

## Executives at Risk: Summer 2018

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The first half of 2018 saw several significant developments in government investigations that impact corporate executives. Since our last publication, the Department of Justice (DOJ):

- Announced charges against former Volkswagen AG CEO, Martin Winterkorn, the highest-ranking executive to be charged in the Volkswagen emissions scandal;
- Indicted five KPMG executives and a former regulator for allegedly participating in a scheme to steal government documents that tipped KPMG off to the government's audit inspection plans; and
- Expanded the scope of its National Collegiate Athletic Association (NCAA) bribery probe to include the men's basketball programs at two additional universities.

Few charges have been brought against individuals under the Foreign Corrupt Practices Act (FCPA) or antitrust cartel laws. Given that DOJ's Antitrust Division has not brought charges against individuals in a major price-fixing scheme in some time, it is not surprising that the Division announced a new initiative: criminal actions related to no-poach employment agreements. It remains to be seen whether the initiative will lead to criminal charges.

Other highlights in this publication include passage of the Clarifying Lawful Overseas Use of Data (CLOUD) Act, which affirms the government's ability to subpoena data stored abroad, and the largest whistleblower award in the history of the Securities and Exchange Commission (SEC).

### Noteworthy Investigations

#### Volkswagen Investigation

**Former Volkswagen AG CEO Charged with Conspiracy and Wire Fraud in Connection with Emissions Scandal:** [Since we last reported](#) on the Volkswagen investigation, on May 3, 2018, a [superseding indictment](#) was unsealed in the Eastern District of Michigan accusing Martin Winterkorn, the former CEO of Volkswagen AG and a German citizen and resident, of

conspiracy and wire fraud. The indictment alleges that Winterkorn knew about Volkswagen's diesel emissions cheating as early as May 2014, and that he and others attended a July 2015 meeting regarding Volkswagen's deception of U.S. regulators. The meeting included a discussion of what information had and had not been disclosed and the potential consequences if Volkswagen were caught. Meeting participants are alleged to have agreed to continue deceiving U.S. customers and regulators. Winterkorn is the ninth individual – and the highest-ranking company official – who has been charged in connection with the diesel emissions scandal. It is reported that Winterkorn [remains in Germany](#).

**German Police Target Porsche AG Executives in Emissions Scandal; Senior Porsche Executive Arrested:** In April, more than 30 German prosecutors and 160 police officers raided the offices of Porsche AG, a Volkswagen brand, as part of Germany's investigation into the diesel emissions scandal. The Stuttgart Public Prosecutor's Office [released a statement](#) that their search targeted three suspects, including a member of Porsche's executive board, a member of Porsche's senior management, and a former Porsche employee. After the raid, German police arrested senior Porsche AG executive Jörg Körner, the company's head of engine development. [Press reports indicate](#) that the unnamed Porsche executive board member is Michael Steiner, who leads research and development at Porsche. [Porsche confirmed](#) that investigators "inspected and secured documents" at their offices and that the company is cooperating fully with the investigation.

## NCAA Investigation

**College Basketball Corruption Scandal Ensnarers Two Additional Universities:** As [we previously reported](#), an Adidas executive, four NCAA assistant basketball coaches, and several other individuals have been charged with bribery in DOJ's probe of college basketball's recruiting channels. A [superseding indictment](#) filed in April adds wire fraud charges against James Gatto (the Adidas executive), Merl Code (a consultant for Adidas), and Christian Dawkins (a business manager). These charges relate to the college basketball programs at the University of Kansas and North Carolina State University, which were not referenced in the initial indictment. Tens of thousands of dollars in payments are alleged to have been made to the families of high school basketball players who agreed to attend Kansas or N.C. State, schools endorsed by Adidas, and that they would sign sponsorship deals with Adidas if they entered the NBA. Gatto allegedly arranged the payments through other individuals, including an unnamed coach at N.C. State. A spokesperson from Kansas [stated](#) that the indictment does not allege involvement by Kansas coaches in facilitating payments and that Kansas will cooperate fully with the investigation. N.C. State also [released a statement](#) that it is cooperating fully with the investigation.

## FIFA Investigation

**Former FIFA Executive Ordered to Forfeit \$6.7 Million; Convicted FIFA Executives Seek New Trial:** Since [we last reported](#) on the FIFA corruption scandal, the Eastern District of New York [ordered](#) Jeffrey Webb, a former FIFA vice president who pled guilty in November 2015 to racketeering conspiracy and other charges, to forfeit \$6.7 million. According to the forfeiture order, the funds represent monies Webb received as a result of his participation in FIFA-related bribery, fraud, embezzlement, and money laundering schemes, as well as monies he received in compensation and bonuses while serving as president of the Confederation of North, Central American and Caribbean Association Football and as vice president of FIFA.

In a January letter to the court, DOJ [announced](#) that it "does not intend to dismiss the remaining open counts" against Manuel Burga, a former Peruvian soccer federation president, who was acquitted of one racketeering conspiracy charge in December 2017. In addition to that charge, Burga faced allegations of wire fraud and money laundering conspiracy but was extradited from Peru only on the racketeering charge, so that is the only charge he faced at trial. The government has not explained its decision to keep the remaining counts open.

Also in January, Juan Ángel Napout, the former president of the South American soccer confederation Confederación Sudamericana de Fútbol (CONMEBOL), and José Maria Marin, a former Brazilian soccer federation president, asked for new trials in the Eastern District of New York. Both men were convicted of conspiracy charges in December 2017 following a five-week

trial.

## Actions Against Executives

### FCPA

**Media Executive Pleads Guilty to FCPA Charges:** In April, Julia Vivi Wang, a Chinese-born naturalized U.S. citizen, [pled guilty](#) in Manhattan federal court to charges of violating the FCPA and filing false tax returns in connection with a scheme to bribe former United Nations General Assembly President John Ashe, who had previously served as the UN representative from Antigua and Barbuda. According to the [superseding indictment](#), Wang, the former vice president of South-South News, a United Nations-focused media company, wired \$500,000 to Ashe in exchange for a diplomatic post for her or her husband with the Antiguan government, which Wang saw as a "business opportunity" that would benefit Chinese businesses operating in the Caribbean. Wang's guilty plea is part of a larger corruption investigation into bribes paid to UN officials by Macau billionaire Ng Lap Seng, who was convicted of paying \$1 million in bribes to Ashe and Francis Lorenzo, a former deputy UN ambassador from the Dominican Republic. Lorenzo himself [pled guilty](#) to bribery and money laundering charges in April and is awaiting sentencing. Wang's sentencing is scheduled for September 5.

**Transportation Executive Indicted for Bribing Russian Atomic Energy Official:** In January, former Transportation Logistics International (TLI) executive Mark Lambert was [indicted](#) on 11 FCPA-related charges stemming from his alleged role in a scheme to bribe an official of a subsidiary of the state-owned Russian Atomic Energy Corporation (ROSATOM). TLI reached its own FCPA-related deferred prosecution agreement with DOJ and agreed to pay a \$2 million penalty in March 2018.

According to Lambert's indictment, Lambert conspired with others at TLI, including his co-president Daren Condrey, to make a series of corrupt payments to Vadim Mikerin, a director of JSC Techsnabexport (TENEX), a ROSATOM subsidiary. Mikerin was also the president of TENAM Corporation, a wholly owned subsidiary and official U.S. representative of TENEX. Lambert and his co-conspirators allegedly agreed to make payments to offshore bank accounts belonging to shell companies associated with Mikerin in exchange for Mikerin's assistance in awarding TENEX uranium contracts to TLI. To conceal the bribery scheme, Lambert allegedly orchestrated the creation of fraudulent invoices describing services that were never actually provided to TENEX.

DOJ previously secured [guilty pleas](#) from Condrey, Mikerin, and Boris Rubizhevsky, an intermediary who facilitated the payments.

**"Siemens-8" Executive Pleads Guilty:** In March, German national and former Siemens AG executive Eberhard Reichert [pled guilty](#) in Manhattan federal court to conspiracy to violate the FCPA and to wire fraud charges related to his role in the worldwide corruption scheme that led to a \$1.3 billion global settlement between Siemens, the U.S. government, and German authorities. As we [discussed in our Winter 2018 issue](#), Reichert is one of the "Siemens-8," a group of eight former Siemens executives who were indicted in 2011 for their role in an alleged corrupt payment scheme in Argentina regarding a billion-dollar contract to modernize the country's national identity cards.

The indictment against Reichert alleged that he served as technical manager at a Siemens subsidiary that played a crucial role in winning the identity card project and that he later approved a sham contract that funneled \$27 million to Argentine officials.

After his arrest in Croatia last year, Reichert agreed to be extradited to the U.S. and initially pled not guilty in December 2017. He now awaits sentencing. Reichert is the second of the "Siemens-8" to appear in federal court. As we [previously reported](#), Andreas Truppel, the former CFO of Siemens's Argentine subsidiary, pled guilty in September 2015 for his role in the conspiracy.

### Kickbacks and Other Fraud

**Former Startup CEO Pleads Guilty to Defrauding Employees:** In February, Isaac Choi, founder and former CEO of the

now-defunct WrkRiot, [pled guilty](#) to one count of wire fraud for making false and misleading statements about his own educational, professional, and financial history to recruit employees for his job search platform startup. He further admitted to deceiving employees in order to keep them working by falsifying wire transfer confirmations to reflect supposed salary payments. This workplace fraud, including the fake wire transfers, was detailed in an August 2016 blog post by a former employee titled, "[I Got Scammed by a Silicon Valley Startup.](#)" Choi was indicted in June 2017, less than a year after the post. In May, he was sentenced to time served.

**Former Pharmaceutical Exec Convicted in \$50 Million Kickback Scheme:** In May, a federal jury [convicted](#) Gary Tanner, a former executive at Valeant Pharmaceuticals International, Inc., and co-conspirator Andrew Davenport, the former CEO of Philidor Rx Services LLC, for their roles in a multimillion-dollar kickback scheme. Valeant, a pharmaceutical manufacturer, tasked Tanner with negotiating its purchase of Philidor. Tanner assisted Philidor during the negotiations and received a \$9.7 million kickback from Davenport. The kickback stemmed from Valeant's acquisition of an option to purchase Philidor for \$133 million, of which Davenport received approximately \$50 million. Following the option purchase, Tanner continued to advance Davenport and Philidor's interests through his position at Valeant. Tanner and Davenport are scheduled to be sentenced in September.

## Cartel

**Antitrust Division Announces First No-Poach Enforcement Actions:** In April, DOJ's Antitrust Division announced proposed [settlements](#) with two rail equipment suppliers, Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporate (Wabtec), to resolve civil allegations that the companies entered into unlawful agreements not to compete for each other's employees, known as "no-poach" agreements. The terms of the proposed settlements have not been publicly disclosed. The settlements signal the Division's intent to prioritize actions against no-poach agreements. In October 2016, the Division issued [guidance](#) to companies of its intent to pursue criminal charges against companies and individuals for engaging in so-called "naked wage-fixing" and no-poach agreements. While the Division has yet to announce any criminal charges related to no-poach agreements, Antitrust Division Assistant Attorney General Makan Delrahim indicated in [remarks](#) made in January that such charges would be forthcoming. The Division did not charge Knorr-Bremse or Wabtec criminally because the no-poach agreements were discovered and terminated before the October 2016 guidance.

## Criminal Cases Against Legal and Compliance Officers

**Compliance Officers for Wall Street Broker-Dealer Charged with Violations of Anti-Money Laundering (AML) Regulations:** In March, the SEC announced [cease-and-desist orders](#) against two former compliance officers of Aegis Capital Corporation, a New York-based brokerage firm, alleging they aided and abetted the company's violations of AML laws by failing to heed red flags associated with transactions potentially related to the market manipulation of low-priced securities. Kevin McKenna and Eugene Terracciano were charged with failing to file Suspicious Activity Reports (SARs) on behalf of Aegis for the transactions at issue. Aegis CEO Robert Eide was found to have caused the violations. Eide and McKenna settled the charges against them and agreed to pay penalties of \$40,000 and \$20,000, respectively. They did not admit or deny the SEC's findings. Terracciano, who faced a public hearing in front of an administrative law judge, has [agreed in principle](#) to a settlement. Aegis Capital itself was fined a combined \$1.3 million by the SEC and the Financial Industry Regulatory Authority (FINRA) for failing to report suspicious transactions and failing to properly supervise its AML program.

## Noteworthy Court Rulings

**Disclosure to SEC Waived Work Product Protections in Internal Investigation:** In [SEC v. Herrera](#), the Southern District of Florida held that outside counsel to General Cable Corporation (GCC), waived work product protections regarding its internal investigation by providing the SEC with "oral downloads" of interview notes and memoranda prepared by the firm's attorneys during the internal investigation. The SEC later initiated civil proceedings against two GCC executives, who moved to compel production of the investigation materials. Even though the company was cooperating with the SEC at the time of the oral

downloads, the court found that GCC and the SEC were still adverse to each other, and because there was no substantive distinction for waiver purposes between giving information to the SEC orally or in writing, the court held that the summaries triggered a limited waiver of work product protection. The court ordered GCC to produce to the two executives all attorney notes and memoranda discussing or reflecting the information disclosed to the SEC.

## Noteworthy Sentencing

**Cooperator Gets Maximum Five-Year Sentence Due to Size of Fraud:** In January, Hyunjin Lerner, former vice president of finance for publicly traded Bankrate, Inc., received the statutory maximum sentence of five years' imprisonment for engaging in securities and accounting fraud, despite extensive cooperation with the government against his former boss, the company's CFO Brian DiMaria. Lerner [pled guilty](#) in October 2017 to federal charges related to a scheme to manipulate Bankrate's financial statements and to artificially inflate its earnings. According to his [sentencing memorandum](#), Lerner's cooperation included testifying before the SEC for three days, settling charges with the SEC before it filed a complaint against him, and providing information to DOJ multiple times. Lerner also is expected to testify at trial against DiMaria, who was indicted in December 2017. Lerner faced a prison range of 10-12 months under the federal Sentencing Guidelines, but the Court was unwilling to sentence him below the five-year statutory maximum because of the extent of the fraud, despite his cooperation.

**CEO Flees, Gets Caught, and Gets 25 Years for 'Diabolical Genius' Loan Fraud Scheme:** In March, Nikesh Patel, CEO of Florida-based First Farmers Financial LLC, received a 25-year sentence for fabricating and selling nearly \$200 million in sham loans to two investment firms. Patel [pled guilty](#) in December 2016 to five counts of wire fraud relating to a scheme in which he created false documents purporting to show that First Farmers had loaned money to borrowers, and that those loans were guaranteed by the federal government. He was [arrested](#) in January 2018 – the day he was originally to be sentenced – after attempting to flee the country on a fake passport to obtain political asylum in Ecuador. According to [media reports](#) of the sentencing hearing, Judge Charles Kocoras of the Northern District of Illinois described Patel's crimes as "diabolical genius." The judge said it was the largest financial fraud case he had overseen during his four decades on the bench and involved a web of lies and falsified documents so broad that "most mere mortals" would never have thought to attempt such a scheme. Media reports also indicate that Patel continued to concoct fraud schemes even after he pled guilty and while he awaited his initial sentencing hearing.

**Court Rejects Government's Bid for Restitution Based on Executives' Salaries:** In March, a California federal court [denied](#) the government's request for \$7.5 million in restitution from Ebrahim Shabudin, the former chief operating officer and chief credit officer of United Commercial Bank (UCB), who was [convicted](#) in March 2015 of conspiring to falsify bank records to conceal UCB's losses during the 2008 financial crisis. Shabudin was originally sentenced to 97 months in prison and ordered to pay back \$946 million in aid that UCB had received from the federal government. In July 2017, however, the Ninth Circuit [vacated](#) the restitution order, holding that Shabudin's conduct "did not alone cause UCB's failure." On remand, the government argued that the trial court could use the gain earned by Shabudin and his co-conspirators (*i.e.*, their combined salaries) as a measure of the "minimum amount of loss the defendant's scheme caused." The court disagreed, holding that the government cannot use ill-gotten gains as a substitute for victims' losses.

**Supreme Court Slashes Restitution Owed by Former Trucking CEO:** In May, the United States Supreme Court [reversed](#) a lower court's decision ordering Sergio Lagos, the former CEO of trucking company USA Dry Van Logistics, to pay attorneys' fees and investigative fees stemming from a company's internal investigation into a fraud scheme in which Lagos participated. Lagos [pled guilty](#) in January 2015 to defrauding lender GE Capital Corporation out of \$26 million. As we [previously reported](#), in February 2016, a Texas district court sentenced Lagos to more than eight years in prison and [ordered](#) him to pay \$16 million in restitution, which included the attorneys' fees and investigative fees GE incurred during its internal fraud investigation. The Fifth Circuit upheld the restitution award on appeal. The Supreme Court concluded, however, that the Mandatory Victims Restitution Act (MVRA) requires reimbursement of expenses incurred in connection with government investigations and criminal proceedings, but not private investigations and civil proceedings. As a result, the high Court reduced the \$16 million restitution

order by \$5 million (the amount related to the internal investigation), still leaving Lagos with \$11 million to pay.

## Extraterritoriality

**CLOUD Act Affirms Government's Power to Subpoena Overseas Data, Mooting Microsoft Case:** In March, Congress amended the Stored Communications Act of 1986 (SCA) to allow federal authorities to subpoena electronic data stored overseas. Congress did so through the [Clarifying Lawful Overseas Use of Data \(CLOUD\) Act](#), which also permits the U.S. Attorney General to enter into bilateral "executive agreements" governing data-sharing with foreign governments, thereby giving U.S. and foreign law enforcement agencies reciprocal access to data stored in each other's countries. The Act includes a formal process through which companies can challenge a search warrant if disclosure would violate the laws of the country in which the data is located. Congress passed the CLOUD Act as part of an omnibus spending bill, at least in part to address a circuit split over whether the SCA had extraterritorial reach. That split led the Supreme Court to grant certiorari in *United States v. Microsoft* in October 2017. In April, the Supreme Court declared *Microsoft moot* in light of the CLOUD Act's passage.

## Whistleblower Issues

**SEC Issues Largest Whistleblower Award in Its History:** In [March](#), the SEC's Office of the Whistleblower issued its largest award in a single case – \$88 million – which it split among three whistleblowers. The media [reported](#) that tips from the three individuals helped launch the SEC's investigation of Merrill Lynch's customer protection practices, which culminated in a record-breaking \$415 million [customer protection settlement](#). [According to the SEC](#), Merrill Lynch used customer funds that should have been deposited into a reserve account to finance the brokerage firm's own trading activities. In September 2017, William Tirrell, the former head of Merrill Lynch's regulatory reporting department, agreed to a [cease-and-desist order](#) but avoided fines, penalties, and a suspension.

**Whistleblowers Must Report to SEC for Dodd-Frank Anti-Retaliation Protections to Apply:** In February, the U.S. Supreme Court ruled in [Digital Realty Trust, Inc. v. Somers](#) that a whistleblower who reports misconduct internally to an employer but not to the SEC is not entitled to the anti-retaliation protections of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. The decision resolved a circuit split over the scope of the Act's anti-retaliation provisions and confirms that employees must report violations of securities laws to the SEC to be protected by Dodd-Frank's anti-retaliation provisions.

**Professional Whistleblower Collects Third False Claims Act Settlement Award:** In April, attorney Cecilia Guardiola received a \$3.3 million whistleblower settlement award for reporting misconduct by her former employer, Banner Health, which recently [settled](#) with DOJ for \$18 million for fraudulently overbilling Medicare. This was Guardiola's third whistleblower settlement award under the False Claims Act (FCA). In June 2016, she was awarded \$1.7 million in relation to a [\\$9.5 million](#) FCA settlement between DOJ and Renown Health, and in June 2012, she was awarded approximately \$1 million in relation to a [\\$5.1 million](#) settlement with Christus Spohn Health System. Guardiola had worked for each of the three companies for less than two years each and, in each instance, resigned and then filed FCA whistleblower actions.

## Officer & Director Issues

**Six Charged in Scheme to Tip Off KPMG to Regulator's Audit Inspection Plans:** Five former KPMG executives and one former employee of the Public Company Accounting Oversight Board (PCAOB), the regulatory body that oversees the audit industry, have been charged with disseminating confidential PCAOB information to KPMG in order to tip off the accounting firm about the regulator's audit inspection plans. The [indictment](#) against five of the individuals was unsealed in January. All five have moved to dismiss the charges against them. The sixth individual, Brian Sweet, has pled guilty to conspiracy and wire fraud charges related to the scheme. Sweet, a former PCAOB employee, admitted that he copied confidential PCAOB information detailing what KPMG financial documents the PCAOB intended to inspect and that he provided the information to KPMG when he took a position with the accounting firm.

**Big Law Partner Sentenced for Stealing DOJ Investigative Files to Boost Practice:** In March, Jeffrey Wertkin, a former prosecutor in DOJ's Civil Fraud Section and a former partner at Akin Gump Strauss Hauer & Feld, [was sentenced to 30 months](#) for stealing sealed investigation files when he left DOJ to solicit business from investigation targets when he joined private practice. He also [admitted](#) that he attempted to destroy evidence of his criminal conduct and frame a former colleague for the theft. Wertkin was arrested in January 2017 in a hotel lobby outside of San Francisco wearing a wig, a fake mustache, and sunglasses, and carrying confidential government documents. He [pled guilty](#) in November 2017.

## Export Controls

**Iranian Bank Executive Indicted and Arrested for Evading Sanctions:** In March, Ali Sadr Hashemi Nejad (Sadr), chairman of a Maltese Bank, was [arrested and charged](#) with bank fraud and conspiracy to evade sanctions against Iran, commit money laundering, and commit bank fraud in connection with receiving \$115 million in payments through U.S. banks for a Venezuelan housing project. The indictment alleges that Sadr evaded U.S. sanctions on Iran by using a United Arab Emirates address to incorporate two entities which would receive payments from a \$475 million deal with a Venezuelan state-owned energy company to build housing units. The two entities were allegedly owned and controlled by Sadr and his family in Iran. The indictment further alleges that Sadr opened U.S. bank accounts for each company, through which they received \$115 million.

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