
GIBSON DUNN
Challenges in Compliance and Corporate Governance
January 24, 2018
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# MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast.

- Virginia Bar Association members should anticipate receiving their certificate of attendance in six weeks following the webcast.

- All questions regarding MCLE Information should be directed to Jeanine McKeown (National Training Administrator) at 213–229-7140 or jmckeown@gibsondunn.com.

# Webcast Overview

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Building & Overseeing Effective Compliance

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# 2017 in Brief

# New Administration, Continuing Enforcement

- The outlook in the new administration varies significantly.
  - –For some agencies, enforcement activity and priorities have not meaningfully changed, and companies' regulatory obligations and compliance practices largely remain the same.
  - –Other agencies, such as the EPA, have seen drastic changes in the new administration.
- Regulatory agencies continue to be active, with resources and attention focused in many of the same areas as in the past. Data privacy and cybersecurity are two notable examples of this trend.
- In 2018, there will likely be an increase in enforcement activity as political appointment vacancies are filled. Agencies that have been inching forward more slowly or stalled in a holding pattern could be spurred into action by new leadership with new priorities.

| ***Top External Risks Identified by Compliance Professionals**** |
|---|
| ***1. International Sanctions*** |
| ***2. Brexit*** |
| ***3. Trump Administration*** |

*2017 Risk Advisory Group Survey

# Shifting Transnational Alliances

- As forecast last year, the current administration has trumpeted a turn toward more isolationist policies.
  - –However, the United States continues to maintain historical relationships with other countries in trade agreements, cooperative cross-border enforcement, and other areas.
- Companies also have been affected by similar political trends in other countries, such as the United Kingdom's Brexit and similar Euroskeptic movements in EU member states such as Austria, the Czech Republic, and Denmark.
- The full effect of these political winds remains to be seen, presenting both challenges and opportunities for companies navigating a shifting political and regulatory landscape.


#ENVIRONMENT AUGUST 4, 2017 / 5:25 PM / 5 MONTHS AGO

**U.S. submits formal notice of withdrawal from Paris climate pact**

Brexit bill passes final stage in House of Commons

By James Masters, CNN
Updated 3:13 PM ET, Wed January 17, 2018

# Continuing Cross-Border Cooperation

- Over the past several years, U.S. enforcement authorities have developed relationships with their counterparts abroad to address multi-jurisdictional violations.
  - –Agency-level cooperation does not seem to have meaningfully changed with the new administration.
- Multinational companies must consider different political and regulatory priorities, approaches, and legal frameworks.
- Cross-border investigations raise difficult questions:
  - –Attorney-client privilege;
  - –Permissible production of information subject to data privacy and bank secrecy laws; and
  - –Different local preferences regarding what a company can do in investigating potential internal misconduct.
- Operating in countries with different approaches to law enforcement may affect how a company runs its corporate compliance program.

*"We are committed to working with our partners . . . shoulder to shoulder—steadfast come what might. Together we will ensure that there is no place for corrupt individuals to hide, and no place for them to hide their money, assets or any kind of wealth. No refuge or rest for the wicked."*

– Kenneth Blanco, Former Acting Assistant Attorney General (July 19, 2017)

# Rise of State Enforcers

- The move toward federal de-regulation led by the current administration has sometimes left a regulatory void increasingly occupied by state-level regulation.
  - In the environmental space, increased state-by-state regulatory differentiation and enforcement is driven by both state attorneys general and state environmental agencies.
    - This regulatory patchwork increases difficulty for companies operating nationwide.
- State enforcers also are active in areas that remain a focus of the federal government.
  - For example, state enforcers reached several major data breach settlements in 2017.
- Highly active states include California, Illinois, Massachusetts, and New York.


*"You underestimate the states at your peril."*

- Beau Buffier, Chief of the Antitrust Bureau of the Office of the Attorney General of New York (March 30, 2017)

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# Enforcement and Regulatory Developments

# Enforcement and Regulatory Developments

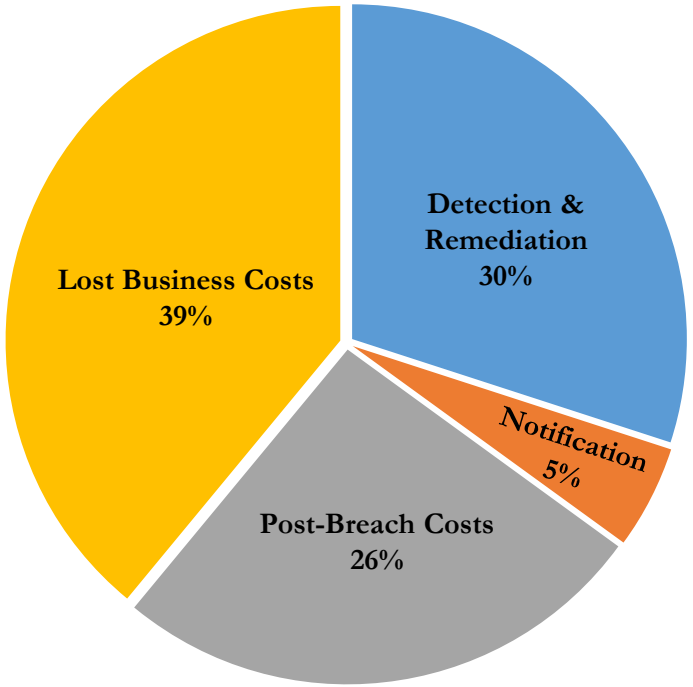
- Data Privacy and Security
- Governance
- Environmental
- Sanctions
- False Claims Act
- Antitrust
- Bank Secrecy Act/Anti-Money Laundering
- Criminal Tax and Cross-Border Concerns
- White Collar and Securities Fraud

# Data Privacy and Security
*Threats and Trends*

- ***Major Risks***:
  - –Nation states, including China, North Korea, and Russia.
  - –Insiders: Involved in 25% of data breaches in 2016.
  - –Limited oversight of trusted third-parties: Only 38% of data risk managers in a 2016 survey felt their boards were involved in managing vendor risk.

- ***Threat Outlook***:
  - –Likely continued focus on hacks to steal valuable information, such as IP.
  - –Increased focus in recent years on hacks using ransomware to raise money.
  - –Disruptive cyberattacks causing ripple effects that impact supply chains for months.
  - –Hackers may exploit recently disclosed hardware vulnerabilities in computer processers.

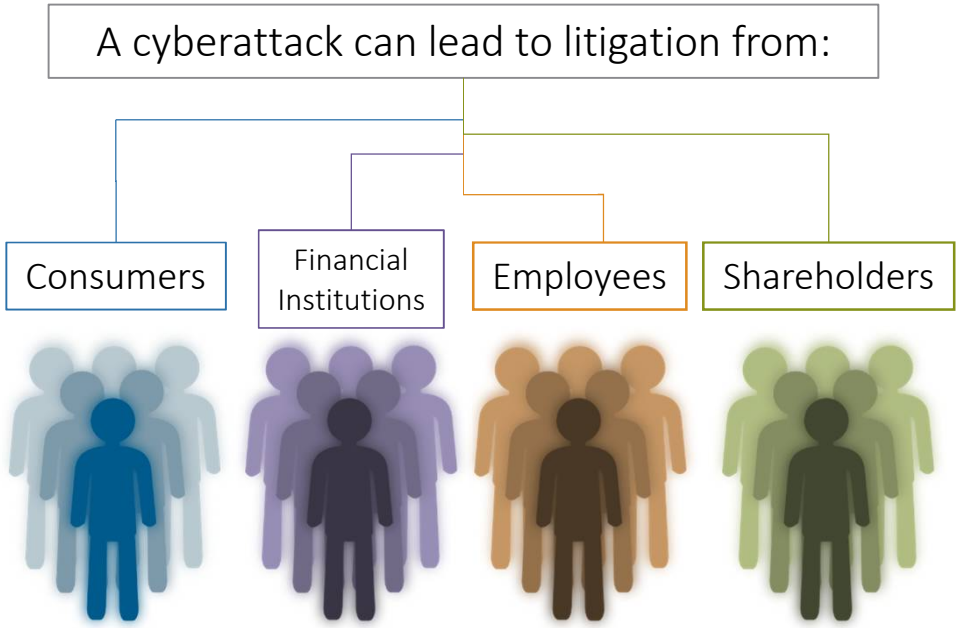
**Data Breach Costs by Source, 2017**




Ponemon Institute - 2017 Cost of Data Breach Study

# Data Privacy and Security
*Litigation Developments*

| Case & Settlement Date | Settlement Details |
|---|---|
| **Seagate**<br>Employee Class<br>Oct. 2017 | Up to **$47.75 million**<br>Up to $42 million for class member costs<br>$5.75 million in identity theft protection<br>Employee training |
| **Anthem**<br>Consumer Class<br>June 2017 | **$115 million** paid into settlement fund<br>Improvements to data security |
| **Target**<br>Financial Institution Class<br>May 2016 | Reportedly up to **$125.5 million**<br>Reportedly up to $67 million for claims<br>Up to $20.25 million for class claims<br>$19.1 million to a financial services company<br>$19.2 million in fees and costs |




*In 2017, the average cost to settle class-action data breach litigation was approximately* ***nine times higher*** *than in 2015.*

# Data Privacy and Security

*Regulatory Developments*

***SEC***

- In 2018, the SEC likely will refresh its 2011 guidance on disclosing cybersecurity incidents.
  - There were multiple SEC investigations related to major data breaches in 2017.
- The SEC filed one cybersecurity enforcement action in 2017 alleging market manipulation using a fake tender offer.

***FTC***

- The FTC actively pursued cybersecurity resolutions in 2017.
  - The FTC took the unusual step of disclosing a data breach investigation.
  - In multiple data privacy settlements from 2017, companies were required to undergo third-party privacy compliance auditing for 20 years.
  - The FTC also reached settlements with two technology hardware manufacturers. One settlement is related to allegations that a company failed to secure products; the second settlement is related to allegations that a manufacturer collected users' information without consent.

***GDPR***

- For organizations processing EU data, the General Data Protection Regulation (GDPR) becomes effective in May 2018.

# Data Privacy and Security

*Key Features of the GDPR*

- Applies to entities handling **data originating in the EU**
- Enhanced **consent and notice requirements** for processing individuals' data
- Greater **individual control** over data, including access, erasure, and portability
- Expedited data breach notification to **individuals**
- Data breach notification to **authorities** within **72 hours**
- **Enhances penalties**: up to the greater of 4% of revenue or €20 million

# Data Privacy and Security

*The Role of Governance*

- Despite the high bar for officer and director liability under *Caremark*, plaintiffs still have brought derivative lawsuits following cyberattacks (six since 2014, including two in 2017).
- Data breach derivative lawsuits have alleged breaches of fiduciary duties and mismanagement based on failure to oversee company policies and procedures.
- More recent cases focus on alleged disclosure deficiencies: failure to disclose cybersecurity risks prior to a cyberattack and failure to timely disclose cyberattacks.
- Instituting policies on cyber-incident disclosure and documenting decisions can help prepare for legal challenges. Disclosure polices should include:
  - A list of potential disclosure obligations (*e.g.*, required notification to customers, reporting to financial or industry regulators, necessary market disclosures);
  - Thresholds for disclosing a cyber event (*e.g.*, severity, duration, impact to business operations, impact to customers);
  - Responsibility for final decisions about disclosure; and
  - Procedures for documenting decisions.

# Data Privacy and Security

*The Role of Governance*

- In the aftermath of recent cybersecurity breaches, boards are seeking greater insight into cybersecurity risks.
  - –According to a 2017 survey, 79% of directors are more involved in cybersecurity efforts this year than last year.
- Boards structure governance of cybersecurity issues in various ways:
  - –A 2017 survey found that 69% of boards assign primary responsibility for cybersecurity to a board committee, whereas 26% oversee cybersecurity at the full board level.
  - –Traditionally, boards have delegated oversight of cybersecurity to the audit committee (57% of companies where a committee has primary responsibility for cybersecurity, according to one survey), but some companies have created technology committees that can spend more time on oversight of cybersecurity.
- Financial services companies often include cybersecurity oversight among the duties of the risk committee.
- Companies might consider whether to have more frequent updates on cybersecurity – perhaps two to four times a year, with one or two in-depth briefings.
  - –Per a 2017 survey, 91% of directors are briefed on cybersecurity at least once a year.

# Data Privacy and Security
## *The Role of Governance*

- Sample board committee charter provisions for cybersecurity:

*Physical Security and Cybersecurity Committee* [critical infrastructure company]

Periodically review cybersecurity policies and procedures, including the development, maintenance, and effectiveness of the Company's cybersecurity strategy, business continuity, disaster response, and incident response and recovery plans; and the Company's cybersecurity and other information technology risks, controls and procedures.

*Technology Committee* [financial services company]

Review and make recommendations to the Board, the Risk Committee and, as applicable, other committees regarding technology and technology-related risk matters, including information- and cyber-security.

*Risk Committee* [supply chain company]

Oversee the Company's risk identification, risk tolerance, risk assessment and management practices for strategic risks, including, but not limited to, risks associated with technology, intellectual property and operations, such as (a) the quality, adequacy and effectiveness of the Company's data security, privacy, technology and information security policies, procedures, and internal controls, (b) cybersecurity and cyber incident response, and (c) business continuity and disaster recovery planning and capabilities.

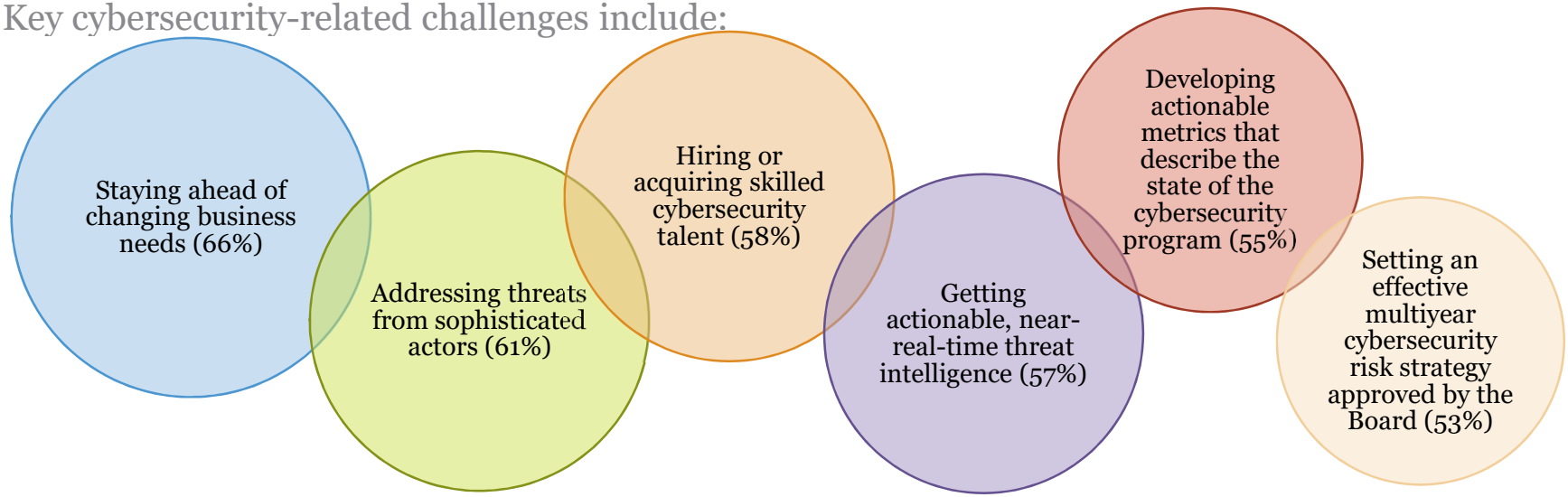
*Audit and Risk Committee* [financial services company]

Review and discuss with management the Company's cyber security and information security programs, and annually review and approve the global business continuity program.

# Data Privacy and Security

*The Role of Governance*

- According to a recent survey, although organizations recognize cybersecurity as a preeminent risk and allocate resources accordingly, many compliance professionals feel their organizations have room to improve in managing cybersecurity risks effectively.
  - **32%** of respondents believe their institutions manage cybersecurity risk extremely effectively or very effectively.
  - **41%** of respondents believe cybersecurity risks will increase the most in importance for their business over the next two years.
- Key cybersecurity-related challenges include:




Deloitte Global Risk Management Survey, 10th Edition

# Data Privacy and Security

*Best Practices*

- In a 2017 derivative litigation settlement, a major retailer agreed to implement the following cybersecurity corporate governance practices:
  - –Hire a Chief Information Security Officer with defined duties;
  - –Monitor key indicators of compromise on computer network endpoints;
  - –Institute cyber tabletop exercises;
  - –Search for confidential company information via a dark web mining service;
  - –Establish an executive committee on data security;
  - –Require management reporting regarding IT spending on cybersecurity;
  - –Institute an Incident Response Team and Incident Response Plan; and
  - –Participate in information-sharing agreements.

Photo by Maarten van den Heuvel // Unsplash

# Data Privacy and Security

*Best Practices*

## Additional best practices include:

- Developing a business continuity plan to mitigate disruptive cyberattacks.
- Building relationships with local and federal law enforcement.
- Using a dashboard of quantitative metrics for the board to measure progress.
- Adopting the NIST Framework for assessing cyber risk.
- Commissioning an independent legal assessment of cybersecurity governance.

This type of assessment can cover:

- Cybersecurity response plans;
- Board and management reporting procedures;
- Employee training materials;
- Third-party vendor assessment processes; and
- Other aspects of cybersecurity governance.

# Governance
*Key Developments*

- Key developments in corporate governance relate to:
  - –Pay Ratio in 2018 Proxy Statements;
  - –Gender Diversity and Pay Gap;
  - –Proxy Disclosure of Director Skills and Expertise;
  - –Director Compensation; and
  - –Staff Legal Bulletin No. 14I.

# Governance

## *Pay Ratio in 2018 Proxy Statements*

- As required by Dodd-Frank, Reg S-K Item 402(u) mandates pay ratio disclosure of:
  - –Annual compensation of median employee (not including CEO);
  - –Annual total CEO compensation; and
  - –The ratio of the above two amounts.

- Likely to be a focus area for employees, which will require communication strategies and coordination of timing of disclosure with HR.
- May become a focus area for investors and proxy advisory firms—especially for outliers.
- Each company's pay ratio will be unique, although there will be a tendency to compare across companies.
- The SEC has stated that the purpose of disclosure is to allow for a better understanding of a "particular registrant's compensation practices . . . rather than to facilitate a comparison of this information from one registrant to another."

# Governance
## *Gender Pay Gap*

- Increased shareholder focus on board gender pay gap:
  - –Continues increase in shareholder proposals in last three years requesting reports on gender pay gaps (23 in 2017 vs. 13 in 2016).
    - Proposals have been on technology and financial services companies.
    - A majority of 2016 and 2017 proposals were submitted by Arjuna Capital, with five submitted by Pax World.

- For 2018, ISS adopted a new case-by-case approach that considers:
  - –Current company policies and disclosures on diversity;
  - –A company's use of "fair and equitable compensation practices;"
  - –Any recent controversies, litigation or regulatory actions related to gender pay gap issues; and
  - –Any lag between the company and its peers with regard to reporting on gender pay gap.

- Under Glass Lewis' 2017 guidelines, they will support gender pay disclosure proposals if the company "has not adequately addressed the issue and there is credible evidence that such inattention presents a risk to the company's operations and/or shareholders."

# Governance
## *Gender Diversity*

- Recent shareholder push for increased board gender diversity:
  - –35 shareholder proposals in 2017 (up from 28 in 2016).
  - –BlackRock and State Street Global Advisors engaging in dialogue with companies to push for greater gender diversity.
  - –CalSTRS recently sent out letters to 125 California corporations with all-male boards, noting that shareholder proposals are possible if private initiatives do not result in changes to board composition.

- Investor Stewardship Group framework includes board diversity as a factor that will inform 2018 proxy voting guidelines and practices.
  - –Under its new policy, beginning in 2019 Glass Lewis will recommend voting against nominating committee chairs of Russell 3000 companies whose boards have no female members.
    - This policy will not apply to companies with disclosed plans for improving board diversity.

# Governance

## *Proxy Disclosure of Director Skills and Expertise*

- Currently, ~15% of S&P 500 companies provide a director skill matrix in proxy statements or elsewhere.
- As part of its "Boardroom Accountability Project," in September 2017 the NYC Comptroller sent letters to the Nominating and Governance committees of 151 companies requesting the inclusion of a director "skills and experience matrix" in proxy statements.

  - This is part of the Comptroller's larger focus on board diversity and refreshment, and also is reflected in a 2015 SEC rulemaking petition from the Comptroller and eight pension funds requesting mandatory skill matrix disclosure.
  - The letter includes request that skill matrix include information on race, gender, and sexual orientation.
  - The Comptroller's sample matrix includes such skills and experiences as industry experience, international, board experience, finance/capital allocation, government/public policy, and technology/systems.

# Governance
## *Director Compensation*

- Recent years have seen a heightened focus on director compensation in light of continued increases in median pay.
  - –Recent Delaware shareholder lawsuits allege breach of fiduciary duty regarding director equity compensation (*e.g.*, *Espinoza v. Zuckerberg*; *In re Investors Bancorp)*.
  - –Delaware courts have held that stockholder approval of an equity compensation plan would not constitute ratification of non-employee director compensation without specific, meaningful limits in the plan on the amount of compensation that could be awarded to non-employee directors.
- ISS adopted a new policy on "excessive" non-employee director pay, which will impact recommendations beginning in 2019.
  - –Under a new policy, ISS will recommend votes "against" board or committee members responsible for approving or setting non-employee director compensation when there is a recurring pattern of "excessive" pay without a compelling rationale or other mitigating factors.
  - –This would apply only after two consecutive years of outlier compensation.
  - –It is intended only to target "extreme" outliers.

# Governance
## *SEC Staff Legal Bulletin No. 14I*

- In November 2017, an SEC Staff Legal Bulletin provided guidance on shareholder proposals submitted under Rule 14a-8, outlining Staff views on four issues:
  - –The application of the "Ordinary Business Exception" (Rule 14a-8(i)(7)).
    - Expectation that future no-action requests include a discussion, where relevant, of the perspective of company boards on whether proposals raise significant policy issues.
  - –The scope of the "Economic Relevance Exception" (Rule 14a-8(i)(5)).
    - Emphasis on whether proposals relate to operations accounting for less than 5% of total assets, net earnings, and gross sales, and the board's perspective on whether the proposal is significant to the company in the context of its operations.
  - –The necessary documentation for the submission of proposals by proxy.
  - –The conditions for the exclusion of graphs and images in proposals.

# Environmental Regulation & Enforcement

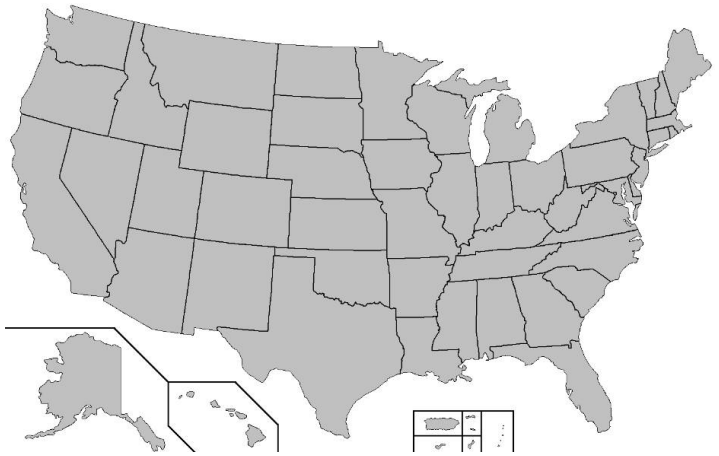
*Regulatory Trends – EPA*

- President Trump issued executive orders in 2017 requiring regulatory reform: agencies must establish processes to review existing regulations and make recommendations about possible repeal, replacement, or modification.
  - –In 2017, EPA finalized the most de-regulatory actions among large federal agencies (sixteen, versus only one final regulatory action).
  - –This signals Administrator Pruitt's commitment towards a broad de-regulatory push.
- In FY 2018, the total costs of EPA's regulatory and de-regulatory actions must result in cost savings of at least $40 million (EPA's regulatory cost "allowance").
  - –EPA will have to increase de-regulatory activities that reduce costs on the regulated community, such as removing regulations or delaying compliance.
- EPA likely will finish its review and reconsideration of many significant regulations in 2018, including several impacting the energy sector.
  - –Expect an increase in some final actions, as required by major environmental statutes.
  - –Litigation of these final actions will add to overall regulatory uncertainty in 2018.

# Environmental Regulation & Enforcement

*Regulatory Trends – States*

- Varied responses by state governments and major municipalities to the de-regulatory push at EPA.
  - –Many have enacted regulations or policies that fill the void created by EPA's perceived retreat.
  - –State-level fiscal constraints, exacerbated by anticipated decreases in EPA's budget (which funds large portions of state environmental budgets through grants), may impact the effectiveness of state activity.
  - –Federal funding accounts for much of the environmental budget in Midwestern and Western states, such as the Dakotas and Idaho, as well as in Southern states, including Georgia and South Carolina.
- 2018 could see a greater "patchwork" of state environmental regulation as the federal floor is lowered and certain states enact stricter standards.



# Environmental Regulation & Enforcement

*Enforcement Trends – EPA*

- EPA initiated significantly fewer administrative and judicial enforcement actions in 2017 compared to the first year of the previous two Administrations (approximately 2000).
- Enforcement resources declined, and Administrator Pruitt announced his intention to increasingly defer to state enforcement mechanisms.
- Key EPA political leadership positions in offices that impact the scope and pace of enforcement were not confirmed until late 2017.
  - The nominee for Assistant Attorney General, Environment and Natural Resources Division has yet to be confirmed.
- Headquarters is asserting greater control over certain enforcement-related actions that historically have been carried out by regional personnel.
  - For example, in May 2017, EPA's Office of Civil Enforcement established new procedures requiring HQ review of certain requests for information or testing under major environmental statutes before regional enforcement staff may issue them to facilities.

# Environmental Regulation & Enforcement

## *Enforcement Trends – States and International*

- ***States***: Some state Attorneys General, environmental NGOs, and others have signaled an intent to increase enforcement actions and bring civil actions to address perceived environmental threats.
  - –Activity related to climate change concerns includes lawsuits recently filed by several major cities in California and by New York City against dozens of oil and gas companies.
  - –States also have brought lawsuits against the Trump Administration, alleging failures to properly carry out environmental laws and regulations.
- ***Internationally***:
  - –In 2017, China began its largest-ever national environmental inspection and enforcement initiative, likely to continue in 2018. Inspection teams identified violations at tens of thousands of facilities in 30 regions and provinces, and issued varying penalties to more than 30,000 companies and officials.
  - –The United States announced its intent to withdraw from the Paris Climate Agreement in 2017, although actual withdrawal does not become effective until November 2020 at the earliest.

*"By the way, we have not lost a case yet against the federal government on these environmental matters."*

– Xavier Becerra, California Attorney General (December 6, 2017)

# Environmental Regulation & Enforcement

*Governance and Risk Management*

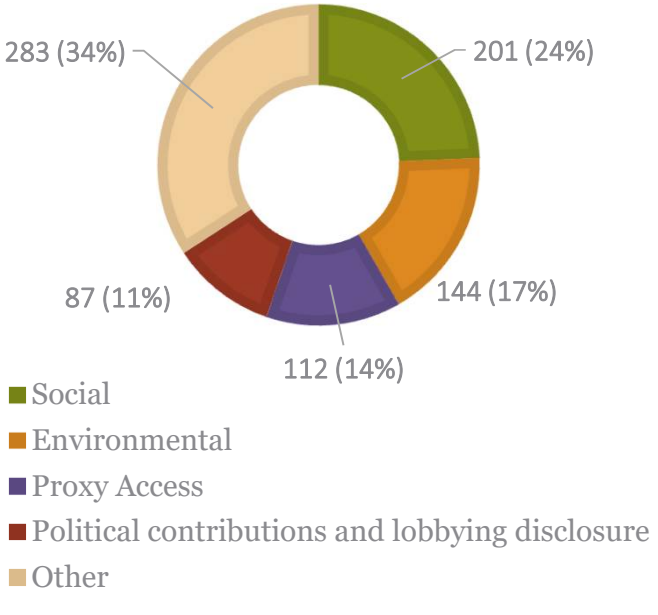
- Companies face various sources of investigatory and litigation risk:
  - Required and voluntary disclosures are a key source of potential liability. The SEC's most recent climate disclosure guidance is from February 2010 (Rel. 33-9106). The agency reportedly is revisiting this guidance.
  - Many companies are voluntarily disclosing, outside of SEC filings, how climate change-related risks are taken into account in their business planning, often using a "carbon cost" to account for the cost of present and future regulation.
  - Lack of federal action may galvanize groups such as NGOs and shareholders, in addition to state regulatory and enforcement authorities taking a larger role.

# Environmental

## *Environmental Shareholder Proposals*

- In 2017, environmental and social issue proposals were the most frequent proposal topic (345 proposals).
- There was unprecedented shareholder support for environmental proposals in 2017.
  - –Three climate change proposals received majority support.
  - –Averaged 32.6% of votes cast, up from 24.2% in 2016.
  - –Reflects shift in approach by institutional investors such as BlackRock, Vanguard, and Fidelity.
- Most common environmental topic: climate change (69 proposals). Sustainability reporting proposals saw an increase to 24 in 2017, up from 18 in 2016.
- ISS also increasingly recommends votes "for" climate change proposals: recommended votes for 82% of proposals in 2017, versus 73% in 2016.

**Common Proposal Topics**

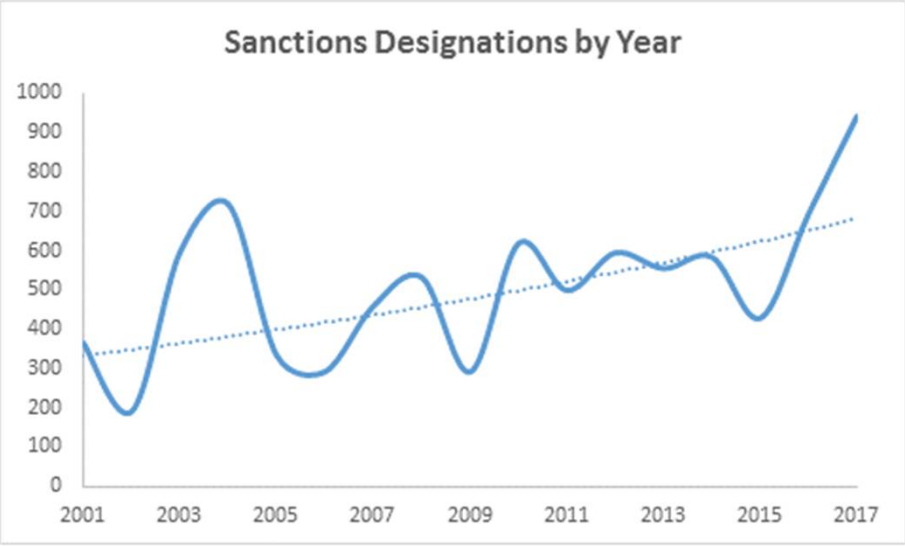


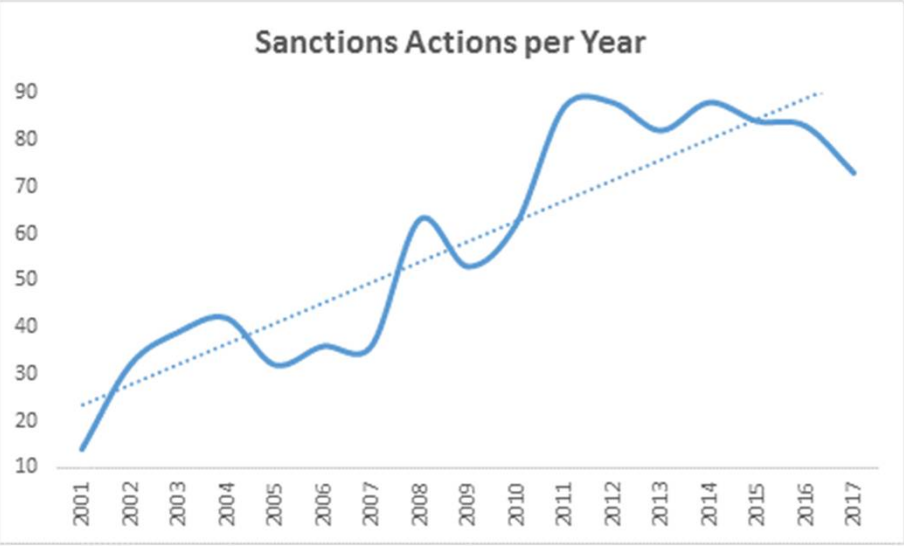

***Ultimately, if companies are not responsive on environmental governance, shareholders may force the issue through activism.***

# Sanctions

2017 continued a nearly two-decade trend of increasing reliance on sanctions by the U.S. Government. President Trump's first year was unprecedented in this regard:

- Nearly 1,000 new designations listings in 2017 (≈5700 persons on SDN List);
- More than one sanctions action per week (nearly 60 over the course of the year);
- Billions of dollars of fines by OFAC, Department of Commerce, and state authorities (*e.g.*, DFS); and
- Several new sanctions programs, including programs targeting Global Human Rights & Corruption and Venezuela and enhanced penalties against DPRK, Russia, and Iran.



# Sanctions Program
## *Key Developments*

*"At the direction of President Trump, Treasury and our interagency partners will continue to take decisive and impactful actions to hold accountable those who abuse human rights, perpetrate corruption, and undermine American ideals."*

– Steven T. Mnuchin, Secretary of the Treasury (December 21, 2017)

***Bottom Line***

- This Executive Order breaks down silos between sanctions risks, anti-money laundering risks, and anti-corruption risks.
- This Order could be used for cases in which it is difficult to establish a formal legal case regarding money laundering or corruption – sanctions are much easier to impose.

- On December 20, 2017, President Trump promulgated a new Executive Order implementing the Global Magnitsky Human Rights Accountability Act.
- The EO—which has been celebrated by human rights and anti-corruption NGOs—allows for the targeted sanctioning of any "current or former government official, or…person acting for on behalf of such an official…responsible for or complicit in…corruption…or bribery; …or…to be or have been a leader or official of an entity…that has engaged in, or whose members have engaged in" human rights abuses or corruption.
  - –52 individuals and entities already have been designated under the EO.
  - –Several of those sanctioned were facing, or had faced, investigation for potential FCPA violations.
  - –The EO is a very flexible tool – many of those sanctioned came from countries that recently had sanctions programs discontinued (*e.g.*, Burma), or from jurisdictions on which the United States likely would be unwilling to impose more comprehensive restrictions (*e.g.*, Israel and China).

# Sanctions
## *U.S. Enforcement Update*

- Aggressive enforcement at federal and state levels, including criminal action:
  - –OFAC and a company are litigating the imposition of a $2 million penalty for violations of the Ukraine-Related Sanctions Regulations.
  - – A Chinese telecommunications company entered into a settlement with BIS, DOJ, and OFAC for economic sanctions and export control violations, with $1.19 billion in total penalties.
  - –On July 27, 2017, OFAC announced a $12 million settlement with CSE Global Limited and its subsidiary. This is the first time OFAC has penalized a non-U.S., non-financial company for "causing" sanctions violations by initiating U.S. dollar payments involving a sanctioned country.
  - –Pakistan's Habib Bank agreed to pay $225 million and close its New York branch to settle an enforcement action brought against it by the New York State Department of Financial Services for infringing sanction rules and laws designed to combat illicit money transfers.
  - –In the largest sanctions evasion case in recent history, earlier this year a Manhattan jury convicted a banker at a major Turkish financial institution of conspiring to evade U.S. sanctions against Iran.

OFAC

***Bottom Line***

- Since 2009, OFAC has issued **185 penalties**; each penalty has averaged nearly **$20 million**.
- In 2017, the maximum OFAC penalty was increased to the greater of nearly **$290,000 or twice the value of the underlying violative transaction**. Penalties are computed on a per-transaction basis.

# Sanctions

*U.S. Update – Current Sanctions Programs*

## Highly Active

1. Iran – Several Programs
2. DPRK – Several Programs
3. Counter-terrorism
4. Counter-WMD Proliferation
5. Counter-narcotics
6. Syria – Several Programs
7. Russia/Ukraine – Several Programs
8. Venezuela – Several Programs
9. Cuba

## Moderately Active

10. Malicious Cyber-Enabled Activities
11. Russia Human Rights (Magnitsky)
12. Transnational Criminal Organizations
13. Global Human Rights/Corruption
14. Zimbabwe

## Less Active

15. Western Balkans
16. Belarus
17. Burma
18. Burundi
19. Central African Republic
20. Darfur
21. Dem. Republic of the Congo
22. Foreign Sanctions Evaders
23. Iraq
24. Lebanon
25. Libya
26. Somalia
27. South Sudan
28. Yemen

# Iran Sanctions Program

*Key Developments*

*"I am [today] waiving the application of certain…sanctions, but only…to secure our European allies' agreement to fix the terrible flaws of the Iran nuclear deal. This is a last chance."*

– President Trump (January 12, 2018)

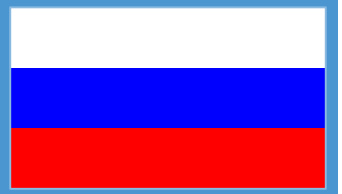
**Bottom Line**

- Likely significant increase in IRGC-related sanctions and potential sanctions on major Iranian banks, companies, and government ministries.
- Uncertainty how snap-back and wind-down provisions agreed in the Obama Administration will be treated if the President follows through on his threat.

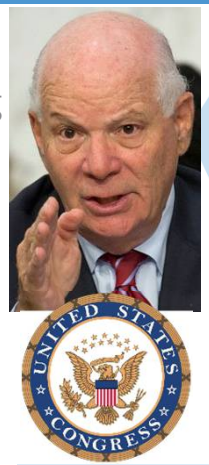
- ***Decertification***: On October 13, 2017, President Trump refused to certify that the 2015 Iran nuclear deal (the "JCPOA") was in the national security interests of the United States.
  - –The statement was made pursuant to the Iran Nuclear Agreement Review Act ("INARA") which governs U.S. participation in the JCPOA.
  - –The President does not claim that Iran is non-compliant with the JCPOA, just that sanctions relief is not in the United States' national security interests (which is the standard provided in INARA).
- Today, the United States remains party to the JCPOA, and the Trump Administration has—at least in the past—indicated that it would like to see some nuclear-related sanctions relief remain in force.
  - –All relief and all licenses issued under or before the JCPOA are valid.
  - –Congressional leaders have begun to draft legislation amending the INARA by removing sunset provisions and requiring automatic re-imposition of sanctions in the event of certain nuclear and non-nuclear related circumstances coming to pass.
- ***Threatened Date-Certain Withdrawal***: On January 12, 2018, President Trump threatened to pull the United States from the Nuclear Deal if European allies do not agree with the United States to improve the deal within 120 days (May 12, 2018).

# Russia Sanctions Program

*Key Developments*



- President Trump signed legislation (H.R. 3364, Countering America's Adversaries Through Sanctions Act – CAATSA) imposing sanctions on Russia; the sanctions are extensive but there is flexibility in the language that would allow the President to enforce the new measures less robustly than lawmakers intended.
- CAATSA codified and expanded existing sectoral and secondary sanctions against Russia:
  - Sectoral Sanctions: Added sectors for potential future sectoral sanctions including the metals and mining, engineering, and "defense and related materiel" sectors.
  - Secondary Sanctions: On a discretionary basis, sanctions can be imposed on non-U.S. persons engaging in transactions with Russia's energy, defense, and/or intelligence sectors.
- CAATSA—in an unprecedented manner—limits the President's discretion to waive or terminate the sanctions or issue licenses that would "significantly" alter foreign policy with regard to Russia.
- Both the OFAC and the State Department guidance devote significant attention not just to how they will implement the law, but also to the President's substantial discretion to not implement—or to weakly implement—large portions of the new law.




*"President Trump must be clear-eyed about the Russian threat, take action to strengthen our government's response…and…mobilize our country…to counter the threat and assert our values."*

– Ben Cardin, Senator (D-MD) (January 10, 2018)

***Bottom Line***

- Likely additional Congressional action unless the Administration is seen to be robustly implementing CAATSA.
- Continued focus on Magnitksy Human Right sanctions; potential use of "Global Magnitsky" EO to address corruption.
- Possible launch of Russian "CryptoRuble" in order to subvert U.S.-dollar-based sanctions.
- Uncertain implications of Mueller probe.

# North Korea Sanctions Program

*Key Developments*

- Executive Order 13810: On September 20, 2017, President Trump issued a new Executive Order imposing additional sanctions on the Democratic People's Republic of Korea.
  - –Most notably, the new measures borrow from the Obama Administration's sanctions playbook by imposing sanctions on specific sectors and threatening to cut off access to the U.S. banking system for any person involved in North Korean trade.
  - –The sanctions could have a profound impact on China and Russia.
  - –Secondary sanctions also could implicate unwitting counterparties involved in North Korean trade.
- In December 2017, the UN Security Council unanimously adopted another U.S.-drafted sanctions resolution targeting North Korea.
- It is unclear if the Olympics-related apparent warming of ties between North and South Korea will have any impact on sanctions.
- There is increasing pressure and enforcement from the United Nations and European Union.

***Bottom Line***

- Likely increasing accusations and evidence of sanctions evasion—followed by enforcement:

*Satellite evidence released by OFAC in December 2017 allegedly showing illegal sales of oil to the DPRK*

- U.S. Department of Justice likely will continue its enforcement activities (adding to the $11 million August 2017 money laundering and forfeiture actions for alleged financial facilitators of North Korea).

# Venezuela Sanctions Program

*Key Developments*

- On August 24, 2017, President Trump issued an Executive Order enhancing sanctions on Venezuela by prohibiting certain transactions involving debt and equity of the Government—including Venezuela's oil company, Petróleos de Venezuela, S.A. (PdVSA).
  - –Modeled in part on the Russian sanctions, these new measures impose substantial restrictions on U.S. persons, but do not require U.S. persons to block Venezuelan government or PdVSA assets.
  - –The new measures were implemented alongside existing sanctions that provide the President the authority to formally blacklist entities and individuals involved in the Maduro government's activities.
  - –Given the economic ties between the United States and Venezuela, the sanctions have affected companies and investors in significant ways. The sanctions have:
    1. Materially limited transactions relating to PdVSA, particularly with respect to funding and payments for services rendered.
    2. In the wake of Venezuela's "technical default" in November 2017, created significant difficulty in renegotiating bonds and other debts due to Maduro's selection of sanctioned persons to lead the negotiations .
    3. Required firms to enhance compliance practices with respect to Venezuelan dealings, including conducting due diligence on long-standing counterparties.

*Sanctions will not be lifted "under any circumstances" unless there are free and fair elections in Venezuela.*

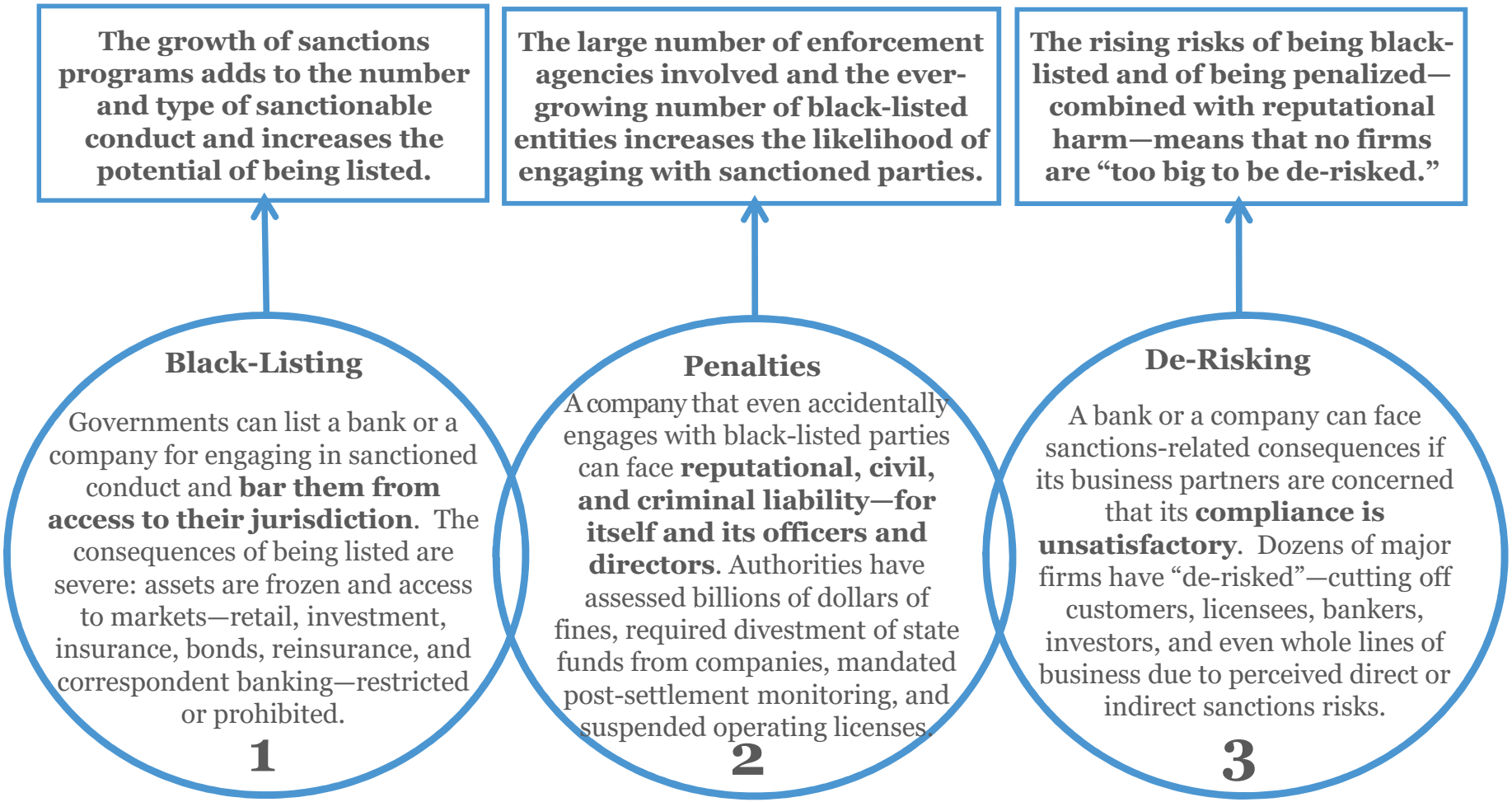
– Marco Rubio, Senator (R-FL) (January 10, 2018)

***Bottom Line***

- Likelihood of more U.S. (and EU) sanctions.
- Increasing enforcement, including on Maduro's "crypto-currency" that he plans to launch to thwart U.S. sanctions.

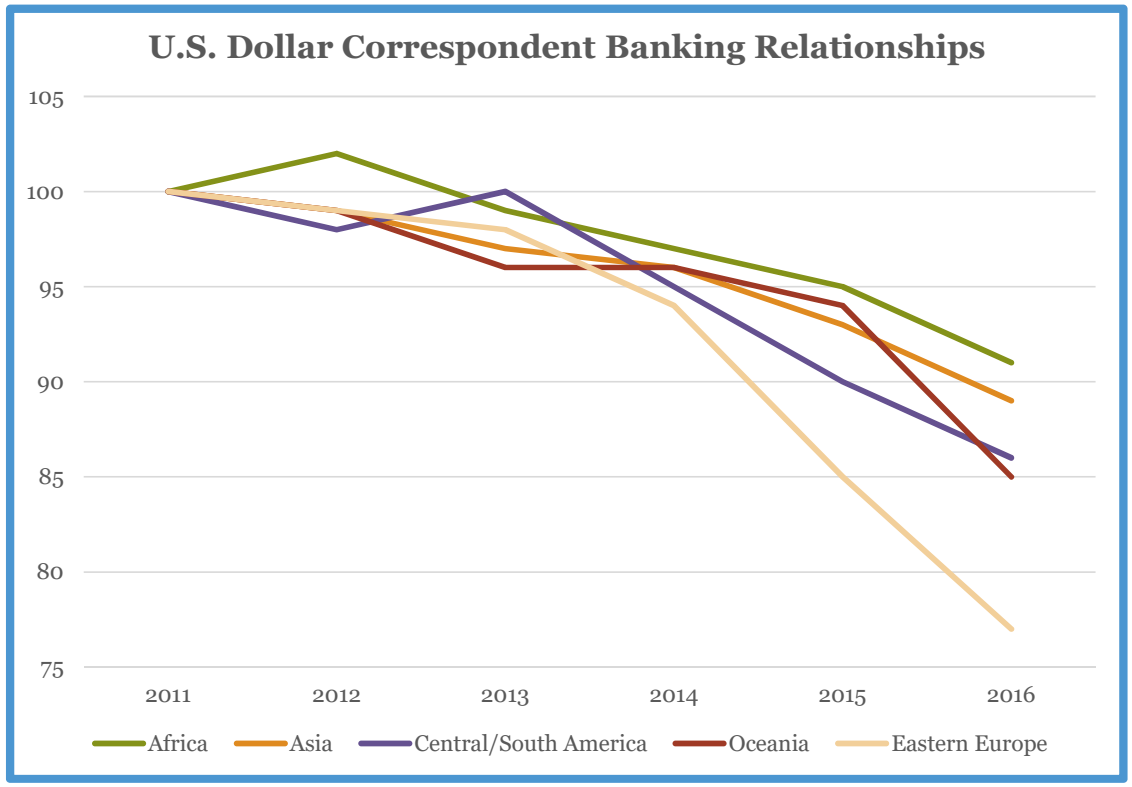
# Three Primary Sanctions Risks

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



# 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.

**3**

# CFIUS Update

## *Proposed Changes to the CFIUS Review Process*

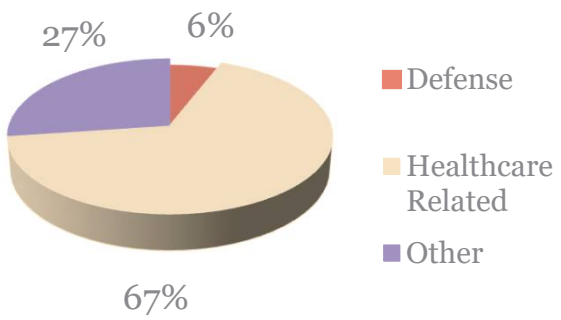
- On November 8, 2017, a bipartisan group of lawmakers introduced a long-awaited bill that could significantly alter the process by which the Committee on Foreign Investment in the United States ("CFIUS") reviews foreign investment in the United States.
- The proposed Foreign Investment Risk Review Modernization Act of 2017 ("FIRRMA") would modernize the CFIUS review and approval process, which has struggled to keep pace with a surge of foreign investment in the United States over the last several years.


- If passed, the bill will revamp the CFIUS review process and update the regulations to address national security concerns implicated in the transfer of sensitive U.S. technology to countries of "special concern," most notably China.
- FIRRMA also would expand the Committee's mandate to include certain joint ventures, minority position investments, and real estate transactions near military bases and other sensitive government facilities.
- The proposed legislation would increase the number of foreign investments in the United States required to win CFIUS approval.

# False Claims Act

- Officials in the new administration—including Attorney General Sessions and Deputy Attorney General Rosenstein—have expressed support for stringent enforcement of the FCA.
  - –In 2017, DOJ recovered more than $3.7 billion in FCA cases (although $445 million was recovered before January 20th).
- The government recovered nearly $426 million in cases where it declined to intervene—the second-highest amount on record. This figure constituted 11% of all recoveries last year.
  - –Historically, approximately 95% of intervened cases result in a settlement or judgment for the government, while only 6% of non-intervened cases succeed.
  - –In July, Celgene paid $280 million to settle a *qui tam* case; this is the largest-ever settlement in a declined case.
- State legislative activity increased in response to calls by the Centers for Medicare and Medicaid Services for increased civil penalties to match federal law.

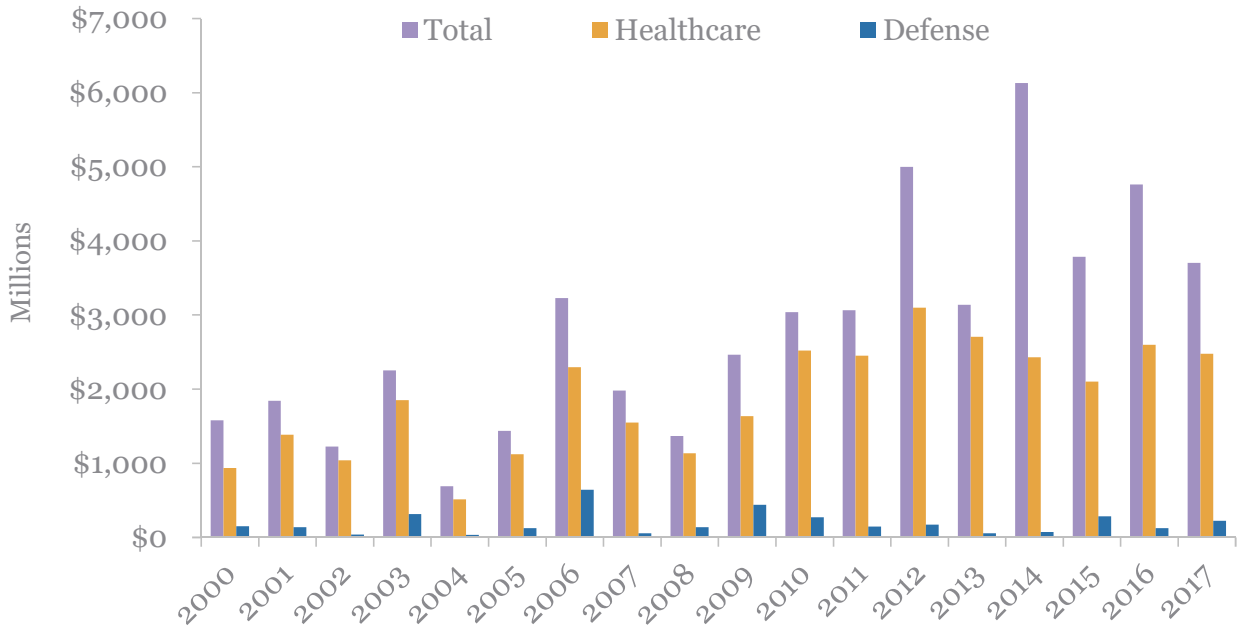
**FCA Recoveries from the Defense and Healthcare Industries**



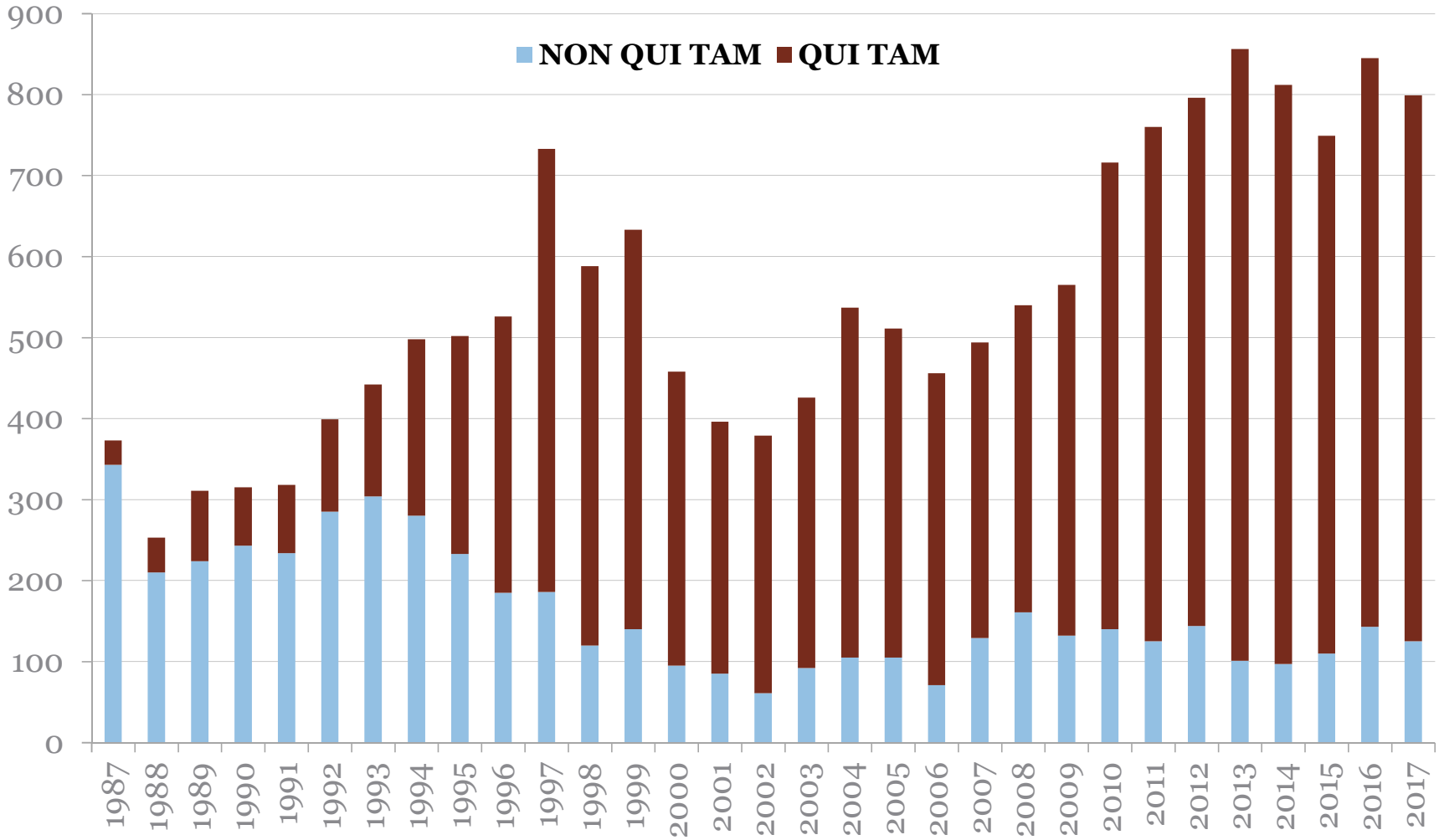
# False Claims Act

- The healthcare industry continued to dominate FCA investigations and enforcement actions, while the financial industry remained another significant focus.

**Annual FCA Recoveries by Industry**



# False Claims Act Annual New Matters (1987 – 2017)



# False Claims Act Post-*Escobar*

- In *Escobar*, the Supreme Court held that FCA liability could accrue under the "implied certification" theory of liability, "at least where two conditions are satisfied:
  - First, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and
  - Second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."
- Courts are continuing to evaluate whether both of *Escobar*'s "two conditions" must be satisfied to establish liability under an implied certification theory, or whether they are merely sufficient conditions to establish a valid implied certification claim.
  - For now, the Ninth Circuit has concluded that both conditions are required, whereas the Fourth Circuit held, in effect, that both of *Escobar's* conditions are not required.

# False Claims Act Post-*Escobar*

- In *Escobar*, The Supreme Court urged a "rigorous" and "demanding" materiality standard, and signaled that cases should be dispatched on materiality grounds at the summary judgment or even pleading stage.
  - A growing number of courts have concluded that an alleged regulatory violation is not material to government payment where the violation is known to the agency and the claims are paid regardless.
  - However, per the Seventh Circuit, at least under some circumstances, continued payment of claims alone may not be dispositive of materiality.
- In May 2017, the Eleventh Circuit concluded that FCA scienter may exist even if a provider's interpretation of a vague regulation was reasonable.

# False Claims Act Notable Judgments

- In September 2017, a federal judge in the Southern District of Texas awarded a $296 million judgment against two mortgage entities and a $25.3 million judgment against their president and CEO for alleged fraudulent conduct while participating in the FHA mortgage insurance program. In November 2016, a unanimous jury found that the defendants violated the FCA and FIRREA.
- In February 2017, a federal judge in the Southern District of Florida entered a final judgment of more than $20 million against a for-profit college chain found liable for defrauding the U.S. Department of Education by submitting falsified documents to secure federal financial aid funding for ineligible students.
  - The for-profit college chain will pay $12 million to the federal government and an additional $10 million in civil penalties.
- In February 2017, a jury in the Middle District of Florida returned a verdict finding that an operator of skilled nursing facilities was liable for over $115 million in damages for submitting false Medicare claims based on false records and misrepresentations. On March 1, 2017, the district court assessed an additional statutory penalty and trebled the jury's damages figure, resulting in a total judgment of nearly $348 million, among the largest-ever FCA judgments.
  - In January 2018, the district court overturned this judgment, agreeing that the relator "failed to offer evidence of materiality, defined unambiguously and required emphatically by" *Escobar*. The court emphasized that the federal and state government continued to reimburse claims following the relator's allegations.

# False Claims Act Notable Settlements

***Healthcare***

- In July 2017, three Ohio-based healthcare providers and their executives agreed to pay roughly $19.5 million to resolve allegations related to the alleged submission of false claims to Medicare for unnecessary rehabilitation and hospice services.
- In August 2017, two wholly-owned subsidiaries of a pharmaceutical company headquartered in Pennsylvania agreed to pay $465 million to settle allegations that they knowingly misclassified a certain product as a generic drug to avoid rebate expenditures primarily owed to Medicaid.

***Government and Defense Contracting***

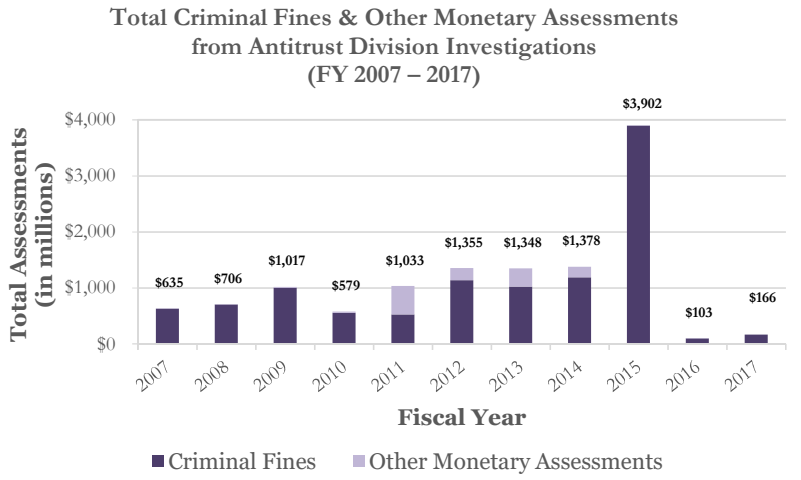
- In August 2017, a Virginia-based contractor and its subsidiaries agreed to pay $16 million to settle allegations that they knowingly conspired with, and caused, small businesses to submit false claims for payment related to fraudulently-obtained small business contracts. The settlement is one of the largest involving alleged fraud implicating small business contract eligibility.

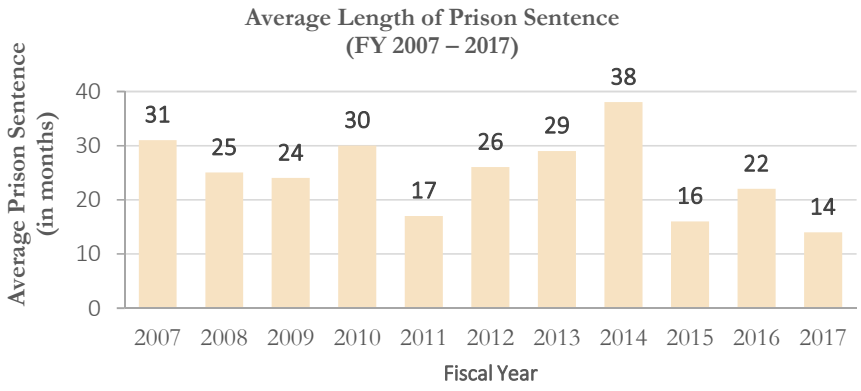
***Financial Industry***

- In August 2017, three mortgage originators and underwriters agreed to pay more than $74 million to resolve allegations that they knowingly provided mortgage loans that did not meet origination, underwriting, and quality control requirements mandated by issuing entities.

# Antitrust
## *U.S. Update*

- In 2017, DOJ Antitrust increasingly pursued litigation in civil and criminal matters, including successfully blocking health insurance mergers at trial.
- Criminal fines increased only slightly in FY 2017, with $166 million in fines, driven largely by settlements against capacitor manufacturers.
- International cooperation continued, with DOJ participating in at least 20 merger and civil investigations in 14 jurisdictions in 2017.
  - DOJ and the SEC also issued revised Guidelines for International Enforcement and Cooperation in 2017.
- State attorneys general signaled that they intend to vigorously pursue antitrust enforcement if they perceive any cutbacks by federal agencies.
  - However, DOJ's November suit to block a proposed AT&T-Time Warner merger signals that the federal government remains sensitive to potentially anti-competitive deals. This case is expected to go to trial on March 19th.



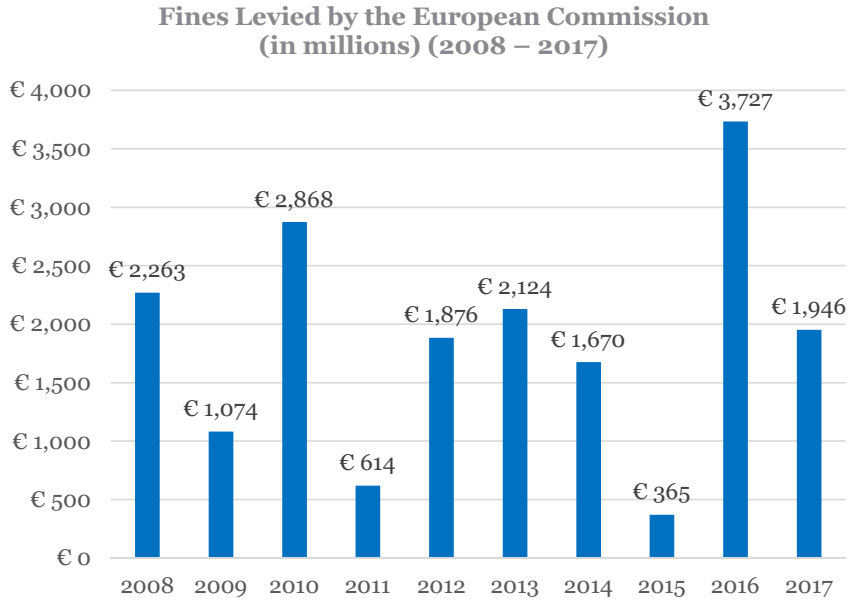
# Antitrust
## *International Update*

### *European Commission*

- EU antitrust enforcement included levying record fines on U.S. technology companies, including fining a company for allegedly preferring another of its own services in search results, and a merger-related fine for a company that allegedly provided misleading information about an acquisition.

### *Latin America*

- In the first half of 2018, Brazil's antitrust authority likely will issue merger guidelines.
- Argentina is expected to adopt a competition law that includes a leniency program.
- Argentina, Brazil, Chile, and Mexico announced a strategic competition alliance to increase cooperation, address structural issues, and bring new cases.



# Antitrust
## *International Update*

***China***

- Following the ten-year anniversary of China's anti-monopoly law in 2017, Chinese antitrust authorities are considering revising competition-related legislation.
  - –In September 2017, draft merger review measures were released. The draft consolidates assorted rules regarding merger review, and introduces a new analysis of "control."
  - –Also in September 2017, Chinese authorities released draft amendments to the anti-unfair competition law, including new regulations for online conduct.
- Companies with business in China should stay attuned to developments in Chinese antitrust law during 2018, including potential opportunities to provide comments and feedback as updates are contemplated.

# Bank Secrecy Act/Anti-Money Laundering

*Trends and Developments*

- The enforcement environment for BSA/AML remains highly charged, with ever-greater regulatory expectations for financial institutions, as well as mounting legal and regulatory risks.
- BSA/AML enforcement actions are increasingly complex, requiring engagement with multiple prosecutors and different regulatory authorities for BSA/AML, sanctions, and other crimes.
  - Enforcement actions often include significant civil and criminal monetary penalties against financial institutions and individuals by multiple regulators and can include expensive and complex remedial measures.
    - For example, BSA/AML issues led to the closure of two financial institutions in 2017.

> *"Compliance risk remains elevated as banks continue to manage money laundering risk in an increasingly complex risk environment."*
>
> – Office of the Comptroller of the Currency *Semiannual Risk Perspective* (January 18, 2018)

- Three multi-million dollar BSA/AML enforcement actions against major banks and money service business in prior two months.
- Treasury Secretary Mnuchin stated in May 2017 remarks that he values strong BSA compliance and will support Treasury's programs to combat financial crime.

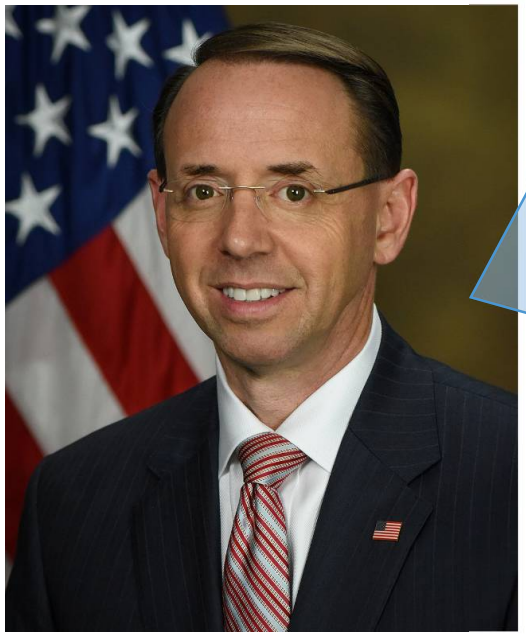
# Bank Secrecy Act/Anti-Money Laundering

*Key Enforcement Agencies*

- NYDFS continues to be the most active state regulator.
  - –In some cases, NYDFS has entered into consent orders with New York-licensed financial institutions in advance of, or after, federal regulators.
  - –In other cases involving New York branches of foreign banks, NYDFS has acted alone without the Federal Reserve imposing simultaneous civil money penalty actions.
- In 2017, FINRA continued to impose BSA/AML fines against individuals, as well as against many financial institutions. AML enforcement remains a stated FINRA priority for 2018.
- FinCEN brought enforcement actions in 2017 against two banks, a California card club, a money services businesses, and a virtual currency exchanger. As in years past, FinCEN continued coordinating with DOJ and other regulators to impose coordinated penalty actions.

# Bank Secrecy Act/Anti-Money Laundering

*Key Developments in Criminal Enforcement*



*"Today, when we prosecute a criminal enterprise, prosecutors and agents ask how the conspirators were able to move illegal proceeds through the financial system. Were the criminals just lucky, or did a financial institution fail to implement an effective anti-money laundering program?"*

*"In our investigations, we often look at which companies processed the payments, which banks held the relevant accounts, and whether any automated alerts or Suspicious Activity Reports were filed in connection with the movement of funds. We also ask who served as the financial advisors, the tax preparers, and the accountants. Most institutions are committed to fulfilling their legal obligations to avoid doing business with criminals. But when we find institutions that fail to live up to their responsibilities, the Department will take appropriate action."*

– Rod J. Rosenstein, Deputy Attorney General (Nov. 8, 2017)

# Bank Secrecy Act/Anti-Money Laundering

*Key Developments in Criminal Enforcement*

- Two of 30 criminal dispositions in the history of the BSA involving alleged institutional BSA/AML violations concluded in 2017.
  - –In January 2017, a money services business entered into a deferred prosecution agreement with DOJ involving a $586 million forfeiture (DOJ and FTC), as well as a $184 million civil penalty from FinCEN concurrent with the forfeiture payment; on January 4, 2018, DFS imposed a $60 million civil penalty.
  - –In May 2017, a bank entered into a non-prosecution agreement with DOJ involving a $97.44 million forfeiture.

- Looking forward in 2018, a California subsidiary of Dutch bank announced that it is likely to plead guilty to BSA/AML violations and has set aside approximately $350 million reserve in anticipation of settlement.
  - –A former compliance manager of the bank entered into a deferred prosecution agreement in December 2017. It is significant in a criminal BSA/AML case for an employee to be prosecuted in advance of (or along with) the bank.

# Bank Secrecy Act/Anti-Money Laundering

*Key Regulatory Developments*

- In January 2018, the Senate Banking Committee held hearings on BSA/AML regime reforms.
- FinCEN launched the "FinCEN Exchange" program to bring FinCEN, law enforcement, and financial institutions together to facilitate sharing of information about emerging threats.
  - The objective is to promote information exchange with private financial institutions, including convening regular briefings to exchange information on priority illicit finance threats.
- The FinCEN Customer Due Diligence ("CDD") rule, requiring collection of beneficial ownership information and formal CDD programs for banks and certain other financial institutions, becomes effective on May 11, 2018, with additional compliance guidance expected from FinCEN at any time.
- FinCEN expanded the Geographic Targeting Orders ("GTO") imposing data collection and reporting requirements for title companies to prevent the use of real estate for money laundering. The GTOs now cover seven geographic areas and require broader transactional reporting, including wire transfers.
  - FinCEN issued an Advisory to financial institutions and real estate firms and professionals on the money-laundering risk of real estate transactions involving the use of opaque legal structures to obscure ownership and illegal sources of funds.
- An updated version of the FFIEC BSA/AML Examination Manual, including the new CDD Rule, is expected to be published in 2018.

# Bank Secrecy Act/Anti-Money Laundering

*Key Regulatory Developments*

- ***Implementing new rules***
  - –Financial institutions must plan for implementation, modify systems, and conduct employee training on FinCEN's CDD Rule with scarce compliance guidance.
  - –The first certifications on compliance screening and monitoring (Board resolution or Senior Officer compliance findings) under New York Rule 504 are due in 2018.

- ***Determining whether to provide financial services to marijuana businesses***
  - –Attorney General Sessions recently rescinded the previous administration's guidance on prosecution of marijuana cases in states where marijuana is legal. FinCEN is reviewing its guidance (based largely on prior DOJ guidance) to financial institutions on providing services to marijuana businesses in these states.
  - –Obtaining financial services likely will be challenging for marijuana businesses at a time when states are taking a different approach.

# Criminal Tax and Cross-Border Concerns

*U.S. and International Update*

- **United States**
  - DOJ's Swiss Bank Program wound down in 2016. In 2017, the DOJ Tax Division continued to focus on offshore accounts, but moved from targeting financial institutions to targeting individuals.
    - DOJ Tax cases involved accounts in diverse countries, including Belize, the Cook Islands, Germany, and Panama. Three separate cases targeted accounts in Israel.
  - DOJ also helped authorities in the Netherlands enforce Dutch tax laws by asking a U.S. court to issue a John Doe summons to identify Dutch residents with bank cards linked to accounts outside the Netherlands.

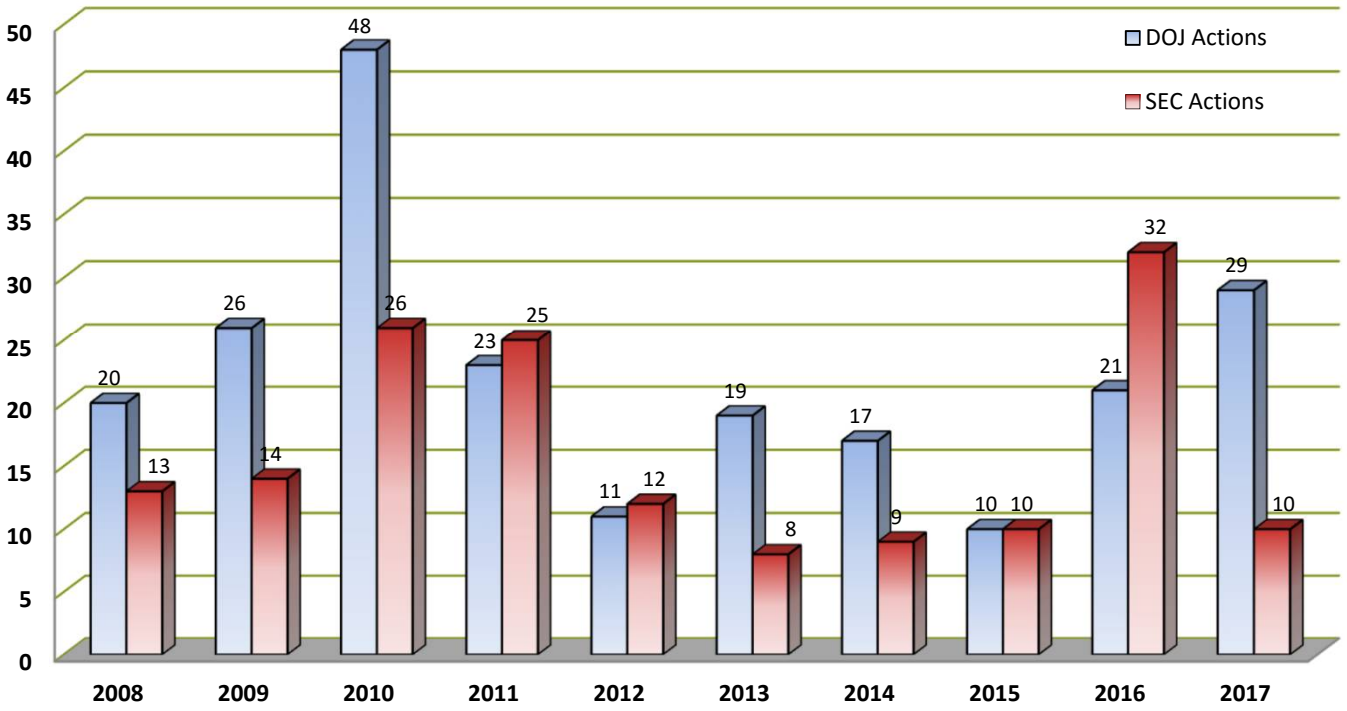
- **International**
  - New criminal offenses under the U.K. Criminal Finances Act 2017 create liability for corporations that fail to prevent tax evasion.

# White Collar and Securities Fraud

*By the Numbers*

- Despite some initial speculation that the new administration might deemphasize FCPA enforcement, both the SEC and DOJ have kept pace with recent years.

**Number of FCPA Enforcement Actions Per Year**



# White Collar and Securities Fraud

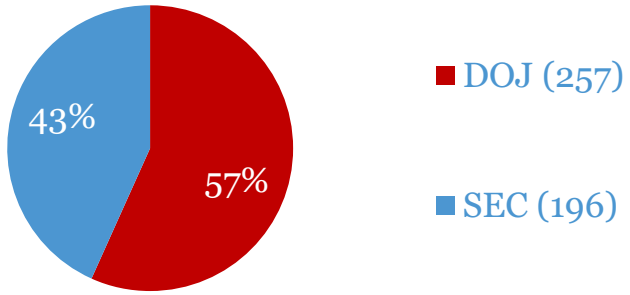
*DOJ and SEC Enforcement*

- After a record-breaking year in 2016, the SEC fell back in line with historical averages in 2017, bringing ten FCPA actions last year. DOJ's 29 enforcement actions, meanwhile, represent its second-most active year of FCPA enforcement.

- In line with the mandate of the 2016 Yates Memorandum, prosecutors in the Trump Administration have been focusing on individual accountability for corporate wrongdoing.

- DOJ and the SEC are pushing the boundaries of FCPA enforcement, both by adopting an expansive definition of "foreign official" and by aggressively pursuing accounting provisions cases absent proof of bribery.

**453 Total FCPA Enforcement Actions: 2005 - 2017**



# White Collar and Securities Fraud

## *International Collaboration*

- The SEC and DOJ continue to cooperate closely with their foreign counterparts, emphasizing the growing importance of international collaboration and bringing four significant multi-jurisdictional corporate enforcement actions in 2017.
  - In September 2017, for example, Telia Company entered into a $965 million global resolution with authorities in the United States, the Netherlands, and Switzerland.
- Law enforcement authorities worldwide have not limited themselves to coordinated global resolutions. Some companies have resolved anti-corruption charges with regulators in one country, only to face subsequent follow-along litigation from regulators in another jurisdiction.
  - In January 2018, Teva Pharmaceuticals—which resolved FCPA charges with the SEC and DOJ in December 2016—reached an approximately $22 million agreement with Israel's Tax and Economic Prosecutor.
  - In November 2017, DOJ announced a $238 million FCPA resolution with SBM Offshore, which previously reached a $240 million settlement with the Dutch Public Prosecutor in November 2014.

# White Collar and Securities Fraud

## *International Collaboration*

- Cross-border partnerships reflect a growing emphasis by national prosecutors on prosecuting bribery and corruption-related crimes in their countries, including with respect to individuals.
  - –Following the imposition by the U.K. SFO of its largest-ever fine of £497.25 million plus interest on Rolls-Royce (as part of a global resolution with U.K., U.S., and Brazilian authorities), the SFO announced that investigating the company's executives remains a priority. The SFO noted in November the significant assistance that it provided to DOJ's prosecution of former Rolls-Royce executives.
  - –In 2017, 27 individuals were convicted of bribery or corruption offences in the United Kingdom—more than any other year since 2008, with custodial sentences ranging up to 15 years.
- Companies must carefully consider the effect of multinational interest. For instance, the May 2017 *ENRC* decision by the English High Court has significant implications for how companies conduct their investigations in the United States and elsewhere.

> *"[I]n an increasingly international enforcement environment, the U.S. authorities cannot—and should not—go it alone in fighting corruption. As global markets become more interconnected and complex, no one country or agency can effectively fight bribery and corruption by itself."*
>
> – Steven R. Peikin, Co-Director of the SEC's Enforcement Division (Nov. 9, 2017)

# White Collar and Securities Fraud

## *DOJ Corporate Enforcement Policy*

- In November 2017, DOJ announced that it was making its FCPA Pilot Program permanent, with a few tweaks.
  - –The new FCPA Corporate Enforcement Policy, codified in the U.S. Attorneys' Manual, seeks to provide greater guidance and certainty to companies while incentivizing self-disclosure, cooperation, and remediation.
  - –When a company satisfies the Policy's standards, there will be a presumption of a declination.
    - Because that presumption may be overcome if there are "aggravating circumstances," it remains to be seen whether the Policy will in fact provide greater certainty to companies.

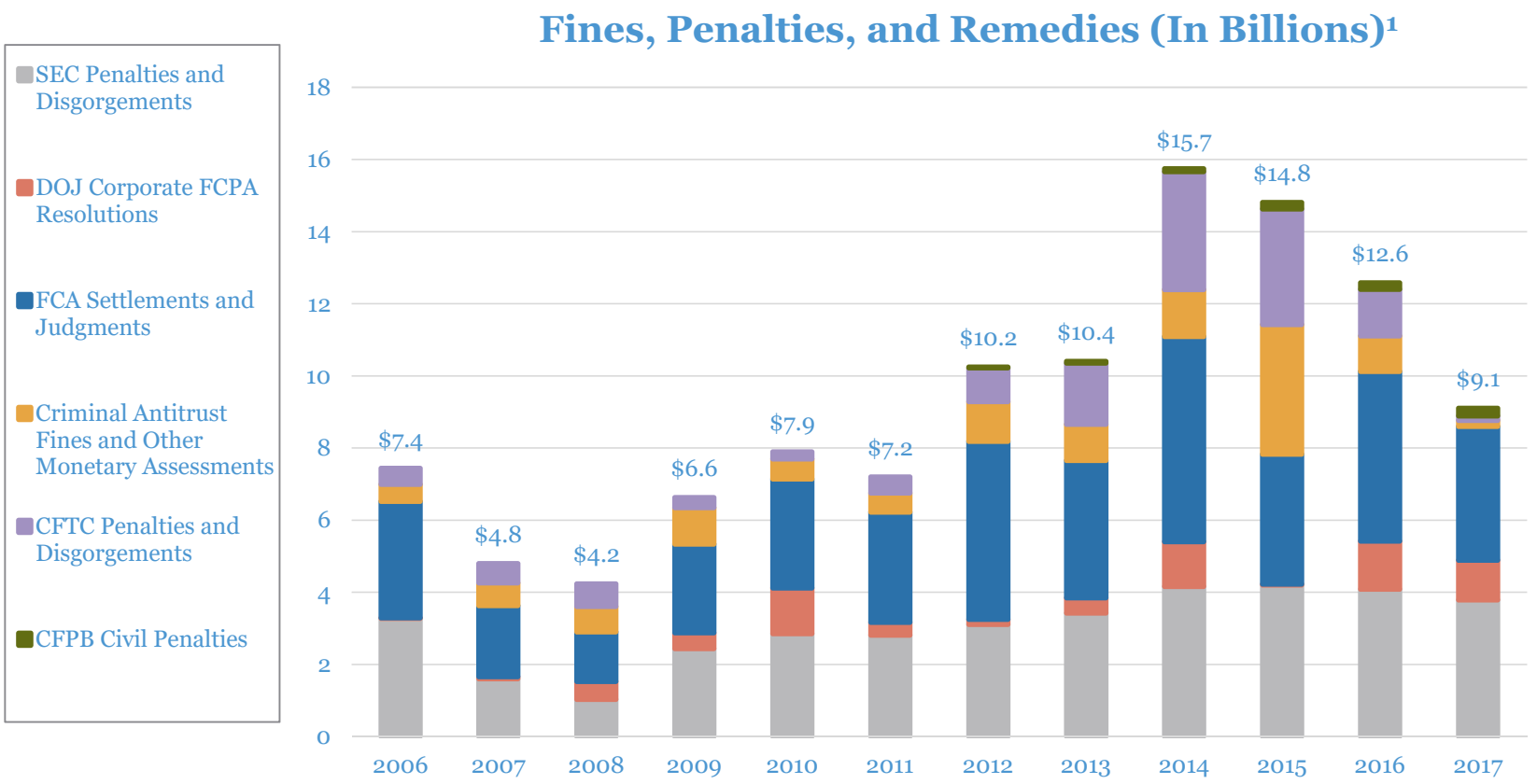
*"[W]hen a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist."*

– Rod J. Rosenstein, Deputy Attorney General (Nov. 29, 2017)

GIBSON DUNN

# U.S. Agencies: Priorities, Policies, and Penalties

# U.S. Fines Decrease

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[1] GDC Internal Aggregations. CFPB Civil Penalties does not include CFPB recoveries and restitutions. CFPB recoveries and restitutions were included in prior iterations of this graphic, but are now addressed below. All figures are tracked by fiscal year except for DOJ Corporate FCPA resolutions, which are tracked by calendar year.

# Top 2017 Fines and Penalties

*Anti-Corruption, Antitrust, FCA, and Sanctions Offenses*

| Amount | Industry/Company | Area | Date |
|---|---|---|---|
| $3.1B | German global banking and financial services company | FIRREA | Jan. 2017 |
| $2.48B | Leading global financial services company | FIRREA | Jan. 2017 |
| $1.19B | Chinese telecommunication company | Sanctions (BIS, OFAC and DOJ) | Mar. 2017 |
| $965M | Swedish telecommunication company | FCPA (SEC, DOJ and Dutch authorities) | Sep. 2017 |
| $864M | Large U.S.-based credit rating company | FIRREA (DOJ and states) | Jan. 2017 |
| $820M | Netherlands-based company specializing in the manufacture and design of offshore oil drilling equipment | FCPA (DOJ and international authorities) | Nov. 2017 |
| $800M | UK-based manufacturer and distributor of power systems for aerospace, defense, marine and energy sectors | FCPA (DOJ and international authorities) | Jan. 2017 |
| $586M | Large money services business | Anti-money laundering & wire fraud (DOJ, FTC and states) | Jan. 2017 |
| $465M | U.S.-based pharmaceutical company | False Claims Act | Aug. 2017 |
| $422M | Singapore-based company that operates shipyards/repairs vessels | FCPA (DOJ and international authorities) | Dec. 2017 |
| $350M | Global biopharmaceutical company | False Claims Act | Jan. 2017 |
| $296M | Mortgage broker | FCA and FIRREA | Sept. 2017 |
| $246M | International banking group | Federal Reserve | July 2017 |
| $210M | U.S.-based pharmaceutical company | False Claims Act | Dec. 2017 |
| $175M | Multinational banking and financial services holding company | Federal Reserve | Sept. 2017 |
| $156.6M | German global banking and financial services company | Federal Reserve | April 2017 |
| $155M | One of largest electronic health records software vendors | False Claims Act | May. 2017 |
| $97M | Multinational bank and financial services company | SEC | May 2017 |

# Details on DOJ Enforcement in 2017

*Key 2017 Developments*

- Many spots remain unfilled at DOJ, including vacancies in high-ranking positions. The Senate has yet to confirm several key nominees:
  - –Brian Benczkowski (Criminal Division);
  - –Jeffrey Clark (Environment and Natural Resources Division);
  - –John Demers (National Security Division);
  - –Eric Dreiband (Civil Rights Division); and
  - –Joseph Hunt (Civil Division).

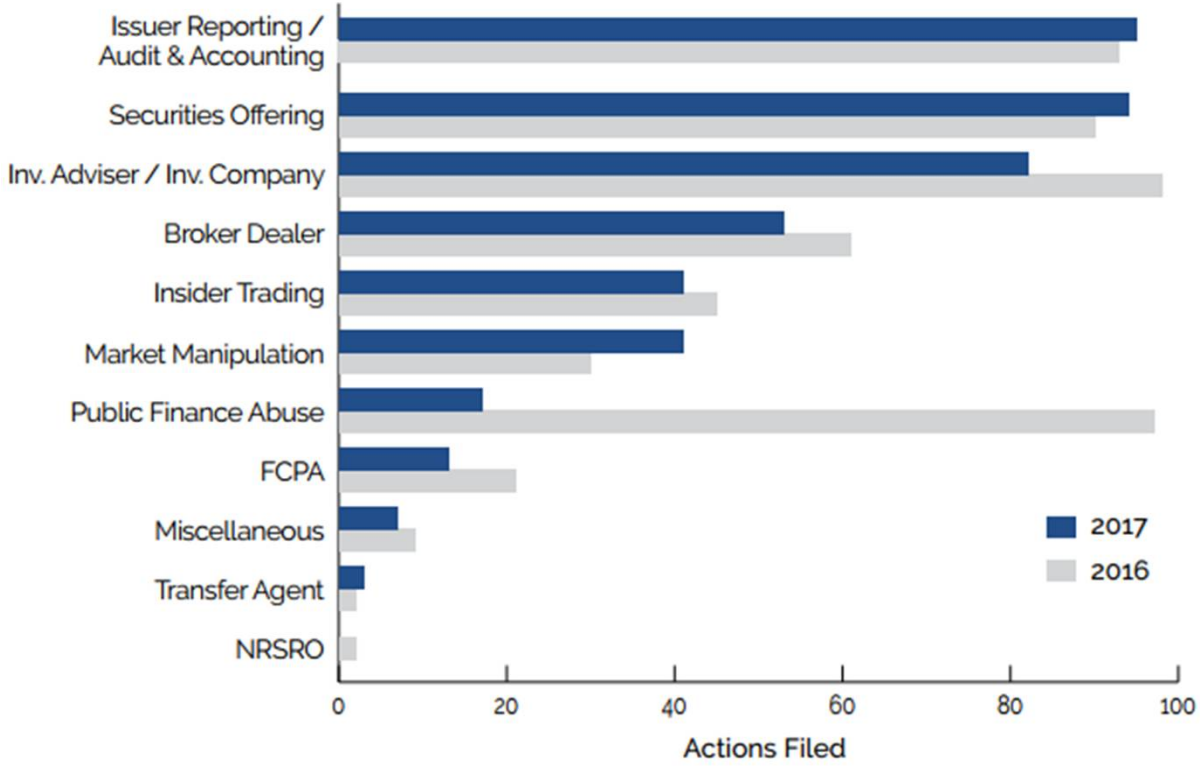
- DOJ continues to demonstrate a focus on prosecuting culpable individuals.
  - –Individual prosecutions comprised nearly 70% of DOJ's 2017 FCPA enforcement docket.

- DOJ is working ever more closely with foreign counterparts to coordinate enforcement across jurisdictions.

# Details on SEC Enforcement in 2017

*Key 2017 Developments*

- Jay Clayton was confirmed as the new Chair of the SEC on May 2, 2017, with many of his views on enforcement-related issues still unknown. The SEC currently has a full complement of commissioners for the first time since 2015.
- The Division of Enforcement 2017 Annual Report highlights five key focus areas:
  - –Protecting the Main Street investor;
  - –Pursuing individual accountability;
  - –Keeping pace with technological change;
  - –Imposing sanctions that most effectively further enforcement goals; and
  - –Constantly assessing its allocation of resources.




SEC Division of Enforcement 2017 Annual Report

# Details on SEC Enforcement in 2017

*Key 2017 Developments*

- In September 2017, the SEC announced new initiatives reflecting Chairman Clayton's enforcement priorities.
  - –The SEC created a Cyber Unit focusing on:
    - Hacking to obtain non-public information;
    - Electronic media-related market manipulation schemes;
    - Misconduct using the dark web; and
    - Other cyber-related misconduct.
  - –The SEC's Retail Strategy Task Force is drawn from SEC offices nationwide to "develop proactive, targeted initiatives to identify misconduct impacting retail investors."
    - The Task Force will focus on wrongdoing implicating the microcap market, Ponzi schemes, and offering frauds.

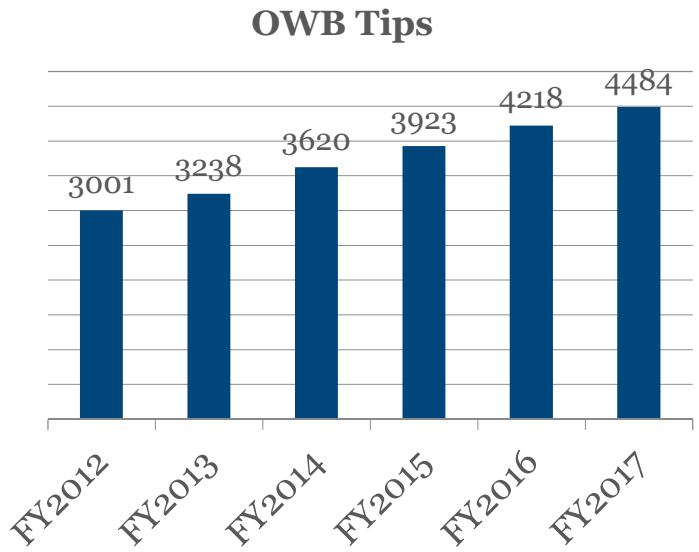
*"The greatest threat to our markets right now is the cyber threat. That crosses not just this building, but all over the country."*

– Steven R. Peikin,
Co-Director of the SEC's
Enforcement Division
(June 8, 2017)

# Details on SEC Enforcement in 2017

*Whistleblower Update*

- The SEC continues to promote its whistleblower program and actively collect tips and complaints—leading to a record-breaking 4,484 tips in FY 2017. In addition to U.S.-based tips, the SEC also received tips from individuals in 114 other countries.
  - –Consistent with previous years, the most common complaint categories were:
    - Corporate disclosures and financials (19%);
    - Offering fraud (18%); and
    - Manipulation (12%).
- In FY 2017, the SEC paid nearly $50 million to twelve individuals. Since the program's inception, the SEC has issued approximately $160 million.

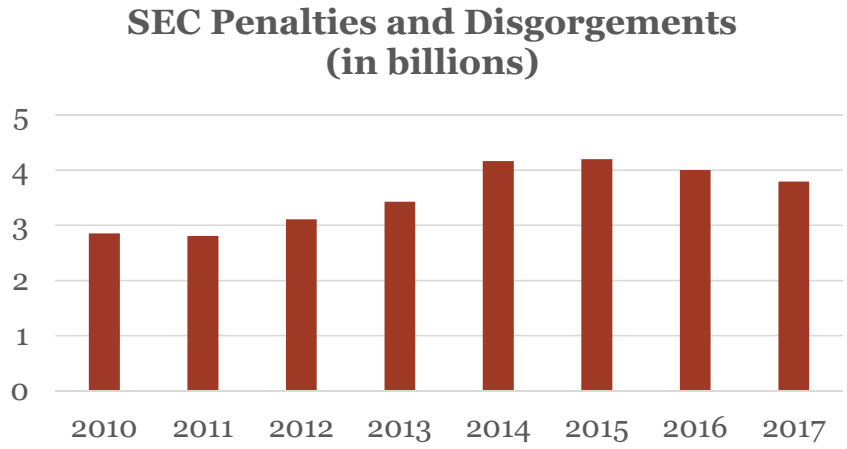


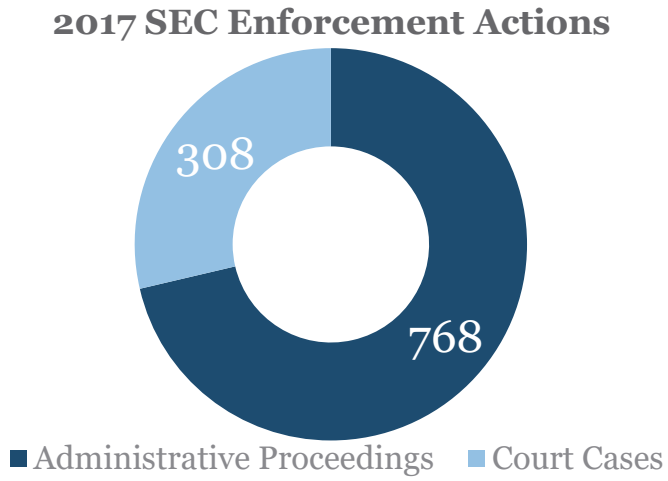

- The SEC also continues to monitor how companies structure separation agreements. In January, the SEC announced that Blackrock would pay $340,000 to settle charges that it improperly used separation agreements forcing employees to "waive any right to recovery of incentives for reporting of misconduct" in order to receive severance payments.

# Details on SEC Enforcement in 2017

*Key 2017 Cases*

- In June 2017, in *Kokesh v. SEC*, the Supreme Court unanimously held that the SEC's claims for disgorgement are subject to a five-year statute of limitations.
- The Supreme Court granted cert in *SEC v. Lucia*, the D.C. Circuit case holding that the SEC's administrative law judges do not violate the Constitution's appointments clause.
  - –In November 2017, the government reversed its position, concluding that SEC judges are officers—not employees—and therefore are subject to the appointments clause.



# Continuing Gatekeeper Liability

- DOJ has targeted lawyers and compliance professionals whom it alleges inappropriately facilitated or participated in client misconduct.
  - In December 2017, DOJ announced that it had unsealed charges against a former "senior member of Keppel Offshore & Marine's legal department" in connection with that company's alleged FCPA violations.
- The SEC also continues to pursue individuals and entities for alleged gatekeeping failures.
  - The SEC reached a settlement order with a Big Four accounting firm alleging that it engaged in improper professional conduct and caused a client's violation of U.S. securities laws after issuing an unqualified audit report despite the existence of the client's overstated values for key assets.
  - In December 2017, the SEC charged a different audit firm (including some individual auditors) with allegedly conducting flawed audits and reviews of financial statements, asserting that "instead of standing in the way of [the] fraud, [the audit firm] facilitated it."
- 96% of surveyed compliance professionals expect to face the same or greater risk of personal liability in the next year.[1]

*"Market professionals, especially gatekeepers, need to act responsibly and hold themselves to high standards. To be blunt, from what I have seen recently . . . they can do better."*

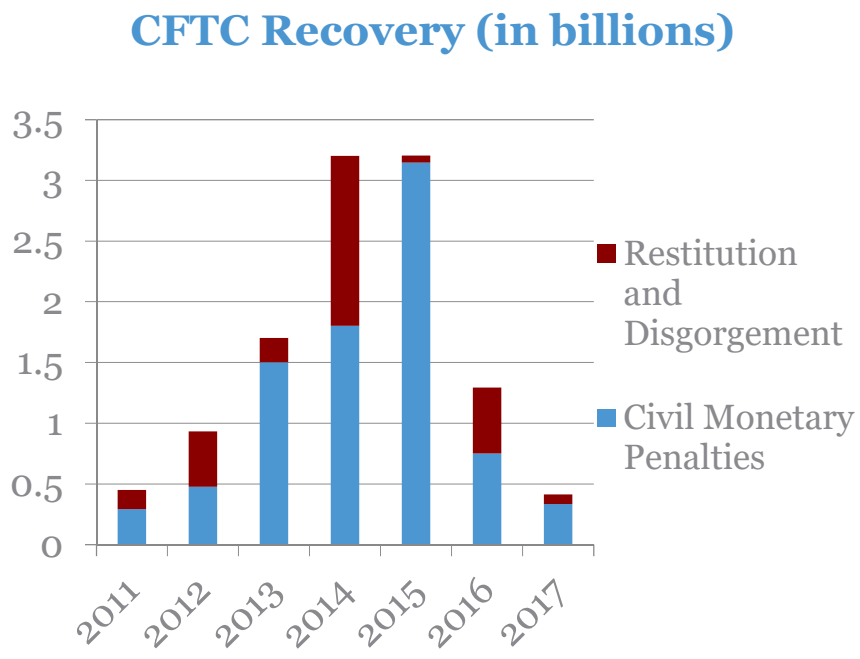
– Jay Clayton, SEC Chairman (January 22, 2018)

[1] Thomson Reuters, Cost of Compliance Report 2017

# Details on CFTC Enforcement in 2017

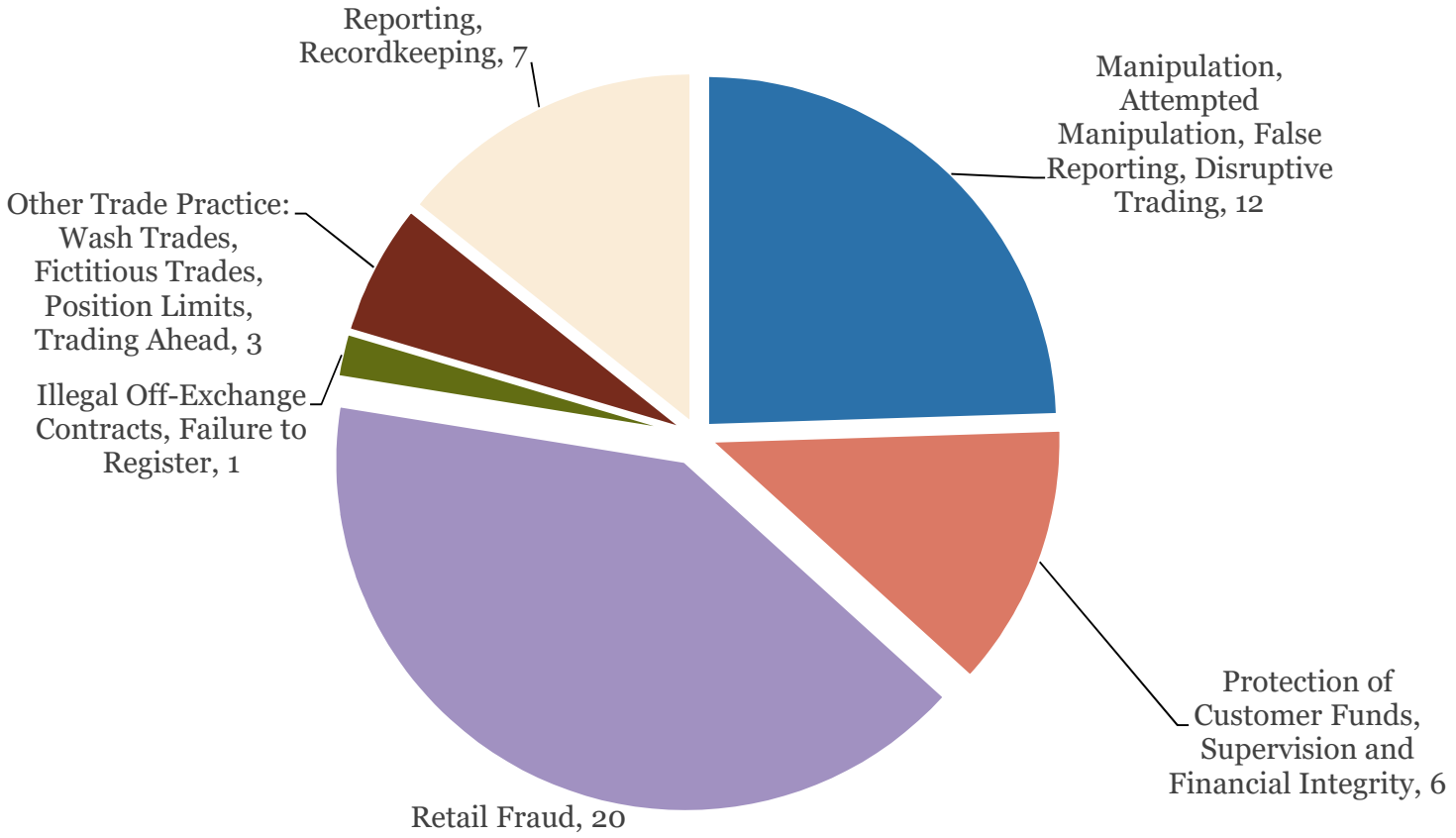
*Key Statistics and Trends*

- The CFTC brought 49 enforcement-related actions in FY 2017, a 30% decrease from 68 enforcement actions filed in 2016.
- CFTC priorities include assessing rules and procedures to better protect whistleblowers and incentivize whistleblowers to come forward.
- The CFTC also is assessing the role of its Division of Enforcement (DOE) market surveillance unit, which conducts market analysis to confirm market integrity and identify areas that may warrant enforcement inquiry.
- The CFTC DOE issued new cooperation advisories to bring its cooperation program in line with those of other enforcement agencies.



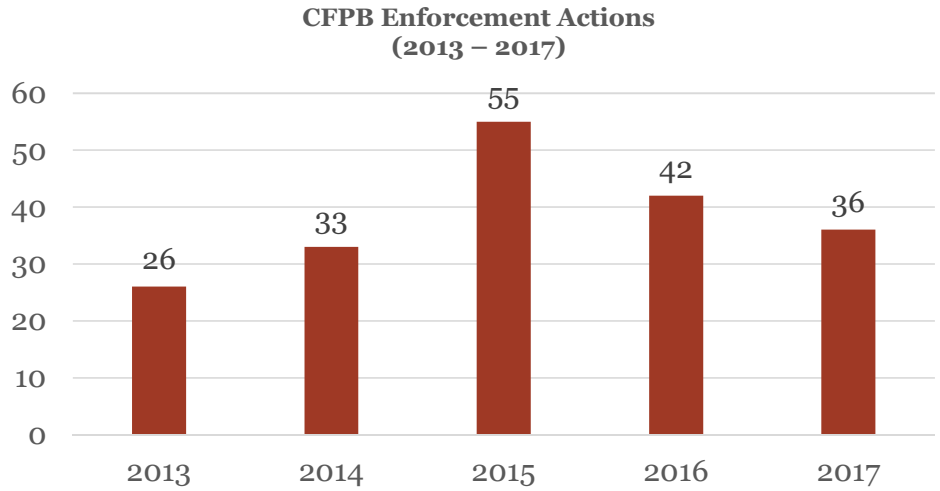
# Details on CFTC Enforcement in 2017

*2017 Enforcement Actions by Category*



# CFPB Update

- In 2017, the CFPB initiated 36 enforcement actions against the backdrop of a legal battle over the agency's future.
  - In November, the U.S. District Court for the District of Columbia ruled that President Trump could appoint the agency's acting director, reaffirming this ruling in January by denying a preliminary injunction motion filed by the agency's deputy director.
  - State attorneys general have weighed in on the controversy, vowing in December to "redouble our efforts at the state level" to protect consumers if necessary.



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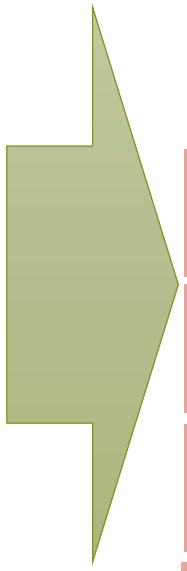
# Building and Overseeing Effective Compliance

# Common Elements of Effective Compliance Programs

- Regulators and experts across the world have issued guidance regarding the hallmarks of an effective compliance program, consistently highlighting the same core components.

***Multiple sources – e.g.,***

- U.S. Sentencing Guidelines Elements of an Effective Compliance Program
- U.S. DOJ/SEC FCPA "Resource Guide"
- U.K. Bribery Act Guidance
- U.K. Financial Conduct Authority Guide to Preventing Financial Crime
- Brazil Comptroller General of the Union "Compliance Programs: Guidelines for Private Companies"
- Companies operating in countries where official standards are not published (such as Australia) may refer to non-country-specific guidelines
- ISO 37001 – Anti-Bribery Management Systems
- OECD Good Practices on Internal Controls, Ethics, and Compliance



Clearly Defined and Enforced Policies and Procedures

Culture of Compliance and Tone from the Top

Targeted but Thorough Risk Assessment

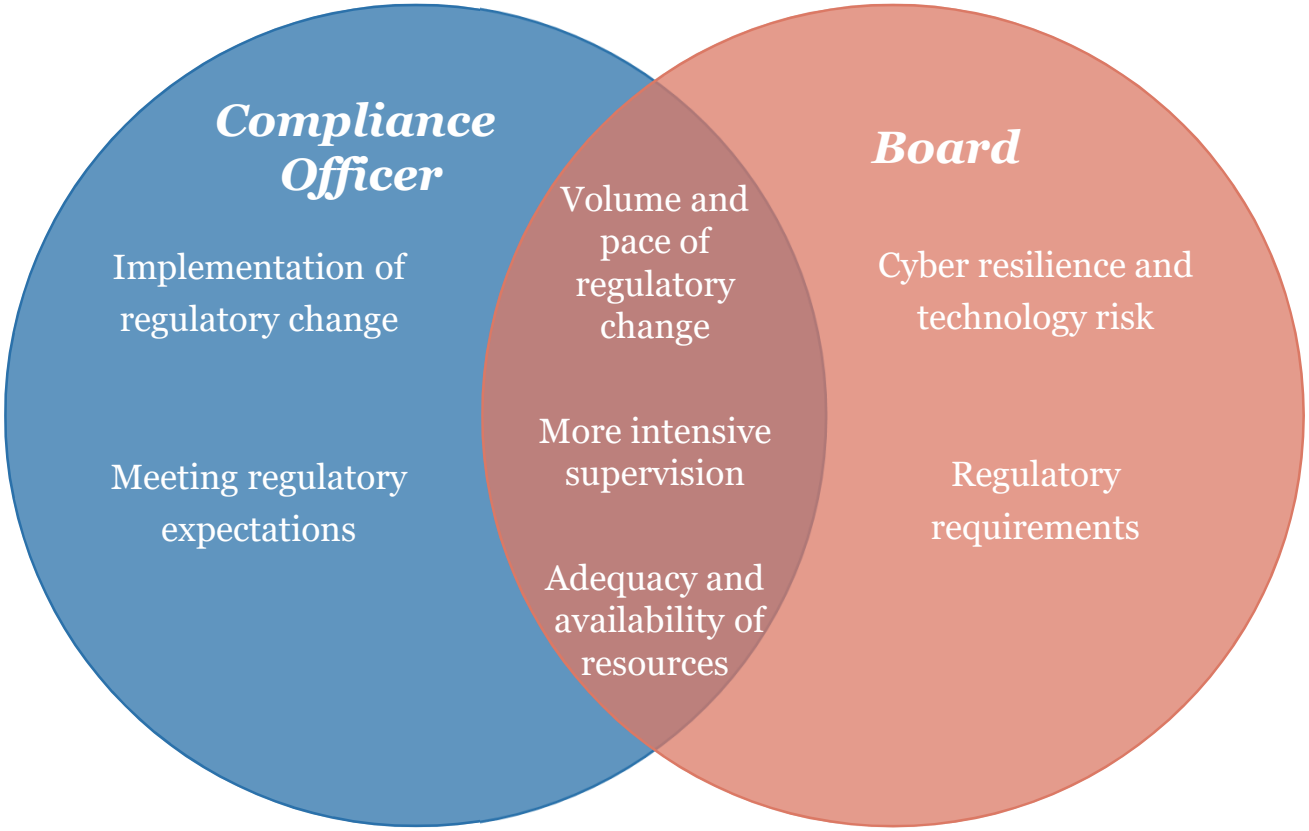
Training Provided to Appropriate Personnel

Monitoring and Testing to Evaluate Program Effectiveness

Thoughtful Remediation and Lessons Learned

# Top Compliance Concerns

- A 2017 survey of compliance professionals and boards identified several prevalent areas of concern, which overlap in certain respects:




Thomson Reuters, Cost of Compliance 2017

# Top Compliance Concerns

- Another recent survey identified the following top five risks, as identified by Board members and senior executives around the world:

1. Rapid Speed of Disruptive Innovation/Technology
2. Resistance to Change within Organization
3. Managing Cyber Threats
4. Regulatory Change and Heightened Regulatory Scrutiny
5. Culture May Not Encourage Timely Escalation of Risk Issues

# DOJ Guidance on Corporate Compliance Programs

- The February 2017 memorandum issued by the DOJ Fraud Section regarding "Evaluation of Corporate Compliance Programs" provides guidance to companies regarding agency expectations for effective corporate compliance programs.

- In addition to identifying 11 key compliance program evaluation topics, the memorandum includes a corresponding set of "common questions" that DOJ might ask in the context of a compliance assessment during a criminal investigation.

- Companies should take note of these topics and questions in evaluating the adequacy of their own compliance programs.

1. Analysis & Remediation of Underlying Misconduct
2. Senior & Middle Management
3. Autonomy & Resources
4. Policies & Procedures
5. Risk Assessment
6. Training & Communications
7. Confidential Reporting & Investigation
8. Incentives & Disciplinary Measures
9. Continuous Improvement, Periodic Testing & Review
10. Third Party Management
11. Mergers & Acquisitions

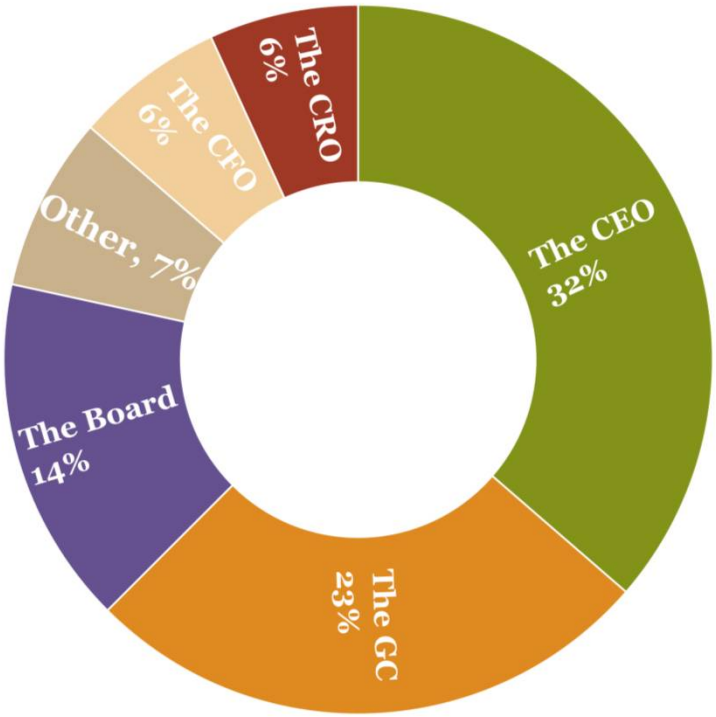
# Structuring Your Compliance Department

- Data from a recent study indicates that:
  - **33%** of companies surveyed have a designated CCO as a standalone position;
  - **21%** of companies do not have a designated CCO;
  - **73%** have fewer than 20 full-time resources within the organization focused specifically on designing, implementing, and maintaining the compliance and ethics program;
  - **59%** reported having a total annual budget for enterprise-wide compliance functions of less than $5 million;
  - **43%** reported that the CCO held a seat on the CEO's executive management committee.

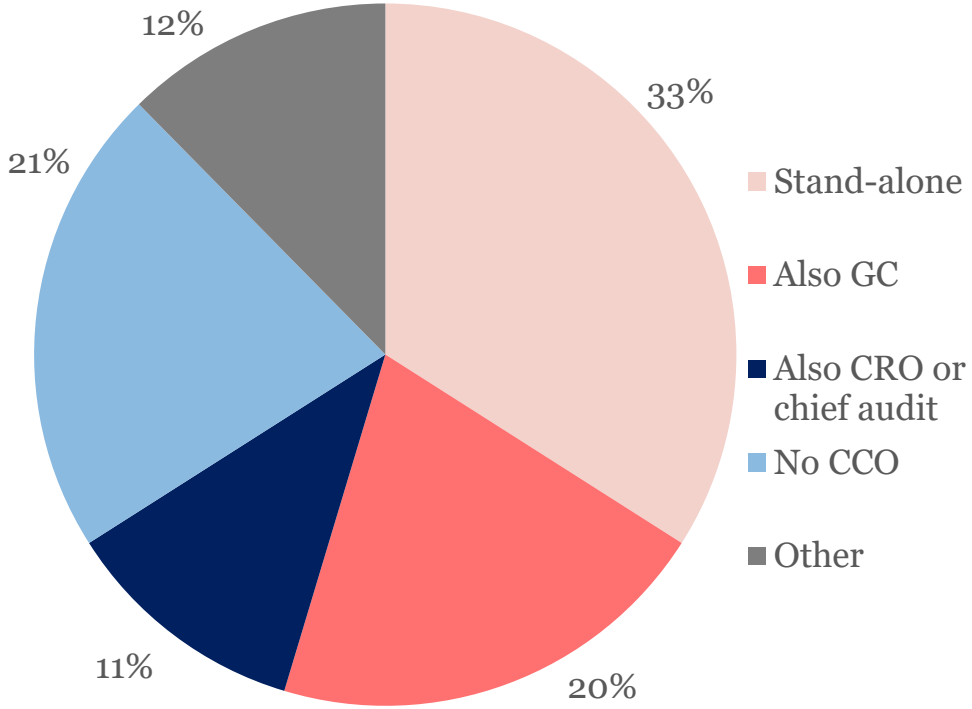
Deloitte, In Focus: 2016 Compliance Trends Survey

# Structuring Your Compliance Department

***To whom does the CCO directly report?***




***At your organization, the designated CCO is…?***




Deloitte, In Focus: 2016 Compliance Trends Survey

# Tracking and Assessing Risk

- Effective risk assessments can both prevent misconduct—by identifying and addressing areas of greater exposure for a firm—and, if matters go awry, demonstrate to regulators that companies were alive and committed to addressing potential compliance risks. An effective risk assessment:

  - Is tailored to particular risk areas (*i.e.*, type of business, geographic operations, business partners, etc.);
  - Is focused but not myopic, taking into account different perspectives (*e.g.*, executive and senior stakeholders, as well as middle management and employee stakeholders) to build a comprehensive overview of enterprise-based risk;
  - Incorporates ongoing monitoring and analysis of results to inform understanding of key strengths, weaknesses, and opportunities;
  - Stays abreast of key regulatory developments and rapidly changing compliance expectations (*e.g.*, cybersecurity, data protection, sanctions); and
  - Ensures that organizational resources are sufficient to address and counter exposure—to analyze results as well as identify problems.

# Intersection of Compliance & Technology

- The compliance community has been exploring the ways in which "regulatory technology, or "RegTech," may be the "future of compliance," particularly given growing concerns regarding cyber-based threats.
- Proponents cite the following potential benefits:
  - –Decreasing compliance costs/ increasing compliance ease;
  - –Dealing with cybersecurity threats; and
  - –Monitoring compliance in digital era (*e.g.*, monitor and archive messaging apps).

*"Industry research shows that over 60% of customers would stop using a company's products or services if a cyber attack resulted in a known security breach. This would have a catastrophic impact on any business, even if the breach was temporary. The very real threat –and consequences – of a cyber attack means organizations must address the issue fully. In fact, their preparedness must be a long-term commitment that has to be embedded in their very culture."*

– Greg Medcraft, Chairman of the Australian Securities and Investments Commission
(January 20, 2017)

# Compliance Trends to Watch in 2018

- ***Eye on cost:*** Moderating costs of senior resources and moderating budgets.
- ***Focus on politics***: Firms report a focus on addressing regulatory uncertainty and change triggered by political developments.
  - –However, whereas 35% of surveyed firms reported that they spent a day per week tracking and analyzing regulatory change in 2016, only 26% reported doing this in 2017.
  - –70% of firms expect the focus on managing regulatory risk to increase over the coming year (versus 73% in 2016).
- ***Outsourcing***: 28% of firms outsourced some or all of their compliance functionality in 2017 (compared to 25% in 2016).
- ***Turning to technology***: A third of all firms overall (33%) and almost half of G-SIFIs (48%) are expecting more compliance involvement in the assessment of FinTech and RegTech solutions in the coming year—in addition to the 48% of all firms that expect to spend more time in 2017 assessing cyber resilience.

Thomson Reuters, Cost of Compliance 2017

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# Upcoming Gibson Dunn Webcasts & Today's Panelists

# Upcoming Gibson Dunn Webcasts

*Tuesday, March 13, 2018*

*U.S. Economic and Trade Sanctions Against Venezuela – the Outlook for 2018*
*- a deep dive into the U.S. economic and trade sanctions against Venezuela, including a review of the most recent developments and a forecast of what may be in store for 2018.*

Register HERE

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F. Joseph (Joe) Warin is co-chair of the firm's White Collar Defense and Investigations Practice Group and chair of the Washington, D.C. Office's Litigation Department, which consists of over 150 attorneys. He served as Assistant United States Attorney in Washington, D.C. In that capacity, Mr. Warin was awarded a Special Achievement award by the Attorney General. As a prosecutor, he tried more than 50 jury trials.

Mr. Warin's areas of expertise include complex civil litigation, white collar crime, and regulatory and securities enforcement – including Foreign Corrupt Practices Act investigations, False Claims Act cases, special committee representations, compliance counseling and class action civil litigation. Mr. Warin has handled cases and investigations in more than 40 states and dozens of countries. His clients have included corporations, officers, directors and professionals in regulatory, investigative and trial matters. These representations have involved federal regulatory inquiries, criminal investigations and cross-border inquiries by dozens of international enforcers, including UK's SFO and FCA, and government regulators in Germany, Switzerland, Hong Kong, and the Middle East.

Mr. Warin's civil practice includes representation of clients in complex litigation in federal courts and international arbitrations. He has tried 10b-5 securities and RICO claim lawsuits, hostile takeovers and commercial disputes. Mr. Warin has handled more than 40 class action cases across the United States. These representations include investment banking firms, global corporations, Big 4 accounting firms, broker-dealers and hedge funds.

For many years, Mr. Warin has been hired by audit committees or special committees of public companies to conduct investigations into allegations of wrongdoing. These investigations have been in a wide variety of industries including energy, oil services, financial services, healthcare and telecommunications.

In 2017, *Chambers* honored Mr. Warin with the Outstanding Contribution to the Legal Profession Award. *Chambers Global 2017* ranked Mr. Warin a "Star" in USA – FCPA "with exceptional expertise across all aspects of anti-corruption law". From 2015-2018, he has been selected by *Chambers Latin America* as a top-tier lawyer in Latin America-wide, Fraud & Corporate Investigations. Mr. Warin is one of only ten lawyers currently ranked in *Chambers USA* in five categories: in 2016, *Chambers USA* selected him as a Leading Lawyer in the nation in the areas of Securities Regulation Enforcement, Securities, and Litigation: FCPA; he also was ranked as a Leading Lawyer in the areas of Securities Litigation and White Collar Crime and Government Investigations in the District of Columbia. In 2017, Mr. Warin was named to *Securities Docket's* "Enforcement 40". *Benchmark Litigation* has recognized him as a U.S. White Collar Crime Litigator Star for seven consecutive years (2011-2017). In 2016, W*ho's Who Legal and Global Investigations Review* named Mr. Warin to their list of World's Ten-Most Highly Regarded Investigations Lawyers. Winners are the "most widely recognized for their achievements by the global legal market" as determined by private practitioners and in-house counsel. He has been listed in *The Best Lawyers in America*® every year from 2006 – 2018 for White Collar Criminal Defense. *Best Lawyers*® also named Mr. Warin 2016 Lawyer of the Year for White Collar Criminal Defense in the District of Columbia. In 2016, he was named among the *Lawdragon* 500 Leading Lawyers in America. Mr. Warin also was recognized by *Lavinex* as one of Latin America's Top 100 Lawyers in FCPA & Fraud. He was selected as a 2017 Top Lawyer for Criminal Defense by *Washingtonian* magazine. He received the *Chambers USA* Award for Excellence in 2014 in the category of Litigation: White Collar Crime & Government Investigations. *U.S. Legal 500* has repeatedly named Mr. Warin a Leading Lawyer for White Collar Criminal Defense Litigation. In 2013, Mr. Warin was awarded the *Best FCPA Client Service Award* by *Main Justice*. He also was named to the publication's *FCPA Masters* list. In 2011, Mr. Warin was named a white collar law MVP by *Law360*. Mr. Warin was named a Special Prosecutor by the District of Columbia Superior Court in 1988.

# Caroline Krass

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Caroline Krass, former Central Intelligence Agency (CIA) General Counsel, is chair of the firm's National Security Practice Group. Ms. Krass is widely recognized for her expertise, both in Washington and abroad, as one of the most experienced national security lawyers in the United States, having served as a senior national security lawyer in the Obama and George W. Bush Administrations. She has particular expertise in intelligence, privacy, surveillance, national security, economic sanctions, the Committee on Foreign Investment in the United States (CFIUS), cybersecurity, and government investigations.

Before joining Gibson Dunn in May 2017, Ms. Krass was appointed to be the General Counsel of the CIA by President Obama, following overwhelming Senate confirmation on a bipartisan basis, and she served in that position from 2014 to 2017. In her role as General Counsel, she served as the agency's Chief Legal Officer, principal legal advisor to the CIA Director, and a trusted member of the Senior Leadership Team. Ms. Krass oversaw more than 150 attorneys and advised on complex, highly sensitive legal and policy issues, including cybersecurity and privacy, foreign investment in the U.S. and export controls, government investigations and litigation, crisis management and congressional relations. She served as the primary liaison with the White House Counsel and general counsels across the Executive Branch, as well as counterparts abroad, on national security legal and policy issues.

From 2011 to 2014, Ms. Krass served as Acting Assistant Attorney General, and before that, Principal Deputy Assistant Attorney General, in the Office of Legal Counsel (OLC) in the Department of Justice. In these roles, she provided legal advice to the Attorney General, the White House Counsel, the National Security Council Legal Adviser, and senior officials at other executive branch agencies on a wide range of complex and significant constitutional, statutory, and regulatory questions relating to national security, cybersecurity, privacy, and foreign affairs, including matters involving foreign sovereign immunity, CFIUS, export control, economic sanctions, surveillance and use of force. At the President's request, Ms. Krass also led OLC in 2011.

Ms. Krass served as Special Assistant to the President for National Security Affairs in the Office of White House Counsel from 2009 to 2010. During this time, she dually served as the Deputy Legal Adviser to the National Security Council. She provided advice on a broad range of pressing and complicated domestic and international legal matters and interacted frequently with the general counsels and other senior lawyers in the Departments of Justice, Defense, State, and Homeland Security, the CIA, and the Office of the Director of National Intelligence. From 2007 to 2009, she served as a prosecutor in the U.S. Attorney's Office for the District of Columbia in the National Security Section.

Before that, she served as Special Assistant to the Department of the Treasury's General Counsel, as an Attorney-Advisor in the Office of the Legal Adviser at the State Department and as a Senior Counsel and Attorney-Advisor in OLC.

In 2017, *Washingtonian Magazine* named Ms. Krass to its Top Lawyer list. For her exceptional contributions to national security while in government, Ms. Krass has been awarded numerous honors, including the CIA's Distinguished Intelligence Medal (2017); the CIA Director's Award (2017); the Director of National Intelligence Medallion for Service to the Intelligence Community (2017); the Department of Justice's John Marshall Award (highest award for an attorney) (2014); the Department of Defense Medal for Outstanding Public Service (2014); the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security (2007); the Department of Defense Exceptional Civilian Service Award (2002); and the Department of State Superior Honor Award (2000 & 2011).

Ms. Krass received a BA with Honors from Stanford University in 1989, where she was elected to Phi Beta Kappa, and graduated in 1993 from Yale Law School, where she served as a Senior Editor of the *Yale Law Journal* and as a Coker Fellow. She clerked for Judge Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia Circuit.

Ms. Krass currently serves on the CIA General Counsel's External Advisory Board, as a member of the ABA Standing Committee on Law and National Security, and as a member of the Advisory Board of the National Security Institute at George Mason University Law School. She holds a Top Secret/SCI security clearance.

# Stuart F. Delery

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Stuart F. Delery is a litigation partner and member of the White Collar Defense and Investigations, National Security, and Appellate and Constitutional Law practices. Before joining the firm, he was the Acting Associate Attorney General of the United States, the third-ranking position at the U.S. Department of Justice. Mr. Delery's practice focuses on representing corporations and individuals in high-stakes litigation and investigations that involve the federal government across the spectrum of regulatory litigation and enforcement.

As the Acting Associate Attorney General from 2014-2016, Mr. Delery oversaw the civil and criminal work of five of DOJ's litigating divisions -- Antitrust, Civil, Civil Rights, Environment and Natural Resources, and Tax -- as well as components supporting state and local law enforcement, among others. As a member of DOJ's senior management team, he assisted the Attorney General and Deputy Attorney General in formulating and implementing DOJ policies. He routinely advised on the most significant legal questions facing the United States, including questions concerning the scope of authority of the federal government. Mr. Delery also served as Vice Chair of the Steering Committee of the President's Financial Fraud Enforcement Task Force and oversaw the Residential Mortgage-Backed Securities (RMBS) working group.

Previously, Mr. Delery was the Assistant Attorney General for the Civil Division, the Department's largest litigating component, a position to which he was confirmed by the Senate by unanimous consent. As head of the Civil Division from 2012-2014, he supervised nearly 1,000 lawyers representing the United States, the President and Cabinet officers, and other federal officials. The Civil Division's docket covers the full range of government activities, including legal challenges to Congressional statutes, Administration policies and federal agency actions. He also supervised the DOJ's enforcement efforts under the False Claims Act, FIRREA and the Food, Drug and Cosmetic Act.

While in the Civil Division, Mr. Delery personally argued some of the government's most significant cases, including high-profile appeals involving the unconstitutionality of the Defense of Marriage Act, interpretation of the Affordable Care Act and the legality of the National Security Agency's data collection programs. The then-Attorney General called Mr. Delery "a lawyer's lawyer who, even as he has risen to the leadership of the department, continues to thrive in the court setting and routinely is called on to personally argue the most complex cases."

Earlier in his seven-year tenure at DOJ, Mr. Delery served in a number of senior positions, beginning as Chief of Staff and Counselor to the Deputy Attorney General in January 2009. His positions included Senior Counselor to the Attorney General, in which he advised on national security litigation and policy and matters arising from the Office of the Solicitor General, the Civil Division and the Office of Legal Counsel.

Prior to his government service, Mr. Delery practiced with an international law firm from 1995 to 2009, where he had a diverse litigation and securities practice. Mr. Delery's clients included large corporations, a national accounting firm, financial institutions, a public university, individuals, non-profit and public-interest organizations, and international organizations. Mr. Delery's matters while in private practice included constitutional and public policy litigation, including representation of the University of Michigan and its law school in *Grutter v. Bollinger* and *Gratz v. Bollinger* concerning the consideration of race in admissions; high-profile, international internal corporate investigations for boards of directors or board committees, including for the Special Investigative Committees of the Boards of Enron Corp. and WorldCom, Inc.; and cases involving securities and other financial frauds in federal and state courts, and in enforcement proceedings by the SEC and other regulators.

Mr. Delery clerked for U.S. Supreme Court Justices Sandra Day O'Connor and Byron White and for Judge Gerald Bard Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit. He received his law degree in 1993 from Yale Law School, where he served as an Articles Editor of the *Yale Law Journal*. Mr. Delery graduated with Highest Distinction from the University of Virginia in 1990.

# 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 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 internal investigations, regulatory enforcement defense, white-collar criminal defense, and compliance counseling. She represents financial institutions, multi-national companies, and individuals in connection with criminal, regulatory, and civil enforcement actions involving anti-money laundering (AML)/Bank Secrecy Act (BSA), sanctions, anti-corruption, securities, tax, and wire fraud. Ms. Brooker's practice also includes BSA/AML compliance counseling and due diligence and significant criminal and civil asset forfeiture matters.

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.

As Enforcement Director, Ms. Brooker also oversaw for the agency litigation of contested enforcement actions, including several cases of first impression in federal court handled by the Department of Justice (DOJ) on behalf of the agency. She also oversaw examinations of regulated financial institutions and development of compliance strategies. Ms. Brooker worked closely with a wide range of state and federal partners, including DOJ/Asset Forfeiture and Money Laundering Section, U.S. Attorneys' offices, State Department, Securities and Exchange Commission, Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Consumer Financial Protection Bureau, Financial Industry Regulatory Authority, and the Conference of State Bank Supervisors. Prior to serving as Enforcement Director, Ms. Brooker served as Chief of Staff and Senior Advisor to the Director of FinCEN.

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.

Ms. Brooker serves as Treasurer of the Board of Directors of the Robert A. Shuker Scholarship Fund. Ms. Brooker is admitted to practice in the District of Columbia.

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Adam M. Smith 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 frequently advises compliance officers of Fortune 500 companies regarding deal compliance, regulatory interpretation, licensure requests from relevant agencies, building compliance programs, and defending in both federal and state fora allegations of noncompliance.

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Lori Zyskowski is a member of the firm's Securities Regulation and Corporate Governance Practice Group. She advises clients, including public companies and their boards of directors, on corporate governance, securities disclosure and compliance issues, with a focus on Securities and Exchange Commission reporting requirements, proxy statements, annual shareholders meetings, director independence issues, and executive compensation disclosure best practices. Ms. Zyskowski also advises on board succession planning and board evaluations and has considerable experience advising nonprofit organizations on governance matters.

Before joining Gibson Dunn, for over a decade Ms. Zyskowski served as internal securities and corporate counsel at several large publicly traded companies, including most recently at General Electric Company. Her in-house experience provides a unique insight and perspective on the issues that her clients face every day.

Ms. Zyskowski is a frequent speaker on governance, proxy and securities disclosure panels and is very active in the corporate governance community. She is a former member of the board of directors of the Society for Corporate Governance and served as the President of its New York Chapter from 2016-2017.

She graduated from Columbia University School of Law in 1996 and was a Harlan Fiske Stone Scholar. Ms. Zyskowski received her undergraduate degree from Harvard University.

# Avi S. Garbow

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Avi S. Garbow is co-chair of the Environmental Litigation and Mass Tort Practice Group, and a member of the White Collar Defense and Investigations, Administrative Law and Regulatory, and Crisis Management Practice Groups. He joined the firm after serving as General Counsel at the U.S. Environmental Protection Agency. Mr. Garbow was nominated by President Obama, confirmed with the unanimous consent of the Senate, and was EPA's longest-serving General Counsel, from 2013 through 2017. Before assuming that position, he served as EPA Deputy General Counsel, held positions in EPA's enforcement office, and was a distinguished federal prosecutor at the U.S. Department of Justice.

Honored by the National Law Journal as an Energy and Environmental Trailblazer in 2017, Mr. Garbow has extensive experience in the development, implementation and enforcement of environmental regulations under nearly all major environmental statutes. His practice focuses on environmental compliance, internal investigations and enforcement proceedings, litigation defense and crisis management. In addition, Mr. Garbow provides strategic counseling on matters relating to climate change and sustainability, helping clients in a wide range of industries identify and maximize business opportunities arising from changing environmental and regulatory landscapes.

Mr. Garbow's tenure as EPA's General Counsel occurred during the most advanced efforts of the federal government to address climate change, both domestically and internationally. While serving as EPA General Counsel, Mr. Garbow twice led the EPA delegation to the U.S.-China Strategic & Economic Dialogue and participated in the U.S.-China Climate Change Working Group.

Mr. Garbow successfully managed one of the most active regulatory and defensive litigation dockets among large federal agencies. Under his leadership, EPA's Office of General Counsel was recognized – for the first time ever – by *The Legal 500 U.S.* as the Best In-House Team for Environment in 2014 and in 2015, and was selected for its *GC Powerlist*, with *The Legal 500* remarking that "under the inspired leadership of Avi Garbow, the dedication that the team shows sets it apart from all others in the field." He also spearheaded significant engagement with State Attorneys General, and he helped to found the EPA/Environmental Council of States Legal Network.

Earlier in his career, Mr. Garbow served as a prosecutor in the Justice Department's Environmental Crimes Section, was appointed as a Special Assistant U.S. Attorney in the Eastern District of Virginia, and held positions in EPA's Office of Enforcement and Compliance Assurance.

Mr. Garbow received his Juris Doctor from the University of Virginia School of Law, where he received the Robert F. Kennedy Award for Public Service. He received a Masters Degree in Marine Affairs from the University of Virginia Graduate School of Arts & Sciences.

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