

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

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Presented by



Greg D. Andres



Angela T. Burgess



Neil H. MacBride



Patrick S. Sinclair



**Linda Chatman
Thomsen**

2019 Overview

ENFORCEMENTS



Corporate Enforcement Actions

1. **Ericsson:** \$1B to DOJ/SEC; DPA; *Monitor Imposed*
2. **MTS:** \$850M to DOJ/SEC; Plea/DPA; *Monitor Imposed*
3. **TechnipFMC:** \$301.3M to DOJ/SEC & Brazil; DPA
4. **Walmart:** \$282.7M to DOJ/SEC; NPA; *Monitor Imposed*
5. **Fresenius:** \$231.7M to DOJ/SEC; NPA; *Monitor Imposed*
6. **Samsung Heavy Industries:** \$75.5M to DOJ; DPA
7. **Microsoft:** \$25.3M to DOJ/SEC; NPA
8. **Cognizant:** \$25.2M to SEC; DOJ Declination
9. **Deutsche Bank:** \$16.2M to SEC
10. **Juniper Networks:** \$11.7M to SEC
11. **Quad/Graphics:** \$9.9M to SEC; DOJ Declination
12. **Barclays:** \$6.3M to SEC
13. **Telefonica Brasil:** \$4.1M to SEC
14. **Westport Fuel Systems:** \$4.1M to SEC

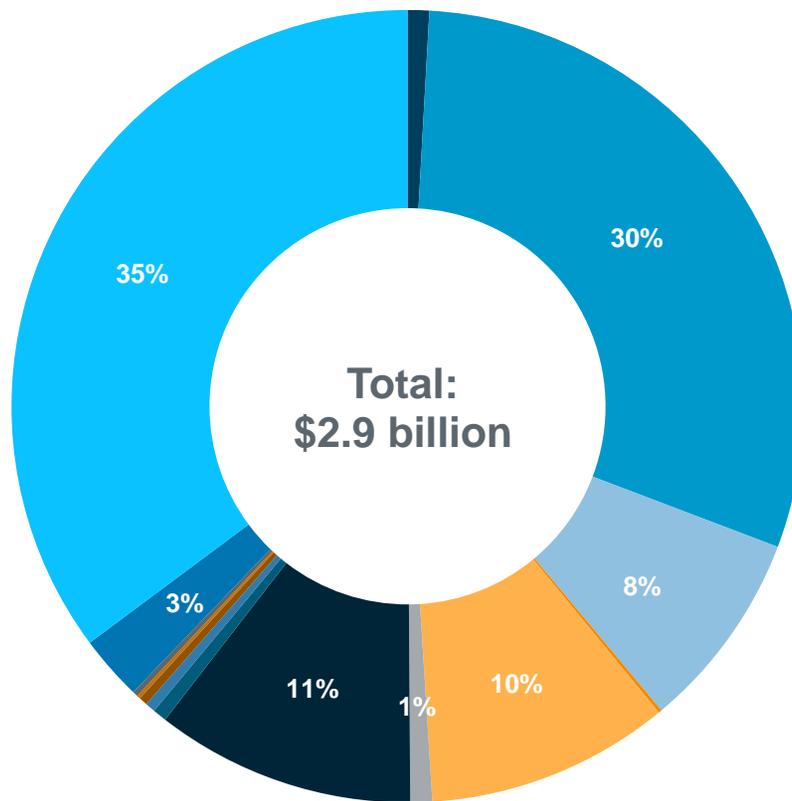


Individual Enforcement Actions

- In 2019, the DOJ brought FCPA-related charges against 34 individuals
 - More than any other year
 - 30 individuals pleaded guilty (also more than any other year)
- Builds on 2017 and 2018, which were previously the two biggest years for those categories of cases
- Part of DOJ's ongoing commitment to holding individual wrongdoers accountable across the board, according to Dec. 4 speech by Assistant Attorney General Brian A. Benczkowski

2019 Facts and Figures

CORPORATE ENFORCEMENT ACTIONS



- Cognizant Technology Solutions (\$25.2 million)
- Telefonica Brasil (\$4.1 million)
- TechnipFMC (\$301.3 million)
- Quad/Graphics (\$9.9 million)
- Samsung Heavy Industries (\$75.5 million)
- Mobile Telesystems (MTS) (\$850 million)
- Walmart (\$282.7 million)
- Deutsche Bank (\$16.2 million)
- Westport Fuel Systems (\$4.1 million)
- Ericsson (\$1 billion)
- Fresenius Medical Care (\$231.7 million)
- Microsoft (\$25.3 million)
- Juniper Networks (\$11.7 million)
- Barclays (\$6.3 million)

2019 Facts and Figures

CORPORATE ENFORCEMENT ACTIONS



Cognizant

Telefonica

Westport
Fuel Systems

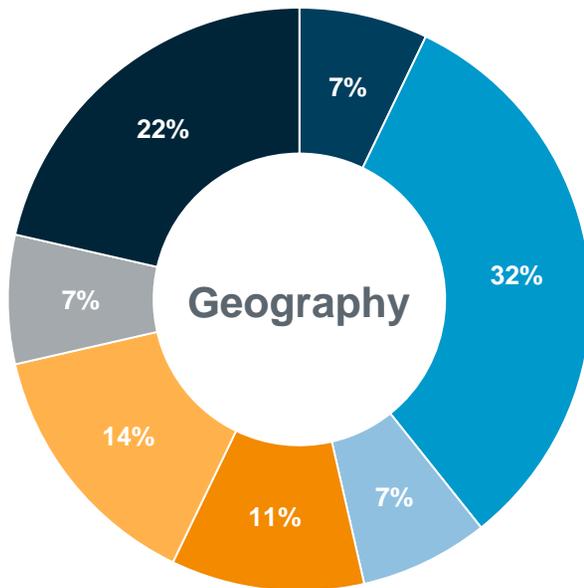


Deutsche Bank

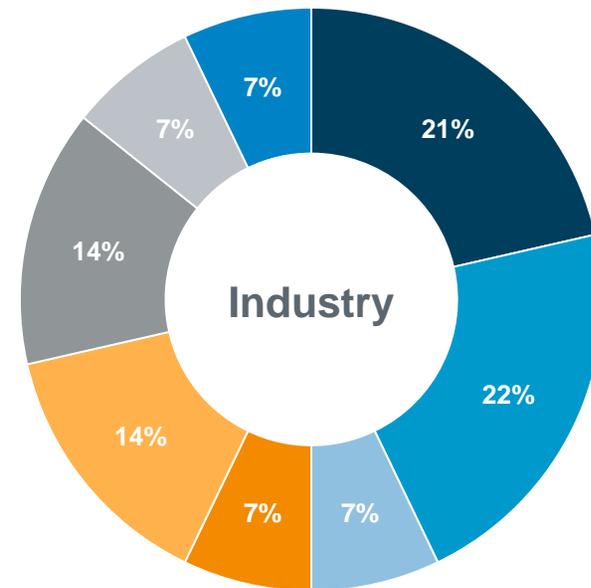
Quad

2019 Facts and Figures

CORPORATE ENFORCEMENT ACTIONS



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



- Information Technology
- Telecommunications
- Healthcare
- Retail
- Oil and Gas
- Financial Services
- Marketing
- Industrial

2019 Enforcements

NOTABLE DOJ/SEC ENFORCEMENT ACTION

Ericsson | December 6, 2019

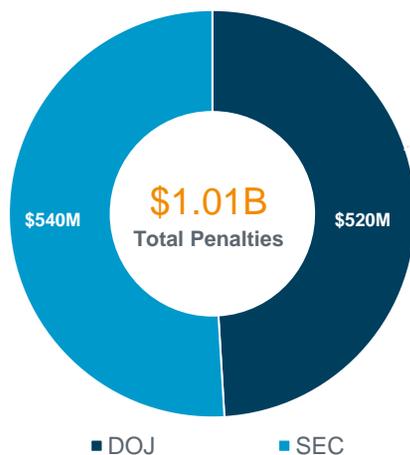
Violations

- Anti-Bribery
- Conspiracy
- Books and Records
- Internal Accounting

Overview

- Between 2011 early 2017, Ericsson subsidiaries paid approximately \$62 million in bribes to government officials through third parties in Djibouti, Saudi Arabia, and China to obtain or retain business.
- Ericsson realized approximately \$427 million in profits from business obtained through the use of these illicit payments.
- In Vietnam and Indonesia, Ericsson subsidiaries used consultants to create slush funds of approximately \$56 million.”

SEC: Civil Complaint
DOJ: DPA, Subsidiary Guilty Plea
3-Year Monitor Imposed



“The department reached this resolution with Ericsson based on a number of factors, including the Company’s failure to voluntarily disclose the conduct to the department and the nature and seriousness of the offense, which included FCPA violations in five countries and the involvement of high-level executives at the Company. Ericsson received partial credit for its cooperation with the department’s investigation.”

– Department of Justice, Press Release

2019 Enforcements

NOTABLE DOJ ENFORCEMENT ACTION

Samsung Heavy Industries Co. Ltd. | November 22, 2019

Violations

- Anti-Bribery
- Conspiracy

Overview

- Admitted to paying \$20 million in commissions between 2007 and 2013 to a Brazilian intermediary, knowing that the money would be paid as bribes to officials at Petrobras.
- Payments to secure ship charter between Petrobras and a Houston-based drilling company with whom SHI had option contract.

“Samsung Heavy Industries has agreed to continue to cooperate with the Department in any ongoing investigations and prosecutions relating to the conduct, including of individuals; to enhance its compliance program; and to report to the Department on the implementation of its enhanced compliance program.”

– Department of Justice, Press Release

“Samsung Heavy Industries received credit for its cooperation with the Department’s investigation and for taking remedial measures. For example, the company made significant enhancements to its compliance program, including hiring additional compliance staff, implementing enhanced anti-corruption policies and heightened due diligence controls over third party vendors, instituting mandatory anti-corruption training and improving whistleblower policies and procedures. The company did not receive full credit for its cooperation, however, due to its failure to meet reasonable deadlines imposed by the department and delays it caused in reaching a resolution. Accordingly, the total criminal penalty reflects a 20 percent reduction off the bottom of the applicable United States Sentencing Guidelines fine range..”

– Department of Justice, Press Release

DOJ Resolution



2019 Enforcements

NOTABLE SEC ENFORCEMENT ACTIONS

Deutsche Bank AG | August 22, 2019

Violations

- Books and Records
- Internal Accounting

Overview

- The SEC found that Deutsche obtained business through corrupt hiring practices in China and Russia.
- Through “referral hiring” Deutsche circumvented its own global hiring policy to award positions to unqualified family members of executives at Chinese and Russian State-Owned Enterprises.

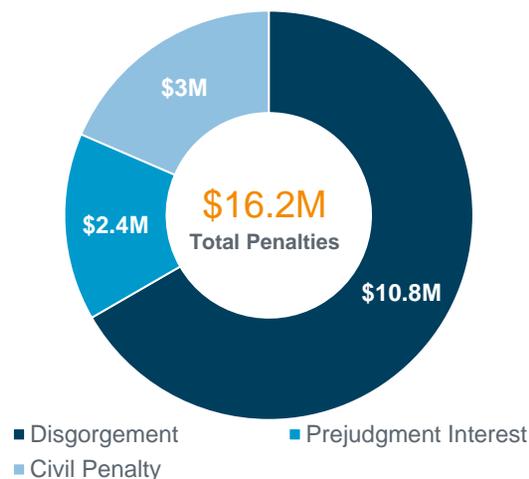
“Deutsche employees created false books and records that concealed corrupt hiring practices and failed . . . to devise and maintain a system of internal accounting controls around its hiring practices sufficient to provide reasonable assurances that its employees did not bribe foreign officials.”

– *Securities and Exchange Commission, Order*

“[Deutsche’s written hiring policy] was not effectively enforced and did not apply to all categories of hires. Additionally, Deutsche Bank, although aware of corruption risks in its referral hiring practices, failed to implement global policies sufficiently to address this risk. . . .”

– *Securities and Exchange Commission, Order*

SEC Resolution



2019 Enforcements

NOTABLE SEC ENFORCEMENT ACTIONS

Barclays PLC | September 27, 2019

Violations

- Books and Records
- Internal Accounting

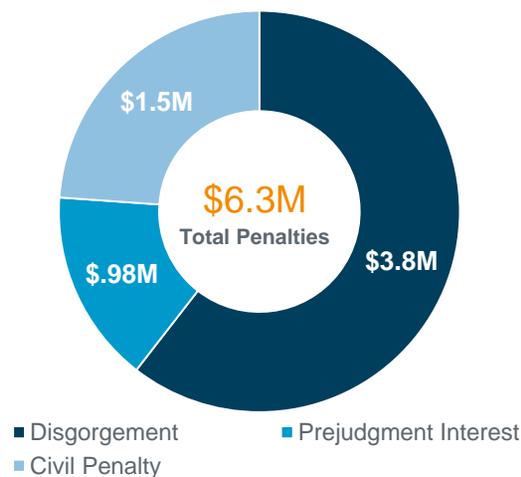
Overview

- From 2009 to 2013, Barclays hired around 117 people referred by or connected to government officials and executives of Barclays' non-government clients.
- The settlement is one of a number of actions related to improper hiring practices in the APAC region.

“ “[B]eginning in at least 2009 and continuing until approximately August 2013, businesses within Barclays Asia Pacific Region (“APAC”) provided valuable employment to the relatives and friends of government officials and executives of Barclays’ nongovernment clients in the form of work experience, internships, and permanent positions. At least some of the offers of employment were extended as a personal benefit to those officials and executives with the expectation that the bank would obtain or retain investment banking business.” .”

– Securities and Exchange Commission, Order

Settlement:



2019 Enforcements

NOTABLE SEC ENFORCEMENT ACTIONS

Juniper Networks | August 29, 2019

Violations

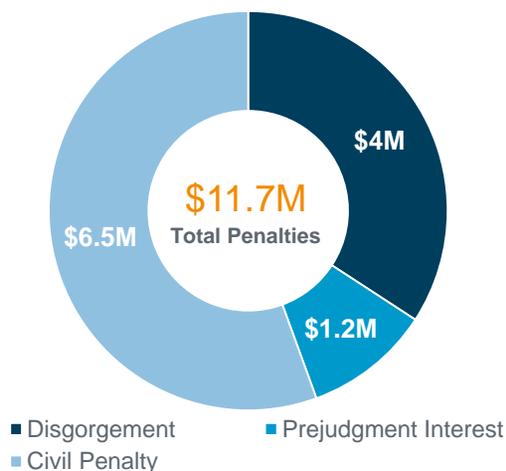
- Books and Records
- Internal Accounting

Overview

- From 2008 to 2013, employees at subsidiary's Russian office diverted discounts into funds used to pay for leisure trips for government officials.
- From 2009 to 2013, employees at China subsidiaries falsified trip and meeting agendas to conceal amount of entertainment on trips.
- Juniper Networks disclosed in 2018 that DOJ had declined to prosecute the company.



SEC Resolution



“Juniper failed to accurately record the incremental discounts and travel and marketing expenses in its books and records, and failed to devise and maintain a system of internal accounting controls sufficient to prevent and detect off-book accounts, unauthorized customer trips, falsified travel agendas and after-the-fact travel approvals.”

– *Securities and Exchange Commission, Order*

2019 Enforcements

NOTABLE SEC ENFORCEMENT ACTIONS

Quad/Graphics, Inc. | September 26, 2019

Violations

- Anti-bribery
- Books and Records
- Internal Accounting

Overview

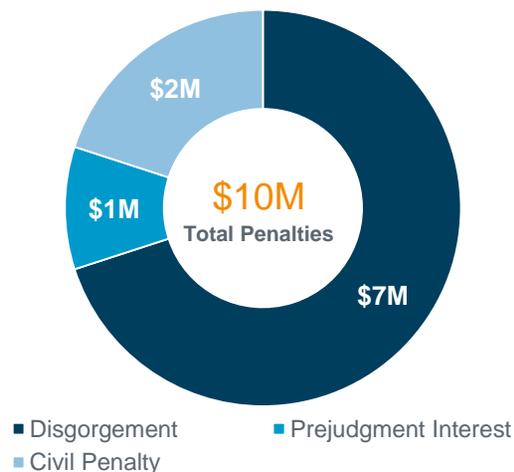
- Peruvian subsidiary bribed government officials in Peru to win sales contracts and to avoid penalties on existing contracts.
- In 2012-2013, Quad Peru participated in a judicial bribery scheme when it tried to influence the outcome of a tax dispute.
- China subsidiary offered around \$182,000 in improper payments to employees of private and government customers through sham sales agents to secure business

DOJ Declination

Reasons for declination: “(1) Quad's prompt, voluntary self-disclosure of the misconduct. . . (2) Quad's thorough and comprehensive investigation. . . (6) Quad's full remediation, including the steps that Quad took to enhance its compliance program.”

– Department of Justice, Declination Letter

SEC Resolution



Monitors

2019



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*



Three year term, subject to extension or early termination

“Because 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*

Policy Updates

OVERVIEW



- The DOJ's Theory of Agency Liability after the Hoskins case
- Changes to the Corporate Enforcement Policy
- Focus on Compliance Programs
- Guidance on a Company's Inability to Pay a Fine or Penalty

Policy Updates

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)
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

Policy Updates

FCPA CORPORATE ENFORCEMENT POLICY REVISIONS | NOVEMBER 2019

Instructions for Early Disclosure

DOJ recognizes that companies may not know all the relevant facts early in an investigation, and companies should disclose known relevant facts but make clear the disclosure is based on a preliminary assessment of information

Clarifying “Full Cooperation”

“Full cooperation” is now defined so as to advise companies to notify DOJ of evidence not in its position of which the company “is aware,” rather than evidence of which the company “should be” aware.

2. Definitions

a. Voluntary Self-Disclosure in FCPA Matters

•The company discloses all relevant facts known to it at the time of the disclosure, including ~~all relevant facts about all~~ as to any individuals substantially involved in or responsible for the ~~violation of law~~ misconduct at issue.^[1]

[1]: The Department 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.

b. Full Cooperation in FCPA Matters

•Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so, and, Additionally, where the company is ~~or should be~~ aware of ~~opportunities for the Department to obtain~~ relevant evidence not in the company’s possession ~~and not otherwise known to the Department~~, it must identify ~~those opportunities~~ that evidence to the Department;

Policy Updates

AGENCY LIABILITY POST-HOSKINS



[T]he Department is not looking to stretch the bounds of agency principles beyond recognition, or even push the FCPA statute towards its outer edges. For example, **the Criminal Division will not suddenly be taking the position that every subsidiary, joint venture, or affiliate is an “agent” of the parent company simply by virtue of ownership status . . .**

In this regard, the district court’s jury instruction in Hoskins is, well, instructive. There, the jury was called upon to evaluate Hoskins’ conduct to look for proof of an agency relationship and control by the principal. Additionally, the court made clear that a person or entity may be an agent for some business purposes and not for others. This meant that the government needed to prove that Hoskins was an agent of a domestic concern in connection with the specific events related to the project at issue.

– *Assistant Attorney General for the Criminal Division
Brian A. Benczkowski, December 4, 2019*

Policy Updates

FOCUS ON COMPLIANCE PROGRAMS



“We want the companies to invest in remedial compliance measures and to talk about those when they come in and present, about how far they’ve come based upon the lessons learned. . . . If a program flagged the misconduct and allowed the corporation to investigate and remediate, and—under our self-disclosure program—self-disclose, that would weigh very, very heavily in favor of mitigating [the severity of the] resolution . . . **[compliance is] a “super mitigator.”**”

– *Former Deputy Assistant Attorney General for the Criminal Division*
Matthew Miner, December 24, 2019

DOJ is also training its prosecutors to better understand compliance:

- Hired a compliance consultant from 2015-2017
- Seeking to hire staff attorneys with compliance experience in the private sector
- Emphasizing range of components of a compliance program, to avoid automatic conclusion that compliance was “de facto inadequate because something bad happened”

DOJ Developments

GUIDANCE ON ORGANIZATIONAL ABILITY TO PAY | OCTOBER 8, 2019



“Criminal Division attorneys may, where appropriate, make an adjustment to a proposed criminal fine or monetary penalty based on the existence of a significant adverse collateral consequence that, while severe, may not necessarily threaten the continued viability of the organization.”

– *Assistant Attorney General for the Criminal Division
Brian A. Benczkowski, October 8, 2019*

Case Law Updates



In ***United States v. Ng Lap Seng***, the Second Circuit ruled that the Supreme Court’s decision in ***McDonnell v. United States*** does not apply in cases brought under the FCPA.

Key Takeaways

- First appellate decision to analyze *McDonnell’s* applicability to the FCPA.
- *McDonnell* requires prosecutors prove that bribes paid in violation of the federal anti-bribery law (18 U.S.C. § 201) were in exchange for an “official act.”
- Court found that the FCPA definition of bribery is broader than the federal anti-bribery law, as the FCPA does not contain an “official act” requirement.

In ***United States v. OZ Africa Management GP LLC***, the Eastern District of New York held that the Mandatory Victims Restitution Act (18 U.S.C. § 3663A) can apply to conspiracies to violate the FCPA in certain circumstances.

Key Takeaways

- Permissible for Court to order restitution after accepting a defendant’s guilty plea.
- Court found that claimants qualified as victims under the MRVA.
- Court was “unprepared” to determine how much restitution was owed.
- Opens door for restitution as an additional avenue of recovery and additional claimants in FCPA cases.

Case Law Updates: *Liu v. SEC* (Granted Cert.)



On Friday, November 1, 2019, the Supreme Court granted certiorari in [*Liu v. Securities and Exchange Commission*](#), a case that challenges the SEC’s long-held position that it has authority to seek disgorgement for securities laws violations as a form of equitable relief.

Key Takeaways

- Previously in [*Kokesh v. Securities and Exchange Commission*](#), the Supreme Court held that disgorgement constituted a “forfeiture” or “penalty,” rather than a remedial tool, and was therefore subject to a five year statute of limitations.
- The Court made clear that it was not expressing any “opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.” However, with the grant of certiorari in [*Liu*](#), the Court appears ready to address the issue directly.
- Any decision that further restricts the SEC’s ability to obtain disgorgement could have major ramifications for the SEC’s enforcement efforts.
 - In 2018, the Enforcement Division reported that it obtained more than \$2.5 billion in disgorgement in fiscal year 2018 and more than \$11 billion combined in the last four fiscal years.
 - In contrast, the Enforcement Division reported \$1.4 billion ordered in penalties in fiscal year 2018 and \$4.7 billion total over four years.

Global Developments

UK SERIOUS FRAUD OFFICE CORPORATE COOPERATION GUIDANCE | AUGUST 2019

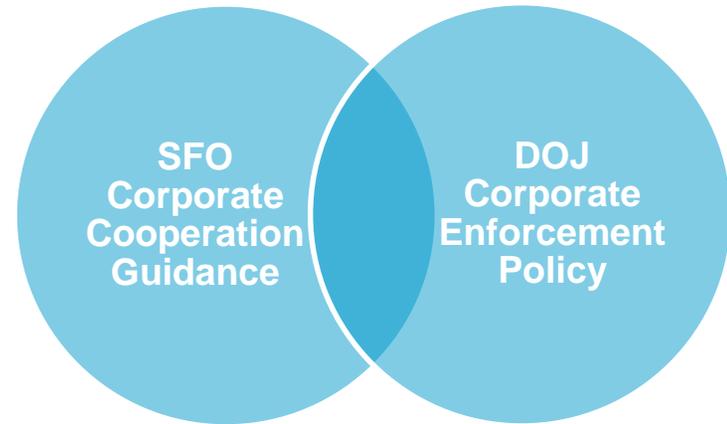


SFO

serious
fraud
office

“Co-operation means providing assistance to the SFO that goes above and beyond what the law requires. It includes: identifying suspected wrong-doing and criminal conduct together with the people responsible, regardless of their seniority or position in the organisation; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving available evidence and providing it promptly in an evidentially sound format.”

– SFO, *Corporate Cooperation Guidance August 6, 2019*



The SFO Guidance is similar to DOJ’s CEP but departs on the issue of privilege waiver.

- DOJ’s CEP states “eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege.”
- SFO Guidance does not require waiver, but provides that a company can earn cooperation credit by waiving privilege, and expects companies asserting privilege to seek certification from independent counsel that the material in question is privileged.

China: Legislative and Enforcement Updates

RECENT DEVELOPMENTS AND TRENDS

United States v. Li

Two former executives of Chinese subsidiary of a Herbalife, a U.S. public company, prosecuted by DOJ for FCPA violations

- Each was charged with one count of conspiracy to violate the FCPA for allegedly leading a decade-long scheme bribing Chinese officials to expand the company's business in China, avoid regulatory scrutiny and suppress negative media reports
- One executive was charged with perjury and destruction of records in federal investigations for lying during SEC interview and destroying evidence
- This individual was also charged by the SEC with FCPA violations

Growing focus of CCDI anti-corruption investigations on the Financial sector

- The Central Commission for Discipline Inspection (CCDI), the Chinese Communist Party's anti-graft watchdog, deployed inspectors to major Chinese banks in early 2019
- A few incumbent or retired high-ranking regulators and SOE officials have been investigated for corrupt conduct, including the Former Chairs of the Securities Regulatory Commission and a major State-Owned Bank
- The financial sector continues to be an area of PRC anticorruption enforcement to watch

Still no clear guidance on the implementation of the International Criminal Judicial Assistance Law (ICJAL)

- Enacted in October 2018
- Prevents companies and individuals in China from providing evidentiary materials and assistance to foreign criminal enforcement agencies without approval of Chinese authorities
- No ancillary regulations promulgated yet; no case yet brought by PRC Procuratorate under the ICJAL
- *In re: Sealed Case*: U.S. district court recognized that the statute creates compliance hardship for Chinese companies to comply with U.S. grand jury subpoenas but found such hardship "speculative and minimal"

Areas to Watch

LATIN AMERICA



Andrés Manuel
López Obrador



Sergio Moro



Alberto Fernández



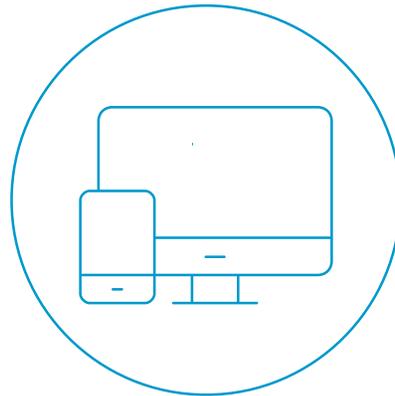
Organization of American States



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 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.



Neil H. MacBride

Neil is in Davis Polk's Litigation Department and is co-chair of the firm's White Collar Criminal Defense and Government Investigations Group. He is based in Washington DC and his practice focuses on government enforcement actions and internal investigations on matters including FCPA, economic sanctions and cybersecurity issues. He is an experienced trial lawyer, having litigated more than 25 jury trials and dozens of bench trials over the course of his career. Before joining Davis Polk in 2014, Neil served as the U.S. Attorney for the Eastern District of Virginia. In addition to his experience as U.S. Attorney, Neil has held a number of other government positions, including with the Department of Justice and the Senate Judiciary Committee.

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.