



## Brazil in Focus: FCPA and Compliance Trends

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# Speakers

## **Maria-Leticia Ossa Daza, Willkie**

Maria Leticia is a partner at Willkie in the Corporate & Financial Services Department, focusing on general corporate and securities matters, and head of the firm's Latin American Practice.



## **Bill Stellmach, Willkie**

Bill is a partner at Willkie and co-head of Willkie's White Collar Defense Group. Before joining Willkie Bill was the Chief of the Fraud Section of the United States Department of Justice's Criminal Division. As Chief of the Fraud Section Bill supervised all of the DOJ's major corporate prosecutions, including all FCPA investigations and prosecutions.



## **Jay Martin, Willkie**

Jay is a senior counsel in the Litigation Department and the Compliance, Investigations & Enforcement Practice Group. Before joining Willkie, Jay was the Associate General Counsel and Chief Compliance Officer at global oilfield services providers Baker Hughes and Baker Hughes, a GE company



# Speakers

## **Ludmila Groch, Lefosse**

Ludmila is a Partner at Lefosse Advogados in the White-Collar Crimes, Anti-corruption, Compliance and Investigations Practice. Ludmila has extensive experience in White-Collar crime and corporate criminal law with emphasis on police investigations, prosecutions and calculations of corporate fraud.



## **José Carlos Berardo, Lefosse**

José Carlos is a Partner at Lefosse Advogados in the Competition and Regulation Practice. José Carlos has extensive experience in providing expert advice and representing Brazilian and foreign clients in various types of high profile competition (antitrust) matters.



# MCLE Certificate Information

- MCLE Certificate Information
  - Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast
  - All questions regarding MCLE Information should be directed to Jessica Coiro - [JCoiro@willkie.com](mailto:JCoiro@willkie.com).

# Agenda

1. FCPA enforcement in 2019
2. Recent enforcement activity in Brazil
3. Recent developments on Compliance Programs
4. Key trends: what to expect

# Part I - FCPA Enforcement in 2019

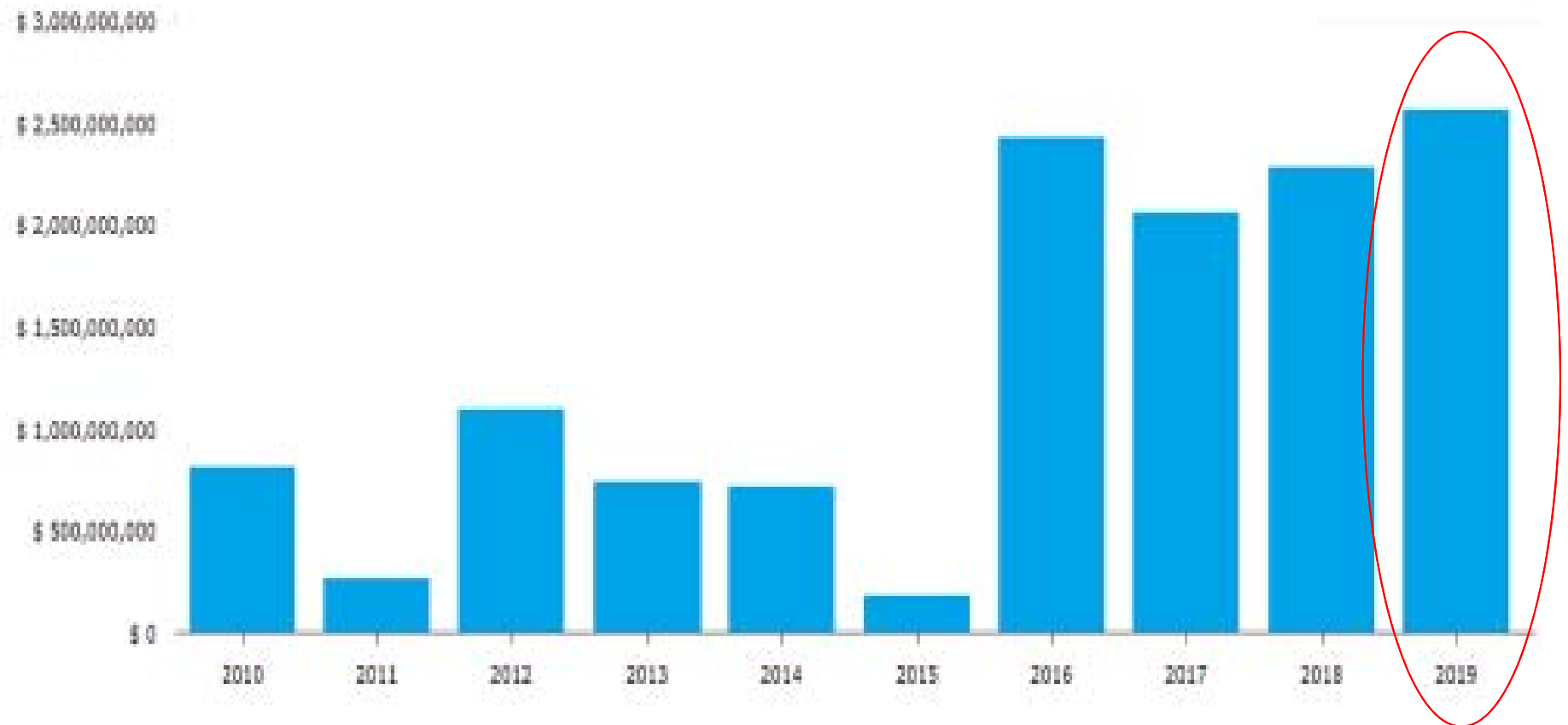
# Introduction to FCPA

- **2019 FCPA numbers**

- 25 Corporate enforcement actions
  - 5 involved acts of bribery that took place in Latin America with repercussions in Brazil
- \$2.9 billion in fines
- \$25 million fine for Cognizant Technology Solutions
- 26 individuals charged

- February 2020 – already a \$3.6 billion fine for Airbus
  - Biggest FCPA settlement so far, even bigger than Petrobras (\$1.78 billion in 2018)

# FCPA Fines by Dollar Amount





# FCPA – Anti-Bribery and Accounting Provisions

## **The FCPA has anti-bribery and accounting provisions**

*Provisions that require companies to maintain a system of internal controls to provide reasonable assurance that transactions are executed in accordance with management's authorization, company policies, and are recorded correctly in the company's books.*

- The DOJ and the SEC have been heavily relying on those provisions to prosecute recent cases
- Charges are sometimes based solely on accounting provisions (no related bribery charges)
  - Walmart (2019)
  - Telefônica Brasil (2019)

# FCPA – 2019 Cases Based Solely on Accounting Provisions

## The Walmart Case

- Between 2000 and 2011, Walmart subsidiaries in several countries, including **Brazil and Mexico**, hired third-party intermediaries to obtain permits disregarding policies and prohibition on improper payments
  - DOJ's enforcement action: fine of \$138 million + 2-year independent compliance monitor
  - Enforcement action by the SEC: \$120 million in disgorgements plus interest of \$25 million + cease and desist order of the books and records and internal control violations

# FCPA – 2019 Cases Based Solely on Accounting Provisions (continued)

## The Telefônica Case

- Telefônica Brasil provided tickets for the 2013 Confederations Cup and 2014 World Cup to government officials involved in legislative and regulatory approvals that could benefit the company
  - SEC's enforcement action: Telefônica Brasil was ordered to cease and desist FCPA's books & records violations
  - \$4.1 million fine

# Non-FCPA Based Charges

Sometimes an FCPA-related investigation may result in non-FCPA charges (i.e. securities fraud, wire fraud, money laundering, etc.)

- Why? Because of evidentiary or other issues?

## **Boustani - Privinvest (2019)**

- Lebanese citizen
- Lead salesperson and negotiator for Privinvest
- Bribes allegedly paid in Mozambique
- **Charges: conspiracy to commit wire fraud, securities fraud and money laundering**

## **Michael Leslie Cohen - Och-Ziff (2019)**

- Head European Office
- Investment adviser, oversaw investments in Europe, Middle East, and Africa
- Allegedly defrauded a U.K. charitable foundation (Och-Ziff's client)
- **Charges: Conspiracy to commit wire fraud and investment adviser fraud, amongst others**

**FIFA (2013)** – FIFA officials and corporate executives charged with racketeering, conspiracy and corruption

# The FCPA and Its Global Reach

## Extraterritorial Jurisdiction (“while in the United States” under § 78dd-3)

- The Fresenius case (2019):
  - German-based medical care provider
  - Bribes paid in Africa and the Middle East
  - **Jurisdictional hook**: use of Internet-based email accounts hosted by service providers in the US (solely).
- MTS and Samsung cases (2019): DOJ and SEC also relied on bank transactions between two foreign banks that merely passed through the US to establish jurisdiction, but *not solely*.
- Chi Ping Patrick Ho and Azat Martirossian (2018): Money laundering cases in which the jurisdictional hook was the mere use of U.S. correspondent bank accounts

# The FCPA and Its Global Reach – Hoskins

- In 2019 the DOJ won a trial conviction against Lawrence Hoskins, former senior VP of Alstom's International
- February 2020: Hoskins was granted his post-trial motion for acquittal **on all FCPA counts**, on the grounds that the DOJ failed to prove that he was an “agent” of a US entity as:
  - He was not a US citizen
  - He was not employed by a US company
  - He never set foot in the US while working for Alstom
- Does this question DOJ's historically aggressive approach to FCPA's jurisdiction?
- Other countries are enacting legislation with global reach (e.g. France and the new anti-corruption law “Sapin II”)

# FCPA – Other Topics of Interest

- **Parent subsidiary liability**

- Ericsson (2019) – DOJ heavily relied on the agency theory to hold Ericsson, the parent company, liable for the misconduct carried out by its subsidiaries

- **Definition of “Thing of Value”**

- Barclays and Deutsche Bank (2019) - “Referral hiring” as a ‘new’ form of bribery under the FCPA
- Similar to 2015 case against BNY Mellon (charged for offering jobs to unqualified relatives of foreign officials)

- **Intermediaries and importance of specific policies and controls**

- Quad Graphics (2019)
- Fresenius (2019)
- Cognizant (2019)
- MTS (2019)

# The Use of Intermediaries in Corrupt Schemes

- Intermediaries are tools that SEC/DOJ are always on the lookout for
- They are frequently used to:
  - Manage the risk of being detected
  - “Shield” parties that perceive themselves as being far from the illicit agreements
  - Overcome communication constraints
  - Launder money in side schemes
- In the “Car Wash” scheme, intermediaries were heavily used to “reduce the cost of corrupt transactions” and its use kept the scheme out of the authorities’ sight for nearly 10 years



## Part II – Recent Enforcement Activity in Brazil

# US Enforcement in Brazil

- The number of enforcement actions in Brazil represents a significant part of the overall enforcement actions
  - From 25 corporate enforcement actions in 2019 (SEC and DOJ), 5 involved acts of bribery taking place in Latin America with repercussions in Brazil
    - Telefônica Brasil, Walmart (Mexico and Brazil), Technip/Skornicki, Samsung (Brazil) and Grubisich (former CEO of Braskem in Brazil)
- Continued actions related to Brazil through the years
  - In 2017, 5 of the 17 corporate enforcement actions involved Brazilian companies
  - In 2018, at least 13 of 54 companies disclosed investigations into possible FCPA-related misconduct in Brazil

# Significant Cases and Recent Developments in Brazil

- Operation “Car Wash” continues to drive the anti-corruption landscape in Brazil
  - Individuals were charged with corruption and money laundering for kickbacks from Odebrecht
    - Former Governor of Minas Gerais and his Chief of Staff were among those charged
  - Former executives of Braskem targeted in latest phase of the Car Wash probe, including former CEO, former legal director, and a local lawyer
- In July 2019, engineering company Camargo Correa agreed to pay \$366 million pursuant to a leniency agreement with Brazil’s General Comptroller’s Office (CGU) and its Attorney General’s Office to settle allegations relating to the probe

# Car Wash and Odebrecht Spin-Off Investigations

- New individual targeted in “Car Wash”:
  - Bernardo Gradin, former CEO of Braskem
- In November 2019, Brazil’s Attorney General signed two settlement agreements:
  - OAS Group for \$287 million
  - Engevix Group for \$124 million
- In November 2019, Samsung agreed to pay \$75 million in a settlement with the DOJ and its Brazilian counterparts in connection with bribes to executives at Petrobras

# FCPA in Brazil in 2019 – Local Enforcement

- **Operation “Car-Wash” – FCPA-related facts:**
  - Over 200 convictions to date
  - \$1.2 billion recovered
  - Over 70 phases
  - Arrest of former president Michel Temer in March 2019
  - Braskem Leniency Agreement (\$100 million) in May 2019
  - Allegations of biased decisions
  - Leakage of texts, emails, video and audio recordings that allegedly evidence ethical breaches and improper coordination between federal prosecutors and former Federal Judge **Sérgio Moro**, during the prosecution of former President **Luiz Inácio Lula da Silva**

# Corruption in Brazil During 2019 – Local Enforcement

49

Acordos de colaboração

Collaboration agreements in Curitiba (out of 96, including São Paulo and Rio de Janeiro)

14

Acordos de leniência

Leniency agreements in Curitiba (out of 19, including São Paulo and Rio de Janeiro)

## Amount recovered in Curitiba (R\$)

4 billion returned to the public vault;

2.1 billion in compensatory fines from collaboration agreements;

12.4 billion in compensatory fines from leniency agreements;

111.5 million from voluntary renunciations from the defendants;

4 million from a conduct adjustment agreement;

14.3 billion expected to be the total amount returned.

\*combining São Paulo and Rio de Janeiro operations, total amount adds up to R\$5 bn

## Corruption in Brazil During 2019 – Local Enforcement (continued)

- March 2019: Brazilian Supreme Court ruled that cases involving illegal campaign contributions should be heard by electoral courts
  - In practice, electoral penalties are less aggressive and statute of limitation restrictions would prevent several investigated conducts from being charged
  - Individuals who were criminally convicted are trying to void their convictions on the grounds that they should have been prosecuted by the electoral justice system
- Overturn of an Operation “Car-Wash” Conviction by the Supreme Federal Court
  - The Supreme Court ruled that prior decision issued on behalf of former Petrobras President **Aldemir Bendine** violated the Brazilian due process clause on the grounds that he should have been allowed to make his closing arguments in response to accusations, so that he was the last to be heard in the procedure
  - This changed a formal aspect of criminal procedure associated with the Car-Wash: although collaborators qualify as defendants, they must still be given the opportunity to argue before the individual whom they accuse of ill conduct

## Corruption in Brazil During 2019 – Local Enforcement (continued)

- On May 6, 2020, the Brazilian Public Prosecutor's Office (MPF – 5<sup>th</sup> CCR) issued a new guidance on individuals that want to adhere to leniency agreements executed by entities to which they are related (the Technical Note No. 1/2020).
  - Individuals will now be able to “tag along” to leniency agreements executed by the companies that they are related to, provided that they comply with certain rules established therein.
    - The purpose is to decrease the bureaucracy related to negotiations of collaboration agreements.
  - Conflicts of jurisdiction between two or more different Public Prosecutor's Offices are now solved by the 5th CCR, and one Office can adhere to an agreement previously entered by another Public Prosecutor's Office
    - Provides for equal and proportionate treatment related to benefits that must be granted to the collaborating parties.
- *Would the passing of this ruling be an indication of an increase in the prosecution of individuals by the Brazilian government?*



## Part III – Recent Developments on Compliance Programs

# Recent Guidance on Compliance Programs

- **2019 DOJ Guidance on Compliance Programs (updated June 2020)**
  - No rigid formula for effectiveness of compliance programs
  - Overall compliance is analyzed based on certain fundamental questions:
    - *Is the corporation's Compliance Program well designed?*
    - *Is the Program being applied earnestly and in good faith?*
    - *Does the corporation's Compliance Program work?*
- **June 2020 Update:**
  - Programs should be dynamic, and updated to fit new circumstances
  - Compliance function should be adequately resourced/compensated

# DOJ 2019 and 2020 Guidelines – Key Themes

- The DOJ 2019 Guidance highlights a few key important themes:
  - Risk Assessment
  - Compliance Personnel
  - Third Parties
  - Compliance Culture
- The DOJ 2020 Update seems to highlight “third-party risk” as a key topic
  - *How the compliance program identifies it and deals with it*
  - *Does the company engage in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process?*

# Recent Guidance on Compliance Programs

## Brazilian CGU's Guidance on Compliance Programs (2018)

- Establishes certain best practices, such as:
  - Commitment to and support of compliance and whistleblowing programs by top management
  - Design of a structure or instance that shall be responsible for enforcing and elaborating the program
  - Profiling and risk management – *Know-your-client* practices
  - Structuring of ethics and performance standards
  - Development of rules, policies and procedures to mitigate risks
    - *Examples:* Limiting decision-making capabilities of individuals to group decisions, and of creating a *cap* for financial transactions to be made without collective approval, amongst others.

# Recent Guidance on Compliance Programs (continued)

## **Brazilian CGU's Guidance for Brazilian Companies Abroad (2019)**

- Extends the guiding parameters on best Compliance practices to include foreign countries wherein the company operates, including risk management and establishment of integrity patterns;
- Emphasizes the necessity to create specific policies and proceedings regarding the company's relationships with foreign public agents and Codes of Ethics;
- Establishes the importance of creating a report channel to collect complaints from abroad;
- Emphasize the advantages of implementing compliance programs abroad: the decrease of internal frauds, attraction of new business partners, support from national government and reduction of sanctions;
- Points out the consequences of the practice of a transnational harmful act: administrative and civil liability;
- Establishes the importance of knowing the international legislation to adopt preventive measures to avoid irregularities; and
- Emphasizes the increase of international cooperation in prosecuting corrupt practices.

## Part IV – Key Trends: What to Expect

# Key Trends in DOJ's Recent Enforcement Activity

- Continued interest in Latin America
  - March 2019: FBI created a dedicated international corruption squad based in its Miami Field Office
- Increased prosecution of individuals
- Charges based exclusively in internal accounting controls/books and records of FCPA violations
- New charges arising out of FCPA “clusters”
- Non-FCPA charges arising from FCPA-related investigations
- Continued use of monitorships
  - Example: Odebrecht (2016); J&F (2017); Rodonorte/CCR (2019)
- Continued importance of self-disclosure and cooperation by the DOJ/SEC
  - Sentencing discounts in 5 out of 6 corporate enforcement actions brought by the DOJ in 2019
  - Ericsson/MTS cases/Fresenius – issues that prevented them from receiving full credit
- Update on enforcement policies, such as:
  - Corporate Enforcement Policy
  - Corporate Compliance Programs guidance

# Recent Enforcement Activity Regarding COVID-19

- In a recent speech at the ABA, Mr. Benczkowski, Assistant Attorney General for the DOJ's Criminal Division, spoke to the effect that the pace of investigations hasn't changed and neither did companies' expectations:

*“Despite the limitations that Covid-19 has placed on our ability to move forward in some white-collar cases, **this isn't downtime—it's just 'different time'**”.*

- The AGA notes that there might have been a slow down in international cooperation the production of evidence from and into the US, however, enforcement activity levels seem to remain steady



# Recent Enforcement Actions During COVID-19

- On May 14, the SEC filed two additional coronavirus-related enforcement actions - ***Applied Biosciences, Corp. and Turbo Global Partners, Inc.***
  - The press release accompanying the filings the agency stated that it is “actively monitoring the markets to detect potential fraudsters” who are trying to exploit the current health emergency in order to reap gains by misleading investors.
- Other recently filed actions evidence that enforcement activity levels haven’t changed:
  - **Deutsche Bank** agreed to pay \$9 million to settle claims stemming from an outage in 2016 of its swaps reporting platform
  - **Eni SpA**, an Italian company headquartered in Rome, engaged in the O&G industry, agreed to pay a disgorgement of \$19,750,000 and prejudgment interest of \$4,750,000 in April 2020

# Compliance Programs in the COVID-19 Era

## ***How can compliance departments implement measures to mitigate compliance risks arising in the COVID-19 era?***

- Establishing increased risk assessment initiatives
- Adopting a formal, compliance approved telework policy
- Organizing virtual trainings sessions
- Organizing virtual committee meetings
- Enhanced record-keeping and reporting standards
- Organizing remote compliance audits

# Recent Activity in Brazil Regarding COVID-19

## **Brazilian CGU's Guidance on Best Practices in Public-Private Relations during COVID-19**

- Following the loosening of the rules for contracting with the Public Authorities during COVID-19, CGU issued a guidance on best practices in public-private relations
  - The guidance is aimed at private sector companies and it is designed to prevent misconduct and irregularities arising from the loosening of rules.
- The guidance recommends that players
  - Enforce their Compliance Programs;
  - Guide their employees and business partners to act with integrity;
  - Register and disclose the operations carried out with Public Authorities;
  - Supervise the performance of the contracts signed; and
  - Effectively use and promote the company's hotline, including the hotline created by CGU specifically for receiving COVID-19 reports.

## Questions

Please use the Q&A function in the Zoom taskbar to submit your question to the Panelists

# Speakers

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