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FCPA 2019 Year in Review

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Agenda

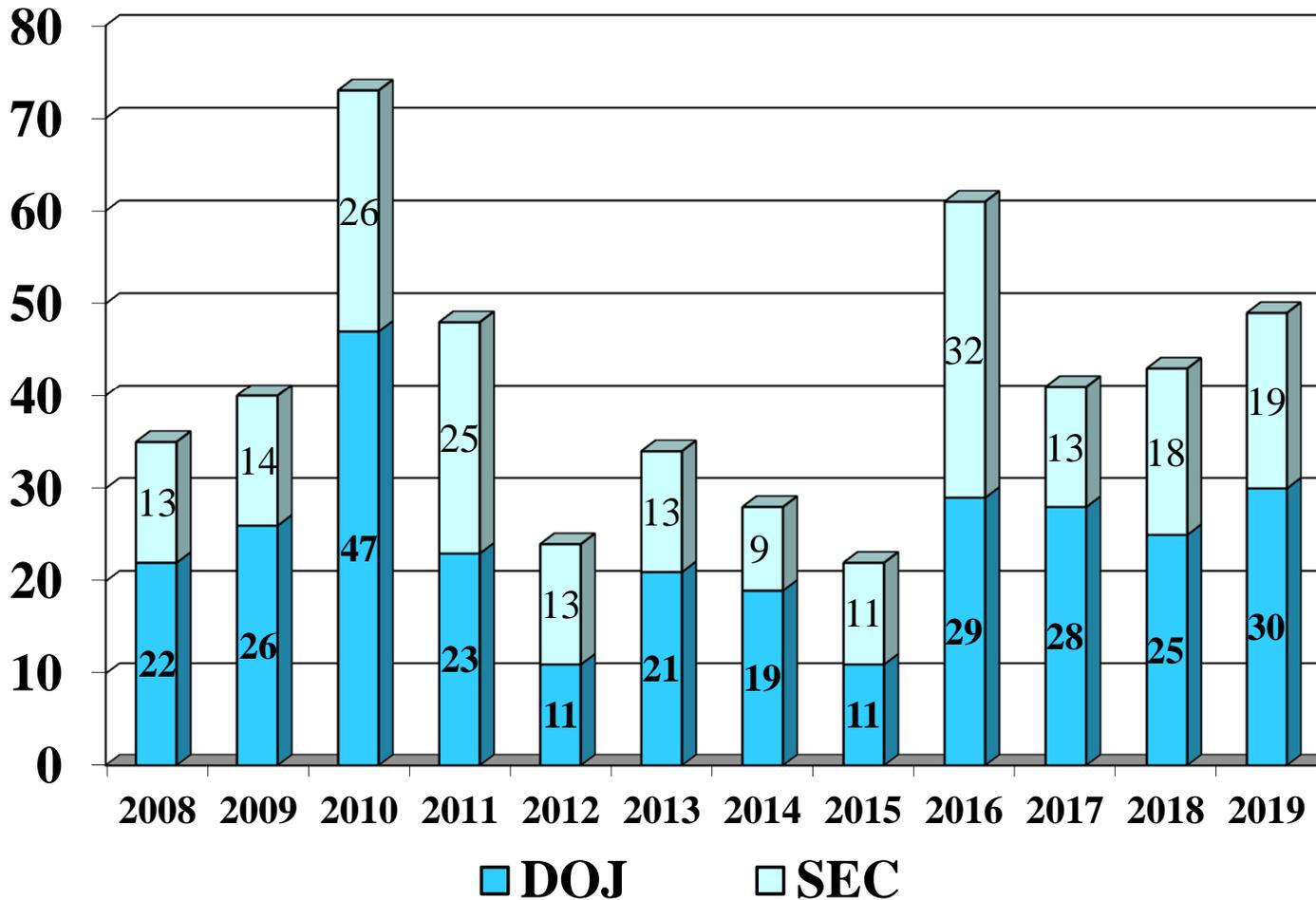
- FCPA Overview
- FCPA Enforcement in 2019 by the Numbers
- Major Enforcement Actions in 2019
- Policy Developments in 2019
- Q&A

Foreign Corrupt Practices Act: Overview

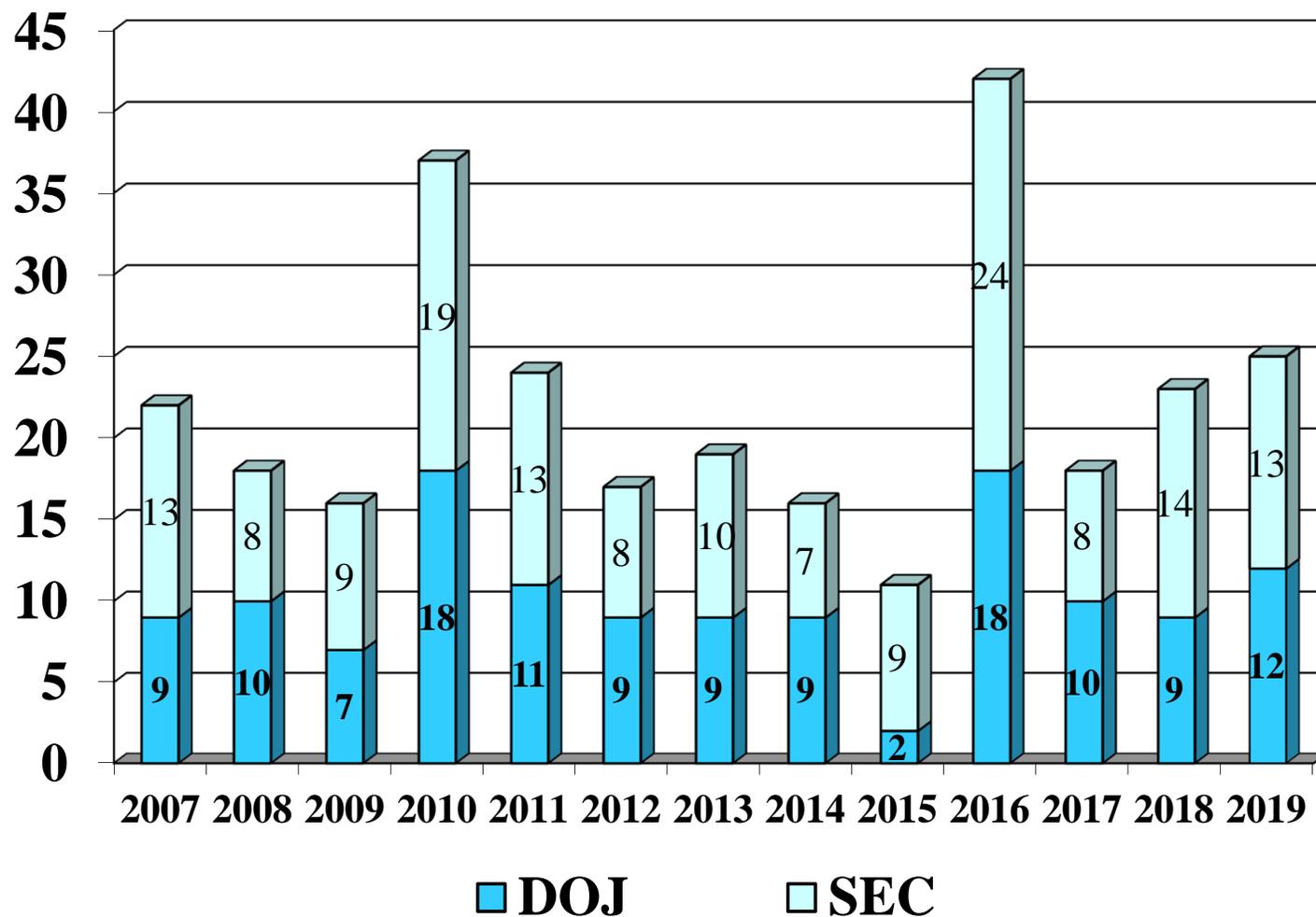
- Two main components:
 - Anti-Bribery Provisions – The FCPA criminalizes providing anything of value to a foreign official corruptly to influence an official act or secure an improper advantage in order to obtain or retain business.
 - Accounting Provisions – The FCPA requires companies whose stock is traded on a U.S. exchange to make and keep accurate books and records and devise and maintain appropriate internal controls.
- Penalties
 - Criminal or civil penalties can be imposed on companies and individuals, including prison time for individuals.
- Enforcement
 - The DOJ and the SEC enforce the FCPA.
 - The DOJ, SEC, and FBI all have specialized units dedicated to investigating and prosecuting FCPA violations.



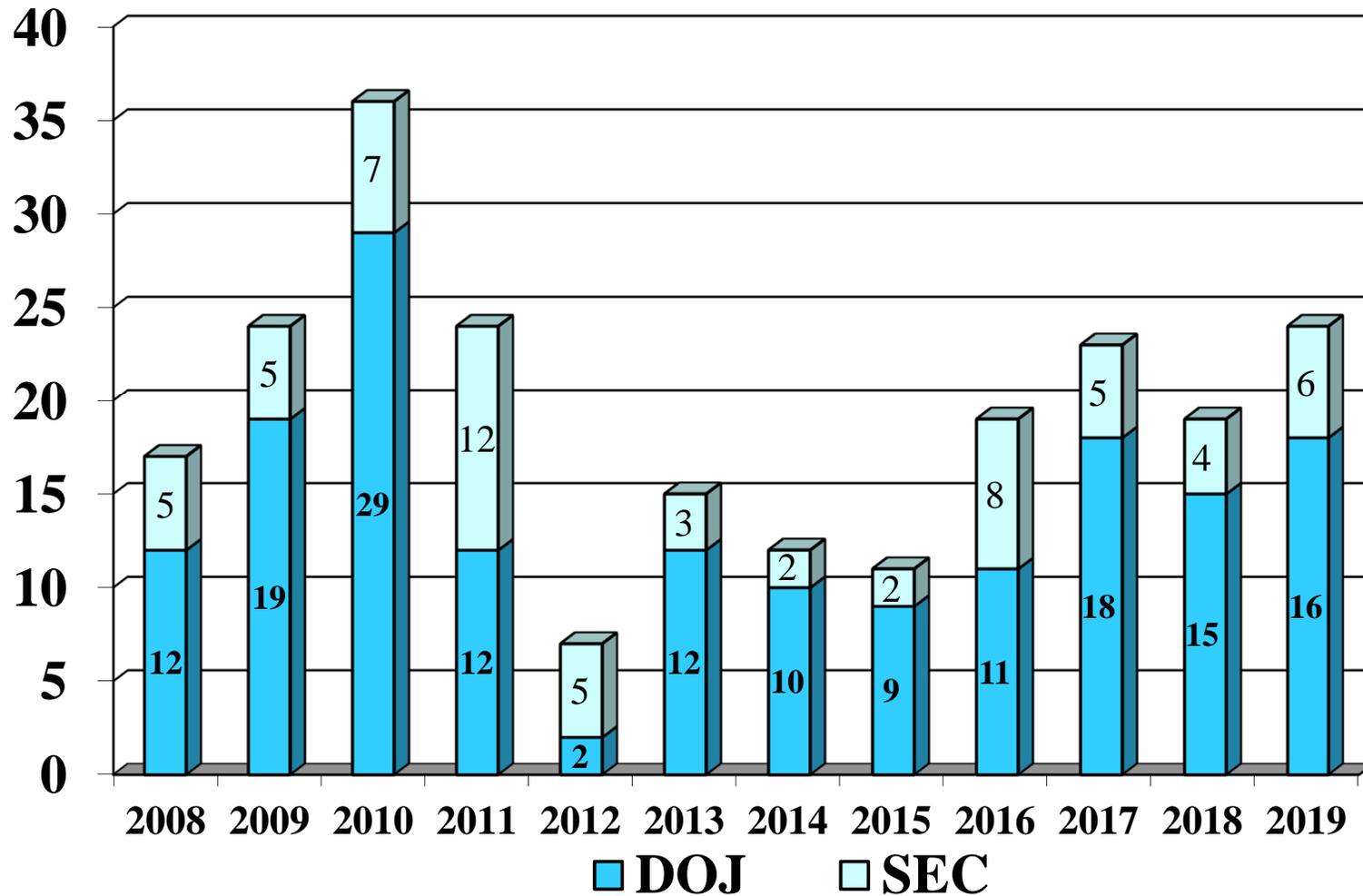
Enforcement Actions Initiated Against Companies and Individuals



Enforcement Actions Initiated Against Companies



Enforcement Actions Initiated Against Individuals



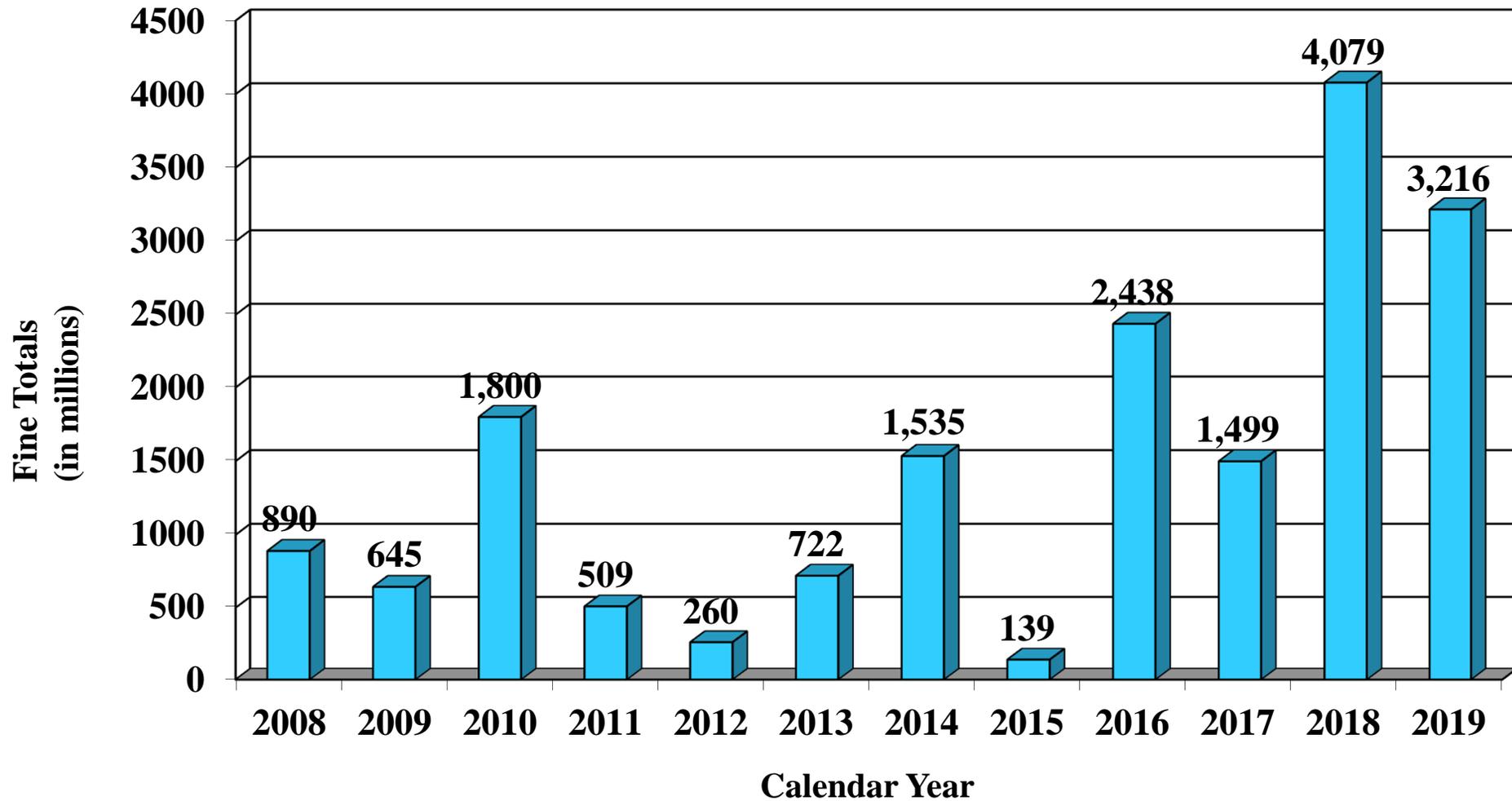
Increased Penalties Under the FCPA

- Increased FCPA enforcement has been accompanied by a steady increase in average penalties, despite same sentencing and penalty regime.

Year	Average Penalty*
2015	\$5,376,833
2016	\$43,516,771
2017	\$51,368,779
2018	\$44,321,886
2019	\$116,044,004

- Does not include data about other forms of monetary sanctions, such as disgorgement or restitution
- Source: <http://fcpa.stanford.edu/chart-penalties.html>

Increased Penalties Under the FCPA (cont'd)



FCPA Cases in 2019: Cognizant

- Cognizant Technology Solutions Corp. settled FCPA charges with the SEC and DOJ in February 2019.
 - The DOJ issued a declination with disgorgement of \$19.4 million, to be credited against any amounts paid to the SEC.
 - In settling with the SEC, Cognizant agreed to pay \$25.2 million in disgorgement and prejudgment interest.
- According to the SEC, an Indian official demanded a \$2 million bribe to ensure a construction permit for Cognizant to build a 2.7 million square foot campus in Chennai. Cognizant's President and Chief Legal Officer were allegedly involved in the bribe scheme and allegedly conspired to conceal the bribe by doctoring documents.
- The DOJ and SEC have brought criminal and civil FCPA charges against the President and CLO.
- The involvement of senior officers is an aggravating factor that would permit the DOJ to not issue a declination under the FCPA Corporate Enforcement Policy, but the DOJ opted to decline based on Cognizant's early voluntary self-disclosure, thorough investigation, full cooperation, and remediation.

FCPA Cases in 2019: Mobile Telesystems

- In March 2019, MTS settled FCPA charges with the DOJ and SEC.
 - MTS entered a DPA with DOJ and its Uzbek subsidiary pled guilty, with a total criminal penalty of \$850 million, including a \$40 million criminal forfeiture.
 - MTS agreed to pay \$100 million to settle with the SEC. DOJ agreed to credit this civil penalty against the amount owed in the criminal settlement.
 - MTS agreed to retain an independent compliance monitor for three years.
- MTS paid \$420 million in bribes to Gulnara Karimova, an Uzbek official and the daughter of former Uzbek President Islam Karimov.
- DOJ also charged Karimova with laundering \$865 million in bribe payments received from three telecommunications companies: MTS, VimpelCom, Telia.
- All three companies have settled FCPA charges for paying bribes to Karimova.
 - VimpelCom (2016) – \$397.5 million to DOJ/SEC; \$795 million globally (with Netherlands)
 - Telia Corporation (2017) – \$483 million to DOJ/SEC; \$965 million globally (with Netherlands, Sweden)
- The DOJ also charged an employee of MTS's subsidiary in Uzbekistan.

FCPA Cases in 2019: Fresenius Medical Care AG

- In March 2019, Fresenius, the world's largest provider of dialysis equipment, settled FCPA charges with the DOJ and SEC for total penalties of \$232 million.
 - The DOJ issued a non-prosecution agreement to Fresenius with a monetary penalty of \$84.7 million.
 - The SEC settled with Fresenius for \$147.7 million in disgorgement and prejudgment interest.
 - Fresenius agreed to retain an independent compliance monitor for 2 years and self-report for a third year.
- Fresenius allegedly made \$30 million of bribe payments to publicly employed health care officials and other government officials, and engaged in FCPA books and records and internal controls violations in 17 countries.
- The company used intermediaries, sham payments to service providers, charitable contributions, and travel and entertainment to convey corrupt benefits to officials.
- Fresenius voluntarily disclosed the conduct, but the DOJ did not issue a declination because the bribery was widespread and the company “did not timely respond to certain requests” by the DOJ.

FCPA Cases in 2019: Walmart

- In June 2019, the DOJ and SEC settled the long-running Walmart FCPA matter for a total of \$283 million.
 - Walmart failed to implement and maintain internal controls to prevent third-party intermediaries from making improper payments to government officials in order to obtain store permits and licenses.
 - In Mexico specifically, a former attorney for Walmart's local subsidiary reported overseeing a years-long scheme by which third parties made improper payments to government officials for permits and licensing. Walmart Inc. entered into a three-year non-prosecution agreement with the DOJ and agreed to \$138 million penalty.
- Walmart lost some cooperation credit with respect to the Mexico investigation for failing to timely provide documents, failing to de-conflict a witness interview, and failing to voluntarily disclose conduct in Mexico while disclosing conduct in other jurisdictions.
 - Walmart's Brazilian subsidiary pleaded guilty and agreed to forfeit \$3.6 million and to pay a fine of \$724,898.
- Walmart agreed to settle with the SEC for \$144.7 million in disgorgement and prejudgment interest.
- Despite spending over \$900 million on the investigation and compliance enhancements, Walmart's settlement included an independent compliance monitor.

FCPA Cases in 2019: TechnipFMC

- Also in June 2019, Technip FMC PLC (TFMC) entered into a DPA with the DOJ stemming from an investigation into two bribery schemes.
 - TFMC agreed to pay a combined total criminal fine of more than \$296 million to resolve charges with the DOJ and with Brazilian authorities: \$82 million to the DOJ, which also credited the \$214 million that TFMC paid to Brazilian authorities. Technip USA, Inc., TFMC's wholly-owned U.S. subsidiary, pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions.
 - In September 2019, Technip agreed to pay the SEC \$4.3 million plus pre-judgment interest of \$735,000.
- The case demonstrates the risk of successor liability. TFMC was created by the 2017 merger of Technip SA and FMC Technologies, Inc. The matter involved corrupt conduct at both legacy Technip and legacy FMC between 2003 and 2013:
 - From 2003 to 2013, Technip conspired with Keppel Offshore to pay \$69 million in bribes to Petrobras officials and a Brazilian political party and party officials.
 - From 2008 to 2013, FMC paid \$800,000 to Unaoil knowing that some or all of the payments would be passed to Iraqi government officials to win contracts with the Iraqi government.
- Technip is a recidivist, having previously been prosecuted for FCPA offenses in 2010 in connection with the Bonny Island, Nigeria matter.

FCPA Cases in 2019: LM Ericsson

- Ericsson, a Swedish telecom company, settled an FCPA case with the DOJ and SEC in December 2019, paying \$1.06 billion in total penalties.
- \$520 million criminal fine (DOJ) and \$540 million in disgorgement and prejudgment interest (SEC).
- Parent company DPA; Egyptian subsidiary pled guilty; independent compliance monitor for 3 years.
- The conduct spanned 17 years, involved high-level executives, and took place in Djibouti, Saudi Arabia, China, Vietnam, Indonesia, and Kuwait.
- The conduct involved tens of millions of dollars in “slush funds,” payments to third-party agents, consultants, and service providers, and lavish trips and entertainment for government officials and their relatives.
- Ericsson did not self-report or receive full credit for cooperation. According to DOJ, the company failed to disclose allegations of corruption with respect to two relevant matters, produced certain relevant materials in an untimely manner, and failed to take adequate disciplinary action against some of the employees involved. It received a 15% discount off the low end of the sentencing guideline range.

FCPA Cases in 2019: US v. Hoskins

- Lawrence Hoskins, a UK national who was a senior executive for Alstom SA, a French company based in Paris, was charged in 2013 with violating the FCPA.
- Alstom paid \$772 million to settle FCPA charges in 2014.
- Hoskins raised legal challenges to the FCPA's jurisdictional reach.
 - An appeals court agreed with Hoskins that he could not be subject to the FCPA solely by virtue of conspiring with others who were subject to the law.
 - But the court ruled that the case could go forward based on the allegation that Hoskins was acting as an agent of a US subsidiary of Alstom that was subject to the FCPA as a “domestic concern.”
- At trial, Hoskins argued that he was not an “agent” of the US subsidiary; it was a lower-tier subsidiary and Hoskins was an employee of the French parent company.
- In November 2019, a jury convicted Hoskins on 11 of 12 counts.
- Hoskins will appeal the conviction, but it is significant that the DOJ was able to convince a jury to convict based on its aggressive theory of agency.

FCPA Cases in 2019: US v. Boustani

- Boustani was alleged to be involved in a scheme in which hundreds of millions of dollars in bribes were paid to Mozambican government officials in the so-called “Tuna Boat” scandal.
- No FCPA charges were brought against Boustani, who was not a US citizen, did not work for a US entity, and was not present in the US at the relevant time.
- Boustani was instead charged with securities fraud for allegedly failing to disclose to investors in Mozambican bonds that bribes would be paid.
- Despite testimony from multiple government cooperating witnesses who had pled guilty, the jury acquitted Boustani of all charges.
- According to press reports, jurors were unconvinced of any tie between Boustani’s conduct and the US.

Developments in DOJ Enforcement Policies

- 2017 FCPA Corporate Enforcement Policy
 - In 2016, DOJ's Fraud Section launched a one-year FCPA enforcement Pilot Program; In November 2017, it was incorporated into the U.S. Attorneys' Manual as the FCPA Corporate Enforcement Policy.
 - The policy was intended to incentivize voluntarily disclosure and enable DOJ to prosecute culpable individuals.
- The policy creates a “presumption that [a] company will receive a declination” when it (1) voluntarily self-discloses, (2) fully cooperates, and (3) timely and appropriately remediates.
 - The company must also pay disgorgement resulting from the misconduct at issue.
- DOJ has discretion to rebut this presumption based on “aggravating circumstances.” Examples include:
 - Involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; the pervasiveness of the misconduct within the company; and criminal recidivism.

Developments in DOJ Enforcement Policies

- Where DOJ seeks a criminal resolution despite a company's voluntary self-disclosed, full cooperation, and timely and appropriate remediation, the DOJ will:
 - Accord or recommend a 50% reduction off the low end of the U.S. Sentencing Guidelines fine range, except in the case of a criminal recidivist; and
 - Generally not require appointment of a monitor if a company has, at the time of the resolution, implemented an effective compliance program.
- If a company does not voluntarily disclose, but fully cooperates and timely and appropriately remediates, the company will receive up to a 25% reduction off of the low end of the U.S. Sentencing Guidelines fine range.
- On July 25, 2018, Deputy Assistant Attorney General Matthew Miner stated that the DOJ would also apply the policy in the context of mergers and acquisitions.
- The policy applies only to the DOJ. The SEC and enforcement authorities in other countries are not bound by it.

Developments in DOJ Enforcement Policies

- 2019 Amendments to the FCPA Corporate Enforcement Policy
 - In March 2019, the DOJ announced several changes to the policy:
 - **Record retention.** The 2017 Policy stated that as part of an effective compliance program, companies must prohibit the use of software that “generates but does not appropriately retain business records or communications” –i.e., ephemeral messaging such as WeChat or Jabber. The 2019 amendments seem to recognize the difficulty of requiring an outright prohibition, and now give companies more control of how to adopt “appropriate guidance and controls” over communications platforms that may pose a risk to record retention.
 - **De-confliction.** The 2017 Policy stated that cooperating companies may be required to “de-conflict” interviews upon request. The 2019 amendments reiterate this, but moderate by adding language that DOJ “will not take any steps to affirmatively direct a company’s internal investigation efforts.” (see US v. Connolly)
 - **Mergers and acquisitions.** The 2019 amendments explicitly allow for cooperation credit if an acquiring company voluntarily discloses misconduct identified during due diligence on an acquired company. This change incorporates DAAG Matthew Miner’s July 2018 comments regarding the application of the 2017 Policy in the mergers and acquisitions context.

Developments in DOJ Enforcement Policies

- In April 2019, DOJ issued a new guidance on Evaluation of Corporate Compliance Programs
 - The guidance is meant to assist prosecutors in determining “whether, and to what extent, the corporation’s compliance program was effective at the time of the offense” as well as at the time of the charging decision.
 - This determination of effectiveness in turn guides the prosecutor’s decision-making as to the appropriate “(1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).”
 - The document breaks the inquiry down into three fundamental questions:
 - 1. “Is the corporation’s compliance program well designed?”
 - 2. “Is the program being applied earnestly and in good faith?” In other words, is the program being implemented effectively?
 - 3. “Does the corporation’s compliance program work“ in practice?
 - This document follows and replaces a prior document, issued in February 2017, by the same name.
 - There is little new in the document, though it reorganizes the pertinent questions and is issued in a more formal, permanent form.

United States v. Connolly (2019)

- A decision by Chief Judge Colleen McMahon (SDNY) may have implications for DOJ interactions with companies related to internal investigations. Judge McMahon found that:
 - Defendant Black “made a rather convincing showing that Deutsche Bank and its outside counsel were de facto the Government” because the DOJ effectively outsourced its investigation of Deutsche Bank’s alleged LIBOR manipulation to them.
 - Because Black was required to cooperate in the investigation as a condition of his employment, it was as if the Government had compelled him to be interviewed.
 - This triggered scrutiny under the Fifth Amendment’s Self-Incrimination Clause.
- Nevertheless, the Court denied the motion to dismiss because, even if Deutsche Bank and its counsel acted as agents of the government, the Court concluded that Black’s *Kastigar* rights were not violated.
 - Specifically, “the Government did not make direct or indirect non-evidentiary use of Black’s statements during its investigation in violation of *Kastigar*.”
- However, Judge McMahon’s opinion should serve as a warning to the DOJ with respect to how far it may go to direct or restrict corporate internal investigations.

Whistleblowers

- The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 provides for rewards for whistleblowers who provide original information to the SEC, relating to any violation of the securities laws (including the FCPA), that results in monetary sanctions exceeding \$1,000,000. The SEC must award whistleblowers between 10% to 30% of the total penalties imposed by the SEC and in other related actions.
- Since FY 2012, the number of whistleblower tips received by the SEC has steadily increased, as has generally the number related to the FCPA.
- In 2018 and 2019, the SEC issued over \$220 million in whistleblower awards to 21 individuals, a marked increase from prior years.

Fiscal Year	Total Tips	FCPA Tips
2012	3001	115
2013	3238	149
2014	3620	159
2015	3923	186
2016	4218	238
2017	4484	210
2018	5282	202
2019	5212	200

Coordination with Foreign Counterparts

- The DOJ and the SEC continue to emphasize their cooperation with foreign agencies in resolving FCPA violations.
- Anti-Piling On Policy
 - Officially called “Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct.”
 - On May 9, 2018, then-Deputy Attorney General Rod Rosenstein announced the formalization of the DOJ’s policy against “piling on,” saying the DOJ will consider “the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result.”
 - The stated “aim” of the policy is to “enhance relationships with [DOJ’s] law enforcement partners in the United States and abroad.”

Coordination with Foreign Counterparts (cont'd)

- Recent FCPA settlements have highlighted this cooperation between the DOJ, SEC, and foreign counterparts:
 - Embraer SA (October 2016)
 - \$107 million to the U.S. and Brazil
 - Odebrecht S.A. and Braskem S.A. (December 2016)
 - \$3.5 billion to the U.S., Brazil, and Switzerland
 - Rolls-Royce Plc (January 2017)
 - \$800 million to the U.S., U.K., and Brazil
 - Telia Company AB (September 2017)
 - \$966 million to the U.S., Netherlands, and Sweden
 - SBM Offshore N.V. (November 2017, when DOJ part announced)
 - \$667 million to the U.S., Netherlands, and Brazil
 - Keppel Offshore & Marine Ltd. (December 2017)
 - \$422 million to U.S., Brazil, and Singapore
 - Société Générale S.A. (June 2018)
 - \$585 million to U.S. and France

Coordination with Foreign Counterparts (cont'd)

- Recent FCPA investigations further highlight this cooperation among the DOJ, SEC, and foreign counterparts:
 - Operation Car Wash (“Lava Jato”) – launched in March 2014, Operation Car Wash is an investigation into a multi-billion corruption, money laundering and tax evasion scheme at Petrobras, the Brazilian state-owned oil company, involving politicians from several parties and some of the largest public and private companies in the country. Operation Car Wash has grown and is not confined to Petrobras, nor to Brazilian boundaries, and there are now investigations in place in a dozen countries.
 - Notebook Scandal – launched in 2018, the Notebook Scandal exposed a multi-million dollar bribery and graft scheme involving former Argentine president Cristina Fernandez de Kirchner. Media reports indicate that both DOJ and SEC have visited Argentina to meet with local prosecutors.
 - Unaoil – after a press exposé in 2016 based on a trove of leaked internal emails, this oil and gas consultancy based in Monaco and several of its clients have been investigated and prosecuted in the US and UK. DOJ recently unsealed guilty pleas by two Unaoil principals, suggesting that they are cooperating with the DOJ.

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Jeffrey is co-author of *The Foreign Corrupt Practices Act: Compliance, Investigations and Enforcement*, a comprehensive book covering all aspects of FCPA compliance and enforcement.