

# Compliance and Enforcement 2019: Year In Review

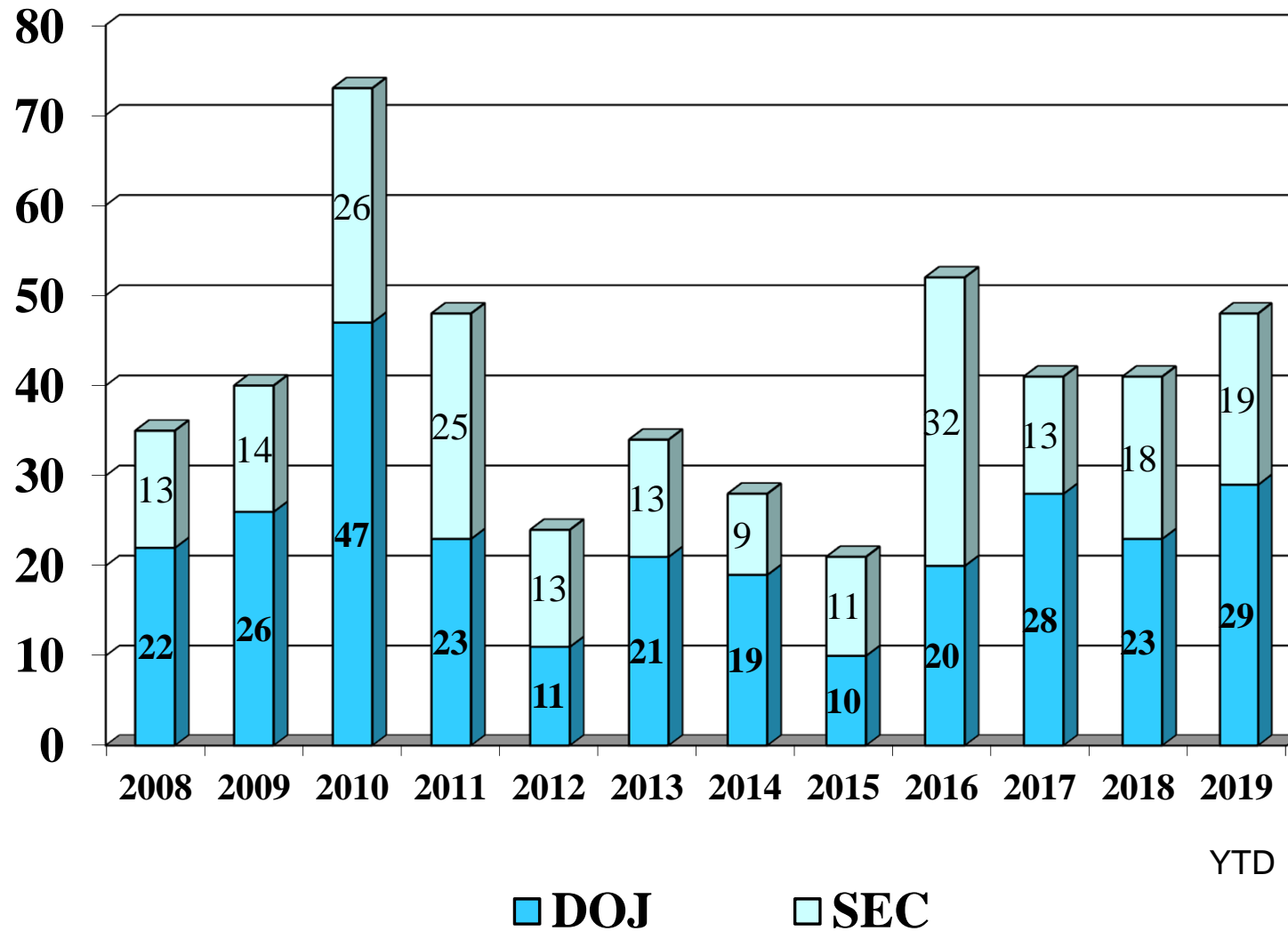
Rita Mitchell | Simon Osborn-King

18 December 2019

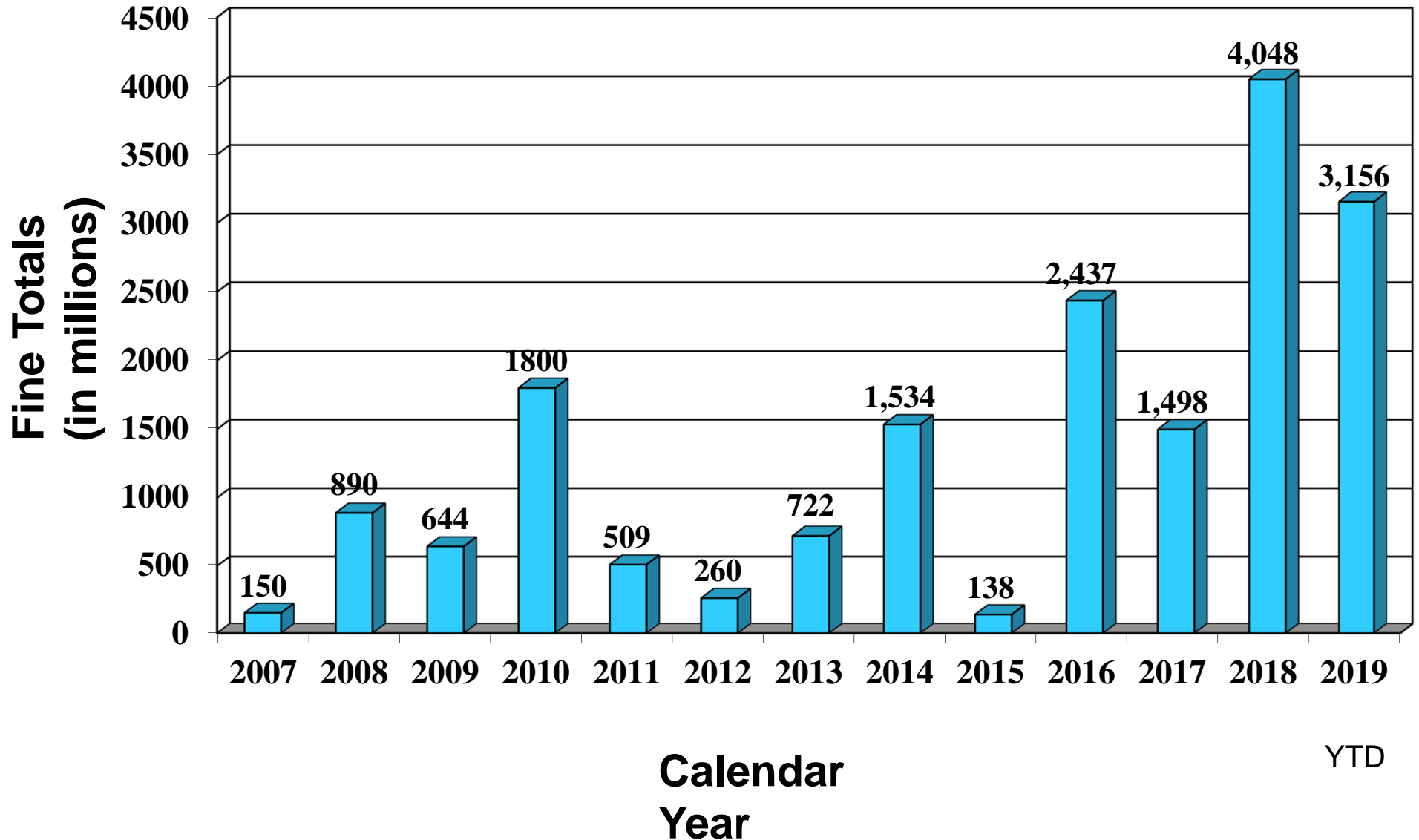
# Introduction

- US anti-corruption and sanctions enforcement: steady
- SFO: a mixed year
- OFSI: baring its teeth
- ICO: reaping rewards
- FCA: a better year and more to come

# Enforcement Actions Initiated Against Companies and Individuals



# Monetary Sanctions Imposed by the DOJ and the SEC in FCPA-Related Matters Against Companies



# FCPA Enforcement Settlements Against Corporations: 2019

COMPANY	COUNTRY	SETTLEMENT Amount (DOJ +SEC)	AUTHORITY	DISPOSITION
Cognizant (15 February)	India	\$44 million	DOJ, SEC	Declination, Cease and Desist Order
Mobile TeleSystems PJSC (6 March)	Uzbekistan	\$950 million	DOJ, SEC	DPA, Cease and Desist Order
Fresenius Medical Care (29 March)	Angola, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Chad, China, Gabon, Ivory Coast, Mexico, Morocco, Niger, Saudi Arabia, Senegal, Serbia, Spain, Turkey	\$378 million	DOJ, SEC	NPA, Cease and Desist Order
Telefonica Brasil S.A. (9 May)	Brazil	\$4.1 million	SEC	Cease and Desist Order
Walmart (20 June)	China, India, Mexico	\$282 million	DOJ, SEC	NPA, Cease and Desist Order
TechnipFMC (25 June and 23 September)	Brazil, Iraq	\$301 million	DOJ, SEC	DPA, Cease and Desist Order
Microsoft (22 July)	Hungary, Saudi Arabia, Thailand, Turkey	\$25 million	DOJ, SEC	NPA, Cease and Desist Order
Deutsche Bank (22 August)	APAC, Russia	\$16.2 million	SEC	Cease and Desist Order
Juniper Networks (29 August)	China, Russia	\$11.7 million	DOJ, SEC	Declination (2018), Cease and Desist Order
Quad/Graphics Inc. (19 September)	Peru, China, Cuba	\$9.9 million	SEC	Cease and Desist Order
Barclays PLC (27 September)	APAC	\$6.3 million	SEC	Cease and Desist Order
Westport Fuel System, Inc. (27 September)	China	\$4 million	SEC	Cease and Desist Order
Samsung Heavy Industries (22 November)	Brazil	\$75.4 million	DOJ	DPA
Ericsson (6 December)	Saudi Arabia, China, Djibouti, Vietnam, Indonesia, Kuwait	\$1.06 billion	DOJ, SEC	DPA, Guilty Plea, Settlement

# FCPA Enforcement 2019: Conduct at Issue

## ■ **Use of Consultants/Third Parties**

- *Ericsson*: allegedly used intermediaries in at least 5 countries to create ‘slush funds’ to bribe officials
  - Use of consultants who were “strictly” intermediaries to create slush funds to transfer money to third parties
    - Recipients disguised by names such as “Exim”, “Ivory”, and “Rezone”
    - One Indonesian slush fund, the “fridge”, held millions of dollars of US cash used for “off the books expenses” including a holiday to Bali and customer entertainment
  - Sham service provider agreements with no legitimate services
- *Cognizant*: alleged use of contractors to pay bribes to Indian government officials to secure and obtain construction-related permits and licenses
  - President and Chief Legal Officer allegedly agreed to reimburse third-party construction company for bribes demanded by a senior Indian government official through construction invoices or “change orders” at the end of the development of the project
    - Allegedly directed their subordinates to withhold payments to contractor if it resisted paying the bribe on Cognizant’s behalf
  - Additional alleged payments through same contractor for environmental clearance and operating licenses

# FCPA Enforcement 2019: Conduct at Issue

## ■ Use of Consultants/Third Parties, cont'd

- *Fresenius (FMC)*: alleged consultancy agreements with publicly employed doctors for services that were never performed to win business and/or to influence or get information on public tenders
  - Fake bonuses to manager, who withdrew cash and paid it to Morocco government official
- *Walmart*: allegedly hired third-party intermediaries (TPIs) who made payments to foreign officials in exchange for store permits and licenses to accelerate store openings
  - In Mexico, certain “gestores” allegedly made payments to government officials where invoices referenced a certain predetermined code
- *TechnipFMC*: allegedly used a third-party consultant to pay nearly \$69 million in bribes (described as “commission payments”) to Brazilian government officials from Petrobras and the Worker’s Party of Brazil
  - FMC Technologies used an intermediary company to pay bribes to Iraqi government officials relating to seven government service contracts
  - Part of Unaoil line of cases
- *Samsung Heavy Industries*: alleged payments to third party intermediaries to bribe Brazilian government officials

# FCPA Enforcement 2019: Conduct at Issue

## ▪ **Inadequate Due Diligence**

- *Ericsson*: employees completed a draft due diligence report that allegedly “failed to disclose the relationship between the owner of the consulting company and one of the high-ranking government officials.”
- *TechnipFMC*: allegedly paid an intermediary without submitting evidence of services rendered, where intermediary then hired subagents without conducting proper due diligence, and falsely characterized the payments in its books and records.



# FCPA Enforcement 2019: Conduct at Issue

- **Compliance Controls around Discounts/Pricing**
  - *Microsoft*: Foreign subsidiary allegedly provided discounts on software licenses where proceeds were used to fund improper payments to government officials in exchange for securing software license sales

# FCPA Enforcement 2019: Conduct at Issue

## ■ Hiring Practices

- *Fresenius*: allegedly hired publicly-employed doctors' family members to incentivise doctors to sign necessary paperwork for FMC products
  - Family members kept on despite being low performers
- *Deutsche Bank*: alleged use of a JV to hire a prohibited candidate once candidate had been rejected under APAC Hiring Policy
  - Candidates not always qualified for positions; received extra assistance from bank employees on resumes and interview coaching
  - Connections between candidate hire and business sought/obtained

# FCPA Enforcement 2019: Conduct at Issue

## ▪ **Gifts, Travel and Entertainment**

- *Fresenius*: Alleged improper travel, entertainment and gifts to publicly-employed doctors
  - Doctor who was CEO of a Saudi organization influential in determining Ministry of Health tender award recipients allegedly received payments for non-business related travel
  - Expensive gifts to the more influential customers
  - Payments for travel and accommodations for 4 doctors serving on the Serbian Health Fund commission to attend conferences and non-business side trips with their spouses
- *Telefonica Brasil*: failure to devise and maintain sufficient internal accounting controls over a hospitality program
  - A total of \$5.1 million worth of 2014 World Cup tickets and \$428,000 worth of 2013 Confederations Cup tickets, where some of the tickets were gifted to numerous Brazilian government officials allegedly in exchange for favorable treatment and legislative assistance.
  - Allegedly recorded as payments “for relationship-building activities with strategic audiences” and also as purchases “for general advertising and publicity purposes.”

# FCPA Enforcement 2019: Conduct at Issue

- **Travel, Gifts, and Entertainment, cont'd**
  - *Microsoft*: allegedly provided gifts and travel to foreign government officials and employees of non-government customers paid through slush funds maintained by Microsoft vendors and resellers
    - Government relied on the books and records provision to go after private commercial bribery (employees of non-government customers).

# FCPA Enforcement 2019: Conduct at Issue

- **False Invoices**

- *Cognizant*: allegedly falsified invoices with supporting spreadsheets that previously had been rejected were retroactively accepted and costs were adjusted to total the \$2.5 million bribe to the Indian government official. For a separate falsified change order, Cognizant India rejected the request, but later approved the payment when purpose was changed from “Liasoning [sic] and consultations charge towards Environmental clearance” to “Change in the make of Workstation from Featherlite to Art matrix.”
  - After sham requests were rejected, they were later approved once the sham descriptions were revised to something more legitimate-sounding
- *Fresenius*: allegedly engaged in sham consulting agreements with doctors for services never performed and over \$1 million in payments to Saudi customs officials with no documentation of services rendered

# FCPA Enforcement 2019: Books and Records Examples

- **Books and Records Failings**

- *Fresenius*: Alleged check-cashing scheme in Saudi whereby employees were directed to cash checks that had been made payable in their own names and return the cash to the GM of Fresenius' distributor and agent, who then arranged to have the cash delivered to Saudi government doctors and others
- *Walmart*: Alleged improper payments recorded as "misc fees," "miscellaneous," "professional fees," "incidental" and "government fee."

# FCPA Enforcement 2019: Conduct at Issue

- **Other Issues Raised**

- Rogue Employees: are your policies being followed?
- Use of personal devices and informal chat and text applications to thwart detection
- Timely remediation
  - When become aware of conduct
  - Pre-merger due diligence

# US Sanctions Enforcement 2019

- Significant year for sanctions enforcement
  - Over a dozen enforcement actions
  - Penalties are over \$1.29 billion to date
  - Not just financial services
    - Whilst significant enforcement actions against Standard Chartered and others, other industries under scrutiny: shipping (MID-SHIP), travel (Expedia), manufacturing (e.l.f. Cosmetics), technology (Apple)
- *Sanctions Screening Glitches*
  - In November, OFAC fined Apple \$466,912 for over 47 transactions linked to a Slovenian software developer and its director that were processed between 2015 and 2017
    - Following designation as a “significant foreign narcotics trafficker” in 2015, Apple ran the developer’s name and the company name through its system but did not get a match.
      - SIS DOO (search Apple ran) vs. SIS d.o.o. (OFAC notice)
    - Significant discount off maximum penalty of \$74 million by self-reporting and because OFAC deemed it non-egregious case



# US Sanctions Enforcement 2019

- *Heightened Compliance Expectations*
  - *Stanley Black & Decker settlement*: resolved 23 apparent violations of the Iranian Transactions and Sanctions Regulations, and imposed extensive sanctions compliance commitments on the Company, and a 5 year annual certification requirement
    - OFAC expects acquiring companies to conduct both pre-acquisition diligence and post-acquisition monitoring
      - Where target known to have had dealings with sanctioned countries, OFAC expects more– reliance on clear instructions, written sanctions policies and procedures, and employee training may not be enough
        - Notwithstanding pre- and post-investment compliance efforts, GQ continued to export products to Iran for 18 months after completion. OFAC faulted SB&D for failing to “implement procedures to monitor or audit GQ’s operations to ensure that its Iran-related sales had in fact ceased or did not recur post-acquisition.”
  - US firms may be held liable for actions of foreign affiliates, even if US employees not aware of or involved in the conduct

# UK Enforcement

- SFO: a mixed year
- OFSI: baring its teeth
- ICO: reaping rewards
- FCA: a better year and more to come

# SFO: A Year In Snapshot

- Dropped cases
- A year of limited success?
- Serco Geografix Ltd Deferred Prosecution Agreement
- Remaining resilient

*“The SFO remains firmly focused on undertaking the effective investigation and prosecution of top-tier serious and complex economic crime. I am eager for the SFO to remain a trusted leader in this fight.” (Lisa Osofsky, SFO)*

# Ongoing Investigations

COMPANY (SECTOR)	COUNTRY	SUMMARY
Glencore PLC	To be announced	On 5 December 2019, the SFO announced that they had opened an investigation into suspected bribery in the conduct of business by the Glencore group of companies, its officials, employees, agents and associated persons.
De La Rue plc (Manufacturing)	South Sudan	On 23 July 2019, the SFO announced that they had opened an investigation into suspected corruption in relation to the activities of the De La Rue group and its associated persons in South Sudan.
Greenergy (Energy)	UK, Netherlands, Belgium	On 16 May 2019, the SFO announced they had opened a joint investigation with the Dutch authorities in relation to biodiesel trading at Greenergy and various third parties. Searches were conducted on the 30th April at five sites across the UK and additional sites in the Netherlands and Belgium. Four individuals have been arrested and released without charge.
London Capital & Finance plc (Finance)	UK	On 18 March 2019, the SFO announced they had opened an investigation (in conjunction with the FCA) into "individuals associated with London Capital & Finance plc". On 4 March 2019, four individuals were arrested in the Kent and Sussex areas. All four individuals have been released pending further investigation.
Pinnacle Angelgate, North Point, Pall Mall, New Chinatown (Property)	UK	On 17 January 2019, the SFO announced they had opened an investigation into a suspected fraud concerning three property developments in Manchester and Liverpool.
Global Forestry Investments (Finance)	UK	On 17 January 2019, the SFO announced that they had opened an investigation into suspected fraud in relation to the activities of Global Forestry Investments between August 2010 and December 2015.
Ultra Electronics Holdings PLC (Defence)	Algeria	The SFO is investigating suspected corruption in the conduct of business in Algeria by Ultra, its subsidiaries, employees and associated persons following a self report by Ultra.
Eurasian Natural Resources Corporation (Mining)	Democratic Republic of the Congo, Kazakhstan	Allegations of fraud, bribery and corruption following a whistle-blower report concerning ENRC's subsidiary in Kazakhstan. In addition, allegations that ENRC made large payments to offshore companies to secure mining rights in the Democratic Republic of the Congo at a significant undervalue.
British American Tobacco PLC (Tobacco)	UK, East Africa	Alleged corrupt payments made by BAT to officials in East Africa.
ABB Limited (Engineering), KBR Inc. (Engineering and Construction) and Petrofac PLC (Oil and Gas)	Various	Suspected bribery, corruption and money laundering related to the issues arising out of the Unaoil investigation.

# Ongoing Investigations

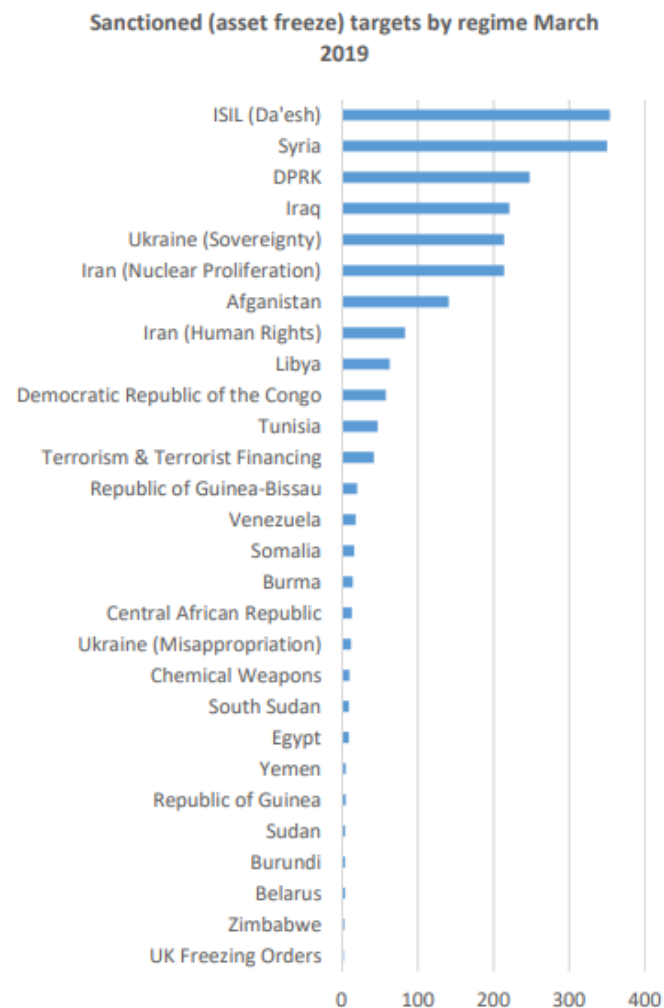
COMPANY (SECTOR)	COUNTRY	SUMMARY
ABB Limited (Engineering), KBR Inc. (Engineering and Construction) and Petrofac PLC (Oil and Gas)	Various	Suspected bribery, corruption and money laundering related to the issues arising out of the Unaoil investigation.
Chemring Group PLC and Chemring Technology Solutions Limited (Defence)	UK, US	Following a self report by CTSL, the SFO has opened an investigation into alleged bribery, corruption and money laundering arising from the conduct of agents representing CTSL to secure contracts for CTSL.
Eurasian Natural Resources Corporation (Mining)	Democratic Republic of the Congo, Kazakhstan	Allegations of fraud, bribery and corruption following a whistle-blower report concerning ENRC's subsidiary in Kazakhstan. In addition, allegations that ENRC made large payments to offshore companies to secure mining rights in the Democratic Republic of the Congo at a significant undervalue.
Unaoil Monaco SAM and Unaoil Ltd (Oil)	Includes UK, Iraq and Singapore	Suspected offences of bribery, corruption and money laundering to secure the award of contracts in Iraq. In November 2017, the SFO charged two individuals (Ziad Akle and Basil Al Jarah) in connection with the Unaoil investigation. In December 2017, it arrested two individuals (Paul Bond and Stephen Whiteley) in connection with the Unaoil investigation. In May 2018, additional charges were brought by the SFO against Basil Al Jarah and Ziad Akle. In July 2019, Basil Al Jarah pleaded guilty to five offences of conspiracy to give corrupt payments.

# SFO: Other Developments

- US - UK Bilateral Data Access Agreement (3 October 2019)
- Corporate Cooperation Guidance (6 August 2019)
  - Provision of material
  - Witness interviews
  - Notes of interviews

# Sanctions Enforcement: a new dawn?

- 32 financial sanctions regimes implemented
- 162 new targets added
- New threats identified
- OFSI enforcement actions:
  - Raphael's Bank & Sons plc (21 January 2019)
  - Travelex (UK) Ltd (24 May 2019)
  - Telia Carrier UK Limited (28 October 2019)
- The Blocking Statute



Source: OFSI Annual Review 2018/2019

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# Data Breaches

- A year of fines:
  - British Airways (£183 million)
  - Marriott International (£99 million)
  - Google (€50 million)

- A clear message:

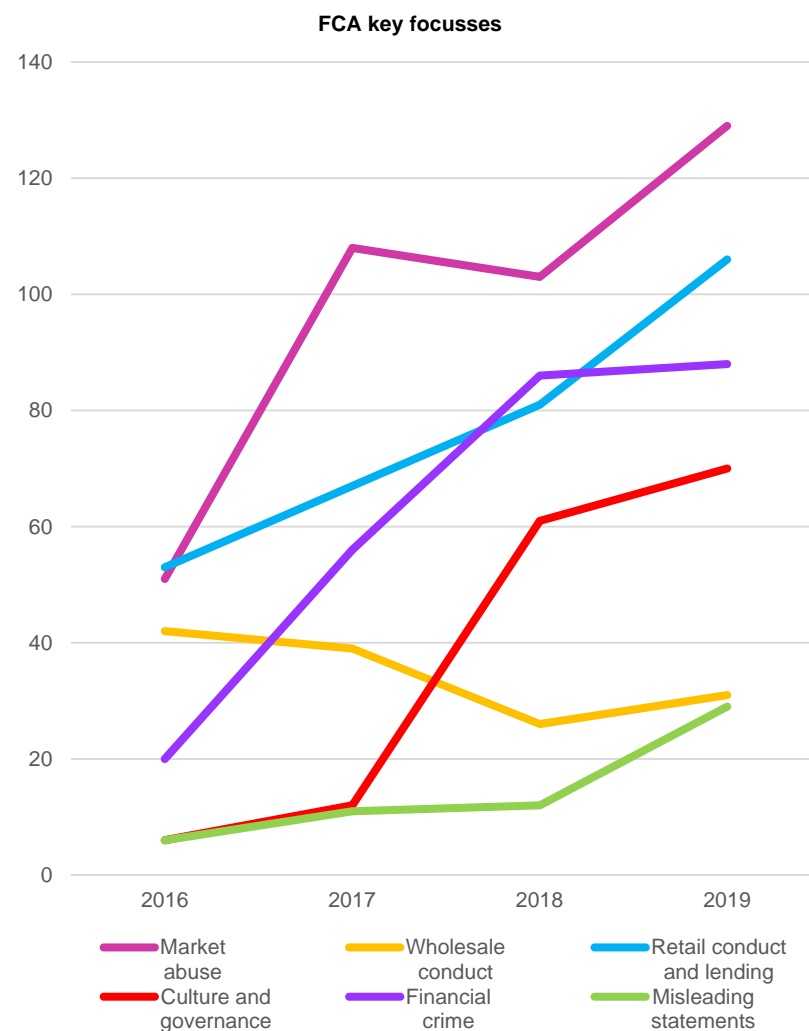
*“The focus for the second year of the GDPR must be beyond baseline compliance – organisations needs to shift their focus to accountability with a real evidenced understanding of the risks to individuals in the way they process data and how these risks should be mitigated.”* (Elizabeth Denham, Information Commissioner)

*“Personal data has a real value so organisations have a legal duty to ensure its security, just like they would do with any other asset. If that doesn’t happen, we will not hesitate to take strong action when necessary to protect the rights of the public.”* (ICO)



# FCA: continued vigilance and enforcement

- Significant number of investigations
- £391,773,187 in fines
- 17 fines in total (5 against individuals)
  - Standard Chartered Bank (£102,163,200)
  - Mr Stewart Owen Ford (£76,000,000)
- Regulatory reporting enforcement
- Culture and governance
- Anti-money laundering and cryptoassets
- Systems and controls



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Rita D. Mitchell is a U.K. partner in Willkie's Compliance, Investigations & Enforcement and White Collar Defense Practices in London. Her practice includes advising and defending corporations in a variety of criminal and civil investigation and enforcement matters, conducting complex, worldwide internal investigations in relation to bribery, corruption and fraud, advising on and developing and benchmarking compliance programs, conducting pre-merger and third party due diligence, and providing day-to-day counseling and training on compliance with U.S., U.K. and other anti-corruption laws, including the U.S. Foreign Corrupt Practices Act (FCPA) and U.K. Bribery Act 2010 (Bribery Act).

Rita was featured in Global Investigations Review's Women in Investigations 2018, which honours 100 investigations specialists from around the world, and was also recognised in the 2019 edition of *Who's Who Legal Investigations: Future Leaders* as an "up-and-coming star in the field."



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Simon Osborn-King is a U.K. partner in Willkie's Litigation and Compliance, Investigations & Enforcement Practices in London. Mr. Osborn-King's practice is focused on complex regulatory, criminal, and internal investigations – often with dual U.K. and U.S. aspects – and enforcement proceedings facing multinational corporations, financial institutions and individuals across a range of business sectors.

Mr. Osborn-King has advised clients under investigation by regulators and prosecutors in multiple jurisdictions, including the U.K. Financial Conduct Authority and Serious Fraud Office, U.S. Department of Justice, European Commission, Italy Public Prosecutors' Office, Japan Financial Services Agency and Korea Fair Trade Commission. He also provides advice on compliance issues relating to sanctions, money-laundering, anti-corruption, whistle-blowing, and data protection. In addition, Mr. Osborn-King defends corporate clients in high-stakes litigation and arbitration proceedings arising out of investigations or regulatory developments.

Mr. Osborn-King played a lead role advising Deutsche Bank on multiple high-profile global investigations by enforcement agencies into LIBOR misconduct, and on the subsequent coordinated settlements in the U.S. and U.K. He also represented Olympus in relation to investigations in several jurisdictions regarding an alleged financial fraud. This work included cooperating with an SFO investigation as well as representing Olympus in claims brought against it by its former CEO.