Mid-Year 2020 Review: Anti-Corruption Trends and Other Corporate Enforcement Issues

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July 30, 2020

Davis Polk

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- China

Presented by

Greg D. Andres

Angela T. Burgess

Robert A. Cohen

Tatiana R. Martins

Patrick S. Sinclair

Policy Updates: COVID-19

ENFORCEMENT DURING COVID-19

- DOJ and the SEC both remain committed to FCPA investigations, and are advancing their work remotely.
- Keeping in communication with DOJ and the SEC is more important than ever for companies conducting internal investigations.

"If we're making requests to a company—if they cannot cooperate on something, we want to understand why.

We will have those conversations and we're not looking to be unreasonable during this time."

- Dan Kahn, Senior Deputy Chief, Criminal Division, Fraud Section, DOJ, May 19, 2020

2020 YTD
ENFORCEMENTS

Corporate Enforcement Actions

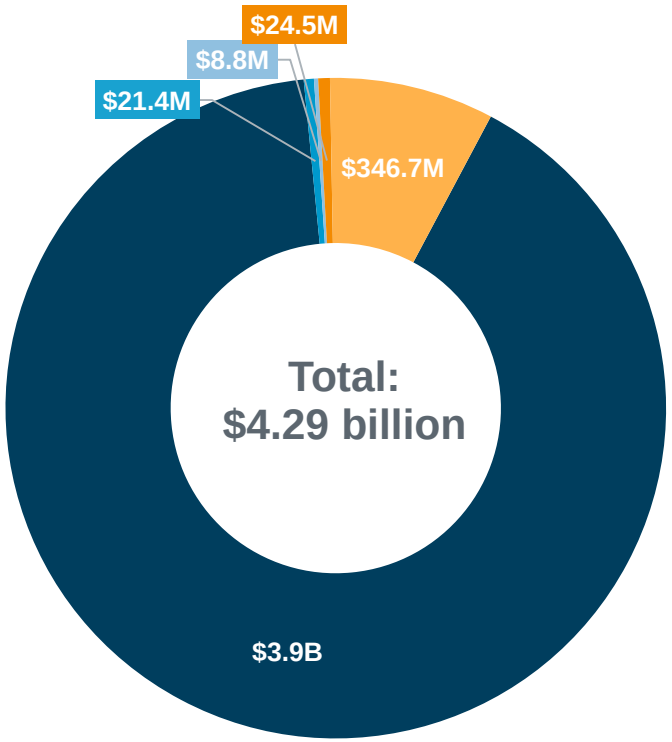
1. **Airbus:** $3.9B to DOJ, French PNF, UK SFO
2. **Cardinal Health:** $8.8M to SEC
3. **Eni S.p.A.:** $24.5M to SEC
4. **Novartis AG (and two subsidiaries):** $346.7M to SEC and DOJ
5. **Alexion:** $21.4M to SEC

Individual Enforcement Actions

- In the first half of 2020, the DOJ and SEC brought 15 FCPA and FCPA-related individual enforcement actions
  - Last year, the DOJ brought FCPA-related charges against 34 individuals, more than any other year
- Part of DOJ's ongoing commitment to holding individual wrongdoers accountable across the board, according to Dec. 4 2019 speech by Assistant Attorney General Brian A. Benczkowski

2020 Facts and Figures

CORPORATE ENFORCEMENT ACTIONS



2020 Facts and Figures

CORPORATE ENFORCEMENT ACTIONS

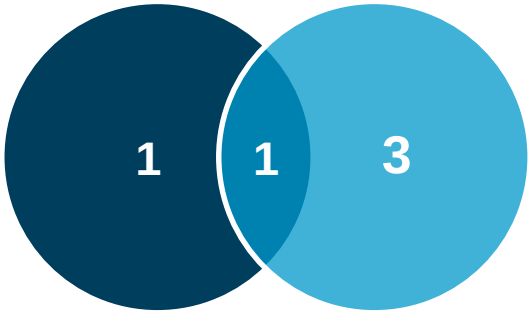
DOJ

SEC

NOVARTIS

CardinalHealth™

AIRBUS

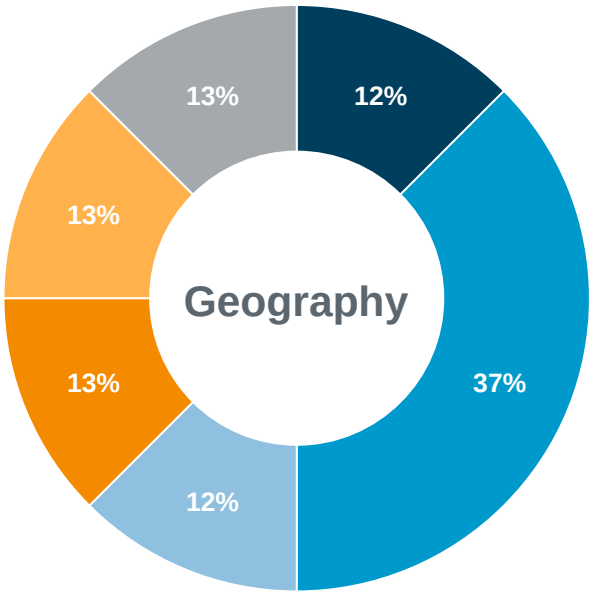


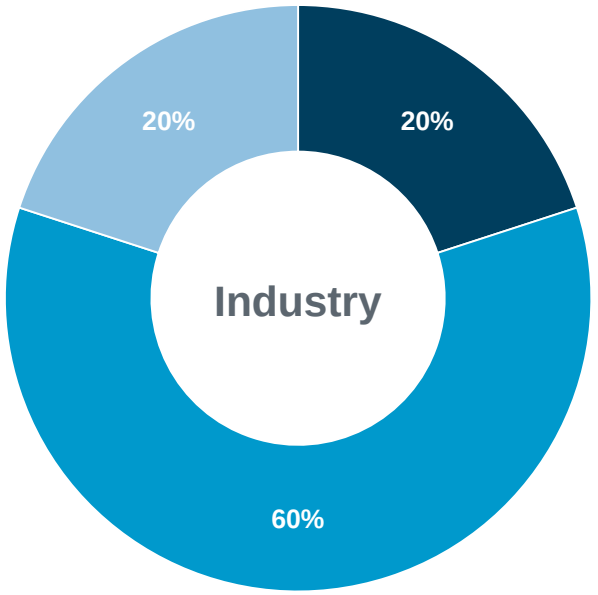
Eni

ALEXION®

2019 Facts and Figures

CORPORATE ENFORCEMENT ACTIONS





2020 Enforcements

NOTABLE DOJ/INTERNATIONAL ENFORCEMENT ACTION

Airbus | January 31, 2020

Violations

- Anti-Bribery
- Conspiracy
- Arms Export Control Act (ITAR Regulations)

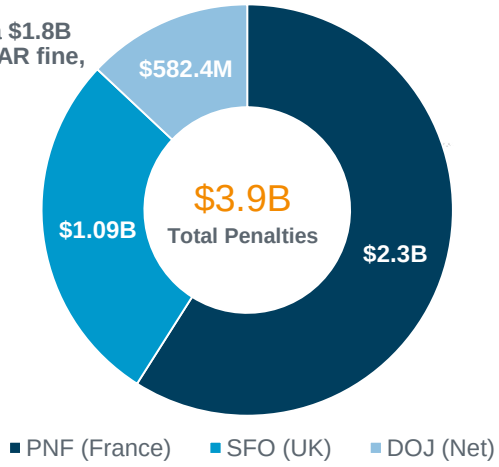
Overview

- In 2013 and 2014, Airbus worked with consultants to pay millions of dollars in bribes to officials with China's government-run airlines to boost the size of aircraft orders and obtain a more favorable regulatory environment.
- Airbus committed numerous disclosure and reporting violations for payments associated with sales of its military airplanes and helicopters in Europe, Asia, and Africa.
- This is the largest FCPA resolution to date.

DOJ: $294M FCPA fine ($2.09B with a $1.8B credit from French fine) and $232M ITAR fine, together $582.4M

PNF (France): $2.3B fine

SFO (UK): $1.09B fine



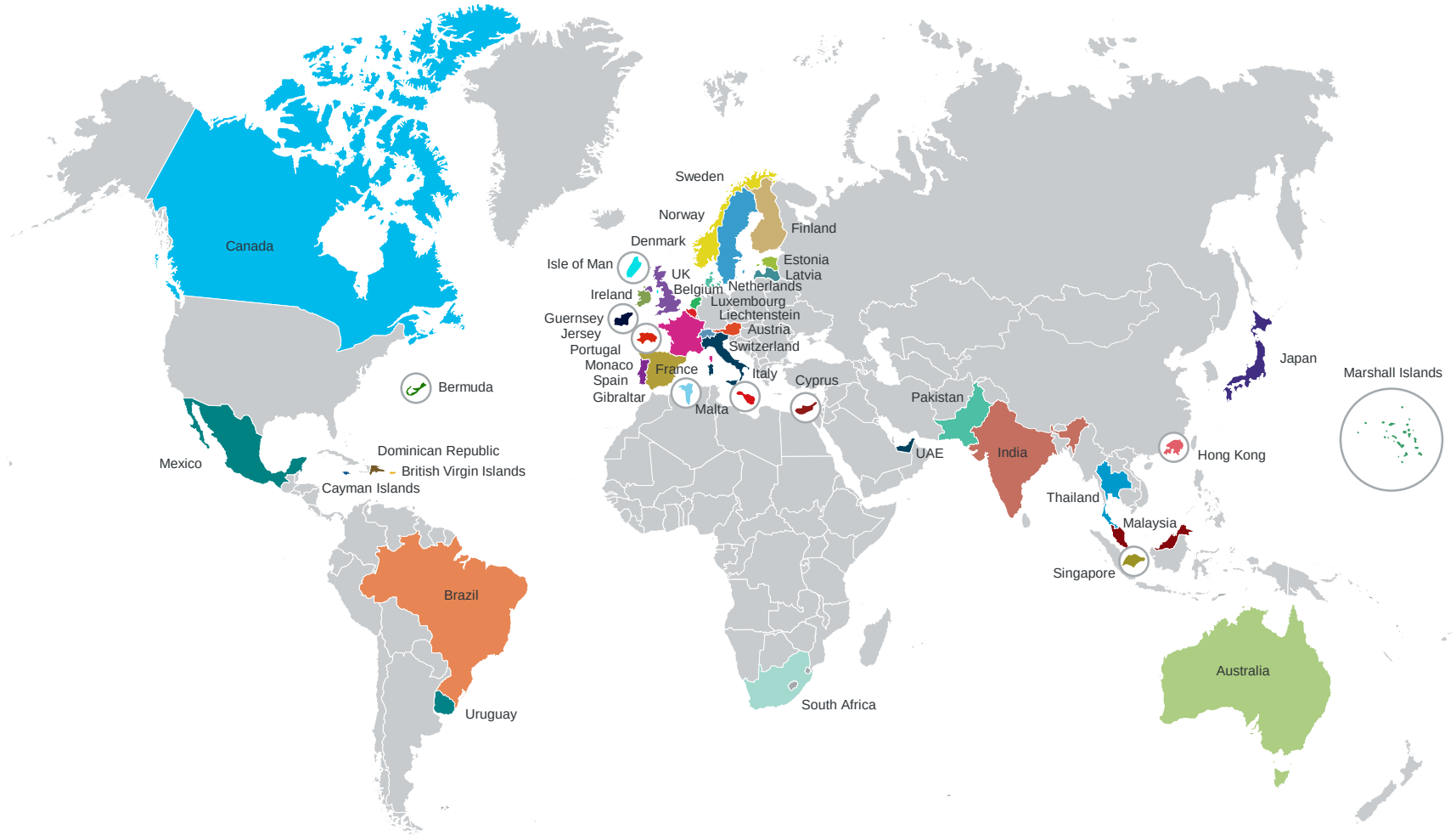
"For the FCPA-related conduct, the department reached this resolution with Airbus based on a number of factors, including the Company's cooperation and remediation. With respect to the AECA and ITAR-related conduct, the department reached this resolution with Airbus based on the voluntary and timely nature of its disclosure to the department as well as the Company's cooperation and remediation."

– Department of Justice, Press Release

Cooperation with Foreign Regulators

CROSS-BORDER COOPERATION (2015 - PRESENT)

Increasing enforcement of anti-corruption laws by foreign regulators and coordination with U.S. authorities



2020 YTD Enforcements

NOTABLE SEC ENFORCEMENT ACTIONS

Cardinal Health, Inc. | February 28, 2020

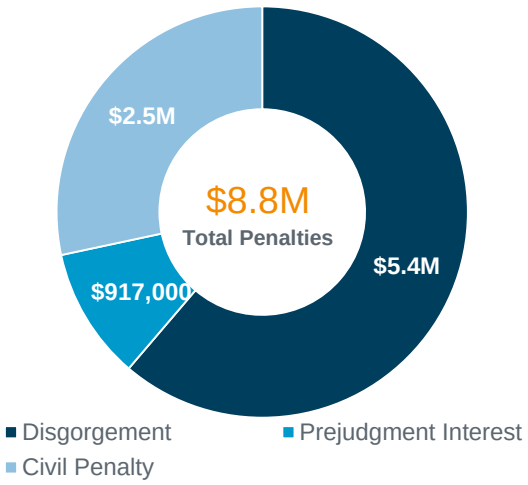
Violations

- Books and Records
- Internal Controls

Overview

- The SEC found that Cardinal Health's Chinese subsidiary operated marketing accounts that certain employees used to pay bribes.
- Despite several red flags, Cardinal Health and the Chinese subsidiary failed to investigate or detect the misconduct for several years.
- Eventually, Cardinal Health launched an internal investigation that uncovered the misconduct, and then self-disclosed, cooperated, and remediated.

SEC Resolution



"From at least March 2013 through December 2016, Cardinal failed to apply sufficient internal accounting controls to the marketing employees and the marketing accounts."

– Securities and Exchange Commission, Order

"Due to Cardinal's insufficient internal accounting controls, the marketing employees were able to easily disguise th[e] payments by channeling funds through complicit third-party vendors and by characterizing transactions with healthcare providers as payments to printing companies for "production fees," and they were also reimbursed for high-value gifts based on falsified or incomplete documentation."

– Securities and Exchange Commission, Order

2020 YTD Enforcements

NOTABLE SEC ENFORCEMENT ACTIONS

Eni S.p.A. | April 17, 2020

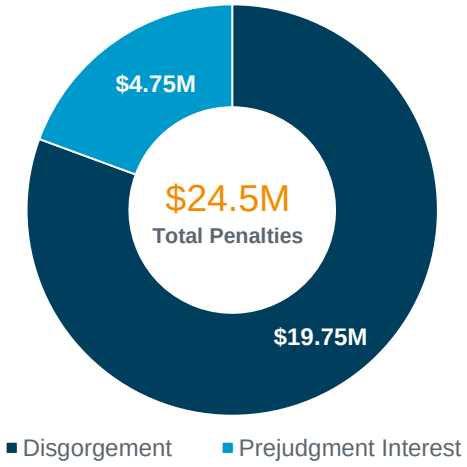
Violations

- Books and Records
- Internal Controls

Overview

- According to the SEC, Eni's subsidiary Saipem entered into four sham contracts with an intermediary to assist in obtaining contracts awarded by Algeria's state-owned oil company.
- Saipem paid approximately $223 million to the intermediary and was awarded at least seven contracts. The intermediary directed a portion of that money to Algerian government officials.
- Saipem conducted little or no due diligence on the intermediary and received no legitimate services from it.

SEC Resolution



"Saipem conducted little or no due diligence before entering into the contracts, received no legitimate services from the intermediary, and falsely characterized its payments to the intermediary as lawful "brokerage fees" in its books and records, which were consolidated into Eni's during the relevant period."

– Securities and Exchange Commission, Order

"In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Eni and cooperation afforded the Commission staff, including compiling financial data and analysis relating to the transactions at issue, making substantive presentations on key topics, and providing translations of key documents and foreign proceedings."

– Securities and Exchange Commission, Order

2020 YTD Enforcements

NOTABLE ENFORCEMENT ACTIONS

Novartis AG | June 25, 2020

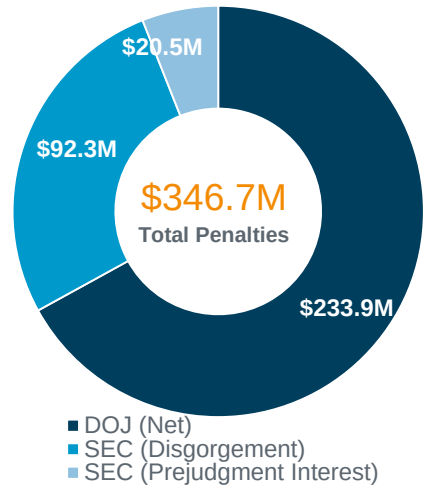
Violations

- Anti-Bribery
- Books and Records
- Internal Controls

Overview

- Novartis's Greek and Singapore subsidiaries engaged in a variety of schemes to make corrupt payments to healthcare professionals
- Relevant conduct took place in Greece, Vietnam, South Korea, and China
- Novartis previously settled an FCPA case with the SEC for $25 million in 2016

DOJ/SEC Resolution



"Novartis AG's subsidiaries profited from bribes that induced medical professionals, hospitals, and clinics to prescribe Novartis-branded pharmaceuticals and use [their] surgical products, and they falsified their books and records to conceal those bribes."

– Assistant Attorney General Brian A. Benczkowski, DOJ, Criminal Division

"In Korea, Vietnam, and Greece, Novartis . . . local subsidiaries and affiliates engaged in schemes to make improper payments or to provide benefits to public and private healthcare providers ("HCPs") in exchange for prescribing or using Novartis [] products. These schemes varied in method and amount but were known among certain managers of the local subsidiaries or affiliates."

– Securities and Exchange Commission, Order

Case Law Updates: *Liu v. SEC*

On June 22, 2020, the Supreme Court decided *Liu v. Securities and Exchange Commission*, the latest decision in a long-running challenge to the SEC's authority to obtain disgorgement in federal court actions.

Key Takeaways

- Relying on the Supreme Court's 2017 decision in *Kokesh v. Securities and Exchange Commission*, the petitioners argued that disgorgement as used by the SEC is a punitive tool rather than a remedial one, which the SEC cannot obtain from a court absent explicit statutory authorization.
- In an 8-1 opinion, the Supreme Court upheld the SEC's authority to seek disgorgement in district court actions as a form of equitable relief, despite its prior holding in *Kokesh*. However, the decision came with limitations, including 3 equitable principles, that raise questions for future litigation.
  - Equitable relief usually requires that funds be returned to the victims, but the Court did not address the scenario when it is impractical to distribute funds.
  - The Court expressed doubt as to whether disgorgement may be sought against multiple individuals via a joint and several liability theory.
  - The court notes that disgorgement is limited to the "net" profits and legitimate business expenses generally must be deducted from a disgorgement award, however expenses need not be deducted in cases in which they are "merely wrongful gains 'under another name.'"
- The SEC often does not attempt to return proceeds to investors because of the costs associated with that process, which may cause the SEC to attempt a distribution to justify a disgorgement award. Or, the SEC might argue that excessive cost is equivalent to impracticality, and that disgorgement in these cases is consistent with the Court's decision even without returning funds to investors
- The SEC will need to deduct legitimate business expenses and delineate the precise amounts received by each defendant. These factors are likely to complicate the SEC's disgorgement calculations and may be subject to further litigation.

2020 YTD Enforcements

NOTABLE ENFORCEMENT ACTIONS

Alexion | July 2, 2020

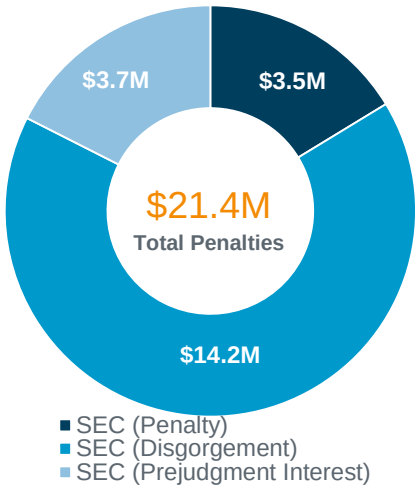
Violations

- Books and Records
- Internal Controls

Overview

- Alexion's subsidiaries in Turkey and Russia made payments to secure favorable treatment for Alexion's primary drug, Soliris.
- Alexion's inadequate internal accounting controls resulted in the failure of Alexion's subsidiaries in Brazil and Colombia to maintain accurate books and records regarding third-party payments

SEC Resolution



"Alexion's internal accounting controls failed to detect and prevent payments to foreign government officials by its subsidiaries. Companies in frequent contact with foreign officials need to ensure that their internal controls appropriately address such risks."

– Associate Director Melissa Hodgman, SEC Division of Enforcement.

"In connection with these improper payments, false books and records were maintained by Alexion's subsidiaries in Turkey and Russia. Alexion had insufficient internal accounting controls to detect and prevent these payments and to provide reasonable assurances that these transactions were recorded accurately in the books and records of these subsidiaries, which were consolidated into Alexion's books and records."

– Securities and Exchange Commission, Order

Policy Updates

OVERVIEW

- DOJ updated its Evaluation of Corporate Compliance Program guidance.

- DOJ and SEC published *Second Edition* of the FCPA Resource Guide.
  - On July 3, 2020, the DOJ's Criminal Division and the SEC's Enforcement Division published the *Second Edition* of its FCPA Resource Guide. This is the first update since 2015 and is comprehensive.
  - The *Second Edition* of the Guide includes, for the first time, the DOJ's FCPA Corporate Enforcement Policy, and contains other helpful updates, including case law developments and other clarifications of the law.
  - The Guide is "non-binding, informal, and summary in nature, and the information contained [t]herein does not constitute rules or regulations."
  - The *Second Edition* retains the Guide's original structure by updating eight substantive chapters: the FCPA's substantive provisions (chapters 2 and 3); related laws (chapter 4); the guiding principles of enforcement by DOJ and SEC (chapter 5); penalties, sanctions, and remedies (chapter 6); resolutions (chapter 7); whistleblowers (chapter 8); and the DOJ Opinion Procedure (chapter 9).
  - The Guide remains an important resource for FCPA practitioners and their clients.

Policy Updates

EVALUATION OF CORPORATE COMPLIANCE PROGRAMS AND SECOND EDITION OF FCPA RESOURCE GUIDE | JUNE-JULY 2020

Revised One of Central Questions Prosecutors Should Ask in Evaluation	"'Is the program being applied earnestly and in good faith?' In other words, is the program *adequately resourced and empowered to function* effectively?"
Added Question to Consider in Gauging Programs' Autonomy and Resources	"Data Resources and Access – Do compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls, and transactions? Do any impediments exist that limit access to relevant sources of data and, if so, what is the company doing to address the impediments?"
Recognized That Pre-Acquisition Due Diligence May Not Always Be Possible	Explicitly recognized that pre-acquisition due diligence may not always be possible, but when that's the case, DOJ expects companies to be able to explain why it was not possible. Also, emphasizes that companies will be expected to justify their approach if they conduct less than typical pre-acquisition due diligence.
Explained the DOJ's Considerations in Case-by-Case Analysis	"Accordingly, we make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program."
Added Credit for "Lessons Learned"	"Lessons Learned – Does the company have a process for tracking and incorporating into its periodic risk assessment lessons learned either from the company's own prior issues or from those of other companies operating in the same industry and/or geographical region?"

Policy Updates

EVALUATION OF CORPORATE COMPLIANCE PROGRAMS AND SECOND EDITION OF FCPA RESOURCE GUIDE | JUNE-JULY 2020

DOJ and SEC Policies Applicable to the FCPA	Now incorporates DOJ's FCPA Corporate Enforcement Policy ("CEP"), located in the "Guiding Principles of Enforcement" section of the Guide. It also includes highlights from the following policies: Selection of Monitors in Criminal Division Matters; Coordination of Corporate Resolution Penalties (also known as the Anti-Piling-On Policy); and the DOJ's Evaluation of Corporate Compliance Programs.
Design of a Company's Internal Accounting Control	"Although a company's internal accounting controls are not synonymous with a company's compliance program, an effective compliance program contains a number of components that may overlap with a critical component of an issuer's internal accounting controls"
Impact of Recent Case Law	Acknowledges the limitations the Second Circuit's ruling in *United States v. Hoskins* placed on "agent" liability under the FCPA, but makes clear that Hoskins does not apply to the FCPA accounting provisions. Discusses the definition of "instrumentality" in light of the Eleventh Circuit's decision in *United States v. Esquenazi*. Incorporates recent disgorgement case law following the Supreme Court's decisions in *Kokesh v. Securities and Exchange Commission* and *Liu v. Securities and Exchange Commission*.

Case Law Updates: *United States v. Hoskins*

On February 6, 2020, Judge Janet Bond Arterton of the District of Connecticut acquitted Lawrence Hoskins of FCPA charges, even though the jury convicted him of conspiring to violate the FCPA. The Court decided that the government provided insufficient evidence that Hoskins had been acting as an "agent" of Alstom's U.S. subsidiary.

- Previously in *United States v. Hoskins*, the Second Circuit held that Hoskins, a British national with minimal ties to the U.S. and an employee of a U.K. branch of Alstom, could not be held liable as a co-conspirator under the FCPA unless he fell within one of the FCPA's three enumerated categories of persons: (1) foreign or domestic issuers of U.S.-registered securities and their officers, employees, or agents; (2) domestic concerns and their officers, employees, or agents; and (3) any person who acts in furtherance of a corrupt payment while within the United States.
- After the Second Circuit holding, the government argued that Hoskins was acting as an "agent" of Alstom's U.S. subsidiary at the time of the alleged corrupt activity, and thus he fell within the second category. The jury agreed, and found Hoskins guilty of FCPA as well as money-laundering offenses.
- The Court disagreed and found that there was insufficient evidence to convict Hoskins under this theory, because although he worked and cooperated with the U.S. company in the scheme, there was no evidence that the U.S. company controlled his behavior, as would be required to prove an agency relationship. The Court upheld Hoskins's money laundering convictions.
- The Court's ruling was fact-intensive, but nonetheless shows the potential limiting effects of the earlier Second Circuit holding. The government may now find it difficult to prosecute individuals such as Hoskins who have minimal ties to the U.S., at least within the Second Circuit (New York, Connecticut, and Vermont).
- DOJ appealed the District Court's order, so the Second Circuit will have another chance to weigh in.

Policy Updates

EVALUATION OF CORPORATE COMPLIANCE PROGRAMS AND SECOND EDITION OF FCPA RESOURCE GUIDE | JUNE-JULY 2020

Statute of Limitations for FCPA Violations	"[F]or substantive violations of the FCPA anti-bribery provisions, the five-year limitations period set forth in 18 U.S.C. § 3282 applies. For violations of the FCPA accounting provisions, . . . under 18 U.S.C. § 3301, there is a limitations period of six years."
FCPA Mental State Requirement	Now reflects that the mens rea requirement is knowing and willful for companies and individuals to face criminal liability for failure to comply with the FCPA's books and records or internal controls provisions.
Examples Addressing Recurring FCPA Issues	Adds examples that span a range of fact patterns, from travel and entertainment payments to charitable donations to hiring foreign officials' relatives. Includes new examples of FCPA enforcement actions involving third parties, including where third-party sales agents used commission payments to pay bribes.

Case Law Updates: *Coburn and Schwartz*

On February 18, 2020, in *United States v. Coburn*, Judge Kevin McNulty for the U.S. District Court for the District of New Jersey held that three separate emails sent regarding a bribery scheme gave rise to *three separate* counts of violating the FCPA's anti-bribery provisions.

Key Takeaways

- For the first time, a federal court answered what the "unit of prosecution" for substantive provisions under the FCPA is: each use of "interstate commerce facilities."
- The court explicitly rejected a bribe or bribery scheme as the "unit of prosecution" for the FCPA's substantive provisions.

China

RECENT DEVELOPMENTS AND TRENDS

New hurdles to investigations of China-based corporates and individuals

- **2020 Revised Chinese Securities Law** (entered into force on March 1, 2020) – foreign securities regulators
  - *Overseas securities regulatory agencies shall not directly conduct investigation and evidence collection activities within the territory of the People's Republic of China. Without the approval of the securities regulatory authority of the State Council and the relevant competent department of the State Council, no entity or individual may provide documents and materials related to securities business activities to overseas authorities.*
  - However, inter-government channel to facilitate the provision of "documents and materials" by targets of SEC investigation can be and has been established in some cases between the SEC and China Securities Regulatory Commission

- **International Criminal Judicial Assistance Law** (enacted in October 2018) – foreign criminal proceedings
  - Another blocking statute that requires companies and individuals in China to seek approval before providing evidentiary materials and assistance to foreign enforcers

- **Draft statute on data security** (published in early July for public consultation; expected to be enacted as early as end of 2020) – all foreign law enforcement agencies
  - Would require that individuals or entities seek approval from Chinese authorities before sharing China-based data with *any* foreign law enforcement agency
  - A catch-all provision for all foreign regulatory enforcement actions

Thank you!

For more information, please visit our FCPA webpage:
https://www.davispolk.com/practices/litigation/anticorruption-and-fcpa/

Appendix A

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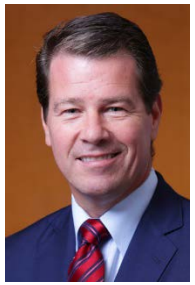
Presenters



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 is 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.

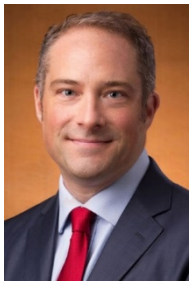
Robert A. Cohen

Rob joined Davis Polk's Litigation Department in 2019. He represents companies, boards and individuals in regulatory matters and internal investigations. He brings 15 years of experience in the SEC's Division of Enforcement, where he led significant enforcement actions involving securities fraud, insider trading, market manipulation and abuse, financial fraud, cybersecurity and cryptocurrency. Rob was a member of the Enforcement Division's senior leadership, and specialized in cutting-edge and highly complex investigations. He was Co-Chief of the Market Abuse Unit, and later the first-ever Chief of the Cyber Unit. Rob is based in Davis Polk's Washington, DC office.

Presenters

Tatiana R. Martins

Tatiana is a partner in the firm's Litigation Department, with extensive experience representing clients in white-collar criminal defense matters, including FCPA-related investigations. Prior to rejoining the firm in 2018, she was an Assistant U.S. Attorney in the Southern District of New York, where she most recently served as Chief of the Public Corruption Unit. As Chief of Public Corruption, Tatiana led a team of over 20 prosecutors and other professionals, overseeing several major investigations and prosecutions including those against Michael D. Cohen, NCAA basketball coaches, and numerous prominent public officials. She is also an experienced trial lawyer, having personally prosecuted multiple high-profile cases.



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.

2020 Mid-Year DOJ and SEC FCPA Resolution Tracker*

July 2020

Davis Polk

*Covering corporate FCPA resolutions from 01/01/2020 through 07/15/2020.

2020 Mid-Year DOJ and SEC FCPA Resolution Tracker

	Target	Enforcer	Resolution*	Alleged FCPA Violation	Industry	Geography	Allegations
01/28/2020	Airbus SE	DOJ	$2.09B (DPA)		Aerospace	China	Paid bribes to government officials through third-party consultants to boost the size of aircraft orders and to obtain a more favorable regulatory environment.
02/28/2020	Cardinal Health, Inc.	SEC	$8.8M (cease & desist order)		Healthcare	China	Regional subsidiary used marketing accounts to pay bribes. Despite apparent red flags, both the parent and subsidiary failed to investigate or detect the misconduct for several years.
04/17/2020	Eni S.p.A.	SEC	$24.5M (cease & desist order)		Oil & Gas	Algeria	Subsidiary entered into sham contracts with intermediary to assist in obtaining contracts from state-owned oil company. The intermediary directed a portion of that money to government officials.
06/25/2020	Novartis AG	DOJ & SEC	DOJ: $233.9M (DPA) SEC: $112.8M (cease & desist order)		Healthcare	China, Greece, South Korea, Vietnam	Local subsidiaries and affiliates engaged in a variety of schemes to make corrupt payments to public and private healthcare providers.
07/02/2020	Alexion Pharmaceuticals, Inc.	SEC	$21.4M (cease & desist order)		Healthcare	Turkey, Russia, Brazil, Colombia	Subsidiaries made corrupt payments to secure favorable regulatory treatment for Alexion's primary drug. Inadequate controls resulted in subsidiaries' failure to maintain accurate books and records regarding third-party payments.

*Resolution figures do not reflect amounts credited to other state and federal agencies or international regulators.

 Anti-bribery

 Books and Records

 Internal Controls