trilogy of cases arising from an almost \$1 billion bribery scheme that reached the highest echelons of the Uzbekistan government and was orchestrated by some of the largest telecommunications companies in the world.

– Geoffrey S. Berman, United States Attorney for the Southern District of New York

Violations

- Anti-bribery
- Books and Records
- Internal Accounting

Overview

- Over \$420 million in bribes paid to Uzbek official
- Two-year DOJ monitor because compliance program not fully implemented or tested

CEP Credit

Voluntary Disclosure Credit	None
Cooperation & Remediation Credit	None

DOJ Developments

NOTABLE ENFORCEMENT ACTIONS

Fresenius Medical Care | March 29, 2019

DOJ and SEC Resolutions



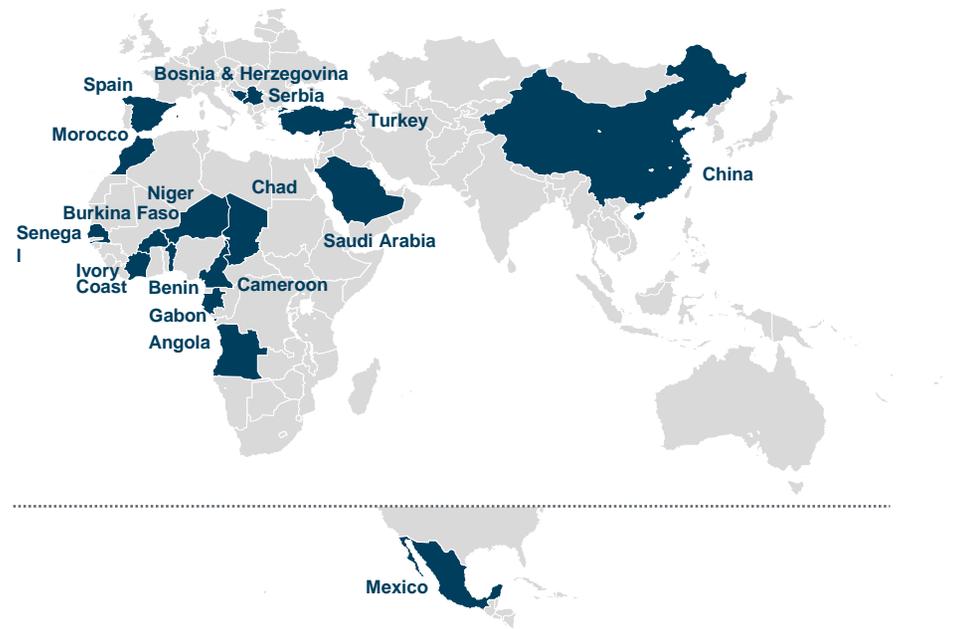
Violations

- Anti-bribery
- Books and Records
- Internal Accounting

Overview

- Involved conduct in 17 different countries between 2007 and 2016
- Two-year DOJ monitor due to untested compliance program

Geographical Regions



CEP Credit

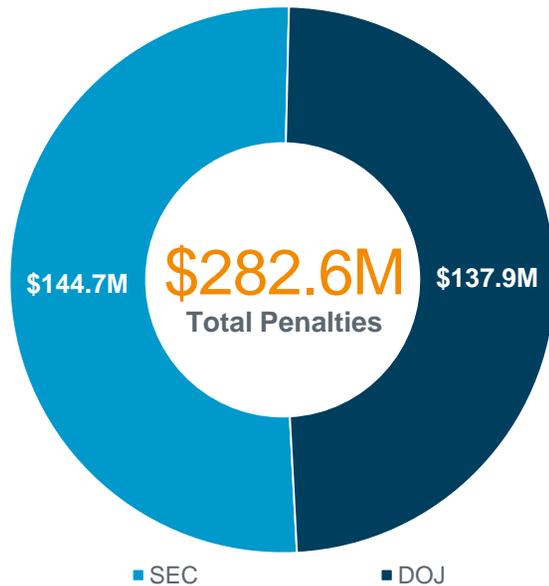
Voluntary Disclosure Credit	Full
Cooperation & Remediation Credit	Partial
40% discount from Guidelines range	

DOJ Developments

NOTABLE ENFORCEMENT ACTIONS

Walmart Inc. | June 20, 2019

DOJ and SEC Resolutions



The Walmart enforcement action involved conduct in Brazil, Mexico, India, and China.

Violations

- Books and Records
- Internal Accounting

Overview

- DOJ Corporate monitor limited in scope
- SEC sought disgorgement despite finding no violation of anti-bribery provisions

DOJ Developments

MONITOR POLICY IN PRACTICE



Three year term, subject to extension or early termination

“[B]ecause the Company has not yet fully implemented or tested its compliance program, the Company has agreed to the imposition of an independent compliance monitor to reduce the risk of misconduct.”

– *Deferred Prosecution Agreement*



Two year term, subject to extension or early termination

“[M]isconduct continued to occur at the Company until 2016, thus the parties have agreed that to ensure and test the effectiveness of the Company’s enhanced compliance program and to prevent a reoccurrence of the conduct outlined in the Statement of Facts, an independent compliance monitor shall be appointed for a term of two years.”

– *Nonprosecution Agreement*



Two year term, subject to possible one year extension

“[A]lthough the Company has engaged in significant remedial measures, the Fraud Section and the Office have determined that an independent compliance monitor is necessary to ensure that the Company’s compliance program is operating effectively and adequately tested to ensure that it meets the minimum elements set forth in the Corporate Compliance Program.”

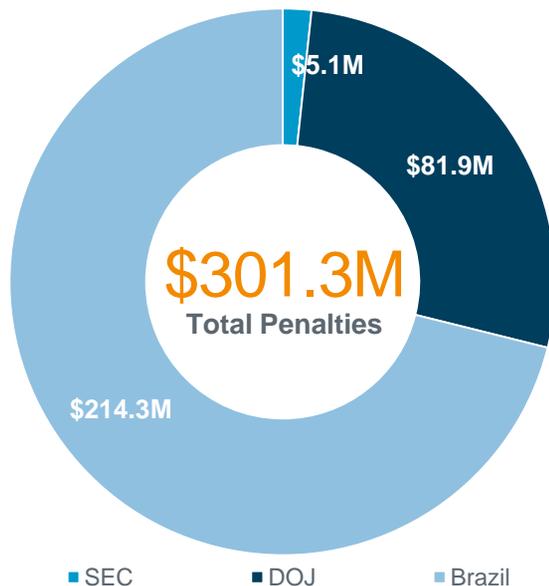
– *Nonprosecution Agreement*

DOJ Developments

NOTABLE ENFORCEMENT ACTIONS

TechnipFMC plc | June 25, 2019

DOJ Resolution and SEC Agreement in Principle



DOJ will “credit” the amount TechnipFMC pays to Brazilian authorities against its criminal penalty of \$296.2 million, resulting in a total criminal penalty of \$296.2 million.

Violations

- Anti-bribery
- Books and Records
- Internal Accounting

Overview

- No monitor imposed due to extensive remediation and compliance enhancements

- TechnipFMC was formed in 2017 in a merger between Technip S.A. and FMC Technologies, Inc.
- Two bribery schemes:
 - (1) corrupt payments to Petrobras officials through consulting companies
 - (2) corrupt payments to Iraqi officials through Monaco-based intermediary
- Technip S.A. previously resolved a \$340 million Nigeria-related FCPA enforcement action in 2010

“Today’s resolution takes aim at the scourge of bribery, but does so in a fair and evenhanded way. . . . [It’s] an acknowledgement that the Department is fully committed to reaching fair and just resolutions with companies that fully cooperate and remediate.”

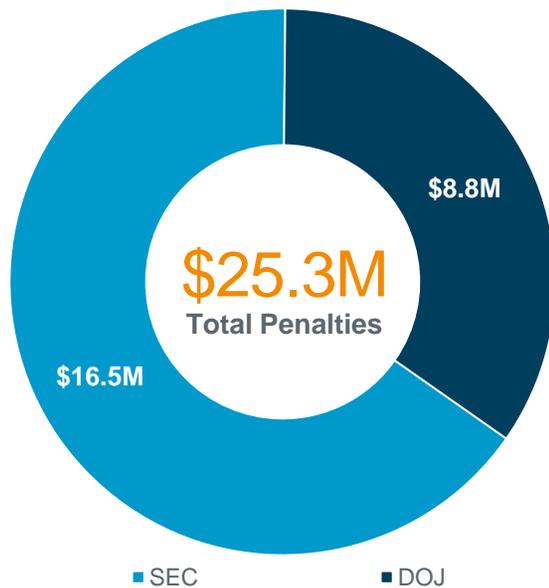
– Assistant Attorney General Benczkowski

DOJ Developments

NOTABLE ENFORCEMENT ACTIONS

Microsoft Corp. | July 22, 2019

DOJ and SEC Resolutions



The SEC Order alleges misconduct in Hungary, Saudi Arabia, Thailand, and Turkey; the DOJ Nonprosecution Agreement addresses misconduct at Microsoft's Hungarian subsidiary.

Violations

- Books and Records
- Internal Accounting

Overview

- DOJ and SEC recognized Microsoft's extensive remediation efforts, including terminating licensing partners and implementing enhanced compliance controls company-wide
- SEC sought disgorgement despite finding no violation of anti-bribery provisions



CEP Credit

Voluntary Disclosure Credit	None
Cooperation & Remediation Credit	Full
25% discount from bottom of Guidelines range	

SEC Developments

NOTABLE ENFORCEMENT ACTIONS

Cognizant | February 15, 2019



Violations

- Anti-bribery
- Books and Records
- Internal Accounting

“During the relevant period Cognizant also failed to devise and maintain a sufficient system of internal accounting controls at its corporate headquarters and at Cognizant India. This conduct took place in an environment in which Cognizant failed to adequately enforce its corporate anti-bribery and anticorruption policies.”

– Securities and Exchange Commission, Order

DOJ Declination



Reasons for declination: “(1) Cognizant’s voluntary self-disclosure . . . (2) Cognizant’s thorough and comprehensive investigation; (3) Cognizant’s full and proactive cooperation in this matter . . . (6) the existence and effectiveness of the company’s preexisting compliance program, as well as steps that the company has taken to enhance its compliance program and internal accounting controls.”

– Declination Letter

SEC Developments

NOTABLE ENFORCEMENT ACTIONS

Telefônica Brasil | May 9, 2019



Violations

- Books and Records
- Internal Accounting

Overview

- The SEC continues to enforce the FCPA against corporate hospitality expenditures

“Telefônica Brasil offered and provided tickets and hospitality to government officials who were directly involved with, or in a position to influence, legislative actions, regulatory approvals, and business dealings involving the company.”

– *Securities and Exchange Commission, Order*

“It recorded the purchases and hospitality as being for general advertising and publicity purposes when in fact those tickets and related hospitality were given to government officials. As such, Telefônica Brasil’s books and records did not, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the company’s assets.”

– *Securities and Exchange Commission, Order*

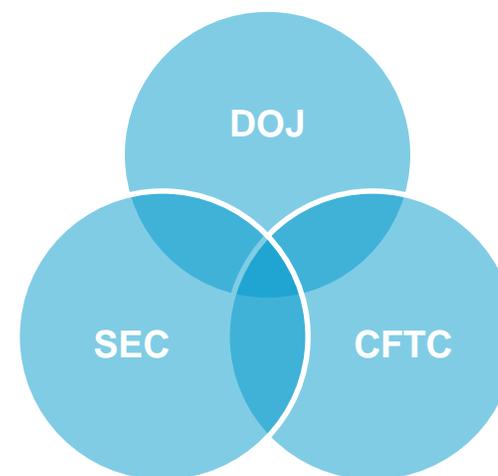
Other Developments

CFTC ENFORCEMENT INITIATIVE ANNOUNCEMENT | MARCH 2019



“Combatting misconduct that affects our financial markets has truly become a team effort, and that is particularly true with respect to foreign corrupt practices We at the CFTC will do our job as part of the team to identify this type of misconduct in our markets and hold wrongdoers accountable, working closely with our enforcement partners domestically and abroad.”

– *CFTC Chief of Enforcement, James McDonald, March 6, 2019*



Corruption impacting commodities may violate the FCPA as well as the CEA

- 7 U.S.C. Section 9(3) (for manipulation or attempted manipulation)
- 7 U.S.C. Section 9(1) and Regulation 180.1 (for use of a manipulative device)

Other Developments

CFTC ENFORCEMENT ADVISORY | MARCH 6, 2019



Advisory applicable only to companies that are not registered (and not required to be registered) with the CFTC

- Presumption against a civil monetary penalty available to companies that voluntarily and quickly disclose CEA violations involving “foreign corrupt practices” and cooperate in any subsequent investigation
- Presumption may not apply where there are aggravating circumstances, including:
 - Involvement of executive or senior level management
 - Pervasive misconduct within the company
 - History of engaging in similar misconduct

Areas to Watch

CASE LAW



In *United States v. Connolly*, Chief Judge McMahon in the Southern District of New York issued an opinion discussing cooperation with the government in internal investigations.

“[R]ather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to Deutsche Bank—the original target of that investigation—and then built its own “investigation” into specific employees . . . on a very firm foundation constructed for it by the Bank and its lawyers.”

– *United States v. Connolly*, 2019 WL 2120523, at *12 (S.D.N.Y. May 2, 2019)



In *United States v. Firtash*, the Northern District of Illinois disagreed with the Second Circuit’s analysis in *Hoskins* limiting the FCPA’s extraterritorial reach.

Key Takeaways

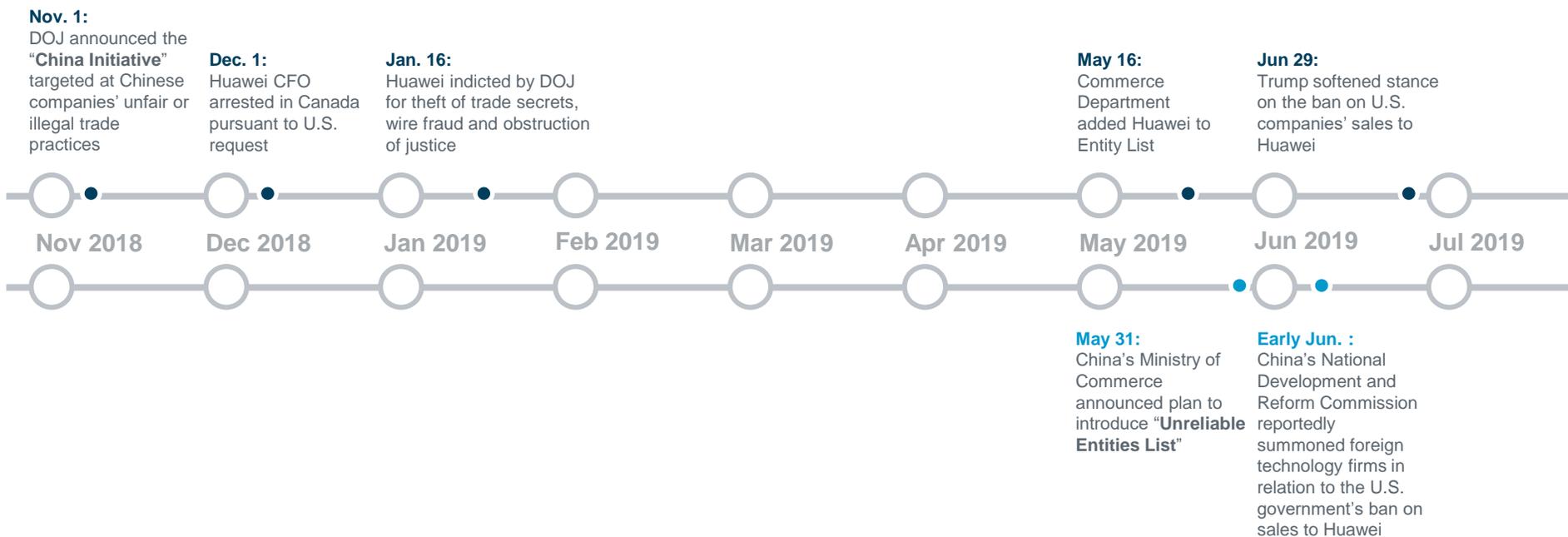
- Sets up circuit split over FCPA’s scope if Seventh Circuit affirms the lower court’s decision.
- Court held that the analysis of legislative history involved in the *Hoskins* decision was contrary to Seventh Circuit precedent, and therefore declined to adopt *Hoskins*’ analysis in examining FCPA’s application to foreign nationals operating outside the U.S.

Areas to Watch

U.S.-CHINA TRADE WAR AND DOJ CHINA INITIATIVE



United States



China

Areas to Watch

DPA AUTHORITY IN THE UK

DPA Authority in the UK



On July 4, 2019, UK court approved the Serious Fraud Office's DPA with Serco Geografix Ltd., a subsidiary of Serco Group PLC.

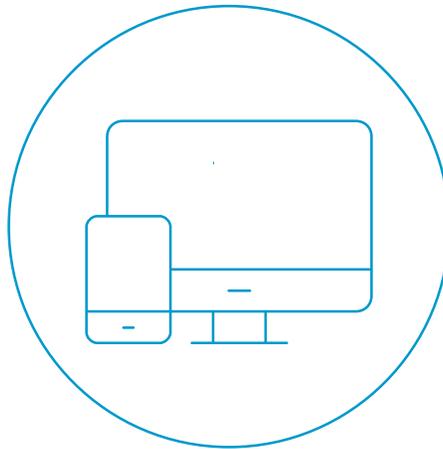
Key Takeaways:

- Fifth approved DPA in the UK.
 - First DPA in which a parent company agreed to substantial undertakings in relation to one of its subsidiaries.
-

Thank you!

For more information, please visit our FCPA webpage:

<https://www.davispolk.com/practices/litigation/anticorruption-and-fcpa/>



Questions



Appendix A



Presenters



Greg D. Andres

Greg is in Davis Polk's Litigation Department, concentrating in white collar criminal defense and representing clients in both civil and criminal trials. He has represented individuals, financial institutions and other entities in a wide range of regulatory and criminal investigations involving market manipulation, insider trading, securities, procurement and tax fraud, and money laundering. He also has extensive experience in anti-corruption matters, both in private practice and at the Department of Justice. Greg rejoined Davis Polk in 2019 after nearly two years as a member of Special Counsel Robert Mueller's team investigating Russian government efforts to influence the 2016 presidential election and related matters. Greg served as the lead trial lawyer in the successful prosecution of Paul Manafort in the U.S. District Court for the Eastern District of Virginia.



Angela T. Burgess

Angela is in Davis Polk's Litigation Department and co-chair of the firm's Global Enforcement and Investigations Group. She has represented leading clients in some of the most high-profile and complex white collar and regulatory matters in recent years. She is based in New York and her global practice focuses on representing companies as well as individuals in matters involving allegations of insider trading, violations of anti-bribery laws, money laundering, antitrust, fraud, and other financial crimes. Angela also routinely advises boards of directors, audit committees, and companies on corporate governance and compliance matters, including the design of strategies, policies and procedures to mitigate risk.



James W. Haldin

James is in Davis Polk's Litigation Department and a member of the firm's Global Enforcement and Investigations Group. He is based in New York and represents financial institutions and other multinational corporations in criminal, regulatory and internal investigations with a particular focus on Foreign Corrupt Practices Act (FCPA) matters. He has conducted FCPA investigations in Bangladesh, Brazil, China, Hong Kong, India, Mexico, Russia and the United Kingdom for clients in a range of industries, including banking, life sciences and technology.

Presenters



Patrick S. Sinclair

Patrick is in Davis Polk's Litigation Department and is a member of the firm's Global Enforcement and Investigations Group. Patrick has more than a decade of experience representing U.S.-based and international corporations, audit committees, banks, individuals, and the government in corporate criminal investigations. He is based in Hong Kong and regularly leads internal investigations for multinational corporations in Asia, and has represented a number of individuals in Asia who were the subject of inquiries from U.S. Attorneys' Offices, the SEC, CFTC, and other U.S. regulators. From 2007 to 2014, Patrick was a prosecutor in the U.S. Attorney's Office for the Eastern District of New York. He was appointed Deputy Chief of the General Crimes Section in 2013.



Linda Chatman Thomsen

Ms. Thomsen, who was the first woman to serve as the Director of the Division of Enforcement at the Securities and Exchange Commission, is in Davis Polk's Litigation Department and practices in the Washington DC office. Her practice concentrates in matters related to the enforcement of the federal securities laws. She has represented clients in SEC enforcement investigations and inquiries, in enforcement matters before other agencies, including the Department of Justice (various U.S. Attorneys Offices) and the Commodity Futures Trading Commission, in investigations and inquiries from self-regulatory agencies, including FINRA, and in internal investigations. Ms. Thomsen returned to Davis Polk in 2009 after 14 years of public service at the SEC. While there she held a variety of positions and ultimately served as the Director of Enforcement from 2005 through February 2009. During her tenure as the Director of Enforcement, she led the Enron investigation, the auction rate securities settlements, the stock options backdating cases and the expansion of the enforcement of the Foreign Corrupt Practices Act.