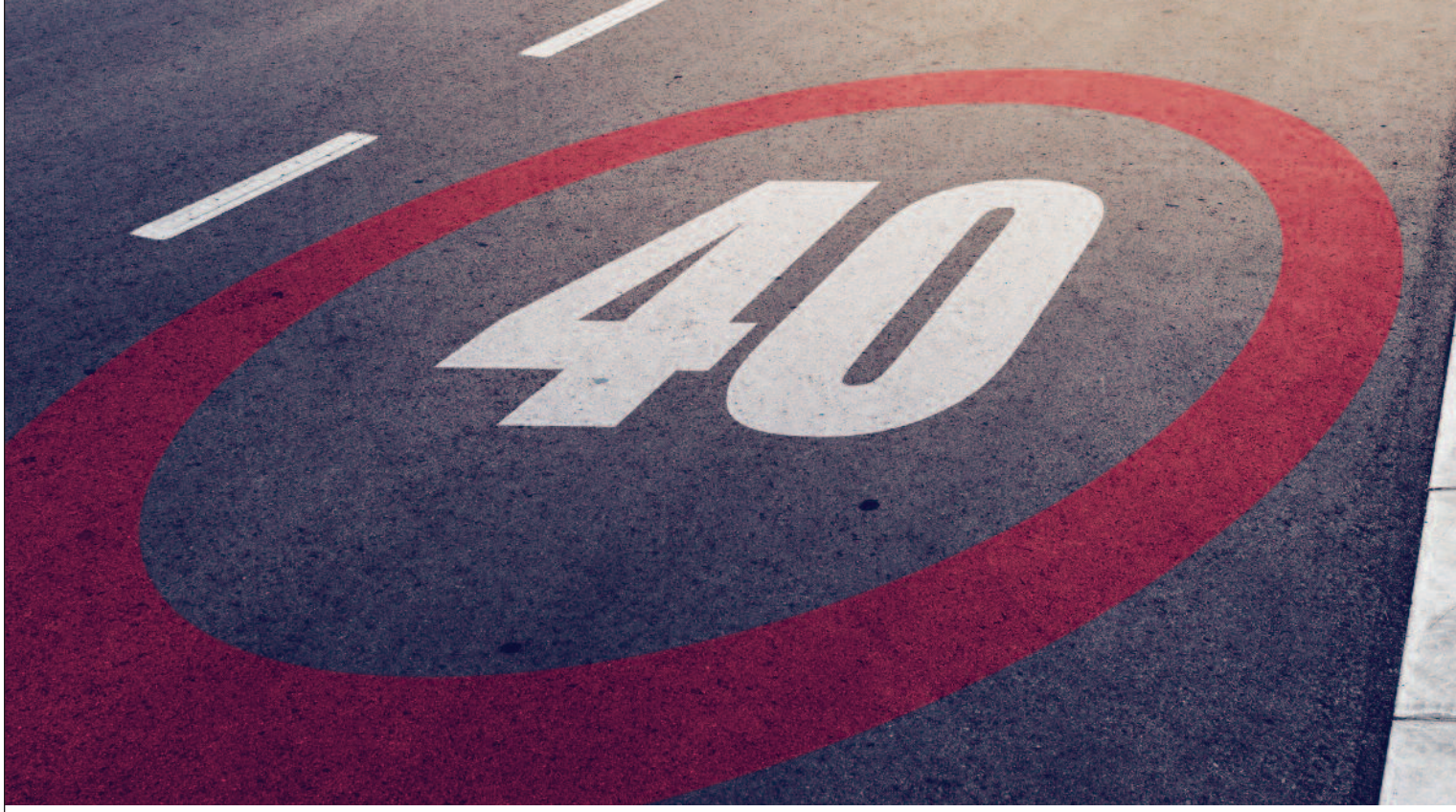

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Happy Birthday, FCPA: Implications of DOJ's New FCPA Corporate Enforcement Policy on the Act's 40th Anniversary

Having celebrated the 40th anniversary of the Dec. 19, 1977, passage of the Foreign Corrupt Practices Act ("FCPA") into law, this article is offered in celebration of the occasion. Fittingly, the U.S. Department of Justice ("DOJ") itself marked the anniversary with a major policy announcement on the eve of the FCPA's anniversary, in a Nov. 29, 2017, speech by Deputy Attorney General ("DAG") Rod Rosenstein regarding the new "Foreign Corrupt Practices Act Corporate Enforcement Policy" (the "Policy"), now set forth in Section 9-47.120 of the U.S. Attorneys' Manual ("USAM").[1]

The Policy adopts and formalizes the so-called "Pilot Program" (discussed below), is the most extensive and substantial change to the USAM section on the FCPA to date, and has notable implications for both companies and individuals. Most significantly, the Policy promises substantial benefits for cooperative companies — including, in the usual case, a presumptive "declination" of prosecution provided that the Policy's prerequisites are satisfied. But companies may be rightly hesitant to join in a shower of confetti and streamers in honor of the FCPA's birthday. For the reasons explained below, the need for careful, fact-sensitive, and detailed weighing of the costs and benefits of disclosure, and the value of robust compliance policies and procedures, remain as critical as ever. The sections that follow discuss the Pilot Program that preceded the Policy, the Policy itself, some paradigmatic cases illustrating how the Policy will be applied, and the implications of the Policy for companies and individuals.

The 'Pilot Program' as Prologue

On April 5, 2016, former Assistant Attorney General Leslie Caldwell announced a new FCPA "Pilot Program," as detailed in a letter by the former chief of the Fraud Section, Andrew Weissmann, that accompanied Caldwell's announcement.[2] (Weissmann subsequently left to join the Office of Special Counsel investigation of alleged ties between the Trump presidential campaign and Russia.) The Pilot Program announcement highlighted three aspects of the DOJ's enforcement plan that included both sticks and carrots: (1) increased enforcement through the addition of 10 new prosecutors to the FCPA Unit in Main Justice's Fraud Section along with three new squads of FBI agents dedicated to investigating and prosecuting FCPA violations; (2) increased international cooperation among

BY JUSTIN C. DANILEWITZ AND ALBERT F. MORAN

enforcement agencies, including the sharing of documents and witnesses; and (3) the start of a "Pilot Program" offering companies compelling incentives to cooperate with regulators, and more guidance regarding the nature of the benefit they could anticipate from voluntary disclosure of FCPA violations.

Congress enacted the FCPA in 1977 to prohibit the bribery of foreign officials by companies seeking their business, and it broadly applied the statute to public and private, as well as domestic and foreign entities, and U.S. and foreign individuals.[3] The FCPA's anti-bribery provisions prohibit payments to foreign officials to obtain or retain business. Its accounting provisions require issuers to make, keep, and maintain true and accurate books and records. Penalties under the FCPA can be devastating, and it is not unusual for fines — separate and apart from the required disgorgement of ill-gotten gains — to reach the hundreds of millions of dollars. In 2016, for example, total sanctions from FCPA violations amounted to $1.8 billion, with an average sanction of $78,965,385.[4] Illustrative is the announcement in late 2017 of SBM Offshore N.V. ("SBM"), and its U.S. subsidiary, SBM Offshore USA Inc., to pay a penalty of $238 million as part of its guilty plea to violations of the FCPA's anti-bribery provisions, and as part of a deferred prosecution agreement ("DPA").[5] The DOJ press release announcing the resolution noted that SBM, in 2014, had already paid the Dutch prosecutor $200 million in disgorgement plus a $40 million fine.[6]

In the face of such staggering potential liability, corporate defendants, like their individual counterparts, have been well incentivized to plead and cooperate. But cooperation produced great variety in outcomes, and the rationale for such differences may not always have been clear. Thus, through the Pilot Program, DOJ sought to achieve greater corporate and individual accountability "by providing greater transparency about what [DOJ] require[s] from companies seeking mitigation credit for voluntarily self-disclosing misconduct, fully cooperating with an investigation, and remediating, and what sort of credit those companies can receive if they do so consistent with these requirements."[7] Furthermore, under the Pilot Program, "[m]itigation credit [would] be available only if a company … [disclosed] all relevant facts about the individuals involved in the wrongdoing," and "disgorge[d] all profits resulting from the FCPA violation."[8]

The Pilot Program was also intended to incentivize corporate cooperation as a means to hold individuals more accountable for FCPA violations, and therefore built upon the emphasis on individual accountability set forth in the memorandum of former DAG Sally Quillian Yates in the so-called "Yates Memo."[9] This emphasis is shared at the U.S. Securities and Exchange Commission ("SEC") which, along with DOJ, bears responsibility for FCPA enforcement. As Steven R. Peikin, Co-Director of the SEC's Enforcement Division, noted in a speech marking the FCPA's anniversary, "companies cannot engage in bribery without the actions of culpable individuals. The Enforcement Division is broadly committed to holding individuals accountable when the facts and the law support doing so."[10]

Weissmann's letter accompanying Caldwell's announcement stated that "[t]he principal goal of this program is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to (1) voluntarily self-disclose FCPA-related misconduct, (2) fully cooperate with the Fraud Section, and, where appropriate, (3) remediate flaws in their controls and compliance programs."[11] In this way, DOJ sought to "further deter individuals and companies from engaging in FCPA violations in the first place, encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations, and, consistent with the memorandum of" former DAG Sally Yates, "increase the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove."[12]

Weissmann's letter also noted that although companies had previously benefited from cooperation — based upon the Principles of Federal Prosecution of Business Organizations in USAM 9-28.000, and as set forth in Chapter 8 of the U.S. Sentencing Guidelines — the Pilot Program for the first time "articulated in a written framework" the Fraud Section's historical practice of according "reduction[s] below the low end of the Sentencing Guidelines fine range" to companies that "self-disclose misconduct, fully cooperate with a criminal investigation, and timely and appropriately remediate."[13]

According to this framework, companies who disgorged ill-gotten gains and satisfied the three requirements of voluntary disclosure, full cooperation, and timely and appropriate remediation could receive a benefit of 50 percent off the bottom of the Sentencing Guidelines range or a full declination of prosecution. On the other hand, if a company did not voluntarily disclose, but otherwise fully cooperated and timely and appropriately remediated, it could expect at most a 25 percent reduction off the bottom of the Sentencing Guidelines range. Importantly, the letter suggested that a declination was not guaranteed even in cases in which the three requirements were satisfied, and that such benefit would be subject to other considerations, such as "involvement by executive management of the company in the FCPA misconduct, a significant profit to the company from the misconduct in relation to the company's size and wealth, a history of non-compliance by the company, or a prior resolution by the company with the Department within the past five years."[14]

The New 'FCPA Corporate Enforcement Policy'

The Policy is broadly consistent with the Pilot Program, but differs in one important respect that benefits companies that voluntarily disclose an FCPA violation: whereas the Pilot Program stated that, for a company that satisfies the three requirements, "the Fraud Section's FCPA Unit *will consider* a declination of prosecution,"[15] the Policy now states that for such a company "there will be a *presumption* that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender."[16] This rebuttable presumption further reduces uncertainty regarding the benefit that may come from voluntary disclosure.

Beyond the change to a rebuttable presumption in favor of declination, the categories of partial benefits to which companies were entitled under the Pilot Program remain the same under the Policy. Thus, as was true of the Pilot Program, in the event DOJ determines that a declination is not warranted despite a company's satisfaction of the three criteria for credit, the company may still benefit by up to a 50 percent reduction off the bottom of the Sentencing Guidelines range and will generally not be required to retain a compliance monitor if it has an effective compliance policy in place. On the other hand, if a company does not voluntarily self-disclose, but still fully cooperates and appropriately reme-

diates, it may still obtain a 25 percent reduction off the bottom of the Sentencing Guidelines range.

Similarly, the Policy's guidance on the meaning of "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation" is also broadly consistent with the guidance in the Pilot Program. *First*, to satisfy the requirement of "voluntary self-disclosure," the disclosure must be both "voluntary" and "timely." Disclosures are "voluntary," within the meaning of U.S.S.G. § 8C2.5(g)(1), when they occur "'prior to an imminent threat of disclosure or government investigation.'" In addition, the disclosure is required "'within a reasonably prompt time after becoming aware of the offense,'" and the company must "disclose[] all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law." Notably, the Policy omits the following language from the Pilot Program: "A disclosure that a company is required to make, by law, agreement, or contract, does not constitute voluntary self-disclosure for purposes of this pilot. Thus, the Fraud Section will determine whether the disclosure was already required to be made."[17] This omission is appropriate. While the requirement of disclosure may be relevant to evaluating the voluntariness of cooperation in certain instances, it should not be a disqualifier.

Second, "full cooperation" requires disclosure of all relevant facts on a timely basis, including facts gathered from an independent investigation, attribution of facts to specific sources (subject to the attorney-client privilege), timely updates and rolling disclosures, and facts relating to individual involvement as well as the involvement of third parties. Furthermore, the Policy requires proactive cooperation, meaning the disclosure of information even when not specifically asked to do so, and sharing with DOJ opportunities to further the investigation of which DOJ is not otherwise aware. Companies must also provide updates on internal investigations, and must preserve, collect, and disclose information uncovered during such investigations, including by producing documents and providing translations. Finally, companies must make witnesses available for interviews and "deconflict" with DOJ, when asked to do so, when the company's own investigative steps could overlap with those of DOJ. The potential need for deconfliction is particularly important to bear in mind, as even the most well-intentioned internal investigation could inadvertently taint witnesses or evidence, particularly where DOJ may be interested in pursuing a covert proactive investigation. By failing to appropriately deconflict, a company may unintentionally diminish the value of its cooperation.

Third, "timely and appropriate" remediation requires a company to conduct a "root cause" analysis to identify the source of the FCPA misconduct, implement an effective compliance and ethics program, discipline involved employees, and take further steps to demonstrate acceptance of responsibility and to mitigate and avoid future misconduct. The Policy establishes illustrative components for an effective compliance and ethics program, as set forth below (verbatim):

- the company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
- the resources the company has dedicated to compliance;
- the quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
- the authority and independence of the compliance function and the availability of compliance expertise to the board;
- the effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
- the compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
- the auditing of the compliance program to assure its effectiveness; and
- the reporting structure of any compliance personnel employed or contracted by the company.

To obtain a declination, companies must name names and provide all relevant facts related to culpable individuals.

Illustrative Case Studies

As of mid-September 2018, DOJ has announced three declinations since adopting the Policy. The first, announced in a letter dated April 23, 2018, related to The Dun & Bradstreet Corporation, and cited among other factors the company's disgorgement to the U.S. Securities and Exchange Commission.[18] The other declinations this year have noted the decision to decline prosecution not only for FCPA violations, but also for money laundering,[19] and have emphasized the ability to identify and charge culpable individuals.[20]

Meanwhile, the entry into DPAs and Non-Prosecution Agreements ("NPAs") with companies has also continued. The most recently announced DOJ resolution applying the Policy was the July 5, 2018, agreement of Credit Suisse (Hong Kong) Limited ("CSHK") to pay $47 million under the terms of an NPA to resolve claims that it made "relationship hires" of friends and family of Chinese foreign officials — some of them less qualified than other candidates — in order to secure Chinese government business.[21] CSHK admitted that the hiring practice, in effect between 2007 and 2013, helped CSHK to gain $46 million in profits. Ultimately, however, CSHK received only a 15 percent reduction on the bottom of the applicable guidelines range because, as the NPA explains: (1) CSHK did not voluntarily disclose the conduct; (2) CSHK's cooperation — which included conducting an internal investigation, making foreign employees available for interviews, and providing foreign documents in a way that did not implicate foreign data laws — was reactive, rather than proactive; and (3) although the company undertook substantial remedial measures relating to its hiring practices, DOJ did not award full remediation credit because CSHK failed to sufficiently discipline individuals.

Prior to the CSHK resolution, DOJ announced a June 4, 2018, NPA with Legg Mason, Inc., by which Legg Mason agreed to pay $64.2 million to resolve charges of corrupt payments to Libyan foreign officials through a rela-

tionship between a Legg Mason subsidiary (Permal Group, Ltd.) and the French financial institution Société Générale S.A.[22] According to the NPA, between 2004 and 2010 (Legg Mason agreed to a tolling of the statute of limitations, a factor considered in its cooperation credit, as noted below), Permal partnered with Société Générale, which made corrupt payments to a Libyan "broker" in order to secure investments from Libyan state-owned financial institutions. These investments — for which Société Générale paid the "broker" over $90 million in "commissions," some of which were paid to Libyan officials to secure investments — ultimately benefited Legg Mason through its subsidiary, Permal. The NPA explains the basis for a 25 percent reduction on the bottom of the applicable guidelines range due to the fact that: (1) Legg Mason did not voluntarily disclose the violations; (2) the company fully cooperated by, among other things, conducting an internal investigation, making individuals available for interviews, organizing documents for investigators, and agreeing to the tolling of statutes of limitations; and (3) a number of mitigating factors, including the involvement of few employees of mid-to low-level rank, Legg Mason's modest gains in comparison to its co-conspirator, and the fact that its co-conspirator maintained the corrupt relationship.

These examples are consistent with the comments of Deputy Attorney General Rod J. Rosenstein offered this May, when Rosenstein reaffirmed that "[t]he Corporate Enforcement Policy is not an offer of immunity, and it contains no guarantees, but it provides companies with greater predictability to inform their decision-making."[23]

Implications of the Policy

Voluntary disclosure is a necessary but not sufficient condition for a declination. Nonetheless, the Policy's creation of a rebuttable presumption in favor of declination means that, all other things being equal, voluntary disclosure will generally tend to benefit companies that have discovered FCPA problems. Of course, given the highly fact-specific nature of the analysis, and the important role that prosecutorial discretion must play, "all other things" may well not always be equal. And, to be sure, the allure of a declination should not obscure the tangible risks of collateral consequences of self-disclosure: (1) potential "mission creep," or the widening of regulatory inquiry beyond what may at first appear to be a limited scope; (2) private civil suits; (3) liability to foreign authorities; (4) reputational harm; and (5) negative impact on a company's stock price.

Companies will continue to need to conduct prompt and independent internal investigations, while balancing competing demands that are frequently in tension: disclosing information to the government in a manner that is deemed sufficiently timely to constitute voluntary and full cooperation, while at the same time gaining an understanding of the full nature and scope of the problem before disclosure and bearing in mind the need for "deconfliction" with a DOJ investigation. Further complicating the issue of timing is the incentive for whistleblowers to report to regulators, and thereby win massive rewards. The potential for such whistleblowers — who may reside in any part of the world — to beat a company to the door of the DOJ or SEC merely through the submission of an online tip is another factor creating pressure for voluntary disclosure, in effect incentivizing companies to blow the whistle on themselves.

Additionally, DOJ has made clear that in order to obtain a declination, the three prongs of the Policy will require companies to name names and to provide all relevant facts relating to the involvement of culpable individuals. This is consistent with the prioritization on individual prosecutions set forth in the "Yates Memorandum." Company employees should be appropriately forewarned of this high enforcement priority.

Finally, the influence of the Policy on other white collar prosecutions is likely to expand with time. Indeed, at the annual American Bar Association white collar conference in March, John Cronan, the acting head of the DOJ's Criminal Division, stated that "We intend to embrace, where appropriate, a similar approach and similar principles — rewarding voluntary self-disclosure, full cooperation, timely and appropriate remediation — in other contexts."[24] Benjamin Singer, Chief of DOJ's Securities and Financial Fraud Unit, who joined Cronan, drew a contrast between the declination of charges against Barclays PLC (which was announced in a declination letter that considered the same factors articulated in the Policy[25]), requiring the payment by Barclays of $12.9 million in restitution and disgorgement, and similar conduct that HSBC Holdings PLC did not voluntarily disclose, resulting in payment of $101.5 million in penalties and disgorgement.[26]

All this of course suggests strongly that the creation and maintenance of effective compliance and oversight programs are essential. In the FCPA area and elsewhere, given the nature of the penalties, an ounce of prevention continues to be worth far more than a pound of cure.

Notes

1. Deputy Attorney General Rod Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) [hereinafter Rosenstein Speech], *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign (last visited Dec. 18, 2017).

2. Press Release, U.S. Department of Justice Office of Public Affairs, Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), *available at* https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program (last visited Dec. 18, 2017); *see also* Letter from Andrew Weissmann, Chief, Fraud Section, U.S. Department of

Justice Criminal Division, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (Apr. 5, 2016) [hereinafter Weissmann Letter], *available at* https://www.justice.gov/archives/opa/blog-entry/file/838386/download (last visited Dec. 18, 2017).

3. *See* 15 U.S.C. §§ 78m (books and records provisions), 78dd-1 (anti-bribery provisions applicable to "issuers"), 78dd-2 (anti-bribery provisions applicable to "domestic concerns"), 78dd-3 (anti-bribery provisions applicable to other "persons"), and 78ff (penalties).

4. *See* Center for Responsible Enterprise and Trade, *FCPA Enforcement Trends* (Apr. 26, 2017) (citing data from a report of Steele Compliance Solutions, Inc.), *available at* https://create.org/news/fcpa-enforcement-trends/ (last visited Dec. 18, 2017).

5. Press Release, U.S. Department of Justice Office of Public Affairs, SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017), *available at* https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case (last visited Dec. 18, 2017).

6. *Id.*

7. Weissmann Letter at 2.

8. *Id.*

9. *See* Memorandum of Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," *available at* https://www.justice.gov/archives/dag/file/769036/download (last visited Dec. 18, 2017).

10. SEC Enforcement Division Co-Director Steven R. Peikin, "Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act" (Nov. 9, 2017), *available at* https://www.sec.gov/news/speech/speech-peikin-2017-11-09 (last visited Dec. 18, 2017).

11. Weissmann Letter at 2.

12. *Id.*

13. *Id.* at 3.

14. *Id.* at 9.

15. *Id.* (emphasis added).

16. *See* U.S. Attorney's Manual ("USAM") § 9-47.120 ("FCPA Corporate Enforcement Policy"), *available at* https://www.justice.gov/criminal-fraud/file/838416/download (last visited Dec. 18, 2017) (emphasis added).

17. Weissmann Letter at 4.

18. *See* Letter to Peter Spivack (Apr. 23, 2018) *available at* https://www.justice.gov/criminal-fraud/pilot-program/declinations (last visited Sept. 18, 2018) (access through *In re Dun & Bradstreet Corporation* link on DOJ's FCPA Declinations webpage).

19. Letter from Daniel S. Kahn to Matthew Reinhard (Aug. 20, 2018), *available at* https://www.justice.gov/criminal-fraud/pilot-program/declinations (last visited Sept. 18, 2018) (access through *In re Guralp Systems Limited* link on DOJ's FCPA Declinations webpage).

20. Letter to Adam B. Siegel (Aug. 23, 2018), *available at* https://www.justice.gov/criminal-fraud/pilot-program/declinations (last visited Sept. 18, 2018) (access through *In re Insurance Corporation of Barbados Limited* link on DOJ's FCPA Declinations webpage).

21. Press Release, U.S. Dep't of Justice, Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (July 5, 2018), *available at* https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt (last visited Sept. 17, 2018).

22. Press Release, U.S. Dep't of Justice, Legg Mason Inc. Agrees to Pay $64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials (June 4, 2018), *available at* https://www.justice.gov/opa/pr/legg-mason-inc-agrees-pay-64-million-criminal-penalties-and-disgorgement-resolve-fcpa-charges (last visited Sept. 17, 2018).

23. Deputy Attorney General Rod J. Rosenstein, Speech at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes (last visited Sept. 18, 2018).

24. Jody Godoy, *DOJ Expands Leniency Beyond FCPA, Lets Barclays Off*, Law360 (Mar. 2, 2018).

25. Letter to Alexander J. Willscher & Joel S. Green, (Feb. 28, 2018), *available at* https://www.justice.gov/criminal-fraud/sff/declinations (last visited Sept. 18, 2018) (access through *United States v. Barclays PLC: Declination* link on DOJ's Securities and Financial Fraud Declinations webpage).

26. Jody Godoy, *DOJ Expands Leniency Beyond FCPA, Lets Barclays Off*, Law360 (Mar. 2, 2018). ■

About the Authors

Justin C. Danilewitz, a former federal prosecutor, conducts internal investigations, defends against civil and criminal enforcement actions, and responds to whistleblower complaints and *qui tam* suits.

Justin C. Danilewitz
Saul Ewing Arnstein & Lehr LLP
Philadelphia, Pennsylvania
215-972-1977
EMAIL justin.danilewitz@saul.com
WEBSITE www.saul.com

Albert F. Moran is an Associate in the Commercial Litigation practice at Saul Ewing Arnstein & Lehr LLP.

Albert F. Moran
Saul Ewing Arnstein & Lehr LLP
Philadelphia, Pennsylvania
215-972-8561
EMAIL albert.moran@saul.com
WEBSITE www.saul.com