FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT AND RELATED DEVELOPMENTS

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INTRODUCTION

This article, part of a continuing series of yearly analysis of Foreign Corrupt Practices Act enforcement and related development,[1] provides a detailed overview of quantitative and qualitative FCPA and related information and will be of value to anyone seeking to elevate their FCPA knowledge. Part I of this article discusses how, similar to prior years in the FCPA's modern

[1] For 2017, see Mike Koehler, Foreign Corrupt Practices Act Continuity in a Transition Year, 70 S.C. L. REV. 143 (2018).
For 2016, see Mike Koehler, The FCPA's Record-Breaking Year, 50 CONN. L. REV. 91 (2018).
For 2015, see Mike Koehler, Foreign Corrupt Practices Act Statistics, Theories, Policies, and Beyond, 65 CLEV. ST. L. REV. 157 (2017).
For 2014, see Mike Koehler, A Snapshot of the Foreign Corrupt Practices Act, 14 SANTA CLARA J. INT'L L. 143 (2016).
For 2013, see Mike Koehler, A Foreign Corrupt Practices Act Narrative, 22 MICH. ST. INT'L L. REV. 961 (2014).
For 2012, see Mike Koehler, An Examination of Foreign Corrupt Practices Act Issues, 12 RICH. J. GLOBAL L. & BUS. 317 (2013).
For 2011, see Mike Koehler, The Foreign Corrupt Practices Act Under the Microscope, 15 U. PA. J. BUS. L. 1 (2012).
For 2010, see Mike Koehler, Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era, 43 TOL. L. REV. 99 (2011).
For 2009, see Mike Koehler, The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence, 43 IND. L. REV. 389 (2010).

era, 2018 was another year of robust FCPA enforcement against companies large and small and across industry sectors. In fact, 2018 was the third most active year in the FCPA's forty-plus years in terms of the quantity of core corporate enforcement actions. Part II of this article switches gears to discuss various qualitative FCPA enforcement issues including the long-time periods associated with FCPA scrutiny, the general lack of judicial scrutiny of enforcement theories; the substantial gap between corporate and individual enforcement; how much of the largeness of FCPA enforcement is due to enforcement actions against foreign companies; and certain statutory interpretation issues. Part III of this article highlights FCPA jurisprudence in 2018 and how courts rejected expansive enforcement theories as well as revisions to FCPA relevant enforcement agency policy as Trump administration officials settled into their positions.

I. 2018 FCPA ENFORCEMENT STATISTICS AND HISTORICAL COMPARISONS

While it is beyond the scope of this article to provide a detailed summary of *each* 2018 FCPA enforcement action, this part highlights the following quantitative enforcement statistics from 2018 as well as historical comparisons: corporate DOJ enforcement actions; corporate SEC enforcement actions; aggregate corporate enforcement actions; and individual DOJ and SEC enforcement actions.

A. Corporate DOJ Enforcement Actions

As demonstrated in Table I, in eight corporate FCPA enforcement actions[2] in 2018 the DOJ collected approximately $618 million in net settlement amounts.

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[2] Corporate FCPA enforcement statistics in this article use the "core" approach. The core approaches focuses on unique instances of corporate conduct regardless of whether the conduct at issue involved a DOJ or SEC enforcement action, or both (as is occasionally the case); regardless of whether the corporate enforcement action involved a parent company, a subsidiary or both (as is occasionally the case), and regardless of whether the DOJ and/or SEC brought any related individual enforcement action (as is occasionally the case). For additional information on this method of quantifying FCPA enforcement, *see* Mike Koehler, *What is an FCPA Enforcement Action*, FCPA PROFESSOR (Jan. 7, 2013) http://www.fcpaprofessor.com/what-is-an-fcpa-enforcement-

Table I - 2018 DOJ Corporate FCPA Enforcement Actions

Company (Industry)	**Settlement Amount**	**Resolution Vehicle**[3]	**Origin**[4]	**Related Individual Action**[5]
Transport Logistics International[6] (Nuclear)	$2 million	DPA	DOJ Inquiry	Yes
Panasonic[7] (Aviation)	$137 million	DPA	DOJ Inquiry	No

action [https://perma.cc/72BS-7JQC]. This method of computing FCPA statistics is consistent with the DOJ's approach, *see* Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Mar. 22, 2013), http://www.fcpaprofessor.com/friday-roundup-72 [https://perma.cc/YE2P-JGYL] (quoting DOJ's FCPA Unit Chief), and is a commonly accepted method used by other scholars in other areas. *See, e.g.*, Michael Klausner & Jason Hegland, *SEC Practice In Targeting and Penalizing Individual Defendants*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 3, 2013), http://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants/ [https://perma.cc/644G-UX2Q].

[3] DPA refers to a deferred prosecution agreement, and NPA refers to a non-prosecution agreement. To learn more about DPAs and NPAs in the FCPA context, *see* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010). To learn more about declinations with disgorgement, *see* Mike Koehler*, DOJ Releases Two So-Called "Declination" Letters, yet "Pursuant to" the Letters, HMT LLC and NCH Corp. Agree to Disgorge $2.7 Million and $335,000*, FCPA PROFESSOR (Sept. 30, 2016), http://fcpaprofessor.com/doj-releases-two-called-declination-letters/ [https://perma.cc/P32N-XXPF].

[4] Refers to the event(s) which initially prompted the scrutiny that resulted in the FCPA enforcement action.

[5] Refers to employees of the corporate entity resolving the FCPA enforcement action.

[6] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Transport Logistics International Inc. Agrees to Pay $2 Million Penalty to Resolve Foreign Bribery Case (March 13, 2018), https://www.justice.gov/opa/pr/transport-logistics-international-inc-agrees-pay-2-million-penalty-resolve-foreign-bribery [https://perma.cc/VQ8N-ZTWY].

[7] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Panasonic Avionics Corporation Agrees to Pay $137 Million to Resolve Foreign Corrupt Practices Act Charges (April 30, 2018), https://www.justice.gov/opa/pr/panasonic-avionics-corporation-agrees-pay-137-million-resolve-foreign-corrupt-practices-act [https://perma.cc/JA5Z-T88Q].

Company (Industry)	**Settlement Amount**	**Resolution Vehicle**[3]	**Origin**[4]	**Related Individual Action**[5]
Société Générale [8] (Financial Services)	$293 million	Plea agreement, DPA[9]	DOJ Inquiry	No
Legg Mason[10] (Financial Services)	$33 million	NPA	DOJ Inquiry	No
Petrobras[11] (Oil & Gas)	$85 million[12]	NPA	Foreign Law Enforcement Investigation	No
Credit Suisse[13] (Financial Services)	$47 million	NPA	Industry Sweep	No

[8] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018), https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan [https://perma.cc/PT7C-D3D2].

[9] The resolution involved a criminal information against SGA Société Générale Acceptance N.V. ("SGA") resolved through a plea agreement and a criminal information against Société Générale S.A. resolved through a DPA. *See id.*

[10] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Legg Mason Inc. Agrees to Pay $64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials (June 4, 2018), https://www.justice.gov/opa/pr/legg-mason-inc-agrees-pay-64-million-criminal-penalties-and-disgorgement-resolve-fcpa-charges [https://perma.cc/X644-8FHL].

[11] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations [https://perma.cc/6AT5-PZC3].

[12] Net settlement amount after accounting for credits / deductions for related foreign law enforcement actions.

[13] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (July 5, 2018), https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt [https://perma.cc/QGK5-LA5A].

Company (Industry)	**Settlement Amount**	**Resolution Vehicle**[3]	**Origin**[4]	**Related Individual Action**[5]
Insurance Corp. of Barbados[14] (Insurance)	$94,000	Declination with Disgorgement	Voluntary Disclosure	No
Polycom[15] (Communications)	$20 million	Declination with Disgorgement	Voluntary Disclosure	No
TOTAL	$618 million			

As highlighted by Tables II and III below, corporate FCPA enforcement by the DOJ in 2018 (measured both in terms of the number of core actions and aggregate settlement amounts) was generally consistent with historical averages.

Table II - Corporate DOJ FCPA Enforcement Actions (2010 – 2018)[16]

Year	**Core Actions**
2018	8
2017	9
2016	13
2015	2
2014	7
2013	7
2012	9

[14] Letter from Richard Donoghue, U.S. Att'y, and Sandra Moser, Acting Chief, Fraud Sec., Crim. Div., U.S. Dep't of Justice, to Adam Siegel (Aug. 23, 2018), https://www.justice.gov/criminal-fraud/page/file/1089626/download [https://perma.cc/Q58Y-55LF].

[15] Letter from Sandra Moser, Acting Chief, Fraud Sec., Crim. Div., U.S. Dep't of Justice, to Caz Hashemi (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download [https://perma.cc/CVM5-2ZVB].

[16] For 2018 data, *see supra* Table I; for 2010 to 2017 data, *see* Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, *supra* note 1 at 157-58.

2011	11
2010	17

Table III – Corporate DOJ FCPA Enforcement Action Settlement Amounts (2010 – 2018)[17]

Year	**Settlement Amounts**
2018	$618 million
2017	$845 million
2016	$1.34 billion
2015	$24.2 million
2014	$1.25 billion
2013	$420 million
2012	$142 million
2011	$355 million
2010	$870 million

B. Corporate SEC Enforcement Actions

As demonstrated in Table IV below, in fourteen corporate FCPA enforcement actions in 2018, the SEC collected approximately $382 million in settlement amounts.

Table IV - 2018 SEC Corporate FCPA Enforcement Actions

Company (Industry)	**Settlement Amount**	**Resolution Vehicle**	**Origin**	**Related Individual Action**
Elbit Imaging[18] (Real Estate)	$500,000	Administrative Order	Voluntary Disclosure	No

[17] For 2018 data, *see supra* Table I; for 2010 to 2017 data, *see* Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, *supra* note 1 at 158.

[18] Elbit Imaging LTD., Exchange Act Release No. 34-82849, 2018 WL 1293181 (Mar. 9, 2018), https://www.sec.gov/litigation/admin/2018/34-82849.pdf [https://perma.cc/D3K3-UG4C].

Company (Industry)	**Settlement Amount**	**Resolution Vehicle**	**Origin**	**Related Individual Action**
Kinross Gold[19] (Mining)	$950,000	Administrative Order	Whistleblower[20]	No
Dunn & Bradstreet[21] (Consumer Services)	$9 million	Administrative Order	Voluntary Disclosure	No
Panasonic[22]	$143 million	Administrative	SEC inquiry[23]	No

[19] Kinross Gold Corp., Exchange Act Release No. 82946, 2018 WL 1468812 (Mar. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-82946.pdf [https://perma.cc/4J2Z-TY79].

[20] As stated in the company's release:

> [The FCPA scrutiny] related to allegations of improper payments made to government officials and certain internal control deficiencies at the Company's West African mining operations, which Kinross first became aware of in August 2013. The Company immediately commenced an internal investigation into the allegations in accordance with its Whistleblower Policy. In March 2014, the SEC commenced an investigation seeking information and documents relating to these allegations, and in December 2014, the DOJ commenced a similar investigation. On October 2, 2015, the Company publicly disclosed the SEC and DOJ investigations.

Press Release, Kinross Gold Corp., Kinross announces end of regulatory investigation of West Africa operations (Mar. 26, 2018), https://s2.q4cdn.com/496390694/files/doc_news/2018/03/KGCNewsRelease_SECinvestigation-Final.pdf [https://perma.cc/T4L8-X4Y5].

[21] U.S. Sec. & Exch. Comm'n, *SEC Charges Dun & Bradstreet With FCPA Violations* (Apr. 23, 2018), https://www.sec.gov/enforce/34-83088-s [https://perma.cc/2KLT-NZTR].

[22] Press Release, U.S. Sec. & Exch. Comm'n, Panasonic Charged With FCPA and Accounting Fraud Violations (Apr. 30, 2018), https://www.sec.gov/news/press-release/2018-73 [https://perma.cc/F9ZR-7N8Z].

[23] The SEC's order states:

> The Company did not receive voluntary disclosure credit because the Company's disclosures occurred only after the Securities and Exchange Commission ("SEC") requested documents from Panasonic related to possible violations of anti-corruption laws and several years after the Company and Panasonic first became aware of the allegations of bribery through a whistleblower complaint and civil lawsuit, which the Company took steps to investigate internally but chose not to voluntarily report to the relevant authorities.

Company (Industry)	**Settlement Amount**	**Resolution Vehicle**	**Origin**	**Related Individual Action**
(Aviation)		Order		
Legg Mason[24] (Financial services)	$35 million	Administrative Order	SEC inquiry	No
Beam[25] (Beverage)	$8 million	Administrative order	Voluntary Disclosure	No
Credit Suisse[26] (Financial services)	$30 million	Administrative Order	Industry Sweep	No
Sanofi[27] (Pharmaceutical)	$25 million	Administrative Action	Voluntary disclosure[28]	No
United Technologies[29] (Industrial)	$14 million	Administrative Action	Voluntary Disclosure	No

Deferred Prosecution Agreement at 3, United States v. Panasonic Avionics Corp., No. 18-CR-00118 (D.C. Cir. Apr. 30, 2018), https://www.justice.gov/opa/press-release/file/1058466/download [https://perma.cc/URM3-VHRU].

[24] Press Release, U.S. Sec. & Exch. Comm'n, Legg Mason Charged With Violating the FCPA (Aug. 27, 2018), https://www.sec.gov/news/press-release/2018-168 [https://perma.cc/CKU4-PAE5].

[25] U.S. Sec. & Exch. Comm'n, *SEC Charges Beam Suntory Inc. with FCPA Violations* (July 2, 2018), https://www.sec.gov/enforce/34-83575-s [https://perma.cc/R9MC-FJTC].

[26] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Credit Suisse With FCPA Violations (July 5, 2018), https://www.sec.gov/news/press-release/2018-128 [https://perma.cc/S7NR-9CCR].

[27] Press Release, U.S. Sec. & Exch. Comm'n, Sanofi Charged With FCPA Violations (Sept. 4, 2018), https://www.sec.gov/news/press-release/2018-174 [https://perma.cc/4K2S-SA8C].

[28] According to a media report, "Sanofi SA said it has told U.S. authorities about allegations of improper payments to health-care professionals in the Mideast and East Africa . . . ." Rachel Louise Ensign & Hester Plumridge, *Sanofi Said It Told U.S. About Improper-Payment Claims*, WALL ST. J. (Oct. 6, 2014), https://www.wsj.com/articles/sanofi-says-it-disclosed-improper-payment-claims-1412623957 [https://perma.cc/UW2M-2WHW].

[29] Press Release, U.S. Sec. & Exch. Comm'n, United Technologies Charged With Violating FCPA (Sept. 12, 2018), https://www.sec.gov/news/press-release/2018-188 [https://perma.cc/A58D-FUED].

Company (Industry)	**Settlement Amount**	**Resolution Vehicle**	**Origin**	**Related Individual Action**
Petrobras[30] (Oil and Gas)	$85 million[31]	Administrative Action	Foreign Law Enforcement Investigation	No
Stryker[32] (Medical Devices)	$8 million	Administrative Action	SEC inquiry	No
Vantage Drilling[33] (Oil and Gas)	$5 million	Administrative Action	Foreign Law Enforcement Investigation	No
Eletrobras[34]	$2.5 million	Administrative Action	Foreign Law Enforcement Investigation	No
Polycom[35] (Communications)	$16 million	Administrative Action	Voluntary Disclosure	No
TOTAL	$382 million			

As highlighted by Tables V and VI below, corporate FCPA enforcement by the SEC in 2018 (measured both in terms of the number of core actions and aggregate settlement amount) was above historical averages.

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[30] Press Release, U.S. Sec. & Exch. Comm'n, Petrobras Reaches Settlement With SEC for Misleading Investors (Sept. 27, 2018), https://www.sec.gov/news/press-release/2018-215 [https://perma.cc/3HJQ-MHT5].

[31] After accounting for various credits and deductions for related foreign law enforcement actions.

[32] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Stryker A Second Time for FCPA Violations (Sept. 28, 2018), https://www.sec.gov/news/press-release/2018-222 [https://perma.cc/VQE7-6F9W].

[33] U.S. Sec. & Exch. Comm'n, *Vantage Drilling International Agrees to Settle FCPA Charges* (Nov. 19, 2018), https://www.sec.gov/enforce/34-84617-s [https://perma.cc/6ZE2-67DN].

[34] U.S. Sec. & Exch. Comm'n, *SEC Charges Eletrobras with Violating Books and Records and Internal Accounting Controls Provisions of the FCPA* (Dec. 26, 2018), https://www.sec.gov/enforce/34-84973-s [https://perma.cc/JM9Y-96Y8].

[35] Polycom, Inc., Exchange Act Release No. 84978, 2018 WL 6804090 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84978.pdf [https://perma.cc/CJ53-96M4].

Table V – Corporate SEC FCPA Enforcement Actions (2010 – 2018)[36]

Year	Actions
2018	14
2017	7
2016	24
2015	9
2014	7
2013	8
2012	8
2011	13
2010	19

Table VI – SEC FCPA Enforcement Action Settlement Amounts (2010 – 2018)[37]

Year	Settlement Amounts
2018	$382 million
2017	$289 million
2016	$1.07 billion
2015	$114 million
2014	$327 million
2013	$300 million
2012	$118 million
2011	$148 million
2010	$530 million

Analyzing DOJ and SEC FCPA enforcement data separately in Tables I-VI above is informative given that the DOJ and SEC are separate law enforcement agencies and different issues may

[36] For 2018 data, *see supra* Table IV; for 2010 to 2017 data, *see* Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, *supra* note 1 at 158.

[37] For 2018 data, *see supra* Table IV; for 2010 to 2017 data, *see* Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, *supra* note 1 at 159.

arise in DOJ and SEC FCPA enforcement actions.[38] On the other hand, analyzing DOJ and SEC FCPA enforcement data in the aggregate is also informative because it provides a more holistic view of FCPA enforcement.

C. Aggregate Corporate Enforcement Actions

As highlighted in Table VII below, the DOJ and SEC together collected approximately $1 billion in 17 core corporate enforcement actions in 2018. In addition, Table VII compares 2018 aggregate enforcement figures to historical figures as well as highlights unique circumstances that may have significantly skewed enforcement data in any particular year.

[38] As a general matter, the SEC has jurisdiction over "issuers" (companies—domestic and foreign—with shares registered on a U.S. exchange or otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. Thus, certain DOJ corporate enforcement actions from 2018 did not have an SEC component because the companies (for instance Transport Logistics International) were private companies not subject to SEC jurisdiction. As a general matter, the DOJ has criminal jurisdiction over "issuers," "domestic concerns," (i.e. any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involved conduct "while in the territory of the U.S." Compared to the SEC's civil burden of proof of preponderance of the evidence, the DOJ has a higher beyond a reasonable doubt burden of proof in a criminal prosecution. Perhaps based on this difference, several SEC enforcement actions in 2018 (such as Elbit Imaging, Kinross Gold, Beam, Sanofi, United Technologies, Stryker, Vantage Drilling and Eletrobras) did not involve a related DOJ component.

Table VII – Corporate FCPA Enforcement Actions (2007 – 2018)[39]

Year	Core Actions	Settlement Amounts	Of Note
2018	17	$1 billion	Three enforcement actions (Panasonic, Société Générale, and Petrobras) comprised approximately 75% of the $1 billion amount.
2017	13	$1.1 billion	Two enforcement actions (Telia and SBM Offshore) comprised approximately 65% of the $1.13 billion amount and four enforcement actions (the two mentioned above plus Rolls-Royce and Keppel Offshore & Marine) comprised approximately 88% of the amount.
2016	27	$2.4 billion	Three enforcement actions (Teva, Odebrecht/Braskem and VimpelCom) comprised approximately 56% of the $2.41 billion amount and five enforcement actions (the three mentioned above plus JP Morgan and Embraer) comprised approximately 72% of the amount.
2015	11	$139 million	No enforcement actions significantly skewed the statistics.
2014	10	$1.6 billion	Two enforcement actions (Alstom - $772 million and Alcoa - $384 million) comprised approximately 72% of the $1.6 billion amount.

[39] For 2018 data, *see supra* Tables I & IV; for 2010 to 2017 data, *see* Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, *supra* note 1 at 160-61. *See also* Mike Koehler, *Keeping FCPA Enforcement Statistics in Perspective*, FCPA PROFESSOR (Jan. 23, 2013), http://fcpaprofessor.com/keeping-fcpa-enforcement-statistics-in-perspective/ [https://perma.cc/M5F3-BH9S].

2013	9	$720 million	The $398 million Total enforcement action comprised approximately 55% of the $720 million amount.
2012	12	$260 million	No enforcement actions significantly skewed the statistics.
2011	16	$503 million	The $219 million JGC Corp. enforcement action involved Bonny Island conduct and comprised approximately 44% of the $503 million amount.
2010	21	$1.4 billion	Six enforcement actions, all resolved on the same day, involved various oil and gas companies' use of Panalpina in Nigeria. Panalpina also resolved an enforcement action on the same day. Two enforcement actions (Technip and Eni / Snamprogetti) involved Bonny Island conduct. In other words, there were 14 unique corporate enforcement actions in 2010. Of further note, the two Bonny Island enforcement actions, Technip($338 million) and Eni/Snamprogetti ($365 million) comprised approximately 50% of the $1.4 billion amount.
2009	11	$645 million	The $579 million KBR / Halliburton Bonny Island, Nigeria enforcement action comprised approximately 90% of the $645 million amount.
2008	10	$885 million	The $800 million Siemens enforcement action comprised approximately 90% of the $885 million amount.

2007	15	$149 million	Six enforcement actions involved Iraq Oil for Food conduct and these enforcement actions comprised 40% of all enforcement actions and approximately 50% of the $149 million amount.
TOTALS	172	$10.9 billion	

D. Individual DOJ and SEC Enforcement Actions

Tables I and IV above highlight the notable gap between corporate FCPA enforcement actions and related individual enforcement actions against company employees. This gap will be discussed in greater detail in Part II of this article but is not meant to suggest that the DOJ or SEC *do not* bring individual FCPA enforcement actions. Accordingly, highlighted next are 2018 DOJ and SEC individual FCPA enforcement actions as well as historical comparisons.

As demonstrated in Table VIII, the DOJ filed or announced FCPA criminal charges against thirteen individuals in 2018.

Table VIII – 2018 DOJ Individual FCPA Enforcement Actions

Individual	**Employer / Former Employer**	**Related Corporate Enforcement Action**
Mark Lambert[40]	Transport Logistics International	Yes

[40] *See* Press Release, U.S. Dep't of Justice, Former President of Maryland-Based Transp. Co. Indicted on 11 Counts Related to Foreign Bribery, Fraud and Money Laundering Scheme (Jan. 12, 2018), https://www.justice.gov/opa/pr/former-president-maryland-based-transportation-company-indicted-11-counts-related-foreign [https://perma.cc/TX6Y-GSRH].

Individual	**Employer / Former Employer**	**Related Corporate Enforcement Action**
Luis De Leon Nervis Villalobos[41] Jose Gonzalez[42] Juan Carlos Castillo[43]	Associated with various privately-held energy companies	No
Julia Vivi Wang[44]	Associated Sun Kian Ip Group	No
Lawrence Parker[45]	Various companies controlled by Parker	No
Frank Roberto Chatburn Ripalda[46]	GalileoEnergy	No
Roger Boncy[47]	Haitian focused non-profit	No

[41] *See* Press Release, U.S. Dep't of Justice, Five Former Venezuelan Gov't Officials Charged in Money Laundering Scheme Involving Foreign Bribery (Feb. 12, 2018), https://www.justice.gov/opa/pr/five-former-venezuelan-government-officials-charged-money-laundering-scheme-involving-forei-0 [https://perma.cc/QP46-5SSH].

[42] *See* Press Release, U.S. Dep't of Justice, Bus. Exec. Arrested on Foreign Bribery Charges in Connection With Venezuela Bribery Scheme (Aug. 1, 2018), https://www.justice.gov/opa/pr/business-executive-arrested-foreign-bribery-charges-connection-venezuela-bribery-scheme [https://perma.cc/2BPP-8NMP].

[43] *See* Press Release, U.S. Dep't of Justice, Bus. Exec. Pleads Guilty to Foreign Bribery Charge in Connection With Venezuelan Bribery Scheme (Sept. 13, 2018), https://www.justice.gov/opa/pr/business-executive-pleads-guilty-foreign-bribery-charge-connection-venezuelan-bribery-scheme [https://perma.cc/C3G4-TXUE].

[44] *See* Superseding Information, United States v. Wang, No. 1:16-cr-00496, 2018 WL 3828990 (S.D.N.Y. Apr. 4, 2018).

[45] *See* Press Release, U.S. Dep't of Justice, Aruban Telecomm. Purchasing Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act (April 13, 2018), https://www.justice.gov/opa/pr/aruban-telecommunications-purchasing-official-pleads-guilty-money-laundering-conspiracy [https://perma.cc/LC6B-PYQM].

[46] *See* Indictment, United States v. Ripalda, No. 18-20312, 2018 WL 7134634 (S.D. Fla. Apr. 19, 2018).

[47] *See* Press Release, U.S. Dep't of Justice, Businessman Indicted for Conspiring to Bribe Senior Gov't Officials of the Republic of Haiti (Oct. 30, 2018), https://www.justice.gov/opa/pr/businessman-indicted-conspiring-bribe-senior-government-officials-republic-haiti [https://perma.cc/95GR-AXNF].

Individual	**Employer / Former Employer**	**Related Corporate Enforcement Action**
Low Taek Jho (Jho Low) Ng Chong Hwa (Roger Ng) Tim Leissner[48]	Employed by or associated with Goldman Sachs	No
Raul Gorrin Belisario[49]	Various companies controlled by Gorrin	No

As demonstrated by Table IX, the number of DOJ individual FCPA enforcement actions in 2018 was generally above historical averages.

Table IX - DOJ Individual FCPA Enforcement Actions (2007 – 2018) [50]

Year	**Individuals Charged With Criminal FCPA Offenses**
2018	13
2017	18
2016	8
2015	8
2014	10
2013	12
2012	2

[48] *See* Press Release, U.S. Dep't of Justice, Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018), https://www.justice.gov/opa/pr/malaysian-financier-low-taek-jho-also-known-jho-low-and-former-banker-ng-chong-hwa-also-known [https://perma.cc/6BQG-JZY8].

[49] *See* Press Release, U.S. Dep't of Justice, Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 20, 2018), https://www.justice.gov/opa/pr/venezuelan-billionaire-news-network-owner-former-venezuelan-national-treasurer-and-former [https://perma.cc/8NBB-2RP7].

[50] For 2018 data, *see supra* Table VIII, for 2010 to 2017 data, *see* Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, *supra* note 1 at 174.

2011	10
2010	33[51]
2009	18
2008	14
2007	7

Switching from DOJ individual FCPA enforcement actions to SEC individual enforcement actions, as demonstrated in Table X below, the SEC brought FCPA civil charges against three individuals in 2018.

Table X – 2018 SEC Individual FCPA Enforcement Actions

Individual	**Employer / Former Employer**	**Related Corporate Enforcement Action**
Joohyun Bahn[52]	Colliers International Group	No
Patricio Contesse González[53]	Sociedad Química y Minera de Chile	Yes
Paul Margis	Panasonic Avionics	Yes

As highlighted in Table XI below, the number of SEC individual FCPA enforcement actions in 2018 was generally consistent with historical averages.

[51] Includes 22 in the manufactured Africa Sting case.

[52] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Real Estate Broker With FCPA Violations (Sept. 6, 2018), https://www.sec.gov/news/press-release/2018-181 [https://perma.cc/K35C-HKYV].

[53] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former CEO of Chilean-Based Chem. and Mining Company With FCPA Violations (Sept. 25, 2018), https://www.sec.gov/news/press-release/2018-212 [https://perma.cc/7TGB-KM3C].

Table XI - SEC Individual FCPA Enforcement Actions (2007 – 2018)[54]

Year	Individuals Charged With Civil FCPA Offenses
2018	3
2017	3
2016	8
2015	2
2014	2
2013	0
2012	4
2011	12
2010	7
2009	5
2008	5
2007	7

As demonstrated by Tables I – XI above, quantitatively 2018 FCPA enforcement was robust, indeed the third most active year in FCPA history in terms of the quantity of core corporate enforcement actions. As highlighted in Part II below, 2018 was also notable for certain qualitative enforcement issues.

II. QUALITATIVE ENFORCEMENT ISSUES

The FCPA is a fundamentally sound statute that was passed by Congress in 1977 for specific, laudable reasons.[55] Because of this, there often seems to be a reflexive narrative that because "bribery" (however defined) is inherently bad, that FCPA enforcement must therefore be inherently good. However, as highlighted in this Part, in 2018 there were several qualitative

[54] For 2018 data, *see supra* Table X, for 2010 to 2017 data, *see* Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, *supra* note 1 at 177. *See also* Mike Koehler, *A Focus On SEC Individual Actions*, FCPA PROFESSOR (Jan. 22, 2014), http://www.fcpaprofessor.com/a-focus-on-sec-fcpa-individual-actions-2 [https://perma.cc/F2CK-TVKA].

[55] *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932 (2014).

enforcement issues worthy of exploration including: the long time periods associated with FCPA scrutiny; the general lack of judicial scrutiny of enforcement theories; the substantial gap between corporate and individual enforcement; how much of the largeness of FCPA enforcement is due to enforcement actions against foreign companies; and certain statutory interpretation issues.

A. Long-Lasting FCPA Scrutiny

The FCPA enforcement agencies have long recognized the problematic issues associated with long-protracted investigations. For instance, in a 2005 speech the DOJ's then Assistant Attorney General of the Criminal Division stated:

> Simply put, speed matters in corporate fraud investigations. The days of five-year investigations, of agreement after agreement tolling the statute of limitations – while ill-gotten gains are frittered away and investor confidence sinks – are increasingly a thing of the past.[56]

More recently, a notable FCPA development from 2017 was when Acting Principal Deputy Assistant Attorney General Trevor McFadden stated it was the DOJ's "intent . . . for our FCPA investigations to be measured in months, not years."[57]

However, facts are facts and notwithstanding this government rhetoric FCPA scrutiny in 2018, consistent with prior years, lasted too long. Specifically, 4.25 years was the approximate median length of time companies that resolved FCPA enforcement actions in 2018 were under scrutiny.[58]

Statute of limitations are ordinarily the remedy the law provides for long, drawn-out investigations, yet as FCPA commentators have long noted in corporate FCPA enforcement

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[56] Christopher Wray, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Remarks to the ABA White Collar Crime Luncheon (Feb. 25, 2005).

[57] Trevor McFadden, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice, Remarks at the Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017), https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti [https://perma.cc/SGW9-JBBM].

[58] *See* Mike Koehler, *The Gray Cloud Of FCPA Scrutiny Lasted Too Long In 2018*, FCPA PROFESSOR (Jan. 10, 2019), http://fcpaprofessor.com/gray-cloud-fcpa-scrutiny-lasted-long-2018/ [https://perma.cc/6TXF-KDFN].

actions this fundamental black-letter legal principle seems not to matter because cooperation is the name of the game. Thus, one of the first steps a company the subject of FCPA scrutiny often does to demonstrate its cooperation is agree to toll the statute of limitations or waive any statute of limitations defenses. As stated by an FCPA commentator:

> [Companies under FCPA scrutiny are] routinely asked to waive the statute of limitations. They could refuse but none do; refusal might trigger an instant enforcement action against the company or its people. So the waiver gives the feds limitless time to investigate, deliberate, or procrastinate. And no one can force the DOJ or SEC to move on, either with an enforcement action or a declination. The result? Companies [under FCPA scrutiny] get stuck in FCPA limbo . . . . But the DOJ and SEC should always keep one eye on the calendar. The threat of FCPA enforcement . . . casts a long shadow. It darkens the future for management, shareholders, lenders, customers, and suppliers. Exactly the problem the statute of limitations was supposed to fix.[59]

A former Principal Deputy Chief of the DOJ's Criminal Division has termed the long time periods associated with FCPA scrutiny as "the foreign bribery sinkhole at Justice" and has stated:

> The Justice Department needs to do more than churn out resolutions to foreign bribery cases notable only for their record-breaking penalties. Rigorous and prompt FCPA enforcement can have a dramatic impact on the insidious and corrosive effect of corruption overseas and provide . . . restorative justice . . . .[60]

When assessing the long time periods associated with FCPA scrutiny, it is important to keep in mind that both the DOJ/FBI and SEC have specific FCPA units that are uniquely tasked with

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[59] Mike Koehler, *The FCPA's Long Shadow*, THE FCPA BLOG (Aug. 6, 2012), http://www.fcpablog.com/blog/2012/8/6/the-fcpas-long-shadow.html [https://perma.cc/9LHP-U9JL].

[60] Paul Pelletier, Opinion, *The Foreign Bribery Sinkhole at Justice*, WALL ST. J. (April 20, 2015), https://www.wsj.com/articles/the-foreign-bribery-sinkhole-at-justice-1429572436?ns=prod/accounts-wsj [https://perma.cc/KNY9-EL38].

investigating and prosecuting FCPA offenses. It is also worth noting the extensive cooperation that companies under FCPA scrutiny typically provide to the enforcement agencies which, it would seem, should make the DOJ and SEC's job easier and should lead to shorter scrutiny periods. For instance, in the 2018 Vantage Drilling enforcement action the SEC stated:

> The Company provided significant cooperation to the Commission during the entire course of its investigation. Vantage voluntarily disclosed information obtained during its own internal investigation, highlighted key documents, and disclosed facts that the Commission would not have been able to readily and independently discover.[61]

Likewise, in the 2018 Petrobras enforcement action, the DOJ stated:

> [T]he Company received full credit for its cooperation with the Fraud Section and the Office' [sic] investigation, including conducting a thorough internal investigation, proactively sharing in real-time facts discovered during the internal investigation and sharing information that would not have been otherwise available to the Fraud Section and the Office, making regular factual presentations to the Fraud Section and the Office, facilitating interviews of and information from foreign witnesses, and voluntarily collecting, analyzing, and organizing voluminous evidence and information for the Fraud Section and the Office in response to requests, including translating key documents . . . .[62]

Similarly, in the 2018 United Technologies enforcement action, the SEC stated that the company:

> [T]imely provided facts developed during its internal investigation. UTC also cooperated with the Commission investigation by timely producing documents, including key document binders and translations of key documents as

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[61] Vintage Drilling Int., Exchange Act Release No. 84617, 2018 WL 6040668 (Nov. 18, 2018), https://www.sec.gov/litigation/admin/2018/34-84617.pdf [https://perma.cc/3KUG-FLPN].

[62] Press Release, Sandra Moser, Acting Chief, Fraud Section, Criminal Div., U.S. Dep't of Justice, Agreement on non-prosecution of Petróleo Brasileiro S.A. – Petrobras (Sept. 26, 2018) (on file with author).

> needed, providing the facts developed in its internal investigation, and making current or former employees available to the Commission staff, including those who needed to travel to the United States.[63]

Several other FCPA enforcement actions could also be cited, but the point remains the same: FCPA scrutiny simply lasts too long and corporate cooperation in FCPA inquiries should be more of a two-way street in which the FCPA enforcement agencies should resolve inquiries in a much more timely fashion.

B. General Lack of Judicial Scrutiny

A second concerning qualitative enforcement issue from 2018 corporate FCPA enforcement was that, as highlighted in Tables I and IV above, 100% of corporate enforcement actions included a DOJ NPA, DPA or declination with disgorgement agreement or an SEC administrative action. The common thread in all of these alternative resolution vehicles is the lack of meaningful judicial scrutiny, an issue that has long been criticized by FCPA commentators.[64]

While such alternative resolution vehicles are widely viewed as increasing the *quantity* of FCPA enforcement actions, the *quality* of many FCPA enforcement actions resolved through alternative resolution vehicles is questionable.[65] In this regard, a notable development from 2018 were several speeches by high-ranking SEC enforcement officials stressing the importance of quality of enforcement, not just quantity of enforcement. For instance, SEC Commissioner Hester Peirce stated:

> [SEC Chair Jay Clayton] understands the importance of vigorous enforcement in protecting investors and building the environment in which capital formation can take place. He does not, however, view enforcement statistics as the measure

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[63] United Technologies Corp., Exchange Act Release No. 84087, 2018 WL 4347768 (Sept, 12, 2018), https://www.sec.gov/litigation/admin/2018/34-84087.pdf [https://perma.cc/NQ5A-SLGL].

[64] *See, e.g.*, Mike Koehler, *Measuring the Impact of Non-Prosecution Agreement and Deferred Prosecution Agreements on FCPA Enforcement*, 49 U.C. Davis L. Rev. 497, 525 (2015) (highlighting various critiques of such alternative resolution vehicles).

[65] *Id.* at 515-27.

> of the agency's success. I share the Chairman's commitment to strong enforcement of our securities laws, without making raw numbers the measure of our success.
>
> . . . .
>
> An enforcement program that pursues every minor violation might appear, at first glance, to be a successful one. Under such an approach, the raw number of enforcement actions is likely to be high. A key metric to gauge success becomes the number of enforcement actions. By holding up raw numbers as the measure of success, the broken-windows-era SEC felt pressure to exceed its previous year's enforcement actions. It was an arms race as our lawyers rushed to settle a case or sprint to the courthouse — or the administrative law judge — to file the next action, especially as the SEC's fiscal year end neared: our own version of earnings management.
>
> . . . .
>
> [A] broken windows approach provides bad incentives for Commission staff. It rewards enforcement staff for the number, rather than the quality of cases. It nudges staff to recommend charging *some* violation — even a minor one — rather than closing an investigation without bringing an enforcement action.
>
> . . . .
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> As the SEC's canons of ethics put it: "The power to investigate carries with it the power to defame and destroy." This price is too high for violations that are minor. The SEC must do its job, but we should save our enforcement program — with the great weight it carries — for violations of a sufficiently serious nature to warrant the expense to us and to those whom we pursue.
>
> Today, the SEC, no longer measuring its success by tallying up enforcement statistics, is making a more concerted effort to bring only meaningful enforcement actions.[66]

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[66] Hester Pierce, Comm'r, U.S. Sec. & Exch. Comm'n, The Why Behind the No: Remarks at the 50th annual Rocky Mountain Securities Conference (May 11, 2018),

Stephanie Avakian and Steven Peikin (Co-Directors of the SEC's Enforcement Division) echoed similar concerns about quantity versus quality in separate 2018 speeches. For instance, Avakian pondered the meaning of success when it comes to SEC enforcement and stated:

> [W]hat does it mean for a civil law enforcement program like ours to be "successful"? Is it simply a numbers exercise? Or something more? We have spent a lot of time thinking about this, particularly at a time when resources are limited and we face many challenges.
>
> . . . .
>
> Let me be emphatic about this. Steve [Peikin also Co-Director of Enforcement] and I fundamentally reject the premise [certain commentators] embrace – that numbers – standing alone – can adequately measure the success or impact of an enforcement program. Statistics such as the number of actions the SEC brought in a fiscal year and the dollar amount of judgments and orders obtained in that year are interesting so far as they go, but they only tell us so much. Put simply, statistics do not provide a full and meaningful picture of the quality, nature, and effectiveness of the Division's efforts.
>
> So, if numbers do not tell the story, what does? Asked another way, how should one measure the SEC's success as the primary civil enforcer of the federal securities laws? Since being appointed Co-Directors, we have asked ourselves that question many times, and we have maintained that the best way to assess the SEC Enforcement Division's effectiveness is by looking at the nature and quality of the SEC's actions. Are we bringing meaningful cases that send clear and important messages to market participants and investors? Are we making an impact?[67]

Peikin likewise pondered the meaning of success and stated:

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https://www.sec.gov/news/speech/peirce-why-behind-no-051118 [https://perma.cc/BE2C-6GUE].

[67] Stephanie Avakain, Co-Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, Measuring the Impact of the SEC's Enforcement Program (Sept. 20, 2018), https://www.sec.gov/news/speech/speech-avakian-092018 [https://perma.cc/58FJ-L4E4].

> Many of those who closely follow the work of the Enforcement Division tend to evaluate its effectiveness based on metrics such as the number of enforcement actions the Commission brings each year and the total amount of penalties and disgorgement ordered by the Commission or federal district courts. These quantitative metrics are of some value in assessing the work of the Division; they certainly provide a rough measure of our overall activity level. But statistics such as these do not provide a full and meaningful picture of the quality, nature, and effectiveness of our efforts. Indeed, in my view, when numbers are the primary lens through which our work is viewed, that perspective can be counterproductive.[68]

None of the above speeches by SEC enforcement officials in 2018 were FCPA specific, but they were all FCPA relevant. For instance, what is the quality of FCPA enforcement actions:

- that focus on the acts of single actors within a large multinational business organization?[69]
- that focus on conduct approximately 10 years (and in many cases more) prior to the enforcement action?[70]
- in which the SEC invokes a legal standard that does not even exist in the FCPA?[71]

Moreover, if SEC FCPA enforcement were "making an impact" then why is there generally more, not less, SEC FCPA

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[68] Steven Peikin, Co-Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, Remedies and Reliefs in SEC Enforcement Actions (Oct. 3, 2018), https://www.sec.gov/news/speech/speech-peikin-100318 [https://perma.cc/X3GC-K5LH].

[69] *See, e.g.*, Nordion (CANADA) Inc., Exchange Act Release No. 77290, 2016 WL 825662 (Mar. 3, 2016), https://www.sec.gov/litigation/admin/2016/34-77290.pdf [https://perma.cc/KPP5-Z78X]; SAP SE, Exchange Act Release No. 77005, 2016 WL 683560 (Feb. 1, 2016), https://www.sec.gov/litigation/admin/2016/34-77005.pdf [https://perma.cc/PYA2-5PJ6].

[70] *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, Legg Mason Charged with Violating the FCPA (Aug. 27, 2018) https://www.sec.gov/news/press-release/2018-168 [https://perma.cc/S64Z-VKLA]; Elbit Imaging, Ltd., Exchange Act Release No. 82849, 2018 WL 1234195 (Mar. 9, 2018), https://www.sec.gov/litigation/admin/2018/34-82849.pdf [https://perma.cc/UV6G-YHAL].

[71] *See, e.g.*, Mike Koehler, *Issues To Consider From The Sanofi Enforcement Action*, THE FCPA BLOG (Sept. 6, 2018), http://fcpaprofessor.com/issues-consider-sanofi-enforcement-action/ [https://perma.cc/W2YP-PP2U]; Mike Koehler, *The Many Issues To Consider From The Dun & Bradstreet Enforcement Action*, FCPA PROFESSOR (Apr. 25, 2018), http://fcpaprofessor.com/many-issues-consider-dun-bradstreet-enforcement-action/ [https://perma.cc/393E-YY4K].

enforcement over time[72] and why have several companies resolved multiple SEC FCPA enforcement actions?[73]

C. Gap Between Corporate and Individual Enforcement

One metric of success Peikin identified in assessing whether the SEC's work "is effective" in accomplishing its mission is "to what extent is the [SEC] holding individuals accountable for violations of the law?"[74] Answering this question in the FCPA context highlights yet another concerning qualitative enforcement issue from 2018 corporate FCPA enforcement.

Specifically, in 2018 the SEC resolved fourteen corporate enforcement actions against issuers (which of course can only act through real human beings). Yet as highlighted in Table IV above, not one of these enforcement actions have resulted (at least yet) in any related FCPA enforcement actions against company employees. Similarly, in 2018 the DOJ resolved eight corporate enforcement actions against business organizations (which of course can only act through real human beings). Yet as highlighted in Table I above, only one of these enforcement actions (12%) has resulted (at least yet) in any related FCPA enforcement actions against company employees.

Such statistics are all the more troubling given that the DOJ and SEC frequently talk about the importance of individual FCPA prosecutions. For instance, in 2018 DOJ enforcement officials stated: "focusing on individual wrongdoers is an important aspect of the Department's FCPA program"[75] and as follows:

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[72] *See* U.S. Sec. & Exch. Comm'n, SEC Enforcement Actions: FCPA Cases, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml [https://perma.cc/72CA-2D4P] (last visited Sept. 4, 2019).

[73] *See Corporate Repeat Offenders*, FCPA PROFESSOR (Oct. 5, 2018), http://fcpaprofessor.com/corporate-fcpa-repeat-offenders-2/ [https://perma.cc/P6DQ-CELG].

[74] Steve Peikin, Co-Dir., SEC Enf't Div., U.S. Sec. & Exch. Comm'n, Remedies and Relief in SEC Enforcement Actions (Oct. 3, 2018), https://www.sec.gov/news/speech/speech-peikin-100318 [https://perma.cc/G46S-56B2].

[75] Rod J. Rosenstein, Deputy Attorney Gen., Deputy Attorney Gen. Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 [https://perma.cc/7CWQ-BEVN].

> The Criminal Division's commitment to corporate enforcement has been on full display with our emphasis on individual accountability. A company only acts through its employees and agents. It therefore makes sense to focus our investigative efforts on the culpable individuals – both to secure appropriate punishment for the bad actors, and to have the greatest impact on preventing and deterring corruption.[76]

Likewise, an SEC enforcement official stated in 2018:

> We have also continued to focus on individual accountability by pursuing charges against individuals for misconduct in the securities markets, including registered individuals, executives at all levels of the corporate hierarchy, including CEOs, CFOs and other high-ranking executives, and gatekeepers.[77]

Nevertheless, actions speak louder than words, and the U.S. government's rhetoric regarding individual FCPA prosecutions remains hollow (at least as measured against corporate enforcement actions) as demonstrated by the above statistics.

D. Enforcement Actions Against Foreign Companies

A fourth concerning qualitative enforcement issue from 2018 corporate FCPA enforcement was how much of the largeness of FCPA enforcement is due to enforcement actions against foreign companies. Specifically, of the 17 corporate enforcement actions in 2018, 9 (53%) were against foreign companies (based in many instances on mere listing of securities on U.S. markets and in a few instances on sparse allegations of a U.S. nexus in furtherance of a bribery scheme). Even more dramatic, of the net approximate $1 billion in FCPA settlement amounts from 2018 corporate

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[76] John P. Cronan, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice Criminal Div., Principal Deputy Assistant Attorney General John P. Cronan of the Justice Dep't's Crim. Div. Delivers Remarks at the 3rd Annual GIR Live DC Fall Event (Oct. 25, 2018), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-1 [https://perma.cc/R2ZA-4QUT].

[77] Stephanie Avakain, Co-Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, Measuring the Impact of the SEC's Enf't Program (Sept. 20, 2018), https://www.sec.gov/news/speech/speech-avakian-092018 [https://perma.cc/44LC-S6WD].

enforcement actions, approximately 72% was from enforcement actions against foreign companies.

With one exception (the relatively minor DOJ enforcement action against Insurance Corporation of Barbados), all of the foreign companies which resolved 2018 FCPA enforcement actions were from peer countries also parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). The question should thus be asked whether these FCPA enforcement actions represented a proper use of the FCPA – at least from a policy standpoint. In other words, what legitimate U.S. law enforcement interests are implicated when for example:

- Brazilian companies such as Eletrobras and Petrobras interact with their own Brazilian government officials?
- French companies like Sanofi and Société Générale interact with alleged foreign officials in Jordan, Lebanon, Syria, Palestine, Bahrain, Kuwait, Qatar, Yemen, Oman, and the United Arab Emirates and Libya?
- A Swiss company like Credit Suisse interacts with alleged foreign officials in China
- A Canadian company like Kinross Gold interacts with alleged foreign officials in Mauritania and Ghana?
- An Israeli company like Elbit Imaging interacts with alleged foreign officials in Romania?
- A Japanese company like Panasonic interacts with alleged foreign officials in the Middle East?

All of these 2018 FCPA enforcement actions were against companies headquartered in countries that, like the U.S., are parties to the OECD Convention. In other words, Brazil, France, Switzerland, Canada, Israel and Japan are all peer countries with mature FCPA-like laws governing the conduct of its companies coupled with reputable legal systems to prosecute such offenses.

Given this reality, as well as the specific provision in Article 4 of OECD Convention providing that "when more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate

jurisdiction for prosecution,"[78] can it truly be said that the U.S. was the most appropriate jurisdiction to prosecute these foreign companies for alleged interactions with non-U.S. officials?

As discussed in more detail in Part III below, an enforcement agency policy development from 2018 relevant to FCPA enforcement was the DOJ's announcement of a "non-piling" policy which provides that:

> The Department should . . . endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.[79]

Granted, in most of the foreign company enforcement actions highlighted above there were credits or offsets in terms of U.S. FCPA settlement amounts for related foreign law enforcement actions. Yet, "piling on" is precisely what the DOJ does when it brings an FCPA enforcement action against a foreign company located in an OECD Country that is also subject to prosecution in its "home" jurisdiction.

The bigger question is whether the above examples should have been instances in which the U.S. government should have simply backed away because of the related foreign law enforcement action? In the minds of some, FCPA enforcement has become a convenient cash cow for the U.S. government. The above enforcement actions in 2018 against foreign companies, which resulted in approximately $715 million flowing into the U.S. Treasury, only amplify these concerns and perhaps the time has come – with the maturity of the OECD Convention – for the U.S. government to adopt a policy of <u>not</u> bringing FCPA enforcement actions against foreign companies from peer OECD Convention countries.

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[78] Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions pmbl., Dec. 17, 1997, 37 I.L.M. 1, at art. 4 ¶ 3.

[79] U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-12.000 (2018), https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings [https://perma.cc/7XB8-QTSJ].

Separately, the FCPA enforcement actions against Petrobras and Eletrobras were notable in that technically these U.S. government enforcement actions were against the Brazilian government. Specifically, the DOJ alleged that Petrobras was a "state-owned-and-controlled oil and gas company"[80] and the SEC found that Petrobras was a "Brazilian government-controlled oil and gas company."[81] Reflective of this unusual aspect of the Petrobras enforcement action, the DOJ's NPA stated:

> By entering into this Agreement, notwithstanding anything contained herein, the Company does not prospectively waive any arguments that, as an instrumentality of the Republic of Brazil, it is protected by sovereign immunity from criminal prosecution in the United States, and it reserves the right to assert this argument in any future prosecution or civil action by the United States.[82]

Likewise, in the Eletrobras enforcement action, the SEC found that the "Brazilian federal government currently owns a 51% stake in Eletrobras and appoints seven of Eletrobras's eleven board members" and thus clearly viewed Eletrobras as an "instrumentality" of the Brazilian government.[83] The Petrobras and Eletrobras enforcement actions are believed to be the only two FCPA enforcement actions in history against a foreign government.

E. Statutory Interpretation Issues

The FCPA is not an all-purpose corporate ethics statute that the DOJ and/or SEC can invoke at will any time objectionable

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[80] Non-Prosecution Agreement at A-1, U.S. Dep't of Justice v. Petróleo Brasileiro S.A., (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download [https://perma.cc/X5LK-JXVN].

[81] Petróleo Brasileiro S.A., Exchange Act Release No. 84295, 2018 WL 4628173 (Sept. 27, 2018), https://www.sec.gov/litigation/admin/2018/33-10561.pdf [https://perma.cc/R8LR-FDTM].

[82] Non-Prosecution Agreement at A-1, U.S. Dep't of Justice v. Petróleo Brasileiro S.A., (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download [https://perma.cc/6DAM-C354].

[83] Centrais Elétricas Brasileiras S.A., Exchange Act Release No. 84973, 2018 WL 6804091 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84973.pdf [https://perma.cc/PVJ2-E6RG].

conduct is brought to their attention. Rather, in passing the FCPA Congress intended for the FCPA to be a limited statute by embedding in the law various legal elements that must be met for a violation to occur. For instance, a violation of the FCPA's anti-bribery provisions requires a "foreign official" and the FCPA's internal controls provisions are qualified through the concept of "reasonableness." Yet, as highlighted in this Part, 2018 witnessed certain concerning statutory interpretations by the enforcement agencies.

Regarding the FCPA's "foreign official" element, the FCPA's legislative history is clear that the recipient category Congress had in mind when enacting the FCPA was bona fide foreign government officials such as presidents, prime ministers and other heads of state.[84] However, as highlighted in Table XII below, 2018 corporate FCPA enforcement actions did not always involve such "foreign officials."

Table XII – "Foreign Officials" Alleged in 2018 Corporate Enforcement Actions

Enforcement Action	**Alleged "Foreign Officials"**[85]
Transport Logistics International	DOJ Vadim Mikerin, a national of the Russian Federation, who was a Director of TENEX and also the President of TENAM. TENEX is described as being "indirectly owned and controlled by, and performed functions of, the government of the Russian

[84] For a detailed discussion of the FCPA's legislative history, *see* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012).

[85] *See The "Foreign Officials" Of 2018*, FCPA PROFESSOR (Jan. 21, 2019), http://fcpaprofessor.com/foreign-officials-2018/ [https://perma.cc/LLT7-NJM9]. Certain enforcement actions technically only involved FCPA books and records and internal control charges or findings. However, actual charges in many FCPA enforcement actions hinge on voluntary disclosure, cooperation, collateral consequences, and other non-legal issues. Thus, even if an FCPA enforcement action is resolved without FCPA anti-bribery charges, most such actions remain very much about the "foreign officials" involved – a fact evident when reading the actual enforcement action. *See supra* Tables I and II for the original source cites for these enforcement actions.

Enforcement Action	**Alleged "Foreign Officials"**[85]
	Federation." TENAM is described as being located in the U.S. and a wholly-owned subsidiary of TENEX. TENAM was TENEX's official representative office in the United States and owned and controlled by, and performed functions of, the government of the Russian Federation.
Elbit Imaging	SEC Generic references to Romanian government officials in connection with real estate projects.
Kinross Gold	SEC Generic references to interactions with officials in Mauritania and Ghana including a Ghanaian government customs officer.
Panasonic	DOJ An individual "employed as a senior contracts official at Middle East Airline." SEC Individuals associated with government owned airlines in the Middle East.
Dun & Bradstreet	SEC Individuals associated with the Chinese State Administration of Industry and Commerce (AIC).
Beam	SEC Indian officials with discretion regarding the various issues: importation of distilled mixes, shipments to bottling facilities, plant inspections, shipments to distribution warehouses, label registrations, licensing of warehouses,

Enforcement Action	**Alleged "Foreign Officials"**[85]
	sales to retail stores that were operated by the Indian government.
Credit Suisse	DOJ Individuals associated with various state-owned enterprises in China, individual with a Chinese government executive agency that administered macroeconomic policy, budget, and government expenditures. SEC Individuals at various Chinese SOEs or foreign government ministers with influence over the business decisions of SOEs.
Insurance Corp. of Barbados	DOJ Donville Inniss – a member of the Parliament of Barbados and the Minister of Industry, International Business, Commerce, and Small Business Development of Barbados.
Legg Mason	DOJ Individuals associated with the Central Bank of Libya, Libyan Arab Foreign Bank, Economic and Social Development Fund, and Libyan Investment Authority. SEC Individuals associated with state-owned financial institutions in Libya.
Société Générale	DOJ Individuals associated with the Central Bank of Libya, Libyan Arab Foreign Bank, Economic and Social Development Fund, and Libyan Investment Authority.

Enforcement Action	**Alleged "Foreign Officials"**[85]
Sanofi	SEC Healthcare professionals in Jordan, Lebanon, Syria, Palestine, Bahrain, Kuwait, Qatar, Yemen, Oman, and the United Arab Emirates.
United Technologies	SEC "Baku Liftremont officials (a municipal entity in Azerbaijan)." Individuals at Chinese state-owned airlines. An individual at a Chinese state-owned bank. Officials of the Republic of Korea Air Force. Generic reference to officials from China, Kuwait, South Korea, Pakistan, Thailand, and Indonesia.
Petrobras	DOJ "Politicians and political parties in Brazil." SEC "Politicians and political parties in Brazil."
Stryker	SEC "Health-care professionals ("HCPs") in India," "Kuwaiti HCPs" and generic reference to HCPs in China.
Vantage Drilling	SEC "Officials at Petróleo Brasileiro SA Petrobras ("Petrobras"), a Brazilian state-owned oil and gas company."
Eletrobras	SEC "Brazilian political parties and Brazilian government officials."

Enforcement Action	**Alleged "Foreign Officials"**[85]
Polycom	DOJ Not specified SEC "Officials at Chinese government agencies and government-owned enterprises."

As the above table demonstrates, of the 17 core corporate enforcement actions in 2018, 9 (53%) involved, in whole or in part, employees of alleged state-owned or state-controlled entities (SOEs) with an additional 2 actions (12%) involving, in whole or in part, individuals associated with foreign health care systems. None of these enforcement actions were subjected to any meaningful judicial scrutiny and notwithstanding a flawed 2014 appellate court decision blessing the enforcement theory that employees of alleged SOEs may be "foreign officials" under the FCPA,[86] this prominent enforcement theory remains disputed.

Regarding the "foreign official" element, a 2018 individual FCPA enforcement action against Lawrence Parker is also worth highlighting. In the criminal action involving a telecommunications bribery scheme in Aruba, the DOJ alleged that Servicio di Telecommunicacion di Aruba N.V. (SETAR) was an instrumentality of the Aruban government such that Egbert Yvan Ferdinand Koolman (a product manager at SETAR) was a "foreign official."[87] What made this allegation interesting is that beginning in 2003 SETAR described itself as a "private sector business."[88] Moreover, in 2017 U.S. court filings, SETAR described

[86] *See* United States v. Esquenazi, 752 F.3d 912, 932 (11th Cir. 2014); Brief of Professor Michael J. Koehler as Amicus Curiae in Support of Petitioners at 11-13, Esquenazi v. United States, No. 14-189 (11th Cir. Sept. 17, 2014), https://www.scribd.com/document/240126311/U-S-v-Esquenazi-Amicus-Brief-of-Professor-Michael-Koehler [https://perma.cc/V9PW-W72K].

[87] Information & Allegations at 1-4, United States v. Parker, No. 1:17-cr-20914-CMA (S.D. Fla. Dec. 20, 2017), https://www.scribd.com/document/376295744/Parker-Information [https://perma.cc/PA8F-8RDA].

[88] *Setar History*, https://www.setar.aw/setar-history/ [https://perma.cc/BSZ7-UYLJ].

itself as "a privatized full telecommunications service provider for the island of Aruba."[89]

In *U.S. v. Castle*, the Fifth Circuit correctly noted that "foreign officials" were a "well-defined group of persons."[90] However, the breadth of the above type of "foreign official" allegations are practically boundless. While FCPA enforcement actions typically escape judicial scrutiny, in 2018 there was judicial scrutiny relevant to the "foreign official" element albeit in a securities fraud class action filed in the aftermath of a company's FCPA scrutiny. As highlighted next, in the action a federal court judge found the term "instrumentality" in the FCPA's "foreign official" definition "unclear" and otherwise narrowly construed the term in a way contrary to the FCPA enforcement agencies' interpretations.

In *Das v. Rio Tinto PLC*, purchasers of Rio Tinto's American Depositary Receipts alleged that Rio Tinto as well as Tom Albanes (former CEO and member of the board), Alan Davies (former CEO of the Energy & Minerals Group), and Sam Walsh (former CEO and member of the board) violated Section 10(b) and 20(a) of the Securities Exchange Act.[91] The underlying conduct concerned Rio Tinto's mining operations in Guinea and the company entering into an arrangement with Francois Polge de Combret, a friend of Guinea's then President Alpha Conde.[92] As alleged in the complaint:

> During the course of this relationship, Individual Defendants agreed to pay Combret $10.5 million ("Combret payment") for his help protecting the mining rights for blocks 3 and 4, in which they were ultimately successful. Plaintiff alleges this payment constituted a bribe in violation of the U.S. Foreign Corrupt Practices Act.[93]

As to the alleged misleading statements at issue in the alleged securities fraud, Plaintiffs alleged:

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[89] Complaint at 3, SETAR N.V. v. Koolman, No. 1:17-cv-20835-JEM (S.D. Fla. Mar. 3, 2017), https://www.scribd.com/document/376412308/SETA-Complaint [https://perma.cc/L9WC-EK4Q].

[90] United States v. Castle, 925 F.2d 831, 836 (5th Cir. 1991).

[91] Das v. Rio Tinto PLC, 332 F. Supp. 3d 786, 796 (S.D.N.Y. 2018).

[92] *Id.* at 796-97.

[93] *Id.* at 797.

> During the class period, Defendants made numerous public statements to Rio Tinto's investors via SEC filings, earnings calls, the Company's code of conduct, media releases, and its website. These statements fall into five main categories: (1) Rio Tinto's commitment to law abidance and anti-corruption, (2) the Company's work with the GoG [Government of Guinea], (3) the Company's contingent liabilities, (4) the adequacy of the Company's of internal controls, and (5) SOX certifications. Plaintiff contends that these statements were materially misleading because, in short, Defendants failed to disclose that they paid Combret a $10.5 million bribe which violated their code of conduct, subjected the Company to regulatory and legal action, and made clear the ineffectiveness of their internal controls.[94]

The defendants moved to dismiss the action for, among other reasons, failure to state a claim. After reviewing the relevant legal standards and pleading requirements, the judge first addressed whether Plaintiff pled the existence of any underlying illegal conduct and summarized the positions as follows: "Plaintiff alleges that the Combret payment violated the FCPA. Defendants contend that, absent allegations that the payment was made to a 'foreign official,' it cannot violate the statute."[95]

Under the heading "Whether Combret is a Foreign Official," the judge stated:

> Plaintiff contends that Defendants indirectly bribed Guinean government officials by paying $10.5 million to Combret for the purposes of effectuating the $700-million settlement with the GoG that allowed the Company to maintain its hold on the Simandou concessions and strengthen its relationship with the GoG. Defendants respond that Plaintiff fails to allege that any of the Company's payment to Combret was ultimately offered to any foreign official. Moreover, allegations that Combret and President Conde had a close relationship are insufficient to show that Combret actually offered President Conde anything of value.

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[94] *Id* (internal citations omitted).

[95] *Id.* at 803.

> The Court agrees with Defendants that such allegations are insufficient.
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> . . . .
>
> Plaintiff argues in the alternative that Combret is himself a foreign official "acting as an 'instrumentality' of or 'on behalf of' the GoG," and thus the payment was a direct bribe. First, the definition of "instrumentality" in the FCPA is unclear and not defined by statute. However, the text of the FCPA compels a reading of "instrumentality" as something other than a person, since the definition of a foreign official includes an "officer or employee *of* a . . . *instrumentality* [of a foreign government]." [. . .] Since Combret is an individual, not an entity, he does not qualify as an instrumentality.
>
> Second, the FCPA requires that the individual act "*in an official capacity* for or on behalf of any such government." Plaintiff does not allege that Combret worked for the GoG in any official capacity. By Plaintiff's own admissions Combret acted "as an *informal* advisor" to President Conde and worked at an "*independent* advisory firm." With no official position in the GoG, it strains logic to consider Combret a "foreign official."[96]

The above judicial interpretation of the "foreign official" element conflicts with the DOJ's "foreign official" interpretation including in a 2018 FCPA enforcement action. Specifically, in the Legg Mason enforcement action the DOJ stated:

> Although Libyan Official 1 did not hold a formal title within the Libyan government, Libyan Official 1 possessed and used a Libyan diplomatic passport and conducted high-profile foreign and domestic affairs for, and on behalf of, the Libyan government. Libyan Official 1 made administrative and investment decisions for the LIA, including through proxies. Libyan Official 1 was a "foreign official" within the meaning of the FCPA . . . .[97]

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[96] *Id.* at 803-04 (internal citations omitted).

[97] Letter from U.S. Dep't of Justice to John F. Savarese, Esq., and Jonathan M. Moses, Esq., of Wachtell, Lipton, Rosen, & Katz at A-5 (June 4, 2018), https://www.justice.gov/opa/press-release/file/1068036/download [https://perma.cc/5QRX-NAQS].

The FCPA enforcement agencies' concerning statutory interpretations are not just limited to the FCPA's anti-bribery provisions, but also include interpretations of the FCPA's internal controls provisions.

For instance, the SEC's $9.2 million enforcement action against Dun & Bradstreet (D&B) was based on the conduct of two indirect Chinese subsidiaries and allegations that individuals associated with the Chinese entities made payments to Chinese officials to acquire data relevant to the company's business.[98] The SEC's order did not contain any finding, suggestion, or inference that anyone at D&B (the issuer) participated in, authorized, or had knowledge of the improper conduct of the indirect subsidiary employees.[99] Rather, the SEC based its finding that D&B violated the books and records and internal controls provisions on the following:

> These unlawful payments [by the indirect subsidiary employees] were not accurately reflected in the books and records of [the indirect subsidiaries], which were consolidated into D&B's books and records. During the relevant period, D&B also failed to devise and maintain sufficient internal accounting controls to detect or prevent the improper payments.[100]

The SEC's $16 million enforcement action against Polycom was also based on conduct in China in which the SEC found that a Vice of President of a Chinese subsidiary, along with senior managers of the subsidiary, "provided significant discounts to Polycom's distributors and/or resellers, knowing and intending that the distributors and/or resellers would use the discounts to make payments to officials at Chinese government agencies and government-owned enterprises in exchange for those officials' assistance in obtaining orders for Polycom's products."[101]

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[98] The Dun & Bradstreet Corp., Exchange Act Release No. 83088, 2018 WL 1907132 (Apr. 23, 2018), https://www.sec.gov/litigation/admin/2018/34-83088.pdf [https://perma.cc/XN48-75XH].

[99] *See id.*

[100] *Id.* at 2.

[101] Polycom, Inc., Exchange Act Release No. 84978, 2018 WL 6804090, at 2 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84978.pdf [https://perma.cc/2S38-6Z83].

According to the SEC, the Chinese subsidiary created "a separate, parallel sales management system outside of Polycom's company-approved systems, which was orchestrated by Polycom's Vice President of China" and that employees of the Chinese subsidiary used "non-Polycom email addresses when discussing deals with Polycom's distributor."[102] The SEC further found that "Polycom personnel outside China were unaware of the existence of this parallel system."[103]

Relevant to the FCPA's internal controls provisions, the SEC stated:

> According to Polycom's policies and procedures, Polycom sales personnel worldwide were required to enter details concerning sales opportunities and deals into a single, centralized customer relations management ("CRM") database. However, Polycom China's senior managers directed Polycom China's sales personnel to enter details concerning sales opportunities into a separate, parallel sales management system outside of Polycom's company-approved systems, which was orchestrated by Polycom's Vice President of China. Polycom personnel outside China were unaware of the existence of this parallel system. Polycom China's senior managers also directed Polycom China's sales personnel to use non-Polycom email addresses when discussing deals with Polycom's distributors.
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> . . . .
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> Senior managers at Polycom China recorded information about each deal in Polycom's centralized CRM database. Entries in the centralized CRM database did not reflect that Polycom was providing discounts to its distributors in China in order to fund improper payments to Chinese government officials. Rather, the entries in the CRM database falsely attributed the discounts to purportedly legitimate purposes.
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> . . . .
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> Product discounts up to a certain threshold could be approved unilaterally by Polycom China's senior managers. However,

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[102] *Id.* at 3.
[103] *Id.*

> discounts above this threshold had to be approved by Singapore-based personnel who worked for another wholly-owned Polycom subsidiary. When these Singapore-based personnel sought information regarding the reasons for particular discounts, Polycom China's senior managers always cited legitimate concerns such as competition with other communications products providers or end-user budget constraints. Polycom China's senior managers never told the Singapore-based personnel that certain discounts were being used to fund improper payments to government officials.[104]

It is safe to assume that if Polycom did not have a single centralized customer relations management database that employees were required to use, or that if Polycom did not have approval policies in place for product discounts above a certain threshold, that the SEC would have found the company in violation of the internal controls provisions. Yet, Polycom did have these controls, nevertheless a few culpable actors at a Chinese subsidiary knowingly and willfully circumvented these controls and otherwise lied. Nevertheless, the SEC found the company in violation of the internal controls provisions in what appears to be a strict liability standard.

It is difficult to reconcile the SEC's theory of enforcement in the D&B and Polycom matters with legal authority relevant to the books and records and internal controls provisions as well as even SEC guidance.

For starters, the FCPA's internal controls provisions state that issuers shall "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that certain financial objectives are met.[105] The FCPA then defines "reasonable assurances" and "reasonable detail" to "mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[106]

In other words, the standard of liability that the SEC invoked in the D&B enforcement action (and many others in the FCPA's modern era), that the company violated the internal controls provisions because it "failed to devise and maintain sufficient

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[104] *Id.* at 3-5.

[105] 15 U.S.C. § 78m(b)(2)(B).

[106] *Id.*

internal accounting controls to detect or prevent the improper payments," is not even found in the FCPA.

As if this were not troubling enough, in *SEC v. World-Wide Coin* (believed to be the only judicial decision to directly address the substance of the internal-controls provisions) the court found, in pertinent part:

> The definition of accounting controls does comprehend reasonable, but not absolute, assurances that the objectives expressed in it will be accomplished by the system. . . . It does not appear that either the SEC or Congress, which adopted the SEC's recommendations, intended that the statute should require that each affected issuer install a fail-safe accounting control system at all costs.[107]

Further relevant to the SEC's theory of enforcement in the D&B and Polycom enforcement actions, the SEC's most extensive guidance on the internal controls provisions states, in pertinent part:

> The accounting provisions[‘] principal objective is to reach knowing or reckless conduct.
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> . . . .
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> Inherent in this concept [of reasonableness] is a toleration of deviations from the absolute.
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> . . . .
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> The test of a company's [internal] control system is not whether occasional failings can occur. Those will happen in the most ideally managed company. But, an adequate system of internal controls means that, when such breaches do arise, they will be isolated rather than systemic, and they will be subject to a reasonable likelihood of being uncovered in a timely manner and then remedied promptly. Barring, of course, the participation or complicity of senior company officials in the deed, when discovery and correction

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[107] S.E.C. v. World-Wide Coin Inv., 567 F. Supp. 724, 751 (N.D. Ga. 1983).

> expeditiously follow, no failing in the company's internal accounting system would have existed.[108]

In short, it is difficult to reconcile the SEC's theory of enforcement in the D&B and Polycom enforcement actions with legal authority relevant to the books and records and internal controls provisions as well as even SEC guidance. Rather, these enforcement actions demonstrate that just because an issuer resolves an FCPA enforcement action without admitting or denying the SEC's findings (as both D&B and Polycom did) does not necessarily mean that the issuer violated the FCPA.

As this Part has highlighted, 2018 FCPA enforcement actions included several concerning qualitative issues including: the long time periods associated with FCPA scrutiny; the general lack of judicial scrutiny of enforcement theories; the substantial gap between corporate and individual enforcement; how much of the largeness of FCPA enforcement is due to enforcement actions against foreign companies; and certain statutory interpretation issues.

III. OTHER NOTEWORTHY DEVELOPMENTS FROM 2018

This section discusses other noteworthy developments from 2018. First, FCPA jurisprudence is discussed in which two separate courts rejected expansive FCPA enforcement theories as well as other FCPA relevant jurisprudence concerning restitution, dollar-denominated transactions, and so-called best practices. Second, FCPA relevant enforcement agency policy is discussed including the DOJ's so-called "non-piling on" policy relevant to settlement amounts, a revision to DOJ corporate monitor policy, and the FCPA component of the DOJ's China Initiative.

A. FCPA and Related Jurisprudence

As highlighted in Part I above, DOJ NPAs, DPAs, declinations with disgorgement and SEC administrative actions are the dominant resolution vehicles used to resolve corporate FCPA enforcement actions and the common thread in these

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[108] Statement of Policy, Exchange Act Release No. 34-17500, 1981 WL 36385 (Jan. 29, 1981).

alternative resolution vehicles is the lack of any meaningful judicial scrutiny. As further highlighted in Tables I and IV above, few corporate FCPA enforcement actions result in related enforcement actions against company employees. The combined effect of these two FCPA enforcement dynamics means that there is little judicial scrutiny of FCPA enforcement. Yet, in the rare instances in which individuals are prosecuted for FCPA offenses by the DOJ or SEC, such defendants – unlike business organizations – are more likely to put the enforcement agencies to its burden of proof as their personal liberty, assets, and reputation are at stake. As highlighted next, in 2018 two separate courts rejected expansive FCPA enforcement theories.

1. *Hoskins*

In 2013, the DOJ criminally charged Lawrence Hoskins (a United Kingdom national and former senior vice president for the Asia region for France-based Alstom) with conspiracy to violate the FCPA's anti-bribery provisions among other charges.[109] According to the DOJ:

> [Hoskins] together with others, allegedly paid bribes to officials in Indonesia – including a member of the Indonesian Parliament and high-ranking members of Perusahaan Listrik Negara (PLN), the state-owned and state-controlled electricity company in Indonesia – in exchange for assistance in securing a $118 million contract, known as the Tarahan project, for the company and its consortium partner to provide power-related services for the citizens of Indonesia. To conceal the bribes, the defendants retained two consultants purportedly to provide legitimate consulting services on behalf of the power company and its subsidiaries in connection with the Tarahan project. The indictment, however, alleges that the primary purpose for hiring the

[109] Press Release, U.S. Dep't of Justice, Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme (July 30, 2013), https://www.justice.gov/opa/pr/former-senior-executive-french-power-company-charged-connection-foreign-bribery-scheme [https://perma.cc/3U4Z-GKFE].

> consultants was to use the consultants to pay bribes to Indonesian officials.[110]

Unlike certain co-defendants who pleaded guilty, Hoskins put the DOJ to its burden of proof and at the trial court level argued in a motion to dismiss that the FCPA charges should be dismissed "on the basis that [the indictment] charges a legally invalid theory that he could be criminally liable for conspiracy to violate the [FCPA] even if the evidence does not establish that he was subject to criminal liability as a principal, by being an 'agent' of a 'domestic concern.'"[111]

As stated by the trial court judge in a 2015 decision, the disputed issue was:

> [W]hether a nonresident foreign national could be subject to criminal liability under the FCPA, even where he is not an agent of a domestic concern and does not commit acts while physically present in the territory of the United States, under a theory of conspiracy or aiding and abetting a violation of the FCPA by a person who is within the statute's reach.[112]

The judge answered the question no and concluded that accomplice liability could not extend to Hoskins under the circumstances of the case and thus granted the motion to dismiss.[113] After the DOJ's motion for reconsideration was rejected,[114] the DOJ appealed to the Second Circuit – representing a rare opportunity in the FCPA's 40-plus-year history for an appellate court to interpret the FCPA.

In its 2018 decision, the Second Circuit framed the issue as follows:

> The central question of the appeal is whether Hoskins, a foreign national who never set foot in the United States or

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[110] *Id.*

[111] United States v. Hoskins, 123 F. Supp. 3d 316, 317 (D. Conn. 2015) (citations omitted)

[112] *Judge Trims DOJ's FCPA Enforcement Action Against Lawrence Hoskins*, FCPA PROFESSOR (Aug. 17, 2015), http://fcpaprofessor.com/judge-trims-dojs-fcpa-enforcement-action-against-lawrence-hoskins/ [https://perma.cc/YK8N-KYZ3].

[113] *Id.*

[114] United States v. Hoskins, No. 3:12cr238, 2016 WL 1069645, at *6 (D. Conn. Mar. 16, 2016).

> worked for an American company during the alleged scheme, may be held liable, under a conspiracy or complicity theory, for violating FCPA provisions targeting American persons and companies and their agents, officers, directors, employees, and shareholders, and persons physically present within the United States. In other words, can a person be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal?[115]

After analyzing analogous case law, the court stated:

> [T]he carefully tailored text of the [FCPA], read against the backdrop of a well-established principle that U.S. law does not apply extraterritorially without express congressional authorization and a legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute, persuades us that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability.
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> . . . .
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> [T]he structure of the FCPA—confirms that Congress's omission of the class of persons under discussion was not accidental, but instead was a limitation created with surgical precision to limit its jurisdictional reach. The statute includes specific provisions covering every other possible combination of nationality, location, and agency relation, leaving excluded only nonresident foreign nationals outside American territory without an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies.[116]

Central to the court's reasoning was the FCPAs legislative history and the court stated:

> When President Carter took office in 1977, sponsors of the 1976 precursor to the FCPA exhorted the administration to take an active approach in promoting an anti-bribery statute comparable to the 1976 bill that passed the Senate but failed

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[115] United States v. Hoskins, 902 F.3d 69, 76 (2d Cir. 2018).

[116] *Id*. at 83-84.

> to pass the House. The Carter Administration indicated its support for such a statute, and, in particular, suggested that "specific criminal penalties" for acts of bribery were the correct approach to solving the problem.
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> . . . .
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> Although it hoped to pass aggressive anti-bribery legislation, the Administration recognized that a statute focusing on criminalization, rather than disclosure, required a delicate touch where extraterritorial conduct and foreign nationals were concerned.[117]

The court then, in painstaking detail, examined the extensive legislative history including a markup session held by a Senate Committee.[118] The court stated:

> The markup session provides powerful evidence of two points relevant to this case. First, before the Carter Administration's concerns and the markup hearing detailed above, the Senate had planned to adopt a bill that largely omitted references to individual liability, and that instead relied on theories of conspiracy and complicity to tie individual action to corporate misdeeds. In response to administration concerns—particularly concerns regarding the clarity of liability and its application to foreign persons—the Senate rejected its prior approach. Instead, it opted for a version of the bill that was *not* reliant on conspiracy or complicity theories. Rather, it defined, with great precision, who would be liable.[119]

After its extensive review of the legislative history, the court summed up its conclusions as follows.

> The strands of the legislative history demonstrate, in several ways, the affirmative policy described above: a desire to leave foreign nationals outside the FCPA when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern, and when they operate outside United States territory.

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[117] *Id.* at 85-86 (citations omitted).

[118] *Id.* at 87 (citing *Markup Session on S. 305, Corporate Bribery*, S. Comm. On Banking, Hous. And Urban Affairs, 95th Cong. 1-2 (1977)).

[119] *Id.* at 87-88.

> First, it is clear that the FCPA's enumeration of the particular individuals who may be held liable under the Act demonstrated a conscious choice by Congress to avoid creating individual liability through use of the conspiracy and complicity statutes. As discussed above, the statute's initial approach was to place liability for bribery largely upon companies, and then to allow prosecution of individuals for conspiring with companies or aiding and abetting their violations of the law. But the Carter Administration objected to that approach, voicing concerns for due process protections and clarity of rules for foreign persons. The statute was amended; the amended version narrowly tailored the liability for foreign individuals, and did not contemplate a reversal of that narrow tailoring by means of conspiracy and complicity theories. These changes were principally discussed in the Senate. But the House bill, and the final legislation, were structured similarly to the Senate's revised bill. At the same time that the Senate made these changes, the House was revising its own legislation to cut back on liability placed upon foreign agents, again because of specific concerns expressed by executive-branch officials regarding overreach.
>
> The 1998 amendments surely extended the statute's jurisdictional reach. But in doing so, Congress delineated as specifically as possible the persons who would be liable, and under what circumstances liability would lie. None of the changes included liability for the class of individuals involved in this case. And despite the government's urging to the contrary, nothing in the OECD Convention required Congress to create such liability.
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> Congress also repeatedly emphasized that out-of-reach foreign entities should not create concern because American companies would be liable for violating the Act even if they did so indirectly through such persons.
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> . . . .
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> Finally, limitations on liability for foreign nationals based on conspiracy and complicity theories were sensible given congressional concerns and aspirations in enacting the FCPA. In passing the statute, Congress was largely concerned with ensuring the SEC's ability to supervise and police companies, as well as the negative perception that bribery could create

> for American companies, its effect on the marketplace, and the foreign policy implications of the conduct. But Congress also desired that the statute not overreach in its prohibitions against foreign persons. Protection of foreign nationals who may not be learned in American law is consistent with the central motivations for passing the legislation, particularly foreign policy and the public perception of the United States. And the desire to protect such persons is pressing when considering the conspiracy and complicity statutes: these provisions are among the broadest and most shapeless of American law, and may ensnare persons with only a tenuous connection to a bribery scheme.
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> In short, the legislative history of the FCPA further demonstrates Congress's affirmative decision to exclude from liability the class of persons considered in this case and we thus hold that the government may not override that policy using the conspiracy and complicity rules.[120]

Thereafter, the court stated:

> Even if we were not persuaded that Congress had demonstrated an affirmative legislative policy in the FCPA to limit criminal liability to the enumerated categories of defendants, we would still rule for Hoskins because the government has not established a ""[sic]clearly expressed congressional intent to" allow conspiracy and complicity liability to broaden the extraterritorial reach of the statute.
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> . . . .
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> Consequently, the presumption against extraterritoriality bars the government from using the conspiracy and complicity statutes to charge Hoskins with any offense that is not punishable under the FCPA itself because of the statute's territorial limitations. That includes both charges that are the subject of this motion—conspiracy to violate Sections 78dd-2 and 78dd-3 of the FCPA, and liability as an accomplice for doing so—because the FCPA clearly dictates that foreign nationals may only violate the statute outside the United States if they are agents, employees, officers, directors, or

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[120] *Id*. at 93-95 (citations omitted).

> shareholders of an American issuer or domestic concern. To hold Hoskins liable, the government must demonstrate that he falls within one of those categories or acted illegally on American soil.[121]

Given the dearth of FCPA jurisprudence including appellate court decisions, the Second Circuit's opinion resulted in substantial commentary and FCPA practitioners noted:

> Historically, large companies, whether public or private, have not been willing to go to trial over FCPA allegations, preferring discussions with the government to earn a declination or enter into an acceptable settlement agreement. This has resulted in a lack of developed case law. In recent years, the DOJ has reaffirmed its emphasis on prosecuting individuals, not just companies, for FCPA violations. Individuals such as Hoskins, especially those able to engage competent counsel, will be more likely to put the DOJ's more aggressive theories to the test. The court's exhaustive analysis of the FCPA's legislative history will support any party who wants to contest DOJ's expansionist theories.[122]

> The holding is of significant interest as it narrows the DOJ's jurisdictional reach over nonresident foreign nationals.[123]

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[121] *Id*. at 95, 97. Notwithstanding the Court's rejection of the DOJ's main theory of prosecution, the court did allow the government to pursue FCPA charges based on the factual issue of whether Hoskins was "an agent of a domestic concern." *Id.* at 97-98. As stated by the court: "Provided that the government makes this showing, there is no affirmative legislative policy to leave his conduct unpunished, nor is there an extraterritorial application of the FCPA. Accordingly, the government should be allowed to argue that, as an agent, Hoskins committed the first object by conspiring with employees and other agents of Alstom U.S. and committed the second object by conspiring with foreign nationals who conducted relevant acts while in the United States." *Id.* at 98.

[122] *Second Circuit Rejects DOJ Theories on FCPA Conspiracy and Jurisdictional Allegations*, BASS, BERRY, SIMS PLC (Aug. 27, 2018), http://www.bassberry.com/publications/2018/08/second-circuit-rejects-doj-theories-on-fcpa [https://perma.cc/YT5A-D64P].

[123] Ayoko Hobbs & Colin Jennings, *Circuit Rejects Expansive Use of Conspiracy for FCPA*, SQUIRE, PATTON, BOGGS: THE ANTICORRUPTION BLOG (Aug. 26, 2018), https://www.anticorruptionblog.com/fcpa-jurisdiction/circuit-rejects-expansive-use-of-conspiracy-for-fcpa/ [https://perma.cc/U44V-RGNP].

> The . . . Hoskins decision punctuates a rare litigation of an FCPA case and presents a defeat for the government's expansive theory of FCPA liability.[124]
>
> [The Second Circuit's ruling] highlights the fact that the DOJ's and SEC's interpretation of the law and their respective mandates for enforcement are not necessarily accurate or ultimately enforceable in court.[125]
>
> This decision is a significant blow to the DOJ's expansive view of the jurisdictional reach of the FCPA and a crucial judicial check on the DOJ's prosecutorial practices with respect to the FCPA.[126]
>
> [T]he Hoskins decision is an example of a court strictly construing the FCPA in a manner that does not align with DOJ's aggressive enforcement of the statute. Although the issue in Hoskins was the alleged violation of the anti-bribery provisions of the FCPA, the Second Circuit's analysis appears to run counter to other aggressive assertions of jurisdiction by DOJ.[127]
>
> Given the tendency of companies subject to FCPA-related allegations to enter into negotiated settlements with the DOJ and SEC, litigated decisions construing the FCPA have been rare and largely limited to claims against individuals, who have less incentive to settle. Given this scarcity of judicial opinions construing the FCPA, decisions such as Hoskins

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[124] Marcus A. Asner, Andrew Bauer, Daniel Bernstein & Leah J. Harrell, *Second Circuit Limits Government's Ability to Prosecute Foreign Nationals for Violations of the FCPA*, ARNOLD & PORTER (Aug. 27, 2018), https://www.arnoldporter.com/en/perspectives/publications/2018/08/second-circuit-limits-governments-ability [https://perma.cc/8S5W-4TKW].

[125] Roberto M. Braceras, Jennifer L. Chunias & Emily S. Unger, *Second Circuit Limits Reach of FCPA,* GOODWIN LAW (Aug. 27, 2018), *https*://www.goodwinlaw.com/publications/2018/08/08_27_18-second-circuit-limits-reach-of-fcpa [https://perma.cc/UDU2-N7QK].

[126] *Second Circuit Rejects DOJ's Use of Conspiracy and Accomplice Liability to Prosecute Foreign Nationals for FCPA Violations*, SIDLEY AUSTIN LLP (Aug. 29, 2018), https://www.sidley.com/en/insights/newsupdates/2018/08/second-circuit-rejects-dojs-use-of-conspiracy-and-accomplice-liability [https://perma.cc/67CJ-TW39].

[127] *Second Circuit Reinforces FCPA's Jurisdictional Limits*, LATHAM & WATKINS: CLIENT ALERT (Aug. 29, 2018), https://www.lw.com/thoughtLeadership/second-circuit-reinforces-FCPA-jurisdictional-limits [https://perma.cc/B86B-WZT6].

> provide useful guidance as to the elements and scope of liability under the statute.[128]

While the *Hoskins* decision concerned a specific, rather narrow, legal issue in the context of unique facts, the Second Circuit's decision also sheds a light on several other "big picture" issues associated with the current FCPA enforcement landscape.

For starters, *Hoskins* once again demonstrates that the FCPA's legislative history matters and undermines certain FCPA commentary that "there's no evidence in the record that judges or juries have any trouble understanding the FCPA" and that FCPA lawyers should not be believed when stating that the FCPA is "complicated, technically challenging and obscure, poorly drafted and badly organized."[129] While FCPA judicial decisions are sparse, a common thread in nearly all judicial decisions – including *Hoskins* – is judges resorting to legislative history to give meaning to the FCPA as judges "rightly care about the motivations of Congress in passing the FCPA, the competing bills Congress considered in enacting the FCPA, and Congress's intent as to various elements of the FCPA."[130]

Hoskins also reinforced how the 2012 FCPA Guidance jointly issued by the DOJ and SEC was little more than an advocacy piece. For instance, relevant to the disputed issue in *Hoskins*, the Guidance stated:

> Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA—i.e., for *agreeing* to commit an FCPA violation—even

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[128] United States v. Hoskins—*Second Circuit Rejects DOJ's Attempt to Expand the Extraterritorial Reach of the FCPA Through Conspiracy and Complicity Doctrines*, SULLIVAN & CROMWELL LLP (Aug. 27, 2018), https://www.sullcrom.com/files/upload/SC-Publication-Second-Circuit-Limits-Extraterritorial-Reach-of-FCPA.pdf [https://perma.cc/78JK-ST9R].

[129] Richard L. Cassin, *We Get It*, THE FCPA BLOG (Sept. 17, 2009, 8:28 PM), http://www.fcpablog.com/blog/2009/9/18/we-get-it.html [https://perma.cc/4AGH-FUW3]; Richard L. Cassin, *Is the FCPA Unclear? Clearly Not*, THE FCPA BLOG (May 19, 2011, 1:08 PM), http://www.fcpablog.com/blog/2011/5/19/is-the-fcpa-unclear-clearly-not.html [https://perma.cc/GJE2-STUH].

[130] *The Importance of the FCPA's Legislative History*, FCPA PROFESSOR (Aug. 25, 2015), http://fcpaprofessor.com/the-importance-of-the-fcpas-legislative-history/ [https://perma.cc/LYR7-NNZ9].

> if they are not, or could not be, independently charged with a substantive FCPA violation.[131]

Obviously, the Second Circuit disagreed and this was not the only example of a court disagreeing with a government position set forth in the Guidance. For instance, the Guidance stated:

> The five-year limitations period applies to SEC actions seeking civil penalties, but it does not prevent SEC from seeking equitable remedies, such as an injunction or the disgorgement of ill-gotten gains, for conduct pre-dating the five-year period.[132]

However, in a notable FCPA related development from 2017, the Supreme Court unanimously disagreed and held in *Kokesh v. SEC* that disgorgement is a penalty and thus subject to a five-year limitations period.[133]

Perhaps most fundamentally, the logic and rationale of the Second Circuit's decision in *Hoskins* applies to so many other pressing issues surrounding FCPA enforcement. For instance, one of the most interesting aspects of the *Hoskins* decision was the concurring opinion of Judge Gerard Lynch who wrote "only to state why I regard this as a close and difficult case."[134] In pertinent part, Judge Lynch stated:

> The FCPA . . . is not an ordinary domestic criminal law, but a novel expansion of criminal liability to impose duties on American businesses to conform to domestic ethical standards even when they operate beyond our borders, in lands with different cultures, laws, and traditions. I agree with my colleagues that the extraterritorial effects of the FCPA require us to exercise particular caution before extending its

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[131] U.S. Dep't of Justice & Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 34 (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/NS4J-264A].

[132] *Id.* at 35.

[133] Kokesh v. Sec. & Exch. Comm'n, 137 S. Ct. 1635, 1639 (2017). *See also* Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, BNA Bloomberg White Collar Crime Rep. 4 (Dec. 14, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189072 [https://perma.cc/SGX4-G6KN] (providing additional examples of why the Guidance is "not a well-balanced portrayal of the FCPA, but replete with selective information, half-truths and information that is demonstratively false").

[134] United States v. Hoskins, 902 F.3d 69, 98 (2d Cir. 2018) (Lynch, J., concurring)

> reach even farther than that expressly declared by the statutory text.
>
> . . . .
>
> [W]e do not sit to decide how Congress might have written the law if it had specifically considered this case. We can only apply the law that Congress did write.
>
> . . . .
>
> Our only task is to enforce the laws as Congress has written them.[135]

Judge Lynch's spot-on observation applies to many other pressing issues surrounding FCPA enforcement. For instance, as Table X demonstrated, a prominent FCPA enforcement theory is that alleged state-owned or state-controlled entities (SOEs) are "instrumentalities" of a foreign government such that SOE employees (regardless of rank, title or position) are "foreign officials" under the FCPA. The issue is not whether SOE employees *should* be "foreign officials" under the FCPA, but rather whether the FCPA *as written by Congress* captures SOEs in the explicit "foreign official" definition.[136]

As relevant to the *Hoskins* ruling, the DOJ has long advanced the absurd position that because the OECD Convention discusses a certain issue (x for instance) that the FCPA must therefore mean x.[137] Yet in *Hoskins,* the Second Circuit rightly rejected this position and stated "despite the government's urging to the contrary, nothing in the OECD Convention required Congress to

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[135] *Id.* at 102, 104 (Lynch, J., concurring) (emphasis omitted). Note: the suggestion that the FCPA applies only to "American businesses" is false as the FCPA applies under various scenarios to foreign businesses as well.

[136] *See* Brief of Professor Michael J. Koehler as Amicus Curiae in Support of Petitioners at 2, Esquenazi v. United States, No. 14-189 (11th Cir. Sept. 17, 2014), https://www.scribd.com/document/240126311/U-S-v-Esquenazi-Amicus-Brief-of-Professor-Michael-Koehler [https://perma.cc/W7PB-SBT5]; Declaration of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment at 2, United States v. Carson, No. SA CR 09-00077-JVS (Feb. 21, 2011); Mike Koehler, *A Snapshot of the Foreign Corrupt Practices Act*, 14 SANTA CLARA J. INT'L L. 143, 171 (2016).

[137] Koehler, *supra* note 135, at 181.

create such liability" that the DOJ was advocating.[138] Likewise, the FCPA issue is not whether conduct outside the context of foreign government procurement (in other words conduct in connection with licenses, permits, certifications, etc.) *should* be captured by the FCPA's anti-bribery provisions, but whether the FCPA *as written by Congress* does. For instance, the government has an overall losing record when put to its burden of proof in non-procurement matters. Nevertheless, many corporate FCPA enforcement actions concern alleged conduct outside the context of procurement, but these numerous enforcement actions have not been subjected to any meaningful judicial scrutiny.[139] If either the above "foreign official" issues or the proper interpretation of the FCPA's "obtain or retain business" element reached the Supreme Court, the question is likely not whether the government position would fail, but by how wide of margin.[140]

Similarly, the FCPA issue is not whether the FCPA's anti-bribery *should* have an express facilitation payments exception (which it does), but rather whether the enforcement agencies recognize the exception Congress specifically wrote into the FCPA. The reality is that many FCPA enforcement actions concern conduct that arguably falls under the exception, however, once again, these resolved enforcement actions are not subjected to any meaningful judicial scrutiny.[141] As stated by the SEC's former Assistant Director of Enforcement:

> The drafters of the [FCPA] recognized that such demands for "grease payments" are a reality in many countries, and

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[138] *Hoskins*, 902 F.3d at 94.

[139] See Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen through Wal-Mart's Potential Exposure*, BNA Bloomberg White Collar Crime Rep. 4 (Sept. 21, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145678 [https://perma.cc/TV5L-NZ67].

[140] *See Supreme Court – The Law Means What Actual Words In A Statute Say, Not What the SEC Interprets Those Words To Mean*, FCPA PROFESSOR (Feb. 26, 2018), *http*://fcpaprofessor.com/supreme-court-law-means-actual-words-statute-say-not-sec-interprets-words-mean/ [https://perma.cc/6VBD-4A9D].

[141] *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Texas-Based Layne Chistensen Company With FCPA Violations, https://www.sec.gov/news/press-release/2014-240 [https://perma.cc/AY2H-Q6PT]; Information, United States v. Alfred C. Toepfer Int'l, Ltd., No. 13-20062-MPM-DBG (C.D. Ill. Dec. 20, 2013), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/03/acti-information.pdf [https://perma.cc/T93T-P7HQ].

> accordingly made clear that certain payments made to expedite the approval of permits or licenses, or to prompt the expeditious performance of similar low-level ministerial duties, fell outside the ambit of the statute's anti-bribery provisions. Yet that exception for "facilitating payments" . . . is becoming harder and harder to rely on. . . . The [DOJ] and [SEC] have pressed a narrow view of the exception in recent years. . . . Of course, the fact that the FCPA's twin enforcement agencies have treated certain payments as prohibited despite their possible categorization as facilitating payments does not mean a federal court would agree. But because the vast majority of enforcement actions are resolved through [DPAs] and [NPAs], and other settlement devices, these cases never make it to trial. As a result, the DOJ and the SEC's narrow interpretation of the facilitating payments exception is making that exception ever more illusory, regardless of whether the federal courts – or Congress – would agree.[142]

2. *Cohen* / *Baros*

SEC v. Cohen was the second FCPA decision in 2018 in which a court rejected an expansive enforcement agency theory. In the enforcement action, the court was presented with disputed statute of limitation issues and provided an opportunity to construe the above-mentioned *Kokesh* decision in the context of an individual FCPA enforcement. By way of background, in the aftermath of the DOJ and SEC's 2016 enforcement against hedge fund Och-Ziff (in which the company agreed to pay $412 million pursuant to resolution vehicles not subjected to any meaningful judicial scrutiny to resolve FCPA offenses related to alleged bribery schemes in the Democratic Republic of Congo and Libya),[143] the

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[142] *See* Richard W. Grime & Sara S. Zdeb, The Illusory Facilitating Payments Exception: Risks Posed by Ongoing FCPA Enforcement Actions And The U.K. Bribery Act, *in* The Foreign Corrupt Practices Act 2011, at 379, 382 (PLI Corp. L. & Prac., Course Handbook Series No. B-1883, 2011).

[143] *See* Press Release, U.S. Dep't of Justice, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016), https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213 [https://perma.cc/LGE9-E5NE]; Press Release, U.S. Sec. & Exch. Comm'n, Och-Ziff Hedge Fund Settles FCPA Charges

SEC charged former Och-Ziff executives Cohen and Baros with FCPA and related offenses based on the same core conduct.[144]

The defendants filed motions to dismiss arguing, among other things, that the SEC's claims were time-barred. In the decision, Judge Nicholas Garaufis considered whether, following *Kokesh*, the SEC may pursue claims for monetary relief against either of the defendants.[145]

The SEC offered three arguments in opposition and the court disagreed with all of them. First, the court rejected the SEC's argument that it should not consider the statute of limitations argument on a motion to dismiss.[146] Second, the SEC argued that its claims against Cohen were timely as a result of tolling agreements Cohen executed with the SEC.[147] As to the three tolling agreements Cohen executed, the court found them – in light of general principles of contract law – limited to certain discrete transactions and not as the court stated "actions arising out of investigations that themselves arose out" the investigation covered by the tolling agreements.[148] The court further stated: "Nor did these tolling agreements use the sort of broad, open-ended language that might have evinced the parties' mutual intent to extend the statute of limitations applicable to any claims the SEC might bring."[149]

Third, the SEC argued that the court should authorize discovery into whether Defendants received ill-gotten gains within the limitations period, which the SEC contended would render its claims for disgorgement timely.[150] However, the court stated:

> The court will not authorize such a fishing expedition. . . . The SEC cites no authority for the proposition that it may resist a motion to dismiss on statute-of-limitations grounds by

(Sept. 29, 2016), https://www.sec.gov/news/pressrelease/2016-203.html [https://perma.cc/A5KK-F5PQ].

144 Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Two Former Och-Ziff Executives With FCPA Violations (Jan. 26, 2017), https://www.sec.gov/news/press release/2017-34.html [https://perma.cc/4J4V-5CRB].

145 Sec. & Exch. Comm'n v. Cohen, 332 F. Supp. 3d 575, 587 (E.D.N.Y. 2018).

146 *Id*.

147 *Id*.

148 *Id*. at 590.

149 *Id*.

150 *Id*. at 587.

> suggesting that discovery might reveal timely misconduct not alleged in its complaint.[151]

Moreover, the court rejected the SEC's argument that its "disgorgement claims accrued only when (and apparently each time) Defendants received ill-gotten gains as a result of the allegedly corrupt transactions."[152] In rejecting this argument, the court stated: "[T]he statute of limitations runs from when Defendants allegedly engaged in misconduct, not when they received compensation in connection with that misconduct."[153]

In a final blow to the SEC, the court also rejected its position that the action may proceed to seek injunctive relief.[154] The court concluded "that the SEC's requested injunction would operate at least partly as a penalty, and thus that all relief requested by the SEC is time-barred."[155] In summary, the court concluded:

> The court agrees that the SEC's claims—all of which accrued more than five years before the SEC filed suit, and seek relief that is at least partly penal, not solely remedial—are time-barred. Accordingly, the court dismisses the amended complaint and need not address Defendants' remaining arguments.[156]

The *Cohen* matter represented merely the latest SEC defeat in an FCPA enforcement when put to its burden of proof. In fact, the SEC has *never* prevailed in FCPA history when put to its burden of proof.[157] More broadly, *Cohen* demonstrates that the Supreme Court's unanimous decision in *Kokesh* is indeed FCPA relevant. However, to become relevant, a defendant first has to put the enforcement agencies to its burden of proof. However, against the backdrop of the SEC's statute of limitations defeat in *Cohen*, there were numerous corporate enforcement actions in

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151 *Id*. at 588.
152 *Id*. at 591.
153 *Id*.
154 *Id*. at 592.
155 *Id*.
156 *Id*. at 585-86.
157 Mike Koehler, *Will There Be An SEC FCPA Trial?*, FCPA PROFESSOR (Sept. 19, 2016), http://fcpaprofessor.com/will-sec-fcpa-trial/ [https://perma.cc/7KFT-B28E] (highlighting other cases in which the SEC was put to its burden of proof in FCPA enforcement actions).

2018 – resolved in the absence of judicial scrutiny – involving conduct well beyond the limitations period.[158]

In short, 2018 was rather unusual in witnessing two FCPA judicial decisions (*Hoskins* and *Cohen*). In most years, there is no FCPA jurisprudence and one must reference non-FCPA caselaw involving similar issues to best appreciate the many controversial aspects of FCPA enforcement. This general dynamic applied as well in 2018. Highlighted next are four judicial decisions (concerning restitution, dollar-denominated transactions, and so-called best practices) that were FCPA relevant.

3. Restitution

The scenario is relatively common. Whether in the FCPA context or otherwise, when an individual acts contrary to the law and his or her conduct is discovered, various business organizations impacted by the illegal activity conduct an internal investigation. The question thus arises: if the individual engaged in the illegal activity is convicted, may the impacted business organizations recover internal investigation expenses from the individual under the Mandatory Victims Restitution Act (MVRA) and, if so, under what circumstances? In *Lagos v. United States*. a unanimous Supreme Court provided some clarity.[159]

As to the relevant factual background, the opinion, authored by Justice Stephen Breyer, stated:

> The petitioner, Sergio Fernando Lagos, was convicted of using a company that he controlled (Dry Van Logistics) to defraud a lender (General Electric Capital Corporation, or GE) of tens of millions of dollars. The fraud involved generating false invoices for services that Dry Van Logistics had not actually performed and then borrowing money from GE using the false invoices as collateral. Eventually, the scheme came to light. Dry Van Logistics went bankrupt. GE investigated. The

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[158] *See, e.g.*, Mike Koehler, *The Many Issues To Consider From The Dun & Bradstreet Enforcement Action*, FCPA PROFESSOR (Apr. 25, 2018), http://fcpaprofessor.com/many-issues-consider-dun-bradstreet-enforcement-action/ [https://perma.cc/HQ6L-XDH2]; Mike Koehler, *Issues To Consider From The Beam Enforcement Action*, FCPA PROFESSOR (July 10, 2018), http://fcpaprofessor.com/issues-consider-beam-enforcement-action/ [https://perma.cc/49EG-JPTN].

[159] Lagos v. United States, 138 S. Ct. 1684, 1687 (2018).

> Government indicted Lagos. Lagos pleaded guilty to wire fraud. And the judge, among other things, ordered him to pay GE restitution. The issue here concerns the part of the restitution order that requires Lagos to reimburse GE for expenses GE incurred during its own investigation of the fraud and during its participation in Dry Van Logistics' bankruptcy proceedings. The amounts are substantial (about $5 million), and primarily consist of professional fees for attorneys, accountants, and consultants. The Government argued that the District Court must order restitution of these amounts under the Mandatory Victims Restitution Act because these sums were "necessary . . . other expenses incurred during participation in the investigation . . . of the offense or attendance at proceedings related to the offense." The District Court agreed, as did the U.S. Court of Appeals for the Fifth Circuit. Lagos filed a petition for certiorari. And in light of a division of opinion on the matter, we granted the petition.[160]

As to the relevant legal background and issue presented, the opinion stated:

> The [MVRA] of 1996 requires defendants convicted of a listed range of offenses to "reimburse the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*."
>
> . . . .
>
> The [MVRA] is one of several federal statutes that govern federal court orders requiring defendants convicted of certain crimes to pay their victims restitution. It concerns "crime[s] of violence," "offense[s] against property . . ., including any offense committed by fraud or deceit," and two specific offenses, one concerning tampering with a consumer product and the other concerning theft of medical products. It requires, in the case of property offenses, return of the property taken or its value; in the case of bodily injury, the payment of medical expenses and lost income; in the case of

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[160] *Id*. at 1687 (internal citations omitted).

> death, the payment of funeral expenses; and, as we have said, in all cases, "reimburse[ment]" to "the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*."[161]

The opinion then stated:

> We here consider the meaning of that italicized phrase. Specifically, we ask whether the scope of the words "investigation" and "proceedings" is limited to government investigations and criminal proceedings, or whether it includes private investigations and civil or bankruptcy litigation. We conclude that those words are limited to government investigations and criminal proceedings.
>
> . . . .
>
> We add that this interpretation does not leave a victim such as GE totally without a remedy for additional losses not covered by the [MVRA]. GE also brought a civil lawsuit against Lagos for the full extent of its losses, and obtained an over-$30 million judgment against him. The Government says that GE has largely been unable to collect on that judgment, but there is no reason to think that collection efforts related to a criminal restitution award would prove any more successful.
>
> . . . .
>
> [W]e conclude that the words "investigation" and "proceedings" in the [MVRA] refer to government investigations and criminal proceedings. Consequently Lagos is not obliged to pay the portion of the restitution award that he here challenges.[162]

From an FCPA perspective, the key language in the Supreme Court's unanimous decision was the following:

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[161] *Id*. at 1687-88 (internal citations omitted).

[162] *Id*. at 1688, 1690.

> The Government makes one additional argument. It points out that GE shared with the Government the information that its private investigation uncovered. And that fact, the Government says, should bring the expenses of that investigation within the terms of the statute even if the "investigation" referred to by the statute is a government's criminal investigation. The short, conclusive answer to that claim, however, lies in the fact that the statute refers to "necessary child care, transportation, and other expenses incurred *during* participation in the investigation or prosecution of the offense." It does not refer to expenses incurred *before* the victim's participation in a government's investigation began. And the Government does not deny that it is those preparticipation expenses—the expenses of conducting GE's investigation, not those of sharing the results from it—that are at issue here. We therefore need not address in this case whether this part of the [MVRA] would cover similar expenses incurred during a private investigation that was pursued at a government's invitation or request. It is enough to hold that it does not cover the costs of a private investigation that the victim chooses on its own to conduct.[163]

In other words, it will be difficult for a business organization to seek restitution for investigative fees and expenses if those fees and expenses were the result of a voluntary disclosure (i.e. not a proactive government investigation). On the other hand, if a business organization incurs investigative fees and expenses after being contacted by the government, a business organization is better positioned for MVRA restitution. In short, there are many reasons why business organizations should pause and not take the government's bait by voluntarily disclosing alleged FCPA violations,[164] and the Supreme Court's unanimous decision in *Lagos* provides yet another reason.

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[163] *Id*. at 1690 (internal citations omitted).

[164] Mike Koehler, *Business Organizations Should Not Take The DOJ's Latest Voluntary Disclosure Bait*, FCPA PROFESSOR (May 16, 2018), http://fcpaprofessor.com/business-organizations-not-take-dojs-latest-voluntary-disclosure-bait/ [https://perma.cc/7XQZ-FCAH]; Mike Koehler, *Grading The DOJ's 'FCPA Corporate Enforcement Policy'*, BNA Bloomberg White Collar Crime Rep. 4-5 (Dec. 22, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091110 [https://perma.cc/2LDN-QLBF].

4. Dollar Denominated Transactions

In another Supreme Court decision from 2018, *Jesner v. Arab Bank*, the Court questioned – albeit in dicta – whether dollar-denominated transactions or other financial transactions in the United States are sufficient to assert jurisdiction over foreign corporations.[165]

The FCPA relevance of this issue stems from the DOJ and SEC's assertion that dollar-denominated transactions or other financial transactions in the U.S. are sufficient to assert jurisdiction over foreign corporations under the FCPA's anti-bribery provisions which state, generally speaking as to foreign actors, that a bribery scheme must have a U.S. nexus.[166] For instance, in the FCPA Guidance the DOJ and SEC assert the following as relevant to jurisdiction over foreign actors:

> [P]lacing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.[167]

Consistent with this government position, several FCPA enforcement actions against foreign corporations (before and after the 2012 guidance) have asserted jurisdiction based on dollar-denominated transactions or other financial transactions in the U.S. For instance, in the Snamprogetti/ENI enforcement action the DOJ alleged that officers, employees, and agents of Snamprogetti (a Dutch company) and their co-conspirators:

> [C]aused wire transfers totaling approximately $132 million to be sent from Madeira Company 3's bank account in Amsterdam, The Netherlands, to bank accounts in New York, New York, to be further credited to bank accounts in

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[165] Jesner v. Arab Bank, 138 S. Ct. 1386, 1394-95 (2018).

[166] *See* 15 U.S.C. § 78dd-1(a) (2012); 15 U.S.C. § 78dd-3(a) (2012).

[167] U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 11 (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/U4ZM-YAS8].

> Switzerland and Monaco controlled by [a third party] for [the third party] to use to bribe Nigerian government officials.[168]

In related FCPA enforcement actions against Technip (a French company) and JGC Corp. (a Japanese company), the DOJ asserted the same jurisdictional basis.[169] Similarly, in the VimpelCom FCPA enforcement action the DOJ alleged that the Dutch Company and a related entity "made numerous corrupt payments that were executed through transactions into and out of correspondent bank accounts at financial institutions in New York, New York."[170] Likewise in the related Telia enforcement action, the DOJ alleged that the Swiss company and a related entity "made and caused to be made, numerous corrupt payments that were routed through transactions into and out of correspondent bank accounts at financial institutions in New York, New York."[171] In yet another example of other enforcement actions that could also be cited, in the Teva FCPA enforcement action the DOJ and SEC asserted jurisdiction over the Israeli company based on certain alleged improper payments passing through intermediary or correspondent bank accounts located in the U.S.[172]

Regarding these expansive FCPA enforcement theories against foreign companies, FCPA commentators have previously noted:

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[168] Information at 11, United States v. Snamprogetti Neth. B.V., No. 4:10-CR-00460, 2010 WL 11606146 (S.D. Tex. July 7, 2010).

[169] Information at 19, United States v. Technip S.A., No. 4:10-CR-00439 (S.D. Tex. June 28, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/06-28-10-technip-information.pdf [https://perma.cc/D8YE-UCA7]; Information at 19, United States v. JGC Corp., No. 4:11-CR-00260 (S.D. Tex. Apr. 6, 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-6-11jgc-corp-info.pdf [https://perma.cc/A2UD-NJH7].

[170] Mike Koehler, *In-Depth On VimpelCom*, FCPA PROFESSOR (Feb. 19, 2016), http://fcpaprofessor.com/in-depth-on-vimpelcom/ [https://perma.cc/MVT3-ULHP].

[171] Mike Koehler, *Next Up – Telia as DOJ and SEC Announce Contemplated $483 Million Net FCPA Enforcement Action,* FCPA PROFESSOR (Sept. 21, 2017), http://fcpaprofessor.com/next-telia-doj-sec-announce-contemplated-483-million-net-fcpa-enforcement-action/ [https://perma.cc/W8P4-RWDJ].

[172] Mike Koehler, *In Depth Into The $519 Million Teva FCPA Enforcement Action*, FCPA PROFESSOR (Dec. 22, 2016), http://fcpaprofessor.com/depth-519-million-teva-fcpa-enforcement-action/ [https://perma.cc/D5KR-M73L].

> The use of correspondent account liability, which has not yet been challenged or litigated by any defendant, is a powerful tool for the U.S. authorities. In the past, although the U.S. authorities had jurisdiction over a foreign issuer's books & records and internal controls by virtue of the issuer having filed periodic reports with the SEC, the U.S. authorities' ability to reach conduct by foreign companies under the FCPA's anti-bribery provisions had been circumscribed by the implicit requirement that the government prove that the foreign company had knowingly and deliberately taken some action in the United States in furtherance of a bribe to a foreign official. Correspondent account liability, assuming it can withstand judicial scrutiny, however, provides the U.S. government with the effective ability to reach the vast majority of U.S. dollar transactions, regardless of whether the foreign company recognized that a financial transaction between two foreign banks would pass through a bank in the United States along the way. It is true that, strictly speaking, the DOJ's assertion of FCPA still does not impose extraterritorial jurisdiction on non-U.S. companies, but correspondent account jurisdiction takes it pretty far along the road.[173]

With this necessary FCPA background, the Supreme Court in *Jesner* questioned whether dollar-denominated transactions or other financial transactions in the U.S. are sufficient to assert jurisdiction over foreign corporations under the Alien Tort Statute (ATS). The Court's opinion, authored by Justice Anthony Kennedy, provided the following factual background:

> Petitioners in this case, or the persons on whose behalf petitioners now assert claims, allegedly were injured or killed by terrorist acts committed abroad. Those terrorist acts, it is contended, were in part caused or facilitated by a foreign corporation. Petitioners now seek to impose liability on the

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[173] *The Other FCPA Shoe Drops: Expanded Jurisdiction over Non-U.S. Companies, Foreign Monitors, and Extending Compliance Controls to Non-U.S. Companies*, SHEARMAN & STERLING LLP (July 19, 2010), https://www.shearman.com/~/media/Files/NewsInsights/Publications/2010/07/The-Other-FCPA-Shoe-Drops—Expanded-Jurisdiction__/Files/View-full-memo-The-Other-FCPA-Shoe-Drops—Expand__/FileAttachment/LT071910TheOtherFCPAShoeDrops.pdf [https://perma.cc/4QCE-8TXX].

> foreign corporation for the conduct of its human agents, including its then-chairman and other high-ranking management officials. . . . The foreign corporation charged with liability in these ATS suits is Arab Bank, PLC; and it is respondent here. Some of Arab Bank's officials, it is alleged, allowed the Bank to be used to transfer funds to terrorist groups in the Middle East, which in turn enabled or facilitated criminal acts of terrorism, causing the deaths or injuries for which petitioners now seek compensation. Petitioners seek to prove Arab Bank helped the terrorists receive the moneys in part by means of currency clearances and bank transactions passing through its New York City offices, all by means of electronic transfers.
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> . . . .
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> Petitioners contend that international and domestic laws impose responsibility and liability on a corporation if its human agents use the corporation to commit crimes in violation of international laws that protect human rights. The question here is whether the Judiciary has the authority, in an ATS action, to make that determination and then to enforce that liability in ATS suits, all without any explicit authorization from Congress to do so.[174]

The Court held "that foreign corporations may not be defendants in suits brought under the ATS."[175] Yet in dicta, the court stated as follows relevant to the jurisdictional basis for the case.

> Most of petitioners' allegations involve conduct that occurred in the Middle East. Yet petitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists. Foreign banks often use dollar-clearing transactions to facilitate currency exchanges or to make payments in dollars from one foreign bank account to another. Arab Bank and certain *amici* point out that CHIPS

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[174] Jesner v. Arab Bank, 138 S. Ct. 1386, 1393-94 (2018) (internal citations omitted).
[175] *Id.* at 1407.

transactions are enormous both in volume and in dollar amounts. The transactions occur predominantly in the United States but are used by major banks both in the United States and abroad. The CHIPS system is used for dollar-denominated transactions and for transactions where the dollar is used as an intermediate currency to facilitate a currency exchange. In New York each day, on average, about 440,000 of these transfers occur, in dollar amounts totaling about $1.5 trillion. The "clearance activity is an entirely mechanical function; it occurs without human intervention in the proverbial 'blink of an eye.'" There seems to be no dispute that the speed and volume of these transactions are such that individual supervision is simply not a systemic reality. As noted below, substantial regulations govern these transactions, both in the United States and in Jordan. In addition to the dollar-clearing transactions, petitioners allege that Arab Bank's New York branch was used to launder money for the Holy Land Foundation for Relief and Development (HLF), a Texas-based charity that petitioners say is affiliated with Hamas. According to petitioners, Arab Bank used its New York branch to facilitate the transfer of funds from HLF to the bank accounts of terrorist-affiliated charities in the Middle East.

. . . .

[The Court has previously held] that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts the presumption." The Court added that "*even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application*."

With these principles in mind, this Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant. It could be argued, under the Court's holding in *Kiobel*, that even if, under accepted principles of international law and federal common law, corporations are subject to ATS liability for human-rights crimes committed by their human agents, *in this case the activities of the defendant corporation and the alleged actions*

> *of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS.*[176]

Although *Jesner* was not an FCPA case, the Court's questioning of whether dollar-denominated transactions or other financial transactions in the U.S. are sufficient to assert jurisdiction over foreign corporations is most certainly FCPA relevant. As FCPA commentators stated:

> We might be trying to read into the smoke here, but in an area bereft of judicial guidance, we have to take what we can get. The Supreme Court's treatment of the question of the sufficiency of U.S. dollar clearing operations to sustain jurisdiction on a foreign corporation was too brief and inconclusive to provide a firm precedential basis for this argument, and, of course, there may be relevant distinctions between evaluating minimum contacts sufficient for civil *in personam* jurisdiction and the factual question of whether a defendant in a criminal case acted "while in the United States." However, the mere hint that this type of activity is not sufficient to warrant jurisdiction may provide support to future challenges or may dissuade the U.S. authorities from relying on it too heavily [in FCPA matters]. This could, in time, have a significant effect on the DOJ's and SEC's ability to bring bribery charges against foreign corporations and individuals, as the main or only jurisdictional hook in several recent cases, including *VimpleCom*, *Teva*, and *Telia*, has been the use of U.S. dollars. *Jesner* provides some support for the notion that such connections might just be "insufficient."[177]

5. Failure to Act Consistent With Best Practices Is Not A Legal Violation

As mentioned in Part II, the FCPA's internal controls provisions require issuers to have internal accounting controls sufficient to provide "reasonable assurances" that certain

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[176] *Id*. at 1394-95, 1398 (emphasis added) (internal citations omitted).

[177] *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, at 19, SHEARMAN & STERLING (Jan. 2019), https://www.shearman.com/-/media/Files/Perspectives/2019/Shearman—Sterlings-Recent-Trends-and-Patterns-in-FCPA-010419.pdf?la=en&hash=D04F50F3BC2A9C3C95AFBF2B7914C65767F7C4FB [https://perma.cc/X3TJ-U2L3].

limited financial objectives are met.[178] The FCPA then provides that "reasonable assurances" and "reasonable detail" mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[179]

Beyond these general definitions, there is no binding authority on what constitutes, in any particular context, "sufficient" internal controls to provide "reasonable" assurances. Indeed, the court in *SEC v. World-Wide Coin* stated: "the main problem with the internal accounting controls provision of the FCPA is that there are no specific standards by which to evaluate the sufficiency of controls."[180]

Against this vacuum, the SEC often advances enforcement theories, with the perfect benefit of hindsight, that seem to equate failure to act consistent with "best practices" (as fuzzy and undefined as that term is) with legal violations. It amounts to little more than *ipse dixit* law enforcement (Latin for he himself said it – meaning an unsupported statement that rests solely on the authority of the individual who makes it). In other words, a business organization violated the FCPA's internal controls provisions because the SEC says so.

For instance, the 2018 FCPA enforcement action against Kinross Gold finding violations of the internal controls was based, like many other enforcement actions, in pertinent part on allegedly insufficient due diligence of a third party and lack of adequate training for employees.[181] However, there is nothing in the internal controls provisions which specify the extent of due diligence or training sufficient to satisfy the "reasonable assurances" standard.

A 2018 decision by the influential Delaware Chancery Court was outside the FCPA context, but nevertheless FCPA relevant because the court rejected the assertion that failure to act consistent with best practices (including best practices articulated in non-binding government guidance) constitutes a legal violation.

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[178] 15 U.S.C. § 78m(b)(2)(B) (2012).

[179] 15 U.S.C. § 78m(b)(7) (2012).

[180] Sec. & Exch. Comm'n v. World-Wide Coin Invs, Ltd., 567 F. Supp. 724, 751 (N.D. Ga. 1983).

[181] Kinross Gold Corp., Exchange Act Release No. 82946, 2018 WL 1468812 (Mar. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-82946.pdf [https://perma.cc/625G-HLCU].

The case against Orexigen Therapeutics, Inc. and certain executives, officers and directors was brought in connection with the development of a drug to battle obesity.[182] As stated by the court:

> Early results of a clinical trial indicated that this drug may have unanticipated, but significant, positive effects on cardiovascular health. Excited by the prospect of following in the footsteps of the likes of Alexander Fleming, the board of directors sought regulatory approval of, and patent protection for, their drug. If further clinical trials confirmed the effects, the drug would be revolutionary and, presumably, worth a great deal of money.
>
> As the company moved through the processes required for both regulatory approval and patent protection, two less-than-ideal events occurred. First, a greater number of people than originally contemplated became aware of the preliminary data. While this did not affect the market approval process, the dissemination of the data threatened the integrity of the ongoing trial and, in part, necessitated the commission of a new clinical trial to further test the safety of the drug. This new clinical trial came with a hefty price tag. Second, through the patent process, the preliminary data from the clinical trial eventually became public. The market originally reacted positively to the news, but later data revealed that the early results were an aberration. The drug was not a revolutionary treatment for heart disease, though it continued to prove safe for its intended weight-loss use. The company's stock price declined in response to the news. Thereafter, stockholders filed this action, arguing that the board of directors made the wrong decisions along the way.
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> Plaintiff's case rests on the premise that "Delaware law does not charter law breakers." Plaintiff alleges that the board was not free to make the decisions it did because doing so violated positive law. *This case, however, is a prime example of the difference between a best practice and a legal obligation.* Plaintiff sets forth an in-depth explanation of best practices in clinical drug trials. All the pages of filings Plaintiff submitted

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[182] Wilkin v. Narachi, No. 12412-VCMR, 2018 WL 1100372, at *1 (Del. Ch. Feb. 28, 2018).

> to the Court show that the directors' decisions ultimately led to a violation of these best practices, but Plaintiff fails to point to a single legal obligation the directors violated.
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> . . . .
>
> A review of Plaintiff's allegations shows the main deficiency in the entirety of Plaintiff's demand futility analysis. Plaintiff attempts to plead knowing and intentional violations of the law without any violation of the law. Instead, Plaintiff paints a picture of directors who, at worst, failed to follow best practices. But, a failure to follow best practices does not create a substantial likelihood of liability.
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> . . . .
>
> Plaintiff's brief and the Complaint also discuss, and quote from, various FDA guidance. *All of the guidance is just that—guidance***.** This is obvious from the notation on the top of every page of each document that says "Contains Nonbinding Recommendations."[183]

As highlighted above, what constitutes so-called "best practices" in the FCPA context is a fuzzy concept because the FCPA's actual internal controls provisions do not articulate any specific standards by which to evaluate the sufficiency of controls in any particular context. Although there are other relevant sources of best practices, such as DOJ FCPA Opinion Procedure Releases, the 2012 FCPA Guidance, and the DOJ's 2017 Evaluation of Corporate Compliance Programs, each one of these sources is merely guidance and non-binding guidance at that. For instance, the governing regulations for the Opinion Procedure Releases state that the releases have no precedential value.[184] Likewise, the FCPA Guidance states:

> It is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or

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[183] *Id.* (emphasis added).

[184] 28 C.F.R. § 80.11.

> procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter.[185]

Similarly, the DOJ's Evaluation of Corporate Compliance Programs states:

> The topics and questions . . . form neither a checklist nor a formula. In any particular case, the topics and questions . . . may not all be relevant, and others may be more salient given the particular facts at issue.[186]

Yet, as the *Orexigen Therapeutics* case demonstrates, failure to follow these supposed sources of best practices is not necessarily a legal violation.[187]

In addition to the above FCPA and related jurisprudence, 2018 was also notable for various enforcement agency policy developments relevant to the FCPA.

B. Enforcement Agency Policy Developments

Even though consistency and predictability are hallmarks of the rule of law,[188] the FCPA has long been impacted by informal enforcement agency policy such that commentators have noted that the FCPA landscape appears to be "government of men and women rather than a government of law."[189] In 2018, Trump administration officials settled into their positions and, not surprisingly, given the change in executive leadership, there were revisions to government enforcement policy relevant to the FCPA and this section discusses the DOJ's so-called "no-piling on" policy

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[185] U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/3APV-E3U2].

[186] U.S. Dep't of Justice, *Evaluation of Corporate Compliance Programs* 2 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/2RJK-3YW9].

[187] *See Wilkin*, No. 12412-VCMR, 2018 WL 1100372.

[188] *See, e.g.*, Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, Deputy Attorney Gen. Rod J. Rosenstein Delivers Remarks at the Penn Wharton Public Policy Initiative Titled "Ethics, Business And The Rule Of Law" (Sept. 18, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-penn-wharton-public-policy [https://perma.cc/PAB6-G2T5].

[189] L. Robert Primoff, *The Foreign Corrupt Practices Act: Implications for the Practitioner*, 9 SYRACUSE J. INT'L L. & COM. 325, 329 (1982).

relevant to settlement amounts, a revision to DOJ corporate monitor policy, and the FCPA component of the DOJ's China Initiative.

1. No-Piling On Policy

For years, a troubling aspect of FCPA enforcement has been multiple law enforcement agencies bringing enforcement actions against the same company based on the same core conduct with the resolving company essentially paying twice or more for the alleged improper conduct. During the Obama administration, the SEC Chair discussed various "pressure points in the current enforcement environment" including "the pressure of multiple regulators in the same or overlapping investigations."[190] In the same address, the SEC Chair stated:

> So, with numerous regulators with overlapping mandates to investigate any given potential case, how do we stay in our lanes? Or is it inevitable that we overcrowd every domestic and international highway on today's enforcement landscape?
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> . . . .
>
> [W]e regulators need to keep in mind the impact we have on those we regulate and ensure that our own respective interests do not lead to unjust, duplicative outcomes.[191]

Early in the Trump administration, the DOJ's Deputy Attorney General stated:

> One concern is about multiple law enforcement and regulatory agencies pursuing a single entity for the same or substantially similar conduct. Some refer to this as the "piling on" problem. When a company engages in wrongdoing, we should enforce the law and punish the wrongdoer. That is fair and just. But repeated punishment for the same conduct has the potential to undermine the spirit of fair play and the rule

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[190] Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Address at the New York City Bar Association's Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (May, 19, 2014), https://www.sec.gov/news/speech/2014-spch051914mjw.html [https://perma.cc/67TW-LVRM].

[191] *Id.*

> of law. Multiple punishments can also deprive a company, as well as its employees, customers, and investors, of the benefits of certainty and finality ordinarily available through a full and final settlement. This is why the Department is committed to making a concerted effort to apportion penalties among both international and domestic agencies, where appropriate.[192]

In May 2018, the Deputy Attorney General announced a non-binding DOJ policy discouraging "piling on" by instructing DOJ "components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company in relation to investigations of the same misconduct."[193] In pertinent part, the Deputy Attorney General stated:

> It is important for us to be aggressive in pursuing wrongdoers. But we should discourage disproportionate enforcement of laws by multiple authorities. In football, the term "piling on" refers to a player jumping on a pile of other players after the opponent is already tackled.
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> . . . .
>
> "Piling on" can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement. We need to consider the impact on innocent employees, customers, and investors who seek to resolve problems and move on. We need to think about whether devoting resources to additional enforcement against an old scheme is more valuable than fighting a new one.

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[192] Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, Deputy Attorney Gen. Rosenstein Delivers Remarks at the Clearing House's 2017 Annual Conference (Nov. 8, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-clearing-house-s-2017-annual [https://perma.cc/9TB7-PGXR].

[193] Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, Deputy Attorney Gen. Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar [https://perma.cc/D9PD-E6M6].

> Our new policy provides no private right of action and is not enforceable in court, but it will be incorporated into the U.S. Attorneys' Manual, and it will guide the Department's decisions.[194]

The DOJ's newly articulated policy is general in nature, not FCPA specific, but the following portion is FCPA relevant:

> The Department should also endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.[195]

This is FCPA relevant for two reasons. First, issuers under the FCPA are subject to enforcement by both the DOJ and SEC and it is common for the DOJ and SEC to announce on the same day coordinated FCPA enforcement actions based on the same core conduct.[196] Second, given the transnational nature of alleged FCPA violations, foreign companies (and theoretically U.S. companies although less frequently) can be subject to U.S. law enforcement and foreign law enforcement as well.[197]

Regarding overlapping DOJ and SEC enforcement actions, concerns have long been voiced that the DOJ and SEC "double dip" in FCPA enforcement actions. Specifically, in most FCPA enforcement actions involving a DOJ and SEC component in

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[194] *Id*.

[195] Letter from Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, to United States Attorneys, on Policy on Coordination of Corporate Resolution Penalties (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download [https://perma.cc/5SKL-HWUJ].

[196] *See* Press Release, U.S. Dep't of Justice, Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (July, 5, 2018), https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt [https://perma.cc/8KQW-YJHJ]; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Credit Suisse with FCPA Violations (July 5, 2018), https://www.sec.gov/news/press-release/2018-128 [https://perma.cc/4BDX-P26V].

[197] *See, e.g.*, Press Release, U.S. Dep't of Justice, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (July 4, 2018), https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan [https://perma.cc/M9YZ-PFXM].

which the SEC seeks disgorgement (the vast majority of FCPA enforcement actions against issuers),[198] the DOJ and SEC seek recovery of the same money for the same conduct in what can only be called double-dipping. This aspect of FCPA enforcement even caught the attention of Congress. For instance, in the aftermath of Congressional FCPA reform hearings in 2011, Senator Mike Crapo (R-ID) asked the SEC Chair a number of FCPA-related questions including: "under what circumstances, if any, is it appropriate for both the Commission and the Department to seek the recovery of penalties from the same entity for the same conduct?"[199] The SEC's Chair responded:

> The Commission and Department of Justice do not obtain duplicative penalties in FCPA cases. Typically, the Commission will obtain monetary sanctions in the form of disgorgement (ill-gotten gains) while the Department of Justice obtains monetary sanctions in the form of penalties. In those rare cases where both the Commission and the Department of Justice obtain penalties, the total penalty assessed against the company is no greater than it would be if either the Commission or DOJ alone obtained the penalty.[200]

Despite this answer, the fact remains that DOJ criminal fines are calculated pursuant to the advisory Sentencing Guidelines in which a key factor determining the ultimate penalty amount is the value of the benefit received by the company from the conduct at issue – the same figure the SEC uses in calculating a disgorgement amount.[201] To highlight just a few examples (of numerous examples that could also be cited), the FCPA

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[198] *SEC FCPA Enforcement – 2018 Year in Review*, FCPA PROFESSOR (Jan. 8, 2019), http://fcpaprofessor.com/sec-fcpa-enforcement-2018-year-review/ [https://perma.cc/P3J9-3274].

[199] Letter from Mike Crapo, United States Senator, to Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, concerning FCPA reform (June 30, 2011), https://www.scribd.com/doc/59910395/Senator-Crapo-Letter-to-SEC-Re-FCPA-Reform [https://perma.cc/VS6A-BBDH].

[200] *See* Letter from Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, to Mike Crapo, United States Senator (Sept. 23, 2011), https://www.scribd.com/doc/67832400/SEC-Chairman-Schapiro-FCPA-Letter-to-Senator-Crapo [https://perma.cc/7T9B-Z2BZ].

[201] *See, e.g.*, *Double-Dipping,* FCPA PROFESSOR (June 4, 2013), http://fcpaprofessor.com/double-dipping/ [https://perma.cc/9QB6-K43L].

enforcement action against LAN Airlines involved parallel DOJ and SEC enforcement actions and the company agreed to pay approximately $22 million.[202] Both the SEC and DOJ stated that LAN obtained a benefit of $6.7 million as a result of the improper payments. The SEC enforcement action consisted of disgorgement of $6.7 million (plus prejudgment interest of $2.6 million) for a total payment of $9.5 million. The DOJ's Deferred Prosecution Agreement set forth the Sentencing Guidelines calculation, which had the value of the benefit received as a major factor.[203] In other words, LAN repaid the approximate $6.7 million benefit it received twice – first to the DOJ and then to the SEC. The JPMorgan enforcement action was not merely a double dip, but a triple dip as the company paid the following amounts to the following agencies based upon the same core conduct:

- $72 million to the DOJ; [204]
- $130.6 million to the SEC;[205] and
- $61.9 million to the Federal Reserve Board.[206]

The second area in which the DOJ's "no-piling" policy is FCPA relevant is due to the transnational nature of alleged FCPA violations against foreign companies (and theoretically U.S. companies) which can be subject to U.S. law enforcement and foreign law enforcement as well.

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[202] *See generally* Press Release, U.S. Dep't of Justice, LATAM Airlines Group Resolves Foreign Corrupt Practice Act Investigation and Agrees to Pay $12.75 Million Criminal Penalty (July 25, 2016), https://www.justice.gov/opa/pr/latam-airlines-group-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1275 [https://perma.cc/A3WS-6S69]; Press Release, U.S. Sec. & Exch. Comm'n, LAN Airlines Settles FCPA Charges (July 25, 2016), https://www.sec.gov/news/pressrelease/2016-151.html [https://perma.cc/9MRE-3GJL].

[203] Deferred Prosecution Agreement at A-7, United States v. LATAM Airlines Group S.A., No. 16-cr-60195-DTKH (S.D. Fla. July 25, 2016), https://www.justice.gov/opa/file/878806/download [https://perma.cc/NM6R-9HUG].

[204] *See generally* Press Release, U.S. Dep't of Justice, JP Morgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016), https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme [https://perma.cc/2XWZ-UEZT].

[205] *See* Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying $264 Million to Settle FCPA Charges (Nov. 17, 2016), https://www.sec.gov/news/pressrelease/2016-241.html [https://perma.cc/ZK5Q-VQ4S].

[206] Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Board orders JP Morgan Chase & Co. to pay $61.9 million civil penalty (Nov. 17, 2016), https://www.federalreserve.gov/newsevents/pressreleases/enforcement20161117a.htm [https://perma.cc/K455-5H5J].

As highlighted in Part II, much of the magnitude of modern FCPA enforcement (including in 2018) results from corporate enforcement actions against foreign companies (based in many instances on mere listing of securities on U.S. markets and in a few instances on sparse allegations of a U.S. nexus in furtherance of an alleged bribery scheme).[207] A substantial majority of these enforcement actions are against companies headquartered in countries that, like the U.S., are parties to the OECD Convention.[208] In other words, "peer" countries with mature FCPA-like laws governing the conduct of their companies coupled with reputable legal systems to prosecute such offenses. Moreover, Article 4 of OECD Convention states that "[w]hen more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."[209]

Granted, in most of the FCPA enforcement actions against foreign companies after the DOJ's May 2018 "no-piling" announcement there were credits or offsets in terms of U.S. FCPA settlement amounts for related foreign law enforcement actions. Yet, "piling on" is precisely what the DOJ does when it brings an FCPA enforcement action against a foreign company located in an OECD country that is also subject to prosecution in its "home" jurisdiction. For instance, the DOJ "piled on" French bank Société Générale for its bribery of alleged Libyan officials by bringing a net $293 million FCPA enforcement action even though the company paid $293 million to French law enforcement authorities based on the same core conduct and also paid $1.1 billion to the Libyan Investment Authority to resolve a related civil dispute.[210]

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[207] *FCPA Enforcement Actions Against Companies from OECD Convention Peer Countries*, FCPA PROFESSOR (Jan. 22, 2019), http://fcpaprofessor.com/fcpa-enforcement-actions-foreign-companies-oecd-convention-peer-countries-3/ [https://perma.cc/DT55-YXTZ].

[208] Org. for Econ. Co-operation and Dev., Convention on Combating Brivery of Foreign Public Officials In International Business Transactions 13 (1997), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [https://perma.cc/2SZ3-H44J].

[209] *Id*. at 8.

[210] *Societe Generale Resolves Net $293 Million FCPA Enforcement Action Concerning Conduct In Libya That Occurred 9-14 Years Ago*, FCPA PROFESSOR (June 4, 2018), http://fcpaprofessor.com/based-conduct-occurred-9-14-years-ago-societe-gene

Likewise, the DOJ "piled on" Brazil-based oil and gas company Petrobras for its alleged bribery of Brazilian officials by bringing a net $170 million FCPA enforcement action even though the company paid approximately $683 million to Brazilian law enforcement authorities based on the same core conduct.[211]

In short, the DOJ's policy of discouraging "piling on" sounds great, but it all depends what "piling on" means and, as highlighted above even after the policy announcement, the DOJ continues to "pile on" in certain FCPA enforcement actions against foreign companies.

2. Corporate Monitor Policy

In recent years, approximately 40% of corporate FCPA enforcement actions have required the resolving company to engage a compliance monitor as a condition of settlement.[212] Certain monitorships have raised the question of whether this condition of settlement was necessary or rather an unnecessary condition resulting in a government-required transfer of shareholder wealth to FCPA Inc. in that monitorships are lucrative assignments for FCPA law firms.[213]

In October 2018, Assistant Attorney General Brian Benczkowski released a memo titled "Selection of Monitors in Criminal Division Matters."[214] Although not FCPA specific, the so-

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rale-resolves-fcpa-enforcement-action-concerning-conduct-libya/ [https://perma.cc/ZE5U-WTKA]; Noemie Bisserbe, *Société Générale to Pay $1.1 Billion to Settle Dispute with Libya Fund*, WALL ST. J. (May 4, 2017), https://www.wsj.com/articles/societe-generale-libya-fund-agree-to-settle-fraud-case-1493878140 [https://perma.cc/AU6J-QY2K].

[211] *Brazil State-Owned Co. Allegedly Facilitates Payments To Brazilian Politicians And Political Parties And U.S. Collects Net $170 Million In FCPA Enforcement Action*, FCPA PROFESSOR (Sept. 27, 2018), http://fcpaprofessor.com/brazil-state-owned-co-allegedly-facilitates-payments-brazilian-politicians-political-parties-u-s-collects-net-170-million-fcpa-enforcement-action/ [https://perma.cc/R4A7-9PQ6].

[212] *More On The DOJ's New Monitor Policy*, FCPA PROFESSOR (Oct. 16, 2018), http://fcpaprofessor.com/dojs-new-monitor-policy/ [https://perma.cc/Y89Y-F6EA].

[213] *See, e.g.*, *Faro's Monitor – Late* and *Expensive*, FCPA PROFESSOR (Dec. 27, 2010), http://fcpaprofessor.com/faros-monitor-late-and-expensive/ [https://perma.cc/88HY-CN2V]; *Telling and Inexcusable*, FCPA PROFESSOR (Mar. 3, 2014), http://fcpaprofessor.com/telling-and-inexcusable/ [https://perma.cc/6RS8-WKVH].

[214] Memorandum from Brian A. Benczkowski, Assistant Attorney General, U.S. Dep't of Justice, to Crim. Div. Personnel, U.S. Dep't of Justice, on Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download [https://perma.cc/WD2S-EYLH].

called Benczkowski memo is FCPA relevant as it establishes "standards, policy, and procedures for the selection of monitors in matters being handled by Criminal Division attorneys" and "shall apply to all Criminal Division determinations regarding whether a monitor is appropriate in specific cases and to any deferred prosecution agreement ("DPA"), non-prosecution agreement ("NPA"), or plea agreement between the Criminal Division and a business organization which requires the retention of a monitor."[215] In announcing the policy, Benczkowski stated:

> Our approach to the new policy began with the foundational principle that the imposition of a corporate monitor is never meant to be punitive. It should occur only as necessary to ensure compliance with the terms of a corporate resolution and to prevent future misconduct. That approach is consistent with our longstanding practice of imposing corporate monitors as the exception, not the rule.[216]

The Benczkowski memo included "Principles for Determining Whether A Monitor Is Needed In Individual Cases" and set forth the following factors relevant to DOJ decision-making:

> (a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems;
>
> (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;
>
> (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and

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[215] *Id*.

[216] Brian A. Benczkowski, Assistant Attorney General, U.S. Dep't of Justice, Assistant Attorney Gen. Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program [https://perma.cc/96GB-SFUY].

> (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.[217]

The Benczkowski memo further states:

> Where misconduct occurred under different corporate leadership or within a compliance environment that no longer exists within a company, Criminal Division attorneys should consider whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct. Criminal Division attorneys should also consider whether adequate remedial measures were taken to address problem behavior by employees, management, or third-party agents, including, where appropriate, the termination of business relationships and practices that contributed to the misconduct. In assessing the adequacy of a business organization's remediation efforts and the effectiveness and resources of its compliance program, Criminal Division attorneys should consider the unique risks and compliance challenges the company faces, including the particular region(s) and industry in which the company operates and the nature of the company's clientele.
>
> In weighing the benefit of a contemplated monitorship against the potential costs, Criminal Division attorneys should consider not only the projected monetary costs to the business organization, but also whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the business's operations.
>
> In general, the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary.[218]

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[217] *See* Benczkowki, *supra* note 213.

[218] *Id*.

Given the costs associated with corporate monitorships as a condition of FCPA settlements, the Benczkowski memo should be welcome news to business organizations subject to the FCPA. Nevertheless, questions remain regarding corporate monitorships, even after the Benczkowski memo, and time will tell how the new DOJ policy is implemented.

For starters, like with any DOJ policy, the Benczkowski memo is full of ambiguous terms such as: manipulation, exploitation, inadequate, pervasive, facilitated, senior management, significant, tested, adequate, appropriately tailored, unnecessary burden, effective, and appropriately resourced. Also concerning is the substantive factor of "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would *prevent or detect* similar misconduct in the future" because "prevent or detect" is not even a legal standard found in the FCPA. Rather, as highlighted in Part II above, the FCPA's internal controls provisions state that issuers shall "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that" certain financial objectives are met. The FCPA then defines "reasonable assurances" and "reasonable detail" to "mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."

The following passage from the Benczkowski memo is also potentially concerning:

> In assessing the adequacy of a business organization's remediation efforts and the effectiveness and resources of its compliance program, Criminal Division attorneys should consider the unique risks and compliance challenges the company faces, including the particular region(s) and industry in which the company operates and the nature of the company's clientele.[219]

Does this mean that a large multinational oil and gas company doing business in Africa is more or less likely to receive a monitor compared to a small privately held company selling shoestrings in Finland? Regardless of the answer, law

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[219] *Id.*

enforcement and law enforcement policies are supposed to be blind and not specific to certain companies and certain industries. Indeed, as applied to the FCPA context, the above factor in the Benczkowski memo is likely in violation of Article 5 of the OECD Convention which states:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[220]

As highlighted next, another DOJ policy pronouncement in 2018 also likely conflicts with U.S. obligations under the OECD Convention.

3. China Initiative

Perhaps it is neither here nor there 40-plus years after enactment of the FCPA in 1977, but the FCPA's legislative history clearly shows that Congress passed the law motivated primarily by selfish foreign policy reasons, not altruistic do-good reasons.[221] In the FCPA's modern era, this dynamic is still relevant as highlighted by the DOJ's November 2018 announcement of a China Initiative.[222]

Among the ten specifically identified components of the law enforcement initiative is to "identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses."

Granted, identify does not exactly mean target, nevertheless the above component of the China Initiative likely conflicts with U.S. obligations under the OECD Convention – specifically Article 5 highlighted above. In other words, identifying Chinese companies is focusing on the identity of the legal person involved

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[220] Org. for Econ. Co-operation and Dev., *supra* note 205, at 9.

[221] *See generally* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*,73 OHIO ST. L. J. 929 (2012).

[222] *See* Press Release, U.S. Dep't of Justice, Attorney General Jeff Session's China Initiative Fact Sheet (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download [https://perma.cc/9E8Y-3G8R].

and identifying Chinese companies that compete with American businesses is a consideration of national economic interest.

Given the change in executive leadership, it is not surprising that Trump administration officials revised certain government policies relevant to FCPA enforcement. Yet, these enforcement agency policy changes once again demonstrate that long held perception that the FCPA landscape appear to be "government of men and women rather than a government of law."