Skadden

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Cross-Border Investigations Update

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See the significant cross-border prosecutions, settlements and developments of 2020, which address organized crime, criminal tax enforcement, fraud, FCPA and bribery regulation, anti-money laundering efforts, cyberattacks and data privacy, cryptocurrencies, and import/export controls.

Enforcement Trends

Swiss Court Makes First Ruling on Internal Investigation Notes in Criminal Trials

In June 2020, the Federal Supreme Court, Switzerland's highest court, recently ruled that notes taken during internal investigation interviews can be admitted as evidence in criminal proceedings, marking the first time the court has issued a ruling on the admissibility of such materials. The underlying case involves an internal investigation concerning a pharmacy assistant who was suspected of negligence. When the pharmacy assistant was interviewed as part of the internal investigation, he was not advised at the outset of his right to avoid self-incrimination. Notes from the interview were later used to convict him, and he subsequently argued that they should not have been admitted into evidence.

The Federal Supreme Court rejected the argument that interview notes could not be admitted into evidence in criminal proceedings where the interview subject had not been informed of his right to avoid self-incrimination. The court found that the criminal statute that requires investigators to inform an individual of his or her right to silence does not apply to interviews that a private company conducts as part of an internal investigation. The court ruled, however, that investigators in the instant case had committed a procedural violation by not allowing the interview subject to review notes from the interview, and also because the person who conducted the interview was not called as a witness at trial. The court noted that in determining the evidentiary value of internal investigation interview notes going forward, courts should examine how the interview was conducted and whether certain procedures were followed.

US and French Regulators Bolster FinTech Cooperation

On June 3, 2020, the French Autorité de Contrôle Prudentiel et de Résolution (ACPR) and the New York State Department of Financial Services (NYDFS) announced the execution of a memorandum of understanding (MoU) on cooperation in the financial technology (fintech) sector. The regulators announced that the purpose of the agreement is to (i) boost supervisory cooperation between the two agencies; (ii) facilitate entry into their respective jurisdictions for financial innovators; and (iii) ensure that financial innovators comply with the laws and regulations applicable to the fintech sector in their respective jurisdictions. The MoU by its terms does not confer any enforceable rights or create any binding legal obligations for the agencies.

The MoU establishes a referral mechanism that grants each agency the ability to submit a referral request to the other agency on behalf of financial innovators under agency supervision. The referral mechanism applies to any financial innovator from either France or New York who wishes to create or expand fintech activities in either jurisdiction, thus improving speed to market. The MoU also provides a framework for the agencies to share best practices and information about regulatory, supervisory and policy issues, and any other issues related to fintech activities. The MoU describes the type of support that each host regulator should provide to assist financial innovators seeking to operate in its jurisdiction, to ensure that innovators in each jurisdiction receive equivalent levels of support.

The MoU builds on a growing framework of international cooperation in the fintech sector for both New York and France, including New York state Gov. Andrew M. Cuomo's 2018 announcement of a partnership between the NYDFS and the Bank of Israel, and similar agreements ACPR signed between 2017 and 2019 with regulators in Singapore, Hong Kong, South Korea, Japan and Taiwan.

Guidance on Fight Against Corruption Issued by French Ministry of Justice

On June 2, 2020, the French Ministry of Justice published a circular addressed to French prosecutors that set forth guidelines for certain of the country's criminal policies. Although not binding law, the circular is significant in that it was issued directly by the executive branch of the French government and so holds more influence than previous guidance disseminated by the National Financial Prosecutor's Office (PNF) and the French Anti-Corruption Agency (AFA).

The circular confirms the central role of the PNF in anti-corruption matters and sets forth guiding principles for prosecutors to detect potential cases of corruption, including the monitoring of facts reported in national and international press and of sectors considered high-risk by the Organization for Economic Cooperation and Development. The circular reiterates principles for conducting corruption investigations that were previously included in guidelines issued by the PNF and AFA. It also summarizes the existing criminal law enforcement framework, including the scope of judicial proceedings and types of sanctions prosecutors can seek in corruption matters.

The circular clarifies that to be eligible for a "convention judiciaire d'intérêt public" (CJIP), the French equivalent of a deferred prosecution agreement (DPA), companies must voluntarily disclose misconduct, cooperate fully with prosecutors and have no prior convictions. Notably, the circular encourages companies to self-report incidents of corruption, although French law contains no obligation or incentive to self-report. The ministry invites the PNF to work with employers' unions to set up incentives for self-reporting.

The ministry encourages the PNF to open parallel investigations when it receives mutual legal assistance treaty requests from foreign authorities and invites the PNF to continue cooperating with foreign authorities. The circular also lists other criminal violations that could be enforced in the context of corruption cases, such as money laundering and misuse of corporate assets.

Finally, the ministry encourages the PNF to prosecute individuals central to company misconduct, including not only employees directly involved in the corruption scheme but also members of management who participated or were actively complicit in an act of alleged corruption.

Decline in White Collar Investigations in US, UK

White collar enforcement by the U.S. Department of Justice (DOJ) and the U.K. Serious Fraud Office (SFO) has declined significantly in recent years, according to those agencies' records. On March 3, 2020, Syracuse University's Transactional Records Access Clearinghouse (TRAC) reported that DOJ white collar prosecutions had reached their lowest point since TRAC began analyzing white collar enforcement data in 1986. DOJ records indicate that the department prosecuted 359 white collar defendants in the first month of 2020 — an 8% decline in prosecutions from the same time period in 2019 and a 25% decline from 2015. Nearly all the defendants prosecuted in January 2020 were individuals; few companies or other business organizations were prosecuted. If the current rate of prosecutions remains the same for the remainder of the year, the DOJ will bring only 5,175 prosecutions in 2020 — half of the peak number of prosecutions brought under the Obama administration in 2011. Analysts state that this trend reflects a shift in the DOJ's priorities away from white collar crime to anti-terrorism and immigration.

Similarly, the SFO launched only five white collar investigations in 2019 — half the number of investigations from the prior year. The agency reported that it closed 10 cases in 2019 — one more case than it closed in 2018. The SFO did not specify whether the closed cases were entire matters or only discontinued components of cases. Some industry commentators point out that the drop may be attributed to the strategic direction of Lisa Osofsky, whose tenure as SFO director began in August 2018, while others attribute the change to budget constraints and a shift in focus from large industrywide investigations to smaller financial misconduct cases.

Hong Kong High Court Confirms Right To Seize Devices and Demand Passwords

On February 14, 2020, Justice Anderson Chow of Hong Kong's High Court of First Instance held that Hong Kong's Securities and Futures Commission (SFC) has authority to seize digital devices in the course of executing a search warrant and to demand the passwords necessary to access the data stored on those devices, rejecting five complaints filed by individuals whose devices were seized during regulatory probes into two Hong Kong-based companies. The parties challenged the reach and scope of two Securities and Futures Ordinance provisions: Section 183, which permits the SFC to demand "any record or document" that could be relevant to an ongoing investigation, and Section 191, which grants the agency authority to enter premises and "seize and remove any record or document" with a search warrant.

The court, in reaching its decision, broadly construed the terms "record" and "document" in these provisions to include data on digital devices. In his ruling, Justice Chow stressed that in the present day, data is generally kept in digital form, and that preventing the SFC from seizing and accessing digital devices could "cripple [its] investigative powers." The court ruled that the SFC's investigative need to seize devices in certain instances outweighs a device owner's right to privacy, but it noted that the SFC should minimize the risk of intruding on personal information by accessing devices in the device owner's presence when possible.

Second French Company Avoids Penalty Over Anti-Corruption Compliance Failures

A sanctions committee within the French Anti-Corruption Agency (Agence française anticorruption, or AFA), declined for the second time to fine a company for compliance failures, in a decision made public on February 18, 2020. The AFA alleged deficiencies in French mineral company Imerys S.A.'s corruption risk mapping, code of conduct and accounting procedures in violation of Sapin II, France's 2016 anti-corruption law. However, the sanctions committee did not impose the recommended €1 million penalty on the company and €100,000 fine on its former interim CEO, noting that the agency's recommendations were not a legally binding blueprint, and also that the former interim CEO had resigned prior to the committee's decision.

This marked the second time that the sanctions committee has refused to apply a financial penalty on a company referred to it by the AFA. Following an anti-corruption compliance audit conducted by the AFA in October 2017, electrical equipment supplier Sonepar was referred to the sanctions committee for several alleged breaches of Sapin II. The sanctions committee ruled in July 2019, however, that the company would not be fined. Sonepar, like Imerys, improved its compliance program between the AFA's initial audit and its eventual appearance before the sanctions committee. The committee in Sonepar ruled that by the date of its decision, Sonepar had taken the necessary measures to ensure that its compliance program met the requirements of Sapin II. The Imerys decision differs from the Sonepar case, however, in that the sanctions committee imposed two injunctions on Imerys, ordering it to improve its code of conduct deficiencies by September 2020 and its accounting procedures by 2021, after which deadlines the sanctions committee will rule again on the effectiveness of Imerys' compliance program.

French Prosecutors Terminate Investigation Under First CJIP

On February 3, 2020, the prosecutor's office in Nanterre notified SAS Kaefer Wanner (KW) that it had satisfied its obligations under the CJIP the company had entered into nearly two years earlier and that the related prosecution against KW was terminated. KW's CJIP was the first such agreement negotiated in the context of an anti-corruption matter under France's Sapin II law; this notice marks the first time the prosecution against an entity has been terminated in the context of a CJIP since the mechanism became available in 2017.

KW's CJIP ended investigations into whether the company had bribed an official at France's partly state-owned electricity company Électricité de France. Prosecutors fined KW €2.71 million and required the company to pay an additional €290,000 in fees. During an 18-month period, the AFA, France's anti-corruption agency, audited KW's anti-corruption compliance program. This contrasts with current practice in the U.S., where a monitor is generally a third-party firm selected by the company and approved by the prosecuting authority. In the course of its review, the AFA verified that KW had correctly implemented the compliance program required under Sapin II. In determining that KW had satisfied its obligations under the CJIP, the prosecutor of Nanterre relied on the AFA's final report — which concluded that KW had implemented most of the items defined in the action plan approved by the AFA — and a subsequent submission from KW.

As other CJIPs reach the end of their stated terms, we expect to see further notices lifting these agreements and terminating the corresponding prosecutions, if prosecutors determine, as they did here, that companies have complied with their obligations under the agreements.

Organized Crime

US Charges Venezuelan President With Drug Trafficking

On March 26, 2020, the DOJ announced that it had secured an indictment against a host of top Venezuelan officials, including Venezuelan President Nicolás Maduro, on charges related to drug trafficking. In a press release, prosecutors alleged that President Maduro and his regime engaged in a far-reaching partnership with the "Fuerzas Armadas Revolucionarias de Colombia" (FARC), a Colombian rebel group, to wield influence over an array of institutions for purposes of facilitating the introduction of cocaine into the United States. President Maduro and his co-defendants — who include Venezuela's Minister of Defense Vladimir Padrino López and Chief Supreme Court Justice Maikel José Moreno Pérez — stand accused of four offenses: (i) participating in a narcoterrorism conspiracy; (ii) conspiring to import cocaine into the United States; (iii) employing the use of machine guns and other destructive devices in furtherance of each conspiracy; and (iv) conspiring to use machine guns and other destructive devices in furtherance of each conspiracy. Two members of FARC were also charged, and the defendants face a maximum sentence of life in prison if convicted on all counts. The Justice Department has offered a reward of $15 million for information leading to President Maduro's arrest and prosecution.

Criminal Tax Enforcement

France Signs DPA With Swiss Company Charged With Tax Evasion

On May 11, 2020, the Court of Justice in Nice approved a CJIP between the Public Prosecutor's Office and Swiru Holding, a Swiss investment company co-founded by Russian businessman Suleiman Kerimov, whom the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) designated in April 2018 for alleged money laundering. The CJIP resolves allegations of tax evasion connected to the 2008 purchase of a French villa. Prosecutors allege that Swiru Holding falsely claimed the villa cost €35 million when the true purchase price was €127 million. (According to the CJIP, Swiru and its subsidiary had paid €35 million, while other companies funded the remainder.) Swiru Holding has agreed to pay a €1.4 million fine, and one of its subsidiaries has agreed to pay €10.3 million in unpaid taxes to French tax authorities. Mr. Kerimov was acquitted of separate money laundering and tax evasion charges in France in June of 2018.

Bank Hapoalim To Pay $875 Million for Role in US Tax Evasion

On April 30, 2020, Bank Hapoalim B.M. entered into a three-year deferred prosecution agreement, and the bank's Swiss subsidiary pleaded guilty in U.S. District Court for the Southern District of New York to conspiring with U.S. taxpayers to hide approximately $7.6 billion across more than 5,500 Swiss and Israeli bank accounts from the Internal Revenue Service (IRS) between 2002 and 2014. Bank Hapoalim separately entered into a consent order with the NYDFS regarding this same conduct. According to the terms of these resolutions, Bank Hapoalim and its Swiss subsidiary will pay approximately $875 million to the U.S. Treasury, the Federal Reserve and the NYDFS — the second-largest recovery by the DOJ since 2008 with respect to offshore tax evasion investigations. According to the DOJ, the bank engaged in a variety of practices that allowed U.S. customers to evade U.S. taxes, such as (i) opening accounts for U.S. customers by using non-U.S. forms of identification; (ii) processing wire transfers and issuing checks from the accounts of U.S. account holders in amounts less than $10,000 to avoid triggering scrutiny; (iii) providing "hold mail" services to customers that prevented mail regarding the undeclared account from being sent to the U.S.; and (iv) offering "back-to-back" loans to U.S. taxpayers to allow them to access funds in their foreign accounts held at the bank's branches in Switzerland and Israel.

According to the DOJ, a minimum of four senior executives at the bank, including two former members of Bank Hapoalim Switzerland's board of directors, had direct involvement in the tax evasion scheme. As part of the resolution, the bank will be required to disclose information going forward, in compliance with the DOJ's Swiss Bank Program relating to accounts closed between 2009 and 2019. Bank Hapoalim will also be required to take other remedial steps in connection with the consent order with the NYDFS. In its press release announcing the settlement, the DOJ criticized Bank Hapoalim's "deficient" cooperation in the early stages of the regulator's investigation, which began in 2011. The DOJ noted that the bank's penalty and fine take into consideration that the bank initially conducted an "inadequate" internal investigation, provided "incomplete and inaccurate information" to government officials and failed to disclose relevant facts on time.

Bankers Under Scrutiny in Cross-Border Cum-Ex Cases

In March 2020, a German court convicted two British bankers in the first criminal trial related to a dividend-stripping practice in which multiple parties exploit a tax loophole on dividend payments, resulting in tax fraud. Dividend stripping, or "cum-ex" trading, allows both seller and buyer to claim the same tax refund. The British bankers, former employees of German bank HypoVereinsbank, received suspended prison terms of one year and 10 months and one year, respectively, for their roles in helping bank clients evade around €400 million in taxes between 2005 and 2011.

According to a 2018 investigative report, cum-ex trading has cost European countries €55 billion in uncollected tax, with Germany shouldering an estimated €30 billion of that total. Meanwhile, regulators in other countries in addition to Germany are investigating and prosecuting dividend-stripping practices. In May 2020, the Amsterdam Court of Appeal ordered an American multinational investment bank to pay €39 million in unpaid taxes in connection with cum-ex trades. Additionally, in October 2020, the U.K. Financial Conduct Authority (FCA) announced its investigation of 14 financial institutions and six individuals related to cum-ex trades executed in Denmark, France, Germany and Italy. The FCA has not revealed the targets of its investigation. In November 2020, Denmark's tax agency, the Danish Customs and Tax Administration, announced that it has launched lawsuits against over 500 individuals and entities in Denmark, the U.K., the U.S., Dubai, Germany, Malaysia and Canada in an attempt to reclaim lost tax revenue caused by cum-ex trades. This is reportedly the most expansive attempt to reclaim such uncollected taxes.

Fraud

Deutsche Bank Resolves US Spoofing and Swap Reporting Probes

The Commodity Futures Trading Commission (CFTC) announced on June 18, 2020, that Deutsche Bank has agreed to pay $10.25 million to settle two enforcement matters related to swap data reporting and spoofing. In the first matter, Deutsche Bank resolved federal court charges stemming from allegations that a computing failure at the bank in 2016 caused the bank to fail to report trading swap data for five consecutive days. In the second matter, the CFTC issued an administrative order against Deutsche Bank Securities Inc. based on allegations that, in 2013, two of the bank's Tokyo-based traders manually placed bids and offers on the Chicago Mercantile Exchange with the intent to cancel them before execution — a practice known as spoofing. Deutsche Bank neither admitted nor denied the findings in either case.

Recent Developments

SFO Drops Case Against Four Euribor Traders

On June 10, 2020, the SFO announced that it had discontinued a long-running investigation into four European traders alleged to have conspired to manipulate the Euro Interbank Offered Rate, or Euribor. The regulator withdrew European arrest warrants it had issued for the traders in March 2016. The SFO had faced difficulties in prosecuting the traders because they refused to appear in England to face charges and because courts in their home countries (France and Germany) refused to extradite them. In connection with its Euribor investigation, the SFO opened criminal proceedings in 2015 against 11 individuals, with the agency obtaining convictions for four of them, while three others resulted in acquittals.

French Regulator Fines US Hedge Fund €20 Million

On April 22, 2020, the Financial Markets Authority (AMF), France's market regulator, announced that it had issued two fines, totaling €20 million, to two subsidiaries of New York-based hedge fund Elliott Capital for filing inaccurate shareholder reports and obstructing the regulator's investigation. The AMF alleges that Elliott Capital filed late and inaccurate public disclosures concerning its 2015 investment in French transport company Norbert Dentressangle in an effort to prevent the company's majority shareholder from exercising its right to appropriate the fund's shares. The AMF fined the fund €5 million for its faulty reporting and €15 million for the obstruction charges.

Former Barclays Executives Found Not Guilty in Qatar Fraud Trial

On February 28, 2020, following a five-month trial, a London jury acquitted three former Barclays executives of fraud. In one of the SFO's most high-profile cases, prosecutors had alleged that the executives — Roger Jenkins, Thomas Kalaris and Richard Boath — funneled £322 million in sham advisory services fees to the Qatari government in exchange for emergency financial support during the global financial crisis in 2008. After six hours of deliberation over the course of three days, the jury unanimously found the three men not guilty of conspiracy to commit fraud by false representation or of fraud by false representation. The decision served as a setback for the SFO, as the criminal case has been the only one brought against U.K. banking executives for their conduct during the financial crisis. The trial was also the second that the SFO initiated against the three executives; the judge in the first trial dismissed the charges against all three men and former Barclays CEO John Varley halfway through the proceedings. The Court of Appeal revived proceedings against the three executives, but acquitted Mr. Varley due to insufficient evidence.

UK Court Upholds First Unexplained Wealth Order

On February 5, 2020, a London appeals court upheld an unexplained wealth order (UWO) that had been granted against Zamira Hajiyeva, the wife of an Azerbaijani banker who was jailed for defrauding the International Bank of Azerbaijan. A UWO is a court order introduced by the U.K.'s Criminal Finances Act of 2017 that requires individuals to reveal the sources of their wealth. The order can be issued against (i) persons suspected of involvement in criminal activity, including "politically exposed persons" (defined as individuals entrusted with a prominent public function, such that they are potentially liable to bribery or corruption) and (ii) persons whose assets are disproportionate to their income. Notably, under U.K. law, "politically exposed persons" do not need to be suspected of serious criminal activity to be subject to a UWO.

A court issued two UWOs against Ms. Hajiyeva in 2018, requiring her to explain to authorities how she and her husband afforded their purchase of two properties. This marked the first time UWO orders had been granted in the U.K. She appealed only one of the orders, which related to her 2009 purchase of a London property for £11.5 million, challenging it on several grounds, including that the court had erred in its interpretation of the statutory test for identifying a "politically exposed person" and that the lower court had based its granting of the UWO on what she characterized as the "grossly unfair trial" of her husband. The appeals court rejected these arguments, ordering that she respond to the order.

In contrast, on June 19, 2020, a London appeals court ruled in favor of UWO recipients, rejecting the National Crime Agency's (NCA) attempt to reinstate three orders that had been issued to relatives of the former Kazakhstan president, Nursultan Nazarbayev. The orders sought to reveal the sources of funds alleged to have been used by four offshore companies connected to Mr. Nazarbayev to purchase five London properties for £80 million. When the High Court of Justice in London rejected the UWOs, ruling that the government had insufficient evidence to tie the properties to illegal proceeds, the NCA appealed.

In rejecting the appeal and finding "no compelling reason" to hear it, the appeals court held that the NCA had no prospect of succeeding in overturning the lower court's decision to discharge the orders. The court also expressed a need for caution in treating the complexity of property holding through corporate structures as grounds for suspicion.

FCPA and Bribery

Former Unaoil Executives Sentenced in UK Over Iraq Bribery Scheme

On July 23, 2020, and July 30, 2020, respectively, Judge Martin Beddoe of the Southwark Crown Court in London sentenced two former executives at Monaco-based energy consultancy Unaoil after a jury unanimously convicted them of conspiring to bribe officials at Iraq's state-owned oil company, South Oil. Judge Beddoe sentenced Ziad Akle to five years in prison and Stephen Whiteley to three years in prison. The allegations at trial pertained to payments made to Oday Al Quoraishi, an official of South Oil, in exchange for confidential information used to secure nearly $55 million in oil contracts. During Mr. Akle's sentencing, the judge noted this scheme was particularly exploitative given the instability in Iraq following the toppling of Saddam Hussein in 2003. Both Mr. Akle and Mr. Whiteley have stated intent to appeal their convictions.

The jury failed to return a verdict on a third defendant, Paul Bond, who will be retried in 2021. A fourth individual, Basil Al Jarah, pleaded guilty and was sentenced in October 2020 to a prison term of three years and four months. Despite the SFO's success in securing these convictions, allegations of prosecutorial misconduct have tainted the wins, as news outlets have reported that the head of the SFO, Lisa Osofsky, improperly communicated with an independent investigator, David Tinsley, who worked for former executives at Unaoil. Separately, Unaoil's former chief executive and chief operating officers, brothers Cyrus and Saman Ahsani, pleaded guilty in October 2019 in the U.S. District Court for the Southern District of Texas to conspiring to violate the Foreign Corrupt Practices Act (FCPA) in connection with the contract scheme. They have yet to be sentenced.

Novartis Pays $346 Million To Settle U.S. Bribery Claims

On June 25, 2020, the DOJ and the U.S. Securities and Exchange Commission (SEC) announced that current and former subsidiaries of Swiss pharmaceutical company Novartis AG (Novartis) have agreed to pay $346 million to resolve investigations into an alleged bribery scheme in Greece and alleged improper record-keeping in multiple countries.

The DOJ entered into DPAs with both Novartis' Greece branch and one of its former subsidiaries. According to the DPA entered into with Novartis Greece, the branch conspired to violate the FCPA by bribing employees of state-owned hospitals to increase the sale of Novartis pharmaceutical products. Specifically, the deferred prosecution agreement alleges that Novartis Greece paid hospital employees to travel to international medical congresses to induce the employees to prescribe Novartis drugs and also made improper payments to employees in connection with studies intended to increase company sales. In the subsidiary DPA, the DOJ alleges that the company maintained false books and records from 2011 through 2014 related to a scheme to bribe hospital employees in Vietnam. Prosecutors maintain the conduct underlying the two deferred prosecution agreements occurred between 2009 and 2015.

In a parallel civil settlement, the SEC charged Novartis with violating the books-and-records and internal accounting controls provisions of the FCPA based on findings that between 2012 and 2016, Novartis and the subsidiary engaged in schemes to bribe healthcare providers in South Korea, Vietnam and Greece in exchange for these providers prescribing Novartis or the subsidiary's products.

Pursuant to the DPAs, Novartis Greece and the subsidiary will pay $225 million and $8.9 million, respectively, in criminal penalties to the DOJ. Novartis separately agreed to pay the SEC $112 million. In setting the penalty amount, the DOJ noted its consideration of Novartis' March 2016 settlement with the SEC for similar conduct. The DOJ also noted that Novartis Greece and the subsidiary failed to timely disclose the conduct at issue and lacked effective compliance and ethics programs at the time of the misconduct, but the authority credited the subsidiaries' full cooperation and remedial measures.

Second Circuit Rules on US Jurisdiction in FIFA Bribery Case

On June 22, 2020, the U.S. Court of Appeals for the Second Circuit upheld the jury convictions of two former Fédération Internationale de Football Association (FIFA) officials, finding that prosecutors did not overreach in applying U.S. law to the extraterritorial conduct of foreign nationals. The two officials were convicted in December 2018 for wire fraud and racketeering based on their acceptance of bribes from sports media and marketing companies in return for arranging for those companies to receive media rights at soccer tournaments under the officials' authority. The officials appealed, challenging their convictions on the ground that they were based on an impermissible extraterritorial application of the wire fraud conspiracy statute. Specifically, the appellants argued that the honest services wire fraud statute only criminalizes conduct that occurred in the U.S., noting that their case was the first in which the government successfully prosecuted foreign nationals who worked for a non-U.S. organization related to alleged conduct that occurred overseas. In rejecting the appellants' argument and upholding their convictions, the Second Circuit concluded that the evidence presented at trial showed that the appellants used U.S. bank accounts and wires to carry out their bribery scheme, making application of the statute permissible.

The Second Circuit's decision is the latest in a wider prosecution of over 30 individuals allegedly connected to the FIFA bribery scandal. To date, in addition to the two convictions of former FIFA officials, U.S. prosecutors have secured 26 individual guilty pleas, four corporate guilty pleas, one deferred prosecution agreement and one nonprosecution agreement. In April 2020, U.S. prosecutors announced charges against three additional individuals for their alleged involvement in the scheme. Additionally, persons allegedly involved in the bribery also face investigations overseas. Swiss prosecutors were investigating the conduct of former FIFA and German Football Association executives related to bribery allegations, but a trial against four of these individuals concluded in April 2020 after the statute of limitations expired, prompting Switzerland to open impeachment proceedings against its attorney general related to his handling of the investigation.

Eni Settles With SEC Over Alleged Accounting Failures

On April 17, 2020, the SEC announced that it agreed to settle charges with Italian oil conglomerate Eni S.p.A. (Eni) for allegedly violating the books-and-records and internal accounting controls provisions of the FCPA. According to the SEC's order, Eni's subsidiary Saipem S.p.A. (Saipem) entered into four counterfeit contracts with an intermediary between 2007 and 2010 to assist in securing contracts with Algeria's state-owned oil company. The SEC alleges that Saipem paid approximately €198 million to the intermediary, which directed a portion of the money to Algerian government officials; the SEC's order finds that Saipem was then awarded at least seven contracts from the state-owned oil company. Prosecutors allege that Eni, which at the time had consolidated Saipem's financial statements into its own, failed to accurately record the true nature of the intermediary payments in its books and records. Additionally, the SEC's order found that a former senior executive at Saipem orchestrated the bribery scheme and, upon being hired to be the CFO of Eni, continued to facilitate Saipem's improper payments to the intermediary. Eni, which neither admitted to or denied the allegations, will pay $19.75 million in disgorgement and $4.75 million in prejudgment interest. The SEC previously charged Eni in 2010 for violating the same FCPA provisions in connection with an alleged bribery scheme in Nigeria by another of its subsidiaries.

The settlement follows Eni's October 2019 announcement that the DOJ had closed, without taking any action, its inquiry into alleged bribes Saipem paid to Algerian and Nigerian officials. The Nigerian-related DOJ inquiry was based on corruption allegations surrounding the $1.3 billion acquisition of OPL 245, a highly sought-after oil block in Nigeria. Eni and its affiliates in the deal, most notably Royal Dutch Shell PLC, are currently standing trial on graft charges in Italy, where prosecutors allege that nearly $1.1 billion of the OPL 245 purchase proceeds were earmarked as bribes for high-ranking Nigerian officials. Authorities in the Netherlands are also investigating the matter.

Federal Judge Upholds FCPA Conviction Related to Russia Bribery Scheme

On February 11, 2020, Judge Theodore Chuang of the U.S. District Court for the District of Maryland denied defendant Mark Lambert's motion for acquittal following a conviction on FCPA and wire fraud charges related to an alleged scheme to bribe an official at TENEX, a subsidiary of Russia's state-owned uranium company. In November 2019, a jury found Mr. Lambert, the former co-president of Transport Logistics International, guilty of one count of conspiracy to violate the FCPA, four counts of violating the FCPA and two counts of wire fraud, based on allegations that he participated in a scheme to bribe a Russian official to obtain contracts with TENEX. Mr. Lambert moved to dismiss the wire fraud convictions, arguing that prosecutors failed to produce evidence sufficient to show that he made material misrepresentations or omissions that caused TENEX to suffer financial loss. Judge Chuang denied the motion, concluding that substantial evidence existed of a fraudulent scheme. Sentencing was originally scheduled for March 25, 2020, but did not take place due to pandemic-related court closures.

Airbus Fined Record $4 Billion To Settle Global Bribery Probe

In January 2020, European aerospace company Airbus SE reached a $4 billion agreement with the U.K. Serious Fraud Office, the French Parquet National Financier (PNF) and the U.S. Department of Justice, settling charges that the company engaged in a years-long scheme to bribe officials in 16 countries, including China, Indonesia, South Korea and Taiwan, in exchange for aircraft sales contracts. The total remittance consisted of a €991 million deferred prosecution agreement with the SFO, a €2.08 billion CJIP with the PNF, a $577 million settlement with the DOJ and a $10 million resolution with the U.S. State Department's Directorate of Defense Trade Controls. The settlement was recognized as the largest global anti-bribery enforcement action in history. In March 2020, Airbus reportedly paid the $4 billion penalty in full within weeks of the settlement announcement. Throughout the investigation, which began in 2016, Airbus did not publicly disclose that it had earmarked funds for a monetary penalty.

The settlement announcement has reportedly sparked investigations by several other countries, including Malaysia, Ghana, Kuwait, Sri Lanka and Colombia. Until recently, the SFO had also been investigating Airbus's U.K. subsidiary, GPT, over its business practices in Saudi Arabia. GPT shut down at the end of 2019, however, foreclosing the possibility of prosecution by the SFO. U.S. and British authorities are still considering charges against individuals.

Judge Overturns Hoskins FCPA Conviction After Jury Trial

In November 2019, a jury in the U.S. District Court for the District of Connecticut found Lawrence Hoskins, a U.K. citizen and former senior executive of French power and transportation company Alstom S.A., guilty of seven FCPA violations and four money laundering violations. On February 26, 2020, however, Judge Janet Bond Arterton granted Mr. Hoskins a partial motion for acquittal, overturning his seven FCPA convictions. The court alternately granted a new trial on those counts, in the event prosecutors succeed in reversing her decision to acquit. Judge Arterton upheld Mr. Hoskins' conviction on four money laundering counts, finding the evidence sufficient to support those verdicts. The decision came only a few days after the court unsealed a 2015 grand jury indictment against three other individuals stemming from the same alleged bribery scheme.

Specifically, the jury had found Mr. Hoskins guilty of conspiring to bribe officials in Indonesia to help Alstom's U.S. subsidiary secure an energy contract with Indonesia's state-owned electricity company. The verdict followed a significant opinion by the U.S. Court of Appeals for the Second Circuit, which held that Mr. Hoskins — a foreign national who did not commit any acts inside the U.S. or work for a U.S. company — was outside the reach of the FCPA unless the government could establish that he was an agent of a U.S. company. At trial, prosecutors argued that he acted as an agent of Alstom's U.S. subsidiary when he helped the subsidiary hire consultants who were subsequently used to funnel bribes. After one day of deliberating, the jury found that he had acted as an agent of the U.S. subsidiary. The verdict prompted considerable commentary that the DOJ would continue to prosecute non-U.S. persons under an agency theory of liability. In acquitting Mr. Hoskins of his FCPA convictions, Judge Arterton held that there was not enough evidence to show that Mr. Hoskins was an agent of the subsidiary, thus counseling against a more expansive reading of the FCPA.

On March 6, 2020, Judge Arterton sentenced Mr. Hoskins to 15 months in prison and ordered him to pay a $30,000 fine. Prosecutors had asked the court for a sentence between seven and nine years. In imposing a significantly shorter sentence, Judge Arterton noted considerations that the defendant did not personally pay or receive bribes, and did not benefit from the scheme; the court also cited his age (69) and health problems as relevant to sentencing. The court agreed with defense counsel that factoring Mr. Hoskins' acquitted alleged bribery conduct into her calculation under the federal sentencing guidelines would be "inappropriate." On March 9, 2020, the DOJ appealed the foreign bribery acquittal to the Second Circuit; that appeal is currently pending. On July 20, 2020, a former Alstom executive and government cooperator, Edward Thiessen, was sentenced to time served for his role in the scheme; Mr. Thiessen pleaded guilty in 2019 to conspiring to violate the FCPA and testified at Mr. Hoskins' trial.

Ericsson Agrees To Pay Over USD $1 Billion To Settle FCPA Charges

In still one of the most relevant cases of the prior year, on December 6, 2019, Telefonaktiebolaget LM Ericsson reached a resolution with the DOJ and the SEC to settle FCPA charges. Ericsson entered into a DPA with the DOJ and agreed to pay more than $1 billion to the DOJ and the SEC, resulting in the second largest FCPA settlement in history.

The settlement arises from charges that, from approximately 2000 to 2016, Ericsson and its subsidiaries engaged in large-scale bribery schemes in multiple countries to win lucrative telecommunications contracts from state-owned customers. Prosecutors alleged that Ericsson concealed illicit payments through fraudulent contracts with third parties and improperly recorded these payments in its books and records.

The three-year DPA, entered by the DOJ Fraud Section and the U.S. Attorney's Office for the Southern District of New York, mandates that Ericsson pay a criminal penalty of over $520 million, which reflects a discount of 15% from the bottom end of the federal sentencing guidelines range. The DPA also provides that Ericsson retain an independent compliance monitor, and that its subsidiary, Ericsson Egypt, Ltd., enter a guilty plea to one count of conspiracy to violate the FCPA. Prosecutors announced that Ericsson did not earn the full cooperation credit available under the FCPA Corporate Enforcement Policy because it failed to disclose allegations of corruption with respect to two relevant matters, produced certain materials late and failed adequately to discipline certain employees. Pursuant to the SEC settlement, Ericsson agreed to pay roughly $540 million in disgorgement and prejudgment interest.

The settlements are notable because the total amount of the bribe payments identified — $62 million — is smaller than that involved in other large FCPA settlements (*e.g.*, Telia Company AB's $450 million or Petroleo Brasileiro S.A.'s $711 million). The case demonstrates that even relatively small bribe payments may result in large monetary settlements where prosecutors believe the payments yielded highly lucrative contracts.

Salesman Acquitted in $2 Billion Mozambique Corruption Case

On December 2, 2019, a jury in the U.S. District Court for the Eastern District of New York acquitted Jean Boustani, a Lebanese salesman at the maritime construction company Privinvest, on charges of conspiracy to commit wire fraud, conspiracy to defraud the U.S. and money laundering. During the seven-week trial, prosecutors argued that Mr. Boustani and others had conspired to fraudulently secure more than $2 billion in loans from international banks to companies owned by the Mozambique government, purportedly to fund maritime construction projects on which Privinvest would be a contractor. Mr. Boustani and his co-conspirators allegedly diverted over $200 million of loan proceeds to pay bribes to Mozambican government officials and kickbacks to bank employees. The loans were allegedly then marketed and sold to U.S. investors. Three bankers previously pleaded guilty in connection with the case, two of whom testified against Mr. Boustani at trial.

Prosecutors argued that the venue in the Eastern District of New York was proper because many transactions in the scheme moved through bank accounts in Brooklyn, but the jury did not agree. Following the verdict, multiple jurors commented that they could not see how venue was considered proper in a district where none of allegedly criminal activity had occurred.

Anti-Money Laundering

Sweden Fines SEB $107M for Anti-Money Laundering Failures

On June 25, 2020, Sweden's Financial Supervisory Authority (FSA) announced that it had fined Stockholm-headquartered Skandinaviska Enskilda Banken (SEB) 1 billion Swedish krona ($107 million) for anti-money laundering (AML) failures based on the bank's alleged failure to take sufficient action to prevent illicit funds from passing through its Baltic subsidiaries between 2015 and 2019. The FSA alleged that SEB failed to adequately identify accounts held at the bank's Baltic subsidiaries that posed a high risk of money laundering, particularly those associated with nonresident customers. The fine is the second largest-ever issued by the FSA.

UK FCA Imposes £37 Million Penalty on Commerzbank for AML Failures

On June 17, 2020, the FCA announced that it had fined the London branch of Commerzbank AG (Commerzbank London) £37.8 million for failures in anti-money laundering systems and controls. The FCA's final notice alleged a number of compliance failures at Commerzbank London between October 2012 and September 2017, including the branch's failure to (i) conduct timely and periodic due diligence on its clients; (ii) address long-standing weaknesses in the branch's automated tool for monitoring money laundering risk; and (iii) maintain adequate customer due diligence policies and procedures. The FCA alleged that Commerzbank London was aware of these weaknesses and failed to take reasonable and effective steps to fix them, despite the regulator having already raised these specific issues with the bank in 2012, 2015 and 2017. The final notice characterized the branch's compliance failings as "particularly serious," not only because they occurred after the FCA and an independent monitor appointed by the New York Department of Financial Services had identified weaknesses in the branch's AML controls, but also because they occurred against a backdrop of "heightened awareness" within Commerzbank of weaknesses in the bank's global financial crime controls following its $1.45 billion resolution with U.S. regulators in 2015 (although that resolution did not involve Commerzbank London).

The final notice noted that the bank has undertaken "significant" remediation to comply with U.K. anti-money laundering regulations since 2017. The FCA announced that the bank received a 30% discount in financial penalty under the FCA's executive settlement procedures for its cooperation with the investigation and for agreeing to resolve the matter at an early stage.

Recent Developments

Bank Hapoalim To Pay $30 Million for Role in FIFA Bribe Scandal

On April 30, 2020, the DOJ announced that Bank Hapoalim and its wholly owned subsidiary, Hapoalim (Switzerland) Ltd. (BHS), entered into a nonprosecution agreement with the DOJ and will pay more than $30 million to resolve an investigation into their involvement in the laundering of over $20 million in bribes and kickbacks to FIFA officials. Prosecutors allege that from 2010 to 2015, bank personnel conspired with sports marketing executives, including executives associated with Argentine sports marketing company Full Play Group (FPG), to launder bribes and kickbacks to soccer officials. According to the DOJ, in exchange for these funds, FIFA officials steered broadcasting rights for soccer matches to certain sports marketing companies. FPG allegedly executed these payments from accounts at Bank Hapoalim's branch in Miami, Florida. On April 6, 2020, charges were unsealed in the U.S. District Court for the Eastern District of New York charging FPG, along with executives from an American multinational mass media corporation and a Spanish sports media company, with racketeering conspiracy, wire fraud, wire fraud conspiracy and money laundering conspiracy.

According to the nonprosecution agreement entered into with Bank Hapoalim and BHS, the bank ignored warnings from its compliance personnel about payments made to soccer officials from accounts associated with FPG. Under the agreement, Bank Hapoalim and BHS will jointly pay a criminal penalty of $9.3 million and will additionally forfeit funds totaling $20.7 million. According to the DOJ, its decision to enter into a nonprosecution agreement with the bank was premised on the bank's "thorough and complete cooperation" throughout the investigation and the bank's "substantial" remedial measures, which have included closing the Latin American subsidiary and Miami branch. BHS is reportedly also in the process of closing its operations.

South Korean Bank Settles $1 Billion Iranian Money Laundering Probe

On April 20, 2020, the DOJ, the New York attorney general (NYAG) and the NYDFS announced that the Industrial Bank of Korea (IBK) had agreed to enter into deferred prosecution agreements with the DOJ and the NYAG and to pay $86 million to the DOJ, the NYAG and the NYDFS to settle criminal and civil charges stemming from violations of anti-money laundering and record-keeping obligations at the bank's New York branch (IBKNY). According to the DOJ press release, IBK provided inadequate anti-money laundering controls at IBKNY from 2011 to at least 2014, despite numerous calls from the bank's compliance officer, internal auditor, regulators and authorities for additional resources and enhanced internal controls. Specifically, the DOJ alleged that IBKNY failed to implement an automated transaction screening program, which then caused the branch to fall months behind on transaction review. According to prosecutors, due to these lapses in IBK's compliance program, IBK and IBKNY processed approximately $1 billion in U.S. dollar payments to Iranian-controlled entities through IBK accounts controlled by Kenneth Zong, an American citizen, and accounts at another bank controlled by Iranian nationals. Prosecutors allege that Mr. Zong and others set up shell companies in Korea, Iran and other locations and submitted false documentation to Korean banks, including to IBK, to engage in counterfeit transactions that allowed them to transfer funds to the accounts of Zong's co-conspirators. Although IBK self-reported $10 million of these illicit transactions to OFAC, prosecutors alleged that the bank failed to self-disclose the remaining $990 million worth of transactions as well as IBKNY's violations of the Bank Secrecy Act. IBK's penalties include a $51 million civil forfeiture and a $36 million fine payable to the NYDFS. Under the DPA, IBK will provide regular reports on its compliance program to the DOJ, but is not required to have an independent monitor.

New Zealand Fines Bank Over China-linked Money Laundering Scheme

New Zealand's Department of Internal Affairs announced on March 3, 2020, that the Auckland High Court fined New Zealand-based Jiaxin Finance and two executives for laundering money generated by an alleged pyramid scheme in China. Jiaxin Finance owner Qiang Fu and his mother, Fuqin Che, were convicted in November 2019 for failing to report NZ$53.4 million in suspicious transactions between 2015 and 2016. The convictions marked the country's first under its anti-money laundering law, which took effect in 2013. The court ordered the company to pay NZ$2.55 million, while Mr. Fu and Ms. Che were ordered to forfeit NZ$180,000 and NZ$202,000, respectively.

Swedbank Fined $386 Million Over Money Laundering Failures

On March 19, 2020, Sweden's financial regulator, *Finansinspektionen* (FI), fined Swedbank 4 billion Swedish krona ($385.7 million) for money laundering failures at the bank's Baltic subsidiaries. FI reported that the bank had serious deficiencies in managing money laundering risk, and that the bank was aware of the failings but did not take "proper and sufficient action" in response. According to the regulator, the bank also withheld documents and information from FI that would have revealed the seriousness and scope of the problems.

Recent Developments

On March 23, 2020, Swedbank published an anti-money laundering report indicating that €36.7 billion in suspicious transactions with a high risk of money laundering flowed through the bank between 2014 and 2019. The report stated that Swedbank Estonia and Swedbank Latvia actively pursued high-risk customers and that Swedbank Estonia took on high-risk customers that had been offboarded by another Estonian bank due to their high risk. Although the report does not conclude that Swedbank engaged in money laundering, it concludes that the bank did not have adequate systems and controls in place to prevent money laundering and economic sanctions violations, noting in particular the failure of senior members at the bank to avert illicit financing. Specifically, the report states that Swedbank's former CEO, Birgitte Bonnesen, and her predecessor, Michael Wolf, failed to sufficiently apprise Swedbank's board of directors of the bank's long-running compliance failures. Swedbank reports that it has implemented 152 initiatives since 2019 to bring it into AML compliance and that it will self-report possible violations of U.S. sanctions to OFAC.

Bank of China Signs €3.9 Million CJIP To Settle Money Laundering Case

On January 10, 2020, Bank of China Ltd. (Bank of China) signed a CJIP with the Paris prosecutor's office to settle money laundering charges, marking both the first CJIP signed by the Paris prosecutor and the first negotiated directly by French prosecutors against a foreign bank. The Paris prosecutor launched an investigation into the Bank of China in 2013 following the detection by TRACFIN, France's anti-money laundering body, of an increase in the revenue of a Paris-based plumbing and locksmith shop. The investigation revealed that between May 2012 and May 2014, Bank of China clients transferred millions of euros of funds derived from undeclared sales in France, which evaded VAT and corporate income taxes, to accounts in China. According to the CJIP, the bank failed to demonstrate that it had performed sufficient due diligence imposed by Know Your Customer and transaction monitoring rules.

The CJIP noted that Bank of China cooperated with the investigation in good faith, but also that the bank did not fully cooperate with the French authorities due to Chinese legal constraints. The CJIP also highlighted remedial measures taken by the bank, such as closing relevant customer accounts and enhancing the bank's anti-money laundering framework. The CJIP stated that the penalty is nonetheless justified given "the growing attention drawn to the fight against money laundering in the broader context of the fight against organized crime, and the importance played by banks in the management of international payment flows."

As part of the settlement, the bank did not plead guilty but acknowledged the underlying facts and their corresponding legal effect. In return, the prosecutor agreed to drop the charges. Pursuant to the CJIP, the bank agreed to pay a €3 million fine to the French Treasury (€1.5 million in disgorgement and €1.4 million in penalties) and €900,000 in damages to the French tax authorities.

Cyberattacks and Data Privacy

DOJ Indicts Two Chinese Hackers for Decade-Long Computer Hacking Activities

On July 7, 2020, a grand jury in the U.S. District Court for the Eastern District of Washington indicted two Chinese nationals, Li Xiaoyu and Dong Jiazhi, for allegedly conducting a decade-long computer hacking campaign that targeted the intellectual property and confidential business information of U.S. and foreign companies, including, most recently, information regarding COVID-19 vaccine research. Prosecutors alleged the defendants worked with the Chinese Ministry of State Security (MSS) and at times acted for the benefit of the MSS or other Chinese government agencies.

Prosecutors further alleged that the defendants exploited software vulnerabilities to place programs known as "web shells," which allow remote execution of commands on computers, on networks without authorization. The indictment asserted that defendants uploaded credential-stealing software and used these passwords to gain further access to victims' networks. The government claimed that once the defendants gained access, they packaged data in encrypted files that they later sold for profit or to the MSS. The defendants are charged with conspiracy to commit computer fraud, conspiracy to commit theft of trade secrets, conspiracy to commit wire fraud, unauthorized access of a computer and aggravated identity theft.

Cryptocurrencies

US Charges Chinese Nationals With Laundering $100 Million in Cryptocurrency

On March 2, 2020, the U.S. Attorney's Office for the District of Columbia announced that it had charged two Chinese nationals, Tian Yinyin and Li Jiadong, with operating an unlicensed money transmitting business and with laundering over $100 million dollars of cryptocurrency that prosecutors alleged was stolen by Lazarus Group, a North Korean-sponsored hacker group. Prosecutors claimed that in April 2018, Lazarus Group stole $250 million in cryptocurrency from a virtual currency exchange, the security of which was breached after one of its employees downloaded malware. According to the indictment, most of the $100 million that Mr. Yinyin and Mr. Jiadong are accused of laundering came from this hacking episode. Prosecutors alleged that the pair laundered the funds through a variety of techniques, including using exchanges and bank accounts, and in some instances, trading bitcoin for Apple iTunes gift cards. OFAC placed the two men on its sanctions list. Prosecutors have separately alleged that Lazarus Group is also implicated in the theft of $48.5 million in virtual currency from a South Korean exchange in November 2019.

Theft and Import/Export Controls

Italian Executive Sentenced to Prison for Violating Russian Sanctions

On June 18, 2020, Italian national Gabriele Villone was sentenced in the U.S. District Court for the Southern District of Georgia to 28 months in prison for conspiring to violate the International Emergency Economic Powers Act and the Export Control Reform Act of 2018. Prosecutors alleged that Ms. Villone, along with two Russian nationals, another Italian national, a U.S. citizen and various companies, conspired to obtain a power turbine from the U.S. without a license on behalf of a Russian energy company. The indictment claimed that the parties were aware that the U.S. had outlawed exports of such turbines to Russia due to national security concerns, and concealed the turbine's final destination by claiming that it would be shipped to Atlanta. Two of Ms. Villone's co-conspirators were arrested in Savannah, Georgia in September 2019 while attempting to complete the transaction and currently await trial.

US Secures Conviction in Iranian Sanctions Case

On June 16, 2020, Seyed Shahidian, the founder and CEO of Iranian financial services firm Payment24, pleaded guilty in the U.S. District Court for the District of Minnesota for his role in helping Iranian citizens make purchases and conduct transactions in violation of U.S. sanctions against Iran. Prosecutors alleged that Payment24 assisted its Iranian clients in purchasing computer software, servers and software licenses from U.S. companies. According to Payment24's website, the company charged a fee to circumvent "American sanctions," and brought millions of dollars of foreign currency into Iran. Additionally, Payment24 marketed on its website a package to assist Iranian clients with making online purchases from U.S. businesses, which, according to prosecutors, included a PayPal account, a fraudulently obtained ID card and address receipt, a United Arab Emirates IP address, and a Visa gift card. Mr. Shahidian was extradited from the U.K. in May 2020 following his arrest in November 2018. The court ordered that he remain in custody until his sentencing in October 2020. Prosecutors have also brought charges against former Payment24 chief operating officer Vahid Vali, who remains at large.

DOJ Charges 33 Individuals With Laundering $2.5B for North Korean Nuclear Program

On May 28, 2020, the DOJ unsealed charges in the U.S. District Court for the District of Columbia against 28 North Korean and five Chinese nationals accused of advancing North Korea's weapons program by channeling at least $2.5 billion in illicit payments through hundreds of front companies. The indictment is reportedly the largest-ever criminal enforcement brought against North Korea.

Executives of the Foreign Trade Bank of the Democratic People's Republic of Korea (FTB), North Korea's state-owned bank, are among the 33 charged individuals. OFAC previously sanctioned FTB in 2013 for aiding in the development of nuclear weapons. According to the current indictment, bank officials established branches in countries around the world (including Libya, Russia, Austria, Thailand and Kuwait) and used veiled intermediary companies to process U.S. dollar payments to facilitate the purchase of products and services in furtherance of North Korea's nuclear weapons program. Court records do not indicate whether U.S. authorities have arrested any of the individuals charged. Prosecutors are also seeking to recover $63.5 million held in bank accounts that was frozen and seized by the government between 2015 and January 2020.

SEC Annual Report 2020 Shows Increased Awards and Regulatory Scrutiny of China-Based US Issuers

From the SEC's first virtual SEC Speaks conference in October 2020, the Enforcement Division sent a clear message: notwithstanding the challenges of remote working, COVID-19 has not slowed the pace of investigations. The division's co-director, Stephanie Avakian, identified 2020 as "a year of contrasts." Although the division was playing catch-up after an initial period of adjustment, the SEC finished its fiscal year on September 30, 2020, having collected $4.68 billion in disgorgement and penalties, a 7.6% increase from 2019. While the SEC's enforcement priorities remain fairly consistent, the division's year is remarkable not only for its response to COVID-19 but also for the record levels of money it collected through disgorgement and the steep increase in the number of awards made pursuant to the Whistleblower Program.

Despite upcoming changes at the SEC, with Chairman Jay Clayton announcing on November 16, 2020, that he would depart by the end of 2020, there is no indication that enforcement will slow. In fact, under the Biden administration, the SEC will likely continue to aggressively enforce securities laws and collect disgorgement and penalties in record numbers.

The division's co-director, Stephanie Avakian, said at the October 28, 2020, Securities Enforcement Forum to "hug your whistleblower[s]."

Response to COVID-19

As the global health crisis unfolded in March 2020, the division focused on a temporary migration to teleworking and setting up staff to work from home. After navigating this transition period, the SEC brought 492 of its total of 715 fiscal year 2020 enforcement actions after the division started working remotely in March. The 715 actions brought in fiscal year 2020 represent an overall 17% decrease from fiscal year 2019, likely due to the natural disruptions presented by the pandemic and the division's time spent transitioning work locations. Despite the drop in the number of enforcement actions, the $4.68 billion in penalties in fiscal year 2020 that the division collected represents its highest annual collection tally.

The associate director of the SEC's Enforcement Division, Anita Bandy, reported at the SEC Speaks conference that although taking witness testimony via video conference has been one of the division's greatest challenges, most witnesses have agreed to participate remotely. The division's pre-pandemic efficiency goal is even finding form in the current climate, with Ms. Avakian explaining that virtual Wells meetings[1] promote investigative efficiencies. Freed from accommodating travel schedules, the division has been able to schedule meetings sooner.

[1] A Wells meeting may take place following the receipt of a Wells notice, which informs the recipient that the SEC is planning an enforcement action against the recipient. The Wells meeting gives the recipient of the Wells notice an opportunity to provide information to the SEC regarding why the SEC should not pursue an enforcement action.

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In March, the SEC established a Coronavirus Steering Committee to coordinate the division's response to coronavirus-related enforcement issues. The committee's focus is to identify key areas of potential market and investor risk, including potential misconduct in the areas of microcap, fraud, insider trading and issuer disclosure. Of the 640 matters opened between mid-March and fiscal year-end, 150 of them were COVID-related matters. Consistent with the SEC's broader goal of protecting retail investors, the SEC will likely continue to pursue vigorous enforcement against opportunistic misconduct. Further, the division's chief accountant, Matthew Jacques, cautioned against using the pandemic "to cover up past mistakes that were either known or discovered as a result of the COVID-19 crisis." Going forward, companies should continue to be proactive in assessing risks and forecasting potential compliance issues presented by COVID-19 and the related risks posed by potential economic decline.

Liu and the Rise in Disgorgement

The Supreme Court's ruling in *SEC v. Liu* is important because it affirmed the SEC's ability to seek disgorgement in civil actions. However, as Ms. Avakian noted in the division's Fiscal Year 2020 Annual Report, *Liu* heaves open questions about the SEC's disgorgement capabilities. Following *Liu*, the SEC will deduct "legitimate" expenses from the disgorgement amount and will seek to benefit harmed investors where possible. The Court notably declined to define what qualifies as a legitimate business expense meriting deduction from disgorgement, and also did not give clear guidance on what would happen should the SEC be unable to return disgorged funds to the original harmed investors. Going forward, the SEC is expected to place more emphasis on determining what expenses arose out of fraudulent schemes, and whether a court would find those to be legitimate or not, for example, by determining if the expenses provided actual value to the investors. Further, the division will seek to identify harmed investors in order to return disgorged funds to avoid challenges on the grounds that the disgorgement was not an equitable remedy.

The *Liu* decision in June came in the midst of a record-breaking year for the SEC in obtaining disgorgement. According to the annual report, the SEC obtained $3.59 billion in disgorgement in fiscal year 2020, making up the large majority of the total $4.68 billion obtained in the year's enforcement actions. In contrast, the SEC obtained $3.25 billion in disgorgement in fiscal year 2019 and $2.51 billion in disgorgement in fiscal year 2018. While not included in the SEC's fiscal year 2020 numbers, the recent November 2020 SEC settlement in which an investment bank agreed to pay $606.3 million in disgorgement signals that the trend towards large disgorgement sums is poised to continue.

Whistleblower Program

The SEC also established new high marks over the past fiscal year in awarding record individual monetary amounts to whistleblowers. In the SEC's fiscal year 2020, the commission awarded 39 individual whistleblowers approximately $175 million. These figures exceeded both the number of awards and the amount awarded in any prior fiscal year. More specifically, the number of individuals who received awards in fiscal year 2020 represents a 200% increase over the next highest year, 2018. On October 22, 2020, after the end of the 2020 fiscal year, the SEC announced that an individual whistleblower would receive a record $114 million award, comprised of approximately $52 million in connection with an SEC case and approximately $62 million in connection with related actions by another agency.

Further, the SEC received a record 33,000 whistleblower tips in fiscal year 2020.[2] Significantly, the SEC obtained more than $765 million in financial remedies in fiscal year 2020 as a result of tips received through the whistleblower program.

In September 2020, the SEC adopted amendments to the whistleblower program, which were "designed to provide greater clarity to whistleblowers and increase the program's efficiency and transparency." Among other changes, the September 2020 amendments will add a provision to Exchange Act Rule 21F-6, which will provide a presumption that if no negative criteria are present, then any meritorious whistleblower whose statutory maximum award amount is $5 million or less will receive the statutory maximum award amount. Historically, if no negative criteria were present, then the presumption was that the whistleblower would receive an award in the top third of the applicable range.

During the SEC Speaks conference, Ms. Avakian provided advice to companies regarding how to handle whistleblowers, directing companies to: 1) take whistleblower allegations seriously; 2) avoid trying to determine a whistleblower's identity; and 3) avoid taking any retaliatory action. She reminded the audience that the SEC has "brought cases against companies that retaliate against whistleblowers or [seek] to prevent whistleblowers from coming forward." Ms. Avakian reiterated these sentiments during the October 28, 2020, Securities Enforcement Forum, where she said to "hug your whistleblower[s]" by taking them seriously and showing them respect.

[2] Jane Norberg, the chief of the SEC's Office of the Whistleblower, made this announcement on October 28, 2020, during the virtual Securities Enforcement Forum.

SEC Annual Report 2020 Shows Increased Awards and Regulatory Scrutiny of China-Based US Issuers

In light of these recent remarks, the SEC may be expected to pursue cases involving retaliation against whistleblowers or any efforts to impede individuals from communicating directly with SEC staff about potential violations. Further, the recent amendments, record-breaking fiscal year 2020 and strong start to fiscal year 2021 provide good reason to expect that large whistleblower award amounts, and large overall award totals, will continue.

Continued Focus on Cooperation

Consistent with prior years, the SEC continued to establish expectations and exert pressure for companies to cooperate with inquiries and to self-report enforcement issues, and this year's SEC orders have described more explicitly the potential benefits of doing so. Recent settlements articulate some of the factors that have enabled companies to pay significantly reduced fines. Cooperative steps that the SEC has highlighted in recent settlements include self-reporting, producing documents promptly, making out-of-country witnesses available in line with the SEC's timetable and taking steps to quickly remediate the practices subject to investigation. For example, Transamerica, a Denver-based investment advisor, avoided a civil penalty altogether because the company self-reported and took swift action to remediate violations.

Nevertheless, companies should remain thoughtful about their cooperation. Often in connection with cooperation efforts, the SEC requests to see interview memoranda, but recent case law suggests that this can lead to broader waivers. For example, the SEC brought an action claiming waiver of the attorney-client privilege by RPM International where, as part of the company's cooperation effort, the company summarized for its auditors the results of interviews conducted during an internal investigation and the auditors subsequently disclosed these summaries to the SEC. While typically the SEC remains neutral where a company has shared information that is privileged work product, the case of RPM International is a cautionary tale. Where counsel discloses potential work-product to a company's auditors, counsel should vet any materials the auditors subsequently produce to the SEC, DOJ or any other third parties, and redact any potential privileged or work-product materials.

What To expect in Enforcement

In the past few years, the SEC brought fewer enforcement actions than it did in the preceding four years of the Obama Administration. An incoming Biden administration, including a new SEC chair, is expected to feature Obama-era priorities and increased enforcement activity and regulation. That focus is likely to include the aggressive pursuit of larger Wall Street financial institutions, public companies and individuals who engage in insider trading, while still monitoring investment advisers who may engage in misconduct that harms retail investors. There is every reason to expect a spike in enforcement activity, similar to the one at the start of the Obama administration.

Although it remains to be seen to what extent the Biden administration's SEC will continue Mr. Clayton's push to strengthen protections for U.S. investors with regard to risks from China, among other emerging markets, such efforts seem likely to continue. As evident from press reports and companies' public disclosures, the SEC has been investigating various China-based U.S. issuers' financial reporting practices. The increased focus on these companies was exemplified by the revelation of alleged accounting misconduct by a prominent China-based issuer, Luckin Coffee, and various short-seller firms' interest in Chinese companies. The SEC's attention on Chinese companies is expected to continue. Separately, the Trump administration has pushed for the delisting of many U.S.-listed Chinese companies, particularly those that are audited by Chinese audit firms, which China has prohibited from being inspected by the Public Company Accounting Oversight Board (PCAOB). The Trump administration had proposed giving these companies until January 1, 2022, to be audited by a firm subject to PCAOB inspection, and the SEC has indicated that it will put forth a proposed rule to this effect before the end of 2020. The Biden administration's SEC may seek a negotiated resolution with its Chinese counterparts instead of pursuing a more unilateral approach. Regardless, the focus on and regulatory scrutiny of China-based U.S. issuers is likely to remain high.

DOJ and SEC Issue Second Edition of the FCPA Resource Guide

On July 3, 2020, the DOJ and the SEC jointly released the second edition of the "Resource Guide to the U.S. Foreign Corrupt Practices Act," which was originally published in November 2012. In the intervening eight years, the DOJ and the SEC have brought over 275 criminal and civil FCPA actions and secured over $7 billion in monetary penalties. Following this period of sustained activity, the guide now includes several investigative, settlement and litigation developments since the first edition, in many cases highlighting the broad views that the two authorities have taken over jurisdiction and substantive liability in settlements, and in other areas acknowledging judicial rulings that clarify or limit the scope of the FCPA. Notably, certain expansive theories pursued by the enforcer and the regulator are reflected in corporate settlements rather than litigated matters.

Although the guide remains largely unchanged in its fundamental approach to and evaluation of key jurisdictional and substantive legal issues, its updates provide insight into DOJ and SEC thinking on certain enforcement challenges and offer practical relevance. The updates include expanded guidance on pre- and post-acquisition due diligence and successor liability, guidance on internal controls and compliance programs, current DOJ and SEC interpretations of the scope of the statute, information on the DOJ's Corporate Enforcement Policy, and examples of enforcement actions. The guide also comprehensively sets forth the enforcement policies applicable to the FCPA, making it a useful resource for companies and their compliance and legal functions in particular. In addition, the guide highlights the DOJ's and the SEC's continued focus on international cooperation, noting that the DOJ has coordinated resolutions in cooperation with foreign authorities in more than 10 cases and the SEC has coordinated resolutions with foreign authorities in at least five. We summarize below the key takeaways from the updates reflected in the second edition.

Companies should have in place not only mechanisms to respond to specific incidents of misconduct, but also systems to integrate lessons learned "into the company's policies, trainings and controls" by analyzing the root causes of the misconduct and implementing timely and appropriate remediation. Inserting these factors from the DOJ policy into the guide extends the DOJ-specific guidance to the SEC.

Recognizing the Benefits of Corporate M&A Activity and Practical Realities of Pre-Acquisition Due Diligence

As in the first edition, the guide continues to emphasize that successor liability attaches when a company merges with or acquires another company, assuming the acquired company was previously subject to the FCPA. However, new language in the guide notes that the DOJ and the SEC "recognize the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity." Consistent with the recently updated guidance in the DOJ's "Evaluation of Corporate Compliance Programs,"

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the guide now states that the DOJ and the SEC recognize that robust pre-acquisition due diligence may not always be possible, but that timely and thorough post-acquisition due diligence and compliance integration efforts are expected.

As reflected by prior enforcement actions, the guide explains that the DOJ and the SEC are more likely to pursue enforcement actions against the predecessor company rather than the acquiring company where the acquiring company uncovered and timely remedied FCPA violations. The guide also flags that under the DOJ's FCPA Corporate Enforcement Policy, "in appropriate cases, an acquiring company that voluntarily discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity."

Interaction Between Internal Accounting Controls and a Compliance Program

Under the FCPA's internal controls provision, issuers are required to devise and maintain a system of "internal accounting controls sufficient to provide reasonable assurances" that transactions are properly executed and recorded. The guide recognizes that internal accounting controls are not coterminous with a company's broader compliance program. However, it notes that effective compliance programs may have components that overlap with an issuer's internal accounting controls. The guide suggests that the SEC may examine an issuer's compliance program in connection with evaluating its internal controls.

As is set forth in the first edition, a company's internal controls "must take into account the operational realities and risks attendant to the company's business, such as: the nature of its products or services; how the products or services get to market; the nature of its work force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption." The new edition further states that "[j]ust as a company's internal accounting controls are tailored to its operations, its compliance program needs to be tailored to the risks specific to its operations."

Update to the "Hallmarks of Effective Compliance Programs"

The often referenced "Hallmarks of Effective Compliance Programs" remain substantively the same in the new edition of the guide. However, in this new edition, the DOJ and the SEC have added "investigations, analysis, and remediation of misconduct" as one of the hallmarks, bringing the guide in line with the DOJ's recently updated Evaluation of Corporate Compliance Programs guidance. (See our June 15, 2020, analysis of the DOJ's updated guidance.)

The guide now states that, to be effective, compliance programs "should have a well-functioning and appropriately funded mechanism for the timely and thorough investigation[s] of any allegations or suspicions of misconduct by the company, its employees, or agents." The guide also states that companies should have in place not only mechanisms to respond to specific incidents of misconduct, but also systems to integrate lessons learned "into the company's policies, trainings and controls" by analyzing the root causes of the misconduct and implementing timely and appropriate remediation. Inserting these factors from the DOJ policy into the guide extends the DOJ-specific guidance to the SEC, which does not have a standalone policy on evaluating corporate compliance programs or internal controls.

Use of Conspiracy and Complicity Theories and Jurisdictional Reach

The second edition of the guide also provides a window into the DOJ's and the SEC's view of current case law and the approach they are likely to take in interpreting the FCPA's provisions where case law is not yet fully developed.

For example, the guide discusses the closely watched criminal prosecution, described above in this newsletter, of a former vice president of Alstom S.A., which resulted in the defendant's acquittal on FCPA charges in February 2020 on the grounds that the government had failed to prove that he was an "agent" of a U.S. entity. (See our September 4, 2018, client alert on U.S. v. Hoskins.) The guide is careful to narrowly interpret the application of this case by noting that it applies to FCPA anti-bribery provisions only, and that it is binding precedent only in the Second Circuit. As such, the substance of the guide on this topic remains unchanged in stating that 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 if they are not, or could not be, independently charged with a substantive FCPA violation. The guide also explains that a foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States.

Notably, recent case law has not addressed several bases of jurisdiction upon which the DOJ has relied in past enforcement actions, such as wire transfers and emails transmitted through the U.S. As in the 2012 edition, the guide states that placing a telephone call or sending an email, text message, or fax from, to or through the United States; sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system; or traveling

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across state borders or internationally to or from the U.S. may all give rise to jurisdiction over issuers and domestic concerns as well as their officers, directors, employees, agents or stockholders.

With respect to individuals who are not entities or domestic concerns, the guide continues to state that "[they] may be prosecuted under the FCPA if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of whether they utilize the U.S. mails or a means or instrumentality of interstate commerce. Thus, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution."

Perhaps in response to *Hoskins* and in acknowledgment that certain limitations may exist on the DOJ's ability to rely on conspiracy theories to establish a violation of the anti-bribery provisions with respect to co-conspirators not subject to the FCPA (who also did not take any action in the United States), the second edition guidance no longer states that "any co-conspirators, even if they did not themselves attend the meeting" may be subject to prosecution. Moreover, the second edition guidance no longer states that liability extends to foreign nationals or companies that aid or abet, conspire with, or act as agents of an issuer or domestic concern, "regardless of whether the foreign national or company itself takes any action in the United States."

Criminal Violations of the Accounting Controls Provisions

The guide now states that a six-year statute of limitations period applies to criminal violations of the FCPA's accounting provisions based on 18 U.S.C. § 3301 because the accounting provisions qualify as securities fraud offenses. Criminal violations of the anti-bribery provisions, on the other hand, are subject to a five-year statute of limitations. For practical purposes, the guide notes that companies or individuals cooperating with the DOJ may enter into a tolling agreement that voluntarily extends the limitations period "so that they may have additional time to do their own investigation of the conduct, as well as to give them an opportunity to meet with the government to discuss the case and attempt to reach a negotiated resolution."

The guide also clarifies that "willfulness" applies to the "intent" requirement with respect to companies when determining potential criminal violations of the act's accounting controls provisions. Citing two corporate settlements, the guide now states that "[c]riminal liability can be imposed on companies and individuals for knowingly and willfully failing to comply with the FCPA's books-and-records or internal controls provisions." The guide generally explains that "willfulness" means acting with knowledge that the conduct at issue was unlawful, and that proof of willfulness is not required to establish corporate civil or criminal liability under the anti-bribery provisions, though proof of corrupt intent is. By contrast, willfulness is required to prove criminal liability against an individual defendant under the FCPA.

To illustrate the intent requirement applicable to companies with respect to potential violations of the act's accounting controls provisions, the guide includes two case references. In one, the company admitted to falsifying its books and records by falsifying records related to the retention, services and payments to an intermediary to conceal the true nature of payments. The company also admitted that it failed to implement a system of internal controls relating to due diligence and oversight of third-party intermediaries. In the other example, the company admitted that it retained so-called consultants who did little or no consulting work, mischaracterized the payments in its general ledger, and admitted that its senior executives provided false or incomplete representations about the effectiveness of the company's internal controls to the parent company on their Sarbanes-Oxley certifications. Given these factors, the DOJ determined that the company knowingly and willfully caused its parent issuer to falsify its books and records.

Incorporation of DOJ Policies and Added Emphasis on Factors That May Lead to a Declination Presumption

The guide helpfully incorporates and summarizes the DOJ's recent policies with respect to corporate enforcement, monitorships, "anti-piling on" and evaluation of corporate compliance programs.

Notably, in its discussion of the DOJ's FCPA Corporate Enforcement Policy, the guide now provides three detailed examples of declinations, illustrating the DOJ's policy that where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there is a presumption that the DOJ will decline to prosecute, absent aggravating circumstances. The examples are notable because the improper payment amounts were relatively high and the improper conduct involved high-level executives. The declination examples also reflect that the DOJ will consider a company's agreement to disgorge all profits made from illegal conduct and whether the DOJ is able to identify and charge the culpable individuals, among other factors.

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Other Relevant Updates

Gifts, Travel, Entertainment and Other Things of Value

The guide provides more recent examples in corporate settlements of what is likely to be considered improper gift-giving, and continues to emphasize that clear and easily accessible guidelines and processes for gift-giving are an essential part of an effective compliance program. The newly added examples focus on high-value extravagant gift-giving, travel and entertainment, but also serve as a reminder regarding other "things of value" that have been key factors in past enforcement actions, such as paying for school tuition, per diems and travel; providing entertainment related to purported "factory visits" or "training" trips arranged for foreign officials; or hiring, promoting and retaining children of foreign officials in order to win business with those officials. As in its first edition, the guide states that "[t]he larger or more extravagant the gift, however, the more likely it was given with an improper purpose."

The Meaning of "Instrumentality of a Foreign Government"

As in the first edition, the guide states that "foreign officials" under the FCPA include officers or employees of a department, agency or "instrumentality" of a foreign government. To further refine the factors used to identify an "instrumentality," the guide now cites to a seminal 2014 case, *United States v. Esquenazi*, which was the first appellate court interpretation of the meaning of "foreign official." In that case, the Eleventh Circuit concluded that an "instrumentality" under the FCPA is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The guide sets forth the nonexhaustive list of factors that the Eleventh Circuit used to determine whether the government "controls" an entity as well as factors to determine whether the entity performs a function that the government treats as its own. These factors align with the nonexhaustive list in the first edition of the guide derived from final jury instructions used in various circuit courts, and do not signal a significant departure from the DOJ's and the SEC's approach with respect to identifying "instrumentalities" of a foreign government.

Third-Party Payments

The guide cites new examples of companies using third-party sales agents in foreign countries to win business. The examples support the DOJ's and the SEC's warning that paying bribes through a third party, particularly in the form of "commissions" to sales agents, does not eliminate the potential for criminal or civil FCPA liability, and that violations of the FCPA on this basis frequently lead to high penalties.

Foreign Written Law Defense

The guide now relies on a 2019 case to support the DOJ and the SEC position that the "local law" affirmative defense is narrow and rarely viable, except where a written local law or regulation explicitly permits corrupt payments. In *United States v. Ng Lap Seng*, the U.S. District Court for the Southern District of New York rejected the defendant's request to provide the jury with an instruction that the jury must acquit if the payments at issue were lawful under the written laws and regulations of the foreign countries at issue. The court found the proposed instruction was "inconsistent with the plain meaning of the language of the written laws and regulations affirmative defense contained in the FCPA."

Disgorgement of Ill-Gotten Gains as Equitable Relief

The guide now references recent cases that discuss the SEC's ability to disgorge profits generated from FCPA violations. In *Kokesh v. SEC*, the U.S. Supreme Court ruled that because the civil disgorgement remedy constitutes a "penalty," it is subject to the five-year statute of limitations set forth in 28 U.S.C. § 2462. Subsequently, in *SEC v. Liu*, the Supreme Court affirmed the SEC's ability to seek disgorgement as long as (i) the amount does not exceed a wrongdoer's net profits and (ii) it is awarded for victims.

* * *

The second edition of the FCPA guide's reflection of new enforcement actions, case law and enforcement policies is especially useful given that FCPA enforcement has continued apace in recent years. Although the backbone of the guidance remains largely similar to the first edition, the updates reflect the DOJ's and the SEC's continued focus on FCPA enforcement and emphasis on adequate, effective and responsive compliance programs and internal controls.

The Impact of COVID-19 on White Collar Enforcement

While enforcement agencies have not halted work in response to COVID-19, there is anecdotal evidence that some agencies have slowed their investigations as remote working impacts matter management. Enforcement agencies are pursuing work-arounds to handle active investigations while maintaining social distancing, such as requesting remote interviews. Where enforcement agencies have allowed, document production has moved to purely electronic means. Internal interviews, meetings and court hearings are progressing by video and teleconference. However, disruptions from remote working will make embarking on new large-scale investigations difficult for enforcement agencies, given potential challenges in fact finding, particularly regarding cross-border matters. The French Anti-Corruption Agency, for example, has indicated that it will not conduct new examinations during the COVID-19 lockdown period. We also anticipate some carryover delay as enforcement agencies resume in-office activities following potentially extended periods of remote working.

To permit firms to focus on heightened risks in this environment and to assist consumers, the Federal Reserve is allowing institutions additional time to resolve noncritical existing supervisory findings.

Once working conditions return to pre-pandemic arrangements, enforcement activity is also likely to return to pre-crisis levels, with increased focus on any misconduct that occurred during the period of market disruption related to COVID-19. Enforcement activity also may increase as investigators look to compensate for the pandemic slowdown. The following are potential areas of heightened COVID-19-related enforcement activity for corporate clients. In-house legal and compliance officers should remain appropriately diligent.

Trading Risk

Increased volatility in debt and equity markets likely will cause enforcement agencies to focus on various forms of market abuse. For example, financial products and trading strategies that have proliferated over the last decade, such as exchange-traded funds and algorithmic trading, may be scrutinized. If such products and strategies are shown to have amplified the impact of market swings, particularly downward swings, this interplay may be an area of enforcement interest, particularly because of the impact that market declines have on "main street" investors who have passively invested their retirement funds. The DOJ's and the CFTC's focus on spoofing and other manipulative behavior is also likely to continue.

Any trading activity that could be viewed as having inappropriately sought to take advantage of the market disruption from COVID-19 will almost certainly be a focus for authorities. On March 17, 2020, the U.K. Financial Conduct Authority released guidance noting that "[f]irms should continue to take all steps to prevent market abuse risks," which "could include enhanced monitoring, or retrospective reviews." The reference to retrospective reviews suggests that the FCA is already encouraging regulated entities to not only prevent misconduct but also to identify for future enforcement action internal misconduct that has already occurred.

Tax Risk

With governments facing bills for large-scale bailouts and social support programs, preventing and punishing tax evasion may also receive increased focus. European regulators already are focused on cum-ex trading, a course of dealing whereby multiple parties claim tax benefits from a single block of securities around dividend dates. Given reports of how widespread cum-ex trading was, it will likely be further scrutinized. European governments may continue to look to large technology companies as potential targets for tax enforcement. The U.K. may look to relatively new legislation that has not yet been widely deployed — the offense of failing to prevent facilitation of tax evasion — to amplify recoveries for tax offenses when they have been identified. As with the U.K. Bribery Act, a corporation can be liable for this offense unless it can prove that it had adequate preventative measures in place. U.K. prosecutors have had success obtaining deferred prosecution agreements in connection with "failing to prevent" offenses in the bribery context, and that trend also may emerge in tax cases.

Sanctions and Anti-Money Laundering Risk

Prior to the COVID-19 crisis, sanctions violations were seeing increased enforcement activity. That is unlikely to change. Likewise, as market disruptions generate flight to safe haven assets and currencies, banks should focus on ensuring the continuity of critical operations in their AML and sanctions programs. However, regulators have acknowledged the strain on operations presented by the pandemic. For example, on March 24, 2020, the Board of Governors of the Federal Reserve System issued guidance on how its supervisory approach is adjusting in light of COVID-19. The guidance stated that the board recognizes the current situation's significant and varied impact on its regulated institutions and will work with them to understand the specific issues. The board also announced that, to permit firms to focus on heightened risks in this environment and to assist consumers, it is allowing institutions additional time to resolve noncritical existing supervisory findings. Specifically, the Federal Reserve is extending the time periods for institutions to remediate existing supervisory findings by 90 days, unless the Federal Reserve notifies the institution that a more timely remediation is needed to address a heightened risk or to help consumers. Supervisory findings include matters requiring attention, matters requiring immediate attention, and provisions in formal or informal enforcement actions.

Corruption Risk

The combination of stretched management and pressure to generate revenue may create issues from an anti-bribery and corruption standpoint. For example, remote working may lead sales personnel to feel as though there is less oversight over their activities, in turn leading to the payment of bribes in connection with winning contracts. Additionally, governmental actors will be more involved in supply chain and procurement activity during the COVID-19 crisis than they were in periods of regular functioning, and a greater number of government touchpoints increases the possibility that improper payments or benefits may be delivered to government officials. Enforcement agencies are unlikely to be sympathetic to bribery related to the response to COVID-19, especially if the perpetrators have benefitted financially from their misconduct, and agencies will experience significant political pressure to identify and punish any instances of corruption that could arguably have impacted governmental responses to the pandemic.

Competition Risk

Although the pandemic conditions present opportunities for legitimate collaboration among businesses, enforcement authorities are remaining watchful for potentially anticompetitive activity. In early March 2020, the DOJ announced its intention to hold accountable violators of federal antitrust laws in connection with the manufacture, distribution or sale of public health products such as face masks, respirators and diagnostics. Subsequently, the DOJ's Antitrust Division and the FTC issued a joint statement announcing expedition of COVID-19-related requests for guidance to the division's Business Review Process and the FTC's Advisory Opinion Process. While the two agencies indicated that they would "account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath," they also would not hesitate to pursue enforcement actions against those perceived to be taking advantage of the crisis to engage in anticompetitive conduct. Price gouging is also likely to become an enforcement target and has been a particular focus of state attorneys general.

Disclosure and Accounting Risk

Periods of economic strain historically have revealed and sometimes caused accounting misconduct. Companies will face decisions regarding how to describe COVID-19's impact on their performance and operations, and understating or misstating the impact of the crisis could lead to enforcement problems in the future. For example, following the 2008 financial crisis, the CFTC, the DOJ, the FCA and the U.K. Serious Fraud Office obtained settlements from banks that had understated LIBOR submissions in order to avoid publishing that they were facing liquidity issues. Financial institutions and insurers should update disclosures on nonperforming loans and claims, respectively. All issuers should ensure that they appropriately disclose COVID-19 related impacts and uncertainty.

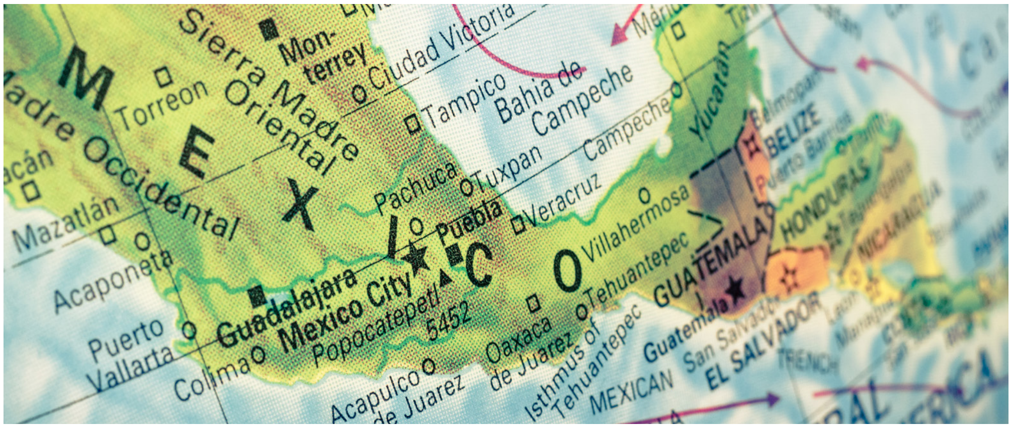
Additionally, in a declining stock market, management may face increased pressure to show earnings resilience. Auditors, compliance groups, boards of directors and other supervisors should be particularly diligent in this period, ensuring that the companies they oversee are not engaging in accounting misconduct in order to hide the impact of the crisis.

Accounting and disclosure misconduct is often coupled with trading misconduct, and trading by corporate insiders will continue to be an area of focus for enforcement agencies. Highlighting this priority, on March 23, 2020, the SEC's Co-Directors of the Division of Enforcement issued a public statement noting that the COVID-19 crisis will lead corporate insiders to have access to "new material nonpublic information that may hold an even greater value than under normal circumstances." The statement reminds corporate insiders and asset managers and other market participants of their duties to maintain this information in confidence and that "[t]rading in a company's securities on the basis of inside information may violate the antifraud provisions of the federal securities laws."

Conclusion

While the COVID-19 crisis will continue to impact enforcement activity, companies will likely see an increase in enforcement activity focused on how they have reacted to the market displacement. Companies should remain vigilant over their compliance and governance processes in the face of the pandemic's ongoing disruptions.

The Changing Landscape of Anti-Corruption Enforcement in Mexico



In 2015, Mexico began taking significant steps to transform its anti-corruption legal framework. In the time since then, Mexico has fallen thirty-three positions in Transparency International's Corruption Perceptions Index — which ranks countries by their perceived levels of public sector corruption — from 95 out of 168 countries in 2015[3] to 130 out of 180 countries in 2019.[4]

This article discusses Mexico's changing anti-corruption landscape, specifically: (i) its enacted and amended anti-corruption laws and (ii) enforcement efforts by the administration of current President Andrés Manuel López Obrador.

Since taking office on December 1, 2018, President López Obrador's administration and his political party have taken steps to enhance Mexico's anti-corruption legal framework.

Mexico's Shifting Anti-Corruption Legal Framework

A May 2015 amendment to the Constitution of Mexico ushered in sweeping anti-corruption legislation. The amendment, among other things, created the National Anti-Corruption System, a government entity charged with coordinating anti-corruption efforts at the federal and state levels.[5] Subsequently, in July 2016, then-President Enrique Peña Nieto ratified and published a series of laws implementing the constitutional amendment,[6] including:

1. the General Law of the National Anti-Corruption System, which coordinates all Mexican governmental bodies (at the federal, state and municipal levels) in preventing, detecting and punishing administrative violations and acts of corruption in the private and public sectors;[7]
2. the Federal Audit and Accountability Law, which establishes the Superior Auditor of the Federation, which investigates administrative offenses;[8]
3. the Organic Law of the Federal Court on Administrative Justice, which grants the Federal Court on Administrative Justice authority to sanction both public servants and private parties for serious administrative violations under the National Anti-Corruption System;[9] and

[3] Corruption Perceptions Index 2015, Transparency Int'l (as of Nov. 11, 2019).

[4] Corruption Perceptions Index 2019, Transparency Int'l (as of Feb. 14, 2020).

[5] *Diario Oficial de la Federación* 27-05-2015 (Mex.); *Constitución Política de los Estados Unidos Mexicanos*, *Diario Oficial de la Federación* 05-02-1917, *últimas reformas* DOF 09-08-2019 (Mex.) (*Constitución*).

[6] Sean Hecker et al., "Mexico's Anti-Corruption Reform Could Be Game Changer," *Law360* (Nov. 8, 2016).

[7] *Ley General del Sistema Nacional Anticorrupción*, *Diario Oficial de la Federación* 18-07-2016 (Mex.).

[8] *Ley de Fiscalización y Rendición de Cuentas de la Federación*, *Diario Oficial de la Federación* 18-07-2016 (Mex.).

[9] *Ley Orgánica del Tribunal Federal de Justicia Administrativa*, *Diario Oficial de la Federación* 18-07-2016 (Mex.).

The Changing Landscape of Anti-Corruption Enforcement in Mexico

4. the General Law on Administrative Responsibilities,[10] which (i) establishes sanctions for public officials, individuals and companies for an array of administrative misconduct such as bribery, misuse of public resources and influence peddling;[11] (ii) provides new requirements that public officials declare their assets, taxes and conflicts of interest on an annual basis;[12] (iii) provides increased penalties for violations of the anti-corruption laws;[13] and (iv) provides incentives for companies to self-report misconduct[14] and implement compliance programs[15] to avoid or minimize corporate liability.

Further changes to the Mexican legal framework in July 2016 included amendments to the Federal Criminal Code (including the addition of new corruption offenses and penalties); the establishment of an Anti-Corruption Prosecutor's Office, which is tasked with investigating and prosecuting acts of corruption; and the strengthening of the role of the secretary of public administration, which is responsible for auditing the actions of federal government officials and the private parties that interact with the Mexican federal government, as well as imposing administrative sanctions for improper conduct.[16]

The Administration of Andrés Manuel López Obrador

Fighting corruption was a key pillar of current President López Obrador's presidential campaign.[17] His success at the polls was due in part to public outrage with the corruption that preceded in past administrations[18] and the perception among the Mexican populace of a lack of accountability for government wrongdoing.[19] Indeed, exit polls showed that corruption was the most important issue for voters in the 2018 Mexican elections.[20]

[10] *Ley General de Responsabilidades Administrativas*, *Diario Oficial de la Federación* 18-07-2016, *últimas reformas* DOF 12-04-2019 (Mex.).

[11] *Id.* at Articles 51-72.

[12] *Id.* at Articles 26-31.

[13] *Id.* at Articles 78-79, 81.

[14] *Id.* at Article 81.

[15] *Id.* at Article 25.

[16] Law360, *supra* note 4.

[17] "Mexico Election: López Obrador Vows To Fight Corruption," BBC News (July 2, 2018), Patrick J. McDonell, "Mexico's President-Elect Lopez Obrador, Who Takes Office Saturday, Vows a National Transformation," *Los Angeles Times* (Nov. 30, 2018).

[18] *Los Angeles Times*, *supra* note 15.

[19] Juan Montes & José de Córdoba, "Mexicans Say They Will Vote for Change," *The Wall Street Journal* (June 29, 2018).

[20] Francisco Abundis, *Identidades, candidatos, campañas y corrupción*, *Milenio* (July 19, 2018).

Enhancements to the Anti-Corruption Framework

Since taking office on December 1, 2018, President López Obrador's administration and his political party have taken steps to enhance Mexico's anti-corruption legal framework. For example, on December 14, 2018, the General Congress of the United Mexican States approved a new law that establishes a framework for the federal Attorney General's Office (*Fiscalía General de la República*) and ensures that the attorney general and investigators will be politically independent from the executive branch.[21] In January 2019, Mexico confirmed its first federal attorney general, Alejandro Gertz Manero, who is serving a nine-year term.[22] Attorney General Manero has filled key positions in the office, including María de la Luz Mijangos Borja as Mexico's first anti-corruption prosecutor.[23] Also in April 2019, Mexico approved an expansion of Article 19 of the Constitution of Mexico (which allows for automatic pre-trial detention for certain types of crimes) to include corruption.[24]

Additionally, in June 2019, Mexico ratified the United States-Mexico-Canada Agreement (USMCA),[25] which provides for cross-border cooperation between enforcement authorities in each country and for each country to "adopt or maintain legislative and other measures" that criminalize, among other things, bribery, solicitation or acceptance of a bribe, and embezzlement or misappropriation of public funds.[26] The USMCA took effect on July 1, 2020.

Certain of President López Obrador's campaign promises remain outstanding, however. For instance, he has yet to name any anti-corruption magistrates to the Federal Tribunal of Administrative Justice; these justices will have exclusive jurisdiction over serious administrative offenses, such as money laundering and embezzlement.[27] At the state level, anti-corruption prosecutors

[21] *Ley Orgánica de la Fiscalía General de la República*, *Diario Oficial de la Federación* 14-12-2018, *últimas reformas* DOF 20-12-2018 (Mex.).

[22] "Mexico Names Veteran Lawman as New Attorney General," AP News (Jan. 18, 2019).

[23] *Perfil. María de la Luz Mijangos Borja, al combate de la corrupción*, *El Universal* (Feb. 8, 2019).

[24] *Declaran reformado el artículo 19 de la Constitución en materia de prisión preventiva oficiosa*, *Senado de la República* (April 4, 2019); *Constitución*, *supra* note 3.

[25] Mary Beth Sheridan, "Mexico becomes first country to ratify new North American trade deal", *The Washington Post* (June 19, 2019).

[26] Office of the U.S. Trade Representative, U.S. Mex. Can. Agreement, Chapter 27, Article 27.3-1: Measures to Combat Corruption.

[27] Gina Hinojosa, "What's Happening with Mexico's National Anti-Corruption System? Progress and Continued Challenges at the Federal and State Level," Wash. Office on Latin Am. (WOLA) (Oct. 28, 2019).

have reportedly voiced concerns that they lack the necessary resources and autonomy to combat corruption.[28] Additionally, in June 2020, President López Obrador railed against the National Anti-Corruption System, saying that it was an expensive and ineffective body, and proposed several changes to its governance.[29] His statements have led to speculation that the administration may attempt to dismantle the National Anti-Corruption System.[30]

Enforcement Efforts

Meanwhile, many corruption investigations are underway in Mexico. According to the first Annual Report from the Special Prosecutor's Office for Combating Corruption, the office launched 950 investigations between March 2019 and March 2020.[31] Mexico has joined other Latin American countries in investigating allegations stemming from the corruption scandal of a Brazilian construction conglomerate whose employees admitted to paying bribes in exchange for contracts across the world.[32] Five former employees of the company admitted to paying $10.5 million dollars to Emilio Lozoya, the former head of Petróleos Mexicanos (Pemex), the Mexican state-owned oil company, and a former member of the Enrique Peña Nieto campaign.[33] Mexican prosecutors issued an arrest warrant for Mr. Lozoya for three charges related to "acts of corruption" committed during the time that he led Pemex.[34] Prosecutors also issued arrest warrants for several members of his family, including his mother and sister.[35] Mr. Lozoya's mother was extradited from Germany and placed on house arrest.[36]

Additionally, prosecutors claimed that Mr. Lozoya received $3.5 million in corrupt payments from Altos Hornos de México, a Mexican manufacturer of steel products.[37] Officials alleged that in exchange, he agreed that Pemex would purchase a fertilizer plant, Agro Nitrogenados, from Altos Hornos at an inflated price.[38] Mexican prosecutors therefore issued an arrest warrant for Mr. Lozoya and for Alonso Ancira, chairman of Altos Hornos,[39] who was subsequently arrested in Spain and later released on bail.[40] Mr. Ancira's case and he remains in Spain.[41] Relatedly, Mexico's Ministry of Public Administration fined José Manuel Carrera Panizzo (former corporate director for alliances and new business at Pemex) more than $200 million and disqualified him from holding public office for ten years after a corruption investigation uncovered that he was responsible for Pemex's purchase of Agro Nitrogenados in 2013.[42]

Mr. Lozoya is also under investigation for Pemex's purchase of another fertilizer plant, Fertinal, at inflated prices.[43] In February 2020, he was arrested in Spain after being on the run since May 2019.[44] In July 2020, he was extradited to Mexico and was being held in home detention as his corruption case proceeds.[45] As of August 2020, Mr. Lozoya has been cooperating with authorities and, in a declaration that was leaked to the press, has named more than twelve current and former politicians, including three former Mexican presidents, as being involved in corruption.[46] He allegedly has video recordings that substantiate some of his claims.[47]

[28] Gina Hinojosa & Maureen Meyer, "Five Years On, What's Still Missing from Mexico's National Anti-Corruption System," WOLA (April 15, 2020).

[29] *See* Héctor Molina, *AMLO cuestiona la utilidad del Sistema Nacional Anticorrupción*, *El Economista* (June 11, 2020).

[30] *See, e.g.*, Víctor Chávez, *Un exceso de AMLO, buscar terminar ahora con el Sistema Nacional Anticorrupción, acusan partidos*, *El Financiero* (June 11, 2020); Emiliano Montes de Oca, *¿El desmantelamiento del Sistema Nacional Anticorrupción?*, *Expansión* (June 17, 2020).

[31] *Informe Anual de Actividades y Resultados, Fiscalía Especializada en Combate a la Corrupción* (Mar. 11, 2020).

[32] *Interroga FGR a exfuncionarios de Odebrecht en Brasil*, *Aristegui Noticias* (April 8, 2019).

[33] *Id.*

[34] Rebekah F. Ward & Anthony Esposito, "Mexico Issues Arrest Warrants for Ex-Pemex CEO Lozoya, Family Members," Reuters (July 5, 2019).

[35] *Id.*

[36] *Vinculan a proceso a madre de Emilio Lozoya y queda bajo arraigo domiciliario*, *Aristegui Noticias* (Nov. 2, 2019); *Agencia Reforma, México: Gilda Margarita Austin, madre de Emilio Lozoya, a juicio*, *Dallas Morning News* (Aug. 19, 2020).

[37] David Luhnow & Juan Montes, "Decrepit Factory Becomes Symbol of Mexican Corruption Battle," *The Wall Street Journal* (June 4, 2019).

[38] *Id.*

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[40] *Alonso Ancira, dueño de Altos Hornos paga fianza de 1 millón de euros para salir de prisión*, *El Economista* (July 1, 2019).

[41] Diana Lastiri, *Juez deja sin efectos acusación de la FGR contra Alonso Ancira por caso Agro Nitrogenados*, *El Universal* (Aug. 19, 2020).

[42] AP, *Millonaria sanción a exdirectivo de Pemex por corrupción*, *Diario de Yucatán* (July 30, 2019).

[43] Peniley Ramírez, *Exclusiva: Pemex pagó sobreprecio millonario de una fábrica basándose en un reporte 'con información engañosa,' según expertos*, *Univisión* (June 11, 2019).

[44] José de Córdoba & Juan Montes, "Former Pemex Chief Arrested in Spain," *The Wall Street Journal* (Feb. 12, 2020).

[45] Patrick J. McDonnell, "Under arrest for corruption, Mexico's former oil boss takes aim at three ex-presidents," *Los Angeles Times* (Aug. 20, 2020).

[46] *Id.*

[47] *Id.*

In another Mexican investigation, in August 2019, Rosario Robles Berlanga, the former social development and agrarian, territorial, and urban development secretary, was jailed for allegedly participating in an embezzlement scheme that diverted from federal agencies approximately $260 million destined for welfare programs.[48] The scheme allegedly involved 11 government departments in Mexico, eight Mexican universities and 186 companies, most of which were front companies.[49] The government entities entered into direct contracts with the universities, under which the universities were to conduct studies or provide services.[50] The universities in turn subcontracted the front companies in exchange for a commission.[51] The Mexican authorities have indicated that other government officials are now also being investigated in connection with this scheme.[52] Ms. Robles has been in jail for one year and denies any wrongdoing.[53]

Conclusion

In light of the enforcement efforts that are underway in Mexico, companies that conduct business in Mexico should ensure they have strong anti-corruption and anti-money laundering compliance programs. Companies with weak Foreign Corrupt Practices Act compliance programs are also at risk of regulatory action in the U.S.

[48] Eric Martin, "Former Mexican Cabinet Minister Heads to Jail in Graft Probe," Bloomberg (Aug. 13, 2019).

[49] Israel Rodriguez, *Participaron 11 dependencias públicas en la 'estafa maestra'*, *La Jornada* (Aug. 15, 2019, 7:24 AM).

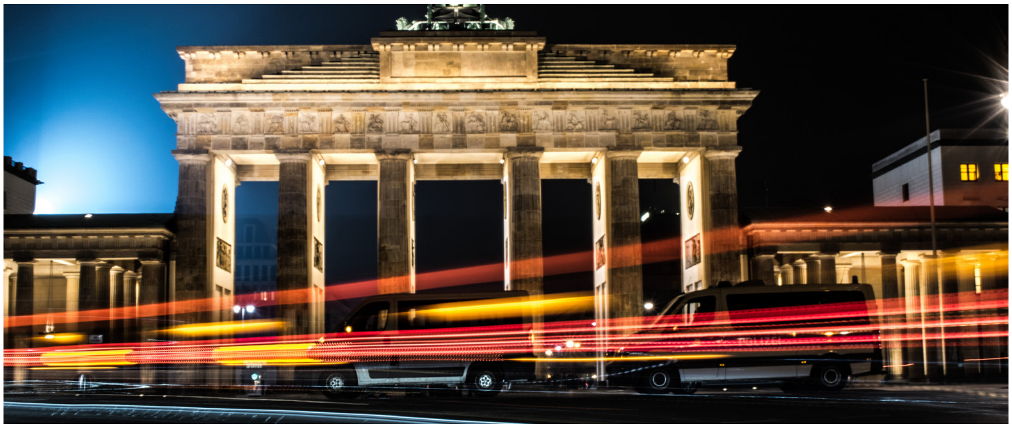
[50] *Id.*

[51] *Id.*

[52] "The 'Master Fraud' Over 1 Billion USD Diverted to 172 Companies During the Peña Nieto Administration," *Yucatan Times* (Sept. 16, 2019).

[53] César Arellano García, *Rosario Robles cumple un año en prisión*, *La Jornada* (Aug. 13, 2020).

New German Law Expected To Transform Corporate Investigations



In June 2020, the German Federal Administration adopted a draft Corporate Sanctions Act (*Verbandssanktionengesetz*) designed to enhance and tighten the rules on enforcement against corporations. Under current German law, corporations cannot be found guilty of criminal acts, as such entities lack individual culpability, which is a prerequisite of any crime according to German legal tradition. German authorities rely on the Administrative Offenses Act (*Ordnungswidrigkeitengesetz*) to investigate and fine corporations for crimes committed by their employees or directors. The draft Corporate Sanctions Act (the Draft Act) will change that. The German parliament, the *Bundestag*, is scheduled to pass the law by early 2021, and the new law will take effect after a transition period of two or three years.

The intended reforms are significant and include (i) an obligation for authorities to investigate corporations, (ii) harsher fines and other penalties for corporations and (iii) substantial discounts for cooperation with authorities.

The Ministry of Justice estimates that around 15,000 new cases of corporate liability will go to court under the new act each year.

Mandatory Investigations Against Corporations

Under the Draft Act, authorities will be obliged to investigate a corporation whenever they become aware of a criminal offense that is related to the corporation's affairs. Under current law, authorities apply discretion when deciding whether or not to investigate the corporation concerned. An obligation to investigate exists only with respect to individuals, *i.e.*, the natural persons that are suspected of committing the offense.

The Draft Act proposes such obligation to investigate corporations only in cases where the authorities suspect that an individual has committed a criminal offense. If the suspected conduct qualifies as only an administrative offense, as is the case for many antitrust infringements, investigations against the company would not necessarily ensue. The enforcement authorities could continue to apply discretion when investigating such offenses. The Ministry of Justice estimates that around 15,000 new cases of corporate liability will go to court under the new act each year (with many more cases to be investigated and closed without court proceedings).

Harsher Fines and Other Penalties

One of the core reforms of the Draft Act relates to corporate penalties. Under current German law, the maximum penalty for corporations is €10 million per infringement and forfeiture of economic benefits generated through unlawful actions. Many regard the penalty element as

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a lesser risk than the forfeiture element. For instance, in 2018, the Braunschweig prosecutor imposed a €1 billion fine on an automaker in connection with diesel emissions — the forfeiture element of this fine amounted to €995 million, and the "penalty element" of the fine amounted to only €5 million.

This ceiling will change. Under the Draft Act, companies with an average annual turnover of €100 million or more may face fines of up to 10% of their annual turnover. The calculation will be made based on the global annual turnover of an economic unit, even across several group entities. Economic benefits will continue to be forfeited. As a result, much higher fines are expected for companies involved.

Discounts for Cooperation With Authorities

The Draft Act also formalizes discounts on penalties. Under the Draft Act, the submission to the authorities of the results of a properly executed internal investigation will, as a rule, lead to a 50% discount on the maximum penalty, and will remove any applicable minimum penalty. The requirements of a proper investigation are detailed in the Draft Act, including requirements that formalize certain rights that are not provided under current employment law, but that have been granted only voluntarily by many companies through their respective corporate policies or investigation guidelines. If a company meets all requirements detailed for investigations in the Draft Act, the company will not only receive the 50% discount on the penalty, but also will be fined in a nonpublic procedure. The fine order and the fact that the company has been fined will not be made public by the authorities.

Many corporations already initiate internal investigations comparable to those contemplated in the Draft Act, as German corporate law already includes compliance obligations commonly referred to as "*Aufklären*, *Abstellen*, *Ahnden*," *i.e.*, "investigate, remedy, reprimand." Thus, if properly executed, internal investigations should satisfy both senior management's compliance obligations and enable a discrete resolution with the German government at a significantly reduced fine.

Companies facing government inquiries will need to regularly re assess their position vis-à-vis the authorities. At the outset of a government investigation, many companies will cooperate in order to preserve the potential 50% discount on a later fine. As more facts of the case become known, terminating cooperation and focusing on defense against the allegations raised may become a viable option. Some companies may want to pursue both cooperation and defense simultaneously, in which case the Draft Act prescribes a strict separation of functions: the (in-house or external) attorneys conducting the internal investigation as part of the company's cooperation efforts may not, at the same time, act as defense counsel for the company. This requirement is in contention and may be revised before legislative proceedings end.

Strategic decisions regarding cooperation and defense, given their potential impact on cooperation bonuses and the effective defense of the company, will often be made by senior management or the management board. These decisions should be prepared with great care in order to avoid any personal board member liability.

Next Steps

The Draft Act addresses a number of other issues such as additional forms of punishment for corporations (including the imposition of a third-party monitor), the scope of the attorney-client privilege (which will continue to be extremely restricted under German law) and jurisdiction (which will apply also to criminal offenses committed abroad, and to criminal offenses relating to foreign corporations having a subsidiary or branch in Germany). All of these aspects continue to be subject of a lively debate, and the *Bundestag* may adjust some details during parliamentary debates. The Merkel administration and its supporting coalition in the German Parliament, however, have set a goal of enhancing enforcement and increasing penalties while incentivizing good corporate governance and cooperation.

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