

Executives at Risk: Winter 2018

White Collar Alert

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The last quarter of 2017 resulted in several significant developments in government investigations that impact corporate executives. Since our last issue of Executives at Risk, the Department of Justice (DOJ) has:

- Charged several executives in the NCAA basketball corruption probe and in the Rolls-Royce Foreign Corrupt Practices Act (FCPA) inquiry;
- Entered into an unusual plea agreement with a defendant in which the defendant pled guilty to willful blindness, allowing him to avoid admitting direct knowledge of FCPA violations;
- Granted last-minute immunity to a cooperating witness at the Retrophin fraud trial; and
- Secured a lengthy sentence for an executive in the Volkswagen emissions prosecution.

However, DOJ has suffered some setbacks in trials in the foreign exchange currency (FOREX) manipulation and Fédération Internationale de Football Association (FIFA) corruption investigations. DOJ also has been forced to defend its indictment of an executive in the London Interbank Offered Rate (LIBOR) investigation in light of the Second Circuit's decision in *U.S. v Allen*.

Finally, DOJ recently issued a new FCPA Corporate Enforcement Policy, which is discussed below.

Noteworthy Investigations

Volkswagen Investigation

Volkswagen AG Executive Receives Seven-Year Sentence for Role in Emissions Scandal: As we [previously reported](#), Oliver Schmidt, Volkswagen AG's former general manager of the U.S. Environment and Engineering Office and senior aide to the company's head of engine development, pled guilty in August 2017 to conspiring to falsify emissions data. In December, Schmidt was [sentenced](#) by U.S. District Court Judge Sean F. Cox of the Eastern District of Michigan to seven years in prison for his role in

the scheme. Schmidt requested a sentence of 40 months, while federal prosecutors sought seven years. In addition, Schmidt was fined \$400,000. With Schmidt's consent, the court ordered that Schmidt, a German citizen, be removed from the United States to Germany, which will be effected upon completion of his term of incarceration. Schmidt is the second Volkswagen AG employee to be sentenced — engineer James Liang [was sentenced to 40 months](#) in prison for his role in the conspiracy. Liang has appealed his sentence to the Sixth Circuit.

Volkswagen Investigation Leads to EU Antitrust Probe: In October, EU officials [raided](#) the headquarters of Daimler, Volkswagen AG, BMW, and Audi. According to [press reports](#), EU antitrust officials are investigating reports that, as far back as the 1990s, Volkswagen, Daimler AG, and BMW AG coordinated activities related to vehicle technology, costs, suppliers, and diesel emissions controls. Both Volkswagen and Daimler have produced information to authorities, and both have claimed leniency as part of an EU program that allows companies to receive full or partial immunity from fines if they self-report wrongdoing. The CEO of Volkswagen AG has [denied](#) that price fixing occurred; Daimler stated that an inspection occurred and that the company was "cooperating fully"; and BMW stated that EU investigators "conducted an inspection," but no formal proceedings have been opened against the company.

FIFA Investigation

Two Executives Convicted and One Executive Acquitted in FIFA Corruption Trial: Since [we last reported](#) on the FIFA corruption scandal, a federal jury in the Eastern District of New York [convicted](#) 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. After a five-week trial, the jury found Napout guilty of two counts of wire fraud conspiracy, Marin guilty of three counts of wire fraud conspiracy and two counts of money laundering conspiracy, and both Napout and Marin guilty of racketeering conspiracy. The jury acquitted Napout and Marin of several other charges. Marin and Napout were taken into custody immediately following the verdict. A few days later, the jury [acquitted](#) Manuel Burga, a former Peruvian soccer federation president, of one racketeering conspiracy charge. The three men are the first executives to be tried as part of the U.S. government's ongoing six-year corruption investigation into the use of bribery, fraud, and money laundering in issuing media and marketing rights for FIFA games.

NCAA Investigation

Adidas Executive and NCAA Coaches Charged with Bribery in Probe of College Basketball: In September, an Adidas executive, four NCAA assistant basketball coaches from top college basketball programs, and several other individuals (including financial advisors and an Adidas consultant) were charged by criminal complaint with offenses ranging from conspiracy to commit bribery to honest services wire fraud. In November, a federal grand jury issued related indictments (which can be found [here](#), [here](#), and [here](#)) alleging two related schemes to pay student athletes to attend and play for universities whose basketball programs are sponsored by Adidas. The first scheme alleges that James Gatto, director of global sports marketing for Adidas, facilitated six-figure payments to the families of high school basketball players in exchange for assurances that the players would accept offers from NCAA Division I basketball programs sponsored by Adidas and sign sponsorship deals with Adidas upon entering the NBA. In the second scheme, the four assistant coaches — Chuck Person from Auburn University, Lamont Evans from Oklahoma State University (previously the University of South Carolina), Emanuel Richardson from the University of Arizona, and Anthony Bland from the University of Southern California — allegedly accepted bribes from agents and financial advisors to induce athletes to hire those agents and financial advisors once they joined the NBA.

Actions Against Executives

Currency Manipulation

Jury Convicts First FOREX Defendant: In October, a federal jury [convicted](#) former HSBC Holdings Plc executive, Mark Johnson, of multiple counts of wire fraud for his role in manipulating FOREX rates. Johnson was convicted of defrauding HSBC's client, Cairn Energy Plc, by scheming with others to inflate the price of British pounds before executing a currency trade on behalf of Cairn. [As we previously reported](#), Johnson was the first individual to be charged in DOJ's FOREX investigation and is the first to

be convicted at trial. So far, seven individuals have been charged, only two of whom have pled guilty. Johnson's sentence is pending.

DOJ Forced to Defend Indictment in LIBOR Case: In October, a federal court [ordered DOJ](#) to show that its case against Gavin Black, a former Deutsche Bank trader accused of manipulating LIBOR, is not tainted by Black's earlier testimony compelled by the U.K.'s Financial Conduct Authority (FCA). The federal court's ruling comes on the heels of the Second Circuit's July 2017 decision in *U.S. v. Allen* holding that a defendant's prior testimony, when compelled abroad, cannot be used against him or her in a criminal trial in a U.S. court. The Second Circuit further held that, when the government calls a witness who had substantial exposure to a defendant's compelled testimony, it is required under *Kastigar v. United States*, 406 U.S. 441 (1972), to prove that a witness's exposure to the defendant's compelled testimony did not influence the government's evidence. Gavin Black's so-called *Kastigar* hearing has been set for February 28.

FCPA

Three Rolls-Royce Employees and Two Others Indicted for Bribery: In November, DOJ [unsealed charges](#) against five individuals in a cross-border bribery investigation. The charges alleged that James Finley and Keith Barnett (former Rolls-Royce executives), Aloysius Zuurhout (a former Rolls-Royce sales employee), and Andreas Kohler (managing director of an international consulting firm) conspired to bribe Kazakh officials in exchange for a \$145 million contract for supplying equipment and services to Asia Gas Pipeline LLP (AGP). AGP, a Kazakh/Chinese joint venture, was created to supervise the construction of a large gas pipeline from Central Asia to China. AGP awarded the contract to Rolls-Royce Energy Systems Inc. (RRESI), a U.S.-based subsidiary of Rolls-Royce.

In 2016 and 2017, Finley, Barnett, Zuurhout, and Kohler each pled guilty to one count of conspiracy to violate the FCPA. Finley also pled guilty to one count of violating the FCPA. The fifth defendant, Petros Contoguris, CEO of Gravitas & CIE International Ltd, a commercial agent advising on the pipeline contract, has been charged with one count of conspiracy to violate the FCPA, one count of conspiracy to launder money, seven counts of violating the FCPA, and 10 counts of money laundering. Contoguris, a Greek citizen who resides in Turkey, has not responded to the indictment.

The announcement of the charges against the individual defendants follows a January 2017 deferred prosecution agreement between DOJ and Rolls-Royce plc. As discussed in Miller & Chevalier's [FCPA Winter Review 2017](#), the company paid \$800 million as part of a global settlement with U.S., U.K., and Brazilian authorities relating to the same pattern of bribery spread across at least a dozen countries.

In 2017, 17 individuals were charged with FCPA-related offenses. As we have [previously reported](#), DOJ has a mixed track record in recent cross-border cases because of jurisdictional issues and problems with extradition. In the Rolls-Royce matter, James Finley, a U.K. national residing outside of the United States, pled guilty to a [two-count information](#) that alleged he was an "agent of a domestic concern," because he had responsibility for U.S. subsidiary RRESI's worldwide sales operations. He also admitted that he caused a wire transfer to be made from RRESI's bank account in Ohio to an account in the U.K. These admissions arguably brought him within the FCPA's jurisdictional orbit and avoided the difficulties the government has faced in other cases involving foreign nationals.

Former Embraer Executive Pleads Guilty to Paying \$1.6 Million in Bribes to Saudi Aramco Officials: In December, Colin Steven, a former sales executive of Brazilian aircraft manufacturer Embraer S.A., [pled guilty](#) in the Southern District of New York to charges that he masterminded a scheme to pay \$1.6 million in bribes to an official of Saudi Arabia's national oil company, in exchange for a contract worth approximately \$93 million. Steven was charged with making three \$550,000 payments from a U.S. bank account to an official of Saudi Aramco through a South African intermediary company that otherwise performed no legitimate services. In exchange, the Saudi official agreed that Embraer would receive favorable terms in an upcoming sale of three jet aircraft. In addition, Steven arranged for a \$130,000 kickback to be reserved from the bribe funds and funneled the money into his personal bank account through the South African entity. Steven pled guilty to conspiracy to violate the FCPA, wire fraud, and money laundering. He also pled guilty to making a false statement, a charge that stemmed from lying to the FBI when questioned

about the kickback.

Steven's plea comes a little more than a year after Embraer S.A. executed a \$205 global corporate resolution with U.S. and Brazilian authorities for a wide range of FCPA-related conduct in the Dominican Republic, Mozambique, Saudi Arabia, and India, as previously discussed in Miller & Chevalier's [FCPA Winter Review 2017](#). At least 13 other individuals have been charged in connection with the scheme.

Executive in "Siemens-8" Conspiracy Pleads Not Guilty to Bribing Argentine Officials: Eberhard Reichert, a German national and former Siemens executive, pled not guilty in December to charges stemming from a [2011 indictment](#) alleging he conspired to pay nearly \$100 million to officials in the Argentine Ministry of Justice. Reichert is one of eight Siemens executives indicted in 2011 for a bribery scheme connected to a billion-dollar contract to produce national identification cards for Argentine citizens. This scheme was part of a \$1.3 billion global settlement between Siemens, the U.S. government, and German authorities, which has been extensively discussed in previous Miller & Chevalier FCPA Reviews (see [here](#), [here](#), and [here](#)). Reichert, who was arrested in Croatia and consented to extradition to the United States, is only the second individual to address the charges. His trial is scheduled to begin in July.

Another former Siemens executive, Andres Truppel, [pled guilty](#) in September 2015 for his role in the conspiracy. The other six individuals, all non-U.S. persons, remain outside the United States. In parallel proceedings, six of the "Siemens-8" also face civil charges brought by the Securities and Exchange Commission (SEC) for the same conduct. Notably, a judge in the Southern District of New York dismissed charges against one individual, Herbert Steffen, due to lack of personal jurisdiction. It remains to be seen whether DOJ will encounter similar jurisdictional hurdles.

Export Controls

Turkish Banker Convicted for Conduct Claimed to Lack a U.S. Nexus : In January 2018, Mehmet Hakan Atilla, the deputy general manager of a Turkish bank, was convicted by a federal jury for participating in a conspiracy to violate the U.S. sanctions program against Iran, bank fraud, and money laundering. The [indictment](#) alleged that Atilla participated in a scheme to launder Iranian funds out of Turkey and Dubai to avoid U.S. sanctions, and that he did so on behalf of the Iranian government. The indictment also alleged that Atilla created fraudulent documents to disguise the financial transactions as shipments of food and medicine (which are exempt from the U.S. sanctions regime). Before trial, Atilla moved to dismiss charges against him on jurisdictional grounds, arguing that the alleged activity occurred entirely outside of the United States and had no U.S. nexus. The court denied Atilla's motion. The government's star witness and Atilla's alleged co-conspirator, Reza Zarrab, [pled guilty](#) in October to seven related charges.

Former Metallurgical Company Executive Sentenced to 57 Months for Conspiring to Export to Iran : In September, Erdal Kuyumcu, CEO of Global Metallurgy, LLC, was [sentenced](#) to 57 months in prison for violating the International Emergency Economic Powers Act. As [we previously reported](#), Kuyumcu pled guilty to conspiring with Mehmet Cingi, owner of Turkish company Era Metalurji, to export cobalt-nickel metallic powders to Iran through Turkey, without obtaining a license from the U.S. Office of Foreign Assets Control. At a presentence evidentiary hearing, the government argued that the metallic powder had potential military and nuclear applications and that Kuyumcu knew that the shipment of metallic powder was destined for Iran and worked with co-conspirators to fabricate end-user information.

Government Contracts Fraud

Minority Small Business Owners Charged in 46-Count Indictment on Charges Relating to Improper Lobbying Expenses: In November 2017, two minority small business owners were among four defendants [charged](#) with defrauding the U.S. government. Joe Diaz and Arturo Vargas obtained multi-million dollar contracts with the U.S. Army's now-defunct Big Crow Program Office (BCPO) to provide the office with technical and analytical support. Beginning in or before 2004, then-BCPO director Milton Boutte allegedly conspired with Diaz, Vargas, and lobbyist George Lowe to divert almost \$6 million paid under the BCPO contracts that should have gone to legitimate services in support of the BCPO, but instead went to Lowe and other lobbyists. The [46-count indictment](#) alleges that all four defendants, who face up to 20 years in prison, conspired to commit wire fraud, conspired

to defraud the U.S., and made false claims. Vargas, Boutte, and Lowe have pleaded not guilty. Trial is currently scheduled for January 29, 2018, but a pending motion indicates it might be continued to a date in the spring.

Owners of Military Equipment Manufacturer Get Prison Time for Defrauding Army; CFO Out on Probation: The former co-owners of a manufacturing company specializing in products for military vehicles were sentenced to prison for defrauding the U.S. government of more than \$6 million. [As we previously reported](#), brothers Thomas and John Buckner owned Ibis Tek, which contracted with the Army to build special Humvee windows. The Buckners greatly inflated their material costs and failed to report income from the sale of scrap aluminum. In June, they each [pled guilty](#) to one count of defrauding the U.S. Army and two counts of income tax evasion. In October, Thomas Buckner was sentenced to 30 months in prison and ordered to pay a \$500,000 fine; John Buckner was sentenced to 24 months in prison and ordered to pay \$300,000. The company's former CFO, Harry Kramer, previously [pled guilty](#) to assisting with the scheme and to filing false tax returns for the company in 2009 and 2010. He was [sentenced](#) to three years' probation, six months' home detention, 150 hours of community service, and a \$15,000 fine.

Kickbacks and Other Fraud

Pharmacist Convicted of Racketeering, Acquitted of Murder: In October, a federal jury found Glenn Chin, a former supervising pharmacist at the now-closed New England Compounding Center (NECC), [guilty](#) of racketeering, conspiracy, mail fraud, and false labeling for his role in a deadly fungal meningitis outbreak stemming from steroid injections manufactured by NECC in allegedly unsanitary conditions. Of the more than 750 individuals who were infected, at least 60 died. Chin is the second defendant to go to trial for charges related to the outbreak. NECC owner and head pharmacist Barry Cadden received a [nine-year sentence](#) in June based on convictions for similar charges. In both cases, prosecutors sought convictions on second-degree murder charges, but the juries found the defendants [not guilty](#). Chin's sentencing is scheduled for January 31, 2018.

Tax

Jury Acquits Former Swiss Banker of Tax Evasion Conspiracy: In November, following a three-week trial, a federal jury acquitted Stefan Buck, the former head of private banking at Bank Frey & Co AG, of conspiracy to defraud the United States. In April 2013, Mr. Buck and Swiss lawyer Edgar Paltzer were [indicted](#) for conspiring to defraud the United States by assisting U.S. taxpayers in opening, maintaining, and closing undeclared bank accounts in Switzerland. Mr. Paltzer cooperated with prosecutors and [pled guilty](#) to conspiring to help U.S. taxpayers evade federal income tax relating to foreign bank accounts in August 2013. In October 2013, Bank Frey became the second Swiss bank to close following DOJ's investigation of the Swiss banking system. The government presented the testimony of five former U.S. Bank Frey clients, Mr. Paltzer, and a Bank Frey asset manager. After a day of deliberations, the jury found Mr. Buck not guilty.

IRS Staffing for Criminal Cases Decreases: In its recently released [2017 annual report](#), the Internal Revenue Service (IRS) Criminal Investigation Division highlighted the agency's Nationally Coordinated Investigations Unit (NCIU). The NCIU was launched in May 2017 and will be fully operational in 2018. It will focus on data-driven case selection and data analytics. The first priority for the NCIU is international tax enforcement and the NCIU will likely interface with the newly created International Tax Enforcement Unit. In addition to international tax enforcement, the NCIU will focus on: microcap stock fraud, employment tax, biofuel credit schemes, and international banking.

Cartel

DOJ Cartel Prosecutions Remain Sluggish: Continuing the trend from 2017, DOJ has not secured any charges against executives in connection with its international cartel investigations [since we last reported](#). On the domestic front, only one executive has been charged or [pled guilty](#) since August 2017. In December 2017, Brian Steppig, a former executive of an Indiana-based water treatment chemical company, [pled guilty](#) for his role in conspiring to rig bids, fix prices, and allocate customers in the sale of water treatment chemicals. Steppig is only the [second corporate executive](#) to plead guilty in connection with DOJ's cartel investigation into the water treatment chemical industry.

Prosecutorial Discretion

Oil Services Executive Pleads Guilty to Willful Blindness: In November, Anthony Mace, a U.K. citizen and the former CEO of SBM Offshore, [pled guilty](#) to conspiracy to violate the FCPA. His plea followed that of another SBM executive, Robert Zubiate, who [admitted](#) to using a sales agent to bribe foreign officials and engaging in a kickback scheme with that agent. Mace's guilty plea is unusual, inasmuch as he admitted his involvement in the conspiracy on a theory of willful blindness. He admitted that he authorized "payments that furthered the bribery scheme and deliberately avoid[ed] learning that certain payments . . . were in fact bribes paid to foreign officials." He further admitted that his "deliberate avoidance was solely and entirely due to his own actions and decisions." While the FCPA does incorporate willful blindness into its definition of knowledge, prosecutors rarely enter into plea agreements on a willful blindness theory. That said, through Mace's plea, the government was also able to send a message that turning a blind eye to bribery will be punished. Mace is scheduled to be sentenced in April.

Pharmaceutical Executive Granted Immunity in Retrophin Trial: Also in November, Jackson Su, the former COO of Martin Shkreli's Retrophin Inc., testified in federal court against Shkreli's co-conspirator, Evan Greebel. During Su's testimony, defense attorneys argued that certain evidence the government sought to use at trial had been procured by Su through criminal conduct, including hacking. These allegations halted the trial and the judge appointed counsel to advise Su on potential self-incrimination. Su's testimony continued the following day, but only after he entered into a [non-prosecution agreement](#) with the government. Greebel was ultimately [convicted](#) of conspiracy to commit wire and securities fraud. The court continues to hear post-trial arguments concerning [alleged jury misconduct](#). No sentencing date has been set.

Obstruction

Oil Company CEO Convicted of Criminal Contempt and Fraud in Relation to Phony Loan Applications: In December, oil executive Raheem Brennerman was [convicted](#) by a federal jury on charges of conspiracy, wire fraud, and visa fraud. Brennerman, CEO of Blacksands Pacific Group, had been [charged](#) with engaging in a years-long scheme to mislead financial institutions into believing Blacksands was a booming oil and gas business, when in fact it employed only a few individuals, possessed few assets, and had little or no involvement in the oil and gas business. Brennerman and his co-conspirators obtained loans for supposed business ventures, including a \$20 million loan from a London-based affiliate of the Industrial and Commercial Bank of China (ICBC), but spent virtually all of the funds on personal expenses.

In addition, both Brennerman and Blacksands were convicted of criminal contempt relating to civil litigation brought by ICBC after Blacksands defaulted on the \$20 million loan. The charges were brought against Blacksands and Brennerman after they failed to comply with court orders directing them to respond to ICBC's interrogatories and document requests, which sought information about Blacksands' assets. The most serious counts of conviction (conspiracy) carry a maximum prison sentence of 30 years.

Former Och-Ziff Executive Indicted for Defrauding Charitable Organization Client and Obstructing Justice: In October, a federal grand jury returned a [10-count indictment](#) charging Michael Cohen, a former executive managing director at New York-based hedge fund Och-Ziff Capital Management Group LLC, with conspiracy, fraud, and obstruction of justice. In 2010, Cohen allegedly made material misrepresentations and omissions to a firm client, a charitable organization and investor, in order to obtain their consent to purchase stock. Among other things, the indictment states that Cohen failed to disclose that a seller of the stock shares, identified as "Co-Conspirator #1," was an individual who personally owed him \$18 million and planned to use the money from the sale to repay \$4 million of that debt. Almost a year and a half later, the SEC served a subpoena on Och-Ziff regarding the co-conspirator and other issues. After the SEC surfaced, Cohen allegedly caused the co-conspirator to create a fake, backdated document stating that the money from the sale would not be used to repay Cohen and then allegedly made false statements to law enforcement agents and an SEC attorney regarding the letter.

The indictment is part of the SEC's and DOJ's investigations of Och-Ziff and its executives. [As we previously reported](#), the SEC filed a civil suit against Cohen and another former Och-Ziff executive in early 2017, alleging that they directed the payment of millions of dollars in bribes to African government officials in violation of the FCPA. That matter remains pending.

Criminal Cases Against Legal and Compliance Officers

Compliance Manager Convicted of Perjury in Connection with Anti-Dumping Scheme: In September, a federal jury in the Southern District of California convicted Ronald Fabor, the Operations Safety and Compliance Manager of Diamond Environmental Services, on [two counts](#) of perjury. Fabor faced charges that he had testified falsely before a grand jury investigating allegations that Diamond had unlawfully discharged portable toilet waste into municipal sewers via illegal sewer connections at company facilities. In his grand jury testimony, Fabor stated that he had never personally seen Diamond trucks disposing of waste and that he had no knowledge of the illegal dumping at several Diamond locations prior to the execution of federal search warrants. On January 8, 2018, Fabor was sentenced to five years of probation for each count.

In June 2017, Diamond itself [pled guilty](#) to charges of mail fraud relating to cheating local municipalities out of revenue by not paying appropriate dumping fees. In addition, both the CEO and COO [pled guilty](#) to conspiring to violate the Clean Water Act for their roles in the conspiracy. Sentencing for the company, CEO, and COO is scheduled for February.

Former Pharmaceutical Company Compliance Director Pleads Guilty to Conspiracy for Adulterated Pharmaceuticals: In November, Caprice Bearden, the former Director of Compliance for Pharmakon Pharmaceuticals, [pled guilty](#) in the U.S. District Court for the Southern District of Indiana to conspiracy to defraud the Food and Drug Administration (FDA) by obstructing its investigation into improperly compounded drugs, as well as to substantive charges of knowingly adulterating drugs and introducing them into interstate commerce. Bearden admitted her role in a [scheme](#) to knowingly distribute over-potent and under-potent drugs to Indiana hospitals, as well as covering up her actions and impeding an FDA investigation into the safety of the compounded drugs. Bearden faces up to five years in prison and a \$250,000 fine for the conspiracy charge and up to one year in prison and a \$100,000 fine for each substantive count. Her plea comes in the midst of increased FDA enforcement efforts to combat violations of drug compounding standards.

Former General Counsel Sentenced to Six Months in Prison After Pleading Guilty to Health Care Fraud: In November, Thaddeus Bereday, the former general counsel of health insurance provider WellCare, was [sentenced](#) to six months in prison and three years of supervised release (including one year of home confinement) after pleading guilty in June to knowingly and willfully causing the submission of a false expenditure report for behavioral health care services to Florida's Medicaid program. Four other WellCare executives — Todd Farha (CEO), Paul Behrens (CFO), and William Kale and Peter Clay (former vice presidents) — were previously convicted of related charges in 2013 after a 13-week trial. They were [sentenced](#) to prison terms between one and three years.

Former Keppel In-House Counsel Pleads Guilty to FCPA Charges: In December, DOJ unsealed [charges](#) against Jeffrey Chow, former in-house legal counsel at Keppel Offshore & Marine Ltd. (KOM), as part of the Singapore-based shipyard company's \$422 million global settlement to resolve charges it paid bribes to Brazilian officials. Chow [pled guilty](#) to one count of conspiracy to violate the anti-bribery provisions of the FCPA and agreed to cooperate with DOJ's investigation into KOM and other executives. During his plea hearing, Chow admitted that he knew KOM had overpaid its Brazilian consultant and that a portion of the overpayments would ultimately be used to pay bribes to Brazilian officials. He also admitted that he drafted the contracts that facilitated the bribe payments. Chow, who faces up to five years in prison, is scheduled to be sentenced in May.

Noteworthy Court Rulings

SEC Ratifies Administrative Law Judge Appointments to Avoid Appointments Clause Dispute: In November, the SEC [ratified](#) its prior appointment of five administrative law judges (ALJs) who preside over administrative enforcement actions for alleged federal securities laws violations. The SEC did so to "put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause." The SEC issued its ratification order a day after the U.S. Solicitor General took the position in a [brief](#) before the U.S. Supreme Court that the SEC's ALJs are "inferior officers" under the Appointments Clause requiring appointment by the president, courts, or agency head — not employees. This position is a departure from the SEC's prior stance that its ALJs are employees and do not require formal appointment. In January 2018, the

United States Supreme Court agreed to take up the constitutionality of the SEC's past hiring practices for ALJs.

Pharmaceuticals Executive Gets New Trial After Advice-of-Counsel Testimony Barred: In December, the Second Circuit [overturned](#) the conviction of William Scully, co-founder of Pharmalogical Inc., on charges of illegally importing and selling medical devices and drugs without FDA approval. The appeals court ruled that the trial court had improperly excluded Scully's testimony in support of his only defense — advice of counsel. At trial, the district court ruled that the probative value of Scully's testimony that he had relied on advice of counsel was substantially outweighed by the risk of prejudice to the government. The Second Circuit disagreed, concluding that because advice of counsel was Scully's only defense, evidence of that advice was necessary to rebut the government's claims of fraudulent intent. The court overturned the conviction and remanded the case for a new trial. Scully had been sentenced to five years in prison.

Noteworthy Sentences

Judge Sends Message About FCPA with 30-Month Sentence for Alstom Executive: In September, former Alstom executive Frederic Pierucci was sentenced to 30 months in prison after [pleading guilty](#) to bribing an Indonesian official in exchange for assistance in securing a \$118 million power contract. Pierucci had requested a sentence of time served. According to the media, the judge stated at the sentencing hearing that Pierucci's sentence was meant to send a message that the FCPA was to be taken seriously and that the legal consequences of bribery outweigh the benefits. As previously reported in the [FCPA Review](#), Alstom paid \$772 million in 2014 to resolve criminal bribery charges in Indonesia, Egypt, Saudi Arabia, the Bahamas, and Taiwan.

Investment Banker Gets 40 Years for \$10 Million Fraud, Twice the Guidelines Range: In August, an ex-NFL player and co-founder of a Virginia investment firm was [sentenced](#) to 40 years in prison for defrauding more than 50 investors of \$10 million. Merrill Robertson Jr. was [convicted](#) of 15 fraud-related charges for luring potential investors and spending their money on personal expenses such as mortgage and car payments, school tuition, spa visits, department store purchases, and vacations. In order to dupe these investors, some of whom were elderly, Robertson and his co-conspirators forged financial statements for fictitious companies. Robertson's sentence was nearly double the high end of the federal Sentencing Guidelines range. The government [requested](#) a sentence of 293 months, the top of the Sentencing Guidelines range. According to [news reports](#), roughly two dozen victims attended the sentencing hearing and the judge said he did not believe that Robertson was sorry.

Disparate Sentences Highlight Potential Benefits of Cooperation: The former CFO of medical device company Arthrocare received a significantly shorter jail sentence after his original conviction for accounting fraud was reversed and he entered a guilty plea, highlighting the potential value of cooperating with the government. Michael Gluk was convicted along with former Arthrocare CEO Michael Baker in 2014 for their part in a massive fraud regarding inflated sales and revenue recognition that resulted in \$750 million in shareholder losses. In January 2016, the Fifth Circuit overturned their convictions because the trial court erroneously barred the defendants from introducing evidence that two other executives were responsible for the accounting fraud at issue and hid the fraud from the defendants, as we [previously reported](#). Following the reversal of their convictions, Gluk pled guilty and cooperated with the government, while Baker elected to face trial a second time. Gluk [received](#) a sentence of just over four years in prison, a significant reduction from the 10 years he received following his original conviction. Baker was convicted again at trial, and in November, he [received](#) the same 20-year sentence that he had previously received.

No Jail Time for Dewey & LeBoeuf's Former CFO and Financial Staff: In October, Joel Sanders, the former CFO of the now-defunct law firm Dewey & LeBoeuf LLP was [spared jail time](#) but ordered to pay a \$1 million fine following his conviction for defrauding firm investors. The sentence comes as a blow to the Manhattan District Attorney's Office, which had spent significant resources prosecuting Sanders through two trials after the first ended in a mistrial. In addition, seven Dewey financial staff members who pled guilty for their role in the fraud scheme have been sentenced to no jail time, including [Frank Canellas](#), Dewey's former finance director; [Thomas Mullikin](#), Dewey's former controller; [Ilya Alter](#), Dewey's former budget chief; [Lourdes Rodriguez](#), Dewey's former billing director; [Dianne Cascino](#), Dewey's former director of revenue; [Victoria Harrington](#), a former accounting manager at Dewey; and partner relations specialist [David Rodriguez](#).

Extraterritoriality and Extradition

Israel and Lithuania Extradite Individuals to the U.S. for Alleged Phishing Scams: Both Israel and Lithuania recently extradited individuals to the U.S. who are accused of orchestrating phishing schemes. In October, Israel extradited a dual Israeli and Russian citizen, Stanislav Nazarov, to the U.S. to face charges of international money laundering based on a phishing scheme that targeted an Indian reinsurance company. [According to DOJ](#), Nazarov and his co-conspirators fraudulently caused the company's director to wire \$1.4 million to a U.S. bank account, and then Nazarov orchestrated a sophisticated money laundering scheme to receive a portion of the payment in Israel. Nazarov has [pled guilty](#) to the charges. In August, Lithuania extradited a Lithuanian citizen, Evaldas Rimasauskas, to the U.S. to face charges surrounding an alleged \$122 million fraud on Google and Facebook. [According to DOJ](#), Rimasauskas allegedly sent phishing emails to Google and Facebook employees using a fake corporation. A Lithuanian court approved the extradition under its extradition treaty with the U.S. because the alleged victims are U.S. companies, even though the alleged conduct occurred in Lithuania. Rimasauskas has pled not guilty to the charges.

Whistleblower Issues

SEC Reports Increase in Whistleblower Tips: In November, the SEC Whistleblower Program issued its seventh [annual report](#) to Congress, documenting a steady increase in whistleblower tips made over the past five years. In FY 2017, the SEC received 4,400 tips, up from approximately 4,200 in FY 2016 and from 3,000 in FY 2012, the first full reporting year. With respect to awards, the SEC issued whistleblower awards to 12 individuals totaling nearly \$50 million in FY 2017. More than 60 percent of whistleblower award recipients were current or former employees of the targeted company, and more than 80 percent of those employees had raised concerns internally before reporting to the SEC. Nearly 75 percent of whistleblower targets were individuals or unregistered entities and companies, as opposed to SEC-registered companies.

Government Policies and Guidance

New FCPA Enforcement Policy Signals an Increase in Actions Against Individuals: In November, Deputy Attorney General Rod Rosenstein [announced](#) DOJ's new [FCPA Corporate Enforcement Policy](#), which replaces and incorporates elements of the department's FCPA pilot program, by offering companies additional incentives to voluntarily disclose potential FCPA violations and providing greater clarity as to the benefits of self-disclosure. Noting that "[e]ffective deterrence of corporate corruption requires prosecuting culpable individuals," Rosenstein signaled that the new policy will increase the number of voluntary self-disclosures, which will enhance DOJ's ability to identify and punish individuals. Indeed, a key component of voluntary disclosure is providing the government with all relevant facts about individuals involved in violations, and companies should expect that full cooperation will emphasize this.

New FCPA Enforcement Policy Seeks to Limit Use of Certain Instant Messenger Services: Under DOJ's new [FCPA Corporate Enforcement Policy](#), in order for a company to receive a presumption of a declination, the company must meet the following criteria: "Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including *prohibiting employees from using software that generates but does not appropriately retain business records or communications*" (emphasis added). This language is unprecedented in prior DOJ guidance on FCPA enforcement and shows a significant evolution in DOJ's expectations for data controls. As we explain in an article in [The FCPA Blog](#), the new policy signals that companies must clearly prohibit employees from communicating about business matters using any type of email or messaging software, such as Snapchat, Wickr, or other software that automatically deletes messages and does not properly store relevant data. Beyond this, companies will also likely have to implement data controls through trainings, blocking installation of apps, and routinely testing compliance.

SEC Officials: *Kokesh* Will Speed Up Enforcement Actions: In October, the Chief of the SEC's FCPA Unit, Charles Cain, [commented](#) during an enforcers' roundtable discussion that [Kokesh v. SEC](#) has created "a greater sense of urgency" for the SEC in bringing cases. In *Kokesh*, the Supreme Court held that disgorgement is punitive in nature, and is therefore subject to a five year statute of limitations. Similarly, the Co-Director of the SEC's Enforcement Division, Steven Peikin, [commented](#) in November that because of *Kokesh* the SEC has "no choice but to respond by redoubling our efforts to bring cases as quickly as possible." Whether

the SEC will, in fact, speed up enforcement actions in the coming year remains to be seen.

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