FCPA Winter Review 2018

International Alert
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Featured in This Edition

Introduction

Despite initial questions in some quarters about the incoming Trump administration's commitment to enforcing the U.S. Foreign Corrupt Practices Act (FCPA), 2017 turned out to be a fairly typical year in terms of resolved FCPA corporate enforcement actions, as well as an unusually active year for enforcement against individuals, driven largely by Department of Justice (DOJ) convictions and charges. Following an active December and January under the outgoing Obama administration, the next several months of 2017 saw only a few FCPA dispositions. However, through the spring and summer of the year, the administration filled key FCPA-related positions at both the DOJ and Securities and Exchange Commission (SEC) that had been vacated after the change in presidential administrations and personnel from both agencies, including Attorney General Jeff Sessions and SEC Chair

Jay Clayton, expressed support for continued assertive FCPA enforcement. By the end of 2017, the number of publicly-announced FCPA dispositions had increased, with several large corporate settlements (including one just under $500 million) and various individual charges and guilty pleas unsealed during the fourth quarter of the year. On balance, there were 17 resolved corporate enforcement actions announced in 2017, a total that is consistent with the average over the last 10 years.

Throughout the year, we saw a continuation of three important FCPA enforcement trends that have become particularly evident in recent years. First, both the DOJ and SEC continued to emphasize actions against individuals responsible for illegal activities. For example, in early September 2017, one of the co-directors of the SEC's Division of Enforcement stated that SEC is "incredibly focused" on the liability of individuals across the enforcement spectrum, including with regard to the FCPA, and she noted that individuals had been the subjects of over 70 percent of the agency's dispositions in the last five years. Similarly, senior DOJ officials repeatedly highlighted the Department's commitment to "prioritize prosecutions of individuals who have willfully and corruptly violated the FCPA," in line with the 2015 guidance on "Individual Accountability for Corporate Wrongdoing," the so-called Yates Memorandum.

Second, the DOJ continued to offer the possibility of declination from prosecution for companies that meet certain requirements. As discussed in our prior alert and in greater detail below, in late November 2017, Deputy Attorney General Rod Rosenstein announced the new "FCPA Corporate Enforcement Policy," which was codified as an addition to the U.S. Attorneys' Manual. The new policy effectively continues and modifies the DOJ's earlier "Pilot Program" and offers the possibility of corporate declinations from prosecution as an incentive for self-disclosure and cooperation by companies. The policy's presumption of a corporate declination continues to depend on three prerequisites: full and timely voluntary self-disclosure to the DOJ; full cooperation (including as to facts relevant to the culpability of individual employees); and timely and appropriate remediation (including implementation of an effective compliance and ethics program and appropriate discipline of employees). However, the policy's presumption also tightens some requirements from the Pilot Program — for example, by imposing a new requirement that, in order to receive full credit for remediation, companies must prohibit employees from using software that "generates but does not appropriately retain business records or communications."

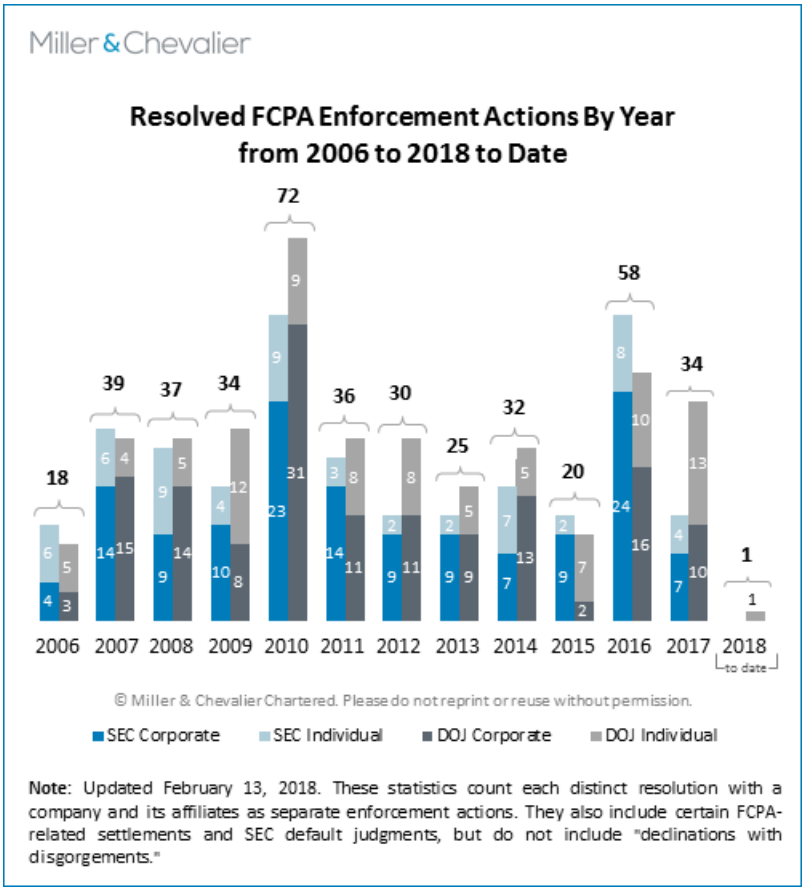
Finally, in 2017, both the DOJ and SEC imposed penalties that were part of large, globally-coordinated settlements in which enforcement authorities from multiple countries imposed combined penalties of hundreds of millions of dollars for the same or similar alleged misconduct, but agreed to consider penalties paid in other jurisdictions for offsets or reductions. This trend was a major theme of 2016 and is, to a significant degree, the result of greater cooperation between the U.S. enforcement agencies and their foreign counterparties, particularly in the United Kingdom, Brazil, and the Netherlands.

All three of these trends were discernable in the FCPA enforcement activity for 2017, especially for the DOJ. The past calendar year marked the fourth consecutive year that both individual prosecutions and corporate declinations by the DOJ have increased. As described below, the large anti-corruption settlements with Telia Company AB and SBM Offshore N.V. (SBM) were among the top 10 global resolutions by settlement amount, making clear that greater cooperation among enforcement authorities is leading to substantial effects, in line with the longstanding U.S. goals of broadening enforcement to other countries and "leveling the playing field" for U.S.-based companies.

A notable milestone during the fourth quarter of 2017 was the 40th anniversary of the FCPA — enacted in November 1977 — which provides an opportunity to reflect on the law's past and future. Looking back a decade, 2007 was an inflection point for the FCPA, ushering in an era of more aggressive corporate and individual enforcement. Given the three trends set forth above — namely, U.S. agencies' commitments to individual prosecutions, more formal corporate declinations driven by companies undertaking reporting and compliance obligations, and greater global cooperation — 2016 and 2017 may mark another inflection point, particularly if the U.S. and foreign enforcement authorities continue moving in the same direction as they have been in recent years.

Corporate Enforcement Trends in 2017

In 2017, the DOJ resolved 10 corporate enforcement actions — including guilty pleas, Deferred Prosecution Agreements (DPAs), and a Non-Prosecutions Agreement (NPA) — for a total just under the Department's average of 12 enforcement actions a year since 2007. For its part, the SEC ended the year with seven corporate enforcement actions, which was below the agency's average of approximately 12 enforcement actions a year over the same period.



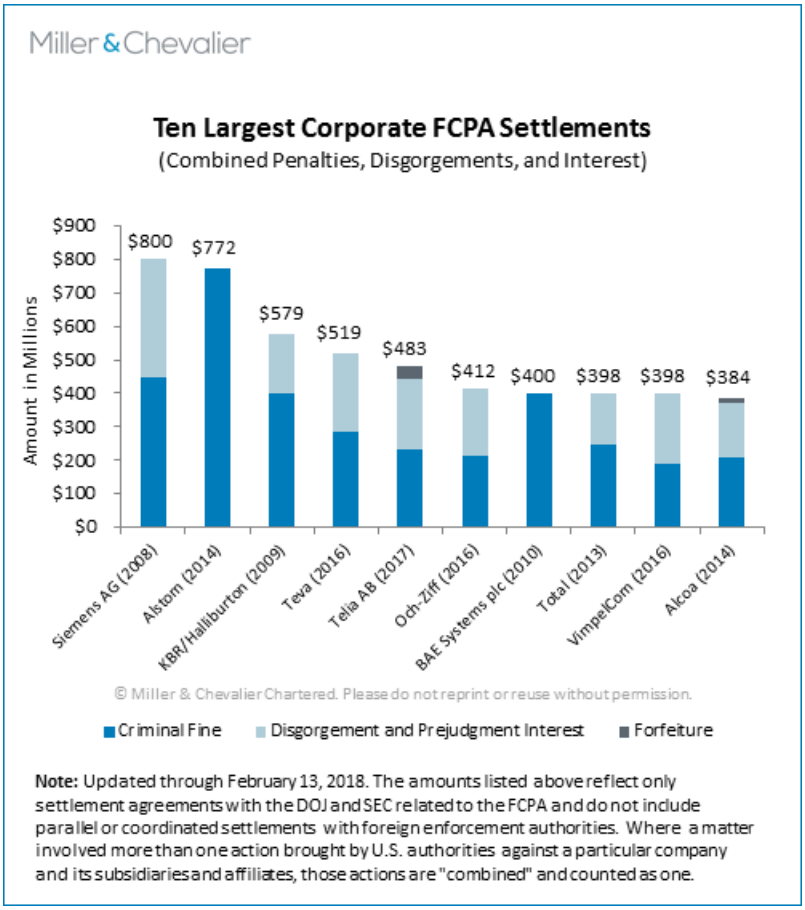
Following an active January 2017 and over seven months with only one corporate disposition, the last four months of the year saw a slight uptick in corporate enforcement actions by the DOJ and SEC. Specifically, the agencies entered into settlements with Telia and Alere, Inc. in September 2017, as discussed in our FCPA Autumn Review 2017, as well as two large, multijurisdictional settlements with SBM and Keppel Offshore & Marine Ltd. (Keppel) in the fourth quarter of the year.

On November 29, SBM, a Netherlands-based manufacturer of offshore oil drilling equipment, agreed to a $238 million criminal fine as part of a DPA with the DOJ to resolve anti-bribery-related charges under the FCPA, while its U.S. subsidiary, SBM Offshore USA Inc. (SBM USA), pled guilty to one FCPA conspiracy charge. As discussed in greater detail below, according to the DPA, from 1996 until at least 2012, SBM paid more than $180 million in commissions to intermediaries, knowing that a portion of these payments would be used to bribe government officials in Angola, Brazil, Equatorial Guinea, Iraq, and Kazakhstan in an effort to obtain or retain business. In calculating SBM's criminal fine in the U.S., the DOJ reportedly took into account the $240 million the company had paid to Dutch authorities in 2014 to resolve similar charges. Nevertheless, the company's combined worldwide penalties total more than $475 million, which does not include the $342 million in cash penalties and discounts on future work that SBM has agreed to pay the Brazilian state-owned energy firm Petróleo Brasileiro S.A (Petrobras), an amount that will affect the company's bottom line even if it does not count as a criminal penalty. Of additional interest is the DOJ's note in

its announcement of the settlement that the company "brought the conduct to the attention of the Criminal Division's Fraud Section and Dutch authorities," but "did not provide a complete disclosure for approximately one year" — emphasizing the risks of a self-disclosure that the DOJ may deem insufficient.

On December 22, Singapore-based shipyard operation company Keppel agreed to a $105.6 million criminal fine as part of a DPA with the DOJ to settle one count of conspiracy to violate the anti-bribery provisions of the FCPA, while its U.S. subsidiary, Keppel Offshore & Marine USA Inc. (Keppel USA), pled guilty to a similar FCPA-related conspiracy charge. As discussed below, the charges against both Keppel and its U.S. subsidiary arose out of an alleged decade-long scheme to pay millions of dollars in bribes to officials in Brazil, including at Petrobras. The fine owed in the United States is only a quarter of the total global settlement, with another $105.6 million owed to authorities in Singapore — where the company is based — and $211 million owed to authorities in Brazil — where the misconduct took place — for a total of $422 million in criminal penalties.

Viewing the large 2017 settlements in the context of broader FCPA enforcement, only Telia's $483 million in combined penalties ranks among the top 10 FCPA corporate dispositions. However, Telia, SBM, and Keppel are also noteworthy as examples of the recent trend of large global corruption settlements, in which the settlement amounts imposed by the DOJ and SEC were offset in recognition of penalties imposed by foreign enforcement authorities.



For example, the DOJ and SEC assessed Telia more than $965 million in penalties, but then discounted that amount by up to $482.5 million to recognize and offset penalties imposed by the Dutch Public Prosecutor's Office and Swedish Prosecution Authority. Similarly, in calculating its $238 million penalty imposed on SBM, the DOJ reportedly took into account SBM's

payment of $240 million in penalties paid to the Netherlands in 2014, as well as future payments and work discounts owed in Brazil. Finally, U.S. enforcement authorities required Keppel to pay only $105.5 million of the $422 million imposed under the company's settlement agreements with the DOJ and SEC, a dollar for dollar reduction accounting for the exact amount of the penalties the company agreed to pay under parallel settlements in Brazil and Singapore.

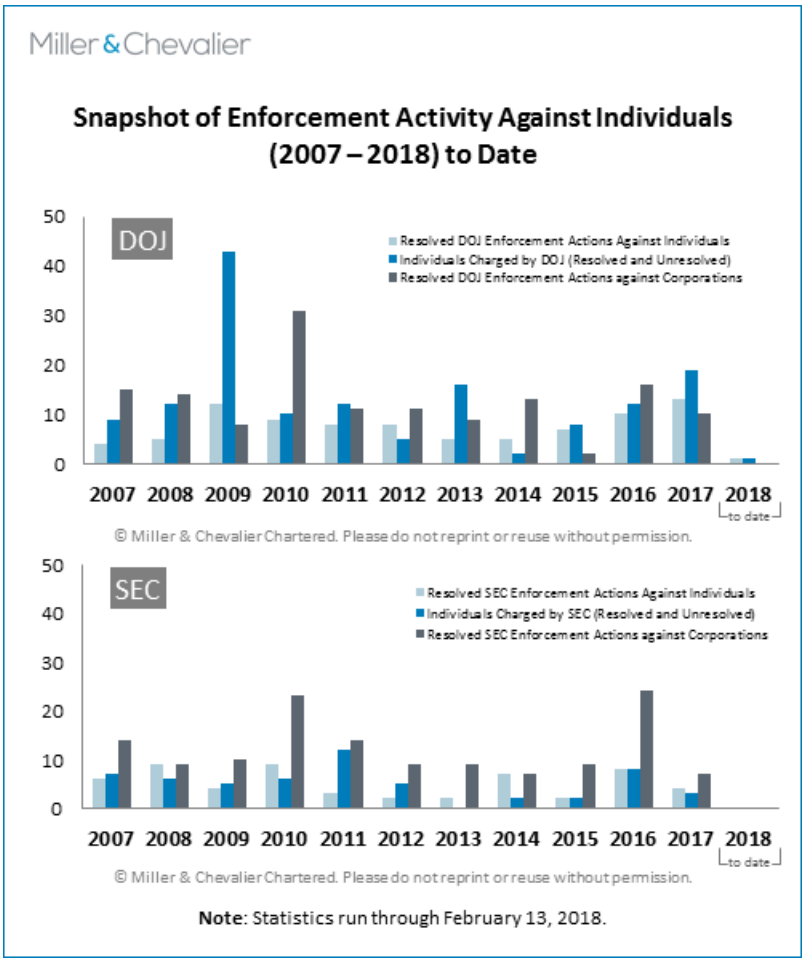
In light of this trend, consideration of total global settlements may now be necessary to adequately assess anti-corruption enforcement trends and the concomitant risks to multinational companies. Therefore, the chart below shows the top 10 global settlements in which the FCPA was a factor:

We first discussed the increase in large multijurisdictional settlements in our FCPA Winter Review 2017, noting several settlements of this nature reached in 2016, including Odebrecht/Braskem, Rolls-Royce plc, Teva Pharmaceuticals, and VimpelCom. With regard to this larger trend, it is noteworthy that, of the 10 companies that appear among the top 10 largest global settlements involving the FCPA,[1] only one is U.S.-based (Halliburton), while all of the others are headquartered and incorporated outside the United States. In fact, some of the companies with top 10 global settlements — for example Odebrecht (and its subsidiary Braskem), Telia, and VimpelCom — appear to do very little business within the United States.

Enforcement Against Individuals During 2017

While 2017 was an average year for corporate enforcement, it was an unusually active year for enforcement activity against individuals, largely driven by individual charges filed and convictions obtained by the DOJ. Specifically, the DOJ brought charges against 17 individuals — the agency's highest number since 2009 — and successfully reached guilty pleas or jury convictions for 13

individuals — the agency's highest number ever in a single year. Eight of these charges and seven of these convictions were for individuals associated with companies subject to parallel investigation and settlements by the DOJ in 2016 or 2017, namely Rolls-Royce, Embraer, SBM, and Keppel. The SEC was less active, with only four judgments or administrative procedures and three charges initiated against individuals in 2017, a slightly below-average year for the agency. All four of the SEC's individual resolutions were also associated with companies subject to parallel investigation by the DOJ, either itself or in conjunction with the SEC.



In the fourth quarter of 2017, the DOJ announced guilty pleas by nine individuals — five of whom had pled guilty during the quarter and four of whom had pled guilty in prior quarters, but whose pleas had not been previously announced. The agency also announced that it had filed charges against two more individuals, but that these charges had yet not been resolved.

In October 2017, the DOJ announced that Fernando Ardila-Rueda (Ardila), a Florida businessman, had pled guilty to two FCPA-related counts stemming from his payments to purchasing managers at Venezuela's state-owned and state-controlled energy company, Petroleos de Venezuela S.A. (PDVSA), to ensure that Ardila's businesses were included on PDVSA bidding lists. As noted below, Ardila's is one of several recent guilty pleas by Florida-based businessmen implicated in the same corruption schemes involving the PDVSA. That same month, real estate broker Andrew Simon was arrested and charged for his role in a corruption scheme involving the Landmark 72 skyscraper in Hanoi, Vietnam, another scheme under which several other individuals have been charged or convicted.

In November 2017, the DOJ announced that two former executives at SBM and its U.S. subsidiary — former CEO and board member Anthony "Tony" Mace and former sales and marketing executive Robert Zubiate — had pled guilty to participating in a scheme to bribe foreign government officials in Angola, Brazil, and Equatorial Guinea, which is discussed in detail below. The same month, the agency announced that it had obtained guilty pleas for FCPA-related charges from four individuals associated with Rolls-Royce: former Rolls-Royce senior executive James Finley, former regional director Keith Barnett, former energy sales employee Aloysius Johannes Jozef Zuurhout, and the former head of a separate engineering and consulting firm, Andreas Kohler. As also discussed in detail below, the DOJ charged all four individuals for their roles in the same alleged corruption scheme for which Rolls-Royce had separately entered into a DPA with U.S. authorities in December 2016. The DOJ simultaneously announced that it had brought charges against Petros Contoguris, who is the founder of a Turkish oil and gas advisory company allegedly involved in the scheme, but who has not pled guilty and is reported by the DOJ to be outside the United States.

Finally, in December 2017, the DOJ announced a guilty plea by Colin Steven, a U.K. citizen and former sales executive at the Brazil-based aircraft manufacturer Embraer S.A. The company settled charges of its own in a combined $205 million disposition with the DOJ and SEC in late 2016, as discussed in our FCPA Winter Review 2017. Also in December 2017, the DOJ announced that a former senior member of Keppel's legal department, Jeffrey Chow, had pled guilty to an FCPA-related charge the prior spring for his role in creating and executing false contracts on behalf of Keppel while suspecting that a portion of the payments under the contracts would be used for bribes. Both Mr. Steven and Mr. Chow's cases are summarized below.

Besides being an active year in terms of individual charges and convictions by the DOJ, 2017 was also the third consecutive year that the number of individuals charged and the number of individuals actually convicted has increased year over year. The numbers for 2017 could increase still further, as additional charges filed in 2017 may be unsealed in 2018. This uptick in enforcement involving individuals may be attributable, at least in part, to the DOJ's formal emphasis on individual prosecutions, as highlighted in the 2015 "Yates Memorandum" and recently reinforced by current policy statements from senior agency officials. Although the impact of the Yates Memorandum was initially unclear, enough time may now have passed to safely trace some of the patterns in individual enforcement we saw in 2017 to the policy priorities established by the Memorandum.

It is also noteworthy that eight of the individuals charged and seven of the individuals convicted by the DOJ in 2017 are associated with companies subject to parallel investigations and convictions — namely Embraer, Rolls-Royce, SBM, and Keppel — demonstrating the DOJ's continued goal of parallel corporate and individual actions. In addition, as discussed further below, this trend is likely to continue in light of the DOJ's new "FCPA Corporate Enforcement Policy," under which corporate declinations are contingent on disclosure of "all relevant facts about all individuals involved in the violation of law." Such disclosures could potentially give the DOJ access to additional information that may be used in subsequent individual prosecutions.

2018 Enforcement Actions to Date

There were no corporate enforcement actions under the FCPA in 2018 to date, but we did see enforcement activity against individuals, including a guilty plea by one individual and charges against another. We will briefly preview this enforcement activity here and will discuss it in greater detail in Miller & Chevalier's forthcoming FCPA Spring 2018 Review.

- **Joo Hyun Bahn, aka Dennis Bahn**: On January 5, 2018, Joo Hyun Bahn pled guilty to two FCPA-related counts for his role in a scheme to pay an official at a Middle Eastern sovereign wealth fund to purchase the Landmark 72 skyscraper in Hanoi, Vietnam. According to the DOJ's public release, Bahn, who was indicted in 2016, admitted to transferring $500,000 to Malcom Harris, an intermediary in New York, on the understanding that Harris would pass the money on to the Middle Eastern official. However, Harris allegedly stole the $500,000 without passing any of it along. Harris has been charged but not convicted. Two of Bahn's co-defendants — Andrew Simon and San Woo, aka. John Woo — pled guilty to FCPA charges in 2017 stemming from their involvement in the scheme.
- **Mark Lambert**: On January 12, 2018, the DOJ unsealed an 11-count indictment — including one count of conspiracy to violate

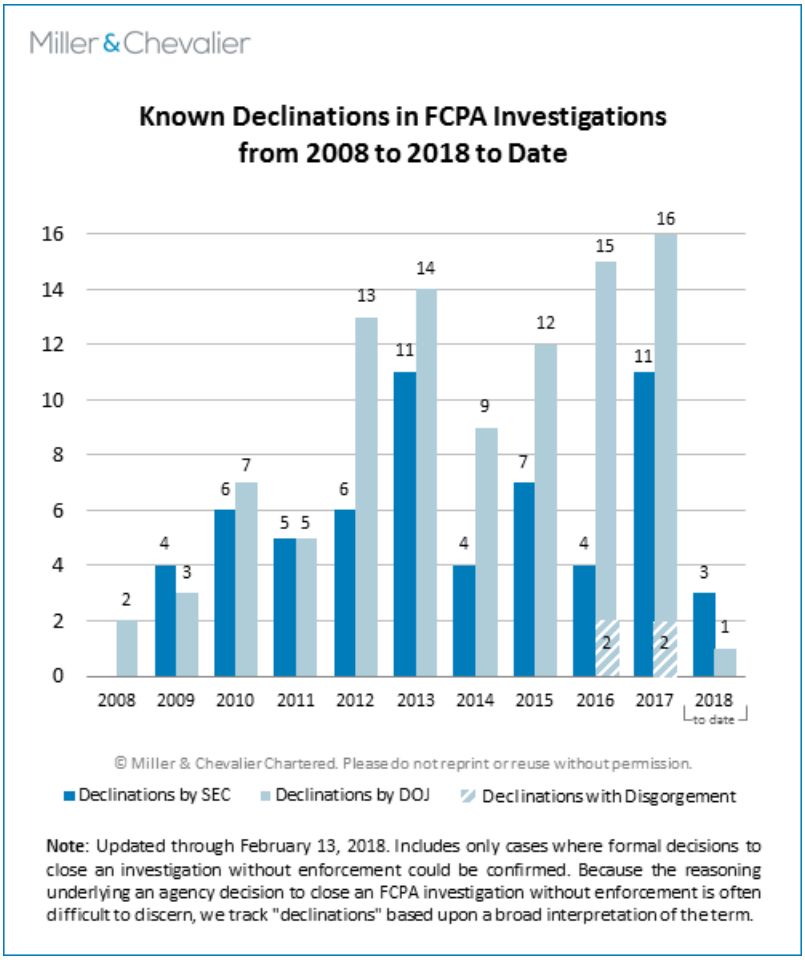
the FCPA and seven counts for substantive FCPA violations — against Mark Lambert, the former co-president of a Maryland company that provided services for the transportation of nuclear materials. According to the indictment, between 2009 and 2014, Lambert conspired to pay kickbacks to the head of a subsidiary of Rosatom, Russia's state-owned nuclear energy corporation. Lambert's case has been the subject of press scrutiny because of Rosatom's indirect acquisition of Canadian mining company Uranium One, which occurred while 2016 Democratic presidential candidate Hillary Clinton was U.S. Secretary of State.

- **PDVSA Officials**: On February 12, 2018, the DOJ unsealed indictments against five former government officials known as the "management team" of PDVSA, the same Venezuelan state-owned oil company that was the center of the alleged kickback conspiracy that led to the convictions of Fernando Ardila Rueda and several other U.S.-based individuals. All five members of the management team are Venezuelan citizens (one also holding a U.S. passport) who allegedly used their significant influence with PDVSA to solicit bribes and kickbacks from vendors in the United States. Of the five members of the management team, only two — Luis Carlos De Leon Perez and Nervis Gerardo Villalobos Cardenas — face FCPA-related charges, with the rest facing various money-laundering charges.

Declinations

In contrast to the average number of corporate enforcement actions, 2017 was a record year for corporate declinations, a term we define broadly as a decision by the DOJ or SEC to close an investigation without enforcement. Declinations are not always publicized, making exact recordkeeping somewhat difficult. Nevertheless, Miller & Chevalier has identified 16 known DOJ declinations in 2017 — including two that imposed disgorgement — which is the most on record for the agency in one year.

Over the course of 2017, the SEC issued 11 known declinations, equaling its previous high set in 2013.



This increase in declinations coincides with the DOJ's FCPA Pilot Program, introduced in April 2016 and lasting until November 2017, which offered the possibility of a declination for companies that (1) voluntarily self-disclosed; (2) fully cooperated in any subsequent government investigation; and (3) carried out timely and appropriate remediation. Although causation is difficult to determine based on available public evidence, in a November 2017 speech, Deputy Attorney General Rosenstein credited the Pilot Program's incentive structure with encouraging more companies to disclose potential misconduct to the DOJ and leading the agency to offer more declinations without prosecution. We will continue to track the DOJ's implementation and application of the new FCPA Corporate Enforcement Policy, particularly its effect on the Department's issuance of declinations.

The declinations we have identified in 2018 to date are:

- **Cobalt International Energy, Inc.**: On January 30, 2018, the company filed a Form 8-K stating, "[o]n January 29, 2018, the United States Securities and Exchange Commission (the "SEC") concluded its FCPA investigation relating to the Angolan operations of Cobalt International Energy, Inc. ("Cobalt") and advised that the SEC staff does not intend to recommend any enforcement action by the SEC against Cobalt. This formally concludes the SEC investigation, which was opened in March 2017."
- **Juniper Networks, Inc.**: In a Form 8-K filed on February 9, 2018, the company stated that "it received a letter from the U.S. Department of Justice ("DOJ") notifying the Company that the DOJ has closed the Company's previously disclosed investigation into possible violations by the Company of the U.S. Foreign Corrupt Practices Act ("FCPA") without taking any

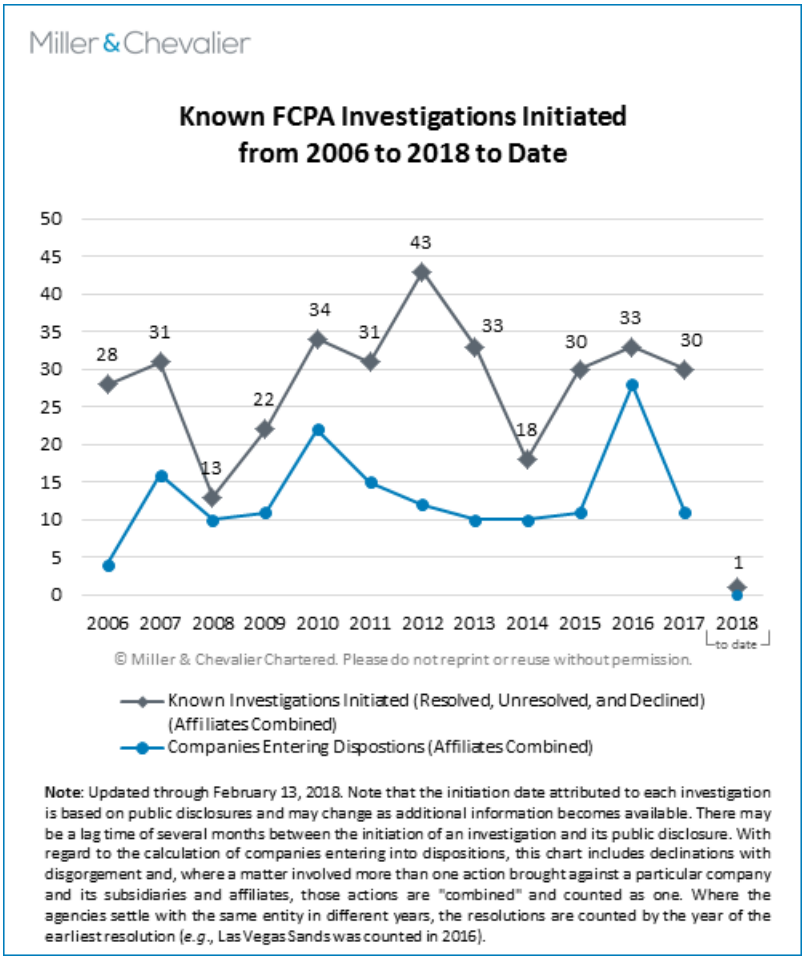
action against the Company. In its letter, the DOJ acknowledged the Company's cooperation in the investigation. As previously disclosed, the Securities and Exchange Commission is also conducting an FCPA investigation, and that matter has not yet been resolved."

- **Core Laboratories N.V.**: On February 12, 2018, the company filed a Form 10-K stating, "[i]n a letter dated February 5, 2018, the Company was informed by the SEC, that they have concluded their investigation as to the Company's connection with Unaoil and they do not intend to recommend an enforcement action by the Commission against the Company." As discussed in our FCPA Autumn Review 2017, the company reported that it received a declination from the DOJ in October 2017.

In addition to the declinations listed above, we are aware of another declination issued by the SEC in 2018 to date. We cannot report any other details for this declination, including the name of the target company, because the declination has not been publicly reported. As is our standard practice, we do not report the details of non-public declinations.

Known Investigations Initiated in 2017

We have identified 30 investigations initiated in 2017 — slightly below the previous year's 33 new known investigations and slightly higher than the post-2005 average of 28.8 new investigations per year. The number of known new investigations initiated by the DOJ and SEC is a reasonable proxy for the enforcement agencies' aggressiveness in FCPA enforcement, making the 2017 statistics particularly noteworthy as an indication of no perceivable drop in FCPA investigative activity under the Trump administration. Although more speculative, the new investigations made known in 2017 may also be a useful metric to predict FCPA enforcement actions yet to come under the Trump administration, as some of the current investigations are likely to result in future dispositions. As of the date of publication, we have identified only one known investigation initiated in 2018 and will continue to monitor investigation activity throughout the quarter.



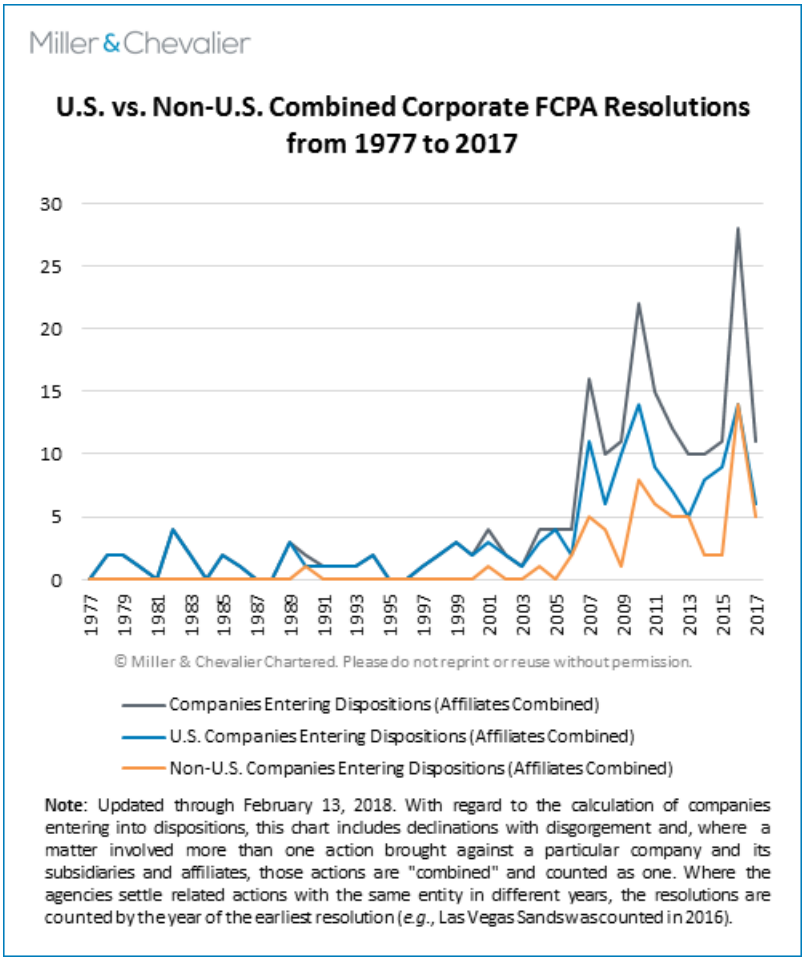
That said, while the number of known investigations initiated is a useful statistic, one cannot directly compare the numbers of resolved enforcement actions, declinations, and new investigations from year to year, as a single investigation can often result in multiple enforcement actions or declinations. Moreover, there are likely additional investigations and declinations of which we are not yet aware because the government agencies or the companies involved have chosen to not publicly disclose them. With respect to the chart above, since public companies sometimes wait months, or even years, to disclose the existence of an investigation in their securities filings — with some choosing never to do so — and since non-issuer companies often never disclose the existence of an investigation, the numbers in the chart are likely to rise, even for past years.

FCPA at 40: A Look Back and Predictions for the Future

Looking back at 2017, early speculation in some quarters regarding an FCPA enforcement slowdown under the Trump administration appears to have not come true. Rather than reflecting any significant change in enforcement priorities, 2017 was a year in which key trends from the past two years continued, offering some insight into the future of FCPA enforcement. The FCPA Corporate Enforcement Policy, announced in November 2017, may produce more formal, public declinations as it solidifies an incentive structure. The DOJ has credited the Policy with prompting more companies to self-disclose in an effort to obtain declinations, though it does not address all of the concerns that have been raised regarding past versions of such policies.

At the same time, the DOJ's emphasis on individual prosecutions, formalized in the 2015 Yates Memorandum, appears to

continue having a tangible effect under the FCPA, resulting in four years of increases in the number of individual charges brought and convictions secured by the agency, including new year-end highs of 17 individuals charged and 13 convicted in 2017. The SEC also has publicly committed to more actions against individuals in the FCPA area. Furthermore, the growing trend of globally coordinated anti-corruption settlements continued in 2017 and encompassed the three largest corporate FCPA settlements of the year.



The last trend continues to represent what is likely the most influential shift in FCPA enforcement going forward. Long a policy goal of the United States as a response to U.S. companies' complaints regarding potential competitive disadvantages created by FCPA enforcement, the acceleration of multijurisdictional investigations, some of which have been led by non-U.S. authorities, will continue to undergird assertive anti-corruption enforcement while presenting increasing challenges to companies under investigation.

International Developments

In November 2017, French authorities entered into a €300 million settlement with Geneva-based HSBC Private Bank (Suisse) SA (HSBC) using a Convention Judiciaire d'Interêt Public (CJIP), or Judicial Agreement in the Public Interest. As discussed in detail below, this resolution marked the first use of a CJIP,an enforcement mechanism introduced in December 2016 as part of France's new anti-corruption legislation (Sapin II) and frequently compared to DPAs and NPAs. The purpose behind the CJIP

was to streamline the resolution of corporate corruption cases, since the only method of resolving such cases before Sapin II was through trial. Although the charges against HSBC involved tax avoidance rather than bribery *per se*, the settlement illustrates French prosecutors' enhanced ability under Sapin II to bring foreign bribery cases against corporations.

In December, Argentina's president signed into law new anti-corruption legislation that introduced corporate liability for foreign and domestic bribery, as well as several related concepts. As discussed below, the new law allows a compliance (or "integrity") program to serve as a key component of a defense to corporate liability, sets forth the elements of an effective compliance program, and introduces a resolution mechanism for cooperating entities akin to a DPA.

Meanwhile, in Peru, a legislative decree adopted in 2017 took effect on January 1, 2018, expanding corporate liability to a broader range of corruption offenses, as well as offenses related to money laundering and terrorist financing. The new law, discussed in detail below, introduces corporate liability for acts of employees and various third parties. It also establishes the minimum components of a compliance program (referred to as a "prevention model"), the adoption of which may serve as a defense against liability under the law.

Actions Against Corporations

SBM Offshore N.V. and Its U.S. Subsidiary Settle with DOJ in Connection with Corrupt Payments in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq

On November 29, 2017, the DOJ announced that it had agreed to settle FCPA-related charges in connection with the alleged bribery of foreign officials in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq with SBM Offshore N.V. (SBM), a Netherlands-based construction and offshore drilling company, as well as with SMB's Houston-based subsidiary, SBM Offshore USA Inc. (SBM USA). SBM entered into a DPA in connection with a one-count criminal information charging the company with conspiracy to violate the anti-bribery provisions of the FCPA. SBM USA pleaded guilty and was sentenced on one count of conspiracy to violate the anti-bribery provisions of the FCPA. Pursuant to the DPA, SBM agreed to pay "total monetary penalties" of $238 million to the United States, including a $500,000 criminal fine and $13.2 million "paid as a forfeiture" on behalf of SBM USA.

As reported in our FCPA Winter Review 2015, SBM settled with the Dutch Public Prosecutor's Office in 2014 for related conduct, agreeing to pay $200 million in disgorged profits and a $40 million fine — an amount the DOJ credited when calculating the 2017 penalties. According to the DPA, the U.S. also credited the amount in the announced provision taken by SBM in connection with its efforts to reach a resolution in Brazil. SBM's total penalties for the actions underlying these resolutions, therefore, constitute more than $475 million. However, this amount does not include the $342 million in cash penalties and discounts on future work that SBM has agreed to pay the Brazilian state-owned energy firm Petróleo Brasileiro S.A. (Petrobras).

The DOJ had also investigated SBM in 2014, but declined to continue the investigation at that time, citing the findings from SBM's internal investigation, other facts known to the DOJ at the time, and the apparent lack of jurisdiction. However, according to the 2017 DPA, the DOJ learned in 2016 that a "U.S.-based executive of one of SBM's domestic concerns managed a significant portion of the corrupt scheme and engaged in conduct within the jurisdiction of the United States." While unclear, this sentence could refer to either Robert Zubiate, a U.S. citizen who served as an executive at SBM USA and two other Houston-based SBM subsidiaries, or Anthony Mace, a U.K. citizen who served as an executive and board member at the same Houston-based SBM subsidiaries. According to the DPA, both Zubiate and Mace "oversaw or executed SBM's worldwide bribery scheme" and "knowingly and willfully conspired with each other and others known and unknown," to cause SBM to make corrupt payments to foreign officials. Both men's guilty pleas are discussed further below.

Based on the DPA's statement of facts, from approximately 1996 to 2012, SBM paid more than $180 million in commissions to intermediaries in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq, knowing that a portion of those payments would be used

to bribe foreign officials of state-owned oil companies — often to obtain confidential information that gave SBM an improper advantage in receiving contracts from those companies. According to the DPA, the company earned or expected to earn at least $2.8 billion in profits from work with these state-owned oil companies. The detailed allegations related to activities in each of the named countries are set forth below:

Brazil

According to the DPA, from approximately 1996 to 2012, SBM paid bribes to at least three officials at the Brazilian state-owned oil company Petroleo Brasileiro (Petrobras) — all through an intermediary "who provided sales and marketing services to SBM in Brazil" and owned several Brazil-based oil and gas services intermediary companies, as well as several offshore shell companies. The intermediary received "commissions" for Petrobras projects that were awarded to SBM. According to the DPA, SBM paid these commissions into a Brazilian bank account controlled by the intermediary's company, as well as into Swiss bank accounts owned by the intermediary's shell companies. Portions of these commissions were then wired to Petrobras officials. The DPA asserts that certain SBM executives knew about the purpose of such payments; in one instance cited by the DPA, SBM executives met with the intermediary to try to reduce the intermediary's commission on one Petrobras project to below three percent, but the intermediary explained that the commission could not be reduced because two percent had already been promised to Petrobras officials. SBM also allegedly provided things of value to Petrobras officials, including unspecified gifts, travel, and entertainment.

Angola

From 1997 to 2012, SBM allegedly paid bribes to at least nine Angolan government officials to improperly obtain and retain business from Sociedade Nacional de Combustriveis de Angola, E.P. (Sonangol), the Angolan state-owned oil company. The DPA states that SBM made some of the payments through a Monaco-based oil and gas services intermediary founded by a former SBM executive in the form of "commissions" for projects Sonangol successfully awarded SBM. SBM deposited these commissions into a Swiss bank account controlled by the intermediary, from which funds were then wired to accounts controlled by Sonangol and Sonangol USA Co. (Sonusa) officials. According to the DPA, SBM also made direct payments to Sonangol officials, paid for Sonangol officials' gifts, travel, and entertainment — including payments for travel to sporting events — and hired and overpaid Sonangol officials' relatives for positions within SBM. In exchange, SBM received confidential information from Sonangol officials, including, for example, an e-mail to an SBM executive stating that Sonangol would recommend SBM as an affiliate to another oil and gas company on an offshore oil and gas development project.

Equatorial Guinea

From 2008 to 2012, SBM allegedly used the same Monaco-based oil and gas services intermediary it had used for payments to Sonangol officials to make payments to at least nine government officials from the Petroleos de Guinea Equatorial (GEPetrol), the national oil company of Equatorial Guinea, as well as to officials from Equatorial Guinean's Ministry of Mines, Industry, and Energy (MMIE). The DPA states that SBM deposited commissions into a Swiss bank account controlled by the intermediary, a portion of which the intermediary then wired to bank accounts controlled by the Equatorial Guinean officials. SBM also provided things of value to GEPetrol and MMIE officials in the form of gifts, travel, and entertainment, including paid travel to sporting events, the provision of luxury goods like watches and sport memorabilia, and covering the costs of shipping vehicles to Equatorial Guinea.

Kazakhstan

The DPA states that from 2003 to 2009, SBM "conspired to pay bribes and attempted to pay bribes" to at least one official at KazMunayGas, Kazakhstan's state-owned oil and gas company, as well as to an employee at the subsidiary of an Italian oil and gas company, which had received a concession from the Kazakhstan government as the operator of the Kashagan oil field development. As discussed in greater detail in the Noteworthy Aspects section below, this allegation regarding the Italian

company's employee illustrates the ability of the U.S. authorities to apply a broad definition of the term "foreign official." SBM paid these officials through commissions to two different intermediaries — one of which was based in Monaco, the other in Milan, and both of which the DPA characterized as providing "sales and marketing services"— in exchange for projects successfully awarded to SBM. The DPA states that both of these intermediaries passed along some portion of these commissions to officials at KazMunayGas and to "[a]t least one employee" at the subsidiary of the Italian oil and gas company. In exchange, SBM allegedly obtained confidential information that helped it obtain or retain business, including confidential information about a meeting between the Kazakh government, KazMunayGas, and the Italian oil and gas company subsidiary.

Iraq

From 2009 to 2012, SBM allegedly conspired and attempted to pay bribes to at least two officials at the former Iraqi state-owned and controlled oil company, South Oil Company (SOC) to improperly obtain or retain business. As in the other countries, SBM acted through an intermediary, the same Monaco-based sales and marketing company it has used in Kazakhstan. According to the DPA, SBM deposited "commissions" into the intermediary's Monaco-based bank accounts with the understanding that the intermediary would transfer portions of the commissions to officials at SOC. SBM also agreed to pay the intermediary $275,000 to induce SOC into preventing a competitor's reentry into bidding. In addition, SBM allegedly received confidential information from SOC officials — including a letter written by one of its disqualified competitors to reenter a bidding process — which helped SBM to formulate its response.

Disclosure and Remediation Issues

Although SBM voluntarily brought the conduct to the attention of the DOJ, the DPA states that the DOJ did not grant the company full voluntary disclosure credit because the company failed to fully disclose the conduct for approximately one year. SBM, however, received full credit for its cooperation with the government, as it conducted a thorough internal investigation; made factual presentations to the DOJ; made foreign-based employees available for interviews; produced documents to the U.S. from foreign countries; collected, analyzed, and organized voluminous evidence; and conducted an expedited internal investigation into conduct related to one of the intermediaries.

The DPA also notes that the company engaged in remedial measures by "terminating two employees and demoting [another]; seeking and obtaining the return of corrupt funds from agents; terminating longstanding agency relationships with corrupt and questionable third parties; stopped all payments to all of its agents in order to engage in a complete review of its then-current agents [...], hiring a full-time Chief Governance and Compliance Officer with authority to raise issues directly to the Supervisory Board or Audit Committee; engaging an independent company to design a new compliance program; creating a whistleblower hotline; training its sales and marketing personnel; and completing 3 years of monitoring under the supervision of the Dutch authorities." The DOJ determined that a U.S.-centric independent compliance monitor was unnecessary based on the company's remediation, "the state of its compliance program," and SBM's agreement to report to the DOJ and the U.S. Attorney's Office for the Southern District of Texas at no less than 12-month intervals during a three-year term.

Based on the factors discussed above, the DOJ determined that SBM was entitled to a 25 percent reduction off the bottom of the U.S. Sentencing Guidelines range. In addition, the U.S. government noted that the penalty assessed would avoid "substantially jeopardizing the continued viability of SBM."

Noteworthy Aspects:

- **Employees of International Oil and Gas Commercial Operators Can Be Considered "Foreign Officials" in Certain Circumstances**: In a previous DOJ opinion procedure release (OPR 10-03) in response to a specific inquiry, the DOJ suggested that it would consider even a U.S. -citizen consultant to be a foreign government official for FCPA purposes, if the consultant was "acting in an official capacity" for or on behalf of a foreign government, department, agency, or

instrumentality. This broad interpretation dates back to at least the SEC's 1986 *Ashland Oil* case, which defined a British national who served as an unofficial advisor to the Sultan of Oman as a "foreign official" (though he did hold several unrelated official titles) and to the 1990 *Young & Rubicam* case, in which the U.S. District Court for the District of Connecticut concluded that a Jamaican citizen who had close political ties to Jamaican officials and who served as an executive chairman of an instrumentality of the government constituted a "foreign official." More recently, in the 2014 *Alstom* case, the DOJ claimed that a dual U.S.-Egyptian citizen and employee of the U.S.-based Bechtel Corp. was a "foreign official" on the basis of his position as GM of Bechtel's joint venture with the state-owned and controlled Egyptian Electricity Holding Company (EEHC). According to the DOJ, the joint venture worked "for or on behalf of EEHC," within the meaning of the FCPA, which qualified the Bechtel employee, who allegedly used his position with the joint venture to secure kickbacks in exchange for parsing out contracts, as a "foreign official" under the statute.

The DOJ applied a similarly broad understanding of the scope of the FCPA's definition of a "foreign official" to SBM's conduct in Kazakhstan, where SBM allegedly made payments to an employee of the subsidiary of an Italian oil and gas company through a sales agent. Although the subsidiary of the Italian oil and gas company was not owned or controlled by the Kazakhstan government, the subsidiary had received a concession as the operator of an oil field in Kazakhstan, and, according to the DPA, "in this capacity, ... was acting in the official capacity on behalf of KazMunayGas in awarding contracts for exploration and development of the Kashagan oil field." Under this reasoning, an employees of a multinational oil and gas company — including a U.S.-based company — that is acting as an operator for a concession from a foreign government authority could be considered a "foreign official" for FCPA purposes.

- **Cooperation with Foreign Authorities**: This case is another example of the increased collaboration among authorities around the world, as well as the increased enforcement by authorities outside the U.S. In its press release, the DOJ expressed its gratitude to the enforcement authorities in Brazil, the Dutch Public Prosecutor's Office, and Switzerland's Office of the Attorney General and Federal Office of Justice for providing substantial assistance in gathering evidence during the investigation. As in the VimpelCom settlement, summarized in our FCPA Spring Review 2016, and to the Embraer disposition summarized in our FCPA Winter Review 2017, the DOJ credited SBM's payment of penalties to the Dutch authorities and the payment of penalties that SBM would likely pay to the Brazilian authorities.

Keppel Settles with DOJ Over Alleged Violations in Brazil

On December 22, 2017, Keppel Offshore & Marine Ltd. (Keppel), a Singapore-based company that operates shipyards and repairs and upgrades shipping vessels, and its wholly-owned U.S. subsidiary, Keppel Offshore & Marine USA Inc. (Keppel USA), settled FCPA and related charges with the DOJ, as part of a global disposition that also included authorities in Brazil and Singapore, for a global penalty totaling $422,216,980. Keppel agreed to pay Brazil over $211 million, or 50 percent of the total penalty, and to pay Singapore over $105 million, or 25 percent of the total penalty. The United States, in turn, agreed to credit those amounts, such that it received the remaining $105 million or 25 percent of the penalty, including $4,725,000 paid as a criminal fine on behalf of Keppel USA. The DOJ issued a DPA and Information that charged Keppel with one count of conspiracy to violate the anti-bribery provisions of the FCPA. Keppel USA similarly entered into a plea agreement regarding a single conspiracy count and on the same day, the DOJ unsealed a one-count information against Jeffrey Chow, a United States citizen and former senior in-house legal counsel at Keppel, for conspiracy to violate the FCPA. His guilty plea is discussed further below.

The Statements of Fact from the DPA and the plea agreements describe conduct spanning from 2001 through 2014. In particular, the DPA sets out how executives from Keppel and Keppel USA conspired to and paid bribes to employees of Petrobras, the Brazilian state-controlled oil company, and to the Workers' Party of Brazil, a Brazilian political party that formed part of the Brazilian federal government during the relevant time period, in connection with a number of projects located in Brazil. According to the case documents, the executives sought to conceal the payments by using a consultant who acted as Keppel's agent from 2000 to 2016. A number of Keppel executives knew these payments were intended to benefit government officials and were connected with the projects in Brazil. The DPA and guilty plea contain numerous examples of high level executives

emailing each other regarding the consultant and his companies. These cited emails overtly reference dollar-denominated payments not only to the consultant but also to "friends." Moreover, the e-mails reflect an understanding of which officials the consultant would approach and a concern with how the payments were to be structured. Pursuant to agreements between companies controlled by this consultant and Keppel, payments were made into bank accounts controlled by the consultant, including some accounts located in the United States. The Statements of Fact reports that the consultant then transferred money to accounts controlled by Brazilian government officials. Through approximately $55 million in corrupt payments, Keppel and its subsidiaries earned profits of over $350 million.

Noteworthy Aspects:

- **Coordination with Singapore and Brazil**: The settlement was the result of a coordinated resolution with Brazil and marked the first time that the DOJ coordinated a public FCPA resolution with the authorities in Singapore. The Leniency Agreement with the Public Prosecutor's Office in Brazil marks that office's latest resolution in the Operation Car Wash corruption probe. In Singapore, the company accepted a conditional warning from the Corrupt Practices Investigation Bureau. The global resolution reflects continuing efforts by the DOJ to work with foreign government partners to investigate international corruption schemes and sanction the responsible corporations and individuals.
- **Cooperation and Remediation Credit**: Neither company received voluntary disclosure credit because, while they initiated communication with the Fraud Section, the DOJ already knew of the publicly-reported allegations at that time contact was made. Yet, both Keppel and Keppel USA received a 25 percent discount off of the bottom of the Sentencing Guidelines range. The DOJ press release credited the discount to the companies' "substantial cooperation" with the investigation and to their having already taken "extensive remedial measures," including terminating and disciplining involved employees and implementing a new compliance and internal controls system. Furthermore, neither the DPA nor the guilty plea imposed an independent compliance monitor on the companies.

Actions Against Individuals

Florida Businessman Pleads Guilty to FCPA-Related Charges in Connection with DOJ's Investigation of PDVSA Energy Contracts

On October 11, 2017, Fernando Ardila-Rueda (Ardila), a Florida businessman, pled guilty to one count of violating and one count of conspiring to violate the FCPA. This action is part of the DOJ's ongoing investigation into various companies' contracts with Venezuelan state-owned energy company PDVSA, which we last discussed in our FCPA Spring Review 2017.

In its PDVSA investigation, the DOJ has alleged a conspiracy involving the owners of multiple U.S.-based energy companies who sought to obtain contracts from PDVSA for the provision of equipment and services by paying bribes to PDVSA purchasing managers. According to the indictment, Ardila served as a business partner of Jose Shiera Bastidas (Shiera), who owned several energy companies implicated in the scheme and whose guilty plea we discussed in our FCPA Spring Review 2016. Ardila conspired with Shiera and Roberto Enrique Rincon Fernandez (Rincon), another energy company owner, to facilitate their schemes. Specifically, the indictment alleges that Ardila helped Shiera and Rincon offer bribes to PDVSA officials equal to a percentage of the value of any contracts the officials steered to Shiera's and Rincon's companies. Ardila also wired bribe payments to the officials, provided meals and entertainment as bribes, and took steps to conceal the scheme.

Ardila is scheduled to be sentenced on February 8, 2018. Each of the charges to which he pled carries a maximum prison sentence of five years. Ardila was the 10th individual to plead guilty as part of the PDVSA investigation. Other defendants' pleas were covered in our Spring 2016, Summer 2016, and Spring 2017 publications. The DOJ's recent indictments against five former PDVSA officials, mentioned above, will be discussed in our FCPA Spring Review 2018.

Two SBM Executives Plead Guilty to FCPA Charges

On November 9, 2017, the DOJ announced that Anthony Mace, a U.K. citizen, and Robert Zubiate, a U.S. citizen from California, had each pled guilty to conspiracy to violate the FCPA for their roles in a scheme to bribe foreign government officials in Brazil, Angola, and Equatorial Guinea. As discussed in greater detail above, the DOJ announced a DPA with Mace and Zubiate's former employer, SBM, later the same month, as well as a guilty plea by SBM USA, SBM's Houston-based subsidiary.

According to the DPA with SBM, Mace served at various times from 2008 to 2011 as a member of the Board of Directors for two of SBM's Houston-based subsidiaries — SBM Atlantia and SBM Imodco — and as an executive for SBM Imodco. Zubiate reportedly served at various times as a member of SBM's sales and marketing team in Latin America and as an executive at SBM USA, SBM Atlantia, and SBM Imodco until February 2016. According to the DOJ's press release announcing the guilty pleas, Mace admitted he joined SBM's global conspiracy to make payments to officials in Brazil, Angola, and Equatorial Guinea "by authorizing payments in furtherance of the bribery scheme and deliberately avoided learning that those payments were bribes." Zubiate similarly admitted that from 1996 through 2012, he and other co-conspirators had used a third-party sales agent in Brazil to make payments to officials at the Brazilian state-owned oil company Petrobras, all in exchange for assistance in SBM's U.S. subsidiaries winning bids. Maces' sentencing was scheduled for February 2, 2018, and Zubiate's for January 31, 2018.

Four Individuals Plead Guilty, a Fifth Charged, in Rolls-Royce Bribery Scheme

The DOJ announced that four individuals have pleaded guilty and a fifth has been charged in relation to activities that the DOJ has alleged enabled Rolls-Royce Energy Systems Inc. (RRESI) — a subsidiary of Rolls-Royce plc — to obtain an unfair advantage in securing business from foreign governments around the world. Among these was a 2009-2012 alleged bribery scheme designed to help RRESI win and maintain contracts with Asia Gas Pipeline LLP (AGP), a joint venture between Kazakh and Chinese state-owned entities that was created for the purpose of constructing a gas pipeline connecting Central Asia and China. We previously reported on this investigation in our FCPA Winter Review 2017, where we explained that Rolls-Royce had entered into deferred prosecution or leniency agreements with the U.S., U.K., and Brazil.

According to recently unsealed court documents, Petros Contoguris, CEO of a Turkish oil and gas advisory company, and Andreas Kohler, managing director at an international engineering and consulting firm, conspired with Rolls-Royce executives and employees to pay kickbacks to Kohler's consulting firm. The kickbacks, which were disguised as legitimate commissions paid to Contoguris's company, were in fact paid to high-ranking Kazakh officials to secure their help in securing AGP contracts for Rolls-Royce.

Of the Rolls-Royce employees, James Finley, a U.K. citizen living in Taiwan and a former senior executive in the company's energy operation, was charged on July 21, 2017 and pled guilty on July 28, 2017 to violating and conspiring to violate the FCPA; Aloysius Johannes Jozef Zuurhout of the Netherlands, a former energy sales employee, was charged June 9, 2017 and pled guilty on June 13, 2017 to conspiring to violate the FCPA; and Keith Barnett of Texas, a former regional director in energy, was charged December 20, 2016 and pled guilty on December 28, 2016 to conspiring to violate the FCPA. In addition to the AGP conspiracy, all three admitted to participating in other foreign bribery schemes that benefitted Rolls-Royce as far back as 1999.

Andreas Kohler of Austria, whose firm received and forwarded the kickback payments, was charged June 6, 2017 and pled guilty on July 20, 2017 to conspiring to violate the FCPA. Petros Contoguris, a Greek citizen residing in Turkey, where he ran the advisory company that disguised the kickbacks, was indicted on October 12, 2017 and charged with several counts of violating the FCPA, laundering money, and conspiring to commit those offenses. He is believed to be outside the U.S. and has yet to be apprehended. Of the defendants who have pleaded guilty, all are scheduled to be sentenced in 2018.

The prosecutions were brought in the Southern District of Ohio, where RRESI held bank accounts from which the corrupt payments were made. The DOJ has touted these indictments and guilty pleas as proof of the Department's commitment to

prosecuting individuals, not just corporations, for violations of the FCPA.

Former Embraer Executive Pleads Guilty to Participating in Bribery Scheme Detailed in Embraer's 2016 Deferred Prosecution Agreement

On December 21, 2017, a former sales executive of Brazilian aircraft manufacturer Embraer S.A. pled guilty in the Southern District of New York to charges that he engaged in a scheme to bribe Saudi officials in exchange for aircraft contracts. The scheme was part of a larger pattern of foreign bribery at Embraer that was the basis for a 2016 FCPA disposition on which we reported in our FCPA Winter Review 2017.

The Information states that Colin Steven, a U.K. citizen residing in the United Arab Emirates, admitted that he caused Embraer to make roughly $1.5 million in bribe payments from a U.S. bank account to an official for Saudi Arabia's national oil company. In exchange, the official ensured Embraer would be awarded a contract for three new aircraft, worth approximately $93 million. According to the Information, Steven had the bribe payments funneled through a South African intermediary company that performed no legitimate services. Steven also arranged for a portion of the payments, totaling about $130,000, to be sent from the South African company to his personal bank account as a kickback. Steven admitted to orchestrating the bribery and kickback scheme, laundering the proceeds, and lying to FBI agents during their investigation. He is scheduled to be sentenced on June 21, 2018.

Steven's guilty plea comes more than a year after Embraer resolved DOJ and SEC charges related to the Saudi Arabian scheme and similar issues in the Dominican Republic and Mozambique. Specifically, Embraer entered into a three-year DPA with DOJ while also agreeing to pay a $107 million penalty, implement various compliance program and remediation measures, and retain an independent compliance monitor for three years. To settle with the SEC, Embraer separately agreed to pay nearly $100 million in disgorgement and prejudgment interest. Brazilian authorities, in cooperation with U.S. law enforcement, have charged 11 other individuals for their alleged involvement in the Dominican Republic payments, while authorities in Saudi Arabia have charged two others in connection with Embraer's activities there.

Senior Member of Keppel Legal Department Pleads Guilty

Nearly four months prior to the Keppel corporate settlement discussed above, Keppel senior in-house counsel Jeffrey Chow pled guilty to one count of conspiracy to violate the anti-bribery provision of the FCPA. According to the charging documents, Chow held various positions in Keppel's legal department between 1990 and 2017, including administrative manager, general manager, and director. At his August 29, 2017 plea hearing, Chow explained that his responsibilities over his time at Keppel included drafting and preparing contracts with Keppel's agents. He admitted to realizing that Keppel was overpaying a Brazilian consultant by millions of dollars in order for that consultant to then pay bribes to Petrobras and political party officials. Despite that knowledge, Chow drafted contracts between Keppel and the consultant that were ultimately used to pay bribes that led Keppel to be awarded projects with Petrobras and Sete Brasil. The court accepted Chow's plea on October 24, 2017 and Chow is scheduled to be sentenced in May 2018.

Ongoing Policy Developments and Related Litigation

DOJ Announces New "FCPA Corporate Enforcement Policy" to Replace the FCPA Pilot Program

As described in a Miller & Chevalier International Alert, on November 29, 2017, the DOJ introduced a new FCPA Corporate Enforcement Policy, which expanded certain aspects of and effectively replaced the Department's FCPA Pilot Program. The new Policy largely maintains the incentive structure of the Pilot Program, in that both policies offer the possibility of reduced penalties and other leniency for companies that (1) voluntary self-disclose FCPA-related misconduct; (2) fully cooperate with the DOJ in any subsequent investigation; and (3) implement timely and appropriate remediation. The new Policy is incorporated into the U.S.

Attorneys' Manual as Section 9-47.120.

Although the Pilot Program appears to be an impetus for the new Policy, there are some notable differences between the two. Companies that properly satisfied the Pilot Program's three main requirements could receive "up to a 50% reduction" off the bottom end of the applicable U.S. Sentencing Guidelines fine range, and under the program the DOJ would "consider" a declination of prosecution. The new Policy, in contrast, offers a "presumption" of a declination and, if the DOJ nonetheless deems a criminal resolution "warranted," the Fraud Section will generally provide a 50 percent (rather than an "up to 50" percent) reduction off the bottom end of the Sentencing Guidelines fine range and not require appointment of a monitor.

The new Policy also retains many of the Pilot Program's detailed criteria that companies must satisfy in order to be eligible for full disclosure credit. For example, like the Pilot Program before it, the new Policy defines voluntary self-disclosure to include disclosure of relevant facts about "*all* individuals involved in the violation of law" [emphasis added]. Similarly, under both the old Pilot Program and the new Policy, the requirement of full cooperation in FCPA matters requires that the company make available "those company officers and employees who possess relevant information" for interview by the DOJ, at least when the agency so requests. This requirement explicitly includes officers and employees located overseas, as well as officers and employees no longer associated with the company. Based on this continuing requirement, companies may wish to ensure that they have processes in place to encourage all relevant individuals to cooperate with the DOJ in the event of a disclosure, for example, through provisions in separation agreements conditioning severance pay on such cooperation.

At the same time, the new Policy also tightens some criteria that companies must satisfy for full disclosure credit. For example, disclosing companies must make "agents" available for interviews, not only officers and employees, as was required under the Pilot Program. Similarly, in order to receive credit for timely and appropriate remediation, a company must appropriately retain all relevant business records, which under the new Policy includes a requirement that companies expressly prohibit employee use of "software that generates but does not appropriately retain business records or communications." The scope of this language is potentially quite broad; on its face, software that falls under this provision if used for business purposes is likely to include outside messaging apps that automatically delete messages after a certain period of time, such as Snapchat or Wickr; outside apps or applications that use end-to-end encryption, such as WhatsApp or Telegram; and even outside e-mail programs, such as Gmail. While the use of such software has long posed challenges in FCPA investigations, it now also threatens to disqualify companies from receiving substantial benefits under the Corporate Enforcement Policy. Until or unless this aspect of the Policy is further clarified, the Policy's language suggests that the DOJ expects companies to at least (1) clearly instruct employees regarding what types of communication software are permissible to use in connection with business matters; and (2) effectively implement and enforce such policies.

In all, the new Policy largely strengthens the incentives previously available under the Pilot Program, continuing the DOJ's longstanding strategy of encouraging companies to voluntarily self-disclose and cooperate with its investigations.

SEC Ratifies the Appointment of Its ALJs; Solicitor General Reverses Course to Take Consistent Position Before Supreme Court

In November 2017, the SEC ratified the appointments of its five administrative law judges (ALJs), exercising its authority as "head of a department" to appoint these ALJs as inferior officers in compliance with the Appointments Clause of the Constitution. The SEC's action comes in the midst of ongoing litigation as to whether the ALJs' decision-making authority for administrative actions before the SEC renders them "inferior officers" — whose appointment is subject to the Appointments Clause — or merely employees who may be hired through a more informal procedure. As stated in the Ratification Order, the agency carried out this action explicitly in order "[t]o put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause."

This position is a departure from the SEC's prior stance in litigation that its hearing officers are employees and did not require

appointment by the president, the courts, or the agency head. The SEC's ALJs preside over administrative enforcement actions against individuals and entities that have allegedly violated federal securities laws. The ALJs are able to, among other things, hold hearings and issue initial decisions. Those decisions are deemed to be the actions of the SEC if further review is not sought or a request for review is denied by the SEC.

The ratification order sets out procedures for matters currently pending before the Commission, whether the ALJ has issued an initial decision or not, but does not address any potential claims by people previously sanctioned by the SEC through actions of ALJs. The order also acknowledged that the Solicitor General had, the day before, filed a brief before the Supreme Court in *Lucia v. SEC*, agreeing with the petitioner that the SEC's ALJs are inferior officers and not employees. In the underlying decision, the U.S. Court of Appeals for the D.C. Circuit held that the ALJs were employees rather than officers and therefore maintained the constitutionality of the hearing system, as discussed in our FCPA Summer Review 2017. The brief acknowledged the circuit split on the constitutionality issue (which is discussed in our FCPA Winter Review 2017), requested that the petition for writ of certiorari be granted, and asked that *amicus* be appointed to defend the contrary position. In January 2018, the Supreme Court granted the petition in *Lucia*.

International Developments

HSBC Enters into First Ever Corporate Criminal Settlement in France

On November 14, 2017, HSBC Private Bank (Suisse) SA (HSBC) entered into the first ever French Convention Judiciaire d'Interêt Public (CJIP) or Judicial Agreement in the Public Interest. The CJIP — which has frequently been compared to U.S.-style DPAs and NPAs — is a mechanism designed to allow for the settlement of corporate criminal cases created by France's new anti-corruption legislation, Sapin II, which came into force in December 2016.

Under French law, French enforcement officials can offer a CJIP to any legal entity suspected of having committed a variety of financial crimes, including bribery and laundering the proceeds of tax fraud. A company entering into a CJIP can be fined up to 30 percent of its average annual turnover over the last three years at the time the offense was committed and can be required to implement a compliance program monitored by France's new anti-corruption agency, the Agence Française Anticorruption.

The English version of the HSBC CJIP indicates that, in 2006 and 2007, HSBC concealed the assets of over 8,900 individuals from French tax authorities, thereby knowingly aiding and abetting violations of French tax laws. In order to resolve the matter, HSBC agreed to pay a total of €300 million in disgorgement, penalties, and damages to the French state.

The disgorgement of €86.4 million and penalties of €71.6 million together total 30 percent of the HSBC's average annual turnover for the last three years. The French authorities indicated that they imposed the highest possibly penalty because the facts were particularly serious, the violation continued for many years, HSBC did not voluntarily disclose wrongdoing to the French authorities and provided only minimal cooperation with the French authorities during the investigation, and did not admit liability. Although the CJIP acknowledges that at the time the investigation began, French law did not provide incentives encouraging full cooperation, French authorities did not reduce the fine amount to recognize this fact. The additional €142 million constitutes damages owed to the French state.

The severity of the penalty and the speed with which this case was resolved after Sapin II's entry into force suggests that French authorities are willing and eager to make use of the prosecutorial tools provided to them under the new law. This case may mark a turning point for the enforcement of financial crimes in France.

Argentina Introduces Corporate Liability and Compliance Standards in New Anti-Corruption Law

On December 1, 2017, Argentina introduced Law 27.401, amending certain corruption-related provisions already in the Criminal

Code and establishing corporate criminal liability for certain corruption offenses, alongside broad vicarious liability provisions and significant potential penalties. The new law, which will take effect on March 1, 2018, allows companies potentially to escape liability by self-reporting violations and returning any undue benefits if the violation occurs after an "adequate" compliance program that meets minimum requirements set forth in the law is instituted. The law also introduces a settlement mechanism that offers lower and predictable penalties for companies that cooperate with enforcement authorities.

The new law imposes liability for the following offenses:

- Bribery of or influence peddling involving public officials, whether domestic or international, in accordance with Articles 258 and 258 bis of the Argentine Criminal Code;
- The offense of "negotiations incompatible with the exercise of public functions," in accordance with Article 265 of the Code, which imposes liability on a public official who acts upon a personal interest, whether directly or indirectly, in any contract or transaction in which the official plays a role by the virtue of his or her position;
- The offense of "concusión" (loosely translated as "extortion"), in accordance with Article 268 of the Code, which imposes liability on a public official who converts, for the official's own benefit or that of a third party, undue funds obtained through an improper request or demand;
- Illicit enrichment of public officials and employees, in accordance with Articles 268(1) and 268(2) of the Code; and
- The offense of "aggravated balances and reports," in accordance with Article 300 bis of the Code, which imposes liability for the misrepresentation of certain books and records and accounting information by a founder, director, administrator, liquidator, or trustee of an entity with the intent to conceal the commission of offenses defined in Articles 258 and 258 bis, namely, bribery and influence peddling.

The new law governs the conduct of domestic and foreign legal entities, including those with state ownership or control. Geographically, the law amends the Criminal Code to apply to all offenses committed in or whose effects occur in Argentina, as well as offenses committed outside of Argentina by Argentine officials acting in an official capacity. With respect to bribery of foreign officials, the law also applies outside of Argentina to Argentine citizens and to legal entities domiciled in Argentina, whether under bylaws or through the existence of any establishments or branches in the country.

A legal entity may be liable regardless of whether it committed the offense directly or if it was committed indirectly on the entity's behalf, in its interest, or for its benefit. Indeed, an entity may be responsible if the action made in its interest or for its benefit is committed by an unauthorized third party, so long as the entity had even tacitly ratified the third party's conduct. The only exception to vicarious liability is if the person who committed the offense acted strictly for his or her own benefit, without generating any benefit for the entity.

The limitations period under the law is six years from the commission of the offense and it expressly provides for successor liability in case of an acquisition, merger, or other corporate transformation.

The law provides a range of penalties, including fines of two to five times the undue benefit obtained or that would have been obtained; a total or partial suspension of the legal entity's activities of up to 10 years; debarment, dissolution and liquidation of the entity's legal status; and others. The law also grants courts discretion to consider a number of factors in determining a penalty. These factors are: failure to comply with internal rules and procedures; the number and seniority of officials, employees, and others involved; lack of oversight over the principal actors and other participants; the extent of the harm; the amount of money involved; the size, nature, and finances of the legal entity; self-reporting to the authorities; subsequent conduct; disposition to mitigate or repair the harm; and recidivism. With respect to the last factor, the law provides a presumption of recidivism if the legal entity is sanctioned for an offense within three years of a previous conviction. Notably, suspension and dissolution penalties do not apply if there is an essential need to maintain the operational continuity of the legal entity or some specific project or service, though the

law does not clarify those circumstances.

Notwithstanding the gravity of potential penalties, a legal entity may be completely exempted from liability if it takes the following steps, concurrently:

- Self-reports the violation as a result of its internal detection and investigation;
- Had implemented an adequate system of control and supervision before the conduct at issue, whose breach would have required an effort by the participants in the offense; and
- Returns the undue benefit.

The second of these requirements references provisions of Law 27.401 that define the benefits and elements of an "integrity program" that companies subject to the law may adopt. As defined in the law, the program should be tailored to a company's risk profile, including its activities, size, and financial capacity. The program must include (1) a code of ethics or conduct, or an equivalent set of integrity-oriented policies and procedures applicable to all directors, administrators, and employees; (2) specific rules and procedures to prevent unlawful conduct in the context of public tenders, the execution of public contracts, or any other interaction with the public sector; and (3) periodic training. Beyond these required elements, the program may include any of 10 additional components, such as periodic risk analysis, visible and clear support from senior leadership and management, reporting mechanisms, whistleblower protection, third-party monitoring, M&A due diligence, and more. Somewhat unique in the context of written global anti-corruption compliance standards, one of the optional elements is compliance with the regulatory requirements with regard to integrity programs of respective authorities at the national police, provincial, municipal, and community levels. Presumably, the rationale behind the optional elements is that companies would adopt them as appropriate based on their risk profile.

Although the law generally does not require companies to have an integrity program, it includes an exception for companies that contract with the Argentine federal government, which must have an integrity program in place to engage in certain types of government contracts (*e.g.*, contracts that under local law require approval by a Minister or higher ranking government official and certain public works or concession contracts).

The law also introduces a new settlement mechanism called "Effective Collaboration Agreement," which has some commonalities with a DPA under U.S. enforcement practice and offers certain leniency to cooperating entities. In entering into such an Agreement with the authorities, an entity commits to providing accurate, useful, and verifiable information regarding relevant facts, identities of participants, and recovery of illicit proceeds. The entity would have to also agree to pay half the minimum applicable fine, return any illicit assets or proceeds, and forfeit any goods that would presumably be confiscated in case of conviction. Optional components of an Agreement include community service, disciplinary measures against direct participants, and implementation of or improvements to an existing integrity program. If a review of the Agreement by the prosecutors or the judge, conducted within one year of its execution, confirms that the information provided by the entity under the Agreement was truthful and useful, the imposed sentence cannot exceed that in the Agreement. If the information provided is not verified, the settlement is nullified and the process continues in accordance with applicable rules.

The Argentine Congress passed the law on November 8, 2017, and it was signed into law by President Macri on December 1, 2017. The law will take full effect 90 days after its official publication, on March 1, 2018.

One of the primary motivations behind the new law is a requirement by the Organization for Economic Co-operation and Development (OECD) – which Argentina has been seeking to join – that member states impose corporate liability for foreign bribery and the OECD's finding that Argentina was not in compliance with this requirement, despite being a signatory to the OECD Anti-Bribery Convention. While it is too early to tell how the authorities might enforce the new law, the carrot-and-stick approach appears at least partly intended to motivate companies to implement meaningful anti-corruption compliance programs.

Peru Introduces Corporate Liability for Corruption Offenses with a Compliance Program Defense

On January 1, 2018, Peruvian Law 30424 went into effect, introducing corporate liability for existing criminal offenses related to corruption, money laundering, and terrorist financing. The law was originally scheduled to take effect in July 2017, but Legislative Decree 1352, adopted on January 6, 2017, amended the original version of Law 30424, broadening the range of applicable offenses and shifting the effective date of the entire law to January 1, 2018.

Under the new law, legal entities may be liable for domestic and international bribery of public servants or officials, expressly including officials in judicial positions (as the corresponding provisions are defined in the Criminal Code), as well as for certain offenses related to money laundering and terrorist financing defined in other legislation. In addition to direct liability, legal entities may be liable for conduct carried out in the legal entity's name, on its behalf, or for its benefit by any of the following:

- Partners, directors, de facto or legal administrators, legal representatives, or attorneys-in-fact of the legal entity or any of its branches or subsidiaries;
- Any person who was under the authority and control of a person or entity in paragraph (a) and committed the offense by their order or authorization; or
- Any person within the scope of paragraph (b), where the commission of the offense was possible because the person or entity in paragraph (a) did not fulfill his or her duties of supervision, oversight, and control with respect to the conduct at issue.

A legal entity is exempt from corporate liability only if an individual who commits the offense does so exclusively for his or her own benefit or the benefit of a third party that is distinct from the legal entity.

Violations of the law can result in two types of penalties. The first is a fine, the amount of which is derived from either the undue benefit or the legal entity's annual income. The second is a corporate "disqualification," which can take one of several enumerated forms, from suspension of an entity's social activities to debarment, nullification of various administrative or municipal licenses, or dissolution.

The law lists several mitigating circumstances that can reduce potential penalties, including cooperation with authorities, impeding the harm caused by the offense, full or partial reparation of the damages, and the adoption and implementation of a "prevention model" (akin to a compliance program) after the commission of an offense but before trial. The law grants courts substantial discretion with regard to the imposition of penalties, including the ability to suspend a penalty by requiring a legal entity to: (1) provide full compensation for the damage caused by the offense; and (2) adopt and implement a prevention model. If the legal entity does not become subject to another criminal proceeding within the suspension period, the court may nullify the imposed sanction and dismiss the case upon confirming that the legal entity satisfied the compensation and prevention model requirements.

To be considered sufficient under the law, a prevention model must be tailored to a legal entity's nature, risks, needs, and characteristics, and must contain adequate monitoring and control measures to prevent the offenses covered by this law or significantly reduce the risk of their commission. It must also include, at a minimum, the following elements (with an exception for small enterprises):

- A person (or body) in charge of prevention, appointed by the highest administrative body of the legal entity and able to exercise this function autonomously;
- Identification, evaluation, and mitigation of risks related to the offenses covered by this law;
- Reporting procedures;
- Dissemination and periodic training; and

- Continuous evaluation and monitoring of the prevention model.

The law states that if an adequate prevention model is in place, corporate liability will not attach if an individual commits a proscribed offense by fraudulently eluding a duly implemented prevention model.

In all, the new law reflects a number of standards called for by the OECD Anti-Bribery Convention. Peru has not yet acceded to the Convention but has agreed to adhere to the Convention's standards under an OECD Country Programme, and the new law appears designed to address certain gaps in the country's legal framework for reducing domestic and international corruption. With corruption allegations recently reaching the highest levels of Peru's government, the new law comes into force at an opportune time for the country's enforcement authorities to put it into practice.

Miller & Chevalier Upcoming Speaking Engagements and Recent Articles

Upcoming Speaking Engagements

02.15.18	ABA Section of International Law Anti-Corruption Committee Meeting (Homer E. Moyer, Jr.)
02.22.18	ABA Section of International Law U.S. Economic Year-in-Review Event (Abigail E. Cotterill)
02.22.18	WIIT Panel: Customs 101 - The Basics of Cross-Border Transactions (Barbara D. Linney)
02.28.18	ABA Section of International Law U.S. Export Controls Year-in-Review Event (Abigail E. Cotterill)
03.02.18	J. Reuben Clark Law Society Event (James G. Tillen, Marc Alain Bohn)
03.09.18	GW Law Event: Emerging Issues in FCPA Enforcement (James G. Tillen)
03.09.18	14th Annual TRACE Forum (Alejandra Montenegro Almonte)
03.12.18	ACI 5th Mexico Summit on Anti-Corruption (Matteson Ellis)
03.14.18	Transparency International's Western Canada Anti-Corruption Conference (Kathryn Cameron Atkinson)
03.21.18	C5 Conference on Anti-Corruption (William P. Barry)
03.22.18	3rd Annual GIR Live DC (Kathryn Cameron Atkinson)

Recent Articles

02.06.18	Sanctions Showdown Looms in U.S. and Cryptocurrency (Brian J. Fleming)
02.01.18	Trade Compliance Flash: United States Names Russian Oligarchs; Promises Additional Sanctions Required by CAATSA (Barbara D. Linney, Collmann Griffin, Patrick M. Stewart)
01.30.18	The ABA Hosts Boni De Moraes Soares, a Federal Prosecutor from Brazil's Advocacia Geral Da União (Leah Moushey)
01.25.18	Executives at Risk: Winter 2018 (Dawn E. Murphy-Johnson, Lauren E. Briggerman, Kirby D. Behre, Adam W. Braskich, Sarah A. Dowd, Nina Gupta, Amelia Hairston-Porter, Ian A. Herbert, Aiysha S. Hussain, Jonathan D. Kossak, Nate Lankford, Nicholas R. Metcalf, Katherine E. Pappas, Dwight B. N. Pope, Michael Skopets, James G. Tillen)
01.16.18	Trade Compliance Flash: United States Issues "Last Chance" Waiver of Iran Sanctions and Steps Up Sanctions Against Iranian Weapons Proliferators and Human Rights Abusers (Brian J. Fleming, Barbara D. Linney, Collmann Griffin; also published in the January 2018 issue of *WorldECR*)

12.20.17	FCPA Enforcement Picks Up in 2nd Half of 2017 (James G. Tillen, Michael Skopets)
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12.12.17	The General Counsel's Guide to Government Investigations: International Investigations Chapter (Lauren E. Briggerman, Lamia R. Matta, Ann Sultan)
12.01.17	DOJ Releases New FCPA Corporate Enforcement Policy, Extending Pilot Program Indefinitely (John E. Davis, James G. Tillen, Michael Skopets, Collmann Griffin)
11.29.17	Getting the Deal Through: Market Intelligence (Volume 4, Issue 7) - Anti-Corruption 2018: Global Trends and Anti-Corruption in the United States Chapters (John E. Davis)

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[1] Our top 10 calculations for global settlements involving the FCPA reflect only the settlements of which we are aware, and may therefore be incomplete. In determining a collective penalty amount for comparative purposes, our top 10 calculations combine all actions brought against a particular company and its subsidiaries and affiliates.