

## **2019 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS**

To Our Clients and Friends:

In 2019, the drumbeat favoring corporate non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”)[1] kept time, and we are continuing to see these agreements used frequently by prosecutors to resolve complex corporate enforcement actions. Despite perennial scrutiny, NPAs and DPAs have withstood political vicissitudes and the comings and goings of administrations and agency heads; they have weathered the test of time and we have seen them become more sophisticated year over year as regulators and practitioners alike learn from past agreements and hone key language to achieve desired results. This has led not only to template language used repeatedly by certain units of the U.S. Department of Justice (“DOJ” or the “Department”), but also an expansion of NPAs and DPAs to other agencies.

In this client alert, the twenty-first in our series on NPAs and DPAs, we: (1) report statistics regarding NPAs and DPAs from 2000 through 2019; (2) discuss the recent return of DPAs to the political spotlight; (3) overview the Commodity Futures Trading Commission’s (“CFTC’s”) new Enforcement Manual and its implications for NPAs and DPAs; (4) discuss developments in DOJ corporate enforcement policy; (5) summarize 2019’s publicly available federal corporate NPAs and DPAs; and (6) survey recent developments in DPA regimes abroad.

Chart 1 below shows all known corporate NPAs and DPAs from 2000 through 2019.

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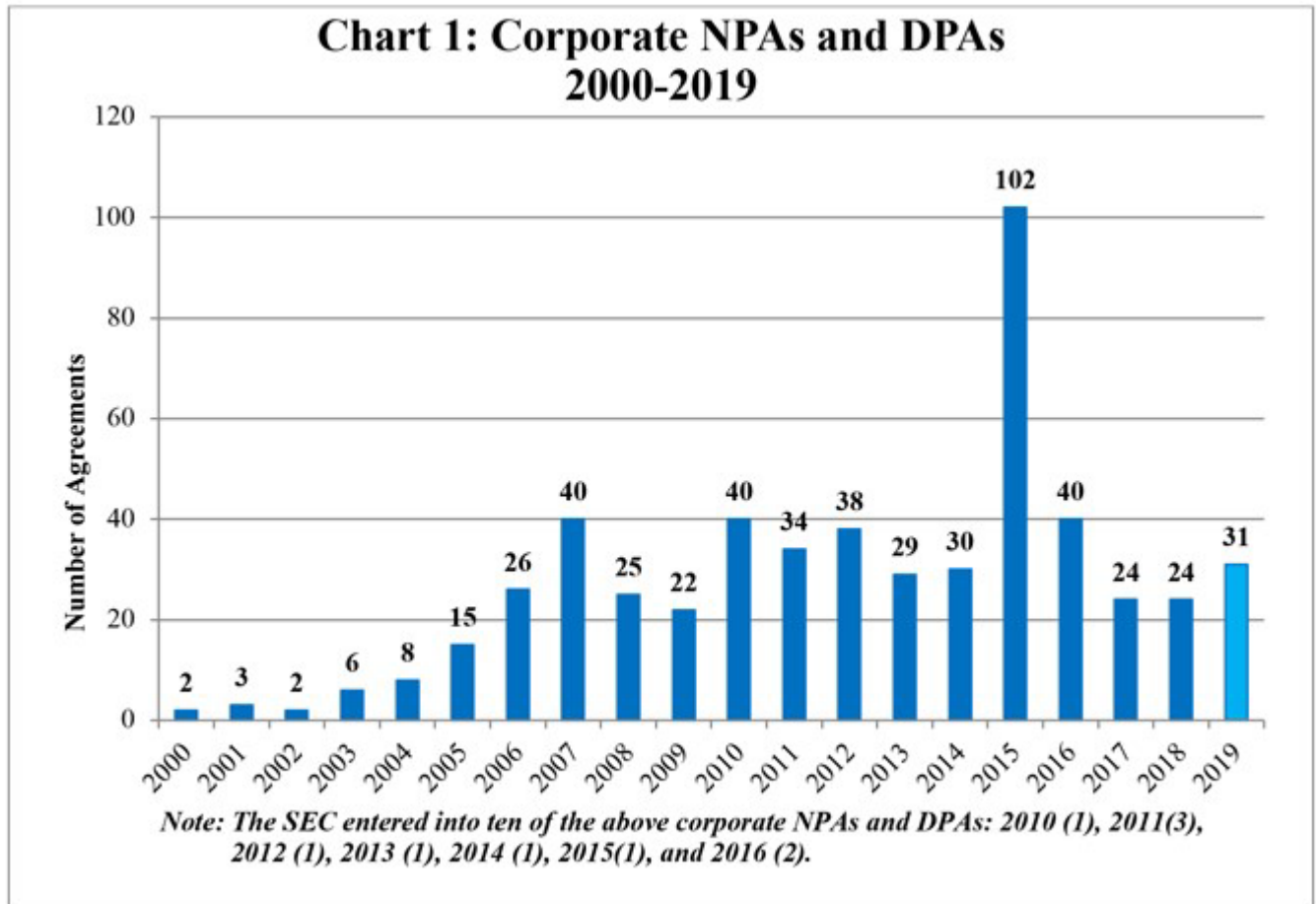
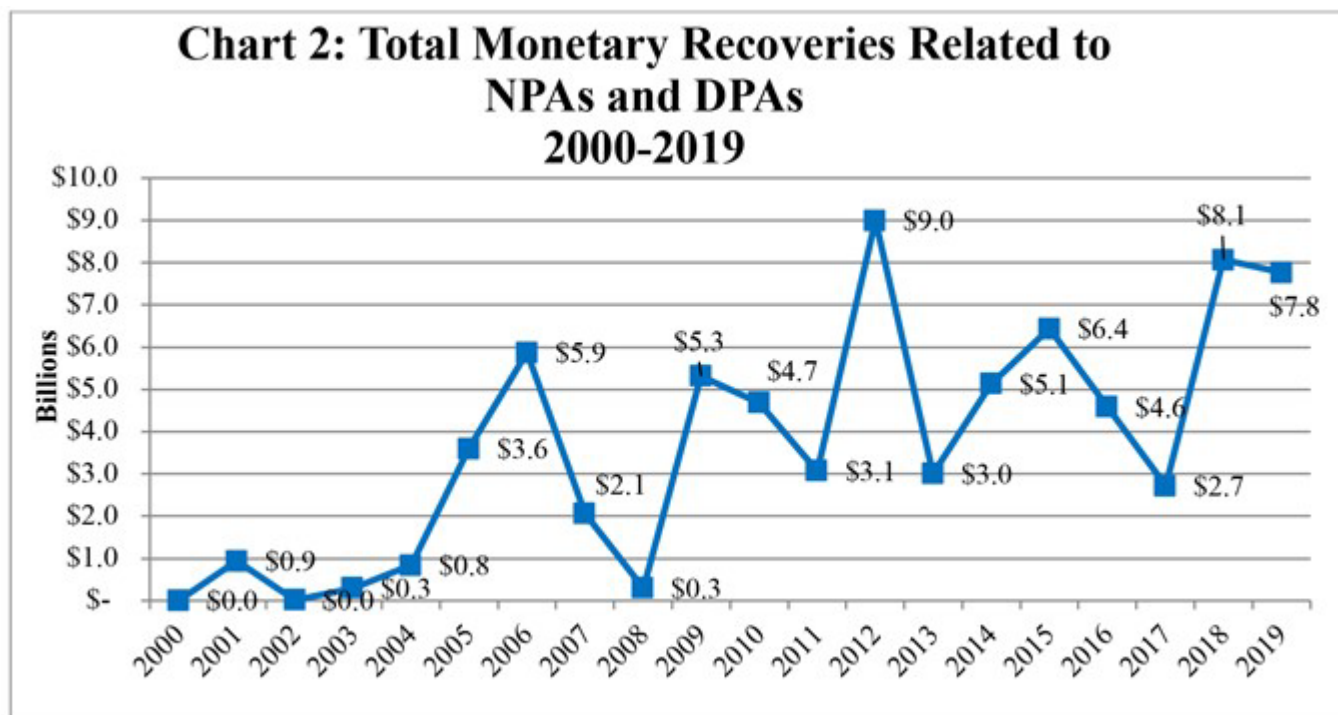


Chart 2 reflects total monetary recoveries related to NPAs and DPAs from 2000 through 2019. At nearly \$7.8 billion, recoveries associated with NPAs and DPAs in 2019 came close to the approximately \$8 billion in total recoveries in 2018, and far outstrip total recoveries in 2017. Total 2019 recoveries also exceeded the average annual recovery from 2005-2018, of approximately \$4.56 billion.

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DOJ entered into seven NPAs and DPAs this year addressing allegations of violations of the Foreign Corrupt Practices Act (“FCPA”). These agreements included the third-largest resolution overall in 2019, a DPA with Swedish telecommunications company Ericsson that imposed a total of nearly \$1.1 billion in monetary obligations. Together, the seven FCPA-focused resolutions imposed a total of approximately \$2.8 billion, or about 36% of total monetary recoveries this year. Only one of the FCPA resolutions involved a voluntary self-disclosure by the settling company, and four of the seven agreements imposed independent compliance monitors. For a more detailed analysis of this year’s FCPA resolutions, see our [2019 FCPA Year-End Update](#).

## **DPAs Back in Political Crosshairs**

In April 2019, Senator Elizabeth Warren (D-Mass.) introduced proposed legislation expanding criminal liability to negligent executives of large corporations that enter into DPAs or NPAs.<sup>[2]</sup> Under the Corporate Executive Accountability Act, executives may be criminally liable if they are negligent with regard to the conduct of companies with more than \$1 billion in annual revenue that: (1) are found guilty of or plead guilty to a crime; (2) enter into a DPA or NPA regarding any criminal allegations; (3) enter into a settlement with any state or federal regulator for any civil law violation that affects the health, safety, finances, or personal data of at least 1% of the population of any state or of the United States; or (4) commit a second civil or criminal violation while operating under a civil or criminal judgment, DPA, NPA, or other state or federal settlement.<sup>[3]</sup> Punishments under the Corporate Executive Accountability Act would include up to a year in jail, or up to three years for a repeat violation. Senator Warren is known for being a frequent and outspoken critic of the use of NPAs or DPAs, arguing they are used to soften the blow for corporations implicated in corporate wrongdoing and act as “get-out-of-jail cards.”<sup>[4]</sup> Senator Warren views the existence of DPAs, and the difficulty of proving that any individual executive had “knowledge” of corporate wrongdoing by their employer, as reasons why no CEO of a major bank has gone to jail for conduct related to the 2008 financial crisis.<sup>[5]</sup> Thus, the Corporate Executive Accountability Act requires only a finding of “negligence” to impose liability.<sup>[6]</sup> Along with the Corporate Executive Accountability Act, Senator Warren also re-introduced the Ending Too Big to Jail Act—covered in our [2018 Mid-Year Update](#)—which requires judicial oversight of DPAs between DOJ and financial institutions; requires DOJ to post on its website both DPAs and the terms and conditions

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of any agreements between the subject companies and independent compliance monitors; and limits courts' discretion to approve DPAs absent a finding that the agreement is in the "public interest."<sup>[7]</sup> As Senator Warren seeks to advance her bid for the 2020 Democratic presidential nomination, we will continue to monitor public discourse about the use and oversight of NPAs and DPAs.

## **Normalization of Corporate NPAs and DPAs Across Agencies**

On May 8, 2019, the U.S. Commodity Futures Trading Commission ("CFTC") Division of Enforcement issued its first public Enforcement Manual. The Enforcement Manual provides a broad overview of the CFTC and its Division of Enforcement, the CFTC's investigative process, and the tools available to the CFTC in pursuing or settling enforcement actions, including DPAs and NPAs.<sup>[8]</sup> The Enforcement Manual, which tracks language in the SEC Enforcement Manual, states that DPAs typically will require that the company cooperate "truthfully and fully in the CFTC's investigation and related enforcement actions," enter into a long-term tolling agreement, comply with express prohibitions or undertakings during the period of deferred prosecution, and agree to "either admit or not to contest" the underlying facts that the CFTC could assert to establish a violation of the Commodity Exchange Act.<sup>[9]</sup> Unlike the SEC, however, the CFTC does not include a lengthy list of terms that "a [DPA] should generally include."<sup>[10]</sup>

The Enforcement Manual states that NPAs will be utilized in "generally very limited" circumstances and will require—again, tracking the SEC Enforcement Manual—truthful and full cooperation with the CFTC's investigation and related enforcement actions, as well as compliance "under certain circumstances" with "express undertakings".<sup>[11]</sup> Of course, we know from experience that, despite the SEC's pronouncements in its own Enforcement Manual—from which the relevant portions of the CFTC Enforcement Manual are drawn—the SEC heavily favors administrative action over NPAs and DPAs. To date, the CFTC has not issued any corporate NPAs or DPAs, and time will tell whether the CFTC follows the SEC's lead and continues to favor administrative proceedings over NPAs and DPAs.

The CFTC's Enforcement Manual devotes significant attention to self-reporting, cooperation, and remediation, including a policy that the Division of Enforcement will consider a "substantial reduction from the otherwise applicable civil monetary penalty" if a company or individual self-reports, fully cooperates, and remediates.<sup>[12]</sup> With respect to FCPA matters, the CFTC Enforcement Manual distinguishes between companies that are required to register with the CFTC, and those that are not. For the former, the Division of Enforcement will recommend, absent aggravating circumstances, a resolution with no civil monetary penalty in a case where a company makes a voluntary disclosure, fully cooperates, and appropriately remediates.<sup>[13]</sup> Companies and individuals who are required to register with the CFTC are not eligible to take advantage of the presumption of no civil monetary policy, but the Division of Enforcement will recommend a "substantial reduction" in the penalty.

## **Developments in DOJ Corporate Enforcement Policies Regarding FCPA and National Security Matters**

2019 witnessed additional developments in DOJ's corporate enforcement policy.

DOJ updated its FCPA Corporate Enforcement Policy (the "FCPA Policy") in four key areas. First, DOJ changed its policy—originally put forth in December 2017—of requiring companies that self-disclose misconduct to prohibit their employees from "using software that generates but does not appropriately retain business records or communications" to receive full remediation credit.<sup>[14]</sup> That policy was widely interpreted as covering the use of ephemeral messaging platforms such as WhatsApp. With the changes announced in March 2019, the policy no longer strictly prohibits the use of ephemeral messaging platforms and instead now requires companies seeking remediation credit to "implement[] appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms . . . to appropriately retain business

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records or communications or otherwise comply with the company's document retention policies or legal obligations."<sup>[15]</sup>

Second, DOJ codified its position that there will be a presumption of a declination where "a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct."<sup>[16]</sup>

Third, DOJ revised the requirement for receiving full cooperation credit after making a self-disclosure. Now, the FCPA Policy states that to receive cooperation credit, a company must disclose "all relevant facts known to it *at the time of the disclosure*, including as to any individuals *substantially* involved in or responsible for the misconduct at issue."<sup>[17]</sup> These changes reflect then Deputy Attorney General Rod J. Rosenstein's statement in 2018 that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted."<sup>[18]</sup> The revisions to the FCPA Policy also included a footnote acknowledging that "a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible. In such circumstances, a company should make clear that it is making its disclosure based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at that time."<sup>[19]</sup> Notably, the revisions also involved modifying language in the previous policy that required a self-disclosing company to identify to the Department opportunities "to obtain relevant evidence not in the company's possession and not otherwise known to the Department" that the company is or should be aware of.<sup>[20]</sup> The revised FCPA Policy now states that a self-reporting company must simply identify relevant evidence of which it is actually aware.<sup>[21]</sup>

Finally, DOJ also relaxed its policy on de-confliction—that is, the deferral, at the request of DOJ, of investigative steps a company otherwise wishes to take in its internal investigation. The previous policy required that a self-disclosing company seeking full cooperation credit agree to de-confliction "where requested."<sup>[22]</sup> The FCPA Policy now states that DOJ will only request de-confliction where "requested *and appropriate*."<sup>[23]</sup> Additionally, in a new footnote, the FCPA Policy states that DOJ will not "take any steps to affirmatively direct a company's internal investigation."<sup>[24]</sup>

DOJ's National Security Division also revised its policy (the "NSD Policy") regarding voluntary disclosures of export control and sanctions violations to more closely resemble the FCPA Policy.<sup>[25]</sup> The changes are detailed in our client alert titled "DOJ National Security Division Released Updated Guidance on Voluntary Self-Disclosures," and several significant changes warrant mention here.

First, the NSD Policy now applies to financial institutions.<sup>[26]</sup> Additionally, the NSD Policy now includes a presumption that companies that voluntarily self-disclose export control or sanctions violations to the Counterintelligence and Export Control Section, fully cooperate, and timely and appropriately remediate will receive an NPA and will not be fined if there are no aggravating factors. If aggravating factors do exist warranting a different criminal resolution (such as a DPA or guilty plea) but the company otherwise satisfies the above criteria, DOJ will recommend at least a 50% reduction in the fine otherwise available under the alternative fine statute,<sup>[27]</sup> and will not impose a monitor if the company has implemented an effective compliance program by the time of resolution.<sup>[28]</sup> However, even a company that receives an NPA will still be required to pay applicable disgorgement, forfeiture, and/or restitution.<sup>[29]</sup>

Second, in another parallel to the FCPA Policy revisions, the NSD Policy now grants a presumption of an NPA where "a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through postacquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct."<sup>[30]</sup>

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Third, the revisions to the NSD Policy follow the changes to the FCPA Policy on voluntary self-disclosure credit: to qualify for a credit, a company must disclose “all relevant facts known to it at the time of the disclosure, including as to any individuals substantially involved in or responsible for the misconduct at issue.”<sup>[31]</sup> Additionally, the revised NSD Policy includes a footnote mirroring footnote 1 in the FCPA Policy, stating that “a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible. In such circumstances, a company should make clear that it is making its disclosure based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at that time.”<sup>[32]</sup>

Fourth, the NSD—like the Fraud Section—also modified its policy on de-confliction. The NSD Policy now states that the Department will only request de-confliction where “appropriate.”<sup>[33]</sup> Additionally, in a footnote, the NSD Policy says the Department will not “take any steps to affirmatively direct a company’s internal investigation.”<sup>[34]</sup>

Finally, as it relates to remediation, the NSD Policy now requires companies to conduct root cause analyses to address and remediate the underlying causes of the conduct at issue.<sup>[35]</sup> Moreover, the NSD Policy now includes guidance addressing ephemeral messaging mirroring the FCPA Policy: a company must “implement[] appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company’s ability to appropriately retain business records or communications or otherwise comply with the company’s document retention policies or legal obligations.”<sup>[36]</sup>

## **2019 Corporate NPAs and DPAs**

### Avanir Pharmaceuticals (DPA)

On September 26, 2019, Avanir Pharmaceuticals (“Avanir”), a pharmaceutical manufacturer, entered into a DPA with the U.S. Attorney’s Office for the Northern District of Georgia to resolve allegations that it had paid kickbacks to a physician to induce prescriptions of its drug Nuedexta.<sup>[37]</sup> As part of the DPA, which has a term of three years, Avanir consented to the filing of a one-count Information alleging that Avanir violated the Anti-Kickback Statute by: (1) paying a doctor to become a high prescriber of Nuedexta to beneficiaries of federal health care programs, (2) offering that doctor financial incentives to write additional Nuedexta prescriptions for beneficiaries of federal health care programs, and (3) inducing the doctor to recommend that other physicians prescribe Nuedexta to beneficiaries of federal health care programs.<sup>[38]</sup> The DPA required Avanir to pay a monetary penalty in the amount of \$7,800,000, and forfeiture in the amount of \$5,074,895.<sup>[39]</sup> In light of a parallel civil settlement (described below), the DPA did not require additional restitution to be paid by the company.<sup>[40]</sup>

Although Avanir did not receive voluntary self-disclosure credit in the DPA, the company did otherwise receive full credit for its cooperation with the government’s investigation.<sup>[41]</sup> The DPA noted its extensive remedial measures (including terminating, or permitting to resign in lieu of termination, multiple employees, at various levels of the organization, including senior executives), and enhancements to its compliance program.<sup>[42]</sup> In determining that an independent compliance monitor was unnecessary, DOJ cited these considerations, as well as the fact that Avanir had entered into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of the Inspector General (“HHS OIG”), which required the engagement of an independent review organization (“IRO”).<sup>[43]</sup>

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In a parallel civil settlement, Avanir also resolved allegations that it violated the civil False Claims Act (“FCA”) by paying kickbacks to long-term care providers and engaging in false and misleading marketing of Nuedexta, all in an effort to induce the physicians to prescribe the drug for off-label uses.[44] The FCA settlement required Avanir to pay \$95,972,017 to the U.S. government, and \$7,027,983 to resolve state Medicaid claims.[45]

The civil settlement resolved allegations, among others, that between October 29, 2010, and December 31, 2016, Avanir provided remuneration in the form of money, honoraria, travel, and food to certain physicians and other health care professionals to induce them to write prescriptions for Nuedexta.[46] Contemporaneous with the civil settlement, Avanir entered into a five-year Corporate Integrity Agreement with HHS OIG. The agreement requires, among other things, that Avanir implement additional controls around its interactions with physicians and conduct internal and external (through an IRO) monitoring of promotional and other activities.[47]

## Baton Holdings LLC / Bankrate, Inc. (NPA)

On March 5, 2019, DOJ reached an NPA with Baton Holdings, LLC, the successor in interest of Bankrate, Inc., to resolve allegations of accounting fraud. The misconduct occurred prior to Bankrate’s acquisition by Red Ventures Holdco, LP, the ultimate parent company of Baton Holdings LLC.[48]

Although the company did not receive self-disclosure credit, DOJ credited Bankrate’s Audit Committee for, two years into the investigation, hiring new outside counsel, ordering an independent internal investigation, and cooperating fully.[49] Under the leadership of the Audit Committee, the company engaged in extensive remedial measures, including termination of employees who engaged in or were aware of misconduct, and issuance of restated financial statements.[50] Further, the company committed to continued improvements in its compliance and reporting programs.[51]

The NPA has a three year term, with a possible one-year extension, and no provision for early termination.[52] In addition to a monetary penalty of \$15.54 million, Baton Holdings agreed to pay \$15 million in disgorgement of profits and prejudgment interest to the SEC, and \$13 million in restitution to shareholders via a third-party claims administrator.[53] The NPA did not impose a monitor, but Baton Holdings agreed to designate knowledgeable employees to provide information to DOJ upon request, including disclosure of “credible evidence or allegations and internal or external investigations.”[54] Celadon Group, Inc. (DPA)

On April 25, 2019, Celadon Group, Inc. (“Celadon”), a transportation company headquartered in Indianapolis, Indiana, entered into a DPA with DOJ’s Criminal Division Fraud Section and the U.S. Attorney’s Office for the Southern District of Indiana to resolve allegations that it had misled investors and falsified books and records.[55] As part of the DPA, which has a term of five years, Celadon consented to the filing of a one-count Information charging the company with conspiracy to commit securities fraud and to “knowingly and willfully falsify the books, records and accounts of the Company.”[56] The DPA resolves allegations that between June 2016 and October 2016, Celadon conspired with a wholly owned subsidiary, Quality Companies LLC (“Quality”), in a scheme that “resulted in Celadon falsely reporting inflated profits and inflated assets to the SEC and the investing public through Celadon’s financial statements.”[57] Ultimately, the DPA alleges, Celadon used falsified invoices reflecting inflated truck values to “hide millions of dollars of losses from investors when reporting its financial condition.”[58]

Although Celadon did not voluntarily disclose the conduct, a “relevant consideration” for entering into the DPA was that, “after learning of the allegations of misconduct by Company officials, the Company retained an external law firm to conduct an independent investigation, and ultimately notified [DOJ] of its investigation and intent to fully cooperate.”[59] The DPA also credits Celadon with engaging in “significant remedial

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measures,” including that “(i) the Company no longer employs or is affiliated with any of the individuals known to the Company to be implicated in the conduct at issue . . . ; (ii) the Company created the new position of Chief Accounting Officer reporting directly to the Chief Financial Officer; (iii) the Company hired an experienced Internal Audit staff member reporting directly to the Company’s Internal Audit Manager; and (iv) the Company enhanced its compliance program . . . .”[60] On the same day DOJ announced the Celadon DPA, it also announced it had reached a guilty plea with the former president of the Celadon subsidiary that included counts of conspiracy to commit securities fraud, to make false statements to auditors, and to falsify the company’s books, records, and accounts.[61]

Pursuant to the DPA, Celadon agreed to pay approximately \$42.2 million in restitution to victims of the offense, in addition to the “cost of the administration of all restitution claims by a third party claims administrator.”[62] Unusually for a resolution lacking in voluntary disclosure credit, the company did not have to pay a fine or further financial penalty beyond the approximately \$42.2 million in victim restitution.

On December 5, 2019, the SEC charged two of Celadon’s former top executives for their participation in the alleged conduct.[63] Less than a week after the executives were charged, Celadon filed for Chapter 11 bankruptcy protection, citing “legacy and market headwinds” as well as the “significant costs associated with a multi-year investigation into the actions of former management, including the restatement of financial statements.”[64]

## ContextMedia Health LLC (NPA)

On October 17, 2019, ContextMedia Health LLC (“ContextMedia”), a digital provider of medical information and advertising in doctors’ offices, entered into an NPA with DOJ and the U.S. Attorney’s Office for the Northern District of Illinois.[65] The agreement was secured by Gibson Dunn and resolved allegations that from 2012 to 2017, former executives and employees of ContextMedia defrauded clients—most of which were pharmaceutical companies—by falsely inflating the numbers of physicians it told those clients they would reach by placing advertisements on ContextMedia’s network.[66]

ContextMedia admitted that former executives invoiced clients as if advertising campaigns had been delivered in full, when in reality the company under-delivered the campaigns because its advertising network did not reach all of the physicians that ContextMedia represented it did.[67] To conceal the under-deliveries, former employees allegedly falsified records to make it appear the company was delivering advertising content to the number of in-office devices its clients were promised their advertisements would reach.[68] Former executives and employees also allegedly inflated metrics measuring the frequency with which patients engaged with devices receiving the clients’ advertising content.[69]

The NPA noted that ContextMedia no longer employs the former executives and employees who were involved in the alleged wrongdoing, and the company has made significant improvements to address and improve the reliability of reporting on advertising campaign delivery, including by hiring third parties to audit all of its advertising campaigns.[70] Based on these improvements and the strength of the company’s enhanced compliance program, DOJ determined that a compliance monitor was not necessary and did not impose a fine.[71]

ContextMedia’s obligations under the agreement have a term of three years.[72] Under the terms of the NPA, the company committed to compensating its pharmaceutical clients up to a cumulative amount of \$70 million, approximately \$65.5 million of which the company had already returned through a combination of cash payments and in-kind services and the remaining \$4.5 million of which will be set aside to cover any future claims for restitution made by ContextMedia’s clients.[73]



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## Dannenbaum Engineering Corporation (DPA)

On November 22, 2019, Dannenbaum Engineering Company (“DEC”) and its parent company, Engineering Holding Corporation (“EHC”), entered into a three-year DPA with DOJ’s Public Integrity Section and the U.S. Attorney’s Office for the Southern District of Texas. The government alleged that DEC violated the Federal Election Campaign Act (“FECA”).<sup>[74]</sup> As part of the resolution, DEC agreed to pay a monetary penalty of \$1.6 million.

According to the DPA’s Statement of Facts, from at least March 2015 through April 2017, DEC and EHC made \$323,300 in illegal conduit contributions through various employees and their family members to federal candidates and their committees.<sup>[75]</sup> The DPA alleges that DEC corporate funds were used to advance or reimburse employee monies for these contributions, and that the object of the alleged scheme was for DEC, its CEO, and a former employee to gain access to and potentially influence various candidates for federal office, including candidates for President, the Senate, and the House of Representatives.<sup>[76]</sup>

DOJ listed several factors on which it based the resolution, including DEC’s cooperation with the government investigation, the “thorough” internal investigation DEC conducted, and its remedial measures. The remedial measures included, among others: (1) resignation by the CEO and departure of the one other employee who allegedly engaged in misconduct; (2) the restructuring of the company’s board to ensure that the former CEO cannot control it; (3) ending all politically related payments to its employees; (4) the hiring/designation of a full-time Chief Governance and Compliance Officer, and the engagement of an independent company to design a new compliance program; and (5) the creation of a whistleblower email system and training program for employees.<sup>[77]</sup>

## Ericsson (DPA)

On November 26, 2019 DOJ and the U.S. Attorney’s Office for the Southern District of New York entered into a three-year DPA with Telefonaktiebolaget LM Ericsson (“Ericsson”), a multinational telecommunications company headquartered in Sweden, for conspiring to violate the FCPA. Ericsson’s subsidiary Ericsson Egypt Ltd. (“Ericsson Egypt”) also pled guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA.<sup>[78]</sup> The DPA alleged that Ericsson paid bribes to high-level government officials in Djibouti and committed violations of the FCPA’s books and records and internal controls provisions to disguise payments in Djibouti, China, Vietnam, Indonesia, and Kuwait over the course of 17 years.<sup>[79]</sup>

The DPA imposed a total criminal penalty of \$520,650,432, which includes a \$9,520,000 criminal fine Ericsson agreed to pay on behalf of Ericsson Egypt. The total penalty reflects an aggregate discount of 15% off the bottom of the U.S. Sentencing Guidelines fine range.<sup>[80]</sup> Ericsson also settled a related investigation by the SEC by agreeing to pay \$458,380,000 in disgorgement and \$81,540,000 in prejudgment interest.<sup>[81]</sup> The approximately \$1.1 billion in total monetary obligations imposed on Ericsson make this matter the third-largest FCPA settlement reached to date. The Ericsson DPA is the largest agreement of 2019 (measured by total dollar value) to require an independent compliance monitor. The DPA imposed a three-year independent compliance monitor, citing the fact that Ericsson “has not yet fully implemented or tested its compliance program.”<sup>[82]</sup> Ericsson also agreed to “implement rigorous internal controls” and “cooperate fully with the [g]overnment in any ongoing investigations.”<sup>[83]</sup> Among the factors DOJ considered in entering into the DPA was the fact that although Ericsson had “inadequate anti-corruption controls and an inadequate anti-corruption compliance program” during the relevant period, Ericsson enhanced its compliance program and controls in the course of DOJ’s investigation.<sup>[84]</sup> DOJ did not give Ericsson full cooperation credit because the company “did not disclose allegations of corruption with respect to two relevant matters, produced certain relevant materials in an untimely manner, and did not timely and fully remediate, including by failing to take

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adequate disciplinary measures with respect to certain executives and other employees involved in the misconduct.”[85]

## Fresenius Medical Care AG & Co. KGaA (NPA)

On March 28, 2019, Fresenius Medical Care AG & Co. KGaA (“Fresenius”), “a German-based provider of medical products and services,” entered into an NPA with DOJ’s Criminal Division, Fraud Section, and the U.S. Attorney’s Office for the District of Massachusetts to resolve criminal and civil claims relating to Fresenius’s alleged violations of the FCPA through “participation in various corrupt schemes to obtain business in multiple foreign countries.”[86] Specifically, Fresenius admitted to making improper payments to “publicly employed health and/or government officials to obtain or retain business in Angola and Saudi Arabia.” Furthermore, DOJ alleged that in certain foreign countries, “Fresenius knowingly and willfully failed to implement reasonable internal accounting controls over financial transactions and failed to maintain books and records that accurately and fairly reflected the transactions.”[87]

The NPA notes that Fresenius received voluntary disclosure credit “because it voluntarily and timely disclosed to the Department the conduct described in the Statement of Facts [attached to the NPA].”[88] The company also received partial credit for its cooperation with DOJ, including, among other things: “conducting a thorough internal investigation; making regular factual presentations to the Department; . . . [and] collecting, analyzing, and organizing voluminous evidence and information from multiple jurisdictions for the Department.”[89]

Fresenius also engaged in remedial measures, according to the NPA, including: (1) terminating the employment of at least ten employees who were involved in or failed to detect the admitted misconduct; (2) enhancing its compliance program, controls, and anti-corruption training; (3) terminating business relationships with the third party agents and distributors who participated in the misconduct described in the Statement of Facts; (4) adopting heightened controls over the selection and use of third parties, to include third party due diligence; and (5) withdrawing from consideration of pending public contracts potentially related to the misconduct described in the Statement of Facts.”[90]

Under the NPA, which has a term of three years, Fresenius “agree[d] to pay a monetary penalty in the amount of \$84,715,273” and to pay “disgorgement and prejudgment interest in the amount of \$147 million,” toward which DOJ credited Fresenius’s disgorgement to the SEC.[91] The monetary penalty reflected a discount of 40% off of the bottom of the U.S. Sentencing Guidelines fine range.[92]

Fresenius agreed “to an independent compliance monitor for a term of two years, followed by selfmonitoring for the remainder of the Agreement.”[93] It also agreed to cooperate with DOJ and “any other domestic or foreign law enforcement and regulatory authorities and agencies, as well as with Multilateral Development Banks, in any investigation of the Company, its parent company or its affiliates, or any of its present or former officers, directors, employees, agents, and consultants, or any other party.”[94] The NPA also acknowledges that Fresenius must comply with relevant data privacy laws, among other applicable laws and regulations, and it requires the company to provide DOJ with “a log of any information or cooperation that is not provided based on the assertion of law, regulation, or privilege.”[95] This is in keeping with DOJ’s public statements that, under the FCPA Corporate Enforcement Policy, the “company bears the burden of establishing the prohibition” on disclosing information.[96] DOJ has expressed an expectation that “a cooperating company will work to identify all available legal means to provide” requested data.[97]

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On October 21, 2019, German prosecutors confirmed they are conducting an investigation based on findings in the NPA.<sup>[98]</sup> [Heritage Pharmaceuticals \(DPA\)](#)

On May 30, 2019, Heritage Pharmaceuticals Inc. (“Heritage”), and the Antitrust Division of DOJ entered into a DPA.<sup>[99]</sup> The Heritage DPA secured by Gibson Dunn is the Antitrust Division’s first DPA with a company other than a financial institution and the only DPA to provide protection from criminal prosecution for all of the company’s current officers, directors and employees.

The Heritage DPA resolved allegations that from about April 2014 until at least December 2015, Heritage participated in a criminal antitrust conspiracy with other companies and individuals engaged in the production and sale of generic pharmaceuticals, a purpose of which was to fix prices, rig bids, and allocate customers for glyburide, a medicine used to treat diabetes.<sup>[100]</sup> The agreement requires Heritage to cooperate fully with the ongoing investigation and pay a \$225,000 criminal penalty.<sup>[101]</sup> In return, the prosecution of Heritage is deferred for a period of three years.<sup>[102]</sup> Heritage’s resolution with the DOJ does not require the imposition of a corporate monitor.

DOJ noted the agreement was based on a variety of facts and circumstances, including the fact that a criminal conviction would have potentially exposed Heritage to mandatory exclusion from federal health care programs.<sup>[103]</sup>

Heritage has agreed to resolve all civil claims relating to federal health care programs arising from its conduct.<sup>[104]</sup> In a separate civil resolution, Heritage agreed to pay \$7.1 million to resolve allegations under the FCA related to the alleged price-fixing conspiracy.<sup>[105]</sup>

For additional information regarding the Antitrust Division’s latest guidance on DPAs, and particularly the role that corporate compliance programs will play in securing a DPA, please see our [recent client alert](#), “DOJ Antitrust Division Will Now Consider DPAs for Companies Demonstrating ‘Good Corporate Citizenship.’”

## HSBC Private Bank (Suisse) SA (DPA)

On December 10, 2019, HSBC Private Bank (Suisse) SA (“HSBC Switzerland”), a private bank headquartered in Geneva, entered into a DPA with DOJ’s Tax Division and the U.S. Attorney’s Office for the Southern District of Florida.<sup>[106]</sup> The agreement resolved allegations that HSBC Switzerland conspired with U.S. taxpayers to evade taxes.<sup>[107]</sup> As part of the DPA, which has a term of three years, HSBC Switzerland consented to the filing of a one-count Information charging the bank with conspiracy to (1) defraud the United States for the purpose of impeding the lawful collection of federal income taxes, (2) file false federal income tax returns, and (3) evade federal income taxes, all in violation of 18 U.S.C. § 371.<sup>[108]</sup>

Specifically, DOJ alleged that from at least 2000 through 2010, HSBC Switzerland “used Swiss bank secrecy to conceal the accounts of U.S. clients from the U.S. tax authorities.”<sup>[109]</sup> This included the provision of a number of traditional Swiss banking services, such as numerical and coded names for accounts, prepaid debit and credit cards to allow U.S. clients to withdraw funds remotely “without a clear paper trail back to their undeclared accounts in Switzerland,” and hold-mail services in which the bank would not send any account documents to U.S. account holders.<sup>[110]</sup> HSBC Switzerland bankers also assisted U.S. clients with creating entities that were incorporated in offshore tax havens and opening accounts in the names of nominee entities and trusts.<sup>[111]</sup>

Pursuant to the DPA, HSBC Switzerland agreed to pay a total of \$192,350,000 to the United States, consisting of restitution of the approximate unpaid pecuniary loss to the United States that allegedly resulted from the conduct, forfeiture of the approximate gross fees paid to HSBC Switzerland by U.S. taxpayers with

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undeclared accounts at the bank, and a monetary penalty.<sup>[112]</sup> Notably, the monetary penalty portion of the resolution reflected a discount of 50% off of the bottom of the U.S. Sentencing Guidelines fine range.<sup>[113]</sup> DOJ considered that HSBC self-reported its conduct, performed a thorough internal investigation, and extensively cooperated with the government as mitigating factors in support of the lower penalty.<sup>[114]</sup> The DPA did not impose a monitor or regular self-reporting requirement.<sup>[115]</sup> Hydro Extrusion USA LLC (DPA)

On April 23, 2019, Hydro Extrusion USA, LLC, formerly known as Sapa Extrusions Inc. (“SEI”), entered into a three-year DPA for mail fraud after an extensive investigation by the National Aeronautics and Space Administration (“NASA”) Office of Inspector General, FBI’s Portland Field Office, and the Defense Criminal Investigative Service (“DCIS”).<sup>[116]</sup> At the same time, SEI’s direct subsidiary, Hydro Extrusion Portland, Inc., formerly known as Sapa Profiles Inc. (“SPI”), agreed to plead guilty to one count of mail fraud in connection with the same criminal activity and to pay restitution in the amount of \$34.1 million and a forfeiture money judgment in the amount of \$1.8 million.<sup>[117]</sup> The resolutions were entered after the two companies admitted to providing customers, including U.S. government contractors, with falsified certifications from altered tensile test results for nearly two decades.<sup>[118]</sup> The tests were designed to ensure the consistency and reliability of aluminum extruded at the companies’ facilities in Oregon, and the falsified results therefore allegedly resulted in the sale of aluminum that did not meet contract specifications for use on rockets for NASA and missiles provided to the Department of Defense’s Missile Defense Agency.<sup>[119]</sup>

A number of factors contributed to DOJ’s criminal resolution with the companies. The DPA noted that Hydro Extrusion USA LLC and SPI “received full credit for their cooperation with the United States’ investigation and the Civil Division’s parallel civil investigation.”<sup>[120]</sup> That cooperation included “conducting an independent internal investigation and making regular factual presentations to the United States; facilitating witness interviews of current and former SPI employees; collecting, analyzing, and organizing voluminous evidence and information for the United States; providing counsel for certain witnesses; and responding to the United States’ requests for evidence and information.”<sup>[121]</sup> Moreover, the companies received significant credit for “their engagement in extensive remedial measures to address the misconduct, including the termination and severance of employees who were involved, the implementation of state-of-the-art equipment to automate the tensile testing process, company-wide audits at all U.S. tensile labs, increased resources devoted to compliance, and revamping internal quality controls and quality audit processes.”<sup>[122]</sup> In entering the DPA, the government also considered SPI’s ongoing negotiations with DOJ’s Civil Division, Commercial Litigation Branch, Fraud Section, “to resolve its civil liability for related civil claims, including under the federal False Claims Act.”<sup>[123]</sup>

Hydro Extrusion USA’s extensive remediation efforts, the state of its compliance program, and its agreement to periodic self-reporting, led DOJ to determine that an independent compliance monitor was unnecessary.<sup>[124]</sup> However, the companies did not receive more significant mitigation credit, either in the penalty or the form of resolution, because the companies did not voluntarily self-disclose the full extent of their misconduct to the Department.<sup>[125]</sup>

## Insys Therapeutics, Inc. (DPA)

Insys Therapeutics, Inc. (“Insys”) entered into a five-year DPA with the U.S. Attorney’s Office for the District of Massachusetts on June 5, 2019, to resolve federal criminal charges arising from Insys’s payment of kickbacks and other unlawful marketing practices related to its promotion of Subsys, a sublingual fentanyl spray DOJ described as a “powerful, but highly addictive opioid painkiller.”<sup>[126]</sup> DOJ alleged that between August 2012 and June 2015, Insys used sham “speaker programs” as a vehicle for paying bribes and kickbacks to physicians and other medical practitioners in exchange for prescribing Subsys to their patients, in many instances where the drug was not medically necessary.<sup>[127]</sup> As part of the resolution, Insys’s wholly owned operating subsidiary, Insys Pharma, Inc. (“Insys Pharma”), pled guilty to five counts of mail fraud.<sup>[128]</sup>

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As part of the DPA, Insys agreed to pay a \$2 million criminal fine and to forfeit \$28 million, representing its unlawful proceeds from the mail fraud scheme.<sup>[129]</sup> Additionally, Insys agreed to pay \$195 million as part of a related FCA settlement, bringing its total penalty amount to \$225 million.<sup>[130]</sup> Insys also agreed to “cooperate fully with the United States . . . in any federal investigation, trial, or other proceeding of its current and former officers, agents, and employees” arising from this investigation or otherwise related the company’s sales, promotion, and marketing practices related to Subsys.<sup>[131]</sup> This cooperation obligation may prove significant given that eight Insys executives have been convicted for crimes related to the illegal marketing of Subsys, five of whom, including company founder John Kapoor, were convicted at trial for racketeering conspiracy in May.<sup>[132]</sup> Insys also agreed to fully comply with federal law related to the marketing, sale, and distribution of pharmaceutical products, to continue implementing its associated compliance policies, procedures, and controls, and to abide by all of the terms of its Corporate Integrity Agreement and associated civil Settlement Agreement with HHS OIG.<sup>[133]</sup>

The Corporate Integrity Agreement sets forth detailed undertakings regarding the structure, content, and oversight of Insys’s corporate compliance program and the commissioning of an annual independent review process,<sup>[134]</sup> as well as: (1) a requirement that Insys establish a program allowing for clawback of up to three years of executive incentive-based compensation;<sup>[135]</sup> (2) restrictions on research grants and charitable donations;<sup>[136]</sup> and (3) a requirement that Insys divest Subsys and an associated product and cease all business activities related to opioids within 12 months.<sup>[137]</sup> The Settlement Agreement required payment of a \$195 million civil penalty over a five-year period.<sup>[138]</sup> The OIG reserved the right to exclude Insys from participating in federal health care programs in the event of a material breach of the Corporate Integrity Agreement or a default in its payment obligations under the Settlement Agreement.<sup>[139]</sup>

Less than a week after entering this resolution, on June 10, 2019 Insys filed for Chapter 11 bankruptcy protection, claiming it could not keep up with its obligations due to the combination of significantly declined sales amid enhanced scrutiny of opioid prescriptions and its costs associated with the DOJ investigation and numerous associated civil lawsuits brought by municipalities seeking damages from Insys’s alleged contributions to the opioid epidemic.<sup>[140]</sup> Since then, Insys has filed a recovery plan providing for tiered treatment of claims, including DOJ’s claim based on the \$225 million settlement.<sup>[141]</sup> The plan has not yet been confirmed, and it is not yet clear how much of the settlement amount DOJ would actually receive under the plan.

## LLB-Verwaltung (Switzerland) AG (NPA)

In July 2019, DOJ’s Tax Division entered into an NPA with LLB-Verwaltung (Switzerland) AG (“LLBSwitzerland”), a private Swiss bank, to resolve allegations that LLB-Switzerland and certain of its employees, including members of management, conspired with an independent Swiss asset manager and with U.S. clients to conceal the clients’ assets and incomes from the IRS through various means, including using Swiss bank secrecy and nominee companies set up in tax-haven jurisdictions.<sup>[142]</sup> The NPA’s Statement of Facts noted that during 2009, “the Bank held nearly \$200 million” in assets for 93 U.S. clients despite allegedly knowing that many of these clients had brought undeclared funds to LLBSwitzerland, and despite knowing of an investigation then being conducted by the U.S. government into similar conduct at another Swiss bank.<sup>[143]</sup> LLB-Switzerland’s parent, Liechtensteinische Landesbank, AG (“LLB-Vaduz”), reached a separate agreement with DOJ in 2013 through the DOJ Tax Swiss Bank Program (covered extensively in our 2015 Mid-Year and Year-End Updates), that excluded LLBSwitzerland from the resolution.<sup>[144]</sup>

The NPA, which has a term of four years, imposed a penalty of \$10,680,554.<sup>[145]</sup> The DOJ Tax Division entered into the Agreement, in part, based on factors including: “(a) [LLB-Switzerland’s] disclosure of the Conduct, including how LLB-Switzerland structured, operated, and supervised its cross-border business for

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accounts owned and/or controlled by U.S. persons; (b) [LLB-Vaduz's] termination of the banking activities by LLB-Switzerland and the return of LLB-Switzerland's banking license to [the Swiss Financial Market Supervisory Authority ("FINMA")] in December 2013; and (c) [LLBSwitzerland's] cooperation with the Tax Division as well as the cooperation of LLB-Vaduz" in the investigation.[146] Additionally, DOJ noted LLB-Switzerland's "comprehensive" remediation efforts since 2012, which included the bank's termination of all cross-border business with U.S. clients and of its relationship with the Swiss asset manager.[147] LLB-Switzerland also closed and surrendered its banking license, as noted above, and dismissed the managers and employees implicated in the investigation.[148]

## Lumber Liquidators (DPA)

In March 2019, the DOJ Fraud Section, U.S. Attorney's Office for the Eastern District of Virginia (E.D. Va.), and Lumber Liquidators entered into a DPA in connection with a criminal information charging the company with securities fraud.[149] The agreement capped a multiyear investigation initiated following a March 1, 2015, *60 Minutes* segment that claimed laminate floors Lumber Liquidators sold did not comply with California Air Resource Board ("CARB") regulations because they contained an unacceptably high amount of formaldehyde.[150]

According to the DPA, Lumber Liquidators filed a false and misleading Form 8-K with the SEC, affirming that it complied with CARB regulations while failing to disclose material facts, the day after the *60 Minutes* segment aired.[151] The DPA alleged that Lumber Liquidators had failed to include in its 8-K that the company's products had failed its own tests for CARB compliance and that the company had discontinued its relationship with a supplier due to compliance concerns.[152]

Lumber Liquidators paid DOJ a total penalty of \$33 million, including a criminal fine of approximately \$19 million, and approximately \$14 million in forfeiture. The DPA is for a three-year period.[153] The agreement reflects the company's cooperation and remedial efforts, which included offering consumers in-home testing for installed flooring, implementing new policies and procedures regarding CARB compliance, and terminating all employees involved in the wrongdoing who did not resign.[154]

The company entered into a separate resolution with the SEC through which it agreed to pay more than \$6 million in disgorgement of profits and prejudgment interest.[155]

## Merrill Lynch Commodities, Inc. (NPA)

On June 25, 2019, Merrill Lynch Commodities, Inc. ("Merrill Lynch") entered into a three-year NPA with DOJ's Fraud Section.[156] The agreement binds Merrill Lynch, which operates a global commodities trading business, as well as its parent company, Bank of America Corporation.[157]

The agreement resolved allegations that Merrill Lynch's precious metals traders deceived other market participants by manipulating U.S. commodities markets with false and misleading information.[158] Specifically, from about 2008 to 2014, its traders allegedly created the false impression of increased supply or demand by placing orders for precious metals future contracts on the market that they intended to cancel before execution (a practice known as "spoofing").[159] That spoofing purportedly induced other market participants "to buy or to sell precious metals futures contracts at prices, quantities, and times that they likely would not have otherwise." [160]

The NPA states that Merrill Lynch agreed to pay "combined appropriate criminal fine, forfeiture, and restitution amounts" of \$25 million. Merrill Lynch also committed to report evidence or allegations of similar misconduct to DOJ.[161] The NPA noted that Merrill Lynch received credit for its cooperation with DOJ's investigation and engaged in remedial measures before the investigation began, "including enhancing their compliance

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program and internal controls designed to detect and deter spoofing and other manipulative conduct.”[162] Based on these factors, DOJ determined that an independent compliance monitor was unnecessary.[163]

On the same day the parties entered into the NPA, the CFTC announced a separate settlement with Merrill Lynch to end parallel civil proceedings.[164] Merrill Lynch agreed to pay \$25 million to the CFTC, including a civil penalty of \$11.5 million, as well as restitution and disgorgement for which it received a credit for restitution and disgorgement paid to DOJ.[165]

Edward Bases and John Pacilio, two former precious metals traders employed by Merrill Lynch, were also indicted last year in connection with the alleged spoofing.[166] The litigation is pending in the U.S. District Court for the Northern District of Illinois.[167]

## Microsoft Magyarország Számítástechnikai Szolgáltató és Kereskedelmi Kft. (Microsoft Hungary) (NPA)

On July 22, 2019, DOJ announced an FCPA resolution with the Hungarian subsidiary of leading technology company Microsoft, relating to alleged violations of the FCPA’s books-and-records and internal controls provisions.[168] These allegations involved Microsoft’s subsidiary allegedly making improper payments to government officials through third parties.[169] To resolve the DOJ matter, Microsoft’s Hungarian subsidiary entered into a three-year non-prosecution agreement and paid a criminal fine of \$8,751,795.[170] The DOJ awarded a 25% cooperation credit to Microsoft Hungary for its substantial cooperation and extensive remedial measures.[171] Microsoft’s Hungarian subsidiary was not required to retain a monitor, but will report on its compliance program efforts and enhanced internal control policies and procedures for the three-year non-prosecution period.[172]

In a parallel resolution with the SEC, parent company Microsoft consented to the entry of a cease-and-desist order and agreed to pay \$16,565,151 in disgorgement plus prejudgment interest, in connection with alleged conduct in Hungary, Turkey, Saudi Arabia, and Thailand. For additional details, please see our 2019 Year-End FCPA Client Alert.

## Mizrahi Tefahot Bank Ltd., United Mizrahi Bank Switzerland Ltd., and Mizrahi Tefahot Trust Co. Ltd. (DPA)

On March 12, 2019, the DOJ’s Tax Division and U.S. Attorney’s Office for the Central District of California entered into a DPA with Mizrahi-Tefahot Bank Ltd., (“Mizrahi-Tefahot”) and its subsidiaries, United Mizrahi Bank (Switzerland) Ltd. (“UMBS”) and Mizrahi Tefahot Trust Company Ltd. (“Mizrahi Trust Company”).[173] In the Gibson Dunn negotiated DPA, Mizrahi-Tefahot admitted responsibility, “under United States *respondeat superior* law,” for the actions of “[c]ertain private bankers, relationship managers, and other employees of [MTB Entities] with similar levels of responsibility” which had, from 2002-2012, allegedly enabled U.S. customers to evade U.S. tax obligations by disguising and failing to report the customers’ ownership and control of assets held at all three entities.[174]

The DPA involved payment terms totaling \$195 million, of which \$53 million was restitution; \$24 million was disgorgement; and \$118 million was a penalty.[175] The agreement notes that a potentially “higher penalty” was “mitigat[ed]” by the fact that Mizrahi-Tefahot “conducted an internal investigation and engaged in concomitant efforts to provide information and materials . . . derived from that investigation to U.S. authorities.”[176]

The agreement describes a comprehensive internal investigation, which involved, among other things, reviewing “millions of e-mails from three countries,” producing over 560,000 pages of documents to the government, providing translations for various documents, conducting internal interviews and proffering the substance of those interviews to the government, and presenting the results of the internal investigation to the government.[177]

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The DPA will remain in place for a two-year period.[178]

## Mobile TeleSystems PJSC (DPA)

On March 7, 2019, DOJ announced the Mobile TeleSystems (“Mobile TeleSystems”) DPA, which involved allegations that Mobile TeleSystems conspired to violate the anti-bribery, books and records, and internal controls provisions of the FCPA.[179] Mobile TeleSystems’ Uzbek subsidiary, Kolorit Dizayn Ink LLC (“Kolorit”), pled guilty to anti-bribery and books and records violations.[180] According to DOJ, the companies allegedly paid bribes to Gulnara Karimova, the daughter of former president of Uzbekistan Islam Karimov, in exchange for the ability to conduct business in Uzbekistan.[181] Between the DPA and an SEC settlement announced the day before, Mobile TeleSystems and Kolorit agreed to pay a total of \$950 million in civil and criminal penalties.[182] In indictments announced the same day as the DPA, Karimova and Bekhzod Akhmedov, the former CEO of another Mobile TeleSystems subsidiary, were charged with money laundering violations, and money laundering and FCPA violations, respectively.[183] According to the press release announcing the indictments, the amount that Karimova allegedly received in bribes is the largest ever paid to any individual FCPA defendant.[184] The Mobile TeleSystems DPA highlights DOJ’s continued emphasis on prosecuting individuals, even in the wake of the recent curtailment of the Yates Memorandum’s requirement of blanket disclosure of relevant individuals by companies hoping for cooperation credit.[185]

While only the fifth-largest NPA or DPA by dollar value in 2019, the Mobile TeleSystems DPA is the second-largest agreement in 2019 to impose an independent compliance monitor.[186] Consistent with its prior practice of imposing monitorships where it believes companies’ compliance programs are immature, DOJ’s agreement with Mobile TeleSystems explains it is imposing a monitor “because the Company [i.e., Mobile TeleSystems] has not yet fully implemented or tested its compliance program.”[187] The Mobile TeleSystems DPA also marks the second monitorship to be imposed in recent years against a foreign telecommunications company over bribery allegations concerning Uzbekistan. DOJ’s 2016 DPA with VimpelCom Limited imposed a three-year monitorship on that company in a case that involved overlapping factual allegations and nearly as much in criminal and civil penalties as the Mobile TeleSystems case did.[188] The largest agreement in 2019 under which a monitor was imposed was the Ericsson DPA, which is discussed further above.

Two additional notable features of the Mobile TeleSystems DPA relate to the nature and size of the company’s total monetary penalty under the U.S. Sentencing Guidelines (“USSG”). First, the penalty was nearly 25% higher than the bottom end of the guideline range dictated by the USSG.[189] In setting forth the facts and circumstances that DOJ believed warranted this upward deviation and the nature and size of the resolution more broadly, the DPA noted (among other things) that Mobile TeleSystems “did not receive voluntary disclosure credit . . . because it did not voluntarily and timely self-disclose . . . the conduct described in the Statement of Facts,” and that while Mobile TeleSystems “ultimately provided” DOJ with “all relevant facts known to it,” the company “did not receive additional credit for cooperation and remediation . . . because it significantly delayed production of certain relevant materials, refused to support interviews with current employees during certain periods of the investigation, and did not appropriately remediate.”[190]

The second notable feature of Mobile TeleSystems’ total penalty is the fact that DOJ’s USSG analysis relied primarily on the value of the alleged bribes, and not on any alleged profit Mobile TeleSystems made as a result of the payments.[191] Unlike other FCPA cases that have involved some amount of profit realized from the alleged improper payments, Mobile TeleSystems’ conduct “result[ed] in no realized pecuniary gain to the Company” because “the Uzbek government expropriated the Company’s telecommunications assets in Uzbekistan.”[192] Only if profits surpassed the value of the alleged bribes would the USSG calculation have required that the profit figure, rather than the value of the bribe, dictate the penalty level.[193] Because the value of the alleged bribe here was larger than the base fine that the USSG would have otherwise provided



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for were profit used as a starting point, the result was a significant increase over the penalty DOJ could have otherwise sought from Mobile TeleSystems.[194]

For additional analysis regarding the Mobile TeleSystems DPA and other FCPA-related agreements, see Gibson Dunn's 2019 Year-End FCPA Update.

## Monsanto Company (DPA)

On November 21, 2019, the U.S. Attorney's Office for the Central District of California (C.D. Cal.), acting as Special Attorney in the District of Hawaii,[195] announced a two-year DPA with the agrochemical and biotechnology company Monsanto, in connection with a criminal information charging the company with storing a banned pesticide.[196] Monsanto also agreed to plead guilty to spraying the pesticide.[197] The case is the result of an investigation by the U.S. Environmental Protection Agency (EPA), Criminal Investigation Division.[198]

According to the DPA, Monsanto continued spraying and storing the pesticide Penncap-M in Hawaii after the EPA issued a cancellation order in 2013 prohibiting all sale or use of the pesticide.[199] After the cancellation order, the pesticide had to be managed as "acute hazardous waste" in compliance with the Resource Conservation and Recovery Act (RCRA), which required a permit for storage or transportation of the pesticide.[200] According to the DPA, from 2013 through 2014 Monsanto stored and transported the pesticide without the required permit.[201]

The resolution required Monsanto to pay \$10.2 million, including a fine of \$6.2 million and \$4 million in community service payments to Hawaiian government entities.[202] The DPA provides that the community services payments will be used for various purposes, including the creation of a pesticide disposal program by the Hawaii Department of Agriculture.[203] The agreement also requires that Monsanto develop and implement an environmental compliance program for all of its Hawaii sites and retain a third-party environmental compliance auditor.[204] The auditor will conduct "audits every six months of all of [Monsanto's] locations in Hawaii in order to determine whether or not [Monsanto] is in full compliance with RCRA and FIFRA [the Federal Insecticide, Fungicide, and Rodenticide Act]."[205] Reckitt Benckiser Group (NPA)

On July 11, 2019, Reckitt Benckiser Group plc ("RB Group"), a global consumer goods conglomerate headquartered in Slough, England, entered into an NPA with DOJ's Consumer Protection Branch and the U.S. Attorney's Office for the Western District of Virginia. The NPA resolved the investigation of RB Group related to the marketing, sale, and distribution of Suboxone in the United States by its former subsidiary Reckitt Benckiser Pharmaceuticals Inc., which spun off from RB Group in 2014 and is now a separate company known as Indivior.[206] Indivior was indicted on April 9, 2019 for alleged fraud in connection with the promotion and sale of Suboxone Film, an opioid used to treat opioid addiction.[207] The NPA with RB Group resolved potential liability "based on the subject matter" of that indictment.[208] The NPA imposed monetary obligations on RB Group of \$1.4 billion – by total dollar value, the RB Group NPA is the largest resolution reached in 2019.

According to the Indivior indictment, Indivior promoted Suboxone Film as less-divertible and lessabusable and safer around children, families, and communities than other buprenorphine drugs, even though such claims have never been established.[209] The Indivior indictment further alleged that Indivior used its "Here to Help" internet and telephone program to connect patients to doctors it knew were prescribing Suboxone to more patients than allowed by federal law, at high doses, and in a careless and clinically unwarranted manner.[210] The Indivior indictment alleged substantial costs to the government as a result of the company's conduct.[211]

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As part of the NPA, which has a term of three years, RB Group agreed that neither RB Group nor any affiliated entity will manufacture, distribute, or sell in the United States any Schedule I, II, or III controlled substance, as defined in the Controlled Substances Act, during the term of the NPA.[212] Moreover, RB Group agreed to fully cooperate with all investigations and prosecutions by DOJ related, in any way, to Suboxone.[213] The agreement did not impose an independent compliance monitor or a self-reporting obligation on RB Group.

The \$1.4 billion in monetary obligations imposed by the NPA consisted of a \$700,000,000 payment pursuant to a Civil Settlement Agreement; a \$647,000,000 payment for forfeiture of alleged proceeds; a \$50,000,000 payment to resolve claims by the Federal Trade Commission;[214] and a \$3,000,000 payment to the Virginia Medicaid Fraud Control Unit's Program Income Fund.[215] Notably, the government did not impose a criminal penalty on RB Group.

The Civil Settlement Agreement resolved six *qui tam* actions filed in the Western District of Virginia and the District of New Jersey alleging that RB Group engaged in fraudulent marketing of Suboxone and promoted the drug to physicians it knew were prescribing the drug illegitimately.[216] As a result, the government alleged, RB Group caused false claims for Suboxone to be submitted to government health care programs.[217] Republic Metals Corporation (NPA)

In an NPA announced on April 17, 2019, the United States Attorney's Office for the Southern District of Florida and Republic Metals Corporation ("RMC"), a gold refinery based in Miami, Florida, resolved allegations regarding RMC's role in an ongoing investigation concerning alleged money laundering and Bank Secrecy Act violations in the gold importation and refining industry.[218] Little information is available on the nature of DOJ's concerns regarding RMC, and on the precise allegations in the broader investigation, as the parties expressly agreed in the NPA—at RMC's request—to keep the agreement's statement of facts confidential "absent a court order." [219] While such a provision is not unheard of in negotiated resolutions, it is rare absent special circumstances, and here may reflect the fact that RMC is currently subject to a Chapter 11 bankruptcy proceeding filed in November 2018.[220] The NPA provided that RMC and the government "may disclose" the agreement publicly without its attachments,[221] but RMC's motion for bankruptcy court approval of the NPA, which attached the NPA itself, was originally filed completely under seal.[222] However, the bankruptcy court determined "that certain information pertaining to the Motion should be made public consistent with the importance of transparency in public proceedings,"[223] and accordingly ordered disclosure of the NPA without attachments.[224] The NPA did not impose a penalty on RMC.[225]

Notably, DOJ granted RMC "full credit for its voluntary cooperation" with the government's investigation, and explicitly noted that the information RMC produced to the government "tended to show that the Company has made significant efforts to create a culture of proper compliance" and "has been corroborated by other evidence." [226] The NPA also cited RMC's remediation efforts and "the state of its compliance program" as factors informing the government's decision not to impose a monitor.[227] Among RMC's remediation efforts was its termination, prior to being aware of the government's investigation, of "several suppliers who ultimately proved suspicious" and which RMC had hired not because it intended to violate the anti-money laundering ("AML") laws, but because of an alleged failure in the company's compliance controls.[228] Rick Weaver Buick GMC, Inc. (Pretrial Diversion Agreement)

On January 15, 2019, Rick Weaver Buick GMC, Inc. (the "Dealership") entered into an agreement with the U.S. Attorney's Office of the Western District of Pennsylvania to resolve allegations of wire fraud and conspiracy to commit wire fraud.[229] According to the indictment incorporated into the agreement and originally handed down in August 2017, the Dealership and three individual defendants defrauded auto loan providers by using straw purchasers to buy vehicles from the Dealership at inflated prices.[230]

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Pursuant to the agreement, which has a term of three years, the Dealership agreed to an annual independent audit of its business operations and books, as well as an independent monitor for the term of the agreement.[231] The Dealership also agreed to undertake remedial efforts, including conducting employee training on ethics and amending its policies and procedures relating to the integrity of its company-wide ethics and compliance program.[232]

Under the agreement, the Dealership paid full restitution in the total amount of approximately \$143,794 under the agreement to five financial institutions.[233] The Dealership also paid a monetary penalty of \$400,000.[234]

The agreement is notable for several reasons. First, it was styled as an Agreement for Pretrial Diversion, which has a deferring effect like that of a DPA but which is more traditionally used in prosecutions of individuals.[235] As such, the agreement does not contain other customary features of corporate DPAs, such as a discussion of the company's cooperation with the government's investigation. Second, the agreement was reached over two years after the Dealership was originally indicted, which stands in contrast to the vast majority of DPAs reached before the government has filed charges.

## Rising Pharmaceuticals, Inc. (DPA)

On December 13, 2019, Rising Pharmaceuticals, Inc. ("Rising") and the Antitrust Division of DOJ entered into a DPA to resolve allegations that from at least April 2014 until at least September 2015, Rising participated in a criminal antitrust conspiracy with other companies and individuals engaged in the production and sale of generic pharmaceuticals.[236] The alleged purpose of the conspiracy was "to suppress and eliminate competition by agreeing to allocate customers for and to stabilize, maintain, and fix prices of Benazepril HCTZ," a generic drug used to treat hypertension.[237] As part of the DPA, Rising consented to the filing of a one-count Information in the Eastern District of Pennsylvania charging the company with conspiracy to suppress and eliminate competition in violation of the Sherman Act.[238]

The agreement imposed \$1.5 million in criminal penalties and \$438,066 in restitution.[239] The DPA has a term of three years but will end earlier if the ongoing Chapter 11 bankruptcy cases of Rising and several related entities are closed before three years have elapsed.[240] The DPA does not impose a formal monitoring or reporting requirement on Rising, but the agreement does require prompt reporting of any "credible evidence or allegations of criminal violations" of which Rising learns.[241]

In a separate civil resolution, Rising agreed to pay approximately \$1.1 million to resolve allegations under the FCA related to the alleged price-fixing conspiracy.[242] This amount was offset in the calculation of the criminal restitution in the DPA. The payment of the monetary obligations imposed by the resolutions will be subject to certain levels of *pro rata* treatment under the reorganization plan in the Chapter 11 bankruptcy.[243]

In entering into the DPA, the Antitrust Division considered that "Rising provided substantial, timely cooperation with the United States' investigation," including disclosing information regarding additional alleged antitrust violations other than those detailed in the DPA.[244] The DPA also cited to the fact that "Rising's cooperation has allowed the United States to advance its investigation into criminal antitrust conspiracies among other manufacturers of generic pharmaceuticals," and to Rising's agreement to pay restitution.[245] Lastly, the DPA also stated that a conviction or guilty plea of Rising would likely result in a substantial delay of the ongoing bankruptcy proceedings.[246]

## Rochester Drug Co-Operative (DPA)

As part of the federal government's continued efforts to combat the opioid crisis, on April 23, 2019, the U.S. Attorney's Office for the Southern District of New York announced a DPA with Rochester Drug Co-Operative

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(“RDC”).<sup>[247]</sup> The DPA resolved criminal allegations that RDC conspired to distribute controlled substances in violation of the Controlled Substances Act (“CSA”), conspired to defraud the Drug Enforcement Administration (“DEA”), and knowingly failed to file suspicious order reports with DEA.<sup>[248]</sup> A separate consent judgment agreed to by the parties resolved allegations that RDC committed civil violations of the CSA’s suspicious order reporting requirements.<sup>[249]</sup> RDC agreed to pay \$20 million in civil forfeiture in satisfaction of its obligations under both the criminal and civil resolutions.<sup>[250]</sup>

The DPA is notable for several reasons. First, it is one of only three agreements from 2019 to carry a term of at least five years,<sup>[251]</sup> which is longer than that typically imposed by DPAs and NPAs. The agreement also includes an option for a one-year extension at the government’s sole discretion.<sup>[252]</sup> The agreement also imposes an independent monitor, but the monitorship carries only a three-year term. Second, whereas a typical DPA or NPA gives the company the opportunity to provide a written response within 30 days of any determination by the government that the company has breached the agreement,<sup>[253]</sup> the RDC DPA affords the “opportunity to make a presentation” in response to such a determination, without explicitly imposing a timeframe for doing so.<sup>[254]</sup> Third, the DPA imposes significant compliance undertakings on RDC—for example, by requiring that the company’s board “establish and maintain a standing Controlled Substances Compliance Committee (the ‘CSCC’),” and by imposing detailed rules for the CSCC’s formation, composition, and activities.<sup>[255]</sup> For example, the DPA requires that the CSCC “report regularly to the full Board on compliance issues, and . . . regularly review the reports from, and interact with, the Independent Monitor [imposed by the agreement],”<sup>[256]</sup> and that the CSCC monitor the company’s compliance program and spearhead updates to the program.<sup>[257]</sup> The agreement also provides that “the CSCC, as well as the full Board, shall have access to timely legal advice, and shall be regularly advised by counsel regarding all aspects of RDC’s compliance with the [CSA], its implementing regulations, and this Agreement.”<sup>[258]</sup> While it is common for a DPA to commit a company to providing its employees with compliance guidance, the explicit requirement of legal advice to RDC’s board represents a rare and substantial level of involvement by the government in corporate governance in the wake of a DPA.

## Samsung Heavy Industries Company Limited (DPA)

On November 22, 2019, DOJ and the U.S. Attorney’s Office for the Eastern District of Virginia entered into a three-year DPA with Samsung Heavy Industries Company Ltd. (“SHI”), an engineering company based in South Korea, for conspiring to violate the anti-bribery provisions of the FCPA.<sup>[259]</sup> This was the second DPA in 2019 concerning alleged FCPA violations related to projects involving Brazil’s stateowned energy company *Petróleo Brasileiro S.A. – Petrobras*.

SHI agreed to pay a criminal penalty totaling \$75,481,600 – half of which it will pay to the United States, and the other half of which it will pay to Brazilian authorities with which SHI entered into MOUs and leniency agreements.<sup>[260]</sup> If SHI fails to pay the Brazilian authorities within a year of the execution of the DPA, that half will also be paid to the United States.<sup>[261]</sup>

In reaching the decision to defer prosecution, DOJ considered among other factors SHI’s “significant remedial measures,” which included increasing the headcount of its compliance function, enhancing its anti-corruption policies, and imposing heightened due diligence requirements for engaging third-party vendors.<sup>[262]</sup> DOJ noted that an independent monitor was not necessary because of these measures and the company’s agreement to make yearly compliance reports to DOJ for the term of the DPA.<sup>[263]</sup> DOJ also noted that SHI did not receive full cooperation credit because it did not meet “reasonable deadlines imposed by” DOJ and caused delays in reaching a resolution.<sup>[264]</sup> The total criminal penalty reflects a 20% reduction off the bottom of the U.S. Sentencing Guidelines range,<sup>[265]</sup> rather than the 25% reduction usually associated with full cooperation credit in the absence of voluntary self-disclosure.

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## Standard Chartered Bank (DPA)

On April 9, 2019, DOJ's Money Laundering and Asset Recovery Section ("MLARS") and the U.S. Attorney's Office for the District of Columbia announced the amendment of their 2012 DPA with Standard Chartered Bank ("SCB") over alleged sanctions violations.[266] The amended DPA, together with an amended agreement with the New York County District Attorney's Office, imposes approximately \$1.01 billion in additional penalties on SCB.[267] In conjunction with the amended agreements, one former employee of SCB's Dubai operation pled guilty to conspiracy allegations, and an Iranian national, who previously engaged in business with SCB, was indicted on similar charges.[268] Notably, the agreement demonstrates that DOJ may credit a company's remediation and compliance efforts,[269] even while perceiving it as a "repeat corporate offender."[270] An earlier amendment of the 2012 DPA imposed a three-year compliance monitorship, which ended on March 31, 2019, and which DOJ and SCB agreed was unnecessary to extend.[271] The 2019 amended DPA marks the conclusion of a DOJ investigation commenced in 2014, before the term of the 2012 DPA had elapsed, on the basis of "new information" DOJ had learned "through an unrelated investigation." [272] The information concerned alleged violations "which took place after the time period specified in the Factual Statement incorporated into the 2012 DPA." [273] The amended DPA further alleges that the violations were known to SCB during the government's initial investigation.[274] The amended SCB DPA suggests that DOJ will not hesitate to pursue additional penalties where it believes that an existing resolution was reached on the basis of an incomplete record.

## Tower Research Capital LLC (DPA)

On November 6, 2019, Tower Research Capital LLC ("Tower"), a New York-based financial services firm, entered into a DPA with DOJ and the U.S. Attorney's Office for the Southern District of Texas to resolve criminal charges concerning three former traders who allegedly engaged in unlawful trading activity in U.S. commodities markets.[275] Specifically, DOJ alleged that from approximately March 2012 until December 2013, three traders who were employees of Tower engaged in spoofing by fraudulently placing orders to buy and sell futures contracts traded on the Chicago Mercantile Exchange and the Chicago Board of Trade with the intent to cancel those orders before execution.[276] According to the DPA, these orders were "intended to, and did, inject false and misleading information about the genuine supply and demand" for these futures contracts into the markets, causing other market participants to make trading decisions that they otherwise likely would not have made.[277]

Although Tower did not voluntarily disclose the conduct, the Company otherwise received full credit for its cooperation with the investigation, including by conducting an internal investigation, voluntarily making employees available for interviews, and making factual presentations to DOJ.[278] Tower also undertook "extensive remedial measures" beginning in early 2014, including terminating the traders involved, enhancing the company's compliance program and internal controls, and making changes to senior management and the company's corporate governance structure.[279]

As part of the DPA, Tower agreed to pay a total of approximately \$67.4 million, which comprises \$24.4 million in criminal penalties, \$10.5 million in disgorgement, and approximately \$32.6 million in victim compensation payments.[280] Simultaneously with the DPA, Tower entered into a separate settlement with the CFTC to end parallel civil proceedings.[281] Tower agreed to pay \$67.4 million to the CFTC, including a civil monetary penalty, disgorgement, and restitution, with all amounts to be offset by payments made to DOJ. According to the CFTC, this is "the largest monetary relief ever ordered in a spoofing case." [282]

For the three-year term of the DPA with DOJ, Tower is obligated to review and modify its corporate compliance program "to ensure that it maintains an effective compliance program that is designed to deter and detect violations of" the Commodity Exchange Act and commodities fraud statute.[283] Pursuant to this

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obligation, Tower agreed to make periodic annual reports to DOJ detailing its remediation efforts and proposals to improve its compliance program.[284]

The three traders involved in the alleged spoofing were all charged criminally in the Southern District of Texas for their roles in the alleged scheme.[285] Kamaldeep Gandhi and Krishna Mohan pled guilty in 2018 to conspiracy to engage in wire fraud, commodities fraud and spoofing, and criminal charges against Yuchun (Bruce) Mao are still pending.[286]

## UniCredit Bank Austria (NPA)

On April 15, 2019, DOJ MLARS and the U.S. Attorney's Office for the District of Columbia entered into a three-year NPA with UniCredit Bank Austria ("UniCredit BA"), a financial institution headquartered in Vienna, Austria and part of the UniCredit Group, for violating U.S. economic sanctions laws and regulations.[287] UniCredit BA has also entered into an NPA with the New York County District Attorney's Office for violating New York state law.[288]

As part of the federal NPA, UniCredit BA admitted that it conspired with certain customers to violate the International Emergency Economic Powers Act ("IEEPA") from at least around 2002 to around 2012 by processing payments to or through the United States involving persons prohibited under IEEPA from accessing the U.S. financial system.[289] In particular, according to the NPA, beginning in 2002, and up through and including 2012, UniCredit BA knowingly and willfully processed 16 transactions worth at least \$20 million through the United States involving persons located or doing business in Iran and other countries subject to U.S. economic sanctions, and willfully caused financial services to be exported from the United States to sanctioned customers in Iran and elsewhere in violation of U.S. sanctions laws and regulations.[290]

UniCredit BA agreed to forfeit \$20 million, the amount of proceeds obtained by UniCredit BA in violation of the IEEPA.[291] However, the NPA credited \$20 million in payments made by UniCredit BA in connection with a concurrent settlement with the New York State Department of Financial Services ("DFS").[292] Additionally, UniCredit BA represented that it has implemented and will continue to implement a U.S. sanctions compliance program designed to prevent and detect violations of U.S. economic sanctions.[293]

DOJ explained that the penalty amount reflected UniCredit BA's thorough internal investigation and cooperation with DOJ in its investigation, as well as its remedial efforts. Specifically, UniCredit BA received credit "for its cooperation with [DOJ's] investigation, including conducting a thorough internal investigation, making regular factual presentations to the Offices, voluntarily making employees available for interviews, producing documents to the Offices consistent with applicable data privacy laws, and collecting, analyzing, and organizing voluminous evidence and information for the Offices." [294] DOJ also noted that UniCredit BA had enhanced its U.S. sanctions compliance program and, based on those remediation efforts, DOJ determined that an independent compliance monitor was unnecessary.[295]

In addition to UniCredit BA's NPA, UniCredit Bank AG ("UCB AG"), a financial institution headquartered in Munich and also part of the UniCredit Group, agreed to enter a guilty plea with DOJ for conspiring to violate the IEEPA and to defraud the United States by processing hundreds of millions of dollars of transactions through the U.S. financial system on behalf of an entity designated as a weapons of mass destruction proliferator and other Iranian entities subject to U.S. economic sanctions.[296] According to DOJ, "over the course of almost 10 years, UCB AG knowingly and willfully moved at least \$393 million through the U.S. financial system on behalf of sanctioned entities, most of which was for an entity the U.S. Government specifically prohibited from accessing the U.S. financial system." [297]

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Pursuant to the guilty plea, UniCredit Group banks will pay total financial penalties of approximately \$1.3 billion. The plea agreement, which has been approved by the court, provides that UCB AG will forfeit \$316,545,816 and pay a fine of \$468,350,000. UniCredit SpA, which is the parent entity of both UCB AG and UCB BA, has agreed to ensure that UCB AG and BA's obligations are fulfilled. As part of a coordinated settlement, UniCredit Group entities also entered into agreements with the Office of Foreign Assets Control ("OFAC"), the Federal Reserve Board ("Federal Reserve"), and DFS under which they will pay additional penalties of approximately \$660 million. In particular, UniCredit agreed to pay approximately \$611 million to OFAC, which will be satisfied in part by payments to DOJ and the Federal Reserve; approximately \$158 million to the Federal Reserve; and \$405 million to DFS.[298] Finally, UCB AG entered into a separate guilty plea in New York state court for violating New York state law and agreed to forfeit \$316 million as part of a deal with the Manhattan District Attorney's Office ("DANY").[299] DOJ has agreed to credit up to \$468,350,000 in payments made in connection with the concurrent resolutions with the Federal Reserve, DFS, and DANY towards the criminal fine, which represents the full criminal fine amount.[300]

## Unitrans International Inc. (NPA)

On December 4, 2019, DOJ announced that Unitrans International Inc. ("Unitrans"), a privately held Virginia defense contracting company, agreed to pay \$45 million to resolve criminal obstruction charges and civil FCA allegations.[301] The allegations arose out of a contract awarded by the U.S. Defense Logistics Agency ("DLA") in 2012 for the provision of material and logistical support to U.S. troops in Afghanistan.[302] The contract was awarded to Anham FZCO ("Anham"), an associated Dubai Free Zone company incorporated under the laws of the United Arab Emirates.[303] Unitrans, an associated company, provided logistical services to Anham.[304] According to DOJ, officers of Unitrans facilitated the illegal transportation of goods across Iran which Anham then used in its performance of the DLA contract in Afghanistan.[305] DOJ alleged that certain officers of Unitrans and Anham obstructed proceedings before DLA, and the related FCA suit alleged that Unitrans and Anham fraudulently induced DLA to award the contract by knowingly and falsely certifying compliance with U.S. sanctions against Iran.[306]

As part of the resolution, Unitrans entered into an NPA with DOJ and agreed to pay \$31.5 million as a combined criminal monetary penalty and victim compensation payment.[307] Under the civil settlement, Unitrans agreed to pay \$27 million, half of which will be deemed satisfied by Unitrans's payment of \$13.5 million of its monetary obligations under the NPA.[308] Together, the two resolutions imposed a total of \$45 million in monetary obligations.[309]

DLA separately entered into an administrative agreement with Anham in May 2019,[310] and DOJ entered into NPAs with three Anham officials who were previously indicted in relation to the alleged scheme.[311]

## Zurich International Life Limited and Zurich Life Insurance Company Limited (NPA)

On April 25, 2019, DOJ's Tax Division announced an NPA with Zurich Life Insurance Company Limited ("Zurich Life"), an insurance carrier headquartered in Zurich, Switzerland, and Zurich International Life Limited ("Zurich International"), an insurance carrier focusing on the international expatriate market based in Isle of Man (collectively, "Zurich").[312]

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According to DOJ, from January 1, 2008 through June 30, 2014, “Zurich issued or had certain insurance policies and accounts of U.S. taxpayer customers[] who used their policies to evade U.S. taxes and reporting requirements.”<sup>[313]</sup> After DOJ initiated its Swiss Bank Program—covered in more detail in our [2015 Mid-Year Update](#) and our [2015 Year-End Update](#)—Zurich conducted an internal review of its non-U.S. operating companies’ sales of life insurance, savings, and pension products, to identify policies or accounts with a possible U.S. nexus.<sup>[314]</sup> Once accounts and policies with a possible U.S. nexus had been identified, Zurich contacted the relevant customers to evaluate their compliance and encourage them to participate in an IRS voluntary disclosure program.<sup>[315]</sup>

Zurich contacted DOJ in July 2017 to self-report the findings of the internal review.<sup>[316]</sup> Following this voluntary disclosure, Zurich conducted a full investigation and reported substantial findings to DOJ’s Tax Division.<sup>[317]</sup> Zurich also coordinated closely with the Swiss Federal Department of Finance to ensure that the bank could provide full disclosures to DOJ.<sup>[318]</sup>

Under the NPA, Zurich Life and Zurich International agreed to cooperate in any related criminal or civil proceedings, to implement controls to stop misconduct involving undeclared U.S. accounts, and to pay a \$5,115,000 penalty.<sup>[319]</sup>

## **International DPA Developments**

### **United Kingdom**

In 2019, the UK Serious Fraud Office (“SFO”) entered its fifth and sixth DPAs since the introduction of the country’s DPA program in February 2014. The July 4, 2019 DPA with Serco Geografix Limited (“SGL”) marked the first DPA since the agreements entered with Tesco Stores Limited (“Tesco”) in April 2017 and Rolls-Royce PLC (“Rolls-Royce”) in January 2017. And the DPA with Güralp Systems Ltd, confirmed on December 20, 2019, came after a series of closures of long-lasting investigations.

The closure of a number of high-profile SFO investigations suggests that the SFO may be refocusing its efforts on new investigations, under the leadership of Director Lisa Osofsky, who began her five-year term in late August 2018. Further, the recently published guidance on corporate cooperation may suggest a renewed focus by the SFO on encouraging early self-reporting. *Investigation Closures*

### **Rolls-Royce**

In January 2017, Rolls-Royce entered into a DPA with the SFO and agreed to the largest penalty ever levied by the SFO in a bribery matter.<sup>[320]</sup> In February 2019, the SFO announced its decision to close the Rolls-Royce investigation without pursuing any individual prosecutions.<sup>[321]</sup> The 2017 DPA remains in force with continuing obligations on Rolls-Royce including to make annual payments until 2021. If the schedule expected by the Compliance Terms has been adhered to, the compliance remediation required will have been completed.

### **GlaxoSmithKline**

At the time of the February Rolls-Royce announcement, the SFO also announced the closure of a longrunning investigation into the “commercial practices” of pharmaceutical company GlaxoSmithKline.<sup>[322]</sup>

In a statement announcing the closure of the Rolls-Royce and GlaxoSmithKline investigations, SFO Director Lisa Osofsky remarked: “After an extensive and careful examination I have concluded that there is either insufficient evidence to provide a realistic prospect of conviction or it is not in the public interest to bring a



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prosecution in these cases.”<sup>[323]</sup> The statement released by the SFO noted that under Osofsky’s leadership, the SFO has closed additional cases that were not announced to the public.<sup>[324]</sup> [Unaoil](#)

In June 2019, the SFO closed its three-year bribery investigation of high-ranking executives of the oil sector consultancy company Unaoil who were being investigated for paying bribes to secure contracts in the energy industry.<sup>[325]</sup> The SFO declined to comment on the closure of the investigation into the individuals, which marked the third major closure of an investigation by the SFO in 2019 and prompted criticism from some anti-corruption observers.<sup>[326]</sup> However, on October 30, 2019, it was announced that two of these executives had pleaded guilty in March 2019 in the United States.<sup>[327]</sup> The SFO prosecution and investigation of Unaoil continues.<sup>[328]</sup>

## *DPA’s Announced in 2019* [Güralp](#)

### Systems Ltd.

On December 20, 2019, the SFO announced a DPA with Güralp Systems Ltd. (“Güralp”), a manufacturer of seismic instrumentation, to resolve charges of (1) conspiracy to make corrupt payments and (2) failure to prevent bribery by employees, both arising from alleged corrupt payments made to a South Korean public official between 2002 and 2015.<sup>[329]</sup> The SFO announced the agreement after the founder and two former executives of Güralp were acquitted of charges of conspiracy to make corrupt payments following a ten-week trial.

This DPA ended a four-year SFO investigation commenced after Güralp self-reported the findings of an internal investigation initiated by its newly appointed executive chairman. Self-reporting and cooperation were key considerations in the SFO’s decision to enter a DPA with Güralp. As Director Osofsky said, “[t]he DPA is a result of Güralp Systems Ltd’s timely self-reporting and full cooperation, and holds the company to account whilst also promoting positive changes in corporate culture[.]”<sup>[330]</sup> The judgment approving the DPA also agreed that Güralp’s current senior management “has done all that it can to remedy the position and to co-operate with prosecuting authorities in two jurisdictions.”<sup>[331]</sup> The cooperation included agreeing not to interview employees.

Under the terms of the five-year DPA, Güralp will provide the SFO with annual reports regarding implementation of its compliance program and pay disgorgement of gross profits of £2,069,861 (approximately \$2.5 million) over the term of the agreement.<sup>[332]</sup> Although the conduct carried a potential penalty of £4 million (approximately \$5.2 million), the Crown Court at Southwark considered that a penalty of that amount “or any sum remotely near to it [] would put GSL out of business.”<sup>[333]</sup> Thus, the DPA imposed no financial consequences other than disgorgement paid on a flexible schedule. In deciding to approve the penalty-free DPA, the Crown Court found that (1) the management of the company had changed completely, (2) the individuals responsible for the corrupt payments were no longer associated with the company, (3) the current management was cooperating to the full extent possible, (4) Güralp had not previously or otherwise engaged in criminal conduct, (5) Güralp investigated and self-reported the misconduct, and (6) most of Güralp’s workforce was innocent and did not deserve to be forced out of business due to conduct by a small number of former senior employees and officers.<sup>[334]</sup> The Crown Court also considered the unique nature of Güralp’s seismological expertise, noting that if Güralp was forced out of business by a fine it could not pay, its closure would cause “some deleterious effect on agencies around the world.”<sup>[335]</sup> Further analysis of this agreement is available [here](#).

### Serco Geografix Ltd.

On July 4, 2019, the Southwark Crown Court approved a DPA with Serco Geografix Ltd (“SGL”), a wholly owned subsidiary of Serco Group PLC (“Serco” or “Group”), a leading global provider of outsourced services

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to governments.[336] The DPA resolved charges of fraud and false accounting committed between 2010 and 2013 and marks the fifth DPA entered since the UK introduced DPAs. SGL, a government services company, allegedly misled the UK Ministry of Justice regarding Serco's profits from a contract for electronic monitoring services.[337]

SGL agreed to pay a penalty of £19.2 million (about \$24 million) and to reimburse the SFO's investigation costs of £3.7 million (over \$4.6 million).[338] The payments supplement £12.8 million (about \$16 million) in compensation that Serco paid to the UK Ministry of Justice in 2013 as part of a £70 million (about \$88 million) civil settlement.[339] The penalty was reduced by 50% to account for Serco's self-reporting and subsequent cooperation.

The term of the DPA is three years.[340] During that time, under the terms of the agreement, SGL must cooperate with enforcement and regulatory authorities, report evidence of fraud, and improve, and report annually on, its compliance program.[341] Although not a party to the DPA, Serco similarly agreed to cooperate on an ongoing basis with authorities, report evidence of fraud to the authorities, strengthen its Group-wide compliance functions, and report annually to the SFO on its Group-wide assurance program.[342] In the judgment approving the DPA, Mr. Justice William Davis emphasized that the commitments made by Serco "are a key component of the DPA," without which "it is very unlikely that the goals of a DPA could have been achieved in the circumstances of this case." [343] He highlighted that "[t]his is the first occasion on which undertakings of the kind made by Serco Group PLC have been [made] by a parent company in relation to a DPA entered into by one of its subsidiaries." [344]

The right to initiate DPA negotiations rests with the SFO, not the company under investigation. The SFO offered SGL a DPA based on several factors, including SGL's (1) prompt and voluntary self-disclosure, (2) agreement not to conduct employee interviews, (3) past and future cooperation, (4) lack of recidivism, (5) payment of the financial penalty, and (6) payment of the SFO's investigation costs.[345] The SFO also considered Serco's (1) cooperation and compliance commitments, (2) significant remedial efforts, (3) commitment that SGL would not be dissolved for the three-year term, and (4) agreement to implement specific compliance programming.[346] The remedial efforts included (1) company-wide compliance programs, (2) complete turnover in senior management, (3) "numerous forms of internal and external examination, analysis, detailed review, and audits," and (4) disgorgement and compensation paid to the UK Ministry of Justice in December 2013.[347]

Notably, the judgment touched on cooperation and waiver of privilege. At the SFO's request, Serco and its subsidiaries did "not engage in any internal inquiry by way of interviewing witnesses during the criminal investigation." [348] Rather, an independent law firm conducted a comprehensive document review and reported its findings to the SFO. The judgment states that Serco provided "[s]ome waiver of privilege" related to accounting materials, and credits Serco's proactive disclosure of information and developments as "very substantial" cooperation.[349] The SFO has given mixed messages regarding whether the "full cooperation" requirement for DPA eligibility necessitates waiver of privilege. In August 2019, the SFO published a new section of its Operational Guidance entitled "Corporate Cooperation Guidance" with the goal of providing clarity to companies regarding what they can expect if they decide to self-report. Further coverage of the Corporate Co-operation Guidance is available [here](#).

The DPA concludes the SFO's six-year investigations into SGL and other Serco companies. On December 16, 2019 the SFO announced that it had charged two Serco senior executives with fraud and false accounting.[350] Further analysis of the SGL DPA is available [here](#).

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## Tesco Stores Limited

January 2019 marked the conclusion of the SFO's cases against three former directors at Tesco, who were charged with false accounting.[351] As we previously reported in our 2017 *Mid-Year Update*, Tesco entered into a DPA in April 2017 to resolve allegations that it engaged in financial misreporting and agreed to pay £129 million in penalties, cooperate with the SFO's investigation, and implement an ongoing compliance program throughout the three-year term of the DPA. In December 2018, the Crown Court at Southwark found that two of the former Tesco directors had no case to answer.[352] At a hearing for the third director in January 2019, the SFO offered no evidence, resulting in an acquittal on all charges.[353] Shortly thereafter, in January 2019, the SFO published the full terms of the Tesco DPA, which was previously unavailable to the public pending the resolution of the individual trials.[354] The published DPA revealed the underlying facts behind the SFO investigation, which centered on charges that Tesco, through its now acquitted three former directors, allowed and encouraged false accounting in order to reach accounting targets.

The judgment approving the DPA also revealed that Tesco agreed to a limited waiver of privilege over relevant materials. The inclusion of privilege waivers in recent DPAs suggests that willingness to consider waiver of privilege may be an important consideration for the SFO when determining whether to enter an agreement. In the judgment, the limited waiver of privilege was cited as one piece of evidence of Tesco's cooperation, in addition to the company's agreement not to conduct employee interviews, voluntary disclosure of relevant material, provision of mailbox accounts of former employees without filtering contents for privileged or out-of-scope items, and facilitation of evidence collection.[355] Further, the judgment cited significant changes to Tesco's leadership structure as a factor favoring adoption of the DPA.[356] Additionally, the judgment highlighted a number of "tangible remedial measures," including simplification of reporting lines, the re-launch of an externally run whistleblowing service, increased compliance headcount, a re-launched Code of Business Conduct, implementation of expensive technology services to support the compliance program, and adoption of a new commercial buying model which reduced the emphasis on back margin, the type of commercial income that the SFO alleged Tesco improperly inflated.[357] In addition to noting Tesco's leadership changes and cooperation, the judgment also noted that (1) this was Tesco's first incidence of misconduct, and (2) severe repercussions for Tesco could also risk harm to innocent third parties and the UK supermarket and food industry, thus presenting a public interest factor weighing against prosecution.[358]

## **Canada**

Quebec engineering company SNC-Lavalin's efforts to resolve fraud and bribery charges against it through a DPA ended with a guilty plea by the company's construction division, and resulted along the way in a political scandal reaching the Office of the Prime Minister. SNC-Lavalin was accused of paying approximately 47.7 million Canadian dollars (approximately \$36.4 million using current conversion rates) in bribes to Libyan officials between 2001 and 2011.[359] If it had been convicted, the company could have faced a ten-year ban on receiving federal government contracts under Canada's "integrity regime." [360] In October 2018, after the federal director of public prosecutions ruled that the case was not suited for a DPA, the company's market value fell by roughly 2.2 billion Canadian dollars (approximately \$1.7 billion).[361]

In February 2019, former Canadian attorney general Jody Wilson-Raybould testified to the House of Commons justice committee that she was pressured by Prime Minister Justin Trudeau's aides to resolve the charges through a DPA.[362] As attorney general, she had the power to overrule the federal director of public prosecutions and direct the prosecution to negotiate a DPA. The former attorney general testified that individuals from the Prime Minister's Office, the Privy Council Office, and the office of the Minister of Finance engaged in a "consistent and sustained effort" to politically interfere with her exercise of prosecutorial discretion.[363]

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In March 2019, Canada's Federal Court rejected SNC-Lavalin's application for a review of the prosecutor's decision not to negotiate a DPA.[364] Following a preliminary hearing in May 2019, a Quebec court judge ruled that there was enough evidence against SNC-Lavalin for the trial to move forward.[365] The company issued a press release stating that it will "vigorously defend itself and plead not guilty to the charges." [366] On December 18, 2019, SNC-Lavalin's subsidiary SNC-Lavalin Construction Inc. pled guilty and "admitted to paying 127 million Canadian dollars [approximately \$97.3 million] in bribes to Libyan officials to secure contracts in that country." [367] Pursuant to the plea, a fine of 280 million Canadian dollars (approximately \$214 million) was imposed. [368] According to a statement by the company, prosecutors have withdrawn all charges against SNC-Lavalin Group Inc. and SNC-Lavalin International Inc., the parent company's international marketing division. [369] Pursuant to the probation order imposed as part of the construction subsidiary's plea, the parent company must engage an independent compliance monitor for a period of three years. [370] According to the company, it "does not anticipate that the guilty plea by [its] construction subsidiary . . . will affect the eligibility of SNC-Lavalin Group companies to bid on future projects that are aligned with the SNC-Lavalin Group's newly announced strategic direction." [371]

If SNC-Lavalin had entered into a DPA, it would have been the first agreement under Canada's fledgling Remediation Agreement Regime, which took effect in September 2018. Please see our 2017 Year-End and 2018 Mid-Year Updates for additional information regarding the Canadian DPA regime.

## **Brazil**

### Braskem SA

At the end of May 2019, Braskem SA ("Braskem"), the largest petrochemical company in Brazil and Latin America, announced that it agreed to pay 2.87 billion reais (approximately \$745.25 million) by 2025 in a leniency deal to settle corruption charges related to Brazil's "Operation Car Wash." The agreement was the first of four leniency deals reached in 2019 related to "Operation Car Wash." The "Operation Car Wash" investigation has been covered in detail in our 2016, 2017, and 2018 Year-End FCPA updates. [372] The other agreements are described below.

Brazil's Office of the Comptroller-General ("CGU") and Office of the General Counsel of the Federal Government ("AGU") have the power to enter into leniency agreements with corporate entities to resolve civil liability under the Clean Companies Act. [373] To be eligible for a leniency agreement, similar to NPAs in the United States, companies must admit liability, cease engaging in illicit conduct, and effectively cooperate with the investigation and any administrative proceedings. [374] Companies subject to a leniency agreement must implement a compliance program, submit to an external audit, and pay applicable fines and damages. [375] The agreement covers the same conduct underlying the global settlement between Braskem and the Brazilian Federal Prosecution Office, the DOJ, the SEC, and the Swiss Office of the Attorney General executed in December 2016. [376] Camargo Corrêa S.A.

At the end of July 2019, the CGU and AGU announced that engineering group Camargo Corrêa S.A. ("Camargo") agreed to pay 1.396 billion reais (approximately \$344 million) by January 2038 to settle allegations that the company entered into fraudulent construction contracts involving public resources and was unjustly enriched as a result. [377] The settlement amount includes 905.9 million reais (approximately \$223 million) received from the alleged fraud, 330.3 million reais (approximately \$81.4 million) totaling the value of the alleged bribes, a 36.2 million reais (approximately \$9 million) administrative fine, and a 123.6 million reais (approximately \$30.5 million) civil sanction under Brazil's administrative misconduct law. [378] The agreement also obligates Camargo to improve its compliance program, with a focus on preventing improper conduct and prioritizing ethics and transparency in the conduct of its business. [379]

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The agreement is not the first settlement Camargo and Brazilian authorities have reached related to “Operation Car Wash.” In January 2017, Camargo sought plea agreements for 40 of its executives,[380] and in August 2015, it agreed to pay 700 million reais (approximately \$173 million) to Brazilian state-owned companies in damages related to bribery and price-fixing practices.[381]

## Engevix Group

On November 12, 2019, the CGU and AGU announced a 516.3 million reais (approximately \$127 million) leniency agreement with Brazilian construction company Engevix Group (“Engevix”), now known as Nova Participações, to settle charges related to bribes the company allegedly paid to win construction contracts.[382] Engevix cooperated with “Operation Car Wash” by providing evidence of conduct by over 100 individuals and entities.[383]

Under the agreement, Engevix will pay the value of the alleged bribes, which totaled 315.84 million reais (approximately \$78 million); 105 million reais (approximately \$26 million) in disgorgement; and 95.44 million reais (approximately \$23 million) in administrative and civil fines.[384] The payments will be made in installments until 2046.[385] The agreement also requires Engevix to improve its compliance program by preventing improper conduct and promoting ethics and transparency throughout the company.[386] OAS S.A.

Two days after CGU and AGU announced the agreement with Engevix, they announced another leniency agreement related to “Operation Car Wash.” Construction company OAS S.A. (“OAS”) agreed to pay 1.92 billion reais (approximately \$473 million) by 2047 to settle bribery charges.[387] The settlement is the third largest of its kind and the ninth leniency agreement related to “Operation Car Wash.” OAS cooperated with the investigation by providing evidence of conduct by more than 304 individuals and 184 entities.[388]

Under the settlement agreement, OAS must pay 720.14 million reais (approximately \$177 million), the amount of the alleged bribes; 800.37 million reais (approximately \$197 million) in disgorgement; and 404.79 million reais (approximately \$99 million) in administrative and civil fines.[389] The agreement also obligates OAS to improve its compliance program, including by implementing an ISO 37.001 certification.[390]

## **France**

On June 26, 2019, the French National Financial Prosecutor (“PRF”) and the French Anti-Corruption Agency (“AFA”) published guidelines (the “PRF-AFA Guidelines”)[391] on the corporate settlement mechanism in France known as a Judicial Public Interest Agreement (*convention judiciaire d'intérêt public*, or “CJIP”). France’s Law on Transparency, Fight Against Corruption and Modernization of Economic Life (*Loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*) (“Sapin II”)[392] created the CJIP procedure, which gives prosecutors the power to offer a company suspected of committing a covered offense the opportunity to settle the case without formal prosecution.[393] Prosecutors may offer a CJIP to a company suspected of having committed corruption, bribery, tax fraud or laundering of the proceeds of tax fraud.[394] The implementation of Sapin II and the first CJIPs entered into under the law were covered in our 2016 and 2017 Year-End Updates and 2018 Mid-Year Update.

The PRF-AFA Guidelines are the first joint guidelines issued by the PRF and AFA, and they are the first guidelines directed at compliance officers, companies, and individuals subject to enforcement actions. Previously, on January 31, 2018 and March 21, 2019, the French Ministry of Justice issued guidance to prosecutors regarding the CJIP process.[395]

The stated purpose of the PRF-AFA Guidelines is to encourage corporate wrongdoers to cooperate with judicial authorities by providing an element of predictability to the CJIP process.[396] The guidelines outline

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the facts and circumstances relevant to the PRF in considering whether to enter into CJIPs in cases involving allegations of bribery or corruption, as well as guidance on what terms to apply in any agreements that are negotiated. The guidelines do not extend to other crimes like tax evasion.

The PRF-AFA Guidelines cover (1) prerequisites to enter a CJIP;<sup>[397]</sup> (2) determination of fines;<sup>[398]</sup> (3) compliance program obligations;<sup>[399]</sup> (4) international coordination;<sup>[400]</sup> and (5) compliance with the French Blocking Statute (discussed further below).<sup>[401]</sup>

## Prerequisites for Entering a CJIP

The PRF-AFA Guidelines clarify that a company may enter into informal discussions with a prosecutor to express a willingness to enter a CJIP.<sup>[402]</sup> Although in practice companies have done so since the implementation of Sapin II, under the law itself only prosecutors were given authority to initiate a CJIP.

Additional prerequisites for a CJIP, as outlined by the PRF-AFA Guidelines, include the absence of prior sanctions for corruption or bribery; the implementation of an efficient compliance program, if one is required by law;<sup>[403]</sup> cooperation in the criminal investigation; and implementation of an internal investigation.<sup>[404]</sup> Voluntary and timely self-reporting is not required, but it is looked upon favorably when prosecutors are considering a CJIP and determining the amount of the financial penalty.<sup>[405]</sup> An initiative by the company to compensate alleged victims even before the proposal to enter into a CJIP is also considered as a positive factor.<sup>[406]</sup>

The PRF-AFA Guidelines discuss the necessity, conduct, and conditions of internal investigations in detail and note that a company must submit a report to the prosecutor, describing the investigation's findings in detail.<sup>[407]</sup> The report must identify relevant witnesses and provide reports of the interviews, as well as the documents on which those reports rely. More generally, a company that has conducted an internal investigation must produce the relevant documents in its possession.

The PRF-AFA Guidelines acknowledge that relevant documents may be subject to attorney-client privilege if the investigation is conducted by a lawyer.<sup>[408]</sup> However, the Guidelines note that not all evidence appearing in an investigative report is necessarily privileged, and a client may nevertheless choose to waive the privilege. If a company refuses to disclose certain documents, prosecutors will determine if the refusal is justified in light of the applicable rules. If there is a disagreement between the prosecutor and company regarding privilege, the prosecutor may consider the refusal to disclose the information at issue as a lack of cooperation.

## Determination of Fines

Under Sapin II, the amount of the fine imposed under a CJIP is proportionate to the benefits derived from the misconduct, up to a limit of 30% of the legal entity's average annual turnover calculated over the previous three years.<sup>[409]</sup> The PRF-AFA Guidelines state that where accounting data is available, the financial benefit should be calculated on the basis of the profit generated from performance of the relevant contracts, less the expenses directly related to the contracts.<sup>[410]</sup> The guidelines enumerate several categories of costs that are excluded from these deductions, including: overheads "not exclusively related" to the relevant project; research and development costs; depreciation and amortization provisions; and the amounts of the alleged bribes.<sup>[411]</sup>

The PRF-AFA Guidelines state that a company subject to a CJIP procedure should communicate its cost accounting, as well as all forecast documents relating to the relevant contracts, to allow prosecutors to assess the expected benefits of the contracts.<sup>[412]</sup>

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The PRF-AFA Guidelines also enumerate the aggravating and mitigating factors taken into account by prosecutors when determining fines. The aggravating factors are: corruption of a public official; failure to implement an anti-corruption compliance program under Sapin II, if statutorily required; past convictions or sanctions in France or abroad for corruption-related offenses; use of company resources to conceal the corruption; and repeated or systemic corruption.<sup>[413]</sup> The mitigating factors are: selfreporting prior to the commencement of a criminal investigation; “excellent” cooperation and a “complete and effective” internal investigation; a preexisting, efficient compliance program and/or the implementation of corrective measures; and voluntary implementation of a compliance program, in the absence of a legal obligation to do so.<sup>[414]</sup>

## Compliance Program Obligations

In addition to a financial penalty, the CJIP may require a company to implement a compliance program. The PRF determines whether to impose such an obligation, after consulting with the AFA.<sup>[415]</sup> The AFA is then responsible for supervising the implementation of the program. An appendix to the PRFAFA Guidelines outlines the five steps of AFA supervision, which are: (1) an initial audit; (2) formulation of an action plan on the basis of the findings of the initial audit; (3) validation of the action plan; (4) validation of the main tools of the company’s anti-corruption program, and the performance of targeted audits; and (5) a final audit.<sup>[416]</sup> Together, the estimated durations of all five stages total just over three years.<sup>[417]</sup> The AFA must update the PRF at least once a year on the status of implementation of the compliance program and any difficulties encountered by AFA or the company.<sup>[418]</sup> A company’s failure to implement the program and pay the associated expert monitoring fees may be grounds for rescission of a CJIP.<sup>[419]</sup>

## International Coordination

The CJIP allows the PRF to coordinate its response with the prosecution authorities of different countries dealing with the same offenses.<sup>[420]</sup> The determination of the financial penalty may be discussed with foreign prosecuting authorities in order to assess the overall fines and penalties paid by a company. If a compliance program is required under a CJIP, the PRF-AFA Guidelines acknowledge that it is preferable to appoint one monitoring body. If the company facing charges has its registered office or operating base in France or conducts all or part of its business activities in France, the French Code of Criminal Procedure requires that the AFA be the monitoring body.<sup>[421]</sup>

## Compliance with French Blocking Statute

Article 1 of Law No. 68-678 of July 26, 1968 (the “French Blocking Statute”) makes it a criminal offense, under certain conditions, to communicate to foreign public authorities information which may harm the economic interests of France.<sup>[422]</sup> When a French company is subject to an anti-corruption compliance program ordered by a foreign authority, the AFA is responsible for ensuring that the information shared with the foreign authority complies with the French Blocking Statute.<sup>[423]</sup>

The PRF-AFA Guidelines state that when a company suspects or detects the commission of a transnational incident of corruption during the course of implementing a compliance program imposed upon it by a foreign authority, the company must inform the AFA of the incident before reporting it to the foreign authority.<sup>[424]</sup> The AFA will assess whether reporting the incident to a foreign authority would violate the French Blocking Statute. The AFA will update the PRF regarding the potential disclosure to the foreign authority to allow the PRF to assess whether the detected offense falls within its jurisdiction.<sup>[425]</sup>

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## APPENDIX: 2019 Non-Prosecution and Deferred Prosecution Agreements

The chart below summarizes the agreements concluded by DOJ in 2019. The SEC has not entered into any NPAs or DPAs in 2019. The complete text of each publicly available agreement is hyperlinked in the chart.

The figures for “Monetary Recoveries” may include amounts not strictly limited to an NPA or a DPA, such as fines, penalties, forfeitures, and restitution requirements imposed by other regulators and enforcement agencies, as well as amounts from related settlement agreements, all of which may be part of a global resolution in connection with the NPA or DPA, paid by the named entity and/or subsidiaries. The term “Monitoring & Reporting” includes traditional compliance monitors, self-reporting arrangements, and other monitorship arrangements found in settlement agreements.

U.S. Deferred and Non-Prosecution Agreements in 2019						
<u>Company</u>	<u>Agency</u>	<u>Alleged Violation</u>	<u>Type</u>	<u>Monetary Recoveries</u>	<u>Monitoring &amp; Reporting</u>	<u>Term of DPA/ NPA (months)</u>
Avanir Pharmaceuticals	N.D. Ga.	Anti-Kickback Statute	DPA	\$115,874,895	No	36
Baton Holdings LLC	DOJ Fraud	Fraud (Accounting)	NPA	\$43,540,000	Yes	36
Celadon Group, Inc.	DOJ Fraud; S.D. Ind.	Fraud (Securities)	DPA	\$42,245,302	Yes	60
ContextMedia Health LLC	DOJ Fraud; N.D. Ill.	Fraud (Wire)	NPA	\$70,000,000	Yes	36
Dannenbaum Engineering Corp.	DOJ Public Integrity; S.D. Tex.	FECA	DPA	\$1,600,000	No	36



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Fresenius Medical Care AG & Co. KGaA	DOJ Fraud; D. Mass.	FCPA	NPA	\$231,715,273	Yes	36
Heritage Pharmaceuticals Inc.	DOJ Antitrust	Antitrust	DPA	\$7,325,000	No	36
HSBC Private Bank (Suisse) SA	DOJ Tax; S.D. Fla.	Tax Evasion; Fraud (Tax)	DPA	\$192,350,000	No	36
Hydro Extrusion USA, LLC, f/k/a Sapa Extrusions, Inc.	DOJ Fraud; E.D. Va.	Fraud (Mail)	DPA	\$46,945,100	Yes	36
Insys Therapeutics, Inc.	D. Mass.	Fraud (Mail)	DPA	\$225,000,000	No	60
LLB Verwaltung (Switzerland) AG	DOJ Tax	Fraud (Tax)	NPA	\$10,680,555	No	48
Lumber Liquidators Holdings, Inc.	E.D. Va.; DOJ Fraud	Fraud (Securities)	DPA	\$33,000,000	Yes	36
Merrill Lynch Commodities, Inc.	DOJ Fraud	Fraud (Commodities)	NPA	\$25,000,000	Yes	36
Microsoft Magyarország Számítástechnikai Szolgáltató és Kereskedelmi Kft. (Microsoft Hungary)	DOJ Fraud; S.D.N.Y.	FCPA	NPA	\$25,316,946	Yes	36

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Mizrahi Tefahot Bank Ltd.; United Mizrahi Bank (Switzerland) Ltd.; Mizrahi Tefahot Trust Company Ltd.	DOJ Tax; C.D. Cal.	Fraud (Tax)	DPA	\$195,000,000	No	24
Mobile TeleSystems PJSC	DOJ Fraud; S.D.N.Y.	FCPA	DPA	\$850,000,000	Yes	36
Monsanto Company	C.D. Cal.	Environmental (RCRA)	DPA	\$10,200,000	Yes	24
Reckitt Benckiser Group plc	DOJ Consumer Protection; W.D. Va.	Fraud (Health Care; Mail; Wire)	NPA	\$1,400,000,000	No	36
Republic Metals Corporation	S.D. Fla.	AML	NPA	\$0	No	36
Rick Weaver Buick GMC, Inc.	W.D. Pa.	Fraud (Wire)	DPA	\$543,794	Yes	36
Rising Pharmaceuticals, Inc.	DOJ Antitrust	Antitrust	DPA	\$3,043,207	No	36
Rochester Drug Cooperative, Inc.	S.D.N.Y.	Narcotics (conspiracy)	DPA	\$20,000,000	Yes	60
Samsung Heavy Industries	DOJ Fraud; E.D. Va.	FCPA	DPA	\$75,481,600	Yes	36

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Standard Chartered Bank	DOJ MLARS; D.D.C.	Sanctions	DPA	\$1,012,210,160	Yes	24
TechnipFMC plc	DOJ Fraud; E.D.N.Y.	FCPA	DPA	\$296,184,000	Yes	36
Telefonaktiebolaget LM Ericsson	DOJ Fraud; S.D.N.Y.	FCPA	DPA	\$1,060,570,432	Yes	36
Tower Research Capital LLC	DOJ Fraud; S.D. Tex.	Fraud (Commodities)	DPA	\$67,493,849	Yes	36
Unicredit Bank Austria AG	DOJ MLARS; D.D.C.	Sanctions	NPA	\$1,378,728,678	Yes	36
Unitrans International Inc.	DOJ Fraud; E.D. Va.	Obstruction of Justice	NPA	\$45,000,000	No	Unknown
Walmart Inc.	DOJ Fraud; E.D.Va.	FCPA	NPA	\$282,646,421	Yes	36
Zurich International Life Limited and Zurich Life	DOJ (Tax)	Fraud (Tax)	NPA	\$5,115,000	No	48
Insurance Company Limited						

[1] NPAs and DPAs are two kinds of voluntary, pre-trial agreements between a corporation and the government, most commonly DOJ. They are standard methods to resolve investigations into corporate criminal misconduct and are designed to avoid the severe consequences, both direct and collateral, that conviction would have on a company, its shareholders, and its employees. Though NPAs and DPAs differ procedurally—a DPA, unlike an NPA, is formally filed with a court along with charging documents—both usually require an admission of wrongdoing, payment of fines and

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penalties, cooperation with the government during the pendency of the agreement, and remedial efforts, such as enhancing a compliance program and—on occasion—cooperating with a monitor who reports to the government. Although NPAs and DPAs are used by multiple agencies, since Gibson Dunn began tracking corporate NPAs and DPAs in 2000, we have identified approximately 532 agreements initiated by the DOJ, and 10 initiated by the U.S. Securities and Exchange Commission (“SEC”).

- [2] Press Release, Elizabeth Warren, Senator Warren Unveils Bill to Expand Criminal Liability to Negligent Executives of Giant Corporations (April 3, 2019), <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-unveils-bill-to-expand-criminal-liability-to-negligent-executives-of-giant-corporations>.
- [3] Corporate Executive Accountability Act, S. 1010, 116th Cong. § 1 (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1010>.
- [4] Senator Elizabeth Warren, The Unfinished Business of Financial Reform, Remarks at the Levy Institute’s 24th Annual Hyman P. Minsky Conference, 4 (Apr. 15, 2015), [http://www.warren.senate.gov/files/documents/Unfinished\\_Business\\_20150415.pdf](http://www.warren.senate.gov/files/documents/Unfinished_Business_20150415.pdf).
- [5] Elizabeth Warren, Summary of the Corporate Executive Accountability Act (April 3, 2019), <https://www.warren.senate.gov/imo/media/doc/2019.4.1%20Corporate%20Executive%20Accountability%20Act%20Summary.pdf>.
- [6] *Id.*
- [7] Ending Too Big to Jail Act, S. 1005, 116th Cong. § 1 (2019), <https://www.govtrack.us/congress/bills/116/s1005>.
- [8] CFTC Enforcement Manual, §§ 7.2.2-3.
- [9] *Id.* § 7.2.2; SEC Enforcement Manual, § 6.2.2.
- [10] SEC Enforcement Manual, § 6.2.2.
- [11] CFTC Enforcement Manual, § 7.2.3; SEC Enforcement Manual, § 6.2.3.
- [12] *Id.* § 7.1.2.
- [13] The aggravating circumstances that the CFTC considers align with several of DOJ’s Filip Factors: executive or senior management involvement, pervasive misconduct within the company, and prior history of misconduct.
- [14] U.S. Dep’t of Justice, Corporate Enforcement Policy (November 2017 Version) [hereinafter “2017 FCPA Policy”].
- [15] U.S. Dep’t of Justice, Corporate Enforcement Policy (November 2019 Update), <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977> [hereinafter “FCPA Policy”].
- [16] *Id.*

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[17] *Id.* (emphases added).

[18] Rod J. Rosenstein, Deputy Attorney General, “Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act” (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-generalrod-j-rostenstein-delivers-remarks-american-conference-institute-0>.

[19] FCPA Policy, *supra* note 15, n.1.

[20] 2017 FCPA Policy, *supra* note 15.

[21] FCPA Policy, *supra* note 15.

[22] 2017 FCPA Policy, *supra* note 15.

[23] FCPA Policy, *supra* note 15 (emphasis added).

[24] *Id.* at n.2.

[25] U.S. Dep’t of Justice, Export Control and Sanctions Enforcement Policy for Business Organizations (December 2019 Update), [https://www.justice.gov/nsd/ces\\_vsd\\_policy\\_2019/download](https://www.justice.gov/nsd/ces_vsd_policy_2019/download) [hereinafter “NSD Policy”].

[26] The NSD Policy eliminated the original footnote 3, which stated that “[b]ecause financial institutions often have unique reporting obligations under their applicable statutory and regulatory regimes, this Guidance does not apply to financial institutions.” [27] 18 U.S.C. § 3571(d).

[28] NSD Policy, *supra* note 25 at 2.

[29] *Id.* at 2–3.

[30] *Id.* at 3 n.7.

[31] *Id.* at 3.

[32] *Id.* at 3 n.8.

[33] *Id.* at 4.

[34] *Id.* at 4 n.9.

[35] *Id.* at 5. [36] *Id.* at 6.

[37] Press Release, U.S. Dep’t of Justice, Pharmaceutical Company Targeting Elderly Victims Admits to Paying Kickbacks, Resolves Related False Claims Act Violations (Sept. 26, 2019), <https://www.justice.gov/usao-ndga/pr/pharmaceutical-company-targeting-elderly-victims-admitspaying-kickbacks-resolves> [hereinafter “Avanir Press Release”].

[38] *Id.*

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- [39] Deferred Prosecution Agreement, *United States v. Avanir Pharmaceuticals, Inc.*, Case No. 1:19-CR-00369, (October 2, 2019) [hereinafter “Avanir DPA”].
- [40] Avanir DPA at 9.
- [41] Avanir DPA at 4.
- [42] *Id.*
- [43] Avanir Press Release; Corporate Integrity Agreement between the Office of Inspector General of the Department of Health and Human Services and Avanir Pharmaceuticals, Inc. (Sept. 25, 2019), [https://oig.hhs.gov/fraud/cia/agreements/Avanir\\_Pharmaceuticals\\_Inc\\_09252019.pdf](https://oig.hhs.gov/fraud/cia/agreements/Avanir_Pharmaceuticals_Inc_09252019.pdf) [hereinafter “Avanir CIA”].
- [44] Avanir Press Release.
- [45] *Id.*
- [46] *Id.*
- [47] Avanir Press Release; Avanir CIA at 12.
- [48] Non-Prosecution Agreement, Bankrate Criminal Investigation (March 5, 2019), <https://www.gibsondunn.com/wp-content/uploads/2019/07/Baton-HoldingsNPA.pdf> [hereinafter “Bankrate NPA”].
- [49] Bankrate NPA at 1-2.
- [50] *Id.*
- [51] *Id.*
- [52] *Id.* at 3.
- [53] *Id.* at 5.
- [54] *Id.* at 3-4.
- [55] Press Release, U.S. Dep’t of Justice, Celadon Group, Inc. Enters into Corporate Resolution for Securities Fraud and Agrees to Pay \$42.2 Million in Restitution (April 25, 2019), <https://www.justice.gov/opa/pr/celadon-group-inc-enters-corporate-resolution-securities-fraud-andagrees-pay-422-million> [hereinafter “Celadon Press Release”].
- [56] Deferred Prosecution Agreement, *United States v. Celadon Group, Inc.*, No. 19-CR-0141 (April 25, 2019), at B-1 [hereinafter “Celadon DPA”].
- [57] *Id.* at 4.
- [58] Celadon DPA, *supra* note 56 at 7.

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- [59] *Id.* at 3. [60] *Id.* at 4.
- [61] Petition to Enter Plea of Guilty and Plea Agreement, *United States of America v. Danny Ray Williams*, 1:19-cr-00138, ¶ 1 (Apr. 22, 2019).
- [62] *Id.* at 8.
- [63] Press Release, Sec. & Exch. Comm'n, SEC Charges Trucking Executives With Accounting Fraud (Dec. 5, 2019), <https://www.sec.gov/news/press-release/2019-253>.
- [64] Vi Ryckaret, Indiana Trucking Company Files for Bankruptcy, Cutting 4,000 Jobs After Two Executives Accused of Fraud, *South Bend Tribune* (Dec. 9, 2019), [https://www.southbendtribune.com/news/local/celadon-group-files-for-bankruptcy-cutting-jobsafter-two-executives/article\\_992a39c9-0b8d-58a2-a4f9-b47ac2cd17a7.html](https://www.southbendtribune.com/news/local/celadon-group-files-for-bankruptcy-cutting-jobsafter-two-executives/article_992a39c9-0b8d-58a2-a4f9-b47ac2cd17a7.html).
- [65] Press Release, U.S. Dep't of Justice, Outcome Health Agrees to Pay \$70 Million to Resolve Fraud Investigation (Oct. 30, 2019), <https://www.justice.gov/opa/pr/outcome-health-agrees-pay-70million-resolve-fraud-investigation> [hereinafter "ContextMedia Press Release"].
- [66] *Id.*
- [67] Non-Prosecution Agreement, ContextMedia LLC (Oct. 17, 2019), Attach. A at 2 [hereinafter "ContextMedia NPA"]; ContextMedia Press Release.
- [68] ContextMedia Press Release.
- [69] *Id.*
- [70] ContextMedia NPA at 2-3.
- [71] *Id.* at 3.
- [72] *Id.* at 4.
- [73] ContextMedia Press Release.
- [74] Press Release, U.S. Dep't of Justice, Houston Engineering Corporation Enters into Corporate Resolution and Agrees to Pay \$1.6 Million Fine (Nov. 22, 2019), <https://www.justice.gov/opa/pr/houston-engineering-corporation-enters-corporate-resolutionand-agrees-pay-16-million-fine> [hereinafter "DEC Press Release"].
- [75] Deferred Prosecution Agreement, *United States v. Dannenbaum Engineering Corporation & Engineering Holdings Corporation* (S.D. Tex Nov. 22, 2019) [hereinafter "DEC DPA"].
- [76] DEC Press Release.
- [77] DEC DPA at 4-7, 10.

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- [78] Press Release, U.S. Dep't of Justice, Ericsson Agrees to Pay More than \$1 Billion To Resolve Foreign Corrupt Practices Act Case (Dec. 6, 2019), <https://www.justice.gov/usao-sdny/pr/ericssonagrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case> [hereinafter "Ericsson Press Release"]; Ericsson Egypt Ltd. Guilty Plea (Nov. 26, 2019).
- [79] Telefonaktiebolaget LM Ericsson Deferred Prosecution Agreement ¶ 4, ¶ 116 [hereinafter "Ericsson DPA"]; Ericsson Press Release, *supra* note 78.
- [80] Ericsson DPA, *supra* note 79, ¶ 7.
- [81] *Id.* ¶ 4.
- [82] *Id.* ¶ 4, ¶ 10.
- [83] Ericsson Press Release, *supra* note 78.
- [84] Ericsson DPA ¶ 4(d).
- [85] *Id.* ¶ 4(c).
- [86] Press Release, U.S. Dep't of Justice, Fresenius Medical Care Agrees to Pay \$231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (April 25, 2019), <https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminalpenalties-and-disgorgement-resolve> [hereinafter "Fesenius Press Release"].
- [87] *Id.*
- [88] Non-Prosecution Agreement, Fresenius Medical Care AG & Co. KGaA, No. 19-CR-0141 (February 25, 2019), at 1 [hereinafter "Fresenius NPA"].
- [89] *Id.*
- [90] *Id.* at 2.
- [91] *Id.* at 6.
- [92] *Id.* at 3.
- [93] *Id.* at 2.
- [94] *Id.* at 3.
- [95] *Id.*
- [96] Speech, Deputy Assistant Attorney General Matt Miner Delivers Remarks at The American Bar Association, Criminal Justice Section Third Global White Collar Crime Institute Conference (June 27, 2019) <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matt-miner-deliversremarks-american-bar-association>.
- [97] *Id.*



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- [98] Ian P. Johnson, German Prosecutors Probe Dialysis Firm Fresenius, Deutsche Welle (Oct. 21, 2019), <https://www.dw.com/en/german-prosecutors-probe-dialysis-firm-fresenius/a-50922473>.
- [99] Deferred Prosecution Agreement with Heritage Pharmaceuticals, Inc. (June 11, 2019) [hereinafter “Heritage DPA”].
- [100] Press Release, U.S. Dep’t of Justice, Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations (May 31, 2019), <https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false> [hereinafter “Heritage Press Release”].
- [101] Heritage DPA, *supra* note 99, at 4–7.
- [102] *Id.* at 3.
- [103] Heritage Press Release, *supra* note 100.
- [104] Heritage DPA, *supra* note 99, at 4.
- [105] Heritage Press Release, *supra* note 100.
- [106] Press Release, U.S. Dep’t of Justice, Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA (Dec. 10, 2019), <https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbcprivate-bank-suisse-sa>.
- [107] *Id.*
- [108] Deferred Prosecution Agreement, *United States v. HSBC Private Bank (Suisse) SA*, No. 19-CR60359 (Dec. 10, 2019), at 1 [hereinafter “HSBC Switzerland DPA”].
- [109] Information, *United States v. HSBC Private Bank (Suisse) SA*, No. 19-CR-60359 (Dec. 10, 2019), at 3.
- [110] *Id.* at 4–5.
- [111] *Id.* at 5–6.
- [112] HSBC Switzerland DPA, *supra* note 108, at 2–3.
- [113] *Id.* at 3.
- [114] *Id.*
- [115] *Id.* at 5–7.
- [116] Press Release, U.S. Dep’t of Justice, Aluminum Extrusion Manufacturer Agrees to Pay Over

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- [117] Deferred Prosecution Agreement, *United States v. Hydro Extrusion USA, LLC*, No. 19-CR-124 (E.D. Va. April 23, 2019) [hereinafter “Hydro Extrusion DPA”].
- [118] Hydro Extrusion Press Release, *supra* note 116.
- [119] *Id.*
- [120] Hydro Extrusion DPA, *supra* note 117, at 4.
- [121] *Id.*
- [122] Hydro Extrusion Press Release, *supra* note 116.
- [123] Hydro Extrusion DPA, *supra* note 117, at 3.
- [124] Hydro Extrusion DPA, *supra* note 117, at 5-6.
- [125] Hydro Extrusion DPA, *supra* note 117, at 4.
- [126] Press Release, U.S. Dep’t of Justice, Opioid Manufacturer Insys Therapeutics Agrees to Enter \$225 Million Global Resolution of Criminal and Civil Investigations (June 5, 2019), <https://www.justice.gov/opa/pr/opioid-manufacturer-insys-therapeutics-agrees-enter-225million-global-resolution-criminal> [hereinafter “Insys Press Release”].
- [127] *Id.*
- [128] Deferred Prosecution Agreement, *United States v. Insys Therapeutics, Inc.*, No. 19-CR-10191 (D. Mass. June 5, 2019), at 3 [hereinafter “Insys DPA”].
- [129] *Id.*
- [130] See Insys Press Release, *supra* note 126.
- [131] Insys DPA at 6, *supra* note 128.
- [132] See Insys Press Release, *supra* note 126.
- [133] Insys DPA, *supra* note 128, at 7-8.
- [134] Corporate Integrity Agreement, Insys Therapeutics, Inc. (June 5, 2019) at 4-18 [hereinafter “Insys Corporate Integrity Agreement”].
- [135] *Id.* at 20, App. C.
- [136] *Id.* at 26-36.

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- [137] *Id.* at 50.
- [138] Settlement Agreement, Insys Therapeutics, Inc. (June 5, 2019), ¶ 1 [hereinafter “Insys Settlement Agreement”].
- [139] Insys Corporate Integrity Agreement at 49-52; Insys Settlement Agreement, *supra* note 138, ¶¶ 17-19.
- [140] Nate Raymond, Opioid Manufacturer Insys Files for Bankruptcy after Kickback Probe, Reuters (June 10, 2019), <https://www.reuters.com/article/us-insys-opioids-bankruptcy/opioid-manufacturerinsys-files-for-bankruptcy-after-kickback-probe-idUSKCN1TB15Q>.
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- [142] Press Release, U.S. Dep’t of Justice, Justice Department Announces Resolution with LLB Verwaltung (Switzerland) AG (Aug. 5, 2019), <https://www.justice.gov/opa/pr/justice-departmentannounces-resolution-llb-verwaltung-switzerland-ag> [hereinafter “LLB-Switzerland Press Release”].
- [143] Non-Prosecution Agreement, LLB-Verwaltung (Switzerland) AG, Exhibit A: Statement of Facts, (July 31, 2019), ¶ 21.
- [144] LLB-Switzerland Press Release, *supra* note 142.
- [145] *Id.*
- [146] Non-Prosecution Agreement, LLB-Verwaltung (Switzerland) AG (July 31 2019), at 2.
- [147] LLB-Switzerland Press Release, *supra* note 142.
- [148] *Id.*
- [149] Press Release, U.S. Dep’t of Justice, Lumber Liquidators Enters into Corporate Resolution for Securities Fraud and Agrees to Pay \$33 Million Penalty (Mar. 12, 2019), <https://www.justice.gov/opa/pr/lumber-liquidators-enters-corporate-resolution-securities-fraud-andagrees-pay-33-million> [hereinafter “Lumber Liquidators Press Release”].
- [150] *Id.*
- [151] Deferred Prosecution Agreement, *United States v. Lumber Liquidators Holdings Inc.*, 19-CR52 (E.D. Va. Mar. 12, 2019), at 33-34, 39 [hereinafter “Lumber Liquidators DPA”].
- [152] *Id.* at 39.
- [153] Lumber Liquidators Press Release, *supra* note 149.
- [154] Lumber Liquidators DPA, *supra* note 151, at 4.

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- [155] Press Release, Sec. & Exch. Comm'n, SEC Charges Lumber Liquidators with Fraud (Mar. 12, 2019), <https://www.sec.gov/news/press-release/2019-29>.
- [156] Non-Prosecution Agreement with Merrill Lynch Commodities, Inc. (June 25, 2019) at 1–2 [hereinafter “Merrill Lynch NPA”].
- [157] *Id.* at 7.
- [158] Merrill Lynch NPA, *supra* note 156, Attachment A, at 4.
- [159] *Id.* at 4-7.
- [160] *Id.* at 4.
- [161] *Id.* at 4–5.
- [162] *Id.* at 1. [163] *Id.* at 2.
- [164] Press Release, U.S. Dep't of Justice, Merrill Lynch Commodities Inc. Enters into Corporate Resolution and Agrees to Pay \$25 Million in Connection with Deceptive Trading Practices Executed on U.S. Commodities Markets (June 25, 2019), <https://www.justice.gov/opa/pr/merrill-lynchcommodities-inc-enters-corporate-resolution-and-agrees-pay-25-million> [hereinafter “Merrill Lynch Press Release”].
- [165] *Id.*
- [166] *Id.*
- [167] See *United States v. Bases*, No. 18-CR-48 (N.D. Ill.).
- [168] Press Release, U.S. Dep't of Justice, Hungary Subsidiary of Microsoft Corporation Agrees to Pay \$8.7 Million in Criminal Penalties to Resolve Foreign Bribery Case (July 22, 2019), <https://www.justice.gov/opa/pr/hungary-subsidiary-microsoft-corporation-agrees-pay-87-millioncriminal-penalties-resolve> [hereinafter Microsoft Hungary Press Release].
- [169] *Id.* [170] *Id.*
- [171] Non-Prosecution Agreement, Microsoft Magyarország Számítástechnikai Szolgáltató és Kereskedelmi Kft. (Jul 22, 2019), at 2-3 [hereinafter MS Hungary NPA].
- [172] *Id.* at 5.
- [173] Press Release, U.S. Dep't of Justice, Mizrahi-Tefahot Bank LTD. Admits Its Employees Helped U.S. Taxpayers Conceal Income and Assets (Mar. 12, 2019), <https://www.justice.gov/opa/pr/mizrahi-tefahot-bank-ltd-admits-its-employees-helpedustaxpayers-conceal-income-and-assets>.
- [174] Deferred Prosecution Agreement, Mizrahi-Tefahot Bank LTD., United Mizrahi Bank (Switzerland) LTD., Mizrahi Tefahot Trust Company LTD. (Mar. 12, 2019) at 3, 6.

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[175] *Id.* at 5.

[176] *Id.* at 6.

[177] *Id.* at 14-15. [178] *Id.* at 10-11.

[179] Press Release, U.S. Dep't of Justice, Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of \$850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019), <https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department>.

[180] *Id.* [181] *Id.*

[182] *See id.*; Press Release, U.S. Sec. & Exch. Comm'n, Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019), <https://www.sec.gov/news/press-release/2019-27>. The combined total monetary penalty amounted to \$950 million, of which DOJ credited \$100 million in forfeiture extracted by the SEC.

[183] *Id.*

[184] Press Release, U.S. Attorney's Office, Southern District of New York, Former Uzbek Government Official and Uzbek Telecommunications Executive Charged in Bribery and Money Laundering Scheme Involving the Payment of Nearly \$1 Billion in Bribes (Mar. 7, 2019), <https://www.justice.gov/usao-sdny/pr/former-uzbek-government-official-and-uzbektelecommunications-executive-charged-bribery>.

[185] *See* Justice Manual § 9-28.700(A) (requiring that a company seeking cooperation credit "identify all individuals **substantially** involved in or responsible for the misconduct at issue" (emphasis added)).

[186] Two larger settlements in 2019 both imposed self-reporting obligations. *See* SCB DPA ¶ 16; UniCredit NPA at Attach. D.

[187] Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, (Feb. 22, 2019) ¶ 4(e) [hereinafter "Mobile TeleSystems DPA"].

[188] *See* Press Release, U.S. Dep't of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016), <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-briberyresolution-more-795-million>.

[189] *See* Mobile TeleSystems DPA, *supra* note 187, ¶¶ 4(k), 7.

[190] *Id.* ¶¶ 4(a)-(c).

[191] *See id.* ¶ 7(b).

[192] *Id.* ¶ 4(j).

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- [193] See U.S. Sentencing Guidelines [“USSG”] § 2C1.1(d)(1)(A) (2018) (requiring that the base fine under § 8C2.4 be calculated based on “the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment”).
- [194] See Mobile TeleSystems DPA, *supra* note 187, ¶ 7(c); USSG 8C2.4.
- [195] According to DOJ, the U.S. Attorney’s Office for the District of Hawaii was recused from the investigation that led to the settlement.
- [196] Press Release, U.S. Dep’t of Justice, Monsanto Agrees to Plead Guilty to Illegally Spraying Banned Pesticide at Maui Facility (Nov. 21, 2019), <https://www.justice.gov/usao-cdca/pr/monsantoagrees-plead-guilty-illegally-spraying-banned-pesticide-maui-facility> [hereinafter “Monsanto Press Release”].
- [197] *Id.* [198] *Id.*
- [199] Deferred Prosecution Agreement, *United States v. Monsanto Company*, No. 1:19-CR-00162 (D. Haw. Nov. 21, 2019), at 6 [hereinafter “Monsanto DPA”]; Exhibit B - Factual Basis, *United States v. Monsanto Company*, 19-CR-00162 (D. Haw. Nov. 21, 2019) [hereinafter “Monsanto Exhibit B Factual Basis”].
- [200] *Id.* at 2.
- [201] *Id.* at 2-4.
- [202] Monsanto Press Release, *supra* note 196.
- [203] Exhibit C - Conditions of Probation, *United States v. Monsanto Company*, 19-CR-00162 (D. Haw. Nov. 21, 2019).
- [204] *Id.* at 2.
- [205] *Id.*
- [206] Non-Prosecution Agreement, *United States v. Indivior Inc. et al.*, No. 1:19-CR-16 (July 11, 2019), ¶ 1 [hereinafter “RB Group NPA”]; see also Indivior, History, <http://www.indivior.com/about/our-history/> (last visited Dec. 22, 2019).
- [207] See Indictment, *United States v. Indivior Inc. and Indivior PLC*, No. 1:19-CR-16 (Apr. 9, 2019), ¶ 1 [hereinafter “Indivior Indictment”].
- [208] RB Group NPA, *supra* note 206, at 2.
- [209] Press Release, U.S. Dep’t of Justice, Justice Department Obtains \$1.4 Billion from Reckitt Benckiser Group in Largest Recovery in a Case Concerning an Opioid Drug in United States History (July 11, 2019), <https://www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckittbenckiser-group-largest-recovery-case>.
- [210] *Id.*

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- [211] *Id.*
- [212] RB Group NPA, *supra* note 206, ¶ 9.
- [213] *Id.* ¶ 10.
- [214] A separate agreement with the FTC resolved claims that RB Group engaged in unfair methods of competition in violation of the Federal Trade Commission Act.
- [215] RB Group NPA, *supra* note 206, ¶ 5.
- [216] Settlement Agreement, U.S. Dep't of Justice and Reckitt Benckiser Group (July 11, 2019), <https://www.justice.gov/opa/press-release/file/1181846/download>, at II.B, II.F.
- [217] *Id.* at II.F.
- [218] Press Release, U.S. Attorney's Office, Southern District of Florida, United States Government and Cooperating U.S. Gold Refinery Enter an Agreement After Money Laundering Investigation (Apr. 17, 2019), <https://www.justice.gov/usao-sdfl/pr/united-states-government-and-cooperating-us-goldrefinery-enter-agreement-after-money>.
- [219] Republic Metals Corporation Non-Prosecution Agreement [hereinafter "RMC NPA"].
- [220] *See* Docket, *In re Miami Metals I, Inc, et al.*, No. 18-BK-13357 (Bankr. S.D.N.Y. Nov. 2, 2018).
- [221] *See* RMC NPA, *supra* note 219, at 6.
- [222] Order Granting Motion for Approval of Non-Prosecution Agreement with the United States Attorney's Office for the Southern District of Florida Pursuant to Federal Rule of Bankruptcy Procedure 9019 at 1, No. 18-13359 (Bankr. S.D.N.Y. Apr. 16, 2019).
- [223] *Id.* (emphasis omitted).
- [224] *Id.* at 2.
- [225] *See generally* RMC NPA, *supra* note 219.
- [226] RMC NPA, *supra* note 219, at 1-2.
- [227] *Id.* at 2.
- [228] *Id.*
- [229] Pretrial Diversion Agreement, *United States v. Rick Weaver Buick GMC Inc.*, No. 16-CR-00030 (Jan. 15, 2019) [hereinafter "Rick Weaver Agreement"].
- [230] Superseding Indictment Mem., *United States v. Rick Weaver Buick GMC Inc.*, No. 16-CR00030 (Aug. 8, 2017). The Dealership was originally indicted in September 2016.
- [231] Rick Weaver Agreement §§ 3–4.

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[232] *Id.* § 2.

[233] *Id.* § 5. [234] *Id.* § 6.

[235] See U.S. Dep't of Justice, Justice Manual § 9.22-100 Pretrial Diversion Program (providing that “[t]he U.S. Attorney, in his/her discretion, may divert any individual against whom a prosecutable case exists and who” meets certain other criteria), <https://www.justice.gov/jm/jm-9-22000-pretrialdiversion-program>.

[236] Deferred Prosecution Agreement, *United States v. Kavod Pharmaceuticals LLC (f/k/a Rising Pharmaceuticals, LLC, f/k/a Rising Pharmaceuticals, Inc.)*, No. 2:19-cr-00689 (E.D. Pa. Dec. 13, 2019) [hereinafter “Rising DPA”].

[237] *Id.* at 15; see also Press Release, U.S. Dep't of Justice, Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violations (Dec. 3,

2019), <https://www.justice.gov/opa/pr/second-pharmaceutical-company-admits-price-fixing-resolvesrelated-false-claims-act> [hereinafter “Rising Press Release”].

[238] Rising DPA, *supra* note 236, at 1.

[239] *Id.* at 6.

[240] Rising Press Release, *supra* note 237.

[241] Rising DPA *supra* note 236, at 5.

[242] Rising Press Release, *supra* note 237.

[243] See Rising DPA, *supra* note 236, ¶¶ 9-10.

[244] *Id.* at 3-4.

[245] *Id.* at 4.

[246] *Id.*

[247] Press Release, U.S. Attorney's Office for the Southern District of New York, Manhattan U.S. Attorney and DEA Announce Charges against Rochester Drug Co-Operative and Two Executives for Unlawfully Distributing Controlled Substances (Apr. 23, 2019), <https://www.justice.gov/usaosdny/pr/manhattan-us-attorney-and-dea-announce-charges-against-rochester-drug-co-operative-and>.

[248] See generally Rochester Drug Co-operative Deferred Prosecution Agreement [hereinafter “RDC DPA”].

[249] See generally Consent Order, *United States v. Rochester Drug Cooperative, Inc.*, 1:15-cv05219 (July 8, 2015) [hereinafter “RDC Consent Judgment”].

[250] See RDC DPA, *supra* note 248, at ¶ 3; RDC Consent Judgment, *supra* note 249 ¶ 3.



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- [251] RDC DPA, *supra* note 248, ¶ 10.
- [252] RDC DPA, *supra* note 248, ¶ 16.
- [253] *See, e.g.*, Mobile TeleSystems DPA, *supra* note 187, ¶ 16; RMC NPA, *supra* note 219, at 5.
- [254] *See* RDC DPA, *supra* note 248, ¶ 18.
- [255] *See id.* ¶¶ 19-26.
- [256] *Id.* ¶ 23.
- [257] *Id.* ¶¶ 24-25.
- [258] *Id.*
- [259] Press Release, U.S. Dep't of Justice, Samsung Heavy Industries Company Ltd Agrees to Pay \$75 Million in Global Penalties to Resolve Foreign Bribery Case (Nov. 22, 2019), <https://www.justice.gov/opa/pr/samsung-heavy-industries-company-ltd-agrees-pay-75-million-global-penalties-resolve-foreign> [hereinafter "SHI Press Release"]; Deferred Prosecution Agreement, *United States v. Samsung Heavy Indus. Co. Ltd.*, No. 1:19-CR-328 (E.D. Va. Nov. 22, 2019), at A-4 [hereinafter "SHI DPA"].
- [260] SHI DPA, *supra* note 259, at 7-9; SHI Press Release, *supra* note 259.
- [261] SHI DPA, *supra* note 259, at 9.
- [262] *Id.* at 3-5.
- [263] *Id.* at 4; *see also id.* at D-1.
- [264] *Id.* at 3. [265] *Id.* at 5.
- [266] Press Release, U.S. Dep't of Justice, Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More Than \$1 Billion (Apr. 9, 2019), <https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions> [hereinafter "SCB Press Release"].
- [267] *See id.*
- [268] *Id.*
- [269] *See* Amended Deferred Prosecution Agreement, *United States v. Standard Chartered Bank*, No. 12-CR-262 (D.D.C., Apr. 9, 2019) ¶ 19 [hereinafter "SCB DPA"] (citing "the progress in SCB's ongoing remediation and compliance efforts, including the comprehensive enhancement of SCB's U.S. economic sanctions compliance program," as justification for the parties' agreement not to extend the prior monitorship).
- [270] *See* SCB Press Release, *supra* note 266 (remarks of U.S. Attorney Jessie Liu).

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- [271] SCB DPA, *supra* note 269, ¶ 19.
- [272] See SCB DPA, *supra* note 269 at 1.
- [273] SCB DPA, *supra* note 269 at 1.
- [274] *Id.*, Ex. B at 3.
- [275] Press Release, U.S. Dep’t of Justice, Tower Research Capital LLC Agrees to Pay \$67 Million in Connection With Commodities Fraud Scheme (Nov. 7, 2019), <https://www.justice.gov/opa/pr/tower-research-capital-llc-agrees-pay-67-million-connection-commodities-fraud-scheme> [hereinafter “Tower Press Release”].
- [276] Deferred Prosecution Agreement, *United States v. Tower Research Capital LLC*, No. 19-CR819 (S.D. Tex. Nov. 6, 2019), at A-24 [hereinafter “Tower DPA”].
- [277] *Id.* at A-25.
- [278] *Id.* at 3.
- [279] *Id.* at 4-5.
- [280] *Id.* at 7.
- [281] Tower Press Release, *supra* note 275.
- [282] Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders Proprietary Trading Firm to Pay Record \$67.4 Million for Engaging in a Manipulative and Deceptive Scheme and Spoofing (Nov. 7, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8074-19>.
- [283] Tower DPA, *supra* note 276, at C-30.
- [284] *Id.* at D-35.
- [285] Tower Press Release, *supra* note 275.
- [286] *Id.*
- [287] Non Prosecution Agreement, UniCredit Bank Austria AG (April 15, 2019) at 1.
- [288] *Id.* at 10.
- [289] *Id.* at 10.
- [290] *Id.* at 10-11.
- [291] *Id.* at 4.
- [292] *Id.*

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[293] *Id.* at 4-5.

[294] *Id.* at 1. [295] *Id.* at 2.

[296] Press Release, U.S. Dep't of Justice, UniCredit Bank AG Agrees to Plead Guilty for Illegally Processing Transactions in Violation of Iranian Sanctions (April 15, 2019) <https://www.justice.gov/opa/pr/unicredit-bank-ag-agrees-plead-guilty-illegally-processing-transactions-violation-iranian> [hereinafter "UCB Press Release"].

[297] *Id.* [298]

*Id.*

[299] Press Release, Manhattan District Attorney's Office, Unicredit Bank AG to Plead Guilty and Pay \$316 Million to DA's Office Related to Illegal Transactions on Behalf of Nuclear Weapons Proliferator (April 15, 2019). <https://www.manhattanda.org/unicredit-bank-ag-to-plead-guilty-and-pay316-million-to-das-office-related-to-illegal-transactions-on-behalf-of-nuclear-weapons-proliferator/>.

[300] UCB Press Release, *supra* note 296.

[301] Press Release, U.S. Dep't of Justice, Defense Contractor Agrees to Pay \$45 Million to Resolve Criminal Obstruction Charges and Civil False Claims Act Allegations (Dec. 4, 2019), <https://www.justice.gov/opa/pr/defense-contractor-agrees-pay-45-million-resolve-criminal-obstruction-charges-and-civil-false> [hereinafter "Unitrans Press Release"].

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *Id.* [309] *Id.*

[310] Administrative Agreement Between ANHAM FZCO and ANHAM U.S.A., Inc. and the Defense Logistics Agency (May 21, 2019).

[311] Unitrans Press Release.

[312] Press Release, U.S. Dep't of Justice, Zurich Life Insurance Company Ltd. And Zurich International Life Limited Enter Agreement with U.S. Regarding Insurance Products (Apr. 25, 2019), <https://www.justice.gov/opa/pr/zurich-life-insurance-company-ltd-and-zurich-international-lifelimited-enter-agreement-us>.

[313] *Id.*

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- [314] *Id.*
- [315] *Id.*
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- [317] *Id.*
- [318] *Id.* [319] *Id.*
- [320] Suzi Ring and Benjamin D. Katz, *Rolls to Pay \$807 Million to End U.K., U.S. Bribery Probes*, Bloomberg (Jan. 16, 2017), <https://www.bloomberg.com/news/articles/2017-01-16/rolls-royce-will-pay-807-million-in-settlement-of-bribery-cases>.
- [321] Serious Fraud Office, Statements, SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals (Feb. 22, 2019), <https://www.sfo.gov.uk/2019/02/22/sfo-closesglaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/>.
- [322] *Id.*
- [323] *Id.* [324] *Id.*
- [325] David Pegg and Rob Evans, *SFO drops investigation into trio accused of energy industry bribes*, The Guardian (June 25, 2019), <https://www.theguardian.com/business/2019/jun/25/sfo-dropsinvestigation-into-trio-accused-of-energy-industry-bribes-unaoil>.
- [326] *Id.*
- [327] Press Release, U.S. Dep't of Justice, *Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials* (Oct. 30, 2019), <https://www.justice.gov/opa/pr/oil-executives-pleadguilty-roles-bribery-scheme-involving-foreign-officials>
- [328] See Serious Fraud Office, Unaoil, <https://www.sfo.gov.uk/cases/unaoil/> (last visited Jan. 6, 2019).
- [329] Serious Fraud Office, News Release, Three Individuals Acquitted as SFO Confirms DPA with Güralp Systems Ltd (Dec. 20, 2019), <https://www.sfo.gov.uk/2019/12/20/three-individuals-acquittedas-sfo-confirms-dpa-with-guralp-systems-ltd/>.
- [330] *Id.*
- [331] Approved Judgment, In the Matter of s.45 of the Crime and Courts Act 2013 between Serious Fraud Office and Güralp Systems Limited (Oct. 22, 2019), ¶ 35.
- [332] *Id.* ¶¶ 39-40.
- [333] *Id.* ¶ 34.
- [334] *Id.* ¶¶ 27-30, 35.
- [335] *Id.* ¶ 35.

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- [337] *Id.*
- [338] *Id.* [339] *Id.*
- [340] Deferred Prosecution Agreement, Serco Geografix Limited (July 2, 2019), at ¶ 4 [hereinafter “SGL DPA”].
- [341] *Id.* ¶¶ 9-14.
- [342] See SGL DPA, Attach. A.
- [343] Judgment, In the Matter of s.45 of the Crime and Courts Act 2013 (April 7, 2019), <https://www.judiciary.uk/wp-content/uploads/2019/07/serco-dpa-4.07.19-2.pdf> [hereinafter “SGL Judgment”].
- [344] *Id.*
- [345] See SGL DPA, ¶ 5(i).
- [346] *Id.* ¶ 5(ii).
- [347] *Id.* ¶ 5(ii)(b).
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- [349] *Id.*
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- [353] Tesco DPA Press Release, *supra* note 351.
- [354] *Id.*
- [355] Judgment, In the Matter of s.45 of the Crime and Courts Act 2013 (April 10, 2017), <https://www.judiciary.uk/wp-content/uploads/2019/01/sfo-v-tesco-stores-ltd-2017-approvedfinal.pdf>, at ¶ 38.
- [356] *Id.* ¶¶ 53-58.

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[401] *Id.*

[402] *Id.* at 6.

[403] If a company is not required by law to have a compliance program, the existence of such a program will be looked upon favorably by the prosecutor. *Id.* at 7.

[404] *Id.* at 7-8.

[405] *Id.* at 9.

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[409] Law on Transparency at Art. 22.

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[411] *Id.* at 11-12.



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[412] *Id.* at 12.

[413] *Id.* at 13.

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[416] *Id.* at 17.

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