

## Q3 2018 FCPA Report

Foreign Corrupt Practices Act enforcement activity increased sharply in the third quarter of 2018. Between July and September, the DOJ and SEC nearly doubled the number of enforcement actions filed this year, increasing the total count from 19 at the end of Q2 to 33 at the end of Q3. The SEC took the lead in enforcement, initiating 9 of the 14 new actions (or 64 percent). In addition, the DOJ formally declined to prosecute one company and announced four actions that were filed under seal in previous quarters. With the massive global resolution against Petroleo Brasileiro S.A., commonly known as “Petrobras,” total sanctions imposed this year have more than doubled from over \$1.2 billion at the end of the second quarter to almost \$3.2 billion at the end of this quarter, though almost one-third of that total is payable to foreign regulators.

### Enforcement Statistics

FCPA enforcement activity can be measured in many different ways. For purposes of these statistics, the Clearinghouse counts all activity by an agency against a single corporate group based on the same underlying bribery scheme as one enforcement action, and counts individual actions separately. Declinations with disgorgement are treated as enforcement actions. The Clearinghouse analysis includes actions that don’t allege FCPA violations but that are FCPA-related.

Between July and September of 2018, the DOJ filed and simultaneously settled FCPA-related enforcement actions against two companies, including one declination with disgorgement pursuant to the revised FCPA Corporate Enforcement Policy. The DOJ filed actions against three individual defendants, all of which remain ongoing. Although not counted in the quarterly enforcement statistics, the DOJ announced previously filed (but originally sealed) enforcement actions against one company and three individual defendants. The DOJ also formally declined to prosecute one company notwithstanding evidence of FCPA violations. The DOJ did not require any disgorgement but noted in the declination letter that the company is subject to an ongoing parallel investigation by the U.K.’s Serious Fraud Office (SFO) based on the same conduct and has committed to accepting responsibility for that conduct with the SFO.

Figure 1 identifies all of the DOJ enforcement actions and formal declinations filed, unsealed, or first identified as FCPA-related from the start of July through the end of September. Figure 2 identifies all the SEC enforcement actions filed, unsealed, or first identified as FCPA-related during the same period. Only actions (including declinations with disgorgement) that were initiated in the third quarter are counted for purposes of quarterly enforcement statistics.

**Fig. 1, DOJ Enforcement Actions Announced in Q3 2018**

<b>Case</b>	<b>Initiation Date</b>	<b>Countries Implicated</b>	<b>FCPA Claims</b>	<b>Sanctions</b>
U.S. v. Jose Orlando Camacho	July 5, 2017 (unsealed Sept. 13, 2018)	Venezuela	None	Guilty plea, sanctions undetermined
U.S. v. Donville Inniss	March 15 (unsealed Aug. 6)	Barbados	None	Ongoing
U.S. v. Juan Carlos Castillo Rincon	April 11 (unsealed Sept. 13)	Venezuela	Anti-Bribery	Guilty plea, sanctions undetermined
In re Credit Suisse (Hong Kong) Limited	May 24 (announced July 5)	China, Asia-Pacific Region	Anti-Bribery	\$47,029,916
U.S. v. Jose Manuel Gonzalez-Testino	July 27	Venezuela	Anti-Bribery	Ongoing
In re: Guralp Systems Limited [Declination]	August 20	South Korea	None	None
U.S. v. Two Redacted Defendants	August 23	Barbados	None	Ongoing
In re: Insurance Corporation of Barbados Limited [Declination with Disgorgement]	August 23	Barbados	Anti-Bribery	\$93,940
In re Petroleo Brasileiro S.A. – Petrobras	September 27	Brazil	Anti-Bribery, Books & Records, Internal Controls	\$853,200,000 (mostly satisfied by payments to the SEC and Brazilian authorities)

**Fig. 2, SEC Enforcement Actions Announced in Q3 2018**

<b>Case</b>	<b>Initiation Date</b>	<b>Countries Implicated</b>	<b>FCPA Claims</b>	<b>Sanctions</b>
In the Matter of Beam Inc., n/k/a Beam Suntory Inc.	July 2	India	Books & Records, Internal Controls	\$8,181,838
In the Matter of Credit Suisse Group AG	July 5	China, Asia-Pacific Region	Anti-Bribery, Internal Controls	\$29,823,804

In the Matter of Legg Mason, Inc.	August 27	Libya	Internal Controls	\$34,502,494
In the Matter of Sanofi	September 4	Kazakhstan, Jordan, Lebanon, Syria, Palestinian Territory, Bahrain, Kuwait, Qatar, Yemen, Oman, United Arab Emirates	Books & Records, Internal Controls	\$25,206,145
In the Matter of Joohyun Bahn, a/k/a Dennis Bahn	September 6	Middle East Region	Anti-Bribery, Books & Records, Internal Controls	\$225,000 (satisfied by payment of restitution or forfeiture in DOJ action)
In the Matter of United Technologies Corporation	September 12	Azerbaijan, China, Indonesia, Kuwait, Pakistan, South Korea, Thailand	Anti-Bribery, Books & Records, Internal Controls	\$13,986,534
In the Matter of Patricio Contesse Gonzalez	September 25	Chile	Books & Records, Internal Controls	\$125,000
In the Matter of Petroleo Brasileiro S.A. – Petrobras	September 27	Brazil	Books & Records, Internal Controls	\$1,786,673,797 (mostly satisfied by payments to the DOJ, Brazilian authorities, and in a parallel private securities class action lawsuit)
In the Matter of Stryker Corporation	September 28	China, India, Kuwait	Books & Records, Internal Controls	\$7,800,000

### **Petrobras**

On September 27, Petrobras reached a global resolution with the DOJ, SEC, and Brazilian authorities to resolve FCPA violations and agreed to pay more than \$1.7 billion in disgorgement and fines. The settlement includes a

penalty of \$853 million, which will be apportioned 10 percent to the DOJ, 10 percent to the SEC, and 80 percent to the Brazilian government. Petrobras also agreed to pay over \$933 million in disgorgement and prejudgment interest to the SEC, although the disgorgement can be entirely offset by payments Petrobras makes to a settlement fund in a parallel class action proceeding. Taking into account the offsets and credits built into the settlement, Petrobras will ultimately pay around \$171 million to U.S. authorities. The global Petrobras settlement ranks as the second largest in FCPA history after the global settlement with Odebrecht, whose global monetary penalties exceeded \$3.2 billion.

Petrobras also appears to be the first state-owned enterprise to settle FCPA charges with the United States, although the claims were predicated on Petrobras' role as a bribe payer rather than as a bribe recipient. Pursuant to *U.S. v. Castle*, 925 F.2d 831 (5th Cir. 1991) (*per curiam*), government officials who accept bribes are not subject to prosecution under the FCPA or general conspiracy statutes, although they are often prosecuted for related crimes such as money laundering.

### **Individual Defendant Resolutions**

During the third quarter of 2018, three individual defendants pled guilty to FCPA-related offenses, and the DOJ unsealed a fourth guilty plea originally filed in July 2017. Three of the four guilty pleas were connected to a broad investigation into bribery at Venezuela's state-owned oil company, Petroleos de Venezuela, S.A. ("PDVSA") that has ensnared at least 17 individuals so far. Luis Carlos de Leon-Perez pled guilty on July 16 to his role in the scheme, and on September 13, the DOJ announced the guilty pleas of Juan Carlos Castillo Rincon and Jose Orlando Camacho. Camacho, an official with PDVSA, pled guilty on July 5, 2017, but the information and plea remained under seal until September of this year. Finally, Jose Larrea pled guilty on September 11 to money laundering charges connected to an alleged bribery scheme involving the Ecuadoran state-owned oil company, PetroEcuador. All four individuals are awaiting sentencing.

Two individual defendants were sentenced in the third quarter. Anthony Mace and Robert Zubiato, who pled guilty to FCPA charges last year, were executives with SBM Offshore, a Dutch oil and gas services company. On September 28, Mace was sentenced to 3 years in prison and ordered to pay a \$150,000 fine, and Zubiato was sentenced to 30 months in prison and ordered to pay a \$50,000 fine. A third individual defendant, commercial real estate broker Joo Hyun Bahn, who pled guilty to FCPA charges on January 5, 2018, was supposed to be sentenced on September 6. Media reports suggest he was sentenced to 6 months in prison, but the publicly available docket does not confirm that. However, on that date, the court did order Bahn to pay restitution of \$500,000 and preliminarily ordered him to forfeit \$250,000.

In an uncharacteristic loss for the SEC, the civil action against Michael L. Cohen and Vanya Baros, filed in January 2017, fell apart when the court dismissed the suit on July 12, 2018, finding the SEC's claims were time-barred under the five-year statute of limitations. The SEC has not appealed the ruling.

### **Hoskins**

On August 24, the Court of Appeals for the Second Circuit affirmed in part a lower court ruling holding that the government could not charge Lawrence Hoskins, an employee of Alstom S.A.'s U.K. subsidiary, with conspiring to violate the FCPA unless he fell within the category of persons directly covered by the statute. However, the Second Circuit reversed the portion of the lower court's ruling that prohibited the government from attempting to establish that Hoskins was liable as an agent of Alstom's U.S. subsidiary for conspiring with foreign nationals who committed acts in furtherance of the misconduct while in the United States. The *Hoskins* decision thus limits the government's ability to charge foreign companies and individuals with conspiracy, while allowing the government to pursue agency theories of liability. Given the government's history of

charging foreign nationals under expansive principles of agency liability, it is not clear whether *Hoskins* will operate as a meaningful limitation on FCPA enforcement activity.

## **Kokesh**

Just over a year ago, the Supreme Court ruled in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), that the SEC could not seek disgorgement for misconduct that had occurred more than five years prior to the filing of the enforcement action. The court held that disgorgement was a penalty under the law and thus subject to the five-year statute of limitations on monetary penalties.

Since *Kokesh*, the SEC has initiated 16 FCPA-related enforcement actions. In every case, the SEC obtained monetary penalties of some sort, often a mix of disgorgement and civil fines. However, in every case, the SEC charged misconduct that occurred at least partially before the five-year statute of limitations, and in at least seven of the enforcement actions, the entirety of the misconduct is alleged to have occurred before the limitations period. Under *Kokesh*, then, the monetary penalties, including disgorgement, in every enforcement action the SEC has brought since June 2017 should be limited to misconduct that occurred within five years of the enforcement action and, in the seven cases noted above, completely circumscribed.

That the SEC nevertheless obtained monetary penalties against the companies suggests one of two possibilities. First, the government may have avoided *Kokesh* entirely by settling these actions at the time of filing, thereby restricting judicial review of the statute of limitations question. The alternative—and perhaps simpler—explanation is that the SEC insisted on tolling agreements with the defendants upon discovery of the misconduct. Indeed, United Technologies Corporation, which settled with the SEC on September 12, disclosed in SEC filings that it had signed tolling agreements with both the SEC and DOJ. No other company sued for FCPA-related violations in 2018 appears to have disclosed the existence of tolling agreements in their SEC filings.

## **What's Next**

Although three months remain in 2018, this year already ranks second in terms of highest monetary sanctions imposed on corporate groups in a single calendar year, both with respect to U.S. sanctions only and total global sanctions. The Clearinghouse continues to monitor several companies that have disclosed accruals for impending FCPA-related settlements. As noted in previous quarterly reports, Walmart Inc. disclosed in November 2017 that it had accrued \$283 million in anticipation of settling the government's FCPA investigation into the company, although progress on that settlement seems to have stalled. If Walmart resolves its FCPA claims this year, then 2018 would take the top spot in terms of U.S. sanctions. Absent another blockbuster FCPA case, total global sanctions for 2018 would remain the second highest since the FCPA's enactment.