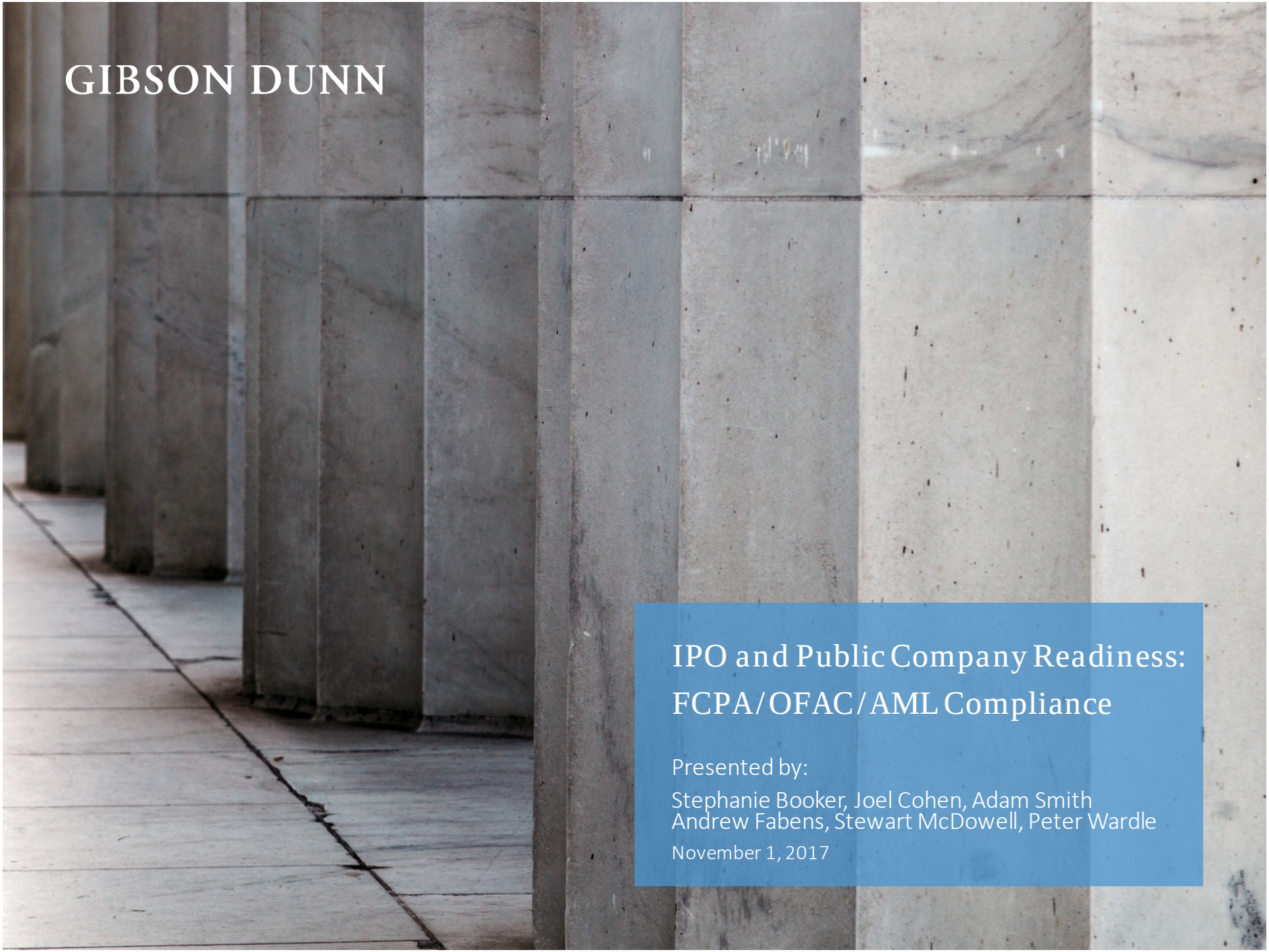


# IPO and Public Company Readiness: FCPA/OFAC/AML Compliance

Presented by:

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# MCLE Information

- **The Handout.** Participants must download the PowerPoint as the handout for this webinar to comply with MCLE requirements. Click on "File" in order to "Save As" to your computer.
- **Sign-In Sheet.** Participants should download the MCLE Sign-In Sheet, complete it and email it to Jeanine McKeown.
- **Certificate of Attendance.** Most participants should anticipate receiving their certificate of attendance in 3 to 4 weeks following the webcast. (Virginia Bar members should anticipate receiving it in ~6 weeks following the webcast.)
- **NY Compliance.** Individuals seeking credit in New York can expect to hear the key word during the webinar.
- **Questions.** Direct MCLE questions and forms to Jeanine McKeown (her contact information is found on all MCLE forms provided):

Jeanine McKeown at 213-229-7140
or jmckeown@gibsondunn.com

# Agenda

- **Overview of IPO Considerations**
- **Bank Secrecy Act/Anti-Money Laundering**
- **Foreign Corrupt Practices Act**
- **OFAC**

# Overview

- "White Collar" enforcement has been significant focus for DOJ/SEC/OFAC in recent years
- Investment banks themselves are heavily scrutinized under AML/FCPA/OFAC regulations
  - Regulators expect investment banks to act as a "gatekeeper" and conduct due diligence on the companies for whom they act as underwriter
  - Compliance issues for an IPO company can result in regulatory scrutiny and reputational harm for underwriters as well as the IPO company
- Compliance issues are therefore a focus of both due diligence and representations and warranties

# Risks From a Compliance Issue

## Damage to Business

- Damage to Reputation
- Diverted Management and Board Focus
- Direct Response Costs
  - Investigation
  - Litigation
  - Settlement/ Disgorgement
  - Ongoing monitor expenses

## Litigation/Regulatory Risks

- Law Enforcement Investigations (e.g., DOJ)
- Regulatory investigations (e.g., SEC/OFAC)
- Derivative/Shareholder Actions

## Impact to Public Company/Stock Price

- Loss of Investor Confidence
- Negative Financial Impact

# Key IPO Considerations

- **Disclosure**
  - Registration statement/prospectus must appropriately disclose material risks regarding compliance efforts/issues
- **Underwriters due diligence**
  - Underwriters seeking to establish due diligence defense AND meet expectations of their own regulators by conducting reasonable diligence
  - Underwriters will expect focused representations and warranties in underwriting agreement
- **Public attention**
  - Publicity around IPO/being a public company may attract higher level of scrutiny

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# Anti-Money Laundering

# Bank Secrecy Act/AML Background

- All corporate entities are subject to the criminal money laundering statutes, 18 USC 1956 and 1957, which require compliance by all corporate entities, not just financial institutions.

- Financial institutions also have Bank Secrecy Act (BSA) regulatory obligations, including programmatic, reporting, and recordkeeping obligations, under Title 31 of the United States Code and 31 CFR, Chapter X. Penalties for BSA violations can be civil and criminal.

- AML and BSA statutes also provide for criminal and civil liability for Board members, executives, and employees.

# Bank Secrecy Act/AML Background

Alphabet soup of criminal authorities and civil regulators with authority to examine for AML and BSA compliance and impose significant penalties. Violations can result in criminal and civil penalties.

- DOJ and U.S. Attorney's Offices
- 4 Federal banking regulators (OCC, FRB, FDIC, NCUA)
- SEC and FINRA
- CFTC and NFA
- Treasury Department (FinCEN)
- State criminal authorities and civil regulators, including New York Department of Financial Services
- International criminal authorities and regulators

# AML: Key Factors and Recent Developments

- Over the past decade, DOJ and the civil regulators have imposed billions of dollars in criminal and civil penalties against financial institutions for BSA violations.
- Actions can be complex and require engaging with multiple prosecutors and different regulatory authorities for BSA/AML, sanctions, and other crimes. Enforcement actions often include penalties against financial institutions by DOJ and multiple regulators.
- Tracing money flows and the use of proceeds has become an anchor in the tightening of financial institution regulation, global terrorism enforcement activities, DOJ's kleptocracy initiative, and generally in corporate criminal enforcement.

# Bank Secrecy Act/Anti-Money Laundering

*Focus on Regulatory Enforcement*

- NYDFS has been actively pursuing alleged BSA/AML violations. In 2016, NYDFS entered into consent orders with foreign banks and their New York branches for alleged BSA/AML deficiencies without the Federal Reserve imposing simultaneous civil money penalty actions. For example:
  - Agricultural Bank of China: $215 million CMP.
  - Intesa Sanpaolo: $235 million CMP.
  - Mega Bank: $180 million CMP.
- FINRA imposed BSA/AML fines against many financial institutions and individuals in 2016 and 2017. FINRA continues to be a significant player in the BSA/AML regulatory and enforcement space.
- FinCEN's 2016 and 2017 enforcement actions covered a wide range of BSA-regulated financial institutions, including banks, credit unions, money service businesses, and casinos/card clubs/race and sports books. FinCEN continued its historical trend of imposing coordinated penalty actions with DOJ.

# AML: Key Factors and Recent Developments

*The regulatory landscape has become more complex and increasing resources have been devoted to compliance and enforcement.*

- Post-9/11, BSA regulations imposed new requirements on banks, securities brokers, money services businesses, casinos, insurance companies, and other financial institutions.
- FinCEN issued mandatory customer due diligence rule in May 2016. Requires banks and broker dealers to collect beneficial ownership information. Effective date May 2018.
- NYDFS issued AML and OFAC transaction monitoring and Board or senior executive certification rule. Effective date January 2017.
- FinCEN issued Notice of Proposed Rulemaking for BSA coverage of Investment Advisers in 2015.

# Legal Requirements

- To address the problem of money laundering, the United States and governments around the world have implemented three types of AML laws:
  - Criminal laws;
  - Forfeiture laws; and
  - Regulatory requirements.
- To address related issues that are based on foreign policy and national security concerns, the U.S. government has implemented economic sanctions programs that prohibit dealings with certain persons and governments.
  - These programs are implemented and enforced by the Treasury Department's Office of Foreign Assets Control ("OFAC").
- Effective, fully-implemented compliance programs can be a deterrent, but not a defense, to an AML or OFAC criminal prosecution and a regulatory enforcement action.
  - *The best defense is a good offense.*

# What Are the Specific U.S. Legal Risks?

## *Potential Criminal Liability under the Criminal AML Laws -- 18 U.S.C. 1956 and 1957*

- Under the money laundering statutes, it is a crime to engage in a financial transaction with knowledge that the proceeds involved are the proceeds of unlawful activity if the government can prove that the proceeds were derived from a specified unlawful activity.
  - *Unlawful Activity* – Generally any violation of criminal law – federal, state, local or foreign.
  - *Specified Unlawful Activities* – There are over 200 specified unlawful activities – U.S. and certain foreign crimes, e.g., drug trafficking, kidnapping, bribery of a foreign government official, misappropriation of foreign public funds, and bank fraud.
  - *Knowledge includes "willful blindness"* – turning a blind eye or deliberately avoiding gaining positive knowledge when faced with a high likelihood of criminal activity, i.e., ignoring red flags.
- The government is not required to establish that the person knew the specific unlawful activity in which the customer engaged, but only that the person knew that the proceeds were derived from some form of unlawful activity.
- Knowledge also can be based on a government sting – a transaction where the government represents that the funds are from illegal activity.

# What Are the Specific U.S. Legal Risks?

## *Money Laundering Forfeiture*

- Under 18 U.S.C. 981, the funds involved in the money laundering transactions or traceable to them can be subject to civil forfeiture.
- There also is forfeiture authority under the BSA.
- How to defend against a civil forfeiture?
  - A financial institution or financial business would have to establish that it was an "innocent owner," i.e., that it engaged in the transaction without knowledge of the illegal conduct or, upon learning of the illegal conduct, that it did all that could be reasonably expected under the circumstances to terminate the illegal use of the property.
  - A reasonable risk-based AML program can help establish innocent ownership – even if the activity occurred despite the controls of the program.

# What Are the Specific U.S. Legal Risks?

## *Regulatory Risk Under the Bank Secrecy Act*

- The main source for AML reporting, recordkeeping, and compliance program requirements for "financial institutions" is the BSA. 31 U.S.C. 5311 et seq. and 31 CFR Chapter X.
- The purpose of the BSA is to provide authority to the Secretary of the Treasury to require reporting, recordkeeping, and compliance program measures for financial institutions that are highly useful in criminal, tax and regulatory investigations and proceedings and, since 2001, to fight international terrorism.
- The BSA requires financial institutions to have an anti-money laundering compliance program and comply with a number of reporting and record-keeping requirements.
- In addition to the criminal money laundering statutes, several U.S. government agencies can impose civil and criminal penalties for violations of the BSA. State banking agencies can impose similar penalties.

# Current Issues in AML Due Diligence

- What information and documentation you obtain and what you do will be risk-based and should be included in written procedures.
  - Any exceptions should be approved in accordance with an established resolution process and the reasons for the approval of any exception should be documented.
- Your traditional counter-parties should pose little money laundering risk and would require little due diligence – publicly traded companies, institutional investors, such as labor unions, pension funds, and endowments, and family offices of families with transparent sources of funds – in jurisdictions that pose low money laundering risks.
- More due diligence should be conducted on counter-parties that pose high money laundering risks, e.g., in high risk jurisdictions, current or former foreign government officials and their close family members and known associates, nongovernment organizations (e.g., charities), and counter-parties or funds from high risk business activities and through financial intermediaries in high risk jurisdictions.
  - In 2016 and 2017, DOJ has continued to increase its focus and resources on proceeds of foreign corruption being laundered through the U.S. financial system.
  - FinCEN's Customer Due Diligence rule is having downstream effect on heightened expectations for beneficial ownership information.
- Certain jurisdictions are considered to pose a higher risk for money laundering because of weak AML controls and high levels of public corruption, drug trafficking and/or terrorism and terrorist financing.

# Government Focus on High-Risks Indicators

*Politically Exposed Persons ("PEPs")*

- PEPs are persons who hold or have held in the past senior positions in any branch of government, including sovereign wealth funds, or in a political party, or has been a candidate for high political office.
  - PEPs also should include senior officials of international organizations.
  - PEPs include close family members and known associates of PEPs and legal entities organized by them or for their benefit.
- PEPs are a major focus of concern – both domestic and non-U.S. – because of the risk that their funds could be derived from public corruption.
- Reasonable measures should be taken to guard against conducting transactions with funds that can be traced to public corruption.
- Reasonable risk-based enhanced due diligence should be performed on PEPs, including research through sources in the country where they held public office.

# Government Focus on High-Risks Indicators

*Geographic Risk and Customer Risk Rating*

- We are seeing heightened government focus on geographic risk, particularly in Latin America and China.
    - A counter-party who is a citizen or resident of, or that has financial accounts in, a country considered to pose a high risk for money laundering, drug trafficking, terrorism, terrorist financing, or public corruption could pose significant money laundering risks.
- Most banks and broker-dealers develop country risk-ratings based on a number of objective criteria and government and private database sources.
- The geographic risk is factored into a counter-party's risk rating and the risk rating drives the level of due diligence conducted.

# Mitigating Risk

- A current or former counter-party, e.g., a legal entity owned by a notorious corrupt foreign political figure that invested illegal funds (or was a straw man for a person on an OFAC list) was to come under criminal investigation by U.S. or foreign authorities cooperating with U.S. authorities.
- The government was to investigate the bank's dealings with the counter-party and the due diligence conducted on the counter-party.
- The government was to find that red flags were purposely ignored by employees or consider the due diligence conducted not to be adequate.
- The government was to seek to forfeit the funds traceable to the investment.
- The case was to appear in the press, and disclose the target's extensive investments in the United States, including with the bank.

# Mitigating Risk

- A fully implemented AML program that includes reasonable risk-based counter-party due diligence.
- If you were to do business with the wrong counter-party, you would need to demonstrate that any illegally sourced funds were invested without knowledge of the underlying illegal activities – that the bank was an "innocent owner."
- Reasonable risk-based due diligence would help establish this defense.

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# Foreign Corrupt Practices Act

# FCPA Overview

The FCPA was enacted in 1977 in the wake of reports that U.S. businesses were making large payments to foreign officials to secure business.

### Anti-Bribery Provisions

The FCPA prohibits corruptly giving, promising, or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his or her official capacity or to secure an improper advantage in order to obtain or retain business.

### Accounting Provisions

The FCPA also requires issuers to maintain accurate "books and records" and internal accounting controls "sufficient to provide reasonable assurances" that the books and records are accurate.

## U.S. Enforcement Agencies


**Department of Justice**

- Criminal enforcement of anti-bribery provisions
- Civil enforcement of anti-bribery provisions (except issuers)
- Criminal enforcement of the accounting provisions (books-and-records and internal controls)
- 35 prosecutors

**Securities and Exchange Commission**

- Civil enforcement of the first anti-bribery provision (issuers)
- Civil enforcement of the accounting provisions (books-and-records and internal controls)
- 38 enforcement attorneys

# FCPA Overview

*Prohibited Conduct*

- The FCPA prohibits not only payments, but also any offer, promise, or authorization to provide anything of value.
  - No payment needs to be made or benefit bestowed for liability.
  - An offer to make a prohibited payment or gift, even if rejected, is a violation of the FCPA
- The FCPA also prohibits indirect corrupt payments.
  - The FCPA imposes liability if a U.S. person authorizes a payment to a third party while "knowing" that the third party will make a corrupt payment.
  - Third parties include local agents, consultants, attorneys, logistics providers or customs handlers.
- Political or charitable contributions can violate the FCPA.
  - If made with corrupt intent, political or charitable contributions can violate the FCPA.

# FCPA Overview

*"Thing of value"*

- There is no "de minimis" exception, and it is not limited to tangible items of economic value.
- A "thing of value" can include anything a recipient would find useful, including:
  - World Cup Tickets
  - Other Event Tickets
  - Political or Charitable Contributions
  - Travel
  - Employment
  - Consulting Fees
  - Tuition
  - Cash
  - Gifts
  - Entertainment
  - Food and Wine
  - Meals
  - Internships
  - Olympics Tickets
  - Professional Training
  - Loans

"As part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift-giving by the company's directors, officers, employees, and agents."

*A Resource Guide to the U.S. Foreign Corrupt Practices Act* (p.16)

# FCPA Overview

## *Knowledge–Conscious Avoidance or Willful Blindness*

- The FCPA prohibits indirect corrupt payments and imposes liability if the company authorizes a payment to a third party while "knowing" that the third party will make a corrupt payment.
- "Knowledge" means either:
  - Being aware of such conduct or substantially certain that such conduct will occur; or
  - Consciously disregarding a "high probability" that a corrupt payment or offer will be made.
- "Head in the sand" or "ostrich" defense will not work.
- Example jury instruction:
  - "When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge."

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# FCPA: Recent Developments

# Recent Developments

- FCPA enforcement to be a high priority for the SEC and DOJ
- SEC has announced over 30 settlements since the beginning of 2016, with penalties/disgorgement ranging from $650,000 to $965 million.
- Significant settlements from individual officers in some cases.
- Och-Ziff settlement
  - Investigations by DOJ and SEC
  - $412 million in settlement/disgorgement penalties
  - $2.2 million payment from CEO
  - Independent monitor for three years

# Observations From Recent Settlements

- Evaluate Risk and Diligence From Perspective of DOJ/SEC
  - DOJ/SEC investigate in hindsight
  - If bribe is suspected or identified, deficiencies in potential risk mitigation take on heightened significance, despite absence of causal nexus
  - DOJ/SEC draw little distinction between reputational or investigative risk and legal risk with respect to dealing with potential counterparties
  - Adverse reputational issues for counterparties, partners or agents can be disqualifying in DOJ/SEC view
  - Background investigations on partners, counterparties and agents are a double-edged sword
  - Third party service providers have limited ability to obtain information
  - DOJ/SEC view content in most skeptical light. Unanswered questions or risks can be used against you
  - Communications with diligence providers may not be privileged
- Risk for executives
  - Despite absence of knowledge of bribes and advice that it was not illegal to transact with counterparty, executives face risk for approving transactions in face of known risks

# Observations From Recent Settlements

- Form of investment not determinative
  - As risk level of transaction increases, form of transaction (loan v. equity; minority v. majority interest) becomes less relevant
  - Loans with conversion option can be viewed as if converted (i.e., greater indicia of control)
  - Depending on circumstances, loan agreements may need to contain provisions strictly limiting use of proceeds and audit rights to confirm proper use of proceeds
- Contractual anti-corruption protections
  - Anti-corruption representations and warranties in agreements with entities are expected but viewed skeptically; should include all relevant entities and individuals
  - If included, audit rights should be exercised and risk issues identified, escalated and addressed
- Limitations on legal advice
  - Consultation with counsel on mitigation of corruption risk does not per se protect against liability
  - Government views legal advice in most skeptical light. Inability to eliminate risk can be used against you

# Observations From Recent Settlements

- Look out for risk of rogue employee
  - Where a former senior employee has actual knowledge of bribery, the company's policies, procedures, and training, as well as transactional diligence and documentation, may not be sufficient to overcome corporate liability
- Compliance program must evolve and not be static
  - Update due diligence on third parties over time; reassess risks in light of ongoing experience and new information
  - Periodically update policies and procedures in light of recent developments
- Risks from conduct of portfolio companies or joint venture partners
  - DOJ/SEC may ignore ownership structure and look through portfolio company or joint venture interest
  - Exercise of diligence and compliance measures can put you on notice of risks that may preclude going forward, despite efforts to mitigate risks
- Transparency with government counterparties
  - In transaction with government counterparty, consider need for disclosure to government of involvement of, and payments to, third parties

# Observations From Recent Settlements

- Don't underestimate reputational risk
  - Media, NGOs and others follow investments in high risk regions and can publish speculative stories that draw regulatory attention
- Additional risk for investment advisers under Investment Advisers Act
  - SEC views violations of FCPA in connection with investments as violation of Adviser Act
- Boards of directors are responsible for compliance oversight and should be briefed periodically on evolving compliance programs and investment initiatives with atypical risk profiles

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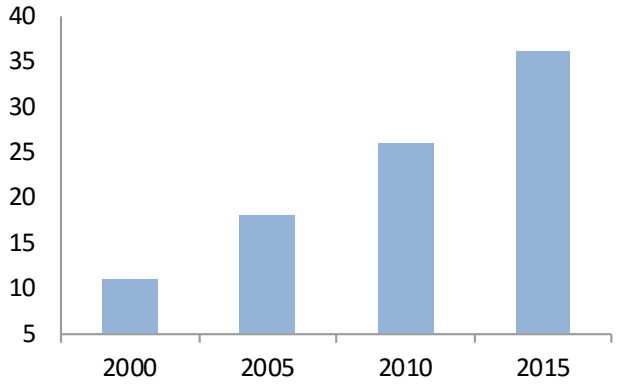
# OFAC

# Growth of Sanctions

*An Ever-Expanding Footprint for U.S. Sanctions*

- On a bipartisan basis the United States continues to rely on economic sanctions as a primary tool of diplomacy and national security.
- New programs have been instituted very quickly, black-listed entities have been added and removed at an unprecedented pace, and the number and severity of enforcement actions – at both the federal and state level – have increased remarkably.

**Active Sanctions Programs**




**300%**

**Since 2000, the growth in US active sanctions programs**

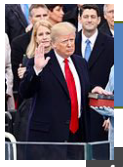
**40%**

**Since 2009, the increase in the number of individuals and entities on the "Specially-Designated Nationals" (SDN) black-list**

**1000s**

**Annual changes to the SDN List – listings and de-listings. On an annual basis the average rate of change has almost doubled since 2007**

# Unprecedented Reliance on Sanctions and Enforcement



| February | March | April | May | June | July | August | September |
|---|---|---|---|---|---|---|---|
| **46 Designations:** Incl 25 Iran; 15 Venezuela; 2 Syria | **24 Designations:** Incl. 11 Counter-Terror; 13 DPRK | **285 Designations:** Incl 271 Syria*; 2 C. Afr. Rep; 1 Libya;1 Org. Crime | **65 Designations:** Incl 10 Syria; 7 Iran; 8 Venezuela 4 Counter-Terror | **95 Designations:** Incl 58 Russia; 14 DPRK; 2 DR Congo | **37 Designations:** Incl 14 Venez. (Maduro); 24 Iran | **95 Designations:** Incl 16 DPRK; 8 Venez.; 65 Narco | **65 Designations:** Incl 6 South Sudan; 6 Iran-Cyber; 30 DPRK |
| **1 Enforcement** $500K –Utd Med $425M - Deutsche* | **1 Enforcement** $100+M- ZTE | **0 Enforcement** | **1 Enforcement** $350M -BNPP* | **2 Enforcements** $90K – Am. Honda $150K – AIG | **2 Enforcements** $2M – Exxon $12M - CSE | **3 Enforcements** $260K – IPSA $520K – Am Exp $415K - COSL | **2 Enforcement** $225M -Habib* **$350K – Richem't** |
| **25 Removals** Incl 2 Org. Crime; 23 Narco | **16 Removals** Incl 2 Zimbabwe; 15 Narco | **5 Removals** Incl 1 Zim.; 2 Narco; 2 Org. Crime | **49 Removals** Incl 46 Narco; 3 Org Crime | **33 Removals** Incl 2 Org Crime; 31 Narco | **0 Removals** | **116 Removals** All Narco related | **0 Removals** |
| **6 Regul Updates** Incl new penalties; 2 GLs, 2 FAQ updates | **1 Regul Updates** Incl 1 Narco General License | **4 Regul Updates** 2 FAQ updates; Belarus General License | **0 Regul Updates** | **1 Regul Update** Incl Cuba FAQ update and interpretation | **2 Regul Updates** Incl update to Sudan E.O.; Cuba FAQ | **6 Regul Updates** Incl new penalties; 2 GLs, 2 FAQ updates | **1 Regul Updates** Incl. updated Russia directives |
| | | | | | | **New Sanctions** DPRK (UN) Venezuela Russia/Iran/DPRK | **New Sanctions** Mali (UN) DPRK (UN) DPRK |

# Legal Basis

*US Sanctions*

- ***Primary Legal Authority*** – International Emergency Economic Powers Act (IEEPA).

Allows the President to issue an "Executive Order" that:

- Declares a "national emergency" concerning a threat to the United States;
- Describes types of actors associated with that emergency; and,
- Imposes restrictions on property owned or controlled by identified actors.

## Enforcement Agencies

**Department of the Treasury**

- Primary enforcement & implementation agency – **The Office of Foreign Assets Control (OFAC)**
- Civil authorities to demand documentation, place entities on the "black list," and levy fines.
- 170 staff divided between enforcement, licensing, and targeting.

**Other Agencies**

- Department of Justice has criminal authorities to prosecute sanctions violations
- Departments of Commerce and State have related authorities regarding export controls
- Non-Federal Agencies – such as NY State Department of Financial Services – also active

# Sanctions Overview

*Types and Applications*

**Primary Sanctions**

**Secondary Sanctions**

In reality, *all* U.S. sanctions have become extra-territorial – some are just more extra-territorial than others…

# US Sanctions

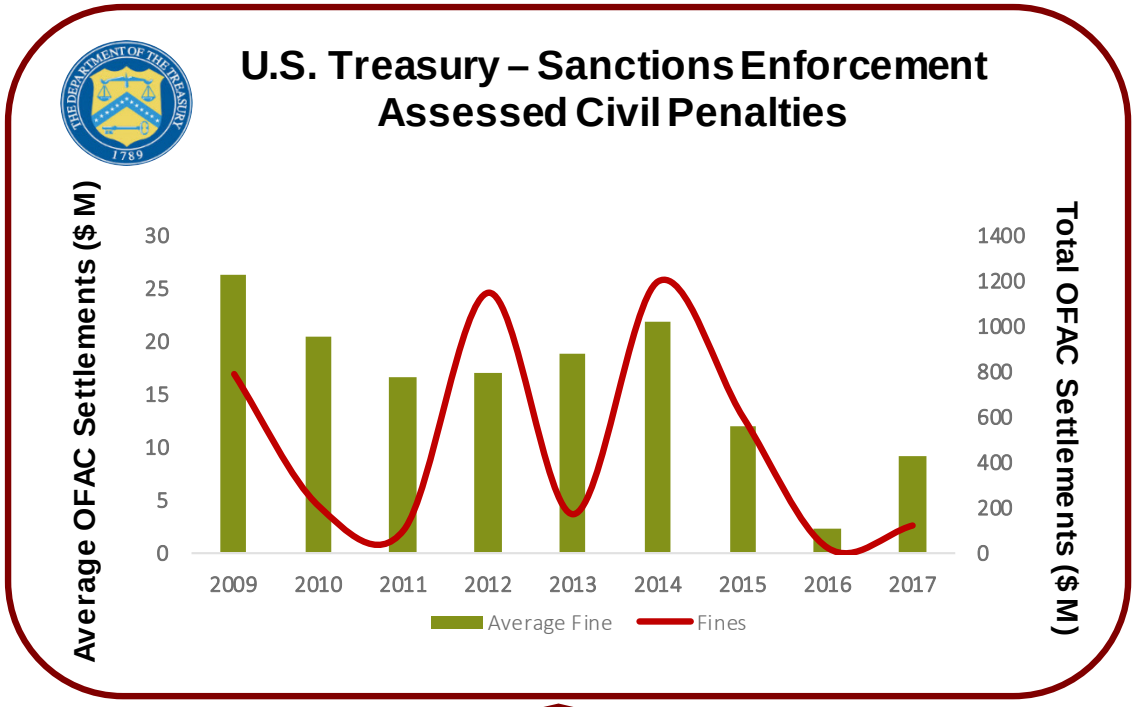
## Who *must* comply?

- US sanctions apply to those under "US jurisdiction" – to any acts occurring within the United States and performed by all "US persons" (natural and legal), which is defined to include:
  - US citizens and permanent resident aliens, wherever located
  - entities organized under the laws of the US, including foreign branches
  - any person in the US, including branches and subsidiaries of foreign entities

**Who *chooses* to comply?**

- Some companies not subject to US jurisdiction choose to comply with US sanctions.
- Firms do so for several reasons, including:
  - concern about potential legal exposure – even if unlikely;
  - worry about the reputational impact of certain dealings – even if not sanctionable;
  - desire to be viewed as a "major company;" obeying US sanctions can be a "seal of approval."

# U.S. Treasury's Active Enforcement Docket




These fines are in addition to penalties and forfeitures assessed by other federal and state authorities including the Department of Justice, the Federal Reserve, the Office of the Comptroller of the Currency, the NY Department of Financial Services and the District Attorney of NY.

These agencies often follow OFAC findings, but have regularly exceeded the amount and scope of penalties assessed by OFAC.

***Civil Enforcement – Quick Facts:***

- ***Since 2008, Treasury has opened more than 5,000 enforcement investigations against entities alleged to have violated U.S. sanctions***
- ***Treasury has assessed nearly $4 billion in fines over that period – averaging more than 30 penalties a year***
- ***Since 2013, the average penalty has been nearly $15 million***
- ***Penalized firms have included major financial institutions from Europe and Asia, and energy, technology, manufacturing and services companies from throughout the world.***

# OFAC Enforcement

*Potent and Increasingly Aggressive*

## ZTE

- In March 2017, the DOJ, OFAC, and BIS announced a combined $1.19 billion penalty against China's ZTE Corporation ("ZTE").
- Simultaneously, ZTE entered a guilty plea for conspiring to violate IEEPA by illegally shipping U.S.-origin items to Iran, obstructing justice, and making a material false statement.
- The total value of the transactions constituting the apparent violations was approximately $39,622,972.
- **Bottom Line**: Technology companies (even in important economies) are under increased scrutiny, export-related sanctions violations can result in huge fines and non-cooperation with regulators can lead to massive penalties

## CSE

- In July 2017, OFAC announced a $12 million settlement against Singapore's CSE Global Ltd. and its subsidiary CSE TransTel Pte. Ltd.
- CSE entered into numerous contracts with Iranian purchasers. OFAC did not allege that any such goods were sourced from the United States nor that any U.S. person was involved in the procurement or re-exporting of such goods. Rather, CSE was fined because it "caused" at least six separate financial institutions to violate sanctions.
- **Bottom Line**: Even in the absence of any other touchpoint, the use of the U.S. dollars *can* bring a transaction under OFAC jurisdiction; a situation that can be exacerbated if a party does not cooperate with regulators.

## COSL

- In August 2017, OFAC announced a $420,000 settlement against China Oilfield Service's Singapore subsidiary.
- From 2011-2013 COSL officials procured at least 55 orders of supplies from the United States for rigs that were operating in Iranian territorial waters.
- The potential statutory maximum penalty was nearly $14,000,000.
- **Bottom Line**: Re-exports of U.S. technology destined for sanctioned jurisdictions are clearly prohibited; that the violations may have occurred in the fairly distant past (and during a time of a different foreign policy) does not mitigate a penalty; OFAC will continue to focus on the Iranian energy sector.

# OFAC Enforcement

*New theories of liability…*

**ExxonMobil**

- In July 2017, OFAC fined ExxonMobil $2 million alleging that the company violated Russia sanctions when it signed a contract with Russian oil firm Rosneft – Rosneft was not sanctioned but its CEO (and the signatory to the contract) was under sanctions.
- OFAC concluded that there was no difference between personal and professional capacities when dealing with SDNs.
- ExxonMobil disagreed and has filed suit in Federal Court claiming that the fine is unjust.
- **Bottom Line**: The court's view will remain unknown for some time – but many observers think that OFAC may have acted unfairly, if not unjustly in the action.

**IPSA International**

- In August 2017, OFAC announced a settlement of $260,000 with IPSA International concerning apparent violations of Iran sanctions.
- IPSA was providing due diligence and investigatory services that involved research in the Iranian market. Though its foreign subsidiary was conducting the work there was an insufficient firewall between the U.S. parent and the foreign subsidiary.
- **Bottom Line**: Even for activities seemingly in line with U.S. foreign policy interests (conducting due diligence in the Iranian market so as to avoid dealings with sanctioned parties) OFAC compliance remains critical.

# Three Primary Sanctions Risks

*Best-Practice Compliance Needs to Simultaneously Cover Each Risk*

**The growth of sanctions programs adds to the number and type of sanctionable conduct and increases the potential of being listed.**

6,000+ Sanctioned Parties

**Black-Listing**

Governments can list a bank or a company for engaging in sanctioned conduct and **bar them from access to their jurisdiction**. The consequences of being listed are severe: assets are frozen and access to markets – retail, investment, insurance, bonds, reinsurance, and correspondent banking restricted or prohibited.

1

**The large number of enforcement agencies involved and the ever-growing number of black-listed entities increases the likelihood of engaging with sanctioned parties.**

$4.1 Billion in OFAC Fines During Obama Administration

**Penalties**

A company that even accidentally engages with black-listed parties can face **reputational, civil, and criminal liability – for itself and its officers and directors**. Authorities have assessed billions of dollars of fines, required divestment of state funds from companies, mandated post-settlement monitoring, and suspended operating licenses.

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**The rising risks of being black-listed and of being penalized – combined with reputational harm – means that no firms are "too big to be de-risked."**

De-banking remains a very serious issue globally

**De-Risking**

A bank or a company can face sanctions-related consequences if its business partners are concerned that its **compliance is unsatisfactory**. Dozens of major firms have "de-risked" – cutting off customers, licensees, bankers, investors, and even whole lines of business due to perceived direct or indirect sanctions risks.

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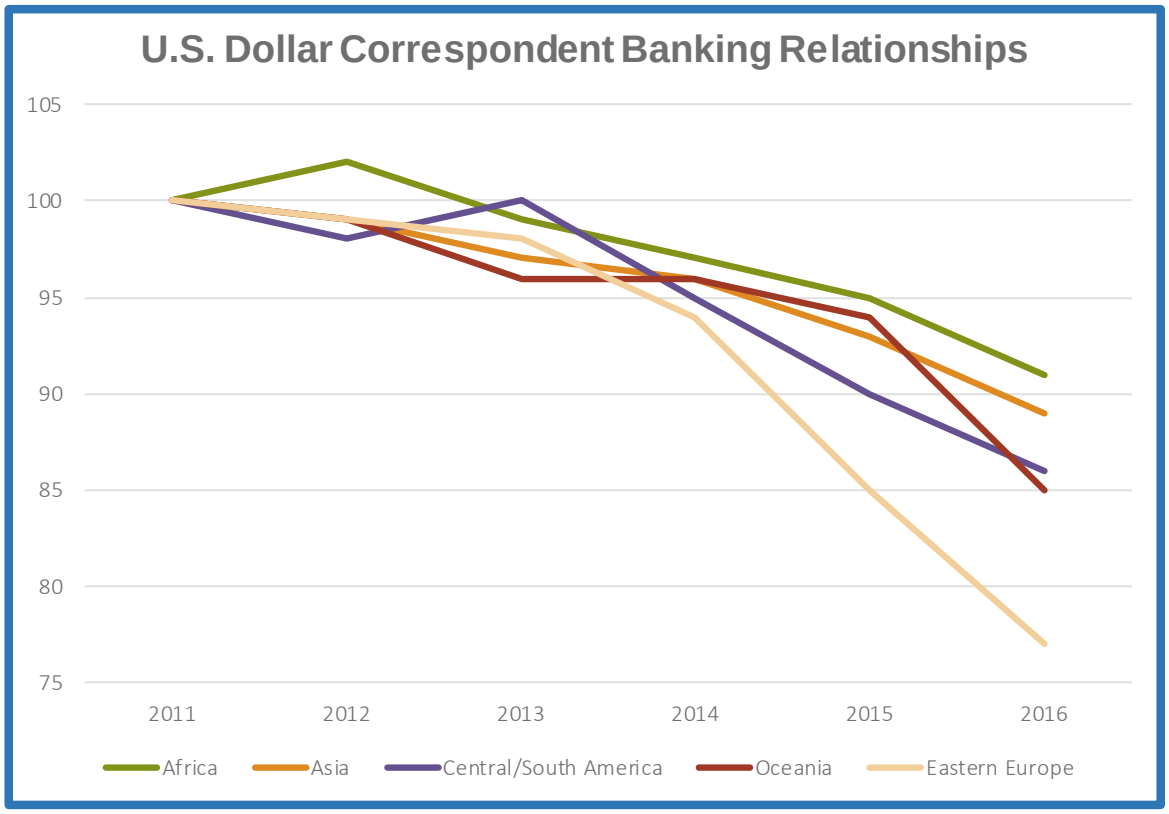
# De-Risking

*Corporations and Entire Countries are being "De-banked"*




Source: The Economist, July 6, 2017
January 2011 = 100

**There has been a 25% reduction in global correspondent banking relationships since 2009**

**The rising risks of being black-listed and of being penalized – combined with reputational harm – means that no firms are "too big to be de-risked."**

De-banking remains a very serious issue globally

**De-Risking**

A bank or a company can face sanctions-related consequences if its business partners are concerned that its **compliance is unsatisfactory**. Dozens of major firms have "de-risked" – cutting off customers, licensees, bankers, investors, and even whole lines of business due to perceived direct or indirect sanctions risks.

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# Professional Profiles

# Stephanie L. Brooker

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*Stephanie L. Brooker, former Director of the Enforcement Division at the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN) and a former federal prosecutor, is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. She is Co-Chair of the Financial Institutions Practice Group and a member of White Collar Defense and Investigations Practice Group. As a prosecutor, Ms. Brooker served as the Chief of the Asset Forfeiture and Money Laundering Section in the U.S. Attorney's Office for the District of Columbia, tried 32 criminal trials, and briefed and argued criminal appeals.*

Ms. Brooker's practice focuses on white-collar criminal defense, internal investigations, regulatory enforcement, compliance counseling. She represents financial institutions in connection with criminal, regulatory, and civil enforcement actions and in responding to regulatory examinations involving compliance with anti-money laundering (AML) laws and regulations, including the Bank Secrecy Act (BSA). Ms. Brooker's practice includes handling criminal money laundering and BSA matters involving a wide range of financial institutions and multi-national businesses and significant criminal and civil asset forfeiture matters. She provides compliance counseling to the full range of financial institutions covered by the Bank Secrecy Act.

Before joining Gibson Dunn in April 2016, Ms. Brooker served as the first Director of FinCEN's Enforcement Division, which is the lead federal regulator with responsibility for enforcing the U.S. AML laws and regulations. In this role, she oversaw all of FinCEN's domestic and foreign enforcement and compliance under the BSA, such as civil money penalty actions and injunctions against a wide range of financial institutions, including banks, credit unions, money services businesses, virtual currency entities, casinos, broker-dealers, futures, insurance, and dealers in precious metals, stones and jewels. She also oversaw rulemaking actions under Section 311 of the PATRIOT Act against foreign institutions and jurisdictions and Geographic Targeting Orders.

Ms. Brooker served from 2005 to 2012 as an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Columbia, where she served as the first Chief of the new Asset Forfeiture and Money Laundering Section from 2010 to 2012. This Section was responsible for all asset forfeiture and money laundering issues in Criminal Division cases and for litigation of civil forfeiture cases. In this role, she investigated and prosecuted complex civil and criminal forfeiture cases involving high-priority enforcement areas, such as national security, sanctions violations, and major financial fraud. She established the USAO's first DC Financial Crimes Task Force and supervised the investigation and prosecution of BSA and money laundering cases. In 2012, she received the U.S. Attorney's Award for Creativity and Innovation in Management. She was awarded three Special Achievement Awards for Superior Performance and the Office's Criminal Division Award.

Ms. Brooker clerked for Judge Diana Gribbon Motz of the U.S. Court of Appeals for the Fourth Circuit and for Judge James Robertson of the U.S. District Court for the District of Columbia. She also worked in private practice as an appellate litigation associate at an international law firm. She graduated *magna cum laude* in 2001 from Georgetown University Law Center, where she served as Managing Editor of Georgetown Law Journal and was elected to the Order of the Coif. She graduated with highest distinction from Northwestern University with a B.S. in Journalism in 1996. She was also selected as a Harry S. Truman Scholar.

# Joel M. Cohen

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*Joel M. Cohen, a trial lawyer and former federal prosecutor, is a partner in the New York office of Gibson, Dunn & Crutcher. He is Co-Chair of Gibson Dunn's White Collar Defense and Investigations Group, and a member of its Securities Litigation, Class Actions and Antitrust Practice Groups. Mr. Cohen has led or participated in 24 civil and criminal trials in federal and state courts. Mr. Cohen is equally comfortable leading confidential investigations, managing crises or advocating in court proceedings. Mr. Cohen's experience includes all aspects of FCPA/anticorruption issues, insider trading, securities and financial institution litigation, class actions, sanctions, money laundering and asset recovery, with a particular focus on international disputes and discovery.*

Mr. Cohen was the prosecutor of Jordan Belfort and Stratton Oakmont, which is the focus of "The Wolf of Wall Street" film by Martin Scorsese. He was an advisor to the OECD in connection with the effort to prohibit corruption in international transactions and was the first Department of Justice legal liaison advisor to the French Ministry of Justice. Mr. Cohen is rated in *Chambers,* where practitioners and clients have noted that he has "incredibly strong substantive depth melded with a risk-based practicality," and praised his ability to "handle very intense, complex matters with regulatory authorities and really just deliver great results." Mr. Cohen has been named a leading white collar criminal defense attorney by *The Best Lawyers in America*©, a "Litigation Star" and multiple times a national Top 100 Trial Lawyer by *Benchmark Litigation*, an "MVP" by *Law360*, a "Super Lawyer" in Criminal Litigation, and his work is noted by *Legal 500* in the areas of white collar criminal defense and securities litigation. In addition, *The American Lawyer* named Mr. Cohen as one of its Litigators of the Week after winning a jury defense verdict in an insider trading case on behalf of Nelson Obus, general partner of Wynnefield Capital.

Mr. Cohen previously was Head of U.S. Litigation at Clifford Chance, where he practiced from 2004 to 2009. From 1999 to 2004, he practiced with Greenberg Traurig. From 1992 to 1999, he served as Assistant United States Attorney in the Eastern District of New York, supervising the Business/Securities Fraud Unit, where he received numerous awards from the Department of Justice and law enforcement agencies.

Mr. Cohen received his bachelor's degree from Middlebury College, his master's degree in History from Duke University and his Juris Doctor from Duke University Law School, where he was a moot court champion. He is a member of the bars of New York and Massachusetts.

Mr. Cohen is committed to pro bono work. He serves on the board of or acts as outside counsel to several prominent nonprofit entities, including New York Lawyers for the Public Interest, Lawyers Without Borders and Jericho Project. He successfully led a team of Gibson Dunn attorneys in representing all plaintiffs in a high-profile immigration civil rights case (Barrera v. Boughton) in Connecticut federal court, which resulted in the largest settlement in history for such claims, for which Gibson Dunn was awarded the National Legal Aid & Defender Association's Beacon of Justice Award, and The New York Times noted the accomplishment in an editorial, and his team received the National Law Journal's Hot Pro Bono designation.

# Andrew L. Fabens

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*Andrew L. Fabens is a partner in the New York office of Gibson, Dunn & Crutcher. Mr. Fabens is Co-Chair of Gibson Dunn's Capital Markets Practice Group and is a member of Gibson Dunn's Securities Regulation and Corporate Governance Practice Group.*

Mr. Fabens advises companies on long-term and strategic capital planning, disclosure and reporting obligations under U.S. federal securities laws, corporate governance issues and stock exchange listing obligations. He represents issuers and underwriters in public and private corporate finance transactions, both in the United States and internationally. His experience encompasses initial public offerings, follow-on equity offerings, investment grade, high-yield and convertible debt offerings and offerings of preferred, hybrid and derivative securities. In addition, he regularly advises companies and investment banks on corporate and securities law issues, including M&A financing, spinoff transactions and liability management programs.

Mr. Fabens is ranked as a leading Capital Markets lawyer by *Chambers USA: America's Leading Lawyers for Business*, *The Legal 500 US* and *Chambers Global: The World's Leading Lawyers for Business*. He is noted as being able to "readily adapt to his client's style, understand what they need and deliver it," that he is "so amazingly even-keeled that nothing throws him," and is a "strong and knowledgeable lawyer" who is very "practical in terms of assessing risk and moving forward."

Mr. Fabens earned his Juris Doctor from Columbia Law School in 2000. He earned a Bachelor of Arts *cum laude* from the University of Michigan in 1989.

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*Stewart L. McDowell is a partner in the San Francisco office of Gibson, Dunn & Crutcher. She is Co-Chair of the firm's Capital Markets Practice.*

Ms. McDowell's practice involves the representation of business organizations as to capital markets transactions, mergers and acquisitions, SEC reporting, corporate governance and general corporate matters. She has significant experience representing both underwriters and issuers in a broad range of both debt and equity securities offerings. She also represents both buyers and sellers in connection with U.S. and cross-border mergers, acquisitions and strategic investments.

Ms. McDowell received her law degree from the University of Virginia School of Law in 1995 and her Bachelor of Arts degree from Princeton University in 1991.

Ms. McDowell is a member of the California State Bar and the New York Bar Association. In 2017, the *Daily Journal* named her one of fifty Top Women Lawyers in California. She has been named a Leading Woman in Tech Law by the *Recorder* for four years in a row. She is ranked by *Chambers USA* for Capital Markets: Debt & Equity (California) and named by *Super Lawyers Magazine* in the area of Securities and Corporate Finance

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*Adam M. Smith is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. He is an experienced international lawyer with a focus on international trade compliance and white collar investigations, including with respect to federal and state economic sanctions enforcement, the Foreign Corrupt Practices Act, embargoes, and export controls.*

From 2010-2015 Mr. Smith served in the Obama Administration as the Senior Advisor to the Director of the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and as the Director for Multilateral Affairs on the National Security Council. At OFAC he played a primary role in all aspects of the agency's work, including briefing Congressional and private sector leadership on sanctions matters, shaping new Executive Orders, regulations, and policy guidance for both strengthening sanctions (Russia and Syria) and easing measures (Burma and Cuba), and advising on enforcement actions following sanctions violations.

Mr. Smith travelled extensively in Europe, the Middle East, Asia, Africa, and the Americas conducting outreach with governments and private sector actors on sanctions, risk, and compliance. This outreach included meetings with senior leadership in several sectors including finance, logistics, insurance and reinsurance, energy, mining, technology, and private equity.

Mr. Smith frequently chaired the Treasury delegation to EU/G7 consultations regarding Russia sanctions and negotiated with EU institutions and member states to implement coordinated measures. Additionally, Mr. Smith managed the development and implementation of the U.S. government's international outreach program on Congressionally-mandated Iran sanctions and helped develop proposed sanctions relief strategies as a part of the Iranian nuclear negotiations.

During Mr. Smith's tenure on the White House's National Security Council he advised the President on his multilateral agenda including with respect to international sanctions, coordinated inter-agency efforts to relieve U.S. economic restrictions on Burma, and developed strategies to counter corruption and illicit flows and to promote stolen asset recovery.

Mr. Smith is a 2006 *magna cum laude* graduate of Harvard Law School where he was a Chayes Fellow, the recipient of the Laylin Prize for the best work in international law, and the Senior Editor of the *Harvard International Law Journal*. He graduated *magna cum laude* from Brown University in 1996 with a Bachelor of Arts degree in Political Science and Economics, and an M.Phil in Politics from Oxford University in 1998 where he was the Seaton Scholar in Politics at St. Hugh's College. Following law school, Mr. Smith served as a law clerk for the Honorable James Baker on the U.S. Court of Appeals for the Armed Forces. Mr. Smith subsequently practiced for more than three years at a major international law firm in Washington, DC, where he advised clients on trade policy, national security, regulatory reform and risk, FCPA, and international investment. He has also held postings with the United Nations in New York, the World Bank / IFC in Washington, DC and abroad, and the OECD in France.

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*Peter W. Wardle is a partner in the Los Angeles office of Gibson, Dunn & Crutcher. He is Co-Chair of its Capital Markets Practice Group.*

Mr. Wardle's practice includes representation of issuers and underwriters in equity and debt offerings, including IPOs and secondary public offerings, and representation of both public and private companies in mergers and acquisitions, including private equity, cross border, leveraged buy-out, distressed and going private transactions. He also advises clients on a wide variety of general corporate and securities law matters, including corporate governance issues.

Mr. Wardle earned his J.D. in 1997 from the University of California, Los Angeles, School of Law, where he was elected to the Order of the Coif and served as Business Manager of the *UCLA Law Review* and Articles Editor of the *UCLA Entertainment Law Review*. He received an A.B. degree *cum laude* in 1992 from Harvard University. Mr. Wardle is a member of the Board of Directors and Co-Chair of the Governance Committee for The Colburn School. He is a member of the firm's Compensation Committee, National Pro Bono Committee and chair of the Community Affairs Committee, and serves as one of the Pro Bono Partners for the Los Angeles area offices.

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